ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his lumbar and thoracic spine while working for Employer on November 29, 2016.

II. Whether Claimant is entitled to a general award of medical benefits and for all treatment provided for his lower back condition to date.

III. Whether Claimant is entitled to temporary total disability (TTD) benefits commencing December 21, 2016.

IV. A determination of Claimant's average weekly wage (AWW) at the time of his alleged lumbar and thoracic spine injury.

FINDINGS OF FACT

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

1. Employer operates an assisted living facility, i.e. a group home that shelters multiple residents with developmental and intellectual disabilities. Claimant is employed as a direct support professional for Employer. Direct support professionals perform duties rooted in assisting the residents with activities of daily living, including cooking, cleaning, doing laundry, and dispensing medications.

2. Claimant testified that on November 29, 2016, he arrived at the group home at around 3:50 PM for a scheduled 4:00 to 9:00 PM shift. According to Claimant, he was unable to clock in because the internet was down. Consequently, Claimant called his supervisor to let him know that he had reported for his shift. While he was on the phone, Claimant heard a "little bit" of commotion emanating from the back hallway of the home. Immediately after hanging up with his supervisor, Claimant proceeded to the back hallway to see what was going on. Upon arrival, Claimant testified that he saw a co-worker, Jose Diaz and resident in a back room. Claimant noticed that the resident was on the floor sitting on his buttocks and leaning backwards. Claimant asked Mr. Diaz what was going on to which Mr. Diaz responded that the resident was "just giving [him] some trouble."

3. Claimant began speaking to the resident in an effort to calm him down as Mr. Diaz left to go to the kitchen. Claimant then proceeded to help the resident off the floor by kneeling down and grabbing the resident's outstretched hand. In so doing, Claimant placed his other hand around the resident's back, somewhat under his armpit,

and helped lift the resident to his feet. As he was assisting the resident from the floor, Claimant developed a sudden "really sharp, shooting pain" in his back. Claimant testified that he promptly called his supervisor to report this incident and his injury.

4. Claimant's supervisor, Ryan Denahy provided a written statement and testified at hearing. Mr. Denahy's written statement is dated December 14, 2016. Mr. Denahy's statement confirms that Claimant called him around 3:56 PM on November 29, 2016, to inform him that that the internet was down and he was unable to clock in for his shift. The statement also indicates that Claimant called Mr. Denahy back at 4:01pm, at which time Claimant purportedly told Mr. Denahy that he had hurt his back during a *previous* shift and that it was bothering him. According to the statement, Claimant did not tell Mr. Denahy about his injury earlier because other Program Staff were next to him while he was on the phone. Finally, the statement indicates that Mr. Denahy thought Claimant reported that he had injured his back during this prior shift while helping a resident off the floor.

5. Claimant was asked about Mr. Denahy's assertion that he reported the injury as occurring during a previous shift. Claimant adamantly denied the contention.

6. Mr. Denahy testified in his capacity as the Adult Services Director for Employer. Mr. Denahy testified all residents of the home where Claimant was allegedly injured are ambulatory. He also testified that no residents living in the home have a lifting protocol and that direct support professionals are trained to let ambulatory persons get up on their own. Based upon the evidence presented, the ALJ finds that Claimant did not actually lift the resident off of the floor. Rather, the evidence presented persuades the ALJ that Claimant extended a hand to the resident and placed his other arm around him as he described in order to assist the resident in standing up. The ALJ finds it probable that Claimant would instinctively extend a hand to an emotionally distraught developmentally disabled resident to help calm him down by getting him up.

7. Mr. Denahy also testified that employees of the Employer are trained to file a "GER" (General Event Report) whenever there is an incident involving a resident, and that it must be filed by somebody, regardless of who first witnessed the event. Mr. Denahy also explained that "T-Logs" are also used to document incidents that do not rise to the level of requiring a formal GER. There were no GERs or T-Logs filed documenting the incident wherein a resident of the Employer's was on the floor on November 29, 2016. Claimant explained that he did not report the individual being on the floor to anybody at the time because he did not see what lead to the resident ending up on the floor and because he was under the impression that it was Mr. Diaz's, responsibility to report that event since he was present when whatever occurred to cause the resident to end up on the floor.

8. Mr. Denahy's testimony was consistent with his written report, in that it was his recollection that Claimant told him at 4:01 PM on November 29, 2016 that Claimant had injured himself lifting a patient albeit during a prior shift. Mr. Denahy acknowledged that he did not reduce the events of November 29, 2016 to writing until

December 14, 2016, more than two-and-a-half weeks after the incident occurred and then at the direction of Employer's CEO. He agreed that his entire statement was recreated from memory and phone call logs.

9. Claimant testified that he was able to finish his shift on the date of injury and he worked one day after his injury, which he believed was December 1, 2016, despite "horrible" back pain which had changed in character to a deep dull ache. Claimant's time cards show that he worked on November 29, 2016 and again on December 1, 2016. Claimant testified that he continued to work because "there was no way somebody was going to cover for [him]." Claimant explained that it is hard to find somebody to cover your shift, as you have to call and find and individual that is willing to cover your shift on short notice.

10. Claimant presented to Valley-Wide Health Systems on December 2, 2016 complaining of lower back pain "starting 3 days ago after helping a client of [sic] the floor." Claimant explained that after helping the resident up on "Tuesday," he has had level seven out of ten back pain ever since. The pain was described as aching involving the back with radiation into the left thigh. It was noted by Physician Assistant (PA-C) Robert Holstead that Claimant's symptoms were aggravated by ascending stairs and bending. Physical examination documented tenderness to the lumbar spine and moderate pain with motion. Claimant was prescribed cyclobenzaprine and ibuprofen. It was anticipated that the back pain would resolve on its own at that time. Claimant testified at hearing that the resident referenced in this medical report is the same resident he was referring to in his testimony.

11. Claimant testified that he was told at Valley-Wide that he had a pulled muscle in his back, which is why he was in pain, and to simply "take it easy." As noted, Claimant was prescribed an anti-inflammatory and a muscle relaxer. Consequently, the ALJ finds credence in Claimant's testimony that he was told that he had a muscle pull and that his pain would resolve on its own.

12. Claimant's low back pain persisted and by December 4, 2016, he had decided to proceed to the emergency room (ER). As Claimant got out of bed and was preparing to go to the ER he experienced severe pain in his back and numbness in his legs. According to Claimant, he was walking in the hallway leading from his bedroom when he lost feeling in the lower half of his body. Claimant specifically denied any new injury between November 29, 2016 and December 4, 2016.

13. An ambulance was summoned and responded to Claimant's home. Upon arrival, paramedics discovered Claimant sitting in the hallway of his home unable to move his legs. Claimant reported that he had injured his back "4 days ago helping someone off the ground at work." He provided the following additional history:

> I started to get muscle spasms in my lower back a couple of hours after lifting the person. The pain slowly got worse so I went to the doctor's office 2 days ago. He prescribed me a muscle relaxer and anti-

> inflammatory medication. I walked for a few hours straight yesterday and last night my back was really sore. My right leg felt like it was numb but I could still move it. I woke up this morning and when I stood up out of bed both legs felt numb. I made it about 10 feet and sat on the ground and could not move my legs.

14. Claimant was transported by ambulance to the emergency room at Arkansas Valley Regional Medical Center. The history of present illness upon intake indicates that Claimant had injured himself when lifting a patient of an assisted-living facility; however, the record erroneously indicated the event occurred that day. The note also erroneously indicates that Claimant is female. The intake form filled out by Claimant indicated that he had injured himself working for the Employer by "Helping [an] individual off of floor." Physical examination revealed neurologic deficits and CT of the lumbar spine demonstrated disc narrowing raising concerns for acute cauda equina syndrome. After consultation with Dr. Braden at Parkview Hospital in Pueblo it was decided that Claimant should proceed with an immediate MRI and be transferred to Parkview.

15. The initial note from Parkview Hospital documents that Claimant had injured his back on November 29, 2016, "when he was lifting a patient at the Assisted Living Facility that he works at. Then on this morning of December 4, 2016, he began having weakness in his legs that progressed to an inability to walk along with loss of bladder control." An MRI was performed and revealed that Claimant had a large disc herniation at L4-5 with spinal cord compression, along with stenosis and slightly lesser herniations at L3-4 and L2-3. There was also evidence of a disc herniation at T11-T12 and congenital spinal stenosis in the thoracic and lumbar spine. Claimant was diagnosed as having a disc herniation at T11-12 with spinal stenosis and low-grade thoracic myelopathy and acute cauda equine syndrome secondary to disc herniation at L2-3, L3-4, and L4-5 with bilateral complete flail foot. Neurosurgical services were consulted after which it was felt that Claimant required emergent surgery to include a laminectomy decompression and discectomy at T11-12 and also a laminectomy, decompression, and discectomy at L2 through L5. Concerning Claimant's need for surgery, Dr. Keith Norville indicated as follows: "Even if something surgical is done, he still may not gain anything back as far as motor strength or sensation but really this is a surgical emergency here for him." Claimant underwent surgery with Dr. Keith Norville on December 5, 2017.

16. Dr. Norville's December 5, 2016 surgical report outlines a complicated multilevel spinal surgery which was extremely difficult given the depth of the incision necessary to reach specific spinal structures due to Claimant's large body habitus. Among the pre and post operative diagnosis listed in the report is acute cauda equina syndrome secondary to disc herniation.

17. While recovering from his surgery as an inpatient at Parkview Hospital, Claimant received a phone call from the representative assigned to adjust the claim for Insurer. Claimant testified that he had no independent recollection of a conversation he

had with Mr. Allen Schrader regarding the November 29, 2016 incident or his injuries. According to Claimant, he did not remember much from his hospital admission because he was highly medicated on Dilauded. The aforementioned conversation was recorded and Claimant recognized his voice on the recording as it was played in open court. During the recording, Claimant is heard telling Mr. Schrader that the November 29, 2016 incident occurred around 5:00 PM. He also told Mr. Schrader that Jose Diaz was present with the individual on the ground prior to his arrival and that once the individual on the ground calmed down, Mr. Diaz left the room. Claimant described the individual as already being on one knee and presenting his hands for assistance. He also indicated that his back did not hurt immediately, but that he felt his back begin to spasm about 1 minute later when he was washing dishes. Finally, he reported that Mr. Diaz knew he had helped the resident up from the floor.

18. While inconsistencies in the details of the events leading up to Claimant's injury exist between his recorded statement and his subsequent testimony, the ALJ finds those inconsistencies minor and likely a result of the side effects of the medication Claimant was administered to control his pain. The suggestion that because Claimant's voice was clear on the recording means his subsequent testimony is not credible is not convincing. To the contrary, the ALJ finds that Claimant's ability to impart information with a clear voice during the recorded statement does not mean that the information he was providing was accurate. Based upon the well known mentally impairing effects of strong pain medication, the ALJ finds the statements Claimant made during his recorded interview unreliable.

19. Claimant was discharged from in-patient care on December 30, 2016 and referred for post-operative care and rehabilitation through Parkview Medical Center, Parkview Neurological Services, NuMotion, High Plains Community Health Center, Craig Hospital, and Matrix Rehabilitation Consultants.

20. On December 20, 2016, Dr. Jon Erickson authored a physician advisor opinion at the request of Insurer to address the "four-day lag from the time [Claimant] noted the onset of his acute symptoms and the date of his alleged lifting injury." Dr. Erickson noted that "it is not all that unusual for a delay in the symptoms following an acute disc herniation, and one can probably not tell exactly which disc was herniated at the time of his alleged injury." Dr. Erickson would continue by indicating that because there was a lifting injury and Claimant developed severe symptoms, the claim was compensable.

21. On April 14, 2017, Respondent requested an independent medical opinion from Dr. J. Raschbacher. At the time of the examination, Claimant had minimal pain, but remained unable to use his lower extremities and explained that he had no independent bladder function. Consequently, Claimant reported that he self-catheterizes six times a day. Claimant was asked about a previous low back treatment that was documented in his medical records. Claimant explained that his previous treatment was to his hip and he testified similarly at hearing. Claimant explained that

there was no specific injury that caused his hip pain, he was just sore and stiff for which he treated with his family doctor approximately four years prior.

22. Review of a May 9, 2014 report from Family Nurse Practitioner (FNP) Doug Miller at Rocky Ford Family Health Center documents: "The patient complains of follow up hip pain. The patient presents with right hip pain, right anterior thigh pain, right lateral thigh pain, and right buttock pain.

23. Dr. Raschbacher also outlined the content of a May 28, 2014 report indicating that Claimant had returned to the clinic for complaints of low back pain with "right upslip." According to Dr. Raschbacher's summary, Claimant started to have low back and right hip pain in December after being bent over a sink doing dishes for three hours. Claimant was referred to physical therapy where nerve stimulation was provided.

24. Claimant returned to FNP Miller on August 21, 2014. He requested more physical therapy. According to Dr. Raschbacher's independent medical examination (IME) report, Claimant received additional physical therapy through October 30, 2014. Claimant was discharged from physical therapy on October 30, 2014. The reason for discharge was "Rehab goals met." At the time of discharge, Claimant "still [had] bouts of pain with certain movements or walking", but demonstrated motivation and understanding to continue with an independent home exercise program (HEP). Claimant testified that he did not have significant ongoing back or hip symptoms after his treatment concluded. The ALJ finds Claimant's testimony in this regard credible given the lack of medical records documenting the need for treatment or disability for any back, hip or leg pain between October 30, 2016 and his visit to the Valley-Wide Health Systems clinic on December 2, 2016. Based upon the evidence presented, the ALJ finds that Claimant's low back, more probably than not, was asymptomatic prior to November 29, 2016.

25. The history surrounding Claimant's injury obtained by Dr. Raschbacher during his IME is consistent with the other medical records on file, regarding both Claimant's previous back/hip injury as well as the mechanism of injury for the November 29, 2016 injury. Specifically, Claimant consistently explained to Dr. Raschbacher that he injured himself helping an individual get up off of the floor, that he began having lower back pain almost immediately after the incident, and that the lower extremity symptoms began approximately four days later. Dr. Raschbacher's physical examination documented 0+/4 reflexes at the knees and ankles with no sensation of the bilateral feet.

26. Following his examination, Dr. Raschbacher opined that Claimant sustained a work related injury to his back. In concluding as much, Dr. Raschbacher stated:

> My medical opinion is that [Claimant's] current condition is the result of a work injury. Clearly he had a grossly abnormal lumbar

> and thoracic spine, the absence of which would likely have precluded this injury.[1] In any event they were present and he had a work-related episode which caused his condition to become symptomatic and it is work related in causation.

27. Claimant underwent an IME with Dr. Timothy Hall on May 18, 2017. During the IME, Claimant described a history of injury generally consistent with the content of the medical records submitted. Dr. Hall also obtained a history surrounding Claimant's prior 2014 back/hip condition wherein Claimant reiterated it was primarily his hip that was hurting at that time, and that he had no ongoing complaints that required any treatment after his physical therapy concluded in October of 2014. Relying on Claimant's description of the incident in question, Dr. Hall agreed with Dr. Raschbacher's causation opinion noting: "From a causation perspective, this seems fairly straight forward. There was clearly an initiating event on 11/29/16. There is some discrepancy in the chart about just when the pain began, but it clearly began following the event of helping a patient up." Dr. Hall also agreed with Dr. Raschbacher that Claimant's injury was likely precipitated by his underlying yet asymptomatic spinal condition stating: "It is true that [this injury] is a fairly devastating outcome from a fairly benign event, but with his history of a congenitally narrow canal, it does not take as much herniation to create nerve compression/nerve injury."

28. Claimant testified on cross-examination that he spoke to Mr. Denahy and reported the incident shortly after it happened and then proceeded to the kitchen where he began to wash dishes. The residents eat dinner at around five or six in the evening, but there are dirty dishes present "all day" at the facility. According to Claimant, prior shifts often leave dishes in the sink for the oncoming shift to wash. Mr. Diaz confirmed during his direct examination that there were probably dishes in the sink from the previous shift as it does happen often.

29. During his testimony, Claimant was asked about the Employee Accident Report dated December 8, 2016, which documents the incident occurring at approximately 5:00 PM. Claimant testified that he did not remember filling out the form. Based upon the evidence presented, the ALJ finds that the form was signed by Claimant on December 8, 2016, three days after a major back surgery and likely while Claimant was under the influence of cognitively impairing pain medication. For the same reasons that the ALJ found Claimant's oral statements to Mr. Schrader unreliable, the ALJ finds the information contained on the form completed by Claimant on December 8, 2016 equally untrustworthy. Regardless, Claimant disagreed with the 5:00 PM injury time.

30. In another Employee Accident Report completed by Ms. Rosa Salo, the interim director of Human Resources on December 5, 2016, it indicates that Claimant contacted Mr. Denahy on November 28, 2016 at 4:22pm to report that he had injured

[1] The ALJ interprets this statement to indicate that the structures of Claimant's lumbar and thoracic spine were compromised prior to the injury in question in this case and without such pre-existing disease (stenosis), the injury would not have happened.

his back a couple of days ago. Ms. Salo's accident report form is in direct conflict with the testimony of all others involved, the written statements of Mr. Denahy and Mr. Diaz and with the employment records in file. Consequently, the ALJ finds her statement and subsequent testimony regarding the date of injury unconvincing.

31. Another statement was provided by a co-employee of Claimant; however, the name affixed to the statement is illegible. This individual documented that Claimant showed up for work on December 1, 2016 grabbing his lower back and that Claimant was walking around the house very slowly. According to the statement, Claimant told the individual that he had hurt his back the other day. There is no discussion of where, when or how Claimant had been injured, only that he had been hurting for a while.

32. Finally, there is a witness statement in the record from Jose Diaz, dated December 15, 2016. Mr. Diaz wrote that he was in the kitchen washing dishes when Claimant approached him, bent over slightly and acting as if he were in pain. According to Mr. Diaz Claimant verbalized his pain and demonstrated discomfort by saying "ouch" and closing his eyes. Mr. Diaz noted: "He (Claimant) didn't performed (sic) any task that will cause no ~~othe~~r further pain. (. . . on that shift; 4 pm-9pm)." Mr. Diaz does not reflect a time that Claimant appeared in the kitchen. The ALJ finds the choice of words Mr. Diaz used in his written statement significant. It is specifically noted that Mr. Diaz used the words "further pain" suggesting that something occurred to cause Claimant pain in the first instance. While Mr. Diaz notes that no tasks were performed on the 4:00–9:00 PM shift that would cause Claimant pain, the ALJ finds this statement unconvincing. Rather, the evidence presented is persuasive of the likelihood that Mr. Diaz was not with Claimant continuously during his shift so would not necessarily be aware of all tasks/activities Claimant engaged in during the shift.

33. Mr. Diaz was specifically asked whether Claimant told him how he injured his back. Mr. Diaz responded, "No, I – I – I – I did ask him, and I said, well, why – why is your back hurting? And he goes, 'I don't know.' It's been – it's – it's just been hurting me for the past few days. That's what he told me." Mr. Diaz's witness statement dated December 15, 2016 makes no mention of Claimant telling him that his back had been hurting for "the past few days."

34. Mr. Diaz testified on cross-examination that he had worked with Claimant on the previous Tuesday, November 22, 2016 and that Claimant did not exhibit any pain symptoms at that time. Mr. Diaz also reiterated during cross examination that Claimant did approach him on November 29, 2016 complaining of back pain.

35. The totality of the evidence presented persuades the ALJ that Claimant proceeded to the back area of the house to determine what was occurring between Mr. Diaz and the resident. The evidence also persuades the ALJ that Claimant probably helped the resident to stand up as he described and in the process he injured his back. Thereafter, the evidence presented convinces the ALJ that Claimant probably called Mr. Denahy to report the incident and his injuries and he then proceeded to the kitchen where Mr. Diaz was able to see that he was in pain.

36. The ALJ credits the testimony of Claimant and the opinions of Dr's. Erickson, Raschbacher and Hall to find that the act of assisting the resident to his feet, more probably than not, resulted in acute disc herniations and an aggravation of his pre-existing, yet asymptomatic congenital spinal stenosis which in turn caused his need for treatment, including the above described emergent spinal surgery. Accordingly, the ALJ is persuaded that Claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his thoracic and lumbar spine on November 29, 2016.

37. Wage records submitted into evidence extending from September 11, 2015 through the December 16, 2016 establish that Claimant earned gross wages of $32,544.59. The ALJ excludes the earnings from the pay date of December 16, 2016 as it encompasses earnings after the date of injury. However, the pay date of December 2, 2016 is used, as it is presumed based on earnings paid out December 16, 2016, that the December 2, 2016 pay date only encompassed earnings prior to the date of injury. Using the twenty-six bi-weekly pay dates, dated December 18, 2015 through December 2, 2016, the ALJ calculates Claimant to have earned a total of $24,304.70 during this time period. Consequently, the ALJ calculates Claimant's average weekly wage to be $467.40 ($24,304.70 ÷ 52 weeks= $467.40). The ALJ finds that Claimant's average weekly wage (AWW) is best calculated using 52 weeks of earnings given the fluctuating nature of his pay. Aside from Claimant's first and last pay periods, he earned anywhere from $812.70 to $1,391.25 for any given two week period.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, the undersigned ALJ concludes that Claimant is a credible witness. Claimant has consistently maintained throughout the course of the claim that he sustained an injury to his back while physically helping a resident to his feet from the floor. Claimant reported to his supervisor on November 29, 2016 that he had sustained an injury at work. Claimant maintains that he told Mr. Denahy he injured himself at work lifting a resident that same day, whereas Mr. Denahy recalled Claimant telling him that he had injured himself at work lifting a resident during a prior shift. While Mr. Denahy asserts that Claimant reported that he had been injured on a prior shift, much of the detail contained in Mr. Denahy's statement corroborates Claimant's account of the events leading up to the injury including the mechanism of injury itself. Given the totality of the evidence presented, the ALJ concludes it more likely than not that Claimant did in fact sustain an injury to his lower back on November 29, 2016, and that Mr. Denahy erred in his recollection of events when reducing them to writing two-and-a-half weeks after the incident occurred.

C. The only individuals that testified at hearing that were present at the facility around the time of the injury were Claimant and Mr. Jose Diaz. Claimant testified, and indicated on various forms filled out after the injury, that he had walked in on Mr. Diaz and a resident that was on the floor. Mr. Diaz left to wash dishes and Claimant assisted the individual to his feet. Mr. Diaz testified that he was never involved with a resident on the floor on November 29, 2016. In this case, the records document Claimant to have consistently reported a work related injury involving the lifting of a resident. At hearing, Mr. Diaz indicated Claimant told him that he had injured his back a few days prior and that Claimant did not know how he had injured himself. However, this information is conspicuously absent from his written statement. Moreover, there is no indication in the written statement of Mr. Diaz as to when Claimant appeared in the kitchen in pain as observed by Mr. Diaz despite his subsequent testimony that it was around 5:00 PM. Given the fact that Mr. Diaz continues to work for the employer, that he was asked by the employer to write a statement, that it was likely Mr. Diaz's responsibility to report the incident involving the resident, which he failed to do, and that his testimony at hearing has expanded to cover critical information not previously disclosed in his prior witness statement, the ALJ finds Mr. Diaz's written statement and testimony less persuasive that Claimant's.

D. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item

contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

E. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App.2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

G. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

H. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Respondent's contend that

Claimant has failed to carry his burden to establish a compensable injury based upon the assertion that his account of the events leading up to his asserted injuries is not credible. As found, the ALJ is not persuaded. To the contrary, the ALJ specifically rejects this contention to conclude that Claimant's testimony is credible and supported by the medical record submitted. In crediting Claimant's testimony, there is little question that the alleged injury occurred in the course and scope of Claimant's employment. Nonetheless, given Claimant's pre-existing degenerative and congenital spine conditions the question of whether his asserted injuries and need for treatment "arise out" his employment must be addressed before the injuries are deemed compensable. The specific question for resolution is whether Claimant's back pain and need for treatment stems from an acute injury, an aggravation of a pre-existing condition or conversely, whether it represents the natural progression of his pre-existing degenerative disc disease and congenital stenosis. As found, the totality of the evidence presented, including opinions of Dr's. Erickson, Raschbacher and Hall persuades the ALJ that the "lifting" incident involved in this case resulted in acute disc herniations which in turn aggravated Claimant congenital spinal stenosis giving raise to his symptoms and emergent corrective spinal surgery. Consequently, the ALJ concludes that Claimant suffered both acute injuries and an aggravation of a pre-existing, yet asymptomatic condition when he assisted the resident to his feet on November 29, 2016.

I. A pre-existing condition "does not disqualify a claimant from receiving worker's compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or the need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). Here, the persuasive evidence demonstrates that Claimant sought treatment for low back pain after assisting a resident to his feet. Although Claimant had pre-existing congenital stenosis, confirmed by MRI, the ALJ finds no evidence to establish that Claimant's pre-existing condition was symptomatic or disabling immediately prior to November 29, 2016. Rather, Claimant's pain and disability came on suddenly after assisting a resident from the floor. Consequently, the ALJ concludes that Claimant's ongoing symptoms are consistent with an acute event rather than the insidious worsening of symptoms representative of the natural progression of a pre-existing degenerative condition. Accordingly, Claimant has proven by a preponderance of the evidence that his injuries are compensable.

J. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and

relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

K. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). As found here, Claimant has proven by a preponderance of the evidence that he sustained an acute disc herniation in addition to a compensable aggravation of his preexisting congenital spinal stenosis. The evidence presented convinces the ALJ that these compensable "injuries" are the proximate cause of Claimant's need for medical treatment including the surgery performed on an emergent basis by Dr. Norville. Moreover, the totality of the evidence presented establishes that the care received, including the surgery performed by Dr. Norville was reasonable and necessary in light of the findings on MRI, the neurologic findings on examination and Claimant's functional decline. Said surgery was performed on an emergent basis in an effort to preserve neurologic function and the ALJ specifically finds/concludes that Claimant's medical status constituted a bona fide emergency representing an exception to the normal requirement that a claimant obtain authorization for all treatment related to the industrial injury. Larson's Workers' Compensation Law, § 94.02[6] (1999); *Sims v. Industrial Claim Appeals Office, 797 P.2d 777* (Colo. App. 1990). For these reasons, the ALJ concludes that Respondents are liable for Claimant's medical treatment, including his hospitalization, surgical intervention and post surgical rehabilitation.

Temporary Disability Benefits

L. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-

42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). In this case, the persuasive evidence demonstrates that Claimant was incapacitated by and suffered a wage loss as a direct and proximate consequence of his industrial injury. It is undisputed that Claimant's medical condition would prevent him from returning to regular employment through the date of his hearing and there has been no modified duty offered to Claimant since the date of injury. Consequently, the ALJ concludes that Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Claimant last worked for the Employer on December 1, 2016 and as noted has not returned to work as of the date of his hearing. Because the period of disability lasted longer than two weeks from the day Claimant left work as a consequence of the injury, Claimant is entitled to recover disability benefits from the day he left work in this case. Section 8-42-103(1)(b), C.R.S. Accordingly, the ALJ concludes that Claimant is entitled to TTD benefits beginning December 2, 2016 and continuing until otherwise properly terminated by operation of law.

Claimant's Average Weekly Wage

M. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).* The ALJ concludes that Claimant's wage records constitute the best evidence concerning his earnings around the time he was injured. The wage records support that Claimant's earnings varied during his employment. As found, Claimant's average weekly wage (AWW) is best calculated using 52 weeks of earnings given the fluctuating nature of his pay. Here, Claimant earned anywhere from $812.70 to $1,391.25 for any given two week period. Because of his irregular earnings, the ALJ concludes that using the broader time period of 52 weeks allows for the most accurate calculation of a figure that most closely approximates Claimant's wage loss and diminished earning capacity at the time of his November 29, 2016 compensable work related injury. Consequently, the ALJ finds that Claimant's AWW is $467.40.

ORDER

It is therefore ordered that:

1. Claimant has established that he sustained a compensable injury to his

lumbar and thoracic spine on November 29, 2016.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his compensable back injuries, including but not limited to the care received through Valley-Wide Health Systems, Rocky Ford Family Health Center, La Junta Rural Fire/Ambulance, Parkview Medical Center, Parkview Neurological Services, NuMotion, High Plains Community Health Center, Matrix Rehabilitation Consultants, and Craig Hospital.

3. Respondents shall pay temporary disability (TTD) benefits in accordance with section 8-42-103(1)(b), C.R.S. at a rate of sixty-six and two-thirds percent of Claimant's AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. As Claimant's disability lasted longer than two weeks from the day that he left work as a result of his injury TTD benefits shall commence December 2, 2016 and continue until they can be terminated according to law. Section 8-42-103(1)(b), C.R.S.

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

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

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

DATED: October 2, 2017

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-037-326-03

ISSUES

- Whether Claimant established by a preponderance of the evidence that he experienced a compensable injury on June 27, 2016?
- If so, whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits and in what amount?
- If so, whether Claimant established by a preponderance of the evidence entitlement to medical benefits authorized and reasonably necessary?
- Whether Respondents have established entitlement for late reporting?
- Whether Respondents have established entitlement to a penalty for late reporting?

FINDINGS OF FACT

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

1. Claimant worked for Employer as a lead service technician servicing slot machines at the time of his alleged injury, June 27, 2016.

2. Claimant testified that on that date, he and a co-worker attempted to a unit of slot machines onto dollies to remove them from the casino. Claimant and his co-worker both testified that they needed the help of two to four others to be able to accomplish the task. While the group was lifting the machines, Claimant stepped back and said he hurt his back. Claimant testified that the immediate pain was sharp but began subsiding within fifteen minutes.

3. Claimant testified that he experienced similar symptoms approximately two years earlier with the same mechanism of injury.

4. Claimant's supervisor, Ed Hall, was not at the site at the time of the incident, but arrived about one hour later and Claimant then told Mr. Hall that he had hurt his back that morning moving the unit of slot machines. He did not ask to seek medical attention.

5. The co-worker could not recall whether Claimant reported the accident that day, whether he saw Claimant working later in the day, or whether he saw Claimant working later that week. He testified that the rest of the group continued moving the unit of slot machines. No one called for an ambulance, and the co-worker did not check with

Claimant to see if Claimant needed medical care. Claimant eventually returned to work until he was laid off.

6. Claimant testified that five or six days after the incident, he awoke with pain rated at 8-9/10. His medical records indicate his pain spiked two days after the accident. On July 5, Claimant reported to his supervisor that he could not work that day due to his back injury.

7. The Employee Injury Report, introduced as a part of Employer's file, provides:

> 8/5/16 Reported ongoing back pain, believed to be tied to 2014 back pain. Formally reported back pain on 8/12/16. In this report of injury [Claimant] states: injured while lifting shuffler (35lb) onto table on 6/27/16. Claims to have told supervisor Ed Hall on 6/27 and 7/4. [Claimant] is no longer employed with [Employer], offered severance due to campus downsizing on 7/16/16. . . . [Claimant] took three days PTO around July 4th, no claims this was due to back pain from 6/27 event.

8. Claimant testified that between the date of his alleged injury and July 5, 2016, he did not experience any other injury, accident, or lifting event. However, in his screening questionnaire for Panorama Orthopedics and Spine Center, Claimant noted that his pain started on July 3, 2016.

9. Claimant could not recall how many days, if any, he took off because of his alleged injury. He also could not recall any medical provider assigning him work restrictions. He recalled telling his co-workers that he wanted to work light duty.

10. Claimant could not recall when Employer provided him with a list of providers or when he initially sought treatment. However, he began treating at Panorama Orthopedics, a provider who happened to be on Employer's list. Claimant's initial treatment included physical therapy and being scheduled for a steroid injection. Claimant also sought treatment from the chiropractor he treated with for his 2014 injury. Claimant reported to these providers that he had inconsistent levels of pain in his low back and that the pain shot down his right outer thigh.

11. Claimant testified that he received a few weeks of physical therapy without improvement, and that the steroid injections – the last of which he received on December 13, 2016 – also provided no relief. Claimant understood from an MRI of his lumbar spine that he had a herniated disc at L4/L5 which caused his sometimes shooting and variable pain.

12. Claimant testified that he treated for four to six weeks after his 2014 injury and that he did not receive a rating or permanent restrictions for that injury. He could not recall receiving any treatment after that until his June 2016 incident.

13. Claimant testified that he had been unable to do heavy lifting since the date of the incident. His pain at best was 2-3/10 and at its worst was 6-7/10. Lying down for short periods of time sometimes relieved his pain. The ALJ is not persuaded. The preponderance of the credible evidence supports a finding that Claimant continued working his regular job until being laid off due to a reduction in force. The ALJ concludes the incident did not disable Claimant from performing his regular job, and that did not cause a wage loss.

14. On July 12, 2016, Claimant sought treatment with Dr. Lonnie Loutzenhiser, with whom he treated in 2014. Dr. Loutzenhiser prescribed Medrol and Norco which she continued at least through November, 2016.

15. Claimant's last day worked was in July 2016.

16. On July 27, 2016, Claimant learned he would be laid off during Employer's down-sizing.

17. On August 5, 2016, Claimant reported his injury to Employer.

18. Also on August 5, 2016, Claimant reported to a medical provider that he had moved one hundred and eighty pieces of lumber measuring 2" x 4" x 8' the day before. He had been finishing his basement and crouched and squatted to get the boards into his basement. Claimant worked on the project for a few weeks with the help of father and brother. Claimant admitted he cut most of the lumber for the project and also performed plumbing and electrical work.

19. On February 1, 2017, Claimant became employed by a real estate company as a commissioned realtor. On July 5, 2017 he also started working as a car salesperson.

20. Claimant received unemployment benefits for a period of time at the rate of $976 every two weeks. In order to collect that benefit, Claimant represented that he was physically capable of working.

21. Respondents called Dr. Douthit who testified as an expert in the field of orthopedic surgery.

- Dr. Douthit performed a Respondents' sponsored medical examination of Claimant on July 10, 2017. Dr. Douthit reviewed Claimant's medical records, including the MRI reports from 2014 and 2016. He observed that the free fragment herniated disc present on the 2014 MRI had resolved on the 2016 MRI. He also noted that the 2016 MRI had been read to show no evidence of acute injury and no neural impingement.

- Dr. Doughit testified that Claimant could have awoken as he did one of the first mornings in July barely able to move even without having experienced an acute injury because Claimant has advanced degenerative disc disease in his low spine which will probably plague him for his lifetime.

- Claimant had suffered a serious injury in 2014 and it would be speculative to connect Claimant's current pain to a new work injury.

- Dr. Doughit opined that there was no medical reason for Claimant to receive epidural steroid injections. Such injections are performed to treat radiculopathy – pathology of the nerve root, which Claimant does not have as seen on the 2016 MRI.

- Dr. Doughit opined that Claimant's 2016 MRI was "ordinary" for a forty-two year old male worker. While the apparent mild central canal stenosis finding by the radiologist was not "good," it was ordinary, as was the nucleus pulposis protrusion.

- Dr. Doughit attributed Claimant's thigh pain to his 2014 injury, which he thought should have been rated.

- Dr. Doughit explained that Claimant not receiving treatment between the 2014 injury and the 2016 incident could be attributed to Claimant simply being asymptomatic during that period of time.

22. Ultimately, Dr. Doughit was unable to render an opinion as to causation. He testified that based on Claimant's testimony, he might find it more likely than not that the 2016 lifting incident exacerbated Claimant's 2014 injury. However, Dr. Doughit was unable to say the exacerbation was medically probable because Claimant's testimony at hearing was inconsistent with what Claimant reported to him. Dr. Doughit also acknowledged that the 2016 lifting incident could possibly have aggravated Claimant's 2014 injury, but that he would need more information in order to opine that an aggravation was medically probable.

23. Claimant is a poor historian. He did not recall several significant events including: how many days, if any, he took off because of his alleged injury; whether any medical provider assigned him work restrictions; and when Employer gave him a list of providers.

24. Based on the totality of the evidence, the ALJ finds Claimant has *not* established by a preponderance of the evidence that he suffered a compensable injury, or the aggravation, or acceleration of one.

CONCLUSIONS OF LAW

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

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

In order to prove a compensable injury and entitlement to benefits, a claimant must show by a preponderance of the evidence that his injury was caused by activities that arose out of and in the course of his employment. *See* §8-43-201, C.R.S. and §8-41-301(1) (c) C.R.S. "Proof by a preponderance of the evidence requires claimant to establish that the evidence of a "contested fact" is more probable than its non existence." *See* Matson v. CLP, Inc., W.C. No. 4-722-111 (ICAO August 13, 2009).

The claimant must prove by a preponderance of the evidence that the alleged injury was proximately caused by an injury arising out of and in the course of his employment with the employer. *See* §8-41-301(1)(b-c) C.R.S. *See also City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "arising out of" element requires claimant to show a casual connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *Triad Painting Co. v. Blair.*

The question of whether the claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. See *Faulkner v. ICAO*, 12 P. 3d 844(Colo. App. 2000).

Merely feeling pain at work in and of itself is not "compensable." *See* Miranda v. Best Western Rio Grande Inn, W.C. No. 4-663-169 (ICAO April 11, 2007). "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the claimant was sustained a compensable injury." *See also* F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App 1995).

The Workers' Compensation Act creates a distinction between an "accident and an "injury." An "accident" is the cause and an "injury" is the result. No workers'

compensation benefits allow an employee unless they prove by a preponderance of evidence found credible the "accident" caused a compensable injury. A compensable injury is one that causes disability or the need for medical treatment. See *City of Boulder v. Payne* 162 Colo. 345, 426 P. 2d 194 (1967).

Here, Claimant has failed to meet his burden of proof and did not show it more probably true than not a causal connection between his employment activities and an injury. Claimant failed to present credible evidence that his injury is compensable. The exact cause of the pain being based upon inconsistent information cannot be found to be credible and persuasive.

It is concluded as a matter of law Claimant failed to prove by a preponderance of the evidence that his injury was caused by his employment.

ORDER

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

1. Claimant's claim is denied and dismissed.

2. The remainder if issues noticed for hearing need not be addressed.

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

DATED: October 3, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-932-919-05

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

PENNSYLVANIA MANUFACTURERS INDUSTRY,
c/o/ GALLAGHER BASSETT SERVICES,

Third Party Administrator (TPA),

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 16, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 8/16/17, Courtroom 1, beginning at 8:30 AM, and ending at 9:45 AM). Alejandro Cesar Lurati Acourt was the official Spanish/English Interpreter.

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

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: A hard copy of the Claimant's opening brief was first filed with the Division of Workers' Compensation (DOWC) on August 24, 2017; and, then with the office of Administrative Courts (OAC) on August 25, 2017. The certificate of mailing is dated August 23, 2017. An electronic version of the opening brief was not filed until September 21, 2017, when the OAC requested an electronic version. The Respondents' answer brief evidences a certificate of mailing as August 30, 2017

however, the same was not received by the ALJ until September 26, 2017. No timely reply brief was filed. Consequently, the matter was deemed submitted for decision on September 26, 2017.

ISSUES

The issues to be determined by this decision concern Claimant's request to overcome the latest Division Independent Medical Examination (DIME) opinion of Brian Beatty, D.O., regarding maximum medical improvement (MMI), after a re-examination subsequent to the decision of ALJ Broniak, which originally determined that Dr. Beatty's DIME had been overcome.. Dr. Beatty's reports dated March 25, 2014 and January 27, 2016, which both found Claimant to be at maximum medical improvement (MMI) as of November 6, 2012. If the DIME opinion is overcome, the Claimant seeks medical benefits, and temporary total disability (TTD) benefits from October 23, 2015 and continuing at the rate established by the decision of ALJ Laura Broniak, dated October 9, 2015, $250.44 per week. If the latest DIME opinion is not overcome as to MMI, the Claimant seeks conversion of the admitted 17% scheduled rating of the right upper extremity (RUE) to a 10% whole person rating.

To overcome the DIME, the Claimant bears the burden of proof, by clear and convincing evidence. To be entitled to a conversion to a whole person rating, the Claimant must accept the four corners of DIME Dr. Beatty's DIME letter, whereupon the Claimant's burden is by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant suffered a compensable injury to her right sternoclavicular joint (SC joint) on July 31, 2012, while working for the Employer in housekeeping. At the time of the injury, the Claimant's primary duties involved cleaning hotel rooms. (Respondents' Exhibit F).

2. Subsequent to her July 31, 2012 injury, the Claimant received treatment from various physicians within Concentra Medical Center, including Theodore Villavicencio, M.D., and Robert J. Dixon, M.D. Dr. Villavicencio became one of the Claimant's authorized treating physicians (ATPs). The Claimant was diagnosed with a SC joint strain and her medical treatment primarily included work restrictions, physical therapy and pain medication. At an appointment with Concentra on August 2, 2012, the Claimant denied "any numbness, tingling, or radicular pain down her arm or up her neck." (Claimant's Exhibit 2, p. 14).

3. On September 24, 2012, the Claimant returned to regular duty with the Employer (Claimant's Exhibit 5, p. 104).

4. After a hearing on May 21, 2015, ALJ Broniak issued a decision on October 9, 2015, which determined that, while the evidence did not support a finding that Claimant suffered a second injury to her SC joint in June 2013, her recurring symptoms may have been related to Claimant's July 31, 2012 injury, and that she was not in fact at MMI as of November 6, 2012. ALJ Broniak determined that the Claimant had overcome the DIME of Dr. Beatty. ALJ Broniak then ordered Respondents to pay TTD benefits beginning August 4, 2014, and ongoing (Claimant's Exhibit 1).

5. Pursuant to ALJ Broniak's decision, which determined that the Claimant had not reached MMI, Respondents paid Claimant TTD benefits for the period of August 5, 2014 through October 22, 2015, at a rate of $250.44 for 63 3/7 weeks, for a total payment of $15,885.05 (Respondents' Exhibit F).

6. Ultimately, the Respondents filed a Final Admission of Liability (FAL), dated April 2016, presumably based on DIME Dr. Beatty's re-affirmed follow up DIME opinion after ALJ Broniak's decision, admitting for and average weekly wage (AWW) of $375.66; for TTD benefits of $250.44 per week from August 5, 2014, through October 22, 2015; for an MMI date of November 6, 2012, for 17% RUE and zero whole person permanent partial disability (PPD), payable at the rate of $266.98 per week, and denying post-MMI maintenance medical benefits (*Grover* medicals).

Medical Treatment

7. By October 30, 2012, the Claimant had responded to the conservative treatment measures and reported two pain free days to Samuel Chan, M.D. her then authorized treating physician (ATP). At that visit, Dr. Chan did not note any visible abnormalities, nor did he document any loss of range of motion (Claimant's Exhibit 2, p. 47).

8. At an appointment with Concentra on November 6, 2012, the Claimant reported no pain in the range of motion (ROM) for her right shoulder, nor any radiation of the same (Claimant's Exhibit 2, p. 49). Due to Dr. Dixon's assessment that the Claimant was consistently pain-free and functioning normally, Dr. Dixon placed her at MMI without impairment, restrictions or recommendations for maintenance care. The Claimant acknowledged understanding her diagnosis and treatment (Claimant's Exhibit 2, p. 49).

9. Following Dr. Dixon's MMI determination and the Claimant's return to full duty, records from Concentra Medical Centers indicate that the Claimant returned for treatment on June 18, 2013, alleging a new injury occurring on or about June 17, 2013,

seven months after her last reported pain and/or request for care. She was seen by Dr. Villavicencio, who noted that the Claimant had "no new injuries or activities outside of work" (Claimant's Exhibit 2, p. 50).

10. Dr. Dixon referred the Claimant to Dr. Chan, a physiatrist, for a specialist opinion. In his initial report dated October 16, 2012, Dr. Chan noted pain complaints localized over the right sternoclavicular joint (Claimant's Exhibit 2, p. 42). On examination, Dr. Chan found no tenderness over AC joints, subacromial space, or bicipital groove. He did, however, note tenderness over the right SC joint and diagnosed the Claimant with a right SC joint strain (Claimant's Exhibit 2, p. 43).

11. When the Claimant returned to Dr. Dixon on November 6, 2012, she no longer had any significant pain and she felt an improvement in her functional status. Dr. Dixon concluded that Claimant had reached MMI without impairment (Claimant's Exhibit 2, p. 49).

12. The Claimant returned to Concentra on June 18, 2013 with recurring SC joint pain. Dr. Villavicencio recommended the claim be reopened, prescribed medication for pain and made a referral back to Dr. Chan (Claimant's Exhibit 2, p. 51).

13. On July 2, 2013, the Claimant saw Dr. Chan. Dr. Chan noted that prior to the appointment, the Claimant had complained of severe pain in her right shoulder and at the SC joint, but that the complaint did not radiate from those areas, to include her right arm and/or neck region (Claimant's Exhibit 2, p. 55).

14. The Claimant saw Dr. Chan on July 2, 2013. At that time, her pain complaints again focused on the right SC joint, but she also described pain all the way from the SC joint to the subacromial space. On examination, Dr. Chan noted positive impingement signs which were not found on prior examinations. He diagnosed the Claimant with a right shoulder sprain in addition to the previously diagnosed SC joint strain and he performed an injection into the subacromial space of Claimant's right shoulder (Claimant's Exhibit 2, p. 55). The Claimant reported that the injection was beneficial (Claimant's Exhibit 2, p. 59).

15. By October 15, 2013, the Claimant's right shoulder pain had returned and Dr. Chan noted that she was again complaining of pain over the entire right shoulder girdle and that examination demonstrated tenderness at the AC joint and subacromial space. He performed another injection in to Claimant's right subacromial space (Claimant's Exhibit 2, pp. 70-71).

16. The medical records establish that Dr. Villavicencio and Dr. Chan treated the Claimant's recurrent symptoms as part of her July 31, 2012 claim.

17. The Claimant saw Dr. Villavicencio again on July 16, 2013 for follow up. Dr. Villavicencio noted that the Claimant reported her pain as a "0/10," and that the subacromial injection she received from Dr. Chan at the last appointment was beneficial (Claimant's Exhibit 2, p. 60)

18. The Claimant returned to see Dr. Villavicencio on July 23, 2013, at which time she reported recurring pain in the SC joint. Dr. Villavicencio placed the Claimant on modified duty (Claimant's Exhibit 2, p. 62).

19. In the month following the July 23, 2013 appointment with Dr. Villavicencio, the Claimant received second opinions from Drs. Hugate and Hewitt, as well as Dr. Rajesh Bazaz, M.D., an orthopedic specialist. These physicians were of the opinion that surgery was not likely to help, and recommended that the Claimant consider additional subacromial injections because they had been previously beneficial (Claimant's Exhibit. 2, p. 65). While initially undecided, the Claimant ultimately declined the recommended injection treatment (*Id.* at 67).

20. Because there were no further treatments available for the SC joint other than injections, Dr. Villavicencio placed the Claimant at MMI on September 23, 2013. (*Id.* at 68; see also Claimant Exhibit 4, pp. 88,89).

21. After placing the Claimant at MMI, Dr. Villavicencio recommended finishing physical therapy, six months of Naproxen, and follow up visits with Dr. Chan for six months for maintenance care. Dr. Villavicencio did not recommend permanent restrictions. With regard to permanent impairment, Dr. Villavicencio assigned the Claimant a 6% RUE rating for lost range of motion (Claimant's Exhibit 2, pp. 96, 99)

22. On December 26, 2013, Claimant was seen by John Burris, M.D., who concurred with Dr. Villavicencio's assessment that Claimant was at MMI, and that, apart from recommended exercises, no "further formal treatment or maintenance is appropriate" (Claimant's Exhibit 2, p. 75).

23. Dr. Burris saw the Claimant for the first and only time on December 26, 2013. He determined that the Claimant's current symptoms were not likely to be related to what he described as a relatively minor event 18 months earlier. He concluded that the Claimant was at MMI with a 6% scheduled impairment rating for the RUE (Claimant's Exhibit 2, p. 74). Dr. Burris' cursory opinion regarding the Claimant's ongoing symptoms is not sufficiently supported by a persuasive medical analysis and is not entitled to any significant weight.

Division Independent Medical Examination (DIME) of Brian Beatty, D.O.

24. Respondents filed a FAL consistent with Dr. Villavicencio's opinion, and the Claimant requested a DIME (Respondents' Exhibit F). Ultimately, Dr. Beatty was selected as the DIME physician (Respondents' Exhibit J).

25. Dr. Beatty performed the DIME on March 5, 2014. In his report, Dr. Beatty noted that on November 6, 2012, the Claimant was "pain free and functioning normal" (Claimant's Exhibit 4, p. 91). He concluded that the Claimant's current symptomatology was unrelated to her July 31, 2012 claim because the Claimant's pain did not return for almost one year, and that her constellation of symptoms were inconsistent with SC strain arising from the July 31, 2012 injury. Dr. Beatty noted an 8% RUE rating which he did **not** attribute to the admitted July 31, 2012 work injury (Claimant's Exhibit 4, p. 91).

26. The Claimant resigned her position with the Employer in August 2014, and has not returned to work since that time (Claimant's Exhibit 5, p. 96).

Independent Medical Examination of Hugh Macaulay III, M.D.

27. Following Dr. Beatty's Report, the Claimant retained Dr. Macaulay to conduct an IME, which took place on September 30, 2014 (*see* Claimant's Exhibit 5). Dr. Macauley noted that the Claimant's ROM had worsened since she was seen by Dr. Beatty. He stated that the Claimant's current impairment rating would be 16% of the RUE. Dr. Macaulay disagreed with the opinion of Dr. Beatty, and directly attributed the Claimant's loss of function in the shoulder to lost function in the SC joint. He concluded that the Claimant would not likely benefit from surgery, but recommended an MRI (magnetic resonance imaging) arthrogram of the right shoulder in order to determine the extent and nature of Claimant's complaints (*Id.* at p. 108). In her 2015 decision determining that the Claimant had overcome Dr. Beatty's MMI date of November 6, 2012, ALJ Broniak relied on Dr. Macaulay's opinions over and above DIME dr. Beatty's opinion, finding that the DIME opinion had been overcome by clear and convincing evidence.

28. The Claimant returned to Dr. Villavicencio on October 22, 2015, and Dr. Villavicencio determined that the Claimant remained at MMI. Furthermore, Dr. Villavicencio stated the opinion that he did not believe any further treatment was indicated for the SC sprain, and that the Claimant's complaints about "diffuse neck, shoulder, and RUE pain" was not related to the admitted July 31, 2012 injury, a finding consistent with Dr. Beatty's original DIME report (*See* Claimant's Exhibit 2, p. 78; *see also* Claimant's Exhibit 4, p. 91).

29. The Claimant returned to Dr. Beatty for re-evaluation on January 27, 2016. Upon his review of the Claimant's medical history and a physical examination, Dr.

Beatty's opinion remained unchanged from his previous report, which determined the Claimant to be at MMI as of November 6, 2012, and that her recurring complaints of pain in her SC joint and RUE were unrelated to the admitted July 31, 2012 injury (*See* Claimant's Ex. 6, p. 125). Additionally, Dr. Beatty noted that Claimant had not sought any additional treatment in the interim, and had been released from care by Dr. Villavicencio in October 2015 (Respondents' Exhibit J). The ALJ finds that Respondents cannot backdoor ALJ Broniak's decision by simply returning the Claimant to the DIME physician to re-assert his unchanged opinion of an MMI date of November 6, 2012, thus, permitting Dr. Beatty to overrule ALJ Broniak. ALJ Broniak's decision established the law of the case and brought the concept of issue preclusion into play—up to a point.

Procedural Developments

30. The Claimant filed an Application for Hearing, dated April 8, 2016, and a hearing date was set for August 2, 2017 (Respondents' Exhibit A).

31. The Claimant then filed a request to withdraw that application for hearing due to then-pending settlement negotiations, which was granted by OAC. Legal Assistant Ronda L. McGovern on July 27, 2016. In granting that request, McGovern ordered the Claimant to file another Application within 10 days of the signed order. *Id.*

32. There was a subsequent settlement conference on August 18, 2016, but no agreements were reached. Nonetheless, between the July 27, 2016 Order, and Claimant's March 2, 2017 Application for Hearing, the Claimant took no further action with respect to her claim, to include filing the court-ordered Application for Hearing within 10 days of the Order, nor did she seek any further treatment for her alleged recurring symptoms (Respondent's Exhibit D, p. 2).

33. Due to the Claimant's inaction for such an extended period, Respondents moved to close the matter on February 21, 2017. *Id.* at p. 1. In response, the OAC. issued an Order to Show Cause, requiring the Claimant to provide good cause as to why the claim should not be closed within thirty (30) days of the March 8, 2017 Order. The Claimant responded within that period, objecting to the closure on April 8, 2017, claiming that her March 10th MRI appointment provided sufficient cause to allow her claim to continue (Respondents' Exhibit D).

34. On March 10, 2017, the Claimant obtained an MRI arthrogram of her right shoulder, at her own expense. Upon review of the MRI, Trystain Johnson, M.D., noted there were no tears in the rotator cuff or the surrounding tendons, but suspected there may be a focal tear and/or fraying in the superior labrum (Claimant's Exhibit 7).

35. The parties appeared for a hearing before the undersigned ALJ on June 22, 2017, at 1:30 PM., at which time the Respondents were first provided with a copy of

the Claimant's recent MRI report-- due to an error in the original submission. To allow time for the Respondents to review the new information, the parties agreed to request the hearing be reset for a later date, and the ALJ approved the request, rescheduling the hearing for August 16, 2017 at 8:30 AM.

36. After receiving the MRI results from Claimant, Respondents provided Dr. Villavicencio with the MRI report. Dr. Villavicencio determined that the MRI report did not change his opinion, despite Dr. Johnson's suspicions of a labral tear, such an injury would not be consistent with the mechanics of Claimant's admitted injury and subsequent treatment history, according to Dr. Villavicencio (Respondent's Exhibit H).

Analysis of Evidence

37. Dr. Beatty's determination that the Claimant reached MMI as of November 6, 2012 is supported by clear and convincing evidence. For example, the Claimant reported to Dr. Dixon and Dr. Villavicencio, her treating physicians at that time, that she no longer had any significant pain, and that she felt improvement in her functional status as of that date. Moreover, following that appointment, seven months passed before the Claimant renewed her complaints of pain in her right shoulder. As Dr. Beatty observed, however, and her treating physicians agreed, the issues complained of were "a constellation of symptoms that would suggest other medical problems including possible tendinitis and impingement of her shoulder and radiation to multiple other areas **inconsistent with the sternoclavicular strain"** (Respondents' Exhibit J, p. 3) (emphasis supplied). While the Claimant returned to her providers at Concentra alleging a new injury on or about June 18, 2013, both her providers and ALJ Broniak determined that there was no new injury (Claimant's Exhibit 1, p. 9).

38. Although ALJ Broniak found that the Claimant's June 2013 complaints were not a new injury, she determined, at most, that her complaints were a continuation of the earlier, admitted injury. ALJ Broniak's determination, however, was based upon an IME conducted by Claimant's retained physician, Dr. Macaulay. .For example, in his September 30, 2014 report, Dr. Macaulay stated the opinion that surgery was unlikely to improve the Claimant's condition, and that "the passage of time is the only healing modality available to [Claimant]." (Claimant's Exhibit 5, p. 108). Nonetheless, Dr. Macaulay was of the opinion that an MRI arthrogram may be helpful, and that even if such a study demonstrated evidence of "labral fraying," surgery would not likely provide "material improvement to her function." *Id.* Dr. Macaulay's recommendation at that time was that Claimant should obtain an MRI arthrogram. *Id.* Claimant obtained the recommended MRI arthrogram of her right shoulder, in March 2017, albeit two and a half years after she first received this recommendation from Dr. Macaulay (Claimant's Exhibit 5, p.108). Claimant testified at the hearing that the delay was due to her need to raise the funds to purchase the MRI out-of-pocket. Respondents submitted the new MRI report to Dr. Villavicencio for his review and comment, and he responded that his opinion on her MMI status remained unchanged (Respondents' Exhibit H). Consistent

with Dr. Beatty's DIME, Dr. Villavicencio agreed that the suspected labrum tear, even if actually present, was nevertheless inconsistent with the Claimant's past medical history and examinations as a "pain generator." *Id.* Therefore, Claimant has failed to demonstrate a causal relationship between her present complaints and her admitted injury.

39. ALJ Broniak found that Claimant was not at MMI as of November 6, 2012 in her October 2016 Order, she nonetheless agreed with Dr. Macaulay that an MRI arthrogram of her right shoulder was necessary to determine whether any additional treatment would be required for the July 31, 2012 admitted injury. Rather than seek immediate treatment or an MRI consultation, the Claimant delayed, causing Respondents to file to close the matter. Despite her failure to file a timely re-application for a hearing as directed by the OAC in July 2016, the Claimant obtained the suggested MRI in March 2017, at her own expense, and asserted that the cause for delay was to raise the necessary personal funds to cover the cost. The Claimant's MRI results lend further support to the ongoing and consistent opinions of Dr. Chan and Dr. Villavicencio, and Dr. Beatty, which is the opinion that Claimant's "recurring symptoms" are inconsistent with her July 31, 2012 admitted injury and history of complaints, and that there are no other treatment options available. Because her Concentra physicians, Dr. Beatty and Dr. Macaulay agree, surgery will be of no help, and while additional subacromial injections may provide some benefit, the Claimant has refused that treatment (Claimant's Exhibit 2, p. 65). Consequently, the ALJ finds that the Claimant's MMI date is March 10, 2017, the date of the recommended MRI.

The Hearing

40. At the hearing on August 16, 2017, the Claimant testified that, immediately after her admitted July 31, 2012 injury, she experienced pain in her SC joint, but added that the pain was also felt in her neck. This testimony is inconsistent with her initial denial of such radiating pain to Concentra providers the very next day, as well as over the course of her treatment following the July 31, 2012 injury.

41. Additionally, on cross-examination, the Claimant acknowledged that after obtaining the MRI, she did not provide it to any of her treating or IME physicians for review to determine whether any additional treatment would be required.

42. At hearing, the Claimant presented no expert witnesses to interpret her March 2017 MRI results, nor to render opinions on their effects, if any, on their previous evaluations of her reported injuries and impairment ratings.

Temporary Disability

43. As found in Finding No. 26, the Claimant voluntarily resigned from her job in August 2014, and she has failed to prove that she was unable to work at her pre-injury job or was under restrictions at the time.

Overpayment Claim

44. Respondents have failed to establish a clerical mistake in their calculations leading to the Final Admission of liability for 17% RUE and in ALJ Broniak's decision of October 9, 2015, determining that the Claimant was not at MMI and awarding the Claimant continuing TTD benefits from May 21, 2015. As noted, Respondents cannot backdoor ALJ Broniak's 2015 decision by returning the Claimant to the original DIME examiner in order for him to effectively overrule ALJ Broniak. The Claimant's MMI date, as found, was March 10, 2017. The Respondents theory of "overpayment," is to retroactively recoup TTD payments after DIME Dr. Beatty attempted to overrule ALJ Broniak's MMI determination of 2015, in his follow up DIME by clinging to his original MMI opinion of November 6, 2012.

Issue Preclusion

45. The doctrine of issue preclusion (f/k/a *res judicata* or collateral estoppel) bars the re-litigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in a prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and, (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Feeley v. Indus. Claim Appeals Office,* 195 P.3d 1154 (Colo. App. 2008). As found herein above, ALJ Broniak found that Claimant was not at MMI as of November 6, 2012-- in her October 2016 Order. She nonetheless agreed with Dr. Macaulay that an MRI arthrogram of her right shoulder was necessary to determine whether any additional treatment would be required for the July 31, 2012 admitted injury.

Ultimate Findings

46. The ALJ finds that ALJ Broniak found that Dr. Macauley's opinion overcame DIME Dr. Beatty's opinion by clear and convincing evidence, and the doctrine of issue preclusion "kicks in" at this juncture. Based on the totality of the evidence, the ALJ finds the opinion of Dr. Macauley more credible than opinions to the contrary.

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

48 The Claimant, as challenger of the DIME, has proven that it is highly likely, unmistakable and free from serious and substantial doubt that the opinion of Dr. Beatty, determining that the Claimant reached MMI on November 6, 2012 is wrong. Therefore, the Claimant has sustained her burden of proof on the issue of MMI, by clear and convincing evidence.

49. Accepting the four corners of Dr. Beatty's DIME Report, there is no indication that the site of the Claimant's functional impairment transcends the right shoulder. Therefore, the Claimant has failed to prove, by a preponderance of the evidence that a conversion of the admitted rating is warranted.

50. Other than the MRI, which the Claimant paid at her own expense, no post-MMI medical maintenance benefits are reasonably necessary to maintain the Claimant at MMI and/or to prevent a deterioration of her condition, Therefore, the Claimant has failed to prove, by a preponderance of the evidence that post-MMI medical maintenance care is indicated.

51. Under the unique circumstances of this case, Respondents may not re-litigate the issue of MMI by "back dooring" ALJ Broniak's decision by virtue of DIME Dr. Beatty effectively overruling ALJ Broniak with his original opinion, which ALJ Broniak rejected.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo.

App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, ALJ Broniak found that Dr. Macauley's opinion overcame DIME Dr. Beatty's opinion by clear and convincing evidence, and the doctrine of issue preclusion "kicks in" at this juncture. Based on the totality of the evidence, the ALJ finds the opinion of Dr. Macauley more credible than opinions to the contrary.

Substantial Evidence

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

Division Independent Medical Examination (DIME) of Dr. Beatty

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leporine Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Claimant, as challenger of the DIME, has proven that it is highly likely, unmistakable and free from serious and substantial doubt that the opinion of Dr. Macaulay, determining that the Claimant had **not** reached MMI on November 6, 2012 is correct and Dr. Beatty's DIME opinion on MMI is clearly wrong. Therefore, the Claimant sustained her burden of proof on the issue of MMI, by clear and convincing evidence.

Issue Preclusion

d. The doctrine of issue preclusion (f/k/a *res judicata* or collateral estoppel) bars the re-litigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in a prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and, (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Feeley v. Indus. Claim Appeals Office,* 195 P.3d 1154 (Colo. App. 2008). As found herein above, ALJ Broniak found that Claimant was not at MMI as of November 6, 2012-- in her October 2016 Order. She nonetheless agreed with Dr. Macaulay that an MRI arthrogram of her right shoulder was necessary to determine whether any additional treatment would be required for the July 31, 2012 admitted injury. The Respondents sought to re-litigate the issue of MMI, with the same parties, based on DIME Dr. Beatty's retrospective re-affirmation of his original MMI date of November 6, 2012. He re-asserted the opinion that nothing had changed since his original MMI date. ALJ Broniak, however, relied on a new opinion by Dr. Macaulay, who was of the opinion that Claimant was **not** at MMI. Under the unique circumstances of this case, Respondents may not re-litigate the issue of MMI by "back dooring" ALJ Broniak's decision by virtue of DIME Dr. Beatty effectively overruling ALJ Broniak with his original opinion, which ALJ Broniak rejected.

Conversion from Scheduled to Whole Person Rating

e. It is well-established that the question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8) (c), C.R.S. is one of fact for determination by the ALJ. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). In resolving this question, the ALJ must determine the site of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the physical injury itself. *Langston v. Rocky Mountain Healthcare Corp.,* 937 P.2d 883 (Colo. App. 1996); *Starch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Further, pain and discomfort which limit a claimant's ability to use a portion of her body may be considered "functional impairment" for purposes of determining whether an injury is on or off the schedule. *Also see, Presque v. Montrose School District RE-1J,* W.C. No. 4-969-602-01 [Indus. Claim Appeals Office (ICAO). April 14, 2017]. For a conversion, the party seeking it must accept the four corners of an ATP's or DIME'S opinion letter. The standard of proof is then "preponderance of the evidence." As found, accepting the four corners of Dr. Beatty's DIME Report, there is no indication that the site of the Claimant's functional impairment transcends the right shoulder. Therefore, the Claimant failed to prove, by a preponderance of the evidence that a conversion of the admitted rating is warranted.

Post Maximum Medical Improvement (MMI) Medical Maintenance Benefits

f. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Common of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant has failed to prove entitlement to post-MMI medical maintenance care.

Overpayment

g. Recovery of overpayments, based on mistake and on a retroactive basis, was prohibited by *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). In 1997, the General Assembly amended the re-opening statute to include overpayments as a ground for re-opening as to overpayments only. § 8-43-303 (1) and (2) (a), C.R.S. Now, employers have a statutory right to review and recalculate payments if an insurance carrier made a mistake in previous payments. *Simpson v. Indus. Claim Appeals Office,* 2009 Colo. App. LEXIS 576 (No. 07CA1581, April 16, 2009) (NSOP). Previously, an admission of liability could only be withdrawn retroactively on the basis of fraud. *Vargo v. Indus. Comm'n,* 626 P.2d 1164 (Colo. App. 1981). To the extent that a case may be re-opened, based on mistake and not fraud, if there were overpayments, the *Vargo* grounds for retroactively modifying a previously admitted award has been altered to include employer mistakes in calculations. As found, the Respondents have failed to prove entitlement to recoup any "alleged" overpayments.

Burden of Proof on Conversion and Post-MMI Medical Maintenance Care

h. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim

Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain her burden on the issue of conversion to a whole person rating and post-MMI medical maintenance care; and, the Respondents failed to satisfy their burden with respect to alleged overpayments.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant, having overcome the Division Independent Medical Examination of Brian Beatty, D.O., on the issue of maximum medical improvement (MMI), the November 6, 2012 MMI date contained in the Final Admission of Liability, dated April 2016, is hereby set aside and the date of maximum medical improvement is hereby re-established as March 10, 2017.

B. The Claimant, having failed to prove that a conversion to a whole person rating is warranted, the admitted 17% right upper extremity rating is hereby adopted and approved.

C. Post maximum medical improvement (*Grover* medicals) medical maintenance benefits, as well as temporary disability benefits beyond those admitted by the Respondents are hereby denied and dismissed.

DATED this_____day of October 2017

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2017, electronically in PDF format, addressed to:

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

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-037-326-03

ISSUES

- Whether Claimant established by a preponderance of the evidence that he experienced a compensable injury on June 27, 2016?
- If so, whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits and in what amount?
- If so, whether Claimant established by a preponderance of the evidence entitlement to medical benefits authorized and reasonably necessary?
- Whether Respondents have established entitlement for late reporting?
- Whether Respondents have established entitlement to a penalty for late reporting?

FINDINGS OF FACT

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

1. Claimant worked for Employer as a lead service technician servicing slot machines at the time of his alleged injury, June 27, 2016.

2. Claimant testified that on that date, he and a co-worker attempted to a unit of slot machines onto dollies to remove them from the casino. Claimant and his co-worker both testified that they needed the help of two to four others to be able to accomplish the task. While the group was lifting the machines, Claimant stepped back and said he hurt his back. Claimant testified that the immediate pain was sharp but began subsiding within fifteen minutes.

3. Claimant testified that he experienced similar symptoms approximately two years earlier with the same mechanism of injury.

4. Claimant's supervisor, Ed Hall, was not at the site at the time of the incident, but arrived about one hour later and Claimant then told Mr. Hall that he had hurt his back that morning moving the unit of slot machines. He did not ask to seek medical attention.

5. The co-worker could not recall whether Claimant reported the accident that day, whether he saw Claimant working later in the day, or whether he saw Claimant working later that week. He testified that the rest of the group continued moving the unit of slot machines. No one called for an ambulance, and the co-worker did not check with

Claimant to see if Claimant needed medical care. Claimant eventually returned to work until he was laid off.

6. Claimant testified that five or six days after the incident, he awoke with pain rated at 8-9/10. His medical records indicate his pain spiked two days after the accident. On July 5, Claimant reported to his supervisor that he could not work that day due to his back injury.

7. The Employee Injury Report, introduced as a part of Employer's file, provides:

> 8/5/16 Reported ongoing back pain, believed to be tied to 2014 back pain. Formally reported back pain on 8/12/16. In this report of injury [Claimant] states: injured while lifting shuffler (35lb) onto table on 6/27/16. Claims to have told supervisor Ed Hall on 6/27 and 7/4. [Claimant] is no longer employed with [Employer], offered severance due to campus downsizing on 7/16/16. . . . [Claimant] took three days PTO around July 4th, no claims this was due to back pain from 6/27 event.

8. Claimant testified that between the date of his alleged injury and July 5, 2016, he did not experience any other injury, accident, or lifting event. However, in his screening questionnaire for Panorama Orthopedics and Spine Center, Claimant noted that his pain started on July 3, 2016.

9. Claimant could not recall how many days, if any, he took off because of his alleged injury. He also could not recall any medical provider assigning him work restrictions. He recalled telling his co-workers that he wanted to work light duty.

10. Claimant could not recall when Employer provided him with a list of providers or when he initially sought treatment. However, he began treating at Panorama Orthopedics, a provider who happened to be on Employer's list. Claimant's initial treatment included physical therapy and being scheduled for a steroid injection. Claimant also sought treatment from the chiropractor he treated with for his 2014 injury. Claimant reported to these providers that he had inconsistent levels of pain in his low back and that the pain shot down his right outer thigh.

11. Claimant testified that he received a few weeks of physical therapy without improvement, and that the steroid injections – the last of which he received on December 13, 2016 – also provided no relief. Claimant understood from an MRI of his lumbar spine that he had a herniated disc at L4/L5 which caused his sometimes shooting and variable pain.

12. Claimant testified that he treated for four to six weeks after his 2014 injury and that he did not receive a rating or permanent restrictions for that injury. He could not recall receiving any treatment after that until his June 2016 incident.

13. Claimant testified that he had been unable to do heavy lifting since the date of the incident. His pain at best was 2-3/10 and at its worst was 6-7/10. Lying down for short periods of time sometimes relieved his pain. The ALJ is not persuaded. The preponderance of the credible evidence supports a finding that Claimant continued working his regular job until being laid off due to a reduction in force. The ALJ concludes the incident did not disable Claimant from performing his regular job, and that did not cause a wage loss.

14. On July 12, 2016, Claimant sought treatment with Dr. Lonnie Loutzenhiser, with whom he treated in 2014. Dr. Loutzenhiser prescribed Medrol and Norco which she continued at least through November, 2016.

15. Claimant's last day worked was in July 2016.

16. On July 27, 2016, Claimant learned he would be laid off during Employer's down-sizing.

17. On August 5, 2016, Claimant reported his injury to Employer.

18. Also on August 5, 2016, Claimant reported to a medical provider that he had moved one hundred and eighty pieces of lumber measuring 2" x 4" x 8' the day before. He had been finishing his basement and crouched and squatted to get the boards into his basement. Claimant worked on the project for a few weeks with the help of father and brother. Claimant admitted he cut most of the lumber for the project and also performed plumbing and electrical work.

19. On February 1, 2017, Claimant became employed by a real estate company as a commissioned realtor. On July 5, 2017 he also started working as a car salesperson.

20. Claimant received unemployment benefits for a period of time at the rate of $976 every two weeks. In order to collect that benefit, Claimant represented that he was physically capable of working.

21. Respondents called Dr. Douthit who testified as an expert in the field of orthopedic surgery.

- Dr. Douthit performed a Respondents' sponsored medical examination of Claimant on July 10, 2017. Dr. Douthit reviewed Claimant's medical records, including the MRI reports from 2014 and 2016. He observed that the free fragment herniated disc present on the 2014 MRI had resolved on the 2016 MRI. He also noted that the 2016 MRI had been read to show no evidence of acute injury and no neural impingement.

- Dr. Doughit testified that Claimant could have awoken as he did one of the first mornings in July barely able to move even without having experienced an acute injury because Claimant has advanced degenerative disc disease in his low spine which will probably plague him for his lifetime.

- Claimant had suffered a serious injury in 2014 and it would be speculative to connect Claimant's current pain to a new work injury.

- Dr. Doughit opined that there was no medical reason for Claimant to receive epidural steroid injections. Such injections are performed to treat radiculopathy – pathology of the nerve root, which Claimant does not have as seen on the 2016 MRI.

- Dr. Doughit opined that Claimant's 2016 MRI was "ordinary" for a forty-two year old male worker. While the apparent mild central canal stenosis finding by the radiologist was not "good," it was ordinary, as was the nucleus pulposis protrusion.

- Dr. Doughit attributed Claimant's thigh pain to his 2014 injury, which he thought should have been rated.

- Dr. Doughit explained that Claimant not receiving treatment between the 2014 injury and the 2016 incident could be attributed to Claimant simply being asymptomatic during that period of time.

22. Ultimately, Dr. Doughit was unable to render an opinion as to causation. He testified that based on Claimant's testimony, he might find it more likely than not that the 2016 lifting incident exacerbated Claimant's 2014 injury. However, Dr. Doughit was unable to say the exacerbation was medically probable because Claimant's testimony at hearing was inconsistent with what Claimant reported to him. Dr. Doughit also acknowledged that the 2016 lifting incident could possibly have aggravated Claimant's 2014 injury, but that he would need more information in order to opine that an aggravation was medically probable.

23. Claimant is a poor historian. He did not recall several significant events including: how many days, if any, he took off because of his alleged injury; whether any medical provider assigned him work restrictions; and when Employer gave him a list of providers.

24. Based on the totality of the evidence, the ALJ finds Claimant has *not* established by a preponderance of the evidence that he suffered a compensable injury, or the aggravation, or acceleration of one.

CONCLUSIONS OF LAW

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

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

In order to prove a compensable injury and entitlement to benefits, a claimant must show by a preponderance of the evidence that his injury was caused by activities that arose out of and in the course of his employment. *See* §8-43-201, C.R.S. and §8-41-301(1) (c) C.R.S. "Proof by a preponderance of the evidence requires claimant to establish that the evidence of a "contested fact" is more probable than its non existence." *See* Matson v. CLP, Inc., W.C. No. 4-722-111 (ICAO August 13, 2009).

The claimant must prove by a preponderance of the evidence that the alleged injury was proximately caused by an injury arising out of and in the course of his employment with the employer. *See* §8-41-301(1)(b-c) C.R.S. *See also City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "arising out of" element requires claimant to show a casual connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *Triad Painting Co. v. Blair.*

The question of whether the claimant met his burden of proof to establish a compensable injury is one of fact for determination by the judge. See *Faulkner v. ICAO*, 12 P. 3d 844(Colo. App. 2000).

Merely feeling pain at work in and of itself is not "compensable." *See* Miranda v. Best Western Rio Grande Inn, W.C. No. 4-663-169 (ICAO April 11, 2007). "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the claimant was sustained a compensable injury." *See also* F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App 1995).

The Workers' Compensation Act creates a distinction between an "accident and an "injury." An "accident" is the cause and an "injury" is the result. No workers'

compensation benefits allow an employee unless they prove by a preponderance of evidence found credible the "accident" caused a compensable injury. A compensable injury is one that causes disability or the need for medical treatment. See *City of Boulder v. Payne* 162 Colo. 345, 426 P. 2d 194 (1967).

Here, Claimant has failed to meet his burden of proof and did not show it more probably true than not a causal connection between his employment activities and an injury. Claimant failed to present credible evidence that his injury is compensable. The exact cause of the pain being based upon inconsistent information cannot be found to be credible and persuasive.

It is concluded as a matter of law Claimant failed to prove by a preponderance of the evidence that his injury was caused by his employment.

ORDER

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

1. Claimant's claim is denied and dismissed.

2. The remainder if issues noticed for hearing need not be addressed.

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

DATED: October 3, 2017

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

ISSUES

1. Whether Claimant sustained a compensable injury on November 25, 2015.

2. Whether Claimant is entitled to a general award of reasonable and necessary medical benefits to treat her November 25, 2015 injury.

3. Whether Respondents are liable for medical treatment costs from Littleton Adventist Hospital and John Prall, M.D.

4. Whether Claimant is entitled to temporary total disability (TTD) benefits.

5. Whether Claimant is responsible for the termination of her employment.

STIPULATIONS

1. Claimant's average weekly wage is $815.81.

2. If TTD benefits are awarded, Respondents are entitled to an offset for unemployment benefits received by Claimant in 2016.

FINDINGS OF FACT

1. Claimant was employed by Employer agency, owned by Jolene Johnson, as a customer service representative and began employment with Employer in approximately June of 2014.

2. Claimant's job duties included customer service, answering phones, selling and giving information about insurance policies, and sorting mail.

3. Claimant alleges that on September 7, 2015 while working for Employer she moved two desks and had pain in her lower back that later subsided. Claimant also alleges that in October, while working for Employer, she lifted a 5 gallon jug of water and also again had pain in her lower back that later subsided.

4. Claimant did not report the September 7, 2015 incident or the October, 2015 incident to Employer.

5. On Wednesday, November 25, 2015 Claimant alleges that she injured her lower back at work when bent under a desk to move a box that was full of paper needing to be recycled.

6. Claimant had been off work Monday and Tuesday, the two days prior to this alleged injury. Claimant was also scheduled to be off work the two days after the alleged injury, Thursday and Friday, for the Thanksgiving holiday.

7. Although other co-workers were in the office on Wednesday, November 25, 2015, none of the co-workers observed Claimant lift the box of recycled papers. Claimant did not inform any of her co-workers that she hurt her back moving the box of recycled papers. Claimant also did not inform her boss or anyone with Employer that she allegedly hurt her back moving the box.

8. Co-worker Gunther testified that on the day in question, Claimant was walking around limping and holding her back and that when she asked Claimant if she was okay, Claimant indicated that she was worried she had hurt her back. Claimant did not tell Ms. Gunther about lifting the box of recycled paper. Ms. Gunther testified that from September to November, Claimant had been helping Claimant's son move as he had recently purchased a home. Claimant had mentioned to Ms. Gunther that she had prior back problems.

9. Over the long holiday weekend, Claimant did not seek medical attention or inform Employer about being injured. On Sunday, November 29, 2015 Claimant sent a text message to Ms. Johnson stating that she needed Monday November 30, 2015 and Tuesday December 1, 2015 off of work to take care of personal family matters. Claimant did not report the alleged injury from Wednesday November 25, 2015 in the text message.

10. On Wednesday, December 2, 2015 Claimant was driving to work when she felt extreme pain and stopped driving. Claimant again reported to Ms. Johnson that she could not make it into work. This time, Claimant reported that she couldn't come in because she was in too much pain. Claimant did not report any injury or that she had back pain, just that she could not come in because of pain. Claimant also sent messages to Ms. Jonson on Thursday December 3, 2015 and Friday December 4, 2015 indicating she couldn't come into work. Again, Claimant failed to report any alleged work related injury when reporting she couldn't come in to work.

11. It was not unusual for Claimant to miss a significant amount of work. Claimant was gone for two weeks in July of 2015 and one week in August of 2015 for personal family matters. Claimant also missed work for non work related health reasons three to four times per month. Claimant would regularly text Ms. Johnson that she would be out and wasn't feeling well.

12. On Friday, December 4, 2015 Claimant was evaluated at the emergency department of Littleton Adventist Hospital. Claimant reported low back pain ongoing for three days. Claimant reported bending over lifting boxes when she began having increased lower back pain that radiated to her left leg. Claimant did not report that this happened at work or that it was a work related injury. Claimant reported that she had

previously ruptured a disc and that her current presentation was similar. Claimant underwent an MRI that showed disc bulging in multiple areas, and indicated poor impingement of the right neural foramen at L5. It was noted that the MRI showed disc herniation, but that Claimant had no radicular symptoms to the right. Upon secondary evaluation, Claimant reported her pain was improved and agreed to attempt home therapy with oral medications. Claimant was advised that if her pain became uncontrollable at home, she should return to the emergency department. *See* Exhibit J.

13. At some point between December 4, 2017 and December 13, 2015, Claimant's husband contacted Ms. Johnson requesting a workers compensation claim number and Ms. Johnson first became aware that Claimant was alleging a work related injury from November 25, 2015.

14. On Monday, December 7, 2015 Claimant returned to returned to the emergency department of Littleton Adventist Hospital. Claimant reported sharp pain in the left lower back that radiated behind her leg and to the outside in front of the left lower leg. Claimant reported she could not walk due to the pain. It was noted that an MRI had shown a small left L3-4 foraminal disc extrusion adjacent to left L3 nerve root, L4-5 moderate left neural foraminal stenosis, and L5-S1 neural foramen moderate stenosis. There was no noted significant nerve root compression or stenosis. The plan was to perform a steroid injection and to have an evaluation for potential surgery with Dr. Prall. *See* Exhibit J

15. At the emergency department, Claimant reported that she had a disc rupture 20 years prior, did not undergo surgery, and that it took 7 years to recover. Claimant, for the first time, reported this as an alleged work injury and stated that 10 days prior she was lifting a heavy box of papers at work and felt pain and tenderness in her left lower back that got worse over the next several days and became severe a week prior. The assessment was small bulging disc at L3-4 on the left. Claimant was kept overnight for observation and for spinal evaluation. *See* Exhibit J

16. An epidural steroid injection was performed on December 8, 2015 and Claimant's pain improved. Claimant was discharged from the hospital on December 10, 2015. Since Claimant responded to the epidural steroid injection, conservative care was noted to be reasonable and recommended along with follow up imaging in 3 months time. Hospital notes indicate that Claimant and her husband would not be happy until she had surgery and that Claimant had an episode of chest pain when told she would not require surgical intervention. Anxiety was suspected. Claimant was discharged on December 10, 2015 with instructions to follow up with neurosurgery. *See* Exhibit J

17. On December 13, 2015 Claimant returned to the emergency department of Littleton Adventist Hospital. Claimant arrived by ambulance and reported that she was awaiting insurance approval for surgery. It was noted that Claimant had been discharged the week prior after an epidural steroid injection but that Claimant was back with a return of radicular symptoms and severe low back pain. Claimant reported that

the pain was so severe she couldn't walk down the stairs at her home. The recent MRI was again reviewed and noted to show lumbar disc herniation but without severe disc herniation or nerve root compression. Claimant and her husband reported that she was not safe at home due to her severe pain. It was noted that Dr. Prall would be back the next day. *See* Exhibit J.

18. On December 14, 2015 Claimant underwent lumbar surgery performed by Dr. Prall. Dr. Prall noted that Claimant had excruciating pain over the last week or two, preceded by a longer period of discomfort that was more manageable. Dr. Prall noted that it was recommended that Claimant consider further conservative therapy but that both Claimant and her husband wanted to proceed with the surgery urgently. Dr. Prall's operative report noted that he performed a partial laminectomy, medial facetectomy, and diskectomy at L4-5 and that a fragment was found to have migrated far enough superiorly that the decompression required progressing up to the L3-4 level on the left side where a partial laminectomy and medial facetectomy and foraminotomy were performed. Dr. Prall noted that allowed for adequate visualization of the large disk extrusion midway between the 2 disk spaces. Dr. Prall noted that when removing bone during the decompression, a small durotomy was created. He repaired it with duragen, duraseal glue, and a fat graft from Claimant's subcutaneous space and performed a dural repair. Dr. Prall visualized that all the nerve roots appeared to be decompressed on the symptomatic left side prior to concluding surgery. *See* Exhibit 12.

19. Due to the dural tear from surgery with Dr. Prall, Claimant had to remain laying flat for 48 hours following surgery. On December 17, 2015 Claimant was discharged. *See* Exhibit 12.

20. On December 23, 2015 Claimant underwent an MRI of her lumbar spine. This MRI was compared to her earlier December 4, 2015 MRI. The impression was: loculated fluid centered in the recently created L4-5 laminectomy bed bulging ventrally into the left side of the spinal canal causing severe compression of the thecal sac; disc space and facet joint degeneration at other levels in the lumbar spine similar to the pre surgical appearance with no discrete disc herniations or other sites of severe thecal sac stenosis and with degenerative foraminal narrowing that still remained moderate bilaterally at L5-S1 and on the left at L4-L5. *See* Exhibit 13.

21. On February 25, 2016 Claimant was evaluated by Dr. Prall's office. It was noted that she was 2 months out from surgery and doing well with some hypersensitivity in the left leg and stiff/sore back. Claimant reported that she was dramatically improved since before surgery and was planning to start physical therapy. *See* Exhibit 13.

22. On December 18, 2015 Claimant spoke with Insurer about the alleged injury. Claimant reported that she had no prior workers compensation injuries and no prior medical conditions. When asked specifically if she had any prior back issues, Claimant responded "no." *See* Exhibit A.

23. Claimant reported to Insurer that she had moved furniture several weeks before while at work and tweaked her back, but that she did back exercises to stretch it out and that she had learned about doing back exercises from teaching aerobics. Claimant reported that on November 25, 2015 when she moved the box of paper it was more than a tweak and that it felt totally different. *See* Exhibit A.

24. Claimant reported that she called her family doctor on Wednesday, December 2, 2015 and that he prescribed her Robaxin and told her to come in if her back was not better in five days. Claimant reported she only made it until Friday, December 4, 2015 before she went to the emergency room because of her pain. *See* Exhibit A.

25. On February 22, 2016 Claimant underwent an independent medical examination performed by Itay Melamed, M.D. Claimant reported that she was doing well until around Labor Day when she moved furniture in the office, and changed a water jug. Claimant then reported that the day before Thanksgiving she tried to get a box of papers from under a desk and that following, her back pain was noticeable. Claimant reported that she eventually went to the emergency room, got an epidural steroid injection that helped her pain, and was discharged. Claimant reported that the pain became worse again and that she was taken by ambulance back to the emergency room where she was admitted and underwent surgery. Claimant reported that she was significantly better after surgery. Dr. Melamed noted that Claimant had a medical history of psychogenic seizures and that she had undergone lumbar spine surgery with Dr. Prall (L3-4 and L4-5 decompression). *See* Exhibits 23, N.

26. Dr. Melamed assessed lumbar stenosis causing back and leg pain and noted lumbar stenosis due to a herniated disc at L4-5 as well as degenerative changes of the lumbar spine. Dr. Melamed opined that Claimant's condition was mostly related to her degenerative changes in her low back but that it was possible that lifting a box of papers exacerbated the changes. However, Dr. Melamed pointed out that there was a time gap of about a week between Claimant's report of lifting the box of papers and the onset of severe pain. Dr. Melamed also noted that a disc herniation can occur for no reason and doesn't require a lifting event but that it was common to simply wake up with pain due to a herniation. Dr. Melamed opined that he could not say with medical certainty that lifting a box of paper caused Claimant's herniation and opined that in all medical probability, the majority of Claimant's problem was due to a pre-existing lumbar spine degenerative condition. Dr. Melamed opined that, at the point of his exam, Claimant had no objective findings to support her subjective complaints. *See* Exhibits 23, N.

27. Despite reporting to Insurer that she had no prior back issues, the records and Claimant's testimony at hearing indicate otherwise.

28. Claimant testified that in 1989 she injured her back while moving a tree. She indicated it took **7 years to recover** and that she did exercise ball therapy to recover.

29. On July 14, 1996 Claimant underwent a CT scan of her lumbar spine. The indications for the CT were low back pain that was exaggerated by walking, sitting, and change of position. Claimant reported that she developed numbness and tingling to her knee level frequently and occasionally to her toes. At L4-5 it was found that there was a slight concentric **disk bulge** but no focal herniation or nerve root encroachment. At L5-S1 there was disk space narrowing and evident degenerative disk disease, vacuum disk changes, mild disk height loss, and minimal concentric **disk bulge** with no focal herniation or nerve root encroachment. There were also minor facet degenerative changes noted at L5-S1. *See* Exhibit H.

30. On July 1, 2013 Claimant slipped and fell at a Walgreens. Claimant went to the emergency department two days later and was evaluated. Claimant reported that since the fall she had a headache, particularly right sided. She also reported pain in the entirety of her back as well as her hips with mild numbness and tingling of her extremities. Claimant also reported neck pain. *See* Exhibit J.

31. At the emergency department and on July 3, 2013 Claimant underwent a CT of the head and cervical spine. The impression of the head CT was: no acute intracranial process. The impression of the cervical spine CT was: degenerative changes involving the cervical spine with no acute displaced cervical spine fracture; degenerative anterolisthesis of C3 on C4; moderate loss of disc height at C4-5 through C6-7; and degenerative facet arthropathy most pronounced on the left at C3-4 and on the right at C2-3. See Exhibit J.

32. Claimant also underwent x-rays of her lumbar spine at the emergency department on July 3, 2013. The impression was: mild degenerative changes and disc space narrowing at L5-S1; some mild facet hypertrophy and minimal disc space narrowing at L4-5; and no evidence of acute fracture or malalignment. See Exhibit J.

33. The discharge diagnoses from the emergency department were: mechanical fall, sub acute; closed head injury with history; post concussive syndrome; and thoracic and **lumbar strain**. *See* Exhibit J.

34. From September of 2013 through February of 2014, Claimant underwent **extensive chiropractic treatment** performed by John Jungers, D.C. due to both the fall at Walgreens and a motor vehicle accident that she was involved in during September of 2013. At each visit, Dr. Jungers noted **continued and variable back pain** with aching and cramping affecting the upper back, interscapular region, and thoracic back. Claimant underwent extensive back treatment and adjustment over these five months without much noted improvement. *See* Exhibit K.

35. In addition to the 7 years of back problems following moving a tree, the CT scan in 1996 showing disc bulges, and the extensive back problems following her Walgreens fall and motor vehicle accident in 2013, Claimant also reported to her

primary care provider in January of 2014 that she had been involved in one motor vehicle accident and two slip and fall accidents in the last two months. *See* Exhibit L.

36. Claimant has had other medical issues that have been ongoing for the past ten years or so and eventually a possible epilepsy diagnosis was made. During her extensive treatment and medication management for these issues, psychological issues and inconsistencies were often raised.

37. On November 3, 2012 Claimant was evaluated by Richard Clemmons, M.D. Dr. Clemmons opined that Claimant was quite odd in her overall affect and behavior and strongly suspected that Claimant had significant overlying psychiatric disease. Dr. Clemmons opined that he would need to capture an epileptic seizure on EEG in order to be convinced that Claimant truly had epilepsy. He suspected that psychiatric disease underlied all of Claimant's presumed neurological complaints. *See* Exhibit I.

38. On January 4, 2013 Claimant was evaluated by Dr. Clemmons. Dr. Clemmons again opined that despite an abnormal EEG, he was not at all convinced that the spells Claimant described were epileptic in nature. Dr. Clemmons noted that Claimant had a history of assault trauma and abuse and that he was more inclined to believe that the events described were behavioral events. Dr. Clemmons had no doubt that Claimant suffered from a co-existing psychiatric condition and noted a strong family history of psychiatric disease. Dr. Clemmons strongly recommended Claimant seek the care of either a psychiatrist of psychologist. Dr. Clemmons noted that Claimant was welcome to return in the future to address her migraines and spells so long as she was also working with someone for psychiatric care. *See* Exhibit I.

39. On March 15, 2013 Claimant was evaluated by Dr. Clemmons who again expressed doubt that Claimant had epileptic seizures. He recommended inpatient video EEG monitoring to know definitively whether or not she had epilepsy. *See* Exhibit I.

40. On July 29, 2013 Claimant was admitted for continuous EEG monitoring for a five day period. The history noted that Claimant had been assaulted 17 years prior with significant trauma to her left face and head, left ear hearing loss, and pain in the left eye and that since the assault Claimant had migraines and spells of blacking out. Dr. Clemons admitted her for monitoring because of his concern that Claimant did not have epilepsy. It was noted that Claimant had been seen by multiple different neurologists in the Denver area. On August 3, 2013 Dr. Clemmons noted that Claimant's clinical events during the admission were clearly non-epileptic in nature. He had concern that past events represented true epileptic seizures and thought she potentially had both epileptic and non-epileptic events. *See* Exhibit J.

41. On September 3, 2013 Claimant was evaluated by Dr. Clemmons. He noted that Claimant had undergone a study that showed spells with no abnormal EEG correlation and opined that the spells were non epileptic events and psychogenic spells. Dr. Clemmons noted that the EEG did reveal occasional potentially epileptogenic

interictal discharges. Dr. Clemmons noted that Claimant was about to be seen by psychology for help with stress management. *See* Exhibit I.

42. On January 16, 2014 Claimant was evaluated by Dr. Clemmons. Claimant reported that her psychogenic non epileptic seizures had resolved with psychotherapy. Claimant reported continued migraines. *See* Exhibit I.

43. On June 25, 2015 Claimant was evaluated by Dr. Clemmons. Claimant reported she had been doing well until the past week with seizures twice in the last week. Claimant reported sleeping for at least 6 hours after each episode and that she had been sleeping poorly recently with 5 hours per night and that she had been under stress due to personal issues. Dr. Clemmons noted that it was unclear if the symptoms were epileptic, migrainous, or psychiatric. *See* Exhibit M.

44. Dr. Jungers testified at hearing that Claimant did not report any prior low back problems or conditions and that he did not x-ray her lumbar spine. He testified that he treated her upper back to mid back and right shoulder following a motor vehicle accident and that he didn't suspect any low back issues during his treatment of Claimant from September of 2013 through February of 2014.

45. Claimant testified at hearing. Claimant did not recall the CT scan of her lumbar spine performed in 1996. Claimant testified that she grabbed the box of recycled paper on November 25, 2015 and took it to her office and had noticeable discomfort, laid on her floor to stretch out her back, and worked the rest of the day. Claimant testified that she learned back stretches at the gym when working out. Claimant testified that her husband called Ms. Johnson at some point while she was hospitalized to get a workers' compensation claim opened and that she did not remember clearly when it was reported due to her pain.

46. Claimant's husband, Mike Masterson, testified at hearing. He recalled going to the emergency room 20 plus years prior for Claimant's low back but believed she had no diagnosis and no follow up care. Mr. Masterson testified that the next time Claimant had any low back issues was in November of 2015. He had no memory of the 1996 CT scan of Claimant's low back and did not provide any testimony about what Claimant reported was a 7 year period of time to recover from a prior back injury. Mr. Masterson testified that he phoned Ms. Johnson to request workers' compensation information after Claimant was admitted to the hospital and that Ms. Johnson provided him a claim number the same day. Mr. Masterson had no contact with Ms. Johnson before December 4, 2015.

47. Ms. Johnson also testified at hearing. She reported that she had no knowledge that Claimant's low back was the problem or that there was an alleged work injury until Claimant was at the hospital. Ms. Johnson had no contact from Claimant after Claimant's hospitalization until January 19, 2016.

48. Claimant's testimony and reports are not found credible or persuasive and her actions are logically inconsistent with sustaining an acute injury at work on November 25, 2015.

49. Mr. Masterson's testimony is not found credible or persuasive. His lack of information about Claimant's prior back issues is concerning and inconsistent with prior medical records and with information provided by Claimant.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet her burden to establish, more likely than not, that she sustained a work related injury on November 25, 2015. Although lifting a box of paper could possibly cause a lower back injury or aggravate a pre-existing degenerative back problem, Claimant is not found credible that an acute incident occurred on November 25, 2015 at work necessitating medical treatment. Claimant's actions are inconsistent with someone who sustained an acute injury on November 25, 2015. At work that day, Claimant did not report to any co-workers that she had injured her back lifting the box of papers. Claimant did not report the injury to Ms. Johnson that day. Further, when Claimant requested days off on Monday and Tuesday the following week, Claimant again did not mention or report the injury. On Wednesday of the following week, when Claimant again called off work due to her pain, Claimant still did not report the alleged injury. Only after Claimant had been hospitalized was Ms. Johnson asked for a workers' compensation claim number and told that Claimant had allegedly injured her back at work over a week before. When Claimant presented to the emergency room on December 4, 2015 she reported back pain for the last three days after having lifted some boxes. She did not report any alleged work injury or that she had injured her back acutely the day before Thanksgiving, approximately 9 days prior, lifting one recycling box at work. Claimant did not allege a work related injury or make any reports that this had occurred acutely at work until her second hospitalization on December 7, 2015 when her report changed.

Further, Claimant reported to Insurer that she had no prior back issues. This is completely inconsistent with prior medical records and Claimant's testimony at hearing.

Claimant had prior back issues and reported a prior ruptured disc to medical providers in this case. Claimant had a CT scan of her lumbar spine in 1996 that showed bulged discs and degeneration. Claimant testified that she had prior low back issues that took her seven years to fully recover from. Additionally, and more recently, Claimant treated with a chiropractor extensively in 2013. Over a period of approximately 5 months, Claimant treated 3 times per week. At each visit she reported back pain and received treatment/adjustments in her upper and mid back. Although Claimant's alleged injury in this case is to her lumbar spine, she failed to disclose to Insurer her extensive 2013 treatment to her mid and upper back when asked if she had any prior back issues.

As found above, Dr. Melamed opined that Claimant had degenerative changes to her lumbar spine that pre-existed her alleged injury. He also pointed out an inconsistency in the one week gap between the alleged injury and onset of severe pain. Claimant has a history of psychological overlay with other conditions as noted by Dr. Clemmons and the extensive medical records in this case. In this case, there are opinions that Claimant's subjective complaints are not supported by objective findings. Claimant and her husband demanded surgery when more conservative care was recommended. Claimant had an anxiety response and chest pain when told she didn't need surgery. Claimant reported inconsistently in responses, reports, and her behavior throughout the claim is unreliable and concerning, at best. Claimant, overall, is not found credible or persuasive and her testimony and reports cannot be relied upon to any degree of certainty.

Claimant has failed to meet her burden to establish that she sustained a work related injury on November 25, 2015. The inconsistent history, lack of reporting, un-witnessed incident with no report to co-workers, gap in time in the incident and severe pain, and the pre-existing history that Claimant denied to Insurer are all logically inconsistent with someone who had sustained an acute injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury on November 25, 2015.

2. Claimant therefore is not entitled to any awards of medical benefits or temporary indemnity benefits. Respondents are not liable for medical treatment costs from Littleton Adventist Hospital or Dr. Prall. The claim is denied and dismissed.

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

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

DATED: October 4, 2017,

/s/ Michelle E. Jones

_____

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

ISSUES

- Whether respondent has demonstrated by a preponderance of the evidence that on February 6, 2017 claimant was an "independent contractor" pursuant to Section 8-40-202(2), C.R.S.

- If claimant is deemed an employee, whether claimant has demonstrated by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment with respondent on February 6, 2017.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that medical benefits he received were reasonable and necessary to cure and relieve him from the effects of the injury.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that that he is entitled to temporary partial disability (TPD) benefits.

- If claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that his compensation should be increased by 50% pursuant to Section 8-43-408, C.R.S.**,** for employer's failure to obtain and maintain worker's compensation insurance.

FINDINGS OF FACT

1. Claimant began working for respondent in May 2015. At that time, claimant was hired to work as a carpenter helper. Claimant continued in that position until he was injured on February 6, 2017. At the time of the injury claimant was paid $19.00 per hour and worked between 40 and 45 hours per week.

2. As a carpenter helper claimant was directed to follow instructions from the carpenters on site. Esau Ruiz, Owner of GP Construction, Inc., testified that he when he would assign claimant to a job site he would specifically instruct claimant to follow the directives of the on-site carpenter.

3. Claimant testified that on February 6, 2017 he was assisting one of the carpenters, Rene Valenzuela, with flooring. Claimant's specific task that day was to cut the flooring pieces with a table saw. While claimant was cutting a piece of flooring

another employee, David Valenzuela, moved the piece being cut. This caused claimant's hand to move into the path of the saw blade. Claimant sustained cuts to four of the fingers on his left hand.

4. Immediately following the injury claimant was treated at Valley View Hospital. However, because the appropriate specialist was not available at that hospital, claimant's care was transferred to St. Mary's Hospital.

5. The medical records identify claimant's injury as "large, macerated laceration[s]" on claimant's left ring, middle, and pointer fingers and a small laceration on claimant's left thumb. In addition, claimant suffered "an open fracture" on his left ring finger.

6. On February 6, 2017, Dr. Jeffrey Pitcher performed surgery on claimant's left hand at St. Mary's hospital. The surgery included nerve repair, tendon repair, debridement, and bony fixation. Claimant testified that his ring finger was partially amputated and his tendons were reconstructed on his pointer and middle fingers. Following surgery claimant was referred to physical therapy.

7. Claimant testified that he has work restrictions and cannot lift more than 10 pounds with his left hand. Claimant also testified that following the February 6, 2017 he did not work until approximately two weeks before the September 7, 2017 hearing. Claimant obtained a temporary position at a hotel. During that temporary job claimant worked a total of 37 hours and was paid $11.00 per hour. The ALJ estimates that claimant worked these hours in mid to late August 2017.

8. Claimant has provided evidence of $53,694.57 in unpaid medical bills. In addition, claimant paid out-of-pocket for medical treatment including prescription medications ($72.78); and a payment to St. Mary's Medical Center ($311.00).

9. At hearing, both parties provided information regarding the relationship between claimant and respondent. Based upon the testimony and evidence presented at hearing the ALJ makes the following findings of fact regarding that relationship.

10. Claimant was hired as an employee in May 2015. Between his date of hire and the February 6, 2017 injury, claimant did not work for any other company. Claimant did not bid on jobs assigned to him by respondent. Claimant does not operate a business as a carpenter helper.

11. During his time providing services for respondent claimant received pay raises culminating in the $19.00 per hour he was paid at the time of the injury. Claimant was paid by check in his own name. In early 2017, respondent issued an IRS Form 1099 to claimant for 2016.

12. Claimant would bring a tool belt and some hand tools to the job site. The items claimant would bring included a tape measure, a square, a hammer, a hand saw, and a pen. Respondent provided claimant (and other workers) with ladders, scaffolding, table saws, nail guns, and materials.

13. Claimant was directed by the on-site carpenter on his specific duties. Claimant was provided on the job training regarding specific materials used at a job site.

14. In February 2016, Mr. Ruiz directed claimant to sign a Declaration of Independent Contractor Form, and a Request for Taxpayer Identification Number and Certification form (IRS Form W-9). Respondent also instructed claimant to obtain liability insurance. Respondent instructed all other workers to complete these same steps.

15. Claimant testified that when respondent presented him with the paperwork in February 2016, he was told that if he did not comply with respondent's instructions, he would not be provided any more work and his paycheck would be withheld. Claimant testified that he did not understand the paperwork he signed in February 2016. Claimant's first language is Spanish. Claimant does not read English and the paperwork presented to him by respondent was in English.

16. Claimant complied with respondent's instructions and completed the paperwork and obtained a liability insurance policy. Claimant signed the Declaration of Independent Contractor Form on February 27, 2016. Mr. Ruiz did not sign the form until February 13, 2017, almost one year later. Mr. Ruiz testified that he although he had the form, he did not sign the form until after claimant's February 6, 2017 injury.

17. The liability policy that claimant obtained from Rapid Insurance Solutions is with Security National Insurance Company. The Certificate of Liability Insurance for claimant's policy shows that the "certificate holder" of the policy is GP Construction, Inc., Esau Ruiz. Respondent withheld money from claimant's paycheck to cover the cost of premiums for the liability policy.

18. Mr. Ruiz testified that respondent does not carry workers' compensation insurance and was not insured at the time of claimant's February 6, 2017 injury.

19. The ALJ credits claimant's testimony and the evidence submitted at hearing and finds that respondent has failed to demonstrate that it is more likely than not that claimant was an independent contractor.

20. The ALJ credits the claimant's testimony and finds that he has demonstrated that it is more likely than not that he suffered an injury on February 6, 2017 while providing services to respondent.

21. The ALJ credits the medical records and claimant's testimony and finds that claimant has demonstrated that it is more likely than not that the medical treatment

he has received for the February 6, 2017 injury was reasonable and necessary medical treatment.

22. The ALJ credits claimant's testimony and finds that claimant has demonstrated that it is more likely than not that his average weekly wage ("AWW") at the time of the injury was $855.00, (45 hours per week at $19.00 per hour).

23. The ALJ credits claimant's testimony and finds that claimant has demonstrated that that it is more likely than he has not been unable to work because of the February 6, 2017 injury, which has resulted in lost wages.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., (2016). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

4. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation. . . under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an

independent trade, occupation, profession, or business related to the service performed."

6. As found, claimant provided services to respondent and was paid for his services. Therefore, claimant is presumed to be an employee of respondent.

7. Respondent has the burden of proving that claimant was an independent contractor rather than an employee. Section 8-40-202(2)(b)(II), C.R.S., sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993). Those nine factors are whether the person for whom services are provided:

- required the individual to work exclusively for the person for whom services are performed; (except that the individual may choose to work exclusively for that person for a finite period of time specified in the document);

- established a quality standard for the individual; (except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed);

- paid a salary or hourly rate but rather a fixed or contract rate;

- may terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce results that meet the specifications of the contract;

- provided more than minimal training for the individual;

- provided tools or benefits to the individual; (except that materials and equipment may be supplied);

- dictated the time of performance; (except the completion schedule and range of mutually agreeable work hours may be established);

- paid the individual personally, instead of making checks payable to the trade or business name of the individual; and,

- combined their business operations in any way with the individual's business, or maintained such operations as separate and distinct.

8. A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), C.R.S, provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in

Section 8-40-202(2)(b)(II) in order to prove by a preponderance of the evidence that the individual is not an employee. See *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1999).

9. In *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) the Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court stated "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in Section 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015.

10. The *Softrock* Court pointed to *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008) in which the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the employer. See *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015.

11. Section 8-40-202(b)(IV), C.R.S., provides that a written document may create a rebuttable presumption of an independent contractor relationship if it meets the nine criteria listed in Section 8-40-202(b)(II), C.R.S. and includes language in bold faced font or underlined typed that the worker is not entitled to workers' compensation benefits and is obligated to pay all necessary taxes. Additionally, the document must be signed by both parties.

12. The ALJ notes that the Declaration of Independent Contractor Form in this case includes the nine factors listed in Section 8-40-202(2)(b)(II), C.R.S., and the bold type font required by Section 8-40-202(b)(IV), C.R.S. However, the ALJ finds that the document is ineffective in overcoming the statutory presumption of employment. Claimant did not understand the impact of the document he signed and the ALJ finds no persuasive evidence on the record to indicate that claimant intended to become an independent contractor. In addition, respondent did not sign the document until seven

days after claimant's injury. The ALJ finds that respondent cannot attempt to retroactively create a rebuttable presumption by simply signing a form after an injury. Therefore, the ALJ concludes that this document has not met all requirements of Section 8-40-202(b)(IV), C.R.S. and the statutory presumption of an employment relationship has not been overcome.

13. The ALJ has considered the nine factors listed in Section 8-40-202(2)(b)(II), C.R.S. and the totality of the circumstances of the relationship of the parties and concludes that claimant was an employee of respondent. Respondent provided claimant with tools, training, and supervision. Claimant was paid hourly and in his own name. With regard to direction and control, it is clear from the record that claimant reported directly to the on-site carpenter. Although claimant obtained liability insurance, he did so only at the direction of respondent. With regard to the liability policy, the ALJ notes that it was respondent that took unilateral steps to ensure that the premiums were paid by withholding funds from claimant's pay.

14. The ALJ concludes that claimant was not independently engaged in a trade, occupation, profession, or business as a carpenter helper. In addition, claimant was not free form the direction and control of respondent in the performance of his work as a carpenter helper. As found, respondent has failed to demonstrate by a preponderance of the evidence that claimant was an independent contractor.

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

16. As found, claimant has demonstrated by a preponderance of the evidence that he suffered an injury on February 6, 2017 that arose out of and in the course and scope of claimant's employment with employer.

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

18. As found, claimant has demonstrated by a preponderance of the evidence that the treatment he received, including but not limited to treatment from Valley View Hospital, St. Mary's Hospital, and Dr. Jeffrey Pitcher, was reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 6, 2017 work injury.

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

20. As found, claimant has demonstrated by a preponderance of the evidence that his AWW at the time of the February 6, 2017 work injury was $855.00.

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

22. As found, claimant has proven by a preponderance of the evidence that he has been unable to work because of the February 6, 2017 injury, resulting in a loss of wages. The ALJ concludes that claimant is entitled to TTD benefits beginning February 6, 2017 and ongoing until terminated by law.

23. Section 8-43-408(1) C.R.S., provides that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits provided in said articles shall be increased fifty percent.

24. As found, claimant has proven by a preponderance of the evidence that employer was not insured for workers' compensation at the time of his injury. As found, claimant's compensation and benefits shall be increased by fifty percent pursuant to Section 8-43-408(1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant was an employee of respondent on February 6, 2017.

2. Claimant suffered a compensable injury on February 6, 2017 that arose out of and in the course and scope of his employment with respondent.

3. Respondent shall pay for claimant's reasonable and necessary medical treatment, including but not limited to treatment from Valley View Hospital, St. Mary's Hospital, and Dr. Jeffrey Pitcher.

4. Respondent shall reimburse claimant $383.78 for medical expenses claimant paid out-of-pocket.

5. Claimant's average weekly wage (AWW) is $855.00

6. Claimant is entitled to a 50% increase in compensation for respondent's failure to obtain and maintain workers' compensation insurance.

7. Respondent is liable for the payment of temporary total disability (TTD) benefits beginning February 6, 2017 and ongoing, until terminated by law.

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

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

10. In lieu of payment of the above compensation and benefits to the claimant, the Respondent-Employer shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $82,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee;

OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $82,000.00 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

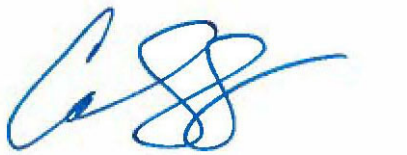
The bond shall guarantee payment of the compensation and benefits awarded.

11. It is further ordered that the Respondent-Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

12. It is further ordered that the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

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

Dated: October 5, 2017



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

ISSUES

I. Have Respondents overcome, by clear and convincing evidence, the Division Independent Medical Examination ("DIME") of Dr. Thomas Higginbotham, on the issue of whole person impairment?

II. Have Respondents overcome, by clear and convincing evidence, the DIME of Dr. Thomas Higginbotham on the issue of Maximum Medical Improvement ("MMI")?

FINDINGS OF FACT

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

1. The Claimant sustained an admitted work-related injury on June 18, 2015. Respondents admitted to an average weekly wage of $756.22 as reflected in the Final Admission of Liability dated April 26, 2016. (Ex. 1, p.1). The Claimant's injury was listed as the thoracic and lumbar spine.

2. The Claimant was employed as a paramedic. Claimant's injury occurred while attempting to transport a patient weighing in excess of 300 pounds. The Claimant and a co-worker were transporting the patient with a hydraulic cot when the hydraulics malfunctioned. Claimant caught the gurney before the gurney struck the ground and again attempted to lift the patient and gurney but the hydraulics again failed. The Claimant then manually locked the hydraulics of the cot and manually lifted the patient up onto the cot.

3. Claimant initially did not seek treatment. The incident occurred on a Thursday. Claimant took the following Friday off and the weekend to rest. Claimant was referred by Employer/Respondent to Concentra Medical Centers for treatment. The first evaluation occurred on June 22, 2015, at which time the Claimant presented with low back injury and spasms throughout "whole back." (Ex. 5, p.42). The evaluating physician was Dr. Walter Larimore. The initial assessment included lumbar and thoracic strain. Dr. Larimore prescribed Naproxen and Cyclobenzaprine along with physical therapy. Dr. Larimore assigned work restrictions at this initial evaluation. (Ex. 5, pp. 43-45). On June 22, 2015, the Claimant began physical therapy. The diagnosis by the physical therapist included lumbar and thoracic strain. The physical examination demonstrated tenderness in the lumbar spine with bilateral *muscle spasms,* tenderness in the thoracic spine at the level of T10-12 along with bilateral *muscle spasms.* (Ex. 8, p.103). Claimant's lumbar and thoracic range of motion was noted to be normal at this visit.

4. On June 30, 2015 the Claimant presented for follow-up and evaluation at Concentra Medical Center. The evaluating physician on this occasion was Dr. Joseph Soldo. Claimant was experiencing some relief due to physical therapy and dry needle treatment, but continued with frequent *spasms* in the thoracic area along with ongoing muscle pain, back pain and joint *stiffness.* (Ex. 5, p. 46). Dr. Soldo noted bilateral muscle *spasms* to palpation with the thoracic spine and diagnosed strain of thoracic region. (Ex. 5, p. 47)(emphasis added). Once again, however, Claimant's range of motion was noted to be within normal limits.

5. On July 14, 2015 the Claimant presented for follow-up evaluation at Concentra Medical Center. The evaluating physician on this occasion was Dr. Daniel Peterson. Claimant continued with lower to mid-back spasms, with an estimated 10% recovery as of this date. (Ex. 5, p. 49). Dr. Peterson diagnosed sacroiliac strain and strain of thoracic region and initiated a prescription of Diazepam for muscle spasms. Dr. Peterson noted lumbosacral sprain tenderness and SI joint pain with extension. Dr. Peterson's report noted ongoing *spasms,* back pain, joint *stiffness* and night pain. (Ex. 5, p. 50)(emphasis added). Range of Motion was again noted to be within normal limits.

6. In a clinical summary dated July 14, 2015, Dr. Peterson identified current work-related health issues as lumbar strain, sacroiliac strain and strain of thoracic region. This physician prescribed additional physical therapy and indicated Claimant may require an SI joint injection. (Ex. 5, pp. 53-55).

7. On July 28, 2015 the Claimant returned to Concentra for a follow-up evaluation, again under the direction of Dr. Peterson. The Claimant continued with spasms in the upper back and lower back. The medical report indicates that the Claimant continued working in a modified capacity performing office work. Throughout all of these evaluations, the Claimant remained under work restrictions imposed by the Concentra physicians. (Ex. 5, p. 57). Continuing assessment provided by Dr. Peterson included lumbar, sacroiliac and thoracic region strain. On this date, Dr. Peterson referred the Claimant to Dr. Blau for evaluation of persistent slowly improving thoracic, lumbar and SI joint pain. Pending the referral, the Claimant's physical therapy was placed on hold. (Ex. 5, pp. 58 and 63).

8. On September 3, 2015 the Claimant was evaluated by Dr. Jocelyn Cavender at Concentra. The Claimant presented with back and left leg pain, left leg tingling and ongoing spasms. Dr. Cavender's assessment included strain of the lumbar strain, low back strain, thoracic strain, and SI joint strain. The Claimant's ongoing prescription medications included Naproxen, Cyclobenzaprine and Diazepam. (Ex. 5, p. 72). On October 1, 2015, the Claimant was evaluated by Dr. Blau, whose specialty is physiatry. (Cl. Ex. 5, p. 73). Dr. Blau diagnosed piriformis syndrome, left sacroiliitis, and left lumbar spondylosis. Dr. Blau recommended a piriformis injection which was accomplished on October 15, 2015. (Ex. 6, p. 99). On October 26, 2015, the Claimant reported improvement in her pain symptoms subsequent to the piriformis injection. The diagnosis provided by Dr. Blau included left piriformis syndrome and low back pain. (Ex. 5, pp. 75-76).

9. Claimant underwent an MRI of the lumbar spine on September 21, 2015. The MRI revealed a completely normal MRI of the lumbar spine with no evidence of disc herniation or nerve root impingement. (Ex. P p.128). Dr. Cebrian testified that the MRI results ruled out any disk pathology or nerve root impingement. The MRI also revealed that the paraspinal muscles, which are the muscles at the sides of the lumbar, were normal and showed no evidence of atrophy, muscle strain, or tear.

10. On December 11, 2015 the Claimant was evaluated by Dr. John Ronning at Concentra Medical Center. The Claimant continued with decreased pain complaints subsequent to the piriformis injection. Dr. Ronning's assessment included lumbar and sacroiliac strain. (Ex. 5, pp. 77-78). The Claimant presented for a follow-up appointment with Dr. Blau on December 14, 2015. It was noted that the Claimant's pain symptoms were returning and Dr. Blau suggested that if pain symptoms worsened, a repeat piriformis injection would be considered. (Ex. 5, pp. 80-81). Dr. Blau's medical report of January 11, 2016 notes that the Claimant was experiencing a relapse in her pain symptoms. The pain was radiating into the left lower extremity with *spasming* in the lower back region. Dr. Blau again assessed left piriformis syndrome and low back pain, and recommended a repeat piriformis injection which was accomplished on March 3, 2016. (Ex. 5, pp. 82-83 and Ex. 6, p. 100). Range of motion on this date was again noted to be normal.

11. On February 11, 2016 the Claimant was evaluated by Dr. Larimore at Concentra. Dr. Larimore's medical report notes constant pain in the lower back and left upper glute. Dr. Larimore's report notes that the Claimant had experienced improvement subsequent to Dr. Blau's piriformis injection in October 2015 but beneficial effects of the injection had worn off by January 2016. (Ex. 5, p. 84). On March 14, 2016, the Claimant was again evaluated by Dr. Blau. Dr. Blau's report notes that the recent piriformis injection performed on March 3, 2016 did not provide any improvement and Dr. Blau continued to diagnose left piriformis syndrome, low back pain and lesion of the sciatic nerve, left lower limb. (Ex. 5, p. 91). Dr. Blau prescribed massage therapy and added a prescription of Tramadol. (Ex. 5, pp. 79-80). On April 11, 2016, Dr. Blau again recommended continued treatment. (Ex 5, pp. 92-93).

12. After referral by Dr. Blau, but before being placed at MMI by Dr.Kurz, Claimant had been seen by Licensed Massage Therapist Christopher Wilson with Medical Massage of the Rockies, LLC. Six visits were approved, but Exhibit 9 has notes only for the first three. On April 2, 2016 (Claimant's first visit, and more than 9 months after the injury), Mr. Wilson notes under *"Objective Findings/Palpatory"*

> ….R Glute Medius, Piriformis is *tight* and *knots* were found in entire length of muscle. QL bilaterally are *tight* and sensitive to the touch. *Hip* on L side *was lifted* so we will need to work on the Psoas next session. Client's ishium sounded like it was *clicking* in ROM…(Ex.9, p. 138)(emphasis added).

"Objective Findings/Palpatory" notes from April 8, 2016 state:

….We worked on her R glute and paraformis. Trps (the ALJ infers 'trigger points' from the context of the reports) were found in erectors on L side and middle traps.(Ex. 9, p.137).

"*Objective Findings/Palpatory"* notes from April 15, 2016 state:

> Pain and *trigger points* were found in L glutes and piriformis. Hip joint in movement has been making a *popping noise,* may need an adjustment. Pain *and Trp* were found in QL, and erector was *tight* from compensation….(Ex 9, p. 136) (emphasis added).

13. Claimant returned to Concentra on April 20, 2016. It was noted that Claimant had undergone two injections, extensive physical therapy, dry needling, and massage therapy without any relief. (Ex. M p. 82). Claimant denied any new complaints. Claimant also denied loss of range of motion, strength, or sensation. The examination revealed no tenderness and full range of motion in both the thoracic and lumbar spines. (Ex. M p.84). The Claimant was evaluated by Dr. Kurz at Concentra. No prior treatment history by Dr. Kurz appears in the record. Claimant testified credibly that she had never seen him before this date. Dr. Kurz summarily placed the Claimant at maximum medical improvement, prescribed no further treatment, provided no work restrictions and further indicated the Claimant did not sustain any impairment. A Final Admission of Liability was then filed on April 26, 2016, based upon this report by Dr. Kurz.(Ex. 1).

14. On May 18, 2016 the Claimant was evaluated by Dr. Roger Sung, orthopedic surgeon. The Claimant sought evaluation outside the Workers Compensation system with Dr. Sung due to ongoing symptoms including pain and spasms resulting from her work injury. Dr. Sung's medical note indicates muscle pain, joint pain, back pain, spasms, balance problems and numbness. Dr. Sung's assessment included low back pain, sacroiliitis, and mild L5-S1 spondylosis. (Ex. 3, pp. 26-27). Dr. Sung referred the Claimant to Dr. Jenks for a left SI joint injection. Dr. Sung further discussed the possibility of a minimally invasive SI joint fusion. (Ex. 3, p. 27). Claimant elected not to proceed with this surgery.

15. The Claimant was evaluated by Dr. Jenks on June 30, 2016. Dr. Jenks provided a left sacroiliac joint injection. (Cl. Ex. 4, Page 34). The Claimant experienced some improvement in her pain symptoms as a result of the injection by Dr. Jenks. Dr. Jenks performed a second SI joint injection on July 26, 2016. (Ex. 4, pp. 37-38).

16. The Claimant had an additional SI joint injection under the direction of Dr. Jenks on September 21, 2016. It was noted that her symptoms had worsened since the last injection. (Ex. 4, pp. 39-41).

17. Respondents filed a Final Admission of Liability on April 26, 2016 admitting to zero impairment and a maximum medical improvement date of April 20, 2016, pursuant to Dr. Kurz's medical report (Ex. M, pp. 82-85 and Ex. 1, p. 1). It is

unclear how often Claimant was actually seen or treated by Dr. Kurz beyond this single visit, but his name does not appear in any other Concentra reports. Claimant, through counsel, objected to the Final Admission of Liability and requested a Division of Workers' Compensation Independent Medical Evaluation ("DIME"). Dr. Higginbotham was selected as the evaluator.

18. Dr. Higginbotham evaluated the Claimant on March 7, 2017. As a result of his evaluation, Dr. Higginbotham assigned a 2% whole person impairment for the thoracic spine under Table 53, and a 5% whole person impairment for the lumbar spine under Table 53. Combined with Range of Motion deficits, this yielded a whole person impairment of 13%. (Ex. 2).

19. Dr. Higginbotham noted that at the time of his evaluation, the Claimant was not at maximum medical improvement, indicating that an appropriate diagnosis had not been made and that further treatment may be indicated. However, the Claimant indicated that she did not want to continue with the Workers' Compensation system and therefore Dr. Higginbotham placed the Claimant at maximum medical improvement effective March 7, 2016. (Ex. 2, pp. 17-18).

21. In his DIME report, Dr. Higginbotham identifies and comments on the medical records provided to him (with the exception of LMT Christopher Wilson) with regard to treatment for the subject work injuries. Dr. Higginbotham provides a detailed explanation for his opinion that clinical findings are consistent with injury to the left iliopsoas hip flexor, left hip rotator muscles, left sacroiliac ligaments and lower left costovertebral musculoligaments. (Cl. Ex. 2, Page 19).

21 Dr. Higginbotham performed a number of pain provocative tests on Claimant, many of which are consistent with dysfunction in or around the left SI joint, to include:

> ..Hip ROM is full and symmetrical bilaterally without pain except with full and resistive abduction of the left hip. There are positive left Patrick/Fabre's signs; prone instability test to the left; thigh thrust test on the left; sacral thrust test with evidence of sacral tilt with the left posterior to the right; Lasegue's signs are negative on the right and positive on the left at 65° with pain experienced over the lower SI and buttocks area; positive slump test on the lest, weakly positive Gaenslen's test on the left and negative on the right.; minimally positive compression test on the left and none on the right. (Ex 2, p.17)

Dr. Higginbotham goes on to explain Claimant's rather unusual dilemma in producing objective evidence of rigidity or spasm to warrant a Table 53 rating:

> The #1 muscle involved with any lifting, particularly heavy lifts, is the iliopsoas muscle. It is a muscle that is *not readily palpated* because of its anatomic location. When injured, it is the muscle that refers pain to the thoracolumbar, groin, and medial thigh regions. A review of its origin as

well as its insertion, as well as its function, hip flexion and back stabilization should be readily appreciated.

….Such muscle strains are real; it is well documented anatomically and physiologically in muscular medicine and, yes, it can be *permanent* and *symptomatic.*(Ex. 2 p. 19)(emphasis added).

22. Utilizing Table 53, Page 80, IIB**,** Dr. Higginbotham assigned the aforementioned impairment ratings, stating that, "I respectfully disagree with the provider who did not believe in permanent strain or myofascial pain complaints could result in impairment." (Ex. 2, p. 19). Dr. Higginbotham further performed spinal range of motion measurements, assigning 3% Thoracic and 3% Lumbar.

23. At the request of Respondents, the Claimant underwent an independent medical evaluation with Dr. Carlos Cebrian. Dr. Cebrian is board-certified in family practice, but not in occupational medicine. He is level II accredited in Occupational Medicine. He was admitted as an expert in Occupational Medicine.

24. The overall conclusion of Dr. Cebrian is that the Claimant does not have a ratable condition because she presents with no objective pathology or objective evidence:

> There was no expectation for the injuries that Ms. Wright sustained in her June 18, 2015 incident to become permanent. The fact that she has limited discomfort does not mean that discomfort lends itself to the impairment schemes in the AMA Guides. Also, that someone has discomfort does not require a medical impairment rating. Application of medical impairment requires that a disorder being rated is identified, accurately treated, is reproducible, measurable and permanent. There also has to be a specific diagnosis and objective pathology identified that correlates with the diagnosis. There is no such that as a permanent strain. Myofascial pain complaints do not result in an impairment. Ms. Wright does not have a spinal mediated disorder. Therefore, she does not have a Table 53 diagnosis. Incidentally, Ms. Wright has full range of motion of her lumbar spine. (Ex. K, p.45).

25. Dr. Cebrian concludes that the Claimant's pain complaints are out of proportion to objective findings. Dr. Cebrian acknowledged that he is the only medical provider to reach this conclusion. The Claimant has been evaluated by multiple physicians at Concentra and by other specialists and medical providers.

26. Dr. Cebrian indicates that the Claimant's SI joint complaints are not related to the subject work-related injury. Again, Dr. Cebrian is the only medical provider to reach this conclusion out of all those who evaluated or treated Claimant.

27. The ALJ finds the testimony of the Claimant to be persuasive. Despite being placed at MMI by her Concentra physician, the Claimant sought treatment with orthopedic surgeon, Dr. Roger Sung, for ongoing pain and symptoms related to the work injury. The Claimant confirmed that there were no intervening events or other activities that had occurred and that her ongoing symptoms were all part of the original injury. The Claimant stated that she continued with daily thoracic and lumbar pain with constant pain with the piriformis, at times severe, with constant tingling in the lower extremity. The Claimant has a 19-year history working in a medical background. The Claimant noted that the piriformis and SI joint are symptomatic due to her work injury. The ALJ finds that Claimant provided accurate information to her treatment providers and IME's in a sincere effort to get better. Her frustration with the Workers Compensation system is not without merit.

CONCLUSIONS OF LAW

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

Generally

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

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

3. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App.

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

Overcoming the DIME-Impairment

4. The medical impairment determination of the DIME is binding unless overcome by clear and convincing evidence. Section 8-42-107(8), C.R.S. *See Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Cudo v. Blue Mountain Energy Inc.*, W.C. No. 4-375-278 (ICAO, October 29, 1999). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it highly probable and free from serious or substantial doubt. As otherwise stated, clear and convincing evidence is defined as evidence which demonstrates that it is highly probable that the rating of the IME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Clear and convincing evidence is evidence which is stronger than a preponderance, is unmistakable and is free from serious or substantial doubt. *In re Welker*, W.C. No. 4-309-642 (Industrial Claim Appeals Office, 1998). *See also DiLeo v. Koltnow*, 613 P.2d 318 (1980). The enhanced burden of proof in overcoming a DIME reflects the underlying assumption that a physician selected independently by the Division of Workers' Compensation will provide a more reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office*. Respondents have failed to prove by clear and convincing evidence that the 13% medical impairment determination by Dr. Higginbotham is incorrect. The DIME physician's opinion is the only opinion the ALJ is required to afford any presumptive weight. *Harrison v. Wal-Mart Stores*, W.C. No. 4-522-344 (ICAO, April 18, 2003). *See also Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

5. Section 8-42-107(8)(b)(III) requires that physicians must use the *American Medical Association Guides to the Evaluation of Permanent Impairment*, Third Edition, Revised, for purposes of determining all physical impairment ratings. Further, physicians may not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings (*See also* 8-42-107(8)(c)). A question of whether the DIME physician properly applied Table 53, IIB to the Claimant's condition is one of fact for the ALJ.

6. The determination by Dr. Higginbotham to provide ratings for specific disorders of the thoracic spine and the lumbar spine is supported by the medical

records and Table 53(II)(b). That table does not prohibit a rating if a lumbar MRI shows no degenerative changes. Table 53(II)(b) explicitly provides for the possibility of a 2% thoracic and 5% lumbar ratings even if the MRI structural test shows no degenerative changes. The key distinction is that the Claimant is entitled to no rating for specific disorders of the spine if she is *asymptomatic* and has no surgery. If the Claimant presents with six months of medically documented pain *and rigidity* with or without muscle spasm, associated with none to minimal degenerative changes on structural tests, then she is entitled to this Table 53 rating for specific disorders of the spine. The medical records in this matter clearly document more than six months of pain and rigidity, with or without spasm, starting with the earliest Concentra records after Claimant's injury. Even then applying Dr. Cebrian's strictest interpretation, Claimant exhibited objective findings in April of 2016 (almost 10 months post injury) to her massage therapist, including trigger points, knots, tightness, and popping sounds coming from hip movement. These are indicative of more than self reported pain; they supply the anatomic correlation with the chronic pain she describes.

7. It is duly noted that not all physicians have consistently documented limited ranges of motion, or consistent evidence of rigidity throughout her treatment process. Some of this is perhaps explained by Claimant's hypermobility from practicing yoga. Claimant's pain has waxed and waned during her treatment, sometimes confounding her providers. However, the DIME physician-tasked statutorily for this purpose-noted sufficient objective indicators, including an extensive battery of provocative tests. These induced a pain response consistent with soft tissue pathology, mainly in the lower left SI region. The ALJ finds that Claimant's pain responses to these provocative tests are more than simple self reported chronic pain over a six month period. They are further evidence of some rigidity, and there is nothing in the record to suggest the Claimant's cooperation in these tests was not genuine. Further, as noted by Dr. Higginbotham, Claimant's iliopsoas muscle does not readily lend itself to palpation to check for rigidity or spasm. On postural examination, he noted that her pelvic crests are dislevel with the right being higher than the left. There is a pelvic side shift to the right and very slight anterior rotation of the right hip relative to the left. Claimant could not even sit straight. These are observed indicia of rigidity by the DIME examiner.

8. The Administrative Law Judge does not find that the conclusions and opinions of Dr. Cebrian are sufficient to overcome the DIME. The Claimant saw multiple medical providers throughout this claim, including at least seven (7) physicians through Concentra, along with Dr. Sung, Dr. Jenks, physical therapists, and massage therapists. Out of these multiple medical providers, only Dr. Cebrian opined that the Claimant's complaints or symptoms were out of proportion to objective findings. A difference of opinion between medical experts is insufficient to overcome a DIME physician's rating by clear and convincing evidence. *In re Holmes*, W.C. No. 4-527-829. *In re Sanchez*, W.C. No. 4-377-463 (ICAO, February 19, 2002). The ICAO, in the *Sanchez* case, noted that it has upheld awards based on soft tissue injury to muscles of the spine. *Welker v. Vogue Construction, Inc.*, W.C. No. 4-309-642 (March 5, 1998).

9. The testimony of the Claimant, the medical records, and other evidence establish that the Claimant sustained permanent impairment involving her thoracic and lumbar spine. Substantial medical evidence confirms that the Claimant experienced ongoing spasms, rigidity, dysfunction to the SI joint and piriformis muscle, lumbar strain, and thoracic strain, all of which provided anatomic or physiologic correlation between the Claimant's injury and her disability. In this matter, the Claimant was consistently prescribed muscle relaxants, along with other prescriptive medications to treat muscle spasms. Dr. Sung opined that the Claimant may benefit from SI joint fusion surgery if conservative care measures continued to provide no benefit to the Claimant. The medical evidence establishes that the Claimant's impairments to the thoracic and lumbar spine, as assigned by Dr. Higginbotham, are based on anatomic and physiologic correlation, and not solely on chronic self reported pain.

10. The *AMA Guides* are often subject to more than one interpretation and reasonable physicians may disagree about their application to a particular clinical case. *Rodriguez v. Domino's Pizza, Inc.*, W.C. No. 4-467-433 (Industrial Claim Appeals Office, August 30, 2002). A difference of opinion between medical doctors is not sufficient to establish that a DIME physician's rating is clearly erroneous or highly improbable. *Rodriguez v. Aurora Public Schools*, W.C. No. 4-447-174 (ICAO, January 7, 2002). *See also Lancaster v. Arapahoe County Sheriff's Department*, W.C. No. 4-744-646 and W.C. No. 4-756-515 (Industrial Claim Appeals Office, May 12, 2010) and *Kuykendoll v. Aurora Public Schools*, W.C. No. 4-193-617 (Industrial Claim Appeals Office, June 3, 1998).

11. The DIME physician's determination of whether a claimant has sustained a permanently impairing injury under Table 53 depends upon the examiner's overall evaluation of the claimant's medical history and the examiner's clinical judgment. *Lopez v. Oasis Outsourcing, Inc.*, W.C. No. 4-416-822 (Industrial Claim Appeals Office, January 8, 2001). Further, while not always consistent from one provider to the next, Claimant's Thoracic and Lumbar ranges of motion were performed according to the AMA guide worksheet by the DIME physician. The DIME physician sufficiently addressed his measurements, and addressed the concerns of Dr. Cebrian, in his report.

12. Consequently, the Claimant is entitled to PPD benefits based upon the 13% whole person impairment rating assigned by the DIME.

Overcoming the DIME- MMI

13. Claimant was placed at MMI and provided a "0" rating on April 20, 2016 by an ATP, Dr. Kurz (who had never personally treated Claimant before this date). Eleven days prior, a different ATP, Dr. Blau, had recommended continued treatment. Inasmuch as Dr. Higginbotham found (and the ALJ does not find otherwise) continued range of motion deficiencies almost a year later, the ALJ cannot reasonably conclude that Respondents have now overcome the DIME on MMI by clear and convincing evidence. Claimant did not "improve" from her injury date up to a baseline of "0" in 2016, only to

later rate a 13% whole person impairment in 2017. While the ALJ harbors continued questions whether Claimant is even yet at MMI on the date of this Order, Claimant stipulates otherwise. The date of MMI, as set by the DIME, is March 7, 2017, and the ALJ so finds.

ORDER

It is therefore ordered that:

1. The DIME of Dr. Higginbotham has not been overcome on the impairment rating; Respondents shall pay PPD benefits based upon a 13% Whole Person Impairment.

2. The DIME of Dr. Higginbotham has not been overcome on the issue of MMI; the date of Maximum Medical Improvement is March 7, 2017.

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

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

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

DATED: October 5, 2017

/s/ William G. Edie

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-041-084-01

ISSUES

- Whether Claimant sustained an injury to her back on December 4, 2016, arising out of and occurring within the course and scope of her employment?

- If Claimant sustained a compensable injury, whether the medical treatment she received is reasonably necessary and related to her compensable injury?

FINDINGS OF FACT

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

1. Claimant is a Comprehensive Health and Safety Supervisor ("CHSP") with Employer who alleges she suffered a low back injury on December 4, 2016. Claimant has been employed with Employer for over sixteen years. Claimant worked in Employer's Fresno, California facility before February of 2016, when she moved to Denver as a CHSP. Claimant has worked multiple jobs for Employer, including supervisor roles in the departments of safety, human resources, dispatch, and operations.

2. Claimant's CHSP duties included working with safety committees, coaching and mentoring employees on proper work methods, filing reports, and performing other training and compliance functions for safety. Lifting is an essential job functions of CHSP supervisors. CHSP training involves training on work-related injuries is more extensive than the training for hourly employees. As a CHSP, Claimant would have been trained in the proper procedures for reporting a work-related injury. Employer requires that work-related injuries be reported immediately to the management team or otherwise into the risk database, if management is unavailable. Employees are required to indicate how they injured themselves when reporting an injury. As a supervisor, Claimant would have undergone annual training every January.

3. In February of 2014, Claimant filed a claim against Employer with the EEOC over a promotional dispute. Claimant filed the complaint because "[Employer] had promoted four male supervisors in the span of three weeks, and admittedly did not consider a single female supervisor." Claimant was upset that she had not been interviewed.

4. On June 20, 2014, Claimant sought medical care at Kaiser. Claimant complained of work-related stress associated with being promoted to Dispatch Supervisor, a job she did not feel qualified to do. Claimant reported stress and anxiety at work and had requested time off work.

5. Also on June 20, 2014, Claimant saw a psychiatric social worker, Janet Ann Flanagan at Kaiser. Claimant reported that Employer discriminated against her by promoting three men when she was not even interviewed. Claimant reported working sixteen hours per day and not being able to take time off. After this visit, Claimant treated through Concentra, her occupational medicine service provider.

6. Claimant testified and told Respondents' IME physician, Dr. Kathleen D'Angelo, that she had injured her back at work on August 19, 2014. Claimant testified that she was putting a package on a shelf and felt pain in her back "like a twinge that went down both legs, and that the pain lasted for several days. Claimant testified that she felt a pop in her back with intense pressure.

7. On the afternoon of August 20, 2014, Claimant returned to Kaiser, complaining of severe pain in her bilateral lower legs "that made her suddenly woke [sic] up this morning." The record states that "Patient wants to know the reason, concerned for blood clot, taking Motrin and Tylenol – pain was better now, can walk well without limping." Claimant asked if the pain may be related to stress. The record does not mention a work-related injury or event precipitating pain or prompting the visit. The examining physician indicated the symptoms were possibly due to cramping.

8. An August 20, 2014 note from Kaiser ER states, "[Claimant] went to work as usual the day before last, slept at noon and awoke at 8:30 p.m. with extreme bilateral leg pain." Claimant indicated that she had been under stress at work during her night shift, and "denies any trauma." Claimant stated that she had pain that ascended into the posterior thighs bilaterally and up towards the back, and that this was different than the sciatica that she has had in the past. The provider noted that in 2005, Claimant had experienced total body pain similar to her then-current symptoms which had lasted a week and dissipated.

9. On October 23, 2014, Claimant returned to Kaiser reporting continuing stress at work over the EEOC complaint. Claimant stated she was "suddenly promoted to a job that she was not qualified for" and that she was working up to 70 hours per week. A note dated March 3, 2015 states that Claimant was reassigned and experienced stress relief. The records note that Claimant had a personal and family history of rheumatoid arthritis.

10. On September 8, 2015, Claimant e-mailed Kaiser reporting right leg pain for around three weeks at this time without a determined cause. Claimant suggested experiencing back symptoms that began before ocean diving. Claimant stated the pain varied extensively, as she was sometimes able to walk fine but other times could put no weight on her leg. Claimant underwent an MRI on September 10, 2015 for right hip pain (without trauma), and the MRI showed only degenerative changes.

11. On September 28, 2015, Claimant reported that she had worse back pain and was seeing a chiropractor. Claimant had pain with walking, standing and sitting and requested an MRI. Claimant stated "there has to be a reason for the pain . . . . how can the pain be diagnosed?"

12. Claimant returned to Kaiser on September 29, 2015, reporting six weeks of low back pain with right hip and leg pain radiating down the buttock. Claimant experienced only mild relief with chiropractor therapy and pain medication. The provider diagnosed chronic low back pain.

13. In December 2015, Claimant underwent physical therapy for her low back pain and right sciatica. On December 8, 2015, Claimant presented with low back complaints which were present "off and on for several years." The complaints involved the anterior right tibia, and hip and groin pain radiating into her lumbar spine. Claimant indicated daily pain in her right hip and shin with right leg pain upon movement, without left-sided complaints.

14. Claimant stated in a December 12, 2015 e-mail that she was worsening with therapy, and reported frequent back pain starting to affect her left leg. Dr. Karl Quinn at Kaiser noted that Claimant had back pain for four months with recent left leg pain that improved with therapy but recently returned. A lumbar x-ray on this date noted "pain without trauma" with mild degenerative spondylosis.

15. On December 13, 2015, Claimant reported to Dr. Quinn that her pain "just left" after four or five chiropractic visits but subsequently returned with symptoms into the right shin and left leg. Claimant indicated that she now had pain regardless of whether she was sitting, standing, or walking.

16. On December 24, 2015, Dr. Marsa White at Kaiser evaluated Claimant for back and right leg pain. Dr. White noted that Claimant had multiple areas of pain that could be attributed to different medical issues, including right hip osteoarthritis. Dr. White questioned radiculopathy versus tibial pathology, and ordered a right leg x-ray and lumbar MRI. On December 28, 2015, Clamant continued to indicate that she was looking for a cause for her symptoms and that she [could] "[could] not live like this for the next 20 years."

17. The December 28, 2015 lumbar MRI showed moderate canal stenosis at L3-4 and right-sided disc protrusion. The findings showed a cyst impressed on the right posterior aspect of the neural elements of the thecal sac. The estimated size of the cyst is not documented.

18. Dr. Quinn reviewed MRI findings and on January 2, 2016 told Claimant that there was a disc bulge at L3-4 that narrowed the central canal through which the nerves ran, which would match the symptoms. Dr. Quinn opined that the pain was not related to the central canal narrowing at L4-5.

19. Dr. Quinn referred the study to Dr. White but, as noted on January 6, 2016, Claimant refused to discuss the matter with Dr. White. "Patient does not allow me to speak once I announce myself. States she cannot talk and proceeds to hang up the phone." On January 11, 2016, Dr. White noted that Claimant's pain had resolved with a prednisone pack and recommended a lumbar ESI.

20. On January 19, 2016, Claimant saw Dr. Eugene Huang for a trial ESI. Dr. Huang opined that Claimant was a "not motivated" patient with radicular pain and low back pain. Dr. Huang reviewed the MRI results and listed his impression as "lumbar radiculopathy and discogenic low back pain."

21. In February 2016, Claimant transferred from Employer's Fresno facility to its Denver facility.

22. On June 21, 2016, Claimant saw Dr. Mark Mills (with Gene Cook, PA-C under supervision) at Panorama Orthopedics, complaining of back pain and bilateral radiculopathy with spondylolisthesis. Dr. Mills characterized the symptomology as "acute re-exacerbation of back and bilateral leg pain." Claimant's pain involved the base of her back with radiating pain down the back and sides of both of her legs with pain in the right greater than left front of shin. Dr. Mills noted that Claimant originally presented benignly in August 2015 with pain that started as back pain. Claimant's pain worsened after therapy and she developed a more radicular pattern, prompting an MRI. Claimant reported significant relief from the January ESI. Dr. Mills noted that Claimant's pain started to come back three weeks earlier and was steadily progressing. Claimant had good relief with prednisone from her primary care provider.

23. Dr. Mills ordered a new MRI "due to [Claimant's] inability to gain access to her [MRI] images and the fact that it has been [greater] than six months since the previous films were obtained and patient does have spondylolisthesis, I believe a new MRI is warranted to evaluate for compressive etiology for possible injection therapy and perhaps surgical planning." On July 1, 2016, Claimant began physical therapy.

24. On June 17, 2016, a repeat lumbar MRI was performed. The MRI showed multilevel degenerative changes with central canal and foraminal encroachment and degenerative anterolisthesis at L3-4. The findings showed a "small synovial cyst arising from the medial aspect of the right facet joint measuring roughly 3.4 x 2.4 mm" which minimally indents the right posterior lateral canal at L3-4. Radiographic findings showed slight, Grade 1 anterolisthesis at L3-4.

25. A July 13, 2016 note by Dr. Lonnie Loutzenhiser indicates a measurement of "5mm" for the synovial cyst at L3-4.

26. On September 14, 2016, Claimant's imaging was noted as significant for spondylolisthesis at L3-4. Claimant reported that she was doing well and felt "about 100%" with only an occasional twinge and that she was more worried about the future and preventative strategies.

27. On December 7, 2016, Employer's Health and Safety Manager, David Loya, authored an e-mail to the Area Human Resources Manager concerning the timeline of events surrounding Claimant's December 4, 2016 alleged injury. On Friday, December 2, 2016, Mr. Loya notified Claimant that she was required to work the hub on Sunday, December 4. Claimant stated that she had a school paper to finish but was

told that the shift was mandatory. Claimant also expressed concern about her ability to load and unload trailers without hurrying her back.

28. On December 4, 2016, Claimant reported to the conference room and was assigned to the small sort shift. While this position required Claimant to perform lifting, the amount of lifting and the weight of pieces lifted was significantly less than what was required in loading and unloading trailers. Claimant expressed concern for her back and again brought up her school work, but accepted the assignment. The shift began at 3:00 p.m. At 9:28 p.m., Mr. Loya received a text message from Claimant stating: "FYI. Sometimes we need to make exceptions. Right now I am in so much pain. It hurts to even walk." Mr. Loya consulted with two other management personnel and agreed that the situation would need to be addressed with Claimant, as she appeared to be either reporting a work injury or asking for an accommodation for a preexisting condition.

29. On Tuesday, December 6, 2016, Mr. Loya contacted Claimant and asked her to meet the following day. Claimant indicated she did not want to meet and attempted to minimize her prior statements. Claimant sent Mr. Loya an e-mail, in which she described the history of her back pain. Claimant noted that in May or June 2016, she had discussed with Mr. Loya needing to take time off for back surgery. Claimant indicated that in 2015 in Fresno, she had filed a claim for a back injury to the base of her spine. Claimant repeatedly stated that she was not injured on Sunday December 4, 2016, and was not going to file a claim. Claimant stated that she was in pain, but reiterated that she was not injured on Sunday December 4, 2016. Claimant stated that she had taken the next day, Monday, off, with Gary's permission, and had been up until 1:30 a.m. to finish her school paper. This was inconsistent with Claimant's hearing testimony. Claimant had worked on the paper all day Saturday, on Sunday until she had to work, and then all day on Monday.

30. At the meeting on Wednesday, December 7, 2016, Claimant was informed that the meeting was necessary because she represented that she did not meet the Essential Job Functions which included lifting. Claimant reiterated at least three times that she had not injured herself on Sunday. Mr. Loya referred Claimant to the ADA process, which Claimant refused, and a verbal altercation ensued. Mr. Loya noted that "At one point, [Claimant] stated out loud that perhaps she should claim the pain as an injury so that she could continue to work."

31. After initial evaluation, Employer's occupational health nurse, Gayle Brown, referred Claimant to Dr. John Ogrodnick at SCL for evaluation for her alleged August 19, 2014 back injury. Dr. Ogrodnick saw Claimant on December 9, 2016. Claimant stated that she did not seek medical attention for the alleged 2014 work injury. Claimant alleged that Employer told her she was not allowed to file a claim, and that her soreness "just kind of went away." The pain returned in 2015 to involve her right and left legs, to the point where it hurt to walk. Claimant reported full relief after her January 2016 ESI but the effects waned and she could barely walk again. After participating in therapy and purchasing new shoes, Claimant's pain again disappeared. Claimant stated that, on December 3, 2016, she was assigned to small sort and could barely walk out of the building after six hours. Claimant stated that she was sent by Employer's

nurse for evaluation to re-open the alleged 2014 claim. Claimant described her low back pain at 2/10 while at rest, however the pain diagram she completed at the visit showed 8/10 pain. Claimant had right shin pain. Claimant stated that her back pain on December 4, 2016 was 20/10. Dr. Ogrondick reviewed the June 2016 MRI and restricted Claimant's lifting to 30-pounds. Dr. Ogrodnick indicated that "it is not at all clear that 2014 events are responsible for current symptoms," and advised Claimant that the work-relatedness was undetermined at that time.

32. Claimant continued working under restrictions. On the morning of December 16, Claimant returned to Dr. Ogrodnick to review the 2014 events. Claimant clarified that the claim filed in December 2014 was for mental stress due to a conflict with management unrelated to the alleged 2014 lifting. Claimant also clarified that the alleged 2016 "small sort incident" occurred on December 4, not December 3. Claimant presented as pain free during the visit but had 4/10 pain in the "very, very base of [her] tailbone" while driving. Claimant stated that it had been two days since she had pain in her legs and that she did not understand her pain as it could be inconsistent. Claimant stated that sometimes it hurt when she rose from sitting and sometimes it did not. Claimant mentioned the possibility of filing another claim for compensation for the alleged 2016 injury. Dr. Ogrodnick released Claimant to full duty and indicated that he did not have sufficient evidence to make a causal connection between her then-present complaints and the alleged August 2014 incident. Dr. Ogrodnick indicated the subjective leg pain was not substantiated with objective findings on the MRI leading to questions of etiology.

33. Later on December 16, 2016, Claimant was sitting in her vehicle thinking that she could lose her job when she decided to report a work-related injury for December 4, 2016. Mr. Loya filed a First Report of Injury on December 16, 2016.

34. On December 17, 2016, Claimant presented to Dr. Natascha Deonarain at Concentra. Claimant stated that she had pain in her lower back and bilateral legs since December 4, 2016, which she believed was due to "repetitive bending of the knees." Claimant stated that she was told to work on small sort after informing her supervisor on December 2 that she was not able to perform that job. Claimant stated that she was "lifting up to 100 pounds repetitively over the course of a 5 ½ hour duration." Claimant stated that there was no specific trauma but at the end of the day she could not walk. Claimant repeated her version of events surrounding the alleged August 2014 injury, again stating that she had not sought medical treatment. Claimant was told during her previous surgical evaluation that she may need to have "special surgery" to prevent long term complications of her condition, but she did not pursue this at the time "presumably because of insurance reasons." Dr. Deonarain diagnosed sacral pain; neck pain (acute); and diffuse left and right leg pain. Dr. Deonarain imposed 30-pound lifting restrictions.

35. On December 19, 2016, Mr. Loya drafted another e-mail concerning Claimant's recent report of a work-related injury. On December 16, Claimant notified Mr. Loya by text message that she had an injury on December 3 as an "exasperation of existing injury." Claimant sent the text shortly after she was notified that she was

required to work the day sort on the following Sunday, December 18. Claimant stated that she had not been released to regular duty, which was contrary to the documentation available to Mr. Loya by Dr. Ogrodnick. Claimant demanded to see another provider, and repeatedly stated that she bent at the knees and this was how she injured her back. Claimant recanted her initial claim that she had to lift 120 pound bags. Claimant previously expressed concern about her ability to load and unload trailers. Claimant was not loading/unloading trailers on December 4 and expressed no concern for the small sort assignment that day.

36. On December 22, 2016, Claimant saw Dr. Bryan Counts. Claimant reported having had received chiropractic care for her back. Dr. Counts diagnoses explicitly included neck complaints, as Claimant reported to him that she hurt herself from "frequent head turning working in the small sort area on December 4th." Dr. Counts prescribed physical therapy for Claimant's neck.

37. Claimant subsequently reported moderate improvement and was working her regular job. On January 23, 2017, Claimant requested another ESI. Dr. Counts requested a lumbar MRI and referred Claimant to Dr. Robert Kawasaki. On February 20, 2017, Claimant told Dr. Counts she felt her back had improved and that she no longer wanted an ESI. However, Claimant did want an MRI to see if the anterolisthesis at L3-4 had worsened. Dr. Counts noted that Dr. Kawasaki had a visit that day and considered MMI.

38. On February 23, 2017, Claimant saw Dr. Kawasaki. Claimant reported that her pain had improved and was 1-2/10 to the low back and legs. Dr. Kawasaki noted "aggravation of underlying condition" with chronic low back pain but that "it is not clear if she has a new injury." Dr. Kawasaki noted that Claimant felt discriminated against at UPS, which may be impacting her recovery. Dr. Kawasaki ordered a lumbar MRI.

39. Claimant underwent a lumbar MRI on March 11, 2017. The reading radiologist read the MRI as showing: multilevel degenerative disc disease; disc bulging; moderate-severe L3-4 central canal stenosis with right L3-4 synovial cyst; and multilevel central canal narrowing and bilateral existing nerve root compression/abutment.

40. On March 20, 2017, Dr. Kawasaki reviewed the MRI and noted degenerative changes. At L3-4, there was moderate-to-severe facet arthropathy and a "4mm synovial cyst" causing some compression of the L3 nerve roots, which appeared to displace the existing L4 nerve root. The impression was "chronic low back pain from the initial workers' compensation claim in February of 2014; right L4 radiculopathy; synovial cyst at L3-4; radicular symptoms at L4; and spondylolisthesis at L3-4, grade 1." Dr. Kawasaki noted that he did not compare the 2017 MRI with the 2016 lumbar MRI. Dr. Kawasaki noted that Claimant had minimal response from the prior ESI and "quite a bit of conservative care." Dr. Kawasaki suggested a facet cyst lysis procedure or ESI and referred Claimant to Dr. Michael Rauzzino.

41. On April 1, 2017, Claimant saw Dr. Rauzzino. Claimant reported no neck complaints. Dr. Rauzzino reviewed the 2017 MRI and noted the synovial cyst at L3-4 with grade 1 spondylolisthesis. Dr. Rauzzino noted that the 2016 MRI was not available for comparison. Dr. Rauzzino recommended a fusion surgery over decompression of the cyst.

42. On April 6, 2017, Claimant saw Dr. Kawasaki and described pain, numbness, tingling, and stabbing into her posterior thigh and calf regions. Dr. Kawasaki noted that it was not clear what Dr. Rauzzino had recommended and indicated a cyst lysis procedure with an ESI at L3-4 may be appropriate.

43. On July 2, 2017, Dr. D'Angelo performed a Respondents' sponsored IME. Claimant complained of "pin-point" tenderness localized to the midline region at the upper sacral area, where Claimant had been told was the location of the cyst. Claimant claimed that she had made a conscious decision to file a work claim while sitting in the parking lot, after a week-and-a-half while thinking about the implications for her career. Claimant's decision to report the injury as work-related was preceded by denials of her previous alleged injury. Dr. D'Angelo noted that Claimant's anticipated prognosis was recurrent, intermittent episodes of pain without any traumatic provocation. Claimant had noted that the cyst was larger on repeat MRIs, however, Dr. D'Angelo compared the records and did not find that the cyst had grown. Dr. D'Angelo noted that the radiologist for the 2017 MRI noted no significant interval change since the prior examination. Dr. D'Angelo noted that there was no evidence on the MRI evaluation or physical examination of any acute trauma, though there was evidence of a genetic condition. Dr. D'Angelo did not causally relate the alleged injury to an aggravation of her underlying degenerative spine disorder. Dr. D'Angelo opined that Claimant's present symptoms were due to an absence of treatment for a chronic degenerative disease. Dr. D'Angelo opined that any aggravation would have been a brief flare with return to baseline shortly thereafter.

44. Claimant testified that she had a back injury in 2014 after putting a package weighing approximately 25 to 26 pounds on the top shelf of a package car. Claimant testified that she felt a pop and intense pressure in her lower back with pain going down into her legs. Claimant testified that she did not see a doctor because she feared retaliation. Claimant nevertheless filed an EEOC claim against Employer in February 2014 after she was not interviewed for promotion.

45. Claimant testified that she worked full duty while receiving treatment for her back in 2015 and 2016. The effects of the 2016 ESI began to wear off around May 2016, after which she sought additional treatment and was evaluated for surgery. Claimant testified that she was hesitant about undergoing surgery, so she continued with physical therapy and became pain free between September 2016 and December 4, 2016.

46. Claimant testified that she told Mr. Loya "three times" during their December 2 discussion that she was worried about her back, contrary to the record and Mr. Loya's testimony. Claimant testified that she did not speak to Mr. Loya on

December 4, except to say hello. Claimant testified that she did not express concern about her back on December 4 and did not express discontent about having to work that day due to her school work, contrary to the record. Claimant testified that she worked the next day, on December 5 (Monday), and was still able to complete her school paper and go to work the full day."

47. Claimant testified that she was reluctant to meet Mr. Loya because she was fearful of being terminated. Claimant testified that, because she is not a doctor, she did not know whether she had a new injury or not. Claimant represents that her symptoms after December 4 were "100 percent different" from her symptoms "in the weeks and months leading up to December 4." Claimant testified that Mr. Loya prevented her from seeking treatment.

48. On cross-examination Claimant testified that she "might tell my doctor that I didn't get hurt at work, not to have to deal with [Employer]." Claimant testified, contrary to her medical records, that she had neither sought nor received treatment for work-related stress due to her dispute with her supervisors. Claimant testified that she did not seek medical treatment for her alleged August 19, 2014 injury to her back. Claimant testified that the pain for which she sought treatment in the emergency department on August 20, 2014 was not the same pain that she had in 2015 or presently. Claimant testified that she was presently seeking treatment for bilateral leg pain. Claimant acknowledged that the August 20, 2014 record reflects that she denied trauma, and that if she did have trauma, she would have reported this to her doctors. Claimant testified that she had pain in the exact same locations in 2015 as she does now. Claimant testified that she was evaluated in 2016 to ascertain the etiology of her pain and that her doctors had recommended surgery as an option, which she would have had to have pursued under private health insurance. Claimant testified that she made the decision to report a work-related injury for December 4 after Dr. Ogrodnick was unable to find any causal relationship to her alleged 2014 incident.

49. The ALJ finds Claimant's credibility to be compromised by both a lack of self control, and a proclivity to exaggerate. For example:

- When asked what she meant by telling Mr. Loya that "perhaps I should claim this pain as an injury;" Claimant responded, "I was just completely beside myself . . . and I could have just blurted out something just because I blurted it out."

- When given a copy of her job description, Claimant admittedly "got belligerent" and argued with Employer's HR personnel in such a manner that she was taken out of a public area and brought into a private office.

- When filling out the injury prevention report with Mr. Loya, Claimant interpreted Mr. Loya as questioning "her integrity," and she "got frustrated." When Mr. Loya asked Claimant how much the bags weighed, she responded, "I don't know, 129 – 120 pounds." Claimant recanted that

statement, saying she had exaggerated. The bags actually weighed between thirty and seventy pounds.

- Claimant later testified that her exaggerated report of how much the bags weighed "was one of those flippant statements that I said while in the heat of disbelief that [Mr. Loya] was questioning my integrity."

- Claimant admitted that she might provide her medical providers with inaccurate information "not to have to deal with [Employer].

- Claimant reported back pain on December 4, 2016 at the level of 20/10. Pain at a level of 10/10 is commonly understood to be the worst possible pain.

50. Mr. Loya testified that he was a health and safety manager at the Denver facility on December 4, 2016. Mr. Loya's duties included designing injury prevention strategies for the district, implementing training programs, ensuring the accurate reporting of injuries, and investigating injuries. Mr. Loya testified that Claimant would have undergone more extensive training than a typical employee, including yearly training in injury reporting. He testified that work-related injuries should be reported immediately to the management team. Mr. Loya testified that lifting is part of the essential job functions of CHSP supervisors. He testified that all of Employer's employees are expected to work during peak season, from Thanksgiving through Christmas, with few exceptions.

51. Mr. Loya testified that he contacted Claimant on December 2, notifying her that she needed to report to work on December 4. Mr. Loya testified that Claimant's objection on that date was specific to her school paper, and did not recall any mention of her back. Mr. Loya testified that he also had a conversation with Claimant on December 4 and that she expressed discontent about having to work on that day. Mr. Loya testified that Claimant had concerns about loading and unloading trailers, but not small sort, which he indicated were very different jobs.

52. Mr. Loya testified that Claimant explicitly denied having a work injury, at least three times, when asked on December 6. Mr. Loya testified that Claimant gave no indication that she had any sort of bending or lifting injury on this date. Mr. Loya testified that the first time he became aware that Claimant was reporting that she had injured herself at work was on December 16, and that she did not give any specific time or specific mechanism by which she injured herself. Mr. Loya testified that he was not aware of any time that UPS ever considered terminating Claimant after December 4. Mr. Loya testified that Claimant's assertion that he prevented her from seeing a doctor on December 16 was not accurate, as he said he could not make accommodations for her restrictions without medical documentation.

53. Dr. Kathleen D'Angelo testified that, to a reasonable degree of medical probability, there was no aggravation of a preexisting condition. Dr. D'Angelo testified that there were minimal, if any, objective findings during her examination. Dr. D'Angelo

testified that, medically, an exacerbation of an underlying condition involved a flare of the underlying condition and returned to normal once prostaglandin and cytokine levels return to normal. Dr. D'Angelo testified that Claimant's intermittent pain, with no pain pattern, was not consistent with an acute exacerbation of a medical condition. Dr. D'Angelo testified that Claimant had a normal progression of her underlying condition. Dr. D'Angelo testified that Claimant's synovial cysts were directly proportional to the degree of degeneration and that the growth of cysts occurred as degenerative conditions worsened. Dr. D'Angelo opined that all of Claimant's symptoms were progressive, including spondylolisthesis and arthropathy. Dr. D'Angelo noted that the examining radiologist comparing both the June 2016 and March 2017 MRIs indicated no clinical changes. Dr. D'Angelo testified that increased pain does not suggest an injury and that, by her own admission, Claimant did not have consistent pain since December 4, 2016.

CONCLUSIONS OF LAW

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

A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). There must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*.

Simply because a claimant experiences symptoms while in the course and scope of their employment does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (April 10, 2008). Claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which

benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009).

In determining whether a claimant has met her burden of proof, the ALJ may resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010).

Claimant's assertion that she suffered an aggravation of her documented and extensive preexisting lumbar condition is not supported by a preponderance of the evidence. Claimant expressly denied to Mr. Loya that she injured herself at work on December 4, 2016. Claimant originally identified her symptoms as having been related to a previous alleged work injury, which was not accepted and for which no evidence was presented. Contrary to Claimant's testimony, she did seek treatment for the same symptoms in 2014 under personal insurance, did not report a work-related injury to her doctors, and denied having trauma. Rather, Claimant's treatment history reflects a pattern of intermittent, chronic pain in her low back and bilateral legs, for which she sought an explanation. When the cause of Claimant's symptoms was identified after a 2016 MRI, she declined surgery under personal insurance and claimed her symptoms resolved.

Claimant's symptoms after December 4, 2016 were identical to those for which she sought treatment in 2014, 2015, and 2016. Claimant only reported having had a work-related injury after being told twice by Dr. Ogrodnick that there was no causal relationship to her alleged 2014 work injury. The MRI studies between 2016 and 2017 showed no clinically relevant changes. The cyst at L3-4 showed no relevant changes (the original estimate on the 2016 MRI was of 3.4 x 2.4 mm, with another note suggesting 5 mm, versus 4 mm on the 2017 MRI). Regardless, Dr. D'Angelo indicated that size of cysts naturally increases with the degenerative changes to the spine, absent acute trauma. Neither Dr. Kawasaki nor Dr. Rauzzino compared the 2016 and 2017 MRIs. Dr. D'Angelo credibly testified that the present symptoms were consistent with the history of chronic, intermittent, and degenerative back pain (with a suggested genetic factor), and not consistent with an aggravation.

Claimant's history suggests a retaliatory motive in filing this claim. In February of 2014, Claimant had a dispute at UPS for which she filed an EEOC claim. Claimant had an ongoing allegation of work-related stress at the time she claims her August 19, 2014 lifting injury occurred. Claimant claims she did not file a claim or seek treatment due to fear of retaliation, despite having filed an EEOC claim and a claim for work-related stress. The contemporaneous medical records from 2014 refute Claimant's assertion that she had a work injury but support that she had a non-related back condition with exacerbations of non acute origin.

Likewise, Claimant's reporting of the December 4, 2016 work injury arose after she was denied time off to finish a school paper, due the following day. Claimant indicated that she had worked on the paper December 2, December 3, December 4 prior to work, and then left work early, finishing her paper after receiving December 5 off (contrary to her testimony). Claimant thereafter related her pain to a previous injury, and did not suggest a work-related mechanism of lifting/bending until her report to David Loya on December 16, 2016. Claimant's testimony is inconsistent with the documented history of the claim in evidence and, regardless, the documented history is not suggestive by a preponderance of the evidence that a work-related injury occurred on December 4, 2016 in the manner described.

Respondents are liable only for those medical benefits which are reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The record must distinctly reflect the medical necessity of any medical treatment needed to cure and relieve an injured employee from the effects of the industrial injury and any ancillary service, care, or treatment as designed to cure and relieve the effects of such industrial injury. *Public Service Co. of Colorado v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 584 (Colo. App. 1999). The question of whether medical treatment is reasonable and necessary is one of fact for determination by an ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Treatment for a work injury must not only be reasonable and necessary but must also be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Id*.; *see also Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). Causation is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint, supra*.

In the event of a compensable claim, Claimant's work-related condition returned to baseline and her ongoing symptoms are the result of a chronic, non-related condition. No further treatment is reasonable, necessary, or related.

ORDER

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

1. Claimant has failed to meet her burden of proof by a preponderance of the evidence that she suffered an aggravation of a preexisting condition, or otherwise a compensable injury, arising out of the course and scope of her employment on December 4, 2016. Claimant's claim for compensation is denied and dismissed.

2. In the event of a compensable injury, no further medical benefits are reasonable, necessary, or related to the December 4, 2016 work injury, for which Claimant has returned to baseline.

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

DATED: October 6, 2017

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

v OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-937-329-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 23, 2017 and August 21, 2017, in Denver, Colorado. The hearing was digitally recorded (reference:5/23/17, Courtroom 1, beginning at 1:30 PM, and ending at 4:00 PM; and, 8/21/17, Courtroom 1, beginning at 8:30 AM, and ending at 3:30 PM.).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a briefing schedule: Respondent's opening brief was filed, electronically, 0n August 28, 2017. Claimant filed a hard copy answer brief on September 5, 2017, despite the ALJ's directive at the conclusion of the last session of the hearing to file electronic briefs. The Claimant did not file an electronic brief until October 5, 2017, after being requested to do so by the Office of Administrative Courts. The matter was deemed submitted for decision on October 5, 2017.

ISSUES

The issues concern Respondent's request to overcome the Division Independent Medical Examination (DIME) of Joseph M. Morreale, M.D., concerning his opinion that the Claimant has not yet reached maximum medical improvement (MMI). If Respondent has overcome the DIME determination regarding MMI, then, whether the DIME erred in calculating the Claimant's degree of permanent .impairment. If the Respondent has not overcome the DIME determination regarding MMI, whether the Claimant has proven, by a preponderance of the evidence that the anterior cervical discectomy and fusion at C3-4 and C4-5 is reasonably necessary to treat her work injury;

On overcoming the DIME, the Respondent's burden of proof is "clear and convincing evidence."

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was born on October 5, 1965. She was 51 years old on the hearing dates.

2. On December 11, 2013, the Claimant was injured in a motor vehicle accident while in the course and scope of her employment for the Employer. Her work was as a utility worker. Her job involved maintaining and cleaning grounds and facilities in the parks and recreation district.

3. While heading west on 38th Street, the Claimant was T-boned by another vehicle and she sustained neck, whiplash injuries.

4. Two years later, on December 11, 2015, Robert Kawasaki ,M.D., the Claimant's authorized treating physician (ATP), placed her at MMI.(Respondent's Exhibit G, p. 56).

5. Dr. Kawasaki provided the Claimant with a 15% whole person impairment rating, including a 6% table 53 rating (*AMA Guides to the Evaluation of Permanent Impairment,* 3rd. Ed., Rev.) for the two-level cervical rhizotomies that were performed at C3-4 and 4-5. (*Id.*). Post-MMI maintenance medical treatment was to include pain medications and repeat rhizotomies if the pain returned after nine months. (*Id*.). Respondent filed its Final Admission of Liability (FAL), dated January 8, 2016, consistent with Dr. Kawasaki's report.

The Claimant's History, Post-injury

6. In April 2014, the Claimant began treating with ATP Dr. Kawasaki (Exhibit. 6, 4/29/14).

7. Early on, Dr. Kawasaki felt that the Claimant would be a surgical candidate (May 23, 2017 Hearing Transcript, hereinafter "T," p. 37, lns 6-9) due to hyperflexia and a positive Hoffman sign (T, p. 43: lns 12-20; T, p. 67:lns 22-25; p. 68:lns 1-11), as well as upper extremity paresthesia (T, p. 68:lns 3-5; T, p. 67: lns 22-25; p. 68: lns 1-11) and radiculopathy later shown on EMGs (T, p. 43: lns 21-24). Dr. Kawasaki was of the opinion that the Claimant had signs and symptoms of myelopathy with correlating MRI (magnetic resonance imaging) and EMG findings (T, p. 37: lns 10-13).

8. Dr. Kawasaki was of the opinion that the clinical findings of hyperflexia and positive Hoffman signs were most likely related to the MRI findings of spinal stenosis and cord compression at the C4-5 level (Claimant's Exhibit 6)..

9. In 2014, Dr. Kawasaki referred the Claimant to orthopedic surgeon Jeffrey Sabin, M.D. Dr. Sabin reported, "I feel that the patient would be in need of a C3-4 anterior cervical discectomy and fusion because of the current physical findings and symptomatology of tingling and paresthesis in her upper extremities" (Claimant Exhibit 4).

10. In a follow-up record review, Dr. Sabin added that if [Claimant] has a diagnostic response to facet blocks at C4-5 then the likely solution would be an ACDF procedure at that level (Claimant's Exhibit 4).

11. Pursuant to Dr. Sabin's recommendation, Dr. Kawasaki performed facet injections at the C4-5 level only (Claimant's Exhibit 6). The results were diagnostic.

12. Dr. Kawasaki thought it reasonable that the Claimant be seen by a second-opinion surgeon (Claimant's Exhibit 6). He referred her to orthopedic surgeon Bryan Castro, M.D.

Bryan Castro, M.D and ATP Fr. Kawasaki

13 In his initial evaluation, Dr. Castro reported that the Claimant had numbness and tingling in her arms, which was worse on the *left*, than on the right (Claimant's Exhibit 5). An addendum to the report stated that Dr. Castro felt that an anterior cervical discectomy and fusion at the C3-4 level would certainly be a reasonable consideration, though he wanted a new MRI first (Claimant's Exhibit 5, addendum).

14. The Claimant next saw Dr. Castro on January 5, 2015. Among other complaints, Dr. Castro reported that the Claimant had pain into the *left* upper extremity. Dr. Castro recommended staged injections, but he also stated, "if surgery were to be considered then a two-level ACDF would be a reasonable consideration secondary to degenerative changes seen at C3-4 and C4-5"(Claimant's Exhibit 5, Castro 1/5/15).

15 On February 20, 2015, Dr. Kawasaki performed left C3-4 and C4-5 epidural steroid injection /spinal nerve root block for "*Left* C4 and C5 radiculopathy (Claimant's Exhibit 7).

16. On March 10, 2015, Dr. Kawasaki performed EMGs on the Claimant's *left* side only, which was indicated for "numbness and tingling into the *left* arm and myelopathic findings after MVA." The results were abnormal between C2 and C4. (Respondent's Exhibit G, pp. 38-39). Dr. Kawasaki's diagnoses on that date included "cervical spondylosis with clinical findings for positive upper motor neuron signs with hyperflexia and positive Hoffman signs;" and "C4-5 spinal stenosis with significant myelopathy extending from this level" (Respondent's Exhibit G, p. 35).

17. The Claimant returned to Dr. Castro on April 20, 2015. Dr. Castro wrote that "globally speaking" he did not think the Claimant was a good operative candidate, "However, with upper cervical EMG findings as well as trapezial pain this certainly could fit a C4 or C-5 radiculopathy. I think this is a reasonable consideration." Dr. Castro recommended rhizotomies, but also stated:"Alternatively surgical intervention via an ACDF at some point is a reasonable consideration" (Claimant's Exhibit 5). At the visit as well Dr. Castro recorded that the Claimant had pain in her arms, particularly on the left.

18. On May 13, 2015, Dr. Kawasaki wrote that the Claimant had increased pain with paresthesias in the left upper extremity with Spurling's test (Claimant's Exhibit 7).

19. On June 5, 2015 and again on July 31, 2015, the Claimant underwent bilateral medial branch blocks at C3-4 and C4-5. The results were diagnostic (Claimant's Exhibit 7).

20. The Claimant then proceeded to bilateral rhizotomies at C3-4 and C4-5 on August 28, 2015 (Respondent's Exhibit G, p. 44; Claimant's Exhibit 7).

21. Before the rhizotomies, the Claimant had reported her pain level as 7; she was taking hydrocodone and gabepentin; and her work restrictions were no lifting over 20 pounds. According to the Claimant, she had intense pain in her neck causing headaches; that sunlight would intensify it; she had pain in her shoulders, tingling in her arm; she could not bend over or lift; and, she could not sit, stand or walk for a long time.

22. The rhizotomies were successful in reducing the Claimant's pain and improving her function. They were still in effect as of December 11, 2015 when Dr. Kawasaki placed the Claimant at MMI (Respondent's Exhibit G, pp. 55-59). At MMI, the Claimant reported her pain as zero at rest, 2 with normal activities and 4 with increased activities (Respondent's Exhibit G, p. 56). Her medications were ibuprofen and lidoderm patches. *Id.*

23. Dr. Kawasaki found 10% ROM impairment and assigned 6% from Table 53. His combined rating was 15% whole person. Respondent filed a FAL, admitting for the 15% rating as well as all post-MMI reasonable, necessary, and related medical benefits (Respondent's Exhibit B, p.5).

The Claimant

24. At the time the Claimant was placed at MMI by Dr. Kawasaki, she requested that all work restrictions be removed. The reason for her request was that she was feeling good and she wanted to work. Her occupational physician at Denver Health complied, but ATP Dr. Kawasaki provided permanent restrictions of lifting 50 pounds occasionally, 25 pounds frequently.

25. In January 2016, the Claimant became employed as a custodian for the Denver Public Library. Dr. Kawasaki had signed off on her job description initially, indicating that she had permanent restrictions of 50 pound occasional lift, push and pull (Claimant's Exhibit 8).

26. After working approximately one month at the new job, however, the Claimant was "let go" due to her permanent restrictions. An ADA (Americans with Disabilities Act) process was initiated, which eventually concluded that the Claimant was "disqualified" due to the absence of any position consistent with her restrictions and qualifications. The Claimant has not worked since January 2016.

27. On March 11, 2016, about three months after Dr. Kawasaki's MMI date, the Claimant returned to Dr. Kawasaki (Respondent's Exhibit G, pp. 60-62; Claimant's Exhibit 8). She requested that she be returned to Dr. Sabin for surgical evaluation. The Claimant was looking for a more permanent solution, in that the pre-MMI rhizotomies had begun to wear off and she could feel the pain returning. Dr. Kawasaki declined to make the referral on the ground that she was still doing well.

Division Independent Medical Examination by Joseph Morreale, M.D.

28 Previously, the Claimant had timely objected to Respondent's FAL and had requested a DIME. She was seen by DIME physician Dr. Morreale on May 6, 2016. Dr. Morreale is a spine surgeon (T, p. 36:lns 21-23). Dr. Morreale recommended an anterior cervical discectomy and fusion (hereinafter "ACDF") at C3-4 and C4-5 before

placing the Claimant at MMI, if the patient wished to proceed with surgery (Respondent's Exhibit E, p. 19).

29. According to the Claimant, as of the time she was evaluated by Dr. Morreale, her rhizotomies had worn off and her pain had returned. She felt as bad as she had felt before the first rhizotomies.

30. According to Dr. Kawasaki, Dr. Morreale's recommendation of surgery, and the more limited range of motion found by him, reflected that the Claimant's condition had worsened as of the May 6, 2016 date of the DIME appointment (T, p. 63: lns 17-25; p. 64: lns 1-4).

31. Regarding Dr. Morreale's provisional impairment rating, Dr. Kawasaki disagreed only with the 7% Table 53 rating. Dr. Kawasaki stated it should have been 6%, so that the total combined rating would have been 24% (T, p. 65: lns 19-25).

32. The Claimant returned to Dr. Kawasaki in June 2016. On June 27, 2016, she described herself as miserable (Respondent's Exhibit G, p. 69), which was attributable, according to Dr. Kawasaki, to the re-growth of her medial branch nerves (T, p. 45: lns 22-25; p. 46 : lns 1-2). On account of her worsening condition as well as DIME Dr. Morreale's recommendation, Dr. Kawasaki referred the Claimant back to Dr. Sabin (T, p. 46: lns 3-9).

Jeffrey Sabin, M.D.

33. The Claimant saw Dr. Sabin on July 22, 2016. Dr. Sabin mistakenly believed that the Claimant's C4-5 level had never been treated (Respondent's Exhibit H, p. 102). In fact, the C4-5 level had been treated with stand-alone facet injections (Claimant's Exhibit 6); a spinal nerve root block for left C4 and C5 radiculopathy (Claimant's Exhibit 7); medial branch blocks (Claimant's Exhibit 7); medial branch blocks again (Claimant's Exhibit 7; Respondent's Exhibit G, p. 41); and rhizotomies (Claimant's Exhibit 7; Respondent's Exhibit G, p. 44). Dr. Sabin recommended repeat rhizotomies.

34. Dr. Sabin had previously observed that the Claimant had had excellent relief from her previous rhizotomies but now her pain had returned (Respondent's. Exhibit H, p. 102). Despite the Claimant's increased pain, Dr. Sabin reported that the Claimant's cervical range of motion was normal. According to the Claimant, Dr. Sabin never examined her for ROM. Dr. Sabin's report is at odds with DIME Dr. Morreale's recent 19% measured ROM impairment (as well as Dr. Kawasaki's earlier 10% ROM impairment, when the initial rhizotomies were still in effect).

35. The Claimant had understood from her appointment with Dr. Sabin that he could not do surgery because the Respondent had not accepted all the (cervical) "levels" involved. In his first, 2014 report, Respondent's Independent Medical Examiner

(IME), Brian Reiss, M.D. had stated that the C4-5 level was not related to the accident (Respondent's Exhibit F, p. 30).

Return to ATP Dr. Kawasaki and Referral to Gary Ghiselli, M.D.

36. The Claimant returned to Dr. Kawasaki two weeks after Dr. Sabin's appointment. At that time, Dr. Kawasaki supplemented her pain relief with a prescription for Tramadol (Respondent's Exhibit G, p.74; Claimant's Exhibit 8). Pursuant to Dr. Sabin's recommendation, the Claimant enquired with Dr. Kawasaki about repeat rhizotomies, and he referred her to another surgeon, Gary Ghiselli, M.D. As the Claimant understood it, Dr. Kawasaki made the referral to surgeon Dr. Ghiselli "for his own purposes."

37. In his August 5, 2016 note discussing his referral to Dr. Ghiselli, Dr. Kawasaki wrote that previously Dr. Castro had been against surgery. He later acknowledged in his testimony that he had been mistaken regarding Dr. Castro's opinion (T, p. 19: lns 16-19; T, p. 35: lns 15-25; p. 36: lns 1-15).

38. Respondent denied authorization of Dr. Kawasaki's referral to Dr. Ghiselli (Claimant's Exhibit 10). In the course of its denial, Respondent repeated Dr. Kawasaki's erroneous statement regarding Dr. Castro's opinion. Respondent also stated, "If Dr. Kawasaki is making the referral because [Claimant] wants the surgery, she has the option of seeking her own opinion (and paying for it). If that physician wants to do surgery, she can choose to do the surgery under her own insurance and litigate it through the worker's compensation system."

39. The Claimant next saw Dr. Kawasaki on November 11, 2016, at which time he told her that his referral to surgeon Dr. Ghiselli had been denied (Respondent's Exhibit G, p. 81-82; Claimant's Exhibit 8). Since surgical referral had been denied, the Claimant requested repeat rhizotomies.

40. Also on November 11, 2016, the Claimant again described herself as miserable. She had obtained prescriptions for Notriptyline, Cyclobenzaprine and Etodolac from her personal physician. Her personal physician referred her to the surgical department, but the Claimant was unable to make an appointment with a surgeon under her personal insurance because her injury was considered work-related.

41. Two months later, on January 20, 2017, the Claimant saw Dr. Kawasaki (Respondent's Exhibit G, p. 78-79; Claimant Exhibit 9). He wrote that she was frustrated and felt that she was not being treated appropriately. According to the Claimant, she felt she wasn't getting any help. She understood that Dr. Kawasaki could see that she was in pain. She needed to know if she could undergo surgery but she was not able to see a surgeon; she wanted to know about repeat rhizotomies but nothing had been done about that. At that point, Dr. Kawasaki requested repeat rhizotomies.

42. On February 13, 2017, the Claimant underwent a Functional Capacity Evaluation (FCE), at her request. The therapist concluded that the Claimant was unable to work at all due to variable and very short tolerances (See Claimant's Exhibit 3, p. 2 of 22, ¶ 5). The Claimant testified that her condition as documented by the FCE had been her condition for many months before that.

43. According to Dr. Kawasaki, the FCE was probably a valid reflection of her function at the time (T, p. 29:lns 22-25; p. 30: ln 1). He also stated that the 50-pound permanent restriction he imposed at MMI had no longer been operative, in that the Claimant's pain had gone up and her function declined (T, p. 40: lns 5-18). At no time after the Claimant's pain returned would he have approved a job for the Claimant lifting 50 pounds (T, p. 62: lns 2-7).

44. In his written reports, Dr. Kawasaki never changed the Claimant's permanent restrictions. The Claimant understood that the reason he believed he could not change them was because they were "permanent."

45. Repeat rhizotomies were done on each side on separate dates, with the second procedure done on May 12, 2017 (T, p. 25:lns 13-14). As of the second, August 21, 2017 hearing date, about three months after the last procedure, the Claimant was still doing well, but she could feel the pressure returning.

46. After the repeat rhizotomies, Dr. Kawasaki referred the Claimant for physical therapy (PT). His hope was to increase her function so that in the long run she may be able to return to lifting 50 pounds (T, p. 39: lns 1-10). According to the Claimant the PT was helping her. She had not yet began exercises to increase her lifting capacities.

47. According to Dr. Kawasaki, his final MMI date was contingent on whether or not the Claimant underwent the ACDF procedure (T, p. 41:lns 4-7).

48. The Claimant wanted the surgery recommended by DIME Dr. Morreale. She explained that the rhizotomies wear off, and she needs a more permanent solution.

Respondent's Independent Medical Examiner (IME), Brian Reiss, M.D.

49. At the request of Respondent, Dr. Reiss evaluated the Claimant twice, in 2014 and in 2016 (Respondent's Exhibit F).

50 Dr. Reiss did not agree with the surgical recommendation. He did not believe the Claimant had any myelopathy, or radiculopathy. He stated that the levels selected for surgery (C3-4 and C4-5) were arbitrary and speculative, in that the pain generators had not been identified, as required by the Medical Treatment Guidelines (MTG). He stated the opinion that the surgery would not help and could hurt. He recommended a better exercise and conditioning program and perhaps medication modification.

51. Dr. Reiss testified that Dr. Kawasaki's diagnosis of myelopathy was pure speculation, on the ground that Dr. Kawasaki relied solely on hyperflexia in support of his diagnosis. The ALJ finds that this is not correct. In addition to hyperflexia, in support of his diagnosis of myelopathy, Dr. Kawasaki also identified positive Hoffman's signs and upper extremity paresthesia (T, p. 67: lns 22-25; p. 68 : lns 1-11) as well as the MRI (T, p. 37: lns 10-13; also, Claimant's Exhibit 6).

52. According to Dr. Reiss, while it was appropriate for Dr. Kawasaki to perform rhizotomies at the C3-4 level, the rhizotomies at the C4-5 level were performed in the absence of adequate information. Specifically, Dr. Reiss testified that Dr. Kawasaki was missing diagnostic information regarding the C4-5 level, which he could have obtained had he performed facet injections or medial branch blocks at the C4-5 level alone (instead of at the same time as at the C3-4 level).

53. In fact, facet injections were done at C4-5 alone (Claimant's Exhibit 6). In rebuttal, after this information was presented, Dr. Reiss significantly revised his testimony. He then contended that facet injections are not sufficiently diagnostic. This is internally contradictory within Dr. Reiss' testimony. Dr. Kawasaki had been following Dr. Sabin's recommendation to perform facet injections at C4-5 to aid in diagnosis of the C4-5 level for surgery (Claimant's Exhibit 4). The ALJ finds that Dr. Reiss' testimony in this regard lacks credibility.

54. Dr. Reiss testified that it was somewhat speculative for anyone to chose C3-4 and C4-5 as the levels at which a surgical procedure would be appropriate. He was unwilling to state whether the recommendation and/or performance of "speculative" surgery was medical malpractice.

55. When asked specifically whether the identification of those two levels by treating surgeon Dr. Castro was "speculative or arbitrary," Dr. Reiss shifted his direction and claimed that the facts had changed after Dr. Castro's recommendations. Specifically, Dr. Reiss contended that at the time she was seen by Dr. Castro, the

Claimant was complaining of *right* upper extremity (RUE) symptoms, but that after her visits with Dr. Castro, her complaints switched to the *left*.

56. Again, Dr. Reiss' factual predicate is inaccurate. At each of the three appointments with Dr. Castro, the Claimant had complained of *left* upper extremity symptoms (Claimant's Exhibit 5). In addition, as stated, during the same time period, namely on February 20, 2015 and on March 10, 2015, Dr. Kawasaki performed procedures and testing on the **left** on account of **left-**sided upper extremity symptoms (Claimant's Exhibit 7).

57. Dr. Reiss wrote in his 2016 report that he would agree with Dr. Castro that surgical intervention is *not* indicated here (Respondent's Exhibit. F, p. 24). Dr. Castro's opinion, as stated in Dr. Castro's records, is that surgical intervention *is* indicated here. There is no documentation in any report written by Dr. Reiss that he had reviewed any of Dr. Castro's records. In rebuttal Dr. Reiss contended he had reviewed Dr. Castro's reports before his hearing testimony, even if his report does not mention he reviewed them at that time. The ALJ finds that this is one more anomaly detracting from dr. Reiss' overall credibility.

58. Similarly, Dr. Reiss stated that Dr. Sabin's identification of the C4-5 level as one of two levels for surgery was speculative. Dr. Reiss could not adequately support his opinion of "speculative."

59. As he had stated in his written report, in which he described Dr. Morreale's proposed surgery as "arbitrary" (Respondent's Exhibit F, p. 24), Dr. Reiss stated that DIME Dr. Morreale's selection of the C3-4 and C4-5 levels as the areas for surgery was speculative and arbitrary. It was his opinion that the surgery proposed by DIME Dr. Morreale was unlikely to improve the Claimant's condition and may well make her worse (*see also* Respondent's. Exhibit F, p. 24).

60. Dr. Reiss, however, was unwilling to characterize Dr. Morreale's opinion as so lacking in medical foundation so as to be beneath the medical standard of care. Instead, he claimed that Dr. Morreale saw the patient before she had had facet rhizotomies; but that, according to Dr. Reiss, after the DIME evaluation, the Claimant had left-sided rhizotomies which resolved her left-sided symptoms and left her with only right-sided symptoms. The implication was that Dr. Morreale's opinion was no longer operative, because the facts had changed. None of this after-the-fact theory appears in Dr. Reiss' written report.

61. The ALJ finds that Dr. Reiss' factual predicates are not accurate. In fact in his earlier testimony Dr. Reiss acknowledged that the Claimant had had rhizotomies before seeing DIME Dr. Morreale on May 6, 2016 (Respondent's Exhibit. G, p. 44). For example, Dr. Reiss agreed with Dr. Sabin's statement that the Claimant had had excellent relief from her first rhizotomies but the pain had worn off. Dr. Reiss' report

documented also the Claimant's history to that effect (Respondent's Exhibit F, p. 25). Dr. Reiss was also present when Dr. Kawasaki testified that at the time the Claimant saw DIME Dr. Morreale on May 6, 2016, the effects of those first rhizotomies had worn off (T, p. 63: lns 17-25; p. 64: lns 1-4).

62. In addition, on both occasions, rhizotomies were done on both sides. The first, August 2015 rhizotomies were done on both sides in the same procedure. The second rhizotomies were done on both the left and on the right, but on two separate dates–on the left on March 17, 2017, and then on the right, on May 12, 2017 (T, p. 25: lns 13-16).

63. In summary, there is no persuasive evidence supporting Dr. Reiss' testimony that rhizotomies were only performed on the left; or that they were done only after the DIME appointment; or that the Claimant persisted with right-sided pain.

64. Dr. Reiss also questioned the validity of Dr. Morreale's report of a positive Spurling's test on exam.

65. Dr. Reiss acknowledged that when he saw the Claimant in November 2016, she looked like she was in pain. Nonetheless he was only willing to acknowledge that it was possible the Claimant's function was diminished by pain; he maintained only that it was "possible," it would be appropriate, when a patient's function diminishes, to change her restrictions. The Claimant had testified that she had to push herself to get off the couch; that traveling to medical appointments left her "done" for the day.

66. Dr. Reiss stated that he administered the same psychological screening tests at each of his two appointments, in 2014 and again in 2016. He testified that his results were "odd" because they diverged from "concerning" in 2014 to "zero" in 2016. Dr. Reiss, however, nowhere documented in his 2016 report that he administered any psychological tests, as he had in 2014 (Respondent's Exhibit F, p. 33). The Claimant testified that Dr. Reiss had administered psychological tests on a tablet in 2014, but not in 2016. In this regard, the ALJ finds the Claimant more credible than Dr. Reiss.

67. Finally, Dr. Reiss testified that he doesn't recommend rhizotomies because they lose their effectiveness. He doesn't recommend them more than twice because they don't tend to work more than a couple of times. Instead he recommends a different and better rehabilitation program. He did not know whether the Claimant was at MMI because he didn't know how she was doing now.

Claimant's Independent Medical Examiner (IME), David Yamamoto, M.D.

68 At the request of the Claimant, Dr. Yamamoto evaluated the Claimant on March 15, 2017(Claimant's Exhibit 2).

69. Dr. Yamamoto testified that there was a concern by several physicians about myelopathy. In fact, Dr. Kawasaki was hesitant to even perform rhizotomies due to the concern that the instability associated with rhizotomies could worsen the Claimant's myelopathic findings. Dr. Sabin was also concerned about myelopathy. In his 2014 report, Dr. Sabin discussed the tingling and paresthesia which he had found on his exam, and the myelopathy shown on the MRI; these factors formed the basis of Dr. Sabin's 2014 recommendation of an ACDF procedure, initially at C3-4.

70. Dr. Yamamoto was of the opinion that the combination of the MRI evidence in conjunction with the clinical evidence of myelopathy–namely hyperflexia and positive Hoffman's test–were worrisome. A person who performs physical labor is more at risk for progression of her myelopathy. Dr. Yamamoto cited Dr. Kawasaki's concern that the Claimant should avoid any kind of manipulation to the neck because of her condition, as reflective of the proposition that any stress on the neck, by, for example, performing physical labor, put the Claimant at risk.

71. Dr. Yamamoto stated that the pattern of the Claimant's arm numbness would fit myelopathy, even though it did not fit radiculopathy.

72. Dr. Yamamoto was of the opinion that successful rhizotomies do not indicate that the Claimant does not have myelopathy because these are two separate issues. He noted that Claimant's arm numbness had persisted despite the rhizotomies.

73. Dr. Yamamoto stated the opinion that there is a relationship between Dr. Kawasaki's identification of C3-4 and C4-5 as pain generating levels for the purpose of rhizotomies, and Dr. Morreale's identification of the same levels for surgery. In this connection, Dr. Yamamoto noted that the predominant findings on the MRI were at those levels, and that all the authorized treating providers referred to those levels when discussing surgery.

74. Dr. Yamamoto testified that Dr. Sabin's error in believing that the Claimant's C4-5 level had never been treated–when it had been treated with facet injections, medial branch blocks, and rhizotomies–indicated either he had not been provided with the Claimant's records or he had not reviewed them. Dr. Yamamoto found it to be not believable when Dr. Sabin wrote that the Claimant's ROM was normal. This is because Dr. Sabin's evaluation occurred shortly after the DIME evaluation, when the Claimant had a marked decrease in cervical range of motion; and after it had been documented that the Claimant had a fairly high pain level and was not doing well at the time.

75. Dr. Yamamoto was of the opinion that Dr. Sabin's evaluation in 2016 was not adequate to answer the question as to whether the Claimant was a surgical candidate. He agreed with treating physician Dr. Kawasaki that the Claimant should be

referred for another surgical evaluation. He supported Dr. Kawasaki's referral to surgeon, Dr. Ghiselli.

76. When Dr. Yamamoto saw the Claimant in March 2017, she was not doing well. His own assessment matched that of the FCE evaluator one month earlier, in that, the Claimant was not able to work.

77. Dr. Yamamoto was of the opinion that the Claimant's condition was not stable when she was placed at MMI. She deteriorated quite quickly. Only three months after the MMI date, in March 2016, she asked for more treatment.

78. In response to the ALJ's question," Is it your ultimate opinion that the Claimant is not at MMI? Dr. Yamamoto testified, "My opinion is that she is not at MMI."

Ultimate Findings

79. For the reasons articulated herein above, the ALJ finds the opinions of DIME Dr. Morreale, IME Dr. Yamamoto, and ATP Dr. Kawasaki considerably more credible than the opinions of IME Dr. Reiss and referral physician, Dr. Sabin. The ALJ further rinds than any opinions contrary to DIME Dr. Morreale's opinion that the Claimant is not at MMI, amount to a mere difference of opinion which does **not** make it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Morreale's opinion concerning MMI is erroneous. Further, it is more likely than not that DIME Dr. Morreale's surgical recommendation is correct. Additionally, the ALJ finds the Claimant's testimony persuasive, straight-forward and credible,

80. Between conflicting medical opinions, the ALJ makes a rational decision, based on substantial evidence, to accept Dr. Morreale's DIME opinion on MMI and his surgical recommendation, as well as Dr. Yamamoto's opinions, and to reject all opinions to the contrary.

81. The Respondent has failed to prove that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Morreale's opinion concerning MMI is wrong. Therefore, Respondent has failed to carry its burden on this issue by clear and convincing evidence.

82. The Claimant has proven that it is more likely than not that the surgery recommended by DIME Dr. Morreale is reasonably necessary to cure and relieve the effects of her admitted injury; and, causally related thereto. Further, the Claimant has proven, by preponderant evidence that further medical treatment for the effects of her admitted injury is causally related thereto and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the opinions of DIME Dr. Morreale, IME Dr. Yamamoto, and ATP Dr. Kawasaki were considerably more credible than the opinions of IME Dr. Reiss and referral physician, Dr. Sabin. As found, any opinions contrary to DIME Dr. Morreale's opinion that the Claimant is not at MMI, amount to a mere difference of opinion which did **not** make it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Morreale's opinion concerning MMI was erroneous. Further, as found, it is more likely than not that DIME Dr. Morreale's

surgical recommendation is correct. Additionally, as found, the Claimant's testimony was persuasive, straight-forward and credible,

Substantial Evidence

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

Overcoming DIME Dr. Morreale's Opinion on MMI

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable

or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, Respondent failed to prove that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Morreale's opinion concerning MMI is wrong. Therefore, Respondent has failed to carry its burden on this issue by clear and convincing evidence. The Claimant is **not** at MMI.

Surgical Recommendation of DIME Dr. Morreale

d. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the admitted injury of December 11, 2013. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the admitted injury, including the surgery recommended by DIMEDr. Morreale.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir.

2001). “Preponderance” means “the existence of a contested fact is more probable than its nonexistence.” *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden, by a preponderance of the evidence with respect to the surgery recommended by DIME Dr. Morreale and continued medical care and treatment at the hands of her ATPs.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent having failed to overcome the Division Independent Medical Examination opinion of Joseph Morreale, M.D. that the Claimant is not at maximum medical improvement, the Claimant is entitled to continuing benefits to improve her condition.

B. Respondent shall pay the costs of medical care and treatment for the Claimant’s admitted injury of December 11, 2013, including the surgery recommended by Dr. Morreale, subject to the Division of Workers’ Compensation Medical Fee Schedule.

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

DATED this_____day of October 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2017, electronically in PDF format, addressed to:

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

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

STIPULATION

Prior to the commencement of hearing, the parties stipulated to an average weekly wage (AWW) of $1,191.07. The stipulation is hereby approved.

REMAINING ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits for days of work she alleged to have missed due to her diagnosis of latent tuberculosis?

II. Whether Claimant proved by a preponderance of the evidence that her medical insurance provider(s) are entitled to reimbursement pursuant to Section 8-42-101(6)(a) for medical expenses related to her tuberculosis treatment?

III. Whether Respondents proved by a preponderance of the evidence that Dr. Daniel Olson is an authorized treating physician (ATP)?

FINDINGS OF FACT

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

1. Claimant is a Registered Nurse (RN). She has worked at a number of Centura Health System hospitals over the course of her career, including a stint at St. Mary Corwin Hospital (St. Mary-Corwin). Claimant testified that as a healthcare worker, she was routinely tested for tuberculosis (TB) by her employer, including St. Mary Corwin which operates under the Centura Health System umbrella.

2. On May 19, 2014, Claimant completed an annual TB screening form for Centura Health as part of her St. Mary Corwin employment. She testified that she signed and dated the form and acknowledged that she had not had any signs or symptoms of active TB including "unexplained fever, persistent cough for more than two months, coughs up blood, recurrent night sweats, unexplained weight loss."

3. On August 13, 2014, Claimant provided a blood sample for TB testing. The sample was analyzed and determined to be positive for TB. For unknown reasons, Claimant's test results were not made clear to her before she left the employ of St. Mary Corwin. Rather, she became aware of her positive test results as part of the new employee on-boarding process at Memorial Hospital which she initiated toward the end of January 2016. As part of her new employee on-boarding process, Claimant completed a tuberculin screening form on January 27, 2016. On the completed form,

Claimant checked the box expressly denying any symptoms associated with TB such as a "productive, prolonged cough (over three weeks duration), fever, chills, night sweats, easy fatigability, loss of appetite, unplanned weight loss or bloody sputum." Claimant also provided a blood sample for TB testing on this date which returned a positive result. Claimant was subsequently notified of her positive result by correspondence dated February 1, 2016.

4. Upon learning that she had been exposed to TB and had a positive test result, Claimant filed a worker's compensation claim against the Centura Health System which, as noted above, includes St. Mary Corwin on February 5, 2016. Claimant also underwent a chest x-ray on this date at Memorial Hospital PPMP employee health. The chest x-ray showed "no evidence of frank pulmonary edema, consolidation, pleural effusion, or pneumothorax" consistent with active TB. Claimant was assessed with latent (inactive) TB and instructed to follow-up with her primary care physician (PCP).

5. After filing her claim, Claimant testified that she was directed to Centura Centers for Occupational Medicine (CCOM) where she saw, but was not treated by, Dr. George Johnson on February 12, 2016.

6. During her February 12, 2016 appointment with Dr. Johnson, Claimant again expressly denied chronic cough, night sweats, bloody sputum, or shortness of breath. She denied weight loss or fevers. She denied feeling sick. She indicated that she was not aware of any exposure to a patient who had active TB. Dr. Johnson noted that her February 5, 2016, chest x-ray was normal. He diagnosed "seroconversion of tuberculosis" from an unknown source. While he agreed that Claimant needed treatment to "decrease her risk of developing tuberculosis", he noted that it was "not known how she was exposed." The ALJ interprets the February 12, 2016 note of Dr. Johnson to indicate that he did not believe that Claimant's TB was causally related to her work activities. Consequently, Dr. Johnson advised Claimant that she needed to treat with her "private care doctor."

7. On February 24, 2016, Claimant presented to her new PCP, Dr. Jena Reichelt. During her appointment with Dr. Reichelt, Claimant reported that she had had a positive TB test, but a negative a chest x-ray. Claimant did not report any symptoms associated with TB. Once again, she denied changes in weight, fevers, chills, coughing, or difficulty breathing. Moreover, she did not report fatigue, general malaise, or night sweats. Dr. Reichelt did not take Claimant off of work. Rather, she referred her for an infectious disease consult with Dr. Thomas Hackenberg. Dr. Hackenberg would start Claimant on a course of antibiotics (Rifampin), which would take four months to complete.

8. Respondents filed a "Notice of Contest" denying liability for Claimant's TB on April 5, 2016. The asserted basis for the denial was that Claimant's injury/illness was not work related.

9. On April 20, 2016, Dr. Hackenberg authored a "Progress Note" wherein he noted the reason for Claimant's visit was due to a positive TB screen and that her primary complaint was "anxiety" He also noted that Claimant had "no known TB illness," but in 2012 Claimant had been diagnosed with pertussis and missed a month of work.[1] According to his medical report Claimant denied any weight loss and fever but she noted some night sweats and a sporadic cough for the past few weeks. A review of systems was completed and noted to be negative despite Claimant's report of a "mild daily cough *lately*" (emphasis added). After careful review of the record evidence, the ALJ finds Dr. Hackenberg's April 20, 2016 report to be the first time Claimant complained of a cough and night sweats that she attributes to her latent TB.

10. Claimant testified that she finished her course of Rifampin on or around July 20, 2016. She also testified that her symptoms, particularly her fatigue and night sweats worsened with time. Nonetheless, she acknowledged that she had not been excused from work as a consequence of these asserted symptoms.

11. Dr. Jeffery Schwartz from Colorado Pulmonary Associates, P.C. performed an independent medical examination (IME) at Respondent's request on December 17, 2016. During the IME, Claimant indicated that she took Rifampin as prescribed by Dr. Hackenberg on a daily basis. She reported feeling well since completing the Rifampin, but had stress related to her TB exposure and her risk of recurrence despite having completed treatment.[2] Dr. Schwartz opined that since Claimant had no specific exposure outside of work, it was more likely that Claimant's latent TB was work related. He noted that Claimant was appropriately treated for her dormant TB with four months of Rifampin as prescribed by Dr. Hackenberg.

12. In the questionnaire Claimant completed before her IME with Dr. Schwartz, she reported that she had night sweats, fatigue and general malaise (worse after completing antibiotic treatment) beginning in 2015 and continuing into 2016.

13. Following Dr. Schwartz' IME, Insurer filed a General Admission of Liability on April 5, 2017, for medical benefits only, admitting that Claimant's latent TB was a work related condition.

14. In a follow-up letter issued on May 19, 2017, Dr. Schwartz explained the nature of the symptoms associated with of latent TB. In his letter, Dr. Schwartz reiterated that Claimant had latent TB that had been treated appropriately. He explained that people infected with TB which subsequently prompts, but is controlled by the body's immune system are rarely aware that they have been infected. Regarding

[1] A report dated September 25, 2012 from Claimant's PCP, Dr. Thomas Johnson reveals that she presented to the office with a chief complaint of coughing for five days. According to the note, Claimant had not felt well for 12 days, the last five of which included her having chills, nausea and a moist non-productive cough. Claimant was prescribed Azithromycin. Based upon the specific assertions in this case and the evidence presented, the ALJ finds and concludes that this episode of coughing is unrelated to Claimant's current TB diagnosis.

[2] As noted, Claimant reported anxiety associated with her positive TB test when she was seen by Dr. Hackenberg on April 20, 2016. She also reported having more headaches related to stress which caused her to miss work.

the symptoms related to the initial infection, Dr. Schwartz noted: A patient first infected with TB may have symptoms, consisting of low grade fever and fatigue as a result of their immune response to the infection, which would occur 1 to 2 weeks after their initial exposure and lasting and additional 1-2 weeks. Dr. Schwartz would go on to opine that it would not be consistent in a course of latent TB for a patient to experience symptoms every few months, reiterating that any symptoms associated with a latent TB infection would only occur within the first few weeks after the exposure.

15. Dr. Schwartz noted that Claimant's positive test, in the absence of active TB, signified that she had a prior exposure to TB resulting in an immune response which controlled the initial infection causing it to become inactive, or latent. The ALJ interprets Dr. Schwartz' report/opinions to indicate that while Claimant is infected with live tuberculin bacteria, those bacteria are inactive. Hence she has a positive blood test result but no active disease. Patients falling into this category are diagnosed with "latent" TB. Such patients are asymptomatic and not contagious, unless these organisms become active to produce "active" TB disease related symptoms.

16. Similar to the assertions Claimant included in the questionnaire she completed prior to her IME with Dr. Schwartz, Claimant testified that in hindsight she had symptoms she associated with TB. Specifically, she testified that she had experienced the following symptoms: (1) night sweats; (2) excessive fatigue; (3) general malaise; (4) periodic fevers; and (5) periodic cough. She did not include in her list of symptoms associated with TB, migraine headaches or diarrhea. Rather, Claimant testified that she missed work and had a wage loss because of the aforementioned TB symptoms. Accordingly, she asserts entitlement to temporary total disability (TTD) benefits for 12.5 hours of work per day for the following days: August 7, 2014, October 16, 2014, February 11, 2015, April 2, 2015, April 22-23, 2015, July 22, 2015, September 3, 2015, October 1, 2015, October 27, 2015, October 28-30, 2015, January 16, 2016, February 5, 2016, February 12, 2016 and March 8, 2016.

17. The evidentiary record in this case demonstrates that Claimant had medical appointments for dates of service which span many of the dates she claims TTD for. Specifically, the record demonstrates that Claimant was evaluated multiple times between February 5, 2015 and January 20, 2016. Careful inspection of these records reveals the following:

- On February 5, 2015, Claimant presented to her primary care physician, Dr. Thomas Johnson, for her annual physical. She indicated that her health since her last visit over a year ago was good. She did not report unexplained fevers, fatigue, general malaise, or night sweats

- On February 10, 2015, Claimant completed an annual TB screening form, this time for Penrose St. Francis Hospital, which also operates under the Centura umbrella.[3] Again, she indicated that she had not had any signs or symptoms

[3] Based upon review of the available records, it does not appear that Claimant actually underwent any TB blood testing at this time.

associated with TB including unexplained fever, persistent cough, coughing up blood, recurrent night sweats, or unexplained weight loss.

- On May 27, 2015, Claimant returned to Dr. Thomas Johnson, for a follow-up regarding her borderline hypertension. She reported that her health was very good. She did not report unexplained fevers, fatigue, general malaise, or night sweats.

- On September 21, 2015, Claimant returned to Dr. Thomas Johnson, to complete FMLA paperwork as a consequence of continued migraine headaches. She reported that she was increasingly sensitive to light, sound, and even smells. She was unable to use a computer screen. She had had headaches since she was nine years of age. She reported that the headaches were affecting her work and that she had missed two days that year already because of the headaches. She reported that her triggers were nitrates in meat, red wine, and some other foods. She did not report unexplained fevers, fatigue, general malaise, or night sweats as a reason she needed time off. As noted above, Claimant did not attribute her headaches to TB.

- On October 28, 2015, Claimant presented to Dr. Johnson for complaints of diarrhea; she was concerned that she had a parasite. Claimant reported that she had had abdominal pain and cramping with diarrhea that developed during a trip she had taken to Reno, Nevada. She reported that she was at a party where several other people were taken ill with gastrointestinal illness. The diarrhea had persisted since October 24. She did not report unexplained fevers, fatigue, general malaise, or night sweats associated with her symptoms of diarrhea and as noted above, did not attribute her bout of persistent diarrhea with her TB diagnosis at hearing. Dr. Johnson took Claimant off work form October 27th through October 30th due to her diarrhea and not because of complaints of or symptoms consistent with TB.

- On January 20, 2016, Claimant returned to Dr. Johnson for her annual physical. She reported muscle spasms of the neck and classic migraine with aura. She indicated that she had not had any trouble falling asleep, feeling tired, or having little energy. Consistent with her statement that her health was good her physical examination is devoid of any specific medical problems/complaints other than that Claimant was overweight. There was no report of unexplained fevers or night sweats.

18. The medical evidence presented strongly contradicts Claimant's assertion that she missed multiple days of work after her positive TB test because she was (in hindsight) experiencing symptoms associated with TB. Based upon the medical record, the ALJ finds that Claimant likely has dormant TB which has never developed into a symptomatic case of active TB, including the time period leading up to her treatment with Dr. Hackenberg. Indeed, Dr. Hackenberg noted on April 20, 2016, that Claimant

reported "no known TB illness." Given the content of the medical record, the ALJ credits the opinions of Dr. Schwartz to find that while Claimant could have experienced symptoms associated with her initial TB exposure for as long as two weeks after her initial infection[4], it is improbable, given the latency of Claimant's TB as of her treatment with Dr. Hackenberg, that she had symptoms associated with TB on any date after her positive August 13, 2014, TB test. Moreover, the ALJ finds Claimant's hindsight claims to the contrary unpersuasive from a reporting perspective. Claimant is a nurse with substantial medical training and experience. According to the medical record, she has worked with "many known TB patients." Her completed TB screening forms indicate that she was keenly aware of the symptoms of TB. In addition, Claimant testified that she left the employ of St. Mary Corwin for safety reasons connected to her feeling "extremely exposed" at work. Given the above, the ALJ is persuaded that Claimant is, more probably than not, aware of the serious medical consequences of contracting TB.[5] Consequently, the ALJ finds it unlikely that she would fail to report symptoms consistent with TB during any of the many appointments she had with her PCP from February 5, 2015 through January 2016, if she was, in fact, experiencing such symptoms.

19. Dr. Daniel Olson saw Claimant on May 16, 2017. Claimant testified that she went to this appointment after receiving a letter from Respondents designating Dr. Olson as the new authorized treating provider in the case. At this appointment, Claimant denied recurrent fever, any cough or productive sputum. She did report night sweats three times per week which Dr. Olson concluded was a non-specific symptom. Dr. Olson opined that Claimant had been appropriately treated for latent TB and that she may need continued monitoring with Dr. Hackenberg. He released Claimant to regular duty without restriction.

20. Connie Cridlebaugh testified by phone as the claims representative assigned to the claim. She testified that she attempted to return Claimant to Dr. Johnson at CCOM for a follow-up evaluation in April 2017. In that attempt, Ms. Cridlebaugh discovered that Dr. Johnson was no longer at CCOM. Consequently, a letter was directed to Claimant's counsel by counsel for Respondents on April 12, 2017 designating Dr. Olson as Claimant's ATP.

21. Ms. Cridlebaugh also testified that she reimbursed Claimant for co-payments she submitted for services rendered to her by Dr. Hackenberg, Dr. Reichelt, and Dr. Williams. Claimant confirmed that she was reimbursed for her out of pocket co-payments. Nonetheless, Ms. Cridlebaugh testified that she did not pay for the remaining portion of any billing associated with Claimant's TB treatment as covered by Claimant's health insurer, Kaiser Permanente.

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[4] Including August 7, 2014.

[5] The ALJ finds the fear and medical uncertainty associated with being exposed to TB in this case explains Claimant's chief complaint of anxiety as reported to Dr. Hackenberg on April 20, 2016 and stress as reported subsequently to Dr. Schwartz during her IME on December 17, 2016. Nonetheless, Claimant specifically reported that she was unable to work as a consequence of fever, night sweats, and extreme fatigue, not stress.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

C. The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the undersigned ALJ concludes that Claimant's hindsight assertions that she had TB symptoms in the weeks and months following her positive August 13, 2014 TB test, including extreme fatigue and night sweats are not credible when the evidentiary record is viewed in its totality. As found,

the medical records submitted belie these assertions as Claimant never developed active TB before she was treated by Dr. Hackenberg and the medical records leading up to her treatment with Dr. Hackenberg are devoid of any reports of night sweats, fever, fatigue, general malaise and/or persistent cough. Indeed, the records submitted are replete with references to "good" health generally. Here, the evidence presented persuades the ALJ that the testimony and opinions of Dr. Schwartz are the most credible and persuasive regarding the symptoms to be expected with an initial exposure to TB and thereafter when the body's immune response controls the preliminary infection causing it to become latent.

Claimant's Entitlement to Temporary Disability Benefits

D. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that she left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). There is no statutory requirement that claimant establish physical disability through the medical opinion of an attending physician. Rather, a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). Here, Claimant failed to establish a causal connection between her latent TB and her missed time from work. She acknowledged, on cross-examination, that she had missed time from work due to migraine headaches and gastrointestinal issues. Yet, she testified that in hindsight this missed time was really due to symptoms from latent TB. As found, these assertions cannot be reconciled with the content of the medical records submitted into evidence and the more persuasive opinions of Dr. Schwartz regarding the expected course of symptoms associated with a case of latent TB. Here, there is no record of Claimant reporting (1) night sweats; (2) excessive fatigue; (3) general malaise; (4) periodic fevers; and (5) periodic cough to her physicians prior to her treatment with Dr. Hackenberg. In fact, she filled out and signed a TB questionnaire each year, during the period in question, in which she expressly denied that she had any symptoms known to be caused by TB. Additionally, as credibly outlined by Dr. Schwartz, latent TB would not produce sporadic symptoms and certainly would not produce any symptoms after August 13, 2014, at which time Claimant's immune system had properly responded to the infection rendering it dormant. Accordingly, Claimant has failed to persuade the undersigned ALJ that any of the time she missed from work for days after August 13,

2014 was caused by symptoms associated with "latent" TB. Moreover, while the ALJ finds/concludes that Claimant's lost day of work on August 7, 2014 was probably associated with symptoms caused by her initial exposure to TB[6], this constitutes one lost shift in the string of work dates Claimant asserts were lost as a consequence of her TB diagnosis. As noted, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts which she failed to do in this case. Accordingly, the claim for lost wage benefits must be denied and dismissed.

Payment of the Costs Associated with Claimant's TB Treatment

E. Pursuant to C.R.S. § 8-42-101(6)(a), respondents are required to reimburse an "insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided." This reimbursement shall be adjusted pursuant to the fee schedule, as Claimant has already been reimbursed for her out-of-pocket expenses. *See* C.R.S. § 8-42-101(3)(a)(I) & (6)(b). Here, Claimant testified that she had already received reimbursement for co-pays and prescription costs for treatment of her latent TB. The dates of those medical appointments were 2/24/16, 3/7/16, 4/20/16, 5/25/16, 6/2/16, and 7/20/16. *See* Ex. 8:1. Respondents, therefore, are required to reimburse Claimant's health insurance carrier as adjusted by the workers' compensation fee schedule for any and all reasonable and necessary medical treatment related to Claimant TB. *See generally* § 8-42-101(1)(a). Respondents are not required to reimburse Claimant directly for these costs.

Dr. Olson's Status as an Authorized Treating Physician

F. Pursuant to statute, "[e]mployers that are health care providers or governmental entities that currently [have their] own occupational health care provider system, . . . may designate health care providers from their own system and [are] required to provide an alternative physician or corporate medical provider from outside its own system." *See* §8-43-404(5)(a)(II)(A)**,** C.R.S; W.C.R.P. 8-1(B).

G. Treatment is compensable under the Act where it is provided by an "authorized treating physician" (ATP). *Bunch v. ICAO*, 148 P.3d 381, 383 (Colo. App. 2006). Employers are liable for the expenses incurred when, as part of the normal progression of authorized treatment for a compensable injury suffered by a claimant; an authorized treating physician refers a claimant to one or more other physicians. Thus, the designation "authorized treating physician" includes not only those physicians to whom an employer directly refers a claimant, but also those to whom a claimant is referred by an authorized treating physician. *Bestway Concrete v. ICAO*, 984 P.2d 680, 684 (Colo. App. 1999) (citation omitted). Where an ATP refers a claimant to his or her primary care physician for continued care for the work-related condition, the primary care physician becomes authorized. *Cabela v. ICAO*, 198 P.3d 1277, 1281 (Colo. App. 2008). But this referral does not thereby de-authorize the original ATP. *See Loy v. Dillon Companies*, W.C. No. 4-972-625-03 (Feb. 19, 2016).

[6] Crediting the opinions of Dr. Schwartz that symptoms associated with an initial exposure can be expected to manifest within 2 weeks and last up to two weeks as an immune response to the initial infection.

H. Under *Yeck v. ICAO*, 996 228 (Colo. App. 1999) respondents retain the right to authorize an additional physician to provide care forthwith upon receipt of knowledge that the previous designated doctor is now refusing to provide necessary care for nonmedical reasons.

I. Here, the employer, as a health care provider with its own occupational health care provider system, designated Dr. George Johnson at one of its occupational health clinics, CCOM. Claimant attended that appointment and Dr. Johnson referred her to her primary care physician for continued care of her latent TB. Respondents learned that Dr. George Johnson had left CCOM in April of 2017 and that he would not be taking any patients with him. At that point, the persuasive evidence indicates that Respondents designated Dr. Daniel Olson, also within CCOM, as the new ATP. Claimant attended a rescheduled appointment with Dr. Olson on May 16, 2017 and was place at MMI based on the report from that appointment. The evidence presented, persuades the ALJ that Respondents have met their burden to establish that once they learned that Dr. Johnson had left the employ of CCOM, they promptly and properly designated Dr. Olson as Claimant's new ATP.

ORDER

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

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

2. Respondents shall reimburse, pursuant to the Colorado Workers' compensation fee schedule, Claimant's health insurance carrier (Kaiser) for all reasonable, necessary and related care rendered to Claimant to cure and relieve her of the effects of her latent TB.

3. Respondents have established by a preponderance of the evidence that Dr. Daniel Olson was properly designated as Claimant's authorized treating physician upon the discovery that Dr. Johnson had left CCOM without taking patients with him..

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

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

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

DATED: October 9, 2017

/s/ Richard M. Lamphere_____

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

At the conclusion of the hearing, the ALJ established a briefing schedule: Respondent's opening brief was filed, electronically, 0n August 28, 2017. Claimant filed a hard copy answer brief on September 5, 2017, despite the ALJ's directive at the conclusion of the last session of the hearing to file electronic briefs. The Claimant did not file an electronic brief until October 5, 2017, after being requested to do so by the Office of Administrative Courts. The matter was deemed submitted for decision on October 5, 2017.

ISSUES

The issues concern Respondent's request to overcome the Division Independent Medical Examination (DIME) of Joseph M. Morreale, M.D., concerning his opinion that the Claimant has not yet reached maximum medical improvement (MMI). If Respondent has overcome the DIME determination regarding MMI, then, whether the DIME erred in calculating the Claimant's degree of permanent .impairment. If the Respondent has not overcome the DIME determination regarding MMI, whether the Claimant has proven, by a preponderance of the evidence that the anterior cervical discectomy and fusion at C3-4 and C4-5 is reasonably necessary to treat her work injury;

On overcoming the DIME, the Respondent's burden of proof is "clear and convincing evidence."

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant was born on October 5, 1965. She was 51 years old on the hearing dates.

2. On December 11, 2013, the Claimant was injured in a motor vehicle accident while in the course and scope of her employment for the Employer. Her work was as a utility worker. Her job involved maintaining and cleaning grounds and facilities in the parks and recreation district.

3. While heading west on 38th Street, the Claimant was T-boned by another vehicle and she sustained neck, whiplash injuries.

4. Two years later, on December 11, 2015, Robert Kawasaki ,M.D., the Claimant's authorized treating physician (ATP), placed her at MMI.(Respondent's Exhibit G, p. 56).

5. Dr. Kawasaki provided the Claimant with a 15% whole person impairment rating, including a 6% table 53 rating (*AMA Guides to the Evaluation of Permanent Impairment*, 3rd. Ed., Rev.) for the two-level cervical rhizotomies that were performed at C3-4 and 4-5. (*Id.*). Post-MMI maintenance medical treatment was to include pain medications and repeat rhizotomies if the pain returned after nine months. (*Id.*). Respondent filed its Final Admission of Liability (FAL), dated January 8, 2016, consistent with Dr. Kawasaki's report.

The Claimant's History, Post-injury

6. In April 2014, the Claimant began treating with ATP Dr. Kawasaki (Exhibit. 6, 4/29/14).

7. Early on, Dr. Kawasaki felt that the Claimant would be a surgical candidate (May 23, 2017 Hearing Transcript, hereinafter "T," p. 37, lns 6-9) due to hyperflexia and a positive Hoffman sign (T, p. 43: lns 12-20; T, p. 67:lns 22-25; p. 68:lns 1-11), as well as upper extremity paresthesia (T, p. 68:lns 3-5; T, p. 67: lns 22-25; p. 68: lns 1-11) and radiculopathy later shown on EMGs (T, p. 43: lns 21-24). Dr. Kawasaki was of the opinion that the Claimant had signs and symptoms of myelopathy with correlating MRI (magnetic resonance imaging) and EMG findings (T, p. 37: lns 10-13).

8. Dr. Kawasaki was of the opinion that the clinical findings of hyperflexia and positive Hoffman signs were most likely related to the MRI findings of spinal stenosis and cord compression at the C4-5 level (Claimant's Exhibit 6)..

9. In 2014, Dr. Kawasaki referred the Claimant to orthopedic surgeon Jeffrey Sabin, M.D. Dr. Sabin reported, "I feel that the patient would be in need of a C3-4 anterior cervical discectomy and fusion because of the current physical findings and symptomatology of tingling and paresthesis in her upper extremities" (Claimant Exhibit 4).

10. In a follow-up record review, Dr. Sabin added that if [Claimant] has a diagnostic response to facet blocks at C4-5 then the likely solution would be an ACDF procedure at that level (Claimant's Exhibit 4).

11. Pursuant to Dr. Sabin's recommendation, Dr. Kawasaki performed facet injections at the C4-5 level only (Claimant's Exhibit 6). The results were diagnostic.

12. Dr. Kawasaki thought it reasonable that the Claimant be seen by a second-opinion surgeon (Claimant's Exhibit 6). He referred her to orthopedic surgeon Bryan Castro, M.D.

Bryan Castro, M.D and ATP Fr. Kawasaki

13 In his initial evaluation, Dr. Castro reported that the Claimant had numbness and tingling in her arms, which was worse on the *left*, than on the right (Claimant's Exhibit 5). An addendum to the report stated that Dr. Castro felt that an anterior cervical discectomy and fusion at the C3-4 level would certainly be a reasonable consideration, though he wanted a new MRI first (Claimant's Exhibit 5, addendum).

14. The Claimant next saw Dr. Castro on January 5, 2015. Among other complaints, Dr. Castro reported that the Claimant had pain into the *left* upper extremity. Dr. Castro recommended staged injections, but he also stated, "if surgery were to be considered then a two-level ACDF would be a reasonable consideration secondary to degenerative changes seen at C3-4 and C4-5"(Claimant's Exhibit 5, Castro 1/5/15).

15 On February 20, 2015, Dr. Kawasaki performed left C3-4 and C4-5 epidural steroid injection /spinal nerve root block for "*Left* C4 and C5 radiculopathy (Claimant's Exhibit 7).

16. On March 10, 2015, Dr. Kawasaki performed EMGs on the Claimant's *left* side only, which was indicated for "numbness and tingling into the *left* arm and myelopathic findings after MVA." The results were abnormal between C2 and C4. (Respondent's Exhibit G, pp. 38-39). Dr. Kawasaki's diagnoses on that date included "cervical spondylosis with clinical findings for positive upper motor neuron signs with hyperflexia and positive Hoffman signs;" and "C4-5 spinal stenosis with significant myelopathy extending from this level" (Respondent's Exhibit G, p. 35).

17. The Claimant returned to Dr. Castro on April 20, 2015. Dr. Castro wrote that "globally speaking" he did not think the Claimant was a good operative candidate, "However, with upper cervical EMG findings as well as trapezial pain this certainly could fit a C4 or C-5 radiculopathy. I think this is a reasonable consideration." Dr. Castro recommended rhizotomies, but also stated:"Alternatively surgical intervention via an ACDF at some point is a reasonable consideration" (Claimant's Exhibit 5). At the visit as well Dr. Castro recorded that the Claimant had pain in her arms, particularly on the left.

18. On May 13, 2015, Dr. Kawasaki wrote that the Claimant had increased pain with paresthesias in the left upper extremity with Spurling's test (Claimant's Exhibit 7).

19. On June 5, 2015 and again on July 31, 2015, the Claimant underwent bilateral medial branch blocks at C3-4 and C4-5. The results were diagnostic (Claimant's Exhibit 7).

20. The Claimant then proceeded to bilateral rhizotomies at C3-4 and C4-5 on August 28, 2015 (Respondent's Exhibit G, p. 44; Claimant's Exhibit 7).

21. Before the rhizotomies, the Claimant had reported her pain level as 7; she was taking hydrocodone and gabepentin; and her work restrictions were no lifting over 20 pounds. According to the Claimant, she had intense pain in her neck causing headaches; that sunlight would intensify it; she had pain in her shoulders, tingling in her arm; she could not bend over or lift; and, she could not sit, stand or walk for a long time.

22. The rhizotomies were successful in reducing the Claimant's pain and improving her function. They were still in effect as of December 11, 2015 when Dr. Kawasaki placed the Claimant at MMI (Respondent's Exhibit G, pp. 55-59). At MMI, the Claimant reported her pain as zero at rest, 2 with normal activities and 4 with increased activities (Respondent's Exhibit G, p. 56). Her medications were ibuprofen and lidoderm patches. *Id.*

23. Dr. Kawasaki found 10% ROM impairment and assigned 6% from Table 53. His combined rating was 15% whole person. Respondent filed a FAL, admitting for the 15% rating as well as all post-MMI reasonable, necessary, and related medical benefits (Respondent's Exhibit B, p.5).

The Claimant

24. At the time the Claimant was placed at MMI by Dr. Kawasaki, she requested that all work restrictions be removed. The reason for her request was that she was feeling good and she wanted to work. Her occupational physician at Denver Health complied, but ATP Dr. Kawasaki provided permanent restrictions of lifting 50 pounds occasionally, 25 pounds frequently.

25. In January 2016, the Claimant became employed as a custodian for the Denver Public Library. Dr. Kawasaki had signed off on her job description initially, indicating that she had permanent restrictions of 50 pound occasional lift, push and pull (Claimant's Exhibit 8).

26. After working approximately one month at the new job, however, the Claimant was "let go" due to her permanent restrictions. An ADA (Americans with Disabilities Act) process was initiated, which eventually concluded that the Claimant was "disqualified" due to the absence of any position consistent with her restrictions and qualifications. The Claimant has not worked since January 2016.

27. On March 11, 2016, about three months after Dr. Kawasaki's MMI date, the Claimant returned to Dr. Kawasaki (Respondent's Exhibit G, pp. 60-62; Claimant's Exhibit 8). She requested that she be returned to Dr. Sabin for surgical evaluation. The Claimant was looking for a more permanent solution, in that the pre-MMI rhizotomies

had begun to wear off and she could feel the pain returning. Dr. Kawasaki declined to make the referral on the ground that she was still doing well.

Division Independent Medical Examination by Joseph Morreale, M.D.

28 Previously, the Claimant had timely objected to Respondent's FAL and had requested a DIME. She was seen by DIME physician Dr. Morreale on May 6, 2016. Dr. Morreale is a spine surgeon (T, p. 36:lns 21-23). Dr. Morreale recommended an anterior cervical discectomy and fusion (hereinafter "ACDF") at C3-4 and C4-5 before placing the Claimant at MMI, if the patient wished to proceed with surgery (Respondent's Exhibit E, p. 19).

29. According to the Claimant, as of the time she was evaluated by Dr. Morreale, her rhizotomies had worn off and her pain had returned. She felt as bad as she had felt before the first rhizotomies.

30. According to Dr. Kawasaki, Dr. Morreale's recommendation of surgery, and the more limited range of motion found by him, reflected that the Claimant's condition had worsened as of the May 6, 2016 date of the DIME appointment (T, p. 63: lns 17-25; p. 64: lns 1-4).

31. Regarding Dr. Morreale's provisional impairment rating, Dr. Kawasaki disagreed only with the 7% Table 53 rating. Dr. Kawasaki stated it should have been 6%, so that the total combined rating would have been 24% (T, p. 65: lns 19-25).

32. The Claimant returned to Dr. Kawasaki in June 2016. On June 27, 2016, she described herself as miserable (Respondent's Exhibit G, p. 69), which was attributable, according to Dr. Kawasaki, to the re-growth of her medial branch nerves (T, p. 45: lns 22-25; p. 46 : lns 1-2). On account of her worsening condition as well as DIME Dr. Morreale's recommendation, Dr. Kawasaki referred the Claimant back to Dr. Sabin (T, p. 46: lns 3-9).

Jeffrey Sabin, M.D.

33. The Claimant saw Dr. Sabin on July 22, 2016. Dr. Sabin mistakenly believed that the Claimant's C4-5 level had never been treated (Respondent's Exhibit H, p. 102). In fact, the C4-5 level had been treated with stand-alone facet injections (Claimant's Exhibit 6); a spinal nerve root block for left C4 and C5 radiculopathy (Claimant's Exhibit 7); medial branch blocks (Claimant's Exhibit 7); medial branch blocks again (Claimant's Exhibit 7; Respondent's Exhibit G, p. 41); and rhizotomies (Claimant's Exhibit 7; Respondent's Exhibit G, p. 44). Dr. Sabin recommended repeat rhizotomies.

34. Dr. Sabin had previously observed that the Claimant had had excellent relief from her previous rhizotomies but now her pain had returned (Respondent's.

Exhibit H, p. 102). Despite the Claimant's increased pain, Dr. Sabin reported that the Claimant's cervical range of motion was normal. According to the Claimant, Dr. Sabin never examined her for ROM. Dr. Sabin's report is at odds with DIME Dr. Morreale's recent 19% measured ROM impairment (as well as Dr. Kawasaki's earlier 10% ROM impairment, when the initial rhizotomies were still in effect).

35. The Claimant had understood from her appointment with Dr. Sabin that he could not do surgery because the Respondent had not accepted all the (cervical) "levels" involved. In his first, 2014 report, Respondent's Independent Medical Examiner (IME), Brian Reiss, M.D. had stated that the C4-5 level was not related to the accident (Respondent's Exhibit F, p. 30).

Return to ATP Dr. Kawasaki and Referral to Gary Ghiselli, M.D.

36. The Claimant returned to Dr. Kawasaki two weeks after Dr. Sabin's appointment. At that time, Dr. Kawasaki supplemented her pain relief with a prescription for Tramadol (Respondent's Exhibit G, p.74; Claimant's Exhibit 8). Pursuant to Dr. Sabin's recommendation, the Claimant enquired with Dr. Kawasaki about repeat rhizotomies, and he referred her to another surgeon, Gary Ghiselli, M.D. As the Claimant understood it, Dr. Kawasaki made the referral to surgeon Dr. Ghiselli "for his own purposes."

37. In his August 5, 2016 note discussing his referral to Dr. Ghiselli, Dr. Kawasaki wrote that previously Dr. Castro had been against surgery. He later acknowledged in his testimony that he had been mistaken regarding Dr. Castro's opinion (T, p. 19: lns 16-19; T, p. 35: lns 15-25; p. 36: lns 1-15).

38. Respondent denied authorization of Dr. Kawasaki's referral to Dr. Ghiselli (Claimant's Exhibit 10). In the course of its denial, Respondent repeated Dr. Kawasaki's erroneous statement regarding Dr. Castro's opinion. Respondent also stated, "If Dr. Kawasaki is making the referral because [Claimant] wants the surgery, she has the option of seeking her own opinion (and paying for it). If that physician wants to do surgery, she can choose to do the surgery under her own insurance and litigate it through the worker's compensation system."

39. The Claimant next saw Dr. Kawasaki on November 11, 2016, at which time he told her that his referral to surgeon Dr. Ghiselli had been denied (Respondent's Exhibit G, p. 81-82; Claimant's Exhibit 8). Since surgical referral had been denied, the Claimant requested repeat rhizotomies.

40. Also on November 11, 2016, the Claimant again described herself as miserable. She had obtained prescriptions for Notriptyline, Cyclobenzaprine and Etodolac from her personal physician. Her personal physician referred her to the surgical department, but the Claimant was unable to make an appointment with a surgeon under her personal insurance because her injury was considered work-related.

41. Two months later, on January 20, 2017, the Claimant saw Dr. Kawasaki (Respondent's Exhibit G, p. 78-79; Claimant Exhibit 9). He wrote that she was frustrated and felt that she was not being treated appropriately. According to the Claimant, she felt she wasn't getting any help. She understood that Dr. Kawasaki could see that she was in pain. She needed to know if she could undergo surgery but she was not able to see a surgeon; she wanted to know about repeat rhizotomies but nothing had been done about that. At that point, Dr. Kawasaki requested repeat rhizotomies.

42. On February 13, 2017, the Claimant underwent a Functional Capacity Evaluation (FCE), at her request. The therapist concluded that the Claimant was unable to work at all due to variable and very short tolerances (See Claimant's Exhibit 3, p. 2 of 22, ¶ 5). The Claimant testified that her condition as documented by the FCE had been her condition for many months before that.

43. According to Dr. Kawasaki, the FCE was probably a valid reflection of her function at the time (T, p. 29:lns 22-25; p. 30: ln 1). He also stated that the 50-pound permanent restriction he imposed at MMI had no longer been operative, in that the Claimant's pain had gone up and her function declined (T, p. 40: lns 5-18). At no time after the Claimant's pain returned would he have approved a job for the Claimant lifting 50 pounds (T, p. 62: lns 2-7).

44. In his written reports, Dr. Kawasaki never changed the Claimant's permanent restrictions. The Claimant understood that the reason he believed he could not change them was because they were "permanent."

45. Repeat rhizotomies were done on each side on separate dates, with the second procedure done on May 12, 2017 (T, p. 25:lns 13-14). As of the second, August 21, 2017 hearing date, about three months after the last procedure, the Claimant was still doing well, but she could feel the pressure returning.

46. After the repeat rhizotomies, Dr. Kawasaki referred the Claimant for physical therapy (PT). His hope was to increase her function so that in the long run she may be able to return to lifting 50 pounds (T, p. 39: lns 1-10). According to the Claimant the PT was helping her. She had not yet began exercises to increase her lifting capacities.

47. According to Dr. Kawasaki, his final MMI date was contingent on whether or not the Claimant underwent the ACDF procedure (T, p. 41:lns 4-7).

48. The Claimant wanted the surgery recommended by DIME Dr. Morreale. She explained that the rhizotomies wear off, and she needs a more permanent solution.

Respondent's Independent Medical Examiner (IME), Brian Reiss, M.D.

49. At the request of Respondent, Dr. Reiss evaluated the Claimant twice, in 2014 and in 2016 (Respondent's Exhibit F).

50 Dr. Reiss did not agree with the surgical recommendation. He did not believe the Claimant had any myelopathy, or radiculopathy. He stated that the levels selected for surgery (C3-4 and C4-5) were arbitrary and speculative, in that the pain generators had not been identified, as required by the Medical Treatment Guidelines (MTG). He stated the opinion that the surgery would not help and could hurt. He recommended a better exercise and conditioning program and perhaps medication modification.

51. Dr. Reiss testified that Dr. Kawasaki's diagnosis of myelopathy was pure speculation, on the ground that Dr. Kawasaki relied solely on hyperflexia in support of his diagnosis. The ALJ finds that this is not correct. In addition to hyperflexia, in support of his diagnosis of myelopathy, Dr. Kawasaki also identified positive Hoffman's signs and upper extremity paresthesia (T, p. 67: lns 22-25; p. 68 : lns 1-11) as well as the MRI (T, p. 37: lns 10-13; also, Claimant's Exhibit 6).

52. According to Dr. Reiss, while it was appropriate for Dr. Kawasaki to perform rhizotomies at the C3-4 level, the rhizotomies at the C4-5 level were performed in the absence of adequate information. Specifically, Dr. Reiss testified that Dr. Kawasaki was missing diagnostic information regarding the C4-5 level, which he could have obtained had he performed facet injections or medial branch blocks at the C4-5 level alone (instead of at the same time as at the C3-4 level).

53. In fact, facet injections were done at C4-5 alone (Claimant's Exhibit 6). In rebuttal, after this information was presented, Dr. Reiss significantly revised his testimony. He then contended that facet injections are not sufficiently diagnostic. This is internally contradictory within Dr. Reiss' testimony. Dr. Kawasaki had been following Dr. Sabin's recommendation to perform facet injections at C4-5 to aid in diagnosis of the C4-5 level for surgery (Claimant's Exhibit 4). The ALJ finds that Dr. Reiss' testimony in this regard lacks credibility.

54. Dr. Reiss testified that it was somewhat speculative for anyone to chose C3-4 and C4-5 as the levels at which a surgical procedure would be appropriate. He was unwilling to state whether the recommendation and/or performance of "speculative" surgery was medical malpractice.

55. When asked specifically whether the identification of those two levels by treating surgeon Dr. Castro was "speculative or arbitrary," Dr. Reiss shifted his direction and claimed that the facts had changed after Dr. Castro's recommendations. Specifically, Dr. Reiss contended that at the time she was seen by Dr. Castro, the

Claimant was complaining of *right* upper extremity (RUE) symptoms, but that after her visits with Dr. Castro, her complaints switched to the *left.*

56. Again, Dr. Reiss' factual predicate is inaccurate. At each of the three appointments with Dr. Castro, the Claimant had complained of *left* upper extremity symptoms (Claimant's Exhibit 5). In addition, as stated, during the same time period, namely on February 20, 2015 and on March 10, 2015, Dr. Kawasaki performed procedures and testing on the **left** on account of **left**-sided upper extremity symptoms (Claimant's Exhibit 7).

57. Dr. Reiss wrote in his 2016 report that he would agree with Dr. Castro that surgical intervention is *not* indicated here (Respondent's Exhibit. F, p. 24). Dr. Castro's opinion, as stated in Dr. Castro's records, is that surgical intervention *is* indicated here. There is no documentation in any report written by Dr. Reiss that he had reviewed any of Dr. Castro's records. In rebuttal Dr. Reiss contended he had reviewed Dr. Castro's reports before his hearing testimony, even if his report does not mention he reviewed them at that time. The ALJ finds that this is one more anomaly detracting from dr. Reiss' overall credibility.

58. Similarly, Dr. Reiss stated that Dr. Sabin's identification of the C4-5 level as one of two levels for surgery was speculative. Dr. Reiss could not adequately support his opinion of "speculative."

59. As he had stated in his written report, in which he described Dr. Morreale's proposed surgery as "arbitrary" (Respondent's Exhibit F, p. 24), Dr. Reiss stated that DIME Dr. Morreale's selection of the C3-4 and C4-5 levels as the areas for surgery was speculative and arbitrary. It was his opinion that the surgery proposed by DIME Dr. Morreale was unlikely to improve the Claimant's condition and may well make her worse (*see also* Respondent's. Exhibit F, p. 24).

60. Dr. Reiss, however, was unwilling to characterize Dr. Morreale's opinion as so lacking in medical foundation so as to be beneath the medical standard of care. Instead, he claimed that Dr. Morreale saw the patient before she had had facet rhizotomies; but that, according to Dr. Reiss, after the DIME evaluation, the Claimant had left-sided rhizotomies which resolved her left-sided symptoms and left her with only right-sided symptoms. The implication was that Dr. Morreale's opinion was no longer operative, because the facts had changed. None of this after-the-fact theory appears in Dr. Reiss' written report.

61. The ALJ finds that Dr. Reiss' factual predicates are not accurate. In fact in his earlier testimony Dr. Reiss acknowledged that the Claimant had had rhizotomies before seeing DIME Dr. Morreale on May 6, 2016 (Respondent's Exhibit. G, p. 44). For example, Dr. Reiss agreed with Dr. Sabin's statement that the Claimant had had excellent relief from her first rhizotomies but the pain had worn off. Dr. Reiss' report

documented also the Claimant's history to that effect (Respondent's Exhibit F, p. 25). Dr. Reiss was also present when Dr. Kawasaki testified that at the time the Claimant saw DIME Dr. Morreale on May 6, 2016, the effects of those first rhizotomies had worn off (T, p. 63: lns 17-25; p. 64: lns 1-4).

62. In addition, on both occasions, rhizotomies were done on both sides. The first, August 2015 rhizotomies were done on both sides in the same procedure. The second rhizotomies were done on both the left and on the right, but on two separate dates–on the left on March 17, 2017, and then on the right, on May 12, 2017 (T, p. 25: lns 13-16).

63. In summary, there is no persuasive evidence supporting Dr. Reiss' testimony that rhizotomies were only performed on the left; or that they were done only after the DIME appointment; or that the Claimant persisted with right-sided pain.

64. Dr. Reiss also questioned the validity of Dr. Morreale's report of a positive Spurling's test on exam.

65. Dr. Reiss acknowledged that when he saw the Claimant in November 2016, she looked like she was in pain. Nonetheless he was only willing to acknowledge that it was possible the Claimant's function was diminished by pain; he maintained only that it was "possible," it would be appropriate, when a patient's function diminishes, to change her restrictions. The Claimant had testified that she had to push herself to get off the couch; that traveling to medical appointments left her "done" for the day.

66. Dr. Reiss stated that he administered the same psychological screening tests at each of his two appointments, in 2014 and again in 2016. He testified that his results were "odd" because they diverged from "concerning" in 2014 to "zero" in 2016. Dr. Reiss, however, nowhere documented in his 2016 report that he administered any psychological tests, as he had in 2014 (Respondent's Exhibit F, p. 33). The Claimant testified that Dr. Reiss had administered psychological tests on a tablet in 2014, but not in 2016. In this regard, the ALJ finds the Claimant more credible than Dr. Reiss.

67. Finally, Dr. Reiss testified that he doesn't recommend rhizotomies because they lose their effectiveness. He doesn't recommend them more than twice because they don't tend to work more than a couple of times. Instead he recommends a different and better rehabilitation program. He did not know whether the Claimant was at MMI because he didn't know how she was doing now.

Claimant's Independent Medical Examiner (IME), David Yamamoto, M.D.

68 At the request of the Claimant, Dr. Yamamoto evaluated the Claimant on March 15, 2017(Claimant's Exhibit 2).

69. Dr. Yamamoto testified that there was a concern by several physicians about myelopathy. In fact, Dr. Kawasaki was hesitant to even perform rhizotomies due to the concern that the instability associated with rhizotomies could worsen the Claimant's myelopathic findings. Dr. Sabin was also concerned about myelopathy. In his 2014 report, Dr. Sabin discussed the tingling and paresthesia which he had found on his exam, and the myelopathy shown on the MRI; these factors formed the basis of Dr. Sabin's 2014 recommendation of an ACDF procedure, initially at C3-4.

70. Dr. Yamamoto was of the opinion that the combination of the MRI evidence in conjunction with the clinical evidence of myelopathy–namely hyperflexia and positive Hoffman's test–were worrisome. A person who performs physical labor is more at risk for progression of her myelopathy. Dr. Yamamoto cited Dr. Kawasaki's concern that the Claimant should avoid any kind of manipulation to the neck because of her condition, as reflective of the proposition that any stress on the neck, by, for example, performing physical labor, put the Claimant at risk.

71. Dr. Yamamoto stated that the pattern of the Claimant's arm numbness would fit myelopathy, even though it did not fit radiculopathy.

72. Dr. Yamamoto was of the opinion that successful rhizotomies do not indicate that the Claimant does not have myelopathy because these are two separate issues. He noted that Claimant's arm numbness had persisted despite the rhizotomies.

73. Dr. Yamamoto stated the opinion that there is a relationship between Dr. Kawasaki's identification of C3-4 and C4-5 as pain generating levels for the purpose of rhizotomies, and Dr. Morreale's identification of the same levels for surgery. In this connection, Dr. Yamamoto noted that the predominant findings on the MRI were at those levels, and that all the authorized treating providers referred to those levels when discussing surgery.

74. Dr. Yamamoto testified that Dr. Sabin's error in believing that the Claimant's C4-5 level had never been treated–when it had been treated with facet injections, medial branch blocks, and rhizotomies–indicated either he had not been provided with the Claimant's records or he had not reviewed them. Dr. Yamamoto found it to be not believable when Dr. Sabin wrote that the Claimant's ROM was normal. This is because Dr. Sabin's evaluation occurred shortly after the DIME evaluation, when the Claimant had a marked decrease in cervical range of motion; and after it had been documented that the Claimant had a fairly high pain level and was not doing well at the time.

75. Dr. Yamamoto was of the opinion that Dr. Sabin's evaluation in 2016 was not adequate to answer the question as to whether the Claimant was a surgical candidate. He agreed with treating physician Dr. Kawasaki that the Claimant should be

referred for another surgical evaluation. He supported Dr. Kawasaki's referral to surgeon, Dr. Ghiselli.

76. When Dr. Yamamoto saw the Claimant in March 2017, she was not doing well. His own assessment matched that of the FCE evaluator one month earlier, in that, the Claimant was not able to work.

77. Dr. Yamamoto was of the opinion that the Claimant's condition was not stable when she was placed at MMI. She deteriorated quite quickly. Only three months after the MMI date, in March 2016, she asked for more treatment.

78. In response to the ALJ's question," Is it your ultimate opinion that the Claimant is not at MMI? Dr. Yamamoto testified, "My opinion is that she is not at MMI."

Ultimate Findings

79. For the reasons articulated herein above, the ALJ finds the opinions of DIME Dr. Morreale, IME Dr. Yamamoto, and ATP Dr. Kawasaki considerably more credible than the opinions of IME Dr. Reiss and referral physician, Dr. Sabin. The ALJ further rinds than any opinions contrary to DIME Dr. Morreale's opinion that the Claimant is not at MMI, amount to a mere difference of opinion which does **not** make it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Morreale's opinion concerning MMI is erroneous. Further, it is more likely than not that DIME Dr. Morreale's surgical recommendation is correct. Additionally, the ALJ finds the Claimant's testimony persuasive, straight-forward and credible,

80. Between conflicting medical opinions, the ALJ makes a rational decision, based on substantial evidence, to accept Dr. Morreale's DIME opinion on MMI and his surgical recommendation, as well as Dr. Yamamoto's opinions, and to reject all opinions to the contrary.

81. The Respondent has failed to prove that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Morreale's opinion concerning MMI is wrong. Therefore, Respondent has failed to carry its burden on this issue by clear and convincing evidence.

82. The Claimant has proven that it is more likely than not that the surgery recommended by DIME Dr. Morreale is reasonably necessary to cure and relieve the effects of her admitted injury; and, causally related thereto. Further, the Claimant has proven, by preponderant evidence that further medical treatment for the effects of her admitted injury is causally related thereto and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the opinions of DIME Dr. Morreale, IME Dr. Yamamoto, and ATP Dr. Kawasaki were considerably more credible than the opinions of IME Dr. Reiss and referral physician, Dr. Sabin. As found, any opinions contrary to DIME Dr. Morreale's opinion that the Claimant is not at MMI, amount to a mere difference of opinion which did **not** make it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Morreale's opinion concerning MMI was erroneous. Further, as found, it is more likely than not that DIME Dr. Morreale's

surgical recommendation is correct. Additionally, as found, the Claimant's testimony was persuasive, straight-forward and credible,

Substantial Evidence

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

Overcoming DIME Dr. Morreale's Opinion on MMI

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable

or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, Respondent failed to prove that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Morreale's opinion concerning MMI is wrong. Therefore, Respondent has failed to carry its burden on this issue by clear and convincing evidence. The Claimant is **not** at MMI.

Surgical Recommendation of DIME Dr. Morreale

d. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the admitted injury of December 11, 2013. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the admitted injury, including the surgery recommended by DIMEDr. Morreale.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir.

2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden, by a preponderance of the evidence with respect to the surgery recommended by DIME Dr. Morreale and continued medical care and treatment at the hands of her ATPs.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent having failed to overcome the Division Independent Medical Examination opinion of Joseph Morreale, M.D. that the Claimant is not at maximum medical improvement, the Claimant is entitled to continuing benefits to improve her condition.

B. Respondent shall pay the costs of medical care and treatment for the Claimant's admitted injury of December 11, 2013, including the surgery recommended by Dr. Morreale, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this 6 day of October 2017.

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

1. Determination of Claimant's average weekly wage

2. Whether Claimant has overcome the opinion of division independent medical examination (DIME) physician John Sacha, M.D. on the date of maximum medical improvement (MMI).

3. Whether Claimant has overcome the opinion of DIME physician Dr. Sacha on her permanent partial disability (PPD) impairment rating.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from March 15, 2015 and ongoing.

5. Whether Claimant has established by a preponderance of the evidence an entitlement to continued medical benefits.

PRELIMINARY ISSUES

Claimant indicated at outset of hearing that she was not seeking permanent total disability and that issue was stricken without prejudice. Additionally, the issues of overpayment and offsets were also reserved for future determination.

FINDINGS OF FACT

1. Claimant worked for Employer as a housekeeper. Wage records show that at the time of her injury, and in the year leading up to her injury, Claimant consistently earned gross wages between $1,305 and $1,380 during each two week pay period. During the year leading up to her injury, there were seven pay periods (covering 14 weeks) where she earned slightly more than her average pay, with a maximum two week gross wage paid of $1,536.67. *See* Exhibit Z.

2. On December 14, 2011 Claimant sustained a compensable injury to her right shoulder when she was putting linen on a cart at work and felt the sudden onset of pain in her anterior shoulder. *See* Exhibit B.

3. On December 22, 2011 Claimant underwent an MRI of her right shoulder. The impression provided by Eric Handley, M.D. was: mild supraspinatus and infraspinatus tendinopathy with bursal surface fraying but no discrete tearing, mild

subacromial subdeltoid bursitis; mild intra-articular long head biceps tendinopathy versus strain; and minimal AC joint arthropathy. *See* Exhibit C.

4. Claimant treated conservatively, undergoing more than 30 physical therapy visits and several injections in her shoulder. Claimant reported in October of 2012 that the injections did not help her and that she believed they made her worse. She also reported that the physical therapy did not do anything to alleviate her symptoms. At an independent medical evaluation October 2, 2012, Steven Horan, M.D. noted that Claimant had persistent pain and discomfort in the shoulder, particularly the front and lateral aspect since her December 2011 injury. Dr. Horan noted that Claimant had undergone subacromial injections, bicep tendon injections, acromioclavicular joint injections, physical therapy, massage therapy, and activity modifications but that Claimant reported being no better since the injury. *See* Exhibit D.

5. On physical examination, Dr. Horan noted that Claimant was really guarding and noted her poor effort. Dr. Horan was surprised that Claimant was still in such pain after so many treatment modalities. Dr. Horan opined that Claimant's subjective complaints were somewhat out of proportion to his findings, and again noted the very poor effort during parts of his examination. Dr. Horan noted that the only modality of treatment that had not been tried was chiropractic manipulation and he recommended four treatments. Dr. Horan indicated that after four chiropractic treatments, he would consider Claimant at maximum medical improvement. *See* Exhibit D.

6. Approximately 1.5 years later, and on May 27, 2014, Claimant underwent right shoulder surgery performed by Thomas Hackett, M.D. Dr. Hackett noted that Claimant had continued tendinopathy of her rotator cuff and clinical signs of impingement as well as anterior shoulder pain at the site of her biceps. Dr. Hackett noted that Claimant had failed conservative management and elected to proceed with surgery. Dr. Hackett performed a right shoulder arthroscopy, open subpectoral long head biceps tenodesis, limited debridement of the glenohumeral joint, subacromial decompression with partial acromioplasty, and CA ligament release. *See* Exhibit E.

7. On November 6, 2014 Claimant was evaluated by Dr. Hackett's PA, Michael Stevenson. PA Stevenson noted that Claimant was five months status post a right shoulder surgery and that Claimant was getting great range of motion with physical therapy. PA Stevenson noted that Claimant was improving very well, had great recovered range of motion, but was still weak in the right shoulder. He noted that Claimant appeared to be getting some tone back in the right shoulder and right upper extremity. He planned for physical therapy to focus on work hardening and strengthening. *See* Exhibit F.

8. On January 29, 2015 Claimant was evaluated by Dr. Hackett. Claimant reported being markedly improved with some persistent pain worse with activity, that she did not believe her strength was back, and that she was not ready to return to work yet. Dr. Hackett noted that the reported pain with glenohumeral based exercises

seemed to be in contrast with Claimant's original injury. On physical examination, Dr. Hackett noted that Claimant had slightly decreased strength associated with her reported pain but that when he prompted her to work through the pain, she had 5/5 strength. Dr. Hackett noted that since Claimant was doing well, he did not anticipate Claimant following up with them further, and that the return to work would be left up to her workers' compensation doctor. Dr. Hackett noted that Claimant had no need for additional orthopedic intervention, surgical or otherwise and needed to give her shoulder time to slowly improve strength. Dr. Hackett noted that after an additional month of physical therapy Claimant would likely be able to continue with a home exercise program. *See* Exhibit H.

9. On March 11, 2015 Claimant was evaluated by Susan Lan, D.O. Claimant reported better with only 1/10 pain with movement. Claimant reported that her left shoulder had not improved. Dr. Lan noted the right shoulder had good strength when Claimant tried but with give way weakness. Dr. Lan opined that Claimant was overly sensitive to pain and that the fairly benign exam did not match Claimant's described pain or inability to perform tasks. Dr. Lan noted that Claimant was at maximum medical improvement for the right shoulder and that Claimant was not happy about it, but that there was nothing else to offer Claimant other than time. Dr. Lan opined that Claimant's underlying autoimmunity in combination with a downsloping acromion set Claimant up for inflammatory shoulder issues which could account for the delayed recover and the left shoulder pain. Dr. Lan opined that maintenance should include follow-ups and short courses of physical therapy for flares. Dr. Lan opined that permanent work restrictions should include lifting 15-20 pounds, 10 pounds reaching away from the body, and limited overhead work. Dr. Lan did not recommend surgery for the left shoulder given the minimal findings on left shoulder MRI but indicated Claimant would see Dr. Hackett one last time for an opinion on the left shoulder. Dr. Lan opined that Claimant had a ratable impairment per AMA Guides to the Evaluation of Permanent Impairment, 3rd Edition, Revised for her right shoulder with a 2% range of motion impairment that converted to a 2% upper extremity impairment and a 1% whole person impairment. *See* Exhibit I.

10. On March 26, 2015 Claimant was evaluated by Dr. Hackett. Claimant reported that her right shoulder was doing much better and felt much stronger. Dr. Hackett noted that Claimant reported symptoms in her left shoulder from possible overuse. Dr. Hackett performed a physical examination and reviewed a left shoulder MRI. Dr. Hackett opined that Claimant was at maximum medical improvement for the right shoulder and that she had left shoulder rotator-cuff tendinitis impingement. He recommended physical therapy with some rotator cuff strengthening and opined that Claimant did not need to return back for evaluation of the left shoulder. Dr. Hackett advised Claimant to continue a strengthening program for the left shoulder and opined that Claimant was at maximum medical improvement for the left as well. Dr. Hackett opined that he did not anticipate any significant disability in the future. *See* Exhibit H.

11. On April 16, 2015 Claimant was evaluated by Frederick Scherr, M.D. Claimant reported better with pain at 1/10 with movement. Dr. Scherr noted that Dr.

Hackett had opined that Claimant was at maximum medical improvement for both shoulders. Claimant reported continued discomfort in both shoulders. On examination, Dr. Scherr noted that Claimant was diffusely tender throughout examination on both shoulders. Dr. Scherr noted excellent range of motion in the left shoulder without difficulty of pain. Dr. Scherr noted inconsistent range of motion in the right shoulder that was worse than her March 11, 2015 visit and inconsistent provocative testing. Dr. Scherr noted that Claimant's subjective complaints had little objective basis. Dr. Scherr closed the case and noted impairment as per Dr. Lan's March 11, 2015 evaluation. Dr. Scherr recommended six physical therapy visits over the next six months. *See* Exhibit I.

12. On August 27, 2015 Claimant was evaluated by Dr. Scherr. Claimant reported she was due to attend a DIME in the near future and that she was not happy with her impairment rating on March 11, 2015. Claimant reported pain at a 6/10. Dr. Scherr noted that Claimant had positive SSA, underlying autoimmunity, which he opined may be contributing to ongoing pain and would of course not be a work related issued. Dr. Scherr noted no change in Claimant's examination from the exam in April. Dr. Scherr opined that Claimant was still at maximum medical improvement and that she needed to follow up with her primary care provider in regards to treatment for her SSA which may also benefit her shoulders. *See* Exhibit I.

13. On January 20, 2016 Claimant underwent a DIME performed by Scott Hompland, D.O. Claimant reported that while working and handling linens, she attempted to toss a 40-50 pound bag of linens six feet and felt a pop in both of her shoulders. Claimant reported that she did not feel that she was at maximum medical improvement, that she had a pain level of 7/10 that was constant and worse in the evening. Dr. Hompland noted that he did not understand on examination why Claimant would have intrinsic muscle weakness. On examination, Dr. Hompland noted palpation tenderness in the trapezius muscle, levitor scapular muscle, supraspinatus muscle, and rhomboid muscle of the right shoulder girdle. Dr. Hompland noted that the right shoulder range of motion on his examination was significantly different than the range of motion noted in September of 2015 by physical therapy. He opined that the significant decline in level of function and dramatic reduction in level of function could include development of a frozen shoulder, learned helplessness, increased pain, or a deliberate attempt to mislead him to enhance impairment rating. Due to the significant reduction and decline in functional ability, he found that Claimants was not at maximum medical improvement and needed a further evaluation with Dr. Hackett as well as four physical therapy visits. He noted that after the evaluation and four sessions of physical therapy, Claimant would be able to reach the ranges of motion documented previously and would be at maximum medical improvement. *See* Exhibit J.

14. On April 4, 2016 Claimant was evaluated by Dr. Scherr. Dr. Scherr noted that Claimant had seen Dr. Hackett and also underwent the recommended 4 sessions of physical therapy. Dr. Hackett injected Claimant's shoulder which only helped for a few days. Dr. Hackett did not offer surgery and also opined that physical therapy might be helpful. Claimant reported that the 4 sessions of physical therapy were not helpful and that she was no better. Dr. Scherr noted that Claimant's pain behaviors were

worse at this visit and that when trying to assist Claimant very gently through any range of motion she jumped and jerked throughout as if it was causing extreme pain. Dr. Scherr noted it was very difficult to examine Claimant due to her pain behaviors. *See* Exhibit K.

15. Dr. Scherr noted that he reviewed surveillance that showed someone that was not bothered with pain and that did not protect the arm like Claimant did while in the office for examination. Dr. Scherr opined that Claimant was still at maximum medical improvement and had been since March 11, 2015. Dr. Scherr opined that no additional care, procedure, or modality would improve the underlying condition and that he was at a loss to explain Claimant's continued pain and exam. Dr. Scherr opined that Claimant had a ratable impairment of 2% for the right upper extremity, that converted to a 1% whole person impairment. *See* Exhibit K.

16. On September 13, 2016 Claimant was evaluated by Dr. Scherr. He noted that Claimant had seen DIME physician Dr. Hompland in May and that Dr. Hompland again opined that Claimant was not at maximum medical improvement and needed a definitive answer from Dr. Hackett as to whether or not Claimant needed surgery. Dr. Hompland also opined that perhaps manipulation under anesthesia would be of benefit. Claimant then saw Dr. Hackett in June of 2016 and he did not like the idea of manipulation under anesthesia but offered an injection which Claimant underwent. Claimant reported to Dr. Scherr that the injection helped with some of the pain but not with her range of motion. Dr. Scherr indicated that Dr. Hackett did not state whether or not surgery was an option and Dr. Scherr indicated he would attempt to reach Dr. Hackett to get the question directly answered. Dr. Scherr noted that on examination there were again pain behaviors, jumping, and jerking and that Claimant was still very difficult to examine. *See* Exhibit K.

17. Dr. Scherr opined that Claimant was still at maximum medical improvement with impairment already calculated. Dr. Scherr was suspicious of some type of somatoform disorder or secondary gain due to Claimant's continued pain behaviors. Dr. Scherr opined that he was at a loss to explain Claimant's continued pain and exam and noted that he would return her to DIME physician Dr. Hompland for review and that he hoped to have a definite answer from Dr. Hackett about surgery before Claimant returned to DIME physician Dr. Hompland. *See* Exhibit K.

18. On December 13, 2016 Claimant was evaluated by Dr. Scherr. Dr. Scherr noted that he spoke with Dr. Hackett about additional surgery and that Dr. Hackett indicated Claimants might be a candidate for capsular release if her trouble with internal rotation was real and that it might be real but he wasn't sure. Dr. Scherr reviewed surveillance video and noted Claimant moving with no difficulty in her right shoulder internal or external rotation. Dr. Scherr noted that in surveillance, Claimant was able to reach behind with her right arm to remove a phone from her right back pocket and was also able to reach to the top of her head. He also observed Claimant lifting a large watermelon out in front of her and placing it in her cart without difficulty. *See* Exhibit K.

19. On examination, Dr. Scherr noted that Claimant was asked to reach to the top of her head and behind to her right back pocket (which she did on surveillance without difficulty and with fluidity) and that Claimant was tentative stating it caused pain of 7/10 reaching to the back pocket. Dr. Scherr noted Claimant did not perform the maneuvers as easily as she did in the surveillance video. He again noted give way weakness and pain behaviors. Dr. Scherr noted that Claimant had met the DIME physician's requirements. He noted that Dr. Hackett was unsure if Claimant's exam was real, and that Dr. Hackett had not reviewed the surveillance. Dr. Scherr noted that the only basis for the possible capsular release surgery would be because of difficulty with internal rotation but that the surveillance indicated no difficulty with internal rotation. Due to the surveillance and the exam where Claimant was not able to repeat motions that were done easily in the surveillance video, Dr. Scherr again opined that the was strongly suspicious for some type of somatoform disorder and/or secondary gain. He returned Claimant to full duty work as the permanent restrictions before were not based upon a functional capacity evaluation or an equivalent objective measure and because he felt the veracity of Dr. Lan's examination (where the restrictions were set) was suspect. *See* Exhibit K.

20. On January 4, 2017 Claimant underwent an additional DIME evaluation performed by John Sacha, M.D. Claimant reported fairly constant pain localized to the right anterior superior shoulder with radiation into the right trapezius and right neck and radiating down the arm. Dr. Sacha reviewed medical records and performed a physical examination. On examination, Dr. Sacha noted that Claimant had exceptionally good passive range of motion but with active range of motion, Claimant was self-limited and had minimal range of motion. Dr. Sacha provided the impression of: history of shoulder surgery; and non-physiologic presentation. *See* Exhibit A.

21. Dr. Sacha noted that he was concerned that Claimant had significant over treatment without any objective findings and with very non physiologic complaints. Dr. Sacha opined that, as a result, Claimant had years and years of therapy all without any benefit. Dr. Sacha noted only modest findings on any of the diagnostic tests despite the fairly vociferous complaints. Dr. Sacha noted that he agreed with the original independent medical examiner, Dr. Horan, who opined in October of 2012 that further care was not indicated and noted that Claimant's case should have been closed back then. *See* Exhibit A.

22. Dr. Sacha noted that Claimant, however, went forward and had surgery with no improvement as would be expected. Dr. Sacha strongly recommended against any further treatment or medical care and opined that Claimant was clearly at maximum medical improvement. He opined that the original maximum medical improvement date of March 11, 2015 was at the very least appropriate. He strongly agreed with prior DIME physician Dr. Hompland's prior findings that Claimant was not at maximum medical improvement and noted the only reason why Dr. Hompland provided that opinion was to try to find an explanation as to why Claimant was still symptomatic which was not appropriate. Dr. Sacha opined that maintenance care was not necessary and would be bad for Claimant as it would cause her to maintain her disabled state of mind.

Dr. Sacha opined that Claimant reached MMI on March 11, 2015, had no work restrictions and was okay for full duty, and needed no maintenance care but could do home exercises for strength and conditioning. Dr. Sacha opined that Claimant had no impairment rating. He noted that Claimant clearly had exceptional passive range of motion that was near full and that she feigned poor active range of motion which was intentional. He opined that a 0% impairment due to lost range of motion was appropriate. *See* Exhibit A.

23. On June 27, 2017 Dr. Hackett wrote a letter indicating that Claimant had last been seen in November of 2016 with continued complaints of discomfort and reduced range of motion of the right shoulder. Dr. Hackett noted that he discussed with Claimant the option of continued stretching and conservative management versus the potential option of a possible capsular release in an attempt to regain full range of motion. Dr. Hackett noted that since his evaluation, Claimant had several other evaluations including an evaluation by Dr. Sacha. Dr. Hackett noted that he did not entirely agree with all of the findings of Dr. Sacha's letter and stands by his original evaluation. *See* Exhibit 1.

24. Dr. Scherr testified at hearing. He indicated that on examination of Claimant, it was difficult to determine if certain maneuvers were positive or not due to her inconsistencies and that Claimant had more strength than she indicated on testing. He noted that after he reviewed surveillance in December of 2016 he saw that Claimant could use her arm much better and without discomfort. Dr. Scherr testified that he knew he wouldn't get true examination effort from Claimant after reviewing surveillance and that despite the significant treatment she had, nothing had helped her so there would be no benefit to any maintenance treatment. He noted that following her shoulder surgery, her internal rotation was the same as her left shoulder in January of 2015, and remained the same through March of 2015 at 60 degrees. However, he noted that at the DIME examination, the internal rotation was at 40 degrees which was inconsistent.

25. Dr. Scherr opined that DIME physician Dr. Sacha did not err in assigning March 11, 2015 as the date of MMI and that Dr. Sacha also did not err in assigning a 0% permanent impairment rating. Dr. Scherr could not explain why Claimant still reported pain.

26. Claimant testified at hearing that she has been struggling for many years with her shoulder and that Dr. Sacha was harsh with her and didn't consider what she was saying. Claimant testified that she still does not have complete range of motion and that the doctor can raise her arm but that she cannot raise it on her own. Claimant also testified that she believed her gross wages were $900 per week, but submitted no wage records to support this contention.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Average Weekly Wage

Section 8-42-102(2) C.R.S. requires the ALJ to base claimant's AWW on her earnings at the time of injury. The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

As found above, Claimant earned varied wages paid over two week pay periods at the time of her injury. After review of the wage evidence, the ALJ finds that Claimant's testimony that her gross wages were close to $900 per week is not credible or persuasive. Rather, her highest wage week at the time of her injury was slightly more than $750 per week and the majority of her wages were less than that. The

evidence establishes that a fair approximation of Claimant's wage loss and diminished earning capacity based on wage records is the admitted average weekly wage provided by Respondents of $680.37.

Overcoming the DIME opinion on MMI

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

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

Claimant has failed to meet her burden to show by clear and convincing evidence that the DIME physician's finding of March 15, 2015 as the date of MMI is highly

probably incorrect. Rather, the DIME physician's opinion is consistent with the opinion of treating physician Dr. Scherr and is consistent with the overall medical records and evidence. Although Claimant disagrees with this MMI date, she has failed to meet her burden to show by clear and convincing evidence that any further treatment is reasonably expected to improve her condition. Rather, as shown above, despite extensive treatment in this case Claimant has not shown improvement. Claimant also has shown by surveillance that she is far more capable then she represents at medical evaluations.

Overcoming the DIME opinion on PPD

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; § 8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Here, Claimant has failed to establish that the DIME physician's rating of 0% permanent impairment was inconsistent with the AMA Guides or was in error. The rating of 0% has not been overcome by clear and convincing or preponderant evidence. DIME physician Dr. Sacha's opinion is consistent with authorized treating provider Dr.

Scherr's opinion and testimony. Further, the medical records and evidence establish at certain appointments that Claimant had range of motion similar and/or identical to her non injured left arm. Only after Claimant went for impairment rating did her range of motion seem to decline significantly. The decline was inconsistent with surveillance. Additionally, as found above, Dr. Sacha noted inconsistencies in passive and active range of motion that did not correlate. There have been numerous inconsistencies throughout Claimant's treatment noted by Dr. Sacha, Dr. Scherr, Dr. Hompland, Dr. Horan, Dr. Hackett, and Dr. Lan. The opinion of Dr. Sacha that there is 0% impairment is credible, persuasive, and consistent with notations from other providers and with the overall records. Claimant has failed to overcome DIME physician Dr. Sacha's opinion that she sustained 0% impairment.

Temporary Total Disability March 15, 2015 and Ongoing

As found above, Claimant reached MMI on March 15, 2015. Temporary total disability benefits are required to continue until an employee reaches MMI. *See* § 8-42-105(3)(a), C.R.S. Claimant has failed to establish a basis for TTD benefits that she is requesting from March 15, 2015 and ongoing as she is at MMI for her work related injury and termination of TTD benefits was appropriate under the statute.

Continued Medical Benefits

MMI exists when any medically determinable physical or mental impairment caused by the injury has become stable and no further treatment is reasonably expected to improve the claimant's condition. *See* § 8-40-201(11.5), C.R.S.; *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). In contrast post-MMI medical benefits are available to relieve the effects of the injury or prevent deterioration of the claimant's otherwise stable condition. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

Claimant has failed to establish an entitlement to continued medical benefits. There are no reasonable medical benefits available to relieve the effects of the injury or to prevent deterioration. As opined by Dr. Sacha and other providers, Claimant's subjective complaints lack objective correlation and are inconsistent. Despite significant treatment, Claimant has remained the same whether undergoing treatment or not. Dr. Sacha is credible and persuasive that no further medical benefits are needed and that Claimant may continue with home stretching and exercises for strengthening. Claimant has failed to establish an entitlement to continued medical maintenance benefits.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $680.37.

2. Claimant has failed to overcome the opinion of DIME physician Dr. Sacha on the date of MMI. Claimant reached MMI on March 11, 2015.

3. Claimant has failed to overcome the opinion of DIME physician Dr. Sacha on her permanent partial disability impairment. Claimant has a 0% permanent impairment rating.

4. Claimant has failed to establish an entitlement to temporary total disability indemnity benefits from March 11, 2015 and ongoing. Her request for TTD is denied and dismissed.

5. Claimant has failed to establish an entitlement to continued medical benefits. Her request is denied and dismissed.

6. All other issues are reserved for future determination.

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

DATED: October 9, 2017,

/s/ Michelle E. Jones

_____

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

ISSUES

1. Whether Respondents have established by a preponderance of the evidence that they should be allowed to withdraw the general admission of liability filed in this case.

FINDINGS OF FACT

1. Claimant worked for Employer as a flight attendant.

2. Claimant alleges that on November 23, 2016 he was helping a customer lift a bag into the overhead compartment when he injured his back.

3. Claimant reported the injury to Employer and was referred for treatment. Claimant spoke to Insurer and adjuster Lindsey Williams on the phone. Ms. Williams asked Claimant questions about the injury and his medical history per normal protocol.

4. Claimant reported that he injured his back assisting a customer putting luggage into the overhead compartment. Claimant reported no prior injuries to his lower back. Claimant indicated that he had lumbar surgery at the age of 16 to correct a curvature in his spine but that he had no ongoing problems with his back and that everything had resolved as a youth and that he was fine leading up to the incident at work.

5. Ms. Williams accepted the claim based on the information Claimant provided to her and Respondents filed a general admission of liability. Claimant later contacted Ms. Williams asking to treat at a specific location, University Neuroscience, because of the rural location of his home. Ms. Williams advised Claimant that Concentra would need to make a referral to University Neuroscience. Claimant did not advise Ms. Williams that he had already been treating at University Neuroscience prior to the date of his alleged November 23, 2015 work injury.

6. Records show that Claimant presented to University Neuroscience with severe lower back pain prior to the alleged injury date and prior to speaking with Ms. Williams.

7. On November 15, 2016 Claimant was evaluated at University Neuroscience in Augusta, Georgia. Claimant reported worsening back pain. Claimant indicated that 10 days prior he was moving some furniture and had 8 days of intractable back pain that was worsening. Claimant reported pain in the lower back and bilateral legs, right worse than left. Claimant reported a prior lumbar surgery 10-15 years ago. Claimant reported that he had already been seen at urgent care, had x-rays performed,

and had been given a Medrol pack, Valium, and Naproxen that had not helped. Claimant reported a pain level of 9/10. *See* Exhibit D.

8. Claimant was noted to have gait problems. The x-rays that had been taken at urgent care were reviewed and showed decreased lumbar lordosis consistent with severe muscle spasm and interbody spacing preserved with an exception at L4/5, right greater than left. It was recommended that Claimant continue conservative care and start Medrol, add Robaxin 3-4 times daily, and use Lortab for breakthrough pain. It was recommended that Claimant continue to ambulate and stretch. It was noted that an MRI would be considered if Claimant did not improve. *See* Exhibit D.

9. On December 1, 2016 Claimant was evaluated at University Neuroscience. It was noted that he was there for follow up of his acute intractable low back pain and constant 9/10 pain with right L5 radiculopathy that Claimant felt was getting worse. Claimant reported initial relief with the Medrol therapy, but that the pain had compounded with the conclusion of therapy and extended sitting. It was noted that the physical exam continued to reflect acute right L5 radiculopathy and that Claimant was obviously uncomfortable. The provider indicated they would try to move up Claimant's MRI to that same day and provided a repeat Medrol pack. Claimant did not report any new incident or injury from November 23, 2016 to providers at this visit. *See* Exhibit D.

10. Later that day, Claimant underwent an MRI of his lumbar spine. The December 1, 2016 report from Brett Horgan, D.O. at American Health Imaging provided the impression of: no acute abnormality; postsurgical changes status post L4 laminectomy; and degenerative changes of the lower lumbar spine most pronounced at L5-S1 with moderate to severe narrowing of the bilateral lateral recesses with possible impingement of the descending S1 nerve roots, particularly the left. *See* Exhibit E.

11. On December 2, 2016 Claimant was evaluated at Concentra, the medical facility he was referred to by Employer. Claimant reported he had already seen his own neurologist and needed a referral to the neurologist to get workers' compensation to cover his visit and MRI. Claimant reported that the adjuster had approved the transfer of care to the neurologist. Claimant was assessed with lumbosacral sprain and referrals to neurology and for an MRI were planned. *See* Exhibit C.

12. The adjuster, Ms. Williams, became aware that Concentra had referred Claimant to University Neuroscience and she called University Neuroscience to make sure they had the correct insurance and claim information. At this time, she found out that Claimant had already been treating at University Neuroscience and that he was actively treating there prior to the date of the alleged work injury. Ms. Williams was concerned about the general admission of liability that had been filed based on the information previously given to her by Claimant. She requested records from University Neuroscience and referred the case to legal for review.

13. Claimant continued to treat with University Neuroscience.

14. On December 6, 2016 Claimant was evaluated at University Neuroscience. Claimant reported continued and constant 4/10 pain with right L5 radiculopathy that had significantly improved following the repeat Medrol therapy. The December 2, 2016 MRI was reviewed by Dr. Oetting and was noted to have broad based disc desiccation, central and rightward at L4/5 with mild associated foraminal stenosis on the right at this level which was noted to be potentially the cause of Claimant's current clinical symptoms. A referral for possible epidural steroid injections was made. *See* Exhibit D.

15. On December 16, 2016 Claimant was evaluated at University Neuroscience by Mark Stewart, M.D. Claimant reported low back pain that started more than one month ago that was gradually worsening with a 7/10 pain that radiated to the right foot. Claimant reported that two rounds of steroids had helped somewhat. Dr. Stewart noted that Claimant needed to be scheduled for an epidural steroid injection as soon as possible. A few days later, on December 20, 2016 Claimant underwent a left L4/L5/S1 transforaminal epidural steroid injection performed by Dr. Stewart. *See* Exhibit D.

16. On January 4, 2017 Claimant was re-evaluated. Claimant reported that he had 70% relief from the injections and Claimant wanted to discuss getting injections on the right side. On February 14, 2017 Claimant underwent right transforaminal epidural steroid injections performed by Dr. Stewart. *See* Exhibit D.

17. In March of 2017 at follow up evaluations, Claimant reported no relief from the right sided injections and that his pain had returned to both legs. It was noted that Claimant was uncomfortable on examinations. Claimant reported continued daily pain in his lower back and bilateral lower extremities. It was noted that Claimant had exhausted conservative measures and that his pain was controlled on current regimens. A plan to order bilateral lower extremity EMGs and schedule Claimant to see Dr. Oetting regarding intervention was made. *See* Exhibit D.

18. On April 20, 2017 Claimant was evaluated by Dr. Oetting. Dr. Oetting noted that the electro diagnostics of the left lower extremity demonstrated acute left L5/S1 radiculopathy consistent with imaging findings and that the lower facet joint arthritis spur was causing significant foraminal stenosis which Dr. Oetting believed was the source of radiculopathy in the leg pain. Dr. Oetting offered Claimant surgery to help the symptomatology which he opined would hopefully improve Claimant by 60-70%. *See* Exhibit D.

19. On April 26, 2017 Claimant underwent a left L5-S1 foraminotomy performed by Dr. Oetting. Dr. Oetting noted in his operative findings that there was severe compression of the S1 nerve root with a large facet spur off the L5/S1 joint and that once the facet spur was decompressed, he could see and pass the ball-tipped probe out the foramen. *See* Exhibit D.

20. On June 22, 2017 Claimant was evaluated in follow up and it was noted that Claimant was doing well with his pain and reported a 50-60% improvement in his leg pain. The plan was to refer Claimant for physical therapy. *See* Exhibit D.

21. At physical therapy on August 14, 2017 It was noted that Claimant was a flight attendant and that the mechanism of injury was that in November of 2016 a bag on an airplane fell on Claimant and his back started hurting. Claimant reported continued pain and difficulty with activities of daily living and work. Claimant reported he was approximately 50% back to his normal level of activity and was improving gradually. *See* Exhibit 1.

22. On September 26, 2017 Claimant was evaluated at University Neuroscience. It was noted that Claimant's pain level was at 4/10 and that he was five months status post surgery. It was noted that Claimant was a flight attendant but was not able to continue to do that work. *See* Exhibit 2.

23. Respondents in this case filed a petition to modify, terminate, or suspend compensation. They indicated on their petition that they were seeking to withdraw their improvidently filed general admission of liability. They further indicated that after filing the general admission of liability based on statements made by Claimant, they learned that Claimant had an identical non work injury just weeks prior for which he sought medical treatment and for which identical medical recommendations as post alleged injury were recommended. Respondents indicated their belief that the general admission of liability was improvidently filed and that all wage loss to this point was not causally related to an alleged work injury. *See* Exhibit A.

24. Respondents also retained a medical expert to perform a medical records review. Kathy McCranie, M.D. performed a medical records review on June 1, 2017. Dr. McCranie noted Claimant's significant history with his lumbar spine. She noted that 8 days prior to the alleged November 23, 2016 work injury Claimant had been seen with worsening low back pain, had already been to an urgent care and had x-rays, and had already been treated with a Medrol pack, Valium, and Naproxyn. Dr. McCranie opined that all of the treatment in this case had to do with Claimant's earlier incident and that the treatment was directed towards Claimant's lumbar radicular symptoms which pre-existed November 23, 2016. Dr. McCranie noted that symptoms from November 23, 2016 at work would be related to the expected lumbar symptoms with activity that can be noted following a lumbar injury and at most that Claimant sustained a lumbar strain on November 23, 2016 and that a lumbar strain is expected to resolve. *See* Exhibit B.

25. Dr. McCranie testified at hearing consistent with her report. Dr. McCranie noted that Claimant had treated 8 days prior to the alleged injury where he reported unrelenting back pain and pain down both legs. Dr. McCranie noted that the symptoms reported at Claimant's November 15, 2016 visit were the same symptoms that he had after the alleged November 23, 2016 incident. She also testified that the operative findings from Claimant's surgery showed that he had a large spur at the L5/S1 level narrowing the space and that a large spur is a degenerative finding that develops over

time and that Claimant's job duties would not cause a bone spur. She noted that the surgical procedure removed this degenerative spur to relieve pressure on the nerve and that the bony spur growth was degenerative. Dr. McCranie opined that Claimant did not sustain a work related injury and noted that Claimant was in severe pain prior to the alleged injury and that his symptoms were the same following the alleged injury.

26. Claimant testified at hearing that he went to an urgent care at the beginning of November, 2016 right after he hurt his back and received a Medrol pack, Valium, and Naproxyn. Claimant reported also that he did go to University Neuroscience on November 15, 2016, 8 days prior to the work incident with 9/10 pain in his back and down both legs. Claimant testified that they gave him another Medrol pack that helped him and that he was fine and went back to work. Claimant testified that on November 23, 2016 while at work he lifted a bag and got much worse. Claimant testified that he should have told the adjuster about the prior treatment but didn't because he thought that work on November 23, 2016 had made his back much worse. Claimant testified that the pain intensity after November 23, 2016 was much worse and was not the same as before.

27. Claimant testified that he was originally injured in October and should have made a claim earlier but that he believed he only had 3 days to do so and had missed the window.

28. Claimant, overall, is not found credible or persuasive. It appears that Claimant is alleging some type of incident in late October or early November of 2016 where he was initially injured. It is not credible or persuasive that Claimant was doing much better on November 23, 2016 until he lifted a bag into the overhead compartment at work, that he was acutely injured on November 23, 2016, or that his condition was aggravated or exacerbated on November 23, 2016.

CONCLUSIONS OF LAW

Generally

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

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

plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Withdrawal of General Admission of Liability

Under § 8-43-201(1), C.R.S, a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order has the burden to prove by a preponderance of the evidence that such a modification should be made. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Here, Respondents have met their burden to establish that the general admission of liability filed for an alleged November 23, 2016 injury should be withdrawn. Claimant did not sustain an injury on November 23, 2016 and provided incorrect information to Insurer when questioned about prior injuries to his back. The credible evidence establishes that Claimant injured his back at some point either late October or early November. He treated for his injury both at an urgent care facility and at University Neuroscience prior to the alleged injury date of November 23, 2016.

When treating for the injury that occurred on an unknown date in late October or early November, Claimant had intractable lower back pain reported at a 9/10 with radiation. Claimant was provided with two Medrol steroid packs prior to the alleged injury date. Although they may have improved his pain for a period of time, the evidence establishes that his underlying condition remained unchanged. Insurer filed a general admission of liability based on Claimant’s statements about the mechanism of injury and the lack of prior back injuries or problems. These statements were false. Respondents have established that, in fact, Claimant sustained an injury prior to November 23, 2016 and that withdrawal of the admission is appropriate.

Claimant, in his own testimony, recognized that he should have told Insurer about his prior treatment and that he should have reported an injury earlier than the date of November 23, 2016. Claimant testified and inferred that he initially sustained an

injury in October of 2016. It is unclear what happened in October or whether it was work related. However, Claimant is not credible that the incident on November 23, 2016 made his back worse or intensified his pain. Rather, the records establish that prior to November 23, 2016 Claimant had the same symptoms of severe intractable back pain with radiation that he had after November 23, 2016 and that no acute injury or aggravation to an underlying condition was sustained on November 23, 2016. Claimant's false information to Insurer led to the filing of an improvident general admission of liability. Respondents have met their burden to establish that the admission should be withdrawn in this case.

ORDER

It is therefore ordered that:

1. Respondents have established by a preponderance of the evidence that withdrawal of the improvidently filed general admission of liability is appropriate and that Claimant did not sustain a compensable work related injury on November 23, 2016.

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

DATED: October 6, 2017,

/s/ Michelle E. Jones

_____

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

ISSUES

I. Whether Claimant has produced clear and convincing evidence to overcome the opinion of Division Independent Medical Examination ("DIME") physician Kenneth Finn, M.D. that Claimant reached maximum medical improvement ("MMI") as of March 10, 2016.

II. If Claimant overcame the DIME physician's opinion as to MMI, whether Claimant established by a preponderance of the evidence that she is entitled to additional reasonable and necessary medical treatment related to her April 16, 2015 industrial injury.

III. If Claimant did not overcome the DIME physician's opinion as to MMI, whether Claimant has established by a preponderance of the evidence that she is entitled to post-MMI maintenance medical treatment.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant is a 57-year-old student employee of Employer pursuing a doctorate in education. Claimant was employed as a women's studies coordinator in a work-study program.

2. Claimant sustained an admitted industrial injury on April 16, 2015. Claimant testified that she sustained the injury when she turned a corner carrying office materials and her dress got caught in a rolling chair. Claimant testified that she fell forward striking her right breast, neck, shoulder arm and left knee.

3. Claimant completed a First Report of Injury form on April 20, 2015, which noted Claimant fell to the floor and landed on her right breast and right shoulder. Claimant was referred to University of Colorado Health Urgent Care for treatment.

4. Claimant presented to Karen Hill, D.O. at University of Colorado Health Urgent Care on April 20, 2015. Claimant complained of right upper back, right shoulder and right elbow pain "and some feeling of fullness and decreased sensory in right hand." Claimant rated her pain at an 8/10. Dr. Hill suspected right shoulder and right elbow pain and closed radial head fracture on the right. Dr. Hill prescribed Claimant pain medication and referred Claimant to Occupational Health Services. Earlier that same day, Claimant attended an appointment with her psychiatrist, Jillian Busch, M.D. for psychological care related to home issues, post-traumatic stress disorder, and depression. Claimant testified that she did not discuss her injuries associated with her

work-related fall with Dr. Busch because she deemed it irrelevant to her psychological care and the purpose of her visit.

5. On April 22, 2015, Claimant presented to Tracey Stefanon, DO at University of Colorado Occupational Health Services Clinic. Claimant reported falling and landing on her right breast, right shoulder and right arm. The pain diagram completed by Claimant on April 22, 2015 indicated pain at the right shoulder, right arm, and right elbow. Claimant reported that the pain in her breast had completely resolved, and that the pain was mostly in her right shoulder and clavicular region, with pain also in her elbow. On physical examination, Dr. Stefanon noted fairly good range of motion in the neck, full left shoulder range of motion, limited right shoulder range of motion, and full range of motion of the elbow. Dr. Stefanon assessed neck and shoulder pain, most likely related to strain, elbow pain with questionable radial head fracture, and numbness and tingling in the hand with unclear etiology. Dr. Stefanon referred Claimant for an orthopedic evaluation.

6. On April 29, 2015, Claimant presented to Steven Seiler, M.D. for an orthopedic evaluation. Dr. Seiler assessed right upper extremity pain after a fall. Dr. Seiler opined that Claimant had a sprain of the elbow and maybe of the capsular portion of her shoulder. Claimant's exam was negative for carpal tunnel or cubital tunnel syndrome and no fractures or dislocations were noted in the radiographic studies. Dr. Seiler recommended that Claimant undergo an EMG and/or MRI if there was no improvement in Claimant's symptoms over time.

7. Dr. Stefanon reevaluated Claimant on May 7, 2015. Claimant continued to complain of neck and elbow pain and numbness and tingling in her right hand. Dr. Stefanon assessed the following: neck pain most likely related to a strain and possibly underlying disk injury, shoulder pain most likely related to a strain, elbow pain with an old healed radial head fracture, and numbness and tingling into the hand with possible cervical etiology. Dr. Stefanon recommended Claimant undergo an MRI to rule out disk pathology and referred Claimant for chiropractic care and physical therapy. Dr. Stefanon remarked, "She has quite a bit of stress at home related to nonwork issues, and I think that this is affecting her recovery from her injury."

8. Claimant underwent an MRI on May 15, 2015 which revealed the following: "Disk space narrowing with disk dessication and disk osteophyte complex noted at the C6-7 level. This extends greater to the right. There is moderate right and mild left-sided foraminal stenosis."

9. On May 18, 2015, Dr. Stefanon reviewed the May 15, 205 MRI and opined that the findings were chronic in nature, with bony osteophytes and foraminal stenosis. Dr. Stefanon opined that Claimant's chronic findings on MRI and psychosocial stressors contributed to Claimant's delayed recovery. Dr. Stefanon referred Claimant for a psychosocial evaluation.

10. Dr. Stefanon reevaluated Claimant on June 3, 2015. Claimant reported improved arm and neck pain with ongoing numbness in her right hand. Claimant reported

experiencing vertigo after her first chiropractic visit. Dr. Stefanon recommended Claimant continue with chiropractic care and physical therapy and use a cervical traction unit.

11. On July 30, 2015, Claimant underwent an EMG/nerve conduction study of her right upper extremity with Raymond van den Hoven, M.D. Claimant reported experiencing tingling and a "frost bite" sensation over her right thumb, index and middle fingers. Claimant reported that her right arm symptoms had subsided moderately over time. Dr. van den Hoven determined Claimant had mild to moderate right carpal tunnel syndrome, moderate left carpal tunnel syndrome, and mild right C7 cervical radiculopathy. Dr. van den Hoven opined that it is "highly likely" Claimant's right arm symptoms were due to cervical radiculopathy and not carpal tunnel syndrome. Dr. van den Hoven recommended continuing with conservative care with consideration of a right C6-7 transforaminal epidural steroid injection if Claimant's pain increased.

12. Claimant returned to Dr. Stefanon for a follow-up evaluation on August 17, 2015. On the pain diagram Claimant now indicated left knee symptoms in addition to ongoing neck, right arm, and right hand pain. Claimant had not previously indicated any left knee symptoms. Dr. Stefanon reviewed Dr. van den Hoven's report and noted that the bilateral carpal tunnel syndrome was not related to the work injury but that the right arm symptoms were likely due to the mild right C7 cervical radiculopathy. Dr. Stefanon commented that Claimant's behavioral health inventory confirmed her concerns regarding delayed recovery. She was concerned about symptom magnification, which she felt would fit with Claimant's behavioral health inventory profile. Dr. Stefanon returned Claimant to full duty and referred Claimant to Dr. Nieves for a second opinion for possible injection.

13. Claimant testified that she had reported her left knee symptoms to Dr. Stefanon prior to August 17, 2015 but that she was advised that her knee pain was not related to her compensable work related injury. Claimant further testified that her most significant pain complaints were related to her neck and right upper extremity and that as her left knee symptoms gradually worsened with time she became more insistent with her physicians that her left knee had been injured in the April 16, 2015 fall.

14. Dr. Stefanon referred Claimant to Gregory Reichhardt, M.D. for a physiatric consultation after it was determined Dr. Nieves was unavailable. Dr. Reichhardt first evaluated Claimant on September 21, 2015. Claimant reported falling and hitting the right side of her neck, her left breast, and her left knee. Claimant reported neck, arm and hand pain, as well as left knee pain, which Claimant related to the work injury. On physical examination, Dr. Reichhardt noted tenderness to palpation around the cervical and periscapular region and decreased cervical range of motion. Dr. Reichhardt gave an impression of neck and right upper extremity pain, left knee pain, and anxiety and depression. Dr. Reichhardt discussed the possibility of trigger point injections, epidural steroid injections and a surgical consultation. He further stated that he could not address the causality of the left knee and needed to discuss it with Dr. Stefanon.

15. On October 27, 2015, Claimant reported to Dr. Reichhardt that she was doing somewhat worse. Dr. Reichhardt once again recommended cervical injections, which the Claimant was not interested in pursuing at that time. Further, upon discussion with Dr. Stefanon, Dr. Reichhardt opined that Claimant's left knee symptoms were not related to the work injury. Dr. Reichhardt released the Claimant from his care.

16. Dr. Stefanon reevaluated Claimant on November 2, 2015. Claimant again reported left knee symptoms on her pain diagram in addition her right upper extremity and neck symptoms. Dr. Stefanon reviewed Claimant's medical records and noted that there was no documentation of any knee pain until August 17, 2015, over four months after the work injury. Dr. Stefanon further stated that Claimant had not indicated that her knee was "a point of contact for her fall." Dr. Stefanon concluded that the left knee pain was not related to the work injury. The report noted inconsistencies in motion and strength testing. Dr. Stefanon noted difficulty ascertaining a consistent answer regarding Claimant's symptomatology, function, and duration of her symptoms. Dr. Stefanon released Claimant to work full duty and referred Claimant to Dr. George Girardi for pain management consultation and possible injections.

17. On November 12, 2015, Claimant reported to the emergency room at Banner Fort Collins Medical Center complaining of right low back and right buttock pain which began the night before. She reported no obvious trauma, falls, or lifting and stated that she never had this type of pain before.

18. Claimant presented to George Girardi, M.D. on December 14, 2015. Dr. Girardi assessed neck pain with right arm pain in a C7 distribution due to neuroforaminal stenosis, and recommended a cervical epidural steroid injection at C6-7.

19. Dr. Stefanon reevaluated Claimant on December 28, 2015. Claimant was now reporting new complaints of lower back and right gluteal pain, which she related to the work injury. When questioned by Dr. Stefanon, Claimant was unable to give a concrete answer as to when she developed the pain in her back, but reported that she "had it all along." In her review of the chart, Dr. Stefanon found no mention of lower back pain in the initial evaluations or in the pain diagrams from her office. Dr. Stefanon also noted Dr. Girardi's initial evaluation from December 14, 2015, which made no mention of low back pain. Dr. Stefanon concluded that Claimant's low back symptoms were not related to the work injury. Dr. Stefanon again noted inconsistencies in strength and motion testing and difficulty trying to ascertain answers to direct questions. Dr. Stefanon's examination of Claimant's neck now revealed very limited flexion and extension and she was concerned that Claimant was not putting forth full effort.

20. Claimant testified that her lower back pain developed as her left knee pain worsened and her gait changed which is why, she believes, the onset was delayed and subsequent reporting was delayed.

21. On January 23, 2016, Claimant was seen at the emergency room at Banner Fort Collins Medical Center complaining of bilateral knee pain, left worse than right. The left knee was severely painful, making it difficult to walk. She attributed the pain in both

knees to her April 2015 fall, stating that the pain had gotten progressively worse over the previous week. Claimant reported that she did not fall on her left knee, but that it got "caught up in a chair." She was referred for a left knee MRI at McKee Medical Center on February 3, 2016, which revealed edema and an acute horizontal tear of the medial meniscus.

22. On February 23, 2016, Dr. Girardi administered a cervical epidural steroid injection at the C6-7 level. Following the injection Claimant reported more than an 80% improvement of her cervical symptoms.

23. Dr. Stefanon placed Claimant at MMI on March 10, 2016. Claimant reported feeling better following the epidural steroid injections performed at C6-7 on February 23, 2016 by Dr. Girardi. Dr. Stefanon diagnosed Claimant with 1) chronic neck pain with MRI evidence of multilevel disc degeneration and foraminal stenosis, 2) shoulder pain and 3) numbness and tingling consistent with a mild right C7 radiculopathy, noting that all were work-related with the exception of the chronic degenerative changes noted on the MRI. Dr. Stefanon assessed Claimant with a 4% right upper extremity rating for range of motion deficits to the shoulder, 6% whole person rating for specific disorder of the cervical spine, and 1% whole person rating for neurological system. She provided no impairment for range of motion deficits to the cervical spine due to inconsistent measurements which she did not believe represented Claimant's true level of function. Range of motion testing was completed on March 10 and again on March 15, 2016. Dr. Stefanon recommended no maintenance medical care.

24. Claimant returned to Dr. Girardi on April 14, 2016. It was noted that Claimant had 100% relief following her initial cervical injection but that her pain had returned and that she had headaches that were disrupting her sleep. It was recommended that Claimant undergo a right C6-7 selective nerve root block. Authorization was requested with the Respondent and was denied.

25. On April 15, 2016, Respondent filed a Final Admission of Liability in accordance with Dr. Stefanon's findings of MMI and impairment. Claimant timely objected to Respondent' April 15, 2016 Final Admission of Liability and requested a DIME. Kenneth Finn, M.D. was selected to perform the DIME and an appointment was scheduled for August 12, 2016.

26. Claimant continued to obtain medical treatment for her symptoms, paid for through Medicaid. Claimant continued to relate her left knee pain and symptoms to the work injury.

27. On August 2, 2016, Claimant returned to Dr. Girardi for a C6-7 selective nerve root block. Claimant testified that following the injection she had significant improvement in her cervical/upper right extremity symptoms.

28. Dr. Finn performed a DIME on August 12, 2016. Dr. Finn reviewed Claimant's medical records dated April 22, 2015 to March 15, 2016 and physically examined Claimant. Claimant reported neck pain radiating into the shoulder and scapular region,

as well as pain in her right upper arm, elbow and wrist. Claimant complained of constant numbness and tingling in her right hand. She also reported left knee symptoms. On physical examination, Dr. Finn found decreased range of motion of the cervical spine, which he noted was non physiologic compared to what he observed on his casual observation of Claimant. Dr. Finn also noted decreased range of motion of the right shoulder, mildly diminished range of motion in the left knee, and diffused lumbar, paravertebral and SI joint tenderness.

29. Dr. Finn diagnosed Claimant with chronic cervical spinal pain with radicular symptoms, chronic right shoulder pain, and right upper extremity numbness and tingling. Dr. Finn concluded that Claimant's carpal tunnel syndrome, left knee pain, and low back pain were not work-related. Dr. Finn agreed with Dr. Stefanon's MMI date of March 10, 2016 and assigned a 4% whole person impairment for specific disorders of the cervical spine and an 11% right upper extremity impairment for loss of range of motion. Dr. Finn recommended Claimant follow-up with Dr. Girardi for periodic cervical epidural steroid injections at her discretion, no more than three or four per year, and one year of ongoing medication management.

30. Respondent filed a Final Admission of Liability on September 21, 2016 admitting to permanent partial disability benefits corresponding with Dr. Finn's impairment rating based on an AWW of $146.37. Respondent denied liability for maintenance medical care.

31. On November 8, 2016, Claimant underwent an MRI of her cervical spine which revealed a broad-based disc bulge at C6-7 and moderately severe right and moderate left foraminal stenosis.

32. On January 3, 2017, Dr. van den Hoven conducted a second EMG/nerve conduction study of Claimant. Dr. van den Hoven noted the testing revealed mild right C7 cervical radiculopathy "old and/or possibly ongoing/chronic," and mild bilateral carpal tunnel syndrome which had mildly improved. Dr. van den Hoven remarked, "I think the majority of her right arm neurologic symptoms are from her cervical spine…I doubt that the carpal tunnel syndrome is a significant factor in that she did not have any of the right arm symptoms on the left side, other than the median numbness complaints in the hand." Dr. van den Hoven recommended that Claimant follow up with neurosurgeon Dr. Gibbons regarding further neurosurgical recommendations.

33. Dr. Stefanon testified by deposition on August 10, 2017 as an expert witness. Dr. Stefanon is board certified in occupational medicine and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Stefanon testified that she placed Claimant at MMI as of March 10, 2016 because Claimant had undergone a "reasonable amount of treatment" and had improved. At the time she placed Claimant at MMI, Dr. Stefanon believed no maintenance medical care was needed. Dr. Stefanon initially testified that she believed Claimant remained at MMI. Dr. Stefanon then acknowledged that Claimant's condition had worsened since her placement at MMI, and that Claimant continued to be symptomatic.

34. Dr. Stefanon further testified that Claimant could undergo additional testing to determine the etiology of her ongoing symptoms, stating:

> Q: As we sit here today, do you think [Claimant] needs maintenance care to maintain maximum medical improvement?
>
> A: I think that there's a possibility that she could need maintenance care. I am not necessarily convinced with Dr. Girardi's evaluation with ongoing injections for her cervical spine. I think that before that would be determined, that there could also be pursuit of getting a clearer picture of the etiology of her pain at this point and any radicular symptoms that she may be having in her hand and any contribution from other – other possibly modifying conditions that would affect her symptoms as well.

35. Dr. Stefanon further testified:

> I would find it difficult to recommend any ongoing maintenance care until, in my – if I – to be able to say that it would be related to her work-related injury as this point, unless I did an evaluation and made a determination about where the etiology of her symptoms were coming from…I would consider, possibly, again, seeing whether or not her symptoms of nerve – whether or not her symptoms were more pain, numbness and tingling, whether or not an injection into the carpal tunnel made any difference in those symptoms, so that that may be – give us some indication about whether or not the radicular symptoms into her fingers are actually related to , not her C7, but maybe her carpal tunnel. So to differentiate between those two things.

36. She stated that Dr. van den Hoven's assessment that Claimant should follow up with a neurosurgeon was a reasonable option considering her ongoing C7 problems reflected in his January 3, 2017 repeat EMG. She subsequently agreed that Dr. Finn's maintenance medical recommendations of periodic cervical injections with Dr. Girardi and one year of medication management was also a reasonable option in light of Claimant's ongoing need for care, repeat MRI results and EMG findings. Dr. Stefanon also subsequently testified that the injections Claimant received with Dr. Girardi up to that point were reasonable, necessary and related.

37. Dr. Stefanon continued to opine that Claimant's left knee and low back symptoms, and carpal tunnel syndrome were not related to the work injury.

38. Claimant's testimony regarding her continued cervical and cervical radicular symptoms is found credible and persuasive. Further, the post MMI EMG findings, cervical MRI pathology, Dr. Stefanon's testimony and Claimant's post MMI medical records establish that Claimant's condition worsened after her placement at MMI by Dr. Stefanon and the DIME with Dr. Finn.

39. Dr. Stefanon changed her opinion on MMI as evidenced by her testimony. Dr. Stefanon testified that the Claimant's condition had worsened since MMI and that she required additional cervical injections, that a neurosurgical consultation is appropriate and that additional diagnostic testing would confirm whether or not there was also a worsening of disc pathology at the C6-C7 level and the etiology of Claimant's pain. Dr. Stefanon's opinion that additional diagnostic procedures are appropriate, that a neurosurgical consult is reasonable, coupled with the post MMI diagnostic findings, cervical injections and medical care, establish that Claimant is not at MMI.

40. Claimant has overcome Dr. Kenneth Finn's DIME opinion regarding MMI by clear and convincing evidence based on with respect to the need for additional diagnostic treatment regarding what Dr. Finn determined to be her work-related conditions. The ALJ credits Dr. Stefanon's testimony regarding additional diagnostic procedures and treatment, which is supported by the medical records.

41. The ALJ credits the opinions of Drs. Finn, Stefanon and Reichhardt, which are supported by the medical records, and finds that Claimant's left knee and low back symptoms are not related to the April 16, 2015 work injury.

42. Claimant has established by a preponderance of the evidence that she is entitled to reasonably necessary and causally-related medical treatment to cure and relieve the effects of the April 16, 2015 industrial injury. The ALJ credits the opinions of Dr. Stefanon regarding the Claimant's worsening of condition and agreement that a neurosurgical consult, additional diagnostic testing and cervical injections with Dr. George Girardi as reasonably necessary and related medical treatment.

43. Claimant testified that there was a fixed rate of pay for the year for the work study program and that should would have been entitled to a minimum of "roughly $11,000" for the 2015 school year. No documentation or other evidence was submitted supporting Claimant's contention that she was entitled to a minimum of approximately $11,000 for the school year. Claimant further testified that she was not able to work during academic breaks. Claimant stated that she believes $239.13 is an accurate representation of her AWW, although it fluctuated.

44. Per the wage records submitted by Respondent, dduring two-week the pay period in which Claimant sustained the work injury, she worked 20.5 hours and earned $307.50. which equates to $153.75 per week. Claimant's hours varied significantly week by week. For the 52-week period from June 28, 2014 through June 26, 2015, Claimant earned $8,731.15. $8,8731.15 divided by 52 weeks equals $167.91, which the ALJ finds is an accurate representation of Claimant's AWW.

45. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Overcoming the DIME Physician's Opinion Regarding MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5),

C.R.S. Under the statute, MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007).

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

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, *supra*. The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As found, the ALJ was not persuaded that Dr. Finn erred in his assessment regarding the work-relatedness of Claimant's left knee and low back symptoms. The ALJ credits the medical records, which document that Claimant did not begin complaining of left knee and low back symptoms until several months after the work injury. Drs. Finn, Stefanon and Reichhardt all credibly opined that Claimant's left knee and low back symptoms are not related to the April 16, 2015 work injury. However, the ALJ concludes that it is highly probable Dr. Finn's opinion that Claimant reached MMI as of March 10, 2016 is incorrect with respect to Claimant's cervical and right upper extremity symptoms. Claimant credibly testified that her condition worsened shortly after being placed at MMI and that she has remained symptomatic. Claimant's testimony is supported by the medical records. Claimant's authorized treating physician, Dr. Stefanon, testified that further diagnostic testing is appropriate to confirm worsening of Claimant's condition and to determine the etiology of Claimant's continued symptoms.

Based on the totality of the evidence, the ALJ is persuaded that Claimant requires additional diagnostic procedures and medical care to cure or relieve the effects of the work injury, which is inconsistent with a finding of MMI.

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant has established by a preponderance of the evidence that she is entitled to additional reasonably necessary and casually-related medical treatment. The ALJ credited Dr. Stefanon's opinion that the Claimant's condition had worsened since MMI and that additional diagnostic testing, a neurosurgical evaluation and follow up injections with Dr. Girardi are reasonably necessary and related. Accordingly, Respondent are liable for reasonably necessary and causally-related medical treatment to cure or relieve the effects of Claimant's April 16, 2015 industrial injury, including the medical treatment as recommended by Drs. Stefanon, Finn, Reichhardt and van den Hoven.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3), C.R.S. establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

Claimant's contention that she was entitled to at least $11,000 for the school year was unsupported by other evidence. During two-week the pay period in which Claimant sustained the work injury, she worked 20.5 hours and earned $307.50, which equates to $153.75 per week. Per the wage records and Claimant's own admission, Claimant's hours fluctuated. Accordingly, the ALJ concludes that an AWW of $167.91 (Claimant's earnings over a 52-week period) is a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

It is therefore ordered that:

I. Claimant has overcome DIME physician Dr. Finn's opinion as to MMI by clear and convincing evidence. Claimant is not at MMI.

II. Claimant has proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment related to the April 16, 2015 industrial injury. Respondent shall pay the costs of causally-related and reasonably necessary medical care as recommended by Drs. Stefanon, Finn, Reichhardt and van den Hoven.

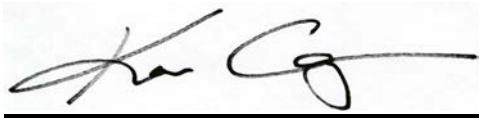
III. Claimant's AWW is $167.91.

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

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

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

DATED: October 6, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Determination of Claimant's average weekly wage.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability benefits from November 4, 2016 through December 5, 2016.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from December 6, 2017 through March 1, 2017.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability benefits from March 1, 2017 through March 23, 2017.

5. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from March 24, 2017 and ongoing until terminated by statute.

STIPULATIONS

1. Claimant was hired by Employer to perform seasonal employment.

FINDINGS OF FACT

1. Claimant was hired by Employer on July 12, 2016 as an hourly seasonal employee to work during the "carrot season" at a rate of $8.31 per hour. Claimant's duties involved sorting and packing 5 pound bags of carrots. Claimant knew the job was seasonal and would continue until the ground froze. Employer's carrot season usually begins sometime in July and continues through October and can go occasionally into December, depending on when the ground freezes.

2. Employer has 26 full time employees who work year round. Annually, the 26 full time employees typically sort onions from January to March, plant from March to June, then work the carrot season from July until the ground freezes. During the carrot season, and from July until the ground freezes, Employer hires between 200-250 additional seasonal employees as carrots are their main product. After carrot season, Employer lets all the carrot workers go and returns to their 26 full time employees. Employer also hires 10-12 seasonal employees for the onion bulb season which goes from January to March. Employer indicated that they let all of the seasonal workers go at the end of every carrot season, but would hire them back the next year if the

employee came back again wanting seasonal work. Employees are told that their employment is seasonal and that they will be let go when the ground freezes and carrot season is over.

3. As carrots are Employer's main product, the seasonal carrot workers (200 to 250) work 50-60 hours per week during the peak season. The seasonal onion bulb employees (10-12) who work the onion season typically work between 10-40 hours per week.

4. In 2016, the carrot season continued until December 5, 2016. *See* Exhibit C.

5. Claimant attended required training for her seasonal carrot employment on July 12, 2016. At training Claimant was provided information about hours, attendance, and punctuality. Claimant was informed that the normal work week for seasonal carrot workers was 10 to 12 hour days from 7 a.m. to 6 p.m. with a one hour unpaid lunch break. Claimant was told the work would typically be Monday through Saturday but sometimes occasionally could include Sunday. *See* Exhibit 2.

6. On July 16, 2016 after she completed training, Claimant received her first paycheck paying her for 26.5 hours at $8.31 per hour. Claimant worked various hours per week until November when she was injured, with the least number of hours per week (outside of her initial hire/training week) being 44.5 and the highest number of hours per week being 62. *See* Exhibit B.

7. On November 4, 2016 Claimant sustained a compensable injury to her right hand after it got caught in a conveyor belt while she was sorting carrots.

8. On November 5, 2016 Claimant was evaluated by Daniel Bates, M.D. Claimant reported pain in the right 3rd and 4th digits radiating into her hand and wrist and up her whole right arm. Dr. Bates assessed: sprain of wrist and flexor tendons of the right hand; some laxity in the right TFCC; concern for tear. Dr. Bates put Claimant in a volar splint with restrictions of no use of the right hand at work for 72 hours. *See* Exhibit 1.

9. On November 7, 2016 at a follow up evaluation, Claimant was advised to continue to wear the splint and to not use her right arm at work for one week. Tufts fractures were noted in the 3rd and 4th fingers. *See* Exhibit 1.

10. At evaluations on November 15, 2016, November 16, 2016, and November 22, 2016 Claimant was diagnosed with tufts fractures and right arm strain. *See* Exhibit 1.

11. Following her injury, Claimant was paid for 57.25 hours of work in her November 5, 2016 paycheck, 59.75 hours of work in her November 12, 2016 paycheck, and for 48.75 hours of work in her November 19, 2016 paycheck. The paychecks for November 26, 2016, December 3, 2016, and December 6, 2016 show fewer hours paid with 28.75, 20.0, and 11.0 paid work hours respectively. *See* Exhibits 2, B.

12. On November 30, 2016 it was noted that Claimant had new symptoms of neck and back pain and no improvement in her right upper extremity pain. Claimant was noted to be able to work 6 hours per shift with the continued restriction of no use of right hand/arm. *See* Exhibit 1.

13. At an evaluation on December 19, 2016 Claimant reported that she was not working since the carrot season was over. It was recommended that Claimant continue physical therapy and an EMG was scheduled. *See* Exhibit F.

14. On January 10, 2017 Dr. Reichhardt noted that the EMG of Claimant's right upper extremity was normal. *See* Exhibit 1.

15. On April 17, 2017 Claimant reported no improvement, that she was still not working, and that it was the off season from her job. The assessment indicated that Claimant's ongoing pain was likely myofascial pain syndrome or brachial plexus injury and that it needed to be determined if it was indeed myofascial or neurologic. *See* Exhibit F.

16. On June 30, 2017 Claimant reported that she didn't feel able to go back to full duty work, but that her job was down seasonally at the time. It was noted in the assessment that Claimant had ongoing neck/shoulder and hand pain from a work injury in November and that they were awaiting a psych appointment, continuing physical therapy, and seeing pain management for trigger point injections. See Exhibit F.

17. On July 31, 2017 Claimant was evaluated by Dr. Bates. Dr. Bates noted that there was unclear definitive cause of Claimant's right arm and shoulder pain but that the jerking injury may have caused a brachial plexus lesion or cervical nerve root lesion resulting in continued neuropathic pain in the upper extremity. Dr. Bates noted intermittent and unpredictable improvement with physical therapy and massage therapy consistent with a non musculoskeletal origin of pain and opined that Claimant likely had some component of myofascial pain syndrome resulting from the injury. Dr. Bates opined that Claimant had likely reached maximum medical improvement but that a review by an independent medical evaluation was appropriate. *See* Exhibit F.

18. In addition to hiring seasonal carrot workers, Employer also employs seasonal onion packer workers. The onion season is usually between January and April and in 2016 it went from January 11, 2016 through April 1, 2016. Seasonal onion packing employees are paid at $9.31 per hour, slightly more than seasonal carrot workers. *See* Exhibit C.

19. On February 27, 2017 Respondents sent a letter to Claimant noting that her treating physician had released her to modified work and that they had a temporary position for her as an onion packer at $9.31 per hour. It advised her that she would begin the modified job on March 8, 2017 and that it was 35 paid hours per week with a schedule of Monday through Friday from 8 a.m. to 4 p.m. Claimant's doctor approved of the job noting that Claimant had to use her left hand only. *See* Exhibit D.

20. On March 20, 2017 Respondents sent a letter to Claimant noting that they had another temporary position as onion packer at $9.31 per hour that would begin on March 29, 2017. This position had similar duties as the position identified in the February 27, 2017 letter, but noted that beginning March 29, 2017 the paid hours per week would be 20 and the hours would be Monday through Friday from 8 a.m. to 12 p.m. *See* Exhibit D.

21. Respondents argue that Claimant's work was seasonal and she was not otherwise employed or anticipating employment. A record from August of 2015 indicates that Claimant reported to her primary care clinic that she was a homemaker. *See* Exhibit E.

22. Employer provided testimony at hearing that 2016 was a bad onion season and that Claimant was paid for 20 hours of work per week during the onion season that she worked not due to her injury but due to the bad crop season they had.

23. Claimant testified at hearing that she stopped working for Employer in December of 2016 and went back to work in March of 2017 when she was offered work again. Claimant testified that in March, she continued to work until March 24, 2017 when she was removed from all work by her doctor.

24. Claimant testified and responded in interrogatories that she had worked previously in seasonal work for Petrocco Farms, for the 2006 season and again seasonally in 2012, 2013, 2014, and 2015. Claimant also testified that during the off seasons, she had previously worked at a Chick-Fil-A, a Tortilleria, and also cleaning houses.

25. Claimant admitted that she had not disclosed work as a housecleaner in her answers to interrogatories and that she had no wage records from cleaning homes. Claimant, however, testified that she had cleaned homes for cash in 2016 prior to her work injury. Claimant's testimony that she cleaned homes for cash is not credible or persuasive. It was not disclosed on interrogatories and there are no wage records or tax records documenting any employment or income from cleaning homes whether self employed or through a cleaning service.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. *See* § 8-41-301(1), C.R.S.; *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers'

compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. *See* § 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. *See* § 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on her earnings at the time of injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon her AWW on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), *supra*, grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

As found above, Claimant was hired as a seasonal carrot worker at $8.31 per hour and was expected to work 50-60 hours per week until the ground froze and carrot season was over. As found above, her hours per week varied, but were consistently within the range expected. From her July 23, 2016 paycheck through her November 19, 2016 paycheck, Claimant worked a total of 1,002.25 hours. This was over a period of 18 weeks which averages out to an average number of hours worked per week during this period of 55.68. From the wage records it is clear that prior to her injury, Claimant was working the expected 50-60 hours per week anticipated at her hire for the carrot season. Had her injury not occurred, she would have continued to earn wages at that level and would have had that level of earning capacity. Physically, she was able to work 50-60 hour work weeks and she also had the ability to earn wages of $8.31 per hour. Although Claimant may have chosen either to work or not work for a different employer after the ground froze and after the carrot season ended, at the time she was injured her earning capacity was at the level of $8.31 per hour for 55.68 hours per week. The objective of determining Claimant’s average weekly wage is to arrive at a fair approximation of her wage loss and diminished earning capacity.

Claimant has established, by preponderant evidence, that her average weekly wage at the time of her injury was $462.70, which is 55.68 hours per week times her

hourly wage of $8.31. This is a fair approximation of her earnings at the time of her injury and of her diminished earning capacity due to her injury. Respondents' arguments are not found persuasive. Claimant was not employed in a job where her hours with Employer would fluctuate within the year so that she would have a busy time and a not busy time. Rather, Claimant understood that she would work 50-60 hours the entire time she was employed with Employer. Claimant did so. Claimant also, prior to her injury, had the capacity to work such hours. Claimant, had she not been injured, may have sought employment with a different employer after carrot season and would have had the capacity to continue to work 50-60 hour work weeks. Thus, she has established that her diminished earning capacity due to her injury is more appropriately based on her ability to work 50-60 hour weeks at the rate paid by Employer. The ALJ determines that Claimant's average weekly wage is $462.70.

Temporary Partial Disability (TPD) Benefits

An employee is entitled to receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly (AWW) wage during the continuance of the temporary partial disability. *See* § 8-42-106(1), C.R.S. As found above, Claimant was injured on November 4, 2016. Despite her injury, Claimant continued to be paid normal wages with hours paid similar to and within range of her normal hours prior to her injury through her November 19, 2016 paycheck. However, for her last 2.5 weeks of work (prior to the season ending), Claimant's paid hours were significantly lower. The week ending November 26, 2016 Claimant was paid $238.91 when her AWW was $462.70. During the week ending December 3, 2016 Claimant was paid $166.20 when her AWW was $462.70. For the pay period ending December 6, 2016, Claimant was paid $91.41 plus a $100 bonus for finishing the carrot season. This pay period covered two work days, December 5, 2016 and December 6, 2016. Claimant's AWW covered the six work days per week that she typically worked, as employees typically did not work on Sundays. Therefore, her AWW divided by six work days in a week results in an average daily wage of $77.12 and for the two work days she was paid for in her December 6, 2016 check, she made $91.41 total, when her normal AWW would have paid her $154.12.

Claimant has thus established an entitlement to sixty-six and two-thirds percent of the difference as outlined below:

11/26/16- normal AWW $462.70; paid $238.91; difference = $223.79

12/3/16 – normal AWW $462.70; paid $166.20; difference = $296.50

12/6/16 - normal AWW $154.12; paid $91.41; difference = $62.71

The total difference in her AWW prior to the injury, and her AWW following the injury and during the continuance of her temporary partial disability is $583.00. Had

Claimant not sustained an injury, she would have earned $583 more for this period of time. Multiplying this by sixty-six and two-thirds results in TPD benefits owed to Claimant in the amount of $388.67.

Temporary Total Disability (TTD) Benefits

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

The loss of seasonal employment does not automatically disqualify a claimant from receiving subsequent disability benefits, but whether or not the wage loss was caused by the injury is a question of fact for determination by the ALJ. *City of Aurora v. Dortch,* 799 P.2d 461 (Colo. App. 1990). Inherent in the Dortch decision is the court's recognition that seasonal employment is a common fact of economic life, and that the conclusion of a particular period of seasonal employment should not automatically be viewed as the permanent end to the employment relationship or evidence of the claimant's "voluntary" decision to become unemployed. Termination of employment resulting from the conclusion of a contract for seasonal work does not automatically disqualify a claimant from receiving subsequent TTD benefits. *Cf. J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989). The fact that a claimant knows the seasonal employment will end at a fixed point in time does not necessarily lead to the conclusion that she is responsible for the termination. *City of Aurora v. Dortch*, supra. However, the result might be different if an ALJ were to find that claimant selected a fixed period of seasonal employment with the intent of the remaining unemployed throughout a portion of the year, or permanently. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1986).

Claimant has failed to establish an entitlement to TTD benefits from December 6, 2016 through July 1, 2017. The credible evidence establishes that even if Claimant had not been injured, Claimant would have been unemployed during this period of time in

between carrot seasons. Claimant was hired as a seasonal worker just for the carrot season. Claimant had no guarantee of future work with Employer, although likely would have been hired again in July of 2017 for the next year's carrot season. As found above, during the onion season, Employer has their 26 full time employees plus an additional 10-12 seasonal onion employees versus the 200-250 seasonal carrot employees they have from July to December. The evidence also establishes that, more likely than not, Claimant would not have worked during the off season and would not have worked again until the seasonal employment began again in July of 2017.

The records and credible testimony establish that Claimant has only worked seasonal jobs from 2012 until present. Although Claimant worked at a Chick-Fil-A during the off season in 2010 and worked at a tortilleria in 2011-2012, the credible evidence establishes that she had been working seasonally for a different farm and employer during 2012, 2013, 2014, and 2015. She then began what she knew was a seasonal job for Employer in 2016. Claimant's testimony at hearing that during the off season and earlier in 2016 she cleaned homes for cash is not found credible. Claimant did not report the home cleaning on her answers to interrogatories nor did she have any wage records, tax records, or other documents to support that she in fact worked during the off season between her seasonal employments. Rather, the evidence establishes that since 2012 she has only worked seasonal employment and there is no evidence of her intent to work during the off season. Therefore, any wage loss after the carrot season ended is due to the seasonal nature of Claimant's employment and not due to her injury. Claimant has failed to establish a causal connection between her injury and any wage loss until the 2017 carrot season began.

Claimant has established an entitlement to TTD benefits beginning in July of 2017 and ongoing until terminated by law. Claimant, as found above, worked seasonally in 2012, 2013, 2014, 2015, and in 2016. Claimant also would have been eligible for rehire with Employer. Beginning with the next year's season, Claimant would likely have been employed but for her work injury and she has established, more likely than not, that if not for her injury she again would have returned for seasonal employment in 2017 and thus would be entitled to TTD benefits at the beginning of the 2017 season and beginning in July. As found above, Claimant was evaluated on July 31, 2017 by Dr. Bates who opined that she was likely at MMI but than an independent medical evaluation first would be appropriate. There is no evidence that Claimant has undergone an IME or been placed at MMI. At her appointment with Dr. Bates, Claimant was still under work restrictions related to lifting, carrying, and pushing/pulling. Claimant had been released to modified duty work, but modified duty work had not been offered to her. Therefore, Claimant has established an entitlement to TTD benefits beginning July 1, 2017 when the 2017 carrot season began as she had not been placed at MMI, had not been released to regular employment, and had not been offered modified employment consistent with her doctor's restrictions. But for her injury, she would have been able to work the 2017 season without restrictions in a normal capacity and would have begun earning wages in July of 2017. Claimant has established that her injury caused her wage loss beginning July of 2017 and an entitlement to TTD benefits from July 1, 2017 and ongoing until terminated by law.

ORDER

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

1. Claimant's average weekly wage is $462.70.

2. Claimant has established by a preponderance of the evidence an entitlement to TPD benefits from November 20, 2016 through December 6, 2016. Respondents shall pay Claimant owed TPD for this period as outlined above in the amount of $388.67.

3. Claimant has failed established by a preponderance of the evidence an entitlement to any temporary indemnity benefits from December 6, **2016** through July 1, 2017.

4. Claimant has established by a preponderance of the evidence an entitlement to TTD benefits from July 1, 2017 and ongoing until terminated by law.

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

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

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

DATED: 10/10/2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-031-897-02

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he has sustained bilateral hearing loss arising out of, and during the course and scope of his employment?

II. If Claimant has proven a compensable hearing loss, is Claimant entitled to all reasonable, necessary and related treatment, to include bilateral hearing aids?

FINDINGS OF FACT

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

1. Claimant is a 61-year old male who has worked as a concrete laborer for Employer since 1999, except for a layoff in 2004. On September 8, 2016, Employer filed a first report of injury indicating that Claimant was alleging bilateral, work related hearing loss from loud noise from equipment and tools with a date of onset of September 1, 2016.

2. Claimant denies any family history of hearing loss. This is confirmed on his initial intake form, wherein he *Denies* ear pain, drainage from ears, *family history of hearing loss,* and other abnormalities (Ex J, p 108)(emphasis added). Claimant denies having diabetes and testified he is "pre-diabetic."[i] On September April 18, 2012, available medical records first mention that Claimant's primary care provider documented that Claimant has "Type 2 diabetes mellitus". (Ex. L, p. 124).

Claimant's pre-employment hearing loss

3. Claimant's denies hearing loss or even being exposed to noise before his employment with Employer. However, shortly after being hired in 1999, Claimant underwent a hearing test which revealed bilateral hearing loss, worse in the left ear than the right. Claimant testified that he has never been exposed to noise of any kind from any source, other than traffic and noise from Employer. Claimant testified that he did notice he had hearing loss at all until sometime after 2016, when his wife had to start yelling at him so he could hear.

4. Dr. Teresa H. Small is an expert audiologist who spends 75 percent of her job reviewing records and determining whether or not hearing loss is work related. Dr. Smalls did an in-depth medical records review, consulted with the Employer regarding the level of noise Claimant was exposed to and considered Claimant's own testimony regarding his alleged work related exposure to noise. Dr. Smalls persuasively testified that prior to his employment with Employer, Claimant had noise related hearing loss that

had to be the result of an unknown noise source that only Claimant could specify, only only Claimant could specify, confirmed by audiogram. An audiogram measures hearing loss and the cause of that loss and the ALJ finds, that claimant had hearing loss from noise that pre-existed his employment with Employer.

Single use hearing protection 1999 through 2006

5. Claimant testified the ear protection he used in 1999 to 2006 was not sufficient because he could still hear noise and the protection was similar to a head set one would use to listen to music. However, according to Dr. Smalls, the level of protection Claimant used from 1999 to 2006 is the correct and appropriate level of protection that Claimant's job required for the entire length of his employment. It was not only sufficient; it was in compliance with OSHA mandated hearing protection.

6. Claimant also testified that for the years 1999 through 2006, occasionally, the protection in one side or the other of his ears would fall out and he would be exposed to noise. According to Claimant, he was either too busy or his hands were too dirty so that he would not immediately put the fallen ear plug back into his ear. Dr. Smalls testified in response to a hypothetical question, that if Claimant's right ear plug fell out while he was operating a chain saw, it would take an estimated 15 minutes of chain saw use with no ear plug to cause irreparable damage. This would continue to add up over time if Claimant continued to operate a chain saw for 15 minutes at a time after his ear plug fell out. Dr. Smalls also testified that she would not expect Clamant to continue to operate a chain saw for 15 minutes at a time after his ear plug fell out without stopping to put his ear plug back in.

7. Claimant was also required to document how often he used ear protection. He admitted that he reported to Employer each year that he used hearing protection 100% of the time (except for 2004 when claimant was laid off and did not work that year). Claimant himself did not testify that he worked for 15 minutes or more at a time on the rare occasion an ear plug would allegedly fall out; only that there were occasions (not corroborated) when he might not pick it right up and reinsert it. Dr. Smalls explained that even if this did occur on occasion, Claimant has too much hearing loss to attribute to such occasions from 1999 to 2006. She stated that Claimant's hearing loss worsened so severely after 2006 when double hearing protection was worn by Claimant, that Claimant's hearing loss continued to progress from a medical condition unrelated to noise.

8. The ALJ does not find that Claimant sustained permanent hearing loss due to the continued use of loud equipment for 15 minutes or more after one side or another of Claimant's hearing protection may have fallen out, but not promptly reinserted on occasion from 1999 to 2006. This is contrary to Claimant's employment records wherein Claimant himself documented that he used hearing protection for these years 100 percent of the time. It is also contrary to the conclusions of Dr. Smalls that the extent of Claimant's hearing loss was too severe and extensive to be explained by this possibility, and that the continued progression of Claimant's hearing loss was caused by something *other than noise*. Most importantly, Claimant himself did not testify that he

had these repeated exposures for over 15 minutes at a time. Beginning in 1999, Claimant has been required to wear hearing protection any time he was using loud equipment, power tools, grinders or torches. The ALJ finds that Employer took extensive and appropriate steps to assure compliance with all noise mitigation requirements.

Claimant's hearing loss from 2006 to the present

9. After the year 2006 and to the present, Claimant admittedly used dual hearing protection. This level of protection is recommended for a person exposed to 100 to 105 decibels of noise over eight consecutive hours or more. Claimant had more than adequate protection by using the double layered protection for the past 11 years. Such level of protection was not even required by OSHA. The single layer of protection Claimant wore from 1999 to 2006 was sufficient to protect claimant from the noise he was exposed to during the entire time he was employed at Employer. After 2005, Employer required Claimant to wear double hearing loss protection 100% of the time, regardless of whether or not he was operating loud equipment. Claimant also indicated to his employer he used this protection 100% of the time. There was no period of time during Claimant's entire employment with Employer where Claimant was exposed to 100 to 105 decibels of noise for an eight hour period of time, even according to Claimant's own testimony. Furthermore, Dr. Smalls credibly explained that Claimant's loss has changed over time, more than it would have if the sole reason was noise exposure from work. Dr. Smalls testified that the audiograms and the pattern of hearing loss demonstrate that "*something else is causing that hearing loss to worsen*" other than the level of noise Claimant himself alleged he was exposed to while at work.

10. Dr. Smalls also testified at hearing on behalf of Respondents consistently with her written report and as a doctor in Audiology. Dr. Smalls is not a medical doctor. She testified on direct that she was hired by the Employer to perform her analysis. Her analysis entailed reviewing Claimant's hearing loss tests for the duration of his employment, speaking to the employer about noise levels, and reviewing the dosimetry. She explained that dosimetry is an employee's personal noise exposure. An employee will wear a dosimeter, aka a sound level meter, for their entire shift to determine noise exposure. (Ex F, p. 25). Dr. Smalls acknowledged that the dosimetry she used was from March 18 of 2011, and she has no personal knowledge of what particular tasks the various employees were engaged in when the dosimetry was performed. Dr. Small also acknowledged that none of these dosimetry readings were ever performed for Claimant or his specific job duties directly.

11. Dr. Small testified that Claimant already had significant hearing loss in his left ear prior to his employment with the Employer; however, the hearing loss as of 1999 was only in the high frequencies of 4,000, 6,000, and 8,000 hertz. According to Dr. Small's report, such hearing loss at that time would not amount to any impairment rating pursuant to the AMA Guides. (Ex. 8, p. 39). By 2006, Claimant's hear loss amounted to a 9.38% impairment of the left ear and 0% of the right. By October 24, 2016, Claimant's impairment had worsened to 33.75% of the left ear and 26.25% for the right ear for a combined binaural impairment of 27.5%.

12. Dr. Small opined at hearing that she felt Claimant's hearing loss was more likely than not unrelated to his work activities. Dr. Small clarified that her opinion was based heavily on the Employer's indication that Claimant was exposed to only intermittent noise exposure at approximately 5% to 10% of his work shift. On cross-examination, Dr. Smalls agreed that more time exposed to noise would make the exposure more hazardous, though she would need more details about the length of the exposure and the actual decibels of the exposure to provide an alternate opinion. Dr. Smalls was not sure of the exact decibel levels of the equipment used by Claimant. She was able to estimate that a concrete grinder would range from 83 to 93 decibels, and that a chainsaw would be the loudest, operating at approximately 100 decibels. Dr. Small explained that decibels are measured on a logarithmic scale, and that the intensity of the sound is doubled with every 3 decibel increase. Dr. Smalls further explained that hearing loss is permanent. Once it is lost, it will not regenerate. Each time the ears are exposed to damaging levels of noise, there is incremental damage to the nerves in the ear that will accumulate over time.

13. The ALJ accepts the testimony of Dr. Smalls, that considering and crediting Claimant's testimony of the level of noise he was allegedly exposed to over the course of his employment with the Employer (which was different from the Employer's perception of the level of noise claimant was exposed to) Claimant's hearing loss was *still* not work caused or work aggravated.

14. After Claimant reported hearing loss in 2016, Employer sent Claimant to the company designated medical provider, Autumn Dean, M.D. Initially, Dr. Dean reported that Claimant's bilateral hearing loss was ">50% probability for causation" based upon Claimant's self report that he had started noticing hearing loss approximately one year prior, that he had been working with loud tools for the past 18 years, and that he denied having any exposures to loud noises outside of work. At that time, Dr. Dean had not reviewed Claimant's audiograms (Ex. I, p. 85).

15. According to Dr. Dean's initial Report of Injury, Claimant reached MMI on October 10, 2016, with no permanent impairment (?) with medical maintenance to include treatment with audiology to have hearing aids fitted (Ex. I, p. 100). *This is no longer the opinion of the treating physician*. On July 3, 2017, after reviewing Dr. Small's report which also summarizes the audiograms, Dr. Dean changed her opinion and opined that Claimant's hearing loss is not work related and that she agreed with Dr. Small's assessment that the hearing loss was not work caused or work aggravated.(Ex. I, p. 106)

16. After acknowledging that Claimant has a list of co-morbidities, including diabetes and hypertension, Dr. Smalls explained that she is not a medical doctor. As such, she cannot state the exact cause of Claimant's hearing loss. As an expert audiologist who specializes in specifically evaluation and diagnosing work related hearing loss, Dr. Smalls can state, with audiological certainty, that Claimant's hearing loss was not caused or aggravated by his employment. In fact, according to Dr. Smalls

"**there is no way** that his hearing loss is work caused or work contributed or work aggravated." (emphasis added).

17. The 2016 audiological evaluation establishes that "there's definitely a medical component to that hearing loss" according to Dr. Smalls who explained that:

> "Not only has that hearing changed quite a bit in the right ear in 2016 compared to 2015, but they also did tympanometry, which is the measurement of the ear drum. And that showed a retracted ear drum, so there was a negative pressure, that the ear drum sucked in a bit. That's usually a sign of medical condition. Plus the change of hearing, the pattern in hearing is affecting the low frequencies. So that is in combination with the retracted ear drum, it's a sign of something going on in that right ear medically.

Thus, claimant's continued progression of hearing loss was not due to noise exposure but some medical condition not related to claimant's work.

Claimant's work related noise exposures

18. There is a great difference between the noise levels Claimant alleges he was exposed to at work versus the noise the Employer says Claimant was exposed to at work. Claimant himself has not been consistent.

19. On direct examination, Claimant testified that he operated a chain saw and/or a sledge saw anywhere from 2-3 hours per day, to all day, to every day and all day, all week. Claimed testified that he operated a demo saw anywhere from 5 hours per day to all day and that he often operated noisy grinders and hammer drills. On cross-examination, Claimant clarified the testimony he gave on direct regarding how often he used a chain saw, demo saw and sledge saw. Claimant admitted he only uses a chain, sledge or demo saw for the purpose of fixing a mistake made on the job. Claimant also testified that he would use a sledge saw "2 to 3 times per year". Claimant rarely used a chain saw, a couple of times per month at most and a demo saw was used "only when the work asked for us to use that."

20. Rick Driver has been employed with Employer since August 1988. He is the Corporate Director of Environmental Health and Safety. Mr. Driver explained that Claimant worked on the patch and repair crew together with 12% of the company's 500 employees, none of whom have a claim for work related hearing loss. Claimant's job duties consisted of mixing and sponging grout and rubbing out holes. Employer has a hearing conservation program because there are noise levels above 80 decibels. Each employee is required to annually submit to a hearing test and hearing training, as required by OSHA. In 1999, OSHA required Employer to review the annual hearing tests which each employee. When Claimant was hired, his hearing test revealed that he had hearing loss below the 50 percentile. Mr. Driver is certain that each year, beginning in 1999, either he, or one of his 3 safety coordinators sat down with Claimant and reviewed his hearing test results. These meetings with Claimant were conducted in

English as Mr. Driver "always communicated with Raul in English. He understands English. I've never had a problem communicating with him . . . So, you know, just having the interpreter today is to make sure that he has full understanding I've never had a problem communicating with him." Mr. Driver worked with Claimant for 18 years and Claimant himself has not alleged that he had any problem communicating with anyone from Employer, including Mr. Driver, throughout those 18 years.

21. During Claimant's entire employment with Employer, he was never issued a written warning for violating the company hearing protection standards. Mr. Driver further stated that if ear protection rules were not being followed, a write-up would be issued and become part of the personnel file. No verbal warnings were issued. No such write-ups exist in Claimant's file.

22. Mr. Driver testified that Claimant was hired, even though he had pre-employment hearing loss, because the company would not discriminate against him because of his hearing issues. From 1999 until 2012, Mr. Driver would be out in the plant where Claimant worked upwards of 6 to 7 hours per day. While he did not personally stand and watch Claimant all day, every day, Mr. Driver credibly testified that he is familiar with Claimant's job, and for what purpose any tool or machine may be used, for and how often it may be needed.

23. Claimant rarely used a chain saw. Mr. Driver saw him use it one time but he admitted he may have used it more than one time but "it's a rarity." A demo saw may be used at most 20 minutes per day on the days it was used. It is not clear if a person could even hold onto a demo saw more than 15 minutes without stopping and resting.

24. The hand grinders and hammer drills were used somewhat more frequently but throughout the course of an 8-10 hour day, the actual hands-on cutting time is very limited. A peanut grinder may be purchased at Home Depot. The sledge or slab saw is something that the company would go years without using at all, as its purpose is very limited. On a daily basis Claimant may use a scraper, hammer or a chisel, none of which are noisy. Every time Mr. Driver saw Claimant "he was always using his hearing protection and then double protection during the – I think from 2005 on."

25. Mr. Driver personally sat down with claimant in 2005 to discuss his audiogram results. The test result from Sound Solutions stated that Claimant had hearing loss and instructed Mr. Driver to recommend that Claimant see his personal physician. Mr. Driver admitted he is not an audiologist so he does not know if Claimant's hearing loss had worsened in 2005 as compared to prior years. He simply did what he was instructed to do and told Claimant to see his personal physician. The testing document did not instruct Mr. Driver to send claimant to a Workers Comp physician but specifically instructed him to see his personal physician.

26. In September 2016, when Claimant first claimed his hearing loss was work related, Employer timely filed an Employer's First Report of Injury and provided claimant with a list of Workers Comp physicians to choose from. Claimant selected Dr. Dean,

who has since opined that Claimant's hearing loss is not work related. Before then, there was no reason to send Claimant to a Workers Comp physician, as neither the audiologists nor Claimant himself were suggesting that Claimant's hearing loss was work related.

27. Timothy Hall, M.D., evaluated Claimant on May 15, 2017, for "low back, left leg symptoms and buttocks pain." In his report, he references that the first note he reviewed about hearing loss is from September 19, 2016, where Claimant alleged that one year prior, he began having problems with hearing and intermittent ringing in his ears. Claimant told Dr. Hall he has been working with loud tools for 18 years. Dr. Hall noted that Dr. Dean opined that Claimant's hearing loss was work related. Dr. Hall reviewed one evaluation from Advantage ENT and Audiology dated October 24, 2016. Based on this data, Dr. Hall stated: "After reviewing the file and discussing with the patient this issue with his hearing, it is my opinion within a reasonable degree of medical probability that his sensorineural hearing loss bilaterally is a direct result of his exposure at work."

28. The ALJ does not find these conclusions of Dr. Hall persuasive. They are not based on a complete review of Claimant's medical records, including yearly hearing tests and audiograms, or any accurate understanding of the noise level Claimant was exposed to at work, nor claimant's use of hearing protection. Moreover, Dr. Hall does not reference that Claimant had pre-employment noise related hearing loss, nor that the medical record suggest that Claimant has diabetes and hypertension. Dr. Hall also does not seem to be aware that Dr. Dean later opined that Claimants' hearing loss is, in fact, not work-related, after reviewing Dr. Smalls' report and summary of audiograms.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or

respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Credibility

D. In this case, the ALJ finds Mr. Driver to be far more persuasive than Claimant on the issue of ambient noise in the facility which Claimant may have been exposed to. It is Mr. Driver's responsibility to know who uses which tools, why, and how often they do so. He is in a far greater position to have this information, and to articulate it accurately. Likewise, while not standing over Claimant 24/7 while he works, Mr. Driver's testimony is persuasive, in that he is out on the shop floor a great deal, and monitors his employees for compliance with hearing protection. That's his job. While the possibility exists that on some occasion Claimant's spark plug earpiece fell out, the ALJ does not find that Claimant just would continue to work with that noise level for minutes at a time without reinserting it.

Compensability

E. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The

latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra.* Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. In this claim, Claimant alleges bilateral hearing loss that was caused or aggravated by the level of noise he was exposed to while at work, with a date of onset of hearing loss in the year 2016. Section 8-40-201(14), C.R.S. defines "occupational disease" as: “[A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.” This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). The failure to satisfy each element by a preponderance of credible evidence is fatal to an occupational disease claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988).

G. The ALJ credits and accepts the opinions of Dr. Smalls. Claimant used OSHA approved single hearing protection from 1999 to 2005, 100% of the time (or nearly so) he used any tools or equipment which made loud noise. He used double hearing loss protection from 2005 to the present, 100% of the time, regardless of what job duty he was performing. Assuming that Claimant’s testimony on direct examination regarding the level of work related noise exposure was true and accurate-that occasionally a hearing protection plug would fall out of one ear or the other- Claimant’s hearing loss is still not work related. Claimant’s audiograms and hearing tests, as explained by Dr. Smalls, show that Claimant’s pre-employment hearing loss, and progression of that hearing loss, was the result of a natural progression of hearing loss and a medical condition or conditions, *irrespective of work related noise exposure.* The actual progression of Claimant’s hearing loss was not noise-caused or noice-aggravated; it is the result of some other medical condition and is “in no way” related to or caused by or aggravated by or intensified by work related noise exposures.

H. The ALJ finds that the level of hearing loss Claimant currently has, as compared to this hearing loss in 1999, is substantial and *not noise related.* Even if the ALJ accepted Claimant's testimony regarding the level of noise he was exposed to operating saws all day, every day, for weeks at a time, (which the ALJ does not) there is "no way" that hearing loss is work related. It is not noise related. As Dr. Smalls explained, Claimant's audiograms and the level and severity of Claimant's current hearing loss establishes that Claimant's hearing loss is the result of a medical condition, and not from ambient noise.

I. Claimant denied that he has pre-existing hearing loss from noise in the left ear- worse than the right-at the time he was hired by Employer. The audiogram showed otherwise. Claimant did have noise related hearing loss that pre-existed his employment. Claimant asserts that his hearing loss was either caused by or aggravated by long term exposure to prolonged noise at work. Consequently, Claimant argues that he aggravated a pre-existing hearing loss condition (which he denies having) and/or that his bilateral hearing loss condition was caused by prolonged noise at work. He asserts his claim for benefits, including medical treatment, is compensable because the aggravation is fairly traced to her employment as a proximate cause, and did not come from a hazard to which he was equally exposed outside of the employment. Simply put, Claimant asserts that the conditions under which his work was performed aggravated, accelerated, and/or combined with her pre-existing conditions to cause his hearing loss, his disability and his need for medical treatment, for which benefits are sought. Based upon the totality of the evidence presented, the ALJ is not persuaded.

J. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Victory,* 805 P.2d 1167 (Colo. App. 1990). While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rita,* 717 P.2d 965 (Colo. App. 1995); *Cots v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). The totality of the evidence presented persuades the ALJ that Claimant's current bilateral noise related hearing loss, more probably than not, arose from the natural progression of his pre-existing bilateral noise related hearing loss; a loss which Claimant denied having. Claimant also denied being exposed to any type of noise outside of the noise he was exposed to while working for this Employer. Again, the ALJ is not persuaded.

K. Shortly after he was hired, claimant was diagnosed with bilateral hearing loss which could not possibly have been caused by noise from this Employer. Claimant had not worked for the Employer long enough to have that level of noise related hearing loss. Whatever source caused claimant's bilateral hearing loss-which pre-existed his

employment with Employer-is the more likely source of claimant's hearing loss. It is a natural progression of hearing loss and a medical condition, *irrespective of additional noise.* Claimant has not met his burden of proof as to either claim asserted: 1. that his hearing loss was allegedly caused, over time, during this employment for this Employer; or 2. that his injuries allegedly arose out of his employment and constitute a compensable occupational disease involving his bilateral noise related hearing loss.

ORDER

It is therefore ordered that:

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

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

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

DATED: October 10, 2017

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

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their General Admission of Liability (GAL) that acknowledged Claimant sustained a compensable cervical spine injury during the course and scope of his employment with Employer on December 6, 2016.

2. Whether Claimant has demonstrated by a preponderance of the evidence that an anterior cervical discectomy and fusion (ACDF) at C7-T1 as recommended by Gary Ghiselli, M.D. is reasonable, necessary and causally related to his December 6, 2016 admitted industrial injury.

3. Whether Respondents have established by a preponderance of the evidence that they are entitled to recover an overpayment of Temporary Total Disability (TTD) benefits beginning May 11, 2017.

FINDINGS OF FACT

1. Claimant worked for Employer as a Truck Driver. He typically drove a truck from Denver to Grand Junction, Colorado five days each week to deliver mail.

2. On July 18, 2007 Claimant suffered a cervical spine injury that required an anterior cervical discectomy and fusion (ACDF) at C3-C4 and C5-C6. Gary Ghiselli, M.D. performed the procedure. Claimant reached Maximum Medical Improvement (MMI) on April 23, 2009 and received a 22% whole person impairment rating.

3. On November 22, 2014 Claimant suffered a second cervical spine injury while undergoing a chiropractic adjustment. Because of continuing pain and functional limitations Dr. Ghiselli performed an ACDF at C6-C7 on May 4, 2015.

4. On September 22, 2016 Claimant returned to Dr. Ghiselli and reported that he began to experience tingling and weakness in his left arm approximately 4-5 months earlier. Dr. Ghiselli noted that Claimant was having increasing symptoms at the C4-C5 level and ordered CT and MRI scans.

5. On October 5, 2017 Claimant underwent CT and MRI scans. In addition to expected post-surgical changes, the scans revealed anterior osteophytes at C7-T1, without stenosis, and dorsal paraspinal muscle atrophy with severe canal stenosis at C4-C5. The C4-C5 level also had a broad-based central left posterolateral and left larger than right foraminal protrusion with flattening and deformity of the cord.

6. Claimant testified that on December 6, 2016 he drove to Grand Junction to deliver mail. On his way back to Denver he encountered treacherous driving conditions

and placed chains on his tires in Vail. While applying the fourth set of chains he felt a "pop" in his neck but no immediate pain. Claimant remarked that he experienced "white knuckle driving" while returning towards Denver in the snow and was very tense because of the road conditions. He removed the chains in Georgetown and completed his drive to Denver.

7. On December 7, 2016 Claimant had the day off from work. He awoke with a stiff neck and minor pain. On the following day Claimant awoke with significant neck pain and told Employer he would be unable to report to work.

8. On December 10, 2016 Claimant visited the Rose Medical Center Emergency Room for an evaluation. He reported worsening neck and upper back pain since applying chains to his truck tires four days earlier. Claimant noted that for about two months he has suffered upper extremity tingling but had a significant evaluation and unremarkable MRI. He also mentioned that he underwent a cervical spinal fusion two years earlier and "note[d] current pain is similar to before surgery."

9. On December 12, 2016 Claimant reported his cervical spine injury to Employer. Employer directed him to Concentra Medical Centers for treatment. Claimant visited Concentra and reported increasing neck pain after applying chains and tense driving on December 6, 2016. He commented that his first spinal fusion involved C3-C4 and C5-C6 in 2007 and his second spinal fusion involved C6-C7 in 2015. Physicians diagnosed Claimant with a "repetitive strain injury of the cervical spine, prescribed medications and restricted him from working.

10. Claimant subsequently received physical therapy and diagnostic testing. On .December 21, 2016 Claimant underwent an MRI of his cervical spine. The MRI reflected post-operative changes at C3-C4 secondary to a prior anterior discectomy and solid fusion. At C4-C5 there was a broad-based posterior disc protrusion with canal stenosis and a possible mass effect on the spinal cord. There were also solid fusions at C5-C6 and C6-C7. At C7-T1 there were osteophytes but no stenosis.

11. On December 27, 2016 Insurer acknowledged that Claimant had suffered an injury on December 6, 2016 and completed a General Admission of Liability (GAL). The GAL recognized that Claimant was entitled to receive medical benefits and Temporary Total Disability (TTD) benefits beginning December 12, 2016 at an Average Weekly Wage (AWW) of $989.32.

12. On January 9, 2017 Claimant visited Robert W. Kawasaki, M.D. for an examination. Dr. Kawaski subsequently ordered diagnostic testing and provided medication management.

13. On March 21, 2017 Claimant visited Dr. Ghiselli for an evaluation. Claimant reported that on December 6, 2016 he suffered a "popping" sensation in his neck while placing chains on his truck tires. Although Claimant completed his shift, his symptoms worsened over the next two days. He noted significant pain and loss of grip strength in his left hand. Claimant also exhibited decreased cervical spine range of

motion. Dr. Ghiselli commented that Claimant had undergone a C3-C4 and C5-C6 ACDF in 2008 followed by a C6-C7 ACDF in 2015. He remarked that Claimant was now suffering an acute disc herniation at C7-T1 that was causing left arm weakness. Positive EMG findings also suggested an acute, severe left C8 radiculopathy. Dr. Ghiselli thus recommended an ACDF at the C7-T1 level.

14. On April 3, 2017 William J. Ciccone, Jr., M.D. performed a Rule 16-11 review of Dr. Ghiselli's surgical request. Dr. Ciccone concluded that Claimant was having increasing neck pain and nerve-related symptoms in his left upper extremity in the months preceding his December 6, 2016 work incident. He did not believe Claimant suffered a work injury that caused his current symptoms. Instead, Dr. Ciccone determined that Claimant's symptoms are the result of the progressive degeneration of cervical discs and had been causing increasing pain for months. Accordingly, Dr. Ciccone reasoned that any treatment for Claimant's cervical symptoms should not be covered by the Workers' Compensation system.

15. On May 2, 2017 Claimant returned to Dr. Kawasaki for an evaluation. After conducting a physical examination and considering diagnostic studies, Dr. Kawasaki assessed Claimant with postlaminectomy in the cervical region and brachial neuritis or radiculitis. Dr. Kawasaki noted that Dr. Ghiselli had recommended an ACDF at the C7-T1 level. He remarked that Claimant exhibited objective findings on MRI as well as "significant findings on EMG/nerve conduction study for C8 radiculopathy." Accordingly, Dr. Kawasaki concluded that the ACDF at C7-T1 constituted reasonable and necessary medical treatment.

16. On July 11, 2017 the parties conducted the pre-hearing evidentiary deposition of Bryan Counts, M.D. Dr. Counts explained that Claimant had undergone two previous cervical spinal fusions but "his symptoms had pretty much resolved other than some neck stiffness" prior to December 6, 2016. He commented that Claimant developed neck, upper shoulder and left arm symptoms after placing chains on his truck and driving through snow on December 6, 2016. Dr. Counts diagnosed Claimant with "underlying cervical disc disorder with radiculopathy." He commented that Claimant's cervical spine MRI reflected diffusely bulging discs and arthritic changes. Dr. Counts agreed with Dr. Ghiselli's recommendation for an ACDF at the C7-T1 level because Claimant's condition has continued to deteriorate. He summarized that the need for surgery is related to Claimant's December 6, 2016 work activities and he has failed conservative treatment. Dr. Counts specifically concluded that Claimant suffered an aggravation of his pre-existing cervical spine condition while performing his job duties on December 6, 2016.

17. On July 26, 2017 Claimant underwent an independent medical examination with Brian Reiss, M.D. After reviewing Claimant's medical records and conducting a physical examination, Dr. Reiss concluded that Claimant's December 6, 2016 work activities did not aggravate, accelerate or combine with his pre-existing cervical spine condition to produce a need for medical treatment. Although he acknowledged that Claimant may have experienced increased pain after his work activities on December 6, 2016, any effects would have quickly worn off "leaving

[Claimant] with his baseline level of symptomatology." Dr. Reiss specified that "the need for treatment would be related to his pre-existing condition 100% and not related to any effects of the work incident." He summarized that any need for surgical intervention or work restrictions was strictly related to Claimant's pre-existing condition.

18. On August 1, 2017 Claimant underwent an independent medical examination with David W. Yamamoto, M.D. Dr. Yamamoto reviewed Claimant's medical records and conducted a physical examination. He determined that Claimant's December 6, 2016 work activities aggravated his pre-existing cervical spine condition. Dr. Yamamoto explained that the critical inquiry is whether Claimant experienced the "natural progression of a pre-existing condition or if the condition is secondary to" his December 6, 2016 work activities. He reasoned that the proximate cause of Claimant's injury was placing the chains on his truck tires. Chaining the tires aggravated Claimant's pre-existing neck condition and created "significant radicular symptoms on the left involving the C8 nerve root." Dr. Yamamoto acknowledged that other physicians had determined Claimant did not suffer a compensable injury on December 6, 2016 based on imaging studies. However, he explained that Claimant's clinical presentation and ability to perform his job duties without difficulty prior to December 6, 2016 suggested that he suffered a compensable cervical spine injury. Dr. Yamamoto thus agreed with Dr. Ghiselli that the proposed ACDF surgery constituted reasonable and necessary medical treatment.

19. Dr. Reiss testified at the hearing in this matter. He maintained that Claimant's December 6, 2016 work activities did not aggravate, accelerate or combine with his pre-existing cervical spine condition to produce a need for medical treatment. Dr. Reiss explained that Claimant suffers degenerative changes in his cervical spine but there was no acute injury on December 6, 2016. Claimant's cervical symptoms simply constitute the natural progression of a pre-existing condition. He also commented that Claimant's activity of applying chains to his truck tires would not have caused a significant spinal injury.

20. Dr. Reiss explained that Dr. Ghiselli's proposed ACDF surgery at C7-T1 is not reasonable, necessary and causally related to Claimant's December 6, 2016 admitted industrial injury. He remarked that the proposed surgery would be the fourth fusion in Claimant's cervical spine and the pain generator has not been adequately identified. Finally, cervical spine surgery would be premature because other treatment options including injections and physical therapy remain available.

21. Respondents have failed to demonstrate that it is more probably true than not that they are entitled to withdraw their GAL that acknowledged Claimant sustained a compensable cervical spine injury during the course and scope of his employment with Employer on December 6, 2016. Initially, Claimant explained that he felt a "pop" in his neck area while applying chains to his truck tires when driving back to Denver from Grand Junction. Although he did not immediately experience symptoms, he developed significant neck pain and stiffness two days after the incident. The medical records reflect that Claimant has undergone two previous spinal fusions and diagnostic testing revealed degenerative changes in his cervical spine.

22. The persuasive medical evidence reflects that Claimant's work activities on December 6, 2016 aggravated his pre-existing cervical spine condition. Dr. Yamamoto persuasively explained that the critical inquiry is whether Claimant experienced the "natural progression of a pre-existing condition or if the condition is secondary to" his December 6, 2016 work activities. He reasoned that the proximate cause of Claimant's injury was placing the chains on his truck tires. Chaining the tires aggravated Claimant's pre-existing neck condition and created "significant radicular symptoms on the left involving the C8 nerve root." Furthermore, Dr. Counts specifically concluded that Claimant suffered an aggravation of his pre-existing cervical spine condition while performing his job duties on December 6, 2016. Finally, Dr. Ghiselli remarked that Claimant experienced an acute disc herniation at C7-T1 on December 6, 2016 that was causing left arm weakness.

23. In contrast, Dr. Reiss explained that Claimant's December 6, 2016 work activities did not aggravate, accelerate or combine with his pre-existing cervical spine condition to produce a need for medical treatment. He also determined that, although Claimant suffers degenerative changes in his cervical spine, there was no acute injury on December 6, 2016. Claimant's cervical symptoms simply constitute the natural progression of a pre-existing condition. He also commented that Claimant's activity of applying chains to his truck tires would not have caused a significant spinal injury. However, Dr. Yamamoto persuasively noted that, although other physicians had determined Claimant did not suffer a compensable injury on December 6, 2016 based on imaging studies, Claimant's clinical presentation and ability to perform his job duties without difficulty prior to December 6, 2016 suggested that he suffered a cervical spine injury while applying chains to his truck tires. Accordingly, Respondents have failed to demonstrate that Claimant's work activities on December 6, 2016 did not aggravate, accelerate or combine with his pre-existing cervical spine condition to produce a need for medical treatment.

24. Claimant has demonstrated that it is more probably true than not that an ACDF at the C7-T1 level as recommended by Dr. Ghiselli is reasonable, necessary and causally related to his December 6, 2016 admitted industrial injury. Dr. Ghiselli commented that Claimant had undergone a C3-C4 and C5-C6 ACDF in 2008 followed by a C6-C7 ACDF in 2015. He persuasively remarked that Claimant was now suffering an acute disc herniation at C7-T1 that was causing left arm weakness. Positive EMG findings also suggested an acute severe left C8 radiculopathy. Dr. Kawasaki remarked that Claimant exhibited objective findings on MRI as well as "significant findings on EMG/nerve conduction study for C8 radiculopathy." He thus concluded that the ACDF at C7-T1 constituted reasonable and necessary medical treatment. Moreover, Dr. Counts agreed with Dr. Ghiselli's recommendation for an ACDF at the C7-T1 level because Claimant's condition has continued to deteriorate. He summarized that the need for surgery is related to Claimant's December 6, 2016 work activities. Furthermore, Claimant has failed conservative treatment. Finally, Dr. Yamamoto also agreed with Dr. Ghiselli that the proposed ACDF surgery constitutes reasonable and necessary medical treatment.

25. In contrast, Dr. Reiss explained that Dr. Ghiselli's proposed ACDF surgery at C7-T1 is not reasonable, necessary and causally related to Claimant's December 6, 2016 admitted industrial injury. He remarked that the proposed surgery would be the fourth fusion in Claimant's cervical spine and the pain generator has not been adequately identified. Finally, cervical spine surgery would be premature because other treatment options, including injections and physical therapy, remain available. However, Claimant has undergone extensive conservative treatment and an EMG revealed a C8 radiculopathy. Furthermore, the persuasive medical records and opinions of Drs. Ghiselli, Kawasaki, Counts and Yamamoto reflect that Claimant's work activities on December 6, 2016 aggravated his pre-existing cervical spine condition and warrant fusion surgery. Accordingly, the ACDF at C7-T1 recommended by Dr. Ghiselli constitutes reasonable and necessary medical treatment designed to cure or relieve the effects of Claimant's December 6, 2016 cervical injury.

CONCLUSIONS OF LAW

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

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

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

Withdrawal of General Admission of Liability

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2015), C.R.S. Because Respondents filed a GAL, they bear the burden of proof to establish that Claimant did not sustain a compensable cervical spine injury during the course and scope of her employment with Employer on December 6, 2016.

8. As found, Respondents have failed to demonstrate by a preponderance of the evidence that they are entitled to withdraw their GAL that acknowledged Claimant sustained a compensable cervical spine injury during the course and scope of his employment with Employer on December 6, 2016. Initially, Claimant explained that he felt a "pop" in his neck area while applying chains to his truck tires when driving back to Denver from Grand Junction. Although he did not immediately experience symptoms, he developed significant neck pain and stiffness two days after the incident. The medical records reflect that Claimant has undergone two previous spinal fusions and diagnostic testing revealed degenerative changes in his cervical spine.

9. As found, the persuasive medical evidence reflects that Claimant's work activities on December 6, 2016 aggravated his pre-existing cervical spine condition. Dr. Yamamoto persuasively explained that the critical inquiry is whether Claimant experienced the "natural progression of a pre-existing condition or if the condition is secondary to" his December 6, 2016 work activities. He reasoned that the proximate cause of Claimant's injury was placing the chains on his truck tires. Chaining the tires aggravated Claimant's pre-existing neck condition and created "significant radicular symptoms on the left involving the C8 nerve root." Furthermore, Dr. Counts specifically concluded that Claimant suffered an aggravation of his pre-existing cervical spine condition while performing his job duties on December 6, 2016. Finally, Dr. Ghiselli remarked that Claimant experienced an acute disc herniation at C7-T1 on December 6, 2016 that was causing left arm weakness.

10. As found, in contrast, Dr. Reiss explained that Claimant's December 6, 2016 work activities did not aggravate, accelerate or combine with his pre-existing cervical spine condition to produce a need for medical treatment. He also determined that, although Claimant suffers degenerative changes in his cervical spine, there was no acute injury on December 6, 2016. Claimant's cervical symptoms simply constitute the natural progression of a pre-existing condition. He also commented that Claimant's activity of applying chains to his truck tires would not have caused a significant spinal injury. However, Dr. Yamamoto persuasively noted that, although other physicians had determined Claimant did not suffer a compensable injury on December 6, 2016 based on imaging studies, Claimant's clinical presentation and ability to perform his job duties without difficulty prior to December 6, 2016 suggested that he suffered a cervical spine injury while applying chains to his truck tires. Accordingly, Respondents have failed to demonstrate that Claimant's work activities on December 6, 2016 did not aggravate, accelerate or combine with his pre-existing cervical spine condition to produce a need for medical treatment.

Medical Benefits

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

12. As found, Claimant has demonstrated by a preponderance of the evidence that an ACDF at the C7-T1 level as recommended by Dr. Ghiselli is reasonable, necessary and causally related to his December 6, 2016 admitted industrial injury. Dr. Ghiselli commented that Claimant had undergone a C3-C4 and C5-C6 ACDF in 2008 followed by a C6-C7 ACDF in 2015. He persuasively remarked that Claimant was now

suffering an acute disc herniation at C7-T1 that was causing left arm weakness. Positive EMG findings also suggested an acute severe left C8 radiculopathy. Dr. Kawasaki remarked that Claimant exhibited objective findings on MRI as well as "significant findings on EMG/nerve conduction study for C8 radiculopathy." He thus concluded that the ACDF at C7-T1 constituted reasonable and necessary medical treatment. Moreover, Dr. Counts agreed with Dr. Ghiselli's recommendation for an ACDF at the C7-T1 level because Claimant's condition has continued to deteriorate. He summarized that the need for surgery is related to Claimant's December 6, 2016 work activities. Furthermore, Claimant has failed conservative treatment. Finally, Dr. Yamamoto also agreed with Dr. Ghiselli that the proposed ACDF surgery constitutes reasonable and necessary medical treatment.

13. As found, in contrast, Dr. Reiss explained that Dr. Ghiselli's proposed ACDF surgery at C7-T1 is not reasonable, necessary and causally related to Claimant's December 6, 2016 admitted industrial injury. He remarked that the proposed surgery would be the fourth fusion in Claimant's cervical spine and the pain generator has not been adequately identified. Finally, cervical spine surgery would be premature because other treatment options, including injections and physical therapy, remain available. However, Claimant has undergone extensive conservative treatment and an EMG revealed a C8 radiculopathy. Furthermore, the persuasive medical records and opinions of Drs. Ghiselli, Kawasaki, Counts and Yamamoto reflect that Claimant's work activities on December 6, 2016 aggravated his pre-existing cervical spine condition and warrant fusion surgery. Accordingly, the ACDF at C7-T1 recommended by Dr. Ghiselli constitutes reasonable and necessary medical treatment designed to cure or relieve the effects of Claimant's December 6, 2016 cervical injury.

ORDER

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

1. Respondents' request to withdraw the GAL acknowledging Claimant's December 6, 2016 cervical spine injury is denied and dismissed.

2. The ACDF surgery at C7-T1 as recommended by Dr. Ghiselli is reasonable, necessary and causally related to Claimant's December 6, 2016 admitted industrial injury.

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

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

you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 10, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-995-089-02

ISSUE

- Whether the surgery proposed by Dr. Jamrich for fusion at L5-S1 and disc replacement at L4-L5, is reasonable, necessary and related to Claimant's admitted September 3, 2015 injury.

FINDINGS OF FACT

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

1. On September 3, 2015, Claimant was injured in the course and scope of her employment for Employer. She was working as a server/bartender at Employer's restaurant when she slipped on a wet floor and fell on her buttocks. She had pain in her low back area with pain radiating down the left posterior leg a short time after the fall. The initial evaluation record from Concentra indicates that she attempted to continue to work, but was off work as of September 21, 2015. She was given restrictions and was able to return to work in a light duty capacity while undergoing treatment for her injury.

2. Claimant received conservative treatment at Concentra, but when that did not resolve her pain, her provider referred her to Dr. Primack for a complete evaluation. On November 24, 2015, Dr. Primack evaluated Claimant and after conducting his exam, ordered an MRI of her low back, and referred Claimant to Dr. Brian Castro for a surgical evaluation.

3. On December 7, 2015, after having undergone the MRI, Claimant saw Dr. Castro. Dr. Castro found that Claimant had "a large disc herniation at L5-S1 left sided compressing and displacing the traversing S1 nerve root consistent with left side radiculopathy."

4. On December 8, 2015, Claimant returned to Dr. Primack, who felt she was a candidate for a decompression laminectomy without further conservative treatment or diagnostics.

5. Later on December 8, 2015, Claimant continued to experience severe leg pain which resulted in an emergency room visit at Sky Ridge Medical Center. Neurosurgeon Dr. Michael Madsen evaluated Claimant and felt her condition was emergent and in need of surgery. On December 10, 2015, he performed a microdiskectomy at L5-S1. Claimant had a recurrent herniation at L5-S1 that resulted in a revision laminectomy, microdiskectomy, and foraminotomy done by Dr. Madsen on March 28, 2016.

6. Respondents filed a General Admission of Liability dated October 14, 2015. However they disputed the surgeries performed by Dr. Madsen as not

reasonable, necessary, or related. Claimant obtained counsel and filed for a hearing on that issue. Respondents ultimately agreed that the two surgeries were reasonable, necessary and related, and agreed that they were responsible for both. Dr. Madsen and his referrals were considered authorized treating physicians in the claim.

7. Claimant continued to work, and continued in physical therapy. However on April 20, 2016, Dr. Madsen reported that Claimant had suffered another setback and suggested more time and therapeutic exercise. Claimant continued physical therapy with Concentra. Despite undergoing frequent physical therapy treatments, Claimant's pain persisted.

8. On May 5, 2016, Claimant reported that she continued to be bothered by pain and indicated that it was somewhat worse with sitting, squatting, twisting, and bending. Additionally, she reported pain into her left leg with sitting or walking for prolonged periods of time. She continued on restrictions and was told to follow up with Dr. Madsen.

9. Claimant testified that she was frustrated with her lack of progress and requested another opinion. Dr. Madsen referred her to Dr. Jamrich whom she saw on September 15, 2016. In his report of that date Dr. Jamrich states:

> On MRI, there is an annular tear with circumferential protrusion, somewhat worse on the right than the left at the L4-5 level. At the 5-1 level, there is significant inflammation on the left side surrounding the L5-S1 area with significant inflammation in this area and also an annular tear.

At that point Dr. Jamrich was discussing the possibility of either an L5-S1 fusion or an L4-5/L5-S1 fusion. He recommended an L4-5 discogram be performed as diagnostically helpful in determining what course of treatment should be pursued.

10. On January 9, 2017, Dr. Jamrich requested authorization for a posterior lumbar inter-body fusion at L5-S1 and anterior disc replacement at L4-5. On January 12, 2017, Respondents denied the request by letter from Respondents counsel. In his deposition taken post hearing, Dr. Jamrich explained that on all the MRI's he has seen going back to the first one dated December of 2015, Claimant had a very large tear through the back of the annulus at the L4-5 level with a protrusion that goes out on the right side. He feels that the injury at the 4-5 level, which was present since before the Claimant's first surgery, was starting to become more symptomatic. He stated in part, "It will be more symptomatic as time goes on, whether or not she has the fusion simply because the 5-1 segment isn't moving normally now, that's putting greater stress on the level above, and if she doesn't have a fusion, that will continue to be painful from both 5-1 and 4-5." Additionally, he stated that "the disc is torn and damaged. That is a full thickness tear through the back of the disc with a disc protrusion on the right side . . . very few people taking care of their own patients would suggest doing a fusion adjacent to a level with a torn, protruding disc.

11. Dr. Brian Reiss saw the Claimant two times, both as a Respondents-sponsored IME, to give an opinion on the requests for authorization of surgeries by an authorized treating physician. He stated that he does three of these types of IME's a week, all for the insurance carriers and attorneys for Respondents. In his report of January 27, 2017, Dr. Reiss indicated that he believes Claimant would have a reasonable chance of improving her level of function if she got the L5-S1 fusion. He thought that the findings at L4-5 represented degenerative changes. However, in his deposition, Dr. Reiss admitted that he had only seen the actual films taken on August 2, 2016, and only the MRI reports on the others. As noted above, Dr. Jamrich testified that he looked at all the films himself, and that not looking at the films did a disservice to the patient. Dr. Jamrich opined that a single level fusion in this patient would be a mistake, and stated: "That would be a mistake because it would immediately make that 4-5 level more symptomatic, and that would necessitate the patient having a second surgery."

12. In his report dated November 29, 2016, Dr. Scott Primack stated that Claimant would benefit from a single level fusion at L5-S1, and did not recommend the L4-5 disc replacement. However, Dr. Primack is not a back surgeon. Dr. Primack stated in his January 10, 2017 report that he hoped that the single level fusion would be approved. Dr. Primack did not consult with Dr. Jamrich and did not issue a report from after January 10, 2017. Additionally, Dr. Primack did not offered his opinion after the Claimant's April MRI and Dr. Jamrich's explanation of why it would be a mistake to fuse one level without addressing the problem at the adjacent level at the same time. Dr. Jamrich stated:

> In my experience and the experience of most of my partners, doing a fusion at a level adjacent to a torn disc with a protrusion results in a very, very high increase in the symptoms of the level with the tear and the protrusion. None of the doctors in my practice would do that. Doing a two-level fusion is something that I would try to avoid in someone the patient's age. That is why I have recommended what I have recommended.

Dr. Primack indicates that Claimant has both significant leg pain and back pain in his reports. Dr. Jamrich testified that the two level procedure would address both issues.

13. On April 24, 2017 Claimant underwent an MRI done at her expense. Dr. Jamrich opined that Claimant's condition was worsening at L4-5. Dr. Reiss called it a new condition that was worsening at L4-5. Dr. Reiss referred to the April 2017 MRI, specifically that portion which addressed the L4-5 level, and said that without being able to see the MRI directly, he could not say if a surgical problem existed. Further, Dr. Reiss testified that the surgeon needs to look at the MRI before doing surgery to quantify the size or amount of the compression. Dr. Jamrich has evaluated the MRI himself, and all of the previous MRIs. Dr. Jamrich questions the opinions of Dr. Reiss because Dr. Reiss has not looked at the MRI films directly, specifically pointing out the worsening protrusion of the disc on the right side. Dr. Jamrich points out that Dr. Reiss had recommended a decompression at that level rather than a disc replacement, but

that would “add insult to injury” because you already have a torn disc that would be further damaged by the decompression.

14. Respondents’ witness Dr. Reiss opined that a fusion at one level and a disc replacement at the adjacent level was not the accepted use of an artificial disc according the Division of Workers Compensation Guidelines. Dr. Jamrich testified he was not familiar with the Guidelines, but he has testified twice in Workers’ Compensation hearings and explained why the procedure he recommended was preferable for this particular patient. While the Guidelines should be appropriately considered, the opinions expressed in the medical records or by the Claimant’s treating physician can provide sufficient rationale for deviation from the Guidelines.

15. Claimant testified that she has continued to work throughout this process at light duty for Employer. She has constant pain in her low back and down her legs that prevents her from full duty work, and also from engaging in any of her normal activities, like hiking. She testified that she had been an extremely active and athletic person prior to this injury and would like to be able to get back to that level of function if possible.

16. All of the physicians involved in Claimant’s care agree that she would benefit from a fusion at L5-S1. Dr. Jamrich also requested authorization for an L4-5 disc replacement. Dr. Primack is not a back surgeon, and there is no indication that he has seen the Claimant, or her recent MRI, since his examination on January 10, 2017. Dr. Reiss is a surgeon, but is not Claimant’s treating physician and has not seen the actual films of all four of Claimant’s MRIs. Dr. Reiss does not know if there is a worsening at L4-5, and believes only the fusion should be done. Dr. Jamrich has the most extensive and comprehensive experience with Claimant and her condition. He has viewed all four MRI films himself. He credibly and persuasively testified to Claimant’s reasonable need for this procedure. His testimony and explanations for the need for this treatment as the treating physician are well reasoned and make sense to try to avoid further treatment and surgery.

17. Dr. Jamrich specifically addressed the issue of whether the disc replacement was related to Claimant’s work injury. The ALJ finds persuasive Dr. Jamrich’s opinion that the disc replacement is related. Dr. Jamrich credibly opined that he had “seen the same torn, protruding, worsening disc” on every one of Claimant’s MRIs, and that he did not know how Dr. Reiss could testify that it wasThe record supports a finding that Dr. Jamrich reviewed all of the MRI films and that Dr. Reiss may not have seen the actual MRI films, but relied instead on the radiologists’ reports. The ALJ finds Dr. Jamrich’s opinion to be better supported and more persuasive than Dr. Reiss’ opinion on the issue of relatedness.

CONCLUSIONS OF LAW

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

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline, 57 P.2d 1205, 1209* (Colo. 1936); CJI, Civ. 3:17 (2013).

The record contains ample support to find that Respondent's expert witness, Dr. Brian Reiss, is biased in favor of Respondents. He performs at least three Independent Medical Examinations a week, all on behalf of Respondents. By his own admission, many times the examinations relate to the denial of surgeries that have been proposed by an authorized treating physician. His opinion that the L4-5 disc replacement is not reasonably necessary is less persuasive due to his apparent bias in favor of Respondents.

Dr. Jamrich, as an authorized treating physician, is more familiar with Claimant's particular symptoms and responses to treatment. He is also the doctor most familiar with objective evidence of Claimant's condition having reviewed all of Claimant's MRI films. Dr. Jamrich's opinion that Claimant's condition warrants the fusion and disc replacement is persuasive.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office, 12 P.3d 844, 846 (Colo. App. 2000)*. A claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n, 491 P.2d 106* (Colo. App. 1971). A causal connection may be established by circumstantial evidence. Expert medical testimony is not necessarily required. *Id.* All results flowing proximately and naturally from an

industrial injury are compensable. *See Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970).*

Respondents have admitted liability for medical treatment to Claimant's lumbar spine and have provided treatment to the lumbar disc at L5-S1. The evidence reflects that after first denying the request for authorization from Dr. Castro, Respondents admitted liability for the first (and second) surgery performed by Dr. Madsen; this first surgery took place on December 10, 2015 and the second on March 23, 2016.

The issue before the ALJ is whether Dr. Jamrich's request for a repeat surgery at L5-S1 and a disc replacement at L4-5 is reasonable, necessary, and related to Claimant's admitted low back injury. Dr. Reiss opined the recommended L4-5 portion is not reasonable or necessary because Claimant did not have a diagnostic response to the discogram. Specifically, Dr. Reiss testified that Dr Jamrich did not show that this area was a generator of her pain. However, Dr. Jamrich opined that Claimant had a disc herniation at L5-S1 with two discectomies, bone on bone, and some residual disc pushing on the nerve on the left side. Dr. Jamrich also opined that she has a very large tear through the back of the annulus at the L4-5 level with a protrusion out the right side with low back and leg pain. He opined that if Claimant does not have a fusion that it will continue to be painful at L5-S1 and L4-5. If only the fusion is performed, Dr. Jamrich opined that the segment at L4-5 will become more painful.

Dr. Jamrich respectfully disagreed with the opinion of Dr. Reiss regarding a decompression at L4-5 and indicated it would add "insult to injury." Again, Dr. Reiss' opinion here is not found to be persuasive. Dr. Jamrich points out that Claimant is a young, active female that has had two surgeries already to that area. There is no question that the L5-S1 portion is reasonable, as even Dr. Reiss and Dr. Primack have stated that this portion of the surgery should be done. The two back surgeons differ on the L4-5 disc replacement. Regardless, Dr. Jamrich makes a compelling and persuasive argument that it would be a mistake to do one without the other. Dr. Reiss' arguments against the second part of the procedure are not found to be convincing.

Respondents have argued that the proposed surgery is not recommended under the Guidelines. While the Guidelines were appropriately considered, the weight of the opinions expressed in the medical records by the Claimant's medical treatment professionals provides sufficient rationale for deviation from the Guidelines.

Dr. Reiss has opined that the need for the L4-5 replacement is not related to this claim. Dr. Jamrich specifically addressed that issue and indicated that he has "…seen the same torn, protruding, worsening disc on every MRI" and consequently does not know how Dr. Reiss can say it is not related. Dr. Jamrich does point out that Dr. Reiss may not have seen the actual MRI films, only the reports. Given the persuasive testimony of Dr. Jamrich, the ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that the L5-S1 fusion and the L4-5 disc replacement as proposed are reasonable, necessary, and related to Claimant's work injury.

ORDER

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

1. Dr. Jamrich's proposed L5-S1 fusion and L4-5 disc replacement are reasonable, necessary, and related. Claimant may proceed with this procedure and Respondents shall be responsible for payment of all costs, per the Colorado Fee Schedule, associated with that treatment.

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

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

DATED: October 11, 2017

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment.

STIPULATIONS

I. The parties stipulated at hearing that, should the claim be found compensable, Respondents shall be liable for Claimant's treatment with Dr. Dixon at CCOM on October 7, 2016.

FINDINGS OF FACT

1. Claimant has been employed by Employer since 2006 working in various capacities including, as of 2016, a Senior Leadership Development Specialist.

2. As a Senior Leadership Development Specialist, Claimant is responsible for developing leadership training for call center managers. Claimant testified that she is a salaried employee and that her usual work hours are from 9:00 a.m. to 5:00 p.m.

3. On September 30, 2016, Employer held its annual employee appreciation event, PAWtober Fest. "PAW" is an acronym for Employer's core values of pride, adventure, and winning. PAW is a part of Employer's corporate culture and is used to reinforce employer's overall business and employment ethos.

4. The event was held at Employer's headquarters and included live music, food trucks, games, and other activities. Alcoholic drinks were also available for purchase. Employees' families, including children, were invited to attend the event.

5. Aaron Groote, Senior Manager of Corporate Communications, testified at hearing on behalf of Respondents. Mr. Groote was the coordinator of the 2016 PAWtober Fest. Mr. Groote testified that the event was held outside of Employer's core business hours of 9:00 a.m. to 4:00 p.m. He stated that the event was recreational and attendance was optional. The messaging to employees about the event did not indicate attendance was mandatory. No training of employees occurred during the event. Volunteers signed up to work shifts and were not required to stay and attend the event upon completion of their volunteer shift. The event was paid for by Employer and some of Employer's programming partners.

6. Claimant volunteered to work the registration table at PAWtober Fest. Claimant testified that her understanding was that, as a Senior Leadership Development Specialist, she was expected to participate in PAWtober Fest. Claimant stated that, throughout her employment with Employer, employees in leadership positions always

participated in “making events happen.” Claimant’s motive in attending the event was to meet Employer’s perceived expectation and to promote Employer’s leadership values. Claimant was not training any employees at the event. Claimant acknowledged that she was free to leave after completing her volunteer shift, that she did not receive compensation for her participation, and that she was not told her performance evaluation relied on her attendance at the event.

7. During the day of September 30, 2016, Claimant attended two meetings regarding PAWtober Fest discussing details of her volunteer duties at the event. Claimant was responsible for ensuring that attendees were registered before entering into the event and distributing wristbands to attendees drinking alcohol.

8. Claimant was stationed at a registration table. Claimant’s volunteer shift was from 4:30 p.m. to 5:30 p.m. Claimant testified that she normally would have worked until 5:00 p.m.

9. Claimant testified that she completed her volunteer shift and began walking to her car to put items in her car. Claimant intended on then returning to the event to attend in a non-volunteer capacity. Claimant testified that, while walking on company premises on the way to the car, her foot slipped off of an uneven sidewalk. Claimant fell forward, injuring her right arm and shoulder. Claimant reported the incident to a security guard and then drove herself home. She went to an emergency room a few days later for treatment of her symptoms.

10. Claimant completed an Employee Accident/Injury Report on October 3, 2016.

11. Claimant subsequently presented to Robert Dixon, M.D. at CCOM on October 7, 2016. Claimant reported falling onto her right shoulder on September 30, 2016. On physical examination, Dr. Dixon noted swelling and bruising and limited range of motion in Claimant’s right upper arm Dr. Dixon noted that emergency room x-rays were negative for an acute bony injury. Dr. Dixon diagnosed Claimant with a work-related right shoulder contusion and rotator cuff strain. Dr. Dixon released Claimant to regular duty and recommended Claimant take Aleve, use ice and heat and begin physical therapy.

12. Claimant underwent an MRI of her right shoulder on October 15, 2016 which revealed a high-grade partial tear far anterior supraspinatus tendon, mild subcapularis tendinosis without tearing, and subacromial subdeltoid bursitis.

13. On October 27, 2016, Claimant presented to Thomas Mann, M.D. Dr. Mann assessed right shoulder pain with a high-grade partial supraspinatus tear and recommended operative intervention.

14. Claimant’s testimony is found credible and persuasive.

15. Claimant has established by a preponderance of the evidence that she sustained an industrial injury arising out of and in the course and scope of her employment. Claimant volunteered at the event based on a reasonable understanding

that, in her role as a Senior Leadership Development Specialist, she was expected to attend and assist with the operation of the event. Although the event itself was recreational, immediately preceding the injury, Claimant was not participating in a recreational or social capacity, but rather as a volunteer assisting Employer in operating the event.

16. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would

accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

In order to recover benefits a claimant must prove by a preponderance of the evidence that his or her injury was proximately caused by an injury arising out of and in the course of her employment. Section 8-41-301(1)(b) & (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

Section 8-40-201(8), C.R.S., provides that the term “employment” shall not “include the employee’s participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program.” Similarly, § 8-40-301(1), C.R.S., defines the term “employee” to exclude any person employed by an employer “while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment.”

In *White v. Industrial Claim Appeals Office,* 8 P.3d 621 (Colo. App. 2000), the court held that the statutory term “recreational activity” should be given its plain and ordinary meaning as an activity that “has a refreshing effect on either the mind or the body.” Determining whether an activity is “recreational” depends on consideration of the circumstances including whether the activity occurred during working hours, whether the injury occurred on the employer’s premises, whether the employer initiated the activity, whether the employer exerted control over the employee’s participation in the activity, and whether the employer stood to benefit from the employee’s participation in the activity. The question of whether an activity was “recreational” is one of fact for determination by the ALJ. *Lopez v. American Lumber Construction,* W.C. No. 4-434-488 (I.C.A.O. Oct. 29, 2003).

Determination of whether the claimant’s participation in a recreational activity was “voluntary” requires consideration of the claimant’s “motive” for participation in the activity. Compensability must be denied if participation in the activity was voluntary, even though the employer promoted, sponsored or supported the activity. When determining whether the claimant’s participation was voluntary the ALJ may consider various factors including whether the activity occurred during working hours, whether the activity occurred on or off the employer’s premises, whether the employer initiated, organized, sponsored or financially supported the activity, and whether the employer derived benefit from the activity. *Dover Elevator Co. v. Industrial Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998). Ultimately, the question of whether the claimant’s

participation in the recreational activity was voluntary is one of fact for determination by the ALJ. *Kvale v. Infinity Systems Engineering,* W.C. No. 4-588-521 (I.C.A.O. March 23, 2005).

As found, Claimant has established by a preponderance of the evidence that she sustained an industrial injury arising out of and in the course of her employment. Pertinent to the ALJ's analysis is the capacity in which Claimant was present at the event and the timing of the injury. Although the event itself was recreational and attendance optional, Claimant's participated in a volunteer capacity in which she performed duties as instructed by Employer. Claimant signed up for a specific shift, which Claimant credibly testified began prior to the end of her normal work hours. Claimant attended two meetings throughout her work day to receive instructions and additional information regarding her volunteer duties. Claimant credibly testified that it was her understanding that she was expected to attend and assist with event, as she had observed other employees in leadership positions do on prior occasions. Claimant's motive to attend the event was to meet such expectation and demonstrate leadership. Claimant's assistance at the registration table benefitted Employer by facilitating the efficient operation of the event.

Although Claimant's intention was to subsequently participate in the event in a recreational capacity, at the time of the injury, Claimant had not participated in the social or recreational aspects. Claimant was in the process of walking to her car immediately after completing the volunteer shift when she fell on company premises. Based on the totality of evidence, Claimant has established that she sustained an injury on September 30, 2016 arising out of and in the course of her employment.

ORDER

It is therefore ordered that:

I. Claimant has established by a preponderance of the evidence that she sustained an industrial injury arising out of and in the course of her employment. Claimant's September 30, 2016 injury is compensable.

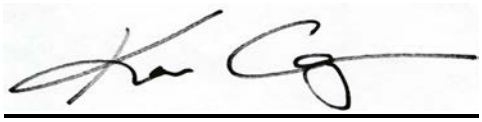
II. Respondents shall pay the cost of Claimant's treatment with Dr. Dixon at CCOM on October 7, 2016 according to the fee schedule.

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

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

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

DATED: October 10, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has demonstrated by a preponderance of the evidence that left shoulder surgery is reasonable, necessary and related to the industrial injury.

FINDINGS OF FACT

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

1. On May 29, 2015, Claimant suffered a compensable injury when he fell approximately 10-12 feet off a roof.

2. Claimant suffered multiple injuries, including an injury to his left shoulder.

3. On June 11, 2015, due to ongoing shoulder complaints and symptoms, Claimant underwent an MRI of his left shoulder. According to Dr. Shah's December 11, 2015 report, the MRI revealed a complete tear of the rotator cuff as well as biceps tendonitis.

4. On December 11, 2015, Dr. Shah operated on Claimant's left shoulder. Dr. Shah noted in his operative report that Claimant suffered from a "complete rupture of the rotator cuff at the level of the supraspinatus." Therefore, Dr. Shah performed a "left shoulder arthroscopy, extensive debridement, rotator cuff repair of supraspinatus, open subpectoral biceps tenodesis, and subacromial decompression."

5. Claimant's pain complaints and symptoms were consistent with the MRI findings and Dr. Shah's operative findings. Therefore, this ALJ finds Claimant to be credible regarding his reporting of pain and symptoms.

6. Subsequent to this surgical procedure performed by Dr. Shah, Claimant showed some gradual improvement but it subsequently worsened. The worsening of his symptoms included both pain as well as popping in the left shoulder. It worsened to the point that he was unable to lift overhead and was unable to reach across his body. Given these symptoms and the fact that he was unable to sleep through the night because of the pain in his left shoulder, a referral was made by the primary treating physician, Dr. Hugh Macaulay, to Dr. Andrew Parker.

7. On November 21, 2016, Claimant was evaluated by Dr. Parker due to ongoing shoulder problems. Claimant had significant discomfort in his left shoulder and also felt that his left shoulder was weak. Dr. Parker noted Claimant had mild AC

joint tenderness on the left and positive impingement. He also noted significant subacromial crepitus and that Claimant hiked his shoulder with rotator cuff strength testing. He also noted fairly significant weakness with Jobe strength testing. Based on his findings on examination, Dr. Parker was of the opinion that Claimant had either a recurrent left rotator cuff tear or a failed repair. Dr. Parker also diagnosed Claimant with a failed biceps tenodesis. Therefore, Dr. Parker recommended an MRI to evaluate Claimant's rotator cuff and determine whether Claimant needed revision surgery.

8. On December 3, 2016, Claimant underwent an MRI of his left shoulder. The MRI report sets forth the following impression:

> i. Residual posterior para signal abnormality in the distal central supraspinatus tendon.
>
> ii. Fine, vertical tear at the distal supraspinatus myotendinous junction.
>
> iii. Biceps tenotomy with bicipital groove tenodesis.
>
> iv. Early but stable subscapularis and infraspinatus tendinosis.

9. On January 10, 2017, Dr. James Lindberg performed an IME. Dr. Lindberg reviewed the MRI and felt that the rotator cuff is mainly intact with a retracted partial undersurface supraspinatus tear with retraction. His physical examination confirmed that Claimant has some weakness with abduction of the left shoulder. Dr. Lindberg asked Claimant, who is 65, how much longer he plans on working before retiring. Claimant stated maybe another year. Based on his physical examination, and Claimant's desire to retire in about a year, Dr. Lindberg did not think shoulder surgery was reasonable and necessary. In essence, Dr. Lindberg did not think Claimant could return to work as an electrician based on all of the injuries sustained by Claimant in the fall. Therefore, he did not think another shoulder surgery would significantly improve his situation, his motion, his strength, and ability to work.

10. This ALJ does not find Dr. Lindberg's opinion to be persuasive. It appears that Dr. Lindberg based his opinion as to whether the surgery is reasonable and necessary based on Claimant's age and possible retirement in one year and Dr. Lindberg's assessment that repeat surgery may not allow Claimant to return to work as an electrician. Moreover, Dr. Lindberg did not address how a revision surgery might reduce Claimant's shoulder pain. Lastly, Dr. Lindberg also based his opinion that the surgery was not reasonable because he could not "guarantee" the surgery will make Claimant better or "significantly" improve Claimant's "situation."

11. On February 1, 2017, Claimant returned to Dr. Parker. Dr. Parker reviewed the MRI scan and evaluated Claimant. He concluded that Claimant's is suffering

from a recurrent partial rotator cuff tear. Dr. Parker Concluded that Claimant's partial thickness rotator cuff tear is 80%.

12. Dr. Parker stated that:

> Certainly the interpretation of the MRI per myself and Dr. Lindberg, both are within the realm of reasonable with regard to what the scan shows. In my mind, the bottom line is, however, he is still having rotator cuff generated pain historically and by exam, and in the setting of his work-related rotator cuff repair I think that this is probably still related to the accident, whether this has been a failure of repair or incomplete repair at the time of the original surgery. I think if he continues to have symptoms it would be worthwhile exploring it arthroscopically and considering revision rotator cuff repair. I have discussed this with him that as per Dr. Lindberg's note there is some unpredictability on what may be found, especially with the interpretative difference by MR.

13. This ALJ finds Dr. Parker's reports, and his opinions contained in such reports, to be credible and persuasive in finding that Claimant has a partial rotator cuff tear and that surgery is reasonable and necessary to cure and relieve Claimant from the effects of the injury.

14. On May 9, 2017, Claimant was evaluated by Dr. Macaulay. Dr. Macaulay noted that Claimant continues to have significant problems with his left shoulder. Dr. Macaulay noted that Claimant awakens from his sleep once or twice a night when he rolls over on his left shoulder. He also noted that Claimant has significant pain when he reaches overhead. Dr. Macaulay indicated that Claimant is not too old to have the surgery recommended by Dr. Parker. Dr. Macaulay indicated that Claimant should have the surgery if he wants it.

15. Claimant does want to have the surgery which has been recommended by Dr. Parker.

16. On June 1, 2017, Claimant was again evaluated by Dr. Macaulay. Claimant continued to complain of left shoulder symptoms. Dr. Macaulay concluded that Claimant's left shoulder continued to be significantly problematic. Claimant was unable to hold his granddaughter (about 7 pounds) in his left upper extremity. Claimant was also unable to assist his grandson, who weighs about 30 pounds, up from the floor. He was also unable to position the child. Claimant also had problems using his left upper extremity for any abduction or overhead work. Claimant also noted weakness and a catching sensation in his shoulder. His left shoulder pain also wakens him from his sleep. On examination, Dr. Macaulay noted that when the supraspinatus was challenged, Claimant had significant

weakness and pain. Claimant also had a palpable and audible clicking sensation with abduction.

17. This ALJ finds Dr. Macaulay's findings on physical examination to be consistent with the MRI findings which demonstrate Claimant has a partially torn rotator cuff. Dr. Macaulay's findings on physical examination are also consistent with Dr. Parker's findings. Therefore, this ALJ credits Dr. Macaulay's opinion that the surgery recommended by Dr. Parker is reasonable and necessary.

18. On June 28, 2017, Dr. Ciccone performed an IME. His impression was that Claimant was suffering from a rotator cuff tear. However, he did not think the surgery recommended by Dr. Parker was reasonable and necessary. Dr. Ciccone stated that:

> The patient's MRI scan in December 2016 reveals no recurrent full thickness tear. In my experience, it is common for postoperative imaging of rotator cuff repairs to reveal continued partial thickness defects. This is not an indication for surgery. On my examination the patient has some persistent stiffness in the left shoulder but had good rotator cuff strength in external rotation and supraspinatus strength testing. While I believe the patient may benefit from a home stretching program, I think it is unlikely that the patient has room for significant improvement in the function of the shoulder with revision cuff surgery. . . The patient may continue with the use of the shoulder as tolerated.

19. This ALJ does not find Dr. Ciccone's opinions as set forth in his report regarding the need for surgery to be persuasive for a number of reasons. First, Dr. Ciccone indicated that he does not anticipate the surgery will provide "significant improvement in the function of the shoulder." The test for whether a surgery is reasonable and necessary is not whether it will provide "significant improvement." Second, Dr. Ciccone does not address how the repair of the torn rotator cuff might reduce Claimant's pain complaints.

20. Dr. Ciccone also testified via deposition. Dr. Ciccone did expand on his opinion regarding the need for surgery. Dr. Ciccone testified that he did not think the surgery would change Claimant's symptoms "all that much." Dr. Ciccone did not, however, reconcile his difference of opinion in his report in which he stated he did not think the surgery would provide "significant improvement" and his opinion during his deposition in which he stated he did not think the surgery would change Claimant's symptoms "all that much." Therefore, this ALJ does not find Dr. Ciccone's opinion to be persuasive.

21. This ALJ finds that Claimant has a partially torn rotator cuff involving his left shoulder which is symptomatic. Due to the partially torn rotator cuff, Claimant

has weakness, limited function, and pain involving his left shoulder and upper extremity.

22. This ALJ finds that the surgery recommended by Dr. Parker is reasonable and necessary to evaluate and repair the partially torn rotator cuff and improve Claimant's left shoulder function and decrease his pain.

23. This ALJ finds that the surgery recommended by Dr. Parker is reasonable and necessary to cure and relieve Claimant from the effects of his industrial injury to his left shoulder.

24. This ALJ also finds that the need for surgery is related to Claimant's May 29, 2015 work injury.

CONCLUSIONS OF LAW

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

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see*

also Heinicke v. ICAO, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

The Respondent is liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. C.R.S. § 8-42-101(1)(a). Claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990.)

Based upon the credible opinion of Dr. Parker, Claimant has a partially torn rotator cuff. As found, the cuff is approximately 80% torn. In addition, as found, and supported by the credible opinions of Dr. Macaulay and Dr. Parker, Claimant's torn rotator cuff is causing Claimant's left shoulder pain and limiting the function of Claimant's left shoulder and upper extremity. As found, Claimant has established by a preponderance of the evidence that the recommended medical treatment, left shoulder arthroscopy as recommended by Dr. Parker, is reasonable, necessary, and related to his May 29, 2015 industrial accident. The evidence credited demonstrates that the surgery is reasonable and necessary to evaluate Claimant's left shoulder and repair Claimant's partial rotator cuff tear in order to improve Claimant's function and pain complaints of his left shoulder and thereby cure and relieve Claimant from the effects of his industrial injury.

Accordingly, Claimant has demonstrated by a preponderance of the evidence, that the recommended medical treatment is reasonable, necessary, and related to his May 29, 2015 industrial accident.

ORDER

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

1. Claimant's request for surgery as recommended by Dr. Parker is reasonably and medically necessary and is related to the underlying industrial accident of May 29, 2015.

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

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

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

DATED: October 11, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-031-151-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
SEDGWICK CMS, Third-Party Administrator (TPA),

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 20, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 9/20/17, Courtroom 1, beginning AT 8:30 AM, and ending at 10:15 AM).

Claimant relied on Respondents' Exhibits A through K, which were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ took the matter under advisement. The following decision is hereby issued.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable aggravation of her right knee in the course and scope of her employment: if so, is the Claimant entitled to medical benefits. At the commencement of the hearing, the parties agreed to reserve the issues of average weekly wage and temporary disability. The Respondents defend on the basis of an alleged "idiopathic

event," and the alleged natural progression of the Claimant's underlying right knee condition.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues. The Respondents bear no burden in this matter.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant (date-of-birth, April 5, 1962) started work for the Employer in August 2011 as an administrator.

2. On November 9, 2016, the Claimant, during a business trip, tripped over an uneven break on the sidewalk while she was walking from a van to a building where she was to train Employer's personnel. She landed on her right knee. The security personnel at the site came to her help and an ambulance was called. The Claimant was taken to the emergency room (ER). She complained of knee pain and shoulder pain. The Claimant was released the same day.

3. The Claimant is diabetic and has had two toes of her right foot amputated prior to the accident. The Claimant usually wears a boot on her right leg. She was wearing a boot on her right leg on the day of the accident. The Respondents contend that it was the boot that caused her to trip. The ALJ finds this contention to be without merit.

4. The Claimant has a history of falling accidents. On January 9, 2016, she fell on a tile floor in a hotel's bathroom while she was showering. Sometime in August/September of 2015, the Claimant fell twice during an unrelated-business trip--inside Disneyland and on a sandy beach in California. After both incidents, the Claimant complained of her knees among other parts of her body.

5. The ALJ finds that the Claimant's injury on November 9, 2016, was within the course and scope of her employment because she was traveling to conduct training for the Employer's personnel as part of her administrative responsibilities.

6. The ALJ further finds that the Claimant's tripping on the uneven break in the sidewalk on November 9, 2016, amounted to exposure to a special hazard of employment; and, it caused, or combined with her pre-existing condition, to aggravate and accelerate the pre-existing injury of her right knee.

7. Prior to the November 9, 2016 slip-and-fall injury, the Claimant had been released to full duty from a previous right knee injury.

Independent Medical Examination (IME) of Timothy O'Brien, M.D.

8. Dr. O'Brien performed an IME at Respondents' request on or about April 3, 2017. Dr. O'Brien's ultimate opinion was that the Claimant sustained a contusion of the right knee on November 9, 2016 with no evidence of substantial tissue breakage; and, the Claimant did not sustain any permanent partial disability as a result of the incident. Further, he was of the opinion that the Claimant needed no further medical treatment other than a home fitness regimen.

Medical

9. The Employer had the Claimant taken, by ambulance to the emergency room (ER) OF Parkland Medical Center; and, subsequently referred the Claimant to Concentra, were she was told that her injury was not work-related and Concentra would not treat the Claimant for non-medical reasons. Later, Concentra called her back for an MRI (magnetic resonance imaging), after which Concentra again told the Claimant that her injury was not work-related and it refused to further treat her for because the claim was denied by the insurance carrier.

10. Diane K. Adams, D.O., who treated the Claim ant t Parkland on November 15, 2016, was of the opinion that the Claimant sustained a work-related injury on November 9, 2016; and, she released the Claimant to return to modified duty from November 12 to November 14, 2016.

11. On November 24, 2016 Scott Richardson, M.D., released the Claimant to modified duty with the following restrictions: (1) sitting 90% of the time; (2) must use crutches; (3) weight bearing as tolerated; (4) no kneeling; and, (5) no climbing ladders (respondents' Exhibit G).

12. On May 17, 2017, Matthew Lugliani, M.D. was of the opinion that the Claimant sustained a work-related injury on November 9, 2016, sustaining an acute-on-chronic right knee pain. He indicated that the Claimant could not work until May 19, 2017. On June 6, 2017, Dr. Lugliani released the Claimant from his care because the insurance carrier was denying the claim.

Ultimate Findings

13. The Claimant's testimony was persuasive, credible and, essentially un-contradicted.

14. Between any conflicting versions of events and medical opinions, the ALJ makes a rational choice, based on substantial evidence to accept the Claimant's version of events, the medical opinions supporting an aggravation and acceleration of her underlying right knee condition on November 9, 2016, and to reject any testimony and/or opinions to the contrary.

15. The Claimant sustained a compensable aggravation and acceleration of her underlying right knee condition by virtue of her slip and fall on an uneven sidewalk on November 9, 2016; and, this arose out of the course and scope of her employment for the Employer.

16. All of the medical care and treatment to which the Respondents referred the Claimant was authorized, causally related, and reasonable necessary, at least until June 6, 2017, when Dr. Lugliani released the Claimant from further care. Beyond that point in time remains an open question.

17. The parties implicitly agreed to reserve the issues of medical benefits, average weekly wage, and temporary disability benefits, if the case was found to be compensable.

CONCLUSIONS OF LAW

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

Idiopathic Injuries & Compensability

a. Where an off-premises injury occurs at a point which lies on the only route, or at least on the normal route, which employees must traverse to reach their employer's premises, special hazards of that route become hazards of the employment. *Matter of Welham*, 653 P.2d 760, 762 (Colo. App. 1982). When a claimant, at the time of an injury, is performing a duty with which the employee is charged as a part of the contract for service, or under the express or implied direction of his employer, the employee is within the course of his employment under the Workers' Compensation Act. *Colorado Civil Air Patrol v. Hagans*, 662 P.2d 194, 196, (Colo. App. 1983). An employee who is away from home on a business trip for his employer is under continuous workers' compensation coverage. *Maryland Casualty Co. v. Messina*, 860 P.2d 556, 558, (Colo. App. 1993). As found, the Claimant was on a business trip when she tripped on her way from a van to the building where she was to provide training to Employers' employees. The Claimant was away from home on a business trip for her employer and was under continuous worker's compensation. Further, she was exposed

to a special hazard of employment, *i.e.,* the uneven break in the sidewalk wherein she tripped, fell and was injured.

b. The [Aggravation] rule specifies that when "an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003). "[i]t is well settled that a heart attack suffered in the course and scope of employment is compensable even though the employee may have suffered from a related preexisting heart condition." *Id*. An "unexplained fall" satisfies the "arising out of" employment requirement in § 8-41-301 (1) (c), C.R.S., if the fall would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he or she as injured. The phrase "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of injury. *City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** Employment risks are distinguished from entirely personal risks (which do not "arise out of" employment) , for instance, a preexisting idiopathic illness or medical condition that is completely unrelated to employment, such as fainting spells, heart disease, or epilepsy. *See, e.g., Irwin v. Indus. Comm'n,* 695 P.2d 763 (Colo. App. 1985); *Gates Rubber Co. v. Indus. Comm'n,* 705 P.2d 6 (Colo. App. 1985). As found, the Claimant tripped while she was walking from the a van to the building where she was going to provide training services for the Employer's personnel as part of her required work. The fact that she fell in a site that does not belong to the employer is irrelevant to the finding of injury.

c. An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, 805 p.2d 1167 (Colo.App. 1990). Even where the direct cause of an accident is the employee's preexisting idiopathic disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). Thus, even if the direct cause of an employee's fall is a preexisting idiopathic condition, any resulting injury caused by a special employment hazard is compensable, so long as the employment condition is not ubiquitous and generally encountered. *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo.App. 1985); *Ramsdell v. Horn*, *supra*. In *Gates Rubber Co. v. Industrial Commission*, the court held that a level concrete floor is not a special hazard because it is a condition found in many non-employment locations. As found, regardless of the fact that whether the Claimant was wearing her boot or had a history of falling accidents, the Claimant tripped on November 9, 2016, because of the un-even concrete pad on the sidewalk.

d. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. §** 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health* 21 *Laboratories v. Indus. Claim Appeals* Office, 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals* Office, 942 P.2d 1337 (Colo. App. 1997). *Also see §* 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225334 (ICAO, April 7, 1998). As found, the November 9, 2017 incident aggravated and accelerated the Claimant's underlying right knee condition. The claimant's injury was causally related and reasonably necessary to work. She was exposed to a special hazard of employment, to wit, a break in the sidewalk over which she tripped, fell, and aggravated her right knee condition. Thus, the Claimant sustained a compensable injury to her right knee on November 9, 2017.

Credibility

e. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Apps. Office*, 183 P.3d 784 (Colo. App. 2008); *Kroupa v. Indus. Claim Apps. Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9TH Cir. 1977). The ALJ determines the credibility of witnesses. *Arenas v. Indus. Claim Apps. Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Apps. Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Apps. Office*, 297 p.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lat witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. 131, 134 P. 254 (1913); *also see Heinicke v. Indus Claim Apps. Office*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistently or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder

should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke*, 139 Colo. 305, 228 P.2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training, and education. *See* § 8-43-210, C.R.S.; *One Hour Cleaners v. Indus. Claim Apps. Office*, 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury*, 62 ALR 2d 1179, maintaining that the fact-finder is not free to disregard un-contradicted testimony. As found, Claimant's testimony that she tripped over the sidewalk is credible, persuasive and convincing. As found, the Claimant's testimony was credible, persuasive and, essentially, un-contradicted. Further, medical opinions supporting an aggravation and acceleration of her underlying right knee condition were more credible and persuasive than opinions to the contrary.

Substantial Evidence

f. An ALJ's factual findings must be supported by substantial evidence in the record. *Pain Connection Plus v. Indus. Claim Apps. Office*, 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Apps. Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Apps. Office*, 131 P.3d 1172 (Colo. App. 2005); *also see Martinez v. Indus. Claim Apps. Office*, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact-finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus Claim Apps. Office*, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made rational choices, based on substantial evidence and the admitted photo of the uneven break in the sidewalk, to accept the Claimant's testimony that she tripped because of the uneven break in the sidewalk, and, to reject the Claimant's testimony that the tripping was the only contributor to her knee injury. As found, between any conflicting versions of events and medical opinions, the ALJ made a rational choice, based on substantial evidence to accept the Claimant's version of events, the medical opinions supporting an aggravation and acceleration of her underlying right knee condition on November 9, 2016, and to reject any testimony and/or opinions to the contrary.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing his entitlement to benefits. §§ 8-43-201 & 8-43-210, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Apps. Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Indus Claim Apps. Office*, 24 P.3d 29 (Colo. App. 2000); *Kieckkhafer v. Indus. Claim Apps. Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim. Apps. Office (ICAO), March 20, 2002]; *also see Ortiz v. Principi*, 274 P.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim App. Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained her burden of proving, by a preponderance of the evidence that she sustained a compensable injury on November 9, 2017; and is entitled to medical benefits to relief the effect of her compensable injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay all the costs of causally related and reasonably necessary medical care and treatment for the Claimant's compensable right knee injury of November 9, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this_____day of October 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2017, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

At the conclusion of the hearing, the ALJ took the matter under advisement. The following decision is hereby issued.

ISSUES

The issues to be determined by this decision concern whether the Claimant sustained a compensable aggravation of her right knee in the course and scope of her employment: if so, is the Claimant entitled to medical benefits. At the commencement of the hearing, the parties agreed to reserve the issues of average weekly wage and temporary disability. The Respondents defend on the basis of an alleged "idiopathic event," and the alleged natural progression of the Claimant's underlying right knee condition.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues. The Respondents bear no burden in this matter.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant (date-of-birth, April 5, 1962) started work for the Employer in August 2011 as an administrator.

2. On November 9, 2016, the Claimant, during a business trip, tripped over an uneven break on the sidewalk while she was walking from a van to a building where she was to train Employer's personnel. She landed on her right knee. The security personnel at the site came to her help and an ambulance was called. The Claimant was taken to the emergency room (ER). She complained of knee pain and shoulder pain. The Claimant was released the same day.

3. The Claimant is diabetic and has had two toes of her right foot amputated prior to the accident. The Claimant usually wears a boot on her right leg. She was wearing a boot on her right leg on the day of the accident. The Respondents contend that it was the boot that caused her to trip. The ALJ finds this contention to be without merit.

4. The Claimant has a history of falling accidents. On January 9, 2016, she fell on a tile floor in a hotel's bathroom while she was showering. Sometime in August/September of 2015, the Claimant fell twice during an unrelated-business trip--

inside Disneyland and on a sandy beach in California. After both incidents, the Claimant complained of her knees among other parts of her body.

5. The ALJ finds that the Claimant's injury on November 9, 2016, was within the course and scope of her employment because she was traveling to conduct training for the Employer's personnel as part of her administrative responsibilities.

6. The ALJ further finds that the Claimant's tripping on the uneven break in the sidewalk on November 9, 2016, amounted to exposure to a special hazard of employment; and, it caused, or combined with her pre-existing condition, to aggravate and accelerate the pre-existing injury of her right knee.

7. Prior to the November 9, 2016 slip-and-fall injury, the Claimant had been released to full duty from a previous right knee injury.

Independent Medical Examination (IME) of Timothy O'Brien, M.D.

8. Dr. O'Brien performed an IME at Respondents' request on or about April 3, 2017. Dr. O'Brien's ultimate opinion was that the Claimant sustained a contusion of the right knee on November 9, 2016 with no evidence of substantial tissue breakage; and, the Claimant did not sustain any permanent partial disability as a result of the incident. Further, he was of the opinion that the Claimant needed no further medical treatment other than a home fitness regimen.

Medical

9. The Employer had the Claimant taken, by ambulance to the emergency room (ER) OF Parkland Medical Center; and, subsequently referred the Claimant to Concentra, were she was told that her injury was not work-related and Concentra would not treat the Claimant for non-medical reasons. Later, Concentra called her back for an MRI (magnetic resonance imaging), after which Concentra again told the Claimant that her injury was not work-related and it refused to further treat her for because the claim was denied by the insurance carrier.

10. Diane K. Adams, D.O., who treated the Claim ant t Parkland on November 15, 2016, was of the opinion that the Claimant sustained a work-related injury on November 9, 2016; and, she released the Claimant to return to modified duty from November 12 to November 14, 2016.

11. On November 24, 2016 Scott Richardson, M.D., released the Claimant to modified duty with the following restrictions: (1) sitting 90% of the time; (2) must use crutches; (3) weight bearing as tolerated; (4) no kneeling; and, (5) no climbing ladders (respondents' Exhibit G).

12. On May 17, 2017, Matthew Lugliani, M.D. was of the opinion that the Claimant sustained a work-related injury on November 9, 2016, sustaining an acute-on-chronic right knee pain. He indicated that the Claimant could not work until May 19, 2017. On June 6, 2017, Dr. Lugliani released the Claimant from his care because the insurance carrier was denying the claim.

Ultimate Findings

13. The Claimant's testimony was persuasive, credible and, essentially un-contradicted.

14. Between any conflicting versions of events and medical opinions, the ALJ makes a rational choice, based on substantial evidence to accept the Claimant's version of events, the medical opinions supporting an aggravation and acceleration of her underlying right knee condition on November 9, 2016, and to reject any testimony and/or opinions to the contrary.

15. The Claimant sustained a compensable aggravation and acceleration of her underlying right knee condition by virtue of her slip and fall on an uneven sidewalk on November 9, 2016; and, this arose out of the course and scope of her employment for the Employer.

16. All of the medical care and treatment to which the Respondents referred the Claimant was authorized, causally related, and reasonable necessary, at least until June 6, 2017, when Dr. Lugliani released the Claimant from further care. Beyond that point in time remains an open question.

17. The parties implicitly agreed to reserve the issues of medical benefits, average weekly wage, and temporary disability benefits, if the case was found to be compensable.

CONCLUSIONS OF LAW

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

Idiopathic Injuries & Compensability

a. Where an off-premises injury occurs at a point which lies on the only route, or at least on the normal route, which employees must traverse to reach their employer's premises, special hazards of that route become hazards of the employment. *Matter of Welham*, 653 P.2d 760, 762 (Colo. App. 1982). When a claimant, at the time of an injury, is performing a duty with which the employee is charged as a part of the

contract for service, or under the express or implied direction of his employer, the employee is within the course of his employment under the Workers' Compensation Act. *Colorado Civil Air Patrol v. Hagans*, 662 P.2d 194, 196, (Colo. App. 1983). An employee who is away from home on a business trip for his employer is under continuous workers' compensation coverage. *Maryland Casualty Co. v. Messina*, 860 P.2d 556, 558, (Colo. App. 1993). As found, the Claimant was on a business trip when she tripped on her way from a van to the building where she was to provide training to Employers' employees. The Claimant was away from home on a business trip for her employer and was under continuous worker's compensation. Further, she was exposed to a special hazard of employment, *i.e.,* the uneven break in the sidewalk wherein she tripped, fell and was injured.

b. The [Aggravation] rule specifies that when "an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable." *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003). "[i]t is well settled that a heart attack suffered in the course and scope of employment is compensable even though the employee may have suffered from a related preexisting heart condition." *Id*. An "unexplained fall" satisfies the "arising out of" employment requirement in § 8-41-301 (1) (c), C.R.S., if the fall would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he or she as injured. The phrase "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of injury. *City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** Employment risks are distinguished from entirely personal risks (which do not "arise out of" employment) , for instance, a preexisting idiopathic illness or medical condition that is completely unrelated to employment, such as fainting spells, heart disease, or epilepsy. *See, e.g., Irwin v. Indus. Comm'n,* 695 P.2d 763 (Colo. App. 1985); *Gates Rubber Co. v. Indus. Comm'n,* 705 P.2d 6 (Colo. App. 1985). As found, the Claimant tripped while she was walking from the a van to the building where she was going to provide training services for the Employer's personnel as part of her required work. The fact that she fell in a site that does not belong to the employer is irrelevant to the finding of injury.

c. An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, 805 p.2d 1167 (Colo.App. 1990). Even where the direct cause of an accident is the employee's preexisting idiopathic disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). Thus, even if the direct cause of an employee's fall is a preexisting idiopathic condition, any resulting injury caused by a special employment hazard is compensable, so long as the

employment condition is not ubiquitous and generally encountered. *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo.App. 1985); *Ramsdell v. Horn*, *supra*. In *Gates Rubber Co. v. Industrial Commission*, the court held that a level concrete floor is not a special hazard because it is a condition found in many non-employment locations. As found, regardless of the fact that whether the Claimant was wearing her boot or had a history of falling accidents, the Claimant tripped on November 9, 2016, because of the un-even concrete pad on the sidewalk.

d. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. §** 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health* 21 *Laboratories v. Indus. Claim Appeals* Office, 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals* Office, 942 P.2d 1337 (Colo. App. 1997). *Also see §* 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225334 (ICAO, April 7, 1998). As found, the November 9, 2017 incident aggravated and accelerated the Claimant's underlying right knee condition. The claimant's injury was causally related and reasonably necessary to work. She was exposed to a special hazard of employment, to wit, a break in the sidewalk over which she tripped, fell, and aggravated her right knee condition. Thus, the Claimant sustained a compensable injury to her right knee on November 9, 2017.

Credibility

e. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Apps. Office*, 183 P.3d 784 (Colo. App. 2008); *Kroupa v. Indus. Claim Apps. Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9TH Cir. 1977). The ALJ determines the credibility of witnesses. *Arenas v. Indus. Claim Apps. Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Apps. Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Apps. Office*, 297 p.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lat witnesses apply to expert witnesses as well.

See Burnham v. Grant, 24 Colo. 131, 134 P. 254 (1913); *also see Heinicke v. Indus Claim Apps. Office*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistently or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke*, 139 Colo. 305, 228 P.2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training, and education. *See* § 8-43-210, C.R.S.; *One Hour Cleaners v. Indus. Claim Apps. Office*, 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury*, 62 ALR 2d 1179, maintaining that the fact-finder is not free to disregard un-contradicted testimony. As found, Claimant's testimony that she tripped over the sidewalk is credible, persuasive and convincing. As found, the Claimant's testimony was credible, persuasive and, essentially, un-contradicted. Further, medical opinions supporting an aggravation and acceleration of her underlying right knee condition were more credible and persuasive than opinions to the contrary.

Substantial Evidence

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

and medical opinions, the ALJ made a rational choice, based on substantial evidence to accept the Claimant's version of events, the medical opinions supporting an aggravation and acceleration of her underlying right knee condition on November 9, 2016, and to reject any testimony and/or opinions to the contrary.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing his entitlement to benefits. §§ 8-43-201 & 8-43-210, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Apps. Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Indus Claim Apps. Office*, 24 P.3d 29 (Colo. App. 2000); *Kieckkhafer v. Indus. Claim Apps. Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim. Apps. Office (ICAO), March 20, 2002]; *also see Ortiz v. Principi*, 274 P.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim App. Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained her burden of proving, by a preponderance of the evidence that she sustained a compensable injury on November 9, 2017; and is entitled to medical benefits to relief the effect of her compensable injury.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay all the costs of causally related and reasonably necessary medical care and treatment for the Claimant's compensable right knee injury of November 9, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule.

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

DATED this 12th day of October 2017.

/s/ Edwin L. Felter, Jr.
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable mental impairment under Section 8-41-301(2), C.R.S.

II. If Claimant established she suffered a compensable mental impairment, whether the January 2015 motor vehicle accident and December 2014 miscarriage were intervening events which severed the causal relationship between the work injury and Claimant's ongoing symptoms and need for treatment.

III. Who is the authorized treating physician ("ATP")?

FINDINGS OF FACT

1. Claimant worked as a personal banker for Employer since 2005. Claimant's job duties included providing service to customers, sales, and "stage-directing," which required Claimant to stand near the entrance of the bank and welcome customers.

2. On November 18, 2014, Claimant was working at the Wells Fargo bank located at 599 South Sable Boulevard. Claimant had been assigned to this branch approximately two months prior. Claimant was scheduled to work from approximately 8:30 a.m. to 6:00 p.m. Claimant arrived to work at approximately 8:15 a.m. or 8:30 a.m. and performed her normal duties throughout the day. Claimant was assigned to stage-direct at approximately 5:00 p.m. or 5:30 p.m.

3. On November 18, 2014, the bank at which Claimant worked was robbed. The perpetrator entered the bank while Claimant was stage-directing and approached Claimant.

4. Claimant testified the perpetrator told Claimant that he knew her and that he had a gun. Claimant testified she believed the perpetrator had her husband and daughter. Claimant did not actually see a gun. Claimant testified the perpetrator took something out of his pocket and struggled to unfold it. Claimant testified she was in a dark area and that she initially struggled to read the note, which asked for no less than $10,000. Claimant testified she started walking to the bank's back area, at which time the perpetrator said "One, two, three, I'm going to shoot." Claimant testified she proceeded to go to the back area of the bank and informed her co-workers of the robbery. Claimant then stayed in the back area while one of her co-workers provided the perpetrator money. Claimant testified she was subsequently in shock and did not know what to do. Claimant testified people were running around and she was worried for her husband and daughter because she did not know where they were.

5. The ALJ reviewed security footage of the robbery. Claimant is observed standing by the entrance of the bank. The perpetrator enters the bank, approaches Claimant and immediately pulls a piece of paper from his left pocket. The perpetrator appears to hand the paper to Claimant then steps backs from Claimant. Claimant appears to read the note and then walks off camera. The perpetrator follows Claimant and appears to have his hands in the pockets of his sweatshirt. The perpetrator is not observed grabbing Claimant. A second camera view shows a customer standing in the lobby area. The perpetrator walks over to the customer and places his left arm around the customer's shoulders while walking the customer to a teller window. The customer removes the perpetrator's arm from around his shoulder. The perpetrator is observed shortly thereafter exiting out of the bank's front entrance. Camera footage from the teller area shows Claimant in the back area with other tellers. A co-worker is observed hugging Claimant and brings Claimant a cup of water. Claimant briefly smiles at the co-worker. Claimant is not observed crying. No one is observed running or screaming.

6. Claimant testified that after the robbery her brain was not functioning, she was constantly afraid, and she continued to think the robber was going to come back and find her. Claimant testified she had panic attacks and anxiety attacks, lost interest in doing things, and lost the will to live.

7. Claimant was approximately three-months pregnant at the time of the robbery.

8. Claimant testified that, prior to the November 18, 2014 robbery, Claimant was not involved in a bank robbery at the 599 South Sable Boulevard branch.

9. Claimant testified she had a good experience working at the 599 South Sable Boulevard location prior to the November 18, 2014 robbery. Claimant testified she loved her job and was performing her job as required.

10. On November 19, 2014, Claimant reported her symptoms to her manager and contacted the Human Resources line. Employer referred Claimant to Karen Hauser, LCSW, through the employee assistance program for experiencing symptoms of trauma in connection with the robbery.

11. No evidence was entered at hearing establishing Claimant was provided a list of designated providers within seven days of Claimant's notification to Employer of her symptoms.

12. Ms. Hauser first evaluated Claimant on November 21, 2014. Ms. Hauser noted Claimant was very tearful, anxious, and worried about the health of her baby. Claimant continued to treat with Ms. Hauser on an almost weekly basis. As of April 2015, Claimant had attended a total of 19 sessions with Ms. Hauser. Ms. Hauser diagnosed Claimant with Posttraumatic Stress Disorder ("PTSD"). Regarding subsequent sessions in November 2014 and December 2014, Ms. Hauser noted Claimant struggled with feelings of fear and anxiety and felt traumatized by the thought of returning to work.

13. On December 2, 2014, Debra D. Baldwin, NP-C, PhD, recommended Claimant refrain from working for 21 days while undergoing counseling.

14. As of December 22, 2014, Claimant was requesting to return to work. Claimant testified she was ready to return to work at such time.

15. Dr. Baldwin recommended Claimant return to modified duty on January 12, 2015, while Claimant continued to undergo counseling.

16. Prior to returning to work, Claimant was involved in a minor motor vehicle accident on January 11, 2015.

17. Claimant was evaluated at Rose Medical Center on January 12, 2015. Claimant underwent an ultrasound which revealed Claimant had suffered a miscarriage at 14 weeks, which was approximately three to four weeks prior to the January 11, 2015 motor vehicle accident. Claimant underwent an ultrasound in December 2015 that was normal.

18. A cytogenetic analysis was performed on the fetal tissue and it was determined that there were no detectable abnormalities of chromosome number or structure.

19. Claimant testified she believes the miscarriage was influenced by the robbery. Claimant testified she let the robber break her. Claimant testified she continues to experience symptoms, that she constantly has images of the robbery, and that she fears the perpetrator is coming back to get her. Claimant testified she is triggered by people who look like the perpetrator and places that remind her of the robbery.

20. In a summary of therapy notes from January 13, 2015, Ms. Hauser noted, "Client learned yesterday her baby had no heartbeat. She is devastated. She will need a DNC. Client unable to cope with the reality of this new trauma. She blames herself for the death. She believes it is due to the stress and trauma she experienced as a result of the robbery."

21. Ms. Hauser noted subsequent counseling sessions with Claimant focused on "dealing with the loss of her baby and the inability to accept this loss." Ms. Hauser remarked, Claimant "continues to experience increased anxiety about the possibility of returning to work even at another branch, but also wants her life to return to normal."

22. In a letter dated January 26, 2015, Ms. Hauser stated, Claimant "was clearly traumatized by the robbery. She was not able to return to work and function effectively due to the trauma and her PCP recommended she take time off." Ms. Hauser also noted Claimant suffered a miscarriage and stated, "[Claimant] continues to be traumatized by all of these events. She has expressed an interest in returning to work but not to same (*sic*) location where the robbery occurred. She continues to struggle emotionally and physically…she continues to experience depression, anxiety, numbness and anger over these event (*sic*)."

23. In a subsequent letter Ms. Hauser remarked Claimant was "highly traumatized by the robbery." Ms. Hauser noted Claimant had been a victim of a robbery at a bank approximately five years earlier. Ms. Hauser stated, "Client continues to struggle with symptoms of trauma which increase significantly when she thinks about returning to

work, especially at the branch where she worked when the robbery occurred." Dr. Hauser further remarked, "She continues to feel traumatized by the robbery and of, course, the loss of her baby."

24. Claimant filed a workers' compensation claim on January 26, 2015, noting "trauma/loss of baby" as the nature of the injury/illness. Claimant indicated a date of injury of November 18, 2014.

25. Dr. Baldwin reevaluated Claimant on February 4, 2015 and noted Claimant continued to be emotionally upset regarding the bank robbery.

26. On February 17, 2015, Claimant's counsel faxed a letter to Insurer requesting the Claimant's workers' compensation claim file. The letter stated, in part:

> Also, it is our understanding that at the time of the injury, [Claimant] was not provided with a designated provider list pursuant to Rule 8-2. It is also our understanding that [Claimant] did not receive an authorized treating physician or designated provider list within seven days after she filed her Workers' Compensation claim form. As such, [Claimant] designates Dr. Caroline Gellrick as her authorized treating physician. In the event that [Claimant] was provided an authorize (sic) treating physician/designated provider list, then please accept this request to change her physician from any prior authorized treating physician to Dr. Caroline Gellrick, for all future medical treatment.

27. Respondents did not respond to the February 17, 2015 letter.

28. On March 16, 2015, Claimant's counsel faxed the same letter to Ms. Karen Sterns with Sedgwick CMS.

29. Samantha Long, Paralegal, testified on behalf of Claimant. Ms. Long credibly testified she received confirmation through a fax report indicating the February 17, 2015 and March 16, 2015 faxes were transmitted successfully.

30. On March 19, 2015, Respondents' counsel sent a letter to Claimant's counsel rejecting Claimant's request to designate Dr. Caroline Gellrick as Claimant's authorized treating physician and denying any request for a change of physician.

31. Respondents filed a Notice of Contest on March 27, 2015.

32. On April 14, 2015, Lupe Ledezma, Ph.D., performed a psychological evaluation of Claimant. Regarding Claimant's psychosocial history, Dr. Ledezma documented the following, among other things: Claimant was grazed by a gunshot during an attempted carjacking at age 15 or 16, Claimant suffered a miscarriage in May 2013, Claimant underwent gastric bypass surgery in December 2013 and, approximately three years prior, Claimant's daughter suffered an illness which led to significant emotional upset for Claimant. Claimant reported that, after the November 18, 2014 robbery, her primary concern was that her continued emotional distress could harm her unborn child.

Claimant reported that it was difficult for her to get up in the morning and, despite attempts to improve her emotional state, Claimant continued to feel fear and nervousness regarding returning to work. Claimant reported replaying the robbery in her mind and feeling unsafe in public and, since the robbery, experiencing anxiety, nervousness, irritability, and lethargy. Claimant also reported startling easily, having difficulty calming down, crying, and a decreased attention span and ability to concentrate. Dr. Ledezma diagnosed Posttraumatic Stress Disorder ("PTSD") and depression. Dr. Ledezma remarked,

> "[Claimant] is experiencing emotional distress related to the robbery that occurred at work on 11/18/14. While she was not physically injured, she did feel that her life was threatened. Also, she experienced sustained fear and apprehension because the robber was not caught for several days and she feared that he did know her." "She has intrusive memories of the incident and has difficulty talking about it without becoming highly emotionally upset."

Referencing the January 11, 2015 motor vehicle accident, Dr. Ledezma stated,

> "While I do not have access to Ms. Hauser's weekly progress notes, based on a treatment summary submitted by Ms. Hauser, there is indication that the motor vehicle accident and miscarriage exacerbated the psychological symptoms that were already present. Also, her primary care physician diagnosed PTSD and took her off work before the motor vehicle accident or miscarriage occurred."

Dr. Ledezma noted that Claimant suffered a prior miscarriage and previously used psychotropic medications, but that Claimant received treatment and stopped medication before the robbery such that she was able to work without incident or emotional reactivity. Dr. Ledezma concluded that "whatever issues" Claimant had from the prior miscarriage and the prior robbery were resolved. Dr. Ledezma noted Claimant had symptoms of PTSD "well after" the prior incidents of trauma, and before the January 2015 motor vehicle accident. Dr. Ledezma further noted Claimant reported being emotionally upset immediately after the robbery and had requested psychological counseling before the January 2015 motor vehicle accident or the miscarriage. Dr. Ledezma opined that, within a reasonable degree of medical probability, Claimant's psychological symptoms are related to the November 18, 2014 robbery. Dr. Ledezma recommended Claimant refrain from returning to work at the same location, and that Claimant receive, among other things, psychotherapy, and antidepressants. Dr. Ledezma reevaluated Claimant on January 11, 2016 and April 12, 2016, noting Claimant continued to experience problems with attention and concentration, significant anxiety at work, and frequent fear responses.

33. On May 28, 2015, Claimant returned to work for Employer at a different branch. Claimant testified that after she returned to work she was afraid to greet customers at the door because it triggered anxiety and panic attacks.

34. In a June 11, 2015 letter, Dr. Baldwin noted Claimant suffered from PTSD and recommended Claimant not perform stage-directing for six months.

35. Claimant testified her manager pushed her to work the door, stating, "You have to face those demons." Claimant testified that on one occasion, after being required to stage-direct, a customer came up behind her, grabbed her at the hips, and yelled in her ear, "I gotcha now!" Claimant testified that she "just lost it and started running like a crazy woman." Claimant testified that she was trying to recover from the robbery, however the incident accentuated her biggest fear: that the robber was going to come back and get her.

36. After the incident, Claimant's manager requested that she recount everything that had happened to her as a result of the robbery to her co-workers, because it would help her get better. Per Claimant's manager's request, Claimant shared her story with at a staff meeting. Claimant testified that she was nervous and scared, and that every time she talks about the robbery she feels it all over again.

37. Claimant worked from May 28, 2015 to July 8, 2016. Claimant subsequently went on short-term disability.

38. On May 28, 2016, Caroline M. Gellrick, MD conducted an Independent Medical Examination ("IME") at the request of Claimant. Dr. Gellrick conducted a medical records review and performed a physical examination of Claimant. Dr. Gellrick diagnosed work-related PTSD and ongoing depression and anxiety with panic attacks. Dr. Gellrick opined Claimant was not at MMI. Dr. Gellrick recommended Claimant undergo a "second opinion psychological evaluation with consideration for restarting medical management." Dr. Gellrick referred Claimant to Walter Torres, PhD for a full psychological evaluation.

39. Dr. Torres first evaluated Claimant on June 29, 2016. Regarding Claimant's background, Dr. Torres noted, in part, the following: Claimant's twin brother was murdered when she was 25 years old, Claimant was molested by an older brother at age eight or nine. Dr. Torres diagnosed Claimant with PTSD and Depression. Dr. Torres noted that psychological testing performed indicated Claimant was not exaggerating her symptoms. Dr. Torres opined that Claimant developed PTSD in reaction to the robbery. Dr. Torres noted Claimant's background suggests

> …that she may have some greater vulnerability than most others to developing posttraumatic stress disorder in reaction to significant stressors. That being said, there is no evidence that she was experiencing any significant ongoing symptomatology, or certainly any disabling psychological symptoms prior the robbery which was the turning point leading to her current state.

Claimant continued to treat with Dr. Torres for 13 sessions. Claimant reported being depressed. Claimant reported experiencing panic attacks in relation to returning to the workplace or talking to her manager, being afraid at work and resenting the workplace.

Claimant reported that she continued to be afraid of individuals who had the same physical appearance as the perpetrator. There is no mention of Claimant's miscarriage again in Dr. Torres' notes until January 3, 2017. Dr. Torres remarked, "Before the death, and prior to the accident, she was in a very deep depression with very pronounced negative symptoms, deeply dulled, not eating, consumed and oppressed by intensely intrusive post traumatic imagery."

40. Dr. Torres testified at hearing on behalf of Claimant as an expert in psychology. Dr. Torres is a licensed clinical psychologist. Dr. Torres opined that Claimant was not exaggerating her symptoms based on the validity scales of his psychological testing and other medical records he reviewed. Dr. Torres explained inconsistencies between Claimant's recollection of the robbery and the surveillance footage of the incident could be caused by Claimant entering into a state of dissociation resulting from the trauma event. Dr. Torres opined that the robbery caused Claimant's PTSD. Dr. Torres testified that losing a baby "per se is not something that we would recognize as an event that characteristically would lead to posttraumatic stress disorder." Dr. Torres testified that, prior to the robbery, Claimant was functioning fine and that the robbery was a "turning point into a degraded state of functioning." Dr. Torres testified that there was no evidence that, prior to November 18, 2014, Claimant had PTSD or suffered the kinds of dysfunction she currently suffers as a result of the PTSD caused by the robbery. Dr. Torres opined there was no reason to believe Claimant's prior traumatic events triggered Claimant's PTSD condition.

41. Regarding a diagnosis of PTSD, Dr. Torres explained that "the criteria requires that a certain amount of time has passed since the event for the diagnosis of post-traumatic stress disorder to kick in. During the first week or so – and I might be fuzzy on some of these details – you would be calling it acute stress disorder…But if it persists, then we go into post-traumatic stress disorder." Dr. Torres testified that PTSD is multifactorial and always "develops with some contribution from a person's basic dispositions."

42. Dr. Torres testified that women who are subjected to a threat while accompanied by their child are more likely to develop PTSD. Dr. Torres opined that Claimant's pregnancy during the robbery "is a relevant factor her with respect to the genesis of her condition and characteristics." Dr. Torres agreed with Dr. Moe that acute fear is expectable in a robbery like the robbery Claimant experienced. Dr. Torres opined that subsequent events of being grabbed from behind by a customer and being pressured by her manager to self-disclose at a staff meeting aggravated Claimant's condition. Dr. Torres testified Claimant's cognitive functioning continues to be poor due to the severity of Claimant's PTSD. Regarding additional treatment, Dr. Torres opined Claimant required a "clean break" from Employer.

43. On July 8, 2015 Stephen A. Moe, MD conducted an IME at the request of Respondents. Dr. Moe issued an IME Report on July 13, 2015. Dr. Moe conducted a psychiatric interview of Claimant and reviewed Claimant's medical records and security footage of the robbery. Claimant reported experiencing a high level of fear during the first six to eight weeks following the robbery, which significantly impacted her ability to

function. Claimant reported that the robbery continued to replay in her mind, and that she experienced panic episodes and crying. Claimant reported feeling nervous and anxious after returning to work. Claimant reported that the first two months post-robbery was when she was doing worse from a psychological perspective post-accident. Claimant reported that the only time she obtained psychiatric treatment was in the wake of her daughter's illness, where she underwent counseling and took an antidepressant. Claimant reported that she ceased taking the Celexa after her first miscarriage.

44. Dr. Moe remarked, "In reflecting on her mental state in the wake of the miscarriage, the patient described feeling different in comparison to the anxiety that had predominated previously. She depicted a grieving process following the miscarriage, starting with a state of disbelief and then processing through feelings of loss."

45. Dr. Moe noted, "[Claimant] was the first to encounter the man who robbed the bank where she worked. She reported the man informed her that he had a gun, and she described the various ways he implicitly threatened to harm her for others in the bank if his demands were not met. Such an experience would be **acutely** distressing to all but the rare individual." [emphasis not added]. Dr. Moe remarked, however, "the question of whether such a experience would cause enduring emotional distress is much less clear." Dr. Moe noted that, as evidenced on the security footage, Claimant did not have physical contact with the perpetrator and was not detained by the perpetrator. Dr. Moe further noted Claimant was not physically harmed, and was subject only to implicit threats by the perpetrator, doing little more than functioning in the role of a messenger. Dr. Moe noted Claimant did not appear severely distressed post-robbery. Dr. Moe opined, "Whereas acute fear is quite expectable, her enduring distress despite numerous benign elements of the incident suggests an important contribution from factors unique to her." Dr. Moe further opined that Claimant's subsequent miscarriage and the experience of employer's response to her symptoms influenced Claimant's symptoms.

46. Dr. Moe opined Claimant merited the diagnosis of PTSD, but questioned whether Claimant's condition was primarily driven by the robbery. Dr. Moe described PTSD as a psychiatric diagnosis included in the Diagnostic and Statistical Manual. Dr. Moe explained that Section 8-41-302(a), C.R.S. sets forth an objective standard in analyzing mental impairment claims stating, "…a potential claimant is barred from establishing an emotional stress Workers' Compensation claim if pre-incident personality traits or life experiences render her uncommonly vulnerable to develop psychiatric symptoms in the wake of a particular workplace event. A worker is also excluded from making a claim if personal stressors are judged to interfere with normal/expectable ways of coping with a particular workplace event."

47. Dr. Moe conducted a follow-up IME evaluation of Claimant and issued a second IME Report on December 12, 2016. Dr. Moe reviewed additional medical records and conducted a follow-up interview of Claimant. Dr. Moe again opined,

> "Establishing the clinical diagnosis of Posttraumatic Stress Disorder (PTSD) is not sufficient to meet the statutory requirement for a mental

> stress claim, given that the diagnosis of PTSD is based on the so-called 'subjective standard,' whereas the latter must meet an 'objective standard.' Consequently, in the wake of a potentially disturbing experience, the greater the extent to which a worker's psychiatric symptoms are due to idiosyncratic (personal) factors, the less likely it becomes that she will meet the statutory definition of a mental stress claim."

Dr. Moe opined Claimant's assessment of her risk remained "highly distorted" despite "abundant exposure to normalizing and symptom-reducing influences." Dr. Moe opined the elements observed in Claimant's case represented "an uncommon response to any trauma, and they are especially unexpected when the trauma involves the objectively mild features that were present in this case…"

48. Dr. Moe testified at hearing on behalf of Respondents as an expert in psychiatry. Dr. Moe is board certified in psychiatry and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Moe testified consistent with his IME Reports. Dr. Moe reiterated that, while acute fear is expected under the circumstances, Claimant's enduring emotional distress is not. Dr. Moe testified that a typical reaction would involve short-lived distress where an individual's normal defenses and coping mechanisms would subsequently "kick in." Dr. Moe opined that he would expect a person might need "a few days off to collect themselves" and "reassurances the event is being taken seriously." Dr. Moe opined that people would not seek psychotherapy for the features of the type of robbery Claimant experienced, reiterating that the robbery was not a violent or highly threatening situation typically associated with PTSD.

49. Dr. Moe testified that prior traumatic events experienced by Claimant are probably are important factors in Claimant's condition, in addition to her personality, which Dr. Moe described as "very dramatic, expressive, reactive." Dr. Moe opined that Claimant personality is, to him, probably the most important variable in Claimant's situation.

50. Dr. Moe opined that the December 2014 miscarriage caused a new trauma, which he characterized as "not a posttraumatic stress disorder trauma, [but] a loss trauma." Dr. Moe opined Claimant's miscarriage modified her view of the robbery, such that Claimant's "interpretation of the bank robbery [was] for the worse and further interfered with this normal recovery process that we would expect." Dr. Moe testified that there was no causal explanation establishing the robbery caused the miscarriage.

51. Claimant's testimony is found credible and persuasive.

52. The ALJ credits the opinions of Drs. Hauser, Ledezma, Gellrick and Torres over the contrary opinion of Dr. Moe and finds Claimant suffered a compensable mental impairment as a result of the November 18, 2014 robbery.

53. The ALJ finds the January 2015 motor vehicle accident and December 2014 miscarriage were not intervening events that severed the causal relationship between the work incident and Claimant's ongoing symptoms and need for treatment.

54. The right of selection of an authorized treating physician passed to Claimant due to Respondents' failure to provide Claimant a designated provider list within seven days of her notification to Employer of the work injury.

55. Although Claimant treated with Ms. Hauser for multiple sessions, Ms. Hauser is a licensed clinical social worker, and thus does not qualify as an ATP.

56. Claimant designated Dr. Gellrick as her ATP in the February 17, 2015 and March 16, 2015 letters to Insurer and Insurer's third party administrator. The ALJ credits Ms. Long's testimony that fax reports indicated both letters were transmitted successfully.

57. Respondent did not reply to the February 17, 2015 letter, thus waiving their right to deny Claimant's request to designated Dr. Gellrick as her ATP. Accordingly, Dr. Gellrick is Claimant's ATP.

58. Evidence and inferences to the contrary of these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846. The Workers' Compensation Act has authorized recovery for a broad range of physical injuries, but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011).

Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19, 2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), affd 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4- 728-064 (ICAP, Jan. 6, 2009). Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

Recognized Permanent Disability Arising from an Accidental Injury Arising Out of and in the Course and Scope of Employment

Claimant established she sustained a recognized permanent disability from an accidental injury arising out of and in the course and scope of employment. Drs. Hauser, Ledezma, Gellrick and Torres diagnosed Claimant with PTSD and , in some cases, depression. As noted in Dr. Moe's IME Report, PTSD is recognized as a psychiatric diagnosis in the Diagnostic and Statistical Manual of Mental Disorders. In explaining the distinction between acute stress disorder and PTSD, Dr. Torres credibly testified that more persisting trauma results in PTSD. Claimant credibly testified to the persistent and disabling nature of her PTSD and depression, which is further evidenced in Claimant's records.

Drs. Ledezma, Gellrick and Torres credibly opined Claimant's PTSD was caused by the robbery. Claimant credibly testified she began experiencing symptoms of trauma soon after the incident, which is supported by Claimant notifying Employer of her symptoms the following day. Claimant continued to report anxiety and other symptoms of trauma in connection with the robbery, as evidenced in Claimant's records.

The robbery, which the ALJ infers was an unforeseen and unexpected event, occurred while Claimant was working her scheduled shift and performing her usual work duties. Claimant came into contact with the robber by virtue of being assigned to stage-direct during the time period in which the robber entered the bank. Claimant's mental injury occurred in the time and place limits of her employment while performing her normal work duties.

Psychologically Traumatic Event Generally Outside a Worker's Usual Experience That Would Evoke Significant Symptoms of Distress in a Similarly Situated Worker

Respondents assert a diagnosis of PTSD is insufficient to establish a mental stress claim because the diagnosis of PTSD is based on a subjective standard, while the statute requires an objective standard. Respondents further contend Claimant's symptoms are more attributable to idiosyncratic factors than to the robbery, and that the robbery would not evoke significant symptoms of distress in a similarly situated worker. The ALJ disagrees.

In *Davison*, the Colorado Supreme Court held that the statute requires an expert medical or psychological testimony to prove that the claimant suffered a psychologically traumatic event." However, the court also held that a claimant can use lay or expert testimony, or some combination of the two to prove the traumatic event would evoke significant symptoms of distress in a similarly situated worker. *Davison*, 84 P.3d at 1030. In *City of Loveland Police Depart*., the court found, "A compensable psychologically traumatic event under § 8-41-301(2)(a) must cause a significant, but not necessarily identical, reaction in similarly situated employees. Individual reactions of employees experiencing the same psychologically traumatic event will vary dramatically depending upon the physical and psychological makeup and resilience of the individuals affected." *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 953 (Colo. Ct. App. 2006).

Claimant established she suffered a psychologically traumatic event generally outside a worker's usual experience that would evoke significant symptoms of distress in a similarly situated worker. While Dr. Moe opined the robbery did not have the violent and highly threatening factors typically associated with PTSD, both Dr. Moe and Dr. Torres agreed acute fear would be expected in the circumstances. Moreover, as previously mentioned, Drs. Ledezma, Gellrick and Torres all credibly opined Claimant's symptoms were caused by the robbery.

Dr. Moe opined that the robbery would not evoke enduring stress in a similarly situated worker. Claimant is not required to establish the psychologically traumatic event would cause identical symptoms of distress in a similarly situated worker. As such, the pertinent issue is not whether a similarly situated worker would develop enduring distress, but rather the event itself is psychologically traumatic and would evoke *significant* symptoms of distress. "Significant" in the context of Section 8-41-301(2)(a), C.R.S. has not been legally defined. Dr. Moe's opinion effectively requires the ALJ to interpret the plain and ordinary meaning of "significant" as "enduring." The ALJ is not persuaded "significant" is solely defined by a period of duration. Thus, fear, while limited in time period, can constitute a significant symptom of distress. Claimant's enduring stress goes to the court's position in *City of Loveland Police Depart*. that individual reactions will vary dramatically.

The ALJ is not convinced Claimant's symptoms are more attributable to idiosyncratic factors than to the robbery. Claimant credibly testified she loved her job

and was performing her job as required prior to November 18, 2014. Dr. Ledezma credibly opined that "whatever issues" Claimant had from prior traumatic incidents were resolved and noted Claimant was able to work without incident prior to the November 18, 2014 robbery. Further, Dr. Torres credibly testified there was no evidence Claimant was experiencing ongoing symptomatology from prior traumatic events and the robbery was the "turning point" for Claimant.

The ALJ is convinced the robbery was generally outside of a worker's usual experience, as Claimant credibly testified that she had not experienced a robbery at the 599 South Sable Boulevard location prior to November 18, 2014. Records also indicate Claimant experienced only one prior bank robbery approximately five years prior.

Based on a totality of the evidence, Claimant has established by a preponderance of the evidence she suffered a compensable work injury in the form of a mental impairment.

Intervening Injury

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 384, 30 P.2d 327, 328 (1934); *Vargus v. United Parcel Service*, W.C. No. 4-325-149 at 3 (ICAO Aug. 29, 2002); *Vandenberg v. Ames Construction*, W.C. No. 4-388-883 at 4 (ICAO Dec. 5, 2007).

Respondents contend that, if Claimant sustained a compensable work-related injury on November 18, 2014, the January 2015 motor vehicle accident and December 2014 miscarriage constitute intervening events that severed the causal relationship between the work injury and Claimant's ongoing symptoms and need for treatment. The ALJ disagrees. Despite some trauma related to the miscarriage, Drs. Ledezma, Gellrick and Torres credibly opined Claimant's PTSD was caused by the robbery. Claimant credibly testified she constantly has images of the perpetrator, and is triggered by people who look like the perpetrator and places that remind her of the robbery. Claimant's records after the miscarriage continue to refer to Claimant reporting fear and anxiety in connection with the robbery and returning to the workplace. As such, the ALJ is not convinced the motor vehicle accident and miscarriage were intervening injuries sufficient to sever the causal relationship between Claimant's work injury, her ongoing symptoms and her need for medical treatment.

Change of Physician

Section 8-43-404(5)(a)(I)(A), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the respondents must provide injured workers with a list of at least four designated medical providers. §8-43-404(5)(a)(I)(A), C.R.S. The respondents must supply a copy of the written designated provider list to the injured worker "in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." WCRP 8-2(A)(1). The list must include the insurer's contact information "including address, phone number and claims contact information." WCRP 8-2(A)(2).

Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the "services of a physician are not tendered at the time of injury, "the employee shall have the right to select a physician." WCRP 8-2(E) additionally provides that "[i[f the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of his choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

As found, the right of selection passed to Claimant because Respondents failed to provide Claimant a designated providers list within seven days of Claimant's notification to Employer of the injury. Employer was on notice that Claimant was suffering some symptoms in connection with the robbery and referred Claimant to the employee assistance program.

Although Claimant treated with Karen Hauser, LCSW, for multiple sessions, Ms. Hauser is not a physician pursuant to the Act. Per Section 8-42-101(3.5)(a)(I)(A), C.R.S. for purposes of the level I and level II accreditation programs, physician is defined as "a physician licensed under the Colorado Medical Practice Act." Licensed clinical social workers are licensed under the Colorado Mental Health Practice Act. As Ms. Hauser is not licensed under the Colorado Medical Practice Act, she cannot be considered an authorized treating physician.

Claimant designated Dr. Gellrick as her ATP in the February 17, 2015 letter. Dr. Gellrick is a medical doctor. Ms. Long credibly testified that she received confirmation that the February 17, 2015 letter was transmitted successfully. It is unrefuted that Respondents did not reply to the February 17, 2015 letter. Respondents did not reply until March 19, 2015. As Respondents neither granted nor refused Claimant's request to designate Dr. Gellrick as the ATP within 20 days of the February 17, 2015 letter, Respondents waived their objection to Claimant's request to designate Dr. Gellrick as the ATP. Accordingly, Dr. Gellrick is Claimant's ATP.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of evidence that she suffered a compensable work-related injury in the form of a mental impairment.

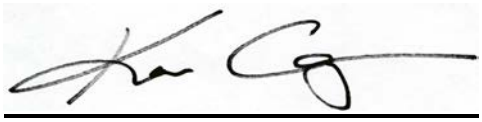
2. The January 2015 motor vehicle accident and December 2014 miscarriage did not constitute intervening events which severed the causal connection to the work injury and Claimant's symptoms and need for treatment.

3. Dr. Gellrick is Claimant's authorized treating physician. Respondents shall pay all reasonable, necessary and related medical treatment ordered by or through Dr. Gellrick.

4. Any and all matters not determined herein are reserved for future determination.

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

DATED: October 12, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the total left knee arthroplasty recommended by Dr. Mitchell Copeland is reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 work injury.

- Whether claimant has proven by a preponderance of the evidence that the urological treatment recommended by Dr. Craig Stagg and Dr. Amir Beshai is reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 work injury.

FINDINGS OF FACT

1. Claimant began working for employer in June 2016 as a mechanic. On August 2, 2016, claimant was driving his vehicle on I-70 to pick up parts for employer. Another vehicle struck claimant's vehicle causing claimant to lose control, resulting in the vehicle rolling four or five times. This is an admitted claim. Claimant testified that at the time of the injury he knew that he had injured his back and ribs. In addition, claimant felt pain in his neck and left knee.

2. Immediately following the August 2, 2016 motor vehicle accident (MVA), claimant was transported by ambulance to St. Mary's Hospital for treatment. Claimant testified that he was informed that his left lung was punctured and that he had broken ribs. Claimant was initially hospitalized for five days.

3. The medical records entered into evidence identify claimant's injuries as left rib fractures on ribs 5-10; a left pulmonary contusion; left L2-L4 transverse process fractures; and abrasions. Elsewhere in the initial medical records, Dr. David Pettit identified "a tiny pneumothorax which does not need a chest tube at this time". Claimant was discharged from St. Mary's Hospital on August 7, 2016.

4. Thereafter, claimant began treating with his authorized treating physician (ATP), Dr. Michael Hughes. Claimant was first seen by James Haraway, NP with Dr. Hughes' practice on August 15, 2016. Mr. Haraway recorded that claimant was experiencing chest pain, shortness of breath, abdominal pain, low back pain with tingling and numbness in his lower extremities, neck pain, and bilateral shoulder pain. On that same date claimant completed a pain diagram.

5. Claimant credibly testified that he reported left knee pain to Mr. Haraway on August 15, 2016 and indicated such pain on the pain diagram of that date. The ALJ has reviewed the August 15, 2016 pain diagram and finds that claimant indicated pain in his left knee with an "x" on that knee in the diagram.

6. Claimant testified that after being seen by Mr. Haraway he continued to have difficulty breathing. When his breathing issues did not improve, claimant sought treatment at Community Hospital on August 25, 2016. At that time, claimant reported that he felt that he had a foreign body stuck in the back of his throat that was worsened with coughing. Claimant also reported that he was experiencing severe burning with urination.

7. A computerized tomography (CT) scan of claimant's chest was taken on August 25, 2016 and showed a large pleural effusion in claimant's left lung. Claimant was admitted to Community Hospital and underwent a thoracentesis in which 1700cc of bloody fluid was pulled from claimant's left lung. Claimant was discharged from Community Hospital on August 27, 2016. However, on August 30, 2016, claimant underwent a second thoracentesis and 460cc of fluid was pulled from claimant's left lung.

8. On August 30, 2016, claimant was seen by Dr. Hughes and reported that he was having difficulty emptying his bladder. Dr. Hughes determined that a referral to urology would be appropriate. On August 31, 2016, Mr. Haraway referred claimant to Dr. Amir Beshai to address claimant's urinary complaints. A second referral to Dr. Beshai was completed on November 9, 2016.

9. On September 14, 2016, claimant was seen at St. Mary's Neurosurgery Clinic and reported to Emily Godfrey, PA-C that he was experiencing knee pain, as well as trouble and burning with urination.

10. Respondents admitted for the August 2, 2016 injury and filed a General Admission of Liability (GAL) on November 21, 2016.

11. Claimant was successful in requesting a change of physician and on November 22, 2016, claimant was first seen by his ATP, Dr. Craig Stagg. At that time claimant reported that he had experienced left knee pain since the MVA. Claimant also reported pain in his neck, mid back, low back, as well as increased urinary frequency and urgency.

12. On December 9, 2016, a magnetic resonance image (MRI) of claimant's left knee showed a tear along the free edge of the body of the medial meniscus, a linear tear in the body of the lateral meniscus, and degenerative changes most significant in the medial compartment.

13. Dr. Stagg referred claimant to Dr. Mitchell Copland for an orthopedic consultation. Claimant was first seen by Dr. Copeland on December 14, 2016. At that time, claimant reported that he had pain, popping, and catching in his left knee and that his symptoms caused sleep disturbance. Claimant described his pain as sharp, aching, and burning. Dr. Copeland opined that although claimant has advanced arthritic changes in his left knee and tearing of his medial meniscus, that the August 2, 2016 MVA caused an exacerbation of a preexisting condition.

14. On December 14, 2016, Dr. Copeland recommended and administered a corticosteriod injection to claimant's left knee. Claimant returned to Dr. Copeland on January 17, 2017 and reported that the injection did not provide any pain relief. Dr. Copeland recommended that claimant undergo a left total knee arthroplasty and opined that claimant's left knee symptoms were related to the August 2, 2016 work injury. An authorization request for the recommended knee surgery was submitted to insurer on January 20, 2017.

15. Claimant was first seen by Dr. Beshai on December 20, 2016. Claimant reported to Dr. Beshai that since the August 2, 2016 MVA he had experienced urinary frequency and urgency. Dr. Beshai determined that it would be appropriate to evaluate claimant for possible neurogenic dysfunction and recommended that claimant undergo a urodynamic study. On December 29, 2016, the urodynamic study was conducted. Dr. Beshai reviewed the results and diagnosed claimant with bladder outlet obstruction and opined that claimant's low pressure bladder instability is related to that diagnosis. Dr. Beshai prescribed tamsulosin to treat the bladder outlet obstruction. On February 10, 2017, Dr. Beshai noted that claimant was responding well to the medication.

16. On January 25, 2017, Dr. Peter Weingarten reviewed the authorization request for left knee surgery and opined that the recommended surgery was reasonable treatment given the advanced degenerative osteoarthritis in claimant's left knee. However, Dr. Weingarten also opined that the need for surgery was not related to claimant's work injury. In support of his opinion Dr. Weingarten noted that claimant did not initially report left knee pain and first complained of left knee pain six weeks after the MVA. Based upon Dr. Weingarten's report, respondents denied the left knee surgery.

17. On March 15, 2017, Dr. Stagg indicated that he agreed with Dr. Copeland that claimant's need for a total left knee arthroplasty is related to claimant's August 2, 2016 work injury.

18. Dr. Stagg referred claimant to Dr. Ellen Price for chronic pain management. Claimant was first seen by Dr. Price on January 5, 2017. On that date, Dr. Price noted that claimant was experiencing pain in his back, left leg, and left knee. In addition, claimant reported to Dr. Price that he had bladder dysfunction, urinary frequency, and urgency. Dr. Price recommended and administered acupuncture. She also recommended that claimant continue with physical therapy.

19. On March 21, 2017, Dr. Michael Janssen reviewed the request for urology treatment and opined that the onset of claimant's urinary and bladder dysfunctions are not related to the August 2, 2016 work injury. Based upon Dr. Janssen's opinion, respondents have denied urology related treatment.

20. On May 10, 2017, claimant underwent surgery on his lumbar spine. Dr. John Prall performed partial laminectomy, medial facetectomy and foraminotomy at L3 and L4; a revision partial laminectomy, medial facetectomy and foraminotomy at L4-L5, removal of hardware; and posterior lateral fusion at L4-L5. Claimant testified that

following the May 10 2017 surgery he felt an 80% improvement in his back pain. However, claimant noted an increase in his left knee pain.

21. On May 26, 2017, respondents sent claimant for an independent medical examination (IME) with Dr. Carlos Cebrian. In connection with the IME, Dr. Cebrian reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant. Following the IME, Dr. Cebrian issued a report in which he opined that claimant's left knee symptoms are not related to the work injury. Dr. Cebrian also opined that claimant's urinary and bladder symptoms are not related to the August 2, 2016 work injury.

22. Dr. Cebrian testified by deposition in this matter and confirmed his opinion that claimant's left knee pain is not related to the August 2, 2016 injury. In support of his opinion Dr. Cebrian testified that there were no immediate complaints of left knee pain and no documentation of swelling in claimant's left knee. Dr. Cebrian testified that while claimant may have suffered a soft tissue injury to his left knee at the time of the MVA, the degenerative condition necessitating surgery is unrelated to the August 2, 2016 injury.

23. Dr. Cebrian testified that it is his opinion that claimant's urinary issues are not related to the August 2, 2016 injury. Dr. Cebrian noted in his testimony that claimant's urinary issues are caused by an enlarged prostate, which is common for men claimant's age. Dr. Cebrian also opined that because claimant had responded to the medical prescribed by Dr. Beshai, the urinary and bladders issues were not related to the MVA.

24. Dr. Copeland testified by deposition in this matter. Dr. Copeland testified that his initial diagnosis was that claimant had an exacerbation of a preexisting condition and degenerative tear of the medial meniscus in his left knee. Dr. Copeland also testified it is his opinion that because claimant continues to have significant left knee pain a total knee arthroplasty is appropriate for claimant. In support of his opinion, Dr. Copeland noted that continued conservative treatment "such as injections, therapy or knee arthroscopy" would not alleviate claimant's left knee symptoms.

25. Dr. Stagg testified by deposition in this matter and stated that it is his opinion that claimant's left knee pain is related to the August 2, 2016 MVA. Dr. Stagg testified that he agrees with Dr. Copeland that the need for a total knee arthroplasty is related to claimant's work injury. Dr. Stagg also testified that it is his opinion that claimant's urological issues are related to the August 2, 2016 work injury.

26. Claimant testified that his current knee symptoms include popping, locking up, burning and numbness into his foot, and a loss of strength. Claimant testified that he did not have these symptoms prior to the August 2, 2016 MVA.

27. Claimant testified that his current urinary symptoms include loss of feeling in his bladder and bowels. As a result, claimant does not feel an urgency to eliminate his bladder or bowels. Claimant testified that he did not have these symptoms prior to the August 2, 2016 MVA.

28. Claimant credibly testified he has had previous treatment on his left knee. In 1992 or 1993 his left knee was "scoped" and he underwent a meniscus repair in 2010. Claimant testified that following the 2010 left knee surgery he was pain free and had no knee related medical treatment until after the August 2016 MVA.

29. Claimant testified that his punctured lung and the pain he was experiencing in his ribs and back initially took priority over his other injuries. As a result, he did not immediately report left knee pain and urinary issues. However, once he began to heal, claimant turned his attention to his left knee and urinary issues.

30. The ALJ credits claimant's testimony and the opinions of Drs. Copeland and Stagg over the contrary opinion of Dr. Cebrian and finds that claimant has demonstrated that it is more likely than not that his left knee was injured during the August 2, 2016 MVA. The ALJ finds that the August 2, 2016 MVA aggravated, accelerated, or combined with claimant's preexisting left knee condition resulting in the need for medical treatment.

31. The ALJ credits the opinions of Drs. Copeland and Stagg and finds that claimant has demonstrated that it is more likely than not that the total left knee arthroplasty is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

32. The ALJ credits claimant's testimony and the opinion of Dr. Stagg over the contrary opinion of Dr. Cebrian and finds that claimant has demonstrated that it is more likely than not that claimant's urinary issues are related to the August 2, 2016 MVA.

33. The ALJ credits the opinion of Dr. Stagg and finds that claimant has demonstrated that it is more likely than not that the urological treatment recommended by Drs. Stagg and Beshai is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

34. CONCLUSIONS OF LAW

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

employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

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

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

5. As found, claimant has demonstrated by a preponderance of the evidence that his left knee complaints are related to the August 2, 2016 work injury. As found, the August 2, 2016 MVA aggravated, accelerated, or combined with claimant's preexisting left knee condition resulting in the need for medical treatment. As found, claimant's testimony and the opinions of Drs. Copeland and Stagg are credible and persuasive.

6. As found, claimant has demonstrated by a preponderance of the evidence that the recommended total left knee arthroplasty is reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 work injury. As found, claimant's testimony and the opinions of Drs. Copeland and Stagg are credible and persuasive.

7. As found, claimant has demonstrated by a preponderance of the evidence that his urological issues are related to the August 2, 2016 MVA. As found, claimant's testimony and the opinion of Dr. Stagg is credible and persuasive.

8. As found, claimant has demonstrated by a preponderance of the evidence that the urological treatment recommended by Drs. Stagg and Beshai is reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 work injury. As found, claimant's testimony and the opinion of Dr. Stagg is credible and persuasive.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the recommended total left knee arthroplasty.

2. Respondents shall pay for claimant's urology treatment as recommended by Drs. Stagg and Beshai.

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

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

DATED: October 13, 2017

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

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that she sustained a work injury in the course and scope of her employment;

2. What is Claimant's average weekly wage (AWW);

3. Whether Claimant proved by a preponderance of the evidence she is entitled to ongoing indemnity benefits;

4. Whether Respondents proved by a preponderance of the evidence Claimant was terminated for cause and is consequently not entitled to indemnity benefits;

5. Whether Claimant proved by a preponderance of the evidence she is entitled to reasonable, necessary and related medical benefits; and

6. Whether Claimant proved by a preponderance of the evidence she is entitled to penalties pursuant to the general penalty statute, Section 8-43-304 (1), C.R.S for failure to produce the claims file within 15 days of the date of the request for the file.

FINDINGS OF FACT

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

1. Claimant started working as a cashier for Employer in September 2015. Claimant testified that on March 19, 2016, she was stocking canned tomatoes and was "taking them from the U boat to turn to put them on the shelf." Claimant testified she "was doing canned tomatoes and just heard a pop." Claimant completed her shift on March 19, 2016. Claimant did not seek treatment on the date of injury or the weeks following.

2. Claimant testified that she felt a pop while placing canned tomatoes on a shelf on March 19, 2016. Claimant testified that she did not feel pain at the time she felt a pop and Claimant testified that she finished her shift and overnight awakened feeling stiffness and soreness. Claimant testified that she completed her shift on March 20, 2016, but at some point she advised a person named Mary Beth that she injured her back the previous day while shelving tomatoes. Claimant testified that on March 20, Mary Beth assigned Claimant chair duty. Claimant testified that no one in the Employer's management could locate paperwork in order to have Claimant prepare a

first report of injury. Claimant concedes that she did not reappear for work, but she testified that she called Employer to report her absence for illness and that on these occasions she spoke to a person named Ruth.

3. Claimant's testimony was deemed less credible and persuasive than information contained in the medical records and testimony offered by Respondents' witness, Kristen Henderson.

4. The record reflects that Claimant completed her scheduled shifts March 20th, March 21st and March 22nd. On March 23, 2016, Claimant left her shift 50 minutes early. Claimant completed her scheduled shift on March 24th and Claimant also completed her next scheduled shifts on March 26th and March 27th. Claimant missed her shifts on March 28th and March 30th, but again completed her next scheduled shifts on April 2nd and April 3rd.

5. Claimant arrived for her April 7th shift as well, but testified she left early. Claimant did not return to work following the April 7th shift. Claimant's activities between April 8th and April 22nd are unknown. The medical records, however, reflect that Claimant did not seek medical treatment for her alleged work injury until a month after the alleged March 19th incident.

6. On April 22, 2016, Claimant presented to Lutheran Medical Center by ambulance with a complaint of "acute on chronic lower back pain. The patient states that 2 weeks ago she switched positions in her job from a cashier to stocker after which she developed acute lower back pain." According to information provided by Claimant during this visit and detailed in the record, Claimant's injury occurred on April 8, 2016. This would have been after Claimant's last shift worked at Employer.

7. Claimant was in severe enough pain on April 22, 2016, that medics gave her 100 mcg of Fentanyl on her way to the hospital.

8. Claimant also underwent a lumbar spine x-ray on April 22, 2016. It demonstrated multifactorial central canal stenosis with varying degrees of foraminal stenosis at L2-3 through L4-5, acute/subacute mild to moderate L3 compression fracture and an old moderate to severe L1 compression fracture.

9. Claimant's L3 compression fracture is not the first time Claimant has suffered a fracture in the past. On March 1, 2011, Claimant arrived via ambulance at Lutheran Medical Center reporting that she "awoke to go to the bathroom and stated she could not move, pt then rolled out of bed and scoot across the floor, calls EMS and c/o severe right hip pain." Claimant was diagnosed with a right femoral neck fracture. She did "not remember falling and was fine when she went to bed." Claimant reported having three drinks a day. Medical records reflected that hospital personnel attempted to discuss alcohol abuse without success.

10. In May 2012, Claimant suffered injury to her right tibia/fibula while working at a café.

11. Part of Claimant's treatment following diagnosis of a L3 compression fracture included a referral to a neurosurgeon for consultation. Claimant met with Dr. Richard Kim on May 24, 2016. At that visit Claimant reported she had injured herself six weeks ago. Six weeks prior to May 24, 2016, would have been April 12, 2016. The date given by Claimant would have again been after the date Claimant stopped working at Employer.

12. Kristen Henderson, Claimant's manager, testified at hearing. Ms. Henderson was not assigned to manage the store where Claimant worked on the alleged date of injury, but came in the weeks thereafter.

13. Ms. Henderson testified she started working at the store around April 5, 2016. She was uncertain of the exact date she started working but she believed it was near Easter. Easter in 2016 was on March 27th.

14. Claimant never reported a work injury to Ms. Henderson while working for Employer.

15. Ms. Henderson testified it was standard business practice at Employer to give new employees at Employer an employee handbook. Employees are expected to acknowledge receipt of the handbook by signature. Claimant electronically signed an acknowledgement of the employee handbook. Claimant acknowledged she received the employee handbook and understood the Employer's policies.

16. Ms. Henderson estimated she worked with Claimant for two weeks before Claimant abandoned her employment. During the period in which Ms. Henderson supervised at Employer, Claimant performed cashier duties. While supervised by Ms. Henderson, Claimant never handled freight.

17. Ms. Henderson testified that she did not notice Claimant demonstrating pain behaviors, Claimant did not ambulate with a walker while working and never saw Claimant working chair duty.

18. On April 7, 2016, the last day Claimant worked, Claimant asked to leave early, but did not report a work injury. Claimant reported her back hurt. Claimant did not appear for her next scheduled shift on April 9th.

19. After Claimant missed the first shift, Ms. Henderson telephoned Claimant with no response. Claimant also did not show for other scheduled shifts on April 12th, April 13th, or April 14th and April 15th.

20. After Claimant missed her second shift, Ms. Henderson called her again reminding Claimant that this is her second no-call no-show. Claimant was terminated on April 15, 2016, for job abandonment.

21. It was Ms. Henderson's testimony that the next communication with Claimant was when Ms Henderson learned that Claimant wanted to file a workers' compensation claim. When Ms. Henderson spoke to Claimant and asked about her claim, Claimant reported she injured her back and needed to see a doctor. When Ms. Henderson told Claimant she needed to contact her district manager, Claimant yelled at her and demanded the workers' compensation claim number. Claimant threatened legal action.

22. On April 15, 2016, Ms. Henderson completed the incident report regarding Claimant's alleged workers' compensation injury based upon the information provided by Claimant. Because Claimant failed to call-in for two shifts, Claimant was considered terminated for job abandonment.

23. Claimant presented no credible or persuasive evidence that she was restricted from working her scheduled shifts between March 19, 2016, and April 21, 2016. And, Claimant did not seek medical treatment between March 19, 2016, and April 21, 2016.

24. Dr. Tashof Bernton, an expert in internal and occupational medicine, evaluated Claimant in March 2017 at Respondents' request. Dr. Bernton opined Claimant suffered an acute compression fracture, however, the compression fracture did not occur on the March 19, 2016, date of injury. Dr. Bernton opined "it is not medically reasonable or probable that the patient in fact had an acute compression fracture on March 19 yet continued to work and then presented on April 22 to the emergency room with severe pain and disability as a result of a compression fracture which was presumed to have occurred on March 19, 2016."

25. Dr. Bernton based his opinions on numerous factors including Claimant's work history after March 19, 2016, Claimant's history of falling and injuring herself without recollection of how the fall occurred, and Claimant's current medical records. Dr. Bernton opined it was not medically reasonable Claimant would have continued to work her regular hours, with the exception of 2 days, from March 19, 2016, until April 7, 2016, with a compression fracture. Dr. Bernton opined that Claimant's history of symptoms is inconsistent with an acute fracture on March 19, 2016.

26. Claimant sought no medical care between March 19, 2016, and April 22, 2016. She continued to work nearly full duty and Ms. Henderson credibly testified Claimant did not work "chair duty," did not use an assistive device and Ms. Henderson was unaware of any back injury until she spoke with Claimant after Claimant abandoned her job.

27. Dr. Bernton opined that Claimant suffers from osteoporosis. Claimant suffered several prior fractures from falling, and most significantly a fall in 2011. Dr. John S. Hughes, an occupational medicine expert, agreed the prior compression fracture at the

L1 level is consistent with Claimant's complaints of back pain and documented use of Percocet in 2011.

28. Claimant underwent a Respondents sponsored IME with Dr. Hughes. Dr. Bernton disagreed with the views of Dr. Hughes'. Dr. Bernton did not believe that Claimant offered a plausible explanation for her compression fracture while Dr. Hughes opined that Claimant's symptom presentation was consistent with her explanation of the mechanism of injury.

29. Contrary to Dr. Hughes' reasoning, Dr. Bernton explained the March 19, 2016, alleged date of injury would not have resulted in an inevitable compression fracture. Dr. Bernton opined, "…April 22nd was an acute compression fracture, which we know because of the MRI. We also know because of the - - the severity of the pain, the need for Fentanyl, the fact the patient was on a walker that she had to call an ambulance for sudden severe pain." (T82:12-16)

30. The type of activities performed by Claimant on April 22, 2016, were unknown. However, Claimant was not working for Employer when she arrived at the emergency room in severe pain requiring an assistive device and strong narcotic medication. It is more probably true than not that the mechanism of Claimant's injury was suffered on or about April 22, 2016. Dr. Hughes' opinion she suffered the compression fracture on March 19, 2016, and it did not cause pain for over one month, requiring her to seek medical treatment, is inconsistent with Dr. Bernton's credible and persuasive opinion regarding the pain experienced following a broken bone and inconsistent with Claimant's ongoing work at Employer between March 19 and April 7, 2016.

31. Claimant presented credible and persuasive evidence that on September 6, and December 19, 2016, her attorney sent letters to the Insurer requesting the claims file. Respondents produced the claims file on January 6, 2017. Respondents did not produce evidence regarding the reasonableness of their actions in producing the claims file in excess of fifteen days after the September 6, 2016, request.

CONCLUSIONS OF LAW

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

Generally

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

interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201(1), C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201(1), *supra*.

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

3. In addition to determining the sufficiency of the evidence presented, the ALJ evaluates the credibility and probative value of conflicting evidence, including competing experts and inconsistencies in a particular witness' testimony. *Johnson v. ICAO*, 973 P.2d 624, 626 (Colo. App. 1997). The ALJ does not have to make findings about every piece of evidence. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

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

Compensability

5. In order to recover benefits, a claimant must prove that he sustained a compensable injury. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work-related functions. *Finn v. Indus. Comm'n,* 165 Colo. 106, 437 P.2d 542 (1968). It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

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

7. Claimant failed to prove by a preponderance of the evidence, that she suffered a compensable compression fracture at L3 on March 19, 2016. The alleged mechanism of injury, medical history and work history are inconsistent with a compression fracture occurring on March 19, 2016. The medical records reflect a compression fracture occurring on or about April 22, 2016, when Claimant sought emergency medical treatment. Claimant, however, was not employed or working for Employer on or about

April 22, 2016, and, consequently, it is found that Claimant's injury did not arise from her employment with Employer.

8. Since Claimant failed to establish by a preponderance of the evidence that her injury arose in the course and scope of her employment, her claim for workers' compensation benefits, specifically, medical benefits, indemnity benefits and AWW, is not discussed here and is denied and dismissed.

Penalties

9. Claimant contends that she is entitled to an order awarding penalties under Section 8-43-304(1) for Respondents' failure to timely produce the claim file. Claimant offered as evidence in support of this claim letters dated September 6, 2016, and December 19, 2016, requesting the claim file from Mr. Jeffrey Barnard of Sedgwick. Claimant contends that Respondents ultimately produced the claim file on January 6, 2017. Claimant seeks a penalty of $10.00 per day for the period from September 21, 2016, or 15 days from the request for the claim file, to December 19, 2016, the date of the second letter requesting the claim file, and a penalty of $20.00 per day for the period from December 20, 2016, to January 6, 2017, the date the claim file was produced.

10. Respondents contend that Claimant failed to sustain her burden of proof to establish a basis for imposition of penalties. Respondents argue that Claimant was required to prove whether Mr. Barnard received the request for the claim file, whether Mr. Barnard knew of Insurer's duty to produce the claim file, the objective unreasonableness or negligence of Mr. Barnard's actions and the harm suffered by Claimant as a result of the alleged violation. Respondents contend that there was an absence of proof regarding these matters and thus the claim for penalties should be denied.

11. Whether statutory penalties may be imposed under Section 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…"

12. Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there

is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

13. The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra.*

14. In the present case, Section 8-43-203(4), C.R.S. provides that fifteen days after the mailing of a written request for a copy of the claim file, the employer or insured shall provide to the claimant the complete copy of the claim file. Claimant presented evidence her attorney's office sent correspondence to the adjuster, Jeffrey Barnard, on September 6, 2016 and December 19, 2016, requesting the claim file and the claim file was not produced until January 6, 2017.

15. Claimant has made a prima facie showing that Respondents failed to comply with the provisions of Section 8-43-203(4). Therefore, the burden of persuasion was on Respondents to make a rationale argument based on law or fact why Respondents did not comply with the statute. Respondents offered no reasonable explanation for its actions in failing to produce the claim file.

16. Accordingly, it is concluded that Respondents are liable for a penalty of $10.00 per day for the period from September 21, 2016, or 15 days from the September 6 request for the claim file, to December 19, 2016, the date of the second letter requesting the claim file, and a penalty of $20.00 per day for the period from December 20, 2016, to January 6, 2017, the date the claim file was produced. The penalty assessed against Respondents for failure to comply with Sections 8-43-203(4) and 8-43-304(1), C.R.S. and totals $1,260.00. The penalty shall be apportioned 75% paid to the aggrieved party, Claimant, and 25% paid to the uninsured employer fund created in Section 8-67-105, C.R.S.

ORDER

It is therefore ordered that:

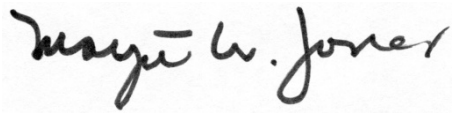
1. Claimant failed to prove by a preponderance of the evidence that she suffered a compensable work injury on March 19, 2016, therefore her claim for benefits under the Act is denied and dismissed.

2. Respondents shall be liable to Claimant for an award of penalties under Sections 8-43-203(4) and 8-43-304(1) in the amount of $1,260.00.

3. The penalty shall be apportioned 75% paid to the aggrieved party, Claimant, and 25% paid to the uninsured employer fund created in Section 8-67-105, C.R.S.

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

DATED: October 12, 2017



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-030-044-02

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her left upper extremity.

- Whether Claimant is entitled to medical and compensatory benefits.

FINDINGS OF FACT

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

1. Claimant worked for less than three years as an assembly line worker for Employer. Employer laid Claimant off effective February 10, 2017.

2. Claimant testified at hearing that she sustained an acute injury at work on September 11, 2016. Claimant testified she was working on an assembly line with five or six other employees. Claimant's boxed light fixtures and stacked the twenty pound boxes 12-high on a pallet. When Claimant threw a box on the stack, she felt immediate pain in her left arm. The pain extended down from her shoulder to her forearm. The next day Claimant's arm was swollen and she felt a lump under her armpit. Claimant did not report an injury.

3. On September 17, 2016, Claimant sought medical treatment at Green Valley Ranch Medical Center, an urgent care provider, for a respiratory infection and the lump under her left armpit. The medical provider prescribed antibiotics, which Claimant took for 10 days. Claimant did not report having been injured at work.

4. On September 21, 2016, Claimant sought medical treatment from her primary care provider, Arbor Family Medicine. Records from the appointment discuss Claimant's treatment for a respiratory infection and "swollen lymph nodes under left arm pitt [sic]." and her improvement with antibiotic treatment. Records noted that Claimant "had a gradual onset of muscle pain for months." The records further provide that Claimant's job that required repetitive left arm movement. Claimant described her pain as occurring in the muscle of her upper left arm and forearm, and as "a moderate dull aching, sharp stabbing and burning sensation."

5. On September 27, 2016, Employer referred Claimant to Concentra Advanced Specialists ("Concentra"). Natasha Deonarian, M.D., noted "pain on the left side of her arm from the posterior neck, trapezius, medial rhomboids, upper shoulder, elbow and forearm. She states that she did not have a specific trauma at work, however her work involves repetitive motion 8-10 hours per day." Claimant informed Dr. Deonarian of the lump under her left armpit. Dr. Deonarian assigned physical work restrictions which Employer accommodated. Claimant continued to work for Employed

in a restricted capacity. Claimant testified that no provider later placed her at maximum medical improvement.

6. On October 28, 2016, Concentra referred Claimant to John Sacha, M.D. Claimant reported she began experiencing pain in her left radial wrist and left thumb approximately six months earlier. The pain was mild at first but then extended to involve the left shoulder and elbow. Dr. Sacha diagnosed possible carpal tunnel syndrome related to repetitive job tasks, and some secondary lateral epicondylitis with shoulder impingement which was not work-related. Dr. Sacha ordered an electrodiagnostic evaluation.

- On December 13, 2016, Dr. Aschberger completed the electrodiagnostic evaluation with normal results. The normal results ruled out carpal tunnel syndrome as a possible diagnosis.

7. Also on October 28, 2017, "Genex" completed a jobsite assessment pursuant to Rule 17. The assessment concluded that Claimant's job duties included no primary or secondary risk factors.

8. Claimant testified that she treated at Concentra for her arm through April or May of 2017.

9. Claimant has a history of diffuse joint and muscle pain:

- On March 5, 2010, Claimant reported that her joint pain had "[i]mproved since taking the herbal calming drops." Claimant also reported that she "[f]eels like she is swollen on the chest and shoulder area." A provider diagnosed "Myalgia currently but suspect that she may have fibromyalgia as she had 18 trigger points."

- On August 11, 2010, Claimant reported numbness and tingling under her right arm. The sensation began six weeks earlier.

- Numerous records mention "polyarthralgia pain in joint, multiple sites" and "fibromyalgia unspecified myalgia and myositis."

- On January 5, 2011, Claimant reported pain in her left foot that radiated into her toes. She reported the onset of the pain a week prior without acute injury.

10. Despite extensive medical records to the contrary, Claimant testified that she had never been tested for or diagnosed with fibromyalgia.

11. On June 8, 2017, Allison Fall, M.D., performed a Respondents' sponsored Independent Medical Examination of Claimant. During that examination, Dr. Fall reviewed Claimant's medical records from Concentra, Claimant's physical therapy records, Dr. Sacha's October 28, 2016 report, and Dr. Aschberger's December 13, 2016

electrodiagnostic evaluation. Dr. Fall opined that Claimant had myofascial pain (muscle pain) or fibromyalgia.

12. Dr. Fall reviewed Claimant's Arbor Family Medicine records just prior to the hearing. Dr. Fall credibly testified that those records support her opinion that Claimant has myofascial pain or fibromyalgia. The records documented test results which excluded other diagnosis, such as rheumatoid arthritis, and Claimant's reports of other symptoms consistent with a fibromyalgia diagnosis such as a sleep disorders and other chronic pain. Further, Arbor Family Medical's records from 2010 established that Claimant had 18 trigger points when she was tested for fibromyalgia, and that a diagnosis of fibromyalgia has a threshold of only 14 trigger points. When Dr. Fall examined Claimant, she found 12 trigger points which supported a possible diagnosis of fibromyalgia.

13. In contrast to Claimant's allegation of an acute injury, Dr. Fall testified that the medical records she reviewed discussed a gradual cumulative injury, possibly caused by work of a repetitive nature. Claimant had not reported an acute injury to her medical providers, and had not described feeling pain when she lifted a box overhead on September 11, 2016. Claimant first mentioned that mechanism of injury on June 8, 2017, during Dr. Fall's examination.

14. On July 19, 2016, Dr. Sacha issued a Special Report after reviewing Dr. Fall's report. In light of Dr. Aschberger's EMG report, the Genex jobsite analysis, and Dr. Fall's report, Dr. Sacha retracted his previous diagnosis of carpal tunnel syndrome. Dr. Sacha noted that the only possible work-related injury Claimant could have experienced was carpal tunnel syndrome. Dr. Sacha opined that Claimant "clearly has multiple findings consistent with myofascial or fibromyalgia complaints." Further, Dr. Sacha opined that Claimant's job duties did not include primary or secondary risk factors for a cumulative trauma disease.

15. The ALJ finds that Dr. Fall's and Dr. Sacha's opinions are credible and persuasive. They are supported by persuasive medical histories, Dr. Aschberger's normal EMG results, and the Genex job site evaluation.

16. The ALJ finds Claimant to be a poor historian. For example, at hearing, when questioned about previously being diagnosed with fibromyalgia, Claimant responded that in 2010, she was experiencing anxiety and that she had a history of anxiety. Claimant also could not recall having experienced multiple instances of joint and muscle pain although they were consistently documented in her medical records.

17. Based on the totality of the evidence, the ALJ finds that Claimant did not meet her burden of proving by a preponderance of the evidence that she sustained a compensable injury.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

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

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

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,*

165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971).

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2017). *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Claimant must prove that an occupational disease is an injury that results directly from the employer or conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of employment. §8-40-201(14), C.R.S.; *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

The fact that a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the logical and recurrent consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

Claimant initially thought she had an infection and took anti-biotics for 10 days because she did not report any work injury. Claimant subsequently reported to her primary care physician, the Concentra physician, the physical therapist, and Dr. Sacha that her left arm and neck pain developed gradually over time. Given that Claimant reported to her treating physicians that she had a cumulative trauma injury, her physicians undertook a causation analysis under Rule 17 for a cumulative trauma injury.

To determine whether Claimant sustained a cumulative trauma injury under Rule 17, Claimant underwent a nerve conduction study and a jobsite analysis was performed. Claimant's EMG came back normal, which ruled out a cumulative trauma diagnosis. Furthermore, the jobsite analysis confirmed there were no primary nor secondary risk factors under Rule 17 for a cumulative trauma injury. With this information, both Dr. Sacha and Dr. Fall confirmed that Claimant did not sustain a cumulative trauma injury related to her work duties.

Consequently, once a cumulative trauma injury had been ruled out, Claimant changed her mechanism of injury and reported to Dr. Fall in June 2017 that she suffered an acute injury at work while lifting a box. Claimant's testimony that she suffered an acute injury while lifting a box is simply not credible as all the prior medical records from her treating physicians contain medical histories that Claimant's symptoms in her left arm, shoulder and neck developed gradually over time and Claimant was actually diagnosed with and effectively treated for an infection.

Even if Claimant had a lifting injury as she now claims, she did not suffer a compensable injury. According to Dr. Fall, a lifting injury would not have caused a lump in Claimant's armpit and Claimant likely would have sought medical treatment sooner than eleven days after the purported date of injury.

Dr. Fall opined that Claimant likely suffers from fibromyalgia. Furthermore, Dr. Fall persuasively testified that Claimant did not suffer an aggravation or exacerbation to her possible pre-existing non work-related fibromyalgia as the medical records do not contain any evidence that Claimant's work duties caused her general diffuse bodily complaints.

Finally, Claimant's testimony lacked credibility as she denied being diagnosed with fibromyalgia and could not remember important parts of her medical history.

The ALJ finds and concludes Claimant did not prove by a preponderance of the evidence that she experienced a compensable injury to her left upper extremity or neck.

ORDER

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

1. Claimant failed to prove by a preponderance of the evidence that she suffered a compensable injury to her left upper extremity and neck.

2. Claimant's claim is denied and dismissed with prejudice.

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

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

DATED: October 13, 2017

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left knee on April 17, 2017.

II. If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary and related medical treatment to cure and relieve the effects of the injury.

III. If Claimant has proven he sustained a compensable injury, whether he has proven by a preponderance of the evidence that he is entitled to temporary indemnity benefits.

IV. If Claimant has proven he sustained a compensable injury, what is Claimant's average weekly wage?

FINDINGS OF FACT

1. Claimant works as a glazier.

2. Claimant sustained a right knee injury in June 2016 while working for Prior Employer. Claimant underwent right knee surgery and returned to work. Claimant was subsequently terminated from his employment with Prior Employer in December 2016.

3. Claimant began working for Employer in approximately early to mid-April 2017.

4. Claimant testified that he sustained a left knee injury while working for Employer on April 17, 2017. Claimant alleges that his left knee twisted when the manlift on which he was working jostled.

5. Claimant reported the alleged incident to his supervisor, Cody Hodges on April 19, 2017. Mr. Hodges completed several documents in connection with Claimant's reported injury. Mr. Hodges testified that Claimant reported that his prior right knee injury caused him to alter his gait, which caused ongoing chronic pain in his left knee and back. Mr. Hodges testified, and employer records also demonstrate, that Claimant reported his left knee symptoms as a flare up from his prior right knee injury. Employer sent Claimant to Concentra for treatment.

6. Claimant presented to Keith Meier, FNP-C at Concentra on April 19, 2017. Claimant completed an Injury Care Patient Information Form. In response to the question, "How did the injury happen?" Claimant replied, "Injury to rt knee cause left knee to assume [illegible]. Injury was never addressed – stumbled on lift slight twist

caused flare up." Claimant reported having twisted his knee and experiencing constant knee pain. FNP-C Meier quoted the Claimant as saying the following:

> I had a knee injury 2016. I had surgery on my knee, but was never given therapy or put on light duty. I told the doctors at that time that because I was favoring my right knee so much that my left knee was hurting. Non [sic] of the doctors ever looked at my left knee. I was fired about 6 months ago. I just recently started a job with Tradesman. I have been having ongoing pain in my left knee like I was having along that I told the other doctors about. I was on a man lift the other day and as I was moving the lift I hit a small hole that caused me to be jarred around. At that time my left knee started to hurt more. I was sent here for evaluation. I don't think this should be on tradesman. It should be related to the prior injury.

7. Claimant acknowledged at hearing that he made such statements to FNP-C Meier. FNP--C Meier diagnosed Claimant with a sprain of his left medial collateral ligament and released Claimant to full duty. He opined that Claimant's left knee injury was related to his prior June 2016 right knee injury.

8. An Employer's First Report of Injury form dated April 24, 2017 notes that Claimant was on a manlift and noticed his knee bothering him, and there was no real mechanism of injury. It was further noted that Claimant did not want to file a workers' compensation claim and has stated that the issue was pre-existing.

9. FNP-C Meier reevaluated Claimant on May 4, 2017. FNP-C Meier noted that Claimant's left knee pain had been present since July 2016 after right knee surgery. FNP-C Meier further noted,

> Patient not able to identify any specific injury at his new job…Patient states that he had complained of left knee pain to the prior workman's compensation provider for several months, but that he was ignored and the left knee was never evaluated…Started new job with current employer in April 2017 pain in left knee returned within several weeks of staring new job.

10. FNP-C Meier diagnosed Claimant with left knee pain and again opined that Claimant's condition was not work-related.

11. FNP-C Meier testified at hearing that he holds Level I Certification with the Colorado Division of Workers' Compensation and is trained on determination causation for work-related injuries. Based on the combination of his physical examination of Claimant and the history provided by Claimant, FNP-C Meier concluded that Claimant had chronic bilateral knee pain and that his current condition was not the result of an injury sustained performing work for Employer, but instead a pre-existing condition sustained in his employment with Prior Employer. FNP-C Meier opined that Claimant's reported mechanism of injury on April 17, 2017 was not sufficient to cause a disabling injury.

12. X-rays of Claimant's left knee taken May 4, 2017 demonstrated no evidence of acute fracture, dislocation, osseous lesion or joint effusion.

13. Respondents filed a Notice of Contest on May 8, 2017.

14. On May 10, 2017, Claimant filed a Petition to Reopen his prior claim for workers' compensation against Prior Employer and Prior Insurer. Claimant attached his own Affidavit to the Petition to Reopen in which he stated that he had expressed to physicians on his prior right knee claim that he was favoring his left knee and experiencing symptoms in his left knee. Claimant further stated that, on April 17, 2017, he experienced a "sharp lateral movement" on a manlift and experienced worsening discomfort as the day progressed.

15. Banner Occupational Health Clinic medical records from June and August 2016 note Claimant reported left knee pain "secondary to 'favoring' the right knee throughout the healing process," and that Claimant attributed increased pain in his left knee and mid-to-low back due to walking with an antalgic gait.

16. Claimant subsequently entered into a full and final settlement with Prior Employer and Prior Insurer on June 22, 2017. Per the Full and Final Settlement Agreement and Order, Claimant settled not only his right knee injury, but any and all related injuries.

17. Claimant testified that he implicated Prior Employer and Prior Insurer in the alleged left knee injury because he was angry with Prior Employer regarding his termination. Claimant stated he entered into the settlement agreement because his left knee was not Prior Insurer's issue and it would be impossible to make it their issue.

18. Claimant acknowledged that he has osteoarthritis in both knees, and has experienced bilateral knee pain since 2015. Claimant testified that his left knee was in pain prior to his employment with Employer, which he attributed to favoring his right knee. However, Claimant alleged that twisting his knee on April 17, 2017 caused his left knee symptoms to worsen. Claimant stated that, prior to April 17, 2017, he did not have problems walking and or working.

19. Claimant underwent an MRI of his left knee on July 3, 2017 which revealed the following: extensive complex medial meniscal tearing, focal prominent chondral loss of mid weightbearing medial femoral condyle with underlying subchondral edema, and prominent chondral loss patellofemoral compartment cartilage.

20. The ALJ credits the testimony of FNP-C Meier and finds that Claimant's left knee condition is not related to his employment with Employer.

21. Claimant has failed to establish that it is more likely than not that he sustained a compensable industrial injury to his left knee on April 17, 2017.

22. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The

claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to establish by a preponderance of the evidence he sustained a compensable injury to his left knee on April 17, 2017. Claimant's history of prior left knee problems is well-documented in the medical records. Subsequent to his right knee injury in June 2016, Claimant continuously attributed his worsening left knee symptoms to the right knee injury. FNP-C Meier credibly testified that Claimant's reported mechanism of injury on April 17, 2017 was insufficient to result in a disabling injury. While Claimant experienced increased pain at work on April 17, 2017, there is insufficient persuasive evidence establishing that Claimant's work duties caused, aggravated, accelerated, or combined with a pre-existing condition to produce a disability or the need for medical treatment. Based on the totality of the evidence, Claimant has not met his burden to prove he sustained an injury arising out of and in the course of employment for Employer.

As the ALJ has determined Claimant did not sustain a compensable injury, the remaining issues of medical benefits, temporary indemnity benefits, and average weekly wage are moot.

ORDER

It is therefore ordered that:

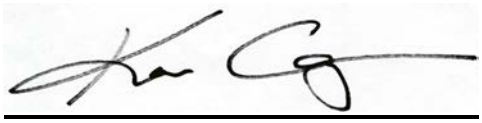
I. Claimant did not sustain a compensable injury to his left knee. Claimant's claim is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

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

DATED: October 13, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-534-505-06

ISSUES

- Whether Claimant proved by a preponderance of the evidence that medical benefits, specifically medication and acupuncture, requested by Claimant's authorized treating provider is reasonable, necessary, and related to the compensable workers' compensation claim.

FINDINGS OF FACT

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

1. Claimant injured his bilateral upper extremities through repetitive motion while working at the glass plant and brewery owned and operated by Employer. On July 5, 2001, Claimant filed a workers' compensation claim and Respondents admitted liability.

2. Claimant's initial diagnosis was "basal joint disease." Claimant's treatment includes at least eight surgical procedures.

3. On December 18, 2003, Dr. Richard Gibson, the authorized treating provider at the time of maximum medical improvement, opined, "Again, I feel that Mr. Aden is pretty much static in his clinical evaluation and functional capacities. I do not have any reasonable expectation that his symptoms or functional status will improve over time." Dr. Gibson assessed "advanced degenerative and post-traumatic disease of bilateral upper extremities with chronic pain."

4. On June 16, 2003, Dr. Gibson opined that Claimant "will need his ongoing medications on an indefinite basis . . . I would also state that there may be a need in the indefinite future for further pain control measures including therapeutic interventions that have been used in the past, including massage/hand therapy."

5. The DIME report from Dr. Goldstein had a medical record review that stated in part, "The patient had been seen originally by Dr. Westerman and a rheumatology workup was performed. It was Dr. Westerman's feeling that due to the patient's 24-year history in the glass factory at the brewery, that he had degenerative arthritis that was related to his thumbs over the years."

6. Dr. Kathleen D'Angelo, Respondents' independent medical examiner, reviewed the extensive records and cited to a report by hand specialist, Dr. Mordick, stating, "Even relatively minor task involving the upper extremity tends to exacerbate or flare his symptoms. He does ha[ve] days where he is having flare ups of his pain which I feel would potentially cause frequent absences from work and would really ha[ve] to question at the present time whether he is gainfully employable."

7. Claimant currently receives prescription management and acupuncture with his authorized treating provider, Dr. Ellen Price, at Redrock Integrative Rehabilitation Medicine. Dr. Price's medical record from June 26, 2017 gives an updated diagnosis of, "Hand Pain, CRPS of right upper limb, carpal tunnel syndrome left upper limb, and CRPS syndrome of upper limb."

8. Claimant's current medication plan as prescribed by Dr. Price consists of Gabapentin, Ultram, Percocet, and a recommendation for Vimovo. Claimant is prescribed other medications, however, prior to hearing, the parties stipulated that medications prescribed for restless leg syndrome, hypothyroidism, and sleep apnea are not related to the claim.

9. Claimant has well documented gastrointestinal issues that arise from use of non-steroidal anti-inflammatory drugs ("NSAID"). Dr. Price testified that when on Vimovo, which is a combination of NSAID and gastrointestinal medication, Claimant does not experience those negative side effects. Dr. Price testified that Claimant currently takes two medications, an NSAID and an over-the-counter GI medication. Dr. Price opined that Vimovo would be more effective than the medication Claimant currently takes, and would be reasonable, necessary, and related to the claim.

10. Dr. Price testified that Claimant should use his hands despite the crippling impairment he has from the years of treatment and surgeries. Dr. Price testified that she anticipates Claimant will have pain that varies depending on the use of the hands, and that is why she prescribes him the various medications. Dr. Price testified that the Percocet is for breakthrough pain, and she does not prescribe it for regular use.

11. Claimant receives relief from acupuncture, and Dr. Price testified that she recommends such treatment once or twice a month. Dr. Price's record from June 26, 2017 states, "good relief. 70% for at least 1 week. The patient is doing activities at home and staying functional." Dr. Price cited the chronic pain treatment guidelines and opined that if there is objective improvement, the acupuncture can continue past the recommended amount of treatment.

12. Claimant testified at hearing that he experiences a constant low-level ache that worsens with use. Claimant discontinued his long-term use of prescribed narcotics and feels that his current medications plan, along with the acupuncture, are very beneficial to him, reducing/controlling his pain and increasing his functionality.

13. On November 6, 2016, Respondents sent Claimant to a Respondents sponsored independent medical examination with Dr. Kathleen D'Angelo. Claimant's subjective complaints on the questionnaire consisted of "crushing/burning in hands/wrists – ache that never goes away, feels like on-set of charlie horse." Claimant indicated that he is never pain free and has tingling sensations after light/moderate use of his hands.

14. Dr. D'Angelo examined Claimant finding, "significant bilateral abnormalities that are noted. . . bilateral ulnar deviation of he finders . . . swelling to the

PIP and DIP joints of both hands . . . early Boutonniere and Swan-neck deformities are also appreciated . . Synovial cists . . . swelling and inflammation of the DIP and PIP joints diffusely." Dr. D'Angelo's examination of Claimant's left wrist found, "diffuse abnormalities in small joints . . . minor swelling . . .Range of motion is decreased diffusely." Dr. D'Angelo also found relevant findings on the left and right hand.

15. Dr. D'Angelo stated in her initial report, "On the matter of Vimovo, it appears, Mr. Aden tolerates this medication better, despite the potential for increased expense. Given the patient's wean from narcotic medication, it is appropriate to utilize NSAIDs, which have the best GI tolerance. Given Mr. Aden's issues with other NSAIDs, I believe the use of Vimovo is appropriate in this patient." Dr. D'Angelo's initial report was silent on the appropriateness of the other medications and acupuncture.

16. On February 2, 2017, Dr. D'Angelo supplemented her report with another interrogatory from Respondents. In the addendum, Dr. D'Angelo stated that none of the medications, including Vimovo and acupuncture, are related to the claim. No information was changed or reevaluated in the report itself, but the supplement was added on to the end of the initial report.

17. Dr. D'Angelo testified at hearing that she went back and revisited the claim and found that there had not been a recent diagnosis, and therefore she could not recommend prescribing treatment or medication for non-diagnosed injuries. Dr. D'Angelo testified that the diagnoses from Claimant's treatment providers and the DIME doctor were all "out of date." Dr. D'Angelo explained she reversed her opinion because she changed her mind after reviewing the records again.

18. Dr. D'Angelo also opined that Claimant had exceeded the recommended amount of acupuncture treatment set forth in the Medical Treatment Guidelines.

19. The ALJ finds Dr. D'Angelo's opinions unpersuasive. They are contradicted by Claimant's extensive treatment history and persuasive opinions that Claimant would need indefinite medication to manage his pain and also other potential treatment modalities. The basis upon which she changed her opinions is not well founded, but rather appears arbitrary and more likely motivated by bias in favor of Respondents.

20. The ALJ finds Claimant's testimony credible and persuasive. Claimant's testimony about his symptoms and responses to treatment was both consistent and supported by his extensive medical records.

21. The ALJ finds that Claimant proved by a preponderance of the evidence that medical benefits, specifically medication and acupuncture, requested by Claimant's authorized treating provider is reasonable, necessary, and related to the compensable workers' compensation claim.

CONCLUSIONS OF LAW

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Rule 16-2(B)(1) of the Workers' Compensation Rules of Procedure defines an authorized treating provider as the treating physician designated by the employer and selected by the injured worker. Subsection (B)(2) of the same rule also designates, "a healthcare provider to whom an authorized treating physician refers the injured worker for treatment, consultation, or impairment rating."

In accordance with C.R.S. §8-43-404(9)(b), "[A] claimant shall not be liable for payment for treatment by the provider under this subsection (9) if the treatment is reasonably needed and related to the injury.

Medication

Testimony and medical records reflect Claimant's extensive impairment and chronic pain in his upper extremities. Claimant and his current authorized treating provider, Dr. Ellen Price, credibly testified that Claimant's pain stays in control using a variety of medications and acupuncture.

On November 16, 2016, Dr. D'Angelo wrote an initial report after performing an extensive medical record review and examination of Claimant. In the initial report, Dr. D'Angelo opined that the non-steroidal anti-inflammatory drug ("NSAID"), Vimovo, was

appropriate based on the gastrointestinal issues that arise from other NSAID medications. Dr. D'Angelo remained silent in regards to the other prescribed medications and acupuncture.

Without adding new information, or amending her report, Dr. D'Angelo wrote an addendum to her report, and changed her opinion on Vimovo and included the other medications and acupuncture as not work-related. At hearing, Dr. D'Angelo opined that Claimant does not have a "current" diagnosis for which she would recommend treatment, and essentially disregarded the years of diagnoses, surgical and other treatment, and prescription plans for pain management. Dr. D'Angelo essentially testified that she does not know what the current diagnosis is, and thus the medications and treatment are not necessary. This opinion contradicts Claimant's sixteen years of treatment and Dr. Price's testimony.

Claimant has admitted injuries to his upper extremities, with multiple surgeries, documented ongoing chronic pain, and a significant list of diagnoses. Dr. D'Angelo's opinion is not compelling when weighed against the extensive list of previous opinions and diagnoses. Claimant has chronic pain that needs to management through prescription medications.

Although several treating providers found Claimant permanently and totally disabled, Dr. Price testified that she does encourage Claimant to use his hands, despite the pain that Claimant testified follows. Claimant testified that it is impossible for him to go a whole day without using his upper extremities, and he has to find some way to cope with the varying levels of pain. Dr. Price testified that the medications assist in keeping the inflammation down, but also for breakthrough pain management. Dr. Price further testified that, in combination with the acupuncture, Claimant's pain levels have been steady for some time, and Claimant has less gastrointestinal issues when taking Vimovo.

Dr. D'Angelo's report states concern for an increase in cost with Vimovo, however, the cost of medication cannot contribute to the weight of the argument, assuming the medication provides relief for Claimant's industrial injuries.

Respondents' position is essentially that Claimant has been on medication for a long time and the diagnosis is out of date, and an out of date diagnosis does not warrant continued medication. However, the consensus of various treating providers determined Claimant would require lifetime pain management. Through the current prescription plan and acupuncture, Claimant was able to take himself off long-term narcotics, and uses Percocet for breakthrough pain only.

The ALJ finds and concludes that Claimant's current medication plan, including Vimovo, is reasonably necessary for Claimant to manage the chronic pain from his industrial injury and its treatment. Respondents are to authorize and pay for all medications prescribed by the treating provider, with the exception of the medication for sleep apnea, restless leg syndrome, and hypothyroidism discussed at the onset of hearing.

Acupuncture

Workers' Compensation Rule 17, Exhibit 9 Chronic Pain Disorder, F(1) states in part, "Acupuncture is recommended for chronic pain patients who are trying to increase function and/or decrease medication usage and have an expressed interest in this modality." Although the maximum duration of treatment is 15 treatments, the Guidelines also state, "Any of the above acupuncture treatments may extend longer treatments if objective functional gains can be documented or when symptomatic benefits facilitate progression in the patient's treatment program."

Dr. Price testified that acupuncture is beneficial for Claimant's pain management, stating up to 70% recovery for a week and "staying functional". With the current medications and acupuncture, Claimant reported a pain level of 2 out of 10 on his June 26, 2017 visit to Dr. Price.

In conformity with the Guidelines, if there is objective relief and the medication usage decreases with the treatment, the acupuncture can continue beyond the recommended amounts of visits. Based on the testimony of Claimant and Dr. Price, acupuncture improves Claimant's functionality and ability to remain off long-term narcotics.

Dr. Price and Claimant testified that acupuncture helped Claimant taper off long-term narcotics and eventually stop using the narcotics completely. There was some discussion about Claimant's usage of Percocet for break-through pain, however, Claimant credibly testified that he does not use it often, and is not dependent on Percocet for regular pain management. The value in functionality and remaining off long-term narcotics outweighs the cost of continued acupuncture beyond the recommended number of sessions, thus it is reasonable.

Dr. D'Angelo cited the treatment guidelines and the fact that Claimant is over the recommended amount of treatment. This argument is not compelling based on the guideline's allowance of continued acupuncture if objective improvement in functionality exists.

Until acupuncture no longer yields functional or pain management benefit, the treatment is reasonable. Acupuncture is a cost-effective method of controlling pain, and Claimant's testimony to its benefits far outweigh any argument regarding cost of treatment. The ALJ finds and concludes that acupuncture is reasonably necessary to allow Claimant to function at a higher level without resorting to long-term narcotic usage. Respondents shall reimburse Dr. Price for any unpaid acupuncture treatments and are to authorize any current prescriptions for further acupuncture.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the ALJ enters the following order:

1. Claimant successfully proved by a preponderance of the evidence that the current medications related to the claim, specifically, voltaren, gabapentin, Percocet, and Vimovo, are reasonable, necessary, and related to Claimant's industrial injury. Respondents are ordered to continue paying for these medications as prescribed by the authorized treating physician.

2. Claimant successfully proved by a preponderance of the evidence that the acupuncture treatment recommended by authorized treating provider, Dr. Ellen Price, is reasonable, necessary, and related to Claimant's industrial injury. Respondents are to continue paying for acupuncture treatment as prescribed by the authorized treating physician.

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

DATED: October 16, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-030-044-02

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her left upper extremity.

- Whether Claimant is entitled to medical and compensatory benefits.

FINDINGS OF FACT

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

1. Claimant worked for less than three years as an assembly line worker for Employer. Employer laid Claimant off effective February 10, 2017.

2. Claimant testified at hearing that she sustained an acute injury at work on September 11, 2016. Claimant testified she was working on an assembly line with five or six other employees. Claimant's boxed light fixtures and stacked the twenty pound boxes 12-high on a pallet. When Claimant threw a box on the stack, she felt immediate pain in her left arm. The pain extended down from her shoulder to her forearm. The next day Claimant's arm was swollen and she felt a lump under her armpit. Claimant did not report an injury.

3. On September 17, 2016, Claimant sought medical treatment at Green Valley Ranch Medical Center, an urgent care provider, for a respiratory infection and the lump under her left armpit. The medical provider prescribed antibiotics, which Claimant took for 10 days. Claimant did not report having been injured at work.

4. On September 21, 2016, Claimant sought medical treatment from her primary care provider, Arbor Family Medicine. Records from the appointment discuss Claimant's treatment for a respiratory infection and "swollen lymph nodes under left arm pitt [sic]." and her improvement with antibiotic treatment. Records noted that Claimant "had a gradual onset of muscle pain for months." The records further provide that Claimant's job that required repetitive left arm movement. Claimant described her pain as occurring in the muscle of her upper left arm and forearm, and as "a moderate dull aching, sharp stabbing and burning sensation."

5. On September 27, 2016, Employer referred Claimant to Concentra Advanced Specialists ("Concentra"). Natasha Deonarian, M.D., noted "pain on the left side of her arm from the posterior neck, trapezius, medial rhomboids, upper shoulder, elbow and forearm. She states that she did not have a specific trauma at work, however her work involves repetitive motion 8-10 hours per day." Claimant informed Dr. Deonarian of the lump under her left armpit. Dr. Deonarian assigned physical work restrictions which Employer accommodated. Claimant continued to work for Employed

in a restricted capacity. Claimant testified that no provider later placed her at maximum medical improvement.

6. On October 28, 2016, Concentra referred Claimant to John Sacha, M.D. Claimant reported she began experiencing pain in her left radial wrist and left thumb approximately six months earlier. The pain was mild at first but then extended to involve the left shoulder and elbow. Dr. Sacha diagnosed possible carpal tunnel syndrome related to repetitive job tasks, and some secondary lateral epicondylitis with shoulder impingement which was not work-related. Dr. Sacha ordered an electrodiagnostic evaluation.

- On December 13, 2016, Dr. Aschberger completed the electrodiagnostic evaluation with normal results. The normal results ruled out carpal tunnel syndrome as a possible diagnosis.

7. Also on October 28, 2017, "Genex" completed a jobsite assessment pursuant to Rule 17. The assessment concluded that Claimant's job duties included no primary or secondary risk factors.

8. Claimant testified that she treated at Concentra for her arm through April or May of 2017.

9. Claimant has a history of diffuse joint and muscle pain:

- On March 5, 2010, Claimant reported that her joint pain had "[i]mproved since taking the herbal calming drops." Claimant also reported that she "[f]eels like she is swollen on the chest and shoulder area." A provider diagnosed "Myalgia currently but suspect that she may have fibromyalgia as she had 18 trigger points."

- On August 11, 2010, Claimant reported numbness and tingling under her right arm. The sensation began six weeks earlier.

- Numerous records mention "polyarthralgia pain in joint, multiple sites" and "fibromyalgia unspecified myalgia and myositis."

- On January 5, 2011, Claimant reported pain in her left foot that radiated into her toes. She reported the onset of the pain a week prior without acute injury.

10. Despite extensive medical records to the contrary, Claimant testified that she had never been tested for or diagnosed with fibromyalgia.

11. On June 8, 2017, Allison Fall, M.D., performed a Respondents' sponsored Independent Medical Examination of Claimant. During that examination, Dr. Fall reviewed Claimant's medical records from Concentra, Claimant's physical therapy records, Dr. Sacha's October 28, 2016 report, and Dr. Aschberger's December 13, 2016

electrodiagnostic evaluation. Dr. Fall opined that Claimant had myofascial pain (muscle pain) or fibromyalgia.

12. Dr. Fall reviewed Claimant's Arbor Family Medicine records just prior to the hearing. Dr. Fall credibly testified that those records support her opinion that Claimant has myofascial pain or fibromyalgia. The records documented test results which excluded other diagnosis, such as rheumatoid arthritis, and Claimant's reports of other symptoms consistent with a fibromyalgia diagnosis such as a sleep disorders and other chronic pain. Further, Arbor Family Medical's records from 2010 established that Claimant had 18 trigger points when she was tested for fibromyalgia, and that a diagnosis of fibromyalgia has a threshold of only 14 trigger points. When Dr. Fall examined Claimant, she found 12 trigger points which supported a possible diagnosis of fibromyalgia.

13. In contrast to Claimant's allegation of an acute injury, Dr. Fall testified that the medical records she reviewed discussed a gradual cumulative injury, possibly caused by work of a repetitive nature. Claimant had not reported an acute injury to her medical providers, and had not described feeling pain when she lifted a box overhead on September 11, 2016. Claimant first mentioned that mechanism of injury on June 8, 2017, during Dr. Fall's examination.

14. On July 19, 2016, Dr. Sacha issued a Special Report after reviewing Dr. Fall's report. In light of Dr. Aschberger's EMG report, the Genex jobsite analysis, and Dr. Fall's report, Dr. Sacha retracted his previous diagnosis of carpal tunnel syndrome. Dr. Sacha noted that the only possible work-related injury Claimant could have experienced was carpal tunnel syndrome. Dr. Sacha opined that Claimant "clearly has multiple findings consistent with myofascial or fibromyalgia complaints." Further, Dr. Sacha opined that Claimant's job duties did not include primary or secondary risk factors for a cumulative trauma disease.

15. The ALJ finds that Dr. Fall's and Dr. Sacha's opinions are credible and persuasive. They are supported by persuasive medical histories, Dr. Aschberger's normal EMG results, and the Genex job site evaluation.

16. The ALJ finds Claimant to be a poor historian. For example, at hearing, when questioned about previously being diagnosed with fibromyalgia, Claimant responded that in 2010, she was experiencing anxiety and that she had a history of anxiety. Claimant also could not recall having experienced multiple instances of joint and muscle pain although they were consistently documented in her medical records.

17. Based on the totality of the evidence, the ALJ finds that Claimant did not meet her burden of proving by a preponderance of the evidence that she sustained a compensable injury.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

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

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

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,*

165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971).

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2017). *See City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Claimant must prove that an occupational disease is an injury that results directly from the employer or conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of employment. §8-40-201(14), C.R.S.; *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

The fact that a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the logical and recurrent consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

Claimant initially thought she had an infection and took anti-biotics for 10 days because she did not report any work injury. Claimant subsequently reported to her primary care physician, the Concentra physician, the physical therapist, and Dr. Sacha that her left arm and neck pain developed gradually over time. Given that Claimant reported to her treating physicians that she had a cumulative trauma injury, her physicians undertook a causation analysis under Rule 17 for a cumulative trauma injury.

To determine whether Claimant sustained a cumulative trauma injury under Rule 17, Claimant underwent a nerve conduction study and a jobsite analysis was performed. Claimant's EMG came back normal, which ruled out a cumulative trauma diagnosis. Furthermore, the jobsite analysis confirmed there were no primary nor secondary risk factors under Rule 17 for a cumulative trauma injury. With this information, both Dr. Sacha and Dr. Fall confirmed that Claimant did not sustain a cumulative trauma injury related to her work duties.

Consequently, once a cumulative trauma injury had been ruled out, Claimant changed her mechanism of injury and reported to Dr. Fall in June 2017 that she suffered an acute injury at work while lifting a box. Claimant's testimony that she suffered an acute injury while lifting a box is simply not credible as all the prior medical records from her treating physicians contain medical histories that Claimant's symptoms in her left arm, shoulder and neck developed gradually over time and Claimant was actually diagnosed with and effectively treated for an infection.

Even if Claimant had a lifting injury as she now claims, she did not suffer a compensable injury. According to Dr. Fall, a lifting injury would not have caused a lump in Claimant's armpit and Claimant likely would have sought medical treatment sooner than eleven days after the purported date of injury.

Dr. Fall opined that Claimant likely suffers from fibromyalgia. Furthermore, Dr. Fall persuasively testified that Claimant did not suffer an aggravation or exacerbation to her possible pre-existing non work-related fibromyalgia as the medical records do not contain any evidence that Claimant's work duties caused her general diffuse bodily complaints.

Finally, Claimant's testimony lacked credibility as she denied being diagnosed with fibromyalgia and could not remember important parts of her medical history.

The ALJ finds and concludes Claimant did not prove by a preponderance of the evidence that she experienced a compensable injury to her left upper extremity or neck.

ORDER

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

1. Claimant failed to prove by a preponderance of the evidence that she suffered a compensable injury to her left upper extremity and neck.

2. Claimant's claim is denied and dismissed with prejudice.

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

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

DATED: October 13, 2017

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

ISSUES

I. Whether Respondents have met their burden to prove that Claimant's injury resulted from the willful failure to use a safety device and/or a willful violation of a reasonable safety rule in contravention of C.R.S. §8-42-112(1)(a) and (b), thus entitling Respondents to reduce Claimant's compensation by fifty (50) percent.

FINDINGS OF FACT

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

1. Employer is a towing company that employs drivers to carry out towing operations in Colorado. Due to the dangerous nature of the duties associated with vehicle towing, Employer imposes and enforces safety rules in order to guard the wellbeing of their drivers, the public, and the vehicles being towed.

2. Employer's tow trucks are equipped with a winch and "v-chain" to load and unload vehicles. In order to load a vehicle, the driver tilts the tow-truck bed at an angle that allows the vehicle to be pulled onto the tow-truck with use of the winch. The v-chain is used to attach most vehicles to the winch which, as noted above, is used to pull the vehicle onto the tow-truck bed. Once a vehicle has been winched onto the truck, the driver secures it to the bed with four additional tie-down straps/chains and levels the bed so the truck can be driven with the car safely secured on top. This process is reversed to off-load vehicles. Specifically, the bed is tilted down, the straps removed, and the vehicle lowered down with the winch and v-chain. Controls for the winch are located on the side of the tow truck where the vehicle being towed has a low probability of striking the driver as it is lowered from the truck bed.

3. Certain vehicles, typically luxury cars of European manufacture, cannot be connected to the v-chain for subsequent winching. For these vehicles only, drivers are permitted to use an I-bolt rather than the v-chain to load and unload vehicles. Whether a vehicle is being loaded with the v-chain or I-bolt, Employer trains their driver's to use the winch to load and unload the vehicle.

4. Claimant began working for the Employer on October 3, 2016. On January 7, 2017, Claimant was assigned to transport a 2004 Jeep Wrangler to a pre-designated drop off point. Claimant proceeded to the pick-up point where he found the Jeep in question. He determined that it was drivable, so he loaded it onto his tow truck by driving it up onto the tilted truck bed, setting the emergency brake, and leaving it in gear. After Claimant got out of the Jeep, he tied the vehicle down in accordance with

how he was trained. Specifically, he secured the safety strap on the front driver's side, secured the two rear safety chains, and then secured the right front safety strap. He then raised the bed. Thereafter, he released the Jeep's emergency brake and put the jeep in neutral to "snug" it up. Claimant then reset the emergency brake, put the jeep back into gear, and drove it uneventfully to the drop off point. Claimant did not use the winch to load or assist in securing the vehicle to the truck bed.

5. Upon reaching his destination, Claimant tilted the bed of his tow truck to the ground. He then exited the truck and proceeded to disengage the emergency brake on the Jeep, allowing it to roll backward slightly. He then re-engaged the emergency brake, and began to release the tie-down straps and chains. While untying the last strap, the Jeep began to roll down the tilted truck bed. In an effort to prevent the Jeep from rolling backward, Claimant grabbed the strap and was forcefully pulled into the side of the tow truck injuring his back.

6. Scott Spurling testified as a former tow truck driver for Employer. Mr. Spurling was a driver for Employer for five years before he was promoted to a supervisory position as a team lead/foreman. Mr. Spurling was Claimant's direct supervisor at the time of the above described incident. He testified that he trained Claimant how to load and unload vehicles according to Employer's protocols with use of the winch and v-chain. According to Mr. Spurling, Claimant was taught to use the winch, at all times, when loading and unloading vehicles.

7. Mr. Spurling also testified that Employer takes the safety of its employees very seriously. Consequently, Employer has adopted a variety of oral and written safety rules which are routinely added to based upon the occurrence of specific events and which are enforced through a variety of mechanisms including written reprimands, fines and termination. A list of Employer's written "Rules & Regulations" was provided to Claimant. He acknowledged his understanding of the various rules and regulations by initialing and signing them. Mr. Spurling admitted that the written list of rules and regulations provided to Claimant are devoid of any reference to use of the v-chain and winch when loading and unloading a vehicle to be towed noting that not all safety rules are in written format.

8. In keeping with Employer's safety minded culture, Mr. Spurling testified he held regular safety meetings with Employer's tow truck drivers. According to Mr. Spurling, the safety meetings usually centered on various problems/situations the drivers encountered the week before. Mr. Spurling admitted that there were no records of what specific subjects were discussed at the safety meetings and he could not recall whether mandatory use of the v-chain and winch was ever discussed at any safety meeting. Nonetheless, he testified that Claimant was certified in use of the v-chain and winch, was aware that use of these items was Employer's required loading and unloading protocol and that failure to use them could result in discipline.

9. Regarding the incident in question, Mr. Spurling testified that if the v-chain and winch had been attached to the Jeep, it would not have rolled off the bed of the

truck because the winch would have supported the vehicle's weight. Claimant agreed that if the vehicle had not rolled down the truck bed, he would not have been injured. Claimant also testified that he was aware of the v-chain and winch, knew how to use them, and decided against their use when towing the Jeep in question. Claimant testified that he drove the Jeep up onto the truck because he had seen other drivers, including Mr. Spurling load and unload vehicles from the tow truck by driving them on/off the bed. According to Claimant, he was told that if a vehicle was drivable, he could load it by driving it onto the truck. Mr. Spurling testified that he never told Claimant it was acceptable to drive a vehicle on and off the towing lift. To the contrary, Mr. Spurling testified that he told Claimant to never drive vehicles on and off the truck. He testified that veteran drives could perform such loading but that all "rookie" drivers were specifically instructed to use the v-chain and winch. Claimant testified that he was never told that use the winch and v-chain was mandatory on every tow.

10. Scott Burdick, Employers current driver manager testified that he was taught that using the winch to load and unload vehicles is required by the Employer. He testified that use of the v-chain is stressed even though it is not included in the written safety rules adopted by Employer. As a previous driver for Employer, Mr. Burdick testified that Employer does not teach employees to drive vehicles on or off of trucks and any driver caught doing so is reprimanded.

11. Julian Cisneros has worked for the employer for fourteen and one-half years. For the past eight years, Mr. Cisneros has been Employer's general manager. Mr. Cisneros helped write the safety rules and regulations for the Employer. He testified that not every rule or policy is written and many rules are conveyed to employees through training, fleet meetings, ride-alongs, and individual training. He testified that the rules are generally a compilation of the aftermath of prior incidents/accidents. Even though some rules are verbal only, Mr. Cisneros testified that they are expected to be followed and are enforced in the same way as any written rule. Mr. Cisneros testified that using the winch was much safer than not using it due to the additional control it provides. When a car is loaded on a tilted truck bed and unsecured, the emergency brake can fail, gears can clip, and cars can simply slide down the ramp. The winch is the only way to control the vehicle at all times while loading and unloading it. Mr. Cisneros stated the purpose of the winch and v-chain rule is to protect operators, customers, and the vehicles themselves from circumstances where the vehicle may become out of control.

12. Mr. Cisneros testified that Claimant was aware that rules were enforced and discipline was imposed. While Claimant worked for Employer, two other drivers committed rule violations and disciplinary action was taken. Mr. Cisneros makes sure that all employees know there are consequences for failing to follow the safety rules. He testified that he spoke to Claimant over the phone but was unable to have a meeting with him regarding the incident because Claimant never returned to work. Had Claimant returned, Mr. Cisneros testified that he would have enforced a safety rule violation and disciplined him.

13. Claimant testified that he signed the written safety rules provided to him when he was initially hired. He also testified that he attended the safety meetings convened by Mr. Spurling wherein use of the winch and v-chain were discussed. He acknowledged that the winch and v-chain were important pieces of equipment; however, as noted above, denied that he was ever told he had to use them for every tow. Moreover, he testified that his pay was based on percentages: the more vehicles he towed, the more money he would earn. He admitted to feeling production pressure and testified that it is much slower to use the winch than it is to drive the vehicle on and off the tow-truck. Concerning the incident in question, Claimant testified that he was short on time and had backlogged calls to other jobs at the time of the injury. He admitted he was in a hurry to finish with the Jeep and move on to his next call because the owner of the Jeep had delayed him at the pick-up location, and he had to wait longer than normal. Consequently, Claimant testified that he made a deliberate decision to drive the Jeep up onto the truck rather than use the winch to load and unload it.

CONCLUSIONS OF LAW

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

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

B. Section 8-42-112(1)(a), C.R.S. 2016, provides for a fifty percent (50%) reduction in benefits when an “injury is caused by the willful failure of the employee to use safety devices provided by the employer.” Section 8-42-112(1)(b) provides for a fifty percent (50%) reduction in benefits if the employee is injured due to a willful violation of “any reasonable rule adopted by the employer for the safety of the employee.” The term "willful" connotes deliberate intent. Mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Moreover, Respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995); Johnson v. Denver Tramway Corp., 171 P.2d 410, 414(Colo.1946).

C. The elements of proving a violation under Section 8-42-112(1)(b) include the following: 1) There must be a safety rule adopted by the employer. 2) The safety rule must be reasonable. 3) The safety rule must be known by the employee; i.e. “brought home” to the employee, and diligently enforced. *Pacific Employers Insurance*

Co. v Kirkpatrick, 111 Colo. 470, 143 P.2d 267 (Colo. 1943). 4) The meaning and content of the safety rule must be specific, unambiguous and definite, clear and non-conflicting. *Butland v. Industrial Claim Appeal Office*, 754 P.2d 422 (Colo. App 1988). 5) The violation of the safety rule must be willful, done with deliberate intent by the employee. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App 1990).

D. It is Respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule." *Horton v. JBS Swift and Company*, W.C. No. 4-779-078 (2010); *Strait v. Russell Stover Candies*, W.C. No. 4-843-592 (2011). The question of whether the respondents carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). Here, the evidence presented persuades the ALJ that Respondents presented sufficient evidence to meet their burden of proof. Despite Claimant's concerns that the alleged safety-rule in this case was not reduced to writing, settled case law provides that a safety rule "does not need to be formally adopted, does not have to be in writing, and does not have to be posted for the reduction pursuant to § 8-42-112(1)(b) to apply. *Bennett Prop., Co. v. Indus. Comm'n*, 437 P.2d 548, 552 (1968). Rather, oral warnings, prohibitions, and directions are sufficient if heard and understood by the employee and if given by someone generally in authority." *Id.* Moreover, a safety rule, if sufficiently obvious to claimant, can be based solely on common sense without any direction by the employer to follow it. *See Indus. Comm'n v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902, 905-06 (1952). Finally, a willful failure to use a safety device or a willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that his conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation Dist.*, W.C. No. 4-335-104 (ICAO Feb. 19, 1999). Instead, willfulness may be inferred from a variety of circumstantial evidence, including:

- The obviousness of the danger, *see Golden Cycle Corp.*, 246 P.2d at 906 ("The operator of a saw mill surely would not be held to liability for failure to post a notice reading, 'Keep your hands out of the buzz saw.'");

- The employee's knowledge of the safety rule and the deliberateness with which the employee performed an act prohibited by the rule, *see, e.g.*, *Salamanca v. Golden Aluminum Co.*, W.C. No. 4-416-802 (ICAO July 16, 2001).

E. In this case, the evidence presented persuades the ALJ that Claimant's Employer adopted a safety rule regarding use of the winch and v-chain to load and unload vehicles to be towed. The evidence, including the testimony of Claimant, convinces the ALJ that both the winch and v-chain are legitimate devices necessary to further Employer's business in a safe and conscientious manner. Moreover, the evidence presented persuades the ALJ that the rule regarding the use of the winch and v-chain, while not reduced to writing were well known to Claimant through safety meetings, training and ride alongs. Consequently, the ALJ concludes that the rule

requiring use of the v-chain and winch were "brought home to Claimant. Based upon the evidence presented the ALJ finds and concludes that the safety rule regarding use of the winch and v-chain to load and unload vehicles is unambiguous, reasonable and diligently enforced. Claimant's contrary assertions are not persuasive. Towing is inherently dangerous. While the truck bed is tilted, the angle is steep enough that perfectly operational cars can begin to slide. Inclement weather conditions only increase this risk. Without a secure support point, the winch, an unsecured vehicle may become out of control and cause injuries to anyone around it. Therefore, it is reasonable to require employees to utilize the winch to control vehicles while they are being loaded and unloaded. While the safety of customers and the public are major considerations, the safety rule is designed to protect the safety of the tow-truck drivers, like Claimant, that work for the Employer. The safety rule is also an application of common sense. The bed of the tow truck is tilted while loading and unloading. Once the four safety straps are removed, if the winch is not attached to the vehicle, there is nothing except the emergency brake of the vehicle preventing it from rolling away. Mr. Cisneros and Mr. Spurling both testified based on long experience in the industry that the emergency brakes are unreliable at such an angle. Even without that knowledge, common sense dictates that a vehicle parked at a steep angle poses a significant risk of rolling away if not properly secured.

F. Finally the evidence presented, including Claimant's own testimony, convinces the undersigned ALJ that his deliberate decision to ignore the loading and unloading protocols enjoined and enforced by Employer constitutes a willful violation of a reasonable safety rule adopted for his safety. Here, Claimant admitted that he had been delayed by the Jeep owner and that he had backlogged calls to answer. Claimant's income is ultimately determined by the number of tows he is able to complete. He had a financial incentive to complete his job as quickly as possible, and Claimant admitted that using the winch was much slower than driving the vehicle. The decision to drive the Jeep off of his truck, rather than use the winch, was one Claimant made willfully and deliberately in violation of a known safety rule and Claimant was injured as a direct consequence of this calculated decision.

G. Claimant is correct that an employee's violation of a safety rule and/or failure to use safety devices need not be considered willful if the employee had some plausible purpose to explain the violation, including the facilitation of the employer's business." *see e.g., City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). *Grose v. Riviera Electric*, W.C. No. 4-418-465 (2000). As noted in *Grose*, an employee's violation of a rule in an attempt to facilitate accomplishment of the employer's business generally does not constitute willful misconduct." Furthermore, evidence that a claimant possessed discretion to circumvent a safety rule might negate a finding of a 'willful' safety rule violation." *Triplett v. Evergreen Builders, Inc.*, W.C. No. 4-576-463 (2004). Finally, "the exercise of poor judgment within the realm of the claimant's legitimate discretion might well qualify as mere 'negligence' sufficient to preclude a finding of willfulness." *Id*. In this case, Claimant does not dispute that he was aware of the importance of the v-chain and winch. Nonetheless, relying on the above cited case law, he ostensibly asserts that there was a plausible reason for not using

them in this case because there was a backlog of calls and he felt pressure to get to the next call along with his claim that he was never informed that the v-chain and winch had to be used on every job. Accordingly, Claimant asserts that his decision to not use the winch and v-chain was not "willful." The ALJ is not persuaded. Based upon the evidence presented, the ALJ concludes that Claimant's conscious decision to ignore his training and not use the winch and v-chain was likely driven by his personal desire to take additional calls and make more money rather, than his desire to facilitate accomplishment of Employer's safety conscious business. Moreover, the evidence presented fails to support a conclusion that Claimant was ever given discretion by Employer to circumvent a known safety rule by failing to use the proper safety devices to catch up on calls. Consequently, the ALJ rejects Claimant's assertion that there was a plausible reason for not using the v-chain and winch at the time he was injured in this case.

ORDER

It is therefore ordered that:

1. Claimant's compensation for his injury in this claim shall be reduced fifty Percent (50%) for his failure to use safety equipment provided by the Employer and for violating the Employer's safety rule concerning the loading and unloading for vehicles from the bed of the tow truck as provided for by C.R.S. §8-42-112(1)(a) and (b).

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

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

DATED: October 16, 2017

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-045-124-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 27, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 9/27/17, Courtroom 3, beginning at 1:30 PM, and ending at 4:00 PM).

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on October 4, 2017. On October 11, 2017, Respondent filed objections, consisting of yellow-lined additions and subtractions to the proposed decision. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability of a right knee (RLE) injury of February 7, 2017; and, if compensable, medical benefits.

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

FINDINGS OF FACT

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

1. The Claimant was employed as an Administrative Support IV worker with the Employer at the time of the February 7, 2017 incident.

2. Part of the Claimant's job duties with the Employer consisted of distributing mail.

3. On February 7, 2017, as the Claimant was distributing mail throughout the office, she tripped over a box on the floor.

4. As the Claimant fell, she caught herself with one hand on the shelving unit and one hand on a stack of plans but struck her right knee on the ground. She bruised her right knee.

5. There is conflicting evidence regarding whether or not the Claimant's right knee actually struck the ground and/or if she sustained a bruise on the right knee. The medical evidence in the record supports the proposition that a contusion does not always mean that there is a bruise. Whether or not the Claimant's right knee actually struck the ground or whether the Claimant bruised it while trying to catch herself is not germane because either situation supports the work-relatedness of the Claimant's present right knee injury. The contemporaneous medical records support the injury occurring when the Claimant "went to catch herself."

6. The Claimant reported the fall and sought medical care for her injuries that same day at Denver Health & Hospital Authority, the Employer's designated workers' compensation medical provider.

7. The February 7, 2017 report of injury (on Denver Health Form) states as follows:

"Employee was delivering mail and went around corner and tripped over box that was on floor and went to catch her and injured right knee…" (Claimant's Exhibit 1, p. 2).

8. The February 8, 2017 injury report of Claimant's supervisor, Tiffany Crank, states as follows:

A. "Tripped over box" (Claimant's Exhibit 2, p. 4).

B. "Box should have been stacked with the other boxes of copy paper and not further out in the walk way" (Claimant's Exhibit 2, p. 5).

C. "Witness Summary: It was reported to me by Ed Kocman on 2/8/17 that he witnessed [Claimant] coming around the corner of the log room, walking away from the permit counter, and tripped over a box of copy paper that was single stacked on the ground next to a stack of other copy paper boxes. Ed reported that she stumbled into the filing shelf but avoided falling completely by catching herself on the filing shelf" (Claimant's Exhibit 2, p. 6).

9. Claimant's medical records with Denver Health and Hospital Authority state as follows:

A. "Contusion to B/L hand B/L knees, neck strain LBP" (Claimant's Exhibit 3, p.7).

B. "It seems that most concerning to her is the pain in her right knee" (Claimant's Exhibit 3, p10).

C. "Given the MOI it seems that her right knee may have taken the brunt of injury" (Claimant's Exhibit 3, p. 10).

D. "R knee edema over patellar tendon and medial aspect of knee" (Claimant's Exhibit 3, p.15).

E. "Assessment…Suspect R medial meniscus dysfunction, possibly due to inflammation and irritation. Pt reports difficulty negotiating stairs, increased pain with WB, pain when turning. Positive pain with hyperextension and joint line tenderness" (Claimant's Exhibit 3, p16).

F. Sadie Sanchez, M.D., noted the following MRI results:

"Diagnostic Test Results…

MRI right knee 4/5/17:
1. Maceration and diminutive appearance involving the body of the medial meniscus which may reflect prior partial meniscectomy however there is complex signal extending to the inferior articular surface of the posterior horn of the medial meniscu[s] which is compatible with residual if not recurrent tearing" (Claimant's Exhibit 3, p. 36).

G. "R knee is swollen and sore in flexion" (Claimant's Exhibit 3, p. 50).

10. Claimant's April 5, 2017 MRI (magnetic resonance imaging) of the right knee revealed the following:

"IMPRESSION: 1. Maceration and diminutive appearance involving the body of the medial meniscus which may reflect prior partial meniscectomy however there is complex signal extending to the inferior articular surface of the posterior horn of the medial meniscux which is compatible with residual if not recurrent tearing" (Claimant's Exhibit 4, p. 62).

11. Claimant's medical records with Colorado Orthopedic Consultants state as follows:

"She complains of difficulty walking with medial and anterior knee pain as well as leg pain" (Claimant's Exhibit 6, p. 67).

12. Additional records from Denver Health & Hospital Authority state "H/o fall on 2/7/17 at City and County Building….Work up through workman's comp. Was told

she needs surgery but that it would have to be done through her doctor…" (Claimant's Exhibit 7, p. 69). The ALJ infers and finds that the Denver Health doctors ultimately were of the opinion that the Claimant's need for surgery was **not** work-related.

13. The Employer's expert witness, Henry Jules Roth, M.D., was of the opinion that surgical meniscectomy is no longer the treatment of choice for a torn meniscus, and that the Claimant had no residual effects from the February 7, 2017 incident. Dr. Roth corroborates the implied opinion of the Denver Health doctors that the Claimant's need for surgery is not work related.

14. Claimant had significant pre-existing problems in her right knee prior to the event of February 7, 2017.

15. Respondent has already paid for all treatment of the right knee as of the date of the hearing at COSH.

16. Dr. Sanchez, Claimant's authorized treating physician (ATP) and primary care doctor, has not yet rendered an opinion on maximum medical improvement (MMI) or additional treatment for the work-related aggravation of the Claimant's right knee. The ALJ finds that it would be appropriate to return the Claimant to Dr. Sanchez and/or COSH for a current opinion concerning the causal relatedness of additional medical treatment needed as a result of the February 7, 2017 injury; or, whether the Claimant has returned to the baseline of her pre-existing condition.

Ultimate Findings

17. The ALJ finds, for the most part, Claimant's history of the February 7, 2017 incident is credible; however, her overall theory that her need for right knee surgery should be attributable to the incident is not necessarily credible. Further, the ALJ finds the ultimate, implied opinions of the Denver Health doctors and Dr. Roth concerning the present, recommended surgery being non-work related and attributable to a pre-existing condition, are credible and persuasive. Further medical treatment for the work-related aggravation of the Claimant's right knee remains an open question.

18. Between conflicting medical opinions concerning recommended surgery for the right knee, the ALJ makes a rational choice to accept the ultimate opinions of the Denver Health physicians and Dr. Roth, based on substantial evidence, and to reject any opinions to the contrary.

19. The Claimant has proven, by a preponderance of the evidence that she sustained a work-related aggravation of her pre-existing right knee condition as a result of the incident of February 7, 2017; however, she has failed to prove, by preponderant evidence that the present need for the recommended surgery is causally related to the

aggravating injury of February 7, 2017. The need for further work-related medical treatment remains an open question.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, for the most part, Claimant's history of the February 7, 2017 incident was credible; however, her overall theory that her right knee surgery should be attributable to the incident is not credible or persuasive. Further, as found, the ultimate, implied opinions of the Denver Health doctors and Dr. Roth concerning the present, recommended surgery being non-work related and attributable to a pre-existing condition, was not credible and persuasive. Further medical treatment for the work-related aggravation of the Claimant's right knee remains an open question.

Substantial Evidence

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

Compensable Aggravation/Acceleration of Pre-Existing Condition

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App.

1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). A compensable injury is one that requires medical treatment or causes disability. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). As found, the Claimant sustained a work-related aggravation of her pre-existing right knee condition as a result of the incident of February 7, 2017 which required medical treatment; however, she failed to prove that the present need for the recommended surgery is causally-related to the work-related right knee aggravating injury. The need for further work-related medical treatment remains an open question.

Medical Treatment

d. The question of whether a particular medical treatment is causally related and reasonably necessary is one of fact to be determined by the ALJ. *Kroupa v. Indus. Claim Appeals Office, supra; Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P. 2d 251, 252 (Colo. App. 1999). As found, the Claimant has established entitlement to authorized medical treatment at COSH that is causally related and reasonably necessary to cure and relieve the effects of the February 7, 2017 aggravation and acceleration of her right knee condition –before returning to the baseline of her pre-existing condition.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the injured worker bears the burden, by preponderant evidence of establishing the right to specific medical benefits. *HLJ Management group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven the compensability of the aggravating event of February 7, 2017, and, the causal relatedness and reasonable necessity of the work-related medical treatment to date at COSH. The Claimant has failed to prove that the need for the recommended right knee surgery is causally related to the aggravating incident of February 7, 2017.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent shall pay the costs of causally related and reasonably necessary medical care and treatment for the aggravating, compensable injury of February 7, 2017, subject to the Division of Workers' Compensation Medical fee Schedule.

B. Any and all claims for the recommend right knee surgery are denied and dismissed unless Sadie Sanchez, M.D., or another COSH doctor, on the Claimant's return visit, expresses the opinion that the surgery is causally related to the aggravating injury of February 7, 2017.

C. The Claimant shall return to COSH for an opinion on the causal relatedness of additional medical treatment, including surgery, and/or whether the Claimant has reached maximum medical improvement from the aggravating injury of February 7, 2017.

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

DATED this_____day of October 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2017, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the lumbar MRI and physical therapy recommended by Robert Nystrom, D.O. are reasonable, necessary and causally related to his July 1, 2015 compensable industrial injuries.

2. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving Temporary Total Disability (TTD) benefits.

3. Whether Respondents have established by a preponderance of the evidence that they are entitled to an offset/credit based on Claimant's poker winnings.

FINDINGS OF FACT

1. Claimant worked for Employer as a Plant Laborer. On July 1, 2015 Claimant was unloading hot oil from a truck through a 400 pound steel braided hose. The hose was suspended from the ground by a cable and winch approximately 20-24 feet high. The cable broke and the large hose fell on Claimant's head. The impact knocked Claimant forcefully to the ground. Claimant suffered a concussion as well as neck and back symptoms as a result of the accident.

2. On October 3, 2015 Claimant approached Employer's Plant Manager and Supervisor Jim Chamberlain at a laundromat. Claimant testified that he sought to give Mr. Chamberlain an October 2, 2015 note from Dr. Weber stating that he should not lift at work. Mr. Chamberlain inquired about what he should do with the note. Claimant responded that he did not know what to do with the note other than give it to Mr. Chamberlain. Mr. Chamberlain responded by stating "do you know what this is going to do to me?" Claimant replied that Mr. Chamberlain could do whatever he wanted with the note.

3. Mr. Chamberlain also testified about the October 3, 2015 laundromat conversation. He stated that he was aware that Claimant had visited Dr. Weber because he had received a text message from Claimant. Although Mr. Chamberlain could not recall the precise words of the conversation, he told Claimant that he had "to turn [the note] in." Mr. Chamberlain explained that Claimant responded by telling him to tear up the note and pretend nothing happened. Mr. Chamberlain then reported the note and conversation to Employer's Safety Manager Dan Glowatz.

4. Mr. Glowatz testified at the hearing in this matter. He first spoke with Mr. Chamberlain about the laundromat encounter. On Monday, October 5, 2015 he discussed the incident with Claimant. Mr. Glowatz inquired as to why Claimant asked Mr. Chamberlain to "rip up the note." Claimant responded that he "didn't want any trouble."

5. On October 5, 2015 Mr. Glowatz terminated Claimant from employment. He explained that he fired Claimant for failing to report an injury. Employer's Personnel Action Form specifies that Claimant was fired for an "ethics violation" and "performance." The explanation for the personnel action mentions that Claimant provided a doctor's note stating that he had suffered a back injury three days earlier. When Mr. Chamberlain explained that he would have to report the incident to the Safety Department Claimant asked him to tear up the note.

6. Mr. Chamberlain and Mr. Glowatz also testified about Employer's Code of Conduct. Mr. Chamberlain explained that Claimant's action of providing and discussing the note at the laundromat violated "company policy." When asked about the Code of Conduct Mr. Chamberlain commented that Claimant violated number six. However, number six simply states "I will promptly report any illegal or unethical conduct to company management or other appropriate authorities." Mr. Glowatz testified that Claimant's conduct at the laundromat violated number five of the Code of Conduct. Number five provides that employees shall comply with the law including anti-bribery prohibitions. Mr. Glowatz remarked that Claimant's presentation of the note and the discourse about what to do with the note constituted bribery.

7. After initially receiving conservative care for his July 1, 2015 injuries Claimant was referred to Concentra Medical Centers for treatment. On October 8, 2015 Claimant presented to Authorized Treating Physician (ATP) Robert Nystrom, D.O. at Concentra with complaints of neck and back pain, numbness, vision problems, difficulty concentrating and fatigue. Review of systems demonstrated neck and back pain, headaches, dizziness, and numbness. Dr. Nystrom noted that Claimant appeared tired and had difficulty concentrating. A musculoskeletal exam revealed tightness and tenderness in his neck and back. Claimant also exhibited decreased cervical, thoracic and lumbar range of motion. Dr. Nystrom diagnosed Claimant with a concussion, cervical strain, thoracic strain and lumbar strain. He restricted Claimant from working.

8. Because Respondents denied compensability for the July 1, 2015 accident, the parties conducted a hearing before ALJ Margot Jones on August 26, 2016. Claimant specifically litigated the following issues: compensability; authorized providers; medical benefits; Average Weekly Wage (AWW); Temporary Total Disability (TTD) benefits and safety rule violation. In a September 16, 2016 Summary Order ALJ Jones ruled for Claimant on all issues. She specifically concluded that Claimant had sustained compensable injuries on July 1, 2015, was authorized to receive medical benefits and was entitled to receive TTD benefits beginning October 8, 2015 until terminated by statute.

9. Respondents subsequently paid Claimant TTD benefits in accord with ALJ Jones' September 16, 2016 Summary Order. However, Respondents only paid for certain medical benefits for a short period of time before denying authorization for physical therapy and a lumbar MRI.

10. Dr. Nystrom's medical records reflect that he has repeatedly requested physical therapy for Claimant. On May 3, 2016 Dr. Nystrom remarked that physical therapy had been benefitting Claimant. On September 27, 2016 he again noted that physical therapy was "very helpful." He commented that Claimant's function had regressed without physical therapy and thus referred Claimant for additional therapy on October 19, 2016. On November 23, 2016 Dr. Nystrom again referred Claimant for physical therapy. He noted that physical therapy "would be very appropriate" and approval of the treatment would help Claimant progress toward Maximum Medical Improvement (MMI).

11. Dr. Nystrom's notes reveal that he repeatedly requested a lumbar MRI to assess Claimant's lower back condition. On December 21, 2016 Dr. Nystrom commented that he had requested authorization for a lumbar MRI. However, the request was denied. Dr. Nystrom spoke with the peer reviewer about the request. The reviewer responded that further conservative care should be provided before an MRI would be authorized. Dr. Nystrom thus again referred Claimant for 10 more physical therapy visits.

12. On December 29, 2016 David H. Elfenbein, M.D. conducted a peer review of Dr. Nystrom's request for a lumbar MRI. He concluded that the request was not medically necessary. Dr. Elfenbein explained that conservative therapy should be considered for Claimant's lower back symptoms "before considering an MRI when there are no radicular signs or symptoms." Relying on the Colorado Division of Workers' Compensation *Rules of Procedure* Rule 17, Dr. Elfenbein reasoned that imaging studies are not supported in the absence of neuropathic signs or symptoms.

13. On January 12, 2017 James Hubbard Jr., M.D. conducted a peer review of Dr. Nystrom's request for additional physical therapy visits. He concluded that the request for 10 additional physical therapy visits for Claimant's lower back symptoms was not medically necessary and appropriate. He noted that the Colorado Division of Workers' Compensation therapy guidelines only permit up to 12 weeks of physical therapy. Dr. Hubbard explained that Claimant had already undergone 22 physical therapy visits and obtained improvement for both his neck symptoms and left hand paresthesias. Claimant has thus already exceeded the recommendations in the guidelines.

14. On January 30, 2017 Dr. Nystrom again sought a lumbar MRI. By March 1, 2017 Dr. Nystrom noted that Respondents had not responded to his request for a lumbar MRI or referral to Dr. Reichhardt. On May 10, 2017 Dr. Nystrom commented that he was still awaiting a response from Respondents regarding the requested MRI and noted that Dr. Blau had also recommended a lumbar MRI.

15. On June 21, 2017 Dr. Nystrom again remarked that he had requested a lumbar MRI and a referral to Dr. Blau. He also concurred with Dr. Blau that Claimant had not received adequate treatment for his back injury.

16. As of the date of the hearing in this matter Claimant has received $91,000 in Temporary Total Disability (TTD) benefits from Respondents. Respondents seek a credit against the TTD benefits based on Claimant's poker winnings. However, Claimant explained that he is not a professional poker player and only occasionally participates in tournaments. Claimant's 2016 Federal Tax Form W-2G pertaining to Gambling Winnings reflects that he had gross annual winnings of $9,358.00 from poker tournaments.

17. Claimant has demonstrated that it is more probably true than not that the lumbar MRI and physical therapy recommended by Dr. Nystrom are reasonable, necessary and causally related to his July 1, 2015 compensable industrial injury. On July 1, 2015 Claimant suffered a concussion as well as neck and back injuries when he was struck on the head by a large hose. In a Summary Order ALJ Jones determined that Claimant had suffered compensable injuries, awarded Claimant medical benefits and reasoned that he was entitled to receive TTD benefits. Although Claimant has received conservative medical treatment for his injuries, ATP Dr. Nystrom has repeatedly requested authorization for a lumbar MRI and additional physical therapy visits. He explained that a lumbar MRI and additional physical therapy sessions were reasonable and necessary because Claimant has not received adequate medical care for his back injury.

18. In contrast, peer reviewer Dr. Elfenbein reasoned that a lumbar MRI was not justified by the *Colorado Division of Workers' Compensation Rules of Procedure* Rule 17 because Claimant has not exhibited neuropathic signs or symptoms. Moreover, Dr. Hubbard explained that additional physical therapy sessions were not medically necessary based on the Colorado Division of Workers' Compensation therapy guidelines. However, both Dr. Elfenbein nor Dr. Hubbard only conducted medical record reviews and have not evaluated Claimant. Dr. Nystrom has examined Claimant and provided extensive treatment over a significant period of time. Accordingly, the lumbar MRI and additional physical therapy visits recommended by Dr. Nystrom constitute reasonable and necessary medical treatment designed to cure or relieve the effects of Claimant's July 1, 2015 lower back injury.

19. Respondents have failed to prove that it is more probably true than not that Claimant was responsible for his termination from employment and is thus precluded from receiving indemnity benefits. The record reveals that Employer terminated Claimant from employment based on a doctor's note he provided to Mr. Chamberlain on October 3, 2015 at a laundromat. The note from Dr. Weber addressed Claimant's lifting restrictions at work. Claimant remarked that he lacked a response to Mr. Chamberlain's inquiry about what to do with the note, but Mr. Chamberlain and Mr. Glowatz commented that Claimant desired to destroy the note and pretend nothing happened.

20. In specifically addressing Claimant's termination, Mr. Chamberlain explained that Claimant's action of providing the note and discussing it at the laundromat violated "company policy." When asked about the Code of Conduct Mr. Chamberlain commented that Claimant violated number six. However, number six simply states "I will promptly report any illegal or unethical conduct to company management or other appropriate authorities." Mr. Glowatz testified that Claimant's conduct at the laundromat violated number five of the Code of Conduct. Number five provides that employees shall comply with the law including anti-bribery prohibitions. Mr. Glowatz remarked that Claimant's presentation of the note and the discourse about what to do with the note constituted bribery. Finally, Employer's Personnel Action Form specifies that Claimant was fired for an "ethics violation" and "performance." The explanation for the personnel action mentions that Claimant provided a doctor's note stating that he had suffered a back injury three days earlier. When Mr. Chamberlain explained that he would have to report the incident to the Safety Department Claimant asked him to tear up the note.

21. Despite the testimony of Mr. Chamberlain and Mr. Glowatz, the record reveals that Claimant did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Claimant simply provided a doctor's note to Employer that addressed work restrictions based on a back injury that occurred three days earlier. Claimant's desire not to pursue the matter based on resistance from his supervisor did not constitute an action that would likely lead to his termination based on Employer's Code of Conduct. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. He is thus not precluded from receiving TTD benefits.

22. Respondents have failed to establish that it is more probably true than not that they are entitled to an offset/credit based on Claimant's poker winnings. Respondents seek an offset/credit against the $91,000 they have paid to Claimant in TTD benefits as a result of his July 1, 2015 industrial injuries. Respondents specifically seek an offset/credit in the amount of $9,358.00 based on Claimant's poker winnings as reflected in his 2016 Federal Tax Form W-2G pertaining to Gambling Winnings. However, because the winnings do not constitute offsets or wages under the Colorado Workers' Compensation Act, Respondents are not entitled to receive an offset/credit for Claimant's poker winnings.

23. Claimant explained that he is not a professional poker player and only occasionally participates in tournaments. His poker winnings thus do not constitute an overpayment or offset because he has not received duplicate benefits that he was not entitled to receive. Furthermore, Claimant's winnings do not constitute wages because he was not compensated for services based on a contract of hire. Accordingly, Respondents are not entitled to recover an overpayment or receive an offset/credit based on Claimant's poker winnings in the amount of $9,358.00.

CONCLUSIONS OF LAW

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

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

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

Medical Benefits

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

5. As found, Claimant has demonstrated by a preponderance of the evidence that the lumbar MRI and physical therapy recommended by Dr. Nystrom is reasonable, necessary and causally related to his July 1, 2015 compensable industrial injury. On July 1, 2015 Claimant suffered a concussion as well as neck and back injuries when he was struck on the head by a large hose. In a Summary Order ALJ Jones determined that Claimant had suffered compensable injuries, awarded Claimant medical benefits and reasoned that he was entitled to receive TTD benefits. Although Claimant has received conservative medical treatment for his injuries, ATP Dr. Nystrom has repeatedly requested authorization for a lumbar MRI and additional physical therapy

visits. He explained that a lumbar MRI and additional physical therapy sessions were reasonable and necessary because Claimant has not received adequate medical care for his back injury.

6. As found, in contrast, peer reviewer Dr. Elfenbein reasoned that a lumbar MRI was not justified by the *Colorado Division of Workers' Compensation Rules of Procedure* Rule 17 because Claimant has not exhibited neuropathic signs or symptoms. Moreover, Dr. Hubbard explained that additional physical therapy sessions were not medically necessary based on the Colorado Division of Workers' Compensation therapy guidelines. However, both Dr. Elfenbein nor Dr. Hubbard only conducted medical record reviews and have not evaluated Claimant. Dr. Nystrom has examined Claimant and provided extensive treatment over a significant period of time. Accordingly, the lumbar MRI and additional physical therapy visits recommended by Dr. Nystrom constitute reasonable and necessary medical treatment designed to cure or relieve the effects of Claimant's July 1, 2015 lower back injury.

Responsible for Termination

7. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

8. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant was responsible for his termination from employment and is thus precluded from receiving indemnity benefits. The record reveals that Employer terminated Claimant from employment based on a doctor's note he provided to Mr. Chamberlain on October 3, 2015 at a laundromat. The note from Dr. Weber addressed Claimant's lifting restrictions at work. Claimant remarked that he lacked a response to Mr. Chamberlain's inquiry about what to do with the note, but Mr. Chamberlain and Mr.

Glowatz commented that Claimant desired to destroy the note and pretend nothing happened.

9. As found, in specifically addressing Claimant's termination, Mr. Chamberlain explained that Claimant's action of providing the note and discussing it at the laundromat violated "company policy." When asked about the Code of Conduct Mr. Chamberlain commented that Claimant violated number six. However, number six simply states "I will promptly report any illegal or unethical conduct to company management or other appropriate authorities." Mr. Glowatz testified that Claimant's conduct at the laundromat violated number five of the Code of Conduct. Number five provides that employees shall comply with the law including anti-bribery prohibitions. Mr. Glowatz remarked that Claimant's presentation of the note and the discourse about what to do with the note constituted bribery. Finally, Employer's Personnel Action Form specifies that Claimant was fired for an "ethics violation" and "performance." The explanation for the personnel action mentions that Claimant provided a doctor's note stating that he had suffered a back injury three days earlier. When Mr. Chamberlain explained that he would have to report the incident to the Safety Department Claimant asked him to tear up the note.

10. As found, despite the testimony of Mr. Chamberlain and Mr. Glowatz, the record reveals that Claimant did not precipitate his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Claimant simply provided a doctor's note to Employer that addressed work restrictions based on a back injury that occurred three days earlier. Claimant's desire not to pursue the matter based on resistance from his supervisor did not constitute an action that would likely lead to his termination based on Employer's Code of Conduct. Accordingly, under the totality of the circumstances Claimant did not commit a volitional act or exercise some control over his termination from employment. He is thus not precluded from receiving TTD benefits.

Offsets/Credits

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

12. Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." There are

thus three categories of possible overpayment pursuant to §8-40-201(15.5). *In Re Grandestaff,* No. 4-717-644 (ICAP, Mar. 11, 2013). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

13. Offsets as delineated in the Colorado Workers' Compensation Act are specific and apply only to disability, pension and unemployment benefits. *See* §8-42-103(1)(c)-(f), C.R.S. Wages are defined as "the money rate at which the services rendered are compensated under the contract of hire in force at the time of the injury." *See* §8-40-201(19)(a), C.R.S.

14. As found, Respondents have failed to establish by a preponderance of the evidence that they are entitled to an offset/credit based on Claimant's poker winnings. Respondents seek an offset/credit against the $91,000 they have paid to Claimant in TTD benefits as a result of his July 1, 2015 industrial injuries. Respondents specifically seek an offset/credit in the amount of $9,358.00 based on Claimant's poker winnings as reflected in his 2016 Federal Tax Form W-2G pertaining to Gambling Winnings. However, because the winnings do not constitute offsets or wages under the Colorado Workers' Compensation Act, Respondents are not entitled to receive an offset/credit for Claimant's poker winnings.

15. As found, Claimant explained that he is not a professional poker player and only occasionally participates in tournaments. His poker winnings thus do not constitute an overpayment or offset because he has not received duplicate benefits that he was not entitled to receive. Furthermore, Claimant's winnings do not constitute wages because he was not compensated for services based on a contract of hire. Accordingly, Respondents are not entitled to recover an overpayment or receive an offset/credit based on Claimant's poker winnings in the amount of $9,358.00. *Compare In Re Scruggs* W.C. No. 4-490-474 (ICAP, Jan. 27, 2004) (concluding that the respondents were entitled to recover an overpayment of TTD benefits from the claimant where he earned seasonal wages for approximately three months).

ORDER

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

1. The lumbar MRI and physical therapy recommended by Dr. Nystrom are reasonable, necessary and causally related to Claimant's July 1, 2015 compensable industrial injuries.

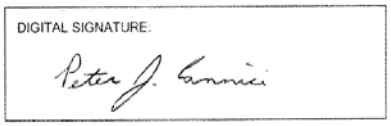
2. Claimant was not responsible for his termination from employment under the termination statutes.

3. Respondents' request for an offset/credit based on Claimant's poker winnings in the amount of $9,358.00 is denied and dismissed.

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

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

DATED: October 17, 2017.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-014-613-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

GUARANTEE INSURANCE
c/o PATRIOT RISK SERVICES,

Third Party Administrator (TPA),

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on September 27, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 9/27/17, Courtroom 3, beginning at 8:30 AM, and ending at 11:45 AM).

Claimant's Exhibits 1 through 18 and 20 were admitted into evidence, without objection. Respondents' Exhibits A through W were admitted into evidence, without objection.

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

ISSUES

The issues to be determined by this decision concern whether or not the Claimant sustained a compensable injury to his right shoulder, arising out of the admitted left shoulder injury of March 8, 2016; if so, whether the recommended right shoulder surgery is causally related and reasonably necessary to cure and relieve the effects thereof.

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

FINDINGS OF FACT

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

1. On March 8, 2016, the Claimant participated in a training exercise. consisting of "employees role played different scenarios." The Claimant was a videographer.

2. According to the Claimant, Ruben Hogan ran up and struck him with an open hand on the Claimant's right shoulder, grabbed the Claimant's jacket, and pushed the Claimant who started to fall backwards. At the same time, Anthony Hodges and Erma Moss came upon Claimant. Moss slapped at the Claimant's hands which were holding a camera, her feet tangled with the Claimant's feet, and they both fell to the ground. As he fell, the Claimant closed the lid on the camera and cupped the camera to protect it. The Claimant testified he fell to the left and crashed into his left shoulder. He claimed he got up by himself without help. Subsequently, the Claimant testified he flipped in the air, landed on his left shoulder, and rolled onto his right shoulder. The Claimant thereupon experienced some pain in both shoulders, but the next day his left shoulder pain became excruciating;" like it was on fire." According to the Claimant, he did not resume work after the incident occurred. Two days later, on March 10, 2016, the Claimant requested medical care and prepared an injury report in which he reported that he flipped in the air, landed on his left shoulder and arm and rolled onto the right shoulder (Respondents' Exhibit T, pp. 103, 104.) According to the Claimant, he has experienced right shoulder pain continuously since March 8, 2016.

3. Anthony Hodges participated with the Claimant in the exercise. He prepared a witness statement and noted that he and Emma Moss surprised the Claimant when they approached him from behind. Hodges and Moss reached to block the camera, the Claimant stepped back, and began to fall. The Claimant landed on his back and Moss tumbled beside him still holding the camera. Hodges helped the Claimant and Moss up. Hodges verified that everyone was okay, they laughed about

the incident, and they all continued with the next exercise; no injury detected (Respondents' Exhibit T, pp. 105, 106.)

4. Erma Moss participated with the Claimant in the exercise. She prepared a witness statement (*see* Respondents' Exhibit T pp. 107, 108). Moss testified at the hearing. According to Moss, she and Hodges approached the Claimant from behind and surprised him. Moss reached for the camera. The Claimant attempted to back away and the Claimant and Moss had a light tumble to the ground. The Claimant fell to the left and Moss fell to the right. The Claimant held onto the camera with both hands and did not let go when he fell onto his back. Hodges gave Moss and the Claimant a hand and helped them up off the ground. The Claimant did not appear injured, or mention he was hurt or injured and they laughed about the incident. All of three individuals resumed work activities. The next day, the Claimant and Moss laughed about the incident and, once again, the Claimant did not mention he was hurt or injured. Two days after the incident, employees were called to a meeting and Moss learned that the Claimant reported he was injured. Moss was surprised. **She apologized to the Claimant but the Claimant responded that Moss did not injure him; that he was hurt at a different time.** Moss testified that Ruben Hogan was not involved in the incident.

5. Two days earlier, on March 6, 2016, the Claimant reported to co-employee, Tyler Seaman (who was also a paramedic), that he experienced pain and swelling in his left lower arm and wrist. The Claimant iced his wrist but otherwise declined medical attention. Seaman prepared a witness statement about the event. (Respondents' Exhibit T, p. 110).

6. Ronald Shumate prepared a witness statement regarding the March 6, 2016, and the March 8, 2016, incidents (Respondents' Exhibit T, p. 109.)

7. Two months later, on May 11, 2016, the Claimant prepared and filed a Worker's Claim for Compensation. He identified his left shoulder as the body part injured after he was pushed to the ground and he landed on his left shoulder. He did not reference right upper extremity (RUE) problems (Respondents' Exhibit U)

8. The Respondents admitted the left shoulder claim and temporary total disability benefits remain ongoing. The latest General Admission of Liability (GAL), dated January 23, 2017, admits for matters related to the left shoulder, including medical benefits, an average weekly wage (AWW) of $1,140; and temporary total disability (TTD) benefits of $760 per week ongoing –related to the left shoulder.

Medical

9. From March 10, 2016, to April 11, 2016, the Claimant treated with Raewyn Shell, D.O., Amanda Cava, D.O. and Mark Fallinger, M.D. and at Concentra. All of the

medical providers noted complaints and treatment of left arm/shoulder symptoms. There were no references to right upper extremity symptoms (Respondents' Exhibits E, F, G, H, I, J, K, L.)

10. On March 14, 2016, Claimant followed up at Concentra with Dr. Cava. The Claimant completed and signed a Patient Information form on which he checked the box that he injured his **left** side and he wrote that he sprained **left** rotator cuff and strained trapezius muscle. He completed and signed a pain diagram that limited pain complaints to the **left** shoulder. Dr. Cava noted a history of "hurt **left** (emphasis supplied) shoulder". Neither the Claimant not the medical provider referenced a **right** shoulder complaint or problem (Respondents' Exhibit F).

11. On March 25, 2016 and April 4 and 8, 2016, the Claimant completed and signed pain diagrams that limited pain complaints to the **left** shoulder (Respondents' Exhibits H, I, K).

Claimant's Move to New York

12. The Claimant moved to New York and medical care was transferred to Joshua Steinvurzel, M.D.

13. On June 2, 2016, the Claimant presented to Dr. Steinvurzal for evaluation of left shoulder problems. Dr. Steinvurzel performed a full examination that included Claimant's head and face, respiratory, skin, neurologic, psychiatric, cervical, right upper extremity, and left upper extremity. Dr. Steinvurzal noted that the Claimant's right upper extremity reflected "no tenderness, swelling or deformities, rounded shoulder posture", strength 5/5 and normal range of motion (Respondents' Exhibit M).

14. Physical therapy notes on June 20, 22, 27, 29, July 1, 6, 8, 11, 13, 15, 18, 20, 25, 27, 2016, indicated that the Claimant complained of and treated for left shoulder problems (Respondents' Exhibit N).

15. On July 1, 2016, the Claimant presented to Dr. Steinvurzel for left shoulder complaints but, for the first time, medical records reflect right shoulder symptoms of localized tenderness. Dr. Steinvurzel recommended an MRI (magnetic resonance imaging) of the right shoulder (Respondents' Exhibit O). On July 8, 2016, Dr. Steinvurzel diagnosed impingement syndrome of the right shoulder (Claimant's Exhibit 15, p. 8).

16. On October 26, 2016, Dr. Steinvurzel performed **left** shoulder arthroscopic surgery (Claimant's Exhibit 15, pp. 12 – 15).

17. On May 16, 2017, a right shoulder MRI reflected severe posterior glenohumeral osteoarthritis with adjacent degenerative tearing of the labrum and a

subcentimeter paralabral cyst; moderate supraspinatus tendinosis with small interstitial tear; no full-thickness tear or retraction; mild infraspinatus tendinosis; moderate to severe acromioclavicular DJD (Claimant's Exhibit 16).

Independent Medical Examination (IME) by Barry Ogin, M.D.

18. On August 24, 2016, Dr. Ogin performed an IME at the request of the Respondents. Dr. Ogin reviewed medical records, took a history from the Claimant and examined him. Dr. Ogin prepared reports dated August 24, 2016, January 5, 2017, August 24, 2017, and September 1, 2017. Also, Dr. Ogin also testified at hearing. Dr. Ogin concluded that the Claimant did not suffer a work-related injury, aggravation, acceleration, or exacerbation to his right shoulder on March 8, 2016. Dr. Ogin based his opinion on multiple factors including but not limited to: Claimant's history of right shoulder injury after he fell and landed on his left shoulder and/or after a co-employee hit Claimant with an open hand, did not support a mechanism sufficient to cause his right shoulder problems; MRI results reflected long-standing chronic degeneration and not an acute injury; medical records did not mention any right shoulder pain or problems for four months after the incident; medical records reflect normal range of motion and strength in Claimant's right shoulder; Claimant's own pain diagrams during that time did not reflect any right shoulder problems; on examination, Claimant admitted he had minimal to no right shoulder pain; Claimant reported occasional right shoulder popping that was consistent with non-work related osteoarthritis reflected on the MRI. Dr. Ogin testified that had the Claimant sustained an injury to the right shoulder on March 8, 2016, to cause the damage identified in the MRI, the Claimant would have presented with prominent symptoms that would not be masked by left shoulder problems. Also, the Claimant showed signs of diabetes and diabetes may be associated with insidious onset of shoulder discomfort and adhesive capsulitis (Respondents' Exhibits A, B, C, D). The ALJ finds r. Ogin's opinions highly persuasive and credible.

Ultimate Findings

19. Insofar as the Claimant attributes his right shoulder problems and need for surgery to the admitted left shoulder injury, the ALJ finds the Claimant's testimony in this regard lacking in credibility. It is not supported by the aggregate medical histories he gave to providers. Further, the ALJ finds the opinions of Dr. Ogin more credible and persuasive than the opinions of Dr. Steinvurzel and any other opinions to the contrary.

20. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Ogin and to reject the opinions of Dr. Steinvurzel and any other opinions to the contrary –insofar as the right shoulder is concerned.

21. The Claimant has failed to prove, by a preponderance of the evidence that he sustained a compensable right shoulder injury, arising out of the admitted left

shoulder injury, on March 8, 2016. It follows that the recommended right shoulder surgery is not causally related to the admitted injury.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, insofar as the Claimant attributes his right shoulder problems and need for surgery to the admitted left shoulder injury, his testimony in this regard is lacking in credibility. It was not supported by the aggregate medical histories he gave to providers. Further, as found, the opinions of Dr. Ogin were more credible and persuasive than the opinions of Dr. Steinvurzel and any other opinions to the contrary.

Substantial Evidence

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

Burden of Proof

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The latest General Admission of Liability, dated January 22, 2017 is adopted, approved and remains in full force and effect until modified according to law.

B. Any and all claims for the compensability of the right shoulder and recommended surgery thereto are hereby denied and dismissed.

DATED this_____day of October 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2017, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

Claimant's Exhibits 1 through 18 and 20 were admitted into evidence, without objection. Respondents' Exhibits A through W were admitted into evidence, without objection.

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

ISSUES

The issues to be determined by this decision concern whether or not the Claimant sustained a compensable injury to his right shoulder, arising out of the admitted left shoulder injury of March 8, 2016; if so, whether the recommended right shoulder surgery is causally related and reasonably necessary to cure and relieve the effects thereof.

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

FINDINGS OF FACT

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

1. On March 8, 2016, the Claimant participated in a training exercise. consisting of "employees role played different scenarios." The Claimant was a videographer.

2. According to the Claimant, Ruben Hogan ran up and struck him with an open hand on the Claimant's right shoulder, grabbed the Claimant's jacket, and pushed the Claimant who started to fall backwards. At the same time, Anthony Hodges and Erma Moss came upon Claimant. Moss slapped at the Claimant's hands which were holding a camera, her feet tangled with the Claimant's feet, and they both fell to the ground. As he fell, the Claimant closed the lid on the camera and cupped the camera to protect it. The Claimant testified he fell to the left and crashed into his left shoulder. He claimed he got up by himself without help. Subsequently, the Claimant testified he flipped in the air, landed on his left shoulder, and rolled onto his right shoulder. The Claimant thereupon experienced some pain in both shoulders, but the next day his left shoulder pain became excruciating;" like it was on fire." According to the Claimant, he did not resume work after the incident occurred. Two days later, on March 10, 2016,

the Claimant requested medical care and prepared an injury report in which he reported that he flipped in the air, landed on his left shoulder and arm and rolled onto the right shoulder (Respondents' Exhibit T, pp. 103, 104.) According to the Claimant, he has experienced right shoulder pain continuously since March 8, 2016.

3. Anthony Hodges participated with the Claimant in the exercise. He prepared a witness statement and noted that he and Emma Moss surprised the Claimant when they approached him from behind. Hodges and Moss reached to block the camera, the Claimant stepped back, and began to fall. The Claimant landed on his back and Moss tumbled beside him still holding the camera. Hodges helped the Claimant and Moss up. Hodges verified that everyone was okay, they laughed about the incident, and they all continued with the next exercise; no injury detected (Respondents' Exhibit T, pp. 105, 106.)

4. Erma Moss participated with the Claimant in the exercise. She prepared a witness statement (*see* Respondents' Exhibit T pp. 107, 108). Moss testified at the hearing. According to Moss, she and Hodges approached the Claimant from behind and surprised him. Moss reached for the camera. The Claimant attempted to back away and the Claimant and Moss had a light tumble to the ground. The Claimant fell to the left and Moss fell to the right. The Claimant held onto the camera with both hands and did not let go when he fell onto his back. Hodges gave Moss and the Claimant a hand and helped them up off the ground. The Claimant did not appear injured, or mention he was hurt or injured and they laughed about the incident. All of three individuals resumed work activities. The next day, the Claimant and Moss laughed about the incident and, once again, the Claimant did not mention he was hurt or injured. Two days after the incident, employees were called to a meeting and Moss learned that the Claimant reported he was injured. Moss was surprised. **She apologized to the Claimant but the Claimant responded that Moss did not injure him; that he was hurt at a different time.** Moss testified that Ruben Hogan was not involved in the incident.

5. Two days earlier, on March 6, 2016, the Claimant reported to co-employee, Tyler Seaman (who was also a paramedic), that he experienced pain and swelling in his left lower arm and wrist. The Claimant iced his wrist but otherwise declined medical attention. Seaman prepared a witness statement about the event. (Respondents' Exhibit T, p. 110).

6. Ronald Shumate prepared a witness statement regarding the March 6, 2016, and the March 8, 2016, incidents (Respondents' Exhibit T, p. 109.)

7. Two months later, on May 11, 2016, the Claimant prepared and filed a Worker's Claim for Compensation. He identified his left shoulder as the body part injured after he was pushed to the ground and he landed on his left shoulder. He did not reference right upper extremity (RUE) problems (Respondents' Exhibit U)

8. The Respondents admitted the left shoulder claim and temporary total disability benefits remain ongoing. The latest General Admission of Liability (GAL), dated January 23, 2017, admits for matters related to the left shoulder, including medical benefits, an average weekly wage (AWW) of $1,140; and temporary total disability (TTD) benefits of $760 per week ongoing –related to the left shoulder.

Medical

9. From March 10, 2016, to April 11, 2016, the Claimant treated with Raewyn Shell, D.O., Amanda Cava, D.O. and Mark Fallinger, M.D. and at Concentra. All of the medical providers noted complaints and treatment of left arm/shoulder symptoms. There were no references to right upper extremity symptoms (Respondents' Exhibits E, F, G, H, I, J, K, L.)

10. On March 14, 2016, Claimant followed up at Concentra with Dr. Cava. The Claimant completed and signed a Patient Information form on which he checked the box that he injured his **left** side and he wrote that he sprained **left** rotator cuff and strained trapezius muscle. He completed and signed a pain diagram that limited pain complaints to the **left** shoulder. Dr. Cava noted a history of "hurt **left** (emphasis supplied) shoulder". Neither the Claimant not the medical provider referenced a **right** shoulder complaint or problem (Respondents' Exhibit F).

11. On March 25, 2016 and April 4 and 8, 2016, the Claimant completed and signed pain diagrams that limited pain complaints to the **left** shoulder (Respondents' Exhibits H, I, K).

Claimant's Move to New York

12. The Claimant moved to New York and medical care was transferred to Joshua Steinvurzel, M.D.

13. On June 2, 2016, the Claimant presented to Dr. Steinvurzal for evaluation of left shoulder problems. Dr. Steinvurzel performed a full examination that included Claimant's head and face, respiratory, skin, neurologic, psychiatric, cervical, right upper extremity, and left upper extremity. Dr. Steinvurzal noted that the Claimant's right upper extremity reflected "no tenderness, swelling or deformities, rounded shoulder posture", strength 5/5 and normal range of motion (Respondents' Exhibit M).

14. Physical therapy notes on June 20, 22, 27, 29, July 1, 6, 8, 11, 13, 15, 18, 20, 25, 27, 2016, indicated that the Claimant complained of and treated for left shoulder problems (Respondents' Exhibit N).

15. On July 1, 2016, the Claimant presented to Dr. Steinvurzel for left shoulder complaints but, for the first time, medical records reflect right shoulder symptoms of localized tenderness. Dr. Steinvurzel recommended an MRI (magnetic resonance imaging) of the right shoulder (Respondents' Exhibit O). On July 8, 2016, Dr. Steinvurzel diagnosed impingement syndrome of the right shoulder (Claimant's Exhibit 15, p. 8).

16. On October 26, 2016, Dr. Steinvurzel performed **left** shoulder arthroscopic surgery (Claimant's Exhibit 15, pp. 12 – 15).

17. On May 16, 2017, a right shoulder MRI reflected severe posterior glenohumeral osteoarthritis with adjacent degenerative tearing of the labrum and a subcentimeter paralabral cyst; moderate supraspinatus tendinosis with small interstitial tear; no full-thickness tear or retraction; mild infraspinatus tendinosis; moderate to severe acromioclavicular DJD (Claimant's Exhibit 16).

Independent Medical Examination (IME) by Barry Ogin, M.D.

18. On August 24, 2016, Dr. Ogin performed an IME at the request of the Respondents. Dr. Ogin reviewed medical records, took a history from the Claimant and examined him. Dr. Ogin prepared reports dated August 24, 2016, January 5, 2017, August 24, 2017, and September 1, 2017. Also, Dr. Ogin also testified at hearing. Dr. Ogin concluded that the Claimant did not suffer a work-related injury, aggravation, acceleration, or exacerbation to his right shoulder on March 8, 2016. Dr. Ogin based his opinion on multiple factors including but not limited to: Claimant's history of right shoulder injury after he fell and landed on his left shoulder and/or after a co-employee hit Claimant with an open hand, did not support a mechanism sufficient to cause his right shoulder problems; MRI results reflected long-standing chronic degeneration and not an acute injury; medical records did not mention any right shoulder pain or problems for four months after the incident; medical records reflect normal range of motion and strength in Claimant's right shoulder; Claimant's own pain diagrams during that time did not reflect any right shoulder problems; on examination, Claimant admitted he had minimal to no right shoulder pain; Claimant reported occasional right shoulder popping that was consistent with non-work related osteoarthritis reflected on the MRI. Dr. Ogin testified that had the Claimant sustained an injury to the right shoulder on March 8, 2016, to cause the damage identified in the MRI, the Claimant would have presented with prominent symptoms that would not be masked by left shoulder problems. Also, the Claimant showed signs of diabetes and diabetes may be associated with insidious onset of shoulder discomfort and adhesive capsulitis (Respondents' Exhibits A, B, C, D). The ALJ finds r. Ogin's opinions highly persuasive and credible.

Ultimate Findings

19. Insofar as the Claimant attributes his right shoulder problems and need for surgery to the admitted left shoulder injury, the ALJ finds the Claimant's testimony in this regard lacking in credibility. It is not supported by the aggregate medical histories he gave to providers. Further, the ALJ finds the opinions of Dr. Ogin more credible and persuasive than the opinions of Dr. Steinvurzel and any other opinions to the contrary.

20. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Ogin and to reject the opinions of Dr. Steinvurzel and any other opinions to the contrary –insofar as the right shoulder is concerned.

21. The Claimant has failed to prove, by a preponderance of the evidence that he sustained a compensable right shoulder injury, arising out of the admitted left shoulder injury, on March 8, 2016. It follows that the recommended right shoulder surgery is not causally related to the admitted injury.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions

(this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, insofar as the Claimant attributes his right shoulder problems and need for surgery to the admitted left shoulder injury, his testimony in this regard is lacking in credibility. It was not supported by the aggregate medical histories he gave to providers. Further, as found, the opinions of Dr. Ogin were more credible and persuasive than the opinions of Dr. Steinvurzel and any other opinions to the contrary.

Substantial Evidence

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

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App.

2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to meet his burden with respect to the right shoulder and the recommended surgery thereto.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The latest General Admission of Liability, dated January 22, 2017 is adopted, approved and remains in full force and effect until modified according to law.

B. Any and all claims for the compensability of the right shoulder and recommended surgery thereto are hereby denied and dismissed.

DATED this 18 day of October 2017.

EDWIN L. FELTER, JR.
Administrative Law Judge

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ISSUES

1. Did Claimant prove by a preponderance of the evidence that the right hip arthroscopy recommended by Dr. White is reasonable, necessary, and causally related to her December 27, 2013 admitted work injury?

FINDINGS OF FACT

1. Claimant works as a server at Employer's restaurant. She suffered an admitted industrial injury on December 27, 2013 due to a slip and fall accident. Claimant's feet slipped out from under her, and she fell with the most of her weight on her left side.

2. Employer did not refer Claimant to an authorized provider, so she treated with her chiropractor, Dr. David Pool.

3. In early January 2014, Claimant received a call from a "Worker's Compensation Representative" directing Claimant to the emergency room because "there was no actual provider associated with" her workers' compensation claim. Claimant went to the St. Mary Corwin Hospital ER on January 9, 2014, and stated that she "injured her left shoulder and arm, left elbow and left side." She described pain "in her left buttock that radiates to her left lateral thigh." Examination of the left hip was reported as normal except for "mild tenderness about the lateral aspect."

4. Claimant treated with Dr. Pool for almost three years after her work injury. The first six months of Dr. Pool's records are handwritten and difficult to interpret, but typewritten notes starting on July 29, 2014 reference "left hip" pain, and later notes document pain and spasm in the "left pelvic" area.

5. Respondent sent Claimant for an Independent Medical Examination (IME) with Dr. Raschbacher on November 30, 2015. Claimant explained she felt "stuck" regarding recovery from the injury. She reported pain in the left hip, left thigh and buttock. She told Dr. Raschbacher that "since this occurred, her symptoms are in the same location and of the same type." Dr. Raschbacher noted Claimant presented "in a straightforward manner." Physical examination revealed left SI joint tenderness and tenderness to palpation of the left groin, aggravated with adduction of the left hip. She also had localized tenderness of the lateral left hip over the greater trochanter. Dr. Raschbacher opined that greater trochanteric bursitis was the most likely primary diagnosis. He recommended discontinuation of chiropractic treatment because Claimant had gone well beyond the "limit" suggested by the Medical Treatment Guidelines, without appreciable long-term benefit. Dr. Raschbacher recommended an orthopedic evaluation with consideration of a left trochanteric bursa injection. He further opined that "her examination was not very suggestive of intrinsic hip joint pathology, but if a trochanteric bursa injection is done and there is persistent symptomatology, then imaging in the form

of MRI arthrogram of the left hip would not be unreasonable to consider, given her reported mechanism of injury."

6. Claimant started treating with Dr. Kenneth Danylchuk, an orthopedic surgeon, on February 16, 2016. Her most significant complain related to her low back, but she also reported left hip pain. On physical examination, she had tenderness on the left lumbar/sacral area, reduced lumbar ROM and "mild to moderate" pain in the left hip. X-rays of the left hip and lumbar spine were normal, so Dr. Danylchuk ordered a lumbar MRI.

7. Claimant returned to Dr. Danylchuk on March 22, 2016 to review the lumbar MRI, which he described as "completely normal." Claimant was frustrated that the focus was on her lumbar spine because she was more concerned about her left hip.

8. Claimant had an MRI of the left hip on April 8, 2016, which revealed a mildly displaced anterior superior labral tear.

9. Claimant followed up with Dr. Danylchuk on April 19, 2016. She reported pain globally around of the left hip joint, over the greater trochanter, and into the left buttock. Dr. Danylchuk administered a left greater trochanteric bursa injection. He noted "she asked me if this will stop her hip from dislocating. I told her I hope so. However, I think she has a poor understanding of her pain generator around the left hip and back."

10. At her next appointment on May 19, Claimant reported no benefit from the trochanteric injection. She continued to complain of pain "all over" her left hip. She said, "the pain moves around from place to place. Sometimes in the buttocks, sometimes in the lateral aspect of the hip and sometimes in the groin. She relates that her hip goes out of socket." Dr. Danylchuk recommended an intra-articular anesthetic injection of the left hip for diagnostic purposes. Claimant declined the injection and stated "if this is not going to fix the problem, she is not interested [in] doing this and wants her hip fixed. Therefore, we will make arrangements for her to be seen by Bryan White, MD for further evaluation and treatment as indicated."

11. Respondents did not authorize the referral to Dr. White but instead sent Claimant back to Dr. Raschbacher for a second IME. When discussing the intra-articular hip injection, Dr. Raschbacher noted "she did not understand what the hip injection was. It appears she understood that this might be essentially the same as a bursa injection." Dr. Raschbacher explained that "an intra-articular hip injection is quite a bit different than a bursa injection and the two are not 'comparable.' " Claimant described difficulty with various activities and motions, such as separating her legs. Her symptoms were "constant" and "not changing." Periodic chiropractic treatment was giving only "temporary" relief. Dr. Raschbacher felt Claimant presented "in a straightforward manner." Significant physical examination findings included tenderness to palpation of the left buttock and left SI joint, the lateral left hip over the greater trochanter area, and the left pelvic are above the hip joint.

12. Since Claimant had declined the intra-articular hip injection, Dr. Raschbacher opined she was at MMI with 11% lower extremity impairment for hip range of motion. Dr. Raschbacher further opined:

> I do not recommend any further treatment of any type unless [Claimant] wishes to have an intra-articular left hip injection for diagnostic and possibly therapeutic purposes. Depending on her response to that, the issue of surgery on the left hip labrum could be addressed. A diagnostic arthroscopy and possibly therapeutic arthroscopy may be in order depending on if she does an intra-articular left hip injection and what result she has with this. It appears she would possibly benefit from returning to the orthopedic physician to discuss in detail and obtain an understanding of left hip intra-articular injection.

13. Claimant returned to Dr. Danylchuk in December 2016 and expressed "frustration" that Respondents had not authorized the referral to Dr. White. Dr. Danylchuk noted the MRI had revealed a labral tear and opined "her symptoms consisting of a feeling of instability and the feeling that the hip is popping out of place certainly could be due to this abnormality." Dr. Danylchuk again referred Claimant to Dr. White, but noted treatment was "at a standstill" without authorization.

14. Claimant saw Dr. White on February 1, 2017. She described the December 2013 accident and stated: "since then, she has had deep pain in the groin, to the point now where she does feel very limited with her function and activity." On physical examination, she had "significant discomfort with the anterior impingement maneuver in this does re-create the pain she typically feels." Dr. White noted X-rays showed "significant over coverage of the acetabulum," and the MRI confirmed a labral tear on multiple sequences. He diagnosed "combined impingement with a labral tear resulting from injury on December 27, 2013." Dr. White recommended a left hip arthroscopy and a labral reconstruction as "the most predictable route to get her better."

15. Dr. Timothy O'Brien performed an IME for Respondents on March 31, 2017. The reported physical examination showed no significant findings other than pain with palpation of the mid-buttock/posterior femoral acetabular articulation. Dr. O'Brien concluded Claimant suffered only "minor" injuries as a result of the accident at work, which were limited to the neck, left arm, and left lateral thigh. He noted that she continued to work after the accident, which he opined "is the behavior of a person who has not sustained a significant injury." He opined all abnormalities shown on imaging studies were chronic, degenerative, age-related changes with "no evidence of any cause related to the work incident." Dr. O'Brien opined the chiropractic records showed "migratory" and "nonorganic" pain complaints. Dr. O'Brien noted he has treated "hundreds of patients" with hip contusions and has "never" treated a patient with a hip contusion "whose injury did not heal." Dr. O'Brien opined Claimant reached "end of healing" by January 9, 2014, and required no further treatment after that date.

16. Dr. O'Brien also disagreed with Dr. White's surgical recommendation, irrespective of causation. He noted there were no findings on his physical examination to

support a diagnosis of femoroacetabular impingement (FAI). Since he believed her pain was nonphysiologic, he did not expect it to respond to surgery.

17. Claimant saw Dr. Jack Rook for an IME at her counsel's request on April 3, 2017. In contrast to the physical examination documented by Dr. O'Brien three days earlier, Dr. Rook's exam showed left hip pain with flexion, abduction, and internal rotation of the joint, and tenderness to palpation of the hip joint anteriorly. She also had severe tenderness with palpation of the left gluteus medius muscle, trochanteric bursa, and the iliotibial band. Finally, she exhibited moderate to severe tenderness of the left sacroiliac joint. Dr. Rook diagnosed femoral acetabular impingement, possible instability, a labral tear, surrounding myofascial pain, left trochanteric bursitis, and left iliotibial band tightness. Dr. Rook thought Claimant was not at MMI and required further treatment relating to the left hip condition. He opined the hip problems and proposed surgery were causally related to the December 27, 2013 accident.

18. Dr. Rook testified at the May 26, 2017 hearing to reiterate and elaborate on the opinions expressed in his IME report. He opined the mechanism of injury was consistent with the labral tear shown on the MRI. Given that Claimant's hip was "completely asymptomatic" before the accident, he believed the fall likely caused the labral tear. He summarized the basis for his causation opinion as:

> [T]he patient was not having any hip problems prior to [the accident]. She sustained a traumatic event with significant mechanical forces applied to her hip. She developed immediate hip problems which have persisted to this day. She has had a sensation of instability which is consistent with the finding of the labral tear.

19. Dr. White testified for Claimant in a post-hearing deposition on August 2, 2017. He explained Claimant's physical examination findings were consistent with FAI, namely pain with flexion and internal rotation of the hip. He testified we cannot determine the acuity of the labral tear from the MRI. He opined the tear was either caused by the fall or was pre-existing but asymptomatic before being aggravated by the fall. Regarding the typical distribution of symptoms from a labral tear, Dr. White testified

> labral tears typically cause pain in the groin, down the front of the thigh to the knee, on the side of the hip and into the buttock. Those are the four locations that labral tears can create pain.

20. Dr. White reviewed some of Claimant's pain diagrams and opined they were consistent with a labral tear. Dr. White outlined his rationale for surgery and opined Claimant fits the metrics he typically uses when deciding whether to recommend surgery. He did not think an intra-articular injection was a necessary prerequisite to surgery.

21. Dr. O'Brien testified on behalf of Respondents in a post-hearing deposition on August 17, 2017. Dr. O'Brien agreed with Dr. White that a fall could cause an asymptomatic labral tear or FAI to become symptomatic, but did not believe that happened in this case. He emphasized the lack of any explicit reference to "groin" pain

until well after Claimant's injury. Dr. O'Brien opined that when FAI or a labral tear causes pain, it "always" causes pain in the hip joint, and if Claimant had a labral tear from the outset, she would have identified groin pain "with 95 percent certitude."[1] He also reiterated that surgery is unlikely to help Claimant due to the "diffuse" nature of her symptoms. He felt there was "zero percent" chance Claimant's symptoms can be explained by FAI or a labral tear.

22. Claimant's description of her post-injury course of symptoms is credible.

23. The opinions of Dr. White, Dr. Rook, and Dr. Raschbacher are more persuasive than the contrary opinions expressed by Dr. O'Brien.

24. Claimant proved by a preponderance of the evidence that the left hip arthroscopy recommended by Dr. White is reasonable, necessary, and causally related to the admitted injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even after an admission of liability is filed, the respondents retain the right to dispute the relatedness of any particular treatment, because the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonable and necessary." Section 8-42-101(1)(a). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201, C.R.S.

As found, Claimant proved that the proposed hip surgery is more likely than not related to the December 2013 accident. Claimant's mechanism of injury was sufficient to cause or aggravate a labral tear, and she has complained of left hip pain throughout her course of treatment. The ALJ is not persuaded by Dr. O'Brien's opinion that a patient with a labral tear would invariably report groin pain. Rather, the ALJ credits Dr. White's opinion that, although groin pain is the "classic" symptom of a labral tear, it can also cause pain

[1] Dr. O'Brien conceded FAI or labral tears can manifest as buttock pain, but opined that presentation is "not quite as common."

on the side of the hip and into the buttock. Those symptoms are well-documented throughout the medical record.

Furthermore, Dr. Pool repeatedly documented pain and spasm in the left pelvic area, which could reasonably be interchanged with left "groin" pain. Claimant has no known diagnosis that relates to the pelvis *per se*, and Dr. Pool's repeated references to left pelvis pain support Claimant's testimony that she has experienced pain in an area that can fairly be describe as the "groin" since the accident. To deny a causal connection simply because Claimant did not explicitly refer to "groin" pain, despite repeated documentation of "left pelvis" pain, puts too fine a point on terminology used by providers and patients.

Nor is the ALJ persuaded by Dr. O'Brien's assertion that Claimant's physical examination was essentially normal, given the abnormal exams documented by Dr. Raschbacher in November 2016, Dr. White in February 2017 and Dr. Rook in April 2017.

Dr. Raschbacher performed two IMEs at Respondents' request. Although he initially thought greater trochanteric bursitis was the most likely diagnosis, he also recognized the possibility that her symptoms were due to intra-articular pathology. Claimant has essentially followed the path outlined in Dr. Raschbacher's IME report and is now pending the surgery he suggested. Coupled with the opinions of Dr. White and Dr. Rook, the ALJ is persuaded the proposed hip surgery is more likely than not related to Claimant's admitted December 2013 injury.

The ALJ has also credited Dr. White's opinions in finding the proposed surgery is reasonably necessary.

ORDER

It is therefore ordered that:

1. Insurer shall pay for all reasonable and necessary medical treatment to cure and relieve the effects of the injury to Claimant's left hip, including the surgery recommended by Dr. White.

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

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

DATED: October 19, 2017

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

ISSUES

I. Whether Claimant sustained a compensable injury on January 5, 2017.

II. Whether Claimant is entitled to reasonable, necessary, and related medical benefits.

III. Claimant's average weekly wage ("AWW").

IV. Whether Dr. Neville is an authorized treating provider.

V. Whether Claimant is entitled to temporary total disability ("TTD") benefits and/or temporary partial disability ("TPD") benefits.

VI. Whether Respondents are subject to penalties for allegedly violating Section 8-43-503(3), C.R.S.

FINDINGS OF FACT

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

1. Claimant is an employee of Respondent-Employer, EmployBridge, a temporary employment agency. **Hearing Tr. 57:15-21.** Claimant was assigned to work for Pro Mold in July 2016. **Hearing Tr. 58:17-25.**

2. While working at Pro Mold, on January 5, 2017, Claimant sustained a laceration to her forehead when she walked into a stationary backhoe in Pro Mold's parking lot.

3. Pro Mold owns and maintains the parking lot which is contiguous to its building. It is a private parking lot closed each night by blocking the entrance with a locked gate. The parking was provided for the benefit of Pro Mold's employees, including Claimant, and its customers. The parking lot is a portion of Employer's premises.

4. Most Pro Mold employees drive to and from work, and park in the parking lot owned and maintained by Pro Mold.

5. Pro Mold is located in Berthoud Colorado. **Hearing Tr. 58:23**.

6. Claimant lived in Johnstown Colorado and her residence was approximately 11 to 11 ½ miles from Pro Mold. **Hearing Tr. 38:5-10.**

7. Claimant had to drive to Pro Mold to get to work. Claimant could not get to Pro Mold via a public bus or light rail. **Hearing Tr. 38:11-19.**

8. Both Claimant and Pro Mold benefited from Claimant's use of the parking lot.

9. On January 5, 2017, Claimant parked her car in the Pro Mold parking lot at approximately 7:45 a.m. and walked into Pro Mold to start work. **Hearing Tr. 62:19-21.** The parking lot is contiguous to the building in which Claimant worked. It had been snowing and the parking lot was covered with snow and was icy. **Hearing Tr. 62:16-17.** Claimant clocked in and began working at 8:00 a.m. At approximately 8:45 a.m., Chris Ensely of Pro Mold, and Claimant's supervisor, asked Claimant to move her car to a different parking space to allow the owner of Pro Mold, Jerry Campbell, to plow the Pro Mold parking lot with a backhoe. **Hearing Tr. 62:22-25.** Allowing the parking lot to be plowed was a benefit to Pro Mold as well as its customers, employees, and Claimant. Claimant, while she was on the clock, went to move her car as requested. After Claimant moved her car, she started walking back into Pro Mold and saw the bucket of the backhoe. **Hearing Tr. 63:17-21, 64:6-8.** Claimant testified that she thought she was going to clear the bucket but instead walked into it and hit her head. **Hearing Tr. 64:18-23, 65:5-9.**

10. Mr. Campbell witnessed Claimant walk into the bucket of the backhoe while in the parking lot. **Hearing Tr. 128:13-23, 129:12-20.** Mr. Campbell jumped off the backhoe and noticed Claimant's head was bleeding. **Hearing Tr. 130:22-131:5.** Mr. Campbell was able to communicate with Claimant. **Hearing Tr. 131:17-22.** Another employee of Pro Mold, Christine Lebeda, took her to the E.R. **Hearing Tr. 132:11-17.**

11. Claimant moving her car at the direction of her supervisor so the parking lot could be plowed, and being in the parking lot at the time of the accident, was sufficiently incidental to her work and employment. Moreover, had Claimant not moved her car at the direction of her supervisor, she would have not walked into the backhoe and been injured.

12. Matthew Lebeda, Pro Mold's Maintenance and Set up Technician, testified Pro Mold's parking lot is open to the public during business hours and that Claimant was allowed to park anywhere in Pro Mold's parking lot as there were no assigned parking spaces. **Hearing Tr. 103:14-16, 106:8-107:3.** However, only Pro Mold's employees, including Claimant, and its customers, use the parking lot on a regular basis. The parking lot is not shared with other businesses. And, although the parking lot could be used by the general public during the day, there is no reason for the general public to use the parking lot.

13. Ms. Lebeda was Pro Mold's Office Manager. Claimant was not required to have her personal vehicle at Pro Mold or drive for Pro Mold. **Hearing Tr. 112:25-113:5.** Claimant was hired as a temporary, full-time machine operator. **Hearing Tr. 113:5-8, 114:6-9.** Claimant was earning $10.00 per hour. **Hearing Tr. 29:23.** Claimant's job duties included sorting, trimming, and putting parts into cartons. **Hearing Tr. 113:14-114:5.** As a full time machine operator, Claimant frequently worked 40 hours per week while working for Pro Mold. **Ex 16.**

14. While Ms. Lebeda was driving Claimant to the E.R. on January 5, 2017, Claimant appeared to be relatively normal. **Hearing Tr. 117:20-118:4.** When Claimant was questioned by the medical providers, Claimant had no problems understanding their questions or providing them with responses. **Hearing Tr. 115:22-24, 116:22-25, 117:1-7.** From January 9, 2017 to January 24, 2017, Claimant told Ms. Lebeda that she was feeling good. **Hearing Tr. 119:10-23, 121:2-4.** Claimant worked up until February 21, 2017. **Hearing Tr. 121:2-4.** Ms. Lebeda was not aware as to why Claimant did not return to Pro Mold after February 21, 2017 even though there was work available for her. **Hearing Tr. 121:2-5, 13-25.**

15. During her initial evaluation at MCR's E.R. on January 5, 2017, Claimant recollected everything fairly well and denied dizziness, syncope, or light-headedness. **Ex. A:4-5.** A CT of the brain was normal and revealed no acute intracranial abnormality. **Ex. A:6, 11-13.** On exam, Claimant had a laceration on the top of her head but her head was otherwise atraumatic. **Ex. A:5.** Claimant also displayed a full range of motion of her neck and was non-tender to palpation of the cervical spine. **Ex. A:5-6.** Claimant was diagnosed with a scalp laceration, concussion without loss of consciousness, and neck strain. **Ex. A:3.** The laceration was repaired with suture staples and Claimant was discharged the same day. **Ex. A:3.**

16. On January 10, 2017, Claimant returned to MCR due to some headaches and nausea. **Ex. A:14.** Claimant, however, had a normal neurologic exam. **Ex. A:14.** Claimant denied vomiting, visual changes, or confusion. **Ex. A:14.** Claimant was also negative for neck pain and stiffness as well as dizziness and weakness. **Ex. A:15.** Following the evaluation, the medical records document that no further workup was needed. **Ex. A:14.**

17. On January 12, 2017, Claimant presented to James Hebard, M.D., at Banner Occupational Health Clinic ("Banner") and began treating with Dr. Hebard. **Ex. B:24-28.** Claimant reported a history of thyroid disease and high blood pressure and denied a history of loss of consciousness. **Ex. B:25.** Claimant reported that she struck the top of her head on January 5, 2017 and noticed left jaw pain about two days after the injury. **Ex. B:27.** Following the injury, Dr. Hebard noted that Claimant had returned to full duty on January 9, 2017. **Ex. B:27.** During the evaluation, Claimant was negative for blurred vision and light sensitivity; however, she was positive for complaints of dizziness, headache, numbness and

neck pain. **Ex. B:26.** On exam, Claimant was not in acute distress, Claimant's left jaw was not sore and not tender to palpation, and her eyes, ears, nose, and throat were unremarkable. **Ex. B:27.** Dr. Hebard removed the suture staples. Following his exam, Dr. Hebard referred Claimant to physical therapy and released Claimant to full duty. **Ex. B:24, 27-28.**

18. On January 17, 2017, due to subjective complaints of ongoing headaches and neck pain, Claimant had a second CT of the brain at MCR, which was normal. **Ex. A:19-20.** Claimant also had a CT of the cervical spine, which revealed no acute bony abnormality and potentially significant C5-6 foraminal narrowing. **Ex. A:19.** Claimant denied having any cervical radiculopathy or any other associated symptoms. **Ex. A:20.** On exam, Claimant had no focal deficits, paresthesias, or vision changes. **Ex. A:17.** Claimant also displayed a normal range of motion of the neck and normal gait. **Ex. A:17-18.** Claimant was discharged in good and improved condition. **Ex. A:20.**

19. On January 24, 2017, Claimant's physical therapist called Dr. Hebard and advised him that Claimant was experiencing increasing headaches. Therefore, Dr. Hebard referred Claimant for a neurology consult. **Ex. 8:84.**

20. On February 2, 2017, Claimant returned to Dr. Hebard for additional treatment. **Ex. 8:84-85.** Claimant complained of increasing headaches, nausea and vomiting. Dr. Hebard indicated Claimant's neurology evaluation was set for February 21, 2017. However, due to Claimant's complaints and contention of increasing headaches, 10/10 pain, nausea and vomiting, Dr. Hebard referred Claimant back to the MCR Emergency Room for evaluation. **Ex. 8:84-85.**

21. On February 2, 2017, Claimant returned to MCR's Emergency Room. Despite her complaints, she had a normal neurological exam. **Ex. A:21.** Claimant denied visual disturbance, neck stiffness, speech difficulty, weakness, or numbness. **Ex. A:22.** On exam, Claimant's neck was supple and had normal reflexes. **Ex. A:22.** Although part of the reason Dr. Hebard referred Claimant back to MCR's Emergency Room was Claimant's contention that she had nausea and was vomiting, Claimant denied nausea and vomiting at the MCR Emergency Room. **Ex A:21**. Thus, Claimant's subjective report of symptoms was not consistent on the same day.

22. Although Claimant was already treating with Dr. Hebard for her work related accident, Claimant went to her primary care doctor, Thomas Neville, M.D., on her own on February 14, 2017. **Hearing Tr. 79:12-14.**

23. Based on a referral from Dr. Hebard, Claimant presented to Reena Dhakal, N.P., from February 21, 2017 to May 2, 2017. **Ex. F:115.** Ms. Dhakal is a nurse practitioner specializing in neurology. Ms. Dhakal testified that she did not staff Claimant's case with medical doctors. **Ex. F:121.** Other than the slight tenderness and scalp laceration, Claimant had a normal physical examination on

January 5, 2017. **Ex. F:118.** Claimant's scalp laceration had resolved by the date of her initial evaluation on February 21, 2017. **Ex. F:121.** On February 21, 2017, Claimant reported to Ms. Dhakal that she was having daily headaches and that narcotics did not relieve her symptoms. **Ex. F:116.** Other than documenting Claimant had a tandem gait, Claimant had a normal physical examination on February 21, 2017. **Ex. F:119.** Ms. Dhakal placed Clamant off work due to Claimant's subjective complaints of a headache. **Ex. F:119-120.** Ms. Dhakal also saw Claimant on March 21, 2017 and May 2, 2017 and that her physical examinations were within normal limits and there was no reason Claimant could not have returned to work. **Ex. F:120.** On May 2, 2017, there was no objective evidence of vertigo/balance issues. **Ex. F:120.**

24. On March 6, 2017, Claimant presented to Kevin A. Tanner, O.D., for an annual eye exam. **Ex. C:30-31.** During the evaluation, Dr. Tanner noted that Claimant was not experiencing headaches, double vision, or blurred/uncomfortable vision. **Ex. C:30.** Claimant denied treatment for musculoskeletal or neurologic issues. **Ex C:30.** Claimant's presentation to Dr. Tanner is inconsistent with her presentation to other medical providers.

25. Claimant continued to treat with Dr. Hebard in April and May 2017. **Hearing Tr. 79:15-17.** According to Dr. Hebard, Claimant's scalp laceration, left jaw contusion, and right hip contusion were at MMI as of February 2, 2017. **Dr. Hebard's Deposition Tr. Tr. 29:15-30:7, 57:7-14.** According to Dr. Hebard, Claimant's musculoskeletal complaints had reached MMI with no impairment as of April 10, 2017. **Dr. Hebard's Deposition Tr. 39:1-17.**

26. On June 14, 2017, Kathleen D'Angelo, M.D., conducted an Independent Medical Examination ("IME") at the request of Respondents. **Ex. D:32-81.** Despite the medical records to the contrary, Claimant reported to Dr. D'Angelo that she did not walk into the backhoe but instead the backhoe drove into her and that she was knocked out. **Ex. D:35-36, 44-45.** Additionally, although there is no mention of hip or jaw pain in the January 5, 2017 medical record, Claimant reported that she hit her jaw and also experienced hip pain following the incident. **Ex. D:37, 47.** Despite driving from January 9, 2017 to May 11, 2017 **(Hearing Tr. 67:8-14, 92:8-10, 14-17)**, Claimant told Dr. D'Angelo that she was not able to drive. **Ex. D:37.** Claimant also reported that she had short-term memory loss, which was not reported by Claimant or mentioned in the medical records until February 21, 2017. **Ex. D:40, 50.** Similarly, Claimant complained of cervical radiculopathy, which was not reported by Claimant or mentioned in the medical records until March 31, 2017. **Ex. D:51.** Dr. D'Angelo noted that Claimant readily confirmed pain to just about any area she mentioned. **Ex. D:38.** Claimant reported that she was taking various pain medications including Gabapentin, which Claimant admitted to being on prior to the date of injury. **Ex. D:39.**

27. When Claimant was evaluated by Dr. DAngelo, her chief complaints were headaches, dizziness, neck pain, right leg pain, memory loss, problems thinking, insomnia, depression, shoulder pain, and hip pain**. Ex. D:33.**

28. On exam, Dr. D'Angelo noted that although Claimant had marked complaints of diffuse pain, and indicated she avoided bright lights, Claimant was in no apparent distress – even with the bright lights in the room. **Ex. D:40-41.** Dr. D'Angelo opined that Claimant was an unreliable historian and her reports of pain are a consequence of conscious malingering or factitious, somaticizing disorder. **Ex. D:54.**

29. Based on her examination and review of the medical records, Dr. D'Angelo opined that Claimant did not suffer a mild traumatic brain injury, also known as a concussion, as a result of the January 5, 2017 incident because she had no findings on physical examination consistent with mild traumatic brain injury during her initial E.R. visit at MCR. **Ex. D:54.** Dr. D'Angelo noted Claimant's symptoms expanded and worsened following her initial E.R. visit, which is inconsistent with either a traumatic brain injury or spinal trauma. **Ex. D:55.** Dr. D'Angelo opined that it is not medically probable for neurological complaints to worsen as time passes following a head injury. **Ex. D:55.**

30. Dr. D'Angelo opined that Claimant's cervical, thoracic, and lumbar spine and cervical radicular complaints are not a result of the January 5, 2017 incident. **Ex. D:63.** Dr. D'Angelo opined that the cervical MRI revealed chronic degeneration anticipated in a 52-year-old like Claimant. **Ex. D:59.** Dr. D'Angelo opined that Claimant's physical examination findings and complaints were not consistent with cervical radiculopathy. **Ex. D:62.** Dr. D'Angelo diagnosed Claimant with a work-related head contusion, myofascial/cervical spine irritation, and head laceration, which were all at MMI. **Ex. D:63.**

31. Following the IME, Dr. D'Angelo testified consistent with her IME report on July 20, 2017. **Ex. E:82-110.** Additionally, Dr. D'Angelo criticized Ms. Dhakal for opining that memory loss and dizziness can have a later onset as that is inconsistent with the medical literature and guidelines. **Ex E:89-90.** In sum, Dr. D'Angelo opined that Claimant was at MMI with no impairment and that Claimant did not require future treatment. **Ex. E:90-91.**

32. Dr. D'Angelo also credibly testified that the January 5, 2017 accident and injury did not cause any disability which precluded Claimant from performing her regular job. **Ex. E:27.**

33. This ALJ finds Dr. D'Angelo's report and testimony to be credible and persuasive as it relates to the extent of Claimant's injuries due to the January 5, 2017, accident and lack of any disability.

34. This ALJ finds Claimant is not credible for the following reasons. First, Claimant specifically told the emergency room personnel that the backhoe was stationary and she walked into it at the time of the accident. However, Claimant told Dr. D'Angelo that the backhoe ran into her. This ALJ finds that Claimant's embellishment of the extent of the accident is an attempt to substantiate the extent of Claimant's subjective complaints.

35. Second, Claimant initially stated that she was not sure if she lost consciousness at the time of the accident. However, as time went on, Claimant started telling providers that she lost consciousness due to the accident. Again, this ALJ finds Claimant's change regarding whether she lost consciousness is an attempt to exaggerate the extent of the accident and substantiate her subjective complaints.

36. Third, according to Dr. D'Angelo, true head injury symptoms are worse at first, and then get better over time. In this case, Claimant's subjective symptoms worsened over time. Claimant's worsening of subjective symptoms is inconsistent with a concussion or mild traumatic brain injury. As stated by Dr. D'Angelo, "Despite this medical understanding of the clinical course of MTBI [mild traumatic brain injury], [Claimant] and her providers, continued to ascribe the patient's increasing number of subjective complaints to her mild brain injury; this included an expanding list of symptoms that progressed and worsened over time, which is not a medically anticipated outcome of mild brain injury."

37. Fourth, Claimant's physical presentation to Dr. D'Angleo was inconsistent with her physical complaints. For example, Claimant complained of severe neck pain which prohibited her from range of motion testing during the examination. However, Claimant was able to move her neck freely and without apparent discomfort during the discussion phase of the evaluation with Dr. D'Angelo. In addition, Claimant complained of 10/10 headache pain. Claimant, however, did not exhibit any signs of suffering from a severe headache during her examination with Dr. D'Angelo.

38. Fifth, Claimant also complained of cervical radiculopathy to both upper extremities as well as thoracic, lumbar, right hip and jaw pain. However, Claimant's physical findings were devoid of hypertonicity, neurological deficits, or appropriate pain behaviors which could have supported such symptoms. Moreover, Claimant's cervical MRI displayed findings of chronic degeneration anticipated in a 52-year-old patient rather than evidence of acute traumatic injury.

39. Sixth, this ALJ had the opportunity to observe Claimant testify at the hearing and observe her demeanor, which included Claimant's intonations, facial expressions, gestures, fluid movements, and the like. Such observations contradicted Claimant's testimony and physical complaints to the various medical providers regarding the extent of her symptoms which she contends flow from the accident.

40. Therefore, this ALJ Finds Claimant is not a reliable or consistent historian regarding how the accident occurred. This ALJ also finds that Claimant is not a reliable or accurate historian regarding the extent of her symptoms due to the work accident. This ALJ further finds that Claimant's subjective complaints to her medical providers are not reliable and are not accurate. Therefore, Claimant is found to not be credible.

41. This ALJ does not find Dr. Hebard's reports and testimony to be persuasive regarding the extent of Claimant's January 5, 2017, injury and any disability caused by the accident because Dr. Hebard relied upon Claimant's subjective complaints which this ALJ does not find credible.

42. This ALJ also does not find Reena Dhakal's, N.P., reports or testimony to be persuasive regarding the extent of Claimant's January 5, 2017, injury, and any disability caused by the accident because Ms. Dhakal also relied upon Claimant's subjective complaints which this ALJ does not find credible.

43. This ALJ is aware that numerous physicians have diagnosed Claimant with a concussion and/or post concussive syndrome. However, each physician based their diagnosis on Claimant's subjective complaints which this ALJ has found to not be reliable or credible. Therefore, this ALJ does not find the diagnosis of a concussion or post concussive syndrome made by numerous physicians to be reliable or accurate.

44. Claimant did suffer an injury due to the January 5, 2017 accident. Claimant's injury is limited to the laceration on the top of her head.

45. Claimant is entitled to medical treatment to cure and relieve her from the effects of her head laceration.

46. The January 5, 2017 accident and injury, which consisted of a head laceration, did not cause any disability and did not preclude Claimant from performing her regular job. Therefore, Claimant did not miss more than three days of work due to her head laceration.

47. Claimant was hired to work full time, 40 hours per week and was paid $10.00 per hour. Claimant frequently earned $400.00 per week. Therefore, Claimant's average weekly wage is $400.00.

48. Respondents denied liability for Claimant's claim.

49. Respondents did not provide Claimant a designated provider list. Therefore, the right of selection passed to Claimant. On January 12, 2017, Claimant exercised her right of selection by going and treating with Dr. Hebard at Banner beginning on January 12, 2017. In addition, Claimant continued treating with Dr. Hebard at

Banner through May 11, 2017. Thus, Claimant's actions evidenced her selection of Dr. Hebard at Banner. Dr. Hebard is an authorized provider.

50. Claimant did not request permission to treat with Dr. Neville. Dr. Hebard, who is Claimant's authorized treating physician, did not refer Claimant to Dr. Neville. Dr. Neville is not an authorized provider.

51. Respondents did not dictate to any of Claimant's treating physicians the type or duration of treatment regarding her work related accident or the degree of physical impairment.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant sustained a compensable injury on January 5, 2017.

Compensability

In Colorado, only those injuries "arising out of" and "in the course of employment," are compensable under the Workers' Compensation Act. Section 8-41-301(l)(b), C.R.S. The course of employment requirement is satisfied when the claimant shows that the injury occurred within the time and place limits of the employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991).

It is now practically universally accepted that a parking lot adjacent to an employer's business is a part of the employer's premises. *See Rodriguez v. Exempla Healthcare, Inc*., W.C. No. 4-705-673 (April 30, 2008). In support of this holding, the Panel in *Rodriguez v. Exempla Healthcare* quoted Professor Larson as follows:

> As to parking lots owned by the employer, or maintained by the employer for its employees, practically all jurisdictions now consider them part of the "premises," whether within the main company premises or separated from it. This rule is by no means confined to parking lots owned, controlled, or maintained by the employer. The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's permission, or just used, by the employees of this employer. Thus, if the owner of the building in which the employee works provides a parking lot for the convenience of all tenants, or if a shopping center parking lot is used by employees of businesses located in the center, the rule is applicable, (emphasis in original).

Larson's Workers' Compensation Law, § 13.04 [2] [a] [b] (footnotes omitted); see also *State Compensation Insurance Fund v. Walter*, 354 P.2d 591 (Colo. 1960) (upholding award of compensation to claimant injured while crossing public street between employer's parking lot and employer's shop); *Woodruff World Travel, Inc. v. Industrial Commission*, 554 P.2d 705 (Colo. App. 1976) (parking lot was provided for use by employer's employees, employer was aware its employees used the lot, and lot constituted "an obvious fringe benefit to claimant"); *Friedman's Market, Inc. v. Welham*, 653 P.2d 760 (Colo.App. 1982) (fact that respondent did not own or control the parking lot does not, as a matter of law, mandate a different result); *Seltzer v. Foley's Department Store*, W. C. No. 4-432-260 (September 21, 2000) (claimant's parking lot

injury compensable even though it occurred while claimant was off the clock, and at a place where the risk was shared by the general public). Additionally, once a parking lot has achieved the status of "a portion of the employer's premises, compensation coverage attaches to any injury that would be compensable on the main premises." Larson's Workers' Compensation Law, § 13.04 [2] [b].

In this case, the parking lot where Claimant walked into the backhoe was situated contiguous to the building where Claimant worked. In addition, the parking lot belonged to Pro Mold, was controlled by Pro Mold, and was used primarily by its customers, employees, and Claimant. The parking lot was for the benefit of Pro Mold's employees and Claimant. The parking lot was a portion of Pro Mold's premises. In addition, Claimant was "on the clock" at the time of the accident. Therefore, Claimant's accident occurred within the course of her employment.

The inquiry does not stop there, however, and Claimant must also satisfy the "arising out of" requirement for compensability. The "arising out of" element is narrower than the "course" element and requires the claimant to prove that the injury had its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando, supra*. The "arising out of test is one of causation. *See Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *City of Brighton v. Rodriquez*, supra.

In order to satisfy the arising out of requirement, it is not necessary that the claimant actually be engaged in performing job duties at the time of the injury. *See Employers' Mutual Ins. Co. v. Industrial Commission*, 76 Colo. 84, 230 P. 394 (1924). Our courts have recognized that it is not essential for the compensability determination that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer so long as the employee's activities are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *See also Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996) (an activity arises out of employment if it is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment"). It is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo.App. 1995). Moreover, injuries sustained in parking lots which are provided by the employer for the benefit of employees arise out of the employment because they are a normal incident to the employment relationship. *Seltzer v. Foley's Department Store*, W. C. No. 4-432-260 (September 21, 2000) (claimant's parking lot injury compensable even though it occurred while claimant was off the clock, and at a place where the risk was shared by the general public).

In this case, Claimant, while on the clock, was specifically asked by her supervisor to move her car in the parking lot so Pro Mold's owner, Jerry Campbell, could plow the parking lot for the benefit of their employees, customers, and Claimant. The parking lot was provided for the benefit of Pro Mold's employees, customers, and Claimant. While walking back inside, after moving her car, Claimant walked into and hit the bucket of the backhoe which was in the parking lot. This ALJ concludes that Claimant's actions of moving her car and then trying to return to work, when she walked into the bucket of the backhoe while in the parking lot, was sufficiently incidental to the work itself to be properly considered as arising out of and in the course of her employment.

Therefore, this ALJ concludes Claimant has proven by a preponderance of the evidence that she suffered a compensable injury on January 5, 2017 when she hit her head on the bucket of the backhoe in the parking lot.

Compensable Conditions

Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. No benefits flow to the victim of an industrial accident unless the accident causes an injury. See *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant has established by a preponderance of the evidence that she suffered a compensable accident on January 5, 2017. However, this ALJ concludes that the condition, or injury, suffered by Claimant is limited to the laceration on her head.

As found, Claimant is not a reliable historian regarding the extent of her symptoms. Claimant was not found to be credible for the following reasons. First, Claimant specifically told the emergency room personnel that the backhoe was stationary and she walked into it at the time of the accident. However, Claimant told Dr. D'Angelo that the backhoe ran into her. This ALJ concludes that that Claimant's embellishment of the extent of the accident is an attempt to substantiate Claimant's subjective complaints.

Second, Claimant initially stated that she was not sure if she lost consciousness at the time of the accident. However, as time went on, Claimant started telling providers that she lost consciousness due to the accident. Again, this ALJ concludes Claimant's change in history regarding whether she lost consciousness is an attempt to exaggerate the extent of the accident and substantiate her subjective complaints.

Third, according to Dr. D'Angelo, true head injury symptoms are worse at first and then get better over time. In this case, Claimant's subjective symptoms worsened over time. Claimant's worsening of subjective symptoms is inconsistent with a concussion or mild traumatic brain injury. As stated by Dr. D'Angelo, "Despite this medical understanding of the clinical course of MTBI [mild traumatic brain injury], [Claimant] and her providers, continued to ascribe the patient's increasing number of subjective complaints to her mild brain injury; this included an expanding list of symptoms that progressed and worsened over time, which is not a medically anticipated outcome of mild brain injury."

Fourth, Claimant's physical presentation to Dr. D'Angleo was inconsistent with her physical complaints. For example, Claimant complained of severe neck pain which prohibited her from range of motion testing during the examination. However, Claimant was able to move her neck freely and without apparent discomfort during the discussion phase of the evaluation with Dr. D'Angelo. In addition, Claimant complained of 10/10 headache pain. Claimant however, did not exhibit any signs of suffering from a severe headache during her examination with Dr. D'Angelo.

Fifth, Claimant also complained of cervical radiculopathy to both upper extremities as well as thoracic, lumbar, right hip and jaw pain. However, Claimant's physical findings were devoid of hypertonicity, neurological deficits, or appropriate pain behaviors which could have supported such complaints. Moreover, Claimant's cervical MRI displayed findings of chronic degeneration anticipated in a 52-year-old patient rather than evidence of acute traumatic injury.

Sixth, this ALJ had the opportunity to observe Claimant testify at the hearing and observe her demeanor, which included Claimant's intonations, facial expressions, gestures, fluid movements, and the like. Such observations contradicted Claimant's testimony and physical complaints to the various medical providers regarding the extent of her symptoms which she contends flow from the accident.

Therefore, this ALJ concludes that Claimant's injury is limited to the laceration on the top of her head. This ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that she suffered any other injuries. Thus, this ALJ concludes that Claimant did not suffer a concussion or traumatic brain injury due to the January 5, 2017 accident and Claimant's numerous alleged neurological symptoms are not due to the accident. In addition, this ALJ also concludes that Claimant failed to establish by a preponderance of the evidence that she injured her jaw, neck, shoulders, back, right hip, leg, or any other body part due to the January 5, 2017 accident.

II. Whether Claimant is entitled to reasonable, necessary, and related medical benefits.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, and set forth above, Claimant's injury is limited to the laceration to her head. Therefore, this ALJ concludes that Claimant is entitled to reasonable, necessary, and related medical treatment to cure and relieve Claimant from the effects of the January 5, 2017 laceration to her head. This includes the January 5, 2017 medical treatment provided by the emergency department and the January 12, 2017 treatment provided by Dr. Hebard when he evaluated Claimant's laceration and removed the suture staples.

As found, and set forth above, Claimant's other conditions and complaints were not caused by the January 5, 2017 accident. Therefore, this ALJ concludes that Claimant is not entitled to medical treatment for her other alleged conditions and alleged symptoms including, but not limited to, concussion, post concussive syndrome, traumatic brain injury, headaches, memory loss, problems thinking, dizziness, vertigo, insomnia, depression, jaw pain, leg pain, neck pain with radiculopathy, back pain, shoulder pain, and right hip pain.

III. Claimant's Average Weekly Wage.

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

As a full time machine operator, Claimant frequently worked 40 hours per week while working for Pro Mold and was paid $10.00 per hour. Claimant frequently earned $400.00 per week. Thus, her earning capacity at the time of the injury was $400.00 per week. Therefore, this ALJ concludes that Claimant's average weekly wage is $400.00.

IV. Whether Dr. Neville is an authorized provider.

The insurer or employer has the right in the first instance to select the physician to attend the injured employee. Section 8-43-404(5)(a), C.R.S. Once the insurer or employer has exercised its right to select the treating physician, the claimant may not change physicians without permission from the insurer, employer, or an ALJ. *See Gianetto Oil Co. v. Indus. Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, if the employer fails timely to tender the services of a physician, the right of selection passes to the claimant and the claimant is entitled to have the physician she selects be an authorized treating provider. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Once the claimant selects an authorized treating physician, she is not free to retain additional physicians without procuring permission from the employer, insurer, or an ALJ. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colo. State Hosp.*, 513 P.2d 228 (Colo. 1973). The Panel has previously held that where a claimant has signified "by words or conduct that she has chosen a physician to treat the industrial injury" she has made a physician selection. *Williams v. Halliburton Energy Servs.*, W.C. 4-995-888-01 (ICAO Oct. 28, 2016).

Claimant has failed to establish by a preponderance of the evidence that Dr. Neville is an authorized provider. This ALJ concludes that Dr. Hebard at Banner is Claimant's authorized treating provider and not Dr. Neville. Respondents did not timely provide Claimant a designated provider list consistent with W.C.R.P. 8. Thus, the right of selection passed to Claimant. Then, on January 12, 2017, Claimant exercised her right of selection by going and treating with Dr. Hebard at Banner beginning on January 12, 2017. Claimant continued treating with Dr. Hebard at Banner through May 11, 2017. Claimant never requested permission to treat with Dr. Neville. Dr. Hebard did not refer Claimant to Dr. Neville. Therefore, Claimant's actions evidenced her selection of Dr. Hebard at Banner and Dr. Neville is not an authorized provider.

V. Whether Claimant is entitled to temporary total disability ("TTD") benefits and/or temporary partial disability ("TPD") benefits.

To establish an entitlement to temporary disability benefits, Claimant must prove that the industrial injury caused a disability, that she left work as a result of the disability, that she was disabled for more than three regular work days and that she suffered an actual wage loss. Section 8-42-103(1)(b), C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). In this context, the term "disability" refers to the claimant's inability to perform her regular employment. *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995).

As found, Dr. D'Angelo credibly testified that Claimant's January 5, 2017 work accident and injury did not preclude Claimant from performing her regular job. The only reason Claimant was taken off of work by various medical providers was due to Claimant's subjective complaints which this ALJ has found to not be credible. This ALJ

concludes that Claimant has failed to establish by a preponderance of the evidence that her injury caused any disability which caused her to miss work. Therefore, Claimant is not entitled to temporary disability benefits.

VI. Whether Respondents are subject to penalties for allegedly violating Section 8-43-503(3), C.R.S.

The imposition of penalties under § 8-43-304(1), C.R.S., is a two step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a violation, he may impose penalties if he also finds that the actions were objectively unreasonable. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

Claimant contends Respondents dictated medical care in violation of Section 8-43-503(3) and are subject to penalties. Section 8-43-503(3), C.R.S. provides in pertinent part as follows:

> Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment.

The ICAO has held that § 8-43-503(3), C.R.S., precludes an insurer or its representative from "issuing commands to a treating physician concerning the type or duration of treatment to be provided to Claimant." *Williams v. City of Colorado Springs,* W.C. No. 4-565-576 (ICAO February 15, 2008).

There was no credible evidence presented by Claimant which demonstrated Respondents issued any commands to any of Claimant's treating physicians regarding the type or duration of Claimant's treatment or impairment. Instead, Claimant argued through her post hearing filing the following argument in support of her position that Respondents dictated medical care:

> Respondent did not provide Claimant with a Designated Provider List and refused to allow Claimant to change her physician to Dr. Thomas Neville, a provider of her choosing as permitted by § 8-43-404(5)(a)(I)(A). Respondent then refused to furnish a designated provider list so Claimant could make a 90 day one-time change of physician permitted by § 8-43-404(5)(a)(III). Although a denied claim, Respondent maintained control over Claimant's medical care and thus must abide by the Act and WCRP.

Claimant's argument cannot support a penalty claim for dictating medical care for a number of reasons. First, such argument does not demonstrate Respondents issued any commands to any of Claimant's treating physicians regarding the type or duration of Claimant's treatment or impairment. Second, this was a denied claim. Therefore,

Respondents did not have a legal obligation to allow Claimant to treat with a physician of her choosing for their failure to provide Claimant a Designated Provider List pursuant to §8-43-404(5)(a)(I)(A) while liability was being denied. Third, Claimant did not provide any credible evidence that she asked to treat with a physician of her choice, Dr. Neville. Fourth, as found, Claimant, by her actions, chose to treat with Dr. Hebard at Banner and treated with Dr. Hebard.

In addition, Claimant's argument pursuant to §8-43-404(5)(a)(III) cannot support a penalty claim for dictating medical care under the facts of this case for many of the same reasons. First, Respondents did not issue any commands to any of Claimant's treating physicians regarding the type or duration of Claimant's treatment or impairment. Second, this was a denied claim. Therefore, Respondents did not have to allow Claimant a change of physician pursuant to § 8-43-404(5)(a)(III). Third, §8-43-404(5)(a)(III) only allows a Claimant to change physicians within 90 days of the date of injury to another physician on the Designated Provider List. When a Designated Provider List is not provided, § 8-43-404(5)(a)(III) does not apply.

Claimant has failed to establish by a preponderance of the evidence that Respondents violated the Act, a duty lawfully enjoined, or an Order. Therefore, this ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that Respondents are subject to penalties.

ORDER

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

1. Claimant suffered a compensable injury on January 5, 2017.

2. Claimant's injury is limited to the laceration on the top of her head.

3. Claimant is entitled to reasonable and necessary medical treatment to cure and relieve her from the effects of the laceration on the top of her head

4. Claimant is not entitled to medical treatment for her other alleged conditions and alleged symptoms including, but not limited to, concussion, post concussive syndrome, traumatic brain injury, headaches, dizziness, vertigo, problems thinking, memory loss, insomnia, depression, jaw pain, leg pain, neck pain with radiculopathy, back pain, bilateral shoulder pain, or hip pain.

5. Claimant's average weekly wage is $400.00.

6. Dr. Neville is not an authorized treating physician.

7. Claimant's claim for temporary disability benefits is denied and dismissed.

8. Claimant's claim for penalties is denied and dismissed.

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

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

DATED: 10-19-17

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury on January 11, 2017.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to a general award of reasonable and necessary medical benefits to treat her January 11, 2017 injury.

3. Determination of authorized treating physician.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from January 11, 2017 through January 29, 2017.

STIPULATIONS

1. Claimant's average weekly wage is $445.00.

FINDINGS OF FACT

1. Claimant was employed by Employer as a stocker in the clothing department. Claimant was hired on October 7, 2016 as a seasonal worker with an expected end date of employment following the holidays and on January 14, 2017.

2. Claimant is also a journalist and obtained a full time job working for Major League Baseball Advanced Media, which was set to begin on January 30, 2017. She also worked part time editing.

3. On January 11, 2017 Claimant was called to assist a cashier with checking out a customer. Claimant squatted down to retrieve an item from a customer's shopping cart and when she stood up she alleges that she struck the top of her head on the handle bar of the shopping cart.

4. Claimant alleges that she felt pain on her head and felt dizzy. She continued to work the last 30 minutes remaining of her shift and then went home. She did not report an injury.

5. Claimant indicated that by that night she had a knot on her head and that her left neck, shoulder, and back ached. Claimant also indicated that she had a headache. The next day she indicated that she had difficulty making the bed, felt faint, felt like she was going to throw up, had a headache, and felt unbalanced.

6. On January 12, 2017 Claimant was scheduled to work an afternoon shift for Employer. Claimant arrived to work at approximately 3:00 p.m. and reported the injury from the day before. Claimant was referred to Nextcare Urgent Care Center (Nextcare) for treatment.

7. On January 12, 2017 Claimant was evaluated at Nextcare by Erick Gomer, M.D. Claimant reported aching pain in her head with headache, nausea, stiff neck, blurry vision, and mental fogginess. Claimant reported that she stood up really fast while unloading customer items from under cart and hit her head on the cart. On examination, Dr. Gomer found that claimant was tender to palpation along the left paracervical greatest at the base of the neck with palpable spasm, and tender to palpation along the proximal to mid left trapezius. Claimant had full range of motion in the cervical spine and mild pain with right lateral flexion. Dr. Gomer assessed mild concussion without loss of consciousness, and closed head injury. He recommended mental and physical rest until the evening of January 13, then limited use of computers, reading small text, or calculating. He indicated that per concussion protocols, Claimant needed mental rest for 24 hours and then a gradual increase in the use of computers, keypad, texting, and social interactions. He anticipated she would be able to return to work after follow up and 6-7 days maximum time needed away. *See* Exhibits 8, L.

8. On January 13, 2017 Claimant was evaluated at Nextcare by Patricia Keller, NP. Claimant reported her symptoms had not changed and that her head felt pulsing and that she couldn't see as well or read signs while driving. Claimant reported a headache at a pain level of 4-5/10. NP Keller discussed the case with Dr. Gomer and recommended Claimant follow up with a CT scan. NP Keller noted that maximum medical improvement date was unknown as Claimant was "pending CT." *See* Exhibit 8.

9. On January 16, 2017 Claimant was evaluated at the emergency department of Lutheran Medical Center by Klementyna Breyer, M.D. Claimant reported that she was at work unloading grocery carts when she hit the top of her head on a cart handle as she was standing up. Claimant reported the next day she developed lightheadedness and mild neck pain and that she later developed a headache, nausea, and left upper and lower extremity paresthesias. Claimant reported she was at the emergency department because she wanted a CT for further evaluation. On examination of Claimant's neck, Dr. Breyer found normal range of motion and mild diffuse tenderness. *See* Exhibit 9.

10. On January 16, 2017 Claimant underwent a CT of her head at Kaiser Permanente ordered by Dr. Breyer. It was unremarkable with no evidence of acute intracranial hemorrhage, mass, midline shift, or acute cortical infarction or hydrocephalus. There was no evidence of skull base fracture and the sinuses and orbits were unremarkable. *See* Exhibits 9, F.

11. On January 16, 2017 Claimant also underwent a CT of her cervical spine ordered by Dr. Breyer. The findings were: no acute fracture or malalignment;

transverse foramina and neural arches intact; odontoid intact; lateral masses well aligned; no evidence of facet subluxation or dislocation; multilevel facet arthrosis and uncovertebral joint spurring resulting in multilevel neural foraminal stenosis, greatest on the right at C6-C7; no prevertebral soft tissue swelling; and disc space narrowing at C5-6 and C6-7. Lower cervical degenerative disc disease and multilevel facet arthrosis and uncovertebral spurring was found that resulted in multilevel neural foraminal narrowing. *See* Exhibits 9, F.

12. On January 18, 2017 Claimant was evaluated at Nextcare by NP Keller. Claimant reported that she was starting to have back pain above a prior fusion, that her left neck was sore, that she was having vertigo, and that her headache was constant in the left frontal area. Claimant also reported that her vision was fuzzy on the edges more in the left eye and that her memory was foggy. Claimant reported having a normal CT scan and that she wanted an MRI. Claimant was referred to neurology for evaluation. *See* Exhibits 8, L.

13. On February 14, 2017 Claimant was evaluated by John Ogrodnick, M.D. Claimant reported that on January 11, she stood up while lifting a package from the floor and knocked her head on a grocery cart handle while assisting a cashier. Claimant reported that she hit the left parietal region, saw stars, and believed that she gave herself a concussion. Claimant reported that on the 14th she felt low back tingling and left foot tingling and that she had a persistent left side neck pain and a knot. Claimant reported that her private chiropractor Dr. Malpiede performed a gentle adjustment with traction and massage which helped quite a bit and that Dr. Malpiede believed she had a disc out of place. Claimant reported about 50% overall improvement but with left sided neck pain of 5/10 at rest that increased with rotation, extension, and flexion. Claimant reported that when editing/reading, she would become dizzy and off balance, that she felt more irritable, that she lacked concentration and that too much noise/people bothered her, and that she could not drive at night. Dr. Ogrodnick assessed concussion without loss of consciousness and cervical strain. He noted the plan would be return to work with restrictions of 25 pounds lifting and that if the MRI was without contraindications, further chiropractic care may be appropriate. *See* Exhibits 11, H.

14. Claimant did not report to Dr. Ogrodnick her prior history of cervical degenerative disc disease or her significant history of left sided neck pain. Claimant also failed to report her significant history of dizziness, vertigo, irritability, lack of concentration or that her current symptoms were similar to symptoms she had in the past.

15. On February 17, 2017 Claimant was evaluated by Shane Steadman, D.C. Dr. Steadman had treated Claimant for several years prior to this visit. Claimant reported that she sustained a concussion at work on January 11th. Claimant reported foggy vision, lack of concentration, light sensitivity, dizziness and balance issues, forgetfulness, occasional nausea, left neck tightness and knots, tingling in the 3-5th digits on the left, tingling in the left foot, and difficulty driving at night. Dr. Steadman

assessed: dizziness and giddiness; paresthesia of skin; and myalgia. He provided an exercise program for Claimant and indicated that she had dysfunction related to the midline cerebellum, instability of the spine, and nystagmus at rest and with movement. He noted that the nystagmus would cause dizziness and occasional nausea. He recommended brain-based exercises similar to ones that he had recommended to Claimant in July of 2016. *See* Exhibit 12.

16. On February 25, 2017 Claimant underwent an MRI of her cervical spine. The impression was: mild canal stenosis and bilateral foraminal stenosis at the C6-7 level due to posterior disc and osteophyte complex and uncovertebral joint hypertrophy; posterior disc and osteophyte complex causing mild central stenosis and bilateral neural foraminal narrowing at the C5-6 level; small central disc protrusion at the C4-5 level with left foraminal stenosis due to uncovertebral joint hypertrophy and facet arthropathy; and left facet arthropathy at C3-4 with no significant stenosis. *See* Exhibits 13, M.

17. On March 6, 2017 Claimant was evaluated by Dr. Ogrodnick. Claimant reported having difficulty walking one day, having constant muscle pain in her neck when at rest with cramping on the left side as well as tingling in her left 2nd and 3rd fingertips. Claimant also reported a headache over her left eye and balance issues. Dr. Ogrodnick noted that Claimant could continue to work with a 25 pound lifting restriction and he referred Claimant to a vestibular therapist. *See* Exhibits 11, H.

18. On March 20, 2017 Claimant was evaluated by Dr. Ogrodnick. Claimant reported horrible nausea and dizziness on March 15th while out running errands. Claimant reported that her memory was getting better but that she still had issues. Dr. Ogrodnick noted that Claimant was diffusely tender over the thighs, calves, and arms bilaterally and that she had spotty tenderness over the thoracic and lumbar regions. He noted tenderness over the left scalenes and trapezius. He encouraged Claimant to attend therapy more regularly. *See* Exhibits 11, H.

19. On April 18, 2017 Claimant was evaluated by Dr. Ogrodnick. It was noted that Claimant had only completed five therapy sessions since referral six weeks prior and that Claimant was traveling frequently. Dr. Ogrodnick noted that Claimant was functioning on a very high level and he returned her to full duty work. Claimant reported 60-70% overall improvement. Claimant reported 4-5/10 neck pain while at rest and that in the past month she had only one headache that resolved in half an hour without medication. Claimant reported speech issues with words not coming out right, having had two episodes of "manic anger," and that she strained her neck while looking up at a bird. Claimant also reported some feelings of being off balance. *See* Exhibits 11, H.

20. On May 16, 2017 Claimant was evaluated by neurologist Bennett Machanic, M.D. Claimant reported that she worked part time as an editor and web producer for major league baseball, working 16 hours per week. Claimant reported head trauma on January 11th. Claimant reported problems with dizziness and disequilibrium, memory, focus, concentration, emotional control, neck pain, low back pain, headaches, and tingling over the left side of her body. Claimant reported that she

previously underwent an L3-4 lumbosacral fusion due to spinal stenosis five years prior. Claimant reported that she had gluten insensitivity and that too much gluten results in vertigo so she has attempted to be gluten free for 8-10 years. Dr. Machanic found no nystagmus on exam of extraocular muscle movements. Dr. Machanic noted that based on Claimant's reports and the review of records, it appeared that Claimant did suffer closed head trauma on January 11th but that it was not clear that she actually sustained a cerebral concussion and that it was not fully clear that Claimant possesses significant posttraumatic encephalopathy. He suspected that Claimant did sustain a low grade vestibular concussion and he noted cervical strain patterns. He also believed there were signs to question left thoracic outlet syndrome. He recommended an EMG nerve conduction study, PT focusing on the neck, left brachial plexus, and vestibular dysfunction. He also noted that Claimant was scheduled for an IME with a psychiatrist, Dr. Striplin and that although Claimant did not feel she had a reason to see a psychiatrist, he suggested that Claimant could benefit from the IME and urged her to attend. Dr. Machanic opined that the prognosis was somewhat unclear and guarded. See Exhibits 15, G.

21. Claimant did not report to Dr. Machanic her significant history of cervical left sided neck pain. Although she reported that eating too much gluten resulted in vertigo, Claimant did not tell Dr. Machanic about issues prior to her work injury including prior neck pain, low back pain, headaches, tingling into her left side, memory issues, mood issues, or dizziness.

22. On June 2, 2017 Claimant was evaluated by Dr. Ogrodnick. Claimant reported improvement in the tingling in her left hands and feet, that her back pain was less frequent, and that her headaches were gone. Claimant reported that she still had 4/10 left sided neck pain. She reported concern about her inability to focus and her balance issues and that she was "depressed" because she could not edit and that she believed her hours were cut back because she was not getting the job done. She indicated that her ability to focus "comes and goes" and that she was veering to the right while walking and stumbling. Dr. Ogrodnick assessed cervical strain and head contusion. *See* Exhibits 11, H.

23. On July 14, 2017 Claimant was evaluated by Dr. Ogrodnick. Claimant reported being so excited as she was so much better. Claimant reported 75% improvement in the neck muscles/neck issue with on 2-3/10 left sided neck pain that was intermittent. Claimant indicated she felt that she had made huge strides in her balance and memory but that 4-7 times per week she felt as if she were on a boat. Dr. Ogrodnick noted her history back to 2011 of cervical spine pain and being diagnosed with cervical degeneration. Dr. Ogrodnick noted that one half hour was spent discussing her detailed history and her Kaiser records. It appears this is the first that Dr. Ogrodnick was aware of her prior history and he noted earlier in this visit that Claimant would not sign any medical releases. *See* Exhibits 11, H.

24. On July 17, 2017 Claimant underwent an EMG performed by Dr. Machanic. Dr. Machanic noted that the results and the clinical correlation from the test

was for the presence of bilateral carpal tunnel syndrome, more advanced on the right than on the left. Dr. Machanic also noted an emerging mechanical compression on the right at the cubital tunnel. Dr. Machanic found no sign of pathology due to a cervical radiculopathy, brachial plexopathy, or thoracic outlet syndrome. *See* Exhibits 15, G.

25. On August 7, 2017 Claimant was evaluated by Dr. Machanic. Dr. Machanic explained the results of her EMG study and Claimant indicated she did not want surgery or injections for her bilateral carpal tunnel and unilateral cubital tunnel but that she just wanted to see her chiropractor. Dr. Machanic recommended seeing a hand surgeon. Dr. Machanic noted that the cognitive behavioral consequences from January 11th would be addressed by Dr. Keatley. Dr. Machanic recommended continued chiropractic care and a visit to a hand surgical specialist if Claimant agreed. *See* Exhibits 15, G.

26. Claimant underwent two separate independent medical examinations related to this case. On June 20, 2017 Claimant underwent an independent medical examination performed by Michael Striplin, M.D. Claimant reported that she used to treat her thyroid problems with medications but was now managing it through chiropractic care with diet and natural supplements. Dr. Striplin reviewed medical records and performed a physical examination. Dr. Striplin assessed: head injury; neck pain; and paresthesias. Dr. Striplin noted the cervical spine imaging studies performed in this case showed multilevel degenerative disease which did not appear to be acute and was most compatible with her age. Dr. Striplin also noted prior medical records showing spine surgery and vertigo. Dr. Striplin noted that Claimant had no focal or lateralizing neurological signs suggesting brain trauma. He noted that findings at the left and right wrist were unrelated to the January 11, 2017 incident. He also noted that Claimant's history of thyroid disease may lead to peripheral nerve symptoms. *See* Exhibit D.

27. Dr. Striplin opined that mild head trauma from January 11, 2017 would not be anticipated to lead to long-term problems. Dr. Striplin also opined that Claimant may have suffered a mild cervical strain but that he would have expected that to resolve. He noted that he could not address causality without further records. *See* Exhibit 17.

28. On August 1, 2017 Claimant underwent an independent medical examination performed by John Hughes, M.D. Dr. Hughes reviewed medical records and performed a physical examination. Dr. Hughes opined that Claimant sustained a closed head injury as well as a cervical spine sprain/strain on January 11, 2017 and that she probably also had at least reactive mechanical low back pain as a result of the injury. He opined that the lumbar spine symptoms had resolved and the cervical spine symptoms were greatly improved. He opined that the medical evaluation and treatment all appeared to be reasonable, necessary, and related to her work injury. Dr. Hughes opined that Claimant was not yet at maximum medical improvement with respect to either her closed head injury or cervical spine injury, but that she was nearly at MMI for her cervical spine. For the closed head injury, Dr. Hughes recommended neuropsychological evaluation. *See* Exhibit 16.

29. On August 30, 2017 Dr. Striplin provided additional information in response to questions asked of him following his receipt of additional medical records. Dr. Striplin noted that he had reviewed patient questionnaires completed by Claimant in 2010 that documented moodiness, low energy, irritability, sleep changes, forgetfulness, poor concentration, distractibility, memory problems, spaciness or confusion, and dizziness when standing quickly. He also noted medical records showing complaints of nystagmus from 2015 after consuming gluten that persisted into 2016. *See* Exhibit D.

30. Dr. Striplin opined that based on Claimant's history and medical records including the normal imaging of her head and brain and the lack of evidence of head trauma, Claimant may have suffered a mild scalp contusion along with a possible mild cervical strain and lumbar strain. He noted that these possible diagnoses were based entirely on Claimant's subjective complaints and that there was no objective evidence of injury related to the January 11, 2017 incident. Dr. Striplin noted that similar complaints of neck pain, vertigo, and low back pain predated the January 11, 2017 incident. Dr. Striplin opined that it was not medically probable that the January 11, 2017 incident would produce a concussion or traumatic brain injury, that a possible lumbar strain would have resolved, and that he would not anticipate any prolonged cervical symptoms or any significant aggravation of Claimant's pre-existing cervical spine degenerative disease from the incident. *See* Exhibit D.

31. Dr. Striplin noted that Claimant had a past history of neck injury in a motor vehicle accident that resulted in chiropractic treatment several years prior to this work incident. Dr. Striplin also noted that Claimant had been previously diagnosed with benign positional vertigo with symptoms into 2016 and that in December of 2016 Claimant indicated by an internet "gofundme" posting that she was still having interference with her ability to work full time due to her vertigo. Dr. Striplin also pointed out that numerous cognitive and psychological symptoms had been noted by Dr. Steadman back in 2010. *See* Exhibit D.

32. Dr. Striplin opined that all of Claimant's current symptoms were chronic and unrelated to the January 11, 2017 incident and that Claimant reached maximum medical improvement on August 7, 2017 when Dr. Machanic reviewed the electro diagnostic studies and noted no evidence of cervical radiculopathy, brachial plexopathy, or thoracic outlet syndrome. He opined that Claimant required no further treatment related to the January 11, 2017 injury. Dr. Striplin opined that the continued subjective symptoms were chronic and pre-existing and that Claimant had no permanent impairment from a January 11, 2017 incident. *See* Exhibit D.

33. Dr. Striplin noted that Dr. Hughes did not reference records documenting cognitive complaints back in 2010 and did not reference records documented continued vertigo symptoms extending into 2016. *See* Exhibit D.

34. Medical records show that Claimant has a significant prior treatment and complaints including a history of left sided neck complaints, history of vertigo, and history of cognitive complaints and problems.

35. Records show that Claimant has been undergoing chiropractic care with Dr. Steadman going back at least until June 9, 2010, when she reported she most always felt dizziness when standing up quickly and had mental fogginess. She had some issues with: agitation, becoming easily upset, poor memory, blurred vision, difficulties with staying asleep, waking up tired, depression, lack of motivation mental sluggishness, nervousness/emotional issues, spells of mental fatigue, inability to concentrate, episodes of depression, muscle soreness, decrease in physical stamina, mental fogginess, mood swings and depression. *See* Exhibit I.

36. On July 13, 2010, Claimant reported to Dr. Steadman "brain fog" and mood instability. She reported most always having difficulties with remembering names and phone numbers. She reported some problems with her: memory noticeably declining; focus noticeably declining; temperament, in general, getting worse; losing her attention span endurance; feeling sad; feeling fatigued when reading, walking in to rooms and forgetting why; loosing pleasure in hobbies, and interests, feeling overwhelmed with ideas to manage; feelings of inner rage/anger; feeling sad for no reason; lack of enjoyment of life; losing enthusiasm for her favorite activities, friendships and relationships; feeling more susceptible to pain; feeling hopelessness; inability to handle stress; anger and aggression while under stress; not feeling rested; preferring to isolate herself from others; distraction from her tasks; inability to finish tasks; feelings of being overwhelmed; disorganized attention; worrying; decreased verbal memory; memory lapses; diminished comprehension; and difficulty calculating numbers. *See* Exhibit I.

37. On July 13, 2010, Claimant also reported frequent problems with: low energy; forgetfulness; poor concentration; poor planning skills; lack of clear goals or forward thinking; and difficulty with expressing feelings, and following through or finishing things; memory problems; periods of forgetfulness; and making repetitive mistakes; and, occasional difficulty with: moodiness, irritability, sleep changes, poor concentration, low motivation, distractibility, lethargy, lack of motivation, negative sensitivity to smells and odors, feeling dizzy, faint or unsteady on her feet, trouble sustaining attention in routine situations, restlessness, impulsivity, senseless worrying, spaciness confusion, feelings of being in a fog, being argumentative or oppositional, having a short fuse or periods of extreme irritability. Also, she reported a history of a head injury or trauma that predated her alleged work injury. *See* Exhibit I.

38. Claimant was seen by Dr. Ruby on December 3, 2010, January 5, 2011, July 27, 2011, and March 6, 2012, with cervical spine complaints. She did report that both of her hands tingled, occasionally at the July 27, 2011, visit. *See* Exhibit I.

39. Clamant was seen at Berkeley Community Acupuncture on January 19, 2013. She complained of allergies, numbness, arthritis, low back pain, neck pain, neck stiffness, near sightedness, pain in her hands, hips, legs, knees, feet and

swollen joints. She reported a previous history of dizziness, depression eye pain, and thyroid problems. Her pain intensity diagram indicated neck pain at the level of 2 and shoulder pain at the level of a 3. *See* Exhibit I.

40. Claimant had a motor vehicle accident when she braced her left arm on the dash 3 weeks before being seen by Dr. Becky on October 31, 2013. She was assessed with a cervical spine strain with some C7-8 radicular symptoms on the left, admitting tingling in the 3rd, 4th, and 5th fingers on that side and a cervical spine strain. She was tender to palpation at the C6-7 spinous process. *See* Exhibit F.

41. Claimant was seen at Five Horses Acupuncture and Oriental Medicine between August of 2013, and October of 2015. On November 2, 2012, she reported that a medical doctor had confirmed a problem with whiplash after surgery. She had neck problems at C7-8 on the left side and that she was getting numbness and tingling in her left hand and fingers. On October 13, 2013, she complained that the C7-8 dermatome was giving her numbness to her left fingers. On February 2, 2014, she complained of tightness and stiffness in her neck, her left side was worse. She continued to report right hand tingling and numbness, scapula, neck, and shoulder complaints. She reported neck pain on May 16, 2015, from being rear-ended on May 5, 2015, noting that her chiropractor took x-rays. She was worse after her last chiropractic treatment. She continued to complain of neck pain, upper back, lower back pain and stiffness. Throughout her treatments there in May through September, 2015. She also reported fatigue at her July 30, 2015, visit. At her October 9, 2015, visit, Claimant reported vertigo and nausea. She had been given anti-nausea, ondansetron, valium, and a Meclizine-Antivert. *See* Exhibit I.

42. Claimant had a fall on her outstretched hand on or about September 12, 2015. She was referred to orthopedics for a fracture of her right distal radius. *See* Exhibit F.

43. Claimant was hospitalized for severe vertigo, dizziness, nystagmus, nausea and vomiting from September 27, to 29, 2015, in Virginia. She admitted to drinking one or two bottles of wine in their entirety the previous day. She was experiencing horizontal nystagmus. She was kept overnight to participate in physical therapy and for maneuvers (the Eply maneuver for benign positional vertigo) to reduce her symptoms. Claimant was diagnosed with vertigo. She was to follow-up with her primary care physician and with an ear nose and throat physician if her symptoms did not improve. *See* Exhibit K.

44. Claimant contacted Dr. Steadman on October 5, 2015, from the event in September, in Virginia, reporting a possible gluten reaction from eating wheat. She was given anti-nausea, anti-vertigo and other medications. She felt the Eply's maneuver helped a little. She was doing some exercises for this. According to what she told Dr. Machanic she had been seeing him for approximately 8 years. According to her report he is an endocrinologist and also a chiropractor who runs a brain clinic for concussion. Dr. Steadman records reflect only DC after his name. *See* Exhibit I.

45. Claimant saw Dr. Becky her PCP at Kaiser on October 20, 2015, for complaints of ongoing vertigo. She did Semont exercises and felt somewhat better. She was referred for physical therapy and was sent to be screened for hearing loss. She was diagnosed with vertigo. She was also screened for hearing loss. Claimant next returned to see Dr. Becky on November 3, 2015, for complaint of left ear pain and swelling of her face that had been ongoing for 6 weeks. She had a history of recurrent sinusitis. She reported her incident in Virginia as the onset of her symptoms. She noticed that both eyelids drooped and swelled. She attributed all of her symptoms to exposure to gluten at a barbeque. *See* Exhibit F.

46. Claimant saw Dr. Steadman on November 3, 2015, she was wondering if her vertigo was a reaction to gluten, or if she was sick and it had affected her inner ear. Visualization of each ear revealed cloudiness behind the eardrum. Visualization of the ossicles was decreased. Dr. Steadman assessed neurological findings of decreased left cerebellum function and possible inner ear infection. He gave her brain-based therapy exercises to include ankle sways, left leg balance, and chair turns. He also recommended she follow up with an ear nose and throat doctor. *See* Exhibit I.

47. Claimant saw Dr. Steadman on November 12, 2105, for her vertigo complaint. Her blood pressure was also low, so the plan was to try adrenal support herbs and sea salt to boost her adrenal function and blood pressure, to see if it helped with her dizziness. R. Ex. pp 151- 153. He saw her again on November 25, and December 9, 2015, for her vertigo complaints. *See* Exhibit I.

48. On November 18, 2015, Claimant e-mailed Dr. Becky her PCP at Kaiser advising him that her dentist found her TMJ muscles were sore from clenching her teeth because of her vertigo, as she concentrated on keeping her balance. She was assessed with left ear pain, swelling on the left side of her face and vertigo for the past 6 weeks. *See* Exhibit F.

49. On December 28, 2015, Claimant again emailed Dr. Becky requesting methocarbamol or other muscle relaxant for when her upper back and neck cramped up as it had the previous day from working out and shoveling. She noted her vertigo was slowly getting better. *See* Exhibit F.

50. In October/December, 2015, Claimant was referred to physical therapy for vertigo, neuromuscular reeducation, movement, balance, coordination, kinesthetic sense, posture and proprioception. *See* Exhibit F.

51. On July 26, 2016 Claimant saw Dr. Steadman for continued complaints of dizziness. Visualization of each ear revealed cloudiness behind the eardrum. Visualization of the ossicles was decreased. He again prescribed brain-based exercises. In the objective portion of the visit note, directly above the clinical instructions and plan, Dr. Steadman noted that chair turns revealed left post rotary nystagmus. *See* Exhibit I.

52. Claimant spoke with Dr. Steadman on or about July 28, 2016, with complaints of low energy. She was to continue with her supplements. *See* Exhibit I.

53. In addition to treating extensively with Dr. Steadman, Claimant also treated extensively with Dr. Malpiede from 2011 through 2016. According to Dr. Malpiede records Claimant began treating with him for cervical, thoracic, and lumbar chiropractic manipulation. On October 8, 2011, Dr. Malpiede recorded complaint of cervical spine pain with secondary lumbosacral pain. A few days later upon return visit degeneration of cervical and lumbar intervertebral discs were added to her diagnosis. Claimant continued to receive cervical, thoracic, and lumbar chiropractic treatment from him on November 14, 23, December, 12, 21, 28, and 30, **2011**; January 18, February 13, 24, 29, March 16, April 11, 27, May 18, June 1, 15, 27, July 25, August, 8, September 21, October 5, 12, 24, November 7, 28, December 12, 19, **2012**; January 9, 16, 30, February 13, March 15, 25, April 24, May 13, June 19, 28, July 8, 19, August 5, 23, 30, September, 13, **2013**. Then she had an L2-3 fusion on September 27, 2013. *See* Exhibit N.

54. Claimant returned for treatment with Dr. Malpiede for her cervical, thoracic, and lumbar spine on June 18, 30, August 6, 8, and October 20, **2014**. *See* Exhibit N.

55. Claimant resumed treatment with Dr. Malpiede on March 3, and May 1, **2015**. Claimant then had a motor vehicle accident on May 5, 2015; wherein she injured her neck, back, hip, shoulder, and sustained tingling in her fingers, and cramps in her feet. Claimant was unemployed at the time of her motor vehicle accident. She reported headaches, neck pain, neck stiffness, irritability, lightheadedness, sleeping problems and mid and low back pain. *See* Exhibit N.

56. Claimant continued to treat with Dr. Malpiede and receive cervical, thoracic and lumbar chiropractic treatment specifically, as a result of her motor vehicle accident until September 30, 2016. Specifically, she treated with him on May 8, 11, 13, 15,18, 20, 22, 27, 29, June 1, 3, 5, 8, 10, 17, 19, 22, 24, 29, July 1, 6, 13, August, 3, 12, 19, 26, 31, September 9, December 9, and 21, **2015** ; and January, 6, 18, February 3, 19, 29, March 7, 21, 28, April 4, May 4, 16, August 1, and September 30, **2016**. *See* Exhibit N.

57. In December, 2016, around Christmas time, Claimant posted a "Go Fund Me" page on the internet. She indicated that she was hospitalized with severe vertigo because of a wheat allergy and she could not work for several months as a result. Consuming gluten at the barbeque caused her to be hospitalized in September of 2015, in Virginia. Claimant posted that due to an autoimmune thyroid condition she has, when she consumes gluten, it causes her body to attack itself. It was her belief that after consuming the gluten, her body attacked her brain and inner ear. She posted that after being discharged from the hospital, she had to use a walker to get around and could not drive for several months. As a result, she could not look for work. She indicated in her post that she had just begun driving on the highway in August, 2016. At the time of her post, she was in between jobs, and had to take money out of her 401K just to pay her

bills. Claimant requested money noting anything, even $5.00, would help. *See* Exhibit C.

58. Claimant testified at hearing. She indicated that she sustained a concussion and cervical strain from the January 11, 2017 incident when she struck her head on a shopping cart and that the injury caused symptoms of vertigo, headaches, vision issues, forgetfulness, sleep disturbance, fatigue, dizziness, lack of balance, concentration problems, anger issues, and brain fogginess. However, the medical records all document the same symptoms on multiple occasions going back to 2010.

59. The conclusions and opinions from medical providers in this case rely significantly on Claimant's subjective reports. Her reports are not found to credible and persuasive. Claimant failed to report to many providers that she had a lengthy treatment history with prior cognitive and cervical complaints and symptoms similar to the symptoms she is alleging are related to this incident. Dr. Machanic does not reference nor does he seem to be aware of her significant prior history. Similarly Dr. Hughes does not reference her significant prior history. The persuasive evidence combined with the credible opinion of Dr. Striplin leads to the conclusion that Claimant did not sustain any new symptoms or injury even if she hit her head on the shopping cart as she claims. Rather, she continued to have the same problems she reported in treatment in 2016 and on an internet posting in late 2016. Claimant's testimony that she was fine leading up to this incident is not credible given her extensive and significant treatment history. Any opinions to the contrary are not found credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

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

Claimant has failed to establish by a preponderance of the evidence that she sustained an injury on January 11, 2017. Even if she struck her head on a grocery cart, Claimant has failed to establish that that accident or incident caused injury. Rather, the persuasive and credible evidence demonstrates that at the time of this alleged injury Claimant had several pre-existing conditions and pain complaints related to her neck, head, cognitive function, vertigo, dizziness, etc and head for which she had actively and extensively sought treatment over many years prior to her alleged work injury.

There is no objective evidence to support that an acute injury was sustained on January 11, 2017 and many opinions rely on Claimant's subjective reports. As found above, Dr. Machanic, even without knowing of Claimant's significant history of cognitive issues, opined that it was not clear that Claimant actually sustained a cerebral concussion and opined that it was not fully clear that she possessed significant posttraumatic encephalopathy. Without knowing of her significant history, he suspected a low grade vestibular concussion and cervical strain patterns. Claimant, as found above, has a significant prior history of both cervical and cognitive problems dating back

several years. Claimant failed to advise Dr. Machanic and Dr. Ogrodnick, her treating providers, of her significant and extensive prior history. Any subjective reports and claim that she was fine prior to the injury and that the symptoms were new and caused by hitting her head on a grocery cart cannot be credited. The opinions of Dr. Machanic and Dr. Hughes rely heavily on Claimant's subjective reports and thus also cannot be credited.

Although Claimant may have bumped her head, none of the diagnostic studies reflected an acute injury, there was no loss of consciousness, there was no and documentation of a bump or abrasion following the event. In addition, the complaints reported after the incident were not new or different from the past problems noted in the medical records of pain in the neck, problems with memory, vision, balance, dizziness, vertigo, concentration, sleep, and fatigue. Claimant has had ongoing and extensive complaints for which she has been receiving treatment for the past six years, predating her alleged injury. Her continued symptoms went into 2016 and just prior to her alleged work related injury. Claimant has failed to meet her burden and has failed to establish by a preponderance of the credible evidence that she sustained an injury to her neck or head on January 11, 2017, while in the course and scope of her employment.

The Claimant's claim for workers' compensation is, therefore, denied and dismissed and the remaining issues need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she sustained a compensable work related injury on January 11, 2017.

2. Claimant is therefore not entitled to an award of any medical or temporary indemnity benefits. Her claim is denied and dismissed.

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

DATED: October 19, 2017

/s/ Michelle E. Jones

_____

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

ISSUES

I. Whether Claimant has overcome the Division-sponsored independent medical examiner's (DIME) opinion regarding maximum medical improvement (MMI) and permanent impairment by clear and convincing evidence.

FINDINGS OF FACT

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

1. Claimant is a 58 year old female employed with Aurora Public Schools as a substitute teacher. On January 14, 2016, Claimant was walking to her car in the school parking lot when she slipped on ice and fell. Claimant began treating at HealthOne Occupational Medical Centers with Dr. Matthew Lugliani.

2. On January 15, 2016, a First Report of Injury was completed. The Report indicates Claimant injured her right knee, left leg, both shoulders, and left lower back side. *(Claimant's Exhibit, A)*

3. On January 22, 2016, Claimant was evaluated by Dr. Lugliani for an initial evaluation. It was noted that she stated she was walking to her car in the parking lot and slipped on ice. The report also indicates Claimant was "extremely vague about details, stating only that she fill directly onto her right knee." The report goes on to state that "Her knee began to hurt. Her other body parts only began to hurt hours later." (Claimant's Exhibit, F). Claimant also completed a pain diagram. In her pain diagram she noted that she had bilateral shoulder pain. *(Claimant's Exhibit, A)*

4. Claimant did not have the immediate and acute onset of pain in either shoulder at the time of the accident. *(Claimant's Exhibit, F.)*

5. On February 8, 2016, Claimant was evaluated by Dr. Lugliani. Claimant did have some complaints of ongoing bilateral shoulder pain. *(Respondent's Exhibit, P.32)*

6. By March 3, 2016, there was documentation by the physical therapist that there was full active range of motion at the right shoulder, both full active range of motion post manual and exercise at the shoulder. By her 12th physical therapy visit, Claimant was having some bilateral shoulder soreness, but she was able to complete full active range of motion without pain. *(Respondent's Exhibit, p.32)*

7. Claimant was seen by Dr. Lugliani back in follow up. By that time, Claimant's bilateral shoulder pain was stable. Claimant's shoulder range of motion was full and normal against resistance. *(Respondent's Exhibits, p.32)*

8. On April 15, 2016, Claimant came under the care of Dr. Primack for complaints of right knee and lumbar pain. On April 15, 2016, Dr. Primack also evaluated Claimant's shoulders. According to Dr. Primack's report, the Hawkin's maneuver was negative. The supraclavicular compression tests were negative. There was also good strength within the rotator cuff musculature bilaterally. According to Dr. Primack, there was no area of upper extremity/shoulder compromise. (*Respondent's Exhibits, p.32-33.)*

9. On April 22, 2016, Claimant presented to emergency room at the Medical Center of Aurora. Claimant was having chest pain and back pain. There was documentation that there was no extremity pain or swelling. It was also noted that she had full range of motion during her musculoskeletal examination and no tenderness at the extremities. It was felt that she had basilar atelectasis involving her lungs and was advised to follow up with her primary care physician. *(Respondent's Exhibits, p.33)*

10. On April 28, 2016, Dr. Lugliani noted Claimant's shoulder range of motion was full and normal against resistance. *(Respondent's Exhibits, p.11)*

11. On May 4, 2016, Claimant returned to Dr. Primack. There were no complaints of shoulder pain. At that time, Claimant complained of pain in her thoracic region of her spine, which was new. *(Respondent's Exhibit, p.33)*

12. On May 12, 2016, Claimant presented to Kelvin Washington, chiropractor. Claimant complained of pain in her upper back, lower back, neck, and tension headaches. Claimant did not complain of shoulder issues. *(Respondent's Exhibits, p.44)*

13. On May 17, 2016, Claimant returned to Dr. Washington, who wrote, "Velma is much improved in her neck, upper back and with headaches, however her lower back is still somewhat restricted in motion with muscle pain." The report does not note concerns regarding bilateral shoulder issues. *(Respondent's Exhibits, p.43)*

14. On May 19, 2016, Claimant returned to Dr. Washington. He discussed with Claimant that she was approaching MMI. Claimant complained of upper back, lower back, and neck pain, along with headaches. Her pain complaints did not exceed 3/10. Claimant did not complain of shoulder symptoms. *(Respondent's Exhibits, p.42)*

15. On May 24, 2016, Claimant returned to Dr. Washington. Claimant reported being about the same with the following pain complaints: upper back 1/10, lower back 3/10, neck 1/10, and tension headaches 1/10. Claimant did not complain of bilateral shoulder issues. *(Respondent's Exhibits, p.41)*

16. On May 25, 2016, Claimant presented to Dr. Lugliani. Dr. Lugliani assessed Claimant with right knee pain, with osteoarthritic changes seen on MRI, and bilateral shoulder/back pain. Dr. Lugliani wrote that at the time of her accident, Claimant complained of bilateral shoulder pain, but denied acute injury to those body parts. She complained of diffuse body pain involving her bilateral shoulders, mid and low back, as well as right knee pain. This is inconsistent with what she described to Dr. Washington. Dr. Lugliani concluded that the majority of Claimant's symptoms were osteoarthritic in nature and longstanding, which may have been exacerbated by the fall. Dr. Lugliani opined that Claimant reached MMI and assigned an 18% right lower extremity rating. Further, Dr. Lugliani opined that Claimant could return to work at full duty with no restrictions. He noted that he would be willing to let Claimant continue to follow up with Dr. Primack, but she refused. *(Respondent's Exhibit F)*

17. On June 23, 2016, Claimant underwent an MRI of her left shoulder. The MRI did demonstrate a full-thickness partial width tear of the anterior fibers at the distal supraspinatus. There was also a SLAP tear extending into the biceps tendon anchor. On the same date, Claimant also underwent an MRI of her right shoulder. This demonstrated tendinosis. There was also a 50-75% thickness tear of the articular surface fibers of the distal anterior supraspinatus tendon. *(Claimant's Exhibit E.)*

18. The MRI reports were sent to Dr. Lugliani, who upon review retracted his opinion regarding MMI. *(Respondent's Exhibit D)*

19. On November 3, 2016, Dr. Scott Primack prepared a record review. Dr. Primack is an authorized treating physician. Dr. Primack reviewed Claimant's medical records, including the shoulder MRIs, and concluded, "After reviewing all of the medical records and specifically the clinical examinations done by Dr. Lugliani as well as myself, I do not believe that she requires intervention to the left shoulder. Although she may have fallen, the functional impairment at least by May 2016 was not at the shoulders. It was at the level of the right knee, and she had a history of chronic pain. She had also maximized her function. Therefore, if she necessitates care at the shoulders, it would not be considered work related. Clearly, shoulder surgery would not be work related in this case, given the medical records and her inconsistency of progressive pain. I can state my opinions as to within a reasonable degree of medical probability." *(Respondent's Exhibit E)*

20. On December 13, 2016, Respondent sent Dr. Primack's report to Dr. Lugliani and asked him to opine regarding relatedness of Claimant's shoulder symptoms. Dr. Lugliani agreed with Dr. Primack that Claimant reached MMI for all symptoms and conditions related to the industrial injury. Additionally, he agreed that Claimant did not require an impairment rating in relation to the left shoulder. Finally, Dr. Lugliani agreed that any future treatment in relation to the left shoulder is not work related. *(Respondent's Exhibit D)*

21. Claimant underwent a DIME with Dr. Allison Fall. The DIME agreed with Dr. Lugliani's determination of MMI. Regarding permanent impairment, the DIME physician assigned a 20% scheduled rating for the right lower extremity. Claimant asked the DIME physician to address Claimant's bilateral shoulders. (Respondent's Exhibits, p.21) The DIME physician wrote, "She has complained of shoulder pain; however, her examinations were inconsistent with, at times, showing full range of motion. Her shoulders have been evaluated numerous times. Now, her shoulder range of motion is quite different than what was depicted in the medical records. Therefore, at this time, I am unable to state that her current right shoulder complaints are directly related to the work injury. The MRI findings are most likely chronic, given that she did not have acute pain associated with acute tearing at the moment her hands hit the ground." The DIME physician went onto note that Claimant did not require permanent work restrictions or further maintenance care. *(Respondent's Exhibit C)*

22. At hearing, Claimant testified she injured her bilateral shoulders and the need for treatment relates to this injury. In support, Claimant presented a written report from Dr. Benjamin Sears, who recently performed surgery on Claimant's left shoulder. Dr. Sears wrote that the MRIs showed a full thickness rotator cuff tear on the left as well as "essentially" a full tear or a very high grade partial tear on the right. Regarding causation, Dr. Sears writes, "This patient did tell me she had absolutely no shoulder issues prior to her fall on January 14, 2016. These injuries identified by the MRI could certainly be as a direct result of the fall. This is especially true, as the patient had no injuries prior to this fall, and based on this patient's age and her activities, these did appear to be more acute type tear from a direct fall." *(Claimant's Exhibit A)*

23. Dr. Sears does not indicate he reviewed Dr. Washington's notes, or the reports from Drs. Lugliani, Dr. Primack, or the DIME. At best, Dr. Sears opines that Claimant's bilateral shoulder issues are consistent with an injury in January 2016. He does not opine that a contrary opinion would be erroneous.

24. The evidence presented does not establish that the DIME physician's opinions regarding MMI and impairment are incorrect. The DIME physician's opinion is supported by the opinions of Drs. Primack and Lugliani. Further, the reports of Dr. Washington issued the same month as the original determination of MMI do not reference significant shoulder issues. Accordingly, the evidence credited does not establish the DIME physician erred.

CONCLUSIONS OF LAW

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

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

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

If a DIME physician renders an opinion regarding MMI or medical impairment, those opinions must be overcome by clear and convincing evidence. Section 8-42-107(8)(b)(iii) – 107(8)(c); *Leprino Foods, Co. v. ICAO*, 134 P.3d 475, 482 (Colo. App. 2005), ("DIME physician's opinions concerning MMI and permanent medical impairment are given presumptive affects … [and] are binding and must be overcome by clear and convincing evidence.")

"Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving Storage v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). The party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the DIME impairment rating or MMI finding are incorrect. *Qual-Med, Inc. v. ICAO*, 961 P.2d 590, 592 (Colo. App. 1998). A party meets this burden if it demonstrates the evidence contradicting the DIME is "unmistakable and free from serious or substantial doubt." *Lemming v. ICAO*, 62 P.3d 1015, 1019 (Colo. App. 2002).

As found, Claimant has failed to demonstrate by clear and convincing evidence that it is highly probable the DIME physician erred. First, Dr. Primack's opinion is consistent with the DIME's. Second, Dr. Lugliani's opinion is consistent with the DIME. Third, the chiropractic notes failed to demonstrate any significant shoulder pathology. Fourth, Dr. Sears' opinion that Claimant's need for shoulder treatment could have

resulted from the fall in January 2016 does not rise to the level of it being "highly probable" that the DIME physician erred. There is no indication Dr. Sears reviewed the prior medical records, or the DIME physician's report. Additionally, Dr. Sears did not opine that the DIME physician erred. At best, as found, it shows only a disagreement among physicians, which does not rise to the level of clear and convincing evidence.

ORDER

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

1. Claimant has failed to overcome the DIME physician's opinion regarding MMI and permanent impairment.

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

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

DATED: 10/19/17

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

ISSUES

I. Whether Claimant has proven entitlement to temporary total disability ("TTD") benefits from March 4, 2017 and ongoing.

II. Whether Respondents are entitled to an offset against TTD benefits for State Disability Insurance benefits paid by the State of California.

III. What is Claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant is 58 years of age. Claimant worked in the oil industry and performed maintenance work for different refineries in various cities. Claimant testified that the work was "turn-around work" such that he moved to a different refinery upon completion of work at another refinery. The jobs typically lasted for approximately six weeks. Claimant did this on a regular basis.

2. Claimant began working for Employer in March 2016 as a mechanical engineer. Claimant testified that he expected the particular job last for approximately six or seven weeks and upon completion Employer would place him on another job.

3. Claimant testified that he earned $31.50 per hour and worked 10-12 hours per day, with time-and-a-half for overtime. Claimant stated that he worked 13 days on and one day off. Employer's Report of Injury from Claimant's personnel file indicates Claimant earned $31.50 per hour and worked an average of 70 hours weekly.

4. On March 26, 2016, Claimant suffered an admitted industrial injury when a wall of salt deposits collapsed on him while working inside of a large tank. Claimant was assisted out of the tank by co-workers.

5. Claimant was taken by ambulance to North Suburban Medical Center for treatment. Claimant presented with right shoulder pain. Claimant denied any head injury or loss of consciousness. The medical record from the hospital visit note that Claimant had no evidence of any other injuries and that Claimant denied neck pain, chest pain, thoracic pain, lumbar pain, and lightheadedness. On physical examination, it was noted that Claimant was non-tender with full range of motion in the neck, no respiratory distress, and tender in the arm/shoulder with limited range of motion. Claimant had full range of motion in back. Claimant was diagnosed with a shoulder contusion and discharged with no restrictions.

6. Claimant returned to light duty the following day. Claimant testified that while on light duty he just sat around in the office for a couple days.

7. On March 29, 2016, Claimant treated at Concentra with Amanda Cava, M.D. Dr. Cava diagnosed Claimant with a right shoulder strain and referred Claimant for physical therapy. Dr. Cava also advised Claimant to ice his shoulder 20 minutes a few times per day as needed and take pain medication as needed.

8. On March 31, 2016, Claimant presented to Michael V. Ladwig at Aviation & Occupational Medicine. On physical examination, Dr. Ladwig noted tenderness over the right shoulder blade, 90 degrees flexion and 45 degrees abduction. Dr. Ladwig noted normal inspection of the rib cage with tenderness in the posterior right rib and "cage below shoulder blade." Dr. Ladwig assessed a contusion of the right front wall of the thorax, abdomen strain, and right arm shoulder strain. He noted there were no acute findings on the x-ray of right ribs/chest and right shoulder injury. Dr. Ladwig ordered Claimant to take ibuprofen and Tylenol and dispensed an arm sling and rib binder. Dr. Ladwig released Claimant to work fully duty. Claimant was scheduled to return on April 5, 2016 for a follow-up visit.

9. Claimant testified that he was laid off by Employer on April 1, 2016. Claimant subsequently returned to his home in California and continued seeking medical treatment. Claimant testified that he has not worked since his separation from Employer.

10. On April 11, 2016, Claimant presented at CareOnSite in Long Beach, California. Claimant was diagnosed with a right shoulder contusion and right rib contusion and released to return to regular work on as of April 14, 2016.

11. On April 12, 2016, Claimant underwent a CT of his right shoulder and chest. The CT revealed no fractures, dislocation or acute pulmonary pathology.

12. On April 15, 2016, Dr. Ladwig revised his report and placed Claimant on modified duty. Dr. Ladwig stated that Claimant should wear a sling as needed and perform activities with the right arm as tolerated.

13. Respondents filed a General Admission of Liability on April 22, 2016, admitting for medical benefits and TTD benefits from April 2, 2016 through April 13, 2016 at a rate of $320.00 per week and an AWW of $480.00.

14. Claimant sought legal counsel in California and applied for State Disability Insurance benefits (also known as Unemployment Compensation Disability ("UCD")), which he received from May 25, 2016 to February 2017. Claimant also filed a workers' compensation claim in California. Claimant's California claim for workers' compensation was denied because California lacked jurisdiction over the Colorado injury.

15. A Notice of Lien Claim from the State of California dated June 30, 2016 states, "An individual is not eligible to receive UCD benefits for the same period he/she receives or is entitled to receive Workers' Compensation benefits…" No evidence was presented at hearing that Claimant received or is requesting TTD benefits for a time period during which he received UCD benefits from California.

16. On June 6, 2016, Claimant presented to Michele Van Dyke, D.C. with right hip, right knee, right rib, right arm/shoulder, mild neck and right lower back pain. Dr. Van Dyke diagnosed Claimant with a cervical spine sprain/strain, right shoulder sprain/strain/contusion, thoracolumbar sprain/strain, right rib contusion, right knee sprain/strain, and right hip/leg contusion resulting from the work injury. Dr. Van Dyke opined that Claimant is not at maximum medical improvement ("MMI") and required further diagnostic work-up and treatment. She recommended Claimant undergo an MRI, x-rays, chiropractic treatment and pain management.

17. On August 31, 2016 Claimant, Dr. Van Dyke noted that x-ray and radiographic evidence obtained revealed discogenic spondylosis, degenerative changes, and mild compression fracture deformities in the cervical spine. Dr. Van Dyke requested authorization for a cervical and lumbar spine MRI and an EMG/nerve conduction study. She further noted that Claimant was temporary totally disabled through October 20, 2016.

18. Dr. Ladwig reevaluated Claimant on March 14, 2017. Dr. Ladwig determined Claimant was not at MMI and placed Claimant on sedentary duty only. No evidence was presented at hearing that Claimant was subsequently determined to be at MMI. No evidence was presented at hearing establishing Employer offered Claimant work within his restrictions.

19. Claimant has not worked since his separation from Employer as a result of the industrial injury.

20. The ALJ credits Claimant's testimony and the opinions of Drs. Ladwig and Van Dyke.

21. Claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits from March 4, 2017 and ongoing.

22. Claimant's AWW is $2,441.25, which represents 40 hours per week at $31.50 and 25 hours of overtime per week at $47.25 per hour.

23. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage

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

Respondents contend that Claimant is not entitled to TTD as Claimant was cleared for full duty by two medical providers. Respondents acknowledge they do not deny compensability, but do deny "the range of maladies that Claimant has claimed since being deemed able to return to work full duty." Respondents also allege Claimant was forum shopping to get benefits from both Colorado and California.

Claimant separated from Employer and has not worked since April 1, 2016. Claimant's testimony and the medical records establish that Claimant continued to suffer from symptoms deemed by his physicians to be related to the industrial injury. Claimant's condition has resulted in his inability to resume his prior work, resulting in actual wage loss. While, at one point, Claimant was released to return to full duty, Dr. Ladwig subsequently revised his report to place Claimant on modified restrictions and, as of March 14, 2017, sedentary duty. Both Drs. Ladwig and Van Dyke opined that Claimant is not at MMI.

Claimant has not returned to regular or modified employment. There was no evidence that Claimant of modified job offer to Claimant. No affirmative defense of termination for cause being asserted by Respondents. Based on the totality of the evidence, Claimant has established by a preponderance of the evidence that he is entitled to TTD benefits beginning March 4, 2017 and ongoing.

Average Weekly Wage and TTD Award

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3), C.R.S. establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

Claimant credibly testified he was expected to continue working for Employer for several more weeks on his particular job and then other jobs for Employer. Claimant's testimony and the Employer Injury Report establish that Claimant earned $31.50 per hour, $42.75 for overtime, and averaged approximately 65-70 hours per week. Thus, the ALJ determines that a fair approximation of Claimant's wage loss and diminished earning capacity is $2,441.25, which represents 40 hours per week at $31.50 and 25 hours of overtime per week at $47.25 per hour. Based on this AWW, Claimant would be entitled to a maximum TTD rate for his date of injury of $914.27 per week.

Offsets

Regarding allowable liens on benefits, Section 8-42-124, C.R.S. provides:

> Except for amounts due under court-ordered support or for a judgment for a debt for fraudulently obtained public assistance, fraudulently obtained overpayments of public assistance, or excess public assistance paid for which the recipient was ineligible, claims for compensation or benefits due, or any proceeds thereof, under articles 40 to 47 of this title shall not be assigned, released, or commuted except as provided in said articles and shall be exempt from all claims of creditors and from levy, execution, 33 and attachment or other remedy or recovery or collection of a debt, which exemption may not be waived.

Respondents request an offset and credit for the payment of $24,105 of State Disability benefits paid by the State of California. It is undisputed that the State Disability benefits Claimant received from the State of California ended in February 2017. Claimant is not claiming TTD for any period prior to March 4, 2017. No evidence was presented of a judgment for fraudulently obtained benefits or of excess public assistance. No evidence was presented establishing that Claimant was not entitled to the disability benefits paid by the State of California. As such, Respondents have failed to establish entitlement to an offset for State Disability benefits paid by the State of California.

ORDER

It is therefore ordered that:

I. Claimant's AWW is $2,441.25.

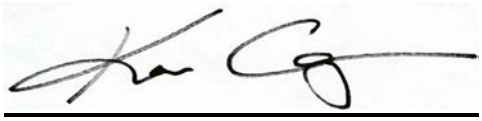
II. Respondents shall pay TTD benefits at the rate of $914.27 from March 4, 2017, ongoing until terminated by operation of law, subject to any applicable offsets. Respondents are not entitled to an offset for State Disability benefits paid by the State of California as such benefits ended prior to March 2017.

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

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

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

DATED: October 19, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable injury on October 12, 2016 arising out of and in the course of his employment.

- Whether Claimant is entitled to reasonable and necessary medical treatment as a consequence of his injury sustained on October 12, 2016 in the form of a recommended right hip arthroplasty.

FINDINGS OF FACT

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

1. Claimant is employed with the City of Boulder Police Department as a Patrol Sergeant. Claimant has been a Boulder police officer for approximately 34 years. In that time Claimant has served as a defensive tactics instructor; a health and fitness instructor; and patrol training instructor. Over last 18 years Claimant has been a Detective Sergeant, Patrol Sergeant, K9 Sergeant and a Supervisor Sergeant in the training program.

2. On October 12, 2016, Claimant participated in a mandatory 10-hour training involving dynamic live scenarios with active shooters. The training was intense by design and involved heavy physical exertion and dynamic response. The training required running, obtaining cover, concealment, and advancing through many types of terrain. The training required running up and down staircases; as well as advancing through doors and hallways. During the training Claimant extracted a downed officer and drug out actors who played victims.

3. Claimant was unable to identify the particular maneuver that caused his injury, which, given the circumstances of the training is not unreasonable. Before lunch he began feeling a pulling type of pain in his right groin and hip. The symptoms worsened after work, and Claimant applied ice to that general area when he returned home.

4. Claimant reported the injury the next morning. On October 13, 2016, Employer completed and filed a corresponding first report of injury which states "injury occurred during the day long advanced in-service department training involving active scenarios."

5. On October 24, 2016, Claimant sought medical care at US Healthworks. On the patient questionnaire Claimant stated, "On 10-12-16 during a day-long active practical training scenarios, my upper right thigh/hip area began to tighten. Later that

night the tightness increased. After ice/heat for the next 10 days the tightness + pain remained when I walk (normal gate) turning and walking down stairs." Claimant testified that initially, he thought he suffered a muscle strain or pull. However, when his pain increased over the next several days he made an appointment.

6. The October 24, 2016 medical records from US Healthworks state under Causation: "In reviewing the patient's history and medical records and examination today, it appears that the patient did sustain an injury to the right thigh and hip arising out of and caused by the industrial exposure of 10/12/16." The corresponding M164 worksheet from Claimant's initial medical visit was marked "yes" when asked "are your objective findings consistent with history and/or work-related mechanism of injury/illness?"

7. Claimant's provider at Healthworks prescribed physical therapy, massage therapy, and a TENS unit. Claimant's initial physical therapy visit records provide: "10/12/16 [Claimant] was doing some intense training + he felt groin tightening pain (increased) over next couple of days." Claimant returned to Healthworks on October 28, 2016, reporting "soreness of a 5/10 and cites his main difficulty is getting in and out of his patrol car."

8. On October 31, 2016, Claimant returned to Healthworks for further evaluation. Dr. Long Miller's notes express concern that Claimant may have torn something in his hip. Dr. Long Miller ordered an MRI arthrogram of Claimant's hip to rule out a labral tear or any type of muscle dysfunction to the hip itself. As mentioned, he was seen in therapy and has had no previous problem with his hip before and it is worse with any type of aggressive activity."

9. Following Claimant's MRI study, Dr. Long referred Claimant to orthopedic surgeon Dr. Blackwood for evaluation. Dr. Long's corresponding M164 form again states that Claimant's condition is work related.

10. Dr. Long Miller's notes from December 5, 2016 discuss Claimant's improvement with physical therapy, and note continued pain with hip abduction and hip pain sometimes waking him from sleep.

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> I am writing this letter to request an appeal to Mr. Seper's denial for his total hip replacement. As you know, he injured his hip during a police training. MRI findings indicate an acute labral tear. He does have existing osteoarthritis that was non-symptomatic prior to the injury. The mechanism of injury acutely flared up his existing arthritis. Conservative management of labral tear and osteoarthritis would only be temporizing measures at this point. I have requested a total hip arthroplasty as means of solving both the osteoarthritis issue as well as the labral tear. I am doubtful that any other treatment will resolve patient's symptoms. Please reconsider your denial of his total hip arthroplasty.

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23. Even Respondent's IME, Dr. James Lindberg, testified that prior to October 12, 2016, Claimant did not experience any episodic waxing or waning of symptoms in his right hip.

24. Dr. O'Brien concluded "the pain that [Claimant] noted on the date in question was due to his personal health, and a long-standing pre-existing arthritic condition that had been symptomatic for years prior to this date." This conclusion is contradicted by Claimant's credible and persuasive testimony, the opinions of other medical providers, and Claimant's medical records.

25. Dr. James Lindberg conducted an IME of Claimant and issued a corresponding report dated July 15, 2017. Dr. Lindberg conceded that Claimant's hip "had been asymptomatic for years." However, Dr. Lindberg stated, "I completely agree with Dr. O'Brien's assessment. I could not have stated it any better and do not need to restate it again in this IME." The ALJ credits Dr. Lindberg's opinion that Claimant had been asymptomatic for years before his injury. However , the ALJ is not persuaded by Dr. Lindberg's agreement with Dr. O'Brien's assessment because it shows no independent analysis.

26. Dr. Lindberg testified that he stopped performing surgeries in 2012, and currently only conducts IMEs and testifies for Respondents.

27. Regarding Claimant's right hip, Dr. Lindberg testified that prior to October 12, 2016, Claimant had never been diagnosed with arthritis; had never been diagnosed with a labral tear; had never received work restrictions; was fully functional; had never sustained an injury; had never received a MRI; had never been prescribed physical therapy; had never been prescribed massage therapy; had never been prescribed a TENS unit; had never been prescribed injections; had never been referred to a hip specialist; had never been prescribed a hip replacement; had never been prescribed any surgical recommendation; had never been prescribed any treatment; had never seen a doctor; and never had any symptoms.

28. Claimant testified that he currently experiences constant pain of 3-4/10. His pain spikes when he walks with a normal gait and when he turns with his right foot while walking. As a result, Claimant takes shorter steps when walking. Claimant's symptoms wake him from sleeping depending on the position of his right leg. Claimant also has symptoms while driving when moving his right foot from accelerator to the brake. Claimant's symptoms improve with physical therapy and massage therapy. However, his hip symptoms remain constant and increase with activity.

29. Prior to October 12, 2016, Claimant has never received a MRI; never had been prescribed physical therapy; never had been prescribed massage therapy; had never been prescribed a TENS unit; had never seen a specialist; had never received a recommendation for a hip replacement; had never received any surgical recommendation; had never received any treatment; had never seen a doctor; and never had any symptoms.

30. Claimant testified that he has no doubt that his right hip injury occurred on October 12, 2016, as his hip symptoms and functionality changed on that date. Claimant testified that he wants to proceed with the recommended total hip arthroplasty to help improve his functionality and pain levels in order to restore his pre-injury quality of life.

31. Regarding the onset of his symptoms, the ALJ finds Claimant's testimony to be credible and persuasive. Claimant's testimony is supported by the medical records regarding the onset of symptoms associated with his training of October 12, 2016. Claimant's description of the symptoms and the activities he conducted on that date are stated repeatedly throughout his medical records. Claimant's testimony is further corroborated by the first report of injury which was filed on October 13, 2016.

32. The ALJ finds credible and persuasive Claimant's testimony regarding his condition prior to October 12, 2016. Claimant testimony is supported by Respondents' IME Dr. Lindberg, who testified that Claimant had no prior medical treatment or symptoms in his right hip prior to October 12, 2016. Claimant's testimony that prior to the date of injury he was asymptomatic and had never required medical treatment for his right hip is undisputed.

33. The ALJ finds credible and persuasive the opinions of Dr. Dolbeare. Dr. Dolbeare's opinions, as outlined in his letter of February 15, 2017 are supported by Claimant' testimony and the medical record. Dr. Dolbeare concluded that Claimant's pre-existing arthritis was asymptomatic prior to the date of injury, which is an undisputed fact. Claimant's October 12, 2016, training resulted in a clear change in Claimant's condition, which according to Dr. Dolbeare resulted in an acute labral tear and acutely flared Claimant's arthritis. The opinions of Dr. Dolbeare are corroborated by the medical record, Claimant's testimony, and the undisputed facts surrounding the claim.

34. The ALJ finds credible and persuasive Dr. Dolbeare's opinions regarding Claimant's need for the total hip arthroplasty. Dr. Dolbeare's opinions are corroborated by those of Dr. Blackwood, in which both doctors concur that the appropriate treatment modality is for Claimant to receive the recommended total hip arthroplasty. Dr. Dolbeare has credibly stated in his letter of February 15, 2017 that conservative management of Claimant's symptoms and labral tear will not resolve Claimant's symptoms as the total hip arthroplasty is the only option.

35. The ALJ finds credible and persuasive the opinions of Dr. Long. Dr. Long is Claimant's authorized treating provider and has evaluated Claimant consistently throughout the claim. Dr. Long's opinions are supported by the medical record, including the opinions of Dr. Dolbeare. Dr. Long's conclusions are also supported by Claimant's testimony regarding the onset of his symptoms and change in condition following the events of October 12, 2016.

36. The ALJ is not persuaded by the opinions of Dr. O'Brien. First, Dr. O'Brien is incorrect in stating that Claimant had been "symptomatic for years." Dr. Lindberg agrees that this was not an accurate statement. Second, Dr. O'Brien repeatedly stated that the progression of arthritis is characterized by "episodic waxing and waning" of symptoms. However, it is undisputed that prior to October 12, 2016, Claimant had never experienced any symptoms in either his right or left hip, much less any episodic waxing and waning. Last, Dr. O'Brien states "there is no such thing as an intact labrum in a patient who has end stage osteoarthritis." Dr. O'Brien and Dr. Lindberg have stated that Claimant has symmetrical bilateral osteoarthritis in his hips. However, Claimant does not have a labral tear in his left hip which renders Dr. O'Brien's conclusion to be false. Therefore, Dr. O'Brien's opinions are not found credible.

37. The ALJ finds the opinions of Dr. Lindberg are not credible or persuasive. Dr. Lindberg states that he "completely agrees with Dr. O'Brien's assessment." As stated in the previous paragraph, Dr. O'Brien's opinions are deeply flawed and are not credible or persuasive. Regarding Claimant's right hip, Dr. Lindberg has testified that Claimant had no prior treatment, symptoms, diagnosis, nor episodic waxing or waning of symptoms prior to October 12, 2016.

CONCLUSIONS OF LAW

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

Generally

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

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

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (1971). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove

causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a “significant” cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment.

A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. Joslins *Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

As found, Claimant has proven by a preponderance of the evidence that he sustained a compensable work related injury on October 12, 2016. Claimant timely reported his injury and the medical records corroborate his testimony regarding his symptoms. Prior to October 12, 2016 Claimant had never received any medical treatment to his right hip, was asymptomatic, and was fully functional.

Medical Benefits

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

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a

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Claimant has proven by a preponderance of the evidence that the need for a total hip replacement is reasonable, necessary, and related to the compensable claim. Dr. Dolbeare's opinions are corroborated by those of Dr. Blackwood in that Claimant's only option to resolve his symptoms is to proceed with the total hip replacement. The need for the surgery is related to the injury of October 12, 2016 as prior to that date Claimant had never received any medical treatment to his right hip, was asymptomatic, and was fully functional.

ORDER

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

1. Claimant has proven by a preponderance of the evidence that he sustained an injury in the course and scope of his employment on October 12, 2016.

2. Claimant is entitled to receive reasonable necessary medical benefits including the recommended total right hip arthroplasty.

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

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

DATED: 20 October 2017

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable injury on October 12, 2016 arising out of and in the course of his employment.

- Whether Claimant is entitled to reasonable and necessary medical treatment as a consequence of his injury sustained on October 12, 2016 in the form of a recommended right hip arthroplasty.

FINDINGS OF FACT

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

1. Claimant is employed with the City of Boulder Police Department as a Patrol Sergeant. Claimant has been a Boulder police officer for approximately 34 years. In that time Claimant has served as a defensive tactics instructor; a health and fitness instructor; and patrol training instructor. Over last 18 years Claimant has been a Detective Sergeant, Patrol Sergeant, K9 Sergeant and a Supervisor Sergeant in the training program.

2. On October 12, 2016, Claimant participated in a mandatory 10-hour training involving dynamic live scenarios with active shooters. The training was intense by design and involved heavy physical exertion and dynamic response. The training required running, obtaining cover, concealment, and advancing through many types of terrain. The training required running up and down staircases; as well as advancing through doors and hallways. During the training Claimant extracted a downed officer and drug out actors who played victims.

3. Claimant was unable to identify the particular maneuver that caused his injury, which, given the circumstances of the training is not unreasonable. Before lunch he began feeling a pulling type of pain in his right groin and hip. The symptoms worsened after work, and Claimant applied ice to that general area when he returned home.

4. Claimant reported the injury the next morning. On October 13, 2016, Employer completed and filed a corresponding first report of injury which states "injury occurred during the day long advanced in-service department training involving active scenarios."

5. On October 24, 2016, Claimant sought medical care at US Healthworks. On the patient questionnaire Claimant stated, "On 10-12-16 during a day-long active practical training scenarios, my upper right thigh/hip area began to tighten. Later that

night the tightness increased. After ice/heat for the next 10 days the tightness + pain remained when I walk (normal gate) turning and walking down stairs." Claimant testified that initially, he thought he suffered a muscle strain or pull. However, when his pain increased over the next several days he made an appointment.

6. The October 24, 2016 medical records from US Healthworks state under Causation: "In reviewing the patient's history and medical records and examination today, it appears that the patient did sustain an injury to the right thigh and hip arising out of and caused by the industrial exposure of 10/12/16." The corresponding M164 worksheet from Claimant's initial medical visit was marked "yes" when asked "are your objective findings consistent with history and/or work-related mechanism of injury/illness?"

7. Claimant's provider at Healthworks prescribed physical therapy, massage therapy, and a TENS unit. Claimant's initial physical therapy visit records provide: "10/12/16 [Claimant] was doing some intense training + he felt groin tightening pain (increased) over next couple of days." Claimant returned to Healthworks on October 28, 2016, reporting "soreness of a 5/10 and cites his main difficulty is getting in and out of his patrol car."

8. On October 31, 2016, Claimant returned to Healthworks for further evaluation. Dr. Long Miller's notes express concern that Claimant may have torn something in his hip. Dr. Long Miller ordered an MRI arthrogram of Claimant's hip to rule out a labral tear or any type of muscle dysfunction to the hip itself. As mentioned, he was seen in therapy and has had no previous problem with his hip before and it is worse with any type of aggressive activity."

9. Following Claimant's MRI study, Dr. Long referred Claimant to orthopedic surgeon Dr. Blackwood for evaluation. Dr. Long's corresponding M164 form again states that Claimant's condition is work related.

10. Dr. Long Miller's notes from December 5, 2016 discuss Claimant's improvement with physical therapy, and note continued pain with hip abduction and hip pain sometimes waking him from sleep.

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32. The ALJ finds credible and persuasive Claimant's testimony regarding his condition prior to October 12, 2016. Claimant testimony is supported by Respondents' IME Dr. Lindberg, who testified that Claimant had no prior medical treatment or symptoms in his right hip prior to October 12, 2016. Claimant's testimony that prior to the date of injury he was asymptomatic and had never required medical treatment for his right hip is undisputed.

33. The ALJ finds credible and persuasive the opinions of Dr. Dolbeare. Dr. Dolbeare's opinions, as outlined in his letter of February 15, 2017 are supported by Claimant' testimony and the medical record. Dr. Dolbeare concluded that Claimant's pre-existing arthritis was asymptomatic prior to the date of injury, which is an undisputed fact. Claimant's October 12, 2016, training resulted in a clear change in Claimant's condition, which according to Dr. Dolbeare resulted in an acute labral tear and acutely flared Claimant's arthritis. The opinions of Dr. Dolbeare are corroborated by the medical record, Claimant's testimony, and the undisputed facts surrounding the claim.

34. The ALJ finds credible and persuasive Dr. Dolbeare's opinions regarding Claimant's need for the total hip arthroplasty. Dr. Dolbeare's opinions are corroborated by those of Dr. Blackwood, in which both doctors concur that the appropriate treatment modality is for Claimant to receive the recommended total hip arthroplasty. Dr. Dolbeare has credibly stated in his letter of February 15, 2017 that conservative management of Claimant's symptoms and labral tear will not resolve Claimant's symptoms as the total hip arthroplasty is the only option.

35. The ALJ finds credible and persuasive the opinions of Dr. Long. Dr. Long is Claimant's authorized treating provider and has evaluated Claimant consistently throughout the claim. Dr. Long's opinions are supported by the medical record, including the opinions of Dr. Dolbeare. Dr. Long's conclusions are also supported by Claimant's testimony regarding the onset of his symptoms and change in condition following the events of October 12, 2016.

36. The ALJ is not persuaded by the opinions of Dr. O'Brien. First, Dr. O'Brien is incorrect in stating that Claimant had been "symptomatic for years." Dr. Lindberg agrees that this was not an accurate statement. Second, Dr. O'Brien repeatedly stated that the progression of arthritis is characterized by "episodic waxing and waning" of symptoms. However, it is undisputed that prior to October 12, 2016, Claimant had never experienced any symptoms in either his right or left hip, much less any episodic waxing and waning. Last, Dr. O'Brien states "there is no such thing as an intact labrum in a patient who has end stage osteoarthritis." Dr. O'Brien and Dr. Lindberg have stated that Claimant has symmetrical bilateral osteoarthritis in his hips. However, Claimant does not have a labral tear in his left hip which renders Dr. O'Brien's conclusion to be false. Therefore, Dr. O'Brien's opinions are not found credible.

37. The ALJ finds the opinions of Dr. Lindberg are not credible or persuasive. Dr. Lindberg states that he "completely agrees with Dr. O'Brien's assessment." As stated in the previous paragraph, Dr. O'Brien's opinions are deeply flawed and are not credible or persuasive. Regarding Claimant's right hip, Dr. Lindberg has testified that Claimant had no prior treatment, symptoms, diagnosis, nor episodic waxing or waning of symptoms prior to October 12, 2016.

CONCLUSIONS OF LAW

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

Generally

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

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

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (1971). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951).

Compensable injuries are those which require medical treatment or cause disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove

causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a “significant” cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment.

A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. Joslins *Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

As found, Claimant has proven by a preponderance of the evidence that he sustained a compensable work related injury on October 12, 2016. Claimant timely reported his injury and the medical records corroborate his testimony regarding his symptoms. Prior to October 12, 2016 Claimant had never received any medical treatment to his right hip, was asymptomatic, and was fully functional.

Medical Benefits

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

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a

preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Claimant has proven by a preponderance of the evidence that the need for a total hip replacement is reasonable, necessary, and related to the compensable claim. Dr. Dolbeare's opinions are corroborated by those of Dr. Blackwood in that Claimant's only option to resolve his symptoms is to proceed with the total hip replacement. The need for the surgery is related to the injury of October 12, 2016 as prior to that date Claimant had never received any medical treatment to his right hip, was asymptomatic, and was fully functional.

ORDER

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

1. Claimant has proven by a preponderance of the evidence that he sustained an injury in the course and scope of his employment on October 12, 2016.

2. Claimant is entitled to receive reasonable necessary medical benefits including the recommended total right hip arthroplasty.

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

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

DATED: 20 October 2017

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable industrial injury on October 17, 2016.

II. If Claimant has established a compensable injury, whether he is entitled to reasonably necessary and related medical benefits.

STIPULATIONS

I. The parties reserved the issues of average weekly wage, temporary disability benefits, and authorized treating provider.

FINDINGS OF FACT

1. Claimant is 63 years of age and works for Employer processing eggs.

Prior Left Shoulder Injury

2. Claimant sustained an admitted injury to his left shoulder on November 13, 2014.

3. Underwent left shoulder rotator cuff repair surgery on August 12, 2015.

4. Lloyd Thurston, M.D. placed Claimant at maximum medical improvement ("MMI") for his left shoulder injury on June 21, 2016 with a 10% upper extremity (6% whole person) permanent impairment rating. Dr. Thurston determined Claimant did not have any restrictions or require medical maintenance care.

5. In approximately July 2016, Claimant returned to work on light duty. Claimant's light duty work involved packaging eggs. Claimant retrieved eggs from a conveyor belt located at chest level, filled a box with approximately 12-15 cartons of eggs, and then pushed the box onto a conveyor belt. Claimant's light duty did not involve lifting. Claimant filled a box approximately every 48 seconds.

6. On October 12, 2016, Brian Mathwich, M.D. performed a Division Independent Medical Examination ("DIME") for Claimant's left shoulder injury. Claimant reported increased left shoulder pain after returning to work. Dr. Mathwich noted, "He is also having some pain on the right side now as well." On physical examination, Dr. Mathwich noted,

> Visual examination of the shoulders reveals he actually carries his left shoulder slightly lower than the right…Palpation of the left trapezius muscle reveals large trigger point in the mid trapezius body which are very

> tender on palpation. Patient actually has a larger more tender trigger point on the right trapezius. He also has very specific point tenderness over the anterior glenohumeral joint.

7. Dr. Mathwich did not further address Claimant's right shoulder in his report. Dr. Mathwich placed Claimant at MMI for the left shoulder injury, pending a left shoulder MRI confirming no re-injury to the left shoulder.

Right Shoulder Injury

8. Claimant sustained an industrial injury to his right shoulder on October 17, 2016. Claimant testified that he felt a pain in his right shoulder while pushing a box of eggs onto a conveyor belt. Claimant testified that the oil on the conveyor belt had worn off, causing friction between the conveyor belt and the box when pushed.

9. Claimant reported the injury to Employer soon thereafter. On the Supervisor Accident/Investigation Report form dated October 18, 2016, it was noted that Claimant reported that he "Pushed boxes onto belt with too much force and it hurt his right shoulder." Claimant reported that the boxes piled up too quickly causing him to work at a faster pace. Employer sent Claimant to Injury Care of Colorado.

10. On October 18, 2016, Claimant presented to Megan Hubbard, PA-C at Injury Care of Colorado. Regarding the mechanism of injury, PA-C Hubbard noted, "Pt states he was pushing a box, he had to push it even harder the second time and instantly felt pain." On physical examination, PA-C Hubbard noted limited range of motion of the right shoulder and tenderness over the AC joint. Impingement and empty can tests were positive. PA-C Hubbard assessed a work-related right shoulder strain and recommended resting, icing, taking ibuprofen as needed. Claimant was released to work full duty without restrictions and instructed to follow up with Julie Parsons, M.D.

11. X-rays of Claimant's right shoulder taken October 18, 2016 shoulder revealed` no fracture, dislocation or acute bony abnormality.

12. Dr. Parsons evaluated Claimant on October 19, 2016. Claimant presented with right shoulder pain. On physical examination, Dr. Parsons noted tenderness and limited range of motion. Dr. Parsons diagnosed Claimant with a work-related right shoulder strain and referred Claimant for physical therapy. She released Claimant to return to light duty, restricting lifting, carrying, and pushing/pulling to 15 pounds or less.

13. Claimant returned to work and Employer accommodated his restrictions.

14. On February 24, 2017, Linda Mitchell, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Mitchell issued an IME Report dated March 2, 2017. Claimant denied a specific injury to his right shoulder and reported experiencing a gradual onset of right shoulder pain since July 2016, which he attributed to favoring his left shoulder. Claimant reported that his pain worsened with working fast. Claimant denied any prior right shoulder problems. On physical examination, Dr. Mitchell noted a ruptured right biceps muscle, tenderness along the

glenohumeral joint and of the right biceps tendon and limited range of motion. Dr. Mitchell also noted give-way weakness and moderately severe pain behaviors. Dr. Mitchell diagnosed Claimant with longstanding right bicipital tendon and probable rotator cuff tears with no specific work injury. Dr. Mitchell concluded that Claimant's modified work duties did not cause or significantly exacerbate his pre-existing bicipital tendon and rotator cuff tears. Dr. Mitchell recommended Claimant limit lifting and reaching with the right upper extremity.

15. Dr. Mitchell subsequently reviewed video footage of workers performing Claimant's job duties and continued to opine that Claimant's work did not cause or significantly exacerbate his pre-existing bicipital tendon and rotator cuff tears, noting, "Videos show only infrequent reaching away from body or overhead to get labels. No heavy lifting. Lifting is generally below chest level, close to body, & not heavy."

16. Dr. Mitchell testified at hearing on behalf of Respondents as an expert in occupational medicine. Dr. Mitchell testified consistent with her IME Report. Dr. Mitchell stated that her examination of Claimant revealed a Popeye deformity of the right bicep and high-riding right shoulder. She testified that such findings were indicative of chronic bicipital and rotator cuff tears, as the upper trapezius tends to overcompensate, resulting in shoulder shrugging. Dr. Mitchell stated that such deformities generally do not occur with acute tears and, if Claimant had sustained an acute tear, there would be more pain, weakness and limited range of motion. Dr. Mitchell stated that her exam findings were consistent with Dr. Mathwich's findings regarding the right shoulder. Dr. Mitchell stated that the vast majority of chronic tears are degenerative and not uncommon for someone of Claimant's age. Dr. Mitchell stated that it was not outside of the realm of possibility that Claimant suffered a right shoulder sprain, although that was not her most probable diagnosis.

17. Dr. Mitchell again opined that Claimant's modified work duties did not cause the bicipital tendon or rotator cuff tears, or significantly exacerbate his condition. Dr Mitchell testified, "I look at it as I think this gentleman had chronic bicipital tendinitis, tears to his rotator cuff. And very simple basic motions might cause discomfort, but I don't see that there's a mechanism for causing tissue damage or structural anatomical changes from that motion."

18. Dr. Mitchell acknowledged that Claimant's work duties could cause pain or discomfort, but not a change to the pathology of his shoulder. Dr. Mitchell testified:

> Q: …So is it now that working fast would reasonably lead to increased symptomatology?
>
> A: I think he would – his shoulder was bad enough that really any activities moving the arm fast would cause discomfort.
>
> Q: Okay.
>
> A: But, again, I'll get back to my point that I don't think that's causing tissue damage or – or alteration of anatomy.

Q: I understand that. In other words, not changing the underlying pathology?

A: Right.

Q: Okay. But you would agree that the work would aggravate – aggravate the pain complaints?

A: Sure.

19. Claimant first testified that he experienced right shoulder pain prior to the October 17, 2016 injury, then later testified that his right shoulder pain began with the October 17, 2016 injury. Claimant also testified that he did not have any treatment for his right shoulder prior to the October 17, 2016 injury. No evidence was introduced at hearing establishing that Claimant sought or received treatment for his right shoulder prior to October 17, 2016.

20. David Valdez, Processing Lead, testified at hearing on behalf of Respondents. Mr. Valdez stated that Claimant was placed on modified duty upon his return from the left shoulder injury and was solely responsible for packing boxes, which weighed approximately 27.5 pounds. Mr. Valdez testified that mineral oil is applied to the conveyor belts throughout the day and the oil can wear off towards the end of the day.

21. Claimant's testimony is found credible and persuasive.

22. Claimant has established that it is more probably true than not that he sustained a compensable injury to his right shoulder on October 17, 2016 in the form of an aggravation of a pre-existing condition. The ALJ also credits Dr. Mitchell's opinion as to the pre-existing nature of Claimant's bicipital tendon and rotator cuff tears. The ALJ credits Claimant's testimony regarding the mechanism of injury and having no prior medical treatment to his right shoulder.

23. Claimant is entitled to reasonably necessary and related medical treatment to cure and relieve the effects of the October 17, 2016 industrial injury.

24. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

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

the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical

treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ concludes Claimant has proven by a preponderance of the evidence that he sustained a compensable industrial injury to his right shoulder on October 17, 2016. The ALJ is persuaded by Dr. Mitchell's testimony that Claimant's bicipital tendon and rotator cuff tear were pre-existing conditions. The ALJ is further persuaded Claimant suffered some right shoulder pain prior to October 17, 2016, as such pain is noted in the October 2016 DIME report, Dr. Mitchell's report, and Claimant's initial testimony, which he later changed.

Nonetheless, an aggravation of a pre-existing condition, even if temporary, is compensable if the employment is the proximate cause of the claimant's temporary disability or need for medical treatment. *In the Matter of the Claim of Earnest Clemons*, W.C. No. 4-311-981 (Indus. Claim Appeals Office, 2000), citing *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988); and *Conry v. City of Aurora*, W.C. No. 4- 195-130, April 24, 1996. Pain is a typical symptom from the aggravation of a pre-existing condition. The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *In the Matter of the Claim of Earnest Clemons*, *supra,* citing *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949).

No evidence was introduced establishing that Claimant received any treatment for his right shoulder prior to the October 17, 2016 industrial injury. The ALJ is persuaded that the mechanism of injury aggravated Claimant's pre-existing condition, producing pain and the need for medical treatment. While Dr. Mitchell opined that Claimant's modified work duties would not alter Claimant's anatomy or cause structural damage, she acknowledged that Claimant's modified work duties would cause pain and aggravate his pain complaints. Based on the totality of the evidence, has established that it is more probably true than not that he suffered a compensable injury on October 17, 2016.

Medical Benefits

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

Claimant has established that he suffered a compensable injury. As such, Claimant is entitled to receive reasonably necessary and related medical treatment to cure and relieve the effects of the October 17, 2016 injury.

ORDER

It is therefore ordered that:

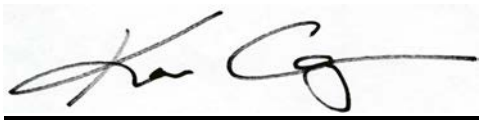
I. Claimant established by a preponderance of the evidence that he suffered a compensable injury on October 17, 2016.

II. Respondents shall pay for reasonably necessary and related medical treatment to cure and relieve the effects of Claimant's October 17, 2016 industrial injury.

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

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

DATED: October 19, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

The issue raised for consideration at hearing is whether Respondents' proved by clear and convincing evidence that the Division Independent medical examiner's (DIME) report regarding Claimant's impairment rating was most probably incorrect.

FINDINGS OF FACT

Having considered the evidence presented at hearing, and the deposition testimony of Dr. John T. Sacha, the Judge makes the following findings of fact:

1. Claimant sustained an admitted injury to his neck on July 7, 2017, in the course and scope of his employment with the Employer.

2. Claimant was placed at maximum medical improvement on February 3, 2016, by Dr. Sacha and given a 0% impairment rating.

3. Dr. Sacha was aware that the Claimant had a pre-existing cervical fusion that was not work-related in 2001. Dr. Sacha therefore apportioned out a range of motion impairment and Table 53 impairment which resulted in 0% permanent impairment after apportionment.

4. Claimant objected to the final admission of liability and requested a DIME which was performed by Dr. Goldman on September 19, 2016. In his impairment rating, Dr. Goldman states, "[Claimant's] case represents, at least from an impairment rating perspective, the incongruencies between the statutory revisions that occurred back in 2007 (as I recall) as articulated through Rule XII versus the AMA Guides, third edition, revised methodology. The patient clearly would qualify for a pre-existing table 53 IID or IIE (depending on how one interprets the October 2014 MRI of the neck indications), as well as would be expected to have range of motion deficits from his prior cervical fusion." Based upon his understanding of range of motion apportionment, he determined that the Claimant had 13% whole person impairment.

5. Following the DIME impairment rating from Dr. Goldman, Respondents took the evidentiary deposition of Dr. Sacha. Dr. Sacha is level 2 accredited and did his last re-accreditation two to three months before his deposition on June 20, 2017. Dr. Sacha noted that both he and Dr. Goldman train other doctors for Level 2 accreditation. Dr. Sacha was not qualified as an expert at hearing.

6. Subsequent to the 0% impairment rating that Dr. Sacha provided at the time of MMI, the doctor received additional training with respect to specific issues regarding apportionment. He testified that based upon a new methodology for interpretation of the *AMA Guides*, Dr. Goldman's interpretation is incorrect. So both Dr. Sacha's initial 0% rating as well as Dr. Goldman's rating was incorrect.

7. Dr. Sacha testified that Claimant's impairment rating should have been 6% whole person based on his proper calculation methodology.

8. Dr. Sacha expressed his vehement opinion that Dr. Goldman's impairment rating was incorrect. However, his testimony regarding Dr. Goldman's impairment rating and why it is most probably incorrect was not made clear. Dr. Sacha's revised rating of 6% whole person is based on his recent training with the Division of Workers' Compensation. Dr. Sacha testified that he relies upon "State of Colorado rulemaking," the Level II accreditation coursebook, interpretation of "work comp pearls" and discussions with the Division of Workers' Compensation Medical Director at a recent accreditation course in support of his assertion regarding the impairment rating.

9. These sources as support for Dr. Sacha's 6% impairment rating, the "State of Colorado rulemaking," the Level II accreditation coursebook, interpretation of "work comp pearls" and discussions with the Division's Medical Director, do not establish clear and convincing evidence that Dr. Goldman's DIME opinion is incorrect. Dr. Sacha's testimony did not clearly illuminate why Dr. Goldman's impairment rating was most probably incorrect.

10. As such, it cannot be concluded that the DIME opinion is incorrect and thus Dr. Goldman's 13% whole person impairment will stand.

CONCLUSIONS OF LAW

Having entered the foregoing findings of fact, the following conclusions of law are reached.

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

201(1), C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201(1), *supra*.

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

3. In addition to determining the sufficiency of the evidence presented, the ALJ evaluates the credibility and probative value of conflicting evidence, including competing experts and inconsistencies in a particular witness' testimony. *Johnson v. ICAO*, 973 P.2d 624, 626 (Colo. App. 1997). The ALJ does not have to make findings about every piece of evidence. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

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

5. Section 8-42-107(8)(c), C.R.S., provides that the DIME physician's finding of MMI and impairment rating is binding unless overcome by clear and convincing evidence. "Clear and convincing evidence" is defined as evidence which is stronger than preponderance, is unmistakable and is free from serious or substantial doubt. *DiLeo v. Koltnow*, 200 Colo. 119, 613 P. 2d 318 (1980). In other words, in order to overcome the DIME report, there must be evidence which proves that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

6. The question whether the party challenging the DIME physician's opinion has overcome the report by clear and convincing evidence is one of fact for determination by the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *Metro Moving and Storage Co. v. Gussert*, supra.

7. The Administrative Law Judge finds that Dr. Sacha's medical report and deposition testimony did not rise to the level of clear and convincing evidence supporting the conclusion that the DIME opinion is most probably incorrect. The Administrative Law Judge finds that Dr. Sacha's testimony is not persuasive since Dr. Sacha's opinion relies on conversations with the Division's medical director, information obtained from a Level II accreditation coursebook, and unspecified State of Colorado regulations.

8. The Administrative Law Judge concludes that Respondents did not overcome Dr. Goldman's DIME impairment rating of 13% whole person by clear and convincing evidence.

ORDER

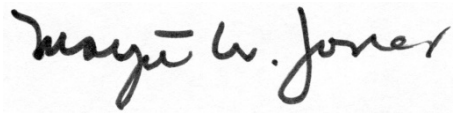
It is therefore ordered that the Respondents shall be liable to Claimant for workers' compensation benefits based on a Dr. Goldman's DIME report and his 13% whole person impairment rating.

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

All matters not determined herein are reserved for future determination.

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

DATED: October 23, 2017



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-041-234-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

EMPLOYERS PREFERRED INSURANCE COMPANY,

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 3, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 10/3/17, Courtroom 1, beginning at 8:30 AM, and ending at approximately 12:00 PM).

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection. Respondents' Exhibits A through X were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ took the matter under advisement. The following decision is hereby issued.

ISSUES

The issues to be determined by this decision is whether Claimant's fall at work on February 24, 2017 was the cause of Claimant's seizure and fall on February 25, 2017, thus, resulting in medical care Claimant received from those injuries, up until the present date. If the claim is compensable, average weekly wage (AWW) and temporary total disability (TTD) are additional issues. Respondents position is that the Claimant's seizure on February 25, 2017, is **not** within the proximate chain of causation from his

fall down the stairs on February 24, 2017. Nonetheless, the Claimant bears the burden of proof, by preponderant evidence, on all issues including causal relatedness of the February 25, 2017, seizure.

FINDINGS OF FACT

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

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated that the Claimant's AWW is $364.00, and the ALJ so finds, however, if the claim is not compensable the AWW issue is moot.

2. Respondents stipulated that if Claimant's injury is compensable, then he is owed TTD benefits, however, this stipulation is moot.

3. The Claimant (date-of-birth, October 7, 1983) worked as a cook for the Employer on February 24, 2017.

4. Laura Sosnowski (hereinafter "Sosnowski"), the General Manager of the Employer's restaurant, testified that the Claimant was a good worker. On an unknown date, however, she and Executive Chef Patrick McCready (hereinafter "McCready") met with the Claimant for a coaching session in which they discussed the Claimant showing up to work intoxicated. Sosnowski stated that she was trained to recognize symptoms of intoxication, and she observed the Claimant with slurred speech, flushed cheeks, and acting unfocused and clumsy. Sosnowski informed the Claimant that the Employer had a zero tolerance policy for workers intoxicated on the job. She further told Claimant that this was his last chance; he would be fired if she suspected him of drinking in the future.

5. According to. McCready, the Claimant was "a drinker". McCready personally observed the Claimant shaking while at work. When this occurred, McCready watched the Claimant go to the bathroom. When the Claimant came out of the bathroom, McCready smelled mouthwash on the Claimant's breath, and the Claimant no longer shook. Additionally, the Claimant's speech was slurred and he repeated questions. McCready further testified that during the coaching meeting with Sosnowski, the Claimant admitted he was intoxicated at work. Claimant said, "Yeah, you got me."

6. According to the Claimant, he generally drinks beer 2 to 3 times per week with friends. He explained that he consumes 2 to 3 beers on each occasion. Based on the totality of the evidence, the Claimant's version of his drinking habits stretches credulity. He admitted that his birthday was the only time he was on a drinking binge.

That binge consisted of 2 to 3 beers and 2 to 3 shots of Jim Beam whisky. The Claimant disagreed with the note in his records from Denver Health Medical Center that stated he said that he consumed a fifth of whisky.

7. According to the Claimant, on February 24, 2017, the only events he remembered were waking up, getting dressed, and going to work. He remembered that he entered work through the back door of the restaurant, but he did not recall anything else from that day.

8. Sous Chef and the Claimant's coworker, Hannah McGowen (hereinafter "McGowen"), reported that the Claimant arrived at work at approximately 8:30 AM on February 24, 2017 (Respondent's Exhibit F, p. 10). The Claimant was supposed to arrive at 9:00 AM. *Id*. When McGowen confronted the Claimant about his time, "he believed the time to be twenty minutes later than it actually was." *Id*. While talking to the Claimant, McGowen noticed that the Claimant's speech was labored and slow. The Claimant had difficulty choosing words and forming full sentences. While McGowen and the Claimant were beginning their prep work, the Claimant asked McGowen the same question, three different times. McGowen answered the Claimant with a direct answer each time.

The Stairs Incident of February 24, 2017

9. McCready testified that on February 24, he arrived at work, spoke to McGowen about the Claimant's appearance of intoxication, and went to the basement locker room to change into his work clothes. While in the basement, McCready observed the Claimant come down the stairs to the basement, grab a box of red potatoes (weighing approximately 50 pounds), and continue up the stairs. The Claimant stopped a couple steps from the top of the stairway for a few seconds, and then he fell backwards. The Claimant landed mostly on the back of his head and his upper shoulders. McCready observed that the Claimant did not reach out for the railing (although there was a railing present) and the Claimant did not slip on the stairs. McCready also observed that Claimant did not hit his head on anything prior to hitting the floor.

10. After the fall, McCready went over to the Claimant and observed that the Claimant's eyes were watery and he smelled of alcohol. The Claimant never lost consciousness after the fall. McCready asked to see the Claimant's head, but the Claimant said no and insisted that he was fine. The Claimant started to pick up the potatoes that had spilled, but McCready told him to sit down and rest. At that point, McCready sent the Claimant home for the day. When McCready picked up the potatoes that had fallen, he did not see any blood on the floor.

11. The next day, February 25, 2017, the Denver Fire Department and Denver Health Paramedics responded to the Claimant's address at 2744 Champa St., Denver,

CO 80205 at approximately 12:36 PM. The Claimant suffered a seizure and had fallen. His roommates, who were intoxicated when they spoke with emergency personal, indicated that the Claimant drank alcohol and smoked marijuana the night before. The Fire Department's report stated "[h]is roommates stated he is a heavy drinker." (Respondents' Exhibit K, p. 21). The Paramedic's report noted that the Claimant had "[a]pprox. 10 cm diameter hematoma to left parietal aspect of scalp. Quarter-sized abrasion to occipital aspect of scalp. Quarter-sized hematoma to right orbital, lateral to eye" (Respondents' Exhibit L, p. 22).

Medical

12. The paramedics transported the Claimant to Denver Health Medical Center. The Claimant stayed in the hospital from February 25 to March 23, 2017 due to an epidural hematoma and skull fracture on the right side of his head, a subdural hematoma on the left side of his head, and he underwent two craniotomies for these hematomas. The first craniotomy was on February 25, 2017 on the right side of Claimant's head (Claimant's Exhibit 6, p. 28). The second craniotomy was on February 26, 2017 on the left side of Claimant's head (Claimant's Exhibit 6, p. 42).

13. A drug test was conducted upon the Claimant's arrival at the hospital. The results of the drug test gave a negative indication for alcohol (Claimant's Exhibit 6, p. 25). This occurred more than twelve hours after the Claimant had anything to drink and it is consistent with a seizure from alcohol withdrawal, according to L. Baron Goldman, M.D., the Respondents' Independent Medical Examiner (IME).

14. The Claimant was in Denver Health Acute Rehabilitation Unit from March 23 to April 5, 2017 (Claimant's Exhibit 8, p. 234).

15. The Claimant visited the emergency room (ER) at Memorial Health University Medical in Savannah, Georgia on May 7, 2017 for a headache. He was referred for occupational therapy at The Neurological Institute of Savannah and Center for Spine which he visited on May 16, 2017 (Claimant's Exhibits 9-10).

Independent Medical Examination (IME) of Bennett I Machanic, M.D.

16. Dr. Machanic performed an IME at the Claimant's request on or about September 6, 2017. Dr. Machanic's ultimate opinion was that Claimant sustained a work-related injury on February 24, 2017 by falling down the stairs at work. Dr. Machanic found the two fractures to Claimant's skull to be significant. According to Dr. Machanic, the Claimant likely sustained the first fracture to the left side of his skull and a subdural hematoma at the fall at work. He then had subsequent superimposed complications on February 25, 2017, that caused the fracture on the right side of his head along with the epidural hematoma requiring critical care at Denver Health Medical Center (Claimant's Exhibit 12, p. 276). Although Dr. Mechanic noted that the Claimant's

medical records from Denver Health suggested heavy drinking, he also noted that there was suggestion that Claimant "had a very modest social alcohol situation." *Id*. That coupled with the fact that the toxic screen came back negative, led Dr. Machanic to conclude that an alcohol abstinence seizure was unlikely. The ALJ infers and finds that Dr. Machanic's underlying assumptions with regard to the Claimant's alcohol usage are inconsistent with the totality of the evidence and, therefore, seriously undercuts Dr. Machanic's ultimate opinions regarding "causation."

IME of L. Barton Goldman, M.D.

17. Dr. Goldman performed an IME at Respondents' request on or about August 9, 2017. Dr. Goldman's ultimate opinion was that Claimant sustained a "non-work-related traumatic brain injury as a result of alcohol abstinence seizures and complications thereof including a fall fracturing his temporal bone occurring February 25, 2017" (Claimant's Exhibit 11, p. 270). Also, Dr. Goldman concluded that it was unlikely that the Claimant's alcohol-induced fall at work on February 24, 2017, and the accompanying occipital abrasion, were predisposing factors to the Claimant's seizure on February 25th, which caused the substantial injuries required lengthy hospitalization..

18. Dr. Goldman was of the opinion that the doctors at Denver Health recorded the Claimant having a right temporal fracture with an epidural hematoma and a left subdural hematoma. Dr. Goldman stated that these injuries on the sides of the head were consistent with head shaking during a seizure and fall on the floor. Dr. Goldman also stated that the CT scan from February 27, 2017 was the only CT scan that mentioned a fracture on the left side of Claimant's head. Dr. Goldman explained that when a craniotomy is performed, the surgery involves breaking open the skull and small fractures can be incidental from that procedure.

19. Additionally, Dr. Goldman was of the opinion that the occipital abrasion described in the paramedic's report is a scrape-like injury to the back of the head. Dr. Goldman was of the opinion that this abrasion was caused by the Claimant's fall at work on February 24, 2017 and would unlikely be the cause of a seizure. Because the Claimant's fall on the 24th was described as the Claimant falling directly on the back of his head and not hitting his head on anything during the fall, it is unlikely that the severe injuries sustained to the sides of Claimant's head were caused by the alcohol-induced fall on the 24th. Dr. Goldman explained that the occipital bone is a thicker bone of the skull, and a safer area of the head to hit. He further was of the opinion that if this was the cause of the Claimant's seizure, the seizure would have been immediate and there would have been much more blood in this area of the skull in the CT scans the following day. Although the CT scans from Denver Health showed some blood pooling in Claimant's occipital region, Dr. Goldman explained that the primary pooling was in the temporal lobes (sides of Claimant's head).

20. Finally, Dr. Goldman's IME states that "[a]lcohol abstinence symptoms can actually occur within 2 – 12 hours of alcohol abstinence" (Respondents' Exhibit T, p. 170). The IME continues by stating that predisposed individuals and those utilizing marijuana can experience seizures within 8 hours of alcohol abstinence. *Id*. Dr. Goldman concluded that the records he reviewed supported the diagnosis of the Claimant sustaining an alcohol abstinence seizure on February 25, 2017.

Analysis of the Evidence

21. Claimant's February 24, 2017 fall at work was not the cause of Claimant's subsequent seizure, fall, and medical care that occurred 28 hours later on February 25, 2017. Although the fall on the 24th occurred at Claimant's place of work, Claimant had no need for medical treatment until after his seizure and fall on the 25th. This was explained by Dr. Goldman's IME and credible testimony. Because Claimant's fall on the 24th did not cause the seizure and fall on the 25th, Claimant did not sustain a compensable injury requiring compensability and medical benefits.

22. Claimant's testimony that he is a moderate drinker is unpersuasive and contradicted by testimony of Sosnowski and McCready. Both Sosnowski and McCready testified that Claimant was intoxicated while at work on a previous occasion. Macready also testified to Claimant's intoxication at work the morning of February 24, 2017.

23. Claimant's testimony about his drinking habits is further contradicted by the Denver Fire Department's report, Denver Health Paramedic's report, and his medical records from Denver Health Medical Center. The Fire Department and Paramedic's reports noted that Claimant had been drinking and smoking marijuana prior to his seizure and was known as a "regular drinker". Doctors at Denver Health Medical Center noted that Claimant admitted to drinking a fifth of whiskey per day. This ALJ has no reason to believe that there is not some truth and credibility to these statements made to medical personal. Medical information given in an emergency situation is for the purpose of assessing and treating a patient. Although, Claimant pointed out in closing that he received a traumatic brain injury and could have been incoherent upon making statements to doctors, there are additional statements supporting Claimant's heavier drinking habit, not just his comment to doctors that he drinks a fifth of whisky each day.

24. Both McCready's and Sosnowski's testimonies were credible and persuasive. As they both mentioned in their testimonies, the Employer's restaurant closed shortly after the incident in this case. Neither Sosnowski nor McCready have incentives to lie in their testimony as they no longer work for the Employer. Further, both their testimonies are consistent to each other's; particularly in regards to their counseling meeting with the Claimant when he was found intoxicated at work on a prior occasion.

25. Dr. Goldman's testimony was credible and more persuasive than Dr. Machanic's IME Report. Dr. Goldman's testimony and medical evaluation was supported by the Claimant's medical record, his review of the facts of the Claimant's fall on February 24th; and, the seizure and fall on February 25th, and the history given by the Claimant, Sosnowski, and McCready on October 3, 2017. Although Dr. Machanic's IME was also supported by Claimant's medical records and facts of both falls, Dr. Machanic did not offer any opinions concerning Claimant's drinking habits on either incident of February 24th or 25th. Dr. Machanic noted the medical records contained contradictory findings of Claimant being a heavy drinker, but it does not appear that Dr. Machanic was aware of the Claimant's drinking issues at work nor the reports from Denver Fire Department or Denver Health Paramedics. Further, Dr. Machanic's opinion as to the causes of Claimant's temporal skull fractures was not as persuasive as Dr. Goldman's opinion concerning their cause. Thus, this ALJ finds Dr. Goldman's testimony and opinion more persuasive than Dr. Machanic's contradictory IME opinions.

26 The ALJ makes the rational choice, based on substantial evidence, to accept Dr. Goldman's expert testimony that the Claimant's medical care, which began on February 25, 2017, was caused by an alcohol abstinence seizure and subsequent complications; not a work-related injury. There is substantially more evidence in the record supporting Dr. Goldman's medical opinion over that of Dr. Mechanic's IME. Claimant's fall down the stairs at work the morning of February 24th did not cause the seizure, fall, and subsequent medical care from February 25th. Further, this ALJ rejects any testimony and/or opinions to the contrary.

27. Claimant failed to establish his burden of proof. As found herein above, his testimony about his alcohol consumption was contradicted by testimony of other witnesses and evidence presented in the record--other witnesses who were more credible than the Claimant. It is more reasonably probable that the Claimant's medical care beginning on February 25, 2017 and continuing to the present were from an alcohol abstinence seizure and subsequent complications, not from his fall at work on February 24, 2017. It is not reasonably probable that Claimant's seizure from February 25th was caused from a work-related injury.

Ultimate Findings

28. The Claimant's testimony regarding his moderate alcohol consumption was contradicted by Sosnowski and McCready's observations of him in the workplace; Claimant's roommates' statements to the Denver Fire Department and Denver Health Paramedics; and his medical reports from Denver Health Medical Center. The ALJ finds that the Claimant's testimony lacks credibility, whereas Sosnowski's and McCready's testimony is persuasive and credible. They have less of a stake in the outcome; their testimonies are consistent; and, their testimonies outweigh the Claimant's version of events.

29. The ALJ makes a rational choice between any conflicting versions of events and medical opinions based on substantial evidence in accepting Dr. Goldman's medical opinion that Claimant's seizure and fall on February 25, 2017 was a non-work related traumatic brain injury, and rejects any testimony and/or opinions to the contrary.

30. The Claimant did not prove by a preponderance of the evidence that his fall at work on February 24, 2017 caused the subsequent seizure and fall on February 25, 2017 and the ensuing, ongoing medical treatments.

CONCLUSIONS OF LAW

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

Compensability

a. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1)(b), C.R.S. When a claimant, at the time of an injury, is performing a duty with which the employee is charged as a part of the contract for service, or under the express or implied direction of his employer, the employee is within the course of his employment under the Workers' Compensation Act. *Colorado Civil Air Patrol v. Hagans*, 662 P.2d 194, 196, (Colo. App. 1983). "An employer is responsible for the direct and natural consequences which flow from a compensable injury." *Hembury v. Indus. Claim Apps. Office*, 878 P.2d 114, 115 (Colo. App. 1994). It is a question of fact if the subsequent injury is the direct and natural consequence of the compensable injury. *Id*. As found, the Claimant did **not** sustain a compensable injury on February 24, 2017, when he fell down the stairs at work.

Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Apps. Office*, 183 P.3d 784 (Colo. App. 2008); *Kroupa v. Indus. Claim Apps. Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Apps. Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Apps. Office*, 297 p.3d 964, 2012 COA 85. The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon

appropriate research); the motives of a witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005). As found, the Claimant's version of matters was not credible because it was contradicted by the weight of the evidence. The testimonies of Sosnowski and McCready were credible.

c. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. 131, 134 P. 254 (1913); *also see Heinicke v. Indus Claim Apps. Office*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof) when determining credibility. *See Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). As found, the expert opinions of Dr. Goldman were more credible and persuasive than the opinions of Dr. Machanic.

Substantial Evidence

d. An ALJ's factual findings must be supported by substantial evidence in the record. *Pain Connection Plus v. Indus. Claim Apps. Office*, 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Apps. Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Apps. Office*, 131 P.3d 1172 (Colo. App. 2005); *also see Martinez v. Indus. Claim Apps. Office*, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is the sole province of the fact-finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus Claim Apps. Office*, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Goldman and to reject the opinions of Dr. Machanic.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing his entitlement to benefits. §§ 8-43-201 & 8-43-210, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Apps. Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Indus Claim Apps. Office*, 24 P.3d 29 (Colo. App. 2000); *Kieckkhafer v. Indus. Claim Apps. Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim. Apps. Office (ICAO), March 20, 2002]; *also see Ortiz v. Principi*, 274 P.3d 1361 (D.C.

Cir. 2001). “Preponderance” means “the existence of a contested fact is more probable than its nonexistence.” *Indus. Claim App. Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain his burden on compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this_____day of October 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of October 2017, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury as a result of a fall at work which occurred on April 4, 2017?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable, necessary, and related medical treatment stemming from this work injury?

III. Is Concentra the Authorized Treatment Provider for Claimant?

IV. Has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability payments, beginning May 4, 2017?

V. Have Respondents shown, by a preponderance of the evidence, that Claimant voluntarily resigned her position with Employer on August 28, 2017?

STIPULATION

I. The parties have stipulated that Claimant's Average Weekly Wage is $371.30. This Stipulation was accepted by the ALJ.

FINDINGS OF FACT

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

1. Claimant began working for Employer on April 3, 2017. Employer, operating under the name Target CW as an employee placement service, placed Claimant at a company called Microchip. Claimant was to begin training on that date.

2. Claimant testified at hearing that on April 4, 2017, she arrived at work around 6:50 A.M. It had snowed the night before, so Claimant stopped inside the front doors to wipe her feet on the mat just inside the doors. As she was doing so, she slipped and fell, landing in an awkward position. Claimant described this fall to medical providers as a "hurdling" or "splits" position, with her right foot forward. In so doing, she twisted her left knee and was unable to rise from the floor under her own power. A coworker who was looking for Claimant soon arrived and helped her up from the ground.

3. Claimant did not seek immediate medical attention for her injury. She explained that she hoped her condition would improve without the need for medical treatment, and so put off medical attention until it became clear the condition would not improve on its own. She testified that on April 18, 2017 she notified Employer's Human

Resources representative that she sustained an injury and would need a workers' compensation referral. Employer provided Claimant with a list of providers the following day.

4. Claimant first sought medical treatment with Concentra Medical Centers ("Concentra") on April 20, 2017. (Ex. B, pp. 18-30). Her intake form reports a mechanism of injury similar to her testimony at hearing. An x-ray was performed that revealed no fractures or dislocations, and she was given an initial diagnosis of a left knee sprain. At Claimant's request, she was released at that time *without restrictions* as Claimant expressed concern about being fired from her job, as she was a new hire. Randall Jones, D.O. referred Claimant for six sessions of physical therapy. At the time of her visit with Dr. Jones on April 20, 2017, he noted that Claimant's left knee exam showed "No tenderness except over the medial joint line, over the medial collateral ligament and the *medial* tibial plateau" (Ex. B, p. 56)(emphasis added).

5. Claimant reported to her physical therapist that following the alleged April 4, 2017 injury, she walked two miles**.** (Ex. D, p.68). On exam, Claimant was positive for medial meniscus involvement and irritation. Claimant continued to participate in physical therapy and reported feeling better on May 1, 2017. (Ex. D., p. 72). On May 2, 2017, Claimant reported that her knee pain "really didn't hurt or anything". (Ex. D, p. 75). Due to reports of joint tenderness and clicking, Claimant was also referred for an MRI. The medical history Concentra obtained from Claimant did not include her prior treatment for left knee pain in 2014.

6. Charles Wennogle, M.D. performed an MRI on Claimant's left knee on May 1, 2017. (Ex. 9, pp. 252-253). Dr. Wennogle noted the presence of a "nondisplaced likely impaction fracture, nondepressed, . . . of the *lateral* tibial plateau" and "a high-grade partial but near complete tear of the ACL . . . and only a few fibers remaining intact. *No effusion* or loose body is seen". *(emphasis added)*

7. Claimant returned to Concentra on May 2, 2017. (Ex. 12, pp. 288-302). On that date Claimant provided a more detailed history of her April 4, 2017 injury to Michael Simpson, M.D., an orthopedic surgeon. She then noted that she noticed immediate discomfort and swelling after the injury, with the swelling becoming progressively worse over a period of 12 hours. She additionally reported instability in her left knee, although the use of a hinged knee brace helped this condition to some extent. Dr. Simpson confirmed the MRI findings, including "a *near* complete rupture of the anterior crucial ligament", as well as "significant bone contusions to the *lateral* tibial plateau". Dr. Simpson recommended against immediate surgical intervention, although he stated that "[i]f she is having issues with instability at some point down the road, whether it be in the near future or the distant future, then an anterior cruciate ligament reconstruction . . . would be appropriate." (emphasis added). At this visit, Claimant did not disclose to Dr. Simpson that she had been diagnosed with a partial ACL tear in 2014, nor was any mention made of her constellation of symptoms from that time period.

8. Claimant saw Dr. Nicholas Kurz, DO with Concentra on May 4, 2017 for a follow-up. She was still diagnosed with a left knee sprain, but was still cleared to return to work full time. At this visit, Claimant was placed on work restrictions, to include sitting 80% of the time, no climbing of any sort, limited lifting, no kneeling or squatting, and wearing a brace. (Ex. B, p. 78). Payroll records show that Claimant was last paid for one 8-hour shift for the week ending May 7, 2017, but the actual date Claimant worked is unclear. The ALJ finds that this final shift could have been worked as early as May 1, 2017. (Ex. J, p. 149).

9. Claimant returned to Dr. Simpson on May 9, 2017. (Ex. 12, pp. 306-307). Dr. Simpson reported that "unfortunately, [Claimant] returned to work" and that her condition had worsened with significant pain, swelling, and instability in her left knee. Because Claimant was "no longer able to work because of pain in her knee and sensation of the knee giving out," Dr. Simpson decided that Claimant had become an appropriate surgical candidate for an arthroscopic anterior cruciate ligament reconstruction. Dr. Simpson scheduled Claimant for this surgery on May 18, 2017.

10. On May 17, 2017, Respondents told Claimant that her surgery was cancelled, and that they were investigating her claim. Claimant returned to Concentra for her follow up appointments on May 23, 2017, June 20, 2017, and July 18, 2017. (Ex. 12, pp. 311-319.). During this period she was restricted to sedentary work. On the May 23, 2017 visit with Dr. Kurz, it was noted that his impression that she had a "closed fracture of left tibial plateau *with routine healing*". (Ex B, p. 50). On the June 20, 2017 visit, Dr. Jones noted that "she is frustrated, as *no prior hx (history) of left knee* problems." (emphasis added). The ALJ notes that the medical records from 2017 are devoid of any mention of her 2014 problems with either her left *or* her right knee.

11. The latest Concentra record indicates that Claimant continued to remain on modified or restricted duty by various physicians up through her last noted visit of August 17, 2017.

12. Claimant attended Respondents' Independent Medical Examination with Dr. Timothy O'Brien on August 16, 2017. (Ex. 15, pp. 330-48). Dr. O'Brien reviewed Claimant's medical record, performed a physical examination, and took an oral history from Claimant. Dr. O'Brien concluded that Claimant's diagnosed anterior cruciate ligament tear stemmed from a prior injury which had occurred in 2014. Dr. Waskow had also diagnosed Claimant with patellofemoral syndrome in 2014. Dr. O'Brien noted that the changes documented on Claimant's 2014 MRI were identical to the changes documented on Claimant's 2017 MRI; however, Claimant's 2017 MRI showed no effusion, which further establishes that Claimant's partial ACL tear is chronic. Dr. O'Brien criticized Dr. Simpson for his representation that Claimant had a large effusion as multiple other doctors and the 2017 MRI showed no effusion, and for recommending surgery without exhausting non-operative treatment. He testified that had Claimant experienced the injury as alleged, one would expect the bloody effusion to last in the MRI from 6 to 12 weeks. He further concluded that although Claimant did fall on April 4, 2017, such fall resulted in only a minor knee sprain.

13. Dr. O'Brien opined that if Claimant had sustained an acute ACL tear and lateral tibial plateau fracture, she would not have been able to walk, as it would have produced massive swelling and bleeding into the joint almost immediately. Dr. O'Brien noted that several weeks after the alleged April 4, 2017 injury, Claimant sought treatment with Dr. Ripp, who referred to Claimant's injury as a "superficial knee injury" and he did not note any swelling or bleeding into the joint. Claimant had then presented to Concentra on April 20, 2017 with no swelling or bleeding into the joint. Further, Claimant did not present with *lateral* joint line tenderness, which is what she should have demonstrated if she had an acute lateral tibial plateau fracture. Instead, Claimant was tender on the *medial* side only.

14. Dr. O'Brien further opined that Claimant's ACL tear and lateral tibial plateau fracture are not work-related, as they are chronic, pre-existing conditions that were not aggravated or accelerated by this fall. Dr. O'Brien testified that there was no special hazard of employment. Dr. O'Brien opined that Claimant sustained a minor non-disabling left knee strain/sprain, which resolved with no impairment and no need for future medical care, and that there was no reason that Claimant cannot work without restrictions.

15. Prior to her April 4, 2017 fall, Claimant had treated at Colorado Springs Health Partners for left knee pain on June 26, 2014. Catherine Hayes, PA-C, documented that Claimant reported left knee pain since June 2013. PA-C Hayes reported that Claimant previously had a steroid shot which had improved her pain. The pain returned in April 2014, and a MRI was ordered, which showed a large knee joint effusion, soft tissue edema, a popliteal cyst (possible cyst rupture), possible ACL tear, and mild osteoarthritis changes. At the time of this exam, Claimant denied any specific injury to her left knee. Claimant was referred to physical therapy and later to an orthopedist on July 28, 2014. (Ex. G, pp. 84-85).

16. On July 9, 2014, Claimant presented for physical therapy at UC Health for left knee pain, which she reported had been ongoing for at least one year. Claimant told her physical therapist that she had an MRI of the left knee, which showed a partial ACL tear. Claimant was on Vicodin for pain, using crutches, and wearing a brace. Claimant reported that descending stairs increased her left knee pain, which had worsened since April, 2014. On July 15, 2014, Claimant returned to physical therapy and reported her left knee had been swelling at work. Two days later, on July 17, 2014, Claimant reported that her left knee was very painful and waking her up at night. Claimant denied doing anything strenuous outside of physical therapy that day. (Ex. H, pp. 132-137).

17. Claimant returned to Colorado Springs Health Partners and saw Steven Waskow, M.D. on August 21, 2014 for left knee pain, which had been ongoing for at least one year. (Ex. G, p. 86-87). Dr. Waskow diagnosed Claimant with left patellofemoral syndrome, metatarsal facture, and left knee pain. He did not recommend a repair of her partially torn ACL.

18. On August 25, 2014, Claimant presented to Marc Conner, D.P.M., a podiatrist, who also diagnosed Claimant with left patellofemoral syndrome and left knee pain. Claimant presented to Dr. Conner eleven times with left patellofemoral syndrome and left knee pain from August 25, 2014 to July 7, 2016. (Ex. G, pp. 94-129). On December 30, 2016, Claimant saw Charles Ripp, M.D., with leg pain that she reported only went away if she props her legs up. She was noted at this time to be "in acute distress due to pain noted" (Ex. E pp. 79-80).

19. Dr. O'Brien placed significant weight upon the 2014 MRI reading by Steven Waskow, M.D. that found "[t]hickening and increased T2 signal within the anterior cruciate ligament, raising the possibility of partial tear or ligament sprain. Large knee joint effusion is present" (Ex. 4, p. 9). On this basis, Dr. O'Brien concluded that Claimant's anterior cruciate ligament tear pre-dated her April 4, 2017 injury, and that Claimant had reached maximum medical improvement for any injuries she may have sustained on that date. Dr. O'Brien also found Claimant to be an unreliable historian, as she was unable to recall all the details of her prior left knee injury.

20. Claimant subsequently attended an Independent Medical Exam with Timothy Hall, M.D. (Ex. 16, pp. 349-53). Dr. Hall reviewed the medical record, performed a physical exam, and took an oral history from Claimant. He also reviewed Dr. O'Brien's IME report. Dr. Hall disagreed sharply with Dr. O'Brien's conclusions, noting particularly that Dr. O'Brien's interpretation of the 2014 MRI was inconsistent with the actual language of the report. Dr. Hall noted that, although Claimant did not recall her prior left knee problems, she had an extensive medical history and it would be reasonable to forget details of a particular visit years after the fact. Moreover, he noted that despite her extensive medical history, Claimant did not have a history of acute complaints of left knee pain and thus the record did not support a conclusion that Claimant's left anterior cruciate ligament tear was a chronic condition predating her April 4, 2017 injury.

21. Claimant testified at hearing that after she was referred for surgery by Dr. Simpson, Employer told her that they would be unable to schedule her for work until she was able to work without physical restrictions. She explained that once she could return to work at full duty, she could be scheduled to work as normal. As a result, she took up additional hours with Current Catalog, a concurrent employer. She explained that Current Catalog was able to accommodate her sedentary work restriction. Claimant testified that she began working full time at Current Catalog on August 28, 2017 after last working for Employer on May 3, 2017 due to their inability to accommodate her work restrictions. The ALJ finds that Claimant made a rational choice and voluntarily left her employment with Employer on August 28, 2017. She then accepted a full-time position with Current, which was simply more suited to Claimant's wants and needs.

CONCLUSIONS OF LAW

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

Generally

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

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201.

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

Compensability

4. Claimant must prove by a preponderance of the evidence that she is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); S*ee*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

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

6. The ALJ concludes that Claimant has established by a preponderance of the evidence that she sustained a compensable injury while working for the Employer on April 4, 2017. The extent of said injury is a factual issue to be resolved.

Medical Benefits

7. The claimant has the burden to prove her entitlement to medical benefits by a preponderance of the evidence. C.R.S. §8-43-201. The respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. C.R.S. §8-42-101(1)(a).

8. The claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is *causally related* to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

9. "[I]f a disability were 95% attributable to a pre-existing, but stable condition, and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling." *Seifried v. Industrial Com'n of State of Colo.*, 736 P.2d 1262, 1263 (Colo. App. 1986). The ALJ finds that Claimant has not met her burden of showing that this fall caused the dormant (if it truly was dormant), pre-existing condition of her partial ACL tear to now become disabling.

10. The ALJ concludes that Claimant is entitled to all reasonable, necessary, *and related* medical treatment as it relates to the April 4, 2017 fall. Some of the treatment Claimant received in the weeks following the fall was a direct result of the injury she sustained when she twisted her knee in falling to the ground that morning. Claimant subsequently had to modify her work in order to accommodate the pain and swelling in her left knee.

11. However, this does not extend to the repair of Claimant's pre-existing partial ACL tear. The medical records and Dr. O'Brien's report and testimony are more persuasive than Dr. Hall's report, and Concentra's initial conclusions- which had been

reached without complete information. While Claimant now states that she did not feel the need to disclose her prior knee issues from 2014, since she thought it was her *right* knee, the ALJ is not persuaded. These issues were serious, involving a partial ACL tear as revealed on her MRI less than three years prior. Further, Claimant did not disclose issues in *either* knee in 2017. Thus, while reasonable minds might differ whether the proposed surgery by Dr. Simpson is now reasonable and necessary, the Claimant has failed to show that such surgery is *causally related* to her fall from April 4, 2017. It is further noted that even with the acute partial ACL tear in 2014, Dr. Waskow did not recommend a surgical repair. No further surgical intervention in 2017 was recommended to address the lateral tibial plateau nondisplaced fracture (regardless of when it may have occurred), since by all accounts it has been healing routinely.

12. The ALJ finds that obtaining the MRI for diagnostic purposes was reasonable, necessary, and related to her fall. This has now been accomplished. Further, and as recommended by Concentra, her physical therapy was also reasonable, necessary, and related to treat her sprained knee. Beyond those modalities and office visits to address the sprain, culminating in a final visit on July 18, 2017, nothing further is warranted.

Authorized Treatment Provider

13. The insurer or employer has the right in the first instance to select the physician to attend the injured employee. Section 8-43-404(5)(a), C.R.S. Once the insurer or employer has exercised its right to select the treating physician, the claimant may not change physicians without permission from the insurer, employer, or an ALJ. *See Gianetto Oil Co. v. Indus. Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, if the employer fails timely to tender the services of a physician, the right of selection passes to the claimant and the claimant is entitled to have the physician she selects be an authorized treating provider. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Once the claimant selects an authorized treating physician, she is not free to retain additional physicians without procuring permission from the employer, insurer, or an ALJ. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colo. State Hosp.*, 32 Colo. App. 282, 513 P.2d 228 (1973). Because Respondents did not timely provide a designated provider list consistent with W.C.R.P. 8, the right of selection passed to Claimant. On April 20, 2017, Claimant treated with Concentra, and she continued to do so. Because Claimant chose to treat with Concentra, Concentra is the authorized treating provider.

Temporary Total Disability Benefits

14. To prove entitlement to temporary total disability ("TTD") benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a

work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998)

15. The ALJ concludes that the April 4, 2017 fall caused a disability resulting in more than three days of wage loss to Claimant. Claimant testified that her job duties both during and after the completion of training would involve significant standing without the opportunity for sedentary work. Claimant testified, and the medical records document, that she had ongoing symptoms of knee pain and instability that prevented her from standing or walking to the extent required for her position with Employer. Indeed, Employer informed Claimant that she could not receive hours until her restrictions on standing were lifted. Claimant was impaired from performing her job duties from May 4, 2017 until August 28, 2017, the date Claimant testified she started working full time with a different employer.

16. A claimant found to be responsible for his or her own termination is barred from recovering temporary disability benefits under the Act. §§ 8-42-103(1)(g), 8-42-105(4). *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). Because the termination statutes constitute an affirmative defense to an otherwise valid claim for temporary disability benefits, the burden of proof is on the Respondents to establish the Claimant was "responsible" for the termination from employment. *Henry Ray Brinsfield v. Excel Corporation,* W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). Whether an employee is at fault for causing a separation of employment is a factual issue for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term “responsible” as used in the termination statutes reintroduces the concept of “fault” as it was understood prior to the Supreme Court’s decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995).

17. Thus, a finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to the termination. *Gilmore v. Industrial Claim Appeals Office*, supra; *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.*

18. While the Claimant is a poor medical historian, she testified that she was told by Employer that they could not accomodate her working with restrictions. She was to contact Employer when said restrictions were removed. While the restrictions imposed vary with the medical provider and the date of service, up through the last visit noted of July 18, 2017, Claimant was under some work restriction. This remained in effect until Claimant took other work on August 28, 2017. There is no evidence in the record that Claimant was ever offered modified work by Employer.

19. The ALJ concludes that Claimant did voluntarily resign from her employment on August 28, 2017 when she took her job with Current. Her Temporary Total Disability benefits ended on that date.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury to her left knee on April 4, 2017.

2. Concentra is Claimant's Authorized Treatment Provider.

3. Claimant's request for ACL surgery as proposed by Dr. Simpson is denied and dismissed.

4. Claimant is entitled to all other reasonable, necessary, and related medical treatment to treat her sprained left knee, including treatment occurring to date.

5. Respondents shall pay TTD benefits to Claimant from May 4, 2017 through August 27, 2017.

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

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

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

DATED: October 26, 2017

/s/ William G. Edie

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

ISSUES

1. Did Claimant prove entitlement to TTD benefits from April 10, 2015 to December 29, 2016?

2. Did Respondents prove Claimant is ineligible for TTD benefit after April 29, 2016 because Dr. Hattem released him to regular employment?

3. Did Respondents prove TTD benefits should be denied or reduced due to earnings from work?

FINDINGS OF FACT

1. Claimant worked as a pilot and aircraft mechanic for Employer. He sustained an admitted industrial injury on February 25, 2014 when he was struck by a propeller. Claimant sufferd multiple injuries, the most significant of which involved his right shoulder and neck.

2. Employer referred Claimant to Emergicare for authorized treatment, where he came under the care of Dr. Cynthia Lund. Claimant reported improvement with a few weeks of physical therapy and Dr. Lund discharged him on March 13, 2014.

3. Claimant returned to Dr. Lund on August 21, 2014 due to persistent right shoulder/trapezius pain and neck pain radiating into his right arm. Dr. Lund sent Claimant back to physical therapy. He also received dry needling and trigger point injections.

4. Claimant saw Dr. Dwight Leggett on December 11, 2014 for consideration of injections. He reported pain primarily on the right side of his neck into the right shoulder and a large "knot" in the trapezius. His symptoms were aggravated by bending to the right, repetitive motions, lifting and carrying objects. The level of pain varied depending on his activity level. Physical examination showed a large fibrocystic nodularity in the upper trapezius and significant myofascial tightness and tenderness in the mid trapezius, levator scapulae, scalenes and cervical paraspinal musculature. He also had pain at the right C3-C6 facet joints. Dr. Leggett recommended facet joint injections with the possibility of medial branch blocks and rhizotomies.

5. Claimant saw Dr. Gretchen Brunworth for a second opinion on January 22, 2015. He reported ongoing pain in his neck, right shoulder, and right arm. Dr. Brunworth opined Claimant's presentation suggested cervical radiculopathy and recommended a cervical epidural steroid injection.

6. Claimant continued to follow up with Dr. Leggett and received several sets of trigger point injections, which provided temporary relief.

7. Claimant saw Dr. Albert Hattem on February 18, 2015 for an Independent Medical Examination (IME) at Respondents' request. Dr. Hattem diagnosed cervical facetogenic pain and opined the industrial injury likely aggravated an underlying pre-existing cervical condition. He thought the right shoulder pain was probably referred myofascial pain from the cervical spine rather than intrinsic shoulder pathology. He opined Claimant was approaching MMI pending additional injections with Dr. Leggett, and could return to work at a "light to medium" physical demand level.

8. Claimant underwent an FCE on April 8, 2015, which showed light-medium lifting abilities and a maximum carrying capacity of 35 pounds.

9. Dr. Lund placed Claimant at MMI on April 10, 2015 with a 15% cervical whole person impairment. She recommended ongoing maintenance care with Dr. Leggett, and assigned permanent work restrictions based on the FCE.

10. Claimant saw Dr. Caroline Gellrick for a DIME on October 2, 2015. His main complaints were neck pain and shoulder pain "to the point that the pain at night in the shoulder keeps him awake and causes insomnia." Dr. Gellrick noted Claimant had received no treatment specifically directed to the shoulder. Examination of his neck showed pain in the paraspinal musculature, right trapezius, and right shoulder. Examination of the right shoulder revealed a positive impingement test, positive supraspinatus testing, and positive Spurling/Weber testing. Dr. Gellrick opined the exam suggested a possible rotator cuff tear.

11. Dr. Gellrick opined Claimant was not at MMI and recommended an MR arthrogram of the right shoulder, followed by evaluation with an orthopedic shoulder specialist. She also recommended a right upper extremity EMG and a cervical ESI. Once those were done, she recommended Claimant see an orthopedic spine surgeon or a neurosurgeon to further evaluate treatment options for the neck.

12. Claimant had the right shoulder MRI arthrogram on February 10, 2016. It was interpreted as showing mild supraspinatus and infraspinatus insertional tendinosis, but no rotator cuff tear. The inferior labrum was partially detached from the underlying glenoid with an adjacent glenoid chondral defect. The AC joint was widened with associated synovitis suggesting a chronic AC ligament tear.

13. Claimant saw Dr. Lund on March 10, 2016 to review the MRI arthrogram. She referred Claimant to Dr. David Walden for evaluation of his shoulder and restricted him to modified duty with a maximum 20 pounds lift/carry and no more than 10 pounds overhead.

14. The parties agreed to a change of physician to Dr. Hattem, who took over as Claimant's primary ATP on April 29, 2016. Dr. Hattem reviewed the DIME report and the MR arthrogram report. Examination of Claimant's right shoulder showed a positive Hawkins impingement maneuver and a positive cross-arm adduction sign. Dr. Hattem noted neither the evaluation with Dr. Walden nor the EMG had been scheduled. He referred Claimant to Dr. Weinstein for a surgical evaluation and Dr. Jenks for the EMG.

Claimant declined the cervical ESI recommended by Dr. Gellrick because he did not feel the previous injections had helped him. Without explanation, Dr. Hattem stated Claimant could work "full duty."

15. Dr. Weinstein performed an arthroscopic subacromial decompression and rotator cuff repair on December 29, 2016. Intraoperative inspection revealed significant inflammation and fraying of the rotator cuff but no discrete tear. The right biceps tendon was torn with significant synovitis. Dr. Weinstein debrided the rotator cuff and performed a biceps tenodesis.

16. Dr. Hattem took Claimant "off work" on January 30, 2017 and Respondents commenced TTD benefits as of that date.

17. Besides his work for Employer, Claimant and his wife own an aircraft-related business, Lamina, Inc. Claimant is the President and his wife is the Secretary. Claimant provides periodic services as a charter pilot, aerial photographer, flight instructor, and aircraft mechanic. He is also certified to perform biannual flight reviews for other pilots. When working as a charter pilot or aerial photographer, Claimant earns $250 per day plus a $50 per diem. All payments for services are made to the corporation and balanced against normal business expenses.

18. Claimant owned Lamina before his date of injury and continues to own the company with his wife. Claimant provided services through Lamina on a sporadic basis, with no regular schedule.

19. Since October 2014, use of Lamina's aircraft has been limited by mechanical and avionics issues.

20. There is no persuasive evidence that Claimant worked or performed any income-generating services for Lamina in 2015.

21. Claimant performed services in May 2016 that generated income for Lamina. He flew as a passenger on an aircraft in Canada which required a U.S. licensed pilot on board. The tasks involved no significant physical exertion or use of the right upper extremity. He received $250 per flight. Claimant did not identify specific dates in May 2016 during which he performed this work, but said it lasted approximately one month.

22. Aside from the work activity in May 2016, Claimant performed no work or services for Lamina that generated income between April 10, 2015 and December 29, 2016.

23. In his hearing testimony, Claimant persuasively described numerous ways that the injury would have interfered with his ability to perform his regular job duties, particularly activities that involved use of his dominant right upper extremity.

24. Employer offered Claimant no work after his injury.

25. Claimant has been disabled from his regular job with Employer since at least April 10, 2015, and lost wages as a direct and proximate consequence of the industrial injury.

26. Dr. Lund and Dr. Hattem issued conflicting opinions in 2016 regarding Claimant's ability to work. Both physicians were "attending physicians" when they issued their respective opinions.

27. When multiple attending physicians give conflicting opinions regarding a Claimant's ability to work, the ALJ must resolve the conflict. Dr. Lund's opinion regarding Claimant's work capacity is more persuasive than the contrary opinion of Dr. Hattem.

28. Claimant's testimony is credible.

29. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits from April 10, 2015 through April 30, 2016.

30. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits from June 1, 2016 to December 29, 2016.

31. Respondents proved Claimant is not entitled to TTD from May 1, 2016 through May 31, 2016, because he was performing modified employment for Lamina.

32. The parties did not try the issue of TPD.

33. Claimant's admitted average weekly wage is $1,242.69, with a corresponding TTD rate of $828.46 per week.

CONCLUSIONS OF LAW

A. Claimant is entitled to TTD benefits commencing April 10, 2015.

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by the inability to resume prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant has been unable to perform his regular job, and therefore "disabled" for purposes of temporary disability benefits, since at least April 10, 2015. Employer was unable or unwilling to accommodate his restrictions and never offered him work after the injury. As found, Claimant sustained a total wage loss since at least April 10, 2015 as a

direct and proximate consequence of his industrial injury. Therefore, Claimant is entitled to TTD benefits commencing April 10, 2015.

B. Dr. Hattem's full duty release does not bar TTD benefits after April 29, 2016.

Once commenced, TTD benefits continue until the occurrence of one of the four terminating events specified in § 8-42-105(3). Termination of TTD under § 8-42-105(3) is an affirmative defense, so Respondents must establish the requisite factual predicates. *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (December 16, 2004); *Schuldies v. United Sporting Good Wholesale*, W.C. No. 4-413-232 (January 7, 1999).

Respondents argue that Dr. Hattem's April 29, 2016 report releasing Claimant to "full duty" bars TTD after that date under § 8-42-105(3)(c)(3). The ALJ disagrees with Respondents' argument for two reasons.

First, § 8-42-105(3)(c)(3) only addresses the termination of TTD benefits, and Claimant was not receiving any TTD benefits when Dr. Hattem issued his report. Under *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374 (Colo. App. 2016), "a medical return to work order that predates the commencement of TTD benefits cannot trigger the benefits cessation provisions of section 8-42-105(3) because there are no benefits in place to 'continue until' one of the listed circumstances occurs."

Second, Dr. Lund and Dr. Hattem issued conflicting opinions regarding Claimant's ability to perform regular employment. Dr. Lund had Claimant on restrictions as of her last appointment on March 16, 2016, but Dr. Hattem opined Claimant was at "full duty" when he took over treatment on April 29, 2016.

As a general rule, an attending physician's full-duty release is conclusive regarding a claimant's entitlement to ongoing TTD benefits. *Burns v. Robinson Diary*, 911 P.2d 661 (Colo. App. 1995). But one attending physician's release to regular work is not conclusive if multiple attending physicians give conflicting opinions. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

The ALJ credits Dr. Lund's opinions over Dr. Hattem's in finding that Claimant has been disabled from performing his regular job throughout the requested period of disability. Dr. Lund's restrictions were based on objective data obtained from an FCE, whereas Dr. Hattem gave no explanation for releasing Claimant to "full duty." Dr. Hattem's decision to release Claimant to full duty on April 29, 2016 was curious since he previously opined Claimant was limited to "light to medium" work activities, consistent with the FCE. He had also reviewed the MRI report showing significant pathology and referred Claimant to Dr. Weinstein for a surgical consult. Claimant ultimately had surgery to debride the rotator cuff and repair a torn biceps. Claimant's persuasive testimony also supports a finding he could not have done his regular work. It is not plausible that Claimant could do his pre-injury job without limitation on April 29, 2016.

Accordingly, Dr. Hattem's full duty release does not preclude an award of TTD benefits after April 29, 2016.

C. Claimant is not entitled to TTD benefits between May 1, 2016 and May 31, 2016 because he worked modified employment.

Respondents argue Claimant is not eligible for TTD because he has been concurrently employed by Lamina, Inc. But the mere fact that Claimant owns a partial interest in Lamina does not preclude receipt of TTD benefits. Rather, the dispositive question is whether he performed any services that resulted in remuneration for himself or the corporation, or otherwise earned income as a result of his activities for Lamina. As found, Claimant did not generate any income for or receive any income from Lamina between April 10, 2015 and December 29, 2016, except during May 2016.

Claimant conceded he worked for Lamina in May 2016, but presented no persuasive evidence to prove the exact dates he worked or exactly what he earned. His testimony suggests he performed these activities for most of the month. Therefore, the ALJ has excluded the entire month of May from the period during which Claimant is eligible for TTD benefits.

In reaching this result, the ALJ found instructive the ICAO's decision in *Clemonson v. Lovern's Painting*, W.C. No. 4-503-762 (January 27, 2004), which involved a similar fact pattern. In *Clemonson*, the ALJ awarded approximately six months of TTD benefits. But the claimant had worked for approximately two weeks during that six month period. Specifically, the ALJ found that the claimant "began to run his own painting business again. He did this for approximately two weeks, and had to stop due to pain." The ICAO reversed the award of TTD benefits, reasoning the ALJ should only have awarded *TPD* benefits during that two-week period. The ICAO held

> [T]he claimant worked as a painter in the fall of 2001 and earned wages. Thus . . . claimant was less than totally disabled for at least a brief period . . . . Under these circumstances, the ALJ erred in awarding temporary *total* disability benefits for the entire period . . . . (Emphasis in original).
>
> On remand the ALJ shall determine the period of time the claimant was self-employed as a painter after the industrial injury. The ALJ shall also determine the wages earned by the claimant during this employment. Based upon those determinations, the ALJ shall adjust the award of temporary disability benefits.

Although Claimant has been continuously disabled from a physical standpoint since at least April 10, 2015, his injury-related total wage loss was interrupted by work in May 2016. The modified work was only available through May 31, 2016, after which Claimant's total wage loss resumed. There is no persuasive evidence he performed any other work for pay during the requested period of disability. As in *Clemonson*, Claimant's performance of modified employment rendered him ineligible TTD benefits in May 2016. Consequently, the ALJ concludes Claimant is entitled to TTD benefits from April 10, 2015 through April 30, 2016, and from June 1, 2016 to December 29, 2016.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant TTD benefits at the rate of $828.46 per week from April 10, 2015 through April 30, 2016.

2. Insurer shall pay Claimant TTD benefits at the rate of $828.46 per week from June 1, 2016 to December 29, 2016.

3. Claimant's request for TTD benefits from May 1, 2016 through May 31, 2016 is denied and dismissed.

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

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

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

DATED: October 26, 2017

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

ISSUES

I. Whether Claimant has proven a preponderance of the evidence that her workers' compensation claim should be reopened based on a worsening of condition as of February 16, 2017.

II. If the claim should be reopened, whether Claimant is entitled to temporary partial disability (TPD) benefits commencing February 16, 2017 and ongoing.

FINDINGS OF FACT

1. Claimant worked for Employer as a ski instructor. Claimant sustained an admitted industrial injury to her right knee on April 6, 2013 during a ski lesson.

2. Claimant underwent four knee surgeries resulting from the April 2013 industrial injury. Claimant's first surgery occurred on June 10, 2013 with Dr. Thomas Hackett. This right knee surgery involved seven different procedures, including medial and lateral meniscectomies and ACL revision/reconstruction.

3. Claimant's second surgery occurred on August 26, 2014 with orthopedic surgeon Dr. Robert. LaPrade. This surgery included nine documented procedures, one of which was a repair to the failed ACL graft.

4. Claimant's third right knee surgery was performed by Dr. LaPrade on March 12, 2015. This surgery included six procedures, again targeting Claimant's failed ACL graft among other problems.

5. On May 20, 2015, Dr. LaPrade began a workup for evaluation of the etiology of the ACL graft absence. It was determined that Claimant suffered from an infection in the knee known as Propionibacterium acnes. She was referred to Western Infectious Diseases and Dr. Brent Weiland for treatment of the infection. Claimant underwent a course of IV antibiotics, followed by a transition to oral antibiotics.

6. Claimant's fourth knee surgery was performed by Dr. LaPrade completed on December 10, 2015. Seven procedures, including hardware removal, were performed at that time.

7. On March 3, 2016, Claimant presented to her authorized treating physician (ATP), Dr. Brian McIntyre. Claimant reported moderate aching pain at a 4/10, which varied with her activity level. Claimant described increased chronicity and aching in the right knee. Physical examination revealed tenderness above the joint with palpation, including the proximal tibia.

8. On April 18, 2016, Claimant reported to Dr. LaPrade that she was experiencing a continuing feeling of instability and pain in her right knee. The physical examination revealed range of motion of the right knee from 0 to 140 degrees.

9. Dr. McIntyre reevaluated Claimant on April 28, 2016. Claimant rated her pain at a 4/10 and reported continued difficulty with strength, pain and functional activities. Physical examination revealed pain on palpation to the proximal tibia. Dr. McIntyre noted, "She has AMA AROM with PT-Bill Lerch, but good flexion is present and grossly Intact extension to 0°. There is some crepitus present with range of motion." Dr. McIntyre placed Claimant at maximum medical improvement (MMI) with no permanent restrictions. As medical maintenance care, Dr. McIntyre recommended two follow-up visits with Dr. LaPrade within the following year. Dr. McIntyre noted, "She will likely need a full right TKA, at some point in the future."

10. Claimant returned to Dr. McIntyre for an impairment rating on May 17, 2016. Dr. McIntyre assigned a 36% lower extremity (14% whole person) impairment rating. Dr. McIntyre noted Claimant "remained with limited ability and function of the knee for many of the higher level activities she had prior to this long injury course." He further stated, "Multiple second opinions ultimately opine that she will resultantly need a Total knee arthroplasty as (*sic*) some time in the future. This was documented extensively at times with Dr. LaPrade as well as second opinion orthopedics by Dr. James Johnson on 11/23/15."

11. Claimant returned to Dr. McIntyre on June 7, 2016, reporting 3/10 pain. Dr. McIntyre noted, "She presents today with complaint of pain affecting the right knee, variable, with a feeling of looseness and instability – slightly worse than at closing [MMI], but mostly similar." Claimant reported having several episodes of her knee buckling. On examination, Dr. McIntyre noted tenderness to palpation, trace effusion, crepitus on active range of motion, and continued instability of the ACL region. Dr. McIntyre advised that Claimant remained at MMI with no work restrictions.

12. On June 10, 2016, Respondent filed a Final Admission of Liability (FAL), admitting consistent with the ATP's opinion regarding MMI and permanent impairment. Additionally, Respondent admitted liability for post-MMI medical treatment. As stipulated at hearing, Claimant did not request a Division-sponsored Independent Medical Examination (DIME).

13. On August 24, 2016, Claimant presented to orthopedic surgeon Dr. William Sterett. Claimant described right knee pain and instability for "many months." Claimant reported being able to walk and bike. Physical examination revealed mild effusion and passive range of motion of 0/0/140. Dr. Sterett recommended that Claimant undergo repeat blood work and an updated right knee MRI and CT scan.

14. Claimant returned to Dr. LaPrade for a follow-up visit on August 31, 2016. Claimant reported mild pain. Physical examination revealed no significant effusion and a range of motion from 0 degrees down to 140 degrees of flexion. Claimant suspected she might have an infection. Dr. LaPrade aspirated Claimant's knee.

15. Dr. LaPrade reevaluated Claimant on October 12, 2016. Dr. LaPrade noted that recent cultures were negative for infection. Claimant complained of continued right knee pain and swelling. Claimant reported remaining active, "taking care of her children and working part time at a friend's ice cream shop; however, she still has been restricted due to the pain and swelling in the knee." Claimant also reported being able to ride her bike as tolerated. Dr. LaPrade noted that findings of an October 5, 2016 MRI were consistent with what would be expected in Claimant's postoperative state. On physical examination, Dr. LaPrade noted -1 to 130 degrees range of motion, mild swelling which had improved from the last visit, diffuse tenderness, and the ability to straight leg raise with no difficulty. He recommended a one-month course of doxycycline, allergy testing for stainless steel and titanium, and referred Claimant back to her workers' compensation physician.

16. Claimant returned to Dr. McIntyre on November 14, 2016. Claimant rated her pain as a 3/10 and described intermittent but regular swelling with prolonged standing activities. Dr. McIntyre noted some swelling and possibly joint effusion. Dr. McIntyre stated that, with the "high level concerns with Ongoing (sic) and changing/worsening symptomatology, I feel it warranted to have a DIME help with the next best steps forward in care." Dr. McIntyre continued to opine that Claimant remained at MMI with no restrictions.

17. Claimant began work on a part-time basis at a frozen yogurt and coffee shop in late 2016. Her first earnings statement reflects a pay period beginning December 9, 2016.

18. Claimant presented to Dr. Thomas Eickmann on February 16, 2017. Claimant rated her knee pain at a 5/10 and complained of decreased mobility, joint instability, joint tenderness, popping and weakness. On physical examination, Dr. Eickmann noted moderate effusion, diffuse tenderness, and no swelling or crepitation. Active range of motion was 120 degrees flexion and 0 degrees extension. Dr. Eickmann assessed traumatic right knee arthritis and recommended a total knee arthroplasty. Dr. Eickmann opined that Claimant's condition was work-related stating, "Considering her original cartilage injury combined with years of being ACL deficient before and between ACL surgeries as well as a P. Acnes infection as a result of surgery, it appears that her arthritis is all related to her original injury." Dr. Eickmann requested prior authorization for a right knee arthroscopy.

19. Respondents did not deny the total knee arthroplasty recommended by Dr. Eickmann.

20. On April 28, 2017, Claimant underwent an Independent Medical Examination (IME) with Dr. Timothy O'Brien at the request of Respondents. Claimant reported pain at a 4-7/10. Physical examination revealed range of motion of negative 5 degrees to 115 degrees versus 0 degrees to 135 degrees with no medial or lateral instability. Dr. O'Brien concluded that the multiple operations in the workers' compensation claim and those prior "ravaged" whatever remaining cartilage was present in Claimant's knee and accelerated Claimant's underlying osteoarthritis beyond its normal rate of progression.

He opined that Claimant was a candidate for a right total knee arthroplasty. In addition, he opined that Claimant remained at MMI.

21. Dr. McIntyre reevaluated Claimant on May 31, 2017. Claimant reported aching, soreness, looseness, grinding and moderate but worsening pain, which she rated at a 4/10. On physical examination, Dr. McIntyre noted swelling and slight increased warmth. He continued to opine that Claimant was at MMI as of April 28, 2016 without restrictions.

22. On June 22, 2017 Claimant was evaluated by Dr. Eric Richards of Rocky Mountain Infectious Disease Specialists to rule out infection prior to surgery.

23. On July 24, 2017, Claimant underwent an evaluation with orthopedic surgeon Dr. Jason Jennings. Claimant testified that she desired a second opinion with regards to the TKR and she did not want to undergo such a procedure without being thorough. Claimant reported that her pain increased with activity and decreased with rest. Dr. Jennings performed a physical examination which showed range of motion up to 125 degrees. He advised that Claimant was a candidate for a right total knee replacement upon completion of testing for potential infection.

24. Claimant testified that since being placed at MMI, she has experienced more frequent pain, the swelling “is a little bit worse,” and her knee gives out more often than it did in April 2016. Claimant testified that the worsening of her symptoms was a slow progression over time. Claimant stated that by the end of the day, her knee is significantly swollen after working, and that activities have become more difficult due to pain and discomfort.

25. The ALJ credits the opinions of Drs. McIntyre, LaPrade, Eickmann and O’Brien over Claimant’s testimony, and finds that Claimant remains at MMI with ongoing, but not worsening, symptomatology resulting from the April 2013 industrial injury.

26. Claimant has failed to establish by a preponderance of the evidence that her workers’ compensation claim should be reopened based on a change of condition.

27. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

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

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

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Petition to Reopen

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the grounds of fraud, an overpayment, an error, a mistake, or change in condition. A change in condition refers either "to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that can be causally connected to the original compensable injury." *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004). The party seeking to reopen an issue or claim bears the burden of proof as to any issues sought to be reopened. Section 8-43-

303(4), C.R.S. A claimant has the burden of proof in seeking to reopen a claim for a worsened condition. *Richards v.Indus. Claim Appeals Office*, 996 P.2d 756, 758 (Colo. App. 2000). 7. The reopening authority granted to an ALJ by Section 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Renz v. Larimer County Sch. Dist. Poudre R-1*, 924 P.2d 1177, 1181 (Colo.App.1996). Moreover, whether the claimant's condition is due to the natural progression of a pre-existing condition or a new industrial accident is one of fact for resolution by the ALJ. *Pavelko v. Southwest Heating and Cooling, LLC*, W.C. No. 4-897-489-02 (ICAO September 4, 2015) (citing *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999)). Further, whether the claimant proved a worsened condition, and whether the worsening was causally related to the industrial injury, are factual issues for resolution by the ALJ. *Id.*

As found, Claimant has failed to establish that it is more probably true than not that she should be permitted to reopen her workers' compensation claim based on a change of her condition. Although Claimant purports that her condition has worsened, the medical records indicate that Claimant's reported pain levels and range of motion have remained relatively stable since being placed at MMI. Claimant continues to suffer from pain, swelling and instability, which were present leading up to and at the time of MMI. While it has been recommended that Claimant now undergo a total knee arthroplasty, Claimant's ATP and Dr. O'Brien opine that Claimant remains at MMI. There has been no change to Claimant's work restrictions. At the time Claimant was placed at MMI, Dr. McIntyre acknowledged that Claimant would be a candidate for total knee arthroplasty in the future. As such, the additional medical treatment now being recommended was contemplated at the time of MMI. Respondents have not denied authorization for such treatment. Based on the totality of the evidence, Claimant has failed to sustain her burden that her petition to reopen should be granted at this time.

As Claimant failed to establish by a preponderance of the evidence that her petition to reopen should be granted, the issue of temporary partial disability benefits is moot.

ORDER

It is therefore ordered that:

I. Claimant's petition to reopen her workers' compensation claim based on a change of condition is denied and dismissed.

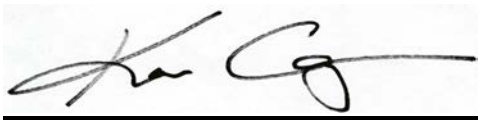
II. The issue of temporary partial disability is denied and dismissed as moot based on Claimant's failure to establish that her petition to reopen should be granted.

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

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

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

DATED: October 26, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did Respondents overcome the DIME's impairment determination by clear and convincing evidence?

2. Disfigurement.

3. Claimant's Response to Application for Hearing endorsed medical benefits after MMI. Claimant's counsel indicated there are no specific medical benefits in dispute, and Claimant is merely seeking a general award of *Grover* benefits. Respondent's counsel stated once permanency is resolved Respondents will file a Final Admission of Liability (FAL) admitting for reasonable, necessary, and related medical benefits after MMI. Claimant's counsel accepted Respondents' representation, so the ALJ need not address *Grover* medical benefits.

4. Claimant withdrew the endorsed issue of average weekly wage.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her low back on July 9, 2014 while carrying books. She developed intense back pain and lower extremity radicular symptoms. Employer referred Claimant to Dr. Terrence Lakin for authorized treatment.

2. A lumbar MRI on September 10, 2014 showed spondylolisthesis at L4-5 with stenosis and bilateral neural foraminal encroachment, and a small disc/osteophyte at L5-S1 effacing the thecal sac with encroachment on the left S1 nerve root.

3. A nerve conduction study on September 23, 2014 showed mild left S1 radiculopathy.

4. Claimant had a surgical consultation with Dr. Joseph Illig on October 8, 2014, who recommended nonsurgical treatment including epidural steroid injections (ESIs).

5. Dr. Scott Ross administered two lumbar ESIs, which led to some improvement and allowed Claimant to return to work. At that point, Claimant felt she could manage her symptoms with medications and periodic injections, if necessary.

6. Dr. Lakin put Claimant at MMI on March 6, 2015 with a 12% whole person impairment. Respondents filed an FAL admitting for Dr. Lakin's rating and *Grover* medical benefits.

7. Claimant's condition progressively worsened over the next several months, and Respondents voluntarily reopened the claim. On December 15, 2015, she underwent a multilevel decompression and an L3-S1 fusion with Dr. Oderia Mitchell and Dr. Illig.

8. Respondents reinstated TTD benefits as of the surgery date and noted on the GAL they would take credit for PPD previously paid.

9. The surgery was helpful, but Claimant continues to suffer residual back pain with lower extremity weakness and sensory deficits.

10. Dr. Lakin placed Claimant at MMI on January 12, 2017 with a 27% whole person impairment. He did not apportion the prior 12% rating because he was unsure of the legal status of the claim, but he noted "appropriate adjustment may be necessary if the claim was concluded." Dr. Lakin also recommended maintenance care to include periodic follow-up with the surgeons, massage, and acupuncture.

11. Respondents requested a DIME, which was performed by Dr. Richard Stieg on May 2, 2017.

12. At the outset of his report, Dr. Stieg noted he was "confused about this case since I have received two different sets of paperwork from the Division of Workers' Compensation IME Examiner's Summary Sheet." The Division had sent Dr. Stieg a summary sheet relating to Claimant but did not attach the DIME Application. The Division also sent a summary sheet and a DIME Application relating to a different claimant with a 2016 date of injury.[1] Dr. Stieg had the DIME medical records packet with a cover letter from Respondents' counsel. He stated:

> From review of the records (see below) it appears that this woman first filed a claim in 2014 which was closed and then reopened again and I'm going to proceed with this report on the assumption that I am to respond to the inquiry with date of injury of 2016 and respond to Mr. Dworkin, the respondent's attorney, with a copy to [Claimant's] attorney. If that is not the correct response I will need some further direction from both attorneys and the division regarding the enclosed paperwork.

13. Dr. Stieg had no records or information regarding the other claimant besides the forms sent by the Division.

14. Dr. Stieg examined Claimant and reviewed the medical records he received from Respondents' counsel. His report accurately summarizes Claimant's injury and medical history.

15. On physical examination, Claimant exhibited mild to moderate paralumbar muscle spasm and "nearly complete absence of range of motion of the spine," consistent with the multilevel lumbar fusion. She had 4+/5 weakness bilaterally in an L4 and L5

[1] The other claimant's name is very close alphabetically to Claimant's name, so it is likely the clerk in the DIME Unit inadvertently included all the documents in the envelope addressed to Dr. Stieg.

distribution, and mild sensory loss in an L5 distribution in the left leg. She also reported symptoms of weakness and cramping in the calf and thigh muscles, and burning paresthesias in the left lower extremity in an L5 distribution.

16. Dr. Stieg agreed Claimant reached MMI as of January 12, 2017. He calculated a 40% whole person impairment based on specific disorders, range of motion loss, and lower extremity neurological deficits. Dr. Stieg noted, "absent any specific data about claim closure and awards, there is no apportionment appropriate on this current impairment rating." He also agreed with Dr. Lakin's recommendations regarding maintenance care and permanent work restrictions.

17. On June 6, 2017, the Division issued a Notice that it had received the DIME report and considered the DIME "concluded." Respondents timely requested a hearing to challenge the DIME rating.

18. Respondents failed to overcome the DIME rating by clear and convincing evidence.

19. Claimant has a 10-inch long by 1/8 inch wide, irregular, indented and discolored surgical scar on the center of her lumbar spine. The primary scar is flanked along its length by at least 16 pairs of staple/suture scars. The ALJ finds that Claimant should be awarded $3,000 for this disfigurement.

CONCLUSIONS OF LAW

A. Permanent Impairment

The DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). This is a higher standard of proof than the typical "preponderance" standard. Clear and convincing evidence is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). Therefore, the party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI finding is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As found, Respondents failed to overcome the DIME rating by clear and convincing evidence. Respondents have not pointed to any specific error in the DIME's methodology or final rating, but primarily focused on his admitted "confusion" regarding the documents he received from the Division.

Although Dr. Stieg was confused by the paperwork, he was not confused regarding Claimant's injury, her course of treatment, or the nature and extent of her impairment. Dr. Stieg evaluated Claimant and considered her records, and there is no indication he relied on any information relating to the other individual. His report accurately describes Claimant's injury and recounts the treatment she received. There are no readily apparent errors regarding Dr. Stieg's application of the rating protocols outlined in the *AMA Guides*

for spinal impairment. Thus, the paperwork error had no substantive effect on the outcome of the DIME.

B. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if she is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has a 10-inch long by 1/8 inch wide, irregular, indented and discolored surgical scar on the center of her lumbar spine. The scar is flanked along its length by at least 16 pairs of staple/suture scars. The ALJ finds that Claimant should be awarded $3,000 for this disfigurement.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on the 40% whole person rating calculated by the DIME. Insurer may take credit for any PPD previously paid to Claimant on this claim.

2. Insurer shall pay Claimant $3,000 for disfigurement. Insurer may take credit for any disfigurement previously paid on this claim.

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

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

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

DATED: October 27, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-937-396-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

A hearing on the merits in the above-referenced matter is scheduled for December 15, 2017, in Greeley, Colorado. On September 27, 2017, Respondents filed a Motion for Summary Judgment on the issue of statute of limitations barring the Claimant's claim. On October 16, 2017, Claimant filed a Response to Respondents' Motion for Summary Judgment (consisting of 29 pages, with no attachments, however, referring to exhibits. The matter was referred to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for a ruling on October 18, 2017.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there are genuine issues of disputed material fact concerning the applicability of the statute of limitations to this claim, thus, barring the Claimant's claim. The Statute of Limitations is an affirmative defense which the respondents have raised.

The Respondents bear the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. A hearing is currently set in this matter for December 15, 2017 at 1:00 PM,. in Greeley, pursuant to the Claimant's Application for Hearing. The hearing issues include compensability, medical benefits, average weekly wage (AWW), Petition to Re-open claim, temporary total disability (TTD), and permanent total disability (PTD) benefits and penalties, specifically "Claimant alleges that W.C. No.3-732-757 was filed fraudulently on December 6, 2013 by her Employer in this claim. Respondents raise the affirmative defense of the Statute of Limitations, and assert that the Claimant has not alleged a penalty stated in specificity as required.

2. The Claimant alleges an occupational disease of exposure resulting in lung and dermatologic conditions. She has filed 61 pages of explanation along with her Application for Hearing explaining her position.

3. An Employer's First Report of Injury was filed on December 4, 2013. The First Report notes that the Claimant was a regular employee working as a technical designer for the Employer. It reflects that Claimant informed the Employer that, during desk work activity, while using cloth, the Claimant alleged respiratory disorders of the lung. The form notes that the time of occurrence cannot be determined. It uses April 9, 2013 as the date of onset and the date of reporting.

4. A Notice of Contest was filed by Pinnacol on behalf of Respondents on December 24, 2013. The Division of Workers' Compensation (DOWC) sent the Claimant a letter on December 26, 2013, informing her of her right to file an Application for Hearing to pursue her claim. This letter states, "If you have not filed a Workers' Claim for Compensation, you may wish to do so." No workers' claim for compensation was filed by the Claimant for over 3 ½ years.

5. The Claimant filed an Application for Hearing and 61 pages of argument, along with exhibits, on September 6, 2017, which she refers to as "Request for Hearing." Her alleged work-related occupational disease is "occupational asthmas and contact dermatitis." She states that "this request for hearing is her notice claiming compensation." From page 60 of her filing:

> The Claimant requests a hearing to be set to review Workers' Compensation claim #37332757 filed Dec. 6, 2013 with one DOI of 4/9/2013 for benefits for the Claimant and

> penalties for [Employer] and Pinnacol Assurance. The Claimant notes statute C.R.S. § 8-43-103 (3) "the right to compensation and benefits shall be barred unless, within five years after the commencement of disability or death, a notice claiming compensation is filed with the Division., this request for hearing is her notice claiming compensation. This request for a hearing is within five years of the date of the Workers' Compensation claim filing date of Dec. 6, 2013; of the date of April 11, 2013.

6. Claimant's claim is not for disability or death resulting from exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds or from asbestosis, silicosis, or anthracnose.

7. As noted by the Claimant in her 61 page filing, there has been a significant amount of correspondence and activity on the part of Claimant since December 26, 2013. Among other things, claimant filed FMLA (Family Medical Leave Act) paperwork, dated July 27, 2014, requesting leave for her serious health condition, signed by Dr. Scott Price. In this document, Dr. Price notes Claimant's condition prevents her from performing her job functions. He states it is medically necessary for Claimant to be absent from work because of "Airway exacerbations worsen at the work place." And that flare ups are "ongoing at the work place." The Claimant wrote the Employer on January 26, 2014 about her condition and her suspicion that it was work related. On June 24, 2014, the Claimant wrote the Employer stating, "I continue to have increasing sickness when at work" Although she acknowledged that testing by both the Employer and Pinnacol Assurance had not supported her claim, she stated that she disagrees, and "I know it is in the building by my sickness and symptoms I continue to have." The Claimant wrote the Employer on August 15, 2014, informing it that she would not be returning to work because, in her opinion, "the building has made me sick and my conditions worsen when in the building." The Claimant's correspondence includes details of Claimant's belief that exposure to something in her workplace had caused her respiratory and dermatological conditions.

8. The Claimant's Request for Hearing admits to knowledge of her condition and claim that that condition was work related as far back as 2012. In her Request for Hearing, the Claimant mistakenly refers to the First Report of Injury as the "Workers' Compensation claim." December 6, 2013 was the date of the First Report of Injury. In her Request for Hearing, the Claimant refers to her Request for Hearing being filed within 5 years of "April 11, 2013, when the Claimant spoke to her supervisor about workplace triggers; of the date of April 12, 2013 when the Claimant had an incident (asthma attack) in the restroom at work; and the date of December 6, 2012 when the Claimant had a Mathacholine Challenge asthma test that showed she had asthma at age 61 with no prior history."

Penalty Request

9. The Claimant has included penalties in her Application for Hearing. Her Request for Hearing and her Application for Hearing indicate that this penalty allegation is that [Employer's] filing of a First Report of Injury on December 4, 2013 was "fraudulent." She states, "[Employer's] fraudulent filing of the Workers' Compensation claim # 3732757 is evident by the filing date of December 6, 2013 being one month after [Employer]. received Dr. Mayer's letter dated 10/21/2013 asking for further information about the workplace and indicating the possibility the building may be to blame." Her accusation centers upon the use of a single date on onset within the First Report of Injury in response to the prompt, "Date of injury/illness" (Exhibit A, Exhibit H).

Analysis

10. It is undisputed that the Claimant has made clear that her suspicions about the connection between her symptoms and complaints and alleged work exposure date back to 2012. She uses April 11, 2013 as the date that she "spoke to her supervisor about workplace triggers." The Claimant stopped working because of her suspicion and filed for FMLA leave. Her Request for Hearing makes it clear that the "discovery" of her workers' compensation claim goes back to at least 2013. It is undisputed that there is no reasonable excuse for extension of the two year statute of limitations, other than the Claimant's mistaken belief that the 5-Year Statute (which applies to fissionable matter, etc.) applied. Even if there was a reasonable excuse,, the Claimant's September 6, 2017 Application for Hearing falls outside of a three year timeframe from her discovery.

11. Section 8-43-103(2), C.R.S. provides that the statute of limitations does not begin to run if the "employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division" as required by the Workers' Compensation Act. An employer has notice of an occupational disease or lost-time injury when it obtains some knowledge of facts connecting a claimant's injury or condition with the employment, and indicating to a reasonably conscientious manager that a the case may involve a potential claim for benefits. A First Report of Injury was filed in this matter on December 4, 2013. The Claimant first gave notice of her claim on September 6, 2017, more than three-years after the Employer filed the First Report of Injury.

Ultimate Findings

12. The Respondents have established, by preponderant evidence that there is no genuine issue of any material fact upon which the Claimant can avoid application of the statute of limitations. A First Report of Injury was filed on December 4, 2013. The Claimant had the required knowledge of a work-related claim by at least that date. She has filed no claim for compensation. She did not file an Application for Hearing until September 7, 2017, more than three-years after she reasonably knew that she had a

workers' compensation claim.

13. It is undisputed that the Employer did not pay the Claimant compensation before her filing of the Application for Hearing (her first notice of a claim); and, it is undisputed that no tolling circumstances existed to stop the statute of limitations from running.

14. It is undisputed that no reasonable excuse existed for the Claimant not timely filing her claim.

CONCLUSIONS OF LAW

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

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Summary Judgment is supported by documents. The Claimant's Response and Cross-Motion for Summary Judgment consists of over 60-pages with no attachments. Nonetheless, it reveals the lack of a genuine issue of disputed material fact concerning the applicability of the statute of limitations.

b. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the documentary evidence establishes that it is undisputed that the Claimant's first written notice of a claim occurred more than three years after she reasonably knew that she had a claim against the Employer.

c. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that

there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Respondents' Motion for Summary Judgment fails to show specific facts probative of their right to summary judgment. The Claimant's Response, however, shows that there is no genuine issue of disputed material fact concerning the filing of the Application for Hearing being more than three years after she reasonably knew that she had a claim.

No Tolling of the Statute of Limitations

d. There are exceptions to the two-year statute of limitations under § 8-43-103(2), but they do not apply in this case. For instance, § 8-43-103(2), C.R.S. provides that: "In all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of [the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee … until the required report has been filed with the division." *Likens v. Dep't of Corrs*, W.C. No. 4-560-107 (ICAO Feb. 10, 2004). As found, the Employer filed its First Report of Injury on December 4, 2013, at which time the clock began running.

e. Section 8-43-103(2), C.R.S. further states that the two-year statute of limitations for filing a claim is tolled if the employer pays "compensation" to the claimant. *Bonazzo v. J.A. Jones Const.*, W.C. No. 4-241-121 (Sept. 24, 1998). Finally, § 8-43-103(2), C.R.S. indicates that the statute of limitations will not apply to a claimant "if it is established to the satisfaction of the director within three years after the injury…that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced."' As found, no "reasonable excuse" or any other tolling exception to the statute of limitations has been established.

f. The statutory reporting requirements are set out in § 8-43-101, C.R.S. *See Grant v. Indus. Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). § 8-43-101(1), C.R.S. requires that the within ten days after notice of knowledge that an employee had contracted a permanently physically impairing injury or lost-time injury, the employer shall file a report with the division. *Pierce-Kouyate v. Wilson's of Colo. Ltd.*, W.C. No. 4-717-784 (ICAO Nov. 21, 2007). A "lost time injury" is defined as one that causes the claimant to miss more than three work shifts or three calendar days of work, and the employer's notice is measured by the "reasonably conscientious manager" standard. *Grant,* 740 P.2d at 531. The Claimant bears the burden of establishing that there was a tolling of the statute of limitations. *Grant*, 740 P.2d at 532. As found, the Employer filed the First Report of Injury on December 4, 2013; and, the Claimant filed her first written notice of her claim by Application for Hearing, dated September 7, 2017, more than three years after which she reasonably knew about her claim.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Respondents have sustained their burden on the applicability of the statute of limitations. The Claimant has failed to sustain her burden on the tolling of the statute.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Summary Judgment is hereby granted in favor of the Respondents.

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

DATED this_____day of October 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

I. Whether Claimant suffered a compensable injury on January 20, 2016.

II. Whether Dr. Zuehlsdorff is an authorized provider.

III. Whether the medical treatment provided by Dr. Zuehlsdorff is reasonable, necessary, and related.

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a paraprofessional and works with students.

2. On October 25, 2015, Claimant went out on medical leave to have heart surgery.

3. On October 27, 2015, Claimant underwent heart valve replacement surgery. The surgery required a thoracotomy. Claimant was ultimately released to full duty.

4. On January 18, 2016, Claimant returned to work with Employer. When Claimant returned to work, she was not having any chest pain.

5. On January 20, 2016, Claimant was working for Employer at Westlake School as a paraprofessional. Claimant was in the hallway talking to one of her students when another male student, who was running down the hallway, ran into the backside of Claimant. Claimant did not fall down, but she was shaken up. After the incident, Claimant had the onset of chest pain across the incision of her heart surgery.

6. On January 21, 2016, the following day, Claimant noticed two lumps in the center of her chest which were very sensitive to touch.

7. On January 21, 2016, Claimant completed a Workers' Compensation Employee's Accident Worksheet which included a pain diagram. Claimant marked the areas of her body that were hurt. Claimant marked the back side of her left arm, the left side of her mid-back, and her left calf. Claimant did not mark her chest. Claimant also stated that: "I was hit by the body of a student in my left arm, ribs, and calve. It left a huge red mark and bruise, fingers were numb most of the day."

8. Claimant was referred by Employer to OccMed Colorado where she was evaluated by Dr. Zuehlsdorff.

9. On February 3, 2016, Claimant was evaluated by Dr. Zuehlsdorff. Dr. Zuehlsdorff's report provides the following history:

> She was on leave of absence from October 25th through January 18th. She did go back to work on January 19th, but on January 20th, she was in the hallway and a male child ran into her, who is a sixth grader and apparently large, and hit her from the left side and jarred her hard to the right and made her twist. She did not fall, but she was shaken up. She noticed later that day that her chest started to ache and had a bump in the mid area where the surgery was performed, as she did have an open thoracotomy due to the recent surgery. She went in and saw Dr. Eysts, her cardiologist, and saw his PA two to three days later, and while an x-ray was not done or any studies, he noted that he felt one of the surgical loop wires may have come loose during the incident in the hallway, and he referred the patient to see the surgeon, who she sees this Friday the 5th. . . . It just hurts there. When sitting, she can feel it lightly, maybe 2-3/10, but when she moves, it is more like 6/10.
>
> She also notes that initially she hurt her left calf and her left arm and flank, but those have pretty much resolved, and she is not worried about them.

10. Dr. Zuehlsdorff's February 3, 2016, assessment included "Chest pain status post collision in hallway with student, possibly impacting a suture wire from recent aortic valve replacement in October of 2015." Dr. Zuehlsdorff indicated Claimant was going to follow up with her cardiologist, Dr. Miller, on February 5, 2016, and return to see Dr. Zuehlsdorff in a week.

11. On February 5, 2016, Claimant went to Dr. Miller's office and was evaluated by Heather Austin, P.A.-C. (Physician's Assistant.) P.A. Austin noted Claimant's subjective complaints as follows:

> [Claimant] is here today for a wound check. She states that a middle school child "hit" her in the back and now she is having point tender pain between her breasts. The AVR surgery was in October 2015-redo sternotomy.

12. P.A. Austin provided the following assessment:

> All wounds well approximated with no evidence of infection. The scar is healing well. The sternum is very stable. There is no shifting or pain with compression. There is some

> tenderness right between the breasts but I don't feel anything out of the ordinary. . . I explained to her that until I have the results of the CXR I can't give her an answer about why she might be having pain there, i.e. wire pain. I also explained that her sternum is stable and that I am not worried about her going back to work. We discussed the possibility of a wire that may need to be removed if the pain continues. I reassured her that this would not compromise the stability of the sternum and she could return to work without restrictions like she had post op.

13. On February 18, 2016, Claimant was evaluated by Dr. Eyster for ongoing chest pain. Dr. Eyster noted that Claimant has been feeling unwell since the accident at school. Dr. Eyster noted that Claimant had the sudden onset of pain after accident in the midsternum wire sites. Dr. Eyster also stated that although the CXR did not show wire breakage, "I do not doubt that a 6th grader running full tilt into a partially healed sternum could cause pain and injury." Dr. Eyster's opinion regarding the cause of Claimant's chest pain and injury is found to be credible and persuasive.

14. On February 19, 2016, Claimant returned to Dr. Zuehlsdorff. His report indicates that Claimant saw the cardiac surgeon a while back and that x-rays were negative and that they were not too concerned. The report also indicates that the cardiologist indicated that they could take out the suture wire, but they probably will not have to. Claimant was still a little tender when she touched her chest, but otherwise there was no pain. Dr. Zuehlsdorff indicated Claimant should return in one month. He also indicated that Claimant might require a minor office surgical procedure to take out the metal suture or sternal wire.

15. In December of 2016, Claimant underwent surgery to have the sternal wire removed. The removal of the sternal wire did not get rid of Claimant's chest pain.

16. Claimant testified at hearing that she did not have chest pain when she returned to work and that she developed chest pain the day of the work accident and continues to have chest pain. Claimant's testimony regarding the onset of her chest pain following the accident at work and the duration of her chest pain is found to be credible and persuasive.

17. The January 20, 2016, accident at work caused Claimant to develop chest pain at her sternum - the site of her heart surgery.

18. The January 20, 2016, accident, which caused Claimant to develop chest pain, triggered Claimant's need for medical treatment.

19. Claimant was referred by Employer to OccMed Colorado - Dr. Zuehlsdorff - so Dr. Zuehlsdorff could evaluate and treat Claimant's chest pain which was caused by the accident.

20. Dr. Zuehlsdorff evaluated and assessed Claimant for her chest pain which was caused by the January 20, 2016 accident.

21. Dr. Zuehlsdorff became an authorized provider.

22. Claimant suffered an injury on January 20, 2016, while working.

23. Claimant's injury arose out of and in the course of her employment.

24. The medical treatment provided by Dr. Zuehlsdorff – in which he evaluated and treated Claimant's chest pain - was reasonable, necessary, and related to the industrial injury of January 20, 2016.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert

witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant suffered a compensable injury on January 20, 2016.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A "compensable" industrial accident is one which results in an injury requiring medical treatment or causing disability. *H and H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). Where pain triggers Claimant's need for medical treatment, Claimant has established a compensable injury if the industrial injury is the cause of the pain. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949). The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury. See *Merriman v. Industrial Commission, supra*; *Villela v. Excel Corp*., W.C. No. 4-400-281 (February 1, 2001); *Hatch v. John H. Harland Co*., W.C. No. 4-368-712 (August 11, 2000).

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

In this case, Claimant had just returned to work after being out for heart surgery. As part of her heart surgery, Claimant underwent a thoracotomy in which they had to cut through her sternum in order to gain access to her heart. On January 20, 2016, Claimant was working at Westlake School and talking to one of her students in the hallway when another student ran into her. The accident caused Claimant to develop chest pain in the area of her thorocotomy – her chest.

In order to evaluate and treat her chest pain, which was caused by the accident that occurred while Claimant was working, Claimant was referred by Employer to Dr. Zuehlsdorff. Dr. Zuehlsdorff evaluated Claimant for her chest pain on February 3, 2016, and February 19, 2016. Claimant was also evaluated for her chest pain by Dr. Eyster and Dr. Miller's physician assistant, Heather Austin. The medical treatment was to determine the extent of the work injury and to pinpoint the underlying source of the pain.

Claimant has established by a preponderance of the evidence that her accident and injury arose out of and occurred within the course of her employment and caused the need for medical treatment. Therefore, this ALJ concludes that Claimant suffered a compensable injury on January 20, 2016.

II. Whether Dr. Zuehlsdorff is an authorized provider.

Authorized providers include those medical providers to whom Claimant is directly referred by Employer, as well as providers to whom an ATP refers Claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

As found, Employer referred Claimant to OccMed Colorado - Dr. Zuehlsdorff. Claimant treated with Dr. Zuehlsdorff on February 3, 2016 and February 19, 2016. Therefore, this ALJ concludes that Dr. Zuehlsdorff is an authorized provider.

III. Whether the medical treatment provided by Dr. Zuehlsdorff is reasonable, necessary, and related.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In this case, Claimant was injured on January 20, 2016. Due to the injury, Claimant developed chest pain. Claimant was referred to OccMed Colorado – Dr. Zuehlsdorff - to be evaluated and treated for her chest pain which was caused by the accident. Dr. Zuehlsdorff evaluated Claimant's chest pain on February 3, 2016 and February 19, 2016 in order to cure and relieve Claimant from the effects of her injury. Therefore, this ALJ concludes that that the treatment provided by Dr. Zuehlsdorff was reasonable and necessary to treat Claimant's January 20, 2016, injury and was also related.

ORDER

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

1. Claimant suffered a compensable injury on January 20, 2016.

2. Dr. Zuehlsdorff is an authorized provider.

3. The medical treatment provided by Dr. Zuehlsdorff on February 3, 2016 and February 19, 2016 is found to be reasonable, necessary, and related to the January 20, 2016 work injury. Therefore, Respondents shall pay for such treatment pursuant to the Colorado Workers' Compensation Fee Schedule.

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

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

DATED: October 31, 2017

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

ISSUES

I. Whether Claimant suffered a compensable injury on September 28, 2016.

II. Whether Claimant is entitled to medical benefits, including the surgery performed on May 1, 2017, by Lonnie E. Loutzenhiser, M.D.

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

EVIDENTIARY RULING REGARDING POST HEARING SUBMISSION

Respondents were allowed to submit, post hearing, a certified copy of the Division of Workers' Compensation file regarding Claimant's prior workers' compensation claims, subject to any objection by Claimant. Respondents filed a certified copy of the Division of Workers' Compensation file regarding Claimant's prior claims. The submission – Division File - contained the partial deposition of Dr. Anthony Euser. Claimant objected to the admission of Dr. Euser's deposition based on hearsay.

This ALJ finds that that the deposition of Dr. Euser is hearsay and not admissible. The mere fact that the deposition was filed with the Division of Workers' Compensation does not make it admissible via a certified copy of the Division file which happens to contain the deposition. See *Leiting v. Mutha*, 58 P.3d 1049, (Colo. App. 2002) *See also Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, (Mo. 1999) (A document which contains hearsay is not automatically admissible as a public record merely because it is authenticated as an official record or is kept in the working file of a governmental agency.)

FINDINGS OF FACT

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

1. On April 31, 2016, Claimant was hired by Employer as a truck driver. **Ex. MM, Bates 225.** Claimant drove a semi-truck with a side-dumping trailer.

2. On Wednesday, September 28, 2016, at approximately 3:00 p.m., Claimant was involved in an incident at a jobsite. Claimant had a full load of dirt in his side-dumping trailer. The trailer, however, had been over loaded and was loaded unevenly. When Claimant went to dump the dirt, the trailer turned over onto its left side. The cab of the truck, which was attached to the trailer, did not tip over.

However, the trailer twisted the cab and caused the right back wheels of the cab to lift up off the ground. This caused the cab of the semi-truck to lean to one side. **Ex. Q, Bates 158.** Claimant got out of the cab of the semi-truck and took the photos which were submitted into evidence. **Ex. 7 and Q.**

3. Juan Ramirez, owner of Ramco Trucking, came to the jobsite after the incident. By the time Mr. Ramirez arrived at the jobsite, the trailer had been righted back onto its wheels using other equipment on the scene. Mr. Ramirez asked Claimant if he was hurt. Claimant denied he was hurt. Claimant stayed at the jobsite and worked on another trailer that needed some minor mechanical work.

4. After the incident, Claimant returned to the Employer's shop. Ms. Denise Tolmich, who is also an owner of Ramco Trucking, met Claimant at the Employers' shop after the incident. She asked Claimant about the incident and asked Claimant whether he was hurt. In response to several Employer inquiries that day and the day after, Claimant said he was not hurt. Claimant did, however, describe the action or motion of the truck cab as moving in "slow motion" during the incident when the wheels on the right side came off the ground. Claimant did not tell either Mr. Ramirez or Ms. Tolmich that the truck cab rolled completely over and onto its side. After returning to the shop, Claimant worked until 7:48 p.m.

5. Mr. Ramirez testified that there was only minor damage to the cab of the semi-truck. He testified that he believed the minor damage was caused when the trailer was righted after the incident. He explained that there was nothing to stop the fall of the wheels to the ground when it was righted, as opposed to the dirt that was on the drivers' side of the trailer which slowed the tip of the trailer during the incident.

6. On Thursday, September 29, 2016, the following day, Claimant worked 12.36 hours. **Ex. R, Bates 166.** Mr. Ramirez testified that he saw Claimant work in the shop. This included Claimant crawling under the truck checking for and repairing the damage done in the September 28, 2016 incident. Mr. Ramirez did not observe Claimant behaving in any way that indicated he was injured in any way. He asked Claimant repeatedly if he was injured during the incident and Claimant stated he was not.

7. On Friday, September 30, 2016, Claimant worked 10:21 hours. **Ex. R, Bates 166.**

8. Claimant did ask for Monday, October, 3, 2016, off in order to meet with his attorney for his upcoming divorce proceeding.

9. Claimant spoke with Mr. Ramirez on or about Wednesday October 5, 2016, to discuss payment of his wages. Claimant also stated that he was experiencing problems with his back. The conversation seemed peculiar. Therefore, Mr.

Ramirez and Ms. Tolmich purchased a recording device to record their next conversation with Claimant.

10. On October 5, 2016, Ms. Tolmich called Claimant and recorded the conversation. The recorded conversation was played at hearing. In this recording, Claimant began the conversation by asking Ms. Tolmich to hide his wages from his wife in order to prevent her from obtaining money in the divorce proceeding. Claimant stated that he wanted his wages to be "on the down low" and asked her to only show his earnings to be $1,100 per month. He asked for this with the express purpose of hiding his wages from his wife and the court in his divorce proceeding. Ms. Tolmich asked Claimant about the work incident and about his back. Claimant stated that he didn't know if he hit the driver's side door or not during the incident, and described the motion of the truck cab as slow motion, like one feels when driving around a corner in a car. When asked about his back complaints, Claimant said that he had aches and pains that he thought were from old age. He said that he historically took over the counter medication every morning and every night for his back. Claimant was asked directly by Ms. Tolmich if he wanted her to file a workers' compensation claim. Claimant said that he did not want to do that. Ms. Tolmich told Claimant that she would not agree to alter records regarding his wages. She offered to reduce Claimant's hours. He refused this, and again indicated that he wanted money owed to him for working to be hidden. Ms. Tolmich told Claimant that she could not do that, and told Claimant that she either needed to file a workers' compensation claim or have Claimant sign a waiver saying he did not wish to file a worker's compensation before she allowed him back to work. Claimant ended the conversation saying that he would meet with his attorney and then call back and let them know if he wanted a workers' compensation claim filed. Claimant did not call back, and Ms. Tolmich called him, again recording the conversation. Claimant told her at that time that he wanted her to file a workers' compensation claim for the incident of September 28, 2016.

11. A first report of injury was filed by the employer the next day on October 6, 2016, and Claimant was provided a choice of provider. **Ex. MM.**

12. Claimant was seen on October 7, 2016, by Advanced Urgent Care. Although Claimant first denied any injuries, and then only made reference to his back when he discussed the matter with Employer, an M164 was completed by Anita Burge, NP, showing complaints of right knee pain, back pain, c-spine, t-spine and L-spine. **Ex. NN, Ex. 1, p. 6.** Claimant was provided no work restrictions. Claimant testified that he brought this form to his employer and left it with them. Claimant did not return to work with Employer.

13. On October 21, 2016, a notice of contest was filed. **Ex. LL.**

14. On October 21, 2016, Claimant appeared in the emergency department of Platte Valley Medical Center. He complained of low back and mid back pain, and noted

that he had fallen twice that morning. He described the incident of September 28, 2016 as a motor vehicle collision ("Patient post MVC 09/28/16" "Truck roll over.") **Ex. 1, Bates. 44, 48, 50.** This characterization of the incident by Claimant continued from this point in his treatment. ("Patient was in a tractor and it flipped.") **Ex. P, Bates 135.** CT Scans of the lumbar, cervical, and thoracic spine were taken during the October 21, 2016 emergency room visit. **Ex. 1, Bates. 46-47.** Medical treatment continued with Dr. Julie Parsons, M.D. Julie Parsons, M.D. referred to Ryan Mansholt PAC on November 17, 2016, for treatment of "low back strain." **Ex. 1, Bates. 73.**

15. Claimant testified that the incident caused the cab of the semi-truck to completely roll over on its side and then roll or bounce back up. Claimant said the incident caused him to be slammed against the door. Claimant likened it to being in a roll-over accident. Claimant also gave a similar history to Dr. Fall. **Ex. A.**

16. Claimant did not tell either Mr. Ramirez or Ms. Tolmich that the truck cab rolled completely over and onto its side or "flipped." In addition, the photographs of the truck taken after the incident show the left side view mirror and left side door are not damaged. Had the truck flipped over onto its side as contended by Claimant, the mirror and door would have been damaged. Therefore, this ALJ finds that the truck did not flip over onto its side. This ALJ finds that at the time of the incident, the right back wheels of the cab came up off the ground slowly and caused the cab to tilt slightly. This did not cause Claimant to be jolted around in the cab or thrown into the driver's side door.

17. This ALJ finds that Claimant's description of the work incident to his medical providers, and testimony to this court, is not credible. This ALJ finds that Claimant overstated what occurred during the incident in an attempt to support his contention that he suffered an injury and that the injury is the cause of his pain complaints and symptoms.

18. Claimant testified that prior to the incident of September 28, 2016, he did not have problems with his back. Later, upon questioning, he testified that he had a remote car accident in 2002, but that his injuries had resolved. Claimant's testimony, however, is in direct conflict with the record. As set forth in the findings below, Claimant has had chronic and progressively worsening low back pain since 2002, was evaluated for back surgery at the end of 2014, and was on social security disability due to his back pain at the time of the September 28, 2016 incident.

19. While working for Employer, Claimant was receiving social security disability income (SSDI) benefits due to a prior back injury. **Ex. S. Ex. I, Bates 67.**

20. On August 24, 2016, just prior to the work incident, Claimant went to see Dr. Lutt at the Colorado Center for Arthritis and Osteoporosis. Claimant was treating with Dr. Lutt for the ongoing management of his psoriasis. Although Dr. Lutt was

managing Claimant's psoriasis, Claimant noted that his "left lower back still hurts." **Ex. O, Bates 125.**

21. On January 27, 2016, prior to the alleged work accident, a medical report from Martin McDermott, M.D., includes in the medical history "lumbar and cervical spinal stenosis for which he [is] on SS disability." **Ex. I, Bates 62.** That provider also noted, "old back injury for which he is on disability." **Ex. I, Bates 67.**

22. On December 29, 2014, Claimant was evaluated by Dr. Joseph Morreale at the Center for Spine & Orthopedics, for a surgical consultation due to his low back pain. Claimant was complaining of:

> [L]ow back pain since approximately 2002 when he was injured in a car accident. Since then he has had episodic low back pain which has been getting progressively worse and his last appointment when he was last seen in June. Really everything, sitting, standing, walking and extension, seems to bother things. He also has some bilateral lower extremity pain down to his knee. He had recently had to use a cane for support. He has been taking Norco and Flexeril as well as a steroid dose pack which has helped relive his pain mildly…He occasionally gets some balance issues.

23. Dr. Morreale's diagnosis of Claimant, on December 29, 2014, was spondylolisthesis, lumbar spondylosis with radiculopathy, degenerative disc disease, disc narrowing, and low back pain. Dr. Morreale's plan was to proceed with a new MRI of the lumbar spine and physical therapy, and to check in after a month, to discuss options. Dr. Morreale noted that: "He will most likely be looking at an L4-5 and L5-S1 anterior-posterior lumbar fusion." **Ex. K, Bates 87-89.**

24. On December 19, 2014, just prior to the visit with Dr. Morreale when he indicated Claimant will most likely need a lumbar fusion, Dr. Ruff wrote a letter describing Claimant's disability due to his back condition, recommending a stationary work situation where Claimant could stand or sit as needed. **Ex. J, Bates 90.** Claimant had requested "light duty" and was complaining that his back was making getting in and out of his tractor trailer very difficult, along with moving heavy hoses and sitting for long periods of time. **Ex. J, Bates 91.**

25. On December 10, 2014, Dr. Ruff ordered a lumbar and pelvis MRI because of Claimant's "severe low back pain not responding to treatment," **Ex. J, Bates 93.**

26. On February 12, 2014, Claimant was evaluated by Dr. Ruff. Claimant, among other things, complained of neck and back problems. Claimant's symptoms were

so severe he had problems walking over a block to get his mail. **Exhibit L, Bates 94.**

27. On May 16, 2013, Dr. Ruff indicated Claimant was suffering from chronic neck pain, chronic back pain, and that Claimant had been told in the past that he had cervical and lumbar degenerative disc disease. **Ex. J, Bates 97.**

28. On March 25, 2013, Claimant was evaluated by Dr. Lutt. Claimant complained of back pain due to a work related accident.

29. On January 31, 2013, back pain was included in Claimant's problems in his visit to the Colorado Center for Arthritis & Osteoporosis. At such visit, Dr. Lutt, noted: "He injured his left ankle, knee, elbow and back at work a few years ago. Workman's comp is fighting him about surgery on his knee and checking out his back." **Ex. O, Bates 111.** Claimant reported taking Vicodin and Flexeril as needed. **Ex. O, Bates 117.**

30. On November 17, 2012, Claimant underwent a comprehensive disability examination. The examination was performed by Dr. Traister of Colorado Disability Exam Services. During the evaluation, Claimant complained of right knee, right elbow, and back pain. Claimant reported that he walked with a cane 100% of the time. The report also provides that "he also continues to have back pain from his neck all the way down to his spine. He reports that that pain is constant as well." Things that worsen the back pain were reported to be sitting for too long and walking longer than a block or two. During the examination, Claimant reported significant limitations in his daily living. Functional limitations were discussed in this report, including weight limitations, standing and sitting limitations. **Ex. M, Bates 101.**

31. On August 18, 2011, Claimant was injured when a "stand-alone pipe" fell on him. Claimant injured his right knee at first, but proceeded to complain of elbow, neck, and back pain. Claimant stated his pain from his neck to his back was constant. **Ex. M, BS 101.**

32. On December 21, 2009, Claimant was seen at Salud Family Health Center complaining of lower back pain, with history of "MVA in 2002 with severe back pain" and neck pain. He was provided Vicodin, Flexeril, and Ketorolac Tromethamine, and provided with a Toradol injection.

33. It is found that Claimant has had progressively worsening back pain since his 2002 motor vehicle accident. It is also found that on December 29, 2014 it was anticipated that Claimant would require a L4-5 and L5-S1 anterior-posterior lumbar fusion.

34. It is found that Claimant attempted to minimize the extent of his pre-existing back problems to the court.

35. Claimant is found to not be credible regarding his contention that the work incident caused his back pain or any other symptoms.

36. This ALJ finds that Claimant's back pain and other symptoms are due solely to preexisting conditions.

37. Claimant also testified at hearing that he did not remember filing a workers' compensation claim for a back injury occurring on October 18, 1995. Claimant also denied remembering settling that claim. The records from the Division of Workers' Compensation indicate Claimant filed a workers' compensation claim for "back pain" with a date of injury of October 18, 1995. The records further demonstrate that the claim was denied and Claimant settled the claim for $60,000. **Ex. OO, Division Files, W.C. #4-273-873.**

38. Claimant's contention that he does not remember filing a claim for a back injury in 1995 and settling the claim for $60,000 is not credible. Although the alleged injury was over 20 years ago, the fact that it settled for $60,000 makes it highly unlikely that Claimant does not remember the claim and the settlement. Therefore, Claimant is again found to not be credible.

39. On January 10, 2017, Claimant presented to Dr. Lonnie E. Loutzenhiser, M.D. a surgeon at Panorama Orthopedics & Spine Center. Claimant told Dr. Loutzenhiser after the work incident he woke up the next morning and was experiencing low back pain radiating down into his legs. Claimant stated that he notified his boss and told him that he was unable to go to work due to the pain. **Ex. J, Bates 76.** Again, Claimant's contention to Dr. Loutzenhiser is not accurate. After the incident at work on Wednesday, September 28, 2016, Claimant worked over 12 hours on Thursday September 29th, and over 10 hours on Friday, September 30, 2016. **Ex. R.** Claimant's statements to Dr. Loutzenhiser regarding his alleged injury and the onset of his symptoms is not consistent with Claimant's timesheets which show he worked the two days, Thursday and Friday, following the incident.

40. On January 10, 2017, Dr. Loutzenhiser proposed an anterior and posterior fusion at the L4-S1 levels. **Ex. J.** This is basically the same procedure Dr. Morreale indicated, on December 29, 2014, Claimant would most likely require.

41. Claimant testified that after the incident at work, he started to have bowel and bladder problems and such symptoms, combined with his back pain, necessitated the need for back surgery.

42. On May 1, 2017, Claimant underwent an L-4-L5 and L5-S1 bilateral posterolateral fusion surgery which was performed by Dr. Loutzenhiser. In his operative note, Dr. Loutzenhiser noted "Due to the fact that his Worker's Compensation insurance was denying paying for his surgical fixation and due to the patient's life-limiting symptoms, he did wish to proceed with operative

intervention through his normal insurance rather than Worker's Compensation insurance which was not providing him the care that he needed," There is no description of cauda equina syndrome, loss of bowel or bladder control or sexual dysfunction in the "indications for procedure" section of the operative report. **Ex. J, Bates 71.** Dr. Loutzenhiser provided the diagnosis as spondylolisthesis, L5/S1, lumbar stenosis, bilateral, radiculopathy, and bilateral pars fracture L5. **Ex. J, Bates 76.** Therefore, this ALJ finds that Claimant was not having bowel and bladder problems. Thus, such problems did not necessitate the need for surgery.

43. Dr. Allison Fall testified as an expert at hearing. She evaluated Claimant on March 2, 2017. She had also evaluated Claimant in relation to a prior workers' compensation claim in December 12, 2012. Her reports were submitted into evidence. **Ex. A.** Dr. Fall was present during Claimant's testimony at hearing. She also reviewed the photographs of the incident. Dr. Fall concluded that Claimant did not sustain any injuries as a result of the incident of September 28, 2016.

44. There are several diagnostic studies of claimant's back in the record. X-rays, November 17, 2012, **Ex. P, Bates 127**; Lumbar X-rays, December 10, 2014, **Ex. P, Bates 129**; ("Severe lower back pain. Motor vehicle trauma in 2002" **Ex. P, Bates 131**); Lumbar MRI January 5, 2015, **Ex. P, Bates 133**; X-rays, cervical, thoracic, lumbosacral, right knee, October 7, 2016, **Ex. P, Bates 135**; MRI and x-rays, 12/21/2016, **Ex. J, Bates 80.** Dr. Fall testified that these diagnostic tests did not show evidence of an acute injury occurring on September 28, 2016. Dr. Fall stated that the diagnostics reflected pre-existing degenerative changes and that the records showed chronic and severe pain predating the work incident. She explained that the 2017 surgery was aimed at the degenerative condition, and that condition was unchanged from the recent 2015 MRI to the MRI taken after the work incident.

45. Dr. Fall noted that it was significant to her that Dr. Parsons had documented Waddell signs. She testified that this indicated that there are issues other than organic pathology that were playing a role in Claimant's presentation. She indicated that Claimant's initial examination of October 7, 2016, showed complaints greatly out of proportion to the physical exam findings and the mechanism of injury. In reviewing her 2012 encounter with Claimant, she noted that subjective complaints were greater than objective findings at that time as well. Dr. Fall is found credible and persuasive. Although Claimant testified that his May 1, 2017, surgery was urgent because he was uncontrollably defecating and urinating, and was experiencing sexual dysfunction, Dr. Fall explained that there was nothing in the medical records that showed these complaints as a reason for surgery. She explained that if these types of symptoms were associated with a spinal injury, that would be because of cauda equina syndrome. That condition was not shown on MRI and was not discussed by

Claimant's surgeon. She explained that this would not be inadvertently left out of the records. Dr. Fall opined that the surgery undergone by Claimant was not urgent and was not emergent.

46. Dr. Fall's opinions as set forth in her testimony and reports are found to be credible, persuasive, and consistent with the medical records.

47. Claimant's treating provider Dr. Anderson-Oeser stated, "the spinal stenosis, lumbar spondylosis and degenerative disk changes are all preexisting and therefore would not be considered part of this work injury." His surgery, therefore in her opinion, was not work related. **Ex. B, Bates 17.**

48. Mr. Ramirez and Ms. Tolmich are found credible.

49. Claimant is found not credible. Claimant's testimony at hearing, and statements he made to his providers, including but not limited to his statements regarding the extent of the incident of September 28, 2016, his medical history, his symptoms, complaints and function, and the timeline of his reporting of his alleged injury to the employer are found not credible.

50. The September 28, 2016, incident did not cause any disability or need for any medical treatment.

51. The September 28, 2016, incident did not aggravate, accelerate, or combine with any of Claimant's pre-existing conditions and cause any disability or need for any medical treatment.

52. This ALJ finds that Claimant did not suffer an injury on September 28, 2016.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), et seq., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a

workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. Section 8-43-201, C.R.S.

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

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

I. Whether Claimant suffered a compensable injury on September 28, 2016.

For a claim to be compensable under the Act, Claimant has the burden of proving that he suffered a disability or need for medical treatment that was proximately caused by an injury arising out of and within the course and scope of employment. Section 8-41-301(1) (c), C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for the determination of the Judge. *Faulkner*, 12 P.3d. at 846.

The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), supra. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one, which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

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

Claimant has not carried his burden to prove by a preponderance of the evidence that the incident of September 28, 2016, resulted in a compensable work injury for a number of reasons.

First, Claimant was found to not be credible. Claimant was found to not be credible regarding the September 28, 2016, incident. As found, Claimant misrepresented the extent of the incident to his medical providers and during his testimony. Claimant alleged the cab of the semi-truck rolled over onto its side during the incident. However, as found, the cab of the semi-truck did not roll over onto its side. As found, the cab of the truck merely tilted when the back right wheels came off the ground during the incident. Therefore, Claimant did not get slammed into the door or jarred around during the incident.

Claimant was also found to not be credible regarding the extent of his pre-existing back problems. Claimant misrepresented the extent of his prior back problems during his testimony. Claimant first said he did not have any prior back problems. Then, he stated that he had a prior back injury in 2002 due to a motor vehicle accident, but that it basically resolved. As found, Claimant has had extensive, chronic worsening back pain and symptoms since 2002. In addition, Claimant had been on SSDI since 2013 due to his prior back injury. Then, in December of 2014, Dr. Morreale indicated Claimant would most likely need a two-level posterior and anterior lumbar fusion due to his worsening back pain and symptoms.

Claimant was also found to not be credible regarding his prior workers' compensation claim regarding his back. Claimant denied filing a prior workers' compensation claim for his back in 1995 and settling it for $60,000. As found, Claimant did file a claim for an alleged 1995 back injury and settled the claim for $60,000. Although the alleged injury was over 20 years ago, this ALJ found that the likelihood of Claimant not remembering this claim is unlikely due to the amount of the settlement.

Claimant was also found to not be credible in light of his attempt to conceal his income in his divorce proceedings. Claimant requested Employer to conceal his income so Claimant could deceive his wife and the court in his divorce proceedings in order to reduce his support obligation to his wife.

All in all, this ALJ did not find Claimant's testimony to be persuasive. Aspects of his testimony went well beyond having a poor memory. Here, Claimant sought to mislead and to create a history that is not truthful.

Second, Dr. Fall credibly and persuasively testified, and set forth in her report, that Claimant did not sustain an injury in the September 28, 2016, event. She credibly testified that nothing that occurred on that day caused disability or the need for medical treatment. Dr. Fall testified that Claimant's diagnostic tests did not show evidence of an acute injury occurring on September 28, 2016. Dr. Fall stated that the diagnostics reflected pre-existing degenerative changes and that the records showed chronic and severe pain predating the work incident. She explained that the 2017 surgery was

aimed at the degenerative condition, and that condition was unchanged from the recent 2015 MRI to the MRI taken after the work incident.

Third, Claimant's medical records demonstrated that Claimant had chronic and progressively worsening back pain since 2002. The records also demonstrated that Claimant was awarded SSDI in 2013 due to his back condition. Moreover, Claimant's back pain and symptoms progressed to the point where he underwent a surgical evaluation in December of 2014 and the surgeon determined that Claimant would most likely need a L4-5 and L5-S1 (2 level) anterior-posterior lumbar fusion. In addition, on August 24, 2016, about one month before the work incident, Claimant was evaluated by Dr. Lutt and complained of back pain.

The incident that occurred on September 28, 2016, did not cause, aggravate, or accelerate Claimant's back condition or any other condition. The September 28, 2016, incident did not cause any disability or need for medical treatment. Therefore, this ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable injury.

II. Whether Claimant is entitled to medical benefits, including the surgery performed on May 1, 2017, by Lonnie E. Loutzenhiser, M.D.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury on September 28, 2016. The incident that occurred on September 28, 2016, did not cause the need for any medical treatment. Therefore, this ALJ concludes that Claimant is not entitled to any medical benefits and Respondents are not responsible for the surgery performed by Dr. Loutzenhiser on May 1, 2017, or any other medical benefits.

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

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury on September 28, 2016. The incident that occurred on September 28, 2016, did not cause any disability. Therefore, this ALJ concludes that Claimant is not entitled to temporary total disability benefits.

ORDER

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

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

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

DATED: October 30, 2017

_____

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

ISSUES

Did Respondent overcome the DIME's determination Claimant is not at MMI?

STIPULATIONS

The parties stipulated to an average weekly wage (AWW) of $1,004.70.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his left knee on September 30, 2015 while working for Employer as a firefighter. He was walking down a ramp while wearing 80+ pounds of firefighter. He turned to the left at the bottom of the ramp and felt a painful pop in his left knee.

2. Claimant had a prior work-related injury to the left knee in 2006. Dr. Michael Hewitt performed an arthroscopic partial medial meniscectomy (40% of the posterior horn) and a patellar chondroplasty in August 2006. After surgery, Claimant continued to have symptoms consistent with patellofemoral syndrome. On April 19, 2007, Dr. Brian Beatty assigned a 22% lower extremity impairment rating and released him to full duties, with allowance for up to three cortisone injections over the next year.

3. The last documented treatment to the left knee was August 17, 2007, when Dr. Hewitt gave Claimant a cortisone injection. Dr. Hewitt indicated Claimant could "return to full running activities in the next three to four days. He will otherwise follow up in this clinic on an as needed basis." There are no subsequent treatment records until the September 30, 2015 injury.

4. Claimant worked as a firefighter without difficulty or limitation from at least 2008 until the injury in September 2015. He also regularly participated in physically demanding avocational activities such as golfing, mountain biking, and waterskiing.

5. Employer referred Claimant to Concentra for authorized treatment of the September 2015 injury. He initially saw Dr. Carlos Guerrero on September 30. The physical examination suggested a medial meniscus tear, so Dr. Guerrero ordered an MRI.

6. Claimant had an MRI of the left knee on October 7, 2015 which showed complex multidirectional tearing of the medial meniscus. The radiologist opined some of the findings could be related to the 2006 surgery but "given the complexity and appearance of the meniscus this is highly concerning for a recurrent tear." The MRI also slowed advanced osteoarthritis, primarily in the medial compartment.

7. Claimant saw Dr. David Walden, an orthopedic surgeon, on October 27, 2015. Dr. Walden referenced Claimant's 2006 injury and remarked "reportedly he had no

problems with regard to this knee following that procedure and was completely able to perform all elements of his firefighting job." Dr. Walden diagnosed an acute medial meniscus tear and left knee osteoarthritis. Dr. Walden opined "although the patient had prior knee surgery, he had been doing well for [a] number of years without any significant limitations (nine years)."

8. On November 11, 2015, Dr. Walden performed an arthroscopic partial medial meniscectomy to address a "substantial avascular tear of the posterior horn and body of the medial meniscus." He also observed "rather significant osteoarthritis" of the femoral trochlea, grade 2 and 3 osteoarthritic changes of the weight-bearing surface of the medial femoral condyle. He performed chondroplasties of the femoral trochlea, the medial femoral condyle, and medial tibial plateau.

9. Claimant progressed relatively well after surgery and was released to work without restrictions on January 26, 2016.

10. Unfortunately, Claimant had ongoing problems with his knee after going back to work. He returned to Dr. Walden's office in April 2016 complaining of "buckling, difficulty going down stairs, and stiffness after being seated for long periods of time or first thing in the morning." Dr. Walden recommended Orthovisc injections, which were completed in May 2016.

11. Dr. Steve Danahey at Concentra put Claimant at MMI on September 13, 2016. Claimant reported the Orthovisc "has worn off. He is feeling the same constant pain. Walking downstairs is high pain for the patient as well as just walking. He was told he may need to consider a knee replacement." Dr. Danahey assigned a 10% lower extremity rating after apportionment of the 2007 rating. Regarding permanent restrictions, Dr. Danahey opined:

> [Claimant] has a new permanent position, which is primarily sit-down work. I do not think he should doing repetitive kneeling, squatting or jumping. If my understanding of his position is wrong then I would be happy to assigned permanent work restrictions, as I do not think he can perform the regular duties of a firefighter.

12. Claimant was considering a knee replacement, but Dr. Danahey deferred the decision regarding the procedure to an orthopedic specialist. He gave no definitive opinion regarding causation of any potential knee replacement, but noted the 2006 injury and surgery "likely contributed significantly to the resultant arthritic changes in the left knee joint."

13. Claimant followed up with Dr. Walden on January 17, 2017. He reported the Orthovisc injections were "helpful and he was able to move around a great deal more with the help of those. They have gradually worn off, and he felt pain and stiffness in the knee and difficulty moving including kneeling, squatting, and pivoting motions." Dr. Walden gave Claimant a steroid injection and requested authorization for another series of Orthovisc injections.

14. Dr. John McBride, an orthopedic surgeon, performed a record review for Respondent on January 25, 2017. Dr. McBride noted Claimant's extensive osteoarthritis undoubtedly preexisted the September 2015 injury. He opined that the July 2006 surgery, which removed 40 percent of the medial meniscus, ultimately caused Claimant to develop medial joint osteoarthritis. He cited the Lower Extremity Medical Treatment Guidelines which state individuals with an intra-articular meniscus injury and/or surgery are at risk for subsequent osteoarthritis. He opined the surgery by Dr. Walden was reasonable and related to the September 2015 injury, but ongoing treatment directed at symptoms of osteoarthritis was not causally related to the admitted injury.

15. Dr. McBride issued a supplemental report on February 1, 2017 addressing the request for preauthorization of additional Orthovisc injections. He opined:

> I agree with Dr. Walden that the arthroscopy was reasonable and necessary for the acute degenerative meniscus tear, but his ongoing symptoms *at this time* are related to his ongoing osteoarthritis, which is what viscosupplementation is used for. The *potential* for a total knee replacement is related to his previous 40% partial medial meniscectomy in 2006. The bottom line is that the viscosupplementation, while it is reasonable and necessary with regards to his arthritis, is ***not related*** to the September 30, 2015 injury. (Emphasis in original).

16. Claimant saw Dr. Jack Rook for an Independent Medical Examination (IME) at the request of his counsel on March 13, 2017. Claimant recounted the history of the 2006 injury and told Dr. Rook he was having no problems with his left knee immediately before the September 2015 injury. After recovering from the 2006 surgery, Claimant returned to work as a firefighter with no restriction or limitation. Additionally, he "engaged in multiple sporting activities without any problems, including basketball, skiing, hiking, mountain biking, and golfing."

17. On physical examination, Claimant ambulated with a slight antalgic gait. There was mild atrophy of the left quadriceps but no appreciable swelling or effusion. He had moderate tenderness to palpation along the medial tibial plateau and crepitus with flexion and extension of the knee. He demonstrated significant range of motion loss.

18. Dr. Rook disagreed with Dr. McBride that further treatment was not injury-related. He agreed the osteoarthritis was pre-existing but noted Claimant was "completely asymptomatic" before the September 2015 injury and engaged in physically demanding vocational and avocational activities without limitation. By contrast, "[s]ince he injured his left knee, he has been unable to engage in these activities due to ongoing and persistent left knee pain." Dr. Rook opined Claimant satisfies the criteria in the Lower Extremity MTGs for aggravated osteoarthritis. Dr. Rook opined Claimant was not at MMI and needed further treatment to address ongoing left knee pain and significant functional limitations, including a possible knee replacement.

19. Claimant saw Dr. John Tyler for Division IME on March 22, 2017. Claimant described a constant, dull ache "deep inside" the knee, aggravated by prolonged walking

and going up and down stairs. On physical examination, Dr. Tyler noted slight atrophy of the left quadriceps muscles and tenderness to palpation along the medial joint line. There was "audible and tactilely noted crepitation that appears to be generated primarily if not completely in the medial joint space."

20. Dr. Tyler determined Claimant was not at MMI. He noted Claimant "was not having difficulties with any pre-existing osteoarthritic changes within the left knee until after the trauma suffered on September 30, 2015." Dr. Tyler opined

> "But if for the" injury of September 30, 2015, I believe this patient would continue to be able to work as a firefighter performing all the heavy lifting, climbing, crawling, etc. and responsibilities of that job and "if but for the" injury suffered, he would not have ongoing pain in the knee from pre-existing osteoarthritis. Secondary to same, though the arthritis did indeed build up over the years from his earlier medial meniscectomy, it was not a symptomatic factor in the level of this patient's functioning and quality of life, both vocationally and non-vocationally, until the injury of September 30, 2015. Secondary to same, surgical intervention toward the knee including the possibility of a total knee replacement at this time, should be entertained and I feel would be related directly to the injury of September 30, 2015.

21. Dr. Tyler further opined:

> I cannot state categorically that a total knee arthroplasty versus a partial knee arthroplasty is required at this time, as I am not a trained orthopedic surgeon and I will defer entirely to the judgment of Dr. Walden and Dr. Walden's partner who performs total knee arthroplasties and partial knee arthroplasties. If Dr. Walden and/or his partner feel that an arthroplasty is required, that arthroplasty would be directly related to the injury suffered in his September 30, 2015 injury.

22. No final decision or formal request for authorization of surgery had been completed as of the hearing date. Therefore, Claimant did not ask the ALJ to address or award any specific surgery.

23. Dr. McBride performed a third record review for Respondent on June 29, 2017. In addition to Dr. Rook's report and Dr. Tyler's DIME report, he viewed several hours of video surveillance Respondents obtained in April 2017. Dr. McBride disagreed with Dr. Rook and Dr. Tyler regarding MMI. He maintained his opinion that the osteoarthritis "indisputably" pre-existed the September 2015 injury. He also opined Claimant's activities on the video contradicted his reported limitations and undermined the DIME's conclusion that the injury aggravated his underlying arthritis.

> Dr. Tyler and Dr. Rook are basing their change in baseline on [Claimant's] **reported history** that he is unable to stand on his left leg, that he is unable to go up and down stairs, that he is unable to walk greater than 1 block, and that he cannot stand for long periods of time. These videos dispute that, so

his change in baseline is **subjective**, which is why the guidelines **require objective evidence**. (Emphasis in original).

24. Respondents deposed Dr. Tyler on August 16, 2017. Dr. Tyler reviewed the video surveillance before the deposition. He noted Claimant appeared to stand for longer than he would have expected. He stated the video changed his mind regarding Claimant's ability to stand for prolonged periods but did not otherwise impact his assessment. Dr. Tyler did not retract or change his opinion that Claimant is not at MMI.

25. Dr. McBride testified at hearing on behalf of Respondent to reiterate and expound on the opinions expressed in his reports. He testified the injury neither aggravated nor exacerbated the pre-existing condition. Dr. McBride thought it "unlikely" Claimant was asymptomatic immediately before September 30, 2015 given the extensive level of "end-stage" osteoarthritis. He opined Dr. Tyler did not to properly apply the MTGs regarding aggravated osteoarthritis and there is no objective evidence that the September 2015 injury changed Claimant's underlying pre-existing baseline condition. He opined Claimant's knee likely would have become symptomatic "eventually" irrespective of the work injury, but admitted he could offer no definitive opinion as to when it would have become so.

26. Dr. Tyler and Dr. Rook's opinions regarding causation are more persuasive than Dr. McBride's opinions.

27. Respondents failed to overcome the DIME's MMI determination by clear and convincing evidence.

CONCLUSIONS OF LAW

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if there is a course of treatment that has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990).

The DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). This is a higher standard of proof than the typical "preponderance" standard. Clear and convincing evidence is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). Therefore, the party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI finding is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The DIME's determination regarding the cause of the claimant's condition is an "inherent" part of the diagnostic assessment which attends the determination of MMI.

Egan v. Industrial Claim Appeals Office, 971 P.2d 664 (Colo. App. 1988). Therefore, the party disputing the DIME must overcome the DIME's causation opinion by clear and convincing evidence.

It is well established that "mere differences of medical opinion" do not constitute clear and convincing evidence that the DIME's determination is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc.*, W.C. No. 4-532-166 (July 19, 2004); *see also Gonzales v. Browning-Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

The mere existence of a pre-existing condition does not disqualify a claim for compensation or medical benefits. A claimant with a pre-existing condition may recover benefits if an industrial accident "aggravates, accelerates, or combines with" the pre-existing condition to cause disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom caused by the aggravation of a pre-existing condition, but an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Witt v. James J. Keil, Jr.*, W.C. No. 4-225-334 (ICAO, April 7, 1988). Rather, a claimant is entitled to medical benefits for treatment of pain only if the pain is proximately caused by the work-related activities or accident, rather than the underlying pre-existing condition. *F. R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985)*; Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

As found, Respondents failed to overcome the DIME's MMI determination by clear and convincing evidence. All the experts agree Claimant needs additional treatment for his left knee; the primary dispute is over causation. There is no doubt Claimant suffers from significant pre-existing osteoarthritis in his left knee. But the Respondent is liable if an accident "aggravates, accelerates, or combines with" the pre-existing condition to produce a need for medical treatment. The ALJ is persuaded that the September 2015 accident substantially aggravated Claimant's underlying osteoarthritis and caused it to become symptomatic. Claimant had advanced "bone-on-bone" osteoarthritis the day before the injury but had no symptoms, required no medical treatment, and could participate in a wide range of physically demanding activities. By contrast, since the date of injury he has been continuously symptomatic, with attendant limitations and need for treatment. Although the prolonged standing depicted in the surveillance footage is somewhat inconsistent with Claimant's description of his symptoms, it is unlikely Claimant would pursue a major surgery if he were not genuinely limited by a painful knee.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME's determination of MMI is denied and dismissed.

2. Per the parties' stipulation, Claimant's AWW is $1,004.70.

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

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

DATED: November 2, 2017

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that a Dorsal Root Ganglion (DRG) stimulator implant to address his ilioguinal/iliohypogastric neuropathy is reasonable, necessary and causally related to his March 23, 2015 admitted right groin injury.

FINDINGS OF FACT

1. Claimant is a 64 year old male who works for Employer as a Project Supervisor. On March 23, 2015 Claimant was installing a fence with three crew members. As he was kneeling to cut off the bottom of the fence pickets a road grader quickly approached him from behind. The other crew members moved out of the way and shouted to Claimant about the approaching road grader. Claimant noticed the road grader getting closer and dove out of the way. He landed on a concrete curb on his left elbow. Claimant immediately experienced sharp and stabbing right groin pain.

2. On April 9, 2015 Insurer filed a General Admission of Liability (GAL). The GAL acknowledged that Claimant had suffered an industrial injury while working for Employer on March 23, 2015. The GAL noted that Claimant had not missed any time from work and the matter only involved medical benefits.

3. On April 17, 2015 Claimant visited Authorized Treating Physician (ATP) Jeffry Gerber, M.D. and Physician's Assistant (PA-C) Erynn E. Kay for an evaluation. Claimant reported that approximately three weeks earlier while at work he was crouching down while constructing a fence and noticed a road grader approaching. He quickly moved out of the way by lying flat on the ground and immediately experienced sharp, stabbing pain in the right groin area. Claimant noted that over the following couple of weeks his condition failed to improve. He noticed significant pain while driving that radiated from his right groin area to his right lower back region. Dr. Gerber remarked that Claimant's injuries were "more muscular than anything." He ordered x-rays of the lumbar spine, right hip and pelvis. Dr. Gerber also prescribed physical therapy twice per week.

4. On May 8, 2015 Claimant returned to Dr. Gerber for an evaluation. Claimant reported continuing pain that radiated "into the right lower extremity anteriorly in the thigh." He assessed Claimant with lower back and right groin pain and strains. Dr. Gerber prescribed medications and continued physical therapy.

5. On May 29, 2015 Claimant again presented to Dr. Gerber. Dr. Gerber recommended that Claimant visit a physiatrist because his symptoms had not improved. He remarked that Claimant's symptoms were unusual.

6. On June 9, 2015 Claimant visited Levi Miller, D.O. at Colorado Rehabilitation and Occupational Medicine. Claimant reported that he jumped out of the way of a road grader at work and developed constant right lower back pain as well as intermittent shooting pain in his right groin area. Dr. Miller commented that Claimant's right lower back and groin pain was consistent with a lumbar strain. He remarked that physical therapy had provided little benefit and ordered a lumbar MRI.

7. On July 7, 2015 Claimant returned to Dr. Miller for an evaluation. Claimant reported minimal changes in his right lower back and right groin symptoms. After reviewing rhe lumbar MRI Dr. Miller remarked that Claimant had suffered an acute onset of right lower back and right groin symptoms as a result of the March 23, 2015 work incident. He explained that Claimant's symptoms were "most consistent with referred pain from lumbar strain, lumbar facet syndrome from the right L3-4, L4-5 levels, also possibly right L5-S1. MRI does show a facet arthritis at these levels." Dr. Miller continued medications and noted that Claimant had undergone "extensive physical therapy with limited benefit."

8. On October 2, 2015 Claimant again visited Dr. Miller for an evaluation. Dr. Miller reported that Claimant continued to suffer "constant pain in the anterior groin and point[ed] to the inguinal ligament in the middle." Claimant was uncertain about the activities that increased his symptoms but commented that they were worse in the morning and when he had cooled down or been inactive. Dr. Miller explained that Claimant had suffered the acute onset of right lower back and groin pain when he jumped away from a road grader at work on March 23, 2017. He reviewed Claimant's right hip MRI and remarked that Claimant had received minimal benefit from medications.

9. On November 16, 2015 Claimant visited Scott J. Primack, D.O. at Colorado Rehabilitation and Occupational Medicine for an evaluation. Dr. Primack remarked that Claimant had undergone a right hip MRI that revealed "thickening at the level of the inguinal ligament." He remarked that when he compared the left hip to the symptomatic right hip "the iliopsoas was actually quite thickened." Dr. Primack concluded that "[t]he problem might be at the thickening of the rectus abdominus at the level of the inguinal ligament or perhaps the iliopsoas tendon."

10. On November 18, 2015 Claimant visited D. Craig Loucks, M.D. at Peak Orthopedics and Spine for an examination. Dr. Loucks commented that Claimant had undergone a "fairly extensive workup" after his March 23, 2015 work accident. He remarked that Claimant had received an intraarticular hip injection with "some short-term relief." Based on a review of Claimant's medical records and a physical examination Dr. Loucks determined that Claimant likely suffered an "aggravation or partial tearing of his rectus femoris and iliopsoas."

11. On February 22, 2016 Claimant returned to Dr. Primack for an evaluation. Dr. Primack noted that Claimant had been seen for a "diagnostic ultrasound-guided iliopsoas injection." The injection "confirm[ed] the fact that the problem is within the iliopsoas myotendinous junction." Dr. Primack remarked that Claimant could undergo

another injection and was "a candidate for PRP." However, Claimant chose to wait on any additional interventional treatment.

12. On May 4, 2016 Dr. Primack drafted a letter addressing Insurer's denial of PRP injections for Claimant. He explained that Claimant was a candidate for PRP but Allison M. Fall, M.D. had determined that the procedure would not be appropriate under the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). Dr. Primack explained that the *Guidelines* were not determinative and Claimant's case constituted an "outlier." He renewed his request for the PRP procedure because Claimant had no problems in his right hip area prior to his March 23, 2015 industrial injury. Dr. Primack explained that using plasma-rich proteins in the PRP procedure is not quite common, but Claimant's condition of iliopsoas tendinopathy is "not exceedingly common." He summarized that PRP injections constituted a reasonable procedure and Claimant had a "high potential ability to recover."

13. On June 6, 2016 Claimant returned to Dr. Primack for an examination. Dr. Primack acknowledged that Dr. Fall correctly determined the PRP procedure was not within the *Guidelines*. However, he explained that "[g]iven the fact that there are no side significant psychosocial factors surrounding this case, his recovery from a diagnostic injection, his willingness to keep pushing himself through his job to continue to work, I do believe it would be considered reasonable and appropriate for [Claimant] to undergo the procedure."

14. On August 3, 2016 Claimant again visited Dr. Primack for an evaluation. Dr. Primack commented that Claimant had received "two-to-four days of pain control following his ultrasound-guided iliopsoas tendon injection." Claimant noted that he wanted a "more definitive procedure." Dr. Primack recommended a PRP injection that would improve Claimant's function.

15. On November 30, 2016 Claimant returned to Dr. Primack. Dr. Primack commented that Claimant had undergone a right PRP injection at the level of the iliopsoas tendon. At the time of the examination Claimant's hip pain had worsened.

16. On February 6, 2017 Claimant visited Kathryn Bird, D.O. at Colorado Rehabilitation and Occupational Medicine for an examination. Dr. Bird remarked that Claimant had returned to work without restrictions. He had undergone a right-sided ultrasound-guided ilionguinal/iliohypogastric injection on December 30, 2016 that provided one week of pain relief. Dr. Bird recommended a visit to an interventional anesthesiologist for "potential cryotherapy or DRG stimulation." She referred Claimant to Giancarlo Checa, D.O. for an evaluation.

17. On February 22, 2016 Claimant returned to Dr. Primack for an examination. Dr. Primack explained that Claimant had done well after receiving an ilionguinal/iliohypogastric injection. Claimant reported much less groin pain after the procedure and he could push, pull, walk and descend stairs. Dr. Primack commented that Claimant's positive response "confirm[ed] the fact that the problem [was] within the iliopsoas myotendinous junction."

18. On March 20, 2017 Claimant visited Dr. Checa for an examination. Dr. Checa noted that Claimant had received physical therapy, PRP injections and an Il/IH nerve block for his right groin pain. He remarked that, although Claimant's pain originated in the right groin area, it radiated through the abdomen into the right lower back. Dr. Checa commented that Claimant's pain was caused by neuritis. Claimant had received 100% pain relief from the Il/IH nerve block on December 30, 2016. Dr. Checa determined that Claimant would benefit from a spinal cord stimulator implant because he had failed multiple conservative therapies aside from the Il/IH nerve block. He summarized that a spinal cord stimulator would be more cost effective than other treatment and the goal of the procedure would be to reduce pain, improve function and reduce medication usage.

19. On March 24, 2017 Claimant returned to Dr. Primack for an evaluation. He noted that Dr. Checa had agreed that Claimant was a candidate for "a right DRG for the ilioinguinal/iliohypogastric neuropathy." Dr. Primack remarked that Insurer had denied the procedure. He explained that a DRG implant was a "reasonable and appropriate 'next procedure.'"

20. On April 12, 2017 Claimant visited Glenn M. Kaplan, Ph.D. for a psychological evaluation. Dr. Kaplan concluded that Claimant was an appropriate candidate for a DRG implant for chronic pain management. He noted that Claimant was not suffering "any significant depression or anxiety." Dr. Kaplan commented that Claimant had "reasonable and rational expectations from the procedure" and sought to reduce pain and improve his quality of life.

21. On May 12, 2017 Claimant returned to Dr. Gerber for an evaluation. After conducting a physical examination Dr. Gerber noted that Claimant continued to suffer right groin pain due to tendonitis. In addressing the necessity for a DRG implant Dr. Gerber explained:

> [Claimant] is good candidate for a DRG implant and is trying to work with physiatry on this. Unfortunately he needs to have further evaluation by work comp provider to see if they really feel that he is a candidate. [Claimant's] physiatrist feels that he is a perfect candidate for this procedure and that this would allow him pain relief for up to 10 years. This would also avoid more complex and more expensive surgical procedures. Ultimately I think this is a great option for this patient.

22. On June 23, 2017 Claimant returned to Dr. Gerber for an evaluation. Dr. Gerber maintained that Claimant was an excellent candidate for a DRG implant. He detailed that the procedure would provide significant chronic pain relief and eliminate office visits.

23. On July 26, 2017 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Dr. Fall reviewed Claimant's medical records and conducted a physical examination. She determined that there was a causal relationship between Claimant's March 23, 2015 industrial injury and his iliopsoas tendon symptoms

but not between the accident and the ilioinguinal and iliohypogastric neuritis diagnosed by Dr. Primack. Dr. Fall concluded that proposed surgical intervention in the form of a spinal cord stimulator was not appropriate because Claimant lacks a diagnosis that can be treated with a spinal cord stimulator. She detailed that Claimant only suffered an iliopsoas tendon injury and did not experience any injury to the ilioinguinal and iliohypogastric nerves. Claimant simply lacks a "work-related diagnosis that is treated by a spinal cord stimulator" and does not have symptoms that are consistent with injuries to the ilioinguinal and iliohypogastric nerves. Finally, Dr. Fall commented that the requested DRG implant is not reasonable, necessary or related to Claimant's March 23, 2015 work injury for the same reasons that the spinal cord stimulator was not appropriate.

24. Claimant has demonstrated that it is more probably true than not that a DRG stimulator implant to address his ilioguinal/iliohypogastric neuropathy is reasonable, necessary and causally related to his March 23, 2015 admitted right groin injury. Initially, on March 23, 2015 Claimant dove out of the way of a road grader while working for Employer. He immediately experienced sharp, stabbing right groin pain. Claimant received conservative treatment in the form of medications, physical therapy and PRP injections for his right groin pain. On December 30, 2016 Claimant received 100% pain relief from an ilioguinal/iliohypogastric nerve block. Dr. Primack commented that Claimant's positive response "confirm[ed] the fact that the problem [was] within the iliopsoas myotendinous junction." Dr. Checa remarked that, although Claimant's pain originated in the right groin area, it radiated through the abdomen into the right lower back. He noted that Claimant's pain was caused by neuritis. Although Dr. Checa suggested that Claimant might benefit from a spinal cord stimulator, he nevertheless acknowledged that Claimant's pain originated in the right groin area.

25. Dr. Primack persuasively explained that Claimant was a candidate for a right DRG implant for his ilioinguinal/iliohypogastric neuropathy. He noted that a DRG implant was a "reasonable and appropriate 'next procedure.'" Dr. Gerber agreed that Claimant was a good candidate for a DRG stimulator implant. He remarked that Claimant would receive pain relief for a significant period of time and avoid more complex and expensive surgical procedures. Dr. Gerber concluded that "[u]ltimately I think this is a great option for [Claimant]." Finally, after conducting a psychological evaluation Dr. Kaplan determined that Claimant was an appropriate candidate for a DRG implant. He commented that Claimant had reasonable expectations, sought to reduce pain and try to improve his quality of life through the procedure.

26. In contrast, Dr. Fall determined that a DRG implant was not reasonable, necessary and related to Claimant's March 23, 2015 accident. She detailed that Claimant only suffered an iliopsoas tendon injury and did not experience any injury to the ilioinguinal and iliohypogastric nerves. Dr. Fall summarized that Claimant simply lacks a work-related diagnosis that can be treated by a spinal cord stimulator or a DRG implant and does not have symptoms that are consistent with injuries to the ilioinguinal and iliohypogastric nerves. However, the medical records reveal that Claimant suffered a right groin injury that caused ilioguinal/iliohypogastric neuropathy. Claimant received significant conservative treatment and an ilioguinal/iliohypogastric nerve block provided

100% pain relief. Based on the persuasive reports of Drs. Primack, Checa and Kaplan, the proposed DRG implant constitutes reasonable, necessary and causally related treatment for Claimant's March 23, 2015 right groin injury.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has demonstrated by a preponderance of the evidence that a DRG stimulator implant to address his ilioguinal/iliohypogastric neuropathy is reasonable, necessary and causally related to his March 23, 2015 admitted right groin injury. Initially, on March 23, 2015 Claimant dove out of the way of a road grader while working for Employer. He immediately experienced sharp, stabbing right groin pain.

Claimant received conservative treatment in the form of medications, physical therapy and PRP injections for his right groin pain. On December 30, 2016 Claimant received 100% pain relief from an ilioguinal/iliohypogastric nerve block. Dr. Primack commented that Claimant's positive response "confirm[ed] the fact that the problem [was] within the iliopsoas myotendinous junction." Dr. Checa remarked that, although Claimant's pain originated in the right groin area, it radiated through the abdomen into the right lower back. He noted that Claimant's pain was caused by neuritis. Although Dr. Checa suggested that Claimant might benefit from a spinal cord stimulator, he nevertheless acknowledged that Claimant's pain originated in the right groin area.

6. As found, Dr. Primack persuasively explained that Claimant was a candidate for a right DRG implant for his ilioinguinal/iliohypogastric neuropathy. He noted that a DRG implant was a "reasonable and appropriate 'next procedure.'" Dr. Gerber agreed that Claimant was a good candidate for a DRG stimulator implant. He remarked that Claimant would receive pain relief for a significant period of time and avoid more complex and expensive surgical procedures. Dr. Gerber concluded that "[u]ltimately I think this is a great option for [Claimant]." Finally, after conducting a psychological evaluation Dr. Kaplan determined that Claimant was an appropriate candidate for a DRG implant. He commented that Claimant had reasonable expectations, sought to reduce pain and try to improve his quality of life through the procedure.

7. As found, in contrast, Dr. Fall determined that a DRG implant was not reasonable, necessary and related to Claimant's March 23, 2015 accident. She detailed that Claimant only suffered an iliopsoas tendon injury and did not experience any injury to the ilioinguinal and iliohypogastric nerves. Dr. Fall summarized that Claimant simply lacks a work-related diagnosis that can be treated by a spinal cord stimulator or a DRG implant and does not have symptoms that are consistent with injuries to the ilioinguinal and iliohypogastric nerves. However, the medical records reveal that Claimant suffered a right groin injury that caused ilioguinal/iliohypogastric neuropathy. Claimant received significant conservative treatment and an ilioguinal/iliohypogastric nerve block provided 100% pain relief. Based on the persuasive reports of Drs. Primack, Checa and Kaplan, the proposed DRG implant constitutes reasonable, necessary and causally related treatment for Claimant's March 23, 2015 right groin injury.

ORDER

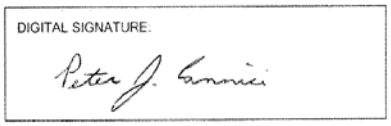
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for a DRG stimulator implant to address his ilioguinal/iliohypogastric neuropathy is reasonable, necessary and causally related to his March 23, 2015 admitted right groin injury.

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

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

DATED: November 2, 2017.



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

ISSUES

I. Whether Respondents have overcome the opinion of the Division Independent Medical Examination (DIME) physician that Claimant is not at maximum medical improvement (MMI) by clear and convincing evidence.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits in form of ongoing prescriptions for Percocet and Flexeril.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury to his low back while lifting plastic totes on July 7, 2015.

2. Claimant sought treatment at Swedish Medical Center where he reported feeling a sharp lumbar pain that radiated into his legs. On physical examination, Claimant was noted to have tenderness in the right perisacral and perilumbar areas and a normal neurologic exam. Claimant was diagnosed with an acute lumbosacral strain on the right and prescribed Percocet and Flexeril.

3. On July 20, 2015, Claimant presented to Kalinda Batra, M.D. at Denver Spine & Extremity LLC. Claimant reported right lumbar spinal and lumbosacral junction pain. He denied symptomatology into the lower extremities. Dr. Batra gave an impression of acute back pain, lumbar spinal/lumbosacral junction strain/sprain, compensatory mechanical dysfunction primarily at right L4-5 and L5-S1, pelvic unleveling and, and compensatory myalgia. Dr. Batra ordered an MRI and referred Claimant to Dr. Zimmerman for additional conservative care.

4. On August 5, 2015, Claimant underwent an MRI which revealed diffuse mild degenerative changes throughout the lumbar spine and, at L5-S1, a mass effect upon the descending S1 nerve roots, right greater than left, secondary to diffuse eccentric disc bulging.

5. Claimant first presented to Rick D. Zimmerman, D.O. on August 21, 2015. Claimant reported constant lumbosacral pain primarily in the right lower quadrant/upper buttock area with symptoms radiating into his hamstring, calf and lateral ankle. On physical examination, Dr. Zimmerman noted reduced lumbar range of motion with positive straight leg raise and neural tension findings on the right. Dr. Zimmerman gave an impression of lumbosacral displaced disc, right lower extremity radiculitis in the S1 distribution, and history of anxiety/depression disorder. Dr. Zimmerman prescribed Claimant chiropractic treatment, physical therapy, Percocet and cyclobenzaprine, and

scheduled a right L5 and S1 epidural steroid injection (ESI) for diagnostic and therapeutic purposes.

6. On September 4, 2015, Claimant presented to orthopedic surgeon Bryan Andrew Castro, M.D. Claimant reported that his leg pain was greater than his back pain. Dr. Castro noted that x-ray and MRI findings were consistent with S1 radiculopathy and assessed work-related lumbar radiculopathy secondary to disc herniation at L5-S1. Dr. Castro recommended Claimant undergo injection and physical therapy and, if no improvement, a possible lumbar microdiscectomy decompression.

7. Claimant saw Dr. Zimmerman for a follow-up evaluation on October 12, 2015. Claimant reported that his symptoms had returned after experiencing two days of 75% relief from an ESI performed September 16, 2015. Physical examination revealed positive straight leg raise and neural tension findings on right side and improved lumbar range of motion. Dr. Zimmerman scheduled a repeat ESI, which was performed on October 28, 2015.

8. On November 20, 2015, Dr. Zimmerman noted Claimant had a diagnostic response to the October 28, 2015 ESI, with two weeks of near-complete relief of back and leg pain. Dr. Zimmerman recommended Claimant undergo a third ESI, and continue his medications, physical therapy and massage therapy. The third ESI was performed on December 16, 2015.

9. Dr. Zimmerman reevaluated Claimant on January 8, 2016. Claimant reported insignificant relief from the third ESI for the first eight days, then a reduction in pain from 7/10 to 3/10 for two to three weeks. Dr. Zimmerman noted very restricted lumbar range of motion and recommended Claimant undergo an EMG/nerve conduction study and return to Dr. Castro to discuss surgical options.

10. Claimant underwent an EMG/nerve conduction study on January 18, 2016. Dr. Zimmerman noted that the results were normal with no evidence of radiculopathy, myopathy or neuropathy.

11. On January 20, 2016, Stephen Danahey, M.D. at Concentra Medical Center noted Claimant was still experiencing difficulties and referred Claimant to delayed recovery specialist Dr. John Burris.

12. Dr. Castro reevaluated Claimant on February 22, 2016 and noted Claimant had ongoing lumbar radiculopathy with short-term relief from injections. Dr. Castro recommended Claimant undergo a new MRI, noting Claimant may be possible candidate for surgical intervention.

13. Claimant underwent a second MRI on February 28, 2016 which revealed a small annular fissure at L5-S1 “not definitively seen on prior exam.” The otherdegenerative findings had not significantly changed.

14. Claimant attended a follow-up evaluation with Dr. Zimmerman on February 29, 2016. Dr. Zimmerman noted that the MRI demonstrated stable and essentially

unchanged right-sided L5-S1 disc protrusion causing encroachment on the right S1 nerve root. Dr. Zimmerman noted Claimant had minimal therapeutic relief after three ESIs and that his history of depression and anxiety were complicating his recovery. Dr. Zimmerman recommended Claimant follow up with Dr. Castro, as well as start OxyContin, reduce his dosage of Percocet, and continue taking his other medications.

15. On April 11, 2016, Dr. Zimmerman noted that Claimant was no longer having referred pain down the right lower extremity and no neuropathic radicular symptoms. On physical exam, Dr. Zimmerman noted self-limited lumbar range of motion and negative straight leg raise and neural tension findings bilaterally. Dr. Zimmerman recommended Claimant undergo diagnostic right L4-5 and L5-S1 medial branch blocks of facet joint to rule out facet-mediated pain.

16. Claimant underwent a medial branch block of the facet joint on May 4, 2016 and reported five to six days of relief during which his pain decreased from 6/10 to 2/10. Dr. Zimmerman recommended Claimant undergo a repeat medial branch block, which was performed on June 8, 2016. Claimant reported a decrease in pain from 5/10 to 0-1/10. Dr. Zimmerman noted a diagnostic response to the block. Dr. Zimmerman recommended Claimant undergo right L4-L5 and L5-S1 radiofrequency neurotomies, which were performed on July 13, 2016.

17. Claimant attended a follow-up examination with Dr. Burris on August 9, 2016 at which he reported that a rhizotomy procedure provided no relief of his low back pain. Dr. Burris noted Claimant was neurologically intact and referred Claimant back to Dr. Castro for further recommendations in light of the failed rhizotomy stating, “If Dr. Castro offered surgery and he wishes to pursue this, then they should move forward with the treatment. If Dr. Castro does not offer surgery, then the patient is at maximum medical improvement.”

18. Dr. Zimmerman reevaluated Claimant on September 26, 2016. Claimant reported that the radiofrequency neurotomy provided relief for the majority of his right lower extremity and buttock symptoms and some relief for his low back pain. Dr. Zimmerman noted that the September 7, 2016 MRI was unchanged overall from February 28, 2016 MRI. He recommended Claimant continue tapering his medication but remain on Percocet to maintain his activity level.

19. Claimant returned to Dr. Zimmerman for a follow-up evaluation on October 17, 2016. Dr. Zimmerman noted that the results of a recent urine analysis were complaint and recommended Claimant continue his current medications. Dr. Zimmerman noted that Claimant lived with his sister and would be assisting her after her own psurgical procedure, and “would not be able to consider surgery for himself until after she has become functionally independent again.”

20. Dr. Burris placed Claimant at MMI on November 1, 2016. Claimant reported 5/10 low back pain. On examination, Dr. Burris noted Claimant was neurologically intact with negative seated straight leg raising bilaterally and self-limited range of motion. He noted that there had been no change in Claimant’s subjective complaints or functional

status over the last seven months. Dr. Burris noted that, per Dr. Zimmerman's October 17, 2016 report, it was not clear if Claimant would avail himself of any further treatment. Dr. Zimmerman further stated that there was secondary gain involved and it was unclear if Dr. Castro would offer surgical intervention. Dr. Burris did not assign an impairment rating at the time stating that doing so would be "premature" in the event Claimant "ever elects to press forward with additional treatment. If and when he avails himself to further treatment and further treatment is offered by Dr. Castro, then I would have the patient return to pursue that treatment."

21. Dr. Castro reevaluated Claimant on November 28, 2016. Claimant reported ongoing low back pain with improved intermittent leg pain. Dr. Castro recommended Claimant undergo a repeat ESI for his low back pain before any surgical intervention stating,

> I did inform him that lumbar radiculopathy as a symptom is more appropriately and effectively treated with microdiscectomy decompression. Lumbago itself is not as effective as a surgical consideration with a microdiscectomy. If his pain is predominantly low back pain, I would favor repeating the epidural injection prior to considering any surgical intervention.

22. Insurer filed a Final Admission of Liability on December 14, 2016 consistent with Dr. Burris' opinions on MMI, impairment and medical treatment post-MMI. Claimant objected and sought a DIME.

23. On December 23, 2016, Dr. Zimmerman noted that Claimant requested an ongoing tapering schedule for Percocet, "as he is concerned the pain medication is masking much of his pain symptoms and allowing him additional function. He states his pain is typically 5/10 in the morning, and it improves with pain medication that he takes in the afternoon." On exam, Dr. Zimmerman noted very limited lumbar range of motion and positive straight leg raise findings on the right. Dr. Zimmerman determined it was reasonable and "diagnostically important" to proceed with a repeat ESI to make further surgical decisions. If surgical options were not recommended, Claimant would be at MMI.

24. Claimant underwent a repeat right ESI on January 4, 2017. On January 10, 2017, Dr. Burris noted that he was awaiting the results of the ESI and opined that, unless surgical intervention is recommended, Claimant remained at MMI and further treatment would be maintenance care.

25. On January 23, 2017, Claimant reported to Dr. Zimmerman experiencing 65-75% relief after the ESI, which lasted three to four hours before returning to baseline. Dr. Zimmerman determined Claimant had a diagnostic response to the ESI and recommended Claimant follow up with Dr. Castro to determine if surgical intervention is indicated stating, "We will move towards MMI if surgical options not recommended."

26. On March 6, 2017, John S. Hughes, M.D. performed an Independent Medical Examination at the request of Claimant. Dr. Hughes reviewed Claimant's medical records dated July 7, 2015 through January 10, 2017 and noted that he did not have records from Dr. Mike Wells regarding Claimant's depression and anxiety. Claimant reported constant 6/10 right-sided stabbing low back pain with shooting pain down his leg. On physical examination, Dr. Hughes noted "highly limited" lumbar range of motion and positive seated straight leg raise findings. Dr. Hughes assessed a lumbar spine sprain/strain with development of a right lateralizing disc protrusion at L5-S1 and emerging S1 radiculopathy. Dr. Hughes opined that Claimant was not at MMI and endorsed Dr. Burris' January 2017 recommendations to follow up with Drs. Zimmerman and Castro. Dr. Hughes assigned a provision 7% whole person impairment under Table 53 (II)(C) of the AMA Guides. He recommended Claimant undergo a repeat EMG/nerve conduction study and a presurgical psychological screening if surgery is contemplated.

27. Dr. Castro reevaluated Claimant on April 3, 2017. Claimant continued to report ongoing pain low back with occasional leg pain. Claimant reported that the injections provided two to three hours of relief. On physical examination, Dr. Castro noted that Claimant was neurologically intact with diminished forward bending range of motion and negative straight leg raising bilaterally. Dr. Castro noted that the MRI revealed some disc bulging at L4-5 and other mild to moderate degenerative changes, with no severe neural impingement. He remarked that it was unclear what was causing Claimant's symptoms and stated, "It is unclear to this provider whether surgical intervention is the best option for him. His symptoms do not seem to be purely radicular in nature. He does not have any positive tension signs and, as such, I think I would want to use surgery as a very last resort…" Dr. Castro indicated he was awaiting the results of other IMEs.

28. On April 17, 2017, Claimant reported to Dr. Zimmerman that he had ceased taking all of his pain medications for four days and lost some ability to tolerate activities of daily living. Claimant reported being in too much pain to completely stop taking the Percocet. Dr. Zimmerman recommended that Claimant continue taking Percocet and noted that he was awaiting the results of other IMEs.

29. On April 28, 2017, Carlos Cebrian, M.D. performed an IME at the request of Respondents. Dr. Cebrian issued an IME report dated June 1, 2017. Claimant reported experiencing constant low back pain with more symptoms in his back than in his leg. Dr. Cebrian reviewed Claimant's medical records, including mental health records dating back to 2013, and physically examined Claimant. On physical examination, Dr. Cebrian noted the following lumbar range of motion measurements: flexion 5 degrees, extension 5 degrees, right lateral flexion 10 degrees, and left lateral flexion 15 degrees. Straight leg raise was negative bilaterally. Dr. Cebrian assessed a work-related lumbar strain with aggravation of L5-S1 disc herniation with S1 radiculopathy.

30. Dr. Cebrian opined that Claimant was at MMI. Dr. Cebrian noted that, although Claimant has lumbar spine pathology, he was concerned that Claimant's psychiatric history affected his subjective presentation. Dr. Cebrian recommended that Claimant return to Dr. Burris for a referral to a neurosurgeon of his choice, stating that Dr. Rauzzino was an option. He noted that, if surgery was then recommended, a

psychological consultation would be required. Dr. Cebrian opined that such steps could be performed as maintenance and, "If [Claimant] is an appropriate surgical candidate with psychological clearance he would no longer be at MMI." Dr. Cebrian further opined that Claimant is not a surgical candidate as the clinical indications in the MTG have not been met for nerve root compression surgery.

31. Referring to the MTG for Chronic Pain and the CDC Guidelines for Prescribing Opioids for Chronic Pain, Dr. Cebrian recommended discontinuation of the opioids over 90 days and of the muscle relaxer over 30 days, contending that the medication was not increasing Claimant's function and had potential side effects. Dr. Cebrian assigned a 7% permanent impairment rating under Table 53(II)(C) of the AMA Guides with possible range of motion impairment.

32. Claimant underwent a DIME with Clarence E. Henke, M.D. on May 4, 2017. Claimant reported 4/10 pain radiating over the right posterior buttock and aching down the right lower extremity. Dr. Henke reviewed Claimant's medical records dated July 9, 2015 to March 6, 2017 and physically examined Claimant. Dr. Henke did not review Claimant's mental health records. On physical examination, Dr. Henke noted tenderness to palpation over the lower lumbar spine with radiation over the right posterior buttocks and down the right lower extremity to the heel. Claimant's active range of motion measurements were as follows: 20 degrees flexion, 10 degrees extension, 10 degrees bilateral flexion, and 15 degrees bilateral rotation, all with pain. Seated straight leg raise was positive on the right at 30 degrees and positive on the left at 50 degrees. Dr. Henke diagnosed Claimant with L5-S1 disc herniation with bilateral S1 nerve root compression more pronounced on the right, causing right lower extremity radiculopathy symptoms. He opined that Claimant had not reached MMI and recommended Claimant undergo a second surgical consultation with a board-certified neurosurgeon. Dr. Henke restricted Claimant from lifting more than 10 pounds, bending, squatting and kneeling. Dr. Henke recommended that Claimant continue taking Flexeril and Percocet.

33. On May 22, 2017, Dr. Zimmerman noted that Claimant was stable on his medications stating, "He successfully tapered his medications and appears to be at the lowest amount of narcotic analgesics to maintain his activities of daily living." Dr. Zimmerman reviewed the IME reports of Drs. Hughes and Henke. Claimant reported pain at a 6/10 and said he was not comfortable accepting his current condition. Dr. Zimmerman recommended Claimant continue his current medications, scheduled a repeat EMG/nerve conduction study, and referred Claimant for a psychological screening with Dr. Ron Carbaugh. Dr. Zimmerman stated that Claimant would then be referred for a second surgical opinion with neurosurgeon Dr. Michael Rauzzino.

34. Dr. Cebrian testified at hearing as an expert in occupational medicine. Dr. Cebrian is board certified in occupational medicine and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Cebrian testified consistent with his June 1, 2017 IME report that, while Claimant suffered a work-related lumbar strain with aggravation of L5-S1 disc herniation with S1 radiculopathy, Claimant was at MMI as of

the date of the April 28, 2017 IME. Dr. Cebrian opined that Claimant's psychiatric history is likely affecting his subjective presentation and recovery.

35. Dr. Cebrian testified that Claimant is not a surgical candidate as the clinical indications outlined in the MTG for Low Back Pain have not been met. Dr. Cebrian stated that, per the MTG on Low Back Pain, in order to qualify for surgery for nerve root compression, the patient should exhibit the following signs of radiculopathy before invasive procedures are considered: (i) pain in the legs greater than the low back which interferes with function, return to work and/or active therapy; (ii) physical exam findings of abnormal reflexes, motor weakness or radicular sensation deficits; and (iii) findings on MRI which indicate impingement of the nerve. Dr. Cebrian testified that because Claimant does not meet the clinical indications for surgery, and he has already been reevaluated by a surgeon, the recommendation for a surgical evaluation prior to MMI is not reasonable and necessary.

36. Dr. Cebrian opined that Dr. Burris appropriately placed Claimant at MMI. Dr. Cebrian stated that Dr. Henke failed to review all medical records submitted to him for review and was unaware of Claimant 's surgical consultation with Dr. Castro one month prior to the DIME appointment.

37. Dr. Cebrian further testified that the ongoing prescription of Percocet and cyclobenzaprine (Flexeril) are not appropriate per the MTG. Dr. Cebrian testified that the treating providers notes do reflect knowledge of Claimant 's substance abuse history or current anti-psychotic medications. Dr. Cebrian testified that Claimant meets several contraindications for continued use of Percocet and cyclobenzaprine, including that Claimant has not demonstrated increased functionality while using opioids and a history of substance abuse as reflected in a medical record reporting that at age 21, Claimant was using cocaine and heroin daily.

38. Dr. Cebrian testified nothing in the medical record justifies deviating from the MTG in this claim.

39. Dr. Henke testified at hearing consistent with his DIME report. Dr. Henke acknowledged that he did not review Claimant's mental health records and, at the time of his DIME, he was unaware of Claimant's psychiatric history. Dr. Henke also acknowledged that he did not have Dr. Castro's April 3, 2017 surgical opinion at the time of his examination of Claimant. Dr. Henke testified that Dr. Castro's opinion "didn't confirm or deny anything." When asked if Claimant's psychological history could be affecting his subjective pain complaints, Dr. Henke stated he had no comment.

40. Dr. Henke testified that his examination of Claimant revealed Claimant's pain was in his back and lower extremity. Dr. Henke testified that Claimant has a herniated disc which could completely disrupt and lead to further nerve damage. Dr. Henke stated that the pain that Claimant's low back pain is different than his leg pain because there is more than one pain generator.

41. Dr. Henke stated that, to the extent that Claimant used substances in the past or is currently taking medications, they do not affect the anatomical changes of Claimant's spine demonstrated by the diagnostic findings. Dr. Henke testified that while a person's psychiatric history can affect his or her perception of pain, it would not affect the cause of such pain.

42. Dr. Henke continued to opine that Claimant is not at MMI and recommended that a second neurosurgical opinion be performed prior to Claimant being placed at MMI.

43. Claimant testified at hearing that his right leg radicular pain extends from his lower back, through the buttock and into his ankle, and that the radicular leg pain is greater than his back pain with increased activity. Claimant stated that his symptoms prevent him from running, sitting and standing for longer than 20 minutes without increasing pain, doing household chores like laundry, cleaning under his bed, and vacuuming, and traversing stairs. Claimant testified that he wants to get better and is eager and willing to participate in his recovery to his full ability.

44. Claimant testified that he has only received surgical consultations from Dr. Castro and has not followed up with Dr. Castro since the April 3, 2017 appointment and after the completion of the DIME and IMEs. Claimant testified that his sister's surgical procedure and post-operative care would not have and did not interfere in any way with his ability to continue to receive medical treatment for his work-related injury.

45. Claimant's current pain medications of Percocet and Flexeril are being prescribed by Dr. Rick Zimmerman. Claimant testified that he disclosed to Dr. Zimmerman all his prior health conditions, including his depression and anxiety. Claimant stated he did not disclose his mental health medications to Dr. Castro because he was under the impression Dr. Castro's questionnaire was only asking for his pain medications.

46. Claimant testified that he has been on other medications that were not as effective as Percocet and Flexeril in addressing his symptoms. Claimant stated that the Percocet and Flexeril medications help improve his physical functionality by limiting the effects of his pain symptoms.

47. Claimant further testified that Dr. Zimmerman put him on a rotation of different types of medications to guard against negative effects like dependency and decreasing effectiveness. Claimant testified that he makes sure to follow the administration instructions of his medications and will take the minimum amount needed in order to function.

48. Claimant testified that he did use cocaine on a daily basis for about two or three months nearly sixteen years ago, and that he has not used cocaine in the past sixteen years. Claimant testified that he used heroin during one isolated incident and believes the medical record to be incorrect in asserting he was using heroin daily.

49. Claimant's testimony is found credible and persuasive.

50. The ALJ credits the opinions of Dr. Henke and Hughes over the contradictory opinion of Dr. Cebrian and finds Claimant is not at MMI.

51. Respondents have failed to overcome the DIME opinion on MMI by clear and convincing evidence.

52. The ALJ credits the opinions of Drs. Henke and Zimmerman over the opinion of Dr. Cebrian and finds that Claimant has met his burden in establishing that the ongoing prescription of Percocet and Flexeril is reasonable and necessary to cure and relieve the effects of Claimant's industrial injury.

53. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Overcoming the DIME on MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The ALJ concludes Respondents have failed to establish that it is highly probable Dr. Henke's finding concerning MMI is incorrect. When placing Claimant at MMI, one of the factors Dr. Burris clearly relied upon was Claimant allegedly not availing himself of

any future treatment. Dr. Burris declined to assign an impairment rating at the time, noting that doing so would be premature if Claimant elected to move forward with additional treatment. Claimant credibly testified that he continues to experience symptoms and that his radicular leg pain increases with activity. Claimant's MRIs demonstrate objective evidence of nerve root compression and an annular fissure.

Subsequent to becoming aware of Claimant's psychiatric history and reviewing Dr. Castro's April 3, 2017 report and Dr. Cebrian's IME report, Dr. Henke continued to opine at hearing that Claimant is not at MMI and requires a second surgical opinion. No evidence was introduced at hearing indicating Claimant has, in fact, obtained a second surgical opinion since the DIME. While Dr. Cebrian opined that Claimant is at MMI and is not a surgical candidate, Dr. Cebrian also recommended Claimant return to Dr. Burris for a referral to a neurosurgeon. Based on the totality of the evidence, the ALJ concludes that Dr. Cebrian's disagreement with Dr. Henke's opinion on MMI represents a mere difference of opinion, which is insufficient to overcome the DIME.

Medical Benefits

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

The ALJ further concludes that Claimant has proven by a preponderance of the evidence that ongoing prescriptions for Percocet and Flexeril are reasonable and necessary to cure and relieve Claimant of the effects of the July 7, 2015 industrial injury. Claimant credibly testified that the Percocet and Flexeril medications provide some relief for his symptoms and allow him to function in activities of daily living. To the extent Claimant has psychological conditions that may interact with the prescribed medications, such conditions have been disclosed to Dr. Zimmerman. As noted in the medical records, Claimant successfully tapered his medications to the minimal amount needed for function. Drs. Zimmerman and Henke continue to opine that Claimant should continue on his current medications. Based on the totality of the evidence, Claimant has met his burden to establish entitlement to ongoing prescriptions for Percocet and Flexeril.

ORDER

It is therefore ordered that:

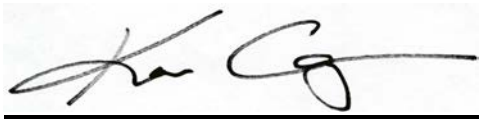
1. Claimant is not at MMI for his July 7, 2015 industrial injury.

2. Respondents shall pay for ongoing prescriptions of Percocet and Flexeril as prescribed by Dr. Zimmerman or other authorized providers.

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

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

DATED: November 1, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence a worsening of condition pursuant to § 8-43-303, C.R.S., and that his case should be reopened.

II. If Claimant's case is reopened, whether Claimant is entitled to reasonable, necessary, and related medical benefits.

FINDINGS OF FACT

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

1. Claimant, who is currently a 58-year-old male, sustained an admitted injury on June 25, 2008 to his right shoulder. **Ex. B:2, Ex. I:151-164, Ex. J:165-168, Ex. K:169-170, Ex. L:171-191, Ex. M:192-198, Ex. N:199-201.**

2. Claimant was initially diagnosed with a right shoulder impingement and treated conservatively. **Ex. G:75.** Despite conservative care, Claimant's pain continued to increase and he was referred to Mark Failinger, M.D., an orthopedic surgeon. **Ex. G:75.**

3. On August 14, 2008, Claimant presented to Dr. Failinger, who diagnosed Claimant with a rotator cuff tear and recommended an MRI. **Ex. G:75.**

4. A MRI of the right shoulder, completed on August 28, 2008, revealed a near full-thickness bursal-sided tear involving the supraspinatus tendon with severe tendinopathy. **Ex F:39-41.**

5. Following the MRI, Dr. Failinger performed a right shoulder arthroscopic decompression and open rotator cuff repair on October 14, 2008. **Ex. E:30-31.**

6. Claimant had a post-surgery MRI of the right shoulder on January 20, 2009, which demonstrated an intact rotator cuff repair. **F:35-38.**

7. On June 29, 2009, Dr. Hattem placed Claimant at maximum medical improvement with a 9% upper extremity rating. At the time of MMI, Claimant was complaining of intermittent shoulder pain. **Ex. G:75-78.**

8. Following Dr. Hattem's MMI report, Respondents filed a Final Admission of Liability ("FAL") on July 13, 2009, admitting to a 9% scheduled impairment rating and post-MMI benefits. **Ex. M:192-197.** Claimant objected to the FAL and requested a Division Independent Medical Examination ("DIME").

9. Jefferson Parks, M.D., completed the DIME on January 26, 2010. **Ex. L:175-191.** Dr. Parks opined that since Claimant was placed at MMI, his condition had worsened and that Claimant was not at MMI. Therefore, Dr. Parks referred Claimant for a repeat right shoulder MRI. **Ex. L:191.**

10. A MRI of the right shoulder completed on December 16, 2010, showed no evidence of rotator cuff disruption. **Ex. F:32-34.**

11. Following the MRI, Claimant presented to Dr. Failinger in February 2011, who referred him to a second orthopedic surgeon, Cary Motz, M.D. **G:70.**

12. Ultimately, and due to ongoing pain complaints, on January 23, 2012, Dr. Motz performed a right shoulder arthroscopy with distal clavicle resection and biceps tenodesis. **Ex. D:27-29.**

13. After the January 23, 2012, surgery, Claimant underwent physical therapy. Claimant contends that during physical therapy, around June of 2012, his shoulder was reinjured.

14. A post-surgery MRI of the right shoulder, dated July 27, 2012, showed no recurrent tear and some bone reaction around the biceps tenodesis. **Ex. F:24-25.**

15. On January 22, 2013, Claimant returned to Dr. Parks for a follow-up DIME. **Ex. B:12-22**. Claimant continued to complain of ongoing shoulder pain. **Ex. B:12-22.** Due to complaints on ongoing shoulder pain, Dr. Parks opined a repeat right shoulder MRI was needed to assess the anchor screw sites. **Ex. B:19.**

16. A right shoulder MRI, completed on April 23, 2013, demonstrated an intact rotator cuff repair and bone healing around the anchor screw with no evidence of displacement. **Ex. C:23.**

17. Claimant testified that this April 2013 MRI scan took place after he completed his physical therapy.

18. Following the MRI, Claimant saw a third orthopedic surgeon, Michael Hewitt, M.D., on July 15, 2013, due to persistent complaints of shoulder pain. **Ex: G:57-58.** Dr. Hewitt evaluated Claimant due to ongoing pain complaints and advised against surgery and recommended that claimant be evaluated by his partner, Craig Davis, M.D. **Ex G:48.**

19. On March 4, 2014, Claimant saw Dr. Davis for persistent right shoulder pain. Dr. Davis stated that Claimant almost certainly has some irregularities of the rotator cuff in the area of his repair, but trying to repair this can sometimes result in more

pain rather than improvement. Therefore, Dr. Davis advised against surgery. **Ex. G:46-47.**

20. On May 20, 2014, Claimant presented to Dr. Hattem, who noted that Claimant still wanted to undergo surgery even though multiple orthopedic surgeons advised against it. **Ex. G:42.** Claimant stated that his pain was 8/10. Although Claimant continued to complain of pain, there was nothing further that could be done. Therefore, Dr. Hattem placed Claimant at MMI and assigned a 22% upper extremity rating. **G:44.** Dr. Hattem recommended no further maintenance medical treatment. **Ex. G:44.**

21. Claimant returned to Dr. Parks for a follow-up DIME on July 13, 2014. **Ex. B:2-11.** Claimant stated that his shoulder pain was 8-10/10 all the time. **Ex. B:6**. Dr. Parks noted that Claimant underwent three right shoulder orthopedic evaluations with Dr. Failinger, Dr. Hewitt, and Dr. Davis, who all opined that surgery was not clinically indicated. **Ex. B:7**. Dr. Parks also agreed that additional surgery was not reasonable. **Ex. B:7.** Dr. Parks agreed with Dr. Hattem's MMI date of May 20, 2014, and assigned a 23% upper extremity rating. **Ex. B:7.** Dr. Parks recommended no further maintenance medical treatment. **Ex B:7.**

22. On August 29, 2014, Respondents filed a Final Admission of Liability consistent with DIME Dr. Park's July 1, 2014 report, admitting for a 23% scheduled impairment rating and denying post-MMI benefits. **Ex. J:165-168.** On December 1, 2014, Respondents filed a subsequent FAL to reflect a corrected average weekly wage, and denying post-MMI benefits, **(Ex. I:151-164)** to which Claimant objected to on December 29, 2014. Claimant filed an Application for Hearing on January 15, 2015 to which Respondents timely filed a Response to Claimant's Application for Hearing on February 13, 2015. A hearing was set then subsequently vacated.

23. On May 6, 2015, Claimant filed an Application for Hearing on the issue of petition to reopen. On June 5, 2015, Respondents timely filed a Response to Claimant's Application for Hearing. On September 1, 2015, the parties attended a hearing before ALJ Cain on Claimant's Application for Hearing. **Ex. P: 206-207.** Before the hearing commenced, the parties agreed that Respondents would authorize a one-time evaluation to evaluate Claimant's right shoulder condition with authorized orthopedist Dr. Failinger. **Ex. P:206-207.**

24. On September 9, 2015, Claimant presented to Dr. Failinger for a one-time evaluation. **Ex. O:202-205.** Dr. Failinger did not find Claimant's condition had worsened and recommended no further treatment. **Ex. O:202-204.** This ALJ finds Dr. Failinger's opinion to be credible and persuasive. Dr. Failinger referred Claimant to authorized Dr. Motz for an orthopedic evaluation at Claimant's request. **Ex.O:204-205.**

25. Following Dr. Failinger's one-time evaluation, Claimant did not show for the scheduled evaluation with Dr. Motz. Thus, on May 4, 2016, Respondents filed a Motion to Close the File for Failure to Prosecute, to which the Division issued a Show Cause Order to Claimant on May 19, 2016. **Ex. V:221-222.**

26. Following the Show Cause Order, the parties attended a hearing before ALJ Felter on October 12, 2016. **Ex U:219-220, Ex. V:222.** ALJ Felter entered a Procedural Order, ordering Respondents to schedule another appointment with Dr. Motz for Claimant and holding the case in abeyance pending completion of Dr. Motz's evaluation. **Ex. U:219-220.**

27. Pursuant to ALJ Felter's Procedural Order, Respondents scheduled an appointment with Dr. Motz. Claimant presented to Dr. Motz on November 3, 2016, and complained of 7-8/10 shoulder pain. **Ex. Q:208-212.** Dr. Motz evaluated Claimant and opined that Claimant did not need any additional medical treatment due to his work related injury, such as another MRI as recommended by Dr. Robinson, as there was no change in his symptoms or status since the MRIs Claimant underwent in 2012 and 2013. **Ex. Q:208-212.** This ALJ finds Dr. Motz' opinion to be credible and persuasive.

28. After granting an Extension of Time to Show Cause, the Division entered an Order Granting Respondents' Motion to Close on June 1, 2017. **Ex. V:222.** The Order Granting the Motion to Close did not preclude a claim to reopen.

29. On June 13, 2017, Claimant filed a Petition to Reopen and an Application for Hearing endorsing his petition to reopen the claim and medical benefits **(Ex. R:213-214, Ex. V:222)** to which Respondents timely filed a Response to Application for Hearing on July 13, 2017. **Ex. S:215-216.**

30. Claimant testified that since being placed at MMI, he did not undergo treatment for his right shoulder until he sought an evaluation with Mitchell Robinson, M.D., on his own. Claimant testified that no treating physician referred him to Dr. Robinson. Claimant testified that Dr. Robinson indicated that the 2013 MRI of the right shoulder showed his shoulder had healed post-surgery. Claimant admitted that no treating physician opined that his condition had worsened since being placed at MMI. Additionally, Claimant admitted that he saw Drs. Failinger and Motz post-MMI and neither recommended additional treatment, including shoulder surgery.

31. Claimant had shoulder pain when he was placed at MMI on May 20, 2014, and when he was evaluated by Dr. Parks on July 13, 2014, pursuant to his follow up DIME. Claimant still has shoulder pain. However, his pain complaints and underlying shoulder condition have not worsened since being placed at MMI.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant established by a preponderance of the evidence a worsening of condition pursuant to § 8-43-303, C.R.S., and that his case should be reopened.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. Claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether Claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

Claimant has failed to establish by a preponderance of the evidence that he sustained a worsening of his underlying condition since being placed at MMI on May 20, 2014.

Claimant injured his right shoulder on June 25, 2008. Claimant initially underwent shoulder surgery, which was performed by Dr. Failinger, on October 14, 2008. Claimant was placed at MMI by Dr. Hattem on June 29, 2009. On January 26, 2010, Claimant underwent a Division Independent Medical Examination ("DIME"), which was performed by Dr. Parks. Claimant complained of increasing shoulder pain since

being placed at MMI. Dr. Parks opined that Claimant was not at MMI. After being found not at MMI, Claimant returned to Dr. Failinger in February 2011. Dr. Failinger referred Claimant to Dr. Cary Motz.

On January 23, 2012, Dr. Motz performed a right shoulder arthroscopy with distal clavicle resection and bicepts tenodesis. After having his second shoulder surgery on January 23, 2012, Claimant underwent physical therapy. Claimant contended that his right shoulder was reinjured during physical therapy in June of 2012. Due to ongoing pain complaints, Claimant underwent an MRI of his right shoulder on July 27, 2012, which showed no recurrent tear and some bone reaction around the biceps tenodesis.

On January 22, 2013, Claimant returned to Dr. Parks for a follow-up DIME and complained on ongoing shoulder pain. Dr. Parks opined a repeat right shoulder MRI was needed to assess the anchor screw sites. Another right shoulder MRI, completed on April 23, 2013, demonstrated an intact rotator cuff repair and bone healing around the anchor screw with no evidence of displacement.

Following the MRI, Claimant continued to complain of shoulder pain. Therefore, Claimant saw another orthopedic surgeon, Michael Hewitt, M.D., on July 15, 2013. Dr. Hewitt evaluated Claimant and advised against surgery and recommended Claimant be evaluated by his partner, Craig Davis, M.D.

On March 4, 2014, Claimant was evaluated by Dr. Davis for ongoing shoulder pain. Dr. Davis evaluated Claimant and advised against surgery.

On May 20, 2014, Claimant presented to Dr. Hattem, who noted that Claimant still wanted to undergo surgery even though multiple orthopedic surgeons advised against it. Claimant complained of 8/10 shoulder pain. Despite Claimant's complaints of ongoing shoulder pain, Dr. Hattem placed Claimant at MMI and recommended no further maintenance medical treatment.

Claimant returned to Dr. Parks for a follow-up DIME on July 13, 2014. Claimant complained of 8/10 shoulder pain. Dr. Parks noted that Claimant underwent three right shoulder orthopedic evaluations with Dr. Failinger, Dr. Hewitt, and Dr. Davis, who all opined that surgery was not clinically indicated. Dr. Parks also agreed that additional surgery was not reasonable. Dr. Parks agreed with Dr. Hattem's MMI date of May 20, 2014. Dr. Parks recommended no further maintenance medical treatment.

After being placed at MMI as of May 20, 2014, Claimant continued to complain of shoulder pain. Therefore, on September 9, 2015, Claimant presented to Dr. Failinger for a one-time evaluation due to ongoing shoulder pain. Dr. Failinger did not find Claimant's condition had worsened and recommended no further medical treatment. Dr. Failinger referred Claimant to Dr. Motz for an orthopedic evaluation at Claimant's request. Claimant presented to Dr. Motz on November 3, 2016, due to ongoing shoulder pain. Claimant complained of 7-8/10 shoulder pain. Despite Claimant's pain complaints, Dr. Motz opined that Claimant did not need any additional medical

treatment due to his work injury, such as another MRI, as there was no change in his symptoms or status since the MRIs Claimant underwent in 2012 and 2013.

This ALJ credits the opinions of Dr. Failinger and Dr. Motz that Claimant's underlying condition has not worsened and that Claimant is not in need of additional medical treatment due to his work related injury. In addition, Claimant's pain complaints have remained the same since being placed at MMI. Therefore, this ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that his underlying condition has worsened, that he is in need of additional medical treatment, and that his case should be reopened based upon a change of condition.

II. If Claimant's case is reopened, whether Claimant is entitled to reasonable, necessary, and related medical benefits.

Claimant's case has not been reopened. Claimant's condition has not worsened since being placed at MMI. Therefore, Claimant is not entitled to additional medical benefits.

ORDER

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

1. Claimant's petition to reopen is denied.

2. Claimant is not entitled to additional medical benefits.

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

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

DATED: November 3, 2017

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable right knee injury while ascending a flight of stairs with construction supplies while working for Respondent-Employer on July 6, 2016; and if so,

II. Whether he proved, by a preponderance of the evidence, that respondents are liable for the diagnostic testing and treatment provided by Dr. Michael Ramos and Dr. Robert Thomas following his release from care by Centura Centers for Occupational Medicine (CCOM).

Because this order determines that Claimant failed to establish that he suffered a compensable right knee injury, the claim for additional medical treatment is not addressed below.

FINDINGS OF FACT

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

1. Claimant works as correctional officer for Respondent-Employer. On July 6, 2016, he was charged with supervision of an inmate maintenance work crew which was remodeling part of the prison facility. The job entailed the mudding, priming and painting of newly installed dry-wall.

2. Prior to taking lunch, standard protocol at the facility requires that Claimant and his crew clean up the designated work area and return all tools and supplies to the designated secured storage area. After the work area is cleaned and all supplies and tools secured, Claimant is responsible for escorting the inmates assigned to his crew to a selected location for count.

3. As Claimant and his crew began clean-up duties in preparation for lunch count, Claimant picked up a five gallon bucket of dry-wall primer and proceeded to carry it up a flight of stairs to the pre-selected storage area. As he was ascending the stairs, Claimant heard/felt a pop and pain in his right knee. He did not slip, trip, stumble or twist his knee while climbing the stairs. Indeed, Claimant testified that nothing about the stairs caused his injury.

4. Claimant limped back to an administrative building where he reported the injury to his supervisor, Lt. Zupan. He was provided with a list of "Designated Providers" and acknowledged receipt of the same by signing the list on July 6, 2016.

5. Claimant was able to limp through the remainder of his shift and depart for home for the evening. He returned to work the next day. His knee was swollen and painful. Consequently, he asked to be evaluated at CCOM; one of the designated providers contained on the list given to him. A "First Report of Injury or Illness" was completed on July 7, 2016 and Claimant was directed to CCOM where was evaluated by nurse practitioner (NP) Theresa Kuhn.

6. Prior to his evaluation on July 7, Claimant completed a pain diagram/questionnaire. According to Claimant's completed pain diagram/questionnaire he had 8/10 aching pain, 40% of the time in the lateral aspect of the right knee.

7. During his initial evaluation with NP Kuhn, Claimant reported that while in midstep, as he was ascending the stairs, he felt a "pop in his right lateral knee with instant pain." While Claimant demonstrated full extension and flexion along with stable collateral ligaments and negative provocative test results, physical examination revealed "Grade I joint effusion" of the right knee. X-ray imaging was not felt to be necessary given the lack of trauma. Claimant was diagnosed with a right knee sprain and instructed to take ibuprofen and ice the knee for 20 minutes, three times a day. He was placed on modified duty for one week with the following restrictions: no stooping, bending, crawling, kneeling, squatting or twisting. He was also limited to 30 minutes of standing per hour. At the conclusion of his initial visit, Claimant was directed to return for a follow-up visit on July 14, 2016.

8. Claimant returned to NP Kuhn on July 14, 2016. Once again, Claimant completed a pain diagram and questionnaire. Claimant's July 14, 2016 pain diagram is devoid of any markings depicting pain anywhere on the body. Moreover, Claimant answered the question regarding the percentage of time he had pain and the level of any such pain as 0% and 0. The content of Claimant's July 14, 2016 pain diagram/questionnaire persuades the ALJ that he intended his diagram and questionnaire responses to indicate that his pain had completely resolved.

9. According to NP Kuhn's July 14, 2016 report, physical examination of the knee was "normal." Moreover, the effusion which was documented following Claimant's July 7, 2016 examination had resolved. Claimant purportedly told NP Kuhn that he "applied ice to the right knee, elevated it, and took ibuprofen as directed over the weekend." The report goes on to reflect that by Monday the knee was "back to normal." NP Kuhn also documented that Claimant denied pain in the right knee and supposedly reported the condition of the knee as "excellent." Finally, the report indicates that Claimant requested to be released from care. NP Kuhn placed Claimant at maximum medical improvement (MMI) and released him to unrestricted full duty work.

10. Claimant denies ever telling NP Kuhn on July 14, 2016 that the condition of his knee was "excellent" or "back to normal." To the contrary, Claimant testified he simply informed NP Kuhn that he was capable to returning to full duty work. According to Claimant, his knee never fully healed and he only indicated that he had no pain on his pain diagram/questionnaire because he wanted to return to full unrestricted duty.

Claimant testified that he was afraid that he would be terminated if he lost time from work. Consequently, he requested a full duty work release and never sought temporary disability benefits.

11. The evidence presented as a whole, persuades the ALJ that, despite his protestations otherwise, Claimant likely reported to NP Kuhn that his knee was "back to normal" and/or in "excellent" condition as documented in the July 14, 2016 report. The reports of "normal" and "excellent" are in direct quotations and in the section of the report attributable to Claimant. Moreover, such reports are consistent with the content of his pain diagram/questionnaire as well as Claimant's request to be released to full duty work. The weight of this evidence convinces the ALJ that Claimant probably reported that he was capable of returning to full duty work because his knee was "back to normal" and in "excellent" physical condition.

12. Claimant testified that after his release from treatment at CCOM, he sought further care through the Worker's Compensation System. In conjunction with his request for additional care, Claimant testified that he was telephonically informed either by a representative of Broadspire, Respondent-Employer's third party claims administrator or CCOM that too much time had elapsed for him to seek additional treatment. Claimant presented no independent verification of the telephone conversation he asserts took place and as noted; he could not recall whether he spoke to someone at Broadspire or CCOM. Based upon the evidence presented, the ALJ is not persuaded that CCOM refused to treat Claimant for non-medical reasons. Furthermore, assuming that CCOM did refuse to treat Claimant for the reason(s) he alleged, the evidence presented fails to convince the ALJ that Respondent-Employer knew of such refusal.

13. On November 14, 2016, the Claimant sought treatment for his knee from his primary care physician, Dr. Michael Ramos at Parkview Family Medicine. Claimant acknowledged that he was not referred by anyone at CCOM to Dr. Ramos. Dr. Ramos advised that Claimant had presented to his office to "get a referral for orthopedic evaluation." Dr. Ramos discussed with Claimant that he was not a Worker's Compensation physician and indicated further that he would make a referral to orthopedics. Claimant was referred to Dr. Robert Thomas at Parkview Orthopedics.

14. Claimant was evaluated by Dr. Thomas on December 5, 2016 where weight bearing x-rays were obtained. X-ray imaging demonstrated "slight medial joint space narrowing" prompting Dr. Thomas to request an MRI to evaluate the potential for meniscal tearing.

15. MRI of the right knee was performed on December 29, 2016. Imaging revealed a "complex tear involving the posterior horn of the medial meniscus with possible full-thickness tear of the posterior horn anchor" along with intrasubstance degeneration of the posterior horn of the lateral meniscus without definable tear and "osteoarthritic degeneration with medial and pattellofemoral compartment predominate chrondromalacia."

16. Claimant returned to Dr. Thomas following his MRI. During his follow-up appointment on January 16, 2016, Dr. Thomas noted that the MRI demonstrated "degenerative signals in the posterior horn of the medial meniscus." Regarding these degenerative signals, Dr. Thomas noted as follows: "The radiologist thought that might be consistent with a tear. My view of it is it looks to be more of a significant mucoid degeneration." I am not actually convinced there is a significant tear in the posterior horn." Dr. Thomas recommended trying a cortisone injection and if symptoms persisted, surgical intervention. Claimant elected to "hold off on doing anything" according to Dr. Thomas' January 16, 2017 report.

17. Respondents sought an opinion regarding the nature of the changes noted on Claimant's right knee MRI. On June 28, 2017, Dr. Wallace Larson performed an independent medical examination (IME). Following a records review and benign physical examination, Dr. Larson opined that Claimant had "evidence of early osteoarthritis of the right knee and a degenerative medial meniscus tear." He noted further that Claimant remained at MMI and did not have maintenance treatment needs.

18. At hearing, Dr. Larson explained that the December 29, 2016 coronal and saggital MRI images, which were projected onto a video screen at hearing, demonstrate thinning of the articular cartilage and a degenerative meniscal tear in the right knee. According to Dr. Larson, nothing about Claimant's physical examination(s) or the MRI images support Claimant's assertion that he suffered an acute right knee injury while climbing a flight of stairs. To the contrary, Dr. Larson testified that the MRI images support the conclusion that Claimant likely had a pre-existing degenerative meniscal tear in the right knee at the time of his alleged injury. According to Dr. Larson, the degenerative changes in the right knee were not caused by the stair climbing incident. On cross examination, Dr. Larson admitted that pre-existing conditions, such as degenerative arthritis and degenerative meniscal tears can be aggravated by activity.

19. The ALJ credits the opinions of Dr. Larson to find that Claimant's meniscal tear is, more probably than not, degenerative in nature and caused by the progression of an underlying degenerative process rather than ascending a flight of stairs with a five gallon bucket of primer as he claims. This is especially true when one considers that Claimant did not slip, trip, stumble or twist his knee and he described the popping as occurring in "midstep." Consequently, Claimant has failed to prove by a preponderance of the evidence that he sustained a work related injury arising out of his employment on July 6, 2016.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et*

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

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

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

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and

place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Based upon the evidence presented, the ALJ finds that Respondents are not contending that Claimant's alleged injury did not occur in the course of his employment. Rather, based principally on the testimony of Dr. Larson and the medical records presented, the undersigned ALJ understands Respondents contention to be that Claimant's knee pain and need for medical treatment did not "arise out" of his employment. Specifically, Respondents assert that Claimant's pre-existing right medial meniscus tear precipitated the popping and pain Claimant experienced as he was ascending a flight of stairs. Accordingly, Respondents contend that a pre-existing condition (a degenerative meniscal tear), and not an activity or condition distinctly associated with Claimant's employment, caused his pain and need for treatment. Given the evidence presented, the argument is persuasive.

E. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* As noted above, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2014. Here, Dr. Larson persuasively testified that Claimant's MRI did not correlate with an acute injury but rather demonstrated chronic degenerative changes and a degenerative meniscal tear. The record evidence supports Dr. Larson's opinions. Indeed, Claimant's MRI specifically notes that there was evidence of "intrasubstance degeneration of the posterior horn of the lateral meniscus without definable tear and "osteoarthritic degeneration with medial and pattellofemoral compartment predominate chrondromalacia." Based upon the evidence presented, including Dr. Larson's testimony, the ALJ concludes that what Claimant experienced on July 6, 2016 was the predictable manifestation, i.e. popping and pain caused by the natural progression of his underlying pre-existing osteoarthritic degeneration and degenerative meniscal tear.

F. The question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and his need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident which merely elicits pain symptoms without a causal connection to industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988); *Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). Moreover, while a pre-existing condition "does not disqualify

a claimant from receiving workers compensation benefits"[1], the fact that a claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Here, the origin and cause of Claimant's pain and need for treatment, more probably than not, was the significant pre-existing degenerative changes within the knee, particularly his pre-existing degenerative meniscal tear. While the ALJ is convinced that the treatment Claimant obtained through Dr. Ramos and Thomas was reasonable and necessary given his ongoing symptoms, the ALJ is not persuaded that the need for this treatment was "related" to Claimant's work duties on July 6, 2016, either as a consequence of an acute trauma or an industrially based aggravation of a pre-existing condition. Accordingly, Claimant has failed to establish a causal connection between his employment related duties on July 6, 2016 and the resulting condition for which medical treatment benefits are sought. Consequently, his claim must be denied and dismissed. *See Horne v. St. Mary-Corwin Hospital*, W.C. No. 4-205-014 (April 14, 1995); *Crass v. Cobe Laboratories,* W.C. No. 3-960-622 (October 10, 1991); *Gutierrez v. Wal-Mart Stores, Inc.*, W.C. No. 4-432-838 (November 30, 2000).

G. Although Claimant is not alleging that his pain and need for treatment was "precipitated" by a pre-existing condition and instead by a discrete injury, i.e. an acute meniscal tear and/or aggravation of a pre-existing tear, the ALJ finds that Respondents are contending, that Claimant's pain and need for treatment is a consequence of a pre-existing degenerative meniscal tear brought by Claimant to the workplace. Consequently, the ALJ has also analyzed the compensable nature of this case pursuant to the decision announced by the Colorado Supreme Court in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014) and the "special hazard" rule announced by the Court of Appeals in *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

H. In *City of Brighton*, the Colorado Supreme Court identified three categories of risk that cause injuries to employees: (1) employment risks directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment related nor personal. 318 P.3d 496 (Colo. 2014). The second category includes risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Such personal conditions generally are not compensable unless an exception applies. *Id.* at 503. One exception is when a pre-existing or idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. Referred to as the "special hazard rule", the Colorado Court of Appeals held that a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Gates*

[1] *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004).

Rubber Co. v. Industrial Comm'n., 705 P.2d 6, 7 (Colo. App. 1985). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission, supra; Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See Ramsdell v. Horn, supra.* In order to be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered. *Id.* The rationale for this exception is that unless a special hazard of employment increases the risk or extent of injury, an injury due to a claimant's personal or idiopathic condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Gates, supra* at 7. Courts have previously held that hard level concrete floors, concrete stairs, and a sidewalk curbs are not special hazards of employment. *Id.; Alexander v. ICAO*, No. 14CA2122 (Colo. App. June 4, 2015); *Gaskins v. Golden Automotive Group, LLC*, W.C. No. 4-374-591 (ICAO Aug. 6, 2009). Here, Claimant did not testify that any particular flaw in stairs he was ascending caused his right knee injury. Based upon the evidence presented, the ALJ concludes that the stairs in this case do not constitute a special hazard of employment but rather a ubiquitous condition which Claimant could have encountered off the job. Moreover, the record evidence supports a conclusion that Claimant's pain and need for treatment was precipitated by his pre-existing osteoarthritic degeneration and degenerative meniscal tear rather than carrying a bucket of primer up a flight of stairs, especially when the fact that the pop and pain occurred "midstep" is considered. Consequently, the ALJ concludes that Claimant bore the burden to establish that there was a concurrence of a pre-existing weakness and a hazard of employment to result in a compensable work injury to Claimant's right knee. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); See *also Ramsdell v. Horn, supra.* Here Claimant failed to establish that a special hazard of employment combined with his pre-existing condition to cause the injury in question. Accordingly, he had failed to establish that he suffered a compensable injury to his right knee while carrying a five gallon bucket of primer up a flight of stairs on July 6, 2016. As claimant failed to carry his burden to prove that he suffered a compensable injury, his claim for medical benefits must be denied and dismissed. Consequently, this order does not address whether the treatment rendered to Claimant by Dr. Ramos and Dr. Thomas should be considered authorized.

ORDER

It is therefore ordered that:

1. Claimant's claim for worker's compensation benefits, including the medical treatment rendered by Dr. Ramos and Dr. Thomas is denied and dismissed.

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

DATED: November 6, 2017

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive permanent total disability (PTD) benefits as a result of admitted industrial injuries she sustained during the course and scope of her employment with Employer on October 24, 2013.

II. Whether Claimant sustained a serious and permanent disfigurement to areas of his body normally exposed to public view.

FINDINGS OF FACT

1. Claimant is a 44-year-old woman who graduated high school in 1991. She attended two or three semesters at Arapahoe Community College and did not obtain a degree or pursue any other academic training.

2. Prior to her employment with Employer, worked in various capacities performing mailroom clerk, retail and clerical duties.

3. Claimant had a prior history of pulmonary emboli and complaints of shortness of breath, chronic fatigue and anxiety.

4. Claimant worked for Employer as a senior cook/cashier.

5. Claimant suffered a compensable industrial injury to her right leg on October 24, 2013 when she slipped and fell on a wet floor. Her initial treating provider, Dr. Gary Zuehlsdorff, diagnosed Claimant with an anterior lateral subluxation dislocation of the proximal tibia-fibula joint and a contusion along the medical plateau.

6. Claimant transferred care to Dr. Jeffrey Hawke on October 30, 2013. Claimant began seeing Dr. Roberta P. Anderson-Oeser on October 31, 2013 in consultation with Dr. Hawke.

7. Claimant was evaluated at St. Anthony North Hospital on November 8, 2013 with complaints of right leg swelling, chest tightness, and shortness of breath. Claimant was diagnosed with deep venous thrombosis (DVT) and pulmonary embolism related to the work injury.

8. On November 26, 2013, Claimant underwent an EMG/nerve conduction study of her right lower extremity. Dr. Anderson-Oeser subsequently diagnosed Claimant with right peroneal neuropathy of the fibular head.

9. On December 10, 2013, Dr. Robert LaPrade performed a placement of a inferior vena cavogram and filer in the infrarenal inferior vena cava, which was removed on March 5, 2014 by Dr. Joseph Leoni.

10. On April 30, 2014, Dr. George Schakaraschwili performed an autonomic testing battery, including QSART, to test for possible complex regional pain syndrome (CRPS). Dr. Schakaraschwili noted that Claimant's right lower extremity had a reddish discoloration with some shininess to the skin and dysethesias to touch. He further noted that Claimant's right foot was cold and clammy. Dr. Schakaraschwili assessed pain and temperature abnormalities in the right lower extremity and stated, "The autonomic testing battery is high probability for complex regional pain syndrome. She had a positive response to a lumbar sympathetic block. She has therefore met Colorado Division of Workers' Compensation Diagnostic Criteria for diagnosis of complex regional pain syndrome, as she has had two positive diagnostic tests."

11. On May 1, 2014, Dr. Anderson-Oeser diagnosed Claimant with probable right lower extremity regional CRPS and referred Claimant for a lumbar sympathetic block with Dr. Floyd Ring. Claimant underwent lumbar sympathetic blocks with Dr. Ring on sixteen occasions between 2014 and 2017.

12. Dr. Hawke released Claimant to light-duty work as of May 12, 2014, restricting Claimant to performing seated tasks in her own footwear with no lifting or carrying over five pounds, and no working on slippery or cluttered surfaces. Dr. Hawke noted that the QSART test was consistent with CRPS and diagnosed Claimant with CRPS type 1 of the lower extremity.

13. On May 16, 2014 Claimant reported to Dr. Hawke that it was difficult to sit for four hours at work and that she was experiencing a burning pain in her leg. Dr. Hawke modified her work restrictions to working three hours a day, with accommodations for Claimant to attend appointments and therapies.

14. On May 30, 2014, Dr. Alan Burgess concluded that Claimant's symptoms and signs of acute pulmonary embolism had resolved and Claimant had no symptoms or consequences of pulmonary embolism that were not present before the work injury.

15. On June 3, 2014, Dr. Anderson-Oeser noted Claimant had a positive response to the lumbar sympathetic blocks and diagnosed Claimant with CRPS. She recommended Claimant continue receiving lumbar sympathetic blocks.

16. Claimant attended a six-month post-operation appointment with Dr. LaPrade on June 23, 2014. Dr. LaPrade noted that on examination Claimant's right knee revealed a full range of motion, the proximal tibia-fibular joint was stable, and the subluxation scar was completely healed.

17. Claimant returned to work on August 20, 2014 after being off for summer break. Claimant reported an increase in pain upon returning to work. Her work restrictions at the time included no lifting/carrying over 10 pounds, no kneeling or squatting, being able

to sit/stand/walk as needed, no walking on slippery or cluttered surfaces, using her own footwear, and being excused from work for all appointments and therapies.

18. Claimant reported to Dr. Hawke increased pain and difficulty concentrating at work. On October 7, 2014, Dr. Hawke removed Claimant from work for five days. Claimant also saw Dr. Anderson-Oeser who noted, "She is also having increasing anxiety and possibly depression related to return to work issues and her chronic pain." Dr. Anderson-Oeser recommended Claimant undergo a psychological evaluation with Dr. William Boyd.

19. Claimant underwent a pain psychological evaluation with Dr. Boyd on October 23, 2014. Dr. Boyd gave the following impression: somatic symptom disorder, adjustment disorder with mixed anxiety and depressed mood, and psychological or personality factors affecting medical condition. Dr. Boyd opined that Claimant's physical symptoms may be multiple and magnified.

20. In October and November 2014, Claimant continued to report pain and difficulty concentrating at work. Claimant reported that the cold weather caused flare-ups of her symptoms. Dr. Hawke removed Claimant from work on November 18, 2014 due to a flare-up.

21. On December 16, 2014, Dr. Thomas M. Horiagon performed an Independent Medical Examination (IME) regarding Claimant's pulmonary issues at the request of Claimant. Upon a physical examination of Claimant and review of her medical records, Dr. Horiagon diagnosed Claimant with, *inter alia*, work-related CRPS Type 2.

22. Claimant last saw Dr. Hawke on December 29, 2014. Dr. Hawke noted,

> [Claimant] has spoken to the "CRPS people" and they told her to report me to the medical board if I did not take her off work when she has a flare up of pain. I was stern and steadfast with her that I would not change her current work restrictions, and that she needs to continue the four hours of very light duty as part of her treatment. We discussed this at length the last visit that I felt strongly that this was in her best interest, in my opinion…

23. Claimant continued to treat with Dr. Anderson-Oeser, who kept Claimant on Dr. Hawke's modified work duty restrictions.

24. On March 26, 2015, Dr. Sander Orent performed an IME at the request of Claimant. Dr. Orent reviewed medical records and physically examined Claimant. Dr. Oren diagnosed Claimant with CRPS, worsening pulmonary hypertension and depression and anxiety related the work-related injury. Dr. Orent stated,"…I do strongly believe that she has CRPS. I think that the data is quite clear. The response to injection is quite clear. She has had a series of lumbar sympathetic blocks which do relieve her pain but only for relatively short periods of time." Dr. Orent opined that Claimant was not at maximum medical improvement (MMI) and placed Claimant in a sedentary work capacity.

25. Claimant continued to work modified duty and continued to report pain, memory problems and fatigue.

26. During a follow-up evaluation with Dr. Anderson-Oeser on August 11, 2015, Claimant reported experiencing severe flare-up of pain and swelling. Dr. Anderson-Oeser noted, "Apparently she had a meeting at work with nutrition services on Friday. She states that the meeting was 'overwhelming' and quite stressful. She states that during the meeting, her chest became heavy and she was shortness of breath." Dr. Anderson-Oeser attributed Claimant's flare-up to increased stress at work.

27. On March 10, 2016 Dr. Annyce Mayer performed a Respiratory Impairment Evaluation. Dr. Mayer assessed, *inter alia*, work-related right lower extremity DVT and pulmonary embolism, as well as pulmonary hypertension that worsened since the work injury. Dr. Mayer assessed a 20% whole person impairment of the respiratory system and recommended Claimant should perform work in the medium work category or less.

28. Dr. Anderson-Oeser placed Claimant at MMI on April 12, 2016. She noted Claimant continued to be symptomatic, but was hopeful Claimant would remain stable with maintenance treatment and home exercise. Dr. Anderson-Oeser assigned a 44% total whole person impairment rating under the AMA Guides, which consisted of 20% whole person impairment of the respiratory system calculated by Dr. Mayer and 30% impairment for CRPS of the right lower extremity under Table 1A of the AMA Guides.

29. Regarding permanent restrictions, Dr. Anderson-Oeser stated,

> [Claimant] is being placed on permanent work restrictions in which she is to avoid any crawling, kneeling, or squatting. She is to perform sedentary work only. She should alternate sitting with standing and walking as needed for comfort. She is to elevate her right leg when sitting and wear her own footwear. She is to avoid walking on slippery or cluttered surfaces.

30. On June 2, 2016, Dr. Anderson-Oeser took Claimant off of all work due to a severe flare-up of CRPS. Dr. Anderson-Oeser noted, "She states that while she is at work, she feels pressured to work faster and this is causing her physical and mental stress…She currently works about 4 hours per day – her pain increases as the day progresses. She functions better when she works a shift from 8am-12pm." Dr. Anderson-Oeser limited Claimant's work hours from 8:00 a.m. to 12:00 p.m. Claimant remained off of work until June 23, 2016.

31. During a follow-up evaluation with Dr. Anderson-Oeser on June 23, 2016, Claimant reported improvement of symptoms after undergoing a sympathetic nerve block. Claimant continued to report pain when walking and sitting, and trouble working in the afternoon. Dr. Anderson-Oeser again remarked that she suspected Claimant's stress at work was contributing to her flare-ups and recommended Claimant limit her work hours from 8:30 a.m. to 12:30 p.m. Claimant remained on sedentary work duties.

32. On July 18, 2016, Dr. John S. Hughes performed an IME the request of Claimant. Dr. Hughes reviewed Claimant's medical records and physically examined Claimant. Dr. Hughes assessed, *inter alia*, right peroneal neuropathy, CRPS, increased severity of chronic thromboembolic pulmonary hypertension, adjustment disorder with features of depression, and long-term antalgia of gait with development of mechanical low back pain. Dr. Hughes opined that Claimant was not at MMI if the inferior vena cava filter had not yet been removed, and also recommended Claimant undergo a psychiatric consultation. Dr. Hughes estimated that Claimant sustained 20% CRPS impairment and 40% total whole person impairment. Dr. Hughes opined that Claimant sustained losses in her residual functional capacities as a result of the work injury and recommended a functional capacity evaluation.

33. On August 9, 2016, Dr. Douglas Scott performed a Division Independent Medical Examination ("DIME"). Dr. Scott reviewed Claimant's medical records and physically examined Claimant. Dr. Scott determined Claimant sustained a peripheral nerve injury and CRPS Type 2 as a result of the work injury. Dr. Scott assigned a total combined whole person impairment of 25%, consisting of an 18% whole person respiratory impairment and 20% lower extremity impairment (8% whole person) for Claimant's common peroneal nerve stretch injury, range of motion, and decreased sensation. Dr. Scott opined that Claimant did not have any work-related psychological, hip or lumbar spine impairments. He further opined that there was insufficient information available to him to identify or determine the prior apportionment regarding Claimant's DVT and pulmonary emboli.

34. Dr. Gary S. Gutterman conducted psychiatric examinations of Claimant on September 12 October 24, 2016. Dr. Gutterman diagnosed Claimant with work-related adjustment disorder with symptoms of anxiety.

35. On September 20, 2016, Claimant reported to Dr. Anderson-Oeser a decrease in pain from the sympathetic block, and that she had since been able to "get up and get dressed, perform light cooking and cleaning, and leave the house to perform small errands." Claimant nonetheless continued to experience pain, paresthesias and spasming in her right lower extremity. Dr. Anderson-Oeser ordered Claimant to remain off of work to ongoing high level of stress and anxiety.

36. Dr. Anderson-Oeser has restricted Claimant from working since September 2016 due to increased symptoms resulting from ongoing high levels of stress and anxiety at work. Dr. Anderson-Oeser has not released Claimant back to work.

37. Claimant underwent a psychological assessment performed by Dr. Ed Cotgageorge on December 23, 2016. Dr. Cotgageorge opined, that psychological factors contributed to Claimant's pain perception.

38. On March 21, 2017, Dr. Lawrence Lesnak performed an IME of Claimant at the request of Respondents. Dr. Lesnak reviewed Claimant's medical records and physically examined Claimant. On physical examination, Dr. Lesnak noted no evidence of muscle atrophy, abnormal skin color, skin temperature, or skin integrity in Claimant's

right lower extremity. Dr. Lesnak further noted full seated range of motion in the knee and ankle and some hypersensitivity to light touch over the right foot. Dr. Lesnak concluded that Claimant sustained a right proximal fibular head subluxation with a probable concomitant right peroneal nerve stretch injury and, most likely, an acute right leg DVT subsequently. Dr. Lesnak questioned if Claimant sustained any pulmonary emboli. He opined that Claimant did not have CRPS, as there were no clinical physical findings supporting a CRPS diagnosis, multiple inconsistencies in Dr. Schakaraschwili's report, and no significant documented evidence of improvement. Dr. Lesnak concluded that Claimant's subjective complaints were unreliable, and that her significant psychosocial issues played a significant role in her symptomatology, recovery and perceived function.

39. Dr. Lesnak disagreed with Dr. Anderson-Oeser's work restrictions, contending that there was no evidence Claimant cannot work full-time and could only perform sedentary work. Dr. Lesnak assigned the following permanent restrictions: refrain from frequent or excessive kneeling or squatting and repetitive or continuous stair climbing activities. He did not assign any specific restrictions in standing, walking, sitting or lifting.

40. Dr. Lesnak reviewed Claimant's responses to interrogatories and issued an addendum to his IME report on April 4, 2017. Dr. Lesnak opined that Claimant's reported inability to work any job was not supported by the medical records or his clinical examination.

41. Dr. Lesnak testified at hearing as an expert in physical medicine and rehabilitation. Dr. Lesnak is board certified in physical medicine and rehabilitation and Level II accredited. Dr. Lesnak testified consistent with his IME report. Dr. Lesnak opined that Claimant did not have CRPS Type 2. Rather, he diagnosed Claimant with a peroneal stretch injury. As a basis for that conclusion, Dr. Lesnak explained Claimant did not have a positive sweat test. Dr. Lesnak further stated, that the peroneal stretch injury better explained Claimant's symptoms than a CRPS type 2 diagnosis, and that a finding that Claimant did not have CRPS was also consistent with the medical treatment guidelines.

42. Dr. Lesnak further opined that Claimant had a somatoform disorder that manifested Claimant's psychological condition as a physical complaint. Specifically, he testified that when people are depressed and anxious, and having other psychological conditions, that can sometimes manifest as physical pain. Further, individuals with a somatoform disorder would also exaggerate their disabilities. Dr. Lesnak stated that physicians should not base their treatment and restrictions on solely subjective pain and impairment complaints from Claimant. Dr. Lesnak concluded that Claimant's pre-existing somatoform disorder was not caused or exacerbated by the work injury.

43. Dr. Lesnak also opined that the estimated time of five to ten days off of work per month was not based on any objective findings and was not a reasonable restriction for Claimant's chronic peroneal neuropathy. He further stated that there was no objective evidence of concentration or memory difficulties.

44. On April 14, 2017, Dr. Jeffrey S. Schwartz performed an IME at the request of Respondents. Dr. Schwartz issued an IME report on May 9, 2017. Dr. Schwartz reviewed medical records and opined that Claimant sustained a work-related pulmonary embolism around November 8, 2013 that resolved without sequelae by December 16, 2013. Dr. Schwartz opined that Claimant did not have any ongoing work-related pulmonary diagnosis and no restrictions based on her pulmonary status.

45. Dr. Schwartz testified at hearing as an expert in pulmonary and critical care medicine. Dr. Schwartz testified consistent with his IME report, and maintained that Claimant's work-related pulmonary emboli and DVT have resolved and there is no impairment of functioning. Dr. Schwartz opined that Claimant does not have pulmonary hypertension and does require ongoing anticoagulation medication.

46. On May 17, 2017, Dr. Brent Van Dorsten performed a Health and Behavior Assessment Evaluation of Claimant. Dr. Van Dorsten noted that Claimant is "likely prone to developing physical symptoms in response to stress." He noted identification of "a variety of significant mood, personality and behavioral factors which are likely strong contributors to the patient's clinical presentation at this time," and high levels of somatic complaints.

47. At the request of Respondents, Donna Ferris performed a Vocational Evaluation of Claimant and issued a report dated June 5, 2017. Ms. Ferris reviewed Claimant's medical records and met with Claimant on two occasions. Claimant reported right leg pain, muscle spasms, intermittent discoloration and coolness, weakness, low back pain, chest tightness and shortness of breath with stress and weather changes, headaches, nausea, fatigue, dizziness, and difficulty with memory and concentration. Per Ms. Ferris' labor market research based on Claimant's education, work history, skills, and the restrictions assessed by Drs. Anderson-Oeser, Orent, Schwartz and Lesnak, Ms. Ferris determined that there are full-time and part-time telephone customer services positions in a variety of industries within Claimant's functional abilities. Ms. Ferris noted that there are companies offering work from home options with schedule and work environment flexibility.

48. On June 6, 2017, Katie Montoya performed a Vocational Assessment at the request of Claimant. Ms. Montoya reviewed Claimant's medical records and interviewed Claimant. Claimant reported feeling overwhelmed, tired and in constant pain with difficulty concentrating and remembering things. Ms. Montoya noted that Dr. Anderson-Oeser had opined that Claimant was not presently able to return to work and, "therefore it cannot be recommended that she return to work with consideration of this opinion." Ms. Montoya noted that if she were only considering the opinions of Drs. Schwartz and Lesnak, Claimant could return to work in a number of capacities.

49. On June 8, 2017, Claimant's counsel sent a letter to Dr. Anderson-Oeser clarifying Claimant's restrictions. In response, Dr. Anderson-Oeser stated that, within a high degree of medical probability, Claimant continued to have the same permanent restrictions she assigned on April 12, 2016. She noted that Claimant experiences frequent pain flare-ups and foresees Claimant missing three days of work per month in

the winter and one day per month in the summer, and needing to take unscheduled breaks during the work day. Dr. Anderson-Oeser noted that Claimant's work-related CRPS symptoms are increased and/or aggravated in stressful work environments, and that Claimant should avoid working in stressful work environments. Dr. Anderson-Oeser also noted that Claimant needs to elevate her leg 12 inches while seated.

50. Dr. Anderson-Oeser testified at hearing as an expert in physical medicine and rehabilitation and occupational medicine. Dr. Anderson-Oeser is board certified in physical and rehabilitation medicine and is Level II accredited. Dr. Anderson-Oeser testified consistent with her prior opinions. She maintained that Claimant's work-related diagnosis is CRPS of the right-lower extremity, right peroneal neuropathy, chronic pain syndrome, depression and anxiety, muscle spasms, pulmonary embolis and pulmonary hypertension.

51. Dr. Anderson-Oeser disagreed with Dr. Lesnak's opinion that Claimant's exam findings were inconsistent and that there was a low probability that her diagnosis is CRPS. Dr. Anderson-Oeser interpreted Dr. Schakaraschwili's QSART testing results from both the laboratory and clinical sections and agreed with Dr. Schakaraschwili that the test confirmed a "high probability of CRPS." Dr. Anderson-Oeser contended that, within the MTG, Claimant meets the CRPS diagnosis criteria because two out of the four CRPS tests Claimant underwent (QSART and sympathetic blocks) were deemed positive.

52. Dr. Anderson-Oeser stated that the sympathetic blocks were helpful and allowed Claimant to get out of bed, dress herself, do simple chores and light shopping. Without the injections Claimant was bed-bound. She foresees Claimant needing the sympathetic blocks indefinitely. Dr. Anderson-Oeser opined that Claimant should not work the day of an injection, and possibly the day after an injection depending on Claimant's response to the injection.

53. Dr. Anderson-Oeser testified that stress and weather can cause CRPS flare-ups, the frequency of which varies. She estimated that Claimant's activity during a flare-up is approximately 0-1. Claimant can have five or six flare-ups in a "bad" winter, and it is foreseeable that Claimant will average three days of flare-ups in winter months and one day of flare-ups in spring and summer where she will be unable to perform any activity. If working, Claimant would need likely need 5-10 minute unscheduled breaks, estimated at one per hour on a "bad" day.

54. Dr. Anderson-Oeser stated that when Claimant returned to work she had increased pain symptoms and that her work-related psychological condition interfered with her daily activities. She stated that she does not think Claimant's subjective complaints are unreliable, and that there are clear, reproducible objective symptoms in Claimant's case. She further stated that Claimant's condition "…changes rather frequently and so she'll have a day maybe she could do an eight-hour day one day, but then the next day two."

55. Dr. Anderson-Oeser testified that Claimant remains subject to the same permanent restrictions she assigned, and that the June 8, 2017 restrictions likely would have applied at MMI.

56. Dr. Anderson-Oeser further testified that the medications prescribed to Claimant can cause cognitive problems, fatigue and memory loss, which Claimant has reported as side effects. She indicated that work requiring a significant amount of focus could be difficult for Claimant.

57. Kristy Riccio, Human Resources Director, testified at hearing that Claimant performed various clerical tasks in the Human Resources Department from approximately fall 2014 to June 2016. Ms. Riccio did not directly supervise Claimant. She stated that Claimant was able to successfully complete her tasks which required attention to detail and an ability to focus and concentrate. Ms. Riccio further stated that Claimant did not request to take unscheduled breaks and that she did not know how many days of work Claimant missed while on modified duty.

58. Claimant testified at hearing that she experiences burning and aching pain on a daily basis, as well as numbness, tingling, shortness of breath, chest tightness, headaches, nausea, dizziness, muscles spasms, and restlessness. She stated the pain affects her ability to function and that she tires easily. Weather and stress, including loud and chaotic environments and deadlines, increase her pain, which then decreases her ability to function and concentrate.

59. Claimant stated that her medications cause fatigue, grogginess, nausea, dizziness, headaches and difficulties with memory, concentration and comprehension. Claimant testified that the sympathetic blocks increased her ability to function, although she needs to rest the day after an injection due to the effects of the medication.

60. Claimant testified that she experienced an increase in symptoms during the modified duty and was unable to work. Claimant testified that her prior conditions did not prevent her from doing her work. Claimant stated that she cannot work now because she is in significant pain which causes an inability to think clearly and meet deadlines.

61. Claimant stated that she continues to treat with several doctors and, on average, seeks treatment four to six times per month. Most of her medical appointments occur between 8:00 a.m. and 5:00 p.m. During the year and a half of modified duty, Claimant contends she took “quite a few days off” due to medical appointments.

62. Katie Montoya testified at hearing as an expert in vocational rehabilitation and placement. Ms. Montoya opined that Claimant had limited transferable skills and both physical and psychological issues. Ms. Montoya considered the permanent restrictions put in place by Dr. Anderson-Oeser, as well as the amount of anticipated absenteeism for medical treatment and flare-ups. Ms. Montoya stated,

> “…when you’re talking about new work, it’s not likely that an employer is going to accommodate on any kind of prolonged bases expected absenteeism, if you will. So certainly everybody has periodic sick days, but

> something that potentially is unexpected in its timing, unexpected in its duration, unexpected in the way that it presents in the working and if there's other implications like the cognitive that we've talked about, and that she's having functioning issues at work before she even departs. All of that are issues- of those- excuse me – are issues with maintaining work."

63. Ms. Montoya further stated that it did not appear that Ms. Ferris's opinion considered Claimant's need for leg elevation, footwear, or anticipated absenteeism. Ms. Montoya opined that Claimant would not be competitive in finding and maintain employment and that there would not be an employer who would accommodate Claimant missing even two days of work per month.

64. Ms. Ferris testified at hearing as an expert in vocational rehabilitation. Ms. Ferris testified that, based on Claimant's restrictions in place at MMI and her transferrable skills, full-time and part-time customer service positions are available to Claimant, including work-at-home opportunities. Ms. Ferris stated that Claimant was competent when she was on modified duty.

65. Ms. Ferris subsequently testified that, if it is indeed the case that Claimant requires five to ten days off of work per month,

> …she would not be able to maintain employment. She may be able to secure a position, but if, in fact, you're missing – what was it – five to ten days a month of work – there's no, you're not going to be able to – you're not going to be able to maintain a position.

However, Ms. Ferris stated that there was nothing in the medical records indicating Claimant was bedridden for a number of days every week or every month.

66. Claimant's testimony is found credible and persuasive.

67. The ALJ credits the opinions of Dr. Anderson-Oeser and Ms. Montoya, which are supported by the medical records, over the conflicting opinion of Dr. Lesnak and Ms. Ferris, and finds that Claimant is unable to earn any wages in the same or other employment. Claimant's industrial injury is a significant causative factor in her current physical and mental limitations and expected absenteeism, which have rendered Claimant unable to obtain and maintain employment. Employment is not reasonably available to Claimant under her particular circumstances.

68. Claimant has established by a preponderance of the evidence that she is entitled to PTD benefits.

69. As a result of the industrial injury, Claimant has a visible disfigurement to the body consisting of the following: (1) a discolored scar on Claimant's right leg measuring approximately six inches in length and less than 1/8th inches in width, (2) two discolored incision scars on Claimant's right leg, each measuring less than one centimeter in length, and (3) a moderate limp.

70. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Permanent Total Disability Benefits

To establish a claim for PTD, the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995).

In weighing whether the claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether the claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

As a matter of public policy, PTD benefits may be awarded even if the claimant has held, or currently holds, some type of post-injury employment where the evidence shows that claimant is not physically able to sustain the post-injury employment, or that such employment is unlikely to become available to claimant in the future in view of the particular circumstances. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

Claimant has been diagnosed with, *inter alia*, CRPS, depression and anxiety resulting from the industrial injury. Claimant credibly testified that she continues to experience various symptoms as a result of her work-related conditions, which have decreased her functionality and ability to work. Objective findings throughout the medical records corroborate Claimant's reports of ongoing symptomatology. Although Claimant returned to modified work for a period of time post-injury, Dr. Anderson-Oeser subsequently removed Claimant from work as of September 2016.

Dr. Anderson-Oeser credibly opined that Claimant is restricted to sedentary work and will require, on average, one to three days of work off per month due to flare-ups. Claimant credibly testified that she continues to seek medical treatment on approximately four to six occasions per month. Both Ms. Montoya and Ms. Ferris agreed that such absenteeism would hinder Claimant's ability to maintain employment. Furthermore, Claimant also suffers from mental limitations with respect to concentration, memory focus and comprehension as a result of her pain and medications. Claimant

functions poorly in stressful environments, which aggravates her symptoms and affects her ability to function.

Although Claimant had pre-existing conditions, the medical records and testimony persuasively establish that Claimant's continued symptoms, restrictions and limitations were substantially caused by the industrial injury and subsequent treatment. Based on the totality of the evidence, Claimant has established that it is more likely than not that she is unable to earn any wages in the same or other employment.

Disfigurement

As found, as a result of the industrial injury, Claimant has a visible disfigurement to the body consisting of the following: (1) a discolored scar on Claimant's right leg measuring approximately six inches in length and less than 1/8th inches in width, (2) two discolored incision scars on Claimant's right leg, each measuring less than one centimeter in length, and (3) a moderate limp. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation under Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

I. Claimant is permanently and totally disabled. Respondents shall pay Claimant PTD benefits from the date of MMI and continuing until terminated by law, subject to any applicable offsets.

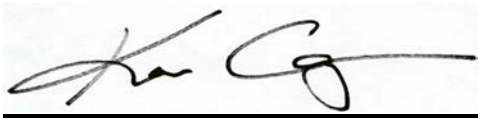
II. Insurer shall pay Claimant $3,000.00 for her disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

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

DATED: November 3, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did Respondents prove entitlement to a 50% reduction in Claimant's compensation for willful violation of a safety rule?

PRELIMINARY EVIDENTIARY ISSUE

Respondents have requested reconsideration of the ALJ's ruling excluding Exhibits P and R. Specifically, Respondents renew their argument made at hearing that the exhibits are "records of the employer" within the meaning of § 8-43-210. Alternatively, Respondents argue the exhibits are admissible as business records under CRE 803(6).

Exhibit P is an "Accident/Incident Investigation Report" prepared by Jeff Sherrod on February 3, 2017. Attached to the report are handwritten statements of two co-workers, Kevin Molina and Israel Gonzales, and a typewritten report from Bill Christie. Exhibit R contains email conversations among Employer's risk management personnel and the claims adjuster recounting their investigation and determinations regarding whether Claimant violated a safety rule.

After giving the matter additional consideration, the ALJ disagrees that the documents are admissible as "records of the employer." Rather the documents are inadmissible hearsay not contemplated by § 8-43-210.

Section 8-43-210 provides that "medical and hospital records, physicians' reports, vocational reports, and ***records of the employer*** are admissible as evidence and can be filed in the record as evidence without formal identification if relevant to any issue in the case." (Emphasis added). Section 8-43-210 as an exception to the general rule that hearsay is not admissible. *Chambers v. CF&I Steel Corp*., 757 P.2d 1171 (Colo. App. 1988). But the exception is limited to the types of documentary evidence explicitly enumerated in the statute.

In *Ackerman v. Hilton's Mechanical Men, Inc*., 914 P.2d 524 (Colo. App. 1996), the court emphasized the distinction between "records" and "reports." The court noted the statute allows admission of vocational and physician "reports" but limits employers to offering "records." The court held the term "report" refers to "a formal statement or account of the results of an investigation" which fairly describes Respondents' Exhibit P and at least some emails contained in Exhibit R.

The ICAO addressed a very similar situation in *Braden v. Integrated Health Services*, W.C. No. 4-406-349 (December 21, 1999). The respondents had offered handwritten statements from the claimant's co-workers regarding the alleged injury. The ICAO affirmed the ALJ's determination that the witness statements did not qualify as "records of the employer." The ICAO reasoned:

> [Section 8-43-210] reflects the General Assembly's implicit determination that physician and vocational "reports" have indicia of reliability stemming from the author's professional status, which do not apply to employer "reports" of investigation. In our view, employer "records" constitute a statutory exception to the hearsay rule because they are presumed to be created in the regular course of business operations, and not generated for the sole purpose of defending workers' compensation claims. … [T]he General Assembly was not confident that "reports" generated by an employer concerning the results of an investigation contain the same indicia of reliability as "reports" generated by third-party medical and vocational experts. Thus, in the absence of formal identification, § 8-43-210 does not allow employers to introduce written "reports" of witnesses as a substitute for testimony under the guise of "employer records."

The purpose of the hearsay rule is to ensure substantive issues are not decided based on witness statements the opposing party has no opportunity to cross-examine. Respondents offered the documents as substantive evidence on the issue of whether Claimant violated a safety rule. As such, they are hearsay and not covered by the exception in § 8-43-210.

Nor is the ALJ persuaded by Respondents' argument that CRE 803(6) provides an independent basis to admit the exhibits. Even if the ALJ accepted the premise that CRE 803(6) creates a broader exception than § 8-43-210, the rules of evidence only apply in workers' compensation hearings to the extent they are consistent with the Act. *Chambers v. CF&I Steel Corp*., 757 P.2d 1171 (Colo. App. 1988). In the event of a conflict, the rules must yield to the statute. Because the Act contains a specific provision regarding the admissibility of employer records, it would be inappropriate to apply Rule 803(6) to admit evidence otherwise excluded by the statute.

Respondents' Motion for Reconsideration is denied.

FINDINGS OF FACT

1. Claimant worked for Employer for approximately 11 years as an insulation installer. Due to his tenure and experience, he worked as a "lead man." Occasionally, Claimant had to wear stilts to complete insulation jobs.

2. Claimant suffered an admitted injury on February 3, 2017 after falling down a flight of stairs while wearing stilts. The staircase consisted of approximately 6-7 stairs down to a landing, a 90-degree turn to the left, and another six or seven steps down to the first floor. Claimant suffered multiple injuries, including a significant head injury with a subarachnoid and subdural hematoma. He has no reliable recollection of the accident.

3. Employer has an established policy that employees are not to wear stilts on uneven surfaces, including stairs. Employer conducts frequent safety meetings to review and emphasize various safety issues. In January 2017, Claimant attended a safety meeting regarding the use of stilts. Although there is some disagreement regarding the

specific materials Claimant received or reviewed, that is immaterial because Claimant acknowledged awareness of Employer's policy prohibiting using stilts on stairs. Claimant agreed with that policy because he knows using stilts on stairs is dangerous.

4. Claimant testified he always removed his stilts before ascending or descending stairs.

5. After the accident, the Colorado Springs Fire Department arrived on scene and found Claimant standing and talking. The CSFD records indicate, "Co-workers stated the pt stumbled on staircase wearing stilts and fell approximately 8-10 feet while installing insulation in interior of new home construction."

6. Shortly after that, EMTs from American Medical Response arrived. Claimant was alert and complaining of back pain. The AMR note states "CSFD stated the patient was wearing drywall stilts and standing on a landing when he fell."

7. Approximately one hour after the accident, Employer's warehouse supervisor, Jon Goff, arrived on the scene to investigate. Mr. Goff took several photographs depicting the staircase from different angles and several individual stair treads. One photograph shows black scuff marks, which Mr. Goff believes were caused by the rubber padding on the bottom of the stilts. Mr. Goff also acknowledged numerous workers wearing boots used that staircase during the construction project. Another photograph shows a wing bolt from Claimant's stilts on the first step up from the first floor.

8. Respondents admitted liability for Claimant's accident and commenced payment of TTD benefits effective February 4, 2017. Respondents reduced Claimant's TTD benefits by 50% based on their determination Claimant's injury resulted from a safety rule violation.

9. Claimant does not dispute the admitted average weekly wage (AWW) of $1,003.92.

10. Respondents proved the existence of a safety rule prohibiting employees from wearing stilts on stairs.

11. Respondents proved Claimant knew of the safety rule.

12. Respondents failed to prove Claimant's injury resulted from willful violation of the safety rule. Specifically, Respondents did not prove Claimant was on the stairs when he fell.

CONCLUSIONS OF LAW

Section 8-42-112(1)(b) provides for a fifty percent reduction of indemnity benefits "where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule need not be formally adopted or reduced to writing to be effective. *Bennett Properties Co. v. Industrial Commission,* 437 P.2d 548 (Colo. 1968). The term "willful" means "with deliberate intent,"

and mere "carelessness, negligence, forgetfulness, remissness or oversight" does not satisfy the statutory standard. *Id*. The respondents do not have to present evidence about the claimant's state of mind or prove he had the rule "in mind" when he did the prohibited act. Rather, a "willful" violation may be inferred from evidence the claimant knew the safety rule and did the prohibited act. *Id*.

The respondents have the burden to prove the requisite elements for the penalty, including the existence of a safety rule, the willfulness of the claimant's conduct, and that violation of the safety rule caused the injury. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

As found, Respondents failed to prove Claimant's injury resulted from willful violation of a safety rule. There is insufficient credible evidence to establish Claimant was on the stairs when he fell. There are no direct witnesses to the fall, and Claimant does not remember the incident. Although co-workers apparently told the EMTs Claimant was on the staircase when he fell, the ALJ cannot ascertain if the statements were based on first-hand observation or mere assumptions and supposition. The circumstantial evidence such as scuff marks on the stair treads, the wing bolt, and 90-degree turn in the staircase does not prove Claimant's injury more likely than not resulted from violation of a safety rule. It is at least equally likely Claimant was at the top of the staircase when the set screw came loose, causing him to tumble down the stairs. Although it is *possible* he was on the stairs when his stilts gave way, the persuasive evidence does not show it to be *probable.*

ORDER

It is therefore ordered that:

1. Respondents' request to reduce Claimant's indemnity benefits by 50% due to a safety rule violation is denied and dismissed.

2. Insurer shall pay Claimant TTD benefits at the weekly rate of $669.28, commencing February 4, 2017 and continuing until terminated according to law. Insurer may take credit for any TTD benefits previously paid to Claimant in this claim.

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

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

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

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

DATED: November 7, 2017

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

ISSUES

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

2. Whether Respondents have overcome by clear and convincing evidence the opinion of DIME physician Dr. Gellrick regarding Claimant's permanent impairment rating.

3. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is a 36 year old employed by Employer as a mechanical broom operator and has been so employed since approximately September 29, 2016.

2. Claimant's duties include driving a vehicle and sweeping and cleaning construction sites with a mechanical broom attached to a truck.

3. Claimant was paid $15.00 per hour. His gross wages from his date of hire September 29, 2016 through the day prior to his injury and through November 7, 2016 were $4,286.53. This was for a period of 5.7143 weeks. *See* Exhibits 9, M.

4. On November 8, 2016 while so employed, Claimant was involved in a motor vehicle accident. On this date, he was traveling southbound on Interstate 25 when he was cut off by a semi-truck. His vehicle crashed into the wall barrier dividing I-25, spun across multiple lanes of traffic, and then crashed into the outside median before coming to a stop. The vehicle did not roll over. Claimant was traveling approximately 55-60 miles per hour at the time of the accident.

5. Claimant immediately reported the injury to his supervisor and to the Northglenn Police Department.

6. Claimant was transported by paramedics from the scene of the accident to Denver Health Medical Center (DHMC).

7. At DHMC, Claimant complained of a headache and left face pain. On physical examination, Claimant was noted to have ecchymosis and swelling over the left side of his face, tenderness on his right knee over an abrasion site, and a non-suturable laceration to his upper right back. X-rays taken of his chest and pelvis revealed no displaced fracture and a CT of his head and facial bones revealed no intracranial

abnormality or facial fracture. Claimant denied neck or back pain. It was noted that Claimant was morbidly obese. It was also noted that Claimant had no cervical, thoracic, or lumbar midline tenderness to palpation and that he was ambulatory with a steady gait. The clinical impression from DHMC was facial pain, and knee pain. Claimant was discharged that day with instructions to follow up with a workers' compensation doctor. *See* Exhibits 5, I.

8. Claimant testified at hearing that the most pronounced pain following the motor vehicle accident was to his face but that he was bruised up all over and had general soreness throughout his entire body.

9. Claimant was referred by Employer to Concentra Medical Center.

10. On November 10, 2016 Claimant was evaluated at Concentra by Rammohan Naidu, PA-C. Claimant reported his chief complaint as a car accident injury to his right knee, back, and bilateral hands. Claimant's body mass index was noted to be 52.77. Claimant reported he had a motor vehicle collision two days prior when he got cut off by a semi truck, had possible loss of consciousness, went to the ER and had negative scans, had a laceration on his back that had healed, and that he was at Concentra for work clearance. On review of symptoms Claimant reported chest pain, joint pain, muscle pain, back pain, joint swelling, joint stiffness, bruising, and lacerations on his back. On examination, PA Naidu found a normal examination with no tenderness or swelling, and normal range of motion and muscle strength and tone. PA Naidu assessed: motor vehicle collision, laceration of back, and bilateral knee pain. PA Naidu released Claimant from care and noted that he had reached maximum medical improvement with no permanent impairment. PA Naidu opined that Claimant could return to full work/activity that day. *See* Exhibits 6, H.

11. On November 22, 2016 Daniel Peterson, M.D. issued a physician's report of worker's compensation injury. Dr. Peterson noted work related medical diagnoses of pain in right knee, pain in left knee, and laceration without foreign body of unspecified back wall of thorax without penetration into thoracic cavity, initial encounter. Dr. Peterson opined that Claimant reached MMI on November 10, 2016, and that Claimant sustained no permanent impairment. *See* Exhibit 6.

12. On November 29, 2016 Respondents filed a Final Admission of Liability (FAL). The FAL noted a maximum medical improvement (MMI) date of November 10, 2016 and a zero percent impairment. Respondents admitted to medical benefits only and noted that they admitted to reasonable and necessary medical treatment after MMI for the right knee, back, and bilateral hands. Respondents noted that temporary disability benefits were denied as Claimant had not had any compensable lost time from work. Respondents attached the November 22, 2016 report from Dr. Peterson and the November 10, 2016 evaluation from PA Naidu to the FAL. *See* Exhibits 4, B.

13. Claimant objected to the FAL and sought a Division Independent Medical Evaluation (DIME).

14. On February 28, 2017 Claimant underwent a DIME performed by Caroline Gellrick, M.D. Claimant reported continued back pain and subscapular shoulder pain. Claimant reported that the low back pain was present at the emergency room but that he was aching all over at that time and had bruises all over his body which slowly subsided. Claimant reported particularly that he had bruises on his back, flanks, and facial region and that as the bruises healed his low back pain continued and did not go away. Claimant reported that he went back to work after several days and continued to work full duty. Claimant reported no new injuries and that he did not have prior problems with his low back. Claimant reported pain at a level of 6-7/10 in his low back and that his pain was increased with prolonged standing, walking, and sleeping. *See* Exhibits 7, G.

15. Dr. Gellrick noted a prior medical history of osteotomy of the left leg in April of 1996 and that due to the leg shortening, Claimant wore shoe inserts or prosthetic shoes on the left and had accommodated his problem with shoe wear. Claimant's gait was noted to be broad based due to body habitus. On physical examination, Dr. Gellrick noted that Claimant's left lower extremity was shorter than the right and produced an abnormal alignment of the entire spine. Dr. Gellrick noted a visualized scar over the posterior right scapula. Claimant was found to have tenderness in the lumbar spine, and a positive straight leg raise on the left with vague discomfort in the left lower lumbar spine. Claimant's range of motion of the lumbar spine was found to be remarkably agile and entirely normal with flexion and extension. Claimant had tenderness on the left lateral side bend. *See* Exhibits 7, G.

16. Dr. Gellrick provided the diagnoses of: status post motor vehicle collision; ecchymosis left facial region along with headaches and positive loss of consciousness, resolved with a scar on the left face; abdominal pain, resolved; bilateral knee pain, resolved; laceration of the right scapula with residual scarring visible; and residual back pain in the area of the lumbar spine which persisted and did not resolve in the first three weeks post accident with persistent discomfort and tenderness, untreated. Dr. Gellrick also provided non work related diagnoses of: morbid obesity and de-conditioning; and status post left osteotomy resulting in the pelvis to be lower on the left side producing an external scoliosis effect on the spine. *See* Exhibits 7, G.

17. Dr. Gellrick noted that Claimant was functional despite the residual problems of lumbar spine strain with pre-existent left leg shortening phenomenon. Dr. Gellrick indicated that she agreed with the date of MMI of November 10, 2016 but that she recommended further diagnostic studies and x-rays of the lumbar spine, 3-4 sessions of chiropractic treatment, and six sessions of physical therapy for conditioning and exercise program to alleviate residual symptoms of back pain. Dr. Gellrick noted that the weight and body habitus would produce chronic effects on Claimant's lumbar spine and would not allow it to totally heal although it was previously totally asymptomatic. Dr. Gellrick opined that there was no invasive treatment warranted on the lumbar spine that she could determine as Claimant had a normal neurologic exam and no evidence of radiculopathy. *See* Exhibits 7, G.

18. Dr. Gellrick opined that Claimant had a ratable impairment of the lumbar spine which was previously asymptomatic prior to the accident. She opined that Claimant warranted a 5% whole person rating under IIB and that he had amazingly normal range of motion with no ratable range of motion impairment. Dr. Gellrick opined that the 5% whole person impairment was related to the injury and was not apportionable. She also noted he merited consideration for his scar formation and disfigurement. *See* Exhibits 7, G.

19. On March 27, 2017 F. Mark Paz, M.D. performed an independent medical record review of Claimant's case. Dr. Paz opined that Dr. Gellrick erred in her permanent impairment rating and application of the Level II Physician Accreditation Curriculum and the AMA Guides to Evaluation of Permanent Impairment, Third Edition Revised. Dr. Paz noted that the medical record and findings on physical examination do not document rigidity of the lumbar spine and note full range of motion of the lumbar spine. Dr. Paz opined that the requirements for a rating under Table 53 IIB require intervertebral disc or soft tissue lesion, un-operated with medically documented injury and a minimum of 6 months of medically documented pain and rigidity with or without muscle spasm. Dr. Paz noted that the motor vehicle accident was on November 8, 2016 and that the DIME was on February 28, 2017, approximately 3.5 months later and that Claimant also did not meet the requirements of 6 months under Table 53. Dr. Paz also noted that there was a need for an injury related diagnosis for a rating and that Claimant had only low back pain, a subjective complaint, not supported by objective findings. Dr. Paz opined that Claimant had subjective complaints without objective findings and that there was no documentation to support an axial spine injury in the medical records. Dr. Paz noted the findings of pelvic tilt due to Claimant's lower extremity osteotomy, scoliosis, and morbid obesity and de-conditioning as more likely etiologies of Claimant's chronic low back pain. *See* Exhibit F.

20. Dr. Paz opined that Claimant had no permanent impairment of the lumbar spine and that Claimant reached MMI on November 10, 2016. Dr. Paz opined that the injuries were clinically stable with no reasonable expectation of improvement with additional treatment. Dr. Paz opined that no further treatment would be required as reasonable, necessary, or related to the November 8, 2016 work injury and that the etiology of Claimant's low back pain based on reasonable medical probability was attributable to pelvic tilt, lower extremity osteotomy, scoliosis, morbid obesity, and de-conditioning which were all conditions unrelated to the November 8, 2016 motor vehicle accident. *See* Exhibit F.

21. On June 19, 2017 Timothy Hall, M.D. performed an independent medical evaluation. Claimant reported continued thoracolumbar/lumbar pain in the left side radiating laterally with no buttock or leg symptoms that was worse with activity. Dr. Hall reviewed medical records and performed a physical examination. On examination, Dr. Hall found muscle tightness through the thoracolumbar area on the left with some local trigger points through the lower trapezius and lower latissimus dorsi. Dr. Hall also found tightness through the left quadratus lumborum with active trigger point locally. Dr. Hall provided the impressions of: work related motor vehicle accident with ongoing myofascial

pain in the thoracolumbar area; improved/resolved issues involving facial laceration and knee trauma; and post-traumatic stress issues. *See* Exhibit 8.

22. Dr. Hall disagreed with Dr. Gellrick's conclusion that Claimant was at MMI. Dr. Hall noted that Claimant was still symptomatic, had received no treatment, and that there was treatment likely to improve Claimant's situation, reduce Claimant's pain, and increase Claimant's level of functioning. Dr. Hall opined that Claimant did not meet the definition of MMI and that Dr. Gellrick suggested further treatment, which could not be defined as maintenance. Dr. Hall opined that Claimant was not at MMI. *See* Exhibit 8.

23. Dr. Paz and Dr. Hall both testified at hearing consistent with their written reports.

24. Dr. Paz testified that the 5% impairment rating provided by DIME physician Dr. Gellrick was in error given that the DIME took place less than six months following the date of injury and the rating requires a minimum of six months. Dr. Paz also testified that Claimant did not have rigidity which was required for a rating.

25. Dr. Hall agreed that the 5% impairment rating was in error given the timing and that the DIME took place less than six months following the date of injury. Dr. Hall, however, opined that at the time of hearing, Claimant had six months or more of the pain and rigidity and that Claimant would as of the time of hearing qualify for a 5% impairment.

26. Dr. Paz testified that Dr. Gellrick had made the assessment that Claimant was clinically stable which is a requirement of MMI and that the DIME's clinical assessment is supposed to be abided by. Dr. Paz testified that Dr. Gellrick did not err and was allowed to recommend treatment after MMI as maintenance. Dr. Paz agreed that the treatment recommended by Dr. Gellrick was likely to improve Claimant's symptoms and to alleviate back pain.

27. Dr. Hall testified that Dr. Gellrick erred in the determination of MMI because, by definition, if there was a treatment plan that could lead to the resolution or significant improvement of symptoms, a patient would not be at MMI. Dr. Hall opined that there was a good probability that Claimant would be symptom free after undergoing additional curative treatment.

CONCLUSIONS OF LAW

Generally

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

to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

OVERCOMING DIME ON MMI

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

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A finding that the claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment

is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Here, Claimant has met his burden to overcome the opinion of the DIME physician regarding MMI by clear and convincing evidence. As found above, Claimant was placed at MMI in this case two days after his work related motor vehicle accident. The DIME physician recommended diagnostic studies to better define Claimant's condition. The DIME physician also recommended chiropractic care and physical therapy to alleviate Claimant's back pain. The diagnostic procedures and the treatment recommendations made by Dr. Gellrick are inconsistent with a finding of MMI. Dr. Hall is found persuasive that the recommended treatment is treatment likely to improve Claimant's condition and that Claimant is not stable or at baseline as argued. Even Dr. Paz, as found above, admitted that the treatment recommended by the DIME physician was to improve and help alleviate Claimant's back pain. The ALJ concludes that Claimant has met his burden to show that Dr. Gellrick erred and that Claimant is not at MMI for his work related injury.

As Claimant is not at MMI, the correctness of the permanent impairment rating is not at issue at this time. However, it is worth noting that the evidence presented by both Claimant and Respondent shows that Dr. Gellrick also clearly erred in assigning a 5% rating at the time of the DIME, which occurred less than six months from the date of injury.

AVERAGE WEEKLY WAGE (AWW)

Section 8-42-102(2) C.R.S. requires the ALJ to base claimant's AWW on her earnings at the time of injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon her AWW on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997).

As found above, Claimant worked for Employer for a very short period of time prior to his date of injury. From September 29, 2016 through November 7, 2016 (the day prior to his injury), Claimant earned $4,286.53. This was for a period of 5.7143 weeks. The ALJ agrees with Respondents calculation that these total wages, divided by the weeks

worked, results in an AWW of $750.14. The ALJ concludes that this is a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

It is therefore ordered that:

1. Claimant has overcome by clear and convincing evidence the MMI opinion of DIME physician Dr. Gellrick. Claimant is not at MMI for his November 8, 2016 work injury.

2. Claimant's average weekly wage is $750.14.

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

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

DATED: November 7, 2017,

/s/ Michelle E. Jones

_____

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

ISSUES

I. Whether Respondent has overcome the DIME opinion of Dr. Caroline Gellrick on permanent impairment by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant suffered a compensable industrial injury on July 28, 2014 when he snowboarded over the edge of a catwalk and struck a tree.

2. Claimant's authorized treating physician, Brian K. McIntyre, D.O., diagnosed Claimant with a C1 and C2 fracture with spinal fusion at C2-3, lumbar fractures – traverse processes, multiple: left L2-5, sacrum fractures, left scapular fracture, spleen laceration, pneumothorax, multiple fractures of ribs, and concussion.

3. Dr. McIntyre placed Claimant at maximum medical improvement (MMI) on August 15, 2016. Dr. McIntyre assigned a 23% whole person impairment rating, consisting of a 14% whole person impairment for the lumbar spine, and an 11% whole person impairment for the cervical spine.

4. Respondent filed a Final Admission of Liability on September 21, 2016 admitting consistent with Dr. McIntyre's 23% whole person impairment rating.

5. Claimant subsequently requested a Division-sponsored Independent Medical Examination (DIME). Caroline M. Gellrick, M.D. performed the DIME on February 14, 2017. Dr. Gellrick performed a medical records review and physically examined Claimant. Claimant reported worsening pain with walking, coughing, exercising, sneezing, bending, working and lifting.

6. On physical examination, Dr. Gellrick noted the following dual inclinometer cervical range of motion measurements: flexion of 66 degrees, extension of 51 degrees, right lateral flexion of 45 degrees, left lateral flexion of 45 degrees, right rotation of 71 degrees, and left rotation of 76 degrees. Dr. Gellrick further noted lumbar flexion of 35 degrees, extension of 14 degrees, right lateral flexion of 25 degrees, and left lateral flexion of 26 degrees.

7. Dr. Gellrick determined Claimant reached MMI as of September 19, 2016. She assigned a total combined 30% whole person impairment rating under the AMA Guides, consisting of 14% whole person lumbar spine impairment (8% under Table 53 and 7% range of motion deficits), and 19% whole person cervical spine impairment (16% under Table 53 and 3% for range of motion deficits). Specifically regarding the cervical range of motion, Dr. Gellrick noted a 2% impairment for cervical extension deficits, and 0.5%

impairment for cervical right rotation, totaling 2.5%. Dr. Gellrick then rounded the impairment rating up to 3%.

8. Dr. Gellrick noted Claimant was not on any medications and had been working in a tire shop as a foreman stating, “His current job involves changing oil in cars, new tires, using a machine to take old tires off, inspecting vehicles, and performing basic maintenance. He has been on this job for 11 months and works typically about 50 hour weeks.” Dr. Gellrick further noted, “On his job with the tire company he is required to do heavy lifting including up to 80 pounds with tires which he will do and work his way through the pain.” In the discussion portion, Dr. Gellrick remarked, “This patient has had an amazing recovery from multiple traumatic injuries resulting from a ski accident at the job. Despite this the patient has rehabbed and considers his exercise program his job where he has to do heavy lifting and has been to return to the sport of skiing despite the above.” She also stated, “He has forced himself to go back to baseline.” Dr. Gellrick did not recommend any maintenance treatment.

9. On July 5, 2017, Carlos Cebrian, M.D. performed an Independent Medical Examination (IME) at the request of Respondent. Dr. Cebrian issued an IME Report dated September 5, 2017. Dr. Cebrian performed a medical records review and physically examined Claimant. Dr. Cebrian noted the following dual inclinometer range of motion measurements for the cervical spine: flexion of 58 degrees, extension of 65 degrees, right lateral flexion to 45 degrees, left lateral flexion of 48 degrees, right rotation of 78 degrees and left rotation of 80 degrees. Dr. Cebrian noted the following lumbar range of motion measurements: flexion of 65 degrees, extension of 28 degrees, right lateral flexion of 30 degrees, and left lateral flexion of 28 degrees.

10. Dr. Cebrian concluded Claimant had reached MMI and had been appropriately released to work with no restrictions. Dr. Cebrian assigned a total combined 24% whole person impairment rating, consisting of 17% whole person rating for the cervical spine (16% under Table 53 and 1% for range of motion deficits) and an 8% whole person impairment for the lumbar spine under Table 53. Dr. Cebrian determined there is no lumbar for range of motion impairment.

11. Dr. Cebrian opined that the DIME physician erred assigning a 1% impairment for the 71 degree cervical right rotation. Additionally, Dr. Cebrian noted that according to the AMA Guides, pain, fear of injury or neuromuscular inhibition may limit mobility by diminishing effort. Dr. Cebrian opined that the DIME physician erred by not addressing inconsistencies between the range of motion impairment and Claimant's functional abilities of working regular duty and lifting up to 80 pounds.

12. Dr. Cebrian testified at hearing on behalf of Respondent as an expert in occupational medicine. Dr. Cebrian is Level II accredited by the Division and testified consistent with his IME Report. Regarding Dr. Gellrick’s impairment rating for cervical range of motion, Dr. Cebrian referred to Table 57 of the AMA Guides and explained that the measurements on the far left include 60 degrees and 80 degrees. Dr. Gellrick measured Claimant's maximum cervical right rotation at 71 degrees and noted that the percent of impairment for cervical right rotation is one-half. Dr. Cebrian purported that,

for mathematical reasons, this is incorrect. Dr. Cebrian testified that 71 is not the mid-point between 60 degrees and 80 degrees and thus, does not equal a.50% impairment but, rather, a .45% impairment.

13. Dr. Cebrian explained that the Impairment Rating Tips issued by the Division provide, in part, that numbers ending in .50 should be rounded up. Dr. Cebrian contended that if numbers ending in .50 should be rounded up, then numbers less than .50 should be rounded down. Dr. Cebrian explained that the AMA Guides do not provide an instance where the "degree" of rotation is rounded. Dr. Cebrian contended that the 71 degrees should not be rounded down. Rather, the 71 degrees should be converted to an impairment rating which is then rounded. Dr. Cebrian opined that because the impairment rating would equal .45, pursuant to the Impairment Rating Tips, this would be rounded down to 0% impairment rating.

14. Regarding the lumbar spine, Dr. Cebrian explained that Claimant did not have surgery as the result of the lumbar spine injuries. Additionally, Claimant suffered from a preexisting condition which caused back pain. Accordingly, Dr. Cebrian explained that there is no affirmative correlation between Claimant's current lumbar pain and the work incident. Additionally, Dr. Cebrian noted that the AMA Guides provides that an individual's function should be considered when addressing impairment, referring to section 2.1 of the AMA Guides which provides,

> If the current findings are not in substantial accordance with the information of record, the appropriate course is to undertake further clinical evaluation to resolve disparities and determine the individual's present status. The second step in assessing the impairment is analyzing the history and the clinical and laboratory findings to determine the nature and extent of the loss, the loss of use of, or derangement of the effected body part, system, or function.

15. Dr. Cebrian stated that this provision requires a DIME physician conducting impairment to correlate the clinical findings with function and that if there is inconsistency, the DIME physician must explain the discrepancy or perform a separate set of range of motion measurements. Dr. Cebrian opined that Dr. Gellrick erred in not doing so. He testified that in Dr. Gellrick's report there is an inherent inconsistency with her description of Claimant's current function and the loss of range of motion demonstrated by her lumbar measurements. Absent such an explanation of this discrepancy as required by the AMA Guides, the impairment rating lacks validity.

16. Ronald Swarsen, M.D., testified at hearing on behalf of Claimant as an expert in occupational medicine. Dr. Swarsen is Level II accredited by the Division. Dr. Swarsen reviewed Claimant's medical records, Dr. Gellrick's DIME Report and Dr. Cebrian's IME Report. Dr. Swarsen opined that Dr. Gellrick performed her impairment analysis consistent with the requirements of the AMA Guides and the directives of the Division. He disagreed with the opinion of Dr. Cebrian concerning both Dr. Gellrick's 3% cervical range of motion rating and her lumbar range of motion findings.

17. Dr. Swarsen opined that Dr. Gellrick's 3% impairment for cervical range of motion loss was appropriate under the AMA Guides. Dr. Swarsen testified that Dr. Gellrick appropriately rounded the cervical right rotation measurement of 71 degrees down to 70 degrees, as such practice is standard. Dr. Swarsen further testified that Dr. Gellrick also appropriately rounded the corresponding .50% impairment up to 1%.

18. Dr. Swarsen testified that Dr. Gellrick was correct in providing a lumbar spine loss of range of motion impairment based on her findings at the time of her evaluation. Dr. Swarsen stated that the determination of the loss of range of motion under the DIME process is established on the date of the DIME. He opined that Claimant's loss of range of motion was not inconsistent with his functioning on the MMI date. He opined that it was reasonable, and consistent with the AMA Guides for the Claimant to have retained functional ability despite having a range of motion loss. He explained that the concepts of impairment and disability are defined separately under the AMA Guides.

19. Dr. Swarsen testified that Dr. Gellrick's range of motion testing was performed consistent with the requirements of the AMA Guides rating charts and were valid measurements.

20. Section 2.2 of the AMA Guides states, in relevant part, "A final impairment percentage, whether the result of single or combined impairments, may be rounded to the nearer of the two nearest values ending in '0' or '5.'"

21. The Division's Impairment Rating Tips states, in relevant part, the following regarding rounding: "Although the AMA Guides allows rounding of an impairment rating to the nearest whole number ending in 0 or 5, the Division recommends rounding up or down to the nearest whole number when presenting the final rating. A number ending in .50 should be rounded up."

22. Neither the AMA Guides nor the Impairment Rating Tips address rounding range of motion measurements.

23. The ALJ credits the opinions of Drs. Gellrick and Swarsen over the conflicting opinion of Dr. Cebrian and finds that it is not highly probable that Dr. Gellrick's DIME opinion is incorrect.

24. Respondent failed to overcome the DIME physician's impairment rating by clear and convincing evidence.

25. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming the DIME Physician's Opinion on Permanent Impairment

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; Section 8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing that it is highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result

from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003).

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence, present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

As found, Respondent failed to overcome the DIME opinion by clear and convincing evidence. Dr. Swarsen credibly testified that Dr. Gellrick performed her range of motion measurements consistent with AMA Guide requirements, and that her measurements were valid. Regarding the cervical range of motion impairment, Dr. Cebrian contends that Dr. Gellrick erred in rounding the 71 degree cervical right range of motion to 70 degrees. The AMA Guides and the Impairment Rating Tips do not address rounding range of motion measurements. As such, there is nothing contained in either text specifically encouraging or discouraging such practice. Dr. Swarsen credibly testified that it is standard practice to round the range of motion measurement in circumstances such as Claimant's, and that Dr. Gellrick did not err her calculations.

Regarding the impairment for lumbar range of motion deficits, Dr. Cebrian contends that Claimant was not entitled to a lumbar range of motion loss because it was inconsistent with his functional impairment. Dr. Swarsen credibly testified that Dr. Gellrick was correct in providing a lumbar impairment for range of motion deficits based on her findings at the time of her evaluation. Based on the totality of the evidence, the ALJ concludes that Dr. Cebrian's opinion represents a mere difference of opinion, which is insufficient to overcome the DIME.

ORDER

It is therefore ordered that:

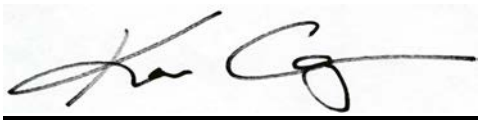
1. Respondent failed to overcome the DIME physician's opinion by clear and convincing evidence that Claimant is entitled to a 30% whole person impairment rating.

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

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

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

DATED: November 7, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right knee injury during the course and scope of his employment with Employer on August 24, 2015.

2. Whether Claimant has established by a preponderance of the evidence that a total right knee replacement is reasonable, necessary and causally related to his August 24, 2015 injury.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,404.00.

FINDINGS OF FACT

1. Claimant worked for Employer as a Lead Vendor Manager or Engineer. His job duties involved the deployment of Direct TV equipment for voice, video and data to customers in all of Employer's areas throughout the United States from New Jersey to Washington.

2. Claimant acknowledged that he has suffered significant prior knee problems and undergone orthopedic surgeries. He specifically recognized that he underwent four right knee surgeries in the 1980's, 1990's, 1998 and 2007. Thomas A. Mann, M.D. performed the May 2, 2007 right knee arthroscopy. The procedure addressed Claimant's torn medial meniscus, extensive chrondomalacia of the femoral condyle and chrondromalacia of the femoral trochlea.

3. On February 1, 2010 Claimant suffered an injury at work when he slipped and fell on ice. Claimant landed on his right knee.

4. On February 16, 2010 Claimant underwent a right knee MRI. The MRI revealed the following: (1) severe articular cartilage pathology throughout the medial compartment; (2) evidence of prior surgical resection at the body of the medial meniscus; and (3) mild chondromalacia of the patella.

5. Dr. Mann evaluated Claimant for possible right knee surgery. He noted that the right knee MRI reflected "clearly" long-standing degenerative changes. Dr. Mann recommended a cortisone injection.

6. On June 10, 2010 Dr. Mann remarked that Claimant had experienced continued pain despite the cortisone injection and a course of physical therapy. He

recommended that Claimant continue with "symptomatic" treatment that included activity modification, anti-inflammatories, ice and possible additional injections. Dr. Mann remarked that Claimant would require a future total right total knee replacement.

7. By September 16, 2010 Claimant visited Concentra Medical Centers for treatment. He was diagnosed with right knee degenerative joint disease. Claimant reported that he had not heard anything about whether a total right knee replacement would be authorized.

8. On November 3, 2010 Claimant returned to Concentra and visited James D. Fox, M.D. for an examination. Claimant had been informed that the insurance company had denied his request for a total right knee replacement. He recognized that his knee problems originated with old injuries that occurred more than 10 years earlier. Dr. Fox noted that an independent medical examination physician determined that Claimant's right knee pathology could be attributed to the February 1, 2010 industrial incident. He agreed with the independent medical examination physician. Dr. Fox explained that Claimant had returned to "pre-2/10 baseline and has not sustained any new impairment as a consequence of that injury." He commented that Claimant had suffered extensive prior knee problems and would likely need a total right knee replacement in the future through his private health insurance. Dr. Fox released Claimant from care.

9. On August 24, 2015 Claimant attended a property meeting with a general contractor, the property owner and city manager Oscar Villa to discuss the location of Direct TV equipment at a job site. As Claimant was walking around a building with Mr. Villa he stepped on a rock, twisted his right knee and heard a pop. Because he began limping he was unable to ascend stairs to the third floor of the building.

10. Claimant explained that he walked out to his car and told Mr. Villa he was going home. He noted that he planned to stop by a store to obtain ice because his right knee had started to swell. When Claimant arrived home he was unable to remove his pants because of his right knee swelling.

11. On September 2, 2015 Claimant visited Concentra for an evaluation. Claimant reported that he stepped on a rock and twisted his right knee while at work on August 24, 2015. The medical provider referred Claimant for physical therapy.

12. On September 28, 2015 Claimant underwent a right knee MRI. The MRI revealed grade 4 chondromalacia of the patellar and trochlear groove, low grade acute on chronic sprains of the ligaments and a possible intracondylar bleed.

13. On September 29, 2015 Claimant returned to Concentra and visited Lloyd Thurston, M.D. for an examination. He diagnosed Claimant with "primary osteoarthritis of the right knee" and a right knee sprain. Dr. Thurston remarked that Dr. Mann had sought referral to a specialist to determine whether "any of the issues are acute or this is a flare of severe pre-existing osteoarthritis." He released Claimant to modified duty employment.

14. On October 29, 2015 Claimant returned to Dr. Thurston for an evaluation. Dr. Thurston agreed with Dr. Mann "that a total knee replacement is warranted and appropriate for this minor work related aggravation of chronic underlying osteoarthritis of the right knee." He noted that "I feel this surgery should be covered under W/C and the sooner the better."

15. By January 7, 2016 Dr. Mann continued to recommend a total right knee replacement. He remarked that the surgery was necessary due to ""right knee pain w/ advanced medial compartment [degenerative joint disease], given failure of extensive conservative treatment, and appearance of knee on radiographs."

16. On April 28, 2017 Claimant underwent an independent medical examination with John T. McBride, Jr., M.D. Dr. McBride recounted that on August 24, 2015 Claimant stepped on a rock or clump of dirt and twisted his right knee while performing a site survey for Employer. Claimant heard a loud "pop" and suffered immediate right knee swelling. Dr. McBride commented that Claimant has suffered a significant history of pre-existing right knee issues. He specifically noted that Claimant suffers from "end-stage osteoarthritis of the right knee." Dr. McBride explained that in 2010 Claimant's right knee MRI revealed "significant osteoarthritis of his medial joint space. He had edema in the tibial plateau, subchondral sclerosis and cystic changes consistent with advanced osteoarthritis in 2010." Dr. McBride commented that the September 28, 2015 right knee MRI revealed findings similar to the 2010 MRI. The similar findings were consistent with severe end-stage osteoarthritis. He summarized that the August 24, 2015 twisting incident did not cause right knee end-stage osteoarthritis or require a total knee replacement.

17. On May 20, 2017 Michael R. Striplin, M.D. conducted a records review of Claimant's case. He specifically addressed whether Claimant's August 24, 2015 work accident warranted a total right knee replacement. Dr. Striplin noted that Claimant has suffered long-standing "severe chronic degenerative disease of the right knee." He explained that the chronic, degenerative disease was not caused by the August 24, 2015 work incident. Furthermore, the incident did not cause an aggravation of Claimant's right knee condition because the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*) require a two-year lapse from the date of injury. Nevertheless, the September 28, 2015 right knee MRI "revealed evidence of acute and chronic sprains of the cruciate ligament and evidence of an intracondylar bleed." The findings suggested that Claimant suffered an acute injury on August 24, 2015 that was "superimposed on the chronic underlying disease." Dr. Striplin explained that, because conservative treatment had failed, a total right knee replacement "appear[ed] to be the only reasonable treatment option given the extensive nature of [Claimant's] underlying degenerative disease."

18. On June 12, 2017 Claimant underwent a total right knee replacement with Dr. Mann's colleague Thomas Eickmann, M.D. The pre-operative diagnosis was osteoarthritis of the right knee. The procedure was performed because there was "x-ray evidence of end-stage arthritis of the knee."

19. On August 28, 2017 Dr. McBride issued an addendum report to his independent medical examination. After reviewing additional medical records Dr. McBride reiterated that Claimant suffers from right knee osteoarthritis that pre-existed the August 24, 2015 industrial accident. He emphasized that the need for Claimant's total right knee replacement was pre-existing osteoarthritis. Dr. McBride summarized that Claimant's end-stage osteoarthritis was unrelated to his August 24, 2015 accident.

20. Dr. McBride testified at the hearing in this matter. He maintained that Claimant suffers from chronic right knee degenerative arthritis. Claimant simply suffered a ligament sprain on August 24, 2015 that resolved on its own. The sprain was unrelated to the total right knee replacement because the surgical request was designed to address Claimant's underlying degenerative disease. Accordingly, Claimant's August 24, 2015 work activities did not cause, aggravate or accelerate his need for a total right knee replacement.

21. On October 4, 2017 the parties conducted the pre-hearing evidentiary deposition of Dr. Striplin. Dr. Striplin explained that Claimant's need for a total right knee replacement was not related to underlying osteoarthritis but rather to the acute findings of a right knee sprain and suspected blood on Claimant's 2015 MRI. However, he acknowledged that the acute findings on the 2015 MRI could have resolved on their own prior to the June 12, 2017 surgery. He specifically recognized that the surgery "was directed at the underlying disease." Nevertheless, Dr. Striplin explained that after Claimant strained his knee "if you're going to treat it surgically, you had no choice but to do the total knee replacement."

22. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right knee injury during the course and scope of his employment with Employer on August 24, 2015. The record reveals that Claimant has suffered significant, pre-existing right knee problems. However, Claimant credibly explained that while attending a property site inspection for Employer on August 24, 2015 he stepped on a rock and twisted his right knee. He immediately experienced right knee pain and swelling.

23. After the August 24, 2015 incident Dr. Thurston at Concentra diagnosed Claimant with "primary osteoarthritis of the right knee" and a right knee sprain. Dr. Striplin persuasively noted that the September 28, 2015 right knee MRI "revealed evidence of acute and chronic sprains of the cruciate ligament and evidence of an intracondylar bleed." The findings suggested that Claimant suffered an acute injury on August 24, 2015 that was "superimposed on the chronic underlying disease." Furthermore, Dr. McBride commented that Claimant simply suffered a ligament sprain on August 24, 2015 that resolved on its own. The consistent medical evidence, in conjunction with Claimant's credible testimony, reflects that Claimant suffered an acute sprain of his right knee on August 24, 2015. The acute sprain resolved on its own with minimal, conservative medical treatment.

24. Claimant has failed to establish that it is more probably true than not that a total right knee replacement is reasonable, necessary and causally related to his August

24, 2015 injury. The record reflects that Claimant suffers from chronic, degenerative osteoarthritis in his right knee. In fact, in 2010 Dr. Mann remarked that Claimant would require a future total right total knee replacement. In addressing the August 24, 2015 incident, Dr. Mann and Dr. Thurston agreed "that a total knee replacement is warranted and appropriate for this minor work related aggravation of chronic underlying osteoarthritis of the right knee." However, the bulk of the persuasive medical evidence demonstrates that the August 24, 2015 twisting incident was a minor strain injury that did not cause Claimant's need for a total right knee replacement.

25. Dr. McBride explained that Claimant suffers from right knee osteoarthritis that pre-existed the August 24, 2015 industrial accident. He commented that the September 28, 2015 right knee MRI revealed severe end-stage osteoarthritis that was similar to the findings on the 2010 MRI. He thus emphasized that the need for Claimant's total right knee replacement was pre-existing osteoarthritis. Dr. McBride noted that Claimant's August 24, 2015 sprain was unrelated to his June 12, 2017 total right knee replacement because the surgical request was designed to address Claimant's underlying degenerative disease.

26. In contrast, Dr. Striplin maintained that Claimant's need for a total right knee replacement was not related to underlying osteoarthritis but rather to the acute findings of a right knee sprain and suspected blood on Claimant's 2015 MRI. However, he acknowledged that the acute findings on the 2015 MRI could have resolved on their own prior to the June 12, 2017 surgery. He specifically recognized that the surgery "was directed at the underlying disease." Nevertheless, Dr. Striplin explained that there were no alternatives to a total right knee replacement. However, based on Claimant's long history of right knee degenerative osteoarthritis, the recommendation for a total knee replacement by 2010, the surgical request to address the underlying osteoarthritis and the persuasive testimony of Dr. McBride, Claimant's need for a total right knee replacement is not causally related to the August 24, 2015 right knee sprain. Claimant's need for a total right knee replacement constituted the natural progression of a pre-existing condition. Accordingly, Claimant's August 24, 2015 work activities did not cause, aggravate or accelerate his need for a total right knee replacement. Claimant's request for Respondents to cover the cost of his June 12, 2017 total right knee replacement is thus denied and dismissed.

CONCLUSIONS OF LAW

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

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a

coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right knee injury during the course and scope of his employment with Employer on August 24, 2015. The record reveals that Claimant has suffered significant, pre-existing right knee problems. However, Claimant credibly explained that while attending a property site inspection for Employer on August 24, 2015 he stepped on a rock and twisted his right knee. He immediately experienced right knee pain and swelling.

8. As found, after the August 24, 2015 incident Dr. Thurston at Concentra diagnosed Claimant with "primary osteoarthritis of the right knee" and a right knee sprain. Dr. Striplin persuasively noted that the September 28, 2015 right knee MRI "revealed evidence of acute and chronic sprains of the cruciate ligament and evidence of an intracondylar bleed." The findings suggested that Claimant suffered an acute injury on August 24, 2015 that was "superimposed on the chronic underlying disease." Furthermore, Dr. McBride commented that Claimant simply suffered a ligament sprain on August 24, 2015 that resolved on its own. The consistent medical evidence, in conjunction with Claimant's credible testimony, reflects that Claimant suffered an acute sprain of his right knee on August 24, 2015. The acute sprain resolved on its own with minimal, conservative medical treatment.

Medical Benefits

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

10. As found, Claimant has failed to establish by a preponderance of the evidence that a total right knee replacement is reasonable, necessary and causally related to his August 24, 2015 injury. The record reflects that Claimant suffers from chronic, degenerative osteoarthritis in his right knee. In fact, in 2010 Dr. Mann remarked that Claimant would require a future total right total knee replacement. In addressing the August 24, 2015 incident, Dr. Mann and Dr. Thurston agreed "that a total knee replacement is warranted and appropriate for this minor work related aggravation of chronic underlying osteoarthritis of the right knee." However, the bulk of the persuasive medical evidence demonstrates that the August 24, 2015 twisting incident was a minor strain injury that did not cause Claimant's need for a total right knee replacement.

11. As found, Dr. McBride explained that Claimant suffers from right knee osteoarthritis that pre-existed the August 24, 2015 industrial accident. He commented that the September 28, 2015 right knee MRI revealed severe end-stage osteoarthritis that was similar to the findings on the 2010 MRI. He thus emphasized that the need for Claimant's total right knee replacement was pre-existing osteoarthritis. Dr. McBride noted that Claimant's August 24, 2015 sprain was unrelated to his June 12, 2017 total right knee replacement because the surgical request was designed to address Claimant's underlying degenerative disease.

12. As found, in contrast, Dr. Striplin maintained that Claimant's need for a total right knee replacement was not related to underlying osteoarthritis but rather to the acute findings of a right knee sprain and suspected blood on Claimant's 2015 MRI. However, he acknowledged that the acute findings on the 2015 MRI could have resolved on their own prior to the June 12, 2017 surgery. He specifically recognized that the surgery "was directed at the underlying disease." Nevertheless, Dr. Striplin explained that there were no alternatives to a total right knee replacement. However, based on Claimant's long history of right knee degenerative osteoarthritis, the recommendation for a total knee replacement by 2010, the surgical request to address the underlying osteoarthritis and the persuasive testimony of Dr. McBride, Claimant's need for a total right knee replacement is not causally related to the August 24, 2015 right knee sprain. Claimant's need for a total right knee replacement constituted the natural progression of a pre-existing condition. Accordingly, Claimant's August 24, 2015 work activities did not cause, aggravate or accelerate his need for a total right knee replacement. Claimant's request for Respondents to cover the cost of his June 12, 2017 total right knee replacement is thus denied and dismissed.

ORDER

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

1. Claimant suffered a compensable right knee injury on August 24, 2015 while working for Employer.

2. Claimant's request for Respondents to cover the cost of his June 12, 2017 total right knee replacement is denied and dismissed.

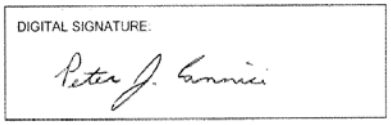
3. Claimant earned an AWW of $1,404.00.

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

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

by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 8, 2017.



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

STIPULATION

I. Prior to the commencement of hearing, the parties stipulated that Claimant was properly placed at maximum medical improvement (MMI) per the Division Independent Medical Examiner, Dr. Frank Polanco and the only issue on overcoming the Division Independent Medical Examination (DIME) involved the calculation of Claimant's permanent impairment.

REMAINING ISSUES

I. Whether Claimant established by clear and convincing evidence that Dr. Polanco, as the Division IME physician, erred in calculating Claimant's impairment rating.

II. Whether Claimant proved, by a preponderance of the evidence, that his average weekly wage (AWW) should be increased to $1,415.61 or some other figure.

FINDINGS OF FACT

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

1. Claimant is a 54-year-old freight truck driver for UPS who suffered a work-related injury to his cervical and lumbar spine on February 18, 2016, arising out of a motor vehicle accident. Respondents' Hearing Exhibits ("RHE") D at 29. The accident occurred in Wyoming. Hearing Transcript ("Tr.") at 12. Claimant was "off duty" in the sleeper of his cab while another UPS driver, who was on duty driving the truck, swerved off of the road to avoid a vehicle which had veered into oncoming traffic. Tr. at 12-13. Claimant's vehicle was struck by the oncoming vehicle and he was thrown about the sleeper cab. Tr. at 13-14. Claimant did not treat immediately because he was in Wyoming but was transported back to Colorado for treatment, which he received the following day. Tr. at 14.

2. Claimant began treatment through Concentra Medical Centers and first saw Dr. Randall Jones on February 19, 2016. Claimant's Hearing Exhibits ("CHE") 4 at 23. Claimant presented with pain in his low back, neck and [left] shoulder. *Id*. It was noted that Claimant had a history of moderate scoliosis all of his life and saw a chiropractor twice per month for this condition. *Id*. Claimant complained of moderate neck and low back pain and stiffness without radiation. *Id*. Dr. Jones reviewed x-rays performed of the left shoulder, lumbar spine, and cervical spine. CHE 4 at 25; CHE 4 at 29-32. It is noted that the x-ray of the lumbar spine showed moderate degenerative joint disease

("DJD") with no acute fracture. CHE 4 at 25. Dr. Jones diagnosed Claimant with a cervical strain and lumbosacral strain and referred him to Dr. Kenneth Ginsburg for medication prescriptions. *Id*.

3. Claimant had a brief course of physical therapy, from February 19 through February 26, 2016. CHE 5.

4. Claimant returned to see Dr. Jones no March 4, 2016, after having been examined by Dr. Ginsburg (for pain management). CHE 4 at 40. It was noted that, per Dr. Ginsburg, the radiology reports showed severe scoliosis and DJD of the spine. *Id*. It is noted on this visit that Claimant had complaints of severe low back pain with activity and pain radiating down the right leg. *Id*. Dr. Jones included acute lumbar radiculopathy as part of the ongoing diagnoses. CHE 4 at 42.

5. It is noted during a follow-up appointment with Dr. Ginsburg on March 18, 2016 that Claimant's neck and upper back symptoms had completely resolved with physical therapy but that he still had low back pain radiating down the left leg to the knee with strenuous activities. CHE 4 at 46. Dr. Ginsburg measured full range of motion in the lumbar spine on this visit. CHE 4 at 49.

6. On April 1, 2016, Dr. Jones noted that Claimant only had low back pain after prolonged strenuous activity and was close to his baseline chronic low back pain state. CHE 4 at 50. It is indicated that Claimant's attorney wanted him to do chiropractic treatments and requested a referral. *Id*. However, Dr. Jones advised that he was not comfortable with this, given the findings on the x-ray studies, including scoliosis and spondylolisthesis. *Id*. Consequently, Dr. Jones referred Claimant for examination by a physiatrist. Id. Claimant indicated that he felt he could return to full duty, as his job did not require much heavy lifting. *Id*. Dr. Jones gave work restrictions of 50 pounds lifting. CHE 4 at 53.

7. Claimant saw Dr. Shimon Blau for physiatry evaluation on April 11, 2016. CHE 4 at 55. Dr. Blau noted that the x-rays showed severe reversed curvature of the thoracolumbar spine. *Id*. Claimant complained of pain radiating into the medial and sometimes posterior aspect of his left lower extremity down to the knee. *Id*. Dr. Blau ordered an MRI study of the lumbar spine. CHE 4 at 57. Physical examination revealed "good range of motion" and 5/5 muscle strength in the extremities. Additionally, straight leg raise (SLR) testing, neural tension testing and bowstring testing were all negative. Specific neurologic testing revealed no atrophy, normal tone and intact sensation in the lower extremities bilaterally. Dr. Blau recommended a lumbar MRI and follow-up. CHE 4 at 56-57.

8. The recommended lumbar MRI was performed on April 21, 2016. CHE 6 at 118. The MRI revealed:

> [An] S-shaped thoracolumbar scoliotic curvature and diffuse lumbar degenerative disc disease and facet joint osteoarthritis. These changes

include small cranial left lateral recess to foraminal disc extrusion at L2-L3. There is moderate central canal and left lateral recess stenosis at L3-L4 with contact of the descending left L4 nerve root. There is mild to moderate left lateral recess stenosis at L2-L3 with contact of the descending left L3 nerve roots. There is also mild central canal stenosis at L1-L2 and L2-L3. There is diffuse neural foraminal stenosis which is moderate to severe on the left at L2-L2 and L3-L4 and moderate on the right at L3-L4 and L4-L5. There is contact of the respective exiting nerve roots at these levels. . .

Id.

9. Dr. Blau reviewed the findings on April 25, 2016 and recommended left L2 and L3 spinal nerve root blocks. CHE 4 at 62.

10. Dr. Jones noted in a follow-up visit on April 29, 2016 that Claimant reported feeling 95% better and capable of driving a truck and chaining up. CHE 4 at 66. Dr. Jones released Claimant to full duty and anticipated MMI on July 1, 2016. CHE 4 at 68.

11. On June 6, 2016, Dr. Ginsburg referred Claimant to Dr. Albert Hattem, for delayed recovery evaluation. CHE 4 at 74. Prior to his appointment with Dr. Hattem, Dr. Blau performed the nerve root blocks at L2 and L3 on June 14, 2016. CHE 7 at 125. Claimant then saw Dr. Hattem on June 24, 2016. CHE 4 at 77. During this appointment, it was noted that the June 14 injections had reduced Claimant's pain by 60%. Id. Claimant indicated that he had been working on full, unrestricted duty. CHE 4 at 78. Dr. Hattem noted that Claimant had a preexisting history of chronic low back pain and that the lumbar MRI demonstrated diffuse spondylosis. *Id*. Dr. Hattem opined that it was not clear if the current condition was any different than it was prior to the work injury and indicated that the problem was approaching MMI. *Id*. Dr. Hattem opined that, if Dr. Blau had nothing further, he would discharge Claimant. *Id*.

12. Dr. Blau recommended repeat injections at L2 and L3 during a June 27, 2016 follow-up visit. CHE 4 at 85. On August 1, 2016, Claimant still estimated 60% improvement from his injections. Consequently, Blau referred Claimant for evaluation with Dr. Michael Rauzzino. CHE 4 at 89.

13. Claimant saw Dr. Rauzzino on August 16, 2016. CHE 8 at 143. Dr. Rauzzino indicated that, since the injections were helping, it was recommended that he proceed with another set of injections with Dr. Blau. CHE 8 at 144. Dr. Rauzzino noted that he covered all conservative and surgical options with Claimant and that he did not recommend a fusion surgery, but that Claimant may benefit from a small decompression procedure. *Id*. However, Dr. Rauzzino indicated that he would hold off on that and would need a CT scan prior to any type of surgery. *Id*. Dr. Rauzzino indicated that, once the injections were complete, Claimant could follow-up on an as-needed basis. *Id*.

14. Claimant underwent additional nerve root blocks at L2 and L3 with Dr. Blau on

September 20, 2016. CHE 4 at 94. Claimant saw Dr. Blau on September 26, 2016 and reported 65% to 70% improvement. *Id*.

15. Dr. Nicholas Kurz at Concentra placed Claimant at MMI on October 3, 2016. RHE D at 28. Claimant denied any loss of range of motion, strength, or sensation at the time of this visit. *Id*. Claimant reported only intermittent discomfort with overuse. *Id*. It was indicated that Claimant had long since returned to work on full duty. *Id*. Dr. Kurz documented that the results of Claimant's physical examination revealed no tenderness of the lumbar spine and that Claimant had full range of motion. RHE D at 30. Dr. Kurz indicated that there were no new or acute findings and that there were chronic degenerative changes that were non-work-related with progressive degenerative scoliosis that should be addressed through private insurance with chiropractic treatment. *Id*. Dr. Kurz indicated that Claimant reached his pre-exacerbation baseline and released Claimant from care with no permanent restrictions or impairment. *Id*.

16. Dr. Eric Ridings performed an independent medical examination (IME) for Respondents on October 25, 2016. CHE 9. Of note, Dr. Ridings indicated in his report that he had discussed the apparent visit with Dr. Rauzzino with Claimant and that Claimant indicated that he had not actually seen Dr. Rauzzino. CHE 9 at 150. Rather, Claimant indicated that he had seen the "physician extender," Stephen Ladd. *Id*. Dr. Ridings opined that Claimant had sustained an aggravation of degenerative disc disease at L2-3 and L3-4 as a result of the accident with resultant radiculitis or radiculopathy at the L2 and L3 nerve roots. CHE 9 at 151. Physical examination revealed "4+/5 strength in left hip flexion but otherwise intact in the bilateral lower extremities." Sensation was noted to be intact with the exception of pin-prick sensation which Dr. Ridings noted was "decreased" in the left L3 dermatone only. SLR testing was negative and there were no Babinski signs present. Dr. Ridings attributed Claimant's mild hip flexor weakness and decreased L3 dermatone sensation to an L3 radiculopathy. Dr. Ridings concluded that Claimant was not at MMI noting that there was a good chance that the "proposed surgery" would alleviate Claimant's thigh condition and bring him to baseline, possibly impacting permanent impairment. CHE 9 at 152.

17. Dr. Ridings assigned an advisory impairment rating of 22% whole person. *Id*. At 253. Dr. Ridings broke down the 22% whole person impairment as follows:

- Under Table 53, Dr. Ridings assigned an 8% under Table 53 II (c) and (f) for specific disorders secondary to an aggravation of Claimant's degenerative disc disease at L2-L3 and L3-L4.

- 13% for range of motion impairment.

- 6% for lower extremity neurologic impairment based off Table 11 and Table 46 for sensory impairment of the L3 nerve root. This impairment is broken down as 2% sensory and 4% motor loss.

18. The above referenced impairments combine to yield an overall 22% whole person impairment rating. *Id*. at 152.

19. Respondents filed a Final Admission of Liability (FAL) in accordance with Dr. Kurz's MMI report on November 2, 2016. RHE A at 1. Respondents denied maintenance care on the basis of the report.

20. Claimant objected to the FAL and sought a DIME. Dr. Frank Polanco was selected as the DIME physician and performed the requested DIME on February 9, 2017. RHE C at 20. Dr. Polanco issued his report on March 1, 2017. *Id*.

21. Dr. Polanco found that Claimant had reached MMI on October 3, 2016. He assigned Claimant 13% whole person impairment rating. *Id*. Dr. Polanco noted that Claimant had preexisting scoliosis for which he attended monthly chiropractic visits. RHE C at 22. Dr. Polanco noted that Claimant's complaints at the time of the DIME included back pain and radiating pain into the knee with more than 20 minutes of activity and "pins and needles sensation with aching that does not interfere with activities." *Id*. Claimant was noted to be working full duty. *Id*. Dr. Polanco performed a physical examination and range of motion measurements. Examination of the thoracolumbar spine revealed limited lumbar flexion and extension; however, directed examination of the lower extremities demonstrated "normal range of motion in the hips, knees, and ankles. Moreover, Dr. Polanco documented symmetrical muscle mass, 5/5 strength, intact sensation and a negative SLR in the lower extremities. RHE C at 23. Dr. Polanco reviewed all pertinent records, including the Concentra records, the MMI report of Dr. Kurz, and the IME report prepared by Dr. Ridings. Dr. Polanco listed the diagnoses as lumbar strain, aggravation of preexisting multilevel degenerative disc disease, and lumbar impairment. RHE C at 24. Dr. Polanco opined that Claimant did not need further active medical care or maintenance care and could continue on full-duty. *Id*. Finally, Dr. Polanco performed an impairment rating *Id.* Dr. Polanco assigned Claimant a Table 53 diagnosis and impairment for degenerative disc disease aggravation of 7% whole person. RHE C at 25. Dr. Polanco gave an additional 6% whole person impairment for measured range of motion loss of the lumbar spine. *Id*. As noted above, when the specific disorders rating was combined with the impairment for range of motion loss, Claimant was assigned 13% whole person impairment. Dr. Polanco also assessed neurological impairment and gave Claimant 0%. *Id*. Dr. Polanco completed and supplied impairment rating worksheets with the correct measurements and calculations corresponding to his given impairment rating(s).

22. Respondents filed an FAL on April 28, 2017, admitting for 13% whole person impairment consistent with Dr. Polanco's DIME opinion. RHE at 3

23. In the April 28, 2017 FAL, Respondents admitted for an AWW of $1,286.43. This corresponds to a weekly temporary total disability benefit rate of $857.62. Claimant admitted AWW was based upon the calculated AWW from April 19, 2015 through February 13, 2016, according to a Schedule of Weekly Earnings Employer provided to Insurer. RHE B at 19. This weekly earning schedule did not include wages dating one

year (52 weeks) prior to the date of injury, but rather 43 weeks prior to the last pay period before the injury, because Claimant's wage records reflect that he was not working for several weeks prior to April 19, 2015.

24. Claimant underwent an IME with Dr. Timothy Hall on August 10, 2017. CHE 11. Dr. Hall also reviewed the pertinent records from Concentra, Dr. Kurz's MMI report, Dr. Ridings' IME opinion, and Dr. Polanco's DIME report. Dr. Hall made a notable error in listing Dr. Polanco's measured range of motion as being 8% of the whole person, as opposed to 6%. CHE 11 at 166. Dr. Hall agreed that Claimant was at MMI and opined that, though he should have upkeep for equipment for a TENS unit, he recommended no treatment going forward. *Id*. Dr. Hall did not supply impairment worksheets or calculations of impairment. Dr. Hall likewise did not give an advisory impairment rating. Instead, Dr. Hall simply stated that he agreed with Dr. Ridings' range of motion measurements over those of Dr. Polanco's, without supplying his own calculations and measurements. CHE 11 at 167. Dr. Hall indicated further that he believed the 8% for specific disorders given by Dr. Ridings was more appropriate that the 7% given by Dr. Polanco, apparently due to an additional level but with no further explanation. *Id*. Dr. Hall also indicated that Dr. Polanco erred in not giving Claimant a neurological impairment, without further explanation. *Id*.

25. Claimant testified at hearing that he believed his symptoms were slightly worse at the time of testimony than at the time of MMI. Tr. at 16. Claimant acknowledged at hearing that he had preexisting scoliosis and regular "maintenance" chiropractic care but that he had some different symptoms after the February 18, 2016 work injury. Tr. at 16; Tr. at 20-22. According to Claimant, his condition had improved by the time he was placed at MMI; nonetheless, he testified that he continues to have increased back, hip and leg pain with activity greater than 10-15 minutes in duration.

26. Claimant testified that he was not paid hourly or by salary, but rather by mileage. Tr. at 17. Claimant testified that he made 26 cents ($0.26) per mile. *Id*. Claimant testified that he received an increase in his mileage rate to 26 cents before the accident, in approximately mid-2015. Tr. at 18. Claimant testified that this rate has not changed since that time. Tr. at 22. Claimant testified that he had driven the same route since July 2012. Tr. at 17-18. Claimant testified that his mileage pay varies, despite driving the same route. Tr. at 17; Tr. at 22-23. Claimant testified that he takes vacations every year and sometimes takes holidays off, as well. Tr. at 22-23. Claimant testified that he does not work consistently throughout the year without taking time off. Tr. at 23. Based upon the evidence presented, the ALJ finds Claimant's AWW to equal $1,400.58.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to Assure

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

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

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

Overcoming the DIME Opinion of Dr. Polanco Regarding Permanent Impairment

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

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert, supra*; *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The determination of impairment under the AMA Guides inherently requires the rating physician, when diagnosing the claimant's condition, to evaluate and identify all losses caused by the industrial injury.

F. The AMA Guides, Section 1.2 provides as follows: "The key to an effective and reliable evaluation of impairment is review of the office and hospital records maintained by the physicians who have provided care since the onset of the medical condition." Section 2.1 further states that, "When a medically sufficient evaluation is carried out, the current clinical status of the individual will be documented accurately."

G. The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). In the present matter, Dr. Frank Polanco reviewed the claimant's medical treatment records, obtained his own personal history from the claimant, and performed his own physical examination, which included range of motion testing. Dr. Polanco very specifically documented in his DIME report that examination of the thoracolumbar spine and lower extremities was performed. While he did not separately indicate that a neurological examination was conducted, the DIME report indicates that soft tissue palpation reflected normal muscle tone and 5/5 lower extremity strength. Moreover, the sensation of Claimant's legs was found to be intact and SLR testing was found to be negative. These findings comport with the findings of examination of Claimant's treating physicians, including Dr. Blau who performed specific neurologic testing which revealed 5/5 muscle strength, no atrophy, normal tone and intact sensation in the lower extremities bilaterally. While Dr. Polanco's DIME report does not contain a separate section entitled "Neurologic Examination", the evidence presented persuades the ALJ that a neurologic evaluation was completed as part of the Division IME and the results of that evaluation documented in the DIME report under the sections entitled "Thoracolumbar Spine" and "Lower Extremity" examination. Based upon that evaluation, Dr. Polanco acknowledged that possible neurological symptoms could exist but specifically concluded that there is no ratable permanent impairment for such complaints.

H. While this is in opposition to Dr. Ridings, the evidence presented fails to persuade the undersigned ALJ that Claimant is actually suffering from a radiculopathy. Indeed, careful review of the medical evidence suggests that the assessment that Claimant has a radiculopathy is based solely upon his subjective reports of leg pain. The record evidence is devoid of any diagnostic testing revealing objective evidence that Claimant suffers from a neurologically impairing condition, i.e. a radiculopathy. To the contrary, the results of multiple physical examinations from Claimant's treating physicians in addition to Dr. Polanco's examination reveal Claimant to have normal lower extremity muscle tone, strength and sensation. Dr. Ridings' contrary assessment

regarding Claimant's strength and sensation is the notable outlying opinion in this regard. After considering the totality of the evidence presented, the ALJ concludes that Claimant has failed to establish that Dr. Polanco's decision to not provide impairment for L3 sensory and motor nerve symptoms was highly probably incorrect. The fact that Dr. Hall disagrees with Dr. Polanco, based upon his interpretation of the medical records, including the IME report of Dr. Ridings does not rise to the level of clear and convincing evidence to overcome Dr. Polanco. For similar reasons, the fact that Dr. Polanco obtained different range of motion values than did Dr. Ridings does not rise to the level of clear and convincing evidence to prove that Dr. Polanco's range of motion readings are highly probably incorrect. Finally, the ALJ is not convinced that Dr. Polanco erred by not including additional impairment for multiple levels intervertebral disc or other soft tissue lesions as provided for under Table 53(II)(F). In this case, the MRI imaging reflects that Claimant suffers from a scoliotic curvature and diffuse degenerative change and facet joint osteoarthritis in the lumbar spine. Even so, the only level of identified intervertebral disc extrusion rests at L2-L3 which was effectively treated through injections provided by Dr. Blau. Consequently, the ALJ concludes that this level was the probable pain generator for Claimant and it was appropriate for Dr. Polanco to rate him for this one level rather than include the L3-L4 level where MRI imaging reflected diffuse central and lateral recess stenosis, without reference to intervertebral disc or other soft tissue involvement.

I. Based upon the evidence presented, the ALJ finds that the opinions expressed by Dr. Polanco in his DIME report are generally supported by the content of the medical records presented to him for review. Moreover, the ALJ finds a paucity of evidence to suggest that Dr. Polanco erred in the methodology he employed to complete the DIME in this case. Rather, the ALJ finds that Dr. Polanco performed a physical examination, the findings of which are consistent with the findings of other providers who also failed to discern evidence of decreased strength and sensation on the left leg to support a finding that claimant is entitled to an impairment rating for sensory and/or motor nerve involvement. Despite Dr. Ridings' and Hall's opinions to the contrary, the evidence presented persuades the ALJ that Dr. Polanco performed proper range of motion measurements. To the extent that Drs. Ridings' and Hall's opinions concerning impairment vary from those expressed by Dr. Polanco, the ALJ concludes that those divergences constitute a professional difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Claimant has failed to prove that Dr. Polanco's opinion regarding permanent impairment is highly probably incorrect.

Claimant's Average Weekly Wage

J. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).* The ALJ concludes that Claimant's wage records constitute the best evidence concerning his earnings around

the time he was injured. The wage records support that Claimant's earnings varied during his employment. Claimant explained that when he is off work due to sick time or vacation he gets paid at a flat rate much less than when he is working. Respondents calculated Claimant's AWW based on 43 weeks of wages prior to the motor vehicle accident. The ALJ agrees with Claimant that Respondents admitted AWW of $1,286.43 is not a fair representation of his average earnings because it accounts for periods of time that Claimant was out for sick time or vacation. The ALJ concludes that Claimant's average weekly wage (AWW) is best calculated using a 24 week average of earnings given the fluctuating nature of his pay because it minimizes those weeks where Claimant was not actually working due to being sick or out on vacation. Over the said 24 week time frame, Claimant earned anywhere from $643.76 to $1,838.34 for any given one week period. As found above, Claimant's AWW is $1,400.58; arrived at by taking the full amount of wages earned over the 24 week time frame extending from 8/30/2015 to 2/13/2016 (33,613.96 ÷ 24 = $1,400.58)

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the Division IME opinion of Dr. Polanco regarding impairment is denied and dismissed.

2. Claimant's AWW is $1,400.58.

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

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

DATED: November 8, 2017

/s/ Richard M. Lamphere

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

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

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the surgery recommended by Dr. Wong is reasonable, necessary, and related to her January 5, 2017, industrial accident.

FINDINGS OF FACT

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

1. Respondent Employer hired Claimant as a cleaner on October 23, 2015. [Ex. A, p. 1]. At hearing, Claimant testified that her job duties required her to clean appliances.

2. Claimant suffered an admitted strain injury to her lower back while working for Employer on January 5, 2017. [Ex. A, p.1; Ex. 1, p. 1.] Claimant testified at hearing that her injury occurred while lifting three to five gallons of Windex.

3. Claimant initially treated with Dr. Michael Striplin, and continued working during the initial months of her treatment. [Ex. D, p. 1; Ex. 7, p. 20]. Claimant continued to work until she was terminated in June of 2017. [Ex. 8, p. 42].

4. Early in Claimant's treatment, she was referred to Dr. Franklin Shih, who at his initial appointment January 25, 2017, explained the anatomy and potential pathology issues of "multiple potential pain generators and the frequent difficulty in identifying a specific pain generator." [Ex. D p. 2; Ex. 7, p. 21].

5. Claimant underwent a lumbar MRI on March 2, 2017. The MRI study was reviewed by Dr. Brian Reiss who found mild thinning of the L1-2 disc, mild to moderate degenerative changes from L-2 to L-4 with no protrusion or compression. At L5-S1, the MRI showed some loss of height and moderate degenerative changes. The L5-S1 level also showed some bulging and osteophyte formation in the foramina. [Ex. C; Ex. 13, p. 79].

6. In order to identify the pain generator, Claimant underwent a course of injections at the L4-5 and L5-S1 levels with Dr. Nicholas Olson from April 2017, through June of 2017. The injections were non-diagnostic**.** [Ex. E; Ex. 10, p. 52].

7. Records reflect that Claimant underwent a limited course of physical therapy and was prescribed six pool therapy sessions. [Ex. C, p. 2-3; Ex. 13, p. 80-81]. Claimant testified at hearing that she did some limited physical therapy with some passive manipulation and ball work with a physical therapist.

8. On June 7, 2017, Claimant attended an appointment with Dr. Douglas Wong, an orthopedic surgeon. After reviewing Claimant's MRI findings, Dr. Wong equivocally stated, "If surgery is considered, it would be a (sic) Anterior spinal fusion L5-S1. I feel this can help but not cure her back pain, not sure how much it can help her chronic L5 radiculopathy." Dr. Wong also indicated, "I can not explain her L5 radiculopathy." [Ex. H, p. 1; Ex. 11, p 55].

9. The day after Claimant saw Dr. Wong, she attended an appointment with Dr. Olsen. In his report of June 8, 2017, Dr. Olsen provided the following statement:

> Given reports of an anterior approach, it likely appears that she has been offered consideration for a lumbar interbody fusion. I discussed rates of a lumbar interbody fusion in a Workers' Compensation setting. Specifically, I reviewed Nguyen's study referenced in the medical treatment guidelines. I explained to her that in this study, 75% of the patients were unable to return to work and 25% were able to return to some kind of occupational duty. Forty percent of the patients required more opioids after the surgical procedure than they took before. An additional 25% of these patients required a second surgery within a year of the initial procedure.
>
> **Overall, I stated that the chances of success with the procedure are poor**, **particularly if she wants to return to work.** I advised her that she consider her choice carefully. I have recommended that she continue her core strengthening and respects correct lifting mechanics.

[Ex. E, p. 5; Ex. 10, p. 52, *emphasis added*].

10. Dr. Olsen's opinion that the chance of the surgery improving Claimant's condition is poor is found to be credible and persuasive.

11. In advance of the hearing, Claimant attended an IME with Dr. Brian Reiss on July 26, 2017. In conjunction with performing a physical examination of the Claimant, Dr. Reiss conducted a thorough review of Claimant's available medical records and diagnostic imaging. [Ex. C; Ex. 13].

12. Dr. Reiss concluded his examination and records review finding that Claimant's MRI exhibits degenerative changes throughout the spine and determining that "it would be quite speculative to suggest that the L5-S1 disc is her pain generator." [Ex. C, p. 2; Ex. 13, p. 80].

13. Therefore, Dr. Reiss concluded "A fusion at L5-S1 would not meet the Workers Compensation guidelines as the pain generator is not clearly identified." Dr. Reiss further agreed with Dr. Olsen's conclusion that the chances of a successful fusion were poor in finding that, "a localized fusion of that sort . . . is unlikely to

resolve her pain, and for that matter even lessen her pain in my opinion." [Ex. C. p. 2, Ex. 13, p. 80].

14. Dr. Reiss ultimately stated in summary of his conclusions:

> The likely injury was a simple lumbar strain with pain and now she has significant deconditioning. With multiple levels of degenerative change in her lumbar spine a single level fusion is unlikely to be successful at decreasing her pain and increasing function and may actually worsen her pain, decrease her function and preclude her from returning to work.

[Ex. C, p. 4; Ex. 13, p. 82].

15. In lieu of surgery, similar to the recommendations of Dr. Olsen, Dr. Reiss recommended an active exercise program emphasizing core strengthening, aerobic conditioning and some stretching. [Ex. C, p. 4; Ex. 13, p. 82].

16. Ms. Ortiz went on to describe her treatment through the date of hearing including acupuncture, injections, pool therapy and some physical therapy.

17. Ms. Ortiz stated that she was in pain and wanted to go forward with surgery.

18. When asked to describe the extent of her physical therapy, Ms. Ortiz provided a vague description of primarily passive treatment modalities, and did not state that she performed active core strengthening and aerobic conditioning.

19. Claimant did not present testimony of a medical provider.

20. In support of their challenge to the surgery recommendation, Respondents put forth the testimony of Dr. Brian Reiss as an expert in orthopedics and spinal surgery.

21. Dr. Reiss' testimony closely followed his findings noted in his report and provided further clarity as to the basis of his conclusions.

22. Dr. Reiss testified that it was undisputed that Claimant suffered an injury to her back and that she was in pain.

23. Dr. Reiss stated that because a specific pain generator was not identified, the recommendation for surgery at the L5-S1 level was not in accordance with the Colorado Workers Compensation Medical Treatment Guidelines. He noted that without such identification, the recommendation was not reasonable and necessary to cure or relieve the effects of Claimant's injury.

24. Additionally, Dr. Reiss noted that in light on the multiple levels of degenerative changes, the proposed surgery did not meet the treatment guidelines as it was not reasonably calculated to relieve pain and improve function.

25. Dr. Reiss echoed the early statements of Dr. Shih in noting that identifying the pain generator in back pain was difficult. In this matter, he indicated that proceeding with surgery on mere speculation that the L5-S1 location was the pain generator was not in compliance with applicable guidelines and training.

26. Dr. Reiss also indicated that Claimant has degenerative changes at more than two levels. According to Dr. Reiss, Claimant has degenerative changes at L2 through S1. The most degeneration is at the L5-S1 level. However, Dr. Reiss also indicated that mere degeneration does not equate to pain. Therefore, merely attributing pain to the most degenerative level, and deciding to operate at that level, does not make sense because you do not know if the degeneration is causing any pain.

27. Dr. Reiss interpreted Dr. Wong's statement that the requested surgery "can help but not cure her back pain" as providing a 50-50 chance of providing some pain relief. Dr. Reiss did not agree that the chances were that high, and instead echoed the report of Dr. Olsen which stated that the chances of success for the surgery were poor.

28. As a Level II accredited physician, Dr. Reiss also noted that under the guides improved functionality must also be an expected outcome. In this case, Dr. Reiss testified and stated in his report that improved functionality was unlikely. Dr. Wong's report does not address functionality, and merely states a possible reduction in some pain.

29. In light of Claimant's multiple levels of degenerative changes, Dr. Reiss testified that there was a risk of cascading failures at spinal levels adjacent to the fusion.

30. However, Dr. Reiss did agree with Dr. Wong in noting that the requested surgery was unlikely to have any impact on Claimant's radicular symptoms causing pain and numbness in her right leg.

31. In discussing Claimant's prior physical therapy, Dr. Reiss noted that Claimant had previously undergone passive treatment modalities, which were less than the active exercise and core strengthening program he recommended.

32. In closing his testimony, Dr. Reiss stated that due to the Claimant's multiple levels of degenerative changes and the inability to specifically pinpoint a pain generator, Claimant is not a candidate for surgery.

33. The opinions of Dr. Reiss, as set forth in his report and testimony, are found to be credible and persuasive.

34. Claimant's has degenerative disc disease – spine pathology - in her lumbar spine from L2 through S1, which is more than 2 levels.

35. The mere degeneration of a lumbar disc does not equate to pain.

36. The medical providers have not identified the pain generator which is causing Claimant's low back pain and symptoms into her right leg.

37. The surgery recommended by Dr. Wong is not likely to decrease Claimant's pain or increase her functioning.

38. The surgery recommended by Dr. Wong is not reasonable and necessary.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles

concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence that the surgery recommended by Dr. Wong is reasonable, necessary, and related to her January 5, 2017 industrial accident.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines ("MTG") because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

W.C.R.P. Rule 17, Exhibit 1, of the MTG, sets forth the treatment guidelines for low back conditions. Rule 17 sets forth care that is generally considered reasonable for most injured workers. Further, while an ALJ is not required to utilize Rule 17 as the sole basis for making determinations as to whether medical treatment is reasonable, necessary and related to an industrial injury, it is appropriate for the ALJ to consider Rule 17 in making such determinations. § 8-43-201(3), C.R.S.

The ALJ credits the testimony and report of Dr. Reiss which indicates that the requested surgery would not meet the requisite criteria of the MTG as the Claimant's specific pain generator cannot be identified. The difficulty in identifying a pain generator was discussed early in Claimant's treatment by Dr. Shih. W.C.R.P. Rule 17, Exhibit 1, Section G (4)(e), sets forth a number of requirements that must be met before a spinal fusion is deemed to be reasonable and necessary. One of the requirements is that all

pain generators must have been adequately defined and treated. As Claimant's pain generator cannot be specifically identified as coming from the L5-S1 level, surgery at the L5-S1 level is not reasonable and necessary. See W.C.R.P. Rule 17, Exhibit 1, Section G (4)(e)(i).

In addition, W.C.R.P. Rule 17, Exhibit 1, Section G (4)(e)(iv) indicates that in order for a spinal fusion to be reasonable and necessary, the spinal pathology must be limited to two levels. In this case, Claimant's spinal pathology, which exists at L2 through S1, exceeds two levels. Therefore, pursuant to W.C.R.P. Rule 17, Exhibit 1, Section G (4)(e)(iv), the spinal fusion is not reasonable and necessary.

Moreover, W.C.R.P. Rule 17, Exhibit 1, Section G, indicates that in order to justify operative interventions, there must be a reasonable likelihood of at least a measurable and meaningful functional and symptomatic improvement. Dr. Reiss and Dr. Olsen have provided credible evidence and opinion testimony that there is not a reasonable likelihood that the proposed surgery will provide measurable, meaningful, functional, and symptomatic improvement. Quite to the contrary, Dr. Reiss and Dr. Olsen have provided credible evidence and opinion testimony that the surgery is more likely to reduce functionality and could reasonably result in increased pain.

In addition, the ALJ concludes that Dr. Wong's recommendation for surgery is equivocal in stating that the surgery "can help but not cure her back pain." This equivocal statement, in conjunction with the report of Dr. Nicholas Olsen noting that the recommended surgery has a 75% chance of resulting in diminished functionality does not meet the requirement of the Medical Treatment Guidelines that the proposed treatment must provide a reasonable likelihood of measurable and meaningful functional and symptomatic improvement.

Although the ALJ has found the MTG to be persuasive, the ALJ has not relied solely upon the MTG. The ALJ concludes that based upon a totality of the evidence, Claimant has failed to establish by a preponderance of the evidence that an anterior lumbar fusion surgery at L5-S1 is reasonable and necessary to cure or relieve the effects of Claimant's admitted lower back injury. The ALJ concludes that the surgery is not reasonably expected to provide pain relief or improve Claimant's functionality. As such the ALJ determines and finds that Claimant has not met her burden of proof in establishing the reasonableness and necessity of the L5-S1 anterior lumbar fusion surgery.

ORDER

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

1. Claimant's claim for medical benefits in the form of an anterior lumbar fusion surgery at L5-S1 is denied and dismissed.

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

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

DATED: November 8, 2017

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

ISSUES

I. Whether Claimant has overcome the Division Independent Medical Examination (DIME) opinion of Dr. John Sacha on causation, maximum medical improvement (MMI) and permanent impairment by clear and convincing evidence.

II. Whether Claimant sustained a serious and permanent disfigurement as a result of his March 9, 2016 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a warehouse employee. Claimant sustained a compensable industrial injury on March 9, 2016 when he tripped over a tote while carrying a metal table base and fell.

2. Claimant reported the injury to Employer on March 11, 2016 and completed an Employee's Report of Work Related Injury. Claimant reported that he tripped and fell, hitting his chest and knee on the concrete. Claimant wrote that he sustained injuries to his right hand, left knee and low back. Employer's First Report of Injury, dated March 15, 2016, notes that Claimant reported injuries to his right rib, left knee, lower back, and third and fourth right fingers.

3. Claimant presented to Amanda Cava, M.D. at Concentra Health Services (Concentra) on March 11, 2016. Claimant reported that he fell, landing on his right hand and left knee. Claimant complained of lower back pain, left knee pain and right thumb/wrist pain. Dr. Cava noted normal musculoskeletal, spine, neurologic and psychiatric findings. X-rays of Claimant's right hand demonstrated no fractures. Dr. Cava diagnosed Claimant with a lumbar strain, wrist strain and knee contusion. She released Claimant to modified duty and recommended medication and occupational therapy.

4. Claimant continued to treat at Concentra with complaints of pain in his low back, abdomen, knees, and right thumb/wrist, as well as numbness in his left leg. On March 21, 2016, all other systems were reviewed and found to be negative. Claimant was released to regular duty.

5. On March 25, 2016, Claimant reported to Dr. Cava complaints of pain in his back and left side/ribs. X-rays of Claimant's chest revealed no acute fracture, infiltrates, or pneumothorax.

6. On March 29, 2016, Claimant was admitted to the emergency department at the University of Colorado Hospital complaining of pain in his low back, groin, and ribcage.

Claimant was diagnosed with left-sided low back pain and left-sided sciatica and was referred for physical therapy.

7. Claimant underwent a lumbar spine MRI on April 8, 2016 which revealed the following: (1) disc degeneration at L3-L4, L4-L5 and L5-S1, (2) L3-L4 mild bilateral lateral recess and foraminal stenosis without nerve root deformity, and (3) L5-S1 mild bilateral lateral recess and moderate to severe bilateral foraminal stenosis with compression of bilateral exiting L5 nerve roots.

8. Dr. Cava reevaluated Claimant on April 12, 2016 and assessed a lumbar strain, bilateral lumbar radiculopathy, muscle spasm of the back, and weakness of both lower extremities. She reviewed the lumbar MRI with Claimant and referred Claimant to Michael Rauzzino, M.D., an orthopedic spine specialist.

9. Claimant presented to Dr. Rauzzino on May 3, 2016. Claimant reported falling on his right hand and left knee. Claimant complained of pain in his back, sides and abdomen, numbness and tingling in his lower extremities, tingling in his neck, right shoulder and hand, neck stiffness, and trouble breathing. Dr. Rauzzino noted no acute sensory deficits on physical examination. He remarked,

> [Claimant] has very diffuse complaints of abdominal pain, headache, arm and hand numbness, low back pain, and leg numbness. It is difficult to put this together anatomically. This lumbar MRI spine does not account for symptoms. I do not see an acute structural change from his low back pain standpoint, therefore, I think he may have had a muscle strain and would benefit from physical therapy.

Dr. Rauzzino recommended Claimant undergo an MRI of his cervical and thoracic spine and consider a referral for psychiatric evaluation due to the possibility of delayed recovery resulting from psychological issues. He did not recommend any surgery for Claimant's low back injury.

10. On May 10, 2016, Claimant reported to Dr. Cava experiencing difficulty with is speech over the last two weeks. She remarked that Claimant's subjective complaints were greater than the objective exam findings. Dr. Cava diagnosed Claimant with bilateral lumbar radiculopathy, spondylolisthesis at L5-S1, thoracic strain, anxiety reaction, and dysarthria. Dr. Cava recommended a head CT scan, which was negative for bleed, stroke, or other acute findings.

11. On May 31, 2016 Claimant sought treatment at the emergency department of Providence Health Center with complaints of pain in his abdomen, back and leg, as well as a difference in his voice and a pulling sensation on the right side of his face. Jason Smith, D.O. noted, "He also states that he had a seizure-like episode yesterday in which he was shaking. Since then his voice has been dramatically changed, he has had tingling of both legs, and has had jaw pain." A CT scan of Claimant's head demonstrated no hemorrhage, mass or acute infarct. A CT scan of Claimant's

abdomen/pelvis revealed questionable enlargement of the prostate gland and a pars defect at L5 with grade 1 anterolisthesis. Dr. Smith noted,

> [Claimant had] a very odd presentation, complains of slight shaking yesterday evening that was then associated with difficulty speaking but it is more accent development than true difficulty speaking seems to speak in a Haitian accent at this time he has no trouble making words he has no hoarseness of his voice just a change in the Tono-Pen in flexion…

12. Dr. Smith further noted that the left side of Claimant's soft palate was not elevating symmetrically and stated, "this may represent a cranial nerve deficit secondary to occult stroke, patient's seizure history also seems to be consistent with simple partial seizure last night this is way too long for the patient to be postictal or Todd's paralysis." Dr. Smith assessed a neuro deficit possible stroke, with simple partial seizure and pars defect lower back as other diagnoses/complicating factors. Dr. Smith noted that he also discussed "the pars intra-reticularis fracture with the patient." There is nothing in the records admitted into evidence that Dr. Smith included an analysis opining that Claimant's symptoms were work-related.

13. Claimant underwent an MRI of his thoracic spine on June 9, 2016 which revealed minimal disc bulges with no evidence of stenosis. Claimant also underwent an MRI of the cervical spine which demonstrated mild degenerative changes and disc bulging at multiple levels, with no acute abnormalities and no evidence of neural impingement.

14. Claimant relocated from Colorado to Texas in approximately June 2016. Claimant's medical care was transferred to Concentra in Waco, Texas.

15. Claimant presented to Kathryn Wright, M.D. at Concentra on June 24, 2016. Claimant reported having gone to the emergency room on June 15, 2016 with abdominal pain, back pain, leg pain, "his voice sounding different and a pulling on R side of face. He also said he had a seizure-like episode on 6/14/16." Dr. Wright physically examined Claimant and assessed bilateral lumbar radiculopathy, lumbar strain, spondylolisthesis at L5-S1, muscle spasm of back, thoracic strain, cervical sprain, and diffuse abdominal pain. She remarked, "I spent close to an hour with this patient going over every work of all of his MRIs, x-rays and ER visits. He is under the impression that since he never had any health issues before except a fracture to his R hand, all of his pain sites and changes are related to this fall injury." Dr. Wright referred Claimant to a neurosurgeon.

16. Claimant presented to Stephanie Roth, M.D. at Concentra on July 20, 2016. Claimant advised Dr. Roth that he had done extensive reading and research on his condition and that he was concerned he has foreign language syndrome. Claimant attributed all of his problems to the work injury. Dr. Roth noted that Claimant demonstrated only 30 degrees of lumbar flexion on examination, but that on the exam table "he goes from supine to sitting up with legs out straight in full extension and able to quickly spin around 180 degrees to put legs at the other end of the table to exam is

(*sic*) L knee." Dr. Roth further noted a normal neurologic and psychiatric exam, with speech appropriate in content and delivery. Dr. Roth assessed lumbar strain, muscle spasm of back, spondylolisthesis at L5-S1, and thoracic strain. She referred Claimant to a neurologist, physiatrist, and psychologist.

17. Claimant was seen by a second neurosurgeon, James Cooper, M.D., on July 28, 2016. Dr. Cooper ordered x-rays of Claimant's lumbar spine, which demonstrated L5 pars defects with grade 1 anterolisthesis of L5 on S1 and no significant abnormal translational motion. Dr. Cooper documented a normal examination and normal x-rays with no evidence of instability. Dr. Cooper opined Claimant was not a surgical candidate.

18. Dr. Wright reevaluated Claimant on August 9, 2016. Dr. Wright remarked that she spent extensive time with Claimant regarding all of his complaints and did a thorough examination. She stated Claimant had no neurological deficits and she found no tenderness to palpation on his body from head to toe. Dr. Wright listed Claimant's complaints of pain, paresthesias, voice changes, sore throat, chest wall pain, abdominal pain, and decreased sensation of scalp. She confirmed that multiple imaging studies had been performed without identification of brain injury, abdominal pathology, or anything other than degenerative discs with mild stenosis.

19. On September 7, 2016, Claimant presented to Martin Solomon, M.D. Only page two of Dr. Solomon's five page provider note was offered into evidence by Claimant. Dr. Solomon stated,

> This patient reports a history of a work-related injury with resultant neck and low back pain. The patient does report pain in his low back moving down his lower extremities, which may be due to S1 radiculopathies, based on the results of the MRI scan. He also has intermittent speech with a foreign accent. This suggests a possible traumatic brain injury.

Dr. Solomon recommended Claimant be referred to pain management for further treatment of his low back pain. There is nothing in the records admitted into evidence that Dr. Solomon included an analysis opining that Claimant's symptoms were work-related.

20. Claimant was placed at MMI by Murray Duren, M.D. at Concentra on September 12, 2016. Claimant continued to complain of back, knee, wrist, abdominal pain and seizure or stroke. Dr. Duren documented, "After lengthy discussion by [Claimant] regarding his problems including his preexisting conditions and subsequent health issues not supported by the mechanism of injury nor initial presenting complaints, the recommended Physical Examination was refused by [Claimant]." Dr. Duren assessed a lumbar strain, left knee contusion and right wrist sprain and released Claimant to regular duty with no restrictions.

21. John Burris, M.D. at Concentra performed an impairment assessment on October 21, 2016. Dr. Burris remarked, "Clear psychosomatic overlay presented

throughout today's encounter. He is tearful at times when discussing his claim. He is a very poor historian with bizarre symptomatology described." Dr. Burris reviewed Claimant's medical records and performed a full physical examination. The diagnostic work up was negative and Claimant's pain diagram did not follow a neuro-anatomical pattern. Dr. Burris found Claimant's examination to be benign with no objective findings. He noted that no pain generator had been identified and Claimant was seen by two neurosurgeons who had not recommended any type of surgery. Dr. Burris agreed that Claimant was at MMI. He found no evidence of residual deficits and concluded that Claimant did not sustain any permanent impairment. Dr. Burris did not recommend any permanent work restrictions or maintenance care.

22. Respondents filed a Final Admission of Liability (FAL) based on the opinion of Dr. Burris. Claimant's counsel at the time filed a timely Objection to the Final Admission of Liability and requested a DIME.

23. John Sacha, M.D. performed the DIME on April 18, 2017. He noted that he was asked to review for Claimant's left-side, which he deemed not work-related, and for "any other areas deemed work related by the examiner." Dr. Sacha noted that he reviewed all of Claimant's medical records in detail. Dr. Sacha performed a physical examination, including cognitive, cutaneous, neurologic and musculoskeletal exams. Claimant complained of, among other things, low back pain with radiation to the left abdominal and groin area and lower extremities, neck pain, mid-back pain, numbness and tingling in in his arms and thumbs, seizures, anxiety and shakiness. On physical examination, Dr. Sacha noted marked pain behaviors and a normal gait pattern with free and easy movement onto and off of the exam table. Dr. Sacha further noted some paraspinal spasm and pain with range of motion, negative straight leg raise and neural tension tests bilaterally, full neck range of motion, and minimal crepitus with range of motion in knees bilaterally. He remarked that Claimant had a non-physiologic presentation.

24. Dr. Sacha determined that the majority of Claimant's complaints were not work-related, including personality disorder, cervical complaints, shoulder complaints, brain and shakiness complaints, and knee complaints. He opined that Claimant's low back injury was work-related and ratable. He further stated, "I do feel that he also qualifies for a small impairment form a psychiatric dysfunction because of his poor coping skills and poor people skills."

25. Dr. Sacha agreed Claimant reached MMI as of October 21, 2016. He assigned a total combined 8% whole person impairment under the AMA Guides, consisting of a 7% whole person lumbar impairment (5% under Table 53 and 2% for range of motion deficits), and a 1% whole person impairment for psychiatric dysfunction. Dr. Sacha agreed Claimant could work full duty without any restrictions. As maintenance care, Dr. Sacha recommended six visits to a pool therapist and six-months of a psychiatric medication regimen.

26. Claimant underwent a psychosocial evaluation with a Dr. Frensley on March 21, 2017. Claimant only submitted page two of five of the clinical interview as an exhibit. Claimant alleged to Dr. Frensley that he hit his head on the ground during the fall at

work in March 2016, but did not know if he lost consciousness. Claimant reported that his speech changed in April 2016, which he described as "It felt like a strain coming from my stomach to my throat. It felt like an octopus grabbing my stomach." Dr. Frensley remarked that Claimant's "speech is decidedly a Jamaican accent and seems consistent with Foreign Accent Syndrome," which he noted is most often caused by damage to the brain or a stroke.

27. Respondents filed a FAL on May 26, 2017 admitting to the impairment rating provided by Dr. Sacha. One of Claimant's prior attorneys filed an Objection to the Final Admission of Liability and an Application for Hearing. A Prehearing Conference Order was entered holding the issue of permanent total disability benefits in abeyance and allowing the parties to proceed on the sole issue of overcoming the DIME.

28. Claimant testified at hearing that at the time of the industrial injury he had a swollen right hand, injured left knee and lower back pain, but also alleges that he "blacked out." According to Claimant, after he finished work on the date of the accident, he went home and felt like his "chest fell down to the bottom of his stomach." He worked modified duty for a period of time but "couldn't lift his arms." Claimant stated that he continues to experience pain, paralysis, an inability to walk, blurred vision and a change in his voice. Claimant testified that he sustained spine damage, traumatic brain injury, foreign language syndrome and a stroke or seizure due to the industrial injury.

29. Claimant stated that he was dissatisfied with the medical treatment he has received and believes he has been "mistreated" by the physicians at various medical facilities. Claimant believes that the physicians that have treated him have committed "malicious acts" and "malpractice."

30. Claimant alleged during his testimony that multiple physicians, including Dr. Sacha, failed to consider his "neurological findings." Claimant specifically referred to Dr. Smith's May 31, 2016 provider note which states that Claimant's soft palate issues "may represent a cranial nerve deficit secondary to occult stroke," and Dr. Solomon's September 7, 2016 provider note which states that Claimant's speech and accent suggest a possible traumatic brain injury.

31. Claimant testified that Dr. Sacha erred by failing to address those medical records, and also alleged that Dr. Sacha failed to address Dr. Rauzzino's May 3, 2016 record and the May 10, 2016 CT scan, which he believes contain evidence neurological findings supporting his position. Dr. Sacha specifically refers to Dr. Rauzzino in the DIME report, noting that Dr. Rauzzino did not feel Claimant was a surgical candidate. Moreover, Dr. Rauzzino's May 3, 2016 note specifically states that he did not document any acute sensory deficits or acute low back structural change. The DIME report does, in fact, reference the CT scan of Claimant's head, which was negative.

32. Claimant acknowledged that he had seven different attorneys representing him on his claim and that, at the time of the DIME with Dr. Sacha, he was given a copy of the DIME packet by one of his prior attorneys. Claimant then provided a supplemental DIME packet to Dr. Sacha.

33. Claimant asserted that he sustained a disfigurement to his voice as a result of the industrial injury. Claimant testified that, subsequent to the industrial injury, he developed a foreign accent and strains when he talks.

34. The ALJ credits the opinion of Dr. Sacha, which is supported by the opinions of the treating physicians and objective medical evidence, over the conflicting testimony of Claimant.

35. The ALJ finds that the lack of specific reference to Dr. Smith's May 31, 2016 and Dr. Solomon's September 7, 2016 provider notes in the DIME report does not rise to the level of clear error. While Claimant interprets such documents as definitive evidence of a traumatic brain injury and other neurological findings, both reports use speculative terms and, more importantly, do not contain sufficient, if any, analysis establishing that the cause of such symptoms are work-related.

36. Dr. Sacha fully reviewed Claimant's medical records, physically examined Claimant, and considered the objective findings in making his determination as to Claimant's work-related condition, MMI and impairment, consistent with the requirements of the AMA Guides.

37. Claimant's allegations that he sustained a spine injury, traumatic brain injury, foreign accent syndrome, and stroke as a result of the March 9, 2016 industrial injury are not credible or persuasive. In multiple reports to Employer and physicians over the course of several months, Claimant reported falling and hitting his chest, knee and hand. There are no records prior to March 21, 2017 with the history of Claimant hitting his head, and such allegation has not been confirmed by any of the treating physicians.

38. Claimant has failed to overcome the DIME opinion of Dr. Sacha on causation, MMI and permanent impairment by clear and convincing evidence.

39. Claimant has not sustained a serious and permanent disfigurement to his voice as a result of the industrial injury. Claimant is not entitled to a disfigurement award.

40. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming the DIME Physician's Opinion

The finding of a DIME physician concerning MMI and the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S.

The questions of whether the DIME physician properly applied the AMA Guides and whether the DIME physician's findings of MMI and medical impairment rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

As found, Claimant failed to overcome the DIME physician's opinion on causation, MMI and impairment by clear and convincing evidence. Dr. Sacha was asked to address which conditions were considered to be work-related and "any other areas deemed work-related by the examiner." Dr. Sacha specifically opined as to Claimant numerous medical complaints and which conditions were in fact non-work-related. Neither Dr. Sacha, nor Claimant's treating physicians opined that Claimant requires additional medical treatment to improve his condition or additional diagnostic procedures. Throughout the course of his claim, Claimant has undergone multiple physical examinations and extensive testing, including x-rays, MRIs and CT scans. Multiple physicians determined Claimant's subjective complaints outweighed the objective findings, and that the objective findings did not account for Claimant's myriad and "bizarre" symptoms.

To the extent the opinions of Drs. Simpson, Solomon and Frensley can be construed as differing from Dr. Sacha's determinations on causation, MMI and impairment, the opinions constitute mere differences of opinion and are insufficient in overcoming the DIME. There is insufficient credible or persuasive evidence establishing that Dr. Sacha deviated from the AMA Guides or committed other error in making his determinations. Claimant failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Sacha's determinations on causation, MMI and impairment are incorrect.

Disfigurement

Section 8-42-108(1), C.R.S provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view."

As found, Claimant did not overcome Dr. Sacha's DIME opinion as to causation. There is insufficient credible and persuasive evidence establishing that Claimant's alleged voice issues are a result of the March 9, 2016 industrial injury. Accordingly, Claimant is not entitled to an award for disfigurement.

ORDER

It is therefore ordered that:

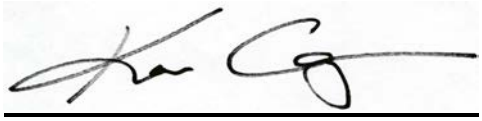
1. Claimant failed to overcome the DIME opinion of Dr. Sacha on causation, MMI and impairment by clear and convincing evidence.

2. Claimant failed to establish that he sustained a serious and permanent disfigurement as a result of the March 9, 2016 industrial injury. Claimant's request for a disfigurement award based on alleged voice issues is denied and dismissed.

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

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

DATED: November 9, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the left ring finger thenar flap surgery as proposed by Dr. Marin is reasonable and necessary to cure and relieve him from the effects of his industrial injury of October 9, 2015?

II. Has Claimant shown, by a preponderance of the evidence, that his carpal tunnel syndrome is causally related to this work injury?

III. If his carpal tunnel syndrome is causally related, has Claimant shown, by a preponderance of the evidence, that the carpal tunnel decompression surgery as proposed by Dr. Marin is reasonable and necessary?

IV. Has Claimant shown, by a preponderance of the evidence, that his cubital tunnel syndrome is causally related to this work injury?

V. If his cubital tunnel syndrome is causally related, has Claimant shown, by a preponderance of the evidence, that the cubital tunnel decompression surgery as proposed by Dr. Marin is reasonable and necessary?

STIPULATIONS

The parties reached two stipulations on the record, both of which were accepted by the ALJ:

I. Claimant is proceeding only under the theory that his carpal and cubital tunnel syndromes were caused by a traumatic event, and not as the result of an occupational disease.

II. The ALJ will take administrative notice of the prior decision entered by Judge Lamphere in companion case WC 4-996-146-02.

FINDINGS OF FACT

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

1. Claimant works as a packer for a potato packing facility. On October 9, 2015, while standing at his assigned station in front of a conveyor belt, Claimant reached for a small bag of potatoes. His left ring finger got caught under this belt, which carried it quickly under some pulleys to his immediate left. At this pinch point, Claimant felt a "bite", and a portion of the last digit of his left ring finger was amputated. It was not reattached.

2. Claimant went to the emergency department at San Luis Valley Health Regional Medical Center on the day of the accident. (Ex. C, p. 40). He was instructed to follow up with his workers' compensation physician for additional treatment.

3. On October 12, 2015, Claimant went to an occupational medicine clinic where he was evaluated by Howard Cox, PA-C. (Ex. D, p. 56). Mr. Cox reviewed Claimant's x-ray from San Luis Valley Health Regional Medical Center and diagnosed Claimant with a left ring finger avulsion with open fracture. Mr. Cox also referred Claimant for an orthopedic consultation. *Id.* at 057.

4. On October 13, 2015, Claimant consulted with Botond Vita, PA-C. (Ex. E, pp. 62-64). Mr. Vita noted Claimant's finger was healing well, and showed no signs of infection. Mr. Vita reported Claimant had no flexion of the DIP joint, and that his extensor tendon appeared to be grossly intact.

5. Also on October 13, 2015, Claimant filled out an employee accident report. (Ex. N, p. 143). Claimant explained his injury as follows: "Not sure what happen. I felt my hand get bit. looked at my finger it was cut past my nail on my ring finger." Claimant reported that the only affected body part was his left ring finger.

6. Claimant completed an employee statement on October 30, 2015, in which he stated …."Then im not sure what happened. I felt it bite me. So I looked at my hand. And noticed i was missing the top of my ring finger"….. (Ex N, p. 141A).

7. Claimant testified at hearing about how his injury occurred. Claimant initially testified that his finger hit the conveyor belt rollers, which caused his arm to rotate around the roller. Later, Claimant testified that the injury happened so quickly that he did not feel his arm rotate around the rollers. Claimant also admitted that his injury happened so fast that he did not know he twisted his arm. Claimant indicated credibly that he has had no prior accidents, injuries, or treatment to his left hand or arm prior to this work injury.

8. Claimant testified at hearing that he does not want an amputation. He wants to try the thenar flap procedure first. He would like to have the carpal and cubital tunnel surgeries performed as well, either before, or concurrent with, the thenar flap procedure.

9. ALJ Lamphere's Finding of Fact, Conclusions of Law and Order dated August 5, 2016 found Claimant's injury occurred as follows: "The finger had been grabbed and yanked into the machine, twisting it and amputating a portion of it."

10. Claimant continued to treat with providers at the occupational medicine clinic and the orthopedic office on several more occasions before changing physicians to Kent Lofley, D.O. on November 25, 2015. (Ex. F, p. 77). Claimant told Dr. Lofley that he was concerned that he could not make a complete fist with his left hand. Claimant described to Dr. Lofley that he experienced a sudden shocking sensation whenever he bumped his left ring finger. Claimant testified at hearing to a similar sensation.

11. On January 19, 2016, Dr. Lofley referred Claimant to a hand surgeon. (Ex. F, p. 82).

12. Based on this referral, Claimant saw Philip Marin, M.D. on March 7, 2016. (Ex. G, pp. 95-99). Claimant complained to Dr. Marin that he could not bend his ring or small finger. Claimant's finger continued to be sensitive to the touch. Dr. Marin believed at this time that Claimant had some degree of complex regional pain syndrome ("CRPS") present. Dr. Marin referred claimant for a nerve conduction study and an MRI to confirm Claimant did not also injure his tendons.

13. Dwight Caughfield, M.D. performed an EMG/NCV on March 16, 2016. Dr. Caughfield concluded the findings were consistent with mild left carpal tunnel syndrome and mild left ulnar neuropathy at the elbow. (Ex. H, p. 105).

14. Claimant also underwent an MRI of his left hand on March 16, 2016. (Ex. K, p. 127B). The MRI found Claimant's flexor and extensor tendons were normal. The radiologist recommended considering reflex sympathetic dystrophy, or CRPS, due to Claimant's ongoing pain complaints.

15. Claimant returned to Dr. Marin on April 5, 2016. (Ex. G, p. 97). Dr. Marin noted the electrodiagnostic studies demonstrated left mild carpal tunnel syndrome and left mild cubital tunnel syndrome. He recommended a thenar flap surgery, but he believed that before proceeding with surgery, Claimant's CRPS (aka RSD, or Reflex Sympathetic Dystrophy) needed to be addressed. Dr. Marin also noted that "He [Claimant] is aware that any surgical intervention of the carpal tunnel or the cubital tunnel could make his symptoms worse."

16. Dr. Marin did not perform any testing himself to support his hypothesis that Claimant had CRPS/RSD. During his deposition, Dr. Marin agreed that, according at least to the Medical Treatment Guidelines, Claimant did not have CRPS. (Marin Depo. p. 40).

17. On September 19, 2016, George Schakaraschwili, M.D., performed an independent medical examination to evaluate whether Claimant had CRPS. (Ex. J, pp. 110-125). Dr. Schakaraschwili performed an infrared stress thermogram and a QSART test, which were both negative. Based on these negative findings, Dr. Schakaraschwili recommended a three-phase bone scan to affirmatively rule out CRPS. He noted that if this test was negative, Claimant would not have CRPS. Instead of CRPS, Dr. Schakaraschwili opined that Claimant had neuropathic pain at the tip of his finger. Dr. Schakaraschwili reviewed Dr. Caughfield's electrodiagnostic studies and concluded that it was "highly unlikely" that either the mild carpal tunnel syndrome or the mild cubital tunnel syndrome were work-related. *Id.* at 119.

18. Claimant had the triple phase bone scan as recommended by Dr. Schakaraschwili on February 23, 2017. (Ex. K, p. 126). The triple phase bone scan was normal, which ruled out CRPS as a diagnosis. (Ex. J, pp. 118 and 120).

19. Claimant returned to Dr. Marin on March 27, 2017. (Ex. G, p. 98). Dr. Marin stated Claimant had been unresponsive to conservative treatments. Dr. Marin recommended a left carpal tunnel decompression, a left cubital tunnel decompression, and a left ring finger thenar flap surgery. Dr. Marin requested authorization for the decompression surgeries. *Id.* at 099. His request was denied after Jason Rovak, M.D. determined that Claimant's carpal tunnel syndrome and cubital tunnel syndrome were not work-related. (Ex. L, p. 128).

20. Dr. Marin recommended the thenar flap surgery to provide Claimant's left ring finger with some cushion to protect the nerves in the finger. To perform a thenar flap surgery, a surgeon makes an incision in the thenar region of the palm near the base of the thumb, and lifts the flap from the incision to provide a space to attach the injured finger. The injured finger is sutured to the thenar region for approximately two weeks. After approximately two weeks, a second procedure is performed to detach the finger from the thenar region of the palm. Finally, a surgeon performs a skin graft from another part of the body to cover up the wound on the thenar region of the palm.

21. On March 7, 2016, Dr. Marin had recorded Claimant had 5 degrees of DIP joint flexion and about 45 degrees of PIP joint flexion. The tendons of the small finger were likely intact. He also noted that "The ***ring*** finger is exquisitely sensitive to the touch. The ***small*** *finger is also sensitive* but to a lesser degree." (Ex. G, p. 96). (emphasis added).

22. Based on these measurements, Dr. Marin thought Claimant's left ring finger had sufficient movement to reach the thenar region. He would need to perform active therapy in the operating room to ensure Claimant's ring finger could touch the thenar region before operating.

23. Dr. Jonathan Sollender, MD, performed an independent medical examination on Claimant on June 22, 2017. (Ex. B, pp. 22-39). Dr. Sollender disagreed that a thenar flap surgery was reasonable and necessary. Dr. Sollender explained that thenar flap surgeries are only performed on the index and middle fingers because those are the only fingers that naturally come to rest on the thenar region. In addition to being the wrong finger, Claimant's left ring finger had a limited range of motion. Dr. Sollender measured the range of motion of Claimant's left ring finger DIP, PIP, and MP joints during his physical examination. *Id* at 33. Dr. Sollender noted that Claimant had reduced range of motion at each of these joints.

24. According to Dr. Sollender, the combination of performing the thenar flap surgery on the ring finger with Claimant's reduced range of motion in that finger greatly increased the failure rate of the thenar flap surgery because the flap may not take, the flap may rip, and the blood vessels may stretch out, causing less blood flow. Even though Dr. Marin recommended splinting Claimant's finger to the thenar region of his palm, Dr. Sollender disagreed that this could compensate for the reduced range of motion in Claimant's left ring finger. He noted that Claimant might not be able to tolerate the pain of having his finger in an unnatural position for two weeks, and he may not be able to actively extend his finger once the splint is removed.

25. Dr. Sollender concluded the thenar flap surgery was not reasonable and necessary because the surgery would not resolve the hypersensitive nerve endings in Claimant's left ring finger. Dr. Marin's proposed thenar flap surgery only adds padding on top of Claimant's finger. Without addressing the underlying nerves that cause Claimant pain, Claimant could still experience hypersensitive responses in his left ring finger if those nerves were stimulated.

26. Instead, Dr. Sollender recommends amputating Claimant's left ring finger through the DIP joint. (Ex. B, p. 26). The amputation would also resect the nerves in Claimant's finger, which would cut them further back from the tip of the finger and provide the nerves with more protection. The amputation would remove damaged tissue, which Dr. Sollender believes is the primary basis for Claimant's pain. And, unlike the thenar flap surgery, the amputation would not require multiple incisions and procedures.

27. Alternatively, Dr. Sollender suggested a flap surgery using skin from another part of the body coupled with a nerve resection, although Dr. Sollender clarified that he still recommends an amputation.

> Yeah, it's part of the reconstructive ladder that hand surgeons and plastic surgeons should be thinking about. But again, *it's up to the patient* whether that kind of an operation that would create scars elsewhere is something that he's interested in. So in general, Ms. Brewer, yes, a distant flap has appeal. But again, it also *should be coupled with nerve resection*. The patient should also be aware that it would not provide any sensation. And *if these things are attractive to him,* then I would have no objections to a distant flap source (Sollender depo, p. 71)(emphasis added).

28. Dr. Sollender pointed out that Dr. Marin did not recommend anything but a thenar flap surgery, and did not specifically recommend nerve resection as part of the surgery.

29. Claimant testified at hearing that he was concerned about how the amputation could affect his ability to work as a manual laborer. Dr. Sollender addressed this concern at his deposition, and noted that he had performed partial amputations on hundreds of laborers who were able to return to work without pain quickly.

30. Dr. Marin testified at his deposition about the basis for his request for authorization for a carpal tunnel decompression. Dr. Marin testified that he believed Claimant's left carpal tunnel syndrome is causally related to the October 9, 2015 injury, in that Claimant's injury may have caused swelling in the ring finger which may have led to swelling that migrated to tendons in the carpal tunnel. (Marin Depo, p. 68: ll.10-23). However, On April 5, 2016, when Dr. Marin diagnosed Claimant with carpal tunnel syndrome based on the EMG/NCV findings, he did not perform any other physical examination to confirm the diagnosis. Specifically, he did not perform a Tinel's test, a Phalen's test, a closed fist test, or a compression test. Records from the Monte Vista

Health Clinic do indicate, however, that there was a positive Tinel's test on the left wrist on July 11, 2017. (Ex. F, p. 92).

31. Dr. Sollender disagreed with Dr. Marin's assessment that Claimant's left carpal tunnel syndrome is work-related. Dr. Sollender reviewed the March 16, 2016 MRI of Claimant's left hand, which showed normal flexor and extensor tendons. (Ex. K, p. 127B). He observed that the normal MRI findings disprove Dr. Marin's theory of carpal tunnel syndrome, since if Claimant had swollen tendons, the MRI would have shown that these tendons were swollen. Dr. Sollender also noted that Claimant did not exhibit any physical conditions consistent with swollen tendons. For example, patients with swollen tendons in a finger often present with a condition known as trigger finger. Trigger finger is a condition in which a patient's inflamed tendons prevent a finger from moving. Based on his physical examination of Claimant and his review of the medical records, Dr. Sollender did not notice any evidence of trigger finger. Finally, Dr. Sollender testified that even if Claimant's injury to his left ring finger caused his tendons in that finger to swell, the inflammation of a single tendon would not cause carpal tunnel syndrome. Nine tendons travel through the carpal tunnel. There is enough room in the carpal tunnel to accommodate the swelling of a single tendon. (Sollender Depo, pp. 65-66)

32. In his deposition, Dr. Sollender further noted that if Claimant's finger injury caused the carpal tunnel syndrome, then:

> You would have complaints of numbness and tingling of specific fingers rather than just a single finger. I think his complaints were numbness and tingling of the *ring and small finger,* which is totally the wrong nerve. It's the *ulnar* nerve that gives those types of symptoms. The *median* nerve will give numbness of the thumb, the index and middle finger and part of the ring finger. (emphasis added).

33. Dr. Sollender and Dr. Marin agreed that Claimant's cubital tunnel syndrome is not causally related to his October 9, 2015 injury. Dr. Sollender initially doubted whether Claimant even has cubital tunnel syndrome. Although the EMG/NCV recognized that Claimant had mild cubital tunnel syndrome, Dr. Sollender explained that it is improper to rely exclusively on electrodiagnostic testing because they often produce false positives. The findings of electrodiagnostic testing must be confirmed by physical examination. Dr. Sollender performed an elbow flexion test on Claimant during his examination. This test was negative, which led Dr. Sollender to question the diagnosis of cubital tunnel syndrome. But, even assuming Claimant had cubital tunnel syndrome, Dr. Sollender concluded that the condition is not work-related because there is no evidence Claimant sustained any injury to his left elbow.

34. In his deposition, Dr. Marin acknowledged that the cubital tunnel syndrome was likely not related to the industrial injury. (Marin Depo., p. 34 and 36).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); Robinson v. Youth Track, 4-649-298 (ICAO May 15, 2007).

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

Medical Benefits Generally

D. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); Faulkner v. Indus. Claim Appeals Office, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. Ringsby Truck Lines, Inc. v. Industrial Commission, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); Industrial Commission v. Royal Indemnity Co., 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. Industrial Commission of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984). Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002).

Cubital Tunnel Surgery

E. Both Dr. Marin and Dr. Sollender testified credibly that Claimant's mild cubital tunnel syndrome is likely not work related, and the ALJ so finds. Regardless of the reasonableness or necessity of such procedure, a cubital tunnel decompression surgery is not reasonable and necessary to cure and relieve Claimant *from the effects of his October 9, 2015 work injury.*

Carpal Tunnel Surgery

F. Dr. Marin testified that the only reason he believed Claimant's October 9, 2015 injury caused carpal tunnel syndrome was that a traumatic accident to a finger can cause tendons to swell in the carpal tunnel. This testimony is not persuasive, since there is insufficient evidence that Claimant's injury caused any tendons to swell. The MRI taken on March 16, 2016 showed that Claimant's flexor and extensor tendons were normal, indicating that they were not swollen. Dr. Sollender persuasively explained that if Claimant's tendons were in fact inflamed, the MRI would show inflammation, fluid accumulation, or edema. None of these symptoms were present on the MRI, leading to the conclusion that Claimant's tendons were not inflamed.

G. Further, Claimant has been consistent in describing his abnormal symptoms in his hand as coming from his *ring and small fingers.* As noted by Dr. Sollender (and the ALJ so concurs), these two fingers are innervated by the *ulnar* nerve, and not the *median* nerve which is the nerve implicated in *carpal* tunnel syndrome. The ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that his carpal tunnel syndrome is *causally related* to his work injury. While Claimant apparently has both mild cubital and carpal tunnel syndrome, and might arguably

benefit from surgery to address it, neither of those conditions are related to his work injury at issue here.

Thenar Flap Surgery

H. The ALJ finds that Claimant has shown, by a preponderance of the evidence, that the injuries to his left ring finger are directly *related* to his work injury which occurred on October 9, 2015.

I. Further, the ALJ credits Claimant's testimony regarding the symptoms he has experienced, his cooperation with all medical professionals involved, and his reasonable desire to undergo a flap surgery (of whatever sort) in an effort to save the bottom half of his affected digit, before going straight to an amputation.

J. Since the date of injury, October 9, 2015, Claimant continues to have extreme sensitivity when the end of his ring finger is touched. He also has stiffness in both the left ring finger and left little finger. To resolve those issues, Claimant's authorized treating hand surgeon, Dr. Philip Marin, has recommended thenar flap surgery. Respondents' independent medical examiner, also a hand surgeon, Dr. Jonathan Sollender, recommends surgery for Claimant's left ring finger, as well. His first recommendation is a partial amputation. However, he also has acknowledged that flap surgery with a donor site at a more distant location than the palm of Claimant's hand would be a viable alternative. Dr. Sollender also opines that a nerve resection should be done, to address the pain Claimant experiences when he strikes this finger, since the additional padding afforded by the flap surgery might not be sufficient.

K. While both surgeons are both capable and sincere in rendering their opinions, the ALJ is persuaded that the most reasonable and necessary alternative is a flap surgery, to be performed by Dr. Marin. Once more reflection can be given to all the details, Dr. Marin is to be afforded the option of resecting the nerves of this finger, if warranted in his professional judgment. Likewise, Dr. Marin, in consultation with Claimant, is to be afforded the opportunity to use a donor flap from the location of his professional choosing, in case further testing indicates a more desirable donor site.

ORDER

It is therefore ordered that:

1. Claimant's request for cubital decompression surgery as proposed by Dr. Marin is denied and dismissed.

2. Claimant's request for carpal decompression surgery as proposed by Dr. Marin is denied and dismissed.

3. Claimant's request for thenar flap surgery as proposed by Dr. Marin is granted. Further, if agreed between Claimant and Dr. Marin, an alternative flap site may be

chosen, and a nerve resection performed. Respondents shall pay for such procedure pursuant to the fee schedule as set by the Division of Workers Compensation.

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

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

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

DATED: November 14, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-004-715-02

ISSUES

- Whether Property Cousins demonstrated by a preponderance of the evidence that Claimant was not an employee.

- Whether Claimant established by a preponderance of the evidence, that he sustained a compensable injury arising out of and in the course and scope of his employment on December 14, 2015.

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable, necessary, and medical treatment stemming from the December 14, 2015 injury.

- Whether the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from December 14, 2015 until June 21, 2016.

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability (PPD) benefits from the December 14, 2015 injury.

- Whether Property Cousins have proven by a preponderance of the evidence that they are entitled to reduced compensation benefits by fifty percent for willful violation of a safety rule pursuant to C.R.S. section 8-42-112(1)(b).

- Whether Claimant has proven by a preponderance of the evidence that he entitled to a fifty percent (50%) penalty as a result of Property Cousins, LLC not having workers compensation insurance at the time of his injury pursuant to C.R.S. CRS 8-43-408.

FINDINGS OF FACT

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

1. Employer hired Claimant, a carpenter's assistant, to perform renovation work on properties Employer owned.

2. Clamant assisted Rosendo Salazar, a master carpenter, who Employer also hired to perform renovation work on properties Employer owned.

3. Claimant speaks Spanish and no English. Brian Moore, Employer's owner, speaks English and almost no Spanish. Mr. Salazar would translate for Mr. Moore to Claimant regarding Claimant's job responsibilities and which jobsite to report to. Mr. Salazar also translated for Claimant whatever Mr. Moore needed to convey to Claimant

about timekeeping, limits on what work Claimant could not perform, and other job related duties.

4. Levi Maes, a cousin of Mr. Moore's, also spent limited time on the jobsite. When he was there, he would also supervise Claimant and Mr. Salazar. Mr. Maes testified that Mr. Salazar provided Claimant with the day-to-day direction of his work because Claimant was Mr. Salazar's assistant/helper.

5. During the four to five months before he was injured, Claimant only worked for Employer and was not allowed to leave without permission to work another job.

6. Mr. Moore told Claimant when to arrive at work and when to leave. Claimant testified that if he needed to leave work early, he was required to have Mr. Moore's permission. However, he also testified that he and Mr. Salazar could leave at 3:00 or 4:00 p.m., they never did.

7. Employer required Claimant to use a time-clock to punch in and out of work for the majority of the time he worked for Employer. Both Claimant and Mr. Salazar testified that they used the time-clock the entire time they worked for Employer. Mr. Moore acknowledged that he required his workers to use the time clock because he did not trust them to accurately report their hours.

8. Employer did not allow Claimant to work on electrical and plumbing projects, and on "more dangerous aspects of construction."

9. Claimant provided his own hand tools but also used a circular saw, table saw, and other large tools Employer provided.

10. Claimant testified that he often worked with Mr. Salazar and two other workers (Roberto and Omar) at the jobsite, while Mr. Moore was often not there. When Mr. Moore was present, he supervised Claimant.

11. Claimant and Mr. Salazar had the combination to the lock box at the Elizabeth property and could let themselves in to begin work. They would lock the house when leaving. Mr. Maes testified that Claimant could come and go from work as he pleased so long as "the project was progressing." However, he also testified that he and Mr. Moore made Claimant use the time clock to track his hours.

12. Mr. Moore paid Claimant weekly based on the number of hours he worked at the rate of $15 per hour, using Employer's company checks. Claimant worked approximately fifty hours per week. Claimant's average weekly wage was $750.

13. Employer made checks out to Claimant personally.

14. Claimant has never owned any type of contracting business.

15. Claimant did not have a written contract while he worked for Employer.

16. Claimant did not work for Mr. Salazar, was never paid by him, and never had a contract to work for him. Mr. Salazar also did not have a contract with Employer.

17. Claimant previously worked for Levi Maes who told Claimant at Mr. Maes' project that he was not an employee and would be given a 1099 tax form. No persuasive evidence supports a finding that Mr. Moore told Claimant similar information about working for Employer.

18. Mr. Moore testified that he did not have employees because it was what he was taught as a general contractor. As the general contractor Mr. Moore oversaw and managed the project. However, he also testified that because he had another full-time job, he would "go in, see if they need anything, and then go about my day and get ready for work." When asked specifically about overseeing the workers, he testified, "I didn't have time for that." Further, Mr. Moore testified that because he was relatively new at flipping houses, he "relied on his workers for a lot of direction." "They would usually tell me what they were going to accomplish during the week, and I'd be like, okay, that sounds great."

19. Mr. Moore testified that he installed the time clock because he did not trust the workers to accurately report their hours. In particular, he found Roberto to be difficult to work with and not trustworthy. After four or five weeks the workers would kick the time clock around and they eventually destroyed it.

20. The ALJ finds it unlikely that Mr. Moore relied on his workers to direct their own work given that he did trust them enough to rely on their time reports. The ALJ also finds it unlikely that Employer, whose business was to flip houses for profit, would ask his workers what they wanted to accomplish in a week of work and that he would simply agree.

21. Mr. Moore testified that he paid Claimant by the hour at the end of the week. He testified that he did not set Claimant's hours, and he did not withhold FICA from Claimant's pay.

22. Claimant worked for Employer for approximately four or five months when, on December 14, 2015, Claimant was assisting Mr. Salazar install bars on a stair rail at Employer's property located at the corner of 13th and Elizabeth in Denver, Colorado. Mr. Salazar was using a pneumatic nail gun to install the stair rails. As he was nailing one of the bars on to the stair rail, a nail ricocheted and penetrated Claimant's right eye.

23. Mr. Salazar immediately reported the injury to Mr. Moore.

24. Claimant pulled the nail out of his eye and a coworker gave Claimant a roll of toilet tissues to cover his eye. Claimant's daughter arrived within minutes and transported Claimant to Rose Medical Center seeking emergent care to evaluate the extent of and to stabilize Claimant's eye injury.

25. Rose Medical Center then referred Claimant to Porter Surgery Center/Harvard Park Surgery Center where Dr. Holly Kent, a specialized ophthalmologist

performed emergency surgery. The procedures performed included repair of a corneal laceration, brief exam under anesthesia, and repositioning of the right iris.

26. Claimant received follow-up evaluation and treatment at Denver Health Medical Center Eye Clinic. Claimant underwent further surgery with Richard Hwang, MD, at the Eye Clinic on December 22, 2015, which included the following procedures: a 23-guage pars plana vitrectomy; a pars plana lensectomy; Endolaser photocoagulation; anterior chamber intraocular lens placement; and Subtenon Kenalog. Claimant's post-surgical diagnoses included traumatic cataract, vitreous debris versus vitreous hemorrhage, and history of open globe repair due to penetrating nail injury.

27. On March 30, 2016, Frank Seringo, MD, evaluated Claimant, and on April 12, 2016, he prepared a Physician's Report of Worker's Compensation Injury report. Dr. Seringo ultimately placed Claimant at MMI on June 1, 2016.

28. On November 1, 2016, Ronald Wise, MD, performed a Claimant-sponsored IME. He reported that subsequent to his December 22, 2015 surgery, Claimant experienced a traumatic and glaucomatous optic neuropathy of his right eye.

- Impairment rating: After performing a physical examination, Dr. Wise used the AMA Guides to arrive at a combined rating of 99% for Claimant's right eye. This equated to a 25% visual system impairment rating and a 24% whole person impairment rating.

- Maintenance Care: Dr. Wise determined that Claimant required maintenance including an ophthalmic examination every six months for life to monitor his macula and glaucoma status. And also that Claimant should remain on timolol and brimonidine twice a day in his right eye for life.

- MMI: Dr. Wise agreed with Dr. Siringo's MMI date of June 1, 2016.

- Permanent Restrictions: Dr. Wise restricted Claimant from driving commercial vehicles and operating heavy machinery. He provided, "[Claimant] should work at heights above the ground and use power tools with extreme caution due to his monocular status." Claimant should undergo a performance evaluation before performing any work activity that might be limited by his monocular status. And finally, he required Claimant to use corrective and protective eyewear at all times.

29. To date Employer has not paid for any of Claimant's medical care and treatment.

30. Claimant's daughter transported Claimant to his medical appointments, including to his initial emergency care. Because Claimant does not speak or read English, his daughter filled out intake forms and provided translation services. Claimant did not direct his daughter how to fill out the forms and she acted at her own discretion in providing information.

31. Claimant testified that Employer did not provide him with any safety equipment, including goggles. And that he never noticed Mr. Moore bring a box of goggles to the jobsite. Claimant testified that Mr. Salazar never told him that there were glasses and to wear them. Further, Mr. Moore did not lecture him about wearing goggles when doing dangerous work.

32. Mr. Salazar testified that on the date of Claimant's injury Employer did not provide Claimant with safety goggles. However, Employer had provided Mr. Salazar with protection glasses on another job. Mr. Salazar did not know whether Employer had provided Claimant with protection glasses on another job. Mr. Salazar testified further that Mr. Moore would bring safety glasses to the jobsite "whenever we asked him to." But that he was not aware of o box of safety glasses being on the jobsite.

33. Mr. Salazar testified that Mr. Moore "sometimes" told him to use safety glasses when he and Claimant were working around dangerous machinery. But he did not know whether Mr. Moore told Claimant the same thing. Mr. Maes testified that he and Mr. Moore would ask Claimant and Mr. Salazar what they needed and then would supply the requested safety items.

34. Mr. Moore testified that he bought a box of safety goggles for Claimant and Mr. Salazar. Mr. Moore testified that many times he would say, "You guys need to wear safety glasses," but they "would just not listen to me." Instead of reprimanding or firing them, Mr. Moore bought a box of safety glasses and told them, "No more excuses. Please use the safety goggles." Mr. Moore testified that he gave Claimant and Mr. Salazar the "safety goggle speech" "more times than he could count." The ALJ finds this testimony inconsistent with Mr. Moore's testimony that he did not have the time to oversee the work being done on the project and that he would just stop in at the jobsite to see if the workers needed anything.

35. While Mr. Maes testified that he told Claimant to wear goggles, from context the ALJ finds that he did so when Claimant was working for him; not for Employer. In addition, Mr. Maes testified that at times there was a box of goggles at the Elizabeth street jobsite, but he did not know if it was there the day Claimant was injured.

36. Mr. Salazar was not wearing safety goggles at the time Claimant was injured. No persuasive evidence was offered that Employer took any negative employment action against Mr. Salazar for failing to use protective eyewear.

37. Based on the totality of the evidence, the ALJ finds that Employer did not have a safety rule about safety glasses or that any such policy was enforced.

38. Mr. Maes has no ownership interest in Employer. He testified inconsistently that he gave no direction at the Elizabeth street project, but rather acted as a "resource;" and that when he supervised Claimant when Mr. Moore was not on site.

CONCLUSIONS OF LAW

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

Generally

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. §8-40-102(1). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-42-101.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The question of whether the claimant met his burden of proof is one of fact for determination by the ALJ. See *Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. C.R.S. §8-43-201. A Workers' Compensation case is decided on its merits. C.R.S. §8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence/or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

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

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

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). This decision does not specifically address every item contained in the record; instead,

incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Status of Claimant: Employee or Independent Contractor

C.R.S. section 8-40-202(2)(a), sets forth a statutory presumption that "any individual who performs services for pay for another shall be deemed to be an employee, irrespective of whether the common-law relationship of master and servant exists, unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

The parties do not dispute that no contract existed between Employer and Claimant. Therefore Claimant is presumed to be Employer's employee. To overcome this presumption, Employer must prove by a preponderance of the evidence that the conditions set forth in C.R.S. section 8-40-202 (2)(b)(II)(A)-(I) have been satisfied to establish Claimant was an independent contractor. To prove independence from the employee-employer relationship Employer must show that it did not:

> (A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
>
> (B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
>
> (C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;
>
> (D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
>
> (E) Provide more than minimal training for the individual;
>
> (F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;
>
> (G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;
>
> (H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

The ALJ finds and concludes that Employer has not meet its burden in regard to proving Claimant was an independent contractor rather than an employee. Claimant and Mr. Salazar both testified in detail about their working relationship with Employer. The ALJ finds both Claimant and Mr. Salazar to be credible witnesses. Both testified to the following: 1) they were told what to do on the jobsite on a given day by Mr. Moore or Mr. Maes; 2) they could not work for another employer other than Employer; 3) their work was supervised by Mr. Moore or Mr. Maes; 4) they were told when to arrive at work and when they could go home; 5) Employer required them to keep track of their hours worked by using a time clock located at the job site; 6) they could not leave the jobsite during the day without getting permission from Mr. Moore or Mr. Maes to do so; 7) they were paid an hourly wage based upon the number of hours worked in a week; 8) their paychecks were made to each of them individually and not to a company; 9) they did not have a contract with Employer; and 10) they brought many of their own small tools to the job site, but Employer furnished certain larger pieces of equipment.

Mr. Moore, owner of Employer, testified that Claimant and Mr. Salazar came to the jobsite as a team and that due to Claimant not speaking English, directions on what Claimant was to do on the jobsite came through Mr. Salazar. Mr. Moore testified that he hired Claimant and Mr. Salazar on a time and material basis but offered no other evidence of Claimant's status as an employee versus an independent contractor. Mr. Moore also testified that he could have fired Mr. Salazar for poor performance, which in turn, since they were viewed as a team, would have terminated Claimant's employment relationship.

In addition, the ALJ is guided by apply the analysis used by the Colorado Supreme Court in *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014), pertinent to the issue of whether the claimant was engaged in an independent trade or business.

To that end, the Supreme Court, in *Softrock*, revised the standard previously used by the Panel and the Court of Appeals when analyzing whether or not an employee "is customarily engaged" in an independent trade or business. That previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court declared, "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565.

Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in § 8-202(2)(b)(II), but also any other relevant factors. The Court pointed as an example to the decision in *Long View Systems Corp. v. Industrial Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008). In *Long View* the Panel was asked to consider whether the

employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the employer. 325 P.3d at 565.

The ALJ must conduct an inquiry into the "nature of the working relationship." A review of the record in this matter reveals there is no persuasive evidence that Claimant had an independent business card, phone listing, and business address, had any financial investment subject to a risk of loss, set the price for performing the project or employed others. There was no evidence he carried liability insurance. There was also evidence in the form of Mr. Moore's acknowledgement that Claimant was working approximately fifty hours per week for Employer which suggested Employer knew Claimant was working full time and exclusively for Employer. The ALJ finds Employer would reasonably be aware that Claimant was not engaged in an independent business, based on the working relationship it had with Claimant.

The Court concludes that Employer failed to meet its burden of establishing by a preponderance of the evidence that the conditions set forth in C.R.S. section 8-40-202 (2)(b)(II)(A)-(H) and in *Softrock* have been satisfied, and further finds and concludes that Clamant was an employee of Employer on December 14, 2015.

Claimant's Entitlement to Benefits

Having determined that Claimant was an employee on the date of his injury, the ALJ next must determine whether Claimant was injured while performing an activity arising out of and in the course and scope of that employment. Arising out of and in the course of an employee's employment means that there must be a nexus between the claimant's injury and the conditions of his employment. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989). Whether an employee is acting within the course and scope of his employment depends on the facts surrounding the incident in question. *Bennett v. Furr's Cafeterias,* 549 F. Supp 847 (D. CO. 1982). The testimony at the hearings was uncontroverted that on December 14, 2015, while working at a property owned by Employer, Claimant was struck in the right eye by a nail discharged from a nail gun operated by a co-worker. Claimant and his co-worker were installing bars in a stair rail at the direction of Employer's owner. Carpentry work such as installing bars on a stair rail were part of Claimant's normal day-to-day responsibilities. The mechanism of Claimant's injury, being struck in the eye by a nail fired from a nail gun, is unquestionably a result of the conditions of his employment. The ALJ therefore finds and concludes that Claimant sustained an injury on December 14, 2015 while performing an activity arising out of and in the course and scope of that employment.

Claimant contends that he is entitled to medical benefits, temporary total disability benefits, and permanent partial disability benefits as a result of the December 14, 2015 accident. Claimant bears the burden of proving his entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo.1985).

Medical Benefits

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

> Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Claimant received medical care as a result of his injury. While the reasonableness and necessity of his medical care was not contested, a review of Claimant's Exhibits 1-6 as well as Claimant's testimony convinces the ALJ that Claimant received extensive medical treatment for the injury to his right eye. The ALJ finds and concludes that Claimant has demonstrated by a preponderance of the evidence that his medical care was reasonable and necessary and the need for those medical services arose directly from his accident of December 14, 2015.

Employer is therefore ordered to pay Claimant's medical expenses arising from this accident.

Claimant also presented persuasive and uncontroverted evidence that he requires medical maintenance benefits including prescriptions for medications Timolol and Brimonidine and ophthalmic examinations every six months to monitor his macula and glaucoma status. Claimant will require these benefits for his lifetime.

Employer is ordered to provide such medical maintenance care.

Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between his work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace*

Electric, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant was injured on December 14, 2015, sought medical attention immediately thereafter, was restricted from returning to work by Dr. Siringo, and was found to be at MMI and released to return to work on June 1, 2016. The ALJ finds and concludes that Claimant has demonstrated by a preponderance of the evidence that as a result of Claimant's December 14, 2015 injury, he was unable to perform his normal occupation from December 14, 2015 until the date he was released to work on June 1, 2016. Claimant is entitled to temporary total disability benefits for the period of December 14, 2015 to June 1, 2016.

Employer is ordered to pay Claimant temporary total disability benefits at the rate of $500.00 per week from December 14, 2015 until June 1, 2016.

Permanent Partial Disability

C.R.S. section 8-42-107 provides that permanent partial disability benefits shall be awarded to an injured worker at such time as he or she reaches maximum medial improvement and has had a determination of his or her medical impairment performed by a physician accredited by the Division of Workers Compensation. Claimant was found to be at maximum medical improvement on June 1, 2016. Dr. Ronald Wide, a workers' compensation accredited physician, found Claimant sustained a permanent impairment of 99% loss of his right eye which converts to a 24% whole person rating. Employer offered no persuasive or contradictory medical evidence. The ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits.

Employer shall pay to Claimant permanent partial disability benefits based upon Dr. Wise's 24% whole person impairment.

Safety Rule Violation

C.R.S. section 8-42-112(1)(b) provides for a fifty percent reduction in compensation to a claimant where a respondent proves that the claimant's injury was caused by his or her willful failure to obey any reasonable rule adopted by the employer for the claimant's safety. *See In re Claim of Bromirski, 082113 COC, 4-882-047-01.*

Under section 8-42-112(1)(b), respondents bear the burden to prove every element justifying a reduction in the claimants' compensation for the willful failure to obey a reasonable safety rule. *Triplett v. Evergreen Builders*, Inc., W. C. No. 4-576-463 (May 11, 2004).

The question of whether the respondent proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not

willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Indus. Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.*, 171 Colo. 214, 171 P.2d 410 (1946). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Employer must prove the following elements: 1) There must be a specific, unambiguous and definite safety rule adopted by the employer; 2) The safety rule must be reasonable; 3) The safety rule must be "brought home" to the employee and diligently enforced; 4) Violation of the safety rule must be willful; and 5) The violation of the safety rule must be a cause of the claimant's injury. C.R.S. § 8-42-112(1)(b)(2015); *L.B. Cole Produce Co. v. Indus. Com'n.*, 228 P.2d 808, 809 (1951); *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995).

The first step is to determine whether or not Employer adopted a reasonable "safety rule." A safety rule does not have to be formally adopted, does not have to be in writing, and does not have to be posted. Rather, it is necessary that the safety rule was heard and understood and given by someone generally in authority. *Indus. Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246P.2d 902 (Colo. 1952); *McCulloch v. Industrial Commission*, 109 Colo. 123, 123 P.2d 414 (Colo. 1942)

Employer alleges Claimant violated a safety rule on December 14, 2015, when he did not wear safety glasses while working with or around a nail gun. Claimant testified that Employer did not provide him with safety goggles; Mr. Moore did not tell him to wear safety goggles; Mr. Salazar did not tell him to wear safety goggles; and Mr. Moore did not lecture or reprimand him for not using safety goggles.

Mr. Moore testified that he bought an entire box of safety goggles for "the guys" working on site. He further testified that after he bought the box of safety goggles, he told them to please use safety goggles.

The ALJ finds that Employer did not have a specific, unambiguous and definite safety rule in place with regard to the use of safety goggles on December 14, 2015. Further, the evidence supports a conclusion that even if there were a safety rule, Employer did not enforce it. Analysis of the other elements of a safety rule violation are unnecessary.

The ALJ finds that Employer failed to prove by a preponderance of the evidence that it is entitled to reduce compensatory benefits by fifty percent for a willful violation of a safety rule pursuant to C.R.S. section 8-42-112(1)(b).

Penalty for Employer's Failure to Have Complying Workers' Compensation Insurance

C.R.S. section 8-43-408(4) provides a fifty percent (50%) penalty against any employer who fails to comply with the insurance provisions of the Colorado Workers Compensation Act. Employer admitted during the June 7, 2017 hearing that it was not insured at the time of Claimant's injury. This Court has no discretion in imposing the penalty. *See Kamp v. Disney,* 135 P.2d 1019 (Colo. 1943). Employer is therefore assessed a 50% penalty on all of the amounts due Claimant for temporary total disability and permanent partial disability.

In addition, C.R.S. section 8-43-408(5) provides that a defaulting employer shall pay an amount equal to twenty-five percent (25%) of the compensation or benefits due to the employee to the Colorado Uninsured Employer Fund created by C.R.S. section 8-67-105. The ALJ finds and concludes that Employer, having failed to have complying workers compensation insurance, is liable to the Colorado Uninsured Employer fund in an amount equal to twenty-five (25%) of the benefits due Claimant.

ORDER

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

1. Claimant's AWW is $750.00 with an equivalent TTD rate of $500.00 per week.

2. Employer shall pay the costs of Claimant's medical care and treatment for his compensable injury of December 14, 2015, subject to the Division of Workers' Compensation Medical Fee Schedule.

3. Employer shall pay the costs of Claimant's maintenance medical care.

4. Employer shall pay Claimant temporary total disability in the amount of $500.00 per week, or $100.00 per day from December 14, 2015 until June 1, 2016, both dates inclusive, in the aggregate amount of $12,100.00, which is payable retroactively and forthwith.

5. Employer shall pay Claimant permanent partial disability benefits based upon an impairment rating of 24% whole person.

6. Employer's claim for a safety rule offset is denied and dismissed.

7. Employer shall pay Claimant an additional fifty (50%) of the temporary total disability and permanent partial disability benefits to which he is entitled.

8. Employer shall pay the Colorado Uninsured Employer Fund an amount equal to twenty-five (25%) of the benefits due Claimant.

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

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

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

DATED: November 14, 2017

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

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Kenneth Finn, M.D. that she suffered an 8% whole person impairment rating as a result of her April 25, 2015 admitted lower back injury.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits in the form of an epidural steroid injection that is designed to relieve the effects of her April 25, 2015 industrial injury or prevent further deterioration of her condition.pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Claimant worked for Employer as a Dialysis Technician. On April 25, 2015 Claimant suffered an admitted lower back injury during the course and scope of her employment with Employer. Claimant slipped on a wet spot, twisted to the right and strained her lower back.

2. Claimant underwent a course of physical therapy for approximately three months. She reported no significant improvement.

3. During September 2015 Claimant was referred to Authorized Treating Physician (ATP) John Burris, M.D. for treatment. After a negative x-ray of her lumbar spine Claimant was referred to a chiropractor and massage therapist. After six treatments Claimant obtained temporary relief of her lower back pain.

4. In November 2016 Claimant was referred to Samuel Chan, M.D. for an examination. Dr. Chan recommended an MRI of Claimant's lower back.

5. On February 9, 2016 Claimant visited Dr. Chan for an evaluation. Dr. Chan commented that the MRI revealed a "disc protrusion lateralizing to the right side and there is abutment against the right S1 nerve root." Although Dr. Chan recommended an epidural steroid injection Claimant first sought to pursue her own research on the procedure.

6. On February 18, 2016 Claimant visited Dr. Burris for an examination. Dr. Burris remarked that Claimant's MRI had revealed "a right paracentral disc protrusion at L5-S1 abutting the right S1 nerve root." However, Dr. Burris commented that Claimant had an essentially normal neurologic examination. He determined that Claimant had reached Maximum Medical Improvement (MMI) for her April 25, 2015 lower back injury. Dr. Burris did not assign any impairment rating and noted that Claimant did not require

any work restrictions. In addressing medical maintenance treatment Dr. Burris explained that Claimant "does have one more follow-up with Dr. Chan. This can be provided through maintenance. I would also add a consideration of an epidural steroid injection within the next 6 months if she changes her mind through maintenance. Otherwise, no formal maintenance is required."

7. On March 29, 2016 Claimant visited Samuel Chan, M.D. for an examination. Dr. Chan remarked that Claimant "would like to pursue the epidural steroid injection. I do feel that this is reasonable. Even though the patient has been placed [at MMI] by Dr. Burris, [the] epidural steroid injection can be performed under maintenance care." He also noted that Claimant's lumbar range of motion in flexion was still limited because of pain. Dr. Chan commented that Claimant's "straight leg raising [was] positive on the right side at about 80 degrees."

8. On July 24, 2016 Dr. Burris responded to a questionnaire about Claimant's MMI status and medical maintenance care. He stated that Claimant remained at MMI. However, he commented that he "outlined an ESI under maintenance care within 6 months if she elected to pursue." He further stated, "I agree with Dr. Chan and this can be provided under maintenance."

9. After Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Burris' MMI and impairment determinations, Claimant sought a Division Independent Medical Examination (DIME). On August 5, 2016 Claimant underwent a DIME with Kenneth Finn, M.D. Dr. Finn diagnosed Claimant with lower back pain as well as unspecified neuralgia and neuritis. He noted that Claimant's lumbar spine x-ray was normal but her MRI reflected disc bulging on the right side at L5-S1. Dr. Finn agreed with Dr. Burris that Claimant had reached MMI on February 18, 2016 but assigned an 8% whole person impairment rating.

10. Dr. Finn assigned Claimant a 5% whole person impairment for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). However, he determined that Claimant was unable to meet the validity criteria for straight leg raises and her lumbar flexion was non-physiological. Dr. Finn thus did not assign an impairment rating for lumbar range of motion. He recommended repeat range of motion testing. Dr. Finn also assigned Claimant a 1% whole person impairment rating for decreased range of motion for left and right lateral bending for a total 2% range of motion impairment. He also assigned Claimant a 3% lower extremity rating that converted to an additional 1% whole person impairment. Combining the ratings yields an 8% whole person impairment. He remarked that "[t]here is no maintenance care recommended as she is not interested in any intervention at this time."

11. On September 7, 2016 Respondents filed a FAL consistent with Dr. Finn's February 18, 2016 MMI determination and 8% whole person impairment rating. Respondents denied medical maintenance treatment.

12. On March 9, 2017 Claimant returned to Dr. Finn for repeat range of motion testing. Claimant was again unable to meet validity criteria for straight leg raises and lumbar flexion. Dr. Finn considered lumbar extension to be non-physiological. He thus reiterated that Claimant suffered an 8% whole person impairment rating as a result of the April 25, 2015 industrial incident.

13. On September 11, 2017 Claimant underwent an independent medical examination with David Yamamoto, M.D. Dr. Yamamoto agreed that Claimant reached MMI on February 18, 2016. However, he reasoned that Dr. Finn erred in assigning Claimant an 8% whole person impairment rating and instead concluded that Claimant warranted a 21% whole person rating for the April 25, 2015 accident. Dr. Yamamoto explained that Claimant was entitled to receive a 7% whole person rating for a specific disorder of the lumbar spine pursuant to Table 53 II.C of the *AMA Guides*. He also assigned Claimant a 15% whole person impairment rating for range of motion limitations. Dr. Yamamoto thus assigned Claimant a 21% whole person rating for her April 25, 2015 lower back injury.

14. Claimant testified at the hearing in this matter. She explained that she would like to pursue an epidural steroid injection to alleviate her continuing lower back pain.

15. The Colorado Division of Labor and Employment *Impairment Rating Tips* (*Rating Tips*) under the section entitled "Spinal Rating" provide guidance for physicians assigning impairment ratings. Specifically, section 7 addresses the differentiation between subsections 53.II.B,C and F regarding x-ray findings. Section 7 provides that "[s]ymptomatic disk extrusion/herniation is rated under II.C" of the *AMA Guides*.

16. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Finn that she suffered an 8% whole person impairment as a result of her April 25, 2015 admitted lower back injury. Initially, Claimant suffered a lower back injury while working for Employer on April 25, 2015. She underwent a course of conservative treatment and obtained minimal improvement. A lumbar MRI revealed "a right paracentral disc protrusion at L5-S1 abutting the right S1 nerve root." ATP Dr. Burris determined that Claimant reached MMI on February 18, 2016 with no permanent impairment.

17. Claimant subsequently underwent a DIME with Dr. Finn. Dr. Finn diagnosed Claimant with lower back pain as well as unspecified neuralgia and neuritis. He noted that Claimant's lumbar spine x-ray was normal but her MRI reflected disc bulging on the right side at L5-S1. Dr. Finn agreed with Dr. Burris that Claimant had reached MMI on February 18, 2016 but assigned an 8% whole person impairment rating. He provided Claimant a 5% whole person impairment for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides*. However, he determined that Claimant was unable to meet the validity criteria for straight leg raises and her lumbar flexion was non-physiological. Dr. Finn thus did not assign an impairment rating for lumbar range of motion deficits. He determined that Claimant warranted a 1% whole person impairment rating for decreased range of motion for left and right lateral bending for a total 2% range

of motion impairment. Dr. Finn also assigned Claimant a 3% lower extremity rating that converted to an additional 1% whole person impairment. Combining the ratings yields an 8% whole person impairment.

18. In contrast, Dr. Yamamoto reasoned that Dr. Finn erred in assigning Claimant an 8% whole person impairment rating and instead concluded that Claimant warranted a 21% whole person rating for her April 25, 2015 accident. Dr. Yamamoto explained that Claimant was entitled to receive a 7% whole person rating for a specific disorder of the lumbar spine pursuant to Table 53 II.C of the *AMA Guides*. He also assigned Claimant a 15% whole person impairment rating for range of motion deficits. The *Rating Tips* specify that a "[s]ymptomatic disk extrusion/herniation is rated under II.C" of the *AMA Guides* and Claimant would thus receive a 7% whole person rating instead of a 5% rating for her specific disorder of the lumbar spine. However, Claimant's lumbar MRI only reflected "a right paracentral disc protrusion" or "disc bulging" at the L5-S1 level. Dr. Finn thus properly assigned a 5% whole person impairment under Table 53.II.B of the *AMA Guides*. Furthermore, Dr. Yamamoto did not outline any other errors in Dr. Finn's application of the *AMA Guides*. Dr. Finn therefore properly applied the *AMA Guides* and exercised his discretion in assigning Claimant a total 8% whole person impairment rating as a result of her April 15, 2015 industrial injury. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Finn's impairment determination was incorrect.

19. Claimant has failed to demonstrate that it is more probably true than not that she is entitled to receive reasonable, necessary and related medical maintenance benefits in the form of an epidural steroid injection that is designed to relieve the effects of her April 25, 2015 industrial injury or prevent further deterioration of her condition. Initially, Dr. Chan recommended an epidural steroid injection that would constitute maintenance care, but Claimant first sought to pursue her own research on the procedure. ATP Dr. Burris agreed that the injection could be covered under maintenance treatment if Claimant pursued the procedure within six months. Dr. Finn did not recommend maintenance care because Claimant was "not interested in any intervention at this time." Although Claimant sought to pursue an epidural steroid injection at the hearing in this matter, the request occurred more than 18 months after she reached MMI. Furthermore, the record reveals that Dr. Burris' recommendation for the procedure expired after six months and Dr. Finn noted at the time of the DIME that Claimant did not desire additional medical intervention. Accordingly, based on the bulk of the medical records, Claimant's request for an epidural steroid injection is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo.

306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Overcoming the DIME

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

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

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

overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. Table 53 of the *AMA Guides* is entitled "Impairments Due to Specific Disorders of the Spine" and is described as a comprehensive diagnosis-based Table. Table 53.II addresses intervertebral disc or other soft-tissues lesions. Impairment under section II B involves lesions that are "unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none-to-minimal degenerative changes on structural tests." A lumbar spine injury under Table 53. II.B. warrants a 5% whole person rating. Section II.C. involves unoperated lesions "with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm associated with moderate to severe degenerative changes on structural tests." A lumbar spine injury under Table 53.II. C. warrants a 7% whole person impairment.

8. The *Rating Tips* provide that permanent impairment ratings are only warranted when a specific diagnosis and objective pathology can be identified. *See Desk Aid #11, General Principles* 1. In specifically addressing spinal impairment ratings the *Impairment Rating Tips* note that "[p]hysicians should be aware that in the asymptomatic population, disk bulges, annular tears or high intensity zone areas, and disk height loss are commonly reported in the lumbar spine from 40 – 60% of the time depending on the condition and study. In the cervical spine, the prevalence of disc degeneration or loss of signal intensity on MRI is greater than 50% in the 50 years and older asymptomatic population." *See Desk Aid #11, Spinal Rating 7.* The *Impairment Rating Tips* summarize that

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

See Desk Aid #11, Spinal Rating 7.

9. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Finn that she suffered an 8% whole person impairment as a result of her April 25, 2015 admitted lower back injury. Initially, Claimant suffered a lower back injury while working for Employer on April 25, 2015. She underwent a course of conservative treatment and obtained minimal improvement. A lumbar MRI revealed "a right paracentral disc protrusion at L5-S1 abutting the right S1 nerve root." ATP Dr. Burris

determined that Claimant reached MMI on February 18, 2016 with no permanent impairment.

10. As found, Claimant subsequently underwent a DIME with Dr. Finn. Dr. Finn diagnosed Claimant with lower back pain as well as unspecified neuralgia and neuritis. He noted that Claimant's lumbar spine x-ray was normal but her MRI reflected disc bulging on the right side at L5-S1. Dr. Finn agreed with Dr. Burris that Claimant had reached MMI on February 18, 2016 but assigned an 8% whole person impairment rating. He provided Claimant a 5% whole person impairment for a specific disorder of the lumbar spine pursuant to Table 53 of the *AMA Guides*. However, he determined that Claimant was unable to meet the validity criteria for straight leg raises and her lumbar flexion was non-physiological. Dr. Finn thus did not assign an impairment rating for lumbar range of motion deficits. He determined that Claimant warranted a 1% whole person impairment rating for decreased range of motion for left and right lateral bending for a total 2% range of motion impairment. Dr. Finn also assigned Claimant a 3% lower extremity rating that converted to an additional 1% whole person impairment. Combining the ratings yields an 8% whole person impairment.

11. As found, in contrast, Dr. Yamamoto reasoned that Dr. Finn erred in assigning Claimant an 8% whole person impairment rating and instead concluded that Claimant warranted a 21% whole person rating for her April 25, 2015 accident. Dr. Yamamoto explained that Claimant was entitled to receive a 7% whole person rating for a specific disorder of the lumbar spine pursuant to Table 53 II.C of the *AMA Guides*. He also assigned Claimant a 15% whole person impairment rating for range of motion deficits. The *Rating Tips* specify that a "[s]ymptomatic disk extrusion/herniation is rated under II.C" of the *AMA Guides* and Claimant would thus receive a 7% whole person rating instead of a 5% rating for her specific disorder of the lumbar spine. However, Claimant's lumbar MRI only reflected "a right paracentral disc protrusion" or "disc bulging" at the L5-S1 level. Dr. Finn thus properly assigned a 5% whole person impairment under Table 53.II.B of the *AMA Guides*. Furthermore, Dr. Yamamoto did not outline any other errors in Dr. Finn's application of the *AMA Guides*. Dr. Finn therefore properly applied the *AMA Guides* and exercised his discretion in assigning Claimant a total 8% whole person impairment rating as a result of her April 15, 2015 industrial injury. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Finn's impairment determination was incorrect.

Medical Maintenance Benefits

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

461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

13. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits in the form of an epidural steroid injection that is designed to relieve the effects of her April 25, 2015 industrial injury or prevent further deterioration of her condition. Initially, Dr. Chan recommended an epidural steroid injection that would constitute maintenance care, but Claimant first sought to pursue her own research on the procedure. ATP Dr. Burris agreed that the injection could be covered under maintenance treatment if Claimant pursued the procedure within six months. Dr. Finn did not recommend maintenance care because Claimant was "not interested in any intervention at this time." Although Claimant sought to pursue an epidural steroid injection at the hearing in this matter, the request occurred more than 18 months after she reached MMI. Furthermore, the record reveals that Dr. Burris' recommendation for the procedure expired after six months and Dr. Finn noted at the time of the DIME that Claimant did not desire additional medical intervention. Accordingly, based on the bulk of the medical records, Claimant's request for an epidural steroid injection is denied and dismissed.

ORDER

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

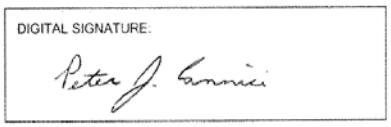
1. Claimant sustained an 8% whole person impairment as a result of her April 25, 2015 industrial injury.

2. Claimant's request for medical maintenance treatment in the form of an epidural steroid injection is denied and dismissed.

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

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

DATED: November 14, 2017.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-004-715-02

ISSUES

- Whether Property Cousins demonstrated by a preponderance of the evidence that Claimant was not an employee.

- Whether Claimant established by a preponderance of the evidence, that he sustained a compensable injury arising out of and in the course and scope of his employment on December 14, 2015.

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable, necessary, and medical treatment stemming from the December 14, 2015 injury.

- Whether the Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) from December 14, 2015 until June 21, 2016.

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability (PPD) benefits from the December 14, 2015 injury.

- Whether Property Cousins have proven by a preponderance of the evidence that they are entitled to reduced compensation benefits by fifty percent for willful violation of a safety rule pursuant to C.R.S. section 8-42-112(1)(b).

- Whether Claimant has proven by a preponderance of the evidence that he entitled to a fifty percent (50%) penalty as a result of Property Cousins, LLC not having workers compensation insurance at the time of his injury pursuant to C.R.S. CRS 8-43-408.

FINDINGS OF FACT

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

1. Employer hired Claimant, a carpenter's assistant, to perform renovation work on properties Employer owned.

2. Clamant assisted Rosendo Salazar, a master carpenter, who Employer also hired to perform renovation work on properties Employer owned.

3. Claimant speaks Spanish and no English. Brian Moore, Employer's owner, speaks English and almost no Spanish. Mr. Salazar would translate for Mr. Moore to Claimant regarding Claimant's job responsibilities and which jobsite to report to. Mr. Salazar also translated for Claimant whatever Mr. Moore needed to convey to Claimant

about timekeeping, limits on what work Claimant could not perform, and other job related duties.

4. Levi Maes, a cousin of Mr. Moore's, also spent limited time on the jobsite. When he was there, he would also supervise Claimant and Mr. Salazar. Mr. Maes testified that Mr. Salazar provided Claimant with the day-to-day direction of his work because Claimant was Mr. Salazar's assistant/helper.

5. During the four to five months before he was injured, Claimant only worked for Employer and was not allowed to leave without permission to work another job.

6. Mr. Moore told Claimant when to arrive at work and when to leave. Claimant testified that if he needed to leave work early, he was required to have Mr. Moore's permission. However, he also testified that he and Mr. Salazar could leave at 3:00 or 4:00 p.m., they never did.

7. Employer required Claimant to use a time-clock to punch in and out of work for the majority of the time he worked for Employer. Both Claimant and Mr. Salazar testified that they used the time-clock the entire time they worked for Employer. Mr. Moore acknowledged that he required his workers to use the time clock because he did not trust them to accurately report their hours.

8. Employer did not allow Claimant to work on electrical and plumbing projects, and on "more dangerous aspects of construction."

9. Claimant provided his own hand tools but also used a circular saw, table saw, and other large tools Employer provided.

10. Claimant testified that he often worked with Mr. Salazar and two other workers (Roberto and Omar) at the jobsite, while Mr. Moore was often not there. When Mr. Moore was present, he supervised Claimant.

11. Claimant and Mr. Salazar had the combination to the lock box at the Elizabeth property and could let themselves in to begin work. They would lock the house when leaving. Mr. Maes testified that Claimant could come and go from work as he pleased so long as "the project was progressing." However, he also testified that he and Mr. Moore made Claimant use the time clock to track his hours.

12. Mr. Moore paid Claimant weekly based on the number of hours he worked at the rate of $15 per hour, using Employer's company checks. Claimant worked approximately fifty hours per week. Claimant's average weekly wage was $750.

13. Employer made checks out to Claimant personally.

14. Claimant has never owned any type of contracting business.

15. Claimant did not have a written contract while he worked for Employer.

16. Claimant did not work for Mr. Salazar, was never paid by him, and never had a contract to work for him. Mr. Salazar also did not have a contract with Employer.

17. Claimant previously worked for Levi Maes who told Claimant at Mr. Maes' project that he was not an employee and would be given a 1099 tax form. No persuasive evidence supports a finding that Mr. Moore told Claimant similar information about working for Employer.

18. Mr. Moore testified that he did not have employees because it was what he was taught as a general contractor. As the general contractor Mr. Moore oversaw and managed the project. However, he also testified that because he had another full-time job, he would "go in, see if they need anything, and then go about my day and get ready for work." When asked specifically about overseeing the workers, he testified, "I didn't have time for that." Further, Mr. Moore testified that because he was relatively new at flipping houses, he "relied on his workers for a lot of direction." "They would usually tell me what they were going to accomplish during the week, and I'd be like, okay, that sounds great."

19. Mr. Moore testified that he installed the time clock because he did not trust the workers to accurately report their hours. In particular, he found Roberto to be difficult to work with and not trustworthy. After four or five weeks the workers would kick the time clock around and they eventually destroyed it.

20. The ALJ finds it unlikely that Mr. Moore relied on his workers to direct their own work given that he did trust them enough to rely on their time reports. The ALJ also finds it unlikely that Employer, whose business was to flip houses for profit, would ask his workers what they wanted to accomplish in a week of work and that he would simply agree.

21. Mr. Moore testified that he paid Claimant by the hour at the end of the week. He testified that he did not set Claimant's hours, and he did not withhold FICA from Claimant's pay.

22. Claimant worked for Employer for approximately four or five months when, on December 14, 2015, Claimant was assisting Mr. Salazar install bars on a stair rail at Employer's property located at the corner of 13th and Elizabeth in Denver, Colorado. Mr. Salazar was using a pneumatic nail gun to install the stair rails. As he was nailing one of the bars on to the stair rail, a nail ricocheted and penetrated Claimant's right eye.

23. Mr. Salazar immediately reported the injury to Mr. Moore.

24. Claimant pulled the nail out of his eye and a coworker gave Claimant a roll of toilet tissues to cover his eye. Claimant's daughter arrived within minutes and transported Claimant to Rose Medical Center seeking emergent care to evaluate the extent of and to stabilize Claimant's eye injury.

25. Rose Medical Center then referred Claimant to Porter Surgery Center/Harvard Park Surgery Center where Dr. Holly Kent, a specialized ophthalmologist

performed emergency surgery. The procedures performed included repair of a corneal laceration, brief exam under anesthesia, and repositioning of the right iris.

26. Claimant received follow-up evaluation and treatment at Denver Health Medical Center Eye Clinic. Claimant underwent further surgery with Richard Hwang, MD, at the Eye Clinic on December 22, 2015, which included the following procedures: a 23-guage pars plana vitrectomy; a pars plana lensectomy; Endolaser photocoagulation; anterior chamber intraocular lens placement; and Subtenon Kenalog. Claimant's post-surgical diagnoses included traumatic cataract, vitreous debris versus vitreous hemorrhage, and history of open globe repair due to penetrating nail injury.

27. On March 30, 2016, Frank Seringo, MD, evaluated Claimant, and on April 12, 2016, he prepared a Physician's Report of Worker's Compensation Injury report. Dr. Seringo ultimately placed Claimant at MMI on June 1, 2016.

28. On November 1, 2016, Ronald Wise, MD, performed a Claimant-sponsored IME. He reported that subsequent to his December 22, 2015 surgery, Claimant experienced a traumatic and glaucomatous optic neuropathy of his right eye.

- Impairment rating: After performing a physical examination, Dr. Wise used the AMA Guides to arrive at a combined rating of 99% for Claimant's right eye. This equated to a 25% visual system impairment rating and a 24% whole person impairment rating.

- Maintenance Care: Dr. Wise determined that Claimant required maintenance including an ophthalmic examination every six months for life to monitor his macula and glaucoma status. And also that Claimant should remain on timolol and brimonidine twice a day in his right eye for life.

- MMI: Dr. Wise agreed with Dr. Siringo's MMI date of June 1, 2016.

- Permanent Restrictions: Dr. Wise restricted Claimant from driving commercial vehicles and operating heavy machinery. He provided, "[Claimant] should work at heights above the ground and use power tools with extreme caution due to his monocular status." Claimant should undergo a performance evaluation before performing any work activity that might be limited by his monocular status. And finally, he required Claimant to use corrective and protective eyewear at all times.

29. To date Employer has not paid for any of Claimant's medical care and treatment.

30. Claimant's daughter transported Claimant to his medical appointments, including to his initial emergency care. Because Claimant does not speak or read English, his daughter filled out intake forms and provided translation services. Claimant did not direct his daughter how to fill out the forms and she acted at her own discretion in providing information.

31. Claimant testified that Employer did not provide him with any safety equipment, including goggles. And that he never noticed Mr. Moore bring a box of goggles to the jobsite. Claimant testified that Mr. Salazar never told him that there were glasses and to wear them. Further, Mr. Moore did not lecture him about wearing goggles when doing dangerous work.

32. Mr. Salazar testified that on the date of Claimant's injury Employer did not provide Claimant with safety goggles. However, Employer had provided Mr. Salazar with protection glasses on another job. Mr. Salazar did not know whether Employer had provided Claimant with protection glasses on another job. Mr. Salazar testified further that Mr. Moore would bring safety glasses to the jobsite "whenever we asked him to." But that he was not aware of o box of safety glasses being on the jobsite.

33. Mr. Salazar testified that Mr. Moore "sometimes" told him to use safety glasses when he and Claimant were working around dangerous machinery. But he did not know whether Mr. Moore told Claimant the same thing. Mr. Maes testified that he and Mr. Moore would ask Claimant and Mr. Salazar what they needed and then would supply the requested safety items.

34. Mr. Moore testified that he bought a box of safety goggles for Claimant and Mr. Salazar. Mr. Moore testified that many times he would say, "You guys need to wear safety glasses," but they "would just not listen to me." Instead of reprimanding or firing them, Mr. Moore bought a box of safety glasses and told them, "No more excuses. Please use the safety goggles." Mr. Moore testified that he gave Claimant and Mr. Salazar the "safety goggle speech" "more times than he could count." The ALJ finds this testimony inconsistent with Mr. Moore's testimony that he did not have the time to oversee the work being done on the project and that he would just stop in at the jobsite to see if the workers needed anything.

35. While Mr. Maes testified that he told Claimant to wear goggles, from context the ALJ finds that he did so when Claimant was working for him; not for Employer. In addition, Mr. Maes testified that at times there was a box of goggles at the Elizabeth street jobsite, but he did not know if it was there the day Claimant was injured.

36. Mr. Salazar was not wearing safety goggles at the time Claimant was injured. No persuasive evidence was offered that Employer took any negative employment action against Mr. Salazar for failing to use protective eyewear.

37. Based on the totality of the evidence, the ALJ finds that Employer did not have a safety rule about safety glasses or that any such policy was enforced.

38. Mr. Maes has no ownership interest in Employer. He testified inconsistently that he gave no direction at the Elizabeth street project, but rather acted as a "resource;" and that when he supervised Claimant when Mr. Moore was not on site.

CONCLUSIONS OF LAW

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

Generally

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. §8-40-102(1). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-42-101.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The question of whether the claimant met his burden of proof is one of fact for determination by the ALJ. See *Jefferson County Public Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. C.R.S. §8-43-201. A Workers' Compensation case is decided on its merits. C.R.S. §8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence/or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

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

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

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). This decision does not specifically address every item contained in the record; instead,

incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Status of Claimant: Employee or Independent Contractor

C.R.S. section 8-40-202(2)(a), sets forth a statutory presumption that "any individual who performs services for pay for another shall be deemed to be an employee, irrespective of whether the common-law relationship of master and servant exists, unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

The parties do not dispute that no contract existed between Employer and Claimant. Therefore Claimant is presumed to be Employer's employee. To overcome this presumption, Employer must prove by a preponderance of the evidence that the conditions set forth in C.R.S. section 8-40-202 (2)(b)(II)(A)-(I) have been satisfied to establish Claimant was an independent contractor. To prove independence from the employee-employer relationship Employer must show that it did not:

> (A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
>
> (B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
>
> (C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;
>
> (D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;
>
> (E) Provide more than minimal training for the individual;
>
> (F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;
>
> (G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;
>
> (H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

The ALJ finds and concludes that Employer has not meet its burden in regard to proving Claimant was an independent contractor rather than an employee. Claimant and Mr. Salazar both testified in detail about their working relationship with Employer. The ALJ finds both Claimant and Mr. Salazar to be credible witnesses. Both testified to the following: 1) they were told what to do on the jobsite on a given day by Mr. Moore or Mr. Maes; 2) they could not work for another employer other than Employer; 3) their work was supervised by Mr. Moore or Mr. Maes; 4) they were told when to arrive at work and when they could go home; 5) Employer required them to keep track of their hours worked by using a time clock located at the job site; 6) they could not leave the jobsite during the day without getting permission from Mr. Moore or Mr. Maes to do so; 7) they were paid an hourly wage based upon the number of hours worked in a week; 8) their paychecks were made to each of them individually and not to a company; 9) they did not have a contract with Employer; and 10) they brought many of their own small tools to the job site, but Employer furnished certain larger pieces of equipment.

Mr. Moore, owner of Employer, testified that Claimant and Mr. Salazar came to the jobsite as a team and that due to Claimant not speaking English, directions on what Claimant was to do on the jobsite came through Mr. Salazar. Mr. Moore testified that he hired Claimant and Mr. Salazar on a time and material basis but offered no other evidence of Claimant's status as an employee versus an independent contractor. Mr. Moore also testified that he could have fired Mr. Salazar for poor performance, which in turn, since they were viewed as a team, would have terminated Claimant's employment relationship.

In addition, the ALJ is guided by apply the analysis used by the Colorado Supreme Court in *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014), pertinent to the issue of whether the claimant was engaged in an independent trade or business.

To that end, the Supreme Court, in *Softrock*, revised the standard previously used by the Panel and the Court of Appeals when analyzing whether or not an employee "is customarily engaged" in an independent trade or business. That previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court declared, "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565.

Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in § 8-202(2)(b)(II), but also any other relevant factors. The Court pointed as an example to the decision in *Long View Systems Corp. v. Industrial Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008). In *Long View* the Panel was asked to consider whether the

employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the employer. 325 P.3d at 565.

The ALJ must conduct an inquiry into the "nature of the working relationship." A review of the record in this matter reveals there is no persuasive evidence that Claimant had an independent business card, phone listing, and business address, had any financial investment subject to a risk of loss, set the price for performing the project or employed others. There was no evidence he carried liability insurance. There was also evidence in the form of Mr. Moore's acknowledgement that Claimant was working approximately fifty hours per week for Employer which suggested Employer knew Claimant was working full time and exclusively for Employer. The ALJ finds Employer would reasonably be aware that Claimant was not engaged in an independent business, based on the working relationship it had with Claimant.

The Court concludes that Employer failed to meet its burden of establishing by a preponderance of the evidence that the conditions set forth in C.R.S. section 8-40-202 (2)(b)(II)(A)-(H) and in *Softrock* have been satisfied, and further finds and concludes that Clamant was an employee of Employer on December 14, 2015.

Claimant's Entitlement to Benefits

Having determined that Claimant was an employee on the date of his injury, the ALJ next must determine whether Claimant was injured while performing an activity arising out of and in the course and scope of that employment. Arising out of and in the course of an employee's employment means that there must be a nexus between the claimant's injury and the conditions of his employment. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989). Whether an employee is acting within the course and scope of his employment depends on the facts surrounding the incident in question. *Bennett v. Furr's Cafeterias,* 549 F. Supp 847 (D. CO. 1982). The testimony at the hearings was uncontroverted that on December 14, 2015, while working at a property owned by Employer, Claimant was struck in the right eye by a nail discharged from a nail gun operated by a co-worker. Claimant and his co-worker were installing bars in a stair rail at the direction of Employer's owner. Carpentry work such as installing bars on a stair rail were part of Claimant's normal day-to-day responsibilities. The mechanism of Claimant's injury, being struck in the eye by a nail fired from a nail gun, is unquestionably a result of the conditions of his employment. The ALJ therefore finds and concludes that Claimant sustained an injury on December 14, 2015 while performing an activity arising out of and in the course and scope of that employment.

Claimant contends that he is entitled to medical benefits, temporary total disability benefits, and permanent partial disability benefits as a result of the December 14, 2015 accident. Claimant bears the burden of proving his entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo.1985).

Medical Benefits

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

> Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Claimant received medical care as a result of his injury. While the reasonableness and necessity of his medical care was not contested, a review of Claimant's Exhibits 1-6 as well as Claimant's testimony convinces the ALJ that Claimant received extensive medical treatment for the injury to his right eye. The ALJ finds and concludes that Claimant has demonstrated by a preponderance of the evidence that his medical care was reasonable and necessary and the need for those medical services arose directly from his accident of December 14, 2015.

Employer is therefore ordered to pay Claimant's medical expenses arising from this accident.

Claimant also presented persuasive and uncontroverted evidence that he requires medical maintenance benefits including prescriptions for medications Timolol and Brimonidine and ophthalmic examinations every six months to monitor his macula and glaucoma status. Claimant will require these benefits for his lifetime.

Employer is ordered to provide such medical maintenance care.

Temporary Total Disability Benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between his work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace*

Electric, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant was injured on December 14, 2015, sought medical attention immediately thereafter, was restricted from returning to work by Dr. Siringo, and was found to be at MMI and released to return to work on June 1, 2016. The ALJ finds and concludes that Claimant has demonstrated by a preponderance of the evidence that as a result of Claimant's December 14, 2015 injury, he was unable to perform his normal occupation from December 14, 2015 until the date he was released to work on June 1, 2016. Claimant is entitled to temporary total disability benefits for the period of December 14, 2015 to June 1, 2016.

Employer is ordered to pay Claimant temporary total disability benefits at the rate of $500.00 per week from December 14, 2015 until June 1, 2016.

Permanent Partial Disability

C.R.S. section 8-42-107 provides that permanent partial disability benefits shall be awarded to an injured worker at such time as he or she reaches maximum medial improvement and has had a determination of his or her medical impairment performed by a physician accredited by the Division of Workers Compensation. Claimant was found to be at maximum medical improvement on June 1, 2016. Dr. Ronald Wide, a workers' compensation accredited physician, found Claimant sustained a permanent impairment of 99% loss of his right eye which converts to a 24% whole person rating. Employer offered no persuasive or contradictory medical evidence. The ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits.

Employer shall pay to Claimant permanent partial disability benefits based upon Dr. Wise's 24% whole person impairment.

Safety Rule Violation

C.R.S. section 8-42-112(1)(b) provides for a fifty percent reduction in compensation to a claimant where a respondent proves that the claimant's injury was caused by his or her willful failure to obey any reasonable rule adopted by the employer for the claimant's safety. *See In re Claim of Bromirski, 082113 COC, 4-882-047-01.*

Under section 8-42-112(1)(b), respondents bear the burden to prove every element justifying a reduction in the claimants' compensation for the willful failure to obey a reasonable safety rule. *Triplett v. Evergreen Builders*, Inc., W. C. No. 4-576-463 (May 11, 2004).

The question of whether the respondent proved willful violation of a safety rule by a preponderance of the evidence is one of fact for the ALJ. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not

willful unless the claimant did the forbidden act with deliberate intent. A violation which is the product of mere negligence, carelessness, forgetfulness or inadvertence is not willful. *Bennett Properties Co. v. Indus. Commission*, 437 P.2d 548 (Colo. 1968); *Johnson v. Denver Tramway Corp.*, 171 Colo. 214, 171 P.2d 410 (1946). Conduct which might otherwise constitute a safety rule violation is not willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). A violation of a safety rule will not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Employer must prove the following elements: 1) There must be a specific, unambiguous and definite safety rule adopted by the employer; 2) The safety rule must be reasonable; 3) The safety rule must be "brought home" to the employee and diligently enforced; 4) Violation of the safety rule must be willful; and 5) The violation of the safety rule must be a cause of the claimant's injury. C.R.S. § 8-42-112(1)(b)(2015); *L.B. Cole Produce Co. v. Indus. Com'n.*, 228 P.2d 808, 809 (1951); *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995).

The first step is to determine whether or not Employer adopted a reasonable "safety rule." A safety rule does not have to be formally adopted, does not have to be in writing, and does not have to be posted. Rather, it is necessary that the safety rule was heard and understood and given by someone generally in authority. *Indus. Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246P.2d 902 (Colo. 1952); *McCulloch v. Industrial Commission*, 109 Colo. 123, 123 P.2d 414 (Colo. 1942)

Employer alleges Claimant violated a safety rule on December 14, 2015, when he did not wear safety glasses while working with or around a nail gun. Claimant testified that Employer did not provide him with safety goggles; Mr. Moore did not tell him to wear safety goggles; Mr. Salazar did not tell him to wear safety goggles; and Mr. Moore did not lecture or reprimand him for not using safety goggles.

Mr. Moore testified that he bought an entire box of safety goggles for "the guys" working on site. He further testified that after he bought the box of safety goggles, he told them to please use safety goggles.

The ALJ finds that Employer did not have a specific, unambiguous and definite safety rule in place with regard to the use of safety goggles on December 14, 2015. Further, the evidence supports a conclusion that even if there were a safety rule, Employer did not enforce it. Analysis of the other elements of a safety rule violation are unnecessary.

The ALJ finds that Employer failed to prove by a preponderance of the evidence that it is entitled to reduce compensatory benefits by fifty percent for a willful violation of a safety rule pursuant to C.R.S. section 8-42-112(1)(b).

Penalty for Employer's Failure to Have Complying Workers' Compensation Insurance

C.R.S. section 8-43-408(4) provides a fifty percent (50%) penalty against any employer who fails to comply with the insurance provisions of the Colorado Workers Compensation Act. Employer admitted during the June 7, 2017 hearing that it was not insured at the time of Claimant's injury. This Court has no discretion in imposing the penalty. *See Kamp v. Disney,* 135 P.2d 1019 (Colo. 1943). Employer is therefore assessed a 50% penalty on all of the amounts due Claimant for temporary total disability and permanent partial disability.

In addition, C.R.S. section 8-43-408(5) provides that a defaulting employer shall pay an amount equal to twenty-five percent (25%) of the compensation or benefits due to the employee to the Colorado Uninsured Employer Fund created by C.R.S. section 8-67-105. The ALJ finds and concludes that Employer, having failed to have complying workers compensation insurance, is liable to the Colorado Uninsured Employer fund in an amount equal to twenty-five (25%) of the benefits due Claimant.

ORDER

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

1. Claimant's AWW is $750.00 with an equivalent TTD rate of $500.00 per week.

2. Employer shall pay the costs of Claimant's medical care and treatment for his compensable injury of December 14, 2015, subject to the Division of Workers' Compensation Medical Fee Schedule.

3. Employer shall pay the costs of Claimant's maintenance medical care.

4. Employer shall pay Claimant temporary total disability in the amount of $500.00 per week, or $100.00 per day from December 14, 2015 until June 1, 2016, both dates inclusive, in the aggregate amount of $12,100.00, which is payable retroactively and forthwith.

5. Employer shall pay Claimant permanent partial disability benefits based upon an impairment rating of 24% whole person.

6. Employer's claim for a safety rule offset is denied and dismissed.

7. Employer shall pay Claimant an additional fifty (50%) of the temporary total disability and permanent partial disability benefits to which he is entitled.

8. Employer shall pay the Colorado Uninsured Employer Fund an amount equal to twenty-five (25%) of the benefits due Claimant.

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

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

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

DATED: November 14, 2017

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

ISSUES

- Whether Claimant provided materially false information to Respondents in order to induce them into admitting liability for his injury and to fraudulently obtain workers' compensation benefits.

- If so, whether the court can declare Respondents general admissions of liability filed on December 22, 2015 and December 23, 2016, void *ab initio*.

- Whether the court can order Claimant to repay Respondents.

FINDINGS OF FACT

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

1. Claimant is a 44-year-old who was working for 5280 Staffing Solutions during November 2015. On November 17, 2015, Claimant alleged that at 11:50 p.m. while he was picking lumbar from a stack of wood, he jumped down from the stack and slipped and fell onto his left shoulder.

2. Respondents conducted an investigation into the incident which included speaking with Employer and Claimant and reviewing medical records. The incident was unwitnessed, however, the Employer had no reason to question the incident as alleged by Claimant. Likewise, Claimant told Respondents how he was allegedly injured at work and medical records corroborated Claimant's story.

3. Relying on the statements Claimant made to Employer, to his providers, and to the Insurer's claims adjuster, Respondents filed a general admission of liability on December 22, 2015, admitting to medical benefits and TTD in the amount of $479.87 per week starting on November 28, 2015.

4. Claimant first reported to the Emergency Department at St. Anthony Hospital on November 18, 2015. Claimant indicated that he had slipped on an icy piece of wood and fell approximately 2 feet onto the ground striking his left lateral shoulder. Claimant was noted to have a 3 cm abrasion to his left shoulder posteriorly and some mild swelling. Claimant was given pain mediation and referred to a worker's compensation provider for further treatment.

5. Claimant followed up with Dr. Noel that same day and was diagnosed with a work-related contusion and dislocation. Claimant was placed in a sling and restricted from using his left arm. Dr. Noel referred Claimant to undergo an MRI of his left shoulder. Employer was unable to accommodate Claimant's restrictions so TTD continued.

6. MRI results obtained on November 23, 2015, and reviewed by Dr. Noel on December 3, 2015, revealed fraying and fissuring of the postero-superior labrum with a small displaced tear. Claimant indicated that he was in 8/10 pain with ROM and that he had been on vacation for two weeks. Claimant was recommended to undergo physical therapy two times a week for four weeks and was restricted from using his left arm. Dr. Noel referred Claimant to Dr. Foulk for orthopedic evaluation.

7. Claimant underwent an EMG study on January 14, 2016, due to continued numbness extending into Claimant's left arm and hand. EMG results showed no abnormality. Claimant denied ever having been in a prior motor vehicle accident and was noted to have multiple prior workers' compensation claims.

8. Claimant continued with physical therapy and home exercises until April 28, 2016, when he returned for evaluation with Dr. Foulk. Upon review, Dr. Foulk recommended Claimant undergo surgery for his left shoulder injury. Claimant elected to pursue surgical intervention and underwent left shoulder arthroscopy, subacromial decompression, distal clavicle resection and extensive debridement of the biceps tendon tear and torn labrum on June 2, 2016.

9. Claimant underwent a second round of physical therapy and home exercises during his recovery from surgery with progressive improvement noted. Claimant continued off from work and received TTD benefits during his recovery.

10. In October or early November 2016, an anonymous tip left on Insurer's fraud hot-line, reported Claimant was involved in an MVA immediately before his claimed injury at work and was fraudulently obtaining workers' compensation benefits. Claimant reportedly fled the scene of the accident, and went to work where he then lied to Employer about a work-related injury.

11. On November 1, 2016, the District Attorney's office of Colorado's17th Judicial District filed a criminal complaint against Claimant and issued a warrant for his arrest. The State charged Claimant with 13 different criminal offenses including insurance fraud, theft of over $20,000, and providing materially false statements in a workers' compensation claim. Claimant was arrested on November 8, 2016.

12. On December 23, 2016, Respondents filed an additional General Admission of Liability in an attempt to stop indemnity benefits based C.R.S. 8-42-113(1). *Resp. Ex. E, BN 13-15.* However TTD benefits continued as claimant had not yet been convicted as required under the statute. *See C.R.S. 8-42-113(1) and Resp. Ex. G, BN 21 (date of actual conviction 3.23.2017).*

13. Claimant remained incarcerated pending conviction until March 23, 2017, when he plead guilty to providing materially false information in order to obtain benefits in violation of C.R.S. 8-43-402 and vehicular assault. *Id., and Resp. Ex. J, BN 31.* Claimant was sentenced to one year in prison, placed on probation, and ordered to pay restitution to the victims of his crimes. *Id.*

14. Respondents filed the current application for hearing on April 11, 2017, requesting to have the court declare all general admissions of liability void ab initio due to Claimant providing materially false information upon which Respondents relied in filling the admissions of liability. *Resp. Ex. A, BN 1.*

15. On April 21, 2017, Respondents filed another petition to terminate claimant's lost wage benefits. *Resp. Ex. F, BN 16.* This motion was granted on May 16, 2017. *Id., at 20.* By that time, Respondents had paid a total of $36,881.44 in lost wage benefits and $24,642.89 in medical benefits for a total of $61,524.33. *Testimony of Arthur Ramirez and Resp. Ex. L.*

1.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S. (2013), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*. **[**Claimant shoulders the burden of proving by a preponderance of the evidence that he/she sustained an injury arising out of and within the course of his/her employment. Section 8-41-301(1), *supra*; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). **OR** Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), *supra*. **OR** Insurer shoulders the burden of proving by a preponderance of the evidence grounds for allowing it to withdraw its admissions of liability on the basis that claimant's injury is not compensable.**]** A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

ORDER

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

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

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

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

DATED: _____

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ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the sacroiliac (SI) joint injection recommended by Dr. John Ogrodnick and Dr. Samuel Chan is reasonable, necessary and related to Claimant's March 24, 2017 industrial injury.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reimbursement for medical mileage.

STIPULATIONS

1. Respondents will file a General Admission of Liability admitting compensability for the March 24, 2017 industrial injury.

2. Claimant's average weekly wage was $997.92.

3. Claimant is entitled to, and Respondents will commence paying, temporary partial disability benefits beginning March 28, 2017 and ongoing.

4. Respondents will authorize and pay for the medical care provided to date by Dr. John Ogrodnick, Dr. Samuel Chan and Dr. William White.

FINDINGS OF FACT

1. Claimant is a 58-year-old man who worked for Employer as a loader. Claimant sustained an industrial injury on March 24, 2017 while stepping into a gap between the dock and trailer while loading packages.

2. Claimant presented to John Ogrodnick, M.D. at SCL Physicians on March 28, 2017. Claimant provided a history of striking his right knee against the dock while his left knee was folded in front of him as he dropped all the way down to his buttocks while hanging from the door strap. Claimant complained of 6-7/10 right-sided low back pain. On physical exam, Dr. Ogrodnick noted very limited lumbar flexion, tenderness over the right SI joint, and positive right FABER and posterior sheer tests. Claimant had full range of motion in the right knee without swelling. Dr. Ogrodnick determined Claimant's condition was work-related and assessed a lumbar strain. He placed Claimant on a 10-pound lifting restriction with no bending or twisting and referred Claimant to Dr. White for chiropractic treatment.

3. At a follow-up evaluations with Dr. Ogrodnick on April 7 and April 18, 2017, Claimant reported that he continued to experience right-sided low back pain, which he rated at a 4-5/10. Dr. Ogrodnick noted tenderness over the SI joint. Claimant's knee pain had resolved.

4. Claimant began chiropractic treatment with William White, D.C. on April 19, 2017. Claimant provided a history of the mechanism of injury consistent with what he had previously reported. Claimant complained of low back pain and tingling into his lower right extremity. Dr. White noted normal lumbar range of motion with pain, tenderness and edema at L5 and the SI joint on the right, and muscle spasm of the lumbar paravertebral musculature on the right. Dr. White diagnosed Claimant with a work-related lumbar sprain and lumbosacral radiculopathy. He recommended that Claimant undergo six sessions of chiropractic manipulative technique and passive physiotherapy.

5. On May 3, 2017, Claimant reported to Dr. White a decrease in low back pain from 5/10 to 3/10. Dr. White noted painful but normal lumbar range of motion and tenderness and edema at L5 and the SI joint on the right. He recommended an additional six sessions of chiropractic treatment.

6. Dr. Ogrodnick reevaluated Claimant on May 9, 2017. Claimant reported constant 3/10 low back pain and 2/10 right thigh pain/tingling. Dr. Ogrodnick remarked that a May 9, 2017 x-ray of Claimant's lumbosacral spine revealed an "unusual degree of lordosis and some degeneration of S1/sacrum interspace." On physical exam, Claimant was able to reach to within five inches of his toes through lumbar flexion. Dr. Ogrodnick noted tenderness over the right SI joint and that the right FABER and FADIR tests created an atypical pain in the usual right low back area. Dr. Ogrodnick recommended Claimant continue working with restrictions, build up his abdominal strength, and continue his chiropractic regimen.

7. On May 25, 2017, Claimant reported to Dr. Ogrodnick 2/10 pain over his upper right gluteals. Claimant was able to reach to within two inches of toes through lumbar flexion. Dr. Ogrodnick noted tenderness mainly over right SI joint. FABER and FADIR and posterior sheer tests reproduced ipsilateral discomfort. Dr. Ogrodnick referred Claimant to Dr. Chan to perform a diagnostic SI injection.

8. On May 26, 2017, Dr. White issued a follow-up report on the final chiropractic visit and completion of treatment. Claimant reported that his pain had reduced from a 3/10 to a 1/10 with additional therapy. Claimant continued to complain of right-sided SI pain. Dr. White noted normal lumbar range of motion and pain and inflammation of the right SI joint. Claimant had completed a total of 12 chiropractic sessions and was discharged from Dr. White's care at this time.

9. Samuel Chan, M.D. performed a physiatric evaluation of Claimant on June 16, 2017. Claimant provided a history of the mechanism of injury consistent with prior histories provided by Claimant. Claimant reported that he was no longer experiencing any pain over the lumbar spine, but continued to experience 3/10 right hip pain that radiated into his right knee. On physical exam, Dr. Chan noted that the "Right SI joint engage somewhat slow on the left with lumbar forward flexion." Gaenslen's and FABER tests were positive. Dr. Chan opined that Claimant had SI joint dysfunction and agreed that an SI injection could be offered as an option that may help truncate a potentially lengthy rehabilitative process.

10. The request for an SI injection was denied by Respondents.

11. On June 22, 2017, Claimant reported to Dr. Ogrodnick 3/10 intermittent right-sided low back pain localized to the upper gluteal region. FABER, FADIR and posterior sheer tests reproduced ipsilateral pain. Claimant was able to reach within four inches of his toes through lumbar flexion. Claimant reported "testing" himself on a few occasions, noting that he had carried a case of 32-ounce water bottles from his car to a company picnic.

12. On July 24, 2017, Claimant reported to Dr. Ogrodnick 1/10 right-sided low back pain. Dr. Ogrodnick noted that FABER, FADIR, posterior sheer, and right log roll tests were positive on the right.

13. Claimant last saw Dr. Ogrodnick on August 22, 2017. At that time, Claimant reported 2/10 right-sided low back pain. Claimant reported that he had attempted to tolerate cashier duties during his second job with King Soopers, which caused significant pain. Claimant was able to reach within 10 inches of his toes through lumbar flexion. The right FABER test reproduced ipsilateral pain. Dr. Ogrodnick suggested not scheduling any additional follow-up until further treatment was authorized by Respondents.

14. On September 8, 2017, F. Mark Paz, M.D. conducted an Independent Medical Evaluation (IME) of at the request of Respondents. Dr. Paz issued an IME report dated October 3, 2017. Claimant reported to Dr. Paz a history of the mechanism of injury consistent with the prior history documented in the medical records. Dr. Paz opined that Claimant had suffered a work-related injury, but that the mechanism reported was not consistent with the diagnosis of SI dysfunction or aggravation of a preexisting SI joint arthritis. Dr. Paz indicated that the anatomical location of the reported pain was over the right buttock and hip, without involvement of the SI joint. Dr. Paz indicated that Claimant suffered an abrasion to the right knee and contusion to the right buttock as a result of the March 24, 2017 injury, and that these conditions were resolved. He opined that there was no further treatment required to address the work-related injury.

15. Claimant testified at hearing that prior to March 24, 2017 he had no problems with his low back. Claimant testified that as a result of the work-related accident, claimant injured his low back, right hip and right leg. Claimant rated his back pain at a 1/10 upon completion of chiropractic treatment, but testified that he continues to experience pain and functional limitation in his low back and right hip that was not present prior to March 24, 2017. Claimant testified that he wished to obtain the SI joint injection recommended by Dr. Ogrodnick and Dr. Chan.

16. Claimant submitted a medical appointment mileage reimbursement form evidencing 244.60 miles traveled to medical appointments from March 28, 2017 through May 8, 2017. Claimant testified that he incurred the mileage documented in the mileage reimbursement form driving to and from treatment with Dr. Ogrodnick and Dr. White. The mileage expenses were reasonable and necessary.

17. Claimant's testimony is found credible and persuasive.

18. The ALJ credits the opinions of Drs. Ogrodnick and Chan over the conflicting opinion of Dr. Paz.

19. Claimant has proven by a preponderance of the evidence that the SI injection recommended by Drs. Ogrodnick and Chan is reasonable, necessary and related to his March 24, 2017 industrial injury.

20. Claimant has proven by a preponderance of the evidence that he is entitled to medical mileage reimbursement for 244.60 miles of travel to and from medical appointments with Drs. Ogrodnick and White from March 28, 2017 through May 8, 2017.

21. Evidence and inferences to the contrary of these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination

regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Reasonable, Necessary and Related Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Claimant provided a specific and consistent history of his mechanism of injury throughout the claim to his health care providers. Claimant has consistently reported ongoing low back pain located in this right SI joint, which has been supported by findings on physical examination. Both Dr. Ogrodnick and Dr. Chan opined based on Claimant's description of the mechanism of injury, pain complaints, and physical examination that Claimant sustained work-related SI joint dysfunction, and recommended SI joint injections for both diagnostic and therapeutic purposes. As found, Claimant has established that it is more likely than not that the SI joint injection is reasonable, necessary and related to the March 24, 2017 industrial injury.

Mileage Reimbursement

Section 8-42-101(1)(A), C.R.S. requires respondents to pay for expenses that are incidental to obtaining reasonable and necessary medical treatment. WCRP Rule 18-6 (E) provides that respondents shall reimburse an injured worker for reasonable and necessary mileage expenses for travel to and from medical appointments at a rate of 53 cents per mile.

Mileage expenses for travel to and from medical appointments are recoverable as incidental medical treatment under the Workers Compensation Act. *Sigman Meat Co. v. Industrial Claim Appeals Office*, 761 P.2d 265 (Colo. App. 1988). "Incidental mileage expenses are those that "would not have been incurred but for the industrial injury." *Daughty v. King Soopers, Inc.,* W.C. No. 3-837-001 (ICAP, Jan. 17, 1996); *see Anderson v. United Airlines,* W.C. No. 4-445-052 (ICAP, Jan. 9, 2004). However,

whether particular mileage expenses are reasonable, necessary and incidental to medical treatment is a question of fact for determination by the ALJ. *Krupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Anderson v. United Airlines,* W.C. No. 4-445-052 (ICAP, Jan. 9, 2004).

As found, Claimant has established by a preponderance of the evidence that the mileage expenses for which he is seeking reimbursement are reasonable, necessary and incidental to medical treatment. 244.60 miles were incurred traveling to and from medical appointments with authorized treating providers.

ORDER

It is therefore ordered that:

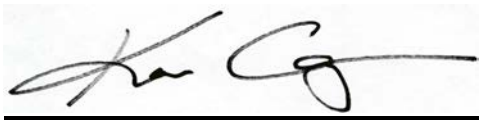
1. Respondents are liable for the SI joint injection recommended by Drs. Ogrodnick and Chan.

2. Respondents shall reimburse Claimant for medical mileage for 244.60 miles at $0.53 per mile, for a total reimbursement of $129.63.

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

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

DATED: November 15, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician Michael Janssen, D.O. regarding Claimant's permanent impairment rating.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from October 28, 2015 through April 4, 2016.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability (TPD) benefits from August 12, 2015 through October 27, 2015.

4. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant worked for Employer as a part-time seasonal gardening technician. Employer is a residential gardening company. Claimant's duties involved weeding and general gardening.

2. Claimant worked for Employer during the 2014 season and from July, 2014 through the end of the season and until approximately the end of October/beginning of November.

3. After the end of the 2014 season, Claimant sought more permanent employment but remained unemployed until January of 2015. In January of 2015 Claimant began employment with New Agora Real Estate, trimming marijuana plants and working at their facility. Claimant worked for New Agora Real Estate until March of 2015.

4. In the spring of 2015 Employer contacted Claimant and offered him the opportunity to come back to work for the 2015 season. Claimant accepted the offer of part-time seasonal employment and began working again for Employer on March 30, 2015 and expected to work part-time through the end of the season like he had in 2014.

5. The seasonal start and end dates depend heavily on the weather and when the ground freezes. The work hours and schedule can vary due to the seasonal nature and due to the number of jobs. Claimant understood that the season for Employer ran from March until November or December. Claimant testified that in 2014 he knew that

half of the employees for Employer were still working at Halloween, and the other half of employees had ended their seasonal work. He expected he would work until the end of the season when he was offered seasonal work for the 2015 season.

6. For the 2015 season, Claimant was paid an hourly rate of $14.00 per hour. Claimant was paid every two weeks.

7. During the 2015 season, Claimant was offered an opportunity to work as an independent contractor for Ottertail in the Mojave Desert in California. Claimant asked Employer if he could take a leave of absence for 15 days so that he could travel to California to work for Ottertail. Employer indicated that was okay.

8. Claimant left Colorado and began the temporary job for Ottertail on April 20, 2015. Claimant worked 15 days straight for Ottertail, through May 5, 2015. Claimant earned $275.00 per day for this work and was paid issued a 1099 for a total of $4,125.00 for the 15 days of work. After this temporary job ended, Claimant returned to Colorado and began working for Employer again.

9. Prior to leaving for California, Claimant had received two paychecks from Employer covering a 4 week period. The first paycheck was for 36.86 hours of work covering the period of March 21, 2015 through April 3, 2015. The second paycheck was for 52.31 hours of work covering the period of April 4, 2015 through April 17, 2015.

10. Claimant did not receive a paycheck from Employer covering April 18, 2015 through May 2, 2015 which was the next pay period for Employer. The first pay period following Claimant's return from California was May 3, 2015 through May 16, 2015 and Claimant was paid for 29.08 hours of work.

11. The next pay periods leading up to Claimant's injury include: May 16, 2015 through May 29, 2015 for 41.21 hours; May 31, 2015 through June 13, 2015 for 40.22 hours; June 14, 2015 through June 27, 2015 for 53.99 hours; June 27, 2015 through July 10, 2015 for 58.33 hours; July 12, 2015 through July 25, 2015 for 65.71 hours. Excluding the initial paycheck at the start of the season for 36.86 hours, and excluding the paycheck that overlapped with some of the time Claimant was in California for 29.08 hours, Claimant worked a total of 311.77 hours in the 6 remaining pay periods, covering approximately 12 weeks. On average, Claimant worked approximately 25.98 hours per week at his hourly rate of $14.00, and on average earned $363.72 per week for Employer.

12. On August 3, 2015 Claimant sustained an admitted work related injury to his lower back when he was bent over a flower bed picking weeds.

13. On August 7, 2015 Claimant was evaluated at Aviation and Occupational Medicine. Claimant reported that on August 3, 2015 while kneeling over a garden bed and bent at the waist he felt muscles in his lower back seize up, and that he had lower back pain ranging from a 4-7/10. Claimant was noted to have tenderness in the

paraspinals, left greater than right and pain with all of range of motion most severe with forward flexion. X-rays performed showed no acute findings. Claimant was found to have a negative straight leg raise bilaterally. Claimant was assessed with lumbar strain, placed on modified duties, and ice/heat/back belt were recommended along with home exercises. *See* Exhibit P.

14. On August 8, 2015 Claimant returned to work within his work restrictions. Claimant continued working through the end of the 2015 season.

15. The pay periods following Claimant's injury and return to work include: August 8, 2015 through August 21, 2015 for 42.44 hours; August 22, 2015 through September 4, 2015 for 42.01 hours; September 5, 2015 through September 18, 2015 for 40.43 hours; September 20, 2015 through October 3, 2015 for 45.95 hours; October 3, 2015 through October 16, 2015 for 44.49 hours; and October 17, 2015 through October 30, 2015 for 30.43 hours. This was a total of 245.75 hours over 6 pay periods, covering approximately 12 weeks. On average, following his injury, Claimant worked approximately 20.48 hours per week at his hourly rate of $14.00, and on average earned $286.72 per week for Employer.

16. Claimant indicated that he had to stop working on Fridays during this time period due to physical therapy and doctors' appointments. *See* Exhibit 4.

17. On October 30, 2015 Claimant's seasonal work for Employer ended. Claimant is unsure if other employees in his same position continued working past that date or not. At the time his seasonal employment ended, Claimant was still under work restrictions.

18. Records show Claimant was evaluated on the following Fridays in 2015 at Aviation & Occupational Medicine: August 14, August 28, September 4, September 18, September 25, October 9, October 23, and November 6. *See* Exhibit P.

19. At these appointments, Claimant was repeatedly noted to have bilateral negative straight leg raises, no lower extremity symptoms, no radiculopathy, and no numbness or tingling in his legs. By September 25, Claimant reported improvement of 65-70%. *See* Exhibit P.

20. On October 30, 2015 Claimant was evaluated by Samuel Chan, M.D. Claimant reported overall improvement but that he had generalized pain over the lumbar spine area that radiated to the lateral buttock region greater on the right than left with no radiating pain and no numbness and tingling. Dr. Chan noted on examination diffuse tenderness to palpation over the lumbosacral paraspinal musculature. Dr. Chan found a negative straight leg raise in the seated and supine positions. Dr. Chan diagnosed lumbosacral strain with an essentially normal neurologic examination and opined that Claimant's findings were most consistent with muscular strain. Dr. Chan recommended Claimant follow through with an active exercise program for core stabilization and recommended acupuncture. *See* Exhibit Q.

21. On November 6, 2015 Claimant was evaluated at Aviation & Occupational Medicine. Claimant reported lower back pain at a 3/10 that was on and off. Claimant reported that he felt better overall. Claimant reported no numbness and tingling in his legs, no lower extremity weakness, and was found to have a negative bilateral straight leg test. An MRI of the lumbar spine was ordered due to the length of the injury and it was noted as important that Claimant did not have radicular symptoms. *See* Exhibit P.

22. On November 13, 2015 the MRI was reviewed with Claimant. At the next appointment, Claimant reported increased pain at 5/10. Claimant reported that he was cleaning his house the week prior when he bent over and had pain up his lumbar spine and then into his legs, left greater than right and into the big toe. This was the first report of radiating pain into the legs. *See* Exhibit P.

23. On December 2, 2015 Claimant was evaluated by Dr. Chan. Claimant reported axial back pain with no radiation, no numbness and tingling. Dr. Chan again found negative straight leg raising in the seated and supine positions. Dr. Chan noted that the MRI had shown an L4-5 disc herniation lateralizing on the left side but also noted that Claimant had an essentially normal neurologic examination. Dr. Chan noted that it was unclear whether the MRI findings were a pain generator. *See* Exhibit Q.

24. On December 31, 2015 Claimant was evaluated by Dr. Chan. Again, Claimant reported axial lumbar spine pain with no radiating pain and no numbness and tingling. Dr. Chan found a negative straight leg raise on testing. Dr. Chan indicated a lengthy discussion was held with Claimant and that despite the MRI showing a L4-5 disc herniation, the clinical findings on examination were more suggestive of being myofascial in origin. Dr. Chan instructed Claimant, therefore, to continue with a core stabilization exercise program. *See* Exhibit Q.

25. Claimant also continued to treat with Aviation & Occupational Medicine throughout the winter of 2015-2016. *See* Exhibit P.

26. On February 10, 2016 Claimant was evaluated by orthopedic surgeon Brian Reiss, M.D. Claimant reported that he had lower back and bilateral buttock pain that got worse through the day. Claimant reported no lower extremity complaints. Claimant reported that he had undergone therapy, chiropractic care, and acupuncture and that he had had an SI joint injection and epidural steroid injection, all without lasting relief. Dr. Reiss noted that Claimant's psychological screening indicated depression with a low to medium level of functional status. On physical exam, Dr. Reis noted that Claimant did not appear to be in any distress, moved around the room quite easily, and transitioned from sitting to standing and lying down quite easily with no pain behaviors. Dr. Reiss found minimal tenderness in the lumbar spine and negative straight leg raises, that just produced back pain at 60 degrees. Dr. Reiss reviewed the MRI from November of 2015. Dr. Reiss assessed low back pain and degenerative change of the lumbosacral spine. Dr. Reiss suggested surgery was not a good solution. Dr. Reiss recommended increasing core strength, continued stretching, and more aerobic conditioning. Dr. Reiss

suggested that Claimant was probably at or near MMI, but noted he would leave that up to Aviation & Occupational Medicine and Dr. Ladwig. *See* Exhibit V.

27. On April 4, 2016 Claimant was evaluated by Dr. Ladwig. Dr. Ladwig noted that Claimant was overall essentially with no change. Dr. Ladwig noted that Claimant was doing a home exercise program and using flexeril as needed. Dr. Ladwig found no lower extremity symptoms and a negative straight leg raise. Dr. Ladwig opined that Claimant was at maximum medical improvement (MMI), recommended permanent lifting restrictions, and recommended no maintenance. Dr. Ladwig opined that Claimant sustained a 9% whole person impairment. *See* Exhibit P.

28. On November 15, 2016 Claimant underwent a Division Independent Medical Examination (DIME) performed by Michael Janssen, D.O. Claimant reported that the week prior to his injury he was moving some 450 pound trees and had some nonspecific low back pain and that the following week he was just bent over doing weeding when he felt an electrical shooting sensation up and down his back and into the posterior thighs and buttocks that had been incapacitating since. Claimant reported that he was unable to work the 2016 summer because of his ongoing back pain and that he was unable to do most activities including recreational fishing. Dr. Janssen noted that he received a fairly extensive amount of medical records to review including a report from surgeon Dr. Reiss who did not believe Claimant was a surgical candidate for the non-specific lumbar spine condition. Dr. Janssen noted an impairment was performed by Dr. Ladwig on April 4, 2016 with permanent restrictions including lifting floor to overhead lift of 35 pounds. Dr. Janssen noted there were no maintenance benefits recommended and that the impairment rating included 2% for range of motion and 7% for II-C under Table 53 for specific disorders of the spine, for a whole person rating of 9%. *See* Exhibits 9, T.

29. Claimant reported back pain, bilateral buttock pain, and intermittent tingling into the left lower extremity that was not constant. Dr. Janssen performed a physical examination noting straight leg raise test on the right at 72 degrees and on the left at 70 degrees both felt to be valid and without radicular pain. Dr. Janssen opined that Claimant had a specific disorder of the spine under Table 53 II-C for a 7% impairment and that Claimant had a valid range of motion impairment of 1% on physical exam. Dr. Janssen opined that Claimant's combined whole person impairment rating was 8%. Dr. Janssen opined that there was no indication for Claimant to have restrictions. Dr. Janssen opined that Claimant had nonspecific low back pain with a suspicion of subjective symptoms that outweighed objective clinical findings. *See* Exhibits 9, T.

30. On March 28, 2017 Claimant underwent an independent medical examination performed by Bennett Machanic, M.D. Claimant reported that he had been unemployed since late October of 105 when he lost his job and that he had previously worked as both a gardener and field botanist. Claimant reported chronic low back and leg pain. Claimant reported that he had been placed at maximum medical improvement in late 2016 and was provided an 8% impairment rating. Claimant indicated that he disagreed that he had ever reached MMI and complained about the 8% rating being too

low. Claimant also reported that he had been placed at MMI in April of 2016 by his occupational physician and provided a 9% permanent rating which he believed was premature and inappropriate. *See* Exhibit 7.

31. Claimant reported that on August 3, 2015 he was weeding a raised flower bed when he turned to the left, bent forward, and experienced an electrical shock which went up and down his spine involving his low back, middle back, and neck. Claimant reported that it was somewhat immobilizing at the time, but that he was capable of completing the work day. Claimant reported the problem to his supervisor and stopped working for about 203 days but the pain got worse. Dr. Machanic noted Claimant's treatment included physical therapy, chiropractic care, and acupuncture. Dr. Machanic noted that by November, 2015, Claimant had an MRI of the lumbar spine since Claimant had not improved and a central disc protrusion at L4-5 causing severe left lateral recess stenosis and suspected left L5 radiculopathy was found. Dr. Machanic noted that Claimant received epidural steroid injections and sacroiliac injections but that it was not clear that the injections benefited Claimant and appeared that Claimant made very little progress and therefore was evaluated by orthopedic surgeon Dr. Reiss. Dr. Machanic noted Dr. Reiss' recommendation against surgery that emphasized core strengthening, stretching, aerobic conditioning, and pointed out that Claimant was probably at or near MMI. *See* Exhibit 7.

32. Claimant reported to Dr. Machanic that he did not wish to undergo surgery. Dr. Machanic reviewed DIME physician Dr. Janssen's report. Dr. Machanic also noted that a February, 2017 MRI showed at L4-5 ongoing moderate to severe left lateral recess stenosis due to a residual small left central disc protrusion/extrusion, slightly smaller in overall size as well as signs of an annular tear and posterior displacement and mass effect upon the adjacent descending left L5 nerve root sleeve. Claimant reported to Dr. Machanic that he had chronic, diffuse, and bilateral low back pain with pain going down both legs. Claimant reported that he felt like he needed further intervention, but was reluctant to accept further injections and/or surgery. *See* Exhibit 7.

33. Dr. Machanic opined that Claimant appeared depressed, showed pessimism, showed psychomotor retardation, and showed a lack of spontaneity. Dr. Machanic opined that on examination it was quite clear that Claimant had a positive straight leg raise causing pain on the right, maximizing at 55 degrees and on the left maximizing at 45-50 degrees. Dr. Machanic opined that on the left, foot there was decreased pin sensation over the dorsum extending up to the anterolateral left calf very much in an L5 distribution. Dr. Machanic used a dual inclinometer to measure lumbar spine range of motion and opined that there was a combined loss of range of motion over the lower back of 8% that was valid. Dr. Machanic opined that Claimant had chronic lumbosacral strain with the presence of an extruded disc and clinical signs of L5 distribution nerve issues that were mild and minor, but present. *See* Exhibit 7.

34. Dr. Machanic opined that Claimant's August 3, 2015 work injury had resulted in chronic problems and that it was not clear that Claimant had necessarily reached a point of true MMI. Dr. Machanic opined however, that if Claimant had in fact

reached MMI, then Claimant would possess a significant impairment rating with a II-C rating from Table 53 of 7% whole person and an 8% whole person range of motion loss, as well as a 4% rating for neurologic system: loss of sensation for the lower extremity. Dr. Machanic opined that combining the different impairments, Claimant would have an 18% whole person permanent partial impairment rating. *See* Exhibit 7.

35. The Figure 83 lumbar range of motion measurements performed by Dr. Machanic from March 28, 2017 and the Figure 83 lumbar range of motion measurements performed by DIME physician Dr. Janssen on November 15, 2016 are sharply in contrast. Both physicians completed three measurements and both found validity, but the difference in the measurements is significant.

36. Kathleen D'Angelo, M.D. testified by deposition on October 6, 2017. Dr. D'Angelo completed an independent medical examination of Claimant on July 2, 2017. Claimant reported to Dr. D'Angelo that DIME physician Dr. Janssen had falsified some of the documentation and had not performed a straight leg raise test and that Claimant had never even laid on his back. Dr. D'Angelo opined that a straight leg test could be performed either seated and/or supine. Dr. D'Angelo opined that if a patient had pain down the leg during the straight leg raise test it would be a sign of radiculopathy. On her examination, she performed both a seated and a supine straight leg raise test. Dr. D'Angelo noted that the pain on straight leg raise was negative bilaterally when Claimant was seated, but that Claimant reported it as positive when supine which did not make sense to her. Dr. D'Angelo opined that if Claimant was presenting truthfully and actually had radiculopathy, she would expect to have had positive results both in the supine and seated positions during testing.

37. Dr. D'Angelo noted that she wasn't able to obtain range of motion or impairment rating measurements because Claimant had literally almost no motion. When she asked him to flex and extend, Claimant moved a fraction of an inch, which does not register on dual inclinometers. Dr. D'Angelo noted that Claimant was able, however, to walk to the exam room, sit down, get onto the exam table, lie down, sit up again, get off the table, and walk out. Dr. D'Angelo did not understand why Claimant had such a lack of movement during measurements. Dr. D'Angelo opined that there was no objective evidence that supported an 18% whole person impairment rating to Claimant's lumbar spine.

38. Dr. D'Angelo noted that although the MRI showed a left central disc protrusion that was suspected to be hitting the left L5 nerve root, Claimant did not have complaints of left sided radiculopathy prior to the MRI or any physical signs of radiculopathy prior to the MRI. Dr. D'Angelo opined that 40-60 percent of patients with no back pain have evidence of a disc herniation. Dr. D'Angelo opined thus that the disc protrusion to the left at L4-5 was not responsible for the symptoms Claimant reported to her, and that she couldn't understand how Claimant had no symptoms or physical findings of radiculopathy prior to the MRI. Dr. D'Angelo opined that Claimant had a work related lumbosacral strain. Dr. D'Angelo noted that she didn't understand how Dr. Machanic could rate sensation loss to the left leg since Claimant did not have

paresthesias to the left leg until months and months after the injury. Dr. D'Angelo opined that DIME Dr. Janssen did not do anything incorrect in providing an 8% whole person impairment. Dr. D'Angelo also agreed with the date of MMI of April 4, 2016.

39. Dr. D'Angelo opined that if Claimant had herniated the disc acutely, the first symptom acutely would have been radicular pain and she noted that Claimant did not have radicular pain until several months after the alleged injury.

40. Dr. D'Angelo noted Claimant's diffuse complaints to her at her independent medical examination and the bilateral symmetrical identical complaints and symptoms in both the upper extremities and lower extremities. Dr. D'Angelo noted Claimant's report of an abnormal brain MRI. Dr. D'Angelo expressed repeatedly her concern that Claimant had a systemic non work related disease, likely multiple sclerosis and that his other symptoms and concerns were very troubling and needed to be evaluated as soon as possible.

41. Dr. D'Angelo is found credible and persuasive. Her opinions are consistent with the DIME physician's findings and consistent with the overall weight of the medical evidence.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186

(Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Average Weekly Wage (AWW)

Section 8-42-102(2) C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon his AWW on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Earnings from concurrent employment may be included in a claimant's AWW where the injury impairs earning capacity from such employment. *Jefferson County Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

The ALJ finds that considering the Claimant’s earnings at the time of his work related injury results in an AWW of $363.72. This is a fair approximation of Claimant’s wage loss and diminished earning capacity. Although Claimant received a temporary 15 day job that paid him significantly higher wages than he had earned while working for Employer or for his past employers, this was not concurrent employment and was not representative of his diminished earning capacity. This employment with Ottertail was an anomaly outside of his normal earnings while employed for Employer. This was also not concurrent employment, but consecutive employment. Claimant, on average, worked part-time for Employer averaging 25.98 hours per week at a rate of $14.00 per hour, resulting in an AWW of $363.72. The ALJ concludes that this is a fair approximation of Claimant’s wage loss and diminished earning capacity.

Overcoming DIME on Permanent Impairment Rating

A DIME physician must apply the AMA Guides when determining the claimant’s medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant’s medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The

questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Claimant has failed to meet his burden to establish by clear and convincing evidence that the DIME physician was incorrect or erred in any way. Claimant has failed to overcome the 8% whole person impairment given by DIME physician Dr. Janssen. The DIME physician's opinion is consistent with the treating physician (who provided a 9% rating) and is supported by the credible testimony of Dr. D'Angelo. No error has been found. Claimant argues that Dr. Janssen did not perform a straight leg test while Claimant was on his back, however, the test can also be performed while seated.

Temporary Partial Disability (TPD)

An employee is entitled to receive sixty-six and two-thirds percent of the difference between the employee's AWW at the time of the injury and the employee's AWW during the continuance of the temporary partial disability. *See* § 8-42-106(1), C.R.S. As found above, Claimant was injured on August 3, 2015. Claimant returned to work shortly after his injury. However, during this time Claimant was under restrictions and missed work due to doctor's appointments as well as therapy appointments. Although Claimant's work hours and schedule could vary based on the weather conditions, the ALJ finds it persuasive that Claimant missed work during this period of time and until the end of the season due to his temporary partial disability, work restrictions, and medical appointments. Claimant's average number of hours worked per week prior to his injury were 25.98. After his injury, he averaged 20.48 hours per week. Claimant's AWW prior to his work injury was $363.72. For the twelve weeks he worked following his injury and until the end of the season, Claimant's AWW was $286.72. The difference in his AWW at the time of injury and his AWW during the continuance of his temporary partial disability is $77.00. Claimant has established that he sustained a total wage loss of $924.00 ($77.00 x 12 weeks) and is entitled to sixty-six and two-thirds of $924.00 for the twelve week period following his injury.

Temporary Total Disability (TTD) Benefits

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and

(2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The loss of seasonal employment does not automatically disqualify a claimant from receiving subsequent disability benefits, but whether or not the wage loss was caused by the injury is a question of fact for determination by the ALJ. *City of Aurora v. Dortch,* 799 P.2d 461 (Colo. App. 1990). Inherent in the Dortch decision is the court's recognition that seasonal employment is a common fact of economic life, and that the conclusion of a particular period of seasonal employment should not automatically be viewed as the permanent end to the employment relationship or evidence of the claimant's "voluntary" decision to become unemployed. Termination of employment resulting from the conclusion of a contract for seasonal work does not automatically disqualify a claimant from receiving subsequent TTD benefits. *Cf. J.D. Lunsford v. Sawatsky*, 780 P.2d 76 (Colo. App. 1989). The fact that a claimant knows the seasonal employment will end at a fixed point in time does not necessarily lead to the conclusion that he is responsible for the termination. *City of Aurora v. Dortch*, supra. However, the result might be different if an ALJ were to find that claimant selected a fixed period of seasonal employment with the intent of the remaining unemployed throughout a portion of the year, or permanently. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1986).

Claimant has established by a preponderance of the evidence an entitlement to TTD benefits from October 31, 2015 through April 4, 2016. At the end of his seasonal employment on October 30, 2015, Claimant remained under work restrictions and was unable to effectively perform his normal job duties. Claimant is credible that he was unable to find employment due to his restrictions and evidence shows that in the prior year, he had not only sought but obtained employment during the offseason at New Agora Real Estate. Claimant has established, more likely than not, that if he had not been injured he would have been employable and had been employed in the prior off season. Claimant is credible that he had an intent of seeking employment but due to his incapacity, restrictions, and pain from the work related injury, he was impaired in his wage earning capacity and in his job search.

ORDER

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

1. Claimant’s average weekly wage is $363.72.

2. Claimant has failed to overcome DIME physician Dr. Janssen’s permanent impairment rating. Claimant is entitled to an 8% whole person impairment, consistent with the DIME opinion.

3. Claimant has established by a preponderance of the evidence an entitlement to TPD benefits from August 8, 2015 through October 30, 2015 in the amount of $616.03 (sixty-six and two-thirds of $924.00).

4. Claimant has established by a preponderance of the evidence an entitlement to TTD benefits from October 31, 2015 through April 4, 2016.

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

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

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

DATED: November 14, 2017,

/s/ Michelle E. Jones

_____

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

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable injury while at work on July 5, 2017?

II. If compensability has been proven, what are the reasonable and necessary medical benefits?

III. If compensability has been proven, who is Claimant's Authorized Treatment Provider?

IV. If compensability has been proven, is Claimant entitled to Temporary Total Disability Benefits?

STIPULATIONS

I. The parties stipulated that Claimant's Average Weekly Wage is $771.81. The ALJ accepted this stipulation.

FINDINGS OF FACT

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

1. Claimant worked as a roofer for Employer off and on since 1996. He was involved in commercial roofing.

2. His job duties included tearing off old roofs, and did require lifting and carrying heavy objects, which Claimant states could be up to 100 pounds.

3. Claimant testified that he first noticed some pain in his right groin area in May of 2016, but was able to continue his job duties unabated.

4. Claimant testified that on July 5, 2016, while working on a drain in a kneeling position, he stood up and felt pain in his groin. He testified that this was the same pain that he had been feeling since May of 2016, but that it was sharper and more intense. Despite this pain, he testified that he continued working and finished out the work day, but most of the heavy lifting had already been completed. He testified that his co-workers noticed his distress, and he told them he thought he had pulled a groin.

5. Claimant testified that he went to the Emergicare on Austin Bluffs in Colorado Springs the same day. Emergicare records show that Claimant did not appear until July 7, 2016. (Ex A, p.1). Upon his presentation to Emergicare on July 7, 2017, Claimant complained of groin pain. He could not identify any specific event or

any specific activity or incident that caused the pain. *Id.*

6. Claimant did not represent to the provider at Emergicare that he believed he had sustained a work related injury. *Id.*

7. The Emergicare provider, Dr. Erik Ritch, MD, provided a work excuse to Claimant from July 6 through July 8, 2016, noting that Claimant could return to work on Monday, July 11, 2016. (Ex. A, p. 4).

8. Claimant testified that he called Employer on the Friday following the date of injury, to report that he had suffered a work related injury. He contends that he spoke with Employer's Office Manager, Kim Stimson.

9. Claimant returned to work on Monday, July 11, 2016 and worked the following week. The following Tuesday, on July 19, 2016, Claimant returned to Emergicare, this time to the facility on South Academy in Colorado Springs with continued complaints of groin pain and pain in his right hip. (Ex. A, p. 5).

10. The Emergicare provider, Dr. Cynthia Lund, provided Claimant with an excuse from work for one week. (Ex A, p. 10). Claimant testified that he presented this work restriction note to Ms. Stimson in person the same day.

11. Claimant also underwent x-rays at the July 11, 2016 Emergicare appointment. The x-rays showed no evidence of an acute fracture in Claimant's right hip. (Ex. A, p. 11).

12. Claimant continued to treat with Emergicare over the next several weeks. On August 3, 2016, Emergicare referred Claimant for a MRI scan of his right hip and also referred Claimant to orthopedist, Dr. Roger Sung. On August 3, 2016, Claimant was cleared to work, with restrictions "1. You may resume light duty. 2. Sitting work. 3. Get up on can[e] and cautiously move around 10 minutes per hour. 4. Maximum 10 lbs lifting." (Ex. 6 p. 45). Claimant was never offered light duty by Employer.

13. Claimant went to Dr. Sung on September 26, 2016. Dr. Sung documented that Claimant had complaints of an approximate 2 month long pain in his right hip. Dr. Sung further documented that Claimant had not reported his hip pain to Employer as a work- related injury. (Ex. B, p. 36).

14. Upon examination and evaluation of Claimant, Dr. Sung could not make a determination whether he had suffered any acute injury and referred Claimant for an MRI.

15. Claimant underwent an MRI on 8/29/16. (Ex. E). The MRI found "No clearly defined fracture is noted, but the appearance of the marrow is 'worrisome' for an infiltrative process." (Ex. E pp. 46, 47).

16. In a January 6, 2017, consulting memo, Dr. Jon Erickson noted: "The MRI scan also showed significant arthritic changes in the hip with a flattening of the femoral head and osteophyte formation noted in the periarticular areas. There was also joint effusion and a great deal of synovitis." (Ex. E, p. 38).

17. In this same memo, Dr. Erickson also observed, in response to Dr. Schuck's treatment plan that:

> When he [Dr. Schuck] saw Mr. Gonzalez next on 11/29/16, he noted that all the lab work was normal including a normal C-reactive protein and erythrocyte sedimentation rate. This is indeed peculiar, because if indeed the patient has suffered any form of fracture *recently,* both of these laboratory parameters *should have been mildly elevated*. *Id.* (emphasis added).

Recently is not defined further, however.

18. There are no follow up records to show that Claimant returned to Dr. Sung.

19. Emergicare subsequently referred Claimant for chiropractic treatment with Dr. Polvi. Claimant testified that it was Dr. Polvi who referred him to Dr. Michael Schuck for an additional orthopedic evaluation. Claimant testified that Dr. Polvi was not able to help with his pain.

20. Claimant testified on direct examination that when he presented to Dr. Schuck, Dr. Schuck examined him and recommended hip replacement surgery.

21. Claimant did not submit a Workers' Compensation Claim for his right hip until December 2, 2016. (Ex 1 p.1). In this filing, he notes the time of injury to be 10:30 a.m. *Id.*

22. Claimant admitted that he did not experience any injury or specific incident at work on the date of injury. He did not fall, and did not twist his body. It was simply while in the act of standing up that caused him to feel this sudden pain.

23. Claimant agreed that in the course of everyday life, there are many situations, work related and non-work related, when he would have a need to crouch or kneel and then stand up from those positions.

24. Further, Claimant acknowledged on cross examination that he did not fill out an accident report with Employer, and that he did not ever request to do so.

25. Claimant also testified that when he first presented to Emergicare, he was not administered a drug test.

26. Claimant testified that he has experienced three prior work related injuries while working for Employer and that in each of those injury events, he reported them to Ms. Stimson who required him to complete an accident report.

27. Claimant testified that he spoke with Ms. Stimson by phone after Thanksgiving when he called to inquire whether he would be given a Christmas food basket that was customarily given by Employer. Claimant did not inform Ms. Stimson that he was about to file, or had already filed, his Workers' Claim for Compensation.

28. Kim Stimson also testified at hearing. She testified that she is Office Manager for Employer. She has worked for Employer for 7 years. She described her job duties as the Office Manager to include Human Resource type activities and Workers' Compensation duties. She testified that she is the person to whom employees are directed to report all work injuries to.

29. Ms. Stimson testified that if an employee has sustained a work related injury, or even if she suspects that an employee has sustained a work related injury, that she requires the employee to fill out an accident report, she provides the employee with a designated provider list, she sends the employee to the doctor whom they have chosen from the list. She also contacts the foreman and any witnesses and requires them to complete a report, and then she contacts her insurer, Pinnacol Assurance, to provide them notice of the work injury.

30. Ms. Stimson testified that Claimant never informed her that he had sustained a work related injury. She did not have a suspicion or reason to believe that Claimant had sustained a work related injury; thus she did not follow the aforementioned steps.

31. Ms. Stimson testified that Claimant called in sick to work on July 7 and July 8, 2016, and that when he called in sick, he did not report anything about a purported work injury.

32. Ms. Stimson concurred that Claimant returned to work the following week and that he worked the entire week.

33. Ms. Stimson testified that Claimant came to the Employer's office on or about July 19, 2016, and presented her with a note from Emergicare excusing him from work for the next several days. She testified that she asked Claimant three times or more whether he'd injured himself at work and that Claimant's response to each inquiry was that he had not.

34. Ms. Stimson testified that she asked Claimant repeatedly whether this was an injury he sustained at work. This was so that she could make certain to follow the steps necessary to report the injury to Pinnacol Assurance, and to make certain that Claimant would receive medical benefits, and that he would also receive some form of income.

35. After July 19, 2016, Ms. Stimson testified that she'd had at least 3-4 more conversations with Claimant by telephone. She testified that Claimant never reported any work-related injury during any of those conversations.

36. Ms. Stimson was the Office Manager for two of the three prior work injuries that Claimant sustained while working for Employer. She testified that Claimant followed the reporting procedure in those two prior injury events, including reporting the injury to her and filling out an accident report.

37. Ms. Stimson said that Claimant last contacted her by phone sometime between Thanksgiving and the second week of December, when he called to inquire about the Christmas food basket. She testified that he still did not report any work injury to her during this conversation.

38. The first time that Ms. Stimson learned that Claimant was alleging a work injury is after she received Claimant's Workers' Claim for Compensation in the mail in December, 2016.

39. On cross examination, Claimant's counsel presented Ms. Stimson with a report completed by Claimant with the Joint Health and Welfare Fund, which is part of the Roofers Union. (Ex. 3). Counsel pointed out to Ms. Stimson that on the document, Claimant asserts that his injury occurred at the jobsite. This documents does not bear Claimant's signature, nor a date that Claimant prepared its contents, but does indicate that the injury occurred at 1:00 p.m. It does bear the signature of Dr. Polvi, dated 8/31/16. (Ex 3, pp. 6, 7).

40. Ms. Stimson testified that she had never seen the Joint Health and Welfare Fund report until Claimant's counsel presented it to her during the hearing. She testified that this is not the Employer's injury report form.

41. Ms. Stimson testified that Emergicare is one of the designated providers for Employer. Employer and Emergicare have an agreed upon practice that when an employee of Employer initially presents to Emergicare, Emergicare will contact Ms. Stimson to confirm that the employee is to be seen for a work related injury and that Emergicare will administer a drug test.

42. Ms. Stimson testified that Emergicare never contacted her regarding Claimant's treatment with them after any of his many presentations to an Emergicare facility. Moreover, Ms. Stimson testified that when Claimant presented her with paperwork from Emergicare excusing him from work in July 2016, the work excuse did not reference any work related injury.

43. Ms. Stimson testified that she has never received any notification, records, or other information from any healthcare provider that Claimant was treating for a work related injury.

44. Claimant took the deposition orthopedic surgeon, Dr. Michael Schuck, on August 30, 2017. Dr. Schuck testified that he is not Level II accredited for Colorado Workers' Compensation. (Dr. Schuck Depo., p. 25, ll. 6-9).

45. Dr. Schuck first saw Claimant on November 15, 2016. His initial evaluation documents that Claimant reported an initial onset of pain began on or about May 7, 2015. (Ex. D, p. 40). His initial diagnosis is that Claimant suffered a femoral neck fracture – possibly pathologic. (Ex. D, p.41). A femoral neck fracture means that the bone just below the ball of the hip is broken, or that a facture or crack is noticed in the bone. (Dr. Schuck Depo., p. 9, ll. 18-24).

46. At the initial examination and evaluation, Dr. Schuck documented that Claimant did not have a fall or any type of twisting injury while at work. (Ex. D, p. 40).

47. Dr. Schuck ordered lab work to rule out infection. He opined that even if the lab work was normal and ruled out infection, that an underlying pathological process could still be at work in Claimant's left hip, including a possible neoplasm. He would have Claimant undergo a bone biopsy in the event the lab testing ruled out infection. (Ex. D, p. 41).

48. On November 29, 2016, at Claimant's second appointment with Dr. Schuck, Dr. Schuck again noted that Claimant had experienced no trauma to the hip at work. (Ex. D, p.44). Dr. Schuck confirmed at this November 29, 2016 appointment that the lab work ruled out an infection. However, despite this Dr. Schuck did not refer Claimant for a bone biopsy. Instead, recommended that Claimant undergo a right hip replacement. (Ex. D. p.44; Dr. Schuck Depo. p. 20, ll. 12-22).

49. Dr. Schuck testified, however, that he could not rule out a pathologic fracture, and that there are other reasons for pathologic fracture that won't really be evidenced on a bone biopsy. (Dr. Schuck Depo. p. 15, ll. 12-15; p. 21, ll. 18-20).

50. He testified regarding the underlying pathologic process in Claimant's right hip:

> Q:…Even when you have…a pathologic fracture where you have a weakening of the bone, you still have to have some *mechanism* to cause the fracture, don't you?
>
> A: Yes, but *that mechanism may be just walking on it.* (Dr. Schuck Depo. p. 15, ll. 21-24; p. 16, ll. 1-2). (emphasis added).

51. He testified that it was because Claimant's symptoms started at work, it would be reasonable to consider this a work related condition. (Dr. Schuck Depo., p. 10, ll. 13-16; p. 11, ll. 13-20; p. 16, ll. 10-11; p. 27, ll. 4-6), (Ex D, p. 41).

52. In his report from January 6, 2017, Dr. Erickson concluded that without a mechanism of injury, it could not be reasonable to say that the femoral neck fracture

occurred as a result of Claimant's employment. It is much more likely that the opposite is true, and that for reasons that have not been discovered as of yet, Claimant probably had a pathologic fracture. (Ex. C, pp. 38-39). Dr. Erickson stated that. "[w]hen it hurts is not necessarily why it hurts." (Ex. C; p. 39).

53. Respondents also referred Claimant for an IME with Dr. James Lindberg on January 31, 2017. He issued a written report dated February 5, 2017. (Ex. G). The parties took the evidentiary deposition of Dr. Lindberg on September 26, 2017.

54. Dr. Lindberg practiced orthopedics for over thirty years, with a subspecialty in hip surgery, knee surgery, and shoulder surgery. He is now retired but continues his practice of performing IMEs. He has been licensed in the State of Colorado since 1981, and is Level II accredited in Workers' Compensation. (Lindberg Depo., p. 5, ll. 10-25, p. 6, l. 1).

55. As part of his IME of Claimant, Dr. Lindberg performed a record review of Claimant's prior medical records. The records reviewed are summarized in Dr. Lindberg's IME report. (Lindberg Depo. p. 6, ll. 16-20). Dr. Lindberg also obtained a personal history from Claimant and performed a physical examination. (Ex.G, pp. 91-92).

56. Dr. Lindberg testified that he retired from active orthopedic practice in 2012. He now primarily performs IMEs, the clear majority of which are paid for by Respondents.

57. Dr. Lindberg documented in his IME report and testified that there was no injury in this case. Claimant did not slip, nor did he fall. He did acknowledge that, among other things, that a fracture such as Claimant's would likely cause severe pain when it occurs, would result in an inability to work physical labor, and that "femurs don't fracture for no reason."

58. Dr. Lindberg testified that he reviewed an x-ray of Claimant's hip that showed marked pathological changes. He could not identify the specific pathology, however. He also viewed an MRI scan of Claimant's right hip which showed what appeared to be an infiltrative process, i.e. cancer, chronic osteomyelitis infection, some sort of congenital anomaly. (Lindberg Depo. p. 7, ll. 9-14), (Ex.G, p. 92).

59. Due to this problem in Claimant's femur, he noted:

> It [the femur] has been altered and changed significantly, and in that process, the femur has become weakened, so that *even taking a step in the activities of daily living is significant enough force to cause this to fracture.* (Dr. Lindbergh Depo, p. 16, ll. 1-5)(emphasis added).

60. Dr. Lindberg strongly advised that it was imperative for Claimant to seek further care under his own health insurance, as he was concerned that the underlying non-work related pathological process could be life threatening to Claimant. (Ex G, p. 94). Claimant subsequently underwent evaluation and examination by Dr. Bennie Lindeque at UCHealth. Dr. Lindeque undertook additional x-rays and performed a right proximal femur bone and tissue biopsy. (Ex. F).

61. The x-rays ordered by Dr. Lindeque of Claimant's right hip region showed significant abnormalities, with collapse of Claimant's right femoral head, with femoral head flattening as well as a mottled, moth-eaten appearance of his intertrochanteric and proximal diaphyseal regions of his right femur. (Ex. F, p. 53).

62. Dr. Lindeque opined that the results of the x-ray were concerning for an infiltrative process that could be due to a possible infection versus multiple myeloma versus avascular necrosis. (Ex. F, p.53).

63. Dr. Lindeque conducted a biopsy of claimant's femur on May 2, 2017. The biopsy ruled out infection, but revealed that Claimant had experienced significant avascular necrosis. (Ex. F, p.87).

64. Dr. Lindberg opined in his IME report and also testified that to the degree of certainty, Claimant's hip complaints are due to an underlying pathological process and not due to claimant's employment. (Ex. G; Lindberg Depo. p. 8, ll. 1-16).

65. Other than the fact that Claimant complained of pain in his right hip while he was at work, there is no causal connection or reason to believe that Claimant sustained a work injury. (Ex.G; Lindberg Depo. p. 8, ll. 23-25).

66. Dr. Lindberg testified that he'd reviewed the medical records of Dr. Schuck and that he'd also reviewed Dr. Schuck's evidentiary deposition testimony. He testified that he disagreed with Dr. Schuck's opinion that claimant sustained a work related injury. (Lindberg Depo., p. 9, li. 10-12). Specifically, Dr. Lindberg cited Dr. Schuck's own documentation that Claimant did not sustain any type of injury at work, but rather, Claimant only had experienced pain while he was at work. (Lindberg Depo. p. 9, ll. 13-23; Ex G, pp.93-94).

67. Dr. Lindberg testified that the underlying pathology occurring in Claimant's right hip has not yet specifically been identified by any provider, within or without the Workers' Compensation system, but that there is definitely an underlying pathologic process that caused Claimant's fracture. (Lindberg Depo. p. 12, ll. 10-18).

68. Dr. Lindberg testified that the moth-eaten, mottled appearance of the femoral head is consistent with, and is objective medical evidence to support, that there is a chronic, longstanding, ongoing underlying pathological process occurring in Claimant's femur that caused the fracture, and that the fracture is not related to Claimant's employment at Central States Roofing. (Lindberg Depo. p. 25, ll. 5-23).

69. Dr. Schuck testified that he had not seen the report from Dr. Lindeque in which the moth-eaten, mottled appearance in and around claimant's right hip was noted. Dr. Schuck admitted, though, that such an appearance is an abnormal finding and that such an appearance is indicative of an underlying pathologic problem. (Dr. Schuck Depo. p. 22, ll. 22-25; p. 23, ll. 3-8).

70. Dr. Schuck conceded on cross examination that there are other reasons for pathologic fracture that won't really be evidenced on a bone biopsy. (Dr. Schuck Depo. p. 15, ll. 12-15; p. 21, ll. 18-20).

71. Dr. Schuck also admitted on cross examination that even though pain can appear while at work, it does not necessarily correlate that the pain was caused by work. (Dr. Schuck Depo. p. 24, ll. 21-23; p.25, ll. 1-5).

72. With regard to the femoral head fracture in Claimant's right hip, Dr. Lindberg testified that a fracture secondary to trauma requires major trauma, as the femur is the largest bone in the body. (Lindberg Depo., p. 14, ll. 2-4). He further testified that there is no objective medical evidence or any report from Claimant that he had sustained any trauma to the right hip at all, whether it be micro trauma or major trauma. Instead, the objective medical evidence, which shows significant abnormalities and changes on his MRI and x-ray, shows the underlying pathology to be the reason Claimant sustained a fractured femur. (Lindberg Depo., p. 14, ll. 5-11; (Ex. G).

73. Dr. Lindberg stated that the underlying pathological process in Claimant's right hip causes Claimant's right hip to be weaker and more susceptible to fracture. Lindberg Depo. 15, l. 17-20. He explained that due to the underlying pathological process that is occurring in claimant's right hip, Claimant's femur had been altered and changed significantly, and in that process, the femur had become weakened, so much so that even taking a step in the activities of daily living could have caused the femoral head fracture. (Lindberg Depo., p. 15, l. 25, p. 16, ll. 1-5).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

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

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

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

Reporting of Injury

D. Every employee who sustains an injury resulting from an accident shall notify said employee's employer in writing of the injury within four days of the occurrence of the injury. If the employee fails to report the injury in writing, the employee may lose up to one day's compensation for each day's failure to so report. §8-43-102(1)(a), C.R.S.

E. The ALJ finds that Claimant did not report this work incident to *anyone* in the Workers Compensation system until the First Report of Injury was filed with the Division of Workers Compensation on December 2, 2016. The record is unclear when Employer received actual notice; apparently some days later when a copy arrived in the mail. The ALJ credits the testimony of Kim Stimson regarding the steps she took to ascertain what occurred with Claimant, and the reasons she did so, to wit: to try to effectuate the dictates of the Workers Compensation system. That is part of her job. The preparation of the Joint Health and Welfare Fund form, and its possible presentation to a labor union constitutes no notice of any sort to the Employer in connection with the Workers Compensation system. It was never presented to Employer until the hearing.

F. While Claimant's repeated denials to Ms. Stimson that his medical problem was work-related does not, ipso facto, mean his injury isn't compensable, it

does lead the ALJ to one conclusion: *Claimant himself didn't believe it was work-related for months.* This, despite the indemnity benefits that could flow from a claim. Claimant was fully aware of the process, having gone through it previously with this same Employer.

Compensability

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

H. An "injury" refers to a physical trauma caused by the accident. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). An injury occurs "in the course of" employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id*. An activity arises out of and in the course of employment when the activity is sufficiently related to the conditions and circumstances under which the employee generally performs her job functions such that the activity may reasonably be characterized as an incident of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo.App.Div. 5 2009).

I. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury." The occurrence of

symptoms may represent the result of a natural progression of a pre-existing condition that is unrelated to the industrial injury or employment. See *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995).

J. The primary basis for Dr. Schuck's opinion that Claimant's fractured femur was caused by work is because Claimant was at work when he experienced pain. As noted above, this is insufficient to establish compensability. Dr. Schuck admitted that Claimant had reported no specific incident or trauma, and he agreed that the findings of a moth eaten, mottled appearance of Claimant's bone on the x-ray taken by Dr. Lindeque was an abnormal finding which suggests an underlying, non-work related pathology. Although the biopsy that was later taken ruled out an infection and a cancerous tumor, there are any number of other underlying pathologies that could cause the weakening and fracture of Claimant's femur. As of the close of the evidence, that exact pathology remains unknown. That does not mean it does not exist. The ALJ finds that Claimant has suffered, and continues to suffer, from an as-yet unidentified pre-existing pathology in his femur that has led to the injuries he complains of.

K. There is simply no way to ascertain how long this pathology has been present, or at what point it may have become symptomatic. Had the bone already been cracked for months? Did such a crack simply widen when Claimant first reported symptoms in May, 2016? Did that occur at work? Did it just widen further on July 5, 2016? Or, as both Drs. Schuck and Lindberg testified, did this severely weakened, moth-eaten femur crack while simply going about daily activities? A *recent* crack-however that term is defined-should have raised certain lab work parameters. They were all normal. Claimant has the burden of showing when the injury occurred. He has not carried that burden.

L Dr. Lindberg, who is a Level II accredited physician, also testified that the Medical Treatment Guidelines require that for an injury to be considered related to employment, there must have some work related *mechanism* of injury. Claimant never identified any particular trauma or incident occurred while he was at work on July 5, 2016. Instead, Claimant testified that he merely stood up from a kneeling position. He agreed that standing up from a crouched or kneeling position to a standing position is something that he routinely does in his everyday life, including during his non-work related activities. Moreover, Claimant testified that July 5, 2016 was not the first time that he had experienced this pain in his right hip area; rather, he had been experiencing pain since at least May, 2016. As Dr. Lindberg testified, the femur is the largest bone in the body. If the femur were to have been fractured through some sort of trauma that occurred at work, it would necessarily had to have been a major trauma. Yet Claimant did not fall, did not twist, did not stumble, and did not bear weight other than his own. He just stood up.

M. Claimant has failed to prove by a preponderance of the evidence that he sustained a work related injury while working for Employer on July 5, 2016. Instead, the objective medical evidence shows that Claimant has long suffered from an underlying pathologic condition. It is hoped that such unfortunate condition can be identified without further delay, and remedial measures taken.

N. Because compensability has not been shown, the other issues raised: Temporary Total Disability, Medical Benefits, and Authorized Treatment Provider, will not be addressed further.

ORDER

It is therefore ordered that:

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

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

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

DATED: November 16, 2017

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

ISSUES

1. Whether Respondents have established by a preponderance of the evidence that Claimant's death benefits should be terminated due to her entry into a common law marriage with Andrew Gardner.

FINDINGS OF FACT

1. Claimant married decedent Gabriel Ortega in 1999 and the couple had a child together, referenced by initials as AO, who has a date of birth of November 4, 1999.

2. On August 7, 2005 Gabriel Ortega suffered fatal injuries when he was involved in a motor vehicle accident while in the course and scope of his employment with Employer.

3. As a result of Gabriel Ortega's death, Claimant receives workers' compensation death benefits as Gabriel Ortega's surviving dependent widow. The death benefits remain ongoing.

4. Following Gabriel Ortega's death and in 2006, Claimant purchased a home in Northglenn, Colorado. Claimant is the sole owner of that home and is the sole person on the home's mortgage.

5. On October 12, 2009 Claimant had a second child, referenced by initials as JG, who was fathered by Andrew Gardner.

6. Around the time of JG's birth, Mr. Gardner moved into the home owned by Claimant. At the time of this hearing four people resided in Claimant's home: Claimant, AO, JG, and Mr. Gardner.

7. Claimant and Mr. Gardner own no real property together, have no joint savings accounts, have no joint credit cards, list themselves as "single" on various policies, and Mr. Gardner is not listed as a beneficiary on any of Claimant's accounts.

8. Claimant and Mr. Gardner sometimes buy items together, sometimes cook and eat together with the two children in the home, and share duties of the house.

9. Claimant, Mr. Gardner, AO, and JG have gone on vacation together along with two of Claimant's other relatives. Mr. Gardner paid for the expenses of himself and JG on that vacation and Claimant paid for the expenses of herself and AO on that vacation.

10. Claimant and Mr. Gardner each own their own respective vehicles and the registration for their respective vehicles is listed in each of their individual names. The vehicles are insured together in a joint policy that allows Claimant to driver Mr. Gardner's two vehicles and also allows Mr. Gardner to drive Claimant's vehicle. This is the only joint policy or item that they are both listed on.

11. There was no evidence that Claimant has ever held herself out publicly to be married to Mr. Gardner, referred to him as her spouse, or intended to enter into a common law marriage with Mr. Gardner.

12. There was no evidence that Mr. Garner has ever held himself out publicly to be married to Claimant, referred to her as his spouse, or intended to enter into a common law marriage with Claimant.

13. There was no evidence or testimony presented from neighbors, friends, or family members as to how the couple holds themselves out in public or how their relationship was publicly viewed.

14. Mr. Gardner indicated by affidavit that after JG's birth, he and Claimant thought it would be best for JG to be in a co-parenting situation and he found it most effective to co-parent by sharing a living space. He further indicated he had never held himself out to be common law married to Claimant. He indicated that he contributed to Claimant's household as is possible, but had a verbal agreement to pay $300 per month in rent and had been doing so since he moved into Claimant's home. *See* Exhibit 6.

15. The evidence establishes that Claimant and Mr. Gardner have never had a formal lease agreement. Similarly, Claimant and Mr. Gardner have no formal child support, custody, or visitation agreements pertaining to JG.

16. On a 2011 Form W-4, Mr. Gardner indicated on a personal allowances worksheet that no one else could claim him as a dependent and that he would file as head of household on his tax return. The worksheet indicates to add lines A-G and then enter them onto the withholding allowance certificate. Mr. Gardener did not add together the allowances for himself and for head of household (which would have equaled 2) and he left the line blank. On his Employee's Withholding Allowance Certificate, which he signed on February 16, 2011 he listed himself as single and listed his total claimed allowances as 1. Mr. Gardner testified at hearing that he files as head of household on his tax returns and has since JG was born. Mr. Gardner lists JG as his only dependent and does not file joint tax returns with Claimant. Mr. Gardner has a tax preparer prepare his returns and he has never been explained what head of household means. *See* Exhibit E.

17. On June 15, 2015 Respondents conducted a "widow check" of Claimant at Claimant's home. Claimant indicated that she had not re-married and had no plans to do so. Claimant indicated that Mr. Gardner was her boyfriend and that they had a child in common. Claimant's marital status was listed as widowed, she was listed as having two dependents one by decedent, and it was listed that Claimant and two children AO and JG

lived in the home. Claimant listed Mr. Gardner (boyfriend) as an emergency contact and listed his contact information. *See* Exhibit C.

18. On February 15, 2017 Respondents conducted another "widow check" of Claimant at Claimant's home. Claimant indicated to the investigator that she had not re-married and had no plans to do so. Claimant reported that Mr. Gardner still remained her boyfriend and that they had a child in common. In the investigative report, Claimant was listed as having two dependents, one by the decedent. The occupants living in the home were listed as Claimant and two children, AO and JG. Claimant provided her sister's information as an emergency contact. The investigator indicated that he had Claimant sign an affidavit in his presence while in the home. The affidavit signed by Claimant includes a statement that she was not engaged in cohabitation and had not remarried since the passing of her husband. *See* Exhibits 7, C.

19. Claimant testified at hearing that she and Mr. Gardner have an open relationship and that she sometimes considers him as her boyfriend, but does not consider him to be her husband. She testified that they co-parent JG. Claimant testified that she told the investigators who came in 2015 and in 2017 that Mr. Gardner was her boyfriend and that he lived at the house.

20. Claimant has an 11th grade education, has not obtained her GED, and is not advanced at reading and writing. Claimant testified that the statement she signed indicating that she was not re-married or co-habitating was put in front of her by the investigator who said by signing she was stating that she was not married or in a co-marriage and that she signed it. Claimant testified that if she knew that document was so important she would have had a lawyer before signing.

21. Claimant also testified that her mortgage payment was approximately $1,100 per month and that Mr. Gardner paid her $300 per month in rent. Claimant also testified that she pays the utility, cable, water, and trash bills. Claimant testified that Mr. Gardner filed bankruptcy and that she was listed as a creditor for a lease agreement through August of 2017.

22. Claimant testified that she has not held herself out as married to Mr. Gardner, has no joint property, that her car is registered in her name only, and that she has no joint bank accounts or credit cards.

23. Mr. Gardner testified at hearing. He testified that he was ordered by a bankruptcy court in 2015 to pay Claimant rent at $500 per month until August of 2017. He testified that before the bankruptcy court order, he paid rent and helped out but was sporadic. He testified that he tried to pay $300 per month. He testified that he paid Claimant $500 per month for two years due to the bankruptcy order, but now pays Claimant $300 per month again.

24. Mr. Gardner testified that Claimant is more than just a friend, and that he sometimes considers Claimant as a girlfriend, but that he also considers her to be a

roommate. Mr. Gardner testified that he likes to come and go as he wants, and doesn't want to have to explain things to Claimant.

25. Mr. Gardner testified that he never told anyone that he was married to Claimant or held himself out as married nor did he hold himself out as married on social media.

26. Claimant and Mr. Gardner are found credible and persuasive that they have no intent to be married or have a relationship beyond that of boyfriend/girlfriend (sometimes and with an open relationship), co-parents, and roommates. Although this relationship is somewhat unusual, there is no agreement or intent between them to be married nor is there any evidence they have held themselves out to the public as being married couple.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

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

Common Law Marriage

Claimant current receives death benefits as the widow of Gabriel Ortega. Under the Act, death benefits shall be paid to her as a dependent widow for life or until remarriage. *See* § 8-42-120, C.R.S. Respondents contend that Claimant has re-married such to allow them to terminate death benefits and argue that Claimant and Mr. Gardner are in a common law marriage.

The existence of a common law marriage "is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship." *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987). The "agreement" of the parties to be married need not be expressed in words but may be "tacitly expressed." *Id.* at 664. Where the existence of an agreement is disputed the agreement may be inferred from "evidence of cohabitation and general repute." *Id.* at 664. The two most important factors demonstrating the parties' agreement to be married are "cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife." *Id.* at 665. Moreover, the parties' agreement to be married may be evidenced by "any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife." *Id*. at 665. Numerous "behaviors" may be considered as evidence of the parties' intention, but none is determinative.

Ultimately the question of whether a party has established the existence of a common law marriage is one of fact for determination by the ALJ. *Sutphin v. Pinnacol Assurance*, WC 4-815-042-04 (ICAO September 9, 2014). Resolution of the issue turns on issues of fact and credibility.

Claimant and Mr. Gardner did not engage in conduct indicating an agreement to be married. There was no evidence they referred to each other as husband and wife or held themselves out publicly to neighbors, family, friends, or on social media as a married couple. There is an absence of any jointly held property, joint banking accounts, joint credit cards, or joint tax returns. Claimant does not refer to herself using Mr. Gardner's surname.

The ALJ acknowledges that Claimant and Mr. Gardner have a non-conventional relationship in that they have a child together, live in the same home, and sometimes consider one another to be boyfriend/girlfriend. However, it is credible that Mr. Gardner likes to come and go as he pleases and does not like to have to explain himself to Claimant. While non-conventional, many non-conventional relationships exist that do not qualify as common law marriages. Neither Claimant nor Mr. Gardner indicate any intent to be married to one another nor have they held themselves out as married. They co-parent, they live in the same house, they share some duties of the house, and they drive each other's cars. However, they have not agreed to be married, have not tacitly

expressed an agreement to be married, have not held themselves out as married, and do not have a general repute of a married couple. The two most important factors in determining whether a couple is engaged in a common law marriage are cohabitation and reputation among persons in the community that the parties hold themselves out as married. Here, although Claimant and Mr. Gardner live in the same home there is insufficient evidence indicating that they have ever held themselves out as married. The weight of the credible and persuasive evidence establishes that no common law marriage exists at this time between Claimant and Mr. Gardner. Respondents have failed to meet their burden.

ORDER

It is therefore ordered that:

1. Respondents' request to terminate Claimant's dependent widow death benefits due to re-marriage is denied and dismissed. Claimant has not re-married and is not, at this time, in a common law marriage.

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

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

DATED: November 16, 2017,

/s/ Michelle E. Jones

_____

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that the request for a right palm, ring and small finger DeQuervain's release by David Conyers, M.D. is reasonable, necessary and causally related to his admitted April 17, 2016 industrial injury.

FINDINGS OF FACT

1. Claimant worked as a Security Officer for Employer. On April 17, 2016 he suffered an admitted industrial injury to his right hand/thumb while at work when he slipped on ice in a parking lot.

2. On April 21, 2016 Claimant visited David Conyers, M.D. for an examination. On April 22, 2016 Dr. Conyers requested authorization from Respondent to perform a closed reduction and percutaneous pinning, fluoroscopic reduction and K-wire fixation of the right thumb metacarpal base fracture.

3. On May 3, 2016 Dr. Conyers performed a fluoroscopic reduction percutaneous K-wire fixation of the right thumb metacarpal base fracture with intra-articular involvement.

4. On May 9, 2016 Respondent filed a General Admission of Liability (GAL). The GAL acknowledged that Claimant was entitled to receive Temporary Total Disability (TTD) benefits beginning April 20, 2016. Claimant subsequently remained off work and received TTD benefits for the period April 20, 2016 through September 14, 2016.

5. On September 13, 2016 Claimant visited Authorized Treating Physician (ATP) Lynne Fernandez, M.D. for an examination. Dr. Fernandez released Claimant to full duty employment with no restrictions. Claimant returned to work for Employer on September 15, 2016.

6. On December 7, 2016 Claimant returned to Dr. Fernandez for an evaluation. An electrodiagnostic study revealed moderate to severe right carpal tunnel syndrome.

7. On January 17, 2017 Dr. Conyers performed an open right carpal tunnel release. He also administered an injection to the right cubital tunnel. Respondent authorized the procedures.

8. On January 27, 2017 Respondent filed a new GAL. The GAL acknowledged that Claimant was entitled to receive TTD benefits for the period January 15, 2017 until April 19, 2017 because he was unable to work.

9. On March 28, 2017 Claimant returned to Dr. Fernandez for an examination. Claimant reported that "he woke up yesterday with pain on the radial aspect of his right wrist." He commented that he was not sure what happened and speculated that he might have slept on it wrong. Dr. Fernandez listed radial wrist pain as a new onset beginning March 27, 2017.

10. On April 19, 2017 Respondent received a request from Dr. Conyers to perform a right long and small finger trigger release as well as a right wrist first dorsal compartment release on Claimant. Prior to responding to the request for authorization Respondent submitted medical records to Thomas Mordick, II, M.D. for review. Dr. Mordick issued a response on April 25, 2017 in which he concluded that only the trigger of the long finger was related to Claimant's April 17, 2016 work accident.

11. On April 27, 2017 Respondent sent a letter to Dr. Conyers informing him that the request for authorization for a small finger trigger release and a right wrist first dorsal compartment release had been denied. However, Respondent approved Dr. Conyers' request for a trigger release of the long finger. Nevertheless, surgery for a trigger release of the long finger was never scheduled.

12. On April 20, 2017 Claimant returned to work for Employer. Claimant has continued to work full-time with no reported physical issues or complaints.

13. On June 16, 2017 Claimant again visited Dr. Conyers for an examination. He reported right wrist pain. Dr. Conyers requested authorization for a right palm, ring and small finger DeQuervain's release. The request noted that the proposed surgery was scheduled for June 27, 2017.

14. Respondent subsequently submitted medical records to Dr. Mordick to review the surgical request. On June 24, 2017 Dr. Mordick issued a response. He concluded that nothing in the additional medical records contradicted his previous opinion that the requested right palm, ring and small finger DeQuervain's release was unrelated to Claimant's April 17, 2016 industrial injury.

15. On August 4, 2017 Dr. Mordick conducted an independent medical examination of Claimant. He recounted that Claimant fractured his right thumb during a work accident on April 17, 2016. After undergoing thumb surgery Claimant remarked that he continued to suffer numbness on the dorsal forearm, wrist and radial aspect of the hand. Claimant also reported that his right long finger began to bother him in September 2016 and his right small finger discomfort began in November 2016. He noted that he underwent a carpal tunnel release in January 2017 for his April 17, 2016 industrial injury.

16. After conducting a physical examination and reviewing Claimant's medical records Dr. Mordick summarized that Claimant's DeQuervain's tendinitis did not arise until late March 2017 and is thus unrelated to his April 17, 2016 industrial injury. Dr. Mordick noted that two providers stated the time of onset occurred around March 2017 despite Claimant's assertion that his wrist has been bothering him since August 2016. Additionally, Dr. Mordick determined that Claimant exhibited objective findings consistent

with trigger of the right long and small fingers. However, although Claimant maintained that his complaints about the trigger on the right small finger began in November 2016, the medical records reveal that the complaints did not begin until March 2017. Dr. Mordick noted that in either event the symptoms were unrelated to the April 17, 2016 work accident. He acknowledged that the symptoms of the trigger of the long finger were related to Claimant's industrial accident. Dr. Mordick summarized that Claimant is predisposed to stenosing tenosynovitis because of his diabetes.

17. On September 26, 2017 Respondent sent Dr. Fernandez copies of Dr. Mordick's record reviews and independent medical examination report. Respondent sought Dr. Fernandez' opinion regarding the relatedness of Dr. Conyer's surgical request to Claimant's April 17, 2016 industrial accident. On October 4, 2017 Dr. Fernandez responded that she agreed with Dr. Mordick's analysis. The small finger trigger release and DeQuervain's tendonitis were unrelated to Claimant's admitted industrial injury. She summarized that she "agreed with [Dr. Mordick's] findings and recommendations."

18. Dr. Mordick testified at the hearing in this matter. He maintained that Claimant's DeQuervain's tendonitis was unrelated to his April 17, 2016 work accident. He remarked that the right wrist pain began almost one year after the industrial incident. Moreover, Dr. Mordick commented that Claimant's need for a small finger trigger release was not caused by the work accident because the triggering did not begin until November 2016. Finally, Claimant's ring finger simply lacked any triggering issues. Dr. Mordick summarized that Dr. Conyers' request for a right palm, ring and small finger DeQuervain's release is not causally related to Claimant's admitted April 17, 2016 industrial injury.

19. Claimant has failed to establish that it is more probably true than not that the request for a right palm, ring and small finger DeQuervain's release by Dr. Conyers is reasonable, necessary and causally related to his admitted April 17, 2016 industrial injury. Initially, Claimant injured his right hand/thumb while at work when he slipped on ice in a parking lot. Claimant subsequently underwent two authorized surgeries to address his right hand/thumb symptoms. However, the medical records and persuasive opinions of Dr. Mordick demonstrate that the need for a right palm, ring and small finger DeQuervain's release is not causally related to Claimant's admitted industrial injury.

20. Following the initial May 3, 2016 surgery to repair a thumb fracture, Claimant returned to work on September 15, 2016. After complaints about pain in his right hand, Claimant underwent another surgery performed by Dr. Conyers on January 17, 2017. The medical records and history of treatment demonstrate that Drs. Fernandez and Conyers addressed Claimant's symptoms and pain complaints. However, Claimant did not mention any right wrist or small finger symptoms until well after his April 17, 2016 work injury. More specifically, the medical records do not reflect that Claimant suffered right small finger triggering until at least November 2016. Claimant also did not mention right wrist pain until March 27, 2017.

21. After conducting two medical record reviews and an independent medical examination, Dr. Mordick concluded that Dr. Conyers' request for a right palm, ring and small finger DeQuervain's release was not causally related to Claimant's admitted April

17, 2016 industrial injury. Considering the temporal delay in Claimant's development of symptoms, Dr. Mordick reasoned that his DeQuervain's tendinitis did not arise until late March 2017. Furthermore, Dr. Mordick noted that two providers stated the time of onset was around March 2017 despite Claimant's assertion that his wrist had been bothering him since August 2016. Additionally, Dr. Mordick determined that Claimant exhibited objective findings consistent with trigger of the right long and small fingers. However, although Claimant maintained that his complaints about the trigger on the right small finger began in November 2016, the medical records reveal that the complaints did not begin until March 2017. Dr. Mordick noted that, in either event, the symptoms were unrelated to the April 17, 2016 work accident. Finally, Dr. Fernandez agreed with Dr. Mordick's analysis. The small finger trigger release and DeQuervain's tendonitis were unrelated to Claimant's admitted industrial injury. Accordingly, Claimant's April 17, 2016 industrial accident did not cause, aggravate or accelerate his pre-existing condition to produce a need for surgical intervention in the form of a right palm, ring and small finger DeQuervain's release.

CONCLUSIONS OF LAW

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

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

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

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment

aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to establish by a preponderance of the evidence that the request for a right palm, ring and small finger DeQuervain's release by Dr. Conyers is reasonable, necessary and causally related to his admitted April 17, 2016 industrial injury. Initially, Claimant injured his right hand/thumb while at work when he slipped on ice in a parking lot. Claimant subsequently underwent two authorized surgeries to address his right hand/thumb symptoms. However, the medical records and persuasive opinions of Dr. Mordick demonstrate that the need for a right palm, ring and small finger DeQuervain's release is not causally related to Claimant's admitted industrial injury.

6. As found, following the initial May 3, 2016 surgery to repair a thumb fracture, Claimant returned to work on September 15, 2016. After complaints about pain in his right hand, Claimant underwent another surgery performed by Dr. Conyers on January 17, 2017. The medical records and history of treatment demonstrate that Drs. Fernandez and Conyers addressed Claimant's symptoms and pain complaints. However, Claimant did not mention any right wrist or small finger symptoms until well after his April 17, 2016 work injury. More specifically, the medical records do not reflect that Claimant suffered right small finger triggering until at least November 2016. Claimant also did not mention right wrist pain until March 27, 2017.

7. As found, after conducting two medical record reviews and an independent medical examination, Dr. Mordick concluded that Dr. Conyers' request for a right palm, ring and small finger DeQuervain's release was not causally related to Claimant's admitted April 17, 2016 industrial injury. Considering the temporal delay in Claimant's development of symptoms, Dr. Mordick reasoned that his DeQuervain's tendinitis did not arise until late March 2017. Furthermore, Dr. Mordick noted that two providers stated the time of onset was around March 2017 despite Claimant's assertion that his wrist had been bothering him since August 2016. Additionally, Dr. Mordick determined that Claimant exhibited objective findings consistent with trigger of the right long and small fingers. However, although Claimant maintained that his complaints about the trigger on the right small finger began in November 2016, the medical records reveal that the complaints did not begin until March 2017. Dr. Mordick noted that, in either event, the symptoms were unrelated to the April 17, 2016 work accident. Finally, Dr. Fernandez agreed with Dr. Mordick's analysis. The small finger trigger release and DeQuervain's tendonitis were unrelated to Claimant's admitted industrial injury. Accordingly, Claimant's April 17, 2016 industrial accident did not cause, aggravate or accelerate his pre-existing condition to produce a need for surgical intervention in the form of a right palm, ring and small finger DeQuervain's release.

ORDER

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

1. Claimant's request for a right palm, ring and small finger DeQuervain's release is denied and dismissed.

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

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

DATED: November 16, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that medications prescribed by Dr. Ellen Price, including Wellbutrin (bupropion), Lunesta, and Belsomra are reasonable and necessary to maintain claimant at maximum medical improvement (MMI).

- At hearing, respondents stated that claimant's use of Nucynta has been authorized and agreed to reimburse claimant for any out of pocket expenses he incurred for Nucynta.

FINDINGS OF FACT

1. Claimant was employed with employer as an underground miner. On March 9, 2008, claimant suffered an admitted injury to his left ankle. Since that injury claimant has undergone two surgeries to his left ankle and a spinal cord stimulator trial. Dr. Ellen Price is claimant's authorized treating physician (ATP).

2. On March 9, 2016, Dr. Price determined that claimant had reached MMI and assessed a permanent impairment rating of 31% whole person. At that time, Dr. Price opined that claimant would need ongoing maintenance medical treatment including prescription medications, physical therapy, and "MTB shoes".

3. Claimant has been diagnosed with complex regional pain syndrome (CRPS). Claimant testified that his current CRPS symptoms include shocking and burning sensations in his left leg and foot as well as discoloration in his lower leg and foot. Claimant testified that he has difficulty walking and the pain in his leg affects his ability to sleep.

4. To address claimant's sleep issues, Dr. Price has prescribed various sleep aides beginning with Ambien on June 7, 2010. Dr. Price first prescribed Lunesta to claimant on September 5, 2013. Claimant reported to Dr. Price that he was sleeping better with Lunesta. Dr. Price has also prescribed the sleep aide Belsomra to claimant. However, on March 6, 2017, Dr. Price noted that Lunesta worked better than Belsomra in treating claimant's sleep issues.

5. Claimant testified that if he does not take a sleep aide, like Lunesta, he will have little or no sleep. This lack of sleep increases claimant's pain levels. Claimant testified that prior to the March 9, 2008 work injury he did not have difficulty sleeping and did not take a sleep aide.

6. Dr. Price has also prescribed Wellbutrin (bupropion) for claimant. Claimant testified that when he takes the Wellbutrin in combination with Nucynta, he is able to better manage his pain. Based upon the medical records entered into evidence, Dr. Price first prescribed Wellbutrin to claimant on June 7, 2012.

7. On January 11, 2016, Dr. Bart Olash reviewed the relatedness of claimant's various prescription medications, including Wellbutrin (bupropion) and Lunesta. Dr. Olash opined that bupropion is prescribed for the treatment of depression, cigarette cessation, seasonal affective disorder, and ADHD. Dr. Olash indicated in his report that bupropion is not used to treat chronic pain. Dr. Olash also opined that sleep aides such as Lunesta are not related to claimant's work injury. In support of this opinion Dr. Olash noted that there was "no clear documentation" that claimant suffers from "sleep abnormalities". Based upon Dr. Olash's opinion, respondents have denied the prescriptions for Wellbutrin, Lunesta, and Belsomra.

8. Dr. Price testified by deposition and stated that it is her opinion that claimant's use of Wellbutrin (bupropion), Lunesta, and Belsomra are related to claimant's March 9, 2008 work injury. Dr. Price credibly testified that although bupropion is an anti-depressant, it is commonly prescribed to treat chronic pain.

9. The ALJ credits claimant's testimony and the opinion of Dr. Price and finds that claimant has demonstrated that it is more likely than not that his difficulty sleeping is caused by his March 9, 2008 injury and related CRPS diagnosis. Therefore, the ALJ finds that claimant has demonstrated that it is more likely than not that sleep aides, including Lunesta and Belsomra, are necessary to maintain claimant at MMI.

10. The ALJ credits claimant's testimony and the opinion of Dr. Price over the conflicting opinion of Dr. Olash and finds that claimant has demonstrated that it is more likely than not that claimant uses Wellbutrin (bupropion) to treat his chronic pain and CRPS symptoms. Therefore, the ALJ finds that claimant has demonstrated that it is more likely than not that the continued use of Wellbutrin (bupropion) is necessary to maintain claimant as MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., (2016). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

5. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

6. As found, claimant has demonstrated by a preponderance of the evidence that the prescription medications Wellbutrin (bupropion), Lunesta, and Belsomra, are reasonable medication treatment necessary to maintain claimant at maximum medical improvement (MMI). As found, claimant's testimony and the opinion of Dr. Price are credible and persuasive.

ORDER

It is therefore ordered that:

1. Respondents shall pay for claimant's maintenance medical treatment including the prescription medications Wellbutrin (bupropion), Lunesta, and Belsomra.

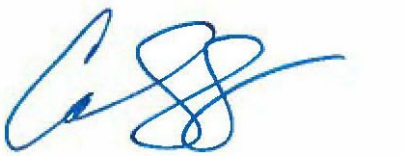
2. To the extent that claimant has paid out of pocket for the prescription medications Wellbutrin (bupropion), Lunesta, and Belsomra, respondents shall reimburse claimant for those expenses.

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

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

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

Dated: November 16, 2017



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable work related occupational disease to her bilateral upper extremities.

FINDINGS OF FACT

1. Claimant works for Employer as a housekeeper and began working for Employer in approximately April of 2016. *See* Exhibit H.

2. Claimant works, on average, approximately 35 hours per week. On a daily basis she cleans 10 apartments per day including vacuuming, cleaning bathrooms, taking out trash, changing linens, dusting, and other general cleaning activities.

3. On November 8, 2016 Claimant was evaluated by her primary care physician, Julia Cuervo, M.D. Claimant reported right medial arm pain that began five weeks ago, and left arm pain that began two weeks ago and that she felt like she had needles in her medial elbows and her hands/fingers felt like she had gloves on due to the numbness. On examination, Dr. Cuervo noted tenderness at the right elbow over the medial epicondyle and lateral epicondyle as well as tenderness at the medial epicondyle on the left elbow. Dr. Cuervo assessed golfers elbow of the left upper extremity, and golfers elbow of the right upper extremity. Dr. Cuervo noted that Claimant would contact her employer since this would likely need to be filed under workman's comp. *See* Exhibit F.

4. On November 11, 2016 Claimant was evaluated at Concentra by Cynthia Goacher, M.D. Claimant reported right elbow pain in the lateral and medial epicondyle that started five weeks ago and that was constant and worsening with swelling. Claimant also reported that her left elbow started to have the same pain three weeks ago. Claimant reported that vacuuming, cleaning kitchens, and cleaning bathrooms caused increasing pain. Claimant reported no known injury. On examination, Dr. Goacher noted swelling in the lateral epicondyle, pain with resisted wrist pronation, pain with resisted wrist extension, pain with resisted wrist flexion, and pain with resisted wrist supination. Dr. Goacher also found swelling in the medial epicondylitis. Dr. Goacher assessed medial epicondylitis of both elbows and lateral epicondylitis of both elbows. Dr. Goacher referred Claimant to physical therapy and ordered a work site evaluation to evaluate for repetitive trauma guidelines. Dr. Goacher noted that a worksite evaluation would be done and would determine whether this fit a workers comp injury. *See* Exhibit C.

5. On December 9, 2016 a physical demands analysis and risk factor assessment evaluation was performed at Employer's location by Sara Nowotny. Claimant was not working at the time of the evaluation so another worker was interviewed and observed performing the work duties associated with the position of housekeeper. The description of the job included: cleaning 10 residential rooms per day (20-30 minutes per apartment); cleaning bathrooms, bedrooms, and kitchens; performing rotation cleaning to include high dusting, cleaning hard furniture, cleaning windows, or vacuuming furniture; wiping down sinks, showers, counters, microwave, and mirrors; removing trash and changing linens weekly; sweeping and mopping vinyl areas and vacuuming carpet. Ms. Nowotny opined after a direct interview and observation of the job tasks and working environment that Claimant's job duties had no primary or secondary risk factors. *See* Exhibit B.

6. On January 18, 2017 Claimant was evaluated at Concentra by Felix Meza, M.D. It was noted that the pathophysiology of the diagnosis was discussed with Claimant along with the physical demands analysis and risk factor assessment evaluation. Given the evaluation, Claimant was referred to her primary care provider for continued care. Dr. Meza noted that Claimant may need an orthopedic evaluation given the stagnation of progress and he opined that given her symptoms and physical examination, continued work restrictions were recommended. The assessment was: lateral epicondylitis of both elbows; medial epicondylitis of both elbows; and mild carpal tunnel syndrome, right. Dr. Meza noted that Claimant was released from care and referred to her primary care provider as the work site evaluation concluded that Claimant's work activities did not meet the criteria for workers' compensation. *See* Exhibit C.

7. On January 20, 2017 Claimant was evaluated by Dr. Cuervo. Claimant reported that she had been seen at Concentra and underwent 8 physical therapy sessions and bilateral elbow injections. Claimant reported continued symptoms and pain and that she had been dropping even light objects. Claimant reported that Concentra found it non work related and requested she see her primary care provider for an orthopedic referral. On examination, Dr. Cuervo found tenderness to palpation over the right medial epicondyle and tenderness to palpation over the right medial and lateral epicondyles. Claimant was diagnosed with left tennis elbow, golfer's elbow of the right upper extremity, and right carpal tunnel syndrome. Claimant was referred to Front Range Orthopedics for evaluation. *See* Exhibit F.

8. On February 5, 2017 Claimant underwent an independent medical evaluation performed by John Burris, M.D. Claimant reported to Dr. Burris that she had bilateral upper extremity pain and that she had the insidious onset of pain several weeks prior to her report of injury. Claimant reported no specific event that precipitated her symptoms but that she initially had pain in her right elbow that then extended into her right hand with a feeling of needle sensation and stiffness in her fingers. Claimant reported that as time went on, the pan extended up her right arm to her shoulder. Claimant reported that she began using her left arm more because of the right arm pain and that then she developed similar symptoms in her left arm. Claimant reported that she believed

the pains were associated with her work activities as a housekeeper, where she cleans 10 apartments per day doing vacuuming, mopping, and sweeping. *See* Exhibit A.

9. Claimant reported treatment that included elbow arm bands, physical therapy, and cortisone injections to her elbows. Claimant reported the treatment had no benefit. Claimant reported continued pain of 8/10 worsened with movements of her arms and forcefully grasping items. Claimant reported that she had no symptoms before September of 2016. Dr. Burris reviewed medical records and performed a physical examination. Dr. Burris assessed subjective complaints of bilateral upper extremity pain. Dr. Burris opined that Claimant's subjective complaints at the IME were non physiologic with a glove type distribution and a benign examination with no objective findings. Dr. Burris opined that significant psychosomatic overlay was present likely contributing to Claimant's symptom maintenance. *See* Exhibit A.

10. Dr. Burris opined that because there was no acute event, it had to be determined if Claimant met the criteria for a cumulative trauma disorder as defined by the medical treatment guidelines. He noted that the jobsite analysis did not identify any primary or secondary risk factors associated with Claimant's jobsite or her work activities. Dr. Burris also opined that there was no temporal association between the time at the jobsite and Claimant's symptoms. Dr. Burris opined that according to the Division of Workers' Compensation, Claimant's subjective complaints cannot be causally related to her workplace. Dr. Burris opined that Claimant's exact diagnosis, with diffuse complaints and no objective findings, was unclear but that the complaints were not work related and that there were no workplace risk factors identified related to any upper extremity cumulative trauma diagnosis. *See* Exhibit A.

11. In March of 2017 Claimant was evaluated by Dr. Cuervo. Claimant reported that she had attempted to schedule an appointment with orthopedics, but was told nothing was available until August. Dr. Cuervo then referred Claimant to Orthopedics Dr. Jani. Claimant was still reporting pain in both upper arms with numbness and tingling of her fingers that went up to the nape of her neck bilaterally. *See* Exhibit F.

12. On April 5, 2017 Claimant was evaluated by Sunif Jani, M.D. Claimant reported right greater than left medial and lateral elbow pain, forearm pain, and hand pain that radiated into all fingers. Claimant reported injections into both elbows had only helped with mild improvement for six weeks and that now her symptoms were getting worse. Claimant reported numbness/tingling from her neck down through both shoulders, elbows, and into both hands. Dr. Jani found positive cervical testing indicating bilateral upper extremity radiculopathy and found circumferential pain and tenderness at the elbows, forearms, wrists, and hands with weakness of the hands/wrists/elbows. Dr. Jani found positive spurlings and positive augmented spurlings. X-rays of the elbows showed minimal degenerative spurring change from the coronoid process of the ulna on the left, and negative unremarkable on the right. Dr. Jani opined that Claimant needed an evaluation and possible referral to a spine specialist and/or to physical therapy for bilateral cervical radiculopathy. *See* Exhibit E.

13. On April 11, 2017 Claimant was evaluated by Dr. Cuervo. Claimant reported that she saw orthopedics Dr. Jani and that she was told that her arm pain was stemming from her neck. Dr. Cuervo noted that the clinic note indicated Claimant had cervical radiculopathy and needed evaluation with possible referral to physical therapy or a spine specialist. Dr. Cuervo noted that a cervical MRI would be ordered and referred Claimant to neurologist Dr. Gill. *See* Exhibit F.

14. On May 9, 2017 Claimant underwent an MRI of her cervical spine. The impression provided was: mild canal stenosis at C4-5 with a small borad based disc and bony oteophytes with no significant effect on the cord. At C4-5 there was severe left foraminal stenosis. *See* Exhibit G.

15. On June 1, 2017 Claimant was evaluated by Kristi Gill, D.O. Claimant reported the onset of pain in her right elbow followed by similar symptoms in her left arm with gradual worsening that involved tingling in both hands and tingling in both upper arms. Dr. Gill noted that examination was made difficult by give way weakness throughout, but doubted there was any severe true weakness. Dr. Gill noted some sensory changes with relative diminished sensation of the first digit on the left and fourth and fifth digits on the right. Dr. Gill noted that if the cervical MRI was negative for any significant stenosis, the symptoms could be related to focal entrapment neuropathy, ulnar neuropathy, and/or median mono-neuropathy at the wrist. Dr. Gill ordered EMGS of both upper extremities. *See* Exhibit D.

16. On June 9, 2017 Claimant underwent nerve conduction studies on her bilateral upper extremities. The findings included prolonged right medial mid palmar sensory response distal latency both relatively and absolutely with reduced amplitude and a slowing of conduction velocity of the left ulnar nerve across the elbow. Dr. Gill concluded that there was electro-diagnostic evidence of ulnar neuropathy at the left elbow and median mono-neuropathy at the right wrist of mild to moderate severity. *See* Exhibit D.

17. Dr. Gill noted that the studies had revealed ulnar neuropathy at the right elbow and mild to moderate right carpal tunnel syndrome. Dr. Gill recommended wearing splints and physical therapy. Dr. Gill reviewed Claimant's cervical MRI and noted evidence of severe neural foraminal narrowing on the left at C4-5 and recommended that Claimant be referred for cervical epidural steroid injections to address the left sided neural foraminal stenosis. *See* Exhibit D.

18. In this case, after receiving a report of injury, Respondents filed a notice of contest. Claimant initially filed an application for hearing on the issue of compensability. The matter was set for hearing in May of 2017. Prior to hearing, a pre-hearing was set and at pre-hearing, an ALJ ordered Claimant to respond to interrogatories and ordered that the scheduled hearing be continued. The hearing was not reset. As it was not reset, Respondents filed an application for hearing on June 19, 2017 which caused this hearing to be set. Claimant did not respond or argue "ripeness" until the start of this hearing.

19. The undersigned ALJ allowed the hearing to proceed. Claimant did not present any evidence or testimony at hearing.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of employment. *See* § 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury.

Singleton v. Kenya Corp., 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet her burden to establish by a preponderance of the evidence that she sustained a work related occupational disease to her bilateral upper extremities. The credible and persuasive evidence presented at hearing establishes that Claimant's normal job duties contain zero primary and zero secondary risk factors for the development of an occupational disease. Claimant failed to present any testimony or evidence contrary to the job duties and physical demands analysis and risk factor assessment evaluation completed by Ms. Nowotny. The evaluation appears to be a thorough representation of the actual duties of the housekeeper position. Additionally, as found above, both the authorized treating provider and Dr. Burris opined that Claimant did not have a work related occupational disease. Further, medical opinions indicate that Claimant's symptoms on the left may be due to severe foraminal narrowing at C4-5 as opposed to an occupational disease of her left upper extremity. Claimant has not established that her employment caused, intensified, or aggravated her bilateral upper extremity conditions or symptoms.

Ripeness

Claimant also argued at hearing that the issue of compensability was not ripe for hearing because Claimant was not sure whether or not she wanted to pursue a claim. Claimant also argued that the issue of compensability was premature as Claimant did not know whether she sustained an occupational injury or whether the symptoms were coming from a different source or her neck. The undersigned ALJ allowed the hearing to proceed. The ALJ concludes that there was no legal impediment to going forward on a hearing regarding the issue of compensability, even though it was Respondents' application for hearing. The issue of compensability is and was ripe and fit for adjudication. The alleged onset of the occupational disease was more than one year prior to the date of hearing. Claimant has seen numerous physicians and a job site evaluation has been performed. Although unusual for Respondents to apply on compensability, under the Act any party may request a hearing on issues ripe for

adjudication by filing an application for hearing. *See* § 8-43-211(2)(b), C.R.S. Here, the issue of compensability is ripe.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable work injury occupational disease to her bilateral upper extremities.

2. The claim is denied and dismissed.

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

DATED: November 20, 2017,

/s/ Michelle E. Jones

_____

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

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant's opening brief, erroneously labeled as Proposed Findings of Fact, Conclusions of Law and Order, was filed on November 13, 2017. Respondents' answer brief, erroneously labeled as Respondents' Proposed Findings…was filed on November 17, 2017. The Claimant waived the prerogative of filing a reply brief. Consequently, the matter was submitted for decision on November 17, 2017.

ISSUES

The issues to be determined by this decision concern compensability of an alleged occupational disease, a hearing loss; medical benefits, and a statute of limitations defense by Respondents.

The Claimant bears the burden of proof, by a preponderance of the evidence regarding compensability.

Respondents bear the burden of proof, by a preponderance of the evidence, on the issue of statute of limitations.

Because the ALJ hereby determines in this decision that the Claimant did not sustain a compensable hearing loss with a date of alleged last injurious exposure of March 15, 2016, resolution of all other designated issues is moot.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant has been employed by the Employer for approximately 36 1/2 years. He began employment as an operator. Thereafter, he became a network technician, approximately 15 years ago, or in 2002.

2. As part of his position as a network technician, the Claimant would use an air tool to remove bolts on telecommunication cases in manholes. He estimated that it would take 2-3 minutes to remove the bolts on the cases, and the same amount of time to replace the bolts, thereby making his average time in the manhole about 4-6 minutes.

3. The Claimant has not worked as a network technician, in manholes with the air tool for approximately 5 years, making his last exposure to the source of his alleged claim sometime in 2012.

Exposures

4. During the 10 year-period that the Claimant was working as a network technician, he removed and replaced the bolts on cases approximately 1,000 times, or 100 times per year. The ALJ calculates that there are approximately 300 work days during a year, discounting weekends, holidays and vacations. This means that the Claimant was performing the task approximately once every 3 working days for about 6 minutes per day. This equates to about 30-40 uses of the air wrench per average work day.

5. The Claimant has participated in indoor-range firearms shooting prior to the date of his alleged occupational disease in this matter. He shot 9mm pistols in indoor, not outdoor, ranges, prior to his employment with Cabela's, which began in 2013. From June 2013 to June 2015, the Claimant shot pistols, and sometimes rifles, in an indoor range on a quarterly basis with his Cabela's co-workers. He described shooting 9mm, .40 caliber, and .45 caliber handguns, and a .308 rifle.

6. The Claimant continued to shoot firearms subsequent to the end of his employment at Cabela's, the last time being in June 2017.

7. The records contained in the official hearing file indicate that the Claimant sought treatment and a hearing test in 2015, during the two-year period when he was engaged in shooting firearms (Respondents' Exhibit D, bates stamp 0020) ("Have you ever had a hearing test? Yes, 2012 & 2015").

8. The Claimant denied ever reporting to any medical provider that he had damaged his hearing due to firearm shooting. The ALJ, however, finds that when the Claimant specifically sought treatment in 2012 for hearing issues, he reported that he had undergone "noise" exposure in the form of an accident relating to "firearms." He also reported notice exposure from "concerts during the 1970's". (Respondents' Exhibit D, bates stamp 24).

9. The Claimant denied that he had *ever* had a referral for an ENT (Ear, Nose, Throat Specialist) prior to his appointment with Urgent Care on March 16, 2016.

10. The records document, however, that the Claimant was referred to and saw an ENT sometime in 2008, and that the Claimant was disappointed with the treatment received from the ENT (Respondents' Exhibit B, bates stamp 15, Exhibit D, bates stamp 26-27).

11. According to the Claimant, his current symptoms are that he hears "white noise" at a level 2-3 and cannot hear people talk. He relies on this to support his contention that these symptoms worsened in 2016, thereby causing him to make the connection between his employment and the condition.

12. The ALJ finds that the Claimant has not actually been in a manhole for over 5 years, and he has not been exposed to the source of noise (use of air tool) which he alleges is the cause of his condition.

13. Further, the evidence does not support the Claimant's contention that his symptoms worsened in 2016 as a result of his employment with the Employer herein. In 2012, the Claimant was reporting a "constant hissing" in his ears, and he was frequently asking people to repeat, he had difficulty following conversations involving more than 2 people, people sounded as if they mumbled or muffled, and he had difficulty hearing in restaurants. Again, the Claimant also characterized his "noise exposure" as stemming from concerts in the 70's and firearms (Respondents' Exhibit D, bates stamp 24).

14. The Claimant confirmed that he has taken for years, and is currently still taking, aspirin.

Medical Evidence--Seth Reiner, M.D. (ENT)

15. The Claimant was seen for an Independent Medical Examination (IME) by Dr. Reiner on September 18, 2017. Dr. Reiner is an ENT (Ear, Nose and throat specialist), board certified by the American Academy of Otolaryngology and in Head and Neck Surgery. He was qualified to testify as an expert witness (October 30, 2017 Depo. of Dr. Reiner, p. 5 lines 9-12).

16. Dr. Reiner reviewed the medical records, including audiograms from 2012 through 2016, as well as the audiogram he performed in his office, and took a history from the Claimant.

17. Dr. Reiner stated that when determining the cause of hearing loss, several factors must be evaluated, including noise exposure, congenital reasons, family history, medication use, trauma, age and sex. Medication usage included taking aspirin (Depo. of Dr. Reiner, p. 14, lines 9 through page 15; and, line 3). Dr. Reiner noted that taking even low-dose aspirin can cause non-occupational tinnitus (Respondents' Exhibit A, p. 4).

18. Dr. Reiner concluded that the Claimant had high frequency, non-occupational hearing loss, known as presbycusis (hearing loss due to aging) and that the audiograms supported this pattern. He noted that presbycusis is more common in males, and that the Claimant's age and onset fit with the diagnosis. He concluded that this was the most likely cause of the Claimant's hearing loss (Depo. of Dr. Reiner, p. 15, line 10 through p. 16, line 20.); Respondents Exhibit A, p. 4).

19. Dr. Reiner also identified through his review of the records and interview with the Claimant other non-occupational exposures such as concert attendance and firearm shooting. He noted the effect of firearm shooting on the inner ear with skull

vibration which can lead to hearing loss (Depo. of Dr. Reiner, p. 17, line 22 through p. 18, lines 1-14).

20. Dr. Reiner also did independent research as part of his expert opinion regarding air wrenches. He noted the range to be from 90 up to 100 decibels, the latter being for removing bolts from tires or wheels in a tire business (Depo. of Dr. Reiner, p. 19, line 20 through p. 20, lines 1-9).

21. Dr. Reiner also evaluated the Claimant's alleged noise exposure with the Employer herein as part of his opinion, and his ultimate conclusion was that the Claimant's hearing loss is due to non-occupational presbycusis. He explained from his research that it is not only the decibel level but the duration of the exposure which must be considered. He was of the opinion that based on the Claimant's report to him, the exposure was limited to short bursts of sound, lasting a few seconds, which would not be sufficient to cause hearing loss (Depo. of Reiner, p. 20, line 10 through p. 21, lines 1 through 21; and, p. 22 lines 1 through 5.).

The Claimant

22. The Claimant argues that Dr. Reiner's opinions should not be credited because he equated the air wrench to a dental drill. This is not an accurate reflection of Dr. Reiner's opinions. In fact, Dr. Reiner specifically noted that the highest decibel level for an industrial air wrench that he found during his research, was 110. Even at this level, however, he noted that only long-term chronic, consistent exposure would be dangerous in terms of hearing loss, and not the short-burst exposure related by Claimant. *Id.*

23. Further, the Claimant testified at hearing that he disagreed with Dr. Reiner because he felt the noise from using his air wrench to remove bolts from telecommunication boxes (5 years ago) was closer to the sound made by a mechanic changing a tire. Dr. Reiner actually addressed this scenario in his testimony. He noted that in his practice he had evaluated car mechanics who used much more powerful air wrenches than what was described to him by the Claimant, to remove tires. He testified that even these individuals, removing lug nuts from cars all day long, did not develop occupationally related hearing loss (Depo. of Dr. Reiner)

24. The Claimant argues that Dr. Reiner's opinion should be discredited based on his assertions about the Claimant's firearm shooting and concert attendance having an effect on his hearing loss. At hearing, the Claimant also denied that he had ever reported damaging his hearing from firearm use, and he attempted to characterize his concert going as inconsequential. Despite the Claimant's denials, the medical records in 2012 confirm that he reported to his own physician that he damage his hearing in a firearm episode, and that concerts during the 70's were "noise exposures". Therefore, the Claimant's attempt to discredit Dr. Reiner for emphasizing non-

occupational factors which are documented in the medical records “falls on deaf ALJ ears” because it is misplaced and is not persuasive.

25. The Claimant contends that the sound of the air wrench was “amplified” in the manhole. Dr. Reiner, as board certified ENT, who researched the specific issue, and is an expert with respect to occupational hearing loss, however, unequivocally concluded that the decibel level of an air wrench is *not* magnified for causation purposes simply by being in a manhole (Depo. of Dr. Reiner, p. 32, lines 15 through 19).

Claimant’s Medical Evidence—PA-C (Certified physician’s Assistant) Baker

26. Claimant asserts that the opinion of “Dr. Michelle Baker” should be credited in this matter. There is no “Dr. Michelle Baker.” The M164 cited by the Claimant is signed by Michelle Baker, PA-C. Baker is a physician’s assistant, not a medical doctor. Further, the Claimant has not submitted any records indicating that Baker’s opinion was countersigned or approved by any physician. There is no evidence in the record to support that Baker has any expertise regarding hearing loss, ENT issues, or is qualified to render an opinion helpful to the ALJ.

27. Moreover, Baker appears to have had at her disposal only the subjective report of the Claimant. She does not reference any review of prior medical records, nor does her report provide a meaningful analysis of causation. She did not examine or interpret the numerous audiology tests done over a period of years, or examine the Claimant’s medical records for contributing non-occupational factors.

28. The ALJ finds that the opinions of Dr. Reiner are more credible and persuasive than those of PA-C Baker. Dr. Reiner is a medical doctor, and a board certified ENT. He was qualified as an expert in occupational hearing loss. He reviewed and interpreted multiple audiograms pertaining to the Claimant, over a span of many years, in addition researching the literature and reviewing the Claimant’s complete medical records. The ALJ finds that his opinions are well founded and credits those opinions over the opinions of PA-C Baker.

29. The ALJ has considered Dr. Reiner’s special knowledge, training, experience and the research that he complied as part of his opinion and finds Dr. Reiner to be credible and persuasive. Dr. Reiner considered the Claimant’s available medical history, including review of audiograms spanning several years, and did research into the literature regarding causation of the injury related to the Claimant’s allegation of using an air wrench. Dr. Reiner’s conclusions that the Claimant’s hearing condition is due to non-occupational factors is persuasive and supports the ultimate fact that the Claimant’s claim is not compensable.

30. The Claimant is not alleging a distinct event occurring on his date of alleged injury, March 15, 2016. Rather, he is alleging an occupational disease

stemming from a work condition to which he was not exposed since *2012*, or over 4 years prior to the alleged date of onset.

31. The ALJ finds that although the Claimant was removed from his alleged occupational exposure almost 4 years before the date of alleged onset, he continued to shoot large caliber firearms and he has done so as late as June 2017. Dr. Reiner persuasively explained firearms shooting's (even with ear protection) effect on hearing, and this constitutes a non-occupational risk. The ALJ finds that the Claimant continued to be exposed to a non-occupational risk factors prior to the alleged alleged onset of his alleged work-related exposure in manholes while working for the Employer herein,

Statute of Limitations

32. The Claimant stated that twelve (12) years ago, he realized that at the end of his working shifts, his ears would ring.

33. When his ringing in the ears would not go away, the Claimant sought treatment with Dr. Mancuso in 2008. Claimant testified that he was told in 2008 by Dr. Mancuso that he had high-frequency hearing loss from exposure to loud noises.

34. The Claimant underwent audiology testing Dr. Mancuso in May 2012 which confirmed "severe sensorineural hearing loss, bilaterally". The Claimant reported that ringing or noises started 10 years previously with constant hissing, ringing/loudness and next to this history is "works Telecom—troubleshooting"(Respondents' Exhibit D, bates stamp 26-27). The Claimant testified that he was again told he had high frequency hearing loss.

35. The Claimant reported Tinnitus, noise exposure, hearing loss and he was recommended the curative modality of "hearing aids" in 2012. *Id.* at p. 27.

36. According to the Claimant, he knew his condition was "serious" because after he reported the condition as work related, he was sent to the authorized provider (Urgent Care) on March 16, 2016, who recommended that he see an Ear, Nose and Throat (ENT) specialist. The records confirm the referral (Respondents' Exhibit C, bates stamp 17).

37. The Claimant denied at hearing that he had *ever* had a referral for an ENT appointment, much less treatment, before his appointment with Urgent Care on March 16, 2016. His denial is contradicted by the weight of medical evidence in the record.

38. The records document that the Claimant was referred to and saw an ENT sometime in 2008, and that he was frustrated with the level of care he received. (Respondents' Exhibit B, bates stamp 15; Exhibit D, bates stamp. 26-27). In addition to

showing that the Claimant's testimony is not credible, it also reinforces the proposition that he knew his condition was "serious" by his own definition as early as 2008. Moreover, according to the Claimant's testimony, Dr. Mancuso told him in 2008 and again in 2012 that he had high frequency hearing loss due to loud noises.

39. The ALJ finds that the Claimant's own terminology is revealing. He seeks medical benefits under the workers' compensation system, based on his belief that a referral to an ENT is "serious". By this logic, he should have understood that his referral in 2008 to an ENT was equally "serious" particularly in light of his testimony that he had ringing in his ears at the end of his shifts after 2002. This is underscored by the fact that the Claimant also testified that Dr. Mancuso told him that he had "high frequency hearing loss due to loud noises" which the totality of the evidence demonstrates was based on the Claimant's report of his position with the Employer herein.

40. As a reasonable person, the Claimant knew or reasonably should have known of the serious and probable compensable nature of his hearing loss as of five years ago, when he last worked in the manholes for the Employer herein, yet he did not report a work-related hearing loss until March 16, 2016, more than three years after the statute of limitations had run.

Ultimate Findings

41. The ALJ finds the opinions of Dr. Reiner, a board certified otolaryngologist and ENT specialist, more credible and persuasive than any and all evidence to the contrary.

42. Between conflicting opinions and evidence, the ALJ makes a rational choice, based on substantial evidence, to accept the ultimate causality opinion (lack thereof) of Dr. Reiner and to reject any and all evidence to the contrary.

43. As a reasonable person, the Claimant knew or reasonably should have known of the serious and probable compensable nature of his hearing loss as of five years ago, when he last worked in the manholes for the Employer herein, yet he did not report a work-related hearing loss until March 16, 2016, more than three years after the statute of limitations had run.

44. The Claimant has failed to prove, by a preponderance of the evidence that he sustained a compensable hearing loss which resulted directly from his employment with the Employer herein or the conditions under which his work was performed, which could be seen to have followed as a natural incident of his work and as a result of the exposure occasioned by the nature of his employment, and which could be fairly traced to his employment as a proximate cause and which did not come from a hazard to which he would have been **equally** exposed outside of his employment.

45. The Respondents have proven, by a preponderance of the evidence that the Claimant reasonably should have known that his hearing loss could be work-related five years before he filed his claim, more than the period encompassed by the statute of limitations.

46. The Claimant failed to prove any circumstances that would toll the statute of limitations.

CONCLUSIONS OF LAW

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

Credibility

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

opinions of Dr. Reiner to be determinative of the compensability issue. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 165 Colo. 504, 441 P.2d 21 (1968); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

b. As further found, the ALJ considered Dr. Reiner's special knowledge, training, experience and the research he complied as part of his opinion and finds Dr. Reiner to be credible and persuasive. *See Young v. Burke*, *supra*. Dr. Reiner considered the Claimant's available medical history, including review of audiograms spanning several years, and did research into the literature regarding causation of the injury related to the Claimant's allegation of using an air wrench. Dr. Reiner's conclusions that the Claimant's hearing condition is due to non-occupational factors is persuasive and supports the proposition that the Claimant's claim is not compensable.

Substantial Evidence

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

Statute of Limitations

d. Pursuant to § 8-43-103(2), C.R.S., a claim for benefits is barred unless a formal claim is filed with the Division of Workers' Compensation within two years after an injury. The statute of limitations does not begin to run until a claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (Colo. 1967). *See, e.g., City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Intermountain Rubber Industries v. Valdez,* 688 P.2d 1133 (Colo. App. 1984). As found, Respondents have proven their

affirmative defense that the Claimant reasonably should have known that his hearing loss could be work-related five years before he filed his claim, more than the period encompassed by the statute of limitations.

e. The statute of limitations is an affirmative defense, which means that the burden to prove that the claimant was aware of the seriousness and probable compensable nature of the injury or occupational disease more than two years prior to filing the claim falls on Respondents. *Atlantic & Pacific Ins. Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983); *Kersting v. Indus. Comm'n*, 567 P.2d 394 (Colo. App. 1977). This is a question of fact for resolution by an ALJ. *Indus. Comm'n v. Canfield*, 172 Colo. 18, 469 P.2d 737 (Colo. 1970). As found, Respondents have proven their affirmative defense.

f. As found, the Claimant failed to prove any tolling provisions, which are provided in § 8-43-103 (20, C.R.S., or as considered in *Likens v. Dept. of Corrs*., W.C. No. 4-560-107 [Indus. Claim Appeals Office (ICAO), Feb. 10, 2004]; or, in *Bonazzo v. J.A. Jones Const.,* W.C. No. 4-241-121 (ICAO, Sept. 24, 1998).

Compensability of Occupational Disease

g. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). As found, the Claimant failed to prove that he sustained a compensable hearing loss which resulted directly from his employment with the Employer herein or the conditions under which his work was performed, which could be seen to have followed as a natural incident of his work and as a result of the exposure occasioned by the nature of his employment, and which could be fairly traced to his employment as a proximate cause and which did not come from a hazard to which he would have been **equally** exposed outside of his employment.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury or occupational disease and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A

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

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this_____day of November 2017.

ISSUES

The issues to be determined by this decision concern compensability of an alleged occupational disease, a hearing loss; medical benefits, and a statute of limitations defense by Respondents.

The Claimant bears the burden of proof, by a preponderance of the evidence regarding compensability.

Respondents bear the burden of proof, by a preponderance of the evidence, on the issue of statute of limitations.

Because the ALJ hereby determines in this decision that the Claimant did not sustain a compensable hearing loss with a date of alleged last injurious exposure of March 15, 2016, resolution of all other designated issues is moot.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant has been employed by the Employer for approximately 36 1/2 years. He began employment as an operator. Thereafter, he became a network technician, approximately 15 years ago, or in 2002.

2. As part of his position as a network technician, the Claimant would use an air tool to remove bolts on telecommunication cases in manholes. He estimated that it would take 2-3 minutes to remove the bolts on the cases, and the same amount of time to replace the bolts, thereby making his average time in the manhole about 4-6 minutes.

3. The Claimant has not worked as a network technician, in manholes with the air tool for approximately 5 years, making his last exposure to the source of his alleged claim sometime in 2012.

Exposures

4. During the 10 year-period that the Claimant was working as a network technician, he removed and replaced the bolts on cases approximately 1,000 times, or 100 times per year. The ALJ calculates that there are approximately 300 work days during a year, discounting weekends, holidays and vacations. This means that the Claimant was performing the task approximately once every 3 working days for about 6

minutes per day. This equates to about 30-40 uses of the air wrench per average work day.

5. The Claimant has participated in indoor-range firearms shooting prior to the date of his alleged occupational disease in this matter. He shot 9mm pistols in indoor, not outdoor, ranges, prior to his employment with Cabela's, which began in 2013. From June 2013 to June 2015, the Claimant shot pistols, and sometimes rifles, in an indoor range on a quarterly basis with his Cabela's co-workers. He described shooting 9mm, .40 caliber, and .45 caliber handguns, and a .308 rifle.

6. The Claimant continued to shoot firearms subsequent to the end of his employment at Cabela's, the last time being in June 2017.

7. The records contained in the official hearing file indicate that the Claimant sought treatment and a hearing test in 2015, during the two-year period when he was engaged in shooting firearms (Respondents' Exhibit D, bates stamp 0020) ("Have you ever had a hearing test? Yes, 2012 & 2015").

8. The Claimant denied ever reporting to any medical provider that he had damaged his hearing due to firearm shooting. The ALJ, however, finds that when the Claimant specifically sought treatment in 2012 for hearing issues, he reported that he had undergone "noise" exposure in the form of an accident relating to "firearms." He also reported notice exposure from "concerts during the 1970's". (Respondents' Exhibit D, bates stamp 24).

9. The Claimant denied that he had *ever* had a referral for an ENT (Ear, Nose, Throat Specialist) prior to his appointment with Urgent Care on March 16, 2016.

10. The records document, however, that the Claimant was referred to and saw an ENT sometime in 2008, and that the Claimant was disappointed with the treatment received from the ENT (Respondents' Exhibit B, bates stamp 15, Exhibit D, bates stamp 26-27).

11. According to the Claimant, his current symptoms are that he hears "white noise" at a level 2-3 and cannot hear people talk. He relies on this to support his contention that these symptoms worsened in 2016, thereby causing him to make the connection between his employment and the condition.

12. The ALJ finds that the Claimant has not actually been in a manhole for over 5 years, and he has not been exposed to the source of noise (use of air tool) which he alleges is the cause of his condition.

13. Further, the evidence does not support the Claimant's contention that his symptoms worsened in 2016 as a result of his employment with the Employer herein. In 2012, the Claimant was reporting a "constant hissing" in his ears, and he was frequently asking people to repeat, he had difficulty following conversations involving

more than 2 people, people sounded as if they mumbled or muffled, and he had difficulty hearing in restaurants. Again, the Claimant also characterized his "noise exposure" as stemming from concerts in the 70's and firearms (Respondents' Exhibit D, bates stamp 24).

14. The Claimant confirmed that he has taken for years, and is currently still taking, aspirin.

Medical Evidence--Seth Reiner, M.D. (ENT)

15. The Claimant was seen for an Independent Medical Examination (IME) by Dr. Reiner on September 18, 2017. Dr. Reiner is an ENT (Ear, Nose and throat specialist), board certified by the American Academy of Otolaryngology and in Head and Neck Surgery. He was qualified to testify as an expert witness (October 30, 2017 Depo. of Dr. Reiner, p. 5 lines 9-12).

16. Dr. Reiner reviewed the medical records, including audiograms from 2012 through 2016, as well as the audiogram he performed in his office, and took a history from the Claimant.

17. Dr. Reiner stated that when determining the cause of hearing loss, several factors must be evaluated, including noise exposure, congenital reasons, family history, medication use, trauma, age and sex. Medication usage included taking aspirin (Depo. of Dr. Reiner, p. 14, lines 9 through page 15; and, line 3). Dr. Reiner noted that taking even low-dose aspirin can cause non-occupational tinnitus (Respondents' Exhibit A, p. 4).

18. Dr. Reiner concluded that the Claimant had high frequency, non-occupational hearing loss, known as presbycusis (hearing loss due to aging) and that the audiograms supported this pattern. He noted that presbycusis is more common in males, and that the Claimant's age and onset fit with the diagnosis. He concluded that this was the most likely cause of the Claimant's hearing loss (Depo. of Dr. Reiner, p. 15, line 10 through p. 16, line 20.); Respondents Exhibit A, p. 4).

19. Dr. Reiner also identified through his review of the records and interview with the Claimant other non-occupational exposures such as concert attendance and firearm shooting. He noted the effect of firearm shooting on the inner ear with skull vibration which can lead to hearing loss (Depo. of Dr. Reiner, p. 17, line 22 through p. 18, lines 1-14).

20. Dr. Reiner also did independent research as part of his expert opinion regarding air wrenches. He noted the range to be from 90 up to 100 decibels, the latter being for removing bolts from tires or wheels in a tire business (Depo. of Dr. Reiner, p. 19, line 20 through p. 20, lines 1-9).

21. Dr. Reiner also evaluated the Claimant's alleged noise exposure with the Employer herein as part of his opinion, and his ultimate conclusion was that the Claimant's hearing loss is due to non-occupational presbycusis. He explained from his research that it is not only the decibel level but the duration of the exposure which must be considered. He was of the opinion that based on the Claimant's report to him, the exposure was limited to short bursts of sound, lasting a few seconds, which would not be sufficient to cause hearing loss (Depo. of Reiner, p. 20, line 10 through p. 21, lines 1 through 21; and, p. 22 lines 1 through 5.).

The Claimant

22. The Claimant argues that Dr. Reiner's opinions should not be credited because he equated the air wrench to a dental drill. This is not an accurate reflection of Dr. Reiner's opinions. In fact, Dr. Reiner specifically noted that the highest decibel level for an industrial air wrench that he found during his research, was 110. Even at this level, however, he noted that only long-term chronic, consistent exposure would be dangerous in terms of hearing loss, and not the short-burst exposure related by Claimant. *Id.*

23. Further, the Claimant testified at hearing that he disagreed with Dr. Reiner because he felt the noise from using his air wrench to remove bolts from telecommunication boxes (5 years ago) was closer to the sound made by a mechanic changing a tire. Dr. Reiner actually addressed this scenario in his testimony. He noted that in his practice he had evaluated car mechanics who used much more powerful air wrenches than what was described to him by the Claimant, to remove tires. He testified that even these individuals, removing lug nuts from cars all day long, did not develop occupationally related hearing loss (Depo. of Dr. Reiner)

24. The Claimant argues that Dr. Reiner's opinion should be discredited based on his assertions about the Claimant's firearm shooting and concert attendance having an effect on his hearing loss. At hearing, the Claimant also denied that he had ever reported damaging his hearing from firearm use, and he attempted to characterize his concert going as inconsequential. Despite the Claimant's denials, the medical records in 2012 confirm that he reported to his own physician that he damage his hearing in a firearm episode, and that concerts during the 70's were "noise exposures". Therefore, the Claimant's attempt to discredit Dr. Reiner for emphasizing non-occupational factors which are documented in the medical records "falls on deaf ALJ ears" because it is misplaced and is not persuasive.

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26. Claimant asserts that the opinion of "Dr. Michelle Baker" should be credited in this matter. There is no "Dr. Michelle Baker." The M164 cited by the Claimant is signed by Michelle Baker, PA-C. Baker is a physician's assistant, not a medical doctor. Further, the Claimant has not submitted any records indicating that Baker's opinion was countersigned or approved by any physician. There is no evidence in the record to support that Baker has any expertise regarding hearing loss, ENT issues, or is qualified to render an opinion helpful to the ALJ.

27. Moreover, Baker appears to have had at her disposal only the subjective report of the Claimant. She does not reference any review of prior medical records, nor does her report provide a meaningful analysis of causation. She did not examine or interpret the numerous audiology tests done over a period of years, or examine the Claimant's medical records for contributing non-occupational factors.

28. The ALJ finds that the opinions of Dr. Reiner are more credible and persuasive than those of PA-C Baker. Dr. Reiner is a medical doctor, and a board certified ENT. He was qualified as an expert in occupational hearing loss. He reviewed and interpreted multiple audiograms pertaining to the Claimant, over a span of many years, in addition researching the literature and reviewing the Claimant's complete medical records. The ALJ finds that his opinions are well founded and credits those opinions over the opinions of PA-C Baker.

29. The ALJ has considered Dr. Reiner's special knowledge, training, experience and the research that he complied as part of his opinion and finds Dr. Reiner to be credible and persuasive. Dr. Reiner considered the Claimant's available medical history, including review of audiograms spanning several years, and did research into the literature regarding causation of the injury related to the Claimant's allegation of using an air wrench. Dr. Reiner's conclusions that the Claimant's hearing condition is due to non-occupational factors is persuasive and supports the ultimate fact that the Claimant's claim is not compensable.

30. The Claimant is not alleging a distinct event occurring on his date of alleged injury, March 15, 2016. Rather, he is alleging an occupational disease stemming from a work condition to which he was not exposed since *2012*, or over 4 years prior to the alleged date of onset.

31. The ALJ finds that although the Claimant was removed from his alleged occupational exposure almost 4 years before the date of alleged onset, he continued to shoot large caliber firearms and he has done so as late as June 2017. Dr. Reiner persuasively explained firearms shooting's (even with ear protection) effect on hearing, and this constitutes a non-occupational risk. The ALJ finds that the Claimant continued to be exposed to a non-occupational risk factors prior to the alleged alleged onset of his alleged work-related exposure in manholes while working for the Employer herein,

Statute of Limitations

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33. When his ringing in the ears would not go away, the Claimant sought treatment with Dr. Mancuso in 2008. Claimant testified that he was told in 2008 by Dr. Mancuso that he had high-frequency hearing loss from exposure to loud noises.

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35. The Claimant reported Tinnitus, noise exposure, hearing loss and he was recommended the curative modality of "hearing aids" in 2012. *Id.* at p. 27.

36. According to the Claimant, he knew his condition was "serious" because after he reported the condition as work related, he was sent to the authorized provider (Urgent Care) on March 16, 2016, who recommended that he see an Ear, Nose and Throat (ENT) specialist. The records confirm the referral (Respondents' Exhibit C, bates stamp 17).

37. The Claimant denied at hearing that he had *ever* had a referral for an ENT appointment, much less treatment, before his appointment with Urgent Care on March 16, 2016. His denial is contradicted by the weight of medical evidence in the record.

38. The records document that the Claimant was referred to and saw an ENT sometime in 2008, and that he was frustrated with the level of care he received. (Respondents' Exhibit B, bates stamp 15; Exhibit D, bates stamp. 26-27). In addition to showing that the Claimant's testimony is not credible, it also reinforces the proposition that he knew his condition was "serious" by his own definition as early as 2008. Moreover, according to the Claimant's testimony, Dr. Mancuso told him in 2008 and again in 2012 that he had high frequency hearing loss due to loud noises.

39. The ALJ finds that the Claimant's own terminology is revealing. He seeks medical benefits under the workers' compensation system, based on his belief that a referral to an ENT is "serious". By this logic, he should have understood that his referral in 2008 to an ENT was equally "serious" particularly in light of his testimony that he had ringing in his ears at the end of his shifts after 2002. This is underscored by the fact

that the Claimant also testified that Dr. Mancuso told him that he had “high frequency hearing loss due to loud noises” which the totality of the evidence demonstrates was based on the Claimant’s report of his position with the Employer herein.

40. As a reasonable person, the Claimant knew or reasonably should have known of the serious and probable compensable nature of his hearing loss as of five years ago, when he last worked in the manholes for the Employer herein, yet he did not report a work-related hearing loss until March 16, 2016, more than three years after the statute of limitations had run.

Ultimate Findings

41. The ALJ finds the opinions of Dr. Reiner, a board certified otolaryngologist and ENT specialist, more credible and persuasive than any and all evidence to the contrary.

42. Between conflicting opinions and evidence, the ALJ makes a rational choice, based on substantial evidence, to accept the ultimate causality opinion (lack thereof) of Dr. Reiner and to reject any and all evidence to the contrary.

43. As a reasonable person, the Claimant knew or reasonably should have known of the serious and probable compensable nature of his hearing loss as of five years ago, when he last worked in the manholes for the Employer herein, yet he did not report a work-related hearing loss until March 16, 2016, more than three years after the statute of limitations had run.

44. The Claimant has failed to prove, by a preponderance of the evidence that he sustained a compensable hearing loss which resulted directly from his employment with the Employer herein or the conditions under which his work was performed, which could be seen to have followed as a natural incident of his work and as a result of the exposure occasioned by the nature of his employment, and which could be fairly traced to his employment as a proximate cause and which did not come from a hazard to which he would have been **equally** exposed outside of his employment.

45. The Respondents have proven, by a preponderance of the evidence that the Claimant reasonably should have known that his hearing loss could be work-related five years before he filed his claim, more than the period encompassed by the statute of limitations.

46. The Claimant failed to prove any circumstances that would toll the statute of limitations.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found herein above, the credibility factors weighed against the Claimant's credibility and against the credibility of PA-C Baker. The ALJ weighed the opinions of Dr. Reiner against the opinions of PA-C Baker, or any other opinion to the contrary, and found the opinions of Dr. Reiner to be determinative of the compensability issue. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 165 Colo. 504, 441 P.2d 21 (1968); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

b. As further found, the ALJ considered Dr. Reiner's special knowledge, training, experience and the research he complied as part of his opinion and finds Dr. Reiner to be credible and persuasive. *See Young v. Burke*, *supra*. Dr. Reiner considered the Claimant's available medical history, including review of audiograms spanning several years, and did research into the literature regarding causation of the injury related to the Claimant's allegation of using an air wrench. Dr. Reiner's

conclusions that the Claimant's hearing condition is due to non-occupational factors is persuasive and supports the proposition that the Claimant's claim is not compensable.

Substantial Evidence

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

Statute of Limitations

d. Pursuant to § 8-43-103(2), C.R.S., a claim for benefits is barred unless a formal claim is filed with the Division of Workers' Compensation within two years after an injury. The statute of limitations does not begin to run until a claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (Colo. 1967). *See, e.g., City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Intermountain Rubber Industries v. Valdez,* 688 P.2d 1133 (Colo. App. 1984). As found, Respondents have proven their affirmative defense that the Claimant reasonably should have known that his hearing loss could be work-related five years before he filed his claim, more than the period encompassed by the statute of limitations.

e. The statute of limitations is an affirmative defense, which means that the burden to prove that the claimant was aware of the seriousness and probable compensable nature of the injury or occupational disease more than two years prior to filing the claim falls on Respondents. *Atlantic & Pacific Ins. Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983); *Kersting v. Indus. Comm'n*, 567 P.2d 394 (Colo. App. 1977). This is a question of fact for resolution by

an ALJ. *Indus. Comm'n v. Canfield*, 172 Colo. 18, 469 P.2d 737 (Colo. 1970). As found, Respondents have proven their affirmative defense.

f. As found, the Claimant failed to prove any tolling provisions, which are provided in § 8-43-103 (20, C.R.S., or as considered in *Likens v. Dept. of Corrs*., W.C. No. 4-560-107 [Indus. Claim Appeals Office (ICAO), Feb. 10, 2004]; or, in *Bonazzo v. J.A. Jones Const.,* W.C. No. 4-241-121 (ICAO, Sept. 24, 1998).

Compensability of Occupational Disease

g. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). As found, the Claimant failed to prove that he sustained a compensable hearing loss which resulted directly from his employment with the Employer herein or the conditions under which his work was performed, which could be seen to have followed as a natural incident of his work and as a result of the exposure occasioned by the nature of his employment, and which could be fairly traced to his employment as a proximate cause and which did not come from a hazard to which he would have been **equally** exposed outside of his employment.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury or occupational disease and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v.Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain his burden with respect to compensability. Also, as found the Respondents sustained their burden with respect to the affirmative defense of statute of limitations.

ORDER

IT IS, THEREFORE, ORDERED THAT:

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

DATED this_____day of November 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-041-084-01

ISSUES

- Whether Claimant sustained an injury to her back on December 4, 2016, arising out of and occurring within the course and scope of her employment?

- If Claimant sustained a compensable injury, whether the medical treatment she received is reasonably necessary and related to her compensable injury?

FINDINGS OF FACT

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

1. Claimant is a Comprehensive Health and Safety Supervisor ("CHSP") with Employer who alleges she suffered a low back injury on December 4, 2016. Claimant has been employed with Employer for over sixteen years. Claimant worked in Employer's Fresno, California facility before February of 2016, when she moved to Denver as a CHSP. Claimant has worked multiple jobs for Employer, including supervisor roles in the departments of safety, human resources, dispatch, and operations.

2. Claimant's CHSP duties included working with safety committees, coaching and mentoring employees on proper work methods, filing reports, and performing other training and compliance functions for safety. Lifting is an essential job functions of CHSP supervisors. CHSP training involves training on work-related injuries is more extensive than the training for hourly employees. As a CHSP, Claimant would have been trained in the proper procedures for reporting a work-related injury. Employer requires that work-related injuries be reported immediately to the management team or otherwise into the risk database, if management is unavailable. Employees are required to indicate how they injured themselves when reporting an injury. As a supervisor, Claimant would have undergone annual training every January.

3. In February of 2014, Claimant filed a claim against Employer with the EEOC over a promotional dispute. Claimant filed the complaint because "[Employer] had promoted four male supervisors in the span of three weeks, and admittedly did not consider a single female supervisor." Claimant was upset that she had not been interviewed.

4. On June 20, 2014, Claimant sought medical care at Kaiser. Claimant complained of work-related stress associated with being promoted to Dispatch Supervisor, a job she did not feel qualified to do. Claimant reported stress and anxiety at work and had requested time off work.

5. Also on June 20, 2014, Claimant saw a psychiatric social worker, Janet Ann Flanagan at Kaiser. Claimant reported that Employer discriminated against her by promoting three men when she was not even interviewed. Claimant reported working sixteen hours per day and not being able to take time off. After this visit, Claimant treated through Concentra, her occupational medicine service provider.

6. Claimant testified and told Respondents' IME physician, Dr. Kathleen D'Angelo, that she had injured her back at work on August 19, 2014. Claimant testified that she was putting a package on a shelf and felt pain in her back "like a twinge that went down both legs, and that the pain lasted for several days. Claimant testified that she felt a pop in her back with intense pressure.

7. On the afternoon of August 20, 2014, Claimant returned to Kaiser, complaining of severe pain in her bilateral lower legs "that made her suddenly woke [sic] up this morning." The record states that "Patient wants to know the reason, concerned for blood clot, taking Motrin and Tylenol – pain was better now, can walk well without limping." Claimant asked if the pain may be related to stress. The record does not mention a work-related injury or event precipitating pain or prompting the visit. The examining physician indicated the symptoms were possibly due to cramping.

8. An August 20, 2014 note from Kaiser ER states, "[Claimant] went to work as usual the day before last, slept at noon and awoke at 8:30 p.m. with extreme bilateral leg pain." Claimant indicated that she had been under stress at work during her night shift, and "denies any trauma." Claimant stated that she had pain that ascended into the posterior thighs bilaterally and up towards the back, and that this was different than the sciatica that she has had in the past. The provider noted that in 2005, Claimant had experienced total body pain similar to her then-current symptoms which had lasted a week and dissipated.

9. On October 23, 2014, Claimant returned to Kaiser reporting continuing stress at work over the EEOC complaint. Claimant stated she was "suddenly promoted to a job that she was not qualified for" and that she was working up to 70 hours per week. A note dated March 3, 2015 states that Claimant was reassigned and experienced stress relief. The records note that Claimant had a personal and family history of rheumatoid arthritis.

10. On September 8, 2015, Claimant e-mailed Kaiser reporting right leg pain for around three weeks at this time without a determined cause. Claimant suggested experiencing back symptoms that began before ocean diving. Claimant stated the pain varied extensively, as she was sometimes able to walk fine but other times could put no weight on her leg. Claimant underwent an MRI on September 10, 2015 for right hip pain (without trauma), and the MRI showed only degenerative changes.

11. On September 28, 2015, Claimant reported that she had worse back pain and was seeing a chiropractor. Claimant had pain with walking, standing and sitting and requested an MRI. Claimant stated "there has to be a reason for the pain . . . . how can the pain be diagnosed?"

12. Claimant returned to Kaiser on September 29, 2015, reporting six weeks of low back pain with right hip and leg pain radiating down the buttock. Claimant experienced only mild relief with chiropractor therapy and pain medication. The provider diagnosed chronic low back pain.

13. In December 2015, Claimant underwent physical therapy for her low back pain and right sciatica. On December 8, 2015, Claimant presented with low back complaints which were present "off and on for several years." The complaints involved the anterior right tibia, and hip and groin pain radiating into her lumbar spine. Claimant indicated daily pain in her right hip and shin with right leg pain upon movement, without left-sided complaints.

14. Claimant stated in a December 12, 2015 e-mail that she was worsening with therapy, and reported frequent back pain starting to affect her left leg. Dr. Karl Quinn at Kaiser noted that Claimant had back pain for four months with recent left leg pain that improved with therapy but recently returned. A lumbar x-ray on this date noted "pain without trauma" with mild degenerative spondylosis.

15. On December 13, 2015, Claimant reported to Dr. Quinn that her pain "just left" after four or five chiropractic visits but subsequently returned with symptoms into the right shin and left leg. Claimant indicated that she now had pain regardless of whether she was sitting, standing, or walking.

16. On December 24, 2015, Dr. Marsa White at Kaiser evaluated Claimant for back and right leg pain. Dr. White noted that Claimant had multiple areas of pain that could be attributed to different medical issues, including right hip osteoarthritis. Dr. White questioned radiculopathy versus tibial pathology, and ordered a right leg x-ray and lumbar MRI. On December 28, 2015, Clamant continued to indicate that she was looking for a cause for her symptoms and that she [could] "[could] not live like this for the next 20 years."

17. The December 28, 2015 lumbar MRI showed moderate canal stenosis at L3-4 and right-sided disc protrusion. The findings showed a cyst impressed on the right posterior aspect of the neural elements of the thecal sac. The estimated size of the cyst is not documented.

18. Dr. Quinn reviewed MRI findings and on January 2, 2016 told Claimant that there was a disc bulge at L3-4 that narrowed the central canal through which the nerves ran, which would match the symptoms. Dr. Quinn opined that the pain was not related to the central canal narrowing at L4-5.

19. Dr. Quinn referred the study to Dr. White but, as noted on January 6, 2016, Claimant refused to discuss the matter with Dr. White. "Patient does not allow me to speak once I announce myself. States she cannot talk and proceeds to hang up the phone." On January 11, 2016, Dr. White noted that Claimant's pain had resolved with a prednisone pack and recommended a lumbar ESI.

20. On January 19, 2016, Claimant saw Dr. Eugene Huang for a trial ESI. Dr. Huang opined that Claimant was a "not motivated" patient with radicular pain and low back pain. Dr. Huang reviewed the MRI results and listed his impression as "lumbar radiculopathy and discogenic low back pain."

21. In February 2016, Claimant transferred from Employer's Fresno facility to its Denver facility.

22. On June 21, 2016, Claimant saw Dr. Mark Mills (with Gene Cook, PA-C under supervision) at Panorama Orthopedics, complaining of back pain and bilateral radiculopathy with spondylolisthesis. Dr. Mills characterized the symptomology as "acute re-exacerbation of back and bilateral leg pain." Claimant's pain involved the base of her back with radiating pain down the back and sides of both of her legs with pain in the right greater than left front of shin. Dr. Mills noted that Claimant originally presented benignly in August 2015 with pain that started as back pain. Claimant's pain worsened after therapy and she developed a more radicular pattern, prompting an MRI. Claimant reported significant relief from the January ESI. Dr. Mills noted that Claimant's pain started to come back three weeks earlier and was steadily progressing. Claimant had good relief with prednisone from her primary care provider.

23. Dr. Mills ordered a new MRI "due to [Claimant's] inability to gain access to her [MRI] images and the fact that it has been [greater] than six months since the previous films were obtained and patient does have spondylolisthesis, I believe a new MRI is warranted to evaluate for compressive etiology for possible injection therapy and perhaps surgical planning." On July 1, 2016, Claimant began physical therapy.

24. On June 17, 2016, a repeat lumbar MRI was performed. The MRI showed multilevel degenerative changes with central canal and foraminal encroachment and degenerative anterolisthesis at L3-4. The findings showed a "small synovial cyst arising from the medial aspect of the right facet joint measuring roughly 3.4 x 2.4 mm" which minimally indents the right posterior lateral canal at L3-4. Radiographic findings showed slight, Grade 1 anterolisthesis at L3-4.

25. A July 13, 2016 note by Dr. Lonnie Loutzenhiser indicates a measurement of "5mm" for the synovial cyst at L3-4.

26. On September 14, 2016, Claimant's imaging was noted as significant for spondylolisthesis at L3-4. Claimant reported that she was doing well and felt "about 100%" with only an occasional twinge and that she was more worried about the future and preventative strategies.

27. On December 7, 2016, Employer's Health and Safety Manager, David Loya, authored an e-mail to the Area Human Resources Manager concerning the timeline of events surrounding Claimant's December 4, 2016 alleged injury. On Friday, December 2, 2016, Mr. Loya notified Claimant that she was required to work the hub on Sunday, December 4. Claimant stated that she had a school paper to finish but was

told that the shift was mandatory. Claimant also expressed concern about her ability to load and unload trailers without hurrying her back.

28. On December 4, 2016, Claimant reported to the conference room and was assigned to the small sort shift. While this position required Claimant to perform lifting, the amount of lifting and the weight of pieces lifted was significantly less than what was required in loading and unloading trailers. Claimant expressed concern for her back and again brought up her school work, but accepted the assignment. The shift began at 3:00 p.m. At 9:28 p.m., Mr. Loya received a text message from Claimant stating: "FYI. Sometimes we need to make exceptions. Right now I am in so much pain. It hurts to even walk." Mr. Loya consulted with two other management personnel and agreed that the situation would need to be addressed with Claimant, as she appeared to be either reporting a work injury or asking for an accommodation for a preexisting condition.

29. On Tuesday, December 6, 2016, Mr. Loya contacted Claimant and asked her to meet the following day. Claimant indicated she did not want to meet and attempted to minimize her prior statements. Claimant sent Mr. Loya an e-mail, in which she described the history of her back pain. Claimant noted that in May or June 2016, she had discussed with Mr. Loya needing to take time off for back surgery. Claimant indicated that in 2015 in Fresno, she had filed a claim for a back injury to the base of her spine. Claimant repeatedly stated that she was not injured on Sunday December 4, 2016, and was not going to file a claim. Claimant stated that she was in pain, but reiterated that she was not injured on Sunday December 4, 2016. Claimant stated that she had taken the next day, Monday, off, with Gary's permission, and had been up until 1:30 a.m. to finish her school paper. This was inconsistent with Claimant's hearing testimony. Claimant had worked on the paper all day Saturday, on Sunday until she had to work, and then all day on Monday.

30. At the meeting on Wednesday, December 7, 2016, Claimant was informed that the meeting was necessary because she represented that she did not meet the Essential Job Functions which included lifting. Claimant reiterated at least three times that she had not injured herself on Sunday. Mr. Loya referred Claimant to the ADA process, which Claimant refused, and a verbal altercation ensued. Mr. Loya noted that "At one point, [Claimant] stated out loud that perhaps she should claim the pain as an injury so that she could continue to work."

31. After initial evaluation, Employer's occupational health nurse, Gayle Brown, referred Claimant to Dr. John Ogrodnick at SCL for evaluation for her alleged August 19, 2014 back injury. Dr. Ogrodnick saw Claimant on December 9, 2016. Claimant stated that she did not seek medical attention for the alleged 2014 work injury. Claimant alleged that Employer told her she was not allowed to file a claim, and that her soreness "just kind of went away." The pain returned in 2015 to involve her right and left legs, to the point where it hurt to walk. Claimant reported full relief after her January 2016 ESI but the effects waned and she could barely walk again. After participating in therapy and purchasing new shoes, Claimant's pain again disappeared. Claimant stated that, on December 3, 2016, she was assigned to small sort and could barely walk out of the building after six hours. Claimant stated that she was sent by Employer's

nurse for evaluation to re-open the alleged 2014 claim. Claimant described her low back pain at 2/10 while at rest, however the pain diagram she completed at the visit showed 8/10 pain. Claimant had right shin pain. Claimant stated that her back pain on December 4, 2016 was 20/10. Dr. Ogrondick reviewed the June 2016 MRI and restricted Claimant's lifting to 30-pounds. Dr. Ogrodnick indicated that "it is not at all clear that 2014 events are responsible for current symptoms," and advised Claimant that the work-relatedness was undetermined at that time.

32. Claimant continued working under restrictions. On the morning of December 16, Claimant returned to Dr. Ogrodnick to review the 2014 events. Claimant clarified that the claim filed in December 2014 was for mental stress due to a conflict with management unrelated to the alleged 2014 lifting. Claimant also clarified that the alleged 2016 "small sort incident" occurred on December 4, not December 3. Claimant presented as pain free during the visit but had 4/10 pain in the "very, very base of [her] tailbone" while driving. Claimant stated that it had been two days since she had pain in her legs and that she did not understand her pain as it could be inconsistent. Claimant stated that sometimes it hurt when she rose from sitting and sometimes it did not. Claimant mentioned the possibility of filing another claim for compensation for the alleged 2016 injury. Dr. Ogrodnick released Claimant to full duty and indicated that he did not have sufficient evidence to make a causal connection between her then-present complaints and the alleged August 2014 incident. Dr. Ogrodnick indicated the subjective leg pain was not substantiated with objective findings on the MRI leading to questions of etiology.

33. Later on December 16, 2016, Claimant was sitting in her vehicle thinking that she could lose her job when she decided to report a work-related injury for December 4, 2016. Mr. Loya filed a First Report of Injury on December 16, 2016.

34. On December 17, 2016, Claimant presented to Dr. Natascha Deonarain at Concentra. Claimant stated that she had pain in her lower back and bilateral legs since December 4, 2016, which she believed was due to "repetitive bending of the knees." Claimant stated that she was told to work on small sort after informing her supervisor on December 2 that she was not able to perform that job. Claimant stated that she was "lifting up to 100 pounds repetitively over the course of a 5 ½ hour duration." Claimant stated that there was no specific trauma but at the end of the day she could not walk. Claimant repeated her version of events surrounding the alleged August 2014 injury, again stating that she had not sought medical treatment. Claimant was told during her previous surgical evaluation that she may need to have "special surgery" to prevent long term complications of her condition, but she did not pursue this at the time "presumably because of insurance reasons." Dr. Deonarain diagnosed sacral pain; neck pain (acute); and diffuse left and right leg pain. Dr. Deonarain imposed 30-pound lifting restrictions.

35. On December 19, 2016, Mr. Loya drafted another e-mail concerning Claimant's recent report of a work-related injury. On December 16, Claimant notified Mr. Loya by text message that she had an injury on December 3 as an "exasperation of existing injury." Claimant sent the text shortly after she was notified that she was

required to work the day sort on the following Sunday, December 18. Claimant stated that she had not been released to regular duty, which was contrary to the documentation available to Mr. Loya by Dr. Ogrodnick. Claimant demanded to see another provider, and repeatedly stated that she bent at the knees and this was how she injured her back. Claimant recanted her initial claim that she had to lift 120 pound bags. Claimant previously expressed concern about her ability to load and unload trailers. Claimant was not loading/unloading trailers on December 4 and expressed no concern for the small sort assignment that day.

36. On December 22, 2016, Claimant saw Dr. Bryan Counts. Claimant reported having had received chiropractic care for her back. Dr. Counts diagnoses explicitly included neck complaints, as Claimant reported to him that she hurt herself from "frequent head turning working in the small sort area on December 4th." Dr. Counts prescribed physical therapy for Claimant's neck.

37. Claimant subsequently reported moderate improvement and was working her regular job. On January 23, 2017, Claimant requested another ESI. Dr. Counts requested a lumbar MRI and referred Claimant to Dr. Robert Kawasaki. On February 20, 2017, Claimant told Dr. Counts she felt her back had improved and that she no longer wanted an ESI. However, Claimant did want an MRI to see if the anterolisthesis at L3-4 had worsened. Dr. Counts noted that Dr. Kawasaki had a visit that day and considered MMI.

38. On February 23, 2017, Claimant saw Dr. Kawasaki. Claimant reported that her pain had improved and was 1-2/10 to the low back and legs. Dr. Kawasaki noted "aggravation of underlying condition" with chronic low back pain but that "it is not clear if she has a new injury." Dr. Kawasaki noted that Claimant felt discriminated against at UPS, which may be impacting her recovery. Dr. Kawasaki ordered a lumbar MRI.

39. Claimant underwent a lumbar MRI on March 11, 2017. The reading radiologist read the MRI as showing: multilevel degenerative disc disease; disc bulging; moderate-severe L3-4 central canal stenosis with right L3-4 synovial cyst; and multilevel central canal narrowing and bilateral existing nerve root compression/abutment.

40. On March 20, 2017, Dr. Kawasaki reviewed the MRI and noted degenerative changes. At L3-4, there was moderate-to-severe facet arthropathy and a "4mm synovial cyst" causing some compression of the L3 nerve roots, which appeared to displace the existing L4 nerve root. The impression was "chronic low back pain from the initial workers' compensation claim in February of 2014; right L4 radiculopathy; synovial cyst at L3-4; radicular symptoms at L4; and spondylolisthesis at L3-4, grade 1." Dr. Kawasaki noted that he did not compare the 2017 MRI with the 2016 lumbar MRI. Dr. Kawasaki noted that Claimant had minimal response from the prior ESI and "quite a bit of conservative care." Dr. Kawasaki suggested a facet cyst lysis procedure or ESI and referred Claimant to Dr. Michael Rauzzino.

41. On April 1, 2017, Claimant saw Dr. Rauzzino. Claimant reported no neck complaints. Dr. Rauzzino reviewed the 2017 MRI and noted the synovial cyst at L3-4 with grade 1 spondylolisthesis. Dr. Rauzzino noted that the 2016 MRI was not available for comparison. Dr. Rauzzino recommended a fusion surgery over decompression of the cyst.

42. On April 6, 2017, Claimant saw Dr. Kawasaki and described pain, numbness, tingling, and stabbing into her posterior thigh and calf regions. Dr. Kawasaki noted that it was not clear what Dr. Rauzzino had recommended and indicated a cyst lysis procedure with an ESI at L3-4 may be appropriate.

43. On July 2, 2017, Dr. D'Angelo performed a Respondents' sponsored IME. Claimant complained of "pin-point" tenderness localized to the midline region at the upper sacral area, where Claimant had been told was the location of the cyst. Claimant claimed that she had made a conscious decision to file a work claim while sitting in the parking lot, after a week-and-a-half while thinking about the implications for her career. Claimant's decision to report the injury as work-related was preceded by denials of her previous alleged injury. Dr. D'Angelo noted that Claimant's anticipated prognosis was recurrent, intermittent episodes of pain without any traumatic provocation. Claimant had noted that the cyst was larger on repeat MRIs, however, Dr. D'Angelo compared the records and did not find that the cyst had grown. Dr. D'Angelo noted that the radiologist for the 2017 MRI noted no significant interval change since the prior examination. Dr. D'Angelo noted that there was no evidence on the MRI evaluation or physical examination of any acute trauma, though there was evidence of a genetic condition. Dr. D'Angelo did not causally relate the alleged injury to an aggravation of her underlying degenerative spine disorder. Dr. D'Angelo opined that Claimant's present symptoms were due to an absence of treatment for a chronic degenerative disease. Dr. D'Angelo opined that any aggravation would have been a brief flare with return to baseline shortly thereafter.

44. Claimant testified that she had a back injury in 2014 after putting a package weighing approximately 25 to 26 pounds on the top shelf of a package car. Claimant testified that she felt a pop and intense pressure in her lower back with pain going down into her legs. Claimant testified that she did not see a doctor because she feared retaliation. Claimant nevertheless filed an EEOC claim against Employer in February 2014 after she was not interviewed for promotion.

45. Claimant testified that she worked full duty while receiving treatment for her back in 2015 and 2016. The effects of the 2016 ESI began to wear off around May 2016, after which she sought additional treatment and was evaluated for surgery. Claimant testified that she was hesitant about undergoing surgery, so she continued with physical therapy and became pain free between September 2016 and December 4, 2016.

46. Claimant testified that she told Mr. Loya "three times" during their December 2 discussion that she was worried about her back, contrary to the record and Mr. Loya's testimony. Claimant testified that she did not speak to Mr. Loya on

December 4, except to say hello. Claimant testified that she did not express concern about her back on December 4 and did not express discontent about having to work that day due to her school work, contrary to the record. Claimant testified that she worked the next day, on December 5 (Monday), and was still able to complete her school paper and go to work the full day."

47. Claimant testified that she was reluctant to meet Mr. Loya because she was fearful of being terminated. Claimant testified that, because she is not a doctor, she did not know whether she had a new injury or not. Claimant represents that her symptoms after December 4 were "100 percent different" from her symptoms "in the weeks and months leading up to December 4." Claimant testified that Mr. Loya prevented her from seeking treatment.

48. On cross-examination Claimant testified that she "might tell my doctor that I didn't get hurt at work, not to have to deal with [Employer]." Claimant testified, contrary to her medical records, that she had neither sought nor received treatment for work-related stress due to her dispute with her supervisors. Claimant testified that she did not seek medical treatment for her alleged August 19, 2014 injury to her back. Claimant testified that the pain for which she sought treatment in the emergency department on August 20, 2014 was not the same pain that she had in 2015 or presently. Claimant testified that she was presently seeking treatment for bilateral leg pain. Claimant acknowledged that the August 20, 2014 record reflects that she denied trauma, and that if she did have trauma, she would have reported this to her doctors. Claimant testified that she had pain in the exact same locations in 2015 as she does now. Claimant testified that she was evaluated in 2016 to ascertain the etiology of her pain and that her doctors had recommended surgery as an option, which she would have had to have pursued under private health insurance. Claimant testified that she made the decision to report a work-related injury for December 4 after Dr. Ogrodnick was unable to find any causal relationship to her alleged 2014 incident.

49. The ALJ finds Claimant's credibility to be compromised by both a lack of self control, and a proclivity to exaggerate. For example:

- When asked what she meant by telling Mr. Loya that "perhaps I should claim this pain as an injury;" Claimant responded, "I was just completely beside myself . . . and I could have just blurted out something just because I blurted it out."

- When given a copy of her job description, Claimant admittedly "got belligerent" and argued with Employer's HR personnel in such a manner that she was taken out of a public area and brought into a private office.

- When filling out the injury prevention report with Mr. Loya, Claimant interpreted Mr. Loya as questioning "her integrity," and she "got frustrated." When Mr. Loya asked Claimant how much the bags weighed, she responded, "I don't know, 129 – 120 pounds." Claimant recanted that

statement, saying she had exaggerated. The bags actually weighed between thirty and seventy pounds.

- Claimant later testified that her exaggerated report of how much the bags weighed "was one of those flippant statements that I said while in the heat of disbelief that [Mr. Loya] was questioning my integrity."

- Claimant admitted that she might provide her medical providers with inaccurate information "not to have to deal with [Employer].

- Claimant reported back pain on December 4, 2016 at the level of 20/10. Pain at a level of 10/10 is commonly understood to be the worst possible pain.

50. Mr. Loya testified that he was a health and safety manager at the Denver facility on December 4, 2016. Mr. Loya's duties included designing injury prevention strategies for the district, implementing training programs, ensuring the accurate reporting of injuries, and investigating injuries. Mr. Loya testified that Claimant would have undergone more extensive training than a typical employee, including yearly training in injury reporting. He testified that work-related injuries should be reported immediately to the management team. Mr. Loya testified that lifting is part of the essential job functions of CHSP supervisors. He testified that all of Employer's employees are expected to work during peak season, from Thanksgiving through Christmas, with few exceptions.

51. Mr. Loya testified that he contacted Claimant on December 2, notifying her that she needed to report to work on December 4. Mr. Loya testified that Claimant's objection on that date was specific to her school paper, and did not recall any mention of her back. Mr. Loya testified that he also had a conversation with Claimant on December 4 and that she expressed discontent about having to work on that day. Mr. Loya testified that Claimant had concerns about loading and unloading trailers, but not small sort, which he indicated were very different jobs.

52. Mr. Loya testified that Claimant explicitly denied having a work injury, at least three times, when asked on December 6. Mr. Loya testified that Claimant gave no indication that she had any sort of bending or lifting injury on this date. Mr. Loya testified that the first time he became aware that Claimant was reporting that she had injured herself at work was on December 16, and that she did not give any specific time or specific mechanism by which she injured herself. Mr. Loya testified that he was not aware of any time that UPS ever considered terminating Claimant after December 4. Mr. Loya testified that Claimant's assertion that he prevented her from seeing a doctor on December 16 was not accurate, as he said he could not make accommodations for her restrictions without medical documentation.

53. Dr. Kathleen D'Angelo testified that, to a reasonable degree of medical probability, there was no aggravation of a preexisting condition. Dr. D'Angelo testified that there were minimal, if any, objective findings during her examination. Dr. D'Angelo

testified that, medically, an exacerbation of an underlying condition involved a flare of the underlying condition and returned to normal once prostaglandin and cytokine levels return to normal. Dr. D'Angelo testified that Claimant's intermittent pain, with no pain pattern, was not consistent with an acute exacerbation of a medical condition. Dr. D'Angelo testified that Claimant had a normal progression of her underlying condition. Dr. D'Angelo testified that Claimant's synovial cysts were directly proportional to the degree of degeneration and that the growth of cysts occurred as degenerative conditions worsened. Dr. D'Angelo opined that all of Claimant's symptoms were progressive, including spondylolisthesis and arthropathy. Dr. D'Angelo noted that the examining radiologist comparing both the June 2016 and March 2017 MRIs indicated no clinical changes. Dr. D'Angelo testified that increased pain does not suggest an injury and that, by her own admission, Claimant did not have consistent pain since December 4, 2016.

CONCLUSIONS OF LAW

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

A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). There must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*.

Simply because a claimant experiences symptoms while in the course and scope of their employment does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (April 10, 2008). Claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which

benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009).

In determining whether a claimant has met her burden of proof, the ALJ may resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010).

Claimant's assertion that she suffered an aggravation of her documented and extensive preexisting lumbar condition is not supported by a preponderance of the evidence. Claimant expressly denied to Mr. Loya that she injured herself at work on December 4, 2016. Claimant originally identified her symptoms as having been related to a previous alleged work injury, which was not accepted and for which no evidence was presented. Contrary to Claimant's testimony, she did seek treatment for the same symptoms in 2014 under personal insurance, did not report a work-related injury to her doctors, and denied having trauma. Rather, Claimant's treatment history reflects a pattern of intermittent, chronic pain in her low back and bilateral legs, for which she sought an explanation. When the cause of Claimant's symptoms was identified after a 2016 MRI, she declined surgery under personal insurance and claimed her symptoms resolved.

Claimant's symptoms after December 4, 2016 were identical to those for which she sought treatment in 2014, 2015, and 2016. Claimant only reported having had a work-related injury after being told twice by Dr. Ogrodnick that there was no causal relationship to her alleged 2014 work injury. The MRI studies between 2016 and 2017 showed no clinically relevant changes. The cyst at L3-4 showed no relevant changes (the original estimate on the 2016 MRI was of 3.4 x 2.4 mm, with another note suggesting 5 mm, versus 4 mm on the 2017 MRI). Regardless, Dr. D'Angelo indicated that size of cysts naturally increases with the degenerative changes to the spine, absent acute trauma. Neither Dr. Kawasaki nor Dr. Rauzzino compared the 2016 and 2017 MRIs. Dr. D'Angelo credibly testified that the present symptoms were consistent with the history of chronic, intermittent, and degenerative back pain (with a suggested genetic factor), and not consistent with an aggravation.

Claimant's history suggests a retaliatory motive in filing this claim. In February of 2014, Claimant had a dispute at UPS for which she filed an EEOC claim. Claimant had an ongoing allegation of work-related stress at the time she claims her August 19, 2014 lifting injury occurred. Claimant claims she did not file a claim or seek treatment due to fear of retaliation, despite having filed an EEOC claim and a claim for work-related stress. The contemporaneous medical records from 2014 refute Claimant's assertion that she had a work injury but support that she had a non-related back condition with exacerbations of non acute origin.

Likewise, Claimant's reporting of the December 4, 2016 work injury arose after she was denied time off to finish a school paper, due the following day. Claimant indicated that she had worked on the paper December 2, December 3, December 4 prior to work, and then left work early, finishing her paper after receiving December 5 off (contrary to her testimony). Claimant thereafter related her pain to a previous injury, and did not suggest a work-related mechanism of lifting/bending until her report to David Loya on December 16, 2016. Claimant's testimony is inconsistent with the documented history of the claim in evidence and, regardless, the documented history is not suggestive by a preponderance of the evidence that a work-related injury occurred on December 4, 2016 in the manner described.

Respondents are liable only for those medical benefits which are reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The record must distinctly reflect the medical necessity of any medical treatment needed to cure and relieve an injured employee from the effects of the industrial injury and any ancillary service, care, or treatment as designed to cure and relieve the effects of such industrial injury. *Public Service Co. of Colorado v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 584 (Colo. App. 1999). The question of whether medical treatment is reasonable and necessary is one of fact for determination by an ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Treatment for a work injury must not only be reasonable and necessary but must also be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Id*.; *see also Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). Causation is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint, supra*.

In the event of a compensable claim, Claimant's work-related condition returned to baseline and her ongoing symptoms are the result of a chronic, non-related condition. No further treatment is reasonable, necessary, or related.

ORDER

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

1. Claimant has failed to meet her burden of proof by a preponderance of the evidence that she suffered an aggravation of a preexisting condition, or otherwise a compensable injury, arising out of the course and scope of her employment on December 4, 2016. Claimant's claim for compensation is denied and dismissed.

2. In the event of a compensable injury, no further medical benefits are reasonable, necessary, or related to the December 4, 2016 work injury, for which Claimant has returned to baseline.

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

DATED: NOVEMBER 22, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-962-740-06

ISSUES

- Whether Respondents overcame the Division IME Report of Clarence Henke, M.D. dated January 12, 2017, as it pertains to MMI, PPD, and relatedness of Claimant's cervical spine treatment.

FINDINGS OF FACT

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

1. On September 25, 2014 and September 26, 2014, Claimant sustained admitted work related injuries to her neck, right arm, and right shoulder.

2. The mechanism of injury Claimant reported to Dr. Freutter, who prepared a Physician's Report of Workers' Compensation Injury, was that she was standing on a ladder holding a steel and Plexiglas shelf over her head on the palm of her right hand. She reported that the shelf weighed "40 pounds or more," but testified at hearing that the shelf weighed ninety pounds. On September 27, 2014, Claimant reported that she was "installing shelf on ladder approx. 12' in air."

3. Claimant's injury complaints evolved over time.

- On September 27, 2014, when Claimant first sought treatment, she complained of right arm and shoulder pain, rating it as 6/10. On physical examination, her neck was supple and non-tender. X-rays of Claimant's right shoulder revealed no acute fracture or dislocation, mild degenerative arthritis of her acromioclavicular joint, and osteopenia. Her provider diagnosed a right shoulder sprain and right elbow neuropathy.

- On December 12, 2014, Levi Miller, D.O. noted that Claimant's chief complaints were of right elbow pain, weakness, and numbness. Claimant exhibited full range of motion and Dr. Miller ruled out cervical radiculopathy and other cervical spine injuries as Claimant's EMG and MRI studies and her physical examination did not support any diagnosis.

- On January 13, 2015, Flory Kreutter, M.D., noted that Claimant's cervical spine was very sensitive to light touch.

- On June 24, 2015, Claimant presented to Dr. Fall with neck pain as her chief complaint, followed by right shoulder and right elbow pain. Dr. Fall noted that Claimant exhibited "significant pain behaviors, rendering her examination nearly impossible." It appeared that Claimant was "voluntarily

guarding throughout the examination, and she gave poor effort with strength testing."

- On August 9, 2016, Dr. Fall noted that Claimant was no longer complaining of pain and numbness in her right arm.

4. Claimant's mental health status was identified as a potential or actual cause of her symptoms by her treatment providers.

- On October 4, 2014, Dr. Kreutter noted Claimant's anxiety and depression.

- On January 14, 2015, Dr. Kreutter twice noted, "Need to do a mental health screening to determine any underlying problems which could contribute to [her condition]."

- On June 24, 2015, Dr. Fall's assessment included, "Rule out somatoform disorder, conversion disorder, factitious disorder, or other psychological issues playing a role in her presentation and perceived disability." Dr. Fall recommended Claimant undergo a psychological evaluation.

- On April 11, 2016, Claimant failed to appear for a Demand Psychological Evaluation with Ron Carbaugh, Psy.D.

- On August 9, 2016 Dr. Fall's impressions included, "Rule out somatoform or conversion disorder." Dr. Fall recommended Claimant pursue treatment through her primary care provider for consideration of psychiatric referral for somatoform or conversion disorder.

- Several of Claimant's treatment providers noted that her objective findings were not consistent with her high levels of pain, and that Claimant exhibited pain behaviors.

- Several of Claimant's treatment providers noted that her complaints did not follow dermatome patterns and that her pain complaints did not make sense physiologically.

- Claimant refused to complete the DIME Summary Sheet prior to her examination.

- When asked whether she would attend a mental health evaluation, Claimant refused to answer.

5. Dr. Michael Horner primarily treated Claimant's neck and shoulder, while Dr. James Johnson primarily treated Claimant's shoulder and arm.

6. On March 14, 2016, Dr. Johnson wrote that Claimant's primary problem was her neck injury and that her shoulder was a minor concern.

7. On June 6, 2016, Dr. Homer noted that Claimant might be at MMI depending on her reaction to Botox injections which Dr. Horner was administering that day. "If she does not respond to the Botox treatment done at today's visit, then she will be at maximum medical improvement." Claimant had a serious negative reaction to the injections.

8. On June 24, 2015, Allison Fall, M.D., performed a second Respondents sponsored IME. Dr. Fall reported that Claimant was at MMI without impairment, and that there was no work-related injury to Claimant's cervical spine. Dr. Fall supported this conclusion by detailing Claimant's mechanism(s) of injury and Claimant's initial emergency room complaints.

9. On June 28, 2016, Dr. Horner answered a letter sent to him by Respondents' counsel opining that Claimant was at MMI for her cervical spine, but not for any other injury for which he had treatment appointments scheduled.

10. On August 9, 2016, Claimant returned to Dr. Fall for a follow-up IME.

11. On November 7, 2016, Claimant returned to Dr. Johnson for additional treatment. At that time, he opined that her primary source of symptoms was from her scapula-thoracic bursa.

12. On March 13, 2017, Claimant returned to Dr. Johnson who requested a repeat MRI of Claimant's right shoulder.

13. Although Dr. Homer placed Claimant's cervical spine injury at MMI on June 28, 2016, neither Dr. Homer nor Dr. Johnson placed Claimant at MMI for her other injuries after twenty-four months of treatment. Respondents applied for and obtained a "24 Month" DIME.

14. On December 27, 2017, Dr. Clarence E. Henke performed Claimant's DIME evaluation. He was instructed to examine and evaluate Claimant's right shoulder and right upper extremity, and to address the issues of MMI, impairment rating, and whether any further medical treatment would be necessary.

15. In his January 12, 2017 report, Dr. Henke determined Claimant was not at MMI for her neck and right upper extremity injuries.

16. Dr. Henke's report and conclusions are flawed in the following ways:

- Claimant testified at Hearing that Dr. Henke spoke with her husband regarding her claim, and Respondents contend that such conduct violates Rule 11-6(A). That rule specifically provides as follows: "(A) During the IME process, there shall be no communication allowed between the parties and the IME physician unless approved by the Director, or an administrative law judge. Any violation may result in cancellation of the IME." Rule 11-6(A) ensures that the opinion of the IME physician is perceived to be unbiased because it is not influenced by unregulated communications from either

party. *See Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172, 1178 (Colo. App. 2005). Because Claimant's husband is not a party to this case, the ALJ finds no Rule 11-6(A) violation.

- Dr. Henke did not rate any impairment, a required step in the DIME process.

- Dr. Henke's findings pertaining to MMI and Claimant's cervical spine are not supported by meaningful analysis.

- Dr. Henke's examination and report were completed without having numerous relevant and necessary medical records, including Dr. Fall's August 9, 2016 IME Report. Claimant also refused to complete the DIME Summary Sheet prior to her examination. Without having all of the medical records at his disposal, especially Dr. Fall's second IME Report, Dr. Henke could not provide complete and accurate findings. Dr. Fall opined in her second IME report, among other things, that Claimant's cervical spine complaints were not related to the work related injury, that Claimant was at MMI without impairment, and that no further intervention was needed.

- Dr. Henke failed to provide any details or analysis as to why Claimant is not at MMI, or what needs to be done for Claimant to reach MMI.

- Dr. Henke recommended that Claimant should follow-up with Dr. Johnson for further orthopedic evaluation and treatment recommendations, which could include surgical intervention. Dr. Henke failed to state what body part Claimant should follow up with, what type of orthopedic evaluation Claimant needs, or why further orthopedic evaluation is necessary, despite nearly three years of treatment without any perceived benefit. Additionally, none of Claimant's treatment providers have recommended surgery, while several have found surgical intervention to be contraindicated.

17. Dr. Fall credibly testified that not only was Claimant at MMI without impairment, but that there was no work-related injury to Claimant's cervical spine.

- Dr. Fall supported this conclusion by detailing the mechanism(s) of injury and the initial complaints by Claimant at the emergency room.

- Despite nearly three years of extensive treatment, Claimant's function has not improved and her pain has worsened. Dr. Fall credibly testified that the objective findings on the MRIs, EMGs, and x-ray reports do not support Claimant's subjective pain complaints or reasons why Claimant claims the necessity of the arm sling.

18. Dr. Fall credibly testified that Claimant does not have CRPS, that none of the records state she has CRPS, that no provider has stated she currently has CRPS, and that Claimant does not meet the criteria for a CRPS diagnosis.

- Dr. Fall credibly testified that Claimant's medical records include no documentation of allodynia, vasomotor (temperature asymmetry and/or skin or color changes), sudomotor changes, such as edema and sweating changes, or motor or trophic changes with motor dysfunction, such as tremor, or dystonia.

- Dr. Fall testified that in the clinical evaluation, there also must be one sign and two more categories, with those categories being: sensory, vasomotor, sudomotor/edema, and motor/trophic. Dr. Fall stated Claimant did not meet these criteria as well.

- Dr. Fall further testified that the two IMEs she performed on Claimant did not document findings consistent with clinical CRPS, Dr. Horner's examinations have not documented findings consistent with clinical CRPS, and the DIME physician did not document findings consistent with CRPS. Nor did the DIME physician diagnose CRPS. Dr. Johnson noted only that Claimant could have CRPS in the future, but did not find that Claimant clinically had it at the time he saw her.

- Dr. Fall testified that psychological evaluations are indicated in any workup of CRPS to rule out any other underlying issues, but Claimant failed to comply with this recommendation and refused to appear for her demand psychological evaluation that was scheduled with Dr. Carbaugh on April 11, 2016. Dr. Fall concurred with Dr. Kreutter's opinion that there was a lack of known "dermatomes" and that Claimant should seek psychological examination.

19. None of Claimant's treatment provided any relief.

- Claimant reported to Dr. Henke that medications, rest, physical therapy, and injections "have not provided any relief." Also, Claimant stated "that she had achieved only 2% of her pre-injury level of health and [was] continuing to regress in her recovery."

- Claimant reported to Dr. Miller that she had no improvement from any of her initial treatments.

- On August 9, 2016, Claimant reported to Dr. Fall that her pain was alleviated by "nothing."

- Claimant's treatment included oral and topical medications, extensive physical therapy, home exercise programs, chiropractic care, trigger point injections, Botox injections, dry needling, and deep tissue massage. Claimant testified without equivocation that all of the treatment she received was of no help. Further, none of her symptoms had improved since the date of her injury, they had only grown worse.

20. Claimant was equivocal about further treatment. When asked if she would like more injections, Claimant responded that she could not answer because she did not know which ones. When asked if she would proceed with surgery if it were offered, she responded, “That would depend on the outcome.”

21. Claimant’s presentation at hearing was inconsistent. As Dr. Fall testified, Claimant became rigid and “fixed” when she testified; in comparison to the more fluid and fuller range of motion she exhibited when she sat at counsel’s table. The ALJ made the same observation.

22. The ALJ finds Claimant not credible. She exaggerated her pain and symptoms. Claimant’s refusal to undergo a psychological examination, her testimony that no treatment has provided any relief, and her ambivalence about additional treatment undermines her credibility concerning the presence of an actual injury. Additionally, several of Claimant’s treatment providers found no objective evidence to support Claimant’s complaints of non-physiologic and subjective severe pain. This finding is further supported by Claimant’s inconsistent presentation at hearing.

23. The ALJ finds Dr. Fall’s analysis and opinions to be more well-informed, thorough, credible and persuasive than those of DIME Dr. Henke.

24. The ALJ finds that Respondents have overcome by clear and convincing evidence the DIME doctor’s opinions on the issues of MMI, PPD, and the relatedness of Claimant’s cervical spine treatment.

25. ATP, Dr. Homer, placed Claimant’s cervical spine injury at MMI on June 28, 2016. Claimant received no impairment rating for her cervical spine injury.

CONCLUSIONS OF LAW

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

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. bvApp. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The finding of a DIME physician concerning MMI or a claimant's medical impairment rating is binding on the parties unless it is overcome by clear and convincing evidence. C.R.S. 8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995*); Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002).

Respondents have produced evidence contradicting the DIME which the ALJ finds is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. The DIME doctor reviewed only a portion of Claimant's medical records and failed to consider Dr. Fall's second IME report. He did not rate any impairment as required. Dr. Henke failed to provide any details or analysis as to why Claimant is not at MMI, or what needs to be done for Claimant to reach MMI. Dr. Henke failed to state what body part Claimant should follow up with, what type of orthopedic evaluation Claimant needs, or why further orthopedic evaluation is necessary, despite nearly three years of treatment without any perceived benefit.

The determination of MMI must be made by an authorized treating physician. § 8-42-107(8)(b)(I), C.R.S.; *Town of Ignacio v. ICAO*, 70 p.3d 513 (Colo. App. 2002). The ALJ concludes that ATP Dr. Homer placed Claimant's cervical spine injury at MMI on June 28, 2016, with no impairment.

ORDER

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

1. Respondents have overcome the Division IME Report of Clarence Henke, M.D., dated January 12, 2017, by clear and convincing evidence, as it pertains to MMI, PPD, and relatedness of Claimant's cervical spine treatment.

2. Claimant reached MMI as of June 28, 2016, and without permanent impairment. As a result, Claimant does not require any further treatment with regard to her cervical spine.

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

DATED: November 22, 2017

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

ISSUES

1. Did Claimant prove by a preponderance of the evidence that a right knee surgery recommended by Dr. Fitzpatrick is reasonable, necessary and related to her admitted industrial injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a telemetry technician. On January 25, 2017 she suffered admitted injuries when her chair tipped over, causing her to fall on her right side. She developed pain in several parts of her body, including her right knee, right elbow, right foot, and neck. Those issues have largely resolved, except the right knee symptoms.[1]

2. Claimant has a history of right knee problems pre-dating the industrial accident. On August 1, 2016, less than six months before her work injury, Claimant saw her PCP, Dr. Harry Keefe, for right knee pain. She reported pain and swelling for the past two weeks with no precipitating injury or trauma. Claimant found it difficult to stand, bend or straighten the knee, and had an abnormal gait, favoring the right knee. Dr. Keefe ordered an x-ray, which showed medial and patellofemoral compartment osteoarthritis. He prescribed tramadol and Mobic and instructed Claimant to wear a knee brace. He also referred Claimant to physical therapy for "right knee osteoarthritis and pain."

3. A few days later, Claimant completed an Outpatient Therapy Health History Form on which she described severe knee pain at an 8-9/10 level. She told the therapist she had "difficulty walking, sitting, and performing all activities due to pain with movement." On physical examination, she was tender to palpation around the knee and at the lateral and medial joint lines. Patellar mobility was decreased in all directions "due to swelling and OA." She had reduced range of motion and a "severe[ly]" antalgic gait. The therapist recommended 2-3 sessions per week for three months, but Claimant did not return after the first visit. At the hearing Claimant admitted she stopped therapy because it was "too much" for her, not because her knee was better.

4. On August 29, 2016, Claimant returned to Dr. Keefe with complaints of left knee pain. He referred her to an orthopedic surgeon "as bil[ateral] knees most likely have OA."

5. Claimant saw PA Aaron Molencamp at Parkview Orthopedics on September 20, 2016. She stated her knees had been hurting for "several months." At times the pain was bad enough to wake her up at night. Her knees were very stiff and painful when arising from a seated position. She said "this pain is quite severe for the first

[1] Claimant has also complained of low back pain, ostensibly related to altered gait. Claimant's low back was not a subject of the October 5, 2017 hearing and is not addressed by this Order.

few steps. Eventually this pain does slowly subside, however it never completely resolves." She also reported "tightness" in the back of her knee. She reported difficulty walking and going up and down stairs. She had tried over-the-counter knee braces which were not helpful because they did not fit properly. Examination of the right knee showed tenderness over the anteromedial joint line and in the peripatellar region. There was crepitus with motion, pain with flexion and extension, and Claimant walked with an antalgic gait.

6. PA Molencamp diagnosed osteoarthritis and recommended additional conservative treatment. He referred Claimant to Hanger Orthotics for bilateral knee braces due to "occasional instability" in both knees. They discussed cortisone or viscosupplementation injections, and Claimant elected to try bilateral cortisone injections.

7. The cortisone injections did not appreciably improve Claimant's symptoms. She obtained the knee brace but continued to have pain. Although she did not follow up with Parkview Orthopedics, at hearing she testified the knee continued to bother her and the conservative measures did not help.

8. After the January 25, 2017 accident at work, Claimant went to the Parkview Medical Center emergency room. She reported pain in her right knee, right foot, and neck. There was no appreciable swelling or ligamentous instability of the right knee, and only mild diffuse tenderness. A right knee x-ray showed mild lateral patellar subluxation and patellofemoral joint space narrowing with subchondral sclerosis, subchondral cyst formation, and osteophytes. The radiologist also noted an ossific density possibly representing a large osteophyte or an intra-articular body. The ER physician diagnosed multiple "contusions," prescribed ibuprofen and gave Claimant a knee immobilizer.

9. Claimant saw Dr. Michael Dallenbach the next day, on January 26, 2017. She told Dr. Dallenbach about the previous cortisone injection in the right knee but said it was "approximately 1 year ago." She described a "constant dull ache about her right knee" before the accident, which was "much more significant" after the fall at work. Dr. Dallenbach did not examine Claimant's knee because she said it was too painful to remove the knee immobilizer. He diagnosed a knee sprain/contusion with questionable intra-articular loose body and ordered an MRI to rule out internal derangement.

10. An MRI of the right knee was done on January 31, 2017. It showed tri-compartmental osteoarthritis with a large full-thickness patellar articular cartilage defect, moderate joint effusion, a small intra-articular loose body, medial patellar retinacular and medial collateral ligament partial tears, and a posteromedial joint capsular injury.

11. Claimant saw Dr. FitzPatrick, an orthopedic surgeon, on February 27, 2017. She described posterior and medial right knee pain. Claimant told Dr. FitzPatrick about the pre-injury cortisone injection and said she would not consider another because the injection was very painful and only helped for two weeks. She stated the pain was "very manageable" before the fall at work. Dr. FitzPatrick reviewed the August 2016 right knee x-ray and noted the loose body was "apparent at that time." Physical examination revealed no effusion or patellar crepitus. Range of motion was reduced in both knees

"symmetrically," and Claimant walked with an antalgic gait due to pain. The knee was tender to palpation at the medial and lateral joint lines. Dr. FitzPatrick diagnosed right knee osteoarthritis and a loose body. She opined the fall had "exacerbated" Claimant's pre-existing osteoarthritis. Dr. FitzPatrick recommended arthroscopy with chondroplasty, possible meniscus debridement, and loose body removal.

12. Dr. James Lindberg, an orthopedic surgeon, reviewed the surgery request on February 28, 2017. He noted Claimant's preinjury history of knee pain with minimal benefit from a cortisone injection. He reviewed the MRI and opined

> My impression is that these are all chronic changes. The loose body is more than likely based on the described position not causing any problems. Her problem is underlying osteoarthritis and arthroscopy with [sic] no benefit; therefore, surgery is denied."

13. Dr. FitzPatrick wrote to Insurer on March 16 to appeal the denial of surgery. She opined:

> Although [Claimant] was seen in 2016 for right knee arthritis primarily in the patellofemoral compartment she had a significant change in function after fall at work. These new symptoms represent exacerbation of baseline arthrosis with acute chondral injury related to this fall. Pain is no better with conservative measures including PT, brace and oral medications without ability to return to work. Additionally localizes pain to posteromedial aspect of the knee, correlating area of loose body noted on MRI.

14. Dr. Lindberg reviewed Dr. Fitzpatrick's appeal letter and opined:

> There is no new information presented by Dr. FitzPatrick other than symptomatic complaints of pain secondary to her pre-existing osteoarthritis. Arthroscopic debridement for degenerative arthritis is of no value and the position of the loose body is generally inaccessible by arthroscopy and is almost never a source of the problems. It appears to be a stable loose body in that position and is not responsible for catching or locking. I would continue to deny the surgery as requested for the reasons stated above.

15. Claimant had another right knee MRI on July 3, 2017. The radiologist interpreted it as showing severe patellofemoral osteoarthritis with large areas of full-thickness chondral loss over the patella, moderate to severe medial and lateral compartment osteoarthritis, and posteromedial capsular ossification.

16. Claimant saw Dr. David Walden for a second surgical opinion on July 11, 2017. It was difficult to get a clear picture of her preinjury knee problems because "she has some issues with remembering her previous care." Dr. Walden obtained x-rays which showed moderate osteoarthritis affecting all three compartments, particularly the patellofemoral joint. He also reviewed the MRI images, and saw no obvious meniscal tears or severe osteoarthritis. He noted "a large unusual osteophyte off the posterior aspect of the knee which is not acute," along with the loose body seen on previous

images. On examination, her right knee was tender medially and anteriorly, but "no specific location is more identifiably painful than the next." McMurray's sign was "equivocal." She had crepitus and limited range of motion. Dr. Walden diagnosed "bilateral knee osteoarthritis with right-sided acute irritation from trauma" and "right knee loose body of unknown etiology or clinical significance." He recommended Claimant try another cortisone injection or viscosupplementation but could consider surgery if conservative treatment failed. He opined there was "some chance" the fall had caused the loose body but doubted removing it would provide much benefit.

17. Claimant saw Dr. Timothy Hall for an Independent Medical Examination (IME) at her counsel's request on August 31, 2017. Claimant told Dr. Hall she had a cortisone injection in the right knee "about three years ago," with no additional treatment before the work accident. She said she had only occasional pain and giving way of her knees descending stairs before the work accident. After the accident her knee pain "changed dramatically" and she was now having pain "most of the time." She had difficulty with ambulation and used a cane. Dr. Hall assumed Claimant was "a good historian." Examination of the knee showed crepitus, joint line tenderness and reduced range of motion. Her gait was "very antalgic." Dr. Hall disagreed with Dr. Lindberg's assessment that the MRI showed "all chronic changes." Dr. Hall thought the MRI revealed "potentially acute" findings including the chondral defect and a possible meniscus injury. He opined her knee symptoms were "obviously" work-related:

> The pain in her knee is not from … the degenerative osteoarthritis. She had minimal symptoms prior to this fall. She has had an acute injury superimposed on the degenerative arthritis. Her pain is coming from the acute injury.

18. Dr. Hall supported the recommendation of arthroscopic surgery for diagnostic and "potentially" therapeutic purposes, depending on the pathology observed during surgery.

19. Claimant saw Dr. Eric Ridings for an IME at Respondents' request on September 6, 2017. He noted Claimant "was not forthright regarding her pre-existing knee pain, telling me today that her last knee pain previously had been more than five years ago. Hence, it does not seem reasonable to accept at face value her history that her right knee was fine and not in any way limiting prior to her fall at work." He agreed with Dr. Lindberg that Claimant's symptoms were due to her significant pre-existing degenerative changes rather than the fall at work. He opined Claimant may have suffered a contusion as a result of landing on her right side, but the mechanism of injury would not have caused, aggravated, or accelerated her pre-existing arthritis. He disagreed that surgery was reasonably necessary, citing the Lower Extremity MTGs.

20. Dr. Hall testified at the hearing and maintained his opinion that Claimant's industrial accident aggravated her pre-existing condition. He opined the accident did not aggravate Claimant's underlying pathology but aggravated her symptomatology, which ultimately resulted in the need for surgery. Dr. Hall admitted he did not have all of

Claimant's preinjury medical records during his IME, but he reviewed the records at the hearing and they did not change his opinions.

21. Ms. Raylene Wetzel, a critical care nurse manager for Employer, testified at hearing for Respondents. Ms. Wetzel was Claimant's supervisor and regularly interacted with her at work. Claimant had complained to Ms. Wetzel of right knee pain, swelling, in increased pain with weather changes on several occasions before the January 25, 2017 accident. Claimant told Ms. Wetzel she treated with Parkview Orthopedics because her knee was bothering her so badly and she had received knee injections. She also recalled Claimant occasionally elevated her right leg on a milk crate.

22. Ms. Wetzel observed Claimant typically walked with a limp and a slow gait before the work accident. She also observed Claimant having trouble getting out of her chair at times.

23. Dr. Ridings testified for Respondents in a posthearing deposition. He opined Claimant was not a reliable historian regarding the preinjury condition of her right knee. He opined the loose body is not symptomatic and does not require surgery. He explained that falling on her right side would not cause or aggravate the pathology in Claimant's knee. Dr. Ridings opined Claimant's underlying osteoarthritis would inevitably remain symptomatic and continue to progress regardless of the fall at work. He reiterated that any surgery would not be causally related to the industrial injury.

24. Dr. Ridings' and Dr. Lindberg's opinions regarding causation are more persuasive than opinions in the record to the contrary.

25. Ms. Wetzel's testimony is credible and persuasive.

26. Claimant failed to prove by a preponderance of the evidence that arthroscopic surgery proposed by Dr. FitzPatrick is causally related to the January 25, 2017 admitted injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove

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

As found, Claimant failed to prove the proposed surgery is causally related to the January 25, 2017 industrial injury. There is no persuasive evidence that the accident caused any internal structural damage to Claimant's right knee. Although Dr. Walden speculated the loose body might be trauma-related, Dr. FitzPatrick dispelled that notion when she observed the loose body on the preinjury x-ray. Dr. Ridings persuasively explained Claimant's accident did not likely cause any of the multi-compartmental chondral damage seen on the MRI. Neither Dr. FitzPatrick nor Dr. Walden (both of whom personally reviewed MRI images) shared Dr. Hall's thesis that Claimant may have an acute medial meniscus tear. Although the radiologist mentioned the meniscal abnormality in the findings section of his report, he did not consider it sufficiently significant to include in the final impressions. He also thought it was likely degenerative.

Dr. FitzPatrick's and Dr. Hall's opinions are predicated on the assumption that the January 2017 accident caused a significant change in Claimant's symptomatology and baseline level of function. But the persuasive evidence does not support that supposition. Before the accident, Claimant described her knee pain as "severe."[2] She had a "severely" antalgic gait due to right knee pain. She had difficulty walking, standing, and climbing stairs. She had crepitus, painful range of motion and her knee gave way at times. She was prescribed a custom knee brace, had a cortisone injection and had considered viscosupplementation.

The rationale for surgery is based on factors that existed before the accident. Claimant could reasonably have been considered a surgical candidate before her work injury, as she already had advanced osteoarthritis causing significant pain, functional limitations, and occasional instability. She had tried and failed conservative measures including bracing, anti-inflammatories, physical therapy and cortisone injections. Had she returned to Dr. Likes immediately before the accident at work, he may well have suggested surgery as the remaining viable option.[3]

Multiple providers have noted Claimant's relatively poor memory for details regarding her past knee issue, which she also demonstrated at the hearing. Although the ALJ does not believe Claimant was purposely deceitful regarding her prior history, the ALJ is not inclined to give significant weight to her testimony regarding worsened symptomatology after the accident.

[2] She had 8-9/10 level pain in August 2006, the same level she reported as a current pain level at the hearing.

[3] As Dr. Ridings pointed out, many surgeons outside the workers' compensation system offer their patients arthroscopic surgery in similar situations. Dr. Walden also noted he would consider surgery if the conservative measures he recommended were unsuccessful.

There is no doubt Claimant suffered a painful contusion and strain/sprain injury when she fell on January 25, 2017. But the surgery is not proposed to remedy a contusion or a strain/sprain. The surgery is intended to address long-standing, chronic osteoarthritis that was symptomatic and functionally limiting before the accident. The totality of persuasive evidence simply does not show that the admitted accident proximately caused the need for surgery.

Since Claimant failed to prove the proposed surgery is causally related to the industrial injury, the question of reasonable necessity is moot.

ORDER

It is therefore ordered that:

1. Claimant's request for arthroscopic surgery proposed by Dr. Fitzpatrick is denied and dismissed.

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

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

DATED: November 22, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-185-01

ISSUES

- Whether the right shoulder surgery recommended by David Schneider, M.D., is reasonable, necessary, and related to Claimant's admitted industrial injury.

- Whether David Schneider, M.D., is an authorized treating physician.

FINDINGS OF FACT

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

1. This admitted claim involves an injury to Claimant's right shoulder. On April 11, 2014, Claimant, who works as a provisioning agent for Employer, was reaching into a cart with his right arm fully extended to remove a tray, which was stuck. As Claimant attempted to remove the tray, he felt a pop on his right shoulder. Previously, in 2010 and 2011, Claimant sought treatment for a work-related right shoulder injury. On January 17, 2011, Claimant treated with Mark Failinger, M.D., who noted that Claimant's right shoulder MRI showed a large, retracted tear that was likely present for many years. Dr. Failinger stated the recent work incident caused more symptomatology. Dr. Failinger opined that a surgery to repair the torn rotator cuff had an approximate 30% success rate and Claimant opted to try that surgery. Dr. Failinger opined that Claimant would eventually need a reverse total shoulder replacement.

2. On February 7, 2011, Claimant treated with A. Todd Alijani, M.D., who opined that Claimant "would be best off with an attempt at a repair of this massive tear. It is not clear to me if it is reparable. By definition this can only be ascertained through an attempt to repair it." Dr. Alijani opined that if the repair did not work, Claimant would be a candidate for a reverse total shoulder arthroplasty. Dr. Alijani opined, "I think that he would be much better suited with an attempt of a repair and if it is deemed irreparable at the time of surgery then we can proceed with a reverse total shoulder arthroplasty if indeed it is irreparable." On March 15, 2011, Dr. Alijani performed a right shoulder arthroscopy, debridement, decompression, and repair of massive rotator cuff tear. At Hearing, Claimant testified he was released back to full duty in September 2011 and that he did not seek any additional right shoulder treatment or have any ongoing right shoulder issues until his April 11, 2014 work-related injury.

3. On April 15, 2014, Claimant treated at Concentra with Michelle Honsinger, PA, and reported he had his right arm at full extension into a drink cart to pull out a 15-20 pound tray, which was stuck. While trying to pull it out, he felt immediate right shoulder pain. PA Honsinger assigned Claimant work restrictions and recommend he start physical therapy. On April 30, 2014, Claimant treated with PA Honsinger and reported 6/10 right shoulder pain. On May 14, 2014, Claimant treated with PA

Honsigner and reported 4/10 right shoulder pain and increased right shoulder pain with elevation and overhead use but that he is working within his restrictions. From April 22, 2014, through May 30, 2014, Claimant underwent eight physical therapy sessions at Concentra. During these sessions, Claimant continued to report right shoulder pain and discomfort, with decreased range of motion and pain with reaching forward and above his head.

4. On June 3, 2014, Claimant treated at Concentra with Matt Miller, M.D., and reported 6/10 right shoulder pain with radiating pain into his neck and down his right arm. Claimant reported that moving and lifting his shoulder caused increased pain. Dr. Miller referred Claimant back to Dr. Alijani. Claimant reported ongoing right shoulder problems since the April 2014 injury and increased pain and stiffness with physical therapy. Dr. Alijani recommended a right shoulder MRI, which revealed superior humeral head migration and multiple rotator cuff tears.

5. On June 17, 2014, Claimant treated with Dr. Miller and reported ongoing right shoulder pain and other symptoms. Dr. Miller reviewed the MRI, which revealed a rotator cuff tear, and recommended Claimant follow-up with Dr. Alijani for surgery. On June 27, 2014, Dr. Alijani reviewed the right shoulder MRI and opined the rotator cuff tear was not amenable to repair. Instead, Dr. Alijani recommended Claimant undergo a reverse total shoulder arthroplasty when his pain became intolerable. On July 1, 2014, Claimant treated with Dr. Miller and reported ongoing right shoulder pain but deferred surgery saying he would try and do his job with his right shoulder.

6. On July 31, 2014, Claimant treated with Dr. Miller, who noted Claimant required unrelated surgery that put his right shoulder treatment on hold. Dr. Miller maintained Claimant's treatment plan and work restrictions. On August 9, 2014, Claimant treated with Dr. Miller and reported increased right shoulder pain and discomfort and decreased range of motion.

7. On January 29, 2015, Claimant returned to Dr. Miller for his right shoulder injury and reported doing worse. Claimant reported 6/10 right shoulder pain with radiating pain into his upper back and numbness down his right arm. Claimant reported increased pain with motion. Dr. Miller recommended Claimant follow-up with Dr. Alijani regarding right shoulder surgery and maintained Claimant's work restrictions. On February 2, 2015, Claimant treated with Dr. Alijani and reported ongoing right shoulder pain. Dr. Alijani recommended Claimant proceed with a right total shoulder arthroplasty.[1]

8. On March 10, 2015, Claimant underwent a right total shoulder arthroplasty with Dr. Alijani, whose surgical report notes that he repaired Claimant's rotator cuff tears and performed a standard total shoulder arthroplasty. Claimant started physical therapy on March 19, 2015. By April 23, 2015, Claimant reported slow improvement to Dr. Miller. Claimant reported ongoing pain and only some improvement in range of motion.

[1] No explanation was offered for why a total shoulder arthroplasty was performed when a reverse total shoulder arthroplasty had been recommended.

Dr. Miller maintained Claimant's treatment plan and work restrictions. On April 20, 2015, and June 1, 2015, Dr. Alijani noted Claimant was doing well since surgery. On May 19, 2015, Claimant reported popping in his right shoulder during physical therapy.

9. On July 10, 2015, Claimant treated at Concentra with Candice Sobanski, M.D., and reported popping and clicking in his right shoulder and increased right shoulder pain from physical therapy. Claimant reported 4/10 pain and decreased range of motion. Dr. Sobanski referred Claimant for a right shoulder MRI, which revealed Claimant's right humeral head continued to be elevated, similar to the prior MRI. On July 31, 2015, Claimant treated with Dr. Sobanski and reported ongoing right shoulder pain and discomfort and range of motion loss. On August 24, 2015, Claimant treated with Dr. Sobanski and reported difficulty progressing in physical therapy and that he felt it was not helpful. Claimant reported the anterior aspect of his right shoulder drooped more than his left shoulder.

10. On August 31, 2015, Claimant treated with Dr. Alijani and reported right shoulder instability. Dr. Alijani noted his concern for Claimant possibly needing revision surgery and recommended Claimant undergo a CT arthrogram and stop physical therapy. On September 4, 2015, Claimant treated at Concentra with Darla Draper, M.D., and reported he went downhill after starting strength exercises in physical therapy. Claimant denied any new injury and reported he was unable to do physical therapy due to increased pain. On September 14, 2015, Claimant treated with Dr. Sobanski and reported 6/10 right shoulder pain that was getting worse and decreased range of motion. Claimant reported upper back and neck pain. Dr. Sobanski referred Claimant to Albert Hattem, M.D., and to Dr. Failinger for a second opinion. On September 22, 2015, Claimant underwent a right shoulder CT scan, which revealed multiple, compete rotator cuff tears and superior subluxation of the humeral head.

11. On October 16, 2015, Claimant treated with Dr. Alijani, who reviewed the right shoulder CT arthrogram. On physical examination, Dr. Alijani noted Claimant had "so-called pseudoparalysis of the upper extremity with weakness and abduction and forward elevation." Dr. Alijani opined Claimant's right total shoulder arthroplasty had failed and recommended Claimant undergo a revision of the right total shoulder arthroplasty and conversion to a reverse arthroplasty.

12. On November 5, 2015, Phillip Stull, M.D., performed a records review for Respondents. Dr. Stull opined that the right shoulder reverse arthroplasty was reasonable, necessary, and related to Claimant's April 11, 2014 injury.

13. On December 28, 2015, Claimant treated at Concentra with Dr. Hattem and reported the history of his right shoulder injury and treatment, including his ongoing right shoulder issues. Dr. Hattem noted that Dr. Alijani was recommending a revision total shoulder arthroplasty and conversion to a reverse arthroplasty. Dr. Hattem recommended Claimant proceed with the right shoulder revision and conversion to a reverse arthroplasty surgery.

14. On February 9, 2016, Claimant treated with Cary Motz, M.D., and Angelina Waller, PA-C, and reported his history of right shoulder problems, including his ongoing issues since the March 2015 surgery. Claimant reported persistent right shoulder pain and weakness and that he had experienced only minimal improvement with activity modification, physical therapy, and rest. Dr. Motz reviewed the risks of the surgery with Claimant, noted he was a low risk, and cleared him for surgery.

15. On February 17, 2016, Claimant underwent a revision right total shoulder arthroplasty/conversion to reverse right total shoulder arthroplasty with Dr. Alijani. On February 25, 2016, Claimant returned to Dr. Alijani, who noted a right shoulder x-ray revealed a dislocated prosthesis and referred Claimant back for surgery.

16. On February 26, 2016, Claimant underwent a revision of his right reverse total shoulder arthroplasty with Dr. Alijani. On February 29, 2016, Dr. Alijani noted Claimant's right shoulder was stable and recommended Claimant start physical therapy.

17. Between March 8, 2016, and June 26, 2016, Claimant treated with Drs. Hattem and Alijani, and underwent 12 physical therapy sessions. All noted Claimant was doing well.

18. On July 27, 2016, Claimant treated with Dr. Alijani and reported that he woke up that morning with significant right shoulder pain. Claimant stated that he started with a new physical therapist in June and that the therapist was making him do range of motion work that was uncomfortable and painful. Dr. Alijani took a right shoulder x-ray and did not believe the shoulder was dislocated. Dr. Alijani put Claimant in a sling and recommended he stop physical therapy. On August 8, 2016, Dr. Alijani recommended Claimant undergo a right shoulder CT guided aspiration, which Claimant underwent on August 22, 2016, to rule out an infection. On August 22, 2016, Claimant treated with Dr. Hattem and reported his increased right shoulder pain and decreased range of motion. Claimant reported he had to keep his arm still. Claimant detailed Dr. Alijani's recommendations, which Dr. Hattem agreed with.

19. On September 19, 2016, Claimant treated with Dr. Alijani, who did not think Claimant needed any additional surgery. On October 10, 2016, Claimant treated with Dr. Hattem and reported persistent right shoulder pain and discomfort with decreased range of motion. Dr. Hattem recommended Claimant follow Dr. Alijani's plan. On October 19, 2016, Dr. Alijani recommended Claimant undergo blood work. On November 11, 2016, Claimant treated with Dr. Hattem and reported he was doing the same, and Dr. Hattem maintained the treatment plan.

20. On October 12, 2016, William J. Ciccone, M.D., Respondents' retained expert witness, performed an independent medical examination. Dr. Ciccone opined that Claimant did sustain a right shoulder injury, but that Claimant's need for the right shoulder replacement was related to Claimant's arthritis, not the injury. Dr. Ciccone opined that the shoulder replacement and revision surgeries were reasonable and necessary.

21. On November 28, 2016, Respondents filed a General Admission of Liability (GAL) stopping Claimant's temporary total disability (TTD) benefits under this claim. In the remarks section of the GAL, the adjuster, Lindsey Williams, noted "TTD is now being paid off WC # 4959778."

22. On November 30, 2016, Claimant independently sought a second opinion from Timothy Lehman, M.D., at Panorama Orthopedics & Spine Center and reported bilateral shoulder pain and his history of right shoulder treatment, including surgeries. Dr. Lehman recommended Claimant treat with David Schneider, M.D., for his right shoulder condition.

23. On December 14, 2016, Claimant treated with Dr. Schneider and reported his right shoulder has been miserable with pain and stiffness. Dr. Schneider noted Claimant's right shoulder x-rays revealed high placement of the glenoid component and bone spurring of the humeral lesser and greater tuberosity. Dr. Schneider opined Claimant's right shoulder pain:

> primarily stems from some of the post op bone formation both of the greater tuberosity and lesser tuberosity and some abutment on the scapula. I am not sure whether or not there has been some drift of the glenosphere, but as it stands right now it's not in a healthy position.

Dr. Schneider recommended Claimant undergo a right shoulder revision reverse total shoulder arthroplasty to address his pain. On December 20, 2017, Claimant underwent an ultrasound guided right shoulder joint aspiration with synovasure testing with Mitchell Seemann, M.D. as recommended by Dr. Schneider.

24. On December 15, 2016, Claimant returned to Dr. Alijani, who noted Claimant underwent a second opinion the day before with Dr. Schneider. Dr. Alijani noted he had already spoken with Dr. Schneider and discussed the heterotopic ossification that was seen on the right shoulder x-ray and that they agreed Claimant needed to undergo a right shoulder CT scan with three-D reconstructions for possible revision right reverse total shoulder arthroplasty. On December 29, 2016, Claimant had the right shoulder CT scan, which revealed possible hardware loosening, suspected adjoining subtle undulating peroprosthetic fracture of the posterior proximal humerus, and curve-like remodeling of the anteroinferior scapular neck, suggesting "scapular notching" related to potential impingement of the humeral cup.

25. On January 9, 2017, Claimant treated with Dr. Hattem and reported that he had consulted with Dr. Schneider (which he paid for out of pocket). Claimant reported that Dr. Schneider and Dr. Alijani agreed that he needed to undergo an additional right shoulder surgery, which would involve repositioning the arthroplasty. Dr. Hattem maintained Claimant's treatment plan.

26. On February 8, 2017, Dr. Alijani opined that since Claimant's February 17, 2016 right reverse total shoulder arthroplasty, "the shoulder prosthesis has become

loose, requiring a revision arthroplasty. This particular surgery is out of my scope of practice. I have referred [Claimant] to Dr. Schneider who is very capable of performing this type of surgery."

27. On March 6, 2017, Claimant treated with Dr. Schneider, who noted Claimant returned after undergoing a right shoulder CT and meeting with Dr. Alijani. Dr. Schneider recommended Claimant proceed with the revision reverse shoulder arthroplasty. On March 28, 2017, Dr. Schneider submitted a request for authorization to Respondents for the right shoulder revision reverse total shoulder arthroplasty.

28. On May 11, 2017, Claimant applied for a hearing on authorized provider and reasonable and necessary medical benefits, specifically authorization of the surgery recommended by Dr. Schneider. On June 9, 2017, Respondents filed a Response to Claimant's Application for Hearing and endorsed reasonable and necessary medical benefits, specifically that the requested surgery is not reasonable or necessary.

29. On June 12, 2017, Claimant treated with Dr. Hattem and reported his right shoulder remained the same. Dr. Hattem maintained Claimant's treatment plan and work restrictions.

30. On June 15, 2017, Timothy S. O'Brien, Respondents' retained expert witness, completed an independent medical examination and opined that Claimant's April 11, 2014 work incident "neither significantly aggravated [Claimant's] condition nor did it accelerate this condition and thus [Claimant's] need for his first shoulder arthroplasty in 2015 and his current need for a revision of that procedure are not related to the work incident in question in this case."

31. Dr. O'Brien opined that regardless of whether the April 11, 2014 incident occurred, "the revision surgery that Dr. Schneider is now recommending would have been necessary at this exact same time as it is currently being recommended." Dr. O'Brien opined that the surgery recommended by Dr. Schneider is reasonable and necessary. Dr. O'Brien opined Claimant's need for the surgery recommended by Dr. Schneider "is the result of failed prior surgeries." Dr. O'Brien opined, "Regarding the minor injury that occurred on April 11, 2014, [Claimant] reached an end of healing within 4 weeks or by May 11, 2104 by which time he returned to his pre-injury level of function."

32. At Hearing, Claimant testified that in October 2010 he hurt his right shoulder while trying to close a galley door and in March 2011 he underwent right shoulder surgery. Claimant testified that about six months after surgery he was released at full duty and that he returned to his regular duty job. Claimant testified that between September 2011 and April 2014

- He did not seek any right shoulder treatment
- He was not under any work restrictions for his right shoulder

- His right shoulder felt great
- He was working a lot of overtime for Employer
- And that he did not have any limitations with his right shoulder.

33. Claimant testified that on April 11, 2014, he was reaching into a cart to grab a tray, but the tray was stuck. Claimant testified that as he pulled on the tray, he felt a pop in his right shoulder. Claimant testified that since that injury, he has not returned to the level of function he had prior to the April 11, 2014 injury.

- Claimant underwent additional right shoulder surgeries
- Since his second surgery, Claimant's shoulder has never stopped aching
- Whenever he uses his arm, his muscles bite and cramp up
- In approximately July 2016, Claimant woke up one morning and had extreme right shoulder pain and felt like something had shifted in his shoulder
- Claimant's right arm was rotated forward
- Claimant stopped physical therapy and had his arm in a sling
- Claimant's right shoulder was worse than earlier in the year and he had to take pain medications.

34. Claimant testified that in October 2016 he treated with Dr. Alijani, who recommended Claimant get a second opinion, and that Claimant told Dr. Alijani that he was going to Panorama for the opinion. While the recommendation does not appear in Dr. Alijani's notes, and Claimant paid for the initial appointment with Dr. Schneider, the ALJ credits Claimant's testimony as credible. Further, based on the context of Claimant's worsening symptoms, Dr. Alijani's soon to follow acknowledgement that he was unable to perform the necessary surgery, and how quickly Dr. Alijani and Dr. Schneider consulted about Claimant's case, the ALJ finds it more likely than not that Dr. Alijani recommended Claimant seek a second opinion.

35. Claimant testified that he used his computer and found Panorama Orthopedics, who was a workers' compensation provider. Claimant testified he scheduled an appointment with Panorama Orthopedics and told Dr. Alijani he was going to Panorama Orthopedics. Claimant treated with Dr. Schneider on December 15, 2016, and that when he saw Dr. Alijani the next day, Dr. Alijani had already spoken with Dr. Schneider. Claimant testified that Dr. Alijani told Claimant that he could not perform the surgery recommended by Dr. Schneider and referred Claimant to Dr. Schneider because he believed that Dr. Schneider could do the surgery. Claimant testified that

since the April 11, 2014 injury, he has not been able to work his full duty job and has not been able to do the things he likes to do outside of work due to his right shoulder injury.

36. At Hearing, Dr. O'Brien testified as an expert in the field of orthopedic surgery. Dr. O'Brien testified consistently with his IME report that the 2011 right shoulder MRI showed a chronic, not acute, rotator cuff tear. Dr. O'Brien opined that Claimant should have undergone the reverse total shoulder arthroplasty in 2011 and that he would not have recommended the rotator cuff repair that Dr. Alijani performed. Dr. O'Brien opined that the 2011 and 2014 work injuries did not aggravate Claimant's right shoulder condition or accelerate Claimant's need for a reverse total shoulder arthroplasty. Dr. O'Brien opined the surgery recommended by Dr. Schneider is not related to Claimant's 2014 work injury. Dr. O'Brien opined the surgery recommended by Dr. Schneider is reasonable and necessary and related to Claimant's failed February 2016 right shoulder surgery. Dr. O'Brien testified that, to his knowledge, Claimant never sought right shoulder treatment prior to the October 2010 work injury and was never under any work restrictions. Dr. O'Brien testified that Claimant's degenerative right shoulder condition was asymptomatic prior to the October 2010 work injury and the April 2014 work injury. Dr. O'Brien acknowledged that from September 2011 to April 2014, Claimant did not seek any right shoulder treatment and was not under any right shoulder work restrictions and was working his full duty job. Dr. O'Brien opined that Claimant reached MMI for his April 2014 work injury on May 11, 2014, because he had returned to his pre-injury level of function on that day. Nevertheless, Dr. O'Brien testified that prior the April 2014 work injury, Claimant was not reporting 6/10 right shoulder pain with radiating pain down his right arm and into his neck. In fact, Dr. O'Brien testified that Claimant was not having any of these or similar symptoms from September 2011 until the April 2014 work injury. Dr. O'Brien admitted that based on the medical records, or lack thereof, Claimant's baseline right shoulder condition is not 6/10 pain with radiating pain down his arm and into his neck.

37. The ALJ finds that Dr. Schneider is an authorized treating physician. Claimant's undisputed testimony is that Dr. Alijani recommended Claimant get a second opinion, which he did with Dr. Schneider, who communicated with Dr. Alijani regarding Claimant's treatment plan. Then, in February 2017, Dr. Alijani exercised his independent judgment and referred Claimant to Dr. Schneider to complete the recommended surgery, as he is unable to perform the surgery. This referral was done in writing.

38. The next question is whether the surgery recommended by Dr. Schneider is related to Claimant's admitted work injury. All providers agree the surgery is reasonably necessary. Respondents argue the surgery is not related to the admitted work injury because the April 11, 2014 work injury did not aggravate Claimant's underlying condition or accelerate his need for the shoulder replacement. Nevertheless, Dr. O'Brien, in addition to Dr. Alijani and Dr. Schneider, opine the recommended surgery is directly related to Claimant's failed February 2016 right shoulder replacement. Respondents are liable for medical treatment flowing proximally and naturally from an industrial injury. In this case, Claimant's need for surgery is directly related to his failed February 2016 surgery, which was admitted under this claim.

Claimant has proven by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Schneider is related to his admitted work injury.

CONCLUSIONS OF LAW

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

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

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205, 1209 (Colo. 1936); CJI, Civ. 3:17 (2013).

MEDICAL BENEFITS

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296.

Respondents' acknowledge that the requested surgery is reasonable and necessary. However, they argue that Claimant's requested surgery is not related to his injury because some evidence could support a conclusion that the surgery was necessary earlier and that the intervening surgeries were not related.

The ALJ is not persuaded by Respondent's argument because it does not recognize that *all* results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). As found, Claimant proved by a preponderance of the evidence that the surgery recommended by Dr. Schneider is reasonable, necessary, and related to Claimant's admitted industrial injury. Respondents' own expert, O'Brien, opined the surgery recommended by Dr. Schneider was reasonable and necessary and related to Claimant's failed February 2016 right shoulder surgery. Claimant's initial surgery flowed proximately and naturally from his admitted industrial injury. The proximate cause of Claimant's need for the requested surgery is the failure of his last authorized surgery. Thus, the ALJ concludes that the requested surgery is related to his treatment for his admitted industrial injury.

AUTHORIZED PROVIDER

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch v. Indus. Claim Apps. Office*, 148 P.3d 381, 383 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Apps. Office*, 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Apps. Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact. *Suetrack USA v. Indus. Claim Apps. Office*, 902 P.2d 854 (Colo. App. 1995).

Claimant testified that in October 2016 he treated with Dr. Alijani, who recommended Claimant get a second opinion, and that Claimant told Dr. Alijani that he was going to Panorama for the opinion. While the recommendation does not appear in Dr. Alijani's notes, and Claimant paid for the initial appointment with Dr. Schneider, the ALJ credits Claimant's testimony as credible. Further, based on the context of Claimant's worsening symptoms, Dr. Alijani's soon to follow acknowledgement that he was unable to perform the necessary surgery, and how quickly Dr. Alijani and Dr. Schneider consulted about Claimant's case, the ALJ finds it more likely than not that Dr. Alijani recommended Claimant seek a second opinion.

The ALJ finds and concludes that Dr. Schneider is an authorized treating physician. Claimant's undisputed testimony is that Dr. Alijani recommended Claimant get a second opinion, which he did with Dr. Schneider, who communicated with Dr. Alijani regarding Claimant's treatment plan. Then, in February 2017, Dr. Alijani exercised his independent judgment and referred Claimant to Dr. Schneider to complete the recommended surgery, as he is unable to perform the surgery.

ORDER

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

1. Respondents shall pay for the right shoulder surgery recommended by David Schneider, M.D., as this surgery is reasonable, necessary, and related to Claimant's admitted industrial injury.

2. David Schneider, M.D., is an authorized treating physician.

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

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

DATED: November 22, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-044-321-01

ISSUES

- Whether Claimant sustained a compensable injury to his right shoulder on March 20, 2017.

- If so, whether rotator cuff surgery is reasonable, necessary, and related to the compensable injury.

STIPULATIONS

- The parties stipulated to an AWW of $308.32 in the event of a compensable claim.

- Workwell Occupational Medicine, including diagnostic referral for an MRI, and Dr. Robert Fitzgibbons, are authorized providers in this matter in the event of a compensable claim.

FINDINGS OF FACT

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

1. Claimant has worked for Employer for 12 years as a loader/unloader, which involves unloading packages from the package car.

2. Claimant alleges that on March 20, 2017, he suffered a work-related injury to his right shoulder. Claimant testified that he began his shift at 6:00 p.m. At approximately 7:50 p.m., he was unloading a truck and attempted to remove a package from a stack. As he slid the package towards himself, he lost his grip causing his right arm to be pushed back. Claimant testified that he did not have any immediate pain or any sort of symptoms. Claimant finished his shift and testified that the event did not interrupt his work in any way. Claimant went home and slept without reporting a work injury.

3. Claimant experienced the onset of pain the following day, March 21, 2017, while operating the manual gearshift of his personal vehicle at approximately noon. Claimant characterized the onset of pain as "severe." Claimant testified that, after the onset of pain, he knew he needed to report a work-related injury to Employer.

4. Claimant first reported a work-related injury to his right shoulder to Employer's manager Aaron Shafenberg on March 21, 2017, about one hour before the start of his 6:00 p.m. shift. Claimant told Respondents' expert, Dr. Mark Paz, and also testified at hearing that he reported to Mr. Shafenberg that he had a work injury during

the evening shift on March 20, 2017, but that his discomfort developed when he was shifting his car earlier that day.

5. Claimant testified that Gary Penaflor, Employer's regional manager, was present by speakerphone when he reported the injury to Mr. Shafenberg. Claimant testified that Mr. Penaflor was upset upon hearing the report of injury. Mr. Penaflor wrote a letter, dated March 24, 2017, reprimanding Claimant for failing to immediately report his injury on March 20, 2017.

6. On March 22, 2017 Claimant had his initial visit at Workwell Occupational Medicine where William Ford, PA-C, evaluated and treated him. Mr. Ford reported Claimant describing his mechanism of injury as follows: "I injured my right shoulder pulling a box to lift, lost my grip and my shoulder went back." The record does not mention that the onset of pain did not occur until the following day, when Claimant was shifting his car. Mr. Ford indicated that Claimant injured his right shoulder "while lifting a box." Mr. Ford diagnosed as a work-related sprain of the right rotator cuff capsule. Mr. Ford placed Claimant on restricted duty with two pound lifting restrictions. Claimant subsequently continued working light duty for Employer. Mr. Ford recommended physical therapy and indicated that he would recommend an MRI if Claimant did not improve by the next visit.

7. Claimant participated in physical therapy with Workwell from March 24, 2017 through July 5, 2017.

8. On March 28, 2017, Claimant returned to Mr. Ford for reevaluation. Mr. Ford was highly suspicious of a rotator cuff tear and on April 4, 2017 he recommended an MRI of Claimant's right shoulder.

9. On April 11, 2017, Claimant underwent an MRI at Health Images. The MRI findings included: High-grade partial, near full-thickness tear of the anterior supraspinatus tendon; no full-thickness tear of the subscapularis tendon identified with tendonopathy and partial-thickness tearing of the subscapularis tendon likely; osteoarthritis of the acromioclavicular joint; and labral degeneration. Mr. Ford referred Claimant for orthopedic evaluation during an April 18, 2017 follow-up visit.

10. On April 28, 2017, orthopedic Dr. Robert Fitzgibbons evaluated Claimant. Claimant reported that he injured his shoulder on March 20, 2017 while lifting boxes at work. Dr. Fitzgibbons noted that the description of the onset of shoulder pain was "sudden," and that he did not have Mr. Ford's treatment summary. There was no indication that Claimant experienced the onset of pain the following day while driving. Dr. Fitzgibbons diagnosed Claimant with a right shoulder rotator cuff tear and recommended right shoulder rotator cuff repair, decompression, and debridement.

11. On May 2, 2017, Claimant returned to Mr. Ford who noted that Claimant was awaiting authorization of surgery. Mr. Ford maintained Claimant's work restrictions and noted that Claimant's modified duty with Employer had expired. Claimant was Claimant has remained off work since May 2, 2017.

12. On May 9, 2017, Respondents issued a letter to Dr. Fitzgibbons notifying him that the requested surgery was denied, pending determination of compensability of the claim.

13. Claimant subsequently saw Mr. Ford for regular follow-up visits at Workwell. Claimant also returned to see Dr. Fitzgibbons on two more occasions. Claimant's last visit with Mr. Ford was on August 16, 2017. Claimant's last visit with Dr. Fitzgibbons was on June 5, 2017. No persuasive evidence a finding that Claimant's treatment providers were aware of the delayed onset of Claimant's symptoms.

14. On July 21, 2017, Dr. Mark Paz performed a Respondents' sponsored IME. He issued his report on August 29, 2017. Dr. Paz took a history of the injury from Claimant with specific details about the alleged mechanism of injury and surrounding circumstances. Claimant described kneeling down and pulling the top box, on a stack of boxes three high, backwards with his right hand. Claimant stated that his right hand lost grip, came free, and pulled backwards so that the right hand movement ended at the level of the right shoulder. Claimant denied experiencing any symptoms to the right shoulder, neck, or right arm at the time of the incident. Claimant continued working after the event and completed his usual duties, moving additional boxes while pushing, pulling, and lifting boxes up to 50 to 60 pounds. Claimant did not develop symptoms during these activities and went home after his shift.

15. Claimant reported to Dr. Paz that he developed "severe pain" in the anterior aspect of his right shoulder at approximately noon on March 21, 2017. Claimant told Dr. Paz that he experienced pain while shifting his vehicle, which has a standard transmission, into reverse. Claimant described his discomfort as both immediate and "sharp" with pain at 6/10 on the VAS pain scale. Claimant told Dr. Paz that he went home, and did nothing. Claimant stated that he subsequently reported the injury to Employer, stating that he had discomfort that developed while shifting his transmission. When questioned about his prior medical and social history, Claimant denied any prior use of illicit drugs to Dr. Paz. Dr. Paz reviewed the MRI study and noted a rotator cuff tear.

16. Based upon the direct history provided by Claimant, the findings upon physical examination, and the review of the medical records, Dr. Paz opined it was not medically probable that the right shoulder rotator cuff tear was causally related to the alleged March 20, 2017 injury. Dr. Paz noted that, per the Level II Physician Accredited Curriculum, causal analysis involves consideration of temporal concerns and consistency with the described mechanism of injury. Dr. Paz noted the delayed onset of symptoms, as well as the onset of pain being associated with a non-work related activity. Dr. Paz opined that the mechanism described was not consistent with the findings on the MRI, which demonstrated no acute injury to the rotator cuff.

17. Dr. Paz testified at hearing as Respondents' medical expert and as a Level II Accredited Provider. Dr. Paz testified that the major findings on the April 11, 2017 MRI were a rotator cuff tear and arthritis within the acromioclavicular joint. Dr. Paz reviewed Dr. Fitzgibbons' opinion and that it appeared the doctor had not reviewed any

records prior to his evaluation. Dr. Paz testified that the mechanism documented by Dr. Fitzgibbons, lifting, was not consistent with the mechanism reported by Claimant during the IME. Dr. Paz likewise noted that the documentation by Dr. Fitzgibbons that the onset of shoulder pain was sudden was not consistent with the history given during the IME in regard to the alleged March 20 pulling event, but rather was consistent with the March 21 description of onset.

18. In Dr. Paz' experience, an acute rotator cuff tear would have immediate pain and symptoms. Dr. Paz testified that the mechanism of pulling in a rowing motion, as Claimant described, does not require the use of the rotator cuff, but instead the triceps muscle. Dr. Paz opined it was not medically probable that Claimant sustained an injury on March 20, 2017 based upon the given history and findings on the MRI. Dr. Paz acknowledged that the cause of Claimant's injury was not known, but that based upon the medical evidence, any injury was not work-related.

19. Claimant testified at hearing that he read Dr. Paz's IME report and that his statements in that report were accurate. Claimant reiterated the alleged mechanism of injury and onset of pain as being consistent with what he told Dr. Paz. Claimant testified that, after his shift on March 20, 2017, he went home and went to sleep. Claimant confirmed that he did not have symptoms until he was operating the manual gearshift of his personal vehicle, on March 21, 2017. Claimant confirmed his statement to Dr. Paz that he reported to Mr. Shafenberg that he developed pain while operating his gearshift on March 21, 2017.

20. Claimant testified that at present he could not lift his right arm up any higher than his left hand and could not go high with it, he could not do any yard work, he had a hard time getting cleaned up, shaving, and had to use his left arm and hand to compensate. Claimant testified that he had pain in his arm with activity and that his pain affects how he sleeps. Claimant testified that, in addition to working for Employer, he had worked at CarQuest, a/k/a Mountain Trucking, in 2016.

21. Claimant admitted at hearing that he had not disclosed several medical providers to Respondents in his answers to interrogatories. He acknowledged that he did not disclose treatment by Marylin Gandolph, PA-C, as his personal care provider, Dr. Kaye, Dr. Chitters for psychiatric care, or Centura Rehabilitation for substance abuse and rehabilitation in 2016. Claimant also acknowledged that he had not disclosed being Hepatitis C positive to Dr. Paz or providers at Workwell.

22. Aaron Shafenberg testified at hearing on Employer's behalf. Mr. Shafenberg testified that he has worked for Employer since 2006 and that he has been a business manager since April of 2016. Mr. Shafenberg testified that, prior to that, he was a full-time supervisor since 2008. Mr. Shafenberg testified that, as part of his job, he oversaw operations preload and local sort. Mr. Shafenberg testified that Claimant was part of the local sort and that he oversaw Claimant's work.

23. Mr. Shafenberg testified that Employer trains its employees to report work injuries as part of the "safe work methods training" on an annual basis. Employees are

trained to report injuries immediately so that they can receive appropriate and timely medical attention, so that the reported mechanism can be properly investigated, and so that Employer can prevent injuries to other employees. Mr. Shafenberg testified that Claimant was last trained in reporting procedures on June 1, 2016 and that if Claimant had followed proper procedures, he would have reported his alleged injury immediately to his direct supervisor, Scott Schwendeman, who would have then reported it to Mr. Shafenberg.

24. Mr. Shafenberg testified that Claimant came in approximately one hour early, prior to his shift, on March 21, 2017 and reported that he felt like he needed to go see a doctor. Mr. Shafenberg testified that he asked Claimant to clarify why, and he stated that he had an injury the previous night. Mr. Shafenberg testified that Claimant described that he was squatting/kneeling to unload packages, grabbed a package at opposite corners and was pulling into his "power zone," when his right hand slipped and jerked back. Mr. Shafenberg testified that Claimant never indicated that he was lifting or reaching over his head. Mr. Shafenberg testified that the "power zone" is the area between the armpits to approximately the mid-thigh or waist, and that employees are trained to lift within this zone to eliminate back and overreaching injuries.

25. Mr. Shafenberg testified that he asked Claimant why he didn't report his injury immediately and Claimant responded that he did not know that he was injured. Mr. Shafenberg was not aware that Claimant ever reported that he injured himself while operating the manual transmission of his vehicle. In regard to the March 24, 2017 disciplinary letter, Employer took no further disciplinary action and never considered terminating Claimant.

26. Claimant denied to Dr. Paz and failed to disclose in answers to interrogatories that he was diagnosed with and treated for insomnia, depression, anxiety, Bipolar, and ADD. He also denied to Dr. Paz and failed to disclose in answers to interrogatories that as late as February 2016 he was addicted to methamphetamine and using marijuana and that he had a history of IV drug use, cocaine use. He denied to Dr. Paz and failed to disclose in answers to interrogatories that he is Hepatitis-C positive. The ALJ finds that Claimant's denial of these conditions to Dr. Paz, and his failure to disclose them in written discovery diminishes his credibility. His use of cocaine and addiction to methamphetamines further diminishes his credibility.

CONCLUSIONS OF LAW

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

A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of*

Brighton v. Rodriguez, 318 P.3d 496 (Colo. 2014). Claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009).

In determining whether a claimant has met her burden of proof, the ALJ may resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). When determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness, probability or improbability, of the testimony and actions, the motives of the witness; whether the testimony has been contradicted; and bias, prejudice and interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936). The ALJ should consider an expert witness' special knowledge, training, experience, or research, and has broad discretion to determine the weight of evidence on this basis. *See Young v. Burke*, 338 P.2d 284 (Colo. 1959).

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Substantial evidence is that "quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is the sole province of the fact finder to weigh the evidence and to resolve contradictions in the evidence. *See Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). It is not necessary that the ALJ address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

Claimant has not established that it is more likely than not that his injury occurred as the result of the described event on March 20, 2017. Claimant did not have any symptoms, including pain or discomfort, at the time he alleges he was injured. Claimant continued to perform his work duties through the end of his shift, went home, and was able to sleep. Claimant testified that, as a result of his alleged injury, he had difficulty with multiple activities with the right arm and had trouble lifting. Claimant also testified that the alleged injury affected his sleep.

Claimant did not experience any symptoms until the acute onset of severe pain while operating the manual gearshift of his personal vehicle midday on March 21, 2017. Claimant then reported it as a work-related injury to Mr. Shafenberg without mentioning that he first experienced pain when shifting his vehicle. This is contrary to his hearing testimony and his report to Dr. Paz. Claimant admitted to Mr. Shafenberg that he did not immediately report he was injured because he did not know he was injured and did not have pain. As Dr. Paz explained, an acute rotator cuff tear would cause immediate

and severe pain. Based on the totality of the evidence, the ALJ finds and concludes that more likely than not, Claimant did not sustain a work related injury on March 20, 2017.

The treating providers who have causally related Claimant's injury to work appear to be unaware of the delayed onset in symptoms with an acute onset of pain after involvement in a non-related activity. Claimant admittedly withheld information concerning his prior treatment history and history of substance abuse, psychological issues, and Hepatitis C, despite being questioned about these issues. This history is relevant to the analysis of the Level II physician for diagnosis and treatment plan, per the Medical Treatment Guidelines.

Dr. Paz was aware of the reported mechanism and delayed onset. It is not evident that the evaluating surgeon was privy to this same information. Dr. Paz persuasively opined that the described mechanism was not consistent with a rotator cuff tear, as that structure would not be involved in the action Claimant described. Dr. Paz also opined that the delayed onset of symptoms was not consistent with an acute rotator cuff tear, despite the absence of an alternative mechanism for the injury observed on the MRI. Dr. Paz opined it was not medically probable that there was any injury to Claimant's right shoulder on March 20, 2017. Based upon the totality of the evidence, it is not likely that Claimant suffered a work-related injury to his right shoulder arising out of and occurring within the course and scope of his employment.

Respondents are liable only for those medical benefits which are reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Treatment for a work injury must be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Respondents are permitted to challenge causation and relatedness of the need for any treatment, despite having admitted liability for a claim. *Id*. Causation is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint*, 717 P.2d 965 (Colo. App. 1985).

Even in the event that Claimant experienced a compensable injury, it is not medically likely that the rotator cuff observed on the MRI, or the requested rotator cuff repair surgery, is causally related to an injury that arose out of and occurred within the course and scope of Claimant's employment on March 20, 2017.

ORDER

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

1. Claimant has failed to meet his burden to prove by a preponderance of the evidence that he sustained an injury which arose out of and occurred within the course and scope of his employment on March 20, 2017. Claimant's claim for compensation is denied and dismissed.

2. Even in the event that Claimant experienced a compensable injury, Claimant failed to meet his burden of proof by a preponderance of the evidence that the surgery requested to repair the rotator cuff repair tear is causally related. The surgery is denied.

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

DATED: November 22, 2017

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered injuries to her head, neck and upper extremities during the course and scope of her employment with Employer on March 24, 2017.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her head, neck and upper extremity symptoms.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $796.36.

FINDINGS OF FACT

1. Employer is a large supermarket with a Bakery Department. Claimant worked for Employer as an Assistant Bakery Manager. On March 24, 2017 she was rolling a cookie rack from her department to the freezer area. Claimant explained that the wheeled rack was about six feet high, contained 12 shelves, was filled with trays of frozen cookies and weighed several hundred pounds. Claimant commented that, upon reaching the freezer area, the rack spun, fell and struck her in the head, face and mouth.

2. Claimant noticed that she was bleeding from the impact and went to the restroom to clean her wounds. After she left the restroom Store Manager Brian Day told her to leave work for the day and apply ice to her face. Claimant then completed her shift and went home.

3. At home Claimant took some medications and fitfully slept during the night. She awoke to report to work at 3:00 a.m. on March 25, 2017. Claimant remarked that she was unable to perform most of her job duties and primarily iced donuts until approximately 7:00 a.m. She explained that she was suffering headaches, dizziness and nausea.

4. At 7:00 a.m. Michelle Young arrived at the store. Claimant recounted to Ms. Young that she had been injured at work on the previous day, felt horrible and desired medical care. Ms. Young directed Claimant to Concentra Medical Centers for treatment.

5. On March 25, 2017 Claimant visited Concentra for an examination. Claimant recounted that she had been rolling a large, metal rack to the freezer area at work. The rack tipped over and struck her in the face. Claimant reported a headache, vertigo and facial abrasions. Stephen Danahey, M.D. diagnosed Claimant with

contusions of the nose, oral cavity and forehead. He also remarked that Claimant might have suffered a slight concussion. Dr. Danahey released Claimant to modified duty employment.

6. On April 5, 2017 Claimant returned to Concentra for an evaluation. Physician's Assistant Stephanie Missey noted that Claimant's chief complaints were head, face and neck injuries. Claimant also reported dizziness, dry eyes, eye pain, a headache, nausea and vomiting. PA-C Missey assessed Claimant with a forehead contusion and acute, tension-type headaches.

7. Claimant testified that on April 18, 2017 she awoke in the middle of the night to use the restroom. While she was walking back to her bedroom she fell down and was found lying on the ground.

8. On April 18, 2017 Claimant visited Concentra and was evaluated by Physician's Assistant Nickolas Curcija, PA-C Curcija noted that Claimant had "a severe migraine and she got dizzy and passed out, since then she has been getting dizzy and vomiting. [Claimant] state[d] her left arm is tingling and numb." PA-C Curcija referred Claimant to an emergency room for additional treatment.

9. On April 18, 2017 Claimant presented to the Emergency Department at UC Health. She reported nausea, vomiting, a left-sided headache, posterior neck pain and dizziness that had started two days earlier. Claimant also noted diffuse, left-sided numbness in the face and left upper extremity. A CTA revealed a Grade 1 left vertebral artery dissection without fracture or cord involvement. The exam was otherwise unremarkable without vascular or acute intracranial abnormalities. After a neurosurgical consultation physicians recommended cervical/brain MRIs.

10. A brain MRI was negative and did not reflect any acute intracranial abnormalities or stroke. The cervical MRI also did not demonstrate any acute abnormalities. Claimant was cleared by neurology and discharged.

11. On May 11, 2017 Claimant underwent an independent medical examination with Stanley Ginsburg, M.D. Claimant reported that she had been struck in the face by a metal rack but did not actually fall or lose consciousness. At the examination Claimant noted head pain, neck pain, shoulder pain, nose pain and headaches. Dr. Ginsburg documented normal neurologic and cerebellar testing. He acknowledged that Claimant probably had suffered a head injury and cervical strain. Dr. Ginsburg recommended follow-up with a neurologist to ensure that Claimant was stable and had reached Maximum Medical Improvement (MMI).

12. On June 1, 2017 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Dr. Fall documented a small scar across the bridge of Claimant's nose. However, there was no swelling or scarring over the right eyebrow or on the lips. Dr. Fall remarked that Claimant was an excellent historian who recalled details from before and after the March 24, 2017 work accident. Claimant exhibited full

range of cervical motion with no radicular signs. She also had a normal neurologic examination.

13. Dr. Fall diagnosed Claimant with right forehead, nasal bridge and upper lip contusions as well as lacerations to the nasal bridge and upper lip that had resolved. She determined that Claimant did not sustain a cervical spine injury but instead had myofascial symptomology likely related to stress and guarding in the left upper quadrant. Dr. Fall was unable to attribute Claimant's reported lower extremity complaints to anything because there was no reported mechanism of injury to the lower extremities. Dr. Fall was also unable to attribute a possible left vertebral artery clot to the work-related injury, but sought to review additional records. She recommended biofeedback for muscle relaxation and to prevent guarding.

14. Claimant continued to periodically visit Concentra from May-July 2017 with continuing headaches. Claimant also reported new symptoms in her lower extremities and lower back. She was referred to a delayed recovery specialist for an evaluation.

15. Claimant requested a change of physician and visited neurologist Brian D. Williams, M.D. at SCL Physicians on August 15, 2017 for an examination. Dr. Williams noted that Claimant "has continued complaining of headaches, neck and upper back and shoulder pains, with intermittent dizziness that is provoked by certain head movements. At times, she feels quite anxious, and does not have control over her thoughts or feelings." Dr. Williams further noted Claimant had "some tenderness at the neck base at the C6-C7 level." He diagnosed Claimant with post-concussion syndrome, whiplash, a facial contusion, a cervical strain, myofascial muscle pain, vertebral artery stenosis and benign paroxysmal positional vertigo (BPPV). Dr. Williams documented that he was unsure whether the vertebral artery dissection had any bearing on the case because it was not consistent with her current symptoms. He recommended physical therapy.

16. On August 22, 2017 Claimant visited neurologist Alexander Zimmer, M.D. for an evaluation. Claimant complained of headaches, dizziness, nausea, vertigo and panic attacks. She also reported vision problems, bilateral posterior neck pain, rare lower back pain and occasional right foot swelling. A neurological examination yielded normal results and Claimant exhibited normal cervical range of motion. Dr. Zimmer recommended a psychological evaluation because it was possible Claimant was suffering from an underlying anxiety or adjustment disorder that was contributing to her headaches and other symptoms. He recommended a follow-up CT angiogram.

17. Nevertheless, Dr. Zimmer diagnosed Claimant with a concussion that occurred at work on March 24, 2017. He explained that "subsequent symptoms, including the headache, dizziness, nausea, abnormal mood including irritability and apathy, and somewhat situational visual symptoms are consistent with post-concussion headache syndrome. She also had an abnormal CT angiogram on [April 18, 2017]. This was consistent with trauma to the left vertebral artery, resulting in mild vertebral artery dissection. This was associated with increased neck pain, headache, dizziness, and transient left-sided symptomatology over the preceding 48 hours. The trauma to the left vertebral artery is consistent with her original head and neck injury." Dr. Zimmer also

remarked that Claimant had "some residual posterior neck pain consistent with cervical strain injury."

18. On August 23, 2017 Claimant returned to Dr. Williams for an examination. Claimant reported constant headaches that began at the base of her skull. She suffered intermittent dizziness that worsened with standing. Dr. Williams noted that Claimant's imaging on April 18, 2017 had revealed a vertebral artery anomaly that was a possible dissection or congenital in nature. He determined that the abnormality did not explain Claimant's predominant symptoms. Dr. Williams summarized that Claimant's symptoms were consistent with post-concussion syndrome and whiplash. He remarked that the documented mechanism of injury "consisting of a blow to the face provides a reasonable explanation for the ongoing symptoms, and it is appropriate to medically manage these symptoms."

19. On October 10, 2017 the parties conducted the post-hearing evidentiary deposition of Dr. Fall. Dr. Fall testified that Claimant was injured when one of the wheels locked on a metal cookie rack that weighed over 500 pounds. The rack spun and struck Claimant above her right eyebrow, in the center of her nose and in the center of her upper lip and gum. Dr. Fall assessed Claimant with right forehead, nasal bridge and upper lip contusions. Claimant also suffered lacerations to the nasal bridge and upper lip and myofascial pain in the left upper quadrant. She based her assessment on the mechanism of injury, the initial symptoms reported and her physical examination. Dr. Fall remarked that there were obvious lacerations and bleeding from Claimant's face that showed the trauma locations. She agreed with Dr. Danaher's initial assessment of a nose contusion, oral cavity contusion and forehead contusion. The records did not reveal that Claimant had suffered any facial or nose fractures.

20. Dr. Fall determined that Claimant likely did not suffer a concussion on March 24, 2017. Although she acknowledged that Claimant may have sustained a slight concussion, the mechanism of injury and Claimant's excellent recall suggested that Claimant did not suffer a concussion. Specifically, the mechanism of injury likely did not cause any significant movement of the head and the facial trauma would not have affected the brain. Dr. Fall explained that, even if Claimant had suffered a slight concussion, the symptoms would have initially been the most severe and improved over time until they had completely resolved. She commented that Claimant's symptoms were inconsistent with a concussion because she has continued to report additional complaints that have not resolved with the passage of time. Dr. Fall also remarked that imaging studies did not reflect any evidence of a brain injury. Finally, she determined that Claimant's continuing headaches and dizziness were not related to the March 24, 2017 accident. Notably, Claimant's headaches could have been caused by a variety of factors including stress and increased muscle tension.

21. Dr. Fall also explained that imaging studies revealed an abnormality in Claimant's vertebral artery. She noted that some providers referred to the condition as a Grade I vertebral artery dissection and others suggested it could be a vasospasm. The CT showed the vertebral artery had narrowed by approximately 25%. Dr. Fall determined that the results could have been a normal variant, a spasming, a small dissection or

tearing. She further remarked that the abnormality could have been caused by non-traumatic sources. Dr. Fall concluded that Claimant's symptoms were temporary and there were no ongoing neurological deficits. She determined that Claimant's symptoms related to the vertebral artery abnormality had resolved by the time of her discharge from the hospital. Dr. Fall agreed with Dr. Williams that Claimant's current symptoms were not causally related to the vertebral artery abnormality.

22. Dr. Fall explained that Claimant did not suffer a cervical strain while working for Employer on March 24, 2017. She noted that, based on the mechanism of injury, there was no torqueing, severe flexion or hyper-extension. Additionally, there were no initial complaints of neck pain and imaging was negative for an acute spinal injury. Dr. Fall testified that Claimant suffered from myofascial pain. She explained that with a cervical strain, something would have happened at the time of the injury, such as an overstretching leading to micro-tears. In contrast, myofascial pain does not require a specific inciting event or trauma and can be caused by stress or sleeping awkwardly. She explained that myofascial pain and a cervical strain have similar symptoms, including tension in the muscles and discomfort. Dr. Fall explained that a cervical strain is expected to improve and heal within three months. However, Claimant has continued to report severe neck pain approximately six months after her industrial accident. Dr. Fall recommended biofeedback for Claimant's myofascial pain to help with relaxation. She also agreed with Dr. Zimmer that Claimant could be suffering from an underlying anxiety or adjustment disorder that was contributing to her continuing headaches.

23. Claimant has demonstrated that it is more probably true than not that she suffered head injuries during the course and scope of her employment with Employer on March 24, 2017. Claimant was injured on March 24, 2017 when a large, metal cookie rack tipped over and struck her in the facial area. Dr. Danahey initially diagnosed Claimant with contusions of the nose, oral cavity and forehead. He also remarked that Claimant might have suffered a slight concussion. Claimant subsequently continued to report headaches and dizziness over the ensuing months. By August 15, 2017 neurologist Dr. Williams summarized that Claimant's symptoms were consistent with post-concussion syndrome and whiplash. Dr. Williams remarked that the documented mechanism of injury "consisting of a blow to the face provides a reasonable explanation for the ongoing symptoms, and it is appropriate to medically manage these symptoms." In a visit with neurologist Dr. Zimmer on August 22, 2017 Claimant complained of headaches, dizziness, nausea, vertigo and panic attacks. Although a neurological examination yielded normal results, Dr. Zimmer diagnosed Claimant with a concussion that occurred at work on March 24, 2017. He explained that "subsequent symptoms, including the headaches, dizziness, nausea, abnormal mood including irritability and apathy, and somewhat situational visual symptoms are consistent with post-concussion headache syndrome." Finally, at an independent medical examination Dr. Ginsburg documented normal neurologic and cerebellar testing. However, he acknowledged that Claimant probably suffered a head injury on March 24, 2017.

24. In contrast, Dr. Fall determined that Claimant's mechanism of injury and excellent recall suggested that she did not suffer a concussion. Specifically, the

mechanism of injury likely did not cause any significant movement of the head and the facial trauma would not have affected the brain. Dr. Fall explained that, even if Claimant had suffered a slight concussion, the symptoms would have initially been the most severe and improved over time until they completely resolved. She commented that Claimant's symptoms were inconsistent with a concussion because she has continued to report new symptoms that have not resolved with the passage of time. Dr. Fall also remarked that imaging studies did not reflect any evidence of a brain injury. Despite Dr. Fall's analysis, the persuasive reports of neurologists Drs. Williams and Zimmer as well as the opinion of Dr. Ginsburg suggest that Claimant continues to suffer post-concussive symptoms as a result of her March 24, 2017 industrial accident. She has consistently reported headaches, dizziness and other head symptoms that began when she was struck by a large cookie rack in the facial area while at work. Accordingly, Claimant's work activities on March 24, 2017 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment of her head injury.

25. Claimant has failed to establish that it is more probably true than not that she suffered injuries to her neck and upper extremities during the course and scope of her employment with Employer on March 24, 2017. Dr. Fall explained that Claimant did not suffer a cervical strain while working for Employer. She noted that, based on the mechanism of injury, there was no torqueing, severe flexion or hyper-extension. Additionally, there were no initial complaints of neck pain and imaging was negative for an acute spinal injury. Dr. Fall testified that Claimant suffered from myofascial pain. In contrast, Drs. Ginsburg, Williams and Zimmer noted that Claimant had suffered a cervical strain during the March 24, 2017 accident. However, Dr. Fall persuasively commented that with a cervical strain something such as overstretching leading to micro-tears would have happened at the time of the injury. Moreover, Dr. Fall explained that a cervical strain is expected to improve and heal within three months. Claimant has continued to report severe neck pain approximately six months after her industrial accident. Based on a review of the record and the persuasive analysis of Dr. Fall, it is unlikely that Claimant suffered a cervical injury on March 24, 2017 that continues to require medical treatment.

26. The record reflects that Claimant did not initially report any shoulder or upper extremity symptoms as a result of the March 24, 2017 accident. Claimant's upper extremity complaints have also varied over the course of her treatment. Finally, Claimant has not received any diagnoses related to her upper extremity complaints. Accordingly, Claimant's work activities on March 24, 2017 did not aggravate, accelerate or combine with any pre-existing condition to produce a need for medical treatment for her neck and upper extremity symptoms.

27. Claimant has established that it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical treatment for her head symptoms. The record reflects that Claimant has received authorized, reasonable and necessary medical treatment for her head complaints from various providers. However, Claimant's symptoms have persisted and she has not reached MMI. Moreover, Claimant continues to suffer headaches, dizziness and a myriad of other post-concussive symptoms that warrant additional treatment. Accordingly, Claimant shall receive

reasonable and necessary medical treatment for her head symptoms that is designed to cure or relieve the effects of her March 24, 2017 industrial injury.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the

natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered head injuries during the course and scope of her employment with Employer on March 24, 2017. Claimant was injured on March 24, 2017 when a large, metal cookie rack tipped over and struck her in the facial area. Dr. Danahey initially diagnosed Claimant with contusions of the nose, oral cavity and forehead. He also remarked that Claimant might have suffered a slight concussion. Claimant subsequently continued to report headaches and dizziness over the ensuing months. By August 15, 2017 neurologist Dr. Williams summarized that Claimant's symptoms were consistent with post-concussion syndrome and whiplash. Dr. Williams remarked that the documented mechanism of injury "consisting of a blow to the face provides a reasonable explanation for the ongoing symptoms, and it is appropriate to medically manage these symptoms." In a visit with neurologist Dr. Zimmer on August 22, 2017 Claimant complained of headaches, dizziness, nausea, vertigo and panic attacks. Although a neurological examination yielded normal results, Dr. Zimmer diagnosed Claimant with a concussion that occurred at work on March 24, 2017. He explained that "subsequent symptoms, including the headaches, dizziness, nausea, abnormal mood including irritability and apathy, and somewhat situational visual symptoms are consistent with post-concussion headache syndrome." Finally, at an independent medical examination Dr. Ginsburg documented normal neurologic and cerebellar testing. However, he acknowledged that Claimant probably suffered a head injury on March 24, 2017.

8. As found, in contrast, Dr. Fall determined that Claimant's mechanism of injury and excellent recall suggested that she did not suffer a concussion. Specifically, the mechanism of injury likely did not cause any significant movement of the head and the facial trauma would not have affected the brain. Dr. Fall explained that, even if Claimant had suffered a slight concussion, the symptoms would have initially been the most severe and improved over time until they completely resolved. She commented that Claimant's symptoms were inconsistent with a concussion because she has continued to report new symptoms that have not resolved with the passage of time. Dr. Fall also remarked that imaging studies did not reflect any evidence of a brain injury. Despite Dr. Fall's analysis, the persuasive reports of neurologists Drs. Williams and Zimmer as well

as the opinion of Dr. Ginsburg suggest that Claimant continues to suffer post-concussive symptoms as a result of her March 24, 2017 industrial accident. She has consistently reported headaches, dizziness and other head symptoms that began when she was struck by a large cookie rack in the facial area while at work. Accordingly, Claimant's work activities on March 24, 2017 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment of her head injury.

9. As found, Claimant has failed to establish by a preponderance of the evidence that she suffered injuries to her neck and upper extremities during the course and scope of her employment with Employer on March 24, 2017. Dr. Fall explained that Claimant did not suffer a cervical strain while working for Employer. She noted that, based on the mechanism of injury, there was no torqueing, severe flexion or hyper-extension. Additionally, there were no initial complaints of neck pain and imaging was negative for an acute spinal injury. Dr. Fall testified that Claimant suffered from myofascial pain. In contrast, Drs. Ginsburg, Williams and Zimmer noted that Claimant had suffered a cervical strain during the March 24, 2017 accident. However, Dr. Fall persuasively commented that with a cervical strain something such as overstretching leading to micro-tears would have happened at the time of the injury. Moreover, Dr. Fall explained that a cervical strain is expected to improve and heal within three months. Claimant has continued to report severe neck pain approximately six months after her industrial accident. Based on a review of the record and the persuasive analysis of Dr. Fall, it is unlikely that Claimant suffered a cervical injury on March 24, 2017 that continues to require medical treatment.

10. As found, the record reflects that Claimant did not initially report any shoulder or upper extremity symptoms as a result of the March 24, 2017 accident. Claimant's upper extremity complaints have also varied over the course of her treatment. Finally, Claimant has not received any diagnoses related to her upper extremity complaints. Accordingly, Claimant's work activities on March 24, 2017 did not aggravate, accelerate or combine with any pre-existing condition to produce a need for medical treatment for her neck and upper extremity symptoms.

Medical Benefits

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

12. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical

treatment for her head symptoms. The record reflects that Claimant has received authorized, reasonable and necessary medical treatment for her head complaints from various providers. However, Claimant's symptoms have persisted and she has not reached MMI. Moreover, Claimant continues to suffer headaches, dizziness and a myriad of other post-concussive symptoms that warrant additional treatment. Accordingly, Claimant shall receive reasonable and necessary medical treatment for her head symptoms that is designed to cure or relieve the effects of her March 24, 2017 industrial injury.

ORDER

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

1. Claimant suffered a head injury while working for Employer on March 24, 2017 and shall receive reasonable, necessary and related medical benefits designed to cure or relieve the effects of her industrial injury.

2. Claimant's claim regarding neck and upper extremity injuries is denied and dismissed.

3. Claimant earned an AWW of $796.36.

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

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

DATED: November 27, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reopen his workers' compensation settlement based upon fraud or mutual mistake of material fact.

PROCEDURAL ISSUES

After the hearing, Claimant filed his Proposed Specific Findings of Fact, Conclusions of Law, and Order. Claimant also filed an Exhibit List and attached additional exhibits for review by the ALJ.

Respondent, Pinnacol, filed a Reply to Claimant's Post-Hearing Filing and Objection to Submission of Additional Evidence. Pinnacol objected to Claimant submitting a partial copy of a letter from CMS responding to Claimant's request for a re-review of the Medicare Set-Aside and objected to the April 4, 2014, medical report from Dr. Kahn. Although Claimant did provide the ALJ the partial copy of the letter from CMS, Claimant did not provide the ALJ with the April 4, 2014, report from Dr. Kahn.

The hearing in this matter was held upon Claimant's application for hearing. Claimant had every opportunity to present any evidence he deemed necessary at the October 25, 2017, hearing. The documents Claimant submitted post-hearing were not dated recently and there is no indication that they were not available at the time of hearing. Moreover, Respondent, Pinnacol, chose not to call any witnesses at the hearing based upon the evidence submitted by Claimant at the hearing. Allowing Claimant to submit additional evidence would be prejudicial to Respondent, Pinnacol, since they would not have the opportunity to call any witnesses and present additional evidence, should they desire, in light of the additional evidence submitted by Claimant. Therefore, the post-hearing exhibits submitted by Claimant will not be considered by the ALJ.

FINDINGS OF FACT

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

1. Claimant is a 62 year old male who has a prior medical history of a severe right leg injury requiring multiple leg surgeries. He also has Parkinson's disease.

2. On May 10, 2006, Claimant sustained a compensable injury to his right knee while working on a Dav-Lin Construction project. (Resp. Exs. A, C) Claimant was diagnosed with meniscus tears in his right knee. On September 16, 2009, Kenneth Berliner, M.D. performed a right knee arthroscopic anterior cruciate ligament reconstruction and a medial and lateral meniscal tear debridement surgery. (Resp. Ex. B)

3. On June 28, 2010, Dr. John Obermiller opined that Claimant was at MMI for this claim, indicating Claimant's right knee was stable and showed no evidence of ongoing acute pathology. (Resp. Ex. G, bns 136-137)

4. On November 9, 2010, Fredrick V. Coville, M.D. performed a DIME. (Resp. Ex. D) He opined that claimant reached MMI on June 28, 2011 and assigned a 32% impairment rating for the right lower extremity. (Id. at bn 020) Dr. Coville recommended a regular home exercise program as maintenance care. (Id.) Pinnacol filed a Final Admission on January 27, 2011 admitting for the 32% scheduled rating, and reasonable and necessary maintenance care related to the claim. (Resp. Ex. E)

5. In 2011, Claimant was represented by Robert Trigg, Esq., and Pinnacol was represented by Thomas M. Stern, Esq. Claimant, through his attorney, entered into settlement negotiations with Pinnacol. On March 23, 2011, Mr. Stern emailed Mr. Trigg a copy of the MSA funding chart identifying what Pinnacol would propose to CMS should a conditional settlement agreement be reached. (Resp. Ex. F) A settlement agreement was ultimately reached, contingent upon CMS approval of the MSA funding.

6. On May 5, 2011, Pinnacol submitted a MSA proposal to CMS containing the proposed funding previously shared with Claimant's attorney. (Resp. Ex. G) The MSA proposal included a cover letter with the proposed funding, the FAL, a draft settlement agreement, rated ages, payment histories of all medical services and prescription medications provided to Claimant under the claim during the last two years, and the last two years of medical records in the claim. (Id.) Pinnacol proposed MSA funding of $110,011. (Id. at bn 036) The proposed MSA funding included (but was not limited to) yearly physician visits, yearly orthopedic visits, 24 total physical therapy visits, and 60 hydrocodone/acetaminophen per month for life. (Id.) The MSA did not include funding for a knee replacement surgery or topical cream. (Id.) The MSA proposal letter was sent to Mr. Trigg, Claimant's attorney, simultaneously with its submission to CMS. (Id. at bn 037)

7. Included in the medical records submitted to CMS was the November 9, 2010 DIME report of Dr. Coville, M.D., an orthopedic surgeon. (Resp. Ex. G, bns 143-146) Dr. Coville opined that "no specific further orthopedic surgery is indicated or needed at this point except that he needs to maintain strength in his quadriceps and hamstrings on a regular home exercise program, but he has been well instructed in this in the past." He also noted, "[t]here is a possibility that his mild

arthritic condition may progress and a knee replacement procedure might be needed in 15-25 years." (Id. at bn 144) Also included in the records to CMS was the February 15, 2011 report of Ronald F. Kahn, M.D., P.A., who noted that Claimant's medications had been reduced by 55%, and stated "we will decrease his medications to OTC only." (Resp. Ex. G, bns 179-181).

8. Claimant wrote letters to CMS disputing the MSA proposal on July 26, 2011, August 12, 2011, August 22, 2011, and August 28, 2011. (Resp. Ex. H) On July 26, 2011, Claimant disputed Pinnacol's MSA proposal for inadequate funding. (Resp. Ex. H, bns 201-203) He claimed that topical cream should have been included, pain medication should be funded at 120 per month, primary care visits should be monthly, physical therapy should be provided 3 times per week, and total knee replacement surgeries should be included. (Id. at bns 201-202) On that date, Claimant asked CMS to require $4,513,411.93 for the MSA. (Id. at bn 203) In his August 22, 2011, letter to CMS, Claimant revised his figures to CMS and asked CMS to require $5,036,476.91 for the MSA. (Id. at bn 204) The ALJ finds that Claimant first had knowledge of the proposed MSA funding on March 23, 2011 when Pinnacol emailed the proposed funding to his attorney. Claimant received additional notice of the proposed funding when his attorney was copied on the May 5, 2011 MSA proposal letter to CMS. Claimant testified that he knew what funding was proposed to CMS, and his knowledge is further evidenced by his July 26, 2011 letter to CMS disputing the proposed MSA.

9. On November 14, 2011, CMS issued an approval letter. (Resp. Ex. I) CMS stated, "instead of the submitter's proposed set-aside, CMS has determined that a different set-aside amount is necessary to protect Medicare's interest." (Id. at bn 207) CMS determined that a MSA of $90,357 adequately considered Medicare's interests. There were differences in the proposed MSA and the approved MSA which included CMS requiring funding for additional physician visits (12 per year for 1 year, and then 4 per year for 23 years) and lower pricing for hydrocodone/acetaminophen. (Id. at bn 214) Claimant and his attorney were both copied on the November 14, 2011 approval letter. (Id. at bn 209)

10. Despite Claimant's contention to CMS in his letters that $4,513,411.93 or $5,036,476.91 would have to be set aside to pay for his future medical treatment which he contended was reasonable, necessary, and related to his industrial injury, Claimant agreed to settle his workers' compensation claim, and waive his right to future medical benefits, for $29,477.19 plus the funding of a MSA in the amount of $90,357.

11. The parties then entered a Settlement Agreement which was signed by Claimant on December 19, 2011, and approved by the DOWC on December 30, 2011. (Resp. Ex. J) The funding terms of the CMS approval letter were incorporated into the Settlement Agreement as Exhibit B, Medicare Set-Aside Agreement. Paragraph 3 and subsection 3(h) of the Settlement Agreement specifically states that as consideration for the amount paid under the terms of the Settlement

Agreement, Claimant was giving up the right to claim all compensation and benefits to which Claimant might be entitled – including medical benefits. Paragraph 4 of the Settlement Agreement states, "The parties stipulate and agree that this claim will never be reopened except of the grounds of fraud or mutual mistake of material fact." Paragraph 9(A)(2) of the Settlement Agreement states, "the settlement proceeds include consideration for present and future medical care. The parties agree that the Respondents will not be responsible for any medical care needed by the Claimant, even if Claimant's future medical expenses are greater than, equal to, or less than the amount of the settlement." Paragraph 6 of the Medicare Set-Aside Agreement states, "Claimant understands that the funds placed in the Account do not include money for items not currently covered by Medicare. Claimant further understands that he has been compensated for these items under the Workers' Compensation Settlement and that if these expenses become covered by Medicare in the future Claimant will pay for them if Medicare refuses to do so. It is agreed by the parties that this agreement is not contingent upon, nor is it a condition precedent or subsequent to this agreement that Claimant's Medicare covered expenses in fact be equal to any amounts to be paid under this agreement, or that Medicare pay for any of Claimant's future medical expense related to the injuries settled in the Workers' Compensation Settlement." (Resp. Ex. J)

12. On January 28, 2015, after the parties settled the case, CMS issued an updated approval letter and requested additional funding of the MSA. (Claimant's Exhibit 1, February 6, 2015, Letter from Pinnacol Assurance to DHHS; Resp. Ex. S at bn 270)

13. On February 6, 2015, Pinnacol wrote to DHHS and stated that the $90,357 CMS determined was required to fund the MSA as set forth in the November 14, 2011, approval letter from CMS was final and could not be modified. (Claimant's Exhibit 1, February 6, 2015, Letter from Pinnacol Assurance to DHHS)

14. On March 18, 2015, CMS responded to Pinnacol. CMS agreed that the $90,357 they determined was required to fund the MSA as set forth in the November 14, 2011, approval letter could not be modified. CMS rescinded their January 28, 2015, updated approval letter. CMS stated that:

> The WCMSA funding has been restored to the originally approved amount in accordance with the 2011 WCMSA approval letter and the court approved settlement. As the re-review requests from 2013 and 2014 post-dated the court approved settlement, (which included the specific amount of WCMSA funding) those re-review requests cannot be considered once a court approves a settlement, including the WCMSA amount stated in the WCMSA approval letter, no changes to a WCMSA can be made.

(Resp. Ex. N)

15. Therefore, the amount determined by CMS to adequately consider Medicare's interests and fund the MSA remained at $90,357. (Resp. Ex. N)

16. Claimant testified, and the ALJ accepts Claimant's testimony, that he knew what MSA funding CMS was requiring and what funding was provided in the Settlement Agreement prior to signing the Settlement Agreement on December 19, 2011. Claimant understood that the MSA funding would be $90,357. Claimant specifically acknowledged that he knew that the MSA funding only included 60 hydrocodone pills per month, 24 physical therapy visits, that it did not include topical cream, nor a total knee replacement surgery; yet he signed the Settlement Agreement anyway. (Hrg. Trans. @ 9:20 a.m.) Claimant's testimony that he thought he had to sign the Settlement Agreement because his claim was "closed" is not credible. The FAL dated January 7, 2011, clearly admitted for ongoing maintenance care. Claimant was represented by counsel throughout the entire settlement process.

CONCLUSIONS OF LAW

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

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306. 592 P.2d 792 (1979); *People v. M.A*., 104 P.3d 273, 275 (Colo. App. 2004) The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005)

Reopening

Section 8-43-204(1) permits an injured worker to settle "all or part of any claim for compensation, benefits, penalties, or interest." Sections 8-43-204(1) and 8-43-303(1), C.R.S, provide that a settlement may be reopened on the ground of fraud or mutual mistake of material fact. The burden of proof is on the party seeking to reopen the settlement. Section 8-43-303(4), C.R.S.

Reopening based on fraud

To reopen a claim on grounds of fraud, Claimant must prove that the Respondent made false representations which Claimant relied upon to settle the claim. Section 8-43-303(1), C.R.S.; *Morrison v. Goodspeed*, 68 P.2d 458 (Colo. 1937). The elements of fraud or material misrepresentation are: (1) A false representation or concealment of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; (2) Made with knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; and (5) Action taken based on the false representation or concealment resulting in damage. *Arczynski v. Club Mediterrancee of Colorado, Inc.,* W.C. No. 4-156-147 (December 15, 2005) citing *Morrison v. Goodspeed, supra.*

In support of his attempt to reopen the settlement, Claimant alleges several errors in the MSA proposal Pinnacol submitted to CMS. Claimant alleges that Pinnacol incorrectly lowered the amount of medication in the MSA proposal. However, the February 15, 2011 medical report of Dr. Kahn generated three months before the MSA proposal indicates Claimant had reduced his medication by half and would be weaned to over the counter medications. (Resp. Ex. G, bn 179) Claimant contends that Pinnacol omitted a total knee replacement surgery from the MSA proposal. However, Dr. Coville opined Claimant did not need any further orthopedic intervention at that time. Claimant alleges the amount of physical therapy was misstated. However, the amount of total funding was clearly stated in the proposal, and Dr. Coville stated Claimant should utilize a home exercise program. Claimant alleges that topical cream was omitted from the proposal. However, no representation was made by Pinnacol that it would be included in the MSA proposal. Similarly with physician visits, Pinnacol clearly stated the number of physician visits they were proposing. As it turned out, CMS required more, but not as many as Claimant wanted.

These alleged errors or omissions, even if they were true, do not amount to fraud. Claimant did not prove that Pinnacol was aware of the "falsity" of their alleged errors or omissions. Claimant did not rely upon any of these alleged errors or

omissions in entering into the Settlement Agreement. Claimant had full knowledge of what was included in the MSA proposal, and Claimant also had full knowledge of the funding CMS was requiring in their approval letter dated November 14, 2011. He had this knowledge long before signing the settlement documents. Claimant understood that the Settlement Agreement provided him $29,477.19 plus $90,357 for the MSA which was far less than the $4 million dollars and $5 million dollars he petitioned CMS to require for the MSA. Pinnacol did not make any false representations regarding the MSA funding, and Claimant did not rely upon any false representations made by Pinnacol when he signed the December 30, 2011 Settlement Agreement. The ALJ concludes that Claimant has not proven by a preponderance of the evidence that Pinnacol made any false representation which he relied upon to settle the claim.

Reopening based on mutual mistake

To reopen a settlement based on mutual mistake of material fact, Claimant must show (1) the mistake was mutual, meaning "both parties must share the same [factual] misconception," (2) the mistaken fact must be material, meaning a fact which goes to the "very basis of the contract," and (3) the mistaken fact must be a past or present existing one, as opposed to "a fact to come into being in the future." *England v. Amerigas Propane*, 395 P.3d 766, 770 (Colo. 2017). The mutual mistake must relate to the nature of the known injuries, rather than "mistakes as to the future course and effects of those injuries." *Gleason v. Guzman*, 623 P.2d 378, 383 (Colo. 1981). In other words, the mistake "must relate to a past or present fact rather than an opinion or prophecy about the future." *Id.* Further, a mutual mistake is one which is reciprocal and common to both parties to an agreement. *Maryland Casualty Co. v. Buckeye Gas Products Co*., 797 P.2d 11 (Colo. 1990); *Gary v. Chevron U.S.A., Inc.*, 867 P.2d 117 (Colo. App. 1993).

The errors in the MSA alleged by Claimant are not mutual mistakes of material fact. Although Claimant alleges that certain treatment or funding should have been included in the MSA, he understood that it was not included when he entered into the Settlement Agreement. Regardless of how the final amount of the MSA was reached, it was the final amount of the MSA that was material to the settlement. Both parties understood what the final funding amount of the MSA would be at the time of settlement, and agreed to it.

The ALJ concludes that Claimant has not proven by a preponderance of the evidence that there were any mutual mistakes of material fact which the parties relied upon in entering into the Settlement Agreement.

Claimant's request to reopen the Settlement Agreement based upon mutual mistake of material fact and/or fraud is denied.

ORDER

It is therefore ordered that:

1. Claimant has not proven that his claim should be reopened for fraud. Claimant has not proven that his claim should be reopened due to a mutual mistake

of material fact. Claimant's petition to reopen the settlement is therefore denied and dismissed.

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

DATED: November 27, 2017

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

ISSUES

- Whether Claimant proved, by a preponderance of the evidence, he sustained an injury in the course and scope of his employment on December February 24, 2017.

- Whether Claimant proved, by a preponderance of the evidence, an average weekly wage in the amount of $755.02.

- Whether Claimant proved, by a preponderance of the evidence, he is entitled to ongoing temporary total disability benefits since February 27, 2017.

- Whether treatments provided by Concentra Medical Centers and their referrals, including Health Images Diamond Hill, John Aschberger, M.D., at U.S. Med Group, and Mark Winslow, D.O., at Rocky Mountain Osteopathic Medicine, including the recommendation by Dr. Aschberger for a "S1 injection," are reasonable, necessary and related to the compensable injury.

FINDINGS OF FACT

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

1. Claimant is 55 years old having a date of birth of August 24, 1962 and worked as a material handler for Employer beginning November 11, 2016.

2. Employer paid Claimant $14.00 an hour for regular hours and $21.00 for overtime. Between November 12, 2016 and February 24, 2017, Claimant worked 506 regular hours and 31 overtime hours, earning $7,084 in regular and $651 in overtime wages. Claimant's total pay for the 103 days was $7,735. Thus, Claimant's average daily wage was $75.10, and his average weekly wage was $525.70.[1]

3. On July 7, 2008, Claimant experienced a previous admitted industrial injury working as a material handler for another employer. Claimant's then ATP released him at maximum medical improvement ("MMI") on June 18, 2009, to "work without restrictions."

4. Claimant did not experience any medical symptoms related to his lumbar spine between his release to full-duty on June 18, 2009, and his workplace accident on February 24, 2017.

[1] While Respondents' exhibit AA purports to be a check history report for the period January 1, 2016 through March 23, 2017, the report actually includes Claimant's pay history beginning with the pay period ending November 19, 2016.

5. On February 24, 2017, Clamant reported to work and started his shift at his normal 4:30 a.m. start time. At approximately 7:45 a.m., as Claimant was standing on a lift, putting away product on the fourth shelf of a six shelf material storage unit with his arms outstretched, Claimant's lift was hit by another lift at ground level. Claimant was attached to the top of his lift by a safety harness. After Claimant's lift was struck by the other lift, he fell to his side where his fall was stopped by his left forearm hitting another shelf.

6. Claimant credibly testified that immediately after the accident he lowered the lift to the ground and began picking up product that had fallen from his lift on impact. Shortly thereafter Claimant developed low back pain which he then reported to his supervisor.

> Claimant sought same-day treatment at Concentra Medical Center where physician's assistant ("PA") Lacie Esser evaluated him. Claimant reported right side low back pain with pain and tingling down both legs. Ms. Esser assessed lumbar strain, radicular syndrome of lower limbs, and a history of back pain. Ms. Esser assigned a greater than 50% probability that the injury was work-related based on Claimant's symptoms and physical exam findings, which she determined were consistent with Claimant's mechanism of injury. She noted, "Appears to be an exacerbation/aggravation of pre-existing lumbar issues form 8 years ago."

Ms. Esser prescribed medications, physical therapy, and imposed work restrictions. Dr. Brian Counts supervises Ms. Esser, and he reviewed the chart, concurred with the final disposition, and signed the report.

7. On February 27, 2017 Employer required Claimant to fill out a workers' compensation "Employee Report of Incident" which Claimant filled out indicating that he had reported the injury at 7:45 a.m. and that a co-worker "ran into the bottom of the pallet with his lift."

8. On February 27, 2017 Employer filled out a "Employer's First Report of Injury," indicating that Claimant was struck, injuring his neck and back while "picking" and that Claimant was taken immediately to a clinic/hospital.

9. Claimant returned to Concentra on February 27, 2017 with continued pain in his low back and down his left leg. Physical therapy was providing some relief.

10. Claimant credibly testified Employer permitted him to work for two days following his injury accommodating his temporary work restrictions from Ms. Esser. But Employer ran out of work within Claimant's restrictions and sent him home. Employer told Claimant he could return to work when he no longer had restrictions. As of the hearing, Claimant remained under restrictions from both the medical providers at the Concentra Medical Facility and ATP John Aschberger, M.D.

11. On May 3, 2017 Claimant returned to Concentra where Ms. Esser noted that Claimant was "Doing the same as last visit, feels he has plateaued. Has pain across the glute and down bilateral legs to the knees (posterolaterally). Doing PT and HEP. No longer working, they sent him home as they had nothing for him to do." She continued his assessment s of Lumbar Strain, Radicular syndrome of lower limbs, and history of herniated intervertebral disc.

12. On March 16, 2017 Claimant underwent an MRI requested by Ms. Esser which MRI reflected multilevel degenerative disc disease and fact arthrosis. Specifically, "L3-L4 disc contacts the bilateral traversing L4 nerve roots with mild dorsal displacement of the left L4 root. L5-S1 disc contacts the bilateral traversing S1 nerve roots with mild dorsal displacement of the right S1 root."

13. On March 27, 2017, Dr. John Aschberger, M.D., at U.S. Med Group, evaluated Claimant on Ms. Esser's referral. Claimant consistently reported his mechanism of injury and onset of symptoms. Dr. Aschberger noted Claimant's prior back injury and MRI findings. Dr. Aschberger remarked that Claimant "may be a candidate to consider corticosteroid injection," and continued conservative treatment in the meanwhile.

14. On April 17, 2017 Claimant returned to ATP Aschberger, reporting continued low back pain and radiation of symptomology radiating into his bilateral lower extremities. Claimant reported no significant improvement with chiropractic care. Dr.Aschberger's Assessment provided:

> ASSESSMENT: Low back pain with lumbosacral strain. There have been symptoms of radiculitis. I had noted a decreased right patellar reflex with the last appointment, not replicated today.
>
> He does have MRI findings with disc bulging and apparent displacement of the S1 nerve root on the right, with narrowing identified to a mild degree at the left. Given the symptoms and the MRI findings and lack of gains, **I recommend a trial of an S1 selective nerve root block.** I did put in that referral for Mr. Love. Precautions and issues were reviewed. I will see him back one week after. I also initiated gabapentin. Precautions and side effects were reviewed. Recheck in 3 weeks. **I recommend restrictions of bending and twisting, restricted to occasional only, and lifting restrictions at 20 pounds.**

15. On May 2, 2017 Claimant returned to Dr. Aschberger whose assessment remained:

> Low back pain and lumbosacral strain with MRI findings of disc bulging and encroachment in the S1 nerve root**. He has positive response to provocative testing. His symptoms**

> **and findings coincide with the MRI scan.** Mr. Love would like to proceed with the injection and we will check on that for him. Recheck with myself in 3 weeks. No new prescription is provided today. I do not recommend any change in his work restrictions.

16. Between February 7, 2017 through July 19, 2017, Claimant underwent a series of 28 physical therapy visits at Concentra, which he testified he was unhappy with, as it did not provide any long-term relief like the relief he received from physical therapy in his 2008 claim.

17. On July 20, 2017 Claimant returned to ATP Aschberger who noted as follows:

> When I had last seen Mr. Love on 06/22/2017, I noted issues of a disc bulge at L5-S1, but examination findings and symptoms suggesting S1 irritation. **I have put in for an S1 selective nerve root block previously and that had not been authorized.** He continues with lumbosacral pain and radiation of symptomatology into the right leg. He has been taking gabapentin, which he has found to be helpful, but has had to limit the amount.
>
> ASSESSMENT
>
> 1. Lumbar Strain
> 2. Left lumbar radiculitis
> 3. Mild findings of S1 irritation on the right.
>
> He is a candidate to consider S1 injection as well. That is still pending approval and I will review the IME if forwarded. Otherwise, Mr. Love is currently status quo. I will see him back in 3 weeks.

18. Claimant credibly testified at hearing that he continues to have pain shooting down his left leg, which was not present prior to the events of February 24, 2017.

19. Respondents retained the services of Mark Paz, M.D., who opined that Claimant's mechanism of injury could not have caused Claimant's underlying degenerative spine condition. Dr. Paz testified, however, that the restrictions assigned by Ms. Esser at the first visit on February 24, 2017 were appropriate for the symptoms Claimant was complaining of, but that eventually those restrictions should have been lifted. Dr. Paz opined that although an injection recommended by Dr. Aschberger was reasonable and necessary, it was not causally related to the accident of February 24, 2017. Dr. Paz agreed that the 2009 report of ATP Mason, which addresses Claimant's L5-S1 disc bulge, indicated that in 2009 it was a "minor disc bulge" with no reference to a disc contacting the "bilateral traversing S1 nerve root." Although Dr. Paz indicated

that that condition could have been preexisting, the record is devoid of any symptoms or treatment for that body part after June 18, 2009.

20. Dr. Paz testified at hearing consistently with his report. He opined that the medical treatments rendered by Ms. Esser on February 24, 2017 were appropriate. Dr. Paz opined, however, that Claimant's long term problems and symptoms were from underlying degenerative disease. He acknowledged no medical records after June 18, 2009 support his opinion.

21. The ALJ finds it is more likely than not that Claimant's forklift was hit while at work on February 24, 2017 injuring Claimant, which resulted in symptoms requiring medical care which symptoms are still present. The ALJ is not persuaded by Respondents' expert's testimony to the contrary and finds the reports of Claimant's ATPs at Concentra including Ms. Esser, Darla Draper, M.D., and Dr. Aschberger, more persuasive.

22. Thus, the ALJ finds Claimant's claim is compensable.

23. The only evidence in the record regarding Claimant's employment is that Employer would not permit him to return to work after February 27, 2017, which evidence is supported by Ms. Esser's March 3, 2017 medical records where she indicates that his Employer "sent him home as they had nothing for him to do." Accordingly, Claimant is entitled to temporary total disability ("TTD") benefits from February 27, 2017 ongoing, until terminated pursuant to statute, subject to applicable offsets as Claimant testified he is receiving unemployment benefits.

24. The ALJ has found Claimant's average weekly wage was $525.70. Therefore, Claimant's weekly reimbursement rate is that amount multiplied by 66.33%, yielding $348.70.

25. The ALJ finds all medical care rendered by Concentra, which referred Claimant to Concentra Physical Therapy; which referred Claimant to Health Images at Diamond Hill; and referred Claimant to John Aschberger, M.D., at U.S. Med Group; who referred Claimant to Mark Winslow, D.O., at Rocky Mountain Osteopathic Medicine are reasonable, necessary and related. This includes Dr. Aschberger's request for injections.

26. Any determination concerning other issues is premature at this time, as a matter of fact.

CONCLUSIONS OF LAW

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

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

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

In order to recover benefits a claimant must prove that he sustained a compensable injury. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work-related functions. *Finn v. Indus. Comm'n,* 165 Colo. 106, 437 P.2d 542 (1968). It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

Based on the totality of the evidence, the ALJ concludes that Claimant has sustained his burden of proving by a preponderance of the evidence that he sustained a low back injury on February 24, 2017 and, therefore, is entitled to benefits under the Workers' Compensation Act.

Once compensability is established, Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *See Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ, and an ALJ's resolution should not be disturbed if supported by substantial evidence in the record.

Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). Respondents designated Concentra as the authorized provider.

The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The ALJ concludes the medical care rendered by Concentra and its referrals to Concentra Physical Therapy, Health Images at Diamond Hill, John Aschberger, M.D., at U.S. Med Group, and Mark Winslow, D.O., at Rocky Mountain Osteopathic Medicine are reasonable, necessary and related, as well as Dr. Aschberger's requested authorization for Claimant to have a spinal injection at the L1 level.

Claimant has established by a preponderance of the evidence that his earnings plus overtime equate to an AWW of $525.70.

As a matter of law, any determinations concerning other issues are premature.

ORDER

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

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury on February 24, 2017.
2. Claimant's has established by a preponderance of the evidence an average weekly wage off $525.70 at the time of his on-the-job injury.
3. Claimant established by a preponderance of the evidence he is entitled to temporary total disability benefits from February 27, 2017, ongoing, subject to applicable offsets.
4. Respondents shall pay for all medical care rendered to date by the physicians at Concentra Medical Facility, including their referrals for an MRI on March 16, 2017 at Health Images Diamond Hill, treatment with Dr. Aschberger at U.S. Med Group, and treatment with Dr. Winslow at Rocky Mountain Osteopathic Medicine as reasonable, necessary, and related, including ATP Aschberger's request for authorization for an S1 injection.
5. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.
6. Issues not expressly decided herein are reserved to the parties for future determination.
7. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 27, 2017

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

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that medical treatment he has received since October 15, 2014 (including but not limited to prescription medications, physical therapy, treatment provided by Delta County Memorial Hospital, and Dr. Ellen Price) constitutes reasonable medical treatment necessary to maintain claimant at maximum medical improvement (MMI).

- Whether respondents have demonstrated by a preponderance of the evidence that claimant experienced an intervening event on October 15, 2014 that was sufficient to sever respondents' liability and terminate claimant's maintenance medical care.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his low back on September 19, 2009. A magnetic resonance image (MRI) of claimant's lumbar spine showed a disk protrusion at the L4-L5 level. Dr. Ellen Price is claimant's authorized treating physician (ATP).

2. Claimant testified that since his injury on September 19, 2009 he has back pain all the time. Claimant also testified that he typically has pain that is 7 out of 10. Claimant testified that his current symptoms include pain in his low back that radiates into his legs. During this claim surgery was recommended. However, claimant elected not to pursue surgery.

3. On March 12, 2010, Dr. Ericson Tentori placed claimant at MMI and assessed a permanent impairment rating of 22% whole person. At that appointment, claimant reported ongoing significant low back pain and stiffness, ongoing bilateral pain and paresthesias in his lower extremities, and radicular symptoms in his right lower extremity. Dr. Tentori assessed claimant with L5 bilateral radiculopathy and associated anxiety and depression. Dr. Tentori opined that claimant would need maintenance medical treatment including acupuncture, an EMG/nerve conduction study, continued use of Lyrica and "any other medications deemed appropriate by Dr. Price".

4. Respondents filed a Final Admission of Liability (FAL) on May 14, 2010, admitting for the MMI date of March 12, 2010 and the 22% whole person impairment rating assessed by Dr. Tentori.

5. Since being placed at MMI claimant has received various maintenance medical treatment including acupuncture, physical therapy, prescription medications (including Tramadol, Lyrica), and a gym pass.

6. Claimant testified that on October 15, 2014, he was outside in his yard and bent over to pick up a garden hose. While in that act of bending, claimant felt pain in his low back that was so severe he "felt like passing out". Claimant was transported by ambulance to Delta County Memorial Hospital.

7. Medical records from Delta County Memorial Hospital from October 15, 2014 indicate that claimant was seen in the Emergency Department by Dr. Carl Malito. At that time, claimant reported sharp pain in his low back. Dr. Malito opined that claimant pulled muscles in his low back. Claimant was prescribed Vicodin and instructed to self-treat with ibuprofen, heat, and ice. Dr. Malito also instructed claimant to return to Dr. Price and continue with physical therapy.

8. Claimant was seen by Dr. Price on November 6, 2014. At that time, claimant described his attempt to pick up the hose and that "he felt quite weak and he nearly passed out". Dr. Price ordered 12 to 15 sessions of physical therapy to address sacroiliac (SI) joint pain and radiculopathy. Dr. Price also ordered an MRI of claimant's lumbar spine.[1] Claimant returned to Dr. Price on December 4, 2014 and reported that he was doing better. On that date, Dr. Price described the October 15, 2014 incident as an exacerbation of claimant's low back radiculopathy.

9. Claimant was again seen by Dr. Price on March 5, 2015. At that visit Dr. Price opined that claimant would likely "have events at least once a month where he is going to need treatment". At that time, Dr. Price also stated her opinion that the October 15, 2014 incident was not a new injury, but "simply an exacerbation of [claimant's] old injury".

10. On June 2, 2016, Dr. Marc Steinmetz performed a review of claimant's medical records and opined that the October 15, 2014 hose incident was a new injury that caused a permanent aggravation of claimant's condition. In support of this opinion, Dr. Steinmetz notes that claimant was not undergoing physical therapy prior to October 15, 2014. However, following that incident, claimant was referred to physical therapy and had an increase in his need for narcotic pain medications. Therefore, Dr. Steinmetz reasoned that claimant's private medical insurance should be responsible for the October 2014 emergency room visit and other related medical treatment.

11. Based upon the opinion of Dr. Steinmetz, respondents argue that on October 15, 2014 claimant suffered an intervening injury, thus severing respondents' liability for medical treatment. As a result, respondents have denied all medical treatment for claimant since October 15, 2014.

[1] As of the date of Dr. Price's deposition on May 22, 2017, the ordered MRI had not been performed.

12. Dr. Price testified by deposition in this matter. Dr. Price confirmed her opinion that the October 15, 2014 incident was not a new injury, but rather a "re-exacerbation" of claimant's September 19, 2009 work injury. Dr. Price testified that it is "inevitable" that claimant will experience exacerbations of his symptoms.

13. Dr. Price also testified that it is her opinion that claimant has ongoing maintenance medical treatment needs related to the September 19, 2009 work injury. These include continuing to take the medications Lyrica, Zoloft, and tramadol. Dr. Price testified that claimant should receive acupuncture once a month, pool therapy, and a gym pass. In addition, Dr. Price opined that claimant will need 6 to 8 weeks of physical therapy when he experiences a flare-up of his low back symptoms.

14. The ALJ credits the opinions of Dr. Steinmetz over the conflicting opinions of Dr. Price and finds that the October 15, 2014 incident was a new injury to claimant's back and not an exacerbation of claimant's work injury. The ALJ finds that the October 15, 2014 incident resulted in an emergency room visit, physical therapy treatment, and an increase in claimant's use of narcotic medications establish evidence of a new injury. The ALJ also finds that respondents have demonstrated that it is more likely than not that the October 15, 2014 incident constituted an intervening event that severed respondents' liability.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., (2016). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

5. If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 384, 30 P.2d 327, 328 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

6. As found, respondents have demonstrated by a preponderance of the evidence that on October 15, 2014 claimant suffered an intervening event that was sufficient to sever respondents' liability and terminate claimant's maintenance medical care. As found, the opinions of Dr. Steinmetz are credible and persuasive.

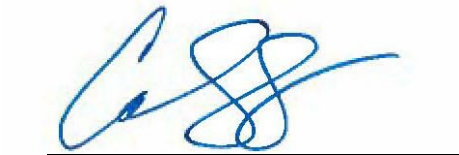
ORDER

It is therefore ordered that:

1. On October 15, 2014 claimant suffered an intervening event that was sufficient to sever respondents' liability and terminate claimant's maintenance medical care.

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

Dated: November 27, 2017



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

ISSUES

The issues to be determined by this decision are:

1. Whether Claimant proved by a preponderance of the evidence that on February 3, 2016, he sustained a right knee injury or aggravation of his preexisting right knee condition arising out of and in the course and scope of his employment with the Employer; and

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits, including the right knee surgery recommended by Dr. McNair, related to his February 3, 2016 work injury.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 31 year old man who has been employed by Employer since October 2014. At the time of a right knee injury which is the subject of this claim, Claimant was employed by Employer as a mechanical engineer.

2. On February 3, 2016, Claimant was walking down an icy sidewalk between buildings at work when he slipped on ice and injured his right knee. As a result, Claimant had right knee pain, swelling, and instability. Claimant testified credibly at hearing that when his knee did not improve over the next one to two weeks, he went to the employee health clinic at work and completed an incident report on February 16, 2016. Claimant testified that he was referred to physical therapy but did not start right away because he was waiting for Respondents to get it setup. Claimant testified that while waiting for the physical therapy to begin, he stopped doing physical activity due to right knee pain, swelling and instability.

3. On March 4, 2016, Justin Adams, Occupation Health RN for the Employer, completed a First Report of Injury detailing Claimant's February 3, 2016, injury. Claimant reported he was walking east of building 330 when he slipped on ice and caught himself on a railing. Claimant reported right knee pain and discomfort. Claimant identified Andrew Hayes as a witness to the accident. Claimant reported the injury to the Employer on February 16, 2016.

4. On March 28, 2016, Claimant underwent his first physical therapy appointment at the Functional Performance Center and reported right knee pain (2-6/10) and instability. Claimant reported that when he was injured, his knee twisted to the right while forcefully extended. Claimant report he had mild pain immediately following the injury and that over the next two weeks his symptoms became severe, so much so that he limped and had to limit his time on his feet. Claimant reported he noticed swelling and bruising for about a week after the injury. Claimant also reported several episodes of instability and intermittent episodes of catching and locking. From March 30, 2016, through July 11, 2017, Claimant underwent seven additional physical therapy sessions and consistently reported right knee pain, instability and popping.

5. On April 28, 2016, Claimant treated with Andrew Plotkin, M.D., at the Employer's Wellness Center regarding his right knee injury. Dr. Plotkin recommended a right knee MRI to rule out a meniscus tear.

6. On May 10, 2016, Claimant underwent a right knee MRI, which revealed "subchondral marrow edema in the central weight bearing aspect of the lateral tibia with a grade 4 chondral fissure overlying and grade 3 chondral fissure in the patellar apex with irregularity but no definite full-thickness extension."

7. On May 25, 2016, Claimant treated with Patrick McNair, M.D., an orthopedic surgeon, and reported the nature and mechanism of his injury. Claimant reported right knee pain, stiffness, weakness, and popping and increased symptoms with increased function. Claimant reported he has had persistent right knee pain, locking and catching since the injury. Dr. McNair noted that Claimant's right knee shows signs of an effusion and that he has a significant amount of patellofemoral crepitance. Dr. McNair reviewed the right knee MRI and noted Claimant has a "significant cartilage injury underneath the patella as well as to the articular surface of the lateral tibial plateau with surrounding edema." Dr. McNair added that Claimant "has an interesting MRI for his young age." Dr. McNair recommended a steroid injection to decrease the inflammation associated with the effusion. Dr. McNair noted that if the injection does not provide long lasting relief, then the next option would be surgical intervention. Dr. McNair gave Claimant the injection.

8. On June 6, 2016, Claimant treated with Dr. Plotkin, who noted Claimant has been followed at the Wateron WC clinic for his February 2016 right knee injury, when he slipped on an icy hill. Claimant reported approximately 30% improvement from the right knee injection but continued pain between 2-5/10. Claimant reported that his knee occasionally feels like it is going to give out. Claimant reported he has been active biking, trail running, and cycling. On physical examination, Dr. Plotkin noted mild tenderness of the far lateral joint line with some crepitus. Dr. Plotkin reviewed the right knee MRI and noted the subchondral bone marrow edema on the lateral tibial weight bearing surface. Dr. Plotkin recommended Claimant give it a few more weeks to see how he responds to the injection and to decrease activity. Dr. Plotkin also noted that Claimant is on chronic opiate pain medication due to a jaw surgery, which may mask some of his symptoms.

9. On July 5, 2016, Claimant returned to Dr. McNair and reported the injection benefited him marginally, not significantly, and that he still has right knee pain, instability, and swelling. On physical examination of Claimant's right knee, Dr. McNair noted patellofemoral crepitus, trace effusion, and tenderness over the lateral pole of the patella, as well as the lateral joint line. Dr. McNair opined that before Claimant undergoes any surgery, he needs to undergo a focused physical therapy program. Dr. McNair added that if physical therapy does not work, then he will likely proceed with arthroscopic surgery.

10. On July 7, 2016, Claimant treated with Dr. Plotkin and reported continued, sharp lateral right knee pain and the occasional feeling that his knee is going to give out. Claimant reported that he has noticed some increased right knee pain, which he related to decreasing his opioid pain medication from his jaw surgery. Claimant reported he has not done any trail running in a few weeks. Dr. Plotkin agreed with Dr. McNair that Claimant needed an aggressive physical therapy program.

11. On July 8, 2016, John Raschbacher, M.D., at Respondents' request, he performed a medical records review and opined that Claimant's right knee MRI revealed a chronic condition, no acute injury, that Claimant does not have any acute or discrete findings attributable to the work-related injury and that the recommended surgery is not related to Claimant's work injury.

12. On July 19, 2016, Claimant had a physical therapy appointment and reported right knee pain and instability and that he went for a run and felt increased right knee symptoms. From July 21, 2016, through September 19, 2016, Claimant underwent 10 physical therapy sessions and consistently reported right knee pain, instability and increased pain with increased function.

13. On August 16, 2016, Claimant treated with Dr. McNair and reported continued right knee pain and instability. Claimant reported that his right knee is very painful during and after exercise. Claimant reported his right knee is very painful while bike riding and that he is not able to run. Dr. McNair noted that Claimant had failed conservative management and that Claimant "is not able to do many of the activities he likes to do without pain" and that he is "not able to do any of the activities that he enjoys outside of daily activities." Dr. McNair recommended Claimant proceed with a right knee arthroscopy and chondroplasty and requested authorization from Respondents.

14. On August 24, 2016, Claimant returned to Dr. Plotkin and reported continued right knee pain and increased discomfort with activities such as running. Claimant reported he has decreased his running due to his right knee pain. Dr. Plotkin noted he reviewed Dr. Raschbacher's IME report. Dr. Plotkin opined:

> I am in agreement with Dr. Raschbacher that [Claimant] has significant degenerative chondral fissuring of the right knee that is most likely chronic in nature. I feel it is probable that the chondral fissuring noted on the MRI scan predated the work-related injury on 2/3/2016 and unlikely to have

> resulted from the work injury, given the mechanism of injury. Given [Claimant's] mechanism of injury, presentation and MRI findings, I feel it is most likely that the patient experienced an aggravation of the underlying degenerative process in his right knee. If [Claimant] has had previous evaluation or treatment of his right knee, a review of the medical records would help clarify [Claimant's] preexisting knee pathology and any current recommendations for surgery. Claimant's Exhibit 6, pages 29-30

15. On September 26, 2016, Claimant treated with Dr. Plotkin, who noted Claimant's ongoing right knee issues and maintained Claimant's treatment plan.

16. On January 17, 2017, Respondents filed a Notice of Contest. On January 26, 2017, Claimant applied for a Hearing on compensability and reasonable and necessary medical benefits. On February 24, 2017, Respondents filed a Response to Claimant's Application for Hearing and did not endorse any other issues relevant for purposes of this Order.

17. On April 28, 2017, Dr. Raschbacher performed an IME for Respondents and prepared a report of the same date. Dr. Raschbacher noted Claimant's mechanism of injury, post-injury symptoms, activities and treatment, and preexisting condition as reflected in the right knee MRI. Claimant reported he can only do limited recreational activities and exercising as compared to what he could do prior to the injury. Claimant reported he can only do limited snowboarding, limited biking and running, and limited weight training. These activities are limited due to Claimant's right knee pain, instability, popping and swelling. Claimant denied any prior right knee injuries or treatment. Dr. Raschbacher opined the right knee MRI results revealed a preexisting, non-work related condition and that the mechanism of injury did not produce any significant objective pathology attributable to the date of injury. Dr. Raschbacher opined that no further treatment is related to Claimant's work injury.

18. At hearing, Claimant credibly testified that he works as a senior mechanical engineer for Employer and that his work for Employer is considered classified. Claimant testified that prior to his work injury he was very active. His recreational activities included running, mountain biking, cycling, hiking and snowboarding, among others. Claimant testified that he would cycle approximately two to three days a week, ride his road bike approximately 10 miles per week, and ran a few miles multiple days per week. Claimant testified that prior to February 2016 he never had any injuries, problems or treatment of his bilateral knees and that he never had any issues with his right knee that would limit his ability to snowboard, bike, run or do anything else.

19. Claimant credibly testified at hearing consistent with his reports to Employer and to medical providers. On February 3, 2016, he was walking down a steep, icy sidewalk between buildings at work with a coworker, Andrew Hayes, when he slipped and caught himself on the railing. Claimant testified that after the work injury he stopped snowboarding, cycling and mountain biking until he could start physical therapy. Claimant testified he had to wear a knee brace and his athletic activities were drastically

limited. Claimant testified that he has not returned to the level of physical activity he was capable of prior to his work injury.

20. On September 22, 2017, Dr. Raschbacher testified by post-hearing deposition. Dr. Raschbacher testified as an expert in the field of occupational medicine. Dr. Raschbacher testified Claimant's right knee MRI revealed chondral fissuring, which are lesions in the cartilage. Dr. Raschbacher testified the February 3, 2016, work injury did not cause the chondral fissuring. Dr. Raschbacher testified chondral fissuring is a chronic condition that develops over time. Dr. Raschbacher attributes Claimant's ongoing right knee issues to his chronic condition, not the February 3, 2016, right knee injury. Dr. Raschbacher testified the surgery recommended by Dr. McNair is not reasonable or necessary on a work-related basis.

21. On the other hand, Dr. Plotkin, Claimant's authorized treating physician, attributes Claimant's ongoing right knee problems and need for treatment to the February 3, 2016 incident. Dr. Plotkin opined that the February 3, 2016, incident aggravated Claimant's preexisting, previously asymptomatic right knee condition. Dr. McNair did not perform a causation analysis. His medical reports and treatment recommendations seems to agree with Dr. Plotkin's conclusion that the February 3, 2016 injury aggravated Claimant's preexisting right knee condition.

22. The ALJ finds Dr. Plotkin's opinion, as authorized treating physician, to be more credible and persuasive than Dr. Raschbacher's opinion. The ALJ finds that Claimant proved by a preponderance of the evidence that the February 3, 2016 work injury aggravated Claimant's preexisting right knee condition and that Claimant is entitled to reasonable and necessary medical benefits, including the surgery recommended by Dr. McNair, needed to cure and relieve him from the effects of that injury.

CONCLUSIONS OF LAW

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

The purpose of the Workers' Compensation Act (Act), Sections 8-40- 101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the right of the Claimant nor in favor of the rights of Respondents. § 8-43- 201(1), C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43- 201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc., v. Indus. Claim. Apps. Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses'; testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205, 1209 (Colo. 1936); CJI, Civ. 3:17 (2013).

COMPENSABILITY

A compensable injury is one that arises out of and occurs within the course and scope of employment. Section 8-41- 301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997). An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Indus. Claim Apps. Office,* 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Indus. Comm'n*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. Id.

As found, Claimant proved by a preponderance of the evidence that on February 3, 2016, he injured his right knee in the course and scope of his employment with the employer.

MEDICAL BENEFITS

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41- 301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.*, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required*. Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co*., supra, 236 P.2d at 295-296. All results

flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

As found, Claimant proved by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits, including the right knee surgery recommended by Dr. McNair, related to his February 3, 2016, work-related right knee injury.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence that on February 3, 2016, he sustained a right knee injury arising out of and in the course and scope of his employment with the Employer.

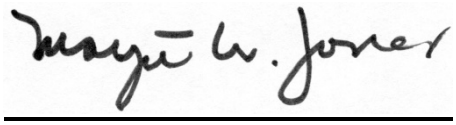
2. Claimant proved by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits, including the surgery recommended by Dr. McNair, related to his February 3, 2016, work-related right knee injury.

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

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

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

DATED: November 28, 2017



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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that her right knee, right shoulder and bilateral hip symptoms are causally related to her October 7, 2016 industrial accident.

2. Whether Claimant has proven by a preponderance of the evidence that the proposed PRP injections for her left hip are reasonable, necessary and causally related to her October 7, 2016 industrial accident.

FINDINGS OF FACT

1. Claimant worked for Employer as a Traffic Controller. On October 7, 2016 she was working at a road construction site. Although she flagged an automobile driver to stop, the vehicle did not appear to slow down. Claimant turned and ran but was struck from behind by the vehicle and fell to the ground on her right side. She immediately experienced pain in her neck and lower back.

2. Claimant initially visited HealthOne Occupational Medicine and Rehabilitation for an evaluation. However, she was referred to an emergency room. Claimant underwent x-rays of her lumbosacral and cervical spine that were negative.

3. On October 10, 2016 Claimant returned to HealthOne for an evaluation. After a physical examination Claimant was diagnosed with the following: (1) a lumbosacral contusion; (2) a cervical strain; (3) a right shoulder contusion; and (4) a right knee contusion. HealthOne determined there was a "greater than 51% probability that [the injuries were] work related."

4. On October 24, 2016 Claimant visited Authorized Treating Physician (ATP) Roberta P. Anderson-Oeser, M.D. for an initial consultation. Claimant reported that she was injured on October 7, 2016 when she was struck by a vehicle from behind while working as a Traffic Controller at a construction site. She landed on her right side and experienced immediate pain in her neck and lower back. Claimant noted that during the ensuing days she suffered pain in her right knee, right hip and right shoulder. However, Claimant remarked that her shoulder, hip and knee symptoms were improving and only her lower back pain persisted.

5. Dr. Anderson-Oeser diagnosed Claimant with contusions of the right knee, right shoulder, lower back and pelvis. She also commented that Claimant suffered bilateral sacroiliac joint strains, a cervical strain and muscle spasms. Dr. Anderson-Oeser continued Claimant's physical therapy, home exercise program and modified work duty. She also prescribed medications and a left sacroiliac joint injection.

6. On October 25, 2016 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged that Claimant was entitled to receive medical benefits and Temporary Total Disability (TTD) benefits as a result of her October 7, 2016 accident.

7. On November 9, 2016 Claimant visited Robert Watson, M.D. at HealthOne for an examination. Dr. Watson noted that the visit involved a recheck of Claimant's neck, back, right shoulder and right knee symptoms. He noted that Claimant's neck and back remained fairly sore but her right shoulder and right knee were improving. Dr. Watson also mentioned "a little bit of clicking" in Claimant's right knee but her pain was diminishing. He diagnosed Claimant with the following: (1) a lower back contusion; (2) a cervical strain; (3) a right knee strain; and (4) a right shoulder strain. Dr. Watson recommended physical therapy, massage therapy and medications. He also continued Claimant's work restrictions of only sedentary job duties.

8. On December 5, 2016 Respondents filed a second GAL The GAL recognized that Claimant was entitled to receive medical benefits, TTD benefits for the period October 10, 2016 through November 28, 2016 and Temporary Partial Disability (TPD) benefits from November 29, 2016 until terminated.

9. On January 10, 2017 Claimant returned to Dr. Anderson-Oeser for an examination. Claimant mentioned bilateral hip pain, but was most concerned about her left buttocks and hip area. She noted frequent popping in her left hip with flexion and adduction. Claimant acknowledged that she had not previously reported popping in her left hip.

10. On January 31, 2017 Claimant underwent an MRI of her left hip based on pain and instability. The MRI reflected a "mild cam type of acetabular impingement" and possible "anterosuperior labral tear." Claimant also exhibited mild chondral degeneration and "mild insertional tendinosis on the greater trochanter with mild underlying trochanteric bursitis."

11. On February 16, 2017 Claimant visited orthopedic surgeon John Xenos, M.D. for an evaluation of left hip pain. Claimant noted that her left hip symptoms were acute and began when she was struck by a vehicle at work on October 7, 2016. She emphasized that she had been experiencing continuous left hip pain since the date of her accident.

12. On April 18, 2017 Claimant returned to Dr. Xenos for an examination. Claimant reported that she suffered from swelling, pain, numbness, weakness and stiffness in her left hip area. She commented that her symptoms were aggravated by daily activities. Dr. Xenos diagnosed Claimant with degenerative osteoarthritis of the left hip. He commented that Claimant had received conservative medical treatment, including medications and physical therapy, but had not obtained relief. Dr. Xenos thus summarized that "her current condition represents a precipitation, aggravation and exacerbation of preexisting left hip degenerative joint disease beyond normal progression." He recommended left hip PRP injections and possible surgical intervention in the form of a total hip arthroplasty.

13. On April 28, 2017 Claimant underwent an independent medical examination with Timothy O'Brien, M.D. After performing a medical records review and conducting a physical examination Dr. O'Brien determined that Claimant suffered the following musculoskeletal injuries when she was struck by a vehicle while working for Employer: (1) a minor cervical spine strain/sprain; (2) a minor lumbosacral spine strain/sprain; and (3) a gluteal contusion. He concluded that the October 7, 2016 work accident did not result in a right shoulder injury, right knee injury or bilateral hip injuries. The accident also did not cause a "radiculopathy due to a cervical or lumbar disc herniation."

14. Dr. O'Brien explained that Claimant only complained of neck and lower back pain shortly after the October 7, 2016 accident when she visited the emergency room. She did not mention shoulder, hip or knee pain. Dr. O'Brien reasoned that tissue injuries from a traumatic accident manifest immediately after the event. He remarked that it is nearly impossible to have tissue tears due to energy dissipation and not be aware of the immediate onset of pain. Dr. O'Brien commented that, when tissue tears from trauma, the nerves in the area also tear and the individual recognizes a painful stimuli. He determined that Claimant's delayed onset of pain in the hip, knee and shoulder areas "were all manifestations of her personal health although they were nonorganic in nature." Dr. O'Brien also stated that Claimant has exhibited little objective evidence or findings consistent with a traumatic injury. Instead, Claimant has only mentioned subjective complaints that are not reproducible. Finally, all of Claimant's imaging studies have been normal.

15. In specifically addressing Claimant's right knee and right shoulder complaints, Dr. O'Brien reiterated that the symptoms were not reported until days after the October 7, 2016 accident and thus likely not work-related. Moreover, he commented that in a November 8, 2016 visit with Dr. Watson Claimant exhibited full right shoulder range of motion and provocative testing was normal. Moreover, although there was some clicking in the right knee, Claimant exhibited full range of motion and no objective abnormalities. Accordingly, Dr. O'Brien reasoned that, regardless of causation, Claimant's right knee and right shoulder pain had resolved by November 9, 2016.

16. In discussing Claimant's bilateral hip complaints Dr. O'Brien disagreed with Dr. Xenos' suggestion that she suffered post-traumatic osteoarthritis as a result of the October 7, 2016 accident. Dr. O'Brien explained that the delayed reporting of hip symptoms suggested that Claimant did not suffer a hip injury at work. He thus summarized that Claimant's hip degenerative arthritis "is a personal health issue and not causally related to the work incident." Accordingly, all of Dr. Xenos' treatment recommendations were not causally related to the October 7, 2016 industrial incident.

17. Claimant testified at the hearing in this matter. She explained that she had been suffering from bilateral hip pain since she was struck by a car on October 7, 2016. Claimant noted that her right hip symptoms improved over time but her left hip pain continued. She acknowledged that her right knee and right shoulder symptoms resolved approximately six weeks after her work accident.

18. On October 3, 2017 the parties conducted the post-hearing evidentiary deposition of Dr. O' Brien. Dr. O'Brien maintained that Claimant suffered the following musculoskeletal injuries when she was struck by a vehicle at work: (1) a cervical spine strain/sprain; (2) a lumbosacral spine strain/sprain; and (3) a gluteal contusion. He concluded that the October 7, 2016 work accident did not cause a right shoulder injury, right knee injury or bilateral hip injuries. Dr. O'Brien explained that the delayed onset of pain in the right shoulder, right knee and bilateral hips lacked an anatomic basis and thus the symptoms were not causally related to the October 7, 2016 accident. Furthermore, Dr. O'Brien remarked that Claimant has exhibited migratory pain during her course of medical treatment that did not correlate with her initial injury complaints.

19. Dr. O'Brien reasoned that diagnostic testing revealed Claimant suffers from degenerative changes consistent with her age of 46 years. He specifically determined that Claimant did not suffer an aggravation of a pre-existing degenerative condition when she was struck by a vehicle on October 7, 2016. Dr. O'Brien noted that Claimant would have known whether she aggravated her pre-existing degenerative conditions because she would have experienced pain in affected body parts immediately after the accident. He remarked that there are very specific nerve endings that connect to the brain, and when tissues and nerves tear, there is a painful stimulus sent to the brain that delineates the location of the injury. Because Claimant was able to detect pain in her neck and lower back immediately after the accident, she was capable of experiencing pain in other body parts but failed to report additional symptoms.

20. Dr. O'Brien specifically addressed Dr. Xenos' request for left hip PRP injections. Reasoning that the injections are typically unsuccessful and contraindicated, Dr. O'Brien concluded that the procedure for Claimant was not reasonable and necessary. He remarked that there has been no proof that the injections create new cells in hips and knees. Furthermore, there are no scientific studies demonstrating that PRP injections actually work. Dr. O'Brien also explained that Dr. Xenos' recommendation for a total left hip replacement was premature and additional conservative care is warranted. He reasoned that there is simply no causal link between Claimant's October 7, 2016 industrial incident and left hip symptoms. He more broadly explained that Claimant's right shoulder, right knee and bilateral hip symptoms were not related to her October 7, 2016 work accident.

21. Claimant has failed to demonstrate that it is more probably true than not that her right knee, right shoulder and bilateral hip symptoms are causally related to her October 7, 2016 industrial accident. Initially, Claimant was struck by a motor vehicle while working for Employer on October 7, 2016. She suffered immediate pain in her neck and lower back. Claimant was diagnosed with the following: (1) a lumbosacral contusion; (2) a cervical strain; (3) a right shoulder contusion; and (4) a right knee contusion. By October 24, 2016 Claimant suffered pain in her right knee, right hip and right shoulder. However, she remarked that her shoulder, hip and knee symptoms were improving and only her lower back pain persisted. In fact, on November 9, 2016 Dr. Watson noted that Claimant's neck and back remained fairly sore but her right shoulder and right knee were improving. He diagnosed Claimant with the following: (1) a lower back contusion; (2) a cervical strain; (3) a right knee strain; and (4) a right shoulder strain. On January 10, 2017 Claimant

visited Dr. Anderson-Oeser and mentioned bilateral hip pain, but was most concerned about her left buttocks and hip area. She noted frequent popping in her left hip with flexion and adduction. Claimant acknowledged that she had not previously reported popping in her left hip. A review of the medical records reveals that Claimant was initially diagnosed with contusions and a cervical strain. However, she has reported a myriad of different, intermittent, migrating symptoms that have gradually improved over time. Notably, Claimant did not mention left hip pain until about three months after her October 7, 2016 accident.

22. The persuasive opinion of Dr. O'Brien demonstrates that Claimant's right knee, right shoulder and bilateral hip symptoms are not likely causally related to her October 7, 2016 industrial accident. Dr. O'Brien explained that Claimant suffered the following musculoskeletal injuries when she was struck by a vehicle on October 7, 2016: (1) a cervical spine strain/sprain; (2) a lumbosacral spine strain/sprain; and (3) a gluteal contusion. He concluded that the October 7, 2016 work accident did not result in a right shoulder injury, right knee injury or bilateral hip injuries. Dr. O'Brien explained that the delayed onset of pain in the right shoulder, right knee and bilateral hips lacked an anatomic basis and the symptoms were thus not causally related to the October 7, 2016 accident. He reasoned that diagnostic testing revealed Claimant suffers from degenerative changes in her left hip that are consistent with her age. Dr. O'Brien specifically determined that Claimant did not suffer an aggravation of a pre-existing degenerative condition when she was struck by a vehicle on October 7, 2016. He summarized that Claimant has exhibited migratory pain during her course of medical treatment that did not correlate with her initial injury complaints. Finally, based on a review of the medical records Dr. O'Brien reasoned that, regardless of causation, Claimant's right knee and right shoulder pain had resolved by November 9, 2016.

23. In contrast, Dr. Xenos determined that the October 7, 2016 accident caused an "aggravation and exacerbation of preexisting left hip degenerative joint disease beyond normal progression." He recommended left hip PRP injections and possible surgical intervention in the form of a total hip arthroplasty. Furthermore, Claimant maintained that she has been suffering from bilateral hip pain since the date of the accident. However, the medical records reveal a significant delay in the initial reporting of left hip symptoms. Notably, Claimant did not mention left hip pain until almost three months after her October 7, 2016 accident. The significant temporal delay attenuated any causal connection between the motor vehicle accident and left hip injuries. Attributing Claimant's left hip symptoms to her work accident is thus speculative. Instead, Claimant's left hip complaints more likely constitute the natural progression of her pre-existing degenerative condition. Moreover, Claimant acknowledged that her right knee and right shoulder symptoms resolved approximately six weeks after her work accident. Accordingly, based on the medical records and persuasive opinion of Dr. O'Brien, Claimant has failed to demonstrate that the October 7, 2016 accident aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment for her right knee, right shoulder and bilateral hip symptoms.

CONCLUSIONS OF LAW

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

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App.

1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that her right knee, right shoulder and bilateral hip symptoms are causally related to her October 7, 2016 industrial accident. Initially, Claimant was struck by a motor vehicle while working for Employer on October 7, 2016. She suffered immediate pain in her neck and lower back. Claimant was diagnosed with the following: (1) a lumbosacral contusion; (2) a cervical strain; (3) a right shoulder contusion; and (4) a right knee contusion. By October 24, 2016 Claimant suffered pain in her right knee, right hip and right shoulder. However, she remarked that her shoulder, hip and knee symptoms were improving and only her lower back pain persisted. In fact, on November 9, 2016 Dr. Watson noted that Claimant's neck and back remained fairly sore but her right shoulder and right knee were improving. He diagnosed Claimant with the following: (1) a lower back contusion; (2) a cervical strain; (3) a right knee strain; and (4) a right shoulder strain. On January 10, 2017 Claimant visited Dr. Anderson-Oeser and mentioned bilateral hip pain, but was most concerned about her left buttocks and hip area. She noted frequent popping in her left hip with flexion and adduction. Claimant acknowledged that she had not previously reported popping in her left hip. A review of the medical records reveals that Claimant was initially diagnosed with contusions and a cervical strain. However, she has reported a myriad of different, intermittent, migrating symptoms that have gradually improved over time. Notably, Claimant did not mention left hip pain until about three months after her October 7, 2016 accident.

8. As found, the persuasive opinion of Dr. O'Brien demonstrates that Claimant's right knee, right shoulder and bilateral hip symptoms are not likely causally related to her October 7, 2016 industrial accident. Dr. O'Brien explained that Claimant suffered the following musculoskeletal injuries when she was struck by a vehicle on October 7, 2016: (1) a cervical spine strain/sprain; (2) a lumbosacral spine strain/sprain; and (3) a gluteal contusion. He concluded that the October 7, 2016 work accident did not result in a right shoulder injury, right knee injury or bilateral hip injuries. Dr. O'Brien explained that the delayed onset of pain in the right shoulder, right knee and bilateral hips lacked an anatomic basis and the symptoms were thus not causally related to the October 7, 2016 accident. He reasoned that diagnostic testing revealed Claimant suffers from degenerative changes in her left hip that are consistent with her age. Dr. O'Brien specifically determined that Claimant did not suffer an aggravation of a pre-existing degenerative condition when she was struck by a vehicle on October 7, 2016. He summarized that Claimant has exhibited migratory pain during her course of medical treatment that did not correlate with her initial injury complaints. Finally, based on a review of the medical records Dr. O'Brien reasoned that, regardless of causation, Claimant's right knee and right shoulder pain had resolved by November 9, 2016.

9. As found, in contrast, Dr. Xenos determined that the October 7, 2016 accident caused an "aggravation and exacerbation of preexisting left hip degenerative joint disease beyond normal progression." He recommended left hip PRP injections and possible surgical intervention in the form of a total hip arthroplasty. Furthermore, Claimant maintained that she has been suffering from bilateral hip pain since the date of the accident. However, the medical records reveal a significant delay in the initial reporting of left hip symptoms. Notably, Claimant did not mention left hip pain until almost three months after her October 7, 2016 accident. The significant temporal delay attenuated any causal connection between the motor vehicle accident and left hip injuries. Attributing Claimant's left hip symptoms to her work accident is thus speculative. Instead, Claimant's left hip complaints more likely constitute the natural progression of her pre-existing degenerative condition. Moreover, Claimant acknowledged that her right knee and right shoulder symptoms resolved approximately six weeks after her work accident. Accordingly, based on the medical records and persuasive opinion of Dr. O'Brien, Claimant has failed to demonstrate that the October 7, 2016 accident aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment for her right knee, right shoulder and bilateral hip symptoms.

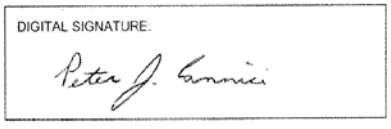
ORDER

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

Claimant's claim for Workers' Compensation benefits for her right knee, right shoulder and bilateral hip symptoms is denied and dismissed.

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

DATED: November 28, 2017.



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

ISSUES

1. Did Claimant prove by a preponderance of the evidence that Respondent should be penalized for failure to obtain a peer review of Dr. Sung's request for surgery authorization within seven (7) business days?

FINDINGS OF FACT

1. Claimant worked for Employer as a deputy sheriff. He suffered numerous admitted injuries in a serious motor vehicle accident on January 9, 2015.

2. Initial treatment was primarily directed to Claimant's right hip and right shoulder. He had right hip surgery in January 2015, and two right shoulder surgeries, in May 2015 and January 2016 respectively.

3. In 2016, Claimant's neck became an additional focus of treatment. Electrodiagnostic testing in September 2016 showed mild right carpal tunnel syndrome and a possible right C6-7 radiculopathy.

4. Claimant saw Dr. Barry Ogin, an orthopedic surgeon, for an Independent Medical Examination (IME) at Respondent's request on December 7, 2016. Dr. Ogin recommended a cervical MRI and possible injections depending on the MRI results.

5. Claimant had the cervical MRI on December 12, 2016 which showed disc bulges and protrusions at C3-4 through C6-7.

6. On January 3, 2017, Claimant saw Dr. Roger Sung, an orthopedic surgeon, who recommended he try injections before considering surgery.

7. Claimant had trigger point injections with Dr. Sparr which were not helpful. He had an epidural steroid injection that relieved his arm symptoms for several days, but a second epidural steroid injection provided no benefit.

8. Dr. Sung reevaluated Claimant on May 3, 2017 and recommended a C5-7 cervical discectomy and fusion.

9. Dr. Sung's office submitted a surgery preauthorization request dated May 15, 2017. Leslie Cavanaugh, the claims adjuster for Respondent's TPA, received the request on May 24, 2017.

10. On May 30, 2017, Respondent advised Dr. Sung in writing that the surgery was denied because it did not appear reasonable, necessary, or related to Claimant's

industrial injury. The letter stated Respondent planned to request a hearing and seek a second opinion regarding the surgery.

11. Respondent filed an Application for Hearing on June 1, 2017.

12. On June 6, 2017, Respondent requested Dr. Ogin to perform a medical records "peer review" regarding the surgery.

13. Dr. Ogin completed the peer review on June 15, 2017. He agreed the surgery was reasonably necessary and related to Claimant's accident.

14. Claimant filed a Response to Respondent's Application for Hearing on June 22, 2017. He endorsed penalties and included the following language:

> Claimant seeks daily Sec. 8-43-305 penalties for Respondents' continuing violation of WCRP 16-11(B). No review medical report within 7 business days. From 6/5/17 on.

15. For unknown reasons, Dr. Ogin's report was not sent to Respondent until Friday, July 14, 2017. On Monday, July 17, Ms. Cavanaugh tried to fax Dr. Sung's office advising the surgery was approved. The fax transmission was unsuccessful because Ms. Cavanaugh inadvertently used area code 970 rather than 719. Ms. Cavanaugh did not review the fax transmission report and was unaware that the transmission had failed.

16. The next day, on July 18, Respondent's counsel notified Claimant's counsel via email that Respondent would authorize surgery based on Dr. Ogin's report.

17. Respondent's counsel notified Dr. Sung in writing on August 2, 2017 that surgery was approved. Claimant ultimately had surgery on October 3, 2017.

18. On August 23, 2017, ALJ Lamphere granted Claimant's Motion for Summary Judgment on the issue of whether surgery was automatically authorized under Rule 16. ALJ Lamphere noted WCRP 16-11(B) required Respondent to obtain a peer review of the preauthorization request within seven (7) business days of receiving the request even though they had timely requested a hearing. ALJ Lamphere held that the deadline to obtain the peer review expired on June 5. Since Respondent did not request the peer review until June 6, they missed the deadline by one day. Therefore, ALJ Lamphere held the surgery was automatically authorized by WCRP 16-11(E) and ordered Respondent to pay for the surgery and ancillary treatment.

19. Ms. Cavanaugh testified at hearing on behalf of Respondent. She had arranged for Dr. Ogin to perform a peer review rather than schedule an IME because she thought it would be the quickest way to evaluate whether the proposed surgery was reasonable, necessary and related. Ms. Cavanaugh knows Rule 16 requires a peer review within seven business days of a request for preauthorization. Ms. Cavanaugh offered no specific reason for the delay in obtaining the peer review. There is no persuasive evidence of malicious intent or other improper motive, and the ALJ infers that the delay was inadvertent and due to oversight.

CONCLUSIONS OF LAW

At hearing, Claimant indicated he was seeking penalties under the "general penalty" provision at § 8-43-304(1), which provides:

> Any employer or insurer . . . who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be . . . punished by a fine or not more than one thousand dollars per day for each such offense . . . .

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. The ALJ must first determine whether the insurer or employer violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

Whether the insurer's conduct was objectively reasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). A party establishes a *prima facie* showing of unreasonable conduct by proving that an insurer violated the statue or a rule of procedure. If the claimant makes a *prima facie* showing, the burden shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*; *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

An insurer acts unreasonably if it fails to take action that a reasonable insurer would take to comply with the statute, a rule or an order. *Pioneers Hospital, supra*. To be objectively reasonable, an insurer's actions (or inaction) must be predicated on "a rational argument based in law or fact." *Diversified Veterans Corporate Center v. Hewuse, supra*. Since the analysis involves an objective standard of reasonableness, the claimant does not have to show the insurer knew or should have known its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

Section 8-43-304(4) provides that any application for hearing on penalties "shall state with specificity the grounds on which the penalty is being asserted." The requirement to describe the basis for the penalty claim "with specificity" is an exception to the general notice pleading rules that otherwise apply to workers' compensation hearings. The specificity requirement serves two functions. First, it notifies the alleged violator of the basis of the claim so it may cure the violation within the statutory time frame. Second, it ensures the alleged violator receives notice of the legal and factual bases for the penalty claim to protect its due process rights to present evidence, confront adverse evidence,

and present argument to support its position. *Jakel v. Northern Colorado Paper, Inc.*, W.C. No. 4-524-991 (October 6, 2003). The party seeking a penalty must plead the appropriate statutory section or rule justifying the penalty claim. *Carson v. Academy School District 20*, W.C. No. 4-439-660 (April 28, 2003).

A penalty claim may be dismissed if it does not state the grounds for the alleged penalty with sufficient specificity. *E.g*., *Maragara v. Xerox Business Services*, W.C. No. 4-946-815-02 (January 27, 2015); *Young v. Bobby Brown Bail Bonds*, *Inc.*, W.C. No. 4-632-376 (April 7, 2010); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010).

Claimant's June 22, 2017 Response to Application for Hearing stated:

> Claimant seeks daily Sec. 8-43-305 penalties for Respondents' continuing violation of WCRP 16-11(B). No review medical report within 7 business days. From 6/5/17 on.

The ALJ agrees with Respondent that Claimant did not plead his penalty claim with sufficient specificity. The point of the specificity requirement is to ensure the opposing party can readily and clearly ascertain *from the initial pleading* the exact factual and legal theory upon which the penalty claim is based. But Claimant's application invoked no specific provision of the Act which imposes a penalty. Rather, he only cited § 8-43-305, which contains no penalty. Section 8-43-305 merely provides that every day during which an insurer violated an order constitutes "a separate and distinct violation," and that any penalty elsewhere provided in the Act shall be "cumulative." Although Claimant described of the conduct he believes should be penalized, *i.e*., failing to obtain a peer review within seven business days, he did not state what penalty he is requesting.

This ICAO addressed this issue in *Jordan v. Rio Blanco Water Conservancy District*, W.C. No. 4-937-000-01, and held that a party seeking penalties under the general penalty provision must explicitly cite § 8-43-304(1). Noting that the Act contains a variety of penalty sections, the Panel held:

> A statement of the particular penalty remedy sought is a critical element of the grounds for the penalty claim. The direction that the specific grounds for the penalty be identified in the application would include specification of the penalty sought to be applied . . . . The claimant's pleading regarding a penalty claim was deficient to the extent it did not identify § 8-43-304(1) as the statutory penalty section for which she sought a penalty . . . .

The discussion in *Jordan* is directly applicable to Claimant's penalty claim and persuades the ALJ Claimant failed to satisfy the specificity requirement. Accordingly, the request for penalties under § 8-43-304(1) should be dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request for penalties is denied and dismissed.

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

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

DATED: November 29, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-022-847-03

ISSUES

- Whether Claimant has proved by a preponderance of the evidence that the L4-5 lumbar decompression recommended by Andrew Castro, M.D., Allison Fall, M.D. and John Burris, M.D. is reasonable and necessary to cure and relieve the effects of Claimant's industrial injuries.

- Whether the L4-5 lumbar decompression surgery is reasonable necessary and related to the October 13, 2014, or March 23, 2016, worker's compensation claims.

- Whether Claimant proved by a preponderance of the evidence that W.C. No. 4-977-514 should be reopened for a worsened condition.

FINDINGS OF FACT

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

1. Claimant has worked as a bus driver for Employer since 2008.

2. On October 13, 2014, Claimant sustained work-related injuries to his low back when he slipped and fell on the wet bathroom floor while working for Employer. Thereafter, Claimant experienced low back and left leg pain.

3. On October 16, 2014, Claimant was evaluated by Michelle Honsinger, PA-C at Concentra. Claimant advised Ms. Honsinger that he slipped and fell on the wet bathroom floor at work on October 13, 2014, and that he landed on his back. Claimant reported that he sought treatment because his pain was not improving and even worsening. Claimant reported low back pain that radiated into his left buttock and left thigh with a pain level of 7/10.

4. On October 23, 2014, Claimant returned to Concentra and reported that he continued to suffer from back pain that shot down his left leg.

5. On November 6, 2014, Claimant was evaluated by Glenn Petersen, PA-C, at Concentra. Claimant advised Mr. Petersen that he continued to experience low back pain that radiated into his left leg and that there was no change in symptoms despite therapy. Accordingly, Mr. Peterson recommended that Claimant undergo an MRI of his lumbar spine.

6. On November 12, 2014, Claimant underwent his first lumbar spine MRI which demonstrated:

   1) *Small broad-based disc protrusion at L4-5, resulting in mild central canal stenosis and moderate bilateral foraminal compromise but as yet,* ***no exiting nerve root deformity****.*
   2) ***Other disc levels remain normal from T11-12 to L5-S1****.*

3) *No osseous trauma or spondylolisthesis. No evidence of a spinal infection or bone tumor.*
4) *No abnormal distal thoracic cord signal or syrinx.*

7. Claimant returned to Concentra on November 13, 2014, at which time it was noted that Claimant did not suffer from muscle pain, neck pain, joint swelling, joint stiffness, muscle weakness or night pain.

8. On November 18, 2014, Claimant was examined by Lacie Esser, PA-C, at Concentra who noted Claimant's MRI findings which demonstrated a small broad-based disc protrusion at L4-L5 with moderate bilateral foraminal encroachment. Ms. Esser noted Claimant's complaints of back pain that radiated down to his left leg. Ms. Esser stated that she would like to send Claimant for a spine consultation to see if he would be a candidate for an epidural steroid injection ("ESI").

9. On December 4, 2014, Gary Ghiselli, M.D. at Denver Spine Surgeons evaluated Claimant and reported that he had been working non-operatively without pain relief with back pain that radiated into his left leg. Dr. Ghiselli found that Claimant had minimal leg symptoms and no weakness on exam. After his physical exam and review of the MRI, Dr. Ghiselli opined that, "**We do not feel that surgery is necessary at this time**. We have recommended that he see a Physiatrist to maximize all non-operative treatment including possible injections to help therapeutically and diagnostically. He can return to see us if surgical evaluation needs to be done again. However, currently we do not feel that surgery would benefit him."

10. On December 4, 2014, Claimant also saw Glenn Petersen, PA-C, at Concentra after his consultation with Dr. Ghiselli. Mr. Petersen noted that Claimant continued to experience back pain that radiated down his left leg and that Dr. Ghiselli only advised him to consult with a physiatrist for possible injections.

11. Claimant was evaluated by physiatrist, Rick Zimmerman, D.O. on January 7, 2015. Claimant reported ongoing low back. **Dr. Zimmerman's straight leg raise and neural tension were negative bilaterally**. Dr. Zimmerman also noted no specific tenderness in the SI joints, sciatic notches or greater trochanters bilaterally. After review and examination, Dr. Zimmerman performed Claimant's first bilateral L4-5 transforaminal ESI. After performing the ESI, Dr. Zimmerman noted that in the recovery room, Claimant stood, flexed and extended his lumbar spine and reported no low back pain. Claimant demonstrated improved range of motion reaching down to his lower shins and eventually touching his ankles, which was a functional improvement compared to his pre-injection ability to reach to his upper shins with his fingertips. **Dr. Zimmerman officially considered it a diagnostic response to the ESI**.

12. On February 9, 2015, thirty-four days after undergoing his first ESI, Claimant was evaluated by Allison Fall, M.D. at Concentra. Claimant reported that he was doing well, able to do his independent home exercise program and that he had no pain. Claimant also advised Dr. Fall that he was still under restrictions but stated that he did not really need them. Dr. Fall's examination revealed that forward flexion, extension

and right and left lateral bending were full and pain-free and that there were **no radicular signs**. Dr. Fall's final impression was that Claimant suffered from an **asymptomatic L4-5 disc protrusion** and she discharged him from care and released him to full duty. Dr. Fall opined that there was **no impairment or indication for work restrictions**.

13. On February 26, 2015, Claimant was involved in a non work-related motor vehicle collision.

14. On February 27, 2015, Claimant presented to Denver Health Medical Center Emergency Room and was evaluated by Cecilia Sorensen, M.D. Dr. Sorensen reported that Claimant was status post a motor vehicle collision from the day before as a restrained driver with no airbag deployment and that Claimant's car was drivable after the collision. Dr. Sorensen stated that after Ibuprofen and Tramadol was administered, his only complaints were of neck pain and headaches. Specifically, that Claimant was complaining of left lateral neck pain. Dr. Sorensen determined that Claimant did not warrant any imaging studies. Most notably, Dr. Sorensen noted that Claimant reported whiplash and **denied incontinence, weakness, tingling or any other pain**. Dr. Sorensen's official diagnosis was that Claimant suffered from upper back pain and discharged him after Motrin was administered. The Nursing Notes also state that Claimant was medicated with Motrin and observed to be ambulatory with a steady gait from the Emergency Department.

15. On March 4, 2015, six days after the motor vehicle collision, Claimant consulted with J. Stephen Gray, M.D. at Lakewood Injury Treatment Center. Claimant's chief complaints were headaches, neck pain and left low back pain with lower extremity symptoms. Dr. Gray noted Claimant's statement that upon impact, he was slammed, thrown forward and caught by the seatbelt which slammed him backwards and to the left where he hit the left side of his head on the post of the jeep. Claimant advised Dr. Gray that he did not lose consciousness but that he did experience immediate left-sided head pain. Dr. Gray noted that Claimant had some improvement in neck pain and minimal improvement in his low back pain. Most notably, Claimant graded his neck pain and 3-4/10 and his back pain at 7/10. Claimant informed Dr. Gray that he had been treated in the past several months for a prior work-related low back injury and that he had an MRI showing a disc protrusion. Claimant reported some aching pain down into his left posterolateral thigh area but specified that, "This does not go down to his knee and has not since the accident." Dr. Gray noted that in Claimant's prior work-related care, he had the same left-sided posterolateral leg pain, and for that reason, underwent one ESI. Dr. Gray reviewed Claimant's MRI and agreed that prior to the motor vehicle collision, his MRI demonstrated a, "small broad-based disc protrusion at L4-5." Dr. Gray's primary assessment was that Claimant suffered from a scalp contusion, mild concussion, cervical strain and exacerbation of pre-existing low back pain with recurrence of left lower extremity symptoms, probably referred. Dr. Gray ordered X-rays of Claimant's cervical and lumbar spine and a repeat MRI of his low back to rule out a worsening of his preexisting broad-based disc protrusion at L4-5.

16. Claimant returned Concentra on March 11, 2015, where he was evaluated by Rosalie Einspahr, N.P. Claimant informed Ms. Einspahr that he suffered from neck, low back and left leg pain. Due to the exacerbation of Claimant's preexisting low back and left leg pain, Claimant was referred back to Dr. Fall.

17. On March 13, 2015, Claimant underwent a second lumbar spine MRI which now demonstrated:

> *L1-L2: No disc herniation, foraminal narrowing, or spinal stenosis.*
>
> *L2-L3: No disc herniation, foraminal narrowing, or spinal stenosis.*
>
> *L3-4: There is mild bilateral facet hypertrophy. There is no focal disc herniation or central canal stenosis. A component of relatively mild bilateral neural foraminal narrowing is noted but there is no significant nerve impingement.*
>
> *L4-5: There is relatively mild bilateral facet hypertrophy. There is mild disc desiccation. There is a shallow broad-based posterior disc protrusion and annular fissure, slightly asymmetric to the left. This contacts and abuts the descending bilateral L5 nerve roots, slightly greater on the left than right. There is no significant central canal stenosis. There is mild to moderate left and relatively mild right sided foraminal narrowing.*
>
> *L5-S1: There is relatively mild bilateral facet hypertrophy. There is no significant disc herniation. No central canal stenosis. No significant foraminal narrowing.*
>
> *IMPRESSION:*
>
> *Mild degenerative disc disease and facet hypertrophy of the lumbar spine, greatest at L4-L5. A shallow broad-based posterior disc protrusion and annular fissure at L4-L5 abuts the descending L5 nerve root, slightly greater on the left than right. There is relatively mild left greater than right L4-5 neural foraminal narrowing.*

This imaging report was subsequently amended with ADDENDUM #1 which stated:

> *Request for addendum has been made to compare with a previous spine MRI from 11/12/2014, which is now available for comparison. The broad-based posterior* ***disc protrusion at L4-L5 is slightly improved and decreased in size in the interval****. No other significant interval changes have occurred.*

18. Claimant returned to Dr. Gray at Lakewood Injury Treatment Center on March 25, 2015, and advised Dr. Gray that he continued to have moderately severe neck pain and moderate low back pain that ran down to the posterolateral aspect of his left leg to his knee. Upon review of Claimant's most recent MRI, Dr. Gray stated, "It

should be noted that in comparing this with the previous MRI there did not appear to be any significant changes. We will ask Dr. Fall to look at these two MRIs and help us differentiate whether there are any new findings. Again, **to this examiner's eye, there is no significant difference in these films**." On examination of Claimant's lumbar spine, Dr. Gray stated that there was no evidence of spasm, erythema, edema or step-off. Dr. Gray also found that Claimant's legs were neurovascularly intact. Dr. Gray referred Claimant for chiropractic care and advised him to follow-up with Dr. Fall to discuss the possibility of a repeat epidural steroid injection.

19. On April 22, 2015, Claimant was re-evaluated by Dr. Gray who reported that Claimant continued to complain of low back pain with left lower extremity symptoms that remained unchanged since their last visit. Claimant reported that his neck pain was improving and denied any new symptomatology. Claimant did not report new symptomatology in his legs and denied any bowel or bladder incontinence, dysfunction, or urinary retention. Dr. Gray's examination of Claimant's lumbar spine revealed no evidence of spasm, erythema, edema, step-off or significant abnormal curvature. Dr. Gray also noted that there was no localized tenderness to palpation of Claimant's lumbar spine. Dr. Gray recommended that Claimant continue with chiropractic care, physical therapy and massage twice a week.

20. Claimant returned to Dr. Gray on May 13, 2015, where he continued to complain of left-sided low back pain and left leg pain. Claimant advised Dr. Gray that his pain improved somewhat since their last visit. Dr. Gray noted that Claimant would not be allowed to see Dr. Fall under his prior work-related claim and other than relatively mild neck discomfort, Claimant denied any new symptomatology. Dr. Gray continued to recommend that Claimant see a physiatrist to determine whether an epidural steroid injection or some sort of injection therapy would be appropriate and that he was to follow-up with his work comp doctor regarding his injuries as well.

21. Claimant was evaluated by Kirk Holmboe, D.O. at Concentra on May 13, 2015. On this date, Dr. Holmboe released Claimant from care and found that he reached maximum medical improvement for his 2014 work-related injuries. Dr. Holmboe stated, "At this point I will release him from care for his work related injury as he was doing quite well when last seen by Dr. Fall and she imposed no restrictions and did not assign any impairment. Further care will have to come through his or other drivers auto insurance."

22. On May 19, 2015, Claimant was evaluated Yusuke Wakeshima, M.D. Claimant advised Dr. Wakeshima that his current symptoms were posterior neck pain and upper back region pain, which Dr. Wakeshima determined to be 100% related to the 2015 MVA. Claimant also reported low back pain with left posterior thigh and leg pain with no lower extremity weakness, bowel or bladder dysfunction. Dr. Wakeshima acknowledged Claimant's history of a preexisting low back injury with corresponding left leg symptoms and stated that he would request notes from Dr. Fall as well as Dr. Holmboe to review and determine what percentage of his symptoms were related to the 2015 MVA and what percentage were related to the 2014 work injury. Dr. Wakeshima

planned to see Claimant back to discuss apportionment of his lumbar spine region and future treatment plans based on his review of the MRI studies.

23. Claimant returned to Dr. Wakeshima on June 2, 2015, and reported pain in his low back, left leg, neck and upper back. Dr. Wakeshima reviewed Claimant's prior lumbar MRI studies and noted that his review of the MRI on November 12, 2014, before the MVA and after his first work-related injury reported only a small broad-based disc protrusion with mild central canal stenosis and moderate bilateral foraminal compromise with no exiting nerve root deformity. Dr. Wakeshima opined that on his over-read of the 2014 MRI, there was facet arthrosis appreciated at multiple levels as well as an annular tear. Accordingly, Dr. Wakeshima opined that Claimant's MRI findings before and after the non work-related MVA **probably did not significantly change despite contrasting reports**. Dr. Wakeshima planned to have Claimant take his 2015 MRI films back to Advanced Medical Imaging so they could compare it to their 2014 MRI to determine if there were any real significant interval changes from his lumbar spine MRI before and after the 2015 MVA. However, it was Dr. Wakeshima's opinion that he did not observe a significant interval changes between Claimant's 2014 and 2015 MRIs. Most notably, Dr. Wakeshima stated, **"Upon my over-read of the MRI films from November 12, 2014, I am not really seeing that much difference that the MRI of March 13, 2015 and I would like to confirm whether there has been no significant interval change."**

24. Dr. Wakeshima re-evaluated Claimant on June 16, 2015, and stated that since his last evaluation, Claimant did not report any change in his neck and low back pain symptoms, specifically that his neck was now as equally as painful as his low back. On this date, Dr. Wakeshima was still without Claimant's 2014 work injury records. In the absence of medical records and based purely on Claimant's subjective responses and answers, Dr. Wakeshima opined that 60% of his ongoing low back pain was related to the MVA of February 26, 2015, and that 40% was preexisting and related to the work injury on October 13, 2014. Dr. Wakeshima recognized that he would need to re-address this apportionment after Claimant's 2014 and 2015 MRIs were properly compared and contrasted by Advanced Medical Imaging. Dr. Wakeshima stated, "**I would like to see him one more time to obtain the radiologist's inputs regarding comparison MRI studies as well as review Dr. Fall's notes, and determine what was accomplished in the past and how severe his pain was prior to his motor vehicle accident.**"

25. On June 30, 2015, Claimant returned to Dr. Wakeshima and reported no significant change in his pain symptoms. Specifically that he still experienced pain in his lower neck, low back and left leg. Dr. Wakeshima noted that Claimant was able to have his lumbar MRI imaging studies over-read to compare and contrast any significant interval changes between the 2014 and 2015 MRIs. Dr. Wakeshima stated, "**They did compare the MRI from March 13, 2015 with an MRI on November 12, 2014 and it did report that there was a broad-based posterior disc protrusion at L4-5 that has slightly improved and decreased in size in the interval. No significant interval change has occurred.**" Dr. Wakeshima also had notes from Dr. Holmboe available to him for review. Dr. Wakeshima noted that Dr. Holmboe's last note indicated he was at

MMI. Dr. Wakeshima opined that Claimant would benefit from undergoing electrodiagnostic studies to make sure there was no radiculopathy. In terms of Claimant's neck and low back pain, Dr. Wakeshima wanted him to undergo a course of chiropractic treatment with acupuncture times six sessions each to see if it improved his pain symptoms. With regard to treatment of Claimant's low back, Dr. Wakeshima stated, "**His MRI studies of the lumbar spine and cervical spine did not demonstrate any major pathology that would lead one to suspect that spine surgical intervention currently is indicated.**"

26. On July 14, 2015, Claimant presented to Wayne Hoffman, D.C. per Dr. Wakeshima's referral. Dr. Hoffman reported Claimant's chief complaints of neck pain, mid back pain, low back pain and that his progress had stagnated. On physical exam, Dr. Hoffman performed orthopedic testing which most notably included a Lasègue's test which was negative bilaterally. Dr. Hoffman also performed a **straight leg test to diagnose lumbosacral radiculopathy which was also negative bilaterally,** demonstrating that Claimant did not reproduce a pain pattern in his bilateral lower extremities when tested for lumbar radiculopathy.

27. On July 21, 2015, Claimant returned to Dr. Hoffman and advised him that he was still experiencing cervical pain at a 3/10 level, no mid back pain at all and improved low back pain at 3/10. Dr. Hoffman assessed that Claimant's cervical spine improved, that his thoracic pain resolved and that his lumbar spine was improved as well.

28. On July 21, 2015, Claimant was also evaluated by Bethany Wallace, M.D. at Lakewood Injury Treatment Center. Claimant advised Dr. Wallace that he was getting better, that his left leg pain was receding and not as intense or consistent and that he still had stiffness in his neck and low back. Claimant reported that if he sat for a long time, it aggravated his left leg. Most notably, Dr. Wallace noted that Claimant was getting much better after the slip and fall at the time Dr. Fall evaluated him on February 9, 2015, just prior to his 2015 MVA. Dr. Wallace also noted Claimant's reports that he no longer needed assistance to stand up and that **he was not interested in injections or surgery**. Claimant reported that, "He is pleased that the chiropractic and the acupuncture, have helped a lot." **Dr. Wallace also performed another straight leg test which was negative** for a reproduced pain pattern in his lower extremities. Dr. Wallace merely recommended that Claimant continue physical therapy, massage therapy, chiropractic and acupuncture and that he could consider spinal surgery for the lumbar disc problem and sciatica. Dr. Wallace did not request authorization for a second epidural steroid injection nor did she request authorization for spinal surgery. Claimant's low back and left leg symptoms had much improved and he was not interested in pursuing further treatment on his low back. Dr. Wallace's one-time evaluation was done under the auspices of a consultation, not a surgical recommendation.

29. On December 8, 2015, Claimant underwent a Division Independent Medical Examination with Jade Dillon, M.D. for evaluation of his October 13, 2014, work injury. Dr. Dillon noted that Claimant's MRI on November 12, 2014, only demonstrated a small broad-based disc protrusion at L4/5 with mild central canal stenosis and moderate

bilateral foraminal compromise with no focal nerve root deformity. She also noted Claimant's neurosurgical evaluation by Dr. Ghiselli on December 14, 2014, wherein Dr. Ghiselli found that Claimant was not a surgical candidate as it related to his 2014 work injuries. Dr. Dillon relied on Dr. Fall's report dated February 9, 2015, which reflected a good response to the first epidural steroid injection on January 7, 2015. Dr. Dillon also agreed with Dr. Holmboe's assertion that Claimant reached MMI for the 2014 work injuries to his low back and left leg. Absent the second subsequent intervening event on March 23, 2016, Dr. Dillon could only conclude that Claimant's increased low back pain and left leg symptoms were due to the non work-related MVA on February 26, 2015. Thus, Dr. Dillon concurred with Dr. Holmboe that Claimant reached MMI on May 13, 2015, for his 2014 work injuries and that his low back pain and left leg symptoms were not ratable conditions; therefore assigning a 0% impairment rating.

30. Aside from DIME Dr. Dillon's finding that Claimant reached MMI on his 2014 low back and left leg conditions, and that Claimant's low back and left leg symptoms were not ratable conditions, Dr. Dillon recorded that as of December 8, 2015, Claimant's symptoms remained isolated to his low back and left leg. Additionally, Dr. Dillon recorded that Claimant moved well with normal gait, stance and balance and, most notably, that her straight leg raising test was negative bilaterally. Dr. Dillon concluded that Claimant merely suffered from a lumbar strain as a result of the occupational injury on October 13, 2014, which she found to go on to good recovery with conservative treatment.

31. On March 23, 2016, Claimant was involved in a second motor vehicle accident while driving a bus for Employer.

32. As the DIME provided no medical treatment, Claimant received no medical treatment for his low back from July 21, 2015, until after his March 23, 2016 accident. This is a period of over 9 months of no treatment.

33. On March 31, 2016, Claimant returned to Concentra and was evaluated by Catherine Hunt, P.A. Ms. Hunt noted Claimant's description of the work-related motor vehicle accident on March 23, 2016, stating that, "Patient reports he was driving a bus and another car was hit, which then lost control and hit the front of the bus with the front of their car. Patient states he was driving about 20 mph at time of impact and was restrained." Ms. Hunt recorded Claimant's chief complaint to be low back pain. Claimant's pain diagram dated March 31, 2016, reveals that, in contrast to all of his prior complaints of low back and left leg pain, Claimant now documented increased low back pain with stabbing pain that radiated into *both* legs.

34. On April 20, 2016, Claimant returned to Concentra and was evaluated by Valerie Skvarca, PA-C. Ms. Skvarca noted that Claimant was still complaining of left-sided low back pain at 6/10. Claimant was forthright in advising Ms. Skvarca that he had a previous history of back injuries and therefore asked for a repeat lumbar spine MRI.

35. On April 29, 2016, Claimant underwent a third lumbar spine MRI read by Bao Nguyen, M.D. which revealed:

1. *Moderate bilateral L4-5 neuroforaminal stenosis and mid central spinal canal stenosis at this level owing to a broad-based protrusion.*
2. *Minor central disc bulge at L5-S1.*

36. Dr. Nguyen filed an addendum to the April 29, 2016, MRI report which stated:

COMPARISON: MRI 11/12/2014

No interval change is appreciated in comparison to the prior MRI exam of 2014.

37. Claimant returned to Concentra on May 5, 2016, and was evaluated by Nickolas Curcija, PA-C. Claimant advised Mr. Curcija that his pain was unimproved despite therapy or medications and that he had been experiencing cramps in *both* legs at night. Mr. Curcija performed a positive straight leg test. Claimant's corresponding pain diagram also documents his ongoing reports of low back pain and bilateral leg pain.

38. On May 19, 2016, Claimant returned to Concentra and was re-examined by Mr. Curcija who specifically noted that, "The patient presents today with recheck back pain radiating down to legs." Another positive straight leg test was performed and again, Claimant's pain diagram continued to document low back pain and bilateral leg pain.

39. Claimant returned to Dr. Fall on May 20, 2016. Although Dr. Fall acknowledged that Dr. Nguyen noted no interval change between the 2014 MRI and 2016 MRI, Dr. Fall found that, in contrast to the 2014 MRI, the 2016 MRI demonstrated moderate bilateral L4-5 neuroforaminal stenosis and mid central spinal canal stenosis due to a broad-based disc protrusion. Dr. Fall stated that Claimant continued to report low back and bilateral leg symptoms and that he was now experiencing parasthesias down *both* legs. Another positive straight leg test was performed and Dr. Fall opined that Claimant had radicular findings consistent with his 2016 MRI. Dr. Fall therefore recommended that Claimant undergo *bilateral* L4-5 transforaminal steroid injections.

40. On June 9, 2016, Claimant returned to Concentra and was re-examined by Mr. Curcija who noted that Claimant was still waiting for his bilateral L4-5 transforaminal steroid injections and that therapy was increasing his pain symptoms. Mr. Curcija reported that Claimant's pain level was 6/10 and that it was located in the low back bilaterally with pain radiating to his bilateral calves. Mr. Curcija also noted that Claimant was experiencing weakness in his both legs.

41. Claimant returned to Dr. Fall on June 10, 2016, and reported that he had a return of symptoms with pain radiating down both legs. Dr. Fall noted that Claimant's bilateral L4-5 transforaminal steroid injections were still pending and, in contrast to her diagnosis of an asymptomatic L4-5 disc protrusion for the 2014 injury, Dr. Fall now found that Claimant suffered from left greater than right L4 radiculitis. Dr. Fall stated that she would await the results of the bilateral L4-5 transforaminal steroid injections.

42. On June 17, 2016, Claimant was evaluated by Robert Kawasaki, M.D. Dr. Kawasaki stated that Claimant was still experiencing low back pain, bilateral thigh region pain, calf cramps and numbness and tingling in his left leg. Dr. Kawasaki then performed right L4-5 transforaminal steroid injections with L4 spinal nerve root block and left L4-5 transforaminal steroid injections with L4 spinal nerve root block.

43. On June 23, 2016, Claimant returned to Concentra and was re-evaluated by Mr. Curcija. Six days had passed since Claimant underwent bilateral L4-5 transforaminal steroid injections and L4 spinal nerve root blocks; however, Claimant continued to report back pain that radiated into *both* legs and that he did not feel any symptom relief following the injections as he continued to have pain at 6/10 in his low back that radiated down to both legs and into his calves. Mr. Curcija performed another positive straight leg test which caused a pulling sensation in Claimant's lower extremity. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

44. Claimant returned to Dr. Fall on June 24, 2016, one week after his bilateral L4-5 transforaminal steroid injections and L4 spinal nerve root blocks, and continued to report no change in symptoms. Dr. Fall noted that the injection he received as a result of his 2014 worker's compensation claim was the only thing that helped that the second set of injections did not change anything. Claimant continued to report pain down both legs and that he was even experiencing numbness in his posterior calf. Accordingly, Dr. Fall recommended an electrodiagnostic evaluation of Claimant's left leg to rule out radiculopathy.

45. On August 25, 2016, Insurer admitted liability for medical benefits on the 2016 work-related injuries.

46. Dr. Fall performed Claimant's electrodiagnostic evaluation on August 26, 2016. Dr. Fall noted that electrodiagnostic evaluation of Claimant's left leg revealed increased insertional activity in the lower lumbar paraspinals and in the left gastrocnemius. Dr. Fall also stated that she saw a visible involuntary contraction of the left gastrocnemius when Claimant was lying flat. Dr. Fall assessed that Claimant suffered from left L5 radiculitis without significant denervation. After reviewing his treatment, Dr. Fall recommended that Claimant undergo a left L5-S1 transforaminal injection which would address the left L5 nerve root. Due to his ongoing low back and bilateral leg symptoms, Claimant asked Dr. Fall if he could discuss his symptoms with a spine surgeon. Dr. Fall felt this request was appropriate and wrote a referral for a surgical evaluation to be done after the L5-S1 transforaminal injection its response could be discussed. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

47. On September 2, 2016, Claimant returned to Concentra where he was evaluated by Dr. Cava. Claimant continued to report low back pain that radiated into both legs and also, that he was having difficulty with sexual function and erections due to his severe back pain and severe cramping in his buttocks and legs. Dr. Cava's straight leg test was positive bilaterally but worse on the left.

48. On September 7, 2016, Claimant was evaluated by spine surgeon, Bryan Castro, M.D. Dr. Castro's report states, "The patient has lower back pain with pains going down his legs, left side greater than right. Sometimes he gets cramping in the legs as well. He has some numbness in the medial calf with some pain and cramping in the posterior aspect of the leg, left greater than right. His low back pains are greater than the leg pains. He has pain with any activities." Most notably, Dr. Castro's report states, "The patient states that now since his automobile accident in March [2016], the pains have been significantly increased." Dr. Castro reviewed Claimant's treatment history and acknowledged that the L5-S1 transforaminal injection as recommended by Dr. Fall was still pending. Dr. Castro's review of systems were, "Positive difficulty and pain with walking, some difficulty with sexual relations secondary to pain." Dr. Castro reviewed Claimant's lumbar spine MRI of April 29, 2016, and compared it to the lumbar MRI of November 12, 2014, which he found to highlight some disc desiccation at L4-L5 with mild disc protrusion and annular tear. Ultimately, Dr. Castro's report states that he was in agreement with proceeding with bilateral L5-S1 transforaminal epidural steroid injections and found them to be reasonable. Once again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

49. Dr. Zimmerman performed Claimant's left L5-S1 transforaminal epidural steroid injection on September 14, 2016. Dr. Zimmerman reported that Claimant's pre-procedure pain score at rest was 6/10 and his straight leg raise and neural tension were positive. After the injection, Claimant's pain score at rest was 0/10. Dr. Zimmerman stated, "Lumbar range of motion improved with forward bending and reaching down to his mid shins with his fingertips, and extension improved to approximately 10" or 15". He had no significant pain with these maneuvers, and straight leg raise pain was reduced from 8/10 before the procedure to 2/10 after the procedure, being a diagnostic response. The patient stood and ambulated without difficulty. Motor and sensation were intact in both lower limbs."

50. Claimant returned to Dr. Fall on September 23, 2016, nine days after his left L5-S1 transforaminal epidural steroid injection, and reported that he was worse. Claimant explained that initially, he was numb so he did not experience pain in Dr. Zimmerman's clinic; however, once he left, the numbing medicine wore off and his pain returned and increased to the point where he was even having difficulty doing things around the house. Dr. Fall's straight leg test was again positive and she referred Claimant for pool therapy two times a week for three weeks for core stabilization and low back pain. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

51. Claimant was re-evaluated by Dr. Cava at Concentra on September 29, 2016. Dr. Cava stated that if Claimant experienced worsening radicular symptoms, that a follow-up with Dr. Castro should be considered to re-evaluate Claimant's need for surgery. Dr. Cava also noted that the most recent injection did not help and that Claimant continued to experience difficulty with sexual function and erections due to severe back pain and severe cramping in his buttocks and legs. Dr. Cava reported that Claimant's pain radiated into his buttocks, thighs, bilateral calves and was worse on the left with associated symptoms of lower extremity numbness, lower extremity tingling and

lower extremity weakness. Dr. Cava's repeat straight leg test was once again positive and Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

52. Claimant was re-examined by Dr. Fall on October 7, 2016. Claimant reported a pain level of 6/10 and Dr. Fall's physical exam revealed decreased flexion with pain radiating down both legs and a positive straight leg raise bilaterally in the seated position. Dr. Fall's impression was that Claimant suffered a lumbosacral strain with a small broad-based disc protrusion at L4-5 with surgery not yet recommended by Dr. Castro. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

53. Between October 13, 2016, and October 27, 2016, Claimant was seen at Concentra at least three more times, and continued to complain of low back pain that radiated into both legs at each appointment.

54. Claimant returned to Dr. Fall on November 14, 2016, where she recorded that Claimant did not benefit from pool therapy. Specifically that, "He states he is 0% better. He still has pain going down the leg and the back. He states they are both together, so one is not worse than the other." Dr. Fall did not have further treatment recommendations, only that she would recommend a follow-up with Dr. Castro prior to MMI to re-address the reasonable necessity of surgery.

55. Claimant was re-evaluated by Dr. Castro on November 15, 2016. Dr. Castro noted Claimant's report of worsened symptoms and stated, "Just prior to closing the case, I will get him a new MRI to make sure there is [sic] no new findings and indeed if this still remains with no significant herniation, then surgical intervention would not be offered. At that point, he will be placed at MMI from a surgical standpoint. We will see him back after the MRI." Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

56. On November 23, 2016, Claimant underwent his fourth lumbar spine MRI, which demonstrated:

IMPRESSION

1. *Canal stenosis L4-L5 level with protrusion and annular tearing. Mild inferior foraminal narrowing is noted.*
2. *L5-S1 with canal narrowing. Foraminal narrowing right greater than left.*

57. Claimant followed up with Dr. Fall on December 5, 2016, who reviewed the results of his fourth lumbar MRI scan. After reviewing the MRI, Dr. Fall assessed that Claimant suffered from **L4-5 and L5-S1 disc protrusions with bilateral lower extremity radiculitis with possible progression on a more recent study**. Dr. Fall stated that she would await the recommendations of Dr. Castro in light of these new MRI findings. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

58. Claimant returned to Dr. Castro on December 7, 2016, to re-address the reasonable necessity of surgery. Dr. Castro stated that Claimant's MRI scans appeared to be significantly changed when compared to the last MRI. Dr. Castro stated that there were no new herniations or instability patterns; however, Claimant demonstrated moderate stenosis of the lateral recesses bilaterally at L4-5. Dr. Castro informed Claimant that low back pain was not an indication for surgical intervention in his case where there was no instability or worsening findings in his low back but that *his buttock and leg pain could be treated with a lumbar decompression*. In lieu of recommending ineffective conservative management, Dr. Castro recommended a one-level microdiscectomy decompression for decompression of lateral recesses to hopefully improve Claimant's claudicatory-type symptoms, which in a setting of moderate stenosis and failure to respond to conservative management, was a reasonable consideration. Dr. Castro stated that there was no indication for a fusion or any other structural type of surgery but that due to Claimant's ongoing pain and worsening of symptoms, he would begin surgical planning for a one-level decompression. Again, Claimant's corresponding pain diagram indicates that he continued to report low back pain and bilateral leg pain.

59. On December 12, 2016, Claimant returned to Dr. Fall who agreed with Dr. Castro's surgical recommendation of a one-level decompression. Claimant's corresponding pain diagram continued to indicate low back pain and bilateral leg pain.

60. On December 14, 2016, Dr. Castro's office requested authorization of an L4-5 lumbar decompression, which was scheduled to take place on December 29, 2016, at Lutheran Medical Center.

61. On January 9, 2017, Claimant returned to Dr. Fall and advised her that the L4-5 lumbar decompression was denied. Claimant stated that he was quite miserable, in a lot of pain and actually felt sick that the surgery had been denied. Dr. Fall noted that Claimant was still working and having pain in his low back and both legs. Dr. Fall assessed that Claimant suffered from L4-5 and L5-S1 disc protrusions with bilateral lower extremity radiculitis. Dr. Fall stated, "I agree with the surgical recommendation by Dr. Castro, the orthopedic spine specialist." Dr. Fall wanted Claimant to follow up with her in one month so if he was to pursue surgery, he would not be at MMI. If however Dr. Fall saw that Claimant would not pursue surgery, she planned to proceed with an impairment rating. Claimant's corresponding pain diagram continued to indicate low back pain and bilateral leg pain.

62. Claimant returned to Dr. Fall on February 6, 2017, and reported ongoing symptoms in both legs and that his pain was quite bad. Claimant advised Dr. Fall that a hearing was set regarding denial of the L4-5 lumbar decompression and that he was to attend two Respondent-sponsored IMEs with Brian Reiss, M.D. and John Burris, M.D. Dr. Fall prescribed additional medication for his radicular symptomatology and advised Claimant that it was only a temporary solution. Claimant's corresponding pain diagram continued to indicate low back pain and bilateral leg pain.

63. On February 27, 2017, Dr. Burris performed a Respondent-sponsored IME. Dr. Burris was to respond to a letter from Respondents dated February 2, 2017. In that letter, Respondents asked Dr. Burris to address the following question:

> *If Mr. Camara has not reached MMI from any work-related injuries, please describe what further treatment is reasonable and necessary to bring him to MMI. Please specifically address whether Dr. Castro's request for authorization to perform an L4-5 lumbar decompression is reasonable, necessary and related to Mr. Camara's injury of March 23, 2016.*

After Dr. Burris conducted his physical exam and reviewed the records, Dr. Burris concurred with Drs. Fall and Castro that Claimant suffered from low back pain with bilateral lower extremity radiculitis. In response to Respondents' inquiry on whether Dr. Castro's request for authorization to perform an L4-5 lumbar decompression was reasonable, necessary and related to the March 23, 2016, injury, Dr. Burris stated:

> *Although he has a history of prior back injuries**, the records support the 3/23/2016 event as the proximate cause of his current symptoms**. Because he has continued symptoms and his treating specialists recommend additional treatment, **I do not believe he has reached maximum medical improvement**. **I believe the L4-5 lumbar decompression recommended by Dr. Castro is reasonable, necessary and related to the 3/23/2016 event**.*

64. On March 1, 2017, Claimant underwent a second Respondent-sponsored IME with Dr. Reiss. By contrast, Dr. Reiss opined that the 2016 work MVA did not change Claimant's preexisting condition. It is Dr. Reiss' opinion that treatment should be considered related to Claimant's only preexisting incident not related to his work injuries. In contrast to the overwhelming evidence, Dr. Reiss' report states that he does not believe the 2015 MVA produced even a temporary aggravation of Claimant's preexisting condition. Dr. Reiss testified consistent with his report that he did not contest the L4-5 lumbar decompression itself, only that it could only be related to the 2015 MVA. On cross-examination, Dr. Reiss admitted that he did not have or review any medical records showing that Claimant suffered from any back pain prior to February 26, 2015. Dr. Reiss also admitted that he did not recall any medical records documenting that Claimant's pain complaints after the 2014 work claim were isolated to his left leg and low back, which would allow him to properly compare and contrast Claimant's complaints of low back and left leg pain prior to March 23, 2016, to Claimant's complaints of low back pain and bilateral leg symptoms after March 23, 2016.

65. Dr. Reiss testified at hearing that the surgery could only be related to the 2016 work MVA if his worsening of condition was simply a lumbar strain superimposed upon Claimant's preexisting condition, which included spinal stenosis and lower extremity symptomatology. Dr. Reiss testified that if Claimant received any injury in the 2016 work MVA, it was possible he had a lumbar strain and that treatment of a lumbar strain was not surgical intervention but physical therapy and time. Dr. Reiss' testimony is inconsistent with every other provider's opinion, the overwhelming medical records

and the objective findings on Claimant's four separate MRI scans documenting that Claimant's initial lumbar strain was objectively worsened after the March 23, 2016, work MVA.

66. Claimant returned to Dr. Fall on March 13, 2017, and advised her that he still had ongoing low back and bilateral leg pain. Dr. Fall addressed Dr. Burris' IME opinion and acknowledged that he found the surgery to be medically reasonable, necessary and related to the March 23, 2016, work injuries. Dr. Fall stated, "Hopefully, this means that the insurance will now approve the surgery and he can proceed." Dr. Fall also wrote Claimant a prescription for a three-month gym membership while he awaited surgery in order to keep him active, mobile and to help him with symptom relief.

67. On April 13, 2017, Claimant returned to Concentra and was re-evaluated by Nickolas Curcija, PA-C. Mr. Curcija noted that Claimant's symptoms remained the same, if not worse, with pain radiating down to the backs of both legs to his calves. Claimant also reported occasional numbness in his left shin and intense pain in the back of his legs which limited his ability to be intimate with his wife. Claimant's corresponding pain diagram continued to indicate low back pain and bilateral leg pain.

68. On May 1, 2017, Claimant followed up with Dr. Fall who acknowledged receipt of Dr. Reiss' IME opinion stating that the L4-5 lumbar decompression was not related to the work injury of March 23, 2016, but rather to Claimant's preexisting condition he solely attributed to the MVA on February 26, 2015. Claimant advised Dr. Fall that although he received treatment from Dr. Wakeshima, he did not pursue surgery after the February 26, 2015, motor vehicle accident and that he was in fact doing well after the 2015 MVA, up until the work-related MVA on March 23, 2016.

69. On May 2, 2017, and May 11, 2017, Claimant was seen at Concentra and continued to complain of ongoing low back pain that radiated into both legs. Claimant's corresponding pain diagrams on these two dates also continued to indicate low back pain and bilateral leg pain.

70. Claimant was evaluated by Albert Hattem, M.D. on May 22, 2017, and reported persistent low back pain with bilateral leg numbness. Claimant rated his pain at 6/10 and advised Dr. Hattem that this injury has really impacted his life and that he continued to have problems with his wife. Claimant stated that prior to March 2016, he was not having these problems. On physical exam, Dr. Hattem's straight leg test was positive in the seated position bilaterally.

71. Dr. Fall re-examined Claimant on June 12, 2017, and noted that Claimant's pain was worsening and that he was experiencing a lot of leg pain and cramping. Claimant rated his pain at 7/10. Since the hearing was scheduled so far out, and there was no treatment to undergo apart from the denied L4-5 lumbar decompression, Dr. Fall recommended proceeding forward with an impairment assessment at their next scheduled visit.

72. Claimant underwent a third IME with John Hughes, M.D. on June 26, 2017. Similar to Drs. Castro, Fall and Burris, Dr. Hughes agreed that the surgical treatment as proposed by Dr. Castro was reasonable and necessary; however, in contrast to every other treating provider, Dr. Hughes found that original 2014 work injury was the proximate cause of his current symptoms. Dr. Hughes stated that:

> *I do believe that surgical treatment as proposed by Dr. Castro is reasonable, necessary, and related to a natural progression of Mr. Camara's initial work-related lumbar spine injuries of October 13, 2014. In my opinion, Mr. Camara is not at MMI pending this surgical treatment.*
>
> *RECOMMENDATION*
>
> *It is my opinion that Mr. Camara sustained work-related lumbar spine injuries on October 13, 2014, that did not resolve, as noted by Dr. Dillon in her report of December 8, 2015. He has now developed left L5 radiculopathy, and I believe that the surgical treatment recommended by Dr. Castro is reasonable, necessary, and related to Mr. Camara's initial work-related lumbar spine injury of October 13, 2014.*

73. Claimant was finally re-evaluated by Dr. Hattem on July 6, 2017, and reported no change in his symptoms within the last 1 ½ months. Claimant continued to report persistent low back pain at 7/10 with ongoing bilateral leg pain. Claimant reported that his low back pain equaled his leg pain and that his right leg was now worse than the left.

CONCLUSIONS OF LAW

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

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder

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

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

In the present case, Claimant began suffering from low back pain and left leg symptoms on October 13, 2014. On February 9, 2015, Dr. Fall evaluated Claimant and found that he merely suffered from an asymptomatic L4-5 disc protrusion as a result of his 2014 work claim. On February 26, 2015, Claimant was involved in a non work-related motor vehicle accident which temporarily aggravated his underlying low back pain and left leg symptoms. On June 30, 2015, Dr. Wakeshima, became the first provider to expressly opine that Claimant's MRI studies on March 13, 2015, did not demonstrate any major pathology that would lead one to suspect that spine surgical intervention was indicated at that time. In this case, the undersigned ALJ agrees with Claimant that the IME report of Dr. Reiss reflects enhanced effects of the claim he was hired to review (the February 26, 2015, MVA claim) to provide an opinion that would mitigate Respondents' obligation to deliver medical benefits per Sections 8-40-101, *et seq.*, C.R.S. The medical records substantiate that prior to March 23, 2016, Claimant's medical treatment was isolated to his low back and left leg.

Reasonable and Necessary Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. See § 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994). The claimant has the burden of proof to establish the right to specific medical benefits by a preponderance of the evidence. § 8-43-201, C.R.S.; *Valley Tree Service v. Jimenez*, 787 P.2d 658 (Colo. App. 1990). The question of whether a claimant has proved that specific medical treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). It is the Judge's sole prerogative to assess the sufficiency and probative value of the evidence to determine whether the claimant has met his burden of proof. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Once the claimant establishes the probability of need for future treatment, as is found in this case, the claimant is entitled to a general award of future medical benefits, subject to the respondents' right to contest the compensability of any particular treatment on grounds that the treatment is not authorized or not reasonably necessary. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Here, Claimant has proven by a preponderance of the evidence Claimant was finished treating for his 2015 MVA by the time he was involved in the motor vehicle accident on March 23, 2016, while in the course and scope of his employment with Employer. Claimant received no medical treatment whatsoever in the more than nine months preceding his March 23, 2016 work related accident. The medical records persuasively document that Claimant's treatment after the 2016 MVA included injections, medications and therapy for his low back and bilateral lower extremities. Moreover, the medical records persuasively and overwhelmingly document that Claimant's complaints of bilateral leg symptomatology did not begin until after the motor vehicle accident on March 23, 2016.

Similarly, the ALJ is not persuaded by Respondents' assertion that Claimant is attempting to get the L4-5 lumbar decompression "bootstrapped" onto the 2016 work claim. On July 21, 2015, Dr. Wallace recorded Claimant's express statement that he was not interested in any injections or surgery at that time. In fact, Dr. Wallace specifically stated that, "He is pleased that chiropractic and acupuncture, have helped a lot." The ALJ finds that Claimant credibly and persuasively testified that he was not sent for any surgery as a result of his evaluation with Dr. Wallace in relation to his 2015 MVA claim. Additionally, the ALJ finds that Dr. Wallace's report is indicative of a mere consultation, not an actual request to conduct surgery, as Respondents contended multiple times at hearing. As is found, Claimant was not a surgical candidate as a result of the 2015 MVA.

Dr. Burris, a Level II accredited physician appointed by Respondents to conduct an IME, provided a causation opinion which the ALJ finds credible and persuasive. Dr. Burris concurred with Dr. Castro and Dr. Fall in opining that although Claimant had a history of back injuries, the records support the 3/23/2016 event as the proximate cause of Claimant's current symptoms. Dr. Burris does not believe Claimant has reached MMI. More importantly, Dr. Burris credibly opined that the L4-5 lumbar decompression recommended by Dr. Castro is reasonable, necessary and related to the 3/23/2016 event. As is found, the L4-5 lumbar decompression is reasonable, necessary and related to the March 23, 2016, work-related MVA claim.

Based on the totality of the evidence presented, the ALJ is not persuaded by Respondents' argument that Claimant's low back and bilateral leg symptoms are primarily attributable to the February 26, 2015, non work-related motor vehicle accident. Although Claimant sustained an aggravation of his preexisting low back pain and left leg symptoms on February 26, 2015, he did not seek any injections or surgery as a result of that MVA and he was finished treatment by the time he was involved in the MVA on March 23, 2016. Respondents did not introduce any persuasive evidence to refute the records of Drs. Castro, Fall or Burris confirming that Claimant sustained additional

injuries to his low back with new symptomatology in both legs as a result of the work-related motor vehicle accident on March 23, 2016.

By contrast, Claimant has been continuously and increasingly limited since the March 23, 2016, industrial injury. Moreover, Claimant provided ample evidence to document additional symptoms in his both legs after the March 23, 2016, motor vehicle accident. Also persuasive was Claimant's testimony and medical records demonstrating that the March 23, 2016, work MVA was the only precipitating event that compelled Claimant to report that he was having difficulty with sexual function and erections due to his severe back pain and severe cramping in his buttocks and legs.

The ALJ concludes that Dr. Burris' opinion that Claimant's low back and bilateral leg symptoms are related to the March 23, 2016, work MVA is credible, persuasive and more persuasive than the contrary causational opinion of Dr. Reiss. The medical records substantiate, and Dr. Burris credibly explained that Claimant's increased low back symptoms with new bilateral leg symptoms are related to the March 23, 2016, work MVA. After the March 23, 2016, work MVA, new findings were observed on Claimant's MRI at the L5-S1 level with new symptoms manifesting in both legs. Moreover, when Claimant's 2014 and 2015 MRIs were compared, every treating provider opined that the 2015 MRI did not demonstrate significant interval changes. By contrast, upon official comparison of Claimant's 2014 and 2015 MRIs, it was found that the broad-based posterior disc protrusion present as a result of the 2014 work claim had actually slightly improved and decreased in size in the interval by March 13, 2015.

Accordingly, Dr. Reiss was not persuasive as to his opinion that the 2015 could be the only cause for Claimant's current symptoms. Dr. Reiss' opinions are not consistent with Claimant's medical records nor do they negate any physician's opinion that an L4-5 lumbar decompression is actually necessary. Dr. Reiss' opinion that the 2015 MVA did not even aggravate Claimant's 2014 low back symptoms is biased, unpersuasive and inconsistent with the overwhelming medical records. That Dr. Reiss issued an opinion in favor or Respondents should not come as a surprise. At hearing, Dr. Reiss admitted that he "testif[ies] for the respondents. That's who hires [him]. That's who pays [him]. And that's who [he] testif[ies] for." Incredibly, and despite all evidence to the contrary, Dr. Reiss issued the opinion that Claimant suffered no injury *at all* as a result of his March 23, 2016 car crash. After weighing the medical opinions and potential biases as a whole, the ALJ finds Drs. Castro, Fall and Burris more persuasive.

Claimant has proved by a preponderance of the evidence that the exacerbation of his low back pain accompanied by new symptomatology in both legs was caused by his involvement in the motor vehicle collision that occurred at work on March 23, 2016. Therefore, Claimant is entitled to such medical benefits under the 2016 worker's compensation claim. The one-level, one-sided decompression surgery is therefore authorized, reasonable, necessary and related to the March 23, 2016, worker's compensation claim. The ALJ is persuaded that the March 23, 2016, incident is the most likely cause of Claimant's current low back and bilateral leg symptomatology, which ultimately requires an L4-5 lumbar decompression as recommended by Drs. Castro, Fall and Burris.

Reopening W.C. No. 4-977-514 - 2014 CLAIM

Given Dr. Hughes' opinion that Claimant's work-related lumbar spine injuries on October 13, 2014, did not resolve and that surgical treatment is related to a natural progression of Claimant's initial work-related injury on October 13, 2014, there is limited basis to reopen the claim in W.C. No. 4-977-514. To warrant reopening, it is not necessary that a worker's industrial disability, i.e. the degree of permanent partial disability, has increased. Rather, reopening is also appropriate where additional medical and temporary disability benefits are warranted. *See Osborne v. Industrial Commission*, 725 P.2d 63 (Colo.App. 1986); *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo.App. 1985).

ORDER

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

1. The L4-5 lumbar decompression as recommended by Drs. Castro, Fall and Burris is reasonable, necessary and related to Claimant's March 23, 2016, work-related MVA.

2. Claimant requires the medical treatment recommended by Drs. Castro, Fall, and Burris to cure and relieve him of the effects of his March 23, 2016, industrial injuries and their sequelae and is entitled to a general award of medical benefits. Respondents shall pay for the Claimant's L4-5 lumbar decompression, and all other medical care Dr. Chamberlain deems reasonable and necessary.

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

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

DATED: November 28, 2017

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

ISSUES

I. May Respondents amend their General Admission of Liability to adjust the Average Weekly Wage of Claimant?

II. Was Claimant responsible for his own termination of employment?

III. If so, has Claimant suffered a worsening of his condition, which would entitle him to Temporary Total Disability payments?

FINDINGS OF FACT

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

1. Respondents filed a General Admission of Liability on June 1, 2017, admitting to reasonable and necessary medical benefits for this claim, and an AWW of $800. (Ex. B). In his original Worker's Claim for Compensation, Claimant listed his Average Weekly Wage at $400.00 (Ex. A)

2. On Thursday, April 27, 2017, Claimant testified he injured his lower back and neck when he was rear ended while stopped at a light. Claimant declined medical care at the time of the accident. Claimant testified he believed he was injured on a Saturday, but the ALJ takes administrative notice that April 27, 2017 was a Thursday.

3. Claimant testified that he was off work for the next 2 days, and still did not seek treatment because he wasn't really in pain, since he was not really moving around very much after the accident.

4. When Claimant returned to work, he testified that he returned to regular work, lifting 25-75 pounds and performing all the activities of a mechanic.

5. Claimant testified that when he returned to work the Tuesday following the accident, the pain was severe. Roger Myers was out of town when the accident occurred, and returned to work on Tuesday, May 2, 2017. When Myers returned, he talked to Claimant about the accident and how he was doing. Myers testified that Claimant reported that his neck and shoulders were a little stiff, but that he was working through it. Claimant testified that he told Bill (co-mechanic Billy Butterfield) and Myers that he was in a lot of pain, but he still did not seek treatment. He further testified that the pain has "worsened as I went."

6. Claimant worked with Myers for three more days until he found out he was going to be terminated on May 5, 2017, because he was underperforming his expected skills, knowledge and ability.

7. Claimant did not seek medical care until the day after he was terminated, on May 6, 2017, at Memorial Hospital. Claimant testified that he sought care because he was in a lot of pain, had constant headaches, and his lower back was painful, mostly on the right side and shooting down his right leg and neck.

8. Claimant testified that this pain in his back, going down his leg, began on the Tuesday when he went back to work. Claimant testified that he did not seek care because he was trying to work through the pain, and didn't want to lose his job. Claimant also testified that he did not seek care because he's not a complainer, and didn't want to complain.

9. Claimant was originally hired as a lead technician.

10. Myers testified that the lead technician is the more knowledgeable, mature employee expected to do jobs on their own without supervision. He testified that Claimant did not live up to the expectations of a lead technician. He explained that he did not expect to have to tell Claimant how to do things, or how to do them quicker, and that as a lead tech, Claimant was expected to either have the skills, or know how to look up the correct answer.

11. Myers testified that making mistakes while putting a customer's car together could result in injury or death. As an example, he testified that on one occasion Claimant installed a brake caliper pin upside down, which could fall out and cause the customer's wheel to lock up. When he confronted Claimant why this occurred, Claimant's response was that "Nobody taught me".

12. Myers testified that he fired the Claimant based on his performance, knowledge and ability. Claimant testified that he was fired because he was not living up to standards as a diagnostician given his 30 years of experience. Claimant agreed that doing reliable work is critical to keeping your customer base, and testified that making errors and would be problematic.

13. Claimant testified that Roger talked to him the first week about his work product, and on a weekly basis after that. Claimant took these conversations to be a "kick in the butt," but not that he was doing anything wrong per se. Myers testified that he spoke to Claimant repeatedly about his mistakes. Claimant testified that when Myers spoke to him about the mistakes, it was basically "pep talks."

14. Claimant initially testified that he did not recall having issues with making errors. However, Claimant then admitted to multiple mistakes, including lifting a garage door into a truck and denting the truck. Claimant first denied that this error cost the shop, then admitted that he was not aware whether or not this cost the shop. Myers testified that he gave the customer $100 off their bill, in lieu of authorizing a body shop repair.

15. Claimant also admitted to breaking an oxygen sensor, and that he didn't know what happened. He did later acknowledge that it was an oversight by him. Claimant also admitted to breaking a hose for a crank case ventilation system.

16. Claimant initially testified that he did not recall an error in failing to tighten bolts correctly, and then clarified that he caught the issue before the car left, took the time to fix it, and retightened the cams. This was done “on his own time”. Myers testified that not only did Claimant leave the cam bolts loose, but he also broke the ‘evap solenoid’. Myers testified that Claimant correcting his error took costly time to repair, as Claimant had to pull the car back around into the shop, remove the top of the engine, correctly tighten the cam shafts, reinstall the top of the engine and pull the car back out.

17. Claimant denied an error in crushing fuel lines while removing a transmission, testifying that they were already bent, and that he just “bent them more.” These lines were ultimately replaced.

18. Myers testified to another of Claimant’s failed repairs, when Claimant used a ventilation hose that was too long when repairing a Camry, and that the car came back after Claimant was let go.

19. Claimant testified that he paid for all replacement supplies for anything he broke. Myers testified that he paid for multiple parts that Claimant broke, including an evap solenoid, crank case ventilation hose, and air intake ducting.

20. Claimant further testified that he did not recall having issues with working slow. However, Claimant admitted that an engine repair job he worked on would not have taken as long if he pulled it out through the bottom of the car, and not the top. Roger testified that mechanics have been pulling the engine from the bottom for years, and that an experienced mechanic should have known this.

21. Roger testified that time was also lost because he had to teach Claimant things he should already know. In one example, Roger had to take time to teach the Claimant how to correctly test Alternators, to verify whether they were bad.

22. Roger testified that Claimant worked slower than the average mechanic “book times”, and rarely finished work within the allotted time. In one example, Claimant testified that he did not recall any issue involving a Honda cylinder head. Myers testified that Claimant was asked to repair a gasket leak, and it took 3 times longer than book time. Myers gave the customer a $100 discount, given the delay in repair.

23. Myers testified that a “comeback” is when a mistake is made while repairing a vehicle, and the work has to be redone to fix the mistake. He explained that comebacks take time to repair, which is a negative to the technician *and* to the shop, because it takes away from time that could be spent on other work. Claimant initially testified that he had no comebacks during his employment, and then clarified that he had no comebacks he could recall. Myers testified that Claimant’s testimony that he had no comebacks was “very incorrect.” He testified that Claimant had comebacks throughout his 6 weeks of employment before his injury, including his very first repair.

24. Claimant was hired under the flag hour compensation (“flag”) system. (Ex. F). Under this system, the employee is paid per job based on the amount charged to the

customer, and the amount charged to the customer is based on the “blue book” time it would take the average mechanic to do the specific task.

25. The flag system rewards employees who are efficient and get work done faster than the “average” mechanic, as the quicker you work, the more money you make. The owner also makes more money if the employee works fast, so it is in the employer’s interest to keep the employee busy. Claimant testified that he was familiar with the flag pay system prior to working with Employer.

26. While working for Employer, Claimant earned a total of $2,147.50 prior to his work injury. (Ex. C). However, Myers testified that Claimant’s earnings of $739.10 for one pay period were incorrect, as Claimant should have been paid $20 an hour, instead of $19 an hour. Therefore, Claimant’s pre-injury earnings should actually have been $2,186.40.

27. Claimant worked for 5 weeks and 3 days prior to his injury, as the testimony established that he started working on March 20. (Ex. C)

28. Claimant testified that he expected to make $750 to $800 a week. He admitted that he knew he wasn’t guaranteed a salary of $800 a week, and that he would have to earn it by doing the work. Claimant testified that when he filled out his Claim for Compensation, he listed his average weekly wage at $400, because that was “basically” what he was earning. Claimant also noted in testimony that “I was paid fairly for the work I was doing”.

29. Prior to working for Respondent, Claimant ran his own mechanic shop, called Hampton’s Automotive. Claimant testified that while working for himself, he charged $65 an hour, and “basically made $750 a week.” At a different point, he indicated he could make “up to a couple thousand” per week.

30. Claimant testified he wasn’t given the jobs by Myers to meet 40 hours per week, and that his co-workers Billy and Jesse were getting more jobs. Myers testified that he did have enough work for Mr. Hampton, outside of a customary reduction in business towards the end of April, which he attributed to it being tax season. He testified that Claimant could have earned more if he had less comebacks, and greater ability and knowledge.

31. Claimant testified he was assigned lot of ‘mediocre’ jobs, such as oil changes and brake jobs. He also testified that some jobs in the flag system are better than other jobs, because they are easier to do, like brakes, oil changes, and bleeding a brake system. Claimant testified you can make more money by doing a lot of oil changes versus a few motor exchanges. Myers testified that for diagnostic jobs, it is not unusual to go beyond the flag rate average time.

32. After his termination, Claimant sought and received unemployment benefits, from the week ending May 20, 2017 through the week ending July 15, 2017, at the rate of $450 a week. (Ex. G).

33. The day after Claimant was terminated, he sought care in the emergency room of Memorial Health on May 6, 2017. (Ex. 1, p. 4). Claimant reported pain in the neck,

low back, with radicular symptoms into the right lower extremity, which had started 2 to 3 days after his accident. (Ex. 1, p. 8). He reported pain that would shoot into his right hip and buttock area and into the leg *on certain occasions.* (emphasis added). Sometimes he said he wakes up in (sic) his arms feel little bit numb, *but none of these happened until 5 or 6 days after the accident occurred.* (emphasis added).

34. Claimant followed up with Dr. Robi Anne Baptist for further care. (Ex. I). Claimant reported neck pain and new low back pain radiating down his right lower extremity. (*Id*. at p. 17). On May 10, 2017, Dr. Baptist gave Claimant restrictions of no lifting more than 5 lbs, no carrying, squatting, or bending. (Ex. I, p.18).

35. Claimant began to treat with Total Function Physical Therapy on 5/31/17. By this time, Claimant had been placed on pain medication. His history on that day, states, in pertinent part:

> Getting out of a chair is difficult. He can't sit for long because he feels pressure on his buttock. If he shifts weight, he can tolerate it 1-2 hours. He has difficulty with stairs and getting in/out of his car. He has a dull headache that is usually in the back of his head and recently moved toward the front of his head as well. He feels symptoms are worsening. He can sleep about 4 hours at night before he wakes. His head also feels heavy at times and difficult to hold.

His modified Oswestry Low Back Pain was listed at 72% disability. He was issued a TENS unit. (Ex. 4.-no page #).

36. The next day, on 6/1/17, Claimant was seen once again. He reports feeling better after using the TENS unit. (Ex. 4- no page #)

37. At visit #3, on 6/7/17, "Pt demonstrates relief with lumbar flexion and extension is painful. Log roll technique instructed to avoid excess rotation of the spine, which was less painful than pt's usual method…TENS unit issued for home use. (Ex. 4- no page #)

38. Progress notes show some improvement until visit #6 on 6/16/17, which note that "Pt stood less than 20 minutes in a garage yesterday and has had excruciating pain in low back since then." Any relief afforded was not long lasting. (Ex. 4, no page #).

39. Visit #7, occurring 6/21/17, notes that "Pt had a significant amount of pain Friday night, but it has gradually decreased since that time. He has not done any long amounts of standing since then." (Ex. 4-no page #).

40. The next visit is #8, occurring on 6/23/17. It notes: "Pt is getting frustrated with pain. He tried walking last night, but could not for more than 10-15 minutes. He would like to resume walking so that he can lose weight." (Ex. 4- no page #).

41. The final visit noted is #9, occurring on 6/28/17. Claimant is still noted to be limited in range of motion, but more notably, "Pt hasn't been able to walk more than approximately 10 minutes." (Ex. 4-no page #).

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a witness. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this instance, both witnesses are sincere in describing the events at issue; any differences in their testimony is simply a good faith difference in recall.

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

Temporary Total Disability

D. To receive temporary disability benefits, the claimant must prove the injury caused the disability. Section 8-42-103 (1), C.R.S. 2001; PDM Molding, Inc. v. Stanberg, 898 P. 2d 542 (Colo. 1995). As stated in PDM, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P. 2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with §8-42-105(3)(a)-(d), C.R.S. 2001. Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. Jorge Saenz Rico v. Yellow Transportation, Inc. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office,* 942 P. 2d 1209 (Colo. App. 1996).

E. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury or disease caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P. 2d 542 (Colo. 1995). The term disability connotes two elements: (1) Medical incapacity evidences by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric,* 971 P. 2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Murphy,* 964 P. 2d (Colo. App. 1998).

Responsible for Termination

F. Where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury. In *Colorado Springs Disposal v. Industrial Claim appeals Office,* 58 P. 3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of fault. In this context fault requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Padilla v. Digital Equipment Corp.,* 902 P. 2d 414 (Colo. App. 1995) *opinion after remand* 908 P. 2d 1185 (Colo. App. 1985). That determination must be based upon an examination of the totality of circumstances. *Id.* The burden to show that the claimant was responsible for her discharge is on the respondents. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P. 3d 790 (Colo. App. 2000).

G. In this case, Respondents have met their burden of showing that Claimant was responsible for his own termination. This is so, despite Claimant's good faith in self-reporting his mistakes, and taking all corrective action to address them at what he believed to be his own expense. Claimant wished to keep his position; he simply made too many errors for a small business to continue to absorb. There is no requirement

that employer show misconduct on the part of Claimant; unmet expectations due to a series of errors is sufficient.

Worsening of Condition

H. The real question is whether or not Claimant's condition worsened due to natural progression of the industrial injury which had occurred while Claimant worked for Employer. In *Anderson v. Longmont Toyota*, the Colorado Supreme Court held that "Section 8-42-2015(4) bars TTD wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury incurred during the employment causes the wage loss." *Anderson v. Longmont Toyota*, 102 P. 3d 323 (Colo. Sup. 2004).

I. In *Anderson*, the Colorado Supreme Court agreed with the ICAO's conclusion on two separate cases, *Anderson* and *Krause*, that:

> [A] worsened condition rendered [Anderson] unable to perform the job. Similarly, after he left the modified employment, [Krause] experienced a worsening of condition that required surgery and prevented him from returning to work. In both situations, because the worsened condition and not the termination of employment caused the wage losses, the ICAO concluded that the claimants were entitled to TTD benefits.
> *Id*. at 331.

J. Claimant was terminated for cause on May 5, 2017. He reported to Memorial Hospital on this admitted claim the next day, and in considerable distress. His condition has continued to deteriorate well beyond the symptoms that Claimant was able to "power through" for a few days after his original onset of symptoms a few days after the accident. Claimant's last medical records from June, 2017 show an inability to walk or stand for more than a few minutes. This is a considerable worsening from when he was terminated. At that time, the extent of his injuries were known to no one. Like the Claimants in *Anderson*, the worsened condition has prevented Claimant from returning to work, and it still does. He was placed on restrictions on May 10, 2017- restrictions which Employer would be unable to accommodate, even if Claimant was a treasured employee. By all accounts, this small business needed all hands to perform heavy lifting, stooping, and squatting.

K. In *Grisbaum v. Industrial Claim Appeals*, in June 2001 the claimant suffered a compensable injury and continued to work with no restrictions. *Grisbaum v. Industrial Claim Appeals Office, 109 P.3d 1054*. In January 2002 the claimant voluntarily resigned from his employment while still under treatment for the work-related injury. In March 2002 the claimant was restricted to light duty because his condition was worsening. In May 2002, the claimant was taken off work completely. In September 2002 and November 2002 the claimant underwent surgeries. The Court of Appeals held that "[b]ecause the ALJ found that the *industrial injury* caused claimant's inability to work

beginning in May 2002, we conclude claimant is entitled to an award of TTD benefits even though his resignation was voluntary."

L. Like the Claimant in *Grisbaum*, Claimant was responsible for his own termination. Afterwards, Claimant's condition worsened considerably. He was effectively unable to work as an auto mechanic as of May 10, 2017, when he was placed on restrictions. He has not been able to return to work due to continued symptoms. His symptoms are related to the work injury, and not due to any prior medical issues. Therefore, the ALJ finds that the industrial injury caused Claimant's inability to work beginning on May 10, 2017 and Claimant is entitled to TTD benefits, even though he was terminated for cause.

Offered Work Restrictions/TTD benefits

M. Respondents argue that Claimant should not be entitled to TTD benefits, because Employer was deprived of the chance to offer work restrictions. For reasons partially noted already, this is unpersuasive. By all accounts, including Mr. Myers', this shop needed all four employees to work at full capacity. That is why Claimant was terminated to begin with. He was not even afforded the chance to work for diminished wages caused by his limited billings. Given the deteriorating relationship, it stretches the imagination to think that Employer, if only afforded the opportunity, would have accommodated Claimant's work restrictions. He was already let go before any work restrictions were put into place.

N. The preponderance of the evidence has established that Claimant suffered a worsening of condition, requiring him to remain off work beginning on May 10, 2017. Claimant was unable to perform his work as an auto mechanic as of that date. Therefore, Claimant is entitled to ongoing TTD benefits beginning on said date, to be offset by his unemployment benefits paid during this time period.

Average Weekly Wage

O. Respondent's would like to withdraw the admitted Average Weekly Wage (AWW), alleging a clerical error in its original calculation. Based upon the evidence in the record, the ALJ concurs. Regardless of Claimant's expectations (reasonable or not) of his position with Employer, or his past history at other places, Claimant was paid what he earned here. He testified that he was paid appropriately for the work he actually performed. Claimant himself listed his Average Weekly Wage at $400 on his original Claim for Workers Compensation, dated May 11, 2017.

P. There is adequate wage information in the record to calculate his AWW at the time of injury. The ALJ adopts the overall reasoning of Respondents, but with some adjustments.

1) Claimant was paid $848.40 for 40.40 hours of work for the two week period ending 4/1/17.

2) Claimant worked 38.9 hours for the two week period ending 4/15/17. By all accounts, he should have been paid at $20 per hour, instead of the $19 per hour noted in the payroll records. The correct figure is therefore $778.00.

3) According to testimony of Myers (which the ALJ accepts as accurate), there is a traditional dip in business in the last part of April, likely due to tax season. For that reason, Claimant's predictably diminished wages (even though pre-injury for most of this pay period) for the period ending 4/29/17 are not used in the AWW calculation. Claimant was also injured on 4/27/17, thus making this pay period even less representative of his earnings.

4) The remainder of his wages for the period ending 5/13/17 are all post-injury.

5) The first four weeks used in the calculation yield an AWW of $406.60. ($1624.40 / 4 weeks = $406.60)

Q. By a preponderance of the evidence, Claimant's Average Weekly Wage is found to be $406.60, which is largely in line with what Claimant himself originally reported to the Division of Workers Compensation.

ORDER

It is therefore ordered that:

1. Claimant's Average Weekly Wage is $406.60.

2. Claimant is entitled to Temporary Total Disability payments, beginning May 10, 2017, until terminated by agreement of the parties or by operation of law.

3. Claimant's TTD payments are to be offset by the unemployment benefits he collected during his period of disability.

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

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

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

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

DATED: November 30, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-016-752-01

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that Shannon Fontana sustained a compensable injury in the course and scope of her employment, entitling Claimant to death benefits.

FINDINGS OF FACT

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

1. Shannon Fontana had known William Hogarth had known for approximately 30 years and they were best friends.

2. Ms. Fontana and Mr. Hogarth had worked together at other automobile dealerships, including Spradley Barr Greeley Ford, prior to their employment by Employer. Mr. Hogarth testified that he worked as the Service Director at Spradley Barr and Ms. Fontana was the Service Manager. Although technically Ms. Fontana reported to Mr. Hogarth, she was his best friend and a peer at work.

3. Mr. Hogarth testified that while at Spradley Barr, he drove a company car and would pick Ms. Fontana up and drive to work. Mr. Hogarth asked for a company car from Spradley Barr because he did not have a vehicle of his own.

4. Mr. Hogarth testified that both he and Ms. Fontana were contemplating going to work for Employer. Mr. Hogarth testified that he requested a company car as part of his compensation package with Employer, and that a demo car was part of his compensation package. Mr. Hogarth signed the demo agreement for the car.

5. James White was the general manager and partner at Employer on May 25, 2016, and he had been with the dealership for fifteen years. As the general manager, Mr. White recruited and hired new employees. Mr. White was involved in offering employment to Ms. Fontana, and he was familiar with her compensation package. He testified that Employer did not offer Ms. Fontana a company car as part of her compensation package because only certain higher level managers and grade level employees were eligible for demo cars. Ms. Fontana was not offered a car and did not sign a demo car agreement.

6. Mr. White testified that Ms. Fontana's compensation package did not include any means of transportation to and from work, and that Employer did not provide any special consideration or treatment for transportation to Ms. Fontana. Mr. White testified that Ms. Fontana would have been expected to arrive at work, just like every other service manager.

7. Although Mr. White was aware that Mr. Hogarth and Ms. Fontana were carpooling, he had no expectations regarding whether Mr. Hogarth and Ms. Fontana intended to continue their personal carpool arrangement.

8. Steve Lacy, the fixed operations director, was also involved in hiring Mr. Hogarth and Ms. Fontana. Mr. Lacy testified that Ms. Fontana was not provided a demo car as part of her compensation package. Mr. Hogarth did not have a car, so Employer provided him with a car, but nothing was discussed with Ms. Fontana regarding how she planned on getting to work. Ms. Fontana was not provided any means of transportation to and from work as part of her employment compensation package.

9. Mr. Lacy was aware that Mr. Hogarth and Ms. Fontana were carpooling, but he did not think anything of it because Ms. Fontana was no different than any other service manager who was required to get to work. Mr. Lacy testified that Employer does not ask its employees how they intend to get to work. The car was given to Mr. Hogarth, but how he chose to use it or whether to carpool was up to him; it was not at Employer's direction.

10. Mr. Hogarth testified that he was not required to nor was it part of his employment compensation with Spradley Barr to provide transportation for Ms. Fontana. It was a personal arrangement between Mr. Hogarth and Ms. Fontana that they would carpool to and from work.

11. A company car was not part of Ms. Fontana's compensation, and she did not sign a demo car agreement.

12. Mr. Hogarth kept the car at his house and he had the keys. Ms. Fontana did not have keys to the car, and was not permitted to use the car at her discretion.

13. Claimant testified that Ms. Fontana had her own car and would have used it if Mr. Hogarth did not take her to work.

14. When Mr. Hogarth and Ms. Fontana began working for Employer, their personal arrangement to carpool simply continued as it had while they worked at Spradley Barr.

15. Mr. Hogarth's employment did not require him to share the car with Ms. Fontana. Employer never instructed Mr. Hogarth to provide transportation for Ms. Fontana. Employer did not provide him with a car on the condition that he and Ms. Fontana would carpool to work. Rather, any assumptions that he and Ms. Fontana would carpool to work were between them and not the Employer.

16. Approximately one week after Ms. Fontana began working as a service manager for Employer, she was involved in a motor vehicle accident as a passenger in the demo car Mr. Hogarth was driving while the two were travelling into work. Ms. Fontana did not survive the accident.

17. Based on the credible testimony provided by Mr. Hogarth, Mr. White and Mr. Lacy, the ALJ finds that Ms. Fontana's compensation package did not include a demo car nor did it include a specific means of transportation to and from work.

18. The ALJ further finds that while Mr. Hogarth was provided a demo car, the Employer did not require nor instruct Mr. Hogarth to provide transportation for Ms. Fontana as a part of either Ms. Fontana's or Mr. Hogarth's compensation package.

19. The ALJ finds that Ms. Fontana's carpool arrangement with Mr. Hogarth pre-dated her employment with the Employer and its continuation was not at the direction of the Employer. Furthermore, the ALJ finds that Mr. Hogarth, as Ms. Fontana's supervisor, neither instructed nor required Ms. Fontana to carpool with him as their carpool arrangement was personal in nature.

20. The ALJ further finds that since the carpool arrangement stemmed from a personal relationship and existed prior to Mr. Hogarth's and Ms. Fontana's employment with Employer, travel was not contemplated by Ms. Fontana's employment with Employer because Employer did not pay for Ms. Fontana's commuting to and from work nor did Employer provide Ms. Fontana with a means of transportation.

CONCLUSIONS OF LAW

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

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

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption that an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968).

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2013). See City of *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

Commuting employees are not typically within the course of employment. These injuries are generally not compensable. *See Madden v. Mountain West Fabricators*, 977 P. 2d. 861 (Colo. 1999). In *Madden*, the Court reiterated the longstanding rule that injuries sustained by claimants going to work from home and while returning, are not compensable. This is known as the "coming and going rule."

The *Madden* opinion set forth four categories of evidence that may establish a travel injury to be an exception to the going and coming exclusion: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the employer's premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

The *Madden* court also listed three categories of cases generally recognized as exceptions to the going and coming exclusion because travel is contemplated by the employment contract: (a) the particular journey was assigned or directed by the employer, (b) the travel was at the express or implied request of the employer and conferred a benefit beyond the employee's arrival at work, and (c) the travel was singled out for special treatment as an inducement to employment. The common element in these types of cases is that the travel is a substantial part of the service to the employer.

The accident occurred while Ms. Fontana was traveling to work, prior to her work hours, and did not occur on Employer's premises. Additionally, there was not sufficient evidence to support a conclusion that the obligations or conditions of employment created a "zone of special danger." There was not sufficient evidence that the travel was assigned or directed by Employer or that the travel was at the express or implied request of Employer and conferred a benefit beyond the employee's arrival at work.

With respect to whether travel was singled out for special treatment, Mr. Hogarth and Ms. Fontana were very close friends for nearly thirty years. Mr. Hogarth and Ms. Fontana worked together at other auto dealerships prior to their employment with Employer. At their prior employment, Mr. Hogarth was permitted to use a company car to travel to and from work because he did not own a car. Because of their close friendship, Mr. Hogarth and Ms. Fontana began carpooling to work while working for their prior employer.

Mr. Hogarth and Ms. Fontana sought employment with Employer. Mr. Hogarth requested use of a company car as part of his compensation package with Employer because he did not own a car. Employer provided a company car to Mr. Hogarth and he signed the demo agreement.

Employer, however, did not provide Ms. Fontana with a company car and she was not part of the demo agreement signed by Mr. Hogarth. Furthermore, Ms. Fontana's compensation package did not include transportation to and from work. Based on Mr. Hogarth's and Ms. Fontana's arrangement at their prior employment and their close personal relationship, Mr. Hogarth and Ms. Fontana chose to continue their carpool arrangement once they began their employment with Employer.

Employer's knowledge that Mr. Hogarth and Ms. Fontana carpooled to work did not extend the transportation provided by Employer to Mr. Hogarth to Ms. Fontana. Mr. Hogarth was not required by Employer to provide transportation to Ms. Fontana, and as her supervisor, he neither instructed nor required that she carpool with him to work.

Thus, the ALJ concludes that travel was not contemplated by the employment contract; therefore, Ms. Fontana was not in the course and scope of her employment when she was traveling to work on the morning of May 25, 2016, when the accident occurred.

ORDER

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

1. Claimant failed to prove by a preponderance of the evidence that Ms. Fontana was in the course and scope of her employment at the time of the accident, and thus, there is not a compensable workers' compensation claim.

2. Claimant's claim is denied and dismissed with prejudice.

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

DATED: November 30, 2017

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

ISSUES

1. Whether the final admission of liability (FAL) filed in this claim is void for lack of a maximum medical improvement (MMI) determination of Claimant's left ankle by an authorized treating provider.

2. Whether the claim is closed due to Claimant's failure to timely request a DIME following a determination of MMI and/or failure to timely request a hearing.

3. Whether, alternatively, a petition to reopen should be granted.

FINDINGS OF FACT

1. Claimant was employed by Employer as a Senior Manager.

2. On October 24, 2008 Claimant sustained a compensable injury to his left ankle when he stepped into a hole and tore ligaments in his left ankle.

3. Claimant eventually underwent four left ankle surgeries related to his injury.

4. The first surgery was performed on November 7, 2008 by Dr. Desai.

5. The second surgery was performed on April 7, 2010 by Mark Conklin, M.D. Claimant continued to follow up with Dr. Conklin following the second left ankle surgery.

6. On April 23, 2010 a general admission of liability (GAL) was filed. The GAL noted the injury date of October 24, 2008 and that temporary total disability benefits from April 8, 2010 through April 13, 2010 would be paid. The remarks indicate that the carrier accepted liability of medical and indemnity benefits due to left ankle tenosynovitis. *See* Exhibit T.

7. On August 26, 2011 Claimant reported to Dr. Conklin that his left foot continued to feel as though there was some type of nerve pain. Claimant also had tenderness and swelling on the right foot. An injection was provided in the right foot. Dr. Conklin recommended physical therapy and provided Claimant with lateral heel wedges. *See* Exhibit 13.

8. On September 9, 2011 Dr. Conklin issued a letter to the Claims Adjuster. Dr. Conklin stated in the letter, "The last time I saw Mr. Stutz was on August 23, 2011 of

which most of his problems concerned his right foot pain and swelling and did an injection to that area. Despite him having continued difficulty with his left ankle, I do feel that he is at Maximum Medical Improvement and feel that there is not much more to do with him from that standpoint. He continues to have nerve type of pain, which may be coming from his back or going down his leg for which he may wind up need persistent care from Dr. Wong." *See* Exhibits 13, A to Respondent's position statement.

9. At the very next appointment with Dr. Conklin and on October 26, 2011, Claimant continued to report nerve pain and numbness over the lateral aspect of his left ankle and foot. Claimant had received several spinal injections for treatment of stenosis and left leg radiculitis with Dr. Wong, but Claimant did not think that his current pain was coming from the lumbar spine and wanted further evaluation. Dr. Conklin performed a physical examination and noted that Claimant's last left ankle MRI was a year old. Dr. Conklin recommended a new MRI to evaluate the left ankle peroneal tendons to rule out tear. *See* Exhibit 13.

10. On November 7, 2011 Claimant underwent an updated MRI of his left ankle. The impression provided was: tenodesis of the torn peroneus brevis to the peroneus longus, just proximal to the level of the peroneus longus accessory ossicle; residual intra substance signal abnormality within the peroneus brevis at the level of the tenodesis that may represent postsurgical intra substance scarring or tendinosis; and persistent mild common peroneal tendon sheath tenosynovitis. *See* Exhibit 13.

11. On November 11, 2011 Claimant reviewed the results of the MRI with Dr. Conklin. Dr. Conklin recommended that Claimant be assessed by Dr. Wong regarding weakness in Claimant's back and left leg. Dr. Conklin indicated that if Dr. Wong found Claimant to be stable, Claimant should return to discuss a flexor halluces longus tendon transfer procedure for Claimant's left ankle. *See* Exhibit 13.

12. On January 11, 2012 Claimant underwent his third left ankle surgery which was performed by Dr. Conklin. The procedure performed was: left ankle peroneal tendon tenolysis; flexor halluces longus tendon transfer from the medial arch of the foot over to the peroneus brevis tendon stump; and tenodesis or transfer of the distal end of the flexor halluces longus tendon to the flexor digitorum longus tendon. *See* Exhibit 13.

13. On January 17, 2012 Respondents filed a GAL. The GAL indicated that temporary total disability benefits were paid from January 11, 2012 and continued and that Claimant was unable to work due to the January 11, 2012 surgery. The date of MMI was listed as N/A. *See* Exhibit T.

14. Following the third left ankle surgery, Claimant continued to have pain and swelling in his left ankle as well as problems with his gait. In June of 2012 Dr. Conklin noted a left foot drop, pain, altered gait and recommended an ankle brace. *See* Exhibit 13.

15. In August of 2012 Claimant continued to report pain aggravated by walking and standing and Dr. Conklin recommended a plan of a fourth left ankle surgery of subtelar fusion with proximal tibia bone graft. *See* Exhibit 13.

16. On January 16, 2013 Claimant underwent his fourth left ankle surgery which was performed by Dr. Conklin. The procedure performed was: corrective triple fusion; navicular decuboid joint fusion; posterior tibial tendon lengthening; and proximal tibial bone graft. *See* Exhibit 13.

17. After the fourth left ankle surgery, Claimant completed physical therapy focused on his awkwardly misaligned left leg as a result of his multiple surgeries. Claimant was noted to have an altered gait with mal-alignment of his left leg. *See* Exhibit 1.

18. Claimant began to experience increasing left knee pain during this period of time following his fourth left ankle surgery and eventually a left total knee replacement was recommended by Peter Lammens, M.D. Dr. Lammens anticipated that the total left knee replacement would help to correct the alignment of Claimant's left leg. *See* Exhibit 1.

19. On August 22, 2013, Claimant was evaluated by Daniel Ocel, M.D. Dr. Ocel noted Claimant's history of traumatic injury to the left ankle with it being a severe inversion injury. Dr. Ocel noted that the ankle procedures Claimant had undergone as well as the knee surgical recommendation. Dr. Ocel noted significant diminished range of motion of the ankle to dorsiflexion, weakness, and abnormal gait. Dr. Ocel opined that Claimant's difficulty was stemming from the remaining hind-foot valgus and that it could be corrected with a calcaneal osteotomy, possible FDL transfer, as well as gastroc recession. Dr. Ocel recommended a CT scan of the left hind-foot, but recommended that Claimant have his left knee replacement performed first and then that they would do the CT scan of the hind-foot and stage the hind-foot corrective osteotomy. Dr. Ocel repeated the recommendation that a fifth ankle surgery be performed after Claimant underwent a left knee replacement at an October, 2013 evaluation. *See* Exhibit7.

20. The relatedness of the total left knee replacement was contested and Claimant underwent a hearing at OAC. In an Order dated January 29, 2014, ALJ Cannici found that Respondents were financially responsible for the additional medical treatment in the form of a total left knee replacement. ALJ Cannici referred to the opinions of doctors who noted that the left ankle surgeries had caused Claimant to suffer an altered gait, that the altered gait had precipitated degenerative changes in the left knee, that the total left knee replacement was necessary to correct the left leg misalignment, and that the total left knee replacement should precede a fifth left ankle surgery. *See* Exhibit 1.

21. ALJ Cannici did not Order that Respondents were responsible for a fifth left ankle surgery or that a fifth left ankle surgery was reasonable, necessary, or related to the compensable injury. *See* Exhibit 1.

22. On July 15, 2014 Claimant underwent a total left knee replacement performed by Dr. Lammens. Claimant also underwent a left knee manipulation under anesthesia on October 16, 2014 performed by Dr. Lammens. *See* Exhibit S.

23. Claimant continued to treat with Dr. Lammens for his left knee and underwent physical therapy for his left knee following his surgery. On December 15, 2014 Dr. Lammens noted that Claimant should continue physical therapy and had made great progress for his left leg, but continued to have left foot issues. On February 13, 2015 Dr. Lammens noted that Claimant was doing globally well with the left total knee and that Claimant would return to him in a year and would to go Dr. Ocel eventually to look at his foot, but recommended Claimant stay out of the operating room for a while to recover from knee surgery. *See* Exhibits 9, S.

24. On October 22, 2015 Dr. Lammens opined that Claimant was at MMI for the left knee injury and that Claimant would need to be referred to a Level II physician in the future for impairment rating assessment. *See* Exhibits 13, S.

25. At this point, Claimant had recovered from the left knee surgery and Dr. Lammens had opined that Claimant reached MMI for his left knee. For unknown reasons, Claimant did not return to any physician regarding his left ankle and follow up despite a prior and outstanding fifth left ankle surgery recommendation from Dr. Ocel (to occur following the left knee surgery). Instead, Respondents referred Claimant to Prejit, Deol, D.O. for an impairment rating.

26. Dr. Deol had never been involved in the treatment of Claimant prior to her impairment rating examination. On April 6, 2016 Dr. Deol met with Claimant. Dr. Deol noted that Claimant was present for an impairment rating of his left knee and left ankle for Workman's Compensation. *See* Exhibit 4.

27. Dr. Deol reviewed the history and performed a physical examination. She noted that Claimant had a complicated history and had undergone multiple surgeries on the left ankle and left knee. She provided an impairment rating and noted significant deficits. Dr. Deol indicated that Claimant had completed his impairment rating on April 6, 2016 and she indicated it would be submitted back to the work comp team and that Claimant would follow up with his physicians as needed. On the closing report, Dr. Deol did not check that Claimant had reached MMI nor did she reference any MMI dates for either the left knee or left ankle that she had rated. Dr. Deol simply indicated Claimant was there for a rating, she provided the rating and measurements, and she sent the case back to the work comp team. *See* Exhibit 4.

28. On May 5, 2016 Respondents filed a Final Admission of Liability (FAL). The FAL noted temporary total disability benefits had been paid from April 8, 2010

through April 13, 2010 and from January 11, 2012 through April 5, 2016. The FAL listed a MMI date of April 6, 2016 and admitted to a permanent partial disability rating of 85% of body code 23 (leg at the hip). Attached to the FAL was Dr. Deol's rating report. *See* Exhibit 4.

29. On May 26, 2016 Claimant filed an Objection to the FAL. Claimant noted that as grounds for the objection that he was not at MMI, that he still needed to have surgery on his left foot and his right knee, that the FAL did not rate his hip, other leg and back, and that he was permanently totally disabled. Claimant did not request a DIME nor did he apply for hearing. *See* Exhibit 5.

30. On July 25, 2016 Claimant filed an Application for Hearing checking the issues of medical benefits and permanent total disability. *See* Exhibit C.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

MMI and FAL

An authorized treating physician (ATP) is required to make a determination as to when the injured employee reaches maximum medical improvement. *See* § 8-42-107(8)(b)(I), C.R.S. If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected. *See* § 8-42-107(8)(b)(II), C.R.S. An ALJ may resolve conflicts or ambiguities in the evidence concerning whether or not an ATP actually placed the claimant at MMI. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002). It is well established that a determination of MMI is not divisible and cannot be parceled out among the various components of a multi-faceted injury. *Paint Connection Plus v. Industrial Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010). There is no provision for partial MMI. *Id.*

In Paint connection, the court reasoned that because MMI was not divisible the rating physician's report triggered no obligation to file a FAL and that waiting to admit liability until the rating physician found claimant at MMI for all conditions was an alternative. *Id*. In this case, Respondents argue that the claim is essentially closed because Claimant failed to follow the proper procedure and failed to request a DIME in response to a determination that Claimant had reached MMI. Respondents thus argue that the determination of MMI is binding. Respondents point to the determination of MMI as to the left knee made by Dr. Lammens and the impairment rating by Dr. Deol where she rated both the left knee and left ankle. Respondents argue that by performing the impairment rating, Dr. Deol made an implicit determination of MMI for both the left ankle and the left knee. Respondents also attached to their position statement a letter sent to the claims examiner in September of 2011 where Dr. Conklin indicated that Claimant was at MMI for the left ankle. They therefore argue that the correct process for Claimant would have been to request a DIME after the MMI determination or apply for hearing and that the claim should be closed as Claimant failed to request a DIME or apply for hearing within 30 days of the FAL on the issues of MMI and permanent impairment.

Respondents further argue that any request or petition to reopen the claim is not actually a request to re-open but an attack on the MMI determination without going through the DIME process. Respondents argue that Claimant failed to file an application for hearing within 30 days of the FAL to prevent closure of the issues in the FAL and that by failing to argue that the FAL was invalid, Claimant acquiesced that the FAL was valid and waived any argument that the FAL was invalid. However, as found above, Claimant filed an objection to the FAL noting that Claimant was not at MMI and

still needed surgery on the left foot among items listed in the objection and did not acquiesce to the invalid FAL.

Respondents' arguments are not found persuasive. Initially, the ALJ concludes that there has been no determination by an authorized treating physician or any physician that Claimant is at MMI for all parts of the multi-faceted injury. We know that the admitted injury initially involved the left ankle. It was also found by ALJ Cannici to involve the left knee. As found above, Claimant underwent extensive left ankle treatment including four left ankle surgeries. After the fourth surgery, a left knee replacement was recommended and Respondents' liability for the left knee was disputed. Respondents ultimately lost and were ordered to pay medical benefits for the disputed left knee. During this time, a fifth left ankle surgery had been recommended By Dr. Ocel but was recommended to not take place until after the left knee surgery. After the dispute over the left knee relatedness was resolved by hearing, Claimant underwent the left knee surgery and was eventually placed at MMI for his left knee by Dr. Lammens. At that time, instead of sending Claimant back to an ATP to see what the recommendations would be for the left ankle, Respondents simply referred Claimant to a physician to provide an impairment rating.

Dr. Deol, who performed the impairment rating, had not treated Claimant during the course of the claim and simply noted that Claimant had been referred for an impairment rating. She performed the impairment rating, rated the left knee and left ankle, and did not check MMI or opine as to what date Claimant reached MMI on either his left ankle or left knee. The ALJ rejects the argument that Dr. Deol implicitly placed Claimant at MMI by performing an impairment rating. Dr. Deol never treated Claimant and simply noted that Claimant had been referred for an impairment rating, which she performed. Dr. Deol also did not check MMI or note any specific dates that Claimant had achieved MMI. There was no implicit determination of MMI made by Dr. Deol. The doctor simply performed an impairment rating and measurements per the referral for a rating that she received. Respondents then filed a FAL without ever sending Claimant back to an ATP for left ankle evaluation despite the fact that they were aware that a fifth left ankle surgery had been previously recommended.

The ALJ finds that Claimant has never been placed at MMI for his left ankle, which is a major component of Claimant's multi-faceted injury. Claimant, as found above, has undergone four left ankle surgeries and had (prior to his left knee surgery) a recommendation for a fifth left ankle surgery. There is no statutory requirement for Claimant to seek a DIME when he has not yet been placed at MMI. Respondents cannot file a premature FAL and then argue that Claimant can no longer attack MMI when Claimant, in fact, has never been placed at MMI. The statutory requirement for Claimant to either request a DIME or apply for hearing was never triggered in this case as Claimant was never placed at MMI for his multi-faceted injury.

Further, the ALJ rejects the contention that ATP Dr. Conklin placed Claimant at MMI for his left ankle in September of 2011. Although Dr. Conklin submitted a letter to the claims adjuster indicating Claimant was at MMI for the left ankle, there is conflicting

evidence from Dr. Conklin indicating his belief Claimant was not, in fact, at MMI. Initially, the letter was sent to the claims adjuster and it does not appear that a MMI determination was ever communicated to Claimant or to the Division. It is unclear if Claimant was ever advised that he was being placed at MMI for his left ankle in September of 2011, putting him on notice of an obligation to object, seek a DIME, or apply for hearing. Additionally, Dr. Conklin at the very next visit in October of 2011, recommended an updated left ankle MRI that had significant findings. Further, Dr. Conklin, four months later, performed a third left ankle surgery. Dr. Conklin continued to treat the left ankle and eventually performed a fourth left ankle surgery. Dr. Conklin's actions in recommending an MRI approximately one month after the September, 2011 letter to the adjuster and in performing a third left ankle surgery approximately four months after the letter to the adjuster are inconsistent with a determination of MMI for the left ankle. Further, as found above, Respondents filed a GAL on January 17, 2012, four months after the letter to the adjuster noting that MMI for the injury was N/A and admitting to TTD for the time off work following the third left ankle surgery performed by Dr. Conklin. The argument that Dr. Conklin placed Claimant at MMI for the left ankle in September of 2011 is found not to be persuasive. MMI is known to be a point in time when any medically determinable physical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. *See* § 8-40-201(11.5), C.R.S. Clearly, during the fall of 2011, despite the letter to the claims adjuster, Dr. Conklin continued significant treatment to Claimant's left ankle to improve Claimant's condition and eventually performed a third left ankle surgery in January of 2012 and a fourth left ankle surgery in January of 2013 to continue to treat Claimant's condition. Claimant has not been placed at MMI for his left ankle and the actions of Dr. Conklin, Respondents filing of a GAL, and the continued treatment of the left ankle after September of 2011 support this determination.

Here, Respondents were aware that there was a significant left ankle injury and an outstanding recommendation for a fifth left ankle surgery. Yet, for unknown reasons, they referred Claimant for an impairment rating after Claimant recovered from the disputed left knee surgery. They never sent Claimant back to an ATP to see if Claimant's left ankle needed further treatment despite being aware of the outstanding recommendations and significant injury to the left ankle. In this case, the only MMI determination is to Claimant's left knee. Claimant has never been placed at MMI for the left ankle and has not been found to be at MMI for the left ankle by an ATP or by any provider. Since MMI cannot be parceled out amongst a multi faceted injury, Claimant has never been placed at MMI and the statutory requirement to request a DIME and/or a hearing has never been triggered. The claim is not closed, Claimant is not barred from arguing MMI, and Claimant has not acquiesced to the invalid FAL. Suggesting that a claim can close after Respondents file an invalid FAL because of any inaction on Claimant's behalf is inconsistent with the purpose of the Act. This would encourage Respondents to regularly file invalid FALs hoping that a Claimant will not timely object in an effort to close claims. Here, although Claimant did not timely request a DIME or a hearing, Claimant's obligation to do so was never triggered as he had never been placed at MMI.

The ALJ concludes that the FAL in this case is void. Respondents erred by filing a FAL prior to a determination of MMI for the multi faceted injury. Claimant shall return to an ATP. The ATP shall be subject to the normal requirements of determining if and when Claimant is at MMI for his left ankle and his multi-faceted injury. As this has not yet happened, the claim remains open and Claimant shall be returned to the ATP for follow up until he is determined to be at MMI for the multi faceted injury.

ORDER

It is therefore ordered that:

1. Claimant has not been placed at MMI for his multi-faceted injury.

2. The FAL is void as it was filed prior to a determination of MMI.

3. Claimant shall return to an ATP who will be subject to normal requirements for evaluating, determining, and reporting when and if Claimant has reached MMI for the multi-faceted injury.

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

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

DATED: November 2, 2017,

/s/ Michelle E. Jones

_____

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-960-618-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 15, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 11/15/17, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM).

Claimant's Exhibits 1 through 11 were admitted into evidence, without objection, with the exception of Exhibit 2, which was rejected, based on Respondents' objection. Respondents' Exhibits A through AA were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed on November 22, 2017. Respondents filed objections to the proposed decision on November 29, 2017, essentially requesting some additions consistent with the ALJ's bench ruling at the conclusion of the hearing. .After consideration of the proposal and the objections thereto, the ALJ hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns Respondents' application to overcome the Division Independent Medical Examination (DIME) opinion

of Thomas W. Higginbotham, D.O., as to the degree of permanent whole person impairment. The parties agree that the date of maximum medical improvement (MMI) is December 12, 2015. The parties further agreed to hold permanent total disability and all other issues in abeyance for consideration at a future hearing, if necessary.

At the conclusion of the Respondents' case-in-chief, Claimant's counsel moved for a judgment in the nature of a directed verdict, which was granted.

The Respondents shouldered the burden of proof by clear and convincing evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant (d.o.b. October 4, 1993) sustained admitted injuries to his back, right foot, right leg, and calf on August 20, 2014, while working for the Employer herein.

2. The Claimant was working at a car wash when a metal grate gave way and the Claimant fell 4 feet, doing the spits and injuring his back, and both legs.

3. As a result of the fall, the Claimant sustained an injury his left ankle and also developed complex regional pain syndrome (CRPS) in his right leg. The Claimant has had a permanent spinal cord stimulator implanted to help him with the CRPS symptoms.

4. The Claimant is unable to walk for more than about 150 feet without crutches or a cane and he cannot ascend stairs or inclines without crutches.

5. The Claimant was placed at maximum medical improvement on December 12, 2016 by his treating physician, Yani Zinis, D.O., who deferred entirely to Annu Ramaswamy, M.D., on the degree of permanent impairment.

6. Ultimately, the Respondents filed a Final Admission of Liability (FAL), dated February 10, 2017, admitting for post-maximum medical improvement (MMI) medical maintenance benefits; and average weekly wage (AWW) of $545.76;; temporary total disability (TTD) benefits of $363.80 per week from August 21, 2014, through December 11, 2016; and permanent partial disability (PPD) benefits of 19%

whole person, with an MMI date of December12, 2016 (which was stipulated as the MMI date), based on the rating of Yani C. Zinis, D.O., who was the Claimant's authorized treating physician (ATP).

7. The Claimant timely requested a DIME, which was performed by Dr. Higginbotham. Dr. Higginbotham rated the Claimant's PPD at 45% whole person. Subsequently, the Respondents challenged the DIME opinion on degree of PPD and requested the hearing, which occurred on November 15, 2017.

8. As found herein above, the parties agree with the DIME's MMI date of December 12, 2015.

Independent Medical Examination (IME) by Annu Ramaswamy, M.D.

9. Dr. Ramaswamy performed an IME at the request of Respondents. Dr. Ramaswamy diagnosed the Claimant as having a right ankle insertional posterior tibial tendon tear, CRPS in the right lower extremity, resolved deep vein thrombosis, right lumbar strain, and reactive depression and anxiety.

10. Dr. Ramaswamy assigned an impairment rating for the CRPS in the amount of 10%. He also gave Claimant a 10% rating for the lumbar strain. Dr. Ramaswamy's total impairment rating was 19%.

11. Dr. Zinis, the ATP, adopted Dr. Ramaswamy's disability rating in his report of December 22, 2016.

Dr. Higginbotham's DIME

12. Dr. Higginbotham performed the DIME on June 13, 2017. The totality of his report (30 pages in length) indicates that the Claimant suffers from severely disabling work-related injuries (Claimant's Exhibit 3).

13. Dr. Higginbotham's diagnosis was extensive, consisting of twelve components:

a. forcible backward extension strain with contusion about the right lower extremity;
b. subsequent right popliteal and peroneal deep vein therombosis with resolution at the popliteal vein by 09/16/2014 and complete resolution by 11/25/2014;
c. anticoagulant therapy for about 1 year with no recurrence;

d. hypercoagulability studies indicative of homocysteinemia and an elevated serology lupus study, untrelated to this work-related injury;
e. sacroiliac and iliolumbar pain and strain with structural diagnostic evidence at L2/3 to the left and disc protrusion at L3/4 affecting both exiting L4 nerve roots;
f. no electrodiagnostic evidence of lumbar radiculopathy;
g. structural diagnostic evidence of multilevel thoracic disc protrusions with mild to moderate cord effacement most significant at T7/8 and T11/12 moderate-sized right paracentral protrusion effacing the spinal cord moderately, of questionable clinical significance or relatedness;
h. initial structural diagnostic evidence of right foot of nonspecific soft tissue swelling and dorsal-laterally with insertional tear of the posterior tibial tendon described as being severe and partial with normal peroneus longus and brevis tendons with subsequent healing on structural diagnostic studies with nominal insertional posterior tibial tendon tendinitis;
i. **complex regional pain disorder (CRPS) right lower extremity Type 1 related to forcible stretch of neurovascular structure and supported by autonomic testing (QSART), theromgram and positive response to several lumbar sympathetic ganglion blocks with MRI (magnetic resonance imaging) evidence of interval marrow signal alteration likely reflecting CRPS with persistent pain and functional limitations** emphasis supplied)
j. status post 03/04/2016 percutaneous temporary implantation of spinal cord stimulator favorable results;
k. status post 04/29/2016 permanent implantation of spinal cord stimulator with overall and continued improved effects for pain control and functionality; and,
l. psychologic assessment of an adjustment disorder with mild anxious and depressed mood, relatively stable without psychotropic medication and without any indication of maladaptive behaviors or symptom magnification (Claimant's Exhibit 3, bates stamp 33, 34).

14.. The ALJ infers and finds that DIME Dr. Higginbotham has diagnosed a multitude of severe physical problems and limitations that resulted from the Claimant's admitted work-related injury.

15 DIME Dr. Higginbotham assigned the following work restrictions for the Claimant, during an 8-hour day:

a. sitting continuously up to 2 hours; intermittently up to 5 hours;
b. walking; none continuously; intermittently up to 2 hours;
c. standing: continuously up to 1 hour with assistive devices;
d. bending: none continuously; intermittently up to 1 hour;
e. squatting: none continuously or intermittently;
f. climbing: none continuously or intermittently;
g. kneeling: none continuously or intermittently;
h. twisting: none continuously; intermittently up to 1 hour;
i. lifting: no lifting or carrying as assistive devices are used for ambulation and balance.
j. repetitive hand use: no limitations with simple grasping or fine manipulation; no continuous pushing or pulling;
k. above shoulder activity: none continuously; intermittently up to 1 hour;
l. repetitive feet use: none continuously;
m. position changes: frequent;
n. any cardiac, visual or hearing limitations: none known;
o. environmental restrictions: avoid temperature extremes, unprotected heights dampness, slippery work surfaces, high speed working, exposure to dust, fumes or gases for safety egress and segmental and whole-body vibration; limited driving;
p. interpersonal relations: none;
q. work activity: anticipated to have varying difficulties with persistence, concentration and pacing of tasks.

16. The ALJ infers and finds that the DIME's assigned physical restrictions are multi-faceted and substantial. These restrictions preclude many activities on the Claimant's part.

17. Dr. Higginbotham agreed to the date of MMI as being December 12, 2016. He rendered a different opinion, however, with regard to the Claimant's permanent impairment rating. He found that the Claimant had a whole person disability rating of 45%. He provided a 15% whole person rating for the spine and a 35% rating for the CRPS.

18. The rating instructions for CRPS of the lower extremity are found in Table 1 at page 109 of the *AMA Guides the Evaluation of Permanent Impairment,* 3rd Ed., Rev (hereinafter the "Guides"), which provides the following instructions:

Station and gait	**Impairment of Whole Person**
Can stand but walks with difficulty	5 – 20
Can stand but walks only on the level	20 – 35
Can stand but cannot walk	40 – 60
Can neither stand nor walk	65

19. Dr. Higginbotham found that because the Clamant is able to stand but can only walk on level surfaces, he was entitled to a 35% rating for the CRPS. His overall permanent impairment rating is 45% whole person.

Dr. Ramaswamy's Testimony at Hearing

20. Dr. Ramaswamy testified at hearing as a witness for Respondents. He stated that he gave a 10% whole person rating because the Claimant could walk and could ascend stairs, albeit with crutches. He also stated that using crutches to ascend stairs is not recommended due to safety issues. The ALJ infers and finds that the 10% rating on this basis is not appropriate and, essentially, contrary to DIME Dr. Higginbotham's rating regarding the Claimant's inability to ascend or descend stairs without crutches.

21. On cross-examination Dr. Ramaswamy conceded that when the *Guides* refer to walking and ambulating on un-level surfaces, they are probably referring to walking without the assistance of crutches or a walker. This concession undercuts Dr. Ramaswamy's 10% rating regarding the Claimant's ability to ascend stairs.

22. The ALJ finds that the plain meaning of walking refers to doing so without crutches or a walker. Therefore the Claimant's disability for CRPS more appropriately falls within the second category of 20- 35%.

Ultimate Findings

23. The ALJ finds Dr. Higginbotham's permanent impairment rating of 45% whole person persuasive, credible, and consistent with the severity of the Claimant's physical condition.

24. Between conflicting opinions on degree of permanent impairment, the ALJ makes a rational choice, based on substantial evidence, to accept DIME Dr. Higginbotham's opinion and to reject Dr. Ramaswamy's opinion.

25. The ALJ finds that Dr. Ramaswamy's opinion on permanent impairment could meet the "preponderance of the evidence" burden but for the anomaly referenced in paragraph 21 herein above , and it does not rise to the level of clear and convincing evidence as required by §8-42-106(8), C.R.S.. Indeed, Dr. Ramaswamy has a good faith difference of opinion with DIME Dr. Higginbotham's permanent impairment rating, which does not rise to the level of clear and convincing evidence. Therefore, the Claimant has proven, by clear and convincing evidence that the degree of his permanent medical impairment is commensurate with a rating of 45% as determined by DIME Dr. Higginbotham.

26. At the conclusion of the Respondents' case-in-chief, their evidence could not get any better. Either the Respondents had proven that DIME Dr. Higginbotham permanent impairment rating was wrong, by clear and convincing evidence, or they had not. In this case, Respondents had not proven their case by clear and convincing evidence at the time their case was concluded.

27. The FAL admits for reasonably necessary and causally related post-MMI maintenance medical benefits. Therefore, these benefits shall continue as prescribed by the Claimant's ATPs.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or

unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, DIME Dr. Higginbotham's permanent impairment rating of 45% whole person persuasive, credible, and consistent with the severity of the Claimant's physical condition.

Substantial Evidence

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

Overcoming the DIME

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's

determination of permanent medical impairment is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P.2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. **A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician.** *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, Dr. Ramaswamy's opinion on permanent impairment may meet the "preponderance of the evidence" test, but it does not rise to the level of clear and convincing evidence as required by §8-42-106(8), C.R.S.. Indeed, Dr. Ramaswamy had a good faith difference of opinion with DIME Dr. Higginbotham's permanent impairment rating, which does not rise to the level of clear and convincing evidence. Therefore, the degree of the Claimant's permanent medical impairment is commensurate with a rating of 45% as determined by DIME Dr. Higginbotham.

Judgment in the Nature of a Directed Verdict

d. Colo. Rules of Civil Procedure, Rule 41(b) (1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss in the nature of a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966)*; Blea v. Deluxe/Current, Inc.*, W.C.

No. 3-940-062 [Indus. Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, at the conclusion of the Respondents' case-in-chief, their evidence could not have gotten any better. Either the Respondents had proven their case by clear and convincing evidence or they had not. In this case, Respondents had not proven their case by clear and convincing evidence at the time their case was concluded, thus, a judgment in the nature of a directed verdict was appropriate.

Post-MMI Medical Maintenance Benefits

e. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Respondents admitted for post-MMI medical maintenance benefits in the FAL and the Claimant is, therefore, entitled to reasonably necessary and causally related post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents having failed to overcome the Division Independent Medical Examination opinion of Thomas W. Higginbotham, D.O., Respondents shall, therefore,

pay the Claimant permanent partial disability benefits, based on 45% whole person permanent medical impairment.

B. Respondents are entitled to credit for all permanent partial disability benefits paid pursuant to the Final Admission of Liability, dated February 10, 2017.

C. respondents shall pay indemnity benefits up to the statutory cap as permitted by § 8-42-107.5, C.R.S.

D. Because the Respondents are continuing to pay permanent medical impairment benefits at the appropriate rate, no interest is warranted.

E. Respondents shall continue to pay the costs of reasonably necessary and causally related post maximum medical improvement maintenance benefits, pursuant to the Final Admission of Liability.

F. Any and issues not determined herein, including permanent total disability, are reserved for future decision.

DATED this_____day of December 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to maintenance medical benefits.

II. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recovery of an asserted $13,354.60 overpayment of indemnity benefits paid over the statutory cap as provided for in C.R.S. § 8-42-107.5.

FINDINGS OF FACT

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

I. Background & Procedural History

1. Claimant was employed by Employer as a maintenance worker when he sustained a compensable injury to his groin/lower abdomen on December 27, 2012. As part of completing a service call, Claimant felt a pop/pull in his groin while attempting to lift a 50-80 pound tool box. He reported his injury and liability for the same was admitted. Claimant was referred for medical care and ultimately underwent two surgical procedures to repair an ilioinguinal hernia.

2. Claimant reached maximum medical improvement ("MMI") on June 27, 2013. Respondents filed a Final Admission of Liability ("FAL") on July 17, 2013. A Final Admission of Liability ("FAL") was filed by Respondents on July 17, 2013. Although no permanent partial disability ("PPD") benefits were admitted to based upon the report of MMI authored by Claimant's authorized treating physician (ATP), Dr. Shireen Rudderow, Respondents admitted to maintenance care in the form of prescription medications, including Gabapentin and Ultram for a duration of one year.

3. At the request of Respondents, Carlos Cebrian, M.D., conducted an Independent Medical Exam ("IME") of Claimant on July 18, 2013. Following his evaluation, Dr. Cebrian agreed with Dr. Rudderow that Claimant was appropriately placed at MMI without permanent impairment, noting that Claimant did not have evidence of a recurrent hernia and was without palpable abdominal defect. Dr. Cebrian opined that there was "no indication for ilioinguinal nerve ablation and/or explantation of the surgical mesh placed by Dr. Khan on January 23, 2013.

4. Claimant timely objected to the July 17, 2013 FAL on July 29, 2013 and filed an Application for a Division Independent Medical Examination ("DIME") on August 15, 2013.

5. Dr. Brian Beatty, completed the requested DIME on April 29, 2014. During the DIME, Claimant reported worsening symptoms of right lower abdominal pain radiating into the right testicle. Bending, coughing, sneezing, exercise, prolonged walking and lifting greater than 20 pounds aggravated Claimant's ongoing symptoms.

6. Dr. Beatty placed Claimant at maximum medical improvement ("MMI") on June 27, 2013 and provided a 4% whole person impairment rating; however, he believed that Claimant should obtain a second opinion regarding whether injections and/or additional surgery for mesh excision or an ilioinguinal neurotomy would be appropriate. Dr. Beatty recommended restrictions, including no more than six hours of walking or standing per day, no longer than 15 minutes at a time with a 15 minute break, no lifting, pushing, pulling, or carrying over 20 pounds, and occasional bending at the waist.

7. After completion of the DIME, Respondents filed a second FAL on May 28, 2014, admitting liability for permanent impairment consistent with Dr. Beatty's April 29, 2014 DIME report.

8. Claimant filed an Application for Hearing endorsing reasonable and necessary medical care, AWW, temporary total disability ("TTD"), and overcoming the DIME regarding MMI and PPD. A hearing was held on May 20, 2015. Following the aforementioned hearing, ALJ Donald E. Walsh, found, among other things, that Claimant's request to overcome the DIME with respect to MMI and PPD was denied and dismissed. Nonetheless, Claimant's request to reopen his claim was granted. ALJ Walsh ordered Respondents to pay Claimant TTD benefits beginning May 20, 2015 and ongoing until terminated by operation of law and found Claimant's AWW effective October 1, 2013 to be $946.83.

9. Respondents filed a General Admission of Liability ("GAL") on August 7, 2015 consistent with the order of ALJ Walsh.

10. Claimant presented to Dr. Ramshaw on September 3, 2015 for medical evaluation at which time both surgical and nonsurgical options for further treatment were discussed.

11. Approximately one year later, on May 27, 2016, Claimant presented to Dr. Ramshaw for diagnostic laparoscopy with explantation of the right inguinal mesh placed by Dr. Kahn in 2013. Claimant also underwent neurolysis, neurectomy, and laparoscopic assisting right groin nerve blocks with long acting local anesthetic without complication.

12. Following his recovery from surgery, Claimant returned to Dr. Jenks. Dr. Jenks placed Claimant at MMI with 17% whole person impairment on September 6, 2016. As part of his September 6, 2016 report, Dr. Jenks noted that Claimant would be limited permanently to sedentary work with no lifting over 10 pounds; no bending, kneeling, or

crawling. He also indicated that Claimant would need to alternate between sitting, standing and walking as needed.

13. On October 28, 2016, Respondents filed a FAL consistent with Dr. Jenks' September 6, 2016 report. The FAL, however, failed to acknowledge the statutory cap on benefits.

14. Claimant filed an Objection to the FAL and an Application for Hearing on November 23, 2016, endorsing compensability, medical benefits, PPD, and Permanent Total Disability ("PTD"). Respondents filed a Response to Application for Hearing on December 5, 2016.

15. Because the October 28, 2016 FAL did not limit indemnity payments to the statutory cap and because Respondents were paying PPD over the cap, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation ("Petition") on March 1, 2017**.** Based on § 8-42-107.5, C.R.S., Respondents requested to suspend compensation for the period from December 9, 2016 and ongoing because Claimant's date of injury was December 27, 2012 with a statutory cap of $78,482.00. Respondents asserted that the statutory cap was met and exceeded on December 9, 2016.

16. After filing their Petition, Respondents filed an Opposed Motion to Endorse Additional Issues for Hearing ("Motion") on March 1, 2017, including termination of payment of indemnity benefits over the statutory cap, credit, overpayment, and reimbursement by Claimant to Respondent-Insurer of indemnity benefits paid to him over the cap. Claimant filed an Objection to the Petition on March 6, 2017.

17. A preconference hearing was held on March 15, 2017 before Prehearing Administrative Law Judge ("PALJ"), Robert J. Erickson, who, among other things, added Petition to Modify, Terminate, or Suspend Compensation to the issues to be addressed at hearing. However, the Division of Workers' Compensation did not rule on the Motion. On May 3, 2017, Respondents requested a ruling. The Motion was denied by PALJ Jeffrey Goldstein. PALJ Goldstein ruled that it was too late to add the issue(s) to the May 18, 2017 hearing, but that another hearing may be held on the issue(s). At the hearing on May 18, 2017,

18. A hearing was convened on May 18, 2017 by the undersigned ALJ during which Respondents requested reconsideration of PALJ Goldstein's Order. The undersigned denied the request. Based upon the evidence presented at the May 18, 2017 hearing, the undersigned concluded that an overpayment existed in Respondents' favor, but that a subsequent hearing was necessary to determine the specific amount and collection of the overpayment. Accordingly, Respondents filed an Application for Hearing on the issues of overpayment and maintenance medical benefits, which as noted above commenced November 7, 2017.

II. Claimant's Medical Treatment History and Need for Maintenance Medical Care

19. Claimant has treated with multiple providers since his injury in 2012. On December 28, 2012, Claimant first saw ATP Shireen Rudderow, M.D., who was Claimant's primary ATP. Khurram Khan, M.D., ultimately performed a laparoscopic right inguinal hernia repair on January 23, 2013. Following the surgery, Claimant continued to have pain in the upper groin area and on April 17, 2013, had a CT scan of the abdomen and pelvis, which were completely normal with no evidence of recurrent hernia but which revealed a possible problem with a blood vessel. Therefore, a Doppler ultrasound was performed of the bilateral lower extremities on April 19, 2013, which was also normal.

20. Dr. Rudderow placed Claimant at MMI without impairment on June 27, 2013. At the request of Respondents, Carlos Cebrian, M.D., conducted an Independent Medical Exam ("IME") of Claimant on July 18, 2013. Following his evaluation, Dr. Cebrian agreed with Dr. Rudderow that Claimant was appropriately placed at MMI without permanent impairment noting that Claimant did not have evidence of a recurrent hernia and was without palpable abdominal defect. Dr. Cebrian opined that there was "no indication for ilioinguinal nerve ablation and/or explantation of the surgical mesh placed by Dr. Khan on January 23, 2013.

21. Following Dr. Cebrian's IME, Dr. Brian Beatty, completed a Claimant requested Division Independent Medical Examination (DIME) on April 29, 2014. During the DIME, Claimant reported worsening symptoms of right lower abdominal pain radiating into the right testicle. Bending, coughing, sneezing, exercise, prolonged walking and lifting greater than 20 pounds aggravated Claimant's ongoing symptoms.

22. Dr. Beatty placed Claimant at maximum medical improvement ("MMI") on June 27, 2013 and provided a 4% whole person impairment rating; however, he believed that Claimant should obtain a second opinion regarding whether injections and/or additional surgery for mesh excision or an ilioinguinal neurotomy would be appropriate. Dr. Beatty recommended restrictions, including no more than six hours of walking or standing per day, no longer than 15 minutes at a time with a 15 minute break, no lifting, pushing, pulling, or carrying over 20 pounds, and occasional bending at the waist.

23. After completion of the DIME, Respondents filed a second FAL on May 28, 2014, admitting liability for permanent impairment consistent with Dr. Beatty's April 29, 2014 DIME report.

24. On September 23, 2014, Claimant presented to John Sacha, M.D., for a second opinion. During his evaluation, Dr. Sacha noted that Claimant denied pain and had normal sensation in the lower extremities although he continued to endorse "pain localized to the right groin that radiates into the right scrotum with burning, numbness, and tingling." It was also noted that Claimant had suffered a work-related closed head injury in 2001 and a heart attack in April 2014. Following his evaluation, Dr. Sacha reached an impression of ilioinguinal neuropathy which he felt may respond to a "one-time right ilioinguinal radiofrequency procedure." Dr. Sacha also noted because Claimant did not have a recurrent hernia, the chance that his symptoms would improve

with repeat surgery was low. Claimant underwent an ilioinguinal radiofrequency neurotomy on October 10, 2014, which provided no improvement.

25. Claimant presented to Michael Crissey, M.D., with a cane on November 17, 2014 for a urology consult. Dr. Crissey completed a thorough examination after which he noted that Claimant had a challenging problem which he could not solve. He recommended the following: "Repeat surgical exploration with lysis and possible mesh removal" in addition to repeat RFA (radio-frequency ablation) of the inguinal nerve and a trial of Lyrica.

26. On December 22, 2014, Dr. Sacha performed a records review and opined that a repeat radiofrequency for ilioinguinal neuropathy had a very low chance of providing any kind of benefit and recommended no surgical procedures other than home exercise, strengthening program, and a gym pass. Dr. Sacha also opined that a cane was not reasonable, necessary and related to the work injury as a cane for someone that had ilioinguinal neuropathy and was actually contraindicated "because the alteration in gait mechanics will actually contribute to issues with other areas other than the ilioinguinal neuropathy." Dr. Sacha reiterated that Claimant was at MMI and no further active care was indicated.

27. Following Dr. Sacha's records review, Claimant filed an Application for Hearing on January 23, 2015, endorsing reasonable and necessary medical care, AWW, temporary total disability ("TTD"), and overcoming the DIME regarding MMI and PPD. Respondents timely filed a Response to Application for Hearing on January 23, 2015.

28. On February 24, 2015, Claimant was evaluated by Dr. Jeffery Jenks. Claimant described continued pain symptoms in the right groin region with radiation into the right leg aggravated by Valsalva maneuvers and significant depression. Dr. Jenks noted that Claimant had been seen by a number of physicians and that there was a disagreement among them as to whether Claimant should have further surgery. Dr. Jenks recommended referral to Bruce Ramshaw, M.D., a nationally known expert for revision surgery for failed herniographies with entrapment of the ilioinguinal nerve.

29. At the request of Respondents, Claimant presented to Dr. Cebrian for a follow-up IME on March 20, 2015. Dr. Cebrian reiterated his opinion that Claimant was appropriately placed at MMI on June 27, 2013, noting further that Claimant's "constellation of symptoms has continued to expand" with reported weakness and collapsing resulting in falls. Dr. Cebrian opined that there was no claim-related physiologic explanation for Claimant's expanding complaints. He also noted that Claimant was no more functional while taking opioid medications than without them. Consequently, he recommended that Claimant be weaned from opioids over the next month. Dr. Cebrian also opined that the restrictions provided by Dr. Beatty were arbitrary and that it was not medically necessary that Claimant limit himself**.** He recommended an increase in Claimant's activity level to help attenuate the nerve response and noted that Claimant was able to work in his medically probable opinion.

30. On April 24, 2015, Respondents requested Dr. Sacha provide an opinion on whether Dr. Jenks' referral to Dr. Ramshaw was medically reasonable, necessary, or related. Dr. Sacha opined that Claimant would not be a good candidate for any type of aggressive interventional procedure, and that Claimant refrain from opioids. Dr. Sacha recommended an aggressive home exercise strengthening and conditioning program.

31. Claimant returned to Dr. Jenks on May 14, 2015, who again referred him to Dr. Ramshaw for evaluation regarding revision surgery status post hernia repair.

32. On May 28, 2015, Respondents requested Dr. Cebrian to conduct a Rule 16 review and provide an opinion on whether Dr. Jenks' referral for an additional surgical consultation was medically reasonable, necessary, or related to Claimant's December 27, 2012 work injury. Dr. Cebrian noted that he agreed with Dr. Sacha that no further surgical treatment was medically reasonable or necessary and the likelihood of any benefit would be extremely low. Accordingly, Dr. Cebrian opined that the referral to Dr. Ramshaw was not medically reasonable or necessary and should be denied.

33. Respondents denied the referral to Dr. Ramshaw prompting Claimant to file an Application for an Expedited Hearing regarding his need for additional medical benefits on June 2, 2015.

34. A hearing was held on May 20, 2015 before ALJ Donald E. Walsh, who denied and dismissed Claimant's request to set aside Dr. Beatty DIME opinions with respect to MMI and PPD. However, Claimant's request to reopen his claim was granted paving the way for Claimant's evaluation by Dr. Ramshaw.

35. Claimant presented to Dr. Ramshaw on September 3, 2015 for medical evaluation at which time both surgical and nonsurgical options for further treatment were discussed.

36. On May 27, 2016, Claimant returned to Dr. Ramshaw for diagnostic laparoscopy with explantation of the right inguinal mesh placed by Dr. Kahn in 2013. Claimant also underwent neurolysis, neurectomy, and laparoscopic assisting right groin nerve blocks with long acting local anesthetic without complication.

37. Following his recovery from surgery, Claimant returned to Dr. Jenks. Dr. Jenks placed Claimant at MMI with 17% whole person impairment on September 6, 2016.

38. At the request of Respondents, Claimant presented to Dr. Cebrian for a follow-up IME on February 6, 2017. Dr. Cebrian opined that Claimant was appropriately placed at MMI by Dr. Jenks on September 6, 2016. Dr. Cebrian opined that the continuation of opioids was not medically reasonable or necessary.

39. Dr. Jenks' license to practice medicine as a physician was suspended on January 17, 2017. Consequently, his role as Claimant's ATP ended. On February 23, 2017, Respondents designed Dwight R. Leggett, M.D. as Claimant's new ATP.

However, Dr. Leggett refused to accept Claimant as a patient. On March 2, 2017, Respondents requested that Claimant choose from a list of physicians to become his ATP. Claimant choose Dr. Timothy Sandell, who also refused to accept Claimant as a patient, due to a "conflict of interest." Claimant then chose Dr. Frank Polanco to be his primary ATP.

40. Dr. Polanco examined Claimant on April 3, 2017. He noted that Claimant presented with chronic pain and that his recent treatment had been "passive and primarily medication oriented." Citing the medical treatment guidelines, Dr. Polanco noted that "evidenced based studies recommend an active program for pain management and do not support long term opioid prescribing without objective documentation of adequate analgesic effect and functional improvement." Dr. Polanco recommended that Claimant wean from opioid dependence. Claimant never returned to Dr. Polanco.

41. Dr. Ballard has recognized that Claimant's "needed prescribed medications [do] have side effects that have affected his limited abilities, and these side effects can potentially cause further harm to Mr. Lange and/or harm others in a workplace environment." Nonetheless, he did not recommend that Claimant's medications be terminated or tapered.

42. Claimant, on his own accord, returned to Dr. Sandell who, without authorization from Insured, unexplainably agreed to initiate treatment with Claimant after having rejected the opportunity to establish a treatment relationship previously due to a "conflict of interest." Dr. Sandell evaluated Claimant on May 17, 2017, noting that Claimant "[was] wishing to transfer his care to [his] office." Dr. Sandell noted that Claimant had been seen for pain management and that Butrans had been helpful in stabilizing his pain. Consequently, Dr. Sandell placed Claimant on a pain medication contract and renewed his Butrans prescription. Claimant had a follow-up appointment with Dr. Sandell on August 15, 2017, during which visit Dr. Sandell recommended a follow-up appointment with Dr. Kahn for surgical reevaluation.

43. Claimant did not seek a change of physician to Dr. Sandell and the evidence presented persuades the ALJ that Dr. Sandell is not an authorized treating provider in this case.

44. While it is clear that Dr. Sandell reviewed "some" of the records authored by Dr. Jenks, the evidence presented persuades the ALJ that he is not familiar with the opinions of Dr. Polanco or Dr. Cebrian regarding Claimant's need for ongoing treatment, including continued prescriptions for opioid medication.

45. Dr. Cebrian reviewed Dr. Sandell's recommendation for a surgical reevaluation by Dr. Khan, and opined that the request for a surgical reevaluation is not medically reasonable or necessary in this claim. Specifically, Dr. Cebrian wrote, "Mr. Lange's problem is not surgical. He has a Chronic Pain Disorder. There is no type of surgery or surgical procedure that will change Mr. Lange's complex symptom complex."

III. Respondents' Asserted Overpayment

46. Based upon the evidence presented, the ALJ finds that Claimant's date of injury is December 27, 2012. Pursuant to C.R.S. § 8-42-107.5, the statutory cap concerning payments from combined temporary and permanent partial disability benefits limits Claimant's payment of the same to $78,482.00 for his date of injury. The evidence presented persuades the ALJ that Insurer has paid a total of $91,836.60 in indemnity benefits. Consequently, the ALJ finds that Claimant has received $13,354.60 in indemnity benefits in excess of the statutory cap ($91,836.60 - $78,482.00 = $13,354.60). Accordingly, the overpayment made to Claimant by Insurer is $13,354.60.

CONCLUSIONS OF LAW

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

I. General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). Although Claimant did not testify, the record evidence presented persuades the ALJ that Claimant suffers from persistent intractable pain which has proved difficult to control. Consequently, the ALJ finds Claimant's ongoing pain complaints credible. Nonetheless, the question of whether Claimant is entitled to ongoing medical treatment for his pain is substantially more complicated necessitating the analysis set forth below.

II. Claimant's Entitlement to Maintenance Medical Treatment

C. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

D. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the ALJ credits the opinion of Drs. Polanco and Cebrian to find and conclude that open ended prescriptions for opioid medications are unreasonable. Here, there is a dearth of objective evidence to support a conclusion that Claimant's continued use of Butrans has produced an adequate analgesic effect to improve Claimant's functional status. Consequently, Drs. Polanco and Cebrian make a convincing argument that Claimant should be weaned from this medication. Nonetheless, "weaning" by its very definition suggests that Claimant needs additional care/monitoring to prevent a deterioration of his current condition as he withdraws from the opioids used to treat the pain caused by his admitted industrial injury. In crediting the opinions of Drs. Polanco and Cebrian concerning weaning Claimant from opioids, the ALJ concludes that Claimant is entitled to maintenance care for this purpose. The evidence presented also persuades the ALJ that Claimant's ongoing medical appointments should be tapered down and ultimately discontinued to stop what the ALJ concludes has been an over reliance on medical treatment providers resulting in an illness-role identification and development of a somatoform disorder on the part of Claimant.

III. Respondents' Asserted Overpayment

E. Section 8-40-201(15.5), C.R.S. provides as follows:

> "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability benefits under said articles.

Thus, §8-40-201(15.5), C.R.S. provides for three categories of possible overpayment: (1) a claimant receives money "that exceeds the amount that should have been paid"; (2) money received that a "claimant was not entitled to receive"; and (3) money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. *See Simpson v. Industrial Claim Appeals Office,* 219 P.3d 354 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010).

F. Respondents bear the burden, by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits. Respondents' assertion of the right to recover an overpayment is a factual matter for determination by the ALJ. *Karyn Milazzo v. Total Long-term Care*, *Inc.*, W.C. No. 4-852-795-02, (ICAP Jun. 11, 2014).

G. Section 8-42-107.5, C.R.S., limits the amount of compensation a claimant may receive in TTD and PPD benefits depending on the claimant's impairment rating. If a claimant's impairment rating is below 25% of the whole person, his compensation is limited to $78,482.00 based on a date of injury on and after July 1, 2012. *See generally*, C.R.S. § 8-42-107.5. Here, Claimant was injured on December 27, 2012, and the impairment (3% mental impairment and 15% physical impairment) admitted to by Respondents is less than 25% of the whole person. Accordingly, under § 8-42-107.5, C.R.S., Claimant's compensation, including TTD and PPD benefits, is limited to $78,482.00.

H. Respondents filed a Petition requesting termination of payment of indemnity benefits paid to Claimant over the statutory cap. Claimant objected to Respondents' Petition. Thus, Respondents could not unilaterally stop paying indemnity benefits to Claimant without an order from the court or until the total payment was complete. *See Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAO July 25, 2013). Ultimately, Respondents paid the full value of PPD and therefore ongoing indemnity payments ended. However, Respondents paid a total of $91,836.60 in indemnity benefits. Consequently, an overpayment exists because the statutory cap pursuant to § 8-42-107.5, C.R.S. was met and exceeded by $13,354.60 ($91,836.60 - $78,482.00 = $13,354.60). Per Section 8-40-201(15.5), C.R.S, there is an overpayment that has been made by Respondents, because Claimant received money that he was not entitled to receive under Section 8-42-107.5, C.R.S. Accordingly, the $13,354.60 must be repaid by Claimant to Insurer pursuant to C.R.S. § 8-43-207(1)(q).

I. The parties have been unable to agree on a repayment schedule concerning the overpayment. When the parties are unable to agree upon a schedule, the ALJ is empowered to determine the terms of the repayment. C.R.S. § 8-43-207(1)(q). In this case, the ALJ concludes that Respondents' request to recoup the overpayment at a rate of $200.00 per month will likely work an undue hardship on Claimant. In order to avoid undue hardship to the Claimant, the ALJ concludes that the overpayment shall be repaid at a rate of $50.00 per month. *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo.App. 1994)(repayment schedule based upon injured workers life expectancy permissible in order to avoid undue hardship).

ORDER

It is therefore ordered that:

1. Claimant shall repay $13,354.60 to respondents at a rate of $50.00 per month. Claimant shall contact Respondents' counsel to obtain the necessary details regarding when and where payments are to be sent.

2. Respondents shall pay for all reasonable, necessary and related medical expenses associated with weaning Claimant from the opioid medication used to treat the pain caused by his industrial injury. The weaning program shall be coordinated through Dr. Polanco and continue in duration and include all treatments which are reasonable and necessary to safely withdraw Claimant from opioids.

3. Claimant's ongoing medical appointments with the treating providers in this claim shall be tapered down and discontinued over a time which is left to the sound medical discretion of Dr. Polanco as Claimant is being tapered off of his opioid medication.

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

DATED: 12/1/2017

/s/ Richard M. Lamphere

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

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

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the medical treatment recommended by Dr. Marc Peck (including physical therapy and injections) constitutes reasonable medical treatment necessary to maintain claimant at maximum medical improvement ("MMI").

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his right wrist on December 1, 2011. The injury occurred when claimant slipped on ice and fell. At the time of the injury claimant worked as a certified automotive technician (mechanic) for employer. Claimant continues to work for employer. Since the injury claimant has undergone two wrist surgeries, a number of injections, and physical therapy.

2. On April 23, 2014, Dr. John Joseph performed an arthroscopic triangular fibrocartilage complex (TFCC) debridement on claimant's right wrist. On June 25, 2014, Dr. Joseph placed claimant at MMI and determined that claimant had no permanent impairment. Based upon Dr. Joseph's report, respondents filed a Final Admission of Liability (FAL) on July 14, 2014. Claimant objected to the FAL and requested a Division-sponsored independent medical examination (DIME)

3. On November 19, 2014, claimant attended a DIME with Dr. Franklin Shih. Dr. Shih agreed that claimant had reached MMI, and assessed an impairment rating of 5% for claimant's right upper extremity. In addition, Dr. Shih recommended claimant undergo a magnetic resonance image (MRI) of his right wrist.

4. An MRI of claimant's right wrist was taken on November 24, 2014 and showed a tear along the scapholunate ligament. Dr. Joseph recommended claimant undergo an arthroscopic TFCC repair with debridement on his right wrist. That second surgery was initially denied by respondents. However, after a hearing on the matter the surgery was authorized.

5. On December 1, 2015 Dr. Joseph performed a right wrist scapholunate repair, synovectomy, and TFCC repair.

6. On October 19, 2016, claimant returned to Dr. Joseph who noted that claimant was doing very well since the surgery and had experienced a decrease in pain following a dorsal wrist injection. At that time, Dr. Joseph stated that he would recommend maintenance treatment allowing for physical therapy. Dr. Joseph indicated that therapy would help claimant "work on his motion if he starts to get stiff". Dr. Joseph also recommended the possibility of another injection, if needed.

7. On November 30, 2016, claimant was placed at MMI by his authorized treating physician (ATP) Dr. Marc Peck. At that time, Dr. Peck recommended maintenance medical treatment, including physical therapy and injections.

8. On February 6, 2017, claimant was seen by Dr. Frederick Scherr for an impairment rating. Dr. Scherr agreed that claimant reached MMI on November 30, 2016. Dr. Scherr released claimant to full duty with no work restrictions. At that time, Dr. Scherr deferred to Dr. Peck on the issue of maintenance care.

9. Claimant attended a second DIME with Dr. Shih on March 21, 2017. At that time, Dr. Shih determined that claimant was at MMI as of November 30, 2016. Dr. Shih also assessed a permanent impairment rating of 8% for claimant's right upper extremity. In the March 21, 2017 DIME report Dr. Shih stated that claimant "should discuss his ongoing use of ibuprofen and aspirin with his physicians". The DIME report is otherwise silent regarding maintenance medical treatment.

10. Respondents filed a FAL on April 5, 2017 admitting for reasonable and necessary maintenance medical treatment. Claimant did not contest the FAL.

11. Claimant testified that after his first surgery he returned to work for employer in August or September 2015. At that time claimant was placed in a shop foreman position. As foreman claimant did not actively perform repairs on vehicles. Instead claimant supervised the other technicians/mechanics. However, when the shop was short mechanics, claimant would need to step in and perform the duties of a mechanic. Claimant testified that at first he was doing very little mechanical type work. That work has increased as the shop continues to lack the necessary technicians.

12. Claimant testified that he continues to work as a foreman, but does more and more work as a technician. As claimant has increased the amount of technician related work he performs he has noticed a return of his right wrist symptoms. Claimant returned to Dr. Peck on May 22, 2017, and reported that his right wrist started hurting when he returned to work as a mechanic. Claimant also reported difficulty with grasping and pinching and overall difficulty using his right hand. At that time, Dr. Peck recommended that claimant undergo physical therapy.

13. The recommended physical therapy was reviewed by Dr. Sollender on June 2, 2017. Dr. Sollender opined that physical therapy is not reasonable, necessary or related to claimant's 2011 wrist injury. Respondents have denied physical therapy treatment.

14. On July 31, 2017, respondents sent claimant for an independent medical examination (IME) with Dr. Sollender. Dr. Sollender opined in his report that "[t]he temporary aggravation of [claimant's] wrist he has experienced is a natural response to his debilitated wrist and is related to his original industrial injury." Dr. Sollender also opined that claimant did not need additional medical treatment. In his report, Dr. Sollender stated that if claimant refrained from performing technician work duties his symptoms will resolve.

15. Dr. Sollender testified at hearing that it is his opinion that claimant's current symptoms are the result of a temporary aggravation of his right wrist condition and not related to his original injury. Therefore, it is Dr. Sollender's opinion that the recommended physical therapy is not necessary. Dr. Sollender also testified that claimant should not be performing mechanic type duties as such duties are likely to aggravate his injury.

16. The ALJ credits claimant's testimony and the recommendations of claimant's treating physicians, Dr. Peck and Dr. Joseph, over the conflicting opinion of Dr. Sollender and finds that claimant has demonstrated that it is more likely than not that his current right wrist symptoms are related to the December 1, 2011 work injury. The ALJ also finds that claimant has demonstrated that it is more likely than not that he is in need of maintenance medical treatment (including physical therapy and injections) to treat these symptoms and remain at MMI.

CONCLUSIONS OF LAW

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

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

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

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

5. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

6. As found, claimant has demonstrated by a preponderance of the evidence that his current right wrist symptoms are related to the December 1, 2011 work injury. As found, claimant has demonstrated by a preponderance of the evidence that the physical therapy and injections recommended by Dr. Peck constitute reasonable medical treatment necessary to maintain claimant at MMI. As found, claimant's testimony and the opinions of Drs. Peck and Joseph are credible and persuasive.

ORDER

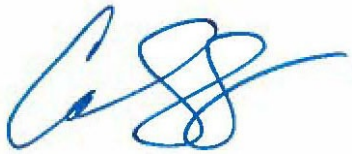
It is therefore ordered that:

1. Respondents shall pay for the physical therapy and injections as recommended by Dr. Peck, pursuant to the Colorado Medical Fee Schedule.

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

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

Dated: December 4, 2017



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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related occupational disease of bilateral hearing loss and has established that his pre-existing bilateral hearing loss was aggravated or accelerated by the conditions of his employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical care related to his bilateral hearing loss, including prescriptions for hearing aids.

3. Whether a portion of Claimant's hearing loss is attributed to his pre-existing condition and can be apportioned out from any hearing loss aggravated by his work exposure.

FINDINGS OF FACT

1. Claimant is employed by Employer as a transportation maintenance 1 worker and has been so employed since approximately November of 2014.

2. Claimant's job duties include general maintenance in and around highways involving replacing/repairing guardrails, pot hole repair, and bridge repair. Claimant uses a variety of tools in performance of his work duties that include jackhammers, pavers, high pressure air machines, generators, rototill machines, and snow plow trucks. Claimant's work activities and daily job assignments vary from day to day.

3. Prior to working for Employer, Claimant held jobs that also involved heavy equipment, large trucks, loud machinery, and use of various tools.

4. When he was hired by Employer, Claimant underwent a physical that included a hearing test. The hearing test showed that Claimant had pre-existing bilateral high frequency sloping hearing loss.

5. The hearing test performed on November 17, 2014 had the following results:

	Left	Right
500 Hz	5	10
1000 Hz	5	5

2000 Hz	10	05
3000 Hz	10	20
4000 Hz	35	45
6000 Hz	60	50
8000 Hz	60	50

See Exhibits 7, F.

6. Claimant testified that he was unaware of his mild hearing loss and did not notice it or know about it prior to the 2014 hearing test.

7. On October 18, 2016, after working for Employer for approximately two years, Claimant underwent a biannual physical that included a new hearing test. The October 2016 hearing test again showed bilateral high frequency sloping hearing loss, worse and more significant than the 2014 test.

8. Claimant testified that during the two years he worked for Employer, he did not notice a change in his hearing and that he did not seek medical treatment before October of 2016 for any perceived hearing loss. Claimant did not seek treatment until after the October 2016 hearing test.

9. After the 2016 hearing test and finding out that his hearing loss was significant at high frequency, Claimant sought treatment.

10. On November 18, 2016 Claimant was evaluated at HealthOne Occupational Medicine & Rehabilitation. Claimant reported on the hearing history form that his hearing was good, that he did not have a hearing loss, that he did not use hearing aids, that he had family members with hearing loss, and that within the past year he had severe ringing in both ears. Claimant reported that within the last year he did not have sudden hearing loss or fluctuating hearing loss. Claimant reported that in a noisy area at work he used his hearing protection 100% of the time. Claimant reported that he had a noisy job, used firearms to hunt, used firearms to target practice, and had noisy hobbies including power tools and motorcycles. *See* Exhibits 6, E.

11. On November 18, 2016 at HealthOne, Claimant underwent a hearing test/audiogram that showed the following levels:

	Left	Right
500 Hz	05	05
1000 Hz	10	10
2000 Hz	15	05
3000 Hz	20	30
4000 Hz	45	45
6000 Hz	80	60
8000 Hz	75	65

See Exhibits 6, E.

12. On November 30, 2016 Claimant was evaluated at Kaiser by audiologist Jolene Emmer. Claimant reported a significant decrease in hearing sensitivity over the last two years. Claimant reported that he had significant noise exposure at work. Claimant reported bilateral tinnitus. Audiologist Emmer noted mild sloping to severe sensorineural hearing loss (3000 to 8000 Hz) in the right ear, and moderate sloping to severe sensorineural hearing loss (4000 to 8000 Hz) in the left ear. Audiologist Emmer noted speech reception threshold at 10 dB HL for both the right and left and right 96% at 50 dB HL and left at 100% at 50 dB HL. Audiologist Emmer assessed bilateral sensorineural hearing loss and opined that the hearing loss was significant enough to result in auditory communication deficits, such as difficulties hearing in background noises. Audiologist Emmer opined that Claimant may benefit from the use of amplification with tinnitus management. *See* Exhibit D.

13. On January 25, 2017 Employer filled out a first report of injury form. Employer indicated that Claimant believed he had lost significant amount of hearing in both ears due to a loud work environment even with the hearing protection that was provided by Employer. *See* Exhibit 3.

14. On January 26, 2017 Claimant was evaluated by Hiep Ritzer, M.D. Claimant reported that in a Department of Transportation physical on October 18, 2016 he was advised of his hearing loss and that he followed up with a Kaiser physician who recommended that he may benefit from hearing aids for the hearing loss and tinnitus. Claimant reported that he worked with a lot of loud noise and had been with Employer for two years. Dr. Ritzer noted that Claimant had an audiogram from November 17, 2014 that showed high frequency hearing loss bilaterally. Dr. Ritzer noted that the audiogram from October 18, 2016 showed progression of high frequency hearing loss bilaterally and assessed bilateral hearing loss, progressive for the last two years. Dr. Ritzer opined that the objective findings were consistent with a history of work related mechanism of injury. Dr. Ritzer referred Claimant to Dr. Lipkin for hearing loss evaluation, hearing aids, and tinnitus evaluation as well as an impairment rating for the progressive hearing loss. *See* Exhibits 8, C.

15. On February 2, 2017 Claimant filled out an employee report of injury. Claimant reported that he had loss of hearing over a two year period that occurred changing plow blades, using jackhammers, using generator, using impact gun, working next to traffic, and driving loud trucks. *See* Exhibit 4.

16. On February 9, 2017 Claimant was evaluated by Alan Lipkin, M.D. Claimant reported hearing loss that had been occurring for the past two years. Claimant reported that he was exposed to loud noises at work including: impact guns, traffic, jack hammer, hammers on steel, and various banging. Claimant reported that he wore hearing protection but that it did not adequately block out the noises at work. Claimant reported newer ear plugs blocked out all the noise which was not always safe when working on the side of the road. Claimant reported bilateral tinnitus and a constant non pulsatile high

pitched sound and bilateral decreased hearing. Claimant reported that his symptoms of tinnitus had been getting worse over time and that he was unsure how long he had the tinnitus. Claimant reported that his father also had noise exposure and hearing loss. On examination, Dr. Lipkin found that Claimant's hearing to conversational voice was moderately impaired. Dr. Lipkin assessed: tinnitus, bilateral; bilateral sensorineural hearing loss; and noise induced hearing loss of both ears. Dr. Lipkin ordered a comprehensive audiometry threshold evaluation and tympanometry impedance testing. Dr. Lipkin opined that work related noise induced hearing loss was highly likely with tinnitus secondary to this. Dr. Lipkin opined that Claimant was a candidate for hearing aids necessitated by Claimant's work related noise induced hearing loss and recommended Claimant meet with the audiologists regarding hearing aids. Dr. Lipkin requested Claimant follow up in one year for a hearing check. Dr. Lipkin opined that Claimant was at maximum medical improvement but would need maintenance treatment with hearing aids and interval audiology and clinical follow up. Dr. Lipkin opined that because of the high frequency nature of the hearing loss, there was no ratable percentage of hearing or whole person impairment. *See* Exhibits 9, B.

17. On February 9, 2107 Dr. Lipkin wrote a letter to Dr. Ritzer indicating that he had concluded with Claimant and assessed: tinnitus, bilateral; bilateral sensorineural hearing loss; and noise induced hearing loss of both ears. Dr. Lipkin indicated that work related noise induced hearing loss was highly likely with tinnitus secondary to that. Dr. Lipkin also indicated that Claimant was a candidate for hearing aids necessitated by the work related noise induced hearing loss. *See* Exhibits 9, B.

18. On March 16, 2017 Dr. Lipkin wrote a letter to Insurer's claim examiner. Dr. Lipkin noted that he had received Insurer's communication concerning Claimant. Dr. Lipkin noted that the hearing screen on November 17, 2014 had predated Claimant's employment with Employer and that the screen had showed bilateral sloping hearing loss, worse in the upper frequencies, although it was somewhat less severe than the February 9, 2017 study. Dr. Lipkin opined, therefore, that the pre-existing hearing loss appeared to have progressed over the last couple of years. Dr. Lipkin opined that the hearing loss was likely related to the tinnitus. Dr. Lipkin opined that sinus issues would have nothing to do with sensorineural hearing loss and that the relative contributions of smoking, family history of hearing loss, and aging were impossible to apportion into Claimant's worsening hearing. Dr. Lipkin opined that it would be reasonable to assume that Claimant's two year employment exacerbated the prior sensorineural hearing loss, assuming that Claimant had significant noise exposure. *See* Exhibits 9, B.

19. On April 17, 2017 Respondents filed a notice of contest notifying Claimant that liability was contested/denied as the injury/illness was not work related. On May 5, 2017 Claimant applied for hearing. *See* Exhibits 1, 5.

20. On September 10, 2017, Sabina Scott, Au.D. issued an audiologist report. Audiologist Scott noted that Claimant had pre-existing hearing loss pre-dating his employment with Employer. She noted that the November 2014 hearing test showed normal hearing from 250 Hz to 3000 Hz that then sloped to a mild to moderately severe

hearing loss with the left ear worse. Audiologist Scott opined that due to Claimant's younger age and long history of loud noise exposure, the pre-existing hearing loss was likely resulting from noise exposure verses aging and that Claimant had a long history of both occupational as well as recreational noise exposure. Audiologist Scott noted that the pre-existing noise exposure included occupational exposure (many years of forklift driving, truck driving, operating cranes, using hammers, and using saws) and included recreational noise exposure (guns, firearms, target shooting, loud music/concerts, noisy motorcycles, noisy dirt bikes). Audiologist Scott opined that as little as one gunshot can cause permanent hearing loss if high quality hearing protection was not consistently used. *See* Exhibit A.

21. Audiologist Scott opined that the type of hearing loss Claimant had was sensorineural hearing loss that refers to the damage of the delicate inner ear hair cell structures most commonly resulting from a combination of loud noise exposure, genetic influences, and aging of the ear. Audiologist Scott opined that based on the hearing test results, Claimant was a candidate for hearing aids in 2014 and that his hearing loss at that time was significant. Audiologist Scott opined that by 2017 Claimant's hearing loss appeared to have worsened by about 30% on average in the right ear, and by 44% on average in the left ear compared to the results from 2014. She opined, however, that the recommended treatment remained the same as it would have been in 2014 with a recommendation for custom hearing aid amplification. *See* Exhibit A.

22. Audiologist Scott reviewed Dr. Lipkin's letter to Insurer from March of 2017. Audiologist Scott noted that while Dr. Lipkin concluded it would be reasonable to assume that Claimant's employment with Employer exacerbated Claimant's hearing loss, more specific information would be needed in order to render a valid conclusion about what may have caused Claimant's progression of hearing loss over those years. Audiologist Scott opined that without knowing specifically what equipment Claimant was exposed to, what decibel levels, or the duration of exposure, it could not be concluded with absolute certainty that Employer was solely responsible for the change in hearing. Audiologist Scott noted that the loud noise exposure with Employer was not measured with a sound level meter, documented with exposure duration times, or compared to the permissible time weighted average charts. Audiologist Scott noted Claimant's long history of recreational loud noise exposure from various hobbies and interests along with his long occupational noise history and opined that those factors made it virtually impossible to determine the exact cause of Claimant's decline in hearing between 2014 and 2017. *See* Exhibit A.

23. Claimant testified at hearing. Claimant indicated that when he was hired by Employer he had never been advised that he had hearing loss and didn't have any problems that he noticed with his hearing. Claimant testified that when he was hired in 2014 he did have ringing in his ears, or tinnitus. Claimant testified that after the 2014 hearing test, no one advised him that he had hearing loss. Claimant testified that after his 2016 hearing test, he was advised that he had severe hearing loss. Claimant testified that in the two years of working for Employer, he did not notice any change in his hearing but also testified that when he first started working for Employer he could hear if someone

was talking while turned away from him and that now if someone was turned away from him while talking he has trouble understanding what they are saying.

24. Claimant testified that he purchased a motorcycle in approximately April of 2016. Claimant testified that in 2016 he rode his motorcycle approximately 8 times and that in 2017 he had ridden his motorcycle approximately 5 times. Claimant testified that his longest ride was probably about 150 miles in one day. Claimant testified that when he rides his motorcycle he does not wear a helmet or any ear protection. Claimant testified that he was not sure whether he told Dr. Ritzer or Dr. Lipkin about his motorcycle riding and testified that he must have forgotten to disclose motorcycle riding in his answers to interrogatories where he was asked to identify all exposures to noise outside of work including motorcycle riding. Claimant also indicated that he went hunting one time in September of 2016 and that he fired 10-15 rounds. Claimant indicated that while hunting, he wore ear protection. Claimant testified that he did not tell his doctors that he had been hunting in 2016. Claimant testified that between 2014 and 2016 he had been to three music concerts. Claimant testified that he did not tell his doctors that he had been to concerts and also did not disclose the concerts in his answers to interrogatories.

25. Claimant testified that a majority of his noise exposure occurs at work and he estimated that 90% of his noise exposure is work related.

26. Although ear protection was provided by Employer, Claimant did not wear it at all times while working. Claimant did not wear it when working highway jobs, as he assessed the risk of oncoming traffic/dangers to be too high.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony

and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

Claimant is required to prove by a preponderance of the evidence that the condition for which he seeks medical treatment was proximately caused by an injury or occupational disease arising out of and in the course of employment. *See* § 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet his burden to establish by a preponderance of the evidence that he sustained a work related occupational disease of bilateral hearing loss. As found above, when Claimant was hired by Employer he had pre-existing bilateral hearing loss. Although Claimant sustained additional hearing loss during his two years of employment with Employer, there is insufficient evidence to establish that the worsening of Claimant's hearing is work related or due to occupational exposures. Claimant is credible that he is often exposed to loud noises at work. However, during the

two years in which his hearing worsened, Claimant also was exposed to loud noises outside of work and he testified credibly as to his noise exposures while hunting, attending concerts, and riding his motorcycle. Even assuming Claimant's estimation that 90% of his noise exposures occur at work and 10% of his noise exposures occur outside of work, there is insufficient evidence that the level of noise exposures at work exceed the level of noise exposures outside of work or that the levels at work were damaging. There was a lack of evidence as to decibel levels of either work activities or outside recreational activities. Although we know Claimant's hearing got worse during the two year period in question, it would be speculative to conclude that the worsening was caused by noise exposure at work versus noise exposure outside of work. There is insufficient evidence that the work related noise exposure was sufficient to cause damage to Claimant's delicate inner ear hair cell structures and the further progression of sensorineural hearing loss that was shown by testing. Rather, it is just as likely that the progression was due to non-work related noise exposures during the two year period of time in question. As found above, Dr. Ritzer opined that the hearing loss progression was consistent with a history of work related mechanism of injury. However, Dr. Ritzer was not made aware of the noise exposures Claimant had outside of work from loud recreational activities. Similarly, Claimant did not disclose to Dr. Lipkin the non-occupational noise exposures that occurred during the two year period in question. Dr. Lipkin opined that it would be reasonable to assume that Claimant's two year employment exacerbated Claimant's prior sensorineural hearing loss assuming Claimant had significant noise exposure at work. Like Dr. Ritzer, Dr. Lipkin did not know that Claimant had exposure to loud noises from his recreational activities and did not opine how that exposure outside of work would impact his overall opinion. Further, Dr. Lipkin noted that he had to make an assumption that Claimant had significant noise exposure at work. As neither Dr. Ritzer nor Dr. Lipkin knew the actual levels of noise at Claimant's work and also did not know that Claimant had loud noise exposures outside of work, their opinions overall are not persuasive.

Claimant testified that the jobs he performs are loud, but there is insufficient evidence that his job duties were at a damaging noise level sufficient to cause the progression of or aggravate/accelerate his pre-existing bilateral hearing loss. From the evidence presented, it appears just as likely that the non-occupational exposures to loud noises (gunfire, concerts, and motorcycle riding) caused the aggravation/acceleration of Claimant's pre-existing sensorineural hearing loss. Audiologist Scott is credible and persuasive that even one exposure to a high noise level (one gunshot) can cause permanent hearing loss if high quality hearing protection was not consistently used. Audiologist Scott is also credible and persuasive that more specific information is needed to render a valid conclusion as to what may have caused the progression of Claimant's pre-existing hearing loss during his two years of employment with Employer. Here, Claimant testified to both loud recreational noise exposures and loud occupational noise exposures. However, there is insufficient evidence to conclude which exposures were the damaging ones or were sufficient to cause the progression of his hearing loss. As there is insufficient evidence to establish, more likely than not, that the occupational exposures were the ones that caused the progression of Claimant's pre-existing hearing loss, Claimant has failed to meet his burden.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work related occupational disease and has failed to establish that his pre-existing bilateral hearing loss was aggravated or accelerated by the conditions of his employment with Employer.

2. The claim is denied and dismissed.

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

DATED: December 4, 2017,

/s/ Michelle E. Jones

_____

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

STIPULATION

Prior to the commencement of hearing, the parties agreed to hold the issue of average weekly wage (AWW) in abeyance.

REMAINING ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right eye while working for Employer on January 23, 2017.

II. If Claimant established that he suffered a compensable injury to his right eye, whether he proved, by a preponderance of the evidence, that he is entitled to reasonable, necessary and related medical treatment to cure and relieve him of the effects of said injury.

III. If Claimant established that he suffered a compensable eye injury, whether he demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability benefits between January 24, 2017 and March 12, 2017.

Because the undersigned concludes that Claimant failed to prove that he sustained a compensable injury on January 23, 2017, this order does not address questions II-III set forth above.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing deposition of Dr. Haug, the ALJ adopts the following findings of fact:

1. Claimant asserts that he sustained a torn retina and other ocular injury while working for A-1 Services, Inc. on January 23, 2017.

2. Claimant is the Head Technician (mechanic) at A-1 Services, Inc. On January 23, 2017, he was working underneath a tractor changing a fuel filter. Claimant testified that as he loosened and removed the fuel filter, diesel fuel splashed in his right eye. He testified that he got up "real quick" from under the tractor and flushed his right eye with water.

3. Claimant testified that when he arose from under the tractor that he immediately experienced white flashes and then a "blob with squiggly lines, black." He rinsed his eye and testified that after doing so, he did not work the rest of the day but instead went home.

4. Claimant admitted that he does not recall hitting his head when getting out from under the tractor.

5. The following day, Claimant testified that when he awoke, the vision in his right eye was nearly black. He testified that he dressed, drove to work, and reported his injury to his employer, Hal Stevens, who directed Claimant to make an appointment with an eye doctor.

6. Claimant presented to ABBA Eyecare the same day, January 24, 2017. ABBA Eyecare referred claimant to Southwest Retina Consultants, where Claimant was examined and evaluated by Dr. Sara Haug.

7. Dr. Haug testified via post hearing evidentiary deposition on August 29, 2017.

8. Upon presentation to Dr. Haug, Claimant provided a history that diesel fuel had splashed into his right eye, that he had flushed his right eye with water, and that he went back to work. He reported that about two hours later, after the diesel fuel had splashed into his eye, he experienced a decrease in his vision. RE A, Bates 1.

9. During her examination of Claimant, Dr. Haug appreciated a vitreous hemorrhage and a subretinal hemorrhage. She diagnosed Claimant with a vitreous hemorrhage secondary to a Valsalva retinopathy. Deposition of Dr. Haug (Haug Depo.) p. 8, l. 4-7, 19-21.

10. Respondents' medical expert, Dr. Ronald Wise, testified at hearing to the nature of a vitreous hemorrhage: the body of the eye is filled with a jelly called the vitreous. Bleeding into the vitreous is called a vitreous hemorrhage.

11. Dr. Haug testified that a Valsalva retinopathy can occur when there is increased intrathoracic pressure such as that cause by heavy lifting, straining with constipation, coughing, vomiting, and other similar things which increase the pressure in the thorax. Haug Depo, p. 8, l. 22-25; p. 9, l. 1-2.

12. Dr. Haug testified that Claimant did not report that he had performed any heavy lifting at work on the date of injury. Haug Depo. P. 20, l. 2-7.

13. Dr. Haug testified that if Claimant had sustained a vitreous hemorrhage secondary to a Valsalva retinopathy on the date of injury, he would have experienced symptoms much more quickly than the two hours he reported had passed before experiencing symptoms. Haug Depo. p. 14, l. 8-14.

14. Dr. Haug testified that regardless of when Claimant's symptoms began, in her medical opinion, the splash of diesel fuel into his right eye had nothing to do with the vitreous hemorrhage secondary to a Valsalva retinopathy. Haug Depo. p. 15, l. 1-6. A diesel fuel splash into the eye does not cause Valsalva retinopathy according to Dr. Haug. Haug Depo. p. 19, l. 9-11.

15. When Dr. Haug evaluated Claimant on the date of injury, she did not recommend immediate surgery. Instead, she advised Claimant that a vitreous hemorrhages secondary to a Valsalva retinopathy most often clear on their own. However, due to Claimant's insistence of claimant, she agreed that she would perform the surgery within a week if Claimant still desired. Haug Depo. p. 9, l, 10-20. Dr. Haug ultimately performed surgery one week later, on January 31, 2017. Haug Depo. p. 9, l. 21-24.

16. During the surgery to correct the vitreous hemorrhage, Dr. Haug testified that she did not appreciate any findings consistent with a retinal tear or detachment. Haug Depo. p. 9, l. 25; p. 10, l. 1-2.

17. Dr. Haug testified that when she performs surgery generally, if she sees areas that could be suspicious for retinal tearing, she will "add laser in the peripheral retina" and that she has a low threshold to add the laser, as she did in this case. Haug Depo. p. 10, l. 2-7. However, when asked specifically on direct examination by Claimant's counsel, Dr. Haug testified that she did not observe any retinal tearing in Claimant's right eye. Haug Depo. p. 11, l. 13-16. She further testified that the purpose of the surgery was to address the vitreous hemorrhage. Haug Depo. p. 11, l. 20-21.

18. The only ocular injury that Dr. Haug identified as having been sustained by Claimant was the vitreous hemorrhage secondary to a Valsalva retinopathy. She testified that a Valsalva retinopathy can be acute or chronic, and that there is no way of telling whether Claimant's condition was acute or chronic. Haug Depo. p. 15, l. 21-25, p. 15, l. 1-5.

19. Claimant contends that Dr. Haug imposed work restrictions effective January 24, 2017, following his first appointment with Dr. Haug. However, Dr. Haug's medical record from January 24, 2017 does not reflect any work restrictions assigned by Dr. Haug. RE A, Bates 1.

20. Claimant also testified that the designated provider/authorized treating provider, Dr. Aaron Singh, assigned work restrictions immediately following the injury event. Yet it is noted that Claimant did not present to Dr. Singh for the first time until February 13, 2017, approximately two weeks following the surgery. CE 4, Bates 34.

21. Claimant sought an independent medical examination (IME) with Dr. Timothy Hall on July 17, 2017.

22. Dr. Hall reviewed medical records from Dr. Haug and an IME report from Respondents' medical expert, Dr. Ronald Wise. He documents in his IME report Claimant's reported mechanism of injury to both Dr. Haug and Dr. Wise, neither of whom documented any reported trauma to Claimant's head. Similarly, Dr. Hall does not document anywhere in his IME report that Claimant reported striking his head while getting up from under the tractor. CA 5, Bates 81-82.

23. Dr. Hall conceded that he did not conduct an extensive eye exam of Claimant, and that his examination was not as extensive as that of Dr. Wise. CE 5, Bates 82. Additionally, Dr. Hall documented that "there is nothing new unearthed" from his examination and evaluation of claimant during his IME. CE 5, Bates 82. Nevertheless, Dr. Hall diagnosed Claimant with post-concussive syndrome with probable post trauma vision syndrome with minimal cognitive symptoms. CE 5, Bates 82.

24. Dr. Hall stated in his IME report that he disagreed with the findings of Respondents' medical expert, Dr. Ronald Wise, because Dr. Wise did not provide an alternate mechanism of injury besides that of diesel fuel splashing into claimant's right eye. CE 5, Bates 81. Regarding Dr. Hall's concerns, the ALJ finds from the evidence presented, that Claimant reported nothing other than diesel fuel splashing into his eye as the mechanism of injury when he saw Dr. Haug and Dr. Wise.

25. The opinions of Dr. Haug and Dr. Wise are supported by the objective findings on examination and the medical records admitted into evidence. Based upon the evidence presented, the ALJ finds the opinions of Drs. Haug and Wise credible and more persuasive than the contrary opinions of Dr. Hall.

26. As noted above, Respondents referred Claimant to Dr. Wise for an independent medical examination (IME) on May 16, 2017 regarding whether the Claimant ocular pathology was causally related to the mechanism of injury (MOI) described by Claimant, specifically getting diesel fuel splashed into his right eye. RE B.

27. Dr. Wise is a Board certified ophthalmologist and is Fellowship trained in corneal disease and anterior segment pathology. He has practiced ophthalmology for 22 years and is licensed in the states of Colorado, Kansas, and Texas. Dr. Wise is also a Level II Certified Ophthalmologist with the Division of Workers' Compensation. He's been Level II certified for more than a decade.

28. As part of his IME, Dr. Wise conducted a comprehensive ophthalmology evaluation and ocular testing of Claimant. He also obtained a personal history from Claimant, including a description of the MOI. Claimant informed Dr. Wise that he got diesel fuel in his right eye while working underneath a tractor, and that he stood up rapidly to wash his eye out with water. He also reported that later in the day, he began to experience difficulties with his vision. Claimant gave no history or report of direct eye trauma and no history or report of striking his head as he stood up to wash out his eye. RE B, Bates 12.

29. Dr. Wise testified that he agreed with the diagnosis determined by Dr. Haug, specifically that Claimant had sustained a vitreous hemorrhage secondary to a Valsalva retinopathy.

30. Dr. Wise further testified that while diesel fuel might cause irritation to the cornea of the eye, it is incapable of causing a Valsalva retinopathy or a torn retina. He also documented this in his IME report. RE B, Bates 15.

31. Following review of records and the IME, Dr. Wise opined in his IME report and in his live testimony that the MOI as described by Claimant, getting diesel fuel in the eye and rising rapidly to wash out the eye, presents no correlation or causal connection to the ocular condition diagnosed and treated by Dr. Haug.

32. Dr. Wise testified that he specifically asked Claimant if he had struck his head and that Claimant did not say that he had. Dr. Wise never had any indication from Claimant's self-reported history or his medical records that Claimant struck his head while getting up from under the tractor to wash his eye.

33. At hearing, Claimant testified that he had immediate visual disturbances following the splash of diesel fuel in his right eye. However, claimant's medical records clearly document a prior self-report that he did not begin experiencing symptoms until at least two hours after the incident, or even until the next day. RE A, Bates 1; CE 4, Bates 34; CE 5, Bates 81. Claimant also testified at hearing that after he washed his eye, he went home and did not work the rest of the day, however, Claimant's medical records document that he worked for at least two additional hours, and in his report to Dr. Singh at Pagosa Springs Medical Center, Claimant reported that he worked the remainder of the day. RE A, Bates 1; CE 4, Bates 34.

34. Claimant testified that he informed his treating providers and evaluating providers all of the events that transpired on the date of injury; he told them everything that happened.

35. Claimant did not provide any history to Dr. Haug, Dr. Wise, or to Dr. Hall that he had struck his head or had any direct trauma to the right eye.

36. The ALJ credits the opinions of Drs. Haug and Wise to find that Claimant's vitreous hemorrhage was likely caused by a Valsalva retinopathy and is unrelated to getting diesel fuel splashed into his eye.

37. Based upon the evidence presented, the ALJ finds that Claimant has failed to establish that he suffered a compensable injury to his right eye on January 23, 2017 as he has alleged. While an incident occurred, the evidence presented fails to establish a causal connection between the MOI, i.e. getting diesel fuel in the eye and Claimant's ocular condition which forms the basis of his claim for medical and indemnity benefits.

CONCLUSIONS OF LAW

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

A. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

B. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically replacing a fuel pump in furtherance of his duties as a mechanic for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

C. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties, does not mean that he sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

D. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms accident and injury. An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.;

Romero v. Industrial Commission, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S. While the ALJ is persuaded that Claimant's visual problems were genuine and his need for treatment reasonable and necessary, the record submitted is persuasive of the fact that his visual condition, i.e. a vitreous hemorrhage is not related to getting diesel fuel in the eye, but rather to an event that increased his intrathoracic pressure such as heavy lifting, straining with constipation, coughing, and/or vomiting. Claimant offered no testimony or other evidence that he had been engaged in any heavy lifting on the date of injury or any other activity which would cause an increased intrathoracic pressure. Rather, Claimant asserted originally that he had sustained a horseshoe retinal tear that required surgical repair after he had splashed diesel fuel into his right eye while changing a fuel filter under a tractor. In his reports to treating providers and evaluating physicians, Claimant stated only that when the diesel fuel splashed into his right eye, he quickly got up from under the tractor and rinsed his eye.

E. Later at hearing, Claimant suggested that he may have struck his head while getting up from under the tractor, but the medical records predating the hearing are devoid of any such suggestion and Claimant admitted he never reported to Dr. Haug, Dr. Wise, or Dr. Hall that he had hit his head. Moreover, Claimant agreed that when he responded to interrogatories, despite having at least three separate interrogatories in which to report that he had struck his head, he never made such assertion nor did he report that he hit his head. The ALJ finds the question of whether Claimant struck his head particularly germane to the issue of compensability since it provides a MOI which would arguably support a conclusion that Claimant's need for ocular treatment with Dr. Haug was causally related to his work duties on January 23, 2017. Consequently, the ALJ has carefully considered Claimant's testimony and has weighed it against the balance of the competing evidence, including the medical records presented. Based upon that review, the ALJ finds and concludes that the suggestion that Claimant may have hit his head while standing quickly to wash out his eye was raised for the first time at hearing. The suggestion is inconsistent with and contradicted by the documentary evidence, including the medical records of Dr. Haug, and Dr. Wise. Based upon the evidence presented, the ALJ finds that the inconsistencies in Claimant's testimony cannot be reconciled with the more persuasive competing record evidence. Accordingly, the ALJ concludes that Claimant's intimation that he may have hit his head upon standing is unconvincing and unreliable.

F. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an "accident" at work without sustaining a compensable "injury." This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where the claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where Claimant involved in motor vehicle accident without resultant injuries, no compensable

injury occurred). As explained by a Panel of the Industrial Claims Appeals Office in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), a coincidental correlation between a claimant's work and his symptoms does not mean there is a causal connection between a claimant's injury and his/her work. To the contrary, as noted by the Panel in *Scully* "correlation is not causation." Further, there is no presumption that an employee found injured on the employer's premises is presumably injured from something arising out of his work. *See Finn v. Industrial Commission,* 437 P.2d 542, 544 (Colo. 1968). While the evidence presented supports that Claimant's work duties caused him to get diesel fuel in his right eye, it does not support a nexus between getting diesel fuel in the eye and Claimant's vitreous hemorrhage which required treatment. Simply put, while an incident occurred, the evidence presented supports a conclusion that the incident did not cause Claimant's need for treatment nor did the incident cause Claimant's disability. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between his employment and the resulting conditions for which medical treatment and indemnity benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim must be denied and dismissed. Accordingly, the claims for medical and temporary disability benefits need not be addressed further.

ORDER

It is therefore ordered that:

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

DATED: December 5, 2017

/s/ Richard M. Lamphere

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

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

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

ISSUES

I. Have Respondents shown, by a preponderance of the evidence, that Claimant did not suffer a compensable injury on October 3, 2016, thus entitling Respondents to withdraw their General Admissions of Liability?

II. If compensability is established, has Claimant shown, by a preponderance of the evidence, that she is entitled to Medical Treatment which is reasonable, necessary, and related to her work injury, including, but not limited to, ongoing physical therapy and purchase of a TENS unit as recommended by her ATP?

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage is $1,094.41. This stipulation was accepted by the ALJ.

FINDINGS OF FACT

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

Injury and Treatment

1. Claimant fell at work on October 3, 2016. While leaving a work-related meeting, she lost her footing on some carpeted stairs, and fell down the last three stairs, striking, at various times, her buttocks, knees, and arms.

2. Claimant sought treatment for the October 3, 2016 incident the following day at the emergency room for the Heart of the Rockies Medical Center. (Ex. 4, pp. 8-14). It was reported at that time that Claimant had a fall at work the day prior. She tripped and fell down approximately three stairs, landing on her arms and knees. Claimant reported pain in her back, neck, right hip, right knee, left shoulder, and left knee. Physical examination documented that she had moderate soft-tissue and "vertebral tenderness in the right upper, mid and lower and left upper, mid and lower thoracic area." *Id.* at 10. Exam of the right hip demonstrated moderate tenderness and limited range of motion secondary to pain. Exam of the right knee documented moderate tenderness and mild swelling along with limited range of motion secondary to pain. Claimant also had tenderness of the left knee and range of motion limited due to pain.

3. Claimant was diagnosed with an acute traumatic thoracic back strain and contusions to the right and left knees. She was given work restrictions to include no

bending or stooping, no prolonged sitting, and no lifting greater than 10 pounds for seven days. Claimant self-reported to her treating physician that she had a history of fibromyalgia, hypertension, and diabetes mellitus.

4. Claimant was first seen at her Workers' Compensation ("WC") provider's clinic, First Street Family Health in Salida, on October 11, 2016. (Ex. 5, pp. 78-80). She was seen regularly by Jennifer Lee, PA-C. Her Authorized Treating Physician ("ATP") was Joel Schaler, MD. Claimant reported a similar mechanism of injury; she lost her footing and fell down three steps, tumbling forward and landing on her hands and knees. Physical examination of Claimant revealed midline tenderness to palpation from T5 to T10, and tenderness to palpation of the lateral paraspinal muscles of the mid-thoracic spine. This WC provider continued Claimant's work restrictions, prescribed Percocet and cyclobenzaprine, and referred Claimant for physical therapy.

5. Her ATP, Dr. Schaler, filed a series of Physician's Reports on 2/17/17 (Ex. 4, p. 120), 3/21/17 (*Id* at 127), 4/17/17 (*Id* at 134), 6/7/17 (*Id* at 138), and 7/17/17 (*Id* at 142). Dr. Schaler was consistent in ordering additional and continued physical therapy, the use of a TENS unit, and stating that Claimant was not yet at MMI, with an unknown date for reaching it. At no point has Claimant's ATP placed her at MMI.

6. Dr. Schaler also noted in his report of April 16, 2017 that "I believe the original injury aggravated an underlying chronic fibromyalgia which she is slowly recovering from…..She is not at MMI, but she has improved significantly by about 75% per her estimation since the originally(sic) injury." (Ex. 4, p. 132).

7. Claimant also began physical therapy on October 24, 2016. (Ex. 6, pp. 143-146). The physical therapist documented that Claimant reported immediate right hip, knee, and thoracic pain. She had continued to work as the manager for Employer, and reported level 8 out of 10 right hip and thoracic back pain. The pain was described as being constant, sharp, and aching.

8. Claimant's stated goal for physical therapy was simply, "To get back to the way [she] was before the fall." *Id.* at 144. Claimant was noted to be unable to perform the full thoracic mobility tests, due to complaints of pain and wincing with palpation. Findings included decreased strength, decreased flexibility, and impaired Range of Motion ("ROM").

9. Claimant followed up at First Street Family Health on October 25, 2016. (Ex. 5, pp. 81-83). Claimant reported that her thoracic back and right hip pain had not improved; in fact it had worsened slightly. Claimant was instructed to continue physical therapy and continue working within her light duty restrictions. As of November 2, 2016, Claimant was still experiencing severe pain and had reduced her working hours to four to five hours per day. Claimant reported the same symptoms on November 8, 2016, noting very slight improvement at that time.

10. On November 24, 2016, Claimant sought emergency treatment at the Heart of the Rockies Regional Medical Center emergency room. (Ex. 4, pp. 17-19). Physical examination again documented tenderness throughout the thoracic spine, along with the lumbar spine. The treating physician recommended work restrictions of no lifting greater than 10 pounds, no bending or stooping and no prolonged sitting. Lumbar radiculopathy was noted on this visit. *Id* at 18.

11. Claimant's reported to the same facility again January 24, 2017. It was noted she received relief from thoracic extension, position changes, heat, and rest. (Ex. 4, p. 26). She reported that used to feel "independent" in her level of functioning until this injury occurred. Her physical therapist documented on this date that Claimant had decreased lumbothoracic ROM secondary to pain, decreased lower extremity strength, hypertonic musculature, and poor scapulothoracic mobility.

12. Claimant was documented to have had a "good response" to physical therapy on January 26, 2017. (Ex. 4, p. 29). Her pain had reduced, and she reported feeling "really good" on this date. Claimant returned to work on January 31, 2017 on light duty, performing mostly office work. On February 2, 2017, Claimant's physical therapist noted that her thoracic mobility was improving. (Ex. 4, p. 36).

13. Claimant reported "60-70% improvement" on February 14, 2017. (Ex. 4, p. 44). Claimant had "asked for more visits" and it was hoped that she would hear soon if more therapy was approved by the WC carrier.

14. Claimant's physical therapy was then discontinued after her next session and she was not able to obtain any further therapy until June 26, 2017. (Ex. 4, p. 57).

15. When Claimant returned to physical therapy on June 26, 2017, it was documented that she had returned to therapy, because 8 additional visits had been approved. (Ex. 4, p. 57). She reported to the physical therapist, "I feel like my symptoms would be resolved by now if I could have only be[en] allowed to continue with PT back in February." Claimant was observed at this visit to have gait abnormalities, sensory/reflex changes, and an up-regulated SNS (sympathetic nervous system), secondary to persistent systemic discomfort.

16. Claimant's final documented physical therapy visit occurred on July 6, 2017. (Ex. 4, pp. 73-77). She again reported improvement and having "less pain" with physical therapy.

Medical Opinions

17. On June 13, 2017, Dr. Frank Polanco performed a peer review regarding Claimant's treating physician's request for a new TENS unit for home use. (Ex. B, pp. 7-9). Dr. Polanco ultimately felt the TENS unit should be denied, because there has been no documentation of objective effectiveness. On July 25, 2017, Dr. Polanco reviewed another request from Dr. Schaler, this time for more physical therapy. (Ex. B,

pp. 10-13). Dr. Polanco denied the request, because Claimant had exceeded the number of physical therapy sessions recommended under the medical treatment guidelines, and there was no documented functional improvement. In this same report, however, Dr. Polanco notes that "Therapy has helped". *Id* at 11.

18. The gap in Claimant's physical therapy was in part due to Respondents' scheduling of an independent medical examination ("IME") with Dr. Wallace Larson. The IME took place on March 9, 2017. (Ex. 7, Ex. A). Claimant reported the same falling mechanism of injury to Dr. Larson. Physical examination documented tenderness of the thoracic spine, right greater than left, and tenderness of the entire lumbar spine, right greater than left also. Dr. Larson reviewed Claimant's records for his IME, but no reference is made in his report to any of the physical therapy notes from February of 2017, which had documented Claimant's improvement with therapy.

19. Dr. Larson was asked to provide an answer to several questions posed by Respondents. (Ex. 7, pp. 175-76, Ex. A, pp. 5-6). Dr. Larson opined that Claimant "does not have an established anatomic diagnosis" and no "specific anatomic injuries." Dr. Larson stated that the fall at work did not aggravate any of Claimant's pre-existing conditions, nor did it cause any "identified anatomic injury." Dr. Larson felt that Claimant did not need any further medications or treatment because she did not have an "identified anatomic injury." Dr. Larson was also asked whether Claimant was at MMI for her work related injury, to which he opined the medical records did not establish a specific date of MMI, but that Claimant would have been at MMI by the date of his evaluation; to wit: March 9, 2017.

20. Claimant subsequently underwent an IME with Dr. Jack Rook at the request of Claimant's counsel on August 25, 2017. (Ex. 8). Dr. Rook obtained a history from Claimant regarding the injury, and the progression of her treatment and symptoms. Dr. Rook also reviewed Dr. Larson's IME report. Dr. Rook noted that it had been 10 months since Claimant's injury. Although she had physical therapy, she only had one session of dry needling and no massage therapy, no chiropractic care, and no injection therapy. Claimant reported to Dr. Rook that she continued working full-time for the employer out of financial necessity, despite her primary care physician's recommendation to work only part-time.

21. Dr. Rook documented Claimant's current complaints of pain, the most severe of which was focused around her mid to low back and hips. (Ex. 8, p. 185). She indicated her back pain felt 'muscular', with occasional sharp severe pain in her mid to lower back radiating to her buttocks.

22. Claimant reported that she was making progress with her physical therapy in February before it was discontinued. She felt the delay in the authorization of her additional treatment set her back considerably. Claimant reported just recently starting physical therapy again. She reported ongoing use of her old TENS unit, despite the new TENS unit prescribed by her ATP having been denied. She also began using a sacroiliac joint belt that was given to her by her physical therapist.

23. Dr. Rook discussed Claimant's prior medical history with her, including her diagnosis of fibromyalgia. (Ex. 8, p. 186). Claimant reported that her fibromyalgia used to cause "aching" type pain, which was different from the severe pain since the injury at work. She was able to perform the full duties of her job without any restriction prior to her injury.

24. Dr. Rook also performed a physical examination of Claimant. The examination of Claimant's back revealed increased muscle tone, with severe tenderness of her bilateral paraspinal muscles, extending from the thoracolumbar junction to the sacrum. There was noted to be exquisite tenderness of the bilateral sacroiliac joints.

25. Dr. Rook diagnosed Claimant with thoracic and lumbar myofascial pain syndrome with chronic muscle spasms. He also wanted to rule out facet malalignment, and bilateral sacroiliac joint strain/dysfunction. (Ex. 8, p. 187-188). Dr. Rook opined that Claimant likely strained and tore muscles and ligaments throughout her back, pelvis, and hip region when she fell at work. Although Claimant was predisposed to hypersensitivity due to her fibromyalgia, Dr. Rook indicated her clinical condition had markedly worsened from a soft-tissue perspective.

26. Dr. Rook opined that Claimant was *not* at MMI, and that she likely would require a few more months of ongoing physical therapy, along with pool therapy, which would be of optimal benefit, considering Claimant's severe myofascial pain. He felt Claimant may also benefit from a chiropractic evaluation and massage therapy. Dr. Rook also indicated a consultation with a pain management specialist would be warranted for possible trigger point injections as well as more specialized medication management. Dr. Rook recommended Claimant have a TENS unit purchased for home use, due to her long-term problem, and her favorable response to earlier usage of the TENS unit.

Testimony at Hearing

27. Claimant testified at hearing in Respondents' case-in-chief. She was asked regarding a previous back injury she had sustained at work. She explained that she had strained her back four or five years ago working for the same employer, but simply sought treatment for a short period of time on her own, as she wanted to avoid filing a workers' compensation claim at that time. Claimant was also asked regarding a physical therapy referral that was made for her by a physician in 2014. Claimant explained that the therapy was for her general aches as a result of her fibromyalgia. Although she would have pain in her back, it was not constant, nor was it nearly severe as it had been since the October 3, 2016 fall. She would typically treat these aches by soaking in a hot tub of water and using her heating pad. Claimant also testified that she had received good relief from her TENS unit to date.

28. Claimant testified that she had worked for the employer for approximately fifteen years, prior to the fall of October 3, 2016. She had never missed more than a

week of work due to illness or injury prior to this fall. Her job would require her to frequently lift items ranging from 5 to 100 pounds, and she was able to perform her job duties in full for the fifteen years prior to October 3, 2016. She testified regarding the difference between the aches prior to the fall, and the pain after the fall. She described the symptoms prior to the fall as more of minor aches and pains; almost a feeling of soreness from overworked muscles. Since the fall, it is more of a severe, constant pain.

29. Dr. Larson testified at hearing on behalf of Respondents. It was his testimony that Claimant's symptoms did not correspond with any particular anatomic injury. He felt that the injury sustained by Claimant should have been minor, and relieved through time alone. Dr. Larson identified the lack of pathology on the x-rays and MRIs in opining that Claimant did not sustain any degree of anatomic injury with a specific diagnosis. He testified that he did not think ongoing physical therapy or use of the TENS unit would be reasonable, necessary, or related to the admitted fall, as Claimant had widespread, diffuse symptoms not attributable to the fall.

30. Dr. Larson testified that it was his opinion Claimant may have sustained a minor strain when she fell, but that she had too many non-anatomic findings to be able to tell for certain. He testified at hearing that she would have been at MMI for her work injury the day after it occurred.

Summary of Claimant's Prior Medical History

31. Claimant had treated at First Street Family Health in Salida since at least 2009. On 7/27/2009, Claimant twisted her back at work, but no further follow-up is noted, as "a rapid recovery was expected". (Ex. C, pp. 14-16). She was treated for depression beginning in 2010 (Ex. C, p. 17). The records do not reflect that such treatment was wholly successful. On Sept. 23, 2010, Claimant was referred to physical therapy for neck pain (Ex. C, p. 22).

32. Claimant complained of a sudden onset of generalized pain on 6/24/14 to Dr. Meggan Grant-Nierman, DO, with First Street. She complained that she "hurt everywhere, feels like someone took a baseball bat to me"…can't stay awake—Came on all of a sudden. Claimant complained of fatigue. (Ex. C, p. 51). Further examination of the records, however, shows a diagnosis of an unspecified fever, likely viral in nature. Nothing in the records indicate that this illness carried over to her current complaints.

33. As recently as June 16, 2016, (Ex. C, p. 65), and again on September 13, 2016 (Ex. C, p. 69), Claimant had been diagnosed with fibromyalgia. Claimant consistently acknowledges this in her medical history.

Procedural History

34. Sharmie Jensen testified telephonically at hearing in her capacity as a claims representative for the Respondent-Insurer. She testified that Claimant's claim had been reassigned to her in January of 2017. She alleged that she scheduled an IME

with Dr. Wallace Larson to figure out why Claimant was not progressing towards MMI and to seek ideas for additional treatment.

35. She testified initially that there were also records from Claimant's primary care provider from before the date of that injury which made her question compensability. On cross-examination, Ms. Jensen acknowledged that in fact, she did not have the prior medical records at the time she sent Claimant for an IME with Dr. Larson.

36. Respondents had initially filed a General Admission of Liability on November 17, 2016, admitting for Medical Expenses and Temporary Total Disability beginning 11/8/2017 and ongoing. (Ex. 3).

37. A subsequent General Admission of Liability was filed on April 18, 2017. Respondents admitted to Medical Benefits, Temporary Total Disability from 11/8/16 through 1/29/17, and Temporary Partial Disability from 1/30/17 through 4/30/17. It was noted that Claimant had returned to work light duty at full wages. (Ex. I)

38. Respondents then filed an Application for Hearing on June 28, 2017, contesting Compensability and Reasonable and Necessary Medical Benefits, and seeking to withdraw all previously filed General Admissions of Liability. (Ex. 1, Ex J). Claimant timely filed her Response thereto. (Ex. 2, Ex. K).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

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

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

3. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this case, Respondents argue that Claimant's credibility is so lacking that her reported symptoms do not establish a compensable claim. The ALJ finds that Respondents have not shown this. Instead, the evidence shows that Claimant is genuinely dismayed at her lack of progress, and that she desires to get better in order to return to work without restrictions. While an imperfect historian, and lacking in sophistication-the ALJ doubts Claimant lifted 100 pounds at work, for example-Claimant is sincere in her testimony, and in reporting her symptoms to her medical providers.

Withdrawal of General Admission of Liability

4. Any party seeking to modify an issue determined by a general or final admission of liability, summary order, or full order, shall bear the burden of proof for any such modification. § 8-43-201(1) C.R.S.; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013). The aforementioned statute was added in 2009 to reverse the effect of *Pacesetter Corp v. Collett*, 33 P.3d 1230 (Colo. App. 2001) that allowed Respondents to move to withdraw an admission of liability without being assessed the burden of proof. The statute in its current form placed the burden on the respondents and much such a withdrawal the procedural equivalent of a reopening. Therefore, Respondents must prove by a preponderance of the evidence that Claimant did not sustain a compensable injury.

5. Admissions of liability bind respondent, subject only to subsequent litigation. *H.L.J. Management v. Kim*, 804 P.2d 250 (Colo. App. 1990). Once either party endorses an issue for adjudication, prior admissions of liability may be altered, changed or withdrawn on a prospective basis. *H.L.J. Management, supra.* Respondent may even obtain complete relief, including a finding that no compensable injury ever existed. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3rd 844 (Colo. App. 2000). Pursuant to C.R.S. Section 8-43-201 (1), respondent has the burden of withdrawing its previously filed GALs in this claim by a preponderance of the evidence. "Employer does

not have to show why its admission was improvidently filed in order to contest liability." *Pacesetter v. Industrial Claim Appeals Office,* 33 P.3d 1230 (Colo. App. 2001).

Compensability

6. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

7. Under the Workers Compensation Act, there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." § 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967); see also, § 8-40-201 (2) (injury includes disability resulting from accident). Consequently, a "compensable injury" to establish a compensable workers' compensation claim is one which requires medical treatment or causes disability. *Id.; Romero v. Industrial Commission,* 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.,* W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990); *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988)." *Romine v. Air Wisconsin Airlines,* W.C. No. 4-609-531 (October 12, 2006). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero, supra;* § 8-41-301, C.R.S.

8. The ALJ finds that Respondents have failed to meet their burden to establish that Claimant did not in fact sustain a compensable injury as previously admitted to by Respondents. Claimant fell at work on October 3, 2016. She sought treatment the next day as a result of the fall, and it was documented at the emergency room that Claimant had symptoms of pain in her back, neck, right hip, right knee, left shoulder, and left knee. The physical examination performed at the emergency room is consistent with the mechanism of injury and Claimant's subjective complaints. Claimant was given restrictions of no lifting more than ten pounds for at least seven days. Claimant's fall at work warranted medical treatment. This resulted in lost time from work; therefore, compensability has been shown.

9. Respondents argue that Claimant did not sustain any "injury," and that simply having pain does not amount to a compensable injury. However, multiple

medical providers have diagnosed Claimant with various injuries, including an acute strain to the back, contusions to the knees, myofascial pain syndrome, bilateral sacroiliac joint dysfunction, etc. It was Dr. Rook's opinion that Claimant likely strained or tore muscles and ligaments throughout her back, pelvis, and hip when she fell at work. Respondents have not met their burden to show that this did not occur.

10. The medical treatment guidelines at WCRP Rule 17, Exhibit 9 specifically address chronic pain disorders, which states that "Chronic pain is a phenomenon not specifically relegated to anatomical or physiologic parameters." (WCRP Rule 17, Exhibit 9, p. 6). The Guidelines go on to state:

> While diagnostic labels may pinpoint contributory physical and/or psychological factors and lead to specific treatment interventions that are helpful, a large number of patients defy precise taxonomic classification. Furthermore, such diagnostic labeling often overlooks important social contributions to the chronic pain experience. Failure to address these operational parameters of the chronic pain experience may lead to incomplete or faulty treatment plans.

Exhibit 9 of Rule 17 allows for treating pain that may not have a "precise taxonomic classification." In any event, ALJ finds that Claimant did in fact sustain defined injuries. Claimant freely admitted to her providers that she, and family members, suffer from fibromyalgia. The ALJ concurs with Claimant's ATP, and Dr. Rook, that Claimant's work injury aggravated her underlying fibromyalgia, making it significantly more symptomatic, despite a lack of specific anatomic findings, as urged by Dr. Larson.

Medical Benefits

11. The Claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The Respondents are only liable for the medical treatment that is reasonable and necessary to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S. Where the relatedness, reasonableness or necessity of medical treatment is disputed, the Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003)

12. The ALJ finds that Claimant has proven by a preponderance of the evidence that she is entitled to all reasonable, necessary, and related treatment for her mid-back, low back, hips, and SI joints as a result of the October 3, 2016 work injury. This specifically includes, but is not limited to, ongoing physical therapy and a new TENS unit as prescribed by her ATP, with the concurrence of Dr. Rook.

13. Claimant sustained multiple injuries when she fell at work. Physical therapy was helping improve both Claimant's pain and function before being

discontinued by Respondents. The ALJ finds that a resumption of physical therapy is reasonable, necessary, and related to Claimant's injury. Claimant also reported some relief from the TENS unit. Dr. Polanco denied the TENS unit primarily because there was a lack of documentation of "objective effectiveness." This opinion is unpersuasive. The ALJ finds that Claimant's testimony, the opinions of Dr. Rook, and the medical records from Claimant's ATP show that the TENS unit is reasonable, necessary, and related to the compensable work injury.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury on October 3, 2016. Respondents may not withdraw their General Admissions of Liability.

2. Claimant is entitled to Medical Benefits to treat her work injury as recommended by her ATP, including, but not limited to, continued physical therapy, and purchase of a TENS unit.

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

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

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

DATED: December 6, 2017

/s/ William G. Edie

_____

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable left ankle injury during the course and scope of her employment with Employer on December 21, 2016.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period December 22, 2016 until terminated by statute.

3. A determination of Claimant's Average Weekly Wage (AWW).

STIPULATION

The parties agreed that, if Claimant suffered a left ankle injury at work on December 21, 2016, her medical care has been authorized, reasonable and necessary.

FINDINGS OF FACT

1. Claimant worked for Employer as a Massage Therapist at Denver International Airport (DIA). Her job duties involved massaging clients, providing education, selling products and greeting customers. Claimant earned a salary of approximately $36,000 per year or $730.00 each week.

2. On December 21, 2016 Claimant was performing a chair massage on a client with particularly tight shoulders. In applying pressure to the middle of the client's back with her elbow, Claimant increased the force on her left leg. As Claimant turned her left foot outward she experienced immediate pain in her left ankle and shouted "ouch." Although Claimant acknowledged that she had problems standing all day at work during her shift, she denied prior pain or problems with her left ankle.

3. Claimant's Supervisor Sean Daly testified at the hearing in this matter. He explained that he assigned Claimant a corrective action on December 21, 2016. He noted that the discipline was predicated on Claimant's attendance issues and discussed the matter with her in a common area at DIA. The Corrective Action Form specifies that Claimant had been disciplined for lateness/attendance issues on three prior occasions in September and October 2016. The corrective action constituted a "Final Warning" prior to termination.

4. Mr. Daly commented that he did not receive any injury report from Claimant on December 21, 2017. However, he acknowledged that he might not have been available because he could have been at Employer's other location approximately 150 yards away at DIA.

5. On December 22, 2016 Claimant contacted Mr. Daly to report her left ankle injury. She also notified Employer's corporate office for treatment recommendations. However, she remarked that she did not receive any instructions about how to proceed.

6. Mr. Daly recalled that he had received a telephone call from Claimant on December 22, 2016. However, she did not report a work injury, but stated that she had injured her left foot shoveling snow. Claimant noted that she would not make it to work on December 22, 2016. Mr. Daly scheduled Claimant to work after December 22, 2016 and never received any restrictions limiting her ability to work.

7. On December 22, 2016 Claimant visited her personal medical treatment provider Elizabeth Couture, P-AC at Peak Vista Community Health Centers in Strasburg. Claimant reported that she had injured her left foot while stretching approximately six months earlier. The shooting pain ran from her heel to lower calf. Claimant did not receive medical treatment but obtained orthotics. PA-C Couture diagnosed Claimant with plantar fasciitis of the left foot.

8. On December 22, 2016 Claimant also visited The Medical Center of Aurora for an examination. Claimant reported that "she works at the airport on her feet all day performing massages. She states she will regularly have sore feet from being on them all day. Patient states yesterday she was stepping out of her car when she had a worsening pain in her left foot and ankle." Claimant denied any trauma and did not "roll her feet or have anybody step on them." The report also provided that Claimant "has history of plantar fasciitis but states this feels different."

9. On December 29, 2017 Claimant visited Podiatry Associates, P.C. for an evaluation of her left ankle. Claimant reported that she did not suffer a discrete injury. Her left ankle pain began after work on December 21, 2016 and worsened by the morning of December 22, 2016. Claimant noted pain while walking after getting out of bed in the morning. Cynrhia S. Oberholtzer-Classen, DPM diagnosed Claimant with plantar fasciitis as a result of chronic overuse. She noted that Claimant's work as a massage therapist required her to remain on her feet each day and caused an overuse injury. Dr. Oberholtzer-Classen immobilized Claimant's left foot with a CAM boot in an effort to alleviate her symptoms. By January 10, 2017 Dr. Oberholtzer-Classen released Claimant to full duty employment.

10. On January 15, 2017 Claimant completed a Workers' Claim for Compensation. She noted that she injured her left foot and the back of her left leg while working for Employer on December 21, 2016. Claimant specifically detailed that her injuries were caused by "working, giving massage, concrete floors for over a year, stretching, bending, twisting, turning, and kneeling, using feet for balance and that she was required to stand all day with no sitting allowed." In response to a question on the form about what "object or substance directly harmed" her she responded "the cement floor."

11. On March 3, 2017 Employer prepared a First Report of Injury. The Report specified that Claimant suffered injuries to her lower extremities while performing a chair

massage on December 22, 2016. Claimant explained that she was experiencing pain in her left foot while completing a massage and the symptoms worsened after work.

12. On March 10, 2017 Claimant underwent an MRI of her left ankle. Audrey Krosnowski, M.D. reviewed the MRI. She noted that the MRI reflected chronic tendinopathy in Claimant's left Achilles tendon, a plantar calcaneal spur in the plantar fascia and "osteochondral insult to the medial shoulder of the talar dome."

13. On May 12, 2017 Claimant completed a second Workers' Claim for Compensation. She remarked that she injured her left ankle while massaging a client on December 21, 2016. Claimant specified that she "changed position for massage and ended up with too much weight on ankle."

14. On June 8, 2017 Claimant underwent an independent medical examination with Scott Resig, M.D. She reported that on December 22, 2016 while performing a massage she twisted, turned and noticed left ankle pain. Although Claimant acknowledged that she had been suffering left ankle pain for the preceding six months, she managed her condition with orthotics. Claimant remarked that the December 22, 2016 incident significantly increased her symptoms. She commented that she had received an injection for her plantar fasciitis and worn a boot for several months. Nevertheless, her symptoms continued. Dr. Resig diagnosed Claimant with "an osteochondral defect of the medial talus with resolving plantar fasciitis and possible CRPS." He noted that it was impossible to determine whether Claimant's left ankle symptoms were causally related to her work accident. However, Dr. Resig remarked that "the pain apparently did worsen at the time of the injury on 12/22/16 and, therefore, it is plausible that with a reasonable degree of medical certainty that the injury occurred on 12/22/2016." He further detailed that Claimant did not have any ankle complaints prior to her injury but she may have aggravated her plantar fasciitis or "caused an osteochondral defect of the medial talus" while at work. Dr. Resig emphasized the need for an evaluation by a pain specialist to consider her possible CRPS.

15. Claimant testified at the hearing in this matter. She maintained that she injured her left ankle while massaging a client at work. Claimant acknowledged that she had received prior disciplinary actions for arriving late for her scheduled work shifts. The most recent disciplinary action occurred on the date of her left ankle injury or December 21, 2017. Claimant remarked that, contrary to Mr. Daly's testimony, she did not injure her left ankle shoveling snow because she lived in an apartment complex that provided snow removal.

16. Dr. Resig testified at the hearing in this matter. He diagnosed Claimant with an osteochondral defect of the talus and possible CRPS in her left ankle. Dr. Resig explained that an osteochondral defect is a break in cartilage typically caused by a traumatic accident. An osteochondral defect usually involves a severe twisting or shearing event "where the ankle will twist, shear a piece of cartilage [and] cause a break or crack in it." The injury is frequently accompanied by immediate pain or swelling. In response to a question about whether standing for long periods of time could have caused Claimant's osteochondral defect Dr. Resig responded that it could not. He continued that

if Claimant "kinda felt like an ouch and moved on" the injury would not fit the severe category. Dr. Resig summarized that, based on objective symptoms, he could not specify the cause of Claimant's left ankle injury.

17. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable left ankle injury during the course and scope of her employment with Employer on December 21, 2016. Initially, Claimant explained that, while she was performing a massage on a client at work, she turned her left foot outward and immediately experienced pain in her left ankle. However, the record reflects that Claimant has suffered a lengthy history of left foot/ankle difficulties and provided a variety of accounts regarding the mechanism of injury. On December 22, 2016 Claimant visited her personal medical provider and reported that she had injured her left foot while stretching approximately six months earlier. She specifically received an injection for her plantar fasciitis and worn a boot for several months. Later on December 22, 2016 Claimant reported that she suffers sore feet from standing all day at work. She specifically explained that on December 21, 2016 she was stepping out of her car when she had worsening pain in her left foot and ankle. Claimant denied any trauma and did not "roll her feet or have anybody step on them." At a podiatry visit on December 29, 2016 Claimant reported that she did not suffer a discrete injury. Her left ankle pain simply began after work on December 21, 2016 and worsened by the morning of December 22, 2016. Furthermore, on her first Workers' Claim for Compensation Claimant noted that her left foot/ankle injuries occurred over a period of time. She detailed that her symptoms were caused by "working, giving massage, concrete floors for over a year, stretching, bending, twisting, turning, and kneeling, using feet for balance and that she was required to stand all day with no sitting allowed." The record is thus replete with inconsistencies regarding the mechanism of Claimant's left ankle injury.

18. The testimony of Dr. Resig also suggests that Claimant did not suffer a left ankle injury while at work on December 21, 2016. Relying on a left ankle MRI, Dr. Resig noted that Claimant suffers from an osteochondral defect of the medial talus and resolving plantar fasciitis. He explained that an osteochondral defect is a break in cartilage typically caused by a traumatic incident. An osteochondral defect usually involves a severe twisting or shearing event "where the ankle will twist, shear a piece of cartilage [and] cause a break or crack in it." Dr. Resig summarized that, based on objective symptoms, he could not speculate on the cause of Claimant's left ankle injury. However, because Claimant's left foot/ankle pain worsened at work on December 21, 2017 she may have aggravated her plantar fasciitis or osteochondral defect. Nevertheless, the bulk of Dr. Resig's opinion reveals that Claimant's activity of performing a chair massage on December 21, 2017 lacked sufficient force to cause a chondral defect. In conjunction with her inconsistent accounts of the cause of her left ankle symptoms, Claimant has failed to demonstrate that her work activities on December 21, 2016 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App.

1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable left ankle injury during the course and scope of her employment with Employer on December 21, 2016. Initially, Claimant explained that, while she was performing a massage on a client at work, she turned her left foot outward and immediately experienced pain in her left ankle. However, the record reflects that Claimant has suffered a lengthy history of left foot/ankle difficulties and provided a variety of accounts regarding the mechanism of injury. On December 22, 2016 Claimant visited her personal medical provider and reported that she had injured her left foot while stretching approximately six months earlier. She specifically received an injection for her plantar fasciitis and worn a boot for several months. Later on December 22, 2016 Claimant reported that she suffers sore feet from standing all day at work. She specifically explained that on December 21, 2016 she was stepping out of her car when she had worsening pain in her left foot and ankle. Claimant denied any trauma and did not "roll her feet or have anybody step on them." At a podiatry visit on December 29, 2016 Claimant reported that she did not suffer a discrete injury. Her left ankle pain simply began after work on December 21, 2016 and worsened by the morning of December 22, 2016. Furthermore, on her first Workers' Claim for Compensation Claimant noted that her left foot/ankle injuries occurred over a period of time. She detailed that her symptoms were caused by "working, giving massage, concrete floors for over a year, stretching, bending, twisting, turning, and kneeling, using feet for balance and that she was required to stand all day with no sitting allowed." The record is thus replete with inconsistencies regarding the mechanism of Claimant's left ankle injury.

8. As found, the testimony of Dr. Resig also suggests that Claimant did not suffer a left ankle injury while at work on December 21, 2016. Relying on a left ankle MRI, Dr. Resig noted that Claimant suffers from an osteochondral defect of the medial talus and resolving plantar fasciitis. He explained that an osteochondral defect is a break in cartilage typically caused by a traumatic incident. An osteochondral defect usually involves a severe twisting or shearing event "where the ankle will twist, shear a piece of cartilage [and] cause a break or crack in it." Dr. Resig summarized that, based on objective symptoms, he could not speculate on the cause of Claimant's left ankle injury. However, because Claimant's left foot/ankle pain worsened at work on December 21, 2017 she may have aggravated her plantar fasciitis or osteochondral defect. Nevertheless, the bulk of Dr. Resig's opinion reveals that Claimant's activity of performing a chair massage on December 21, 2017 lacked sufficient force to cause a chondral defect. In conjunction with her inconsistent accounts of the cause of her left ankle symptoms, Claimant has failed to demonstrate that her work activities on December 21, 2016 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

ORDER

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

Claimant's claim for Workers' Compensation benefits for her left ankle symptoms is denied and dismissed.

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

DATED: December 6, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-993-117-06

ISSUES

- Whether Claimant established by clear and convincing evidence that Dr. Finn erred by placing Claimant at MMI?

- Whether Claimant's left shoulder condition is related to her July 8, 2015 work injury entitling her to medical benefits?

- Whether Claimant sustained a permanent disfigurement as a result of the compensable right shoulder injury?

FINDINGS OF FACT

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

1. Claimant is a 55 year old female who Employer employed as a packer when she injured her right shoulder on July 8, 2015. She was reaching overhead for an empty carton when she felt a pop in her shoulder. She felt pain in her right shoulder, neck and hand.

2. Claimant did not seek treatment until August 7, 2015 when she saw Richard Shouse PA-C at Arbor Occupational Medicine. Mr. Shouse diagnosed shoulder tendonitis, prescribed medication, referred Claimant to physical therapy, and assigned work restrictions.

3. Claimant left Employer approximately three days later on August 10, 2015. She has not worked since.

4. Two and a half months later, despite being off work, Claimant began complaining of left sided shoulder pain. Dr. Orgel's October 30, 2015 report states that Claimant had pain in her left bicep and tricep. She had good range of motion. There was no weakness to resisted elbow movement. Dr. Orgel stated that the pain appeared to be muscular in nature. He did not find anything about her presentation to be "worrisome." Claimant testified that she did not have left shoulder pain prior to this, her left shoulder pain came on slowly, and the pain was not a result of any specific event.

5. On November 5, 2015, after conservative care failed, Claimant had surgery on her right shoulder. Claimant testified that she did not perform household activities. She lives with an adult daughter who performed all the household tasks. Claimant only attend to her personal hygiene and occasionally prepared simple meals for herself. Claimant testified that at all times, she obeyed Dr. Orgel's restrictions.

6. On January 12, 2016, Dr. Erickson performed a physician advisor review regarding the relatedness of Claimant's left shoulder complaints. Claimant was emphatic that her left shoulder complaints were caused by overuse of her left upper extremity while she recovered from her right shoulder surgery. However, Dr. Erickson concluded: "Contralateral overuse, however, has been thoroughly examined in the Workers' Compensation literature, and there is insufficient evidence that an injury can occur to the contralateral side from overuse. One interesting point in the majority of these studies is that a workers' activities are severely restricted and reduced after an injury, making it highly unlikely that a contralateral injury could occur. . . . I would conclude, to a reasonable degree of medical probability, that the left shoulder pain experienced by Ms. Loredo is not related to her work injury, or the surgery to her right shoulder."

7. Dr. Orgel noted on March 25, 2016 that Claimant's left shoulder was improving with physical therapy. She had good range of motion and all other tests were negative. Dr. Orgel noted that he was holding his request for a left shoulder MRI. On May 18, 2016, Dr. Orgel thoroughly examined Claimant's left shoulder and surrounding musculature. The examination was negative. He specifically noted that Claimant's left bicep tendon and rotator cuff were not tender, and there was no range of motion deficit. No weakness was noted.

8. On June 17, 2016, Dr. Orgel placed Claimant at maximum medical improvement and assigned a 13% upper extremity impairment rating for the right shoulder. Dr. Orgel noted Claimant continued to complain of significant pain in the right shoulder despite a repeat MRI revealing that the rotator cuff was intact and there was no failure of her surgery. Dr. Orgel released Claimant to full duty at that time. Dr. Orgel did not provide work restrictions because he found her right shoulder to be essentially normal on repeat MRI. Respondents filed a final admission admitting to this rating. Claimant requested a DIME.

9. Dr. Kenneth Finn performed the DIME examination and authored a report dated September 29, 2016. Dr. Finn agreed with the MMI date and assigned a 12% upper extremity impairment rating for the right shoulder injury. Respondents admitted to this rating in a final admission dated October 12, 2016.

10. Despite recommendations for maintenance care in the form of medication refills for one year post MMI, Claimant did not return to Dr. Orgel for eleven months, on May 15, 2017. Dr. Orgel noted Clamant had completed her psychological counseling. On examination, Claimant exhibited limited active range of motion in all planes, which was not found with passive movement. Passive range of motion was found to be full. The rotator cuff was intact and there was no improvement after two subacromial injections. Dr. Orgel noted that her examination suggested that her presentation was out of proportion to her objective findings in that she would only abduct and flex her right arm to 90 degrees though he could easily obtain 180 degrees of passive motion, and there was no obvious weakness. Additional surgery to the right shoulder was not indicated. Dr. Orgel noted that Claimant was not filling her prescriptions any longer. Dr.

Orgel noted Claimant remained at fully duty release with no follow up medical care and remained at MMI.

11. Claimant pursued further treatment for her left shoulder under her own insurance. She underwent a left shoulder MRI on September 11, 2017, approximately one year and three months after she reached MMI, and over two years from the date of her injury. The MRI identified multiple abnormalities including a full thickness tear of the distal supraspinatus tendon and a partial thickness tear of the subscapularis tendon which was noted to be related to subcoracoid impingement. There was also a full thickness rupture of the long head of the biceps tendon and degenerative changes in the acromioclavicular joint.

12. The MRI findings are inconsistent with Dr. Orgel's prior findings on physical examination on May 18, 2016 of a specific lack of tenderness in the bicep tendon. Further, Claimant exhibited essentially full range of motion of her left shoulder when she was seen by Dr. John Paul Spittler on October 25, 2016 for an ultrasound guided injection to the right shoulder. Dr. Spittler performed full examinations of the right and left shoulders, and the values he recorded on the left were essentially normal. The "close to normal" nature of these results for left shoulder active range of motion was confirmed during Dr. Finn's testimony. These reports support a finding that Claimant did not have significant tendon or rotator cuff injuries to her left shoulder at those times. Dr. Finn also noted that the MRI findings are inconsistent with the examination of Richard Shouse on June 1, 2016, just prior to Dr. Orgel placing Claimant at MMI. On that date, Mr. Shouse noted Clamant had the same examination on both shoulders, and presented as angry, defensive and hostile.

13. Dr. Finn testified as an expert in the fields of general medicine, physical medicine and rehabilitation, pain medicine and pain management at hearing on Respondents' behalf. Dr. Finn is level II accredited with the DOWC. He was present at hearing and listened to Claimant's testimony. Dr. Finn normally treats in his medical practice the same types of injuries that Claimant complained of.

14. According to Dr. Finn, Claimant completed a pain drawing and patient history form at the DIME appointment. Neither included complaints of left shoulder pain or dysfunction. A copy of this patient history form, which includes the pain drawing, was admitted into evidence as Respondents' Exhibit P. Claimant alleged that she complained of left shoulder pain during the evaluation but could not recall whether Dr. Finn examined her left shoulder. It is clear from the DIME report and Dr. Finn's testimony that he did in fact examine and consider Claimant's left shoulder.

15. At the time he authored his report, Dr. Finn was aware that Claimant was alleging compensatory pain in the left shoulder. However, she reported pain only in the right shoulder and marked the pain diagram accordingly. Dr. Finn examined both upper extremities during his examination. Nothing about the left shoulder examination made Dr. Finn believe treatment for the left shoulder was warranted, and there was no impairment for the left shoulder.

16. Prior to hearing, Dr. Finn reviewed additional records of treatment which occurred after his DIME, including a follow up visit from Dr. Orgel, the left shoulder MRI, University Hospital records, and Clinica Family Health records. None of the information changed Dr. Finn's opinion that Claimant's left shoulder complaints are not related to Claimant's injury.

17. The left shoulder MRI showed multiple tears and tendonitis. These are very similar findings as those initially found on the right side. In Dr. Finn's experience, such tears would typically be caused by trauma. Very rarely would such MRI findings be caused by overuse. Some of the degenerative findings such as bursitis, inflammation, and arthritis are also quite typical for patients of Claimant's age. Dr. Finn testified that the rotator cuff tears shown on MRI are not related to compensatory use of her left shoulder as a result of her right shoulder injury. He agreed with Dr. Erickson's findings in this regard. Further, Claimant did not report pain to Dr. Finn or indicate on the pain diagram any pain in the left shoulder. Dr. Finn agreed with Dr. Erickson's statements regarding actual injury to contralateral sides. Normally, compensatory pain from having surgery on one shoulder would be musculoskeletal or muscle related pain, stiffness or spasm. There is "absolutely" a difference between the compensatory muscle tightness Claimant exhibited and the tendon and rotator cuff tears revealed on MRI.

18. If the left MRI symptoms had been present during Claimant's active treatment, one would expect her to have consistently reduced range of motion in probably all planes of movement of the shoulder. She did not.

19. Dr. Finn maintained his opinions, within a reasonable degree of medical probability, as to MMI, permanent impairment, and the relatedness of Claimant's left shoulder MRI findings. In his opinion, the MRI findings are not related to compensatory pain from her right shoulder injury. Claimant at all times denied having any pre-existing conditions in her left shoulder, and there are no medical reports or other evidence to establish that she had a preexisting rotator cuff tear or other injury or condition which might have been aggravated by the right shoulder injury.

20. The ALJ finds Dr. Finn to be credible and persuasive when testifying in support of his DIME report and opinions. His testimony is more persuasive and reasoned than that of Claimant concerning relatedness of the left shoulder conditions, particularly when the totality of evidence in the medical records is considered. Claimant exhibited non-physiological complaints, symptoms out of proportion to objective findings, and significant injuries on an MRI taken over two years after her work injury and approximately a year and a half post MMI which are inconsistent with her prior physical examinations and inconsistent with a finding of overuse or compensatory pain.

21. Claimant was released with maintenance recommendations of medication refills for one year and six visits for psychological counseling. Claimant underwent a psychological examination but only completed two of the six recommended therapy sessions. On May 15, 2017, Dr. Orgel noted Claimant would have two months of more medication, but that she had not been refilling her medications through his office. A

review of the medical records reflects that at the time of her discharge at MMI, she had only been taking Ibuprofen. Claimant presented no persuasive evidence or testimony that ongoing treatment should be provided for her right shoulder. She completed the recommendations of the authorized treating physician and there are no medical reports evidencing additional treatment designed to cure and relieve the effects of the industrial injury. The ALJ therefore concludes that Claimant is not entitled to additional maintenance medical care related to her right shoulder injury.

22. Claimant exhibited a surgical scar on the anterior of her right shoulder approximately two inches in length and well healed. Claimant also has an arthroscopic portal scar on the posterior of her right shoulder. The ALJ finds that the permanent disfigurement from this injury warrants an award of $500. Respondents have paid Claimant $500 in disfigurement as a result of this injury. Respondents thus are entitled to a credit in this amount against the award of disfigurement made herein.

CONCLUSIONS OF LAW

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

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. "Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; and a workers' compensation case shall be decided on its merits." *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office,* P.3d (Colo. App. No. 01CA0852, February 28, 2002).

The DIME physician's findings of maximum medical improvement and permanent impairment are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(c), C.R.S. The finding of a DIME physician that a particular component of the claimant's impairment was caused by the industrial injury is binding unless overcome by clear and convincing evidence. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The determination of maximum medical improvement inherently requires the examining physician to determine the cause or causes of the claimant's condition. Thus, a DIME physician's finding that a condition is or is not related to the industrial injury must be overcome by clear and convincing evidence when challenging a finding of maximum medical improvement. Section 8-42-107(8)(b)(III), C.R.S.; *Cordova v. Industrial Claim Appeals Office, supra*.

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's findings must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proven by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra.* In other words, to overcome a DIME physician's opinion, "[T]here must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004).

The present case is similar in nature to the recent decision by the Industrial Claim Appeals Panel in *Powell v. Aurora Public Schools*, W.C. # 4-974-718-03 (ICAO March 15, 2017). In that case, claimant attempted to overcome the maximum medical improvement determination of the DIME physician Dr. Fillmore. Claimant had obtained a subsequent MRI of her hip reflecting a labral tear. As here, the medical testimony supported a conclusion that there was no evidence of pathology until a significant period of time post-injury – in the *Powell* case, thirteen months. The ALJ was not persuaded that the DIME physician would have altered his opinion on maximum medical improvement had he seen the MRI results at the time of his exam. The Panel stated: "Insofar as Dr. Fillmore did not have the MRI results at the time he conducted his examination and reached his opinion on maximum medical improvement, this evidence goes only to the weight of his opinion. Nevertheless, this did not preclude the ALJ from crediting his opinion. As noted above, the weight and credibility to be assigned evidence is a matter within the discretion of the ALJ." *Cordova v. Industrial Claim Appeals Office, supra.*

Similar circumstances exist here. As found, Dr. Finn testified at hearing that the MRI findings in the left shoulder in fact did not change his opinion regarding maximum medical improvement or the relatedness of the left shoulder condition to the industrial injury. He explained that the types of conditions seen on the MRI are not the types of injuries he would expect to occur as a result of "overuse" or compensatory activities with the contralateral shoulder. In fact, he testified that "very rarely" would such findings on an MRI be caused by overuse. Dr. Finn's opinions are supported by Dr. Erickson's physician advisor review report on this issue. Some of the degenerative findings such as bursitis, inflammation, and arthritis are also quite typical for a person of claimant's age. Dr. Erickson and Dr. Finn agree that contralateral compensatory pain anticipated from having surgery on one shoulder would be musculoskeletal or muscle related pain, stiffness, or spasm. Dr. Finn agrees with Dr. Erickson's statements regarding actual injury to contralateral body parts. Dr. Finn explained that there is "absolutely" a difference between compensatory muscle tightness and the tendon and rotator cuff tears and age-consistent degenerative findings exhibited on the MRI.

Based on this evidence and the credible and persuasive testimony of Dr. Finn, the ALJ therefore finds and concludes Claimant has failed to establish by clear and convincing evidence that the DIME physician was clearly wrong when he assessed Claimant to be at MMI on June 17, 2016. Claimant did not overcome Dr. Finn's opinions that she remains at MMI, and her left shoulder condition is not related to the admitted right shoulder injury.

The ALJ finds and concludes that based on the totality of the evidence in this case, there are no ongoing recommendations for additional treatment from the authorized treating physician at this time. The recommendations made at the time of MMI have been completed. Further, Claimant did not present persuasive evidence as to ongoing maintenance care needed to cure and relieve the effects of the industrial injury. Claimant has not carried her burden of proof to establish by a preponderance of the evidence the need for additional maintenance care related to the admitted injury to her right shoulder.

Claimant is entitled to disfigurement for her right shoulder surgical scars as outlined above.

ORDER

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

1. Respondents shall pay Claimant $500 for permanent disfigurement due to surgical scars related to this injury, with credit allowed for any amount of disfigurement benefits already paid in this claim.

2. Claimant did not overcome the DIME by clear and convincing evidence

    - Claimant remains at MMI.
    - Claimant's left shoulder is not related.
    - Claimant's claim for additional medical benefits is denied and dismissed.

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

DATED: December 6, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-047-389-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 30, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 11/30/17, Courtroom 1, beginning at 8:30 AM, and ending at 12:30 PM).

Claimant's Exhibits 1 through 30 were admitted into evidence, without objection. Respondents' Exhibits A through M, with the exception of pages 90 and 91 of Exhibit J (whereby the Claimant's objection was sustained) were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. After careful consideration, the ALJ has decided to issue the following decision without the benefit of a proposed decision.

ISSUES

The issues to be determined by this decision concern compensability (specifically implicating whether or not the Claimant's auto accident of May 16, 2017 occurred while the Claimant was in the "sphere" of her employment while traveling for her Employer);

and, whether the accident was subject to the "going to" and "coming from" rule, or an exception thereto by virtue of the Claimant performing duties arising out of the course and scope of her employment at the time of the accident.

If the case is compensable, the additional issues are medical benefits (authorization, causally related and reasonably necessary; average weekly wage (AWW); and, temporary total disability (TTD) benefits from June 1, 2017 (the Claimant was paid full wages through May 31, 2017).

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant (d.o.b. November 6, 1959) now lives in San Antonio, Texas. By agreement of the parties, the Claimant appeared at the hearing by telephone.

2. In April 2017, the Employer hired the Claimant as a "Landscape Architectural Project Manager," a professional position requiring a professional registration with the State of Colorado. She started at a salary of $78,000 per year plus a minimum profit sharing of $12,000 for the first year. The ALJ finds that the contract of hire establishes an AWW of $1,730.77 ($90,000 divided by 52 weeks). Two-thirds of the AWW exceeds the statutory cap of $948.15 per week for Fiscal year (FY) 2016/2017. Therefore, the maximum TTD rate in this case is $948.15 per week.

3. The Claimant's job duties involved consulting with entities, such as the City of Loveland and Denver, on large scale infrastructure developments. For example, she worked with the City and County of Denver on a project involving a land bridge from downtown Denver to the national Western Center. The Claimant traveled two to three times per week for the Employer, using her own personal vehicle for which she was reimbursed mileage and tolls. The Employer's office is in Aurora and, at the time of the accident, the Claimant lived in Broomfield, Colorado. For the mutual convenience of the Employer and the Claimant, the Claimant would leave to a work site up north from home and return home from the north. Indeed, the Employer advised her that her home was conveniently situation for the Claimant to handle business in northern Colorado.

4. According to the Claimant, she was reimbursed round trip when she left for a job in Northern Colorado and returned home as opposed to returning to the Aurora office. According to Rita Shank, the Employer's controller, who testified at hearing, the Claimant was reimbursed on the way to a job but not on the return trip unless the Claimant was returning to the Aurora office, even if it was to do no work activities at the

Aurora office. Under the circumstances of this case, Shank's version of the reimbursement policy makes no sense to the ALJ if the return trip was to the Claimant's home as opposed to the Aurora office, although it was a shorter return distance to the Claimant's home. On the record at hearing, the ALJ took administrative notice of the fact that the Claimant's home in Broomfield was a shorter distance from Loveland than the Aurora office. There was no objection. The ALJ, therefore, finds the Claimant's version concerning travel reimbursement more credible and persuasive than Rita Shank's version.

5. For employees whose jobs were highly mobile, such as the Claimant, the Employer accepted the proposition that they would leave for a project from home and return home, if the project was closer to the employee's home, which was true under the circumstances of the present case.

The Accident of May 16, 2017 and "Sphere" of Employment

6. On May 16, 2017, the Claimant drove to Firestone, Colorado, to attend a business meeting, and from there she drove to the City of Loveland to attend a planning meeting, which was in the course and scope of her employment. The meeting was with the City of Loveland Public Works officials and it ended at 3:50 PM. Thereafter, the Claimant began driving home. At the intersection of North Washington Avenue and East 1st Street in the City of Loveland, the Claimant was involved in an auto accident. In the official accident report, the Loveland police Officer noted that the Claimant failed to stop/yield right away at a stop sign (Claimant's Exhibit 2).. The Claimant was broad-sided by another vehicle. As a result of the collision, the Claimant sustained serious concussive and vision injuries.

7. At the time of the collision, the Claimant placed a call on her cell phone to Jodi Lessman, a technical specialist with the Loveland Department of Public Works. Lessman testified by telephone, and she corroborated the business nature of the telephone call at the time of the accident. According to Lessman, at some point in the call, the Claimant said, "I've been involved in an accident and the line went dead. Lessman is not a personal friend of the Claimant. The Claimant placed the call concerning outreach for the Big Thompson Master Project, a business purpose. The Claimant used a hands-free ear plug for her cellphone at the time of the accident. The Accident Report makes no notation concerning alleged "distracted driving." Lessman further stated that the Claimant called her back after the accident to report what happened. The ALJ finds that even if the Claimant was "going" home within the ambit of the "coming from work" rule," she had stepped back into the course and scope of her employment when she placed the work-related call to Lessman.

8. Further, according to the Claimant's undisputed testimony, which the ALJ finds credible and persuasive, the Claimant left the Loveland meeting and after she made the telephone call to Lessman, the Claimant was going to make notes of the

phone call but the accident prevented her from doing so. Consequently, she remained within the course and scope of her employment at the time of the accident.

9. The "Employee Handbook" of the Employer (Respondents' Exhibit L), which the Claimant acknowledged in writing receiving (Respondents Exhibit L, bates stamp 000146) sets forth the following policy concerning portable communication device use while driving (Respondents' Exhibit L, bates stamp 000136):

> Employees who drive on company business must abide by all state or local laws prohibiting or limiting…cell phone use while driving **[The ALJ took administrative notice on the record that the use of cell phones while driving does not violate any state or local laws in Colorado and there was no objection].**
>
> Regardless of the circumstances, including slow or stopped traffic, if any use is permitted while driving, employees should proceed to a safe location off the road and safely stop the vehicle before placing or accepting a call. If acceptance of a call is absolutely necessary while the employee is driving, and permitted by law, the employee must use a hands-free option and advise the caller that he/she is unable to speak at that time and will return the call shortly.

10. The Respondents are not alleging a safety violation, seeking to reduce benefits by 50%. Moreover, relying on an allegedly analogous Industrial Claim Appeals Office (ICAO) opinion, the Respondents argue that the Claimant deviated from "the sphere" of her employment by placing the call while driving, in violation of the Employer's policy as herein above stated, thus, making her injuries non-compensable.

11. To accept "the sphere of employment" argument under the unique circumstances of this case, as opposed to alleging a safety rule violation, would subvert the beneficent, no-fault intent of the Workers' Compensation Act (hereinafter the "Act"), which provides injured workers with 50% benefits even when they have willfully violated a safety rule that resulted in their injury. A deviation from the "sphere of employment" argument would deprive an injured worker of 100% of workers' compensation benefits, opening up "Pandora's Box" to a wholesale removal of cases from the ambit of workers' compensation coverage and render the "safety Violation" provisions concerning a 50% reduction in benefits meaningless. Under the circumstances, the ALJ finds that the Respondents argue for an unwarranted expansion in the nature of a "frolic and detour" removal from the "course and scope" of employment. In the present case, the Claimant placed the call for purely business reasons, not for the purpose of a frolic and detour. Further, she did **not** perform unnecessary work in direct disobedience of an Employer's

order. She may have violated a safety policy but that was not a designated issue and it was not reserved as an issue. Therefore, it is waived. Furthermore, the Claimant was going to make notes of the telephone conversation with Lessman, when she could find a safe place to pull over and write the notes before getting home, thus, she remained within the course and scope of her employment at the time of the accident.

12. The ALJ finds that the Claimant's injuries arose out of the course and scope of her employment for the Employer and she did **not** deviate from the "sphere of employment" to a degree contemplated by prevailing case law or ICAO opinions, thus, she sustained compensable injuries in the auto accident of May 16, 2017.

Medical—Cate Blanche Referral by Claimant's Supervisor

13. On the same day as the compensable accident, the Claimant reported it to her immediate supervisor, Kevin Shanks. Without specifying a specific medical provider, Kevin Shanks told the Claimant to go see a doctor. Although endorsed as a witness on the respondents' case information Sheet (CIS), Kevin Shanks was not called to testify. Consequently, it is unrefuted that Kevin Shanks told the Claimant to go see a doctor, without specifying any specific medical provider. The Claimant first went to her family physician, Sara A. George, M.D. By virtue of the fact that the Claimant's supervisor gave her a carte blanche in the selection of the first medical provider, Dr. George became an authorized treating physician (ATP) for the Claimant. Consequently, all referrals in the authorized chain of referrals, emanating from Dr. George, are authorized.

14. On May 23, 2017, Dr. George re-evaluated the Claimant and diagnosed a severe concussion. Dr. George thereupon referred the Claimant to a concussion specialist, the Blue Sky Concussion Clinic, where the Claimant came under the care of Cheryl Melick, M.D., a neurologist. Dr. Melick referred the Claimant to Boulder Brain Recovery for speech therapy, where the Claimant was evaluated by Hilary Booco, M.A., CCC, a speech and language pathologist; and, to Rebecca E. Hutchins, O.D., for an evaluation of vision defects. These medical providers were within the chain of authorized referrals.

15. In a report, dated June 5, 2017, Hilary Booco stated that the Claimant presented with a cognitive-communication disorder secondary to a concussion injury she sustained on May 16, 2017. Booco indicated that formal testing revealed deficits in the areas of auditory memory for meaningful information, visual-spatial skills, and word retrieval fluency. According to Booco, given the Claimant's educational level, her scores represented decrements from her prior level of functioning. Booco was of the opinion that the Claimant's cognitive challenges, coupled with her physical and emotional symptoms "will impact her ability to perform tasks in both work and home environments." Booco went on the state the following opinion: She (Claimant) will likely have difficulty completing tasks or making decisions in a timely manner, remembering

what she must do on a daily basis, organizing and tracking information, visualizing plans for future landscaping projects (**the core functions of the Claimant's pre-injury job)** , prioritizing tasks, processing spoken and written information quickly, communicating efficiently and effectively, keeping up with household tasks and chores, etc. At this time, the patient is not working or driving, as recommended by Dr. Melic." (Claimant's Exhibit 14, bates stamp 056).

16. Rebecca E. Hutchins, O.D., did a comprehensive binocular vision evaluation on June 19, 2017, and completed testing on August 17, 2017. In a report dated August 18, 2017 (Claimant's Exhibit 15). Dr. Hutchins indicated that at the Claimant's last vision evaluation by Dr. Brian Nichols in January 2017, the Claimant was diagnosed with dry eyes. Dr. Hutchins observed that the Claimant complained of severe headaches since the accident, which wake her up at night and can last all day. The Claimant reported that she is now light sensitive and no longer raises her blinds at home. Dr. Hutchins diagnosed the following: for refraction, presbyopia; for binocularity, Dr. Hutchins is of the opinion that her binocularity is poor and she is symptomatic. Dr. Hutchins' ultimate impressions were: convergence insufficiency; general binocular vision disorder with right eye suppression at near, headache, photophobia, deficiencies of smooth pursuits and saccadic dysfunction. Dr. Hutchins stated: "These diagnoses are frequently seen after a concussion, whiplash, or mild traumatic brain injury and they, coupled with her symptoms, constitute what is termed a Post Trauma Vision Syndrome. There is a reasonable degree of medical probability that they were caused by the MVA (motor vehicle accident) noted above." She also has a pre-existing presbyopia." The Claimant indicated that she would be moving back to San Antonio, Texas, and Dr. Hutchins referred her to a local optometrist who works with vision rehabilitation. Dr. Hutchins ultimately was of the opinion that the Claimant's vision issues definitely…prevent her from returning to work.

17. Dr. Melick referred the Claimant to North Boulder Physical Therapy and Sports Rehabilitation for concussion therapy, where she was first seen on June 1, 201`7. The un-named physical therapist (PT) noted that the Claimant had previous concussions and a history of vestibular challenges ongoing for more than 20 years (Claimant's Exhibit 17, bates stamp 063). The ALJ finds, however, that the Claimant was able to do the full range of her job duties before the compensable injuries of May 16, 2017, and could not thereafter. The ALJ further finds that the accident of May 16, 2017 aggravated and accelerated all of the Claimant's concussive and visual conditions to the point that she has been unable to work at her pre-injury job since the auto accident of May 16, 2017.

Medical—Referral by Insurance Carrier

18. On May 26, 2017, upon referral by the insurance carrier, the Claimant saw James Fox, M.D., at Concentra. Dr. Fox was of the opinion that his objective findings were consistent with the mechanism of injury (Respondents' Exhibit C, bates stamp

000003). Dr. Fox noted that the Claimant was seen initially by her primary care physician (Dr. George), who referred her to Dr. Melick. Dr. Fox restricted the Claimant from returning to work until June 9, 2017. He rendered **no** diagnoses of the Claimant's condition nor did he refer the Claimant to any specialists. The ALJ infers and finds that Dr. Fox's release to return to work is without any medical foundation and it is contradicted by the Claimant's testimony, as well as the aggregate medical evidence. As of August 1, 2017, Dr. Melick, who was providing primary care to the Claimant, had not released the Claimant to return to her pre-injury work. The ALJ infers and finds that the aggregate medical evidence following the visit with Dr. Fox supersedes his skeletal release to return, without a diagnosis.

19. All of the Claimant's medical care and treatment as reflected in the evidence was and is authorized, causally related to the compensable injury of May 16, and reasonably necessary to cure and relieve the effects that injury.2017

Move to San Antonio, Texas

20. On October 2, 2017, the Claimant moved to San Antonio, Texas so she could be near a family support system and because the cost-of-living there is less than in the Denver Metro area. The ALJ infers and finds that the move made sense because the Claimant was not able to work and had no income. Although the insurance carrier should reasonably have been aware of this move, it made **no** medical referral in San Antonio so the Claimant began treatment with her health care provider. The Claimant could either return to the Denver area for treatments by authorized medical providers, whereby the Respondents would be required to pay her travel expenses, or the carrier could make a referral to a treatment provider in San Antonio.

Average Weekly Wage (AWW)

21. In April 2017, the Employer hired the Claimant as a "Landscape Architectural Project Manager," a professional position requiring a professional registration with the State of Colorado. She started at a salary of $78,000 per year plus a minimum profit sharing of $12,000 for the first year. The ALJ finds that the contract of hire establishes an AWW of $1,730.77 ($90,000 divided by 52 weeks). Two-thirds of the AWW exceeds the statutory cap of $948.15 per week for Fiscal year (FY) 2016/2017. Therefore, the maximum TTD rate in this case is $948.15 per week.

Temporary Total Disability

22. The Claimant has not been able to work since the accident of May 16, 2017. Her persuasive and credible testimony supersedes Dr. Fox skeletal release to return to work on June 9, 2017, without even a diagnosis. The aggregate evidence, lay and medical, supersedes any piecemeal releases to return to work before definite diagnoses were made concerning the severity of the Claimant's condition. The ALJ

infers and finds that the Claimant has not been able to return to her pre-injury work since May 16, 2017; she has not worked or earned any wages since that time; and, she has not been declared to be at maximum medical improvement, however, she was paid full salary until June 1, 2017. Therefore she is entitled to TTD benefits from June 1, 2017 and continuing. The period from June 1, 2017, through the hearing date, November 30, 2017, both dates inclusive is 183 days. Based on the maximum TTD rate for FY 2016/2017 of $948.15 per week, which equals $140.59 per day, aggregate past due TTD benefits for this period equal $25, 727.97.

Ultimate Findings

23. The ALJ finds the Claimant's testimony about the accident and her present condition highly credible and persuasive. The ALJ further finds that her testimony concerning her inability to work since the accident outweighs and is more persuasive and credible than the skeletal medical release to return to work provided by Dr. Fox of Concentra and any piecemeal releases provided by any other medical providers before definitive diagnoses were rendered. Further, the ALJ finds the opinions of Dr. Melick and her referrals, concerning the Claimant's present condition as compared to her pre-accident condition more credible and persuasive than any opinions to the contrary. Indeed, their opinions are virtually undisputed.

24. Between conflicting opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Drs. George and Melick and their referrals, concerning the work-relatedness of the Claimant's present post-concussive condition, and to reject all opinions to the contrary. Further, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony concerning her inability to work since May 16, 2017, and to reject all opinions to the contrary.

25. The Respondents are not alleging a safety violation, seeking to reduce benefits by 50%. Moreover, relying on an allegedly analogous Industrial Claim Appeals Office (ICAO) opinion, the Respondents argued that the Claimant deviated from "the sphere" of her employment by placing the call while driving, in violation of the Employer's cell phone policy as herein above found, thus, removing her injuries, altogether, from compensability

26. To accept "the sphere of employment" argument, as opposed to an allegation of a safety rule violation, would subvert the beneficent, no-fault intent of the Workers' Compensation Act (hereinafter the "Act"), which provides injured workers with 50% benefits even when they have knowingly violated a safety rule. A deviation from the "sphere of employment" would deprive the injured worker of 100% of workers' compensation benefits. Under the circumstances, as found, the Respondents argue for an unwarranted expansion of the "frolic and detour" exception to the "course and scope" of employment. In the present case, as found, the Claimant placed the call for purely business reasons, not for the purpose of a frolic and detour. Further, she did **not**

perform unnecessary work in direct disobedience of an Employer's order. She may have violated a safety policy but that was not a designated issue and it was not reserved as an issue. Therefore, it is waived. Furthermore, as found, the Claimant was going to make notes of the phone conversation as soon as she could find a safe place to pull over and write notes. Thus, she remained in the course and scope of her employment at the time of the accident.

27. As found, the Claimant's injuries arose out of the course and scope of her employment for the Employer and she did **not** deviate from the "sphere of employment" to a degree contemplated by prevailing case law or ICAO opinions. Thus, the Claimant sustained compensable injuries in the auto accident of May 16, 2017.

28. As found, all of the Claimant's medical care and treatment for the effects of the May 16, 2017 auto accident was authorized, within the chain of authorized referrals, causally related to the compensable injuries, and reasonably necessary to cure and relieve the effects thereof.

29. As found, the Claimant's AWW is of $1,730.77 ($90,000 divided by 52 weeks). Two-thirds of the AWW exceeds the statutory cap of $948.15 per week for Fiscal Year (FY) 2016/2017. Therefore, the maximum TTD rate in this case is $948.15 per week.

30. As found, the Claimant was paid full wages through June 1, 2017. As further found, she is entitled to TTD benefits of $948.15 per week, or $140.59 per day, from June 1, 2017 and continuing.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo.

App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony about the accident and what she was doing at the time plus what she intended to do (make written notes after the phone call with Lessman) and her present condition is highly credible and persuasive. As further found, her testimony concerning her inability to work since the accident outweighs and is more persuasive and credible than the skeletal medical release to return to work provided by Dr. Fox of Concentra and any piecemeal releases provided by any other medical providers before definitive diagnoses were rendered. Further, as found, the opinions of Dr. Melick and her referrals, concerning the Claimant's present condition as compared to her pre-accident condition are more credible and persuasive than any opinions to the contrary. Indeed, their opinions are virtually undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Substantial Evidence

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

ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Drs. George and Melick and their referrals, concerning the work-relatedness of the Claimant's present post-concussive condition, and to reject all opinions to the contrary. Further, as found, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony concerning her inability to work since May 16, 2017, and to reject all opinions to the contrary.

Compensability—Course and Scope of Employment

c. Ordinarily, an injury while traveling to and from work is not compensable. *See Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). There are many exceptions, however, to the "going to and coming from" rule. Exceptions where there are "special circumstances" include:

- travel during working hours;
- the obligations or conditions of employment create a "special zone of danger" resulting in the injury. *Madden v. Mountain West fabricators, supra*;
- performing a service requested by the employer;
- traveling between job assignments;
- reimbursement for the employee's cost of commuting;
- being on "travel status" while working out-of-town.

As found, even if the Claimant was going home ("coming from") her job-related meeting in Loveland, at the time of the work-related phone call and the accident, she was within the course and scope of her employment. Furthermore, as found, she was going to pull over to a safe place on the side of the road, after the phone call with Lessman, to make written notes of the phone call, thus, she remained within the course and scope of her employment at the time of the accident.

d. If an employee does a purely personal errand or deviation while on "travel status," and is injured this may take the injury out of the ambit of compensability. *See Pat's Power Tongs, Inc. V. Miller,* 172 Colo. 541, 474 P.2d 613 (1970). When the personal errand or deviation is completed, however, the employee on "travel status" returns to the regular travel routine and continuous coverage resumes. *See Phillips Contracting, Inc. v. Hirst,* 905 P.2 9 (Colo. App. 1995). There was no persuasive evidence that the Claimant was doing any personal errands before and after the accident.

e. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of

causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, although the Claimant had pre-existing concussions and vestibular problems, an un-named North Boulder Physical Therapy physical therapist noted that the Claimant had previous concussions and a history of vestibular challenges ongoing for more than 20 years. As found, however, the Claimant was able to do the full range of her job duties before the compensable injuries of May 16, 2017, and could not thereafter. As further found, the accident of May 16, 2017 aggravated and accelerated all of the Claimant's pre-existing concussive and visual conditions to the point that she has been unable to work at her pre-injury job since the auto accident of May 16, 2017.

"Sphere of Employment" Argument

f. Respondents argue that because the Claimant violated the "cell phone" policy of the Employer, the Claimant was removed from the "sphere of employment" and, thus, her injuries were not compensable. The Respondents principally rely on the Industrial Claim Appeals office (ICAO) opinion in *Escobedo v. Midwest Drywall Company, Inc.,* W.C. No. 4-700-124 (ICAO, July 13, 2007), wherein the claimant and his partner were using scaffolding. Two supervisors noticed problems with the scaffolding. The claimant was directly told by his supervisor to cease using the scaffolding until replacement parts could be obtained. The claimant was told he could wait for the replacement parts or go home. The supervisors removed the wheels, side rails and plank from the scaffolding so that it was unusable. The supervisors then left. The claimant waited for 30 to 40 minutes for the new parts but they did not arrive. The claimant then decided to rebuild the scaffolding and continue working. In doing so, he fell and sustained injuries. Under the unique circumstances of the case, the ALJ found

that the claimant had failed to establish that the fall was proximately caused by an injury arising out of the course and scope of employment. The ALJ concluded that the employer's specific directive to the claimant temporarily limited the claimant's "sphere of employment," thus, the injuries were not compensable. Relying on *Bill Lawley Ford v. Miller,* 672 P.2d. 1031 (Colo. App. 1983), *ICAO* affirmed the ALJ. The facts in the present case are significantly distinguishable from the facts in *Escobedo.* As found herein above, there are several reasons why the Claimant remained in the course and scope of her employment at the time of the accident.

g. In *Bill Lawley Ford v. Miller, supra,* the facts are even **less** analogous to the facts in the present case. There, the employee was a tow truck driver who was sent to pick up a tow truck. The employee had informed the employer that his vehicle had broken down. The employee had been drinking during the day and drank more while traveling with the co-worker sent to pick up the employee. The employer ordered the employee to stay where he was for the night, but the employee disobeyed the order and was then involved in an accident. The Court of Appeals held that the employer's order limited "the sphere of employment" and that acting in violation of that order, the employee was not acting in the course of employment. The ALJ concludes that an analogy of the facts in the present case to the facts in *Bill Lawley* are attenuated to the point of not being germane herein. Indeed, extreme caution must be used in order not to confuse a safety violation with removal from "the sphere of employment." Otherwise, why have a beneficent system that still gives benefits (50%) to a willful safety violator, when an employer could avoid liability altogether by taking the position that the safety violator removed himself/herself from "the sphere of employment."

Medical

h. Because this matter is compensable, Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, upon reporting the accident/injury to her supervisor, Kevin Shank, he told her to go to a doctor, without specifying any particular medical provider. Thereupon, the Claimant went to her primary care physician, Dr. George. The Claimant's testimony in this regard was found credible and undisputed. Therefore, Dr. George was an authorized treating physician (ATP). Thereafter, the Employer sent the Claimant to Concentra, where she was seen

once by Dr. Fox who, as found, issued a skeletal release to return to work, without rendering a diagnosis. Therefore, Dr. Fox was also authorized. The Claimant has two authorized medical providers. Dr. Fox, however, made no referrals to other medical providers.

l. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, all referrals emanating from ATP Dr. George and Dr. Melick were within the authorized chain of referrals

j. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the compensable aggravation and acceleration of her pre-existing concussive condition, as caused by the accident/injuries of May 16, 2017.. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of the aggravating injuries of May 16, 2017.

Average Weekly Wage (AWW)

k. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As found, the Claimant's AWW is $1,730.77 ($90,000 divided by 52 weeks). Two-thirds of the AWW exceeds the statutory cap of $948.15 per week for Fiscal Year (FY) 2016/2017. Therefore, the maximum TTD rate in this case is $948.15 per week.

Temporary Total Disability

l. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual

job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant's testimony and the aggregate medical evidence in the record was more credible and outweighed Dr. Fox's early June 2017 release to return to work, without a diagnosis. As further found, the Claimant was paid full wages through June 1, 2017. Also as found, she is entitled to TTD benefits of $948.15 per week, or $140.59 per day, from June 1, 2017 and continuing.

m. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring and modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found herein above, all the prerequisites for the Claimant's receipt of TTD benefits from June 1, 2017 and continuing have been met.

n. As found, the Claimant is entitled to retroactive TTD benefits of $948.15 per week, or $140,.59 per day, from June 1, 2017 through the hearing date, November 30, 2017, both dates inclusive, a total of 183 days, in the aggregate amount of $25, 728.49. From December 1, 2017 until cessation or modification of benefits is warranted by law, Respondents are liable for continuing TTD benefits at the rate of $948.15 per week.

Burden of Proof

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

Claimant has sustained her burden on all issues. Including the fact that she did **not** deviate from her "sphere of employment" at the time of her auto accident and resultant injuries.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical expenses, attributable to her compensable injuries of May 16, 2017, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits of $948.15 per week, or $140.59 per day, from June 1, 2017 and continuing until cessation or modification thereof is warranted by law.

C. Respondents shall pay the Claimant past due temporary total disability benefits in the aggregate amount of $25, 728.49, which is payable retroactively and forthwith. Thereafter, Respondents shall continue paying the Claimant temporary total disability benefits as provided in paragraph. B above.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

E. Any and all issues not determined herein, including permanent total disability, are reserved for future decision.

DATED this_____day of December 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2017, electronically in PDF format, addressed to:

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

_____
Court Clerk

Wc.ord

ISSUES

I. Whether Respondents overcame the Division IME of Dr. Douthit, by clear and convincing evidence, regarding Claimant's impairment rating.

II. Whether Respondents overcame the Division IME of Dr. Douthit, by clear and convincing evidence, regarding MMI.

FINDINGS OF FACT

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

1. On March 28, 2016, Claimant slipped on a patch of ice in the parking lot at work. Claimant landed on her left hip, buttocks, and left wrist. Claimant reported the accident to Employer and was referred to Concentra for medical treatment.

2. On March 28, 2016, Claimant presented to Concentra and was evaluated by Dr. Bryan Counts. Claimant complained of 8/10 pain which was mostly left sided and involved her low back, left hip, and thigh area. Claimant's symptoms included some shooting pain down the back side of her left leg to her knee. Claimant underwent an x-ray of her left hip due to her low back and hip pain. The x-rays were normal. Claimant was diagnosed as suffering from a contusion to her left hip, lumbar strain, and contusion to her left wrist. Dr. Counts prescribed physical therapy and ibuprofen. Dr. Counts concluded that Claimant's symptoms and physical exam findings were consistent with the mechanism of injury.

3. On April 6, 2016, Claimant returned to Dr. Counts. Dr. Counts noted that Claimant was returning for a recheck of her back pain, hip pain, and upper leg pain. He also noted that between visits, Claimant's pain got much worse and she could not get out of bed and had to call an ambulance. Claimant was seen at University Hospital and was prescribed valium and ibuprofen. Claimant underwent additional x-rays, which were negative. Claimant was using a cane and could barely stand for very long or ambulate very far. Dr. Counts assessed Claimant as suffering from a contusion of her left hip and a lumbar strain. Claimant was prescribed tizanidine, a muscle relaxant, and advised to not work or drive within 8 hours of taking the muscle relaxant. Dr. Counts noted that Claimant's history and mechanism of injury were consistent with her presenting symptoms and physical examination.

4. On April 11, 2016, Claimant returned to Concentra and was evaluated by Glenn Peterson, PA-C. It was noted that Claimant was limping on the left, but Claimant reported that she was improving. Claimant was provided work restrictions of no working more than 4 hours per day.

5. On April 19, 2016, Claimant returned to Dr. Counts. Claimant complained of ongoing back pain with tingling and numbness. Dr. Counts noted ongoing joint stiffness. He continued Claimant on her muscle relaxant tizanidine.

6. On April 28, 2016, Claimant returned to Concentra due to ongoing back and hip pain. Claimant's symptoms included muscle weakness, limping, and night pain. Claimant was seen by Dr. Counts. His assessment of lumbar strain continued. Claimant was provided work restrictions which limited her work to 5 hours per day.

7. On May 13, 2016, Claimant returned to Dr. Counts. Claimant continued to complain of back pain as well as pain and numbness down her left thigh. She also indicated that with prolonged sitting, her pain got worse and that she also had spasms in her left thigh. Claimant was frustrated with her symptoms as she could not sit or stand for prolonged periods of time. Dr. Counts noted that Claimant had ongoing joint stiffness. Dr. Counts ordered an MRI. He also continued Claimant's physical therapy and directed Claimant to continue taking her muscle relaxant, tizanidine, at night.

8. Due to persistent complaints of low back pain and radiated symptomology into her left lower extremity, Dr. Counts referred Claimant to Dr. Aschberger.

9. On June 7, 2016, Claimant was evaluated by Dr. Aschberger. He noted that Claimant underwent an MRI on May 31, 2016. The MRI demonstrated degenerative disc changes at L3-L4, L4-L5, and L5-S1 with facet degenerative changes at L4-L5 and severe facet degenerative changes at L5-S1. The MRI did not show any obvious nerve root encroachment.

10. Dr. Aschberger also noted Claimant had restricted motion at the PSOS. He also noted there was tightness at her lower lumbar paraspinal musculature and that her lumbosacral flexion was 70 degrees and her extension was 20 degrees. Dr. Aschberger's assessment included lumbar contusion, hip contusion, IT band myofascial irritation, lumbosacral dysfunction, SI joint irritation, and psoas spasm and tightness. Dr. Aschberger went on to note that Claimant's objective findings were consistent with her subjective complaints and consistent with the described injury. Based on his evaluation, Dr. Aschberger referred Claimant for manual therapy and OMT. He also noted that Claimant was a candidate for lumbar facet injections given the positive response to provocative maneuvers, SI injection, and a cortisteroid injection along the IT band. His report also noted that Claimant should continue taking her medications which included an anti-inflammatory and muscle relaxant.

11. On July 14, 2016, Claimant returned to Dr. Aschberger. He noted that her range of motion had improved, but yet Claimant continued to take a muscle relaxant intermittently. His assessment included lumbosacral dysfunction and SI joint irritation. He noted that her MRI demonstrated degenerative changes at L3 through S1 with facet degenerative changes identified, with the most severe at L5-S1. Due to Claimant's different levels of involvement and radiated symptomology, Dr. Aschberger recommended electrodiagnostic testing to see if there was any specific localized nerve root involvement. At this visit, it was also noted that Claimant was still taking an anti-inflammatory and a muscle relaxant.

12. On August 17, 2016, Claimant returned to Dr. Aschberger. Claimant continued to complain of pain in the left low back and radiation of her symptoms into the lateral thigh. Claimant stated that her pain levels started to decrease, but then she increased her activity level and that caused her pain to increase. Therefore, her overall pain complaints remained the same. Dr. Aschberger evaluated Claimant and noted that she was still tight and tender at the left SI joint. Dr. Aschberger ordered an SI joint injection. He also performed electrodiagnostic testing which was normal. Claimant noted her pain was 60% better.

13. On August 24, 2016, Claimant was evaluated by Glenn Petterson, PA-C. At this visit, Claimant still had back pain and joint stiffness. He recommended Claimant continue taking her muscle relaxant, tizanidine.

14. On September 15, 2016, Claimant returned to Dr. Aschberger due to ongoing back pain and achiness into her left hip. Dr. Aschberger noted that Claimant had a diagnostic response to her SI joint injection. Claimant had no pain for about 7 hours. Dr. Aschberger also noted Claimant had tightness, i.e., rigidity, in her psoas musculature bilaterally. Dr. Aschberger referred Claimant for massage therapy hoping that would "loosen her up." Dr. Aschberger's assessment at that time was lumbar contusion.

15. On September 23, 2016, Claimant was evaluated by Lacie Esser, PA-C. PA Esser noted ongoing back pain and joint stiffness.

16. On October 14, 2016, Claimant was evaluated by Dr. Counts. He noted Claimant did not have full range of motion of her lumbar spine. He noted leftward side bending and extension were lagging. He also noted tenderness at the left SI joint and L5 left paraspinal area. His assessment at that time was SI joint dysfunction and contusion of the left hip and thigh.

17. On October 20, 2016, Claimant was evaluated by Dr. Aschberger. Dr. Aschberger noted that although Claimant's recovery has been slow, Claimant reported that treatment had been beneficial. Dr. Aschberger wanted Claimant to finish up her treatment with Dr. Conforti and her massage therapy. He also wanted Claimant to continue taking her anti-inflammatory and muscle relaxant. His assessment at that time was still a lumbar contusion with SI joint irritation.

18. As of the October 20, 2016, visit with Dr. Aschberger, Claimant had a medically documented injury to her lumbar spine – lower back - with more than six months of medically documented pain and rigidity, with and without muscle spasm.

19. On November 1, 2016, Claimant was evaluated by PA Petersen. He noted ongoing symptoms of back pain, stiffness in her back, and joint stiffness.

20. On November 10, 2016, Claimant returned to Dr. Aschberger. He noted progressive improvement. Claimant denied any radicular symptomology, but she still had back pain. Dr. Aschberger noted Claimant's lumbar flexion was limited to 90 degrees, but found full extension. His assessment was lumbar contusion and ailments of SI irritation. He continued her medications of naproxen and tizanidine. Claimant noted her pain was about 60% better.

21. On November 21, 2016, Claimant was again evaluated by Dr. Counts and he noted that Claimant did not have full range of motion of her lumbar spine. Regarding work restrictions, Dr. Counts noted that Claimant needs to be able to leave the counter as needed to stretch her back.

22. On November 30, 2016, Claimant was evaluated by Dr. Aschberger. His assessment of Claimant was a lumbar strain. Although Claimant, subjectively, did not think the injection helped, Dr. Aschberger noted some objective improvements. Claimant noted she was about 65% better.

23. On December 19, 2016, Claimant was evaluated by Dr. Counts. He noted Claimant had ongoing back pain with decreased range of motion in her lumbar spine. He also noted tightness and stiffness. On January 6, 2017, Claimant was again seen by Dr. Counts. He noted ongoing back pain, back stiffness, but improving range of motion in her low back.

24. On January 26, 2017, Claimant was evaluated by Dr. Bloch. This was the first time Dr. Bloch evaluated Claimant. Dr. Bloch indicated that: "ongoing behavior consistent with malingering as much as anything." He went on to state that "She strikes me as deconditioned and unmotivated and unhappy with her job, which I would say is the cause of her stated need for less work than anything related to this injury." Therefore, Dr. Bloch placed Claimant at maximum medical improvement and determined she had no impairment.

25. Claimant credibly testified that Dr. Bloch evaluated her for only 5-10 minutes. Although Dr. Bloch indicated that he thought Claimant was malingering, there is no indication in the record that any other medical provider thought Claimant was malingering. The medical records consistently document that Claimant's history and mechanism of injury were consistent with her presenting symptoms and physical examination. Moreover, Dr. Aschberger, as set forth below, disagreed with Dr. Bloch's statement that Claimant was malingering. In addition, Claimant credibly testified that she likes her job and has won awards for her performance at work. There was no credible evidence in the record that Claimant was

unhappy with her job and did not want to work – as stated by Dr. Bloch. Therefore, the ALJ does not credit Dr. Bloch's opinions.

26. On February 2, 2017, Claimant returned to Dr. Aschberger. He disagreed with Dr. Bloch's assessment. Dr. Aschberger assessed Claimant as suffering from a lumbar strain. He also noted Claimant's lumbosacral range of motion was limited to 80 degrees of flexion and 30 degrees of extension. Dr. Aschberger also stated the following:

> "[Claimant] has had consistent findings. I have not noted exaggerated pain behaviors with evaluation. Dr. Bloch had indicated ongoing behavior "consistent with malingering" which I did not have any sense of. There have been objective findings with her evaluations with myself as well as with osteopathic evaluation. . . I think it is reasonable for [Claimant] to try and increase her work hours. Ultimately, it is reasonable to continue with the osteopathic as reviewed by Dr. Counts. I would like [Claimant] to follow up with Dr. Counts specifically as he has been familiar with the case. If there is persistent localized irritation, I believe that a follow up injection would be reasonable.

27. The ALJ finds Dr. Aschberger's opinions to be credible and persuasive.

28. On February 14, 2017, Claimant was evaluated by Dr. Aschberger. Claimant noted ongoing low back pain which was 4-5/10 in the morning and improved to 2-3/10 throughout the day. Dr. Aschberger noted Claimant continued to take tizanidine and naproxen. He also noted her lumbosacral flexion was limited to 80 degrees, but that her extension was full. His ongoing assessment was lumbar strain. Claimant noted she was about 75% better.

29. On March 13, 2017, Claimant underwent another injection. Claimant indicated the injection decreased her pain and improved her movement and made her more mobile.

30. On March 14, 2017, Claimant was evaluated by Dr. Aschberger. Dr. Asberger's assessment was persistent low back pain with SI irritation. He noted that since Claimant had been placed at MMI by Dr. Bloch, ongoing treatment was maintenance treatment. He also noted that if Claimant continued with persistent recurrent irritation with objective findings, an impairment rating would be appropriate.

31. On May 10, 2017, Claimant underwent a left SI joint injection, which was performed by Dr. Sacha. Claimant had an approximate 70-80% relief of her pain. Dr. Sacha determined it was a borderline diagnostic response to the procedure.

32. On May 14, 2017, Claimant returned to Dr. Aschberger. He noted Claimant recently had another SI joint injection and had a nice response to the injection confirming that was the likely source of her pain. He noted that the procedure notes from Dr. Sacha, who performed the injection, indicated Claimant had 70 to 80% improvement with a borderline diagnostic response. Dr. Aschberger noted that maintenance medical treatment would be reasonable. He also noted that they discussed MMI and impairment, but yet Dr. Aschberger did not provide Claimant an impairment rating.

33. On May 22, 2017, Claimant underwent a Division Independent Medical Examination ("DIME"), which was performed by Dr. John Douthit. As set forth in his report, Dr. Douthit determined Claimant reached MMI on May 22, 2017. Dr. Douthit also provided Claimant an 8% whole person impairment rating for the injury to her lumbar spine pursuant to the AMA Guides. The impairment rating was comprised of a 5% rating pursuant to Table 53 II(B) of the AMA Guides, due to a specific disorder of the lumbar spine, and a 3% rating due to a loss of range of motion.

34. In his report, Dr. Douthit stated that after reviewing the medical records, "I found no strictly objective findings noting underlying pain and restrictive range of motion of the lumbar spine."

35. In his report, Dr. Douthit ultimately provided Claimant a diagnosis of "lumbosacral pain syndrome." He then stated the following:

> The source of pain is speculation and there may be a large functional component. Her MRI is ordinary and consistent with her age and no examiner has reported objective findings. There has been no evidence of any studies that would indicate a permanent anatomical change or injury has occurred and any organic injury should have recovered or will so with the passage of time. As regard to rating, I will allow that she now had pain for over six months on her lumbar spine with minimal changes. Table 53 AMA Guide III, IIb will allow 5% impairment. I will also allow 3% impairment with loss of range of motion, which would equal an 8% impairment in a whole person.

36. Dr. Douthit also testified by deposition. In his deposition, Dr. Douthit clarified the statements and opinions set forth in his report. Dr. Douthit testified that although there were no objective physical findings that explained Claimant's low back pain complaints, there were some objective MRI findings which supported Claimant's low back pain complaints. Dr. Douthit testified that he tended to agree with Dr. Bloch that Claimant's complaints were nonphysiologic. However, Dr. Douthit was asked whether he agreed with Dr. Bloch's conclusion that Claimant's history and mechanism of injury do not appear to be consistent with Claimant's presenting symptoms and physical exam. Dr. Douthit stated that he did not agree with Dr.

Bloch's conclusion. Dr. Douthit stated that Claimant gave a history that she fell and injured her back and left hip. Later in his testimony, Dr. Douthit stated that he believed Claimant was injured due to the fall. Dr. Douthit also testified that based upon the MRI findings, which he determined were objective, he believed Claimant had degenerative disease of her lumbar spine and it was aggravated by the fall at work.

37. In support of the impairment rating he provided for Claimant, Dr. Douthit testified that:

> [B]ased on my interpretation versus her symptoms, the subjectivity of it, and I felt that there was a possibility that she aggravated her – she had degenerative diseases of her lumbar spine and was having pain therefrom, and that's why I gave her a rating.

38. The ALJ finds that Dr. Douthit's opinions as set forth in his report and testimony conflict at times. However, the ALJ resolves such conflicts and finds that Dr. Douthit determined the following:

- Claimant injured her back on March 28, 2016, when she fell and aggravated her preexisting degenerative lumbar disease.
- Claimant's medical records document more than 6 months of pain and rigidity, with and without muscle spasm, in her lumbar spine.
- Claimant's pain complaints, and evidence of her injury, are supported by the objective findings demonstrated by the MRI of her lumbar spine.
- Claimant has a specific disorder of her lumbar spine which is rateable under table 53 II(B) of the AMA Guides and entitled Claimant to a 5% impairment rating.
- Claimant had decreased range of motion in her lumbar spine, which entitled Claimant to an additional 3% impairment.
- Claimant's total impairment due to her work related injury pursuant to the AMA Guides is 8%.
- He did not rate Claimant for chronic pain.
- Claimant's rating was based upon objective evidence of anatomic or physiologic correlation.

39. The ALJ finds Dr. Douthit's opinion that Claimant has an 8% whole person impairment of her lumbar spine pursuant to the AMA Guides due to her work injury to be credible.

40. On September 18, 2017, Claimant underwent an IME, which was performed by Dr. John Hughes. Although Dr. Hughes did not think Claimant was at MMI due to increased pain complaints and decreased range of motion of her lumbar spine, he did provide Claimant a provisional impairment rating. He agreed with Dr. Douthit that Claimant qualified for a 5% rating pursuant to Table 53 II(B) of the

AMA Guides due to a specific disorder of her lumbar spine. He also found that Claimant's range of motion had decreased and that Claimant was entitled to an additional 9% impairment for her decrease in range of motion. He concluded Claimant had a 14% impairment pursuant to the AMA Guides. The ALJ finds Dr. Hughes' opinion that Claimant has a rateable impairment to be persuasive that Claimant has a rateable impairment pursuant to the AMA Guides and §8-42-107(8)(c), C.R.S.

41. Claimant suffered a medically documented injury to her lumbar spine.

42. Claimant has a specific disorder of her lumbar spine. The specific disorder is degenerative disease of her lumbar spine which was aggravated by her fall at work.

43. Claimant's medical records demonstrate she has had back pain for more than six months. Claimant's low back pain complaints are found to be credible. Therefore, Claimant has had more than six months of medically documented pain.

44. Claimant's medical records demonstrate Claimant has had limited range of motion and joint stiffness in her low back for more than six months. Her medical records also establish that Claimant has been taking a muscle relaxant, tizanidine, for more than six months to help treat her muscle spasms and joint stiffness in her low back. Therefore, Claimant has had more than six months of medically documented rigidity with, and without, muscle spasm in her low back.

45. Claimant also has minimal degenerative changes to her lumbar spine, which are demonstrated by structural tests, i.e., her MRI.

46. Claimant's MRI findings, range of motion impairment, muscle spasms, and stiffness, which were associated with her injury, constitute objective findings of anatomic or physiologic correlation regarding her back injury.

47. Dr. Douthit properly applied the AMA Guides in determining Claimant's impairment rating. The impairment rating provided by Dr. Douthit is based on a specific disorder of Claimant's lumbar spine which is supported by a medically documented injury to her lumbar spine and is accompanied with a minimum of six months of medically documented pain and rigidity, with non-to-minimal degenerative changes on structural tests, pursuant to Table 53(II)(B) of the American Medical Association Guidelines to the Evaluation of Permanent Impairment, Third Edition, Revised (AMA Guides).

48. Claimant was not provided an impairment rating for chronic pain without objective anatomic or physiologic correlation.

49. The impairment rating provided by Dr. Douthit is consistent with §8-42-107(8)(c), C.R.S.

50. At the time of the hearing on November 9th, 2017, Claimant testified that she continues to struggle with pain and continues to take some time off work due to her pain. She testified that she cannot sit still or stand for long periods of time and that she must switch from seated to standing position while working. Claimant also testified that she is not able to do what she used to, and that she basically works, comes home, and then takes a muscle relaxant. She testified that she has been limited in her ability to engage in recreational activities. However, on cross examination, Claimant admitted to riding motorcycles with her boyfriend – in a limited capacity - on multiple occasions since the incident. This includes going for a motorcycle ride after the IME with Dr. Hughes on September 18, 2017, after she advised Dr. Hughes that she had burning low back pain of 5/10. Claimant also admitted during cross examination that since her injury, she has done some traveling. However, the ALJ does not find Claimant's admitted recreational activities to be inconsistent with her general presentation to medical providers during the course of her claim, inconsistent with her injury, or inconsistent with her direct testimony. Therefore, the ALJ finds Claimant's presentation to her medical providers and her testimony regarding her injury and symptoms to be credible.

51. Pursuant to the AMA Guides Claimant has an 8% whole person impairment of her lumbar spine due to her work injury.

52. Claimant reached MMI on May 22, 2017.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the

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

I. Whether Respondents overcame the Division IME of Dr. Douthit, by clear and convincing evidence, regarding Claimant's impairment rating.

A DIME physician must apply the AMA Guides when determining Claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning Claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

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

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not

necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

"Where the DIME physician's opinions are internally inconsistent it is the ALJ's sole prerogative as the fact finder to resolve the conflict and determine the nature of the DIME physician's true opinions." *E.g. Wales v. Infab, Inc.,* 2002 Colo. Wrk. Comp. LEXIS 462 (ICAO 2002)(citing *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998)). To the extent a medical expert's opinions are internally inconsistent or subject to varying inferences, the ALJ may resolve the inconsistency by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Respondents contend Claimant is not entitled to an impairment rating pursuant to Section 8-42-107(8)(c). Respondents contend the 8% whole person impairment rating provided by Dr. Douthit is based on chronic pain without objective findings of anatomic or physiologic correlation.

Section 8-42-107(8)(c) provides:

> For purposes of determining levels of medical impairment, the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings.

First, Claimant has a specific disorder of her lumbar spine which is rateable under Table 53 of the AMA Guides. In his report, Dr. Douthit diagnosed Claimant as suffering from lumbosacral pain syndrome, which he also described in his deposition as degenerative lumbar spine disease, which was aggravated by Claimant's fall. Therefore, as found by the ALJ, Dr. Douthit rated Claimant for a specific disorder of her lumbar spine under Table 53 of the AMA Guides. Thus, this is not a case in which the impairment rating is based solely on "chronic pain." Therefore, Section 8-42-107(8)(c) is inapplicable to the facts of this case. *See Murphy v. Legend's Casino*, W.C. No. 4-297-222 (May 24, 2001); *Herrera v. Sturgeon Electric Co*., W.C. No. 4-320-602 (January 8, 1999) (anatomic correlation requirement not applicable where Claimant is rated for a specific disorder of lumbar spine under the AMA Guides).

Second, Claimant's MRI of her lumbar spine objectively demonstrated degenerative disease of her lumbar spine. In addition, Claimant was also found to have range of motion impairment, muscle spasms, and stiffness, which were associated with her lumbar spine injury. Therefore, even if Section 8-42-107(8)(c) was applicable, Claimant's MRI findings, range of motion impairment, muscle spasms, and stiffness, which were associated with her injury, constitute objective findings of anatomic or physiologic correlation sufficient to uphold a rating involving "chronic pain." *See Herrera v. Sturgeon Electric Co., supra (anatomic correlation requirements of § 8-42-107(8)(c) satisfied where claimant exhibited reduced movement of the spine); Welker v. Bogue Construction Inc., W.C. No. 4-309-642 (March 5, 1998).*

Respondent's cite to *Silva v. Express Temporary Service*, W.C. No. 4-303-227 (April 28, 1998) for the proposition that Claimant is not entitled to an impairment rating. *Silva*, however, does not require a different result. In that case the ALJ credited the treating physician's opinion that Claimant's pain was not the result of a diagnosis based condition, but instead resulted from "non-work-related psychological factors." In this case, based upon the opinion of Dr. Douthit, which this ALJ credits, it was found that Claimant's back pain was caused by a diagnosis based condition, i.e., the aggravation of her degenerative lumbar disease. Plus, this ALJ found that Claimant's back pain was supported by objective anatomical and physiological findings, which included the MRI, muscle spasm, stiffness, and decreased range of motion. Moreover, this ALJ did not find Dr. Bloch's opinion credible in which he opined Claimant was malingering. Therefore, *Silva* is factually and legally distinguishable from this case.

The impairment rating Dr. Douthit provided Claimant is consistent with the AMA Guides and Section 8-42-107(8)(c). Respondents' have failed to overcome the impairment rating provided by Dr. Douthit by clear and convincing evidence. Therefore, this ALJ concludes that Claimant has an 8% whole person impairment due to her industrial injury as determined by Dr. Douthit.

II. Whether Respondents overcame the Division IME of Dr. Douthit, by clear and convincing evidence, regarding the date of MMI.

A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Respondents did not dispute the finding of the Division Examiner that Claimant reached MMI on May 22, 2017. Therefore, Claimant reached MMI on May 22, 2017.

ORDER

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

1. Respondents' have failed to overcome the Division IME regarding Claimant's impairment rating or the date of MMI.

2. Claimant suffered an 8% whole person impairment rating as a result of her industrial injury.

3. Claimant reached MMI on May 22, 2017.

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

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

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

DATED: December 6, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-993-117-06

ISSUES

- Whether Claimant established by clear and convincing evidence that Dr. Finn erred by placing Claimant at MMI?
- Whether Claimant's left shoulder condition is related to her July 8, 2015 work injury entitling her to medical benefits?
- Whether Claimant sustained a permanent disfigurement as a result of the compensable right shoulder injury?

FINDINGS OF FACT

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

1. Claimant is a 55 year old female who Employer employed as a packer when she injured her right shoulder on July 8, 2015. She was reaching overhead for an empty carton when she felt a pop in her shoulder. She felt pain in her right shoulder, neck and hand.

2. Claimant did not seek treatment until August 7, 2015 when she saw Richard Shouse PA-C at Arbor Occupational Medicine. Mr. Shouse diagnosed shoulder tendonitis, prescribed medication, referred Claimant to physical therapy, and assigned work restrictions.

3. Claimant left Employer approximately three days later on August 10, 2015. She has not worked since.

4. Two and a half months later, despite being off work, Claimant began complaining of left sided shoulder pain. Dr. Orgel's October 30, 2015 report states that Claimant had pain in her left bicep and tricep. She had good range of motion. There was no weakness to resisted elbow movement. Dr. Orgel stated that the pain appeared to be muscular in nature. He did not find anything about her presentation to be "worrisome." Claimant testified that she did not have left shoulder pain prior to this, her left shoulder pain came on slowly, and the pain was not a result of any specific event.

5. On November 5, 2015, after conservative care failed, Claimant had surgery on her right shoulder. Claimant testified that she did not perform household activities. She lives with an adult daughter who performed all the household tasks. Claimant only attend to her personal hygiene and occasionally prepared simple meals for herself. Claimant testified that at all times, she obeyed Dr. Orgel's restrictions.

6. On January 12, 2016, Dr. Erickson performed a physician advisor review regarding the relatedness of Claimant's left shoulder complaints. Claimant was emphatic that her left shoulder complaints were caused by overuse of her left upper extremity while she recovered from her right shoulder surgery. However, Dr. Erickson concluded: "Contralateral overuse, however, has been thoroughly examined in the Workers' Compensation literature, and there is insufficient evidence that an injury can occur to the contralateral side from overuse. One interesting point in the majority of these studies is that a workers' activities are severely restricted and reduced after an injury, making it highly unlikely that a contralateral injury could occur. . . . I would conclude, to a reasonable degree of medical probability, that the left shoulder pain experienced by Ms. Loredo is not related to her work injury, or the surgery to her right shoulder."

7. Dr. Orgel noted on March 25, 2016 that Claimant's left shoulder was improving with physical therapy. She had good range of motion and all other tests were negative. Dr. Orgel noted that he was holding his request for a left shoulder MRI. On May 18, 2016, Dr. Orgel thoroughly examined Claimant's left shoulder and surrounding musculature. The examination was negative. He specifically noted that Claimant's left bicep tendon and rotator cuff were not tender, and there was no range of motion deficit. No weakness was noted.

8. On June 17, 2016, Dr. Orgel placed Claimant at maximum medical improvement and assigned a 13% upper extremity impairment rating for the right shoulder. Dr. Orgel noted Claimant continued to complain of significant pain in the right shoulder despite a repeat MRI revealing that the rotator cuff was intact and there was no failure of her surgery. Dr. Orgel released Claimant to full duty at that time. Dr. Orgel did not provide work restrictions because he found her right shoulder to be essentially normal on repeat MRI. Respondents filed a final admission admitting to this rating. Claimant requested a DIME.

9. Dr. Kenneth Finn performed the DIME examination and authored a report dated September 29, 2016. Dr. Finn agreed with the MMI date and assigned a 12% upper extremity impairment rating for the right shoulder injury. Respondents admitted to this rating in a final admission dated October 12, 2016.

10. Despite recommendations for maintenance care in the form of medication refills for one year post MMI, Claimant did not return to Dr. Orgel for eleven months, on May 15, 2017. Dr. Orgel noted Clamant had completed her psychological counseling. On examination, Claimant exhibited limited active range of motion in all planes, which was not found with passive movement. Passive range of motion was found to be full. The rotator cuff was intact and there was no improvement after two subacromial injections. Dr. Orgel noted that her examination suggested that her presentation was out of proportion to her objective findings in that she would only abduct and flex her right arm to 90 degrees though he could easily obtain 180 degrees of passive motion, and there was no obvious weakness. Additional surgery to the right shoulder was not indicated. Dr. Orgel noted that Claimant was not filling her prescriptions any longer. Dr.

Orgel noted Claimant remained at fully duty release with no follow up medical care and remained at MMI.

11. Claimant pursued further treatment for her left shoulder under her own insurance. She underwent a left shoulder MRI on September 11, 2017, approximately one year and three months after she reached MMI, and over two years from the date of her injury. The MRI identified multiple abnormalities including a full thickness tear of the distal supraspinatus tendon and a partial thickness tear of the subscapularis tendon which was noted to be related to subcoracoid impingement. There was also a full thickness rupture of the long head of the biceps tendon and degenerative changes in the acromioclavicular joint.

12. The MRI findings are inconsistent with Dr. Orgel's prior findings on physical examination on May 18, 2016 of a specific lack of tenderness in the bicep tendon. Further, Claimant exhibited essentially full range of motion of her left shoulder when she was seen by Dr. John Paul Spittler on October 25, 2016 for an ultrasound guided injection to the right shoulder. Dr. Spittler performed full examinations of the right and left shoulders, and the values he recorded on the left were essentially normal. The "close to normal" nature of these results for left shoulder active range of motion was confirmed during Dr. Finn's testimony. These reports support a finding that Claimant did not have significant tendon or rotator cuff injuries to her left shoulder at those times. Dr. Finn also noted that the MRI findings are inconsistent with the examination of Richard Shouse on June 1, 2016, just prior to Dr. Orgel placing Claimant at MMI. On that date, Mr. Shouse noted Clamant had the same examination on both shoulders, and presented as angry, defensive and hostile.

13. Dr. Finn testified as an expert in the fields of general medicine, physical medicine and rehabilitation, pain medicine and pain management at hearing on Respondents' behalf. Dr. Finn is level II accredited with the DOWC. He was present at hearing and listened to Claimant's testimony. Dr. Finn normally treats in his medical practice the same types of injuries that Claimant complained of.

14. According to Dr. Finn, Claimant completed a pain drawing and patient history form at the DIME appointment. Neither included complaints of left shoulder pain or dysfunction. A copy of this patient history form, which includes the pain drawing, was admitted into evidence as Respondents' Exhibit P. Claimant alleged that she complained of left shoulder pain during the evaluation but could not recall whether Dr. Finn examined her left shoulder. It is clear from the DIME report and Dr. Finn's testimony that he did in fact examine and consider Claimant's left shoulder.

15. At the time he authored his report, Dr. Finn was aware that Claimant was alleging compensatory pain in the left shoulder. However, she reported pain only in the right shoulder and marked the pain diagram accordingly. Dr. Finn examined both upper extremities during his examination. Nothing about the left shoulder examination made Dr. Finn believe treatment for the left shoulder was warranted, and there was no impairment for the left shoulder.

16. Prior to hearing, Dr. Finn reviewed additional records of treatment which occurred after his DIME, including a follow up visit from Dr. Orgel, the left shoulder MRI, University Hospital records, and Clinica Family Health records. None of the information changed Dr. Finn's opinion that Claimant's left shoulder complaints are not related to Claimant's injury.

17. The left shoulder MRI showed multiple tears and tendonitis. These are very similar findings as those initially found on the right side. In Dr. Finn's experience, such tears would typically be caused by trauma. Very rarely would such MRI findings be caused by overuse. Some of the degenerative findings such as bursitis, inflammation, and arthritis are also quite typical for patients of Claimant's age. Dr. Finn testified that the rotator cuff tears shown on MRI are not related to compensatory use of her left shoulder as a result of her right shoulder injury. He agreed with Dr. Erickson's findings in this regard. Further, Claimant did not report pain to Dr. Finn or indicate on the pain diagram any pain in the left shoulder. Dr. Finn agreed with Dr. Erickson's statements regarding actual injury to contralateral sides. Normally, compensatory pain from having surgery on one shoulder would be musculoskeletal or muscle related pain, stiffness or spasm. There is "absolutely" a difference between the compensatory muscle tightness Claimant exhibited and the tendon and rotator cuff tears revealed on MRI.

18. If the left MRI symptoms had been present during Claimant's active treatment, one would expect her to have consistently reduced range of motion in probably all planes of movement of the shoulder. She did not.

19. Dr. Finn maintained his opinions, within a reasonable degree of medical probability, as to MMI, permanent impairment, and the relatedness of Claimant's left shoulder MRI findings. In his opinion, the MRI findings are not related to compensatory pain from her right shoulder injury. Claimant at all times denied having any pre-existing conditions in her left shoulder, and there are no medical reports or other evidence to establish that she had a preexisting rotator cuff tear or other injury or condition which might have been aggravated by the right shoulder injury.

20. The ALJ finds Dr. Finn to be credible and persuasive when testifying in support of his DIME report and opinions. His testimony is more persuasive and reasoned than that of Claimant concerning relatedness of the left shoulder conditions, particularly when the totality of evidence in the medical records is considered. Claimant exhibited non-physiological complaints, symptoms out of proportion to objective findings, and significant injuries on an MRI taken over two years after her work injury and approximately a year and a half post MMI which are inconsistent with her prior physical examinations and inconsistent with a finding of overuse or compensatory pain.

21. Claimant was released with maintenance recommendations of medication refills for one year and six visits for psychological counseling. Claimant underwent a psychological examination but only completed two of the six recommended therapy sessions. On May 15, 2017, Dr. Orgel noted Claimant would have two months of more medication, but that she had not been refilling her medications through his office. A

review of the medical records reflects that at the time of her discharge at MMI, she had only been taking Ibuprofen. Claimant presented no persuasive evidence or testimony that ongoing treatment should be provided for her right shoulder. She completed the recommendations of the authorized treating physician and there are no medical reports evidencing additional treatment designed to cure and relieve the effects of the industrial injury. The ALJ therefore concludes that Claimant is not entitled to additional maintenance medical care related to her right shoulder injury.

22. Claimant exhibited a surgical scar on the anterior of her right shoulder approximately two inches in length and well healed. Claimant also has an arthroscopic portal scar on the posterior of her right shoulder. The ALJ finds that the permanent disfigurement from this injury warrants an award of $500. Respondents have paid Claimant $500 in disfigurement as a result of this injury. Respondents thus are entitled to a credit in this amount against the award of disfigurement made herein.

CONCLUSIONS OF LAW

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

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. "Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; and a workers' compensation case shall be decided on its merits." *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

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

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

ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office,* P.3d (Colo. App. No. 01CA0852, February 28, 2002).

The DIME physician's findings of maximum medical improvement and permanent impairment are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(c), C.R.S. The finding of a DIME physician that a particular component of the claimant's impairment was caused by the industrial injury is binding unless overcome by clear and convincing evidence. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The determination of maximum medical improvement inherently requires the examining physician to determine the cause or causes of the claimant's condition. Thus, a DIME physician's finding that a condition is or is not related to the industrial injury must be overcome by clear and convincing evidence when challenging a finding of maximum medical improvement. Section 8-42-107(8)(b)(III), C.R.S.; *Cordova v. Industrial Claim Appeals Office, supra*.

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's findings must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proven by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra.* In other words, to overcome a DIME physician's opinion, "[T]here must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004).

The present case is similar in nature to the recent decision by the Industrial Claim Appeals Panel in *Powell v. Aurora Public Schools*, W.C. # 4-974-718-03 (ICAO March 15, 2017). In that case, claimant attempted to overcome the maximum medical improvement determination of the DIME physician Dr. Fillmore. Claimant had obtained a subsequent MRI of her hip reflecting a labral tear. As here, the medical testimony supported a conclusion that there was no evidence of pathology until a significant period of time post-injury – in the *Powell* case, thirteen months. The ALJ was not persuaded that the DIME physician would have altered his opinion on maximum medical improvement had he seen the MRI results at the time of his exam. The Panel stated: "Insofar as Dr. Fillmore did not have the MRI results at the time he conducted his examination and reached his opinion on maximum medical improvement, this evidence goes only to the weight of his opinion. Nevertheless, this did not preclude the ALJ from crediting his opinion. As noted above, the weight and credibility to be assigned evidence is a matter within the discretion of the ALJ." *Cordova v. Industrial Claim Appeals Office, supra.*

Similar circumstances exist here. As found, Dr. Finn testified at hearing that the MRI findings in the left shoulder in fact did not change his opinion regarding maximum medical improvement or the relatedness of the left shoulder condition to the industrial injury. He explained that the types of conditions seen on the MRI are not the types of injuries he would expect to occur as a result of "overuse" or compensatory activities with the contralateral shoulder. In fact, he testified that "very rarely" would such findings on an MRI be caused by overuse. Dr. Finn's opinions are supported by Dr. Erickson's physician advisor review report on this issue. Some of the degenerative findings such as bursitis, inflammation, and arthritis are also quite typical for a person of claimant's age. Dr. Erickson and Dr. Finn agree that contralateral compensatory pain anticipated from having surgery on one shoulder would be musculoskeletal or muscle related pain, stiffness, or spasm. Dr. Finn agrees with Dr. Erickson's statements regarding actual injury to contralateral body parts. Dr. Finn explained that there is "absolutely" a difference between compensatory muscle tightness and the tendon and rotator cuff tears and age-consistent degenerative findings exhibited on the MRI.

Based on this evidence and the credible and persuasive testimony of Dr. Finn, the ALJ therefore finds and concludes Claimant has failed to establish by clear and convincing evidence that the DIME physician was clearly wrong when he assessed Claimant to be at MMI on June 17, 2016. Claimant did not overcome Dr. Finn's opinions that she remains at MMI, and her left shoulder condition is not related to the admitted right shoulder injury.

The ALJ finds and concludes that based on the totality of the evidence in this case, there are no ongoing recommendations for additional treatment from the authorized treating physician at this time. The recommendations made at the time of MMI have been completed. Further, Claimant did not present persuasive evidence as to ongoing maintenance care needed to cure and relieve the effects of the industrial injury. Claimant has not carried her burden of proof to establish by a preponderance of the evidence the need for additional maintenance care related to the admitted injury to her right shoulder.

Claimant is entitled to disfigurement for her right shoulder surgical scars as outlined above.

ORDER

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

1. Respondents shall pay Claimant $500 for permanent disfigurement due to surgical scars related to this injury, with credit allowed for any amount of disfigurement benefits already paid in this claim.

2. Claimant did not overcome the DIME by clear and convincing evidence

    - Claimant remains at MMI.

    - Claimant's left shoulder is not related.

    - Claimant's claim for additional medical benefits is denied and dismissed.

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

DATED: December 6, 2017

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

ISSUES

The issue addressed in this order involves Claimant's entitlement to ongoing medical benefits. The specific question answered is whether Claimant established by a preponderance of the evidence that additional corticosteroid and viscosupplementation, i.e. Supartz injections are reasonable, necessary, and related maintenance treatment to relieve the effects of his left knee injury or to prevent deterioration of his condition.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to his left knee on August 27, 2014. Claimant underwent extensive medical treatment, including a left knee arthroscopy with medial/lateral meniscus repair, patellar chondroplasty, and plica resection under the direction of Dr. Wiley Jinkins on January 22, 2015.

2. Claimant was ultimately placed at MMI with a 40% lower extremity rating on December 17, 2015 by Dr. Jones. Regarding maintenance care, Dr. Jones recommended three additional visits with Dr. Jinkins over the next six months. Since MMI, Claimant has received extensive maintenance care to include follow-up visits with Dr. Jinkins every four to six weeks, medications, and repeat corticosteroid injections. [Resp. Ex. D, p. 53-61]

3. Per Dr. Jinkins, Claimant's response to the additional injections "generally was somewhat transient." [Deposition of Dr. Jinkins, p. 16 at 12-14] Dr. Jinkins acknowledged that Claimant's response as far as the efficacy of the injections varied. [Deposition of Dr. Jinkins, p. 42 at 21-24]

4. Respondents retained Dr. Eric Ridings to perform an independent medical examination (IME). At the IME, Claimant told Dr. Riding that he had "significant improvement by the third day after each injection, feeling about 95% relief of his pain, but then by one week after each injection, he had returned to his previous baseline with no longer-term benefit. He did not differentiate between the corticosteroid injections and the viscosupplementation injections." [Resp. Ex. H, p. 118]

5. Dr. Ridings opined that Claimant did not require any additional injection therapy for his left knee. According to Dr. Ridings, "[Claimant] does not now, nor has he had documented by Dr. Jinkins any significant findings suggesting ongoing inflammation requiring treatment by corticosteroid injection, nor has he had any significant benefit from the multiple corticosteroid injections he has been receiving every four to six weeks

recently." [Respondents' Ex. H, pg. 120] At hearing, Dr. Ridings testified that in the absence of inflammation steroids won't provide therapeutic benefit.

6. Regarding Claimant's response to continued steroid injections, Dr. Ridings noted: "His reported response to the corticosteroid injections is in my opinion nonphysiologic while also being ineffective. He does not require any additional x-rays of his knee at this time, which he has been receiving about every three months, and which on the last three occasions Dr. Jinkins documented showed minimal arthritis. A reasonable interpretation of these repeated x-rays is that Dr. Jinkins also finds his symptoms to be out of proportion to the objective findings, and continues to look for new objective findings." *Id.*

7. On examination, Claimant stated that he feels the injections help him because they, for a period ranging from a few days to a week or two, reduce his pain from a 2-3 to a 1-2 on the pain scale.

8. Claimant's documented response to the corticosteroid and Supartz injections has been mixed in his reports to Dr. Jinkins. On May 24, 2016, he told Dr. Jinkins "there has not been a great deal of change as far as his knee is concerned following the hyaluronate injections (Supartz). (Resp Ex. F, p. 80) On August 2, 2016, Claimant told Dr. Jinkins "the previous corticosteroid injections did help to some degree, however, he is unsure of whether there was any significant lasting improvement associated with the injections." (Resp. Ex. F, p. 82)

9. Dr. Ridings opined that Claimant's pattern of response to repeated injections was not anticipated in terms of duration and type of relief provided. Specifically, he testified that the relief associated with steroid injections would be expected to last longer than Claimant's reported duration and if effective, Supartz injections would provide several months of relief. Consequently, Dr. Ridings opined that Claimant's reported responses to additional injections were more consistent with a placebo effect. (Resp. Ex. H p. 118)

10. Per Dr. Ridings, "I consider this an entirely negative response to the injection therapy, not only because there was no long-term benefit, but because the pattern he describes is not consistent with the expected response to a local anesthetic and a corticosteroid injection." *Id.*

11. The Division of Workers' Compensation has promulgated the Medical Treatment Guidelines (Guides) for medical treatment in the workers' compensation context. Under Section 6, which pertains to the lower extremity, viscosupplementation is discussed as follows: "Viscosupplementation - There is strong evidence that, in the setting of knee osteoarthritis, the effectiveness of viscosupplementation is clinically unimportant, and may impose a risk of adverse events on the patient. Therefore, it is generally not recommended. It may occasionally be appropriate for patients with significant functional deficits who are not yet eligible for or wish to delay an arthroplasty. Refer to Section F.6.e. Viscosupplementation for more information." Section F.2.vii.I.

12. Section F.6.e of the Guides goes on to say that viscosupplementation is "not recommended" for the knee. It also provides that in cases where it is utilized that the "maximum duration" is "2 series." F.6.e

13. With regard to corticosteroid injections, the Guides state there is good evidence for a small to moderate reduction in pain. However, the maximum duration for this treatment is "3 injections in 1 year spaced at least 4 to 8 weeks apart. No more than 4 steroid injections to all body parts should be performed in one year." F.6.a

14. Dr. Jinkins testified the commentary of the Medical Treatment Guidelines on the frequency of corticosteroid and viscosupplementation injections was dependent on the amount that is given and also the time line. He did not appear to be aware of the provisions in the Guides regarding the limitation of 2 series with respect to viscosupplementation injections or a limitation to 3 injections per year contained within the guides. [Deposition of Dr. Jinkins, p. 49 at 8-14]

15. The medical record evidence persuades the ALJ that that Claimant received eight injections where steroid was introduced into the synovial cavity of the knee sometimes in combination with Supartz in 2016. Moreover, the medical records admitted support a finding that Claimant received eight additional injections into the knee between January 25, 2017 and October 10, 2017. All eight of the injections provided in 2017 included the administration of steroid and three of the eight also included the administration of Supartz. Based upon the evidence presented, the ALJ finds that Claimant has received two series of three Supartz injections for a total of six viscosupplementation shots in addition to 16 injections wherein steroid was introduced into the synovial cavity of the knee.

16. Dr. Jinkins testified, "[w]e always offer patients a repeat injection if it had been helpful and leave it up to them as to whether or not they want this to be done, and invariably on the occasions he was injected, he indicated that he would like to have this done." [Deposition of Dr. Jinkins, p. 49 at 19-23]. While Claimant repeatedly requested that his knee be injected, Dr. Jinkins agreed that the injections provided had not always been beneficial testifying as follows: Some of the times they have not helped, and some of the time they have. You have to take it visit by visit.

17. Claimant apparently reported to Dr. Jinkins that "without the injections his symptoms intensify to the point that he has problems negotiating the duties of his job." Consequently, Claimant asserts that repeat injections have improved his functional capacity. While Claimant reports that recurrent injections have resulted in functional gain, Dr. Jinkins reports fail to detail what gains Claimant enjoys as a direct result of the repeat injections. Moreover, as noted by Dr. Ridings, Claimant continued to work in the same capacity even when the repeat injections failed to produce the desired reduction in his symptoms.

18. Based upon the evidence presented, the ALJ finds that Claimant has failed to

failed to meet his burden to establish that additional Supartz and/or corticosteroid injections constitutes reasonable, necessary maintenance treatment to relieve the effects of his left knee injury or to prevent deterioration of his condition.

19. The ALJ credits the opinions of Dr. Ridings to find Claimant's inconsistent and transient pain response to post MMI steroid injections in combination with the lack of documented functional gain following these injections renders the continued administration of the same unreasonable. Moreover, the evidence presented persuades the ALJ that the number of injections provided in the approximately 22 months since Claimant was placed at MMI is grossly outside the recommendations set forth in the Medical Treatment Guidelines.

CONCLUSIONS OF LAW

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

I. General Legal Principals

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

II. Claimant's Entitlement to Maintenance Medical Treatment

C. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure

for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, Respondents retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

D. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). As noted above, the ALJ credits the opinions of Dr. Ridings to find and conclude that the lack significant inflammation in Claimant's left knee coupled with the lack of documented functional gain following injection along with Claimant's transient pain response renders continued steroid injections unreasonable. Moreover, continued steroid and/or viscosupplementation injections fall outside the recommendations set forth in the Medical Treatment Guidelines.

E. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. An ALJ is allowed to take judicial notice of the contents of the AMA Guides, the Rating Tips, the Director's Level II Curriculum and other documents officially promulgated by the Director pertinent to the interpretation of the AMA Guides regardless of whether a copy of those documents were inserted into the evidentiary record. *Serena v. SSC Pueblo Belmont Op. Co, LLC,* W.C. No. 4-922-344 (December 1, 2015), *aff'd, Serena v. Indus. Claim Appeals Office,* (Colo. App. No. 15CA2095, November 3, 2016) (Not published pursuant to C.A.R. 35(e)). Furthermore, the ALJ may appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011).

F. As provided for under § 8-43-201(3), the ALJ has considered the medical

treatment guidelines adopted under § 8-42-101(3) in determining whether ongoing steroid/Supartz injections are reasonable, necessary, and related to Claimant's industrial injury. While the ALJ concludes that the evidence establishes that Claimant's original need for injection therapy was related to his work injury, continued injections are no longer reasonable or necessary. As noted, the Guides set forth very specific recommendations regarding the number of steroid injections to be provided in any given year. Specifically, the Guides provide that the maximum duration for steroid injection treatment is "3 injections in 1 year spaced at least 4 to 8 weeks apart and no more than 4 steroid injections to all body parts should be performed in one year. In this case, Claimant has received at least 16 steroid injections in the past 22 months with what the ALJ finds has been mixed results at best. In keeping with the Guides, the ALJ rejects the opinions of Dr. Jinkins with respect to continued corticosteroid and Supartz injections. As noted, Dr. Jinkins has not documented the source of Claimant's subjective pain complaints and has inadequately documented the basis for Claimant's continued utilization of injections, particularly when such use exceeds the Medical Treatment Guidelines.

ORDER

It is therefore ordered that:

1. Claimant request for ongoing corticosteroid and Supartz injections is denied and dismissed as this treatment is neither reasonable nor necessary at the current time.

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

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

DATED: December 7, 2017

/s/ Richard M. Lamphere

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

ISSUES

Did Claimant suffer a compensable injury arising out of and in the course of his employment as a result of a motor vehicle accident on May 10, 2017?

FINDINGS OF FACT

1. Claimant worked for Employer as a utilities inspector.

2. Inspectors spend most of their typical day traveling to various sites within Employer's service area. Employer provides inspectors, including Claimant, with vehicles to use at work.

3. On May 10, 2017, Claimant attended a retirement luncheon for a long-time colleague at a restaurant in Colorado Springs. Claimant was injured in a rear-end motor vehicle accident while leaving the restaurant after the luncheon.

4. Employer arranged the location, date and time of the luncheon, and notified the inspectors via email. The email also said, "we hope to see everyone there." Claimant received a group calendar invitation which, when accepted, put the luncheon on his work calendar. Employer covered the cost for all employees out of a dedicated retirement lunch budget.

5. Employer instructed the employees to pair up and carpool to the restaurant. Employer had two reasons for asking employees to carpool: to reduce congestion at the restaurant's parking lot and to prevent members of the public from seeing such a large number of identifiable Colorado Springs Utilities ("CSU") vehicles gathered at the restaurant.

6. Claimant picked up his co-worker, Patrick Evans, at a CSU facility and drove to the restaurant in Claimant's CSU vehicle.

7. The luncheon lasted from 11:30 AM until approximately 1:00 PM. Claimant normally receives a 30-minute lunch break, but he was paid for the full 90-minute luncheon on May 10.

8. Most of Claimant's managers and fellow inspectors attended the luncheon. Claimant's immediate supervisor noted one or two employees could not attend or arrived late due to other work-related commitments. Several co-workers spoke informally to honor and "roast" the retiring co-worker. There was no "script" or specific agenda, and employees "chatted" about work and nonwork-related topics.

9. Employer perceived several benefits from employees' attendance at the luncheon. The primary purpose was to honor the retiring employee. The luncheon also

boosted the morale of the remaining employees by showing Employer's appreciation of employees who make a long-term commitment to their job. The luncheon promoted "teambuilding" by fostering camaraderie among employees who do not interact with each other on a day-to-day basis.[1]

10. Attendance at the luncheon was not "mandatory" *per se,* but Employer expected employees to be there unless they had a conflict. Claimant's co-worker, Patrick Evans credibly testified:

> [T]he expectation of our job is to attend all meetings that . . . we can make. Basically, unless I have something going on in the field that is a priority emergency, a preconstruction meeting, water chlorination, something that I have scheduled the same time, the expectation is for us to attend all meetings. It's part of the job.
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> Q: And did you consider this a meeting?
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> A: Absolutely.
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> Q: And so you felt there was an expectation for you to . . . be there?
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> A: Absolutely.

11. Claimant offered similar credible testimony about Employer's expectations regarding attendance at the luncheon.

12. Claimant suffered physical injuries as a result of the accident.

13. After the accident, Employer referred Claimant to its designated provider, Dr. Kyle Akers. Claimant saw Dr. Akers twice, and attended one physical therapy session on Dr. Akers' referral.

14. Claimant proved by a preponderance of the evidence he suffered a compensable injury arising out of and in the course of his employment on May 10, 2017. Claimant was not participating in a voluntary recreational activity at the time of the accident.

15. Claimant proved by a preponderance of the evidence he requires medical treatment to cure and relieve the effects of the May 10, 2017 injury.

16. The office visits with Dr. Akers and the physical therapy session(s) were reasonable, necessary, and causally related to the May 10, 2017 injury.

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[1] Brian Whitehead, Employer's manager of system extensions, testified "the primary objective [of the luncheon was] to recognize and appreciate the person that left. As a manager I look at any opportunity of employees getting together to be good, to see each other as individuals, understand their strengths, their weaknesses, who they are as a person and the more you understand that they more people work together. That's always a side benefit that I see coming out of any format of meeting."

CONCLUSIONS OF LAW

A. Compensability

To prove a compensable injury, a claimant must prove the injury occurred while performing service arising out of and in the course of his employment. Section 8-41-301(1)(b). The terms "arising out of" and "in the course of" are not synonymous. The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower, and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001 The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Rather, the question is whether the activity is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Id*. at 210. Whether an injury arises out of and in the course of employment are questions of fact for the ALJ. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998).

The Act imposes additional limitations on the compensability of injuries occurring during recreational activities. Section 8-40-201(8) defines "employment" to exclude "the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored or supported the recreational activity or program." Similarly, § 8-40-301(1) defines the term "employee" as excluding a person "while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment."

In *White v. Industrial Claim Appeals Office,* 8 P.3d 621 (Colo. App. 2000), the court held that the statutory term "recreational activity" should be given its plain and ordinary meaning, which can be "easily discerned by reference to a standard dictionary." The *American Heritage College Dictionary* (3d Ed. 1993) defines "recreation" as "refreshment of one's mind or body through activity that amuses or stimulates; play." In determining whether an activity is "recreational," the ALJ should consider the factors enumerated in *Price v. Industrial Claim Appeals Office, supra*, including whether the activity occurred during working hours, whether the injury occurred on the employer's premises, whether the employer initiated the activity, whether the employer exerted control over the employee's participation in the activity, and whether the employer stood to benefit from the employee's participation in the activity. Whether an activity was "recreational" is a question of fact for determination by the ALJ. *Lopez v. American Lumber Construction,* W.C. No. 4-434-488 (October 29, 2003).

To determine whether the claimant's participation in a recreational activity was "voluntary," the ALJ must assess the claimant's "motive" for participating in the activity. In

making this determination, the ALJ may consider whether the employer initiated, organized, sponsored or financially supported the activity, because the employer has the "power to enlarge the scope of employment by its affirmative act of embracing various recreational or social activities." *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998).

After considering the totality of circumstances, the ALJ concludes that Claimant's injuries arose out of and within the course of his employment. The retirement luncheon was not a "recreational activity" within the meaning of § 8-40-201(8). Even if the luncheon were considered a recreational activity, it ended and Claimant had resumed his regular work activity at the time of the accident. Finally, Claimant's attendance at the luncheon was not "voluntary."

In reaching these conclusions, the ALJ finds these factors particularly significant: The accident occurred during the workday while Claimant was "on the clock." The luncheon extended an hour beyond Claimant's normal lunch break and he was paid for the extra time. Employer arranged and paid for the luncheon, and Claimant had no nonwork-related reason to be in that location at the time of the accident. The accident occurred in a vehicle provided by Employer. Employer requested the employees to carpool to the luncheon. At the time of the accident, the luncheon had ended and Claimant was returning to Employer's facility to drop off his co-worker.

Respondent argues the accident cannot give rise to compensable injuries because the luncheon was a "recreational activity" within the meaning of § 8-40-201(8). The ALJ disagrees with this argument. The purpose of the luncheon was not "recreation." Even though the employees performed no work during the luncheon, it was intimately connected to their employment. The purpose was to honor the retiring colleague for his service to Employer. While the employees undoubtedly enjoyed themselves, it was fundamentally a work-related function.

The mere fact that an activity has some tendency to "refresh" the employee or entails some element of enjoyment does not necessarily convert it into a "recreational activity." Actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water, and keeping warm have been held to be incidental to employment under the "personal comfort" doctrine. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Industrial Commission v. Golden Cycle Corporation*, 246 P.2d 92 (Colo. 1952).

The recreational activity exclusion has primarily been applied to activities such as refereeing a volleyball game, lifting weights, playing sports such as hockey, basketball and volleyball, a weekend camping trip, and skiing. Although a meal-based activity could be "recreational" depending on the circumstances, it is a much less natural fit than games, sports or other activities commonly referred to as recreation.

Moreover, even if the luncheon were considered a recreational activity, the accident occurred after it had ended and Claimant had resumed his work duties. The exclusion in § 8-40-301(1) applies to injuries sustained "***while*** participat***ing*** in recreational

activity who ***at such time*** is relieved of and is not performing any duties of employment." (Emphasis added). This language indicates the accident must occur during the recreational activity for the exclusion to apply. In this sense, the recreational activity exclusion is akin to the "personal deviation" doctrine, under which the employee is deemed to have returned to employment "the moment" the personal deviation ends. *E.g*., *Pat's Power Tongs, Inc. v. Miller*, 474 P.2d 613 (Colo. 1970); *see also Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995) (injuries that occurred while an intoxicated employee was driving back to his hotel after drinking in a bar were compensable); *Continental Airlines v. Industrial Commission*, 709 P.2d 953 (Colo. App. 1985) (employee slipped while walking out of a grocery store).

Finally, the ALJ credits Claimant's testimony that he was motivated, at least in part, by Employer's "expectation" that he attend the luncheon. Although attendance was not strictly "mandatory," Claimant's supervisors took note of the few employees who did not attend, and would likely have been disappointed had Claimant not been there absent a specific, legitimate scheduling conflict. These factors indicate the activity was not "voluntary."

B. Medical benefits

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, *supra*.

As found, Claimant proved he is entitled to medical treatment to cure and relieve the effects of the May 10, 2017 compensable injury. Additionally, the two office visits with Dr. Akers and the physical therapy sessions were reasonable, necessary, and causally related to the industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's injuries suffered in the May 10, 2017 motor vehicle accident are compensable.

2. Respondent shall pay for all reasonably necessary medical treatment from authorized providers to cure and relieve the effects of the May 10, 2017 compensable injuries, including, but not limited to the office visits with Dr. Akers and physical therapy sessions.

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

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

DATED: December 11, 2017

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

ISSUES

Did Claimant suffer a compensable injury arising out of and in the course of his employment as a result of a motor vehicle accident on May 10, 2017?

FINDINGS OF FACT

1. Claimant worked for Employer as a utilities inspector.

2. Inspectors spend most of their typical day traveling to various sites within Employer's service area. Employer provides inspectors, including Claimant, with vehicles to use at work.

3. On May 10, 2017, Claimant attended a retirement luncheon for a long-time colleague at a restaurant in Colorado Springs. Claimant was injured in a rear-end motor vehicle accident while leaving the restaurant after the luncheon.

4. Employer arranged the location, date and time of the luncheon, and notified the inspectors via email. The email also said, "we hope to see everyone there." Claimant received a group calendar invitation which, when accepted, put the luncheon on his work calendar. Employer covered the cost for all employees out of a dedicated retirement lunch budget.

5. Employer instructed the employees to pair up and carpool to the restaurant. Employer had two reasons for asking employees to carpool: to reduce congestion at the restaurant's parking lot and to prevent members of the public from seeing such a large number of identifiable Colorado Springs Utilities ("CSU") vehicles gathered at the restaurant.

6. Claimant met his co-worker, Joseph Busemeyer, at a CSU facility and drove to the restaurant in Mr. Busemeyer's CSU vehicle.

7. The luncheon lasted from 11:30 AM until approximately 1:00 PM. Claimant normally receives a 30-minute lunch break, but he was paid for the full 90-minute luncheon on May 10.

8. Most of Claimant's managers and fellow inspectors attended the luncheon. Claimant's immediate supervisor noted one or two employees could not attend or arrived late due to other work-related commitments. Several co-workers spoke informally to honor and "roast" the retiring co-worker. There was no "script" or specific agenda, and employees "chatted" about work and nonwork-related topics.

9. Employer perceived several benefits from employees' attendance at the luncheon. The primary purpose was to honor the retiring employee. The luncheon also

boosted the morale of the remaining employees by showing Employer's appreciation of employees who make a long-term commitment to their job. The luncheon promoted "teambuilding" by fostering camaraderie among employees who do not interact with each other on a day-to-day basis.[1]

10. Attendance at the luncheon was not "mandatory" *per se,* but Employer expected employees to be there unless they had a conflict. Claimant credibly testified:

> [T]he expectation of our job is to attend all meetings that . . . we can make. Basically, unless I have something going on in the field that is a priority emergency, a preconstruction meeting, water chlorination, something that I have scheduled the same time, the expectation is for us to attend all meetings. It's part of the job.
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> Q: And did you consider this a meeting?
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11. Claimant's co-worker, Joseph Busemeyer, offered similar credible testimony about Employer's expectations regarding attendance at the luncheon.

12. Claimant injured his jaw, neck, and back as a result of the accident.

13. After the accident, Employer referred Claimant to its designated provider, Dr. Kyle Akers. Claimant saw Dr. Akers twice, and attended two physical therapy sessions on Dr. Akers' referral.

14. Claimant proved by a preponderance of the evidence he suffered a compensable injury arising out of and in the course of his employment on May 10, 2017. Claimant was not participating in a voluntary recreational activity at the time of the accident.

15. Claimant proved by a preponderance of the evidence he requires medical treatment to cure and relieve the effects of the May 10, 2017 injury.

16. The office visits with Dr. Akers and the physical therapy session(s) were reasonable, necessary, and causally related to the May 10, 2017 injury.

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[1] Brian Whitehead, Employer's manager of system extensions, testified "the primary objective [of the luncheon was] to recognize and appreciate the person that left. As a manager I look at any opportunity of employees getting together to be good, to see each other as individuals, understand their strengths, their weaknesses, who they are as a person and the more you understand that they more people work together. That's always a side benefit that I see coming out of any format of meeting."

CONCLUSIONS OF LAW

A. Compensability

To prove a compensable injury, a claimant must prove the injury occurred while performing service arising out of and in the course of his employment. Section 8-41-301(1)(b). The terms "arising out of" and "in the course of" are not synonymous. The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower, and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001 The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Rather, the question is whether the activity is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Id*. at 210. Whether an injury arises out of and in the course of employment are questions of fact for the ALJ. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998).

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To determine whether the claimant's participation in a recreational activity was "voluntary," the ALJ must assess the claimant's "motive" for participating in the activity. In

making this determination, the ALJ may consider whether the employer initiated, organized, sponsored or financially supported the activity, because the employer has the "power to enlarge the scope of employment by its affirmative act of embracing various recreational or social activities." *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998).

After considering the totality of circumstances, the ALJ concludes that Claimant's injuries arose out of and within the course of his employment. The retirement luncheon was not a "recreational activity" within the meaning of § 8-40-201(8). Even if the luncheon were considered a recreational activity, it ended and Claimant had resumed his regular work activity at the time of the accident. Finally, Claimant's attendance at the luncheon was not "voluntary."

In reaching these conclusions, the ALJ finds these factors particularly significant: The accident occurred during the workday while Claimant was "on the clock." The luncheon extended an hour beyond Claimant's normal lunch break and he was paid for the extra time. Employer arranged and paid for the luncheon, and Claimant had no nonwork-related reason to be in that location at the time of the accident. The accident occurred in a vehicle provided by Employer. Employer requested the employees to carpool and Claimant would not have even been in the vehicle but for Employer's request. At the time of the accident, the luncheon had ended and Claimant was returning to Employer's facility to retrieve his vehicle.

Respondent argues the accident cannot give rise to compensable injuries because the luncheon was a "recreational activity" within the meaning of § 8-40-201(8). The ALJ disagrees with this argument. The purpose of the luncheon was not "recreation." Even though the employees performed no work during the luncheon, it was intimately connected to their employment. The purpose was to honor the retiring colleague for his service to Employer. While the employees undoubtedly enjoyed themselves, it was fundamentally a work-related function.

The mere fact that an activity has some tendency to "refresh" the employee or entails some element of enjoyment does not necessarily convert it into a "recreational activity." Actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water, and keeping warm have been held to be incidental to employment under the "personal comfort" doctrine. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Industrial Commission v. Golden Cycle Corporation*, 246 P.2d 92 (Colo. 1952).

The recreational activity exclusion has primarily been applied to activities such as refereeing a volleyball game, lifting weights, playing sports such as hockey, basketball and volleyball, a weekend camping trip, and skiing. Although a meal-based activity could be "recreational" depending on the circumstances, it is a much less natural fit than games, sports or other activities commonly referred to as recreation.

Moreover, even if the luncheon were considered a recreational activity, the accident occurred after it had ended and Claimant had resumed his work duties. The

exclusion in § 8-40-301(1) applies to injuries sustained "***while*** participat***ing*** in recreational activity who ***at such time*** is relieved of and is not performing any duties of employment." (Emphasis added). This language indicates the accident must occur during the recreational activity for the exclusion to apply. In this sense, the recreational activity exclusion is akin to the "personal deviation" doctrine, under which the employee is deemed to have returned to employment "the moment" the personal deviation ends. *E.g*., *Pat's Power Tongs, Inc. v. Miller*, 474 P.2d 613 (Colo. 1970); *see also Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995) (injuries that occurred while an intoxicated employee was driving back to his hotel after drinking in a bar were compensable); *Continental Airlines v. Industrial Commission*, 709 P.2d 953 (Colo. App. 1985) (employee slipped while walking out of a grocery store).

Finally, the ALJ credits Claimant's testimony that he was motivated, at least in part, by Employer's "expectation" that he attend the luncheon. Although attendance was not strictly "mandatory," Claimant's supervisors took note of the few employees who did not attend, and would likely have been disappointed had Claimant not been there absent a specific, legitimate scheduling conflict. These factors indicate the activity was not "voluntary."

B. Medical benefits

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, *supra*.

As found, Claimant proved he is entitled to medical treatment to cure and relieve the effects of the May 10, 2017 compensable injury. Additionally, the two office visits with Dr. Akers and the physical therapy sessions were reasonable, necessary, and causally related to the industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's injuries suffered in the May 10, 2017 motor vehicle accident are compensable.

2. Respondent shall pay for all reasonably necessary medical treatment from authorized providers to cure and relieve the effects of the May 10, 2017 compensable injuries, including, but not limited to the office visits with Dr. Akers and physical therapy sessions.

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

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

DATED: December 11, 2017

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-023-439-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 28, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 11/28/17, Courtroom 1, beginning at 1:30 PM, and ending at 2:45 PM).

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondent, which was filed on December 5, 2017. No timely objections thereto were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant's scheduled right shoulder impairment rating should be converted to a whole person rating. Provided the Claimant accepts the four corners of the Division Independent Medical Examiner's (DIME's) opinion, "lock, stock and barrel." The maximum medical

improvement (MMI) date of March 20, 2017 is undisputed. The additional issue concerns post-MMI medical maintenance benefits (*Grover* medicals).

On both issues, the Claimant's burden of proof is by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant is a heavy equipment operator and garbage collector for the Employer. On June 29, 2016, the Claimant suffered a compensable injury while attempting to remove a heavy metal pole with a cement base from a dumpster. While attempting to remove the pole, the Claimant felt a pop and immediate onset of right shoulder pain.

Medical Chronology

2. The Claimant was initially seen by Sadie Sanchez, M.D., the authorized treating physician (ATP), at Denver Health. The Claimant was diagnosed with a sprain of the right shoulder and was referred for an MRI (magnetic resonance Imaging). The MRI was conducted on July 7, 2016 and the findings were: superior and posterosuperior labral tear with associated paralabral gaglion cysts; a paralabral gaglion cyst along the posterosuperior margin of glenoid extending to the spinoglenoid notch). Based on the MRI findings, the Claimant was referred to Michael Hewitt, M.D., for a surgical evaluation.

3. The Claimant was evaluated by Dr. Hewitt on August 3, 2017. At the evaluation, Dr. Hewitt recommended that the Claimant undergo a right shoulder arthroscopic labral repair, cyst decompression, rotator cuff debridement and bursectomy. This procedure was completed by Dr. Hewitt on August 30, 2016.

4. Dr. Hewitt took the Claimant off work beginning August 30, 2016 through September 27, 2016.

5. Postoperatively, the Claimant underwent 30 sessions of physical therapy (PT) and regular evaluations with her ATP. She was reevaluated by Dr. Hewitt on February 1, 2017, and was released from care. In releasing the Claimant from care, Dr. Hewitt noted that the Claimant was progressing well and that her rotator cuff testing was

without pain. Dr. Hewitt also noted that the Claimant would likely not require any permanent work restrictions.

6. The Claimant's final evaluation with her ATP, Dr. Sanchez, took place on March 20, 2017. At this evaluation, Dr. Sanchez noted, "Today, the patient reports no pain in her right shoulder now, but does have "a little bit of pain" at the end of the work day." Dr. Sanchez determined that the Claimant had reached maximum MMI as of March 20, 2017. Dr. Sanchez performed an impairment rating finding that the Claimant had a 4% scheduled impairment for loss or range of motion in her right shoulder [4% right upper extremity (RUE)]. Dr. Sanchez also recommend that the Claimant receive post-MMI maintenance medical care, consisting of a 6-month gym membership and one year follow-up with Dr. Hewitt. At MMI, Dr. Sanchez did not assign any permanent work restrictions and released the Claimant to full duty.

7. Respondent filed a Final Admission of Liability (FAL), consistent with Dr. Sanchez's MMI determination, impairment rating and recommendation on maintenance medical care, on March 31, 2017. The Claimant timely objected to the admission and sought a D IME.

8. A DIME was conducted by Linda Mitchell, M.D., on July 6, 2017. Following her review of the medical records and thorough physical examination, Dr. Mitchell agreed with Dr. Sanchez's determination of MMI-- March 20, 2017. Dr. Mitchell provided the Claimant with a 7% (RUE) scheduled rating for loss of range of motion in the right shoulder and she also recommended maintenance medical care. Dr. Mitchell's physical examination of the Claimant included an evaluation of the right shoulder, the RUE and the cervical spine. In evaluating the cervical spine, Dr. Mitchell found the neck was without spasm, rigidity, tenderness or loss of range of motion. At the conclusion of her DIME report, Dr. Mitchell noted "The prognosis is good given minimal symptoms and excellent functional abilities at this time." The ALJ finds that Dr. Mitchell did not rate the Claimant's cervical spine nor did she rate any portion of the Claimant's body transcending the right shoulder. Although Dr. Mitchell converted her 7% RUE rating to 4% whole person as mandated by the American Medical Association *Guides to the Evaluation of Permanent Impairment,* 3rd ed., Rev., she did not state or imply that the whole person rating was more appropriate than her scheduled rating. . Dr. Mitchell's DIME report also indicates that the Claimant made a good recovery from her surgery with Dr. Hewitt, had minimal symptoms beyond her shoulder on physical examination and did not require work restrictions.

9. On July 26, 2017, the Respondent filed an amended FAL, consistent with Dr. Mitchell's DIME impairment rating and admitting for maintenance medical care. The Claimant timely objected to Respondent's amended admission and sought a hearing on the issue of conversion.

Testimony

10. At hearing, the claimant testified regarding her functional abilities and the location of her pain. The Claimant stated that she continued to feel pain in her shoulder and into her upper back and neck. She testified that she experienced cramping and pain in her right shoulder and into her cervical spine. Claimant testified that, as a result of the work injury, she was unable to complete her assigned job duties in the same way she had prior to the incident. She also testified that her work injury prevented her from throwing a ball in the same manner as prior to the work injury and that she was unable to use the same methods to coach youth football. The ALJ infers and finds that the Claimant's testimony, although illustrating referred pain to the upper back and neck, does not support actual functional limitations transcending the right shoulder. All her limitations are limitations of the RUE.

11. The Claimant also testified that she was able to return to her regular job duties as a heavy equipment operator without restrictions. She stated that she could meet the full criteria for her job as a heavy equipment operator, including lifting up to 50 pounds. She also testified that she had not sought medical treatment since being placed at MMI by Dr. Sanchez nor did she pursue a gym membership as part of her maintenance medical care. The ALJ further infers and finds that the Claimant's testimony in this regard is compelling prof that she does **not** have functional limitations above the RUE.

12. The Claimant's supervisor, Jeremiah Catalano, testified at hearing regarding the Claimant's job duties. He confirmed that a heavy equipment operator was required to lift 50 pounds, climb and descend objects, engage in frequent pushing, pulling and reaching. He also stated that he had not observed the Claimant being unable to complete her assigned duties as a heavy equipment operator, nor had the Claimant made any statement to him regarding an inability to perform her job duties as a result of her work injuries.

Ultimate Findings

13. The ALJ finds that the opinions of Dr. Sanchez and DIME Dr. Mitchell are highly persuasive and credible. Dr. Sanchez's reports indicate that the Claimant was able to return to her regular duties without restriction, indicating no loss of functional ability beyond the RUE. Dr. Mitchell's DIME report also indicates that the Claimant made a good recovery from her surgery with Dr. Hewitt, had minimal symptoms beyond her shoulder on physical examination and did not require work restrictions. The ALJ finds that the Claimant testified credibly regarding her condition, but that her testimony did not prove loss of function beyond the RUE as a result of the work injury. Instead, the Claimant's testimony focused on referred pain and fatigue at the end of the work

day, symptoms which do not equate to loss of function beyond the RUE and into the whole person.

14. To the extent there is a conflict between the medical reports and the Claimant's testimony, the ALJ makes a rational choice, based on substantial evidence, to accept the objective observations of the ATP and DIME physician and to reject any evidence to the contrary.

15. The Claimant has failed to prove by a preponderance of the evidence that her 7% scheduled impairment rating should be converted to whole person impairment.

16. The ALJ finds that the medical opinions of Dr. Sanchez and Dr. Mitchell, both recommending that the Claimant receive maintenance medical care, are credible and persuasive. Although the Claimant may not have pursued maintenance medical care since being placed at MMI, the medical records provide substantial evidence that the Claimant is entitled to maintenance medical care.

17. The Claimant has sustained her burden of proof to show that she requires post-MMI maintenance medical care to maintain her condition at MMI and to prevent a deterioration thereof. Respondent's motion to withdraw their admission for maintenance medical care should be denied.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254

(1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the medical evidence in its silence about the appropriateness or lack thereof of a conversion to a whole person is, essentially, undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the medical reports of Drs. Sanchez and Mitchell were credible and persuasive on the issue of the Claimant's functional abilities and whether there was loss of function beyond the extremity. Also as found, the Claimant's testimony did not provide evidence sufficient to show loss of function of the whole person. To the extent there is a conflict between the medical reports and claimant's testimony, the objective observations of the ATP and DIME physician and deemed persuasive.

Substantial Evidence

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

rational choice , based on substantial evidence, to accept the objective observations of the ATP and DIME physician and to reject any evidence to the contrary.

Conversion

c. The law concerning the conversion of upper extremity ratings to whole person ratings in cases of shoulder injuries is well established. The question of whether a claimant has sustained a scheduled "injury" measured as "loss of an arm at the shoulder" under § 8-42-107(2)(a), C.R.S., or a whole person impairment compensated under § 8-42-107(8)(c), C.R.S., depends on whether the claimant sustained "functional impairment" beyond the arm at the shoulder. This is true because the term "injury," as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Warthen v. Indus. Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Whether the claimant has sustained functional impairment beyond the arm at the shoulder is a factual question for the ALJ and depends on the particular circumstances of the individual case. *Walker v. Jim Fuoco Motor Co*., 942 P.2d 1390 (Colo. App. 1997). As found, the Claimant failed to show functional impairment beyond the right arm at the shoulder.

d. For a conversion, the party seeking it must accept the four corners of an ATP's or DIME'S opinion letter. The standard of proof is then "preponderance of the evidence."

Maintenance Medical Care

e. A claimant may receive maintenance medical benefits that is reasonably, necessary and causally related to the compensable injury in order to relieve the effects of the industrial injury or to prevent further deterioration of the claimant's condition. *See* § 8-42-101(1)(a), C.R.S.; *Grover Indus. Comm'n,* 759 P.2d 705 (Colo. 1988), The burden of proof to establish entitlement to these benefits, however, is on a claimant. *Id.* In order to receive such benefits, a claimant must present substantial evidence that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. *See Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003); *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The question of whether a claimant met the burden of proof to establish entitlement to maintenance medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Indus. Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). As found, the Claimant carried her burden of proof, providing substantial evidence that future medical treatment is or will be reasonably necessary to maintain her condition at MMI.

Burden of Proof

f. For a conversion, the party seeking it must accept the four corners of an ATP's or DIME'S opinion letter. The standard of proof is then "preponderance of the evidence." The injured worker has the burden of proof, by a preponderance of the evidence, to establish entitlement to benefits beyond those admitted.. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain her burden with respect to a conversion. The Claimant has sustained he3r burden with respect to post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent's request to withdraw its final admission concerning post-maximum medical improvement medical maintenance benefits is hereby denied and dismissed.

B. Claimant's request for conversion of her admitted 7% of the right upper extremity rating to a 4% whole person rating is hereby denied and dismissed.

C. The Respondent shall pay the costs of all reasonably necessary and causally related post-maximum medical improvement maintenance medical benefits, subject to the Division of Workers' Compensation Medical fee Schedule.

D. The latest Final Admission of Liability, dated July 26, 2017, is hereby adopted and approved.

DATED this_____day of December 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2017, electronically in PDF format, addressed to:

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

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion by Dr. Michael Janssen, DO, on the issue of Maximum Medical Improvement?

II. Has Claimant proven, by a preponderance of the evidence, that the SI joint surgery as recommended by Dr. Roger Sung, MD, is reasonable, necessary, and related to her work injury?

III. Did Claimant sustain an intervening event on or about April 18, 2016, which severed the causal connection between her work injury and the need for her SI joint surgery?

FINDINGS OF FACT

Based on the testimony and evidence presented at Hearing, the undersigned ALJ enters the following Findings of Fact:

1. The Claimant sustained an admitted work-related injury on April 15, 2015. The Claimant's injury involves the lumbar spine, including the left sacroiliac (SI) joint.

2. The Claimant was employed as a Registered Nurse. The Claimant's injury occurred while attempting to lift a patient in bed with the assistance of another nurse on the opposite side of the bed, with the use of a draw sheet. While moving the patient, the Claimant experienced a popping sensation in her lower back resulting in immediate low back, low buttock and left thigh pain.

3. The Claimant was referred by Employer/Respondent to CCOM with an initial evaluation date of April 16, 2015. The Claimant was evaluated by Dr. Kathryn Murray. The Claimant presented with ongoing, severe low back pain radiating into the buttocks and the left thigh. Dr. Murray noted a positive Faber test, left side only, with lumbar paraspinal muscle tenderness with chronic decreased sensory in the left lower extremity. Pain level was noted to be 6-8/10, 100% of the time. The initial diagnosis included low back strain with radiculopathy. (Ex. 6, p. 62). The Claimant was prescribed a steroid (Medrol Dose Pak), Flexeril for muscle spasms, and was provided work restrictions, including a 5-pound lifting restriction, no bending at the waist, and alternate sitting and standing every hour. (Ex. 6, pp. 62 -64). X-rays were unremarkable (Ex. B, p. 5)

4. On April 23, 2015, the Claimant presented for follow-up evaluation with Dr. Murray at CCOM. Dr. Murray's neurological evaluation noted "positive for numbness and tingling, joint pain, joint stiffness and muscle pain." (Ex. 6, p. 65). Dr. Murray also noted that the Claimant's pain was so severe that she did not lift her thigh and was experiencing worsening radiculopathy. (Ex. 6, p. 69).

5. A MRI was taken on April 30, 2015, yielding minimal degenerative changes, a minimally diffuse disc bulge at L5-S1, and no significant spinal canal or neural foraminal compromise. (Ex. D, p. 12).

6. On May 4, 2015, the Claimant was evaluated by Joseph Mullen, PA-C, at CCOM. PA-C Mullen noted that Patrick's test was strongly positive on the left. This medical provider also noted that the recent MRI of the lumbar spine showed minimal degenerative changes. PA-C Mullen diagnosed lumbar and sacroiliac sprain, left. PA-C Mullen also indicated that the cause of these problems was related to work activities as had been previously concluded by Dr. Murray. (Ex. 6, pp. 70-72).

7. Dr. Murray's (CCOM) physical examination on May 18, 2015 noted tenderness bilaterally in the paravertebral muscles, worse on the left, with positive FABER test on the left and normal FABER test on the right. Dr. Murray's diagnosis included lumbar and sacroiliac sprain, left, related to work activities. Pain level was 7-10/10, 80% of the time. The Claimant was referred for physical therapy, continued on work restrictions, and medications. Dr. Murray noted that Flexeril was prescribed as needed for muscle spasm. (Ex. 6, pp. 74-76).

8. Dr. Murray's medical report of June 4, 2015 indicates that the Claimant was experiencing improvement as a result of physical therapy and heat and ice to the affected area. Dr. Murray notes that the initial five physical therapy sessions were not helpful, but began helping when the Claimant had her SI joint readjusted. (Ex. 6, p.78). Dr. Murray directed the Claimant to continue physical therapy, with work restrictions. She also prescribed medications, and further identified an ongoing diagnosis of lumbar and left sacroiliac sprain. (Ex. 6, p.79).

9. On July 7, 2015, Dr. Murray referred the Claimant to Dr. Abercrombie for up to six sessions of manipulative treatments. As part of the referral, Dr. Murray notes lumbar and sacroiliac sprain, left. (Ex. 6, p. 86). On this date, the Claimant noted overall improvement in her symptoms to the point (60 to 70% better) where she was exercising. Dr. Murray's physical examination noted pain when palpating the left SI joint and FABER test on the left continued causing SI joint pain. The continuing diagnosis included lumbar and left sacroiliac sprain. (Ex. 6, p. 89).

10. Dr. Murray's medical report of July 22, 2015 notes that the Claimant was experiencing intermittent improvement with physical therapy and Dr. Murray was hopeful that Dr. Abercrombie could help with the ongoing left SI joint pain. If

no improvement was noted, a referral to pain management would be considered. (Ex. K, p. 34).

11. Dr. Abercrombie's medical notes consistently identify involvement of the left SI joint and low back as a result of work-related activity. Dr. Abercrombie's physical examination on July 23, 2015 identified poor motion at the left SI joint that reproduced pain. Cross compression testing, shear and Patrick's maneuver was also identified as positive on the left. Dr. Abercrombie's assessment identified chronic phase of lumbar/lumbosacral strain with facet left SI joint involvement. (Ex. 7, pp. 241-242, 249)

12. By August 14, 2015, the Claimant was experiencing significant improvement as a result of physical therapy and treatment by Dr. Abercrombie. Dr. Murray's physical examination indicated positive FABER test on the left (Patrick's test was negative) and the ongoing diagnosis included lumbar and sacroiliac sprain, left. Pain was down to 4/10, 70 to 80% of the time. No radiation of pain or numbness was noted. Work restrictions were increased to allow up to 25 pounds lifting. (Ex. 6, pp. 97-98).

13. On August 25, 2015, the Claimant returned to Dr. Murray. The Claimant was now experiencing a worsening of her condition. Dr. Murray's report notes positive findings for joint and muscle pain and joint stiffness. Physical examination identified moderate tenderness when palpating the lumbar spinal muscles on the left and moderate pain when palpating the left SI joint. FABER test was positive on the left. The diagnosis continued to include lumbar and left sacroiliac strain. (Ex. 6, pp. 104-105).

14. On September 11, 2015, Dr. Murray referred Claimant to Dr. Scheper for consideration of an epidural steroid injection into the left SI joint area. The Claimant was experiencing a flare in pain, and including episodes of left toe numbness. FABER test was positive on the left. (Ex. 6, pp. 110-112).

15. On September 16, 2016, the Claimant was evaluated by Dr. Scheper of Accelerated Recovery Specialists. Dr. Scheper's physical examination notes focal prominent tenderness of the left sacroiliac joint, with reproduction of concordant symptoms subsequent to sacroiliac compression and shear testing. Pain was now averaging 3-4/10, with about 70% improvement since the injury. Dr. Scheper's diagnostic impression included predominantly left sacroiliitis with secondary myofascial dysfunction with significant hypertonicity and tenderness in the piriformis and left lumbar paraspinals. Dr. Scheper scheduled the Claimant for a left SI joint injection. (Ex. 5, pp. 17-19).

16. PA-C Mullen evaluated the Claimant at CCOM on September 24, 2015. PA-C Mullen noted a mildly positive Patrick's test on the left and diagnosed lumbar and sacroiliac sprain, noting that the Claimant was awaiting an SI joint injection under the direction of Dr. Scheper. (Ex. 6, pp.115-116).

17. On October 14, 2015, Dr. Scheper performed an SI joint injection, consisting of Xylocaine, Marcaine, and Triamcinolone (steroid). (Ex. 5, Pages 20-22). The injection was not performed under fluoroscopy, no dye was injected, and no pain diaries were noted to be kept after that injection (Ex. R, pp.62-63). A pain questionnaire prior to the injections indicate 3-4/10 pain; 80% better since the date of injury. Pain diagrams showed pain on the left and extending into the right SI joint areas (Ex. R, p. 66).

18. A follow-up appointment with Dr. Murray on October 16, 2015 indicated that the Claimant was experiencing a worsening of pain since the injection which had occurred two days prior. The Claimant was referred to Dr. Johnson within the CCOM clinic for evaluation of trigger point injections. Medications were continued, along with physical work restrictions and the continuing diagnosis included lumbar strain and left-side sacroiliitis. (Ex. 6, pp. 119-121).

19. On October 22, 2015, the Claimant was evaluated by Dr. Johnson at CCOM. By this date, the Claimant's symptoms had improved significantly with minimal pain. Her pain was noted as 1/10, 20-30% of the time. As a result, the Claimant requested a release to return to full work. Dr. Johnson accommodated the Claimant's request by releasing her to full duty with no restrictions and provided a diagnosis of sprain of ligaments of lumbar spine and sacroiliitis, left side. Dr. Johnson's physical exam indicated a positive FABER test on the left. (Ex. 6, pp.123-125).

20. On November 12, 2015 Dr. Johnson provided trigger point injections with steroids into the left lower lumbar and gluteus maximus regions. Her pain was noted to be 3/10, 20-30% of the time. Dr. Johnson continued to diagnose a lumbar spine sprain and sacroiliitis, stating that these problems were related to work activities. (Ex. 6, pp.128-129). She was returned to work with no restrictions (Ex. U, pp. 76-80).

21. On January 21, 2016, Claimant was seen by her PCP, outside the Workers Compensation system. Examination showed full range of motion for cervical, thoracic, and lumbar spine and no increased tonicity. (Ex. V, p. 84).

22. The Claimant did not return for Workers Compensation medical evaluation or treatment until April 14, 2016. (Claimant had missed appointments of Dec 1, 2015 and March 16, 2016 (Ex. V, pp. 81-83). On that date, she returned to Dr. Johnson with complaints of intermittent muscle spasms down the left lower extremity that was no longer responding to Flexeril. Pain was now noted to be 3-4/10, 60-70% of the time. Dr. Johnson's physical examination on that date noted a positive FABER test on the left. Dr. Johnson added a diagnosis of myalgia (myofascial pain lumbar region) to the ongoing diagnosis of left-sided sacroiliitis and lumbar spine sprain. This physician recommended further trigger

point injections, followed by deep tissue massage. Dr. Johnson continued Claimant at full work activity with no restrictions. (Ex. 6, pp.132-134).

23. On April 19, 2016 the Claimant received the first set of trigger point injections with steroids. Her pain was now worse, 8-9/10, 70-80% of the time. This report also references that the Claimant stated that "her left lower back pain is worse because she had to shovel snow *yesterday* with the snowstorm" (Ex. 6, pp.136-137)(emphasis added). The report does not indicate that Claimant provided any further detail on the amount of snow to be removed, how long this chore took, or what precautions, if any, were taken, given that she had already reported increasing symptoms two days prior.

24. The Claimant returned to Dr. Johnson on April 20, 2016 because of increasing pain. This report notes that the Claimant had undergone a trigger point injection followed by deep tissue massage on April 19, 2016. Initially, the Claimant experienced some relief from the injections, but her pain became severe by the evening of April 19, 2016. Dr. Johnson's treatment plan included additional trigger point injections followed by deep tissue massage, noting that the Claimant is experiencing a flare of her pain. (Ex. 6, pp.139-141). The Claimant stated that her pain was worse after the injection. Dr. Johnson noted that "The patient is having a flare of her pain. It may be a steroid *surgery* (sic)". (The ALJ notes that in the context of the medical records, "*surgery*" appears to be a typo for "*allergy*"). Claimant was taken off work, at least until her next visit.

25. On April 22, 2016, Dr. Johnson evaluated the Claimant, noting that she was having difficulty working due to increased pain. Dr. Johnson wondered if Claimant had significantly injured her back, noting that her pain was significantly different than a week ago. It was now 9/10, 100% of the time. He recommended an MRI (Ex. AA, pp. 96-99). The ongoing diagnosis remained lumbar spine sprain, sacroiliitis, left side, and myalgia, all related to work activities. (Ex. 6, pp. 143-144).

26. The Claimant testified at hearing that she began experiencing a progressive increase in her pain in the low back and left lower extremity in late January and into February of 2016. The pain was aggravated by physical or exertional activity. It eventually got worse with any kind of activity, to the point that it was difficult for the Claimant to get through her work shift. The Claimant attempted to arrange work shifts that avoided consecutive days. All shifts are 12-hour shifts, and the Claimant was not always able to avoid working consecutive days in her job. The Claimant attempted to self-treat at home with extra rest, stretching, and ice and heat. The Claimant testified that did not want to risk being taken off of work again. The Claimant confirmed that she was placed on restrictions by her Workers' Compensation medical provider, but the Employer would not offer any accommodations due to employer policy.

27. The Claimant testified at hearing that she has a single car garage, and there was a small snow drift on one corner of the garage door. The Claimant indicated this was not a lot of snow and took about two minutes to move out of the way. The Claimant did not have any slip, fall, twist or other injury, nor did she experience any onset of pain during or immediately after moving the snow. The Claimant testified that she did work that weekend and had the typical increase in pain that occurred with working several days in a row. Claimant testified that she did not pick up and move snow, but shoved it out of the way.

28. The Claimant continued treating with Dr. Johnson throughout April and May of 2016. The Claimant presented with significant pain complaints, resulting in increased pain medication prescriptions. She also received a referral for a left hip MRI. The Claimant was also referred back to Dr. Scheper for consideration of another SI joint injection. On May 3, 2016, Dr. Johnson's physical examination indicated positive FABER test on the left with tenderness of the SI joint with palpation. Pain was now 8/10. The left hip MRI demonstrated a left hip labral tear. (Ex. EE, pp. 109-110). Dr. Johnson opined that the Claimant had continuing lower back pain including SI joint pain, all related to work activities. Dr. Johnson concluded that the left hip condition was not work-related. (Ex. 6, p.161).

29. Dr. Scheper evaluated the Claimant again on June 2, 2016 and noted that she had previously experienced significant benefit from the SI joint injection from October 14, 2015. (Ex. 5, pp. 24-25). Dr. Scheper notes that the Claimant's symptoms began returning in January and were aggravated with prolonged standing, sitting, walking, bending and twisting. Occasional relief was noted with using a sacroiliac belt. Dr. Scheper's physical examination identified, "Most severe tenderness right at the left SI joint with provocation through sacroiliac shear, FABER's test, sacroiliac compression." (Ex. 5, pp. 24-25) The diagnostic impression included recurrent left sacroiliitis with overlying myofascial dysfunction to the gluteus medius and piriformis. A repeat SI joint injection was recommended and eventually performed on July 7, 2016. *Id.*

30. The Claimant returned to Dr. Johnson on June 9, 2016. Dr. Johnson opined that the Claimant has continuing lower back pain including SI joint pain and recommended continuing with the injection under the direction of Dr. Scheper. (Ex. 6, p. 166). Pain was listed as 7/10, 80-90% of the time. (Ex. ii, p. 122). Dr. Johnson indicated that a labral tear, demonstrated on recent MRI, was not work-related. (Ex. 6, p. 166). Physical examination on this date identified a positive FABER test on the left and the SI joint was tender to palpation on the left. (Ex. 6, p. 165). Dr. Johnson also referred the Claimant to Falcon Physical Therapy for evaluation and treatment of left SI joint. (Ex. 6, pp.168-169).

31. On June 29, 2016, Dr. Johnson noted that the Claimant was in acute distress because of left leg pain. Again, FABER test was positive on the

left and the SI joint was tender to palpation on the left. (Ex. 6, p. 176). Throughout the Claimant's treatment from April, 2016 through July, 2016, Dr. Johnson identified the Claimant's need for treatment to the SI joint and lumbar spine as work-related. The only matter not considered work-related by Dr. Johnson was the left hip labral tear.

32. The Claimant experienced only temporary relief as a result of the SI joint injection performed by Dr. Scheper on July 7, 2016. This injection was performed under ultrasound, with a hard copy of the ultrasound confirming the position of the needle. No mention of dye or fluoroscope is listed in the record (Ex. 5, p. 27). Dr. Scheper's diagnostic impression included chronic left sacroiliitis with profound diagnostic response after recent joint injection but unfortunately with only modest lasting benefit. When later asked by Respondents to produce this hard copy, Dr. Scheper's office was unable to retrieve it. Dr. Scheper discussed the possibility of radiofrequency for the SI joint subsequent to performing a medial branch block. Dr. Scheper also discussed the possibility of prolotherapy for the sacroiliac ligament complex. (Ex. 5, pp. 31-32).

33. On August 30, 2016, the Claimant had diagnostic blocks under the direction of Dr. Scheper. These were performed at the left L5, S1, S2, and S3 (SI joint). Dr. Scheper's medical report of September 2, 2016 notes that the diagnostic branch block provided a short-lived benefit. Left SI joint was noted as painful with provocative testing. Diagnostic impression included chronic left sacroiliac joint arthritis, without diagnostic response to branch blocks. Dr. Scheper concluded that the Claimant's beneficial therapeutic response from prior intra-articular injection confirmed the sacroiliac origin of the pain. As a result, Dr. Scheper recommended a series of prolotherapy injections into the sacroiliac ligament complex. (Ex. 5, pp. 30-37). Dr. Scheper did not recommend radiofrequency ablation (Ex. SS, p. 152-154). It was also noted at this time that "she [Claimant] would like to try anything other than surgical fusion" *Id.*

34. The Claimant continued seeing Dr. Johnson with little improvement in symptoms related to the lumbar spine and left SI joint. Although Dr. Johnson indicated that prolotherapy may not be helpful, the therapy was approved and provided under the direction of Dr. Scheper. (Ex. 6, p. 203). Dr. Johnson also referred the Claimant to Dr. Sung for a surgical consultation. (Ex. 6, p. 198 and Ex. 5, pp. 40, 43, 48). Dr. Scheper noted that, "Based on her remarkable diagnostic response to intra-articular injections but no substantial relief from anything targeting the posterior nerve innervation or ligament complex, I would recommend a surgical consultation for consideration of SI-bone iFuse implant placement." (Ex. 5, p. 48). On October 28, 2016, Dr. Johnson referred the Claimant to Dr. Sung, orthopedic surgeon, for evaluation of left SI joint and lower back pain. (Ex. 6, p. 209).

35. Dr. Sung evaluated the Claimant on November 3, 2016. Dr. Sung's physical examination demonstrated, "Quite significant tenderness over her left SI

joint," and a positive FABER test and compression and distraction on the left. The diagnostic impression included chronic left sacroiliitis. Dr. Sung recommended a left minimally invasive SI joint fusion with SI-bone, consistent with the recommendation previously made by Dr. Scheper. (Ex. 4, p.15; Ex. 5, p. 48).

36. The proposed surgery by Dr. Sung involves a minimally invasive left SI joint fusion which is a same-day surgery performed in an out-patient setting. Dr. Sung noted that the criteria for this procedure is a physical exam consistent with left sacroiliitis as well as a positive response to an SI joint injection. Dr. Sung stated that chronic SI joint pain does not have significant radiographic findings, in that MRI is not sufficiently sensitive in picking up chronic sacroiliitis. Neither is x-ray, unless the patient has had a significant traumatic injury to the SI joint. Per Dr. Sung's report of May 18, 2017, he has performed approximately 50 of these surgeries with a 90% success rate. Dr. Sung states that there is a strong likelihood that patients who undergo the minimally invasive SI joint fusion are less likely to use opioids. (Ex. 4, p. 12).

37. The Claimant returned to Dr. Johnson for evaluation on November 10, 2016. Dr. Johnson confirmed that Dr. Sung had recommended a left SI joint fusion, noting that this was pending approval. Dr. Johnson noted that the recommended SI joint fusion, "Appears to be the best option for the patient at this time. Will follow orthopedic lead in treatment." (Ex. 6, pp. 212-213). In an additional report prepared by Dr. Johnson on that date, entitled, "Visit Summary for Employer," there is a notation under "Treatment Plan" stating: "Procedures: Dr. Sung recommends SI joint fusion. I agree." (Ex. 6, p. 215). Dr. Johnson requested authorization for the proposed surgical procedure. (Ex. zz, pp. 189-191).

38. In his medical report of November 23, 2016, Dr. Johnson again confirms that he agrees with the proposed surgery by Dr. Sung, stating that the insurance company is requesting an independent medical evaluation, not yet scheduled. (Ex. aaa, pp.194-196).

39. Dr. Johnson also had referred the Claimant to Falcon Physical Therapy. At the initial examination on July 21, 2016, the Claimant presented with left-sided SI joint and low back pain. The assessment/diagnosis included signs and symptoms of left SI joint laxity and secondary muscle tightness due to compensation. (Ex. 10, pp. 254-255). Physical therapy records indicate a consistent diagnosis of sacroiliitis, and involve treatment of the SI joint as well as the lumbar spine. Claimant was provided with an SI belt in an effort to improve stabilization. (Ex. 10, pp. 265-267).

40. Respondents referred the Claimant to Dr. Andrew Castro for an independent medical evaluation ("IME"). This evaluation occurred on February 13, 2017. (Ex. ddd, pp. 201-209). Dr. Castro indicates that it is "not clear to me"

that she has sacroiliac joint dysfunction. In addition, he recommends against the surgical procedure, in part because the Claimant is considered to be of child-bearing age. This IME evaluator did not ask the Claimant whether she intended to have children, or if she had undergone a surgical procedure to prevent further pregnancies. At hearing, the Claimant credibly testified that she had undergone a surgical procedure to avoid future pregnancies. This was done in 2010.

41. In his independent medical evaluation, Dr. Castro refers to an SI joint surgery as debilitating with questionable outcome. This evaluator admitted that he was referring to SI joint fusions involving bone grafts with instrumentation as addressed in the Workers' Compensation *Medical Treatment Guidelines.* This is not the same procedure as recommended by Dr. Sung (and recommended by Dr. Scheper and Dr. Johnson), which is a minimally invasive outpatient surgery. Dr. Castro acknowledges that this is a newer technique and that he has not performed this procedure, other than as an observer.

42. The testimony at hearing shows that Dr. Castro did not actually perform the physical examination to the extent alleged in his February 13, 2017 report. This witness admitted that he uses a template and that some items should have been removed from the template. Dr. Castro, contrary to his report, did not palpate the Claimant's neck to assess bony tenderness or lymphadenopathy. He did not assess the Claimant's neck range of motion. This witness acknowledged that he did not check for bowel sounds, despite a statement to the contrary in his report. No stethoscope was used and he did not touch Claimant's abdomen. He did not look in the Claimant's nose, mouth or ears with any instruments, nor perform any actual physical assessment of the cranial nerves, oropharynx and nasopharynx and external auditory canals.

43. Similarly, with regard to the lumbar spine, Dr. Castro stated in his report that no palpable deformity was appreciated. Upon further cross-examination, it was established that this evaluator did not touch the Claimant's lumbar spine during the IME. He used no inclinometers or instruments to measure range of motion. In his report, Dr. Castro states, "Good lumbar range of motion," and later, on the same page states that, "Dynamic exam reveals limited range of motion in regards to the lumbar spine." (Ex. ddd, Page 203).

44. In his report, Dr. Castro stated that Hoffmann sign is negative and that sensory dermatomes are intact. The Claimant, as a Registered Nurse, is familiar with these tests. Many of these tests have been conducted by evaluating physicians throughout this claim. The Claimant testified that Dr. Castro did not perform a Hoffmann's test and did not test the sensory dermatomes. Further, the Claimant testified that when tested by squatting, that she had limitations, and expressed those during the recorded independent medical evaluation. This does not appear in Dr. Castro's report, in which he states that the Claimant is able to squat down and walk on her heels and toes without deficits. Nowhere in Dr. Castro's report, or his testimony, does he ask Claimant for any details on the

snow shoveling incident: *How much snow was removed, how long did it take her to do so, was she able to complete the task, or what technique did Claimant use to remove the snow?*

45. In nearly every evaluation by every medical provider in this matter, the Claimant underwent compression testing such as FABER or Patrick's tests which are relevant to assessing SI joint involvement. At hearing, Claimant described the FABER and the Patrick tests, and how they are performed. Dr. Castro apparently performed no compression testing when evaluating the Claimant and there is no reference to any such testing in his report. Dr. Castro testified at hearing that he recommended an EMG test. There is no reference in his report to recommending an EMG.

46. Dr. Castro testified that the SI joint injections performed by Dr. Scheper did not meet criteria under the *Medical Treatment Guidelines ("Guidelines')* because it was performed by ultrasound and not with dye. The ALJ takes administrative notice of the *Guidelines*, and concludes that Dr. Castro is correct in this assessment. However, Dr. Castro is the only physician to express concern over the SI joint injections performed by Dr. Scheper. Neither Dr. Janssen nor Dr. Sung commented or expressed concern over how this injection procedure was performed.

47. Dr. Castro also cast doubt on the quality of advice provided Claimant, based upon her insufficient relief from these injections, which he states under the *Guidelines* did not meet the criteria to justify a SI fusion. Further, given the uncertainty of success, the SI fusion is contraindicated in cases like Claimant's, which does not involve significant impact and trauma.

48. Respondents requested an addendum report from Dr. Castro. This was prepared without further evaluation or discussion with the Claimant. (Ex. kkk, pp. 231-232). In his second report, Dr. Castro suggests that the Claimant's work-related injury could not have caused trauma to the SI joint, thereby causing a chronic and permanent problem requiring an SI joint fusion. This conclusion on *causation* was not rendered at the time that he actually met with the Claimant and issued his first report.

49. After the release of Dr. Castro's report, Dr. Johnson released the Claimant with no restrictions and placed her at MMI. (Ex. 6, p. 229). Dr. Johnson, in his report of March 2, 2017, continues to acknowledge that the Claimant's lumbar spine strain, sacroiliitis and myalgia is related to work activities. Dr. Johnson, after the receipt of Dr. Castro's report, had previously submitted a letter dated 2/22/17, concluding that the snow shoveling incident permanently aggravated the condition which was work-related. (Ex. 6, p. 226).

50. In his Report of Maximum Medical Improvement and Impairment, Dr. Johnson acknowledges that Claimant continued in mild distress, had

tenderness over the lumbar spine particularly over the left SI joint. (Ex. 6, pp. 227-229). The Claimant continued with pain in her left buttock with left foot numbness and pain, aggravated with prolonged standing. Up until this point in time, Dr. Johnson, as well as other medical providers at CCOM, had assigned physical restrictions or limitations to the Claimant. On the date of MMI, Dr. Johnson, without further explanation, released the Claimant with no physical restrictions. (Ex. 6, Pages 227-230).

51. Respondents filed a Final Admission of Liability consistent with Dr. Johnson's determination of MMI and impairment. Claimant timely objected and requested a DIME. Dr. Michael Janssen, of the Center for Spine and Orthopedics in Thornton, Colorado was selected to perform the DIME with an evaluation date of June 6, 2017.

52. As part of the physical examination, Dr. Janssen, conducted compression testing, which demonstrated positive Patrick's and FABER test on the left side. Based upon his physical examination of the Claimant, and review of medical records, Dr. Janssen concluded that the Claimant is *not* at maximum medical improvement. Claimant presents with a sacroiliac joint arthropathy on the left side, which has failed to respond with an adequate trial of conservative management. (Ex. 3, p. 8). Dr. Janssen concluded that the Claimant, "**Firmly meets all of the reasonable criteria for consideration for a left sacroiliac joint stabilization.**" *Id.* Dr. Janssen states that Claimant was inappropriately placed at maximum medical improvement, and that the proposed surgery gives her the best chance for her to return to the healthcare profession and activities of daily living. The DIME notes that the Claimant has overcome a variety of other medical and surgical issues in the past with an excellent clinical outcome. (Ex. 3, p. 8).

53. Dr. Sung, Dr. Scheper, the selected DIME evaluator, and, (until receiving Dr. Castro's report), Dr. Johnson all recommended and agreed with the proposed surgery by Dr. Sung.

54. Dr. Castro considers Dr. Janssen to be a well-regarded competent orthopedic surgeon. Dr. Castro acknowledged that he respects Dr. Janssen's abilities. Similarly, Dr. Castro acknowledged that Dr. Sung is a well-regarded, competent orthopedic surgeon.

55. Dr. Scheper was provided with a copy of Dr. Janssen's DIME report along with the reports from Dr. Sung and Dr. Castro. Upon review, Dr. Scheper stated that he agreed with the recommendation of Dr. Sung and Dr. Janssen that the SI joint fusion surgery is a reasonable and necessary medical procedure for the Claimant and that the proposed surgery is related to the work injuries sustained by the Claimant. (Ex. 5, pp. 56-57).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

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

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

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

Overcoming the DIME of Dr. Janssen

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular

component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect. Further, this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

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

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

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

G. The testimony of the Claimant, the medical records, and other evidence establishes that the ***Claimant has not reached maximum medical improvement*** in regards to her work-related injuries. The Claimant has received extensive treatment and evaluations through CCOM, Dr. Scheper, Dr. Sung, Dr. Abercrombie, Falcon Physical Therapy, and the DIME by Dr. Janssen. Each of these medical providers document that the Claimant sustained SI joint injury or dysfunction as a result of her work injuries. At nearly every medical or therapy appointment, the Claimant was evaluated with compression testing which in nearly every instance was positive on the left for SI joint involvement or injury. The Claimant's pain and functional limitations fluctuated in severity and at times the Claimant's pain medications were increased by her treating physicians with regard to these pain flares. Claimant suffers from this work injury to this day.

H. Claimant experienced beneficial relief from the first SI joint injection provided by Dr. Scheper in October of 2015. Indeed, the Claimant requested a return-

to-work with no restrictions which was authorized by Dr. Johnson. However, over time, and particularly in late January and into February 2016, the Claimant's symptoms and pain began returning particularly during those periods of time where she worked consecutive 12-hour shifts. The Claimant hesitated to return for treatment, believing that she could alleviate the symptoms by self-treating with heat, ice and rest. The Claimant expressed concern that she would be given restrictions, taken off work and would lose her employment. The ALJ finds this explanation plausible.

I. Eventually, the Claimant's symptoms became severe to the point where she did return for treatment to Dr. Johnson on April 14, 2016. At that time, Dr. Johnson recommended trigger point injections followed by deep tissue massage. **Only days *afterward*** did an issue arise as to whether or not a snow shoveling event at home contributed to or caused a significant permanent aggravation to the Claimant's work-related medical condition. There is evidence to suggest that the Claimant experienced a bad reaction to one of the trigger point injections, thereby causing a significant flare in her pain. Dr. Johnson, despite expressing concerns over the snow-shoveling episode, continued to document that the Claimant's lumbar and SI joint diagnoses were due to the Claimant's work-related activities. Dr. Sung, Dr. Scheper and Dr. Janssen all concluded that the SI joint fusion surgery as recommended by Dr. Sung and Dr. Janssen is related to the work injury sustained by the Claimant. The only physician who disagrees with this conclusion is Respondents' IME, Dr. Castro, followed later by Dr. Johnson.

J. The ALJ does not find that the conclusions and opinions of Dr. Castro are sufficient to overcome the DIME. The Claimant saw multiple medical providers throughout this claim, including at least three physicians or physician assistants through CCOM, along with Dr. Scheper, Dr. Abercrombie, physical therapists, and the evaluation by Dr. Janssen. Out of these multiple medical providers, only Dr. Castro opined that the Claimant's mechanism of injury likely would not cause an SI joint injury severe enough to warrant surgery. Dr. Castro admitted that he did not actually perform many of the physical examination tests that were listed in his IME report. The IME did not perform any compression tests such as Patrick's or FABER which are typically used to assess SI joint dysfunction. The medical records establish that these compression tests were generally performed on the Claimant at nearly every visit she had from her evaluating and treating medical providers and therapists.

Reasonable, Necessary and Related SI Fusion Procedure

K. Claimant has the burden of proving by preponderance of the evidence that the SI joint fusion is reasonable and necessary as related to the industrial injury. Respondents contend that Dr. Scheper deviated from the letter of the Guidelines, and the ALJ concurs. The Guidelines are to be used by healthcare practitioners when furnishing medical aid. It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. In this case, the ALJ finds that despite the strict wording of the guidelines, with the lack of progress in recovery, the ATP's have acted reasonably in making treatment recommendations.

L. Dr. Castro acknowledged that he has never performed the SI joint surgery as proposed by Dr. Sung, Dr. Janssen and Dr. Scheper. In addition, Dr. Castro, in his independent medical evaluation, expresses concern over the impact of the surgery on an individual of child-bearing age. Dr. Castro admitted that he did not actually discuss this with the Claimant and had he done so, would have been advised that the Claimant had undergone a surgical procedure to avoid future pregnancies in 2010. Dr. Castro agreed that Dr. Janssen and Dr. Sung are well-regarded competent orthopedic surgeons and that he respects Dr. Janssen's abilities. A difference of opinion between medical doctors is not sufficient to establish that a DIME physician's rating is clearly erroneous or highly improbable. *Rodriguez v. Aurora Public Schools*, W.C. No. 4-447-174 (ICAO, January 7, 2002). See also *Lancaster v. Arapahoe County Sheriff's Department*, W.C. No. 4-744-646 and W.C. No. 4-756-515 (Industrial Claim Appeals Office, May 12, 2010) and *Kuykendoll v. Aurora Public Schools*, W.C. No. 4-193-617 (Industrial Claim Appeals Office, June 3, 1998). Nor does a difference in medical opinion mean that Claimant has not met her burden. The ALJ finds that the proposed SI Fusion, as proposed by Dr. Sung, is reasonable, necessary, and related to Claimants work injury. Claimant wanted to avoid surgery for a considerable length of time, in a sincere effort to get better and return to work without restrictions. Ultimately, she and her providers have concluded that this is the best option. Time will tell if Dr. Castro is correct in his assessment of the wisdom of moving forward, but Claimant has earned the right to find out.

Intervening Event- Snow Removal

M. Of great concern to the ALJ is that Dr. Castro appears to have seized upon the language of Dr. Johnson in attaching great significance to the snow shoveling incident. In turn, Dr. Johnson seized on Dr. Castro's report attaching great significance to the shoveling incident, and changed the opinions he had consistently held for months. At no point in the process did either physician bother to ask Claimant, in taking a routine medical history, just how she shoveled the snow. For the first time in the entire process, Claimant was permitted to explain what happened by her attorney at hearing. Claimant credibly described, and the ALJ so finds, that she pushed some snow away from her single car garage door for about two minutes. There is a paucity of evidence in the medical record to impeach her testimony, Claimant's expressed belief at the time notwithstanding. She was in distress. The ALJ concludes that Claimant had already suffered a worsening condition to the point of re-entering the Workers Compensation system on April 14, before she moved a gram of snow on April 18. Her back was already bothering her again; it is reasonable to infer that Claimant exercised reasonable caution in clearing her garage door in the easiest way possible. This minor chore is not an intervening event which severed the causal connection between the work injury and the need for surgery; nor did it significantly aggravate her pre-existing SI injury.

ORDER

It is therefore ordered that:

1. The DIME of Dr. Janssen has not been overcome on the issue of Maximum Medical Improvement.

2. Respondent's shall pay for all reasonable, necessary, and related medical treatment to bring Claimant to MMI, including, but not limited to, the SI joint fusion as proposed by Dr. Sung.

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

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

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

DATED: December 11, 2017

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable occupational disease arising out of and in the course of her employment with employer.

- If claimant has proven a compensable occupational disease, whether claimant has proven by a preponderance of the evidence that the medical treatment she received was reasonable and necessary to cure and relieve her from the effects of the work injury.

- If claimant has proven a compensable occupational disease, whether claimant has proven by a preponderance of the evidence that the medical treatment she received following the injury was authorized.

- At hearing, the parties agreed that if a compensable occupational disease is found, they will reach a stipulation on the issues of average weekly wage, temporary total disability benefits, and temporary partial disability benefits.

FINDINGS OF FACT

1. Claimant began her employment with employer in 2002. Claimant worked primarily as a waitress. Claimant testified that she worked eight to nine hours a day, four days per week. Claimant testified that she averaged 36 hours per week. Claimant described the work as "grueling" and "non-stop".

2. Claimant asserts that because of her job duties as a waitress she developed injuries to her low back and feet. Claimant testified that her job duties included lifting racks of drinking glasses and stacks of ceramic dishes. Claimant believes that because she was on her feet during her shift and engaged in lifting and bending, she injured her low back and feet.

3. Claimant testified that she began experiencing these symptoms in 2008 and reported her condition to her manager at that time. Claimant also testified that she reported symptoms to employer in 2009 and 2011. Employer did not provide claimant with a list of medical providers. Claimant did not seek medical treatment for her low back or feet at these times.

4. Claimant quit her employment with employer on August 20, 2016. Claimant testified that she quit because she "had nothing left to give". When claimant initiated her claim for Workers' Compensation benefits on May 18, 2017, she reported her date of injury as August 20, 2016.

5. The medical records entered into evidence indicate that prior to her alleged workplace injury, claimant received medical care through her primary care physician, Dr. Guy Kovacevich. Between April 26, 2010 and June 24, 2016 claimant was seen by Dr. Kovacevich a number of times for various medical issues. These issues included: cough, sore throat, hypercalcemia, high blood pressure, hemorrhoids, an evaluation for carbon monoxide poisoning, palpitations, depression, hypertension, chronic fatigue disorder, and parathyroid disorder. At these various appointments Dr. Kovacevich did not record any complaints of back pain.

6. During this same time period claimant reported a foot related concern to Dr. Kovacevich on one occasion. On October 14, 2013, claimant complained of pain in a toe on her left foot after striking it on a piece of furniture. There is no indication in that medical record that the injury to claimant's toe was work related.

7. Claimant first reported low back pain to Dr. Kovacevich on August 31, 2016. The records from Dr. Kovacevich are silent regarding the cause of claimant's low back pain. Dr. Kovacevich referred claimant to physical therapy at Howard Head Sports Medicine.

8. Claimant was first seen at Howard Head Sports Medicine by Brittney Huntimer, PT on September 15, 2016. At that time, claimant reported to Ms. Huntimer an incident that occurred three weeks prior while claimant was staying at her daughter's house. Claimant described lifting a laundry basket and feeling "immediate low back pain that felt like a jolt of pain all the way into the front of both hips and made her stomach cramp".

9. The medical records entered into evidence indicate that on April 27, 2017 claimant complained of foot issues when she was seen at Mountain Family Health Centers. At that time claimant reported pain in the bottom of her right foot that started "two weeks ago". This is the first instance of a foot related complaint after October 14, 2013 toe incident as described above.

10. Claimant first reported that she believed that her foot pain was work related on June 16, 2017 when she was seen by Noel Armstrong, DPM with Foot and Ankle Center. At that time claimant reported that when she was "on her feet for prolonged periods of time, the pain became excruciating". Dr. Armstrong opined that claimant's foot symptoms were "probably somewhat activity related or totally activity related". This was nine months after claimant left her employment with employer, and approximately one month after she initiated her claim for workers' compensation benefits.

11. Mr. Thompson testified that claimant did not report any low back or foot symptoms during her employment. Mr. Thompson also testified that as evidenced by the payroll records entered into evidence, claimant averaged 30.5 hours per week.

12. The ALJ does not find claimant's testimony to be credible with regard to the onset of her low back and foot symptoms. The ALJ credits the medical records and finds that claimant did not begin to seek treatment for these symptoms until well after her resignation from her employment. The ALJ further credits the medical records and finds that it is more likely than not that claimant injured her back while staying at her daughter's house as claimant reported to the physical therapist on September 15, 2016. Likewise, the ALJ finds that it is more likely than not that claimant injured her right foot in April 2017, months after she quit her employment with employer. The ALJ credits the testimony of Mr. Thompson and finds that claimant did not report low back or foot symptoms during her employment. Based on the foregoing the ALJ finds that claimant has failed to demonstrate that it is more likely than not that she suffered an occupational injury while employed with employer.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

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

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

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

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008)

7. As found, claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable occupational disease arising out of and in the course of her employment with employer. As found, the medical records and the testimony of Mr. Thompson are credible and persuasive.

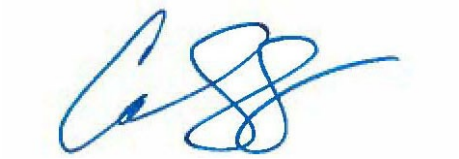
ORDER

It is therefore ordered that:

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

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

Dated: December 12, 2017



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-991-359-07

ISSUES

- Whether the Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Dr. Dwight Leggett that the Claimant reached maximum medical improvement on March 24, 2015 and has no ratable impairment from his February 22, 2015 industrial injury.

- If the Claimant is entitled to medical impairment benefits, the average weekly wage that would be applied to the benefit calculation.

- Whether the Claimant is entitled to maintenance medical care.

STIPULATIONS

In the last Final Admission of Liability filed April 4, 2016, Respondents admitted for maintenance medical treatment per the DIME report from Dr. Leggett dated January 19, 2016. Claimant accepted that submission regarding maintenance medical care.

FINDINGS OF FACT

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

1. On February 22, 2015, Claimant suffered an admitted work-related injury while working as an attendant at Employer's convenience store.

2. Claimant fell from a free-step ladder and experienced pain in his lower back on his left side. This occurred at approximately 9:00 p.m. and Claimant worked until his shift ended approximately one hour later.

3. Claimant was sore the next morning. He called Employer who sent him to Concentra the next day. Dr. Rosalinde Pineiro at Concentra in Fort Collins treated Claimant.

4. At the initial visit, Claimant completed a patient information form indicating that his injury was limited to his lower back. He also completed a pain diagram circling the lower back indicating that he had pins and needles symptoms in that area.

5. Dr. Pineiro's February 23, 2015, report noted Claimant's complaints of the following on physical examination: muscle pain, back pain, joint stiffness, muscle weakness, limping and night pain. Claimant did not report no joint pain, neck pain, or joint swelling. On examination, Dr. Pineiro found Claimant's head and face to be atraumatic with no tenderness. She found a normal gait and no tenderness or swelling of the extremities. Dr. Pineiro noted Claimant's range of motion to be within normal

limits as was muscle strength and tone.[1] She noted tenderness in the right shoulder AC joint. There was also some tenderness in the right upper arm. The left shoulder was abnormal due to polio. The right hip showed no tenderness except in the gluteus maximus, minimus, greater trochanter and bursa. The lumbar spine appeared normal with some tenderness and bilateral muscle spasm.

6. Dr. Pineiro x-rayed Claimant's spine during his February 23, 2015 visit. It showed no fracture or subluxation. The disc spaces and heights of Claimant's vertebral bodies were relatively preserved, the spinal rods placed due to Claimant's polio as a child were noted.

7. Dr. Pineiro released the Claimant to return to modified duty as of that date. Claimant returned to work within the restrictions. Claimant did not miss sufficient time to receive temporary total disability benefits.

8. On February 25, 2015, Claimant returned to Dr. Pineiro. She noted that Claimant was working within her restrictions and tolerating the work. However, Claimant had difficulty changing positions, sitting, and placing weight on his right buttock. Dr. Pineiro referred Claimant to physical therapy two to three times a week for four weeks. She continued his work restrictions.

9. Claimant participated in physical therapy with Concentra from February 26, 2015 through March 17, 2015.

10. On March 10, 2015, Claimant reported to Dr. Pineiro that he was improving and could perform his regular job duties. He was motivated to return to full duty at least in part by Employer's ability to employ him only part-time at restricted duty and his thereby becoming ineligible for health insurance benefits. She placed him at regular duty and advised him to report if he did not tolerate it. Dr. Pineiro continued Claimant's physical therapy and refilled his Tylenol No. 3 prescription.

11. Claimant's final visit to Dr. Pineiro was on March 24, 2015. He had been back at regular duty for two weeks. He reported mild back pain and that his symptoms were continuing to improve. He had no abdominal pain, back stiffness, lower extremity numbness, paresthesia, or weakness by history. On examination Dr. Pineiro found Claimant had a normal gait, no tenderness or swelling of his extremities, a range of motion within normal limits and normal muscle strength and tone. Claimant's thoracic and lumbar spine showed no tenderness. Dr. Pineiro noted that Claimant had polio as a child which led to back deformity.

12. On March 24, 2015, Dr. Pineiro released Claimant at maximum medical improvement (MMI) without restrictions. She provided no permanent impairment rating. She continued his home exercise program.

[1] As a result of childhood polio, Claimant had metal rods placed along his spine from T2 through T9, and exhibits extreme scoliosis. Dr. Pineiro did not explain how Claimant's range of motion could be described as normal given those conditions.

13. On September 11, 2015, Respondents filed a Final Admission of Liability regarding Dr. Pineiro's release. Respondents admitted for zero whole person impairment and no maintenance medical treatment.

14. Claimant requested a Division IME which Dr. Leggett performed on January 19, 2016. According to the DIME report, Claimant listed for consideration review of his lumbar spine, thoracic spine, and cervical spine; evaluation for a closed head injury, and any other body parts or conditions related or associated to the injury such as psychiatric, if appropriate. Claimant also requested review of his placement at MMI.

15. At his DIME, Claimant reported multiple areas of pain generation. The primary area concerned Claimant's low back greater on the right than left. This is inconsistent with the pain questionnaire Claimant filled out when placed at MMI when he indicated that his pain 1 on a scale of 1 to 10, with pins and needles pain on his left side. Claimant also complained at the DIME that he had pain traveling down his left leg and into his toe as well as down the right leg into the calf and bottom of his foot. Claimant complained of right elbow pain and snapping in his left knee. Claimant further reported pain coming from his bilateral shoulder blades, a large amount of tenderness and tension in that area which traveled to the base of his neck creating severe headaches. He reported hypersensitivity with any sort of touch over the top and side of his head. Finally, he mentioned cyclic emotional changes at times.

16. Despite all these pain complaints, Claimant acknowledged that he had not sought treatment through the authorized provider subsequent to his discharge, either before the DIME or thereafter, up to the date of the hearing.

17. Claimant disclosed his medical history to Dr. Leggett, including polio affecting his back, lower extremities and left upper extremity. Claimant has severe scoliosis from the polio. He underwent Harrington rod placement from T2 through T9. He also reported a left shoulder arthrodesis, left pronator release and tendon transfer.

18. Claimant continued to work full duty for Employer subsequent to being placed at MMI. Wage records show that Claimant worked more hours after being placed MMI until he left Employer than he had worked prior to the date of injury. Claimant left Employer in June, 2015. He subsequently became employed by another convenience store/gas station in the Fort Collins area and continued to work in that position up to the date of hearing. Claimant works fulltime for similar pay and with job duties similar to those he had at Employer.

19. On examination, Dr. Leggett deferred range of motion measurements in the thoracic spine due to clear limitation caused by the Harrington rods placed in his thoracic spine. Dr. Leggett noted Claimant's altered low back anatomy which caused difficultly in palpating Claimant's thoracic facet joints. Claimant's unique anatomy caused Dr. Leggett to be unable to stabilize Claimant's positioning well enough to obtain a meaningful straight leg test which voided the validity testing.

20. Despite repeated testing and repositioning throughout the examination, Dr. Leggett was unable to produce any paresthesia on examination. After performing his physical examination and reviewing Claimant's medical records, Dr. Leggett determined that the work-related treatment which had targeted Claimant's thoracic and lumbar region appeared to be appropriate. He then addressed the various areas Claimant had requested in the DIME Application. Dr. Leggett indicated that he was unable to find any records supporting an injury to Claimant's head or neck region and that Claimant's initial evaluation showed multiple findings and history that would be inconsistent with a cervical injury.

21. Dr. Leggett found no supporting information to identify a closed head injury and therefore did not relate one to the claim. He found no knee injury or treatment as part of the claim. As to psychological issues, Dr. Leggett found no psychological impairment.

22. Dr. Leggett agreed with Dr. Pineiro that the Claimant reached MMI on March 24, 2015. Dr. Leggett recommended a maintenance program to maintain MMI. Based on Dr. Leggett's report, Respondents filed the last Final Admission of Liability on April 4, 2016. In that Admission, Respondents admitted for zero permanent whole person impairment and maintenance medical benefits per the DIME report.

23. In his initial report, Dr. Leggett found Claimant's loss of range of motion to be 19% whole person. However, Dr. Leggett did not diagnose a specific disorder as required by Table 53 of the AMA Guides. Dr. Leggett apportioned the range of motion measurement attributing 75% to the pre-existing polio and 25% to Claimant's work injury. Thus, Dr. Leggett gave Claimant a 5% whole person impairment rating.

24. The Division of Workers' Compensation DIME unit wrote to Dr. Leggett on February 5, 2016, informing him that he needed to address the Table 53 issue and apportionment if he applied it.

25. Dr. Leggett responded with a final report dated February 16, 2016. Dr. Leggett indicated that upon further review of the AMA Guides, he realized a Table 53 diagnosis must be given in order to give a range of motion impairment rating. Dr. Leggett stated that given Claimant's history of pre-existing polio, he was unable to adequately assign any of the specific disorders identified in Table 53 to the work injury. Absent a Table 53 rating, no range of motion impairment can be given. Claimant's overall impairment rating was assigned at zero. Apportionment was not applied.

26. In addition to the polio references in the medical records, Claimant provided specific information as to his pre-existing polio diagnosis and its impact. Claimant was diagnosed with polio as a child. He wore a brace on his right leg until the age of 5. He had a body brace from his neck down thereafter. He had severe scoliosis/curvature from the polio. Claimant received treatment from the Shiner's Hospital in Salt Lake City from age 10 through 13. He had back surgery and multiple shoulder surgeries on the left side. He had a plate placed in his left shoulder. He also had work done on his left arm muscles, and on his thumb and fingers.

27. Claimant has worked in multiple positions for grocers and convenience stores since age 18. He has worked as a sacker, checker, attendant, and front desk person. Claimant was able to do the work required for these positions and does not consider himself disabled. However, Claimant admitted that polio did limit his bending, caused him to limp, and limited certain ranges of motion. Claimant continues the same type of work without restrictions.

28. Claimant detailed pain complaints ongoing since March 2015. He discussed them with DIME physician, Dr. Leggett, in January 2016. Claimant admitted that his surgeries left him with pain in his shoulder and back. Dr. Leggett testified by deposition that Claimant had a tremendous amount of shoulder blade pain which Claimant attributed to polio. Claimant acknowledged that obvious changes in his gait and his ability to get on and off the examination table also resulted from polio. On examination, Dr. Leggett noted high levels of muscle tension throughout Claimant's mid-back and several other areas into the scapular region. Dr. Leggett attributed Claimant's muscle spasticity as more likely related to polio than a traumatic injury.

29. Dr. Leggett testified that in addition to discussing polio with Claimant, he reviewed clinical notes from 1983 which documented Claimant's treatment and ongoing symptoms. Dr. Leggett also found that because pre-existing polio is a degenerative disease that leads to musculoskeletal problems, he believed it inappropriate to assign a Table 53 impairment rating.

30. Dr. Leggett testified that the range of motion measurements were probably invalid due to abnormal pelvic positioning from the polio and scoliosis. In order to evaluate range of motion in the low back one has to be able to look at the relation of the motion between the low back and the sacral component. In Claimant's case, he had an abnormal rotation of his hips and tightness in one greater than the other. This made doing straight leg raising painful. Claimant had to assume an outward rotation position in order to perform the testing which invalidated the results. Although Dr. Leggett was able to obtain range of motion measurements of the lumbar spine, those measurements were also impacted by the Claimant's underlying polio.

31. The Division challenged Dr. Leggett's report because he assigned a range of motion impairment rating without providing a Table 53 determination. Dr. Leggett responded by making calls to the workers' compensation board and further reviewing the AMA Guidelines. Ultimately, Dr. Leggett determined he was unable to adequately assign any Table 53 disorder to the workers' compensation injury and withdrew the range of motion impairment rating.

32. Dr. Leggett admits Claimant suffered a work-related injury; but attributed, no radicular process to his injury. Also, the majority of Claimant's pain was reproducible soft tissue, and myofascial in nature. Dr. Leggett opined that the significant tightness and rigidity in Claimant's low back related to pre-existing polio.

33. Claimant seeks a higher average weekly wage based on wages paid through the end of his employment. The records do indicate that the Claimant earned

greater wages after maximum medical improvement through the date of his resignation. However, there was no temporary disability or lost time subsequent to Claimant's initial injury or the date of MMI.

CONCLUSIONS OF LAW

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

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

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

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

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

When a DIME physician issues conflicting or ambiguous opinions, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc.,* supra.

Overcoming the DIME

The DIME physician's opinions regarding causality must be overcome by clear and convincing evidence. *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). As a matter of diagnosis, the assessment of impairment requires a rating physician to identify and evaluate all losses and restrictions which result from the industrial injury. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995); AMA, Guides to the Evaluation of Permanent Impairment ch. 2.1-2.2 (3rd ed. 1990). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). In other words, a DIME physician's findings may be not overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, October 4, 2001).

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

In *Wackenhut Corp.,* the court noted that under the AMA Guides, the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment

rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower*, W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids*, W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

Claimant has failed to produce clear and convincing evidence to overcome Dr. Leggett's Division IME opinion that Claimant suffered no permanent medical impairment as a result of the admitted February 22, 2015 work injury. Dr. Leggett received substantial information regarding Claimant's underlying pre-existing impairment from childhood polio. Dr. Leggett discussed this information with Claimant and reviewed medical records regarding the prior polio related treatment and limitations. On examination, Dr. Leggett noted substantial physical abnormalities and impairment as a result of the polio. Claimant's pre-existing abnormalities and disabilities impacted Claimant's presentation and range of motion measurements. Dr. Leggett was unable to assign a Table 53 impairment rating for Claimant's work related injury.

The parties do not dispute the compensability of Claimant's February 22, 2015 injury. However, they do dispute the nature and extent of Claimant's permanent impairment and whether that impairment was related to the February, 2015 accident. The DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova,* supra. Claimant has not met his burden to overcome the DIME physician's opinion that Claimant, although injured, did not suffer a ratable impairment under the AMA Guidelines. As such, Claimant is not entitled to a range of motion impairment because he failed to establish a ratable impairment.

In *Marquez v. Americold Logistics*, W.C. No. 4-896-504 (ICAO, August 7, 2014) the claimant challenged a zero impairment rating by a DIME physician. The ALJ determined that the claimant failed to overcome the zero impairment rating and the ICAO affirmed the decission. The DIME physician did perform an impairment analysis and determined that the claimant had an overall impairment of 26% of the whole person. But in her opinion, none of the claimant's impairment was causally related to the industrial injury. As such, the doctor opined that the claimant's impairment was related to a pre-existing industrial injury. Apportionment statutes are to be applied only after a rating physician, including the DIME physician, initially determines that the industrial injury caused ratable impairment under the AMA Guides. *Marquez*, supra; C.R.S. § 8-42-104(5)(a) and (b).

It is well established that the DIME physician's opinion on MMI, just as with a medical impairment rating, is binding unless overcome by "clear and convincing" evidence. § 8-42-107(a)(c) C.R.S. 2017. To overcome a DIME physician's opinion, there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt. *Adams*, supra.

In the present case there is no difference in medical opinion regarding whether the Claimant has reached maximum medical improvement. Dr. Pineiro, Claimant's ATP, placed him at MMI in March 2015. Claimant did not seek maintenance care and made no effort to return to the physician for additional care or reopening. The DIME occurred in January of 2016. Dr. Leggett concluded that Claimant remained at MMI after evaluating all of Claimant's complaints. Dr. Leggett also found that the majority of the body parts which Claimant complained about were not included in the claim and did not form the basis of ratable impairment. Claimant has not sought care or treatment from January of 2016 to the present despite the DIME's recommendations and Insurer's admission.

Claimant has failed his burden to overcome, by clear and convincing evidence, the finding of the Division IME physician that Claimant reached MMI as of March 24, 2015.

Medical Maintenance Treatment

Claimant has raised the issue of entitlement to maintenance medical care. In their April 4, 2016, Admission, Respondents admitted for maintenance medical treatment per the DIME report. Maintenance medical treatment may not be conditioned, thus the Admission results in maintenance treatment being open to the extent the requested care is reasonable, necessary, and related to the industrial injury.

As Claimant has not sought specific care, there is no issue to address as to the reasonableness, necessity or relatedness of any treatment but merely a conclusion that the claim remains open pursuant to Admission.

The ALJ need not address the issue of Average Weekly Wage.

ORDER

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

1. Claimant has failed to meet his burden of proving that the DIME physician, Dr. Dwight Leggett, erred in his DIME report on the issue of MMI or lack of permanent medical impairment. Claimant's request to overcome the DIME as to those two issues is denied and dismissed.

2. Claimant is entitled to maintenance medical treatment that is reasonable, necessary and related to the workers' compensation injury pursuant to Respondents' Admission.

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

DATED: December 13, 2017

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that his hearing loss arose out of and occurred within the course and scope of his employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment, including hearing aids, which is reasonable and necessary to cure or relieve the effects of his industrial injury.

FINDINGS OF FACT

1. In November 1983 when Claimant was 20 years old he began working for Employer as a Refrigeration Mechanic. Claimant asserts that during his work for Employer over a 33 year period he was continually exposed to loud noises and thus suffered hearing loss.

2. Claimant initially underwent hearing testing in 1984. On August 10, 1994 Claimant again had his hearing evaluated. The testing revealed that Claimant had suffered diminished hearing as documented by a Standard Threshold Shift (STS). Employer monitored Claimant's hearing over the ensuing years.

3. On November 11, 2003 Claimant visited Otolaryngologist Alan Lipkin, M.D. for an examination. Claimant reported that he "has been exposed to pumps, chillers, motors, power tools, and hand tools with a significant noise exposure in spite of using ear protection whenever it is possible." Claimant also reported "a gradual deterioration in hearing, as well as about three years of high-pitched tinnitus, which is bilateral." Claimant denied smoking or taking any medications on a regular basis and remarked that he was "not aware of any family history of tinnitus, ear infections, or major hearing loss." Dr. Lipkin summarized:

> Bilateral sloping high-frequency sensorineural hearing loss is slightly more prominent on the left than the right. It is essentially pure nerve loss. There is excellent word discrimination. It is consistent with his prior screening hearing tests. It is of a pattern most consistent with noise-induced hearing loss.

Dr. Lipkin diagnosed Claimant with work-related noise-induced hearing loss that was present despite hearing protection. Dr. Lipkin noted that Claimant "is not aware of any nonwork-related causes of hearing loss. I, thus, will conclude that it is work-related."

4. On September 1, 2016 Claimant visited Richard Leahy, D.O. for a physical examination. He reported worsening tinnitus and hearing loss. Dr. Leahy referred Claimant to ENT William Dickey, M.D.

5. On October 21, 2016 Claimant visited Dr. Dickey for an evaluation. Dr. Dickey noted that Claimant's audiogram revealed significant presbycusis. He commented that hearing loss is a benign process and recommended hearing aids.

6. On October 21, 2016 Claimant visited audiologist Zachary A. Zells, Au.D. for an evaluation. Claimant reported ringing in both ears and increased difficulties understanding conversations. He noted "extensive occupational noise exposure." Audiological testing revealed severe sensorineural hearing loss in both ears. Dr. Zells noted that Claimant's hearing loss was having a negative impact on his ability to communicate and could not be corrected through medications or surgery. Accordingly, he recommended hearing devices for both ears at a cost of $6,200.00.

7. On November 17, 2016 Claimant visited Andrew Plotkin, M.D. for an examination. He reported that he has worked for Employer for approximately 33 years as a Refrigeration Mechanic. Claimant commented that he has worked around many sources of loud noises including chillers, pumps, motors and power tools. He remarked that his worst noise exposure occurred during the 1980's and 1990's when he less frequently used hearing protection. Claimant explained that he has experienced gradually worsening hearing loss and has difficulties with conversations.

8. Dr. Plotkin reviewed all available documentation including medical records and audiograms. He noted that Claimant's audiograms revealed a steady decline in high frequency hearing. Dr. Plotkin also reviewed ambient noise level sampling data from August 26, 1994 and July 25, 2013. The 1994 data reflected an exposure range of 50.6 dB to 116.2 dB with a 59.2% 8 hour dose at the 90dB threshold and 73.3% 8 hour dose at the 80 dB threshold. Dr. Plotkin added that he "would expect the noise exposure to have been below the OSHA threshold if adequate hearing protection was in use at all times." He recommended evaluation by an otolaryngologist to ascertain the cause of Claimant's hearing loss and tinnitus.

9. On January 4, 2017 Claimant visited ENT Clark Walker, M.D. for an examination. He reported gradual hearing loss over the years that he attributed to his work exposure. Claimant denied any other causes or aggravating factors that contributed to his condition. Dr. Walker diagnosed Claimant with bilateral high frequency sensorineural hearing loss. After conducting an audiogram, Dr. Walker remarked that Claimant's hearing loss was likely work-related. He remarked that Claimant did not suffer any pre-existing conditions that caused or contributed to his hearing loss. Dr. Walker summarized that the "causative agent for progressive hearing loss is, very likely, unprotected hearing while at work." He recommended hearing aids.

10. On February 24, 2017 Employer filed a First Report of Injury. The report specified that on November 26, 2003 Claimant suffered bilateral hearing loss as a result of his cumulative work activities.

11. On September 20, 2017 Claimant underwent an independent medical examination with Allison M. Fall, M.D. Dr. Fall reviewed Claimant's work history and medical records. Claimant reported that he was exposed to noise from chillers, pumps and fans at work for over 30 years. Claimant noted that he usually worked nine hour shifts and experienced noise approximately 80% of the time while performing his job duties. Relying on the noise sampling data reflected in Dr. Plotkin's November 17, 2016 report, Dr. Fall reasoned that Claimant's noise exposure while at work was within OSHA Guidelines. Dr. Fall thus attributed Claimant's hearing loss to age rather than his work exposure.

12. Claimant testified at the hearing in this matter. He explained that he began working for Employer as a Refrigeration Mechanic when he was 20 years old in 1983. He noted that he did not suffer any hearing loss prior to working for Employer. However, his job duties of maintaining the air conditioning for Employer's entire campus required him to work in very loud rooms with large machines that included chillers, pumps, air compressors and fans. Claimant specifically noted that the chillers in the equipment rooms sounded like jet engines. He explained that he would sometimes wear hearing protection during the 1980's and 1990's but often removed it because the equipment rooms were so loud that he had to yell to co-workers to communicate. Claimant remarked that he worked a significant amount of overtime in excess of his 40 hour week during the 1980's and 1990's.

13. Claimant testified that Employer first provided education regarding noise exposure and hearing loss in approximately 2005 or 2006. He has diligently worn hearing protection since he was advised of the dangers of noise exposure. Claimant remarked that Employer's equipment rooms are much quieter than in the 1980's and 1990's because the equipment has been updated.

14. Dr. Fall testified at the hearing in this manner. Although Dr. Fall acknowledged that Claimant suffers from hearing loss, she maintained that his condition was not caused by his work duties for Employer. Dr. Fall explained that Claimant's hearing loss was a progressive, age-related condition that was not related to his work exposure. She detailed that 12% of males over the age of 12 suffer hearing loss and 20% of males over 50 have hearing loss. Relying on the noise sampling data reflected in Dr. Plotkin's November 17, 2016 report, Dr. Fall reiterated that Claimant's noise exposure at work was within OSHA Guidelines. However, Dr. Fall acknowledged that she did not know of the origin of the noise sampling data. Furthermore, Dr. Fall noted that she did not know the percentage of each work day that Claimant spent at the higher decibel levels as opposed to the lower levels referenced in the noise sampling data.

15. Claimant has demonstrated that it is more probably true than not that his hearing loss arose out of and occurred within the course and scope of his employment with Employer. It is undisputed that Claimant began experiencing gradual, bilateral hearing loss in 1994. The critical inquiry is whether Claimant's hearing loss was caused by working for Employer in a noisy environment or a natural age-related process. Claimant credibly explained that his job duties required him to work in very loud rooms with large machines that included chillers, pumps, air compressors and fans. The bulk of the persuasive medical records reflect that Claimant's hearing loss is attributable to his job duties for Employer.

16. After considering Claimant's job history and medical records otolaryngologist Dr. Lipkin determined that Claimant suffered from sensorineural hearing loss. He noted that Claimant's condition was a "pure nerve loss" that was consistent with "noise-induced hearing loss." In the absence of non-work-related factors, Dr. Lipkin concluded that Claimant's hearing loss was work-related. Furthermore, ENT Dr. Walker diagnosed Claimant with bilateral high frequency sensorineural hearing loss. After conducting an audiogram, Dr. Walker remarked that Claimant's hearing loss was likely work-related. He remarked that Claimant did not suffer any pre-existing conditions that caused or contributed to his hearing loss. Dr. Walker summarized that the "causative agent for progressive hearing loss is, very likely, unprotected hearing while at work."

17. In contrast, Dr. Fall explained that Claimant's hearing loss was a progressive, age-related condition unrelated to his work exposure. She detailed that 12% of males over the age of 12 suffer hearing loss and 20% of males over 50 have hearing loss. Relying on the noise sampling data from August 26, 1994 reflected in Dr. Plotkin's November 17, 2016 report, Dr. Fall explained that Claimant's noise exposure at work was within OSHA Guidelines. However, Dr. Fall acknowledged that she did not know the origin of the 1994 noise sampling data. Furthermore, Dr. Fall noted that she did not know the percentage of each work day that Claimant spent at the higher decibel levels as opposed to the lower levels referenced in the noise sampling data. Dr. Fall's opinion is strictly based on speculative, sampling data with an unclear origin that the noise levels in Employer's air conditioning facilities are within OSHA limits. However, the persuasive reasoning of ear specialists Drs. Lipkin and Walker suggests that Claimant's hearing loss was not caused by age, but by his occupational exposure over a number of years. Accordingly, Claimant's job duties with Employer aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

18. Claimant has proven that it is more probably true than not that he is entitled to receive authorized medical treatment, including hearing aids, which is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant suffered an occupational disease in the form of hearing loss as a result of his work activities for Employer. He has received reasonable medical treatment for his hearing loss from a number of providers over the years. Physicians have recommended hearing aids to cure or relieve the effects of Claimant's work-related

hearing loss. Accordingly, Claimant shall receive reasonable and necessary medical benefits for hearing loss, including hearing aids, designed to cure or relieve his condition.

CONCLUSIONS OF LAW

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

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

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

Compensability

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or

working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. As found, Claimant has demonstrated by a preponderance of the evidence that his hearing loss arose out of and occurred within the course and scope of his employment with Employer. It is undisputed that Claimant began experiencing gradual, bilateral hearing loss in 1994. The critical inquiry is whether Claimant's hearing loss was caused by working for Employer in a noisy environment or a natural age-related process. Claimant credibly explained that his job duties required him to work in very loud rooms with large machines that included chillers, pumps, air compressors and fans. The bulk of the persuasive medical records reflect that Claimant's hearing loss is attributable to his job duties for Employer.

7. As found, after considering Claimant's job history and medical records otolaryngologist Dr. Lipkin determined that Claimant suffered from sensorineural hearing loss. He noted that Claimant's condition was a "pure nerve loss" that was consistent with "noise-induced hearing loss." In the absence of non-work-related factors, Dr. Lipkin concluded that Claimant's hearing loss was work-related. Furthermore, ENT Dr. Walker diagnosed Claimant with bilateral high frequency sensorineural hearing loss. After conducting an audiogram, Dr. Walker remarked that Claimant's hearing loss was likely work-related. He remarked that Claimant did not suffer any pre-existing conditions that caused or contributed to his hearing loss. Dr. Walker summarized that the "causative agent for progressive hearing loss is, very likely, unprotected hearing while at work."

8. As found, in contrast, Dr. Fall explained that Claimant's hearing loss was a progressive, age-related condition unrelated to his work exposure. She detailed that 12% of males over the age of 12 suffer hearing loss and 20% of males over 50 have hearing loss. Relying on the noise sampling data from August 26, 1994 reflected in Dr. Plotkin's November 17, 2016 report, Dr. Fall explained that Claimant's noise exposure at work was within OSHA Guidelines. However, Dr. Fall acknowledged that she did not know the origin of the 1994 noise sampling data. Furthermore, Dr. Fall noted that she did not know the percentage of each work day that Claimant spent at the higher decibel levels as opposed to the lower levels referenced in the noise sampling data. Dr. Fall's opinion is strictly based on speculative, sampling data with an unclear origin that the noise levels in Employer's air conditioning facilities are within OSHA limits. However, the persuasive reasoning of ear specialists Drs. Lipkin and Walker suggests that Claimant's hearing loss was not caused by age, but by his occupational exposure over a number of years.

Accordingly, Claimant's job duties with Employer aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

Medical Benefits

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

10. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized medical treatment, including hearing aids, which is reasonable and necessary to cure or relieve the effects of his industrial injury. Claimant suffered an occupational disease in the form of hearing loss as a result of his work activities for Employer. He has received reasonable medical treatment for his hearing loss from a number of providers over the years. Physicians have recommended hearing aids to cure or relieve the effects of Claimant's work-related hearing loss. Accordingly, Claimant shall receive reasonable and necessary medical benefits for hearing loss, including hearing aids, designed to cure or relieve his condition.

ORDER

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

1. Claimant suffered an occupational disease in the form of hearing loss while working for Employer.

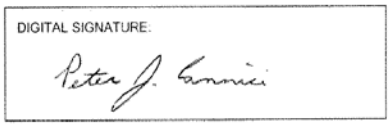
2. Claimant shall receive reasonable and necessary medical benefits for hearing loss, including hearing aids, designed to cure or relieve his condition.

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

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

within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 13, 2017.



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

STIPULATION

At the commencement of hearing the parties stipulated that Claimant's average weekly wage (AWW) at the time of her alleged injury was $591.76. The stipulation is approved.

REMAINING ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury to her upper extremities as a consequence of falling down some stairs on March 6, 2017.

II. If Claimant sustained a compensable injury, whether she established by a preponderance of the evidence that she is entitled to reasonable, necessary and related medical treatment to cure and relieve her of the effects of that injury.

III. If Claimant sustained a compensable injury, whether she established by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits for the period March 7, 2017 through March 14, 2017.

Because the ALJ finds/concludes that Claimant failed to carry her burden to establish that she sustained a compensable injury, this order does not address Issues II and III above.

FINDINGS OF FACT

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

I. Claimant's Prior Medical History

1. In 2014 Claimant developed a deep vein thrombosis (DVT) in her right thigh. Claimant's DVT was treated with blood thinners, including Warfarin and Lovenox. Claimant would later injure her right hamstring while receiving anticoagulation therapy. After approximately two weeks of increasing right leg pain and lower extremity swelling, it was discovered that Claimant had suffered a compartmental bleed associated with acute blood loss. According to Claimant, her compartmental bleed resulted in a balance issue necessitating the use of a walker at first and later a cane, which she reportedly did not use after 2014. The medical records admitted into evidence indicate that Claimant developed compartmental syndrome in the calf area and on March 4. 2016, she was told that her right lower extremity "would never be 100% normal again after the bleeding from anticoagulation for the DVT."

2. Claimant also has a long standing history of bilateral knee pain and has been diagnosed with osteoarthritis of the knees which caused a stiff, antalgic gait.[1]

3. On May 24, 2016, Claimant was evaluated by Dr. Lance Farnworth for chronic knee pain. In his report from this date of visit, Dr. Farnworth notes that Claimant presented with complaints of bilateral knee pain which made it "difficult to ascend stairs, descend stairs, walk long distances, sleep at night and progress from sit to stand". Dr. Farnworth diagnosed Claimant with bilateral tricompartmental osteoarthritis and recommended Synvisc injections.

4. On February 2, 2017, Claimant presented to the Arkansas Valley Regional Medical Center for "chronic disease management". In the report from this appointment date, the condition of Claimant's knees is documented as follows: "Knees are about the same, still has swelling at the end of the day, mild decrease in ROM + stiffness, intermittent weakness of knees." During the physical examination conducted on this date, it was noted that Claimant avoided putting pressure on the right leg.

II. Claimant's March 6, 2017 Slip and Fall

5. Claimant fell down some stairs on March 6, 2017. At the time she fell, Claimant was employed with AT&T as a Customer Service Representative. Claimant's primary duties included taking inbound calls, helping customers resolve billing questions and upselling Direct TV internet service.

6. Claimant testified that on the date she fell, she and a co-worker had decided to go to lunch off premises. Claimant exited the building and proceeded to descend a flight of stairs when she fell onto her outstretched hands/arms. According to Claimant's testimony, she made it down about five of the approximately seventeen concrete stairs in the font of the building when she "noticed that [her] left foot slipped and [she] was falling". She landed on her outstretched hands at the bottom of the steps and was assisted off the ground by building security. According to Claimant, there was nothing on the stairs[2] and they were not icy or slick.

7. Claimant testified after falling she lay on the ground for a "minute or two" during which time she did not see any "bones protruding out of her jacket". Consequently, after the security guard helped her to her feet, she and her friend proceeded to lunch.

8. Following lunch, Claimant returned to work and informed Liz Archuleta, her supervisor that she had fallen down the stairs. Claimant took some over-the-counter pain medication and returned to work. She was able to finish her shift and return home for the evening.

[1] See the February 18, 2016 report from Arkansas Valley Regional Medical Center.
[2] See Claimant's recorded statement, Exhibit D, page 14, lines 573-574.

9. Claimant sought medical treatment on the morning of March 7, 2017 with her family nurse practitioner (N.P.), Rebecca Walters. At hearing, Claimant testified that she sought treatment that morning because she was unable to raise her arms to wash her hair or perform basic hygiene, and because her arms were significantly swollen beyond their normal size. Claimant's initial complaints included bilateral wrist and elbow pain, numbness and tingling in bilateral wrists and elbows, and generalized muscle soreness and pain. N.P. Walters advised that x-rays would be ordered if Claimant's condition did not improve within 4 or 5 days.

10. X-rays were performed on March 30, 2017 and revealed minimally displaced radial neck fractures. On April 4, 2017, N.P. Walters referred Claimant to Dr. Farnworth, the same orthopedist who was treating her knees, due to ongoing right hand weakness and bilateral elbow, wrist, and hand pain. N.P. Walters suspected that Claimant suffered from radial head fractures as evidenced by her continued elbow pain when reaching behind herself.

11. Dr. Farnworth examined Claimant on April 21, 2017. He confirmed that she suffered from minimally displaced right and left radial neck fractures. Dr. Farnworth referred Claimant for physical therapy which she attended with some improvement in her symptoms as a result.

12. Claimant testified that she missed two weeks of work on the orders of Dr. Farnworth. However, she did not provide exact dates for the days she missed from work. Claimant's interrogatory responses indicate that she missed work from March 7 to March 14, 2017 due to the injuries she sustained in her fall.

III. Claimant's Recorded Statement

13. On March 8, 2017, two days after her fall, Claimant provided a recorded statement to the claims adjuster investigating the claim.

14. When questioned about her health status, Claimant stated that she had a balance issue with her right leg. Claimant stated that after she completed the treatment associated with her compartmental syndrome, she was informed her balance would be "80 to 90 percent" of what it had been. Claimant acknowledged during her statement that the balance issue with her right leg had been an ongoing problem for the past four years. She also noted that her balance deficit would be a "lifelong thing." The ALJ finds that this comports with the content of the March 4, 2016 medical record from Arkansas Valley Regional Medical Center wherein Claimant was told that her right leg would never again be 100% normal.

15. During her recorded statement, Claimant stated that sometimes her nerves acted up, which caused her to have she good days and bad days and that on "bad days" she would have to use a cane to ambulate. The ALJ interprets this statement to indicate that the nerves in her right leg would cause symptoms resulting in Claimant's need to use a cane as an assistive device to walk. Based upon the evidence presented, the ALJ finds that Claimant's unwillingness to put pressure on her right leg is

a probable consequence of the residual effects of her prior compartmental bleed. Claimant also confirmed that she had to utilize a handicap sticker because of her ongoing conditions.

16. In her recorded statement, Claimant stated that due to her balance issues, when she went down stairs, she typically hung onto the railings and she would "side-step all the way down". She also admitted in the recorded statement that she was not paying attention and that she was "preoccupied with other thoughts" as she was descending the stairs. Finally, Claimant stated that the wind was "whipping"[3] and because of her "balance issue", she "just lost her balance and, um went flying down the stairs". Contrary to the assertion espoused in Claimant's position statement, the recorded statement does not indicate that Claimant endorsed high wind as the proximate cause of her fall. To the contrary, the ALJ finds from the content of the recorded statement that only after the claims adjuster expressed that the claim may not be compensable due to her pre-existing balance issues did Claimant assert that she fell due to a combination of her balance issue and the wind (emphasis added). Prior to this, Claimant's recorded statement indicates that her pre-existing balance problem was the root cause of her fall.

17. Claimant subsequently attended an Independent Medical Examination with Dr. Timothy Hall on September 14, 2017. Dr. Hall performed a physical exam, took a patient history, and reviewed the records associated with Claimant's treatment. Dr. Hall confirmed that Claimant's injuries stemmed from her March 6, 2017 fall, and suggested that her symptoms were not from her radial fractures but from traumatic bilateral epicondylitis associated with bracing her fall with her outstretched arms. Dr. Hall recommended continuing treatment to address this diagnosis.

18. Based upon the evidence presented, including the medical records submitted and Claimant's recorded statement, the ALJ finds that Claimant continues to suffer from residual effects caused by her 2014 DVT/compartmental bleed and the ongoing symptoms associated with significant bilateral arthritis in her knees which impact both her balance and ability to ascend and descend stairs.

IV. Claimant's Hearing Testimony

19. At hearing, Claimant testified that she no longer had any ongoing medical issues from her 2014 DVT condition. Moreover, when questioned directly about the current state of her health, Claimant categorically denied any such issues. Specifically, Claimant testified as follows:

> Q: Do you have any ongoing issues with balance?
> A: No.
> …
> Q: Are you typically able to go up and down stairs without difficulty?
> A: Right.

[3] According to Claimant the wind was blowing approximately 40 miles per hour.

…
Q: Any particular difficulties balancing or walking?
A: No.

20. Claimant's testimony is inconsistent with her prior statement given to the claims adjuster on March 8, 2017. In her own words shortly after this incident, Claimant provided a full description of the effects that her prior DVT and subsequent compartmental bleed had on her balance and ability to walk. She portrayed the residual deficits caused by the compartmental bleed as significant, noting that her nerves would act up requiring her to use a cane to walk and noting further that at full recovery her balance would be 80%-90% of pre-DVT/compartment bleed status. Moreover, she characterized her balance deficit as being a "lifelong thing". During her recorded statement, Claimant suggested that she was still impaired and even attributed her fall to her ongoing balance issues. These statements are supported by the content of the medical records admitted into evidence. Claimant's subsequent testimony that she had no such balance/ambulation issues directly contradicts her statements that she made two days after the injury, when she was not aware that her claim might be denied because her pre-existing balance issues caused her fall. The ALJ finds Claimant's recorded statements and the medical records regarding her ongoing balance/ambulation deficits and the condition of her knees more persuasive and reliable than her subsequent hearing testimony.

21. Claimant also testified that she did not take any special precautions with stairs other than watching where she was going and being cautious. Claimant denied that she typically had to side-step down stairs while holding the railing. In fact, Claimant testified that she did not even know what this meant. Again, Claimant's testimony contradicts the statements she made during the course of her recorded statement. In her recorded statement, Claimant provided a detailed account of how she typically descended stairs, which included hanging onto the rail and "side [stepping] it all the way down". Consequently, the ALJ finds Claimants purported ignorance as to what "sidestepping" meant incredible.

22. Finally, Claimant testified that she did not use a cane and she had not used a cane since 2014. However, in her recorded statement, Claimant conceded that on "bad days" she still utilized a cane to walk. Furthermore, the February 2, 2017 medical report from Arkansas Valley Regional Medical Centers indicates that as a result of Claimant's DVT and subsequent bleed, she "sometimes . . . has to use her cane to get around". Given the balance of the competing evidence, the ALJ finds Claimant's testimony that she had not used a cane since 2014 unpersuasive.

CONCLUSIONS OF LAW

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

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. While the ALJ is convinced that Claimant sustained significant injuries as a consequence of her slip and fall, the cause of her fall is the primary issue for resolution in this case. As found, Claimant's testimony regarding the cause of her fall is generally inconsistent with her prior recorded statement and the content of the medical records admitted into evidence. As noted, the ALJ concludes that the statements Claimant made two days after the event but before being made aware that the claim might be denied due to a concern that the injury was precipitated by a pre-existing condition are the most reliable statements concerning the cause of the fall in this case. Given the inconsistency between Claimant's testimony and balance of the competing evidence, the ALJ finds Claimant's testimony concerning the cause of her fall unpersuasive and unreliable.

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

Compensability

D. Under the Workers' Compensation Act, an injured employee is entitled to

compensation where the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Based upon the evidence presented, the ALJ finds that Respondents are not contending that Claimant's alleged injury did not occur in the course of her employment. Rather, the undersigned understands Respondents contention to be that Claimant's asserted injury did not "arise out" of her employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.*

F. In C*ity of Brighton and Cirsa v. Rodriguez,* 318 P.2d 496, 502 (Colo. 2014), the Colorado Supreme Court set forth the following three categories of risks that cause injury to employees when it addressed the question of whether a fall down a flight of stairs was compensable: (1) employment risks which are directly tied to the work itself; (2) risks which are inherently personal or private to the employee; and (3) neutral risks that are neither employment-related, nor personal. *Id.* at 503.

G. Under the first category, a slip and fall at work is "typically…only attributable to an employment-related risk if it results from tripping on a defect or falling on an uneven or slippery surface on an employer's premises." *Id.* at 501, quoting from *In re Margeson*, 162 N.H. 273, 27 A.3d 663, 667 (2011). Based upon the evidence presented, the ALJ concludes that the record fails to support a finding that an employment-related risk caused Claimant's fall. To the contrary, the overwhelming evidence demonstrates that the stairs were clean, dry and otherwise free from defects or other hazardous conditions at the time of Claimant's fall.

H. The third category includes injuries caused by "neutral risks." *City of Brighton*, *supra* at 503. Such risks are associated neither with the employment itself nor with the employee. *Id.* at 504. As noted in *City of Brighton*, an injury is compensable under the Act if triggered by a neutral force if that force is not "specifically targeted at a particular employee and would have occurred to any person who happened to be in the position of the injured employee at the time and place in question". *Id.* citing *Horodyskyj*,

32 P.3d at 477. Concerning unexplained falls the Court noted that unexplained falls necessarily stem from neutral risks, that is risks "attributable neither to the employment itself nor to the employee him or herself." (318 P. 3d 500) The Court went on to explain that "[u]nder our longstanding 'but-for' test, such an unexplained fall 'arises out of' employment if the fall would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where he or she was injured." *City of Brighton* and *Cirsa v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Here, the evidence presented persuades the ALJ that the cause of Claimant's fall is not unexplained nor is it due to a "neutral risk", i.e. wind that blew claimant from the stairs and would have caused injury to any person who happened to be in the position of Claimant at the time and place in question. To the contrary, Claimant herself attributed her fall to a long-standing balance deficit caused by a pre-existing right leg condition rather than being "blown" from the steps by a gust of wind as she now suggests. Based upon the evidence presented, the ALJ finds/concludes that it is unlikely that Claimant was blown down the stairs by winds gusting to 40 miles per hour. The evidence presented persuades the ALJ that Claimant's fall was, more probably than not, caused by preexisting physical infirmities she brought with her to the workplace. Consequently, further analysis under the second category of risks that cause injury to employees as set forth in the *City of Brighton* case is necessary to determine whether Claimant's injuries are compensable.

I. As noted above, the second category of risks that cause injury to employees addresses risks that are entirely personal or private to the employee. Such risks would include an employee's pre-existing or idiopathic condition that is completely unrelated to her employment. Injuries precipitated by pre-existing conditions brought to the workplace are generally not compensable unless an exception applies. *Id.* at 503. As found here, Claimant admitted during her recorded statement that she suffered from ongoing balance issues as a result of her 2014 compartmental bleed and that as a consequence her nerves "act" up occasionally. Moreover the medical record evidence supports a finding that Claimant has significant bilateral arthritis in her knees which affects her strength and ability to ascend and descend stairs. A reasonable interpretation of the recorded statement and the medical records presented supports the ALJ's conclusion that Claimant's pre-existing balance problems along with the condition of her knees likely precipitated her fall from the stairs. Consequently, the ALJ finds/concludes that Claimant's fall and subsequent injuries would not be compensable, unless an exception to the rule that injuries caused by such pre-existing maladies are not compensable applies.

H. One exception is when a pre-existing or idiopathic condition precipitates an accident and combines with a hazardous condition of employment to cause an injury. Referred to as the "special hazard rule", the Colorado Court of Appeals held that a claimant may be compensated if a preexisting injury, infirmity, or disease is exacerbated by "the concurrence of a pre-existing weakness and a hazard of employment." *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989); *Gates Rubber Co. v. Industrial Comm'n.*, 705 P.2d 6, 7 (Colo. App. 1985). The rationale for this rule is that unless a special hazard of employment increases the risk or extent of injury, an injury due to the

claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of the employment. *Gates Rubber Co. V. Industrial Commission, supra; Gaskins v. Golden Automotive Group, L.L.C.,* W.C. No. 4-374-591 (August 6, 1999). In such cases, the existence of a special hazard, which elevates the probability of injury or the extent of the injury incurred, serves to establish the required causal relationship between the employment and the injury. *See Ramsdell v. Horn, supra.*

J. In order to be considered a special hazard, the employment condition cannot be a ubiquitous one; it must be a special hazard not generally encountered. *Id.* The rationale for this exception is that unless a special hazard of employment increases the risk or extent of injury, an injury due to a claimant's personal or idiopathic condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Gates, supra* at 7. Courts have previously held that hard level concrete floors, concrete stairs, and a sidewalk curb are not special hazards of employment. *Id.; Alexander v. ICAO*, No. 14CA2122 (Colo.App. June 4, 2015); *Gaskins v. Golden Automotive Group, LLC*, W.C. No. 4-374-591 (ICAO Aug. 6, 2009). Here, Claimant did not testify that any particular flaw in the stairs caused her to fall injuring her wrists/arms. As presented, the stairs Claimant was descending were not a special hazard of employment but rather a ubiquitous condition which she could have encountered off the job. Because Claimant's fall and subsequent injuries were precipitated by her pre-existing balance deficit and the osteoarthritis in her knees rather than the wind as a neutral risk, the ALJ concludes that Claimant bore the burden to establish that there was a concurrence of a pre-existing weakness and a hazard of employment to result in a compensable work injury. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); See *also Ramsdell v. Horn*, *supra.* Claimant failed to carry that burden in this case. Accordingly, her claims must be denied and dismissed.

ORDER

It is therefore ordered that:

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

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

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

DATED: December 14, 2017

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-041-216-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 5, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 12/5/17, Courtroom 1, beginning at 8:30 AM, and ending at 9:30 AM). No testimony was taken. Oral arguments were made.

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

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The Claimant filed a proposed decision on December 12, 2017. Respondents were given two working days, or until the close of business on December 14, 2017, within which to file objections to the proposal. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision is whether the Claimant is entitled to a Division Independent Medical Examination in the absence of any admission

or determination concerning indemnity benefits. Because the Claimant's counsel made a judicial admission that the Claimant was not indigent and the Claimant would be paying for the DIME, any determination of the issue would be interlocutory.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

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

1. The Claimant sustained an admitted compensable injury (within the definition of "sufficiency to be compensable") arising out of the course and scope of her employment on February 16, 2017.

2. The Claimant underwent significant medical treatment at the hands of Henry J. Roth, M.D. (Claimant's Exhibit 7), who was the Claimant's authorized treating physician (ATP). Dr. Roth diagnosed "a whiplash like response involving cervical, thoracic, and lumbar regions, primarily right-sided" (Claimant's Exhibit 7), occurring on February 16, 2017. He released the Claimant to full time work, effective February 21, 2017, with restrictions of "no patient turning, transfers, transport, or boosting." These restrictions continued until May 3, 2017. On May 24, 2017, Dr. Roth gave the Claimant a full release to work, and declared her to be at maximum medical improvement (MMI) with no residual impairment. Dr. Roth was of the opinion that the Claimant's condition was work-related.

3. First, the Respondents filed a General Admission of Liability (GAL) on May 1, 2017. Under the section "Liability is admitted for the following benefits, the box was checked, marking "medical benefits." No other box in that section was checked. In the "remarks" section, Respondents wrote "medical only claim with no lost time….Not at MMI/no PPD owed" (Claimant's Exhibit 1). The ALJ infers and finds that statement "Not at MMI/no PPD owed" a "rush to judgment before a Final Admission of Liability (FAL) was ripe.

4. Next, based on Dr. Roth's opinions, the Respondents ultimately filed an FAL, dated June 15, 2017 (Claimant's Exhibit 2), admitting for an MMI dated of May 24, 2017 and zero permanent partial disability (PPD). There have been no admissions for temporary disability benefits.

5. The Claimant filed a timely objection to the FAL and a Notice and Proposal to Select a DIME.

6. On July 12, 2017, Respondents requested a pre-hearing conference where both attorneys appeared by telephone.

7. A pre-hearing conference was held on July 31, 2017, before Pre-Hearing ALJ (PALJ) Thomas J. DeMarino. Based on the Industrial Claim Appeals Office Order in *Trujillo v. Elwood Staffing,* W.C. No. 4-957-118-02 [Indus. Claim Appeals Office(ICAO), June 22, 2017], PALJ DeMarino granted Respondents' motion to strike the Claimant's Notice and Proposal, articulating the fact that ATP Henry J. Roth, M.D., found zero PPD. This determination will be further discussed in detail herein below under "Conclusions of Law."

8. Thereafter, the Claimant applied for a hearing before the Office of Administrative Courts (OAC) on the issue of whether the Claimant is entitled to a DIME, under the holding in *Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003).. The hearing was held on December 5, 2017, with no testimony taken –only oral arguments of counsel. Also, Respondents filed a written "Trial Brief Regarding Claimant's Lack of Entitlement to a DIME," which was considered herein.

RESPONDENTS' ARGUMENTS

In a nutshell, Respondents orally argued that its admissions of liability are, essentially, nullities because the case does not involve a compensable "indemnity" claim. This Respondents incorrectly analogize the circumstances in this case to the established law that an employer may pay an injured worker's medical benefits without admitting or denying liability. *See* § 8-43-101, C.R.S. Reading the statutory section *in pari materia,* it is clear that an employer/insurance carrier can pay for an injured worker's medical benefits without taking a position admitting or denying compensability. The underlying purpose of this provision is to encourage the payment of medical bills by an employer without the employer committing to a position on liability. The ALJ concludes that this analogy is misplaced because the Respondents filed **admissions** concerning medical benefits and an FAL for zero PPD. *Black's Law Dictionary,* 10th Ed., defines "admission" as "an acknowledgement that facts are true." In this case, an admission of **liability** is an admission that the fact of liability is true, *i.e.* that the Respondents accept liability for a compensable injury resulting in the need for authorized medical treatment. An **admission of liability** in workers' compensation law is legally binding unless set aside in an adjudicatory proceeding. The ALJ soundly rejects the Respondents analogy to paying medical benefits without admitting or denying liability.

Respondents mechanistically rely of Workers' Compensation Rules of Procedure (WCRP), Rule 5-5 (E) (1) (a) [Trial Brief, p. 2, par. 5], which states"…within 30 days after the date of mailing or delivery of a determination by an authorized treating physician providing primary care that there is **no** (emphasis supplied) impairment, the insurer shall either: (a) file an admission of liability consistent with the physician's

opinion, or ()b) Request a Division Independent Medical Examination (IME) in accordance with…." The ALJ infers and concludes that Respondents must having been laboring under a scotoma (blind spot) with respect to the full import of this rule, which mandates a DIME request if no final admission is filed. Indeed, to accept the respondents' argument in this regard would be to interpret that only respondents, **and not claimants,** could obtain a DIME when there is zero PPD. Such an interpretation would do violence to the plain meaning of the rule.

Respondents, as did PALJ DeMarino in striking the Claimant's request for a DIME, rely heavily on ICAO's Order in *Trujillo v. Elwood Staffing,* W.C. 4-957-118-02 (ICAO, June 22, 2017). *Trujillo* is part of the progeny of *Harman-Bergstedt, Inc. v.* Lo*ofbourrow*, 320 P.3d 327 (Colo. 2014), which applied very narrow, fact specific principles, without establishing a sweeping precedent. *Trujillo* determined that MMI is a term of art, and has no legal significance in a case with no indemnity benefits payable. This makes implicit sense because MMI is the demarcation line between temporary and permanent disability indemnity benefits. In *Loofbourrow* by extension, an FAL is not effective to close a case as to further medical benefits. The Court stated that a claimant could still seek further medical benefits, with the burden of proof as to reasonableness and causal relatedness on the claimant. The holding of the case is that a petition to reopen need not be filed under §8-43-303, if the claimant should seek further medical benefits. The case sets no precedent as to any broader meaning than in the context of reopening for medical benefits, and it does not specify what type of medical benefits it is meant to address (*i.e*. *Grover* or pre-MMI substantive treatment). To accept the Respondents argument that the FAL, admitting for zero PPD is a nullity, would overturn the reasonable expectations of the community of injured workers who received a perfunctory zero impairment rating. It would undermine the DIME process whereby the ATP's opinion of zero PPD would be the end of the line and not subject to challenge.

CONCLUSIONS OF LAW

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

COMPENSABILITY

a. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. A priori, **the consequences of a work-related incident must require medical treatment or be disabling** in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, by admissions of the Respondents and the

medical evidence, the Claimant sustained compensable injuries on February 16, 2017, arising out of the course and scope of her employment.

CLAIMANT'S ENTITLEMENT TO A DIME

Rule 5-5 (E) (1) (a) of the WCRP

b. Rule 5-5 (E) (1) (a), WCRP, allows for a DIME when an ATP rates PPD at zero.

Trujillo v. Elwood Staffing, W.C. 4-957-118-02 (ICAO, June 22, 2017)

c. This case, which was relied upon by PALJ DeMarino in striking the Claimant's request for a DIME at the pre-hearing conference, is part of the progeny of *Loofbourrow*, *supra*. The Supreme Court held in *Loofbourrow* that MMI is a term of art, and has no legal significance a case with no indemnity payable. By extension, a FAL is not effective to close a case as to further medical benefits. This makes implicit sense because MMI is the demarcation line between temporary and permanent disability indemnity benefits. The Court stated that the claimant could still seek further medical benefits, with the burden of proof as to reasonableness and causal relatedness on the claimant. The holding in the case is that a petition to reopen need not be filed under §8-43-303, C.R.S., if the claimant should seek further medical benefits. The case sets no precedent as to any broader meaning than in the context of reopening for medical benefits, and it doesn't specify what type of medical benefits it is meant to address (i.e. Grover or pre-MMI substantive treatment).

d. Additionally, *Trujillo* continues down the path of *Kazazian v. Vail Resorts*, W.C. No. 4-915-969-03 (ICAO, April 24, 2017), in that there is no statutory consequence of MMI unless there is an injury for which disability is payable. ICAO reasoned, "In Loofbourrow, the Court held that a determination of MMI has no statutory significance with injuries that do not result in the loss of no more than three days or shifts of work time or permanent disability, as is the case in this action…." See, *Trujillo v. Elwood Staffing*, *supra.* As stated, extending the *Loofbourrow* case this far was not the Supreme Court's intent. The "unique" circumstances of *Loofbourrow* are distinguishable from both this *Trujillo* case, as well as the present case decided herein. Moreover, this *Trujillo* case involves the limited issues of medical **benefits after a DIME had already occurred.** It is clearly distinguishable on these grounds as well. The case does not stand for the fact that the DIME should never have occurred, or that §8-42-107.2(a)(1)(A) does not apply in these instances. Stretching the rationales of these cases to the present case is an interesting gymnastic devoid of merit as applied herein.

[T]he General Assembly created the DIME System within the Statutory Scheme because of the Potential for Treating Physicians to be Biased

e. The logical result of the Respondents' argument is that if an ATP is allowed to determine whether or not a DIME should occur (if a zero PPD is assessed, there is no right to a DIME), is that it runs afoul of the decision in *Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). *Whiteside* stands for the notion that the worker is giving up a lot of common law rights within the Colorado workers' compensation system, and therefore access to the system—including the DIME process—is a substantive due process right. The *Whiteside* Court stated unequivocally that the "substantive right to workers' compensation is a constitutionally protected property interest." Generally, this is true concerning the right to challenge an ATP's zero PPD rating. If not challenged through the DIME process, the ATP's zero PPD rating is final and "supreme." To argue the a request for a DIME is not yet ripe creates a logical fallacy, whereby any challenge or rating other than the ATP's zero PPD rating will, most likely never be ripe unless there's a worsening of condition. There is a missing link in such a notion, *i.e.,* the present right to challenge an ATP's zero PPD rating.

Harman-Bergstedt, Inc. v. Loofbourrow, 320 P.3d 327 (Colo. 2014)

f. The *Loofbourrow* case is distinguishable from the present case. In *Loofbourrow* there *was no* FAL filed. It is clear error to extend this holding to the conclusion that there can be no DIME without a TTD payment. It is a stretched connection, beyond the bounds of reason, with such overwhelming, key distinguishing facts.

g. The Respondents argue that a DIME should not be granted in the absence of PPD or TTD award. The argument relies squarely on the holding in the *Loofbourrow* case and its ICAO progeny. The *Loofbourrow* case did not involve a FAL. The filing of an FAL triggers a claimant's duty to request a DIME. *See*, § 8-42-107.2(a)(1)(A), C.R.S. The only legal remedy for a claimant (or respondent) who disagrees with an ATP's MMI determination is to request a DIME. Thus, the *Loofbourrow* decision does not apply in this instance given the clear factual incongruence. There is also the issue of **due process**, which will be discussed *infra*. In fact, many cases would not be factually similar to *Loofbourrow*, as that case involved "unique circumstances." See, *Harman-Bergstedt, Inc. v. Loofbourrow*, *supra*. For the Respondents' arguments to prevail, *Loofbourrow* must be read in such a way that it tortures the facts and looks nothing like the decision itself. The *Loofborrouw* holding is very narrow and limited. Its progeny have gone far out of bounds. The *Loofbourrow* decision itself concedes how unique the factual situation was. It does not apply to a situation in which an FAL is part of the procedural history (there was no FAL in *Loofbourrow*, *supra*).

h. The *Loofbourrow* Court refers to the "unique circumstances of that case. *See, Harman-Bergstedt, Inc. v. Loofbourrow*, *supra*. Further, the Supreme Court stated: "The **sole** (emphasis supplied) issue before this court is whether Loofbourrow could be entitled to an award of temporary disability benefits without having challenged, by means of a division-sponsored independent medical examination, the initial treating physician's assessment that she had reached maximum medical improvement. The intermediate appellate court found that**, under the unique circumstances of this case,** including particularly her claim of a worsening condition and the **absence of a final admission of liability…**" [emphasis supplied], *Id*. If the Respondents use *Loofbourrow* to skirt the due process import of *Whiteside v. Smith, supra,* they do so in a "circular" way. Specifically, they implicitly argue that the Claimant never had a right to the DIME in the first place. The ALJ concludes that this circuitous argument is a stretch beyond the bounds of reason and without merit.

Setting Aside Pre-Hearing Order Striking DIME

i. The orders of a PALJ are not final for purposes of an appeal. *See Indus. Claim Appeals Office v. Orth,* 965 P.2d 1246 (Colo. 1998). As found and concluded, PALJ DeMarino's pre-hearing conference order misplaced a reliance on ICAO's Order in *Trujillo, supra.* For the reasons articulated herein above, the pre-hearing conference order was in error and should be set aside.

Burden of Proof

j. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992), and it is by a "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden that she is entitled to a DIME to challenge ATP Dr. Roth's zero PPD rating.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant is entitled to a Division Independent Medical Examination (DIME) at her own expense.

B. The DIME process shall proceed forthwith. PALJ DeMarino's Pre-Hearing Conference Order is hereby set aside.

C. This order is procedural and interlocutory because it does not award any benefits. Therefore, any and all issues not determined herein are reserved for future decision.

DATED this_____day of December 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of February 2015, electronically in PDF format, addressed to:

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

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-991-359-07

ISSUES

- Whether the Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Dr. Dwight Leggett that the Claimant reached maximum medical improvement on March 24, 2015 and has no ratable impairment from his February 22, 2015 industrial injury.

- If the Claimant is entitled to medical impairment benefits, the average weekly wage that would be applied to the benefit calculation.

- Whether the Claimant is entitled to maintenance medical care.

STIPULATIONS

In the last Final Admission of Liability filed April 4, 2016, Respondents admitted for maintenance medical treatment per the DIME report from Dr. Leggett dated January 19, 2016. Claimant accepted that submission regarding maintenance medical care.

FINDINGS OF FACT

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

1. On February 22, 2015, Claimant suffered an admitted work-related injury while working as an attendant at Employer's convenience store.

2. Claimant fell from a free-step ladder and experienced pain in his lower back on his left side. This occurred at approximately 9:00 p.m. and Claimant worked until his shift ended approximately one hour later.

3. Claimant was sore the next morning. He called Employer who sent him to Concentra the next day. Dr. Rosalinde Pineiro at Concentra in Fort Collins treated Claimant.

4. At the initial visit, Claimant completed a patient information form indicating that his injury was limited to his lower back. He also completed a pain diagram circling the lower back indicating that he had pins and needles symptoms in that area.

5. Dr. Pineiro's February 23, 2015, report noted Claimant's complaints of the following on physical examination: muscle pain, back pain, joint stiffness, muscle weakness, limping and night pain. Claimant did not report no joint pain, neck pain, or joint swelling. On examination, Dr. Pineiro found Claimant's head and face to be atraumatic with no tenderness. She found a normal gait and no tenderness or swelling of the extremities. Dr. Pineiro noted Claimant's range of motion to be within normal

limits as was muscle strength and tone.[1] She noted tenderness in the right shoulder AC joint. There was also some tenderness in the right upper arm. The left shoulder was abnormal due to polio. The right hip showed no tenderness except in the gluteus maximus, minimus, greater trochanter and bursa. The lumbar spine appeared normal with some tenderness and bilateral muscle spasm.

6. Dr. Pineiro x-rayed Claimant's spine during his February 23, 2015 visit. It showed no fracture or subluxation. The disc spaces and heights of Claimant's vertebral bodies were relatively preserved, the spinal rods placed due to Claimant's polio as a child were noted.

7. Dr. Pineiro released the Claimant to return to modified duty as of that date. Claimant returned to work within the restrictions. Claimant did not miss sufficient time to receive temporary total disability benefits.

8. On February 25, 2015, Claimant returned to Dr. Pineiro. She noted that Claimant was working within her restrictions and tolerating the work. However, Claimant had difficulty changing positions, sitting, and placing weight on his right buttock. Dr. Pineiro referred Claimant to physical therapy two to three times a week for four weeks. She continued his work restrictions.

9. Claimant participated in physical therapy with Concentra from February 26, 2015 through March 17, 2015.

10. On March 10, 2015, Claimant reported to Dr. Pineiro that he was improving and could perform his regular job duties. He was motivated to return to full duty at least in part by Employer's ability to employ him only part-time at restricted duty and his thereby becoming ineligible for health insurance benefits. She placed him at regular duty and advised him to report if he did not tolerate it. Dr. Pineiro continued Claimant's physical therapy and refilled his Tylenol No. 3 prescription.

11. Claimant's final visit to Dr. Pineiro was on March 24, 2015. He had been back at regular duty for two weeks. He reported mild back pain and that his symptoms were continuing to improve. He had no abdominal pain, back stiffness, lower extremity numbness, paresthesia, or weakness by history. On examination Dr. Pineiro found Claimant had a normal gait, no tenderness or swelling of his extremities, a range of motion within normal limits and normal muscle strength and tone. Claimant's thoracic and lumbar spine showed no tenderness. Dr. Pineiro noted that Claimant had polio as a child which led to back deformity.

12. On March 24, 2015, Dr. Pineiro released Claimant at maximum medical improvement (MMI) without restrictions. She provided no permanent impairment rating. She continued his home exercise program.

[1] As a result of childhood polio, Claimant had metal rods placed along his spine from T2 through T9, and exhibits extreme scoliosis. Dr. Pineiro did not explain how Claimant's range of motion could be described as normal given those conditions.

13. On September 11, 2015, Respondents filed a Final Admission of Liability regarding Dr. Pineiro's release. Respondents admitted for zero whole person impairment and no maintenance medical treatment.

14. Claimant requested a Division IME which Dr. Leggett performed on January 19, 2016. According to the DIME report, Claimant listed for consideration review of his lumbar spine, thoracic spine, and cervical spine; evaluation for a closed head injury, and any other body parts or conditions related or associated to the injury such as psychiatric, if appropriate. Claimant also requested review of his placement at MMI.

15. At his DIME, Claimant reported multiple areas of pain generation. The primary area concerned Claimant's low back greater on the right than left. This is inconsistent with the pain questionnaire Claimant filled out when placed at MMI when he indicated that his pain 1 on a scale of 1 to 10, with pins and needles pain on his left side. Claimant also complained at the DIME that he had pain traveling down his left leg and into his toe as well as down the right leg into the calf and bottom of his foot. Claimant complained of right elbow pain and snapping in his left knee. Claimant further reported pain coming from his bilateral shoulder blades, a large amount of tenderness and tension in that area which traveled to the base of his neck creating severe headaches. He reported hypersensitivity with any sort of touch over the top and side of his head. Finally, he mentioned cyclic emotional changes at times.

16. Despite all these pain complaints, Claimant acknowledged that he had not sought treatment through the authorized provider subsequent to his discharge, either before the DIME or thereafter, up to the date of the hearing.

17. Claimant disclosed his medical history to Dr. Leggett, including polio affecting his back, lower extremities and left upper extremity. Claimant has severe scoliosis from the polio. He underwent Harrington rod placement from T2 through T9. He also reported a left shoulder arthrodesis, left pronator release and tendon transfer.

18. Claimant continued to work full duty for Employer subsequent to being placed at MMI. Wage records show that Claimant worked more hours after being placed MMI until he left Employer than he had worked prior to the date of injury. Claimant left Employer in June, 2015. He subsequently became employed by another convenience store/gas station in the Fort Collins area and continued to work in that position up to the date of hearing. Claimant works fulltime for similar pay and with job duties similar to those he had at Employer.

19. On examination, Dr. Leggett deferred range of motion measurements in the thoracic spine due to clear limitation caused by the Harrington rods placed in his thoracic spine. Dr. Leggett noted Claimant's altered low back anatomy which caused difficultly in palpating Claimant's thoracic facet joints. Claimant's unique anatomy caused Dr. Leggett to be unable to stabilize Claimant's positioning well enough to obtain a meaningful straight leg test which voided the validity testing.

20. Despite repeated testing and repositioning throughout the examination, Dr. Leggett was unable to produce any paresthesia on examination. After performing his physical examination and reviewing Claimant's medical records, Dr. Leggett determined that the work-related treatment which had targeted Claimant's thoracic and lumbar region appeared to be appropriate. He then addressed the various areas Claimant had requested in the DIME Application. Dr. Leggett indicated that he was unable to find any records supporting an injury to Claimant's head or neck region and that Claimant's initial evaluation showed multiple findings and history that would be inconsistent with a cervical injury.

21. Dr. Leggett found no supporting information to identify a closed head injury and therefore did not relate one to the claim. He found no knee injury or treatment as part of the claim. As to psychological issues, Dr. Leggett found no psychological impairment.

22. Dr. Leggett agreed with Dr. Pineiro that the Claimant reached MMI on March 24, 2015. Dr. Leggett recommended a maintenance program to maintain MMI. Based on Dr. Leggett's report, Respondents filed the last Final Admission of Liability on April 4, 2016. In that Admission, Respondents admitted for zero permanent whole person impairment and maintenance medical benefits per the DIME report.

23. In his initial report, Dr. Leggett found Claimant's loss of range of motion to be 19% whole person. However, Dr. Leggett did not diagnose a specific disorder as required by Table 53 of the AMA Guides. Dr. Leggett apportioned the range of motion measurement attributing 75% to the pre-existing polio and 25% to Claimant's work injury. Thus, Dr. Leggett gave Claimant a 5% whole person impairment rating.

24. The Division of Workers' Compensation DIME unit wrote to Dr. Leggett on February 5, 2016, informing him that he needed to address the Table 53 issue and apportionment if he applied it.

25. Dr. Leggett responded with a final report dated February 16, 2016. Dr. Leggett indicated that upon further review of the AMA Guides, he realized a Table 53 diagnosis must be given in order to give a range of motion impairment rating. Dr. Leggett stated that given Claimant's history of pre-existing polio, he was unable to adequately assign any of the specific disorders identified in Table 53 to the work injury. Absent a Table 53 rating, no range of motion impairment can be given. Claimant's overall impairment rating was assigned at zero. Apportionment was not applied.

26. In addition to the polio references in the medical records, Claimant provided specific information as to his pre-existing polio diagnosis and its impact. Claimant was diagnosed with polio as a child. He wore a brace on his right leg until the age of 5. He had a body brace from his neck down thereafter. He had severe scoliosis/curvature from the polio. Claimant received treatment from the Shiner's Hospital in Salt Lake City from age 10 through 13. He had back surgery and multiple shoulder surgeries on the left side. He had a plate placed in his left shoulder. He also had work done on his left arm muscles, and on his thumb and fingers.

27. Claimant has worked in multiple positions for grocers and convenience stores since age 18. He has worked as a sacker, checker, attendant, and front desk person. Claimant was able to do the work required for these positions and does not consider himself disabled. However, Claimant admitted that polio did limit his bending, caused him to limp, and limited certain ranges of motion. Claimant continues the same type of work without restrictions.

28. Claimant detailed pain complaints ongoing since March 2015. He discussed them with DIME physician, Dr. Leggett, in January 2016. Claimant admitted that his surgeries left him with pain in his shoulder and back. Dr. Leggett testified by deposition that Claimant had a tremendous amount of shoulder blade pain which Claimant attributed to polio. Claimant acknowledged that obvious changes in his gait and his ability to get on and off the examination table also resulted from polio. On examination, Dr. Leggett noted high levels of muscle tension throughout Claimant's mid-back and several other areas into the scapular region. Dr. Leggett attributed Claimant's muscle spasticity as more likely related to polio than a traumatic injury.

29. Dr. Leggett testified that in addition to discussing polio with Claimant, he reviewed clinical notes from 1983 which documented Claimant's treatment and ongoing symptoms. Dr. Leggett also found that because pre-existing polio is a degenerative disease that leads to musculoskeletal problems, he believed it inappropriate to assign a Table 53 impairment rating.

30. Dr. Leggett testified that the range of motion measurements were probably invalid due to abnormal pelvic positioning from the polio and scoliosis. In order to evaluate range of motion in the low back one has to be able to look at the relation of the motion between the low back and the sacral component. In Claimant's case, he had an abnormal rotation of his hips and tightness in one greater than the other. This made doing straight leg raising painful. Claimant had to assume an outward rotation position in order to perform the testing which invalidated the results. Although Dr. Leggett was able to obtain range of motion measurements of the lumbar spine, those measurements were also impacted by the Claimant's underlying polio.

31. The Division challenged Dr. Leggett's report because he assigned a range of motion impairment rating without providing a Table 53 determination. Dr. Leggett responded by making calls to the workers' compensation board and further reviewing the AMA Guidelines. Ultimately, Dr. Leggett determined he was unable to adequately assign any Table 53 disorder to the workers' compensation injury and withdrew the range of motion impairment rating.

32. Dr. Leggett admits Claimant suffered a work-related injury; but attributed, no radicular process to his injury. Also, the majority of Claimant's pain was reproducible soft tissue, and myofascial in nature. Dr. Leggett opined that the significant tightness and rigidity in Claimant's low back related to pre-existing polio.

33. Claimant seeks a higher average weekly wage based on wages paid through the end of his employment. The records do indicate that the Claimant earned

greater wages after maximum medical improvement through the date of his resignation. However, there was no temporary disability or lost time subsequent to Claimant's initial injury or the date of MMI.

CONCLUSIONS OF LAW

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

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

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

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

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

When a DIME physician issues conflicting or ambiguous opinions, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc.,* supra.

Overcoming the DIME

The DIME physician's opinions regarding causality must be overcome by clear and convincing evidence. *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). As a matter of diagnosis, the assessment of impairment requires a rating physician to identify and evaluate all losses and restrictions which result from the industrial injury. *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995); AMA, Guides to the Evaluation of Permanent Impairment ch. 2.1-2.2 (3rd ed. 1990). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). In other words, a DIME physician's findings may be not overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, October 4, 2001).

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

In *Wackenhut Corp.,* the court noted that under the AMA Guides, the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment

rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower*, W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids*, W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

Claimant has failed to produce clear and convincing evidence to overcome Dr. Leggett's Division IME opinion that Claimant suffered no permanent medical impairment as a result of the admitted February 22, 2015 work injury. Dr. Leggett received substantial information regarding Claimant's underlying pre-existing impairment from childhood polio. Dr. Leggett discussed this information with Claimant and reviewed medical records regarding the prior polio related treatment and limitations. On examination, Dr. Leggett noted substantial physical abnormalities and impairment as a result of the polio. Claimant's pre-existing abnormalities and disabilities impacted Claimant's presentation and range of motion measurements. Dr. Leggett was unable to assign a Table 53 impairment rating for Claimant's work related injury.

The parties do not dispute the compensability of Claimant's February 22, 2015 injury. However, they do dispute the nature and extent of Claimant's permanent impairment and whether that impairment was related to the February, 2015 accident. The DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova,* supra. Claimant has not met his burden to overcome the DIME physician's opinion that Claimant, although injured, did not suffer a ratable impairment under the AMA Guidelines. As such, Claimant is not entitled to a range of motion impairment because he failed to establish a ratable impairment.

In *Marquez v. Americold Logistics*, W.C. No. 4-896-504 (ICAO, August 7, 2014) the claimant challenged a zero impairment rating by a DIME physician. The ALJ determined that the claimant failed to overcome the zero impairment rating and the ICAO affirmed the decission. The DIME physician did perform an impairment analysis and determined that the claimant had an overall impairment of 26% of the whole person. But in her opinion, none of the claimant's impairment was causally related to the industrial injury. As such, the doctor opined that the claimant's impairment was related to a pre-existing industrial injury. Apportionment statutes are to be applied only after a rating physician, including the DIME physician, initially determines that the industrial injury caused ratable impairment under the AMA Guides. *Marquez*, supra; C.R.S. § 8-42-104(5)(a) and (b).

It is well established that the DIME physician's opinion on MMI, just as with a medical impairment rating, is binding unless overcome by "clear and convincing" evidence. § 8-42-107(a)(c) C.R.S. 2017. To overcome a DIME physician's opinion, there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt. *Adams*, supra.

In the present case there is no difference in medical opinion regarding whether the Claimant has reached maximum medical improvement. Dr. Pineiro, Claimant's ATP, placed him at MMI in March 2015. Claimant did not seek maintenance care and made no effort to return to the physician for additional care or reopening. The DIME occurred in January of 2016. Dr. Leggett concluded that Claimant remained at MMI after evaluating all of Claimant's complaints. Dr. Leggett also found that the majority of the body parts which Claimant complained about were not included in the claim and did not form the basis of ratable impairment. Claimant has not sought care or treatment from January of 2016 to the present despite the DIME's recommendations and Insurer's admission.

Claimant has failed his burden to overcome, by clear and convincing evidence, the finding of the Division IME physician that Claimant reached MMI as of March 24, 2015.

Medical Maintenance Treatment

Claimant has raised the issue of entitlement to maintenance medical care. In their April 4, 2016, Admission, Respondents admitted for maintenance medical treatment per the DIME report. Maintenance medical treatment may not be conditioned, thus the Admission results in maintenance treatment being open to the extent the requested care is reasonable, necessary, and related to the industrial injury.

As Claimant has not sought specific care, there is no issue to address as to the reasonableness, necessity or relatedness of any treatment but merely a conclusion that the claim remains open pursuant to Admission.

The ALJ need not address the issue of Average Weekly Wage.

ORDER

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

1. Claimant has failed to meet his burden of proving that the DIME physician, Dr. Dwight Leggett, erred in his DIME report on the issue of MMI or lack of permanent medical impairment. Claimant's request to overcome the DIME as to those two issues is denied and dismissed.

2. Claimant is entitled to maintenance medical treatment that is reasonable, necessary and related to the workers' compensation injury pursuant to Respondents' Admission.

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

DATED: December 13, 2017

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on February 25, 2014.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to a general award of reasonable and necessary medical benefits to treat a February 25, 2014 work injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability benefits from February 25, 2014 through March 13, 2014.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from March 14, 2014 and ongoing.

5. Whether Claimant is subject to penalties pursuant to § 8-43-304, C.R.S. and § 8-43-305, C.R.S. for violations of the following rules/statutes: OAC Rule 15; OAC Rule 16(b); W.C.R.P. Rule 9-3(A)(C); § 8-43-102, C.R.S. ; or § 8-43-211(B)(3), C.R.S.

STIPULATIONS

1. The parties stipulated that Claimant's average weekly wage is $409.15.

2. The parties stipulated that if the claim is found compensable, Respondents would be entitled to an offset for Social Security Disability Insurance payments received by Claimant.

PRELIMINARY ISSUES

A Motion to Compel answers to interrogatories was filed by Respondents. An Order compelling Claimant to provide responses to interrogatories was issued on September 11, 2017. Claimant provided responses to interrogatories on September 19, 2017. Question 15 asked for information on whether or not Claimant sought agreement from Respondents prior to cancelling the hearing set for September 19, 2016. Claimant did not answer the question indicating it requested an improper admission and sought information not relevant to issues for hearing. Question 17 asked for legal authority supporting the position that the claim was not closed. Again, Claimant indicated that the question requested information not relevant to hearing.

Although Respondents had almost a month before hearing and although they did not seek a motion for more substantial answers and did not file any motions to compel

more complete answers, the ALJ agrees that the questions sought information relevant to the penalty issue and the closure of claim issue and that the questions were not answered completely. The ALJ thus, at the start of hearing, barred Claimant from presenting any testimony or evidence surrounding the penalties for failing to confer with Respondents prior to cancelling the September 19, 2016 hearing and also barred Claimant from presenting any testimony or evidence surrounding claim closure as a sanction for failing to completely and appropriately respond to discovery. Claimant was allowed to make legal arguments as to the issues but could not offer testimony/evidence as a discovery sanction.

FINDINGS RELATED TO PROCEDURAL HISTORY

This case followed a somewhat circuitous course to the issuance of this Order. An Application for Hearing was initially filed by Claimant on February 25, 2016. A Response to Application for Hearing was filed by Respondents on March 17, 2016. The matter proceeded to hearing before ALJ Felter on June 23, 2016. A post hearing deposition was set to take the testimony of Dr. Roth and was completed on July 11, 2016. At hearing, before ALJ Felter, ALJ Felter indicated that the parties needed to set a continuation hearing in the event of rebuttal. ALJ Felter ordered the parties to complete briefs following the deposition of Dr. Roth and set deadlines of August 9th for Claimant's opening brief, August 18th for Respondent's answer brief, and August 22nd for Claimant's reply brief. ALJ Felter also ordered that the continuation hearing in the event of rebuttal be set for a time after September 1st. The parties went directly to the clerk's window following the June 23, 2016 hearing to clear a continuation hearing date which was set for a half day hearing on September 19, 2016.

Claimant submitted an unopposed motion for extension of time to file his opening brief which was granted. Claimant then filed his opening brief and Respondents submitted their response brief. By August 31, 2016, both briefs had been received by the Office of Administrative Courts. On September 1, 2016 Claimant's attorney submitted a hearing cancellation form to cancel the September 19, 2016 continuation hearing. Claimant's attorney checked that he had had conferred with the opposing party and that they agreed to cancel the hearing and checked the reason for cancellation was "application withdrawn." Respondents did not file any objection or response to the hearing cancellation. After the September 19th hearing was cancelled and in October and November, Claimant's attorney contacted the Office of Administrative Courts to find out if ALJ Felter had issued an order yet in the case. In mid-November of 2016 both Claimant and Respondent were informed by the Office of Administrative Courts that the matter was no longer pending and thus no order would be issued by ALJ Felter because the application had been withdrawn.

On March 28, 2017 Claimant filed a new Application for Hearing on the same issues that were heard by ALJ Felter. Claimant also, on the same date, filed a Motion for Post Hearing Conference with ALJ Felter. Claimant indicted that he had mistakenly marked "application withdrawn" on the hearing cancellation form to cancel the continuation hearing set for rebuttal. Claimant requested that the parties be allowed to schedule a post hearing conference with ALJ Felter to determine the best course of action

for this claim. On April 5, 2017 Respondents filed a Response to Claimant's Request for Status Conference. Respondents indicated their belief that the September 19, 2016 continuation hearing was for both possible rebuttal and for closing arguments. Respondents also pointed out that Claimant did not confer with Respondents prior to filing the hearing cancellation as required by rule. Respondents argued that they had filed a response to the application, and that the application therefore could not be withdrawn without either the agreement of the parties or upon the order of a judge and that neither had happened. Respondents argued that they did not agree to cancel the hearing or withdraw the application.

Respondents, in essence, argued that the application was not withdrawn since there had been no agreement to withdraw it and there had been no Order from a Judge withdrawing it. However, despite this argument, Respondents then took the position that the application should be withdrawn. Respondents argued that the case should be "closed" due to Claimant's mistake in marking application withdrawn without the agreement of both parties and Respondents objected to a post hearing conference. Respondents argued that they would be prejudiced in having to address issues on a matter that was clearly closed. From Claimant's filing, the ALJ finds that Claimant was attempting to notify ALJ Felter that checking "application withdrawn" was an inadvertent error and he was simply seeking to cancel the rebuttal hearing and to have the ALJ issue an Order on the evidence and briefs that had been received. Claimant was not intending to withdraw the application and start anew requiring both sides to re-litigate the same case. However, Respondents argued that because the application was withdrawn by Claimant without Respondents consent and in violation of rule, the application should be ordered withdrawn.

On April 7, 2017 ALJ Felter issued an Order Denying Claimant's Motion for Post-Hearing Conference with ALJ Felter and Upholding Withdrawal of Application for Hearing. ALJ Felter sided with Respondents and ordered that the application in this matter was withdrawn. ALJ Felter noted that Claimant had re-filed an Application for Hearing on the same issues he had heard that could proceed de novo to any ALJ. ALJ Felter ordered that the case that he heard was "closed" because Claimant had filed a withdrawal of the application for hearing without the agreement of Respondents and he denied the request for a post hearing conference.

Neither counsel for Claimant nor counsel for Respondent filed a motion for reconsideration of ALJ Felter's April 7, 2017 Order. Neither attorney informed the Court that the matter was ready for an Order based on the evidence, testimony, and briefs that had been submitted nor did they request a follow up hearing to make closing arguments or to submit the matter for an Order.

FINDINGS OF FACT

1. Claimant was employed by Employer as an inventory clerk. Employer was a sub-contractor for the grocery store chain, King Soopers. Claimant would be assigned to go to various King Soopers stores to count/track inventory.

2. On February 25, 2014 Claimant was at a King Soopers location counting/tracking inventory. Claimant alleges that while bending down on his knees and crouching, he felt a sharp pain in his low back that went down into his right leg.

3. Claimant alleges that he informed his supervisor, Nate Williams, that he was having back pain. Claimant took Motrin for the pain and continued to work the remainder of his shift.

4. On February 26, 2014 Claimant worked his regularly scheduled shift but continued to have back pain. Claimant did not work again until March 5.

5. On March 5, 2014 Claimant was unable to work his entire shift due to back pain and he left early. Claimant was driven home that day by his supervisor Mr. Williams.

6. Claimant took a few days off of work due to his back pain and was scheduled to go on a work inventory road trip on March 9, 2014. Claimant went on the road trip with co-workers and performed his normal inventory duties.

7. On March 12, 2014 Claimant was performing his job duties and was sitting on a step stool. Claimant alleges that he fell backwards off the stepstool and landed on his tailbone. Claimant alleges that his low back pain became excruciating and he did not finish his shift, but waited in the company vehicle for his co-workers to finish inventory.

8. Claimant did not return to work after March 12, 2014. Claimant alleges that he contacted Mr. Williams regarding visiting the doctor for the work injury and was told he would be given information from Employer's owner. Claimant alleges that he did not receive any further calls or communication from Employer. The only contact at Employer that Claimant had was Mr. Williams, and despite calling Mr. Williams on several occasions, Claimant never received a call back. Claimant did not file a report of injury or make any further attempt to file a workers' compensation claim other than calling Mr. Williams.

9. On March 14, 2014 Claimant went to the emergency department of Lutheran Medical Center. Claimant reported low back pain in the right lower lumbar area that radiated down the back of the leg into the foot. Claimant reported that his symptoms started about one week prior and got a lot worse after falling off a stool two days prior. Claimant did not report the alleged crouching incident on February 25, 2014. Claimant reported a history of chronic back pain that was usually well controlled with anti-inflammatories. Claimant was found to have right lower lumbar area tenderness. X-rays of the lumbosacral spine showed no evidence of fracture or acute osseous abnormality, but showed moderate chronic spondylosis at the L5-S1 level with narrowing of the disc space and endplate sclerosis. Mild narrowing of the L4-5 disc space was also present. The impression provided was: no acute fracture or alignment abnormality; and chronic lumbar spondylosis at L4-5 and L5-S1. Claimant was discharged with anti-inflammatories, muscle relaxants, painkillers, and was advised to follow up in outpatient. There was a question of back strain or discopathy. *See* Exhibits 1, Z.

10. On March 21, 2014 Claimant was evaluated at Kaiser. Claimant reported that since the emergency department visit his right leg felt weak. Claimant was assessed with lumbar radiculopathy and the plan was to obtain a lumbar spine MRI. Claimant was referred to physical therapy. *See* Exhibits 2, AA.

11. On April 7, 2014 Claimant underwent physical therapy. Claimant reported a history of back problems with a surgery on L4-5 years ago. Claimant reported that his back pain was worsening starting the middle of last month and then he had even more pain and worsening symptoms after falling off a stool. Claimant did not report the alleged crouching incident on February 25, 2014. *See* Exhibits 2, AA.

12. On April 18, 2014 Claimant underwent physical therapy. Claimant reported that he thought his back was moving better with the exercises but that the pain in his leg was unchanged. *See* Exhibit AA

13. On May 14, 2014 Claimant was evaluated by Oscar Sanchez, M.D. Claimant reported having pain beginning in February after being at work. Claimant did not report the alleged crouching incident on February 25, 2014. No major trauma was reported. It was noted that Claimant had a prior hemilaminectomy on L5 in 2001 for a herniated disc. Claimant reported that over time, his pain got worse and he took time off work which did not help. Claimant also reported that after going on a road trip he felt worse. Dr. Sanchez noted that the recent MRI showed post-surgical changes and hemilaminotomy on L5 and also showed a new disc herniation of the L5 disc with a right-sided protrusion and abutment of the right proximal S1 nerve root. On examination, Claimant had a positive straight leg raise test on the right leg. Dr. Sanchez assessed: lumbo-sacral radiculopathy; L5 disc re-herniation; right leg pain; and history of prior microdiscectomy in the past. Dr. Sanchez noted that Claimant had sub-acute radicular pain and that the MRI showed a recurrent herniation in L5, explaining the leg pain. Dr. Sanchez recommended epidural steroid injections at S1 and L5 and noted that if Claimant did not respond to the injection, Claimant may see a surgeon soon. *See* Exhibits 2, AA.

14. On May 16, 2014 Claimant underwent a right S1 transforaminal epidural steroid injection, spread to the L5-S1 lateral recess. It was noted that the post procedure neurologic exam was identical to the pre procedure neurologic exam. *See* Exhibits 2, AA.

15. On June 18, 2014 Claimant was evaluated by Dr. Sanchez. Claimant reported that he had good anesthetic response to the injection but after a few days, he had worsening of the pain. Dr. Sanchez noted that Claimant had persistence of radicular pain despite conservative efforts and that the injection worked only for a week. Dr. Sanchez noted that Claimant could benefit from surgery and surgeon Mark Melton, M.D. discussed re-operative discectomy with Claimant on the dame date. Dr. Sanchez noted that the goal would be to improve the radicular pain but that Claimant likely may continue with axial low back pain. *See* Exhibits 2, AA.

16. On August 4, 2014 Claimant underwent physical therapy. Claimant reported that in February of 2014 he woke up with increased back pain that progressed to right leg pain and weakness. Claimant reported that there was no injury that caused the pain. It was noted that his MRI showed degenerative disc disease and that he was scheduled for surgery on August 11th. *See* Exhibit AA.

17. On August 15, 2014 Claimant underwent surgery performed by Mark Melton, M.D. Dr. Melton noted a pre and post-operative diagnosis of recurrent right L5-S1 disk herniation. In surgery, Dr. Melton noted that the disk annulus at L5-S1 was visualized and had no frank disk herniation, but had a large disk osteophyte complex which was freed and trimmed. Dr. Melton significantly freed the nerve root and freed the S1 nerve root from the undersurface of the prior disk herniation and disk operation. Dr. Melton took down the osteophytic portions of the prior disk and after freeing the osteophytes and resecting them the nerve was checked along it entirety and was decompressed adequately and completely. *See* Exhibit 1.

18. On August 16, 2014 Claimant was discharged following lumbar decompression surgery.

19. On August 28, 2014 in a post-operative follow up, Claimant reported that his right leg pain was somewhat better but that he still had low back and mid back pain. Later that year, Claimant continued to report pain and the possibility of a spinal cord stimulator was discussed. Claimant reported 25% relief in his right lower leg symptoms but continued problems and pain. *See* Exhibit AA.

20. On July 15, 2015 Claimant filed a claim for workers' compensation. Claimant listed the date of injury as February 25, 2014.

21. On May 11, 2016 Claimant underwent an independent medical examination performed by Henry Roth, M.D. Claimant reported low back pain and right leg pain. Claimant reported that in 2000 he lifted a box while working in a warehouse and had the onset of low back pain. Claimant reported that he had surgery, physical therapy, and thereafter had only residual aches and pains with no major pain and was able to return to casual sports activities like basketball and softball league. Claimant reported that from 2000 to 2014 he would take an occasional ibuprofen. Claimant reported that on February 25, 2014 he experienced low back pain while crouching/squatting down at work to check inventory on the lower 2 shelves. Claimant reported that he was on his way down and had not yet gotten into a kneeling position or yet handled any inventory when he felt the pain. Claimant reported that he went to the front of the store to get Ibuprofen and reported the occurrence to his supervisor. Claimant reported that he worked the rest of the day and that his next day at work was not until March 5, 2014 and that he had to leave early that day due to his low back pain. Claimant reported that he went on a work related road trip and while on the road trip on March 12, 2014 he slipped off the back of a stool and the discomfort he already had in his back became worse. Claimant reported that he did not work the rest of the day on March 12 and has not returned to work since. *See* Exhibit BB.

22. Dr. Roth reviewed medical records. Dr. Roth asked why Claimant did not report to the emergency department or Kaiser that he had a work injury. Claimant indicated he was concerned only about his health. Claimant also indicated that he did report it as a work injury to his providers. Claimant reported, however, that it did not cross his mind to file a workers' compensation claim. Claimant reported that in July of 2015 he sought the assistance of an attorney to help him with social security disability and that the attorney recommended he file a workers' compensation claim. Dr. Roth noted that a lumbar MRI performed in April of 2014 showed a new herniated disc at L5-S1 on the right and that Claimant had low back pain, buttock pain, right leg pain, and difficulties with sleep. Claimant repotted no benefit as the result of his surgery and that he had a low standing and sitting tolerance. *See* Exhibit BB.

23. Dr. Roth noted that as a result of Claimant's work related low back injury in 2000, Claimant had received a 15% whole person impairment rating. Dr. Roth assessed chronic low back pain. Dr. Roth opined that it was not medically probable that the activity described on February 25, 2014 resulted in an acute lumbar disc herniation and that it was medically probable that the anatomy seen on the MRI was degenerative and pre-existing. Dr. Roth opined that the MRI findings correlated with potential for right sided sciatica and appeared to have been precipitated by the February 25, 2014 event but that since surgery did not improve the back pain or right leg symptoms, the assumption that the anatomy visualized on MRI was the cause of Claimant's symptoms was not medically confirmed or demonstrated. *See* Exhibit BB.

24. Dr. Roth opined that Claimant's progression of and additional lower lumbar degenerating including a herniated disc conformed to reasonable medical expectation and was a normal occurrence not requiring and not associated with trauma. Dr. Roth opined that it was possible that Claimant's condition was in part work-related but Dr. Roth was uncertain of the accuracy of what was reported to have occurred on February 25, 2014. Dr. Roth noted that there was no mention in multiple reports of an initial work related onset and only reports that he had a worsening of pre-existing pain. Dr. Roth noted that there was reported worsening and more severe pain after slipping off a stool on March 12, 2014 but that March 12, 2014 was not the onset or cause of the pain and did not change the history or medical treatment. *See* Exhibit BB.

25. Dr. Roth opined that when Claimant first filed for workers' compensation on July 15, 2015 Claimant reported an activity on February 25, 2014 that would not be the specific type or mechanism that would medically probably be associated with acute lumbar pathology. Dr. Roth opined that it was more likely than not that the discomfort Claimant claimed to have experienced at work was in its entirety a reflection of the degenerative cascade and commensurate with Claimant's personal illness. Dr. Roth opined, however, that if there was no chronic pain before February 25, 2014 and Claimant made an acute report of pain at work on February 25, 2014, then Claimant would have a compensable event from which he did not recover. *See* Exhibit BB.

26. On March 28, 2016 Claimant received a notice of disposition from social security administration noting a fully favorable decision had been issued in favor of his disability. *See* Exhibit 3.

27. Dr. Roth testified at hearing. Dr. Roth opined that the crouching act on February 25, 2014 that Claimant described would not have caused Claimant's spinal stenosis and that minor strains or events were not probable sources of alteration in lumbar anatomy. Dr. Roth opined that although Claimant may have experienced pain at work while crouching down, crouching did not cause Claimant's underlying condition. He opined that a strain would not cause the anatomy that Claimant had in his back. Dr. Roth opined that Claimant's underlying condition was not changed by a work incident and that the underlying condition was causing the pain and need for treatment.

28. Dr. Roth pointed out that the medical records are devoid of suggestions of a crouching incident at work as the cause. Dr. Roth testified that it was hard to reconcile that Claimant did not report this as a work related injury given Claimant's prior workers' compensation case that involved time off work and a whole person rating. Dr. Roth pointed out that the prior surgery from 2001 was not entirely successful and noted that Claimant had permanent impairment and range of motion limitations back in 2001 from the prior injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186

(Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury on February 25, 2014. Although Claimant testified that he felt symptoms of low back pain at work, the Claimant has failed to establish that the duties of employment caused his symptoms or aggravated/accelerated an underlying condition. The medical records are inconsistent as to when the low back pain began. The records also do not indicate consistently that it occurred due to a crouching movement at work. At the emergency department on March 14, 2014 Claimant reported that his increased pain started one week prior and got worse two days prior after falling off a stool. This is inconsistent with an acute incident on February 25, 2014. Claimant reported to providers that he had worsening back pain but did not report the specific incident of crouching at work as the event/cause of his pain. Further, at a physical therapy appointment on August 4, 2014 Claimant reported that in February of 2014 he woke up with increased back pain that progressed to right leg pain and weakness and that there was no injury that caused his pain. This also is inconsistent with an acute incident on

February 25, 2014. Claimant also reported a history of chronic back pain usually well controlled by anti-inflammatories.

Although possible that Claimant experienced pain at work on February 25, 2014, Claimant has failed to establish by a preponderance of the evidence that his low back condition was proximately caused by an injury arising out of and in the course of employment. Dr. Roth is credible and persuasive that the mechanism of injury reported (crouching down) would not have caused the pathology in Claimant's low back. Further, Dr. Roth opined that it was more likely that the discomfort Claimant reported was felt at work was a reflection of Claimant's degenerative condition and personal illness. Dr. Roth noted that if Claimant had no chronic pain before February 25, 2014 and if Claimant made an acute report of pain at work on February 25, 2014 then Claimant would have a compensable event. Here, as found above, Claimant reported to providers that he had chronic back pain prior to February 25, 2014. Additionally, although Claimant indicated that he reported an acute event or incident at work on February 25, 2014 to his supervisor, Claimant did not file a claim for workers' compensation until over one year later. When treating, Claimant did not indicate an acute event at work when he crouched down as the initial cause of his low back pain. Further, despite having been through the workers' compensation system before, Claimant did not file any workers' report of injury despite alleging that he initially knew and reported this to be a workers' compensation injury. This is logically inconsistent.

Claimant, overall, is not credible or persuasive and has failed to meet his burden to establish that he sustained an acute work related injury to his low back on February 25, 2014. His claim is denied and dismissed.

Penalties

C.R.S. § 8-43-304(1) provides for the imposition of penalties of up to $1000 per day where an employee "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." *See* § 8-40-201(15), C.R.S. Every day during which any employee fails to comply with any lawful order of an administrative law judge, the director, or the panel or fails to perform any duty imposed by articles 40 to 47 of this title shall constitute a separate and distinct violation thereof. *See* § 8-43-405, C.R.S.

Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S. involves a two-step analysis. The ALJ must first determine whether there was conduct that constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the violator's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2,

2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the violator know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the violator's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). A party establishes a prima facie showing of unreasonable conduct by proving that an employee violated a rule of procedure. If a party makes such a prima facie showing the burden of persuasion shifts to the opposing party to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

Section 8-43-304(4), C.R.S. provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The Industrial Claim Appeals Office has held that the purposes of the specificity requirement are to provide notice of the allegedly improper conduct so as to afford the alleged violator an opportunity to cure the violation, and to provide notice of the legal and factual bases of the claim for penalties so that the alleged violator can prepare its defense. *Davis v. K Mart,* W.C. No. 4-493-641 (I.C.A.O. April 28, 2004); *Gonzales v. Denver Public School District Number 1,* W.C. No. 4-437-328 (I.C.A.O. December 27, 2001).

Here, Respondents are seeking a variety of penalties against Claimant for various violations of the Act and of rules of procedure. Each request for penalty is addressed below.

Alleged Violation of OAC Rule 15 (9/1/16 and ongoing)

OAC Rule 15 provides that after a response to an application [for hearing] is filed, the application may not be withdrawn and the hearing may not be vacated except upon the agreement of all parties or upon the order of a judge. If the parties agree to the withdrawal of the application the applicant must promptly notify the OAC of the agreement to vacate the hearing.

Respondents argue a violation of OAC rule 15 beginning on September 1, 2016 and ongoing. As noted in the procedural history above, Claimant filed a Hearing Cancellation form on September 1, 2016. At this time, not only had a response to application for hearing been filed, but the hearing had taken place, an expert deposition had taken place, and the parties had submitted briefs to the presiding ALJ. On the Hearing Cancellation form, Claimant marked that the application was withdrawn. Claimant, per rule, is not allowed to withdraw an application for hearing unless the parties agree or the application is withdrawn by order of a judge.

From the pleadings submitted in evidence by Respondents, it appears that Claimant marked application withdrawn in error and intended only to cancel the hearing

as Claimant had decided not to present rebuttal evidence. As the hearing was set for possible rebuttal testimony, it would be Claimant's decision whether or not the hearing was necessary and ordinarily would not require conferral. However, it would require notice that the hearing was not necessary because Claimant had determined no rebuttal was needed. Claimant, clearly, should have checked the "other" box and listed that rebuttal was not needed and the matter was ready for an order or should have filed a separate motion/status update advising ALJ Felter that a rebuttal hearing was not necessary. The evidence and pleadings suggest that the parties had communicated about the briefs submitted to ALJ Felter during this time and the possible need for rebuttal testimony, however no emails were introduced into evidence to support the content of the communications during this time. Claimant erred and violated the rule by indicating to the court that the application had been withdrawn at the consent of both parties. However, after contacting the court and being advised that there would be no forthcoming order from ALJ Felter because the application had been withdrawn, Claimant attempted to rectify the error by requesting a post hearing conference with ALJ Felter to determine how to proceed. Claimant also filed a new application for hearing.

Although Claimant violated the rule by checking and noting that the parties agreed to vacate the hearing and withdraw the application for hearing, Claimant's actions were not objectively unreasonable and amounted to a clerical error. From the pleadings the ALJ finds that Claimant intended to only cancel the upcoming hearing as Claimant did not intend to submit rebuttal testimony or evidence. Although Respondents argue that the hearing was for both rebuttal and for closing arguments, the hearing recording indicates that it was set only for possible rebuttal. Further, although Claimant violated the rule by checking and noting that the parties agreed to vacate the hearing and withdraw the application for hearing, Claimant attempted to remedy the violation by his subsequent motion to ALJ Felter to have a post hearing conference. Under the circumstances, having been advised that no order was forthcoming on the matter as the application had been marked as withdrawn, Claimant's actions were reasonable. Claimant explained the error in the motion and sought a conference with the ALJ.

The violation of unilaterally marking that an application had been withdrawn, when there was no agreement to withdraw it, could have been easily and quickly remedied by Claimant's subsequent motion and/or any filings or responses by Respondent. Respondents, when they received the hearing cancellation form knew that Claimant had submitted to the Court a form indicating that Respondents agreed to withdraw the application. Respondents did not file an objection or request that the hearing remain set. Additionally, when Claimant attempted to rectify the situation by requesting a post hearing conference, Respondents took the position that the application was withdrawn due to Claimant's error and asked the judge to issue an order that the application was withdrawn despite knowing that a new hearing application had been filed and that they may have to re-litigate the entire case. The ALJ granted Respondents request.

Although a violation of the rule exists in this case, penalties are not appropriate. Under the circumstances, there is at most a clerical error by Claimant when attempting to

cancel a hearing set for rebuttal only, and Claimant made reasonable efforts to correct this error when it was realized.

Alleged Violation of OAC Rule 16(b) (9/1/16 and ongoing)

OAC Rule 16 provides for the requirements when filing motions. It provides that every motion must include a certification by the party or counsel filing the motion that he or she has conferred, or made a good faith effort to confer, with opposing counsel and unrepresented parties, and provides that the motion must also include a statement regarding whether the motion is contested, uncontested, or stipulated. It also provides that the motion conspicuously state in the caption if the motion is unopposed or stipulated. Rule 16 further provides that the responding party shall file a response or objection within 10 days from the date the motion was filed at the OAC.

Respondents are alleging a violation of OAC Rule 16(b) and they list the date of September 1, 2016 and ongoing. Respondents have failed to establish a violation of OAC Rule 16(b) starting September 1, 2016 and ongoing. It is noted that the Respondents have not pled this alleged penalty with enough specificity for the ALJ or Claimant to understand or know what motion was allegedly filed on September 1, 2016. The only document in evidence filed that date is the Hearing Cancellation form. This is not a motion requiring certification of conferral, a statement whether the motion is contested, or a response within 10 days. The requirements for the Hearing Cancellation form – and marking whether or not there is an agreement of parties to vacate the hearing- is addressed above under the penalty section relating to OAC Rule 15. Therefore, the request for penalties under OAC Rule 16 is denied and dismissed.

Alleged Violation of W.C.R.P Rule 9-3(A), Rule 9-3(C) (9/1/16 and ongoing)

W.C.R. P. Rule 9 deals with requirements for motions. It provides under Rule 9-3(A) that all matters for the Director's determination shall be filed with the Division of Workers' Compensation, to the attention of the Director. It also lists what matters may be included as matters for the Director's determination. Respondents have failed to identify, with specificity, which part of 9-3(A) they believe Claimant has violated or explain the basis for alleged penalties under this rule. There was a lack of evidence as to whether or not Claimant filed a specific request for the Director's determination at the Division of Workers' Compensation or whether Claimant was required to. Therefore, the request for penalties under W.C.R.P. 9-3(A) is denied and dismissed.

W.C.R.P. Rule 9-3(C) provides that every motion must include a certification by the party or counsel filing the motion that he or she has conferred, or made a good faith effort to confer, with opposing counsel and unrepresented parties. If no conference has occurred, an explanation must be included in the motion. Again, Respondents are alleging a violation of this rule from September 1, 2016 and ongoing. It is noted that the Respondents have not pled this alleged penalty with enough specificity for the ALJ or Claimant to understand or know what motion was allegedly filed on September 1, 2016. The only document in evidence filed that date is the Hearing Cancellation form. This is not a motion requiring certification of conferral, a statement whether the motion is

contested, or a response within 10 days. The requirements for the Hearing Cancellation form – and marking whether or not there is an agreement of parties to vacate the hearing- is addressed above under the penalty section relating to OAC Rule 15. Therefore, the request for penalties under W.C.R.P. 9-3(C) is denied and dismissed.

Alleged Violation of 8-43-102

This section of the Act requires an employee who sustains an injury resulting from an accident to notify their employee in writing of the injury within four days of the occurrence of the injury. It provides that the failure to report in writing may result in the employee losing up to one day's compensation for each day's failure to so report. Here, the claim has been found not to be compensable. Therefore, Respondents request for penalties and the specific statutory penalty for losing up to one day's compensation for each day's failure to report is deemed moot. No compensation is ordered and the claim is not compensable.

Alleged Violation of 8-43-211(B)(3)

Respondents indicate in filings an alleged violation of 8-43-211(B)(3). It is noted that such a provision does not exist. The ALJ construes this alleged violation to include 8-43-211(2)(b), C.R.S. and 8-43-211(3) C.R.S. These provisions provide that a hearing shall be set after a party requests a hearing on issues ripe for adjudication…and that if an attorney requests a hearing or files a notice to set a hearing on an issue that is not ripe for adjudication at the time the request or filing is made, the attorney may be assessed the reasonable attorney fees and costs of the opposing party in preparing for the hearing or setting. *See* § 8-43-211(2)(b), 8-43-211(3), C.R.S.

Respondents have failed to establish a violation of these provisions. Initially, it is noted that again Respondents failed to plead with enough specificity to allow the ALJ or opposing counsel to understand the basis for penalty under this section. Initially, Respondents listed a provision that does not exist. Further, Respondents failed to specify what issues they believed were unripe. Assuming, arguendo, that Respondents believe the new application for hearing filed March 28, 2017 for compensability was unripe, the ALJ disagrees. The issue of compensability had not been determined and was ripe and fit for adjudication. Generally, the term "ripeness" refers to whether an issue is "real, immediate, and fit for adjudication." Our courts have held that under this doctrine "adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur." *Olivas-Soto v. Industrial Claim Appeals Office,* 143 P.3d 1178 (Colo. App. 2006). Here, the issue of compensability and the application for hearing was on an issue real, immediate, and fit for adjudication. Although the matter had been previously heard by ALJ Felter, there was still a real issue that had not been determined- the compensability of Claimant's alleged injury. Claimant filed both a request for ALJ Felter to conduct a post hearing conference and a new application for hearing as there was no ruling or determination on the ripe issue of compensability. After Respondents' objection and request to "close" the case before ALJ Felter and the ALJ's

ruling that the application was withdrawn, the new application for hearing and the setting of that hearing was on a ripe issue. The application for hearing, in this regard, was proper.

Further, it is noted that penalty sought is Respondent's alleged attorney's fees and expert witness costs. Respondents attached to their position statement an affidavit of attorney's fees and witness costs. Respondents did not submit this evidence at hearing. Respondents did not ask for leave of court to include this late submission of evidence. There was insufficient evidence presented at hearing of any amount of attorney's fees or extra expert witness costs.

Therefore, Claimant's request for attorney's fees/costs and expert witness fees/costs is denied and dismissed. Claimant has failed to establish a violation of § 8-43-211(2)(b), C.R.S. or § 8-43-211(3) C.R.S.

Alleged Violation of order to compel interrogatory responses

Respondents further allege a violation of the Order to Compel answers to interrogatories in this matter. This violation is addressed above in preliminary matters. The appropriate sanction/penalty was exclusion of evidence and testimony.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury on February 25, 2014. His claim is denied and dismissed.

2. Respondents have failed to establish that any penalties are appropriate. The request for penalties is denied and dismissed.

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

DATED: December 14, 2017

/s/ Michelle E. Jones

_____

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

****The ALJ notes that the parties have wasted an inordinate amount of attorney's fees, costs, and judicial resources in re-litigating a matter that was previously litigated and ready for an Order. The hearing before ALJ Felter had been completed, briefs had been submitted, and the case was ready for Order. By arguing "case closure" based on a clerical error instead of working together to either: 1. jointly request ALJ Felter issue an Order based on the completed testimony, expert deposition, and briefs or 2. Jointly request that ALJ Felter allow the parties to re-convene to present closing arguments and then issue an Order on the completed testimony, expert deposition, and briefs, the parties have wasted substantial time engaged in litigation to merely try the same case again. The parties are strongly urged to communicate with one another if ever they are on the same case in the future to avoid this waste of resources. As the parties are well aware, the overarching purpose of the Workers' Compensation Act is the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. The actions of the parties in this case are inconsistent with the purposes of the Act.*

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-004-801-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 26, 2017 and December 15, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 10/26/17, Courtroom 1, beginning at 8:30 AM, and ending at 11:30 AM; 12/15/17, Courtroom 1, beginning at 8:30 AM, and ending at 11:00 AM).

Claimant's Exhibits 1 through 25 were admitted into evidence, without objection, with the exception of Exhibits 23 and 24, to which Respondent objected and the objection was sustained. Respondent's objections to Claimant's Exhibits 18 and 19 were overruled and the documents were admitted into evidence. Claimant's Exhibit 25 was a surreptitious audio recording of the Division Independent Medical Examination (DIME) by Jade E. Dillon, M.D., to which Respondent and Dr. Dillon, who was present at the hearing, objected. The Claimant, who is not an attorney, surreptitiously recorded the DIME. If the Claimant were an attorney, the surreptitious recording would violate Colorado Bar Association Formal Ethics opinion 112 (July 19, 2003), however there is no legal prohibition against a non-lawyer party surreptitiously recording a transaction that affects that party. Indeed, the Claimant alleged that recording was a necessary part of her evidence to help prove that the ultimate DIME determination of Dr. Dillon was clearly in error and the ALJ should listen to it. The ALJ, in fact listened to the audio

recording, overruled the objections thereto and admitted Claimant's Exhibit 25 into evidence. Respondent's Exhibits A through I were admitted into evidence, with the exception of Exhibit A (a video surveillance film which was not shown with a fair opportunity for confrontation). Respondent's Exhibit A was rejected. Moreover, Respondent relied of physician's narratives after viewing the surveillance video. The ALJ overruled Claimant's objections to Respondent's Exhibits F and G, and admitted these documents into evidence. At the hearing, the ALJ requested a copy of the follow up report of John Aschberger, M.D., the authorized physician who rated the Claimant upon referral from Lloyd J. Thurston, D.O., Claimant's authorized treating physician (ATP). It was a letter addressed to Respondent's counsel and it was admitted, without objection as Respondent's Exhibit J.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Claimant's request to overcome the DIME of Dr. Dillon on maximum medical improvement (MMI) and degree of permanent medical impairment; and, the Claimant's entitlement to medical benefits, either pre-MMI benefits or post-MMI benefits, depending of the determination of MMI.

The Claimant's burden of proof to overcome the DIME is by clear and convincing evidence. Her burden of proof on either pre or post-MMI medical benefits is by a preponderance of the evidence.

FINDINGS OF FACT

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

Preliminary Findings

1. The Claimant (d.o.b. December 31, 1962) worked as a Certified Spanish Health Interpreter in June 2015. Her job entailed walking around hospitals, including the Respondent hospital herein, interpreting for those in need of interpretation.

2. Based on the DIME of Dr. Dillon, Respondent filed a Final Admission of Liability (FAL), dated June 29, 2017, admitting for pre-maximum medical improvement (MMI) medical benefits only; for an MMI date of May 3, 2016; for zero permanent partial disability (PPD); an average weekly wage of $909.87 (which would yield a temporary total disability benefit rate of $606.57 per week); and, denying liability for post-MMI medical maintenance benefits (*Grover* medicals).

3. It is undisputed by medical providers that the Claimant reached MMI on May 3, 2016. The Claimant disputes that she reached MMI. The ALJ finds that she reached MMI on May 3, 2016.

4. On June 10, 2015, during the course and scope of her employment, the Claimant tripped on some cable, and sustained injuries to her left knee and ankle. She promptly reported the work-related nature of her injury and was referred to Concentra, where she presented on June 12, 2015. She suffered an abrasion on the anterior aspect of the distal anterior foreleg, with an initial assessment of knee injury and sprain as well as left ankle sprain. Subsequently, she came under the care and treatment of Dr. Thurston at Concentra. Dr. Thurston diagnosed a "tear of tendon of left ankle; left knee injury; and sprain of left knee (Claimant's Exhibit 13). On November 17, 2015, Dr. Thurston released the Claimant to return to work/modified duty. He also referred the Claimant to Daniel Ocel, M.D., at Cornerstone Orthopedics and Sports Medicine. Dr. Ocel assessed an injury of the peroneal tendon of the left foot (Claimant's Exhibit 15).

5. On May 23, 2017, Rebecca Bub, D.O., who had been the Claimant's primary health care provider at Centura Health indicated she had not treated the Claimant for left knee or ankle pain for any pre-existing conditions ()Claimant's exhibit 1).

ATP Dr. Thurston

6. As of March 31, 2016, ATP Dr. Thurston diagnosed a tear of tendon of left ankle; left knee injury; and, sprain of left knee. At this time, the Claimant was given work restrictions of sitting 30 minutes for every two hours.

Independent Medical Examination (IME) by Douglas C. Scott, M.D.

7. Respondent engaged Dr. Scott to perform an IME of the Claimant, which occurred on March 16, 2016 (Claimant's Exhibit 16). Dr. Scott assessed the Claimant with: (1) left knee pain probably due to left knee sprain or **aggravation of underlying and pre-existing chondromalacia patella** [Dorland's Medical Dictionary defines "chondromalacia patella" as a "premature degeneration of the patellar (knee cap) cartilage, the patellar margins being tender so that pain is produced when the patella is pressed against the femur" **;** (2) left ankle abrasion/laceration, now healed; and, (3) reported evidence of a peroneus brevis muscle tendon tear distal to the lateral malleolus and between its insertion over the left fifth metatarsal, symptomatic (Dr. Scott reported that this was the Claimant's primary diagnosis at the time). Dr. Ocel had recommended prolotherapy as had the Claimant's health care provider. Dr. Scott's alternative diagnosis of "**aggravation of underlying and pre-existing chondromalacia** ties into the diagnosis of John J. Aschberger, M.D., who rated the Claimant's permanent disability at the request of her ATP, Dr. Thurston. DIME Dr.

Dillon assumed that the Claimant had the degenerative condition of chondromalacia. She did **not** address whether there was an aggravation and acceleration thereof.

Maria Hopp, M.D., Littleton TLC Clinic.

8 Dr. Hopp, M.D., the Claimant's private health care provider, saw the Claimant on March 30, 2016, and diagnosed: (1) left ankle paid; and, (2) chondromalacia of the left knee. She recommended physical therapy (PT) and prolotherapy.

9. On March 31, 2017, Dr. Hopp saw the Claimant again for her left knee and assessed: (1) other tear of medial meniscus of left knee, unspecified whether old or current tear…; and, (2) chondromalacia. Dr. Hopp's latest evaluation of the Claimant corroborates ongoing pain and symptoms in the LLE as the Claimant testified.

Roger E. Murken, M.D., Panorama Orthopedics and Sports Medicine

10. The Claimant was evaluated by Dr. Murken on August 31, 2016, for a second opinion. Dr. Murken noted that the Claimant's MRI (magnetic resonance imaging) showed a left brevis tear and the Claimant had chronic left knee pain and some mild chondromalacia. He recommended physical therapy (PT) for both sides and "I think if she does not get significantly better, an exploratory arthroscopy and evaluation of the brevis tendon **surgically** (emphasis supplied) would be indicated…. (Claimant's Exhibit 6). It was the Claimant's undisputed testimony that her left lower extremity (LLE) has not only not gotten better, it has worsened.

John J. Aschberger, M.D.

11. ATP Dr. Thurston referred the Claimant to Dr. Aschberger for an impairment assessment. Dr. Aschberger performed a thorough physical examination, review of medical records, and assessment of the Claimant on August 19, 2016 (Claimant's Exhibit 17). He also reviewed the IMEs performed by Dr. Scott, to whom Respondent referred the Claimant. Dr. Aschberger also reviewed an MRI (magnetic resonance imaging) scan of the left knee.

12. Dr. Aschberger assessed a left knee strain with findings of chondromalacia patella on the MRI scan; and, a longitudinal tear of the peroneal tendon. Without the benefit of having watched the video (Claimant's Exhibit 25), Dr. Aschberger rated the Claimant at 22% LLE, with no indication that a whole person rating was appropriate. The ALJ takes administrative notice of the fact that Dr. Aschberger is a fully Level 2 Accredited Physician with the Division of Workers' Compensation, authorized to perform permanent medical impairment (PPD) ratings and, in doing so, uses the American Medical Association *Guides to the Evaluation of Permanent Impairment,* 3rd Ed. Rev. (hereinafter the "Guides").

13. During the hearing, a reference was made to a follow up evaluation by Dr. Aschberger, after he watched the video. It was a letter, dated September 2, 2016, addressed to J.P. Moon, Esq. of Ritsema & Lyon, P.C. Respondent produced the letter and it was admitted into evidence as Respondent's Exhibit J, without objection. After having watched the video (DIME Dr. Dillon has never watched the video), Dr. Aschberger reduced his rating to 11% LLE. The video depicts Claimant doing Zumba steps for a short while; standing on her right leg;, and subsequently climbing the steps to the Mother Cabrini Shrine, near lookout Mountain in Golden, Colorado (Respondent's Exhibit J). Indeed, Dr. Aschberger's findings, as detailed, illustrate a recognition of Dr. Aschberger's use of the "Guides." The ALJ finds that Dr. Aschberger's opinions, plus the aggregate medical evidence spanning two years, make it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Jade's zero PPD rating is clearly erroneous as more fully found herein below.

14. For an 11% LLE rating, according to § 8-42-107 (2) (w.5), C.R.S., the formula for an 11% scheduled impairment of a leg above the foot is 208 weeks X the TTD rate of $606.57 X 11%=$13, 878.32.

15. According to the Claimant, she was following ATP Dr. Thurston's advice to "resume her outside activities as much as possible…" at the times she was videotaped doing some Zumba steps and climbing the steps at the Mother Cabrini Shrine. Claimant testified that she took breaks.

Division Independent Medical Examination by Jade E. Dillon, M.D.

16. Dr. Dillon did **not** testify at the hearing. The Respondent rested on her report (Respondent's Exhibit D).

17. Dr. Dillon performed the DIME on June 6, 2017. She concluded that the Claimant had reached MMI on May 3, 2016, which is not disputed by any other medical evidence. The Claimant disputes this MMI date but has failed to show that it is highly probable, unmistakable and free from serious and substantial error that the DIME MMI date is in error. Dr. Dillon went on to State that there was no **ratable** condition with respect to chondromalacia or left knee or ankle strain Without having seen the video, Dr. Dillon went on to render an opinion that "given the level of activity, she has **obviously** (emphasis supplied) regained functionality…." The ALJ finds that this opinion is unsupported by the aggregate medical evidence, the Claimant's testimony. She goes on to render an opinion that the Claimant's symptoms are "well out of proportion to the underlying pathology. Indeed, Dr. Dillon states the categorical opinions that there are no ratable impairments for any of the Claimant's conditions. Dr. Dillon ultimately makes the bald statement that the impairment rating was made in accordance with the Guides and the impairment was zero. She gives no explanation,

other than categorically and consistently stating that there were no “ratable” conditions; or, how her zero PPD rating was made in accordance with the Guides.

18. Dr. Dillon states the opinion that “there is no chronic presentation of strain itself.” The ALJ finds that this opinion is contrary to the significant weight of the evidence. The ALJ infers and finds that the four corners of Dr. Dillon’s DIME letter reflects a bias that the Claimant is either magnifying her symptoms or has functional overlay. This is inconsistent with the weight of medical evidence in the file and the Claimant’s presentation at hearing. Indeed, the ALJ infers and finds that this bias taints and overshadows Dr. Dillon’s ultimate opinions leading to her unexplained rating of zero PPD. Coupled with the weight of other medical evidence as herein above found, especially Dr. Aschberger’s ultimate rating of 11% LLE, after viewing the video of the Claimant doing Zumba steps and climbing the stairs of the Mother Cabrini Shrine the ALJ finds that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Dillon’s PPD rating is erroneous. This is significantly more than a difference of opinion between Dr. Dillon and Dr. Aschberberger. Dr. Aschberger’s ultimate rating contributes significantly to the fact that DIME Dr. Dillon’s zero impairment rating is clearly wrong.

19. A review of the audiotape of the DIME examination reveals from the beginning that Dr. Dillon was gravitating to an opinion of zero PPD. As more fully found herein above, Dr. Dillon’s rating of zero is not adequately explained or supported, it is contradicted by the weight of the evidence, lay and medical; and, it is clearly erroneous.

20. DIME Dr.Dillon thereupon stated: “Given her level of function, the only ongoing future treatment I recommend is a self-directed exercise and stretching program (Dr. Dillon makes no indication of how these programs would be implemented) and NSAID medication for symptomatic control. The ALJ infers and finds that it is more likely than not that the Claimant requires post-MMI medical maintenance care, based on Dr. Dillon’s statement and the aggregate, credible medical evidence.

Ultimate Findings

21. Based on the aggregate medical evidence, including Dr. Aschberger’s ultimate rating of 11% LLE, the ALJ finds that DIME Dr. Dillon’s ultimate zero PPD rating lacks credibility and Dr. Aschberger’s 11% LLE rating is significantly more credible than DIME Dr. Dillon’s zero rating. Indeed, Dr. Aschberger’s 11% LLE rating significantly contributes to making it highly probable, unmistakable, and free from serious and substantial doubt that DIME Dr. Dillon’s zero rating is clearly erroneous. There is significantly more than a difference of opinion between DIME Dr. Dillon and Dr. Aschberger as herein above found.

22. The Claimant has established that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Dillon’s zero impairment rating is

wrong. Therefore, the Claimant has overcome DIME Dr. Dillon's zero impairment rating by clear and convincing evidence. Therefore, the ALJ ultimately finds and concludes that the degree of the Claimant's permanent impairment is 11% of the LLE, which equates to 208 weeks X the TTD rate of $606.57 X 11%=$13, 878.32.

23. Based on the totality of the medical evidence, the Claimant has established that it is more likely than not that she requires post-MMI maintenance medical care. Therefore, the Claimant has proven by preponderant evidence that she is entitled to post-MMI maintenance medical care at the hands of an ATP.

CONCLUSIONS OF LAW

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

Credibility

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

the MMI date of May 3, 2016 is undisputed by the medical evidence. Only the Claimant disputes it. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, based on the aggregate medical evidence, including Dr. Aschberger's ultimate rating of 11% LLE, DIME Dr. Dillon's ultimate zero PPD rating lacks credibility and Dr. Aschberger's 11% LLE rating is significantly more credible than DIME Dr. Dillon's zero rating. Indeed, Dr. Aschberger's 11% LLE rating significantly contributes to making it highly probable, unmistakable, and free from serious and substantial doubt that DIME Dr. Dillon's rating is clearly erroneous. There is significantly more than a difference of opinion between DIME Dr. Dillon and Dr. Aschberger as herein above found.

Overcoming Dr. Dillon's DIME

b. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office***,** 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. As found, there was significantly more than a difference of opinion between Dr. Aschberger and Dr. Dillon. *See Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush,*

Inc., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Also, In *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997), the Court of Appeals concluded that a medical opinion was not necessary to prove causation because imposing such a requirement would be reading something into the statute that was not there. As observed in *Lymburn*, to require a medical opinion to support a causality determination would be to read something into the statute that does not exist. By analogy, the Claimant's testimony that she continues to suffer from her admitted LLE injuries is sufficient to overcome Dr. Dillon's observations. Further, as found, the Claimant established that it was highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Dillon's zero impairment rating was in error. Thus, the Claimant overcame DIME Dr. Dillon's zero impairment rating by clear and convincing evidence.

c. Therefore, as found, the degree of the Claimant's permanent impairment is 11% of the LLE. For an 11% LLE rating, according to § 8-42-107 (2) (w.5), C.R.S., the formula for an 11% scheduled impairment of a leg above the foot is 208 weeks X the TTD rate of $606.57 X 11%=$13, 878.32.

Burden of Proof on Post-MMI Medical Maintenance Benefits

d. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address her injury. The burden of proof is placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

As found, the Claimant has sustained her burden with respect to post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant having overcome the opinion of Jade E, Dillon, M.D., the Division Independent Medical Examiner, by clear and convincing evidence, primarily based of the opinions and rating of authorized treating rater, John J. Aschberger, M.D., the Claimant's degree of permanent impairment is 11% of the left lower extremity. Therefore, the Respondent shall pay the Claimant permanent scheduled disability benefits of 208 weeks X the TTD rate of $606.57 X 11%=$13, 878.32, the grand total of scheduled permanent partial disability benefits, which shall be paid retroactively to May 3, 2016, the date of maximum medical improvement, and forthwith.

B. The Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

C.. The Respondent shall pay all the costs of post-maximum medical improvement maintenance treatment, which is authorized, causally related to, and reasonably necessary to cure and relieve the effects of the Claimant's admitted injury of June 10, 2015, subject to the Division of Workers' Compensation Medical Fee Schedule.

DATED this_____day of December 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

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

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of December 2017, electronically in PDF format, addressed to:

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

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the right sacroiliac (SI) joint fusion recommended by Dr. Kirk Clifford is reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted February 1, 2013 work injury.

FINDINGS OF FACT

1. Claimant was employed with employer as a mechanic. Claimant suffered an admitted injury to his low back on February 1, 2013. Claimant testified that the injury occurred when he was repairing a set of rear semi wheels. While attempting to move the wheels, claimant felt a "pop" in his low back.

2. Claimant first sought treatment with his primary care provider at the Department of Veterans' Affairs (VA). Claimant then reported his injury to employer and was sent for medical treatment. Claimant was first seen by his authorized treating physician (ATP) Dr. Craig Stagg on February 14, 2013.

3. On February 19, 2013, a magnetic resonance image (MRI) of claimant's lumbar spine showed grade 1 anterolisthesis at L5-S1, a broad based disc bulge at L5-S1, and mild foraminal narrowing at L4-L5 and L5-S1.

4. Dr. Daniel Nelson administered a left L5-S1 epidural steroid injection (ESI) on June 26, 2013 and again on September 20, 2013.

5. Ultimately, Dr. Stagg referred claimant to Dr. Kirk Clifford for consultation. Claimant was first seen by Dr. Clifford on December 4, 2013. Claimant testified that when he first treated with Dr. Clifford his symptoms included stabbing pain in his right buttock, shooting pain down both legs, limited mobility, and difficulty walking.

6. On January 13, 2014, Dr. Clifford performed a fusion at the L4-L5 level with laminectomy and bilateral foraminotomy and decompression.

7. Following the January 13, 2014 surgery claimant pursued physical therapy, but continued to report back pain to his medical providers. Claimant testified that following the January 2014 surgery he noticed a reduction in the radiating pain down his legs. However, he continued to experience stabbing pain in his right buttock and "pressure" and "discomfort" when he would lie down. On July 11, 2014, an MRI of claimant's lumbar spine showed a central disc extrusion at the L5-S1 level.

8. On August 4, 2014, Dr. Clifford administered a right sided L5-S1, S1-S2 transforaminal ESI. On September 3, 2014 claimant reported to Dr. Clifford that he "did not feel like he got a lot of benefit from the injection".

9. On September 10, 2014, Dr. Clifford administered bilateral L3-L4 transforaminal ESIs. On October 22, 2014, claimant reported to Dr. Clifford that these injections provided temporary pain relief. Based upon claimant's limited relief from injections, Dr. Clifford recommended surgery.

10. On December 1, 2014, Dr. Clifford performed a fusion with right sided facetectomy and decompression at the L5-S1 level, and with laminectomy and Coflex instrumentation at the L3-L4 level.

11. Claimant testified that following the December 2014 surgery the radicular symptoms into his legs improved, but he continued to have stabbing pain and discomfort into his right buttock. Claimant also testified that he began to have paralysis in his right leg, culminating in a fall in August 2015 when his "right leg gave out".

12. On December 8, 2015 an MRI of claimant's lumbar spine showed resolution of the central disc protrusion at the L5-L1 level; moderate acquired spinal stenosis at the L3-L4 level; and the instrumental posterior fusion at the L4-S1 level.

13. On January 7, 2016, Dr. Clifford administered right sided L3-L4 and L4-L5 transforaminal ESIs. On February 18, 2016, claimant returned to Dr. Clifford's practice and reported to Todd Ousley, PA-C that the injections did not provide him with any significant improvement in his back pain.

14. On April 14, 2016, Dr. Clifford administered bilateral L3-L4 parafacet injections. Claimant returned to Dr. Clifford on June 9, 2016 and reported "really good results" from those injections. However, claimant reported pain in his lower back across the iliac crest region. Dr. Clifford identified SI joint pain and recommended claimant use pain cream and ice on the problem area. Dr. Clifford indicated at that time that if claimant's lower back pain persisted he would consider administering a right sided SI joint injection.

15. Claimant's low back pain did continue and on July 13, 2016 and September 29, 2016, claimant underwent right-sided SI joint injections. Following each injection claimant felt immediate relief of his symptoms. In each instance this relief lasted approximately seven weeks.

16. Claimant returned to Dr. Clifford on December 7, 2016. At that time, Dr. Clifford noted a positive Fortin finger test of the right sulcus SI joint. Claimant also exhibited positive responses to distraction, thigh thrust, and FABER maneuver. On that date, Dr. Clifford indicated that claimant had right SI joint instability. Based upon claimant's symptoms and the relief he obtained from the SI joint injections, Dr. Clifford recommended that claimant undergo a "minimally invasive" right SI joint fusion.

17. On December 21, 2016, Dr. James Ogsbury performed a review of the recommended SI joint fusion. Dr. Ogsbury opined that the recommended SI joint fusion was "investigational" and therefore not medically necessary. Based upon Dr. Ogsbury's opinion respondents denied the recommended fusion.

18. On January 11, 2017, Dr. Clifford responded to respondent's denial and reasserted his opinion that the recommended SI joint fusion was appropriate treatment for claimant. In his response Dr. Clifford noted that an individual can have sacroiliitis with a normal looking SI joint. In addition, imaging studies will not show an abnormal SI joint. Dr. Clifford further opined that claimant had gone through the appropriate clinical workup with positive provocative maneuvers and diagnostic relief from two SI joint injections to demonstrate that claimant's SI joint is the pain generator.

19. On January 17, 2017, Dr. Michael Janssen also reviewed whether the recommended SI joint fusion was reasonable and necessary medical treatment. Dr. Janssen opined that the Medical Treatment Guidelines do not support SI joint fusion for mechanical low back pain. Dr. Janssen recommended that claimant have his right hip evaluated as a possible pain generator. Based upon Dr. Janssen's opinion, respondents again denied the recommended SI joint fusion.

20. On February 9, 2017, claimant was seen by Dr. Steven Heil. Dr. Heil opined that claimant's hip is not the pain generator of claimant's current symptoms.

21. On May 3, 2017, claimant was again seen by Dr. Clifford. Dr. Clifford again noted a positive Fortin finger test as well as positive SI joint provocative maneuvers including thigh thrust, compression, and FABER maneuver.

22. On July 3, 2017, claimant underwent an independent medical examination (IME) with Dr. Michael Rauzzino. In connection with the IME, Dr. Rauzzino reviewed claimant's medical records, obtained a medical history from claimant and performed a physical examination. Dr. Rauzzino issued an IME report in which he opined that the recommended SI joint fusion is not reasonable or necessary medical treatment and it is not related to claimant's work injury. In support of this opinion, Dr. Rauzzino noted that there is no radiographic evidence of injury to claimant's right SI joint. Dr. Rauzzino also recorded that his physical exam of claimant did not result in any "severe SI joint pain".

23. Dr. Rauzzino testified by deposition in this matter and confirmed his opinion that the recommended SI joint fusion is not reasonable or necessary medical treatment for claimant. Dr. Rauzzino testified that although the procedure recommended by Dr. Clifford is "minimally invasive", the fusion itself is invasive. Dr. Rauzzino also testified that once the instrumentation is surgically placed as part of the SI joint fusion, that instrumentation cannot be removed later.

24. Dr. Rauzzino further testified that he questions claimant's presentation of unilateral rather that bilateral SI joint pain. Dr. Rauzzino also noted that the x-rays of claimant's SI joint show a normal SI joint. Finally, Dr. Rauzzino testified that claimant did not demonstrate SI joint pain responses during the IME.

25. Dr. Clifford testified by deposition in this matter and affirmed his opinion that claimant's right SI joint is a pain generator and an SI joint fusion is appropriate treatment for claimant. Dr. Clifford testified that the SI joint provocative maneuvers (thigh thrust, compression, and FABER maneuver) are indicative of SI joint instability. Dr. Clifford testified that the treatment he has recommended for claimant is "minimally invasive" SI joint fusion and not the SI joint fusion contemplated in the Medical Treatment Guidelines. In his testimony, Dr. Clifford described the advancements that have been made in recent years regarding SI joint fusions, including the development of the less invasive procedure.

26. Dr. Clifford further testified that in his practice he does see a connection between lumbar fusion and SI joint pain. Dr. Clifford also noted in his testimony and the literature recognizes that a large percentage of patients present with unilateral SI joint pain.

27. The ALJ credits the opinion of Dr. Clifford over the conflicting opinion of Dr. Rauzzino and finds that claimant has demonstrated that it is more likely than not that the recommended SI joint fusion is reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 1, 2013 work injury.

28. The ALJ further credits the opinion of Dr. Clifford and finds that the SI joint fusion contemplated by the Guidelines is different from the minimally invasive SI joint fusion recommended by Dr. Clifford.

CONCLUSIONS OF LAW

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

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

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

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

5. The Division's Medical Treatment Guidelines (the Guidelines) are generally accepted as professional standards for medical care under the Act and are to be used by health care providers when providing care. Section 8-42-101(3)(b), C.R.S.; *Hall v. ICAO*, 74 P.3d 459 (Colo. App. 2003). The ALJ is not required to grant or deny medical benefits based on the Guidelines and the ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

6. As found, claimant has proven by a preponderance if the evidence that the recommended right SI joint fusion is reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 1, 2013 work injury. As found, the ALJ is persuaded that the SI joint fusion contemplated by the Guidelines is not the minimally invasive fusion recommended by Dr. Clifford. As found the testimony of Dr. Clifford is credible and persuasive.

ORDER

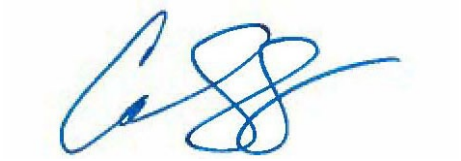
It is therefore ordered that:

1. Respondents shall pay for the recommended minimally invasive right SI joint fusion, pursuant to the Colorado Medical Fee Schedule.

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

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

Dated: December 20, 2017



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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left hip injury during the course and scope of his employment with Employer on May 1, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive causally related, reasonable and necessary medical treatment for his May 1, 2015 left hip injury.

FINDINGS OF FACT

1. Claimant is a 35 year old male who worked for Employer as a Firefighter. He testified that on May 1, 2015 he was returning from a fire call wearing his bunker pants and boots. As he was descending from an engine his left foot twisted and he felt an immediate pull or strain to the lateral area of his left hip. Claimant did not fall down. He continued to work regular duty and did not miss any time from work as a result of the incident.

2. Claimant acknowledged that Employer provided training about reporting work injuries within 24 hours. Nevertheless, Claimant recognized that he did not report that he suffered a left hip injury until September or October 2015. Claimant explained that the pain was minor and he had experienced similar pain on other occasions in different body parts while engaged in athletic activities. He remarked that he did not report his symptoms earlier because they were minor and firefighters are expected to work through injuries.

3. In the months subsequent to May 1, 2015 but prior to reporting his work injury, Claimant remained fully functional. He continued to engage in a variety of activities that included plyometrics and running. Claimant's symptoms generally waxed and waned throughout the period. However, he testified that the time interval between symptoms gradually decreased and his pain became sharper. After several months Claimant noticed clicking in his left hip and restricted his activities.

4. In October 2015, after a mandatory physical in which Claimant experienced difficulties with leg raising, he finally reported a work injury that had occurred on May 1, 2015. Claimant acknowledged that he had not previously mentioned a work injury to Employer other than commenting that his hip ached to Lieutenant Mark Evans in September 2015.

5. On October 20, 2015 Claimant visited Lori Long Miller, M.D. for an examination. Claimant reported that he stepped off a fire engine at work and experienced

significant left hip flexion that resulted in pain radiating into his inguinal area. He remarked that the symptoms improved over time so that they only occurred during activities such as running stairs. Because Claimant had not previously suffered left hip symptoms, Dr. Long attributed his condition to his work activities on May 1, 2015. Dr. Long released Claimant to regular duty employment.

6. On October 22, 2015 Employer prepared a First Report of Injury. On November 12, 2015 Respondent filed a Notice of Contest challenging Claimant's claim.

7. On December 4, 2015 Claimant underwent an MRI of the left hip. The MRI reflected mild CAM impingement, a partial labral tear and subchondral cysts in the acetabulum.

8. On January 15, 2016 Claimant visited Brian Joshua White, M.D. for an examination. Dr. White noted that Claimant suffered significant pain in the hip area for a couple of days after running or engaging in similar physical activities. He diagnosed Claimant with an underlying femoral, CAM type acetabular impingement, a labral tear and subchondral cystic degenerative changes in his left hip.

9. On February 3, 2016 Claimant returned to Dr. White for an evaluation. Dr. White determined that "this is likely an acute-on-chronic phenomenon from the chronic underlying CAM, but the acute injury is what made it symptomatic." He recommended "some level of activity modification, moving forward with surgery if he feels that he needs to for work, or for his basic activity and function to get him back to some level of function."

10. On February 28, 2016 Claimant returned to Dr. Miller for an examination. Dr. Miller remarked that Claimant suffers from a pre-existing anatomical problem that was exacerbated by his work activities. Therefore, Claimant's claim "would likely be covered by the Workers' Compensation system."

11. On March 21, 2016 Dr. Miller authored a letter to the claims adjuster for Respondent. She noted that Claimant suffers from a pre-existing anatomical left hip problem. However, "he was not having any difficulties and had never been seen for pain prior to the injury that occurred at work. Therefore, by definition, this is a work-related problem."

12. On August 24, 2016 Claimant returned to Dr. White for an evaluation. Dr. White noted that Claimant had reached a point where he suffered significant pain through the spring and had difficulties working. He concluded that it was "reasonable to move forward with hip arthroplasty."

13. On August 27, 2016 Dr. White requested authorization for left hip surgery. He specifically sought to perform a left hip scope, labral repair, reconstruction and a femoral acetabular osteoplasty.

14. On December 1, 2016 Timothy O'Brien performed a records review of Claimant's case to ascertain the cause of his left hip pain. Dr. O'Brien concluded that Claimant's left hip symptoms were not causally related to the May 1, 2015 incident in

which he descended from a fire truck. He reasoned that the mechanism of injury did not "generate enough energy into the hip joint to cause tissue breakage or yielding. Even if hyperflexion was involved with [Claimant's] stepping down from an engine, this is not the type of event that causes new tissue breakage or yielding." Dr. O'Brien commented that Claimant's history of physical activities, including hiking, biking skiing and running, more likely resulted in tissue breakage or yielding. He remarked that imaging studies revealed early onset, progressive arthritis. Dr. O'Brien summarized that "stepping down from the fire truck did not aggravate or accelerate the pre-existing condition." Finally, he did not agree with Dr. White's surgical recommendation because surgical intervention would not likely be successful in relieving degenerative arthritis.

15. On July 19, 2017 the parties conducted the pre-hearing evidentiary deposition of Dr. White. Dr. White reiterated that Claimant suffered from the underlying conditions of a femoral, CAM type acetabular impingement, a labral tear and subchondral cystic degenerative changes in his left hip. Without performing a causation analysis, he acknowledged that the conditions likely existed prior to Claimant's May 1, 2015 accident. Dr. White explained that impingement abnormalities are either congenital and part of our genetic code from birth or develop as a result of use over time. Nevertheless, Dr. White explained that "based on his story he had no symptoms before. And then when he loaded his hip coming down off the rig, that's when he started having pain. And so that was the precipitant to creating an irritable and painful hip." Accordingly, Dr. White reasoned that Claimant had exhausted conservative treatment and warrants surgery.

16. On October 15, 2017 Dr. O'Brien prepared a report in response to Dr. White's determination that Claimant's left hip symptoms were caused by his May 1, 2015 work accident. He drafted a detailed analysis in which he explained that the proposed hip arthroscopy would not limit or prevent the progression of Claimant's pre-existing osteoarthritis. Dr. O'Brien summarized that surgical intervention in the form of a microfracture procedure would not cure or relieve Claimant's condition.

17. On October 17, 2017 James P. Lindberg, M.D. performed a records review of Claimant's claim. Dr. Lindberg agreed with Dr. O'Brien's determination that Claimant's May 1, 2015 accident was not causally related to his left hip symptoms. He specified that Claimant's underlying left hip osteoarthritis was not caused by stepping off the fire truck on May 1, 2015. Instead, Claimant's underlying pathophysiology in the form of a femoracetabular impingement caused his labral tear through multiple traumatic events. Claimant has subchondral cysts because of his osteoarthritis. His condition preceded the May 1, 2015 incident and stepping off the fire truck did not cause Claimant's labral tear. Dr. Lindberg summarized that "because one suffers the symptoms of an underlying disease at work does not make it a compensable injury." Finally, he noted that Dr. White's proposed surgery would be unsuccessful because Claimant's left hip degenerative, arthritic process has already begun.

18. Claimant testified at the hearing in this matter. He explained that he had never suffered any left hip symptoms prior to May 1, 2015. In fact, he had engaged in numerous physical activities including running, biking, working out and playing tennis.

Claimant remarked that he suffers from clicking of the left hip, has difficulty standing for long periods of time and experiences pain when he overextends his left hip.

19. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable left hip injury during the course and scope of his employment with Employer on May 1, 2015. Claimant explained that as he was descending from a fire engine his left foot twisted and he felt an immediate pull or strain to the lateral area of his left hip. Claimant continued to perform his regular job duties and did not miss any time from work as a result of the incident. He subsequently engaged in a variety of activities that included plyometrics and running. Claimant's symptoms generally waxed and waned throughout the period. He ultimately reported a May 1, 2015 work injury in October 2015. However, the persuasive medical records reveal that, although Claimant may have experienced left hip symptoms at work on May 1, 2015, his work activities did not cause his condition.

20. Dr. O'Brien concluded that Claimant's left hip symptoms were not caused by descending from a fire truck. He remarked that Claimant suffered from early onset, progressive arthritis. Dr. O'Brien reasoned that the mechanism of injury did not "generate enough energy into the hip joint to cause tissue breakage or yielding." Stepping down from a fire truck simply did not aggravate or accelerate Claimant's pre-existing hip condition. Instead, Claimant's history of physical activities, including hiking, biking, skiing and running, more likely resulted in tissue breakage or yielding. Moreover, Dr. Lindberg agreed with Dr. O'Brien's determination that Claimant's May 1, 2015 accident was not causally related to his left hip symptoms. He commented that Claimant suffers from subchondral cysts because of his osteoarthritis. Claimant's underlying pathophysiology in the form of a femoracetabular impingement caused his labral tear through multiple traumatic events. Dr. Lindberg summarized that Claimant's left hip condition preceded the May 1, 2015 incident and stepping off the fire truck did not cause his labral tear.

21. In contrast, Drs. Miller and White concluded that stepping off the fire truck on May 1, 2015 precipitated Claimant's left hip symptoms. Although acknowledging that Claimant suffered from a pre-existing, degenerative left hip condition, they reasoned that Claimant had not experienced any left hip symptoms prior to descending from the fire truck. His development of symptoms on May 1, 2015 thus constituted a work-related condition. However, the mere experience of symptoms at work does not warrant the inference that there has been an aggravation or acceleration of a pre-existing condition. Claimant suffered from a pre-existing left hip condition. Stepping down from a fire truck provided insufficient force to cause a labral tear or tissue breakage. Instead, it is more likely that Claimant's waxing and waning left hip symptoms were related to his physical activities of hiking, biking, skiing and running. Accordingly, Claimant's May 1, 2015 work activities did not aggravate, accelerate or combine with his pre-existing left hip condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers

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

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27,

2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable left hip injury during the course and scope of his employment with Employer on May 1, 2015. Claimant explained that as he was descending from a fire engine his left foot twisted and he felt an immediate pull or strain to the lateral area of his left hip. Claimant continued to perform his regular job duties and did not miss any time from work as a result of the incident. He subsequently engaged in a variety of activities that included plyometrics and running. Claimant's symptoms generally waxed and waned throughout the period. He ultimately reported a May 1, 2015 work injury in October 2015. However, the persuasive medical records reveal that, although Claimant may have experienced left hip symptoms at work on May 1, 2015, his work activities did not cause his condition.

8. As found, Dr. O'Brien concluded that Claimant's left hip symptoms were not caused by descending from a fire truck. He remarked that Claimant suffered from early onset, progressive arthritis. Dr. O'Brien reasoned that the mechanism of injury did not "generate enough energy into the hip joint to cause tissue breakage or yielding." Stepping down from a fire truck simply did not aggravate or accelerate Claimant's pre-existing hip condition. Instead, Claimant's history of physical activities, including hiking, biking, skiing and running, more likely resulted in tissue breakage or yielding. Moreover, Dr. Lindberg agreed with Dr. O'Brien's determination that Claimant's May 1, 2015 accident was not causally related to his left hip symptoms. He commented that Claimant suffers from subchondral cysts because of his osteoarthritis. Claimant's underlying pathophysiology in the form of a femoracetabular impingement caused his labral tear through multiple traumatic events. Dr. Lindberg summarized that Claimant's left hip condition preceded the May 1, 2015 incident and stepping off the fire truck did not cause his labral tear.

9. As found, in contrast, Drs. Miller and White concluded that stepping off the fire truck on May 1, 2015 precipitated Claimant's left hip symptoms. Although acknowledging that Claimant suffered from a pre-existing, degenerative left hip condition, they reasoned that Claimant had not experienced any left hip symptoms prior to descending from the fire truck. His development of symptoms on May 1, 2015 thus constituted a work-related condition. However, the mere experience of symptoms at work does not warrant the inference that there has been an aggravation or acceleration of a pre-existing condition. Claimant suffered from a pre-existing left hip condition. Stepping down from a fire truck provided insufficient force to cause a labral tear or tissue breakage. Instead, it is more likely that Claimant's waxing and waning left hip symptoms were related to his physical activities of hiking, biking, skiing and running. Accordingly, Claimant's May 1, 2015 work activities did not aggravate, accelerate or combine with his pre-existing left hip condition to produce a need for medical treatment.

ORDER

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

Claimant's claim for Workers' Compensation benefits for his left hip symptoms is denied and dismissed.

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

DATED: December 20, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-048-407-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 12, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 12/12/17, Courtroom 1, beginning at 1:30 PM, and ending at 2:30 PM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Respondent accepted the Claimant's exhibits as its own.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on December 18, 2017. On December 19, 2017, Respondent filed an objection to the proposal. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues designated for hearing concerned compensability; if compensable, medical benefits, average weekly wage (AWW), and temporary total disability benefits (TTD) from May 24, 2017, and continuing. At the commencement of the hearing, it was agreed that the Claimant was paid full wages during temporary disability. Therefore, TTD was stricken as an issue, without objection.

FINDINGS OF FACT

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

Preliminary Finding

1. At the commencement of the hearing, the parties stipulated and that should the claim be found compensable, medical benefits rendered to date for the Claimant, including treatment by Mark Failinger, M.D., and his surgical recommendation, are reasonably necessary, and causally-related to Claimant's industrial injury. The claim having been found compensable (Finding No. 2 below), the ALJ finds the medical treatment to be causally-related to the May 24, 2017, injury and reasonably necessary to cure and relieve the effects thereof.

Findings

2. The Claimant suffered injury to his right shoulder while performing work duties for the Employer on May 24, 2017, specifically, he was lifting bulky items and felt a pain in his right shoulder, which got worse. He immediately reported the work-related nature of his injury to his supervisor and was referred for authorized medical treatment at Concentra Medical Centers.

3. Concentra later referred the Claimant to. Mark Failinger, M.D., an orthopedic specialist. Dr. Failinger has recommended that the Claimant undergo rotator cuff surgery to address his symptoms and limitations.

4. Dr. Failinger credibly testified that Claimant's injury was causally-related by his work activities on May 24, 2017, and the Claimant is in need of further medical treatment, including surgical intervention, and the ALJ so finds.

5. The Claimant desires to undergo the right shoulder surgery recommended by Dr. Failinger.

Ultimate Findings

6. Both the Claimant's and Dr. Failinger's testimonies were credible, undisputed and dispositive of the compensability and medical benefits issues.

7. The Claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on May 24, 2017, arising out of the course and scope of his employment for the Employer.

8. The Claimant has proven by preponderant evidence that all of his medical care and treatment for his compensable right shoulder injury, including Dr. Failinger's surgical recommendation, was and is authorized, causally-related, and reasonably necessary to cure and relieve the effects of his compensable right shoulder injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof).

See Young v. Burke, 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, both the Claimant's and Dr. Failinger's testimonies were credible, undisputed and dispositive of the compensability and medical benefits issues. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony

Compensability

b. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** There is, essentially, a presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent on the claimant to show proximate causation to job related factors; and, on the employer to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury to his right shoulder on May 24, 2017, arising out of the course and scope of his employment for the Employer.

Medical Benefits

c. The parties stipulated, and the ALJ found, that all medical benefits for the Claimant's compensable right shoulder, including Dr. Failinger's surgical recommendation were authorized, causally related to the compensable injury, and reasonably necessary to cure and relieve the effects thereof. Therefore, the ALJ concludes that respondent is liable for this care and treatment.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden of proof on compensability and medical benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent shall pay the costs of all medical care and treatment for the Claimant's compensable right shoulder injury, including the surgery recommended by Mark Failinger, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of December 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-009-779-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

,

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 12, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 12/12/17, Courtroom 1, beginning at 9:”00 AM, end ending at 10:00 AM).

Claimant’s Exhibits 1 through 9 were admitted into evidence, without objection. Respondents’ Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on December 20, 2017. On the same date, counsel for the Respondents indicated, electronically, that the Respondents had no objections to the proposed decision. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns the Claimant's entitlement to post-maximum medical improvement (MMI) medical maintenance benefits as recommended by Theodore Villavicencio, M.D., one of the Claimant's authorized treating physicians (ATPs).

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant sustained an admitted injury to her neck, upper back, and right hand on March 9, 2016. She reported the incident to her Employer and was referred to Concentra for medical treatment of her injuries.

2. The Claimant presented to Concentra for treatment on March 10, 2016. (Claimant's Exhibit 6, pp. 38-140). She was diagnosed with cervical and lumbar strain, a sprained ligament of the right ankle, and a strain of the left knee. She was seen first by Scott Richardson, M.D., and subsequently by Steven Abrams, M.D. and Theodore Villavicencio, M.D., all ATPs.

3. During her treatment with Concentra, the Claimant underwent physical therapy (PT) that was largely effective at reducing her symptoms (Claimant's. Exhibit 6, pp. 38-140). According to the Claimant, her symptoms, especially in the cervical spine, were controlled as long as she received regular therapy, especially when she had multiple sessions per week. The Claimant's symptoms in her lumbar spine, right ankle, left knee, and right hand dissipated entirely during the course of her treatment, although the symptoms recurred in her wrist and lumbar spine after she was placed at MMI. Throughout her treatment, the Claimant reported a waxing and waning of the symptoms in her cervical spine, often manifesting as tenderness and pain in her left trapezius.

4. Ultimately, the Respondents filed a Final Admission of Liability (FAL), dated February 10, 2017, admitting for medical benefits; an average weekly wage

(AWW) of $288.48; temporary total disability (TTD) benefits of $192.31 per week from March 10, 2016 through March 20, 2016; permanent medical impairment of 15% whole person, with an MMI date of August 17, 2016; and, an ambiguous statement (admission or denial) concerning post-MMI medical maintenance (*Grover* medicals) benefits.

Findings

5. The Claimant presented to Patrick O'Malley, M.D., on July 18, 2016 for an MRI (magnetic resonance imaging) of her cervical spine (Claimant's Exhibit 5, pp. 36-37). Dr. O'Malley found degenerative disc disease of the cervical spine, especially at C4-5, C5-6, and C6-7. Such disc degeneration predated the Claimant's March 9, 2016 admitted injury.

6. ATP Dr. Villavicencio referred the Claimant to Samuel Chan, M.D., for EMG testing of her right upper extremity (RUE), which was performed on July 21, 2016. (Claimant's Exhibit 7, pp. 141-148). The EMG findings were unremarkable, but Dr. Chan noted that the Claimant had continuing left-sided cervical spine pain. He recommended that the Claimant continue with an active exercise program as already planned for her cervical symptoms.

7. Dr. Chan subsequently examined the Claimant on July 26, 2016. (Claimant's Exhibit 6, pp. 106-109). At that time, Dr. Chan recommended that the Claimant consider facet injections to address the ongoing symptoms in her cervical spine. The Claimant declined, preferring to first discuss the issue with her friends in order to weigh the benefits and risks. Dr. Chan found this request to be reasonable. Dr. Chan was of the opinion that "[i]f the patient is not interested in any further therapeutic measures, the patient should definitely continue to follow through with an active exercise program on an individualized basis and she most likely would be at maximal medical improvement." *Id*. at p. 109.

8. The Claimant returned to Dr. Chan on August 16, 2016, for a recheck of her ongoing cervical symptoms (Claimant's. Exhibit 6, pp. 114, 115). At that time, the Claimant reported that her ongoing pain was roughly six out of ten, and had remained at that level since the time of her last visit. She described the pain, however, as no longer constant, although a hard day at work would increase her reported pain level. Dr. Chan noted that the Claimant decided against pursuing facet injections, having done research and decided against invasive therapeutic intervention. Dr. Chan concluded that the Claimant had reached MMI, and that her "prognosis is ultimately good if she does follow through with active exercise program." *Id*.

9. Dr. Villavicencio remained the Claimant's ATP until August 20, 2016, when he placed the Claimant at MMI as of August 16, 2016, the date of Claimant's last visit with Dr. Chan (Claimant's Exhibit 3, pp. 11-14). Dr. Villavicencio assigned the

Claimant a zero percent impairment rating at that time. Dr. Villavicencio also did not recommend that the Claimant receive maintenance care going forward.

10. The Claimant challenged Dr. Villavicencio's report and sought a Division Independent Medical Examination (DIME).

11. J. Stephen Gray, M.D., performed the DIME on December 19, 2016. (Claimant's Exhibit 4, pp. 18-32). Dr. Gray reviewed the medical records, took a patient history, and performed a physical examination. He assigned the Claimant a 15% whole person rating based on impairment to her cervical spine. He additionally agreed with Dr. Villavicencio that Claimant had reached MMI, however, he erroneously assigned an MMI date of August 17, 2016, one day later than ATP Dr. Villavicencio. The ALJ finds that the Claimant reached MMI on August 16, 2016.

12. Dr. Gray, however, disagreed with Dr. Villavicencio as to maintenance care. *Id*. At the time of Dr. Gray's examination, the Claimant's symptoms had increased from the level she had presented to Dr. Villavicencio in August 2016 – as of December 19, 2016, the Claimant presented with pain at a level of nine out of ten, worsened by a variety of basic physical activities such as standing, sitting, and walking, as well as by cold weather. As such, Dr. Gray concluded that due to the Claimant's ongoing pain symptomology, **maintenance care was indicated** in her case. Specifically, Dr. Gray recommended that the Claimant follow up with Dr. Chan quarterly, who could in turn refer the Claimant for PT, steroid injections, and appropriate medications to control her pain.

13. The Claimant subsequently returned to Dr. Villavicencio's office on May 8, 2017 and June 28, 2017 (Respondents' Exhibit D, pp. 5-8). Dr. Villavicencio examined the Claimant at the May 8, 2017 visit, but he did not personally examine her on June 28, 2017; the latter exam was conducted by Dr. Villavicencio's physician's assistant (PA), Casey McKinney. On May 8, 2017, the Claimant reported persistent pain with no new injury or job duties, centered on her left trapezius, cervical and lumbar spine, and right wrist. Dr. Villavicencio recommended re-opening the Claimant's case for a physiatry reevaluation, restarting physical therapy, and possible facet injections. On June 28, 2017, PA McKinney restated Dr. Villavicencio's opinion that the Claimant receive ongoing maintenance care with Dr. Chan.

14. Dr. Villavicencio's evidentiary deposition was taken on October 20, 2017 (and filed on December 12, 2017) in his capacity as an expert in the field of family medicine, as well as the Claimant's ATP (Villavicencio Deposition, pp. 1-27). Dr. Villavicencio testified that the Claimant still experienced pain symptoms when he placed her at MMI, and that he did not initially think that she would require maintenance care. Dr. Villavicencio reviewed Dr. Gray's DIME report and Dr. Villavicencio agreed with Dr. Gray's conclusions as to maintenance care, specifically that Claimant be allowed to follow-up with Dr. Chan.

15. Dr. Villavicencio testified that the Claimant was no longer at MMI with respect to her cervical spine as of his most recent examination dated May 8, 2017. *Id*. He stated that he related her reported pain in May 2017 back to her March 9. 2016 admitted injury because he had been presented with an identical pattern of worsening pain, with no evidence of a new injury or increased job duties. Finally, Dr. Villavicencio concluded that, to a reasonable degree of medical probability, the Claimant should follow up with Dr. Chan for maintenance care, and this would be reasonably necessary to address her ongoing and worsening symptoms.

The Claimant

16. The Claimant testified live at hearing. She stated that her symptoms follow a cyclical pattern of increase and decrease, with increases often associated with greater levels of activity. She indicated that after Dr. Villavicencio placed her at MMI, her pain level steadily increased despite her attempts to control the pain with at-home exercises and over-the-counter medication. She further testified that she sought follow-up appointments with Dr. Villavicencio when it became clear that she could not control her symptoms on her own. According to the Claimant, she began working a new job in June 2017, but that her increase in pain pre-dated her starting work with the new employer.

Ultimate Findings

17. Based on the medical record and the opinions of her treating physicians, the Claimant's present symptoms are identical to those immediately seen after her March 9, 2016 admitted injury. The Claimant testified credibly that she has persistently experienced increases and decreases in her level of pain, and that keeping her pain to a manageable level is only accomplished by access to PT. Further, ATP Dr. Villavicencio's ultimate opinion that the Claimant needs post-MMI medical maintenance care and treatment was persuasive and credible. Also, both the Claimant's testimony and the ultimate opinion of ATP Dr. Villavicencio are undisputed.

18. The ALJ finds that the Claimant has proven, by a preponderance of the evidence that maintenance medical care, as recommended by ATP Dr. Villavicencio, is reasonably necessary to address the ongoing symptoms she experiences as a result of her March 9, 2016 admitted injury and it is causally related thereto.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony, as well as the ultimate opinion of ATP Dr. Villavicencio, concerning Claimant's need for post-MMI maintenance medical care and treatment was persuasive and credible. As further found, both the Claimant's testimony and the ultimate opinion of ATP Dr. Villavicencio are undisputed. *See Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Post Maximum Medical Improvement (MMI) Maintenance Medical Care

b. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity, at any time. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). As found, the Claimant is entitled to maintenance medical care, which is reasonably necessary to address the admitted injuries.

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden of proof with respect to post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Respondents shall pay all of the costs of post-maximum medical improvement maintenance medical care and treatment for the Claimant's admitted injuries of March 9, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule.

DATED this_____day of December 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

STIPULATIONS

Prior to the commencement of hearing, the parties stipulated that Claimant's average weekly wage at the time of her injury was equal to $508.72. They also stipulated that if Claimant is determined to be at maximum medical improvement (MMI), an overpayment in benefits paid to Claimant in the amount of $2,215.87 exists in favor of Respondents. Finally, Claimant agreed to withdraw the issues of permanent total disability (PTD) and conversion of her scheduled impairment rating to impairment of the whole person as being premature based upon her contention that she is not at MMI. Respondents voiced no objection. The stipulations are hereby approved.

REMAINING ISSUES

I. Whether Claimant established by clear and convincing evidence that Dr. Tyler erred in concluding that her left shoulder condition was not causally related to her May 13, 2015 admitted work related injury.

II. If Claimant established that Dr. Tyler's causality opinion regarding the left shoulder is highly probably incorrect, whether she also produced clear and convincing evidence that she not at MMI for the work related aspects of her left shoulder condition.

III. If Claimant established that she was not properly placed at MMI, whether she established by a preponderance of the evidence that Respondents are liable for additional treatment related expenses to cure and relieve Claimant of her left shoulder injury.

IV. If Claimant established that she is not at MMI, whether she established by a preponderance of the evidence presented that she is entitled to additional temporary total disability (TTD) benefits.

V. If Claimant failed to overcome the DIME opinions of Dr. Tyler by clear and convincing evidence, whether she established by a preponderance of the evidence that she is entitled to maintenance medical benefits.

VI. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recovery of the stipulated $2,215.87 overpayment of indemnity benefits.

VII. Whether Claimant suffered permanent disfigurement to a part of the body normally exposed to public view entitling her to additional benefits pursuant to C.R.S. §8-42-108(1).

Because the undersigned ALJ finds and concludes that Claimant failed to overcome the causality opinion of Dr. Tyler regarding the relatedness of Claimant's shoulder joint pathology and associated symptoms to her May 13, 2015 trip and fall, this Order does not address Issues II-IV outlined above.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Respondent-Employer operates an assisted living facility known as the Florence Veterans Nursing Home. Claimant is a former certified nursing assistant (CNA) who was injured in the course and scope of her employment On May 13, 2015, when she fell to the floor after becoming tangled in a bed alarm cord.

2. According to Claimant's "injury/Exposure on the Job (IOJ) Form", as she was leaving a patient's room to retrieve a clean gown, her foot "caught in the bed alarm string/cord and [she] fell to the ground on her left leg area/knee." Per Claimant, the area was bruised and swollen.

3. Claimant presented to the Centura Centers for Occupational Medicine (CCOM) on May 14, 2015 where she was evaluated by Physician Assistant (PA), Steven Quakenbush. During this initial appointment, Claimant reported that she fell onto her left knee and outstretched left hand and wrist. She reported having "instant" pain in the left knee and "minimal discomfort" involving her left shoulder, hand and wrist. Physical examination revealed an "obvious" antalgic gait and a palpable hematoma in the left lower leg downward to the knee, but no "obvious swelling or effusion of the left knee." No pain was reported during palpation of the left shoulder and Claimant demonstrated "full abduction above shoulder height, full internal and external rotation, cross chest reach, above head reach and posterior reach without significant pain." Claimant also demonstrated full range of motion of the left wrist and no "swelling or discoloration of the left hand and wrist." Claimant was assessed with a left knee contusion, left shoulder strain and left hand and wrist strain.

4. Between Claimant's May 13, 2015 date of injury and July 15, 2015, she continued to complain of pain and dysfunction in the left knee but not the left shoulder, wrist or hand. Review of the treatment records from CCOM for this same time frame reflects that Claimant's physical examination and treatment was limited to and focused on the left knee. However, on July 15, 2015, Claimant presented with a new complaint of neck pain and headaches. A pain diagram completed by Claimant on July 15, 2015 depicts aching pain in the back of the neck, the trapezius musculature bilaterally, the front and back of the upper arms and the upper chest area. PA Quakenbush reserved the question of whether Claimant's new neck and headache pain was causally related to her May 13, 2015 injury to Dr. Nanes.

5. On July 16, 2015, Dr. Nanes noted that Claimant had been treated for "many

years for headaches and has had previous MRI studies and . . . physical therapy and is taking a muscle relaxer at nighttime." After review of Claimant's pain diagrams, which did not document any complaint of headaches, Dr. Nanes opined that Claimant's headaches and neck pain were not related to the May 13, 2015 trip and fall.

6. On July 23, 2015, Dr. Nanes noted that Claimant's primary care physician (PCP) would not treat her headaches or neck complaints as she felt that these conditions were work related. After noting that Claimant had retained an attorney "over this whole matter." Dr. Nanes reiterated his opinion that Claimant's headaches and neck pain were unrelated to her May 13, 2015 work injury.

7. On September 24, 2015, four months after her trip and fall, Claimant returned to CCOM with a primary complaint of left arm pain. According to the treatment note authored by Dr. Nanes from this date, Claimant reported that she had been having increasing left shoulder pain for several weeks and was concerned that this was related to her original injury. Dr. Nanes informed Claimant that he did not see a causal relationship given the length of time that had elapsed since her May 13, 2015 injury. Claimant was informed to initiate treatment for her left shoulder with her PCP.

8. On October 5, 2015, Claimant presented to Valley Wide Health Systems where she was evaluated by PA Robert Dawson. PA Dawson noted that Claimant presented with "musculoskeletal pain", specifically left shoulder pain in the area of the rotator cuff that was occurring "intermittently and [was] worsening." He noted further that Claimant's shoulder pain was aggravated by "lifting and movement" and that Claimant was told she had bursitis which was unrelated to her fall for which she should pursue an injection. PA Dawson mistakenly identified Dr. Timothy Hall as Claimant's primary workers' compensation doctor noting further that she had an upcoming appointment with him in two weeks. According to PA Dawson's note, Claimant wanted to wait on the injection until she saw Dr. Hall because if she had a "small labral tear from the fall, having [PA Dawson] treat her for bursitis could void her claim." Finally, PA Dawson advised Claimant that if Dr. Hall declined to inject her shoulder she could return to the clinic and he would.

9. Dr. Hall evaluated Claimant at the request of her attorney on November 3, 2015. Historically, Dr. Hall documented that Claimant's shoulder symptoms were present early on, improved for a time and then worsened. She denied any history of prior shoulder problems. Dr. Hall also noted that Claimant's worsening shoulder symptoms were associated with her return to light duty work "feeding clients" as this activity involved "a lot of reaching and twisting, which flared most all of her symptoms." He indicated that Claimant's shoulder did not hurt a "great deal" and that she did not have substantial trouble when functional activities were limited to the "ergonomic box." However, any activity requiring reaching, excessive internal rotation and/or activity at or above shoulder level was painful.

10. Physical examination of the left shoulder and upper back during Dr. Hall's November 3, 2015 IME revealed the following:

> There are active trigger points noted in the left parascapular area and left trapezius. Her left shoulder is forward and elevated compared to the right. No significant AC joint tenderness with the shoulder. There is some pulling/discomfort in the parascapular area and trapezius area with internal as well as external rotation. She has difficulty with weighted abduction with the arm extended. This is through the shoulder generally. No cepitus with range of motion. No evidence of instability on stressing the left shoulder. Her range of motion is actually pretty good, just with discomfort at extremes. . . . No weakness about the shoulder girdle.

11. Based upon the information gathered during his IME, including Claimant's report of having no "previous problems" with her left shoulder, Dr. Hall opined that Claimant's left shoulder symptoms were causally related to her May 13, 2015 trip and fall. According to Dr. Hall, Claimant was likely "dealing with bursitis/tendonitis" of the shoulder. He did not suspect a tear. He recommended a steroid injection into the bursa and an orthopedic referral if that did not improve her situation. Dr. Hall also related Claimant's neck pain and headaches to her fall. In doing so, Dr. Hall theorized that the abnormal mechanics and "postural distortion created by the shoulder sprain, as well as the direct trauma to the upper back area and potential whiplash-type injury created by the inertia of the fall could certainly have brought on an increase in her neck pain and headache." While he related Claimant's headaches and upper back/neck pain to the May 13, 2015 fall, Dr. Hall noted that the symptoms associated with these injuries were "under better control." Consequently, he did not recommend additional treatment for these conditions.

12. In contrast to the denial of previous left shoulder problems Claimant conveyed to Dr. Hall, her medical records substantiate the existence of a lengthy history of left shoulder complaints/symptoms predating her May 13, 2015 fall. The first notation in Claimant's medical records of left shoulder pain dates back to June 19, 2008.[1] While many of Claimant's prior complaints were associated with her neck and trapezius area, the records also contain specific reference to left shoulder pain with treatment directed to this area. Indeed, the records submitted at hearing include an August 28, 2014 note, which outlines referrals to Caring Hands Physical Therapy for treatment for "left shoulder pain with rotator cuff symptoms", to St. Thomas More radiology regarding the need for an MRI and to Dr. Keith Minihane secondary to a "failed sub-acromial injection done under ultrasound guidance."

13. Review of Claimant's physical therapy records supports a finding the she has been treated for symptoms consistent with fibromyalgia affecting her neck, upper back and shoulders. On October 23, 2014, Claimant reported shooting pain in her left shoulder extending into her left arm. On December 15, 2014, physical examination revealed moderately increased muscle tone in the shoulders bilaterally. On March 19, 2015, Claimant reported bilateral shoulder pain. On April 14, 2015, Claimant reported

[1] See Dr. Tyler's Division Independent Medical Examination (DIME) report dated March 15, 2017. (Exhibit M, bate stamp 91)

that her shoulders were "bothering her more lately." During Claimant's April 21, 2015 appointment, Claimant reported increased pain throughout her left shoulder after lifting a patient. Just 6 days prior to her fall or May 7, 2015, Claimant was still complaining of left shoulder pain.

14. Dr. Daniel Olson placed Claimant at MMI on October 5, 2016 with 13% scheduled impairment of the left knee. Claimant requested a DIME, which would be completed by Dr. John Tyler on March 15, 2017.

15. Prior to undertaking the requested DIME, an MRI of Claimant's left shoulder was completed on December 9, 2016. Imaging demonstrated a small rim rent tear in the supraspinatus tendon and possible intrasubstance tear or a partial tear to the subscapularis tendon or rotator cuff.[2]

16. Claimant's MRI results were discussed at a December 12, 2016 follow-up appointment. It was noted during this appointment that an injection had provided no significant relief. Consequently, surgery was also discussed.

17. As noted, Dr. Tyler completed a DIME on March 15, 2017. As part of his DIME, Dr. Tyler undertook an exhaustive review (in excess of 5 hours) of a "copious" amount of medical records dating back to March 19, 2007. Dr. Tyler's records review identified a report from June 19, 2008 noting complaints of numbness in the hands in addition to left shoulder and arm pain. He also made mention of a May 26, 2009 report wherein Claimant reported chronic pain and waking with painful swollen hands and feet as well as painful shoulders. Additional records reviewed revealed a diagnosis of fibromyalgia and chronic pain of the neck, upper back, shoulders and knees.

18. During her DIME, Claimant identified two primary problems that she associated with her trip and fall. These were labeled 1A and 1B by Dr. Tyler. Problem 1A was noted as left shoulder pain/tightness that Claimant reported limited her ability to flex and abduct the shoulder beyond 90 degrees. Abduction beyond 100 degrees reportedly resulted in popping of the shoulder joint. Claimant also described an aching sensation in the top and front aspects of the left shoulder occurring 4 to 5 times per week, which Claimant reported was associated with prolonged activity/use of the left arm.

19. Examination of the left shoulder revealed "significant myofascial trigger point sites . . . within the right posterolateral neck extending into the region of the infraspinatus." Dr. Tyler noted that Claimant's trigger point sites "may be a component of some of [Claimant's] ongoing complaints of shoulder pain but not within the shoulder." Based on the content of the medical records and his clinical examination, Dr. Tyler opined that there was no definitive evidence that would directly relate any internal shoulder pathology directly to her May 13, 2015 trip and fall. Dr. Tyler agreed that Claimant had reached MMI on October 5, 2016. He assigned 5% lower extremity impairment for Claimant's left knee injury.

[2] See Dr. Hall's IME report dated September 27, 2017. (Claimant's Exhibit 4, bate stamp page 42)

20. Dr. Hall competed a follow-up IME at Claimant's request on September 27, 2017. In a report authored by Dr. Hall following his follow-up examination, he attributed the "potential intrasubstance tear involving the subscapularis and supraspinatus" to Claimant's May 13, 2015 trip and fall. Because Claimant had failed to benefit from a local injection, Dr. Hall opined that arthroscopic intervention was appropriate. Given the need for additional treatment to address her ongoing left shoulder complaints, Dr. Hall concluded that Claimant was not at MMI.

21. Dr. Hall testified at hearing. He opined that while Claimant had treated on a number of occasions for issues related to her left shoulder, those complaints could not be definitely linked to Claimant's left shoulder joint. Rather, he testified that Claimant's prior left shoulder symptoms were more probably related to muscular issues in Claimant's upper back between the neck and the shoulder joint itself, supporting the diagnosis of fibromyalgia. Dr. Hall testified that the shoulder consists of a number of different components, and thus a general shoulder complaint could refer to either joint issues or more wide spread problems involving the area of the neck and upper back. Dr. Hall testified that he had reviewed records of Claimant's prior shoulder complaints before hearing, and had to conclude that they related to a soft tissue (muscular) condition encompassing the trapezius between Claimant's shoulder/upper back and her neck, rather than symptom producing condition in the joint itself.

22. Based upon his subsequent review of the medical records pertaining to the condition of Claimant's left shoulder prior to her trip and fall, Dr. Hall testified that Claimant's current shoulder complaints are, more probably than not, causally related to internal pathology, i.e. a rim rent tear in the shoulder. Moreover, he testified that this tear is causally related to her fall rather than a chronic, preexisting degenerative condition. In reaching this opinion, Dr. Hall noted that when an injured party falls onto their outstretched arm as Claimant did in this case, pain complaints somewhere along the length of the arm, whether they be in the hand, wrist, elbow, or shoulder, are expected.

23. Dr. Hall's opinions regarding causality of Claimant's left shoulder condition/complaints places significant weight on his review of the left shoulder MRI report. In suggesting that Dr. Tyler's causality opinion concerning the left shoulder was erroneous, Dr. Hall noted that Dr. Tyler did not review the MRI. Rather, Dr. Hall testified that Dr. Tyler's causality opinion was based primarily upon a records review and his physical examination. According to Dr. Hall, physical examination of the shoulder is very limited in its ability to catch internal pathology of the shoulder.[3] Thus, Dr. Hall testified that imaging, including MRI is necessary to determine the nature and extent of pathology. Because Dr. Tyler did not review the left shoulder MRI demonstrating the existence of "potential" tears and because physical examination has limited diagnostic

[3] The ALJ notes that as far back as May 14, 2015, one day after her trip and fall, Claimant's shoulder examination was essentially normal. Multiple examinations after that date, including those by Dr. Hall himself were also benign.

capabilities, Claimant submits that Dr. Tyler erred in failing to relate Claimant's left shoulder condition to her May 13, 2015 fall.

24. While Dr. Hall testified that the MRI imaging obtained in this case is critical to the analysis of whether Claimant's left shoulder condition and current symptoms are related to her May 13, 2015 trip and fall, he conceded that there is no way to tell from the MRI when the potential tears identified on MRI occurred and such tears can be caused from lifting and/or motor vehicle accidents. The ALJ notes that the MRI in this case was obtained in excess of sixteen months following Claimant's May 13, 2015 fall and that Claimant was involved in a car accident on January 7, 2015 and subsequently complained of increased pain in the left shoulder on April 21, 2015, after lifting a patient.

25. Claimant testified at hearing. She explained that she had indeed treated for problems with both shoulders, her present complaints related to pain within the shoulder joint while her complaints before her fall related to the portions of her shoulder that connected to her upper back and neck. Claimant testified that before her fall she was experiencing neither pain within the shoulder joint itself nor any loss of range of motion. Rather, those problems arose solely after Claimant's May 13, 2015 admitted injury.

26. While the evidence presented persuades the ALJ that Claimant likely has internal pathology in the left shoulder, the ALJ is not convinced that this pathology is related to the May 13, 2015 trip and fall. Claimant has failed to carry her burden to establish by clear and convincing evidence that Dr. Tyler's DIME opinion regarding the relatedness, i.e. the cause of Claimant's "joint" pathology and associated symptoms to her May 13, 2015 trip and fall is highly probably incorrect.

27. The ALJ finds that as a result of her May 13, 2015 work injury, Claimant has a visible disfigurement to the body consisting of a total of two (2), 3/8 inch, light red arthroscopic surgical scars located on either side of the left leg in the area of the knee. In addition to these scars, there is mild swelling of the left knee when compared to the right.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to Assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). In this case, the ALJ concludes that Dr. Tyler's opinions are supported by the content of the medical records he reviewed. They are also supported by the fact that it is impossible to determine whether the "potential" tears noted on MRI occurred before or after the fall in question. As such, the ALJ finds Dr. Tyler's opinions credible. There is also a lack of persuasive evidence to support a conclusion that Dr. Tyler deviated from the accepted methodology of the AMA Guidelines when he completed his DIME in this case. Indeed, Claimant makes no such assertion. Rather, Claimant contends that the DIME has been overcome based upon the fact that Dr. Tyler relied solely on his physical examination of Claimant's shoulder without reviewing the results of the MRI study. For the reasons enumerated below, the evidence presented fails to persuade the undersigned ALJ that Dr. Tyler's opinion regarding the relatedness of Claimant's need for surgery to her industrial injury is "clearly erroneous."

Overcoming the DIME

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI and/or causation is incorrect.

Metro Moving and Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI and/or the cause of a particular condition asserted to be related to Claimant's industrial injury, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

E. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Here, the weight of the persuasive evidence demonstrates that Claimant's need for additional left shoulder treatment, including surgical intervention is related to a condition that cannot be definitively traced to her industrial injury. Because physical examination is limited in its ability to identify internal joint pathology and because the only MRI evidence actually presented at hearing cannot tell us when the tear occurred, there is no way of knowing when the "potential" tears in the rotator cuff tear actually occurred. Here it is equally likely that the tear was present before Claimant's trip and fall or occurred sometime after based on Claimant's failure to report increased left shoulder symptomatology until 4 months after her fall. While Dr. Hall surmised that since Claimant underwent surgery and the surgery helped, her fall must have caused the joint pathology noted on MRI, this theory does not constitute clear and convincing evidence that Dr. Tyler's causality assessment was highly probably incorrect. Simply because the surgery that Claimant underwent reduced her pain that does not correlate the onset of Claimant's left shoulder pain due to suspected internal pathology to her May 13, 2015 fall. As explained by a Panel of the Industrial Claims Appeals Office in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), a coincidental correlation between a claimant's work and his symptoms does not mean there is a causal connection between a claimant's injury and his/her work. To the contrary, as noted by the Panel in *Scully* "correlation is not causation."

F. After considering the totality of the evidence presented, including the DIME reports and testimony of Dr. Hall, the ALJ concludes that Claimant has failed to produce unmistakable evidence establishing that the Dr. Tyler's determination regarding causality and MMI is highly probably incorrect. Rather, the ALJ concludes that the

evidence presented establishes a mere difference of opinion regarding causation between the DIME physician and the medical expert (Dr. Hall) retained by Claimant. A professional difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Tyler's opinions concerning causality and MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Claimant has failed to meet her required legal burden to set Dr. Tyler's causality and MMI determination aside.

Maintenance Medical Benefits

G. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

H. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, Claimant has failed to prove entitlement to medical maintenance benefits. Here, Dr. Olson, the authorized provider, Dr. Tyler, the DIME physician, and Dr. Hall, Claimant's own IME physician, all opined that there is no need for medical maintenance benefits. (Exhibit L, bate stamp 74, Exhibit M, bate stamp 102, and Exhibit 4, bate stamp 44) Consequently, Claimant's request for medical maintenance benefits is denied and dismissed.

Repayment of Overpayment

I. Section 8-40-201(15.5), C.R.S. provides as follows:

> "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability benefits under said articles.

Thus, §8-40-201(15.5), C.R.S. provides for three categories of possible overpayment: (1) a claimant receives money "that exceeds the amount that should have been paid"; (2) money received that a "claimant was not entitled to receive"; and (3) money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. *See Simpson v. Industrial Claim Appeals Office,* 219 P.3d 354 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010).

J. Respondents bear the burden, by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits. Respondents' assertion of the right to recover an overpayment is a factual matter for determination by the ALJ. *Karyn Milazzo v. Total Long-term Care*, *Inc.*, W.C. No. 4-852-795-02, (ICAP Jun. 11, 2014). In this case, the parties stipulated that the Final Admission of Liability accurately reflects an overpayment to Claimant in the amount of $2,215.87. Consequently, Respondent are entitled to recover $2,215.87 from Claimant.

Disfigurement

K. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found in this case, Claimant has surgical scarring located on the left leg on either side of the knee, which alters the natural appearance of skin in these areas. Consequently, the ALJ concludes that Claimant has suffered a visible disfigurement entitling her to additional benefits as provided for by Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME opinion of Dr. Tyler regarding the cause of Claimant's left shoulder condition/symptoms and MMI is denied and dismissed.

2. Claimant's request for maintenance medical benefits is denied and dismissed.

3. Claimant shall repay Respondents the stipulated $2,215.87 overpayment in benefits.

4. Claimant is entitled to disfigurement benefits in the amount of $800.00.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 22, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she sustained a compensable injury to her lower back while working for Employer on July 18, 2016?

II. Has Claimant shown, by a preponderance of the evidence, that the surgery performed by Dr. Toby Moore, to include the L4-L5 and L5-S1 fusion, was reasonable, necessary, and related to Claimant's compensable condition?

III. Has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability Payments, beginning August 3, 2016 and ongoing?

STIPULATIONS

I. The parties stipulated that Claimant's Average Weekly Wage is $550.80. This stipulation was accepted by the ALJ.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant asserts that she sustained an injury to her back while working for Taylor Farms on July 18, 2016.

2. Claimant worked for Taylor Farms from 2002-2003, and then again from 2008-2016. She worked on the trim deck at the production line for cabbage. Claimant testified that on July 18, 2016, she was handling the controls of the conveyor belt that moves the cabbage.

3. Claimant testified that began work at 7:30 a.m. on July 18, 2016 and that when she started work, she did not have any pain. She estimated that she began experiencing pain at around 8:30 a.m. or 9:00 a.m. She testified that she had bent down to pick up a cabbage that was clogging the conveyor belt, and that is when she experienced pain in her waist, right leg, and right arm.

4. Claimant testified that when this occurred, there was no one across from her on the conveyor belt, and that there were only three other people working on the conveyor belt line. She said that they could not keep up with how fast the cabbage were being loaded onto the conveyor belt. Because there was no one on the other side of the conveyor belt, and because the cabbages were coming so fast, cabbage was getting stuck and clogging the conveyor belt and falling to the floor.

5. Claimant testified that in order to clear the cabbage, she held on to a piece of equipment on the conveyor belt, bent forward and then twisted so she could reach under the conveyor belt to the other side and stab the cabbage that had fallen to the floor with her cabbage knife and put it onto the trash conveyor that is directly under the production conveyor belt.

6. Claimant also demonstrated this in court, showing specifically that she reached under the conveyor belt to the other side of the belt in order to reach the cabbage that had fallen to the floor.

7. Claimant stated that she did not report her pain to the employer, but instead she continued to work until the lunch break, at around 12:30 p.m. She attempted to walk it off prior to this time, to no avail. Her supervisor, Lupita Pelayo asked her if she was feeling alright. Ms. Pelayo asked if Claimant had fallen or hurt herself at work. Claimant responded no, that she just had a strong pain.

8. Ms. Pelayo took Claimant to the office to speak with Operations Manager, Troy Janzer. Ms. Pelayo accompanied Claimant to the office in order to provide translation between Claimant, who is a Spanish speaker, and Mr. Janzer, who is an English speaker.

9. Claimant contends that she told Mr. Janzer that she had injured herself while working with the cabbage. She said that Mr. Janzer asked her what she wanted to do and that she said she wanted to go home. Claimant also testified that Mr. Janzer told her to go to her own doctor to find out what kind of treatment she needed, to bring that information back to him, and that he would then help her to get the recommended treatment.

10. Claimant went to Emergicare later that same day, and was assessed by Dr. Joseph Zaremba. She reported right leg pain and told Dr. Zaremba that she had not suffered any kind of trauma. Claimant did not complain of any back pain or arm pain. (Ex. E, p. 16). The intake report from Emergicare states that Claimant reported "She was at work today when the pain happened, she was *picking up a box at work*". *Id* (emphasis added).

11. Dr. Zaremba conducted a physical examination and specifically documented that Claimant had a normal musculoskeletal exam to the lumbar spine and that she had normal musculoskeletal posture. (Ex. E, p. 18). Dr. Zaremba diagnosed Claimant with right sided sciatica and recommended that Claimant receive a steroid injection. (Ex. E, p. 19). Claimant was advised to return to Emergicare within 3 to 4 days for a recheck, but the records do not reflect that this occurred.

12. Dr. Zaremba also took Claimant off work from July 18-20, 2016. Claimant did not return to work following these dates. Claimant had begun a vacation which had been previously scheduled to begin on July 20, 2016. Claimant was already scheduled to return to work from her vacation on August 3, 2016.

13. On August 3, 2016, Claimant returned to Taylor Farms. Claimant testified that she spoke with Mr. Janzer on that day, with translation again provided by Ms. Pelayo, regarding the physical therapy she asserts he told her he would help her with. Claimant testified that Mr. Janzer told her he could not help her and that she should go to her own doctor.

14. Claimant reported to the Emergency Room at Penrose St. Francis on August 10, 2016. She reported at this visit that she had no prior significant lumbar condition, but it was suggested by hospital personnel that she might have a herniated disc. At this visit, Claimant reported pain radiating into the right leg slightly, but now seems worse on the left leg. Her range of motion in lower back was minimal due to pain. (Ex. 6, p. 17).

15. Claimant went to Dr. Amir Salek with Briargate Medical Associates on August 22, 2016 as a new patient. (Ex. G, p. 57). Claimant complained of pain in her low back radiating down into her right leg. (Ex. G, p. 58). Upon completion of the physical examination, Dr. Salek diagnosed her with sciatica. (Ex. G, p. 61).

16. Dr. Salek referred Claimant for an MRI of her lumbar spine, which she underwent on September 1, 2016. The MRI showed moderate to severe canal stenosis and moderate degenerative disc disease of the lower lumbar region. (Ex. C, p. 3).

17. On September 7, 2016, Dr. Salek reviewed the MRI findings with Claimant, and continued her diagnosis of sciatica. He added the diagnoses of spinal stenosis of lumbar region and lumbar disc disease with radiculopathy. Claimant was referred for an orthopedic consult. (Ex. G, p. 68).

18. Claimant subsequently treated with Dr. Toby Moore at Front Range Orthopedics. Her first appointment was on or about October 31, 2016. (Ex. F, p. 23). In describing the mechanism of injury, Claimant reported that she bad bent over to pick up cabbage. When she stood up, she had a sharp pain shoot down her legs. She did not describe any kind of twisting, lifting, or any other motion other than simply bending over. (Ex. F, pp. 23, 28).

19. Dr. Moore referred Claimant for lumbar spine physical therapy, and also recommended that she undergo a lumbar epidural steroid injection. (Ex. F, p. 25). There are no medical records that Claimant ever participated in or received the physical therapy recommended by Dr. Moore; however, Dr. Moore's records occasionally reference that Claimant 'continue' her physical therapy.

20. At Claimant's appointment on January 9, 2017, Dr. Moore documented that on examination, she had normal alignment of the lumbar spine, with normal active and passive range of motion on both flexion and extension. Despite these findings, Dr. Moore recommended to Claimant that she undergo surgery in the form of a two level fusion at L4-L5 and L5-S1. Claimant underwent this surgery on January 26, 2017. (Ex. H, p. 97).

21. In a follow-up visit with Dr. Moore on April 24, 2017, Claimant reported considerable improvement, post-surgery. She reported only "modest" lower back pain on this visit, and no more radicular symptoms. (Ex. 11, p. 109).

22. Claimant testified that the surgery helped to resolve her leg pain. She testified that she still experiences significant waist and low back pain. She further testified that because she still experiences pain in her waist and low back, she is still undergoing medical treatment.

23. Claimant testified that she is fully aware of the sanitation policies at Taylor Farms. She knows that she is not supposed to pick produce up from the floor by hand, or with her cabbage knife.

24. When asked why she didn't turn off the conveyor belt so that she and her coworkers could catch up with the cabbage production, Claimant testified that she was not permitted to turn the conveyor belt off "all the time."

25. Claimant had previously been injured while working for Taylor Farms, after she had fallen from a ladder. She testified that Taylor Farms referred her for care through a workers' compensation doctor. She was also provided light duty while she was still on work restrictions.

26. Claimant also admitted on cross examination that when she met with Mr. Janzer and others at Taylor Farms on August 3, 2016 that she did not state that she hurt herself at work. She only told Mr. Janzer that she could not come back to work because of the pain.

27. When Claimant informed Employer on August 3, 2016 that she would be unable to return to work, she did not have any written excuse from any healthcare provider taking her off work.

28. On cross examination, Claimant agreed that bending over is an everyday activity in which most people engage. She further specifically agreed that in her activities of daily living, she was often required to bend over.

29. Claimant's son, Eric Sanchez, testified that on July 18, 2016, Claimant appeared to him to be without pain when they both left their home that morning. He testified that he was notified by his father later that morning to pick up Claimant from work, as she was experiencing pain.

30. Mr. Sanchez testified that when he arrived at Taylor Farms to pick up Claimant, she told him that she had bent forward to pick up cabbage, and that she felt pain. Mr. Sanchez did not testify that Claimant described to him any kind of twisting, lifting, or other mechanism other than simply bending forward.

31. Claimant also called Dr. Timothy Hall to testify in her case in chief. Dr. Hall is licensed in the State of Colorado and practices in the field of Physical Medicine & Rehabilitation. He has been Level II accredited since the mid-1990s. Dr. Hall is not an

orthopedist, nor does he specialize in disorders of the spine.

32. Dr. Hall testified that he reviewed Claimant medical records and spoke with her at her IME appointment. He did not conduct a physical examination of Claimant because "he did not see the point." Dr. Hall also did not view the actual MRI scan taken on September 1, 2016; he did review the narrative report of the MRI findings.

33. Dr. Hall testified that Claimant demonstrated to him how she bent forward to reach the cabbage on the other side of the conveyor belt with her cabbage knife. He feels that Claimant's description of the mechanism of injury is consistent with the injury she sustained.

34. Dr. Hall testified to his belief that the surgery performed on Claimant by Dr. Moore was causally related to the mechanism of injury, and is therefore reasonable, necessary and related. He further testified that the surgery was necessary to relieve Claimant's symptoms.

35. Dr. Hall testified that he relied on Claimant's self-report that the surgery helped her, and used as an example to demonstrate Claimant's improvement her report that after the surgery, she is now able to walk for up to 10 minutes. However, on cross examination, Dr. Hall was forced to admit that prior to the surgery, claimant reported that she was able to walk up to 10 minutes, which demonstrated no post-operative improvement. Furthermore, Dr. Hall also admitted that, as he documented in his IME report and also by claimant's own testimony at hearing, claimant still experiences considerable waist and back pain, and that the pain is not much improved in these areas from the surgery. CE 14, Bates 216.

36. On cross examination, Dr. Hall agreed that the Medical Treatment Guidelines ("Guidelines") had not been followed. According to the Guidelines, Claimant did not meet the criteria for a two level fusion, as she was not a surgical candidate.

37. Respondents called Guadalupe "Lupita" Pelayo to testify. Ms. Pelayo worked at Taylor Farms for eight years as a production supervisor. She was working on July 18, 2016.

38. Ms. Pelayo testified that she was approached by Claimant's husband a few minutes before the lunch break. He informed her that Claimant was not feeling well, and that she was experiencing pain. Mr. Pelayo further testified that Claimant's husband told her that Claimant had awakened with the pain.

39. After speaking with Claimant's husband, Ms. Pelayo sought out Claimant to ask how she was feeling. Claimant told her that she was having some pain and that she woke up that morning feeling that way.

40. Ms. Pelayo testified that she immediately asked Claimant if she had hurt herself at work. Claimant responded that she had not hurt herself at work.

41. Ms. Pelayo stated that Claimant then told her that she wished to go home. Ms. Pelayo then accompanied Claimant to the office to speak with the Operations Supervisor, Troy Janzer. Ms. Pelayo then provided translation from English to Spanish for Mr. Janzer and Claimant.

42. Ms. Pelayo testified that Mr. Janzer asked Claimant three times whether she had hurt herself at work. Each time, Claimant responded that she had not. She further testified that Claimant simply asked to go home, and that Claimant did not ask to seek a workers' compensation doctor.

43. As a production supervisor, Mr. Pelayo testified that if she even only suspects that an employee is injured at work, the employee is immediately provided with what help is necessary. She then completes an accident report, and the injured worker is sent to the workers' compensation doctor. If a worker states that they have been injured at work, Ms. Pelayo testified that the employee would certainly be sent to the workers' compensation doctor.

44. Ms. Pelayo testified that in her experience as a production supervisor, if an employee is suspected of having been injured at work, there has never been a time when Employer did not send the injured worker to the workers' compensation doctor.

45. Ms. Pelayo testified that on August 3, 2016, when Claimant returned to Taylor Farms to inform Employer that she could not work, that she participated in that meeting, once again providing translation assistance.

46. Claimant said during the August 3, 2016 meeting that she thought now that she had hurt herself at work on July 18, 2016. Ms. Pelayo testified that she reminded Claimant that on July 18, 2016, Claimant had been asked three times if she'd hurt herself at work and each time, Claimant had said 'no'. Ms. Pelayo testified that in response, Claimant then told her that she wasn't sure how she'd hurt herself.

47. Ms. Pelayo testified that during the July 18, 2016 meeting, neither Mr. Janzer nor any other Employer representative, told Claimant to go to her own doctor and then to come back with a note about what she needs, and that the Employer would help her.

48. Ms. Pelayo also testified that at any time that the production line becomes full, employees are permitted to turn off the conveyor belt as many times as necessary, so that they can catch up.

49. Ms. Pelayo further testified that Claimant's testimony that no one was across from her on the conveyor belt did not make sense. The requirement on the production floor is that there is always someone on both sides of the conveyor belt.

50. When asked about Claimant's assertion that the cabbage was clogging the conveyor belt, Ms. Pelayo testified that this does not make sense either. In all her time as a production supervisor, she has never seen cabbage clog the conveyor belt.

51. Respondents also called Troy Janzer to testify at hearing. Mr. Janzer is the Operations Manager for Taylor Farms. He has worked at Taylor Farms for 21 years, and has been the Operations Manager for 10 years.

52. Mr. Janzer testified that he was working on July 18, 2016 when Ms. Pelayo brought Claimant to the office. He agreed that Ms. Pelayo provided translation assistance for him and Ms. Sanchez.

53. Ms. Janzer testified that Claimant reported to him that she was not feeling well, and that she was having some pain. Claimant did not specify where she was having pain, or what type of pain she was experiencing.

54. Upon hearing that Claimant was experiencing pain, Ms. Janzer testified that he asked her at least twice if she had hurt herself at work. Each time, Claimant responded no, that she did not get hurt at work.

55. Mr. Janzer testified that if he had any reason at all to believe that Claimant had injured herself at work, he would have immediately sent her to HealthQuest, which is the workers' compensation facility utilized by Taylor Farms. He further testified that he would have begun an accident investigation, to include completing an accident report, viewing the video footage form the production floor, and address and correct any safety hazards that might be identified. He testified that he did not undertake any of these actions because Claimant told him that she was not injured at work.

56. Mr. Janzer testified that safety in the workplace at Taylor Farms is "Job One." As the Operations Manager, Mr. Janzer testified that safety is of the utmost importance, and that he strives for every employer to go home safely at the end of the day. He testified that if he had any reason to suspect or belief that a work injury had occurred, he would require the employee to go to HealthQuest for evaluation and treatment.

57. Mr. Janzer was asked to recall the testimony and demonstration by Claimant of how she reached under the conveyor belt to stab a cabbage that had fallen to the floor. He testified that Claimant's description of the MOI was completely implausible, as it is impossible to reach under the conveyor from one side to the other due to a stainless steel divider under the conveyor belt that blocks to two sides of the belt from each other.

58. Mr. Janzer also testified that an employee would not be in trouble for turning off a conveyor belt so that the workers can get caught up. Employees are encouraged to do so in order to avoid damaging the produce. Moreover, he testified that Claimant was well aware of this, as she had been doing it for years while working for Taylor Farms.

59. Mr. Janzer testified that in the entire time he has worked for Taylor Farms, he has never seen cabbage clog a production line such as Claimant described. Mr. Janzer added that Claimant's version of the MOI is implausible, because Taylor Farms has a strict sanitation policy that employees are not allowed to touch anything on the

floor with their hand *or any utensils*, including a cabbage knife. He testified that Claimant is also fully aware of this sanitation policy, as this has been the policy for as long as he has worked there for 21 years.

60. Mr. Janzer denied that he ever told Claimant to see her own doctor, then return to him for help in obtaining medical services that may be required.

61. Mr. Janzer testified that at the meeting with Claimant on August 3, 2016, he offered for her to go to HealthQuest for evaluation, even though she had said that did not injure herself at work. However, Claimant never went to HealthQuest. The first time Mr. Janzer became aware that Claimant was even alleging a work injury was during the meeting on August 3, 2016.

62. Respondents called medical expert, Dr. Brian Reiss, to testify via post-hearing evidentiary deposition on November 7, 2017.

63. Dr. Brian Reiss conducted a medical records review at Respondents' request. The purpose for the records review IME was to determine whether or not there was a consistent injury, whether Claimant's symptoms were related to any particular injury at all, and whether or not Claimant's treatment, including the fusion surgery, was reasonable and necessary. (Depo p. 8, ll. 18-25; p. 9, l. 1).

64. Dr. Reiss is an orthopedic surgeon. He has practiced in Colorado since 1988 and specializes in disorders of the spine. (Depo p. 5, ll. 1-4). He has a Fellowship in spine surgery and is Board certified in orthopedics. He is a Level II accredited physician, and has been so accredited since the beginning of the Workers' Compensation accreditation program. (Depo. p. 5, ll. 3-4, p. 6 ll. 3-14).

65. Dr. Reiss reviewed 362 pages of Claimant's medical records. He testified that there were no physical therapy notes. Dr. Reiss also testified that he had reviewed not only the MRI report, but that he had reviewed the actual film of the MRI scan as well.

66. After his review of Claimant's medical records, Dr. Reiss concluded that there was no good documentation that Claimant had injured herself at work. The description of her work injury, based on what was documented in the medical records, was that of simply bending over, which would not have caused a work injury. (Depo p. 9, ll. 6-10).

67. Dr. Reiss testified that simply because one develops pain at work does not mean work is responsible. In Claimant's case, Dr. Reiss specifically opined that there was no unique activity at work which required her to bend over any differently than she would have bent over at home doing anything else. (Depo p. 9, ll. 15-20).

68. Dr. Reiss testified that Claimant's medical records documented that she simply bent over to pick up a cabbage, and that there was no reference in her medical records to any kind of twisting while bending. (Depo. p. 10, ll. 13-25, p. 11, l. 1).

69. Dr. Reiss testified that he reviewed the MRI scan and report of Claimant's spine. The MRI scan did reveal some positive findings; however, he further testified that there was nothing in the medical records and the description of the mechanism of injury that Claimant gave to multiple providers that anything she did at work *caused* those findings. (Depo. p. 11, ll. 5-17). Instead, Dr. Reiss concluded, after his review of the MRI scan and report, that the positive findings were likely pre-existing, and were a normal degenerative finding that occurs over time. (Depo. p. 11, ll. 16-19).

70. Dr. Reiss testified that back pain does not require any injury; that a person can wake with back pain, stand up from sitting and have back pain, walk down the street and have back pain. (Depo. p. 13, ll. 2-5). He testified that Claimant's report to Ms. Pelayo that she had awakened with back pain on the morning of July 18, 2016 is consistent with this. (Depo., p. 13, ll. 12-21).

71. Dr. Reiss also testified regarding the inconsistencies regarding Claimant's reports of pain to her medical providers, specifically noting that Claimant initially reported only pain down into the right leg, but no back pain. (Depo. p. 15, ll. 23-25, p. 16, ll. 1-5).

72. Dr. Reiss opined that the surgery performed by Dr. Moore was not reasonable or necessary. (Depo. p. 16, ll. 22-25, p. 17, ll. 1-2).

73. Dr. Reiss noted that Claimant's major complaint was back pain. He described that the treatment for back pain should be a core strengthening program, aerobic conditioning, stretching, and time. Fusion procedures do not work well for complaints of back pain without instability. (Depo. p. 17, ll. 6-11). Dr. Reiss further testified that even if all conservative measures as described fail, the likelihood of the fusion surgery such as Dr. Moore performed of being helpful is dismal. Specifically, Dr. Reiss explained that when there are multiple levels of degeneration with no instability and all a person has is back pain-which was the situation for Claimant-a fusion is an act of desperation, and it should not be done. (Depo, p. 17, ll. 12-22).

74. Moreover, as Dr. Reiss testified, the Guidelines also support his expert opinion that the fusion surgery was not reasonable or necessary. He noted that there was no pain generator identified, as required by the Guidelines, and explained that the presence of more degeneration at one level than another is not an indication of a pain generator. (Depo. p. 18, ll. 2-6). He also testified that pursuant to the Guidelines, before a two level fusion should occur, the injured worker needs to have completed conservative care. As Dr. Reiss testified, there is no objective medical evidence that Claimant went through appropriate physical therapy, whether she even went to physical therapy, and if she did, for how long and with what result. (Depo. p. 18, ll. 20-25, p. 76, ll. 8-12, 15-24). Additionally, the Guidelines require that Claimant undergo a psychological evaluation, which Dr. Reiss testified did not occur. Lastly, the surgery that is being proposed should be more likely to provide a positive result than continued non-surgical treatment. (Depo. p. 19, ll. 1-6). In Claimant's case, Dr. Reiss testified that a fusion surgery to address degenerative change and back pain without instability had a very poor likelihood of being helpful.

75. Dr. Reiss testified that merely because claimant experienced back pain at work does not mean that anything claimant did at work caused the back pain. Reiss Depo., p. 21, l. 14-17.

76. Dr. Reiss explained in testimony that an epidural steroid injection is not diagnostic for the location or the source of claimant's back pain. (Depo., p. 23, ll. 16-25, p. 24, ll.1-5). Even if claimant had experienced some relief from the lumbar epidural steroid injection, Dr. Reiss advised that this is not an indication in any way that claimant would get the same relief from a fusion surgery. (Depo. p. 24, ll. 3-5).

77. Dr. Reiss agrees that claimant had some stenosis in the area of the L5 nerve root but explained that this would be the cause only for the leg symptomatology, and that it would not be a cause for back pain symptomatology. (Depo. p. 24, ll. 6-12).

78. Dr. Reiss was asked on cross examination whether bending and twisting would be more likely to have caused an injury to claimant's low back than simply bending. In response, Dr. Reiss testified that generally, just bending and twisting wouldn't necessarily be much different than just bending over. Instead, Dr. Reiss testified that the most likely cause of an injury to a disc would be a loading action – like lifting and twisting. (Depo., p. 25, ll. 17-25, p. 26, ll. 1).

79. On redirect, Dr. Reiss reiterated that Claimant never reported that she was lifting anything as part of the MOI and also that she not report any kind of twisting to any of her medical providers. Claimant reported only that she had been bending forward. (Depo. p. 26, ll. 16-22).

80. Dr. Reiss offered his expert medical opinions based upon a reasonable degree of medical probability.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved

essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

Compensability

D. Claimant must prove by a preponderance of the evidence that she is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); *See*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

E. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

F. The mere fact that a Claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury." The occurrence of symptoms may represent the result of a natural progression of a pre-existing condition that is unrelated to the industrial injury or employment. See *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995).

G. Taken as a whole, the evidence does not support a finding of compensability. While it is certainly possible that certain details can literally become lost in translation, Claimant had the benefit of interpreters throughout the process which she, and the ALJ, could have confidence in. Claimant was familiar with her work station, her duties and obligations, and policies and procedures to complete her daily tasks. She was at least generally familiar with the Workers Compensation process, having been through it on a prior occasion. The ALJ finds that both Troy Janzer and Guadalupe Pelayo are credible, both in describing sanitation and safety procedures of Employer, as well as their interactions with Claimant surrounding this claim.

H. It is entirely unclear *when* Claimant's symptoms began. While Claimant testified at hearing that she felt this sudden onset of pain at work while retrieving a wayward cabbage from the floor, she told both her husband, and Ms. Palayo that her back had been hurting since she awoke that morning. This threshold discrepancy has not been satisfactorily explained. It has, therefore, not been shown by a preponderance of the evidence that Claimant's symptoms began at work, instead of at home.

I. The record is also unclear *where* Claimant was injured. In contrast to Claimant's position at hearing, she was insistent, on the date in question, to two different co-workers that she was not injured at work. Employer has protocols in place, and the ALJ so finds, which satisfactorily address addressing safety reviews when an employee reports an injury, and referral to Workers Compensation physicians. The ALJ cannot conclude that Employer's representatives chose to ignore such protocols by sending her to a private physician, and not performing a safety review. The location of Claimant's injury has not been shown by a preponderance of the evidence.

J. Assuming, arguendo, that such initial matters have been satisfied, Claimant has not shown *why* she was injured. At her first visit to the Emergency Room, medical personnel reported that she was picking up a box at work. Claimant testified at hearing, that Employer was so short-staffed on the date of injury that no one was across from Claimant at the conveyor, that she was not comfortable in hitting the "off" button, so she

resorted to stabbing a cabbage on the floor to dispose of it. While it is theoretically possible that Claimant did not want to admit to her superiors that she violated company policy in so doing, the ALJ is not now persuaded that she then told a series of prevarications, all against her own medical interests, in order to avoid the consequences of a work infraction. Nor has Claimant herself advanced that argument.

K. It is also unclear from the record *how* Claimant might have been injured. The theoretical chances of such an injury occurring are increased somewhat with a contemporaneous *twisting* motion, in addition to bending straight over. Claimant reported to Dr. Hall that she was engaging in this twisting motion *repetitively.* She denied it outright to her supervisors. Had she told them, safety video could have been reviewed for verification. Presumably, Claimant was aware of on-premise video capabilities, which could have corroborated her account. If her current account is accurate, she knowingly violated company policy *while being filmed*. She testified at hearing that she reached over towards the other side of the conveyor on a *single occasion*- an action which is not possible due to a steel barrier, according to credible testimony. Claimant reported an *acute, repetitive* (no mention of twisting) to Dr. Moore, who classified it as work-related. Curiously, Dr. Moore's notes do not reference advising Claimant to inquire about the Workers Compensation system.

L. Lastly, assuming one accepts at face value Claimant's testimony at hearing (which the ALJ does not), there is insufficient evidence that Claimant herniated her disc in this singular event at work. There was no loading on the spine from lifting anything. Claimant suffered from pre-existing, degenerative changes to her lower back. The mere act of bending over, even if twisting, would not cause this condition, according to the persuasive opinion of Dr. Reiss. Instead, Claimant's condition and symptoms could arise as a result of everyday activities, not unique to her work environment.

Reasonable and Necessary Surgery by Dr. Moore

M. One might reasonably argue that since Claimant reported significant benefits from her surgery, it demonstrates that, *ipso facto,* it was reasonable and necessary to perform it. However, since Claimant's condition was not related to a compensable work injury, the ALJ declines to address this issue.

Temporary Total Disability

N. Since Compensability has not been established, Temporary Total Disability benefits are likewise denied.

ORDER

It is therefore ordered that:

1. Claimant's request for Workers Compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 22, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 south Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is entitled to medical benefits for his low back condition.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary disability benefits.

III. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant has a pre-existing history of low back problems. Claimant was involved in a motor vehicle accident in 2006 and subsequently underwent a lumbar spine fusion from L4-S1. Claimant was involved in another motor vehicle accident in February 2008 and presented to the Medical Center of Aurora on February 25, 2008 complaining of lumbar and low back pain. An x-ray of his lumbar spine evidenced the prior lumbar fusion surgery and degenerative joint disease.

2. On March 23, 2015, Claimant sustained a work injury to his low back while working for a different employer. Claimant was diagnosed with a lumbar strain and lumbar radiculopathy. It was noted that Claimant had spinal stenosis of the lumbar region.

3. Claimant treated with Rick Zimmerman, D.O. and Bryan Castro, M.D. for the March 2015 work injury. A June 9, 2015 MRI of Claimant's lumbar spine demonstrated chronic extensive degenerative disc changes. Claimant underwent epidural steroid injections.

4. On August 23, 2016, Claimant sustained a work injury while working for Employer.

5. Claimant presented to the Emergency Department at Littleton Adventist Hospital on August 23, 2016 with a left leg laceration. It was noted that a double pane glass window fell onto Claimant's left posterior calf. Claimant reported that he also twisted his back and complained of diffuse lower back pain. An x-ray of Claimant's lumbar spine revealed degenerative changes with no acute abnormalities. Dr. Gary Witt's impression was a left leg laceration and lumbar strain. Claimant underwent a laceration repair and received a splint.

6. On August 30, 2016, Claimant saw Michael Fuller, D.O. at Panorama Orthopedics & Spine Center. Claimant reported 8/10 pain and sensory deficits in the

back of his left leg. No low back complaints were noted. Dr. Fuller recommended Claimant begin strengthening and range of motion exercises.

7. Claimant attended a physical therapy evaluation on September 14, 2016 and complained of left leg and back problems. He reported falling during the August 23, 2016 incident and alleged that he hyperextended his back.

8. A November 2, 2016, a lumbar spine CT and myelogram demonstrated Claimant's prior L4-S1 fusion as well as significant degenerative changes throughout the lumbar spine with severe central canal stenosis.

9. On November 10, 2016, Dr. Fuller assessed a medial and lateral meniscus tear of left knee and peroneal nerve injury. He recommended Claimant undergo a knee arthroscopy.

10. Thomas Puschak, M.D. evaluated Claimant on November 11, 2016. Dr. Puschak reviewed Claimant's CT myelogram and recommended Claimant undergo a laminectomy from L1-L4. There is no indication in Dr. Puschak's medical notes that he reviewed Claimant's prior medical records demonstrating pre-existing low back issues. Dr. Puschak did not include a causation analysis regarding the work-relatedness of Claimant's low back condition or need for low back treatment.

11. Claimant's authorized treating physician, Dr. Kirk Holmboe, referred Claimant to Dr. Castro for a second opinion. Dr. Castro evaluated Claimant on December 9, 2016. Claimant reported low back pain as his primary complaint. Dr. Castro's impression was a lumbar sprain/strain. He noted that he previously treated Claimant for a March 2015 work injury, and that Claimant's complaints of radiculopathy were greater at that time compared to now. Dr. Castro opined that the changes seen on imaging are pre-existing and not related to the August 23, 2016 injury. He discussed the possibility of a Claimant undergoing a lumbar decompression, with the following caveat: "All of this, however, should be viewed within the prism of causality. Certainly, there are significant concerns in this patient as to what injury caused his symptoms, as I have seen him for very similar findings approximately one year ago in a previous injury."

12. Dr. Castro ultimately performed a partial laminectomy with revision and decompression on April 20, 2017.

13. In a September 11, 2017 response to Respondents' counsel, Dr. Castro opined that Claimant's low back condition and need for low back treatment was unrelated to the August 23, 2016 work injury. Dr. Castro noted that the MRI findings did not demonstrate any significant changes from March 2015 to August 23, 2016. He further opined that Claimant had pre-existing severe stenosis at L3-4, and his low back problems were the progression and natural consequence of the March 2015 work injury. Dr. Castro stated that the lumbar surgery he performed in April 2017 was to address Claimant's severe stenosis at L3-L4 and unrelated to the August 23, 2016 work injury.

14. In a September 14, 2017 letter to Dr. Holmboe, Respondents' counsel made multiple inquiries as to Claimant's status in light of Dr. Castor's opinion that the April 20,

2017 lumbar surgery was not related to the August 23, 2016 work injury. Dr. Holmboe did not indicate he disagreed with Dr. Castro's opinion on the relatedness of Claimant's low back condition. However, he opined that Claimant was not at maximum medical improvement ("MMI") for the knee injury and that Claimant required an EMG of his left lower extremity to check the status of the nerve potentially injury by broken glass.

15. One of the questions read, "Considering that the April 20, 2017 lumbar surgery is not related to the subject claim of August 23, 2016, does the claimant have any restrictions that are currently attributable to the August 23, 2016 accident? If so, what are those restrictions?" Dr. Holmboe listed the following restrictions: limited standing/walking, no kneeling, squatting, crawling or climbing. Referring to Dr. Holmboe's May 4 and June 1, 2017 reports, Respondents' counsel asked, "Was your opinion that the claimant was unable to work based on the fact that he had undergone surgery on April 20, 2017?" Dr. Holmboe circled both "Yes" and "No" and wrote, "In part but also due to knee injury."

16. Respondents accepted the claim and filed a General Admission of Liability on July 6, 2017 admitting for medical benefits only.

17. Respondents do not contest Claimant's knee injury.

18. Claimant testified on his own behalf at hearing. Claimant believes his condition, including his low back problems and the need for low back treatment, is the result of the August 23, 2016 work incident. He testified that he requested and required medical treatment and lost wages as a result of his injury. He further testified that he has not returned to work since the date of his injury.

19. Claimant's pay records for the weekly pay periods ending May 29, 2016 to May 14, 2017 were admitted into evidence at hearing. For the pay period ending May 29, 2016 through July 31, 2016, Claimant earned between $430.00 and $1,734.00 a week for working anywhere between 21.50 and 48 hours of work. Claimant's hours and pay varied prior to August 1, 2016. The pay records reflect that as of August 1, 2016, Claimant earned $20.00 per hour. Claimant did not offer any testimony or other evidence regarding his rate of pay or AWW.

20. Based on the totality of the evidence, the ALJ finds that $800.00 is a fair approximation of Claimant's AWW at the time of injury.

21. The pay records further reflect Claimant continued to receive full wages at $800.00 per week from the date of injury through May 14, 2017. Claimant has since separated from Employer.

22. The ALJ credits the opinion of Dr. Castro and finds that Claimant's low back condition and need for low back treatment is not related to the August 23, 2016 industrial injury.

23. Claimant failed to establish by a preponderance of the evidence that he is entitled to medical benefits for his low back condition.

24. The ALJ credits Dr. Holmboe's opinion regarding Claimant's current restrictions and inability to work as a result of the knee injury sustained on August 23, 2016. The ALJ finds that Claimant's knee injury caused a disability lasting more than three work shifts, that Claimant left work as a result of the disability, and that the disability resulted in an actual wage loss.

25. Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 15, 2017 and ongoing.

26. Claimant failed to establish by a preponderance of the evidence that he is entitled to temporary disability benefits from the date of injury through May 14, 2017, as Claimant was paid his full wages during such time period.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability and Medical Treatment

A claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant failed to establish that his low back condition and low back treatment are related to the August 23, 2016 industrial injury. Claimant has a well-documented history of pre-existing low back issues. Dr. Castro, who is familiar with Claimant's 2015 back injury, credibly opined that Claimant's current low back issues are pre-existing and represent the natural progression of his low back condition. Dr. Castro also credibly opined that Claimant's need for low back treatment is unrelated to the August 23, 2016 industrial injury. Thus, the treatment Claimant received for his low back, including the April 20, 2017 lumbar surgery, was not related to the August 23, 2016 industrial injury. Dr. Castro's opinion is supported by objective x-ray, CT and MRI

findings. Dr. Holmboe was notified of Dr. Castro's opinion and did not indicate any disagreement as to the relatedness of the low back condition. While Dr. Puschak recommended low back surgery, there is no indication Dr. Puschak was aware of Claimant's pre-existing low back issues. Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that he is entitled to medical treatment for his low back condition.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary disability benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Respondents contend Dr. Holmboe did not determine or indicate which restrictions were due to Claimant's lumbar condition as opposed to his knee condition, and that Dr. Holmboe failed to determine if Claimant's off-work status was the result of the unrelated lumbar condition. The ALJ disagrees. Each question asked of Dr. Holmboe in the September 14, 2017 letter was prefaced with the qualification that the April 20, 2017 lumbar surgery was not related to the August 23, 2016 industrial injury. Dr. Holmboe opined that Claimant was not at MMI for the August 23, 2016 industrial because of Claimant's knee injury. Respondents' counsel specifically asked what current restrictions were related to the August 23, 2016 considering the April 20, 2017 lumbar surgery was not related. In response, Dr. Holmboe listed multiple restrictions. Dr. Holmboe clearly stated that his opinion Claimant was unable to work was based in part on the fact Claimant underwent lumbar surgery in April 2017, but also due to the knee injury.

Based on Dr. Holmboe's responses, Claimant is subject to restrictions due to the knee injury sustained on August 23, 2016 and is unable to work due to such knee injury. Claimant has not worked since the date of the industrial injury. Accordingly, it is more probably true than not that Claimant's knee injury caused a disability that resulted in Claimant missing more than three work shifts. Claimant is thus entitled to temporary total disability ("TTD") benefits for the time period in which he experienced actual wage loss as a result of the disability.

As found, Claimant failed to establish that he is entitled to temporary disability benefits from the date of injury through May 14, 2017. Claimant's disability did not result in actual wage loss during such time period. However, Claimant has established entitlement to TTD benefits from May 15, 2017 and ongoing. Claimant suffered wage loss subsequent to May 15, 2017. No evidence was presented establishing that Claimant was placed at MMI, has returned to employment, or that he has been given a written release to return to regular or modified duty. No evidence was presented establishing that Claimant was responsible for his termination. Based on the totality of the evidence, Claimant has established by a preponderance of the evidence that he is entitled to TTD disability benefits beginning May 15, 2017 and ongoing, until terminated by law.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3), C.R.S. establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

As found, Claimant's AWW is $800.00, based on Claimant earning $20.00 per hour and working 40 hours per week at the time of injury. Although the pay records reflect variances in Claimant's rate of pay and hours in certain weeks leading up to the industrial injury, the ALJ is persuaded that $800.00 as an AWW is a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

1. Claimant failed to prove by a preponderance of the evidence that his low back condition and low back treatment are related to the August 23, 2016 industrial injury. Claimant's claim for medical benefits for his low back condition is denied and dismissed.

2. Claimant's AWW is $800.00.

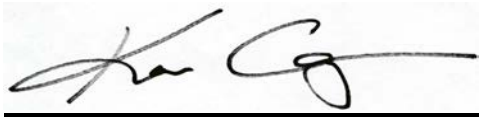
3. Claimant has established entitlement to TTD benefits beginning May 15, 2017 and ongoing. Claimant failed to establish entitlement to TTD benefits from August 23, 2016 through May 14, 2017. Respondents shall pay TTD benefits from May 15, 2017 and ongoing until terminated by operation of law, subject to any applicable offsets.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 20, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician Brian Mathwich, M.D. regarding Claimant's permanent impairment rating.

FINDINGS OF FACT

1. Claimant worked for Employer as a dental technician with duties including installing and maintaining dental equipment in various dental offices.

2. On February 8, 2016 Claimant was involved in a work related motor vehicle accident. Claimant was hit from behind by another vehicle after traffic suddenly came to a stop on Highway 225.

3. Claimant's air bags did not deploy. The company vehicle that Claimant was driving had some minor damage to the rear and the lift gait was slightly bent. There was no other damage to the vehicle that Claimant was driving.

4. Claimant was able to drive the vehicle home.

5. Later that day Claimant began having increasing pain in his low back radiating into his neck and he went to the Veterans Administration emergency department.

6. On February 8, 2016 Claimant was evaluated at the Denver VA Medical Center. Claimant reported being rear ended earlier that day and that he had a headache, neck pain, back pain, and left wrist and thumb pain. A CT of the cervical spine and head were taken and showed no acute osseous abnormality and no acute intracranial process. An x-ray of Claimant's left wrist showed no acute fracture or dislocation. Claimant was assessed with neck strain, headache/TBI, and left wrist sprain. Claimant was noted to be stable with only mild 1-2/10 pain scale headache and neck pain and was discharged. *See* Exhibit C.

7. On February 9, 2016 Claimant was evaluated at Mountain View Pain Center by chiropractor Matthew Usel, D.C. Claimant reported being rear ended the day prior while in his work van and on the highway. Claimant reported that since the crash he had been experiencing pain with stiffness in his neck, low back, and shoulders and that the neck pain radiated into his left hand. Claimant reported severe symptoms of low back pain on both sides with ache and tightness. Claimant reported severe neck pain

symptoms on both sides with radiating pain and tightness. Dr. Usel found muscle spasms bilaterally at Occ, C1, C5-7, T1-3, L2-4, and in the sub-occipital region. Cervical radiology was completed that showed mild degenerative joint disease at C4-5 and moderate disc thinning at C6-7. Dr. Usel noted that Claimant's objective findings correlated with subjective complaints and provided a reasonable medical probability that the symptomatology that Claimant presented with was in large part musculoskeletal in origin. Dr. Usel diagnosed: cervicalgia, cervical segmental and somatic dysfunction, muscle spasm of neck, sprain of ligaments of cervical spine, low back pain, lumbar segmental and somatic dysfunction, muscle spasm of back, and sprain of ligaments of lumbar spine. *See* Exhibit 3.

8. On April 28, 2016 Claimant was evaluated by Dr. Usel. Claimant reported that he was doing better but still had some tension in his neck and shoulders. Claimant reported minimum symptoms of pain in his neck bilaterally that included dull ache and tightness. Claimant also reported mild symptoms of low back pain bilaterally that included dull ache and tightness. Dr. Usel found tautness and tenderness bilaterally at C5-7, T7-9, and L2-4. Dr. Usel continued to assess cervicalgia, cervical segmental and somatic dysfunction, muscle spasm of neck, sprain of ligaments of cervical spine, low back pain, lumbar segmental and somatic dysfunction, muscle spasm of back, and sprain of ligaments of lumbar spine. *See* Exhibit 3.

9. On June 2, 2016 Claimant was evaluated by Hugh Macaulay, M.D. Claimant reported that he was driving his company vehicle when he was struck from the rear while stuck in traffic on 225. Claimant reported that his vehicle moved approximately one half to one car length forward on impact. Claimant reported being in shock and nervous after being struck. Claimant reported that he was able to drive home and noted that his neck was stiff and his back was starting to hurt so he decided to go to the VA Hospital. Claimant reported the next day he decided to see a chiropractor. Claimant reported pain that was making it difficult to do his normal activities including work, personal care, traveling, sitting/standing, lifting bending stooping and squatting, and running/walking. Claimant reported that he was well up until the February 8, 2016 accident. Claimant reported problems with his neck, upper back, low back, and shoulder. Claimant reported two prior motor vehicle accidents, one where he was taken out of a vehicle by the jaws of life and had his right femur rodded and performed 3 months of physical therapy. Claimant also reported that he sustained a prior back injury while serving in the United States Marine Corps when he was doing a swimming qualification with a weighted pack on his back. Claimant reported that he had a pop in his back while jumping off the diving board and had to be pulled out of the pool. Claimant reported that the physician at the VA was going to give him an 80% disability. *See* Exhibits 2, D.

10. On examination, Dr. Macaulay noted that Claimant had relatively good neck range of motion and tenderness to palpation about C4-5 on the right side. Claimant also had para-cervical muscular tenderness. Dr. Macaulay noted good range of motion in the lumbar spine with tenderness over the right SI joint. Dr. Macaulay noted a minimally positive faber's test on the right. Dr. Macaulay noted that pelvic compression showed relative stiffness of the right himi-pelvis. Dr. Macaulay noted that Claimant had done well

despite the injury and that the mechanism of injury indicated moderate contact. Dr. Macaulay noted that Claimant had gone through a long course of chiropractic and physical therapy along with massage therapy with no beneficial response. Dr. Macaulay noted that Claimant still had mechanical issues in both the cervical and lumbar spines that needed to be treated with physical therapy and osteopathic manual therapy but opined that Claimant's condition was not surgical. Dr. Macaulay opined that Claimant did not appear to have foraminal neural compromise and that it was unlikely that Claimant had a significant discogenic lesion. Dr. Macaulay opined that with a several week course of physical therapy and osteopathic manual therapy, Claimant should return to baseline and be able to develop his normal activities. Dr. Macaulay assessed: mechanical cervical spine dysfunction- C4-5 right and mechanical lumbar spine dysfunction- right SI joint hypomobility. *See* Exhibits 2, D.

11. On June 2, 2016 Claimant underwent physical therapy. Claimant reported neck pain and low back pain. Claimant reported that he had low back pain forever but that it had been worse than usual with tightness, pressure, and pain following a motor vehicle collision in February. Claimant's lumbar range of motion was noted to be impaired. The physical therapist noted that Claimant had right S1 dysfunction and limitation in movement at L3/4. It was noted that Claimant probably had some neck impairments too, but that the evaluation was focused on the lumbar spine.

12. On June 21, 2016 Claimant was evaluated by Dr. Macaulay. Claimant reported significant improvement in his low back and modest improvement in his cervical spine. Claimant denied any upper or lower extremity paresthesias. Claimant reported some stiffness and pain in the neck. Dr. Macaulay found some modest tightness in the cervical spine along the upper margins of the cape musculature of the trapezius and found that range of motion of the cervical spine was quite good. Dr. Macaulay found a small mechanical deficit at C4-C5 on the right and found no para-cervical muscle spasm. With the lumbar spine, Dr. Macaulay found a right sacroiliac joint hypomobility, less significant than at the last visit, positive march and forward flexion tests. Dr. Macaulay opined that Claimant was doing quite well and could continue with regular work. *See* Exhibit D.

13. On July 7, 2016 Claimant was evaluated by Christopher Lafontano, D.O. Claimant reported neck and back pain, more neck than back. Claimant reported that his neck and shoulder seemed to be the worst and that his low back was sore and stiff. Dr. Lafontano found the cervical axial compression test positive, eliciting radicular symptoms on the right side and the spurlings test positive, also eliciting or aggravating radicular pain symptoms on the right. Dr. Lafontano found the slump test positive, eliciting shooting pain radiating down the leg along the distribution of the sciatic nerve on the right side. Dr. Lafontano assessed acute cervical radiculopathy, acute cervicalgia, acute lumbar radiculopathy, and acute low back pain. Dr. Lafontano recommended MRI studies of the cervical spine and lumbar spine. *See* Exhibit E.

14. On July 14, 2016 Claimant was evaluated by Dr. Macaulay. Dr. Macaulay noted that Claimant continued to have modest improvement in symptoms with less low

back pain, no radiculitic pain in the lower extremities, and no discomfort in the upper extremities. Claimant reported continued issues with mobility of the cervical spine and that looking to the left was a problem. On examination, Dr. Macaulay noted subjective tenderness in the cervical spine with palpation of the musculature and some limitation in range of motion particularly with left rotation and right side bend. In the lumbar spine, Dr. Macaulay noted right sacroiliac joint hypomobility and tenderness over the right SI joint though less than on previous examinations. Dr. Macaulay noted that Dr. Lafontano had recommended an MRI of both the cervical and lumbar spines. Dr. Macaulay opined that the studies would not offer a great deal of information and expected that they would show some osteoarthritic change in the low back, disc dessication, and changes attended with age. Nevertheless, Dr. Macaulay noted that they would do the studies. *See* Exhibit D.

15. On July 22, 2016 Claimant underwent an MRI of his cervical spine and lumbar spine. The cervical spine MRI showed multilevel cervical disc degeneration at C3-4, C4-5, C5-6, and C6-7 with no cervical spinal stenosis evident. Broad based disc bulges were seen at C3-4, C5-6, and C6-7. A minimal focal central disc bulge was seen at C4-5. The lumbar spine MRI showed L5-S1 disc degeneration with broad based disc bulge and focal central annular tear causing moderate bilateral lateral recess stenosis with contact of bilateral descending S1 nerve roots. *See* Exhibit H.

16. On July 27, 2016 Claimant was evaluated by Dr. Usel. Claimant reported bilateral neck pain rated as minimum and described as a dull ache with pain at a 1/10. Claimant reported minimum bilateral low back pain also described as a dull ache and rated at a pain level of 1/10. Dr. Usel indicated that Claimant's condition was stabilizing with continued treatment. *See* Exhibits 3, F.

17. On August 1, 2016 Claimant was evaluated by Dr. Lafontano. Claimant reported continued low back and neck pain and reported that he woke up sore and stiff and ended his day in pain. Dr. Lafontano discussed options and planned to try oral prednisone and aggressive physical therapy. Dr. Lafontano discussed options that included: doing nothing; physical therapy; injections; and surgery. *See* Exhibit E.

18. On August 2, 2016 Claimant was evaluated by Dr. Macaulay. Claimant reported that overall, he felt better and that both his neck and low back were better. Claimant reported a feeling of slight tightness in the upper cape musculature but reported no limitation in range of motion of his cervical spine. Claimant reported some soreness in the sacral area of his lower back. On examination, Dr. Macaulay found good range of motion in the lumbar spine and normal march and forward flexion tests. Dr. Macaulay noted that the MRI of the cervical spine showed mild multilevel cervical disc degeneration with no cervical spinal stenosis and that the lumbar spine MRI showed L5-S1 disc degeneration with broad based disc bulge and focal central annular tearing causing moderate bilateral lateral recess stenosis with contact of bilateral descending S1 nerve roots. Dr. Macaulay opined that Claimant was doing well clinically. Dr. Macaulay opined that Claimant's' cervical spine issues were "back to par." Dr. Macaulay noted that Claimant still had some tenderness over the upper trapezial and paracervical

musculature which he opined was probably due to the significant amount of stress Claimant was feeling related to his job and litigation circumstances. Dr. Macaulay noted that in the lumbar spine Claimant continued to have an ache in the low back that Claimant referenced in relation to the Marines. Dr. Macaulay noted that Dr. Lafontano had recommended a Medrol Dosepak and the possibility of interventional treatment and that his opinion was different. He therefore recommended that Claimant have another opinion with Dr. Bart Goldman. Dr. Macaulay opined that the changes evident in both the cervical and lumbar spines were normal degenerative changes and that the function of Claimant's upper and lower extremities did not reflect a problem with neural impingement. *See* Exhibit D.

19. On September 16, 2016 Claimant was evaluated by L. Barton Goldman, M.D. Claimant reported neck pain and mid-back/upper thoracic pain, as well as low back pain. Claimant reported a prior low back injury while in the military from 1993-1997. Claimant reported that he had seen a chiropractor for the low back complaint years ago. Claimant reported that his low back pain from the military comes and goes but had been improving over the last two years and that at the time of this new work injury, his low back pain symptoms averaged a 1-2/10 on the pain scale. Claimant reported that on the day in question he was rear ended after his vehicle came to a complete stop in traffic and that he believed it was a high impact rear end collision at 45-50 miles per hour. Claimant reported that he began noticing waxing and waning pain in his wrist shortly after the accident and that after he got home that evening his neck and upper back began to hurt. Claimant reported seeing a chiropractor and later Dr. Macaulay. Claimant reported that his back and shoulder were a little bit better but that he had no change in his neck symptoms with treatment. Claimant reported that Dr. La Fontana had recommended injections followed by more physical therapy but that Dr. Macaulay was skeptical as to how much injections or steroids would help and that Dr. Macaulay referred him for this second opinion. Claimant reported that his symptoms interfered with his activities. Dr. Goldman opined that Claimant's cervical MRI from July 22, 2016 showed mild diffuse spondylosis but nothing traumatic and no nerve root impingement and opined it was normal for age. Dr. Goldman opined that the lumbar MRI showed L5/S1 degenerative disc with a broad based bulge and focal central annular tear resulting in bilateral lateral recess stenosis contacting the descending S1 nerve roots. Dr. Goldman opined that Claimant had a chronic thoracic strain due to the work related motor vehicle accident and a chronic lumbosacral strain that was pre-existing but exacerbated by the work related motor vehicle accident. *See* Exhibits 4, G.

20. Dr. Goldman opined that chronic thoracic strain patterns were unusual with rear end motor vehicle accidents unless there was a medium to high velocity impact and noted that he did not have the accident report, engineering report, damage estimates, or pictures but that if it was a medium to high G force, then the thoracic strain symptoms would be considered accident related. Dr. Goldman also opined that the lumbosacral strain may make sense in Claimant's case one way or the other and even if it were a low velocity impact, as Claimant was somewhat predisposed from an "eggshell" perspective. Dr. Goldman opined that Claimant's pain pattern was primarily axial, diffuse in a very myofascial and primarily myogenic and musculoskeletal pattern. Dr. Goldman opined

that the pain would perhaps respond briefly and partially to a steroid injection but that the injections recommended by Dr. La Fontana were probably not necessary at this time. Dr. Goldman opined that the cervical MRI was normal for age with findings seen in more than 50 percent of individuals Claimant's age or older who do not have back pain. Dr. Goldman suggested core strength endurance and thyroid level checks. Dr. Goldman opined that it may or may not be the case that Claimant would have a mild residual impairment involving the upper back if indeed the mechanism of injury was confirmed to be a medium to high velocity range. Dr. Goldman opined that Claimant would most likely continue to work full time and full duty with no significant disability. *See* Exhibits 4, G.

21. On September 29, 2016 Claimant was evaluated by Dr. Macaulay. Claimant reported that he had "no real problems." Claimant reported that his neck and shoulders were doing well and that he had periodic discomfort in his low back where he felt a pressure sensation. Claimant reported that he had a service connected issue with his back and that he was trying to get into the VA for evaluation of his back. Claimant reported that he had not been able to engage in his normal activities such as track and tennis since he got out of the military and that his back had been weak since he left the military. Dr. Macaulay found good range of motion in the lumbar spine with little para-lumbar tenderness and no spasm. Dr. Macaulay found some mild tenderness over the right sacroiliac joint and motion in that joint less brisk than that of the unaffected left side. Dr. Macaulay noted that he would wait for Dr. Goldman's report but that from what Claimant reported, the treatment recommended was activity based and not interventional. *See* Exhibit D.

22. On September 29, 2016 Claimant attended physical therapy and it was noted that Dr. Macaulay and Dr. Goldman wanted Claimant to have a more rigorous stabilization program. Claimant was again diagnosed with low back pain and cervicalgia. *See* Exhibit 5.

23. On October 17, 2016 Claimant was evaluated by Dr. Macaulay. Claimant reported no issues with the cervical spine. Claimant reported an aching sensation in his mid-low back that did not radiate and some difficulty with mechanics with bending, stooping, and twisting. Dr. Macaulay noted no significant tenderness over either SI joint and that functionally Claimant appeared to be doing very well. Dr. Macaulay opined that there was nothing from an interventional standpoint that would offer Claimant improvement in function and recommended transitioning from physical therapy to a gym-based program to maximum strength and flexibility. Dr. Macaulay believed that Claimant was approaching MMI and anticipated doing an impairment rating at the next visit. *See* Exhibit D.

24. On October 24, 2016 Claimant attended physical therapy. Claimant reported general low back pain and stiffness. Claimant's active range of motion and passive range of motion was tested. It was found that Claimant had no impairment of range of motion in: lumbar lateral flexion-left; lumbar flexion; lumbar lateral flexion-right; and lumbar rotation-right. The lumbar extension was noted to be impaired but more

posturally related and not a specific segmental restriction. The therapist noted that Claimant could continue the stabilization program independently. *See* Exhibit 5.

25. On October 31, 2016 Claimant attended physical therapy. It was noted that Claimant was able to go and gamble and didn't complain of back pain with the weekend. It was noted that Claimant's lumbar extension was impaired with it being more posturally related than a specific segmental restriction. The diagnosis of low back pain and cervicalgia continued. *See* Exhibit 5.

26. On November 8, 2016 Claimant was evaluated by Dr. Macaulay. Dr. Macaulay noted that after the July, 2016 MRI, there was a disagreement over whether or not surgical evaluation and consultation was needed. Dr. Macaulay felt Claimant was progressing satisfactorily and did not need a surgical consultation with the absence of true radiculitic issues. Dr. Macaulay noted that Claimant had continued with manual physical therapy and had done quite well. Dr. Macaulay noted that Claimant had little discomfort in either the cervical or lumbar spine and was able to engage in most activities of daily living without limitation. On physical examination, Dr. Macaulay noted good range of motion of the cervical spine with some decrease on the left side bend and extension. Dr. Macaulay found mild left para-cervical tenderness but no evidence spasm. In the lumbar spine, Dr. Macaulay found good range of motion with mild para-lumbar tenderness. Dr. Macaulay used an electronic dual inclinometer to take range of motion measurements for the cervical spine and lumbar spine. *See* Exhibits 2, D.

27. Dr. Macaulay opined that Claimant's cervical spine fell under Table 53, Section II(B) of the AMA Guides and qualified for a 4% whole person impairment. Dr. Macaulay also found a 6% whole person range of motion impairment of the cervical spine and opined that the cervical spine impairment was 10%. Dr. Macaulay also opined that Claimant's lumbar spine fell under Table 53, Section II(B) of the AMA Guides and qualified for a 5% whole person impairment. Dr. Macaulay found a 8% range of motion impairment in the lumbar spine and opined the total lumbar spine impairment was 13% whole person. Dr. Macaulay used the combined values chart to arrive at a rating for Claimant of 22% whole person permanent impairment. Claimant was found to be at maximum medical improvement and was discharged from care with no restrictions. *See* Exhibits 2, D.

28. The range of motion measurements that Dr. Macaulay performed on Claimant's lumbar spine and cervical spine on November 8, 2016 were invalid. The cervical flexion and extension angles did not consistently measure within 10% or 5 degrees. For the lumbar spine measurements, the right lateral flexion and left lateral flexion were not consistently measured within 10% or 5 degrees. Dr. Macaulay noted that that sum of sacral flexion and extension (45 degrees plus 4 degrees) equaled 49 degrees and noted the measurement had to be within 10 degrees when subtracted from the straightest straight leg raise which was 59 degrees. He opined thus, with it being at 10 degrees, the measurements for lumbar flexion were validated. However, the criteria requires that if the tightest range of motion value exceeds the sum of the sacral flexion and sacral extension by greater than 10% (not 10 degrees), then the lumbar range of

motion is invalid. Here, the 59 degree value exceeds the 49 degree value by greater than 10%.

29. On December 20, 2016 Claimant underwent an independent medical examination performed by John Aschberger, M.D. Claimant reported most of his pain was in the low back across the lumbosacral area with no radiation, numbness, or tingling to the lower extremities. Claimant also reported some stiffness at the upper back with irritation predominantly in the upper back musculature with no significant cervical irritation and no radiation of pain, numbness, or tingling to the upper extremities. Claimant reported a prior back injury with the military and that he had some residual low back pain that was worsened by the motor vehicle collision. On examination, Claimant had full range of motion in the cervical spine and was non tender at the cervical levels at the midline and paraspinal musculature. Claimant was also non tender at the subocciput. Claimant was tight at the trapezial musculature with reported tenderness. Claimant was also mildly tender at the infraspinatus with identified trigger points. Dr. Aschberger found good lumbosacral flexion of 90 degrees with fingers within a couple of inches of the toes, full extension, and straight leg raises supine at 70 degrees bilaterally with no pain and no radicular symptoms. *See* Exhibit B.

30. Dr. Aschberger reviewed the July 22, 2016 MRIs and noted the cervical MRI showed mild multilevel degenerative changes without any evident spinal stenosis and the lumbar MRI showed disc degeneration and broad based disc bulge at L5-S1 with a focal central annular tear and some bilateral lateral recess stenosis and encroachment of the S1 nerve roots. Dr. Aschberger reviewed medical records. Dr. Ashberger noted Dr. Macaulay's opinion that Claimant was doing quite well and that the cervical spine issues were back to par on August 2, 2016 and that Claimant's continued low back achiness was in relation to the marines. Dr. Aschberger assessed: cervical strain, resolved; upper back/trapezial myofascial pain and tightness complicated with postural issues; cervical degenerative changes of doubtful clinical significance; pre-existing chronic low back pain; lumbosacral strain; and lumbar degenerative changes, likely pre-existing. Dr. Aschberger opined that Claimant may reasonably have suffered some aggravation or an injury of the neck and low back with the described motor vehicle collision and that Claimant had some residual upper back myofascial irritation. Other than the residual myofascial irritation, Dr. Aschberger opined that there were not significant findings on Claimant's presentation that he would attribute to the motor vehicle collision. Dr. Aschberger opined that although Claimant may have had some cervical irritation, there was no residual based on Claimant's current physical examination and that the cervical degenerative changes identified on MRI were likely pre-existing. Dr. Aschberger also opined that although Claimant was described to have had some SI restriction, which would be reasonable following the described motor vehicle collision, Claimant had no current residual and no radicular abnormality affecting the cervical or lumbar region. Dr. Aschberger noted that the residual myofascial irritation at the upper back could be followed up with trigger point injections, deep tissue massage, and review with physical therapy. Dr. Aschberger opined that no permanent impairment would be anticipated for the residual myofascial irritation at the upper back. *See* Exhibit B.

31. Dr. Aschberger opined that Claimant had no impairment and that there was no functional limitation regarding the neck and no residual pain with provocative maneuvers. Dr. Ashberger opined that although there was myofascial irritation affecting the upper back and trapezial musculature with some tightness there was no intrinsic cervical abnormality as a result of the motor vehicle collision. Dr. Aschberger opined that for the lumbar region, Claimant had a pre-existing and chronic back condition and that although Claimant reported intermittent symptomatology, the records indicate something more persistent and chronic issues with worsening over the previous 5 years. Dr. Aschberger opined that there was no permanent impairment for the lumbar region as a result of the motor vehicle accident. Dr. Aschberger noted that if a lumbar impairment was felt to be related to the motor vehicle collision, he would recommend apportioning out 7% for specific disorders given the degenerative changes. Dr. Ashberger opined that there were undoubtedly going to be restrictions regarding range of motion for Claimant, but that he did not consider the restrictions attributable to the motor vehicle collision based on the current presentation, records, and Dr. Macaulay's reports. *See* Exhibit B.

32. On February 21, 2017 Claimant underwent a Division Independent Medical Evaluation (DIME) performed by Brian Mathwich, M.D. Claimant reported stiffness and pain in his low back and upper back/shoulders and neck generally after sitting for 3-4 hours. Claimant reported that after sitting or lying down for extended periods of time he had increased stiffness and pain in the low back and upper neck. Claimant reported that he was taking Motrin once or twice per week when his back was stiff. Dr. Mathwich reviewed medical records and performed a physical exam. Claimant reported in the medical records that his low back pain had begun in 1994 during military training and that he had back spasms, not improved, over the last 20 years. Claimant also reported in the medical records that he had back pain since getting out of the service, but that from 2010 to 2015 it had been worse. On physical examination, Dr. Mathwich found that Claimant had no pain on palpation throughout the para-cervical muscles, minor discomfort in the right mid trapezius, and several small trigger points in the mid bodies of the trapezius bilaterally and in the levator scapulae muscles. Dr. Mathwich found full range of motion in all planes of the cervical spine including flexion, extension, side bending, and rotation with no pain during range of motion. In the lumbar spine, Dr. Mathwich found no tenderness and no trigger points. On range of motion, Dr. Mathwich noted that Claimant was able to flex placing his hands well below his knees almost to the feet and that extension side bending and rotation were normal. *See* Exhibits 1, A.

33. Dr. Mathwich diagnosed myofascial pain of the lumbar spine and bilateral trapezius. Dr. Mathwich opined that Claimant had undergone appropriate and necessary conservative treatment for the myofascial injury sustained in the motor vehicle accident and recommended no further treatment. Dr. Mathwich opined that no impairment rating was given and that Claimant's complaint of stiffness and occasional pain was myofascial in nature and the underlying spinal abnormalities were not contributors to Claimant's current pain complaints. Dr. Mathwich opined that the underlying spinal issues shown on MRI were pre-existing and were not Claimant's current pain generators. Dr. Mathwich opined, therefore, that without a Table 53 diagnosis no impairment was given. Dr. Mathwich noted that Claimant had a long-standing history of chronic low back pain well

documented in the records and that the motor vehicle accident resulted in myofascial injuries. Dr. Mathwich opined that the ongoing minor myofascial discomfort would improve and resolve with activity and exercise and that no further medical treatment was recommended or warranted. *See* Exhibits 1, A.

34. Dr. Mathwich testified by deposition. Dr. Mathwich opined that there was not a documented injury to the cervical spine in this case, but that there was a neck strain and a documented injury to the neck. Dr. Mathwich opined that there was six months of medically documented pain and rigidity without muscle spasm following Claimant's injury. Dr. Mathwich noted that he measured Claimant's range of motion objectively without using inclinometers.

35. Dr. Mathwich testified that there was a documented injury to Claimant's low back as a result of the work related motor vehicle accident and that claimant had six months of medically documented pain and rigidity with or without spasm in the lower back. Dr. Mathwich noted that he measured Claimant's range of motion but not using an inclinometer.

36. Dr. Mathwich testified that he referred to Table 53 of the AMA Guides during his examination. Dr. Mathwich testified that his opinion that Claimant had an overall 0 impairment rating remained the same. Dr. Mathwich testified that at the time of evaluation, Claimant had no significant cervical complaints, had functional range of motion, had no activities of daily living issues, and did not have any permanent impairment to the cervical spine so Table 53 was not used. Dr. Mathwich opined that Claimant had no specific impairment under Table 53 for the cervical spine or the lumbar spine and that therefore there could not be an impairment for range of motion deficits which is why he did not perform full range of motion testing with inclinometers. Dr. Mathwich opined that he had to look at the time the examination was done in conjunction with the historical records and make a determination of all the facts together. Dr. Mathwich opined that Table 53 in isolation, applied to Claimant's case, did not support a 0 percent rating. However, Dr. Mathwich opined that Claimant had no significant impairment of his functional abilities, had pain within a reasonable degree for a person his age and physical condition, and was back to his baseline prior to the injury so that there were no functional or pain issues justifying the use of an impairment rating. Dr. Mathwich testified that he used Claimant's VA records to determine the baseline prior to the work injury and that he took the entire picture into conjunction rather than a vacuum view. Dr. Mathwich noted the accident was very low speed, Claimant was returned to full duty work at the first visit, and that he did not feel that Claimant had a permanent impairment. Dr. Mathwich opined that Claimant had consistent treatment to the low back and cervical spine and objective findings in both the cervical and lumbar spine. However, he opined that nothing found in his DIME physical examination indicated a basis for a Table 53 impairment and that Claimant had full and functional range of motion.

37. Claimant has a significant pre-existing history of low back problems. He also has had prior problems with his neck.

38. On May 7, 2009 Claimant was evaluated at the VA hospital emergency room. Claimant reported that he had been in a motor vehicle accident last Friday and that he had pain in his left wrist and left shoulder. Claimant reported feeling sore in his neck and left shoulder and that he sometimes felt numb when laying on his left side. *See* Exhibit C.

39. On May 26, 2009 Claimant was evaluated at the VA medical center in follow up. Claimant reported numbness in his left arm when sleeping on the left side, left shoulder tenderness with movement, and neck and upper back pain when he moved or lifted things. Claimant reported injuring his back while in the military during a swim test and that while on the diving board with bricks in his backpack, he felt a pop in his back. On review of symptoms, neck pain and chronic low back pain were listed. Claimant was found to have good range of motion in the cervical and lumbar spines with probable muscle tension in the left lumbar muscles. The plan was to continue to monitor joint and musculoskeletal pain. It was noted that Claimant appeared to have a musculoskeletal neck injury and an acute exacerbation of his chronic low back pain. It was recommended that Claimant continue to wear his back brace while working. *See* Exhibit C.

40. On August 6, 2009 Claimant called the VA to report numbness in his side and hip that he had been having for about a month. Claimant also reported that his left hand was bothering him. An attempt was made to contact Claimant but no contact was made. *See* Exhibit C.

41. On August 3, 2011 Claimant was evaluated at the VA medical center. Claimant's active problems were noted to include low back pain, shoulder arthralgia, and neck pain. Claimant reported numbness in his right thigh/groin several weeks ago after sitting on a court bench for a long period. Claimant also reported chronic low back pain since the military after swimming with a heavy back pack with symptoms by straightening his back. Claimant was assessed with paresthesis due to prolonged sitting and chronic low back pain. A recommendation on the back pain was to continue conservative treatment. *See* Exhibit C.

42. On June 30, 2015 Claimant was evaluated at the VA emergency department. Claimant reported bilateral lower back pain and sciatica with shooting pains. Claimant also reported mild lumbar spasm. Claimant denied any trauma. Claimant was found to have paraspinal tenderness at L2. X-rays of Claimant's lumber spine were completed. They were noted to show mild degenerative change of the SI joints, mild wedging of the T11 and T12 vertebral bodies, a 6 mm retrolisthesis L5 on S1, minimal corner osteophytosis at L4-5 and L5-S1, and possible mild congenital canal stenosis. Claimant was assessed with low back pain and advised to see his primary care provider. *See* Exhibit C.

43. On July 8, 2015 Claimant was evaluated at follow up by the VA. Claimant reported an acute exacerbation of chronic low back pain. Claimant reported that on June 27, 2015 he woke up and felt like he had pulled a muscle in his back with tightness and pain from the lower back up to the shoulders at a 10/10. Claimant reported that he went

to the emergency department on June 30 and was sent home. Claimant reported that he had improved significantly but continued to have lower back tenderness and intermittent tightness in his back. Claimant reported that his lower back pain began while conducting military training in 1994 when he experienced a popping sensation in his back while carrying a backpack weighing over 150 pounds and that he was diagnosed with a back strain and had been taking ibuprofen since 1994 with mild relief. Claimant reported that he never had physical therapy or home exercises. Claimant reported that he had never had numbness/weakness in the legs. Claimant reported that the pain always started in his lower back and went up to the back of his shoulders. Claimant reported bilateral hand numbness/weakness getting worse over the past 5-6 months and that it occurred when working with his hands, laying on his arm, and working on the computer. The provider noted that Claimant had a history of chronic low back pain and an acute exacerbation without trauma, likely due to muscle spasm. Concern was noted about the long history of chronic low back pain that had not improved over the last 20 plus years. The provider noted that Claimant's pain was likely a combination of degenerative joint disease, SI arthritis and muscle strain. It was noted that the one concerning feature from the June 30, 2015 images was the mild wedging of the T11 and T12 vertebral bodies which was usually caused by a compression fracture. It was noted that Claimant was not in a demographic prone to osteoporosis (young, athletic, African American, male) but that the vertebral changes were concerning for osteoporosis. The plan was to do a physical therapy consultation, heat/cold on the chronic low back pain, and to complete a bone density scan. *See* Exhibit C.

44. On July 15, 2015 Claimant underwent a bone density scan of both his hips and lumbar spine. The impression was no osteopenia and his results were at 104 percent of young adult value. *See* Exhibit C.

45. On July 20, 2015 Claimant was evaluated at the VA. Claimant reported low back pain and trouble sleeping due to the pain. Claimant reported the pain was at the midline L2-5 with no radiation to his legs. Claimant reported that he had the back pain since getting out of the service, but that it had been worse the last 5 years.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME on Permanent Impairment Rating

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002);

Qual-Med, Inc. v. Industrial Claim Appeals Office, 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Claimant has failed to meet his burden to overcome DIME physician Dr. Mathwich's opinion on permanent impairment by clear and convincing evidence. Claimant has failed to show that it is highly probable that Dr. Mathwich's opinion that he has no permanent impairment causally related to the February 8, 2016 motor vehicle accident is incorrect. Rather, Dr. Mathwich's opinion is consistent with the opinion of Dr. Aschberger and consistent with the overall weight of the evidence. Although the ATP, Dr. Macaulay provided an impairment rating, and it is inferred that Dr. Macaulay believed the impairment was related to the motor vehicle accident, there is at best a difference of opinion on the causation between the two physicians. The weight of the evidence supports the causal opinion given by the DIME physician that Claimant did not have any qualifying Table 53 diagnoses related to the February 8, 2016 motor vehicle accident. Table 53 provides for impairments due to specific disorders of the spine. Under II(B), the section at issue, Claimant would have to have either an intervertebral disc lesion or a soft tissue lesion causally related to the work injury to qualify for permanent impairment.

Dr. Mathwich opined that although Clamant had a neck strain, Claimant did not have a qualifying Table 53 impairment to the cervical spine. Despite any documented pain or rigidity, the opinion of the DIME physician on the causal relationship has to be overcome by clear and convincing evidence. As found above, Claimant had numerous findings on his cervical MRI that would, in a vacuum, put him into qualification as having a cervical spine disorder. However, the MRI findings were opined by multiple physicians to be degenerative and not acutely caused by the work related motor vehicle accident. On the date of the motor vehicle accident, a CT of Claimant's neck was performed and revealed no acute findings. The opinion of Dr. Mathwich that Claimant did not have permanent impairment or a qualifying Table 53 cervical spine disorder due to the motor vehicle accident is credible, persuasive, and consistent with the weight of the evidence. The opinion is consistent with the opinion of Dr. Goldman on September 16, 2016 that Claimant had no cervical trauma and the MRI of the cervical spine was normal for age. It also is consistent with Claimant's reports to Dr. Macaulay on October 17, 2016 that he had no issues with his cervical spine. Dr. Aschberger also opined on December 20, 2016 that Claimant had full range of motion in the cervical spine and that the cervical spine changes on MRI were likely pre-existing.

At the DIME, Dr. Mathwich was able to review Claimant's pre-existing medical records from the VA. Despite reporting to Dr. Aschberger that he had intermittent low back symptoms, the records showed persistent and chronic issues of low back pain with worsening over the five years prior to the February 8, 2016 motor vehicle accident. The MRI of Claimant's lumbar spine showed L5-S1 disc degeneration with broad based disc bulge and focal central annular tear causing moderate bilateral recess stenosis with

contact of bilateral descending S1 nerve. However, Dr. Mathwich opined that the findings related to the lumbar spine pre-existed the motor vehicle accident. This is supported by a similar opinion from Dr. Aschberger that Claimant had no permanent impairment for the lumbar spine as a result of the motor vehicle accident. As found above, x-rays of the lumbar spine taken at the VA prior to the motor vehicle accident showed retrolisthesis and backward slipping of the vertebrae at L5-S1, ostophytosis and bone spurs at L4-5 and at L5-S1, and a compressed T-11 and T-12 with wedging. Further, at the initial visit at the emergency department of the VA on the date of the motor vehicle accident, Claimant was assessed only with neck strain, headache, and left wrist sprain. This is logically inconsistent with an acute lumbar spinal injury or spinal impairment causally related to the motor vehicle accident. The opinions that there are no intervertebral disc lesions or soft tissue lesions causally related to the motor vehicle accident to support the application of Table 53 for Claimant's lumbar spine is credible, persuasive, and consistent with the weight of the evidence.

The DIME physician had significant records of pre-existing chronic low back pain that had been worsening in recent years. The DIME physician's opinion that Claimant had no ratable permanent impairment causally related to the motor vehicle accident on February 8, 2016 is credible, persuasive, supported by the opinion of Dr. Aschberger, and consistent with the overall weight of the evidence. Although Claimant has findings on his cervical and lumbar MRI that could potentially put him into a Table 53 rating if the findings were related to his industrial injury, in this case the objective findings and any intervertebral disc lesions or soft tissues lesions were opined to be pre-existing. Thus, Table 53 does not apply.

Claimant has had years of medically documented pain and rigidity in his lower back prior to his work related motor vehicle accident. Claimant has significant chronic low back pain that has existed since 1994. Any claims that Claimant was fine and not having low back pain symptoms or problems prior to the work related motor vehicle accident are incredible given the extensive medical history documenting chronic low back pain. On August 2, 2016 Claimant reported to Dr. Macaulay that his continued ache in the lumbar spine was related to the Marines. Dr. Macaulay also opined on this date that the changes evident in both the cervical and lumbar spines were normal degenerative changes. Claimant has only degenerative changes on his cervical MRI and no acute findings. The lumbar spine MRI findings also were opined to be pre-existing which is consistent with Claimant's history of significant chronic low back pain. Claimant has failed to meet his burden to show by clear and convincing evidence that the DIME opinion was in error or that he qualifies for a table 53 impairment rating causally related to his industrial injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to overcome DIME physician Dr. Mathwich's permanent impairment rating. Claimant has no permanent impairment causally related to the February 8, 2016 motor vehicle accident.

2. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 21, 2017,

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-046-205-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 14, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 12/14/17, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM). The official Spanish/English Interpreter was Jessie Lemmon.

Claimant's Exhibits 1 through 3 were admitted into evidence, without objection. Respondents' Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which filed, electronically, on December 19, 2017. Respondents were given 2 working days within which to file objections. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability and, if compensable: medical benefits, average weekly wage (AWW). The parties agreed to defer the issue of temporary disability benefits.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the outset of the hearing, the parties stipulated that the AWW is $393.43, and the ALJ so finds. The parties also stipulated that if the claim was found compensable, all medical benefits rendered by Concentra and any of its referrals that have accrued and all future medical benefits are causally related to t5he injury of December 15, 2016 to the Claimant's right ring finger and are reasonably necessary to cure and relieve the effects of the injury, and the ALJ so finds. Further, the surgery recommended by Tracy Wolf, M.D., for a right ring finger trigger release is reasonably necessary and causally related to the work injury of December 15, 2016.

Findings—Compensability

2. While in the course and scope of her employment as a housekeeper for the Employer, the Claimant suffered a work injury to her right ring finger on December 15, 2016, while pushing a housekeeping cart into an elevator.

3. According to the Claimant, the cart got stuck and started to tip as she was pushing it into the elevator. She thrusted her right arm out to keep from falling and grabbed the hand rail inside the elevator. Her right ring finger got jammed on the rail and went inwards causing severe pain. There were no witnesses present at the time of the injury.

4. According to the Claimant she reported her injury on the day of occurrence to her direct supervisor, Sandra Gutierrez. According to the Claimant, Gutierrez told her that she would report the injury to Isabela Gonzales and write a report. Isabela Gonzales was not there that day and the Claimant continued to work that day in pain. Gutierrez was not called to testify nor is there any recorded statement of Gutierrez. The Claimant version of events, including the reporting to Gutierrez on the

day of the occurrence is undisputed by any non-hearsay evidence [in Respondents' Exhibit A, the January 23, 2017 memorandum, Danielle Zayatz, the hotel's general manager, and Isabela Gonzales, the assistant general manager, recite: "[Claimant] mentioned on January 12, 2017 to her supervisor, Sandra Gutierrez, that approximately 30 days ago she her finger…."] The ALJ finds Gutierrez's apparent delay in reporting to be at odds with the Zayatz's and Gonzales' harmonious versions that there was no reporting until January 23, 2017. Indeed, the ALJ infers and finds that the Claimant's version of reporting to her immediate supervisor on the day of the incident to be more credible than the hearsay versions of Zayatz and Gonzales, and the hearsay-upon-hearsay version of Gutierrez as told by Zayatz and Gonzales. Indeed, the Respondents did **not** endorse "late reporting" as an issue.

5. The Claimant was off work on Saturday, December, 16, Sunday, December 17 and Monday, December 18.

6. On December 19, 2016, the Claimant again told Sandra Gutierrez that she had injured her finger at work. The Claimant continued to complain to Gutierrez. On January 23, 2017, the Claimant told Isabela Gonzales and Gutierrez that she was going to go to her own doctor if they were not going to send her to a clinic. According to the Claimant, Gonzales told her that she would take care of this and inform Danielle Zayatz. In fact, Zayatz signed off on the memorandum, admitted into evidence as Respondents' Exhibit A. On January 23, 2017, the Employer referred the Claimant to Concentra. Thereafter, Concentra and its referrals provided treatment for the Claimant

Isabela Gonzales and Danielle Zayatz

7. Isabela Gonzales and Danielle Zayatz testified for the Respondents. Gonzales is the direct supervisor of Sandra Gutierrez. Gonzales stated that she was first informed of the Claimant's work injury on January 23, 2017. The ALJ infers and finds that Gonzalez's late knowledge of the Claimant's work injury was due to Gutierrez's (Claimant's immediate supervisor) delay in reporting the Claimant's injury to her supervisor, Gonzales.

8. Zayatz is the General Manager of the Employer and the direct supervisor of Isabela Gonzales. Zayatz is the person who completes the injury reports. Zayatz stated that she observed the Claimant at work and the Claimant did not appear to have been injured. Based on Zayatz limited opportunity to observe t5he Claimant at work, the ALJ places minimal weight upon this testimony of Zayatz. From the time of the injury until January 23, 2017, Zayatz stated that the Claimant had the opportunity to report the injury to herself or to Gonzales but did not do so. The ALJ finds this testimony to be a considerable stretch, analogous to a Capitol groundskeeper having the opportunity to report his injury to the Governor. Neither Zayatz nor Gonzalez are Claimant's direct supervisors, nor did they have the intensive contact with the Claimant had by Gutierrez. Zayatz stated that the Employers' policy requires an injured employee to report their

injury to their supervisor within 24 hours of occurrence. As found herein above, the Claimant reported her work injury to her **direct** supervisor, Gutierrez, on the day of the occurrence (within 24-hours) as required by the "Policy." According to Zayatz, the first time she was made aware of the Claimant's work injury was on January 23, 2017.

9. Respondents' Exhibit A, the Employment File, which is untitled, but states in part that "[Claimant] mentioned on January 12, 2017 to her supervisor, Sandra Gutierrez, that approximately 30 days ago she injured her finger." The context of this exhibit acknowledges that. Gutierrez knew of the Claimant's injury at least by January 12, 2017. The exhibit is dated January 23, 2017 and is signed by Zayatz, Gonzales and the Claimant. The letter was not signed by Gutierrez. Gonzales signed it as "translator." Further, the Exhibit A states that all injuries are to be reported within 24 hours of the event. According to Gonzales, she translated the letter for the Claimant, and the Claimant signed it. The Claimant disputes that the letter was translated for her and testified that the letter was not translated for her and she was told by Gonzales that she was required to sign the letter as authorization to go to the doctor. The ALJ infers and finds, in the Claimant's eagerness to see a doctor, there was a misunderstanding at best.

Medical

10. The Claimant was sent to Concentra on January 23, 2017 and was seen by Jonathan Bloch D.O. The recorded history taken by Dr. Bloch on January 23, 2017 as to how the injury occurred is consistent with the mechanism of injury and consistent with the presenting symptoms and physical examination (Claimants' Exhibit 3, p. 5-6). Dr. Bloch rendered a diagnosis of crushing injuring to the right finger and referred the Claimant to a hand specialist for a trigger finger injection (Claimants' Exhibit 3, p.6).

11. The Claimant was seen by Tracy Wolf, M.D., a hand specialist, on February 3, 2017, and the Claimant received an injection into her right ring finger (Claimants' Exhibit 3, p.9). On March 3, 2017, Dr. Wolf performed a second injection to the Claimants' right ring finger (Claimants' Exhibit 3, p.17). On April 10, 2017 a surgery request/authorization/notification form was sent by Dr. Wolf's office to Patty Button for prior authorization to perform a right ring finger trigger release (Claimants' Exhibit 3, p. 38). In a May 26, 2017 medical report, Dr. Wolf notes that in regard to the request for surgery, "I do not have the letter to look why this was denied and we will look at appealing. However to note, she never had any problems with her hand prior to her injury with the cart. Since then she developed the problem, so it does appear to be work relate." (Claimants' Exhibit 3, p.70).

Ultimate Findings

12. Based on the totality of the evidence, the ALJ finds the Claimant's recounting of the work-related injury to her right ring finger to be credible and corroborated by medical evidence with respect to the mechanism of injury as described by the Claimant. Further, the ALJ finds the Claimant's testimony with respect to reporting her work injury, on the day of the occurrence, to her immediate supervisor. Sandra Gutierrez, to be credible and undisputed by competent non-hearsay evidence. The medical opinions concerning the condition of the Claimant's right ring finger are credible and undisputed.

13. Between conflicting evidence, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's version of events, including the same-day reporting to her immediate supervisor, Sandra Gutierrez, and to reject any evidence to the contrary.

14. The Claimant has proven, by a preponderance of the evidence that she sustained a compensable injury to her right ring finger, arising out of the course and scope of her employment, on December 15, 2016.

15. Based in the stipulation of the parties and the ALJ's finding thereon, the Claimant's AWW is $393.43.

16. Based on the stipulation of the parties, and the ALJ's findings thereon, all of the Claimant's medical care and treatment for the December 15, 2016 right ring finger injury was authorized, within the chain of authorized referrals, causally related to the compensable injury, and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines

the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's recounting of the work-related injury to her right ring finger was credible and corroborated by medical evidence with respect to the mechanism of injury as described by the Claimant. Further, as found, the Claimant's testimony with respect to reporting her work injury, on the day of the occurrence, to her immediate supervisor. Sandra Gutierrez, was credible and undisputed by competent non-hearsay evidence. As found, all of the medical opinions and observations were undisputed by any competent evidence. As further found, the medical opinions were credible. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co .v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions

in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting evidence, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's version of events, including the same-day reporting to her immediate supervisor, Sandra Gutierrez, and to reject any evidence to the contrary.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** Somewhat of a presumption that an injury arises out of employment is the starting point when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable injury to her right ring finger on December 15, 2016.

Average Weekly Wage (AWW)

d. As stipulated and found, the Claimant's AWW is $393.43.

Medical

e. Based on the stipulation findings, all of the Claimant's medical care and treatment for the December 15, 2016 right ring finger injury was authorized, within the chain of authorized referrals, causally related to the compensable injury, and reasonably necessary to cure and relieve the effects thereof.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d

786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to Compensability, AWW, and medical benefits,

ORDER

IT IS, THEREFORE, ORDERED THAT:

DATED this_____day of December 2017.

A. Respondents shall pay all of the costs of medical care and treatment for the Claimant's compensable right ring finger injury of December 15, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Claimant's average weekly wage is $393.43.

C. Any and all issues not determined herein are reserved for future decision.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-046-205-01

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 14, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 12/14/17, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM). The official Spanish/English Interpreter was Jessie Lemmon.

Claimant's Exhibits 1 through 3 were admitted into evidence, without objection. Respondents' Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which filed, electronically, on December 19, 2017. Respondents filed an objection on December 21, 2017, objecting to any references to a Division Independent Medical Examination (DIME), which has not occurred. Any references to a DIME have been extricated during the ALJ's substantial modifications of the proposed decision. After a consideration of the proposed decision. After a consideration of the proposal and objection, the ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability and, if compensable: medical benefits, average weekly wage (AWW). The parties agreed to defer the issue of temporary disability benefits.

The Claimant bears the burden of proof, by a preponderance of the evidence on all issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the outset of the hearing, the parties stipulated that the AWW is $393.43, and the ALJ so finds. The parties also stipulated that if the claim was found compensable, all medical benefits rendered by Concentra and any of its referrals that have accrued and all future medical benefits are causally related to t5he injury of December 15, 2016 to the Claimant's right ring finger and are reasonably necessary to cure and relieve the effects of the injury, and the ALJ so finds. Further, the surgery recommended by Tracy Wolf, M.D., for a right ring finger trigger release is reasonably necessary and causally related to the work injury of December 15, 2016.

Findings—Compensability

2. While in the course and scope of her employment as a housekeeper for the Employer, the Claimant suffered a work injury to her right ring finger on December 15, 2016, while pushing a housekeeping cart into an elevator.

3. According to the Claimant, the cart got stuck and started to tip as she was pushing it into the elevator. She thrusted her right arm out to keep from falling and grabbed the hand rail inside the elevator. Her right ring finger got jammed on the rail and went inwards causing severe pain. There were no witnesses present at the time of the injury.

4. According to the Claimant she reported her injury on the day of occurrence to her direct supervisor, Sandra Gutierrez. According to the Claimant, Gutierrez told her that she would report the injury to Isabela Gonzales and write a report. Isabela Gonzales was not there that day and the Claimant continued to work

that day in pain. Gutierrez was not called to testify nor is there any recorded statement of Gutierrez. The Claimant version of events, including the reporting to Gutierrez on the day of the occurrence is undisputed by any non-hearsay evidence [in Respondents' Exhibit A, the January 23, 2017 memorandum, Danielle Zayatz, the hotel's general manager, and Isabela Gonzales, the assistant general manager, recite: "[Claimant] mentioned on January 12, 2017 to her supervisor, Sandra Gutierrez, that approximately 30 days ago she her finger…."] The ALJ finds Gutierrez's apparent delay in reporting to be at odds with the Zayatz's and Gonzales' harmonious versions that there was no reporting until January 23, 2017. Indeed, the ALJ infers and finds that the Claimant's version of reporting to her immediate supervisor on the day of the incident to be more credible than the hearsay versions of Zayatz and Gonzales, and the hearsay-upon-hearsay version of Gutierrez as told by Zayatz and Gonzales. Indeed, the Respondents did **not** endorse "late reporting" as an issue.

5. The Claimant was off work on Saturday, December, 16, Sunday, December 17 and Monday, December 18.

6. On December 19, 2016, the Claimant again told Sandra Gutierrez that she had injured her finger at work. The Claimant continued to complain to Gutierrez. On January 23, 2017, the Claimant told Isabela Gonzales and Gutierrez that she was going to go to her own doctor if they were not going to send her to a clinic. According to the Claimant, Gonzales told her that she would take care of this and inform Danielle Zayatz. In fact, Zayatz signed off on the memorandum, admitted into evidence as Respondents' Exhibit A. On January 23, 2017, the Employer referred the Claimant to Concentra. Thereafter, Concentra and its referrals provided treatment for the Claimant

Isabela Gonzales and Danielle Zayatz

7. Isabela Gonzales and Danielle Zayatz testified for the Respondents. Gonzales is the direct supervisor of Sandra Gutierrez. Gonzales stated that she was first informed of the Claimant's work injury on January 23, 2017. The ALJ infers and finds that Gonzalez's late knowledge of the Claimant's work injury was due to Gutierrez's (Claimant's immediate supervisor) delay in reporting the Claimant's injury to her supervisor, Gonzales.

8. Zayatz is the General Manager of the Employer and the direct supervisor of Isabela Gonzales. Zayatz is the person who completes the injury reports. Zayatz stated that she observed the Claimant at work and the Claimant did not appear to have been injured. Based on Zayatz limited opportunity to observe t5he Claimant at work, the ALJ places minimal weight upon this testimony of Zayatz. From the time of the injury until January 23, 2017, Zayatz stated that the Claimant had the opportunity to report the injury to herself or to Gonzales but did not do so. The ALJ finds this testimony to be a considerable stretch, analogous to a Capitol groundskeeper having the opportunity to report his injury to the Governor. Neither Zayatz nor Gonzalez are Claimant's direct

supervisors, nor did they have the intensive contact with the Claimant had by Gutierrez. Zayatz stated that the Employers' policy requires an injured employee to report their injury to their supervisor within 24 hours of occurrence. As found herein above, the Claimant reported her work injury to her **direct** supervisor, Gutierrez, on the day of the occurrence (within 24-hours) as required by the "Policy." According to Zayatz, the first time she was made aware of the Claimant's work injury was on January 23, 2017.

9. Respondents' Exhibit A, the Employment File, which is untitled, but states in part that "[Claimant] mentioned on January 12, 2017 to her supervisor, Sandra Gutierrez, that approximately 30 days ago she injured her finger." The context of this exhibit acknowledges that. Gutierrez knew of the Claimant's injury at least by January 12, 2017. The exhibit is dated January 23, 2017 and is signed by Zayatz, Gonzales and the Claimant. The letter was not signed by Gutierrez. Gonzales signed it as "translator." Further, the Exhibit A states that all injuries are to be reported within 24 hours of the event. According to Gonzales, she translated the letter for the Claimant, and the Claimant signed it. The Claimant disputes that the letter was translated for her and testified that the letter was not translated for her and she was told by Gonzales that she was required to sign the letter as authorization to go to the doctor. The ALJ infers and finds, in the Claimant's eagerness to see a doctor, there was a misunderstanding at best.

Medical

10. The Claimant was sent to Concentra on January 23, 2017 and was seen by Jonathan Bloch D.O. The recorded history taken by Dr. Bloch on January 23, 2017 as to how the injury occurred is consistent with the mechanism of injury and consistent with the presenting symptoms and physical examination (Claimants' Exhibit 3, p. 5-6). Dr. Bloch rendered a diagnosis of crushing injuring to the right finger and referred the Claimant to a hand specialist for a trigger finger injection (Claimants' Exhibit 3, p.6).

11. The Claimant was seen by Tracy Wolf, M.D., a hand specialist, on February 3, 2017, and the Claimant received an injection into her right ring finger (Claimants' Exhibit 3, p.9). On March 3, 2017, Dr. Wolf performed a second injection to the Claimants' right ring finger (Claimants' Exhibit 3, p.17). On April 10, 2017 a surgery request/authorization/notification form was sent by Dr. Wolf's office to Patty Button for prior authorization to perform a right ring finger trigger release (Claimants' Exhibit 3, p. 38). In a May 26, 2017 medical report, Dr. Wolf notes that in regard to the request for surgery, "I do not have the letter to look why this was denied and we will look at appealing. However to note, she never had any problems with her hand prior to her injury with the cart. Since then she developed the problem, so it does appear to be work relate." (Claimants' Exhibit 3, p.70).

Ultimate Findings

12. Based on the totality of the evidence, the ALJ finds the Claimant's recounting of the work-related injury to her right ring finger to be credible and corroborated by medical evidence with respect to the mechanism of injury as described by the Claimant. Further, the ALJ finds the Claimant's testimony with respect to reporting her work injury, on the day of the occurrence, to her immediate supervisor. Sandra Gutierrez, to be credible and undisputed by competent non-hearsay evidence. The medical opinions concerning the condition of the Claimant's right ring finger are credible and undisputed.

13. Between conflicting evidence, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's version of events, including the same-day reporting to her immediate supervisor, Sandra Gutierrez, and to reject any evidence to the contrary.

14. The Claimant has proven, by a preponderance of the evidence that she sustained a compensable injury to her right ring finger, arising out of the course and scope of her employment, on December 15, 2016.

15. Based in the stipulation of the parties and the ALJ's finding thereon, the Claimant's AWW is $393.43.

16. Based on the stipulation of the parties, and the ALJ's findings thereon, all of the Claimant's medical care and treatment for the December 15, 2016 right ring finger injury was authorized, within the chain of authorized referrals, causally related to the compensable injury, and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines

the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's recounting of the work-related injury to her right ring finger was credible and corroborated by medical evidence with respect to the mechanism of injury as described by the Claimant. Further, as found, the Claimant's testimony with respect to reporting her work injury, on the day of the occurrence, to her immediate supervisor. Sandra Gutierrez, was credible and undisputed by competent non-hearsay evidence. As found, all of the medical opinions and observations were undisputed by any competent evidence. As further found, the medical opinions were credible. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co .v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions

in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting evidence, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's version of events, including the same-day reporting to her immediate supervisor, Sandra Gutierrez, and to reject any evidence to the contrary.

Compensability

c. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** Somewhat of a presumption that an injury arises out of employment is the starting point when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable injury to her right ring finger on December 15, 2016.

Average Weekly Wage (AWW)

d. As stipulated and found, the Claimant's AWW is $393.43.

Medical

e. Based on the stipulation findings, all of the Claimant's medical care and treatment for the December 15, 2016 right ring finger injury was authorized, within the chain of authorized referrals, causally related to the compensable injury, and reasonably necessary to cure and relieve the effects thereof.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to Compensability, AWW, and medical benefits,

ORDER

IT IS, THEREFORE, ORDERED THAT:

DATED this_____day of December 2017.

A. Respondents shall pay all of the costs of medical care and treatment for the Claimant's compensable right ring finger injury of December 15, 2016, **provided by Concentra doctors and physician assistants and their referrals, including the surgery recommended by Tracy Wolf, M.D**., subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Claimant's average weekly wage is $393.43.

C. Any and all issues not determined herein are reserved for future decision.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that a total right knee replacement as recommended by Geoffrey Patrick Doner, M.D. is reasonable, necessary and causally related to his April 28, 2016 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 54 year old male who works for Employer as a Police Chief. On April 28, 2016 Claimant responded to the Conejos County Hospital to assist the Conejos Sheriff's Department with an inmate who had escaped from custody while undergoing an evaluation at a hospital. Claimant became involved in a struggle while the fugitive attempted to flee in a patrol car. Claimant eventually became entangled with the inmate's leg irons and fell onto the pavement. He injured his left shoulder and right knee during the altercation.

2. On April 28, 2017 Claimant sought medical treatment for his injuries from the Conejos County Hospital. Claimant reported that, while apprehending an inmate he "sustained a scrape to his right knee on the pavement." He did not "break the material of his jeans." Physician's Assistant Linda Lee noted that Claimant's extremities were non-tender and he exhibited full range of motion. PA-C Lee discharged Claimant with no work restrictions or recommendations for additional treatment.

3. On May 4, 2016 Claimant visited the Jackson Medical Clinic for an examination. He explained that he struck his right knee and twisted his left shoulder while wrestling an escaped prisoner. Vaughn D. Jackson, M.D. diagnosed Claimant with a left rotator cuff strain and a right knee strain with contusion. Dr. Jackson recommended x-rays.

4. A May 4, 2016 x-ray of Claimant's right knee reflected small, loose bodies in the posterior aspect of the right knee joint as well as small ossification due to an old avulsion injury. There was no evidence of joint effusion. The x-ray also revealed degenerative arthritis of the patellofemoral joint.

5. On May 24, 2017 Claimant returned to Dr. Jackson for an evaluation. Claimant reported severe left shoulder pain and was walking with a limp. Dr. Jackson suspected a meniscal tear and requested an MRI.

6. On June 29, 2016 Claimant underwent a right knee MRI. The MRI revealed findings consistent with a prior injury and surgical involvement. The diagnostic testing also reflected a possible meniscal tear. Dr. Jackson referred Claimant to Geoffrey Patrick Doner, M.D. for an orthopedic evaluation.

7. On July 14, 2016 Claimant underwent an evaluation with Dr. Doner. Based on a left shoulder rotator cuff tear, Dr. Doner recommended surgical intervention. In addressing Claimant's right knee, Dr. Doner remarked that Claimant suffered "an acute injury with some fat pad inflammation" as well as chronic osteoarthritis. He recommended an intra-articular injection of the right knee if Claimant failed to improve.

8. After Claimant underwent rehabilitation for his left shoulder injury, Dr. Doner recommended surgery for his right knee meniscal tear. Claimant specifically exhibited a bucket handle tear that displaced into the notch and a grade IV cartilage loss of the medial facet of the patella and medial trochlea. On November 28, 2016 Dr. Doner performed a right medial and lateral meniscectomy and chondroplasty.

9. On February 2, 2017 Claimant returned to Front Range Orthopedics for an evaluation. Claimant reported muscle aches, weakness and joint pain. Physician's Assistant Mitchell Dawson observed right knee tenderness, pain with motion and crepitus behind the patellofemoral joint. He determined that most of Claimant's pain was caused by his patellofemoral osteoarthritis. PA-C Dawson administered an intra-articular corticosteroid injection.

10. On March 13, 2017 Claimant again visited Front Range Orthopedics. He was evaluated by Edward Szuszczewicz, M.D. Claimant reported burning right knee pain since April 2016. Dr. Szuszczewicz recounted that Claimant had undergone a meniscectomy with Dr. Doner in December that had revealed significant cartilage defects. A physical examination did not reveal any tenderness or swelling in the right knee area. Dr. Szuszczewicz diagnosed Claimant with end-stage osteoarthritis of the right knee. Intraoperative pictures of the right knee arthroscopy in 2016 revealed advanced chondromalacia. Dr. Szuszczewicz recommended a total right knee arthroplasty.

11. On May 18, 2017 Claimant underwent an independent medical examination with Timothy S. O'Brien, M.D. Claimant reported that on April 28, 2016 he was apprehending an escaped prisoner, became involved in an altercation and fell to the ground. Claimant struck and twisted his right knee. He also injured his left shoulder. Dr. O'Brien concluded that Claimant's minor right knee contusion that healed by May 24, 2016. He remarked that Claimant's pain symptoms continued to increase in the absence of a physiologic or anatomic explanation. Dr. O'Brien also noted that Claimant's full range of motion in his right knee during examination on April 28, 2016 was inconsistent with a meniscal tear. He reasoned that the November 28, 2016 right knee arthroscopy did not improve Claimant's symptoms but instead introduced surgical trauma. The procedure "awakened quiescent areas of osteoarthritis and created an intractable synovitis that resulted in the progression of Claimant's symptomology and underlying disease." Dr. O'Brien concluded that Claimant remained a candidate for a total right knee arthroplasty just as he had been prior to the April 28, 2016 incident and the need for the surgery was not related to the altercation.

12. On September 19, 2017 the parties conducted the post-hearing evidentiary deposition of Dr. O'Brien. Dr. O'Brien maintained that Claimant's mechanism of injury on April 28, 2016 was insufficient to cause the need for a total right knee replacement. He

remarked that Claimant only suffered a superficial abrasion and contusion of the right knee that healed. Dr. O'Brien specified that there was insufficient stress on Claimant's knee during the April 28, 2016 altercation to cause a meniscal tear.

13. Dr. O'Brien commented that Claimant did not display any symptoms consistent with a meniscal tear at his examinations on April 28, 2016 and May 4, 2016. He explained that an acute injury to the meniscus would produce immediate symptoms rather than a delayed onset until approximately four weeks later. Dr. O'Brien summarized that Claimant's delayed report of right knee symptoms until May 24, 2016 was due to non-organic factors.

14. Dr. O'Brien explained that Claimant's right knee MRI findings were not related to his April 28, 2016 work incident. He noted that over 60% of men in their mid-50's have similar MRI findings. Claimant's findings were thus consistent with normal age-related degeneration that was not caused by an acute incident. Dr. O'Brien summarized that Claimant's right knee injury on April 28, 2016 was limited to a minor contusion that did not mandate surgical intervention.

15. Claimant testified at the hearing in this matter. He explained that he actually damaged his right knee three times during the April 28, 2016 altercation with the escaped prisoner. Claimant remarked that he struck his right knee on the ground when he became entangled with the fugitive's leg irons, he injured his right knee when another officer was removing the prisoner from the patrol car and he again struck his right knee when all three of the parties fell to the ground. Although Claimant denied that he exhibited full range of right knee motion during a physical examination on April 28, 2016 he acknowledged that he did not suffer any swelling.

16. On November 14, 2017 the parties conducted the post-hearing evidentiary deposition of Dr. Doner. Dr. Doner concluded that Claimant's altercation with the prisoner on April 28, 2016 caused his right knee meniscal tear and warranted a total right knee arthroplasty. He specifically noted that Claimant was functioning and performing his job duties prior to apprehending the prisoner. Claimant tore his meniscus on April 28, 2016 and underwent a right knee meniscectomy. The partial removal of the meniscus caused Claimant's symptoms to accelerate and progress to the extent that he now requires a total right knee replacement.

17. Claimant has demonstrated that it is more probably true than not that a total right knee replacement as recommended by Dr. Doner is reasonable, necessary and causally related to his April 28, 2016 admitted industrial injury. Initially, the record reveals that Claimant suffers from pre-existing degenerative osteoarthritis of the right knee. While apprehending an escaped prisoner on April 28, 2016 Claimant became entangled with the inmate's leg irons, fell onto the pavement and injured his right knee. Dr. Doner emphasized that Claimant was functioning and performing his job duties normally prior to apprehending the prisoner. After receiving conservative medical treatment Claimant underwent an MRI that revealed a possible meniscal tear. On November 28, 2016 Dr. Doner performed a right knee procedure in which he removed a portion of the meniscus. Dr. Doner persuasively concluded that Claimant's altercation with the prisoner on April

28, 2016 caused his right knee meniscal tear. The partial removal of the meniscus caused Claimant's symptoms to accelerate and progress to the extent that he now requires a total right knee replacement.

18. In contrast, Dr. O'Brien maintained that Claimant's mechanism of injury on April 28, 2016 was insufficient to cause the need for a total right knee replacement. He remarked that Claimant only suffered a superficial abrasion and contusion of the right knee that healed. Dr. O'Brien specified that there was insufficient stress on Claimant's knee during the April 28, 2016 altercation to cause a meniscal tear. Furthermore, Claimant did not display any symptoms consistent with a meniscal tear at his examinations on April 28, 2016 and May 4, 2016. Dr. O'Brien explained that an acute injury to the meniscus would produce immediate symptoms rather than a delayed onset until approximately four weeks later. Nevertheless, the record reflects that, although Claimant suffered from right knee osteoarthritis, he was functional, could perform his job duties and did not experience right knee pain prior to his altercation with the prisoner on April 28, 2016. However, Claimant required medical treatment after the incident and subsequent diagnostic testing revealed a right knee meniscal tear. As Drs. Doner and O'Brien recognized, the partial removal of the meniscus caused Claimant's symptoms to accelerate and progress to the extent that he now requires a total right knee replacement. Accordingly, Claimant's employment activities on April 28, 2016 aggravated, accelerated or combined with his preexisting condition to produce a need for medical treatment in the form of a right knee replacement.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has demonstrated by a preponderance of the evidence that a total right knee replacement as recommended by Dr. Doner is reasonable, necessary and causally related to his April 28, 2016 admitted industrial injury. Initially, the record reveals that Claimant suffers from pre-existing degenerative osteoarthritis of the right knee. While apprehending an escaped prisoner on April 28, 2016 Claimant became entangled with the inmate's leg irons, fell onto the pavement and injured his right knee. Dr. Doner emphasized that Claimant was functioning and performing his job duties normally prior to apprehending the prisoner. After receiving conservative medical treatment Claimant underwent an MRI that revealed a possible meniscal tear. On November 28, 2016 Dr. Doner performed a right knee procedure in which he removed a portion of the meniscus. Dr. Doner persuasively concluded that Claimant's altercation with the prisoner on April 28, 2016 caused his right knee meniscal tear. The partial removal of the meniscus caused Claimant's symptoms to accelerate and progress to the extent that he now requires a total right knee replacement.

6. As found, in contrast, Dr. O'Brien maintained that Claimant's mechanism of injury on April 28, 2016 was insufficient to cause the need for a total right knee replacement. He remarked that Claimant only suffered a superficial abrasion and contusion of the right knee that healed. Dr. O'Brien specified that there was insufficient stress on Claimant's knee during the April 28, 2016 altercation to cause a meniscal tear. Furthermore, Claimant did not display any symptoms consistent with a meniscal tear at his examinations on April 28, 2016 and May 4, 2016. Dr. O'Brien explained that an acute injury to the meniscus would produce immediate symptoms rather than a delayed onset until approximately four weeks later. Nevertheless, the record reflects that, although Claimant suffered from right knee osteoarthritis, he was functional, could perform his job duties and did not experience right knee pain prior to his altercation with the prisoner on April 28, 2016. However, Claimant required medical treatment after the incident and subsequent diagnostic testing revealed a right knee meniscal tear. As Drs. Doner and O'Brien recognized, the partial removal of the meniscus caused Claimant's symptoms to accelerate and progress to the extent that he now requires a total right knee replacement. Accordingly, Claimant's employment activities on April 28, 2016 aggravated, accelerated or combined with his preexisting condition to produce a need for medical treatment in the form of a right knee replacement.

ORDER

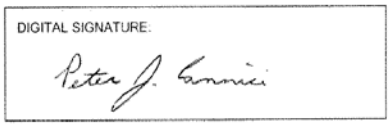
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for a total right knee arthroplasty is reasonable, necessary and causally related to his April 28, 2016 industrial right knee injury.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 27, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable work related injury on October 23, 2016.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits to treat her October 23, 2016 injury.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary partial disability (TPD) benefits from October 23, 2016 through December 14, 2016.

STIPULATIONS

1. Claimant's average weekly wage is $944.32.

2. If the claim is found compensable, Claimant is entitled to temporary total disability (TTD) benefits from December 15, 2016 through February 19, 2017.

3. If the claim is found compensable, Banner Occupational Health and Sterling Medical Center are authorized providers.

FINDINGS OF FACT

1. Claimant is a 66 year old female employed as a Correction Officer 1 for Respondent. Claimant has been employed by Respondent for approximately 4 years.

2. As part of her duties, Claimant oversees inmates at the Sterling Correctional Facility. Claimant works full time and overtime as needed. Claimant is required as part of her duties to perform rounds every 30 minutes to check on the inmates. The rounds involve walking and going up and down stairs. Claimant estimated that during each shift she spends approximately 4 hours performing rounds, walking, and going up and down stairs.

3. In the fall of 2016 Claimant reported that she was working a lot of overtime. Claimant reported that before October 23, 2016 she had a catch in her right knee and thought it was due to all the overtime work and the amount she was going up and down stairs on her rounds. Claimant reported she didn't know what was wrong with her knee and that she had made an appointment with a doctor to get it evaluated. Claimant testified that she did not make it to the appointment because of an injury on October 23, 2016.

Claimant reported that she had taken one of her husband's prednisone steroid pills hoping it would help her inflammation before October 23 but that it did not help. Claimant reported telling Officer Magelssen that her knee felt weird and had a catch before October 23 and that she also told Officer Coonrod that she had taken one of her husband's steroid pills that did not help and told Officer Coonrod that she was going to make an appointment with the doctor to check out her right knee.

4. On October 23, 2016 Claimant alleges that she was performing her normal rounds to check on inmates. She alleges that she turned and felt a click in the right knee, that she walked over to the stairs, and that she couldn't put her foot down because it was so painful. Claimant alleges that it felt like she had stepped on a taser. Claimant reported that before October 23 she had no problems performing rounds.

5. Security video of the date and location of the alleged injury shows Claimant performing rounds. Claimant is seen on video walking on the floor while peering into various rooms. Claimant then walks to the stairs and ascends half way up the stairs before stopping to rub her right knee. Claimant does not appear to walk with a limp either before ascending the stairs or while on the stairs. In the video, Claimant stops approximately 1-2 steps from the top of the stairs, pauses, and appears to crouch/stretch before going up the last couple of steps. Claimant then walks the upstairs corridor, peers into three rooms, and again pauses. Claimant is seen on video bending over and rubbing her right knee for several seconds. Claimant then continues walking down the upstairs corridor peering into windows, walks back to the top of the stairs, and descends the stairs before walking out of camera view. *See* Exhibit 15.

6. Claimant alleges that before October 23, 2016 she could do her job and that she was good enough to work. She alleges, however, that after October 23, 2016 she couldn't even walk or put her foot down because it was so bad.

7. Claimant filled out a first report of injury on October 23, 2016. Claimant reported that while making rounds she was going from the 1st tier to the 2nd tier when her knee locked up and pain shot down her leg into her knees. Claimant reported sharp pain in her knee and that she was not able to put weight on her right foot. *See* Exhibits A, 7.

8. On October 23, 2016 Claimant was evaluated at the Sterling Regional MedCenter by Brook Wager, M.D. Claimant reported that she was at work doing her rounds and that her knee locked up while she was coming down the stairs. Claimant reported that she felt like she had hyperextended her knee. Claimant reported pain behind the knee and that she could not put weight on her leg. On examination, Claimant had tenderness and swelling in her right knee with minimal tenderness over the anterior aspect of the patella and minimal tenderness at the medial collateral ligament and lateral collateral ligament. X-rays of Claimant's right knee showed no acute fracture or dislocation and no definite knee joint effusion. Claimant was discharged as stable and was recommended to follow up with Craig Van Schooneveld. *See* Exhibits B, 1.

9. On October 23, 2016 Correctional Officer Launa Coonrod sent an email to Captain Carol Thomas indicating that Claimant was sent home at approximately 3:00 a.m. that day after becoming unable to put weight on her knee. Officer Coonrod reported that Claimant had called her to report that her knee locked up and that she was unable to put any weight on it. Claimant reported that she had taken some prednisone earlier in the day and that since it wore off Claimant believed it caused her the inability to continue. Claimant reported to Officer Coonrod that she had an appointment set for Thursday for her knees but didn't think she would be able to wait. Officer Coonrod reported that Claimant did not make a claim of work injury until she was wheeled to her vehicle and the person picking her up asked if had had made a first report of injury and that then Claimant asked if workers' compensation would cover her. Officer Coonrod also reported that Claimant did not attend roll call on October 20 because of her knee bothering her and that on October 21 Claimant told Officer Coonrod that she was given steroid shots for her knees and was doing better. *See* Exhibits A, 12.

10. On October 23, 2016 Correctional Officer Neal Magelssen sent an email to Captain Carol Thomas. Officer Magelssen noted that he had just filled out a report of injury for Claimant due to Claimant's claim that she injured her right knee after starting her 2:30 round. Officer Magelssen noted that Clamant claimed that her right knee locked up and pain started shooting through her right leg. Officer Magelssen noted that Claimant had worked Thursday, but missed roll call due to her knee hurting. Officer Magelssen noted his belief that Claimant injured herself prior to the Thursday incident and was now trying to get the state to pay for whatever may need corrected. *See* Exhibits A, 12.

11. On October 24, 2016 Claimant was approved for transitional duty assignment working her normal graveyard shift, full schedule, from 10 p.m. to 6:00 a.m. Monday through Friday. This approval was through October 31, 2016 and was noted that the assignment and work restrictions were related to a work related injury and were for main entry duties. It was noted that Claimant could not participate in any physical/dynamic training. Claimant's transitional duty assignment for full schedule graveyard shifts was extended on October 27, 2016 to go through November 15, 2016. *See* Exhibit 9.

12. Claimant testified that she was not allowed to work overtime at the transitional duty job assignment and that she sustained wage loss while in the transition job due to the lack of overtime.

13. On October 25, 2016 Claimant was evaluated by Bonnie Hablutzel, NP. Claimant reported shooting pains down the back of her legs. Claimant reported walking up steps at work when she felt pain in her knee that radiated down the back of the knee to her foot on the right. Claimant reported no specific injury, that she went to the emergency department that day, and that x-rays were negative. It was noted that Claimant was wearing a right knee brace and using crutches. On examination, Claimant had right knee pain on range of motion flexion. Claimant was found to have moderate pain around the front and medial knee. Claimant was found to have no edema and no bruising. Claimant was assessed with right knee pain. Work restrictions of no lifting

greater than 10 pounds, no kneeling, no crawling, no squatting, and no climbing ladders or stairs were provided. Physical therapy, muscle rub, neoprene sleeve, and crutches as needed were planned. *See* Exhibits B, 2.

14. On November 30, 2016 Claimant underwent physical therapy. Claimant reported that while at work at the prison her right knee collapsed and the back of her calf got real tight. Claimant reported the pain went into the buttocks and that she was unable to put her foot down. Claimant reported that she got a lot of swelling in the knee. Claimant continued to undergo physical therapy with sessions on December 5, 2016, December 7, 2016, December 12, 2016, December 14, 2016, and December 19, 2016. *See* Exhibits B, 13.

15. On December 14, 2016 Claimant's claim was denied. Claimant continued to seek care on her own for her right knee.

16. On January 5, 2017 Claimant was evaluated by Kirk Kindsfater, M.D. Claimant reported ongoing right knee pain for the last four months that began originally in October when she was walking up some stairs and felt something shift inside of her knee. Claimant reported that since then she has had pain over the anteromedial and posterior aspect of her knees. Claimant reported that prior to this injury, she was having no pain or discomfort in the knee. On examination, Claimant had moderate effusion and a positive McMurray's test. Dr. Kindsfater provided the impression of right knee likely medial meniscal tear. Dr. Kindsfater recommended a right knee MRI to dictate further treatment. *See* Exhibit 3.

17. On January 19, 2017 Dr. Kindsfater called Claimant regarding Claimant's right knee MRI. Dr. Kindsfater noted that Claimant had a posterior horn medial meniscal tear, a radial tear, and a horizontal cleavage tear. He also noted that Claimant had minimal chondrosis in the tibiofemoral joint and significant patellofemoral disease. He noted that Claimant's symptoms were mostly along the medial joint line and he opined they were due to the meniscal tear and that it was reasonable to consider arthroscopic debridement of the knee. He noted that Claimant's knee had been unresponsive to conservative measures and that Claimant's symptoms had continued to progress. *See* Exhibit 3.

18. On February 6, 2017 Claimant underwent right knee surgery performed by Dr. Kindsfater. The pre-operative diagnosis was right knee posterior horn medial meniscal tear. The post-operative diagnoses were: right knee posterior horn medial meniscal tear; right knee posterior horn root attachment lateral meniscus; right knee grade II/III chondrosis patella and trochlea; and right knee grade II and grade III chondrosis medial femoral condyle. Dr. Kindsfater noted significant degenerative tearing of the posterior horn medical meniscus that was resected back to stable tissue using a combination of biters and shavers. Dr. Kindsfater also found some grade II and early grade II chondrosis with some chondral flaps in the medial femoral condyle that were resected using a shaver. Dr. Kindsfater found tearing of the posterior horn of the lateral

meniscus root attachment and he debrided it back to stable tissue using a combination of biters and shavers. *See* Exhibit B.

19. On February 16, 2017 Claimant was evaluated by Dr. Kindsfater. Claimant reported overall that she was doing well. Claimant reported still having a hard time with stairs. Dr. Kindsfater noted that at the time of surgery it was revealed that Claimant had a large tear in the medial meniscus as well as a smaller tear in the lateral meniscus and tri-compartmental arthritis. It was noted that Claimant still had mild effusion but that the incisions were healing well. Claimant was released to return to work but limited restrictions to avoid stair climbing were given. *See* Exhibits B, 3.

20. On March 28, 2017 Claimant underwent an independent orthopedic evaluation performed by Stephen Davis, M.D. Claimant reported that she sustained an injury to her right knee at work on October 23, 2016 and that she sprained/twisted her right knee on the stairs at the prison. Claimant reported concern with the frequency of stairs during the course of her daily duties and that the constant up and down contributed to her problem. Claimant reported persistent right knee pain and swelling. Dr. Davis reviewed medical records and performed a physical examination. Dr. Davis opined that Claimant sustained a work related injury to the right knee and opined that Claimant's description was a cumulative problem with an acute aggravation on October 23. Dr. Davis noted that examination findings included an acute medial meniscal tear as well as degenerative joint disease. *See* Exhibits C, 4.

21. Officer Magelssen testified at hearing. He reported that Claimant missed roll call on October 20, 2016 and that he called to ask her why she missed. He testified that Claimant said she had hurt her knee at home and did not want to walk all the way to roll call. Officer Magelssen testified that this stuck out in his mind because he was new to the position and was worried about staffing and workers' compensation issues.

22. Officer Coonrod testified at hearing. She reported that on October 20, 2016 Claimant missed roll call and that she went to the unit and called Claimant. She testified that Claimant reported that her knees were bothering her and she didn't want to walk to roll call. The next day, on October 21, 2016, Officer Coonrod testified that she talked to Claimant as they were walking into roll call. Officer Coonrod testified that she asked Claimant how her knee was doing and that Claimant indicated she had gotten a steroid shot and that she was feeling better. Officer Coonrod testified that she recalled responding as to how she heard those shots hurt. On October 23, 2016 Officer Coonrod testified that Claimant called her on the phone at the facility to report that she had hurt her knee and could no longer do rounds. Claimant reported that her knee locked up and that she had pushed through and finished but couldn't do it anymore. Officer Coonrod testified that she got Claimant a desk office chair and wheeled Claimant out to the parking lot. Officer Coonrod testified that Claimant did not report a work related injury, but just said her knee had locked up during rounds until they got to Claimant's car.

23. Claimant testified at hearing. She reported that prior to October 23, 2016 she had a catch in her right knee and some pain and had scheduled a doctor's

appointment to see what was wrong with it. Claimant testified that she continued to work her regular schedule and overtime which involved a lot of stairs. Claimant testified that on October 21, 2016 she took one of her husband's prednisone pills, but that it didn't help and that she told others about the catching in her knee. Claimant testified that on October 23, 2016 when the alleged injury happened she turned, felt something like a click and something strange in her knee, and then walked over to the stairs. Claimant testified that she started going up the stairs but couldn't put her foot down. Claimant reported that after the incident she couldn't even step down on her foot and couldn't even walk. Claimant testified that she called Officer Coonrod and reported that something had happened to her knee and that she started up the stairs and could no longer hardly walk up the stairs. Claimant indicated she told Officer Coonrod that she was having to pull herself up the stairs and was rubbing her knee. Claimant testified that she reported to Officer Magelssen that she was going up the stairs when she suddenly couldn't walk on her right knee anymore or put pressure on that leg and that she couldn't get up the stairs.

24. Claimant's testimony at hearing is inconsistent with the security video. The Although the video shows her stopping while ascending the stairs and while walking the upstairs corridor to rub her knee and/or stretch, it does not show her suddenly being unable to walk or bear weight. Rather, it shows her rubbing/stretching and continuing her duties. Claimant walks the upstairs corridor, descend the stairs, and walks out of view of the camera. The video does not show an acute incident or an immediate inability to bear weight. It does not show her pulling herself up the stairs or failing to be able to get up the stairs.

25. Although Dr. Scott opined that the right knee was work related, he did not address the surgical findings of degenerative tearing. His report and opinion are not found persuasive as they fail to explain the pre-existing symptoms and the degenerative surgical findings and instead note that examination findings included an acute medial meniscus tear and degenerative joint disease.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. (2014), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. (2014). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. (2014). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even

if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable work related injury. As found above, the surgical findings included significant degeneration. Claimant’s symptoms were opined by Dr. Kindsfater

to be related to a medial meniscal tear and in surgery Dr. Kindsfater found significant degenerative tearing of the posterior horn medial meniscus. Claimant had catching and trouble with her right knee prior to the alleged injury and the surgical report showed degenerative tearing as opposed to an acute tear. Due to the pain and catching that she had in her right knee prior to October 23, Claimant had already scheduled a doctor's appointment to evaluate her right knee and had taken one of her husband's prednisone pills to try to alleviate her symptoms. Claimant had symptoms of pain and catching prior to October 23 and on October 23. Claimant has failed to establish she sustained an acute work related injury or that her employment aggravated, accelerated, or combined with her pre-existing right knee problems to produce a disability or the need for medical treatment. Rather, Claimant had right knee disability and had the need for medical treatment prior to October 23. It is just as likely that Claimant merely had symptoms at work on October 23 as a result of the progression of her pre-existing condition that is unrelated to her employment. Further, Claimant's testimony about the acute incident is not consistent with the security video. Claimant also reported inconsistently to medical providers and on October 23, 2016 reported her knee locked up when she was walking down the stairs and on October 25, 2016 reported no specific injury. Overall, Claimant is not found credible or persuasive.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show she sustained a compensable injury on October 23, 2016. Her claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 27, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Did Claimant prove entitlement to a general award of medical benefits after MMI by a preponderance of the evidence?

2. The parties stipulated to an average weekly wage of $591.20.

3. At the commencement of the hearing, Claimant argued he suffered a whole person impairment, and Respondents were bound by the DIME rating because they filed a Final Admission of Liability rather than requesting a hearing after receiving the completed DIME report. The ALJ concluded Claimant properly preserved that issue by endorsing "PPD" on his Application for Hearing, but did not give Respondents sufficient notice of his intent to try that issue through discovery. Respondents elected to reserve that issue for future determination.

FINDINGS OF FACT

1. Claimant suffered admitted injuries to his left leg on April 8, 2015 while working for Employer as a plumber. He was stepping up onto a scaffold and his left foot slipped into a gap between the ground and the front step of the scaffold, causing him to fall backward onto the ground. In the process of falling, he twisted his left leg and ankle.

2. Claimant's boss took him to Concentra, where he saw Dr. Walter Larimore. Claimant reported pain in the left ankle and left calf, and had difficulty bearing weight on the left leg. His left ankle was swollen and tender with limited range of motion. Dr. Larimore diagnosed a moderate left ankle sprain, splinted the ankle and gave Claimant crutches. He advised Claimant to remain nonweightbearing and released him to sedentary duties only.

3. Claimant returned to Concentra on April 13, 2015 and reported minimal improvement. He was not using crutches but was limping due to lateral ankle and calf pain. His left ankle remained swollen and painful. Examination of the left calf showed tenderness at the gastrocnemius and Achilles junction. Dr. Larimore added the diagnosis of gastrocnemius tendon strain. Ibuprofen was not helping, so Dr. Larimore prescribed naproxen instead. He also referred Claimant for physical therapy.

4. Claimant's ankle steadily improved over the next several weeks, but his calf remained painful with minimal relief from medication and therapy. Dr. Larimore referred Claimant for a lower leg MRI and an orthopedic consultation with Dr. Michael Simpson.

5. Claimant saw Dr. Simpson on May 18, 2015. Dr. Simpson reviewed the MRI and described it as "completely normal" with no evidence of a muscle tear. He saw no surgical pathology and expected Claimant's pain to resolve with time. He also stated, "if

he continues to have pain, it may be prudent to have him evaluated by a pain management specialist to determine whether or not he has any neuropathic pain."

6. Claimant did not improve, and on June 8 he told Dr. Peterson at Concentra he was "becoming worse." Dr. Peterson ordered a "STAT" ultrasound which ruled out DVT and referred Claimant to Dr. Jeffrey Jenks for electrodiagnostic testing.

7. Claimant had a repeat MRI on June 30 due to imaging artifact in the first MRI. The second MRI showed "minimal Achilles tendinosis."

8. Dr. Jenks performed a left leg EMG on July 8, 2015, which showed peroneal neuropathy at the left fibular head. Testing of the lumbar paraspinals was normal with no evidence of denervation or motor changes. Dr. Jenks started Claimant on Neurontin and prescribed a topical compound analgesic cream.

9. Claimant began treating with Dr. Shimon Blau, a physiatrist, on July 20, 2015. He described ongoing left leg pain and weakness, aggravated by walking. The Neurontin was not helping, so Dr. Blau switched him to Lyrica.

10. In late October 2015, Claimant reported the pain had "started working its way up into his posterior thigh and buttocks."

11. Dr. Blau administered an ultrasound-guided injection of steroid and lidocaine on November 3, 2015. On follow up in December, Claimant told Dr. Blau the injection "did not help at all."

12. Claimant started experiencing low back pain in approximately November 2015. Claimant never noted low back pain on the pain diagrams he completed at Concentra. Claimant has admitted he first developed back pain "eight or nine months" after the injury.

13. In January 2016, Dr. Blau discontinued Lyrica and started Claimant on Cymbalta. He also refilled trazodone and referred Claimant back to Dr. Jenks for a repeat lower extremity EMG.

14. Dr. Albert Hattem took over as Claimant's primary ATP on January 14, 2016 due to "delayed recovery." Claimant told Dr. Hattem "overall since his injuries . . . he is unchanged despite considerable time and treatment." The physical examination was largely normal, except slight tenderness on the lateral aspect of the ankle and lower leg. Dr. Hattem advised Claimant if the repeat EMG was unchanged or improved, he would be at MMI.

15. Claimant saw Dr. Jenks for the repeat EMG on February 16, 2016. Although Dr. Jenks' report is not in evidence, Dr. Blau described it in his March 7, 2016 report. According to Dr. Blau, the EMG showed "findings and symptoms potentially consistent with a left L5 radiculopathy. This was based on _____ peroneus longus muscle."

16. Dr. Blau's March 7, 2016 report also contains what appears to be the first mention of low back pain in the Concentra records. He described the back pain as "constant, aching and throbbing." Claimant also described ongoing leg pain which was "more sharp in nature." He rated his pain at 7.5-9/10, but it is unclear whether he was referring to his back pain, leg pain, or both. Dr. Blau noted "he has tried Lyrica, Cymbalta, and trazodone in the past . . . and states these were not helping very much." Dr. Blau ordered a lumbar MRI.

17. Claimant followed up with Dr. Hattem on March 24. Dr. Hattem noted the repeat EMG "demonstrated no evidence of left peroneal neuropathy. This condition is now resolved and is at maximum medical improvement." He also opined the potential L5 radiculopathy was a "new finding" not causally related to the industrial accident. Dr. Hattem placed Claimant at MMI with no impairment, no restrictions, and no maintenance care. He advised Claimant to "consult with his personal physician outside of workers' compensation for non-claim-related lumbosacral radiculopathy."

18. Claimant has been treating with his primary care providers for leg pain since March 2016. The working diagnosis throughout the PCP records is "left L5 radiculopathy."

19. Claimant saw Dr. Stephen Gray for a Division Independent Medical Examination ("DIME") on April 11, 2017. Claimant complained of intermittent "severe" sharp, shooting, and stabbing pain across his entire lumbosacral region. Dr. Gray noted none of the Concentra pain diagrams identified low back pain. Claimant stated the back pain did not develop until "8 or 9 months after the original injury." He described stabbing pains and tingling in the posterior aspect of the left leg from the buttock into the heel. He complained of numbness laterally over the left thigh and calf area, and weakness "in the entire left leg." On exam, he was tender over the left iliac crest and iliolumbar ligament, and the left SI joint. Straight leg raise and tension signs were "equivocally positive" on the left. He had decreased sensation over the left L5 dermatome "consistent with L5 radiculopathy." Strength testing was "difficult to evaluate as there was a rather extreme breakaway weakness in testing dorsiflexion and left knee extension. Left leg range of motion testing showed difficulty with eversion "consistent with his previous peroneal nerve palsy." He had significant difficulty with dorsiflexion, and his EHL was weak.

20. Dr. Gray agreed Claimant was at MMI on March 24, 2016. Dr. Gray's diagnoses included "left peroneal neuropathy, probably secondary to 4/8/15 work-related incident," and "lumbosacral radiculopathy, unclear relationship to [the industrial accident]." Dr. Gray struggled to sort out which symptoms were injury-related:

> This case proved to be quite difficult in regards to causation of the late complaint of low back pain and the late findings of the L5 radiculopathy. It seems reasonably clear that the left lower extremity peroneal neuropathy is related to the strain/sprain injury of the left lower extremity that occurred on 4/8/15. The late finding of an L5 radiculopathy throws a wrench or red herring into the thought process. To this examiner's knowledge an MRI scan was not obtained. Even if an MRI scan of the lumbar spine showed a corresponding disc lesion at the left L5 area, it would not answer whether

> there was ever a low back injury. [Claimant] was quite frank about the fact that his complaints of low back pain did not manifest until long after the initial injury. The first mention of back injury in the medical records occurred almost ½ a year after the injury . . . . Nevertheless, we have the electrodiagnostic studies that show a left leg peroneal neuropathy and then a later electrodiagnostic study that shows an L5 radiculopathy. This examiner did not have the benefit of reviewing a complete set of notes on the electrodiagnostic studies that were performed. . . . Even if this examiner did have complete raw data on the electrodiagnostic studies, it would require the input of Dr. Jenks to help answer the following question. Is it possible that the early study showing a peroneal neuropathy was limited by how far of the exam was done? Is it possible that what we are seeing is the result of a "double crush" phenomena? Is it possible that, if the earlier study had been performed all the way up into the proximal right lower extremity and pelvis, would this have shown an L5 radiculopathy?

21. Dr. Gray opined "there ***may*** have been a relationship between the peroneal nerve injury and electrodiagnostic changes proximal to that, in the L5 spinal nerve root, which is partially where the peroneal nerve comes from." (Emphasis added). Ultimately, Dr. Gray assigned a 14% lower extremity impairment rating based on range of motion deficits and impairment of the common peroneal nerve. He indicated the neurological rating addressed "***both*** the L5 radiculopathy and peroneal nerve changes." (Emphasis added). He did not assign a lumbar spine rating.

22. Dr. Gray recommended maintenance care in the form of quarterly visits with Dr. Hattem for pain management and medication refills. He also opined Dr. Hattem should have the option to refer Claimant for brief courses of physical therapy for flare-ups, and ESIs "if Dr. Hattem thinks that injections might help him control his pain." Dr. Gray did not specify what "pain" the recommended treatment was intended to address; i.e., the peroneal nerve pain or the unrelated back pain and L5 radiculopathy? He recommended a follow-up visit with Dr. Jenks for "an opinion on the relationship of the L5 and peroneal nerve changes." Finally, he recommended a follow-up visit with Dr. Simpson, despite opining Claimant "does not appear to be a surgical candidate for his current work-related condition."

23. Claimant underwent a lumbar MRI on April 21, 2017, which was essentially normal.

24. Claimant's PCP referred him to Dr. Christopher Malinky, an interventional pain management specialist, in May 2017. Claimant's primary complaint was left-sided low back pain radiating down his left leg. Dr. Malinky administered an L4-5 transforaminal ESI, which gave Claimant "0 relief." Dr. Malinky recommended a spinal cord stimulator trial since no previous treatment had helped Claimant's leg pain.

25. Claimant saw Dr. Mark Paz for an IME at Respondents' request in October 2017. Dr. Paz opined the left peroneal neuropathy had resolved per the EMG, and the L5 radiculopathy was not injury-related. Dr. Paz pointed out that Claimant did not complain

of low back pain until several months after the original injury, and opined the mechanism of injury does not correlate to an L5 radiculopathy. Dr. Paz agreed Claimant was at MMI as of March 24, 2016, and requires no additional treatment for any injury-related condition. He disagreed with Dr. Gray's rating because it was based on conditions that are not related to the April 2015 accident.

26. Dr. Hattem testified in a deposition for Respondents on September 15, 2017. He does not believe Claimant's low back pain is work-related, as it did not manifest until well after the original injury. He also noted Claimant's pain from the work injury originated in the lower leg and radiated at times *upward*, which is not consistent with the later onset of L5 radiculopathy radiating from the back *downward*.

27. Dr. Paz testified at hearing on behalf of Respondents. He reiterated and expanded on the opinions expressed in his IME report. He explained that symptoms of peroneal neuropathy are similar to those of L5 radiculopathy, but they are distinct entities and peroneal neuropathy would not evolve into an L5 radiculopathy. He maintained the peroneal neuropathy has resolved and the L5 radiculopathy is not related to Claimant's industrial injury. Dr. Paz agreed with Dr. Hattem that Claimant requires no additional treatment for any injury-related condition.

28. The opinions of Dr. Hattem and Dr. Paz are more persuasive than opinions in the record to the contrary.

29. Claimant failed to prove by a preponderance of the evidence that his low back pain and L5 radiculopathy is causally related to the April 8, 2015 industrial accident.

30. Claimant failed to prove by a preponderance of the evidence that the industrial accident proximately caused the need for ongoing medical treatment.

CONCLUSIONS OF LAW

Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if the claimant requires maintenance care to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the employer's right to dispute compensability, reasonableness, or necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

A claimant must prove entitlement to medical benefits after MMI by a preponderance of the evidence, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). The DIME's opinion regarding medical treatment after MMI is not entitled to any special weight but is simply another medical

opinion for the ALJ to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

As found, Claimant failed to prove by a preponderance of the evidence that the industrial accident proximately caused the need for ongoing medical treatment. Claimant simply did not present sufficient evidence for the ALJ to tease out the degree to which the industrial accident "more likely that not" caused a need for treatment. Dr. Hattem and Dr. Paz provided well-reasoned arguments and Claimant has no persuasive countervailing opinion evidence. No treating providers have recommended further treatment on a work-related basis, and Claimant is primarily relying on Dr. Gray's opinions. But Dr. Gray did not differentiate treatment intended to address injury-related peroneal nerve pain versus nonindustrial back pain and L5 radiculopathy. As Dr. Gray pointed out, the assessment of causation is "difficult" due to the conflicting EMG findings and evolving symptomatology. Claimant has some symptoms consistent with peroneal neuropathy, but no corresponding current EMG findings. He also has symptoms consistent with L5 radiculopathy and positive EMG findings, but no apparent spinal pathology per the lumbar MRI. Dr. Gray raised several valid questions in his report but failed to answer them. Ultimately, Dr. Gray "punted" on the causation question, conflated the conditions and calculated a rating which covers both the peroneal neuropathy and the nonindustrial L5 radiculopathy. It is reasonable to assume he applied similar reasoning to his recommendations for maintenance care. Therefore, the ALJ concludes there is insufficient persuasive evidence for Claimant to carry his burden.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits after MMI is denied and dismissed.

2. Any issues not decided herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 27, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-004-801-02

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

No further hearings have been held in the above-captioned matter. On December 27, 2017, counsel for the Respondent filed a Motion for a Corrected Order, based on an error in the ALJ's calculation of the aggregate benefits due for 11% permanent scheduled disability of the left lower extremity (LLE). The Motion is well taken and the decision is hereby corrected accordingly.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on October 26, 2017 and December 15, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 10/26/17, Courtroom 1, beginning at 8:30 AM, and ending at 11:30 AM; 12/15/17, Courtroom 1, beginning at 8:30 AM, and ending at 11:00 AM).

Claimant's Exhibits 1 through 25 were admitted into evidence, without objection, with the exception of Exhibits 23 and 24, to which Respondent objected and the objection was sustained. Respondent's objections to Claimant's Exhibits 18 and 19 were overruled and the documents were admitted into evidence. Claimant's Exhibit 25 was a surreptitious audio recording of the Division Independent Medical Examination (DIME) by Jade E. Dillon, M.D., to which Respondent and Dr. Dillon, who was present at the hearing, objected. The Claimant, who is not an attorney, surreptitiously recorded

the DIME. If the Claimant were an attorney, the surreptitious recording would violate Colorado Bar Association Formal Ethics opinion 112 (July 19, 2003), however there is no legal prohibition against a non-lawyer party surreptitiously recording a transaction that affects that party. Indeed, the Claimant alleged that recording was a necessary part of her evidence to help prove that the ultimate DIME determination of Dr. Dillon was clearly in error and the ALJ should listen to it. The ALJ, in fact listened to the audio recording, overruled the objections thereto and admitted Claimant's Exhibit 25 into evidence. Respondent's Exhibits A through I were admitted into evidence, with the exception of Exhibit A (a video surveillance film which was not shown with a fair opportunity for confrontation). Respondent's Exhibit A was rejected. Moreover, Respondent relied of physician's narratives after viewing the surveillance video. The ALJ overruled Claimant's objections to Respondent's Exhibits F and G, and admitted these documents into evidence. At the hearing, the ALJ requested a copy of the follow up report of John Aschberger, M.D., the authorized physician who rated the Claimant upon referral from Lloyd J. Thurston, D.O., Claimant's authorized treating physician (ATP). It was a letter addressed to Respondent's counsel and it was admitted, without objection as Respondent's Exhibit J.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the Claimant's request to overcome the DIME of Dr. Dillon on maximum medical improvement (MMI) and degree of permanent medical impairment; and, the Claimant's entitlement to medical benefits, either pre-MMI benefits or post-MMI benefits, depending of the determination of MMI.

The Claimant's burden of proof to overcome the DIME is by clear and convincing evidence. Her burden of proof on either pre or post-MMI medical benefits is by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant (d.o.b. December 31, 1962) worked as a Certified Spanish Health Interpreter in June 2015. Her job entailed walking around hospitals, including the Respondent hospital herein, interpreting for those in need of interpretation.

2. Based on the DIME of Dr. Dillon, Respondent filed a Final Admission of Liability (FAL), dated June 29, 2017, admitting for pre-maximum medical improvement (MMI) medical benefits only; for an MMI date of May 3, 2016; for zero permanent partial disability (PPD); an average weekly wage of $909.87 (which would yield a temporary total disability benefit rate of $606.57 per week); and, denying liability for post-MMI medical maintenance benefits (*Grover* medicals).

3. It is undisputed by medical providers that the Claimant reached MMI on May 3, 2016. The Claimant disputes that she reached MMI. The ALJ finds that she reached MMI on May 3, 2016.

4. On June 10, 2015, during the course and scope of her employment, the Claimant tripped on some cable, and sustained injuries to her left knee and ankle. She promptly reported the work-related nature of her injury and was referred to Concentra, where she presented on June 12, 2015. She suffered an abrasion on the anterior aspect of the distal anterior foreleg, with an initial assessment of knee injury and sprain as well as left ankle sprain. Subsequently, she came under the care and treatment of Dr. Thurston at Concentra. Dr. Thurston diagnosed a "tear of tendon of left ankle; left knee injury; and sprain of left knee (Claimant's Exhibit 13). On November 17, 2015, Dr. Thurston released the Claimant to return to work/modified duty. He also referred the Claimant to Daniel Ocel, M.D., at Cornerstone Orthopedics and Sports Medicine. Dr. Ocel assessed an injury of the peroneal tendon of the left foot (Claimant's Exhibit 15).

5. On May 23, 2017, Rebecca Bub, D.O., who had been the Claimant's primary health care provider at Centura Health indicated she had not treated the Claimant for left knee or ankle pain for any pre-existing conditions ()Claimant's exhibit 1).

ATP Dr. Thurston

6. As of March 31, 2016, ATP Dr. Thurston diagnosed a tear of tendon of left ankle; left knee injury; and, sprain of left knee. At this time, the Claimant was given work restrictions of sitting 30 minutes for every two hours.

Independent Medical Examination (IME) by Douglas C. Scott, M.D.

7. Respondent engaged Dr. Scott to perform an IME of the Claimant, which occurred on March 16, 2016 (Claimant's Exhibit 16). Dr. Scott assessed the Claimant with: (1) left knee pain probably due to left knee sprain or **aggravation of underlying and pre-existing chondromalacia patella** [Dorland's Medical Dictionary defines "chondromalacia patella" as a "premature degeneration of the patellar (knee cap) cartilage, the patellar margins being tender so that pain is produced when the patella is pressed against the femur" **;** (2) left ankle abrasion/laceration, now healed; and, (3)

reported evidence of a peroneus brevis muscle tendon tear distal to the lateral malleolus and between its insertion over the left fifth metatarsal, symptomatic (Dr. Scott reported that this was the Claimant's primary diagnosis at the time). Dr. Ocel had recommended prolotherapy as had the Claimant's health care provider. Dr. Scott's alternative diagnosis of "**aggravation of underlying and pre-existing chondromalacia** ties into the diagnosis of John J. Aschberger, M.D., who rated the Claimant's permanent disability at the request of her ATP, Dr. Thurston. DIME Dr. Dillon assumed that the Claimant had the degenerative condition of chondromalacia. She did **not** address whether there was an aggravation and acceleration thereof.

Maria Hopp, M.D., Littleton TLC Clinic.

8 Dr. Hopp, M.D., the Claimant's private health care provider, saw the Claimant on March 30, 2016, and diagnosed: (1) left ankle paid; and, (2) chondromalacia of the left knee. She recommended physical therapy (PT) and prolotherapy.

9. On March 31, 2017, Dr. Hopp saw the Claimant again for her left knee and assessed: (1) other tear of medial meniscus of left knee, unspecified whether old or current tear…; and, (2) chondromalacia. Dr. Hopp's latest evaluation of the Claimant corroborates ongoing pain and symptoms in the LLE as the Claimant testified.

Roger E. Murken, M.D., Panorama Orthopedics and Sports Medicine

10. The Claimant was evaluated by Dr. Murken on August 31, 2016, for a second opinion. Dr. Murken noted that the Claimant's MRI (magnetic resonance imaging) showed a left brevis tear and the Claimant had chronic left knee pain and some mild chondromalacia. He recommended physical therapy (PT) for both sides and "I think if she does not get significantly better, an exploratory arthroscopy and evaluation of the brevis tendon **surgically** (emphasis supplied) would be indicated…. (Claimant's Exhibit 6). It was the Claimant's undisputed testimony that her left lower extremity (LLE) has not only not gotten better, it has worsened.

John J. Aschberger, M.D.

11. ATP Dr. Thurston referred the Claimant to Dr. Aschberger for an impairment assessment. Dr. Aschberger performed a thorough physical examination, review of medical records, and assessment of the Claimant on August 19, 2016 (Claimant's Exhibit 17). He also reviewed the IMEs performed by Dr. Scott, to whom Respondent referred the Claimant. Dr. Aschberger also reviewed an MRI (magnetic resonance imaging) scan of the left knee.

12. Dr. Aschberger assessed a left knee strain with findings of chondromalacia patella on the MRI scan; and, a longitudinal tear of the peroneal

tendon. Without the benefit of having watched the video (Claimant's Exhibit 25), Dr. Aschberger rated the Claimant at 22% LLE, with no indication that a whole person rating was appropriate. The ALJ takes administrative notice of the fact that Dr. Aschberger is a fully Level 2 Accredited Physician with the Division of Workers' Compensation, authorized to perform permanent medical impairment (PPD) ratings and, in doing so, uses the American Medical Association *Guides to the Evaluation of Permanent Impairment,* 3rd Ed. Rev. (hereinafter the "Guides").

13. During the hearing, a reference was made to a follow up evaluation by Dr. Aschberger, after he watched the video. It was a letter, dated September 2, 2016, addressed to J.P. Moon, Esq. of Ritsema & Lyon, P.C. Respondent produced the letter and it was admitted into evidence as Respondent's Exhibit J, without objection. After having watched the video (DIME Dr. Dillon has never watched the video), Dr. Aschberger reduced his rating to 11% LLE. The video depicts Claimant doing Zumba steps for a short while; standing on her right leg;, and subsequently climbing the steps to the Mother Cabrini Shrine, near lookout Mountain in Golden, Colorado (Respondent's Exhibit J). Indeed, Dr. Aschberger's findings, as detailed, illustrate a recognition of Dr. Aschberger's use of the "Guides." The ALJ finds that Dr. Aschberger's opinions, plus the aggregate medical evidence spanning two years, make it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Jade's zero PPD rating is clearly erroneous as more fully found herein below.

14. For an 11% LLE rating, according to § 8-42-107 **(6) (b),** C.R.S**., for fiscal year 2014/2015,** the formula for an 11% scheduled impairment of a leg above the foot is 208 weeks **X $277.03** X 11**%=$6,338.45 .**

15. According to the Claimant, she was following ATP Dr. Thurston's advice to "resume her outside activities as much as possible…" at the times she was videotaped doing some Zumba steps and climbing the steps at the Mother Cabrini Shrine. Claimant testified that she took breaks.

Division Independent Medical Examination by Jade E. Dillon, M.D.

16. Dr. Dillon did **not** testify at the hearing. The Respondent rested on her report (Respondent's Exhibit D).

17. Dr. Dillon performed the DIME on June 6, 2017. She concluded that the Claimant had reached MMI on May 3, 2016, which is not disputed by any other medical evidence. The Claimant disputes this MMI date but has failed to show that it is highly probable, unmistakable and free from serious and substantial error that the DIME MMI date is in error. Dr. Dillon went on to State that there was no **ratable** condition with respect to chondromalacia or left knee or ankle strain Without having seen the video, Dr. Dillon went on to render an opinion that "given the level of activity, she has **obviously** (emphasis supplied) regained functionality…." The ALJ finds that this

opinion is unsupported by the aggregate medical evidence, the Claimant's testimony. She goes on to render an opinion that the Claimant's symptoms are "well out of proportion to the underlying pathology. Indeed, Dr. Dillon states the categorical opinions that there are no ratable impairments for any of the Claimant's conditions. Dr. Dillon ultimately makes the bald statement that the impairment rating was made in accordance with the Guides and the impairment was zero. She gives no explanation, other than categorically and consistently stating that there were no "ratable" conditions; or, how her zero PPD rating was made in accordance with the Guides.

18. Dr. Dillon states the opinion that "there is no chronic presentation of strain itself." The ALJ finds that this opinion is contrary to the significant weight of the evidence. The ALJ infers and finds that the four corners of Dr. Dillon's DIME letter reflects a bias that the Claimant is either magnifying her symptoms or has functional overlay. This is inconsistent with the weight of medical evidence in the file and the Claimant's presentation at hearing. Indeed, the ALJ infers and finds that this bias taints and overshadows Dr. Dillon's ultimate opinions leading to her unexplained rating of zero PPD. Coupled with the weight of other medical evidence as herein above found, especially Dr. Aschberger's ultimate rating of 11% LLE, after viewing the video of the Claimant doing Zumba steps and climbing the stairs of the Mother Cabrini Shrine the ALJ finds that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Dillon's PPD rating is erroneous. This is significantly more than a difference of opinion between Dr. Dillon and Dr. Aschberberger. Dr. Aschberger's ultimate rating contributes significantly to the fact that DIME Dr. Dillon's zero impairment rating is clearly wrong.

19. A review of the audiotape of the DIME examination reveals from the beginning that Dr. Dillon was gravitating to an opinion of zero PPD. As more fully found herein above, Dr. Dillon's rating of zero is not adequately explained or supported, it is contradicted by the weight of the evidence, lay and medical; and, it is clearly erroneous.

20. DIME Dr.Dillon thereupon stated: "Given her level of function, the only ongoing future treatment I recommend is a self-directed exercise and stretching program (Dr. Dillon makes no indication of how these programs would be implemented) and NSAID medication for symptomatic control. The ALJ infers and finds that it is more likely than not that the Claimant requires post-MMI medical maintenance care, based on Dr. Dillon's statement and the aggregate, credible medical evidence.

Ultimate Findings

21. Based on the aggregate medical evidence, including Dr. Aschberger's ultimate rating of 11% LLE, the ALJ finds that DIME Dr. Dillon's ultimate zero PPD rating lacks credibility and Dr. Aschberger's 11% LLE rating is significantly more credible than DIME Dr. Dillon's zero rating. Indeed, Dr. Aschberger's 11% LLE rating significantly contributes to making it highly probable, unmistakable, and free from

serious and substantial doubt that DIME Dr. Dillon's zero rating is clearly erroneous. There is significantly more than a difference of opinion between DIME Dr. Dillon and Dr. Aschberger as herein above found.

22. The Claimant has established that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Dillon's zero impairment rating is wrong. Therefore, the Claimant has overcome DIME Dr. Dillon's zero impairment rating by clear and convincing evidence. Therefore, the ALJ ultimately finds and concludes that the degree of the Claimant's permanent impairment is 11% of the LLE, which equates to 208 weeks **X $277.03 X 11%=$6,338.45.**

23. Based on the totality of the medical evidence, the Claimant has established that it is more likely than not that she requires post-MMI maintenance medical care. Therefore, the Claimant has proven by preponderant evidence that she is entitled to post-MMI maintenance medical care at the hands of an ATP.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo.

275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the MMI date of May 3, 2016 is undisputed by the medical evidence. Only the Claimant disputes it. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, based on the aggregate medical evidence, including Dr. Aschberger's ultimate rating of 11% LLE, DIME Dr. Dillon's ultimate zero PPD rating lacks credibility and Dr. Aschberger's 11% LLE rating is significantly more credible than DIME Dr. Dillon's zero rating. Indeed, Dr. Aschberger's 11% LLE rating significantly contributes to making it highly probable, unmistakable, and free from serious and substantial doubt that DIME Dr. Dillon's rating is clearly erroneous. There is significantly more than a difference of opinion between DIME Dr. Dillon and Dr. Aschberger as herein above found.

Overcoming Dr. Dillon's DIME

b. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable

and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. As found, there was significantly more than a difference of opinion between Dr. Aschberger and Dr. Dillon. *See Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Also, In *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997), the Court of Appeals concluded that a medical opinion was not necessary to prove causation because imposing such a requirement would be reading something into the statute that was not there. As observed in *Lymburn*, to require a medical opinion to support a causality determination would be to read something into the statute that does not exist. By analogy, the Claimant's testimony that she continues to suffer from her admitted LLE injuries is sufficient to overcome Dr. Dillon's observations. Further, as found, the Claimant established that it was highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Dillon's zero impairment rating was in error. Thus, the Claimant overcame DIME Dr. Dillon's zero impairment rating by clear and convincing evidence.

c. Therefore, as found, the degree of the Claimant's permanent impairment is 11% of the LLE. For an 11% LLE rating, according to **§ 8-42-107 (6) (b), C.R.S., for FY 2014/2015, the formula for an 11% scheduled impairment of a leg above the foot is 208 weeks X $277.03 X 11%=$6,338.45.**

Burden of Proof on Post-MMI Medical Maintenance Benefits

d. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address her injury. The burden of proof is placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a

fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant having overcome the opinion of Jade E, Dillon, M.D., the Division Independent Medical Examiner, by clear and convincing evidence, primarily based of the opinions and rating of authorized treating rater, John J. Aschberger, M.D., the Claimant's degree of permanent impairment is 11% of the left lower extremity. Therefore, the Respondent shall pay the Claimant permanent scheduled disability benefits of **208 weeks X $277.03 X 11%=$6,338.45**, the grand total of scheduled permanent partial disability benefits, which shall be paid retroactively to May 3, 2016, the date of maximum medical improvement, and forthwith.

B. The Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

C. The Respondent shall pay all the costs of post-maximum medical improvement maintenance treatment, which is authorized, causally related to, and reasonably necessary to cure and relieve the effects of the Claimant's admitted injury of June 10, 2015, subject to the Division of Workers' Compensation Medical Fee Schedule.

DATED this_____day of December 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease to her right upper extremity as of April 21, 2016.

II. Whether Claimant has established by a preponderance of the evidence that she is entitled to a general award of all reasonable and necessary medical benefits.

III. Whether the right to selection of an authorized treating provider has passed to claimant.

IV. Whether Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits.

V. Whether Respondents have established by a preponderance of the evidence that they are entitled to penalties pursuant to C.R.S. Section 8-43-102 for failure to report the injury.

STIPULATION

At the commencement of hearing, the parties stipulated to an average weekly wage of $578.06. The stipulation is approved.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Background/Procedural History

1. On April 20, 2017, Claimant filed a claim for compensation in which she alleged an injury to her right shoulder, right elbow, and right wrist from "repetitive and overuse—lifting overhead and felt pop in shoulder". Respondents denied the claim on May 23, 2017.

2. Claimant filed a hearing application dated June 2, 2017 in which she endorsed the issues of compensability, average weekly wage (AWW), medical benefits (authorized physician and reasonably necessary), and temporary total disability (TTD) benefits from April 21, 2016 onward. Respondents filed a response on June 26, 2017, which endorsed those issues as well as statutory offsets and a penalty against Claimant for failure to report an injury pursuant to section 8-43-102, C.R.S. from April 21, 2016 onward. A hearing was scheduled for September 28, 2017 in Pueblo.

3. While the September 28th hearing was pending, the parties had a dispute as to discovery which resulted in a motion to compel which was denied as moot on August 28, 2017. Shortly thereafter, the hearing was continued from September 28th and rescheduled as noted above for November 16, 2017.

Lay Testimony/Evidence

4. Claimant is a 52-year old former female factory worker for Employer. She is a Mexican citizen who is working legally in the United States under a green card. She worked on Employer's tortilla production line for 10 years, starting her employment in July 2006 and ending the same in April 2016.

5. Claimant testified as to the specifics of employer's tortilla production process. She reported that production occurs on an assembly line and that there are three basic jobs on the line. The three jobs are packager, sealer, and boxer.

6. As a tortilla packager, Claimant described that she would use her hand to grab a stack of tortillas at the end of the line with a pinching motion. She would then turn that hand over and with the use of her other hand, shuffle the tortillas before placing them into a bag. She would then place the bagged tortillas onto a conveyer belt where they would travel down the line. According to Claimant, the process of grabbing, shuffling and bagging the tortillas took seconds. Claimant testified that she would perform these same packaging steps repeatedly while working as a packager.

7. Employer's job description for a tortilla packager was admitted into evidence. It establishes that the job of packager requires constant repetitive hand and wrist motions. The job description defines constant as 67% to 100% of the scheduled shift. The job description also establishes that the job requires frequent forearm rotation defined as 34% to 66% of the scheduled shift. Finally, occasional reaching above shoulder height defined as 1-33% of the scheduled shift is referenced in the physical demands section of the job description.

8. Claimant also described the position of sealer. According to Claimant, a sealer would pick up the bagged tortillas using a pinching motion with the hands, pinch the bag of tortillas using both hands, and feed the top end of the bag through a machine that seals the bag. After sealing the bag, Claimant testified that the sealer would place the bag back on the conveyer where it would travel down the line. Again, Claimant described a process which she maintained took a matter of seconds and which was repeated over and over during the work shift.

9. Claimant testified that the third job on the line was caser/boxer. Claimant testified that the caser collects the sealed bags of tortillas at the end of the line with their hands using a pinching motion. The caser would then put the bagged tortillas in a box, tape the box, and place the box on a pallet. Claimant testified that this job was also highly repetitious and required some heavy lifting.

10. Claimant testified that the packagers and sealers would rotate every hour. She testified that there were two packagers for every sealer. She testified that the general rotation was packager for an hour, then packager for an hour, then sealer for an hour. Claimant testified that the rotation would then repeat. Claimant testified that while she primarily performed as a packager and sealer, one person on the line was assigned to be the caser and that this person generally did not rotate as described above. Claimant testified that she would occasionally be assigned the job of caser if someone called off. Claimant testified that the vast majority of time she was packaging and sealing for 8 to 12 hours a day 6-7 days per week. She also testified that once or twice a week she would grind defective tortillas for 8-9 hours. On rare occasions when the line was down, Claimant testified she would be called upon to clean the machinery, sweep, and perform other similar tasks sometimes requiring heavy lifting.

11. Video demonstrating the packager and sealer positions was admitted into evidence. The recording shows packers working three distinct lines, a small flour tortilla line, a small corn tortilla line and a large flour tortilla line. The compact disc also contains video of a worker performing two different sealing positions.

12. In the first clip, 4 minutes and 12 seconds of video was obtained. This video demonstrates a line with three packing positions, one seated and two standing. The seated position is stationed such that the packager reaches out with the left hand to grab tortillas being routed to him/her from a large oven. Moving counterclockwise from the seated position is the next station. At this station, a packager stands directly in front of the oven and reaches directly out in front of her to grab tortillas coming out of the oven. An additional move counterclockwise places the viewer at the final station where the packager stands with the aforementioned oven to the right. In the video presented, the packager at this station reaches out with her right hand to retrieve the tortillas moving out of the oven. In all positions at this line, the ALJ observed the packagers to grab and pinch a stack of tortillas with one hand in a supinated position. The packagers then pronated the forearm and used their other hand to shuffle the stack before placing them into a plastic bag. The packagers then supinated the forearm once again to place the bags on a conveyer belt for sealing. The video also shows white plastic totes resembling trashcans on the floor into which the packer would occasionally toss defective tortillas for reprocessing. Neither bagging (packing) of nor removal of defective tortillas involved a significant amount of shoulder range of motion. Moreover, the ALJ did not observe any of the packagers to engage in any overhead activity during the 4 minutes and 12 seconds of video submitted for review. The ALJ also observed that the packager in the center position processed 26 bags of tortillas during the 4 minutes and 12 seconds of video obtained or roughly one bag every 9.7 seconds. Based upon the video observed, the ALJ finds the finger, hand, wrist and forearm movements associated with the position of packager highly repetitive.

13. The second video clip demonstrates a worker seating on a stool in front of a sealing machine. The video is 2 minutes 15 seconds long and reveals the worker quickly passing bags of tortillas through a sealing machine by repeatedly deviating the wrist in an ulnar and radial fashion. Repeated gripping is involved to position the bags on the conveyer so as to guide the bags through the sealer with the hands and fingers. The worker sealed 36

bags in 2 minutes 15 seconds or 1 bag every 3.75 seconds. While there is little shoulder motion involved in the sealing process, the video presented persuades the ALJ that the sealing position involves highly repetitive gripping and constant movement of the fingers, hands and wrists.

14. The third video clip contains footage of two workers operating the small corn tortilla line. The video obtained demonstrates upper extremity movements very similar to the small flour line as described. In the video footage, the seated worker packaged 21 bags of tortillas in 2:01 or one bag every 5.76 seconds. Again, the ALJ finds the finger, hand, wrist and forearm movements depicted in the video to be highly repetitive in nature.

15. The fourth video clip includes footage of the sealer position for the large flour tortillas. The worker in the video demonstrating this position is seated and manipulates the bags for sealing by gripping them with the fingers and hands. There is very little movement of the shoulder outside of occasional slight shoulder abduction to reach for a bag on the conveyer belt. Thirty-eight (38) bags were sealed in 2 minutes during the video. This equates to one bag every 3.1 seconds, which the ALJ finds requires quick repetitive gripping and movement of the fingers, hands and wrists to accomplish.

16. The fifth video clip demonstrates a worker packing large flour tortillas into plastic bags for sealing. Similar to the other packer positions this position involves repetitive use of the fingers, hands, wrist and forearms to pinch, grab and fold tortillas. Although repetitive pronation and supination of the forearms is apparent in the video, there is little movement of the shoulder required and the ALJ never observed the worker to reach above her shoulder while preforming this job.

17. No video footage depicting the caser/boxer position was submitted for review.

18. Claimant testified that in 2009 she was asked to clean some equipment. Claimant testified that she was cleaning what amounts to a large mixer and when she attempted to lift the lid on the mixing bowl, she heard a “pop” in her right shoulder and felt an immediate onset of pain. Claimant did not seek medical attention, did not report the alleged injury in writing, and did not notify anyone in human resources about the injury. Rather, Claimant continued to work unrestricted full duty for employer. According to Claimant, all of her subsequent right upper extremity problems began with the 2009 incident and have continued from that date forward.

19. Claimant testified that as time went on, she continued to have right shoulder pain and she began to develop right elbow and wrist pain. Claimant testified that she continued to work unrestricted full duty and that her right upper extremity symptoms continued to worsen.

20. In April 2016, Claimant went to human resources and spoke with Hubert Murias regarding the condition of her right shoulder/arm. Mr. Murias is the Director of Human Resources and in charge of processing workers’ compensation claims and assisting employees with other insurance and employment related matters. During a meeting with

Mr. Murais in April 2016, Claimant told him "[She] couldn't work" as her arm hurt. She could not recall telling him anything else. According to Claimant, she was instructed by Mr. Murias to take a few days off to let her right arm rest. Claimant testified that she did so but the symptoms did not resolve. Consequently, she sought medical treatment with her primary care physician (PCP) on April 26, 2016.

21. Claimant testified that shortly after her April 26, 2016 medical appointment, she returned to Employer and informed Mr. Murias of the physical restrictions given to her by her PCP. Claimant testified, and Hubert Murias confirmed, that the employer was unable to accommodate these physical limitations. Consequently, Claimant was instructed to file for short-term disability benefits. In a Disability Insurance Employer's Statement form completed by Mr. Murias, it was represented that Claimant's disability was not work related. Claimant disputes telling Mr. Murias that her upper extremity condition was not work related. However, in a statement provided by her to the Standard Insurance Company (SIC), Employer's long/short term disability carrier, Claimant represented that her right arm disability was not work related. Based upon the materials submitted by Claimant, SIC awarded her short-term disability of $200.00 beginning May 5, 2016 and continuing through July 5, 2016.

22. Claimant testified that since leaving work on April 26, 2016, she has not been able to perform her pre-injury job of a packager and that she has not performed any other type of work.

23. During cross-examination, Claimant testified that she is not diabetic and has never taken medication for diabetes, including Metformin. She also testified that she was never told how to report work-related injuries[1] by HR but inexplicably testified during cross-examination that she told Hubert Murias, the HR Director that she had been hurt on the job. She did not refer to the alleged 2009 injury in her interrogatory responses nor her 2017 workers' claim for compensation. She also admitted that she never reported the injury forming the basis for this claim in writing to Employer.

24. Mr. Murias recorded the above-described video. He testified at hearing as Employer's Human Resources Director. Aside from the worker's claim for compensation filed in 2017, Mr. Murias testified that Employer never received any report of a 2009 shoulder or any other work related injury to Claimant. He testified that Employer instructs employees to report work injuries to supervisors or department managers who will sit down with the employee to complete accident paperwork, which is then submitted to himself. According to Mr. Murias, Claimant did not tell him she had been injured on the job when they met in April 2016. To the contrary, she simply told him she was unable to work and he assisted her by giving her the paperwork necessary to file for FMLA and completing Employer's short-term disability statement as he had done previously in 2014 and 2015. According to Mr. Murias, short-term disability was not available for those claiming to have suffered a work related injury. Mr. Murias testified that if Claimant had put him on notice that she was injured on the job, he would have responded by giving Claimant a "Rule 8 letter".

[1] Claimant's report in this regard is inconsistent with her her report to Dr. Scoot that she "attended meetings where the employer told employee how to report a work injury."

25. Mr. Murias testified that he is familiar with Claimant's job duties. Per Mr. Murias, as a packer, Claimant would have lifted, at most, stacks of tortillas weighing between 1 and 2 pounds. She would have lifted even less as a sealer. As a caser, Mr. Murias testified that Claimant would have had no overhead lifting. After careful review, the ALJ finds that the video submitted supports Mr. Murias' testimony regarding the lifting required of a packer and sealer. As noted, no video depicting the physical demands of a caser was introduced into evidence.

26. Mr. Murias testified that he has observed the job duties associated with the grinder position and was present in court when Claimant testified as to the items she lifted. He testified that Employer's mixers, as described by Claimant, weighed tons and that it was unlikely that Claimant lifted the lid as she testified. At most, she would have lifted plastic totes containing dry flour from reprocessing, but would not have lifted them overhead. To the contrary, the operator would lift and deposit dry flour so as to manage the nutritional content of the tortillas.

27. Claimant testified in rebuttal. During her rebuttal testimony, she reported that during the 2009 incident wherein she felt a pop in her shoulder, she was lifting a bin of dry tortilla ingredients near the area of the grinder. According to Claimant, multiple bins were stacked up and she had to lift the one she was holding overhead to place it on top of the others when she felt a pop and pain. The ALJ finds this version of the 2009 incident to be materially inconsistent with her earlier testimony that she injured her shoulder lifting a heavy lid while cleaning one of Employers industrial mixers.

Medical Evidence

28. Claimant's prior medical history reveals that she has treated with Emergi Medical Centers (EMC) since March 3, 2010 when she presented to the clinic for a routine female examination along with a request to be screen for diabetes. Despite her claimed 2009 injury and report of worsening symptoms, Claimant provided no history of a 2009 shoulder injury and the report from this date of visit is devoid of any upper extremity complaints.

29. On September 11, 2013, Claimant presented to EMC with complaints of left wrist pain of two weeks duration. The record from this date of visit notes that while Claimant could "not recall an injury to her wrist"; she worked "a lot" with her hands. Claimant wrist was swollen and painful with certain movements and with "gripping/lifting." Claimant was assessed with suspected osteoarthritis and overuse of the left wrist. Again, Claimant did not provide any history of right shoulder or upper extremity problems/symptoms. Claimant's Hgb A1C was read as high normal at 5.8%. Claimant was instructed to "rest her left wrist and apply ice to the affected area for 15 minutes, 2-3 times daily. She was also encouraged to wear a wrist brace while working with her hands.

30. Claimant returned to EMC on October 30, 2015 with a report of joint pain. She stated that "since her rash" her fingers felt swollen with tender joints and had a family history of arthritis. On examination of her musculoskeletal system, she had "tender but not inflamed

or boggy DIP, PIP, MCP joints of hands bilaterally". There was no history of right wrist, elbow or shoulder complaints and no history of a 2009 shoulder injury provided. Her complaints appeared "allergic, [and] could be secondary to prior medications". She was assessed with among others things, pain in her hand joints bilaterally.

31. On March 23, 2015, Claimant was evaluated in the Emergency Room of Parkview Medical Center (PVMC) for complaints of abdominal pain. During this visit, a physical examination of Claimant's upper extremities revealed normal range of motion in the upper extremities. Furthermore, the records from this date are devoid of any history of a 2009 shoulder injury or any other work related injuries/conditions.

32. Claimant returned to EMC on April 26, 2016. On history, she presented for evaluation of shoulder pain of one year in duration and worsening for the past few weeks. Her pain radiated to the posterior shoulder, upper neck and elbow. No recent shoulder injury was recalled. No prior right shoulder injury was recalled. She stated that she worked in a factory and lifted heavy weight frequently, greater than 8 hours per day. There were no wrist or hand complaints. The right shoulder was injected with steroid and Claimant was advised to rest the shoulder and not engage in any heavy lifting in flexion and/or abduction until her symptoms improved.

33. Claimant returned on May 4, 2016 for treatment of the shoulder and did not raise any elbow, hand or wrist complaints. She provided no additional history. An MRI of the shoulder was ordered given her persistent pain and inability to perform activities of daily living. She also requested that FMLA paperwork be completed.

34. Claimant suffered from substantial anxiety regarding completion of the requested MRI necessitating the extension of her FMLA. On July 20, 2016, an MRI under general anesthesia was ordered.

35. On July 28, 2016, Claimant presented to EMC with continued right shoulder pain. She also reported right-sided neck and right and left wrist pain in addition to right thumb stiffness. According to the report from this date of visit, Claimant reported that she had been unable to flex her thumb for about two weeks. The thumb was injected with Lidocaine and Depo-medrol. It was also noted that Claimant's MRI under general anesthesia was scheduled for August 19, 2016.

36. Claimant's right shoulder MRI was completed as scheduled on August 19, 2016. Imaging revealed a small articular tear of the anterior supraspinatus insertion, a small interstitial tear of the superior infraspinatus tendon and rotator cuff tendinopathy.

37. On September 1, 2016, Claimant returned to EMC where she reported that she had been referred to physical therapy for evaluation and treatment of her right shoulder. She requested new FMLA paperwork and was excused from work until November 11, 2016. There was no additional history as to the etiology of her complaints and no mention of other right upper extremity complaints.

38. Claimant reported for initial physical therapy evaluation on September 2, 2016. As part of her evaluation, Claimant completed an Outpatient Therapy Health History Form wherein she reported that the condition she was referred to therapy for was work related. Claimant would go on to report having shoulder pain for a year in duration. She reported that while she did not have a specific injury, her work duties consisted of reaching and packing/moving of heavy boxes. There was no mention of elbow complaints or a 2009 shoulder injury.

39. Claimant reported persistent right shoulder, elbow and wrist pain when she returned to EMC on November 8, 2016. An EMG of the right upper extremity was suggested to "rule out other etiologies of her pain."

40. On November 10, 2016, Claimant appeared to EMC to have her FMLA paperwork completed. She was assessed as having dysfunction of the rotator cuff muscle group, suspected carpal tunnel syndrome, and unspecified pain in the right elbow. She was excused from work until January 2, 2017. EMG results were noted to be pending.

41. EMG was completed on November 10, 2016. The stated reason for the test was "[p]ain and numbness from the right arm and shoulder down to the fingers for many years." Testing demonstrated "[m]oderate slowing of the right median motor and sensory potentials consistent with a moderate right carpal tunnel syndrome."

42. Claimant returned to EMC on May 23, 2017. She complained of right elbow, right wrist, and right shoulder pain. She was diagnosed with lateral epicondylitis, carpal tunnel syndrome, and an incomplete tear of the right rotator cuff. There was no additional history as to the etiology of her complaints.

43. Claimant's final documented visit at EMC came on June 8, 2017. She presented with abnormally high liver enzymes, increased cholesterol, and a report of presently taking Metformin 500 mg and Rosuvastatin 20 mg QD. She was diagnosed with mixed hyperlipidemia, abnormal liver functions, and "metabolic syndrome."

44. In preparation for hearing, both Claimant and Respondents obtained independent medical opinions. Claimant was first examined by Dr. Miguel Castrejon on August 24, 2017 and later at Respondents' request by Dr. Douglas Scott on October 16, 2017.

45. Dr. Castrejon is a level II accredited physician and a diplomat of the American Board of Physical Medical and Rehabilitation. His credentials are otherwise absent from the record. Dr. Castrejon obtained a history from Claimant in Spanish, as he is fluent in the same. During her independent medical examination (IME) with Dr. Castrejon, Claimant described her employment as being 8-12 hours per day with two 15-minute breaks and one 30-minute lunch. She reported that her work duties involved rare sitting, rare reaching up, rare kneeling, rare climbing, occasional walking, occasional reaching out or down, occasional climbing, occasional overhead work, occasional pushing/pulling, constant standing, constant bending, and constant gripping/grasping. She reported "frequently" lifting forty pounds.

46. Claimant told Dr. Castrejon that she injured her shoulder while lifting a heavy container, which was higher than she was. She said that after the 2009 popping sensation, she experienced an onset of pain, which gradually worsened as time progressed. As to right hand pain, she stated that her initial pain with numbness began approximately five years before April 21, 2016 (2011) and that she reported it to her primary care physician. She admitted to being diagnosed with diabetes and being prescribed medication, but stated that she "did fine with diet that allowed for discontinuation of medication until more recently". She described pain in the right shoulder, numbness in the hand and all fingers. There was no mention of right elbow problems. In terms of past medical history, Dr. Castrejon noted that Claimant was taking both Metformin and Rosuvastatin as on June 8, 2017.

47. Dr. Castrejon assessed Claimant with a right shoulder partial rotator cuff tear, right elbow medial epicondylitis, moderate right carpal tunnel syndrome, and mild right DeQuervain's tenosynovitis and reactive depression/anxiety.

48. After taking a history, completing his physical examination and reviewing the available medical records, Dr. Castrejon reached the following opinions:

- It appears that prior to June 8, 2017 there is no documentation for a diagnosis or treatment of diabetes, merely a marginal Hb A1c. In my professional opinion the medical file does not support the presence of a metabolic condition that could be associated with the development of the claimant's presenting complaints. Furthermore, I remind the reader that electrodiagnostic testing failed to demonstrate the presence of a "polyneuropathy" which would typically be seen in cases of longstanding diabetes. Instead, the study revealed very specific changes consistent with a moderate median nerve entrapment at the right wrist.

- With regard to the right shoulder, the claimant described a specific injury, in 2009, when she lifted a heavy object at work. She continued working and has noticed persistent and gradual worsening of symptoms over time attributed to her work activities. The medical file supports the presence of right shoulder symptoms prior to April 26, 2016 however there is no description as to etiology of onset.

49. In performing a W.C.R.P., Rule 17 causation analysis, Dr. Castrejon considered the repetitive flexion/extension of the elbow along with the forceful grasping of tortillas associated with Claimant's position as a packer to reach the conclusion that her hand, wrist and elbow pain were occasioned by Claimant's cumulative exposure to repetitive activity. Consequently, Dr. Castrejon opined that the hand, wrist and elbow conditions constituted work related injuries thereby rejecting any relationship between these conditions and Claimant's subsequently diagnosed diabetes.[2] Based upon the evidence presented, the

[2] As noted, Dr. Castrejon rejected the suggestion that there was a causal connection between Claimant's upper extremity conditions and her diabetes based upon the results of the EMG study.

ALJ is persuaded that Claimant's diabetes is not a causative factor with respect to her hand/wrist pain.

50. Even though the medical records made no mention of a 2009 or other specific shoulder injury, Dr. Castrejon accepted Claimant's report as to cause and onset of shoulder symptoms. In this regard, Dr. Castrejon opinioned as follows: The development of right shoulder impingement arose as a specific event and was aggravated by the work activities that she continually performed.

51. Dr. Douglas Scott performed an IME at the request of Respondents on October 16, 2017. Dr. Scott is board certified in occupational medicine, level II accredited by the Division of Workers' Compensation, and a former assistant clinical professor at the University of Colorado School of Medicine, Department of Preventive Medicine. During the IME, Luis Saldarriaga, served as Dr. Scott's Spanish interpreter. As part of his IME, Dr. Scott viewed what he described were photographs of the packing process. Dr. Scott's description of the imagines he viewed are consistent with what the undersigned ALJ saw is the video tape submitted for review.

52. Claimant reported persistent right shoulder pain, pain from the right side of her neck down to the right upper trapezius, nocturnal pain/tingling in the right hand and pain around the right lateral elbow.

53. Regarding her right shoulder, Claimant reported that her pain began in 2009. She thought it was from a work related cause. Concerning the cause of her shoulder pain, Claimant told Dr. Scott that while she was working for Employer she "lifted a plate of tortillas above her head to place on a shelf and she noted a 'cracking noise' in the right shoulder without pain. This purported mechanism of injury is inconsistent with either of the other reported causes of Claimant's 2009 shoulder pain.

54. In his review of medical records, Dr. Scott noted that Claimant was seen by a physician assistant on September 11, 2013, but did not report right shoulder pain. He also interpreted the findings outlined in the radiologist's report regarding Claimant's right shoulder MRI as suggestive of chronic degenerative change.

55. In terms of medical history, Claimant told Dr. Scott that she had been diagnosed as diabetic and prescribed metformin 500 mg for that condition. She took the medication, but discontinued it due to the absence of health insurance.

56. As did Dr. Castrejon, Dr. Scott reviewed the Colorado Medical Treatment Guidelines (CMTG). He noted that per Rule 17, Exhibit 4, work related shoulder injuries might occur from a specific incident, aggravation of a pre-existing condition, or a work related exposure that renders a previously asymptomatic condition symptomatic and requires treatment. He also noted that the Guidelines referenced heavy lifting (of 20 kilograms or greater) or repetitive overhead work for at least thirty minutes a day for a minimum of five years would be considered risk factors for developing shoulder disorders. Per Rule 17, Exhibit 5, the identification of work related risk factors was based on a

comparison of work tasks and a determination of whether a temporal association existed between work place risk factors and the onset of symptoms. In making this determination, the physician needs to identify nonoccupational diagnoses such as rheumatoid arthritis, obesity, diabetes, and avocational activities.

57. Dr. Scott stated that Claimant alleged a specific injury to the right shoulder during 2009, but found no supporting documentation of or reference to such an event in the medical records. While he referenced objective testing results consistent with a diagnosis of moderate right median nerve neuropathy at the right carpal tunnel, Dr. Scott found no evidence of lateral epicondylitis, medial epicondylitis, or other elbow problems. He also found no evidence of cubital tunnel syndrome or Dequervain's tenosynovitis. Finally, he assessed Claimant with a history of non-insulin dependent diabetes, which was probably poorly controlled, as Claimant was not taking prescribed metformin.

58. Dr. Scott was asked to address the compensability or work relatedness of Claimant's various complaints. In doing so, he noted:

- If Ms. Desanchez experienced an injury to her right shoulder as she alleges in 2009 while lifting overhead, and citing the CMTG for shoulder injury, then it is possible that she had a compensable injury to her right shoulder in 2009.[3]

- In my opinion Ms. Desanchez (sic) alleged 2009 injurious right shoulder incident possibly aggravated a pre-existing and progressively deteriorating right shoulder condition beyond the normal progression.

- In my opinion there is some work job factor evidence to support her median nerve neuropathy at the right carpal tunnel as a compensable injury to her right wrist, but only if documentation can be found of this complaint before she left employment at Mission Foods in 4/2016 and before she was noted to be pre-diabetic from the 9/11/2013 laboratory testing with elevated HbH1C (sic).

- Per Ms. Desanchez the cause of her right median nerve neuropathy at the carpal tunnel developed from grabbing tortillas with her right hand repetitively and stuffing them into bags. This work activity is supported by the CMTG on Cumulative Trauma Conditions as a risk factor in the development of the carpal tunnel syndrome. Her development of a pre-diabetes from 9/11/2013 laboratory testing and her later Type II diabetes may have been a non-work related risk factor, which served to accelerate her carpal tunnel syndrome.

[3] He did not otherwise state that her work activities on an ongoing basis caused or contributed to her shoulder problems.

59. Based upon the evidence presented, the ALJ finds that Claimant has failed to prove, by a preponderance of credible evidence, that she developed a compensable occupational disease involving her right shoulder as a consequence of her position as packer, sealer or caser for Employer. To the contrary, the evidence presented persuades the ALJ that Claimant's testimony regarding the cause of her right shoulder symptoms is unreliable and the remaining evidence does not support that she suffered an aggravation of a pre-existing injury occurring in 2009. Nonetheless, the ALJ finds substantial record evidence to support Claimant's assertion that her hand/wrist complaints are related to the repetitive nature of her job.

CONCLUSIONS OF LAW

Based upon the forgoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). In this case, the ALJ finds Claimant's testimony regarding the cause of her right shoulder symptoms unreliable. Claimant saw several medical providers for a host of conditions between 2010

and 2017, yet never mentioned a 2009 shoulder pop connected to her work duties. Moreover, she failed to mention it in her discovery responses but astonishingly remembered to mention it to Drs. Castrejon and Scott. Claimant also testified that the company never told her what to do in the event of a work injury, contradicting Employer's records and her statement to Dr. Scott. She varied in her account, depending upon the medical provider, as to the amount of lifting, which was done, and the weights lifted. She denied dealing with Standard Insurance yet the Standard records submitted establish the she stated that her condition was not work related. Finally, but importantly, she gave varying accounts of the alleged 2009 shoulder injury. She told the forensic examiners about lifting a plate overhead. She told the ALJ it came from lifting the lid of a mixer "taller" than herself. On rebuttal, after she had a chance to listen to the testimony of Hubert Murias, she modified her story again to say that she had been lifting plastic bins or totes containing flour product. Such inconsistences cannot be reconciled with the balance of the competing evidence rendering Claimant's testimony regarding her right shoulder condition unpersuasive.

C. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where the injury is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that her symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's right upper extremity conditions arise out of her employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of*

Denver, supra. An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges two distinct but related injuries to her right upper extremity caused by the repetitive nature of her work. First, she contends that she suffered a compensable aggravation of a right shoulder condition caused by 2009 injury. Secondly, she asserts that she developed hand, wrist and elbow problems because of the repetitive gripping and handling required to bag tortillas moving on Employers assembly line. She did not allege the occurrence of a discrete injury, even a specific shoulder injury despite her claim of having sustained the same in 2009. Rather, she is alleging that she sustained an occupational disease as a result prolonged exposure occasioned by her work activities for Employer.

G. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado*

Fuel & Iron Corp. v. Industrial Commission, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). The failure to satisfy each element by a preponderance of credible evidence is fatal to an occupational disease claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). Here, two forensic experts, Dr. Scott and Dr. Castrejon, addressed compensability. Dr. Scott was cautious. He noted Claimant's prior medical history, particularly with regard to the suspect 2009 shoulder injury and diabetes. He set forth a very reasoned opinion and stated that if there was proof or medical documentation of certain factors, Claimant's complaints might be work related. Implicitly, Dr. Scott opined that the absence of such proof or documentation would mean that Claimant's complaints were non-occuptional in nature. Moreover, while he testified that Claimant may have suffered a discrete shoulder injury in 2009, he did not otherwise state that her work activities on an ongoing basis caused, aggravated or contributed in any way to her current shoulder problems.

H. In constrast, Dr. Castrejon seemingly accepted Claimant's account of the cause of her right shoulder condition in concluding that the conditions under which her work was preformed aggravated, accelerated, and/or combined with her pre-existing conditions to cause her symptoms, her disability and her need for medical treatment, for which benefits are sought. Based upon the totality of the evidence presented, the ALJ is not persuaded. Here, Dr. Castrejon did not view the video tape, which the ALJ concludes fails to support that any substantial shoulder movement or overhead lifting is requires a packer or sealer. Moreover, while the position of caser was not depicted in the video, the ALJ finds, as credible and persuasive, the testimony of Mr. Murias that no overhead lifting is required in this position. Dr. Castrejon's willingness to accept Claimant's version of the cause of Claimant's shoulder condition without viewing the video and/or explaining the discrepancies in the record regarding the absence of reports of a 2009 shoulder injury or the varied causes of the same adversely affect the persuasiveness of his opinion. The totality of the evidence presented persuades the ALJ that Claimant's right shoulder symptoms, more probably than not, are emanating from the natural progression of a pre-existing degenerative condition as suggested by Dr. Scott.

I. To the extent that Claimant asserts that she developed carpal tunnel syndrome from repetitively grabbing and stuffing tortillas into plastic bags, the ALJ concludes the record supports this claim. As noted by Dr. Scott, this work activity is supported by the CMTG on Cumulative Trauma Conditions as a risk factor in the development of the carpal tunnel syndrome. As suggested by Dr. Scott, the undersigned poured over the record evidence in an effort to locate any documentation that Claimant complained of hand/wrist pain before she left employment at Mission Foods in 4/2016. As noted, Claimant was evaluated on September 11, 2013, for complaints of left wrist pain of two weeks duration. The record from this date of visit notes that while Claimant could "not recall an injury to her wrist"; she worked "a lot" with her hands. Claimant wrist was swollen and painful with certain movements and with "gripping/lifting." Moreover, the record supports that Claimant returned to her PCP on October 30, 2015 with a report of joint pain. As found, she stated that "since her rash" her fingers felt swollen with tender

joints and had a family history of arthritis. On examination of her musculoskeletal system, she had "tender but not inflamed or boggy DIP, PIP, MCP joints of hands bilaterally". While the note suggests that her complaints appeared "allergic, [and] could be secondary to prior medications," the ALJ finds it probable, based upon the totality of the evidence presented, that Claimant's hand symptoms were probably related to her repetitive work. The undersigned ALJ, having carefully reviewed the evidentiary record and the IME reports from both doctors, finds that the opinions of Dr. Castrejon regarding the cause of Claimant's wrist symptoms to be credible and persuasive. Claimant has proven the request causal connection between the repetitive nature of her employment and her finger/wrist, i.e. carpal tunnel syndrome. Regardless, there is no record support for a similar finding concerning her elbow.

Claimant's Request for Medical Benefits

J. Once a Claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S., Contending that Claimant's current symptoms represent the effects of a non-work related condition, Respondents urge the ALJ to conclude that Claimant's need for ongoing treatment should be denied. As found and concluded above, as it pertains to the shoulder and elbow, Respondents' implication is compelling. Nonetheless, the evidence presented, persuades the ALJ that Claimant requires treatment to cure and relieve her of the ongoing effects of her compensable finger/wrist conditions. Consequently, Respondents are liable for this treatment.

Claimant's Right to Select a Treatment Provider to Attend to her Hand/Wrist Injuries

K. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Under §8-43-404(5)(a)(I)(A), C.R.S. 2014 the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); Pickett v. Colorado State Hospital, 32 Colo. App. 282, 513 P.2d 228 (1973).

L. In order to assert the statutory right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 545 (Colo. App. 1987). The employer's failure to designate the authorized treating physician results in the right of

selection passing to the claimant. *Id*. The employer's duty is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. See *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984). Based upon the evidence presented, the ALJ concludes that Respondents failed to designate a provider to attend to Claimant's compensable hand/wrist injuries. Here the evidence establishes that after the claim was reported in writing on April 20, 2017, Respondents did not assign Claimant an authorized treating provider. Consequently, the right of selection passed to Claimant. Claimant has selected Dr. Douglas Bradley at Emergicare in Pueblo, CO. Dr. Bradley is authorized to treat Claimant for the compensable occupational disease she has developed involving the right hand/wrist.

Claimant's Entitlement to Temporary Total Disability & Respondents Request for Penalties

M. To receive temporary disability benefits, the claimant must prove the injury caused a disability, he/she leaves work as a consequence of the injury, and the disability is total and lasts more than three regular working days. *C.R.S. § 8-42-103(1); PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Here, the evidence presented persuades the ALJ that Claimant was excused from work due to the effects of her compensable hand/wrist injury in addition to her shoulder condition. Consequently, Claimant is "disabled" within the meaning of section 8-42-105, C.R.S. and is entitled to TTD benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Respondents shall pay TTD in accordance with C.R.S. § 8-42-103(1)(b), for the period beginning April 21, 2017 and ongoing until terminated by operation of law at a rate of sixty-six and two-thirds percent of the stipulated AWW, but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. C.R.S. § 8-42-105(1). Because Claimant's period of disability has lasted longer than two weeks from the date she filed her claim as a consequence of her injury, TTD is recoverable to April 21, 2017. See C.R.S. § 8-42-103(1)(b).

N. Respondents seek a penalty against the claimant for Claimant's failure to timely to report the injury in writing as required by § 8-43-102(1)(a), C.R.S. Section 8-43-102(1)(a) provides that an employee that sustains an injury from an accident "shall notify the said employee's employer in writing of the injury within four days of the occurrence of the injury." If the employee fails to report the injury in writing, "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left to the discretion of the ALJ. *LeFou v. Waste Management*, W.C. No. 4- 519-354 (I.C.A.O. March 6, 2003). In this case, Claimant admits that no written report of the injury was filed until April 20, 2017. Moreover, the ALJ is persuaded that Claimant was educated on the method/requirements to report injuries. Here, the employment records submitted contain instructions to employees to report injuries and Claimant's acknowledgement of same. Claimant testified that she only said she could not work and does not recall what else she may have said. She admitted that she did not report the injury in writing. Mr. Murias testified that there was no report of a work injury in writing

prior to receipt of the claim for compensation. Accordingly, the ALJ concludes that it is appropriate to impose a penalty against Claimant in this case, disqualifying her from the receipt of temporary disability benefits before April 20, 2017.

ORDER

It is therefore ordered that:

1. Claimant failed to established by a preponderance of the evidence that she sustained a compensable occupational disease to her right elbow and shoulder.

2. Claimant has proven by a preponderance of the evidence that she developed an occupational disease to her right hand/wrist as a consequence of the repetitive nature of her employment related duties.

3. Claimant has established by a preponderance of the evidence that she is entitled to a general award of all reasonable and necessary medical benefits to cure and relieve her of the ongoing effects of her compensable occupational disease involving her right hand/wrist.

4. The right to select a physician to attend to the effects of her compensation hand/wrist condition passed to Claimant. She has selected Dr. Douglas Bradley at Emergicare in Pueblo, CO. Dr. Bradley is authorized to treat Claimant for her compensation hand/wrist condition.

5. Respondents have proven by a preponderance of the evidence that they are entitled to a penalty of one day's compensation for each day's failure to report the injury pursuant to C.R.S. Section 8-43-102. Claimant's request for temporary total disability benefits for the time period extending from April 21, 2016 to April 20, 2017, is denied and dismissed.

6. Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits from April 21, 2017 ongoing until terminated by operation of law.

7. All matters not determined herein are reserved for future determination.

DATED: December 29, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service

of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the trial spinal cord stimulator, as recommended by Dr. Barolat, is reasonable and necessary to treat Claimant's admitted injury?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant sustained an admitted injury on December 11, 2014 while working for Employer as a police detective. She was participating in a department mandated physical agility test ("PAT") when, while doing pushups to meet department criteria, she felt a sudden burning pain in her lower back that continued down into both legs. Claimant reported that the pain was concentrated first on the left, then largely on the right side. She attempted to continue the PAT, but could not complete the following sit-up portion, after which notified her sergeant that she was unable to continue.

2. Claimant has a history of injury to her lumbar spine. (Ex. 5, p. 108). Claimant has a history of two lumbar discectomies, after which an L5-S1 fusion surgery was performed in July 2003. Claimant sought intermittent maintenance treatment for these procedures continuing through 2014. Claimant's follow-ups focused primarily upon occasional flare-ups of left leg radiculopathy stemming from the fusion. (Ex. L). As of June 17, 2014, she was seen by Jeffrey Jenks, M.D., who commented that she would need continuing use of Naprosyn and Topamax to maintain her well controlled minimal low back and leg pain. Dr. Jenks recommended that she receive follow-up care a year after that appointment.

3. The records from City of Colorado Springs Occupational Health Clinic from December 11, 2014 document that Claimant complained of acute low back pain immediately after the incident, with pain radiating down her left buttock into her left leg to the knee. (Ex. 4, p. 9). Miguel Castrejon, M.D. examined Claimant, finding largely full range of motion in Claimant's lumbar spine. Claimant reported pain at a level of 6 or 7 out of 10. Dr. Castrejon prescribed Percocet, Flexeril, and ibuprofen to help control her symptoms. Claimant was also referred for a course of physical therapy.

4. Claimant was referred to Stephen Ford, M.D. for bilateral piriformis injections on March 30, 2015. Following this procedure, she reported pain reduction from 4/10 to 2/10. (Ex. 7, p. 123). She received Sacroiliac ("SI") joint injections of April 17, 2015, after which she noted a reduction in pain from 5/10 to 3/10 (Ex. 7, p.124).

Claimant returned to Dr. Ford for a second round of SI injections on June 19, 2015 and for L4-5 facet injections on July 14, 2015. *Id*. at 125-26. Each injection gave Claimant a mild reduction in reported pain.

5. Upon Dr. Castrejon's referral, Michael Rauzzino, M.D. examined Claimant on June 8, 2015. (Ex. 9, pp. 144-50). Dr. Rauzzino noted that conservative care had afforded Claimant no relief from her symptoms. While he recommended that Claimant receive an additional injection to the SI joint, Dr. Rauzzino noted that Claimant's prior injection had been largely without effect. Dr. Rauzzino reviewed Claimant's January 28, 2015 MRI, and concluded that her fusion surgery was well done, and he did not attribute her present concerns to the prior procedure. Dr. Rauzzino further noted in his report:

> She has had an EMG which shows a left sensory *radiculopathy* without polyneuropathy or plexopathy. Id at 150, (emphasis added).

6. While walking down a flight of stairs on June 11, 2015, Claimant fell due to *numbness* in her right foot. (Ex. J, p. 147). Claimant reported to Colorado Springs Occupational Health Clinic later that day for treatment. Claimant's fall resulted in contusions to the right wrist and right knee, as well as mild aggravation of her lumbar pain. Paula Hornberger, PA-C, who examined Claimant on that day, noted that Claimant had suffered from ongoing pain and *numbness* in both feet, but especially the right.

7. Claimant was then referred to Roger Sung, M.D. on June 25, 2015. (Ex.8, pp. 128-43). Dr. Sung had performed Claimant's 2003 spinal fusion, and made note of it in his report. Dr. Sung described Claimant as essentially asymptomatic from her 2003 fusion. Dr. Sung noted that she had received appropriate conservative care but so far had seen no appreciable relief in her pain. Dr. Sung recommended that Claimant be referred for pain management, including the possibility of a spinal cord stimulator ("SCS"). Dr. Sung discussed SCS hesitantly, as Claimant had previously been quite functional in daily life, and as such he recommended observing how Claimant would respond to injection treatment before recommending proceeding with SCS. Dr. Sung also noted:

> EMG report shows chronic S1 *radiculopathy* but no other obvious pathology. *Id* at 130 (emphasis added).

8. A subsequent MRI taken on July 28, 2015, and interpreted by Tanweer Khan, M.D. revealed mild post-operative changes to Claimant's L5-S1 fusion, consistent with Claimant's prior imaging. (Ex. H, p. 116). This MRI found Claimant's bilateral SI joints to be within normal limits.

9. On August 18, 2015, Claimant was examined by George Schakaraschwili, M.D. (Ex. 11, pp. 153-55). Dr. Schakaraschwili reviewed the results of Claimant's May 7, 2015 electrodiagnostic testing, which showed a distal tibial *neuropathy* and an *S1 sensory radiculopathy.*

10. Dr. Schakaraschwili noted that, as of his exam, Claimant suffered from burning pain extending down the back of her right thigh, as well as numbness and pain

as far down as her right heel, although her pain diagram largely focused upon her right buttock and thigh. Dr. Schakaraschwili performed an autonomic testing battery of Claimant's lower extremities, but found no evidence of CRPS. Dr. Schakaraschwili concluded that Claimant might benefit from a right lumbar sympathetic block, but if that procedure proved ineffective she could benefit from a SCS.

11. Claimant presented to Bert T. Willman, M.D. on September 9, 2015 so she could be evaluated as a candidate for SCS. (Ex. 12, pp. 156-58). Dr. Willman summarized Claimant's prior ineffective treatment and concluded that she was a prime candidate for SCS: "All physicians have involved (sic) at this point in time that consideration of spinal cord stimulator trial is reasonable and appropriate. I would agree" *Id* at 156. Dr. Willman explained the procedure to Claimant, who was enthusiastic to proceed as her symptoms had continued to worsen since her date of injury.

12. Claimant returned to Dr. Jenks on October 1, 2015 for a second opinion. (Ex. 5, p. 108-114). Dr. Jenks, who noted: "Terry's symptoms and exam are very consistent with *an L5 or S1 radiculitis*" *Id* at 109 (emphasis added). He recommended that she receive diagnostic and possibly therapeutic epidural injections to address this condition. Claimant subsequently returned to Dr. Jenks on August 16, 2016, having received such injections, which had given her roughly two weeks of relief as a result. As had Dr. Sung, Dr. Jenks reported that he had no other ideas for further treatment.

13. Dr. Willman referred Claimant to Dale Mann, Ph.D. for a pre-operative SCS psychological evaluation. (Ex. 13, pp.159-62). Dr. Mann performed a standard psychological testing battery and concluded that Claimant was ready to proceed with the trial stimulator.

14. Nicholas Olsen, D.O. performed an IME on behalf of Respondents on October 26, 2015. (Ex. A, pp. 11-35). Dr. Olsen reviewed the medical record, took a patient history, and performed a physical exam. On this date, Claimant's reported 90% of her pain centered around the right buttock, while roughly ten percent radiated into the right lower leg. Dr. Olsen emphasized Claimant's reported left lower extremity pain stemming from her 2003 spinal fusion. Dr. Olsen ultimately concluded, to the extent Claimant's symptoms did not stem from her prior spinal fusion, that Claimant suffered from a mechanical problem in the SI joint and thus was not a good candidate for SCS. While he indicated that physical therapy would be the best treatment for such a condition, he did not explain why Claimant saw no relief in her symptoms after having received extensive physical therapy already.

15. Upon Respondents' notice and proposal, Claimant was referred for a Division Independent Medical Examination with Joseph Morreale, M.D. (Ex. N, pp. 245-51). The examination took place on April 25, 2016. Dr. Morreale reviewed the medical record, took a patient history, and performed a physical exam. Dr. Morreale noted Claimant's bilateral lower extremity pain terminating in her posterior thigh. Dr. Morreale found Claimant *not at MMI* and recommended that she undergo an additional right SI joint injection. However, Dr. Morreale did not comment upon Claimant's lower leg pain

in his report, nor did he comment upon the source of this problem. He did not recommend in his proposed treatment plan the use of a SCS.

16. Dr. Castrejon referred Claimant to Giancarlo Barolat, M.D., who examined Claimant on April 20, 2017. (Ex. 17, pp. 218-220). Dr. Barolat concluded that Claimant suffers from a chronic, severe, and likely permanent neuropathic pain syndrome. Dr. Barolat reviewed the medical record and concluded that while Claimant had received extensive management, her only likely option remaining was a neurostimulation procedure. Dr. Barolat concluded that this was the best option to significantly reduce Claimant's chronic pain.

17. On December 14, 2015, Claimant saw Dr. Castrejon for another monthly visit. (Ex. E, p. 81). On this date, he diagnosed her with:

- Acute lumbar strain with primarily right piriformis involvement.

- Right piriformis injection per Dr. Wilman (sic) 2/18.

- Exam findings consistent with SI joint dysfunction

- Neuropathic pain right knee strain/sprain

-Right elbow strain/contusion, resolved

He placed her at MMI on this date, assigned an 11% whole person impairment rating, gave no work restrictions, and prescribed maintenance care for her pain, to be reviewed after one year.

18. Claimant continued treating with Dr. Castrejon through July 2017. (Ex. 4, p. 105). In his June 27, 2017 treating physician's progress report, Dr. Castrejon reviewed the findings of an MRI taken on January 28, 2015 which indicated post-operative changes to her L5-S1 fusion without evidence of recurrent or residual disc herniation, as well as a lack of nerve impingement from that prior surgery. (Ex. E, p. 52). Dr. Castrejon specifically noted that Claimant had no marked improvement from her symptoms when she received SI and piriformis injections. Dr. Castrejon ultimately requested that Claimant be referred back to Dr. Barolat for the proposed SCS, although that procedure was not yet approved. Dr. Castrejon finally noted that although he, Dr. Sung, Dr. Rauzzino, Dr. Ford, Dr. Willman, and Dr. Barolat had recommended that Claimant receive SCS, the procedure nonetheless remained denied.

19. Dr. Castrejon was subsequently deposed on June 26, 2017, in his capacity as an expert in physical medicine and rehabilitation. (Castrejon Depo., pp. 1-35). Dr. Castrejon summarized Claimant's treatment to that point, ultimately concluding that such treatment was on the whole ineffective, and that Claimant had failed conservative treatment. *Id*. at 10-11. Dr. Castrejon reviewed Dr. Olsen's October 26, 2015 IME report but did not entirely agree with Dr. Olsen's findings. *Id*. at 15. This was primarily for two reasons: (1) the Medical Treatment Guidelines recognize that treatment

may deviate from dictated policy as individual cases dictate, and (2) that Claimant clearly suffered from radicular nerve pain. *Id*.

20. Dr. Castrejon also noted, in response to assertions of Dr. Olson:

> I also want to state that Dr. Olson has indicated that there is no true definable lesion.
>
> Well, neuropathic pain, in and of itself, is somewhat of a non-definable process. It is a chronic pain as a result of some element of tissue damage that has occurred that then typically results in symptoms that distribute over….a certain….anatomical area that may or may not coincide with dermatomal distribution.
>
> This process is usually chronic, and ….typically does not respond to conservative treatment measures. And that's what she's experiencing. Id at 16.

21. Dr. Castrejon indicated that while Dr. Olsen had examined Claimant on only one occasion, Dr. Castrejon had treated Claimant for three years and was more acutely aware of her symptoms. *Id*. at 16. As such, Dr. Olsen's assertion that Claimant's pain was overwhelmingly located in her right buttock might be accurate as of the date of Dr. Olsen's examination, but inaccurate as to Claimant's symptoms over a longer time frame. *Id*. Dr. Castrejon testified that Claimant's symptoms were absolutely reflective of a neuropathic, radicular condition. *Id*. at 17-18. In Dr. Castrejon's opinion, Claimant is a good candidate for SCS both because of her reported symptoms, and because other treatment methods have been exhausted. *Id*. at 18.

22. Dr. Olsen performed a follow-up IME on Respondents' behalf on August 9, 2017. (Ex. A, pp. 1-10). Dr. Olsen discussed the possibility of SCS with Claimant, emphasizing the risk of paralysis as a side-effect of the procedure. *Id*. at 2. Dr. Olsen noted from Dr. Castrejon's report that, as of October 28, 2015, Claimant had no referred lower limb pain and that there was no present electrodiagnostic evidence of S1 nerve root involvement. *Id*. at 4. Dr. Olsen concluded that Claimant had pain isolated over the right SI joint, and that there was no evidence of radiculopathy. *Id*. at 8. Dr. Olsen concurred with Dr. Morreale's DIME report, especially with respect to Claimant receiving additional treatment centered around the SI joint. *Id*. at 9. Dr. Olsen concluded, consistently with his prior IME report, that Claimant was not a candidate for SCS, as her complaints were mechanical in nature. *Id*. at 10.

23. Claimant testified live at hearing. She described how her injury occurred, and the treatment she subsequently received. She indicated that her pain requires her to take a significant amount of medication, and that she sought an alternative that would allow her to reduce consumption of prescription drugs over the long term. Claimant expressed an understanding that SCS would plausibly meet this criterion. Claimant testified that since her date of injury she has been unable to exercise at the level to which she had been accustomed, and that her injury had completely changed her

formerly active lifestyle. The ALJ finds Claimant to be credible, not only in her testimony, but in reporting her symptoms to all medical professionals she has encountered. Claimant has been fully compliant with all recommended treatment, and is not motivated by any secondary gain. In fact, she knows that permanent placement of this device could spell the end of a career she enjoys. Claimant simply wants her pain to be mitigated, and she is psychologically prepared to accept less than perfection. She's had three years of practice at that already.

24. The post-hearing deposition of Dr. Barolat was taken on November 1, 2017 in his capacity as an expert in neurosurgery and the surgeon recommending Claimant receive a trial stimulator. Dr. Barolat testified that the recommended SCS would consist of an operation to install an electrode in Claimant's lower thoracic and upper lumbar spine. (Barolat Depo. P. 10). This electrode would stimulate Claimant's S1-S2 nerve root. *Id*. If the trial stimulator was to remove as much as half of Claimant's reported pain, the trial would be considered a success and Dr. Barolat would install a device similar to a pacemaker allowing the stimulator to be fully contained within Claimant's body. *Id*.

25. Dr. Barolat testified that this procedure did carry with it risks and potential drawbacks. *Id*. As the surgery would implicate Claimant's spinal column, the procedure would come with the possibility of permanent paralysis, as well as infection and pain associated with the procedure. *Id*. at 12-13. However, Dr. Barolat testified that in his practice no patient had suffered these effects after the procedure was performed. *Id*. at 14. Dr. Barolat was confident that, given Claimant's condition, the benefits of the procedure strongly outweighed the risks. *Id*. He emphasized that Claimant's condition is one that would typically make her a prime candidate for a trial stimulator. *Id*. at 16.

26. When asked about Dr. Olsen's opinion that Claimant did not present the necessary neurologic symptoms to make her a candidate for SCS, Dr. Barolat strongly disagreed. *Id*. at 17. Dr. Barolat testified that Claimant's chronic burning pain along the distribution of the S1 and S2 nerve roots clearly indicated radiculitis, which he defined as neuropathic damage to the nerve root. *Id*. at 18. When asked about Dr. Olsen's opinion that Claimant's complaints stem from a mechanical rather than neuropathic issue, Dr. Barolat testified that the ineffective injection Claimant received in the SI joint ruled out a mechanical issue as the primary cause of her reported symptoms, although he conceded that the SI joint could also constitute a lesser, contributing source of pain. *Id*. Additionally, Dr. Barolat noted that Claimant was examined by two spine surgeons, neither of whom recommended a spinal surgery to correct a mechanical issue in the lumbar spine. *Id*. at 19. Rather, Dr. Barolat described Claimant's stated complaints as stemming from nerve damage. *Id.* Dr. Barolat concluded that, based on Claimant's subjective complaints and the lack of positive effect obtained by her prior treatment, Claimant would benefit strongly from a trial stimulator.

27. The post-hearing deposition of Nicholas Olsen, D.O. was taken on November 13, 2017, in his capacity as an expert in physical medicine and rehabilitation. (Olsen Depo. pp. 1-35). Dr. Olsen commented on Dr. Barolat's recommendation that Claimant receive a trial stimulator. In regard to the Claimant's symptoms, he stated:

> The pain Ms. Thrumston documents, she draws a circle around her right buttock, which we consider the piriformis/SI joint area and into the posterior thigh. And there are no symptoms starting below the knee to the lateral foot. The S1 nerve root emerges in the lateral calf and out of the foot. And there is no indication of any pain, numbness, or tingling, or any other symptoms in the right calf or foot.

28. Rather, Dr. Olson attributed Claimant's complaints to a mechanical issue rooted in the SI joint. *Id*. at 20-21. Dr. Olsen noted the potential drawbacks involved in implanting SCS, as well as what he defined as the lack of a clearly defined pain generator in Claimant's case. *Id*. at 23-26. He ultimately concluded that SCS would not be considered reasonable treatment in Claimant's case. *Id*. at 30-31.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. § 8-40-101, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

B. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. *Section 8-43-201*, *supra*. A Workers' Compensation case is decided on its merits. *Section 8-43-201, supra*.

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

D. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. *C.R.S. Section 8-42-101.* The right to workers' compensation benefits, including medical benefits, however, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment is proximately caused by an injury arising out of an in the course of employment. *C.R.S. Section 8-41-301(1)(c); Faulkner v. Industrial Claim Appeals Office, 12 P.3rd 844 (Colo. App. 2000).* In addition, Respondents are free to challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care on a case. *See Kroupa v.*

Industrial Claim Appeals Office, 53 P.3rd 192 (Colo. App. 2002). The question of whether a particular medical treatment is reasonable and necessary and/or related to the claim is one of fact for determination from the ALJ. Id.; *Walmart Stores Inc. v. Industrial Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999).* Claimant continues to bear the burden to prove her right to specific medical benefits. *HLJ Management Group, Inc. v. Kim, 804 P.2d 250 (Colo. App. 1990).*

E. Pursuant to *W.C. Rule of Procedure 17-2 (A), 7 Code Colo. Regs. 1101-3,* health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at W.C. Rule of Procedure 17-7, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009). The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007)(not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011).

F. While the Medical Treatment Guidelines do call for failed lumbar surgical intervention prior to implantation of a neurostimulator under *Rule 17-7, Exhibit 1,* Claimant received such a surgical intervention in 2003 when she underwent an L5-S1 spinal fusion. Several surgeons have examined Claimant and identified no surgical procedure, with the exception of SCS, that would be effective in controlling her symptoms. While *Rule 17-7, Exhibit 9* warns that *permanent* implantation is suitable solely for "patients [who] meet all of the indications," Dr. Barolat and Dr. Castrejon testified that Claimant would absolutely not receive a permanent neurostimulator unless she saw a marked decrease in her pain symptoms, hopefully by as much as half, during the trial period.

G. Dr. Olson repeatedly emphasizes that there is not sufficient objective evidence of a lesion that is a specific pain generator. While he opines on several occasions to point out the insufficiency of evidence for an *S1 or S2* radiculopathy, on others occasions he opines that he believes it is a mechanical issue, to the *exclusion of a radicular pathology altogether.* The ALJ is not persuaded by Dr. Olson. The records are replete with references, by most of Claimant's attending physicians, to radicular symptoms, going all the way into Claimant's foot. On one occasion, her foot was so numb she fell down some stairs. There is no other explanation for this numbness. On two discrete occasions-almost two years apart-Claimant reported to Dr. Olson pain centered on her buttock region. This is not surprising. Claimant's symptoms vary in intensity from day to day, and vary with her activity level. The precise location of her symptoms has been a moving target. She just reports what she feels when asked on the day in question. The truth is that the pain comes and goes- but mostly it stays-and it

has wreaked havoc. This has confounded her providers at times, who have nobly sought the least invasive alternatives, but to no avail. The ALJ finds more persuasive Dr. Castrejon's explanation at his deposition, to wit: neuropathic pain is a process that is hard to define; while it may not lend itself well to pigeonholing, it has not made itself any less real to Detective Thrumston for over three years.

H. The Guidelines are, as indicated by their title, meant to guide treatment of patients and not dictate their care to the letter. *See Jones, supra.* The medical record shows clearly that Claimant has tried and failed conservative treatment over several years, and her authorized treating physician has indicated that further conservative treatment is highly unlikely to improve her condition. A very experienced neurosurgeon has concluded that SCS will likely result in a significant decrease in Claimant's symptoms over the long term. While the Guidelines recommend caution with respect to SCS, upwards of eight physicians have examined Claimant, and all but Dr. Olsen have concluded that Claimant would benefit from SCS. The DIME physician did not render an opinion specific to this device. Those doctors who treated her have all agreed that Claimant is a prime candidate for SCS, and by a preponderance of the evidence, the ALJ agrees with their conclusion. The ALJ concludes that the proposed trial stimulator is reasonable and necessary to address Claimant's ongoing radicular symptomology.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the trial spinal cord stimulator as recommended by Dr. Barolat.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 2, 2018

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant as proven by the preponderance of the evidence that he sustained a compensable injury to his low back and lumbar spine arising out of, and in the course and scope of, his employment with Respondent sometime in May or June of 2016.

II. Whether, if the Court concludes claimant has proven that he did sustain a compensable injury, Claimant has proven by a preponderance of the evidence that the need for medical benefits directed to his low back and lumbar spine, are causally related to, and authorized for, this injury.

III. Whether, if the ALJ concludes that Claimant has proven that he did sustain a compensable injury, neurosurgeon Todd Thompson is an authorized treating physician.

IV. Whether, if the Court concludes claimant has proven that he sustained a compensable injury arising out of the in the course and scope of his employment with King Soopers in May or June of 2016, Claimant has proven he is entitled to temporary total disability ("TTD") benefits beginning when Claimant first missed time from work after he had surgery on August 19, 2016, or if those TTD benefits are barred with Claimant's release to full duty given by his medical provider on August 17, 2016;

V. Whether, if the Court concludes Claimant has proven that he sustained a compensable injury arising out of the in the course and scope of his employment with King Soopers in May or June of 2016, Claimant should be penalized the amount equal to one day's temporary total disability payment for each day he failed to report this alleged injury to King Soopers pursuant to C.R.S. § 8-43.102 (1.5) (a), beginning June 22, 2016, and ending July 21, 2016; and

VI. What is Claimant's Average Weekly Wage.

STIPULATIONS

1. Respondent reserved the Workers' Compensation medical fee schedule to apply to any medical benefit awarded or ordered; and

2. The parties reserved the issue of offsets for future determination if necessary.

These stipulations were accepted by the Court.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant was working as a meat cutter in the King Soopers meat department sometime in May or June of 2016 when he was using hand Jack to unload pallets from a semi-truck. Claimant does not remember the exact date of the injury. Unloading semi-trucks is a frequent occurrence at work. Claimant does recall an evening where Claimant was unloading the semi-truck as usual. He was using a hand-jack, as opposed to the motorized jack, to move pallets of food products. In order to get heavy pallets moving, Claimant sometimes had to lean away from the pallet, which was loaded onto the pallet jack, and give a strong yank to get the pallet jack rolling. Pallets would be filled with various items, such as dairy, meat, or flowers, and would have to be delivered to its specific department. Occasionally there was only one person unloading the truck, but usually there were at least couple of employees, sometimes more.

2. On the night of the alleged injury, Claimant was unloading a pallet of chicken. Claimant was moving pallets with the hand Jack when he began to feel cramps and stiffness in both legs, but primarily the right. When he returned to the meat department he began feeling specific cramping in his legs so he sat down to relax and massage them for a minute. He subsequently returned and finished unloading the semi-truck.

3. Once the semi-truck was unloaded Claimant returned to the meat department and "broke down" the pallet. He had to separate products, such as chicken, red meat, or product that needed to be prepared for the next morning. As Claimant continued this process his legs began to “really cramp up.” The cramping began in the back of Claimants upper thighs, just below his gluteus muscles. Before he left work they were significantly tighter with continued cramping. Claimant did not report an injury before he left work because he felt he just had a “Charlie horse” in both legs. By the time Claimant got home the he developed some numbness in his right leg and the cramping extended to the bottom of his legs, as well as the front and sides. His right foot got tight to the point where he had to push it against a wall to return his foot to a normal position. At this point time Claimant did not have any back pain.

4. The next day Claimant worked his normal shift in job duties. His legs were tight with some cramping, but not as bad as the previous evening. Claimant testified at hearing that he had felt cramping in his legs before the evening in question, but the cramping he experienced on this occasion was of a different character and intensity. He testified he would address those cramps with rest and stretching, the same methods he employed after this alleged injury occurred.

5. Claimant testified at hearing that does not know what date he was allegedly injured in this claim. As he and Mr. Milligan testified at hearing, when claimant first informed King Soopers of this alleged claim on July 21, 2016, claimant said he did not know what day the alleged injurious traumatic event occurred. It could have been in May or June. Mr. Milligan testified that claimant did not know when he was injured, and

claimant selected June 22, 2016, not because he recalled that date but because his best guess at that meeting with Mr. Milligan was that his symptoms had been present for a month. Claimant appeared at King Soopers to report this incident right after he had left from an emergency visit at Memorial Hospital, where it was recommended he undergo emergency surgery on his lower lumbar region.

6. Claimant testified that he felt tightness in his thighs and the back of both his right and left legs going down to his knees after pulling this manual pallet jack loaded with boxes of frozen chicken from the loading area of the store to the meat department, and that those symptoms of tightness increased as he unpacked the boxes from the pallet in the meat department. He testified that he did this work regularly as a part of his job at employer's store, and had done so since he was hired in 2009. He was accustomed to this job task. Claimant testified that his symptoms were only in his lower extremities, and not his lower back. He did not trip, stumble, twist, fall, or do anything out of the ordinary other than pull the pallet jack when the symptoms first arose. There were no impediments to the pallet jack's movement beyond the weight of the product, and he pulled the pallet jack as he always did without anything unusual occurring as he traveled through the store with the pallet jack.

7. Claimant testified that once the jack was moving it would move with minimal effort or force. Claimant testified that these symptoms went away after they arose, would come back "a little bit" claimant testified, and went away again the rest of his shift. He worked the rest of his scheduled shift doing all his usual job tasks, and went home without significant symptoms. He took a shower at home, went to bed, and testified that then he felt cramps again in his right and left legs while resting at home that night. Claimant testified that cramps were around his entire right and left legs and into his feet. Claimant was able to stretch his legs to alleviate those cramps and the cramps disappeared.

8. Claimant had no significant symptoms in his low back or lumbar spine regions at any time on the alleged date of injury, while he was at his home that evening, or in the days following the alleged date of injury. He testified he had no back pain.

9. Claimant testified that he was able to alleviate these cramps in his right and left legs in the days after his alleged injury date. He worked full duty, without any limitations or lost time, and he did not discuss these cramps with anyone working at or for King Soopers at any time before July 21, 2016.

10. On June 22, 2016, Claimant received a comprehensive examination and evaluation at the Veteran's Administration Clinic for disability benefits (Resp. Ex. B, pgs. 35-54). There is no mention of this alleged injury, leg cramping, leg symptoms, low back symptoms, lumbar spine problems, or any other condition or symptoms allegedly related to this claim's injury in this thorough exam and history done at this appointment.

11. Claimant testified that when his legs' symptoms of tightness and cramping did not dissipate, he decided to see a chiropractor on his own volition on July 20, 2016.

Claimant testified that the chiropractor referred him to an emergency room for further evaluation. Claimant presented to the Memorial Hospital emergency room on July 20, 2016. He testified, and the medical records reveal, that he had no symptoms in his lower back or lumbar spine when he was examined in the emergency room on July 20, 2016. To discover the cause of claimant's bilateral lower extremity symptoms, a lumbar spine MRI was done. No acute findings were noted in the MRI.

12. Claimant also testified that he sometimes suffers from PTSD, and sometimes has issues with memory and recall. The ALJ finds Claimant to have been *sincere* and *consistent* in his reporting of his symptoms to his employer and medical providers, as well as during his testimony in court. Claimant did not exaggerate or embellish the events he describes in pulling the heavy manual pallet jack.

13. At one point in time he sought treatment with the Veterans' Administration, where he was instructed to take vitamin D and calcium for the leg cramps. Claimant's wife recommended he see a chiropractor. On July 20, 2016 Claimant went to a chiropractor who refused to treat him because of his foot drop and referred Claimant to the emergency room.

14. On July 20, 2016 Claimant went to the emergency room at Memorial Hospital in Colorado Springs. He was given an MRI, which reflected a herniation of right side of L4–L5 intervertebral disc, weakness of right foot, acute back pain and elevated blood pressure. Claimant was referred to neurosurgeon Todd Thompson and given an appointment for July 21, 2016 at 1:00 PM. (Claimant's Ex. 2, p. 37).

15. The history recorded by the emergency department physician, Christopher A Souder, M.D., states:

> "This patient presents emergency department with ongoing right back pain radiating down his right leg. It is 7 out of 10 intensity. He does not when he pain medication [sic]. "He states it's been there since he strained his back and right leg while moving and lifting a pallet for work about a month ago. He has not sought medical attention yet for this. He reports that initially he had numbness of the right leg. That since resolved has recurred a few times ever since. He has no numbness now. He states his right leg is becoming progressively weaker. He is having difficulty lifting of his foot when he walks. He's had no incontinence of stool or urine. He denies fever. He denies direct trauma or fall. The pain is worse with certain movements. He states when the pain is really bad in his right leg his right calf swells up." (Claimant's Exhibit 2, p. 43).

Because Claimant was released from the emergency department sometime after midnight, he reported the injury to his assistant store manager, Patrick Milligan, on July 21, 2016.

16. Claimant was given a list of designated providers. He selected and treated with Concentra Medical Center on S. Academy Blvd. in Colorado Springs. However, prior to his appointment with physician's assistant Kenneth Ginsberg, Claimant was

evaluated by neurosurgeon Dr. Todd Thompson at 12:45 PM on July 21, 2016. Dr. Thompson's notes reflect that Claimant has had pain in his right leg since "May of this year". (Claimant's Ex. 5, p. 72). The history was recorded as:

> "He has had pain in his right leg since May of this year. He works at King Soopers in the meat department. He pushes a heavy pallet of supplies regularly and unloads it. One day in May, he was doing this and felt an unusual pain in his right leg. That evening he had some cramps in his right leg. Since that time, he has had right-sided sciatica. He describes a foot drop when he walks. Yesterday, he felt that his weakness was getting worse so he presented to the emergency department. He had tried calling the VA several different times and they gave him numerous recommendations from changing his diet to taking calcium, to calling an ambulance with the belief that he was having a heart attack." (Claimant's Ex. 5, p. 72).

17. Dr. Thompson diagnosed radiculopathy, lumbar region and lumbar disc herniation. He noted that Claimant has right-sided sciatica with a partial foot drop, due to a lateral disc herniation at L4-5. The disc herniation at L5–S1 may be partly contributory. Claimant was given the option of surgery. (Claimant's Ex. 5, p. 71).

18. On that same day, July 21, 2016 Claimant went to the first visit with the authorized treating provider at Concentra, physician's assistant Ginsberg. The same history is reported by Mr. Ginsberg that is recorded in the emergency department notes and Dr. Thompson's notes.

19. Concentra medical records reflect: "Truck unloader stocker for meat department at King Soopers for 7 years states that sometime towards the end of May of this year he was pulling a pallet with the pallet jack off of the truck and had some discomfort to his right leg but finished his shift. That evening he had much pain in this leg radiating all the way to down to his toes which he attributed to having a leg cramp. He continued to work, but would get bilateral leg cramps every evening, right greater than left. Then, yesterday, the pain became severe to his low back and both legs, right greater than left so he went to the emergency room… Today he states that his symptoms are improving, he can now raise his right foot partially. He denies any prior back problems." (Claimant's Ex.1, p. 1).

20. During this first visit to Concentra Claimant also completed a "Front Office Symptom Screening Questionnaire." Claimant wrote that he was "at work" when the injury occurred. He further stated, "unloading semi-trailer pulling a full pallet of chicken off trailer through back rooms into meat department staging area." He described the injury as "cramps numbness hip and right upper leg down to foot." (Claimant's Ex. 1, p. 12).

21. When Claimant was treated at Concentra medical centers on July 21, 2016 he was given restrictions and referred to Dr. Shimon Blau with an appointment date of August 1, 2016. (Claimant's Ex. 1, pp. 3, 7, 8). Claimant has not returned to work since that time.

22. On August 1, 2016 Claimant was evaluated by Dr. Blau, who is a physiatrist. The same history is noted in the medical records. “The patient states that a few weeks prior to this, he started feeling cramping in the back of his right lower extremity after pulling a pallet of chicken. He went home and had an increase in the cramping, it also started affecting both legs. This lasted for about 20 to 30 minutes. He was out of work for a few days and had no further pain symptoms. However, he started working again and started having ongoing cramping in his legs for several weeks. He thinks that this may have started about a month before his case date.” (Claimant’s Exhibit 6, page 85). Dr. Blau recommended that Claimant undergo surgery as soon as possible given the severity of his symptoms and the right foot drop. (Claimant’s Ex. 6 at p. 86).

23. Claimant was seen for a follow-up visit with physician’s assistant Ginsberg on August 17, 2016. Under “Plan,” Claimant was “advised to see primary provider or go to emergency room right away for further evaluation and treatment.” (Claimant’s Exhibit 1 at page 33). Dr. Randall Jones, a physician at the South Academy Concentra Medical Center completed a WC164 on August 20, 2016. On that form Dr. Jones noted “released from care, denied by workers compensation carrier, further treatment and work restrictions per primary or treating provider.” (Claimant’s Ex. 1, p. 36). Claimant was released from care for nonmedical reasons.

24. Claimant underwent surgery on August 20, 2016 with Dr. Todd Thompson. (Claimant’s Ex. 5, pp. 82–84). As noted, Claimant has not returned to work since that time.

25. Henry Roth, M.D. performed an independent medical examination ("IME") at the request of Respondent's. Dr. Roth is the only medical provider who has reviewed and considered all of Claimant’s medical records, examined claimant, and taken claimant’s medical history with the specific goal of addressing the causation and relatedness of claimant’s alleged lumbar spine injury to this claim’s allegedly injurious event of pulling a pallet jack from May or June of 2016. Dr. Roth stated it is very significant that claimant appreciated only lower extremity symptoms in the weeks after the claim’s injury as that is entirely consistent with and proof of a degenerative condition in claimant’s lumbar spine, and not any traumatic injury. Had claimant sustained an *injury* to his lumbar spine while pulling the pallet jack, he would have felt pain and symptoms in his lumbar spine/lower back region. Claimant is older, and at an age when symptoms for this degenerative process claimant might be expected to arise.

26. As Claimant testified, he had no low back symptoms at the time of or in the weeks after this claim’s alleged injury event. Dr. Roth further testified that the fact claimant’s symptoms were simultaneously in both his lower extremities, were appreciated to be cramping by Claimant, and that his symptoms involved his entire lower extremities, is more consistent with spinal stenosis than the herniated disc.

27. Claimant's lumbar MRI on July 20, 2016, showed no traumatic injury signs, findings, or conditions attributable to a traumatic event. Instead, it showed an entirely degenerative condition and disease process. There was no acute condition or

injury revealed by the MRI. This MRI, Dr. Roth stated, would likely have been exactly the same had it been taken on May 1, 2016, before claimant's report of symptoms. Dr. Roth wrote in his report that Claimant only related his symptoms in his legs to this alleged injury after he because his lower extremity symptoms were emanating from his lumbar spine on July 20, 2016, when he was evaluated at Memorial Hospital. Dr. Roth stated in his report:

> In my opinion, the history provided [by Claimant] is not that of a specific injury occurring at a specific time and place at work. Rather, the history is that Mr. Rucker reports he had the onset of discomfort while engaged in his ordinary work related material handling. There was no specific work incident or event….
>
> The MRI findings noted on 7/20/16 are ordinary degenerative changes. I agree that the degenerative findings are likley causal of his lower extremety symptoms. MRI's of ths degree occur in asymptomatic persons as well. (Resp. Ex A, p. 6)

28. There was, as Dr. Roth testified, no injurious event that gave rise to Claimant's symptoms. Claimant symptoms are consistent with the spontaneous onset of symptomatic spinal stenosis. They could well have arisen when they did, how they did, whether or not Claimant had been working or pulling the pallet jack. This claim's symptoms involve only a degenerative, non-industrial disease process.

29. Also noted in Dr. Roth's report is a detailed timeline of Claimant's medical history. On 3/16/16, weeks before this reported injury, VA records reveal that Claimant was suffering from depression to include:

> …negative mood, discourage (sic.) thinking, irritability, sleep problems, lowered motivation and decreased interest.
> Goal of treatment is to……make healthy interpretations of events and set realistic expectations. (Resp. Ex A, p. 10)

An entry from 5/4/16 notes:

Depressive disorder. Alcohol abuse and remission. Hypertension. Hyperlipidemia. OCCUPATIONAL STRESS (Resp. Ex A, p. 10) (emphasis not added).

Dr. Roth's report mentions that he "Strongly suspects psychological factors affecting physical condition. Clinical presentation is atypical. MRI pathology is not explaining symptoms distribution. (Resp. Ex. A, p. 6).

30. While the ALJ finds Claimant to be *sincere* and *consistent*, that does not render him entirely *credible*, nor can *causation* be inferred from the events as Claimant describes.

31. The ALJ finds that the opinions of Dr. Roth are credible and persuasive. There is no sufficient evidence to rebut or refute his opinions that the cause of claimant's symptoms and need for medical treatment including surgery is not causally related to the alleged incident in this claim. Claimant sustained no *injury* to his low back or lumbar spine when he pulled the pallet jack in May or June of 2016.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Generally

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things: the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Where a party presents expert opinions, the weight, and credibility, of the opinions are matters exclusively within the discretion of the ALJ as the fact-finder. Cordova v. Industrial Claim Appeals Office, P.3d (Colo. App. No. 01CA0852, February 28, 2002); Rockwell International v. Turnbull, 802 P.2d 1182 (Colo. App. 1990). To the extent that expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. Colorado Springs Motors, Ltd. v. Industrial Commission, 441, P.2d 21 (Colo. 1968).

Compensability

5. "Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; and a workers' compensation case shall be decided on its merits." Qual-Med, Inc. v. Industrial Claim Appeals Office, 961 P.2d 590, 592 (Colo. App. 1998) ("Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); Lerner v. Wal-Mart Stores, Inc., 865

P.2d 915, 918 (Colo. App. 1993) (“The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.”). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. Hoster v. Weld County Bi-Products, Inc., W.C. No. 4-483-341 (ICAO March 20, 2002).

6. The phrases "arising out of” and "in the course of" are not synonymous and claimant must meet both requirements for the injury to be compensable. Younger v. City and County of Denver, 810 P.2d 647, 649 (Colo. 1991); In re Question Submitted by U.S. Court of Appeals, 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. Popovich v. Irlando, 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. Finn v. Industrial Commission, 165 Colo. 106, 437 P.2d 542 (1968); *see also*, Industrial Commission v. London & Lancashire Indemnity Co., 135 Colo. 372, 311 P.2d 705 (1957).

7. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301(1) (c); Faulkner v. ICAO, 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. Wal-Mart Stores v. Industrial Claim Appeals Office, 989 P.2d 521 (Colo. App. 1999); Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997).

8. A compensable industrial accident is one which results in an injury requiring medical treatment or causing disability. H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). To satisfy her burden of proof on compensability, claimant must prove that the industrial accident is the proximate cause of claimant's need for medical treatment or disability. § 8-41-301 (1) (c), C.R.S. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. Subsequent Injury Fund v. State Compensation Insurance Authority, 768 P.2d 751 (Colo. App. 1988) The question of whether claimant had proven a causal relationship between employment and the alleged injury or disease is one of fact for determination of the ALJ. City of Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997); Metro Moving & Storage v. Gussert, 914 P.2d 411 (Colo. App. 1995)

9. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. Horodyskyj v. Karanian, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain or symptoms while or shortly after performing job duties does not mean

he sustained a work-related injury. An incident which merely elicits symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985); Parra v. Ideal Concrete, W.C. No. 3-963-659 and 4-179-455 (April 8, 1988); Barba v. RE1J School District, W.C. No. 3-038-941 (June 28, 1991); Hoffman v. Climax Molybdenum Company, W.C. No. 3-850-024 (December 14, 1989).

10. Under the Act, there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." § 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); see also, § 8-40-201 (2) (injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. Id.; Romero v. Industrial Commission, 632 P.2d 1052 (Colo. App. 1981); Aragon v. CHIMR, et al., W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." Romero, supra; § 8-41-301, C.R.S.

11. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain during, or from an event or incident, at work without sustaining a compensable "injury." As explained in Scully v. Hooters of Colorado Springs, W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in Scully noted, "[C]orrelation is not causation." Thus, merely because there may be a coincidental correlation between claimant's work activities and his bilateral leg symptoms exists in this case does not mean there is a causal connection between claimant's alleged injury and his work duties.

12. The ALJ concludes that the fact Claimant's symptoms arose while working is not dispositive. As Dr. Roth explained credibly, Claimant's symptoms are the result of a degenerative process that was ongoing. The symptoms he experienced in May or June of 2016 while pulling this pallet jack were likely to arise as the inevitable outcome of that disease process. The fact that the symptoms arose at work is coincidental only, and does not prove a compensable injury occurred in this claim. The ALJ concludes that the symptoms Claimant experienced while pulling this pallet jack are not the result of any work-related *injury* or *incident.* The ALJ concludes Claimant's lumbar spine and low back pathology did not arise out of or in the course and scope of his employment with Respondent on June 22, 2016, or any other time surrounding it.

13. Because this claim is not compensable, the issues of medical benefits, authorized treating provider, temporary total disability, penalties, and average weekly wage are not addressed further.

ORDER

It is therefore ordered that:

1. Claimant has not proven a compensable claim. His claim for Workers Compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-744-551-06

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 23, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 3/23/17, Courtroom 1, beginning at 1:30 PM, and ending at 2:45 PM).

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Before the Claimant's opening brief was due, the ALJ informed the parties that briefs need not be filed and that the ALJ decided to take the matter under advisement and issue the following decision.

ISSUE

The issue to be determined by this decision concerns whether surgery recommended by Mark Conklin, M.D. (a Division of Workers' Compensation (DOWC) Level 2 Accredited Physician, limited in Orthopedics and Lower Extremity Only), for the Claimant's increasing left foot pain, hammertoes, other diagnoses of the Claimant's left

foot, including fusion of the great toes MTP joint of the left foot, including reconstruction of the angular deformity of the toes of the Claimant's left foot and a lengthening/shortening of the tendons, is causally related to an aggravation/acceleration of the Claimant's admitted low back injury of November 21, 2007, and reasonably necessary to cure and relieve the proximate effects of that injury.

The Claimant bears the burden of proof, by a preponderance of the evidence on the designated issue and on collateral issues relative thereto.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

i. The Respondent filed a Final Admission of Liability (FAL), dated September 11, 2011, ultimately admitting for a date of maximum medical improvement (MMI) of June 1, 2011; permanent medical impairment (PPD) of 28% whole person for the Claimant's low back injury of November 21, 2007; and post-MMI medical maintenance benefits.

ALJ Krumreich Decision of 2010

ii. ALJ Ted A. Krumreich, on January 19, 2010, issued the following decision (Claimant's Exhibit 4), which was not appealed, with the following Findings of Fact relevant to the Claimant's bilateral foot condition:

1. Claimant was employed as an aircraft mechanic for Employer. Claimant had been employed by Employer for 19 years as of the time of her injury on November 21, 2007.

2. Claimant sustained an admitted injury to her low back on November 21, 2007. On that date, Claimant was working to repair a seat in an airplane and became caught up in the framework of the seat while working underneath the seat. As Claimant twisted to remove herself, she felt a sharp pain in her low back.

3. Following her injury, Claimant was referred to Concentra Medical Center for treatment. Dr. Darrell Quick, M.D. of Concentra assumed Claimant's care beginning February 6, 2008 and became an authorized treating physician. Dr. Quick referred Claimant to Dr. Robert Kawasaki, M.D., a physical medicine and rehabilitation physician, and to Dr. Brian Reiss, M.D., an orthopedic surgeon.

4. Dr. Reiss performed surgery on Claimant on June 9, 2008 consisting of discectomy and fusion from L4 to L5-S1. Prior to that surgery, Dr. Kawasaki on January 28, 2008 had noted that Claimant had "somewhat of a right foot slap". (Dr. Jacobs' report, Exhibit 11, page four).

5. **Following surgery, Dr. Kawasaki noted on October 16, 2008 that Claimant ambulated with evidence of a foot drop and a steppage type gait pattern with significant foot slap. On November 14, 2008 Dr. Kawasaki noted that Claimant continued with foot slap and occasional toe drag and that she "occasionally trips on her toes" (Dr. Jacobs' report, Exhibit 11, page six)** (emphasis supplied).

6. Prior to her injury on November 21, 2007 Claimant had developed a left foot drop condition as the result of several surgeries on her left lower leg. Claimant did not have a right foot drop condition prior to the injury of November 21, 2007. **Prior to the injury of November 21, 2007 Claimant was not on any work restrictions for her left foot drop condition and did not have problems with walking or stumbling while walking** (emphasis supplied)**.**

7. Claimant's right foot drop condition prevents her from lifting the toes of her right foot and lifting her foot at the ankle. Claimant has weakness in the muscles of the right foot and ankle and loses her balance as a result. Claimant will catch her feet on the floor because of her abnormal gait. Claimant did not have any problems with her balance or with abnormal gait prior the injury of November 21, 2007.

8. On December 24, 2008 Claimant was at home and was walking from the family room area to the kitchen. While walking, Claimant fell because of her inability to pick up her feet due to the foot drop condition. Claimant fell on her outstretched right arm injuring her right shoulder.

9. Claimant was evaluated by Dr. Quick on December 31, 2008. **Dr. Quick noted that Claimant had elements of bilateral ankle weakness and foot drop that had developed since her injury and surgery, with some difficulty with her gait. Dr. Quick further stated that Claimant had developed some progressive foot drop that had been observed by Dr. Kawasaki and himself. Dr. Quick opined, and it is found, that Claimant's symptoms of bilateral foot drop were substantially related to the surgery for Claimant's compensable low back injury** (emphasis supplied).

10. Dr. Quick again evaluated Claimant on January 14, 2009 and noted a history that she had fallen and injured her right shoulder 2 –3 weeks ago.

11. Claimant was evaluated by her primary care physician, Dr. Jennifer Mix, D.O. on January 16, 2009. Dr. Mix obtained a history that Claimant had fallen on her outstretched right arm on Christmas Eve and now had shoulder pain. Dr. Mix further

noted that Claimant had drop foot bilaterally and at times has difficulty walking. Dr. Mix suspected a Grade 2 injury of the right shoulder and referred Claimant for an MRI.

12. Claimant was re-evaluated by Dr. Reiss on February 6, 2009. Dr. Reiss noted that Claimant had dropped foot bilaterally with inability to raise her foot against gravity. Dr. Reiss obtained a history that because of her dropped foot Claimant had tripped over her foot and hit her shoulder and that Claimant questioned if this was related to her work injury due to the fact that her fall was caused by her foot being weak.

13. [Omitted as not relevant to bilateral foot condition].

14. Claimant underwent a Division-sponsored independent medical examination [DIME] with Dr. Matthew Brodie, M.D. on July 16, 2009. Dr. Brodie noted on physical examination that Claimant had a substantial gait disorder with difficulty standing, walking and that Claimant stumbles when she walks. Dr. Brodie further noted that Claimant had substantial drop foot bilaterally and cannot actively extend her ankles or her great toes against gravity. Dr. Brodie noted Claimant's right shoulder problem but did not provide an opinion on its causal relationship to the admitted low back injury. Dr. Brodie noted that Claimant had constant right shoulder symptoms with worsening pain with movement of the shoulder [Dr. Brodie's DIME was for the purpose of determining permanent medical impairment (PPD) and maximum medical improvement (MMI) and as herein below argued, the Respondent contends that Dr. Brodie's determination that the Claimant's foot condition was not causally related to the admitted injury of November 21, 2007 has issue preclusive effect)].

15. At the request of Respondent, Claimant was evaluated by Dr. Alexander Jacobs, M.D. Dr. Jacobs performed a review of medical records provided to him regarding Claimant's work injury and her pre-existing left leg and foot drop conditions. With regard to the pre-existing left leg conditions, Dr. Jacobs stated, and it is found, that "After multiple surgeries, and with the consequent left foot drop, the patient continued to function and to work." Dr. Jacobs did not provide an opinion on whether Claimant's right shoulder injury was caused by a fall due to right foot drop, left foot drop or foot drop at all.

16. The ALJ finds Claimant's testimony, including her testimony regarding the circumstances and cause of her fall on December 24, 2008, to be credible and persuasive. Claimant has proven by a preponderance of the evidence that her fall on December 24, 2008 injuring her right shoulder is causally related to the effects of her admitted compensable low back injury on November 21, 2007 with Employer.

17. The treatment provided by Dr. James P. Lindberg, M.D. from February 9 through May 5, 2009 was reasonable and necessary to treat Claimant's right shoulder injury and Dr. Lindberg is found to be an authorized treating physician.

Recent Procedural History

18. On September 1, 2016, Kristin D. Mason, M.D., the Claimant's authorized treating physician (ATP), among other things, assessed the Claimant with "progressive neuropathic foot deformities causing increasing dysfunctional gait." Thereafter, Dr. Mason referred the Claimant to Dr. Conklin for a surgical evaluation. Dr. Mason is a Level 2 Accredited physician with the Division of Workers' Compensation (DOWC). She made a referral to Dr. Conklin for consideration of surgery for what she considered a work-related condition—not for an opinion on causal relatedness. Indeed, the ALJ infers and finds that Dr. Mason was considering an aggravation/acceleration of the Claimant's left foot condition as work-related. Otherwise, the ALJ draws a plausible inference that Dr. Mason, as a Level 2 Accredited physician, would have advised the Claimant to see her private, healthcare physician. This did not happen. The Claimant remained within the chain of authorized workers' compensation referrals.

19. On November 15, 2016, Mark Conklin, M.D. (a Division of Workers' Compensation (DOWC) Level 2 Accredited Physician, Limited in Orthopedics and Lower Extremity Only, filed a Request for Prior Authorization for the Claimant's increasing left foot pain, hammertoes, other diagnoses of the Claimant's left foot, including fusion of the great toes MTP joint of the left foot, including reconstruction of the angular deformity of the toes of the Claimant's left foot and a lengthening/shortening of the tendons (Claimant's Exhibit 6).. Because Dr. Conklin is Level 2 Accredited by the DOWC, the ALJ infers and finds that he is of the opinion that the need for the recommended surgery is causally related to the admitted injury of November 21, 2007, and reasonably necessary to cure and relieve the effects thereof. It is clear from Dr. Conklin's request for prior authorization (Claimant's Exhibit 6) that he is of the opinion that the need for his recommended left foot surgery is related to the admitted back injury of November 21, 2007 and the proximately related back surgeries that followed over the next few years. Indeed, the ALJ draws a plausible inference and finds that any ancillary surgeries, recommended by Dr. Conklin, are in his opinion causally related to the original back injury of November 21, 2007, and designed to address the Claimant's escalating left foot pain and difficulty walking. The ALJ infers and finds that Dr. Conklin substantially included his reasoning and underlying documentation concerning why the requested surgery was causally related to the Claimant's claim at hand, as required by Rule 16-11, WCRP (Workers' Compensation Rules of Procedure), 7 CCR 12101-3.

20. By letter from Respondent's counsel, dated November 28, 2016, to Dr. Conklin's Office, the request for prior authorization was denied because the Respondent was filing an Application for Hearing to contest Dr. Conklin's recommended surgery as "not causally related" nor "reasonably necessary," and indicating that the Respondent would be seeking an Independent Medical Examination (IME) [Claimant's Exhibit 7], which ultimately occurred on January 6, 2017, and was performed by Alexander H. Zimmer, M.D.

21. The Respondent filed an Application for Hearing on November 28, 2016, designating the issue of whether surgery recommended by Mark Conklin, M.D., for the

Claimant's left foot pain, hammertoes, other diagnoses of the Claimant's left foot, including fusion of the great toes MTP joint of the left foot, including reconstruction of the angular deformity of the toes of the Claimant's left foot and a lengthening/shortening of the tendons, is causally related to the Claimant's admitted low back injury of November 21, 2007, and reasonably necessary to cure and relieve the proximate effects of that injury (Claimant's Exhibit 1)..

22. The Claimant filed a Response to Application for Hearing on December 2, 2016, designating the same issue designated by the Respondent.

23. The matter was heard on March 23, 2017.

Respondent's Independent Medical Examination (IME) by Alexander H. Zimmer, M.D.

24. On January 6, 2017, Dr. Zimmer performed an IME at the Respondent's request. He was of the opinion that the surgery recommended by Dr. Conklin, involving the left foot procedures on all of the toes as well as lengthening the Achilles' tendon "would appear to be reasonable." He was of the opinion, however, that the Claimant's left foot drop was related to an original femur fracture in 1989 and "subsequent complex surgeries to that area at that time." He observed that Matthew Brodie, M.D., documented in his Division Independent medical Examination (DIME) in this case that on September 23 1993, "Dr. Murphy documented past medical history of femur fracture with foot drop and multiple surgical procedures. On July 22, 1997, Dr. Caskey documented that [the Claimant] was unable to wiggle the toes of the left foot….On July 23, 1997, Dr. Passeur documented left foot drop, lack of significant union of the left foot and being unable to stand on her left toes. She was noted in those records to have left hammertoes and bilateral bunions." Dr. Zimmer noted that his examination showed a left foot drop. Dr. Zimmer did not indicate that he had reviewed, or had access to any other medical records for over ten years, from July 23, 1997 through the date of the admitted injury herein, November 21, 2007. He offered no explanation or consideration of the fact that the Claimant was able to work full duty as an aviation mechanic during this period as established by the Claimant's undisputed testimony, and the fact that the Claimant could no longer work as an aviation mechanic after the proximately caused back surgeries.

25. IME Dr. Zimmer was ultimately of the opinion that any left foot surgeries were not causally related to the Claimant's admitted injury of 2007. Dr. Zimmer is of the opinion that none of the Claimant's lower extremity conditions are causally related to the admitted injury of November 21, 2007. He did not persuasively address whether or not the Claimant's back surgeries set in motion a proximate chain of causation that aggravated/accelerated the Claimant's pre-existing left foot condition. Dr. Zimmer's ultimate IME opinion is at odds with the opinions of the Claimant's treating physician,

Dr. Mason, and surgeon, Dr. Conklin. The ALJ makes a rational decision, based on substantial evidence, to resolve this conflict in favor of Dr. Mason, Dr. Conklin, and the Claimant's credible and compelling testimony, which creates a circumstantial before-and-after (the back surgeries) picture of an aggravation/acceleration of the Claimant's left foot condition resulting from the back surgeries necessitated by the original admitted injuries, and not by the 1989 femur fracture and "complex surgeries to that area around 1989 (as is Dr. Zimmer's IME opinion). Dr. Zimmer concedes that the recommended surgery is reasonably necessary.

26. Against a backdrop of the totality of the evidence, the ALJ does **not** find Dr. Zimmer's IME opinion credible or persuasive.

2011 Division Independent Medical Examination by Matthey Brodie, M.D. for the Purpose of Evaluating MMI AND PPD

27. Dr. Brodie performed a follow up DIME on August 1, 2011, and he issued his DIME report on August 21, 2011. The purpose of the Dr. Brodie's DIME was to rate the Claimant's permanent medical impairment and to determine MMI within the confines of the procedures outlined in § 8-42-107 (8), C.R.S., not to render an opinion controlling whether or not the work-related surgeries would cause an aggravation/acceleration of the Claimant's bilateral foot problems. The Respondent filed an FAL, dated September 11, 2011, based on Dr. Brodie's DIME opinion. The FAL admitted for post-MMI medical maintenance benefits. The issue at hand concerns admitted post-MMI maintenance medical benefits. Consequently, there is **not** an identity of issues between Dr. Brodie's DIME and the issue at hand today. Indeed, exactly as a DIME opinion on post-MMI maintenance treatment stands on the level playing field of "preponderance of the evidence" so does Dr. Brodie's opinion concerning the left foot, without the benefit of the progression of the Claimant's left foot condition over the next five years." Therefore, as of today, Dr. Brodie's opinion on lack of causal relatedness of the left foot is entitled to less weight than the current medical opinions of Dr. Mason and Dr. Conklin. The evidence establishes that the Claimant's left foot problems today have progressed to more severity than as of Dr. Brodie's 2011 DIME opinion. Consequently, the ALJ does not find Dr. Brodie's opinion concerning the Claimant's left foot credible in terms of addressing the Claimant's present left foot condition.

28. The Respondent now argues that Dr. Brodie's collateral opinion in his DIME report that the Claimant's foot condition is not related creates an issue preclusion situation, and the Claimant is now barred from raising the issue concerning a subsequent causally work-related aggravation/acceleration of her left foot condition. The ALJ finds that at the time of Dr. Brodie's DIME, five years ago, the issues differed from today's maintenance medical issues. Consequently, there was not an identity of issues, nor did the Claimant have an opportunity to litigate the then unanticipated need for left foot surgery because of an aggravation/acceleration of her left foot condition, caused by the back surgeries. The Claimant's left foot condition grew progressively

worse after Dr. Brodie's DIME. Dr. Brodie's DIME opinion cannot "reach out from the grave" (of an admitted MMI date and 28% whole person permanent impairment) and control the new issue of causal relatedness of the need for left foot surgery today. Indeed, there is **no** indication that Dr. Brodie had the ability to foresee the future.

The Claimant's Testimony

29. According to the Claimant, before the admitted injury of November 21, 2007she could walk "just fine," despite her left foot drop. The Claimant's testimony in this regard is undisputed. Indeed, she was able to work full duty as an aviation mechanic (but for brief periods connected to her "complex" left foot surgeries) until the admitted back injury of November 21, 2007, despite her left foot drop. After the back surgeries, following the admitted injury of November 21, 2007, the Claimant's left foot condition grew worse where she sometimes stumbled and fell. Her testimony in this regard was highly persuasive, credible and essentially undisputed. Her testimony paints a compelling before-and-after picture (after the back surgeries) of the causal relatedness of the need for the left foot surgery recommended by Dr. Conklin. Indeed, coupled with recent medical records of her ATPs, the ALJ draws a plausible inference and finds that the progression of the aggravation/acceleration of the Claimant's left foot condition paints a compelling circumstantial picture that the present need for left foot surgery is within the proximate chain of causation from the admitted injury of 2007. the Claimant's testimony renders it more likely than not that the present need for Dr. Conklin's recommended surgery is attributable to the back surgeries, and left foot worsening thereafter, that resulted from the admitted injury of July 21, 2007, and not from the "ancient" and complex foot surgeries around 1989, as opined by IME Dr. Zimmer.

Ultimate Findings

30. The Claimant's credible and undisputed lay testimony plays a significant role in determining the proximate causal relatedness of the Claimant's need for the surgery recommended by Dr. Conklin, despite Dr. Zimmer's opinion to the contrary. The ALJ finds the opinions of Dr. Mason, Dr. Conklin, and other treating and consulting physicians credible and persuasive for the reasons herein above stated. The ALJ does not find Dr. Zimmer's ultimate IME opinion credible or persuasive for the reasons herein above stated.

31. Between conflicting medical opinions, including the circumstantial evidence created by the Claimant's lay testimony, the ALJ makes a rational decision, based on substantial evidence, to accept these opinions and the plausible inferences derived from the Claimant's testimony, and to reject Dr. Zimmer's ultimate IME opinion, and Dr. Brodie's five year old collateral DIME opinion, rendered under a different set of issues.

32. At the time of Dr. Brodie's 2011 DIME, he was dealing with permanent disability and MMI and not with a progressively worsening aggravation/acceleration of the Claimant's left foot condition, proximately attributable to the back surgeries resulting from the admitted injury of November 21, 2007. Consequently, there is not an identity of issues regarding Dr. Brodie's collateral DIME opinion and the causal relatedness of the need for left foot surgery today. Also, the Claimant did not have a full and fair opportunity to litigate the future worsening and aggravation/acceleration of her left foot condition to the point of Dr. Conklin's recommended left foot surgery.

33. Although there is medical corroboration by the Dr. Mason and Dr. Conklin, the Claimant's lay testimony, coupled with an analysis of the deficiencies in Dr. Zimmer's IME opinion, the Claimant's undisputed lay testimony and the compelling circumstantial picture it creates, could be sufficient by itself despite IME Dr. Zimmer's opinion to the contrary. The ALJ finds IME Dr. Zimmer's opinion that the recommended surgery is "reasonable" credible and supporting the proposition that it is reasonably necessary to cure and relieve the effects of the admitted injury of 2007.

34. The Claimant has proven, by a preponderance of the evidence that the foot surgery recommended by Dr. Conklin is because of an aggravation/acceleration of the Claimant's left foot condition with the proximate chain of causation from the Claimant's admitted back injury of November 21, 2007.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or

inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's lay testimony concerning the worsening progression of her left foot problems is undisputed and it paints a compelling circumstantial picture that the current need for left foot surgery is due to an aggravation/acceleration of her left foot condition, within the proximate chain of causation from the admitted November 21, 2007 injury. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the Claimant's credible and undisputed lay testimony plays a significant role in determining the proximate causal relatedness of the Claimant's need for the surgery recommended by Dr. Conklin, despite Dr. Zimmer's opinion to the contrary. The ALJ finds the opinions of Dr. Mason, Dr. Conklin, and other treating and consulting physicians credible and persuasive for the reasons herein above stated. The ALJ does not find Dr. Zimmer's ultimate IME opinion credible or persuasive for the reasons herein above stated, nor does the ALJ find DIME Dr. Brodie's five-year old opinion, arising out of different issues, credible for today's situation. Indeed, it is highly probable, unmistakable and free from serious and substantial error that Dr. Brodie's five-year old DIME opinion is not relevant to today's issues nor is it credible for today's issues.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An

ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, including the circumstantial evidence created by the Claimant's lay testimony, the ALJ made a rational decision, based on substantial evidence, to accept these opinions and the plausible inferences derived from the Claimant's testimony, and to reject Dr. Zimmer's ultimate IME opinion, and Dr. Brodie's five year old collateral DIME opinion, rendered under a different set of issues.

Issue Preclusion/The Effect of Dr. Brodie's Five-year Old Collateral DIME Opinion on Lack of Causal Relatedness of Left Foot

c. The doctrine of issue preclusion "may bind the parties to an administrative agency's findings of fact or conclusions of law." The criteria for the application of the doctrine of issue preclusion are: (1) the issue sought to be precluded is identical to an issue actually determined in a prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper,* 25 P.3d 44 (Colo. 2001). *See also Holnam, Inc. v. Indus. Claim Appeals Office,* 159 P.3d 795 (Colo. App. 2006). The doctrine of issue preclusion or *res judicata* also prohibits re-litigation of issues that **might** have been decided. *Metcalfe v. Bruning Division of AMI,* 866 P.2d 877 (Colo. App. 1993). *Also see Feeley v. Indus. Claim Appeals Office,* 195 P.3d 1154 (Colo. App. 2008). As found, at the time of Dr. Brodie's 2011 DIME, he was dealing with permanent disability and MMI, within the context of § 8-42-107 (8), C.R.S., and not with a progressively worsening aggravation/acceleration of the Claimant's left foot condition, proximately attributable to the back surgeries resulting from the admitted injury of November 21, 2007. Consequently, there is not an identity of issues regarding Dr. Brodie's collateral DIME opinion and the causal relatedness of the need for left foot surgery today. Also, the Claimant did not have a full and fair opportunity to litigate the future worsening and aggravation/acceleration of her left foot condition to the point of Dr. Conklin's recommended left foot surgery.

Effect of Claimant's Lay Testimony

d. In *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997), the Court of Appeals dealt with a situation wherein the injured worker could proceed no further with medical treatment and evaluations because the employer and the treating physician took the position that because the claimant had resigned her employment, she was **not** entitled to further evaluations. Ultimately, the Court of Appeals concluded that a medical opinion was not necessary to prove causation because imposing such a requirement would be reading something into the statute that was not there. *See Jacoby v. Metro Taxi, Inc.,* 851 P.2d 245 (Colo. App. 1993). § 8-41-301, C.R.S., which

specifies the conditions necessary for a compensability determination (this would include the compensability of a medical procedure or diagnostic tests) does **not** provide that a medical opinion is necessary to make such a determination. As observed in *Lymburn*, to require a medical opinion to support a causality determination would be to read something into the statute that does not exist. Consequently, *Lymburn* remains good law today. As found, although the Claimant's undisputed testimony was corroborated by the opinions of ATP Dr. Mason and Surgeon Dr. Conklin, the Claimant's lay testimony alone paints a compelling circumstantial picture that the need for the present recommended left foot surgery is attributable to an aggravation/acceleration of her left foot condition, in the proximate chain of causation from the admitted November 21, 2007 back injury and the back surgeries that ensued.

Aggravation/Acceleration

e. A claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's back surgeries resulting from the admitted 2007 injury aggravated and accelerated her left foot condition to the point that Dr. Conkin was recommending left foot surgery.

Causal Relatedness/Reasonable Necessity of Medical Treatment

f. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the

proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, the aggravation/acceleration of the Claimant's left foot condition is in the direct, proximate chain of causation from the admitted injury of November 21, 2007, thus, the Claimant's need for the surgery is causally related to the admitted injury.

g. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, Dr. Conklin's recommended left foot surgery is reasonably necessary to cure and relieve the effects of the November 21, 2007 admitted injury.

Maintenance Medical Care/Treatment of Related Conditions to Treat the Effects of the Admitted Injury

h. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. Services that are "medical in nature" include home health services in the nature of "attendant care," if reasonably needed to cure or relieve the effects of the industrial injury. *Atencio v. Quality Care, Inc.*, 791 P.2d 7 (Colo. Ct. App. 1990). As found, the surgeries recommended by Dr. Conklin are reasonably necessary and causally related to the admitted injury and, although some of the recommended surgeries encompass the pre-existing left foot condition and hammertoes, it is reasonably necessary to address the

Claimant's increasing left foot pain which is proximately caused by the original admitted injury.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden of proof on the causal relatedness and reasonable necessity of the left foot surgery recommended by Dr. Conklin.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay the costs of the surgery recommended by Mark Conklin, M.D. on November 16, 2016 for left foot pain, hammertoes, and other diagnoses of the left foot, including fusion of the great toe MTP joint, correction of the hammertoe, capsulotomy of the MTP joint, with or without tenorrhaphy of each joint, an osteotomy with or without lengtening/shortening/angular correction, reconstruction of the angular deformity of the toes, and a lengthening/shortening of the tendon of the left leg/ankle, subject to the Division of Workers' Compensation Medical Fee Schedule. The recommended surgery is medical maintenance treatment to prevent the deterioration of the Claimant's condition and to maintain her at maximum medical improvement.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April, 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc..ord

ISSUES

1. Has Claimant proven by a preponderance of the evidence that her claim should be reopened based on a change in condition of her left shoulder?

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury to her bilateral shoulders on December 3, 2010. Claimant worked for Employer performing production work for approximately 12 years. She had various assignments, but typically her work involved assembling small products, inspecting tools, and stamping tool parts.

2. She began experiencing pain in her bilateral shoulders in December 2010. There was no specific accident, and her injury was accepted as an occupational disease.

3. Claimant reported symptoms to her supervisor in January 2011 and was referred to CCOM for authorized treatment. Shoulder MRIs revealed bilateral rotator cuff tears, worse on the right, consistent with her symptoms. She was referred to an orthopedic surgeon, Dr. John Redfern.

4. Dr. Redfern performed arthroscopic rotator cuff surgery on Claimant's right shoulder in December 2011. Following the surgery, she developed a "frozen shoulder" on the right, for which she underwent a manipulation under anesthesia (MUA) on March 30, 2012. Dr. Redfern suggested surgery on the left shoulder, but Claimant declined.

5. She was placed at MMI in July 2012 by her ATP and released to return to work with restrictions.

6. On December 19, 2012, Claimant underwent a DIME with Dr. Eric Ridings. By the time of the DIME, she had decided that she wanted to have surgery on the left shoulder. As a result, Dr. Ridings determined that Claimant was not at MMI. Dr. Ridings opined "within a reasonable degree of medical probability her rotator cuff tears are work-related." Respondents accepted the results of the DIME and authorized further treatment.

7. Dr. Redfern performed arthroscopic surgery on her left shoulder on June 14, 2013. He performed a left biceps tenotomy and repaired a full-thickness tear of the supraspinatus tendon.

8. Claimant did not have a good response to surgery. She participated in extensive physical therapy, without significant benefit. On November 12, 2013, she told Dr. Redfern that "she was in physical therapy and as they were stretching her, she felt a pop with intense, immediate pain. The pain has not been relieved the past three weeks."

She had very limited range of motion. In light of her symptoms, Dr. Redfern recommended a repeat MRI.

9. Claimant had the MRI on November 22, 2013. The MRI showed supraspinatus tendinopathy, but the repair was intact, with no evidence of a re-tear. There was mild infraspinatus insertional tendinosis, and mild subacromial subdeltoid bursitis. Dr. Redfern diagnosed adhesive capsulitis and recommended an MUA procedure.

10. Claimant had the MUA on January 21, 2014. Dr. Redfern broke up some scar tissue and achieved "excellent" passive range of motion. Claimant followed up with Dr. Redfern the next day and reported that the procedure had improved her range of motion. Dr. Redfern opined that "she has reached maximum medical improvement and has no anticipated future intervention regarding her shoulder."

11. Dr. Johnson at CCOM referred Claimant for a functional capacity evaluation (FCE), which was conducted on February 20, 2014. The FCE was invalid due to numerous inconsistencies, symptom exaggeration, and poor effort. Dr. Johnson opined Claimant had reached MMI. He stated that "the objective findings do not match the subjective complaints. I believe she's exaggerating her pain. However, I think that she does not tolerate pain well." He gave Claimant a permanent 10-pound lifting restriction and recommended maintenance medications for pain management.

12. Claimant attended a follow-up DIME with Dr. Ridings on February 14, 2014. Dr. Ridings agreed that Claimant had reached MMI on February 20, 2014. Dr. Ridings felt that Claimant's residual complaints were "out of proportion to objective findings." He agreed with the recommendation for maintenance medications. Dr. Ridings assigned impairment ratings of 9% for the right upper extremity and 12% for the left upper extremity.

13. Respondents filed an FAL on June 23, 2014 based on Dr. Ridings' DIME report. Respondents denied medical benefits after MMI "on the grounds that it is not reasonable, necessary, or related to the compensable injury."

14. Claimant timely objected to the FAL in July 2014 and requested a hearing. Subsequently, several hearings were scheduled and vacated. Eventually, the matter was set for hearing on January 8, 2016. The parties participated in a settlement conference with PALJ De Marino on December 11, 2015. Settlement negotiations were unsuccessful, and the parties stipulated that PALJ De Marino could rule on a stipulated motion to vacate the January 8, 2016 hearing. PALJ De Marino allowed Claimant to withdraw the Application for Hearing without prejudice and gave her 60 days to file a successor Application on the same issues. PALJ De Marino further ordered that "the failure to do so [will result] in the issues being withdrawn and dismissed with prejudice."

15. On that same date, Claimant's counsel filed a Motion to Withdraw. Claimant subsequently retained new counsel on January 21, 2016.

16. On March 24, 2016, Claimant applied for a hearing on the previously endorsed issues, and two other issues that Claimant had not preserved in her prior Applications. Respondents moved to strike the Application because it was not filed within 60 days of PALJ De Marino's order. Respondents also argued that the two additional issues were closed because they had not been endorsed within 30 days of the June 2014 FAL. PALJ Goldstein agreed with Respondents' arguments and struck Claimant's March 24, 2016 Application.

17. Claimant filed another Application on August 19, 2016 endorsing reopening and some other issues. Claimant eventually filed a new Application dated September 14, 2016 on the sole issue of Petition to Reopen. That Application was the basis for the March 6, 2017 hearing before the undersigned ALJ.

18. In the summer of 2016, Claimant pursued treatment for her left shoulder through her personal physicians. On July 26, 2016, she saw Eileen Johnson, NP at Peak Vista Community Health Center. She reported a three-year history of bilateral shoulder pain. Claimant told NP Johnson "[this] is a work-related injury from overuse. States still having pain but her case has been dropped." NP Johnson recommended Claimant follow up "with her workman's comp. doctor."

19. Claimant returned to NP Johnson on August 26, 2016 and reported that her lawyer was trying to "reopen" her claim. In the meantime, she wanted to pursue treatment under Medicaid. NP Johnson ordered x-rays and prescribed medication.

20. On September 2, 2016, Claimant told NP Johnson that her shoulder pain "occurs constantly and is worsening." Claimant reported her pain level was 10/10. NP Johnson ordered an MRI.

21. Claimant had the MRI on September 28, 2016. The radiologist opined that the supraspinatus tendon was "markedly attenuated, which may represent sequelae of prior rotator cuff tearing and subsequent debridement." He also saw "a new partial-thickness bursal-sided tear of the posterior supraspinatus tendon." The imaging was also "suspicious for subacromial-subdeltoid bursitis." Based on the MRI results, NP Johnson referred Claimant to an orthopedic surgeon.

22. Claimant saw PA-C Eve Turkington at the St. Thomas More Orthopedic Services clinic on November 3, 2016. Claimant reported "left shoulder pain since December 2010." She told PA-C Turkington that "she has never really been better since the surgery. However, she had an incident in physical therapy where she felt a pop and she reports that has been worse since then." PA-C Turkington initially proposed a cortisone injection. However, Claimant reported an allergic reaction to cortisone. Previous physical therapy had made her worse, so PA-C Turkington recommended surgery.

23. Claimant underwent arthroscopic shoulder surgery on December 13, 2016 with Dr. Keith Minihane. Visual inspection of the rotator cuff tendons showed no tear. Dr. Minihane debrided some "degenerative fraying" of the superior labrum and the

superior aspect of the anterior labrum. The rotator cuff insertion was intact, but there were some "attenuated" fibers. Dr. Minihane debrided "some mild frayed edges." The bursal side of the rotator cuff had similar "attenuated" fibers but was overall "intact." Dr. Minihane stated "this was just debrided. No takedown or repair was performed." Dr. Minihane performed a subacromial arthroplasty and a distal clavicle resection.

24. Respondents sought expert medical opinions from Dr. Jon Erickson several times during this claim. Dr. Erickson initially performed an Independent Medical Examination (IME) for Respondents on January 12, 2015. Dr. Erickson opined that Claimant's bilateral shoulder problems were simply degenerative, and were not caused or aggravated by her work. He noted there was no specific accident and did not believe her work activities were sufficient to cause an occupational disease. Nevertheless, he acknowledged that Respondents had admitted liability for the injury and provided treatment, including multiple surgeries. Dr. Erickson diagnosed Claimant with "bilateral moderate to severe pain in both shoulders following surgery, work-related, but not explained by any documented pathology." Dr. Erickson felt that Claimant's "shoulder pain is excessive and out of proportion, considering the lack of objective evidence of pathology. I seriously doubt that either shoulder would respond positively to any additional surgery." Although he found Claimant to be "pleasant and cooperative," but felt her examination was "very inconsistent and not reproducible, exhibiting a lack of effort and exaggerated pain."

25. On February 24, 2015, Dr. Erickson issued an addendum report based on review of a May 30, 2014 MRI report that had been interpreted as showing a partial-thickness supraspinatus tear. Dr. Erickson opined the tear was degenerative, and "this minor tear, still more likely caused by non-occupational risk factors, is not the cause of the severe pain that [Claimant] is now experiencing. . . . I seriously doubt that a surgical repair would have a beneficial effect."

26. Respondents asked Dr. Johnson at CCOM to review and comment on Dr. Erickson's report. Dr. Johnson agreed with Dr. Erickson's opinions. Dr. Johnson opined Claimant remained at MMI, and her ongoing shoulder symptoms were no longer causally related to the work-related injury. Dr. Johnson further opined that a further surgery to Claimant's left shoulder was not causally related to her work activities.

27. Dr. Erickson subsequently authored two additional addendum reports, based on review of additional records. None of the additional information he reviewed changed any of his opinions. Dr. Erickson opined there was no medical justification for reopening Claimant's claim.

28. NP Johnson testified on behalf of Claimant at the March 2017 hearing. NP Johnson testified she referred Claimant for a surgical evaluation based on the September 28, 2016 MRI report, which showed a tear of the supraspinatus tendon. NP Johnson testified that Claimant reported her shoulder problems were related to a work-related injury. NP Johnson had no opinion regarding causation of Claimant's shoulder pathology.

29. Dr. Erickson testified at hearing. He reiterated and expounded on the opinions previously expressed in his reports. Dr. Erickson persuasively opined that the December 2016 surgery was not causally related to the original industrial injury.

30. Claimant has failed to prove a justification for reopening her claim.

31. Under the circumstances, allowing Claimant to reopen her claim based on a change of condition that occurred before MMI would allow Claimant to circumvent the heightened standard of proof attendant to challenging a DIME.

32. The pathology that Dr. Minihane addressed with surgery in December 2016 was not proximately caused by Claimant's admitted 2010 industrial injury. The changes in Claimant's left shoulder between the June 14, 2013 surgery and the December 13, 2016 surgery was due to non-occupational factors, primarily age-related degeneration.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The reopening authority reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and the decision whether to reopen a claim when the statutory criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof on any issue sought to be reopened. Section 8-43-304(4).

Claimant is seeking to reopen her case based on a change in condition. In the reopening context, a change in condition refers "to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 741 P.2d 1328, 1330 (Colo. App. 1985). If a claimant's condition is shown to have changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from an intervening cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (ICAO, May 3, 2001). If an industrial injury leaves the body in a weakened condition, and that weakened condition is a proximate cause of further injury to the claimant, the additional injury is a compensable consequence of the original industrial injury. *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970). But, if the claimant sustains an additional injury as a result of an efficient intervening cause, the mere fact that the additional injury would not have occurred had the employee retained all of his former physical powers does not render the additional injury compensable. *Post Printing and Publishing Co. v. Erickson*, 30 P.2d 327 (Colo. 1934).

Reopening a closed claim is appropriate when the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000). When a claimant alleges a worsening of condition after reaching MMI, the claimant is not entitled to additional temporary disability benefits unless the claimant proves the worsening has caused additional restrictions resulting in additional temporary wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1987).

Claimant was placed at MMI by the DIME on February 10, 2014. A DIME's determination that a claimant is at MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III). On the other hand, a previous determination of MMI is not presumptive or conclusive where a claimant is alleging a change of condition after MMI. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

There is a tension in the law between the reopening authority and the provisions giving presumptive or conclusive effect to the determinations of a DIME. This tension is exemplified by *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005). In *Berg*, the employer had filed a final admission of liability based on a DIME report. The claimant timely objected to the FAL but did not request a hearing. As a result, the claim closed. Subsequently, the claimant filed a petition to reopen alleging the treating physicians and the DIME were mistaken regarding his diagnosis and the cause of his symptoms. The ALJ granted the petition to reopen, finding that the physicians were mistaken both about MMI and about the causal relationship between the claimant's condition and the industrial injury. The ICAO reversed the ALJ, concluding that allowing a claimant to reopen based on a "mistake" of an uncontested DIME would subject the DIME's determination of MMI to collateral attack under a diminished burden of proof. But the Court of Appeals set aside the panel's order, holding that nothing in the statutory DIME scheme limits the reopening provisions. The court noted the reopening statute applies even in circumstances where the determination of a DIME is questioned. The court emphasized that the ALJ's discretionary authority regarding reopening serves as "an inherent protection against improper collateral attacks on a DIME determination of MMI. If a claimant files a petition to reopen in an attempt to circumvent the DIME process and gain the advantage of a lower burden of proof, the ALJ has authority to deny it." *Id*. at 273-74.

A critical fact in *Berg* was that the claimant did not know of the mistake until after the claim had closed. Since the claimant was unaware of the issue during his window of opportunity to challenge the DIME, the court reasoned that he could not have been strategically attempting to circumvent the DIME procedures. The court further noted there was no evidence that the claimant "made the tactical decision to let his claim close to avail himself of the lower burden of proof." The court concluded that the decision to reopen the claim under those circumstances was within the ALJ's discretion.

The Court of Appeals recently revisited this issue in *Justiniano v. Industrial Claim Appeals Office*, ___ P.3d ___, 2016 COA 83 (Colo. App. 2016). In *Justiniano*, a DIME determined the claimant had reached MMI. Shortly after the DIME, the claimant

underwent surgery for the injury-related condition. The respondents subsequently filed an FAL based on the DIME report. The claimant did not object to the FAL, but instead filed a petition to reopen based on a change in condition, as evidenced by the post-MMI surgery. The ALJ found that the claimant was attempting to circumvent the "clear and convincing evidence" standard to overcome a DIME, and denied the petition to reopen. The claimant appealed, arguing she had a "right to reopen" her claim under *Berg*. The Court of Appeals affirmed the ALJ, reasoning that the claimant knew about the asserted change of condition *before* the claim closed. The court agreed that the evidence supported the ALJ's finding that the claimant was trying to avoid the heightened burden of proof attendant to challenging a DIME. Therefore, the ALJ had appropriately exercised her discretionary authority to deny the request to reopen the claim.

Berg and *Justiniano* show that the timing of the alleged change in condition or mistake in relation to the date the claim closed is not necessarily dispositive, but is a relevant factor for the ALJ to consider. The ALJ should evaluate the totality of the circumstances in the individual case when deciding whether to exercise the discretionary authority to reopen a claim.

The ALJ concludes Claimant's case is more akin to the circumstances in *Justiniano*, rather than *Berg*. The DIME determined Claimant reached MMI on February 20, 2014. Although Claimant timely objected to the FAL and requested a hearing to challenge the DIME's finding, she ultimately failed to pursue the issue in a timely manner. On December 11, 2015, PALJ de Marino ordered that if Claimant did not apply for a hearing by February 9, 2016, the issues would be closed and dismissed "with prejudice." Claimant did not pursue her claim within that window, so her claim closed.

Claimant is now asking the ALJ to reopen the claim based on an alleged re-injury that occurred in physical therapy in November 2013. The alleged re-injury occurred *before* the DIME and *well before* the claim closed. Had claimant properly pursued her challenge to the June 23, 2014 FAL, she would have had to overcome the DIME's MMI date by clear and convincing evidence. The ALJ concludes it would be inappropriate to reopen Claimant's case under the preponderance standard based on circumstances that existed before her claim closed, and of which she was aware.

The remaining question is whether there has been a change of condition after the claim closed that would justify reopening the claim. Although Claimant had left shoulder surgery on December 13, 2016, the surgery was not causally related to the admitted industrial injury.

Admittedly, the radiologist interpreted the September 28, 2016 MRI as showing "a new, partial-thickness, bursal-sided tear of the posterior supraspinatus tendon." But the December 13, 2016 operative report shows no tear. Dr. Minihane observed that the bursal side of the rotator cuff had some "attenuated fibers," but was "intact . . . overall." He specifically noted that "no takedown or repair was performed." Therefore, it does not appear that the previous surgical repair had significantly changed as to warrant surgery. Dr. Minihane debrided some degenerative labral fraying which was new since the previous surgery, but degenerative changes to the labrum are not causally related to

Claimant's employment or original injury. While Claimant's symptoms may have increased to some degree since her claim closed, the ALJ is not persuaded that any worsening of her symptomatology was proximately caused by the 2010 industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen her claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 3, 2017

s/ Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable industrial injury arising out, and in the course of, her employment with Employer.

II. If Claimant has shown a compensable injury, is Claimant entitled to continued medical treatments for the injuries she received.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant testified that in August of 2016 she was working for Verizon through Xerox. She worked in customer service. This job required her to "go over people's billing with them, activate phones," and discuss data issues.

2. Claimant testified that she was not completely certain whether she was injured on August 30, or August 31. On cross, she testified she was sure it was August 30, 2016. Claimant testified that her shift began at 6:00 AM and she always showed up early so she could be ready to start at 6:00 AM. Her injury occurred upon exiting her car right after arriving at work.

3. Claimant testified that when she got out of her car, she took about four or five steps and fell after stepping into a pot hole. She landed on her right knee and she felt something pop in her right shoulder. She also landed on her right hand.

4. Claimant testified credibly regarding her parking arrangements on the date of her injury, and the ALJ makes the following findings in paragraphs 5, 6, 7, 8:

5. Claimant was not required to drive her car to work; she was free to use whatever forms of transportation she needed to commute. Xerox did not supply a car, nor did Xerox make ownership of a car a condition of employment. Claimant did not have to use her car for work errands during her work day. She was not reimbursed mileage, gasoline, or insurance on her car by Xerox.

6. There were several businesses in the building where Claimant worked for Xerox. There was parking supplied by the building's owner, which was for the benefit and convenience of the employees of the various business housed there, including Xerox. There was not a specifically designated parking lot for "Xerox

personnel only". Claimant was not assigned a particular parking spot within the lots available; such lots were, unless otherwise marked, "first come, first served". There was no fee, gate, or parking attendant.

7. On the date of her Injury, Claimant arrived to find traffic cones, marking off the parking area she usually used, which was on the campus of the aforementioned building complex where Xerox was housed. There was repair work being performed in this lot, so Claimant reasonably went to a different parking lot, still on the same campus, and still existing for the benefit and convenience of Claimant, as well as for Xerox itself. She was not specifically directed to this secondary lot by a person in authority; rather Claimant made the reasonable supposition that she should find the closest allowable lot and park her car. This was not the lot where she normally parked, and it was further from the entrance to the building. Any reasonable person in Claimant's position would have done the same thing.

8. Claimant arrived in time for her assigned work shift, and upon exiting her car, was intending to report on foot to her work station; there was no frolic or detour upon exiting her car. It was after a few steps that she stepped into this pothole.
9. Claimant testified that after her injury, she sat on the curb for a few minutes and then was able to get up. Claimant testified that she went home and called the sick line. She left a message. After she cleaned herself up she went back to talk to her supervisor. She testified she was told he was in Denver. She testified she went back the next day to report it.

10. Claimant testified that she had to wait for her boss to tell her where to go for treatment. Claimant testified that her supervisor gave her the phone number for Concentra.

11. Claimant saw Kenneth Ginsburg, PA, at Concentra on September 1, 2016. Mr. Ginsburg noted difficulty with Claimant's right shoulder. Specifically, he noted "Forward Flexion: AROM 75 degrees with pain with pain. Extension: AROM. Abduction: AROM 70 degrees. Motor strength is normal bilaterally. Motor tone is normal. Neurovascular function intact. Rotator Cuff Test(s): positive Painful Arc and positive Empty Can test. He also noted trouble with her lumbar spine, including "tenderness in the right paraspinal" and "right-sided muscle spasms." *Id.* at 11. He diagnosed her with "thoracic myofascial strain," "strain of right shoulder," lumbosacral strain," and "contusion of right knee." Mr. Ginsburg ordered pain medication, x-rays, and physical therapy. Claimant was thereafter limited to working four hour days. She was to change body positions as needed, and was not to bend, squat, kneel, climb stairs, climb ladders, work at heights, lift/push/pull more than five pounds, or walk on even terrain.

12. A x-ray of Claimant's shoulder showed no fractures—only mild-moderate degeneration in her acromioclavicular joint.

13. Claimant returned to Concentra on September 6, 2016. She began physical therapy for her injuries. She continued physical therapy for several visits.

14. On September 9, 2016, Mr. Ginsburg noted that Claimant was having a "poor response to treatment," and he referred her to Dr. Albert Hattem.

15. Claimant agreed on cross-examination that she fell getting out of her shower on September 10, 2016. She reported to Daniel Edwards that she had some light bruising on her arm after this incident, and her back was worse.

16. Claimant was seen by Dr. Daniel Peterson on September 16, 2016. Dr. Peterson noted that she "likely has a RTC tear in right shoulder," and that her "knee and back are strained and need more time to recover with PT" (Cl's Exh. 4, 44). He wanted her to continue physical therapy and noted he would provide her with a handicapped parking application.

17. Imaging of her right knee on September 16, 2016 showed no fractures, and mild degenerative changes (Cl's Exh. 4, 47). Imaging of her spine showed "Grade 1 anterolisthesis of L5 on S1" and "grade 1 retrolisthesis of L3 and L4" (Cl's Exh. 4, 48). She had multilevel degenerative changes.

18. A Notice of Contest was filed in this claim on September 22, 2016. The reason given was, "Injury/Illness Not Work-Related."

19. On September 28, 2016, Claimant was seen by Dr. Nicholas Kurz. Dr. Kurz noted she needed to schedule MRIs with Valium as quickly as possible (Cl's Exh. 4, 61). He noted an anticipated MMI date of October 30, 2016 (Cl's Exh. 4, 62).

20. Dr. Timothy O'Brien performed an independent medical examination on Claimant on January 9, 2016. Dr. O'Brien's report stated that he found "no medical record documentation that supports Ms. Seymour's allegation that she sustained a work-related injury on August 31, 2016". Dr. O'Brien stated he did not think Claimant needed any medical treatment for her injury, as "no untoward event occurred." *Id.* However, he also noted he only had three medical records, and all of them were from October or later. *Id.* He also noted that two records noted acute knee pain, but none mentioned a "work injury" per se. *Id.* He noted pre-existing osteoarthritis.

21. However, these records are in the record at Claimant's Exhibit 5. The October 4, 2016 note specifically references "Workmen's Comp" (Cl's Exh. 5, 64). It specifically mentions that physical therapy had ended on the claim. *Id.* It specifically mentions that she had fallen in a pothole in the Xerox parking lot (Cl's Exh. 5, 65). It specifically mentions that she was having knee, shoulder and back pain, which she had been treating for at "Concerta (sic)." *Id.* While "arthritic manifestations" were listed in November of 2016, no examination is listed or testing done to support that assertion (Cl's Exh. 4, 70). Dr. O'Brien's opinion that

her pain was from pre-existing arthritis appears to be based wholly on the two words "arthritic manifestations."

22. Dr. O'Brien also testified at a deposition held on January 30, 2017. Dr. O'Brien testified that he would have expected bruises to have been noted if she had fallen (O'Brien Depo. 7). He felt Mr. Ginsburg's note that she suffered a "contusion of right knee" was not supported. *Id.* at 11. He agreed that this was his belief because Mr. Ginsburg *might* just be referring to pain because he wrote the medical term "contusion" and not the lay term "bruise." *Id.* at 31. He testified that while Mr. Ginsburg had made findings including reduced range of motion and positive rotator cuff tests, this did not mean Mr. Ginsburg's findings were directly related to the alleged fall. *Id.* at 14.

23. However, Dr. O'Brien also testified that he had no objective evidence that the arthritic changes noted in her knee x-rays were anything more than "mild." *Id.* at 29. He testified he would expect an MRI to show a rotator cuff tear purely due to her age, again with no objective evidence. *Id.* at 30. He testified that he had found no evidence to suggest pre-existing pain in her shoulder, knee, or lower back. *Id.* Dr. O'Brien also testified that "95 to 100 percent of folks who are in their seventh decade of life" have arthritis, but this would not always be the cause of their pain. *Id.* at 31.

24. Dr. Timothy Hall also completed a records review in this claim (Cl's Exh. 7). Dr. Hall was in possession of records from Peak Vista and also from Concentra (Cl's Exh. 7, 80). Dr. Hall noted that he felt Dr. O'Brien "did not have sufficient records when he did his evaluation" (Cl's Exh. 7, 81). Dr. Hall felt there was a temporal connection between the alleged fall and the development of symptoms. *Id.* He noted that she had "the sort of symptoms one would expect from a fall, that being the knee, back, shoulder, and arm. I do not see anything out of the ordinary about her presentation that would be inconsistent with trauma from a fall" (Cl's Exh. 7, 82). It was his opinion "within a reasonable degree of medical probability that Nancy Seymour's present symptoms involving the knee, shoulder, and back are directly related to the August 31, 2016 fall." *Id.*

25. Claimant testified that she has trouble sitting for long at work. She testified that she has trouble with her shoulder at work. Claimant testified that she has difficulty because of her symptoms outside of work as well.

26. Claimant testified she is still having symptoms. Her knee buckles. She has problems with her shoulder. She has trouble sleeping.

27. Claimant testified that she used a cane occasionally before the incident due to dizziness from medicine. She did not need it for her knee. She testified that she used a cane after the injury due to buckling in the knee.

28. Claimant testified that she has not returned for treatment because she cannot afford it. She testified that she wants to see a doctor, and she wants to get better.

29. Despite inferences by Dr. O'Brien that Claimant's symptoms were "psychosomatic," the ALJ finds no evidence to support a non-physiological cause. It should be noted that Kenneth Ginsburg noted Claimant had normal "judgment and insight," and she was "oriented to person, place and time" on September 9, 2016 (Cl's Exh. 4, 30). He noted her "speech is appropriate in content and delivery," her "recent and remote memory is intact," and her "mood and affect are appropriate." *Id.* While Dr. O'Brien testified that it was possible "psychologic effect" was "coloring" her complaints of pain, there simply is no medical evidence in the record to support this inference (O'Brien Depo. 22). Dr. O'Brien agreed on cross that he is not a psychologist, he performed no mental exam on her, and he found no mental health exam in the record. *Id.* at 37.

30. The ALJ finds that Claimant testified credibly about the fall she experienced. As is almost always the case with falls, Claimant was not expecting it until it happened, which likely took less than a second or two. While the precise sequence of events in that brief interval cannot be articulated in detail, Claimant fell, and hurt herself in that parking lot. The event itself, and symptoms she describes, are possible without bruising to her hand being specifically noted in the reports. She is credible in describing the symptoms she has experienced since the fall. After this fall, she has experienced pain in her right shoulder, right knee, and lower back.

31. The ALJ finds, based upon the evidence received, including Claimant's credible testimony of the mechanism of injury and symptoms suffered, that the medical opinions of Dr. Hall are more persuasive than those of Dr. O'Brien.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither

in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

2. Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301 (1), C.R.S.; see, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001).

3. An injury occurs "in the course of' employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. See *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of' requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *Id*.

4. Section 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers ' compensation benefits that the injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employment." Under the statute the requirement that the employment be the proximate cause of the "injury" exists whether the claimant is alleging an "accidental injury" or an "occupational disease." See *CF & I Steel Corp. v. Industrial Commission*, 650 P.2d 1333 (Colo. App. 1982); § 8-40-201(2), C.R.S. (term "injury" includes disability resulting from accident or occupational disease); § 8-40-201(14) (occupational disease is one occasioned by the nature of the employment and can be traced to the employment as a proximate cause).

5. The question of whether the claimant proved an injury or occupational disease proximately caused by the performance of service arising out of and in the course of employment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000) (proof of causation is threshold requirement that must be established before any compensation is awarded); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999) (claimant seeking benefits for occupational disease must establish existence of the disease and that it was directly and proximately caused the conditions of employment).

6. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. C*olorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

Compensability

7. An injury in a parking lot can be compensable. See *Campbell v. Gates Rubber Co.,* 526 P.2d 679 (Colo. App. 1974)(claimant who, while leaving work, fell and injured wrist in parking lot owned and maintained by employer for employees' convenience had compensable injury); *Woodruff World Travel v. Industrial Commission,* 554 P.2d 705 (Colo. App. 1976)(employee suffered compensable injury while crossing parking lot provided by employer's landlord for employees, where employer was aware of employee use and where parking privileges were an obvious fringe benefit).

8. Generally, an injury received by an employee outside the employers' premises is not compensable, if the injury happens outside work hours, and while coming from or going to work. *Woodruff World Travel v. Industrial Commission,* 554 P.2d 705 (Colo. App. 1976). There is an established exception to this rule "if special circumstances surrounding the employee's injury reflect a causal connection between the conditions under which the work is to be performed and the resulting off-premises injury." *Id.* at 707. In *Woodruff,* the court found special circumstances: "Space in the parking lot was afforded Woodruff for the use of its employees, and Woodruff was aware that its employees used the lot. Parking privileges constituted an obvious fringe benefit to claimant. Claimant was injured while in the act of enjoying that benefit." *Id.* at 707.

9. Claimant was not injured during travel to work. She was not injured leaving her house. She was not injured while driving her car. She was injured after she arrived in the employer-supplied parking lot, parked, and exited her vehicle. She was walking straight into the building to report to work. Special circumstances exist in this claim. Claimant, like the claimant in *Woodruff,* was injured while using an obvious fringe benefit in parking at the building. Arriving at work and entering the building are necessary to performing one's duties. The ALJ finds that Claimant's injury occurred within the course of her employment.

Medical Benefits

10. For a compensable injury, Respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101 (2010). Respondents are liable for reasonable and necessary medical treatment by a physician to whom a claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987). The claimant has the burden of proving entitlement to specific medical benefits. See § 8-43-201(1), C.R.S; *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29, 31 (Colo. App. 2000). Whether the claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

11. The ALJ gives greater weight to the medical opinion of Dr. Hall than that of Dr. O'Brien. Dr. Hall's opinion that Claimant's symptoms are consistent with her alleged mechanism of injury is reasonable, and well supported by the record.

12. The ALJ finds that Claimant has consistently reported pain and symptoms from her injury, and no evidence in the record exists to support pre-existing complaints. While she may have had pre-existing degenerative *conditions*, there is no evidence that Claimant was having any *symptoms* before the August 2016 injury.

13. For a compensable injury, Respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101 (2010). Respondents are liable for reasonable and necessary medical treatment by a physician to whom a claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987). The claimant has the burden of proving entitlement to specific medical benefits. See § 8-43-201(1), C.R.S; *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29, 31 (Colo. App. 2000). Whether the claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

14. Claimant was not at maximum medical improvement when her treatment with Concentra ended. Dr. Nicholas Kurz was predicting MMI a month in the future at her last appointment (Cl's Exh. 4, 62). She had not yet finished physical therapy, and had been referred for MRIs. *Id.* Dr. Peterson had noted a probable rotator cuff tear, but this had not been fully evaluated. The ALJ finds that Claimant requires additional medical treatment to reach MMI.

ORDER

It is therefore ordered that:

1. Because Claimant suffered a compensable injury on or about August 30 or 31, 2017, Respondents shall provide all reasonably necessary and related medical treatment.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 5, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-998-215-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insure/ Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 23, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 3/23/17, Courtroom 1, beginning at 1:30 PM, and ending at 5:00 PM). Jorge Espinosa and Milton A. Roman served as the official Spanish/English interpreters.

Claimant's Exhibits 1 through 14 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection. The evidentiary depositions of Kirk Holmboe, D.O., the Claimant's authorized treating physician (ATP) [who is level 2 Accredited by the Division of Workers' Compensation (DOWC)]; and, Lawrence Lesnak, D.O., were filed and included as part of the testimonial evidence at hearing.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to Claimant's counsel, giving Respondents' counsel three working days after receipt thereof within which to file electronic objections as to form. The proposed decision was filed, electronically, on April 4, 2017. After a consideration of the proposed decision and any objections thereto, the ALJ has modified the proposal and hereby issues the following decision. Contrary to the ALJ's bench ruling, the ALJ hereby determines that the Respondents' non-compliance with

Rule 10 (A), WCRP (Workers' Compensation Rules of Procedure), 7 CCR 1101-3 (in effect at the time in question), rendered the request for prior authorization, made by Douglas Foulk, M.D., on October 26, 2016 automatically approved by operation of Rule 10 (E).

ISSUE

The issue to be determined by this decision concerns whether the Respondents timely complied with the provisions for contesting a request for prior authorization made by Douglas Foulk, M.D. and, if not, did the recommended right shoulder surgery automatically become authorized by operation of Rule 16-10, WCRP in effect at the time of the request; and, if an automatic authorization has not occurred by operation of the rule in effect at the time of the request, is the right shoulder surgery recommended by Dr. Foulk causally related to the admitted injury and reasonably necessary to cure and relieve the effects thereof.

The Claimant bears the burden of proof on all issues, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings and Stipulations

1. The Claimant sustained an admitted injury to his right shoulder on September 25, 2015. The Respondents filed a general Admission of liability (GAL), dated October 6, 2016, admitting for medical benefits only.

2. At the commencement of the hearing, the parties stipulated that Dr. Foulk's October 26, 2016 surgery authorization request complied with WCRP 16-9 and was a completed request for surgery. The parties also stipulated that this surgery authorization request was properly submitted to Respondents and that Respondents wrote a letter to Dr. Foulk denying the surgery request within seven business days of October 26, 2016. The ALJ finds accordingly.

3. On September 25, 2015, the Claimant injured his head, neck, right shoulder and arm when he was struck by an eight-foot ladder while he was kneeling and lifting 20-25 pounds of materials. The Respondents initially denied compensability, and on January 27, 2016, filed a Notice of Contest (Claimant's Exhibit 3). On October 6, 2016, the Respondents filed a General Admission of Liability (GAL) for medical benefits only (Claimant's Exhibit 5). On November 29, 2016, Claimant applied for a hearing (Claimant's Exhibit 6). On November 30, 2016, the Respondents filed a Response to

Claimant's Application for Hearing (Claimant's Exhibit 7). The hearing occurred on March 28, 2017.

Kirk Holmboe, DO, and Lon Noel M.D. - Claimant's Authorized Treating Physicians (ATPs)

4. On September 25, 2015, the Claimant treated at Midtown Occupational Health Services (hereinafter Midtown) with Dr. Holmboe (Claimant's Exhibit 10, pages 41-43) The Claimant reported neck pain and other symptoms and was diagnosed with a right shoulder contusion and a cervical strain and he was given work restrictions. *Id*. On September 29, 2015, the Claimant again treated with Dr. Holmboe and reported right posterolateral neck and trapezius pain with some soreness radiating down to his right forearm (Claimant's Exhibit 10, pages 44-46). On October 6, 2015, the Claimant again treated with Dr. Holmboe and reported increased pain on the right side of his neck and along the superior aspect of his right shoulder and upper back. Dr. Holmboe noted limited cervical and right shoulder range of motion. Dr. Holmboe maintained the Claimant's work restrictions (Claimant's Exhibit 10, pages 47-49).

5. On October 20, 2015, the Claimant treated at Midtown with Lon Noel, M.D., who examined the Claimant's right shoulder and noted that the Claimant had decreased active range of motion, decreased strength, positive anterior and posterior impingement signs, and pain to direct palpation of the AC joint and long head of the biceps. Dr. Noel referred the Claimant for a right shoulder MRA (magnetic resonance angiogram) and cervical MRI (magnetic resonance imaging) and maintained the Claimant's work restrictions (Claimant's Exhibit 10, pages 50-52).

6. On October 26, 2015, the Claimant treated with Dr. Noel, who noted the abnormal right shoulder MRA findings, and referred Claimant to Douglas Foulk, M.D., and continued to maintain the Claimant's work restrictions (Claimant's Exhibit 10, pages 53-55).

7. On December 22, 2015, the Claimant treated with Dr. Holmboe, who noted that he reviewed the Claimant's mechanism of injury, history, the MRI findings, and Dr. Erickson's IME (independent medical examination) report. Dr. Holmboe added that the Claimant's history suggests he did **not** have any pre-existing shoulder problems. Dr. Holmboe is of the opinion that based on Claimant's history, he has an acute rotator cuff tear and that it should be treated as such (Claimant's Exhibit 10, pages 58-60). In response to a letter from Respondents regarding Dr. Erickson's November 16, 2015 report and whether the Claimant's injuries are work-related, Dr. Holmboe stated, "[Claimant] denied any prior shoulder injury and mechanism of injury consistent with [rotator cuff] injury" (Claimant's Exhibit 10, page 57).

8. On January 12, 2016, the Claimant again treated with Dr. Holmboe and reported ongoing neck and right shoulder pain with some radiating pain down his right

arm and into his fingers. The Claimant reported that he continues to work light duty, which involves sweeping and other lighter activities, but he still finds the duties difficult and painful (Claimant's Exhibit 10, pages 61-62).

9. On January 22, 2016, the Claimant treated with Dr. Holmboe, who noted that he reviewed Dr. Lesnak's report. Dr. Holmboe also noted that he "cannot reconcile [Claimant's] statement that he has never had symptoms or problems before this injury with the evidence of the MRI and the EMG suggesting chronic pathology." Dr. Holmboe maintained the Claimant's treatment plan and work restrictions (Claimant's Exhibit 10, pages 63-64).

10. On October 4, 2016, the Claimant returned to see Dr. Holmboe, who noted that the Claimant had not been to see him since January 2016 when his claim was denied. The Claimant reported that he had continued to work light duty since January 2016. The Claimant further reported that he continued to have neck and right shoulder pain and limited range of motion and some radiating pain down his arm into his fingers. Dr. Holmboe noted that he was referring the Claimant back to Dr. Foulk and to a physiatrist, Robert Kawasaki, M.D. Dr. Holmboe added that he disagreed with Dr. Lesnak's opinion that Claimant's symptoms are pre-existing and unrelated to the work injury. Dr. Holmboe maintained Claimant's work restrictions (Claimant's Exhibit 10, pages 65-69).

11. On November 23, 2016, Claimant treated with Dr. Holmboe, who noted THAT the right shoulder surgery was denied. Dr. Holmboe recommended that the Claimant follow-up with Dr. Kawasaki (Claimant's Exhibit 10, pages 72-73). On December 14, 2016, the Claimant again treated with Dr. Holmboe, who noted the Claimant's ongoing symptoms, recommended that the Claimant continue with Dr. Kawasaki, and maintained the Claimant's work restrictions (Claimant's Exhibit 10, pages 74-75). On January 6, 2017, the Claimant again treated with Dr. Holmboe, who maintained the Claimant's treatment plan and work restrictions. As of January 6, 2017, Dr. Holmboe had not placed Claimant at maximum medical improvement (MMI) [Claimant's Exhibit 10, pages 76-77].

12. On September 26, 2016, the Respondents took the evidentiary deposition of Dr. Holmboe. Dr. Holmberg testified consistently with the above-mentioned reports. Dr. Holmboe stated that his opinion was "that the mechanism of injury of the blow to the shoulder area certainly could have led to a rotator cuff injury" (Dr. Holmboe's Deposition Transcript page 23, lines 15-17 (hereinafter Tr. 25:15-17). The ALJ infers and finds that this opinion, against a backdrop of Dr. Holmboe's previous reports referred to herein above, is an opinion to a reasonable degree of medical probability. Dr. Holmboe testified that Dr. Lesnak's opinion really does not change his opinion regarding causality Holmboe Depo., pp. 23:20-25; 24:1-3). Dr. Holmboe reviewed the Claimant's right shoulder MRI and found Claimant "had both findings that could have been acute, the rotator cuff tearing, in addition to the chronic, which would be AC joint arthritis, and the

tendinopathy of the rotator cuff muscles" (Holmboe Depo., p. 32:2-6). Dr. Holmboe stated that he is familiar with construction work and treats construction workers and that they are often required to work overhead and with their arms extended away from their body 9Holmboe depo. p. 38:16-25; p. 39:1-22). Dr. Holmboe testified that it is his understanding that leading up to his injury, Claimant was working full duty without restrictions and has no history of right shoulder injuries, treatment, restrictions, or limitations(Holmboe Depo., pp.. 40 41). There is no persuasive evidence contradicting that prior to the admitt5ed right shoulder injury, the Claimant was working full duty without restrictions.

Douglas Foulk, M.D. – The Claimant's Surgeon

13. On November 10, 2015, Claimant treated with Dr. Foulk and reported his mechanism of injury, including the fact that it occurred at work, pain and other symptoms, and the treatment he has undergone. Dr. Foulk noted that he reviewed the right shoulder MRA and recommended that the Claimant undergo surgery, specifically a right shoulder arthroscopy, subacromial decompression, AC joint debridement, extensive debridement, biceps tenotomy, and rotator cuff repair. Dr. Foul added that Claimant should continue under Dr. Noel's work restrictions. On November 11, 2015, Dr. Foulk submitted a surgery authorization request to Respondents (Claimant's Exhibit 9, pages 24-32).

14. On October 24, 2016, the Claimant returned to Dr. Foulk and reported ongoing and worsening right shoulder symptoms. The Claimant reported that he had been sent home from work due to his increased pain and functional limitations, which rendered him unable to do his light duty work. Dr. Foulk recommended right shoulder surgery, the same surgery he recommended back in November 2015. Even if part of Dr. Fouok's recommended surgery is to address ancillary conditions of the Claimant's right shoulder, it is causally related to an aggravation/acceleration of the consequences of the original admitted injury and is reasonably necessary to cure and relieve the effects thereof.

Request for Prior Authorization by Dr. Foulk

15. The Claimant's ATP, Dr. Holmboe referred the Claimant to Dr. Foulk for consideration of right shoulder surgery. The ALJ draws a plausible inference and finds that Dr. Holmboe is of the opinion that the mechanism of the Claimant's admitted right shoulder injury warranted a referral to Dr. Foulk for consideration of right shoulder surgery for the first time in November 2015 and subsequently in 2016, which is the request in issue herein. Dr. Holmboe is of the opinion that a referral for a surgical evaluation is causally related to the admitted injury herein.

16. Dr. Holmboe referred the Claimant to Dr. Foulk and on October 24, 2016 for evaluation of right shoulder surgery.

17. On October 24, 2016, Dr. Foulk faxed a request for prior authorization to Pinnacol, indicating that the Claimant's condition had worsened since his first visit in 2015. The ALJ infers and finds that at the November 2015 visit with Dr. Foulk, Dr. Foulk was of the opinion that the need for his recommended surgery was work related. Essentially, Dr. Foulk re-affirmed this opinion in his October 24, 2016 request for prior authorization and he recommended right shoulder arthroscopy, subacromial decompression, AC joint debridement, biceps tenotomy, and rotator cuff repair. The ALJ finds that Dr. Foulk, in his October 24, 2016 request for prior authorization indicated in writing, including his reasoning and prior documentation (referring to his prior November 2015 request for prior authorization), his belief that the requested treatment is related to the **admitted** workers' compensation claim.

18. On October 28, 2016, Jason Trujillo, Senior Claims Representative at Pinnacol sent a denial of the request for prior authorization, stating as follows: "The condition for which this care is requested **is not related (emphasis supplied)** to the injury/illness for which **we have admitted liability** (emphasis supplied). There was no timely medical review of the request for prior authorization within the seven (7) days prescribed by Rule 16-10, WCRP, in effect at the time. Thereafter, the Claimant filed an Application for Hearing on November 29, 2016, endorsing medical benefits (surgery) and penalties (which was mis-characterized since the Claimant only seeks automatic authorization for the alleged non-compliance with Rule 16-10, WCRP, in effect at the time. In his denial, Trujillo attached a pre-dated independent medical evaluation (IME) report of Jon M. Erickson, dated August 15, 2016, in which Dr. Erickson had expressed the opinion that Claimant's right shoulder condition was pre-existing and not related "to this claim." Dr. Erickson's opinion of non-work relatedness was superseded by the GAL, dated October 16, 2016, which admitted compensability. The ALJ finds that Dr. Erickson's IME opinion principally addressed "compensability." It did serve as a current medical review of Dr. Foulk's request for prior authorization sent to Pinnacol on October 24, 2016, as required by Rule 16-10 (A), WCRP (in effect at the time in question).

19. The Respondents did not request a hearing within seven business days and notify the requesting provider that the matter was going to hearing within seven business days as required by Rule 16-10 (E) [in effect at the time in question]. The first request for a hearing was the Claimant's Application for Hearing, filed one month later on November 29, 2016. The Respondents filed a Response to Application for Hearing on November 30, 2016, asserting, *inter alia,* that the requested surgery is not reasonably necessary or related to the **admitted** claim. Respondents further asserted that with respect to the "penalty" claims of the Claimant, Respondents' conduct was "objectively reasonable." At the commencement of the hearing, the ALJ determined that the "penalty" claim was mis-characterized since all the Claimant sought was automatic authorization of the surgery recommended by Dr. Foulk because the Respondents had not timely complied with Rule 16-10 (in effect at the time].

Right Shoulder MRA (Magnetic Resonance Angiogram)

20. On October 21, 2015, the Claimant had a right shoulder MRA, which revealed:

a) Full thickness complete supraspinatus tendon tear with minimal retraction of the torn fibers and a near full thickness, near complete subscapularis tendon tear sparing a few of the bursal surface fibers of the central tendon;

b) Long head of the biceps tendon is perched at the medical bicipital groove with mild tendinosis of its proximal extraarticular segment;

c) Moderate to severe AC joint arthropathy with mild to moderate mass effect upon the myotendinous junction of the supraspinatus;

d) Lateral downsloping of the acromion, undersurface spurring, and coracoacromial ligament ossification likely contribute to lateral outlet stenosis; however, this is likely overestimated due to superior subluxation of the humeral head secondary to loss of the depressor mechanism; and

e) Mild to moderate volumetric and grade 1 fatty metamorphosis of the supraspinatus, infraspinatus, and subscapularis tendons.

(Claimant's Exhibit 11, pages 78-79).

Lawrence Lesnak, D.O.

21. Dr. Lesnak saw the Claimant on January 7, 2016, January 14, 2016, and for the third time on February 11, 2016. Dr. Lesnak reviewed some medical records, including notes from ATP Dr. Holmboe. He also reviewed reports from the Respondents' independent medical examiner (IME) Jon M. Erickson, M.D., who ultimately testified on the Respondents' behalf at the hearing.

22. On January 7, 2016, Claimant treated with Dr. Lesnak, and reported his mechanism of injury, pain and other symptoms, and treatment to date. Dr. Lesnak noted that he reviewed the right shoulder MRA and cervical MRI and examined the Claimant. He noted that Claimant exhibited multiple pain behaviors and non-physiologic findings, however, he offered no further persuasive explanation concerning how he arrived at these behavioral conclusions. Dr. Lesnak stated that the right shoulder MRA findings are not consistent with an eight-foot ladder falling and striking his right shoulder and that the findings show chronic changes that likely have been present for many years. Dr. Lesnak offered no further or persuasive explanation concerning this conclusion. Dr.

Lesnak recommended a cervical and right arm EMG (Claimant's Exhibit 13, pages 82-85).

23. On January 14, 2016, the Claimant returned to see Dr. Lesnak, who performed the EMG and rendered the opinion that it showed chronic abnormalities unrelated to Claimant's work-related injury. Dr. Lesnak added that the "EMG findings could certainly explain [Claimant's] subjective complaints*" (*Claimant's Exhibit 13, pages 86-91).

24. On February 11, 2016, the Claimant treated with Dr. Lesnak and confronted Dr. Lesnak regarding his opinion that none of Claimant's injuries, symptoms, complaints, etc., is related to the September 25, 2015 work-injury. Dr. Lesnak notes Claimant was upset and blamed Dr. Lesnak for having his claim closed. Dr. Lesnick quoted Claimant, "You told the insurance company that I had not injury and that I was faking it." Dr. Lesnick noted that the Claimant thereupon refused to do a physical exam. Dr. Lesnak maintained his opinion that the Claimant's symptoms and need for treatment are unrelated to the September 25, 2015 injury (Claimant's Exhibit 13, pages 92-94). The ALJ infers and finds that Dr. Lesnak should have realized at this point that the Claimant did not trust him.

25. On September 6, 2016, Respondents took the evidentiary deposition of Dr. Lesnak. Dr. Lesnak testified consistently with his reports that Claimant's right shoulder MRA revealed chronic degeneration (Lesnak Depo., p. 10, lines 22-23). Dr. Lesnak speculated that based on the Claimant's right shoulder MRA findings, it is unlikely that the Claimant did not have any symptoms prior to his work-related injury (Lesnak Depo., p.12:lines11-25). Dr. Lesnak testified "the MRI findings did not correlate with the reported mechanism of injury at all" (Lesnak Depo., p. 15: lines 1-3). **Dr. Lesnak testified he has no information to indicate Claimant had any problems doing his job prior to the September 25, 2015 work-related injury (**Lesnak Depo., p. 38:lines 3-8).. Dr. Lesnak testified he has no records that indicate Claimant had any prior right shoulder or neck issues or treatment Lesnak Depo., p. 38:lines18-19). Dr. Lesnak stated that to his knowledge Claimant was working full duty without restrictions prior to his September 25, 2015 work-related injury (Lesnak Depo., p.39: lines 20-25; p. 40: lines 1-5). According to Dr. Lesnak, he was not aware that Dr. Foulk recommended that the Claimant undergo right shoulder surgery (Lesnak Depo., p. 52: lines 16-18). Based on the totality of Dr. Lesnak's opinions, the ALJ finds his opinions neither credible nor persuasive. Indeed, for the reasons state herein below, the ALJ finds the opinions of Dr. Holmboe and Dr. Foulk considerably more credible and persuasive than the opinions of Dr. Lesnak.

Jon M. Erickson, M.D. – Respondents' Independent Medical Examiner

26. On November 16, 2015, Dr. Erickson, Respondents' retained IME expert witness, performed a records review and opined, "It is unclear in this MRI as to whether

this is an acute rotator cuff tear or a pre-existing injury. The only way to settle this dilemma is to obtain a very accurate and detailed description of how this shoulder was injured." Dr. Erickson recommended denying the surgery until this issue is addressed (Respondents' Exhibit E, pp. 18-19).

27. On August 15, 2016, Dr. Erickson performed a physical IME concerning the Claimant. Dr. Erickson was of the opinion that the Claimant sustained multiple soft tissue injuries to his neck, upper back, and right shoulder and arm. Dr. Erickson rendered the opinion that the Claimant's cervical and right shoulder MRIs demonstrated chronic, pre-existing issues and no evidence of any acute injury. Dr. Erickson recommended that the Claimant undergo a psychological evaluation and then he could be placed at MMI. Dr. Erickson added that he found the Claimant pleasant, cooperative, as honest as possible, and a fair historian (Respondents' Exhibit F, pp. 20-32), contrary to Dr. Lesnak's findings.

28. On August 16, 2016, Dr. Erickson wrote a supplemental note and stated that the Claimant's injuries were minor and should have resolved in a few weeks and that Claimant is at MMI (Respondents' Exhibit F, p. 33). The ALJ does not find this opinion credible because it conflicts with the opinions of the Claimant's ATPs and seemingly conflicts with Dr. Erickson's earlier suspicions.

29. On February 20, 2017, Dr. Erickson issued an addendum report. He was of the opinion that the Claimant's mechanism of injury would be unlikely to cause a rotator cuff tear. Dr. Erickson did not render an opinion concerning whether or not the admitted injury of September 25, 2015 aggravated/accelerated the Claimant's pre-existing degenerative condition. He further opined that Dr. Foulk's surgery authorization request was not reasonable, necessary, or causally related to the Claimant's work-related injury and that it is addressing pre-existing issues. Again, Dr. Erickson did **not** persuasively deal with whether or not the admitted injury aggravated/accelerated the Claimant's pre-existing condition. His opinions are in conflict with the opinions of the Claimant's ATPs, and the ALJ resolves this conflict in the evidence in favor of Dr. Holmboe and Dr. Foulk. Dr. Erickson recommended that the Claimant undergo a forensic psychological/psychiatric evaluation (Respondents' Exhibit G, pp. 34-38). The ALJ infers and finds that Dr. Ericikson believes that the Claimant's manifestation of chronic pain may be related to psychological factors. Dr. Erickson does not persuasively explain why the Claimant's present debilitated condition is not "real."

30. At hearing, Dr. Erickson testified consistently with his reports. He stated that the Claimant definitely sustained an injury, is severely impaired, and that the Claimant is getting worse. Dr. Erickson testified that he does not believe the requested surgery is related to Claimant's work injury but that the surgery request is reasonable and indicated based on the pathology found on the MRI. Dr. Erickson testified that there is nothing to indicate that the Claimant had any right shoulder pain or other symptoms, treatment, restrictions, limitations, or difficulties doing his job prior to the September 25,

2015 work-related injury. In this regard, the ALJ finds Dr. Erickson's testimony concerning the fact that the Claimant sustained an injury and is severely impaired credible and corroborating the opinions of the ATPs in part, however, based on the totality of the evidence, the ALJ does **not** find Dr. Erickson's ultimate opinion that the requested surgery is **not** causally related credible or persuasive. The opinions of Dr. Holmboe and Dr. Foulk are more credible and persuasive than Dr. Erickson's ultimate opinion concerning lack of causal relatedness.

Request for Prior Authorization

31. The Claimant's ATP, Dr. Holmboe, referred the Claimant to Dr. Foulk for consideration of right shoulder surgery. The ALJ draws a plausible inference and finds that Dr. Holmboe is of the opinion that the mechanism of the Claimant's admitted right shoulder injury warranted a referral to Dr. Foulk for consideration of right shoulder surgery for the first time in November 2015 and subsequently in 2016, which is the request in issue herein. Dr. Holmboe is of the opinion that a referral for a surgical evaluation is causally related to the admitted injury herein.

32. Dr. Holmboe referred the Claimant to Dr. Foulk for evaluation of right shoulder surgery on October 24, 2016.

33. On October 24, 2016, Dr. Foulk faxed a request for prior authorization to Pinnacol, indicating that the Claimant's condition had worsened since his first visit in 2015. The ALJ infers and finds that at the November 2015 visit with Dr. Foulk, Dr. Foulk was of the opinion that the need for his recommended surgery was work related. Essentially, Dr. Foulk re-affirmed this opinion in his October 24, 2016 request for prior authorization and he recommended right shoulder arthroscopy, subacromial decompression, AC joint debridement, biceps tenotomy, and rotator cuff repair. The ALJ finds that Dr. Foulk , in his October 24, 2016 request for prior authorization indicated in writing, including his reasoning and prior documentation (referring to his prior November 2015 request for prior authorization), his belief that the requested treatment is related to the **admitted** workers' compensation claim.

34. On October 28, 2016, Jason Trujillo, Senior Claims Representative at Pinnacol, sent a denial of the request for prior authorization, stating as follows: "The condition for which this care is requested **is not related (emphasis supplied)** to the injury/illness for which **we have admitted liability** (emphasis supplied). There was no timely medical review of the request for prior authorization within the seven (7) days prescribed by Rule 16-10, WCRP, in effect at the time. Thereafter, the Claimant filed an Application for Hearing on November 29, 2016, endorsing medical benefits (surgery) and penalties (which was mis-characterized since the Claimant only seeks automatic authorization for the alleged non-compliance with Rule 16-10, WCRP, in effect at the time. In his denial, Trujillo attached a pre-dated independent medical evaluation (IME) report of Jon M. Erickson, dated August 15, 2016, in which Dr. Erickson had expressed

the opinion that Claimant's right shoulder condition was pre-existing and not related "to this claim." Dr. Erickson's opinion of non-work relatedness was superseded by the GAL, dated October 16, 2016, which admitted compensability. The ALJ finds that Dr. Erickson's IME opinion principally addressed "compensability." It did **not** serve as a current medical review of Dr. Foulk's request for prior authorization sent to Pinnacol on October 24, 2016, as required by Rule 16-10 (A), WCRP (in effect at the time in question).

35. The Respondents did not request a hearing within seven business days and notify the requesting provider that the matter was going to hearing within seven business days as required by Rule 16-10 (E) [in effect at the time in question]. The first request for a hearing was the Claimant's Application for Hearing, filed one month later on November 29, 2016. The Respondents filed a Response to Application for Hearing on November 30, 2016, asserting, *inter alia,* that the requested surgery is not reasonably necessary or related to the **admitted** claim. Respondents further asserted that with respect to the "penalty" claims of the Claimant, Respondents' conduct was "objectively reasonable." At the commencement of the hearing, the ALJ determined that the "penalty" claim was mis-characterized since all the Claimant sought was automatic authorization of the surgery recommended by Dr. Foulk because the Respondents had not timely complied with Rule 16-10 (in effect at the time].

Ultimate Findings

36. Based on the findings herein above, the ALJ finds the Claimant's ATPs and surgeon, Dr. Holmboe and Dr. Foulk more credible than Dr. Lesnak and Dr. Erickson on the issue of causal relatedness of the need for the surgery recommended by Dr. Foulk. Also, the ALJ finds that the Claimant's decrepit condition is genuine and his lay testimony at hearing plays a significant role in discrediting Dr. Lesnak's opinions, as well as rendering Dr. Erickson's ultimate opinion concerning lack of causal relatedness not credible. The ALJ finds the Claimant's presentation and testimony credible.

37. The ALJ makes a rational choice, based on substantial evidence, to accept the opinions of the Claimant's ATPs, Dr. Holmboe and Dr. Foulk, and to reject the opinions of Dr. Lesnak and Dr. Erickson.

38. The Claimant has proven, by a preponderance of the evidence that his present need for the surgery recommended by Dr. Foulk is within the proximate chain of causation from the admitted injury, resulting from an aggravation/acceleration thereof.

39. The ALJ finds that the Respondents failed to comply with the appropriate provisions for contesting a request for prior authorization, as found in Findings Nos. 34 and 35 herein above. Consequently, authorization of Dr. Foulk's recommended surgery is automatic by operation of Rule 16-10 (E) [in effect at the time in question].

DISCUSSION OF REQUEST FOR PRIOR AUTHORIZATION

Citing the Industrial Claim Appeals Office (ICAO) decision in *Flanagan v. Brookdale Senior Living,* W.C. No. 4-948-599-02 (ICAO, May 24, 2016, the Respondents argue that a denial without a medical review is appropriate when medical and **non-medical** reasons are stated in the denial. Essentially, the Respondents argue that the general provisions of Rule 16-11, "Payment of Medical Benefits", applies. In *Flangan,* ICAO noted that the denial of the request for prior authorization was made in a **fully contested case**, not an admitted case such as the present case. ICAO held that the denial in *Flanagan* was for **non-medical** reasons because the case was fully contested. A close analysis of *Flanagan* reveals that "compensability" is a **non-medical** reason for a denial, thus, Rule 16-11 (in effect at the time), concerning the "general payment of medical bills" applied in *Flanagan.*.

The present case is clearly distinguishable from *Flanagan*. As found, a GAL, dated October 6, 2016 (that pre-dated Dr. Foulk's request for prior authorization) was filed in the present case. As further found, the denial letter from Pinnacol, dated October 28, 2016, explicitly refers to the "admitted" case. Consequently, the explicit language of Rule 16-10 (A) [Contest of a Request for Prior Authorization—in effect at the time in question) applies, and not the general provisions of Rule 16-11 [Payment of Medical Bills –in effect at the time in question].

The rules of statutory construction are applicable to the proper construction of rules. First, statutory (rule) provisions are to be construed according to their plain meaning and should not be subjected to strained or forced interpretation. *People v. Browning,* 809 P.2d 1086 (Colo. App. 1990); *People v. Thomas,* 867 P.2d 880 (Colo. 1994). In interpreting a comprehensive legislative (rule) scheme, meaning must be given to all portions thereof. *A.B. Hirschfeld Press v. Denver,* 806 P.2d 917 (Colo. 1991). Statutes (rules) are to be construed *in pari material* so as to give effect to the legislative intent to avoid inconsistencies and absurdities. *Whisler v. Kuckler,* 36 Colo. App. 200, 538 P.2d 477 (1975) *rev'd on other grounds,* 191 Colo. 260, 552 P.2d 18 (1976). A well established rule of statutory construction is that the entire statute (rule scheme) is intended to be effective. *People v. Phillips,* 652 P.2d 575 (Colo. 1982); *In re Estate of Hill,* 713 P.2d 928 (Colo. App. 1985). It is a well settled principle of law that the" specific" controls over the "general." *See City of Littleton v. Indus. Claim Appeals Office,* 2012 COA 187. It is clear that the legislative intent of Rule 16-10 (requests for prior authorization in admitted cases) was to get medical treatment by an ATP on a fast track, thus, the seven-day medical review requirement. § 8-40-102 (1), C.R.S., declares that the Workers' Compensation Act be interpreted so as to assure the quick and efficient delivery of disability and **medical** benefits. The "medical review" provision (within seven business days) in Rule 16-10 (in effect at the time in question) is designed to eliminate litigation in admitted cases, where appropriate. Rule 16-11(in effect at the

time in question) of necessity contemplates the resolution of the "compensability" issue before an insurer is obliged to pay medical benefits.

In the present case, the Respondents' argument pushes an interpretation of applicable rule [Rule 16-11—general payment of medical bills] beyond any principle of plain meaning and reasonable interpretation of the applicability of the appropriate rule to a request for prior authorization, by a physician, in an admitted case. Respondents argue that a medical review, as required by Rule 16-10 (A) is not required because their denial in an admitted case was based on Rule 16-11, arguing that the denial was for non-medical reasons. The fallacy in this argument is that the denial was made in an **admitted** case. Rule 16-10 (a) explicitly states that the "insurer cannot deny (in an admitted case) based solely on relatedness **without a medical review as required by section 16-10 (B)** [within seven business days]. Such review did not occur. Rule 16-10 (a) is specific in requiring a medical review in seven business days. Rule 16-11 is general and, by its terms, refers to denials of causal relatedness in terms of fully contested cases. The ALJ concludes that the specific rule, Rule 16-10, applies to a proper contest of Dr. Foulk's request for prior authorization, and since there was no timely medical review, the Respondents failed to comply with the specific rule applicable. The consequences of not obtaining the medical review in seven business days are that the request for prior authorization "shall be deemed authorized for payment of the requested treatment," under the provisions of Rule 16 (E) [in effect at the time in question].

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App.

2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's ATPs and surgeon, Dr. Holmboe and Dr. Foulk, were more credible than Dr. Lesnak and Dr. Erickson on the issue of causal relatedness of the need for the surgery recommended by Dr. Foulk. Also, the Claimant's decrepit condition is genuine and his lay testimony at hearing plays a significant role in discrediting Dr. Lesnak's opinions, as well as rendering Dr. Erickson's ultimate opinion concerning lack of causal relatedness not credible. The ALJ finds the Claimant's presentation and testimony credible. *See Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997) [compensability may be decided on lay testimony alone despite medical opinions to the contrary].

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of the Claimant's ATPs, Dr. Holmboe and Dr. Foulk, and to reject the opinions of Dr. Lesnak and Dr. Erickson.

Aggravation/Acceleration of Pre-Existing Condition

c. A claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's present need for the right shoulder surgeries recommended by Dr. Foulk results from an aggravation/acceleration of his condition within the proximate chain of causation.

Causal Relatedness and Reasonable Necessity of Surgery Recommended by Dr. Foulk

d. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original

compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). The chain of causation, however, can be broken by the occurrence of an independent intervening injury. *See* 1 A. *Larson, Workers' Compensation Law,* section 13.00 (1997). As found, the aggravation/acceleration of the Claimant's right shoulder condition condition is in the direct, proximate chain of causation from the admitted injury of September 25, 2015, thus, the Claimant's need for the surgery is causally related to the admitted injury.

e. Medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, Dr. Foulk's recommended right shoulder surgery is reasonably necessary to cure and relieve the effects of the admitted injury of September 25, 2015.

Request for Prior Authorization

f. the surgery recommended by Dr. Foulk should be automatically authorized under Rule 16-10(E), WCRP [in effect at the time] because the Respondents failed to obtain a medical review to support the surgery denial within seven business days of Dr. Foulk's October 26, 2016 surgery authorization request.

g. Rule 16-9(F), WCRP, provides:

> To complete a prior authorization request, the provider shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting documentation. Supporting medical documentation is defined as documents used in the provider's decision-making process to substantiate the need for the requested service of procedure.

The issue of whether a provider has submitted a "completed request" for purposes of WCRP 16-9(B) is a question of fact for the Administrative Law Judge. *Lichtenberg v. J.C. Penney*, W.C. Nos. 4-814-897 & 4-842-012 [Industrial Claim Appeals Office (ICAO), July 19, 2012]; *see Skelly v. Wal-Mart*, W.C. No. 4-632-887 (ICAO, July 31, 2008). At the outset of the hearing, the parties stipulated that Dr. Foulk's October 26, 2016 surgery authorization request complied with WCRP 16-9 and was a valid request for surgery, and the ALJ so found.

h. As outlined in WCRP 16-9(G), after receipt of a completed request for prior authorization, the insurer must then comply with WCRP 16-10(A) (non-medical reasons) or (B) (medical reasons) for the contest. WCRP 16-11(B)(1) outlines examples of non-medical reasons, including the billed services are not related to the admitted

injury. Respondents denied Dr. Foulk's surgery authorization for alleged nonmedical reasons, specifically that the surgery is not related to the work injury, thus WCRP 16-10(A) applies. *See Respondents' Exhibit D, page 17*.

i. Rule 16-10(A), WCRP applies to admitted cases, and it provides, "If an ATP requests prior authorization and indicates in writing, including their reasoning and relevant documentation, that they believe the requested treatment is related to the admitted workers' compensation claim, the insurer cannot deny based solely on relatedness without a medical review as required by 16-10(B)." WCRP 16-10(B) provides that if the payer is contesting a request for prior authorization for medical reasons, the payer shall, within seven (7) business days of the completed request, have the request reviewed by a physician and "furnish the provider and the parties with a written contest that sets forth" specific information. Claimant argues Dr. Foulk's October 26, 2016 surgery authorization request complied with WCRP 16-10(A), and Respondents violated WCRP 16-10(A) because Respondents did not obtain a medical review within seven business days of Dr. Foulk's October 26, 2016 surgery authorization request. On October 28, 2016,

j. As further found, Jason Trujillo, Senior Claims Representative at Pinnacol sent a denial of the request for prior authorization, stating as follows: "The condition for which this care is requested **is not related (emphasis supplied)** to the injury/illness for which **we have admitted liability** (emphasis supplied). There was no timely medical review of the request for prior authorization within the seven (7) days prescribed by Rule 16-10, WCRP, in effect at the time. Thereafter, the Claimant filed an Application for Hearing on November 29, 2016, endorsing medical benefits (surgery) and penalties (which was mis-characterized since the Claimant only seeks automatic authorization for the alleged non-compliance with Rule 16-10, WCRP, in effect at the time.

k. Also as found, the Respondents did not request a hearing within seven business days and notify the requesting provider that the matter was going to hearing within seven business days as required by Rule 16-10 (E) [in effect at the time in question]. The first request for a hearing was the Claimant's Application for Hearing, filed one month later on November 29, 2016. The Respondents filed a Response to Application for Hearing on November 30, 2016, asserting, *inter alia,* that the requested surgery is not reasonably necessary or related to the **admitted** claim. Respondents further asserted that with respect to the "penalty" claims of the Claimant, Respondents' conduct was "objectively reasonable." At the commencement of the hearing, the ALJ determined that the "penalty" claim was mis-characterized since all the Claimant sought was automatic authorization of the surgery recommended by Dr. Foulk because the Respondents had not timely complied with Rule 16-10 (in effect at the time].

l. Respondents cite an ICAO opinion, *Flanagan v. Brookdale Senior Living, Inc.*, W.C. No. 4-948-599 (ICAO, May 24, 2016) to support their position that Dr. Foulk's that Respondents denial was proper. In *Flanagan*, an ATP requested authorization for

surgery while the claim was still under a notice of contest; Respondents denied the surgery request for non-medical reasons, *i.e.,* that "compensability" was being contested.

m. The present case is clearly distinguishable from *Flanagan*. As found, a GAL, dated October 6, 2016 (**pre-dated** Dr. Foulk's request for prior authorization) was filed. As further found, the denial letter from Pinnacol, dated October 28, 2016, explicitly refers to the **"admitted**" case. Consequently, the explicit language of Rule 16-10 (A) [Contest of a Request for Prior Authorization—in effect at the time in question) applies, and not the general provisions of Rule 16-11 [Payment of Medical Bills –in effect at the time in question].

n. Section 8-40-102 (1), C.R.S., declares that the Workers' Compensation Act be interpreted so as to assure the quick and efficient delivery of disability and **medical** benefits. The "medical review provision (within seven business days) in Rule 16-10 (in effect at the time in question) is designed to eliminate litigation in admitted cases, where appropriate. Rule 16-11(in effect at the time in question) of necessity contemplates the resolution of the "compensability" issue before an insurer is obliged to pay medical benefits.

o. The rules of statutory construction are applicable to the proper construction of rules. First, statutory (rule) provisions are to be construed according to their plain meaning and should not be subjected to strained or forced interpretation. *People v. Browning,* 809 P.2d 1086 (Colo. App. 1990); *People v. Thomas,* 867 P.2d 880 (Colo. 1994). In interpreting a comprehensive legislative (rule) scheme, meaning must be given to all portions thereof. *A.B. Hirschfeld Press v. Denver,* 806 P.2d 917 (Colo. 1991). Statutes (rules) are to be construed *in pari materia* so as to give effect to the legislative intent to avoid inconsistencies and absurdities. *Whisler v. Kuckler,* 36 Colo. App. 200, 538 P.2d 477 (297) *rev'd on other grounds,* 191 Colo. 260, 552 P..2d 18 (1976). A well established rule of statutory construction is that the entire statute (rule scheme) is intended to be effective. *People v. Phillips,* 652 P.2d 575 (Colo. 1982); *In re Estate of Hill,* 713 P.2d 928 (Colo. App. 1985). It is a well settled principle of law that the" specific" controls over the "general." *See City of Littleton v. Indus. Claim Appeals Office,* 2012 COA 187. In the present case, the Respondents' argument pushes an interpretation of the applicability of the wrong rule [Rule 16-11—general payment of medical bills] beyond any principle of plain meaning and reasonable interpretation of the applicability of the appropriate rule to a request for prior authorization, by a physician, in an admitted case. Respondents argue that a medical review, as required by Rule 16-10 (A) is not required because their denial was based on Rule 16-11, arguing that the denial was for non-medical reasons. The fallacy in this argument is that the denial was made in an **admitted** case. Rule 16-10 (a) explicitly states that the "insurer cannot deny (in an admitted case) based solely on relatedness **without a medical review as required by section 16-10 (B)** [within seven business days]. Such review did not occur. Rule 16-10 (a) is specific in requiring a medical review in seven business days.

Rule 16-11 is general and, by its terms, refers to denials of causal relatedness in terms of fully contested cases. The ALJ concludes that the specific rule, Rule 16-10 (in effect at the time in question), applies to a proper contest of Dr. Foulk's request for prior authorization, and because there was no timely medical review. The Respondents failed to comply with the specific rule applicable. The consequences of not obtaining the medical review in seven business days, or otherwise complying with Rule 16-10 (a), WCRP, are that the request for prior authorization "shall be deemed authorized for payment of the requested treatment," under the provisions of Rule 16 (E) [in effect at the time in question].

Burden of Proof

p. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has met his burden on all of the designated issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay for the right shoulder surgery recommended by Dr. Foulk on October 26, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. All matters not determined herein are reserved for future decision.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-974-311-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 29, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 3/29/17, Courtroom 1, beginning at 1:30 PM, and ending at 3:30 PM).

Claimant's Exhibits 1 through 9 were admitted into evidence without objection. Respondents' Exhibits A through Y were admitted without objection. Respondents submitted the evidentiary deposition of Mark Paz M.D., taken on March 13, 2017. The ALJ took administrative notice of WCRP (Workers' Compensation Rules of Procedure) Rule 17, Exhibit 8 (Cervical Spine Injury Medical Treatment Guidelines), 7 CCR 1101-3.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on April 5, 2017. On April 7, 2017, Respondents filed an objection "to the language contained in the proposed order. I do not believe the ALJ made a determination the (*sic*) Dr. Higginbotham was incorrect in his diagnosis." As found herein below, the ALJ determines that Dr.Higginbotham was correct in determining that the Claimant's shoulder and cervical spine conditions are work-related (Finding No. 35, but incorrect in diagnosing the Claimant's "neurotic discomfort" is due to soft tissue problems and 'does not appear to have a complete base and analysis.'" As found

herein below, five physicians, including Dr. Macaulay, attribute the Claimant's left upper extremity (LUE) pain secondary to radiculitis or radiculopathy (Finding no. 41.vi through 41. Ix. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision are whether the Claimant has overcome the opinion of Division Independent medical examiner (DIME), Thomas Higginbotham, D.O. , that the Claimant was at maximum medical improvement (MMI); if Claimant is not at MMI, what treatment is reasonably necessary and causally related to the admitted cervical/left shoulder injury of February 4, 2015; if the Claimant is not at MMI, is he entitled to temporary total disability (TTD) benefits from April 19, 2016 and continuing; and, what is the extent of his bodily disfigurement attributable to his industrial accident.

To overcome the DIME OF Dr. Higginbotham on the issue of MMI, the Claimant bears the burden of proof, by clear and convincing evidence. On all other issues the Claimant's burden is by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Posture/Findings

1. The Claimant was born on December 26, 1968 and was 49 years old at time of hearing.

2. The Claimant was injured on February 5, 2015 in the course and scope of his employment as automotive mechanic for the Employer. On that date, he was twisting a fuel filter from the diesel truck engine when he felt a pop in his left shoulder and experienced sharp and burning pain in the shoulder. After a short time, the pain subsided. He then lifted a 70-pound tire when he felt further pain in his left shoulder with pain extending to the left side of his neck.

3. The Claimant timely reported the injury, which was admitted by the Respondents. Ultimately, the Respondents filed the latest Final Admission of Liability (FAL) dated September 14, 2016, admitting for TTD through April 18, 2016; admitted; for the 7% whole person cervical rating and the 2% scheduled rating given by Dr. Higginbotham in his DIME report (Claimant's Exhibit 5); denying post-MMI medical

maintenance benefits; and, agreeing with the MMI date assigned by authorized treating physician (ATP), Robert Dixon, M.D.

4. Based on Dr. McCranie's one page record review and Respondents' choice not to authorize a third injection, Dr. Dixon placed the Claimant at maximum medical improvement (MMI) on April 22, 2016, giving the Claimant a 6% impairment range of motion of the shoulder, which converted to a 4% whole person impairment (the conversion is mandated by the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. He expressed no opinion concerning whether it was appropriate to convert to LUE rating to a whole person rating. Dr. Dixon did not give the Claimant a rating for his neck condition, noting that "In March 2016, a peer review was performed and it was felt that that the neck injury was not related to his original left shoulder injury and no further treatment for the neck work was approved" (Respondents' Exhibit Y, bates stamp, pp. 318-319). Dr. Dixon did not explain why the neck condition was no longer injury related after he had sanctioned extensive conservative care for the neck condition. The ALJ infers and finds that with regard to the Claimant's neck, Dr. Dixon relied entirely on the hearsay conclusion of the peer review, which did not persuasively explain the reasons for their conclusion that the neck was not related.

5. The Claimant filed a timely objection to the FAL, along with a timely Notice and Proposal for Selection of a DIME. Dr. Higginbotham was selected as the DIME, which he performed and issued a DIME Report, dated August 15, 2016. DIME Dr. Higginbotham agreed with ATP Dr. Dixon and placed the Claimant at MMI on April 19, 2016. Thereafter, the Claimant filed an Application for Hearing to challenge Dr. Higginbotham's DIME opinion concerning MMI.

Preliminary Findings

6. On the day of the admitted injury, the Claimant sought care at Littleton Adventist Hospital where he was seen by Michael Anderson, M.D. Dr. Anderson noted a prior injury to the Claimant's rotator cuff, and he assessed "left shoulder pain." Reviewing films of the shoulder, Dr. Anderson noted that the Claimant had previously undergone a Bankart repair. Dr. Anderson recommended follow up with an orthopedic surgeon (Respondents' Exhibit P, bates stamp.106).

7. The Claimant followed up with John S. Hughes, M.D., on February 17, 2015, and dr. Hughes agreed with the findings of Dr. Anderson in the Emergency Room (ER) and referred the Claimant to Michael Fuller, D.O.., for orthopedic surgical evaluation (Claimant's Exhibit 7, bates stamp167-68).

8. An MRI (magnetic resonance imaging) of the left shoulder on February 16, 2015 showed: 1. Superior labral tear of the left shoulder; 2. Small high-grade partial thickness tear at the junction of the infraspinatus and supraspinatus tendons with a full-

thickness perforation in the area, and 3. moderate osteoarthritis of the acromioclavicular joint Respondents' (Exhibit T, bates stamp 178-79).

9. In his report dated February 17, 2015, Dr. Fuller, noted that the injury "was caused by twisting motion while lifting", and he recommended surgery (Respondents' Exhibit S, bates stamp 120).

10. On March 13, 2015, Dr. Fuller performed a biceps tendon release, a labral repair and subacromial decompression (Respondents' Exhibit P, bates stamp 109).

11. On March 20, 2015, ATP Dr. Dixon assumed post-operative care of the Claimant's left shoulder condition (respondents' Exhibit Y, bates stamp 251-253). Dr. Dixon, however, did not specifically identify left neck symptoms until his report of July 2, 2015 (Respondents' Exhibit Y, bates stamp 266).

12. The Claimant credibly testified that he experienced pain from his left shoulder to the left side of his neck from the date of the injury through date of surgery. While he acknowledged that available medical records do not reflect complaints of neck pain during that period, he credibly testified that he uniformly reported problems in his left neck region in the pain diagrams submitted to his treating providers, and some pain diagrams reflect reported neck problems.

13. After surgery, the Claimant wore a sling for about six weeks. He noted that the sling "pulled" on the left side of his neck causing increased pain in that area.

14. On August 18, 2015, Dr. Fuller indicated an assessment of cervical nerve root compression and referred the Claimant to Michael n. Horner, D.O.., for a cervical evaluation (Respondents' Exhibit S, bates stamp 140-143).

15. By report dated September 10, 2015, Dr. Horner assessed cervical radiculopathy, cervicalgia, and symptomatic cervical degenerative disc disease. He recommended continued physical therapy, medication and MRI of the cervical spine pending the outcome of physical therapy and medication trial (Respondents' Exhibit S, bates stamp 146).

16. The Claimant received conservative therapy for his left shoulder and neck pain after surgery, which included physical therapy, medications, and chiropractic care with Dr. Patrick Noel, D.C., on September 3, 2015 and on September 29, 2015 (See Respondents' Exhibit R). None of this conservative therapy reduced the Claimant's neck pain significantly.

17. An MRI of the Claimant's cervical spine was performed on October 9, 2015, and it showed foraminal stenosis at C4-C5 level on the left and bilaterally at the

C5-C6 level. Prominent facet arthropathy changes were seen at the C4-C5 level on the left (respondents' Exhibit T, bates stamp 175-176).

18. The Claimant complained of neck pain to Dr. Dixon on September 1, 2015; September 11, 2015, September 22, 2015 and again on October 14, 2015, when Dr. Dixon wrote that the Claimant "returns for recheck of left shoulder injury, [status post-surgery] and left neck pain" (Respondents' Exhibit Y, bates stamp 274-286).

19. Dr. Horner recommended an epidural steroid injection (ESI), which was approved by the Respondents and performed by Dr. Horner on November 25, 2015. That injection, which was a C7-T1 interlaminar ESI, reportedly worsened the neck discomfort and dysthesias (Respondents' Exhibit N, bates stamp 76-77).

20. Because of the failure of conservative measures, Dr. Dixon referred the Claimant to Andrew Castro, M.D., a surgeon, for an orthopedic surgical evaluation for the neck (Respondents' Exhibit Y, bates stamp 291; Respondents' Exhibit M, bates stamp 36).

21. In a report dated December 14, 2015, Dr. Castro noted a history of neck complaints and that the Claimant was wearing a sling "for several weeks after surgery and noticed some pain into the neck running down the arm after the sling was placed". He encouraged conservative treatment prior to consideration of surgery; recommended a TESI at C4-C5 and C5-C6 and, if that failed, surgical intervention might be considered, specifically an anterior cervical fusion at C4-C6. Dr. Castro referred the Claimant to J. Scott Bainbridge, M.D., for the injection (Claimant's Exhibit 7, bates stamp106-109).

22. On February 5, 2016, the Claimant underwent a C4-C6 medial branch block administered by Dr. Bainbridge (Respondents' Exhibit M, bates stamp. 55-57), which resulted in no clinical improvement.

23. On February 22, 2016, Dr. Castro recommended a TESI at C4-C5 and C5-C6 and suggested that if the injection was beneficial, a second injection should be considered. Failing any benefit, Dr. Castro was of the opinion that, a cervical fusion would be reasonable treatment (Claimant's Exhibit 7, bates stamp 102-104).

24. By report dated March 3, 2016, after a record review only, Kathy McCranie, M.D., recommended denial of a TESI at C4-C5 and C5-C6. She stated that she could not correlate the MRI findings with his sling usage, and stated the opinion that the Claimant's degenerative disc disease and spinal stenosis should be treated outside of the workers' compensation arena (a legal conclusion on Dr. McCranie's part). She believed that it was reasonable to treat the Claimant's soft tissue complaints through the workers' compensation system, but she made no specific recommendations for such treatment (Respondents' Exhibit Q).

25. Thereafter, the Respondents denied authorization of a TESI at C4-C5 and C5-C6 recommended by Dr. Castro.

26. As previously noted in the Procedual Posture/Findings section of this decision, based on Dr. McCranie's one page record review and Respondents' choice not to authorize a third injection, Dr. Dixon placed the Claimant at MMI on April 22, 2016, giving the Claimant a 6% impairment range of motion of the shoulder, which converted to a 4% whole person impairment (the conversion is mandated by the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev.. He expressed no opinion concerning whether it was appropriate to convert to LUE rating to a whole person rating. Dr. Dixon did not give the Claimant a rating for his neck condition, noting that "In March 2016, a peer review was performed and it was felt that that the neck injury was not related to his original left shoulder injury and no further treatment for the neck work was approved" (Respondents' Exhibit Y, bates stamp, pp. 318-319). Dr. Dixon did not explain why the neck condition was no longer injury related after he had sanctioned extensive conservative care for the neck condition. The ALJ infers and finds that with regard to the Claimant's neck, Dr. Dixon relied entirely on the hearsay conclusion of the peer review, which did not persuasively explain the reasons for the peer review conclusion that the neck was not related.

Division Independent Medical Examination (DIME) by Thomas Higginbotham, D.O

27. Dr. Higginbotham performed a DIME on August 15, 2016. He disagreed with Dr. Dixon about the causality of the cervical condition, and he assigned a whole person rating of 7% for the cervical spine, finding a 4% Specific Disorders for "myofascial pain" and 3% range of motion of impairment. For the shoulder, Dr. Higginbotham assigned a 2% impairment rating of the LUE, which converted to a 1% whole person rating but he did not express an opinion concerning whether a conversion of the LUE rating to a whole person rating was appropriate or not.. He agreed with Dr. Dixon's MMI date of April 22, 2016, and stated the opinion that the Claimant did not need any maintenance medical care for the neck other than self-care such as a concerted stretching/strength exercise program and auto-massage (Claimant's Exhibit 8).

28. It is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Higginbotham is in error in concluding that the Claimant was at MMI on April 19, 2016. Also, it is highly likely that diagnosis that the Claimant's neurotic discomfort is due to soft tissue problems and "does not appear to have a complete base and analysis" is clearly erroneous. As found herein below, five physicians, including Dr. Macaulay, attribute the Claimant's left upper extremity (LUE) pain secondary to radiculitis or radiculopathy (Finding no. 35.vi through 35. Ix). It is also highly likely that Dr. Higginbotham is in error in concluding that the Claimant needs no further medical treatment or tests. It is an anomaly that DIME Dr. Higginbotham seemingly adopted

ATP Dr. Dixon's MMI date, mechanistically, when ATP Dr. Dixon did not rate the Claimant's cervical spine and DIME Dr. Higginbotham rated it.

29. In the latest FAL, dated September 14, 2016, the Respondents admitted for TTD through April 18, 2016; admitted; for the 7% whole person cervical rating and the 2% scheduled rating given by Dr. Higginbotham in his DIME report (Claimant's Exhibit 5); denying post-MMI medical maintenance benefits; and, agreeing with the MMI date assigned by authorized treating physician (ATP), Robert Dixon, M.D.

30. The Claimant timely objected to the FAL and applied for hearing to challenge Dr. Higginbotham's DIME determination of MMI on April 19, 2016 and his characterization of his neck problems as "myofascial in nature." However, the Claimant does not challenge Dr. Higginbotham's permanent impairment ratings, including the overall rating for the neck condition

Respondents' Independent Medical Examiner (IME), Mark Paz, M.D.

31. Dr. Paz performed an IME for the Respondents on March 3, 2017. In a report of that date, Dr. Paz stated the opinion that the Claimant's cervical spondylosis was not caused, aggravated or accelerated as a result of the February 5, 2015 injury. He explained that the long-standing cervical spondylosis symptoms have naturally "evolved", despite treatment and no reported recurrent exposures, and therefore they are "idiopathic in nature". He rejected the theory that sling usage aggravated or accelerated the underlying cervical spondylosis. He concluded that Claimant would have required treatment for neck symptoms with or without the industrial injury (Respondents' Exhibit W). Dr. Paz testified in his evidentiary deposition consistently with his report. Dr. Paz categorically uses all the key phrases to support his ultimate opinion. Indeed, his categorical denial of any causal relatedness of the neck is contrary to the DIME's rating of the neck and the Respondents' FAL regarding the neck. For the reasons given herein above and below and considering the totality of the evidence, the ALJ does not find Dr. Paz's ultimate opinions credible and hereby rejects his opinions.

32. The Claimant testified credibly that he had no neck pain or treatment prior to his industrial injury. This lay testimony is essentially undisputed

33. The Claimant testified credibly that his left neck pain, which started after his industrial injury, worsened after his left shoulder surgery, and it has never been improved by any conservative treatment to date. His testimony in this regard is corroborated by the weight of the credible medical evidence.

Maximum Medical Improvement (MMI)

34. The Claimant is not at MMI; he has not been released to his regular job by Dr. Dixon, his primary authorized treating physician; he has not worked anywhere since his date of injury; he credibly testified that he cannot perform the lifting requirements of his regular job as an auto mechanic. He needs an evaluation by surgeon Dr. Castro in order to determine a future course of treatment.

Temporary Disability

35. The Claimant received TTD between February 6, 2015 and April 18, 2016, both dates inclusive (Respondents' Exhibit H, FAL).

36. While Claimant's last day of working was February 5, 2016, he was terminated in September 2016 and he has not worked anywhere since, nor has he earned any wages since being terminated.

37. At present, the Claimant can lift only about 20 pounds he cannot perform the duties of his regular job as an auto mechanic, which involve lifting tires and equipment weighing as much as 70 pounds or more.

38. The admitted TTD rate in this case of $771.13 per week, which equals to $110.16 per day (*See* Claimant's Exhibit 5, FAL, dated September 14, 2016).

39. The Claimant has been temporarily and totally disabled since the date of the admitted injury and continuing. He should receive $110.16 per day in TTD benefits ($771.13 weekly TTD rate divided by 7 days) beginning April 19, 2016 through March 23, 2017, both dates inclusive, a total of 345 days, for the sum of $38,005.20, less all permabnent partial disability payments made through that period, pursuant to previous admissions of liability. TTD benefits from March 30, 2017 and continuing are appropriate unless cessation thereof is warranted by law.

Present Medical Opinions Corroborating Claimant's Testimony and Refuting DIME Opinion of MMI

40. Claimant testified credibly that he experiences shocks from his left neck area down his left arm. This testimony is consistent with various medical reports including, but not limited to:

i. Dr. Fuller opined on August 18, 2015 that Claimant has nerve root compression (Claimant's Exhibit 7, bates stamp 126).

ii. On September 10, 2015, Dr. Horner opined that Claimant has cervical radiculopathy (Exhibit 7, bates stamp 124-125).

iii. On December 14, 2015, Dr. Castro noted that Claimant "has some intermittent radicular type symptoms" and recommended a TESI (Claimant's Exhibit 7, bates stamp 106-109).

iv. On December 17, 2015, Dr. Bainbridge's physician assistant, Jadon Redington, PA-C, noted that Claimant has spondylosis with radiculopathy. (Respondents' Exhibit M, bates stamp 36).

Claimant's IME, Hugh Macaulay, M.D.

41. Hugh Macaulay, III, M.D. performed an IME on behalf of the Claimant on January 30, 2017. In a report of that date, Dr. Macaulay noted as follows:

i. Claimant's subjective complaints include pain in his neck, inability to look up, lift heavy objects, jog, exercise, sit, stand or sleep for any prolonged time; significantly worsening symptoms; radiation of his discomfort from his neck into his left arm with numbness at times; pain ranging from level 4 to 10;

ii. Pain medicines, heat, ice, physical therapy, chiropractic manipulation and injections have not resolved his neck pain;

iii. Claimant worked for Respondent-Employer from 1996 until he was terminated in September 2015;

iv. Claimant has not been able to return to work because of his neck pain;

v. Dr. Macaulay agrees with Dr. Higginbotham that the shoulder and cervical spine conditions are work-related;

vi. He disagrees with an opinion that Claimant's neuritic discomfort is due to soft tissue problems and "does not appear to have a complete base and analysis." On the contrary, other physicians including Drs. Fuller, Horner, Castro and Bainbridge, have all considered the left upper extremity pain secondary to radiculitis or radiculopathy;

vii. His objective findings include tenderness in the lateral aspect of the cervical spine segments C5-C7 on the left side, difficulty extending the cervical spine with neuritic pain developing as he performs the

maneuver, a significantly positive Spurling's maneuver, and pressure over C5-C7 on the left side "literally brings him to tears";

viii. While the cervical spondylosis was not caused by his industrial accident, as Drs. Fuller, Horner, Castro and Bainbridge have opined, Claimant reasonably, medically probably has an aggravation of his cervical spine condition resulting in radiculitis of the left upper extremity;

ix. Citing page 8 of the Cervical Spine Medical Treatment Guidelines, of which the ALJ takes administrative notice, he opined that Claimant meets the criteria for surgical intervention and he should have a TESI on C4-C5 and C5-C6 and an EMG and NCVS for evaluation of neural integrity for nerve roots C6-C8;

x. He recommends a weight lifting maximum of 15 pounds and that Claimant should not look upwards or extend his neck on a chronic basis;

xi. Claimant will not be able to return to work as an auto mechanic at this time because of the lifting requirements of that job;

xii. Dr. Macaulay is of the opinion that the Claimant is not at MMI.

42. The ALJ finds the opinions expressed by Dr. Macaulay in his January 30, 2017 report to be highly persuasive and credible. In particular, this ALJ finds and concludes that Dr. Macaulay's diagnosis of aggravation of an underlying non-injury-related cervical spondylosis is correct since it is supported by the findings of four **treating** physicians, the credible testimony of Claimant, and a cervical MRI.

43. Dr. Macaulay's opinion that Claimant's continuing left arm symptoms are due to radiculitis is substantially more persuasive than the IME opinions of **independent medical examiners** Drs. McCranie, Paz, and Dr. Higginbotham who all have erroneously concluded that Claimant's injury-related neck condition is myofascial in nature, and that his current symptoms are due to his non-injury related cervical spondylitis. Dr. McCranie gave her "peer review" without the benefit of a physical examination. She, like Drs. Paz and Higginbotham, improperly ignored or disregarded the evidence of radiculopathy documented by Drs. Fuller, Horner, Castro and Bainbridge. This ALJ finds that Dr. Paz's opinion that Claimant's continuing problems are "idiopathic" is not credible since four **treating doctors,** and Dr. Macaulay, have documented radiculopathy that did not exist before the industrial accident. This ALJ rejects Dr. Paz's opinion as not credible that Claimant would need treatment for his cervical and left upper extremity complaints whether or not he had an industrial injury in light of the complete absence of any evidence that Claimant had any neck or left

extremity symptoms or needed any treatment before his industrial accident. This ALJ finds particularly persuasive the fact that Claimant was able to work as an auto mechanic for nineteen years for the same employer without apparent difficulty, but since the industrial accident he has not been able to work in that position. In light of this evidence, this ALJ rejects a conclusion that Claimant's left neck and left arm symptoms developed "coincidently" and "independently" of the industrial accident. On the contrary, the testimony of Claimant and the reports of four treating physicians point to left-sided neck problems, which correlate with the cervical MRI performed on October 9, 2015.

Bodily Disfigurement Examination

44. After an examination of Claimant without his shirt as witnessed by counsel, this ALJ finds that Claimant has three small, whitish, round scars on his left shoulder and back which are due to his shoulder surgery performed on March 13, 2015. This ALJ finds and concludes that these scars constitute bodily disfigurement pursuant to Section 8-42-108(1), C.R.S.

Ultimate Findings

45. Dr. Macaulay's opinion that Claimant's continuing left arm symptoms are due to radiculitis is substantially more persuasive than the IME opinions of respondents' IMEs, Dr. McCranie, Dr. Paz, and DIME Dr. Higginbotham who all erroneously concluded that Claimant's injury-related neck condition is myofascial in nature, and that his current symptoms are due to his non-injury related cervical spondylitis. Dr. McCranie gave her "peer review" without the benefit of a physical examination. She, like Drs. Paz and Dr. Higginbotham, improperly ignored or disregarded the evidence of radiculopathy documented by Drs. Fuller, Horner, Castro and Bainbridge. Dr. Paz's opinion that the Claimant's continuing problems are "idiopathic" is highly **incredible** since four **treating doctors,** and Dr. Macaulay, have documented radiculopathy that did not exist before the admitted industrial accident. The ALJ rejects Dr. Paz's opinion as not credible that the Claimant would need treatment for his cervical and left upper extremity complaints whether or not he had an industrial injury in light of the complete absence of any evidence that Claimant had any neck or left extremity symptoms or needed any treatment before his industrial accident. This opinion is contrary to the weight of the evidence. The ALJ finds particularly persuasive the fact that Claimant was able to work as an auto mechanic for nineteen years for the same employer without difficulty, but since the admitted industrial accident he has not been able to work in that position. In light of this evidence, this ALJ rejects a conclusion that Claimant's left neck and left arm symptoms developed "coincidently" and "independently" of the industrial accident. On the contrary, the testimony of Claimant and the reports of four treating physicians point to left-sided neck problems, which correlate with the cervical MRI performed on October 9, 2015. Consequently, the ALJ finds the Claimant's testimony credible and persuasive, as well as the opinions of the four treating physicians and

Claimant's IME, Dr. Macaulay. The ALJ specifically finds opinions to the contrary as lacking in credibility.

46. The ALJ makes a rational decision, based on substantial evidence to accept the opinions of the Claimant's four treating physicians and the carefully reasoned and articulated opinion of Dr. Macauley, and to reject all opinions to the contrary.

47. Dr. Higginbotham erred not only because he failed to recognize the mechanical explanation for radiculopathy present in this case, but also because he did not refer Claimant back to Dr. Castro for surgical recommendation in light of the apparent failure of two injections. In this regard, he failed to follow the requirements of the Colorado Medical Treatment Guidelines, Rule 17, Exhibit 8, pp.7-8. As Dr. Macaulay opined, since Claimant's radiculopathy meets all the criteria found on those pages, invasive procedures should be considered. While it is true that Claimant underwent evaluation with Dr. Castro prior to the DIME, Dr. Castro did not meet with him after the injection and medication trials for a final recommendation after exhaustion of conservative treatment. Dr. Higginbotham should have recognized this fact and found that Claimant was not at MMI until after a repeat evaluation with Dr. Castro. MMI exists when "any medically determinable physical or mental impairment as a result of an injury has become stable and when no further treatment is reasonably expected to improve the condition." In this regard, the ALJ finds that it is highly probable, unmistakable and free from serious and substantial error that DIME Dr. Higginbotham erred in placing the Claimant at MMI on April 19, 2016, in apparent mechanistic agreement with ATP Dr. Dixon. It is an anomaly that DIME Dr. Higginbotham seemingly adopted ATP Dr. Dixon's MMI date, mechanistically, when ATP Dr. Dixon did not rate the Claimant's cervical spine and DIME Dr. Higginbotham rated it.

48. The Claimant has overcome DIME Dr. Higginbotham's opinion that the Claimant reached MMI on April 19, 2016, by clear and convincing evidence.

49. The Claimant has proven, by a preponderance of the evidence that he is entitled to a further evaluation by Dr. Castro and further medical care and treatment to improve his work-related condition.

50. The Claimant is not at MMI; he has not been released to his regular job by Dr. Dixon, his primary authorized treating physician; he has not worked anywhere since his date of injury; he credibly testified that he cannot perform the lifting requirements of his regular job as an auto mechanic. He needs an evaluation by surgeon Dr. Castro in order to determine a future course of treatment.

51. The Claimant, by virtue of the FAL, has established that he is entitled to a TTD rate of $771.13 per week, which equals to $110.16 per day.

52. The Claimant has proven, by a preponderance of the evidence that he has been temporarily and totally disabled since the date of the admitted injury and continuing. He should receive $110.16 per day in TTD benefits ($771.13 weekly TTD rate divided by 7 days) beginning April 19, 2016 through March 239, 2017, both dates inclusive, a total of 345 days, for the sum of $38,005.20, less all permabnent partial disability payments made through that period, pursuant to previous admissions of liability. TTD benefits from March 30, 2017 and continuing are appropriate unless cessation thereof is warranted by law.

53. the Claimant has sustained bodily disfigurement because of the admitted injury, plainly visible to public view, which entitles him to an $800.00 award, in addition to all other benefits due and payable.

DISCUSSION

As found, the ALJ finds and concludes that Claimant has met his burden to prove, by clear and convincing evidence, that Dr. Higginbotham has committed error by finding Claimant is at MMI and failing to recommend that he return to Dr. Castro for further evaluation, as recommended. Dr. Higginbotham's primary error is an incorrect diagnosis: myofascial pain of the cervical and left upper extremity regions. It is highly probable, unmistakable and free from serious and substantial error that this diagnosis is incorrect based on a review of the weight of the medical evidence. The question of whether a DIME physician's opinion concerning MMI has been overcome is one of fact for determination by the ALJ. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

As found, the opinions expressed by Dr. Macaulay in his January 30, 2017 report are highly persuasive and credible. In particular, as found, Dr. Macaulay's diagnosis of aggravation of an underlying non-injury-related cervical spondylosis is correct since it is supported by the findings of four **treating** physicians, the credible testimony of Claimant, and a cervical MRI.

Further, this ALJ finds and concludes that Dr. Macaulay's opinion that Claimant's continuing left arm symptoms are due to radiculitis is substantially more persuasive than the IME opinions of **independent medical examiners** Drs. McCranie, Paz, and Dr. Higginbotham who all have erroneously concluded that Claimant's injury-related neck condition is myofascial in nature, and that his current symptoms are due to his non-injury related cervical spondylitis. Dr. McCranie gave her "peer review" without the benefit of a physical examination. She, like Drs. Paz and Higginbotham, improperly ignored or disregarded the evidence of radiculopathy documented by Drs. Fuller, Horner, Castro and Bainbridge. This ALJ finds that Dr. Paz's opinion that Claimant's continuing problems are "idiopathic" is not credible since four **treating doctors,** and Dr. Macaulay, have documented radiculopathy that did not exist before the industrial

accident. This ALJ rejects Dr. Paz's opinion as not credible that Claimant would need treatment for his cervical and left upper extremity complaints whether or not he had an industrial injury in light of the complete absence of any evidence that Claimant had any neck or left extremity symptoms or needed any treatment before his industrial accident. This ALJ finds particularly persuasive the fact that Claimant was able to work as an auto mechanic for nineteen years for the same employer without apparent difficulty, but since the industrial accident he has not been able to work in that position. In light of this evidence, this ALJ rejects a conclusion that Claimant's left neck and left arm symptoms developed "coincidently" and "independently" of the industrial accident. On the contrary, the testimony of Claimant and the reports of four treating physicians point to left-sided neck problems, which correlate with the cervical MRI performed on October 9, 2015.

Dr. Higginbotham erred not only because he failed to recognize the mechanical explanation for radiculopathy present in this case, but also because he did not refer Claimant back to Dr. Castro for surgical recommendation in light of the apparent failure of two injections. In this regard, he failed to follow the requirements of the Colorado Medical Treatment Guidelines, Rule 17, Exhibit 8, pp.7-8. As Dr. Macaulay opined, since Claimant's radiculopathy meets all the criteria found on those pages, invasive procedures should be considered. While it is true that Claimant underwent evaluation with Dr. Castro prior to the DIME, Dr. Castro did not meet with him after the injection and medication trials for a final recommendation after exhaustion of conservative treatment. Dr. Higginbotham should have recognized this fact and found that Claimant was not at MMI until after a repeat evaluation with Dr. Castro. MMI exists when "any medically determinable physical or mental impairment as a result of an injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. The ICAO has held that reasonable and necessary diagnostic procedures are a prerequisite to MMI if they have a prospect "of defining a claimant's condition and suggesting further treatment." *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000); *Villela v. Excel Corporation*, W.C. Nos. 4-400-281, 4-410-547, 4-410-551 (February 1, 2001); *cf. Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1948). Here, Dr. Higginbotham erred by failing to refer Claimant back to Dr. Castro for a repeat surgical evaluation and consideration of other conservative treatment modalities. As such, he erred by finding Claimant was at MMI. This ALJ finds and concludes that Claimant is not MMI at this time.

The ALJ accepts Dr. Macaulay's recommendation for additional surgical evaluation and further finds that Respondents should be liable for a repeat visit with Dr. Castro for further recommendations regarding Claimant's aggravation of a pre-existing cervical spondylosis.

Claimant is not at MMI; he has not been released to his regular job by Dr. Dixon, his primary authorized treating physician; he has not worked anywhere since his date of injury; he credibly testified that he cannot perform the lifting requirements of his regular job as an auto mechanic; and he has been terminated by Respondent-Employer.

Accordingly, he is entitled to TTD beginning April 19, 2016, when Respondents terminated TTD, less any credits for permanent partial disability benefits paid, to continue ongoing until further Order or by operation of law.

As stated above, this ALJ finds and concludes that Claimant's surgical scars constitute bodily disfigurement pursuant to Section 8-42-108(1), C.R.S., and that Claimant should be awarded benefits for such disfigurement in the amount of $800.00.

Because this ALJ finds that Claimant is not MMI, he does not need to rule about the correctness of Dr. Higginbotham's permanent impairment ratings. The issue of permanent partial disability is not ripe at this time.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's

knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, Dr. Macaulay's opinion that Claimant's continuing left arm symptoms are due to radiculitis is substantially more persuasive than the IME opinions of respondents' IMEs, Dr. McCranie, Dr. Paz, and DIME Dr. Higginbotham who all erroneously concluded that Claimant's injury-related neck condition is myofascial (soft tissue according to DIME Dr. Higginbotham) in nature, and that his current symptoms are due to his non-injury related cervical spondylitis.

b. As further found, Dr. McCranie gave her "peer review" without the benefit of a physical examination. She, like Drs. Paz and Dr. Higginbotham, improperly ignored or disregarded the evidence of radiculopathy documented by Drs. Fuller, Horner, Castro and Bainbridge. Dr. Paz's opinion that the Claimant's continuing problems are "idiopathic" is highly **incredible** since four **treating doctors,** and Dr. Macaulay, have documented radiculopathy that did not exist before the admitted industrial accident. The ALJ rejects Dr. Paz's opinion as not credible that the Claimant would need treatment for his cervical and left upper extremity complaints whether or not he had an industrial injury in light of the complete absence of any evidence that Claimant had any neck or left extremity symptoms or needed any treatment before his industrial accident. This opinion is contrary to the weight of the evidence. The ALJ finds particularly persuasive the fact that Claimant was able to work as an auto mechanic for nineteen years for the same employer without difficulty, but since the admitted industrial accident he has not been able to work in that position. In light of this evidence, this ALJ rejects a conclusion that Claimant's left neck and left arm symptoms developed "coincidently" and "independently" of the industrial accident. On the contrary, the testimony of Claimant and the reports of four treating physicians point to left-sided neck problems, which correlate with the cervical MRI performed on October 9, 2015. Consequently, the ALJ finds the Claimant's testimony credible and persuasive, as well as the opinions of the four treating physicians and Claimant's IME, Dr. Macaulay. The ALJ specifically finds opinions to the contrary as lacking in credibility.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial**

evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational decision, based on substantial evidence to accept the opinions of the Claimant's four treating physicians and the carefully reasoned and articulated opinion of Dr. Macauley, and to reject all opinions to the contrary.

Maximum Medical Improvement (MMI)

d. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. As found, the Claimant is not at MMI; he has not been released to his regular job by his ATP, Dr. Dixon; he has not worked anywhere since his date of injury; he credibly testified that he cannot perform the lifting requirements of his regular job as an auto mechanic; and, he needs an evaluation by surgeon Dr. Castro in order to determine a future course of treatment. Reasonable and necessary diagnostic procedures are a prerequisite to MMI if they have a prospect "of defining a claimant's condition and suggesting further treatment." *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000); *Villela v. Excel Corporation*, W.C. Nos. 4-400-281, 4-410-547, 4-410-551 (February 1, 2001); *cf. Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1948). As found, Dr. Higginbotham clearly erred by failing to refer Claimant back to Dr. Castro for a repeat surgical evaluation and consideration of other conservative treatment modalities. As such, he clearly erred by finding Claimant was at MMI. Therefore, the ALJ concludes that Claimant is not MMI at this time.

Overcoming Dr. Higginbotham's DIME

e. Clear and convincing evidence is established by showing that the truth of a contention is highly probable, *Askew v. Sears Roebuck & Co*., 914 P.2d 1049 (Colo. App. 1983), and free from substantial or serious doubt, *Metro Moving & Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995). The question of whether a party meets the "clear and convincing" burden of proof is a question of fact for the administrative law judge. *McLane Western, Inc. v. Indus. Claim Appeals Office*, 906 P. 2d 263 (Colo. App. 1999). In order to overcome a DIME opinion, there must be evidence which proves that it is highly probable that the DIME physician's opinions are incorrect. *Metro Moving &*

Storage Co. v. Gussert, 914 P2d 411 (Colo. App. 1995). As found, it is highly likely, unmistakable and free from serious and substantial doubt that Dr. Higginbotham's DIME opinion that the Claimant reached MMI when ATP Dr. Dixon declared the Claimant to be at MMI on April 19, 2016. It is an anomaly that DIME Dr. Higginbotham seemingly adopted ATP Dr. Dixon's MMI date, mechanistically, when ATP Dr. Dixon did not rate the Claimant's cervical spine and DIME Dr. Higginbotham rated it.

Pre-MMI Medical Treatment

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravation/acceleration of his LUE and cervical condition set in motion by the admitted injury of February 4, 2015. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary. As found, reasonable and necessary diagnostic procedures are a prerequisite to MMI if they have a prospect "of defining a claimant's condition and suggesting further treatment." *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000); *Villela v. Excel Corporation*, W.C. Nos. 4-400-281, 4-410-547, 4-410-551 (February 1, 2001); *cf. Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1948). As found, Dr. Higginbotham clearly erred by failing to refer Claimant back to Dr. Castro for a repeat surgical evaluation and consideration of other conservative treatment modalities. As such, he clearly erred by finding Claimant was at MMI. Therefore, the ALJ concludes that any medical treatment, at this time, is for the purpose of curing and relieving the effects of the Claimant's February 4, 2015 admitted injuries.

Temporary Disability

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case was not his fault but as a result of his inability to perform his job duties. There is no statutory requirement that a

claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone would be sufficient to establish a temporary "disability." *Id*. As found, the Claimant is not at MMI; he has not been released to his regular job by Dr. Dixon, his primary authorized treating physician; he has not worked anywhere since his date of injury; he credibly testified that he cannot perform the lifting requirements of his regular job as an auto mechanic; and, he has earned no wages since the admitted injury. He needs an evaluation by surgeon Dr. Castro in order to determine a future course of treatment.

h. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant has been sustaining a 100% temporary wage loss since the date of the admitted injuries. Therefore, he has been temporarily and totally disabled since April 19, 2015 and continuing. He should receive $110.16 per day in TTD benefits [(the admitted TTD rate) is $771.13 weekly TTD rate divided by 7 days], beginning April 19, 2016 through March 29, 2017, both dates inclusive, a total of 345 days, for the gand total sum of $38,005.20, less all permanent partial disability payments made through that period, pursuant to previous admissions of liability. TTD benefits from March 30, 2017 and continuing are appropriate unless cessation thereof is warranted by law.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to all designated issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has overcome the Division Independent Medical Examination of Thomas Higginbotham, D.O., by clear and convincing evidence concerning maximum medical improvement. Therefore, the Claimant is **not** at maximum medical improvement.

B. Respondents shall pay the costs of a repeat evaluation by Andrew Castro, M.D., and any recommendations concerning a course of medical treatment to cure and relieve the effects of the Claimant's admitted injury of February 4, 2015, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. The Respondents shall pay the Claimant temporary total disability benefits at the admitted rate of $771.13 per week, or $110.16 per day from April 19, 2016 through March 29, 2017, both dates inclusive, a total of 345 days, in the gand total sum of $38,005.20, less all permanent partial disability payments made through that period, pursuant to previous admissions of liability, which is payable retroactively and forthwith.

D. The Respondents shall continue paying the Claimant temporary total disability benefits of $%771.13 per week from March 30, 2017 and continuing until cessation thereof is warranted by law.

E. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

F. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-979-208-04

ISSUES

- As a factual matter, whether Claimant's ATP, Dr. Brian Williams, made a valid MMI determination under C.R.S. § 8-40-201(11.5) and *Town of Ignacio v. ICAO,* 70 P.3d 513 (Colo. App. 2002);

- Should the ALJ find that the ATP did not make a valid MMI determination, whether Respondents' June 3, 2016 FAL based upon the invalid MMI determination should be stricken;

- Whether the MMI/*Town of Ignacio* issue was ripe and the ALJ had jurisdiction to resolve that issue;

- Whether Claimant waived her right to request a hearing by filing her application before the DIME process terminated; and

- Whether PALJ Barbo's August 29, 2016 PHO properly held the DIME process in abeyance.

- The ALJ denied Respondents' oral motion to add the affirmative defense of intervening event on grounds that the defense was asserted against TTD benefits and neither party endorsed TTD as an issue for the December 6, 2016 hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant suffered a compensable work injury to her left knee on or about 3/20/15. In addition, the parties stipulated that Dr. Brian Williams and Dr. Nemesh Patel and their referrals are authorized providers in this claim.

2. Claimant is a package driver for employer, UPS, and had worked in this position for 18 years as of the date of injury.

3. Claimant's usual delivery truck had an automatic transmission. At the time of her injury, her truck was in the shop and she was using a replacement vehicle with a manual clutch transmission. Claimant made approximately 320 stops over a two day period ending March 20, 2015, requiring repetitive clutching. Afterwards she experienced significant pain and swelling in her left knee. Claimant had no prior history of left knee pain or swelling.

4. Initially, Claimant went to urgent care and took a week off of work. She returned to work on March 30, 2015, but the knee pain returned. Employer sent claimant to Dr. Brian Williams, M.D., MPH, for medical treatment. Claimant saw Dr. Williams on April 2, 2015.

5. Dr. Williams is board certified in Occupational and Environmental Medicine as well as Family Medicine. He also has Level II accreditation with the Colorado Division of Workers' Compensation. At hearing, without objection, Dr. Williams was qualified and testified as an expert in Occupational and Environmental Medicine as well as Family Medicine.

6. Dr. Williams diagnosed a medial meniscal tear and "reactive arthritis from clutching repetitively over 2 days." His diagnoses were based upon the mechanism of injury (repetitive clutching), Claimant's symptoms, age and work history, as well as the clinical findings of his examination of Claimant. He noted that Claimant had no prior history of knee pain or swelling. Dr. Williams opined that the acute work activity of repetitive clutching likely caused her meniscal tear and also caused a flare of her significant but asymptomatic pre-existing arthritis. Dr. Williams further explained that Claimant's previously non-symptomatic arthritis had reacted to the aggravation of the repetitive clutching.

7. Respondents' RIME, Dr. John Schwappach, agreed that the acute work activity on March 20, 2015 aggravated Claimant's pre-existing arthritis: "The temporal relationship between the onset of her pain and the March 2015 event indicate an exacerbation of the pre-existing degenerative changes in her left knee."

8. Dr. Williams prescribed a course of conservative treatment including physical therapy, anti-inflammatories, rest, and work restrictions.

9. About three weeks after her first examination with Dr. Williams, Claimant's physical therapist noticed unusual swelling in Claimant's left thigh. Dr. Williams testified that the thigh swelling was very different, as the original knee swelling he observed was discrete and confined to the knee joint itself. An MRI was performed revealing a large lipoma, a benign fatty tumor.

10. Dr. Williams found the lipoma unrelated to the work injury, and it was treated outside of the workers compensation system. Treatment for Claimant's work injury was temporarily suspended until after the lipoma was surgically removed and rehab of Claimant's thigh was completed.

11. An MRI was performed on Claimant's knee on July 20, 2015, while she was still rehabilitating from the lipoma surgery. The MRI confirmed Dr. Williams' original diagnosis, finding a large medial meniscus tear as well as chondromalacia with "reactive marrow changes" and "[s]ubperiosteal fluid along the anterior cortex of the patella probably related to stress reaction." Chondromalacia is an arthritic condition of the knee that involves thinning of the cartilage caps of the bones in the knee over time.

12. Dr. Williams opined that the stress reaction indicated by the MRI was consistent with a new activity which caused swelling to the pre-existing, but previously non-symptomatic, chondromalacia. He further opined that the "new activity" was the March 20, 2015 work injury, which had aggravated or accelerated the pre-existing arthritic condition.

13. Dr. Williams resumed conservative treatment of Claimant's knee at the conclusion of her lipoma rehab in early August of 2015. However, conservative therapy ultimately failed to improve Claimant's condition. Dr. Williams concluded that the aggravation of the previously non-symptomatic chondromalacia had not subsided with conservative treatment and eventually became permanent.

14. Dr. Williams concluded that the work activity of clutching on March 20, 2015 caused Claimant's meniscal tear and aggravated or accelerated her chondromalacia to the point that it had become permanent.

15. Dr. Williams referred Claimant to an orthopedic surgeon, Dr. Mitchell Robinson. Dr. Robinson advised against proceeding with arthroscopic surgery to address the torn meniscus alone, because of the "accelerated arthritis." Instead, he provided a steroid injection, which was ineffective, and counseled that knee replacement surgery may be necessary in the future.

16. Dr. Williams referred Claimant to Dr. Nemesh Patel, another orthopedic surgeon, for a second opinion. Dr. Patel concurred with Dr. Robinson and recommended a series of synthetic cartilage injections as a means to stave off knee replacement. The injections did not work and Claimant's condition worsened. Having exhausted more conservative measures, Dr. Patel requested authorization for knee replacement surgery because arthroscopic surgery alone "would not provide long term benefit."

17. Respondents denied Dr. Patel's request for authorization to perform the knee replacement by the letter from counsel dated April 13, 2016. Counsel informed Dr. Patel that Respondents intended to file an application for hearing to challenge his request.

18. Dr. Williams saw Claimant on May 17, 2016, after surgery had been denied. Upon examination he found

> [Claimant h]as had no interval improvement. She is not making any gains for her left knee. She was unable to complete work hardening, so she has not been able to return to work.

19. In completing the Division's Physician's Report, Dr. Williams checked the MMI box (*id.,* p. 60), but explained in his narrative report:

> No further conservative treatments indicated. ***I do not think she will have reasonable recovery until such time as she***

> ***completes knee replacement surgery on the left.*** She and her attorney will continue moving forward with their claim against the insurance carrier. In the meantime, I feel she is a MMI ***because no further recovery is expected without surgery.***
>
> . . .
>
> Additionally, she was unable to complete work hardening, and could not overcome her current temporary work restrictions. Therefore, I feel she has permanent work restrictions. ***These could perhaps be rescinded after knee replacement surgery and subsequent rehabilitation.***

20. The ALJ finds that Dr. Williams' May 17, 2016 note indicates that he believed that further treatment, specifically knee replacement surgery, would likely improve Claimant's condition resulting from her work injury.

21. Dr. Williams explained at hearing that he considered Claimant at MMI only with respect to conservative treatment, which was all that had been approved by Respondents. Ex. 2, p. 64b (12/2/16 email from Brian Williams to Brittany Pintor (Liberty Mutual) subject: RTW for Sandra Arnhold) ("I placed her at MMI with impairment since she was failing conservative care."). He testified that, on May 17, 2016, he reasonably expected the surgery would improve Claimant's condition. He explained the surgery would give her the best chance for a reasonable recovery from her work injury because she was a good candidate from an age and fitness perspective and because the surgery would likely extend her work life and enable her to do the things she wanted in a pain-free or -reduced fashion. He testified that surgery was a better alternative than recurrent temporary measures, such as injections and physical therapy, all of which had failed to get her back to work.

22. In light of Respondents' denial of the requested surgery, however, he felt "My hands were tied." He placed her at MMI for conservative care only, hoping she could get the surgery she needed outside the workers' compensation system since Respondents had denied it.

23. On June 3, 2016, Respondents filed an FAL attaching Dr. Williams' May 17, 2016 note. On June 16, 2016, Claimant filed an objection and notice and proposal.

24. Claimant went forward with the knee replacement surgery outside of the workers compensation system in August of 2016. Her surgeon, Dr. Patel, released her for work with no restrictions starting December 1, 2016.

25. Dr. Williams examined Claimant at Respondents' request on December 2, 2016. Asked at hearing to opine on her post-surgical condition, he testified:

> She did remarkably well after her knee replacement surgery and she's done very well with her rehab and has progressed to the point in both her strength and range of motion with the

> knee arthroplasty and the joint replacement that her surgeon Dr. Patel cleared her to return to work full duty, no restrictions. And I agree with his assessment.

26. At hearing, Respondents' counsel asked Dr. Williams to speculate as to whether Claimant had attained MMI by the December 2, 2016 examination. On re-direct he clarified that he had not been asked to make an MMI determination at the time and to do so he would have had to perform procedures which he did not perform.

27. The ALJ finds Dr. Williams' opinions and conclusions credible, persuasive and supported by the medical records.

28. The ALJ finds that Dr. Williams did not determine Claimant was at MMI on December 2, 2016.

Additional Procedural History

29. As discussed above, prior to Dr. Williams' May 17 2016 note, on March 13, 2016, Respondents filed an application for hearing in response to Dr. Patel's request for authorization for the knee replacement surgery. A hearing on Respondents' application was set for August 11, 2016 on medical benefits, reasonable and necessary, and relatedness, among other issues. In response to and predicated upon Dr. Williams' May 17 2016 note, Respondents filed a final admission on June 3, 2016. Claimant filed an objection and notice and proposal on June 16, 2016.

July 27, 2016 PHO

30. At a July 27, 2016 pre-hearing conference, Respondents moved to hold in abeyance the August 11, 2016 hearing they had requested on medical benefits pending completion of the DIME process. Claimant argued that because Dr. Williams' MMI determination was ambiguous, the hearing should go forward for a factual determination as to whether Claimant was actually at MMI, pursuant to *Town of Ignacio v. ICAO*, 70 P.3d 513 (Colo. App. 2002). In his July 27, 2016 pre-hearing order (PHO), PALJ Gallivan found that "[a]mbiguity in the medical report provides a basis for an objection to the FAL and a hearing regarding the factual issues raised by such ambiguity." *Id.* However, because the *Town of Ignacio* issue had not been endorsed, he held the August 11, 2016 hearing in abeyance with regard to medical benefits, finding that issue was not ripe "unless and until this is a finding that Claimant is not at MMI (either via a DIME or an order finding the ATP did not actually place Claimant at MMI)." *Id.*

31. In response to the July 27, 2016 PHO, on July 28, 2016 Claimant filed an application for hearing, which was amended on August 18, 2016 to limit the hearing to the *Town of Ignacio* issue, consistent with Judge Gallivan's PHO. The hearing on Claimant's application was originally set for December 1, 2016, but was continued to December 6, 2016.

8/29/16 PHO

32. On August 12, 2016, Claimant filed an Opposed Motion to Hold the DIME Process in Abeyance until the factual question of Claimant's MMI status was resolved at hearing by an OAC ALJ. A pre-hearing conference was held before PALJ Barbo on August 25, 2016. He granted Claimant's motion, holding:

> The DIME process contemplates that an authorized treating physician has made an appropriate definitive determination of maximum medical improvement. If the determination [of] maximum medical improvement is ambiguous, then the DIME process cannot proceed until it is determined whether the claimant is actually at maximum medical improvement.

9/13/16 PHO

33. At the September 13, 2016 PHC before PALJ Steninger, Respondents moved to strike the MMI/*Town of Ignacio* issue from Claimant's hearing application. Respondents asserted that the MMI ambiguity issue was not ripe, arguing the DIME has exclusive jurisdiction to resolve ambiguities in the ATP's report once the DIME process starts. Judge Steninger rejected this argument, holding that under *Town of Ignacio* an OAC merits judge has jurisdiction to resolve factual ambiguities in an ATP's MMI determination. "Once Claimant exercised her right to challenge the ambiguity of the MMI finding through a *Town of Ignacio* based hearing, the issue became ripe and ready for determination."

34. Respondents also argued Claimant had waived the right to a hearing by filing her application more than 30 days after the FAL. Judge Steninger rejected this argument based upon the express language of C.R.S. § 8-43-203(b)(II)(A), which states that "the claimant is not required to file a request for hearing on disputed issues that are ripe for hearing until the division's independent medical examination process is terminated for any reason." *Id.* (emphasis added by PALJ Steninger). Because Claimant timely filed her objection and notice and proposal, he found:

> [t]he statute states that Claimant is not "required" to file an application for hearing on ripe issues until the DIME process is concluded, but does not state that Claimant is prohibited from filing such application prior to the DIME process being terminated.

Accordingly, he held that Claimant's application was timely and that she had not waived her right to apply for hearing.

35. At the September 13, 2016 PHC, Respondents also challenged Judge Barbo's order holding the DIME process in abeyance. PALJ Steninger confirmed Judge Barbo's order, holding that an OAC merits judge had jurisdiction to resolve the factual issue of whether Claimant had reached MMI.

36. Respondents did not endorse review of PALJ Steninger's September 13, 2016 PHO for the December 6, 2016 hearing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to insure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1).

A workers' compensation case is decided on its merits. C.R.S. § 8-43-201. The requirements of proof for civil non-jury cases in the district courts apply in workers' compensation hearings. C.R.S. § 8-43-210. The ALJ's factual findings concern only evidence that is dispositive of this issues involved; the ALJ has not addressed every piece of evidence that may lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering Inc. v. Industrial Claims Appeals Office*, 5 P. 3d 385 (Colo. App. 2000).

C.R.S. § 8-42-101(1)(a), provides:

> Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.

C.R.S. § 8-40-201(11.5), defines "[m]aximum medical improvement" as:

> [A] point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.

"An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement as defined in section 8-40-201(11.5)." C.R.S. § 8-42-107(8)(b)(I).

A DIME "is not a prerequisite to the ALJ's resolution of a factual dispute concerning . . . the issuance of conflicting or ambiguous opinions concerning whether the claimant has reached MMI." *Blue Mesa Forest v. Lopez*, 928 P.2d 831, 833 (Colo. App. 1996) (ATP retracted initial MMI determination).

OAC merits judge must resolve factual questions raised by ATP's ambiguous opinion as to whether Claimant is at MMI

Where an ATP's report is ambiguous with respect to MMI that issue "must be remanded [to the ALJ] for a factual determination as to whether the [physician] found the claimant to be at MMI." *Town of Ignacio v. ICAO,* 70 P.3d 513, 515 (Colo. App. 2002).

In *Town of Ignacio*, a treating physician (hand specialist) checked the "MMI" box on the Physician's Report form, but stated in his narrative that the claimant might seek surgery "if she could not live with the pain." 70 P.3d at 515, *see also id.* at 516 ("implying that claimant was not at MMI"). The court of appeals found this ambiguity created a factual dispute as to whether the ATP had determined that C was at MMI. As a factual dispute, it was remanded to the ALJ to be resolved. *See also Blue Mesa Forest v. Lopez*, 928 P.2d at 833 (ATP issued two conflicting opinions on MMI creating factual dispute for ALJ to decide) and *Magnetic Eng'g, Inc. v. ICAO,* 5 P. 3d 385, 387 (Colo. App. 2000) (DIME's ambiguous report on MMI presented factual issue).

Similar to the facts in *Town of Ignacio,* Dr. Williams' May 17, 2016 note created a factual ambiguity by both checking the "MMI box" in the Division's Physician's Report form and by opining in his narrative report that knee replacement surgery was necessary for Claimant to obtain full recovery from her work injury. Under *Town of Ignacio*, ambiguity in an ATP's MMI determination raises a factual question that must be resolved by a merits ALJ. *Town of Ignacio,* 70 P.3d at 515.

Jurisdiction/Ripeness/Collateral attack on DIME process

Respondents' argue that the ALJ has no jurisdiction to resolve the MMI issue in this case because issue is the sole province of the DIME and therefore is not ripe. In their response to Claimant's application, Respondents make the same argument in various ways by endorsing the issues of jurisdiction, ripeness and collateral attack on DIME process. This argument conflicts with the relevant case law. The court of appeals has specifically held that a DIME "is not a prerequisite to the ALJ's resolution of a factual dispute concerning . . . the issuance of conflicting or ambiguous opinions concerning whether the claimant has reached MMI." *Blue Mesa Forest*, 928 P.2d at 833. Accordingly, under *Town of Ignacio* and *Blue Mesa Forest*, the merits ALJ in this case clearly has jurisdiction to resolve the factual ambiguities raised by Dr. Williams' May 17, 2016 note.

Further, the *Town of Ignacio* issue became ripe once Dr. Williams issued his ambiguous note and Respondents filed their FAL predicated upon it. Respondents have conceded as much by arguing that the MMI issue is ripe for determination by the DIME. Respondents' arguments are not supported by the facts or the law and are rejected.

Dr. Williams' May 17, 2016 note did not make a valid MMI determination under the Act

As discussed above, in relevant part, the Act defines MMI as that point in time when both (1) Claimant's work-related condition "has become stable;" and "when no further treatment is reasonably expected to improve the condition." C.R.S. § 8-40-201 (11.5). Dr. Williams' note and hearing testimony indicate that further treatment – *i.e.,* the knee replacement surgery recommended by Dr. Patel – was reasonably expected to improve Claimant's condition. He explained at hearing that, in his mind, his "MMI" determination applied only to conservative care because Respondents had denied authorization for the surgery that was needed to enable Claimant to recover from her work injury. Dr. Williams specifically testified that knee replacement surgery offered the best alternative for Claimant to have a reasonable recovery from her work injury. His opinion was confirmed by his December 2, 2016 examination of Claimant, after the surgery performed byDr. Patel in August of 2016 outside the workers' compensation system. Dr. Williams concluded that the surgery and subsequent rehabilitation had successfully enabled Claimant to return to work full duty.

Based upon substantial evidence on the record, the ALJ concludes Claimant had not reached MMI on May 17, 2016 and that such determination has not yet been made by her ATP.

Respondents' FAL was premature and must be stricken

Respondents filed their June 3, 2016 FAL predicated upon the assumption that Dr. Williams' May 17, 2016 note constituted a valid MMI determination under the Act. Based on substantial evidence in the record, discussed above, the ALJ concludes Dr. Williams May 17, 2016 note did not constitute a valid MMI determination under the Act. *See* C.R.S. § 8-40-201 (11.5). As a consequence, Respondents' FAL was premature and must be stricken.

Medical Benefits: knee replacement surgery was related to and reasonably necessary

Respondents endorsed the issue of medical benefits in their response to Claimant's application for hearing. Respondents are required to furnish medical benefits and all other compensation provided for under the Act, "[w]here the injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment and is not intentionally self-inflicted." C.R.S. § 8-41-301. In particular, Respondents must furnish all medical treatment and supplies "reasonably needed . . . to cure and relieve the employee from the effects of the injury." *Id.* § 8-42-101(1)(a).

Here, substantial evidence proves that, while performing her duties as a package driver in the course of her employment with UPS, Claimant tore her left medial meniscus and aggravated a previously non-symptomatic arthritic condition. Dr. Williams determined that repetitive clutching likely caused meniscal tear and flare up of pre-

existing arthritis. He later noted that Claimant's work injury aggravated her previously asymptomatic chondromalacia "which had never previously bothered her." Even Respondents' RIME agreed that the March 20, 2015 acute work activity aggravated the pre-existing degenerative condition of Claimant's knee. Further, the evidence demonstrates that the aggravation and acceleration of Claimant's arthritic condition did not resolve with conservative treatment and eventually became permanent, requiring surgery. Respondents presented no persuasive evidence to the contrary.

A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). An otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *See Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Indus. Comm'n*, 736 P.2d 1262, 1263 (Colo. App. 1986) ("[I]f a disability were 95% attributable to a pre-existing, but stable, condition and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.").

A claimant must be compensated if a work-related injury "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought." *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). The evidence clearly established that the March 20, 2015 work injury aggravated, accelerated or combined with Claimant's previously non-symptomatic arthritis to become disabling and that the knee replacement surgery performed by Claimant's authorized surgeon, Dr. Patel, was reasonably necessary to cure or relieve its effects.

For the reasons set forth above, The ALJ concludes that Respondents are liable for the knee replacement surgery performed by Dr. Patel and related treatment, medication, supplies and equipment because they were related to and reasonably necessary to cure or relieve the effects of Claimant's March 20, 2015 work injury.

In addition to the issues discussed above, Respondents also endorsed the issue of waiver and sought review of PALJ Barbo's August 29, 2016 PHO holding the DIME process in abeyance.

Claimant did not waive her right to request a hearing

Respondents previously raised the waiver issue at the September 13, 2016 prehearing conference before PALJ Steninger. Judge Steninger denied Respondents' oral pre-hearing motion to strike the MMI/*Town of Ignacio* issue from Claimant's hearing application on the grounds stated in his order and summarized above.

Respondents argue here, as they did before PALJ Steninger, that Claimant waived the MMI/*Town of Ignacio* issue by failing to file an application for hearing within 30 days after the date of the final admission, selectively citing the first sentence of C.R.S. § 8-43-203(2)(b)(II)(A). Respondents fail to consider the next sentence,

however, which expressly states: “If an independent medical examination is requested pursuant to section 8-42-107.2, the claimant is not required to file a request for hearing until the divisions independent medical examination process is terminated for any reason.” C.R.S. § 8-43-203(2)(b)(II)(A) (emphasis added). Once a claimant requests a DIME, she is not required to file an application for hearing until that process is terminated – essentially tolling the 30 deadline.

Here, Claimant filed a timely objection and notice and proposal, tolling the 30 day hearing request deadline. Her application was filed July 28, 2016, prior to the completion of the DIME process. At that time, the parties had not even selected a DIME physician. For these reasons, The ALJ concludes that Claimant timely filed her hearing application and did not waive her right to a hearing. To the extent Respondents sought review of PALJ Steninger’s September 13, 2016 PHO on this issue, their arguments are rejected and Judge Steninger’s order is affirmed.

The August 29, 2016 PHO properly held the DIME process in abeyance

Respondent’s seek review of PALJ Barbo’s August 29, 2016 PHO holding the DIME process in abeyance pending resolution of the MMI issue at a *Town of Ignacio* hearing. Respondents argue that in making his ruling, Judge Barbo made a prohibited factual finding. The ALJ is not persuaded. In pertinent part, Judge Barbo found:

> The DIME process contemplates that an authorized treating physician has made an appropriate definitive determination of maximum medical improvement. If the determination [of] maximum medical improvement is ambiguous, then the DIME process cannot proceed until it is determined whether the claimant is actually at maximum medical improvement.
>
> Here the authorized treating physician’s statements do not make it clear that the claimant is unambiguously at maximum medical improvement.

The ALJ concurs with and affirms PALJ Steninger’s interpretation of Judge Barbo’s pre-hearing conference order:

> A careful reading of Judge Barbo’s order shows that he did not find that the MMI determination was ambiguous or unambiguous; rather, he implicitly held that the MMI issue requires facts to found by a merits-judge.

Once Claimant raised the ambiguity of the MMI determination by filing an application for hearing on the issue, the question had to be resolved by a merits judge. If an ALJ determines that the Claimant was not at MMI, the DIME process is not ripe and cannot proceed.

For the reasons discussed above, the ALJ affirms PALJ Barbo’s August 29, 2016 order holding the DIME process in abeyance.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The factual issue raised by the ATP's May 17, 2016 note as to whether Claimant had reached MMI was ripe and the ALJ has jurisdiction to resolve it;

2. The ATP's May 17, 2016 note does not make an MMI determination consistent with the Act and the ALJ finds and concludes that Claimant had not been placed at MMI at that time and that the ATP has yet to make that determination consistent with the Act;

3. Claimant's application for hearing was timely and her right to assert the issue of whether Claimant had reached MMI was not waived;

4. The June 3, 2016 FAL, predicated upon the ATP's May 17, 2016 note is stricken because Claimant had not reached MMI at that time;

5. Respondents are liable for the knee replacement surgery performed in August of 2016 by Claimant's authorized surgeon, Dr. Patel, and for related treatment and other medical benefits because they were related to and reasonably necessary to cure or relieve the effects of Claimant's March 20, 201616 work injury;

6. PALJ Barbo's July 29, 2016 pre-hearing order holding the DIME process in abeyance is affirmed; and

7. All other issues are reserved for later determination.

DATED: April 10, 2017

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

The issues presented for determination include: 1) Claimant's entitlement to temporary total disability benefits, 2) average weekly wage and, 3) whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment precluding entitlement to TTD benefits after July 21, 2016.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On May 17, 2016 Claimant, who works as a housekeeper for Employer sustained an injury to her low back after falling backwards and landing on her right buttock. Said injury was admitted and Claimant has received medical benefits pursuant to the Workers' Compensation act of Colorado.

2. Claimant's duties as a housekeeper included mopping, sweeping, dusting, and other tasks associated with cleaning hospital rooms. In performing these tasks, Claimant testified that she spent approximately one-half of her work days walking and bending at the waist. In addition Claimant would have to lift, push and pull items weighing more than 10 pounds on a regular basis.

3. After she was injured, Claimant was directed by Employer to Concentra Medical Center for treatment. Claimant came under the care of Dr. Walter Larimore and Dr. Randall Jones who provided medications, and referrals to physical therapy. Claimant was also referred to Dr. Wiley Jenkins and Dr. Shimon Blau who provided injection therapy.

4. Claimant was first seen at Concentra by Walter Larimore on May 18, 2016. On this date, Claimant gave Dr. Larimore a history of being startled while cleaning and then falling backwards landing on her right buttock. Claimant told Dr. Larimore that the fall knocked the breath out of her for a moment and the pain was such she required assistance to get to a chair. Claimant further told Dr. Larimore that while the pain was better, it hurt to sit or stand too long. Dr. Larimore diagnosed Claimant with multiple buttock contusions. He imposed work restrictions of lifting up to ten pounds constantly, occasional bending, standing, and walking, occasional work requiring trunk rotation, and no driving the company vehicle. In his initial treatment note, Dr. Larimore specifically noted that Claimant's English, "is not great" and so her history may be inaccurate. Under the section of the note titled "Plan" Dr. Larimore referred Claimant to a Korean Interpreter.

5. Claimant testified that she has a limited ability to speak, read, and write English. Claimant testified at hearing, through a translator, that she can understand small words in English; mainly those associated with cleaning.

6. Claimant was next seen at Concentra by Dr. Randall Jones on May 20, 2016. On this date, Claimant was having low back and hip pain with some intermittent pain down her right leg. Following this appointment, Dr. Jones removed Claimant from work entirely until she was cleared to return by Dr. Larimore. Dr. Jones noted that Claimant's husband was there to help interpret, but hoped that there would be a professional interpreter at the follow up visit. Dr. Jones also noted on this date that she is concerned about driving, "as her husband is unable to take her to work."

7. On May 23, 2016, Claimant was reevaluated by Dr. Larimore. Dr. Larimore again noted that he was hampered by Claimant's limited English and that communication is difficult. During this appointment, Claimant was still experiencing low back, SI, and buttock pain radiating down the right leg. Dr. Larimore prescribed medication and recommended physical therapy. Dr. Larimore assigned the same work restrictions that he had imposed on May 18, 2016.

8. Claimant was provided with an offer of modified duty approved by Dr. Larimore on May 23, 2016. Claimant's modified duty involved cleaning and disinfecting room keys by dipping the keys in a bucket of pre-mixed chemical and then rinsing the keys with fresh water while seated at a table. Claimant responded to this offer of modified employment by returning to work on May 24, 2016. Claimant testified that she was able to stand while cleaning the keys and that she wore gloves and goggles.

9. Claimant worked her modified duty position on May 24, 2016 from 3:30 p.m. to 6:30 p.m. She testified that she could not continue beyond the three hours worked as she began to experience severe pain in her hip and back. She also testified that her eyes starting hurting, she got a headache and got dizzy. Claimant was sent home by her supervisor after these three hours of modified duty work. During her testimony, Claimant noted that she could smell the chemical used to disinfect the keys and suggested that it irritated her eyes and nose.

10. Upon Claimant's return to work on May 24, 2016, Barbra Curd, Employer's Director of Safety and Loss Control called Dr. Larimore indicating that Clamant had returned to work with crutches indicating that her symptoms were worse. Ms. Curd raised several concerns about the claim with Dr. Larimore prompting Dr. Larimore to indicate that he did not prescribe the crutches and that Claimant had reported to him that she was improved. Apparent discussion was had regarding Claimant's need for an interpreter to which Ms. Curd replied that Claimant was "totally fluent in English, but sometimes is nervous around folks she does not know." Ms. Curd's statement contradicts Claimant's testimony that her English skills are substantially limited.

11. In an office note dated May 25, 2016, from Physician Assistant (PA) Kenneth

Ginsberg it was noted that Claimant was given a cane at physical therapy, but was too unsteady and therefore got a crutch from a neighbor. PA Ginsburg noted that Claimant was not allowed to use the crutches at work without clearance. PA Ginsburg advised Claimant that she should use the crutches as needed for comfort.

12. Claimant was seen on June 1, 2016 by PA Ginsberg. On this day, PA Ginsberg assigned the same restrictions as on Claimant's May 23, 2016 appointment, noting that Claimant should "change positions periodically to relieve discomfort" and that she should "sit, stand or walk as needed for comfort." He also noted that Claimant "may not drive company vehicle due to functional limitations", noting further that Claimant should not drive at all. Regarding work, it was noted that Claimant was returned to modified duty and could work her entire shift.

13. Claimant was seen in follow up by PA Ginsberg on June 13, 2016 with complaints of persistent pain in her hips and low back. Claimant told PA Ginsberg that she was not working as she did not have transportation and that she did not feel she could do modified duty." PA Ginsberg referred Claimant to Dr. Wiley Jinkins for further evaluation and treatment. PA Ginsberg also continued the same work restrictions as imposed at her previous office visit.

14. Claimant returned to Concentra Medical Centers (Concentra) on June 20, 2016, for an initial physiatry evaluation by Dr. Blau. Claimant told Dr. Blau that her pain was worse with walking and sitting and that because of the pain she sits leaning to the left. Documentation from this date of visit reflects that Claimant presented to Concentra at 10:55 am and left at 11:56 am. Plans were made to initiate injection therapy.

15. Claimant's Pay Detail Reports admitted into evidence reflect that after she was evaluated by Dr. Blau she worked from 4:00 pm to 7:00 pm and from 7:30 pm to 11:30 pm on June 20, 2016. It is not clear what duties Claimant performed on this date; however, as Claimant remained restricted, the ALJ finds that she, more probably than not, performed the modified duty approved by Dr. Larimore, i.e. cleaning keys. The record is also not clear on how Claimant got to work on this date. Based upon the evidence presented, it is likely that her husband took her or she took a cab. Regardless, the record is clear that Claimant completed a seven hour shift.

16. On June 23, Claimant was seen in follow up appointment by Dr. Larimore. Claimant told Dr. Larimore that she has not returned back to modified duty due to transportation issues. She went on to tell Dr. Larimore that workers' compensation is "asking her to prepay for transportation which [she was] told would be reimbursed but [she] cannot afford this" as she is not receiving any "pay" from workers' compensation. Dr. Larimore indicated in this same note that communication with Claimant, even with an interpreter, is prolonged and difficult. Dr. Larimore assigned the same restrictions as on the previous visit and reiterated that claimant should not drive at all.

17. An addendum to the June 23, 2016, treatment note reflects that Ms. Curd called and reported that the Claimant had not "returned to work even though her

restrictions [could] be accommodated and she [was] wanted back at work as a valuable employee." The record also reflects that Ms. Curd notified Dr. Larimore that "transportation [had] been offered by the carrier."

18. Claimant was evaluated by orthopedic surgeon Dr. Jinkins on June 28, 2016. Dr. Jinkins felt that Claimant could not work if she had to work on her feet and use crutches but should be able to work part time sitting. In his office note, Dr. Jinkins wrote that Claimant does not have transportation to work and would have to take a taxi which would cost approximately $30.00 each way.

19. On July 21, 2016, Claimant returned to the modified duty position of cleaning and disinfecting keys as approved by Dr. Larimore on May 23, 2016. Claimant testified that she was prompted to return to work after receiving a phone call from someone at her employer informing her that if she did not return she would not have a job. Claimant testified that after approximately three hours of cleaning keys, she developed nausea and a headache. She alerted her supervisor and was sent home. The Pay Detail Report submitted in to evidence reflects that Claimant was paid for two hours and forty-five minutes of work on this date. She has not returned to work since.

20. Claimant was seen by Dr. Albert Hattem on August 2, 2016. During this visit Claimant was noted to ambulate with the aid of a wheeled walker. Dr. Hattem was concerned about Claimant presentation considering her "unrevealing MRI." He ordered an EMG study which was subsequently performed and interpreted to be normal. Given Claimant's persistent complaints and normal EMG, consideration was given toward the possibility that she had a subacute cervical myelopathy. Consequently, a cervical MRI was obtained which was unremarkable.

21. On August 23, 2016, Claimant was reevaluated by Dr. Jinkins who noted that Claimant was still having significant issues with pain. He felt that there was a "significant myofascial component to her . . . symptomatology" and that surgery was not indicated as the same would not "correct her problem." Dr. Jinkins noted that Claimant reported that she was not working and that there was no work available to her. Dr. Jinkins would go on to indicate after this report that he really did not see how Claimant could work at that time.

22. Claimant was seen in follow-up by Dr. Hattem on September 8, 2016. During this visit Claimant reported that her condition was "unchanged." She continued to complain of low back and right hip pain with radiation into the right leg. It was noted further that Claimant had been evaluated by Dr. Blau, Dr. Jenkins, Dr. Brinley and Dr. Scott and none of them had been able to discern a cause for her ongoing pain and functional limitations. An additional short course of physical therapy was scheduled after which Dr. Hattem anticipated performing an impairment rating. Dr. Hattem continued Claimant's restrictions, which the ALJ notes were previously accommodated by Employer.

23. Claimant presented to Dr. Hattem on October 13, 2016 with persistent low

back and right leg pain. On this date, Claimant was accompanied by a translator. Dr. Hattem noted that Claimant's persistent pain behaviors coupled with the negative diagnostic studies suggest that there were behavioral factors contributing to her pain complaints. Consequently, Dr. Hattem noted that he would schedule a psychological evaluation prior to claim closure. Dr. Hattem also recommended that Claimant proceed with one trial of a sacroiliac injection. Claimant's work restrictions remained unchanged.

24. On October 18, 2016, Claimant presented back to Dr. Jinkins with her husband and an interpreter. At this visit, Claimant was still ambulating with a walker. Claimant's husband advised Dr. Jinkins that Claimant is able to ambulate around the house occasionally without the walker or crutches but has fallen multiple times. In addition, Claimant's husband told Dr. Jinkins that Claimant seems to be significantly depressed. Dr. Jinkins opined that Claimant appears to have significant psychological depression which quite conceivably is affecting her recovery. Dr. Jinkins wrote in his report that based on Claimant's fairly profound depressive state and the fact she has fallen multiple times it would not be in Claimant's best interest to return to work. He did not feel that Claimant was employable.

25. On October 18, 2016 Employer sent Claimant a letter terminating her employment for job abandonment effective October 17, 2016.

26. Claimant was next seen by Dr. Jinkins on November 15, 2016, with her husband and an interpreter. At that time, Claimant was still experiencing pain in her back and legs. In addition, Claimant was not sleeping well; having crying spells, had no energy, and overall felt generally "listless." Dr. Jinkins raised concern that Claimant was psychologically depressed and was probably "somatizing" some of her mental and physical symptoms. Moreover, Dr. Jinkins noted Claimant's report that she was not working in so much as "she did not return to work and has had her job suspended." Claimant also informed Dr. Jinkins that as far as she knew, she had not been "officially" terminated. The ALJ interprets the exchange between Dr. Jinkins and Claimant regarding the status of her job evidence of Claimant's conscious decision not to return to work which she likely knew had affected the status of her continued employment with PCSI, especially since the termination letter had been sent approximately one month earlier.

27. On December 23, 2016, Claimant was placed at maximum medical improvement by Dr. Nicholas Kurz without impairment or restrictions.

28. Throughout the course of her treatment, Claimant's treating physicians approved various modified jobs for Claimant. Indeed, her physicians signed off on modified duty jobs on June 1, 2016, June 23, 2016, August 4, 2016, September 9, 2016, and October 17, 2016. Claimant testified that she did not receive any offers of modified employment. Nonetheless, she was provided with and started modified duty on May 24, 2016. She then completed a 7 hour shift on June 20, 2016 and returned to work again in a modified capacity on July 21, 2016. Consequently, the ALJ finds that Claimant accepted and began modified duty on May 24, 2016. In review of the

evidence presented, the ALJ is also mindful that Claimant's restrictions were largely unchanged throughout her course of care. While Claimant was later prohibited from driving, the evidence presented does not establish that her driving restriction precluded the performance of modified duty as approved by Dr. Larimore on May 23, 2016, as evidenced by the work she performed on June 20th and July 21st, 2016.

29. Mitchell Delduca, quality control manager/safety coordinator at Respondent-Employer testified that he would coordinate the modified job offers to Claimant. He further testified that he personally had her sign the modified job offers which led to her subsequent work on May 24th, June 20th and July 21, 2016. Mr. Delduca also testified that the job of cleaning keys included the use of an odorless chemical cleaner (Vinex) which is mixed with water in a bucket in which the keys are dipped. While Mr. Delduca did not offer persuasive testimony as to whether or not Vinex is irritating to the nose, throat, or respiratory tract, his testimony that Vinex is odorless contradicts Claimant's testimony that she could smell chemicals. He also testified that the use of goggles was to prevent any chemical from getting splashed into the eyes. According to Mr. Delduca, Claimant could alternate between sitting and standing while cleaning keys. He explained that Claimant's modified work station included an office chair with a reclining feature so as to accommodate Claimant with extending her leg.

30. Mr. Delduca also testified that after July 21, 2016, he attempted to get Claimant to return to modified duty by calling her at home and leaving messages on her voice mail. He also testified that he was unaware of whether Claimant received the additional aforementioned modified job duty offers or if she received his voice messages because no return phone calls were received from her. Mr. Delduca testified that after July 21, 2016, he never personally spoke with Claimant regarding modified job offers. Mr. Delduca testified that Claimant never used an interpreter at work and that part of Claimant's training as a housekeeper included watching videos, taking proficiency tests and participating in in-services presented in English. Regarding Claimant's command of English, Mr. Delduca testified that her skills were sufficiently proficient to answer phones and communicate with co-workers.

31. During her testimony, Claimant admitted that she received telephone messages from work at home but claimed that she did not understand what the messages meant. She also testified that she understood that messages left for her by someone at work were important. If Claimant did not understand the messages left for her, the evidence presented persuades the ALJ that she took no action to determine the significance of the messages. Finally she admitted that Employer had contacted her by phone previously regarding returning to work, testifying that after discussing her need to return to work, she went back on two occasions.

32. Macellino Perra, site director for Respondent-Employer, testified that he assists corporate management in coming up with modified jobs for injured employees. He testified that he had minimum contact with Claimant before her industrial injury and no direct contact with Claimant after. He testified that he was unsure if Claimant ever received any offers of modified employment after July 21, 2016.

33. Barbara Curd testified by telephone as to the corporate procedures for offering modified duties to injured workers. Ms. Curd testified that both a DOWC Rule 6-1 letter and the offers of modified duty were sent directly to Claimant until she retained counsel after which the same were sent to her counsel of record.

34. At the time she was injured, Claimant was earning $14.78 per hour. The wage records indicate that for the period January 1, 2016, through May 15, 2016, Claimant earned $10,564.13. Dividing this figure by the 135 day time period referenced above and multiplying by seven gives an average weekly wage (AWW) of $547.79. Under the circumstances presented here, this is the fairest way to determine Claimant's AWW.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of

the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). Based upon the evidence presented, the ALJ concludes that Claimant's professed inability to effectively understand and communicate in English is overstated. As noted, Claimant functioned at work without the assistance of an interpreter and according to Mr. Delduca her training during "Zero Week" was presented in English and consisted of watching videos, participating in in-services and taking proficiency tests. Moreover, she was noted in a report from Dr. Staudenmayer to converse with her husband in English and is, according to Ms. Curd, fluent in English. Claimant did not present convincing evidence to the contrary. Finally and most importantly, Claimant returned to work in a modified capacity after speaking with Mr. Delduca in English during which he explained the modified duty position approved by Dr. Larimore. Consequently, the ALJ finds unpursuasive, Claimant's assertion that she did not know what the messages left on her voice mail meant. Even if she did not know, Claimant, who admitted that the messages were important, no took action to determine what they meant in an effort to protect her position.

Claimant's Entitlement to Temporary Total Disability & Termination for Cause

D. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P. 3d 872 (Colo. App. 2001).

E. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998). TTD benefits ordinarily continue until the first occurrence of any one of the following: the employee reaches maximum medical improvement; the employee returns to regular or modified employment; the attending physician gives the employee a written release to return to regular employment; or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. § 8-42-105(3), C.R.S.

F. As found above, Employer made a modified employment offer to Claimant

in writing on May 23, 2016. Claimant accepted this offer and returned to modified work on May 24, 2016 after being off work entirely due to the effects of her industrial injury. Consequently, Claimant has proven by a preponderance of the evidence that she was temporarily totally disabled and entitled to indemnity benefits beginning May 20, 2016; however, on May 24, 2016, the provisions of § 8-42-105(3)(b), C.R.S. were met, and Claimant's entitlement to TTD properly terminated.

G. As Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply regarding her continued entitlement to TTD benefits. These identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if the claimant is responsible for his/her termination of employment, the wage loss which is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* W.C. No. 4-465-839 (ICAO February 13, 2002). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo.App. 2000).

H. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008). In this case, Claimant asserts primarily that a communication barrier precluded her from understanding and asking questions about her modified duty and the messages left on her voice mail. Respondents contend that Claimant voluntarily quit her job and as such committed a volitional act barring her entitlement to TTD benefits. Even assuming that Claimant voluntarily quit her job, *Blair v. Art C. Klein Construction Inc.,* W.C. No. 4-556-576 (ICAO, November 3, 2003), held that a claimant's voluntary resignation is not dispositive of the issue of whether he is responsible for termination of his employment. The *Blair* Court held that the pertinent issue is the reason claimant quit because the claimant is not "responsible" where the termination is the result of the injury. *See Colorado Springs Disposal v. Industrial Claim Appeals Office, supra; Gregg v. Lawrence Construction Co.,* W.C. No. 4-475-888 (ICAO, April 22, 2002); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO, April 24, 2002). According to *Blair,* "if the claimant was compelled to resign from

. . . employment such that it can be said the termination was a necessary and a natural consequence of the injury, rather than the claimant's subjective choice, the claimant would not be at fault for the termination." Here Claimant argues that her English speaking abilities prevented her from understanding the messages left on her voice mail and further, that she was subsequently removed from work by Dr. Jinkins. As such, that she was not responsible for her wage loss. As noted, concerning Claimant's argument that her English speaking capabilities precluded her from understanding the voice mail left for her encouraging her to return to work, the ALJ is not persuaded. Regarding Claimant's assertion that she was incapable as supported by the October 18, 2016 report, the ALJ is also unconvinced. Dr. Jinkins in his report of October 18, 2016, indicated that it would not be in Claimant's best interest to work. It is well established law that if the record contains conflicting opinions from attending physicians as to Claimant's ability to work the ALJ must resolve the conflict. *Bestway Concrete v. Industrial Claim Appeals Office,* 984 P. 2d 680 (Colo.App. 1999). Considering the entire evidentiary record, the ALJ concludes that Dr. Larimore's and Dr. Hattem's opinions regarding Claimant's restrictions and ability to return to modified duty work are more persuasive than the contrary opinions of Dr. Jinkins as of October 18, 2016. These opinions are supported by the November 3, 2016 report of Dr. Staudenmayer who opined that Claimant was somatizing her "emotional dysfunction" and that given her "psychological overlay . . . and given the lack of objective evidence from multiple specialist examinations, she [did] not appear to be a good candidate for further intervention." Dr. Jenkins appeared to give these opinions credence when he opined on November 15, 2016, that Claimant was not working in so much as she did not return to work and not that she was incapable of working.

I. In this case, there is a dearth of evidence to establish that Claimant's injury is the reason she did not return to work after July 21, 2016. Indeed, Claimant worked, by her testimony and the evidentiary records on three occasions after being cleared to modified duty and she presented no evidence to establish that Employer made Claimant's working conditions so difficult that a reasonable person in Claimant's position would feel compelled to resign. *Derr v. Gulf Oil Corp*., 796 F.2d 340, 344 (10th Cir. 1986). *Evenson v. Colorado Farm Bureau*, 879 P.2d 402 (Colo.App. 1993). Rather, the convincing evidence establishes that Claimant's persistent conscious refusal to respond to and otherwise communicate with Employer after being placed on modified duty explains her wage loss. In short, Claimant ignored Employers efforts to get her to return to modified work. The decision to ignore her Employer, despite knowing that such communication efforts were "important" was volitional and within Claimant's control. Moreover, by admitting that she knew that Employer's pains to reach out to her were important and nevertheless choosing to disregard those efforts persuades the ALJ that Claimant knew or reasonably should have known that refusing to communicate with the employer would result in her termination. Here, the ALJ is convinced that Claimant simply abandoned her job. Because her termination was not compelled by the natural consequence of the work injury, Claimant is "responsible" for her job separation and her claim for TTD benefits is permanently barred. *Blair v. Art C. Klein Construction Inc., supra.; Longmont Toyota, Inc.*, *supra*.

Claimant's Average Weekly Wage (AWW)

J. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo.App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo.App. 1997).*

K. Section 8-42- 102(2), C.R.S., sets forth certain methods of calculating the average weekly wage. Section 8-42-102(2)(d) provides that "[w]here the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from the daily wage in a manner set forth in paragraph (c) of this subsection (2).

L. Section 8-42-102(3), C.R.S., permits the ALJ discretion in the method of calculating the average weekly wage if the nature of the employment or the fact that the injured employee has not worked a sufficient length of time, has been ill or self-employed, or for any other reason, the specific methods do not fairly compute the average weekly wage. *Benchmark/Elite Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008). Here, the evidence presented demonstrates that at the time of the injury Claimant was being paid $14.78 per hour. In review of the payroll records, Claimant's hours fluctuated; however, for the twelve week time period January 1, 2016 through May 15, 2016, Claimant earned a total of $10,564.13. Dividing this figure by this 135 day time period and multiplying by seven gives an AWW of $547.99. Because of the fluctuation of hours it would not be fair to "cherry pick" Claimant's highest earning weeks or her lowest earning weeks to determine the AWW. The ALJ concludes that the fairest way to determine Claimant's AWW is to use total wages for time period from January 1, 2016 through May 15, 2016 and then average it out as it takes into account the various fluctuations in Claimant's wages over a longer period of time. Based on the above, Claimant has proven by a preponderance of the evidence that her AWW is $547.79.

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ORDER

It is therefore ordered that:

1. Claimant is entitled to TTD disability benefits beginning May 21, 2016 and continuing through May 23, 2016. Respondents may take credit for TTD benefits paid during this time frame.

2. Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for her termination of employment and her resulting wage loss, as such Claimant's request for TTD benefits after July 21, 2016 is denied and dismissed.

3. Claimant has proven, by a preponderance of the evidence an AWW of

$547.79.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 10, 2017

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that he suffered injuries to his knees and hips during the course and scope of his employment with Employer on July 10, 2016.

FINDINGS OF FACT

1. Employer is a large department store. Claimant began working for Employer on June 20, 2016 as a Customer Service Associate.

2. Claimant asserts that he sustained injuries to his knees and hips while performing his job duties for Employer on July 10, 2016. He specifically contends that he sustained his injuries as a result of prolonged standing, walking and lifting in excess of six hours with only one 15 minute break in the Customer Service area. Claimant does not claim that he sustained his injuries as a result of a fall or other traumatic event. His wage records reflect that he did not work for Employer in excess of 12.45 hours per week prior to July 10, 2016.

3. On July 12, 2016 Claimant visited Denver Health Medical Center for an examination. He reported that he has suffered a long-history of knee osteoarthritis that he attributed to serving in the army for eight years. Claimant noted that he had undergone arthroscopic knee surgery a few years earlier but his symptoms were slowly worsening. He reported that he had a long day at work without a break and his knees had become more swollen and painful. Upon physical examination Lucy W. Loomis, M.D. commented that Claimant exhibited decreased range of motion, swelling and effusion in both knees. Dr. Loomis diagnosed Claimant with "primary osteoarthritis of both knees" and recommended MRI's. She noted that Claimant could return to light duty employment with the restriction that he was only permitted to sit at work because of a "recent flare of his knee arthritis."

4. On July 26, 2016 Claimant visited Martin Kalevic, D. O. for an evaluation. Claimant reported that he had been working for Employer for two months in customer service and is often on his feet. He commented that by July 10, 2016 his knees had become so sore and swollen that he sought medical treatment. Claimant acknowledged that "there was no specific trauma. No falls. Nothing struck his knees." Dr. Kalevic noted that Claimant's right knee MRI revealed ""marked degenerative medial meniscal tearing and meniscal body extrusion" and the left knee MRI reflected "severe degenerative medial meniscus tearing and severe medical compartment osteoarthrosis." He questioned the causality of Claimant's injuries and specifically commented that "I do not feel that two months of working [for Employer] with no trauma caused any permanent damage to these knees." Specifically, in the three weeks

preceding the July 10, 2016 injuries, Claimant had worked 7.78, 9.6, and 5.60 hours respectively, each week. Dr. Kalevic diagnosed Claimant with bilateral knee pain with evidence of "severe degeneration." He concluded that Claimant was "heading toward knee replacement."

5. On October 4, 2016 Claimant visited Donald G. Eckhoff, M.D. for an examination. Dr. Eckhoff noted that Claimant had a three year history of bilateral knee pain that had progressively worsened over the previous six months. He noted that Claimant had undergone bilateral knee arthroplasty in 2013 and his symptoms had been fairly well-controlled with synvisc injections. Dr. Eckhoff explained that Claimant had recently started working for Employer and was on his feet for several hours. Claimant's work activities significantly aggravated his knee condition. Dr. Eckhoff diagnosed Claimant with bilateral knee osteoarthritis.

6. On December 1, 2016 Claimant underwent an independent medical examination with Eric O. Ridings, M.D. Dr. Ridings reviewed Claimant's medical records and conducted a physical examination. He concluded that Claimant's work activities for Employer for approximately 23 hours over a three week period did not "cause, aggravate or accelerate any medical condition." Dr. Ridings noted that Claimant has suffered a long history of severe, bilateral knee pain due to osteoarthritis since at least 2002 and bilateral knee replacements had been recommended by two orthopedic surgeons in 2013.

7. Dr. Ridings remarked that Claimant had been receiving viscosupplementation injections every six months since 2013 when he had his knee arthroscopies. By July 10, 2016 Claimant was overdue for his injections. Dr. Ridings commented that having increased knee pain when overdue for injections is entirely expected.

8. Upon examination, Dr. Ridings noted that Claimant had hypertropic osteoarthritis of each knee, but no acute inflammation. While performing straight leg raises Claimant lifted each leg only a few millimeters. Claimant exhibited pain behaviors as a result of the slightest pressure placed on his knees. He did not tolerate flexing either knee enough for ligament testing and did not tolerate any passive range of motion.

9. Dr. Ridings explained that Claimant had no evidence of acute inflammation, but exhibited ongoing bilateral osteoarthritis in his knees. He remarked that Claimant's "demonstrated abnormalities on physical examination today were wildly out of proportion to what would be medically expected and were entirely inconsistent with his observed ambulation in and out of the clinic. Additionally, if the patient were having the symptoms that he stated that he had during the physical examination, he would not have been able to walk at all."

10. Dr. Ridings noted that Claimant's claim was "entirely without merit from a medical standpoint." He explained that, although Claimant's work activities of standing, walking and carrying merchandise may have caused him to experience increased

symptoms because of his end-stage arthritis in both knees, his activities did not cause any worsening of his condition. Dr. Ridings summarized that Claimant has had a long history of bilateral knee complaints and required knee replacements for a number of years. A connection between Claimant's work activities for Employer for 23 hours during a three week period was thus "a highly improbable etiology for any significant increase" in pain to his knees or hips. Accordingly, Claimant's work activities on July 10, 2016 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

11. On January 31, 2017 Dr. Loomis authored a note regarding Claimant's bilateral knee condition. She stated that Claimant suffers from severe osteoarthritis of the knees. His symptoms remained stable until he began working for Employer in June of 2016. Dr. Loomis concluded that Claimant's "condition was aggravated after repeatedly carrying a lot of heavy loads."

12. Employer's Store Manager Brad Benson testified at the hearing in this matter. He explained that Claimant's position as a Customer Service Associate did not require him to restock merchandise and rarely required him to lift anything heavy.

13. Dr. Ridings testified at the hearing in this matter. He maintained that Claimant suffers from significant end-stage osteoarthritis in both knees and has received recommendations for total knee replacements. Dr. Ridings commented that Claimant remained symptomatic after knee surgeries in 2013 because he required synvisc injections every six months. He summarized that standing, walking, and lifting would not aggravate or accelerate Claimant's underlying degenerative knee and hip conditions.

14. Claimant has failed to demonstrate that it is more probably true than not that he suffered injuries to his knees and hips during the course and scope of his employment with Employer on July 10, 2016. Claimant asserts that he sustained injuries to his knees and hips while performing his job duties for Employer on July 10, 2016. He specifically contends that he sustained his injuries as a result of prolonged standing, walking and lifting in excess of six hours with only one 15 minute break in the Customer Service area. However, the record reveals that Claimant has suffered an extensive history of severe, degenerative, end-stage osteoarthritis and his work activities as a Customer Service Associate for Employer did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

15. Dr. Ridings persuasively explained that, although Claimant's work activities of standing, walking and carrying merchandise may have caused him to experience increased symptoms because of his bilateral, end-stage knee arthritis, his activities did not cause any worsening of his condition. He summarized that Claimant has had a long history of bilateral knee complaints and required knee replacements for a number of years. A connection between Claimant's work activities for Employer for 23 hours during a three week period was thus "a highly improbable etiology for any significant increase" in pain to his knees or hips. Accordingly, Claimant's work activities

on July 10, 2016 did not aggravate, accelerate or combine with his pre-existing condition to cause a need for medical treatment.

16. Dr. Kalevic questioned the causality of Claimant's injuries and specifically commented that "I do not feel that two months of working [for Employer] with no trauma caused any permanent damage to these knees." Specifically, in the three weeks leading up to the July 10, 2016 injuries, Claimant had worked 7.78, 9.6, and 5.60 hours respectively, each week. Dr. Kalevic diagnosed Claimant with bilateral knee pain with evidence of "severe degeneration" as reflected on the MRI's. He concluded that Claimant was "heading toward knee replacement."

17. In contrast, Dr. Loomis acknowledged that Claimant suffers from severe osteoarthritis of the knees. However, she noted that his condition was stable but became aggravated after repeatedly carrying heavy loads while working for Employer. Moreover, Dr. Eckhoff determined that Claimant's work activities significantly aggravated his pre-existing knee condition. However, the overwhelming medical records and the persuasive opinions of Drs. Ridings and Kalevic demonstrate that Claimant's work activities for Employer on July 10, 2015 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's symptoms constituted the natural progression of his pre-existing condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered injuries to his knees and hips during the course and scope of his employment with Employer on July 10, 2016. Claimant asserts that he sustained injuries to his knees and hips while performing his job duties for Employer on July 10, 2016. He specifically contends that he sustained his injuries as a result of prolonged standing, walking and lifting in excess of six hours with only one 15 minute break in the Customer Service area. However, the record reveals that Claimant has suffered an extensive history of severe, degenerative, end-stage osteoarthritis and his work activities as a Customer Service Associate for Employer did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

8. As found, Dr. Ridings persuasively explained that, although Claimant's work activities of standing, walking and carrying merchandise may have caused him to experience increased symptoms because of his bilateral, end-stage knee arthritis, his activities did not cause any worsening of his condition. He summarized that Claimant has had a long history of bilateral knee complaints and required knee replacements for a number of years. A connection between Claimant's work activities for Employer for 23 hours over a three week period was thus "a highly improbable etiology for any significant increase" in pain to his knees or hips. Accordingly, Claimant's work activities on July 10, 2016 did not aggravate, accelerate or combine with his pre-existing condition to cause a need for medical treatment.

9. As found, Dr. Kalevic questioned the causality of Claimant's injuries and specifically commented that "I do not feel that two months of working [for Employer] with no trauma caused any permanent damage to these knees." Specifically, in the three weeks leading up to the July 10, 2016 injuries, Claimant had worked 7.78, 9.6, and 5.60 hours respectively, each week. Dr. Kalevic diagnosed Claimant with bilateral knee pain with evidence of "severe degeneration" as reflected on the MRI's. He concluded that Claimant was "heading toward knee replacement."

10. As found, in contrast, Dr. Loomis acknowledged that Claimant suffers from severe osteoarthritis of the knees. However, she noted that his condition was stable but became aggravated after repeatedly carrying heavy loads while working for Employer. Moreover, Dr. Eckhoff determined that Claimant's work activities significantly aggravated his pre-existing knee condition. However, the overwhelming medical records and the persuasive opinions of Drs. Ridings and Kalevic demonstrate that Claimant's work activities for Employer on July 10, 2015 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's symptoms constituted the natural progression of his pre-existing condition.

ORDER

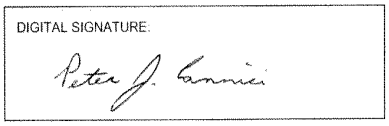
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to*

Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 4, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her May 5, 2015 Workers' Compensation claim in case number 4-992-278.based on a worsening of condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a cervical spine injury during the course and scope of her employment with Employer on August 3, 2016 in case number 4-993-931

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer performing a variety of tasks. Her job duties specifically involved selling auto parts, answering telephones, typing orders, sending out orders, checking-in freight, removing auto parts from shelves, restocking auto parts and unloading trucks.

2. On May 5, 2015 Claimant was unloading a truck. As she was pulling a tote filled with starters, alternators, brake pads and rotors she experienced a "pop" in her neck area. Claimant immediately suffered pain and tightness in her neck and shoulders. Employer directed Claimant to Concentra Medical Centers for an evaluation. The May 5, 2015 matter was assigned Workers' Compensation case number 4-992-278.

3. On May 6, 2015 Claimant visited Concentra. A physical examination of Claimant's cervical spine revealed tenderness and muscle spasms. Claimant received physical restrictions including no lifting, pushing, pulling in excess of 10 pounds or reaching above the shoulders. Medical providers referred Claimant to three sessions of physical therapy for two weeks.

4. On May 11, 2015 Claimant returned to Concentra for an examination. The medical records reflect that Claimant's neck pain had resolved and she was released to regular duty. However, Claimant testified that she was "doing about the same" and continued to experience neck pain and right arm tingling. She explained that she was not truthful with medical providers because she could perform physical therapy exercises at home and was unable to miss work because of her financial circumstances. Claimant thus returned to regular duty employment.

5. On May 21, 2015 Claimant returned to Concentra for an examination. She reported that she had experienced a 95% improvement, was performing her physical therapy exercises at home and was working without restrictions. Physicians released Claimant to Maximum Medical Improvement (MMI) with no permanent impairment.

6. Claimant testified that her symptoms worsened after she reached MMI and returned to regular duty employment. She detailed that her right arm tingling worsened and she developed left arm tingling. Claimant also noted constant neck pain and stiffness.

7. On August 20, 2015 Claimant visited personal physician Thomas J. Allen, M.D. for an examination. She reported hand pain over the prior two weeks. Claimant noted that her job duties involved significant typing and ordering parts. Dr. Allen diagnosed Claimant with work-related Carpal Tunnel Syndrome (CTS).

8. On August 20, 2015 Claimant completed an Injury Report for Employer. She explained that she was experiencing pain in her wrists from picking up items, holding merchandise and typing. Claimant remarked that she did not suffer a traumatic injury. She selected August 3, 2015 as her date of injury. Employer again referred Claimant to Concentra for medical treatment. The August 3, 2015 matter was assigned Workers' Compensation case number 4-993-931.

9. On September 1, 2015 Claimant returned to Concentra for an examination. Claimant reported bilateral wrist pain, sharp shooting pains and tingling from lifting heavy truck parts. Medical providers diagnosed Claimant with CTS and assigned physical restrictions.

10. On September 24, 2016 Claimant returned to Concentra for an evaluation. Claimant reported a lack of movement in her neck area. Treatment thus focused on her neck instead of her bilateral wrists.

11. On October 8, 2015 Claimant again visited Concentra for an examination. She continued to report neck pain radiating into her shoulders and decreased range of motion.

12. On November 3, 2015 Respondents filed a Final Admissions of Liability (FAL) in Workers' Compensation claim number 4-992-931 acknowledging that Claimant reached MMI on May 21, 2015 with no permanent impairment. Claimant did not object to the FAL and her claim closed by operation of law.

13. On February 8, 2016 Claimant underwent a cervical spine MRI. The MRI revealed degenerative changes at C4-C5 and C5-C6. There was also a central and left recess disc extrusion at the C6-C7 level.

14. On March 1, 2016 Claimant visited Shimon Blau, M.D. at Concentra for an evaluation. Dr. Blau noted that the cervical spine MRI revealed a herniated disc, cervicalgia and cervical radiculopathy.

15. On March 4, 2016 Claimant visited Douglas W. Beard, M.D. of the Front Range Center for Brain & Spinal Surgery. Dr. Beard remarked that principle complaints involved neck and shoulder pain. He diagnosed Claimant with a herniated nucleus pulposus on the left side at C6-C7 and an intermittent left C7 radiculopathy.

16. Claimant testified that she continues to experience pain and stiffness in her neck area as well as tingling in her left and right arms. She commented that, although her symptoms are similar to when she reached MMI, they have worsened. Claimant specifically detailed that she is suffering constant neck pain, limited neck motion and constant tingling in her arms. Nevertheless, Claimant acknowledged that she did not suffer an acute injury to her neck on August 3, 2015. Instead, she contends that her symptoms are related to the May 5, 2015 incident.

17. On September 6, 2016 Claimant filed a Petition to Reopen case number 4-992-278. She asserted that her condition has worsened since she reached MMI.

18. Claimant acknowledged that she has suffered a history of cervical spine injuries as a result of motor vehicle accidents and sports injuries. Claimant was involved in a motor vehicle accident in 1997 when she was 16 years old and developed ongoing neck pain. She also suffered neck pain as a result of playing sports as a teenager. A December 20, 2011 MRI revealed degenerative changes at the C4-C5, C5-C6 and C6-C7 levels. Moreover, in 2012 Claimant underwent nerve blocks for neck pain but the symptoms failed to resolve. She thus received additional treatment in the form of radiofrequency ablation. Finally, in 2013 Claimant strained her neck while playing football with her children.

19. On November 22, 2016 Claimant underwent an EMG of her left upper extremity. The EMG was normal with no evidence of acute or chronic cervical radiculopathy, brachial plexopathy, peripheral neuropathy, CTS or ulnar neuropathy.

20. On July 30, 2016 Claimant underwent an independent medical examination with Kathleen D'Angelo, M.D. Dr. D'Angelo reviewed Claimant's medical records, conducted a physical examination and prepared a detailed report. She also testified through an evidentiary deposition in this matter on February 24, 2017. Dr. D'Angelo concluded that Claimant has not suffered a worsening of her cervical spine injury since she reached MMI on May 21, 2015. She also determined that Claimant did not suffer a new cervical spine injury during the course and scope of her employment with Employer on August 3, 2015.

21. Dr. D'Angelo explained that Claimant suffered a cervical spine injury that resolved with conservative treatment. Claimant reached MMI on May 21, 2015. Claimant reported to Dr. D'Angelo that she returned to full duty work and continued until she began to experience bilateral arm pain in August 2015. Claimant maintained that she did not suffer pain for the period May until August, 2015. However, Dr. D'Angelo noted that, if Claimant had sustained a herniated disc as reflected on the MRI, she would have suffered her worst pain at the time of the injury. She commented that Claimant would have experienced a gradual decrease in pain as the disc was re-

absorbed into the body. Claimant also would have suffered radicular symptoms into her arms and hands at the time of the cervical spine injury. However, Dr. D'Angelo remarked that Claimant did not mention radicular symptoms until she visited personal physician Dr. Allen on August 20, 2015.

22. Dr. D'Angelo summarized that a worsening of an underlying condition is typically not characterized by intermittent periods without symptoms. She reiterated that with any type of a spinal injury individuals suffer the most pain at the time of injury with a gradual decrease in symptoms. Dr. Dangelo determined that "[i]t does not make medical sense" that Claimant was injured in May, had no symptoms by September and then had increased symptoms in October. Dr. D'Angelo remarked that Claimant had full range of motion in her neck area when she visited her personal physician in September 2015. There was simply no "linear relationship" between Claimant's initial injury in May 2015 and symptoms that manifested several months later. Finally, Dr. D'Angelo explained that Claimant's February 8, 2016 MRI as well as her November 22, 2016 EMG did not support Claimant's subjective complaints of worsening symptoms.

23. Dr. D'Angelo also explained that Claimant did not suffer a new industrial injury to her cervical spine on August 3, 2015. She remarked that when Claimant visited Concentra on September 1, 2015 she only reported bilateral wrist pain, shooting pain and tingling. Claimant did not report any neck pain. Furthermore, on September 3, 2015 Claimant visited her personal physician for sore throat symptoms. Claimant underwent a neck evaluation, did not have any difficulties in moving her neck and demonstrated full range of motion. Dr. D'Angelo reasoned that the lack of physical findings during the September 3, 2015 examination revealed that Claimant did not suffer a neck injury on August 3, 2015. Finally, Dr. D'Angelo commented that there was no mechanism for a cervical spine injury and no causality analysis that linked Claimant's cervical spine symptoms to an August 3, 2015 incident. Accordingly, Dr. D'Angelo could not causally connect Claimant's subsequent cervical spine complaints with an August 2015 industrial incident.

24. Claimant testified that she has been experiencing cervical spine symptoms since she was unloading a truck on May 5, 2015. She maintained that her cervical spine symptoms did not improve during her short course of conservative treatment in May 2015. Claimant remarked that she sought to return to regular duty employment because of financial concerns. She thus stated on May 21, 2015 that her symptoms had resolved. Claimant also maintained that her strenuous job duties caused a worsening of her cervical spine symptoms during the summer and fall of 2015.

25. Claimant has failed to establish that it is more probably true than not that she should be permitted to reopen her May 5, 2015 Workers' Compensation claim in case number 4-992-278 based on a worsening of condition pursuant to §8-43-303(1), C.R.S. On May 21, 2015 Claimant reached MMI with no permanent impairment. Claimant testified that she continues to experience pain and stiffness in her neck area as well as tingling in her left and right arms. She commented that, although her symptoms are similar to when she reached MMI, they have worsened. Claimant specifically detailed that she is suffering constant neck pain, limited neck motion and

constant tingling in her arms. Claimant's attributes her continuing neck symptoms to her May 5, 2015 industrial injury.

26. In contrast, Dr. D'Angelo persuasively explained that, if Claimant had sustained a herniated disc as reflected on the MRI, she would have suffered her worst pain at the time of the injury. She commented that Claimant would have experienced a gradual decrease in pain as the disc was re-absorbed into the body. Claimant also would have suffered radicular symptoms into her arms and hands at the time of the cervical spine injury. Dr. D'Angelo reasoned that the worsening of an underlying condition is typically not characterized by intermittent periods without symptoms. She reiterated that with any type of a spinal injury individuals suffer the most pain at the time of injury with a gradual decrease in symptoms. Dr. Dangelo determined that "[i]t does not make medical sense" that Claimant was injured in May, had no symptoms by September and then had increased symptoms in October. She persuasively summarized that there was simply no "linear relationship" between Claimant's initial injury in May 2015 and symptoms that manifested several months later. Finally, Dr. D'Angelo explained that Claimant's February 8, 2016 MRI as well as her November 22, 2016 EMG did not support Claimant's subjective complaints of worsening symptoms.

27. Dr. D'Angelo persuasively concluded that Claimant has not suffered a worsening of her cervical spine injury since she reached MMI on May 21, 2015. Moreover, the record reveals that Claimant has suffered an extensive history of degenerative changes to her cervical spine. Claimant's medical history and the persuasive testimony of Dr. D'Angelo reflect that she has not suffered a change in condition that entitles her to additional medical benefits. Accordingly, Claimant's request to reopen her May 5, 2015 Workers' Compensation claim in case number 4-992-278 based on a worsening of condition is denied and dismissed.

28. Claimant has also failed to demonstrate that it is more probably true than not that she suffered a cervical spine injury during the course and scope of her employment with Employer on August 3, 2016 in case number 4-993-931. Initially, Claimant acknowledged that she did not suffer an acute injury to her neck on August 3, 2015. Instead, she contends that her symptoms are related to the May 5, 2015 incident. Furthermore, Dr. D'Angelo reasoned that Claimant did not suffer a new industrial injury to her cervical spine on August 3, 2015. She remarked that when Claimant visited Concentra on September 1, 2015 she only reported bilateral wrist pain, shooting pain and tingling. Claimant did not report any neck pain. Furthermore, on September 3, 2015 Claimant visited her personal physician for sore throat symptoms. She did not have any difficulties in moving her neck and demonstrated full range of motion. Dr. D'Angelo reasoned that the lack of physical findings during the September 3, 2015 examination revealed that Claimant did not suffer a neck injury on August 3, 2015. Finally, Dr. D'Angelo commented that there was no mechanism for a cervical spine injury and no causality analysis that connected Claimant's cervical spine symptoms to an August 3, 2015 incident. Accordingly, Claimant as failed to demonstrate that her August 3, 2015 work activities aggravated, accelerated or combined with her pre-existing cervical spine condition to cause a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Worsening of Condition

4. Section 8-43-303(1), C.R.S. provides that a Worker's Compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

5. As found, Claimant has failed to establish by a preponderance of the evidence that she should be permitted to reopen her May 5, 2015 Workers' Compensation claim in case number 4-992-278 based on a worsening of condition pursuant to §8-43-303(1), C.R.S. On May 21, 2015 Claimant reached MMI with no

permanent impairment. Claimant testified that she continues to experience pain and stiffness in her neck area as well as tingling in her left and right arms. She commented that, although her symptoms are similar to when she reached MMI, they have worsened. Claimant specifically detailed that she is suffering constant neck pain, limited neck motion and constant tingling in her arms. Claimant's attributes her continuing neck symptoms to her May 5, 2015 industrial injury.

6. As found, in contrast, Dr. D'Angelo persuasively explained that, if Claimant had sustained a herniated disc as reflected on the MRI, she would have suffered her worst pain at the time of the injury. She commented that Claimant would have experienced a gradual decrease in pain as the disc was re-absorbed into the body. Claimant also would have suffered radicular symptoms into her arms and hands at the time of the cervical spine injury. Dr. D'Angelo reasoned that the worsening of an underlying condition is typically not characterized by intermittent periods without symptoms. She reiterated that with any type of a spinal injury individuals suffer the most pain at the time of injury with a gradual decrease in symptoms. Dr. Dangelo determined that "[i]t does not make medical sense" that Claimant was injured in May, had no symptoms by September and then had increased symptoms in October. She persuasively summarized that there was simply no "linear relationship" between Claimant's initial injury in May 2015 and symptoms that manifested several months later. Finally, Dr. D'Angelo explained that Claimant's February 8, 2016 MRI as well as her November 22, 2016 EMG did not support Claimant's subjective complaints of worsening symptoms.

7. As found, Dr. D'Angelo persuasively concluded that Claimant has not suffered a worsening of her cervical spine injury since she reached MMI on May 21, 2015. Moreover, the record reveals that Claimant has suffered an extensive history of degenerative changes to her cervical spine. Claimant's medical history and the persuasive testimony of Dr. D'Angelo reflect that she has not suffered a change in condition that entitles her to additional medical benefits. Accordingly, Claimant's request to reopen her May 5, 2015 Workers' Compensation claim in case number 4-992-278 based on a worsening of condition is denied and dismissed.

Compensability

8. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

9. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing

condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

10. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

11. As found, Claimant has also failed to demonstrate by a preponderance of the evidence that she suffered a cervical spine injury during the course and scope of her employment with Employer on August 3, 2016 in case number 4-993-931. Initially, Claimant acknowledged that she did not suffer an acute injury to her neck on August 3, 2015. Instead, she contends that her symptoms are related to the May 5, 2015 incident. Furthermore, Dr. D'Angelo reasoned that Claimant did not suffer a new industrial injury to her cervical spine on August 3, 2015. She remarked that when Claimant visited Concentra on September 1, 2015 she only reported bilateral wrist pain, shooting pain and tingling. Claimant did not report any neck pain. Furthermore, on September 3, 2015 Claimant visited her personal physician for sore throat symptoms. She did not have any difficulties in moving her neck and demonstrated full range of motion. Dr. D'Angelo reasoned that the lack of physical findings during the September 3, 2015 examination revealed that Claimant did not suffer a neck injury on August 3, 2015. Finally, Dr. D'Angelo commented that there was no mechanism for a cervical spine injury and no causality analysis that connected Claimant's cervical spine symptoms to an August 3, 2015 incident. Accordingly, Claimant as failed to demonstrate that her August 3, 2015 work activities aggravated, accelerated or combined with her pre-existing cervical spine condition to cause a need for medical treatment.

ORDER

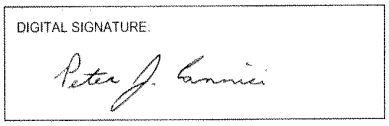
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request to reopen her Workers' Compensation claim in case number 4-992-278 is denied and dismissed.

2. Claimant's request for Workers' Compensation benefits in case number 4-993-931 is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 3, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

- Whether Respondent overcame the Division IME which found Claimant not at MMI?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On June 23, 2015, Claimant suffered a work related accident when she tripped over a floor mat at work and fell. Claimant was 62 at the time of the accident.

2. On June 26, 2015, Claimant was evaluated by Dr. Martin Kalevik. Dr. Kalevik reported that Claimant tripped on a rubber floor mat and fell forward on her hands and knees. Claimant complained of soreness in her neck, back, and shoulders. Claimant also presented with an abrasion on her right elbow, soreness of her left palm, and a contusion on her left lower shin. Dr. Kalevik assessed Claimant with cervical, thoracic, and posterior shoulder strains and muscle tightness, left wrist contusion, a right elbow superficial abrasion, and a left shin contusion.

3. On July 17, 2015, Claimant returned to Dr. Kalevik. He stated that Claimant presented with radicular symptoms going down both arms. He also noted that although Claimant stated that she could not turn her neck to the right unless she turned her entire body, he noticed she was able to turn and look to her right. Claimant underwent a cervical spine x-ray. Dr. Kalevik stated that the x-ray showed cervical disk disease at C4-5-6-7, with bone-to-bone contact and severe joint narrowing. Due to Claimant's presentation, Dr. Kalevik prescribed physical therapy and ordered an MRI of Claimant's cervical spine.

4. According to Dr. Kalevik's July 23, 2015 report, Claimant's MRI demonstrated moderate to severe degenerative disk disease and spondylosis throughout the cervical spine, predominately from the C4 down to C7. Dr. Kalevik stated that although this was preexisting and not caused by her accident, "[H]er neck is not forgiving. It does not have the cushion or the mobility to take shots." He was hopeful that her neck pain would settle down within the next couple of months and with the help of physical therapy.

5. On August 5, 2015, Claimant returned to Dr. Kalevik. Claimant was complaining of numbness down her right arm.

6. On August 18, 2015, Dr. Kalevik stated in his report that Claimant continued to improve, however, due to ongoing radicular complaints, she was referred to Dr. Samuel Chan for an EMG.

7. On October 16, 2015, Claimant was evaluated by Dr. Chan. Dr. Chan stated that Claimant complained of pain over the left side of her neck which radiated into her left shoulder, shooting pain into her left hand, and some left handed grip weakness. Dr. Chan stated that based on Claimant's pain complaints, he thought an EMG was appropriate. He also stated that injection therapy of the cervical spine might be appropriate if the EMG was normal and Claimant still had pain complaints.

8. On November 6, 2015, Claimant presented to Dr. Kalevik and complained of left arm weakness and that she was dropping things.

9. On November 6, 2015, Claimant returned to Dr. Chan and underwent an EMG and electrodiagnostic study of her left arm. The test was normal. Dr. Chan stated that the normal test results completely ruled out a frank neuropathic lesion. Dr. Chan recommended Claimant continue with her self-directed exercise program and that she should consider acupuncture.

10. Claimant returned to Dr. Chan on December 4, 2015. According to Dr. Chan's report, Claimant still had cervical spine pain and pain over the left shoulder girdle. Dr. Chan concluded that Claimant's findings were most consistent with musculoskeletal pain. He stated that Claimant will begin a trial of acupuncture. He also stated Claimant might want to consider facet injections under fluoroscopic guidance if she continues to be symptomatic and the clinical examination continues to demonstrate findings consistent with facetogenic pain.

11. Claimant returned to Dr. Kalevik on December 30, 2015. She complained of ongoing pain in her neck and back and numbness down her left arm. She also complained about feeling depressed.

12. On December 30, 2015, Claimant was again seen by Dr. Chan. Claimant complained of ongoing pain which was rather severe. Dr. Chan also noted Claimant presented with a rather flat affect. Dr. Chan was concerned that there were underlying psychological factors such as stress and depression which might account for some of Claimant's ongoing symptoms. Dr. Chan indicated Cymbalta might be considered at some point to see if that might give Claimant some relief from her pain. Dr. Chan did not refer Claimant to a psychologist.

13. On January 29, 2016, Claimant returned to Dr. Chan with ongoing pain complaints. Although she no longer complained of radiating pain or

numbness and tingling down her left arm, she complained of pain in her right trapezious region. Dr. Chan indicated that he still thought her pain was myofascial. He also stated that Claimant had "inherent underlying depression which mainly impacts the patient's presentation as well as recovery process." Despite his concerns, Dr. Chan did not refer Claimant to a psychologist.

14. On February 10, 2016, Claimant returned to Dr. Chan. She rated her pain at 6 out of 10. Dr. Chan also noted Claimant had a very flat affect and that she was almost on the verge of tears during the entire interview part of the examination. In his assessment and recommendations, Dr. Chan stated Claimant appeared "rather clinically depressed" and that her depression was contributing to her ongoing symptomatology and presentation. Despite thinking Claimant was clinically depressed, Dr. Chan did not refer Claimant to a psychologist. He did, however, think Claimant was reaching a plateau regarding her treatment and would be at MMI after the completion of her acupuncture.

15. On February 24, 2016, Claimant was evaluated by Dr. Chan. He again stated that although Claimant continued to have complaints of pain, he thought that there was an underlying psychological disorder, such as depression, that was impacting Claimant's presentation and her ability to respond to treatment. He also stated that upon completion of acupuncture, Claimant would most likely be at MMI without any impairment. He also stated that upon being placed at MMI, maintenance medical treatment in the form of four to six sessions of acupuncture might be appropriate.

16. On March 3, 2016, Claimant was evaluated by Dr. Chan and Dr. Kalevik. Dr. Chan concluded Claimant was at MMI. Dr. Kalevik agreed and placed Claimant at MMI. In his report of March 3, 2016, Dr. Kalevik stated that Claimant was complaining of spasm and a numbing sensation down her right arm and into her palm. Regardless, Claimant was placed at MMI and determined to have zero impairment. Dr. Kalevik recommended maintenance medical treatment in the form of acupuncture. He also refilled a prescription for chlorzoxazone and wrote a prescription for massage therapy.

17. Claimant did not have the facet injections previously suggested by Dr. Chan. Claimant had right upper extremity symptoms, but yet Dr. Chan did not perform an EMG of her right upper extremity. Moreover, Claimant's symptoms of depression seemed to become inextricably intertwined with her physical complaints, but neither Dr. Kalevik nor Dr. Chan referred Claimant for a psychological evaluation and possible treatment.

18. Claimant requested a Division IME ("DIME"). On June 22, 2016, Dr. Striplin performed the DIME. Dr. Striplin determined Claimant was not at MMI. Dr. Striplin recommended a psychological evaluation, with psychological testing, to determine whether Claimant has a defined psychological disorder, whether the disorder is likely to have been caused or exacerbated by the fall at work,

and whether any psychological treatment is recommended. Dr. Striplin also recommended electrodiagnostic testing of both upper extremities to determine if there has been any interval change compared to the prior testing, which just evaluated Claimant's left upper extremity. Dr. Striplin stated in his report that "depending on the results of the psychological testing and the repeat electrodiagnostic studies, consideration could then be given to cervical injections for diagnostic, if not therapeutic purposes." The ALJ finds Dr. Striplin's opinion regarding MMI persuasive.

19. The ALJ finds that the additional diagnostic evaluations recommended by Dr. Striplin have a reasonable prospect of diagnosing or defining Claimant's condition so as to suggest a course of further treatment. This course of additional treatment might include cervical injections, psychological treatment, and additional medication, such as Cymbata, which was previously suggested by Dr. Chan.

20. Dr. Wallace Larson testified on behalf of Respondent. Dr. Larson is an orthopedic surgeon and performed an Independent Medical Examination ("IME"). Dr. Larson opined that Claimant was at MMI. He testified that the additional electrodiagnostic testing and psychological evaluation recommended by Dr. Striplin is not medically indicated. Dr. Larson testified that Claimant does not have any objective findings to support her symptoms. He also stated that Claimant's presentation is non-physiologic. For example, the prior electrodiagnostic testing of Claimant's left upper extremity was negative. Dr. Larson testified that Claimant's presentation regarding the alleged weakness and lack of sensation in her left upper extremity would involve 2-3 nerve levels and the degree of impairment described by Claimant would have shown up on the electrodiagnostic testing. Dr. Larson also testified that even if the electrodiagnostic testing came back positive with minimal findings, the rest of Claimant's exam would not support any additional treatment. Dr. Larson is of the opinion that even if the testing was positive, additional treatment would not be reasonable and necessary. Regarding the psychological testing, Dr. Larson summarily stated that the accident is not the type of accident that causes a psychological injury or condition. For example, according to Dr. Larson, seeing someone get hurt really bad, or getting hurt really bad, would be the type of situation that could cause a psychiatric condition that might need treatment.

21. The ALJ does not find Dr. Larson's opinion regarding MMI to be persuasive. The ALJ finds that the results of the electrodiagnostic studies combined with the psychological evaluation will help determine whether additional treatment is reasonable and necessary.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Diagnostic procedures constitute a compensable medical benefit which must be provided prior to MMI if such procedures have a "reasonable prospect" of diagnosing or defining Claimant's condition so as to suggest a course of further treatment. Section 8-42-101(1)(a); *Villela v. Excel Corp*., W.C. No. 4-400-281 (February 1, 2001); *Hatch v. John H. Garland Co*., W.C. No. 4-368-712 (August 11, 2000); cf. *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Gonzales v. Industrial Claim Appeals Office*, 905 P.2d 16 (Colo. App. 1995); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080 (Colo. App. 1990). A finding that additional diagnostic procedures offer a reasonable prospect for defining Claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The ALJ finds Dr. Striplin's opinion to be credible and persuasive. In this case, Dr. Striplin, the Division Examiner, is of the opinion that Claimant needs to undergo additional diagnostic evaluations to evaluate her work related injury. Dr. Striplin is of the opinion that Claimant needs to undergo additional electrodiagnostic testing to determine whether there has been any change from the prior testing of Claimant's left upper extremity and to test the right upper extremity. The results of the electrodiagnostic

testing will determine what additional treatment might be appropriate. Additional treatment might include the facet injections which were previously recommended, but never performed. In addition, Dr. Striplin is of the opinion that Claimant needs to undergo a psychological evaluation, including testing, to determine whether Claimant's work related accident has caused or aggravated a psychological condition, and if so, whether treatment is appropriate. This ALJ concludes that the additional evaluations recommended by Dr. Striplin have a reasonable prospect of diagnosing or defining Claimant's condition so as to suggest a course of further treatment.

Dr. Larson is of the opinion that Claimant's pain complaints are not supported by any objective evidence and that any additional testing or treatment is not reasonable or necessary. This ALJ does not find Dr. Larson's opinion to be persuasive.

There is merely a difference of opinion between Dr. Striplin and Dr. Larson as to whether Claimant is at MMI. This ALJ concludes that Dr. Larson's opinion does not provide the clear and convincing evidence necessary to overcome Dr. Striplin's opinion. Therefore, Respondent has failed to overcome the opinion of Dr. Striplin. Accordingly, the ALJ concludes that Claimant is not at MMI.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondent has failed to overcome the Division IME regarding MMI. Therefore, Claimant is not at MMI.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 4-5-17

/s/ *Glen B. Goldman*
Glen B. Goldman
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her September 28, 2010 Workers' Compensation claim involving her left knee based on a worsening of condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a left knee injury during the course and scope of her employment with Employer on July 25, 2016.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her left knee injury.

4. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period December 16, 2016 until terminated by statute.

5. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant has worked for Employer as a Customer Service Agent for the past 16 years. As a part of her work-related duties, Claimant is required to squat down to pick up and tag luggage and other carry-on items on a regular basis. Claimant is also required to pick up and move luggage for customers to appropriate conveyor belts. The average piece of luggage weighs approximately 50 pounds. Claimant squats down and lifts luggage hundreds of times each day.

2. Claimant testified that she normally works 36 to 48 hours per week for Employer and is paid on an hourly basis. Since her date of hire almost 16 years ago Claimant has received raises in her hourly rate of pay at least once per year. Claimant's most recent raise in her hourly pay occurred in November of 2016. Wage records reveal that she began earning $29.88 per hour.

3. On September 28, 2010 Claimant sustained an admitted industrial injury to her left knee while working for Employer. A suitcase struck Claimant's kneecap. Claimant was diagnosed with chondromalacia of the patella and patella maltracking.

4. On August 20, 2012 Claimant underwent a left knee arthroscopy and lateral release with Carrie Motz, M.D. Following post-surgical rehabilitation Claimant was released from care. On November 2, 2012 Deborah Moore, M.D. determined that

Claimant had reached Maximum Medical Improvement (MMI) with no restrictions and no permanent impairment. Claimant subsequently returned to full-duty employment.

5. On November 12, 2012 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Moore's MMI and impairment determinations. Claimant did not object to the FAL and her claim closed by operation of law.

6. On March 19, 2014 Claimant sustained an injury to her right knee when she squatted down to put a tag on a stroller. Claimant received medical treatment for her right knee through Authorized Treating Physician (ATP) Matthew Lugliani, M.D. at HealthOne. She was diagnosed with an acute chondral defect of the patella with patellofemoral pain syndrome. Claimant initially underwent an arthroscopic debridement and lateral release with James W. Genuario, M.D. on May 9, 2014 and underwent additional right knee surgery in late 2015. Claimant's Workers' Compensation claim for her right knee was initially denied. However, she established the compensability of her right knee injury in Findings of Fact, Conclusions of Law and Order dated February 2, 2015 by Administrative Law Judge Broniak. Respondents subsequently filed a FAL.

7. Claimant testified at the hearing in the present matter that, following a second surgery on her right knee, she experienced intermittent pain and swelling in her left knee. Claimant noted that her late 2015 left knee symptoms persisted into early 2016. However, her symptoms were relatively minor and did not preclude her from performing her typical activities of daily living.

8. Claimant visited Dr. Lugliani for a left knee evaluation. On March 10, 2016 Claimant underwent a left knee MRI. The MRI revealed a chondral defect.

9. In May of 2016 Claimant returned to regular, full-duty employment with Employer. Between May of 2016 and July of 2016 Claimant's left knee occasionally swelled, but the symptoms were never severe enough to prevent her from working. Claimant testified that at no point in time between May of 2016 and July of 2016 did she have to call in sick due to left knee pain and she was able to successfully complete all of her required job duties.

10. On July 25, 2016, while performing her job duties, Claimant squatted down to lift a heavy piece of luggage and move it to a conveyor belt. While standing up and pivoting toward the conveyor belt Claimant felt the sudden onset of intense pain and swelling in her left knee. Claimant testified that the pain and swelling she felt after the July 25, 2016 incident was significantly worse than the intermittent symptoms she had experienced during the prior year. She reported the injury to her supervisors and was instructed to return to HealthOne for treatment.

11. At Claimant's first return visit to HealthONE on July 26, 2016 Dr. Lugliani was not available. She thus visited Paul Raford, M.D. for an evaluation. The notes from Dr. Raford's initial visit reflect that, if Claimant's new, worsened symptoms persisted, more imaging would be necessary. Dr. Raford also remarked that Claimant

clearly had degenerative changes in her left knee in addition to any acute changes and "symptoms and functional issues related solely to degeneration [would] likely be non-occupational." Nevertheless, Dr. Raford commented on his July 26, 2016 Physician's Report of Worker's Compensation Injury that his objective findings were consistent with a work-related mechanism of injury.

12. Claimant subsequently resumed treatment with Dr. Lugliani. On August 17, 2016 Claimant underwent a left knee MRI. The MRI again revealed a chondral defect near the patella. Dr. Lugliani referred Claimant to Dr. Genuario for a surgical evaluation.

13. On August 24, 2016 Claimant visited Dr. Genuario for an examination. Dr. Genuario diagnosed Claimant with a left knee chondral defect of the patella with associated patellefemoral pain. He initially recommended conservative medical treatment. Although Claimant received injections and physical therapy she did not obtain significant relief. Nevertheless, Claimant continued to complete her job duties for Employer.

14. On November 30, 2016 Dr. Lugliani issued a causality report in response to an inquiry from Claimant's counsel. He maintained that Claimant's left knee injury was caused by her work activities for Employer. Dr. Lugliani detailed:

> [Claimant] has a history of a previous work-related injury in 2011 and is status post lateral release. This injury was exacerbated on July 26, 2016 while [Claimant] was moving luggage and twisted her knee, sustaining an exacerbation of degenerative changes involving her left knee, more specifically attenuation of the cartilage, involving the inferior third of the lateral patellar facet. It is my professional opinion, with greater than 50% medical probability, that [Claimant's] current complaints and presentation are consistent with a work-related injury, and, as such, should be surgically treated.

15. On December 16, 2016 Claimant underwent left knee surgery with Dr. Genuario. Claimant testified that she has been unable to work since the December 16, 2016 surgery because of her left knee limitations and the work restrictions assigned by Drs. Lugliani and Genuario. She noted that her left knee condition has significantly improved and continues to progress over time.

16. On February 2, 2017 the parties conducted the pre-hearing evidentiary deposition of Dr. Genuario. Dr. Genuario confirmed that Claimant suffered from a chondral defect of the left patella. He explained that a chondral defect is damage to the cartilage cap at the end of a bone. Essentially, a piece of cartilage had been "sheared off." Chondral defects can be either chronic or acute in nature. Chronic chondral defects caused by degeneration are often simply referred to as "arthritis." However, Dr. Genuario determined that Claimant's chondral defect was focal rather than degenerative or chronic based on the MRI findings and a visual examination of the area surrounding the chondral defect during surgery.

17. While Dr. Genuario testified that the chondral defect in Claimant's left knee was focal rather than chronic or degenerative in nature, he also emphasized that the chondral defect had existed prior to Claimant's July 25, 2016 incident at work. Dr. Genuario noted that the chondral defect had been present as far back as the March 10, 2016 MRI. Nevertheless, he explained that chondral defects are often asymptomatic but can suddenly become symptomatic because of an aggravation or exacerbation. Dr. Genuario thus determined to a reasonable degree of medical certainty that Claimant had a pre-existing chondral defect of the patella that was once asymptomatic. Claimant then aggravated the pre-existing chondral defect in late 2015 to early 2016 by putting extra weight on her left leg following her right knee surgery. However, the aggravation was relatively minor and temporary.

18. Dr. Genuario explained that on July 25, 2016 Claimant once again aggravated her pre-existing condition by pivoting out of a squat while lifting a heavy piece of luggage at work. The incident caused "significant swelling and disability." Dr. Genuario suggested that the swelling in late 2015 and early 2016 and the more significant pain and swelling Claimant experienced in July of 2016 were likely caused by the same chondral defect with different exacerbating or aggravating factors. He summarized that the July 25, 2016 incident aggravated the underlying chondral defect that had been detected on the left knee MRI.

19. Dr. Genuario acknowledged that, if the chondral defect he surgically repaired in 2016 was not present during the 2010 arthroscopy, the July 25, 2016 incident constituted a new injury. After reviewing the left knee surgical record from 2012 Dr. Genuario testified that the arthritic findings during that surgery were in a different location than reflected on the March 2016 MRI and observed during surgery. He also explained that the 2012 MRI did not reflect the chondral defect that he addressed during surgery. Dr. Genuario later clarified that the cartilage defect revealed in 2012 as a result of Claimant's 2010 work injury was different than Claimant's 2016 condition.

20. On November 11, 2016 Claimant underwent an independent medical examination with Timothy O' Brien, M.D. Dr. O'Brien also testified at the hearing in this matter. He determined that "standing and pivoting is not an injury mechanism" and attributed Claimant's symptoms to degenerative arthritis.

21. Dr. O'Brien detailed that Claimant's March 2016 MRI revealed extensive arthritis on both sides of the facet joint of the patella. He confirmed that there was no difference in the MRI scans from March 2016 and August 2016 other than significant improvement in the swelling of the joint. There was no evidence of any acute or structural injury consistent with the July 25, 2016 work incident.

22. Dr. O'Brien explained that Claimant's left knee MRI in March of 2016 reflected a new chondral defect. The chondral defect thus appeared after Claimant's September 28, 2010 industrial injury but before the July 25, 2016 work incident. Dr. O'Brien testified that there was "no relationship" between the current chondral defect described by Dr. Genuario in his surgical report and the 2010 injury. He explained that, if the chondral defect had existed in 2012, it would have been seen and recorded by the

surgeon and been evident in the 2012 MRI. Dr. O'Brien concluded that the new finding of the chondral defect was not causally connected with the 2010 injury.

23. Dr. O'Brien also explained that Claimant's 2012 knee surgery did not cause degeneration and result in her current condition. He detailed that the 2012 surgery did not

> debride any viable tissue that the knee needs to avoid the progression of arthritis. So it didn't take out meniscal tissue. It didn't take out anything other than frayed cartilage. And it performed a lateral release that didn't overcorrect. It just didn't work. So there was no untoward effect from the surgery that could have contributed to the acceleration of an – preexisting arthritic condition.

24. Based on his review of the medical records, Dr. O'Brien testified that the July 25, 2016 incident did not injure Claimant's left knee. He specifically remarked that, if there had been an injury, it would have been seen both on the MRI and during physical examination. However, Dr. O'Brien commented that the post-incident MRI did not reflect any new tissue breakage or yielding as compared to the pre-incident MRI. He further explained that the exam findings from July 25, 2016 did not document objective findings suggesting a substantial acute event.

25. Dr. O'Brien testified that Claimant's need for the December 16, 2016 surgery performed by Dr. Genuario was not causally related to the July 25, 2016 work injury. Rather, he reasoned that the procedure performed addressed structural findings and symptoms that were present prior to July 25, 2016. Dr. O'Brien specifically remarked that the chondral defect that was the focus of the December 12, 2016 surgery was both present and symptomatic as early as March of 2016 and continued to cause symptoms until the July 25, 2016 incident.

26. Claimant has failed to establish that it is more probably true than not that she should be permitted to reopen her September 28, 2010 Workers' Compensation claim involving her left knee based on a worsening of condition. On November 2, 2012 Claimant reached MMI with no restrictions and no permanent impairment. Claimant testified that, following a second surgery on her right knee, she experienced intermittent pain and swelling in her left knee. She noted that her late 2015 left knee symptoms persisted into early 2016. However, her symptoms were relatively minor and did not preclude her from performing her typical activities of daily living.

27. The medical records reveal that Claimant did not suffer a worsening of her September 28, 2010 left knee condition warranting reopening. Initially, Dr. Genuario acknowledged that, if the chondral defect he surgically repaired in 2016 was not present during the 2010 arthroscopy, the July 25, 2016 incident constituted a new injury. After reviewing the left knee surgical record from 2012 Dr. Genuario testified that the arthritic findings during that surgery were in a different location than reflected on the March 2016 MRI and observed during surgery. Dr. Genuario also explained that the 2012 MRI did not reveal the chondral defect that he surgically repaired. He later clarified that the

cartilage defect revealed in 2012 as a result of Claimant's 2010 work injury was different than Claimant's 2016 condition.

28. Dr. O'Brien also explained that Claimant's left knee MRI in March of 2016 revealed a new chondral defect. The chondral defect thus appeared after Claimant's September 28, 2010 industrial injury but before the July 25, 2016 work incident. Dr. O'Brien testified that there was "no relationship" between the current chondral defect described by Dr. Genuario in his surgical report and the 2010 injury. He explained that, if the chondral defect had existed in 2012, it would have been seen and recorded by the surgeon and evident in the 2012 MRI. Dr. O'Brien concluded that the new finding of the chondral defect had no relationship with the 2010 injury.

29. Claimant's medical history and the persuasive medical opinions of Drs. Genuario and O'Brien reflect that she has not suffered a change in condition that entitles her to additional medical benefits. Although Claimant experienced left knee symptoms in 2015 there is no causal or temporal connection between her symptoms and the admitted September 28, 2010 industrial injury. Accordingly, Claimant's request to reopen her September 28, 2010 Workers' Compensation claim based on a worsening of condition is denied and dismissed.

30. Claimant has demonstrated that it is more probably true than not that she suffered a left knee injury during the course and scope of her employment with Employer on July 25, 2016. Claimant explained that while working for Employer on July 25, 2016 she squatted down to lift a heavy piece of luggage and move it to a conveyor belt. While standing up and pivoting toward the conveyor belt, Claimant felt the sudden onset of intense pain and swelling in her left knee. Claimant commented that the pain and swelling she experienced after the July 25, 2016 incident was significantly worse than the intermittent symptoms she had suffered in the prior year.

31. Dr. Lugliani persuasively explained that the July 25, 2016 incident constituted the exacerbation or aggravation of Claimant's pre-existing, degenerative left knee condition. He summarized that Claimant's complaints and presentation were consistent with a work-related mechanism of injury. Dr. Genuario detailed that on July 25, 2016 Claimant aggravated her pre-existing condition by pivoting out of a squat while lifting a heavy piece of luggage at work. The activity caused "significant swelling and disability." Dr. Genuario suggested that the swelling in late 2015 and early 2016 and the more significant pain and swelling Claimant experienced in July of 2016 were likely caused by the same chondral defect with different exacerbating or aggravating factors. He summarized that the July 25, 2016 incident aggravated the underlying chondral defect that had been detected on the left knee MRI. Finally, even though Dr. Raford expressed concerns regarding the causation of Claimant's July 25, 2016 symptoms, he ultimately concluded that Claimant's condition was caused by the work event.

32. In contrast, Dr. O'Brien testified that the July 25, 2016 incident did not cause an injury to Claimant. He specifically remarked that, if there had been an injury, evidence should have been revealed both on the MRI and during physical examination. However, Dr. O'Brien commented that the post-incident MRI did not show any new

tissue breakage or yielding as compared to the pre-incident MRI. He further explained that the exam findings from July 25, 2016 did not document objective findings that would suggest a substantial acute event. However, Dr. O'Brien did not adequately address the aggravation of Claimant's pre-existing left knee condition. The persuasive medical records and opinions of Drs. Lugliani and Genuario reflect that the July 25, 2016 incident caused Claimant's pre-existing chondral defect to become symptomatic and warrant medical treatment. Accordingly, Claimant has demonstrated that her employment activities on July 25, 2016 aggravated, accelerated, or combined with her pre-existing left knee condition to produce a need for medical treatment.

33. Claimant has proven that it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical benefits for her left knee injury. The medical treatment Clamant received through HealthOne was designed to treat her July 25, 2016 left knee injury. Dr. Lugliani's referral to Dr. Genuario was performed in the normal progression of treatment to obtain a surgical consultation. Dr. Genuario determined that the July 25, 2016 industrial incident aggravated Claimant's pre-existing chondral defect. He initially recommended conservative medical treatment but injections and physical therapy did not provide significant relief. Dr. Genuario thus determined that Claimant warranted surgical intervention.

34. In contrast, Dr. O'Brien testified that Claimant's need for the surgery performed by Dr. Genuario was not causally related to the July 25, 2016 work injury. Rather, he reasoned that the procedure addressed structural findings that were present and symptomatic prior to July 25, 2016. Dr. O'Brien specifically remarked that the chondral defect, which was the focus of the December 12, 2016 surgery, was both present and symptomatic as early as March of 2016 and continued to cause symptoms until the July 25, 2016 work incident. However, the persuasive medical opinion of Dr. Genuario reflects that his December 12, 2016 surgery was designed to address an aggravation of Claimant's underlying chondral defect as a result of the July 25, 2016 incident. Accordingly, Claimant's medical treatment, including her December 12, 2016 left knee surgery, was reasonable, necessary and causally related to her July 25, 2016 industrial incident.

35. Claimant has established that it is more probably true than not that she is entitled to receive TTD benefits for the period December 16, 2016 until terminated by statute. On December 16, 2016 Dr. Genuario performed surgery on Claimant's left knee. Claimant credibly testified that she has been unable to work since December 16, 2016 because of her left knee limitations and the work restrictions assigned by Drs. Lugliani and Genuario. Claimant's July 25, 2016 industrial injury and subsequent surgery caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Claimant is thus entitled to receive TTD benefits for the period December 16, 2016 until terminated by statute.

36. Claimant suffered a compensable left knee injury on July 25, 2016. Relying on Claimant's 12 weeks of pay prior to her injury date, Respondents contend

that she earned an AWW of $1,106.96. However, Claimant credibly testified that she normally works 36 to 48 hours per week for Employer and is paid on an hourly basis. Since her date of hire almost 16 years ago Claimant has received raises in her hourly rate of pay at least once per year. Claimant's most recent raise occurred in November of 2016. Wage records reveal that she began earning $29.88 per hour. Because Claimant was not precluded from performing her job duties until after her December 16, 2016 surgery, her raise became effective before her disability period began. A calculation of Claimant's AWW based on periods prior to her November 2016 pay raise would not constitute an accurate approximation of her wage loss. Accordingly, relying on Claimant's pay raise in November 2016, an AWW of $1,122.41 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Worsening of Condition

4. Section 8-43-303(1), C.R.S. provides that a Worker's Compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to

a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

5. As found, Claimant has failed to establish by a preponderance of the evidence that she should be permitted to reopen her September 28, 2010 Workers' Compensation claim involving her left knee based on a worsening of condition. On November 2, 2012 Claimant reached MMI with no restrictions and no permanent impairment. Claimant testified that, following a second surgery on her right knee, she experienced intermittent pain and swelling in her left knee. She noted that her late 2015 left knee symptoms persisted into early 2016. However, her symptoms were relatively minor and did not preclude her from performing her typical activities of daily living.

6. As found, the medical records reveal that Claimant did not suffer a worsening of her September 28, 2010 left knee condition warranting reopening. Initially, Dr. Genuario acknowledged that, if the chondral defect he surgically repaired in 2016 was not present during the 2010 arthroscopy, the July 25, 2016 incident constituted a new injury. After reviewing the left knee surgical record from 2012 Dr. Genuario testified that the arthritic findings during that surgery were in a different location than reflected on the March 2016 MRI and observed during surgery. Dr. Genuario also explained that the 2012 MRI did not reveal the chondral defect that he surgically repaired. He later clarified that the cartilage defect revealed in 2012 as a result of Claimant's 2010 work injury was different than Claimant's 2016 condition.

7. As found, Dr. O'Brien also explained that Claimant's left knee MRI in March of 2016 revealed a new chondral defect. The chondral defect thus appeared after Claimant's September 28, 2010 industrial injury but before the July 25, 2016 work incident. Dr. O'Brien testified that there was "no relationship" between the current chondral defect described by Dr. Genuario in his surgical report and the 2010 injury. He explained that, if the chondral defect had existed in 2012, it would have been seen and recorded by the surgeon and evident in the 2012 MRI. Dr. O'Brien concluded that the new finding of the chondral defect had no relationship with the 2010 injury.

8. As found, Claimant's medical history and the persuasive medical opinions of Drs. Genuario and O'Brien reflect that she has not suffered a change in condition that entitles her to additional medical benefits. Although Claimant experienced left knee symptoms in 2015 there is no causal or temporal connection between her symptoms and the admitted September 28, 2010 industrial injury. Accordingly, Claimant's request to reopen her September 28, 2010 Workers' Compensation claim based on a worsening of condition is denied and dismissed.

Compensability

9. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

10. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

11. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

12. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered a left knee injury during the course and scope of her employment with Employer on July 25, 2016. Claimant explained that while working for Employer on July 25, 2016 she squatted down to lift a heavy piece of luggage and move it to a conveyor belt. While standing up and pivoting toward the conveyor belt, Claimant felt the sudden onset of intense pain and swelling in her left knee. Claimant commented that the pain and swelling she experienced after the July 25, 2016 incident was significantly worse than the intermittent symptoms she had suffered in the prior year.

13. As found, Dr. Lugliani persuasively explained that the July 25, 2016 incident constituted the exacerbation or aggravation of Claimant's pre-existing, degenerative left knee condition. He summarized that Claimant's complaints and presentation were consistent with a work-related mechanism of injury. Dr. Genuario detailed that on July 25, 2016 Claimant aggravated her pre-existing condition by pivoting out of a squat while lifting a heavy piece of luggage at work. The activity

caused "significant swelling and disability." Dr. Genuario suggested that the swelling in late 2015 and early 2016 and the more significant pain and swelling Claimant experienced in July of 2016 were likely caused by the same chondral defect with different exacerbating or aggravating factors. He summarized that the July 25, 2016 incident aggravated the underlying chondral defect that had been detected on the left knee MRI. Finally, even though Dr. Raford expressed concerns regarding the causation of Claimant's July 25, 2016 symptoms, he ultimately concluded that Claimant's condition was caused by the work event.

14. As found, in contrast, Dr. O'Brien testified that the July 25, 2016 incident did not cause an injury to Claimant. He specifically remarked that, if there had been an injury, evidence should have been revealed both on the MRI and during physical examination. However, Dr. O'Brien commented that the post-incident MRI did not show any new tissue breakage or yielding as compared to the pre-incident MRI. He further explained that the exam findings from July 25, 2016 did not document objective findings that would suggest a substantial acute event. However, Dr. O'Brien did not adequately address the aggravation of Claimant's pre-existing left knee condition. The persuasive medical records and opinions of Drs. Lugliani and Genuario reflect that the July 25, 2016 incident caused Claimant's pre-existing chondral defect to become symptomatic and warrant medical treatment. Accordingly, Claimant has demonstrated that her employment activities on July 25, 2016 aggravated, accelerated, or combined with her pre-existing left knee condition to produce a need for medical treatment.

Medical Benefits

15. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

16. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

17. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her left knee injury. The medical treatment Clamant received through HealthOne was designed to treat her July 25, 2016 left knee injury. Dr. Lugliani's referral to Dr. Genuario was performed in the normal progression of treatment to obtain a surgical consultation. Dr. Genuario determined that the July 25, 2016 industrial incident aggravated Claimant's pre-existing chondral defect. He initially recommended conservative medical treatment but injections and physical therapy did not provide significant relief. Dr. Genuario thus determined that Claimant warranted surgical intervention.

18. As found, in contrast, Dr. O'Brien testified that Claimant's need for the surgery performed by Dr. Genuario was not causally related to the July 25, 2016 work injury. Rather, he reasoned that the procedure addressed structural findings that were present and symptomatic prior to July 25, 2016. Dr. O'Brien specifically remarked that the chondral defect, which was the focus of the December 12, 2016 surgery, was both present and symptomatic as early as March of 2016 and continued to cause symptoms until the July 25, 2016 work incident. However, the persuasive medical opinion of Dr. Genuario reflects that his December 12, 2016 surgery was designed to address an aggravation of Claimant's underlying chondral defect as a result of the July 25, 2016 incident. Accordingly, Claimant's medical treatment, including her December 12, 2016 left knee surgery, was reasonable, necessary and causally related to her July 25, 2016 industrial incident.

Temporary Total Disability Benefits

19. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written

release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

20. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive TTD benefits for the period December 16, 2016 until terminated by statute. On December 16, 2016 Dr. Genuario performed surgery on Claimant's left knee. Claimant credibly testified that she has been unable to work since December 16, 2016 because of her left knee limitations and the work restrictions assigned by Drs. Lugliani and Genuario. Claimant's July 25, 2016 industrial injury and subsequent surgery caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Claimant is thus entitled to receive TTD benefits for the period December 16, 2016 until terminated by statute.

Average Weekly Wage

21. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

22. As found, Claimant suffered a compensable left knee injury on July 25, 2016. Relying on Claimant's 12 weeks of pay prior to her injury date, Respondents contend that she earned an AWW of $1,106.96. However, Claimant credibly testified that she normally works 36 to 48 hours per week for Employer and is paid on an hourly basis. Since her date of hire almost 16 years ago Claimant has received raises in her hourly rate of pay at least once per year. Claimant's most recent raise occurred in November of 2016. Wage records reveal that she began earning $29.88 per hour. Because Claimant was not precluded from performing her job duties until after her December 16, 2016 surgery, her raise became effective before her disability period began. A calculation of Claimant's AWW based on periods prior to her November 2016 pay raise would not constitute an accurate approximation of her wage loss. Accordingly, relying on Claimant's pay raise in November 2016, an AWW of $1,122.41 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request to reopen her September 28, 2010 Workers' Compensation claim is denied and dismissed.

2. Claimant suffered a compensable Workers' Compensation injury to her left knee on July 25, 2016.

3. Respondents are financially responsible for all of Claimant's reasonable, necessary and related medical benefits, including her December 16, 2016 left knee surgery, designed to cure and relieve the effects of her July 25, 2016 left knee injury.

4. Claimant shall receive TTD benefits for the period December 16, 2016 until terminated by statute.

5. Claimant earned an AWW of $1,122.41.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 7, 2017.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-023-311-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 1, 2017 and April 3, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 3/1/17, Courtroom 1, beginning at 1:30 PM, and ending at 4:30 PM; and, 4/3/17, Courtroom 1, beginning at 1:30 PM, and ending at 2:30 PM).

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondents' Exhibits A through T were admitted into evidence, without objection. The evidentiary deposition of Jeremy Howard, taken on January 20, 2017, was admitted into evidence in lieu of his live testimony at hearing (hereinafter referred to as Howard Depo., followed by a page number and line numbers).

At the conclusion of the last session of the hearing on April 3, 2017, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically, on April 7, 2017. On April 10, 2017, counsel for the Claimant stated that he had no objections as to form of the proposal. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The primary issue to be determined by this decision concerns whether the Claimant sustained a compensable injury to his low back on March 27, 2016. If so, additional issues designated concern whether he is entitled to temporary total disability (TT) benefits; average weekly wage (AWW); reasonably necessary medical benefits; the right to choose his authorized treating provider (ATP); and, whether the Claimant was responsible for his termination, through a volitional act, and thus not entitled to temporary disability benefits. Because the ALJ hereby determines that the Claimant did **not** sustain a compensable injury as claimed, the other issues are moot. "Responsibility for termination" is considered only insofar as it sheds light on whether the Claimant sustained a compensable back injury on March 27, 2016, as he claims.

Claimant bears the burden of proof, by a preponderance of the evidence on all issues with the exception of "responsibility for termination," for which Respondents bear the burden of proof by preponderant evidence, however, this issue is moot in light of the fact that the Claimant did **not** sustain a compensable injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Findings

1. On July 20, 2016, the Claimant filed a worker's claim for compensation, alleging he suffered a low back injury on his delivery run to Casper on March 27, 2016 (Respondents' Exhibit A).

2. The Claimant then filed an Application for Hearing on September 16, 2016, endorsing issues of compensability, medical benefits, temporary indemnity benefits, AWW, medical benefits, and authorized treating physician (ATP) [Respondents' Exhibit B).

3. The Respondents filed a Notice of Contest on October 7, 2016 (Respondents' Exhibit C).

4. On October 20, 2016, Respondents filed a Response to Claimant's Application for Hearing, endorsing the same issues as well as applicable defenses, including termination for cause and voluntary resignation (Respondents' Exhibit E).

Preliminary Findings

5. At the commencement of the hearing, the parties stipulated that Claimant's average weekly wage (AWW) is $1,275.19 if the claim is found compensable. Because the claim is not compensable, as found herein below, the stipulation is now moot.

6. The Claimant was hired by the Employer on or about February 24, 2016, as an over-the-road truck driver [Hearing Transcript (hereinafter "Tr.") p. 11:lines13-19—Respondents'. Exhibit G]. The Claimant's job primarily included delivering mattresses to stores across the Western region of the United States (Tr., p. 11: lines 20-25, p. 12: lines17-25, p.13: lines 1-4).

The Alleged Injury of March 27, 2016

7. On or about March 27, 2016, the Claimant made a delivery to Casper, Wyoming. (Claimant's Exhibit 9; Tr., p. 14: lines19-25). Casper, Wyoming, is about a four-and-a-half-hour drive from the Employer's site in Aurora, Colorado (Tr., p. 31: lines 6-10 and 23-25).

8. According to the Claimant, before he left for Casper, he was attempting to latch the trailer or fifth wheel and pulled on it when he fell backwards onto his tail bone (Tr., p. 15: lines 1-21). The Claimant alleged that initially he did not feel any pain when he hit the ground and "didn't really think [he] was injured at that time" (Tr., p. 15: lines 22-25; p. 16: lines 1-4). He said that he returned from Casper the next day, on March 28, 2016 (Claimant's Exhibit 9).

9. The Claimant never reported to anyone with the Employer on either March 27, 2016 or March 28, 2016 that he had injured himself on the delivery run (Tr., p. 16: lines 24-25, p.17: lines 1-3). He said that he did not report his injury then because he "still wasn't hurting that much" (Tr., p. 17: lines 4-10).

10. The Claimant never showed up for work after his Casper delivery run (Respondents' Exhibit R; Howard Depo., p 48: lines 19-25, p. 49: line 1).

Medical

11. The first time the Claimant saw a doctor for his alleged work injury was on July 5, 2016, about four months after the alleged injury.(Respondents' Exhibit Q, bates stamp 258). The Claimant presented to James J. Williams, M.D., at Clinica Colorado for a follow-up appointment regarding his diabetes mellitus and right sacroilitis. The Claimant mentioned that he had been taking ibuprofen for low back pain, but he never told Dr. Williams he had suffered a work injury. The ALJ finds this omission detracts

from the credibility of the Claimant's alleged on-the-job injury. Clinica Colorado is the Claimant's primary health care provider and not an Employer-authorized workers' compensation medical provider.

12. On August 2, 2016, the Claimant returned to Dr. Williams, complaining of "right SI pain and right leg weakness" (Respondents' Exhibit Q, bates stamp 261). The Claimant, however, still did not tell Dr. Williams about a work injury.

13. Instead of meeting with Dr. Williams on August 24, 2016, the Claimant met with physician assistant Victoria Chazin, PA-C, at Clinica Colorado (Respondents' Exhibit Q, bates stamp 263). He complained of "low back pain and right leg pain and weakness [from a slip and] fall **2 months** ago while at work." (*Id*.) (Emphasis supplied). Claimant reported no numbness or tingling. (*Id*.). He told Chazin that he was terminated after he had requested to be seen by a workmen's compensation doctor (*Id*.). His stated reasons for his termination were **not** true and contradicted by all of the Employer witnesses. His reported alleged work injury to PA-C Chazin would be in June 2016 (three months after his alleged injury). These statements cause the ALJ to infer and find that the Claimant, essentially, has not been truthful about his alleged injury.

Respondent's Independent Medical Examination (IME) with Robert L. Messenbaugh, M.D.

14. At the Respondents' request, the Claimant underwent an IME with Dr. Messenbaugh (Respondents' Exhibit S).

15. The Claimant reported "severe, constant, debilitating low back pain, poor balance, entire right lower leg numbness and weakness" due to his alleged slip and fall (Respondents' Exhibit S, bates stamp 276). The Claimant said that he started feeling pain two weeks after the date of injury; the pain started at a level of 3 out of 10 but later escalated to a 7 out of 10 (Tr., p. 27: lines 8-12; p. 28: lines 5-9).

16. Dr. Messenbaugh found the Claimant's story of injury "to be rather unbelievable" and the Claimant's subjective symptoms "to be in all probability exaggerated and … magnified" (Respondents' Exhibit S, bates stamp 277).

17. The Claimant reported a pain level of 8 out of 10 about 90% of the time, a 10 out of 10 present 50% of the time, and 7 out of 10 present 50% of the time (Respondents' Exhibit S, bates stamp. 274). The Claimant understood a 10 out of 10 was the most severe pain imaginable (*Id*.). The Claimant stated he was unable to walk, stand, sit for long periods of time, or keep his body balanced because of the pain (*Id.).*

18. Dr. Messenbaugh, however, observed that the Claimant sat comfortably in the exam chair, moved about the exam room rather freely, and did not lose his

balance while walking (Respondents' Exhibit S, bates stamp. 275-76). The ALJ infers and finds that the Claimant's reported pain levels, under the circumstances, significantly detract from the overall credibility of his claim.

19. Nonetheless, the Claimant told Dr. Messenbaugh he was incapable of walking upon his tip-toes and heels because it would cause him too much pain (Respondents' Exhibit S, bates stamp. 275-76; Tr., p. 96: lines 1-4). Upon physical examination, Dr. Messenbaugh noted that the Claimant exhibited "excellent quad and hamstring strength bilaterally" (Respondents' Exhibit S, bates stamp 276). The ALJ infers and finds that the Claimant's symptoms reported to Dr. Messenbaugh are inconsistent with Dr. Messenbaugh's actual physical examination of the Claimant.

20. At hearing, Dr. Messenbaugh explained that the Claimant's reports appeared inconsistent, that is "[neurologically] ... his symptoms didn't correlate with his physical findings" (Tr., p. 97: lines 3-4).

21. The Claimant also complained of right knee pain in his medical records. (Respondents' Exhibit S, bates stamp. 276). At hearing, the Claimant testified that the alleged fall caused numbness in his right knee and right leg that starts from the small of his back (Tr., p. 26: lines 17-25; p. 27: lines 1-3). Dr. Messenbaugh, however, found no evidence of pathology or atrophy of the Claimant's right knee (Respondents' Exhibit S, bates stamp. 277; Tr., p. 108: lines 15-17).

22. The Claimant described "numbness radiating from his right lower back into his right buttock down his entire right leg, both anteriorly and posteriorly, both above his knee and below his knee" (Respondents' Exhibit S, bates stamp 276). In his report, Dr. Messenbaugh explained: "In my experience, such a description of complete lower extremity numbness is inconsistent with human anatomy, except in cases of severe spinal cord nerve injury, an injury not suspected in [Claimant's] situation as a result of his reported fall" (*Id*.).

23. At hearing, Dr. Messenbaugh testified consistently with his report: "[T]o have pain in your entire lower extremity means that you have to involve a multitude of spinal nerves from the lumbar spine. You have to involved [sic] those that involve the musculature and sensation to the anterior part of the leg, to the posterior part of the leg, to the anatomic sites that would relate to above the knee as well as below the knee." Tr., p. 95: lines 15-24). Dr. Messenbaugh found no objective evidence to support the Claimant's assertion that he had numbness in his right leg (Tr., p. 100: lines 3-6).

24. Dr. Messenbaugh also took issue with the fact that the Claimant did not report his symptoms in a prompt and usual fashion, especially in a workers' compensation environment (Respondents' Exhibit S, bates stamp 276; Tr. , pp.12-15).

25. Dr. Messenbaugh found it "most unusual in [his] experience" that Claimant fell and did not experience pain for "a fairly lengthy period of time" (Tr., p. 94: lines 12-15). The Claimant said it took two weeks for any numbness to set in (Tr., p. 111: lines 17-21). Dr. Messenbaugh testified, however, that "two weeks would be delayed" and "on the far side of the curve" (Tr., p. 112: lines 8-16).

26. Dr. Messenbaugh was of the opinion that the Claimant's subjective symptoms were "disproportionate to his accident as he described" (Respondents'. Exhibit S, bates stamp 276). Dr. Messenbaugh elaborated in his report: "It is possible that [Claimant] does have the diagnosis of lumbar strain, but his subjective symptoms seem to be magnified beyond what I would expect from an accident as he describes, particularly when he reported that initially he experienced very little discomfort, reports getting up after his fall, reports continuing his driving activities to Casper, reports assisting in the unloading of his truck, sleeping in his truck that night, and then driving his truck back to Denver that next morning" (Respondents' Exhibit S, bates stamp 276). Based on the Claimant's overall statements, actions, and inactions, the ALJ infers and finds that it is unlikely that the Claimant sustained a "lumbar strain" at work.

27. Based on his "experience over 50 years of dealing with orthopedic back and lower extremity injuries," Dr. Messenbaugh ultimately concluded that it was medically improbable that the Claimant suffered a work injury that caused his self-reported symptoms (Tr., p. 96: lines 11-20). The ALJ finds the ultimate opinion of Dr. Messenbaugh that the Claimant did not sustain a work-related injury highly persuasive and credible, against a backdrop of the numerous improbabilities that are replete throughout the Claimant's testimony, plus the Claimant's actions and inactions, which make it improbable that he sustained a work-related injury as he claims.

Claimant Never Returned to Work After His Alleged Injury

28. Jeremy Howard, the Employer's human resource business partner, testified that he did not know the Claimant was claiming an alleged work injury until he received notice from the State of Colorado after July 20, 2016 (Howard Depo., p. 53: lines 16-19).

29. Howard testified that after the Claimant did not show up for work after the Casper delivery run, he tried calling the Claimant on March 28, 2016, March 29, 2016, and March 30, 2016 (Howard Depo., p. 44: lines 12-18; p. 46: lines 10-11). Howard also tried to reach the Claimant on March 29, 2016 and March 30, 2016 via email:

> [Claimant], I have been unable to contact you via phone. When you get a chance please give me a call on Wednesday at any of the numbers below…

> [Claimant], I was unable to contact you today via phone and want to check in with you. Please call me on my cell phone at your earliest convenience. (Respondents' Exhibit I, bates stamp 118).

30. Howard knew other co-workers had also tried to get in touch with the Claimant but to no avail (Howard Depo., p. 48: lines 5-18).

31. The Claimant never responded to Howard's calls or emails (Howard Depo., p. 46: lines 20-21).

32. According to Howard, he tried calling the Claimant's personal number, which was the number listed in the Claimant's Employee File (Howard Depo, p. 44: lines 19-25). Also, Howard emailed the email address Claimant used to apply for the job (Howard Depo., p. 61: lines11-18). Howard testified that he never received an "undelivered message" stating his emails were not delivered to the Claimant. (Howard Depo., pp. 14-19).

33. At hearing, the Claimant testified that he never received Howard's calls or emails (Tr. 53:15-24). The Claimant admitted, however, that his cell phone number was the same number dispatchers would call to contact him for deliveries (Tr., p. 61: lines 3-12). The fact that the Claimant, an employee of the Employer with an Employee File with contact information for the Claimant, denies ever receiving contact by Howard defies probability, reason and common sense in light of the fact that the Employer's dispatchers could contact the Claimant to assign jobs to the Claimant. The ALJ does **not** find that Claimant credible in stating that he never got had any messages from Howard. On the other hand, the ALJ finds Howard's testimony highly persuasive, credible, and consistent with the actions of an Employer attempting "to bend over backwards) to salvage the Claimant's job.

Job Abandonement and the Claimant's Testimony

34. On April 4, 2016, the Claimant was terminated for job abandonment (Respondents' Exhibit J, bates stamp 32).

35. The Employer has a policy stating, "Absences of three (3) consecutive workdays without notifying the Company within the first hour (no call/no show) of scheduled start time shall be interpreted by the Company as a voluntary quit" (Respondents' Exhibit M, bates stamp. 54).

36. The Claimant understood this policy because he received a copy of the Employee Handbook and signed the acknowledgement form (Respondents' Exhibit M; Tr., p. 51: lines 2-9). The Employer gave the Claimant an ample opportunity to salvage his job, and the ALJ infers and finds that the Claimant did not respond.

37. At hearing, the Claimant testified that on or about March 29, 2016, he called and left a message for Cecilia Deal, who is responsible for hiring truck drivers. (Tr., p. 121: lines 20-22). The Claimant explained, "there was something kind of bothering me" and "I wasn't going to be working for a while" (Tr. , p. 17: lines13-25; p. 18: lines 1-9; p. 39: lines 5-24). The Claimant testified that he did not indicate in his message that he was injured at work (Tr., p. 18: lines 2-9). According to the Claimant, he did not actually speak with Deal at this time. He just left a voicemail message. This statement of the Claimant, alone, substantially detracts from credibility of the Claimant's claim that he injured his back in Casper, Wyoming, on March 27, 2016. Cecilia Deal, as found herein below, contradicts the Claimant's testimony in this regard, and the ALJ finds Deal significantly more credible than the Claimant.

38. The Claimant's representations to Dr. Messenbaugh that he experienced pain and numbness two weeks after the slip and fall injury and that his pain remained at a level of 7 or 8 out of 10 since its onset, are not credible. The Claimant's representations were discredited by his own medical records. The Claimant did not seek treatment until July 5, 2016, almost four months after his work injury. The ALJ finds it highly unlikely that the Claimant felt a pain level of 7 or 8 out of 10 and did not seek treatment for many months. Essentially, Dr. Messenbaugh corroborates the fact that this would be highly unlikely. Also, medical records reveal that the Claimant did not tell a doctor about his work-related injury until August 24, 2016, which is five months after his alleged injury, and only one month after he filed a Worker's Claim for Compensation. Additionally, on August 24, 2016, the Claimant told his physician that he had a slip and fall at work *two* months prior. Claimant was not working for the Employer in June 2016. The ALJ finds it very doubtful Claimant could not remember if his injury happened in March or June, three months apart. Indeed, this further detracts from the overall credibility of the Claimant's claim.

39. The Claimant's testimony is also contradicted by the highly credible and persuasive testimony of Dr. Messenbaugh. Dr. Messenbaugh testified he that he found the Claimant's story and reported symptoms to be incredible and "exaggerated." Importantly, Dr. Messenbaugh testified it was *medically improbable* that the Claimant sustained the injuries he did based on the type of accident he described. The opinions of Dr. Messenbaugh are un-contradicted by any other credible medical opinions.

Cecilia Deal

40. At hearing, Cecilia Deal testified that, contrary to the Claimant's claims, she never received a call or voice message from the Claimant in March 2016 or April 2016. (Tr., p. 124: lines 19-25; p. 125: lines 6-11). Deal denies this and the ALJ finds her significantly more credible than the Claimant. Deal testified that the only time she had spoken to the Claimant was on May 20, 2016, about two months after the alleged injury. (Tr., p. 124: lines 19-22; p. 127: lines 23-25,; p.128: lines 1-4). On that date, the Claimant called and left a message asking for his Union Representative's number

(Respondents' Exhibit. I, bates stamp 33). Deal returned his phone call a day or two later (Tr., p. 125: lines 6-15).

41. In the phone call to Deal of May 20, 2016, the Claimant did not report that he had a work-related injury (Tr., p. 132: lines 10-13). Instead, he claimed "he was out for a kidney infection that he's still recovering from" (*Id*.). He asked for the number of his Union representative. Deal did not know the number so she directed him to contact the local plant or talk to Howard (Tr. p. 126: lines 21-25). The ALJ finds the Claimant's actions and words, in this regard, inconsistent with a claimed work-related injury, thus, rendering the overall credibility of the Claimant's claim unworthy of belief. Indeed, Deal has no interest in the outcome of this case, whereas the Claimant has an interest in the outcome. Consequently, the ALJ finds Deal highly credible and the Claimant **not** credible in this regard.

42. Howard testified that he never heard from the Claimant in either written correspondence or by phone after their meeting on March 25, 2016 (Howard Depo. p. 48: lines 19-25; p. 49: line 1), which was before the alleged injury.

43. The Claimant's consistent failure to respond to his Employer, when he was aware of the Employer's policy concerning no call/no show, in the face of his claimed back injury, makes no sense. His cavalier attitude about contacting his Employer, or responding to his Employer, makes the validity of his claimed injury incredible.

Ultimate Findings

44. Overall, for the reasons stated in Finding No. 38 herein above, the ALJ finds that the Claimant actions and testimony are not credible. For the reasons stated in Finding No. 39 herein above, the ALJ finds IME Dr. Messenbaugh's opinion that it is highly unlikely that the Claimant sustained a work-related injury on March 27, 2016, in Casper, Wyoming, as the Claimant claims, highly persuasive, credible and, un-refuted by any other credible medical evidence.

45. Claimant's representations to Dr. Messenbaugh that he experienced pain and numbness two weeks after the slip and fall injury and that his pain remained at a level of 7 or 8 out of 10 since its onset, are not credible. The Claimant's representations were discredited by his own medical records. The Claimant did not seek treatment until July 5, 2016, almost four months after his work injury. The ALJ finds it highly unlikely that the Claimant felt a pain level of 7 or 8 out of 10 and did not seek treatment for many months. Essentially, Dr. Messenbaugh corroborates the fact that this would be highly unlikely. Also, medical records reveal that the Claimant did not tell a doctor about his work-related injury until August 24, 2016, which is five months after his alleged injury, and only one month after he filed a worker's claim for compensation. Additionally, on August 24, 2016, Claimant told his physician that he had a slip and fall at work *two*

months prior. Claimant was not working for the Employer in June 2016. The ALJ finds it doubtful that the Claimant could not remember if his injury happened in March or June, three months apart. Indeed, the ALJ finds this statement of the Claimant undermines the overall credibility of his claim.

46. The Claimant's testimony is also contradicted by the highly credible and persuasive testimony of Dr. Messenbaugh. Dr. Messenbaugh testified he found Claimant's story and reported symptoms to be incredible and "exaggerated." Importantly, Dr. Messenbaugh testified it was *medically improbable* Claimant sustained the injuries he did based on the type of accident he described. Significantly, Claimant did not present any evidence refuting the opinion of Dr. Messenbaugh.

47. The ALJ finds that the Claimant has failed to prove, by a preponderance of the evidence that he sustained a work-related injury arising out of the course and scope of his employment for the Employer, as he alleges.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo.

275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, IME Dr. Messenbaugh's highly persuasive and credible ultimate opinion that the Claimant did not sustain a work-related injury on March 27, 2016, in Casper, Wyoming, as the Claimant claims is un-refuted by any other credible medical evidence. As further found, the Claimant's testimony and actions are replete with inconsistencies, contractions, and improbabilities that defy reason and common sense. For these reasons, the ALJ finds that the Claimant's claimed injury is **not** credible.

Compensability

b. An alleged injury must occur within the "course and scope of employment" in order to be a compensable injury. "Course and scope of employment" deals with the time, place and circumstances of an employee's injury. *See General Cable Co. v. Indus. Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994). As found, the Claimant did not sustain an injury within the course and scope of his employment for the Employer herein.

c. Also, in order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** While there may be an initial presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment, it is still the injured worker's burden to prove that the injury arose out of work-related duties. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant failed to prove that he sustained an industrial injury, arising out of the course and scope of his employment for the Employer.

Burden of Proof

d.. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to prove that he sustained a compensable injury on March 27, 2016, in Casper, Wyoming, as he alleges.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for workers' compensation benefits are hereby denied and dismissed.

B. Resolution of the other designated issues is moot.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance that he suffered a compensable injury to his right knee in the course and scope of his employment on February 10, 2016, and

2. Whether the referral by authorized treating physician, Lori Szczukowski, M.D., to Michael Hewitt, M.D., for a determination regarding the etiology of the pain in Claimant's right knee is a reasonable, necessary and related medical benefit.

STIPULATIONS

The parties stipulated that,

1. Indemnity benefits are not due and payable, and

2. Claimant's average weekly wage was $660.80.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 59 year old man who is employed by Employer at the Denver Public Library as a custodian.

2. Claimant has been employed by Employer for 16 years, 5 years of which were as a security guard and the remaining years as a custodian. As a custodian, Claimant credibly testified he maintains the Denver Public Library by cleaning toilets, polishing floors, and other custodial services.

3. Claimant credibly testified that he underwent right knee surgery in approximately 2001 and has had no symptoms, pain complaints or problems in his right knee since that time. Claimant also testified, however, that he has had ongoing pain complaints and symptoms in his left knee, which has also been previously operated upon. Claimant credibly testified that he was not alleging a left knee injury because he had symptoms in his left knee prior to bringing the electric wheelchair down the stairs, but did not have symptoms in his right knee prior to that event and after his 2001 surgery.

4. On February 10, 2016, there was a power outage at the Denver Public Library. A patron was upstairs in a stainless steel electric wheelchair and was unable to use the elevators to get to the ground level. The patron's husband assisted the patron to walk the approximate 20 steps on the circular staircase from the second story to the ground floor, while Claimant and James Cohen, a security guard at the facility, carried the patron's electric wheelchair from the second floor to the first floor.

5. James Cohen prepared a memorandum following the event which described what occurred as follows:

> On Feb. 10, 2016 the power went off in the Bear Valley branch and with no reasonable time frame for its resumption it was decided to close the branch. With no power the elevator would not function. There was a customer in an electric wheel chair on the second floor. I contacted her and asked if she wanted to have paramedics come to assist her getting to the first floor so she could exit. She said that her husband had come to the branch and that if he could come in he could help her down the stairs without her chair. I let her husband in the branch and he came upstairs. She was able to walk down the stairs with his assistance. We needed to get her wheel chair down the stairs and Tony Garcia [Claimant] volunteered to help me carry it down. The chair itself was very heavy. I would estimate it weighed between 200 to 250 lbs. I took one side and Tony took the other and we managed to carry it down the steps. A day or so later Tony mentioned to me that he hurt his knee while we carried the chair. He said he was going to file a report.

6. Claimant credibly testified he did not immediately report the right knee injury as he has had aches and pains over the course of working for Employer which eventually subsided, but that when his right knee condition did not improve he reported the injury. Claimant also testified he did not report a left knee injury because the symptoms he was having in his left knee were present prior to lifting the wheelchair.

7. On February 17, 2016, Claimant was evaluated at the Centers for Occupational Safety and Health at OHSC (OHSC) by authorized treating physician (ATP) Ann Dickson, M.D., who diagnosed Claimant as having a right knee strain and took a history of present illness. Dr. Dickson's history of present illness indicates that Claimant had a right knee injury when he was carrying an electric wheelchair down a flight of stairs on his job for Employer at a library.

8. Dr. Dickson assessed the following:

> ASSESSMENT: Right knee strain (583.91XA). At present his symptoms are intermittent and brief but they have been persistent for a week. This is a new injury superimposed upon a previously operated knee.

9. Claimant had not been on any temporary or permanent work restrictions for his right knee since 2001. Claimant credibly testified that he had no medical treatment or care since approximately 2001 on his right knee, prior to the events of February 10, 2016. For the 2016 injury, following the evaluation by ATP Dickson on February 16, 2016, she placed him on a temporary work restriction of "no standing, no walking, no bending and no stooping."

10. Claimant credibly testified, and the medical records support his testimony, that his right knee condition and painful symptoms waxed and waned after his February 10, 2016, injury, but that he had no such problems or symptoms before lifting the electric wheelchair.

11. On March 21, 2016, ATP Lori Szczukowski, M.D., who had taken over from ATP Dickson at OHSC submitted a request for Claimant to be evaluated by Michael Hewitt, M.D., as to "the etiology of pain in both knees." That request was denied by Respondent.

12. On April 21, 2016, ATP Szczukowski again recommended a consultation with a "qualified orthopedic surgeon to determine the etiology of patient's knee pain and to address causality."

13. Respondent refused to authorize the referral and, on July 1, 2016, Claimant filed an Application for Hearing alleging a compensable right knee injury and requesting authorization for a one time visit to Michael Hewitt, M.D.

14. Claimant was seen by Respondent's independent medical examiner, James P. Lindberg, M.D. Dr. Lindberg testified consistent with his report that:

> At this point, in the right knee, I do not have an opinion, but the right knee really was never very symptomatic after the surgery, and I would recommend an MRI be obtained and I could opine whether there is any aggravation, acceleration or exacerbation of the right knee preexisting patellar femoral disease. With his preexisting patellar femoral disease, one would expect him to have some pain going down 20 stairs. Whether or not there is any permanent injury or new injury is unknowable at this time.

15. Claimant testified and the medical records reflect that Claimant has remained on temporary work restrictions since his evaluation on February 17, 2016, by ATP Dickson and the subsequent medical providers.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered.

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado (the Act), Sections 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case must be interpreted neutrally, neither in favor of either the rights of the claimant or nor in favor of the rights of the respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability/Medical benefits

4. Claimant has the burden of proving by a preponderance of the evidence that his accidental injury arose out of the course and scope of his employment. *See City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). The facts in a workers' compensation case may not be interpreted liberally in favor of either claimant or respondents. Section 8-43-201. C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

5. Claimant sustained his burden of proving by a preponderance of the evidence that he sustained a right knee strain on February 10, 2016, and, therefore, Claimant is entitled to benefits under the Act.

6. Once compensability is established, respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. *See Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ, and an ALJ's resolution should not be disturbed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. *See City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence that a rational fact finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Durocher v. Industrial Claim Appeals Office*, 905 P.2d 4 (Colo. App. 1995).

7. Medical treatment rendered by the Employer's designated physicians at the OHSC and thereafter, including ATP Szczukowski's referral to Dr. Hewitt, are reasonable, necessary and the responsibility of Respondent.

8. ATP Dickenson's medical records reflect the Claimant suffered an acute injury. The medical records are devoid of any symptoms in Claimant's right knee after 2001. Claimant's description of injury was consistent on all medical evaluations, including that with Respondent's selected physician James P. Lindberg. Further, Dr. Lindberg has opined that without an MRI it is impossible to determine whether Claimant suffered a substantial and permanent aggravation of a preexisting underlying asymptomatic condition.

ORDER

It is therefore ordered that:

1.Claimant established by a preponderance of the evidence that he suffered a right knee strain while carrying an electric wheelchair a distance of 20 steps in the course and scope of his employment on February 10, 2016.

2.All medical care rendered by medical providers at the Center for Occupational Safety and Health, including the referral to ATP Michael Hewitt, M.D., is reasonable, necessary and related to Claimant's February 10, 2016 injury.

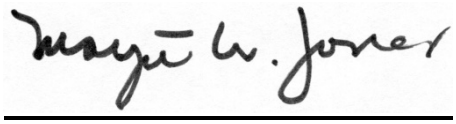
3.The referral by ATP Szczukowski to ATP Hewitt for an evaluation is reasonable, necessary and related and shall be paid for by Respondent.

4.Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

5.Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _April 12, 2017_



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has shown by a preponderance of the evidence that he is incapable of earning wages in the same or other employment as a result of the July 12, 2012 industrial injury and entitled to an award of permanent total disability ("PTD") benefits.

- Whether claimant has shown by a preponderance of the evidence that he is entitled to an award of penalties pursuant to Section 8-43-304, C.R.S. for violation of the April 12, 2016 order of Prehearing Administrative Law Judge Goldstein.

- If claimant proves that he is entitled to a penalty, whether respondents have shown by a preponderance of the evidence that any potential violation was cured pursuant to Section 8-43-304(4), C.R.S.

- If respondents prove they cured the violation pursuant to Section 8-43-304(4), C.R.S., whether claimant has shown by clear and convincing evidence that respondents knew or reasonably should have known that respondents were in violation of an order.

- Whether claimant has shown that he sustained a serious permanent disfigurement to areas of his body normally exposed to public view, resulting in additional compensation under the Colorado Workers' Compensation Act.

FINDINGS OF FACT

1. Claimant resides in Dolores, Colorado and at the time of the hearing was 56 years old. Claimant suffered an admitted injury to his low back on July 12, 2012 while employed in employer's restaurant. Claimant testified that the injury occurred when he lifted a five gallon bucket full of water and lettuce and felt tightness in his legs. Claimant timely reported the incident to employer and on July 13, 2012, an Employer's First Report of Injury was completed.

2. Following the July 12, 2012 injury, employer referred claimant to La Plata Family Medicine for treatment. On July 17, 2012, claimant was seen at La Plata Family Medicine by Dr. Victor Lopez and complained of low back and right leg pain. Dr. Lopez diagnosed an acute lumbar strain.

3. Following the initial appointment with Dr. Lopez, claimant was also seen by Dr. Jordan Loftis with La Plata Family Medicine. During that time claimant underwent conservative treatment including physical therapy and steroid injections. On July 22, 2013 claimant underwent medial branch blocks at the L5-S1 level. Claimant testified that he may have an allergy to the steroids in these injections because the injections caused him to have nausea and headaches that lasted for several days.

4. On January 13, 2014, claimant underwent an anterior lumbar discectomy with arthrodesis at L5-S1, performed by Dr. Jim Youssef and Dr. Mark Stern with Spine Colorado.

5. On June 18, 2014, claimant returned to Dr. Youssef for post-surgical follow up. In his report of that date, Dr. Youssef noted that claimant was recovering well and released him to return to full duty with no work restrictions. On that same date, Dr. Youssef recommended that claimant undergo an impairment rating with Dr. Loftis within 20 days.

6. On September 10, 2014, claimant underwent a functional capacity evaluation ("FCE") with Integrated Physical Therapy. The report issued by the FCE evaluator, Charles Alexander, indicated that claimant had the ability to perform medium level work.

7. Claimant testified that during the FCE he told the evaluator that items he was asked to lift were too heavy, but he was instructed to "just try" to lift the items. Claimant testified that following the FCE he felt "beat up" and the next morning he was unable to walk.

8. On October 13, 2014, claimant reported to Dr. Loftis that he was sore from the FCE. Claimant's symptoms on that date included right sciatic radiation pain and tingling. Dr. Loftis chose to postpone the impairment evaluation because he felt that claimant was presenting with new symptoms following the FCE and referred claimant to physical therapy.

9. On November 10, 2014, claimant returned to Dr. Loftis and reported that he had numbness into his right leg and that physical therapy was not helping. Dr. Loftis referred claimant to Spine Colorado for evaluation.

10. On December 11, 2014, a magnetic resonance image ("MRI") was taken of claimant's lumbar spine and showed a new left paracentral disc protrusion at the L4-5 level. On that same date, claimant was seen by Lance Hamlin, PA-C with Spine Colorado, who diagnosed an L4-5 herniated disc with bilateral recess stenosis. Mr. Hamlin referred claimant to physical therapy and ordered an L4-5 interlaminar injection, which was administered by Dr. Cyril Bohachevsky on December 30, 2014. On March 10, 2015, Dr. Bohachevsky administered a right-sided sacroiliac ("SI") joint injection.

11. On June 18, 2015, claimant underwent an L4-5 bilateral microdiscectomy, medial facetectomy and foraminotomy at the L4-5 level. This surgery was also performed by Dr. Youssef.

12. On July 1, 2015, claimant reported to Dr. Loftis that following the surgery he had "sore pain" that was moderate. Then on October 1, 2015 claimant reported to Dr. Loftis that he was experiencing "horrible" pain, that nothing was helping with his pain and physical therapy was difficult.

13. On November 18, 2015, Dr. Youssef noted that claimant had reached maximum medical improvement ("MMI") and recommended maintenance medical treatment in the form of physical therapy, pain medication, and possible future injections. Dr. Youssef also noted it was possible that claimant would need revision decompression and fusion at the L4-5 level if he developed instability at that level in the future.

14. Dr. Youssef has recommended that claimant undergo a third surgery. Claimant testified that he does not want the third surgery given his negative experience following the June 18, 2015 surgery.

15. On January 11, 2016, Dr. Loftis opined that claimant was at MMI as of that date and assessed an impairment rating of 35% whole person. At that time, Dr. Loftis determined a number of work restrictions for claimant. These restrictions include: a lifting restriction of 10 pounds for frequent lifting; and 20 pounds for occasional lifting; walking no more than 500 feet per day; driving no more than two hours per day; and changing position between sitting and standing every 30 minutes. Dr. Loftis also determined that claimant is able to reach frequently; and bend, stoop, crawl and kneel occasionally; but he is prohibited from climbing.

16. On September 30, 2016, respondents sent claimant for an independent medical examination ("IME") with Dr. George Schakaraschwili. Dr. Schakaraschwili reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with the IME. Dr. Schakaraschwili issued a written report and opined that claimant is capable of working in at least a sedentary position and his work restrictions indicate that he falls within the light duty to medium duty work categories.

17. In his report, Dr. Schakaraschwili assigned a permanent impairment rating of 33% whole person. With regard to work restrictions, Dr. Schakaraschwili assigned a maximum lift of no more than 30 pounds, with no more than 20 pounds for frequent lifting, and claimant should be allowed to shift positions every 30 minutes. Dr. Schakaraschwili also opined in his IME report that within these restrictions, claimant could tolerate an eight hour work day, but would need to begin at four hours per day and gradually increase to eight hours per day.

Claimant's Work History

18. Claimant testified that he graduated from Paradise High School in 1978 or 1979 and took "special education" courses. Claimant also testified that he attended Devereux Day School which he describes as a "school for disabled kids". Claimant testified that he has been diagnosed with attention deficit hyperactivity disorder ("ADHD") and anxiety. Claimant also asserts that he has a learning disability that causes him to have difficulty with reading and math.

19. With regard to his prior work experience, claimant testified that he has experience working in the restaurant industry for employer and for another restaurant, Francisco's, which is located in Cortez, Colorado. During his employment with employer claimant worked as a manager and cook. Prior to working for employer,

claimant owned and operated employer's restaurant with his spouse. During that time claimant oversaw the kitchen and front of the house staff, prepared food, and interacted with customers. Prior to owning employer's restaurant, claimant and his spouse also owned and operated The Wild Bunch Deli, where claimant prepared food and baked cakes and bread.

20. Claimant testified that he obtained a commercial drivers license ("CDL") when he was 20 years old and recently let the license expire. Claimant testified that he has prior experience working in construction as a laborer and doing carpentry and worked in the oil and gas industry as a roustabout. At one time claimant operated his family's horse and cattle ranch. Claimant testified that he is unable to return to any of these prior positions.

21. Claimant also testified that he is the owner of SIM Investment Corporation, which owns three rental properties. Claimant testified that prior to the work injury and the related surgeries he performed all of the maintenance at these rental properties. Since his injury, claimant hires others to perform this maintenance work. This includes assessing that there is a maintenance need, contacting the appropriate service provider and scheduling the repair or service. Claimant also then pays the service provider once the service or repair is completed. In 2012, claimant reported earnings of $24,000.00 from his employment with SIM investment Corporation.

Vocational Evaluations

22. At the request of his attorney, claimant underwent a vocational evaluation by vocational expert, Robert Van Iderstine. Mr. Van Iderstine met with claimant on March 2, 2016 and August 10, 2016. On October 21, 2016, Mr. Van Iderstine issued a written report in which he opined that based upon claimant's vocational profile (which includes claimant's age, education, prior work history, and physical limitations); claimant is precluded from returning to employment in his commutable labor market, even on a part-time basis. Mr. Van Iderstine considered claimant's commutable labor market to be the Montezuma County area including Dolores, Colorado; Dove Creek, Colorado; and Cortez, Colorado. Mr. Van Iderstine's testimony at hearing was consistent with his report.

23. At the request of respondents, on August 25, 2016 claimant underwent a vocational evaluation by respondent's vocational expert, Torrey Kay Beil. On October 6, 2016, Ms. Beil issued a written report in which she opined that claimant is employable in his commutable labor market. Ms. Beil reviewed job opportunities in the Durango, Colorado and Cortez, Colorado area. In her report, Ms. Beil listed a number of transferrable skills that claimant obtained during his prior work experience that he can

apply in new employment. These transferrable skills include following instructions, performing basic math calculations, planning and scheduling necessary maintenance, and communicating with members of the public.

24. Based upon claimant's transferrable skills and his current physical limitations, Ms. Beil listed five vocational categories that she believes claimant is able to

perform. The listed categories were collections agent; receptionist; plant trimmer; customer service clerk; and property leasing agent.

25. On October 24, 2016, Ms. Beil issued an addendum to her report in which she specifically identified three employers hiring positions that Ms. Beil believes claimant would be able to perform. The first position she identified was that of a trimmer/harvester at Durango Organics located in Durango, Colorado. Ms. Beil also identified the position of check cashing clerk with the employer Check Into Cash, located in Durango, Colorado. The third position identified by Ms. Beil was Domino's Pizza delivery driver in Cortez, Colorado. Ms. Beil testified at hearing and also by deposition in this matter confirming her opinion that claimant is employable.

26. Claimant testified that he does not possess a number of the transferrable skills identified by Ms. Beil. Claimant also provided testimony that he has limited math and reading skills and pointed to his special education classes as an indication that he lacks the skills necessary to find new employment. The ALJ is not persuaded by this testimony. It is clear from claimant's own testimony regarding his prior work experience that he has developed a number of skills that are transferrable to positions that comply with his physical limitations, including managing a restaurant and operating rental properties.

27. Claimant testified that after receiving Ms. Beil's report, he applied for work with Durango Organics, Check Into Cash, and Domino's Pizza and in each instance he was not offered employment because he was either physically unable to perform these jobs or lacked the necessary math and reading skills. With regard to a "trimmer" position with a marijuana operation, claimant testified that he does not hold the required "med license" and would have to travel to either Grand Junction, Colorado or Denver, Colorado to take the appropriate testing.

28. Scott Holland, Director of Operations with Durango Organics, provided testimony by deposition regarding the physical requirements of positions available with his company. Mr. Holland testified that members of the Grow Team work in very physical jobs. With regard to individuals working on the Post Harvest Team, Mr. Holland testified that these employees must sit for extended periods of time.

29. Terri Woodard, Manager with Check Into Cash, provided testimony by deposition regarding job duties at her location, specifically those of a Customer Service Representative ("CSR"). Ms. Woodward testified that there are days when a CSR does not sit at their desk at all.

30. Greg Lindus, Area Supervisor with Pecos Valley Pizza Incorporated, testified by deposition. Pecos Valley Pizza Incorporated operates a Domino's Pizza franchise in Cortez, Colorado. Mr. Lindus' provided testimony regarding delivery driver positions at his franchise. Mr. Lindus testified that delivery drivers are expected to perform various duties beyond delivering pizzas, including cleaning and carrying items for food preparation.

31. Dr. Schakaraschwili's testimony by deposition in this matter was consistent with his IME report. During his deposition Dr. Schakaraschwili was asked his opinion regarding claimant's ability to perform specific jobs identified by Mr. Van Iderstine and Ms. Beil in their reports. Dr. Schakaraschwili testified that it is his opinion that if the job duties are within claimant's work restrictions, claimant would be able to work in maintenance, as a front desk clerk, as a sales associate, and in the specific positions identified at Durango Organics, Check into Cash, and Domino's Pizza.

32. The ALJ credits the opinion of Ms. Beil and finds that claimant possesses a number of transferrable skills from his prior work experience. The ALJ further credits Ms. Beil's opinions and finds that claimant's commutable labor market includes Cortez, Colorado and Durango, Colorado.

33. The ALJ further credits the tax information entered into evidence and finds that claimant has some amount of earnings from his employment with SIM Investment Corporation. Although this evidence only addresses the year 2012, the ALJ finds that this is credible evidence of claimant's transferrable skills.

34. The ALJ credits the opinions of Dr. Schakaraschwili and Ms. Beil over the contrary opinion of Mr. Van Iderstine and finds that claimant is able to earn wages in various types of employment in his commutable labor market. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that he is unable to earn any wages.

35. The ALJ notes the individual testimony of Mr. Holland, Ms. Woodard, and Mr. Lindus, regarding the physical demands of positions at their various companies. However, the ALJ finds that this testimony is neither persuasive nor demonstrative of all employment opportunities available in claimant's commutable area.

Penalties

36. On March 8, 2016, respondents filed a Notice and Proposal to Select an Independent Medical Examiner ("Notice and Proposal"). Claimant objected to respondents' Notice and Proposal on the basis that the notice was untimely filed.

37. On April 12, 2016 the parties attended a pre-hearing conference before PALJ Jeffrey Goldstein on claimant's motion to strike respondents' Notice and Proposal. On that same date, PALJ Goldstein granted claimant's motion and ordered respondents to issue a Final Admission of Liability ("FAL") consistent with Dr. Loftis's January 11, 2016 report. Respondents were ordered to do so within seven days of PALJ Goldstein's order, which would have been April 19, 2016.

38. As indicated by evidence entered into the record at hearing, on April 18, 2016 respondents completed the required FAL and placed it in the U.S. Mail to claimant's counsel and the Division of Workers' Compensation ("the Division"). However, for unknown reasons claimant's counsel and the Division did not receive the FAL.

39. It is undisputed that on June 17, 2016, a copy of the FAL was received by the Division. It is also undisputed that on June 28, 2016, respondents' counsel learned that the FAL had not been received by claimant's counsel and took steps to provide a copy to claimant's counsel on that same date. Claimant requests penalties for the period of April 19, 2016 to June 17, 2016 for what claimant argues is respondents' failure to comply with PALJ Goldstein's April 12, 2016 order.

40. Jaclyn Grandgeorge, former claims representative with insurer, testified by deposition in this matter. Ms. Grandgeorge testified that on April 18, 2016 she completed the FAL and envelopes for mailing the FAL to claimant's attorney and the Division. Ms. Grandgeorge further testified that it was her normal practice to then place the envelopes in an outgoing mail location for others to place in the U.S. Mail. Ms. Grandgeorge believed that the FAL was successfully mailed on April 18, 2016.

41. The ALJ credits the testimony of Ms. Grandgeorge and finds that respondents completed and attempted to properly file the FAL on April 18, 2016, as ordered. The ALJ also finds that upon learning that the FAL was not received by claimant and the Division, respondents immediately provided copies to claimant's counsel and the Division.

42. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that respondents violated PALJ Goldstein's order. The ALJ also finds that claimant has failed to demonstrate that it is more likely than not that respondents' behavior was unreasonable. Therefore, claimant has failed to demonstrate that penalties are appropriate in this matter.

43. Based upon the above findings that no penalty is appropriate, the ALJ need not consider respondents' affirmative defense of cure.

Disfigurement

44. Claimant has a well healed surgical scar on his abdomen from the January 13, 2014 surgery. This abdominal scar is approximately five inches long and ¼ of an inch wide. Claimant also has a well healed surgical scar on his lower back from the June 18, 2015 surgery. This second scar is three inches long and ¼ of an inch wide.

45. The ALJ finds claimant has proven that it is more likely than not that he is entitled to an award of disfigurement benefits pursuant to Section 8-42-108, C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2012). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

Permanent Total Disability

3. In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. Section 8-40-201(16.5)(a), C.R.S. (2012). A claimant therefore cannot receive PTD benefits if he is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. *Lobb v. ICAO,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his particular circumstances.

4. The claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather the claimant must demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury create some disability which ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), *rev'd on other grounds, Askew v. Industrial Claim* Appeals Office, 927 P.2d 1333 (Colo. 1996).

5. The respondents are not required to prove the existence of a job offer to refute a claim for permanent total disability benefits. *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (ICAO, December 1998) (claimant is not permanently totally disabled even though respondents' vocational expert was unable to identify a single job opening available to claimant); *Beavers v. Liberty Mutual Fire Ins. Co.,* (Colo. App. No. 96 CA0275, September 5, 1996) (not selected for publication); *Gomez v. Mei*

Regis, W.C. No. 4-199-007 (September 21, 1998). Rather, the claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that the claimant is capable of earning wages. *Duran v. MG Concrete Inc.,* W.C. No. 4-222-069 (September 17, 1998).

6. As found, claimant has failed to demonstrate by a preponderance of the evidence that he is incapable of earning wages in the same or other employment in his commutable labor market. As found, claimant's commutable labor market includes Cortez, Colorado and Durango, Colorado. The ALJ is persuaded that with his prior work experience and the work restrictions determined by Drs. Loftis and Schakaraschwili, claimant is able to work in sedentary to light duty type work. As found, the testimony of Ms. Beil that claimant has prior training in a variety of jobs resulting in a number of transferrable skills, is likewise persuasive.

Penalties

7. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that any employer or insurer:

> "who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey any lawful order…, shall be subject to … a fine of not more than one thousand dollars per day for each such offense."

This provision has been construed as applying to violation of an order issued by an administrative law judge. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

8. Before penalties may be assessed the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S*.; City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). In addition, Section 8-43-305, C.R.S. provides that each day a party engages in the violation is construed as a separate offense.

9. In this case, the Claimant seeks penalties for respondents' failure to file the FAL with the Division within seven days of PALJ Goldstein's April 12, 2016 order.

10. Generally, the question of whether notice was mailed is a question of fact. *See Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). When a letter is properly addressed, stamped and mailed, there is a rebuttable presumption that it was received by the addressee. However, when the evidence is conflicting as to whether the letter was mailed initially, the presumption does not arise and the conflict must be resolved by the trier of fact. *Id., citing National Motors, Inc v. Newman*, 29 Colo. App. 380, 484 P.2d 125 (Colo. App 1971).

11. With regard to calculating dates and date of filing, W.C.R.P. 1-2, provides, in pertinent part:

> "Unless a specific rule or statute states to the contrary, the date a document or pleading is filed is the date it is mailed or hand delivered to the Division of Workers' Compensation or the Office of Administrative Courts. Computation of days is consistent with Rule 6 of the Colorado Rules of Civil Procedure."

12. Pursuant to Colorado Rules of Civil Procedure ("C.R.C.P.") 5(b)(2)(B) service under C.R.C.P. 5(a) is properly made by mailing a copy to the last known address of the person served. The Rules of Civil Procedure note that service by mail is complete on mailing.

13. As found, claimant has failed to demonstrate by a preponderance of the evidence that respondents violated PALJ Goldstein's April 12, 2016 order. Respondents reasonably believed they had complied with the order by following the normal business practice of mailing the FAL to the Division and opposing counsel. The insurer's reliance of the U.S. Postal Service was also reasonable, under the circumstances.

14. Upon learning that the FAL had not been received respondents' counsel took immediate steps to deliver copies of the FAL to claimant's counsel and the Division on June 28, 2016. During the period between April 19, 2016 and the date of "cure" of June 28, 2016, respondents were not aware that there was an issue with the filing of the FAL.

15. As found, respondents did not violate PALJ Goldstein's order as they reasonably believed that they had filed the FAL within seven days. Therefore, no order was violated. However, the ALJ also notes that even if the order had been violated, the insurer's behavior was reasonable at the time of the initial attempt to file the FAL on April 18, 2016.

Disfigurement

16. Section 8-42-108 (1), C.R.S. provides that claimant may be entitled to additional compensation if, as a result of the work injury, he has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

17. As found, claimant has a visible disfigurement to his body consisting of a surgical scar on his abdomen and a surgical scar on his low back. Therefore, claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view. In addition, this disfigurement is the result of claimant's July 12, 2012 work injury. Respondent shall pay claimant $1,800.00 for his disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent total disability benefits is denied and dismissed.

2. Claimant's claim for penalties is denied and dismissed.

3. Respondent shall pay claimant $1,800.00 for his disfigurement. Respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 12, 2017

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable work injury to his hearing on February 25, 2016.

II. If Claimant proved he sustained a compensable work injury, whether Claimant is entitled to reasonably necessary and related medical benefits, specifically, treatment of hearing loss and tinnitus.

FINDINGS OF FACT

1. Claimant works for Employer as a police officer. While responding to a call on February 25, 2016, 9-12 gun rounds were fired approximately eight inches from Claimant's face, causing Claimant to become disoriented. Claimant testified his hearing became muffled and he began hearing high-pitched ringing. Claimant was not wearing hearing protection at the time.

2. Claimant reported the incident to his direct supervisor, Sergeant Frazen. Claimant went to the emergency room for testing of his hearing. Claimant returned to work on approximately March 3, 2016.

3. On March 24, 2016, Leann Johnson, Au.D., CCC-A, conducted a hearing evaluation of Claimant and issued a report. Dr. Johnson stated test results revealed Claimant had bilateral moderate high frequency sensorineural hearing loss. Dr. Johnson noted a decrease in hearing thresholds from a pre-employment baseline audiogram obtained on June 14, 2013. Dr. Johnson noted Distortion Product Evoked Otoacoustic Emissions were "present and robust from 1000 Hz to 4000 Hz and reduced or absent from 6000 Hz to 8000 Hz, bilaterally, consistent with damage to the hearing organ at these frequencies…" Dr. Johnson recommended binaural amplification to assist with speech discrimination, tinnitus sound therapy, binaural custom hearing protection, custom in-ear monitor for his radio car and custom electronic hearing protection for the non-radio ear, and a recheck of Claimant's hearing in six months.

4. Alan F. Lipkin, M.D. reviewed the March 24, 2016 audiogram and addressed his findings in a letter dated April 8, 2016. Dr. Lipkin did not physically examine Claimant. Dr. Lipkin noted he was not provided with any previous audiograms to review and, as such, concluded he could not determine changes in hearing loss based on the single, March 24, 2016 audiogram. Dr. Lipkin agreed with Dr. Johnson's recommendations

regarding the use of hearing protection; however, Dr. Lipkin concluded "The recommendations for hearing aids and tinnitus sound therapy seem excessive at this point." Dr. Lipkin recommended a period of observation. Dr. Lipkin further stated, "In any event, it is debatable as to whether amplification, i.e., hearing aids, would be appropriate in somebody whose hearing is so normal in the usual speech frequencies. Likewise, tinnitus sound/biodfeedback therapy is an area of some controversy and whether this expensive treatment would be worthwhile at this point is not clear." Dr. Lipkin remarked that it was debatable if the recommended treatment was needed at that time. Dr. Lipkin recommended noise protection, sodium/caffeine reduction, and a recheck of an audiogram with clinical monitoring in three months.

5. Tracey L. Stefanon, D.O. evaluated Claimant on April 27, 2016. Claimant reported a total of 12 rounds were discharged 8-10 inches away from him within a few seconds. Claimant reported he was not wearing hearing protection, and immediately experienced ringing in his ears and subsequent difficulty hearing. Claimant denied prior hearing problems, prior military service, and prior weapon use in his previous position as a police officer in Fort Lupton, Colorado. Claimant complained of ringing in his ears and headaches. Dr. Stefanon noted full visualization of the right tympanic membrane and partial visualization of the left tympanic membrane, noting both were normal in appearance. Dr. Stefanon remarked that the evaluation was conducted in a quiet room with normal conversation levels, and Claimant did not have difficulty hearing. Dr. Stefanon assessed bilateral high frequency hearing loss and tinnitus. Dr. Stefanon remarked that she believed the condition "is possibly related to the normal scope and duties of the patient's employment. However, it is unclear at this time whether the injury/condition is more medically probable than not related to their employment." Dr. Stefanon stated she needed to review prior audiograms to make a causality determination. Dr. Stefanon noted, "There is some inconsistency between the report to the emergency department in the patient's rapport today including date of injury an exposure to weapon discharge vs blast exposure." Dr. Stefanon requested prior audiograms and referred Claimant to the ear, nose and throat department. Dr. Stefanon recommended Claimant continue full duty work with use of hearing protection.

6. On August 10, 2016, Roger M. Traynor, Ed.D., FAAA conducted a hearing evaluation of Claimant and issued a report. Claimant reported high pitched tinnitus and a decrease of hearing. Dr. Traynor noted a pre-employment hearing test demonstrated "mild hearing loss at 6Hz of about 35 dBHTL bilaterally." Dr. Traynor assessed moderate high frequency sensori-neural hearing loss bilaterally. Dr. Traynor noted the results from his evaluation are similar to the results from the pre-employment baseline hearing evaluation and the March 2016 evaluation. Dr. Traynor recommended reduction of sodium/caffeine and the use of hearing protection. Dr. Traynor opined

hearing instruments "will not be of much benefit for everyday communication." Dr. Traynor further opined, "A demonstration of hearing devices, however, did suggest that he will obtain some tinnitus masking effects and probably some residual inhibition from the use of hearing devices." Dr. Traynor stated he agreed with Dr. Lipkin as to whether amplification would be appropriate, as Claimant had "almost normal hearing for speech communication." Dr. Traynor concluded, "I do, however, feel that the tinnitus is a handicapping disorder for this patient and he appears to be among the 53% of patients that greatly benefit from tinnitus masking and the possible residual inhibition that may be part of that treatment program."

7. Dr. Stefanon reevaluated Claimant on September 8, 2016. Claimant reported no change since his last evaluation and continued to complain of tinnitus. Comparing the June 14, 2013 audiogram to the August 10, 2016 audiogram, Dr. Stefanon noted no significant change in the right ear, except for at the 8000 Hz range, where Claimant's 2013 hearing level was 0 and the 2016 hearing level was 35. Dr. Stefanon further noted no change in left ear except at the 8000 Hz range, where Claimant's 2013 level was 20 and the 2016 level was 45. Dr. Stefanon also noted a change in the left ear at the 4000 Hz range, from level 0 in 2013 to level 20 in 2016. Dr. Stefanon opined that a trial of hearing aids to try to modulate the tinnitus was reasonable to see how Claimant responded. Dr. Stefanon further opined that she was not convinced custom earplugs and custom ear piece would modulate Claimant's tinnitus. Dr. Stefanon stated, "In looking at his hearing loss it is unusual that he'll be reporting the level of disruption in his hearing and the fact that the abnormalities are only noted in the 6000 and 8000 Hz range." Indicating the only frequency that was significantly affected was the 8000Hz range, Dr. Stefanon commented, "Again it is somewhat difficult to explain the level of hearing difficulty that the patient reports based on the data available regarding the audiograms. However it may be that the tinnitus is more of the issue." Dr. Stefanon opined Claimant would not qualify for a hearing impairment or a tinnitus impairment, but that he may require maintenance care for the tinnitus if the hearing aids were successful in modulating the tinnitus.

8. On the WC164 form completed by Dr. Stefanon on September 8, 2016, Dr. Stefanon listed "Bilateral high frequency hearing loss" and "Tinnitus" under work-related medical diagnoses. Dr. Stefanon stated her objective findings were consistent with Claimant's injury and/or work related mechanism of injury/illness.

9. At Respondents' request, Jeff Raschbacher, M.D. reviewed the request for the authorization for hearing aids and authored a letter dated September 13, 2016. Dr. Raschbacher reviewed audiograms, a follow-up note from Dr. Stefanon, notes from the audiologist and a note from Dr. Lipkin. Dr. Raschbacher noted Claimant had

abnormality only at the 6,000 Hz range. Dr. Raschbacher stated it was not clear that Claimant's hearing loss and/or tinnitus is work-related. Dr. Raschbacher remarked,"…it does not appear with respect to a causation analysis that his 6,000 Hz isolated hearing loss is work-related in causation given in particular its bilaterally symmetric nature and it is not clear that he has tinnitus, as this is not measureable." Dr. Raschbacher did not recommend authorizing any masking devices or hearing aids on a work-related basis.

10. Respondents filed a Notice of Contest on October 11, 2016.

11. Claimant testified at hearing he continues to experience constant ringing in both ears that varies in pitch and volume. Claimant indicated the ringing has resulted in severe headaches and difficulty sleeping. Claimant testified he cannot hear like he once could, and it is difficult to hear conversations when background noise is present. Claimant testified he did not have issues with his ears or hearing prior to the February 25, 2016 incident. Claimant stated the issues with his hearing have caused disorientation at times, and affected his work due to the difficultly in discerning the source or location of sounds.

12. Claimant testified he desperately wants the hearing aids. Claimant testified Dr. Traynor provided Claimant hearing devices for a period of approximately two-to-three months. Claimant stated the hearing devices reduced the tinnitus such that he no longer suffered headaches and the ringing was almost nonexistent. Claimant indicated the hearing devices assisted Claimant in hearing conversations in the presence of background noise, and in falling asleep.

13. Claimant's testimony is found credible and persuasive.

14. The ALJ credits the medical records and the opinions of Drs. Johnson, Stefanon and Traynor over the conflicting opinion of Dr. Raschbacher.

15. Claimant has established by a preponderance of the evidence that he sustained an industrial injury arising out of and in the course and scope of his employment on February 25, 2016.

16. Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment related to the industrial injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service.

Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ concludes Claimant has proven by a preponderance of the evidence he sustained a compensable injury on February 25, 2016. The industrial injury occurred while Claimant was on duty performing his work-related functions responding to a service call. No contrary evidence was admitted at hearing. Claimant credibly testified multiple gun shots were fired inches from his face, causing his hearing to become muffled and ringing in his ears. Claimant was not wearing hearing protection at the time. Both Dr. Johnson and Dr. Stefanon noted hearing loss in the 6000-8000 Hz range when comparing Claimant's 2013 pre-employment test to the tests taken post-injury in 2016. As indicated by Dr. Stefanon in the form WC164, her objective findings of bilateral high frequency hearing loss and tinnitus are work-related and consistent with Claimant's mechanism of injury. Claimant credibly testified he did not have hearing issues, including ringing, prior to the industrial injury. The ALJ is persuaded the industrial injury produced Claimant's need for treatment.

Reasonable, Necessary and Related Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

The ALJ further concludes Claimant has proven by a preponderance of the evidence he is entitled to receive reasonable and necessary medical treatment related to the February 25, 2016 industrial injury. Drs. Lipkin, Traynor and Stefanon noted Claimant has almost normal hearing for speech communication which does not necessitate amplification devices. Nonetheless, Drs. Traynor and Stefanon credibly opined tinnitus is an issue for Claimant and Claimant could benefit from devices used to mask or modulate the tinnitus. Claimant credibly testified the hearing devices significantly reduced his tinnitus and that, without the hearing devices, he continues to experience tinnitus which affects both his personal and professional life. As such, Respondents shall be liable for reasonable and necessary treatment to cure or relieve the effects of Claimant's tinnitus.

ORDER

It is therefore ordered that:

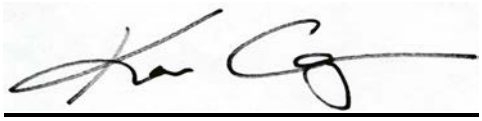
1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury to his hearing on February 25, 2016.

2. Respondents shall pay for reasonable and necessary medical treatment related to the February 25, 2016 industrial injury, including treatment of Claimant's tinnitus.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 12, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Respondents have produced clear and convincing evidence to overcome Dr. Castrejon's Division IME opinion that Claimant has not reached maximum medical improvement (MMI).

II. If Respondents failed to prove by clear and convincing evidence that Dr. Castrejon's opinion regarding MMI is clearly erroneous, whether Claimant established, by a preponderance of the evidence, that the need for additional low back treatment is causally related to his admitted June 17, 2015 industrial injury.

III. If Respondents presented clear and convincing evidence to overcome the Dr. Castrejon's determination concerning MMI, whether Claimant's 15% whole person impairment rating as calculated by Dr. Castrejon is appropriate.

Because the undersigned ALJ concludes that Respondents have failed to overcome Dr. Castrejon's determination concerning MMI, this order does not address the question concerning permanent impairment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as a ranch laborer for Employer. He was hired by Employer in March 2015. At the time of hearing, Claimant was 71 years of age. He has a seventh grade education and has been working as a ranch hand since he was 16 years old. Claimant is primarily Spanish speaking but does speak and understand English. He does not require the assistance of an interpreter to converse with others in English.

2. On June 17, 2015, Claimant was asked to roundup a bull that had escaped its enclosure. Claimant testified that he got onto a small motorcycle and proceeded into the pasture to locate the animal and bring it back to the corral.

3. Claimant found the bull, got off the motorcycle and attempted to roust it out from behind a tree. As he approached, the bull started moving so Claimant attempted to herd the animal by running toward it. As he advanced in the direction of the bull, Claimant failed to appreciate an irrigation ditch that was covered by tall weeds. Claimant noticed the ditch at the last moment and attempted to jump the channel. Claimant landed on an extended left leg on the upslope on the far side of the ditch. As he hit the upslope with his left leg, Claimant "popped something" in his left calf and was pitched backward coming down hard on his right foot and falling backward on the

upslope on his back. According to Claimant he experienced immediate pain his right and left leg as well as his back.

4. Claimant testified that his injury occurred between 9:00 and 10:00 AM. He testified that he continued working despite his pain. He was able to complete the balance of the work day but as he was in substantial pain at the end of the day, he reported the injury to the ranch foreman. He then returned home and retired for the evening. Claimant testified that he continued to have considerable pain in his legs (calves/thighs) and low back the following morning. Consequently, he called the foreman asking permission to see a medical provider. Claimant was referred to Rio Grande Hospital Clinic (RGHC) in Del Norte, Colorado.

5. Claimant was evaluated on June 18, 2015 at RGHC. The documentation form this date of visit documents that Claimant "hurt his left calf yesterday chasing a bull." According to the report Claimant "stepped in a hole and stepped down on his leg really hard" resulting in left leg pain extending to the left hip. Claimant reported that he felt like he had stretched "something" too far. Claimant was assessed with a likely calf strain and instructed to ice and rest the leg for the weekend.

6. Claimant testified that he was evaluated initially by a medical student who really did not examine him completely. According to Claimant, after a cursory examination, this student left the exam room to speak with a doctor about the possibility that he had sustained a tendon injury to his left calf. The report from this date of visit does not specifically reference complaints of low back pain or treatment recommendations for the same. According to Claimant he informed both the medical student and the examining physician that he had both leg and back pain only to be told that treatment would be focused on his left calf and that if he continued to have symptoms in other body parts attention to be turned there.

7. Claimant testified that he was disappointed in the level of attention/care he received during his initial examination. Accordingly, he advised his foreman that he wanted to see a different provider. Claimant was referred to San Luis Valley (SLV) Regional Medical Center where he was likely seen by Physician Assistant (PA) Howard Cox. The history of injury as documented in the report from this visit notes that Claimant was "chasing a bull and while running inadvertently fell into a hole, injuring both legs." On examination, Claimant's left calf was significantly swollen, tender and bruised (ecchymotic). Concern was raised for the potential of a deep vein thrombosis (DVT). Consequently, a Doppler study was performed and an MRI scheduled. Claimant's Doppler study was negative; however, the MRI demonstrated a rupture of the plantaris tendon of the left lower leg.

8. On June 25, 2015, Claimant was placed in a full cast boot and advised to elevate and ice his left leg. He was taken off work and referred to physical therapy.

9. In a return visit to SLV Regional Medical Center on July 20, 2015, Claimant reported that his cast boot had interrupted his gait and caused pain in his legs and back. According to the report from this date of visit, Claimant reportedly informed PA Cox that

he had not had back pain before. Claimant disputes this, testifying that the boot made his back pain worse and that once he was able to discontinue the boot his low back pain never went away. Claimant was referred for chiropractic care for treatment of his back and was to continue off work.

10. On August 4, 2015, Dr. Susan Geiger documented complaints of diffuse tenderness of the thoracolumbar region with palpation. Claimant's gait was documented as being "normal." Claimant was to continue chiropractic treatment.

11. On August 13, 2015, Claimant was evaluated by Dr. Kevin Rice who documented Claimant's complaint of persistent low back pain with radiation into both thighs. According to Dr. Rice's report this pain had begun approximately one month earlier. Dr. Rice obtained x-rays which revealed moderate multilevel lumbar spondylosis without instability on flexion/extension views prompting Dr. Rice to request and MRI of the lumbar spine.

12. An MRI of the lumbar spine was completed on August 17, 2015, demonstrating multilevel degenerative changes in the lumbar spine, including: mild to moderate facet arthropathy along with a disc bulge and right foraminal nerve root impingement at L1-2, a disc bulge at L2-3 a diffuse disc bulge at L3-4 with moderate facet arthropathy, and severe left foraminal narrowing along with impingement of the left L3 nerve root. At L4-5 a diffuse disc bulge with central disc protrusion and impingement of the bilateral L4 and L5 nerves roots secondary to severe foraminal narrow along with osteophyte formation was present. Similar findings of severe foraminal narrowing and bilateral nerve root impingement as well as moderate facet arthropathy were noted at the L5-S1 spinal level. The degree of changes noted on MRI lead to a the radiologist reading it as demonstrating impingement of the right L1, left L3, bilateral L4 and bilateral L5 nerve roots.

13. On August 19, 2015, Dr. Rice opined that Claimant's back pain emanated from Claimant's arthritic spine which was exacerbated during his June 17, 2015 work related injury. He planned to proceed with electrodiagnostic (EMG) testing.

14. On August 20, 2015, Dr. Rice forwarded correspondence to Liz Bivens, a senior claims representative for Insurer. In his letter, Dr. Rice would answer Ms Bivens question about the relatedness of Claimant's low back symptoms to his June 17, 2015 industrial injury. In his response, Dr. Rice reiterated that Claimant had lumbar stenosis which was exacerbated by his fall of June 17, 2015. He also opined that Claimant needed to see a neurosurgeon and proceed through electrodiagnostic (EMG) testing. Dr. Rice would go on to perform EMG testing on this date which demonstrated polyradicular changes he felt were related to the degenerative change noted on MRI of the lumbar spine.

15. On August 27, 2015, Claimant returned to Dr. Rice for follow-up. Dr. Rice recommended neurosurgical consultation for Claimant's persistent low back pain complaints.

16. On September 3, 2015, Dr. Robert Davis, an orthopedic surgeon completed the recommended surgical consultation. Dr. Davis noted complaints of low back and bilateral leg pain along with altered sensation throughout the L5-S1 dermatomes.

17. On September 17, 2015, Claimant returned to Dr. Davis who recommended lumbar epidural steroid injections at the two lowermost segments of the lumbar spine and raised consideration for a right L4-5 and L5-S1 hemilaminectomy should injection therapy fail. Claimant would later see Dr. Rice this same day who documented that the complexity of Claimant's low back condition warranted Dr. Davis' involvement to direct Claimant's proposed injections. It was noted that Claimant would proceed with injections though a physiatric partners of Dr. Davis in Durango.

18. Claimant was evaluated by Dr. Patrick McLaughlin in Durango on September 25, 2015. Following examination, Dr. McLaughlin recommended both facet blocks and transforaminal epidural steroid injections to be completed on the same visit given the distance of Claimant's residence from the clinic. Dr. McLaughlin's request for authorization to perform the aforementioned injections prompted Insurer to seek a physician advisor opinion from Dr. Kathy McCranie.

19. On October 1, 2015, Dr. McCranie noted that Claimant's history of injury documented that he stepped into a hole injuring his left calf without other body part involvement. She would go on to note that Claimant did not "fall" into a hole and that his complaints of back pain arose, from review of the records, on July 20, 2015. She opined that the mechanism of injury (MOI) was "inconsistent with the development of spinal stenosis, severe lumbar degenerative disc disease, and/or lumbar radiculopathy." Consequently, while she agreed that Claimant's calf injury could cause muscular pain in the lumbar spine due to an altered gait, the anatomic changes in the lumbar spine were not caused by Claimant's temporary changes in his gait pattern. She recommended treatment for Claimant's spinal stenosis and possible radiculopathy outside the workers' compensation system. Accordingly, the request for authorization to proceed with injection therapy was denied.

20. On October 16, 2015, Dr. Rice wrote a letter to Ms. Bivens. In his letter, Dr. Rice addressed the concern raised by Dr. McCraine regarding the inconsistent history of Claimant's injury as documented in the medical record as a whole. In this regard, Dr. Rice noted that whether Claimant stepped into a hole or fell into one was "inconsequential to the issue of whether Claimant's low back symptoms were related to his June 17, 2015 injury. According to Dr. Rice, the "incident resulted in a rapid deceleration injury which caused a situation which jarred [Claimant's] entire lower body and consequently aggravated pre-existing lumbar spinal stenosis resulting in symptoms that he continues to suffer with on a daily basis." Accordingly, Dr. Rice opined that Claimant's current status was attributable to his June 17, 2015 work injury.

21. Despite Dr. Rice's October 16, 2015 letter, Respondents stood on their denial regarding injections. On December 14, 2015, Claimant returned to Dr. Rice who documented that Claimant's treatment "seems to have come to a stop" and that he had

nothing else to offer expect supportive care. A return appointment was schedule for four weeks.

22. On January 14, 2016, Claimant returned for follow-up. Dr. Rice documented that Claimant's condition was stable and unchanged subjectively. He noted further, that Insurer had denied the requests for injections because the "condition for which care [was] requested [was] not compensable." Finally he noted that Claimant was scheduled for an independent medical examination (IME) and a hearing.

23. Claimant attended an IME with Dr. Eric Ridings at the request of Respondents on January 18, 2016. Dr. Ridings took a history and completed a physical examination. Dr. Ridings would go on to opine that it was "not at all medically probable that an acute injury to the patient's low back on 06-17-15 would not cause any symptoms (or increased symptoms over baseline) until about a month later, but would rather be expected to have presented themselves within the first 24 hours. In so concluding, the ALJ finds that Dr. Ridings does not believe that Claimant reported back pain to any of his providers prior to July 20, 2015. Indeed, Dr. Ridings noted that it was not "reasonable that the [Claimant] would have complained of low back pain to multiple providers prior to 07-20-15 and yet none of them documented [it] in the medical record." While Dr. Ridings agreed with Dr. McCranie that being in a cast boot would likely cause an altered gait, he felt any muscular low back pain caused thereby would be temporary. He also assumed that Claimant was out of the cast boot by July 20, 2015. Consequently, Dr. Ridings opined that it was not reasonable to assume that the cast boot would explain Claimant's low back pain early on in the course of recovery and that persistent back pain after getting out of the cast boot would be related to the degenerative changes noted in the lumbar spine. Rather, Dr. Ridings opined that all of Claimant's low back symptoms and ongoing lower extremity complaints were related to non-work causes.

24. On April 18, 2016, Claimant returned to Dr. Rice for follow-up. During this appointment, Claimant reported that his legs were "getting worse" and that he was tired of "waiting around" to obtain treatment. Thus, Claimant reported to Dr. Rice that he was going to pursue treatment "under his own medical insurance" in Durango. DR. Rice instructed Claimant that he would defer further treatment for his low back/legs to his personal care physician (PCP) and that his case was closed from the perspective of his plantaris rupture without impairment or restriction on his work.

25. Insurer filed a Final Admission of Liability (FAL) based upon Dr. Rice's April 18, 2016 note on May 18, 2016. Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME).

26. The requested DIME was completed by Dr. Miguel Castrejon on August 2, 2016. Dr. Castrejon obtained a history of the injury and a listing of Claimant's present complaints. Claimant reported a history consistent with that he testified to. He also reported during the DIME that he had "constant, sharp stabling pain that extends across [his] lower back and into both legs posteriorly and anteriorly, right worse than left, to below the knee level." Claimant reported that his back pain was worsening with the

passage of time and that it was limiting his ability to stand, walk or sit for prolonged periods of time.

27. Dr. Castrejon reviewed Claimant's medical records noting that the August 20, 2015 EMG study performed by Dr. Rice demonstrated fibrillation potentials in the muscles of the extremities (lower) and positive sharp waves which were indicative of an acute or subacute process which was, in his opinion, "temporally consistent" with an inciting event occurring one to two months previously, i.e. around June 2015. Dr. Castrejon also noted that Claimant likely minimized his low back symptoms focusing instead on the pain in his leg. According to Dr. Castrejon, Claimant was "used to experiencing intermittent low back pain as a natural consequence of the work activities that he performed." These prior symptoms were temporary and did not require ongoing care and did not result in lost work time. Thus, when the low back pain associated with his June 17, 2015 injury did not resolve and began to impair his function, Claimant began to report it.

28. Dr. Castrejon also reviewed Dr. Ridings IME report carefully. He was critical of the opinions reached by Dr. Ridings noting that he (Dr. Ridings) was "quick" to discuss comments raised by Dr. McCranie regarding the possible association between the onset of low back pain and Claimant's altered gait caused by the cast boot. The ALJ infers from Dr. Castrejon's report that he feels that Dr. Ridings' decision to focus on this association was an intentional attempt to place distance between Claimant's date of injury and his reports of low back in an effort to discredit him and confuse the issue of whether Claimant's low back pain was related to the June 17, 2015 incident. Dr. Castrejon also took exception with Dr. Ridings suggestion that the failure of the medical record to document complaints of pain prior to July 20, 2015 meant that there "could not possibly be an association between the mechanics of the injury and the claimant's presentation." Dr. Castrejon explained that Claimant is Hispanic and primarily Spanish speaking and that the individuals who treated him likely provided care through "some form of interpretation". He also noted that persons of Hispanic descent typically respond "differently" during examination and that often their complaints are minimized and seen as signs of malingering. Based upon his review of the medical record and his physical examination Dr. Castrejon found Claimant, in contradistinction to Dr. Ridings, to be very credible and without "pain behaviors" that could not be explained anatomically. Consequently, Dr. Castrejon opined that Claimant, in all medical probability, sustained an injury to his lumbar spine and left lower extremity during the incident occurring June 17, 2015. According to Dr. Castrejon, Claimant has not reached MMI for his work related low back condition and is in need of additional treatment, including a repeat electrodiagnostic study, additional facet injections, potential nerve root blocks and a repeat neurosurgical consultation.

29. Dr. Ridings testified at hearing. Dr. Ridings testified that Claimant's suffers from biomechanical low back pain secondary to degenerative changes in the lumbar spine and that Claimant's current symptoms are related to the natural and probable progression of this pre-existing condition. According to Dr. Ridings, Claimant would have needed low back treatment despite the incident that occurred on June 17, 2015.

30. Dr. Ridings reiterated that Claimant did not report back pain at the time he initially sought treatment and that the delay in reporting is critical to the question of relatedness of his slow back symptoms to his work injury because the MOI in this case would be expected to cause pain immediately.

31. Dr. Ridings testified that he has treated hundreds of Hispanic patients over time and that he recognizes that there are cultural differences in the presentation of Hispanic and non-Hispanic patients. However, Dr. Ridings maintained that the differences in Claimant's presentation were outside the known cultural norms and as such, Dr. Castrejon was clearly wrong in relating Claimant's low back pain to the June 17, 2015 industrial injury. Moreover, because Dr. Castrejon opined that Claimant was not at MMI for a condition that was unrelated to the industrial injury, the opinion that Clamant was not at MMI was also erroneous.

32. Based upon the evidence presented, the ALJ finds the opinions expressed by Dr. Castrejon are generally supported by the content of the medical records presented to him for review. Moreover, the ALJ finds a paucity of evidence to suggest that Dr. Castrejon erred in the completion of his DIME, including his opinions concerning MMI and/or the methodology he employed to reach a total combined whole person impairment rating of 15%. To the contrary, the evidence presented persuades the ALJ that there is a mere difference of opinion between the Dr. Castrejon as the division independent medical examiner and Respondent's retained medical expert, Dr. Ridings. Consequently, Respondents have failed to meet their required legal burden to set Dr. Castrejon's opinion regarding MMI aside.

33. Claimant has proven by a preponderance of the evidence presented that his need for additional treatment concerning the low back is causally related to his June 17, 2015 industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

B. In determining credibility, the ALJ should consider the witness' manner and

demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As found here, Dr. Castrejon's opinions are supported by the content of the medical records he reviewed. As such, the ALJ finds Dr. Castrejon's opinions credible and convincing. There is also a lack of persuasive evidence to support a conclusion that Dr. Castrejon deviated from the accepted methodology of the AMA Guidelines when he completed his DIME in this case. Indeed, Respondent makes no such assertion. Rather, Respondents contend that the DIME has been overcome based upon inconsistencies in the record regarding the MOI and the opinions Dr. Ridings regarding the pre-existing nature of Claimant's low back condition. As found, the evidence presented fails to persuade the undersigned ALJ that Dr. Castrejon's opinion regarding the relatedness of Claimant's low back condition and his current need for treatment to his June 17, 2015 is "clearly erroneous." The ALJ credits Dr. Castrejon's opinion as more persuasive than the contrary opinions of Dr. Ridings.

Overcoming the DIME

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C.

No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

E. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Here, the weight of the persuasive evidence demonstrates that Claimant's need for additional treatment is directly related to an aggravation of a pre-existing condition resulting from Claimant's attempt to jump an irrigation ditch while in the course and scope of his duties as a ranch hand. Because this treatment presents a reasonable prospect for curing and relieving Claimant of the ongoing effects caused by the aggravation of his pre-existing degenerative disc disease, Claimant is not at MMI. See *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001), *aff'd. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, (Colo. App. No. 01CA0401, February 14, 2002)(*not selected for publication)* (citing *PDM Molding v. Stanberg,* 898 P.2d 542 (Colo. App. 1995*)* and *Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995)]; *Hatch v. John H. Harland Co.,* W.C. No. 4-368-712 (August 11, 2000).

F. After considering the totality of the evidence presented, including the DIME report of Dr. Castrejon and the conflicting report and testimony of Dr. Ridings, the ALJ concludes that Respondent has failed to produce unmistakable evidence establishing that the Dr. Castrejon's determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that the evidence presented establishes a mere difference of opinion regarding causation between Dr. Castrejon and Dr. Rice and the contrary opinions of Dr. Ridings. A professional difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Castrejon's opinion concerning MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents have failed to meet their required legal burden to set his MMI determination aside.

Relatedness of Claimant's Need for Low Back Treatment to his June 17, 2015 Work Injury

G. Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

H. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Moreover, a pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo.App. 2004). To the contrary, a

claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo.App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). Here, the evidence presented supports a conclusion that Claimant likely had pre-existing degenerative disc disease in his lumbar spine. Indeed the MRI demonstrates substantial changes which were probably long standing in nature. Nonetheless, the record evidence fails to demonstrate that Claimant was actively symptomatic, was in need of or had recently received low back treatment prior to the June 17, 2015 incident or that his pre-existing condition was functionally limiting to him. While Dr. Ridings concludes that Claimant's current symptoms are related to the natural and probable progression of his pre-existing degenerative disc disease, the ALJ is not persuaded. Rather, the ALJ credits the opinion of Dr. Rice to conclude that Claimant's attempt to jump the ditch likely "resulted in a rapid deceleration injury which caused a situation which jarred [Claimant's] entire lower body and consequently aggravated pre-existing lumbar spinal stenosis resulting in symptoms that he continues to suffer with on a daily basis." Consequently, the ALJ concludes that Claimant has established a causal connection between his admitted June 17, 2015 work injury and his need for additional low back treatment. Thus, Respondents are liable to provide payment for such treatment.

ORDER

It is therefore ordered that:

1. Respondents request to set aside the DIME opinion of Dr. Castrejon regarding MMI is denied and dismissed.

2. Respondents shall pay for all reasonable, necessary and related medical expenses to cure and relieve the Claimant from the effects of his low back injury, including but not limited to the treatment recommended by Dr. Rice and Dr. Castrejon.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 13, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Determination of the Division independent medical evaluation (DIME) physician's true opinion on causality and maximum medical improvement (MMI) of Claimant's left shoulder.

2. Whether the DIME physician's opinion has been overcome.

3. Whether left shoulder surgery is reasonable, necessary, and causally related to the October 7, 2014 work injury.

STIPULATIONS

1. Dr. Hatzidakis is an authorized treating provider.

2. If the left shoulder is found not to be causally related to the October 7, 2014 work injury, Claimant is not be entitled to a permanent partial disability rating for the left shoulder. If the left shoulder is found to be causally related, Claimant will be referred for additional treatment and other issues will be reserved for future determination.

FINDINGS OF FACT

1. Claimant is a 62 year old male employed by Employer as an HVAC technician and has been so employed for approximately 26 years. Claimant services various HVAC units in properties used by Employer. Claimant's job can be physical at times and includes climbing ladders, working on roofs, and carrying tools.

2. On October 7, 2014 Claimant was so employed. Claimant was working on a roof that day when he needed to make a run to pick up parts. Claimant took Employer's truck to get parts.

3. Claimant was stopped at a red light and had the window down and his left arm out the window with his left elbow sitting on the window opening when he was rear-ended by another vehicle.

4. Claimant did not hear the other vehicle coming and the strike from behind was sudden and unexpected. Claimant was thrown backward 8-10 inches and struck his head against the headrest. Claimant's knee hit the steering wheel. Claimant's left arm that had been sitting on the open window remained on the window opening when he went backward. Claimant's car was pushed approximately 8-10 feet. Claimant's head and neck hurt and he saw stars.

5. Claimant pulled off of the road to get out of the way of traffic and got out of his work truck to talk to the other vehicle that had been involved. The other vehicle left the scene of the accident. Claimant called 911 and followed the other vehicle until the other vehicle drove up onto a bicycle path. Claimant then pulled over and waited for the police and ended up stopping approximately 12 blocks from the location of the accident.

6. Claimant's adrenaline was pumping and his heart was racing during this period of time. Claimant called his boss to report what had happened. Claimant met with police officers (both from Denver police department and Lakewood police department) and then drove himself to the doctor.

7. Claimant was evaluated by Clarence Ellis, M.D. at approximately 3:30 p.m. that day. Claimant testified that he wanted to go home, lay down, and get lunch because he had not yet eaten lunch that day. Claimant reported hitting his head with no loss of consciousness, a headache, and a stiff neck. Claimant reported mild spasm of the paralumbar muscles and that he thought his left knee hit the steering wheel and that it was stiff. Dr. Ellis noted mild decreased range of motion of the neck in all planes, mild parathoracic muscle tenderness, and mild paralumbar muscle tenderness. Dr. Ellis noted tenderness to palpation over the dorsal spinous process of C7 to very light palpation and some tenderness to very light palpation throughout the lumbar spine. Dr. Ellis noted that the left knee appeared normal without abrasion, bruising, or swelling. Dr. Ellis assessed motor vehicle accident with cervical and lumbar strains and a minor left knee contusion and advised Claimant to use ice packs. Dr. Ellis prescribed Mobic and Robaxin and opined that Claimant could return to light duty work the next day. *See* Exhibit A.

8. On October 9, 2014 Claimant was evaluated by Dr. Ellis. Claimant reported that generally all of his discomfort was improved but that he continued to have some neck and back stiffness. Dr. Ellis noted that Claimant's neck range of motion was slow with the appearance of discomfort but was much improved. Dr. Ellis noted that cervical spine x-rays showed some generalized degenerative disc disease and no acute abnormalities. Dr. Ellis noted that Claimant was quite concerned still and that it was reasonable for Claimant to see physiatry for another opinion. *See* Exhibit A.

9. On October 16, 2014 Claimant was evaluated by John Sacha, M.D. Claimant reported being rear ended in a motor vehicle accident on October 7 and that he hit his head with no loss of consciousness. Claimant reported acute onset of pain in the neck with radiation to the bilateral periscapular area and left proximal arm, some blurry vision, and some left knee pain that had since resolved. Claimant reported pain localized to the bilateral neck and bilateral periscapular areas and that he got headaches that started in the occipital and radiated into the periorbital area. Claimant reported a prior left clavical fracture with open reduction internal fixation. Dr. Sacha noted no pain behaviors and 0/5 Waddell signs. Dr. Sacha noted that an examination of the neck, shoulders, and upper extremities showed paraspinal spasm and segmental dysfunction in the mid to upper cervical spine. Dr. Sacha noted pain with extension and

extension rotation on the left greater than right side and a positive Hawkins and Neer test on the left side. Dr. Sacha assessed cervical facet syndrome status post motor vehicle accident and left shoulder impingement. Dr. Sacha opined that they were secondary to the motor vehicle accident and recommended a trial of chiropractic and acupuncture as well as some physical therapy for the rotator cuff as well as for strengthening the cervical spine. *See* Exhibit B.

10. On November 3, 2014 Claimant was evaluated by Donald Aspegren, D.C. Claimant reported that he had been rear ended by another vehicle and that he sustained injuries to the cervical region and left shoulder. Claimant reported a prior left clavicle fracture and surgery. Dr. Aspegren examined and treated Claimant and provided the impression of cervical facet syndrome and left shoulder impingement. *See* Exhibit C.

11. On November 6, 2014 Claimant was evaluated by Dr. Sacha. Claimant reported significant improvement with some temporary relief and some lasting relief with his neck pain, headaches, and shoulder pain. Claimant reported much better range of motion of the left shoulder. Dr. Sacha noted negative Hawkins and Neers tests in the left shoulder on exam which he opined was marked improvement. Dr. Sacha noted that Claimant still had some paraspinal spasm, segmental dysfunction, and pain with extension and extension rotation of the cervical spine. Dr. Sacha assessed cervical facet syndrome and left shoulder impingement. *See* Exhibit B.

12. On November 22, 2014 Claimant was evaluated by Dr. Ellis. Claimant reported that his headaches were better but that he still had pretty consistent pressure on the top of his head and felt like he was wearing a lead hat. Claimant reported continued neck pain and being concerned about a cracking and crunching in his neck. Claimant also reported decreased sensation in the total of his left arm. Dr. Ellis assessed neck and shoulder discomfort following a motor vehicle accident and recommended Claimant continued to follow up with Dr. Sacha. *See* Exhibit A.

13. On December 4, 2014 Claimant was evaluated by Dr. Sacha. Claimant reported that he was doing great with chiropractic and acupuncture care and physical therapy and that his neck and shoulders were about 80% improved and headaches were about 50% improved. Claimant reported some ongoing numbness and tingling in the left hand and some diminished range of motion. Dr. Sacha noted on exam paraspinal spasm and segmental dysfunction in the mid to upper cervical spine and a positive thoracic outlet test on the left. Dr. Sacha assessed cervical facet syndrome with headaches, and numbness and tingling in the left upper extremity due to the cervical facet syndrome. Dr. Sacha noted that Claimant was still having symptoms from the cervical spine and recommended an MRI. Dr. Sacha noted that there was no evidence of carpal tunnel syndrome or cervical radiculopathy. *See* Exhibit B.

14. On December 30, 2014 Claimant was evaluated by Dr. Sacha. Claimant reported that he was doing great with neck pain, was not having any scapular pain, and was not having any shoulder pain. Dr. Sacha noted that an MRI showed evidence of

multilevel degenerative disc disease and facet spondylosis from C4-5 and C5-6 into the C6-7 levels with significant canal and foraminal stenosis as multiple levels. Dr. Sacha noted some diminished range of motion in the cervical spine, but that it was markedly improved. Dr. Sacha assessed cervical facet syndrome, left shoulder impingement, and pre-existing cervical spinal stenosis. *See* Exhibit B.

15. On January 22, 2015 Claimant was evaluated by Dr. Sacha. Dr. Sacha noted a flare in symptoms from an exacerbation at work on January 5 when Claimant was working on a boiler valve that blew hot water causing Claimant to jump back and hit a control panel. Claimant reported flared neck pain, left shoulder, and left scapular pain all in the same distribution as previously. Claimant reported his symptoms were significantly elevated. Dr. Sacha noted positive pain with extension and extension rotation to the left. Dr. Sacha provided the impression of cervical facet syndrome, cervical radiculopathy, and history of pre-existing cervical spinal stenosis. Dr. Sacha provided an oral steroid. Dr. Sacha opined that it was likely just an exacerbation of pre-existing problems. *See* Exhibit B.

16. On February 18, 2015 Claimant was evaluated by Dr. Ellis. Dr. Ellis noted that as usual, Claimant had a long list of vague complaints. Dr. Ellis noted that day the complaints centered on weakness and paresthesias in the left arm and vague symptoms of poor concentration and memory difficulties. Dr. Ellis noted that when checking neck range of motion and asking Claimant to flex as far as possible, Claimant scrunched up his nose and didn't move his head even one degree forward. Dr. Ellis assessed continued complaints of neck and shoulder and arm difficulties post what initially seemed like a relatively minor motor vehicle accident. *See* Exhibit A.

17. On March 5, 2015 Claimant was evaluated by Dr. Sacha. Claimant reported that he was doing somewhat better. Dr. Sacha noted some pain with extension and extension rotation of the cervical spine. Dr. Sacha also noted some increased left shoulder pain and opined that it was likely a secondary area of symptoms due to the neck issues. Dr. Sacha noted some positive Hawkins and Neer testing on the left side and performed a left shoulder corticosteroid injection. Dr. Sacha noted that Claimant reported 100% temporary relief of the shoulder pain. Dr. Sacha noted that Claimant was likely approaching an endpoint for treatment. *See* Exhibit B.

18. On March 26, 2015 Claimant was evaluated by Dr. Sacha. Dr. Sacha noted that following the steroid injection in the left shoulder Claimant was markedly better and that the shoulder pain was gone. Claimant reported just having neck pain and intermittent pain down the left arm that was improving nicely. Dr. Sacha noted that Claimant should finish physical therapy, chiropractic, and acupuncture and that prognosis for complete recovery was excellent. *See* Exhibit B.

19. On April 16, 2015 Claimant was evaluated by Dr. Ellis. Claimant reported that since having been placed on medical leave he had noted other areas of his body that had problems including some upper back pain, increased left arm symptoms, increasing headaches, poor focus, and worsening of sleep. Claimant reported feeling

weak and shaky particularly in the left arm and that the neck and left shoulder continued to bother him. Dr. Ellis assessed motor vehicle accident with worsening of all symptoms. *See* Exhibit A.

20. On April 23, 2015 Claimant was evaluated by Dr. Sacha. Claimant reported a slight flare in symptoms for the last two weeks and that he had a marked increase in stress levels after being placed on medical leave on April 4 and that he felt that was creating some difficulties and higher stress levels. Claimant reported neck pain, periscapular pain, and left shoulder pain. Dr. Sacha noted mild pain behaviors. Dr. Sacha noted some pain with Hawkins testing on the left side and some mild paraspinal and segmental dysfunction in the cervical spine. Dr. Sacha provided the impression of cervical facet syndrome and shoulder pain and noted that Claimant would return for MMI and case closure and that a functional capacity evaluation (FCE) may be needed. *See* Exhibit B.

21. On May 7, 2016 Claimant was evaluated by Dr. Sacha. Dr. Sacha opined that Claimant was at MMI. Dr. Sacha noted that Claimant was still doing some maintenance chiropractic and acupuncture treatment that provided some benefit. Dr. Sacha noted that they had ordered an FCE and that Claimant planned on returning to full duty work. Dr. Sacha noted that Claimant had pain behaviors in the severe category. On examination, Dr. Sacha noted positive Hawkins and Neer test on the left shoulder, some paraspinal spasm and pain with extension and extension rotation to the left on the neck, and some diminished range of motion and segmental dysfunction in the mid cervical spine. Dr. Sacha provided the impression of cervical facet syndrome and shoulder impingement. Dr. Sacha noted that work restrictions would be assessed after the FCE and that maintenance care was recommended for medications, gym/pool pass for 6-12 months, a couple of follow ups, and 6-8 visits of chiropractic and acupuncture. Dr. Sacha provided a 9% whole person impairment rating for the cervical spine and a 2% whole person impairment rating for the shoulder and combined them for a total of 11% whole person permanent impairment rating due to the injury. *See* Exhibit B.

22. On May 18, 2016 Claimant was evaluated by Dr. Ellis. Claimant was concerned that Dr. Ellis didn't understand the seriousness of the car accident. Claimant reported some improvement in all of his symptoms. Claimant reported his neck was still stiff and that he was dropping things with his left arm and felt weak in the left arm but was determined to work through it and get back to work. Dr. Ellis noted that Claimant's range of motion was as bad as it ever had been. Dr. Ellis assessed motor vehicle accident with little subjective improvement in symptoms. *See* Exhibit A.

23. On June 11, 2015 Claimant was evaluated by Dr. Sacha. Dr. Sacha noted that the FCE had been completed and that Claimant did quite well, was valid and consistent, and could perform full duty work based on the results of the FCE. Claimant reported some increased pain and stiffness following the FCE, but overall felt pretty good. Dr. Sacha cleared Claimant for full duty work. Dr. Sacha also performed a left shoulder subacromial bursa injection with ultrasound guidance. *See* Exhibit B.

24. On June 24, 2015 Dr. Ellis noted that Claimant had been placed at MMI by Dr. Sasha on May 7, 2015 with a 9% rating for the low back and a 2% rating for the shoulder. Dr. Ellis noted that Claimant had passed the functional capacities evaluation (FCE) with flying colors and that no restrictions were necessary. Dr. Ellis provided maintenance meds, a gym and pool pass for 6-12 months, 2 visits with Dr. Sasha if necessary, and 6-8 chiropractic or acupuncture sessions if needed. Dr. Ellis noted that the case was closed and that Claimant was not expected to need follow up at the clinic. *See* Exhibit A.

25. On July 30, 2015 Claimant was evaluated by Dr. Sacha for a maintenance follow up visit. Claimant reported doing fairly well with full duty work with some pain that was tolerable. Claimant reported that the shoulder injection helped but that he still had left shoulder pain with overhead activities. Claimant reported an issue with dropping objects that Dr. Sacha opined did not correlate with cervical facet syndrome or shoulder impingement. On examination Dr. Sacha noted that there was evidence of a fine motor tremor, worse on the left than the right side but definitely present and extremely fine in nature. Dr. Sacha opined that the new onset of essential tremor was not work related, that the shoulder impingement was work related, and that the cervical facet syndrome was work related. Dr. Sacha planned to get a one-time EMG/nerve conduction study because of the neurological complaints of dropping objects to make sure there was nothing going on that was work related. *See* Exhibit B.

26. Dr. Sacha performed an EMG on September 22, 2015 and concluded that it was a normal study with no evidence of neuropathy, plexopathy, or radiculopathy. *See* Exhibit B.

27. On December 8, 2015 Claimant underwent a Division independent medical evaluation (DIME) performed by Richard Stieg, M.D. Claimant reported that he was rear ended and that his work truck was pushed forward about 10 feet into an intersection. Claimant reported that he was whiplashed hard and struck the back of his head. Claimant reported he was still experiencing 1-4 level pain in the neck with sharp exacerbations that last a few minutes at a time. Claimant also reported intermittent left arm numbness involving all five fingers and residual weakness in his left arm. Dr. Stieg performed a physical examination noting some impingement signs on flexion and abduction over the shoulder and some limitations in shoulder range of motion with pain on abduction/adduction and over the infraspinatus tendon on extension. Dr. Stieg provided the impression of: chronic neck pain in association with cervical spondylosis, symptomatic since the September 7, 2014 motor vehicle accident; and impingement syndrome and myogenic thoracic outlet syndrome of the left shoulder with persistent pain and crepitus, rule out internal derangement of the left shoulder joint. *See* Exhibit E.

28. Dr. Steig opined that Claimant had reached MMI on May 7, 2015. Dr. Steig suggested that during maintenance Claimant undergo an MRI of the left shoulder to rule out further internal derangement and the need for any possible interventional treatment, including surgery. Dr. Steig opined that if an MRI was performed and surgically remedial disease was found in the shoulder, then the date of MMI should be

rescinded and impairment rating recalculated following recovery. Dr. Steig opined that if the MRI showed no internal derangement requiring any other maintenance treatment then the current maintenance treatment program was reasonable and appropriate and should be continued. Dr. Steig provided a permanent partial disability impairment rating of 24% whole person based on a 9% whole person rating of the left upper extremity and a 16% rating of the cervical spine. *See* Exhibit E.

29. On April 21, 2016 Claimant was evaluated by Dr. Sacha. Dr. Sacha noted that a DIME had been performed and that an MRI of the left shoulder had been recommended. Dr. Sacha opined that was reasonable. Dr. Sacha noted on examination pain with Hawkins and Neer testing and some mild pain with extension and extension rotation. Dr. Sacha noted that he still had to comment on diagnosis and causality depending on the findings of the MRI and that he would have to go through all of the medical records before commenting on causality. *See* Exhibit B.

30. On April 25, 2016 Claimant underwent an MRI of his left shoulder interpreted by Craig Stewart, M.D. Dr. Stewart provided the impression of: large full thickness tear involving the majority of supraspinatus tendon with mild tendon retraction and very mild muscular volume loss; acromioclavicular joint osteoarthritis and old postoperative changes of the distal clavicle and coracoclavicular ligaments; mild bony remodeling of the superiorlateral aspect of humeral head, query old Hill-Sachs deformity. *See* Exhibit H.

31. On April 28, 2016 Claimant was evaluated by Dr. Sacha. Dr. Sacha noted that the MRI showed evidence of a full thickness tear at the supraspinatus with retraction, arthritis of the AC joint, and old distal clavicle and coracoacromial surgery. Dr. Sacha also noted that it showed evidence of some degenerative changes at the humeral head consistent with an old Hill-Sachs lesion. Dr. Sacha opined that Claimant had a very unusual looking shoulder consistent with old trauma and that with the history of old shoulder surgery it was difficult to state whether it was related. Since causality was an issue, Dr. Sacha noted that he would obtain all of the medical records including Dr. Ellis' records and the initial reports of injury to assess whether the shoulder should be included in the claim. Dr. Sacha assessed shoulder pain with evidence of a full thickness rotator cuff tear and severe degenerative changes and cervical facet syndrome. Dr. Sacha again noted that it was unclear whether the shoulder should be related as it looked like there was old trauma predating the date of injury and that the mechanism of having a motor vehicle accident and being rear ended should not be sufficient enough to injure the left shoulder. Claimant reported his arm was hanging out the window when he was rear ended and was not on the steering wheel. Dr. Sacha noted he wanted to review the records before commenting and that he could not rule out the possibility of an orthopedic shoulder specialist evaluating for causality as well. *See* Exhibit B.

32. On August 2, 2016 Dr. Sacha issued a special report noting that he had received the medical records including the initial report of injury and intake forms. Dr. Sacha noted that there was no evidence of shoulder complaints at the initial evaluation.

Dr. Sacha also noted that the MRI showed evidence of AC arthritis which would cause a chronic tear, a full thickness tear with loss of muscular volume consistent with a chronic tear, and an old Hills-Sachs deformity consistent with prior dislocation. Dr. Sacha opined that none of those would be related to the claim and opined that Claimants' shoulder was not work related from a causality standpoint and that no further care should be done under workers' compensation. Dr. Sacha believed that no one who had seen Claimant including any independent medical examiner had seen all of the initial questionnaire and pain intake forms when assessing causality. *See* Exhibit B.

33. On October 18, 2016 Dr. Stieg performed a follow up independent medical evaluation. Dr. Steig noted that Claimant had a follow up MRI of his left shoulder like he had recommended during the initial DIME. Dr. Stieg noted that the follow up MRI was abnormal but that Dr. Sacha did not recommend specific treatment allegedly because Dr. Sacha felt Claimant's problems were due to an old 1985 injury to the left clavicle. Claimant reported sharply rejecting Dr. Sacha's opinion and that his shoulder was asymptomatic for almost 30 years before the current claim. Dr. Stieg reviewed additional medical records and performed a physical examination. Dr. Stieg provided the impression of chronic neck pain with cervical spondylosis more symptomatic since his previous examination in December of 2015 and left shoulder impingement syndrome with persistent pain and crepitus and MRI evidence of considerable joint degenerative disease and history of old left clavicular fracture. Dr. Stieg opined that he concurred with Dr. Sacha that it was difficult to attribute all of the MRI changes to the most recent accident in October of 2014, however, Dr. Stieg found that to be a moot point and opined that since Claimant was asymptomatic in the left shoulder prior to the accident on October 7, 2014 the chronic pain and loss of range of motion could not be attributed to anything but the accident. *See* Exhibits 1, E

34. Dr. Steig again concurred that Claimant reached MMI on May 7, 2015. For maintenance treatment, Dr. Steig recommended that Claimant be sent back to Dr. Messenbaugh who did a medical file review but never examined Claimant. Dr. Steig opined that Claimant should have the benefit of orthopedic treatment to the left shoulder if Dr. Messenbaugh believed Claimant had a claims related injury, as he did. Dr. Steig provided a 25% whole person impairment rating and noted that Claimant's left shoulder impairment was at 5% whole person compared to 9% in his prior report and that the spinal impairment was now at 21% instead of 16% from 2015. *See* Exhibits 1, E.

35. On November 30, 2016 Robert Messenbaugh, M.D. performed a medical records review. Dr. Messenbaugh opined that the pathology noted on Claimant's radiographs/MRI was degenerative in nature, predated Claimant's October 7, 2014 accident, and was not caused by the October 7, 2014 accident. Dr. Messenbaugh agreed that Claimant's shoulder condition was degenerative. *See* Exhibit F.

36. On December 15, 2016 Claimant was evaluated by Armodios Hatzidakis, M.D. Claimant reported that he was rear ended by another car on October 7, 2014 and that his left arm was on the console of the window in an abducted position with the window down when he was struck. Claimant reported continued pain and difficulties

with his range of motion and that his shoulder was 100% of normal before the injury. Claimant reported a prior clavicle open reduction in 1985. Dr. Hatzidakis noted that the MRI of the left shoulder from April of 2016 showed a full thickness anterosuperior rotator cuff tear with lateral down slope to the acromion, noted AC joint arthrosis, and degeneration. Dr. Hatzidakis assessed left shoulder work related strain with resultant full thickness anterosuperior rotator cuff tear, long head of biceps strain, and continued pain with noted acromioclavicular joint arthrosis. Dr. Hatzidakis discussed left shoulder arthroscopic rotator cuff repair with subacromial decompression surgery and noted that Claimant wanted to proceed with surgery since conservative measures over the past several years had failed. *See* Exhibits 2, G.

37. On December 15, 2016 Dr. Hatzidakis submitted a letter to Respondent's adjuster. The letter noted that Claimant had no symptoms in the left shoulder before the accident and that very soon after the accident, Claimant had significant pain and weakness in the shoulder. Dr. Hatzidakis opined that Claimant's currently left shoulder symptomatology was secondary to the motor vehicle accident and noted that prior to the accident Claimant had no symptoms whatsoever referable to the left shoulder and that Claimant now had significant weakness and dysfunction of the left shoulder with significant rotator cuff tear that explained the weakness. Dr. Hatzidakis opined that there was not significant fatty infiltration of Claimant's rotator cuff on the MRI that would indicate that Claimant had a longstanding chronic extensive rotator cuff tear. Dr. Hatzidakis opined that if Claimant quit smoking, Claimant would be a reasonable candidate to proceed with arthroscopic rotator cuff repair and opined that there was a good chance Claimant would have significant improvement with the left shoulder symptomatology. Dr. Hatzidakis requested authorization for surgery. *See* Exhibits 2, G.

38. On January 24, 2017 Claimant was evaluated by Dr. Sacha. Claimant provided records regarding left shoulder complaints documented in the past and was somewhat irritated that the left shoulder was not work related. Dr. Sacha noted moderate to severe pain behaviors. On examination, Claimant had some paraspinal spasms and pain with extension and extension rotation bilaterally. The shoulder showed Hawkin's and Neer testing positive bilaterally. Dr. Sacha assessed shoulder impingement bilaterally and neck pain and noted that he would review the records Claimant brought in and issue a special report. *See* Exhibit B.

39. On January 30, 2017 Dr. Sacha issued a special report. Dr. Sacha noted he received the medical records including the request for surgery from Dr. Hatzidakis in detail. Dr. Sacha noted that one month after the onset of injury, Claimant had left shoulder complaints with chiropractor Dr. Aspegren but that Claimant also had full range of motion of the left shoulder that continued in follow-ups. Dr. Sacha also noted a full thickness rotator cuff tear, a lateral downslope of the acromion, AC arthrosis, and degeneration. Dr. Sacha noted that although Claimant denied any previous left shoulder injury that Claimant clearly had trauma to the shoulders in the past including Hill-Sachs deformity as well as clavicular fracture and subacromial surgery all consistent with prior trauma. Dr. Sacha noted that Dr. Hatzidakis had stated that Claimant was asymptomatic with the shoulder before the accident, then symptomatic after and

therefore it should be related to the motor vehicle accident but that Dr. Hatzidakis did not give specifics. Dr. Sacha noted that after reviewing everything, what he could tell from Claimant was: 1. Claimant did not have any complaints of the shoulder pain for approximately one month after the injury. Dr. Sacha opined that with a post-traumatic full thickness rotator cuff tear, Claimant would have had immediate pain and symptomatologic and very little movement. Dr. Sacha noted that instead, Claimant had full range of motion of the shoulder immediately after the injury. 2. Claimant had evidence of what appeared to be old trauma to the shoulder and that it was very likely that it was a chronic pre-existing rotator cuff tear not an acute injury based on Claimant's lack of reporting it within the first month, lack of findings on physical exam, and evidence of pre-existing trauma. *See* Exhibit B.

40. Dr. Messenbaugh testified at hearing consistent with his medical records review report. Dr. Messenbaugh opined that acute injury to the rotator cuff from trauma was exquisitely rare. He opined that a dislocation or fracture of the shoulder could cause an acute rotator cuff tear and that it would be a significant injury with severe pain that was immediately recognizable. Dr. Messenbaugh opined that the medical records were not consistent with an acute rotator cuff tear and that there was no mechanism of injury to support an acute tear and that there was no initially reported acute and severe shoulder pain. He opined that Claimant had not sustained a shoulder dislocation, fracture, and that Claimant did not report any shoulder pain to Dr. Ellis at the first two visits. Dr. Messenbaugh opined that an acute rotator cuff tear would be so painful that it would have overshadowed Claimant's minor cervical sprain and knee contusion complaints. Dr. Messenbaugh agreed that Claimant has a rotator cuff that requires surgery but opined that it was not related to the October 7, 2014 motor vehicle accident.

41. Dr. Messenbaugh noted that Claimant has a downsloping acromion and that impingement is commonly seen where the overhanging and downsloping acromion narrows the space for the rotator cuff to pass through, rubs and frays the rotator cuff over time, and can cause a degenerative tear due to the wearing and impingement.

42. Claimant testified credibly at hearing. Claimant testified consistent with the medical records that at his first visit to Dr. Sacha, 9 days after the accident a left shoulder diagnosis was made and that he was referred for treatment that included acupuncture in his left arm and shoulder and physical therapy for his left arm and shoulder. Claimant testified credibly that he had several fractures as a child and a surgery in 1985 on his left collarbone where a plate was put in and that he had no problems following recovery from that surgery 30+ years ago. Claimant had no problems with his left shoulder or left collarbone before the motor vehicle accident, no treatment in 30+ years, and no limitations in performing his normal job duties. At the initial appointments the day of the accident and two days later, Claimant was focused on his head and neck.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

DIME Opinion

When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Causation of left shoulder:

As found above, Dr. Steig opined in his initial DIME report and in his supplemental DIME report that Claimant's left shoulder condition was causally related to October 7, 2014 motor vehicle accident. Although Dr. Steig noted in the follow up DIME that he did not believe that all of the changes shown on Claimant's left shoulder MRI were due to the motor vehicle accident, he noted that Claimant was asymptomatic in the left shoulder prior to the motor vehicle accident and opined that Claimant's chronic pain and loss of range of motion in the left shoulder could not be attributed to anything but the motor vehicle accident. In the follow up DIME report, Dr. Steig also noted that he found the opinion of Dr. Sacha that the left shoulder was not work related to be inexplicable.

Dr. Steig opined that Claimant should have the benefit of orthopedic treatment to the left shoulder if Dr. Messenbaugh believed Claimant had a claim related injury, like he did. Dr. Steig did not leave open the question of causation, rather, he opined in both DIME reports that the left shoulder was causally related to the work injury and motor vehicle accident. Dr. Steig also did not defer to Dr. Messenbaugh for a causation determination, but rather noted that Claimant should have treatment if the orthopedic doctor agreed with him on causation. Dr. Steig did not indicate what should be done if an orthopedic doctor disagreed with him on causation of the left shoulder. As found above, after the follow up DIME two orthopedic surgeons had different opinions about Claimant's left shoulder. Dr. Messenbaugh performed a medical records review and opined that the pathology on the MRI of the left shoulder was degenerative in nature and was not caused by the October 7, 2014 motor vehicle accident. Dr. Hatzidakis evaluated Claimant and opined that the left shoulder symptomatology was secondary to the motor vehicle accident and noted that the MRI had shown that there was not significant fatty infiltration for the rotator cuff indicating that Claimant did not have a longstanding chronic extensive rotator cuff tear. The ALJ concludes that the DIME physician's true opinion is that the left shoulder is causally related to the October 7, 2014 motor vehicle accident.

MMI date:

Dr. Steig's opinion on MMI is conflicting. In the initial DIME report, in addition to his opinion that the left shoulder was causally related to the motor vehicle accident, Dr. Steig opined that Claimant had reached MMI on May 7, 2015. However, in that same report Dr. Steig noted that Claimant needed an MRI of the left shoulder to rule out further internal derangement and to rule out the possible need for any interventional treatment including surgery. Dr. Steig opined that if the MRI showed surgically remedial disease in Claimant's left shoulder, then the date of MMI should be rescinded. As found above, an MRI was performed on April 25, 2016 and surgically remedial disease was found. Claimant was sent back to Dr. Steig for a follow up DIME after the MRI was performed. Dr. Steig noted that in the initial DIME report he had some disagreement with Dr. Sacha about maintenance treatment and had suggested an MRI of the left shoulder to rule out further internal derangement and need for more definitive surgical and/or non surgical treatment and that if that were done the date of MMI should be rescinded and an impairment rating recalculated following recovery. Dr. Steig noted that Claimant did have a follow up MRI that was abnormal but that Dr. Sacha did not

recommend specific treatment because of Dr. Sacha's opinion that Claimant's injury was due to an old injury, which Dr. Steig found to be inexplicable. Despite noting in the follow up DIME report that the date of MMI should be rescinded and that the impairment rating should be recalculated following recovery if the MRI showed the need for more definitive surgical and/or non surgical treatment to the left shoulder, Dr. Steig again listed the date of MMI as May 7, 2015. Dr. Steig also recommended that Claimant be sent back to Dr. Messenbaugh noting that Dr. Messenbaugh had never had the opportunity to examine Claimant. The ALJ concludes that Dr. Steig issued conflicting opinions about MMI with both opinions that the May 7, 2015 MMI date should be rescinded and opinions that May 7, 2015 remained the MMI date. After review of all the evidence, the ALJ concludes that the true opinion of the DIME physician is that the May 7, 2015 MMI date should be rescinded and that Claimant is not at MMI due to Claimant's causally related left shoulder condition that requires further treatment and evaluation.

Overcoming DIME on MMI

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." *See* § 8-40-201(11.5), C.R.S. Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's

findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

As found above, Claimant's left shoulder is causally related to his October 7, 2014 work related motor vehicle accident. There is further treatment reasonably expected to improve Claimant's left shoulder condition. The opinions of DIME physician Dr. Steig that Claimant is not at MMI and that the left shoulder is causally related is found credible, persuasive, and overall supported by the medical records and the credible testimony of Claimant. Dr. Hatzidakis agreed with Dr. Steig that the left shoulder was related and has recommended surgery to improve Claimant's left shoulder condition and symptomatology. The Respondents have failed to overcome the opinion of Dr. Steig. The opinions of Dr. Sacha are not found persuasive. Nine days after the motor vehicle accident Dr. Sacha evaluated Claimant and opined that Claimant's left shoulder impingement was related to the motor vehicle accident and he sent Claimant for physical therapy for the left rotator cuff. Dr. Sacha also initially rated Claimant's left shoulder as being related to the work injury when he placed Claimant at MMI. Dr. Sacha later issued a report noting that Claimant had denied any previous left shoulder injury and opined that Claimant's shoulder was a chronic, pre-existing rotator cuff tear, not an acute injury based on Claimant's lack of reporting within the first month. However, the records establish that Claimant consistently reported a pre-existing left clavicle surgery to his providers and that there was reporting within 9 days to Dr. Sacha who immediately referred Claimant for physical therapy to the left rotator cuff and assessed left shoulder impingement. Dr. Sacha, in his review, appears to have missed his own medical records showing that Claimant reported the left shoulder well before one month and Dr. Sacha's opinion is not found persuasive. Further, the opinion of Dr. Messenbaugh appears, at most, to be a difference of opinion from the DIME physician Dr. Steig and from Dr. Hatzidakis. The ALJ finds the opinions of Dr. Steig and Dr. Hatzidakis to be more credible and persuasive and overall consistent with the medical records and credible testimony of Claimant. Respondents have failed to meet their burden. Claimant is not at MMI for his related left shoulder condition.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found above, the providers agree that left shoulder surgery is reasonable and necessary for Claimant. There was a disagreement on whether or not the surgery recommended was causally related, but the experts agree the procedure is reasonable and necessary. As the ALJ finds the left shoulder to be causally related to the October 7, 2014 motor vehicle accident and work injury, Claimant has established that the

recommended surgical treatment is reasonable, necessary, and causally related to his work injury and that he is entitled to the surgery.

ORDER

1. The DIME physician's opinion is that Claimant is that Claimant's left shoulder is casually related to the October 7, 2014 work injury and that Claimant is not at MMI for the left shoulder.

2. Respondents have failed to overcome the DIME opinion.

3. Claimant has established that the recommended left shoulder surgery is reasonable, necessary, and related to his October 7, 2014 work injury.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 13, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical maintenance benefits designed to relieve the effects of her right upper extremity symptoms or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. On July 28, 2008 Claimant sustained an admitted left ankle injury during the course and scope of her employment with Employer. She was diagnosed with a left ankle sprain/strain. After continued discomfort, Claimant underwent left ankle surgery on July 30, 2010.

2. Claimant subsequently experienced increased pain and decreased function in her left ankle. She thus received physical therapy, acupuncture and injections. On March 7, 2012 Authorized Treating Physician (ATP) Kathy McCranie, M.D. placed Claimant at Maximum Medical Improvement (MMI) with diagnoses of Chronic Regional Pain Syndrome (CRPS) in her left lower extremity and sympathetically mediated pain in her right ring finger. Dr. McCranie assigned Claimant a 15% whole person impairment rating and recommended medical maintenance benefits.

3. On May 23, 2012 Respondent filed a Final Admission of Liability (FAL). The FAL was consistent with Dr. McCranie's MMI and impairment ratings. The FAL also recognized that Claimant was entitled to receive reasonable, necessary and related medical maintenance benefits.

4. On February 20, 2013 Claimant returned to Dr. McCranie for an examination. Dr. McCranie remarked that additional testing had revealed no evidence of CRPS. She specifically noted that "[w]ith a negative bone scan there does not appear to be objective evidence of spreading of her previous history of CRPS and in fact there is no ongoing evidence of this condition in her ankle on her recent bone scan."

5. On November 4, 2014 Claimant visited George Schakaraschwili, M.D. for an examination. Autonomic testing revealed a high probability of CRPS in the left lower extremity but a low probability of CRPS in the right upper extremity. Dr. Schakaraschwili summarized that there was "no objective laboratory evidence and no objective clinical evidence for the spread of [CRPS] to the right upper extremity."

6. Claimant's primary ATP changed from Dr. McCranie to Scott J. Primack, D.O. On August 3, 2016 Dr. Primack determined that Claimant did not have CRPS in her right upper extremity. He also noted that, if Claimant had sympathetically mediated pain, it was not related to her work activities for Employer. Dr. Primack noted that Claimant had CRPS of her left lower extremity that was not spreading.

7. On August 9, 2016 Claimant underwent another bone scan that did not reveal any evidence of CRPS in her right hand. On August 31, 2016 EMG testing reflected electrophysiologic evidence of mild right Carpal Tunnel Syndrome (CTS) in Claimant's right wrist. Dr. Primack remarked that the CTS was not related to Claimant's admitted left ankle injury.

8. On September 27, 2016 Claimant visited Craig A. Davis, M.D. for a second opinion evaluation. Dr. Davis diagnosed Claimant with possible CTS in her right wrist. He administered a steroid injection for both diagnostic and therapeutic purposes.

9. On October 5, 2016 Claimant returned to Dr. Davis for an evaluation. She reported no improvement from the steroid injections. Dr. Davis concluded that, because Claimant did not respond to the steroid injections, she likely did not have "clinically significant [CTS]." He commented that Claimant might be experiencing "some element of CRPS in the right hand, particularly given the hypersensitivity in her ring finger."

10. On November 28, 2016 Claimant returned to Dr. Primack for an evaluation. She attributed her right hand symptoms to using a cane because of her left ankle condition. Claimant also sought a second opinion. Dr. Primack denied Claimant's request for a second opinion because her right upper extremity symptoms were not work-related. He explained that, because Claimant was female and over 40, she was susceptible to the development of CTS.

11. On January 16, 2017 Claimant visited Giancarlo Barolat, M.D. for an evaluation. Dr. Barolat recounted that Claimant had initially visited his office in 2010 with symptoms in her left lower extremity that were consistent with CRPS. Claimant reported that she had experienced a burning and "shocking" sensation in her right hand area over the previous 5-6 years. Dr. Barolat noted that Claimant continued to suffer CRPS in her left foot with "similar symptomatology in her right hand." He remarked that Claimant "clearly has a neuropathic pain condition, which has some of the features consistent with CRPS" in her right wrist. Dr. Barolat explained that Claimant's right wrist symptoms were likely a "permanent neuropathic pain condition" and did not constitute CTS because the pain was inconsistent with the typical distribution for CTS.

12. On February 27, 2017 Claimant underwent an independent medical examination with Henry J. Roth, M.D. Dr. Roth reviewed Claimant's medical records and conducted a physical examination. He determined that Claimant's right upper extremity symptoms were not related to her July 28, 2008 left ankle injury. Dr. Roth explained that Claimant did not have CRPS in her right upper extremity and her symptoms did not reflect a spreading of CRPS from her left ankle. He also agreed with Dr. Primack that Claimant did not have sympathetically mediated pain in her right ring

finger. Dr. Roth did not recommend any additional medical maintenance evaluation, diagnosis or treatment related to Claimant's right upper extremity.

13. Dr. Primack testified at the hearing in this matter. He maintained that Claimant did not have CRPS in her right upper extremity and her right wrist CTS was not related to her work activities for Employer. Dr. Primack recounted that objective testing had consistently revealed that CRPS had not spread to Claimant's right upper extremity. Initial testing for right wrist CTS presented borderline results. Additional testing did not reveal a motor component, but only a sensory component of Claimant's right wrist CTS. Dr. Primack explained that, because Claimant's CTS lacked a motor component, it was unlikely that it was caused by her use of a cane or related to her July 28, 2008 admitted left ankle injury. Dr. Primack summarized that the cause of Claimant's right wrist CTS was likely idiopathic in nature.

14. Claimant has failed to prove that it is more probably true than not that she is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her right upper extremity symptoms or prevent further deterioration of her condition. She has failed to demonstrate a causal connection between her July 28, 2008 admitted left ankle injury and right upper extremity condition. Claimant initially suffered a left ankle sprain/strain and underwent surgical repair on July 30, 2010. Objective testing subsequently revealed the development of CRPS in Claimant's left lower extremity. Claimant reached MMI on March 7, 2012.

15. Claimant subsequently reported right upper extremity pain and discomfort. Additional testing revealed that Claimant continued to suffer from CRPS in her left lower extremity but the condition had not spread to her right upper extremity. However, Dr. Davis speculated that Claimant might have "some element of CRPS" in her right hand. Moreover, Dr. Barolat remarked that Claimant exhibited "a neuropathic pain condition which has some of the features consistent with CRPS" in her right wrist. He noted that Claimant's right wrist symptoms were unlikely to constitute CTS because the pain was not consistent with the typical symptom distribution for CTS.

16. Although the opinions of Drs. Davis and Barolat suggest that Claimant might have CRPS in her right upper extremity, the persuasive medical records reflect that Claimant does not have CRPS in her right upper extremity but suffers from CTS that is not causally related to her July 28, 2008 admitted left ankle injury. On August 9, 2016 a bone scan did not reveal any evidence of CRPS in Claimant's right upper extremity. However, subsequent EMG testing revealed electrophysiologic evidence of mild right CTS. Dr. Roth determined that Claimant's right upper extremity symptoms were not related to her July 28, 2008 left ankle injury. He emphasized that Claimant did not have CRPS in her right upper extremity and her symptoms did not reflect a spreading of CRPS from her left ankle. Furthermore, Dr. Primack persuasively explained that Claimant did not have CRPS in her right upper extremity and her right wrist CTS was not related to her work activities for Employer. He recounted that objective testing consistently revealed that CRPS had not spread to Claimant's right upper extremity. Instead, Claimant suffered from right wrist CTS that lacked a motor component, but only involved a sensory component. Dr. Primack explained that,

because Claimant's CTS lacked a motor component, it was unlikely that it was caused by her use of a cane or related to her July 28, 2008 admitted left ankle injury. Dr. Primack summarized that the cause of Claimant's right wrist CTS was likely idiopathic in nature.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. As found, Claimant has failed to prove by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her right upper extremity symptoms or prevent further deterioration of her condition. She has failed to demonstrate a causal connection between her July 28, 2008 admitted left ankle injury and right upper extremity condition. Claimant initially suffered a left ankle sprain/strain and underwent surgical repair on July 30, 2010. Objective testing subsequently revealed the development of CRPS in Claimant's left lower extremity. Claimant reached MMI on March 7, 2012.

6. As found, Claimant subsequently reported right upper extremity pain and discomfort. Additional testing revealed that Claimant continued to suffer from CRPS in her left lower extremity but the condition had not spread to her right upper extremity. However, Dr. Davis speculated that Claimant might have "some element of CRPS" in her right hand. Moreover, Dr. Barolat remarked that Claimant exhibited "a neuropathic pain condition which has some of the features consistent with CRPS" in her right wrist. He noted that Claimant's right wrist symptoms were unlikely to constitute CTS because the pain was not consistent with the typical symptom distribution for CTS.

7. As found, although the opinions of Drs. Davis and Barolat suggest that Claimant might have CRPS in her right upper extremity, the persuasive medical records reflect that Claimant does not have CRPS in her right upper extremity but suffers from CTS that is not causally related to her July 28, 2008 admitted left ankle injury. On August 9, 2016 a bone scan did not reveal any evidence of CRPS in Claimant's right upper extremity. However, subsequent EMG testing revealed electrophysiologic evidence of mild right CTS. Dr. Roth determined that Claimant's right upper extremity symptoms were not related to her July 28, 2008 left ankle injury. He emphasized that Claimant did not have CRPS in her right upper extremity and her symptoms did not reflect a spreading of CRPS from her left ankle. Furthermore, Dr. Primack persuasively explained that Claimant did not have CRPS in her right upper extremity and her right wrist CTS was not related to her work activities for Employer. He recounted that objective testing consistently revealed that CRPS had not spread to Claimant's right upper extremity. Instead, Claimant suffered from right wrist CTS that lacked a motor component, but only involved a sensory component. Dr. Primack explained that, because Claimant's CTS lacked a motor component, it was unlikely that it was caused by her use of a cane or related to her July 28, 2008 admitted left ankle injury. Dr. Primack summarized that the cause of Claimant's right wrist CTS was likely idiopathic in nature.

ORDER

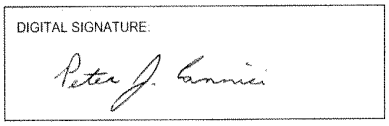
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for medical maintenance benefits for her right upper extremity is denied and dismissed.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 14, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Have Respondents overcome the DIME's determination that Claimant is not at MMI?

2. If Claimant is not at MMI, was the treatment she received after being released by Concentra on May 16, 2016 reasonable, necessary, related and authorized?

3. Is Claimant entitled to TPD benefits from March 16, 2016 through May 15, 2016?

4. Is Claimant entitled to TTD benefits commencing May 16, 2016?

FINDINGS OF FACT

1. Claimant sustained an admitted occupational disease involving her bilateral upper extremities on February 3, 2016. Claimant worked as a sterile packager for Employer since 2006. She worked in several departments at Employer's facility, including sterile packaging, boxing, shipping and preparing, and labeling. Typically, the employees rotate through various work areas to minimize their cumulative exposure to any particular activity.

2. Before her date of injury, Claimant was on maternity leave from April through September 2015. Her baby was born in June 2015. When Claimant returned from maternity leave, she was assigned to the boxing area. Claimant remained in the boxing area for several months and did not rotate to other tasks. She worked up to 12 hours per day, 6-7 days per week.

3. Claimant worked an average of 58.11 hours per week from November 1, 2015 through January 31, 2016, including five weeks of more than 74 hours. Her highest number of hours worked was 83.25 hours during the week ending December 6.

4. On February 2, 2016, Claimant went to her primary care physician, Dr. Melissa Devalon, with complaints of pain, numbness, and tingling in her hands. She said the symptoms had been present for approximately two months. She was having difficulty gripping and twisting objects. Dr. Devalon diagnosed tendinitis, which she opined "is clearly related to her work with a repetitive strain injury." She advised Claimant to report a work-related injury.

5. Claimant reported the injury to Employer and was referred to Concentra for authorized treatment. At her initial visit on February 3, 2016, she saw Dr. John Ronning. Claimant described the gradual development of bilateral hand and wrist pain associated with her work. She told Dr. Ronning that her job involves "a lot of repetitive

lifting and hand work." She reported numbness at night. Dr. Ronning diagnosed bilateral de Quervain's tenosynovitis and osteoarthritis. He prescribed a Medrol Dosepak and referred Claimant for physical therapy. Dr. Ronning gave Claimant work restrictions of maximum four-hour shifts, lifting up to 20 pounds, occasional gripping and pinching, and advised her to wear bilateral wrist splints "frequently."

6. Claimant returned to Concentra on February 10 and saw PA-C Shaun Lynch. Her pain was worsening despite therapy and splints. PA-C Lynch opined that Claimant "appears to have tendinitis, likely repetitive and cumulative from her job." He referred Claimant to Dr. Timothy Hart, a hand specialist.

7. Claimant saw Dr. Hart on February 18, 2016, and reported severe bilateral radial-sided wrist pain with swelling. Dr. Hart diagnosed de Quervain's disease and administered bilateral cortisone injections. Dr. Hart wanted to see Claimant again in a few weeks and opined, "if she is not substantially improved, then I think we need to rapidly move toward surgical resolution for her severe bilateral wrist de Quervain's." Dr. Hart further opined "I do think that her work activities are material contributory causative factors in the onset and progression of her severe bilateral de Quervain's."

8. Claimant started seeing Dr. Nicholas Kurz at Concentra on February 18, 2016. She described pain in both arms radiating up to her shoulders. Dr. Kurz also noted neck pain. Claimant's wrist pain had increased following the injections from Dr. Hart earlier that morning. Dr. Kurz took Claimant off work due to the severity of her symptoms.

9. Claimant followed up with Dr. Kurz on March 3, 2016, and reported that her hands were "no better" following the injections. She reported, "she cannot move her hands or grip at all functional [sic]." Dr. Kurz noted Claimant was a difficult historian "due to the language barrier." Dr. Kurz referred Claimant for an EMG, x-rays, and blood work to "clarify" her diagnosis. He released Claimant to work with restrictions of "sedentary/desk type of work only," lifting no more than 5 pounds occasionally, and advised Claimant to wear her splints "continually."

10. Dr. Timothy Sandell performed bilateral EMG/NCV testing on March 9, 2016. Claimant described "pins and needles" and pain in her bilateral wrists, radiating to the elbows. Her symptoms were "worse with activity." The electrodiagnostic testing showed mild right carpal tunnel syndrome and borderline-to-mild left carpal tunnel syndrome. Dr. Sandell opined "it is my suspicion that she is experiencing a combination of nerve entrapment along with some of the musculoskeletal issues that are being addressed by Dr. Hart."

11. Dr. Kurz reviewed the electrodiagnostic test results with Claimant on March 17, 2016. He felt her clinical presentation was consistent with de Quervain's, but not carpal tunnel syndrome. He noted that Claimant was "completely asymptomatic and complains of no numbness or tingling in either hand."

12. The Concentra records reflect that Claimant saw Dr. Hart on March 17, 2016, but Dr. Hart's report is not contained within the parties' exhibit packets. The ALJ infers from the records that Dr. Hart recommended proceeding with bilateral surgery.

13. Claimant returned to Concentra the next day and saw a different physician, Dr. Daniel Peterson. Dr. Peterson recommended a job site analysis "to determine if her de Quervain's is work related or not."

14. Sara Shugars, MS CRC, performed an ergonomic job site analysis ("JSA") on March 30, 2016, and documented her findings in a narrative report dated May 9, 2016. Ms. Shugars interviewed Claimant regarding her work activities and observed various tasks, including boxing. The report states typically 250-550 full boxes are produced per shift. Claimant's duties while boxing required: "Exerting considerable physical effort to complete a motion, doing the same motion over and over again, performing motions constantly without short pauses or breaks in between, maintaining [the] same position or posture while performing tasks, and using hands or body as a clamp to hold objects while performing tasks." The evaluation determined that Claimant is exposed to several primary and secondary risk factors listed in the Cumulative Trauma Disorder MTGs, including prolonged use of hand-held tools and awkward postures with repetition/duration. Since there is no way to modify the essential duties of the job, Ms. Shugars recommended that Claimant "move from packaging areas every 1 to 2 days and not remain in one area for more than two days/shifts at a time."

15. Claimant saw Dr. Kurz on May 16, 2016 to review the JSA. Dr. Kurz noted "discrepancies" between the information in the JSA report and information provided by Employer, including "verbal clarification" he received from Employer's on-site nurse, Andrew Aneson. Dr. Kurz noted Claimant gets two 15 minute breaks and a 30 minute lunch break during an eight-hour shift. Based on the information from Employer, Dr. Kurz determined that the boxing activity requires "minimal force" and primarily involves "clerical" duties of inserting documents into boxes. Dr. Kurz stated Claimant's work "does not meet the CO WC Cumulative injury criteria," and "this patient is advised to follow-up with [her] PCP for this non-work-related condition." He placed Claimant at MMI and released her to return to work with no restrictions.

16. As Dr. Kurz had instructed, Claimant went to see Dr. Devalon on May 18. She reported "worsening tendinitis that is really impeding her work." Claimant explained that Dr. Hart had recommended surgery, but she had been released by Concentra. Until that time, she was working modified duties in another department. Although Dr. Devalon noted "I do not do workers comp," she was willing to address Claimant's situation because "she is in limbo" regarding her claim. Dr. Devalon asked to see copies of Dr. Hart's records and the EMG/NCV report. In the meantime, she gave Claimant work restrictions of "wear your braces all the time," and "no gripping or using your thumbs." Those restrictions are incompatible with Claimant's regular job.

17. Claimant went to her workplace with the restrictions from Dr. Devalon, but Employer was no longer willing to accommodate her. Claimant was told "she does not have a place there." Employer's on-site nurse "suggested she take short-term disability."

18. Claimant followed up with Dr. Devalon on June 6, 2016 and took a copy of Dr. Sandell's report. Dr. Devalon diagnosed bilateral carpal tunnel syndrome, but stated "[the] patient has worsening wrist pain which I believe is tenosynovitis and not as much carpal tunnel syndrome." Dr. Devalon recommended a second opinion from a hand surgeon, and referred Claimant to Dr. Karl Larsen. Dr. Devalon opined "I am not convinced surgery on your carpal tunnels will help you completely. You have other problems going on." Dr. Devalon added, "in the meantime, she is not able to work and disability forms are amended and re-sent."

19. Claimant next saw Dr. Devalon on July 11, 2016. She was still waiting for the second opinion with Dr. Larsen. Dr. Devalon was not certain surgery was necessary, but would defer to the surgeon's recommendation. Dr. Devalon updated Claimant's disability forms.

20. Claimant was evaluated by Dr. Karl Larsen, a hand surgeon, on July 20, 2016. He noted "she is in some type of a legal conflict involving having this taken up by work comp but now she is here under her own insurance." She reported ongoing wrist pain and difficulty gripping. She was experiencing episodic numbness and tingling with gripping and grasping activities during the day, and was also being awakened by numbness and tingling at night. The clinical exam findings were consistent with de Quervain's and carpal tunnel syndrome. Dr. Larsen opined "the indication for surgery is not necessarily unreasonable; however, I do not know that she has had a lot of conservative management for her carpal tunnel syndrome." He felt the carpal tunnel symptoms were more consistent with median neuritis and might respond to conservative measures. He recommended injections and obtaining better fitting braces.

21. Respondents filed a Final Admission of Liability (FAL) on July 21, 2016, based on Dr. Kurz's report. Claimant timely objected to the FAL and requested a DIME.

22. Claimant followed up with Dr. Hart on August 3, 2016. He continued to recommend bilateral de Quervain's and carpal tunnel release surgery. Claimant explained that her workers' compensation claim was being contested. Dr. Hart told Claimant he would request authorization from Respondents first, but "if they deny again, we will perform both surgeries . . . under her regular health insurance."

23. Claimant went to see Dr. Larsen again on August 19, 2016, and asked "if we would be willing to pursue this under work comp or failing that her own insurance." She continued to have positive Finkelstein's, Phalen's, and carpal tunnel compression signs bilaterally. Dr. Larsen opined "I had recommended nonsurgical measures but she seems to be in a hard way, and I think that progressing to surgery is probably reasonable." He stated "it is surprising to me that this has not been accepted under work comp given her work description of working 12-hour shifts with a lot of wrist intensive activities, building boxes. I think it is reasonable to try to pursue this under work comp. . . . We will seek permission through work comp first and then go from there."

24. Dr. Timothy Hall performed the DIME on October 26, 2016. Because causation was a critical issue in the case, Dr. Hall spent significant time investigating Claimant's work activities. He noted that before her onset of symptoms, Claimant "spent two months in the boxing area without rotation." Claimant explained that "the boxing area is one of the more difficult aspects of the job," and involves "the most difficult and hand-intensive pressure, pinching, and squeezing activities." Claimant disputed the job description in Dr. Kurz's May 16, 2016 report. Dr. Hall noted Claimant engages in "no outside activities that might contribute to the situation."

25. Dr. Hall diagnosed bilateral de Quervain's tenosynovitis, lateral epicondylitis, bicipital tendinitis, generalized neuritis without convincing evidence of specific entrapment, and mild proximal myofascial pain related to cumulative trauma. Regarding causation, Dr. Hall opined:

> within a reasonable degree of medical probability [ ] her upper extremity symptoms relate to her work. I can think of no better explanation. . . . When she got back to work after being off for the pregnancy, she was working repetitively without rotation in an environment that involves a great deal of repetitive pinching, gripping, manipulating, and torqueing involving upper extremities.

26. Dr. Hall opined that Claimant met the medical causation guidelines in the CTD MTGs, based on "a combination of force and possible awkward posture and also force and repetition, force in the wrist and hand repetition." Dr. Hall also emphasized the "temporal association" between the work and the onset of her symptoms.

27. Dr. Hall determined Claimant is not at MMI. He recommended further treatment, including surgery if Claimant's surgeon recommended it.

28. Dr. Hart performed de Quervain's surgery and carpal tunnel release on Claimant's right arm on December 13, 2016.

29. Dr. Carlos Cebrian performed an Independent Medical Examination (IME) at Respondents' request on January 11, 2017. He diagnosed bilateral de Quervain's tenosynovitis, mild right median neuropathy and borderline to mild left median neuropathy, bilateral lateral epicondylitis with myofascial complaints including the shoulders and cervical spine. Dr. Cebrian opined that none of these diagnoses are causally related to Claimant's work.

30. Dr. Cebrian opined that Claimant's work did not expose her to any of the primary or secondary risk factors identified in the MTGs. He noted "she engages in many different activities throughout the day," and "does not utilize significant amounts of force." Although her job involved awkward postures, it did not satisfy the minimum durational threshold. Dr. Cebrian felt the JSA "had many errors and it was [ ] poorly performed." Dr. Cebrian opined that Claimant's recent pregnancy and delivery of her child were "the most important factors" in the development of her symptoms. He opined that de Quervain's has a high association with pregnancy, and is also called "mommy

thumb" or "mommy wrist." He opined the suspected mechanism was picking up the baby with both hands on a frequent basis with the thumb in an abducted position." Ultimately, Dr. Cebrian opined "it is not medically probable that [Claimant's] bilateral upper extremity complaints are directly or indirectly related to her work activities." Dr. Cebrian disagreed with Dr. Hall's causation analysis, calling it "inadequate and meaningless."

31. In February 2017, Respondents obtained another JSA from a different evaluator. Specifically, Employer's on-site ergonomist-physical therapist, Rudy Haberzettl, evaluated the boxing task. Mr. Haberzettl documented that the boxing job exposes a worker to numerous "high" risk factors, including frequent, forceful pinch grip, awkward wrist postures, and "excessive repetitive motion at a single joint over a workday." The job requires more than 20,000 repetitive finger movements and more than 6,500 repetitive hand movements per shift. Mr. Haberzettl also noted the high number of overtime hours "greatly increases the risk for injury."

32. Claimant testified credibly at the hearing. She described her work activities consistent with descriptions reflected in the medical records. The baby born in June 2015 was Claimant's fourth child. She had no problems with her wrists or hands with any of the other children. She had no problems with her wrists and hands until after she returned to work from maternity leave and was assigned exclusively to the boxing area. Claimant testified that the right arm surgery in December 2016 improved her symptoms. Dr. Hart performed surgery for de Quervain's and carpal tunnel on her left arm a few days before the hearing, so it was too early to tell how much benefit she would receive.

33. Dr. Hall testified in a deposition on March 2, 2016. Dr. Hall disagreed with Dr. Cebrian's opinions regarding causation. Dr. Hall opined that Claimant's work activities exposed her to a sufficient combination of force and repetition to be considered causative of cumulative trauma disorders. Dr. Hall thought Dr. Cebrian's theory that Claimant has "mommy thumb" was "ridiculous."

34. Dr. Cebrian testified in a deposition on March 3, 2016. Dr. Cebrian opined that Claimant's work does not involve any primary or secondary risk factors under the MTGs causation guidelines. Dr. Cebrian disagreed with Dr. Hall that "mommy thumb" is a rare condition. Regardless, Dr. Cebrian opined the MTGs do not require the physician to establish an alternate causal explanation. Rather, failure to satisfy the MTGs causation requirements is a sufficient basis to determine that a condition is not work-related. Dr. Cebrian conceded that several other physicians opined that Claimant's condition is work-related, but emphasized those physicians did not perform a formal causation analysis consistent with the MTGs. Dr. Cebrian opined that the de Quervain's surgery was reasonable and necessary. He opined that carpal tunnel surgery was not reasonable and necessary.

35. The causation opinions of Dr. Hall, Dr. Devalon, Dr. Larsen and Dr. Hart are more persuasive than medical opinions in the record to the contrary.

36. Respondents have failed to overcome the DIME's determination of MMI by clear and convincing evidence. Claimant is not at MMI.

37. Dr. Devalon became authorized after May 16, 2016. Dr. Larsen is authorized by virtue of the referral from Dr. Devalon.

38. Claimant has proven by a preponderance of the evidence that the surgeries performed by Dr. Hart were reasonable, necessary, and related to her industrial injury.

39. Claimant has been disabled by the effects of her industrial injury since February 3, 2016. Claimant was under work restrictions throughout the time she treated at Concentra, and Employer accommodated the Concentra restrictions with modified duty. Employer was not willing to accommodate Dr. Devalon's restrictions or provide modified duty since Claimant was released by Concentrao. Claimant has not worked since May 16, 2016.

40. Respondents admitted for one closed period of TTD, and two closed periods of TPD. The last admitted period of temporary disability benefits ended March 16, 2016.

41. Claimant had a partial wage loss from March 4, 2016 through May 15, 2016 as a result of her injury. Respondents admitted $818.72 in TPD benefits for the period March 4, 2016 through March 16, 2016. Claimant is entitled to an additional $2,748.68 in TPD benefits through May 15, 2016.

Pay Period		**Earnings**	**Difference from AWW**	**TPD Owed**	
3/4/2016	3/6/2016	$725.20	-$183.42	$0.00	only 3 days
3/7/2016	3/13/2016	$960.28	$303.88	$202.59	
3/14/2016	3/20/2016	$966.63	$297.53	$198.35	
3/21/2016	3/27/2016	$275.33	$988.83	$659.22	
3/28/2016	4/3/2016	$571.23	$692.93	$461.95	
4/4/2016	4/10/2016	$488.04	$776.12	$517.41	
4/11/2016	4/17/2016	$2,215.90	-$951.74	$0.00	
4/18/2016	4/24/2016	$570.33	$693.83	$462.55	
4/25/2016	5/1/2016	$668.83	$595.33	$396.89	
5/2/2016	5/8/2016	$805.56	$458.60	$305.73	
5/9/2016	5/15/2016	$720.10	$544.06	$362.71	

Total TPD Owed: $3,567.40
TPD admitted Paid: $818.72
TPD underpayment: **$2,748.68**

42. Claimant suffered a total wage loss commencing May 16, 2016 as a direct and proximate consequence of her injury.

43. Dr. Kurz and Dr. Devalon issued conflicting opinions regarding Claimant's ability to work in May 2016. Dr. Kurz was Claimant's "attending physician" when he released Claimant to return to regular employment on May 16, 2016. Dr. Devalon was Claimant's "attending physician" when she restricted Claimant from regular work on May 18, 2016. When multiple attending physicians render conflicting opinions regarding a Claimant's ability to work, the ALJ must resolve the conflict. Dr. Devalon's opinions regarding Claimant's ability to work are more persuasive than the contrary opinion of Dr. Kurz.

44. Claimant is entitled to TTD benefits commencing May 16, 2016 and continuing until terminated according to law.

45. Claimant received short-term disability (STD) benefits from May 25, 2016 through September 15, 2016 from an Employer-provided disability policy.

CONCLUSIONS OF LAW

A. Respondents have failed to overcome the DIME regarding MMI.

The DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the MMI determination is incorrect. *Qual-Med*, 961 P.2d at 592.

The DIME physician must engage in a "diagnostic process" when evaluating whether a claimant is at MMI. A determination of MMI inherently involves issues of diagnosis and causation, because the DIME must determine what medical conditions exist and which are causally related to the industrial injury. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Hodges v. ATR Collision, Inc*., W.C. No. 4-751-557 (ICAO, August 24, 2010). Accordingly, the DIME's findings regarding diagnosis and causation are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(II); *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007).

It is well established held that "mere differences of medical opinion" do not constitute clear and convincing evidence that the DIME's determination is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (ICAO March 18, 2016); *Javalera v. Monte Vista Head Start, Inc.*, W.C. No. 4-532-166 (ICAO July 19, 2004); *see also Gonzales v. Browning-Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

As found, Respondents have failed to overcome the DIME's determination that Claimant is not at MMI by clear and convincing evidence. Claimant clearly required additional treatment for her bilateral upper extremity conditions, and the primary dispute is regarding causation. Dr. Hall persuasively explained the basis for his conclusion that Claimant's bilateral upper extremity diagnoses are causally related to her work duties. He noted that Claimant "was working repetitively without rotation in an environment that involves a great deal of repetitive pinching, gripping, manipulating, and torqueing involving the upper extremities." Dr. Hall explicitly considered the MTGs in assessing causation of Claimant's diagnoses, noting that a combination of force and repetition are risk factors for the development of de Quervain's. Dr. Hall cited the close temporal association between Claimant's work exposure and the development of symptoms, as well as the lack of alternate causal explanations he found plausible. Dr. Hall's opinions regarding causation are supported by the opinions of Dr. Hart, Dr. Larsen, and Dr. Devalon, and the two JSAs. Although Dr. Cebrian disagrees with Dr. Hall's analysis, Dr. Cebrian's opinion does not rise to the level of clear and convincing evidence. Rather, Dr. Cebrian and Dr. Kurz's opinions simply reflect "differences of medical opinion" with Dr. Hall. Dr. Hall's conclusions reflect reasonable interpretations of the evidence, and the DIME's determination trumps other opinions unless it is "highly probably incorrect."

B. Dr. Devalon and Dr. Larsen are authorized providers.

Dr. Devalon and Dr. Larsen are authorized because Dr. Kurz discharged Claimant from care and instructed her to pursue treatment with her personal physicians.

"Authorization" refers to a physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). A physician who commences treatment upon a referral made in the "normal progression of authorized treatment" becomes an authorized treating physician. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). Once the respondents have exercised their right to select the treating physician in the first instance, the claimant may not change physicians without permission from the insurer or an ALJ. *Giannetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

In *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008), the Court of Appeals held that if an ATP determines that a claimant's condition is not work-related and instructs the claimant to pursue treatment with personal physicians, the treatment will be deemed authorized if it is later determined that the condition was compensable. The court held, "the risk of mistake by an ATP in concluding that an injury is noncompensable lies with the employer" rather than the claimant.

Dr. Kurz placed Claimant at MMI on May 16, 2016 because he believed she did not have a work-related condition. He told Claimant "to follow up with [her] PCP for this non-work related condition." As a result, Claimant sought treatment with Dr. Devalon, who subsequently referred her to Dr. Larsen. Under *Cabela*, Dr. Devalon became authorized as of May 16. Dr. Larsen is authorized by the referral from Dr. Devalon.

C. The December 2016 and March 2017 surgeries were reasonable and necessary.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where the respondents dispute a claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonable and necessary. Section 8-42-101(1)(a).

As found, the surgeries performed by Dr. Hart were reasonable and necessary. Both Dr. Hart and Dr. Larsen opined Claimant was a candidate for bilateral de Quervain's and carpal tunnel surgery. Dr. Hall opined that surgery was reasonable, but deferred to the ultimate decision to the surgeons. Dr. Cebrian opined that only de Quervain's surgery was reasonable and necessary. The ALJ credits the opinions of the hand surgeons over Dr. Cebrian's contrary opinions and concludes the surgeries were reasonable, necessary, and related, including carpal tunnel surgeries.

D. Claimant is entitled to TPD from March 4, 2016 through May 15, 2016.

A claimant is entitled to TPD benefits if she suffers a partial wage loss as a result of a work-related injury. Section 8-42-103(1). As found, Claimant is entitled to $3,567.40 in TPD benefits from March 4 through May 15, 2016. Although Respondents previously paid $818.72, Claimant is entitled to an additional $2,748.68 in TPD benefits.

E. Claimant is entitled to TTD benefits commencing May 16, 2016.

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Once commenced, TTD benefits continue until the occurrence of one of the four terminating events specified in § 8-42-105(3). As a general rule, an attending physician's full-duty release is conclusive regarding a claimant's entitlement to ongoing TTD benefits. *Burns v. Robinson Diary*, 911 P.2d 661 (Colo. App. 1995). But if there is a conflict between multiple attending physicians as to whether a claimant can return to

regular employment, the ALJ has jurisdiction to resolve the conflict. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999). An attending physician is defined as a physician within the chain of authorization who assumes care of the claimant. *Id*. at 685; *see also Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

Claimant has been unable to return to her regular job, and therefore "disabled" for purposes of entitlement to temporary disability benefits. since her date of injury. Employer generally accommodated Claimant's restrictions with modified duties until Dr. Kurz released her to full duties on May 16. Employer was unwilling to accommodate the restrictions imposed by Dr. Devalon. Claimant was eventually terminated in November 2016 because she could not return to work.

As found, Claimant sustained a total wage loss commencing May 16, 2016 as a direct and proximate consequence of her industrial injury. Furthermore, there are conflicting opinions from two attending physicians regarding Claimant's ability to perform regular employment. Dr. Kurz was unquestionably an attending physician on May 16, 2016. Dr. Devalon also became authorized on May 16, 2016 when Dr. Kurz released Claimant from treatment. Although she did not typically treat workers' compensation patients, Dr. Devalon assumed responsibility for Claimant's care by default. Therefore, Dr. Devalon was Claimant's "attending physician" when she reinstituted work restrictions on May 18.

The ALJ credits Dr. Devalon's opinions over Dr. Kurz's opinions in finding that Claimant was disabled from performing her regular job on and after May 16, 2016. Indeed, Dr. Kurz continuously had Claimant on work restrictions until he released her from his care. Dr. Kurz advised Claimant to follow-up with his PCP, which indicates he believed she needed further treatment. The ALJ interprets Dr. Kurz's rescission of Claimant's work restrictions as a function of his determination that her condition was not work-related, rather than a medical determination she was capable of performing her regular duties. It is not plausible that Claimant was capable of doing her pre-injury job on May 16, 2016.

Accordingly, Claimant is entitled to TTD benefits commencing May 16, 2016, and continuing until terminated according to law.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME regarding MMI is denied and dismissed.

2. Insurer shall pay for all reasonable, necessary and related medical treatment to cure and relieve the effects of Claimant's industrial injury.

3. Insurer shall pay for medical treatment provided by Dr. Devalon after May 16, 2016.

4. Insurer shall pay for evaluations and treatment provided by Dr. Larsen.

5. Insurer shall pay for Claimant's surgeries with Dr. Hart in December 2016 and March 2017, including all ancillary provider and facility charges.

6. Insurer shall pay additional TPD benefits in the amount of $2,748.68 for the period of March 4, 2016 through May 15, 2016.

7. Insurer shall pay TTD benefits commencing May 16, 2016, and continuing until terminated according to law, subject to any applicable offsets.

8. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 14, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-955-901-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON REMAND

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

.,

Employer,

and

Insurer/ Respondents.

No further hearings have been held in the above-captioned matter. On April 10, 2017, the Industrial Claim Appeals Office entered a procedural order pursuant to § 8-43-301 (9), C.R.S., ordering clarification of the ALJ's order of December 15, 2016, concerning who should pay for the CT scan test recommended by

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on November 23, 2016, in Denver, Colorado. The hearing was digitally recorded (reference: 11/23/16, Courtroom 1, beginning at 8:30 AM, and ending at 10:30 AM).

Hereinafter shall be referred to as the "Claimant." shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection, with the exception of Claimant's Exhibit 3, whereby Respondents' objection thereto was overruled and the exhibit was admitted into evidence. Respondents' Exhibits A through F were admitted into evidence, without objection. Respondents; Exhibits G and H were withdrawn.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant , which was filed, electronically, on November 30, 2016. On December 2, 2016, the Respondents filed their "Objection to Claimant's Full Findings of Fact, Conclusions of Law and Order," which essentially amount to a counter proposed decision. After a consideration of the proposed decision and the counter proposed decision, the ALJ has modified the proposal submitted by the Claimant and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether the April 13, 2016 Division Independent Medical Examination (DIME) report of Kathy McCranie, M.D. was in error insofar as it did not address and independently assess the Claimant's left foot injury to determine that the Claimant was at maximum medical improvement (MMI) with regard to such injury and all injuries sustained in the admitted injury of July 3, 2014; if not at MMI, whether the Claimant is likely in need of further diagnostic testing and treatment with regard to his left foot injury; and, ultimately whether the Claimant was properly assessed to be at MMI. Alternatively, the issue exists as to whether Claimant is entitled to post-MMI medical maintenance benefits pursuant to *Grover v. Indus. Comm.*, 759 P.2d 705, 710 (Colo. 1988). If the DIME opinion concerning MMI is overcome, the Claimant also designated the issue of temporary total disability benefits (TTD) from September 28, 2015 and continuing.

The Claimant bears the burden of proof, by clear and convincing evidence on overcoming Dr. McCranie's DIME opinions. On all other issues, the Claimant's burden is by preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant suffered an admitted industrial injury on July 3, 2014 while working for the Employer, when his left foot was run over by a small track hoe. He underwent a course of treatment for such injury (See Claimant's Exhibit. 7).

2. Ultimately, the Respondents filed an Amended Final Admission of Liability (FAL), dated April 22, 2016, admitting for an average weekly wage (AWW) OF $720.00; an MMI date of September 28, 2015; 10% of the left lower extremity (LLE); and, reasonably necessary post-MMI medical maintenance care and treatment. The Amended FAL was filed, based on DIME Dr. McCranie's opinions.

3. The Claimant was placed at MMI by his authorized treating physician (ATP), Gary Zuehlsdorff, D.O., a physiatrist, pursuant to Dr. Zuehlsdorff's report of September 28, 2015 .Dr. Zuehlsdorff had been one of the Claimant's authorized ATPs. At no time did Dr. Zuehlsdorff refer the Claimant to a podiatrist. Dr. Zuehlsdorff rated the Claimant at 10% of the LLE and placed the Claimant at MMI on September 28, 2015. DIME Dr. McCranie's opinions mirror the opinions of Dr. ,Zuehlsdorff.

4. James D. Davis, D.P.M. apparently last saw the Claimant on July 9, 2015, before Dr. Zuehlsdorff placed the Claimant at MMI. He indicated that the Claimant should be seen thereafter as needed.

5. Brett D. Sachs, D.P.M., evaluated the Claimant on June 6, 2016,and issued a report dated July 12, 2016 (Claimant's Exhibit 8). Dr. Sachs was of the opinion that "the Claimant's current symptoms are related to the previous injury and post-traumatic arthritis. At this point, I have recommended a CT scan to further evaluate the extent of the arthritis. [The Claimant] will require further treatment for the foot injury and may ultimately require additional surgery…." The ALJ infers and finds that Dr. Sachs has significantly more expertise than Dr. Zuehlsdorff and/or DIME Dr. McCranie concerning matters related to the feet, and his opinions are accorded more weight than those of Dr. Zuehlsdorff and Dr. McCranie. Indeed, based on Dr. Sachs' opinions, the ALJ infers and finds that it is highly probable, unmistakable and free from serious and substantial doubt that Dr. McCranie was in error by placing the Claimant at MMI.

6. By an email chain of October 4, 2016 (Claimant's Exhibit 3), at 11:20 AM, the insurance adjuster, Llimoni Moten, advised Claimant's counsel: "I've contacted his treating provider, James Davis, DPM, to authorize an initial evaluation. They will contact [the Claimant] for scheduling." On the same date at 11:30 AM, the adjuster

advised Claimant's counsel: "…please disregard the below. {the Claimant's] treating doctor is Dr. Gary Zuehlsdorff…." Subsequently, at 11:37 AM, counsel for the Respondents advised Claimant's counsel: "Yes. The ATP will make the referral back to a specialist if he deems appropriate. The ATP makes the decisions w/regard to future medical care. The adjuster is following the law." The ALJ infers and finds that Dr. Davis was **not** within the chain of authorized referrals and, therefore, not authorized.

The Division Independent Medical Examination (DIME) by Kathy McCranie, M.D.

7. Kathy McCranie, M.D., a physiatrist, was selected as the DIME examiner. The Claimant contends that he would have preferred a podiatrist, but no podiatrists were on the Division of Workers' Compensation (DOWC) list of DIME examiners. Dr. McCranie issued her DIME report on April 13, 2016 (Claimant's Exhibit. 6). The Claimant asserts that Dr. McCranie made no independent assessment of his left foot injury, or the need for further treatment for the left foot injury.

8. The ALJ infers and finds that the DIME report of Dr. McCranie, in fact, makes no reference to a persuasive independent evaluation of the Claimant's left foot injury, but instead is entirely deferential to Dr. Zuehlsdorff's opinions in his report, and in fact merely adopts, without a persuasive independent assessment, Dr. Zuehsldorff's conclusions.

9. In the reports, Dr. Sachs is of the opinion that the Claimant "has developed persistent pain and post-traumatic arthritis of the tarsometatarsal joints," and [u]pon further review of his medical records, [Dr. Sachs] suspect[s] that the current symptoms are related to the previous injury and post-traumatic arthritis." The trauma Dr. Sachs refers to is Claimant's industrial injury. Thus, this is a work-related injury and condition. Based upon this, Dr. Sachs has "recommended a CT scan to further evaluate the extent of the arthritis (post-traumatic)," and that Claimant "will require further treatment for the foot injury and may ultimately require additional surgery." The ALJ infers and finds that Dr. Sachs is recommending the additional test to ascertain whether there is a reasonable prospect that will reveal a course of treatment which may cure and relieve the effects of the admitted injury.

10. According to the Claimant, he desires such an assessment and would undergo any recommended treatment. The Claimant continues to have significant problems with the foot and he believes these injuries are preventing him from working full time. The Claimant's testimony, in this regard, is credible and convincing. Indeed, it is highly probable, unmistakable and free from serious and substantial doubt that the post-traumatic arthritis resulting from the July 3, 2014 "crush-like" injury is the sole cause of the Claimant's continuing LLE problems.

11. Since the originally determined MMI date of September 25, 2015, the Claimant has only been able to engage in part time light duty work, earning on average,

$250-300 per week. His inability to engage in full time work is attributable to his ongoing problems from his admitted, compensable foot injury.

Ultimate Findings

12. The ALJ finds the opinions of Dr. Sachs, D.P.M., significantly more persuasive and credible than the opinions of DIME Dr. McCranie and ATP Dr. Zuehlsdorff because Dr. Sach's possesses more specific expertise concerning feet than the DIME doctor and the ATP; because Dr. Sachs articulates the condition of the Claimant's left foot in a more specific and relevant manner than the DIME and ATP. Further, since the DIME opinion mirrors the ATP opinion, the ALJ finds that it has been undermined by lack of a specific attention to the details of the Claimant's left foot condition. The same is true of Dr. Zuelsdorff's opinions.

13. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Sachs and to reject all opinions to the contrary.

14. The Claimant has demonstrated that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. McCranie erroneously placed the Claimant at MMI. Consequently, the Claimant has sustained his burden by clear and convincing evidence.

15. Based on the pendency of a CT scan test, recommended by Podiatrist Dr. Sachs, to determine if there is a reasonable prospect that a course of treatment can cure and relieve the effects of the admitted injury, the Claimant's condition has not become stable whereby "no further treatment is reasonably expected to improve the condition (of the left foot)." Consequently, the Claimant is not at MMI. If the test reveals that the Claimant was at MMI as of September 28, 2015, then, it would be premature to make any determinations concerning TTD benefits.

16 Dr. Sachs is not within the authorized chain of referrals, nor was he authorized. He performed an evaluation on referral from Dr. Davis. Nonetheless, this does not diminish his opinion, which the ALJ finds persuasive. ATP Dr. Zuehlsdorff did not refer the Claimant to Dr. Davis, D.P.M., or to Dr. Sachs, D.P.M.

Respondents' Arguments

Citing Industrial Clam Appeals Office (ICAO) decisions in their Counter-Findings, the Respondents argue that the recommendation for an additional test is not enough to overcome an MMI finding by a DIME. While this may be true in a vacuum, if the additional test reveals a reasonable prospect of a course of treatment to cure and relieve the effects of an injury, then, opinions of the Court of Appeals trump ICAO decisions. Otherwise, the Respondents' Counter-Findings take issue with the Claimant's

proposed Findings, which the ALJ has substantially modified but, nonetheless, rejects most of the counter proposals.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Sachs, D.P.M., were significantly more persuasive and credible than the opinions of DIME Dr. McCranie and ATP Dr. Zuehlsdorff because Dr. Sach's possesses more specific expertise concerning feet than the DIME doctor and the ATP; and, because Dr. Sachs articulates the condition of the Claimant's left foot in a more specific and relevant manner than the DIME and ATP. Further, since the DIME opinion mirrors the ATP opinion, the ALJ finds that it has been undermined by lack of a specific

attention to the details of the Claimant's left foot condition. The same is true of Dr. Zuehlsdorff's opinions.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Sachs and to reject all opinions to the contrary.

Overcoming the DIME

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage*

Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office, 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Claimant has demonstrated that it is highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. McCranie erroneously placed the Claimant at MMI. Consequently, the Claimant sustained his burden by clear and convincing evidence.

MMI

d. MMI is defined as the point in time when any medically determinable physical or medical impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. § 8-40-201(11.5), C.R.S. *Donald B. Murphy Contractors, Inc. V. Indus. Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). Diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. As found, based on the pendency of a CT scan test, recommended by Podiatrist Dr. Sachs, to determine if there is a reasonable prospect that a course of treatment can cure and relieve the effects of the admitted injury, the Claimant's condition has not become stable whereby "no further treatment is reasonably expected to improve the condition (of the left foot)." Consequently, the Claimant is **not** at MMI.

Brett D. Sachs, D.P.M.

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, **Dr. Sachs is not within the authorized chain of referrals, nor was he authorized. He performed an evaluation on referral from**

Dr. Davis. Nonetheless, this does not diminish his opinion, which the ALJ finds persuasive. ATP Dr. Zuehlsdorff did not refer the Claimant to Dr. Davis, D.P.M., or to Dr. Sachs, D.P.M.

TTD

e. If the test reveals that the Claimant was at MMI as of September 28, 2015, then, it would be premature to make any determinations concerning TTD benefits.

ORDER ON REMAND

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant has overcome the Division Independent Medical Examiner's (Kathy McCranie, M.D.) opinion by clear and convincing evidence. Therefore, the Claimant is not at maximum medical improvement.

B. The Respondents shall pay the costs of authorized, causally-related and reasonably necessary medical care and treatment for the admitted left lower extremity injury of July 3, 2014, subject to the Division of Workers' Compensation Medical Fee Schedule, **however, since Brett Sachs, D.P.M.. was not within the chain of authorized referrals, the Claimant is liable for the CT scan that Dr. Sachs recommended**

C. Any and all issues, including temporary total disability benefits from September 28, 2015 and continuing, are reserved for future decision.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-008-721-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED
c/o GALLAHER BASSETT SERVICES,
Third-Party Administrator (TPA),

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 4, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 4/4/17, Courtroom 3, beginning at 1:30 PM, and ending at 4:30 PM).

Claimant's Exhibits 1 through 5 were admitted into evidence, without objection, with the exception of Claimant's Exhibit 6 to which the respondent objected, however, the objection was overruled and Exhibit 6 was admitted into evidence. Respondent's Exhibits A through L were offered into evidence. Claimant's objections to Respondent's Exhibits B and C were sustained and these Exhibits were rejected. Otherwise, Exhibits A through L were admitted into evidence without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on April 11, 2017. The Respondent was given 2 working days within which to file objections. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns an alleged safety violation, thus, entitling the Respondent to a 50% reduction in benefits, pursuant to § 8-42-112, C.R.S. As a collateral issue, the Respondent contends that the Claimant has waived raising this issue because the Claimant accepted reduced benefits under admissions of liability that set forth 50% reduced benefits.

Claimant's designated issue concerning temporary disability benefits is driven by the safety violation issue, whereby the Claimant is requesting that temporary and permanent disability benefits be increased to the statutory maximum for Fiscal Year (FY) 2015/2016 of $914.27 per week for temporary total disability (TTD) benefits and the whole person permanent partial disability (PPD) award be increased to the appropriate amount, based of the admitted average weekly wage (AWW) of $1,555.70, payable at $502.53 per week for injuries occurring in FY 2015/2016, instead of the reduced rate, by virtue of the Respondent exacting the "safety violation" reduction in its admissions of liability.

Ordinarily, the Respondent bears the burden of proof on the above-mentioned issues, by a preponderance of the evidence, however out of caution, the ALJ determines that since the Claimant is allegedly seeking modification of the previously filed admissions, the Claimant bears the burden of proof, by a preponderance of the evidence, which the Claimant has successfully carried.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant suffered an admitted industrial injury to her low back on November 20, 2015, arising out of the course and scope of her employment with the Employer when she was carrying a panel and tripped, falling on a concrete floor causing injury to her low back and left hip.

2. In her position as a foreman, a position the Claimant has held for 10 years with the Employer, she is required to practice "good housekeeping" and to keep the aisles free for safe movement of materials, equipment and employees.

3. Starting with the General Admission of Liability (GAL), dated April 25, 2016 (Respondent's Exhibit D, bates stamp 8); then with the GAL, dated May 31,2016 (Respondent's Exhibit F, bates stamp 10), and ultimately with the Final

Admission of Liability (FAL), dated November 22, 2016 (Claimant's Exhibit 3 bates stamp 6),wherein the Respondents AWW) of $1,555.70, but reduced indemnity benefits by 50%, the Respondent admitted for a temporary total disability (TTD) benefit rate of $457.13 (one-half of the statutorily capped maximum TTD rate of $914.27 for FY 2015/2016)for aggregate TTD benefits of $6,465.12 (one-half of the normal amount based on the Claimant's AWW), aggregate temporary partial disability (TPD) benefits of $3,189.43 (one-half of the normal amount); and, aggregate PPD benefits of $17,773.21, payable at $286.91 per week from the date of maximum medical improvement (MMI) [one-half of the aggregate amount and one-half of the weekly amount, based on the admitted AWW], November 3, 2016; zero percent scheduled disability; and, for post MMI maintenance medical benefits (Claimant's Exhibit 3, bates stamp 6 – 26). The Claimant filed a timely objection to the FAL and a timely Notice and Proposal to Select a Division Independent Medical Examiner (DIME), which is now in progress.

4. On May 6, 2016, the Division of Workers' Compensation (DOWC) sent the Claimant a letter, advising her that if she disagreed with the reduction, she must apply for a hearing. Indeed, applying for a hearing is the only option for resolving a disagreement on an alleged "safety violation."

5. The Claimant first filed an Application for Hearing, on October 28, 2016 and an Amended Application for Hearing 2016, mailed November 18, 2016, which stated there was "no safety violation" (Claimant's Exhibit 1, bates stamp 1).

6. In the Respondent's Response to Amended Application for Hearing, mailed November 23, 2016, the respondent listed 20 witnesses but no issues were designated (Claimant's Exhibit 2, bates stamp 3 and 4).

7. The Respondent now alleges that the Claimant has essentially waived her right to require the Respondent to prove its alleged "safety violation" at hearing by not contesting the 50% reduction in indemnity benefits after each and every admission of liability. For the reasons given herein below and above, the ALJ finds the argument interesting but, essentially, without merit. Nonetheless, the assignment of the burden of proof is a *non sequitur* because the Claimant has proven, by preponderant evidence that she did **not** willfully violate a clear and known safety rule.

The Circumstances of the Injury and the Alleged Safety Violation

8. On October 26, 2015, at approximately 9:45 AM, the Claimant was carrying a panel, approximately 3 feet by 5 feet in size, sideways, to place it on an A-frame. She demonstrated that she had carried the panel in the only feasible way, sideways so that she could see where she was going. As she stepped over material on the side of the floor, she caught the heel of her foot and fell.

9. At the time of the Claimant's injury, she submitted to Gus Davila, the Employer's Safety Director, an "Individual Accident/Incident Report" indicating that she had caught her foot on materials on the floor (*See* Claimant's Exhibit 6). The Claimant was not written up in October 2015 for a safety rule violation by her Employer.

10. The Claimant credibly testified that although the injury occurred on October 26, 2015 all parties were using November 20, 2015 as the date of injury, because that is when she was first evaluated by a medical provider following her October 26, 2015, injury.

Alleged Waiver of the Right to Require Respondent to Prove the Alleged Safety Violation

11. The Respondent's assert that the § 8-43-201(1), C.R.S. controls and the burden is on the Claimant to establish a negative, that is, that she did not deliberately and willfully violate a safety rule of the Employer because the Claimant is seeking to modify the admissions of liability insofar as they unilaterally exact a 50% reduction in indemnity benefits without a hearing. This is analogous to a criminal defendant being required to prove her innocence.

12. § 8-43-201(1), C.R.S., addresses disputes arising under "Workers' Compensation Act of Colorado" and states in pertinent part:

> [A] party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

13. The ALJ finds that although the Respondent's argument would create an interesting and novel shifting of the burden of proof on an issue to which the Claimant is ordinarily entitled to an evidentiary hearing and require the Respondent to prove the "safety violation" under circumstances where the Respondent has unilaterally exacted a 50% reduction in indemnity benefits, without the benefit of a hearing. The argument disingenuously would uphold the Respondent's unilateral actions and put the Claimant on her proof to establish that she did **not** do what she is charged with having done. The argument, in the final analysis, is a *non sequitur* because the Claimant has proven, by preponderant evidence that she did **not** violate a safety rule.

14. On February 19, 2016, the Employer required the Claimant to fill out another "Individual Accident/Incident Report", where she gave a more detailed account of what occurred, indicating that the material she tripped on was a "C channel" (*See* Claimant's Exhibit A, bates stamp 1-4). After the Claimant filled out for the second time the "Individual Accident/Incident Report," the Claimant again

discussed with Davila how the accident occurred and again was not written up for a safety rule violation or any other infraction by the Employer. Such actions or inactions on Davila's part (the safety Manager) detract from the credibility of the Employer's "safety violation" claim. The ALJ infers and finds that Davila's delayed actions in raising the "safety violation' issue significantly detract from the credibility of Davila's position.

15. On February 22, 2016, the Employer filed the "Employer's First Report of Injury" and did not allege a safety rule violation (*See* Respondent's Exhibit I, bates stamp 33).

16. On April 25, 2016, the Respondent filed the first GAL, accepting responsibility for the Claimant's admitted industrial injury, but alleging a safety rule violation for the first time (*See* Respondent's Exhibit D, bates stamp 8).

17. Thereafter, the Respondent filed another GAL and an FAL as set forth in paragraph 3 above; and, the Claimant filed an Amended Application for Hearing and the Respondent filed a Response thereto as set forth in paragraphs 4 and 5 above.

18. The chronology of the alleged "safety violation" causes the ALJ to infer and find that the Claimant diligently contested the alleged "safety violation," by filing a timely Application for Hearing. Therefore, the Respondent's argument of "waiver" of the Claimant's right to require the Respondent to prove the "safety violation" is without merit.

Safety Rule Violation

19. At hearing, the Respondent relied on the [Employer] Loss Prevention Health and Safety Policy Manual," (hereinafter "the Company Manual") which Davila testified was provided to all employees of the Employer as a basis for their allegation that the Claimant violated a safety rule. He had no knowledge of whether the Company Manual was specifically provided to the Claimant. There was no persuasive evidence that the Claimant acknowledged receipt of the Company Manual, and the Claimant denies having received it.

20. Davila concluded in April of 2016 that the Claimant had violated a safety rule of the Employer in October 2015, as outlined in the Company Manual, which required that she "practice good housekeeping at all times" and that "aisles shall be kept clear to provide free and safe movement of material handling equipment and employees and to provide access to all fire extinguisher" (*See* Respondent's Exhibit L, bates stamp 42 and 43). According to Davila, it was his opinion that the Claimant violated a safety rule by not pushing the C channel material the Claimant tripped on to a safer location. The ALJ infers and finds that part of Davila's opinion is based on his lack of understanding of the immediate circumstances surrounding the Claimant's accident and his interpretation of the vague concept of "good housekeeping." According to the Claimant there was **no** other safer location in their

small and crowded work space. Davila was not there at the time of the Claimant's accident. He did not exhibit familiarity with the scene and circumstances existing at the time and location of the Claimant's accident. Indeed, he came up with safety options that would have been impossible or highly impractical to implement under the circumstances, and get the work done. For these reasons, the ALJ does **not** find Davila's opinion that the Claimant violated a safety rule credible.

21. The Claimant credibly testified there was no place to put the C channel material as she works in a small area and space is at a premium. The ALJ finds the Claimant's testimony in this regard highly persuasive and credible. Further, the ALJ infers and finds that the Claimant, an experienced working Foreman, has proven that it is highly likely that she was working as safely as possible under the constricted circumstances of her work site and a last minute moving of the C-Channel to cause it to stick out further from the side of the aisle caused the Claimant's accident ["accident" is defined as "an unintentional happening "a mishap"—*Webster's New World Dictionary.* In S 8-40-201 (2), C.R.S., "accident means an unforeseen event occurring without the will or design of the person whose act causes it; an unexpected, unusual, or undersigned occurrence….]. The Claimant's accidental injury fits the definition of "accident," contained in the Workers' Compensation Act.

22. Davila, however, maintained that the Claimant violated a general safety rule by stepping over the C channels while performing the job responsibility of putting together the panels and placing them on the A-frame. **Davila testified that there was no specific policy or safety rule that forbade the Claimant for stepping over the C channels, however, there was a general rule to maintain "good housekeeping"** (presumably in Davila's discretion concerning the meaning of "good housekeeping" and to keep the aisles free. According to the Claimant's credible testimony, the C-channel, unbeknownst to her, had recently been moved to stick out on the side of the aisle, a fact which Davila did not adequately appreciate. Davila simply generalized that the Claimant stepping over the C channels, where they were placed, was a safety rule violation, although there was no specific policy covering the situation. Essentially, Davila's position is that he will interpret what amounts to a violation of "good housekeeping. This is hardly consistent with the Workers' Compensation Act provision contained in § 8-42-112 (1) (b), C.R.S., which provides: "Where injury results from the employee's **willful** (emphasis supplied) failure to obey any reasonable rule adopted by the employer for the safety of the employee." Under the circumstances herein the alleged rule, the Claimant denies knowledge of it, it is vague and interpretation is left to the Safety Manager, and the Claimant has established that she was working safely under the circumstances and it is more likely than not that she did **not** violate a safety rule.

23. According to the Claimant, the C channels were 16 feet in length and that the goal was to finish completion of the panels and then move the C channels to the tables for sanding. There was no other place to put the C-Channels in the Claimant's work area. Davila testified that the warehouse had other places the C

channels could be placed, but he did not elaborate. For this reason, the ALJ finds the Claimant more credible than Davila.

24. The Claimant credibly testified she had safely stepped over the C-Channels for two hours and because they had been moved immediately prior to her injury, she caught her heel and fell. The ALJ finds the Claimant's description of the event persuasive and credible. The ALJ further finds that Davila's interpretation of safety policies is arbitrary and, ultimately, left to his discretion on what is safe and what is unsafe. For this reason, the ALJ finds that the Claimant has proven that she did **not** willfully violate a vague safety rule.

25. The ALJ finds the Employer's "Safety Manual" is vague, nebulous and that "good housekeeping" is not defined and the Claimant credibly testified the aisles were clear.

26. The Claimant demonstrated that she carried the panel in the only feasible and safe way possible, sideways, where she could see where she was walking to avoid the C channels.

27. The Claimant credibly testified she had walked over the C channels for approximately two hours and that someone had moved them a small amount shortly before she tripped on them.

28. The Claimant credibly testified that at the time the C channels were on the floor every table had panels being assembled and there was no place for the C channels to be placed.

29. The ALJ infers and finds the timing of the Respondent's safety rule allegation, after the Claimant started missing time from work and approximately 6 months after the injury occurred challenges the Employer's credulity.

Ultimate Findings

30. The ALJ finds that the Claimant's testimony, supporting the fact that she did **not willfully** violate a safety rule is more credible and persuasive than Davila's testimony and any other evidence to the contrary.

31. The ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and to reject Davila's testimony and any other evidence to the contrary.

32. The ALJ finds that the Claimant acted safely in an efficient manner discharging the employees' mission.

33. The ALJ concludes that Davila erroneously concluded that the C channel was in the aisle, without describing the aisle. In fact, Davila, in his unfettered discretion, determined what was and what was not bad housekeeping or "in the aisle," without describing the aisle. This is not a knowable or reasonable safety rule.

It is analogous to “Caligula’s Laws,” where the Roman Emperor Caligula placed the laws on pillars so high that no one could read them, but when it came to enforcing the laws, he knew what they were.

34. The Claimant has proven by a preponderance of the evidence that she did **not**, with deliberate intent, willfully fail to obey a known safety rule of the Employer.

35. The ALJ finds that the reduction, unilaterally assessed against the Claimant for a 50% reduction in her TTD, TPD and PPD benefits by the Respondents does not have a factual basis and for the period of time the Claimant’s temporary total disability rate should be reinstituted to the State maximum of $914.27 for FY 2015/2016, and $914.27 is the correct formula factor for computing PPD benefits, pursuant to § 8-42-107 (8) (d), C.R.S. Based on 9% whole person PPD, the correct grand total is $32, 913.72 and not $17,773.21 (reduced by approximately one-half), as admitted in the FAL.

DISCUSSION

The legislative declaration of the Workers’ Compensation Act (the “Act”), § 8-40-102 (1), C.R.S., states that the Act is to “assure the quick and efficient delivery of…benefits to the injured worker at a reasonable cost without the necessity of any litigation….” The laws of workers’ compensation should be liberally interpreted to achieve the beneficent purposes of the Act. *See Wolford v. Pinnacol Assurance,* 107 P.3d 947 (Colo. 2005). *Weld County School District re-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). § 8-43-201 (1), C.R.S.., of course, provides that the facts **shall not** be interpreted liberally in favor of either party. This does not conflict with the rule of liberal statutory construction to achieve the beneficent purposes of the Act. *See Anderson v. Longmont Toyota, Inc.,* 102 P.3d 323 (Colo. 2004); *Federal Express v. Indus. Claim Appeals Office,* 51 P.3d 1107 (Colo. App. 2002).

A strained interpretation of the statutes, read *in pari material,* to relieve an employer of the burden of proving a safety violation by invoking the general provisions of § 8-43-201 (1), C.R.S., which provides that a party seeking to modify an admission “shall have the burden of proof for any such modification.” In order to shift the burden of proof on a safety violation to the injured worker to prove a negative and reduce the worker’s indemnity benefits by 50% strikes at the core of the public policy of providing income to injured workers and the principle of liberal construction of the laws to achieve the beneficent purposes of the Act. Nonetheless, the ALJ has found that the Claimant has proven the negative that she did **not** violate a safety rule. On the other hand, the law provides that an employee who deliberately violates a safety rule should not be rewarded with full benefits.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony, supporting the fact that she did not willfully violate a safety rule is more credible and persuasive than Davila's testimony and any other evidence to the contrary.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007).

Substantial evidence is “that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence.” *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ’s resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant’s testimony and to reject Davila’s testimony and any other evidence to the contrary.

Safety Violation

c. Sections 8-42-112(1) (a) & (b) C.R.S., authorize a 50% reduction in compensation for an employee's "willful failure" to use a safety device or "willful failure to obey any reasonable rule adopted by employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective*. Lori's Family Dining v. Indus. Claims Appeals Office*, 907 P. 2d 715, 719 (Colo. App. 1995). To establish that a violation of §§ 8-42-112(1)(a) & (b) has been **willfu**l, the Respondents, ordinarily, must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." In *re Alvarado*, W.C. No. 4-559-275 [Indus. Claim Appeals Office (ICAO), Dec. 10, 2003]. Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, and the extent of deliberation evidenced by a claimant's conduct. *Id.* As found, there was no persuasive evidence presented at hearing, or in the documentary evidence, that the Claimant **willfully** violated a safety rule. As found, the Claimant was stepping over the C channel, she had stepped over several times before her injury and it was not in the aisle as Davila testified.

Shifting the Burden of Proof to the Claimant

d. The Respondent asserts that § 8-43-201, C.R.S., has shifted the burden to the Claimant because it has been amended to read:

> [A] party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.

e. The Respondent's theory of the safety violation case is that the Claimant violated a safety rule by not performing good housekeeping or keeping the aisles clear. As found, the Respondent's opinion of whether the Claimant violated this rule relies upon the opinion and unfettered discretion of the Safety Director Gus Davila, which opinion is too vague and tenuous to be consistent with due process and fundamental fairness concepts. Indeed, as found, Davila was not credible. The Respondent cites no written rule, regulation or other document other than the general direction "to perform good housekeeping, and to keep the aisles clear" to support their assertion. As further found, there was no persuasive or credible evidence that the Claimant violated a safety rule when stepping over the C channels to place her panel on the A-frame.

f. Further, "willfulness" is not established if the conduct is the result of thoughtlessness or negligence. In *re Bauer*, W.C. No. 4-495-198 (ICAO, October 20, 2003). 'Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." In *re Gutierrez*, W.C. No. 4-561-352 (ICAO April 29, 2004). Rather the term "willful" in § 8-42-112(1)(b), C.R.S., "connotes "deliberate intent" and carelessness, [and] negligence, forgetfulness, remissness or oversight do not satisfy that statutory standard." *Miller v. City and County of Denver*, W.C. # 4-658-496 (ICAO, August 31, 2006); *see Bennet Properties v. Indus. Claim Appeals Office*, 437 P.2d 548 (Colo. 1968). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Office, supra* at 719. As found, the Claimant established that the she did not willfully violate any Employer's safety rule because it was not establishing what that rule was or how the Claimant violated it.

g. *Stockdale v. Indus. Comm'n of Colorado,* 76 Colo. 494, 232 P 669, 670 (1925), sets forth the definition of willful, setting forth:

> The meaning of the word, as used in this place, is "with deliberate intent." If the employee knows the rule, and yet intentionally does the forbidden thing, he has "willfully failed to obey" the rule.

h. Accordingly, even if the Respondent could establish that there was a specific safety rule that covered the Claimant's conduct, it must also be demonstrated that the Claimant violated the rule willfully. As found, the Claimant demonstrated that she did northing willful. Willfulness is not established if the conduct is the result of thoughtlessness or negligence. Rather the term "willful" in §8-42-112(1)(b), C.R.S., connotes deliberate intent, so that even if the Claimant's conduct were found to be careless, negligent, forgetful or remiss, the statutory standard has not been satisfied. *Miller v. City and County of Denver,* W.C. # 4-658-496, *supra*; *see Bennett Properties v. Indus. Claim Appeals Office*, 437 P .2d 548 (Colo. 1968).

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Although the ALJ disagrees that the burden of proof for an alleged "safety violation' should shift to the Claimant, pursuant to the general provisions of § 8-43-201 (1), C.R.S., in the final analysis, the Respondent's theory is a *non sequitur* because the ALJ has found that the Claimant has proven that she did **not** violate a safety rule. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has satisfied the shifted burden of proof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. None of the admissions, including the Final Admission of Liability, dated November 22, 2016, are modified per se, they are overridden after an evidentiary hearing on the merits. The amount of the average weekly wage, the periods of temporary disability, the degree of permanent disability, the maximum medical improvement date, and the admission for post-maximum medical improvement are accepted as part of this decision.

B. Independently, after an evidentiary hearing on the merits, the Respondent shall pay the Claimant a grand total of $32, 913.72 in aggregate permanent partial disability benefits. In addition to the aggregate reduced amount of $17, 773.21, the Respondent shall pay the Claimant the additional total amount of $15,140.51payable at the rate of $502.53 per week instead of the admitted reduced amount of $286.91 per week, which is payable retroactively and forthwith.

C. Independently, after an evidentiary hearing on the merits, the Respondent shall pay the Claimant aggregate temporary total disability benefits of $12, 930.24. In addition to the reduced $6,465.12 in temporary total disability benefits, the Respondent

shall pay the Claimant an additional $6,465.12, payable at the rate of $914.27 per week, which is payable retroactively and forthwith.

D. Independently, after an evidentiary hearing on the merits the Respondent shall pay the Claimant aggregate temporary partial disability benefits of $6,378.86, payable at 2/3 of the temporary wage loss. In addition to the aggregate reduced temporary partial amount of $3,189.43, the Respondent shall pay the Claimant the additional aggregate amount of $3,189.43, which is payable retroactively and forthwith.

E. The Respondent is entitled to credit for any payments made pursuant to previous admissions of liability.

G. The Respondent shall continue paying the Claimant's post-maximum medical improvement maintenance medical benefit, subject to the Division of Workers' Compensation Medical Fee Schedule.

H. The Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of additional indemnity benefits due and not paid when due.

I. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc..ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-588-918-17

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED
c/o SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.

Third-Party Administrator (TPA),

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 5, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 4/5/17, Courtroom1, beginning at 8:30 AM, and ending at 9:45 AM).

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection, Respondents' Exhibits A through D were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on April 12, 2017. On April 13, 2017, counsel for the Respondent indicated no objection as to form. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether the Claimant is entitled to 24 pool therapy visits as recommended by his authorized treating physician (ATP) David Schneider, M.D., as reasonably necessary to cure and relieve the effects of his admitted left knee injury of July 22, 2003, consisting of an amputation at the left knee.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant suffered an admitted injury to his left ankle in the course and scope of his employment with the Employer on July 22, 2003 (*See* Claimant's Exhibit 4, bates stamp 18).

2. As a result of the admitted injury, the Claimant underwent multiple surgeries including multiple attempts at an ankle fusion. He developed complications with infections and eventually had a below knee amputation of his left leg on May 2, 2012. *Id.*

3. The latest General Admission of Liability (GAL), dated June 4, 2012, admits for temporary total disability (TTD) benefits of $658.84 per week; 7% of the upper extremity; 20% of the left lower extremity (LUE); and, medical benefits.

4. On November 6, 2014, ALJ Michelle E. Jones issued a decision ordering the Respondent to pay for the patellofemoral arthroplasty recommended by ATP Dr. Schneider.

5. On November 18, 2015, ALJ Margot Jones issued a decision ordering the Respondent to authorize and pay for ATP Chris Huser's recommended referral of the Claimant for an ENT evaluation.

6. On May 16, 2016, the Industrial Claim Appeals Office (ICAO) affirmed ALJ Margot Jones' decision of November 18, 2015. There was no timely appeal of ICAO's Final Order

7. The Claimant has treated with many different authorized treating providers (ATPs) from the date of his injury in 2003 until the present and is currently being treated by David J. Schneider, M.D., at Panorama Orthopedics and Spine Center.

8. The Claimant is currently using a prosthetic device below the knee on his left leg and has osteoarthritis, which was asymptomatic prior to his injury, and which is now symptomatic.

9. On May 16, 2014, ATP Dr. Schneider recommended that the Claimant undergo patellofemoral arthroplasty of his left knee, due to the Claimant's severe pain and severe chondromalacia of the patellofemoral joint (*See* Claimant's Exhibit 4, bates stamp 20, paragraph 15).

10. The Respondent challenged that surgery and the matter was heard on October 1, 2014, where the ALJ ordered that the proposed surgery by ATP Dr. Schneider was reasonably necessary to cure and relieve the effects of the Claimant's industrial injury (*See* Claimant's Exhibit 4, bates stamp16-24).

11. On August 24, 2015 the Claimant underwent the patellofemoral arthroplasty.

12. Following that surgery, the Claimant has undergone approximately 24 sessions of physical therapy, but still has pain and weakness deficits in his left knee.

13. At the hearing, the Claimant credibly testified that the physical therapy he had in the pool, with the exception of one visit where the therapist overworked the left knee, has been beneficial because the water supports and provides buoyancy, so as not to overtax his left leg. The Claimant stated that land based therapy caused him pain, that his left knee symptoms were aggravated by dry environment therapy and that he was willing to pursue the pool therapy on a regular basis

ATP Dr. Schneider's Recommendation of 24 Pool Therapy Visits

14. On November 4, 2016, the Respondent sent ATP Schneider's request for the Claimant to have pool therapy out for a "peer review" performed by Frank Polanco, M.D., who stated the opinion that the "pool therapy 3x8 visits" were not medically necessary and in support of his opinion set forth as follows:

> The claimant is two years post knee surgery and has had physical therapy and aqua therapy. There are no clinic notes provided reflecting progress or clinical findings. There are no findings noted that would preclude land based therapy. Thus, at this point the request does not meet criteria of the guidelines as the guidelines do not support

> ongoing therapy beyond the acute to subacute phase of injury and does not support aqua therapy in individuals who can tolerate land based therapy. As well there is no documentation of functional improvement. From the additional information provided to me by Dr. Schneider, he notes he is wanting the claimant to have access to a facility to be able to perform exercise activities and his written request is for a YMCA membership. In that the clamant is post op with residual deficits and requires ongoing independent rehabilitation, the claimant would meet criteria for a 3 month gym membership, however the formal physical therapy as requested above is not indicated. Therefore, physical therapy with pool therapy three times a week for eight weeks for the left knee is not medically necessary.

(*See* Claimant's Exhibit 1, bates stamp 5).

15. Peer review physician Polanco reached his conclusion after discussing the case with ATP Schneider and noting that ATP Schneider was also "requesting a [YMCA] gym membership to maintain fitness and strength." (*See* Claimant's Exhibit 1, bates stamp 5).

16. In support of his conclusion, peer review physician Polanco referenced Colorado Medical Treatment Guidelines Rule 17, Exhibit 6, which sets forth:

> CO Guidelines RULE 17, EXHIBIT 6 Lower Extremity Injury Medical Treatment Guidelines
>
> Aquatic Therapy:
>
> Is a well-accepted treatment which consists of the therapeutic use of aquatic immersion for therapeutic exercise to promote ROM, flexibility, core stabilization, endurance, strengthening, body mechanics, and pain management. Aquatic therapy includes the implementation of active therapeutic procedures in a swimming or therapeutic pool. The water provides a buoyancy force that lessens the amount of force gravity applies to the body. The decreased gravity effect allows the patient to have a mechanical advantage and more likely to have a successful trial of therapeutic exercise. Studies have shown that the muscle recruitment for aquatic therapy versus similar non-

> aquatic motions is significantly less. Because there is always a risk of recurrent or additional damage to the muscle tendon unit after a surgical repair, aquatic therapy may be preferred by surgeons to gain early return of ROM. In some cases the patient will be able to do the exercises unsupervised after the initial supervised session. Parks and recreation contacts may be used to locate less expensive facilities for patients. Indications include:
>
> Post-operative therapy as ordered by the surgeon; or
>
> Intolerance for active land-based or full-weight-bearing therapeutic procedures; or
>
> Symptoms that are exacerbate in a dry environment; and
>
> Willingness to follow through with the therapy on a regular basis. The pool should be large enough to allow full extremity ROM and fully erect posture. Aquatic Vests, belts, snorkels, and other devises may be used to provide stability balance, buoyancy, and resistance.
>
> * * *
>
> There is some evidence that for osteoarthritis of the hip or knee, aquatic exercise probably slightly reduces pain and slightly improve function over 3 months.

(See Claimant's Exhibit 1, bates stamp 6).

17. The Claimant credibly testified and the medical records support the proposition that the post-operative aquatic therapy, recommended by ATP Dr. Schneider, was good for him and that he was intolerant of active land-based or full-weight-bearing therapeutic procedures and that his left knee symptoms were exacerbated by working in a dry environment. The Claimant also testified that he was willing to pursue the 24 pool therapy visits.

Independent Medical Examiner (IME) Nicholas Olsen, D.O.

18. At hearing, the Respondent retained the services of Dr. Olsen to perform a record review. Dr. Olsen concurred with peer review physician Dr. Polanco that aquatic therapy was not reasonably necessary.

19. Dr. Olsen placed a heavy reliance on the Claimant's problems at the first pool therapy, but had not physically examined or spoken to the Claimant since May of 2014. The Claimant had explained the first pool therapy session was an exception of one visit where the therapist overworked the left knee, however, pool therapy has been beneficial because the water supports and provides buoyancy, so as not to overtax his left leg. The Claimant stated that land based therapy caused him pain, that his left knee symptoms were aggravated by dry environment therapy and that he was willing to pursue the pool therapy on a regular basis.

20. Dr. Olsen did not have the benefit of all of the actual facts when he performed his medical record review. Therefore, the ALJ discounts his opinion and finds ATP dr. Schneider's implied opinion, coupled with the Claimant's persuasive and credible testimony, to be more credible. The same is true for Dr. Polanco's "peer review," denial which the ALJ finds less credible than ATP Dr. Schneider's implied opinion and the Claimant's testimony.

The Totality of the Evidence

21. Considering the totality of the evidence, including the medical records and the Claimant's testimony, the ALJ rejects the opinions of Dr. Polanco and Dr. Olsen concerning whether the pool therapy recommended by ATP Dr. Schneider was reasonably necessary to cure and relieve the effects of the Claimant's admitted injury. Instead, the ALJ finds the opinion and recommendation of ATP Schneider is more consistent with the totality of the evidence. The ALJ finds that the Claimant's recurrent left knee pain is related to the injury of July 22, 2003 and the medical care for that injury since that time. The ALJ notes that the Claimant remains under a General Admission of Liability. *See* Claimant's Submission Tab 3, BS 10-15. Further treatment as recommended by ATP Schneider is warranted.

22. The Court rejects the opinions of Dr. Olsen on the issue of whether the 24 pool therapy visits are reasonably necessary to cure and relieve the effects of the Claimant's admitted industrial injury and in support of that rejection notes as follows:

> A. On May 7, 2014, Dr. Olsen performed a Respondent requested medical evaluation of Claimant. Dr. Olsen noted that he agreed with Jared Foran, M.D., and William Peace,

M.D., that the Claimant was not a candidate for surgery on his knee. Dr. Olsen listed the risks of possible infection complications and Claimant's obesity supporting that this conclusion was not a candidate for arthroplasty. Dr. Olsen recommended no other treatment other than losing weight (*See* Claimant's Exhibit 4, bates stamp 16-24). The Claimant has now had the surgery and it has improved his condition,

B. Dr. Olsen had previously stated the opinion, as early as 2014, that the Claimant would be at maximum medical improvement ("MMI") "in a couple of days" following his last scheduled physical therapy (*See* Claimant's Exhibit 4, bates stamp 20, paragraph 19). The Claimant is still not at MMI,

C. Dr. Olsen had previously rendered the opinion that the Claimant's tinnitus was not related to his work-related injury or the medications to treat the symptoms of the injury (See Claimant's Exhibit 5, bates stamp 28, paragraph 12), and

D. Dr. Olsen has only performed a medical record review prior to his **fourth time** testifying **against** Claimant's request for medical benefits in the above-captioned matter.

23. The Claimant's testimony, as well as the medical records, establish the Claimant's need for additional pool therapy as being reasonably necessary to cure and relieve the effects of his admitted injury, and causally related to the admitted injury of July 22, 2003. The ALJ rejects the contrary opinions on reasonable necessity, rendered by Dr. Polanco and Dr. Olsen.

Ultimate Findings

24. For the reasons stated herein above, the ALJ finds the implied opinion of ATP Dr. Schneider, and the Claimant's undisputed testimony, more credible than all other opinions to the contrary.

25. The ALJ makes a rational choice, based on substantial evidence, to accept the implied opinion of ATP Dr. Schneider, and the Claimant's undisputed testimony, and to reject all opinions to the contrary.

26. The Claimant has proven, by a preponderance of the evidence that the 24 pool therapy visits, recommended by his ATP, are causally related to the admitted

injury of July 22, 2003, and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony concerning the benefits to him of pool therapy is undisputed other than by physicians who never saw him or spoke with him regarding the pool therapy. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the implied opinion of ATP Dr. Schneider, and the Claimant's undisputed testimony, more credible than all other opinions to the contrary.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice, based on substantial evidence, to accept the implied opinion of ATP Dr. Schneider, and the Claimant's undisputed testimony, and to reject all opinions to the contrary.

Causally Related and Reasonably Necessary Medical Care/Ancillary Treatment

c. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, the pool therapy, recommended by ATP Dr. Schneider and wanted by the Claimant is causally related to the admitted injury of July 22, 2003. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the recommended 24 visits for pool therapy is reasonably necessary to cure and relieve the effects of the Claimant's admitted injury.

d. To be a compensable medical benefit, the service requested must be medical in nature or incidental to obtaining such medical or nursing treatment. *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Services that are "medical in nature" include home health services in the nature of "attendant care," if reasonably needed to cure or relieve the effects of the industrial injury. *Atencio v. Quality Care, Inc.*, 791 P.2d 7 (Colo. Ct. App. 1990). The 24 visits for pool therapy, recommended by the Claimant's ATP, Dr. Schneider, are clearly ancillary to medical treatment in the same manner as physical therapy. Therefore, it is a reasonably necessary medical benefit.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven his entitlement to 24 visits for pool therapy.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay the costs of the 24 pool therapy visits at a YMCA recommended by ATP Dr. Schneider as reasonably necessary to cure and relieve the effects of the Claimant's industrial injury and the Claimant is entitled to this medical treatment.

B. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc..ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-996-220-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 5, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 4/5/17, Courtroom 1, beginning at 1:30 PM, and enduing at 5:30 PM). The official Spanish/English Interpreter was Carmen Pedrego.

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondents' Exhibits A through P were admitted into evidence, without objection. Respondents' Exhibit Q (Interrogatory # 6 and 7 and answers thereto) was admitted into evidence as extrinsic evidence after the Claimant could **not** remember the answers she gave. Respondents' Exhibit R (which was the anatomical chart in Exhibit P but marked by the Respondents' Independent Medical Examiner (IME), I. Stephen Davis, M.D., to illustrate his testimony, was admitted into evidence without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on April 12, 2017. On April 13, 2017, counsel for the Respondents indicated no objection to the proposal. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The issue to be determined in this decision concerns the compensability/causal relatedness the Claimant's left shoulder injury, allegedly sustained in the quasi-course of employment on October 7, 2016, while the Claimant was receiving physical therapy for her admitted right hip injury of October 3, 2015.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant sustained admitted injuries to her right hip and back on October 3, 2015. She was authorized to treat with Felix Meza, M.D., at the Boulder, Colorado Concentra Medical Center. Dr. Meza was designated as her authorized treating physician.ATP.

2. The Respondents filed a General Admission of Liability (GAL), dated October 28, 2015, admitting for medical benefits, an average weekly wage (AWW) OF $446.95, and ongoing temporary total disability (TTD) benefits of $297.97 per week from October 4, 2015. The GAL remains in full force and effect.

3. The Claimant was diagnosed with a right hip labral tear, an intra-articular loose body and chondromalacia. Michael B. Ellman, M.D., performed arthroscopic surgery on May 3, 2016 to repair the hip pathology.

4. Authorized treatment post-surgery included physical therapy (PT) at the Boulder Concentra Center with William Dmytriw, P.T. Physical therapy sessions with Dmytriw began on May 20, 2016.

The Left Shoulder Injury

5. On the afternoon of October 6 2016, the Claimant attended a PT session with Dmytriw at the Concentra Medical Center as part of the authorized treatment for her right hip and back. The therapeutic exercises that day included the use of a theraband, an elastic band approximately 5 to 6 inches in width and 4 to 5 feet in length. The exercise required that the theraband be placed over a metal rod above her head. She performed the exercise by pulling one end of the theraband with her arms from overhead, down and behind her hip. When demonstrating the exercise during her

testimony, the Claimant's left arm was at times extended above her head and backward.

6. According to the Claimant, she felt extreme pain in her left shoulder immediately upon completing the exercise and advised her therapist. Dmytriw, however, was in a different area of the exercise room and was not present, or in proximity to the Claimant while she was engaged in the exercise. Dmytriw did not realize that the Claimant may have been injured. Her session was ended and he allowed the Claimant to leave and go home.

7. The Claimant's home was only a few minutes away. When at home, the Claimant laid down because she was in significant pain. Her husband arrived from work at sometime between 6:00 and 6:30 PM Although concerned, the couple believed her left shoulder symptoms would pass.

8. The Claimant's husband left for work at approximately 5:00 AM the next morning, while the Claimant slept. He returned from work the following day, again, between 6:00 and 6:30 PM and found the Claimant still in bed and still complaining of extreme pain in her left shoulder. The Claimant's left shoulder appeared swollen and the couple decided to go to the local hospital.

9. The Claimant and her husband went to the Boulder Community Hospital on October 7, 2016 at 10:01 PM She was seen by Jason E. Rozeski, M.D. and D. Cris Benner, PA-C.

10. The Claimant complained of acute left shoulder pain which she felt while performing PT exercises the previous day. Dr. Rozeski ordered left shoulder x-rays which revealed an anterior dislocation of the left humeral head. The dislocation of the left shoulder was reduced using a traction and counter traction technique. There were no complications and the Claimant was released to home with a sling for comfort and a recommendation for an orthopedic follow up.

11. Jeremiah Cogan, M.D., saw Claimant at Concentra on October 10, 2016. The Claimant reported to Dr. Cogan that she sustained a left shoulder dislocation in her last PT appointment. The Claimant noted some shoulder pain from her use of crutches prior to commencing PT but not like the pain experienced by the dislocation. She denied any previous shoulder injuries. Dr. Cogan deferred any finding concerning causation pending receipt of the hospital ER 9emergency room) records.

12. The Claimant saw Dr. Meza, her ATP, on October 13, 2016. After discussing the manner of injury with her and reviewing the ER records, Dr. Meza recommended the inclusion of the left shoulder into the claim. Dr. Meza also recommended an MRI (magnetic resonance imaging) arthrogram and orthopedic evaluation.

13. The Respondents denied the ATP Dr. Meza's request for authorization of treatment for the left shoulder and instead arranged for an IME with Dr. I. Stephen Davis. Dr. Davis performed the Respondents' IME on January 26, 2017.

Respondents' Independent Medical Examination (IME) by I. Sephen Davis, M.D.

14. After examining the Claimant and reviewing the relevant medical records it was Dr. Davis' opinion, to a reasonable degree of medical probability, that there was no documentation of a reasonable explanation as to the mechanism for the Claimant's left shoulder dislocation. Dr. Davis stated the opinion that the force necessary to tear the ligaments supporting the shoulder joint and cause a dislocation did not occur in the Claimant's October 6, 2016 PT session. Dr. Davis did **not** notice the Claimant demonstrating moving her left arm overhead and behind her. The ALJ, in fact, noticed the Claimant moving her left arm overhead and behind her while demonstrating the theraband exercise before she felt the pain in her left shoulder.

15. Dr. Davis' testimony at the hearing was generally consistent with his IME report. He testified that the Claimant's injury probably occurred within the 24 to 36 hours after the PT session and before responding to the ER. The testimony of the Claimant, and her husband, accounts for nothing happening during this period of time, other than the Claimant remaining in bed.

16. Dr. Davis testified at hearing, however, that an anterior dislocation of the shoulder joint occurs when the arm is extended upward and backward with enough force to cause the humeral head to dislocate from the joint. He also testified that the shoulder joint can become unstable from prior trauma and will therefore be more susceptible to a dislocation. As found, herein above, Dr. Davis did **not** notice the Claimant demonstrating the theraband exercise where she moved her left arm overhead and behind her.

17. Based on the totality of the evidence, the ALJ finds that the therapeutic exercise as demonstrated by the Claimant credibly explains how her injury occurred. Further, even though she did not realize, it is more probable than not that the Claimant had an unstable left shoulder and that the Claimant's activity in physical therapy on October 6, 2016, aggravated, accelerated or exacerbated the underlying instability and caused the dislocation.

18. Dr. Davis explained in his testimony how an anterior shoulder dislocation occurs but seemingly disregarded the Claimant's testimony and demonstration of the activity which probably caused her injury. The ALJ finds the Claimant's testimony more credible than that of Dr. Davis in that regard.

19. Dr. Davis also testified that the Claimant's shoulder dislocation occurred in the 24 to 36 hours after the physical therapy session and prior to her responding to the hospital ER. As found herein above, nothing happened during this period of time, and the ALJ finds Dr. Davis' seemingly alternative explanation unpersuasive in light of the totality of the evidence.

20. Oscar Jaime Segovia, Claimant's husband, testified in rebuttal to Dr. Davis' testimony, that he found his wife in bed and in extreme pain when he arrived at home from work on the evening of October 6, 2016. He spent the night with her and left for work at 5:00 AM the next morning. On the evening October 7, 2016, he arrived at home to find the Claimant still in bed still and still complaining of extreme shoulder pain. He stated that he was compelled to take the Claimant to the hospital for treatment.

21. The ALJ finds that testimony of Oscar Segovia credible and persuasive. The inference that the Claimant was injured after her PT session, while at home, or in some other manner prior to her GOING to the hospital amounts to speculation and the ALJ rejects this inference

Ultimate Findings

22. The ALJ finds the Claimant's testimony, and the testimony of her husband, credible, persuasive and supporting the proposition that nothing happened during the 24 to 36 hours after the Claimant's theraband exercises at her PT session on October 7, 2016, contrary to the speculative explanation of Dr. Davis that something must have happened to dislocate the Claimant's left shoulder. Dr. Davis' opinions support a pre-existing weakness of the left shoulder that could have caused the dislocation with minimum force such as demonstrated by the Claimant at hearing. In this case, the ALJ finds the lay testimony of the Claimant and her husband (that nothing happened in the 24 to 36 hours after the PT session more persuasive and credible than Dr. Davis' speculative opinion, however, Dr. Davis' opinion that the Claimant may have had an unstable left shoulder and did not know it. The ALJ infers and finds that the PT exercises with the theraband, as demonstrated by the Claimant, as an aggravating/accelerating factor is more credible as the cause of the dislocation, in which case lay testimony prevails despite medical opinion seemingly to the contrary.

23. The ALJ makes a rational choice to accept the testimony of the Claimant and her husband that nothing happened in the 24 to 36 hours after the PT event, based on substantial evidence, and to reject Dr. Davis' speculative opinion that the cause must have been some unknown event within 24 to 36 hours after the PT event.

24. The Claimant sustained her left shoulder injury while receiving authorized physical therapy, ordered by ATP Dr. Meza. Consequently, it occurred in the quasi-course of her employment for the Employer.

25. The ALJ infers and finds that the PT exercises with the theraband, as demonstrated by the Claimant, was an aggravating/accelerating factor and a more credible cause of the dislocation, in which case lay testimony prevails despite medical opinion seemingly to the contrary.

26. The Claimant has proven, by a preponderance of the evidence that the theraband exercises, during authorized PT, caused her unknown-as-of-then pre-existing left shoulder instability to become aggravated and accelerated to the point of dislocating her left shoulder.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony, and the testimony of her husband, was credible, persuasive and supporting the proposition that nothing happened during the 24 to 36 hours after the Claimant's theraband exercises at her PT session on October 7, 2016, contrary to the speculative explanation of Dr. Davis that something must have happened to dislocate the Claimant's left shoulder. Dr. Davis' opinions support a pre-existing weakness of the left shoulder that could have caused the dislocation with minimum force such as demonstrated by the Claimant at hearing. In this case, the ALJ finds the lay testimony of the Claimant and her husband (that nothing happened in the 24 to 36 hours after the PT session more persuasive and credible than Dr. Davis' speculative opinion, however, Dr. Davis' opinion that the Claimant may have had an unstable left

shoulder and did not know it. As found, the PT exercises with the theraband, as demonstrated by the Claimant, was an aggravating/accelerating factor and more credible as the cause of the dislocation, in which case lay testimony prevailed despite medical opinion seemingly to the contrary.

b. Compensation can be awarded where there is competent evidence other than expert opinion. *Martin Marietta Corp. v. Faulk*, 158 Colo. 441, 407 P.2d 348 (1965). Such competent evidence includes lay testimony. *See Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Colorado Fuel & Iron Corp. v. Alitto*, 130 Colo. 130, 273 P.2d 725 (1954). *Also see Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997) [compensation may be determined on lay testimony despite medical opinion to the contrary].

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made a rational choice to accept the testimony of the Claimant and her husband that nothing happened in the 24 to 36 hours after the PT event, based on substantial evidence, and to reject Dr. Davis' speculative opinion that the cause must have been some unknown event within 24 to 36 hours after the PT event.

Quasi-Course of Employment

d. Injuries sustained while a claimant is obtaining authorized medical treatment for an admitted injury are compensable. *See price Mine Service, Inc. v. Indus. Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003); *Jarosinski v. Indus. Claim Appeals office,* 62 P.3d 1082 (Colo. App. 2002); *Excel Corp. v. Indus. Claim Appeals office,* 860 P.2d 1393 (Colo. App. 1993). As found, the Claimant sustained her left shoulder injury while receiving authorized physical therapy, ordered by ATP Dr. Meza. Consequently, it occurred in the quasi-course of her employment for the Employer.

Aggravation/Acceleration of Pre-Existing Condition

e. An unexplained injury satisfies the "arising out of" employment requirement in § 8-41-301 (1) (c), C.R.S., if the injury would not have occurred but for the fact that the conditions and obligations of employment, and/or quasi-course of employment, placed the employee in the position where she was injured. The phrase "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the employee's injury. This includes an injury during authorized medical treatment for an admitted injury. It is not essential, however, that an employee be engaged in an obligatory job function or in an activity resulting in a specific benefit to the employer at the time of injury. *City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.**

f. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a pre-existing condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a pre-existing condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the theraband exercises, during authorized PT, caused the Claimant's unknown-as-of-then pre-existing left shoulder instability to become aggravated and accelerated to the point of dislocating her left shoulder.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App.

2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden that her left shoulder injury was an aggravation/acceleration of her underlying left shoulder instability and it occurred, on October 7, 2016, in the quasi-course of her employment during authorized medical treatment for her admitted right hip injury of October 3, 2015.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay all of the costs of medical care and treatment for the Claimant's left shoulder injury occurring in the quasi-course of employment, during authorized medical treatment for her admitted right shoulder injury, at the hands of her ATP, Felix, Meza, M.D., AND his referrals, including his referrals for physical therapy, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The General Admission of Liability, dated October 28, 2015, remains in full force and effect.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

I. Whether Claimant demonstrated by a preponderance of the evidence that he sustained a compensable lower back injury on May 18, 2016.

II. If Claimant has sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment related to the industrial injury.

I. If Claimant has proven a compensable injury, whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits.

II. If Claimant has proven a compensable injury, whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits.

III. If Claimant has established he is entitled to TTD or TPD benefits, what was Claimant's average weekly wage (AWW).

IV. If Claimant has established entitlement to TTD or TPD benefits, whether Respondents have demonstrated by a preponderance of the evidence Claimant was responsible for his termination.

FINDINGS OF FACT

1. Claimant sustained a low back injury on October 6, 2005 while working as a bricklayer for a previous employer, Creative Masonry. Claimant underwent an MRI on November 4, 2005. Steven P. Ross, MD noted "Broad-based, central HNP with impression upon the thecal sac and transversing S1 nerve roots bilaterally."

2. Claimant underwent a L5-S1 discectomy and partial left hemilaminectomy at L5 in March 2006. Dr. Ross interpreted a June 12, 2006 MRI, noting inflammation. Dr. Ross remarked that a broad-based posterior disc bulge remained. Dr. Ross also noted Claimant's overall alignment was anatomic and the remaining intervertebral discs of the lumbar spine were normal.

3. Claimant underwent a second MRI on September 20, 2006. Susan Powell Wu, MD interpreted the MRI and documented "residual broad-based diffuse disc bulge at L5-S1 slightly asymmetric to the right. This does result in mild right greater than left lateral

recess stenosis and does abut the descending S1 nerve roots." Dr. Powell Wu also noted bilateral degenerative facet disease at L4-5 and L5-S1.

4. Claimant continued to experience symptoms post-operatively. Sander Orent, MD, referred to the surgery as a failed lumbar disc surgery in a July 27, 2006 medical note. Claimant was placed at maximum medical improvement ("MMI") on October 12, 2006. On November 16, 2006, Dr. Orent placed Claimant on permanent medical restrictions of lifting ten pounds on an occasional basis, floor to knuckle, knuckle to waist and waist to overhead and could carry 20 pounds 100 feet at waist level, and bending kneeling and flexing forward and standing on an occasional basis. Dr. Orent noted Claimant's lifting fell within the sedentary work category. Dr. Orent also noted Claimant should not balance on a scaffold.

5. In an Impairment Rating Report dated December 4, 2016, Dr. Orent assigned Claimant a 20% whole person impairment rating, consisting of a 10% impairment rating under Table 53(2)(E) of the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), and 12% rating based on range of motion.

6. Claimant testified at hearing he subsequently returned to work as a bricklayer and had no issues performing his job duties until May 18, 2016. There was no evidence in the record that Claimant lost time from work through May 2016. Claimant testified he did not continue to receive treatment for his low back. No evidence was provided indicating Claimant continued to receive ongoing treatment for the October 2005 injury.

7. Claimant testified he initially worked for Employer in approximately 2013, and then returned for a second period of employment beginning in approximately 2015. Claimant stated his job duties for Employer included working with brick, blocks and, occasionally, rocks. Claimant testified the bricks weighed 2 to 45 pounds, with the rocks weighing more. Claimant testified that, in a typical day, he laid 90 to 100 bricks and 180 to 300 blocks per day. Claimant testified he also carried cans of 70 to 80 pound gravel at times. Claimant testified he has 14-15 years of experience as a bricklayer.

8. Claimant testified he sustained an injury on May 18, 2016 while employed as a bricklayer by Employer. Claimant was working on a scaffold laying split-face blocks onto a wall. The blocks weighed approximately 35 pounds each. Claimant testified a co-worker failed to position the scaffold properly, resulting in the scaffold being approximately four to five inches farther away from the wall than it should have been. Claimant also alleged the scaffold was uneven and "bouncy." During the task, Claimant

retrieved a block located to his right and placed the block on the wall to his left. While bending over the wall to ensure the block was properly aligned, Claimant experienced an onset of lower back pain. Claimant testified he felt as though he could not move and he was unable to straighten his back. Upon being able to straighten his back and walk, Claimant reported the back pain to his foreman. Claimant performed lighter tasks for the remainder of the shift.

9. Claimant testified the pain increased later that night and into the following day. Claimant reported continued pain to his foreman on the morning of May 19, 2016. Claimant continued performing light duties until around noon when his pain became unbearable. Claimant again reported to his foreman, who transported Claimant to an Employer-approved Concentra clinic.

10. Janine Boyt, PA-C evaluated Claimant on May 19, 2016. Claimant reported experiencing sharp right lower back pain while working on May 18, 2016. Claimant reported the pain worsened, shooting down his posterior right leg and into his right groin. Claimant also reported some numbness and tingling of his posterior right thigh. Claimant admitted having a prior lumbar disc injury 10 years prior with no subsequent issues. PA-C Boyt noted limited lumbar range of motion. PA-C Boyt assessed lumbar strain and radiculopathy. PA-C Boyt referred Claimant for physical therapy and released Claimant to return to modified duty with restrictions of lifting no more than 15 pounds, pushing/pulling no more than 25 pounds, and bending occasionally. PA-C Boyt noted Claimant "may work their [*sic*] entire shift."

11. On direct examination, when asked if he was able to subsequently return to work activity for Employer, Claimant testified he did not return to work for the remained of the day on May 19, 2016. Claimant then testified "For the next day - I'm not sure - but I returned, they gave me restrictions and the foreman did have the restrictions."

12. PA-C Boyt reevaluated Claimant on May 24, 2016. Claimant reported worsening pain, with a burning pain in his right leg. Claimant reported "he had to leave work early today." PA-C Boyt noted limited lumbar range of motion in all planes and a positive straight leg raise test on the right. PA-C Boyt again assessed lumbar strain and radiculopathy. PA-C Boyt ordered an MRI and released Claimant for modified duty, noting Claimant could work his entire shift.

13. Claimant returned to PA-C for a follow-up evaluation on June 2, 2016. Claimant reported missing work the day prior. Claimant reported pain shooting down his leg and numbness in his right toe when standing more than 10 minutes. PA-C Boyt noted the

same exam findings from the prior evaluation and the same assessment. PA-Boyt again released Claimant to work modified duty for an eight hour shift.

14. On the WC164 form completed by Daniel M. Peterson, MD on June 3, 2016, Dr. Peterson listed the codes for radiculopathy and lumbar strain under work-related medical diagnoses. Dr. Peterson stated the objective findings were consistent with Claimant's injury and/or work related mechanism of injury/illness.

15. PA-C Boyt reevaluated Claimant on June 9, 2016. Claimant reported aching and shooting pain. PA-C Boyt noted the same exam findings from the prior evaluation and the same assessment. PA-Boyt again released Claimant to work modified duty for an eight hour shift.

16. Claimant underwent an MRI of his lumbar spine on June 10, 2016. Kevin Wooley, MD interpreted the MRI. Dr. Wooley compared the MRI to the September 20, 2006 MRI. Dr. Wooley noted, grade 1 retrolisthesis, irregularity of the left lamina, broad-based disc bulge, right-sided paracentral disc herniation (8 x 7 x 6 mm in dimension), "severe spinal stenosis and effacement of the right lateral recess with likely impingement of the right L1 nerve root," and mild left-sided foraminal impingement. Dr. Wooley gave the following impression: (1) minimal grade 1 retrolisthesis of L5 relative to S1, (2) probable previous left laminotomy at the L5-S1 level, (3) mild multilevel degenerative changes, and (4) new right-sided paracentral disc herniation at L5-S1 level with severe spinal stenosis and probable impingement of the right S1 nerve root.

17. Frederic Zimmerman, DO (Physiatry) evaluated Claimant on June 14, 2016. Claimant reported constant right-sided leg pain. Dr. Zimmerman noted Claimant sustained a lumbar spine injury in 2005 and treated with a lumbar decompression/laminectomy on the left side. Upon physical examination, Dr. Zimmerman noted positive straight leg raise and neural tension on the right, paraspinal hypertonicity bilaterally, mild tenderness in the sciatic notch on the right, and no specific tenderness in the SI joints or greater trochanters bilaterally. Dr. Zimmerman assessed lumbosacral displaced disc, right lower extremity radiculitis, and previous lumbar laminectomy on the left, remarking "current symptoms on the right". Dr. Zimmerman ordered a right L5 plus S1 transforaminal ESI, and continued physical therapy.

18. Lloyd Thurston, MD evaluated Claimant on June 20, 2016. Dr. Thurston noted tenderness in Claimant's lumbosacral spine and bilateral muscle spasms. Dr. Thurston also noted the straight leg test, Valsalva test, and Waddell test were negative. Dr. Thurston assessed radiculopathy and lumbar disc herniation. Dr. Thurston

recommended Claimant receive an epidural steroid injection ("ESI"). Dr. Thurston released Claimant to work eight hours/day of modified duty.

19. Claimant continued to treat with Dr. Thurston. During an August 8, 2016 evaluation, Claimant reported pain when standing with pain shooting down his right leg. During an October 6, 2016 evaluation, Claimant reported pain and a burning sensation in his right leg and numbness when sitting or walking for extended periods of time. Dr. Thurston noted numbness in the fourth and fifth toes on Claimant's right foot, tenderness in the lumbar spine, and bilateral muscle spasms. Dr. Thurston referred Claimant back to Dr. Zimmerman and stated, "I think he would benefit greatly from an ESI, he has weakness and continued numbness in the right L5-S1 distribution and this needs to be addressed!" Dr. Thurston again released Claimant to work eight hours/day of modified duty.

20. Dr. Zimmerman reevaluated Claimant on October 11, 2016. Claimant reported right-sided lumbosacral pain radiating down Claimant's right lower extremity. Claimant also reported numbness and tingling in the right foot. Dr. Zimmerman noted straight leg raise and neural tension remained positive on the right side, decreased sensation light to touch in the lateral aspect of Claimant's right leg, and 10-15 degree extension in lumbar range of motion. Dr. Zimmerman provided the same assessment from his prior evaluation. Dr. Zimmerman recommended Claimant reschedule the ESI and restart formal physical therapy.

21. Philip L. Engen, MD evaluated Claimant on February 14, 2017. Claimant reported numbness and pain in his low back and right leg pain and numbness. On physical examination, Dr. Engen noted "marked muscle spasm" in the lumbar spine, restricted range of motion in the lumbar spine, and a positive straight leg test. Dr. Engen noted,

> "The MRI study done on June 10, 2016, compared to the November 20, 2006, demonstrates L5-S1 retrolisthesis with evidence of congenital AP narrowing of the canal due to shortened pedicles. There is evidence of the previous laminectomy in the left at the L5-S1 and the laminotomy at that L5-S1 segment. There is a right-sided paracentral disk herniation 8 x 7 x 6 mm in diameter."

Dr. Engen gave the following impression: (1) recurrent disk herniation at L5-S1, (2) right S1 root compression secondary to recurrent disk herniation, (3) severe spinal stenosis secondary to recurrent disk herniation, and (4) congenitally small canal.

22. Dr. Engen opined Claimant suffered a recurrent disk herniation "emanating from" the October 2005 injury. Dr. Engen concluded it was more likely than not that the the L5-S1 laminotomy and surgical correction of a left L5-S1 radicular pain syndrome caused an instability in the retrolisthesis L5-S1. Dr. Engen remarked Claimant had an "abnormal disk at L5-S1 identified in his previous work-related injury and he now has a recurrent disk herniation at L5-S1 right-sided which impacts the L5 and the S1 roots. It is more likely than not that this is part of his original Worker's Compensation claim."

23. On November 30, 2016, Carlos Cebrian, MD, PC conducted an Independent Medical Evaluation ("IME") at the request of Respondents. Dr. Cebrian issued an IME Report on January 20, 2017. Dr. Cebrian conducted a medical record review and physical examination of Claimant. On physical examination, Dr. Cebrian noted there were no spasms in the lumbar spine, mild discomfort to palpation in the area of the right SI joint and normal pelvic alignment. Dr. Cebrian noted a range of motion of 45 degrees flexion, 20 degrees extension, 25 degrees in the right lateral flexion, and 25 degrees in the left lateral flexion. Dr. Cebrian documented Claimant had pain down the back of his right knee on straight leg raise testing at 45 degrees. Dr. Cebrian concluded there were no claim-related diagnoses. Dr. Cebrian diagnosed the following, characterized as "not claim related, preexisting, concurrent and subsequent:" (1) prior lumbar disc herniation with laminotomy performed, (2) right-sided paracentral disc herniation at L5-S1 with severe spinal stenosis and probable impingement of the right S1 nerve root, (3) minimal Grade I retrolisthesis of L5, and (5) mild multilevel degenerative changes.

24. Dr. Cebrian stated it was his medically probable opinion that Claimant's symptoms are "due to the underlying natural history of his lumbar degenerative disc disease and not due to a new injury, cumulative trauma or due to aggravation of a pre-existing condition." Dr. Cebrian concluded there was not a "mechanism of sufficient force to cause an injury to the lumbar spine or to aggravate an underlying pre-existing condition," nor was there a mechanism to cause a cumulative injury to Claimant's lumbar spine. Referring to the Colorado Division of Workers' Compensation Medical Treatment Guidelines on Low Back Pain (the "Guidelines"), Dr. Cebrian noted the Guidelines indicate the best evidence supports regular heavy lifting (50 or more pounds) combined with flexion as a risk factor for low back pain. Dr. Cebrian also noted the Guidelines refer to studies indicating a BMI greater than 25 acts as a risk factor for low back pain. Dr. Cebrian noted Claimant does not engage in regular heavy lifting as defined in the Guidelines.

25. Dr. Cebrian opined the most recent MRI demonstrated pre-existing, degenerative and "genetically proscribed changes." Dr. Cebrian noted that, in most cases, pain from lumbar degenerative disease and stenosis presents spontaneously.

Dr. Cebrian contended prior surgery "would weaken the existing disc making the opposite side of the disc more likely to herniated." Dr. Cebrian noted Claimant has a prior history of L5-S1 disc herniation, multi-level lumbar spine degenerative disc disease, and a BMI over 25, which he referred to as risk factors for lumbar disc pathology. Dr. Cebrian concluded, "Further evaluation, diagnosis and treatment under workers' compensation is not medically reasonable, necessary, appropriate or related."

26. Dr. Cebrian testified at hearing on behalf of Respondents as an expert in family medicine. Dr. Cebrian is board certified and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Cebrian testified consistent with his IME report. Dr. Cebrian reiterated his opinion that Claimant's condition is unrelated to his employment with Employer and instead represents the natural progression of Claimant's October 2005 injury. Dr. Cebrian contended Claimant experienced right-sided disc issues post-surgery in 2006, as evidenced by the enlarged disc on Claimant's right side revealed in the September 20, 2006 MRI. Dr. Cebrian stated the majority of findings on the 2016 MRI were present on the 2006 MRI, and the other findings represented "slow-process minor changes." Dr. Cebrian contended it was not surprising Claimant is now experiencing symptoms on the right side after having compression on the S1 nerve root on the same side 10 years prior. Dr. Cebrian concluded Claimant's condition is a reflection of underlying pathology that was present 10 years ago, and stated it is normal to see changes over time. Dr. Cebrian reiterated that, per the Guidelines, lifting 50-55 pounds may be a risk factor when combined with flexion and performed 15-20 times per day over cumulative years of exposure. Dr. Cebrian noted the majority of Claimant's job involved lifting under 50 pounds. Dr. Cebrian testified that considering all of the factors, the level of his exposure, his prior history, and the objective evidence from the prior injury, it was his medically probable opinion Claimant's complaints are unrelated to his employment with Employer.

27. Audrey Sevalt testified at hearing on behalf of Respondents. Ms. Sevalt is a Human Resources Consultant for Insurer and has worked in such capacity for Insurer for five years. Ms Sevalt testified Insurer is a professional employer organization ("PEO") that handles payroll and other services for Employer, including providing worker's compensation insurance through their own self-insured plan. Ms. Sevalt testified Insurer began working with Employer in March 2016. Ms. Sevalt contended she became aware of Claimant's alleged work-related injury on May 19, 2016 and that Claimant was offered modified duty on May 19, 2016.

28. Ms. Sevalt testified Insurer did not check Claimant's work status when Employer became a new client in March 2016, as Insurer was not required to do so. Insurer subsequently checked Claimant's work status in August 2016 after an investigation into

Claimant's workers' compensation claim revealed Claimant had used two social security numbers. During the investigation, Insurer also became aware that Claimant's permanent resident card expired in 2014. Ms. Sevalt testified Claimant was asked to provide a new permanent resident card, which Claimant provided the following day. Ms. Sevalt testified she attempted to verify the resident card through the Social Security Administration's E-Verify website. Ms. Sevalt received a letter of non-confirmation from the Social Security Administration indicating Claimant was not authorized to work in the United States under the social security number he provided. Ms. Sevalt testified Claimant was given a letter of an election to contest the notice of non-compliance, which provided detailed instructions on how to resolve the issue with the Social Security Administration. Ms. Sevalt testified Claimant returned the letter and checked the box electing not to contest the determination of non-confirmation. Ms. Sevalt testified Claimant was terminated as of August 8, 2016 because he elected not to contest the letter of non-confirmation and correct his eligibility to work in the United States.

29. Claimant testified he filed a workers' compensation claim in connection with the October 2005 injury under a social security number beginning with 412, using his same name and same birth date. While working for Employer, Claimant used the same name and same date of birth, but a different social security number beginning with 646. Claimant acknowledged Employer asked him to provide a new permanent resident card, which he did. Claimant also acknowledged Employer subsequently provided him a letter of non-confirmation from the Social Security Administration with instructions on how to correct his eligibility to work in the United States. Claimant was aware that his failure to correct the issue would result in termination. Claimant testified he was "not able" to correct the issue. Claimant did not identify any particular reasons preventing his ability to correct the issue.

30. Claimant was paid on a weekly basis. The payroll records demonstrate Employer's pay periods run from Monday to Sunday. Payroll records establish Claimant earned $32.00 per hour and $48.00 for each hour of overtime worked over 40 hours. Payroll records from the pay period ending June 14, 2015 through July 3, 2016 demonstrate Claimant did not consistently work 40 hours each week or earn overtime pay. For the eight-week period from March 21, 2016 through May 15, 2016, Claimant earned a total of $10,072.00 in gross wages, resulting in an average weekly wage of $1,259.00. The ALJ finds an average weekly wage of $1,259.00 to be a fair approximation of Claimant's wages at the time of injury.

31. For the eight-week period from March 21, 2016 through May 15, 2016, Claimant worked a total of 307 hours including 15.5 hours of overtime, averaging 38.38 hours per week. For the six-week period from May 22, 2016 through July 3, 2016, Claimant

worked a total of 183 hours, averaging 30.5 hours per week. Payroll records include two entries that effectively cover the same time period: one entry 24 total hours worked from May 22, 2016 through May 28, 2016, and a second entry of 9 hours total hours worked from May 23, 2016. No evidence was admitted at hearing regarding Claimant's hours worked and earnings subsequent to July 3, 2016.

32. For the four-week period from May 22, 2016 through June 19, 2016, after the injury, Claimant earned a total of $3,552 in gross wages, averaging $888.00 per week.

33. The ALJ finds Claimant's testimony credible and persuasive.

34. The ALJ credits the medical records and opinions of Drs. Wooley and Zimmerman over the contrary opinions of Drs. Engen, Thurston and Cebrian.

35. Claimant sustained a compensable injury to his low back on May 18, 2016 and is entitled to reasonably necessary medical benefits to cure or relieve the effects of the industrial injury.

36. Claimant did not prove by a preponderance of the evidence that he is entitled to TTD benefits.

37. Claimant has proven by a preponderance of the evidence that he is entitled to TPD benefits from May 22, 2016 through June 19, 2016 Claimant has not proven entitlement to TPD benefits beyond June 19, 2016.

38. Respondents have proven by a preponderance of the evidence that Claimant is responsible for his termination.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reaso29nable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

A claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ concludes Claimant has proven by a preponderance of the evidence he sustained a compensable injury to his low back on May 18, 2016. Although Claimant sustained prior low back injury in October 2005 and underwent a lumbar surgery which was considered "failed", Claimant credibly testified he did not receive ongoing treatment

and he subsequently continued to perform his job duties as a bricklayer without issue until May 18, 2016. The ALJ is persuaded that, while Claimant may have had a preexisting condition or susceptibility to injury due to the prior injury, the employment combined with the condition to produce the need for medical treatment. The ALJ is not persuaded Claimant's condition solely represents the natural progression of Claimant's October 2005 injury. There is objective evidence of pathology in the medical records causing Claimant's new right-sided symptoms. The ALJ is persuaded that, by a preponderance of the evidence, Claimant sustained a new injury arising out of and in the course and scope of his employment on May 18, 2016.

Reasonable, Necessary and Related Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant has proven by a preponderance of the evidence he is entitled to reasonable and necessary medical treatment related to the industrial injury. As such, Respondents shall be liable for reasonable and necessary treatment to cure or relieve the effects of the May 18, 2016 industrial injury.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW, Section 8-42-102(3), C.R.S. affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

Claimant did not regularly work 40 hours per week, nor did Claimant regularly work overtime. As such, Claimant's average earnings during any given period of time fluctuated. As found, the ALJ determines a fair approximation of the Claimant's total wage loss in this case is expressed as an AWW of $1,259.00.

Entitlement to TTD/TPD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in Section 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. TTD benefits shall continue until the employee returns to regular or modified employment. *See* Section 8-42-105(3)(b), C.R.S.

As found, Claimant did not meet his burden to establish he is entitled to TTD benefits. The payroll records demonstrate Employer's pay periods run from Monday to Sunday. There is insufficient persuasive evidence establishing what days of the week Claimant worked. Claimant testified he worked the remainder of his shift on May 18th, worked a portion of his shift on May 19th, and subsequently returned to work with restrictions. Claimant testified Employer accommodated his restrictions. Claimant did not testify as to what date he returned to work or how many shifts he missed subsequent to the injury. The medical records establish Claimant was released to return to work as of May 19, 2016 to work an entire shift on modified duty.

While the payroll records indicate a decrease in hours occurred during the week following the industrial injury, there is insufficient persuasive evidence establishing Claimant was totally disabled from working for more than three of his regular working days. A paystub for the pay period May 23, 2016 to May 29, 2016 indicates Claimant worked a total of nine hours. A paystub for the pay period May 22, 2016 to May 28, 2016 indicates Claimant worked a total of 24 hours. The paystubs effectively cover the same period of time. As such, while the payroll records establish there was a decrease from Claimant's average hours worked in a week, Claimant has not proven by a preponderance of the evidence that the industrial injury caused a disability lasting more than three work shift. .

Section 8-42-106, C.R.S. provides that in cases of temporary partial disability, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability. As found, Claimant has established an entitlement to TPD from May 22, 2016 through June

19, 2016. Claimant was released to work subject to medical restrictions that rendered him unable to perform his regular job duties. During these periods of time Claimant worked less than his average of 38.38 hours per week and earned less than his average weekly wage of $1,259.00. Claimant has established an entitlement to TPD benefits at a rate that is sixty-six and two-thirds percent of the difference between his AWW at the time of injury, $1,259.00 and his AWW during the continuance of TPD, $888.00.

Claimant worked 40 hours and earned gross wages of $1,280.00 during each pay period from June 20, 2016 through June 26, 2016 and June 27, 2016 through July 3, 2016. No payroll records regarding the time period between July 4, 2016 and Claimant's termination date of August 8, 2016 were admitted at hearing. As such, there is insufficient persuasive evidence establishing entitlement to TPD benefits from June 20, 2016, ongoing.

Responsibility for Termination

Sections 8-42-105(4), C.R.S and 8-42-103(1)(g), C.R.S. (the "termination statutes") provide a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

The ALJ further concludes Claimant is responsible for his termination, thus severing Claimant's entitlement to TPD benefits as of August 8, 2016. Subsequent to providing Employer an invalid permanent resident card, Claimant was provided a notice of non-compliance including instructions on how to correct the issue with the Social Security Administration. Claimant was aware that failure to correct the issue would result in termination. Claimant elected to not contest the determination of non-

correct the issue; however, Claimant did not testify as to what prevented him from doing so. As such, there is insufficient persuasive evidence Claimant's failure to correct the issue was non-volitional or otherwise due to circumstances outside of Claimant's control. Claimant was aware his failure to correct the issue would result in termination.

Accordingly, by failing to do so, Claimant committed a volitional act he reasonably could expect to cause the loss of his employment. Respondents have demonstrated by a preponderance of the evidence that Claimant is responsible for his termination. Thus, any wages loss subsequent to August 8, 2016 was not attributable to the industrial injury.

ORDER

It is therefore ordered that:

1. Claimant established by a preponderance of the evidence he sustained a compensable lower back injury on May 18, 2016.

2. Respondents shall pay for reasonable medical treatment necessary to cure and relieve Claimant from the effects of the May 18, 2016 industrial injury.

3. Claimant's average weekly wage is $1,259.00.

4. Claimant failed to establish by a preponderance of the evidence he is entitled to TTD benefits. Claimant's request for TTD benefits is denied and dismissed.

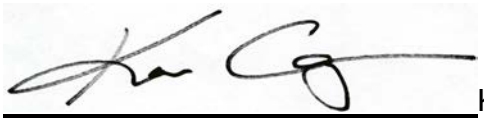
5. Claimant established by a preponderance of the evidence he is entitled to TPD benefits. Respondents shall pay claimant TPD benefits from May 22, 2016 through June 19, 2016, based upon an AWW of $1,259.00.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 18, 2017

 Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. I. No. 2016-045

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DIVISION OF WORKERS' COMPENSATION

IN THE MATTER OF THE APPLICATION OF:

DIVISION OF WORKERS' COMPENSATION,

Applicant,

v.

Employer / Respondent.

On January 24, 2017, the Division of Workers' Compensation (hereinafter the "Division") filed an Application for Hearing in the above-captioned matter, and the Division mailed the Notice of the Hearing set for May 17, 2017, to the Employer at its last known and regular address as follows: xxxxx, the last known address on file with the Division, and the notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing.

On March 24, 2017, the Division filed a Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist continuing its business operations for failure to maintain workers' compensation insurance as required by §§ 8-44-101 and 8-43-409, C.R.S. The Division's Motion was mailed to the Employer on March 24, 2017, at its last known address on file with the Division, and it was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received the Division's Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist xxxx (hereinafter "Employer") filed **no** timely response to the Motion nor did it file any response whatsoever. The matter was submitted for decision on April 18, 2017.

The Division is represented by Emmy A. Langley, Esq., Assistant Attorney General, Colorado Office of the Attorney General. There has been no appearance or response by the Employer.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether the Employer continues business operations without maintaining workers' compensation insurance; and, if so, should the Employer be ordered to cease and desist from continuing to do business.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On January 24, 2017, the Division of Workers' Compensation filed an Application for Hearing in this matter pursuant to Office of Administrative Courts Rules of Procedure (OACRP), Rule 8, 1 CCR 104-1 and § 8-43-409(1), C.R.S.. The Division mailed a Notice of Hearing to the Employer/Respondent at its last known address on file with the Division xxxx, and the notice was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received notice of the hearing. The hearing has been set for May 17, 2017, at 1:30 PM.

2. On March 24, 2017, the Division filed a Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist continuing its business operations for failure to maintain workers' compensation insurance as required by §§ 8-44-101 and 8-43-409, C.R.S. The Division's Motion was mailed to the Employer on March 24, 2017, at its last known address on file with the Division, and it was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received the Division's Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist. .xxxx (hereinafter "Employer") filed **no** timely response to the Motion nor did it file any response whatsoever. The matter was submitted for decision on April 18, 2017.

3. Pursuant to OACRP, Rule 17, the Employer had 20 days after the date of filing of the Motion to file an objection to the Motion xxxx (hereinafter "Employer") filed **no** timely response to the Motion nor did it file any response whatsoever.

4. The Employer failed to file a Response to the Motion for Summary Judgment. Accordingly, there are no genuine issues of material fact in dispute for hearing. The Employer failed to provide a written response with supporting documentation to the Division's Motion for Entry of Summary Judgment.

Findings

5. It is undisputed, and the ALJ finds, that the Employer employs employees for whom it must carry workers' compensation insurance under the provisions of the Workers' Compensation Act (hereinafter the "Act")..

6. The Employer does not have a policy of workers' compensation insurance in effect.

7. The Employer continues to operate its business in the absence of workers' compensation insurance coverage.

8. The Employer received legal notice of the hearing set before the Office of Administrative Courts, and the Motion for Summary Judgment as herein above detailed.

9. The Employer is in default of its workers' compensation insurance obligations under the Act.

Ultimate Findings

10. There are no genuine disputed issues of material fact concerning the fact that the Employer continues to operate its business without insuring its liability for workers' compensation.

11. The Division has proven, by a preponderance of the evidence that the Employer continues business operations without insuring its liability for workers' compensation.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Jurisdiction and Notice

a. The ALJ has jurisdiction of the subject matter and over the parties to this action pursuant to the Workers' Compensation Act of Colorado.

b. As found, the Division's Motion was mailed to the Employer on March 24, 2017, at its last known address on file with the Division, as herein above detailed, and it was not returned to the sender, by the U.S. Postal Service, as undeliverable. Therefore, there is a legal presumption of receipt and the ALJ finds that the Employer received the Division's Motion for Entry of Summary Judgment and Motion for Issuance of Order to Cease and Desist. *See Olsen v. Davidson,* 142 Colo. 205, 350 P.2d 338 (1960); *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993).

c. As found, the Employer failed to provide a written response with supporting documentation to the Division's Motion for Entry of Summary Judgment. Accordingly, the facts set forth in the Division's Motion and in the supporting affidavits and documents attached to the Motion for Summary Judgment are deemed undisputed. *WRWC, LLC v. City of Arvada*, 107 P.3d 1002, 1006 (Colo. App. 2004).

d. The Employer is in violation of § 8-44-101(1), C.R.S., by failing to maintain workers' compensation insurance for its covered employees, and is therefore subject to a cease and desist order under the provisions of § 8-43-409 (1) (a), C.R.S.

e. . Section 8-43-409(1) (a), C.R.S., provides that an employer in default of its workers' compensation insurance obligations shall be ordered to cease and desist immediately from continuing its business operations during the period such default continues.

f. The issuance of an order requiring the Employer to cease and desist business operations while in default of its workers' compensation insurance obligations is an appropriate penalty for failure to keep workers' compensation insurance in force.

g. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to

interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the Motion for Summary Judgment is supported by documents and affidavits. As further found, there were no timely responses to the Motion. 12. Summary judgment is appropriate in this matter because there are no genuine issues of material fact in dispute, and the Division is entitled to entry of judgment as a matter of law. *McCormick v. Union Pacific Resources Co.*, 14 P.3d 346, 348-349 (Colo. 2000); C.R.C.P. 56(c).

h. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, the attachments to the Division's Motion for Summary Judgment support the proposition that there is no genuine issue of disputed material fact exist.

i. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, there were no timely responses to the Division's Motion for Summary Judgment. Therefore, the Division is entitled to Summary Judgment, as a matter of law.

Burden of Proof

j. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Division has sustained its burden that there is no genuine issue of disputed material fact concerning the Employer continuing to operate a business without insuring its liability for workers' compensation;

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Division of Workers' Compensation's Motion for Summary Judgment is hereby granted.

B. The Employer shall cease and desist immediately from continuing its business operations during the period it remains in default of its mandatory obligation to have workers' compensation insurance in force and effect.

C. The hearing in this matter, May 17, 2017, is hereby vacated.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order Granting Summary Judgment in Favor of the Division of Workers' Compensation** on this_____day of April 2017, mailed, postage prepaid, first class, or electronically in PDF format, addressed to:

Emmy A. Langley, Esq.
Assistant Attorney General
Office of the Attorney General
Ralph L. Carr Colorado Judicial Center
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Denver, CO 80203
emmy.langley@coag.gov

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wci.dowc.v..sjord

ISSUES

1. Whether Respondents have overcome the opinion of division independent medical examination (DIME) physician Brian Beatty, D.O. on Claimant's permanent partial disability (PPD) impairment rating by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant is employed by Employer as a customer service representative.

2. On January 2, 2015 Claimant was walking into Employer's building when she slipped on water and fell. Claimant landed on her left side. When she fell, she was holding a glass Snapple bottle in her right hand that flew out of her hand and struck her on the right side of her head. Claimant did not striker her head on the ground or any other object.

3. Claimant was evaluated at Concentra. Claimant reported dizziness, nausea, vomiting, and a pressure sensation in the head from her fall earlier that day. At Concentra, Kirk Nelson, M.D. performed an examination and noted right trapezius tenderness and full cervical range of motion without spasms. Dr. Nelson assessed closed head injury and cervical strain.

4. On January 5, 2015 Claimant was evaluated by Dr. Nelson. Claimant reported a continued headache in the front and right occipital region and that her neck was also sore. Dr. Nelson noted a medical history positive for migraines but that treatment had not been required for some time. Dr. Nelson noted tenderness in the right trapezius and paracervical muscles and tenderness across the nuchal line and greater occipital groove on the right. Dr. Nelson noted an unremarkable neurologic exam. Dr. Nelson referred Claimant to physical therapy. Claimant continued to be evaluated at Concentra. *See* Exhibit D.

5. On April 17, 2015 Claimant underwent a neuropsychological evaluation performed by Kevin Reilly, Psy.D. Dr. Reilly opined that the evaluation showed suboptimal effort, magnified memory complaints, and that the obtained measures indicated symptom magnification/response bias. Dr. Reilly noted that Claimant's observed pattern of performance was consistent with non-organic factors influencing the neuropsychometric performance. Dr. Reilly opined that it was likely that psychosocial factors were contributing to delayed recovery/chronic pain syndrome. Dr. Reilly noted that the description of Claimant's injury was consistent with a diagnosis of mild traumatic brain injury and that the natural history of mild traumatic brain injury/postconcussional syndrome is one of steadily resolving symptoms in the hours/days/weeks post injury and that the neurocognitive symptoms are at the worst

immediately after the injury. Dr. Reilly opined that the psychosocial factors likely played a significant role in Claimant's reported cognitive difficulties and that Claimant could potentially benefit from behavioral medicine approaches to her chronic pain. *See* Exhibit B.

6. On November 25, 2015 Claimant was evaluated by her primary care provider. Claimant reported difficulty losing weight despite exercising and eating healthily and a small lump in her left armpit. Claimant denied muscle cramps, joint pain, back pain, stiffness, muscle weakness, and loss of strength or muscle aches. Claimant denied headaches and weakness. *See* Exhibit E.

7. On February 3, 2016 Claimant underwent an independent medical examination (IME) performed by Allison Fall, M.D. Claimant reported that she was walking into work on January 2, 2015 when she slipped on water and fell. Claimant reported that a glass bottle of Snapple was in her hand and that when she fell the bottle hit her on the back of her head on the right side and that she landed on the left side of her body. Claimant reported getting up and that her head was throbbing and felt heavy. Claimant reported feeling nauseous and drowsy and that she started throwing up. Claimant reported leaving work and that when she got home she started feeling neck pain and went to Concentra. Claimant reported that she was now 75% better but that she still had neck muscle soreness and headaches with tightness/stiffness more on the left side of her neck than the right. Dr. Fall reviewed medical records and performed a physical examination. Dr. Fall assessed left upper quadrant myofascial pain. Dr. Fall opined that Claimant was near MMI for the ongoing treatment of myofascial pain. Dr. Fall opined that there was no indication for permanent work restrictions and that there was no indication for any permanent impairment. Dr. Fall opined that maintenance care may include either chiropractic treatment or massage if needed to maintain MMI status but that the focus should be on independent exercise and symptom management. *See* Exhibit 2.

8. On February 29, 2016 Claimant was evaluated by Eric Tentori, D.O. Dr. Tentori noted on examination that Claimant had the persistence of mild tenderness with palpation overlying the paraspinous musculature but with no significant muscle spasm, no midline bony abnormalities, and good active range of motion in all planes. Dr. Tentori opined that Claimant was at MMI and that the injury had not resulted in any permanent physical impairment. Dr. Tentori agreed with Dr. Fall's assessment of the work injury and agreed that the primary ongoing issue appeared to be myofascial pain/irritation. He also agreed that the injury did not result in permanent physical impairment. Dr. Tentori noted that Claimant had been provided with an appropriate course of treatment to address her work related issues. He recommended as maintenance treatment six additional sessions of chiropractic care, six sessions of dry needling, and six sessions of active/therapeutic massage therapy. Dr. Tentori noted that Claimant had no indication for further follow up care/evaluation at Concentra. *See* Exhibit C.

9. On September 12, 2016 Claimant was evaluated by her primary care provider. Claimant reported that when she did pushups she felt some discomfort and a bulging sensation in right lateral umbilical area. *See* Exhibit E.

10. On September 22, 2016 Claimant was evaluated by her primary care provider. On examination Claimant had no neck masses, thyromegaly, or abnormal cervical nodes. It was noted that Claimant had normal full range of motion of all joints and no focal deficits and normal muscle strength and tone. *See* Exhibit E.

11. On October 26, 2016 Claimant underwent a DIME performed by Dr. Beatty. Claimant reported that on January 2, 2015 while walking into the front door of her workplace she slipped on water on the floor. Claimant reported falling on her left side and that a glass bottle of juice that was in her hand flew out of her hand and came down hitting her in the head. Claimant reported that she initially had a headache and some swelling on the left side of her head, felt dizzy and lightheaded, and that an hour later she felt nauseous and vomited. Claimant reported that she continued to have tightness in her neck with pain radiating from her neck into her head. Dr. Beatty reviewed medical records and performed a physical examination. Dr. Beatty noted tenderness to palpation over the paracervical musculature into the trapezius muscles and along the levator scapula bilaterally. Dr. Beatty noted range of motion measurements that were reduced. Dr. Beatty opined that Claimant had reached maximum medical improvement (MMI) on February 29, 2016. Dr. Beatty opined that Claimant had a 7% whole person impairment rating for the cervical spine based on a 3% impairment for loss of range of motion combined with a 4% impairment based on Table 53, and referenced page 80#IIB. *See* Exhibits D, 1.

12. Table 53 (II)(B) on page 80 provides for a Table 53 impairment rating of 4% to the cervical spine for intervetebral disc or other soft tissues lesions that are unoperated, with a medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with non to minimal degenerative changes on structural tests.

13. There is insufficient evidence to establish that Claimant has an intervetebral disc or soft tissue lesion. There is insufficient evidence to establish that Claimant has had six months of rigidity.

14. On November 10, 2016 Claimant was evaluated by her primary care provider. Claimant reported period headaches. On physical examination, Claimant was able to move both upper and lower extremities with no muscle spasms and had no focal or asymmetric muscle weakness or deficits. *See* Exhibit E.

15. On February 1, 2017 Claimant underwent an independent medical evaluation (IME) performed by Carlos Cebrian, M.D. Claimant reported that she was injured on January 2, 2015 when she was walking into a building and slipped on the floor. Claimant reported that a glass bottle of Snapple was in her right hand and came out of her hand and hit her on the right side of her head as she fell down. Claimant

reported that she landed on her left arm and leg and did not hit her head or lose consciousness but felt a flash. Claimant reported having a headache and pain on the right side of her head as well as sensitivity to light that day and that she felt nauseated forty five minutes to an hour later and went home. Claimant reported that at home she started to vomit so was taken to Concentra. Claimant reported that she still had neck pain leading to headaches and that the pain went up the sides of her head. Claimant reported that she had been placed at MMI with maintenance care that she did for the next six months and that once she finished the maintenance visits, she started to have more pain and felt as though she was getting worse. Claimant reported tightness in her neck radiating to her shoulders, primarily the left shoulder and pressure in her head that hurt a lot. Claimant also reported that she still had light sensitivity when she has headaches. *See* Exhibit F.

16. Dr. Cebrian reviewed medical records and performed a physical examination. On examination, Claimant had no spasms, trigger points, or atrophy. Claimant was tender to palpation over the left paracervical muscles into the left trapezius. Claimant reported tenderness to palpation posterior to the left shoulder and a pinching sensation in the posterior left shoulder on movement and into the left trapezius. Dr. Cebrian assessed non claim related migraine headaches and claim related scalp contusion with mild concussive symptoms and cervical strain. Dr. Cebrian opined that Claimant did not require any further treatment related to her January 2, 2015 claim and that she was appropriately placed at MMI by Dr. Tentori on February 29, 2016. Dr. Cebrian noted that the mechanism of injury was a minor slip and fall with a Snapple bottle hitting the parietal aspect of her skull and that she did not hit her head against the ground or other object. Dr. Cebrian noted that Claimant's post-concussive symptoms were minimal with no confusion and no loss of consciousness or amnesia. Dr. Cebrian opined that Claimant's ongoing pain complaints were out of proportion to the objective findings and noted that the cervical MRI findings were unremarkable. Dr. Cebrian opined that there was no objective examination findings or pathology that would explain Claimant's level of ongoing symptomatology and that the neuropsychological evaluation provided an explanation as to why her symptoms have continued to persist. *See* Exhibit F.

17. Dr. Cebrian opined that the injuries Claimant sustained on January 2, 2015 would not be expected to be permanent and that any limited discomfort she had did not lend itself to an impairment rating under the AMA guides. Dr. Cebrian noted that application of medical impairment required that a disorder being rating be identified, accurately treated, reproducible, measurable, permanent, and required a specific diagnosis and objective pathology. Dr. Cebrian opined that there was no such thing as a permanent strain or contusion and that myofascial pain complaints did not lead to a permanent impairment. Dr. Cebrian opined that Claimant did not have a spinal mediated disorder and that Claimant did not have a Table 53 diagnosis and opined that Claimant did not have a claim related impairment of her cervical spine. Dr. Cebrian also opined that the range of motion measurements he took on February 1, 2017 were normal. Dr. Cebrian opined that Dr. Beatty erred in assigning a permanent impairment rating and that Dr. Beatty's assignment of impairment was not in compliance with the

AMA guides or level II accreditation as there was no specific diagnosis or objective pathology correlating with Claimant's ongoing pain complaints. *See* Exhibit F.

18. Dr. Cebrian testified by deposition consistent with his written report. Dr. Cebrian opined that Claimant had a zero percent impairment rating because she did not have a spinal mediated condition in her cervical spine and had no objective evidence to support any kind of permanent impairment. Dr. Cebrian noted that Claimant had only tenderness which is a subjective response of a patient when you are palpating various structures where the patient says it hurts. Dr. Cebrian noted that objective findings could include radiographic findings, muscle atrophy, muscle spasms, or other things but that Claimant had no objective findings. Dr. Cebrian noted that the DIME physician Dr. Beatty had only noted subjective findings of tenderness to palpation and decreased range of motion and that Dr. Beatty also had not found anything objective. Dr. Cebrian opined that in the absence of objective findings correlating with subjective complaints, a Table 53 diagnosis is not appropriate and that Claimant did not qualify for a Table 53 rating. Dr. Cebrian also noted that Claimant's range of motion at the IME he performed was normal. Dr. Cebrian noted that even if Claimant qualified for a Table 53 impairment, Claimant would have an additional zero percent impairment for range of motion. Dr. Cebrian noted that Dr. Tentori also had found no objective evidence and rated a zero percent impairment. Dr. Cebrian opined that Dr. Beatty was in error for providing an impairment rating in the absence of objective pathology and that he could not explain why Dr. Beatty did so. Dr. Cebrian also noted that Dr. Reilly's psychological evaluation and opinion provided an explanation for why Claimant's care went on for such a long period of time after such a minor mechanism of injury. *See* Exhibit G.

19. The opinions of Dr. Cebrian are found credible and persuasive. His opinions are consistent with the overall medical evidence and with the opinions of Dr. Tentori and Dr. Fall. His opinions are further supported by the psychological opinions and conclusions of Dr. Reilly.

20. Dr. Beatty erred in assigning a Table 53 impairment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME on Impairment Rating

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Respondents have met their burden by clear and convincing evidence to show that it is highly probable that Dr. Beatty's impairment rating is incorrect. Dr. Beatty opined that Claimant qualified for a Table 53(II)(B) impairment rating for the cervical spine. However, Respondents have shown by clear and convincing evidence that a

Table 53 diagnosis does not exist in this case and that Claimant is not entitled to an impairment rating due to a specific disorder of the spine related to intervertebral disc or other soft tissue lesion. Section II(B) of Table 53 provides for impairments for intervertebral disc or other soft tissue lesions when un-operated with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm associated with none to minimal degenerative changes on structural tests. There is insufficient objective evidence of an intervertebral disc or soft tissue lesion or of six months of rigidity to support the rating provided by DIME physician Dr. Beatty. As found above, a complete review of the medical evidence establishes no credible medical evidence of objective pathology that can reasonably explain Claimant's subjective complaints. Tenderness and reduced range of motion were the main findings. However, the range of motion limitations reported by Claimant varied between different evaluation dates and different providers. Given Claimant's psychological evaluation, her subjective reports of symptoms, tenderness, and limitations in range of motion cannot be relied upon to any degree of certainty.

Although Claimant reports symptoms and limitations in range of motion, there is no objective or organic pathology that exists to qualify her for a Table 53 impairment rating. The opinions of Dr. Tentori, Dr. Fall, and Dr. Cebrian are credible and persuasive that Claimant does not qualify for a permanent impairment rating. Respondents have presented evidence that is highly probable and free from serious or substantial doubt that Dr. Beatty erred in calculating an impairment rating and that Claimant does not qualify for an impairment rating under Table 53. With no Table 53 rating, Claimant does not qualify for a range of motion impairment rating for the cervical spine and the ALJ concludes that the proper impairment rating is 0%.

ORDER

1. Respondents have overcome the DIME physician's opinion on permanent impairment by clear and convincing evidence. Claimant does not qualify for a Table 53 impairment and the proper permanent impairment rating is 0%.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 19, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-003-724-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 30, 2017, in Denver, Colorado. The hearing was digitally recorded (reference 3/30/17, Courtroom 1, beginning at 8:30 AM, and ending at 12:30 PM).

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection. Respondent's Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement in order to prepare a written decision.

ISSUES

The issues to be determined by this decision concern compensability, specifically, whether the Claimant sustained an industrial injury arising out of and in the course of his employment with the Employer, by virtue of an exception to the "going-to and coming-from" exclusion from the course and scope of employment; and, temporary total disability (TTD).

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated that if the case is compensable, the Claimant would be entitled to temporary total disability (TTD) benefits from January 6, 2016 through January 26, 2016, and the ALJ so finds, however, employees of the Employer herein are subject to the provisions of § 8-42-124 (20 (a), C.R.S., whereby the Employer continues to pay full wages during periods of TTD, and if a claim is determined to be compensable, the Employer restores the "sick leave" used during disability and changes it to "work injury leave."

2. The Claimant was born on June 8, 1962, and was 54 years of age on the date of the hearing.

3. The Claimant was hired by the Employer on October 13, 2008, where he continues to work as a police officer. He works as a motorcycle patrol officer.

4. The Claimant has served as a police officer for different law enforcement agencies for over 30 years.

5. The Claimant completed the Police Officer Standardized Training (POST) and is a state certified police officer, giving him the authority to make arrests within the State of Colorado. He is also a drug recognition expert and can be called in to perform drug evaluations on parties arrested anywhere in the State of Colorado.

The Injury

6. On January 5, 2016, the Claimant was riding home on a patrol motorcycle issued to him by the Employer, in full uniform with the motorcycle bearing full police regalia, including sirens and flashing red lights (turned off) when he fell and fractured his clavicle and broke three of his ribs. The motorcycle for the trip home was at no cost to the Claimant. The ALJ infers and finds that the Employer considered it a benefit to the Employer for the Claimant to go home, in full uniform, on his official motorcycle.

7. The accident occurred in Thornton, Colorado, at the intersection of North York Street and Signal Creek Boulevard. The Claimant was stopped at a four way

intersection facing southbound, getting ready to make a left turn to eastbound Signal Creek Blvd.

8. When the intersection was clear, the Claimant started making a left turn at approximately five miles per hour, when he lost control of his motorcycle and fell to the roadway. The area was dark and had some icy areas remaining from a previous snowstorm.

9. The Claimant was in full police uniform at the time of the accident. He had all his safety gear on to include his helmet, safety glasses, gloves, jacket, and motorcycle boots. His motorcycle was an un-mistakable police motorcycle.

10. The Claimant was on regular duty from 1PM to 9 PM on the day of the accident. After enforcing the law at a high school, the Claimant rode his motorcycle from Denver and headed to Thornton where he resides. Throughout his drive home the Claimant observed traffic and was on the lookout for any infractions. According to his undisputed testimony, he was required to make arrests, anywhere in the State of Colorado, for observed misdemeanor infractions. For speeding violations, he was required to notify local law enforcement and to assist them.

11. The Employer Police Department is located on West Colfax Avenue in Denver.

Employer Policy History on Commuting Employees

12. On July 9, 2002, an Employee Directive Memo was issued by Chief of Police Gerald R. Whitman. The Directive permitted the Mayor or Manager of Safety to authorize full use of certain public safety vehicles where the employee's assignment requires immediate response to emergency situations on a 24-hour on-call basis. The Directive also states that officers who wish to designate "full-use public safety vehicles must complete a "DPD Authorization for Full-Use Vehicle" form. At the time of his injuries on January 5, 2016, while in full uniform and on his official motorcycle, the Claimant was required to make an immediate response to emergency situations on a 24-hour on-call basis.

13. Officers who signed up for the Full-Use Vehicle program would be able to take their vehicles home and would be covered under Workers' Compensation if an injury occurred on the journey home. Vehicles included motorcycles until the policy was changed in 2006.

14. In 2006, the Worker's Compensation coverage for officers who signed up for the Full-Use Vehicle program **was reduced to exclude motorcycles** (emphasis supplied). No persuasive rationale for this change was given.

15. The Employer has over the years selectively extended Worker's Compensation to include or exclude employees based on the type of City issued vehicle they chose to take home. As of 2009 the coverage was only offered to employees who used City issued cars, specifically excluding employees who took home City issued motorcycles. On June 21, 2016 the Workers' Compensation coverage was enhanced to include employees who took home City issued motorcycles as well.

16. On June 21, 2016, after the Claimant's accident, the Employer's Department of Finance issued a Memo informing employees that although employees are not typically considered to be in the course or scope of employment when taking a City-owned vehicle home, the City will be extending the benefit of Workers' Compensation coverage to employees who drive or ride a City-owned vehicle home (Respondents' Exhibit H). The ALJ finds that the Workers' Compensation Act (the "Act"), and the case law dealing with work-related injuries controls unless the Employer's policies are more generous than the Act and the case law.

17. The Memo also specifies that police officers who ride home on a motorcycle issued by the Employer will be given the benefit of Workers' Compensation, thus, eliminating the distinction between taking vehicles and motorcycles home.

Employer Authorization for Full Use Vehicle

18. On January 7, 2015, the Claimant signed an Authorization for Full Use Vehicle Contract issued by the Employer as a Class II Motorcycle Officer. The contract specifies that Class II Motorcycle Officers **need** to have a take home motorcycle for a 24 hour emergency response throughout the City and County.

19. The Authorization for Full Use Vehicle Contract also specifies that the motorcycle officers provide a "force multiplier" throughout the day and night by providing a visible and active traffic enforcement capability as they travel to and from their home or place of work. The ALJ infers and finds that this means they provide a visible police presence in order to deter traffic infractions and other violations of the law –to and from home or work.

20. Class II (motorcycle) users may operate the vehicle as a full use vehicle **except for personal use.** The ALJ finds that the prohibition of "personal use" is a critical factor underscoring the proposition that the motorcycle patrolman is within the course and scope of employment on the way home from work.

21. The Claimant was subsequently issued an ML 117 Harley Davidson motorcycle.

22. The ALJ infers and finds that part of the Claimant's employment contract with the Employer contemplated the Claimant going home from work, in full uniform, on

an official motorcycle, partially, for legitimate law enforcement objectives, more so than for any personal convenience to the Claimant.

Sergeant Robert Parsons

23. Sergeant Parsons was called to testify on behalf of the Claimant. When the City's policy covered marked police cars while an officer was going home but not marked motorcycles, Sergeant Parsons could not understand the distinction. He stated that if Officer Barnes had an accident on the way home a week before the hearing, he would be covered because of the policy change on June 21, 2016-- to cover motorcycles as well as marked police cars.

Raymond Sibley, Employer's Risk Manager

24. Raymond Sibley, the Employer's Director of Risk Management, testified on behalf of the Respondent. He stated that the Employer's Chief Financial Officer (CFO) makes the policy decisions on what vehicles are covered "going" home from work. Sibley understood that the distinction between patrol cars and motorcycles was that there was less risk of injury involved with patrol cars than motorcycles. He did not mention any objective studies justifying this distinction nor did he further explain his understanding of the distinction. Based on Sibley's testimony, it could be equally likely that the risk of injury on a motorcycle could be the same or less than in a motor vehicle. No plausible inference can be drawn concerning greater or lesser risks of injury on a motorcycle as opposed to a patrol car. Sibley further stated that the policy changed in June 2016 to cover motorcycles on the way home. The ALJ infers and finds that the Employer changed the policy to cover motorcycles on the way home because it could not objectively justify the distinction between patrol cars and motorcycles. The ALJ further infers and finds that Sibley could not persuasively and objectively justify risk factors concerning the distinction between patrol cars and motorcycles on the way home.

Benefits to the Employer

25. Level II Motorcycle officers including the Claimant often make traffic stops on their way to and from work. The Employer requires officers on the way to and from work to fill out a log sheet of any traffic stops effectuated.

26. The Claimant has experienced a slowing down of traffic whenever he travels to and from work when he is on the patrol motorcycle and in full gear. The slowing down occurs within the City and County but also extends to the City of Thornton where the Claimant resides. Indeed, the ALJ infers and finds that a fully equipped police motorcycle is more conspicuous to motorists than an un-marked patrol car.

27. The Claimant is also able to get to a scene of an emergency faster on the take home motorcycle and is on call 24 hours to respond to any emergencies as a condition of taking the motorcycle home.

28. Although the "dual purpose" doctrine applies, the ALJ infers and finds that the benefits of the Claimant going home in full uniform, on his official motorcycle, are greater for the Employer than they are for the Claimant.

29. There is no evidence whatsoever that the Claimant deviated on his trip home for personal reasons, in violation of his agreement with the Employer.

Temporary Total Disability

30. As a result of his injuries on January 5, 2016, the Claimant was temporarily and totally disabled (TTD) from January 6, 2016 through January 26, 2016, however, he was paid full wages during this time, pursuant to § 8-42-124 (2) (a), C.R.S. Because the claim was fully contested, the Claimant was required to use "Sick Leave" during this period of time.

Ultimate Findings

31. The Claimant's overall presentation was persuasive and credible. As found, the testimony of the Claimant concerning the nature of his duties as a police officer travelling to and from work are more credible and persuasive than the testimony of the Respondent's witnesses. Indeed, the Claimant's testimony was essentially undisputed. Sergeant Parsons' testimony-- that he could not understand the distinction between motor vehicles and motorcycles for purposes of workers' compensation coverage, before the June 21, 2016, on the way home, covering patrol cars and not covering motorcycles on the way home. Sergeant Parson's testimony is highly persuasive, credible and, essentially, undisputed. Indeed Sibley did not persuasively and objectively justify the distinction.

32. Between conflicting testimonies, the ALJ makes a rational choice to accept the testimony of the Claimant and Sergeant Parsons and to reject any testimony to the contrary.

33. The injury event of January 5, 2016 constituted a compensable injury arising out of and in the course and scope of the Claimant's employment as a police officer with the Employer, and it falls within a fact specific exception to the "going-to and coming-from" exclusion from the course and scope of employment.

34. At a minimum, as found, the Claimant's trip home on his official motorcycle served a dual purpose of benefiting the Employer and the Claimant; however, there was a greater benefit to the Employer.

35. The Claimant's trip, on his way home from work on January 5, 2016 was in the course of his employment as a police officer with the Employer. He was in full police uniform and was on the lookout for any infractions throughout his travels home as well as illustrating a police presence for motorists on the Claimant's way home. Indeed, the ALJ finds important distinctions between the Claimant's injury and other police injury claims, allegedly compensable on the theory that the officer is on duty 24/7 without more specific facts. These bald theories have been soundly rejected by appellate tribunals. Therefore, under the specific facts of the present case, the ALJ finds that the Claimant sustained compensable injuries on January 5, 2016.

36. As a result of his injuries on January 5, 2016, the Claimant was temporarily and totally disabled (TTD) from January 6, 2016 through January 26, 2016, however, he was paid full wages during this time, pursuant to § 8-42-124 (2) (a), C.R.S. Because the claim was fully contested, the Claimant was required to use "Sick Leave" during this period of time.

DISCUSSION

As found herein above, the Employer has over the years selectively extended Worker's Compensation to include or exclude employees based on the type of City issued vehicle they chose to take home. As of 2009 the coverage was only offered to employees who used City issued cars, specifically excluding employees who took home City issued motorcycles. As of June 21, 2016 the Workers' Compensation coverage was enhanced to include employees who took home City issued motorcycles as well.

The Worker's Compensation coverage does not discriminate between the different types of motor vehicles and, as found, the ALJ rejected the distinction as not objectively supportable. The distinction between patrol vehicles and official motorcycles is not objectively sustainable, based on the totality of the evidence. Indeed, as found, the ALJ plausibly inferred that the Employer changed the policy to include official motorcycles because it could not objectively support the distinction between patrol cars and official motorcycles. The issue that is of importance in this matter is whether the Claimant's journey from work to home on a City issued take home motorcycle is within the course of his employment.

Generally, an employee who is injured while going to or coming from work does not qualify for compensation under the Act because such injuries are not considered to have "arisen out of, or in the course of, employment." *Indus. Comm'n v. Lavach,* 165 Colo. 433, 439 P.2d 359 (1968*); Berry's Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2 (1967). This is known as the "going to and coming from rule". The Colorado Supreme Court, in *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999),

set forth four, non-exclusive variables to be considered in determining whether an exception to the "going to and coming from" rule should apply. 977 P.2d at 864

In *Madden,* citing *Electric Mut. Liab. Ins. Co. v. Indus. Comm'n,* 154 Colo. 491, 495, 391 P.2d 677, 679 (1964), the Supreme Court noted that it had granted recovery when the employee's travel is at the employer's express or implied request or when the travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work. As found, the Claimant's travel home in full uniform, on an official police motorcycle, confers a benefit on the Employer herein, *i.e.,* a police presence encouraging obedience to the law—the "force multiplier.."

In *Warren v. Olson Plumbing & Heating*, W.C.No. 4-701-193 [Indus. Claim Appeals Office (ICAO), August 24, 2007], a plumber was injured in a motor vehicle accident in his company van on his way home from work. The court found that the plumber had not established that his electing to drive the company vehicle home following work established that the travel to and from the job site was a substantial part of his job. *Id.* The present case is distinguishable. The Claimant in the present case was riding home on a police issued motorcycle for multiple purposes. The Claimant signed a vehicle release form that allowed him to take home the motorcycle on the condition that he would be on call 24 hours to respond to emergencies throughout the city and county of Denver. The Claimant also observed his surroundings on his way home, looking for any possible infractions, traffic or otherwise. Being a state certified police officer, the Claimant would be obligated to make an arrest if the need occurred.

In *Rogers v. Indus. Comm'n*, 40 Colo. App. 313, 574 P.2d 116 (1978). a police officer was injured when riding home on his **personal motorcycle**. The officer was not in uniform but carried his service revolver, badge, and police identification card. The court found that the officer was not performing any police duties but merely riding home. *Id.* The present case is distinguishable. Herein, the Claimant here was in full uniform, riding a police issued motorcycle and was acting as a law enforcement agent throughout his journey home. He observed and enforced the law when he came across any infraction. The Employer encourages the use of police issued motorcycles as the officers riding home in full uniform and on a police motorcycle provides a "force multiplier" throughout the day and night (a police presence that encourages motorists to be law abiding)..

The general rule against compensability for travel to and from work is subject to exceptions where there are **special circumstances** bringing the accident within the course of employment. *Madden v. Mountain West Fabricators, supra.* Whether a particular situation warrants an exception to the "going-to and coming from" rule requires a **fact-specific** analysis. Special circumstances include traveling as part of the service the employee provides for the employer. *See Mineral County v. Indus. Comm'n,* 649 P.2d 728 (Colo. App. 1982) [A sheriff was killed while returning to his patrol car after he had stopped at a private club. He was in uniform and was expected to be on

duty 24 hours a day. Death benefits were awarded even though he was planning to go out to dinner with his wife after leaving the club]. The facts in the present case are more compelling for an exception to the "Going-To and Coming-from" Rule than the facts in *Mineral County.* Here, Officer Barnes was in full uniform, riding on an official police motorcycle, and his personal use thereof was prohibited.

As part of the contract of employment, the employer had agreed to provide free transportation to work, thus, the injury en route to the job site was held to be work connected. *See State Compensation Insurance Fund v. Batis,* 117 Colo. 1, 183 P. 2d 891 (1947). As found, in the present case, the Employer provided free transportation home, *i.e.* an official motorcycle, because the Employer considered this a benefit to the Employer.

Where an employer provides transportation to and from work, compensation is appropriate when the employee is killed or injured in a vehicle **used strictly for business** on a direct route to work with no evidence of deviation for **personal purposes.** *Monolith Portland Cement v. Burak,* 772 P.2d 688 (Colo. App. 1989); *Indus. Comm'n v. Lavach, supra.*

The "Dual Purpose" doctrine holds that an injury sustained while the employee is performing an act for the mutual benefit of the employer and the employee is usually compensable. *Berry's Coffee Shop, Inc. v. Palomba, supra*; *Also see Keystone International, Inc. v. Gale,* 33 Colo. App. 216, 518 P.2d 296 (1973). As found, the Claimant's trip home, in full uniform, on an official motorcycle, with personal use prohibited, conferred a benefit on the Employer. Though not strictly in the line of the employee's obligatory duty, it has been held that the employee was doing something incidental to his work when he was injured, thus, the accident causing the injury was held to arise out of the course of employment and was compensable. *See Security State Bank of Sterling v. Propst,* 99 Colo. 67, 59 P.2d 798 (1936).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990);

Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was undisputed and the ALJ is not free to disregard any part of it. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the Claimant's overall presentation was persuasive and credible. As found, the testimony of Claimant concerning the nature of his duties as a police officer travelling to and from work are more credible and persuasive than the testimony of the Respondent's witnesses. Sergeant Parsons' testimony that he could not understand the distinction, before the June 21, 2016 policy change, between covering patrol cars on the way home and not covering motorcycles on the way home, is highly persuasive and credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies, the ALJ made a rational choice to accept the testimony of the Claimant and Sergeant Parsons and to reject any testimony to the contrary.

Course and Scope of Employment

c. Generally, an employee who is injured while going to or coming from work does not qualify for compensation under the Act because such injuries are not considered to have "arisen out of, or in the course of, employment." *Indus. Comm'n v. Lavach,* 165 Colo. 433, 439 P.2d 359 (1968*); Berry's Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2 (1967). This is known as the "going to and coming from rule". The Colorado Supreme Court, in *Madden v. Mountain West Fabricators, supra*, set forth four, non-exclusive variables to be considered in determining whether an exception to the "going to and coming from" rule should apply. 977 P.2d at 864. As found, in this fact-specific matter, the Employer contemplated the Claimant taking his official motorcycle home in full uniform as a benefit to the Employer. The Claimant could not use the motorcycle for personal use. As further found, the present case involves fact specific circumstances that warrant a compensable exception to the "going-to and coming-from" rule.

d. Citing *Electric Mut. Liab. Ins. Co. v. Indus. Comm'n,* 154 Colo. 491, 495, 391 P.2d 677, 679 (1964), the *Madden* court noted that it had granted recovery when the employee's travel is at the employer's express or implied request or when the travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work. As found, the Claimant's travel home in full uniform, on an official police motorcycle, confers a benefit on the Employer herein, *i.e.,* a police presence encouraging obedience to the law—the "force multiplier.." As found herein above, in this fact-specific matter, the Employer contemplated the Claimant taking his official motorcycle home in full uniform as a benefit to the Employer. The Claimant could not use the motorcycle for personal use. As further found, the present case involves fact specific circumstances that warrant a compensable exception to the "going-to and coming-from" rule.

Exception to the "Going-To and Coming-From" Rule

e. Whether a particular situation warrants an exception to the "going-to and coming from" rule requires a **fact-specific** analysis. Special circumstances include traveling as part of the service the employee provides for the employer. *See Mineral County v. Indus. Comm'n,* 649 P.2d 728 (Colo. App. 1982) [A sheriff was killed while returning to his patrol car after he had stopped at a private club. He was in uniform and was expected to be on duty 24 hours a day. Death benefits were awarded even though

he was planning to go out to dinner with his wife after leaving the club]. The facts in the present case are more compelling for an exception to the "Going-To and Coming-from" Rule than the facts in *Mineral County.* Here, the Claimant was in full uniform, riding on an official police motorcycle, and his personal use thereof was prohibited.

f. As part of the contract of employment in another case, the employer had agreed to provide free transportation to work, thus, the injury en route to the job site was held to be work connected. *See State Compensation Insurance Fund v. Batis,* 117 Colo. 1, 183 P. 2d 891 (1947). As found in the present case, the Employer provided free transportation home, *i.e.* an official motorcycle, because the Employer considered this a benefit to the Employer. Where an employer provides transportation to and from work, compensation is appropriate when the employee is killed or injured in a vehicle **used strictly for business** on a direct route to work with no evidence of deviation for **personal purposes.** *Monolith Portland Cement v. Burak,* 772 P.2d 688 (Colo. App. 1989); *Indus. Comm'n v. Lavach, supra.* As found, the Claimant's trip home in full uniform, on an official police motorcycle benefited the Employer as much as, if not more, than the Claimant.

"Dual Purpose" Analysis

g. The "Dual Purpose" doctrine holds that an injury sustained while the employee is performing an act for the mutual benefit of the employer and the employee is usually compensable. *Berry's Coffee Shop, Inc. v. Palomba, supra*; *Also see Keystone International, Inc. v. Gale,* 33 Colo. App. 216, 518 P.2d 296 (1973). As found, the Claimant's trip home, in full uniform, on an official motorcycle, with personal use prohibited, conferred a benefit on the Employer. Though not strictly in the line of the employee's regular, obligatory duty, it has been held that when the employee was doing something incidental to his work and he was injured, thus, the accident causing the injury was held to arise out of the course of employment and it was held to be compensable. *See Security State Bank of Sterling v. Propst,* 99 Colo. 67, 59 P.2d 798 (1936). As found, the Claimant's trip home in full uniform on an official police motorcycle benefited the Employer as much as it may have benefited the Claimant, if not more.

Compensability

h. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7.** Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo.

App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained injuries on January 5, 2016, arising out of the course and scope of his employment for the Employer.

Temporary Total Disability

i. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," as the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). As found, the Claimant has proven TTD from January 6, 2016 through January 26, 2016, however, he was paid full wages during this time, pursuant to the provisions of§ 8-42-124 (2) (a), C.R.S. Because the claim was fully contested, the Claimant was required to use "sick Leave" during this period of time.

Burden of Proof

j. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden of proof on all designated issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained compensable injuries on January 5, 2016, arising out of the course and scope of his employment for the Employer, consisting of a fractured clavicle and three broken ribs.

B. Because the Employer paid the Claimant full wages during his period of temporary total disability from January 6, 2016 through January 26, 2016, pursuant to the provisions of § 8-42-124 (2) (a), C.R.S., the Respondent shall restore the "Sick Leave" used by the Claimant during this period of time and convert the leave to "Work Injury Leave."

C. Any and all matters not determined herein are reserved for future decision.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury on July 25, 2016 arising out of and in the course of her employment?

- If compensable, did Claimant prove she was entitled to medical benefits?

FINDINGS OF FACT

1. Claimant worked as a groundskeeper for Employer, starting on April 12, 2016. Claimant testified she did not work during the first part of 2016, but previously worked cleaning offices.

2. Claimant's job duties included cleaning the hallways, elevators, play area, pool area and dog area. Claimant described her job at Employer as much harder than her previous position.

3. Claimant testified she had no injuries to her low back before working for Employer. She lost no time from her prior job because of problems with her back. There was no evidence in the record which showed Claimant suffered a previous injury to her low back at work.

4. Claimant's records from Kaiser Permanente were admitted, which documented she treated for low back pain after starting with Employer. In particular, Claimant was evaluated by Ray Howe, M.D. on April 15, 2016. At that time, she was evaluated for low back pain, present at the middle-low back. The pain was described as ongoing for the past 1-2 months and had worsened after starting a new job as a groundskeeper. Dr. Howe diagnosed low back pain with bilateral sciatica. Dr. Howe prescribed Naproxen and Prednisone, as well as ordering physical therapy ("PT").

5. Claimant testified the pain she felt at the time of the April 15, 2016 visit was like a cramp. The pain after her injury was more significant.

6. On June 10, 2016, Claimant returned to Kaiser and was evaluated by Todd Landin, M.D., at which time a lumbar MRI and plain films were ordered.

7. Claimant underwent an MRI on June 20, 2016. The radiologist's impression was: approximately 7 mm chronic spondylolytic anterolisthesis of L5/S1; multilevel degenerative disc disease and facet osteoarthropathy changes throughout the lumbar spine as described above; left lateral recess stenosis at L5/S1 could impinge the left S1 nerve root; moderate stenosis of the neural foramina bilaterally at L5/S1 could impinge the exiting L5 nerve roots on either side.

8. The findings/impression for the x-rays of the lumbar spine were grade one L5-S1 spondylolisthesis, with L5 spondylolyses; marked degenerative disc changes at the L5-S1 level; hypertrophic degenerative joint changes in the articulating facet joints bilaterally at the L4-L5 and L5-S1 levels.

9. Claimant testified she sustained an injury on July 25, 2016. She was cleaning up trash and was in room three. In that room there was a piece of furniture (TV). She retrieved a cart (flat) from downstairs and went to pick up the piece of furniture. No one was helping her at that time. When she lifted the TV stand, it felt like something had pulled in her spine/hip. She felt a bit of pressure on the hip, then continued to work. The ALJ notes there was no contrary evidence in the records to contradict Claimant's testimony this event occurred. Claimant was a credible witness when she described the injury. Claimant testified she did not report the incident that day.

10. On July 27, 2016, Claimant testified she was moving dumpsters, as well as sweeping and mopping. She felt pain in her hip and reported the injury. She reported the injury first to her supervisor (Dion), and then to the manager, Lasarha Pass.

11. Claimant testified she was not referred to an ATP for Employer.

12. Claimant testified she went to the emergency room at North Suburban on July 27, 2016 because of back pain.

13. Claimant was evaluated at Kaiser on August 3, 2016, complaining of back pain. Jennifer Hronkin, M.D. noted Claimant had been at the ER within the past two days and received IV meds. Dr. Hronkin diagnosed lumbar radiculopathy and prescribed Ketorolac and Oxycodone. Claimant was referred to a neurosurgeon for the thoracic and lumbar spine.

14. Claimant returned to Dr. Landin on August 16, 2016. The treatment notes recorded chronic worsening low back pain, with right sided radiation. Dr. Landin's assessment was low back pain with right sciatica. Dr. Landin's notes recorded that Claimant was considered temporarily and totally disabled if Employer could not accommodate the work restrictions. Claimant was advised to follow-up with her employer regarding whether the injury should be treated through workers' compensation. This note leads to the inference by the ALJ that Claimant advised Dr. Landin and/or medical personnel at Kaiser she was injured at work.

15. On August 18, 2016, Claimant was evaluated by Lloyd Thurston, D.O. at Concentra. Dr. Thurston recorded Claimant moved heavy furniture on 7/25 and then had low back pain and radicular symptoms on July 27, 2016. On examination, she had tenderness of the right SI joint, with intact neurovascular function. Dr. Thurston's assessment was: strain of lumbar paraspinal muscle and lumbosacral radiculitis at S1. Dr. Thurston opined he was 51% certain this was a work-related injury, even though

symptoms started two days after the work event. He ordered an MRI and made a referral to a physiatrist. Claimant was given work restrictions of: may lift, push/pull up to 20 pounds up to three hrs./day, occasional bending, may stand and walk frequently. The findings and opinions of Dr. Thurston helped to corroborate Claimant's testimony that she sustained an injury. The ALJ credited Dr. Thurston's opinion.

16. Claimant was offered modified duty on August 19, 2016, which she accepted on August 22, 2016.

17. An MRI was performed on August 31, 2016. The films were read by Robert Leibold, M.D., whose impression was severe right L5-S1 foraminal stenosis; chronic bilateral L5 pars interarticularis defects with grade one anterolisthesis of L5 on S1 and advanced L5-S1 degenerative disc disease.

18. Claimant was evaluated by Frederic Zimmerman, D.O. on September 1, 2016. Her symptoms were right-sided buttock and lumbosacral pain, which radiated down the posterior lateral aspect of her right leg to include her lateral calf. On examination, Dr. Zimmerman noted weakness in the extensor hallucis longi, as well as dorsiflexors and plantar flexors, as demonstrated by rapid fatigue during heel and toe walking. He found decreased sensation to light touch in the right lateral lower leg to include the lateral ankle and foot complex. Dr. Zimmerman's assessment was: lumbosacral spondylolisthesis, grade one with bilateral pars defect; right lower extremity radiculitis; facet arthropathy at the bilateral L5-S one and to a lesser extent L4-L5 levels. His treatment plan was a right L5 plus S1 transforaminal epidural steroid injection ("ESI") and to begin PT.

19. On September 9, 2016, Dr. Thurston evaluated Claimant and continued Claimant's restrictions, as well as beginning her on a course of PT. His assessment was concordant with Dr. Zimmerman's. Claimant returned to Dr. Thurston on October 10, 2016, noting that her symptoms were unchanged. Claimant's lumbar spine had restricted range of motion ("ROM"), but Waddell signs were negative. Dr. Thurston returned Claimant to Dr. Zimmerman for evaluation and treatment.

20. A Worker's Claim for Compensation was prepared by Claimant and signed on October 4, 2016.[1] Claimant testified her daughter helped her complete this form, which described the injury as follows: "I was picking up a TV set from a trash room when I felt pain in lower back". Claimant testified this description was a mistake, as it was a piece of furniture for a T.V.

21. On October 27, 2016, Dr. Zimmerman examined Claimant, who reported a diagnostic response following the ESI. Claimant's pain was essentially resolved other than in the buttock region. She also reported perisacral pain. On examination, Claimant had restrictions in lumbar ROM, along with tenderness directly over bilateral SI joints. Claimant had diffuse myofascial pain in bilateral upper and lower quadrants through the lumbar paraspinals and gluteus media muscles. Claimant also had a positive

[1] Exhibit 1.

fibromyalgia screen. Dr. Zimmerman ordered bilateral SI joints steroid injections for diagnostic and therapeutic purposes, after which time PT would be restarted.

22. Brian Reiss, M.D. testified as an expert in orthopedic surgery, the specialty in which he is board-certified. He is Level II accredited pursuant to the W.C.R.P. Dr. Reiss was present during Claimant's testimony. He reviewed the medical records from Kaiser, as well as Concentra. Dr. Reiss also reviewed the actual films for the MRIs of Claimant's lumbar spine. Dr. Reiss did not examine Claimant and did not prepare a written report.

23. Dr. Reiss opined that while it was possible, it was unlikely Claimant suffered a work-related injury. He based this opinion on the fact the Claimant had back pain prior to working for Employer and the Kaiser Permanente records documented a worsening of her condition. Her symptoms included radiculopathy, which was worsening immediately before her alleged injury. Dr. Reiss testified there was no significant difference between the two MRIs taken. Dr. Reiss believed Claimant's pre-existing low back pain was significant, as evidenced by the fact that both an MRI and plain films were ordered by the physicians at Kaiser. The ALJ credited Dr. Reiss' testimony regarding the condition of Claimant's low back and his opinion regarding similarity in the MRIs. However, Dr. Reiss did not address the potential aggravation of this preexisting condition in Claimant's lumbar spine. More particularly, he did not address whether her work activities could have caused the symptoms as described to Drs. Landin and Thurston. Dr. Reiss also did not discuss the precise mechanism of injury as articulated by Claimant. The ALJ found Dr. Landin's and Dr. Thurston's opinions more persuasive than those of Dr. Reiss, who did not evaluate Claimant.

24. Claimant's testimony that she suffered an injury was credible and persuasive.

25. Claimant proved she sustained an injury to her low back and hip on July 25, 2016 arising out of and in the course of her employment. The injury was caused by her work. Her low back condition was aggravated by her work activities on July 27, 2016.

26. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Compensability

The legal standard applicable to the compensability issue is found in § 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers' compensation benefits the injury must be "proximately caused by an injury or occupational disease arising out of and in the course of the employment".

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. ICAO*, 107 P.3d 999, 1001 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury, the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siegfried v. Industrial Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

The ALJ determined Claimant met her burden of proof and established she sustained an injury proximately caused by the performance of duties arising out of and in the course of her employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). As a starting point, Claimant's testimony first established her job with Employer was more physically demanding than her previous position. (Finding of Fact 2). The medical records adduced at hearing proved she experienced symptoms within three days of starting her job. (Finding of Fact 5). The ALJ found Claimant to be a credible witness and credited her testimony in which she described the incident. No contrary evidence was introduced by respondent to rebut this testimony.

Second, Dr. Thurston, the occupational medicine physician at Concentra offered his opinion Claimant's injury was work-related and the ALJ credited this opinion. (Finding of Fact 15). The Concentra treatment records evinced the opinion of those providers that Claimant suffered a work-related injury. As found in Findings of Fact 18-19, Drs. Thurston and Zimmerman recorded limitations in ROM of Claimant's lumbar spine, which correlated to the injury. Claimant had objective indicia of an injury, as

documented by these physicians. The ALJ was persuaded that Claimant's job duties while working for Employer aggravated her low back.

Based upon the totality of the evidence, the ALJ concluded Claimant sustained a compensable injury on July 25, 206. Although she had preexisting issues with her lumbar spine, this condition was aggravated by her specific job duties that day. This aggravation caused Claimant to require medical treatment and the treating physicians also issued work restrictions. The ALJ determined Claimant met her burden of proof and established she suffered a compensable injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to her low back and hip arising out of and in the course of her employment on July 25, 2016.

2. Respondents shall provide medical benefits to Claimant.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 20, 2016

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether Respondent established by clear and convincing evidence that the DIME physician, Dr. Frederick Scherr, erred by providing Claimant a 7% whole person impairment rating for his lumbar spine.

- To the extent that Respondents overcome the DIME opinion with regard to permanent impairment, whether Claimant established by a preponderance of the evidence that the scheduled rating provided for Claimant's lower extremity should be converted to a whole person impairment rating.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was working for Labor Ready on February 26, 2013 when he was injured.

2. Claimant was standing on a loading dock and was talking to a coworker on the side of a forklift. Another coworker was driving a forklift and backed into Claimant, while going 15-20 miles per hour, and crushed Claimant's right lower leg between the two forklifts. Claimant was transported to the hospital via ambulance. He sustained a comminuted femur fracture and a bicondylar tibial plateau fracture of the right lower extremity. Claimant spent a few days in the hospital to have the injury stabilized via external fixation. Claimant returned to the hospital the following week for another surgery to have an intramedullary nailing of the right distal femur fracture and open reduction internal fixation of the bicondylar tibial plateau fracture.

3. After the accident, Claimant was non-weight-bearing for approximately 10-12 weeks.

4. Before the work accident, Claimant did not have any back problems.

5. About three weeks after the accident, Claimant started having back pain. Claimant did not, however, report his back pain to his medical providers at this time.

6. On June 19, 2013, Claimant came under the care of Dr. David Yamamoto. As part of his initial evaluation, Claimant completed a pain diagram. On the pain diagram, Claimant noted pain in his right leg and right hip. Claimant did not note any back pain.

7. On September 13, 2013, approximately 7 months after his injury, Claimant reported to Dr. Yamamoto that he was having back pain, which he stated started a few weeks after the injury. Claimant admitted to Dr. Yamamoto that he did not previously report his back pain and did not mark it on the pain diagram he completed on June 19, 2013.

8. On October 1, 2013 Claimant returned to Dr. Yamamoto complaining of ongoing back pain. Dr. Yamamoto indicated Claimant's right leg was 2.5 cm shorter than his left leg and it caused Claimant to have an altered gait. Dr. Yamamoto determined Claimant had low back pain due to his altered gait. Dr. Yamamoto referred Claimant to Eric Graves, D.C., for chiropractic treatment directed towards his low back.

9. Claimant's leg length discrepancy and altered gait was caused by the work accident.

10. On November 1, 2013, Claimant was evaluated by Eric Graves, D.C. for low back pain. Dr. Graves noted spasms, restriction, adhesions and tenderness in Claimant's lumbar region.

11. Claimant returned to Dr. Yamamoto on November 22, 2013. He was still complaining of low back pain.

12. On December 3, 2013, Claimant returned to Dr. Graves, who still noted spasms, restriction, adhesions and tenderness in Claimant's lumbar region.

13. Claimant returned to Dr. Yamamoto on January 20, 2014 with ongoing back pain. At this visit, Dr. Yamamoto's evaluation of Claimant's back revealed Claimant had a mild loss of active range of motion, and some pain with flexion and extension.

14. On February 6, 2014, Claimant was evaluated by Dr. Ksiazek for back pain. Dr. Ksiazek noted a 2 cm difference in leg length, with the right being shorter than the left. Dr. Ksiazek diagnosed Claimant as suffering from a lumbar strain.

15. On February 17, 2014, Claimant returned to Dr. Yamamoto. He still noticed a decrease in active range of motion of Claimant's lumbar spine. Dr. Yamamoto also diagnosed Claimant as suffering from a lumbar strain.

16. Claimant was seen by Dr. Yamamoto on March 3, 2014, April 1, 2014, May 2, 2014, December 8, 2015, and December 16, 2015 and his reports indicate Claimant had good lumbar flexion and could bend forward and touch his fingertips to his ankles. Dr. Yamamoto does not, however, comment on Claimant's lumbar extension.

17. On December 29, 2015, Claimant was seen by Dr. Yamamoto. The report from this visit indicates Claimant continued having low back pain and lower back

spasms. Dr. Yamamoto indicated that he was treating Claimant for a sprain of ligaments of the lumbar spine.

18. Claimant returned to Eric Graves, D.C., on February 10, 2016, complaining of worsening back pain over the past couple of months. Dr. Graves noted spasms in Claimant's lower back. Claimant returned to Dr. Graves on February 24, 2016 and Dr. Graves still noted spasms in Claimant's lumbar spine.

19. On April 27, 2016, Dr. Timothy O'Brien performed an Independent Medical Examination on behalf of Respondents and issued a report. At the time of the IME, Claimant was 23 years old. Dr. O'Brien concluded that based on the magnitude of the mechanism of injury, Claimant suffered a lumbosacral strain/sprain at the time of the accident. He determined the lumbosacral sprain/strain was a minor injury since there was no evidence of an acute disc herniation, sciatica, or neurologic deficit and that Claimant healed within 6 months. He determined that Claimant's ongoing back pain is due to his pre-existing osteoarthritis. He also stated that the vast majority of Americans have a leg length discrepancy of under ¾ of an inch and that a leg length discrepancy in of itself is not a cause for low back pain. Dr. O'Brien concluded that Claimant is not entitled to an impairment rating for his back under the AMA Guides. This ALJ does not find Dr. O'Brien's opinion that Claimant's current back pain is related to his preexisting osteoarthritis to be persuasive.

20. On May 4, 2016, Dr. Yamamoto placed Claimant at maximum medical improvement. He assessed Claimant as suffering from a lumbar strain/mechanical back pain with persistent symptoms caused by both the injury and the leg length discrepancy. Dr. Yamamoto provided claimant a 13% impairment rating for his low back. The rating was comprised of a Table 53,II-B rating of 5% and a loss of range of motion rating of 8%. Dr. Yamamoto also provided Claimant a 15% lower extremity impairment rating, which converts to a 6% whole person impairment. The 13% whole person rating combined with the 6% whole person lower extremity rating equated to an 18% whole person impairment rating.

21. On June 3, 2016, Dr. Yamamoto responded to Dr. O'Brien's April 27, 2016 report in which Dr. O'Brien stated that Claimant is not entitled to an impairment rating for his low back. Dr. Yamamoto stated that "It appears that Dr. O'Brien is not familiar with Table 53,II-B, which states 'Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none-to-minimal degenerative changes on structural tests.'" He went on to provide that Claimant "clearly meets the criteria for a Table 53 impairment. It is of no importance that he has no disc herniation, or sciatica, or neurologic deficit. If this were the case, then he would meet criteria for a II-C impairment." Dr. Yamamoto also stated that Claimant had a severe injury that resulted in a significant leg length discrepancy and that he does "NOT" have normal lumbar range of motion. This

ALJ credits Dr. Yamamoto's opinion that Claimant is entitled to an impairment rating under Table 53 II B of the AMA Guides.

22. Dr. O'Brien evaluated Claimant again on November 11, 2016. Dr. O'Brien stated in his report that Claimant is not entitled to a spinal impairment rating pursuant to the AMA Guides. Dr. O'Brien stated in his report that in order to get an impairment rating under Table 53 II-B, Claimant must have a permanent injury with documented pain and rigidity. Dr. O'Brien stated that a Table 53 rating cannot be provided for an injury which has healed and for someone with normal range of motion. Dr. O'Brien also concluded that Claimant's leg length discrepancy is only ½ of an inch and is well within the bell curve of normal for the American population and he did not consider it clinically significant. Dr. O'Brien concluded that Claimant does not have back pain from his work related injury and Claimant has normal range of motion and therefore is not entitled to an impairment rating. Dr. O'Brien testified at hearing and testified consistent with his reports. In essence, Dr. O'Brien testified that Claimant had a minor lumbar sprain due to the initial accident and he has fully recovered and is not entitled to an impairment rating. This ALJ does not find Dr. O'Brien's opinion to be persuasive regarding the application of the AMA Guides and whether Claimant is entitled to an impairment rating for his lumbar spine.

23. On September 6, 2016, Dr. Frederick Scherr performed a Division Independent Medical Examination ("DIME"). Dr. Scherr's assessment included (1) Crush injury with fractured distal femur and tibial plateau with surgical intervention; and (2) Chronic back pain secondary to injury and leg length discrepancy. Dr. Scherr provided Claimant an impairment rating for his low back. Dr. Scherr determined that Claimant qualified for a Table 53 II-B rating of 5% combined with a 2% impairment rating for Claimant's abnormal range of motion of his lumbar spine which resulted in a 7% whole person impairment rating for Claimant's lumbar spine. Dr. Scherr also determined Claimant's right lower extremity had a 13% scheduled impairment, which converted to a 5% whole person rating. Therefore, Dr. Scherr provided Claimant a 12% whole person impairment rating.

24. Dr. Scherr was deposed on February 8, 2017. Dr. Scherr testified as to the anatomical and physiological correlation between the work accident and Claimant's back injury which supports the impairment rating he provided. Dr. Scherr testified that the accident caused Claimant's leg length discrepancy which in turn caused Claimant's altered gait, which in turn caused Claimant's back injury and pain. Dr. Scherr went on to testify that he also found Claimant had decreased range of motion in his lumbar spine. Dr. Scherr further testified that without the initial work injury, Claimant would not be having back problems at this time.

25. Dr. Scherr's DIME report combined with his testimony established that Claimant's work related accident resulted in an injury to Claimant's lumbar spine. His DIME report and testimony also established that Claimant had pain and

rigidity for more than 6 months and that there is anatomical and physiological basis for Claimant's back pain.

26. A review of the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition Revised, provides that in order to get a Table 53 II-B rating, Claimant must have a medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none-to minimal degenerative changes on structural tests.

27. This ALJ Finds that there is sufficient evidence to support a finding that Claimant suffered an injury to his back in the form of a lumbar strain/sprain due to his work accident. The trauma related to the injury and Claimant's subsequent altered gait was documented by Claimant's treating physician. This ALJ also finds that there is sufficient evidence to find that Claimant had 6 months of medically documented pain and rigidity in his lumbar spine. Therefore, this ALJ finds that Dr. Scherr properly applied the AMA Guides in rating Claimant's lumbar spine.

28. Dr. Yamamoto was deposed on March 8, 2017. In addition to finding that Claimant suffered a lumbar strain/sprain as set forth in his medical reports, Dr. Yamamoto also testified as to the anatomic and physiologic basis for Claimant's low back pain. Dr. Yamamoto stated that based on Claimant's altered gait: "[T]he pelvis is going to be tilted slightly. And, when the pelvis is tilted, then it's going to start putting an untoward type of load on the lower back because the lower back is not going to be in good alignment. So, there will be pressure on one side and compensatory – there will be compensatory curve, and then, primary curve, and then the body will then compensate for that so that your head and upper body is vertical. So, there's a twisting or bending of the lower back. And, that's going to be all the time that you're walking." In essence, Dr. Yamamoto testified that Claimant's altered gait changed the biomechanics of Claimant's pelvis, which in turn caused a strain/sprain to Claimant's back, which ended up causing Claimant's back pain. This ALJ credits Dr. Yamamoto's testimony and finds that it supports Dr. Scherr's opinion to rate Claimant's lumbar spine.

29. This ALJ finds that Respondents have not overcome Dr. Scherr's opinion by clear and convincing evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Principles

A. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

B. A DIME physician must apply the AMA Guides when determining the Claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

C. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

D. The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level

of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

E. Dr. Scherr evaluated Claimant and determined that Claimant suffered a crush injury to his right leg and a rateable injury to his low back which was caused by Claimant's altered gait. Regarding Claimant's lower back, Dr. Scherr determined that Claimant met the requirements for a Table 53 II-B diagnosis and rating under the AMA Guides. As set forth above, a review of the AMA Guides provides that in order to get a Table 53 II-B rating, Claimant must have a medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none-to minimal degenerative changes on structural tests. In this case, Dr. Yamamoto, Dr. O'Brien, and Dr. Scherr all concluded that Claimant suffered an injury to his low back. Therefore, the determination of whether Claimant is entitled to a rating, pursuant to the AMA Guides, turns on whether Claimant has had 6 months of medically documented pain and rigidity.

F. The medical records establish Claimant had 6 months of medically documented pain complaints. The medical records also establish Claimant had 6 moths of rigidity. Dr. Graves evaluated Claimant on October 25, 2013 and found rigidity and spasms in Claimant's low back. Dr. Yamamoto also found decreased range of motion on January 20, 2014, and February 17, 2014. Dr. Yamamoto also evaluated Claimant on May 2, 2014 and found trigger points, bilaterally in the lumbar paraspinous muscles. When Dr. Yamamoto placed Claimant at MMI on May 4, 2016, he found Claimant had a decrease in his lumbar range of motion. When Dr. Scherr performed a Division Independent Medical Examination, ("DIME") and evaluated Claimant, he also found Claimant had decreased range of motion in his lumbar spine. Therefore, Claimant has had 6 months of medically documented pain and rigidity and qualifies for a Table 53 II-B rating of 5%.

G. Respondents contend that even if Claimant has back pain, there is no documented injury, pain, or rigidity that is related to the industrial injury. They support their contention with the opinions of Dr. O'Brien. This ALJ has considered Dr. O'Brien's opinions and does not find them persuasive as to the issue of impairment and application of the AMA Guides. This ALJ concludes that the evidence presented through Dr. O'Brien is merely a difference of opinion as to whether Claimant has a rateable impairment of his lumbar spine. Therefore, Respondents have failed to establish by clear and convincing evidence that Dr. Scherr erred in rating claimant's low back.

H. Respondent's also contend Claimant is not entitled to an impairment rating based on chronic pain, without an anatomic or physiologic correlation pursuant to Section 8-42-107(8)(c). This ALJ does not agree that Section 8-42-107(8)(c) precludes an impairment rating in this case. First, Claimant

suffered a documented injury – disorder - in the nature of a lumbar sprain/strain to his lumbar spine. Therefore, Section 8-42-107(8)(c) does not apply. *See Herrera v. Sturgeon Electric Co*., W.C. No. 4-320-602 (January 8, 1999)(anatomic correlation requirement inapplicable where Claimant is rated for a specific disorder of lumbar spine under AMA Guides.) Second, even if Section 8-42-107(8)(c) does apply, this ALJ finds that Claimant's pain complaints are supported by an anatomic and physiological basis. Claimant had reduced range of motion in his lumbar spine. See *Herrera v. Sturgeon Electric Co*., W.C. No. 4-320-602 (January 8, 1999)(anatomic correlation requirements of Section 8-42-107(8)(c) satisfied where Claimant exhibited reduced movement of the spine.) In addition, Dr. Yamamoto and Dr. Scherr both provided a physiological basis for Claimant's back pain, i.e., his altered gait. Therefore, Section 8-42-107(8)(c) is either inapplicable, or its requirements have been met.

I. Respondents have failed to overcome the DIME.

CONVERSION OF SCHEDULED IMPAIRMENT RATING

J. Section Section 8-42-107(7)(b)(II), C.R.S., governs circumstances where a Claimant sustains both scheduled and nonscheduled injuries from the same industrial accident. Without combining or adding individual impairment ratings, the scheduled injury is compensated as a scheduled disability, and the nonscheduled injury must be compensated as whole person impairment. See also *In the Matter of the Claim of Karl Maldonado v. State of Colorado*, W.C. No. 4-823-986, (ICAO Feb. 17, 2012).

K. Pursuant to the DIME, Claimant has a 7% whole person impairment rating for his lumbar spine and a 13% scheduled injury to his right lower extremity. Each shall be paid separately.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have failed to overcome the Division IME of Dr. Scherr.

2. Claimant has a 7% whole person impairment rating for his lumbar spine and a 13% extremity impairment rating for his right lower extremity and each shall be paid separately.

3. Insurer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 4-20-17

_____
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he is entitled to TTD benefits from August 3, 2015 through March 8, 2016?

2. Did Respondents prove by a preponderance of the evidence that Claimant's TTD benefits should be reduced based on the failure to timely report the injury in writing?

3. Did Respondents prove by a preponderance of the evidence that Claimant was responsible for the termination of his employment on October 10, 2015?

FINDINGS OF FACT

1. Claimant worked as a warehouse loader for Employer. The job is physically demanding, requiring heavy lifting and long shifts. His shift started at 2:00 PM and frequently continued into the following morning.

2. Claimant sustained an admitted injury to his right elbow on the morning of August 3, 2015 while wrapping carts of merchandise.[1] While spinning a cart, Claimant felt a pop in his right arm, accompanied by sharp pain and a burning sensation going down to his fingers.

3. Claimant asked his supervisor, Bill MacLean, if he could take a break. Claimant did not specifically inform Mr. MacLean that he suffered an injury while working. Mr. MacLean denied the requested break because the warehouse was already behind schedule and holding up the delivery drivers. Claimant continued working but eventually left because he could no longer tolerate the pain.

4. Claimant called Mr. MacLean the evening of August 3 and stated he was on the way to the Evans Army Hospital Emergency Room for his elbow pain. Claimant did not tell Mr. MacLean that his condition was caused by a work injury.

5. Claimant was evaluated by Dr. Brian Fuller, an orthopedist, on August 4, 2015. He reported "acute-on-chronic right elbow pain following a long shift at the Pepsi warehouse. . . . The patient reports similar symptoms off and on for the previous 7 years; however, it is currently worse in nature than previous, following a recent prolonged shift at the warehouse." On physical examination, Dr. Fuller noted: "the ulnar nerve subluxes over the medial epicondyle with flexion and snaps back with extension." Claimant was instructed to wear a splint for one week, and then transition to an elbow pad.

[1] The injury occurred at the end of the shift which started on August 2, 2015.

6. Claimant went to the workplace on August 4 and told Mr. MacLean he had been put in a sling and could not work. Claimant did not tell Mr. MacLean that his condition was caused by a work injury. Mr. MacLean knew Claimant had prior problems with his right elbow, and Claimant had previously told Mr. MacLean he would eventually need surgery on the right elbow. Given that Claimant did not reference a work-related injury Mr. MacLean reasonably assumed Claimant's elbow symptoms were a manifestation of his pre-existing condition.

7. Mr. MacLean subsequently tried to contact Claimant on more than one occasion regarding his status but received no reply. Although Mr. MacLean knew Claimant was receiving medical treatment and unable to work because of the elbow problems, he did not know the problems were related to a work injury.

8. Claimant had worked for Employer for over 15 months at the time of his injury. Claimant received an employee Guidebook at orientation and underwent training regarding Employer's policies and procedures for reporting work-related injuries. Per Employer's established policies, employees must report injuries to their supervisor within 24 hours. Additionally, Employer uses a third party service, 1-800-JOBHURT, to process initial reports of workplace injuries. Employees must report injuries to 1-800-JOBHURT within 24 hours.

9. Employer has several posters in the facility to inform employees of the obligation to report injuries in writing within four days. The notices are posted in the main employee hallway, the breakroom, and the hallway to the warehouse offices.

10. At the time of his injury, Claimant knew he was required to report injuries to his supervisor and 1-800-JOBHURT. Claimant testified he contacted 1-800-JOBHURT within a day or two of his injury, but there is no documentation or other persuasive evidence to corroborate his testimony.

11. Claimant retained counsel to represent him in connection with his claim on or about August 15, 2015.[2] Claimant's counsel filed an Entry of Appearance and a Workers' Claim for Compensation with the DOWC on August 15, 2015. Claimant's counsel did not send a copy of the entry or claim form to Employer or Insurer. Claimant testified that his counsel advised him not to have direct contact with 1-800-JOBHURT or Employer.

12. Claimant underwent a right elbow ulnar nerve transposition with Dr. Fuller on August 26, 2015.

13. Claimant temporarily exacerbated his elbow pain on September 9, 2015, when his arm was caught in a closing car door. His symptoms returned to baseline by September 16, 2015. The incident with the car door did not cause any new injury or long-term aggravation of Claimant's elbow condition.

[2] Claimant's current attorney is not affiliated with the attorney who previously represented Claimant during the period of time pertinent to this Order.

14. Courtney Archbold works for Employer in an administrative position supporting Health and Wellness, workers' compensation benefits, and other claims for medical leave.

15. Ms. Archbold learned that Claimant was having trouble with his right elbow "a day or two" after the incident. Claimant did not report the condition as work-related, and Ms. Archbold provided Claimant with information about short-term disability (STD) benefits.

16. Ms. Archbold helped Claimant apply for STD benefits. Claimant's STD claim was ultimately denied because he failed to submit required documentation to support his claim. Ms. Archbold learned the STD benefits were denied around August 27 or 28, 2015.

17. Ms. Archbold first learned Claimant was pursuing a workers' compensation claim on September 14, 2015. She received the notification via email from Employer's insurance representative, rather than Claimant or his counsel. Before that time, the information available to Employer would not lead a reasonably conscientious manager to believe or suspect that Claimant had suffered a work-related injury. Although Mr. MacLean and Ms. Archbold knew Claimant was having problems with his elbow, they reasonably assumed it was caused by a non-work-related personal medical condition.

18. Upon receiving notice of the claim, Ms. Archbold spoke with Claimant by phone about the need to report the claim to 1-800-JOBHURT. She also asked Claimant to come to the office to receive a Rule 8 physician designation letter and complete some additional paperwork regarding the claim. Claimant did not follow up on that conversation or take any further action.

19. Ms. Archbold contacted 1-800-JOBHURT on September 16, 2015 and reported a work-related injury on Claimant's behalf. She took it upon herself to report the injury "because I couldn't get him to do it."

20. Ms. Archbold subsequently tried to contact Claimant several times with no response.

21. Claimant did not timely provide Employer documentation regarding his medical condition or work restrictions.

22. Claimant was terminated on October 10, 2015 for "prolonged absence without proper documentation." The Disciplinary Action Report stated "[Claimant] is being terminated . . . due to excessive absences and failure to file STD and important information to Job Hurt within the proper time frame."

23. Claimant was disabled from his regular job and suffered a wage loss as a direct and proximate consequence of his injury commencing August 3, 2015.

24. Employer first received written notice of the injury on September 14, 2015. The delay in reporting was due to circumstances within Claimant's control. A 100% reduction of TTD benefits is warranted through September 13, 2015.

25. Claimant was responsible for the termination of his employment effective October 10, 2015.

CONCLUSIONS OF LAW

A. TTD benefits commencing August 3, 2016

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Once the claimant establishes temporary disability, the right to benefits is measured by the degree of the wage loss, not the claimant's willingness to seek employment or the claimant's hypothetical ability to perform modified employment. *See Black Roofing Inc. v. West*, 967 P.2d 195 (Colo. App. 1998); *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987).

The persuasive evidence shows that Claimant was disabled by the effects of his admitted injury and suffered a wage loss as a direct and proximate consequence of his injury. Ordinarily, that would entitle Claimant to an award of TTD benefits commencing August 3, 2015. But Respondents have requested that Claimant's TTD benefits be reduced because he did not timely report his injury in writing.

Section 8-43-102(1)(a) requires an employee who suffers an accidental injury to report the injury in writing within four days of the injury. The required notice may be given by any person with knowledge of the injury. If the employee fails to report the injury in writing, the employee "may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left to the ALJ's discretion. *Emigh v. Wal-Mart Stores, Inc.,* W.C. No. 4-151-148 (ICAO, April 14, 1995); *LeFou v. Waste Management*, W.C. No. 4-519-354 (ICAO, March 6, 2003). Accordingly, the ALJ must determine whether a penalty is warranted under the particular circumstances of each case. Even if a penalty is deemed appropriate, the ALJ has discretion to reduce the TTD benefits by any amount "up to" one day's compensation for each day of late reporting.

As found, a 100% reduction of TTD based on "late reporting" is warranted. Claimant was aware of his obligation to report the injury, but provided no persuasive explanation for his failure to do so. Claimant not only neglected to report the injury in writing, he did not even provide verbal notification. Although he told Mr. MacLean he was having problems with his elbow, he did not state it was due to an injury at work. Claimant filed for STD benefits rather than workers' compensation benefits, which further cemented Employer's impression that his elbow condition was not work-related. The claim form filed by Claimant's former counsel was ineffective notice because he did not send a copy to Employer. In fact, Employer had no knowledge Claimant was alleging a work-related injury until it received notice from its insurance representative on September 14, 2015. The delay in reporting the injury was prejudicial because it prevented Employer from mitigating its liability for TTD benefits with modified duty.

As found, Ms. Archbold received notification of the workers' compensation claim via email on September 14, 2015. The statute provides that the requisite written notice may be given by the claimant or "any other person" with knowledge of the injury. The ALJ concludes that the penalty for late reporting should remain in effect through September 13. Claimant is entitled to TTD benefits commencing September 14, 2015.

B. Responsible for Termination

The termination statutes, § 8-42-103(g) and § 8-42-105(4)(a) C.R.S., provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The employer must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The mere fact that the employer discharged the claimant in accordance with its personnel rules does not automatically establish that the claimant acted volitionally or exercised control over the circumstances of the termination. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. App. 1987). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents have proven by a preponderance of the evidence that Claimant was responsible for the termination of his employment effective October 10, 2015. Claimant had minimal contact with Employer after his injury and ignored multiple

messages from Mr. MacLean and Ms. Archbold. Claimant failed to follow Employer's well-established policies regarding injuries, of which he was fully aware. Even after Ms. Archbold asked Claimant to come in to the office, he did not comply. Employer gave Claimant the benefit of the doubt by maintaining his position until October 10, even though Employer would have been justified in terminating him sooner. Claimant effectively abandoned his job by failing to communicate with Employer regarding his status. Claimant provided no persuasive explanation for why he did not stay in contact with Employer after the injury. The fact that Claimant may have received bad advice from his former attorney does not excuse his failure to take actions that a reasonable employee would take under the circumstances. Based on the evidence presented, the ALJ concludes that Claimant's termination resulted directly from volitional acts within his control. Consequently, Respondents are entitled to terminate Claimant's TTD benefits on October 10, 2015.

ORDER

It is therefore ordered that:

1. Claimant's claim for TTD benefits from August 3, 2015 through September 13, 2015 is denied and dismissed.

2. Insurer shall pay Claimant TTD benefits from September 14, 2015 through October 9, 2015.

3. Claimant's claim for TTD benefits from October 10, 2015 through March 8, 2016 is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 21, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues presented for hearing involve Claimant's challenge to the impairment rating opinions of the Division Independent Medical Examiner, Dr. Richard Stieg and Respondents contention that Claimant has been overpaid temporary partial disability benefits. The specific questions to be answered are:

I. Whether Claimant has established by clear and convincing evidence that Dr. Stieg's impairment rating opinions are highly probably incorrect and if so what is the correct impairment rating associated with Claimant's industrial injury;

II. Whether Respondents have established by a preponderance of the evidence that they are entitled to credit the value of Claimant's 5% impairment rating against the value of continued TTD payments made to Claimant between the original release at MMI, the DIME and the subsequent FAL as well as any alleged overpayment in temporary disability benefits paid during the time period of October 2, 2014 through November 9, 2015 against wages earned in concurrent employment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant suffered an admitted injury to his lower back while working for Employer on July 17, 2014.

2. Claimant testified and the initial medical records indicate that he was shoveling sand off a conveyor belt when he felt a pop in his low back. He developed low back pain and difficulty walking prompting him to report the injury and seek treatment.

3. Claimant has had prior back injuries and has been bothered on and off by back pain in the past.

4. On August 29, 2014, an MRI of the lumbar spine was performed which was interpreted as revealing mild degenerative disc disease with facet involvement with mild bilateral neural foraminal narrowing at L2-3 and minimal narrowing at L3-4.

5. A repeat MRI of the lumbar spine was completed on December 10, 2014. The results were compared to the prior MRI, after which it was noted that there was an increase in synovitis with reactive edema around the L4-5 facet joint with soft tissue edema "tracks" into the left L4-5 foramen, as well as borderline L4-5 central canal stenosis.

6. On December 18, 2014, Dr. Michael Sparr issued a report regarding the results of an EMG study which he felt contained findings "consistent with a longstanding sensorimotor axonal and demyelinating peripheral neuropathy and completely unrelated to Claimant's July 17, 2014 work injury.

7. Dr. Sparr saw Claimant on January 26, 2015, at which time Dr. Sparr found:

> "He is diffusely tender to even light touch from L1 through the sacrum bilaterally and over diffuse gluteal muscles. This is evident with only very light skin touch. Waddell's are positive today for axial loading, regional pain complaints, diffuse overreaction. . . ."

Dr. Sparr went on to note that the findings of Claimant's MRI showed mild degenerative findings which were inconsistent with his pain and numbness complaints.

8. Plain view x-rays of the lumbar spine obtained at Penrose hospital obtained February 18, 2015 demonstrated "evidence of moderate multilevel degenerative disc and facet joint changes throughout the lumbar spine, and 2-3mm of anterolisthesis at L4-5."[1]

9. Claimant underwent several injections, but he testified that "they didn't do any good."

10. During Claimant's course of treatment, Dr. Scott Primack authored three separate reports concerning various treatment modalities recommended by some of Claimant's authorized treating physicians. In a report addressing the reasonableness and necessity of continued injections, Dr. Primack opined that additional injections were not warranted since a previous set of injections proved unhelpful, and non-diagnostic. He also recommended a follow up EMG/Nerve conduction study to confirm the results of Dr. Sparr's findings.

11. A follow up EMG/NCS was performed on June 22, 2015, by Dr. William Seybold, which verified that Claimant continued to exhibit signs of polyneuropathy, not radiculopathy.

12. In considering and comparing Claimant's negative diagnostic response to a transforaminal epidural steroid injection along with the objective results of the EMG/nerve conduction studies with his MRI findings, Dr. Primack opined that Claimant's continued pain complaints were more reasonably related to a previously diagnosed peripheral polyneuropathy.

13. Dr. Primack also testified that internal fear constructs, i.e. pain behavior

[1] This information is contained in the Division Independent Medical Examination (DIME) report of Dr. Stieg.

associated with Claimant's documented; pre-existing, non-work related conditions could influence his level of effort during motion testing and thus, the validity of his lumbar range of motion measurements.

14. Claimant underwent a Functional Capacity Evaluation (FCE) at Excel Physical Therapy (Excel) on November 8, 2015. As part of this evaluation, lumbar range of motion testing was performed. Claimant's range of motion loss pursuant to this testing totaled 16% whole person impairment.

15. Claimant returned to Colorado Springs Health Partners, his authorized providers on November 10, 2015 where he was evaluated by Dr. Shireen Rudderow on November 10, 2015. Dr. Rudderow placed Claimant at maximum medical improvement (MMI) after receiving conservative care for more than a year noting further that a permanent impairment rating would be received within fourteen days.

16. Dr. Robert Baptist, revaluated Claimant for permanent impairment on December 10, 2015. In his report generated after this encounter, Dr. Baptist wrote that he spoke with Claimant regarding his care noting further that all other treatment providers had considered Claimant at or near MMI. Consequently he assumed that Claimant's care was complete, a fact which Claimant understood and accepted. As part of his evaluation, Dr. Baptist indicated that Claimant's medical situation presented as "very complex." It was noted that Claimant was "almost totally refractory to any treatment modalities" and that his prognosis for improvement was poor. According to Dr. Baptist, Claimant's only "hope for improved pain relief was an implantable spinal stimulator which he recommended as maintenance care.

17. As part of his impairment rating, Dr. Baptist relied upon, but slightly altered Claimant's impairment for range of motion loss as determined by the physical therapist during the FCE as Excel. Specifically, Dr. Baptist found that Claimant's loss of lumbar extension equated to 6% impairment, not 5% as calculated by the physical therapist. Consequently, the full amount of impairment for range of motion loss totaled 17% rather than 16%.

18. Dr. Baptist would go on to supplement the range of motion impairment with 7% impairment for a Table 53 diagnosis citing "moderate degenerative changes" as the basis despite that the MRI's noting the presence of "mild degenerative changes." Additionally, Dr. Baptist provided a total of 8% whole person impairment for motor and sensory nerve impairment which he admitted was somewhat of an arbitrary calculation given that the Claimant was "very difficult to assess." Dr. Baptist combined the various components of Claimant's impairment rating reach a final combined whole person impairment rating of 29%.

19. The existence of a polyneuropathy would prompt Dr. Primack to opine that Claimant's leg pain was not claim related. Accordingly, Dr. Primack did not consider Claimant to be an appropriate candidate for the placement of a spinal cord stimulator as part of this claim as recommended by Dr. Baptist.

20. Respondents timely challenged the 29% rating and initiated the Division Independent Medical Examination (DIME) process. Dr. Richard Stieg was selected as the DIME physician.

21. On June 21, 2016, Claimant attended the requested DIME with Dr. Stieg.

22. Dr. Stieg undertook a review of Claimant's medical records dating back to 1990. He also performed a physical examination and referenced the amount of motion Claimant had in his lumbar spine. Despite Respondents suggestion otherwise, there is a dearth of evidence to suggest that Dr. Stieg took formal lumbar range of motion measurements. He issued his DIME Report on July 15, 2016. In his DIME report Dr. Stieg agreed with Dr. Rudderow's MMI date of November 10, 2015 and concluded that Claimant was entitled to a Table 53 rating of 5%.

23. As part of his physical examination, Dr. Stieg found that Claimant "tender to some degree over both SI joints, but all provocation testing at the hips [was] negative for the production for radicular pain or SI pain." He also noted that Claimant "[exhibited] 4/5 Waddell's signs with increased back pain being reported on simulated axial load and simulated axial rotation . . . ."

24. Though Dr. Stieg specifically noted that Claimant had "very minimal motions of the lumbar spine in flexion/extension and side bending", he did not include any range of motion measurement worksheets serving to demonstrate that formal "testing" was completed, choosing instead to state:

> I am giving the patient a final impairment rating based on his mild to moderate degenerative lumbar disease. He has no objective evidence of radiculopathy to allow me to offer any impairment for neurological findings. His range of motion testing coupled with Waddell's findings, although technically valid is incompatible with the radiology findings. That coupled with clear cut evidence of symptom magnification (positive Waddell's signs) does not allow for any impairment for loss of range of motion.

25. Based upon the evidence presented, the ALJ finds that Dr. Stieg technically invalidated Claimant's lumbar range of motion measurements secondary to his opinion that the measurements were non-physiologic and incongruent with the objective findings on imaging.

26. Respondents filed a Final Admission of Liability (FAL) based on the DIME report of Dr. Stieg on August 19, 2016. In the FAL, Respondents took credit for the value of Claimant's 5% impairment rating against the value of continued TTD payments made to Claimant between the original release at MMI, the DIME and the subsequent FAL. After taking credit, Claimant was left with an overpayment which, by stipulation of the parties, amounted to $14,709.96. Respondents also reserved the issue of an additional

overpayment noting, “Respondents retain the right to reimbursement of additional overpayment amounts based on claimant’s receipt of TTD benefits while maintaining employment.”

27. Claimant timely objected to the Final Admission and filed an Application for Hearing endorsing the issue of “overcoming DIME.” Respondents timely responded to the application endorsing issues of causation, apportionment, and overpayment.

28. At hearing, Claimant presented the testimony of Dr. John Hughes, who was endorsed as an expert in occupational medicine.

29. Relying primarily on Desk Aid 11, Dr. Hughes testified that Dr. Stieg’s failure to attach range of motion worksheets, whether the range of motion measurements were valid or not, to the DIME report left the report incomplete and fatally flawed. Dr. Hughes also noted that the lack of range of motion worksheets coupled with the content of the DIME raises the appearance that formal range of motion testing was not done. Finally, while he agreed that it was within Dr. Stieg’s discretion to invalidate range of motion secondary to the presence of significant pain behavior and being non-physiologic, Dr. Hughes suggested that Dr. Stieg erred in failing to reference another complete, but invalid range of motion study as the basis for his decision to invalidate subsequent range of motion and have the Claimant return for a second round of range of motion measurements as provided for by Desk Aid 11.

30. Dr. Scott Primack testified at hearing as an expert in physical medicine with a sub-specialty in electro diagnostic medicine. Dr. Primack testified in support of the findings of Dr. Stieg’s DIME report. In his testimony, Dr. Primack explained that Dr. Stieg’s nullification and lack of attachment of range of motion measurement was within his discretion, was in accordance with the Division’s Level II accreditation, and was consistent with the AMA Guides, Third Edition Revised.

31. Specifically, Dr. Primack testified as follows:

> And you know, whether you want to put in the work sheets or not, the work sheets are going to be invalid, so I don’t think that by not having the work sheet it invalidates all of the work that he did, because he went through some pretty extensive notes.

32. After a discussion of the differing reports and findings of the various treatment providers in the record, Dr. Primack testified that the questions concerning validity of Claimant’s pain complaints, range of motion measurements, and diagnosis were nothing more than “physician’s different opinions.”

33. Based upon the evidence presented, the ALJ finds Dr. Hughes’ opinions concerning the validity of Dr. Stieg’s DIME report more persuasive than the contrary opinions of Dr. Primack. While the record evidence supports clear differences of opinion between Dr. Baptist and Dr. Stieg concerning Claimant’s diagnosis, pain

complaints and range of motion measurements, the challenges to Dr. Stieg's DIME opinions are based upon his failure to adhere to established methods/protocols regarding the testing and documentation of range of motion measurements. It is undisputed that Dr. Stieg failed to attach range of motion worksheets to his DIME report. Moreover, the evidence presented persuades the ALJ that Dr. Stieg failed to reference another report wherein range of motion was invalidated or schedule Claimant for a second set of range of motion measurements as referenced by Desk Aid 11.

34. The combination of Dr. Stieg's failure to attach worksheets to his DIME report coupled with his failure to reference/accept another report which invalidated range of motion measurements or bring Claimant back for a second set of measurements constitutes clear and convincing evidence that formal range of motion testing was not done in this case rendering the legitimacy of his opinions concerning the degree of impairment associated with range of motion loss in this case suspect and highly probably incorrect. Consequently, Claimant has met his required legal burden to set Dr. Stieg's opinion regarding impairment associated with range of motion loss aside.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Conclusions of Law

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo.

1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). As found here, Dr. Hughes' opinions are supported by the content of the medical record he reviewed and Desk Aid 11. As such, the ALJ finds Dr. Hughes' opinions credible and convincing. Moreover, there is substantial persuasive evidence to support a conclusion that Dr. Stieg deviated from the accepted methodology of the AMA Guidelines, the tenets set forth by the Division of Worker's Compensation in Desk Aid 11 and the principles of the Level II Accreditation Curriculum when he completed the DIME in this case. Consequently, the ALJ rejects Dr. Stieg's opinions regarding range of motion impairment as unpersuasive and highly probably incorrect.

Overcoming the DIME Physician's Impairment Rating

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning impairment is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding impairment, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). As found here, the ALJ concurs with Claimant's expert (Dr. Hughes) that Dr. Stieg's failure to follow accepted rating protocols regarding the testing and documentation of range of motion loss/impairment renders the his report incomplete and his opinions regarding range of motion impairment fatally flawed.

E. Desk Aid 11, paragraph 5 reminds providers evaluating range of motion impairment to "attach all applicable work sheets to the narrative report and include this information to all legally concerned parties." More importantly, paragraph 10 provides that "[t]o invalidate spinal range of motion impairment, claimants must have two visits"

where “[t]wo sets of three measurements must be taken on each visit (12 measurements total)(emphasis in original). However the tip provides that if a “physician performing a Division IME finds range of motion measurements invalid (due to SLR check or for physiologic reasons) such physician may fulfill this requirement by accepting invalidated measurements from other reports in lieu of bringing the claimant back for a second set of measurements.” Nonetheless, the tip notes that the “physician must, however, report his/her own initial sets of measurements”, referencing the Level II Accreditation Curriculum for range of motion testing for the spine. As found, Dr. Stieg failed to actually reference any formal range of motion testing measurements in his DIME report or follow any of the aforementioned protocols encouraged by the Division of Worker’s Compensation and referenced in the AMA Guides and/or Level II Accreditation Curriculum. Respondents’ suggestion that Dr. Stieg’s explanation of the reasoning he invalidated the range of motion makes the need to attach worksheets “extraneous and immaterial” is unconvincing as it assumes that formal range of motion testing was done in this case and completely ignores the need to cite to a previous report invalidating range of motion or have the claimant return for a second set of measurements. Here, the convincing evidence presented persuades the undersigned that Dr. Stieg did neither. Consequently, the ALJ concludes the DIME in this case is fatally flawed and the opinion of Dr. Stieg regarding range of motion impairment highly probably incorrect.

F. Where the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). In this case, the undersigned concludes that Dr. Baptist’s impairment rating for spinal disorders, i.e. 7% from Table 53 of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised*), hereinafter the “AMA Guides”, is supported by the record. The written record is replete with reference to moderate degenerative changes revealed by imaging study, including x-ray. Even Dr. Stieg provides the following impression of the lumbar spine: “[m]ild to <u>moderate</u> disc and joint degenerative disease of the lumbar spine without evidence of specific radiculopathy” (emphasis added). Moreover, Dr. Stieg rated Claimant for “mild to moderate degenerative lumbar disease. Regarding the spinal range of motion impairment as determined by Dr. Baptist along with his Table 49 nerve rating is supported by the content of the medical records associated with Claimant’s injury, the undersigned concludes that these aspects of Claimant’s impairment rating are also supported by the record. While Dr. Baptist calculated 17% impairment for range of motion loss and Claimant has polyneuropathy, Claimant’s range of motion measurements were valid and Respondents failed to present evidence of a specific error committed by Dr. Baptist in assigning Table 49 spinal nerve root impairment. Indeed, Dr. Stieg did not opine that Claimant’s leg pain was exclusively caused by his polyneuropathy. Rather, he noted simply that the “majority” of Claimant’s leg pain was

related to polyneuropathy and that while there was a suggestion that Claimant may have radiculitis there was no evidence of radiculopathy. Consequently, he elected not to rate Claimant's leg pain. On the other hand, Dr. Baptist felt that Claimant's imaging supported a finding inflammation and fluid accumulation sufficient to produce an acute radiculopathy. Thus, he elected to rate Claimant's leg pain. Based upon the evidence presented, the ALJ concludes only that there is a difference of opinion between Dr. Baptist and Dr. Stieg as it pertains to these aspects of Claimant's impairment. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Accordingly, the ALJ concludes that Claimant's true impairment ratings causally related to his July 17, 2014 industrial injury is 29% as calculated by Dr. Baptist.

Credits & Overpayments

G. Section 8-40-201(15.5), C.R.S. provides as follows:

> "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability benefits under said articles.

Thus, §8-40-201(15.5), C.R.S. provides for three categories of possible overpayment: (1) a claimant receives money "that exceeds the amount that should have been paid"; (2) money received that a "claimant was not entitled to receive"; and (3) money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. *See Simpson v. Industrial Claim Appeals Office,* 219 P.3d 354 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010).

H. Respondents bear the burden, by a preponderance of the evidence that Claimant received an overpayment of TTD benefits. Respondents' assertion of the right to recover an overpayment is a factual matter for determination by the ALJ. *Karyn Milazzo v. Total Long-term Care*, *Inc.*, W.C. No. 4-852-795-02, (ICAP Jun. 11, 2014). In this case, the ALJ agrees that Respondents properly preserved the issue of an additional overpayment in their Final Admission and in Response to Claimant's Application for Hearing for Claimant receipt of wages while working concurrent employment at Specialty Sports. Nonetheless, the ALJ concludes that Insurer is not entitled to any credit for any alleged overpayment in temporary disability benefits for wages earned while working at Specialty Sports. Claimant's AWW is $1,459.71. This amount exceeds the TTD cap of $881.65. Two thirds of $1,459.71 is $972.16. This is $90.51 over the TTD cap. Thus, any money received by Claimant for any wage loss is what he was entitled to because even with any offset from his previous gross wage he is still due $881.65. Respondents assert that as Claimant was employed in a modified duty role at Specialty Sports he was entitled to receive TPD benefits, not TTD during the time frame

of October 2, 2014 through November 9, 2015. For the reason outlined above, the ALJ is not persuaded. While Respondent is entitled to recover the remaining overpayment of $14,709.96, Respondents request to credit an additional overpayment of $13,752.61 against the value of his 29% impairment rating is denied and dismissed.

ORDER

It is therefore ordered that:

1. The DIME opinions of Dr. Stieg regarding impairment have been overcome and are hereby set aside.

2. Respondents shall pay permanent partial disability benefits to Claimant in accordance with a whole person impairment of 29% as calculated by Dr. Baptist.

3. The stipulation of the parties that Claimant has been overpaid by $14,709.96 is approved. Respondents are entitled to take a credit against the value of additional permanent partial disability benefits due and owing to Claimant based upon the 29% whole person rating to which he is entitled.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 21, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-025-409-02 and 5-025-140-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 19, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 4/19/17, Courtroom 1, beginning at 8:30 AM, and ending at 11:30 AM).

By Order, dated January 28, 2017, W.C. No. 5-025-140-01 (involving an alleged neck injury of October 30, 2011) and W.C. No. 5-025-409-02 (involving an alleged neck injury of January 14, 2012) were consolidated for hearing. The primary reference file is W.C. No. 5-025-409-02.

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection, Respondents' Exhibits A through S were admitted into evidence, without objection, with the exception of Exhibit F to which there was an objection that was sustained, however, it is identical to Claimant's Exhibit 4, which was admitted into evidence without objection. Claimant's exhibit 4 is an incomplete Employer's First Report of Injury in W.C. No. 5-025-409-02, which was only filed with the insurance carrier and not the Division of Workers' Compensation (DOWC) because the Employer was taking the position that it concerned an alleged "no lost time" injury.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents to be filed, electronically, within 6 working days, ,giving the Claimant 2 working days within which to file objections. After the referral, the ALJ decided to take the matter under advisement in order to prepare the written decision himself without a proposed decision. The ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability of an October 30, 2011, alleged neck injury (W.C. No. 5-025-140-01) and a January 14, 2012, alleged neck injury (W.C. No. 5-025-409-02); and, if compensable, the Respondents have raised the affirmative defense of "statute of limitations."

The Claimant bears the burden of proof, by a preponderance of the evidence, on the threshold issues of compensability on each claim. The Respondents bear the burden of proof, by preponderant evidence on the 'statute of limitations" affirmative defense as it pertains to each claim.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant was drafted by the Employer in 2011. Prior to being drafted, he had a physical examination at the Columbine facility, including an MRI (magnetic resonance imaging) on February 27, 2011. The cervical MRI showed disc degeneration at C3-4, a slight bulge at C4-5 and a more prominent diffuse annular bulge at C6-7. Prior to being drafted, the Claimant had been involved in a rollover motor vehicle accident with neck pain. Prior to the rollover accident, he had two injuries in college with neck pain.

2. When the Claimant was drafted by the Employer, a physical examination completed by Theodore F. Schlegel, M.D., noted that the Claimant's February 27, 2011 MRI demonstrated C3-4 degeneration and foraminal narrowing.

COMPENSABILITY

W.C. No. 5-025-140-01

3. On October 30, 2011, the Claimant alleges a neck injury when he was struck on the right side of his helmet while playing football. He was evaluated by Alan H. Weintraub, M.D., on October 31, 2011. Dr. Weintraub's impression was a "probable concussion, migraines exacerbated by **trauma** (emphasis supplied) and cervigogenic (neck) **sprain/strain.**" Three days later, on November 3, 2011, Dr. Weintraub noted that the Claimant had been asymptomatic for the last two days. In a report, dated November 28, 2011, Dr. Weintraub noted a complete resolution of all posttraumatic concussive symptoms by November 3, 2011. Nonetheless, the Claimant required medical attention and Dr. Weintraub diagnosed and treated the Claimant for a traumatic injury, the effects of which were of two day's duration.

4. According to the Claimant's undisputed telephone testimony, he sought out and required some medical treatment, from Employer doctors on hand, for the October 30, 2011 traumatic incident. The ALJ infers and finds that but for the October 30, 2011 incident, the Claimant would not have otherwise sought and received the short-lived medical care that he received.

5. The ALJ infers and finds that the totality of the evidence supports the proposition that the Claimant experienced an aggravation/acceleration of his underlying degenerative C-Spine condition, by virtue of the traumatic event of October 30, 2011, as opposed to a temporary exacerbation along the path of a natural progression of his underlying neck condition. Although the effects thereof were of a temporary duration (two days) at the time, the Claimant was required to seek medical attention because of the incident of October 30, 2011.

6. The Employer had no notice of a claimed "lost time" or "permanently impairing" injury in W.C. No. 5-025-140-01.

7. The ALJ finds the Claimant to be credible on the issue of "compensability" of the October 30, 2011 incident. Indeed, Dr. Weintraub's impressions corroborate a traumatic event on October 30, 2011, the effects of which were of a short duration.

W.C. No. 5-025-409-02

8. On January 14, 2012, the Claimant alleges another injury to his neck. This was the end of the season. During the end of the season physical examination, the next day, January 15, 2012, Martin Boublik, M.D., noted that the Claimant had two right-sided" stingers" in the game the day before. On examination, the Claimant reported no symptoms related to the stingers Nonetheless, Dr. Boublik recommended a cervical MRI of the neck and he declared the Claimant fit to play According to the

Claimant, he was experiencing neck pain at the time but did not say so because if he did, he knew that he'd risk losing his job. The Claimant did, in fact, seek medical treatment from staff doctors on hand. The Employer filed a First Report of Injury with the insurance carrier but not with the Division of Workers' Compensation (DOWC) because the Employer was taking the position that the matter was a "medical only-no lost time" alleged injury, stating that the "Claimant sustained right cervical nerve root C6-7 irritation after tackling a runner with his head (Claimant's Exhibit 4). The document corroborates a traumatic event on January 14, 2012 for which the Claimant sought and required medical attention. The ALJ finds that the position the Employer was taking did not require the Employer to admit or deny liability for an alleged work-related injury for the January 14, 2012 incident.

9. According to the Claimant's undisputed testimony, after the January 14, 2012 incident, he sought medical treatment in the form of soft tissue massage from Dr. Leahy on the same day. January 14, 2012, was the end of the season and the Claimant was supposed to keep in shape with unsupervised exercises that were **not** under the watchful eye of the Employer. The Claimant testified that he had physical problems doing these exercises because of his neck condition.

10. The ALJ infers and finds that the totality of the evidence supports the proposition that the Claimant experienced an aggravation/acceleration of his underlying degenerative C-Spine condition, as opposed to a temporary exacerbation along the path of a natural progression of his underlying neck condition, because of the incident of January 14, 2012. Although the effects thereof were of a temporary duration at the time (one day), the Claimant was required to seek medical attention because of the incident of January 14, 2012.

11. Six months later, on June 11, 2012, the Claimant underwent a pre-season physical, the Claimant was asymptomatic, and he was declared fit to play.

12. Although of a very short duration, the incident of January 14, 2012, required the Claimant to seek medical attention and receive some treatment from Dr. Leahy. But for the January 14, 2012 incident, the Claimant would not have otherwise sought and received the medical care that he received. According to the Claimant, however, he realized that the effects of both the January 14, 2012 and October 30, 2011 incidents would most likely be permanent. According to his undisputed testimony, he made this realization before his October 2012 left knee surgery (unrelated to the two claims herein), but the Employer was not made aware of this until the Claimant testified at the April 19, 2017 hearing.

13. The Employer had no notice of a claimed "lost time" or "permanently impairing" injury in W.C. No. 5-025-409-02 until the Claimant filed his Worker's Claims for Compensation on September 7, 2016, and until he testified at the April 19, 2017 hearing..

14. The ALJ finds the Claimant to be credible on the issue of "compensability" of the January 14, 2012 incident. Dr. Boublik corroborates the fact of a traumatic event on January 14, 2012, that required medical attention, albeit of short-lived duration.

The Left Knee Injury of July 26, 2012 (Unrelated to Present Claims)

15. On July 26, 2012, the Claimant sustained a left knee injury. Claimant did not play most of 2012 and 2013 because of the left knee injury. This claim was previously resolved by the parties. The Claimant underwent left knee surgery in October of 2012. According to his undisputed testimony, he knew, prior to the left knee surgery the neck problems caused by the October 30, 2011 and the January 14, 2012 incidents were likely to be permanent.

16. The Claimant knew, or should have known, of the nature, serious and probable compensable nature of his injuries as of February 28, 2014, the date he states that he could not continue to play football. According to his undisputed testimony, he knew that the effects of the October 30, 2011 and the January 14, 2012 neck injuries would likely be permanent. He had this realization prior to the October 2012 left knee surgery.

17. On February 4, 2014, the Claimant had an end of season physical, which cleared him for full participation. There was no discussion of neck injuries. Five months later, on July 23, 2014, the Claimant had another physical and was declared fit to play. Although the Claimant continued to have problems with his left knee, there were no medical notations of ongoing neck problems, however, the Claimant testified that he continued to have neck problems but did not want to mention this because he was afraid of being "fired." The ALJ finds the Claimant credible in this regard.

18. The Claimant became a free agent on March 10, 2015. Claimant did not return to play football because of his left knee.

Ultimate Findings, W.C. No. 5-025-409-02 and 5-025-140-01 on Compensability

19. The ALJ finds that the incidents of October 30, 2011, and January 14, 2012, aggravated and accelerated the Claimant's underlying, degenerative neck condition to the point that the Claimant sought and required medical attention. But for these two incidents, the Claimant would not have otherwise sought and required the medical attention that he actually received shortly thereafter.

20. Therefore, the ALJ finds that the Claimant has proven, by a preponderance of the evidence that he sustained two compensable neck injuries on October 30, 2011 and January 14, 2012, respectively, of a "no lost time" nature.

Statute of Limitations

21. As a reasonable person, the Claimant knew, or should have known, the nature and serious compensable nature of his neck injuries of October 30, 2011 and January 14, 2012, prior to his October 2012 left knee surgery. As found herein above, he testified that he believed the effects of his two neck injuries would be permanent, prior to his October 2012 left knee surgery. He stated, however, that he did not "really, really" appreciate how serious his neck condition was until he saw an un-named specialist in Los Angeles in 2016. The ALJ infers and finds that this 2016 heightened awareness does **not** negate the fact that the Claimant first knew the serious compensable nature of his neck injuries prior to his October 2012 left knee surgery.

22. The Claimant first filed a Worker's Claim for Compensation in W.C. No. 5-025-409-02 and 5-025-140-01 on September 7, 2016, more than three years after the Claimant, as a reasonable person knew, or should have known the serious and compensable nature of his October 30, 2011 and January 14, 2012, neck injuries.

23. The Employer did not know that the Claimant was claiming permanent physical impairment, or allegedly sustained "lost time" injuries until September 7, 2016, at the earliest. With regard to the alleged October 30, 2011 injury, there are scant medical records that reflect an injury to the neck on or about October 30, 2011. The only record is a notation by Dr. Wientraub that Claimant may have sustained a cervicogenic sprain/strain on October 31, 2011. There was no further medical evaluation for the alleged October 30, 2011 C-spine injury. Claimant continued to play football for the Employer as evidenced by his second claim of injury on January 14, 2012. There is no record declaring the Claimant unfit to play after the alleged October 30, 2011 injury. The end of season physical completed on January 15, 2012 noted that the Claimant's neck complaints had resolved and the Claimant was declared fit to play pending an MRI for a separate knee injury. The Claimant also participated in a pre-season physical on June 11, 2012 and reported no issues with his neck. The Claimant was again declared fit to play. In the end of season physical completed on February 4, 2014, there was no discussion of Claimant's neck injuries, and the Claimant was again declared fit to play. The Claimant participated in another physical on July 23, 2014 and was again declared fit to play with no mention of his alleged neck injuries. Thus, the Employer had no knowledge of a physical permanent impairment, or a "lost-time' injury as a result of his alleged October 31, 2011 and January 14, 2012 C-spine injuries.

24. The Respondents have proven, by a preponderance of the evidence that the Claimant failed to file his claims for workers' compensation benefits until September 7, 2016) for more than three years after he, as a reasonable person, knew, or should have known, the serious and compensable nature of the two neck injuries. He knew this prior to his October 2012 left knee surgery.

25. The Employer had no notice of a “lost time’ or “permanently impairing injury in both neck cases until September 7, 2016, at the earliest.

26. Although the Claimant alleges that he sustained an injury preventing him from playing football on February 28, 2014, he continued to receive his full salary,

27. The Claimant has failed to prove, by preponderant evidence that there was a tolling of the Statute of Limitations by any “reasonable excuse” or any other tolling exceptions to the two-year statute of limitations.

28. Indeed, the Claimant’s credibility was enhanced when he admitted that he realized the serious and compensable nature of his two knee injuries before the October 2012 left knee surgery. This was more than three years before his Worker’s Claims for Compensation were filed.

DISCUSSION OF STATUTE OF LIMITATIONS

Section 8-43-103(2), C.R.S., provides that the right to workers’ compensation benefits is barred unless a formal claim is filed within two years of the injury. The statute of limitations does not begin to run until a claimant, as a reasonable person, knows, or should have known, the “nature, seriousness and probable compensable character of his injury.” *City of Boulder v. Payne,* 426 P.2d 194 (Colo. 1967) at 197. In order to recognize the probable compensable character of the injury, “the injury must be of sufficient magnitude that it causes a disability which would lead a reasonable person to recognize that he may be entitled to compensation benefits.” *Choi v. Colo. Architectural Mills Works Supply*, W.C. No. 4-794-282 [Indus. Claim Appeals Office (ICAO), October 14, 2010]. As found, the Claimant, as a reasonable person, knew the serious and compensable nature of his neck injuries prior to his October 2012 left knee surgery.

As found, the Claimant had knowledge of the serious and probable compensable nature of his injuries as early as February 28, 2014, the date he alleges that he could not continue to play football, and no later than before his October 2012 left knee surgery. Despite this knowledge of his inability and realization that his neck injuries may be permanent, he did not file his claims with the DOWC until September 7, 2016. This is over two years from the date the Claimant knew, or should have known, of the serious and compensable nature of his neck injuries. Therefore, because the Claimant had knowledge of his two neck injuries more than two years prior to the date he filed the the two claims herein, his claims are barred by the statute of limitations under the provisions of § 8-43-103(2), C.R.S.

There are exceptions to the two-year statute of limitations under § 8-43-103(2), but they do not apply in this case. For instance, § 8-43-103(2), C.R.S. provides: “In all cases in which the employer has been given notice of an injury and fails, neglects, or

refuses to report said injury to the division as required by the provisions of [the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee … until the required report has been filed with the division. *Likens v. Dep't of Corrs*, W.C. No. 4-560-107 (ICAO Feb. 10, 2004). This applies to alleged "lost time" or "permanently disabling injuries of which an employer has notice. As found, the Employer had **no** notice of "lost time' injuries in either W.C. No. 5-025-140-01 or W.C. No. 5-025-409-02.

Finally, § 8-43-103(2), C.R.S., indicates that the statute of limitations will not apply to a claimant "if it is established to the satisfaction of the director within three years after the injury…that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced."' As found, the Claimant's claims were filed more than three years after he, as a reasonable person, knew or should have known, of the serious and probable compensable nature of his claims.

There was **no** tolling of the statute of limitations due to any failure to report the injury on the part of Employer. § 8-43-102(2), C.R.S., provides that the statute of limitations is tolled where an employer does not "report said injury to the division as required by the provisions of [the Workers' Compensation Act]." Thus, where no report was required to be filed, the statute of limitations is not tolled. As found, the Employer herein did not know of a claimed "lost time" injury until September 7, 2016 or thereafter.

The statutory reporting requirements are set out in § 8-43-101, C.R.S. *See Grant v. Indus. Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). § 8-43-101(1), C.R.S., requires that the within ten days after notice of knowledge that an employee had contracted a permanently physically impairing injury or lost-time injury, the employer shall file a report with the division. *Pierce-Kouyate v. Wilson's of Colo. Ltd.*, W.C. No. 4-717-784 (ICAO Nov. 21, 2007). A "lost time injury" is defined as one that causes the claimant to miss more than three work shifts or three calendar days of work, and the employer's notice is measured by the "reasonably conscientious manager" standard. *Grant,* 740 P.2d at 531. There is no requirement to file a First Report of Injury, however, where the employer has no notice or knowledge that a claimant had a lost-time injury or permanent physical impairment. *Pierce-Kouyate v. Wilson's of Colo. Ltd., supra.* The claimant bears the burden of establishing the tolling of the statute of limitations. Regardless, there was no persuasive evidence of the tolling of the Statute of Limitations. *Grant*, 740 P.2d at 532. As found, the Claimant failed to prove that there was a tolling of the statute of Limitations.

Here, it is undisputed that Employer did not report the incidents of October 30, 2011 and January 14, 2012 to the DOWC. Because the Employer did not have knowledge or notice that the accidents caused a permanent physical impairment or lost-time, the Employer was under no duty to report the accident to the DOWC under § 8-43-101(1), C.R.S.

As found, the Employer did not know that the Claimant was claiming that he sustained a permanent physical impairment until more than three years after the Claimant knew, or reasonably should have known, that he believed he had sustained permanent impairment of his neck as a result of the October 30, 2011 and January 14, 2012, neck injuries. With regard to the alleged October 30, 2011 injury, there are scant medical records that reflect an injury to the neck on or about October 30, 2011. The only record is a notation by Dr. Wientraub that Claimant may have a cervicogenic sprain/strain on October 31, 2011. This corroborates that the Claimant sought and obtained medical treatment for this injury. There was no further medical evaluation for the alleged October 30, 2011 C-spine injury. Claimant continued to play football for the Employer as evidenced by his second claim of injury on January 14, 2012. There is no record declaring Claimant unfit to play for the alleged October 31, 2011 injury. The end of season physical completed on January 15, 2012 noted that Claimant's neck complaints had resolved and declared Claimant fit to play pending an MRI for a separate knee injury. Claimant also participated in a pre-season physical on June 11, 2012 and reported no issues with his neck. Claimant was again declared fit to play. In the end of season physical completed on February 4, 2014, there was no discussion of Claimant's neck injuries, and Claimant was again declared fit to play. Claimant participated in another physical on July 23, 2014 and was again declared fit to play with no mention of his alleged neck injuries. Thus, the Employer had no knowledge of a claimed permanent physical impairment as a result of his alleged January 14, 2012, C-spine injury.

Further, although the Claimant alleges that he was unable to play football after February 28, 2014, the Respondents contend that he did not lose any time from his employment with Employer as he was continuing to receive his full salary pursuant to his contract. A similar situation occurred in *Cooper v. Bowlen*, W.C. Nos. 4-189-488 & 4-189-486 (ICAO Jan. 26, 1996). In that case, the claimant sustained injuries while employed as a professional football player, but failed to file a claim for compensation until after the statute of limitation had run. He argued the statute was tolled due to the employer's failure to report the injury to the division, reasoning that he sustained a "lost-time injury" because he was physically unable to engage in full, physical practices for more than three days. The ALJ determined there were other requirements of employment the claimant fulfilled for which he received his regular pay, and concluded the claimant did not miss more than three days of work as a result of his injuries. The Panel agreed, stating that "'modified' employment without a loss of wages is not a "lost-time injury" for purposes of triggering the employer's statutory obligation under 8-43-101(1)." The Panel went on to state that "the claimant's temporary inability to perform the 'essential functions' of his employment is not dispositive of whether the claimant has lost more than three days of work."

As found, although the Claimant alleges that he sustained an injury preventing him from playing football as of February 28, 2014, he continued to receive his full salary,

as did the claimant in *Cooper*. Claimant's temporary inability to play football is not dispositive of whether he lost more than three days of work. Thus, the Employer's duty under § 8-43-101(1), C.R.S., to report the injury to the DOWC was never triggered.

Because the Employer did not have notice or knowledge that the Claimant was claiming a permanent physical impairment or a "lost-time" injury until September 7, 2016, at the earliest, the Employer did not have a duty to report the injury to the DOWC.. Therefore, there was no tolling of the statute of limitations.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony was credible, concerning the medical treatment he received after the October 30, 2011 and the January 24, 2012 incidents, and it was corroborated by the two physicians who attended him for the October 30, 2011 and January 14, 2012, neck injuries. Further, the Claimant's testimony that he first believed that the effects of the 2011 and 2012 neck injuries would be permanent was prior to his October 2012 left knee surgery.

Sufficiency of an Injury or Injuries to be Compensable

b. The conventional view maintains that an "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. For example, paper cuts, may be insults to the body of an office worker, but they are not sufficient to be compensable unless medical attention is sought and required therefore. The consequences of a work-related incident must require **medical treatment or** be disabling in order to be sufficient to constitute a compensable event. "Or" is the critical connecting word. The Industrial Claim Appeals Office (ICAO) decision does not state "and/or," and it does not state "and." It states "or," by itself. If an incident is not a significant event resulting in an injury, a claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, the neck injuries of October 30, 2011 and January 14, 2012 were sufficient to be compensable because they required medical attention, however minimal and however briefly furnished.

Compensability/Aggravation/Acceleration

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to **cause a need for medical treatment or produce the disability** for which benefits are sought. § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 (ICAO, April 8, 1998); *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's neck injuries of October 30, 2011 and January 14, 2012 were compensable

aggravations/accelerations of his underlying, pre-existing neck condition.

Statute of Limitations

d. The Statute of Limitations is an affirmative defense and unless raised, it is waived. *See Kersting v. Indus. Comm'n,* 30 Colo. App. 297, 567 P.2d 394 (1977). To paraphrase the late U.S. Supreme Court Justice Oliver Wendell Holmes, Jr: "It has nothing to do with justice. It is a housekeeping device of the law to clean out old cases." When the time specified in a statute of limitations has passed, it could be conceptualized that there is a conclusive presumption that there will be prejudice to the side on the receiving end of the lawsuit. As found, herein above, the Respondents raised this affirmative defense and fully litigated it.

e. Although the Claimant established that he sustained two compensable neck injuries on October 30, 2011 and January 14, 2012, respectively, his claims are barred by the statute of limitations. § 8-43-103(2), C.R.S., provides that the right to workers' compensation benefits is barred unless a formal claim is filed within two years of the injury. The statute of limitations does not begin to run until the claimant, as a reasonable person, knew or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v Payne,* 162 Colo. 345, 426 P.2d 194 (1967) at 197. In order to recognize the probable compensable character of the injury, "the injury must be of sufficient magnitude that it causes a disability which would lead a reasonable person to recognize that he may be entitled to compensation benefits." *Choi v. Colo. Architectural Mills Works Supply*, W.C. No. 4-794-282 (ICAO Oct. 14, 2010). Therefore, the statute of limitations does not begin to run until a claimant knows, or reasonably should know of the serious and compensable nature of the claimed injuries. As found, the Claimant had knew, or reasonably should have known, of the probable compensable nature of his injuries prior to his October 2012 left knee surgery, according to his undisputed testimony at hearing This is over two years from the date Claimant had knowledge of his inability to play. Therefore, because Claimant had knowledge of the believed permanent nature of his neck injuries more than two years (actually more than three years) prior to the date he filed his two claims, his claims are barred by the statute of limitations under § 8-43-103(2), C.R.S.

Tolling of the Statute of Limitations

f. There are exceptions to the two-year statute of limitations under § 8-43-103(2), but they do not apply in this case. For instance, § 8-43-103(2), C.R.S. provides that: "In all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of [the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee … until the required report has been filed with the division." *Likens v. Dep't of Corrs.*, W.C. No. 4-560-107 (ICAO Feb. 10, 2004).

g. Section 8-43-103(2), C.R.S.,further states that the two-year statute of limitations for filing a claim is tolled if the employer pays "compensation" to the claimant. *Bonazzo v. J.A. Jones Const.*, W.C. No. 4-241-121 (Sept. 24, 1998). Finally, § 8-43-103(2), C.R.S. indicates that the statute of limitations will not apply to a claimant "if it is established to the satisfaction of the director within three years after the injury…that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced."' As found, no "reasonable excuse" or any other tolling exception to the statute of limitations has been established.

h. The Employer's non-reporting did not toll the statute of limitations because there was no tolling of the statute of limitations due to any failure to report the injuries on the part of Employer. § 8-43-102(2), C.R.S. , provides that the statute of limitations is tolled where an employer does not "report said injury to the division as required by the provisions of [the Workers' Compensation Act]." Thus, where no report was required to be filed, the statute of limitations is not tolled. The statutory reporting requirements are set out in § 8-43-101, C.R.S. *See Grant v. Indus. Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). § 8-43-101(1), C.R.S. requires that the within ten days after notice of knowledge that an employee had contracted a permanently physically impairing injury or lost-time injury, the employer shall file a report with the division. *Pierce-Kouyate v. Wilson's of Colo. Ltd.*, W.C. No. 4-717-784 (ICAO Nov. 21, 2007). A "lost time injury" is defined as one that causes the claimant to miss more than three work shifts or three calendar days of work, and the employer's notice is measured by the "reasonably conscientious manager" standard. *Grant,* 740 P.2d at 531. There is no requirement to file a First Report of Injury where the employer has no notice or knowledge that the claimant had a lost-time injury or permanent physical impairment. *Pierce-Kouyate v. Wilson's of Colo. Ltd., supra.* The claimant bears the burden of establishing that there was a tolling of the statute of limitations. *Grant*, 740 P.2d at 532. As found, the Employer did not report the incidents of October 30, 2011 and January 14, 2012 to the DOWC because the Employer did not have knowledge that the accidents caused a permanent physical impairment or lost-time, The Employer was under **no** duty to report the accidents to the DOWC under § 8-43-101(1), C.R.S.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979).

People v. M.A., 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained his burden with respect to the compensability of the injuries of October 30, 2011 and January 214, 2012. As further found, the respondents sustained their burden with respect to the applicability of the Statute of Limitations to both claims. Also, it has been established by preponderant evidence that none of the tolling exceptions to the Statute of Limitations apply to either claim.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Both claims in W.C. Nos. 5-025-409-02 and 5-025-140-01 are barred by the Statute of limitations and are, therefore, denied and dismissed.

DATED this_____day of April 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of April 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc..ord

ISSUES

1. Whether Respondents have overcome the opinion of division independent medical examination (DIME) physician Dr. Henke on maximum medical improvement (MMI) by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant is employed by Employer as a full time housekeeper. On July 30, 2014 Claimant sustained an admitted industrial injury to her right shoulder after a hospital attendant pulled her cart out of her grasp to move it out of the way. Claimant reported a pop in her right shoulder and immediate pain.

2. Claimant was evaluated at Concentra on August 5, 2014 and was assessed as having a right shoulder strain. On August 8, 2014 Claimant was evaluated again and was referred for a right shoulder MRI.

3. On August 13, 2014 Claimant underwent an MRI of her right shoulder that was interpreted by Craig Stewart, M.D. The impression was: severe tendinosis of the supraspinatus tendon with moderate grade partial thickness tearing of the undersurface fibers anteriorly and no full thickness tendon tear and mild tendon retraction of the torn undersurface fibers; multiple small cysts within the greater tuberosity adjacent to the anterior insertion of the supraspinatus tendon; and small amount of subacromial/subdeltoid bursal fluid and moderate subaracoid bursal fluid. *See* Exhibit E.

4. On August 19, 2014 Claimant was evaluated at Concentra and was referred to an orthopedic surgeon for a consultation of her right shoulder due to the MRI results. *See* Exhibit C.

5. On September 4, 2014 Claimant was evaluated by orthopedic surgeon Mark Failinger, M.D. Dr. Failinger found on examination no increased warmth or redness of the shoulder, no skin discoloration or changes, and light touch intact. Dr. Failinger noted that the MRI showed some significant supraspinatus and anterior cuff tendinosis with a high grade partial thickness tear. Dr. Failinger performed a cortisone shot and noted that it would hopefully help but, if not, Claimant knew the options of living with the high grade partial thickness tear or performing surgery. *See* Exhibit D.

6. On September 25, 2014 Claimant was evaluated by Dr. Failinger. Claimant reported that the injection did not really help, that she continued to have pain, and that she had some burning at night. Claimant reported on and off tingling to her right upper extremity all the way down to her fingers. Dr. Failinger noted on

examination no increased warmth or redness, pain with range of motion, and no skin discoloration or changes. Dr. Failinger provided the impression of right shoulder probable high grade partial thickness supraspinatus tear and recommended ruling out radiculopathy to see if Claimant had radiculopathy contributing to her problems. *See* Exhibit D.

7. On October 23, 2014 Claimant underwent NCV and EMG testing performed by Robert Kawasaki, M.D. to rule out cervical radiculopathy, compression neuropathy, and brachial plexopathy. Dr. Kawasaki opined that the right upper extremity nerve tests were all within normal limits and that all examined muscles showed no evidence of electrical instability. *See* Exhibit F.

8. On November 13, 2014 Claimant was evaluated by Dr. Failinger. Claimant reported continued pain at the side and top of her right shoulder. Dr. Failinger noted pain in range of motion, some AC joint pain, and some mild bicipital pain. Dr. Failinger noted no fever, chills, warmth, or redness and that Claimant's EMG and nerve conduction study showed no obvious neurologic abnormalities. Dr. Failinger noted that Claimant wanted to push on with surgery and went through the risks and alternatives with her. *See* Exhibit D.

9. On December 10, 2014 Claimant was evaluated at Concentra by Theodore Villavicencio, M.D. Claimant reported having two episodes of transient (25-30 seconds) right arm stiffness from the hand to the shoulder with no precipitating events, no other involved areas, and no residual neurological issues. On examination Dr. Villavicencio noted that Claimant's right upper arm, elbow, forearm, wrist and skin were normal. He found no problems with range of motion, strength, deformity, or tenderness. Dr. Villavicencio also found her skin to be normal and that her upper extremity reflexes were symmetric bilaterally. *See* Exhibit C.

10. On February 5, 2015 Claimant was evaluated by Dr. Villavicencio. Claimant reported having some transient right hand edema upon awakening last week that had resolved. Claimant had continued right shoulder pain and was awaiting surgery. *See* Exhibit C.

11. On February 10, 2015 Claimant underwent right shoulder surgery performed by Dr. Failinger. Dr. Failinger performed right shoulder arthroscopic subacromial decompression, mini-open rotator cuff repair, and distal clavicle resection. *See* Exhibit D.

12. On June 1, 2015 Claimant was evaluated at Concentra by Christine O'Neal, PA-C. Claimant was referred for an additional MRI of the right shoulder. Claimant reported pain at a 5/10 worse with movement in her right shoulder. *See* Exhibit C.

13. On June 10, 2015 Claimant underwent an MRI of her right shoulder interpreted by Robert Liebold. The impression provided was supraspinatus tendinosis

with evidence of prior rotator cuff tear and no full thickness tear, and mild to moderate subacromial bursitis. *See* Exhibit E.

14. On June 15, 2015 Claimant was evaluated by PA O'Neal. Claimant was advised that the MRI showed supraspinatus tendinosis and no structural defects. Claimant reported that she continued to have pain at the superior shoulder and lateral shoulder and was still having strength problems. On examination PA O'Neal noted tenderness in the anterior glenohumeral joint, trapezius muscle, and supraspinatus muscle. She found limited range of motion in all planes, neurovascular function of the right upper arm to be normal, and the skin to be normal. *See* Exhibit C.

15. On June 26, 2015 Claimant was evaluated by PA O'Neal. Claimant reported pain in her entire right shoulder and down to her right elbow. Claimant also felt like her right hand was slightly swollen. PA O'Neal noted that Claimant was having diffuse right shoulder tenderness to palpation due to a cortisone injection received the prior day. *See* Exhibit C.

16. On July 6, 2015 Claimant was evaluated by PA O'Neal. Claimant reported that she had minimal pain that day in the middle of her biceps body and that her shoulder joint was feeling good. Claimant reported normal sensation in her right hand and that she had no more swelling. *See* Exhibit C.

17. On August 4, 2015 Claimant was evaluated at Concentra by Craig Hare, PA-C. Claimant reported that her right arm felt like it was swelling and that she had increased discomfort in her right forearm for the last five days with no numbness or weakness. PA Hare noted no noticeable change in circumference of right forearm compared to the left. Claimant underwent an ultrasound of her right arm for the pain and swelling that was found to be normal with no evidence of deep venous thrombosis. *See* Exhibits C, E.

18. On August 17, 2015 Claimant was evaluated by PA O'Neal. Claimant reported continued swelling in her arm with any movement that extended down to her finger. On examination, PA O'Neal noted diffuse swelling of Claimant's right forearm and minimal tenderness due to the tightness from swelling. PA O'Neal referred Claimant to a delayed recovery specialist physician. *See* Exhibit C.

19. On September 14, 2015 Claimant was evaluated by PA O'Neal. Claimant reported that two days prior her right hand was very shaky. Claimant also reported that swelling was continuing in her right arm with any movements. On examination, PA O'Neal noted that Claimant's right shoulder was diffusely tender to palpation over the glenohumeral joint and that Claimant had a mild tremor in her right hand when her arm was extended. PA O'Neal noted no tremor in the left arm. *See* Exhibit C.

20. On September 24, 2015 Claimant was evaluated by Dr. Failinger. Dr. Failinger noted that Claimant had done pretty well in the shoulder in terms of motion, strength, and had pain when she got back to work and a little fine tremor in her hands at

times. Dr. Failinger noted that Claimant was going to see Dr. Burris soon. Dr. Failinger noted that an MRI had shown an intact surgical repair of Claimant's right shoulder and that she had a well healed surgical incision with no warmth or redness. Dr. Failinger provided the impression of right shoulder status post rotator cuff repair with what appeared to be a healed repair on MRI, and recommended ruling out neurologic abnormality. Dr. Failinger opined that there was little else for him to do in Claimant's shoulder and deferred a physiatry evaluation o Dr. Burris. *See* Exhibit D.

21. On October 8, 2015 Claimant was evaluated by Concentra delayed recovery specialist John Burris, M.D. Claimant reported diffuse pain in the right shoulder, 5/10 in severity and pain throughout the right arm in a glove type distribution circumferentially throughout. Claimant also reported some shaking in her right hand particularly when she tried to perform a forceful grasping maneuver. Claimant denied neck pain, numbness, or weakness. On examination Dr. Burris opined that clear psychosomatic overlay was present and that Claimant was tearful throughout the examination because of persistent pain. Dr. Burris opined that Claimant was neurovascularly intact throughout the right upper extremity and that Claimant had normal color, temperature, and muscle tone. Dr. Burris found 5/5 motor strength throughout the right upper extremity with normal grip and normal interosseous strength distally. Dr. Burris found normal sensation, normal capillary refill, normal hair and nail growth, and no unusual tenderness to light touch. Dr. Burris opined that Claimant was likely at an endpoint for active care. *See* Exhibit C.

22. On November 19, 2015 Claimant was evaluated by Dr. Burris. Claimant reported persistent pain in her right shoulder region. Claimant reported no periscapular pain and that the tingling in her right upper extremity had resolved. Claimant reported no neck pain, numbness or weakness, and no associated symptoms. Dr. Burris opined that Claimant continued to have psychosomatic overlay present. On examination, Dr. Burris noted full range of motion in all planes and that her right upper extremity was neurovascularly intact throughout with normal color, temperature, and muscle tone throughout the extremity. Dr. Burris noted that the surgical scars at the shoulder were well healed with no unusual swelling, erythema, or tenderness and that the functional range of motion at the shoulder was near full. Dr. Burris noted normal sensation and capillary refill throughout and noted normal hair and nail growth. Dr. Burris diagnosed right shoulder strain. Dr. Burris noted that Claimant continued to have pain 9 months after surgical repair and that she had completed postoperative rehabilitation and had been released by the treating specialist. Dr. Burris opined that Claimant was at MMI. Dr. Burris provided an impairment rating of 5% upper extremity. Dr. Burris released Claimant from care and opined that no follow up was required. For maintenance treatment, Dr. Burris provided some continued massage therapy and one final prescription of methaxalone and opined that no other formal maintenance was required. *See* Exhibit C.

23. On July 13, 2016 Claimant underwent a Division Independent Medical Examination (DIME) performed by Clarence Henke, M.D. Claimant reported that she was using a mobile cart with cleaning supplies when another hospital employee coming

down the hall moved the cart while her am was holding on to cleaning supplies inside the cart causing immediate right shoulder pain and a pop in her shoulder. Claimant reported that her current symptoms included constant aching pain extending from the right shoulder down to her hand, numbness in the right hand, and tingling in her fingers when doing any activities of lifting, pushing, or extending her arm overhead. Dr. Henke reviewed medical records and performed a physical examination. On physical examination Dr. Henke noted localized tenderness present over the right lateral posterior cervical muscles that extended into the deltoid muscle and increased when Claimant attempted to perform right shoulder active ranges of motion. Dr. Henke also noted hand grip strength, measured with dynamometer, to be right grip 20 pounds and left grip 42 pounds. He noted pinwheel testing of the right upper extremity showed decreased sensation over the right posterior hand and thumb and positive tinel's sign in the right wrist. *See* Exhibit B.

24. Dr. Henke noted that Claimant's complaints currently included constant right upper extremity pain, hand tingling, cramping, and that Claimant had weak right grip strength. Dr. Henke opined that Claimant was not at MMI for her injury. Dr. Henke recommended a thermo graphic examination for reflex sympathetic dystrophy which he opined was strongly suspected clinically. He also recommended follow up with orthopedic surgeon Dr. Failinger for consideration of any further surgical procedures that might be recommended. Dr. Henke did not perform an impairment rating. *See* Exhibit B.

25. On October 4, 2016 Claimant underwent an Independent Medical Evaluation (IME) performed by Lawrence Lesnak, D.O. Claimant reported while attempting to move her housekeeping cart another employee grabbed and quickly pulled the cart and that her right arm was pulled and she felt an acute pop in her right shoulder and also developed acute pain. Claimant reported that she had constant diffuse right shoulder, suprascapular, and right upper arm pains with associated weakness. Claimant reported no right elbow, forearm, wrist, hand, or finger symptoms. Claimant reported that her pain level was 70/100. Dr. Lesnak reviewed medical records and performed a physical examination. On examination, Dr. Lesnak found absolutely no evidence of any type of abnormal skin temperature, skin color, skin hair, or nail changes throughout the bilateral upper extremities. Dr. Lesnak noted passive range of motion of Claimant's right shoulder was difficult to assess because of her significant guarding with any attempts of flexion or extension greater than 50 degrees. Dr. Lesnak noted that Claimant was able to perform greater active range of motion measurements than was seen during his attempts at active range of motion of the right shoulder. Dr. Lesnak found no trigger points or muscle spasms and no evidence of any specific soft tissue or bony abnormalities. *See* Exhibit A.

26. Dr. Lesnak provided impressions including: subjective complaints of constant diffuse right shoulder, suprascapular, and right upper arm pains and weakness without any symptoms radiating at or involving below the right elbow; no current clinical evidence of right rotator cuff impingement signs, cervical or thoracic radiculitis, radiculopathy, or myelopathy, neurogenic or vascular thoracic outlet syndrome, or right

elbow or wrist joint pathology; and probable residual right shoulder girdle/upper arm myalgias. Dr. Lesnak opined that there was absolutely no current clinical evidence of sympathetic dysautonomia, including CRPS type 1. Dr. Lesnak opined that Claimant's self-reported functional abilities absolutely did not correlate with any clinical exam findings or with Claimant's medical history. Dr. Lesnak noted that despite extensive treatments Claimant had not had any significant improvements of her pre-operative right shoulder symptoms. *See* Exhibit A.

27. Dr. Lesnak noted that Dr. Henke at the DIME had suggested that Claimant may have some type of ongoing neurologic condition such as sympathetic dysautonomia/CRPS type 1 but opined that during his examination Claimant had absolutely no clinical findings of sympathetic dysautonomia. He noted no skin color, temperature, hair, or distal upper extremity nail changes whatsoever as compared to the left upper extremity and that Claimant had symmetrical and normal capillary refill throughout her upper extremities bilaterally as well as no evidence of any type of peripheral edema or swelling involving her right upper extremity. He noted that the Medical Treatment Guidelines, Rule 17, Exhibit 7 for CRPS/RSD noted that specific criteria must be met to provide a diagnosis of CRPS and that although Claimant had ongoing pain complaints, Claimant would need one symptom in three out of four categories: sensory, vasomotor, pseudomotor/edema, and motor/trophic. Dr. Lesnak opined that Claimant had zero out of four of the symptom categories. Dr. Lesnak opined that without meeting any of the diagnostic component criteria to provide a diagnosis of CRPS, Claimant was not a candidate for any diagnostic testing and that diagnostic testing was not indicated whatsoever. *See* Exhibit A.

28. Dr. Lesnak opined that Dr. Henke's opinion that Claimant may have sympathetic mediated pain/sympathetic dysautonomia/CRPS type 1 was incorrect. Dr. Lesnak noted that although Claimant had ongoing complaints of pain involving her right shoulder, suprascapular, and right upper arm, the components appeared to be stemming purely from a myofascial etiology involving her right shoulder girdle musculature. Dr. Lesnak opined that without any current diagnostic criteria to support the diagnosis of sympathetic dysautonomia/CRPS, Claimant required no further diagnostic testing whatsoever, including tomography. Dr. Lesnak also opined that the recommendation to return to the treating surgeon Dr. Failinger was completely inconsistent with the medical records. Dr. Lesnak opined that it was quite clear that Claimant remained at MMI and concurred with Dr. Burris' MMI date of November 19, 2015. *See* Exhibit A.

29. As part of the IME, Claimant underwent a computerized outcome assessment that included a psychosocial evaluation and a self-reported functional evaluation. Claimant scored in the distressed somatic category for psychosocial functioning and scored in the worst level of 0/12 for self-reported perceived function. Dr. Lesnak opined that the results suggested that there were significant psychosocial factors present and affecting Claimant's symptoms, recovery, and perceived function. Dr. Lesnak noted that Claimant viewed herself as being completely unable to perform any significant activities with her right upper extremity whatsoever and unable to

perform normal work activities. Dr. Lesnak noted, however, that Claimant had been performing normal work activities for nearly the past one year. Dr. Lesnak opined that based on the results, Claimant's subjective complaints were unreliable at best and that one had to rely solely on reproducible objective findings rather than Claimant's complaints. *See* Exhibit A.

30. Both Dr. Henke and Dr. Lesnak provided testimony in this matter.

31. Dr. Lesnak opined that Claimant's care had been appropriate and that after her surgery she did not recover as expected and was treated until she reached a point of stability. Dr. Lesnak opined that Claimant was at MMI. He noted that her orthopedic surgeon Dr. Failinger had discharged her from treatment with no ongoing recommendations and that the delayed recovery specialist Dr. Burris believed she was at MMI. He testified that Claimant had a lot of somatic pain complaints and he questioned the reliability of Claimant's subjective reports and opined that you couldn't diagnose based just on Claimant's complaints but needed to rely on the objective in Claimant's case. He noted that Claimant's physical examination and active versus passive range of motion did not make sense. Dr. Lesnak noted that Claimant's EMG had showed no neurologic abnormality. Dr. Lesnak testified that he disagreed with Dr. Henke and that his exam had showed no evidence of CRPS or reason to do further testing. Dr. Lesnak testified that Claimant had no indications consistent with the Medical Treatment Guidelines for possible CRPS and that there was no indication for CRPS testing.

32. Dr. Lesnak testified that Claimant's somataform, complaints out of proportion to objective findings, lack of criteria per the Medical Treatment Guidelines, and lack of physical findings showed that Claimant did not have CRPS. Dr. Lesnak noted that none of Claimant's providers before the DIME even speculated about CRPS and that Dr. Henke was not correct and erred. Dr. Lesnak also opined that Claimant did not need to go back to surgeon Dr. Failinger and that she had been released as no further surgical treatment was needed and that there was no need to go back to the surgeon. Dr. Lesnak noted that Dr. Henke did not perform a preliminary rating as required and did not follow the DIME rules.

33. Dr. Lesnak testified that a right shoulder joint replacement was never mentioned by Dr. Failinger as a recommendation, remote recommendation, or even a possibility. Dr. Lesnak opined that the MRI from June of 2015 showed that the rotator cuff was intact with no recurrent full thickness tears. Dr. Lesnak opined that any tremor Claimant had would not be associated with a shoulder abnormality.

34. Dr. Henke testified that a shoulder injury doesn't cause the type of reaction Claimant has had and that he recommended thermographic testing to evaluate and rule out CRPS. Dr. Henke opined that CRPS was unpredictable and that symptoms can vary. Dr. Henke noted that the Medical Treatment Guidelines are very broad and that symptoms of this condition can vary. Dr. Henke testified that a patient with early signs of CRPS may have days where they have very little clinical findings and

that in the first phase of dystrophy condition it is varied. Dr. Henke opined that only when a patient gets to the second or third stages are symptoms constant. Dr. Henke testified that thermography would be of help in trying to determine if CRPS was the condition causing Claimant's hand tremor or constant pain.

35. Dr. Henke testified that Claimant had an EMG test which was quite different than a thermography test. Dr. Henke opined that an EMG is for peripheral nerves when the thermography is for sympathetic nerves and opined that the EMG test cannot identify RSDS conditions. Dr. Henke noted that the Medical Treatment Guidelines indicate some of the clinical findings that may be present in the very early stages but that the symptoms are not consistent and that it is conceivable that on the day Claimant was examined by Dr. Lesnak, she didn't have any of the findings. Dr. Henke opined that the thermogram was necessary.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME on MMI

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." *See* § 8-40-201(11.5), C.R.S. Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

Respondents have failed to meet their burden to overcome the opinion of DIME physician Dr. Henke that Claimant is not at MMI. As found above, DIME physician Dr. Henke opined that Claimant was not at MMI and believed that Claimant's continued symptoms were consistent with potential CRPS and that Claimant had not been sufficiently worked up. Dr. Henke opined that an additional diagnostic procedure (thermogram) offered a reasonable prospect to further define Claimant's condition or suggest further treatment. It is unclear whether Claimant has CRPS. Claimant does not meet all of the diagnostic criteria for CRPS pursuant to the Medical Treatment Guidelines. However, Dr. Henke is credible and persuasive that the symptoms can be present at times and not present at other times. As found above, at different points in her treatment after her right shoulder surgery, Claimant has had decreased grip strength in her right hand, fine tremors in her right arm/hand, and swelling in her right arm/hand. Claimant also has symptoms that are not easily explained. The symptoms Claimant has displayed intermittently have been noted by multiple providers including Dr. Henke, Dr. Failinger, and PA O'Neal. As found above, Dr. Failinger noted the tremors at his final examination of Claimant. Dr. Failinger also recommended ruling out a neurologic abnormality.

Although Claimant's symptoms were not present on some examination dates, including at the IME performed by Dr. Lesnak, Dr. Henke credibly explained that they might not be present at times. Dr. Lesnak opined that Claimant did not have any diagnostic criteria to support the diagnosis of CRPS and therefore required no further diagnostic testing, however, his opinion was largely based on the belief that Claimant had no criteria on the date of his exam. His opinion also noted that Claimant's subjective reports could not be relied upon due to Claimant's high degree of somatization. Although Claimant may have psychosocial issues and somatization disorder, there is also a possibility that she may have early stage CRPS. The testing recommended by DIME physician Dr. Henke offers a reasonable prospect to further define Claimant's condition. Respondents have failed to show that Dr. Henke erred in determining that Claimant is not at MMI. Rather, Dr. Henke has recommended additional diagnostic testing that is supported by some of Claimant's intermittent symptoms and unexplained pain levels. Although the thermography testing might ultimately rule out CRPS, the testing offers a reasonable prospect to further define Claimant's condition or suggest further treatment. Dr. Lesnak's opinions are, at best, a difference of opinion and Respondents have failed to overcome Dr. Henke's opinions by clear and convincing evidence. Claimant is not at MMI. Respondents shall authorize thermography testing.

Dr. Henke also recommended a referral back to Dr. Failinger for further evaluation. This is found to be in error. Dr. Failinger indicated in his last examination of Claimant that there was nothing further he could do for her shoulder, that she had an intact repair, and he recommended ruling out a neurologic abnormality. Nothing further has been done to rule out a neurologic abnormality and there is no indication of new injury or trauma to Claimant's right shoulder that would necessitate a new evaluation with Dr. Failinger. Essentially, he opined that her shoulder repair was intact and that he couldn't do anything more and couldn't explain her pain. There is no reason that

sending Claimant back to Dr. Failinger would assist in any neurologic evaluation (he is an orthopedic surgeon) and there is no evidence/indication to support the need for a further orthopedic evaluation. Although Claimant is not at MMI due to the thermography recommendation, the referral to Dr. Failinger is in error. Claimant does not need to be evaluated again by Dr. Failinger prior to a determination of MMI as Dr. Failinger has released her with no further orthopedic recommendations.

ORDER

1. Respondents have failed to overcome the DIME physician's opinion on MMI by clear and convincing evidence. Claimant is not at MMI.

2. Respondents shall authorize and pay for the recommended thermography testing.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 24, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Respondent established by a preponderance of the evidence that they are entitled to withdraw their March 30, 2016 General Admission of Liability (GAL) which admitted liability for a December 25, 2015 injury and payment of medical and temporary partial disability (TPD) benefits.

II. If Claimant did suffer a compensable injury on December 25, 2015, whether she established by a preponderance of the evidence that the left knee surgery proposed by Dr. Steven Side is reasonable, necessary and related to said December 25, 2015 injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Drs. O'Brien and Smith, the ALJ enters the following findings of fact:

1. On December 25, 2015, Claimant was getting out of her car in the parking lot of her employer. As she exited her car, she stepped on an uneven icy patch just outside the car door. She twisted her knee, heard a pop and experienced pain behind her knee and calf. Claimant was able to catch herself against the car door and steering wheel arresting her fall to the ground.

2. Claimant reported to work. As her shift wore on, Claimant's knee and calf pain gradually worsened throughout the evening. At approximately 12:35 am, she sent an email to her supervisor, Joy Anderson, the Director of Nursing reporting that she twisted her left knee while getting out of her car to report to work. Claimant indicated that her left knee was tender but not swollen. She also reported that she had a discolored bump on her right hand from hitting it on the steering wheel when she slipped.

3. A few days later, on December 28, 2015, Claimant presented to Dr. Courtney Isley, her primary care physician at Banner Health in follow-up for her diabetes, hyperlipidemia, a screening for colon cancer, and the persistent pain in left calf following the December 25, 2015 slip and twist incident. Claimant, who is a nurse, was concerned that she had a blood clot in her left calf due to the swelling. Claimant testified that she did not attribute the potential blood clot to the December 25, 2015 incident.

4. Dr. Isley noted that Claimant's left leg started hurting constantly three days ago. Claimant reported that she was experiencing pain in addition to aching and burning behind the knee which radiated down into the calf and up into the groin. Dr. Isley referred Claimant for an ultrasound to rule out a deep vein thrombosis ("DVT").

5. Claimant underwent an ultrasound which was negative for DVT.

6. On January 4, 2016, Claimant reported the Dr. Cathy Smith (at Banner Occupational Health Clinic. Dr. Smith noted that after Claimant saw her primary care physician she continued to work but the pain did not subside. She reported that she had to change shifts with coworkers for shorter shifts because of her inability to stand and walk a full shift. She rated her pain at a 9/10. Physical examination revealed that Claimant complained of significant discomfort with direct palpation over the popliteal area and tenderness with direct palpation of the upper calf; however, Claimant did not report swelling in the rest of the calf. *Id*.

7. Dr. Smith noted that Claimant suffered from a slip and twist at work resulting in left knee and calf strain, Baker's cyst in left knee, and contusion of right hand. Dr. Smith placed Claimant on restricted duty. Claimant was referred for an x-ray of the left knee to rule out bony abnormality, referred for physical therapy to address continued discomfort in the posterior knee, and given crutches due to her gait abnormality. Dr. Smith noted that at that time that it appeared Claimant had a deep upper calf strain that was aggravated by her abnormal gait over the week.

8. On January 4, 2016, Claimant underwent an x-ray of her left knee that revealed mild to moderate lateral compartment joint space loss but not acute injury.

9. On January 20, 2016, Claimant returned to Dr. Smith for follow-up. During this visit, Claimant reported that her left knee had improved with physical therapy. Nonetheless, Claimant reported constant fullness under the kneecap.

10. By February 9, 2016, Claimant was reporting to Dr. Smith that she can do about five steps before she develops a severe pressure sensation under the knee cap and in the popliteal area. It was noted that while her calf pain had improved, she still had pain with deep palpation therapy. Claimant was instructed to continue physical therapy.

11. On March 8, 2016, Claimant returned to Dr. Smith reporting that her left knee pain had improved in some ways. Regardless, she reported continued pain while descending stairs, standing for too long and prolonged walking. Dr. Smith also noted that Claimant's physical therapist had indicated that since Claimant's swelling and muscular pain had subsided, her examination revealed what he felt was suspicious for meniscal involvement. Consequently, Dr. Smith referred Claimant for an MRI of her left knee.

12. On March 15, 2016, Claimant underwent an MRI of her left knee which revealed:

- Abnormal signal and morphology of the posterior horn root attachment of the medial meniscus, concerning for fraying vs. ill-defined tearing at this site. Posterior horn of the medial meniscus peripheral to this site demonstrates abnormal intrasubstance signal concerning for

intrasubstance tearing, without definite extension to an articular surface.

- Mild to moderate chondral degenerative changes involving articular cartilage over the inferior aspect of the lateral patellar facet. There is also evidence of a mild degree of Hoffa's disease (impingement of the superolateral aspect of Hoffa's fat). This constellation of findings raises suspicion for a possible patellar tracking disorder.

- Small joint effusion, and mild synovitic changes.

13. On March 28, 2016, Claimant was examined by Dr. Linda Young. Dr. Young performed a Kenalog injection on Claimant's left knee.

14. On March 30, 2016, Respondents filed a General Admission of Liability (GAL) admitting liability for medical and temporary partial disability benefits associated with Claimant's December 25, 2015, slip and twist injury.

15. On April 25, 2016, Claimant returned to Dr. Young reporting improved general pain levels after her injection four weeks prior. Nonetheless, Claimant continued to complain of pain more laterally in the band across the patella than elsewhere in the knee.

16. On May 4, 2106, Claimant returned to Dr. Smith reporting continued sharp pain if stepping wrong. Dr. Smith noted that Dr. Young did not feel that Claimant had a surgical problem and that with strengthening the problem would resolve. Continued physical therapy was recommended.

17. On June 14, 2016, Respondents retained Dr. Timothy O'Brien to perform an independent medical evaluation (IME) of Claimant. Dr. O'Brien opined that there is no medical documentation that supported a conclusion that Claimant sustained a work injury on December 25, 2015. Dr. O'Brien indicated that "his examination revealed that Claimant's knee as was still inflamed and symptomatic but this was to be expected given her long-standing, pre-existing, moderately-to-severely advanced osteoarthritis of the lateral compartment of her knee."

18. On July 5, 2016, Claimant returned to Dr. Smith. Dr. Smith referred Claimant back to an orthopedic specialist for possible repeat injection. She was also instructed to continue physical therapy.

19. On August 15, 2016, Claimant was examined by orthopedic surgeon, Dr. Steven Sides. Dr. Sides noted that Claimant had an acute medial meniscus tear of the left knee. He noted that Claimant had not improved with conservative management. Accordingly, Claimant recommended considering diagnostic arthroscopy opining further that he would not continue to inject Claimant's knee due to the paucity of other findings by exam and MRI.

20. On August 25, 2016, Claimant was examined by Dr. Smith who instructed Claimant to follow up with Dr. Side for arthroscopic surgery. In her report generated as part of this visit, Dr. Smith noted:

> We discussed the mechanism of injury with twisting of the knee while falling backwards does explain not only the muscle injury, but also the posterior medial meniscus injury. She was counseled that I am not surprised that pain did not seem to be localized over the posterior medial meniscus until the muscle pain had subsided; therefore, I agree with Dr. Sides' assessment and recommendations for the surgery since she has exhausted all conservative care at this point. We also reviewed the IME report from Dr. O'Brien. [Claimant] is adamant that she did not have an injury to the knee in November of 2015 as reported by Dr. O'Brien… She states that at her regular visit, she was concerned about the calf pain and possible DVT, so did not think about the slip and twist being the cause of the symptoms. We reviewed the MRI report and that the radiologist report does not in any way agree with Dr. O'Brien's interpretation of the MRI. They are so radically different that he is suspicious that they were not looking at the same MRI.

21. On September 26, 2016, Claimant returned to Dr. Smith in follow-up. Dr. Smith noted that they were waiting to hear from Respondents as to whether or not the surgery recommended by Dr. Sides was approved.

22. On September 29, 2016, Respondents retained Dr. Timothy O'Brien to perform a follow-up IME of Claimant. Dr. O'Brien opined that the arthroscopic surgery recommended by Dr. Sides was "contraindicated, not reasonable and [would] not relieve the claimant's symptomatology." He also opined that Claimant had a non-work related onset of left knee pain and that Claimant did not sustain a work-related injury.

23. Dr. O'Brien based his opinions on his interpretation of the MRI of Claimant's left knee. Regarding the MRI, Dr. O'Brien opined that it demonstrated osteoarthritis of the patellofemoral joint. Dr. O'Brien also felt that Claimant's age and weight were contributing factors in causing her symptoms. Finally, Dr. O'Brien cited a journal from the New England Journal of Medicine released 2002 as evidence that the proposed surgery is contradicted to treat osteoarthritis.

24. On October 24, 2016, Claimant returned to Dr. Smith for examination. Dr. Smith noted that she was concerned about the "severe quadriceps atrophy and how this will delay recovery once she has surgery." Dr. Smith started Claimant back on physical therapy and fitted her for a new hinge brace.

25. Dr. Smith testified by deposition as a Level II Accredited expert in Occupational medicine on December 7, 2016. Dr. Smith testified that Claimant was initially assessed with a strain to the knee along with a muscular strain in the upper calf in the posterior

portion of the knee. According to Dr. Smith, the upper-calf strain resolved with time and as the muscular pain subsided, the continued pain was consistent with a possible meniscus injury. Dr. Smith clarified that Claimant complained of posterior knee pain where the upper calf muscles attach to the back of the knee from the beginning, that is right after the December 25, 2015 incident and after the swelling had abated her continued pain in the back of the knee raised suspicion that something was going on with the medial meniscus.

26. Dr. Smith testified that findings on Claimant's MRI were acute in origin or sub-acute rather than degenerative in nature. She felt Dr. O'Brien's interpretation of the MRI was "significantly different" that than the findings of the interpreting orthopedic radiologist in that there was no mention by the radiologist of severe osteoarthritis anywhere in the knee causing her to question why Dr. O'Brien would recommend a total knee replacement procedure. She also took exception to Dr. O'Brien's suggestion that Claimant suffered an injury to the knee on November 15, 2016, indicating that the medical records fail to substantiate any such injury. Finally, Dr. Smith explained that she also questioned Dr. O'Brien's description of the mechanism of injury (MOI) and his conclusion that it was not consistent with a meniscus tear explaining that the described MOI would stress the "posterior horn of the medial meniscus where the tear is located and also explain the significant strain to the upper calf. Dr. Smith testified that Claimant's meniscal injury was overshadowed by her calf injury suggesting that as the calf injury resolved Claimant's meniscal tear became more apparent as it remained symptomatic.

27. Dr. Smith testified that in her opinion, based upon a reasonable degree of medical probability that the arthroscopic knee surgery recommended by Dr. Sides is reasonable, necessary and related to the injury that occurred on December 25, 2016. During cross examination, Respondents counsel questioned Dr. Smith about journal articles tending to establish that arthroscopic surgery for osteoarthritis is unsuccessful in abating symptoms associated with the disease. While she agreed with this principal, Dr. Smith clarified that Claimant did not have severe osteoarthritis and that the surgery recommended by Dr. Sides was to address a meniscus tear.

28. Dr. O'Brien's deposition was taken on January 9, 2017. The transcript was lodged with the Office of Administrative Courts on April 6, 2017. Dr. O'Brien testified consistent with his IME reports reiterating that Claimant's MRI demonstrated arthritis in the knee and that this arthritis was deteriorating the backside of the kneecap and the lateral compartment of the knee between the femur and the tibia. He also testified that Claimant's arthritis affects the meniscal cartilage suggesting then that the tear in the meniscus is degenerative in nature rather than acute. Dr. O'Brien would go on to testify that the condition of Claimant's knee is a "personal health issue that's due to the following factors. No 1, her genetic makeup. No. 2, her age. No.3, her gender, which is a subset of her—of No. 1, genetics. No. 4, obesity. No. 5, diabetes.

29. Dr. Sides testified via post hearing deposition on February 13, 2017. Dr. Sides

was admitted as an expert in the field of orthopedic surgery. Dr. Sides testified that he met with Claimant one time and that during that visit he took a history from Claimant regarding the injury. He testified that Claimant reported slipping on ice and twisting her knee. Dr. Sides testified that he reviewed both x-ray and MRI images of Claimant's left knee and although the x-rays were not weight bearing both the x-rays taken, along with the MRI, failed to demonstrate any "significant" arthritis.

30. Dr. Sides testified that he reviewed the actual films from the MRI and x-ray and then correlated it with what the radiologist report reads. He testified that based on Claimant's x-ray, MRI, and his physical examination he was suspicious about meniscal involvement as Claimant's main problem.

31. Dr. Sides testified that Claimant has "already had a good trial of nonoperative treatment. So he thought it would be reasonable to do a knee scope and to address what he felt like was going on inside the knee. Dr. Sides testified that based upon his experience of performing perhaps a thousand knee arthroscopies for meniscus tears, the surgery tends to have good success rates. He testified, "it's minimally invasive. So if you have a small meniscus tear like hers appears, you can usually perform a partial medial meniscectomy and it will help their symptoms and they can get back to being more active after a brief recovery period."

32. Dr. Sides testified that Claimant does not suffer from advanced osteoarthritis in the left knee and while it is difficult to say "completely" that the findings on MRI was acute, there's not any chronic arthritis in the knee on MRI, so the "signal change in the meniscus would be more acute than chronic."

33. Addressing what Respondents believe was a delay in seeking treatment, Dr. Sides testified in contrast to Dr. O'Brien that many people wait longer than three days to seek treatment. According to Dr. Sides some people "gimp" around and sometimes don't present to treatment for "several weeks." Consequently, Dr. Sides did not believe the fact that Claimant did not seek treatment for three days following the inciting event "unusual". Moreover, Dr. Sides responded to the suggestion that Claimant did not complain of swelling in the knee upon initial presentation to Dr. Isley by indicating that the report generated after the initial visit is devoid of any indication that a physical examination was completed. Thus, while the ALJ is persuaded by Dr. O'Brien's testimony that it would be unusual for a patient with an acutely torn meniscus to have no objective findings of a traumatic injury at the initial visit, the ALJ finds the lack of objective findings attributable to Dr. Isley's failure to document the same in her report of December 28, 2015, rather than the suggestion that Claimant did not report swelling.

34. Regarding the MRI, Dr. Sides testified that Dr. O'Brien was overstating what was present on imaging and what Dr. Fuller, the interpreting radiologist included in his report. According to Dr. Sides, the MRI and Dr. Fuller's report support a finding of "one area of lateral patellar condromalacia" rather than "mild-to-moderate osteoarthritis in the patellofemoral joint as well as mild-to-moderate chondromalacia" as testified to by Dr. O'Brien. Moreover, even if Claimant had the "makings of early arthritis" under the

kneecap, Dr. Sides testified that the proposed surgical intervention would be focused to her medial meniscus where there is no evidence of chondromalacia and where Claimant's symptoms were probably coming from per his examination.

35. The ALJ finds the opinions of Dr. Smith and Sides to be supported by the record evidence submitted, including the MRI and x-ray imaging. Conversely, the ALJ finds the testimony and opinions of Dr. O'Brien speculative and overstated. Accordingly, the ALJ finds the opinions of Dr. Smith and Sides more persuasive than the contrary opinions of Dr. O'Brien.

36. The evidence presented convinces the ALJ that Claimant likely injured her left calf and knee during the December 25, 2015, twisting incident and that she only became aware of the meniscal tear when the effects of the calf injury resolved and the knee remained symptomatic. While the ALJ is persuaded that Claimant likely had pre-existing degenerative changes behind the kneecap and in the lateral compartment of the left knee, the proposed surgery is necessary to address probable pathology in the posterior aspect of the medial meniscus where Claimant's symptoms are likely emanating from and where there is no evidence of chondromalacia. Consequently, the ALJ finds ample evidence to support a finding that this meniscal pathology (tear) is acute and likely caused by Claimant's sudden and unexpected December 25, 2015 twisting event as described. Accordingly, the ALJ is persuaded that Claimant sustained a compensable left knee injury resulting in her need for treatment, including meniscal surgery.

37. To the extent that Respondent's seek to withdraw the March 30, 2016 GAL on the grounds that Claimant did not suffer a compensable injury resulting in the need for treatment and payment of temporary partial disability benefits, the evidence presented persuades the ALJ otherwise. In this case, the evidence presented establishes that the GAL was filed approximately three months after Claimant provided a statement to her supervisor regarding the MOI and nature of the injuries sustained and after substantial treatment and diagnostic testing had been received. Based upon the evidence presented, the ALJ finds that Respondent had the information necessary to admit to liability and initiate payment of benefits. Given that they had substantial information regarding the incident in question along with the treatment received therefore and still took approximately three months to consider it before filing their GAL, the ALJ finds any assertion that the GAL was filed improvidently unpursuasive.

38. Respondent has failed to establish by a preponderance of the evidence that Claimant did not sustain a compensable left calf and knee injury on December 25, 2015 entitling them to withdraw their March 30, 2016 General Admission of Liability (GAL).

39. Based upon the evidence presented, the ALJ finds that Claimant has failed conservative treatment and that the surgery recommended by Dr. Sides will probably help cure and relieve her of the ongoing symptoms associated with her left posterior medial meniscal tear. Consequently, the ALJ finds the proposed surgery reasonable and necessary.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

I. General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As found, both Dr. Smith and Dr. Sides agree that Claimant does not have severe osteoarthritis. Their opinions in this regard are supported by the record evidence as a whole and in particular by the x-rays and MRI images obtained. Since Dr. O'Brien's opinion regarding the reasonableness, necessity and relatedness of surgery revolves around an "overstated" theory that Claimant suffers from advanced osteoarthritis while ignoring evidence that there is no chondromalacia in the medial compartment where the surgery will be focused, the ALJ concludes that Dr. O'Brien's opinions are unpersuasive. Moreover, for the reasons cited above, the ALJ is also unpersuaded by Dr. O'Brien's opinion that Claimant did not suffer a compensable injury to the left knee

because she waited three days to seek care and because the initial examination report failed to document evidence of swelling consistent with an acute injury.

II. Respondents' Request to Withdraw the March 30, 2016 General Admission of Liability

D. Pursuant to § 8-43-201(1), C.R.S., Respondents bear the burden of proof regarding any attempt to modify an issue that previously has been determined by an general or final admission of liability or an order. *Section 8-43-201(1), C.R.S*.; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the 8-43-201 in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

E. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. In this case, Respondents, relying principally on the opinions of Dr. O'Brien are seeking to modify an issue determined by the March 30, 2016 GAL, specifically compensability. Therefore, the burden is on Respondents to prove that Claimant did not sustain a compensable injury. In this case, the evidence presented convinces the undersigned ALJ that Claimant, more probably than not, suffered an acute tear to the posterior horn of the medial meniscus of the left knee due to a sudden and unexpected twisting after slipping on icy while exiting her car to report to work. Moreover, the evidence persuades the ALJ that while Claimant likely had pre-existing degenerative changes behind the left kneecap and in the lateral compartment of the left knee, the proposed surgery is necessary to address the probable pathology in the posterior aspect of the medial meniscus where Claimant's symptoms are likely emanating from and where there is no evidence of chondromalacia. Based upon the evidence presented as a whole, the ALJ is persuaded that Claimant sustained a compensable left knee injury resulting in her need for treatment, including meniscal surgery. Consequently, Respondents have failed to prove, by a preponderance of evidence, that they are entitled to withdraw the GAL filed March 30, 2016.

* * *

F. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo.App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

G. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo.App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found in this case, the totality of the evidence presented persuades the undersigned ALJ that Claimant's current symptoms and need for treatment, i.e. an arthroscopic partial medial meniscectomy is causally related to an acute tear caused by an unexpected twisting injury sustained on December 25, 2015. In so concluding, the undersigned ALJ rejects Dr. O'Brien's contrary opinions as unpursuasive.

H. Once a claimant has established the compensable nature of his/her work injury, as in this case, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo.App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*. As found, Claimant has established that her need

for arthroscopic surgery is directly related to her compensable left knee injury. Nonetheless, the question of whether the arthroscopy is reasonable and necessary must be addressed.

The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984). As found here, Claimant has proven by a preponderance of the evidence that the left partial medial meniscectomy is reasonable and necessary. The medical reports submitted and testimony generated outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Sides to recommend surgery which he testified has "good success rates" in reliving the symptoms associated with small meniscal tears such as the one suffered by Claimant in this case. Dr. O'Brien disagrees, citing concerns that surgical intervention will only serve to introduce additional trauma that will "awaken quiescent areas of osteoarthritis and result in an intractable synovitis that actually results in more pain rather than less pain." While Dr. Sides generally agreed that performing surgery on patients with severe osteoarthritis is generally contraindicated, he concluded that Claimant does not have osteoarthritis and as such the opinions espoused by Dr. O'Brien do not apply in the instant case. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that the left knee arthroscopy presents as a reasonable and necessary procedure to cure and relieve Claimant of the ongoing effects of her December 25, 2015 industrial injury.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish by a preponderance of the evidence that the Claimant did not suffer a compensable injury while in the course and scope of her employment on December 25, 2015. Therefore, Respondents request to withdraw the March 30, 2016 General Admission of Liability is denied and dismissed.

2. Respondent-Insurer shall pay for all medical expenses to cure and relieve Claimant from the effects of her December 25, 2015 left knee injury, including but not limited to the arthroscopic surgery recommended by Dr. Sides.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 25, 2017

/s/ Richard M. Lamphere_____
Richard M. Lamphere
Administrative Laws Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Whether Claimant has proven, by a preponderance of the evidence, she sustained an occupational disease arising out of and in the course and scope of her employment with Employer.

II. If Claimant has proven she sustained an occupational disease, whether Claimant has proven by a preponderance of the evidence that she is entitled to reasonable, necessary and related medical treatment.

III. Whether UC Health (Tracey Stefanon, D.O.) remains an Authorized Treating Physician ("ATP").

STIPULATIONS

At hearing, the parties stipulated that if the claim is found compensable, Claimant's average weekly wage ("AWW") is $2,445.00, the time periods of temporary total disability benefits ("TTD") are August 8, 2016 through November 21, 2016 and November 28, 2016 through December 11, 2016, and the time periods of temporary partial disability benefits ("TPD") from November 22, 2016 through November 27, 2016, and December 12, 2016 onward.

FINDINGS OF FACT

1. Claimant worked as a pharmaceutical sales representative for Employer. Claimant worked in such capacity for Employer since 2012, relocating from Alaska to Colorado in August 2015 for a promotion. Claimant testified that, while working in Alaska, she primarily flew to different locations for work purposes and her job duties did not involve much driving.

2. Claimant testified she was promoted in approximately February 2016. Claimant spent approximately one month studying at home and then began field work in approximately March 2016. Claimant's job duties required Claimant to drive to various medical offices throughout her territory of Colorado and Wyoming. Claimant drove a company vehicle. Claimant testified that, after the promotion, her driving time increased from approximately three hours per day to six or seven hours per day.

3. Claimant testified she began noticing discomfort in her tailbone in late March 2016. Claimant testified the pain became "excruciating" approximately one month later, which caused her to visit her personal chiropractor.

4. Claimant first treated with her personal chiropractor, John H. Zimmerman, D.C., on April 29, 2016. Claimant reported tailbone and sacral pain that had been occurring

for two months, with right-sided sacral pain for a longer, unspecified amount of time. Dr. Zimmerman assessed an ongoing S-1 problem. Claimant attended seven additional sessions with Dr. Zimmerman from May 6, 2016 to July 22, 2016.

5. Claimant notified her supervisor, Donald Cleveland, that she was experiencing back pain and that she believed the amount of time spent driving contributed to the pain. Mr. Cleveland recommended an ergonomic assessment of the company vehicle, which occurred at some point after Claimant went on a leave of absence in August 2016. Claimant testified she was informed she "already had the ergonomic vehicle choice" and there was nothing further that could be done. Claimant last worked for Employer on August 8, 2016. Claimant ceased working due to the pain.

6. Donald Cleveland testified at hearing on behalf of Respondents. Mr. Cleveland testified Claimant reported to him that she was experiencing back pain as a result of spending too much time in the car. Mr. Cleveland initially did not consider Claimant to have reported a work injury and believed Claimant's complaints necessitated an ergonomic evaluation of the company vehicle.

7. The First Report of Injury or Illness Form notes the date of injury as March 28, 2016, and the date employer notified of the injury as August 8, 2016.

8. On August 5, 2016, Claimant was evaluated by her personal physician, Vincent J. Ross, M.D., of the Orthopaedic & Spine Center of the Rockies. Claimant reported sitting and driving as the main causes of aggravation. On examination, Dr. Ross noted tenderness at the tip of Claimant's coccyx. Dr. Ross read radiology reports of Claimant's lumbar spine and noted Claimant's tailbone tipped anteriorly, taking "an angulated turn on the tip of the tailbone." Dr. Ross noted there were no acute findings and gave an impression of pain in the coccyx/tailbone. Dr. Ross recommended Claimant reduce the amount of hours she drove per day, getting a different seat, or getting a different vehicle. Dr. Ross did not address work-relatedness in his August 5, 2016 medical notes.

9. On August 16, 2016, Claimant was evaluated by Tracey L. Stefanon, D.O., of University of Colorado Health. Claimant reported that her tailbone pain developed in late February 2016. Claimant denied sustaining any prior injury to the area. Claimant reported doing five weeks of home study where she sat for approximately 10 hours per day, and that she then began driving for six to six-and-a-half hours per day in mid-April 2016, and sitting in medical offices for up to eight hours a day. Claimant reported experiencing pressure on her tailbone when sitting in the car seat. Claimant reported having a prior "history of SI pain in the past since the birth of her son." On examination, Dr. Stefanon noted full range of motion in the lumbar spine with no tenderness over the SI joints and or over the sacrum. Dr. Stefanon further noted focal tenderness over the coccyx, greatest at the tip. During the evaluation, Dr. Stefanon observed Claimant sitting in the seat of the company vehicle. Dr. Stefanon noted Claimant's sacrum contacted the back of the seat while Claimant was sitting, but that her coccyx did not contact the seat while in the seated position. Dr. Stefanon remarked, "I could not

appreciate any direct pressure over the coccyx itself. The seat does appear to be somewhat small compared to the patient's build." Dr. Stefanon assessed coccydynia. Dr. Stefanon opined that, "although possible, it is more medically probably than not Claimant did not have a work caused injury/condition." Dr. Stefanon concluded Claimant had "at least a variant in her coccygeal alignment," but that such findings were not caused by Claimant's sitting. Dr. Stefanon referred Claimant to a primary care manager for further evaluation and treatment.

10. At the request of Claimant, Dr. Stefanon reviewed Claimant's record and added an addendum to her August 16, 2016 record dated October 5, 2016. Dr. Stefanon stated she believed Claimant's chart and record were accurate and correct, and noted that viewing Claimant's x-rays would not have changed her opinion regarding the work-relatedness of the condition.

11. On August 22, 2016, Claimant attended an evaluation with Robert Nystrom, D.O., of Concentra Medical Centers. Claimant reported experiencing tailbone pain as of March 28, 2016, which she associated with sitting while driving. Claimant reported driving approximately five to six hours per day and sitting all day. Claimant reported that the driving and sitting increased approximately four to five months prior, and since then she experienced a progressive increase in pain. Dr. Nystrom noted Claimant reported Dr. Ross "told her she had a very angulated sacrum that would predispose her to sacral contusion/pressure with prolonged sitting." On examination, Dr. Nystrom noted normal gait, muscle strength, muscle tone, and range of motion. Dr Nystrom also noted tenderness over the distal end of the sacram. Dr. Nystrom assessed contusion of the sacram and referred Claimant to physical medicine and rehabilitation and physical therapy. Dr. Nystrom opined there is "a greater than 50% probability that this is a work-related injury."

12. Respondents filed a Notice of Contest on August 23, 2016.

13. Dr. Nystrom reevaluated Claimant on September 6, 2016. Claimant reported no significant improvement in her symptoms. Dr. Nystrom noted the same physical examination findings as the August 22, 2016 evaluation. Dr. Nystrom again assessed contusion of the sacram.

14. On September 12, 2016, Tashof Bernton, M.D. conducted an Independent Medical Evaluation ("IME") at the request of Respondents. Dr. Bernton reviewed Claimant's medical records and physically examined Claimant. Dr. Bernton noted Claimant had good range of motion in the lumbar spine with no tenderness of the SI joints, but mild tenderness over the trochanteric bursal area and at the base of the sacrum over the coccyx. Dr. Bernton assessed coccydynia. Dr. Bernton opined Claimant's condition is not work-related and is most likely idiopathic. Dr. Bernton explained that, generally, coccydynia is caused by direct trauma, pregnancy, or is idiopathic. Dr. Bernton opined it is unlikely Claimant's condition was caused by pregnancy because Claimant had a cesarean section. Dr. Bernton also noted Claimant had no trauma to the coccyx. Dr. Bernton opined Claimant's sitting at work did not

reasonably act as a primary causative factor. Dr. Bernton stated, "There is a difference between a condition, which hurts while performing a specific activity, and the specific activity causing or empirically exacerbating the problem." Dr. Bernton noted, "Although (as with any cause of coccydynia) she will experience greater symptoms while sitting, there is not a sound objective medical basis for the determination that, to a reasonable degree of medical probability, the sitting itself is the cause or substantial aggravation of the problem." Dr. Bernton opined Claimant did not require treatment or result in impairment on a work-related basis. On a non-work-related basis, Dr. Bernton recommended using a donut cushion, avoiding prolonged sitting, and a trial of injection therapy.

15. Claimant participated in physical therapy with Orthopaedic Center of the Rockies from September 7, 2016 through September 20, 2016. September 20, 2016 evaluation note documents Claimant reporting "having pain with sitting and driving after her baby was born," and "having a lot of pain with any sitting position now."

16. On September 27, 2016, Claimant was evaluated by Shimon Blau, M.D. (Physiatry) of US MedGroup. Claimant reported an onset of pain in late March 2016 after sitting for about 10 hours per day while studying, then driving for increased periods of time. Claimant reported pain at a 4/10, reaching an 8/10, worsening with sitting and driving. Dr. Blau noted tenderness along the sacrococcygeal joint with good range of motion. Negative straight leg raise test bilaterally and negative neural tension bilaterally. Dr. Blau gave an impression of low back pain. Dr. Blau stated, "I agree with Dr. Nystrom that even though she may have an existing angulated sacrum, this may predispose her to pain in this area with prolonged sitting, which was then caused by her job. As such, I would consider this work-related." Dr. Blau recommended bilateral ultrasound-guided sacroiliac joint steroid/lidocaine injections.

17. Dr. Ross reevaluated Claimant on November 15, 2016. Claimant reported she was able to walk, climb, and hike, but that she could not sit without increasing discomfort. Dr. Ross noted Claimant was tender at the sacrum and the coccyx. Dr. Ross again noted Claimant's coccyx curves anteriorly. Dr. Ross recommended limiting extended sitting periods to 20 minutes.

18. Dr. Ross reevaluated Claimant on December 2, 2016. Claimant reported that she was not experiencing any relief. Dr. Ross noted tenderness around the coccyx and distal aspect of the sacrum. Dr. Ross gave an impression of sacrococcygeal pain/strain.

19. Dr. Bernton testified at hearing as an expert in internal medicine and occupational medicine. Dr. Bernton is board certified in internal medicine and occupational medicine and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Bernton testified consistent with his IME report, opining Claimant's occupational duties did not cause or aggravate Claimant's condition. Dr. Bernton testified that coccydynia may occur with blunt trauma or childbirth but, in large part, the cause of coccydynia is unknown. Dr. Bernton opined Claimant's pregnancy was more

than likely not the cause of Claimant's condition, and noted Claimant did not have a history of trauma to the coccyx. Dr. Bernton testified there is no causal medical connection between sitting and coccydynia.

20. Dr. Bernton noted Claimant's coccyx curves anteriorly, which is uncommon. Dr. Bernton noted the curvature of Claimant's coccyx likely puts "unusual stress" on the area and may be associated with Claimant's pain; however, Dr. Bernton noted sitting does not cause curvature of the coccyx. When asked if Claimant's angulated coccyx predisposed Claimant to having symptoms when pressure is applied to the coccyx, Dr. Bernton responded, "I don't think there's enough information to be able to answer that in the affirmative. All we can say is that it may be associated with coccydynia, but it doesn't mean if you apply pressure and you have an angulated coccyx, you're going to be more likely to develop coccydynia. We don't have that information." Dr. Bernton further testified, "The coccydynia predisposed her to developing the symptoms and requiring treatment. And the coccydynia is idiopathic, and it's not due to the environmental situation." Dr. Bernton testified that experiencing pain at a certain time is not dispositive of an occupational injury, and that it "simply means you have an abnormal condition which lowers your tolerance for the activities you're performing, and they therefore hurt when otherwise they wouldn't." Dr. Bernton testified that, if Claimant's condition was work-related, Claimant would see improvement in her symptoms once she ceased performing her occupational duties. Dr. Bernton opined that the lack of improvement in Claimant's condition after Claimant ceased performing her occupational duties indicates Claimant's condition is idiopathic, and not caused by her work.

21. Claimant testified Employer gave her a list of physicians sometime after she reported the injury. Claimant testified she chose UC Health as a provider and was treated by Dr. Stefanon.

22. A WC164 form Physician's Report of Worker's Compensation Injury dated February 7, 2017, Rosalina Pineiro, MD, noted a report type of "closing", stating no exam- case denied and released from care.

23. Claimant testified she did not experience coccyx pain prior to the onset of pain in approximately March 2016. Claimant testified she gave birth to her son via cesarean section in March 2015 and did not have any issues subsequent to his birth. Claimant later testified she had experienced some low back pain and discomfort since her pregnancy, but the pain was not consistent. Claimant testified that, prior to the onset of pain, she had been very athletic and had no issues performing physical activities. Claimant testified she has since ceased her involvement in sports and cannot sit without being in pain. Claimant testified she continues to experience intense pain when sitting for multiple hours at a time.

24. The ALJ credits the medical records and opinions of Drs. Bernton and Stefanon over the contrary opinions of Drs. Nystrom and Blau and finds Claimant did not sustain a work-related occupational disease or injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S. (the "Act"), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

A claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *See, Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section of the Act imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the condition for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

The ALJ concludes Claimant has not proven by a preponderance of the evidence she sustained a compensable occupational disease or injury. While Dr. Bernton testified the coccydynia "predisposed" Claimant to developing symptoms and requiring treatment, Dr. Bernton credibly established Claimant's coccydynia is idiopathic. Dr.

Bernton credibly opined there is insufficient medical information affirmatively establishing Claimant's angulated coccyx predisposed Claimant to having symptoms when pressure was applied to the coccyx. Moreover, Dr. Stefanon observed Claimant positioned in the company vehicle and credibly noted there was no pressure applied to Claimant's coccyx. Dr. Bernton credibly opined there is not an objective medical basis to determine, within a reasonable degree of medical probability, that sitting caused or aggravated Claimant's condition. While Claimant credibly testified the onset of pain occurred after increased hours of driving, there is insufficient persuasive evidence establishing more than a temporal connection. Dr. Stefanon credibly opined that, while possible, it is more likely than not Claimant's condition is not work-related. Based on the totality of evidence, Claimant has failed to demonstrate by a preponderance of the evidence that her work activities for Employer caused an occupational disease or injury, or aggravated, accelerated or combined with an underlying condition to produce the need for medical treatment.

As Claimant failed to establish a compensable occupational disease or injury, the other issues for determination are moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish, by a preponderance of the evidence, that he suffered an occupational disease or injury. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _____

_____
Administrative Law Judge Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor

Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment on September 26, 2014.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period October 9, 2014 until terminated by statute.

4. A determination of Claimant's Average Weekly Wage (AWW).

5. Whether Claimant has demonstrated by a preponderance of the evidence that Eco Roof and Solar is a statutory employer pursuant to §8-41-401(2), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Jose Lopez as a roofer. On September 2, 2014 Claimant was working on a project located at 4400 South Fox in Englewood, Colorado. He was walking on a roof carrying shingles on his shoulder when the roof collapsed under his left leg. Claimant's left leg plunged into a hole up to his hip area.

2. Eco Roof and Solar obtained the contract for roofing work at 4400 South Fox in Englewood, Colorado but subcontracted the work to Davie Roofing. Davie Roofing is operated by Victor Lopez Zapata. Claimant's Employer Mr. Lopez then obtained the roofing work from Davie Roofing.

3. Claimant testified that when his left leg plunged into the hole he experienced pain in his left knee and waist. After a short break he was able to complete his work for the day. At the end of his shift Claimant reported his injury to Mr. Lopez. However, because Mr. Lopez did not have Workers' Compensation insurance, he reported Claimant's injuries to Mr. Zapata of Davie Roofing.

4. Because Claimant's pain worsened when he arrived home on September 26, 2014 he did not work on the following Saturday and Sunday. When he returned to work on Monday he learned that Mr. Zapata of Davie Roofing was reviewing his insurance coverage. Claimant subsequently worked through October 9, 2014 but had to cease employment because of his injuries. He experienced significant pain and had difficulty walking because of his left knee injury.

5. Claimant's co-worker Axel Laredo testified that he did not directly witness Claimant's September 26, 2014 accident because he was not on the roof. However, he heard someone yelling, went up to the roof and saw Claimant's left leg in a hole. He subsequently observed Claimant's inability to properly use his left leg and shoulder over the following two weeks..

6. Claimant did not obtain medical treatment for his injuries during his last two weeks of work. After Claimant ceased working on October 9, 2014 he waited for an additional two weeks while Mr. Zapata checked his insurance status.

7. On October 28, 2014 Claimant visited the Denver Health Medical Center Emergency Room with complaints of neck, back, left knee, left foot and right foot pain. He was diagnosed with a non-displaced, comminuted fracture of the left knee patella, a thoracic strain and a foot strain. Claimant received a knee immobilizer, crutches and pain medications.

8. On November 21, 2014 Claimant visited the Denver Health Medical Center Orthopedic Clinic for an evaluation. He explained he had been injured at work and had a Workers' Compensation claim but had not sought treatment beyond the emergency room because he was without insurance or funds to pay for medical care. Philip Frank Stahel, M.D. diagnosed Claimant with a non-displaced horizontal patellar fracture of the left knee that did not require surgical intervention. He also questioned whether Claimant's neck and lower back pain were associated with the mechanism of injury on September 26, 2014. Dr. Stahel remarked that Claimant could "resume full activity without restrictions" but also instructed him to follow up with the Spine Clinic if his neck and lower back pain continued.

9. On February 3, 2015 Claimant returned to the Orthopedic Clinic. Claimant's knee fracture had healed and his pain decreased, but he continued to experience difficulty bending his knee. Because he continued to complain of back and neck pain he was referred to the Spine Clinic.

10. On March 24, 2015 Claimant visited the Denver Health Medical Center Spine Clinic. He explained that approximately three days after the September 26, 2014 incident he began experiencing neck pain, lower back pain, mid-back pain and left knee pain. The left knee pain was the most severe of all his symptoms. Physicians noted that Claimant's condition had improved considerably and they recommended conservative treatment that included physical therapy.

11. On June 2, 2015 Claimant returned to the Spine Clinic with persistent back pain. He had not attended physical therapy but had been doing his home exercises for his back.

12. On October 28, 2016 Claimant returned to the Denver Health Medical Center. He was diagnosed with chronic right shoulder pain most consistent with rotator cuff tendinopathy as well as anxiety and depression. Claimant reported that he had

experienced aching and burning in his right shoulder as well as weakness with lifting since the accident. He received medications for his symptoms.

13. On November 29, 2016 Claimant again visited the Denver Health Medical Center. He received additional medications for his symptoms.

14. Claimant testified that, because of his September 26, 2014 industrial injuries, he has been unable to return to full-time employment as a roofer. He has occasionally helped his cousin in performing landscaping duties. However, he only worked for his cousin approximately two days per week and he last worked in October 2016. Claimant explained that he did not have a specific salary arrangement with is cousin and earned between $50.00-$120.00 each day.

15. Claimant explained that he worked six days per week and earned $200.00 each day while working for Mr. Lopez as a roofer. He only did not work six days each week when it rained or snowed. An Average Weekly Wage (AWW) of $1200.00 thus constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

16. Owner of Davie Roofing Mr. Zapata testified at the hearing in this matter. He explained that he began his roofing business in Texas and expanded his operations into Colorado in 2013. Mr. Zapata explained that he purchased a Workers' Compensation Insurance Policy from Texas Mutual Insurance on approximately June 25, 2014 to cover his Texas and Colorado operations. He purchased the policy under his business name Davie Roofing, LLC. and submitted a payment of $2,600.00.

17. Owner of Eco Roof and Solar Dylan Lucas explained that the company required all subcontractors to carry both Workers' Compensation insurance and liability insurance. The requirement of Workers' Compensation and liability insurance is part of the agreement Eco Roof and Solar establishes with all subcontractors. Subcontractors are hired on a per job basis. Mr. Lucas remarked that Eco Roof and Solar requires subcontractors to provide Workers' Compensation insurance because it does not insure the employees of its contractors for injuries at work. He commented that Eco Roof and Solar employs sales staff and managers but does not perform actual roofing work. In order to enter into a contract with Eco Roof and Solar the contracting roofers must provide proof of Workers' Compensation and liability insurance. Eco Roof and Solar is insured by Pinnacol Assurance for Workers' Compensation claims.

18. Davie Roofing provided Eco Roof and Solar with a certificate of Workers' Compensation and a certificate of liability insurance. Before he received any work from Eco Roof and Solar Mr. Zapata contacted Texas Mutual Insurance and spoke with a representative in order to confirm that he was covered for Workers' Compensation injuries while performing contract work for Eco Roof and Solar in Colorado. He provided the representative of Texas Mutual Insurance with the address and FAX number of Eco Roof and Solar in Colorado. Mr. Lopez commented that he would not receive any work from Eco Roof and Solar unless there was confirmation that he had coverage for work injuries for contracts provided by Eco Roof and Solar to Davie

Roofing. A representative of Eco Roof and Solar subsequently confirmed to Mr. Zapata that she had received notice that Davie Roofing was insured for workplace injuries. Davie Roofing then received work from Eco Roof and Solar.

19. Mr. Zapata's testimony is supported by the Certificate of Liability Insurance issued by Texas Mutual Insurance through Northwest Insurance Agency of Dallas, Texas. The Certificate of Liability Insurance "certifies the policies of [Workers' Compensation] insurance . . . have been issued to . . . [Davie Roofing, LLC] for the policy period indicated." Davie Roofing, LLC is listed as the insured and Eco Roof and Solar is listed as the certificate holder. The policy includes Workers' Compensation and Employer liability limits of $1,000,000. The dates of coverage for the Workers' Compensation insurance policy are June 26, 2014 through June 26, 2015. Claimant's injuries that occurred on September 26, 2014 are within the period listed by the Certificate of Liability Insurance.

20. There was no evidence presented at the hearing in this matter that Texas Mutual Insurance withdrew, recanted or denied the Certificate of Liability Insurance issued to Eco Roof and Solar on behalf of Davie Roofing. That Certificate of Liability Insurance acknowledged and affirmed there was coverage in place on the date of Claimant's injuries. Texas Mutual Insurance received notice and an opportunity to defend its position at hearing but chose not to appear for the matter.

21. Claimant produced a Workers' Compensation and Employers Liability Insurance Policy issued by Texas Mutual Insurance to Victor Lopez Construction, Inc. The policy covered Workers' compensation claims in Texas for the period October 2, 2014 through October 2, 2015, but was cancelled on August 14, 2015. Because Claimant's injuries occurred on September 26, 2014 in Colorado, the Workers' Compensation and Employers Liability Insurance Policy would not have covered Claimant's claim. However, the Policy is inconsistent with Mr. Zapata's testimony that he procured Workers' Compensation insurance in June 2014 under the name Davie Roofing. Mr. Zapata explained that he never conducted business under the name Victor Lopez Construction. Moreover, the Policy is inconsistent with the testimony of Mr. Lucas that all subcontractors must carry both Workers' Compensation insurance and liability insurance. The requirement of Workers' Compensation and liability insurance is part of the agreement Eco Roof establishes with all subcontractors. The Workers' Compensation and Employers Liability Insurance Policy thus does not appear to be the document that is pertinent to the Workers' Compensation coverage for Claimant's September 26, 2014 injuries.

22. Claimant has demonstrated that it is more probably true than not that he suffered compensable injuries during the course and scope of his employment on September 26, 2014. Claimant credibly explained that on September 26, 2014 he was working on a roofing project located at 4400 South Fox in Englewood, Colorado. He was walking on a roof carrying shingles on his shoulder when the roof collapsed under his left leg. Claimant's left leg plunged into a hole up to his hip area. He remarked that when his left leg plunged into the hole he experienced pain in his left knee and waist.

Claimant subsequently worked through October 9, 2014 but ceased employment because of his injuries.

23. Claimant's co-worker Mr. Laredo corroborated Claimant's account of the incident. Although Mr. Laredo did not directly witness Claimant's September 26, 2014 accident because he was not on the roof, he heard someone yelling, went up to the roof and saw Claimant's left leg in a hole. He subsequently worked with Claimant for two weeks and observed Claimant's inability to properly use his left leg and shoulder. Based on the credible, uncontroverted accounts of Claimant and Mr. Laredo, Claimant suffered compensable Workers' Compensation injuries on September 26, 2014.

24. Claimant has proven that it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial injuries. On October 28, 2014 Claimant visited the Denver Health Medical Center Emergency Room with complaints of neck, back, left knee, left foot and right foot pain. He was diagnosed with a non-displaced, comminuted fracture of the left knee patella, a thoracic strain and a foot strain. Claimant subsequently received periodic medical treatment from the Denver Health Center Orthopedic and Spine Clinics. He continues to receive medications for his symptoms. Based on the medical records and Claimant's credible testimony Claimant is entitled to receive reasonable, necessary and causally related medical benefits to cure or relieve the effects of his September 26, 2014 industrial injuries.

25. Claimant has established that it is more probably true than not that he is entitled to receive TTD benefits for the period October 9, 2014 until terminated by statute. Claimant credibly explained that, because of his September 26, 2014 industrial injuries, he has been unable to return to full-time employment as a roofer. He has occasionally helped his cousin in performing landscaping duties. However, he only worked for his cousin for approximately two days per week and he last worked in October 2016. Claimant explained that he did not have a specific salary arrangement with is cousin and earned between $50.00-$120.00 each day.

26. On November 21, 2014 Dr. Stahel remarked that Claimant could "resume full activity without restrictions" but also instructed him to follow up with the Spine Clinic if his neck and lower back pain continued. Nevertheless, Dr. Stahel's comment did not constitute an event that would terminate Claimant's TTD benefits. Claimant has not reached MMI, he has not returned to regular or modified employment, he has not received a written release to return to regular employment, and he has not received a written offer to return to employment and failed to begin the employment. Accordingly, based on Claimant's credible testimony and the medical records, Claimant is entitled to receive TTD benefits for the period October 9, 2014 until terminated by statute minus any earnings he received while sporadically working for his cousin.

27. Claimant has failed to demonstrate that it is more probably true than not that Eco Roof and Solar is a statutory employer. Initially, the record reveals that Mr. Lopez lacked Workers' Compensation insurance coverage. Mr. Lopez thus sought coverage for Claimant's industrial injuries from Mr. Zapata through Davie Roofing.

Claimant has failed to demonstrate that Davie Roofing, as a subcontractor of Eco Roofing and Solar, lacked Workers' Compensation insurance.

28. The record demonstrates that, because Davie Roofing possessed a valid Colorado Workers' Compensation insurance policy through Texas Mutual Insurance on September 26, 2014, Davie Roofing is Claimant's statutory employer. Owner of Eco Roof and Solar Mr. Lucas explained that the company required all subcontractors to carry both Workers' Compensation insurance and liability insurance. The requirement of Workers' Compensation and liability insurance is part of the agreement Eco Roof establishes with all subcontractors. Mr. Lucas remarked that Eco Roof and Solar requires subcontractors to provide Workers' Compensation insurance because it does not insure the employees of its contractors for injuries at work. In order to enter into a contract with Eco Roof and Solar the contracting roofers must provide proof of Workers' Compensation and liability insurance.

29. Mr. Zapata credibly explained that he purchased a Workers' Compensation Insurance Policy from Texas Mutual Insurance on approximately June 25, 2014 to cover his Texas and Colorado operations. He purchased the policy under his business name Davie Roofing, LLC. and submitted a payment of $2,600.00. Davie Roofing provided Eco Roof and Solar with a certificate of Workers' Compensation and a certificate of liability insurance. Before he received any work from Eco Roof and Solar Mr. Zapata contacted Texas Mutual Insurance and spoke with a representative in order to confirm that he was covered for Workers' Compensation injuries while performing contract work for Eco Roof and Solar in Colorado. He provided the representative of Texas Mutual Insurance with the address and FAX number of Eco Roof and Solar in Colorado. Mr. Zapata commented that he would not receive any work from Eco Roof and Solar unless there was confirmation that he had coverage for work injuries for contracts provided by Eco Roof and Solar to Davie Roofing. A representative of Eco Roof and Solar subsequently confirmed to Mr. Zapata that she had received notice that Davie Roofing was insured for workplace injuries. Davie Roofing then received work from Eco Roof and Solar.

30. Mr. Zapata's testimony is supported by the Certificate of Liability Insurance issued by Texas Mutual Insurance through Northwest Insurance Agency of Dallas, Texas. The Certificate of Liability Insurance "certifies the policies of [Workers' Compensation] insurance . . . have been issued to . . . [Davie Roofing, LLC] for the policy period indicated." Davie Roofing, LLC is listed as the insured and Eco Roof and Solar is listed as the certificate holder. The policy includes Workers' Compensation and Employer liability limits of $1,000,000. The dates of coverage for the Workers' Compensation insurance policy are June 26, 2014 through June 26, 2015. Claimant's injuries that occurred on September 26, 2014 are within the period listed by the Certificate of Liability Insurance.

31. Claimant produced a Workers' Compensation and Employers Liability Insurance Policy issued by Texas Mutual Insurance to Victor Lopez Construction, Inc. The policy covered Workers' compensation claims in Texas for the period October 2, 2014 through October 2, 2015, but was cancelled on August 14, 2015. Because

Claimant's injuries occurred on September 26, 2014 in Colorado, the Workers' Compensation and Employers Liability Insurance Policy would not have covered Claimant's claim. However, the Policy is inconsistent with Mr. Zapata's testimony that he procured Workers' Compensation insurance in June 2014 under the name Davie Roofing. Mr. Zapata explained that he never conducted business under the name Victor Lopez Construction. Moreover, the Policy is inconsistent with the testimony of Mr. Lucas that all subcontractors are required to carry both Workers' Compensation insurance and liability insurance. The requirement of Workers' Compensation and liability insurance is part of the agreement Eco Roof establishes with all subcontractors. The Workers' Compensation and Employers Liability Insurance Policy thus does not appear to be pertinent to determining Workers' Compensation coverage for Claimant's September 26, 2014 injuries.

32. Based on the credible testimony of Mr. Zapata and Mr. Lucas, as well as the persuasive documentary evidence, Davie Roofing possessed a valid Colorado Workers' Compensation insurance policy through Texas Mutual Insurance on September 26, 2014, Davie Roofing is Claimant's statutory employer. Accordingly, Eco Roof and Solar is not Claimant's statutory employer and its insurer Pinnacol Assurance is not liable for Claimant's September 26, 2014 industrial injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment on September 26, 2014. Claimant credibly explained that on September 26, 2014 he was working on a roofing project located at 4400 South Fox in Englewood, Colorado. He was walking on a roof carrying shingles on his shoulder when the roof collapsed under his left leg. Claimant's left leg plunged into a hole up to his hip area. He remarked that when his left leg plunged into the hole he experienced pain in his left knee and waist. Claimant subsequently worked through October 9, 2014 but ceased employment because of his injuries.

8. As found, Claimant's co-worker Mr. Laredo corroborated Claimant's account of the incident. Although Mr. Laredo did not directly witness Claimant's September 26, 2014 accident because he was not on the roof, he heard someone

yelling, went up to the roof and saw Claimant's left leg in a hole. He subsequently worked with Claimant for two weeks and observed Claimant's inability to properly use his left leg and shoulder. Based on the credible, uncontroverted accounts of Claimant and Mr. Laredo, Claimant suffered compensable Workers' Compensation injuries on September 26, 2014.

Medical Benefits

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

10. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

11. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial injuries. On October 28, 2014 Claimant visited the Denver Health Medical Center Emergency Room with complaints of neck, back, left knee, left foot and right foot pain. He was diagnosed with a non-displaced, comminuted fracture of the left knee patella, a thoracic strain and a foot strain. Claimant subsequently received periodic medical treatment from the Denver Health Center Orthopedic and Spine Clinics. He continues to receive medications for his symptoms. Based on the medical records and Claimant's credible testimony Claimant is entitled to receive reasonable, necessary and causally related medical benefits to cure or relieve the effects of his September 26, 2014 industrial injuries.

Temporary Total Disability Benefits

12. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and

subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

13. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TTD benefits for the period October 9, 2014 until terminated by statute. Claimant credibly explained that, because of his September 26, 2014 industrial injuries, he has been unable to return to full-time employment as a roofer. He has occasionally helped his cousin in performing landscaping duties. However, he only worked for his cousin for approximately two days per week and he last worked in October 2016. Claimant explained that he did not have a specific salary arrangement with is cousin and earned between $50.00-$120.00 each day.

14. As found, on November 21, 2014 Dr. Stahel remarked that Claimant could "resume full activity without restrictions" but also instructed him to follow up with the Spine Clinic if his neck and lower back pain continued. Nevertheless, Dr. Stahel's comment did not constitute an event that would terminate Claimant's TTD benefits. Claimant has not reached MMI, he has not returned to regular or modified employment, he has not received a written release to return to regular employment, and he has not received a written offer to return to employment and failed to begin the employment. Accordingly, based on Claimant's credible testimony and the medical records, Claimant is entitled to receive TTD benefits for the period October 9, 2014 until terminated by statute minus any earnings he received while sporadically working for his cousin.

Average Weekly Wage

15. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-

42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007). As found, an AWW of $1200.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Statutory Employer

16. Section 8-41-401(1)(a), C.R.S. creates a statutory employment relationship when a company contracts out part or all of its work to any subcontractor. Under the preceding circumstances, the contracting company "shall be liable" to pay compensation for injuries to employees of subcontractors. *In Re Trujillo,* W.C. No. 4-537-815 (ICAP, Mar. 12, 2004). The purpose of the statute is to prevent employers from "avoiding responsibility under the workers' compensation act by contracting out their regular business to uninsured independent contractors." *Finlay v. Storage Technology Corp*., 764 P.2d 62 (Colo. 1988). The burden is on the party seeking to establish a statutory employer relationship to demonstrate that the subcontractor is uninsured. *Mendez v. Interstate Van Lines,* W.C. No. 4-330-270 (ICAP, Jan. 19, 2001).

17. As found, Claimant has failed to demonstrate by a preponderance of the evidence that Eco Roof and Solar is a statutory employer. Initially, the record reveals that Mr. Lopez lacked Workers' Compensation insurance coverage. Mr. Lopez thus sought coverage for Claimant's industrial injuries from Mr. Zapata through Davie Roofing. Claimant has failed to demonstrate that Davie Roofing, as a subcontractor of Eco Roofing and Solar, lacked Workers' Compensation insurance.

18. As found, the record demonstrates that, because Davie Roofing possessed a valid Colorado Workers' Compensation insurance policy through Texas Mutual Insurance on September 26, 2014, Davie Roofing is Claimant's statutory employer. Owner of Eco Roof and Solar Mr. Lucas explained that the company required all subcontractors to carry both Workers' Compensation insurance and liability insurance. The requirement of Workers' Compensation and liability insurance is part of the agreement Eco Roof establishes with all subcontractors. Mr. Lucas remarked that Eco Roof and Solar requires subcontractors to provide Workers' Compensation insurance because it does not insure the employees of its contractors for injuries at work. In order to enter into a contract with Eco Roof and Solar the contracting roofers must provide proof of Workers' Compensation and liability insurance.

19. As found, Mr. Zapata credibly explained that he purchased a Workers' Compensation Insurance Policy from Texas Mutual Insurance on approximately June 25, 2014 to cover his Texas and Colorado operations. He purchased the policy under

his business name Davie Roofing, LLC. and submitted a payment of $2,600.00. Davie Roofing provided Eco Roof and Solar with a certificate of Workers' Compensation and a certificate of liability insurance. Before he received any work from Eco Roof and Solar Mr. Zapata contacted Texas Mutual Insurance and spoke with a representative in order to confirm that he was covered for Workers' Compensation injuries while performing contract work for Eco Roof and Solar in Colorado. He provided the representative of Texas Mutual Insurance with the address and FAX number of Eco Roof and Solar in Colorado. Mr. Zapata commented that he would not receive any work from Eco Roof and Solar unless there was confirmation that he had coverage for work injuries for contracts provided by Eco Roof and Solar to Davie Roofing. A representative of Eco Roof and Solar subsequently confirmed to Mr. Zapata that she had received notice that Davie Roofing was insured for workplace injuries. Davie Roofing then received work from Eco Roof and Solar.

20. As found, Mr. Zapata's testimony is supported by the Certificate of Liability Insurance issued by Texas Mutual Insurance through Northwest Insurance Agency of Dallas, Texas. The Certificate of Liability Insurance "certifies the policies of [Workers' Compensation] insurance . . . have been issued to . . . [Davie Roofing, LLC] for the policy period indicated." Davie Roofing, LLC is listed as the insured and Eco Roof and Solar is listed as the certificate holder. The policy includes Workers' Compensation and Employer liability limits of $1,000,000. The dates of coverage for the Workers' Compensation insurance policy are June 26, 2014 through June 26, 2015. Claimant's injuries that occurred on September 26, 2014 are within the period listed by the Certificate of Liability Insurance.

21. As found, Claimant produced a Workers' Compensation and Employers Liability Insurance Policy issued by Texas Mutual Insurance to Victor Lopez Construction, Inc. The policy covered Workers' compensation claims in Texas for the period October 2, 2014 through October 2, 2015, but was cancelled on August 14, 2015. Because Claimant's injuries occurred on September 26, 2014 in Colorado, the Workers' Compensation and Employers Liability Insurance Policy would not have covered Claimant's claim. However, the Policy is inconsistent with Mr. Zapata's testimony that he procured Workers' Compensation insurance in June 2014 under the name Davie Roofing. Mr. Zapata explained that he never conducted business under the name Victor Lopez Construction. Moreover, the Policy is inconsistent with the testimony of Mr. Lucas that all subcontractors are required to carry both Workers' Compensation insurance and liability insurance. The requirement of Workers' Compensation and liability insurance is part of the agreement Eco Roof establishes with all subcontractors. The Workers' Compensation and Employers Liability Insurance Policy thus does not appear to be pertinent to determining Workers' Compensation coverage for Claimant's September 26, 2014 injuries.

22. As found, based on the credible testimony of Mr. Zapata and Mr. Lucas, as well as the persuasive documentary evidence, Davie Roofing possessed a valid Colorado Workers' Compensation insurance policy through Texas Mutual Insurance on September 26, 2014, Davie Roofing is Claimant's statutory employer. Accordingly, Eco

Roof and Solar is not Claimant's statutory employer and its insurer Pinnacol Assurance is not liable for Claimant's September 26, 2014 industrial injuries.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable Workers' Compensation injuries on September 26, 2014.

2. Claimant shall receive reasonable, necessary and related medical benefits designed to cure and relieve the effects of his September 26, 2014 industrial injuries.

3. Claimant shall receive TTD benefits for the period October 9, 2014 until terminated by statute minus any earnings he received while sporadically working for his cousin.

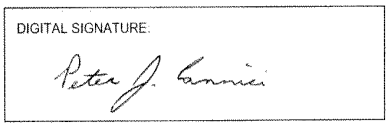
4. Claimant earned an AWW of $1,200.00.

5. Davie Roofing is Claimant's statutory employer and Texas Mutual Insurance is liable as its insurer.

6. Eco Roof and Solar and Pinnacol Assurance are dismissed as parties from this matter.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: April 26, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **KRIS MIDDLEDORF,** Claimant, vs. **STATE OF COLORADO,** Employer, and **STATE OF COLORADO C/O BROADSPIRE,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-004-887-02**

SUMMARY ORDER

Hearing was held before Margot W. Jones, Administrative Law Judge (ALJ), on January 27, 2017, in Denver, Colorado.

The following issues were raised for consideration at hearing:

a. Whether Claimant established by a preponderance of the evidence that he suffered an occupational disease or acute injury to his lumbar spine in the course and scope of his employment for Employer;

b. If Claimant established an occupational injury, whether Claimant has established by a preponderance of the evidence that he is entitled to medical care as a result of the injury; and

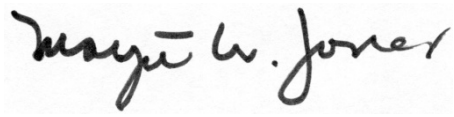
c. Whether Claimant established by a preponderance of the evidence that he is entitled to an order awarding indemnity benefits from October 1, 2015, and continuing until terminated by law.

Based on the evidence presented at hearing, the ALJ orders as follows:

1. The ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered an occupational disease or acute low back injury in the course and scope of his employment for Employer. Further, it was not established that Claimant's condition was aggravated, accelerated or combined with a pre-existing condition so to produce disability. Based on credible and persuasive testimony and evidence, it is equally likely that Claimant's non-work activities caused Claimant's condition.

2. Claimant's claim is denied and dismissed.

DATED: April 26, 2017



Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

This decision is final and not subject to appeal unless a full order is requested. The request shall be made at the Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203 within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a party makes a request for a full order both parties shall submit a proposed full order containing specific findings of fact and conclusions of law within five working days from the date of the request. The proposed full order must be submitted by e-mail in Word or Rich Text format to oac-dvr@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above **SUMMARY ORDER** was served by placing same in the U.S. Mail, or by e-mail to:

Michael H. Kaplan Esq.
Kaplan Morrell, LLC
pleadings@kaplanmorrell.com

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Division of Workers' Compensation
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Date: 04/26/2017

/s/ Jenna Brantley
Court Clerk

ISSUES

- Did Claimant prove by a preponderance of the evidence that her condition has worsened warranting reopening under § 8-43-303(1), C.R.S.

- If Claimant proved a worsening of condition, was the surgery performed by ATP orthopedic surgeon (Brian White, M.D.) reasonable, necessary, and related?

- Whether the Claimant has shown that she is entitled to temporary disability from the date of filing of the Petition to Reopen on March 22, 2016, ongoing.

- Whether sanctions should be imposed against Claimant for spoliation of evidence.

FINDINGS OF FACT

1. Claimant suffered an admitted right hip injury on October 28, 2010 while working for Employer. A baggage cart pinned Claimant against a belt loader and she suffered injuries to her right hip and lower extremity.

2. Claimant has been treated by doctors at OccuMed Colorado ("Occumed") throughout the claim, including John J. Raschbacher, M.D., Greg Smith, D.O. and Jonathon Bloch, D.O.

3. Claimant received extensive treatment for the right hip injury, including four (4) surgeries. The first surgery was an arthroscopic labral repair, acetabuloplasty and femoral osteoplasty performed by Derek Johnson, M.D. on May 18, 2011.

4. On May 30, 2012, Claimant was initially evaluated by Brian White, M.D. On examination, she had significant pain with the anterior impingement maneuver on the right side. The x-rays showed evidence of reactive Cam morphology on the proximal femur. Dr. White's assessment was incomplete healing of labral repair, with some residual impingement and potentially early avascular necrosis. The ALJ noted this was an indication that the avascular necrosis developed following the arthroscopy, suggesting a causal link. He postulated that Claimant's pain was coming from the incomplete healing of her labral repair. He referred Claimant to Cynthia Kelly, M.D.

5. On July 11, 2012, Claimant was re-evaluated by Dr. White, whose assessment was avascular necrosis, with failed previous hip arthroscopy and residual

impingement. Dr. White noted Dr. Kelly would proceed with the avascular necrosis procedure, to be followed by the hip arthroscopy and femoracetabular osteoplasty and labral reconstruction.

6. The second procedure was a right femoral head decompression and attempted vascularized free fibula flap performed by Cynthia Kelly, M.D. on October 12, 2012. This procedure was done to address osteonecrosis of the right femoral head. This procedure could not be completed because the blood vessels were different sizes.

7. On January 24, 2013, Dr. White performed a third procedure, which was a revision-right hip arthrosopy, including acetabular rim trimming, labral reconstruction and injection of platelet rich plasma.

8. After her third surgery, Claimant underwent a course of physical therapy ("PT") and was followed by the physicians at Occumed. Dr. White evaluated Claimant at regular intervals.

9. On January 8, 2014, Dr. White evaluated Claimant for a follow up visit. On examination, he noted that Claimant's overall range of motion was good, but painful, particularly with both internal and external rotation. A review of the x-rays showed no evidence of progression of the avascular process, however, there was cloudiness to the femoral head. Dr. White's assessment was failed revision hip arthroscopy, as well as a vascular salvage procedure. Claimant was noted to have progressive pain. Dr. White did not think there was much to be done for Claimant, with the most efficient treatment being a total hip replacement. He described this procedure as sub optimal given her age. Claimant testified that they discussed the total hip replacement, but Dr. White didn't want her to have it at age 30.

10. On April 20, 2015, Claimant was evaluated by Douglas Scott, M.D. At the time, she noted her right hip popped and was painful. She also had pain in her left hip because she favored her right hip. Dr. Scott prepared a comprehensive review of Claimant's treatment records. On examination, right hip flexion was limited by pain to 100° and right hip abduction was decreased compared to the left. Right hip adduction and extension were also decreased compared to the left, as was external rotation. Dr. Scott commented that in many respects Claimant appeared to have failed surgical treatment of her right hip condition. She had partly failed to respond to therapeutic measures and he opined she needed a full psychological assessment before proceeding with any type of further surgical procedures.

11. In Dr. Scott's opinion, Claimant's condition was probably stable and it was appropriate to consider whether she was at MMI. He recommended Claimant be referred to a 24 month Division IME to address MMI, ratable impairment, maintenance treatment, whether a total hip arthroplasty was reasonable and necessary; an evaluation of the ongoing prescription-pain medication and benzodiazepamines, as well as whether continued massage therapy was reasonable and necessary. The ALJ noted Dr. Scott, at least in this report, did not offer a definitive opinion regarding whether Claimant was at MMI or whether a total hip replacement, reasonable and necessary and

related to the injury.

12. Dr. Scott issued an addendum report on May 23, 2015.[1] He opined Claimant had reached maximum medical improvement and her hip was stable. He believed she had probable permanent medical impairment of the right hip pursuant to the AMA Guides to the Evaluation of Permanent Impairment (3rd Ed. Rev.).

13. On July 7, 2015, Respondents filed a Final Admission of Liability ("FAL"), admitting Claimant had a 17% scheduled medical impairment related to her hip, as found by Dr. Bloch. However, no PPD benefits were paid, as Claimant received in excess of the $75,000.00 statutory cap. Respondents claimed an overpayment of $79,137.79 against future benefits.

14. The FAL admitted for maintenance medical benefits based upon the recommendations of Dr. Bloch. In his June 18, 2015 report[2], Dr. Bloch stated Claimant was to follow up with her surgeon as regularly scheduled, although there was no active management and really just post surgical follow-ups. Claimant was noted to continue to take reasonable amounts of narcotics and controlled benzodiazepine type substances which were to be managed by a pain management specialist.

15. Claimant returned to Dr. Smith, on September 11, 2015. She had a great deal of pain in her left hip, lumbar region and right calf, most likely due to antalgic gait. Her pain level was 6-7/10. Claimant had been experiencing these symptoms for two weeks. Dr. Smith's assessment was status post-hip reconstruction. He prescribed additional massage therapy twice a week for 4 to 6 weeks and plan to see Claimant in follow up in 3 to 4 weeks. Dr. Smith stated he did not know that he was not sure when Claimant would be at MMI, which led the ALJ to infer that he did not believe she was at MMI at the time of this appointment. On the WCM164 form, no notation was made about MMI.

16. Claimant returned to Occumed on October 5, 2015 and was evaluated by Kevin Page, PA-C. At that time, Claimant was noted to have an antalgic gait, but no detailed evaluation took place. PA-C Page thought Claimant was at MMI and should be under maintenance for pain management.

17. Claimant returned to Dr. Smith, on October 27, 2015 and the WCM164 noted she was at MMI, with a neurological evaluation, EMG and MRI of the right leg ordered.

18. On October 27, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported ongoing pain. Dr. Bloch opined that her case required more workup including: an EMG of the right lower extremity, a repeat hip MRI for stability, a three-phase bone

[1] As found infra, Dr. Scott testified he issued this supplemental report upon receipt of additional medical records. However, those documents were not in the record.

[2] Dr. Bloch referred to an addendum report from the physician who performed the DIME. However, that report was not introduced into evidence.

scan to make sure there was no CRPS, and a neuropsychological evaluation. Dr. Bloch noted he would be hard pressed to say that Claimant needed a hip replacement without any current imaging. Dr. Bloch opined that otherwise, Claimant was still at MMI and would have ongoing tests while at MMI, but should the tests show anything positive it could change the MMI status. Dr. Bloch requested referrals for Claimant to have neuropsychological testing, an MRI of her right hip, an EMG of her right leg, and massage therapy.[3]

19. On November 10, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported not doing well and having increased pain. Dr. Bloch opined that Claimant was still at MMI, that he would refer Claimant for pain management, and noted that they had asked for an EMG, a repeat MRI, and a neuropsychiatric evaluation as testing post MMI to make sure that none of the findings would change Claimant's MMI status. The inference drawn from this report and the one from 10-27-15, is that Dr. Bloch questioned whether Claimant was still at MMI.

20. Evidence of Claimant's physical activity level in November 2015 was admitted at hearing. This evidence was in the form of video surveillance, which documented Claimant shopping at Costco and performing various tasks. Claimant also shoveled snow the next day. The ALJ notes this raised the question whether Claimant exaggerated her physical capabilities when she was being evaluated by physicians during this period of time. The ALJ also notes there was no evidence admitted hearing as to Claimant's exact physical restrictions during this time.

21. Claimant testified that she went to the emergency room because of pain in her hip a couple of days before the prior hearing (mid-December 2015),. Pain was radiating down the right side of her leg. Claimant testified the pain was much worse than in June 2015, when she was placed at MMI.

22. Claimant testified in the December 10, 2015 hearing before ALJ Jones that she wanted the hip replacement done to be able to stop taking pain pills and be more of a mom to her daughter.[4] Claimant also testified when the symptoms were bad, her foot would go numb, she would experience burning pins and needles and it felt like someone was taking an ice pick to her hip. She could not get comfortable.

23. Claimant returned to Dr. White on December 23, 2015. She was described as getting progressively worse. Claimant had pain with range of motion of the hip, which did not move well. Dr. White noted nerve pain going down her distal fibula and leg. The ALJ found this was evidence of a worsening of Claimant's condition. Some narrowing was also noted on x-rays which were taken at that evaluation. Dr. White's assessment was failed revision hip arthroscopy, as well as core decompression. He stated the only option was a total hip replacement and discussed all the risks,

[3] These medical benefits were denied by ALJ Jones' Findings of Fact, Conclusions of Law and Order, dated March 28, 2016-Claimant's Exhibit 7; Respondents' Exhibit A.

[4] Exhibit 13.

benefits and alternatives of the surgery. The decision was made to proceed with the total hip replacement.

24. On March 22, 2016, Claimant filed a Petition to Reopen, as well as an Application for Hearing. The Petition to Reopen alleged a worsening of condition and attached the request for authorization of proposed right total hip arthroplasty.

25. Respondents scheduled a follow-up IME for June 28, 2016. Claimant failed to appear for this appointment.

26. Claimant testified she was out of town attending her daughter's graduation immediately before the appointment with Dr. Scott was set to take place. Claimant testified the letter was sent on the June 15, 2016 to her attorney's office and then sent to her the next day. The fax confirmation reflected the letter was faxed June 14, 2016. Claimant learned of the IME two hours after she was supposed to be there. Claimant testified she called her attorney's office to inquire what to do.

27. Under these facts, the ALJ determined Claimant did not engage in intentional conduct which led to her missing the appointment with Dr. Scott.

28. Claimant testified that prior to the hip replacement surgery, she was in a lot of pain. She had difficulty walking. The injection done by Dr. White provided relief, but her pain got worse after the injection began wearing off. Claimant decided to undergo the total hip replacement because her symptoms had gotten to a point that she could not tolerate.

29. On July 5, 2016, Dr. White performed a right hip total arthroplasty. In the indications for the surgery, he noted that after Claimant's initial hip arthroscopy, she developed avascular necrosis. An attempted joint salvage, with a combination of hip arthroscopy conversion to labral reconstruction, as well as cord compression was tried. A vascularized free fibula was tried, but the vessel size was not appropriate proximally for this and could not be completed. Even after these procedures, Claimant continued to have pain, although she had short-term relief from a steroid injection. The pre-operative and post-operative diagnosis was: right hip failed attempted salvage from a vascular necrosis and to hip arthroscopy, with continued hip pain, no other joint salvage solution. Claimant testified the surgery has provided her relief.

30. The ALJ credited the opinions of Dr. White, who has treated Claimant since 2012. Dr. White's records documented a worsening of Claimant's condition.

31. On August 12, 2016, letters were sent by counsel for Respondent-Insurer to Porter Hospital and ATI Physical Therapy denying liability for medical expenses from July 5-8, 2016.

32. There was no evidence in the record that Claimant was placed at MMI after the surgery.

33. On August 17, 2016, Dr. Scott reviewed additional medical records at the request of Respondents. The question posed to Dr. Scott was whether the July 5, 2016 right total hip replacement (arthroplasty) was reasonable, necessary and related to Claimant's October 28, 2010 work injury. Dr. Scott opined the July 5, 2016 right total hip arthroplasty (per the Colorado Medical Treatment Guidelines) was probably reasonable and necessary to treat Claimant's osteonecrosis of the right femur. If the osteonecrosis resulted from May 18, 2011 right hip arthroplasty and the procedure was performed to address her work injury related labral tear, then it was related to the work injury. Dr. Scott stated: if the osteonecrosis did not result from the May 18, 2011 right hip arthroplasty, it was not related to the work injury. The ALJ noted there was no evidence in the record that Claimant had a diagnosis of avascular necrosis prior to the 2011 arthroplasty. The arthroscopy caused the avascular necrosis. Based on the totality of the medical evidence, including Dr. Scott's opinion, the ALJ found the total hip arthroplasty was reasonable, necessary and related to Claimant's industrial injury.

34. Dr. Scott testified at hearing as an expert in occupational medicine. He is also Level II accredited pursuant to the WCRP. Dr. Scott stated he first examined Claimant on April 20, 2015 and issued a report. After receiving additional medical records, he opined that Claimant was at MMI, which was actually before Dr. Bloch concluded Claimant was at MMI.

35. Dr. Scott noted that since he was not able to examine Claimant on June 28, 2016, he could not determine whether there was actually a worsening of her condition. However, he reviewed the medical records and opined that there was nothing specific about March 22, 2016, which showed a worsening of Claimant's condition. This is because the doctors had previously discussed a total hip replacement with her. Dr. Scott concluded Claimant knew by the December 10, 2015 hearing that she needed a hip replacement. Dr. Scott also noted that she was taking medications, including Percocet and had continuing pain complaints and her hip. Dr. Scott characterized this process as osteoarthritis after Claimant developed avascular necrosis. Dr. Scott never testified that the avasular necrosis was not related to Claimant‘s industrial injury and the first surgical procedure. On cross-examination, Dr. Scott admitted he did not know whether Claimant had numbness and tingling down her leg\ prior to December 2015. The ALJ finds this was a new symptom.

36. Claimant's hip arthroplasty was reasonable, necessary and related to her industrial injury.

37. Claimant's hip arthroplasty was required to prevent a deterioration of her condition.

38. There was no evidence of increased work restrictions or wage loss tied to Claimant's worsening of condition. As of the date of hearing, Claimant has not worked for five years.

39. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Claimant, as well as the various health care providers, bore directly on the issue of reopening.

Reopening

Section 8-43-303(1), C.R.S. authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including error, mistake, or a change in condition. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). A change in condition refers either "to a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury". *Chavez v. Industrial Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985).

The reopening authority granted ALJs by § 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the

sound discretion of the ALJ". *Cordova v. Industrial Claim Appeals Office*, 55 P.3d at 189. The party seeking reopening bears "the burden of proof as to any issue sought to be reopened". § 8-43-303(4), C.R.S.

The medical evidence before the Court led to the conclusion that Claimant's symptoms worsened after MMI. As a starting point, the evidence established her 2011 hip arthroscopy did not resolve her symptoms. (Finding of Fact 3). Dr. White described this as "incomplete healing" of her labral repair. (Finding of Fact 4). The evidence also showed Claimant developed avascular necrosis a short time after the first surgery and required surgery performed by Dr. Kelly. (Findings of Fact 4-6). The ALJ concluded the avascular necrosis developed as a result of the injury and the initial surgery because of its proximity in time, the inferences drawn from the medical records and the lack of contrary evidence. (Finding of Fact 33).

Claimant then underwent two surgical procedures to try to resolve the avascular necrosis, which were not successful and her symptoms persisted. Evidence of Claimant's worsening condition post-MMI was admitted at hearing. Dr. Smith noted worsening symptoms on September 11, 2015. (Finding of Fact 15). Additional evidence of increased came in the form of Dr. Bloch's evaluations on October 27, and November 10, 2015 wherein Dr. Bloch raised the issue of whether Claimant remained at MMI. (Findings of Fact 18-19).

As found, Claimant then returned to Dr. White, who noted worsening of symptoms, including radiating pain down the right leg. (Finding of Fact 23). He performed an injection, which provided symptom relief. Claimant experienced a recrudescence of the symptoms after the injection was performed. The ALJ credited Claimant's testimony that her pain was worsened, which necessitated a trip to the emergency room.

In coming to this conclusion, the ALJ considered Respondents' contention that the medical evidence of worsening was simply based on Claimant's subjective report of increased symptoms. Respondents urged the ALJ to find Claimant not to be credible as a witness with regard to pain complaints, pointing to the video evidence before the Court. Respondents also cited the determination previously made by ALJ Jones with regard to Claimant's credibility.

The ALJ declines to reach the conclusion that because Claimant did not credibly report her symptoms, there was insufficient evidence of a worsening of condition. As noted above, physicians including Drs. Bloch, Smith, and White made treatment recommendations based upon Claimant's report of symptoms. In addition, there was objective evidence of avascular necrosis, which ATPs identified as a cause of Claimant's symptoms. This led to treatment these ATPS provided to Claimant. The conclusion to be drawn from the doctor's recommendations is that they were concerned about a worsening of Claimant's condition. In addition, Claimant's testimony supports the conclusion that her condition had worsened. She had previously declined to undergo an arthroplasty, however, her symptoms reach the point that she opted for this procedure.

Therefore, based on the evidence before the ALJ, including the foregoing medical records and Claimant's testimony, Claimant met her burden of proof and established her condition worsened.

Medical Benefits

Whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). In order to determine this question, the ALJ considered whether Claimant was no longer at MMI and, thus the total hip replacement was treatment to cure and relieve the effects of Claimant's industrial injury or whether this was post-MMI treatment to prevent deterioration of Claimant's condition. The ALJ determined this condition fell within the latter category. First, there was no evidence in the form of a report from an ATP which conclusively said Claimant was no longer at MMI.

Second, surgical procedures can be considered post-MMI treatment to prevent deterioration. As found, Claimant met her burden of proving the surgery was required to prevent a deterioration of her symptoms. As the Colorado Court of Appeals articulated in *Milco Construction v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992):

> "If the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury, or to prevent deterioration of the Claimant's present condition. "

Milco Construction v. Cowa, supra, was followed by *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995), which reaffirmed the principle that a particular course of treatment can be ordered following MMI to prevent deterioration of Claimant's condition. See also *Sanchez v. Lafarge Corporation,* 2004 WL 1944689 (ICAO August 27, 2004).

Here, substantial evidence supported the conclusion that the hip replacement was required to prevent the deterioration of Claimant's condition. As found, the surgical recommendation was made after Claimant had reached MMI, but Dr. White was not initially inclined to recommend the procedure and Claimant followed that recommendation. (Finding of Fact 23). Claimant's symptoms worsened as reflected the medical records, including a new symptom of radiating pain down the right leg. This culminated in Claimant undergoing the total hip arthroplasty.

The ALJ notes that Dr. Scott's testimony at hearing did not refute that the hip replacement surgery was reasonable and necessary. Dr. Scott also noted in his August 17, 2016 report that if the avascular necrosis resulted from May 18, 2011 right hip arthroplasty and the procedure was performed to address her work injury related labral tear, then it was related to the work injury. The ALJ concluded there was a causal

relationship between the arthroscopy and Claimant's development of avascular necrosis. The medical evidence showed that Claimant underwent treatment, including surgeries, because of the failed labral repair. She ultimately underwent the total hip arthroplasty because of her continued symptoms. Thus, the ALJ concluded the medical evidence admitted at hearing supported the conclusion the hip replacement was required to prevent further deterioration of Claimant's condition. Respondents are liable for said treatment.

Temporary Total Disability

Claimant alleges she is entitled to TTD benefits as a result of her worsened condition. In *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997), the Court held that in order to receive TTD benefits after reopening based on a change of condition, the Claimant must show increased restrictions that result in "greater impact on the Claimant's temporary work capacity than he had originally sustained as a result of the" industrial injury. 954 P.2d at 639-640.

The question of whether Claimant proved a worsened condition and whether this caused increased impairment of earning capacity presents a question of fact for the ALJ. *Giammarino v. Contemporary Services Corp.,* W.C. No. 4-546-027 (ICAO November 22, 2006). There is no requirement that Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). However, the ALJ may consider whether the worsened condition has resulted in the imposition of additional medical restrictions. *Giammarino v. Contemporary Services Corp., supra.*

In the case at bench, the ALJ determined Claimant's condition had worsened and her testimony supported this conclusion. However, there was no evidence before the ALJ which documented Claimant's work restrictions had increased after MMI or when the Petition to Reopen was filed. In fact, there was no evidence concerning post-MMI Claimant's restrictions in the record at all.[5] Even though Claimant was arguably restricted from work after the total hip replacement, she had not been working for five years. (Finding of Fact 38). Thus, there was no evidence which established a link between her latest surgery and a loss of wages. This lack of direct evidence of a wage loss attributable to the worsening of condition leads to the ALJ's conclusion Claimant is not entitled to wage benefits. Accordingly, the ALJ determined Claimant failed to establish an entitlement to TTD benefits as a result of the Petition to Reopen and/or worsening of condition.

Spoliation

[5] Dr. Bloch issued restrictions as of June 18, 2015.

Respondents seek sanctions for Claimant's alleged spoliation of evidence. More particularly, Respondents alleged Claimant's failure to attend the June 28, 2016 IME with Dr. Scott deprived them of the opportunity to examine Claimant before she had the total hip replacement. Respondents argued this constituted spoliation of evidence, as her condition was changed after the surgery. Response requested an adverse inference to be drawn from the claimed spoliation of evidence.

The Colorado Supreme Court articulated the legal standard for evaluating a claim of spoliation in *Aloi v. Union Pacific Railroad Corporation*, 129 P.3d 999 (2006). In that case, Plaintiff, who was a conductor, was injured when he tripped and fell while descending interior stairs on the locomotive. There was a loose rubber mat, which he identified as a tripping hazard on an engineering report. Plaintiff notified Defendant that a personal injury claim was going to be filed within one week of the accident and thus, Defendant knew a claim was going to be pursued. In the course of discovery, Plaintiff requested documents related to inspections and maintenance, however, Defendant failed to retain the relevant report, which was destroyed.

The trial court granted Plaintiff's request for an instruction to the jury that it could draw an adverse inference that the evidence contained in the missing documents was unfavorable to Defendant. The Colorado Supreme Court considered whether in order to receive the adverse instruction, the proponent had to demonstrate the evidence was destroyed in bad faith, as opposed to willfully. The Court held that it was not necessary for the trial court to make a finding that the evidence was destroyed in bad faith, rather a showing of willful conduct was required. 129 P.3d at 1003. See also W*estern Fire Truck v. Emergency One*, 134 P. 3d 570, 576 (Colo. App. 2006).

As determined in Findings of Fact 25-26, Respondents failed to make the requisite showing of willful or intentional conduct on the part of Claimant. Accordingly, the ALJ declined to draw an adverse inference against Claimant that the IME would have provided contrary evidence to the claim that her condition worsened.

ORDER

It is therefore ordered that:

1. Respondents are liable for the treatment provided by Dr. White and Porter Hospital, including the total hip arthroplasty. These shall be paid pursuant to the Workers' Compensation Fee Schedule.

2. Respondents shall provide medical benefits to Claimant through authorized treating physicians until she is released from care. These medical benefits are to be provided as post-MMI maintenance benefits.

3. Claimant's request for TTD benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm

DATED: April 26, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO

ISSUES

The issues raised by Respondents' Partial Motion for Summary Judgment was whether there are disputed issues of fact between the parties and whether judgment should be entered for Respondents as a matter of law with regard to the overpayment of temporary total disability benefits (TTD). Respondents contend that Claimant was overpaid TTD and that an order should be entered in favor of Respondents as a matter of law finding Claimant is liable to Respondents for overpaid TTD totaling $10, 718.39 at the rate of $25.00 per week. Claimant contends the Partial Motion for Summary Judgment should be denied because there remain disputed issues of fact and summary disposition of this matter is not appropriate.

UNDISPUTED FACTS

1. This matter arises out of an admitted work-related injury on May 8, 2015, to Claimant's right wrist.

2. Claimant received TTD for the time period of 5/12/15 through 5/14/15, and again beginning on 5/22/15. See Exhibit B and Exhibit I.

3. Claimant has an AWW of $425.03, and a TTD benefit rate of $283.35. See Exhibit B and Exhibit I.

4. On February 12, 2016, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation (Petition to Terminate). Claimant returned to regular employment on or about December 4, 2015. See Exhibit C.

5. The Department of Labor and Employment approved Respondents' Petition to Terminate on March 17, 2016, stating Respondents were permitted to terminate benefits as of the date of their petition. See Exhibit D.

6. Contained in the Findings of Fact, Conclusions of Law, and Order dated March 31, 2016, was a stipulation from the parties that Claimant returned to work on December 2, 2015. The Order further held that benefits for Claimant's left upper extremity were denied and dismissed. See Exhibit E.

7. On April 5, 2016, the authorized treating physician, Davis Hurley, M.D., wrote a letter stating Claimant reached MMI on her right wrist and hand on July 2, 2015, with a 0% impairment rating, and no need for maintenance care. See Exhibit F.

8. On May 4, 2016, Respondents filed an Amended Final Admission of Liability stating Claimant was entitled to TTD for 5/22/15 thru 7/1/15. The cutoff for TTD was changed to 7/1/15, pursuant to Dr. Hurley's report placing Claimant at MMI on July 2, 2015, and the

Amended FA showed an overpayment of $10,718.39. See Exhibit G. On December 6, 2016, Respondents filed an Application for Hearing. Among other issues raised are, Respondents endorsed overpayment and recovery of overpayment. See Exhibit A.

10. The amount of TTD owed for 5/12/15 through 5/14/15 is $121.44, and the amount owed for 5/22/15 through 7/2/15 is $1,700.10. See Exhibit I.

11. Claimant has been paid a total of $12,548.36 in TTD to date. See Exhibit H and I.

CONCLUSIONS OF LAW

General Legal Principles

Under C.R.C.P. 56, an ALJ may enter summary judgment where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *See e.g. Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo.App. 1988). The C.R.C.P. is applicable to Workers' Compensation proceedings to the extent that they are not inconsistent with applicable Workers' Compensation statutes. *Renaissance Salon v. Industrial Claim Appeals* Office, 994 P.2d 447 (Colo. App. 1999); *Nova, supra*. (C.R.C.P. apply in WCA proceedings insofar as it is not inconsistent with the Act's procedural or statutory provisions); *Cf. In re Rivera*, W.C. No. 4-574-706 (ICAO, 1/22/04).

Pursuant to C.R.C.P. Rule 56(c), summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *McCormick v. Union Pacific Res. Co*., 14 P.3d 346, 349 (Colo. 2000)(citing, *Bebo Contsr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999)).

The purpose of a Motion for Summary Judgment is to pierce through the formal allegations of the pleadings and save the time and expense connected with a trial, when, as a matter of law, based on undisputed facts, one party could not prevail. *Ginter v. Palmer and Co*., 196 Colo. 203, 205, 585 P.2d 583, 584 (1978)(citing, *Abrahamsen v. Mountain States Telephone & Telegraph Corp*., 177 Colo. 422, 494 P.2d 1287 (1972)).

The burden of establishing that there is no triable issue of material fact is on the moving party. *McCormick, supra* (*citing Greenwood Trust v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997). The moving party meets its burden by identifying those parts of the record to demonstrate the absence of genuine issue of material fact. *Id*. Once the moving party establishes that no material fact is in dispute, the burden of proving the existence of an issue of material fact for trial shifts to the opposing party. *Id*. If the opposing party fails to satisfy its burden of proof, the moving party is entitled to summary judgment. *Id*.

Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates it is entitled to judgment as a matter of law. *Van Alstyne v. Housing*

Authority of Pueblo, 985 P.2d 97 (Colo.App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. Furthermore, failure to file an affidavit or other documentary evidence in opposition to a motion for summary judgment does not relieve the moving party of its burden to establish entitlement to summary judgment. *People v. Hernandez and Associates*, 736 P.2d 1238 (Colo.App. 1986); *Cf. Division of Workers' Comp. v. Sundance*, W.C. No. 2002-110238 (ICAO, 1/13/04).

A "material fact" is simply a fact that will affect the outcome of the case. *In re Water Rights of the United States*, 854 P.2d 791 (Colo. 1993). Where there are disputed issues of material fact, due process requires the parties be afforded a reasonable opportunity to present evidence and confront adverse evidence. *Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo.App. 1990).

Denial of the Motion for Summary Judgment

Respondents alleged entitlement to recover of an overpayment in the amount of $10,718.39. Respondents seek an order granting Summary Judgment in favor of them finding Claimant is liable to Respondents for the $10,718.39 overpayment. Claimant contends Respondents' Partial Motion for Summary Judgment should be denied and that a hearing should be held because Claimant took no action that contributed to or brought about the overpayment and thus she contends she is not liable for repayment of the overpaid TTD. Neither party cites authority for their position.

The undisputed evidence established that Claimant received TTD in excess of the amount she might have been entitled to if the authorized treating physician had timely made the MMI determination or if Respondents had learned of Claimant's return to work in December 2015. However, since Respondents continued to pay TTD until advised that its Petition to Terminate benefits was granted on March 17, 2016, no overpayment for which Respondents were entitled to recovery arose. *See United Airlines v. Industrial Claims Appeals Office,* 312 P.3d 235 (Colo. App. 2013), cert. denied, 2013 5797529 (Colo. 2013); *Rocky Mountain Cardiology v. Industrial Claims Appeals Office,* 94 P.3d 1182 (Colo. App. 2004).

Therefore, Respondents are not entitled to judgment as a matter of law. The undisputed facts do not support the conclusion that Respondents are entitled to recover an overpayment.

ORDER

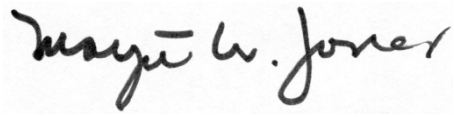
It is therefore ordered that:

Respondents Motion for Partial Summary Judgment is denied.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2017



Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Has Claimant overcome the DIME's finding of no impairment by clear and convincing evidence? If so, what is the proper impairment rating?

2. Has Claimant proven by a preponderance of the evidence that he is entitled to medical benefits after MMI?

STIPULATIONS

1. The parties stipulated Claimant's average weekly wage (AWW) is $334.62, with a corresponding TTD rate of $223.08.

2. With regard to the video surveillance, the parties stipulated the video does not depict continuous filming of the Claimant, the video was turned off between frames when the Claimant was not bowling, and the video does not show Claimant's activities when he was not bowling on the days that the surveillance was undertaken.

FINDINGS OF FACT

1. Claimant performs security monitoring and light maintenance for Employer. On January 28, 2014, he sustained an admitted injury to his neck as a result of a motor vehicle accident. Claimant was performing "security rounds" at one of Employer's properties when his vehicle slid off a snowy road into a snowbank. He was traveling approximately 10 mph at the time of the accident.

2. Employer referred Claimant to Woodland Park Family Medicine for authorized medical treatment. At his initial visit on February 4, 2014, Claimant saw NP Stacy Concelman. Physical examination revealed spasm of the bilateral trapezius muscles extending over the shoulders and midway to the scapula, worse on the right. Nurse Concelman diagnosed cervicalgia, and headache related to muscle spasm. She prescribed Valium for muscle spasm, Percocet, and meloxicam.

3. Claimant had x-rays and an MRI of his cervical spine on February 14, 2014. The MRI showed an eccentric C3-C4 disk bulge making minimal contact with the exiting left nerve root, moderate facet hypertrophy and arthritis at C4-C5, and mild central canal stenosis at C5-C6 related to posterior disk osteophyte formation.

4. Claimant followed up with Nurse Concelman after the MRI exam. She documented spasm of the paraspinal muscles in the cervical region extending to the trapezius across the shoulders.

5. On February 21, 2014, Nurse Concelman referred Claimant to physical therapy for his neck pain and muscle spasms.

6. Claimant participated in physical therapy over the next few months with moderate improvement. Nurse Concelman documented cervical muscle spasm at more than one visit.

7. Claimant began treating with Dr. Matthew Young on July 18, 2014. He reported aching neck pain and right upper extremity numbness and paresthesias affecting his fingers. Physical examination revealed spasm throughout the cervical region extending laterally to the trapezius on the right side. Claimant was not interested in epidural steroid injections because he had a bad experience with steroid injections for a previous shoulder injury. Dr. Young recommended nerve conduction studies to investigate his radicular-type upper extremity symptoms.

8. Claimant saw Dr. Thomas Bowser on August 8, 2014 for EMG/NCV testing. The electrodiagnostic testing showed moderate bilateral carpal tunnel syndrome, but no evidence of cervical radiculopathy.

9. After reviewing Dr. Bowser's report, Dr. Young referred Claimant to Dr. Christopher Malinky for consideration of injections. He also referred Claimant back to physical therapy because "he was having efficacy with less pain while he was in physical therapy."

10. On September 19, 2014, Dr. Young noted Claimant was experiencing "mild to moderate [neck pain] most of the time with severe pain occasionally." Physical therapy was helping, and he was taking Percocet "occasionally."

11. Respondents obtained video surveillance footage of Claimant on November 20, 2014. The video showed Claimant bowling and interacting with family members with no apparent difficulty or pain.

12. Claimant saw Dr. Young on November 21, 2014, the day after he was video-recorded bowling. Claimant reported "severe" neck pain, at a level of 8/10. Physical activity aggravated the pain. Dr. Young noted Claimant's cervical range of motion was "markedly diminished." He refilled Claimant's medications and referred him to Dr. Todd Thompson for a neurosurgical consultation.

13. In December 2014, Claimant started chiropractic treatment, which was reportedly helpful.

14. Respondents obtained additional video surveillance of Claimant on January 15, 2015 that showed Claimant bowling for an extended period. Claimant was able to move his neck freely and fluidly, without apparent limitation. Claimant demonstrated no apparent limitation or pain in the video.

15. On April 3, 2015, Claimant saw Dr. Scott Primack for an Independent Medical Examination (IME) at Respondents' request. Dr. Primack concluded

> Based upon the history, clinical examination, review of the medical records, and the surveillance tapes, I do believe that the patient is

> consciously misrepresenting his physical capabilities. At best, there may have been a cervical strain on 01/28/2014. However, if the patient has any pain at all, it has absolutely nothing to do with his auto accident, but has everything to do with his cervical spondylosis. The cervical spondylosis may well be periodic. This could occur from extensive bowling or lifting of his granddaughter.

16. Dr. Primack opined that any treatment after November 2014 should not be considered work-related.

17. On May 27, 2015, Dr. Young opined Claimant had reached MMI. Claimant was still suffering from chronic neck pain with some radicular symptoms to the upper extremities. He referred Claimant for an FCE and asked him to return for an impairment rating.

18. Claimant saw Dr. Young on June 12, 2015 to review Dr. Primack's IME report. Dr. Young disagreed with Dr. Primack's opinions. Regarding the video of Claimant's bowling activities, Dr. Young noted "I currently have [the] patient without restrictions. He has no restrictions on lifting, and whether or not he can bowl has nothing to do with his case. I do believe that [this] patient has pain and he demonstrates decreased ROM on exam and has evidence of palpable cervical spasm on exam." On physical examination that day, Claimant demonstrated reduced range of motion, and "significant paraspinal muscle spasm."

19. Claimant completed the FCE on August 6, 2015. The FCE was considered valid based on internal consistency criteria. The therapist opined that Claimant gave reliable and maximal effort. Claimant demonstrated the ability to work at a modified light level of exertion, with maximum lifting of 30 pounds.

20. Dr. Young saw Claimant on August 10, 2015 to review the FCE and complete an impairment rating. Dr. Young opined there was "clear correlation" between Claimant's symptoms and his industrial injury. Dr. Young assigned 6% whole person specific disorder impairment under Table 53 II-C of the *AMA Guides*. Range of motion measurements showed an additional 9% impairment, for an overall combined whole person cervical rating of 15%.

21. Respondents requested a DIME, and Dr. Miguel Castrejon was selected as the DIME physician. Dr. Castrejon evaluated Claimant on November 11, 2015.

22. On physical examination, Claimant demonstrated "diffuse" tenderness involving the lower paracervical muscles. Dr. Castrejon appreciated no palpable muscle spasm. Facet loading was negative. Dr. Castrejon concluded the upper extremity symptoms were caused by carpal tunnel syndrome, unrelated to the industrial injury. Dr. Castrejon diagnosed "temporary exacerbation of long-standing pre-existing multilevel cervical degenerative disk and joint disease with no acute changes as a result of the event of January 28, 2014." Dr. Castrejon opined that Claimant's mechanism of injury was "relatively minor," and the physical examination findings were "only minimally

abnormal." Dr. Castrejon opined that Claimant's cervical range of motion measurements were significantly more limited than the motion demonstrated on casual observation and in the surveillance video. Dr. Castrejon thought the video footage demonstrated "no apparent limitation in terms of cervical range of motion nor use of the upper limbs when carrying out bowling activities." Dr. Castrejon concluded:

> the mechanics of the injury for the event of January 28, 2014 would be consistent with the development of neck pain on the basis of a cervical straining injury. This condition was adequately and appropriately treated. This condition resulted in a temporary exacerbation of the claimant's pre-existing long-standing cervical degenerative changes.

23. Dr. Castrejon determined Claimant was at MMI as of the IME with Dr. Primack and sustained no permanent impairment under Table 53. Dr. Castrejon further opined Claimant requires no maintenance treatment after MMI.

24. Although Dr. Castrejon's narrative report referenced April 30, 2015 as the MMI date, the ALJ concludes that is a typographical error. Dr. Castrejon explicitly stated he assigned MMI as of Dr. Primack's IME, which took place on April 3, 2015. Moreover, Dr. Castrejon's handwritten notation on the Division IME Examiner's Summary Sheet states MMI was "4-3-15." Therefore, Claimant's MMI date is April 3, 2015.

25. Dr. Linda Mitchell performed an IME for Respondents on March 18, 2016. Dr. Mitchell's physical examination found no spasm, tenderness, or rigidity in Claimant's cervical spine. Dr. Mitchell reviewed the surveillance video, which shows Claimant moving his neck through a nearly full range of motion quickly, freely, and with no evidence of discomfort. Dr. Mitchell opined Claimant reached MMI on August 10, 2015 as determined by Dr. Young. Dr. Mitchell opined Claimant's ongoing symptoms are related to his underlying preexisting degenerative changes rather that the industrial injury. Dr. Mitchell agreed with Dr. Castrejon that Claimant has no injury-related permanent impairment and requires no further medical treatment for the work injury.

26. Dr. David Yamamoto performed an IME at Claimant's request on April 7, 2016. Dr. Yamamoto diagnosed a cervical strain with persistent symptoms, and chronic degenerative changes in the cervical spine. On physical examination, Claimant had tenderness in the posterior neck without appreciable spasm. His range of motion was reduced in all directions. Dr. Yamamoto opined that Claimant "DID INJURE HIS NECK on 01/28/2014 and certainly qualifies for a table 53, II-B impairment." (Capitals in original). Dr. Yamamoto used category II-B because "it is my opinion that the [degenerative] changes seen [on MRI] were primarily chronic in nature." Dr. Yamamoto did not assign a range of motion rating because the measurements he obtained were inconsistent with the video surveillance and the prior measurements by Dr. Young.[1]

27. Dr. Young testified in a deposition on August 23, 2016. Dr. Young disagreed with Dr. Castrejon's determination that Claimant's ongoing symptoms are

[1] The cervical ROM measurements obtained by Dr. Yamamoto would correlate to an 18% rating, double Dr. Young's ROM rating.

related to pre-existing degenerative changes. Dr. Young opined Claimant's symptoms are causally related to his industrial injury. Dr. Young testified Claimant has repeatedly demonstrated muscle spasm on multiple examinations. Dr. Young did not believe the surveillance video was inconsistent with Claimant's injury or negated his impairment rating.

28. Dr. Mitchell testified at hearing on behalf of Respondents. Dr. Mitchell testified Claimant has degenerative joint disease in his cervical spine, unrelated to his work injury, and this condition can progress over time, causing symptoms and restricted range of motion. Dr. Mitchell opined Claimant has a "chronic pre-existing condition [cervical spondylosis] that would account for his ongoing symptomatology, regardless of whether the work injury had occurred." Dr. Mitchell opined that, if Claimant qualified for a permanent impairment rating, Table 53 II-C was the most appropriate section. But Dr. Mitchell did not believe Claimant had any permanent impairment as a proximate result of his industrial injury.

29. Claimant was an avid bowler for many years before his industrial injury, and at one point even considered turning professional. As a result of his injury, Claimant gradually cut back on his bowling, and eventually stopped bowling entirely in the spring of 2015.

30. Claimant continued to work for Employer throughout his course of treatment after the injury.

31. Dr. Young's notes consistently document that medication improves Claimant's quality of life and ability to perform activities of daily living, with low suspicion for abuse and no side effects.

32. Claimant has overcome the DIME's determination of no impairment by clear and convincing evidence.

33. Dr. Young's opinion regarding Claimant's entitlement to a rating under Table 53 II-C is credible and persuasive.

34. Claimant has proven by a preponderance of the evidence that he is entitled to a 6% whole person cervical rating under Table 53 II-C.

35. Dr. Castrejon, Dr. Mitchell, and Dr. Yamamoto's opinions that Claimant's cervical ROM measurements are inconsistent with his clinical presentation and the video surveillance are credible and persuasive.

36. Claimant has failed to prove by a preponderance of the evidence he is entitled to a rating for cervical ROM deficits.

37. Dr. Young's opinions regarding Claimant's need for medical treatment after MMI are credible and persuasive.

38. Claimant has proven by a preponderance of the evidence that he requires medical treatment after MMI to relieve the effects of his injury and prevent deterioration of his condition.

CONCLUSIONS OF LAW

A. Claimant has overcome the DIME by clear and convincing evidence

The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(c); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the MMI determination is incorrect. *Qual-Med*, 961 P.2d at 592.

The DIME physician must engage in a "diagnostic process" when evaluating whether a claimant is at MMI. A determination of MMI inherently involves issues of diagnosis and causation, because the DIME must determine what medical conditions exist and which are causally related to the industrial injury. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Hodges v. ATR Collision, Inc*., W.C. No. 4-751-557 (ICAO, August 24, 2010). Accordingly, the DIME's findings regarding diagnosis and causation are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(II); *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007).

As found, Claimant has overcome Dr. Castrejon's determination of no impairment by clear and convincing evidence. The crux of Dr. Castrejon's determination is his opinion that Claimant suffered a "temporary exacerbation of long-standing pre-existing multilevel cervical degenerative disk and joint disease." The problem with that opinion is that the degenerative changes in Claimant's neck were entirely asymptomatic before the admitted industrial injury, but Claimant has been continuously symptomatic and required ongoing treatment since the injury. He has never returned to his pre-injury baseline status, which was a nonpainful neck requiring no medical treatment. Dr. Castrejon agrees Claimant suffered a compensable injury and did not reach MMI until he received 15 months of treatment. Claimant's treating providers have repeatedly documented muscle spasm, which is an objective finding. Based on the evidence presented, the ALJ concludes that Claimant's injury was not "temporary," because it continues to affect him to this day. The ALJ concludes Dr. Castrejon is highly probably incorrect that all of Claimant's symptoms after April 2015 are causally related to underlying degenerative changes, which were entirely asymptomatic before the industrial injury.

B. Claimant sustained a 6% whole person impairment to his cervical spine

Once the ALJ determines that a DIME rating has been overcome in any respect, the proper rating becomes a question of fact for the ALJ under the preponderance standard. *Paredes v. ABM Industries*, W.C. No. 4-862-312-02 (ICAO, April 14, 2014); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (ICAO, September 5, 2001). The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating protocols. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (ICAO, October 14, 2016). A finding that the DIME's rating has been overcome does not require the ALJ to reject the DIME's opinions in their entirety. Rather, the DIME's findings can be considered with all other evidence when evaluating the preponderance of persuasive evidence. *Paredes, supra*.

The *AMA Guides* require the rating physician to conduct a clinical and historical evaluation of the claimant's health status and compare the results to the rating criteria in the *AMA Guides*. *Wackenhut Corporation v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000). A rating physician is not required to award impairment under Table 53 merely because a claimant reports pain and rigidity, or merely because the claimant's medical records document pain and rigidity of six months' duration. To the contrary, a physician may conclude the claimant's overall clinical picture is inconsistent with impairment under Table 53 and decline to assess such impairment. *Marquez v. Inverness Hotel & Golf Club*, W.C. No. 4-498-415 (ICAO, March 25, 2003). *Wilson v. Qwest Communications, Inc.,* W.C. No. 4-846-802-01 (ICAO, January 12, 2012). The same logic applies to ratings based on ROM deficits, and exclusion of otherwise "valid" ROM measurements may be appropriate where the measured impairment does not correlate with the rating physician's clinical observations or other persuasive evidence of function. *Garcia v. Merry Maids*, W.C. No. 4-493-324 (ICAO, August 12, 2002). The above-stated principles apply equally when the ALJ is determining the claimant's impairment rating under the preponderance standard because the ALJ assumes the role of the rating physician. *Serena v. SSC Pueblo Belmont OP Co. LLC.*, W.C. No. 4-922-344-01 (ICAO, December 1, 2015).

As found, the preponderance of persuasive evidence demonstrates that Claimant suffered a 6% whole person cervical impairment under Table 53 II-C as a result of his industrial injury. Dr. Young persuasively opined that Claimant's condition most closely approximates the criteria in section II-C, based on "moderate to severe" degenerative changes on structural tests. Dr. Mitchell agreed that, if Claimant were entitled to a rating, he should be rated under section II-C. The ALJ is not persuaded by Dr. Yamamoto's decision to apply section II-B, because that section refers to "none-to-minimal" degenerative changes. Based on the degree of degenerative changes demonstrated on Claimant's MRI, the ALJ agrees with Dr. Young and Dr. Mitchell that section II-C is most appropriate.

The ALJ is not persuaded that Claimant has demonstrated ROM deficits with sufficient consistency and reliability to support a ROM-based rating. Claimant has shown substantial variability of cervical ROM with multiple providers. The ALJ acknowledges many of the measurements were "valid" under the *AMA Guides'*

reproducibility criteria. But with the exception of Dr. Young, all Level II examining physicians — *including Claimant's IME* — agreed the cervical ROM measurements are inconsistent with Claimant's clinical presentation and the mobility demonstrated on the surveillance video. In light of the numerous inconsistencies and the activities depicted in video footage, the ALJ has no confidence that any cervical ROM measurements contained in the record accurately reflect true permanent impairment. Based on the totality of evidence presented, the ALJ concludes that Claimant has no ratable impairment related to cervical ROM deficits.

C. Claimant is entitled to a general award of medical benefits after MMI

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond MMI if the claimant requires further treatment to relieve the effects of the injury or prevent deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Where the respondents dispute a claimant's entitlement to medical benefits after MMI, the claimant must prove entitlement to those benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). If the claimant establishes the probability of a need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003).

As found, Claimant has proven by a preponderance of the evidence that he requires further medical treatment to relieve the effects of his injury and prevent deterioration of his condition. Claimant has continued to receive maintenance-type treatment from Dr. Young since he was placed at MMI. Dr. Young's records consistently document that the medications improve Claimant's quality of life and ability to engage in activities. Dr. Young regularly reviews the PDMP, and there is no persuasive evidence Claimant has abused his medications or violated his narcotics contract. Dr. Young's opinions regarding Claimant's need for ongoing treatment are credible and persuasive. The contrary opinions of Dr. Castrejon and Dr. Mitchell are primarily based on their opinions that Claimant's ongoing symptoms are not causally related to the industrial injury. The ALJ has rejected this reasoning by finding that Claimant overcame the DIME by clear and convincing evidence.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant PPD benefits based on a 6% whole person rating.

2. Respondent shall pay statutory interest of 8% per annum on all compensation not paid when due.

3. Claimant's claim for additional PPD benefits based on cervical ROM deficits is denied and dismissed.

4. Respondents shall pay for reasonable, necessary, and related medical treatment after MMI from authorized providers to relieve the effects of Claimant's industrial injury and/or prevent deterioration of his condition.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 27, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issue presented involves Claimant's entitlement to additional medical benefits. The specific question to be answered is:

I. Whether Dr. Mark Meyer's request for additional physical therapy and dry needling is "deemed authorized" for Respondents' failure to contest his request for prior authorization in compliance with WCRP 16-9 and 16-10.

II. If Claimant failed to establish that the additional physical therapy and dry needling should be deemed authorized, whether Claimant is nevertheless entitled to said physical therapy and dry needling on the grounds that it is otherwise reasonable, necessary and related to his January 6, 2000 industrial injury.

III. Whether Claimant established by a preponderance of the evidence that repeat medial branch blocks and a repeat MRI as recommended by Dr. Mark Meyer is reasonable, necessary and related to Claimant's January 6, 2000, admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Allison Fall, the ALJ enters the following findings of fact:

1. On January 6, 2000, Claimant injured his low back in the produce department for Employer while attempting to charge an electric pallet jack. Claimant experienced immediate, debilitating pain in his lumbar spine and bilateral legs. Claimant undertook a protracted course of conservative care which failed to provide lasting relief of his symptoms. Eventually Claimant underwent lumbar spine fusion surgery with Dr. Roger Sung on January 15, 2002. The surgery was ineffective in relieving Claimant's pain, and in fact, his pain was worse after the surgery. Consequently, Claimant has received wide-ranging post surgical maintenance medical treatment.

2. As part of his post surgical treatment, Claimant came under the care of Dr. Mark Meyer on July 16, 2003. When Dr. Meyer first evaluated the claimant, the claimant described a "throbbing, constant, sharp, burning pain ranging from an 8/10 at rest to a 10/10 with activity predominantly in the mid area of the back and radiating into the left side and leg." According to Dr. Meyer, Claimant had tried "nonsteroidals, muscle relaxants, Tylenol, physical therapy, chiropractic, acupuncture, opioids and massage over time with varying degrees of temporary benefit." It was also noted that Claimant had received two nerve blocks from Dr. Benecke, which Claimant reportedly could not recall were of particular benefit in providing lasting symptom relief. .

3. On October 28, 2003, Dr. Meyer performed a selective nerve root block at L5 on the left. The block was not of any help in relieving Claimant's pain complaints.

4. On April 4, 2004, Dr. Jeffrey Jenks evaluated Claimant and performed EMG testing. The EMG was read as showing "[n]o obvious evidence of left lumbosacral radiculopathy." According to Dr. Jenks' report, The absent motor unit on testing "may be secondary to a lack of voluntary effort of the muscles tested." Dr. Jenks reported that "[t]t is unusual to see complete lack of motor units without evidence of membrane irritability in the context of a lumbosacral radiculopathy." Given these findings, Dr. Jenks suggested the potential for functional overlay and symptom magnification.

5. On May 14, 2004, Insurer filed an Amended Final Admission f Liability (FAL) admitting liability for 33 percent whole person impairment in addition to reasonable, necessary and related post maximum medical improvement (MMI) treatment benefits.

6. On June 10, 2005, Dr. Jeffrey Sabin evaluated Claimant at the request of Insurer. Based on his independent medical evaluation (IME), which included an extensive review of Claimant's medical records, Dr. Sabin diagnosed chronic low back pain and left leg pain and weakness of unknown etiology. Dr. Sabin opined that Claimant's left leg weakness went beyond any particular nerve root finding on examination. Specifically he noted: "[h]e is physically weak in a number of areas, which simply does not make sense and it hurts when he puts any weight whatsoever on the left lower extremity, which is difficult to support on the basis of the x-ray and MRI reports".

7. On April 25, 2006, Dr. Meyer evaluated Claimant in follow-up during which visit Claimant was requesting a stair lift in his house. Dr. Meyer indicated he is not supportive of Claimant having a lift, as "this is allowing him to take on the role of a more debilitated person." Dr. Meyer went on to opine, "I would like to see him become more active and proactive in his rehabilitation".

8. On August 15, 2006, Dr. Meyer opined that Claimant was not likely to have significant improvement with pain management "over time regardless of any interventions, based on his psychiatric profile."

9. Dr. Meyer reevaluated Claimant on October 10, 2006. He recommended L5-S1 medial branch blocks. Claimant underwent the recommended blocks; however, his pain did not improve, but rather worsened to a level 10/10. Despite Dr. Meyer's extensive treatment, Claimant continued to report a very poor quality of life and very limited abilities.

10. On July 29, 2010, Dr. Meyer opined, "the only thing which [he] would consider for [Claimant] . . . would be the possibility of a left sacroiliac joint (SI) injection diagnostically. Nonetheless, Dr. Meyer did not think it would "realistically . . . address a significant portion of [Claimant's] pain".

11. On November 8, 2010, Claimant underwent repeat L5-S1 transforaminal epidural steroid injections, which again provided no benefit and actually worsened his pain.

12. On September 12, 2011, Dr. Meyer performed bilateral SI joint injections. Claimant reported no benefit from the procedure. Rather, he complained of new and worsening right-sided radiculopathy and weakness.

13. Claimant underwent repeat L5-S1 transforaminal ESIs on November 19, 2012, which Claimant reported for a third time in a follow-up visit on December 10, 2012, caused worsening symptoms. During his December 10, 2012 visit, Claimant reported to physician assistant (PA), David Faron that he was willing to try an additional injection if Dr. Meyer "though there was a reasonable chance for improvement."

14. On November 6, 2013, Dr. Meyer drafted a letter, "To Whom It May Concern", in which he opined: "The only thing that has really provided him any significant benefit over the last couple of years has been some occasional chiropractic treatments/manipulations which do tend to help the severe spasm in his back". Dr. Meyer also recommended repeat diagnostic SI joint injections. The repeat SI joint injections were performed on November 18, 2013, with no reported benefit.

15. Claimant continued his maintenance treatment with Dr. Meyer for many months without reported improvement in symptoms. On May 5, 2016, Dr. Meyer reevaluated Claimant for complaints of increasing low back pain and spasms in the anterior thigh. Dr. Meyer's "plan" was to "request authorization for repeat MRI, with and without contrast, and resume PT with dry needling since [Claimant] has increased LBP and radicular symptoms."

16. On May 11, 2016, Dr. Meyer's office drafted a facsimile cover sheet wherein he indicated that he was seeking authorization for a repeat lumbar MRI with and without contrast along with dry needling and physical therapy. This cover sheet along with a copy of the May 5, 2016 treatment note was faxed to the adjuster assigned to the case on May 17, 2016, and was purportedly received by Insurer on May 18, 2016. Claimant contends that the cover sheet and May 5, 2016 report faxed to the claims representative constitutes a completed request for prior authorization pursuant to WCRP 16-10.

17. Respondents took no action concerning the request for physical therapy and dry needling; however, a repeat MRI, with and without contrast, was performed on May 30, 2016. The images from this MRI were compared to one performed May 9, 2011. A reported generated thereafter indicates that the May 30, 2016 MRI was read as a "stable, but abnormal MRI." Although opposing counsel suggests Dr. Meyer continued to request another MRI after that performed May 30, 2016, there has been no subsequent request for prior authorization and there seems to be some confusion on Dr. Meyer's part. Dr. Meyer is apparently unaware the May 30, 2016, MRI was performed. In response to opposing counsel's correspondence regarding the repeat MRI, on December 18, 2016, Dr. Meyer indicated:

> Yes, I do think it is appropriate to repeat the lumbar MRI given the fact that the patient has not had one for four to five years as increasing weakness and severity of the radiculopathy on EMG as well as increasing pain all evident…..

18. On July 5, 2016, Claimant returned to Dr. Meyer for evaluation. Dr. Meyer documented a normal gait pattern and graded Claimant's strength as "good" [4/5] in all the major muscle groups tested in both the upper and lower extremities. Moreover, Claimant's straight raise leg testing was noted to be negative. Claimant's lumbar exam was only a positive left quadrant loading test. Under "Plan", Dr. Meyer noted: "Bilateral L5S1MBB" and "Repeat EMG/NCV Dr. Scott or Dr. Sandell". The note fails to provide an explanation of the reasonableness or medical necessity of either procedure.

19. On July 12, 2016, Dr. Meyer requested "repeat EMG testing of Claimant's lower extremities. The EMG testing was authorized and would be performed by Dr. Timothy Sandell on July 26, 2016.

20. On July 18, 2016, the carrier received a request for prior authorization of the bilateral medial branch blocks recommended by Dr. Meyer during Claimant's July 5, 2016 appointment. Respondents denied the request on July 22, 2016 and filed choosing to set the matter for hearing pursuant to WCRP 16.

21. As noted, the EMG testing requested by Dr. Meyer was authorized and performed by Dr. Sandell on July 26, 2016, and was read as being abnormal. Specific findings included:

> Electrodiagnostic evidence suggestive of severe bilateral motor and sensory peripheral neuropathy.
>
> Electrodiagnostic evidence of multilevel radiculopathy involving the left L4, L5 and S1 levels and the right L5 and S1 levels.

22. At Respondents' request, Dr. Allison Fall preformed a fourth IME of Claimant on August 24, 2016.[1] Dr. Fall was asked to address Dr. Meyer's request for prior authorization of dry needling/physical therapy and repeat bilateral L5-S1 medial branch blocks. Dr. Fall opined that dry needling "would not lead to any long-term benefit and would likely increase [Claimant's] pain." According to Dr. Fall is thought to "affect muscle relaxation" and as such would not be expected to "do anything for his pain and chronic deconditioning." She also opined that there was "no indication for epidural

[1] Dr. Fall preformed an IME of Claimant on November 1, 2007 to address questions regarding the reasonableness, necessity and relatedness of the request for a stair glide. She also completed a records review request and a follow-up IME on January 27, 2009 and October 8, 2009 to answer questions regarding whether Claimant presented as a good candidate for spinal cord stimulation, whether a trial of spinal cord stimulation was reasonable and necessary and Claimant's need for a lightweight manual wheelchair. Finally, Dr. Fall conducted a third IME on March 6, 2013, to address questions surrounding whether physical therapy modalities were reasonable and necessary.

steroid injections due to the non-physiologic findings and chronicity of the symptomatology and a chronic pain syndrome."

23. By letter dated December 18, 2016, Dr. Meyer responded to interrogatories propounded by Claimant's counsel. In his letter report, Dr. Meyer indicates he recommends physical therapy and/or dry needling. However, Dr. Meyer noted that there are no guarantees with any benefit in dry needling in patients such as Claimant. He also noted that it "should be recognized that [dry needling/physical therapy] will not play a role in likely changing any of [Claimant's] radiculopathy pain or weaknesses as this is a chronic and permanent problem for him." Dr. Meyer also addressed the request for MRI and additional medial branch blocks stating:

> I do continue to recommend an [sic] lumbar medial branch blocks. Reason for this if [sic] the patient carries a diagnosis now 14 years after an L4-L5 decompression fusion with progressive changes over the years of L5-S1 degenerative disease, the MRI from 2011 clearly reports advanced L5 and S1 bilateral arthropathy of the facet joints as well as severe degenerative disc disease, which would be quite common this time duration after a fusion with the caudal transition levels being involved."
>
> "Mr. Mascotti has pain across his low back, increased with standing, bad when he first gets up from a sitting or lying down position and is consistent with elements of facet arthropathy given his pain complaints in his back as well as down into his left leg. I believe there are significant components likely attributable to the facet arthropathy post fusion at degenerative disc at the L5-S1 level, to me it has clearly indicated to proceed with medical branch blocks and if positive, move forward radiofrequency rhizotomy, which certainly could not only help his pain, but improve his ability to stand, ambulate, and maintain his ability to work."

24. The claimant testified that it is his hope the requested dry needling/physical therapy will reduce his pain and weakness, the two symptoms Dr. Meyer specifically concedes are "unlikely" to change with dry needling.

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25. Dr. Fall testified by deposition on February 8, 2017. She testified that the results of the May 30, 2016, MRI were very positive or reassuring in that there was no significant interval change compared to the May 9, 2011, MRI. There is no recurrent stenosis and there is a stable fusion. Consequently, Dr. Fall opined that a repeat MRI some nine months was not reasonable and necessary.

26. Based upon the evidence presented, the ALJ finds that Claimant has failed to prove that Dr. Meyer requested prior authorization of a repeat MRI after the May 30, 2016, MRI was performed or that repeating this diagnostic study a mere nine months after it was last performed is reasonable and necessary to maintain his condition at MMI.

27. Dr. Fall also testified that additional physical therapy is not warranted in this case explaining that Claimant's activity level is so minimal currently that he simply needs to "start doing more." According to Dr. Fall, there has been an over reliance on passive modalities in treating Claimant in this case. The ALJ infers and finds from Dr. Fall's testimony and the report of Dr. Meyer that she does not believe Claimant will benefit from additional therapy. Even Dr. Meyer agrees that Claimant presents with signs of functional overlay and symptom magnification. Moreover, multiple psychologists and evaluating physicians have opined Claimant is not likely to improve with any interventional modalities.

28. According to the testimony of Dr. Fall, dry needling is included within the Medical Treatment Guidelines as a modality that can be performed as part of physical therapy, but in this case it is not reasonable or necessary as it will not "change any underlying . . . anatomy or physiologic problem." Dr. Fall testified that dry needling will likely cause Claimant more pain since it involves "[sticking] needles in the muscles to try to alleviate increased muscle tension and spasm." Based upon the record evidence presented, the ALJ credits the opinion of Dr. Fall to find that Claimant's demonstrated poor response to prior injection therapies renders the request of dry needling unreasonable. While the undersigned is acutely aware of the fact that dry needling is very different than ESI and/or medial branch blocks, it is nonetheless invasive and involves the introduction of a needle into the body which has been poorly tolerated by Claimant in the past. Moreover, the evidence presented persuades the ALJ that dry needling is unnecessary as it is unlikely to play a role in "changing any of [Claimant's] radiculopathy pain or weaknesses [which] is a chronic and permanent problem for him" according to Dr. Meyer.

29. Based upon the evidence presented, the ALJ finds that Claimant has failed to prove, by a preponderance of the evidence that the requested physical therapy/dry needling is reasonable and necessary to maintain MMI. Furthermore, the evidence presented persuades the ALJ that Dr. Meyer's failed to present a completed request for prior authorization to the adjuster for dry needling.

30. To complete a prior authorization request under WCRP 16-10, the provider shall concurrently explain the reasonableness and the medical necessity of the services requested, and shall provide relevant supporting medical documentation. Supporting medical documentation is defined as documents used in the provider's decision-making process to substantiate the need for the requested service or procedure.

> (1) When the indications of the Medical Treatment Guidelines are met, no prior authorization is required. When prior authorization for payment is indicated, the following documentation is required:
>
> (a) An adequate definition or description of the nature, extent, and necessity for the procedure;
>
> (b) Identification of the appropriate Medical Treatment Guideline applicable to the requested service, if applicable; and

(c) Final diagnosis.

In this case, the ALJ finds that documentation sent to the adjuster consisting of a cover sheet and Dr. Meyer's May 5, 2016 treatment note is missing information required by Rule 16-10(F(1)(b), W.C.R.P. to make it a completed request for prior authorization for dry needling.

31. As noted at paragraph 23 above, Dr. Meyer, believes that Claimant, "has pain across his low back which is consistent with elements of facet arthropathy rendering the recommendation to proceed with medical branch blocks diagnostically and if positive, to radiofrequency rhizotomy a reasonable and necessary treatment modality to help, not only with pain, but to improve Claimant's ability to stand, ambulate, and maintain his ability to work." Claimant returned to work for Employer approximately 8 weeks after surgery and is currently working, albeit in a different section of the store from his wheelchair.

32. Regarding the recommendation for additional medical branch blocks, Dr. Fall testified that Claimant's reported leg pain is not consistent with facet arthropathy. Dr. Fall explained that facet joint arthropathy does not cause numbness and tingling or pain distal to the knee, "all of which is present in [Claimant's] leg pain." Moreover, Dr. Fall testified that simply having low back pain does not necessarily prove the existence of facet arthropathy. Rather, Dr. Fall testified that in this case she has not seen objective evidence of pain caused by facet arthropathy during examinations she's completed. She went on to explain that Claimant is fused at the level which Dr. Meyer believes is causing pain associated with facet arthropathy. According to Dr. Fall, symptoms from facet arthropathy are elicited with hyperextension and rotation. As noted, Claimant's low back has been fused and does not move at the level where Dr. Meyer believes his pain is emanating from. Consequently, Dr. Fall does not believe that the records clearly defines Claimant's facet joints as his pain generator as suggested by Dr. Meyer. Moreover, Dr. Fall testified that it was not medically probable that Claimant's response to an additional set of medical branch blocks would be different than that he demonstrated previously which in this case was counterproductive in that it increased Claimant's pain levels considerably. Finally, Dr. Fall explained that it was not medically appropriate to perform an invasive procedure without an expected improvement in function. Based upon the evidence presented, the ALJ finds that Claimant did not experience any meaningful improvement in his function following any of the blocks administered by Dr. Meyers. Rather, the ALJ finds that medical records support a conclusion that Claimant experienced increased pain levels without any improvement in function following ESI and SI joint injection as well as medial branch blocks. Consequently, the ALJ finds that the requested repeat medial branch blocks are not in accordance with Colorado's Medical Treatment Guidelines.

33. The ALJ finds the opinions of Dr. Fall to be credible, persuasive, and supported

by the evidence presented as a whole. Accordingly, the ALJ finds Dr. Fall's opinions more persuasive and entitled to greater weight than the contrary opinions issued by Dr. Meyer.

34. Claimant has failed to prove the requested repeat L5-S1 medial branch blocks are reasonable and necessary to maintain MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's

testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As found, the ALJ credits the opinions of Dr. Fall as persuasive regarding the reasonableness, necessity and relatedness of Claimant's need for additional physical therapy, dry needling and repeat medical branch blocks to his January 6, 2000 industrial injury.

Medical Benefits

The Requested Dry Needling/Physical Therapy, MRI and Repeat L5-S1 Medial Branch Blocks

D. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). Based upon the evidence presented, the ALJ concludes that Claimant has failed to prove that the request for additional physical therapy and dry needling is authorized because Respondents failed to comply with Rule 16-10(F), W.C.R.P.[2] In this case, the ALJ concludes that the request for prior authorization for additional physical therapy/dry needling dated May 11, 2016 was incomplete as it did not contain information required by Rule 16-10(F(1)(b), W.C.R.P. to make it a completed request. While the "request" did include a copy of the May 5, 2016 treatment note, the ALJ concludes that the note itself does not contain an adequate description of the nature, extent, and necessity for authorizing dry needling and/or additional physical therapy. Moreover, to the extent that dry needling is included within the Medical Treatment Guidelines as a modality that can be performed as part of physical therapy, as testified to by Dr. Fall, the May 5, 2016 report fails to identify the appropriate Medical Treatment Guideline applicable to the requested service.

E. The evidence presented also persuades the ALJ that Claimant failed to prove, by

[2] As found, the requested MRI was authorized and completed May 30, 2016. Thus, this order does not address the request for a repeat MRI in so much as Dr. Meyer did not submit a follow-up request for a repeat MRI following the May 30, 2016 study. Nonetheless, to the extent that Dr. Meyer made a follow-up request, the ALJ concludes that the results of the May 30, 2016 study render a follow-up MRI unnecessary and unreasonable.

a preponderance of the evidence, that the requested dry needling/physical therapy, repeat bilateral L5-S1 medial branch blocks and to the extend requested a follow-up MRI after May 30, 2016 are reasonable and necessary to maintain Claimant's MMI status.

F. Here, the evidence presented persuades the ALJ that the testimony and opinions of Dr. Fall are the most credible and persuasive. In the instant claim, the Claimant has undergone repeat EMG testing. The court accepts the testimony of Dr. Fall that the EMG shows a worsening peripheral neuropathy attributable to Claimant's 26-year history of diabetes, requiring the use of oral and injectable medications. Regardless of the cause of the peripheral neuropathy, Claimant presented no credible evidence that any of Dr. Meyer's treatment recommendations are designed to treat any of the findings on EMG. Rather, Dr. Meyer specifically stated the dry needling/physical therapy would likely *not* address the claimant's radiculopathy and lower extremity weakness, as these are chronic and permanent conditions. Furthermore, the ALJ accepts the testimony of Dr. Fall that repeat MRI is currently not reasonable and necessary given the results of the pre and post-contrast MRI that was authorized and performed on May 30, 2016. This MRI was read as "stable" when compared to the May 9, 2011, MRI. Finally, the court finds the request for prior authorization to perform repeat bilateral L5-S1 medial branch blocks similarly incomplete as the May 11, 2016 request for authorization for additional physical therapy and dry needling. Nonetheless, Respondents timely denied this request on July 18, 2016 and the ALJ is persuaded by the testimony of Dr. Fall that medical branch blocks were previously performed on October 6, 2010, with poor, nondiagnostic outcome. Given Claimant's prior response to medial branch blocks along with Dr. Fall's credible and convincing testimony, the ALJ concludes that such repeat intervention is unlikely to result in a different outcome. Consequently, the ALJ concludes that the request to repeat bilateral L5-S1 medial branch blocks is neither reasonable nor necessary.

ORDER

It is therefore ordered that:

1. Dr. Meyer's request for prior authorization for dry needling/physical therapy is denied and dismissed.

2. Dr. Meyer's request for a repeat lumbar MRI is denied and dismissed.

3. Dr. Meyer's request for repeat bilateral L5-S1 medial branch blocks is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 27, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he injured his right arm during the course and scope of his employment with Employer on November 20, 2016.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial injury.

FINDINGS OF FACT

1. Employer operates a casino in Colorado. Claimant works for Employer as an Assistant Chef on a buffet line. On November 20, 2016 Claimant completed his shift and clocked out for the day at 10:00 p.m. He left his station at Employer's first floor kitchen to wait for his friend Edward Kemp at Employer's Fireside Kitchen on the second floor of the facility.

2. Claimant waited for approximately 30 minutes until Mr. Kemp completed his work shift. At 10:30 p.m. Mr. Kemp clocked out. He planned to meet Claimant so they could drive back to Denver, Colorado from Employer's casino.

3. Claimant explained that he subsequently played a prank on Mr. Kemp. As Claimant was walking behind Mr. Kemp while on the second floor of Employer's casino, he popped a small creamer container at Mr. Kemp's back. The popping sound startled Mr. Kemp. As Mr. Kemp turned around, a knife from his knife bag struck Claimant in the right arm. Claimant suffered a laceration in his right elbow area.

4. Mr. Kemp initially reported that he and Claimant were turning a corner from opposite directions. They collided and Claimant suffered a right elbow laceration. However, he corrected his initial statement because the facts were incorrect. Mr. Kemp testified that, after he clocked out from work, he was walking ahead of Claimant. He heard a load popping sound that startled him. As he spun around, a serrated knife from his knife bag cut Claimant in the right elbow area.

5. Claimant remarked that he was not involved in any work activities when he popped the creamer container at Mr. Kemp. He acknowledged that the activities causing his right arm laceration on November 20, 2016 could be characterized as horseplay. Claimant noted that the event constituted an isolated prank and was not the type of activity that occurred regularly throughout the casino. He did not observe other employees engaging in horseplay while working for Employer. Claimant explained that

he had been trained and advised that he would be coached by a supervisor if he engaged in horseplay.

6. A Supervisor's Accident Investigation Report reflects that Claimant was engaged in horseplay with another employee after the completion of his shift. A knife came through the other employee's knife bag and cut Claimant's right arm. The Report reflects that Claimant would receive training and continued coaching from Chef de Cuisine J. David Stenborg.

7. Employer's Risk and Safety Manager Lorry Mooney testified that she conducted an investigation of the November 20, 2016 accident. She reviewed notes, statements and surveillance footage regarding the event. Ms. Mooney remarked that the incident occurred at 10:33 p.m. Claimant had clocked out from his shift at 10:00 p.m. Ms. Mooney explained that Claimant popped a creamer container at Mr. Kemp's back and was then cut by a knife in Mr. Kamp's bag. She confirmed that Mr. Stenborg coached Claimant and Mr. Kemp regarding horseplay at Employer's casino.

8. Ms. Mooney commented that an ambulance arrived at Employer's casino after the November 20, 2016 incident. Claimant received treatment for his right arm laceration in the ambulance.

9. Ms. Mooney presented Claimant with a designated provider list so that he could choose an Authorized Treating Physician (ATP). Claimant selected Occupational Medicine Physicians and received medical care from ATP Dee Jay Beach, D.O. and other authorized providers.

10. Claimant has failed to demonstrate that it is more probably true than not that he injured his right arm during the course and scope of his employment with Employer on November 20, 2016. Claimant explained that after he completed his work shift and clocked out he went up to Employer's second floor kitchen to wait for Mr. Kemp to finish his shift so they could travel together back to Denver. As Claimant was walking behind Mr. Kemp he popped a small creamer container at Mr. Kemp's back. Mr. Kemp became startled and twisted around. A serrated knife from his knife bag cut Claimant in the right elbow area. Although Mr. Kemp initially provided a different version of the November 20, 2016 incident, he subsequently corroborated Claimant's account. After conducting a comprehensive investigation, Ms. Mooney also confirmed Claimant's account. She remarked that the November 20, 2016 accident occurred at 10:33 p.m. in Employer's casino. Claimant had clocked out from his shift at 10:00 p.m. He was cut by a knife in Mr. Kamp's bag after he had popped a creamer container at Mr. Kemp's back. Ms. Mooney commented that Mr. Stenborg coached Claimant and Mr. Kemp regarding horseplay at Employer's casino.

11. The record reveals that the November 20, 2016 incident constituted a deviation from employment so substantial as to remove it from the employment relationship. The deviation from employment activities was significant because Claimant had completed his shift and clocked out about 30 minutes prior to popping the creamer container. The activity of popping a creamer container at Mr. Kemp did not

constitute an employment duty. Instead, Claimant engaged in an activity outside of his employment duties that caused his injury. Moreover, Claimant remarked that he was not performing any job duties when he popped the creamer container at Mr. Kemp. He acknowledged that the activities causing his right arm laceration on November 20, 2016 could be characterized as horseplay. Claimant noted that the November 20, 2016 event constituted an isolated prank and was not the type of activity that regularly occurred throughout the casino. Furthermore, Employer provided Claimant with training and coaching regarding horseplay after the incident. Therefore, Claimant's deviation constituted horseplay and removed the activity from the employment relationship. Accordingly, Claimant's right arm injury did not arise out of his job duties for Employer on November 20, 2016.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has

its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991).

5. Regardless of the theoretical framework that is applied, the issue is whether the “claimant’s conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing activity for his sole benefit.” *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

6. When the employer asserts a personal deviation from employment activities “the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship.” *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAP, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986). However, ministerial actions for an employee’s personal comfort do not constitute a substantial deviation from employment unless the personal need being met or the means chosen by the employee to satisfy his personal comfort is unreasonable. *In Re Rodriguez,* W.C. 4-705-673 (ICAP, Apr. 30, 2008); *see Larson’s Workers’ Compensation Law,* §21.00. In assessing if a particular activity has sufficient connection with the circumstances under which the employee usually performs his job so as to be "incidental" to the employment depends on whether the activity is a common, customary and accepted part of the employment instead of an isolated incident. *In Re Rodriguez*, W.C. 4-911-673 (ICAP, Jan. 21, 2016).

7. In *Lori’s Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 718 (Colo.App. 1995), the court announced the following four part test to analyze whether an activity constitutes a deviation or horseplay: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay. The question of whether a deviation is significant enough to remove the claimant from the course and scope of employment is a factual determination for the ALJ. *Id.*

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he injured his right arm during the course and scope of his employment with Employer on November 20, 2016. Claimant explained that after he completed his work shift and clocked out he went up to Employer’s second floor kitchen to wait for Mr. Kemp to finish his shift so they could travel together back to Denver. As Claimant was walking behind Mr. Kemp he popped a small creamer container at Mr. Kemp’s back.

Mr. Kemp became startled and twisted around. A serrated knife from his knife bag cut Claimant in the right elbow area. Although Mr. Kemp initially provided a different version of the November 20, 2016 incident, he subsequently corroborated Claimant's account. After conducting a comprehensive investigation, Ms. Mooney also confirmed Claimant's account. She remarked that the November 20, 2016 accident occurred at 10:33 p.m. in Employer's casino. Claimant had clocked out from his shift at 10:00 p.m. He was cut by a knife in Mr. Kamp's bag after he had popped a creamer container at Mr. Kemp's back. Ms. Mooney commented that Mr. Stenborg coached Claimant and Mr. Kemp regarding horseplay at Employer's casino.

9. As found, the record reveals that the November 20, 2016 incident constituted a deviation from employment so substantial as to remove it from the employment relationship. The deviation from employment activities was significant because Claimant had completed his shift and clocked out about 30 minutes prior to popping the creamer container. The activity of popping a creamer container at Mr. Kemp did not constitute an employment duty. Instead, Claimant engaged in an activity outside of his employment duties that caused his injury. Moreover, Claimant remarked that he was not performing any job duties when he popped the creamer container at Mr. Kemp. He acknowledged that the activities causing his right arm laceration on November 20, 2016 could be characterized as horseplay. Claimant noted that the November 20, 2016 event constituted an isolated prank and was not the type of activity that regularly occurred throughout the casino. Furthermore, Employer provided Claimant with training and coaching regarding horseplay after the incident. Therefore, Claimant's deviation constituted horseplay and removed the activity from the employment relationship. Accordingly, Claimant's right arm injury did not arise out of his job duties for Employer on November 20, 2016.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

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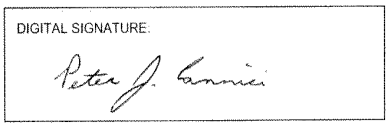
DATED: April 28, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

1. Determination of authorized treating physician and whether or not Claimant is entitled to a change of physician.

2. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician Stephen Lindenbaum M.D. regarding maximum medical improvement (MMI).

3. Determination of Claimant's permanent partial disability (PPD) impairment rating.

4. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is employed by Employer as a part time EMT on ski patrol and also as a part time ski instructor.

2. Claimant's hours and wage rates vary. In 2015, Claimant earned total wages from Employer of $874.10. *See* Exhibit 9.

3. Claimant also works at additional mountains, has her own business, and does bookkeeping work. In 2014, Claimant earned $10,204.71 from Clear Creek Skiing Corp., $4,428.00 from Loveland Basin Racing Club, and $1,008.00 from Cindy Sterling, CPA INC. Claimant also reported on her 2014 tax returns a net profit of $4,020.00 for her own business. *See* Exhibits 6, 7, 8.

4. In 2015, Claimant reported on her tax returns a net profit of $174.00 for her business. She also earned $1,120.80 from Clear Creek Skiing Corp. *See* Exhibits 10, 11, 14.

5. Claimant did not submit a W-2 for 2014 from Employer. Claimant also did not submit any wages for 2015 beyond Employer, Clear Creek Skiing, and her business net profit. Claimant testified credibly at hearing regarding her total wages. Claimant's goal is to earn $500 per week so that she has enough money to live on.

6. On February 4, 2015 Claimant was volunteering at Beaver Creek Resort and was not working for Employer. Claimant was skiing when another skier came at her out of control. Claimant tried to immediately react and stopped quickly on the

downhill edge of her right ski to avoid a collision. Claimant felt a snap on the inside of her right knee. Claimant's knee was weak and swollen.

7. On February 8, 2015 Claimant worked her scheduled shift for Employer and felt like her knee was good enough to work. Claimant had no issues working that day.

8. On February 9, 2015 Claimant was working her scheduled shift for Employer at Vail Mountain Resort. Claimant unclipped from her skis and was in her ski boots unloading fencing supplies from the basket of a snow cat. Claimant twisted to throw fencing out of the basket and felt a snap across her right knee and her right knee gave way a little bit.

9. Claimant did not fall and was able to finish unloading the fencing and was able to ski down the hill. Claimant advised her supervisor about her knee issues and that she would most likely not be able to work the next day.

10. Claimant's knee continued to be swollen and painful after February 9, 2015 and she approached Employer regarding workers' compensation. Claimant testified credibly that Employer did not provide her with a choice of physicians but told her to go to Vail Valley Medical Center. Claimant testified credibly that she decided to go to Vail Summit Orthopedics and set up an appointment with them shortly after her injury.

11. In a February 18, 2015 email to Employer's Occupational Health Specialist, Claimant reported that her injury for Employer happened on February 9, 2015 and was not the same injury as on February 4, 2015. Claimant reported that both injuries involved the right knee but that the mechanism of injury was different and that different parts of the knee were injured in each incident. *See* Exhibit 16.

12. On February 19, 2015 Claimant was evaluated by Lucia London, NP at Vail Valley Medical Center. Claimant reported a snap across her right knee when she twisted to throw a fence out of the basket of a snow cat. Claimant reported that one week prior while volunteering for the Vail Valley Foundation, she had injured her right knee while skiing and that it had swelled considerably and was painful but felt strong and solid. Claimant reported that on April 9 when the second incident occurred she was still experiencing swelling but that the pain had improved somewhat. Claimant reported it was probably a mistake to have continued with her work shifts for Employer and that she was likely partially responsible for the April 9 incident. Claimant reported knee pain of 5/10 to the medial aspect of the knee worse when she walked and with lateral movements. Claimant also reported an intermittent shooting pain over the anterior aspect of her knee. Claimant had a knee brace that she purchased on eBay and also indicated that she had an appointment set up with Vail Summit Orthopedics for the following day. NP London ordered an MRI of Claimant's right knee and provided a referral to Vail Summit Orthopedics. *See* Exhibit AA.

13. On February 20, 2015 Claimant underwent an MRI of her right knee that was interpreted by Vincent Herlihy, M.D. The impression provided was: acute full-thickness tear of the proximal anterior cruciate ligament; grade 1 sprain of the superficial medical collateral ligament with mild underlying ligament scarring from prior injury; diffuse longitudinal tearing throughout the medial meniscus with a prominent bucket-handle type meniscal flap displaced into the intercondylar notch with displaced meniscal tissue involving 60 percent of the body segment, 50 percent of the anterior horn, and 40 percent of the posterior horn; small non displaced kissing subchondral impaction fractures in the posterior lateral tibial plateau and the periphery of the anterior weightbearing lateral femoral condyle, moderate surrounding bone marrow edema without chondral injury, and small bone contusion in the inferomedial aspect of the medial tibial plateau without chondral injury; and mild grade II and III chondromalacia patella. *See* Exhibit Z.

14. On March 3, 2015 Claimant underwent surgery performed by Peter Janes, M.D. of Vail Summit Orthopaedics. He performed an arthroscopic medial meniscus repair and an arthroscopic assisted anterior cruciate ligament reconstruction. *See* Exhibit Y.

15. On June 8, 2015 Claimant underwent an MRI of her right knee interpreted by Trystain Johnson, M.D. Dr. Johnson found that since the prior MRI, Claimant had undergone surgery and that the ACL graft was intact but that there was some developing fluid signal along the tibial tunnel and surrounding prominent bone edema in the proximal tibia suggestive of reactive edema. Dr. Johnson found persistent vertical signal in the posterior horn of the medical meniscus that may represent incomplete vertical tear, partially healing and interval resection of bucket handle fragment. Dr. Johnson also found moderate to high grade area of chondral fibrillation and thinning in the upper medial facet of the patella that was new/increased. *See* Exhibit X.

16. On June 16, 2015 Claimant underwent a second surgery performed by Dr. Janes of Vail Summit Orthopaedics. He performed an arthroscopic anterior notch debridement, debridement of the anterior cruciate ligament grafting, and shrinkage and resection of the radial tear of the medial meniscus of the right knee. He removed scar tissue and meniscal tissue. *See* Exhibit W.

17. On July 9, 2015 Claimant was evaluated by Frederick Scherr, M.D. at Vail Valley Medical Center. Claimant reported concern with the pain in her right medial lower leg due to varicosities or nerve pain. Dr. Scherr noted that she was status post ACL repair and meniscus repair and planned to get an EMG to rule out any nerve pain. *See* Exhibit U.

18. On September 15, 2015 Claimant was evaluated by Dr. Scherr. Claimant reported that her right knee was doing well. Claimant reported needing sclerosing of the veins in her right lower leg and that she believed the surgery on her right knee exacerbated her veins. Dr. Scherr noted no swelling or effusion in the right knee and that Claimant had good range of motion and strength. Dr. Scherr noted that Claimant

had a normal EMG and that he did not believe the vein vacriosities were work related and that it was not probable that the right knee surgery contributed to the inflammation. Dr. Scherr opined that Claimant was approaching MMI. *See* Exhibit T.

19. On November 6, 2015 Claimant underwent another MRI of her right knee that was interpreted by Kelly Lindauer, M.D. The impression provided was: interval arthroscopy; moderate degeneration of the ACL graft which was intact with buckling of the graft in the intercondylar notch; bandlike scar tissue confluent with the anterior margins of the ACL near the tibial tunnel, anterior horn segment of the lateral meniscus, in the deep margins of Hoffa's fat pad along the spectrum of arthrofibrosis and could be a source of impingement or tethering; possible interval medial meniscal surgery with a new vertically oriented tear extending to the body and posterior horn segments with a tear site intermediate in signal suggestive of granulation tissue with the longitudinal signal possibly representing sequel of meniscal repair or a new meniscal tear with some granulation tissue repair; mild to moderate chondromalacia involving the patella manifested by chondral softening and fibrillation similar to previous exam; and moderate effusion with synovitis. *See* Exhibit R.

20. On November 23, 2015 Claimant was evaluated by William Sterett, M.D. at Vail Summit Orthopaedics. Claimant reported wanting a second opinion on her right knee. Claimant reported two right knee surgeries both done with Dr. Janes and that she had plateaud and felt her issues were different now than before the first surgery. On exam Dr. Sterett noted mild effusion, pain with flexion and extension, positive mcmurrays, pain with deep weighted squat, and antalgic gait. X-rays performed showed moderate patellafemoral and medial joint osteoarthritis with ACL reconstructive hardware in excellent position. Dr. Sterett recommended continued conservative treatment to allow meniscus time to heal and recommended re-evaluation in 8 weeks and opined that if there was no improvement, likely a repeat arthroscopy would be indicated to address the arthrofibrosis and meniscal issues. *See* Exhibit Q.

21. On December 7, 2015 Claimant was evaluated by Dr. Scherr. Claimant reported that she was doing better and that her right knee was getting stronger but taking longer than expected. Dr. Scherr noted Dr. Sterett's plan to consider arthroscopic surgery if Claimant did not improve. *See* Exhibit P.

22. On January 26, 2016 Claimant was evaluated by Dr. Scherr. Claimant reported that she was doing better but that Dr. Janes had recommended another right knee scope based on her symptoms and the MRI. Claimant was uncertain and wanted another opinion. Dr. Scherr referred Claimant to Dr. Laprade at the Steadman Clinic. Claimant was returned to full duty work with no restrictions. Dr. Scherr opined that if surgery was not indicated by Dr. Laprade or if Claimant did not want to undergo addition surgery then Claimant would be at MMI. *See* Exhibit N.

23. On February 17, 2016 Claimant was evaluated by Robert Laprade, M.D. at the Steadman Clinic. Claimant reported continuing to struggle with her right knee with pain on the medial aspect that was occasional and up to 5/10 on the pain scale at

its worst. Claimant reported that the pain was recently improving. Dr. Laprade noted on examination that Claimant had tenderness to palpation over the medial joint line and that the medial meniscus appeared extruded on physical examination. He found a grade 2 lachman and grade 2 pivot shift. Dr. Laprade reviewed the MRI report from November, 2016. Dr. Laprade noted that Claimant had evidence on physical exam that the ACL graft was not functioning properly and that she was having medial joint line pain. Dr. Laprade recommended getting the MRI images from the November, 2016 scan and noted that it might be necessary to get a new MRI and CT scan. He opined that once he had reviewed the images, he could discuss a further treatment plan. *See* Exhibit M.

24. On February 23, 2016 Dr. Laprade had a telephone conversation with Claimant. He had reviewed the MRI images that Claimant brought in. Dr. Laprade explained to Claimant that the MRI showed that her ACL graft had failed and that she had a medial meniscus tear. Dr. Laprade recommended a CT scan of the knee to determine the size of the bone tunnels and the need for bone grafting prior to revision ACL reconstruction. Dr. Laprade opined that Claimant would likely require 2 stage procedures with bone grafting and medical meniscal repair versus debridement followed by ACL revision reconstruction. *See* Exhibit K.

25. On February 26, 2016 Claimant underwent a CT of her right knee interpreted by Vincent Herlihy, M.D. The impression provided was: femoral tunnel without significant ossification; tibial tunnel without significant ossification, with an interference screw without appreciable bony incorporation; minimal medial and patellofemoral compartment osteoarthritis with a small joint effusion. *See* Exhibit J.

26. On February 29, 2016 Dr. Laprade had a telephone conversation with Claimant after he reviewed her CT scan. He noted that the CT had showed tunnel widening and that he recommended proceeding with right knee arthroscopy with bone grafting and meniscal repair versus debridement as needed. He recommended that once the bone grafting of the tunnels had healed 4-6 weeks later, that Claimant should undergo revision ACL reconstruction. Claimant expressed reservations about another repair of the medial meniscus since it had likely failed from prior surgery and Dr. Leprade explained that depending on the pattern at her arthroscopy the decision would be made for debridement versus repair but that at Claimant's young age, repair would be favored. *See* Exhibit H.

27. On March 7, 2016 Claimant was evaluated by Dr. Janes. Claimant reported intermittent pain reproducible with some pivoting and rotation motions and that she was very frustrated with the work comp bureaucracy and hoping to move forward without work comp. Claimant reported that she had a second opinion with Dr. Leprade who recommended a repeat ACL reconstruction via staged procedures with bone grafting ACL tunnels and examining her meniscus arthroscopically and wondered if Dr. Janes agreed. Claimant also reported that she had not had her left ACL reconstruction and did not have feelings of instability or pain and she questioned the need for ACL reconstruction on her right knee. Dr. Janes agreed that a repeat arthroscopy to

evaluate her medial meniscus may benefit her, but was hesitant about the recommended ACL procedure as the ACL graft was intact. Dr. Janes agreed with Claimant's transfer of care to Dr. Leprade at the Steadman clinic and noted that due to her transfer of care he did not anticipate her returning for further treatment. *See* Exhibit I.

28. Claimant underwent physical therapy on March 22, 2016 at Axis Sports Medicine. Claimant reported subjectively on how her knee affected her ability to do a number of activities with a total score on ability as 31/36. *See* Exhibit 2.

29. On April 26, 2016 Claimant was evaluated by Dr. Scherr. Claimant reported that Dr. Laprade wanted to do a scope and see how the meniscus looked and decide at that time whether to repair or remove it and then proceed later with the ACL revision. Claimant reported that she just wanted Dr. Laprade to remove the meniscus and that because he wanted to look first, she was unwilling to proceed with the surgery and did not have the time to be on crutches for three months if he repaired the meniscus. Claimant reported that she just wanted the meniscus removed and wanted to have a 4th opinion in regards to her right knee. Dr. Scherr had a long discussion with Claimant that they had gone to Dr. Laprade at Claimant's request and that because she didn't like his recommendation, she had chosen not to proceed with surgery which was her choice. Dr. Scherr opined that Claimant's right knee was functional. Dr. Scherr explained the concept of MMI to Claimant and because she had three opinions already and had elected not to proceed with surgery, Dr. Scherr opined that Claimant was at MMI. He noted that Claimant disagreed. *See* Exhibit E.

30. On examination, Dr. Scherr opined that there was no swelling, effusion, or tenderness. He noted full range of motion without difficulty or pain and that Claimant had good strength and gait that was not hindered by pain. Dr. Scherr performed an impairment rating for the right knee and opined that her Table 40 diagnosis for the ACL repair warranted a 10% impairment, medial meniscectomy x2 for a 6% rating and arthritic changes of 3% along with a 4% impairment for flexion range of motion and opined that Claimant's total Table 40 diagnosis impairment was 19% and combined with the range of motion came to a 22% impairment of the right lower extremity. Dr. Scherr opined that apportionment was not applicable. Dr. Scherr opined that Claimant was at MMI after electing not to have surgery and that a fourth opinion was not warranted and opined that additional physical therapy would not improve Claimant's condition. Dr. Scherr opined that Claimant required no permanent restrictions. *See* Exhibit E.

31. After disagreeing with Dr. Scherr, Claimant sought treatment on her own with Charles Gottleib, M.D. Claimant was not referred to Dr. Gottleib by anyone and went to him on her own. Dr. Gottleib referred Claimant to physical therapy for dynamic stability exercises to compensate for ACL insufficiency. *See* Exhibits 25, D.

32. On October 7, 2016 Claimant underwent a Division Independent Medical Evaluation performed by Stephen Lindenbaum, M.D. Claimant reported two injuries in this case, the first on February 4, 2015 while Claimant was volunteering for the Vail

Valley Foundation while skiing, trying to avoid another skier, and twisting in a funny manner. Claimant reported feeling immediate pain and a popping sensation in her knee and felt like this initial injury caused her ACL problem because of a similar ACL injury she had in her left knee. Claimant reported after the February 4 incident, her right knee swelled considerably and was painful but was strong enough and solid to ski and that she felt she could continue to work on it. Claimant reported that the following week on February 9 she was unloading a basket from a snow cat and while throwing fencing out twisted her right knee and felt a sudden snap and her felt her knee giving way. Claimant reported after being done with work, she skied down the hill and was seen at Vail Valley Medical Center. Dr. Lindenbaum noted that Claimant had an MRI done on February 20, 2015 and opined that based on the MRI the likelihood is that the first injury on February 4 was the cause of the ACL injury and that the second injury on February 9 most likely caused a displacement of the medical meniscal tear from the first injury to become symptomatic with the twisting injury. *See* Exhibit C.

33. On examination, Dr. Lindenbaum noted no antalgic gait, no evidence of atrophy, full range of motion of both knees, no effusion, and mild crepitus on range of motion. Dr. Lindenbaum opined that there was not any pain on subluxation of the patella on medial or lateral excursion and no gross instability. Dr. Lindenbaum noted that Claimant's pain on range of motion was below the joint line and over the area which most likely represented a remaining button from the cruciate repair. Dr. Lindenbaum opined that Claimant had 0 percent impairment for range of motion, 5 % impairment for the chondromalacia involving the medial patellar facet, 10% impairment for that ACL, and 5% for the meniscal injury. Combining the three ratings provided for a 19% impairment to the lower extremity. Dr. Lindenbaum concurred with the MMI date provided by Dr. Scherr of April 26, 2016. Dr. Lindenbaum also opined that there was no evidence of apportionment if both of the injuries occurred while working for Vail Associates. Dr. Lindenbaum opined that further physical therapy was not indicated and that Claimant could do exercises on an independent basis. Dr. Lindenbaum opined that the pain on the inferior medial aspect of the knee represented a painful piece of hardware that could be removed under maintenance and that Claimant would not require physical therapy after that procedure. Claimant reported not being interested in ACL reconstruction and Dr. Lindenbaum opined that based on the fact that Claimant was doing well, no further surgical intervention was indicated. *See* Exhibit C.

34. Claimant continued seeing Dr. Gottleib on her own without any referral and outside the workers' compensation system. On November 16, 2016 Claimant underwent right knee surgery performed by Dr. Gottleib. Dr. Gottleib performed an arthroscopic partial medial meniscectomy, chondroplasty of the patella and medial femoral condyle, and removal of deep bone staple of the proximal tibia. Dr. Gottleib noted that Claimant's medial compartment had a small recurrent complex flap meniscus tear in the region of the prior partial meniscectomy. Dr. Gottleib noted that overall Claimant had lost approximately 65% of the posterior half of her meniscus primarily from the prior surgery and he removed only the small recurrent flap tear and left Claimant with as much meniscus as possible. *See* Exhibits 24, B.

35. Respondent sent the records of Dr. Gottleib to Dr. Scherr and asked for his opinion on several items. Dr. Scherr opined that Claimant currently had no symptoms, that only the hardware removal performed by Dr. Gottleib was reasonable, necessary, and related to her industrial injury, and that the surgery performed by Dr. Gottleib did not change his opinion on the date of MMI. Dr. Scherr continued to opine that Claimant required no maintenance treatment. *See* Exhibit A.

36. Dr. Scherr also evaluated Claimant on February 28, 2017. Claimant reported that she was doing much better after the surgery performed by Dr. Gottleib with little to no pain. Claimant also reported having better range of motion. Dr. Scherr noted on examination full range of motion without difficulty or pain and very good strength. *See* Exhibit A.

37. Claimant underwent physical therapy at Axis sports medicine both prior to and following her surgery with Dr. Gottleib. Claimant reported subjectively that her functionality with various activities and her total functional score on June 8, 2016 was 70/80. On October 17, 2016 her score was 76/80. Following her surgery with Dr. Gottleib and on December 30, 2016 Claimant reported very slight subjective improvement with a score of 73/76 (did not check one four point scoring area). *See* Exhibit 1.

38. Claimant testified at hearing that she was off work due to her injury until August of 2015 and that she began earning regular wages again in August of 2015. Claimant argued that Dr. Scherr was not her authorized treating provider and that she never selected him but only continued to see him due to the workers' compensation bureaucracy. Claimant also argued that she was not at MMI on April 26, 2016 because she kept improving after that date. Claimant argued that her impairment rating should be adjusted for her meniscus rating to include the surgery performed in November of 2016.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Authorized Treating Provider

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Whether or not a provider is an authorized treating provider is generally a question of fact for the ALJ which must be upheld if supported by substantial evidence in the record. *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996); *Popke v. Industrial Claim Appeals Office, supra*. Section 8-43-404(5)(a)(I)(A), C.R.S., provides, in pertinent part: [t]he employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor." WCRP 8-2(A), provides a framework for providing the required list of physician and similarly states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list ...." WCRP 8-2(D) further provides that if the employer fails to comply with this Rule 8-2, the injured worker may select an authorized treating physician of the workers' choosing.

Claimant is credible and persuasive that Employer did not provide her with a written list of physicians after she reported her injury. Rather, Employer directed her to treat with Vail Valley Medical Center. Claimant, as found above, scheduled an appointment with Vail Summit Orthopaedics prior to her first visit with Vail Valley Medical Center and testified that she intended to choose Vail Summit Orthopaedics as

her authorized treating provider since she was not provided a list or choice. At her first visit with Vail Valley Medical Center, Claimant was referred to Vail Summit Orthopaedics. Claimant treated both with Vail Valley Medical Center and with Vail Summit Orthopaedics from February of 2015 to April of 2016. During this time she underwent three MRIs of her right knee, one CT scan of her right knee, two right knee surgeries, was evaluated by three different orthopedic surgeons including two at Vail Summit Orthopaedics and one at Steadman Clinic, and she received extensive physical therapy.

Claimant's testimony that she only continued going to Vail Valley Medical Center because of workers' compensation bureaucracy is not found credible or persuasive. Rather, the ALJ concludes that she continued to treat with Vail Valley Medical Center because she was receiving extensive treatment including multiple referrals both to doctors Janes and Starett at Vail Summit Orthopaedics (the exact practice she chose to treat with) and to Dr. Laprade at Steadman Clinic. Claimant treated extensively through Vail Valley Medical Center until she was placed at MMI and disagreed with the determination. Claimant argues, at that point, that she was free to choose Dr. Gottleib as her own physician since she was never provided a designated provider list by Employer. This argument is not found persuasive.

Here, the choice of physician had passed to Claimant as a consequence of Employer's failure to comply with § 8-43-404(5)(a)(I)(A). C.R.S. and the application of WCRP Rule 8-2 (E). Claimant, however, signified through her conduct of continuing to treat extensively with Vail Valley Medical Center for over one year that she had chosen them. Further, Vail Valley Medical Center referred Claimant to the exact practice and to two doctors in that practice that Claimant testified she wanted or intended to choose initially. Vail Valley Medical Center thus made Dr. Janes and Dr. Starett of Vail Summit Orthopaedics authorized providers within the chain of referral. Claimant, essentially, treated with the exact practice that she had chosen. Claimant received extensive care during this period of time and only after she was placed at MMI, with which she disagreed, did she argue that she required a change of physician or a change in authorized provider.

When a claimant has signified by words or conduct that he has chosen a physician to treat the industrial injury he has made a physician 'selection'. *Pavelko v. Southwest Heating and Cooling*, W.C. No. 4-897-489 (Sept. 4, 2015), *Tidwell v. Spencer Technologies*, W.C. No. 4-917- 514 (March 2, 2015); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (February 19, 2016); *Miller v. Rescare*, Inc., W.C. No. 4-761-223 (Sept. 16, 2009); *Squittieri v. Tayco Screen Printing, Inc*., W.C. No. 4-421-960 (September 18, 2000). Here, the ALJ concludes that the conduct of Claimant leads to the conclusion that she selected Vail Valley Medical Center and their referrals. Although Claimant was referred to three orthopedic surgeons during her treatment, she was never referred to Dr. Gottleib and he was not in the chain of referral from Dr. Janes or any other treating provider. Claimant has failed to establish that Dr. Gottlieb is an authorized provider. The authorized providers include Dr. Scherr, Dr. Janes, Dr. Starett, and Dr. Laprade.

Claimant's request also can be treated as a request to change physicians. Upon a proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. *See* § 8-43-404(5)(a)(VI), C.R.S. Because the statute does not contain a specific definition of a proper showing, the ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. *Loza v. Ken's Welding,* WC 4-712-246 (ICAO January 7, 2009). The claimant may procure a change of physician where she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart,* W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of his/her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995). But, where an employee has been receiving adequate medical treatment, courts need not allow a change in physician. *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995). Here, Claimant has received adequate and extensive medical treatment from her authorized treating physicians. Claimant has failed to show that a change of physician to Dr. Gottleib is appropriate. Although Claimant disagreed with the MMI determination of Dr. Scherr, the ALJ finds no reasonable mistrust of his care or failure to communicate. Rather, throughout her treatment, Claimant received extensive treatment and referrals that relieved her from the effects of her injury. A change of physician has not been shown to be appropriate.

Overcoming DIME on MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." *See* § 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. *See* § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition

or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Here, Claimant has failed to meet her burden to show that DIME physician Dr. Lindenbaum erred in opining that Claimant reached MMI on April 26, 2016. At the DIME, Dr. Lindenbaum noted how well Claimant was doing, that she had no limitations in range of motion, and that she was not interested in ACL reconstruction. Dr. Lindenbaum opined that no further surgical intervention was indicated to improve Claimant's condition. His opinion that no treatment was necessary to reduce pain or improve function is consistent with his finding of MMI. Although he noted that removal of hardware could be performed under maintenance treatment, the ALJ does not find this to be inconsistent with a MMI determination. The opinion of DIME physician Dr. Lindenbaum is consistent with and supported by the opinions of Dr. Scherr. Additionally, although Claimant sought treatment and additional surgery on her own with Dr. Gottleib after the DIME, records show that following surgery with Dr. Gottleib Claimant was not functionally better. Physical therapy notes indicate an extremely slight subjective improvement in functional ability with a score before the surgery with Dr. Gottleib of 76/80 and after the surgery at 73/76. This further supports the DIME physician's opinion that additional surgery was not indicated to improve Claimant's condition. Clamant has failed to meet her burden to show that Dr. Lindenbaum erred in assigning an MMI date of April 26, 2016.

Permanent Partial Disability (PPD) Impairment Rating

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c),

C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has stated in this respect that: scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of § 8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

Claimant has the burden of showing the extent of her scheduled impairment by a preponderance of the evidence. *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (2007); *Burciaga v. AMB Janitorial Services, Inc. and Indeminity Care ESIS Inc*., W.C. No. 4-777-882 (2010).

As found above, the DIME physician Dr. Lindenbaum assigned a PPD impairment rating of 19% for the lower extremity. Dr. Lindenbaum opined that Claimant had no impairment for range of motion. Claimant testified consistently with this determination. He also provided a 5 % impairment for the chondromalacia involving the medial patellar facet, 10% impairment for that ACL, and 5% for the meniscal injury. When Dr. Scherr performed an impairment rating, he also came to a total impairment rating of 19% lower extremity. However, at the earlier date of Dr. Scherr's examination, Dr. Scherr did find impairment in range of motion of 4% and using the combined valued table, Dr. Scherr found a total impairment rating of 22% lower extremity. The ratings of both physicians are very similar. The lack of range of motion rating by the DIME physician at a later date is consistent with the objective medical evidence and with Claimant's testimony. Further, although a range of impairment under Table 40 exists for the meniscal injury, Claimant has failed to establish by a preponderance of the evidence why she is entitled to a rating higher than the rating provided by Dr. Lindenbaum or Dr. Scherr. In fact, the ratings provide for a range starting at zero. Both physicians who rated her came to similar results within the acceptable range and Claimant has failed to establish that a certain number in that range is more appropriate or probable for her condition. The ALJ finds credible and persuasive the rating of 19% lower extremity provided by DIME physician Dr. Lindenbaum, which is consistent with the rating provided by Dr. Scherr.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo.

1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

The average weekly wage admitted by Respondents in this matter included only Claimant's wages from Employer. As found above, Claimant works for Employer in addition to several other concurrent employers. Claimant has established that her average weekly wage should be adjusted to include concurrent employment. Claimant's credible testimony leads the ALJ to believe that Claimant's goal is to earn $500 per week to live, pay rent, etc. However, Claimant's wage records, W-2's, and tax returns demonstrate that her average weekly wage and a fair approximation of her wage loss is closer to $400 per week. The ALJ determines that Claimant's credible testimony combined with the records that have been submitted indicate that, on average, Claimant earns approximately $400 per week and that ALJ concludes this to be a fair approximation of Claimant's wage loss and diminished earning capacity due to her injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that Dr. Gottleib is an authorized treating provider or that a change of physician to Dr. Gottleib is appropriate.

2. Claimant has failed to overcome by clear and convincing evidence the opinion of DIME physician Dr. Lindenbaum regarding maximum medical improvement. Claimant reached MMI for her work injury on April 26, 2016.

3. Claimant is entitled to a permanent partial disability impairment rating of 19% lower extremity. Claimant has failed to establish an entitlement to a higher rating.

4. Claimant's average weekly wage is $400.00.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 27, 2017,

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Stewart Weinerman is reasonable, necessary and related to cure or relieve the effects of Claimant's April 8, 2015 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer for two years stocking drywall materials. Claimant sustained an admitted work injury to his left shoulder on April 8, 2015 while pulling drywall through a window.

2. Matthew Lugliani, M.D. evaluated Claimant on April 9, 2015. Claimant reported left shoulder pain at an 8/10 in severity. Dr. Lugliani assessed acute shoulder strain and tendonitis. Dr. Lugliani noted Claimant had been prescribed Percocet from a recent dental procedure and had two Percocets remaining. Dr. Lugliani referred Claimant to physical therapy and prescribed Claimant ibuprofen, robaxin and Percocet.

3. Dr. Lugliani reevaluated Claimant on April 16, 2015. Claimant rated his pain at an 8/10 in severity. Dr. Lugliani again assessed acute shoulder strain and tendinitis. Dr. Lugliani noted he declined Claimant's request for a refill of narcotics because Claimant should have a two-week supply. Dr. Lugliani recommended Claimant continue taking ibuprofen and robaxin.

4. Claimant underwent an MRI of his left shoulder on April 30, 2015. Charles Wennogle, M.D. gave the following impression: (1) stable osteochondral injury of the humeral head with associated marrow edema, (2) moderate to severe AC joint osteoarthritis with subacromial spurring and impingement, (3) subacromial/subdeltoid bursitis, (4) distal supraspinatus tendinosis with interstitial tearing of the distal supraspinous tendon insertional footplate, (5) SLAP tear of the superior labrum, and (6) increased signal and caliber of the inferior glenohumeral ligament.

5. Dr. Lugliani reevaluated Claimant on May 4, 2015. Dr. Lugliani reviewed the April 30, 2015 MRI and assessed chronic left shoulder pain, moderate-to-severe AC joint arthritis, distal supraspinatus tear, and SLAP tear of the superior labrum. Dr. Lugliani referred Claimant to an orthopedic surgeon.

6. Cary Motz, M.D. evaluated Claimant on May 21, 2015. Dr. Motz assessed shoulder joint pain, partial thickness left rotator cuff tear, left shoulder impingement syndrome, left SLAP tear, and left osteoarthrosis AC joint. Dr. Motz noted evidence of a partial tear of the rotator cuff. Dr. Motz concluded the SLAP tear was degenerative and Claimant's pain was related to the partial thickness rotator cuff tear. Dr. Motz administered 1 cc of Betamethasone and 5 ccs of Marcaine. Dr. Motz noted the injection did not improve Claimant's pain.

7. Dr. Lugliani reevaluated Claimant on June 15, 2015. Claimant reported persistent left shoulder pain rated at a 6/10 in severity, worse with over-the-shoulder reaching or movement. Claimant reported the "only thing that helps with his pain is Percocet." Dr. Lugliani noted tenderness at the biceps tendon and subacromial bursa. Dr. Lugliani assessed chronic left shoulder pain, moderate-to-severe AC joint arthritis, distal supraspinatus tear, and SLAP tear of the superior labrum of the left shoulder. Dr. Lugliani noted he would not provide Claimant any Percocet at that time. Dr. Lugliani remarked Claimant failed conservative management and was a candidate for surgery.

8. Dr. Motz reevaluated Claimant on June 25, 2015. Dr. Motz ordered arthroscopy with left rotator cuff repair, subacromial decompression, biceps tenodesis and distal clavicle resection. Claimant indicated he wished to proceed with surgical intervention.

9. Claimant underwent surgery on August 3, 2015. Dr. Motz performed the following procedures: left shoulder arthroscopy with arthroscopic rotator cuff repair, arthroscopic biceps tenodesis, arthroscopic distal clavicle excision, and arthroscopic subacromial decompression. Dr. Motz noted no complications with the procedures. Dr. Motz' post-operative diagnosis was: left shoulder grade A3 partial-thickness supraspinatus tear; SLAP tear; impingement syndrome; and degenerative joint disease of the acromiclavicular joint.

10. Claimant continued to treat with Dr. Lugliani and continued reporting persistent pain ranging from a 6/10 to 8/10 in severity. Claimant reported his current medication regimen had little impact on his pain control, and that Percocet was the only thing that assisted with the pain.

11. Dr. Motz reevaluated Claimant on September 3, 2015. Dr. Motz noted Claimant's pain "is more significant than would be expected…" Dr. Motz remarked Claimant did not seem motivated. Dr. Motz recommended weaning from the sling and continuing physical therapy.

12. In a September 10, 2015 medical note, Dr. Lugliani remarked, “I believe this patient is prone to symptom magnification. We are multiple weeks out from his surgery. He has showed (*sic*) minimal improvement. He continues to be dependent on narcotics.”

13. Dr. Motz reevaluated Claimant on October 1, 2015. Dr. Motz noted Claimant was slowly progressing and having more pain than expected. Dr. Motz assessed left rotator cuff tear (traumatic), left impingement syndrome shoulder, and left bicipital tenosynovitis. Claimant was to discontinue his use of the sling.

14. Dr. Lugliani reevaluated Claimant on October 1, 2015. Claimant reported persistent pain at a 6/10 in severity. Claimant requested a refill of Percocet, alleging he dropped an entire bottle down the sink. Dr. Lugliani assessed chronic left shoulder pain, opioid dependence, moderate-to-severe AC joint arthritis, distal supraspinatus tear, and SLAP tear. Dr. Lugliani commented “I am concerned in regard to drug-seeking behavior with this patient. He will not be receiving any Percocet from me.”

15. Claimant returned to Dr. Lugliani for a follow-up evaluation on October 15, 2015. Dr. Lugliani noted Claimant continued to use an arm sling. Claimant reported persistent pain at an 8/10 in severity. Dr. Lugliani assessed chronic left shoulder pain and opioid dependence. Dr. Lugliani referred Claimant to pain management.

16. On October 27, 2015, David L. Reinhard, M.D. conducted a Distress Risk and Assessment Method Evaluation of Claimant’s psychosocial functioning. Dr. Reinhard noted Claimant scored at the worst level of function. Dr. Reinhard concluded Claimant was in the distressed/somatic category of psychosocial functioning, and “There could be significant psychological factors which would preclude a good outcome.” Dr. Reinhard recommended psychological counseling for pain management and a psychology pain evaluation.

17. Dr. Motz reevaluated Claimant on October 29, 2015. Dr. Motz noted Claimant continued to have more pain than expected and ordered an MRI.

18. Claimant underwent a second MRI on November 5, 2015. Bao Nguyen, M.D. interpreted the MRI and gave the following impression: (1) “interval central rotator cuff repair with suspected double row technique, with a suggestion of a recurrent partial tear of the distal conjoined cuff region,” and (2) “abnormal marrow changes across the central dome of the humeral head, worrisome for potential early AVN, as yet, without subchondral collapse or osteochondral separation.”

19. Dr. Lugliani reevaluated Claimant on November 9, 2015. Claimant reported persistent pain rated at an 8/10 in severity. Dr. Lugliani reviewed the November 5th MRI. Dr. Lugliani remarked Claimant is opioid-dependent and advised Claimant to follow-up with Mr. Motz and continue medications as prescribed.

20. On November 11, 2015, Mary W. McCord, M.D. of University of Colorado Hospital, Internal Medicine, evaluated Claimant. Claimant reported he smoked a half-pack of cigarettes per day and consumed one to two 40-ounce beers daily. Referring to Claimant's common-law wife Dr. McCord documented, "Mary pulled me aside at the end of the visit to privately address the patient's depression and alcohol abuse, which she reports are bigger problems than he admits to me." Dr. McCord also noted, "Per patient's partner, he admits he is an alcoholic. He reports drinking 2-4 40oz beers nightly. He is a recovered drug user as well."

21. Dr. Motz reevaluated Claimant on November 12, 2015. Dr. Motz noted the November 5, 2015 MRI revealed the rotator cuff was healing well but there was also an area of bone edema/avascular necrosis ("AVN") in the humeral head. Dr. Motz assessed pain in Claimant's joint and shoulder, impingement syndrome in the left shoulder, and adhesive capsulitis of the shoulder. Dr. Motz remarked she could not explain the appearance of the edema/AVN in the humeral head. Dr. Motz ordered Claimant to cease physical therapy.

22. Dr. Reinhard reevaluated Claimant on November 17, 2015. Dr. Reinhard noted Claimant was exceeding two Percocet per day at times. Dr. Reinhard reviewed the narcotic agreement with Claimant and increased Claimant's doses for pain.

23. Claimant returned to Dr. Motz for a follow-up on December 10, 2015. Claimant reported continued pain at a 5-6/10 in severity. Dr. Motz assessed shoulder joint pain, left shoulder impingement syndrome, adhesive capsulitis of the shoulder, injury of right rotator cuff (subsequent encounter), and AVN of the left humeral head. Dr. Motz referred Claimant to Cindy Kelly, M.D. for an evaluation of the AVN.

24. Dr. McCord reevaluated Claimant on December 16, 2015. Dr. Motz remarked, "Strongly advised him to cut back to no more than 24oz of beer per day. He reports he is not an alcoholic, but discussed that he is drinking too much given his lab results." Dr. McCord noted she encouraged Claimant to cease tobacco use.

25. On January 4, 2016, Jon M. Erickson, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Erickson issued an IME report on January 11, 2016. Dr. Erickson remarked that, when he evaluated Claimant,

Claimant was "upset that he has not been able to get adequate pain medication…" Claimant reported no history of substance or recreational drug use. Claimant reported smoking up to cigarettes per day for 20 years, and drinking one to two beers per day. Dr. Erickson documented weakness in Claimant's left upper extremity and reduction of grip strength. Dr. Erickson noted there no atrophy in the left upper extremity and no tenderness over the acromioclavicular joint. Dr. Erickson remarked he could not evaluate the rotator cuff due to Claimant's pain and limited range of motion.

26. Dr. Erickson reviewed the April 30, 2015 MRI and noted a 1.1 cm cystic lesion in the subscapularis recess anteriorly, cortical edema over the greater tuberosity, and arthritic changes in the acromioclavicular joint. Dr. Erickson reviewed the November 5, 2015 MRI and noted anchors in the greater tuberosity, thinning of articular cartilage in the glenohumeral joint, and an area of subcortical scarring over the apex of the humeral head. Dr. Erickson noted there was no evidence of cuff muscle atrophy in either MRI scan.

27. Dr. Erickson gave the following impression: work-related left shoulder injury status post arthroscopic acromioplasty, rotator cuff repair, biceps tenodesis, and distal clavicle resection. Dr. Erickson opined, within a reasonable degree of medical probability, there was no reasonable explanation for Claimant's continued severe pain and limited function of the left shoulder. Dr. Erickson noted the medical records contained drug seeking behavior and symptom magnification, remarking Claimant had a tendency to exaggerate his responses and maximize abnormalities on his physical examination. Dr. Erickson questioned whether the lesion seen in the superior humeral head on the November 2015 MRI was, in fact, avascular necrosis. Dr. Erickson remarked, "I am assuming Dr. Kelly, an expert in this area, will perform appropriate studies…to confirm or rule out this diagnosis." Dr. Erickson explained avascular necrosis is not usually associated with trauma and opined the lesion was likely not related to Claimant's work injury. Dr. Erickson opined there was no physiologic cause for Claimant's symptoms and that surgical procedures would not benefit Claimant. Dr. Erickson recommended a thorough evaluation of the humeral head lesion and an assessment of Claimant's psychological issues.

28. Stewart Weinerman, M.D. evaluated Claimant for a second opinion on January 5, 2016. Dr. Weinerman noted the MRI demonstrated avascular necrosis "of about 50% of the humeral head" with no collapse. Dr. Weinerman also noted a subchondral fracture above the area of the rotator cuff repair. Dr. Weinerman remarked Dr. Motz did an "excellent job repairing the rotator cuff" and that it was healing adequately, but "I am worried about the AVN of the left humeral head." Dr. Weinerman recommended a repeat MRI in two months. Dr. Weinerman suggested Claimant would be a good

candidate for a “subchondroplasty type of procedure done arthroscopically” if the AVN continued to be a problem at that time.

29. Dr. Lugliani reevaluated Claimant on January 6, 2016 and concurred with Dr. Weinerman’s treatment plan.

30. Cynthia M. Kelly, M.D. evaluated Claimant on January 22, 2016. Claimant reported smoking three to four cigarettes per day and drinking two beers per day. Dr. Kelly reviewed the prior MRIs and noted the most recent MRI demonstrated “changes suggestive of osteonecrosis of the humeral head.” Dr. Kelly reviewed radiographs taken the day of the evaluation and concluded the x-rays showed “an osteonecrotic segment of the humeral head with no evidence of subchondral collapse.” Dr. Kelly recommended decompression of the area of osteonecrosis and injection of autologous stem cells.

31. Dr. McCord reevaluated Claimant on February 3, 2016. Dr. McCord noted she would not refill Claimant’s Percocet prescription and that he should not be due for refill until February 14, 2016.

32. On February 10, 2016, Dr. Kelly performed a decompression of left humeral head osteonecrosis, bone marrow harvest, and autologous stem cell injection. Dr. Kelly noted there were no complications with the procedure.

33. In a letter to Dr. Kelly from Respondents’ counsel dated February 18, 2016, Respondents’ counsel inquired as to the cause of the osteonecrosis and how it was causally connected to Claimant’s April 8, 2015 injury or subsequent medical treatment. Dr. Kelly responded on March 4, 2016, stating there were injury pattern findings on the April 30, 2015 MRI that could have predisposed Claimant to development of AVN of the humeral head. Dr. Kelly further stated the subchondral fracture was from the AVN and not from the placement of suture anchors.

34. Claimant continued to treat with Dr. Lugliani and continued report pain. Dr. Lugliani ordered a repeat MRI on June 16, 2016.

35. Claimant attended a post-operative follow-up evaluation with Dr. Kelly on July 7, 2016. Claimant reported significant global pain in his shoulder. Dr. Kelly noted there was no significant muscle atrophy. Regarding radiographs, Dr. Kelly noted two views of Claimant’s left shoulder did not demonstrate any evidence of subchondral collapse of the humeral head. Dr. Kelly remarked the decompression had been an effective procedure.

36. Claimant underwent a third MRI on July 11, 2016. Andrew Sonin, M.D. read the films and his impression was:

> (1) Previous rotator cuff repair with possible linear nondisplaced full-thickness defect in the distal posterior fibers, (2) subscapularis tendinopathy without tear, (3) previous biceps tenotomy and tenodesis, with marrow edema around the associated soft tissue anchor, and (4) osteonecrosis of the superior aspect of the left humeral head with no collapse or associated joint effusion.

37. Dr. Sonin remarked, "A small full-thickness linear defect could be present on sagittal image 19 of series 5." Dr. Sonin noted there was no retraction of cuff musculature and no significant atrophy.

38. Dr. Weinerman reevaluated Claimant on July 19, 2016. Claimant reported being a former smoker with no alcohol use. Dr. Weinerman reviewed the July 11, 2016 MRI and noted acute rotator cuff tear, glenohumeral joint arthritis, shoulder bursitis, and a "small but significant area of osteonecrosis superiorly to the humeral head." Dr. Weinerman diagnosed osteonecrosis and rotator cuff tear supraspinatus. Dr. Weinerman recommended and submitted a request for "left shoulder arthroscopy with rotator cuff repair and possibly a subchondroplasty to treat the area of osteonecrosis."

39. Dr. Erickson reviewed additional medical records and issued a report dated July 27, 2016. Dr. Erickson opined the surgery recommended by Dr. Weinerman is not reasonable or necessary. Dr. Erickson referred to Claimant as a "pain outlier" and recommended Claimant undergo a forensic psychological evaluation before additional surgery is considered, per Exhibit 9 of the Colorado Division of Workers' Compensation Medical Treatment Guidelines ("MTG"). Dr. Erickson contended the July 11, 2016 MRI did not show clear evidence of a surgical lesion stating, "A possible short segment linear tear is not a likely cause of pain." Dr. Erickson further opined, within a reasonable degree of medical probability, Claimant's pain and disability are not related to Claimant's April 8, 2015 industrial injury. Dr. Erickson concluded the injuries Claimant sustained on April 8, 2015 were present on the April 30, 2015 MRI and were "appropriately addressed with two surgical procedures." Dr. Erickson contended the July 11, 2016 demonstrated the lesions healed and were stable. Dr. Erickson explained a cause cannot be determined in the majority of AVN cases, and that AVN was not seen secondary to trauma with the exception of "severely displaced humeral head fractures." Regarding Dr. Kelly's March 4, 2016 statement that the injury pattern could have caused development of AVN in the humeral head, Dr. Erickson remarked, "I do believe

Dr. Kelly was more concerned about providing appropriate treatment than addressing the issue of causality."

40. On August 9, 2016, William Boyd, Ph.D. conducted a psychological evaluation of Claimant. Dr. Boyd issued a report dated August 17, 2016. Claimant reported smoking one pack of cigarettes per day and drinking six beers per day. Dr. Boyd noted there was no meaningful interpretation possible from Claimant's testing based on the Validity Index score. Dr. Boyd noted Claimant had high levels of depression and anxiety, and indicated his scores classified Claimant as having a high probability of substance abuse disorder. Dr. Boyd diagnosed pain disorder with related psychological factors and adjustment disorder with mixed anxiety and depressed mood. Dr. Boyd recommended, in part, Claimant attend eight sessions of cognitive-behavioral treatment, consult with his physician regarding smoking cessation and alcohol issues. Dr. Boyd concluded Claimant "may be at risk of overusing healthcare services because of his psychological profile." Dr. Boyd remarked, "At the present time, [Claimant] is a poor candidate from a psychological perspective for invasive medical procedures. It is important for him to complete the recommended cognitive behavioral treatment before considering invasive medical procedures."

41. Dr. Lugliani reevaluated Claimant on August 15, 2016. Claimant reported pain at a 9/10 in severity. Dr. Lugliani noted the July 11, 2016 MRI showed osteonecrosis of the superior aspect of the left humeral head with no collapse or associated joint effusion, subscapularis tendinopathy without tear, and previous cuff repair. Dr. Lugliani agreed Claimant requires surgery.

42. In a letter dated September 5, 2016, Dr. Lugliani opined, within a reasonable degree of medical probability, the surgery requested by Dr. Weinerman was reasonable and necessary, stating surgery was the "only viable option." Dr. Weinerman further opined Claimant did not need counseling for chronic pain because he had already undergone counseling. Dr. Weinerman remarked Claimant's pain complaints were real, and concluded the torn rotator cuff and avascular necrosis were the pain generators.

43. In a letter dated September 6, 2016, Dr. Weinerman stated he agreed Claimant had pain and was requiring a lot of pain medication, however, "…given his exam and his MRI scan, I think it is reasonable to assume that at least some if not most or all of the pain is coming out from his continued rotator cuff problems." Dr. Weinerman stated Claimant was a reliable patient and was not malingering. Dr. Weinerman opined Claimant would not improve with conservative treatment and that Claimant's condition would be permanent if he did not undergo the surgery. Dr. Weinerman stated, "Certainly, performing this arthroscopic procedure will resolve a lot of issues including

the torn rotator cuff and evaluation of the repair, as well as evaluating the reason why his is having so much pain in the shoulder, and possibly resolving all of the above issues at the time of surgery."

44. In an October 10, 2016 medical note, Dr. Boyd noted Claimant denied a history of problems with alcohol and drug abuse.

45. Claimant returned to Dr. Reinhard for a follow-up evaluation on October 12, 2016. Dr. Reinhard documented Claimant "states that the oxycodone 'works real good,' however, the last UDT showed no oxycodone in his system. On the previous urine drug test, on 07/16/2016, he states he ran out early, which is plausible. The urine drug test on 09/14/2016 showed no oxycodone either. This is somewhat concerning, as I discussed with him monitoring and utilizing drugs as prescribed. The PDMP shows no red flags as he has been getting these prescribed monthly, and he has been complaint." Dr. Reinhard assessed left shoulder pain with avascular necrosis.

46. At the request of Respondents, James Piko, M.D. reviewed Claimant's MRIs and reported his findings in a letter dated November 26, 2016. Dr. Piko gave the following overall impressions of the April 30, 2015 MRI: (1) high grade partial thickness tear of the distal supraspinatus tendon, (2) 1 cm loose body within the biceps tendon sheath, (3) SLAP tear, (4) osteochondral lesion of the greater tuberosity, (5) joint effusion, (6) osteoarthrosis and subacromial arch stenosis, and (7) infraspinatus tendon undersurface low grade partial tear. Regarding the November 5, 2015 MRI, Dr. Piko impressed, in part: (1) AVN of the superior humeral head, (2) increased partial thickness tearing of the infraspinatus tendon, and (3) interval rotator cuff repair and SLAP repair. Regarding the July 11, 2016 MRI Dr. Piko impressed: (1) persistent AVN of the humeral head, (2) posterior partial tearing of the distal supraspinatus repaired tendon, (3) subdeltoid/subacromial bursitis, and (4) post surgical biceps tenodesis.

47. Referring to the AVN of the humeral head, Dr. Piko remarked, "This can be potentially be a complication of microtrauma or surgery, possible steroid use, or from alcohol abuse. Indeed, alcohol abuse is a well-known risk factor for AVN." Dr. Piko opined the July 11, 2016 MRI did not "convincingly show any significant changes to the humeral head," and that "Any further need for surgery would have to be based on functional evaluation of the rotator cuff." Dr. Piko stated there were multiple reasons for Claimant's pain symptoms, including the AVN.

48. Claimant's counsel authored a January 3, 2017 letter to Dr. Boyd asking, "Do you believe that [Claimant] is now a good candidate, from a psychological perspective, for an invasive medical procedure (specifically orthoscopic surgery with rotator cuff

repair?" Dr. Boyd replied "Yes." Dr. Boyd further indicated Claimant was equipped to follow doctor's orders regarding dosage and use, and that he does not envision any issues with prescribing pain medication for Claimant post-surgery. Dr. Boyd indicated he believes Claimant is motivated to get better as opposed to being motivated to obtain narcotic pain medication. In response to the question "Do you believe that it is now an appropriate time, from a psychological perspective, to move forward with the surgery recommended by Dr. Lugliani (Authorized Treating Physician) and Dr. Weinstein (*sic*)?" Dr. Boyd replied "Yes."

49. The medical records indicate Claimant attended seven cognitive-behavioral treatment sessions with Dr. Boyd, from August 2016 to December 2016.

50. Dr. Weinerman testified by deposition on February 10, 2017. Dr. Weinerman testified as an expert in orthopedic surgery. Dr. Weinerman opined the proposed surgery is reasonable, necessary and related. Dr. Weinerman contended Claimant's condition would not improve with conservative treatment and would be permanent without surgery. Dr. Weinerman contended there is "very little downside while the upside could be favorable." Dr. Weinerman initially testified he felt Claimant was honest and reliable in his examinations and he did not observe any drug seeking behavior.

51. On cross-examination, Dr. Weinerman acknowledged that, when he recommended the surgery in July 2016, he was not aware Claimant had undergone a prior procedure to treat the AVN or that Claimant had any active history of alcohol abuse. When asked by Claimant's counsel, "So would that call into question, as of July 2016, your opinion about that procedure because you were kept in the dark?" Dr. Weinerman replied, "Yes, that's correct."

52. Dr. Weinerman testified alcohol abuse is a significant risk factor for avascular necrosis and stated,"…I think if you knew that he was an alcoholic, and you could make the connection between the AVN and alcohol, you probably wouldn't do anything about the AVN. You would probably just look at the rotator cuff, make a decision about that, and leave the humeral head alone." Dr. Weinerman acknowledged it is important to know if a patient uses tobacco because smokers have a harder time healing. Dr. Weinerman stated, "…if you know he's had two operations and he hasn't gotten better, and he's a big smoker, you might be a little reluctant to do a third operation." Dr. Weinerman conceded Claimant was not a reliable historian.

53. Dr. Weinerman acknowledged smoking a pack of cigarettes a day, drinking six-pack of beer a day and not taking pain medications as prescribed increases surgical risks. Dr. Weinerman concluded, "I don't know if it would keep me from doing it, but it

makes me nervous that a patient isn't being really straight with the surgeon, you know." Dr. Weinerman testified Claimant needed a support system and stated, "So I think, knowing all this, it's not that I absolutely wouldn't do it, but you have to be reassured that he's on the right track if you were actually going to do it." Dr. Weinerman further testified, "So if we can be assured that he's not going to have a lot of problems afterwards handling it, that's his really only chance to get better."

54. Claimant testified at hearing he continues to experience symptoms since undergoing surgery and the symptoms have worsened. Claimant testified that he is unable to work, lift more than five pounds, throw, or perform overhead activities. Claimant alleged he currently drinks two 12-ounce alcoholic beverages every other day, which Claimant testified is "way less" than in the past. Claimant testified he does not have a drug or alcohol problem and has not received any drug or alcohol treatment. Claimant contended he is not addicted to pain medications and takes his medications as prescribed. Claimant testified he is psychologically ready for surgery and will take medications as prescribed. Claimant stated his common-law wife will assist him post surgery and that he needs the surgery to "get rid of the pain and get on with his life."

55. On cross-examination, Claimant disputed telling Dr. McCord he drank two 40-ounce beers nightly and that he smokes one pack of cigarettes per day. Claimant testified he reported drinking two to three beers per day. Claimant stated he smokes one cigarette per day. Claimant testified he is not a recovered drug user. When questioned regarding his use of Percocet, Claimant first testified he ran out of Percocet, then testified he misplaced the Percocet. When questioned regarding how he ran out of Percocet early, Claimant was unable to give an explanation.

56. Claimant's common-law wife, Mary Williams testified at hearing on behalf of Claimant. Ms. Williams testified she has known Claimant for seven years and lives with Claimant. Ms. Williams alleged Claimant is not and has never been an alcoholic or a drug addict. Ms. Williams testified Claimant cut back on his alcohol consumption and has a support group. Including herself, to assist him. Ms. Williams denied pulling Dr. McCord aside to speak with her privately.

57. Dr. Erickson testified at hearing as an expert in orthopedic surgery. Dr. Erickson is board certified and level II accredited with the Colorado Division of Workers' Compensation. Dr. Erickson testified consistent with his reports. Dr. Erickson opined, within a reasonable degree of medical probability, the recommended surgery is not reasonable or necessary. Dr. Erickson opined there is no objective evidence of a surgical lesion, and the July 2016 MRI demonstrated a healed rotator cuff and stable AVN. Dr. Erickson stated that if there is a tear, the tear would be approximately 2 mm

in length and would not be large enough to cause the pain Claimant alleges. Dr. Erickson stated his physical examination of Claimant did not produce objective findings. Dr. Erickson noted Claimant's use of alcohol and tobacco can have deleterious effects. Regarding the AVN, Dr. Erickson referred to a study indicating 22% of AVN cases are associated with some form of alcohol abuse, while 40% of AVN cases are idiopathic. Dr. Erickson testified he did not know if Claimant's alcohol use is a significant issue at this point. Dr. Erickson opined surgery is not indicated in Claimant's circumstances under the MTG for chronic pain, and the recommended approach would be to conduct a forensic evaluation.

58. The ALJ credits the medical records and opinions of Drs. Lugliani, Weinerman, Kelly and Boyd over the contrary opinion of Dr. Erickson.

59. Claimant has proven by a preponderance of the evidence that the recommended left shoulder surgery is reasonable, necessary and related to the April 8, 2015 industrial injury.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Reasonable, Necessary and Related Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008); Section 8-43-201(3), C.R.S.

The ALJ concludes Claimant has established by a preponderance of the evidence the left shoulder surgery recommended by Dr. Weinerman is reasonable, necessary and related to the April 8, 2015 industrial injury. As found, the ALJ credits the medical records and opinions of Drs. Weinerman, Lugliani, Kelly and Boyd. The ALJ is persuaded there is objective evidence of a recurrent rotator cuff tear and AVN. Despite Claimant's history of alcohol use, objective evidence of the AVN did not appear in the medical records until the November 2015 MRI, subsequent to Claimant's first left shoulder surgery. Dr. Weinerman credibly testified that the recurrent tear and AVN are related to the April 8, 2015 injury. Moreover, Dr. Kelly indicated there were injury pattern findings on the April 30, 2015 MRI that could have predisposed Claimant to development of AVN, and Dr. Piko stated microtrauma or surgery can be one of the causative factors of AVN.

Both Dr. Weinerman and Dr. Lugliani credibly opined the recommended procedure is the only option for curing or relieving Claimant's condition. Although Dr. Weinerman indicated there are potential concerns in light of Claimant's alcohol and tobacco use, Dr. Weinerman did not withdraw his recommendation for the surgery, but instead testified there should be reassurance Claimant is on the "right track." While Claimant's testimony cannot be relied upon with certainty, Dr. Boyd, who counseled Claimant over multiple sessions, credibly opined Claimant is now a good candidate for the recommended surgery. Given the time that has elapsed since he last evaluated Claimant, it is reasonable for Claimant to return to Dr. Weinerman for an evaluation of his left shoulder to be cleared for surgery. Based on the totality of the evidence, Claimant has proven by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Weinerman is related to the April 8, 2015 industrial injury, and is reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury.

ORDER

It is therefore ordered that:

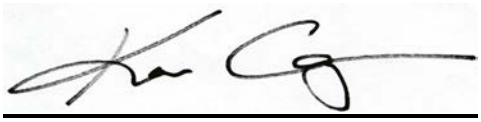
1. The request for the left shoulder surgery recommended by Dr. Weinerman is found to be reasonable, necessary and related to Claimant's April 8, 2015 industrial injury. Insurer shall authorize the proposed left shoulder surgery.

2. Respondents shall pay for an appointment with Dr. Weinerman to clear Claimant for the proposed left shoulder surgery.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 7, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
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STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 South Circle Drive, Suite 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **RICK FRANKLIN,** Claimant, vs. **PUEBLO CITY SCHOOLS,** Self- Insured Employer, **c/o FCC SERVICES,** Respondent.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 4-988-862-03**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A hearing in this matter was held on March 2, 2017 before Administrative Law Judge Patrick C.H. Spencer II.

Claimant was present and represented by Lawrence D. Saunders, Esq. Respondents were represented by Frank M. Cavanaugh, Esq. The hearing was digitally recorded in the CMHIP Courtroom in Pueblo, Colorado from 10:52 AM to 11:31 AM.

The following exhibits were admitted into evidence: Claimant's Exhibits 1 and Respondents' Exhibits A-F. Claimant testified live at hearing. Ray Wilber testified via telephone. The ALJ gave the parties until March 20, 2017 to submit written closing arguments, at which time the matter became ready for an order.

In this order, Rick Franklin will be referred to as "Claimant," Pueblo County Schools will be referred to as "Employer" or "Respondent."

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "ATP" refers to authorized treating physician, "C.R.S." refers to Colorado Revised Statutes (2016); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by U.S. Mail, or by e-mail addressed as follows:

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Date: April 5, 2017

s/Angela Heckman-Cowles
Court Clerk

ISSUES

1. Is Respondent entitled to apportionment of Claimant's PPD award under 8-42-104(5)(a) for a previous 5% impairment rating Claimant received in a 1998 claim?

FINDINGS OF FACT

1. Claimant worked for Employer as an irrigation maintenance technician. On May 20, 2015, he injured his low back while lifting a heavy backflow device.

2. Claimant had a prior work-related injury to his low back on October 10, 1998, while working for Employer. He was placed at MMI for that injury on April 10, 1999. He received a 5% whole person impairment rating from a DIME, Dr. Thomas Higginbotham. Employer admitted liability for the 5% rating with a Final Admission of Liability (FAL) dated December 30, 1999.

3. Claimant had a lumbar MRI on June 18, 2015, which showed multilevel degenerative disk disease with a large left disc extrusion at L4-5, severe left neural foraminal narrowing and severe bilateral neural foraminal narrowing at L5-1.

4. Claimant received authorized medical treatment at Southern Colorado Clinic Occupational Medicine. At his initial visit, he described ongoing "waxing and waning" low back pain and left lower extremity weakness. Claimant reported a prior back injury as a result of a 1996 motor vehicle, for which he underwent chiropractic treatment and an injection with Dr. Hess. Claimant said he had "been well since then." Claimant did not disclose the 1998 injury or the prior impairment rating.

5. Claimant underwent chiropractic care and therapeutic massage. He was also referred to Dr. Michael Sparr, a physical medicine and rehabilitation specialist. Under Dr. Sparr's direction, Claimant had multiple trigger point injections with myofascial release. He subsequently underwent radiofrequency ablation (rhizotomy) at L3, L4, and L5.

6. The rhizotomy was helpful, and Claimant was able to return to his regular work duties. Ultimately, Claimant underwent an FCE and was placed at MMI on August 25, 2016.

7. Dr. Terrance Lakin provided a permanent impairment rating on August 25, 2016. Dr. Lakin calculated a 15% whole person impairment rating for the lumbar spine, based on specific disorders and range of motion deficits.

8. Respondent filed an FAL on October 5, 2016 based on Dr. Lakin's MMI report. The FAL referenced Dr. Lakin's 15% rating, but only admitted for PPD benefits based on a 10% rating. Respondent "apportioned" out the prior 5% rating attributable to

the 1998 injury. Respondent attached the first page of the December 30, 1999 FAL to document the previous PPD award.

9. Mr. Ray Wilber of FCC Services is the adjuster handling Claimant's current claim. Mr. Wilber has adjusted several injury claims for Claimant, including three lumbar injuries.

10. At the time of Claimant's 1998 injury, Mr. Wilber was adjusting Employer's claims for a different third party administrator, SCA Claims Management Services ("SCA"). In 2008, FCC Services took over adjusting responsibility for Employer's claims, and Mr. Wilber continued handling Employer's claims with FCC Services.

11. When he received Dr. Lakin's rating report, Mr. Wilber tried to locate the medical records associated with Claimant's 1998 injury. However, the physical file was not transferred to FCC Services when it took over from SCA. Mr. Wilbur contacted SCA about the claim, but they could not locate the old file. He also contacted the previous ATP to request a copy of the rating, but was told those patient records had been destroyed. Respondents' counsel contacted Dr. Higginbotham's office, and was informed that Claimant's "records have been purged."

12. Mr. Wilber credibly testified that he remembers the 1998 claim involved a lumbar injury. He also credibly testified that the prior injury is coded in his computer system as a "lumbar strain," which matches his recollection. On cross-examination regarding how he could recall that information after so many years, Mr. Wilber credibly testified that people with more than three claims "tend to stick out in my memory," and "there were enough things that happened in that claim that I do remember it."

13. Claimant did not testify at hearing or otherwise present persuasive evidence to rebut the adjuster's recollection that the 1998 claim involved a lumbar injury.

14. Respondent has proven by a preponderance of the evidence that Claimant previously received a PPD award based on a 5% impairment of his lumbar spine. Therefore, Respondent has proven the requirements of § 8-42-104(5)(a), that Claimant had a prior "permanent medical impairment to the same body part and has received an award" for that impairment.

15. Respondent is entitled to apportion Claimant's PPD award based on the prior 5% rating.

16. Claimant is entitled to PPD benefits for his 2015 industrial injury calculated on the basis of a 10% whole person impairment rating.

CONCLUSIONS OF LAW

A. The ALJ can decide the issue of apportionment absent a DIME.

Respondent is not challenging Dr. Lakin's rating, and agrees that Claimant's current overall permanent impairment rating is 15%. Respondent asserts it is only required to compensate Claimant for 10% because he was previously compensated for the remaining 5% in a different claim.

The critical legal issue is whether Respondent is entitled to apportion Claimant's rating under § 8-42-104(5)(a) when the ATP did not apportion the rating and neither party requested a DIME. Based on the version of the apportionment statute in effect on the date of Claimant's injury, the ALJ concludes that apportionment premised on a prior "award or settlement" is a factual/legal issue for the ALJ to determine under the "preponderance of the evidence" standard. The ATP's decision whether or not to apportion the rating is not "binding" in the absence of a DIME. Application of the apportionment statute is an affirmative defense, and therefore, the burden of proof is on Respondent.

Apportionment of permanent medical impairment is governed by § 8-42-104 (the "apportionment statute").[1] The legal standards governing apportionment have changed several times since the passage of SB 91-218. Under the version of the apportionment statute in effect from 1991-1999, apportionment was limited to cases where the claimant had a "previous disability." As interpreted by *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996), the term "previous disability" was not synonymous with "medical impairment." *Askew* held that apportionment was only appropriate if the pre-existing impairment hindered the claimant's ability "to meet personal, social, or occupational demands" at the time of the subsequent injury. In *Askew*, the pre-existing condition was dormant and asymptomatic at the time of the industrial injury, and therefore did not constitute a "previous disability" as a matter of law.

The Court of Appeals later extended *Askew* to cases where the claimant had a previous permanent impairment rating, but had improved and was not "disabled" at the time of a subsequent injury. See *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 658 (Colo. App. 1998) ("if a claimant has a prior impairment rating, but is asymptomatic at the time of the subsequent injury, apportionment is not appropriate."); *Public Service Co. v. Industrial Claim Appeals Office*, 40 P.3d 68, 71 (Colo. App. 2001) (apportionment "is appropriate only when the impairment rises to the level of a disability and continues to affect the claimant at the time of the subsequent injury").

The Court of Appeals also determined that whether a claimant's prior injuries were "disabling" for purposes of apportionment was a question of fact to be determined

[1] There have been several iterations of the apportionment statute since 1991. From July 1, 1991 to June 30, 1999, apportionment of PPD was codified in § 8-42-104(2). From July 1, 1999 to June 30, 2008, apportionment of PPD was codified in § 8-42-104(2)(b). Effective July 1, 2008, apportionment of PPD is governed by § 8-42-104(5).

by the ALJ under the preponderance of the evidence standard. *Public Service Co., supra*. Therefore, the parties were not required to submit the issue to a DIME, and a DIME's opinion regarding apportionment was not entitled to any special weight.

In 1999, the General Assembly amended the apportionment statute to legislatively overrule *Askew* and its progeny. The amended statute provided that PPD benefits "shall exclude any previous impairment to the same body part." See § 8-42-104(2)(b), C.R.S. (2006). It was immaterial whether the prior impairment was "disabling" at the time of the subsequent injury. As a result of the statutory change, apportionment became "a pure medical determination" for the rating physician, rather than a question for the ALJ. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826, 828 (Colo. App. 2007). As a consequence, the ALJ did not have jurisdiction to consider apportionment absent a DIME, and a DIME's apportionment determination was subject to the clear and convincing evidence standard.

In 2008, the General Assembly amended the apportionment statute again, with the passage of SB 08-241. The current statute now distinguishes work-related and nonwork-related prior impairments. *Compare* § 8-42-104(5)(a) & (b). In cases involving a prior nonwork-related impairment, the statute tracks the *Askew* standard, and only allows apportionment where the prior impairment was "independently disabling." On the other hand, if the prior impairment was work-related, apportionment is mandatory if the prior impairment involved "the same body part," and resulted in "an award or settlement" in a workers' compensation claim.

The ALJ concludes that apportionment under § 8-42-104(5)(a) is a factual question which the ALJ has jurisdiction to decide without a DIME. The 2008 amendments reflect a legislative compromise to restore the *Askew* apportionment standard, but with a provision to limit awards when a claimant has previously been paid for an impairment to the same body part. Under the *Askew* regime, apportionment was a factual question for the ALJ. It naturally follows that apportionment under the current statute is again a factual question.

Logically, whether a claimant was previously compensated for a permanent impairment with an "award" or "settlement" is a question most appropriately answered by an ALJ. It involves no significant medical determination and primarily turns on information a rating physician would not be expected to have. *See* WCRP 11-3(K) (setting forth requirements and restrictions on the contents of the DIME records package). The point is well-illustrated by Claimant's case because the prior rating was proved at hearing, not by reference to medical reports, but by reviewing an FAL, claim history data, and the claims adjuster's memory. In other cases, the decision to apportion a PPD award may hinge on interpretation of a settlement agreement or stipulation.

The plain language of the statute supports the interpretation that apportionment is a question for the ALJ. § 8-42-104(5) states that a claimant's "award or settlement" shall be reduced by the prior rating. Thus, the statute does not apportion the <u>rating</u>; it apportions the PPD <u>award</u>. Although Claimant correctly notes that Dr. Lakin's rating is "binding" under § 8-42-107.2(2)(b), the apportionment statute has no impact on

Claimant's rating. It simply limits the benefits payable to Claimant based on the rating. The overall rating is assigned by the ATP or DIME, *as a medical determination*. Once the overall permanent medical impairment rating has been determined, § 104(5)(a) reduces the "award" payable to the claimant for that rating. The apportionment statute thus operates as a statutory offset, much like the offset for SSDI or unemployment benefits. In essence, § 104(5)(a) gives Respondent a credit for the amount of the PPD award attributable to the prior 5% rating. Consequently, there was no need for Respondent to request a DIME before taking the credit to which it is entitled under the statute.

B. Respondents proved the requirements to apportion Claimant's PPD award.

As found, Claimant was previously compensated for a 5% lumbar spine rating in connection with his October 10, 1998 injury. Although the original rating report was lost, the ALJ is persuaded by Mr. Wilber's credible testimony that the prior rating was based on the lumbar spine. Although the prior impairment report would be the most desirable evidence to establish the prior rating, Respondent is entitled to rely on any competent and probative evidence to sustain its burden, including sworn testimony. There is no dispute that Claimant received an "award" of PPD benefits based on that prior rating, as evidenced by the December 30, 1999 FAL. Therefore, all the elements of § 8-42-104(5)(a) are satisfied.

The statute explicitly provides that if the factual predicates are established, a claimant's PPD award "shall be reduced." The term "shall" connotes a mandatory requirement. The purpose of § 8-42-104(5)(a) is to prevent a claimant from receiving a "double recovery" and being compensated repeatedly for the same impairment. *Pederson v. Jonathan P. Bayne DDS*, W.C. No. 4-894-819-02 (ICAO, May 19, 2015). Accordingly, Respondent is entitled to apportionment as a matter of law.

Dr. Lakin assessed a 15% whole person impairment, before apportionment. The ATP's pre-apportionment rating is binding because neither party requested a DIME. Section 8-42-107(8)(c). Therefore, Claimant's overall impairment is 15%, from which the prior 5% must be subtracted, pursuant to § 8-42-104(5)(a). For PPD purposes, Claimant's compensable impairment rating is 10% whole person.

ORDER

It is therefore ordered that:

1. Claimant's claim for PPD benefits based on a 15% whole person rating, without apportionment, is denied and dismissed.

2. Respondent shall pay PPD benefits calculated based on a 10% whole person rating. Respondent may take credit for any PPD benefits previously paid to Claimant in this matter.

3. Respondent shall pay statutory interest of 8% per annum on any benefits not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 5, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Has Claimant proven by a preponderance of the evidence that she suffered a compensable work-related injury on May 10, 2016?

FINDINGS OF FACT

1. Claimant works as a merchandise receiver for Employer. Her job duties include scanning inventory at a warehouse and completing related paperwork.

2. On May 10, 2016, Claimant was pushed from behind by a stack of pallets on a moving forklift. Claimant fell to the ground on her left side. She testified that she could not recall where the pallets struck her: "I really don't know because, all I know is it pushed – it pushed me and I fell. . . . I don't know where they hit me. I wasn't bruised by them on the right side."

3. A coworker called a "code blue," which refers to a "minor incident" in the warehouse. Claimant's supervisor came over and discussed the incident with her. Claimant did not request medical treatment, and her supervisor simply recommended that she go home.

4. Claimant was scheduled off the next day. When she went to work on May 12, she was still having pain in her hip and legs. Claimant asked if she could see a doctor, so Employer referred her to Dr. Frank Polanco for evaluation.

5. Dr. Polanco documented a comprehensive physical examination, including Claimant's head, neck, thoracic spine, lumbar spine, bilateral upper extremities, and bilateral lower extremities. Although Claimant reported hand pain, neck pain, bilateral shoulder pain, lower back pain, and left thigh pain, the examination findings were entirely normal without evidence of any acute injury. Dr. Polanco diagnosed a headache for which he recommended OTC ibuprofen. Aside from the headache, she had no clinical findings to support any specific diagnosis. Dr. Polanco opined Claimant was at MMI with no impairment and required no further treatment.

6. On May 23, 2016, Claimant returned to Dr. Polanco, now complaining of abdominal pain, low back pain, and groin pain. Based on her pain diagram, the neck, shoulder, left thigh, and right hand pain she was having at the initial visit had apparently resolved. The physical examination was again entirely normal, except for left lower quadrant tenderness. There were no musculoskeletal findings to suggest that her pain was related to the reported injury of May 10, 2016. Dr. Polanco opined that Claimant remained at MMI and recommended that she follow up with her primary care physician for her non-work-related symptoms.

7. At Claimant's request, Employer referred her for a second opinion with Dr. Jay Neubauer at CCOM. When she saw Dr. Neubauer on July 7, 2016, her symptoms had changed again. Claimant reported aching and stabbing left chest and abdominal pain, bilateral thigh pain, and "rare" right low back pain. She felt her pain was not improving. On physical examination, she had "slight" pain to palpation of the Trapezius muscles, tenderness around the left lateral ribcage at the bra line, "slight" left lower quadrant tenderness with deep palpation, and tenderness of the bilateral iliotibial bands. Dr. Neubauer opined that "some of the current complaints have objective findings consistent with injury related to a fall. Specifically, left chest pain and left thigh pain." But he also noted that the "chest pain did not start until a week or two[1] after the initial fall." Dr. Neubauer offered no explanation for why Claimant would still be experiencing pain from minor contusions and strains that happened nearly 2 months prior. The "minimal" exam findings relating to her abdominal pain made definitive diagnosis "difficult." Dr. Neubauer stated "if this was related to the fall, it would be a muscular injury that would have resolved quickly. Physical examination today suggests something other than a muscular injury." He opined that the bilateral thigh pain was more consistent with an overuse injury as opposed to a fall. Dr. Neubauer recommended a trial of physical therapy for left thigh and chest wall pain.

8. Claimant saw Dr. Polanco again on August 1, 2016. She reported pain in the left rib area, left lower abdominal area, and bilateral thighs. Once again, a comprehensive physical examination showed no significant abnormalities. Dr. Polanco diagnosed abdominal pain of "undetermined etiology" and "musculoskeletal pain with no significant clinical findings." Dr. Polanco opined that Claimant's presentation "is unusual for a work-related injury. While she did have a pallet strike on May 10, her clinical examination was unremarkable for any specific bruising or abnormal musculoskeletal findings. Subsequently approximately 13 days later she developed left lower quadrant pain. At that time she did not report rib cage pain or leg pain or radicular symptoms."

9. Dr. Polanco stated, "[a]t this time she has no musculoskeletal findings, but as the second opinion physician recommends physical therapy, we will proceed to provide this treatment." He also recommended an abdominal ultrasound to rule out a hernia. The subsequent ultrasound revealed no evidence of hernia or other abnormality in Claimant's left lower quadrant.

10. On August 19, 2016, Claimant saw Dr. Richard Rivera, her primary care physician. She reported left rib pain and pain at the insertion of the abdominal wall musculature into the left iliac crest. Dr. Rivera opined that Claimant "appears to have a chronically symptomatic strain at the insertion of the abdominal wall musculature into the left iliac crest accounting for her chronic pain in the area." Dr. Rivera gave Claimant injections at the costochondral joint and the rim of the iliac crest.

11. On August 25, 2016, Claimant returned to Dr. Rivera's office. She reported improvement of her pain and requested additional injections in her ribs and

[1] In fact, Dr. Neubauer's report contains the first mention of "chest pain," which is actually two **months** post-accident.

sacroiliac joint. She also requested clarification of her diagnosis so she could apply for short-term disability.

12. At a September 2, 2016 follow-up appointment with Dr. Rivera's office, Claimant reported the injections were only helpful for 3-4 days. PA-C Lindsay Goetzmann opined "at this time there are no further interventions as there seems to be no clear etiology of [the] patient's pain. She was given [a] work note for one more week off to determine if these injections helped. After discussion with Dr. Rivera, patient will be advised this will be her final work excuse from this office. . . . Patient's current condition is as optimized as we believe she will be and does not warrant restrictions at work." The note is cosigned by Dr. Rivera, indicating his agreement with its content.

13. On September 9, 2016, Claimant saw PA-C Lindsay Stringer at Dr. Rivera's office. She was still complaining of chronic pain in her abdomen and left ribs. PA-Stringer advised Claimant that Dr. Rivera's office would "no longer manage her left sided pain as there is no etiology and all interventions have failed; she will need to seek treatment elsewhere along with short-term disability." PA-C Stringer referred Claimant to Dr. Hess for "pain management." The note is cosigned by Dr. Rivera, indicating his agreement with its content.

14. Dr. Eric Ridings performed an Independent Medical Examination (IME) at Respondents' request on September 21, 2016. Dr. Ridings opined that Claimant's abdominal pain was "most consistent with an intra-abdominal source, not a musculoskeletal source." He could not relate any of her ongoing complaints to the May 10, 2016 incident within a reasonable degree of medical probability. Dr. Ridings agreed that "Dr. Polanco correctly placed the patient at maximum medical improvement without the need for treatment or work restrictions at the time of her initial evaluation on May 12, 2016." Her only work-related diagnoses were "minor contusions which did not cause any injury."

15. Dr. Timothy Hall performed an Independent Medical Examination (IME) at Claimant's request on January 6, 2017. Dr. Hall diagnosed: traumatic trochanteric bursitis with secondary iliotibial band pain and tightness; psoas spasm/ trauma, leading to groin pain/lower abdominal symptoms likely radiating symptoms into the anterior thigh; pelvic obliquity related to the trauma with quadratus lumborum spasm and local pain; and similar symptoms on the right, but not as severe.

16. Dr. Hall opined "there is no reason to even question the work-relatedness of the symptoms. I do not see how anyone who is looking at this situation reasonably could come to any other conclusion." Dr. Hall stated "the problem here is that she has not been treated. She has not been treated because Dr. Polanco decided she was not going to get any treatment right off the bat. Now, we have a problem of chronic pain, which is going to be very difficult to overcome."

17. Dr. Ridings testified at the February 16, 2017 hearing to expound upon the opinions expressed in his IME report. Dr. Ridings disagreed with Dr. Hall's assessment. Dr. Ridings explained that Dr. Hall's diagnoses were not consistent with the physical

examinations documented in Claimant's medical records or the mechanism of injury reported by Claimant. Additionally, Dr. Hall's conclusions were inconsistent with Dr. Ridings' examination of Claimant. Dr. Ridings noted inconsistencies in the location of Claimant's pain complaints throughout the course of treatment, with no significant musculoskeletal abnormalities documented. Accordingly, he concluded Claimant did not sustain a compensable injury as a result of the May 10, 2016 incident.

18. Dr. Polanco testified in an evidentiary deposition on February 28, 2016. Dr. Polanco explained that, contrary to Claimant's testimony, he performed a thorough physical examination at the initial appointment on May 12 2016, as documented in his report. He placed Claimant at MMI that same day because she presented with no musculoskeletal injuries and her primary complaint was a non-disabling headache.

19. Dr. Polanco saw Claimant a second time 11 days later, at which time she reported new symptoms of lower abdominal pain and urethral burning. She no longer complained of headache, neck pain, shoulder pain, right hand pain, or left thigh pain. Dr. Polanco concluded Claimant's new symptoms were unrelated to the work incident and recommended she seek treatment from her primary care provider.

20. On August 1, 2016, Claimant presented to Dr. Polanco with a new set of complaints. She complained of front and back rib pain with bilateral thigh pain. She was still complaining of lower abdominal pain, so Dr. Polanco ordered a left-side ultrasound. The ultrasound was normal, which Dr. Polanco believed showed Claimant's complaints were disproportionate to her clinical and diagnostic findings.

21. Dr. Polanco concluded, based on the medical evidence and his examinations, that Claimant sustained only minor contusions on May 10, 2016 which were not even clinically evident. He maintained his opinion that Claimant was at MMI as of May 12, 2016 with no impairment, work restrictions, or need of maintenance care.

22. Dr. Polanco's opinions are credible and more persuasive than medical opinions in the record to the contrary.

23. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury as a result of the May 10, 2016 incident at work. Although the incident caused transient symptoms, the symptoms did not require any medical treatment or cause any disability.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App.

1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, *supra*.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016).

As found, Claimant has failed to prove that she suffered a compensable "injury" on May 10, 2016. Although she was involved in an "incident" at work on that date, the incident did not proximately cause any disability or a need for medical treatment. Claimant did not request medical treatment immediately following the injury. When Dr. Polanco examined her two days later, he found no abnormalities and no persuasive evidence of any medical condition that required treatment. Claimant did not even have any abrasions or visible bruising. As Dr. Polanco noted in his deposition "I didn't see any musculoskeletal injuries to treat." Two of Claimant's most significant current concerns — abdominal pain and chest/rib cage pain — were not even present at the initial evaluation. The rib pain did not manifest until two months after the injury. The ALJ acknowledges that Claimant has subsequently undergone evaluations and received treatment from multiple providers, but none of that treatment was proximately caused by the incident on May 10, 2016. The persuasive evidence shows that the abnormalities appreciated by Dr. Rivera and Dr. Hall are new and unrelated to the May 10, 2016 incident.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 17, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Has Claimant proven entitlement to temporary total disability (TTD) and/or temporary partial disability (TPD) benefits between August 9, 2016 and August 29, 2016?

2. Has Claimant proven entitlement to temporary total disability (TTD) benefits from August 30, 2016 through November 16, 2016?

STIPULATIONS

1. The parties stipulated to an average weekly wage (AWW) of $572.34.

FINDINGS OF FACT

1. Claimant worked for Employer in several positions, including assistant manager, trainer and closing server.

2. Claimant sustained an admitted injury on August 9, 2016 lifting water jugs in the "dish pit." She reported the injury to her supervisor, but was able to finish her shift. Claimant was not scheduled to work the following day, August 10, 2016.

3. Claimant's pain was worse the next day, so she went to the Memorial Hospital emergency room that evening. She reported flank pain, hip pain, and leg pain. On physical examination, she had bilateral SI joint tenderness and tenderness over the bilateral IT bands and adductors. Her discharge diagnoses were lumbar strain, muscle spasm, and acute sciatica. The ER physician prescribed a muscle relaxer, Norco, and NSAIDs. The ER physician took Claimant off work until August 14, 2016.

4. Claimant called Employer and emailed the documentation from the ER, including the "off work" note.

5. Upon receipt of the information, Employer referred Claimant to Concentra. Claimant was evaluated by Dr. Randall Jones on Monday, August 15, 2016. He noted that she was "scheduled to work doubles this next week." He noted her average work shift was 6-8 hours, and she averaged 30 hours per week. The ALJ infers from this information that Claimant typically worked 4-5 days per week.

6. On physical examination, Claimant had tenderness in the lumbar spine, the bilateral paraspinal musculature, and bilateral sciatic notches. Dr. Jones diagnosed lumbosacral strain and sciatica, for which he prescribed medication and physical therapy. Dr. Jones released Claimant to return to work the next day with restrictions of: maximum four-hour shifts, 10 pounds lifting, limited bending, and postural shifts as needed.

7. Dr. Jones advised Claimant that Concentra would notify Employer about her restrictions. Shortly thereafter, Claimant's manager, Jimmy Campos, contacted her to discuss modifying her schedule to accommodate the work restrictions. Mr. Campos told Claimant he had received notification from Concentra regarding Claimant's work restrictions.

8. Claimant's wage records show she earned $252.12 in the week ending August 14, 2016. The following week, she earned $162.59. Her earnings in those weeks are substantially less than the stipulated AWW of $572.35. The ALJ infers from Claimant's wage records, in conjunction with the evidence regarding her typical work hours, that Claimant suffered a wage loss immediately after being taken off work by the ER physician on August 11, 2016. The ALJ further infers from the evidence presented that Claimant returned to modified duty on August 16, 2016.

9. On August 25, 2016, Claimant told Dr. Jones she was "a little better," but had experienced some minor issues of incontinence. As a result, Dr. Jones referred Claimant for a "stat" lumbar MRI.

10. Claimant had the MRI the next day, on August 26, 2016. The MRI showed a diffuse disc bulge at L4-5, with moderate to severe central canal stenosis, and mild to moderate neuroforaminal stenosis.

11. On August 30, 2016, Claimant returned to Concentra on an emergent basis due to worsening pain and incontinence. Dr. Jones referred Claimant to the Memorial Hospital ER "stat" for further evaluation. Because of her worsening symptoms, Dr. Jones took Claimant off work. Subsequently, another manager at the restaurant, Justin Dorman, called Claimant and told her Concentra had notified Employer she was taken off work.

12. Claimant had the second lumbar MRI on August 30, 2016. At L4-5, there was a small broad-based disk bulge with resulting mild spinal canal stenosis, and bilateral L5 nerve root impingement, right greater than left.

13. Claimant returned to Concentra on September 30, 2016, and was seen by a new physician, Dr. Nicholas Kurz. Dr. Kurz released Claimant to return to "sedentary type work only," with a 5 pound lifting restriction, occasional standing and walking and postural shifts as needed.

14. During the appointment, Dr. Kurz did not tell Claimant he was releasing her to return to work, nor was she given any documentation when she left the office. She received an email from Concentra later that evening with her new restrictions. Claimant did not contact Employer, because she assumed Concentra had notified Employer, as it had done previously.

15. Claimant saw Dr. Kurz a few more times in October and November 2016. On each occasion she was released to work with restrictions. Claimant continued to assume that Concentra was sending reports to Employer regarding her status.

16. Dr. Kurz placed Claimant at MMI on November 17, 2016, with no impairment and no restrictions.

17. Claimant did not contact Employer between September 30, 2016 and November 17, 2016. Employer did not contact Claimant either. As a result, Claimant did not return to work, even though Employer could have accommodated her restrictions.

18. Janine Akerman, an injury coordinator at Concentra, testified credibly at the hearing regarding Concentra's procedures for notifying employers about their injured workers' restrictions. Ms. Akerman explained that employers have the option of setting up "what is called auto comm — auto communication. Things go to the employer automatically." The employer may receive information via fax, email, or signing into an internet portal. Concentra's system automatically notifies the employer via the designated method, without requiring any action by a Concentra employee. Ms. Akerman verified that Employer was set up for automatic notification via email. Ms. Akerman could not verify that Employer received the emails, only that they were sent.

19. Shannon Moore, the managing partner for Employer, testified at hearing. Ms. Moore was on maternity leave from July 12, 2016 through September 30, 2016. During that period, other managers were filling in for her. Ms. Moore did not communicate with Claimant regarding her work status between September 30 and November 17, 2016. Ms. Moore did not know about Claimant's restrictions after September 30, but testified Claimant could have worked modified duty at the host stand.

20. Ms. Moore received an email from Concentra dated September 30, 2016, the day Dr. Kurz released Claimant to return to restricted duty. The email header did not specifically identify to whom it pertained. A link in the email took Ms. Moore to a web page that required a user name and password. Ms. Moore could not access the link, because she did not know the user name or password.

21. Based on the stipulated AWW of $572.35, Claimant's weekly TTD rate is $381.57. The daily TTD rate is $54.51 ($572.35 x 2/3 = $381.57 ÷ 7 = $54.51).

22. Claimant is not entitled to TTD benefits on August 10, 2016 because she was not scheduled to work on that date. Accordingly, Claimant's injury did not cause a wage loss on August 10, 2016.

23. Claimant has proven entitlement to TTD benefits from August 11, 2016 through August 15, 2016, in the amount of $272.55 ($54.51 x 5 days = $272.55).

24. Claimant has proven entitlement to TPD benefits from August 16, 2016 through August 29, 2016.

25. Claimant has proven entitlement to TTD benefits from August 30, 2016 through November 16, 2016 in the amount of $4,306.29 ($54.51 x 79 days = $4,306.29)

CONCLUSIONS OF LAW

As of August 11, 2016, Claimant could not return to her pre-injury job due to the effects of the work injury. Consequently, Claimant was "disabled" for purposes of entitlement to temporary disability benefits. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999).

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. Once commenced, TTD benefits continue until the occurrence of one of the four terminating events specified in § 8-42-105(3). *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

Claimant was restricted from all work from August 11 through August 15, 2016. Nevertheless, Respondents argue she is not entitled to TTD benefits because she did not prove she was scheduled to work during that period. Based on the evidence presented, the ALJ is persuaded that Claimant likely lost wages as a result of her injury during that window of time. Claimant's August 14, 2016 pay stubs shows she earned less than half of her AWW for that week. The next pay stub shows even lower earnings. Claimant typically worked four to five days per week, and near the time of her injury, she was working some "double" shifts. The ALJ finds no persuasive reason to conclude Claimant would have been off work for five consecutive days if she had not been injured. Therefore, Claimant is entitled to TTD benefits from August 11 through August 15, 2016.

Claimant returned to work on August 16, 2016 and worked modified duties through August 29. Respondents' counsel conceded at hearing that Claimant is entitled to TPD benefits during that time. Claimant's counsel asked for a general award regarding TPD, and stated the parties could "figure out" the specific amount. Based on the evidence presented, the ALJ concludes that Claimant is entitled to TPD benefits from August 16 through August 29, 2016.

Dr. Jones took Claimant off work on August 30, and she did not return to work after that date. As a result, Claimant became entitled to TTD benefits commencing August 30, 2016.

Having determined that Claimant was entitled to TTD benefits commencing August 30, 2016, the next question is whether her TTD benefits should be terminated on September 30 when she was released to restricted duty. The ALJ finds no basis to terminate Claimant's TTD benefits, for several reasons. First, none of the terminating events enumerated in § 8-42-105(3) had occurred by September 30. Second, Claimant had no affirmative obligation to notify Employer of her restrictions. Third, Claimant reasonably relied on Concentra to notify Employer of her status after each appointment, and Concentra did so. Employer's inability to access the transmission from Concentra was Employer's own fault.

Once commenced, TTD benefits "shall continue" until the occurrence of one of the events enumerated in § 8-42-105(3)(a)-(d). None of the listed events had occurred by September 30, 2016. Consequently, there is no statutory authority for terminating Claimant's TTD benefits on that date.

Moreover, it is well established that a temporarily disabled claimant has no affirmative duty to seek work within her restrictions. *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987); *Schlage Lock v. Lahr*, 870 P.2d 615 (Colo. App. 1993); *Vigil v. Denver Catholic Community Services*, W.C. No. 3-796-867 (ICAO, April 29, 1993). A claimant's willingness to seek work "is irrelevant to the issue of entitlement to temporary disability benefits." *Cobb v. Terry Personnel Service*, W.C. No. 3-970-262 (ICAO, October 22, 1991). The onus is on the employer to offer the claimant modified duty within her restrictions.

Respondents argue Employer would have offered modified duty had it known Claimant was released to work. Therefore, Respondents argue Claimant created her own wage loss by failing to inform Employer of her restrictions. But Respondents' argument ignores Employer's failure to communicate with Claimant. There was no reason Employer could not have contacted Claimant regarding her work status. Ultimately, the failure of communication cuts both ways in this case.

In any event, the ALJ is persuaded that Claimant had a reasonable excuse for failing to notify Employer regarding her restrictions. She was under the impression that Concentra sent notice to Employer. In fact, Concentra emailed the information to Employer, but Ms. Moore could not access the documentation because she did not know the password.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant $272.55 for TTD benefits from August 11, 2016 through August 15, 2016.

2. Insurer shall pay Claimant $4,306.29 for TTD benefits from August 30, 2016 through November 16, 2016.

3. Insurer shall pay Claimant TPD benefits from August 16, 2016 through August 29, 2016. The parties shall confer regarding the exact amount of TPD benefits to which Claimant is entitled. Either party may request a hearing if the parties cannot resolve the issue by agreement.

4. Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 7, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Are Respondents entitled to withdraw all Admissions of Liability because they have now proven, by a preponderance of the evidence, that on or about November 2, 2015 Claimant did not sustain a compensable injury to her **right** knee, arising out of, and in the course of, her employment?

II. If the evidence establishes that Claimant suffered a compensable injury to her **right** knee, has Claimant proved, by a preponderance of the evidence, that her need for medical benefits for the **left** knee is causally related to the injury to her **right** knee?

FINDINGS OF FACT

Based upon the evidence admitted at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed by the Gymboree Corporation in November, 2015 as a "manager of sorts". Her duties included helping customers and putting out a new line [of clothing].

2. On November 2, 2015, Claimant testified that she was "maneuver[ing] around boxes and twisted [her] knee". She testified that she injured her right knee, and she told "everybody I worked with". She also described herself as "hurrying".

3. Claimant testified that she first sought medical treatment on November 9, 2015. She went to Penrose Community Urgent Care. She was given crutches and an immobilizer. She did not seek immediate medical care after the injury, because "we all get aches and pains, and they get better". She finally went on this day because the pain was so bad.

4. An x-ray of Claimant's right knee on November 9, 2015 showed only *mild* tibiofemoral and patellofemoral arthritis. (Ex. 7, p. 53).

5. Claimant began treating with Higgins Family Practice on or about December 1, 2015.

6. An MRI was taken on December 4, 2015, and was interpreted by Vincent Herlihy, M.D. His pertinent findings, were, in summary:

> 1….There is a macerated flap *tear* of the intercondylar aspect of the posterior horn and the posterior root insertion with moderate free edge truncation and an *irregular meniscal flap* displaced superiorly.

2. …There is *mild* degenerative fraying of the posterior root insertion of the lateral meniscus *without evidence of discrete tear*.
3. There is *moderate* grade 2-4 patellofemoral chondromalacia.
4. There is *mild* grade 2 and 3 chondromalicia in the central lateral tibial plateau. (emphasis added).

7. Claimant began treating with Dr. Ronald Royce on January 8, 2016. Dr. Royce noted a positive McMurray's test, and limited passive range of motion due to pain. She had "swelling and warmth" in the right knee. Inspection and testing of the left knee was totally normal. Dr. Royce noted that Claimant had "failed nonsurgical care," and would proceed with a knee arthroscopy.

8. The knee arthroscopy was completed on January 21, 2016.

9. The post operative surgical findings from Dr. Royce confirmed the chondromalacial findings on the MRI, indicating the presence of chronic arthritis. Additionally, however, it was noted that "The medical meniscus had a *tear* at the posterior horn. The *tear involved 20% of the meniscal tissue.* (emphasis added).

10. The repair then consisted of a partial meniscectomy for the aforementioned tear. The chondromalacia was then addressed by smoothing it with an arthroscopic shaver.

11. Overall, the medical records indicate that Claimant responded well to the arthroscopic surgery to her right knee.

12. Claimant testified that later in her treatment, her left knee began to hurt as well She reported the left knee pain to her boss and her doctors.

13. On March 30, 2016, Claimant reported the left knee pain to Dr. Royce (Cl's Exh. 7, 80). He noted "Patient returns for orthopedic clinic complaining of left greater than right knee pain. She's had a prior work-related injury to the right knee requiring treatment and because she has not mailed [sic] to walk on her right knee it's aggravated her opposite left knee." He noted an essentially normal right knee upon examination, but "limited flexion" and "pain elicited by motion" in the left knee. He provided an injection.

14. In April of 2016, Claimant reported her left knee pain to Higgins Family Practice (Cl's Exh. 5, 52).

15. An MRI was performed on May 3, 2016. The pertinent findings of the MRI were:
3. *Moderate to advanced* chondromalacia involving the medial patellar facet, trochlear cartilage, and medical compartment of the knee. There is a small focal area of osteochondrial irregularity involving the medial femoral condyle measuring 4.4 x 6

mm with adjacent marrow edema. The edema is *likely degenerative* or bone contusion…..

5. …*Meniscal degeneration is favored.* (emphasis added).

16. On review of the MRI, Dr. Royce and Claimant opted to move forward with an arthroscopic procedure on the left knee as well (Cl's Exh. 7, 91).

17. Dr. Adam Farber issued an opinion for Insurer stating surgery for the left knee would not be related to the November 2015 work injury (Cl's Exh. 11, 112).

18. Claimant testified that she had never had knee pain before her injury. Her left knee never hurt before her right knee surgery.

19. Claimant had prior nerve pain in her legs, but it had resolved. She also suffered from restless leg syndrome. However, she had never had knee trouble.

20. Despite Claimant's documented episode of mental health issues dating to 2007, the ALJ is persuaded that Claimant is sincere, to the best of her ability, in describing the events which she attributes to her injuries, and the symptoms she felt. An "inconsistencies" in her described mechanism of injury to her right knee are not of sufficient materiality to affect her sincerity.

21. Dr. Timothy Hall performed an independent medical examination on this claim on September 29, 2016 (Cl's Exh. 12, 113). Dr. Hall noted,

> "…the right Work Comp injury/event goes beyond the injury date of November 2, 2015 when she felt significant symptoms at the right knee. The work injury/event encompasses all subsequent interventions and associated consequences, which obviously includes increased stress on the opposite knee. She went from November to January limping, on crutches, all involving the left leg/knee. She then had a postoperative situation which further increased weightbearing and load on the left knee. She began to develop symptoms while still in rehabilitation for the right knee" (Cl's Exh. 12, 114).

22. Dr. Hall noted that while there are degenerative changes in Claimant's left knee, they "had been asymptomatic for years" (Cl's Exh. 12, 114). He stated, "In my opinion, this left knee degenerative situation would not evolve to a point of pain when it did if not for the problems with the right." *Id.* at 115.

23. Dr. Timothy O'Brien performed a records review for Respondents on November 16, 2016. He indicated that he felt her pain was due to arthritis, and he commented on inconsistent injury reports (Cl's Exh. 13, 124). He also stated that any problems with her left knee could not be "because she was compensating for the right." *Id.* at 126.

24. Dr. Hall reviewed additional records on January 18, 2017. He was critical of Dr. O'Brien's report, noting,

> "Certainly, arthritic patients can overtime become more symptomatic due to these chronic degenerative changes. It is also the case that they can have injuries superimposed on the arthritic changes. The arthritic changes make them more susceptive to local injuries due to reduced tissue tolerances and reduced healing capability. This is the case in this situation where the patient has had meniscal injury superimposed on her chronic degenerative arthritis. For Dr. O'Brien to flatly state that pain in an arthritic joint is not because of new tissue breakage or yielding is simply not the case" (Cl's Exh. 12, 116).

25. Dr. Hall also testified. He testified that the twisting injury Claimant described to him was a "common meniscal injury… rotating on a fixed extremity".

26. Dr. Hall also testified that he disagreed with Dr. O'Brien's statement that Claimant's pain was just arthritis. Dr. Hall testified that it was his opinion that "something needed to occur on top of those degenerative changes in order to make them that symptomatic at that particular moment." He testified that degenerative changes "absolutely" make a joint more susceptible to injury. Dr. Hall felt Dr. O'Brien's report accurately described what happens in arthritis, but noted that Claimant "didn't have waxing and waning pain in her knee joints." He noted that "it seems awfully coincidental to me that she has this event at work, and then, all of a sudden for the first time she has this waxing knee pain, which did not wane until somebody did a surgery on her…. I don't think her pain is from the osteoarthritis." Additionally, Dr. Hall noted that any pain from chondromalacia would not have been resolved by an arthroscopic surgery to repair a meniscus.

27. Dr. Hall testified that it appeared Claimant "had a similar meniscal event" in her left knee. He felt the left knee was related to the right knee. He testified that the "left knee injury comes from abnormal weight-bearing, abnormal mechanics when she was on the crutches, in rehab, post-operatively. That's an awful lot of load on the opposite leg." He testified that it wasn't "much of a stretch" to think she injured her left knee by overusing it after her right knee injury, "especially with her preexisting degenerative disease predisposing her to this sort of thing." Dr. Hall was clear that he did not think Claimant injured her left knee at the same time as the right knee, however.

28. Dr. Hall testified that pain from CRPS is very different than joint injury pain, and he would not expect a patient to confuse the two.

29. Dr. Hall testified that medical records tend to be "inconsistent," and in this case the injury was "described differently by different people". Despite these differences, Dr. Hall saw no indication to make him think Claimant wasn't telling him the truth.

30. Dr. Hall testified that additional treatment was needed for Claimant's left knee, but Claimant is at MMI for the right knee.

31. Dr. O'Brien also testified by deposition in the claim. Dr. O'Brien testified that he believed "there was a fall that predated her alleged work incident by one month" (O'Brien Depo. 8). He testified that he did not feel the pre-surgery MRI Claimant underwent showed any acute injury (O'Brien Depo. 18).

32. Dr. O'Brien also testified that even though there were inconsistencies in the records that could have been elucidated through a conversation with Ms. Harrison, he had no need to see her before making his opinions (O'Brien Depo. 48). He also testified that even though he found no documentation in the records that Ms. Harrison was having pain in her knees before the injury, he was certain she was.

33. Dr. O'Brien noted that Respondents' Exhibit I was not necessarily a good source of information on Claimant's credibility as, "…you have to interpret a report that was that far in the past with a certain amount of caution relative to her truthfulness or lack thereof eight years later."

34. Dr. O'Brien agreed that falling on a knee was not a normal mechanism of injury for tearing a meniscus, and that twisting a knee can tear a meniscus.

35. The ALJ finds that while both Drs Hall and O'Brien are learned, experienced, credible, and sincere, they both bring their respective biases into the hearing. Neither are persuasive in their entirety.

36. Jeannie Gerardo, senior resolution manager for Gallagher Basset Services also testified in this claim. She testified that had Insurer had the report from Dr. O'Brien, they would not have filed a general admission on this claim (Hrg. Trans. 81). However, Ms. Gerardo had only been with Gallagher Bassett for eight months when she testified. Additionally, her familiarity with this case stems wholly from notes she read, which were not made available to the court or to opposing counsel. Ms. Gerardo testified that she'd been on the case for only a few weeks.

37. Ms. Gerardo also testified that based on the notes she reviewed, there was absolutely no indication that the general admission on this claim should be withdrawn until Dr. O'Brien's report, which Insurer commissioned. Ms. Gerardo testified that it is the practice of Insurer to regularly obtain medical records during the claim, and to review them. She testified that she saw no notes that any prior adjuster noted a good faith basis to withdraw the general admission. Respondents had no reason to believe the general admission might have been improvidently filed until they hired Dr. O'Brien and he issued a report providing such an opinion.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

2. Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301 (1), C.R.S.; see, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo.App. 2001).

3. An injury occurs "in the course of' employment where claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. See *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of' requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.

4. Section 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers ' compensation benefits that the injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employment." Under the statute the requirement that the employment be the proximate cause of the "injury" exists whether the claimant is alleging an "accidental injury" or an "occupational disease." See *CF & I Steel Corp. v. Industrial Commission*, 650 P.2d 1333 (Colo. App. 1982); § 8-40-201(2), C.R.S. (term "injury" includes disability resulting from accident or occupational disease); § 8-40-201(14) (occupational disease is one occasioned by the nature of the employment and can be traced to the employment as a proximate cause).

5. The question of whether the claimant proved an injury or occupational disease proximately caused by the performance of service arising out of and in the

course of employment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000) (proof of causation is threshold requirement that must be established before any compensation is awarded); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999) (claimant seeking benefits for occupational disease must establish existence of the disease and that it was directly and proximately caused the conditions of employment).

6. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. C*olorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

Claimant's Right Knee

7. An employer must continue to pay on an admission of liability unless sufficient evidence exists to "permit withdrawal of the admission." *Rocky Mountain Cardiology v. ICAO,* 93 P.3d 1182 (Colo. App. 2004) (citing *Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001); *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000).

8. The burden of proof regarding the **left** knee lies with Claimant. The burden of proof on compensability of the **right** knee, however, lies with Respondents. This is in large part because in failing to contest Claimant's entitlement to benefits, Respondents have, "'in effect, admitted that the claimant has sustained the burden of proving entitlement' to benefits." *City of Brighton v. Rodriguez,* 318 P.3d 496, 507 (Colo. 2014) (quoting *Rocky Mountain Cardiology v. ICAO,* 94 P.3d 1182, 1184 (Colo.App.2004)). A party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall

bear the burden of proof for any such modification. C.R.S. § 8-43-201(1). The court in *Brighton* determined that the burden in such a situation was a preponderance of the evidence.

9. Respondents infer that Claimant did not suffer a compensable injury on November 2, 2015 because “changing directions” is a normal part of life. While changing directions while walking is certainly a ubiquitous component of daily life, the ALJ finds that this particular movement, on that date and at that time, *caused* her meniscal tear. Claimant maneuvered around these boxes as part of her job duties with Gymboree. As she testified, she was "just hurrying", and got careless. Dr. Hall testified that the twisting injury Claimant described to him was a “common meniscal injury… rotating on a fixed extremity”. On cross, Dr. O’Brien even agreed that twisting a knee can tear a meniscus. It does not require a stretch of the imagination to conclude that Claimant, stepping awkwardly around boxes in the aisle, tore her fragile right meniscus, if a professional athlete in his 20s, untouched by an opponent, can tear a meniscus on an open field by simply changing direction-albeit at much higher speeds.

10. There is no evidence that Claimant ever had pain in her right knee before the date of injury. Claimant did not damage the meniscus which was repaired when she fell onto her knee about one month prior. While she did have other problems in her legs (CRPS, restless leg syndrome), none of the medical records indicate right knee pain. Claimant’s CRPS was in her **left** leg, and she testified that it is resolved. Claimant explained credibly that her right knee hurt when it happened, but she expected it to resolve with time, just like aches and pains usually do. When the pain persisted, she sought help.

11. The pertinent findings on Claimant's *right* knee MRI-and post surgical confirmations- are suggestive of two conclusions. First, her degenerative condition, while plainly evident, was *mild to moderate* in severity. Secondly, there is a large torn flap- which was repaired successfully- suggestive of trauma, especially in combination with the concurrent onset of pain Claimant could no longer ignore.

12. The adjuster for Respondents testified credibly about the *reasons* that they now wish to withdraw their admission for Claimant's right knee. That does not mean that the burden of proof was met which would enable Respondents to do so. Respondents have not proven by a preponderance of the evidence that they are entitled to withdraw the general admission admitting for compensability of her right knee. The ALJ finds that Claimant suffered a compensable injury to her right knee. Dr. O'Brien's report and testimony does not change that.

Claimant's Left Knee

13. Subsequent injuries are “compensable under the quasi-course of employment doctrine” when they are “the ‘direct and natural’ consequence of an original injury which itself was compensable.” *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1265 (Colo. 1985). Relatedness is subject to a “but for” test, in which Claimant is entitled to compensation under the doctrine if he would not have received the injury ‘but for’ the fact that he had a prior compensable injury.” *Turner v. Indus. Claim Appeals Office of State of Colo.,* 111 P.3d 534, 537 (Colo. App. 2004).

Reasonable and Necessary

14. Dr. O’Brien’s opinion that Claimant is not a surgical candidate for her left knee issues is not persuasive. The ALJ finds that the opinion of Dr. Royce is more credible regarding the need for surgery. Dr. Royce is a treating physician, who has already performed surgery on one of Claimant’s knees. He is well aware of her ability to undergo surgery, and her ability to heal. If Dr. Royce believed Claimant would not be a good candidate for another surgery, he would not have recommended it. Dr. O'Brien is unnecessarily overreaching in opining that Claimant is not a candidate for arthroscopic surgery to safely improve her quality of life.

Causation

15. Even if the proposed surgery is reasonable and necessary to alleviate the pain in Claimant's left knee, the analysis does not end there. Claimant still bears the burden of proof that her admitted injuries to her right knee *caused* her left knee injuries.

16. Once again, the pertinent findings of her left knee MRI are helpful. Her chondromalacia is described as *moderate to advanced.* The edema is *likely degenerative* **or** a bone *contusion.* The bone contusion- if it exists- is more suggestive of a trauma- and a trauma is not advanced by Claimant's narrative of her left knee. The overall state of her left meniscus is "favored" to be *degenerative* in nature, per her MRI. While small tears are noted, there is insufficient evidence that these tears- if they caused the pain she reported- came into being due to simple overuse during her brief recovery period.

17. In this instance, the ALJ does credit Dr. O'Brien's opinion, as well as that of Dr. Farber, on the causation issue; Claimant has not shown, by a preponderance of the evidence, that her increased reliance upon her left knee, during the recovery period for the right knee, *caused an injury* to her left knee. Any *injuries* to Claimant's left knee, and pain she experienced, are more likely the result of chronic degenerative conditions, and are not compensable.

ORDER

It is therefore ordered that:

1. Claimants suffered a compensable injury to her right knee on or about November 2, 2015. Claimant is entitled to all reasonable and necessary medical benefits in connection therewith.

2. Claimant did not suffer a compensable injury to her left knee. Her claim for Workers Compensation benefits for her left knee is denied and dismissed.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 26, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that her case should be reopened, based upon one or more mistakes by one of her Authorized Treating Physicians in placing her at Maximum Medical Improvement?

FINDINGS OF FACT

Based upon the evidence presented, the ALJ enters the following Findings of Fact:

1. Claimant was employed as a school principal for the Harrison School District. While on an assignment off campus, she sustained an admitted back injury on August 11, 2014, after falling onto some bleachers, striking her back and buttocks.

2. Claimant testified that she had not experienced back pain from 2012 until this work injury.

3. Claimant was involved in a motor vehicle accident on June 17, 2010. The details of her treatment are scant, but indicate it occurred in a parking lot. She was struck the passenger side of the car she was driving. She reported neck and back pain at the time, and was diagnosed with muscle strain and spasms. She was prescribed flexeril and ibuprofen, and cleared. (Ex. L, p. 277). No follow up for this injury is noted in the records.

4. Claimant's medical records show visits to the Dressen Spine Center for back pain in both 2005 and 2008, with lumbar strain and spasm. (Ex Q.). No long term follow up is noted. Claimant also had a long history of depression dating back to 2003.

5. On August 14, 2014, three days after her fall, Claimant was seen at Concentra by Dr. Randall Jones who diagnosed a contusion to the back wall of her thorax, and lumbar contusion and strain. She also suffered a knee sprain and a right ankle strain. Dr. Jones prescribed physical therapy ("PT") 3 times per week and Naproxen. Claimant was given temporary work restrictions. (Ex. K, pgs. 202-204). At this very first visit, Dr. Jones notes state " The patient presents today with a new injury, pt states while walking down the bleachers, she fell injuring her left knee, **neck,** low back, left hip, and right ankle" (emphasis added). Later medical entries from Concentra note that Claimant denies actually *landing on or striking* her neck. No further diagnosis or treatment of her neck appears in the records, but Claimant does complain of pain in her upper back.

6. Also on August 14th, thoracic spine x-rays showed minimal degenerative changes at multiple levels and lumbar spine x-rays showed minimal degenerative changes at L2 through L4 with osteophytosis. (Ex. H, pg. 147)

7. By September 24, 2014 following several visits to Dr. Jones and physical therapy, Claimant was seen by Brian Polvi, D.C. Claimant's low back pain was sharp and severe and Dr. Polvi referred Claimant for acupuncture and dry needling. (Ex. R, pg. 434). He also noted that Claimant has returned to full duty employment. (*Id.*)

8. After dry needling, Claimant was evaluated by physiatrist Jeffrey Jenks, M.D., on October 1, 2014, and he noted that PT had not helped Claimant but chiropractic seemed to be helping. He diagnosed thoracic myofascial pain and bilateral sacriolitis and recommended bilateral sacroiliac joint injections. (Ex. K, pgs. 216-217).

9. By December 16, 2014, after chiropractic care and manipulation, physical therapy and dry needling, Claimant was seen again at Concentra where she had full lumbar range of motion. (Ex. K, pg. 225). She was referred to Albert Hattem, M.D., a delayed recovery specialist. (*Id*. at 226)

10. On February 12, 2015, she was seen by Dr. Hattem, and told him that overall she was improved but still had hip stiffness and some upper back discomfort. She had not followed up with Dr. Jenks because she had decided to not undergo the injections at that time, citing a mistaken belief that once she began injections, she would be required to continue them indefinitely. Dr. Hattem noted an essentially normal exam and that Claimant denied radiating leg pain or numbness and was continuing to work full duty. Under "Impression", Dr. Hattem noted "*likely* bilateral sacroiliac dysfunction". He recommended continued chiropractic care. (Ex. K, pg. 232).

11. On February 25, 2015, Claimant underwent her ninth chiropractic visit with Terrence Thomas, D.C. (Ex. H, pg. 144). On March 11, 2015, Dr. Polvi reported that Claimant had been non-compliant with the recommended acupuncture visits. (Ex, S, pg. 456). By May 18, 2015, Claimant had her 6th visit with Dr. Polvi, focusing on acupuncture and manipulation for low back pain. Claimant indicated 75 percent overall improvement. (Ex. R, pg.468).

12. On May 21, 2015, Claimant followed-up with Dr. Hattem. She expressed concerned that nobody had treated her upper back or neck. She then wanted to undergo the SI injections which she had previously declined. Dr. Hattem diagnosed a new onset of neck pain and told Claimant that he did not feel that was related to her work injury and *she had not complained of neck pain* ***previously****.* (emphasis added). Dr. Hattem noted that Claimant had a pattern of "very severe" non-compliance resulting in difficulty to him managing her case. Dr. Hattem noted that Claimant returned to see him because of a demand appointment made by Respondents. Claimant requested additional chiropractic care. Dr. Hattem referred Claimant back to Dr. Jenks for his opinion regarding injections. (Ex. K, pgs. 244-245). Dr. Hattem went on to state that if Claimant continued to be non-compliant that she would be placed at MMI. (*Id.* at 245).

13. However, Claimant had been seeing her previous ATP, Randall Jones. In his notes from a 4/16/15 visit, Dr. Jones notes that "she [Claimant] missed her f/u (follow-up) appt dr hattem 4-2 as 'I though (sic) it was the next day'….she has not heard when f/u appt dr hattem is….I will have Kristina set up appt for her asap".

14. Claimant underwent the bilateral SI injections on June 12, 2015 by Dr. Jenks. (Ex. Q, pg. 411).

15. On July 7, 2015, Claimant saw Dr. Hattem and reported that the injections were somewhat helpful. Given that Claimant was one year post injury, Dr. Hattem recommended further work-up with thoracic and lumbar MRI and laboratory work-up. He also felt that given Claimant's various pain complaints, ***there is likely "behavioral issues impeding her recovery."*** (Ex. K, pgs. 248-249) (emphasis added).

16. Claimant was not referred for any psychiatric or psychological treatment or diagnosis until her IME with Dr. Gutterman in December of 2016.

17. There is no evidence in the record of any missed appointments or noncompliance by Claimant since her visit with Dr. Hattem on 5/21/2015.

18. A July 15, 2015, lumbar MRI showed mild degenerative changes at L5-S1 without nerve root impingement. A thoracic MRI revealed minimal spondylosis and moderate changes at C5 through C7. (Ex. H, pg. 147).

19. On August 6, 2015, Claimant continued to complain to Dr. Hattem of persistent, unchanged, diffuse back pain from the base of her neck to the lumbar spine. She indicated that Dr. Jenks had also discharged her from his care earlier that month. Dr. Hattem noted that Claimant presented in no distress. Her gait was normal and she moved across the room without difficulty. (*Id*. at 251)

20. Dr. Hattem's impressions were that Claimant had had normal lumbar and thoracic x-rays. The recent lumbar and thoracic MRIs showed mild degenerative changes. A chemistry panel was normal. An arthritis panel demonstrated a rheumatoid factor of 108. Dr. Hattem went on to state that Claimant "has variously complained of neck, diffuse spine, and bilateral hip pain. ***It is my opinion that these migrating pain complaints are more likely related to rheumatoid arthritis or to behavioral issues rather than to the 8/2014 [work injury]."*** (Ex. K, pg. 252) (emphasis added).

21. On August 9, 2015, Dr. Hattem completed the WC form, placing Claimant at MMI on August 6, 2015, with no impairment, no restrictions and no need for medical maintenance care. (*Id.* at 254).

22. In his final visit with Claimant, Dr. Hattem lists three Impressions which provide his basis for placing Claimant at MMI. In summary, they state, in pertinent part:

> 1. "Today, I informed Geraldine that her ongoing migrating pain complaints are *more likely related to rheumatoid arthritis* than to the work injury that occurred one year earlier." (emphasis added).

2. "I informed Geraldine that her neck pain was not causally related to the 8/11/2014 work injury *because* she did not report neck pain *until* one month afterwards." (emphasis added).

3. "Pattern of noncompliance. In 02/2015, I instructed Geraldine to return in one month. She did not return again until three months later on 05/021/2015 (sic). Since 05/2015, her compliance has been more appropriate." (emphasis added).

Later in the report, Dr. Hattem notes diffuse pain complaints, then elaborates, "It is my opinion that these migrating pain complaints are more likely related to rheumatoid arthritis *or* to behavioral issues rather than the 08/2014 fall she work injury" (sic).

23. On August 18, 2015, Respondents filed a final admission of liability consistent with the opinions of Dr. Hattem that Claimant reached MMI on August 6, 2015, with no impairment and on medical maintenance. (Ex. B, pg. 4).

24. Up through August 18, 2015 Claimant was unrepresented by counsel.

25. Claimant did not file an objection to the final admission of liability. Claimant did not apply for a Division IME, challenging Dr. Hattem's findings on MMI and impairment.

26. On May 12, 2016, Claimant, apparently still unrepresented, filed a Petition to Reopen. The initial bases for the petition were both change of condition for Claimant's back and neck and error/mistake. (Ex. C, pg. 10). Multiple medical records, receipts, emails and other records were attached to Claimant's petition. (*Id.* at 13 to 45).

27. On September 15, 2016, Claimant, now represented by counsel of record herein, filed an Application for Hearing on the issues of petition to reopen for worsening of condition. (Ex. D, pg. 47).

28. On November 7, 2016, a Prehearing Conference was held whereby Respondents sought to pursue attorney's fees against Claimant for trying to challenge both the admitted MMI date and the admitted work-related medical conditions (by trying to include Claimant's neck), without applying for a Division IME. During that prehearing, Claimant withdrew the claim that her neck problems were work-related and also withdrew the petition to reopen based upon worsening of condition. The PALJ ordered that Claimant's petition to reopen was restricted to an alleged mistake and not any change of condition. Respondents, therefore, withdrew their request to purse attorneys' fees against Claimant for applying for hearing without obtaining a DIME.[1]

29. Claimant contends that when he placed her at MMI, Dr. Hattem told Claimant that if it turned out she did not have rheumatoid arthritis, "then you simply give

[1] Respondents submitted a copy of PALJ De Marino's November 9, 2016, PHC order at the hearing in this claim and Claimant did not object.

documentation to that and your case will be re-opened." (Ex. C, pg. 14). Dr. Hattem's records do not reflect that he ever made such a statement to Claimant. To the contrary, Dr. Hattem's MMI report expressly states that: "***[i]t is my opinion that these migrating pain complaints are more likely related to rheumatoid arthritis or to behavioral issues rather than to the 8/2014 [work injury]."*** (Ex. K, pg. 252) (emphasis added). The ALJ is unable to conclude that such a conversation actually occurred as understood by Claimant; however, Claimant believed (reasonably or not) that her RA would be seen by the WC system as an issue unrelated to her back pain.

30. Claimant was seen by Austin J. Corbett, M.D., a rheumatologist, outside of the workers' compensation claim. On January 13, 2016, Dr. Corbett documented that Claimant presented for joint pain and that her "symptom's and history are consistent with rheumatoid arthritis ("RA") and rheumatoid factor is significantly positive at 60 units." (Ex. Q, pg. 339) Dr. Corbett also documented Claimant's self-report that as a result of the work injury, Claimant had "debilitating neck and back pain since then, and right lateral hip pain." (*Id*. at 337) On February 17, 2016, Dr. Corbett reported that: "I do believe the patient has rheumatoid arthritis, but the fairly minimal abnormalities on joint exam is a little troubling." (*Id.* at 343) On March 28, 2016, Dr. Corbett took a history from Claimant that Claimant "was told [by her ATP] that she does not have a work-related injury causing pain but rather that all her symptoms could be attributed to rheumatoid arthritis." (*Id.* at 344)

31. On April 27, 2016, Dr. Corbett wrote a "To Whom it May Concern" letter stating that Claimant has seropositive rheumatoid arthritis. "However, she also has disabling chronic back pain related to a work-related injury. Chronic back pain, hip pain, pelvic and neck pain *cannot be attributed to the newly established diagnosis of rheumatoid arthritis.* In my opinion [Claimant] should continue to be followed up for her work-related injury by workers' compensation. This problem should be considered completely independent of the newly diagnosed problem of rheumatoid arthritis." (Ex. Q, pg. 345). Dr. Corbett also noted that her back pain predated any symptoms of RA.

32. Further, in a medical summary dated July 28, 2016, Dr. Corbett notes *"Rheumatoid arthritis typically does not cause lower back pain.* It is typically most active in extremity joints, especially the small joints of the hands and feet. Therefore, I do not think that the patient's preexisting and debilitating problems with neck and back pain should be attributed to the diagnosis of rheumatoid arthritis. (Ex O, p. 349).

33. No evidence was presented that Dr. Corbett is Level II accredited by the Division of Workers' Compensation or that he conducted a causality determination as required by Level II accredited teachings. The record is unclear whether Dr. Corbett reviewed any medical or records of any kind concerning the admitted work injury. Dr. Corbett may well have obtained all of his information regarding Claimant's work injury solely from Claimant.

34. On December 6, 2016, Claimant underwent an IME with Level II accredited and physical medicine and rehabilitation expert Brian Lambden, M.D. Dr. Lambden also conducted a medical records review and causality determination. Dr.

Lambden testified that he agreed with Dr. Hattem that Claimant reached MMI on August 6, 2015 for the work injury. According to Dr. Lambden's testimony, there was no error or mistake with the MMI date given by Dr. Hattem.

35. Dr. Lambden opined that Claimant's back complaints are likely multi-factorial, including obesity, history of pre-existing lumbar and thoracic disc disease, significant deconditioning, diabetes and arthritis and depression. (Ex. H and Dr. Lambden testimony). Dr. Lambden expressed some familiarity with rheumatoid arthritis, and opined that Dr. Corbett's opinions regarding Claimant's work injury were not reliable because the assumptions underlying those opinions (*i.e.,* that Claimant suffered from chronic neck and back pain from the work injury) were simply not true.

36. On December 16, 2016, Claimant underwent a psychiatric IME with Gary S. Gutterman, M.D. A report was then generated on January 23, 2017. He reviewed Claimant's medical records and ultimately opined that Claimant has a non-work-related "somatic symptom disorder" due to various psychological stressors as outlined in his IME report. He felt that this disorder was contributing to Claimant's current pain complaints.

37. Dr. Gutterman testified at hearing that he was aware that when Dr. Hattem placed Claimant at MMI on August 6, 2015, Dr. Hattem stated that: "*It is my opinion that these migrating pain complaints are more likely related to rheumatoid arthritis or to behavioral issues rather than to the 8/2014 [work injury]"* (emphasis added)*.* According to Dr. Gutterman, Dr. Hattem was correct. Claimant's migrating pain complaints, including back pain that she had at MMI were, in fact, related to "behavioral issues" rather than to the work injury. Those behavioral issues, as Dr. Gutterman explained, were not conscious. Claimant, he said, is not consciously embellishing pain complaints. In fact, Dr. Gutterman found Claimant to be "pleasant, likeable and forthcoming." (Ex. I pg. 175)

38. Nonetheless, Dr. Gutterman explained that when she was placed at MMI by Dr. Hattem, Dr. Hattem was correct when opining that Claimant's continued migrating pain complains were more likely related to "behavioral issues", *i.e*., non-work-related somatic symptom disorder, rather than the work injury.

39. No treating physician diagnosed Claimant with a work-related psychological condition of any kind. The purpose of Dr. Gutterman's IME was to assess whether or not Dr. Hattem's opinion that Claimant's continued back complaints at MMI were "more likely related to behavioral issues" rather than the work injury, was accurate and correct. Dr. Gutterman opined that Dr. Hattem was, indeed, correct.

40. The more appropriate avenue for Claimant to challenge Dr. Hattem's August 6, 2015 MMI date was to apply for a Division IME within 20-days from the date of the filing of the Final Admission of Liability. Claimant admitted that when Dr. Hattem placed her at MMI on August 6, 2015, she disagreed with him then and believed ***at that time*** that he was mistaken. The ALJ finds that this alleged error/mistake could possibly

have been rectified or avoided by the timely exercise of Claimant's right to apply for a Division IME to challenge MMI prior to the closure of the claim.

41. However, the ALJ further finds that Claimant, who remained unrepresented until a new Application was filed on her behalf, was not well versed in the Workers Compensation process when she failed to request a DIME. There is no evidence that this erstwhile pro se claimant intended to use the reopening process in order to circumvent the DIME process, in order to benefit from a reduced burden of proof. Indeed, it remains unknown at this time what result such a DIME process might have yielded. The ALJ finds that such circumvention was not a motive of Claimant.

42. The ALJ finds that while Dr. Corbett is not Level 2 accredited, and did not perform a causation analysis as contemplated by Workers Compensation standards, he does possess far greater knowledge of the diagnosis, cause, and treatment of RA than Drs. Hattem and Lambden. The ALJ especially finds the opinion of Dr. Corbett to be more persuasive that *RA does not ordinarily cause lower back pain*- especially lower back pain-which began on the date of Claimant's injury, and before her symptoms or RA appeared in her lower extremities. Without more evidence in support, Dr. Hattem was mistaken in attributing her back pain to RA.

43. The ALJ further finds that Dr. Hattem was mistaken in his assumption that Claimant had not reported neck pain, either for one month after the fall, or "previously", (i.e., at all) as he alternately stated in his reports. Claimant reported it as soon as she could have.

44. While Claimant missed at least one appointment with Dr. Hattem, and plainly showed overt irresponsibility in the spring of 2015, the file indicates she may have been confused about her April appointment with Dr. Hattem. She reported to Dr. Jones in April, continuing to seek help. It then appears from the record that she made every appointment with each provider from May 21, 2015 onwards. As Dr. Hattem notes himself when he placed her at MMI in August of 2015, her compliance of late has been 'more' appropriate. While no doubt frustrating to the providers concerned, it there could be said to be a "pattern of noncompliance", such pattern no longer existed when Dr. Hattem placed her at MMI on August 6, 2015, after 3 months of no missed appointments. The ALJ finds this to have been an additional mistake by Dr. Hattem in placing her at MMI, using noncompliance as a basis.

45. While the ALJ finds Dr. Gutterman to be highly qualified professionally, and sincere in his assessment of Claimant's condition, the ALJ is not persuaded that this after-the-fact IME justifies Dr. Hattem's final reason for placing Claimant at MMI, to wit: his belief, wholly unsupported by medical evidence *at the time*, that there was a behavioral component to explain Claimant's symptoms of pain. Having Dr. Gutterman's diagnosis in hand in August, 2015 would have rendered Dr. Hattem's (behavioral component) opinion far more persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

a. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. (2007), *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

b. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000).

c. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The requirement of a DIME to contest a finding of MMI by the ATP

d. A Division IME is ordinarily a prerequisite to any hearing concerning the validity of an authorized treating physician's finding of MMI, and, absent such a DIME, an ALJ lacks jurisdiction to resolve a dispute concerning that determination. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80, 82 (Colo. App. 1995); *Town of Ignacio v. ICAO*, 70 P.3d 513, 515 (Colo. App. 2002). Due process requires that party have the opportunity of a DIME report before issues of permanency are resolved. *Delaney v. ICAO*, 30 P.3d 691 (Colo. App. 2000). Section 8-42-108(8)(b)(I) & (II), C.R.S. 2013 provides that if either party disputes an MMI finding by an authorized treating physician, a Division IME may be requested and the opinion of the DIME physician will carry presumptive effect unless overcome by clear and convincing evidence. *See Magnetic Eng'g. Inc. v. ICAO,* 5 P.3d 385, 388 (Colo. App. 2000). An ALJ lacks jurisdiction in the absence of a Division IME to resolve conflicts in opinions as to whether Claimant reached MMI. Absent a reopening, a Division IME is a prerequisite to any hearing

concerning the validity of an authorized treating physician's finding that Claimant reached MMI. *See Story v. ICAO,* 910 P.2d 80, 82 (Colo. App. 1995).

Reopening when no DIME is requested

e. Pursuant to §8-43-303, C.R.S., any award may be reopened on the grounds of error, mistake, or a change in the claimant's condition. The intent of the reopening statute is to provide relief to claimants who are entitled to awards of any type of benefits. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). The ALJ has wide discretion to determine whether a mistake has occurred that justifies reopening the claim. *Osborne v. Industrial Commission,* 725 P.2d 63 (Colo. App. 1986). The standard for reopening a claim is an abuse of discretion by the ALJ. The standard on review of an alleged abuse of discretion is whether the ALJ's order exceeds the bounds of reason, as where it is not supported by the evidence or the law. *Coates, Reid & Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993); *Rosenberg v. Board of Education of School District* #1, 710 P.2d 1095 (Colo. 1985).

f. Respondents argue here that the claimant was required to timely request a DIME or file an application for hearing to determine the compensability of the claimant's shoulder condition, and the claimant's failure to do so deprived the ALJ of jurisdiction to address the claimant's petition to reopen.

g. As the Court of Appeals recognized in *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005), the statutory authority to reopen "any award" is broad and nothing in the subsequently enacted DIME procedures was intended to restrict that authority. The issues inherent in challenging a DIME report are not identical to those regarding reopening and, therefore, the ALJ has jurisdiction to address the claimant's request to reopen her claim.

h. In *Berg* the respondents filed a final admission of liability based on a DIME report. The claimant objected, seeking surgery for his back, but failed to file an application for hearing in conjunction with the objection. The claimant subsequently filed a petition to reopen alleging that the claimant's treating physicians and the DIME physician were mistaken regarding the cause of his back symptoms. The ALJ granted the petition to reopen, finding that the doctors had been mistaken both about MMI and about the relatedness of the claimant's back condition to his industrial injury. The Industrial Claims Appeals Panel ("ICAP") set aside the ALJ's order, reasoning that permitting reopening based upon the "mistake" of an uncontested DIME report would subject a DIME physician's determination of MMI to collateral attack under a diminished burden of proof. The Colorado Court of Appeals, however, set aside the panel's order, holding that there is nothing in the statutory DIME procedures that limits the reopening provisions. The court also rejected the panel's reasoning that permitting reopening

under these circumstances encouraged efforts to circumvent the DIME procedures, with the attendant higher burdens of proof. The court noted the reopening statute was designed to apply even in these circumstances where the determination of the DIME physician is sought to be questioned.

i. A recent case from ICAP demonstrates the breadth of the discretion that an ALJ must exercise when considering a motion to reopen. In re *Claim of Jaterka, WC- 4-984-216-02*, the pro se Claimant, as here, failed to timely request a DIME, instead filing an Application for Hearing, requesting to reopen. ICAP stated, in *Jaterka:*

> The principles announced in *Berg* are applicable to the facts of this case. Although the respondents in *Berg* had obtained a DIME and argued that the claimant "circumvented" it through reopening, the court's reasoning is equally applicable to the present case, where the claimant failed to obtain a DIME prior to reopening. We are bound by the published authority issued by the court of appeals. *C.A.R. 35(f)*.
>
> A review of the record here indicates that the claimant raised factual issues concerning whether her claim should be reopened under §8-43-303, C.R.S., and the ALJ erred by not making corresponding findings to address the issue of reopening. It is therefore necessary to remand this matter to the ALJ for further proceedings to determine the issue of reopening. The ALJ must first determine whether there has been an error or mistake or change of condition. If there is, then the ALJ must determine whether it is the type of error, mistake or change of condition which warrants a reopening. *See Klosterman v. Industrial Commission,* 694 P.2d 873 (Colo. App. 1984). For example, when determining whether a mistake warrants reopening, the ALJ may consider whether it could have been avoided by the timely exercise of appropriate procedural or appellate rights. *Industrial Commission v. Cutshall,* 164 Colo. App. 240, 433 P.2d 765 (1967); *Klosterman v. Industrial Commission, supra.* The failure to exercise procedural or appellate rights, however, is not dispositive of whether the claimant has established an error or mistake which justifies reopening the claim. *Renz v. Larimer County School District Poudre R-l, supra.* To the contrary, the ALJ may exercise his discretion to reopen a claim if he determines that the overall circumstances warrant reopening. *Standard Metals Corp. v. Gallegos,* 781 P.2d 142 (Colo. App. 1989). In reaching this result, we should not be understood as expressing any opinion on the resolution of the reopening issue. The ALJ retains the discretion to grant or deny the petition to reopen. The ALJ, however, must exercise that discretion and not forgo the determination because of a perceived lack of jurisdiction. *See Justiniano v. Industrial Claim Appeals* Office, 83 COA 2016. Whether the ALJ needs to consider any additional issues for hearing endorsed by the parties depends on his resolution of the reopening issue.

j. In this case, Claimant could have exercised her procedural rights by timely requesting a DIME. This did not occur. Claimant believed at the time she was placed at MMI that Dr. Hattem was wrong on this issue. A petition to reopen need not be granted where it is used as a method of circumventing the ordinary adjudicative and appellate processes available prior to closure. *ICAO v. Cutshall*, 433 P.2d. 765 (Colo. 1967); *Klosterman v. ICAO,* 694 P.2d 873 (Colo. App. 1984). However, Claimant was unrepresented at this time, and nothing suggests that Claimant was even aware of her ability to circumvent the DIME procedure, thus lessening her burden of proof. There is no evidence of a willful attempt to "back door" the process. Indeed, if a future DIME (which Respondent argues should have been the procedure) were to find Claimant to be at MMI, Claimant would still have this enhanced burden to overcome after all.

k. Further, while the record is unclear exactly what was meant, and mutually understood, between Claimant and Dr. Hattem regarding the ability to reopen on the interplay between RA and causation, the case was certainly delayed for a time by Claimant's (mis)understanding of the process. This is so, even if Dr. Hattem had no intention of misleading her during this alleged conversation.

Mistakes by Dr. Hattem in placing Claimant at MMI

l. In this case, Dr. Hattem's decision to place Claimant at MMI when he did was based upon several mistakes; indeed, each reason he lists for doing so is mistaken in some fashion. First, while Claimant (suffering from depression, by all accounts) missed some appointments in the spring of 2015, she continued to seek help from her original ATP, and reported some ongoing benefit from chiropractic care. At least one missed appointment stemmed from a likely confusion in dates and times. Taken as a whole, it cannot be concluded, as Dr. Hattem did, that Claimant was so noncompliant that further treatment would be of no avail. Second, Dr. Hattem is factually incorrect in stating that Claimant failed to report neck pain, either "previously", or for at least one month after the fall. Perhaps most importantly, Dr. Hattem mistakenly attributed her ongoing back pain to RA, without having medical evidence in support. Alternatively, he attributed her pain to behavioral issues-once again, with no medical evidence in support *at the time* he drew this conclusion.

m. Taking the evidence as a whole, Claimant has met her burden, by a preponderance of the evidence, that sufficient mistakes were made in her MMI determination by the delayed recovery specialist which now warrants a reopening of her case.

ORDER

It is therefore ordered that:

1. The case is reopened for a further determination of reasonably needed medical benefits.

2. The case is reopened for a further determination of Maximum Medical Improvement.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 18, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Did Claimant prove by a preponderance of the evidence that Respondent should be subject to penalties under § 8-43-304(1) for violating § 8-43-503(3)?

2. Did Respondent prove by a preponderance of the evidence that Claimant should be subject to penalties under § 8-43-304(1) for violating § 8-43-503(3)?

FINDINGS OF FACT

1. Claimant works for Respondent as a correctional officer. He suffered an admitted injury to his low back on December 6, 2016 when he was involved in a takedown and restraint of an inmate.

2. Respondent referred Claimant to CCOM for authorized treatment. He saw Steven Byrne, PA-C on December 6, 2016, who diagnosed a lumbar strain and imposed work restrictions of no lifting/pushing/pulling/carrying greater than 10 pounds, no repetitive twisting at the waist, and no direct physical management of inmates.

3. On December 9, 2016, Claimant saw Dr. Thomas Centi, who changed Claimant's restrictions to no more than 5 pounds lifting, minimal bending, sitting 75% of the time, no standing/walking more than 15 minutes per hour, and no direct interaction with inmates.

4. Respondent offered Claimant modified duty in the control center. Although tasks in the control center were within the restrictions, the work required Claimant to look up at monitors, which exacerbated his pre-existing migraine condition.

5. On December 12, 2016, Claimant saw his personal physician, Dr. Arline, who completed FMLA paperwork relating to Claimant's pre-existing migraine condition. Claimant requested FMLA accommodation to avoid prolonged viewing of monitors while he got back on his migraine medication.

6. Claimant returned to CCOM on December 14, 2016 and told PA-C Byrne about the restrictions imposed by Dr. Arline relating to viewing monitors. As a result, PA-C Byrne added the restriction of "should not be placed in a duty area where he is required to constantly observed monitors due to a pre-existing medical condition."

7. After receiving a copy of Claimant's restrictions from CCOM, Arlene Castro, Employer's risk management specialist, contacted Sheila Phillips, a nurse case manager at CCOM, to clarify Claimant's work restrictions as they related to his December 6, 2016 injury. Ms. Castro must document and track FMLA and workers' compensation leave separately. Ms. Phillips clarified that the restriction on viewing monitors was related to Claimant's pre-existing condition, rather than the admitted

injury. Ms. Castro asked Ms. Phillips if PA-C Byrne was willing to amend the paperwork to reflect only those restrictions related to the injury. Ms. Castro did not direct or command Ms. Phillips to change the restrictions.

8. Following the December 14, 2016 telephone conversation between Ms. Castro and Ms. Phillips, PA-C Byrne crossed out the restriction relating to observing monitors.

9. Employer accepted Claimant's medical restriction on viewing monitors but treated it as an FMLA-related accommodation.

10. Ms. Castro's testimony is credible and persuasive.

11. Respondent did not dictate the type or duration of medical treatment to any physician.

12. Claimant did not dictate the type or duration of medical treatment to any physician.

13. Claimant failed to prove that any penalty should be imposed on Respondent.

14. Respondent failed to prove that any penalty should be imposed on Claimant.

CONCLUSIONS OF LAW

Claimant and Respondent seek penalties under the "general penalty" provision at § 8-43-304(1), which provides:

> Any employer or insurer . . . or any other person who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by said articles shall be . . . punished by a fine or not more than one thousand dollars per day for each such offense . . . .

Penalties are only available for violation of an express duty or prohibition established by a statute, rule, or an order. Section 8-43-304(1) does not refer to any implied duties or prohibitions, and the ALJ cannot read non-existent provisions into the Act. Therefore, if a party's action is not specifically prescribed or proscribed by a statute, rule or order, there can be no penalty. *Reves v. McCormick Excavation & Paving*, W.C. No. 4-835-166-04 (ICAO, July 19, 2012).

The assessment of penalties is governed by an objective standard of negligence and turns on a two-step analysis. The ALJ must first determine whether the insurer's

conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively unreasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

Whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*; *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

Claimant has failed to show that Respondent violated any specific provision of the Act. Claimant's penalty claim is predicated on an alleged violation of § 8-43-503(3), which prohibits an employer or insurer from "dictating" to any physician "the type or duration of treatment or the degree of physical impairment." This section prohibits a representative of the employer or insurer from issuing commands to a treating physician about the type or duration of treatment to be provided to the claimant. *Casillas v. Bemas Construction, Inc*., W.C. No. 4-777-652 (ICAO, May 24, 2010). But there is no persuasive evidence that Respondent attempted to direct any of Claimant's "treatment." Rather, the issue involves Claimant's *work restrictions*. Although a claimant's work restrictions may reasonably be considered an adjunct to medical treatment, they do not constitute a form of "treatment" per se.

Even if the ALJ were to construe Claimant's work restrictions as a form of treatment, penalties are not appropriate because Employer did not direct or command the ATP to change Claimant's restrictions. Ms. Castro merely asked if Emergicare was willing to amend the WC 164 form to remove the restrictions that were not related to Claimant's injury. That is fundamentally different from a command because PA-C Byrne was free to decline the request.

Applying similar reasoning set forth above regarding the acts prohibited by § 8-43-503(3), the ALJ concludes Respondent failed to prove that a penalty should be imposed against Claimant.

ORDER

It is therefore ordered that:

1. Claimant's claim for penalties is denied and dismissed.

2. Respondent's claim for penalties is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 1, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that the scheduled impairment rating of 18% for claimant's right ring finger should be converted to a 2% impairment of claimant's right upper extremity.

- Whether claimant has demonstrated by a preponderance of the evidence that the admitted average weekly wage ("AWW") of $1,061.65 should be increased.

- Whether claimant sustained a serious permanent disfigurement to areas of his body normally exposed to public view, resulting in additional compensation pursuant to Section 8-42-108(1), C.R.S.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his right ring finger on April 14, 2016. The injury occurred when the drill claimant was operating twisted and broke claimant's right hand. Following the injury claimant underwent two surgeries on his right hand.

Conversion

2. On October 18, 2016, Dr. Frederick Scherr placed claimant at maximum medical improvement ("MMI") and did not assign any- work restrictions. Dr. Scherr assessed an impairment rating of 18% for claimant's right ring finger; (which equates to a 2% impairment of the right hand and a 2% impairment of the right upper extremity).

3. Respondents filed a Final Admission of Liability ("FAL") on March 14, 2017 in which they admitted for the MMI date of October 18, 2016 and the 18% impairment rating for claimant's right ring finger.

4. Claimant testified that his current symptoms include pain in his ring and middle fingers, with pain that travels up his arm and into his right shoulder. Claimant also testified that he is currently working as an electrician and often operates a screwdriver with his right hand. However, claimant has no current work restrictions.

5. With regard to impairment of claimant's right ring finger, the ALJ credits the medical records over claimant's testimony and finds that claimant has failed to demonstrate that it is more likely than not that he has suffered a functional impairment that would necessitate a conversion to a right upper extremity impairment rating.

Average Weekly Wage

6. In the March 14, 2017 FAL respondents admitted to an AWW of $1,061.65 based upon claimant's hourly rate of pay. Claimant testified that when he was hired he was paid a per diem of $40.00 for each 8 hour day he worked. However, in early April 2016 claimant's per diem was increased to $80.00. Claimant testified that he paid taxes on this per diem pay. Claimant argues that his AWW should be increased to reflect the per diem rate.

7. Based upon the payroll records entered into evidence, the ALJ finds that claimant earned different per diem totals because he did not work 40 hours each week. The payroll records indicate that claimant earned at total of $10,680.18 during the eight weeks prior to the work injury. These earnings were as follows:

For the pay period ending February 21, 2016, earnings of $631.96 and $80.00 per diem for 19 hours worked (at the $40.00 per diem rate).

For the pay period ending February 28, 2016, earnings of $1,089.60 and $160.00 per diem for 32 hours worked (at the $40.00 per diem rate).

For the pay period ending March 6, 2016, earnings of $544.80 and $80.00 per diem for 16 hours worked (at the $40.00 per diem rate).

For the pay period ending March 13, 2016, earnings of $1,750.60 and $200.00 per diem for 40 hours worked (at the $40.00 per diem rate).

For the pay period ending March 20, 2016, earnings of $1,362.01 and $200.00 per diem for 40 hours worked (at the $40.00 per diem rate).

For the pay period ending March 27, 2016, earnings of $1,089.61 and $160.00 per diem for 32 hours worked (at the $40.00 per diem rate).

For the pay period ending April 3, 2016, earnings of $1,362.00 and $400.00 per diem for 40 hours worked (at the $80.00 per diem rate).

For the pay period ending April 10, 2016, earnings of $1,249.60 and $320.00 per diem for 32 hours worked (at the $80.00 per diem rate). The ALJ calculates claimant's AWW to be $1,335.02.

8. The ALJ credits the payroll records and claimant's testimony regarding the per diem rate he was paid by employer. The ALJ finds that claimant has demonstrated that it is more likely than not that his AWW should be increased to include the per diem rate.

Disfigurement

9. As a result of two hand surgeries, claimant has a well healed surgical scar on his the back of his right hand that is a different color than the surrounding skin. The scar is approximately 1 and 1/2 of an inch long and less than 1/16 of an inch wide. Claimant testified that the scarring is "connected to the bone" and causes him pain.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2012).

Conversion

3. Section 8-42-107(1) states in pertinent part:

> (a) When an injury results in permanent medical impairment and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.
>
> (b) When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

4. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

5. It is the claimant's burden of proof by a preponderance of the evidence to establish both that he suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is the claimant's burden to prove by a preponderance of the evidence the extent of the permanent impairment.

6. As found, claimant has failed to demonstrate by a preponderance of the evidence that he suffered a functional impairment that would necessitate a conversion of his scheduled impairment rating. As found, the medical records are credible and persuasive on this issue.

Average Weekly Wage

7. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid to the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

8. As found, claimant has demonstrated by a preponderance of the evidence that his AWW should be increased to $1,335.02 to reflect the per diem pay. As found, the payroll records and claimant's testimony are credible and persuasive on this issue.

Disfigurement

9. Section 8-42-108 (1), C.R.S. provides that at claimant may be entitled to additional compensation if, as a result of the work injury, he has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

10. As found, claimant has sustained a permanent disfigurement to an area of the body normally exposed to public view. Therefore, respondents shall pay claimant $750.00 for that disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's request to convert his scheduled impairment rating is denied and dismissed.

2. Claimant's AWW shall be increased to $1,335.02.

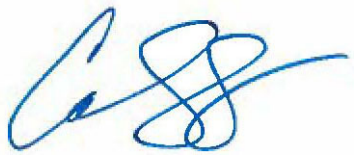
3. Respondents shall pay claimant $750.00 for his disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 3, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome the Division Independent Medical Examiner's opinion that Claimant is at maximum medical improvement for her work injury.

II. Whether Respondent produced clear and convincing evidence to overcome the Division Independent Medical Examiner's opinion that Claimant sustained a 7% whole person permanent impairment to her lumbar spine.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on February 19, 2015. Claimant testified at hearing that, while seated in an office chair, she reached for the lever to adjust the height of the chair seat. The hydraulics of the chair malfunctioned causing the chair to crash to the floor. Claimant testified that her leg was bent back when she touched the lever, and that she experienced an immediate onset of pain in her right knee, right thigh and lower back.

2. Claimant sought initial treatment the following day at NextCare Urgent Care. Claimant presented with right knee pain. Claimant reported that she twisted her right knee. Rick Eaton, PA-C noted Claimant's symptoms were negative for back pain. PA-C Eaton assessed right leg pain.

3. Claimant subsequently came under the care of Concentra as her authorized treating providers ("ATP"). Claimant's initial evaluation at Concentra occurred on February 27, 2015. Claimant presented with a knee injury. Claimant complained of diffuse right knee pain and radiating symptoms in her lateral buttock down her leg. On physical examination of the right knee, Allison Hedien, NP noted diffuse tenderness in the lateral right knee, no crepitus or warmth, normal strength bilaterally, and full but painful range of motion. NP Hedien further noted full range of motion in Claimant's lumbosacral spine, tenderness in L4-S1 right paraspinal and right sciatic notch, and right-sided muscle spasms. Slump test and straight leg raise tests were positive. NP Hedien assessed sacroiliac pain, lumbar radicular pain and right knee sprain and referred Claimant for physical therapy for the right knee sprain.

4. NP Hedien reevaluated Claimant on March 6, 2015. Claimant continued to complain of low back and radicular symptoms but reported the symptoms had improved. Claimant complained of her right knee catching without warning. On examination, NP Hedien noted diffuse lateral tenderness in the right knee with painful full flexion, tenderness at L1-S1 right paraspinal and right sciatic notch, right sided muscle spasms,

and full lumbar range of motion. NP Hedien again assessed sacroiliac pain, right knee sprain, and lumbar radicular pain.

5. On March 19, 2015, Sharon O'Connor, MD evaluated Claimant at Concentra. Claimant reported right knee pain with a locking sensation and tingling in her right leg. On examination of the right knee, Dr. O'Connor noted tenderness along the lateral joint line with full range of motion. Regarding the lumbar spine, Dr. O'Connor noted Claimant was non-tender but tender in the right paraspinous, with full but painful range of motion. Dr. O'Connor commented, "I feel patient does have mechanism of injury that is consistent with knee injury and possible disc herniation." Dr. O'Connor assessed lumbar radicular pain and a right knee sprain, and ordered MRIs of Claimant's lumbar spine and right knee.

6. On March 25, 2015, Claimant underwent MRIs of her right knee and lumbar spine, both without contrast. The MRI of Claimant's right knee revealed a tear of the medial meniscus, degenerative tearing of the lateral meniscus, mild-to-moderate grade 2 through 4 chondromalacia in the patella and lateral tibial plateau, and a poorly defined mass. The lumbar spine MRI revealed degenerative changes, most significant at L3-4 and L4-5, with mild right and moderate-to-severe left foraminal stenosis at L3-4, and moderate-to-severe right and mild left foraminal stenosis at L4-5.

7. NP Hedien reevaluated Claimant on April 2 and April 30, 2015. Claimant continued to report right knee pain with radiating symptoms into her leg. Claimant reported that her lower back pain had improved with physical therapy. On examination at both visits, NP Hedien noted diffuse tenderness in the right knee with full range of motion, L3-S1 right paraspinal and right sciatic notch tenderness, right-sided spasms, full lumbar range of motion, positive facet loading, and a negative straight leg raise test. NP Hedien referred Claimant to Martin Boublik, MD for an orthopedic evaluation.

8. On May 29, 2015, Bryan Counts, MD evaluated Claimant at Concentra. Claimant presented for a recheck of her right knee. On examination, Dr. Counts noted no effusion or tenderness in the right knee, and full range of motion. Dr. Counts further noted that there was no lumbosacral spine tenderness.

9. On June 17, 2015, Claimant underwent right knee surgery for removal of the mass identified on the March 25, 2015. The mass was determined to be unrelated to her work injury of February 19, 2015.

10. Claimant continued to treat with Concentra. Evaluations conducted on June 24, July 22, August 11, September 23, and November 10, 2015 focused on Claimant's right knee. The medical records continue to note tenderness of the right knee and painful range of motion, ranging from limited to full. Concentra's assessment was a meniscus tear and right knee sprain. Claimant's lumbosacral spine range of motion was not discussed or measured, nor were there any physical examination findings regarding the lumbosacral spine, with the exception of August 11, 2015, when NP Hedien noted that all other systems were reviewed and found to be negative.

11. As part of her treatment at Concentra, Claimant completed pain diagrams on ten separate visits. The diagrams include a drawing of both the front and the back of the body with instructions to Claimant to mark the areas on her body where she felt pins and needles, burning, pain, or aches. Claimant completed pain diagrams on March 20, April 30, May 21, May 29, June 24, July 22, August 11, September 23, November 10, and December 15, 2015. Claimant did not indicate any symptoms or sensations in her lower back on any of these ten pain diagrams.

12. On July 27, 2015, Claimant attended a physical therapy session at Concentra. Claimant rated her lumbar spine pain at a 5-6/10. The physical therapist noted tenderness to palpation and normal range of motion in the lumbar spine. Seated straight leg raise test was negative, while the supine straight leg raise test was positive.

13. Claimant also established care with a personal physician, Joan Song-Nichols, DO on July 27, 2015. Claimant denied back pain, but did discuss her February 2015 knee injury, along with other unrelated conditions. Claimant treated with Dr. Song-Nichols on eight occasions between July 27, 2015 and April 20, 2016. Dr. Song-Nichols did not note any back symptoms during those visits. There is no mention of back symptoms in Dr. Song-Nichols' medical notes until October 5, 2016, when Claimant reported having back pain. There is again no mention of back symptoms in the medical notes of Dr. Song-Nichols until April 4, 2017, when Claimant reported experiencing an exacerbation of chronic back pain.

14. On September 10, 2015, Martin Boublik, MD performed partial lateral and medial meniscectomies and debridement on Claimant's right knee. The preoperative and postoperative diagnoses were lateral meniscus tear, medial meniscus tear, and degenerative joint disease.

15. On November 10, 2015, NP Hedien referred Claimant to a massage therapist for her lower back pain. Claimant attended 15 massage therapy sessions at Concentra from December 16, 2015 through June 8, 2016. At the initial session on December 16, 2015, Claimant reported numbness in her right lower leg and a burning sensation in her right lower leg, and low back and hip pain, which Claimant rated at a 2/10. Claimant continued to report back pain and leg/foot numbness. On May 5 and May 11, 2016, Claimant also reported lumbar tightness. The massage therapist noted Claimant's condition was "consistent with the medical diagnosis of lumbar strain." The massage therapist noted hypertension in the lumbar paraspinals on May 11, June 1 and June 8, 2016.

16. On December 15, 2015, Claimant reported improved right knee pain and continuing low back pain. On examination, NP Hedien noted diffuse tenderness in the right knee with full but painful range of motion, and tenderness in the L5-S1 left paraspinal, right paraspinal, right sciatic notch and left sciatic notch. NP Hedien noted Claimant had full range of motion in the lumbosacral spine with no bilateral muscle spasms. NP Hedien referred Claimant for an EMG with Marc Triehaft, MD. NP Hedien also referred Claimant to a chiropractor for her low back pain, and recommended Claimant continue physical therapy for her right knee and low back.

17. Claimant began chiropractic care with Richard Mobus, DC on January 14, 2016. Claimant presented with regional right low back pain with pain into her right hip and lateral thigh, as well as paresthesias of right foot. Claimant rated her back pain at a 3/10. On examination, Dr. Mobus noted "Lumbar active range of motion notable for aggravation of right low back pain with right side bending 20 degrees, extension 20 degrees, forward bending 40 degrees caused by aggravation of her right lower extremity pain…Supine passive straight leg raise is somewhat equivocal, mildly positive on the right, end range for aggravation of right low back pain, lower extremity symptoms not elicited." The FABER maneuver was positive on the right. By February 18, 2016, Claimant was rating her back pain at a 1-2/10 and denying radiation and radicular complaints. Dr. Mobus noted normal, pain-free active range of motion in the lumbar spine and documented that all orthopedic/neurological tests on his examination were unremarkable. As of April 15, 2016, Claimant was reporting low back pain at a 3-4/10 and continuing to deny radiation. Dr. Mobus noted that the lumbar range of motion was "Notable for mild aggravation of right low back pain with extension 20 degrees, mild aggravation of right hip joint pain with right-side bending 20 degrees. All other motions normal and pain-free to end range." Dr. Mobus further noted that the FABER maneuver was positive on the right for mild aggravation of right low back pain.

18. On February 3, 2016, Claimant presented to John Burris, MD at Concentra. Claimant reported right-sided low back pain with occasional pain down her right leg, and right knee pain. Claimant denied any persistent numbness or weakness. Dr. Burris noted that an EMG of Claimant's right lower extremity performed by Dr. Treihaft on January 15, 2016 was normal. Regarding Claimant's low back, Dr. Burris noted that the March 25, 2015 MRI did not evidence any acute abnormalities and was normal with the exception of degenerative changes, which were consistent with age. On physical examination, Dr. Burris noted full range of motion of the lumbar spine remarking, "She can easily touch her toes on forward flexion, full extension without pain." Dr. Burris further noted tenderness to palpation of the right lower lumbar region, negative seated straight leg raise results to 90 degrees bilaterally, and full range of motion in the right knee with no localized tenderness over the medial and lateral joint lines. Dr. Burris diagnosed a right knee strain, low back strain, and low back pain. Dr. Burris referred Claimant for 12 additional physical therapy sessions, six additional massage therapy sessions, six additional chiropractic sessions, and a six-month gym membership. Dr. Burris also noted the importance of Claimant participating in an aggressive home exercise program.

19. Claimant underwent a second MRI of her right knee on February 24, 2016, which was compared to the March 25, 2015 MRI. The MRI revealed degenerative tears of the medial and lateral meniscus.

20. During a consultation with Dr. Burris on March 9, 2016, Claimant reported 2/10 right-sided low back pain. Dr. Burris noted Claimant underwent a second MRI of her right knee in February 2016 which revealed degenerative changes. Dr. Burris remarked, "She does have a fair amount of degenerative changes, which are unrelated to the work event." Dr. Burris deferred a formal physical examination and diagnosed a right knee

strain and low back pain. Dr. Burris noted Claimant was approaching the endpoint with conservative management.

21. Dr. Burris placed Claimant at maximum medical improvement ("MMI") on April 20, 2016. Claimant reported some ongoing pain along the lateral aspect of her right leg, which she rated 3/10. Dr. Burris documented, "This does not interfere with her normal activities. She continues to work her normal job, which is administrative in nature. No other complaints on today's visit. Denies any numbness or weakness in the extremity, low back pain, locking of the right knee or instability with ambulation." On physical examination, Dr. Burris noted that there was no palpable tenderness in the lumbar spine and full range of motion in all planes, remarking that Claimant "easily touches the floor on forward flexion." Dr. Burris further noted full range of motion of the right knee and negative seated straight leg raise findings to 90 degrees bilaterally. Dr. Burris diagnosed a right knee strain and low back pain. Dr. Burris opined that Claimant completed all reasonable and necessary care.

22. Dr. Burris further opined that there was no ratable condition of Claimant's lumbar spine stating, "With regards to her low back complaints, her examination is benign with negative diagnostic workup. She has nonspecific complaints, which are not present today." Dr. Burris concluded that there was no ratable condition of Claimant's right knee, noting that the mechanism of injury would be reasonably expected to cause only a minor strain, the MRI identified only degenerative changes and an unrelated mass, and that his examination of Claimant was benign with no objective findings. For maintenance care, Dr. Burris recommended continuing a home exercise program and referred Claimant to six additional sessions each of massage therapy, dry needling and chiropractic care, noting that no other formal maintenance care or follow-up would be required.

23. On June 6, 2016, Claimant returned to Dr. Boublik for a follow-up evaluation. Claimant reported continuing numbness on the medial plantar aspect of her foot, with a burning pain along the lateral aspect of her leg and low back. Claimant also reported occasional sharp shooting pains in the knee. On examination, Dr. Boublik noted right knee range of motion at 0-140 degrees with mild medial and lateral pain on forced flexion, and some mild medial and lateral joint line tenderness to palpation. Dr. Boublik further noted paresthesias on the medial and plantar aspect of the right foot and that straight leg raise caused increased numbness in the great toe and burning in the lateral thigh and calf. Dr. Boublik gave an impression of right knee moderate degenerative joint disease. Dr. Boublik noted that Claimant's overall complaint was of burning pain radiating from her back into her foot and recommended a referral to a spine physician for discussion of a possible lumbar spine injection.

24. Claimant began chiropractic care with her personal chiropractor, Aaron Johnson, DC, on June 7, 2016. Claimant attended approximately 58 sessions with Dr. Johnson from June 7, 2016 through February 21, 2017. Claimant complained of low back throughout her care with Dr. Johnson. Dr. Johnson's medical notes document "multiple segmental dysfunctions with spasm, hypomobility and end point tenderness" in

multiple levels of Claimant's spine, including L1, L2, L3, L4, as well as Claimant's sacrum, left pelvis and right pelvis.

25. Dr. Boublik reevaluated Claimant on September 12, 2016. Dr. Boublik noted Claimant was doing reasonably well overall and had been working. Claimant reported some continuing pain in the anterolateral and peripatellar aspects of her right knee. On physical examination of the right knee, Dr. Boublik noted trace joint line tenderness, good strength, and range of motion of 0-150 degrees. Regarding Claimant's back, Dr. Boublik documented, "The patient's back examination shows good range of motion without discomfort. She is nontender to palpation of her lumbar spine. Straight leg raising is negative." Dr. Boublik did not further address Claimant's back. Dr. Boublik opined that Claimant's right knee was at MMI. Dr. Boublik remarked, "[Claimant] continues to have some symptoms, but is working. She does feel like she has plateaued and is not improving at this point." Dr. Burris assigned a combined 19% lower extremity rating using the AMA Guides, consisting of a 12% lower extremity impairment rating for "loss of lateral greater than medial meniscus" under Table 40, and an 8% lower extremity impairment rating "due to the arthritis/chondral changes."

26. Brain Beatty, DO, conducted a Division Independent Medical Examination ("DIME") of Claimant on October 4, 2016. Dr. Beatty reviewed Claimant's medical records and physically examined Claimant. Dr. Beatty noted that Claimant's pre-existing medical records he reviewed were limited to handwritten notes from Ronald Malpiede, D.C. Dr. Beatty deemed the records illegible. Dr. Beatty did not list any records from Kaiser in the preexisting records he reviewed. Claimant reported intermittent discomfort with continuing numbness and tingling into her right calf and right foot. Claimant rated the pain at a 3-5/10. Dr. Beatty documented,

> The patient notes that her activities are not restricted despite her symptoms. During a 24-hour day she sleeps or lays down 6 hours, stands or walks 7 hours and sits approximately 11 hours. She would rate her physical activity as moderately active. She enjoys hobbies in sports including hiking and biking which are unrestricted but she has difficulty with bowling.

27. On examination of the lumbar spine, Dr. Beatty noted mild tenderness with no tightness or apparent spasms. Dr. Beatty measured Claimant's lumbar range of motion using the two-inclinometer method and documented the following measurements: "Flexion 50 degrees, extension 25 degrees, side bending right 25 degrees and side bending left 25 degrees." Negative straight leg raise was to 70 degrees on the right and 65 degrees on the left. Dr. Beatty noted sensory deficits to pinprick over the right medial ankle and foot and along the mid-calf. On examination of the right knee, Dr. Beatty noted tenderness around the patella with no swelling or effusion. Dr. Beatty further noted that the right knee was stable to varus and valgus stress, with negative anterior and posterior drawer signs, Lachman's test and McMurray's test. Dr. Beatty noted Claimant had full extension of the right knee and flexion at 145 degrees.

28. Dr. Beatty diagnosed Claimant with a lumbar strain and right knee meniscus tear. Dr. Beatty opined that Claimant was at MMI as of April 20, 2016, the MMI date determined by Dr. Burris. Dr. Beatty noted that Claimant was concerned about persistent numbness in her leg, but stated that the EMG/nerve conduction study was negative. Dr. Beatty suggested that Claimant pursue any further desired care through her personal physician. Dr. Beatty further noted that the new meniscus tears in Claimant's right knee were degenerative and unrelated to the February 19, 2015 work injury. Dr. Beatty recommended a one-year gym membership for maintenance care.

29. Based on the AMA Guides, Dr. Beatty assigned a total combined 10% whole person impairment rating. Dr. Beatty assigned a 7% impairment rating for the lumbar spine, consisting of a 2% impairment for loss of range of motion and a 5% rating based on Table 53(II)(B). Dr. Beatty assigned a 7% lower extremity impairment (3% whole person) for the right knee consisting of a 2% impairment for loss of range of motion combined with a 5% impairment for a torn meniscus, meniscectomy or partial meniscectomy under Table 40(2).

30. On February 6, 2017, Scott Primack, DO, performed an IME of Claimant at the request of Respondent. Dr. Primack performed a medical records review and physically examined Claimant. Dr. Primack noted that he reviewed medical records dating back to 2012/2013 indicating Claimant had issues with low back pain, right-sided hip pain, sacroiliac joint discomfort, and right leg pain.

31. A Kaiser medical record dated March 12, 2011 indicates Claimant reported right hip pain. Kaiser medical records from February 2013 noted Claimant complained of lower back pain over the right sacroiliac joint area and right hip pain. Claimant was diagnosed with strain of the hip on June 7, 2013.

32. Dr. Primack noted that Dr. Beatty did not take a history of Claimant's previous problems of the sacroiliac joint and spine. Claimant reported achiness at the right iliolumbar area at the level of the sacroiliac joint and burning and achiness of the right knee. On physical examination, Dr. Primack noted the following lumbar range of motion measurements: flexion 45 degrees, extension 25 degrees, right lateral sidebending 30 degrees, and left lateral sidebending 25 degrees, with rotation giving "some discomfort." Dr. Primack further noted full knee flexion at 144 degrees and full knee extension, and no evidence of clonus. Vaglus and varus stress testing, Lachman maneuver, and straight leg raise tests were negative.

33. Dr. Primack opined that Claimant did not sustain a permanent injury to her back. Dr. Primack noted that Claimant had issues with her lumbar spine, right hip and sacroiliac joint going back to 2012/2013 and received chiropractic care from Dr. Malpiede for the lumbar spine prior to the February 19, 2015 work injury. Dr. Primack noted that he reviewed Dr. Beatty's DIME report and, while Dr. Beatty utilized the "apportionment guidelines," Dr. Primack disagreed that the mechanism of injury was sufficient to intensify, aggravate, exacerbate, accelerate or cause Claimant's back problems. Dr. Primack remarked, "This was classic multilevel degenerative disk disease

which does correlate with her most recent objective findings on MRI, as well as her clinical examination."

34. Dr. Primack did, however, opine that Claimant sustained a permanent impairment to her right knee and assigned 5% lower extremity impairment for a meniscus tear under Table 40 of the AMA Guides. Dr. Primack declined to assign an impairment rating for loss of range of motion, opining that Claimant had full range of motion. Dr. Primack noted that he had "no issues" with a gym membership for a year, but stated that any further treatment for the right knee would be secondary to Claimant's tricompartmental osteoarthritis and not work-related.

35. On May 22, 2017, John Hughes, MD performed an IME at the request of Claimant. Dr. Hughes performed a medical records review and physically examined Claimant. Claimant reported experiencing an achy, burning pain in her right lateral knee and right low back, which she rated at rated at 2-3/10. Claimant also reported experiencing improved numbness in her right foot. Claimant reported not being able to sleep for more than two hours at a time, and that her right leg was not as strong as it once was. On physical examination, Dr. Hughes noted the following lumbar range of motion measurements: "Maximum true lumbar flexion is 40 degrees, sacral flexion is 63 degrees, lumbar spine extension 15 degrees, right and left lateral flexion of the lumbar spine 15 degrees and 19 degrees respectively." Dr. Hughes noted straight leg raise testing in the supine position was 45 degrees on the right and 55 degrees on the left. Dr. Hughes further noted global atrophy of the right leg compared to the left and diminished sensation over the right first and second toes and the right plantar foot. Dr. Hughes also noted right knee flexion was at 145 degrees with extension at 0 degrees over both knees. McMurray's and Lachman's tests were negative.

36. Dr. Hughes made the following work-related assessments: a right knee sprain/strain with development of medial and lateral meniscus tears; residual right knee arthritis post resection of the synovial chondromatosis mass and medial/lateral meniscectomies; and lumbar spine sprain/strain with development of symptomatic facet joint arthropathy and right lower extremity radiculitis.

37. Dr. Hughes opined that Claimant is not at MMI regarding her back issues. Dr. Hughes agreed with Dr. Boublik's recommendations regarding assessment by a spine physician and undergoing right-sided transforaminal epidural injections "in an effort to assess pain generation in [Claimant's] right low back and leg."

38. Dr. Hughes offered an estimate of permanent impairment under the AMA Guides. Dr. Hughes opined that the MRI findings revealed at least moderate pathology in the lumbar spine and merited a 7% whole person impairment under Table 53(II)(C), combined with a 10% impairment for loss of range of motion, for a total lumbar spine regional whole person impairment of 16%. Dr. Hughes further opined that Claimant's right knee is "probably stable" and assigned a Table 40 impairment rating of 15%, combined with a 2% impairment for loss of range of motion, for a 17% lower extremity (7% whole person) impairment. Dr. Hughes combined the lumbar spine regional

impairment of 16% with the 7% whole person knee impairment for a 22% total combined whole person impairment.

39. Dr. Primack testified at hearing on behalf of Respondent as an expert in physical medicine and rehabilitation and occupational medicine. Dr. Primack is board certified in physical medicine and rehabilitation and neurology and rehabilitation, and is Level II accredited by the Colorado Division of Workers' Compensation. Dr. Primack testified consistent with his IME report. Dr. Primack opined that Claimant sustained a work-related meniscus tear, but did not sustain a work-related injury to her back. Dr. Primack opined that Claimant has a non-work-related personal diagnosis of lumbar spondylosis with dextroscolisis at L3-4.

40. Dr. Primack reviewed the March 25, 2015 MRI. He explained that the L3 labral body has rotated on L4, which is associated with degenerative changes as Claimant's disc has narrowed. Dr. Primack further explained that Claimant has a disc bulge with facet arthropathy, which is arthritis of the small joints in the back, and restrolisthesis, or misalignment, of L2 and L3. Claimant also has facet and ligamentous hypertrophy, which are degenerative changes of the spine, which Dr. Primack testified has caused spurring and, in turn, stenosis. Dr. Primack further testified that Claimant also has curvature at L3 and L4, which has caused a right lateral disc protrusion with facet and ligamentous hypertrophy, which are degenerative changes with some degenerative discogenic changes. Dr. Primack testified that the lumbar MRI findings were degenerative in nature and that none of the lumbar MRI findings were causally related to the work injury of February 19, 2015.

41. Dr. Primack discussed Dr. Burris' April 20, 2016 MMI report. Dr. Primack contended that Dr. Burris' assessment of "low back pain" is not a diagnosis stating, "In fact, within the medical treatment guidelines as well as the third edition revised guidelines, you can't rate pain. That's not a diagnosis, it's a symptom." Dr. Primack agreed with Dr. Burris' assessment that Claimant had a benign low back examination and a negative diagnostic work-up, with no ratable condition of her back. Dr. Primack disagreed with Dr. Burris' assessment that Claimant did not sustain a right knee impairment.

42. Regarding Dr. Beatty's DIME report, Dr. Primack disagreed with the diagnosis of a lumbar strain. Dr. Primack testified that Dr. Beatty's own clinical examination does not support his diagnosis of a lumbar strain. Dr. Primack explained that Dr. Beatty noted that there was no tightness or apparent spasms in Claimant's back on his examination. Dr. Primack further explained that Claimant had "excellent motion" with "normal extension, normal side bending, and a negative straight leg raise," which was not consistent with a lumbar strain.

43. Dr. Primack further testified that you can have some loss of range of motion with lumbar spondylosis. Dr. Primack stated that Claimant's complaints of low back pain were more inconsistent than consistent in her medical records. Dr. Primack contended that Claimant's intermittent back problems were more consistent with a patient with lumbar spondylosis, and meant that "there can't be a permanent impairment, because

it's intermittent at best." Dr. Primack further contended that, if Claimant did sustain a lumbar strain, lumbar strains are not permanent.

44. Dr. Primack also disagreed with Dr. Beatty's assessment of a lumbar spine impairment rating under Table 53(II)(B) of the AMA Guides. Dr. Primack stated that Table 53(II)(B) requires a medically documented injury, which requires analysis of the mechanism of injury and the "consistency of the specific injury." Dr. Primack opined that Claimant does not have a medically documented injury to her low back as a result of the February 19, 2015 work injury. Dr. Primack explained that Claimant has lumbar spondylosis and dextroscoliois. Dr. Primack opined that, while Claimant may have pain in her back, she did not sustain a specific injury.

45. Dr. Primack testified that Claimant also lacks the required six months of medically documented pain and rigidity to qualify for a rating under Table 53(II)(B). Dr. Primack testified that there needs to be pain documented in the medical records consistent over six months. Dr. Primack testified that the ATP records from February 2015 to April 2016 did not document Claimant complaining of low back pain for a minimum of six months. Dr. Primack testified that Claimant also lacked six months of medically documented rigidity. Dr. Primack explained that rigidity refers to a spastic or tight quality to the paraspinous muscles, and that rigidity should correlate with loss of range of motion. Dr. Primack testified that Claimant's ATP records from the date of injury to MMI consistently note full range of motion in the lumbar spine, which indicates Claimant a lack of rigidity, and is inconsistent with a permanent impairment to the low back.

46. Dr. Primack testified that Claimant's complaints of leg pain would not be radicular pain coming from the back, as Claimant's EMG ruled out radiculopathy. Dr. Primack stated that there are two nerves at the location of Claimant's meniscus tear, the fibular and tibial nerves, which can also give symptoms to the leg.

47. Dr. Primack testified that Claimant also did not qualify for an impairment rating for loss of range of motion in her low back. Dr. Primack stated,

> You cannot render loss of motion unless you initially fulfilled criteria for Table 53. So you have to meet Table 53 first, not the other way around. And that's why you can't just render motion as a permanent impairment, because that's almost just like a clinical finding. You have to have an associate diagnosis…That's in the medical treatment guidelines as well as within the third edition revised. It's both.

Dr. Primack testified that Dr. Beatty's 2% impairment rating for lumbar range of motion was consistent with the AMA Guides if Claimant had a work-related diagnosis.

48. Dr. Primack agreed with Dr. Beatty's impairment rating for Claimant's right knee.

49. Dr. Primack discussed Dr. Hughes' IME report. He disagreed with Dr. Hughes that Claimant is not at MMI because she needs further work-up of the spine. He testified

that Dr. Hughes' conclusion was not consistent with Dr. Hughes' own exam, stating that Dr. Hughes' exam indicated that there were no paraspinal spasms of the spine, with a negative straight leg raising sign. Dr. Primack contended that these findings are inconsistent with a recommendation for further treatment stating, "How you leap to recommend an epidural steroid injection—that's what I do for my living—I would not be doing an epidural steroid injection for someone who has no paraspinous tone, a negative straight leg raise and degenerative changes on the spine." Dr. Primack further explained that Dr. Hughes' conclusions and recommendations were inconsistent with claimant's functioning per the DIME report, which indicated Claimant can stand or walk for seven hours and can sit for approximately 11 hours, and rated Claimant's physical activity as moderately active.

50. Dr. Primack also discussed Dr. Hughes' diagnosis of symptomatic facet joint arthropathy. He explained that symptomatic facet joint arthropathy cannot be diagnosed without facet joint loading with extension and rotation. Dr. Primack testified that Dr. Hughes did not load Claimant's facet joints as part of his clinical examination. He further explained that symptomatic facet joint arthropathy would be accompanied by paraspinal spasms or tone, which Dr. Hughes did not find on clinical examination. Dr. Primack further stated that he would not perform an epidural steroid injection on a patient who had not had a consistent facet loading exam.

51. Dr. Primack stated that the treatment Claimant has been obtaining from her personal physicians, including chiropractic and massage, would not be related to the work injury of February 19, 2015. Dr. Primack contended that these treatments would only control symptoms of Claimant's degenerative changes of the spine.

52. Claimant testified that, at the time she was placed at MMI, she was still experiencing back and knee pain, as well as numbness in her foot. Claimant testified that her back pain was fairly constant throughout her treatment and that she continued to experience numbness as well as knee and back pain. Claimant testified that she felt her condition regressed during the approximately four to six weeks she did not undergo any treatment.

53. Claimant further testified that she had not sustained a prior injury to her low back, but simply had "normal" low back aches and pains prior to the February 19, 2015 injury. Claimant testified that she is interested in receiving epidural steroid injections. Claimant stated that she currently experiences some numbness in her foot and pain in her right knee, right thigh and lower back. Claimant testified that she can perform limited activities such as house cleaning, but cannot perform "normal activities" like bowling, hiking, or biking for long distances.

54. At hearing, Respondent acknowledged that Dr. Beatty's 5% rating of the knee under Table 40 of the AMA Guides was proper, but challenged the 2% range of motion rating for the knee, and the low back rating in its entirety. In its post-hearing position statement, Respondent's only challenge was to the 7% low back rating.

55. The ALJ credits the opinions of Drs. Beatty, Burris and Primack on the issue of MMI over the conflicting opinions of Drs. Boublik and Hughes and finds that Claimant has failed to overcome the DIME physician on the issue of MMI by clear and convincing evidence.

56. The ALJ credits the opinions of Drs. Beatty and Hughes on the issue of permanent impairment over the conflicting opinions of Drs. Burris and Primack and finds that Respondent has failed to overcome the DIME physician on the issue of permanent impairment by clear and convincing evidence.

57. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Maximum Medical Improvement

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, *914 P.2d 411 (Colo. App. 1995).*

Claimant contends that she is not at MMI because she has not received complete treatment for her lumbar spine injury to date and continues to experience pain, aching, burning and numbness. Claimant relies on the opinions of Drs. Boublik and Hughes, who recommended of a spinal assessment and epidural steroid injections.

As found, Claimant has failed to overcome the DIME physician's finding of MMI by clear and convincing evidence. The DIME physician, Dr. Beatty, found Claimant was at MMI as of the date Dr. Burris placed Claimant at MMI. As one of Claimant's ATPs, Dr. Burris was familiar with Claimant's symptoms, treatment and prognosis. At the time he placed Claimant at MMI, Dr. Burris noted that benign diagnostic workup of Claimant's back on examination. Dr. Beatty considered Claimant's concern over numbness in her leg, but credibly determined that further care should be sought with her personal physician, as there were no positive EMG findings. Further, Dr Primack credibly testified that Dr. Hughes' diagnosis of symptomatic facet arthropathy was not supported by the requisite testing, and that epidural steroid injections were contraindicated under the circumstances.

The ALJ concludes that the opinions of Drs. Boublik and Hughes that Claimant is not at MMI represent a mere difference of opinion, which is insufficient to overcome the DIME. Based on the totality of evidence, there is insufficient persuasive and credible

evidence establishing that the DIME's determination of MMI was highly probably incorrect.

Permanent Impairment

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; Section 8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, *supra*.

In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Respondent contends that Dr. Beatty erred in assigning a 7% permanent impairment rating for the lumbar spine, relying on the opinions of Drs. Burris and Primack that Claimant does not have a ratable lumbar spine condition. Specifically, Respondent contends that Dr. Beatty erred in assigning a Table 53(II)(B) impairment rating and a rating for loss of range of motion. Respondents

As found, Respondent has failed to overcome the DIME physician's 7% permanent impairment rating for the lumbar spine. Dr. Beatty diagnosed Claimant with a lumbar strain, which was also diagnosed by Dr. Burris and Dr. Hughes. While Dr. Primack testified that "low back pain" is not a diagnosis, no credible and persuasive evidence was introduced at hearing establishing that a lumbar strain is not a medically

documented injury. To the extent Dr. Primack disagrees with the diagnosis of a lumbar strain, the ALJ considers the disagreement a mere difference of opinion. The medical records reflect at least six months of reported back pain and rigidity between the date of injury and MMI. The medical records note back pain in February March, July, October November, and December 2015, as well as January, February, April, May, and June 2016. The medical records include mention of either spasms, limited range of motion, stiffness, tension, hypertension or hypomobility in February and April 2015, and January, February April, May, and June, July, August, September and October 2016.

Dr. Beatty found loss of range of motion on his DIME exam. There was no credible or persuasive evidence introduced at hearing that Dr. Beatty's range of motion measurements were not in compliance with the AMA Guides. In fact, Dr. Primack testified that, if Claimant met the Table 53(II)(B) criteria, Dr. Beatty's 2% rating for range of motion loss would be correct. Dr. Beatty's use of Table (53)(II) and assignment of a permanent impairment rating for the low back is also supported by Dr. Hughes.

Based on the totality of evidence, the ALJ concludes that Respondent has failed to establish that it is highly probable Dr. Beatty's 7% lumbar impairment rating is incorrect.

ORDER

It is therefore ordered that:

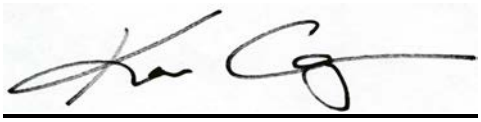
1. Claimant failed to overcome the DIME opinion on the issue of MMI. Claimant's request to overcome the DIME opinion on the issue of MMI is denied and dismissed.

2. Respondent failed to overcome the DIME physician's 7% permanent impairment rating for the lumbar spine. Respondent's request to overcome the DIME opinion on the issues of permanent impairment is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 3, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their General Admission of Liability (GAL) that acknowledged Claimant sustained compensable occupational diseases to her right upper extremity during the course and scope of her employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of work-related injuries.

FINDINGS OF FACT

1. Employer is a family-friendly restaurant and entertaining corporation with a location in Denver at the intersection of Interstate 25 and Colorado Boulevard.

2. Claimant has worked for Employer for several years performing various jobs as a Cleaner. Her duties included cleaning kitchen floors, removing trash, washing doors, filling bins with ice in the bar area and general kitchen duties.

3. Claimant testified that on February 2, 2016 she was scooping ice out of an ice machine and developed pain in her right thumb and hand. Claimant specifically asserted that she hit her right thumb against the ice machine and it "twisted backwards" causing shooting pains into her finger and hand. Claimant acknowledged having right thumb and hand pain for a few months prior to the incident.

4. On February 23, 2016 Claimant presented to Porter Adventist Hospital for treatment. She described right thumb pain that had been present after scooping ice for "3 weeks." Claimant did not allege a specific trauma or incident that caused her pain. Instead, Claimant felt that her pain was due solely to scooping ice at work. She was diagnosed with a sprain and received a splint.

5. Following the initial visit to Porter Adventist Hospital Claimant reported her condition to Employer. Employer referred Claimant to Concentra Medical Centers for treatment. Respondents subsequently filed a General Admission of Liability (GAL).

6. Claimant received conservative medical treatment through Concentra. She was referred to a hand surgeon and received injections to alleviate her right thumb pain.

7. Claimant was eventually referred to Eric Tentori, D.O. for treatment. On July 14, 2014 Claimant reported pain that was radiating into her upper extremity that she attributed to the February 2, 2016 incident or her continuing job duties. Dr. Tentori

was concerned that Claimant's symptoms were worsening in the absence of any objective findings.

8. On July 15, 2016 Claimant visited Kathy McCranie, M.D. for an evaluation. Dr. McCranie took a history from Claimant regarding her February 2, 2016 mechanism of injury and pain complaints. Dr. McCranie noted that Claimant attributed her right thumb symptoms to repetitively scooping ice at work. She remarked that Claimant had been experiencing numbness in her index and middle fingers one week prior to her date of injury. Dr. McCranie diagnosed Claimant with trigger thumb.

9. On August 19, 2017 Claimant again visited Dr. McCranie for an examination. Dr. McCranie noted that Claimant's electrodiagnostic testing revealed right median neuropathy that was indicative of Carpal Tunnel Syndrome (CTS). Specifically, testing revealed moderately severe findings regarding both the sensory and motor nerves including chronic denervation in the distal median-innervated abductor pollicis brevis. Dr. McCranie suspected that the findings caused Claimant's ongoing right upper extremity symptoms.

10. On September 12, 2016 Claimant returned to Dr. Tentori for a scheduled follow-up visit. Dr. Tentori noted that a detailed job tasks analysis had not been done to determine causality and ascertain whether Claimant's job activities caused her right upper extremity symptoms. Dr. Tentori ordered a job site evaluation to ascertain the cause of Claimant's condition.

11. On October 25, 2016 and October 29, 2016 Sara Nowotny conducted a Physical Demands Analysis & Risk Factor Assessment for the position of Cleaner at Employer's restaurant. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties. Ms. Nowotny specifically commented that scooping ice did not fit within the Primary or Secondary Risk Factors regarding pronation and grip strength. She also noted that Claimant's job of filling ice from ice machines constituted only 15% of her daily work activities.

12. On November 2, 2016 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian reviewed Claimant's medical records and conducted a physical examination. He considered Ms. Nowotny's report as well as a job description to ascertain Claimant's duties. Dr. Cebrian noted that Claimant engaged in a variety of tasks while working for Employer that included scooping ice, cleaning the kitchen, mopping, cleaning offices and removing trash. Claimant reported that she was suffering right thumb and hand pain that began two weeks prior to the February 2, 2016 incident. She denied any specific injury, but attributed her symptoms to her daily, repetitive ice-scooping activities.

13. Dr. Cebrian explained that in order to perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to

compare the job duties with the delineated primary risk factors. Dr. Cebrian concluded that Claimant had right trigger thumb and right CTS.

14. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that the Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per hour or 6 hours of use of hand held tools weighing two pounds or greater. Dr. Cebrian concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Dr. Cebrian noted that Claimant performed several different activities throughout the day and many of the activities do not meet the minimal force or time duration requirements.

15. Dr. Cebrian noted that an additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires 4 hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees, or ulnar deviation greater than 20 degrees, 6 hours of elbow flexion greater than 90 degrees, or 6 hours of supination/pronation with task cycles 30 seconds or less or awkward posture is used for at least 50% of a task cycle. Additional Primary Risk Factors include computer work for more than 7 hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than 4 hours or use of a handheld vibratory power tool for 6 hours or more. Dr. Cebrian determined that Claimant's job duties did not meet any of the Primary Risk Factors. Moreover, Dr. Cebrian explained that Claimant's work activities did not meet the Secondary Risk Factors enumerated in the *Guidelines*

16. Dr. Cebrian remarked that the manifestation of symptoms while at work does not establish a causal relationship with job duties. He explained:

> There is no question that someone with a non-work related trigger finger will experience symptoms while performing activities at work or anywhere else. This is the reasonable medical expectation for the underlying condition. That [Claimant] may have had symptoms when doing certain activities at work is an indication of the underlying disease process and not of a causal relationship between the disease and the work exposure. The fact that symptoms are experienced at work does not require medical inference that work is causal but rather the reasonable and symptomatic manifestation of the underlying condition. . . .

Dr. Cebrian thus concluded that Claimant's right upper extremity symptoms were not directly or indirectly related to her work activities for Employer.

17. On December 23, 2016 Claimant returned to Dr. McCranie for an evaluation. Dr. McCranie received a copy of Dr. Cebrian's opinion and the job analysis from Ms. Nowotny. Dr. McCranie agreed with Dr. Cebrian's determinations and the findings from Ms. Nowotny that there were no Primary or Secondary Risk Factors for

the development of a cumulative trauma disorder in Claimant's job duties for Employer. Specifically, Dr. McCranie noted that Claimant's conditions of right trigger finger and CTS did not constitute cumulative trauma disorders for work-related activities.

18. Dr. Cebrian testified at the hearing in this matter. He discussed the Primary and Secondary Risk Factors enumerated in the *Guidelines*. Dr. Cebrian explained that the key to the *Guidelines* is that the tasks have to be a combination of the force, repetition and duration for a minimum time period. Different activities are not included in calculating the time period. Dr. Cebrian commented that Claimant's job duties did not meet the Primary or Secondary Risk Factors enumerated in the *Guidelines* because they do not involve continuous, repetitive activity. Finally, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Cleaner failed to meet the causation requirements for trigger finger and CTS outlined in Rule 17, Exhibit 5 of the *Guidelines*.

19. Dr. Cebrian detailed that CTS occurs when the ulnar and median nerves are compressed around the adipose tissue of the hands and wrists. He remarked that the compression of the ulnar and median nerves reduces the nerve conduction signals through the hands and wrists causing numbness and tingling. Dr. Cebrian also explained the diagnosis of trigger finger and commented that someone with non-work-related trigger finger will experience symptoms when performing activities at work or anywhere else. He summarized that Claimant was properly diagnosed with CTS and trigger finger but the conditions were not work-related. Dr. Cebrian also concluded that Claimant did not sustain any aggravation of a pre-existing, underlying condition. Instead, he noted that Claimant was experiencing the natural progression of her underlying non-work-related degenerative condition.

20. Claimant testified at the hearing in this matter. She explained that she scoops ice more frequently than noted by her medical providers. Claimant commented that she normally scoops ice into several buckets per day and is constantly going back and forth between the kitchen and the bar to fill buckets of ice and re-load the various areas of the restaurant. She specified that it takes her approximately 25-35 minutes to scoop one bucket of ice and she scoops about 6-8 buckets per day. However, Claimant subsequently amended her response and increased the number of buckets she fills to at least 8-10 per day and sometimes in excess of 20. Claimant also noted that she suffered an acute injury on February 2, 2016 when scooping ice and felt her thumb being "'pushed back" and "twisted backwards." Claimant summarized that, although she performs many job activities for Employer, she scoops ice the majority of each shift.

21. Respondents have demonstrated that it is more probably true than not that they are entitled to withdraw their GAL that acknowledged Claimant sustained compensable occupational diseases to her right upper extremity during the course and scope of her employment with Employer. Although Claimant attributed her CTS and trigger thumb symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause cumulative trauma disorders. Claimant engaged in a variety of numerous tasks throughout each shift. The record reflects that Claimant's tasks as a Cleaner included scooping ice, cleaning the kitchen,

mopping, cleaning offices and removing trash. Rule 17, Exhibit 5 of the *Guidelines* requires a combination of force, repetition and duration. However, Claimant's job duties fail to meet all of the criteria in the *Guidelines* for a cumulative trauma condition.

22. Relying on Rule 17, Exhibit 5 of the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Cleaner failed to meet the causation requirements for CTS and trigger thumb. He persuasively explained that Claimant did not suffer a cumulative trauma disorder to her right upper extremity as a result of his work activities for Employer. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that the Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per hour or 6 hours of use of hand held tools weighing two pounds or greater. Dr. Cebrian concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Dr. Cebrian noted that Claimant performed several different activities throughout the day and many of the activities do not meet the minimal force or time duration requirements.

23. Ms. Nowotny conducted a Physical Demands Analysis & Risk Factor Assessment for the position of Cleaner at Employer's restaurant. Her job site analysis supports the opinion of Dr. Cebrian. Relying on the *Guidelines*, Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties. Ms. Nowotny specifically commented that scooping ice did not fit within the Primary or Secondary Risk Factors regarding pronation and grip strength. She also noted that Claimant's job of filling ice from ice machines constituted only 15% of her daily work activities.

24. Dr. McCranie received a copy of Dr. Cebrian's opinion and the job analysis from Ms. Nowotny. Dr. McCranie agreed with Dr. Cebrian's determinations and the findings from Ms. Nowotny that there were no Primary or Secondary Risk Factors for the development of a cumulative trauma disorder in Claimant's job duties for Employer. Specifically, Dr. McCranie noted that Claimant's conditions of right trigger finger and CTS did not constitute cumulative trauma disorders for work-related activities. Based on the persuasive opinions of Dr. Cebrian, Dr. McCranie and Ms. Nowotny that Claimant did not suffer cumulative trauma disorders to her right upper extremity while working for Employer, Respondents are permitted to withdraw their GAL.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-

40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to

development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2015), C.R.S. Because Respondents filed a GAL, they bear the burden of proof to establish that Claimant did not sustain compensable occupational diseases to her right upper extremity during the course and scope of her employment with Employer.

7. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

8. "Good" but not "strong" evidence that occupational risk factors cause CTS, as set forth in the *Guidelines*, include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. "Some" evidence of occupational risk factors for the development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. W.C.R.P. Rule 17, Exhibit 5, pp. 23-24.

9. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of supination/pronation with task cycles 30 seconds or less, or awkward posture for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more

than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for 6 hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater.

10. As found, Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their GAL that acknowledged Claimant sustained compensable occupational diseases to her right upper extremity during the course and scope of her employment with Employer. Although Claimant attributed her CTS and trigger thumb symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause cumulative trauma disorders. Claimant engaged in a variety of numerous tasks throughout each shift. The record reflects that Claimant's tasks as a Cleaner included scooping ice, cleaning the kitchen, mopping, cleaning offices and removing trash. Rule 17, Exhibit 5 of the *Guidelines* requires a combination of force, repetition and duration. However, Claimant's job duties fail to meet all of the criteria in the *Guidelines* for a cumulative trauma condition.

11. As found, relying on Rule 17, Exhibit 5 of the *Guidelines*, Dr. Cebrian testified that the combination of repetition, force and cycle time in Claimant's duties as a Cleaner failed to meet the causation requirements for CTS and trigger thumb. He persuasively explained that Claimant did not suffer a cumulative trauma disorder to her right upper extremity as a result of his work activities for Employer. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. Dr. Cebrian compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He reviewed the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Cebrian noted that the Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per hour or 6 hours of use of hand held tools weighing two pounds or greater. Dr. Cebrian concluded that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*. Dr. Cebrian noted that Claimant performed several different activities throughout the day and many of the activities do not meet the minimal force or time duration requirements.

12. As found, Ms. Nowotny conducted a Physical Demands Analysis & Risk Factor Assessment for the position of Cleaner at Employer's restaurant. Her job site analysis supports the opinion of Dr. Cebrian. Relying on the *Guidelines*, Ms. Nowotny did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties. Ms. Nowotny specifically commented that scooping ice did not fit within the Primary or Secondary Risk Factors regarding pronation and grip strength. She also noted that Claimant's job of filling ice from ice machines constituted only 15% of her daily work activities.

13. As found, Dr. McCranie received a copy of Dr. Cebrian's opinion and the job analysis from Ms. Nowotny. Dr. McCranie agreed with Dr. Cebrian's determinations and the findings from Ms. Nowotny that there were no Primary or Secondary Risk Factors for the development of a cumulative trauma disorder in Claimant's job duties for Employer. Specifically, Dr. McCranie noted that Claimant's conditions of right trigger finger and CTS did not constitute cumulative trauma disorders for work-related activities. Based on the persuasive opinions of Dr. Cebrian, Dr. McCranie and Ms. Nowotny that Claimant did not suffer cumulative trauma disorders to her right upper extremity while working for Employer, Respondents are permitted to withdraw their GAL.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 2, 2017.

DIGITAL SIGNATURE.

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving indemnity benefits.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $831.25.

2. If Respondents are unable to meet their burden of proof, Claimant is entitled to the aggregate amount of $4,504.22 in Temporary Total Disability (TTD) benefits for the period December 31, 2016 through January 21, 2017 and Temporary Partial Disability (TPD) benefits for the period January 22, 2017 through April 3, 2017.

FINDINGS OF FACT

1. Employer is an appliance delivery and installation company. Claimant commenced employment with Employer on November 1, 2016. He had previously worked for Employer as a temporary employee on assignment from Labor Ready for two-and-one-half weeks.

2. Claimant worked in the inventory section of Employer's warehouse. His primary duties were loading and unloading appliances from trucks. Claimant did not have a supervisory position.

3. On December 7, 2016 Claimant was involved in a verbal altercation with Independent Service Provider (ISP) Adrian Livingston. Quality and Compliance Manager Clark Betz advised Claimant that ISP's were contractors and did not work for Employer. Mr. Betz informed Claimant not to address issues directly with ISP's but to bring concerns or issues with ISP's to him or General Manager Chip LeRoy. Claimant agreed to the procedure.

4. On December 12, 2016 Claimant had another altercation with ISP's Jason Craven and Charlie Vigil. Claimant accused Mr. Craven of hitting a trailer with a truck. Claimant did not present his concerns to Mr. Betz or Mr. Leroy, but another employee contacted Mr. Betz to diffuse the situation. Mr. Betz did not find any damage to the trailer and asked Claimant to drop the issue. Claimant responded with a profanity-laced statement and stormed away.

5. Mr. Betz reported that Claimant continued to have a negative demeanor for the rest of the day and was slamming things around. Claimant testified that he was angry and admitted that he made the profane statement attributed to him by Mr. Betz. He acknowledged that this was not a respectful way to speak to his supervisor and should not have made the statement.

6. Elizabeth Plata was Employer's Warehouse Manager in November and December of 2016. She explained that she was responsible for everything within the building by overseeing warehouse operations. Claimant's job duties in the inventory side of the warehouse were not supervisory. Ms. Plata recalled telling Claimant that this was "his house." She uses the statement with all employees to encourage them to take pride in their work. Ms. Plata was unable to think of anything she said to Claimant that would have suggested he was in a supervisory position.

7. At approximately 10:00 a.m. on December 30, 2016 Claimant entered Ms. Plata's office and confronted her regarding whether there were a sufficient number of trucks on site to haul inventory. Claimant questioned Ms. Plata's authority and decision-making. He became argumentative and confrontational. Ms. Plata asked Claimant to leave her office and he stormed away.

8. Ms. Plata subsequently discussed the incident with Mr. LeRoy. They had previously conferred about Claimant's behavioral issues. They specifically noted that Claimant's behavior was a problem and there were almost daily incidents reflecting his inability to work with others.

9. Later on December 30, 2016 Claimant was working with employee Dalton Davis. Mr. Davis was an African-American employee who had been hired on December 1, 2016 to work on the inventory side of Employer's warehouse with Claimant. While loading trucks Claimant called Mr. Davis "boy" and specifically stated, "know your place, boy, and get back to work." Mr. Davis testified that he interpreted the statement to be racially insensitive and was very upset. He explained that the context of the phrase and the way Claimant used the words was racist.

10. Later in the afternoon of December 30, 2016 employee Maurice Harris visited Ms. Plata's office to report that Mr. Davis was upset because Claimant had called him "boy." Mr. Harris was also upset because Claimant had directed a racial slur toward Mr. Davis. He remarked that Mr. Davis walked out of the warehouse after the incident.

11. During the first 90 days of his employment with Employer Claimant was an "introductory employee." The probationary period is used to determine if new employees are suited for their positions with Employer. On October 30, 2016 Claimant signed an Employee Acknowledgment stating he had read and understood the Employee Handbook. The Employee Handbook contains a section entitled "Introductory Period" that provides either the employee or Employer may terminate employment for any reason during the introductory period.

12. Because Claimant was a probationary employee within his first 90 days there was no required procedure for his termination. Mr. LeRoy noted that Claimant would have received an evaluation had he completed the 90-day probationary period. He considered the incident involving Claimant and Mr. Davis on December 30, 2016 to constitute an escalation of Claimant's prior behavior and inability to work with others. Mr. LeRoy terminated Claimant on the afternoon of December 30, 2016 because he was not a good fit with Employer and failed to work with the team.

13. Claimant testified that he believed he had some authority on the inventory side of Employer's warehouse based on Ms. Baca's comments that the area was "his house." He explained that immediately prior to his verbal altercation with Mr. Davis on December 30, 2016 he was attempting to talk to a driver who was picking up a load from the warehouse. The driver spoke very little English and Mr. Davis kept interrupting Claimant. Claimant explained that Mr. Davis was acting like a child. He disputed that he used the phrase "know your place, boy" and instead told Mr. Davis to "remember who he was talking to." However, he admitted that he called Mr. Davis "boy." Claimant was familiar with the historical context of the use of the word "boy" and aware that people viewed the term as a racial slur. He expressed surprise when he was advised by Mr. LeRoy that he had been terminated because he was not a good fit and did not get along with the rest of the team. Claimant commented that he had never undergone a review to discuss his attitude and job performance.

14. Respondents have demonstrated that it is more probably true than not that Claimant was responsible for his termination from employment and is thus precluded from receiving indemnity benefits. The record reveals that Claimant had multiple altercations with ISPs, co-employees and supervisors during his employment with Employer. On December 7, 2016 Mr. Betz informed Claimant not to address issues directly with ISP's but to bring concerns or issues with ISP's to him or Mr. LeRoy. On December 12, 2016 Claimant had another altercation with ISP's and another employee contacted Mr. Betz to diffuse the situation. Mr. Betz asked Claimant to drop the issue but Claimant responded with a profanity-laced statement and stormed away. Mr. Betz reported that Claimant continued to have a negative demeanor for the rest of the day and was slamming things around.

15. At approximately 10:00 a.m. on December 30, 2016 Claimant entered Ms. Plata's office and confronted her regarding whether there were a sufficient number of trucks on site to haul inventory. Claimant questioned Ms. Plata's authority and decision-making. He became argumentative and confrontational. Ms. Plata asked Claimant to leave her office and he stormed away. Later on December 30, 2016 Claimant was involved in a verbal altercation with employee Mr. Davis. Mr. Davis interpreted Claimant's statements to be racially insensitive and became very upset. He explained that the context of the phrase and the way Claimant used the words was racist. Mr. LeRoy considered the incident involving Claimant and Mr. Davis on December 30, 2016 to constitute an escalation of Claimant's prior behavior and inability to work with others. He terminated Claimant on the afternoon of December 30, 2016 because Claimant was not a good fit with Employer and failed to work with the team.

16. Claimant was involved in two confrontations with ISP's, spoke to supervisors Mr. Betz and Ms. Plata in an argumentative, confrontational and disrespectful manner, and directed a racial slur toward co-employee Mr. Davis. The record reveals that Claimant thus precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. He is thus precluded from receiving indemnity benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents assert that Claimant is precluded from receiving temporary disability benefits because he was responsible for his termination from employment pursuant to §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. Under the termination statutes a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from

performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. As found, Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for his termination from employment and is thus precluded from receiving indemnity benefits. The record reveals that Claimant had multiple altercations with ISPs, co-employees and supervisors during his employment with Employer. On December 7, 2016 Mr. Betz informed Claimant not to address issues directly with ISP's but to bring concerns or issues with ISP's to him or Mr. LeRoy. On December 12, 2016 Claimant had another altercation with ISP's and another employee contacted Mr. Betz to diffuse the situation. Mr. Betz asked Claimant to drop the issue but Claimant responded with a profanity-laced statement and stormed away. Mr. Betz reported that Claimant continued to have a negative demeanor for the rest of the day and was slamming things around.

6. As found, at approximately 10:00 a.m. on December 30, 2016 Claimant entered Ms. Plata's office and confronted her regarding whether there were a sufficient number of trucks on site to haul inventory. Claimant questioned Ms. Plata's authority and decision-making. He became argumentative and confrontational. Ms. Plata asked Claimant to leave her office and he stormed away. Later on December 30, 2016 Claimant was involved in a verbal altercation with employee Mr. Davis. Mr. Davis interpreted Claimant's statements to be racially insensitive and became very upset. He explained that the context of the phrase and the way Claimant used the words was racist. Mr. LeRoy considered the incident involving Claimant and Mr. Davis on December 30, 2016 to constitute an escalation of Claimant's prior behavior and inability to work with others. He terminated Claimant on the afternoon of December 30, 2016 because Claimant was not a good fit with Employer and failed to work with the team.

7. As found, Claimant was involved in two confrontations with ISP's, spoke to supervisors Mr. Betz and Ms. Plata in an argumentative, confrontational and disrespectful manner, and directed a racial slur toward co-employee Mr. Davis. The record reveals that Claimant thus precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. He is thus precluded from receiving indemnity benefits.

ORDER

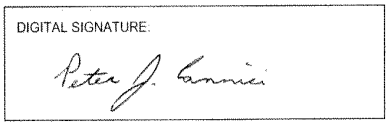
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is precluded from receiving indemnity benefits because he was responsible for his termination from employment with Employer on December 30, 2016.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 3, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issue was raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that he suffered an injury on June 2, 2016, in the course and scope of his employment for Employer.

FINDINGS OF FACT

1. Claimant is a 61 year old former employee of Employer. Claimant worked for Employer for approximately two years.

2. On June 2, 2016, Claimant was hit on the side of the head by a two inch pipe while working. The two inch pipe was covered in insulation and the pipe was still attached on one end so the pipe did not fall free.

3. William Sears, the Health, Safety and Environmental supervisor for the Employer, responded to and investigated work accidents for Employer. Mr. Sears credibly testified that Claimant suffered a small abrasion approximately the size of a dime, and no larger than a quarter, on the side of Claimant's head in the temple area due to the incident. Claimant was given first aid which included cleaning the wound and placing a band-aid on the abrasion.

4. Mr. Clayton Williams, Claimant's co-worker, provided first aid at the scene and confirmed that Claimant had a small scratch above his eye that was bleeding. Mr. Williams cleaned the wound with antiseptic wipes and put a band-aid on it.

5. Mr. Sears asked Claimant multiple times whether he needed medical treatment, and Claimant indicated he did not need medical attention.

7. After the investigation of the incident, Mr. Sears took Claimant to Concentra for a drug test. Mr. Sears did not observe Claimant acting injured, talking strange or acting like he had a head injury.

8. Claimant initially testified that he could not recall whether he requested medical treatment when he was taken to Concentra. Subsequently, Claimant testified that the reason he did not receive medical treatment was because he was not offered any treatment. Claimant's testimony was not deemed credible.

9. Mr. Sears credibly testified that on the way back from Concentra Claimant confirmed he was fine and did not need medical treatment.

10. Claimant returned to work the next day, June 3, 2016, and worked for five hours without requesting or requiring medical treatment. Claimant was able to perform all his duties.

11. Mr. Williams observed Claimant while he was working and Claimant reported he was fine and did not require any formal medical care.

12. After five hours of working in the morning of June 3, 2016, Claimant was terminated from his employment due to safety rule violations. Following Claimant's termination, he threatened to sue Employer.

13. Claimant reported to Dr. Lawrence Lesnak, Respondents' independent medical examiner, that Claimant had contacted an attorney on June 3 following his termination.

14. On June 5, 2016, Claimant requested medical treatment from Employer for his alleged injuries. Also, on June 5, 2016, Claimant went to the emergency room reporting a head injury. At the time of Claimant's emergency room visit, three days had passed since the June 2 alleged work injury. At the emergency room, there were no acute findings on CT scan or MRI. Nonetheless, based on Claimant's representations of right arm paresthesias, he was given a differential diagnosis of post concussive syndrome.

15. Claimant pursued an OSHA claim against the Employer as a result of the June 2 alleged injury. Claimant's OSHA complaint was summarily dismissed; however, Claimant testified that he has appealed the dismissal.

16. Claimant initially testified that he lost consciousness as a result of the pipe hitting his head. Subsequently, Claimant testified he "probably" lost consciousness. Then, Claimant testified he "maybe" lost consciousness and he really did not know if he lost consciousness. Claimant's testimony that he lost consciousness after the incident lacked credibility.

18. Mr. Williams and Mr. Sears credibly testified that Claimant seemed fine shortly after the incident, and he was coherent and able to talk normally shortly after the incident.

19. Dr. Lesnak credibly testified that, based on all the testimony provided at hearing, there was no mechanism of injury which would have produced a concussion. Dr. Lesnak opined that if there is an insult to the brain, a person will have symptoms immediately thereafter. Dr. Lesnak further testified that Claimant reported to him that he had no symptoms initially after the incident, and Claimant did not have any issues for three days. Dr. Lesnak further opined that this pattern of symptoms is not consistent

with any type of brain injury. Additionally, Dr. Lesnak noted that the brain scans completed three days after the incident showed no acute abnormalities.

21. Claimant testified that he has continued to have problems. Specifically, Claimant alleged that he cannot sleep, his vision is impaired, he has pain in his head, he suffers from depression, and he has had behavioral changes. Yet, despite all these continued complaints, Claimant testified that he returned to work at Kindred Healthcare as an engineer in November 2016. Claimant admitted that he performed physical work as part of his job duties with Kindred Healthcare. Claimant attempted to explain that he was at work, but his capacity was diminished by the work injury and he did not perform all his duties.

22. Dr. Lesnak credibly testified that Claimant's ongoing complaints and medical treatment is not consistent with a head injury. Dr. Lesnak noted that when Claimant went to the emergency room three days after the incident he complained of dizziness, nausea, and vomiting; however, over time, Claimant's symptoms have expanded. Dr. Lesnak opined that Claimant's symptomatology is not consistent with any type of head injury as a patient's worse symptoms would appear first, and then the symptoms would get better.

23. Additionally, Dr. Lesnak opined that Claimant did not sustain a cervical spine injury from the incident. Dr. Lesnak explained that the emergency room records three days after the incident documented Claimant's full range of motion in the cervical spine without tenderness, and there was no clinical indication for imaging of the cervical spine.

24. Dr. Lesnak reviewed the subsequent cervical spine MRI and testified the imaging performed two months later showed normal degeneration of the cervical spine for a 60 year old man.

25. Based on Employer's safety policies, Claimant was required to have work orders for the work he was performing on the pipe; a STA permit and a line break permit were required for the work he was performing at the time of the incident. Mr. Sears requested Claimant's STA and line break permits at the time of the incident and Claimant was initially not able to produce these documents. Claimant left the mezzanine level where the incident occurred, climbed down a 12 foot ladder on his own and left the area. Claimant could not be found by Mr. Sears after he left. Mr. Sears called Claimant on the radio, but Claimant did not respond to inform Mr. Sears where he was.

27. Mr. Sears learned that Claimant drove his scooter back to the work shop where he was found sitting at his desk in the shop writing something. Claimant testified variously that he did return to the shop following the alleged incident, that he did not recall returning to the shop after the incident and that he had the permits all along in his tool bag. Claimant's testimony about leaving the area where the alleged incident occurred lacks credibility.

29. Mr. Sears credibly testified that when Claimant returned to the incident location, he provided Mr. Sears with the STA and line break permits from a pouch on Claimant's scooter. The STA and line break permits were incomplete and not fully filled out.

31. Mr. Sears credibly testified that the Employer ensured that all employees knew the STA and line break permits were required through new-hire orientation, employee training, including classroom training, online training and weekly safety topics. Claimant credibly testified that he was required to have lockouts in place when performing the work he was doing at the time of the incident. Claimant admitted that he needed a red lock, which he did not use.

33. Mr. Sears credibly testified that during his investigation into the incident he learned that Claimant failed to follow the safety rule regarding proper lockout/tagout procedures.

34. Claimant credibly testified that he had signed paperwork which instructed employees to wear a hard hat in the area where the alleged work injury occurred. Claimant admitted he received training on the areas where he was required to wear a hard hat. Claimant admitted he was not wearing a hard hat, as required, at the time of the incident. The failure to wear the hard hat was contrary to Employer's safety policies.

35. Mr. Sears confirmed that Claimant received training regarding appropriate personal protective equipment (PPE) similar to the permits and lockout/tagout training and had a written policy regarding PPE.

37. Mr. Sears credibly testified that Claimant had four safety violations as a result of the June 2, 2016, incident. Mr. Sears indicated that because of the severity of the safety rule violations committed by Claimant, Employer's policy called for termination.

CONCLUSIONS OF LAW

Having entered the Findings of Fact above, the following Conclusions of Law are reached.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers'

compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

4. A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

5. Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2013). See City of *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29 (Colo. App. 2000).

6. Compensable injuries involve an "injury" which requires medical treatment or causes disability. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). Even if an "accident" occurs at work it must be significant enough to result in an "injury" requiring formal medical treatment or resulting in impairment. *Wherry v. City and*

County of Denver, W.C. No. 4-475-818 (Ind. Cl. App. Office, March 7, 2002). Pursuant to *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (Ind. Cl. App. Off. March 7, 2002), if an accident is not a significant event resulting in an injury requiring more than first aid, claimant is not entitled to workers' compensation benefits.

7. Claimant was admittedly involved in an "accident" at work, when a two inch insulated pipe struck him in the head. However, as Mr. Sears and Mr. Williams both credibly testified, Claimant suffered only a small scratch above his eye that was cleaned and a band-aid was applied. Claimant's inconsistent testimony that he lost consciousness as a result of being struck is not credible. Both Mr. Sears and Mr. Williams credibly testified that after the incident Claimant stated that he was fine. Mr. Sears and Mr. Williams observed that Claimant appeared fine, and he was coherent and spoke in a normal fashion after the incident.

8. Furthermore, Claimant repeatedly declined medical care after the incident. In fact, Claimant did not allege any symptoms or ill-effects from the incident until three days afterwards, and after he had already been terminated from employment. Claimant admitted he returned to work the next day after the incident and worked for five hours, performing his regular duties. At no time did Claimant request medical treatment. Indeed, Mr. Williams credibly testified that he saw Claimant the next day and Claimant specifically stated he was fine. Mr. Sears confirmed that Claimant did not request medical care at the termination meeting.

9. Dr. Lesnak credibly testified that it is not consistent with head injuries to have delayed symptoms. Dr. Lesnak explained that because Claimant had no symptoms for three days, he did not suffer a concussion from the pipe striking his head. Moreover, Dr. Lesnak persuasively testified Claimant's ongoing symptomatology is inconsistent with a head injury in that it is not possible to have no symptoms, then some delayed symptoms and then an expanding and worsening symptom pattern.

10. Therefore, it is concluded that Claimant did not sustain a compensable "injury" as a result of the June 2, 2016 incident, which warranted medical treatment or produced disability. Therefore, Claimant did not sustain a compensable injury which entitled him to benefits.

ORDER

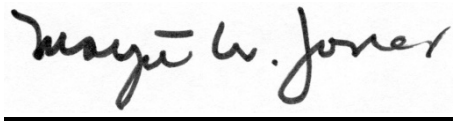
It is therefore ordered that:

1. Claimant's claim is denied and dismissed with prejudice.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail,

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 3, 2017_



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did Claimant prove that he suffered a compensable injury to his right shoulder on December 14, 2016?

If this claim is deemed compensable, the ALJ will address these additional questions:

2. Is Claimant entitled to temporary total disability (TTD) benefits commencing December 14, 2016?

3. Can the ALJ order Employer to reinstate Claimant's charged PTO?

4. Is the arthroscopic shoulder surgery recommended by Dr. Simpson reasonable and necessary treatment for the compensable injury?

STIPULATIONS

1. Claimant's average weekly wage (AWW) is $614.

2. If the claim is compensable, Dr. Jefferson Lloyd and other providers at Emergicare are authorized.

3. If the claim is compensable, Respondents do not dispute Claimant's entitlement to TTD benefits commencing December 14, 2016.

FINDINGS OF FACT

1. Claimant operated a rotomold machine making plastic parts for Employer. The job required Claimant to lift plastic molds up to approximately chest or shoulder-level multiple times per day. The molds weigh between 5 to 45 pounds, depending on the parts being produced.

2. On December 14, 2016, Claimant felt a painful "pop" in his right shoulder while lifting a mold that weighed approximately 15-20 pounds.

3. Due to severe pain, Claimant immediately reported the injury to his supervisor, Bill Doutre. Claimant recalls telling Mr. Doutre he felt a pop, but also said he might have injured the shoulder at his previous job. Mr. Doutre did not recall Claimant mentioning a pop, but recalled Claimant saying he may have hurt the shoulder at work for Employer or at his previous job. In any event, the information Claimant conveyed

was clearly sufficient to indicate a potential work-related injury, because he was referred for treatment forthwith at Employer's designated provider, Emergicare.

4. Several days before December 14, Claimant had mentioned intermittent shoulder pain to his coworker, Jim Valdez. Claimant told Mr. Valdez he might have hurt his shoulder at his last job climbing up and down towers at a wind farm. Mr. Valdez recalls the complaints related to Claimant's left shoulder and does not recall Claimant ever mentioning problems with the right shoulder. Mr. Valdez also noted it was not unusual to be sore after starting a new position on the rotomold machine.

5. Claimant saw Dr. Agnes Flaum at his initial visit to Emergicare on December 14. Dr. Flaum's report notes Claimant "presents with right shoulder pain that has been prevalent at work for the last 2 days, but this morning he was lifting at work and felt a pop in his shoulder." Claimant's active shoulder ROM was reduced in all directions and he reported a pain level of 7. Dr. Flaum diagnosed a right shoulder "sprain," gave Claimant a sling and released him to return to modified duty with "no use of right hand or arm."

6. Claimant saw Dr. Flaum again on December 21, 2016. His shoulder pain had not improved but was actually worse, so Dr. Flaum sent him for an MRI. The MRI showed a bilobed paralabral cyst extending into the supraspinatus fossa, and a small tear of the posterior superior labrum. The rotator cuff was intact. Based on the MRI results, Dr. Flaum referred Claimant to Dr. Michael Simpson for an orthopedic evaluation.

7. Claimant began treating with Dr. Jefferson Loyd at Emergicare on December 28, 2016.

8. Claimant saw Dr. Simpson on January 4, 2017. He told Dr. Simpson he felt a pop in his shoulder while lifting a plastic mold at work. Claimant described severe pain since the episode. He denied any prior history of shoulder problems or shoulder treatment. Dr. Simpson opined the paralabral cyst is likely impinging on the suprascapular nerve, causing Claimant's pain. Dr. Simpson opined "it is impossible to say whether or not his labral tear was acute or pre-existing. However, he was working at the job for approximately four months and I think this would have been very difficult for him to do with this degree of paralabral cyst. Therefore, I think the job he was assigned to which required repetitive lifting to the chest level puts significant strain on his shoulder resulting in development of enlarging paralabral cyst, which is now causing suprascapular nerve compression. Therefore, his pathology and symptoms do appear to be cause[ally] related to the job he was working at the time." Dr. Simpson recommended arthroscopic decompression of the paralabral cyst, a labral repair, and a decompression of the suprascapular nerve. Dr. Simpson requested preauthorization and tentatively scheduled Claimant for surgery on January 18, 2017.

9. Respondents filed a Notice of Contest on January 13, 2017.

10. Claimant has not undergone surgery due to lack of prior authorization.

11. On February 13, 2017, Insurer's adjuster wrote to Dr. Loyd seeking his opinions regarding causation of Claimant's shoulder condition. Dr. Loyd responded that the bilobed cyst was chronic, but the labral tear was acute and resulted from the lifting incident on December 14. Dr. Lloyd subsequently indicated he agrees with Dr. Simpson's surgical recommendation.

12. Although Claimant was released work with restrictions, Employer did not offer Claimant modified duty, and he has been off work since December 14, 2016. Employer paid Claimant for 38.77 hours of paid time off (PTO) from December 15 until December 21, 2016.

13. On May 31, 2017, Dr. Loyd opined that absent any interval improvement in Claimant's condition, the prior work restrictions remain in effect pending surgery.

14. Claimant saw Dr. Jack Rook for an Independent Medical Examination (IME) at his counsel's request on May 29, 2017. Claimant gave Dr. Rook a history of injury consistent with the history described to Dr. Flaum, Dr. Simpson and in his hearing testimony. Dr. Rook opined it was "quite clear" that Claimant's right shoulder condition reflects a work-related injury. Dr. Rook opined the popping sensation likely represented the acute tearing of the labrum. Dr. Rook agreed with Dr. Simpson's surgical recommendation.

15. Dr. William Ciccone Jr. performed a record review for Respondents on June 5, 2016. Dr. Ciccone agreed with Dr. Simpson that the paralabral cyst might be irritating the suprascapular nerve, but thought surgery was premature pending a diagnostic suprascapular nerve block. If Claimant received good relief from the nerve block, Dr. Ciccone suggested needle aspiration of the cyst.

16. Dr. Ciccone opined that Claimant's shoulder condition is not causally related to his employment. Although Claimant experienced increased right shoulder pain while at work, Dr. Ciccone does not believe he suffered any acute injury. Dr. Ciccone opined that labral cyst formation generally occurs after a tear has been present for "a while" and is usually a chronic condition.

17. At the time of his injury, Claimant had been in the rotomolding position for approximately three weeks. Claimant worked without difficulty or limitation until the morning of December 14, 2016. Although Claimant felt intermittent "soreness" in his right shoulder a few days before the injury, this soreness did not impede his ability to perform his duties.

18. Since the morning of December 14, 2016, Claimant has been unable to use his right arm for significant activities due to severe shoulder pain.

19. Claimant's testimony is credible and persuasive.

20. The opinions of Dr. Simpson, Dr. Loyd, and Dr. Rook are more persuasive than Dr. Ciccone's contrary opinions.

21. Claimant proved by a preponderance of the evidence he suffered a compensable injury to his right arm as a result of his work duties on December 14, 2016.

22. Claimant has been continuously disabled and suffered a wage loss as a proximate result of his industrial injury since December 14, 2016.

23. Claimant proved by a preponderance of the evidence that the surgery proposed by Dr. Simpson is reasonable, necessary, and causally related to his industrial injury.

CONCLUSIONS OF LAW

A. Claimant's right shoulder injury is compensable

To receive compensation or medical benefits, Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation. If a claimant's work aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Cotts v. Exempla*, W.C. No. 4-606-563 (ICAO, August 18, 2005). Rather, when a claimant experiences symptoms at work, the ALJ must determine whether the subsequent need for treatment was caused by an industrial aggravation of a preexisting condition or due to the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

As found, Claimant proved he injured his right shoulder while lifting a plastic mold at work on December 14, 2016. Claimant presented as forthright and sincere at the

hearing. As reflected in the medical records, Claimant has consistently attributed the onset of symptoms to lifting a mold that morning. There is no persuasive evidence that Claimant had any limitation in using his right arm before that date, and Claimant's condition appears to have changed significantly on the morning of December 14. Since that day, he has had difficulty using his right arm for even routine activities of daily living.

Admittedly, the testimony from Claimant's co-workers is puzzling, as they have no obvious reason to fabricate their stories. But each witness gave different accounts of what Claimant allegedly said, and when he said it. As a result, crediting any individual witnesses' testimony effectively discredits the others. According to Ms. Mellon, Claimant said he injured his shoulder over the weekend "playing tackle football and rock climbing." She further testified this conversation occurred early in the morning of December 14 while they were picking up their daily assignments at a computer terminal. By contrast, Ms. Rodriquez and Mr. Kerr testified Claimant reported injuring his shoulder while they were outside on their morning smoke break. Both witnesses stated Ms. Mellon was also present, but Ms. Mellon did not mention any conversation during a smoke break. Regarding the alleged mechanism of injury, Ms. Rodriguez testified Claimant said he hurt his shoulder playing football or basketball, whereas Mr. Kerr said Claimant hurt the shoulder "playing around with friends over the weekend" but "did not specify how he did it." In light of these inconsistencies, the ALJ declines to give the co-worker testimony substantial weight.

Furthermore, even if Claimant had done something to his shoulder on the weekend before December 14, he worked on Monday and Tuesday with no difficulty and no outward sign of pain or limitations. Given that the job required extensive use of his upper extremities and frequent lifting of objects to chest or shoulder height, it is not likely Claimant could have worked on Monday and Tuesday of that week if his shoulder was in the condition it was when he was evaluated by Emergicare on Wednesday, December 14. Based on the totality of evidence presented, the ALJ concludes more likely than not something happened to Claimant's shoulder on the morning of December 14, 2016 while he was performing his work duties. Claimant either suffered a new traumatic injury or aggravated a previously asymptomatic pre-existing condition. Either scenario results in a compensable injury.

B. Claimant is entitled to TTD benefits commencing December 14, 2016

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v.*

Charles J. Murphy & Co., 964 P.2d 595 (Colo. App. 1998). Once the claimant establishes temporary disability, the right to benefits is measured by the degree of the wage loss, not the claimant's willingness to seek employment or the claimant's hypothetical ability to perform modified employment. *See Black Roofing Inc. v. West*, 967 P.2d 195 (Colo. App. 1998); *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987).

The persuasive evidence shows that Claimant was disabled by and suffered a wage loss as a direct and proximate consequence of his industrial injury. Claimant could not effectively utilize his right upper extremity for work tasks due to pain and range of motion loss. Dr. Flaum opined he could only perform work requiring "no use" of his right arm, and Dr. Loyd continued that restriction pending surgery. Employer did not offer Claimant modified duty, resulting in a total wage loss since December 14, 2016.

Consistent with the above-referenced evidence, Respondents' counsel stated at the hearing Respondents do not dispute Claimant's entitlement to TTD benefits if the claim is compensable.

C. The ALJ cannot order Employer to reimburse Claimant's PTO

Employer paid Claimant wages from December 15 through December 21, 2016 by depleting his accrued PTO. Since Employer "charged" Claimant's earned PTO, Claimant is entitled to a full award of TTD benefits for that period of time. *See* § 8-42-124(2)(a) & (4); *Public Service Co. of Colorado v. Johnson*, 789 P.2d 487 (Colo. App. 1990); *Barnhill v. City and County of Denver*, W.C. No. 4-525-398 (ICAO, August 27, 2003).

The ALJ has no authority to order Employer to reinstate Claimant's PTO leave. *E.g., Nielsen v. Public Utilities Commission*, W.C. No. 4-405-800 (ICAO, May 10, 2000). The propriety of an employer's action in charging a claimant for accrued leave is a contractual matter, and disputes regarding this issue are properly adjudicated in another forum.

D. The surgery proposed by Dr. Simpson is reasonable and necessary

As found, the arthroscopic surgery recommended by Dr. Simpson is reasonable and necessary treatment for Claimant's compensable injury. The ALJ has credited Dr. Simpson's opinion regarding surgery as more persuasive than Dr. Ciccone's contrary opinions. Furthermore, Respondents' objection to the proposed surgery was primarily based on their contention that the Claimant's injury is not compensable. Having resolved the compensability question in Claimant's favor, it follows that the surgery is reasonable, necessary, and causally related.

ORDER

It is therefore ordered that:

1. Claimant's right shoulder injury is compensable.

2. Based on the stipulated AWW of $614, Insurer shall pay Claimant TTD benefits at the rate of $409.33 per week, commencing December 14, 2016 and continuing until terminated according to law.

3. Insurer shall cover all reasonable and necessary medical treatment from authorized providers to cure and relieve the effects of Claimant's December 14, 2016 injury, including, but not limited to, the surgery recommended by Dr. Simpson.

4. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 7, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant has established by the preponderance of the evidence that she suffered a compensable injury or occupational disease.

II. If Claimant has established that she suffered a compensable injury or occupational disease, whether Claimant is entitled to reasonable, necessary and related medical benefits.

FINDINGS OF FACT

1. Claimant has worked for Employer since 2000. Claimant works as a Sorter/Unloader and is responsible for lifting boxes and bags of clothing and other items, sorting items, and pushing, pulling, and unloading carts.

2. Claimant testified at hearing that, on August 16, 2016, she felt a pop or click in her back while lowering a box of items from a cart to the floor. Claimant testified that the pain subsequently increased by the day. Claimant did not report the incident to Employer at that time. Claimant continued working her regular work duties.

3. Claimant also alleged that she sustained leg lesions with an onset date of August 16, 2016, which was the subject of a separate workers' compensation claim (W.C. No. 5-036-138).

4. Claimant initially sought treatment for her leg pain and leg lesions with her primary care physician at Clinica Family Health. While the visits focused on Claimant's leg condition, a medical record dated September 19, 2016 notes that the review of systems was positive for back pain and leg pain. A subsequent medical note dated September 30, 2016 indicates the review of systems was negative for back pain, and a December 14, 2016 medical record does not reference any back complaints or back findings.

5. Claimant reported her leg lesions and leg pain to Employer on December 15, 2016.

6. That same day, Employer sent Claimant to Hiep Ritzer, M.D. at HeathONE Occupational Medicine and Rehabilitation. Claimant complained of a right leg lesion, right ankle pain, right leg pain, and lower back pain. Dr. Ritzer documented,

> At the end of her work day on August 16, 2016, she 'felt pain and a heavy sensation to her left lower leg, ankle region.' There was no particular injury. Her bags of clothing that she would lift range from 20 to 50 pounds per bag. She has been having pain progressive since that time…She also

> relays that greater than about 5 months ago she has been having lower back pain with the same right leg radiation with difficulty finding comfortable position at night. No particular injury as well. She has not made a formal report of that complaint.

Dr. Ritzer's physical examination of Claimant focused on Claimant ankle and legs, but also noted mild tenderness to palpation in the lower lumbar paraspinal musculature. Dr. Ritzer diagnosed Claimant with a disorder of the skin and right leg pain. Dr. Ritzer placed Claimant on work restrictions and noted "She may need to be evaluated for her lower back and right leg pain under a different claim."

7. On December 20, 2016, Leigh-Ann Jara interviewed Claimant regarding her workers' compensation claim for the leg lesions. Ms. Jara works for Insurer as a Bilingual Claims Professional and testified at hearing on behalf of Respondents. Ms. Jara testified that, during the December 20, 2016 interview, Claimant reported a rash on her leg, as well as pain in her legs and back. Claimant initially indicated to Ms. Jara that her back pain was due to repetitive lifting. When Ms. Jara further questioned Claimant, Claimant referred to lifting heavy boxes on August 16, 2016.

8. Dr. Ritzer reevaluated Claimant for the leg lesions on January 3, 2017. Claimant continued to complain of right lower leg lesions, right ankle pain, right leg pain, and lower back pain. Dr. Ritzer advised Claimant that her back pain needed to be evaluated as a separate injury under a second workers' compensation claim.

9. Claimant completed an accident reporting form for her low back pain on January 5, 2017. Claimant reported that she injured her lower back and right hip on August 16, 2016. In response to the question, "What object or substance directly harmed you?" Claimant's response was, "Unloading thrift items in heavy bags and boxes; or alternatively repetitive motion of years of lifting heavy bags/boxes." On the form, Claimant indicated that she notified her supervisor, Mike Mallet, of the alleged injury on August 24, 2016.

10. Dr. Ritzer reevaluated Claimant on January 9, 2017 for the leg lesions. Claimant's leg lesions were diagnosed as erythema nodosum and determined to not be work-related. Dr. Ritzer discharged Claimant from her care for the leg lesions, but continued Claimant's work restrictions due to Claimant's continued leg and back pain. Dr. Ritzer noted, "There is overlap between her leg pain, which most likely is from the lesions. Initially when she presented she stated that it radiated up from the lesions to her hip and back, and now she is stating that there is some radiation the other way as well."

11. Claimant presented to Dr. Ritzer on January 10, 2017 for an evaluation of her lower back and right hip pain. Dr. Ritzer noted the following regarding Claimant's reported mechanism of injury:

> She felt that it occurred around August 16, 2016. She was taking multiple boxes down from a height of about four feet to the ground repetitively

> when she felt pain to her lower back, which she felt got worse over the following two days. About two days later, she did notify her supervisor, who reported it as an incident. She did feel a pop in the lower back area. She continued working since that time and noticed progressively worsened lower back pain with right hip and leg radiation.

Claimant reported that the boxes weighed between 15 to almost 50 pounds, and that her work entailed a significant amount of repetitive lifting.

12. On physical examination, Dr. Ritzer noted mild tenderness of the lower lumbar paraspinal musculature and lateral hip area. Seated and supine straight leg raise tests were negative bilaterally. Dr. Ritzer assessed a lumbar strain and right hip strain. Dr. Ritzer concluded that the objective findings were consistent with Claimant's history and work-related mechanism of injury. Dr. Ritzer placed Claimant on work restrictions, ordered an MRI of Claimant's lumbar spine and right hip, and recommended Claimant undergo physical therapy.

13. Ms. Jara conducted a second interview of Claimant on January 17, 2017 regarding Claimant's claim for her back. Claimant informed Ms. Jara that she felt a spasm in her back due to lifting a single heavy box on August 16, 2016. When Ms. Jara questioned Claimant further on the mechanism of injury, Claimant stated that she lifted and moved heavy things throughout the day every day. Claimant also reported to Ms. Jara that she did not have any prior back injuries or back pain, and had not been to the doctor for her back problems.

14. Claimant underwent MRIs of her right hip and lumbar spine on January 17, 2017. The MRI of the right hip revealed slight iliac edema adjacent to the right SI joint, and fibrocystic changes along the right anterior femoral head, which was noted, could be associated with cam-type femoroacetabular impingement. No labral tear was identified. The MRI of the lumbar spine revealed mild multilevel facet arthrosis, mild degenerative changes at T11-T12, and sagittal sequences showing trace physiologic or nonspecific free pelvic fluid. There was no posterior disk, central canal stenosis, or neural foraminal stenosis, and no evidence of fractures, spondylosis, or spondylolisthesis.

15. Dr. Ritzer reevaluated Claimant on January 19, 2017. Claimant reported her pain was unchanged. Dr. Ritzer reviewed the MRI results. On physical examination, Dr. Ritzer noted tenderness to the lower lumbar paraspinal musculature with no swelling or tightness. Seated straight leg raise test was negative. Dr. Ritzer continued Claimant's work restrictions and referred Claimant for chiropractic care with Jennifer G. Walker, D.C.

16. Claimant presented to Dr. Walker on January 31, 2017. Dr. Walker documented the following regarding Claimant's reported mechanism of injury:

> She states that on August 16, 2016, she was at work and unloading heavy boxes and bags weighing 40-50 pounds. She felt a pop in her low back

> but did not have instant pain. She states that later that night her pain increased greatly. She did not sleep well that night due to her pain. She states that she let her manager know that she injured her back and she was sent to HealthONE Occupational Medicine and Rehabilitation clinic about a month following her injury.

17. On physical examination, Dr. Walker noted decreased thoracic rotation, decreased lumbar range of motion, lumbar tenderness and clinical evidence of trigger points in the lumbar area reproducing some leg pain. Kemps testing, Nachlas, Ely, SLR and BLR were negative. Yeomen produced low back pain but no radiation. FABRE test produced mild right side low back pain. Dr. Walker remarked that Claimant's "symptom/pain generators appear to be myofascial/myogenic in nature." Dr. Walker concluded that Claimant's complaints appeared to correlate with her account of the injury. Dr. Walker gave an impression of lumbar strain; myofascial/myogenic dysfunction and trigger points in the lumbar paraspinal and gluteal musculature; and mechanical dysfunction in the thoracic, lumbar, and pelvis. Dr. Walker ordered that Claimant undergo chiropractic/myofascial release treatment.

18. In a letter to Respondents' counsel dated April 27, 2017, Dr. Ritzer opined that Claimant's condition was work-related. Dr. Ritzer noted that she reviewed a medical record from Clinica Family Health dated May 26, 2016. Dr. Ritzer stated,

> Based on review of my initial evaluation, as well as the medical record, I would have to say that this is causally related to the incident on August 16, 2016, unless medical records can be produced from her primary care physician from May 26, 2016, onward through August 2016. It may be that the incident described by the patient on August 16, 2016, may have exacerbated her underlying condition, but regardless, an exacerbation of an underlying condition would be treated as a workers' compensation injury.

19. The May 26, 2016 medical record referenced by Dr. Ritzer indicates Claimant complained of back pain to her personal physician prior to August 16, 2016. Claimant presented to Jennifer Manchester, N.P. at Clinica Family Health on May 26, 2016 for back pain. Claimant reported that the back pain was gradual without injury and persistent. Claimant rated the pain at a 10. Claimant reported having back pain for the last three months, with the pain increasing within the last three nights. NP Manchester noted that there were no concerning exam findings and no evidence of 10/10 pain. NP Manchester assessed acute right-sided low back pain without sciatica.

20. Dr. Ritzer testified by post-hearing deposition on June 22, 2017. Dr. Ritzer testified that her April 27, 2017 opinion regarding the work-relatedness of Claimant's condition was based on Claimant's description of the August 16, 2016 incident given to her at the January 10, 2017 evaluation. Dr. Ritzer acknowledged that there were discrepancies in the histories Claimant gave to her and other physicians. Dr. Ritzer acknowledged that Claimant provided contradictory histories to her in different evaluations. Specifically, on December 15, 2016, Claimant told Dr. Ritzer that she had

back pain for five months with no particular injury while on January 10, 2017, Claimant told Dr. Ritzer that she felt a "pop" in her back and felt pain. Dr. Ritzer further acknowledged that Claimant did not report to Dr. Walker on January 31, 2017 that she felt instant pain.

21. Dr. Ritzer testified that if Claimant had given her the same history of gradual onset of pain with no trauma as she reported to Dr. Manchester on May 26, 2016, she would not determine the pain to be work-related. Dr. Ritzer clarified, however, that her opinion as to the work-relatedness of the condition as described in May 2016 and the condition as described in January 2017 were different because the description of Claimant's pain was different in May 2016 and January 2017. Dr. Ritzer stated that Claimant denied numbness to Dr. Manchester in May 2016 but reported burning and numbness to Dr. Manchester in January 2017. Dr. Ritzer then acknowledged that there remained a discrepancy of Claimant's description of the injury given to her in December 2016.

22. Dr. Ritzer testified that Claimant never described the injury as an exacerbation of her preexisting condition or as a repetitive trauma. Dr. Ritzer testified that she did not believe the injury was due to repetitive trauma.

23. Claimant testified at hearing that the bags and boxes she moved at work varied in weight, but weighed approximately 50-55 pounds. Claimant testified that she worked at both the clothing table and the miscellaneous table throughout different periods of her employment with Employer. Claimant testified that she performed her job duties of lifting, moving and sorting seven hours a day. Claimant testified that she experienced back pain prior to August 16, 2016, but the pain was not as bad as it was subsequent to the alleged date of injury. Claimant stated that she believes her back condition is work-related because of the repetitive nature of the job and her condition worsening in August 2016. Claimant testified that she spoke to her supervisor, Mike Mallet about her back condition. Claimant testified that she also mentioned her back problems to the Assistant Supervisor, but did not report it as a work-related incident until later. Claimant acknowledged she had been trained on how to report work-related incidents.

24. Mike Mallet testified at hearing on behalf of Respondents. Mr. Mallet testified that Claimant reported an issue regarding a bite or rash on her ankle to him, but did not report any issue with her back. Mr. Mallet testified that bags and boxes at the clothing station typically weigh approximately 20-25 pounds, while those at the miscellaneous table are "a little" heavier. Mr. Mallet testified that Claimant last worked at the miscellaneous table at least five years ago, and that it was not typical to see bags or boxes weighing 50-55 pounds.

25. Based on multiple inconsistencies and contradictions in Claimant's reports to Employer and to medical providers, the ALJ finds Claimant's testimony is not credible or persuasive.

26. The ALJ credits the testimony of Mr. Mallet and Ms. Jara.

27. The ALJ does not credit the opinions of Drs. Ritzer and Walker on the work-relatedness of Claimant's condition and finds Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury or an occupational disease.

28. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S. (the "Act"), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of

conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

A claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

As found, Claimant failed to establish by a preponderance of the evidence that sustained a compensable injury to her low back. While Claimant was diagnosed with a lumbar strain and a right hip strain, there is insufficient credible and persuasive evidence establishing that Claimant's work proximately caused her back condition, or aggravated, accelerated, or combined with a preexisting condition to produce the need for treatment. To the extent Claimant contends she suffered an occupational disease, the ALJ is also not persuaded.

Claimant's reported mechanism of injury is inconsistent throughout the medical records and in her interviews with Ms. Jara. Claimant contends she felt a pop or click on August 16, 2016 and felt worsening pain, but failed to mention her back pain to Employer until December 2016. Claimant initially reported in the medical records that she sustained no particular injury to her back. Claimant subsequently alleged a specific incident occurred, while continuing to also attribute her pain to the heavy lifting and repetitive nature of her employment.

Exhibit 1 of the Guidelines addresses Low Back Pain and provides, in part:

> Given conflicting evidence regarding lifting alone, it would appear that the best evidence exists to support a combination of regular heavy lifting and bent posture as cumulatively causing low back pain. Applying the totality

> of evidence, it would appear that heavier lifting, 25 kilograms or 50-55 pounds and higher, may be considered a risk factor for cumulative low back pain, when combined with flexion and performed 10-15 times per day over cumulative years of exposure.

While Claimant alleged that she lifted 50-55 pound bags and boxes for seven hours a day, the ALJ credited the testimony of Mr. Mallet, who indicated the bags and boxes typically weighed between 20-25 pounds. There is insufficient credible and persuasive evidence Claimant was subject to the risk factors for cumulative low back trauma under the Guidelines.

Drs. Ritzer and Walker's determination that Claimant's condition is work-related is based on the history and description of the mechanism of injury provided to them by Claimant, which has been found inconsistent and incredible. While Dr. Ritzer later opined in her post-hearing deposition that her opinions on work-relatedness were different for Claimant's reported symptoms in May 2016 and January 2017, Dr. Ritzer continued to acknowledge discrepancies in Claimant's reported history on December 15, 2016.

Based on the totality of evidence, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable injury or occupational disease. As Claimant failed to establish a compensable occupational disease or injury, the issue of Claimant's entitlement to medical treatment is moot.

ORDER

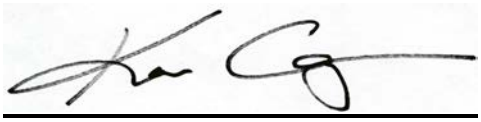
It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she suffered an occupational disease or injury. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 4, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

1. Whether Claimant is entitled to an increase in her average weekly wage ("AWW") based on her earnings from a different employer prior to her commencement of work for Respondent-Employer.

FINDINGS OF FACT

Based on the testimony and evidence presented at hearing, the undersigned ALJ enters the following Findings of Fact:

1. On September 27, 2016, Claimant was hired by Employer, located in Colorado Springs, to work as a CNA ("Certified Nursing Assistant"). Claimant's AWW for work performed for Employer is $426.56.

2. The Claimant was hired at Union Printers Home effective September 27, 2016. (Exhibit A, p. 1). The Claimant's work schedule provided for three days off for one week, followed by four days off for the following week. The Claimant testified that she *intended* to continue working her existing job at St. Mary Corwin in Pueblo, selecting shifts to accommodate those days off from Union Printers Home.

3. The Claimant participated in a two-week temporary training schedule subsequent to her hire by Union Printers Home. The temporary training schedule was Monday through Friday, 8:00 a.m. to 5:00 p.m. The Claimant did not take any shifts at St. Mary Corwin during the temporary training schedule with Union Printers Home.

4. On October 6, 2016, Claimant injured her low back while moving a patient as part of her job duties for Employer.

5. Claimant was referred by her employer to Memorial Health System Occupational Health Clinic with an initial evaluation date of October 11, 2016. The Claimant was evaluated by Dr. Cynthia Lund who assigned work restrictions of light work with lift/carry less than 10 lbs., alternate positions as needed, no patient assists, lifts or transfers. (Exhibit. 3, pp. 15-17).

6. At the time of hearing, the Claimant remained under work restrictions assigned by her Workers' Compensation physician and had not been placed at MMI or released to full-duty without restrictions. (Exhibit. 3, pp. 9-11)

7. A General Admission of Liability was filed by Respondents on March 15, 2017 (Exhibit B). The Respondents admitted for temporary total disability benefits for a

closed period: October 25, 2016 through December 11, 2016. The AWW listed on the General Admission of Liability is $426.56.

8. Prior to commencement of work for Employer, Claimant earned wages from St. Mary Corwin Hospital in Pueblo, CO, as a CAN. Claimant earned $14.11 per hour for St. Mary Corwin Hospital. (Exhibit D, p. 10). The Claimant's gross earnings for 2016 related to her work at St. Mary Corwin totaled $13,789.87. (Exhibit 2, p. 5).

9. After starting work for Employer on September 27, 2016, Claimant did not return to work for St. Mary Corwin Hospital. At no point did Claimant work both jobs concurrently.

10. According to wage records from St. Mary Corwin Hospital, Claimant's last paycheck for hours worked issued on September 24, 2016 (Exhibit D, p. 11). Three days after the issuance of that check, Claimant started work for Employer. Claimant did not receive any earnings for hours worked from St. Mary Corwin Hospital after September 24, 2016. A check was issued on November 5, 2016 for paid time off, based on testimony from Claimant's supervisor at St. Mary Corwin Hospital, Angela Mullins (Exhibit D, p. 10).

11. Angela Mullins testified as Claimant's supervisor at St. Mary Corwin Hospital. Ms. Mullins testified that Claimant was required to schedule shifts online at least 2 weeks before the schedule started, and the minimum requirement for Claimant to maintain her employment was to work at least 4 8-hour shifts per 6-week schedule.

12. According to the attendance records from St. Mary Corwin Hospital, Claimant had "called-off" for her shifts on September 27th, 28th and 30th, 2016. She was scheduled to work shifts on October 26th, 27th, and October 28th, 2016, although Ms. Mullins testified she had no way of knowing when those shifts were scheduled. The attendance records indicate Claimant called-off on October 28, 2016 (Exhibit D, p. 12). While the attendance records indicate that Claimant had scheduled herself for shifts on October 26th and October 27th, her pay records from St. Mary Corwin Hospital do not reflect that she actually presented for those shifts. The last paycheck issued to Claimant for hours worked was dated September 24, 2016 (Exhibit D, pp. 10-11).

13. Claimant testified at hearing that she intended to maintain the same number of hours at St. Mary Corwin Hospital while working full-time for Employer, which included 3-4 8-hour shifts at St. Mary Corwin Hospital each six weeks. Some of the available shifts would be "doubles" or "graveyards", thus enabling Claimant greater flexibility in seeking outside work. Claimant testified that she would have worked 24-32 hours a week at St. Mary Corwin Hospital in addition to her full-time work for Employer but for the work injury. Claimant testified that she intended to work, on average, 40 hours a week for Employer and 32 hours for St. Mary Corwin Hospital, for a total of 72 hours per week.

14. Nowhere in the record is there evidence that Claimant, while working an average of 24 to 32 hours per week at St. Mary Corwin (including some double shifts) sought additional hours to maximize her income, by seeking more shifts at St. Mary Corwin or other health care facilities. Failing that possibility, Claimant did not seek greater income by seeking part time work in, for example, retail or restaurant work.

15. Claimant testified that, if she was released to work with no restrictions, she would be able to return to work for both St. Mary Corwin and Employer if re-hired. She testified that her CNA license was currently active, as of the date of the hearing.

16. According to the State of Colorado website, which serves as the primary source verification of the license from the Colorado Division of Professions and Occupations, Claimant's CNA license expired on January 31, 2017. (Exhibit G). At hearing, Claimant then acknowledged that her CNA license had expired on January 31, 2017.

17. Claimant admitted that she failed to list her complete employment history on her application to a subsequent employer, Service Source, dated November 7, 2016 (Exhibit F, p. 31). Claimant testified that she omitted Respondent-Employer from the application "Because I only worked—I was only there for a few weeks."

18. In this same application, Claimant indicates that in March, 2015, she left a full-time position making $13.00 per hour at University Park Care Center in Pueblo, to begin a part-time position making $11.00 per hour at St. Mary Corwin. She could not recall her supervisor's name from University Park.

CONCLUSIONS OF LAW

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App.

2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Calculation of Claimant's Average Weekly Wage

D. Under Colorado's Workers' Compensation Act, the "average weekly wage" is a key part of the formula used to calculate compensation for injured workers, and it is based upon the definition of "wages" provided at section 8-40-201(19). *Industrial Claim Appeals Office v. Ray,* 145 P.3d 661 (Colo. 2006). To determine a claimant's AWW, the ALJ may choose from two different methods set forth in section 8-42-102. The first method, referred to as the " default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." § 8-42-102(2), C.R.S.

E. The default provision in § 8-42-102(2)(a)-(f), C.R.S lists six different formulas for conducting this calculation. Per § 8-42-102(5)(a), the phrase "at the time of injury" in subsection (2) requires the AWW to be determined using the wage earned on the date of the employee's accident. Wages are the money rate at which the services rendered are "recompensed under the contract of hire in force at the time of the injury," § 8-40-201(19)(a), C.R.S.

F. The second method for calculating a claimant's AWW, referred to as the "discretionary exception," applies when the default provision will not fairly compute the employee's AWW. § 8-42-102(3), C.R.S. In such a circumstance, the ALJ has discretion to compute the AWW of a claimant in such other manner and by such other method as will, based upon the facts presented, fairly determine the employee's AWW. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). Using this discretionary

authority, an ALJ may consider wages from concurrent employment as appropriate, on a case-by-case basis. *Jefferson County Public Schools*, 765 P.2d 636, (Colo. App. 1988).

G. In this case, the parties do not dispute the amount of wages that the Claimant earned working for the Employer. The parties dispute whether the wages Claimant earned from St. Mary Corwin Hospital prior to commencement of employment for Employer should be included in the AWW under this claim. While Claimant frames the issue as one involving "concurrent employment," the evidence offered at hearing shows that Claimant never actually earned wages from Employer and St. Mary Corwin Hospital concurrently. Rather, she asserts that her AWW should be increased based solely on her testimony that she *intended* to work both jobs concurrently, working, on average, 72 hours per week.

H. Claimant testified that she *intended* to work 72 hours a week between the two employers, but there is insufficient evidence that Claimant took sufficient steps to work both jobs at the same time. While Claimant had scheduled shifts at St. Mary Corwin Hospital, there is no evidence as to when those shifts were scheduled. Further, Claimant failed to present to any of the shifts scheduled at St. Mary Corwin Hospital once she started work for the Employer.

I. Claimant's explanation for her expired CNA license, standing alone, is plausible. Once she was able to return to work, this oversight presumably could have been noted and corrected in short order. The failure to list her current employer on her job application is more problematic, as this employer has provided Claimant her highest wage to date, and upon which she is now seeking workers' compensation.

J. Claimant's prior work history does not establish a pattern of conscious income maximization sufficient to impute her average St. Mary Corwin wages on top of her admitted, full-time AWW from Employer. Her stated *intention* of consistently working both jobs in tandem, in two cities, is speculatively optimistic, at best.

K. The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992). Because the default method fairly computes Claimant's AWW at the time of the injury in this case, the discretionary method is unnecessary in order to reach the AWW that Claimant asserts she is entitled to.

ORDER

It is therefore ordered that:

1. Claimant's request to increase her AWW based on wages earned prior to the commencement of work for Employer is denied and dismissed. Claimant's average weekly wage (AWW) remains $426.56

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 9, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether Claimant has proven that his request for left hip surgery is reasonable, necessary and related to his January 30, 2015 work injury.

PRELIMINARY MATTERS

1. The Parties filed a Joint Stipulated Submission of Exhibits, Exhibits A – KK. These exhibits were also the same exhibits used by the Parties at the deposition of Dr. Ciccone on July 5, 2017.

2. Dr. William John Ciccone, II, a physician board certified in Orthopedics and Level II accredited for Workers' Compensation was the only witness to testify in this case (Depo. Tr., p. 5, l. 12 – p. 6, l. 7). The original, sealed transcript of the deposition of Dr. Ciccone was filed in this matter.

3. Pursuant to the July 12, 2017 Order of PALJ Steninger, the Parties submitted simultaneous written briefs/proposed orders to the main OAC e-mail address for Workers' Compensation at: OAC-DVR@state.co.us on or before July 31, 2017. Only the Exhibits A – KK and the transcript of the deposition of Dr. Ciccone were considered in evidence and referenced in the Parties' written briefs/proposed orders. No subsequent motions were filed to consider additional evidence.

FINDINGS OF FACT

1. Claimant is a 61 year old man (DOB 07/26/1955) who worked for Employer on January 30, 2015. On the date of his injury, January 30, 2015, the Claimant was installing tarp systems on semi-trailers. He was walking along one section of scaffolding to another when he slipped through an opening between the sections. He fell to the left and down about 5 feet and struck his left hip on the corner of the scaffolding (See Exhibit H, p. 21, R, p. 42, and Exhibit FF, p. 96).

2. Claimant was initially evaluated for his work injury on February 2, 2015 by Dr. Frederick Scherr. Claimant reported that he had fallen about 5 feet off scaffolding and landed on his left hip, left lateral side and buttock area. Claimant did not seek medical care over the weekend after the fall but he did take some ibuprofen. Claimant presented on crutches he borrowed from a roommate and complained of pain and discomfort. He reported he had no weakness, numbness, radicular symptoms or back problems. Claimant reported that the left sided hip and leg pain made it difficult to bear

weight without the aid of crutches. Dr. Scherr noted an x-ray of the left hip was negative per the radiologist (see Exhibit I). On examination, Dr. Scherr noted bruising, ecchymosis and swelling over the left hip and buttock area and noted it was tender to palpation. Dr. Scherr offered Claimant prescription pain medication which Claimant declined. Claimant preferred to take OTC Advil. Dr. Scherr returned Claimant to work with a 10 pound lifting, repetitive lifting, carrying, pushing and pulling restrictions and no crawling, kneeling, squatting or climbing with sitting, standing and walking to comfort. (Exhibit H).

3. Dr. Scherr saw Claimant for follow up on February 23, 2015. Claimant reported that he was not working due to his activity restrictions, but was doing home exercises and taking Ibuprofen. Claimant reported he was "doing much better." Claimant reported that he still had pain and there was still a lump on his left hip. He reported difficulty with squatting or kneeling but his gait was improved and he was no longer using crutches. Dr. Scherr assessed a left hip contusion with subsequent hematoma. Dr. Scherr noted that "there is a pretty good, significant hematoma still present there that is probably about 3 cm in diameter." Dr. Scherr also recommended that the Claimant start physical therapy and continued the same work restrictions from the initial visit (Exhibit K).

4. At his initial evaluation for physical therapy with Select Physical Therapy on February 25, 2015 and through March of 2015, Claimant exhibited tenderness on palpation of the greater trochanter and over the large palpable bump to the left of the greater trochanter and problems with hip abduction (Exhibit KK).

5. When Claimant saw Dr. Scherr again on March 23, 2015, he reported that the physical therapy had been helpful and he was better. Dr. Scherr noted that the swelling and the lump had gone down. Claimant reported he was still having difficulty with squatting and kneeling, but "he has really no other complaints at this time." On examination, Dr. Scherr noted good range of motion of the hip with pain and discomfort at the endpoints. Dr. Scherr noted that Claimant had a difficult time squatting secondary to pain or discomfort but that his gait was not hindered secondary to pain. Dr. Scherr recommended continuing with physical therapy and seeing a specialist to see if an injection or additional studies might be of benefit, but Claimant declined and was not interested in an injection or any additional things being done to his hip. Dr. Scherr continued the work restrictions and noted Claimant was not currently working due to the unavailability of light duty work.

6. When Claimant returned to Dr. Scherr for evaluation on April 13, 2015, he continued to report he was improving although he still had difficulty kneeling, squatting and lying on his left side. In checking Claimant's range of motion, Dr. Scherr specifically noted "trouble with abduction." Dr. Scherr recommended Claimant continue with his physical therapy and moved his work restrictions up to 25 pounds lifting, repetitive lifting, carrying, pushing and pulling. Dr. Scherr also strongly encouraged Claimant to see a specialist again and noted Claimant "has again strongly declined" (Exhibit M).

7. On May 13, 2015, after months of refusing to see an orthopedic specialist, Claimant stated “he wants to do something about it” because he complained “that there is just something wrong in there.” Of note, Dr. Scherr did tell Claimant that he “needed to either do something or have the case closed.” Dr. Scherr also noted that Claimant was not really complaining of anything new, just the same pain, soreness and tenderness on the left side. Dr. Scherr recommended an MRI of the hip and continued the work restrictions at 25 pounds (Exhibit N).

8. Claimant underwent an MRI without contrast on May 14, 2015. The MRI was generally unremarkable with no substantial chondromalacia or evident labral tear but the radiologist did note nominal femoroacetabular impingement related morphology of both hips (Exhibit O).

9. When Claimant returned to see Dr. Scherr on June 1, 2015, he reported no new concerns, just continuing tenderness and soreness on his left side. After Dr. Scherr explained options to Claimant, he chose to do more physical therapy as he was still not interested in a hip injection from an orthopedic surgeon. Dr. Scherr advised that he would see Claimant back in 2 weeks and if Claimant was not better he either had to agree to see an orthopedic surgeon or the case would be closed (Exhibit P).

10. On June 15, 2015, Dr. Scherr stopped Claimant’s physical therapy after 4 more sessions as Claimant reported it did not really help. Dr. Scherr assessed Claimant with a left hip contusion and probable trochanteric bursitis with possible impingement interfering with his recovery. The Claimant asked Dr. Scherr if he could just go back to work but Dr. Scherr did not think that made sense since he was still complaining of pain and he wasn’t any better and kept his work restrictions at 25 pounds. The Claimant was to return to Dr. Scherr after being evaluated by Orthopedics (Exhibit Q).

11. Claimant saw Dr. Christopher Isaacs, an orthopedist, at the Center for Spine & Orthopedics on June 19, 2015. Claimant reported he has had persistent pain in his hip since a slip and fall at work. He complained of a soft tissue mass on the posterolateral aspect of the left hip. This note is also the first document of groin pain in the left hip. Prior to this, Dr. Scherr had consistently noted lateral hip pain and buttock or posterior hip pain rather than anterior or groin pain. Dr. Isaacs also noted pain at the end range of motion on internal and external rotation whereas Dr. Scherr had noted difficulty with abduction. Dr. Isaacs recommended a steroid injection into the hip (Exhibit R and for comparison to Dr. Scherr’s prior notes, see Exhibit M).

12. Upon review of Dr. Isaac’s medical note dated June 19, 2015, Dr. Ciccone opined in his deposition that from a medical standpoint, it is not likely that a complaint of groin pain noted for the first time, over four and one half months after the work injury, would be related to the Claimant’s January 30, 2015 work injury (Depo. Tr., p. 18, ll. 3-13). Specifically, Dr. Ciccone testified that, “if a claimant or someone experiences an acute labral tear or acute injury to a joint, you would expect to have the pain in that joint much earlier. It would be an initial complaint” (Depo. Tr., p. 18, ll. 15-18).

13. Dr. George Leimbach performed a left hip intra-articular injection on July 7, 2015 (Exhibit S).

14. Claimant saw Dr. Scherr again on July 14, 2015 and reported that the injection did not really help (Exhibit T).

15. On July 21, 2015, Claimant returned to Dr. Isaacs. Claimant reported that the injection gave him an immediate dramatic relief of the symptoms but this only lasted for a couple of days and then the symptoms recurred. Dr. Isaacs diagnosed degenerative arthritis of the left hip and explained to Claimant that due to his underlying condition, the solution to resolution of the symptoms was likely arthroplasty. Dr. Isaacs also opined that Claimant's underlying degenerative arthritis "has been aggravated by his work injury." (Exhibit U). Dr. Isaac's opinion regarding causation is credible and persuasive. Moreover, with respect to Dr. Isaac's surgical recommendation, Dr. Ciccone credibly and persuasively testified that "[a]rthroplasty is performed for arthritis" (Depo. Tr., p. 19, ll, 17-23).

16. Claimant saw Dr. Scherr again on August 4, 2015 when Dr. Scherr discharged him from care. Dr. Scherr noted that after conservative treatment (physical therapy, MRI and an injection), Claimant reported that he did not get much better. He also noted that after consultation with Dr. Isaacs in Orthopedics, there was not much more to do for the Claimant other than a hip replacement, which Dr. Scherr thought should be done under private insurance. Dr. Scherr opined that Claimant's work incident was a "mild exacerbation" of his underlying arthritic condition. Dr. Scherr also stated that he thought Claimant would have developed this issue at some point in time anyway due to his heavy smoking and lack of exercise. Dr. Scherr placed Claimant at MMI with no impairment because he thought the "etiology is mostly subjective hip complaints that are not related to this work injury" (Exhibit V).

17. On December 4, 2015, Claimant was seen for an IME with Dr. John Raschbacher. In a pain diagram, the Claimant reported his pain at 7/10 on the day of the exam and circled the area on the outside of his hip and his buttocks. Claimant stated that his pain is worse when he tries to roll onto his left side when sleeping or standing up to get out of bed. Claimant reported to Dr. Raschbacher that he has a big bump on his left hip and he has left hip pain where he hit it. Dr. Raschbacher noted left lateral hip pain that is numb once in a while. Claimant reported that he had a hip injection that made his pain worse. Claimant told Dr. Raschbacher that the injection was painful and the pain decreased for two days but then on the third day it felt worse than it had before and he thought he would have to go back on crutches. Claimant also reported to Dr. Raschbacher that the physical therapy did not really help and he felt he could do just as well at home. Dr. Raschbacher noted that his physical examination of Claimant was "somewhat compromised" due to Claimant's reluctance to lie flat. Dr. Raschbacher stated that he would prefer to offer his opinion after a repeat MRI arthrogram of the left hip to characterize the nature of the mass, and to rule out labral tear or other etiology of persistent left hip pain. (Exhibit W).

18. Claimant underwent a left MRI arthrogram of the hip with contrast on January 11, 2016. The radiologist found a 1.4 cm full thickness labral tear localized to the anterosuperior quadrant and the chondroosseous junction. He also noted an anterosuperior femoral head-neck bump-cyst complex consistent with cam-type femoroacetabular impingement (FAI) mechanics (Exhibit X).

19. Dr. Ciccone testified that the left hip MRI with contrast had two significant findings which were a full thickness labral tear along the anterior superior quadrant at the chondro-osseuous junction of the hip and a finding associated with cam-type femoroacetabular impingement. Dr. Ciccone explained that, "the claimant has an anatomy where the ball of the hip is not completely round and does not roll well within the acetabulum. So over time, bones with that type of anatomy tend to cause these labral tears, which can then lead to degenerative changes within the hip." Based on the MRI findings, Dr. Ciccone testified that none of the Claimant's reported symptoms up to this point correlate with the pathology seen on the MRI. In considering the MRI findings and Claimant's clinical presentation, Dr. Ciccone opined that the labral tearing was not acute since there was not significant immediate groin pain and that labral tearing related to the femoroacetabular impingement anatomy would be developmental and not related to trauma (Depo. Tr., p. 21, l. 5 – p. 22, l. 18).

20. After receiving the MRI of the left hip, Dr. Raschbacher prepared an Addendum to his IME dated February 3, 2016. Dr. Raschbacher found that the left hip labral tear was likely related to the work injury but that the FAI impingement mechanics were not work-related. He also found the soft tissue mass on the left lateral thigh was also likely to be a pre-existing condition. Overall, Dr. Raschbacher felt that the Claimant was not at MMI pending review of the MRI findings by an orthopedic surgeon (Exhibit Y). Dr. Raschbacher's opinion regarding the cause of Claimant's labral tear is found to be credible and persuasive.

21. The Claimant was then evaluated on February 24, 2016 by the Division Independent Medical Examiner, Dr. Lloyd Thurston. The Claimant complained of a pain level of 7/10 for 98% of the time and on a pain diagram circled the area of the pain as the outside/lateral aspect of the left hip and buttock. Dr. Thurston did not have the benefit of the February 3, 2016 MRI of the left hip and agreed with Dr. Raschbacher that Claimant was not at MMI and required a left hip and proximal thigh MRI. Dr. Thurston nevertheless opined that he believed the Claimant has a significant tear of the insertion of the gluteus medius which would explain continued pain in this area (Exhibit Z).

22. On February 29, 2016, Dr. Raschbacher issued a second Addendum to his IME. He noted that an MRI of the left thigh did not disclose anything other than fat at the site of the place possibly thought to be a soft tissue mass. Dr. Raschbacher continued to recommend an evaluation by an orthopedic hip specialist (Exhibit AA).

23. Claimant returned to the Healthone Occupational Medicine and Rehabilitation Clinic and was seen by Dr. Ryan Otten who noted that Claimant was previously placed at MMI by Dr. Scherr but that Dr. Raschbacher had subsequently

opined that the Claimant required an orthopedic evaluation for the left hip labral tear. The Claimant continued to report pain of 7/10 but that he was not taking any medications for his condition. Claimant reported he was not working and on SSI disability at this point. Dr. Otten referred Claimant for an orthopedic evaluation (Exhibit BB).

24. On May 25, 2016, Claimant was evaluated by Dr. Brian White, an orthopedic surgeon. Dr. White noted that Claimant has had progressive left hip and groin pain for over 16 months when he fell off a scaffold. He further noted that Claimant has gotten to the point where he feels something needs to be done since he cannot get around or work. On examination, Dr. White noted that Claimant's hip flexion was limited to 115 or so on the left side and 125 on the right side. Dr. White further noted very limited rotational motion due to discomfort and guarding. He also had discomfort with the anterior impingement maneuver. Dr. White opined that the MRI showed CAM morphology over the femoral neck consistent with femoroacetabular impingement and a labral tear with some underlying degenerative changes. Dr. White assessed "left hip femoroacetabular impingement, degenerative labral tear, as well as some degenerative arthritis." While Dr. White noted that Claimant's hip joint did not look horrible, he still opined that the Claimant needed a total hip replacement due to Claimant's decreased function and level of pain since falling off the scaffold. This ALJ credits Dr. White's opinion that the Claimant needs a total hip replacement to treat Claimant's hip pain and limited function which was caused by Claimant falling off the scaffold at work.

25. Dr. Ciccone performed a medical record review on June 14, 2016 reviewing all of the Claimant's medical records to that date and Claimant's x-rays and the May 14, 2015 and January 11, 2016 MRIs of the left hip. After reviewing and summarizing each of the individual records, Dr. Ciccone opined that the Claimant suffered a contusion to his left hip as a result of his work injury. With respect to the pathology noted on the second MRI, Dr. Ciccone disagreed with Dr. Raschbacher regarding the genesis of the Claimant's labral tear. While Dr. Raschbacher opined that the cam-type femoroacetabular impingement (FAI) would not be work related, he found the labral tear likely work related. Dr. Ciccone offered a different opinion in that he explained that in a 60-year old male with FAI anatomy, the diagnosis of a labral tear would be expected and not related to an acute injury. According to Dr. Ciccone, the labral tear is chronic and due to Claimant's preexisting condition. As Dr. Ciccone also notes, the orthopedic surgeons that evaluated the Claimant both noted degenerative changes. Dr. Ciccone opined that it is these degenerative changes causing the Claimant's symptoms and not the labral tear, which itself is degenerative in nature. Further, Dr. Ciccone pointed out that the recommended surgery, a total hip replacement is not the procedure performed for a labral tear, but rather to treat arthritis. (Exhibit EE).

26. The Claimant saw Dr. Michael Striplin for an initial evaluation on January 25, 2017. On examination, Dr. Striplin noted a large (7cm) soft tissue mass over the left hip. He noted that left hip motion was limited and painful. On review of medical records and imaging, Dr. Striplin noted that Dr. White has recommended a total hip

replacement but Dr. Ciccone has opined that the labral tear is unrelated to the injury. After a telephone SAMMS conference with legal counsel for Claimant and Respondents, Dr. Striplin recommended an orthopedic consultation to address both the causality of the hip pain and labral tear and what surgical treatment is appropriate (Exhibit FF and GG).

27. The Claimant was next evaluated by Dr. Michael Ellman, an orthopedic surgeon on February 13, 2017. Dr. Ellman stated that the Claimant "is a 61-year-old gentleman with signs and symptoms consistent with a large left hip labral tear in the setting of early arthritis as well as FAI, two years status post a work-related injury with the acute onset of pain." Dr. Ellman opined there was an acute tear at the time of injury and recommended a total hip replacement versus a hip arthroscopy procedure. He explained that he was a hip arthroscopy expert and did not perform total hip replacements and referred the Claimant back to Dr. White. This ALJ finds Dr. Ellman's opinion to be credible and persuasive regarding the cause of Claimant's labral tear and the need for a hip replacement. (Exhibit HH).

28. In reviewing Dr. Ellman's medical report, Dr. Ciccone testified that, in his opinion, "the left hip labral tear is degenerative in nature and not related to the fall at work." Dr. Ciccone pointed out that Claimant fell and struck the lateral aspect of the left hip with ecchymosis noted. Further, based on the pathology noted in the left hip MRI, Dr. Ciccone stated that a 59-year old man with a long history of the cam-type femoroacetabular impingement (FAI) would almost be expected to have a labral tear on his MRI scan given the amount of time that the impingement had been occurring. Dr. Ciccone additionally pointed out that the specific location of the labral tear on the top edge of the acetabulum is where the most common degenerative effects of FAI start and this is where the tear is located as shown in the Claimant's MRI. Although Dr. Ciccone's opinion provides a plausible explanation for the labral tear, this ALJ does not find it to be persuasive. Both Dr. Raschbacher and Dr. Ellman opined that the labral tear was torn at the time of the work accident and this ALJ credits their opinions over Dr. Ciccone's.

29. The Claimant returned to Dr. Striplin on February 16, 2017. Dr. Striplin noted that Dr. Ellman recommended a total left hip arthroplasty secondary to a labral tear and that the Claimant wished to pursue the left hip surgery (Exhibit II).

30. On May 8, 2017, Dr. Ciccone issued a supplemental report after reviewing medical records he reviewed before and new medical records received since his last report. Dr. Ciccone opined that Claimant's labral tear was degenerative and not acute and not related to the work injury. Dr. Ciccone pointed out that it is undisputed in the medical records that the Claimant fell striking the lateral aspect of his left hip with ecchymosis over the greater trochanter. Dr. Ciccone opined that if the Claimant had suffered an acute labral tear, significant groin pain immediately following the injury would be expected. Dr. Ciccone also opined that the mild groin pain that was noted in later medical records is consistent with the Claimant's hip arthritis. Dr. Ciccone also opined that in a 61-year-old man with cam-type femoroacetabular impingement (FAI) pathology (a pre-existing condition), one would expect to see a labral tear on the MRI

located where the Claimant's tear is, in the anterosuperior quadrant. He further explained that cam-type FAI occurs when an individual has a non-spherical femoral head with a bump of bone that impinges on the acetabulum which causes labral tears and degeneration of the hip. FAI is a developmental abnormality of the hip and is unrelated to trauma, nor does it predispose an individual to labral tearing with trauma. As a result, Dr. Ciccone took issue with Dr. Ellman's opinion that the Claimant suffered an acute labral tear as a result of his work-related injury, especially where the Claimant had minimal complaints of groin pain initially after the injury and has a labral tear in the location where degenerative impingement from FAI occurs naturally. Dr. Ciccone found that the work injury did not, in any way, aggravate or accelerate the already ongoing degenerative process occurring in the Claimant's hip. Dr. Ciccone opined the Claimant was at MMI for the work injury on August 4, 2015 as stated by Dr. Scherr and the Claimant's continued symptoms are secondary to his pre-existing arthritic condition associated with his FAI pathology (Exhibit JJ). This ALJ, however, does not find Dr. Ciccone's opinions to be credible or persuasive regarding the cause of Claimant's labral tear or that Claimant's injury did not aggravate or accelerate Claimant's degenerative hip condition. This ALJ finds that Claimant's work injury did aggravate and accelerate Claimant's degenerative hip condition and was causing Claimant's hip pain and dysfunction.

31. There are conflicting opinions on causation offered in this case as to the relationship of Claimant's symptoms arising out of the work injury and the need for the recommended total hip replacement surgery. However, the ALJ finds that the opinion of Dr. Isaacs is the most credible and persuasive opinion. Dr. Isaacs concluded that Claimant suffers from degenerative arthritis of his hip and his work accident aggravated his preexisting degenerative hip arthritis and necessitated the need for a hip replacement.

32. There are also conflicting opinions as to whether Claimant's labral tear was caused by his work accident. This ALJ finds that Claimant's labral tear was caused by his work accident.

33. There are also conflicting opinions as to whether Claimant's labral tear has in any way necessitated the need for Claimant's hip replacement surgery. This ALJ finds that the need for a hip replacement was caused by the January 30, 2015 work accident which aggravated Claimant's hip arthritis and caused the labral tear.

34. Based on Dr. Isaac's credible and persuasive opinion and the medical records and imaging, the ALJ determines as a matter of fact that the total hip replacement surgery recommended by Dr. Ellman and Dr. White is intended to cure and relieve Claimant from the effects of his work injury of January 30, 2015. The total hip replacement being recommended is intended to address the aggravation of Claimant's hip arthritis and labral tear which were caused by the January 30, 2015 work accident.

35. This ALJ finds that the January 30, 2015 accident was a significant cause of the need for a hip replacement and that there is a direct relationship between the

work accident, Claimant's pain and disability, and the need for the hip replacement.

36. This ALJ finds that the need for the hip replacement is related to the January 30, 2015 work accident and injury.

37. This ALJ finds that the hip replacement is reasonable and necessary to treat Claimant's work accident and injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits – Related and Reasonably Necessary

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Thus, a preexisting disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is “a typical symptom from the aggravation of a pre-existing condition” and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not

attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Prior to the work related accident of January 30, 2015, Claimant did not have any left hip pain. Claimant's left hip was asymptomatic and no one was recommending any medical treatment, let alone a hip replacement. Since the accident, Claimant has had ongoing left hip pain and dysfunction which has required medical treatment. Due to Claimant's ongoing hip pain and dysfunction, a hip replacement has been recommended.

As found, on January 30, 2015, Claimant was installing tarp systems on semi-trailers. He was walking along one section of scaffolding to another when he slipped through an opening between the sections. He fell to the left and down about 5 feet and struck his left hip on the corner of the scaffolding. Claimant was initially evaluated for his work injury on February 2, 2015 by Dr. Frederick Scherr. The Claimant reported that he had fallen off scaffolding and landed on his left hip, left lateral side and buttock area. On examination, Dr. Scherr noted bruising, ecchymosis and swelling over the left hip and buttock area and noted it was tender to palpation.

On May 13, 2015, after months of refusing to see an orthopedic specialist, the Claimant finally told Dr. Scherr that he wanted to do something about his pain complaints. The Claimant underwent an MRI without contrast on May 14, 2015. The MRI was generally unremarkable with no substantial chondromalacia or evident labral tear but the radiologist did note femoroacetabular impingement (FAI) related morphology.

After the MRI, the Claimant saw Dr. Christopher Isaacs, an orthopedist at the Center for Spine & Orthopedics on June 19, 2015 and he recommended a left hip intra-articular injection. The hip injection was performed in July of 2015.

On July 21, 2015, Claimant returned to Dr. Isaacs. It was noted that the injection provided dramatic relief of his symptoms, but that it only lasted for a couple of days. Based on his evaluation of Claimant and the response Claimant had from the injection, Dr. Isaacs diagnosed Claimant as suffering from degenerative arthritis of the hip. Dr. Isaacs went on to state that Claimant's degenerative arthritis has been aggravated by his work injury and that the solution to the problem is an arthroplasty/hip replacement. This ALJ found Dr. Isaacs' opinion regarding causation and the need for surgery to be credible and persuasive.

Moreover, Dr. Ellman opined there was an acute labral tear at the time of injury and recommended a total hip replacement versus a hip arthroscopy procedure. He explained that he was a hip arthroscopy expert and did not perform total hip replacements and referred the Claimant back to Dr. White. Dr. Ellman's opinions were found to be credible and persuasive.

Dr. White, an orthopedic surgeon, evaluated Claimant and stated that Claimant's MRI showed CAM morphology over the femoral neck consistent with femoroacetabular impingement and a labral tear with some underlying degenerative changes. Dr. White assessed "left hip femoroacetabular impingement, degenerative labral tear, as well as some degenerative arthritis." While Dr. White noted that the Claimant's joint did not look horrible, he still opined that the Claimant needed a total hip replacement. Dr. White's opinions were found to be credible and persuasive.

This ALJ concludes that the January 30, 2015 accident caused the torn labrum and also aggravated, accelerated, and combined with Claimant's preexisting degenerative hip arthritis and produced the need for medical treatment in the form of a hip replacement.

This ALJ concludes that Claimant has proven by a preponderance of the evidence that the hip replacement is reasonable, necessary, and causally related to the January 30, 2015 accident.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The recommended left hip replacement surgery is reasonable, necessary, and related to Claimant's January 30, 2015 work injury.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 8, 2017

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right knee medial meniscus tear during the course and scope of his employment with Employer on April 1, 2016.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial right knee injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period April 1, 2016 through December 1, 2016.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $801.92.

FINDINGS OF FACT

1. Claimant was employed by Employer as a Health Care Technician. His job duties involved working at a residential facility known as Lamar House to provide support, care and activities for developmentally disabled individuals.

2. On April 1, 2016 Claimant arrived to work at Lamar House at approximately 7:30 p.m. He loaded residents into a bus for a trip to the movies. After the movie Claimant was "escorting a couple of residents off of the bus." As he turned to get off the bus his right knee "popped and gave way." Claimant subsequently slid down a few steps.

3. Claimant explained that he was unable to walk or drive after the fall. He immediately contacted Employer and was directed to the Lutheran Medical Emergency Department for an evaluation.

4. Claimant's co-worker Angela Jimenez was present in the driver's seat of the bus when Claimant injured his right knee. She did not directly observe the incident, but stated that she heard a sound when Claimant stepped while walking on the bus. He reacted in pain and reached for a handle. Ms. Jimenez drove Claimant to the Lutheran Medical Center Emergency Department for treatment.

5. The medical records reflect that on April 1, 2016 Claimant underwent a right knee x-ray at the Lutheran Medical Center Emergency Department. The x-ray did

not reveal an acute injury. Claimant was placed in a right knee immobilizer, obtained crutches and received prescription medications.

6. On April 2, 2016 Claimant visited Lutheran Medical Center for an examination. He reported that at approximately 10:45-11:00 p.m. on April 1, 2016 while he was at work he "twisted his right knee while walking down a flight of four steps on a bus." He recounted that he heard a "pop" and his right knee gave out. Claimant noted that he fell to the ground and immediately suffered right knee pain. His pain continued into the morning and he developed mild swelling in the right knee area. After conducting a physical examination, Joanne Marie Edney, M.D. diagnosed Claimant with a right knee strain. Dr. Edney suspected that Claimant injured his right knee medial meniscus.

7. On April 2, 2016 Claimant completed an injury report form for Employer. He noted that he injured his right knee while working for Employer on April 1, 2016. Claimant stated that "while unloading the guys off the bus I turned to walk down the steps. His right knee popped and "gave out so I fell down the steps."

8. The medical records reveal that on April 1, 2016 Claimant had visited personal health care provider Kaiser Permanente for a right knee evaluation. Between 3:04 and 3:06 p.m. Desiree Gonzales, R.N. received a call from Claimant. Claimant complained of "[i]njury to R knee 2 days ago, twisted while walking and heard pop. Pain has increased + edema to inside of R knee. Is able to bear weight. Rates pain 7/10, 8/10 with wt bearing." Nurse Gonzales noted that Claimant preferred an immediate appointment.

9. In a report dated April 1, 2016 at 5:25 p.m. Claimant explained to Sean R. McBrearty, M.D. at Kaiser that he had been suffering right knee pain for two days. Claimant specified that he

> was standing at work, right foot planted, twisted medially, heard pop and had immediate pain of the medial knee. Was able to bear weight and walk immediately after the injury. Over the past 24-48 hours, pain has increased and has had increased swelling in the knee. Medial knee pain throughout the day. Now hurts to put any weight on the right knee. Pain exacerbated with turning to the right.

10. Although the Kaiser records reflect that Claimant called and visited the facility on April 1, 2016, it appears that the records are incorrectly dated. Instead, the records suggest that Claimant visited Kaiser sometime after April 1, 2016 because he recounted that he had injured his right knee at work and his pain had increased over the past 24-48 hours. Construing the April 1, 2016 Kaiser record as improperly dated is also consistent with Claimant's testimony, report to Lutheran Medical Center on April 2, 2016 and the bulk of the other evidence in this matter.

11. On April 4, 2016 Claimant visited Tomm Vanderhorst, M.D. at SCL Physicians for an examination. Dr. Vanderhorst recorded that on April 1, 2016 at about

11:00 p.m. Claimant was helping residents exit a bus after attending a movie. He was "planted on his right foot and turning to the right when he 'felt a pop' in his right knee which buckled and he fell down several steps to the ground." Claimant suffered immediate right knee pain. Dr. Vanderhorst determined that Claimant's mechanism of injury and right knee symptoms were "compatible with a medial meniscus injury." In assessing causality, Dr. Vanderhorst concluded that Claimant's right knee condition constituted a work-related injury. He recommended a right knee MRI.

12. On April 6, 2016 Claimant returned to Dr. Vanderhorst for an evaluation. Based on Claimant's level of pain, employment responsibility concerns and continuing use of narcotic pain medication Dr. Vanderhorst took Claimant off of work pending additional evaluation.

13. On April 12, 2016 Claimant returned to Dr. Vanderhorst for an examination. The MRI revealed an undersurface tear of the right medial meniscus. Dr. Vanderhorst expected a complete recovery without surgical intervention and recommended physical therapy. He assigned work restrictions of "10 minutes per hour combined sitting/standing with use of his crutch" and a maximum of 10 pounds when lifting and carrying. Dr. Vanderhorst also prohibited kneeling, crawling, squatting, climbing and physical confrontations.

14. On May 2, 2016 Claimant again visited Dr. Vanderhorst for an examination. Dr. Vanderhorst noted that Claimant remained off work and elevated his right knee at home. He commented that Claimant was awaiting a transfer of care "per his report."

15. On January 17, 2017 Claimant underwent an independent medical examination with Wallace K. Larson, M.D. Claimant recounted that on April 1, 2016 he had taken residents to a movie and was walking in a bus. While he was turning to the right to go down the steps to exit the bus, his right knee "popped" and "gave out." After reviewing Claimant's medical history and conducting a physical examination Dr. Larson determined that Claimant likely did not suffer an industrial injury in the form of a medial meniscus tear on April 1, 2016. Relying on a medical record from Kaiser dated April 1, 2016, Dr. Larson reasoned that Claimant had suffered a right knee medial meniscus tear prior to his work activities on April 1, 2016. He explained that Claimant's right knee medial meniscus tear likely constituted a degenerative change rather than a specific traumatic event. Nevertheless, Dr. Larson acknowledged that degenerative changes are uncommon in someone who is Claimant's age of 25. He speculated that Claimant suffered an unrelated traumatic right knee injury that was not documented in the medical records.

16. Claimant testified that he ceased working for Employer after the April 1, 2016 incident because he was unable to perform his rigorous job duties due to his right knee medial meniscus tear. In June 2016 Claimant returned to full-time employment at a veterinary hospital. However, after working at the hospital for approximately three to four weeks, he ceased employment. On December 1, 2016 Claimant obtained full-time employment with another employer.

17. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right knee medial meniscus tear during the course and scope of his employment with Employer on April 1, 2016. He testified that on April 1, 2016 he loaded residents into a bus for a trip to the movies. After the movie Claimant was "escorting a couple of residents off of the bus." As he turned to get off the bus his right knee "popped and gave way." Claimant subsequently slid down a few steps. Although Ms. Jimenez did not directly observe the incident because she was in the driver's seat of the bus, she corroborated Claimant's account. She specifically heard a sound when Claimant stepped on the bus. He reacted in pain and reached for a handle.

18. The consistent medical records support Claimant's testimony that he tore his right knee medial meniscus while working for Employer on April 1, 2016. On April 2, 2016 Claimant reported to Lutheran Medical Center that at approximately 10:45-11:00 p.m. while working on April 1, 2016 he "twisted his right knee while walking down a flight of four steps on a bus." He recounted that he heard a "pop" and his right knee gave out. Claimant noted that he fell to the ground and immediately suffered right knee pain. On April 4, 2016 Dr. Vanderhorst recorded that on April 1, 2016 at about 11:00 p.m. Claimant was helping residents exit a bus after attending a movie. He was "planted on his right foot and turning to the right when he 'felt a pop' in his right knee which buckled and he fell down several steps to the ground." Claimant suffered immediate right knee pain. Dr. Vanderhorst determined that Claimant's mechanism of injury and right knee symptoms were "compatible with a medial meniscus injury." In assessing causality, Dr. Vanderhorst concluded that Claimant's right knee condition constituted a work-related injury.

19. In contrast, after reviewing Claimant's medical history and conducting a physical examination, Dr. Larson determined that he likely did not suffer an industrial injury in the form of a medial meniscus tear on April 1, 2016. Relying on a medical record from Kaiser dated April 1, 2016, Dr. Larson reasoned that Claimant had suffered a right knee medial meniscus tear prior to his work activities on April 1, 2016. The April 1, 2016 Kaiser record reveals that Claimant sought a right knee evaluation. Between 3:04 and 3:06 p.m. Nurse Gonzales received a call from Claimant. Claimant complained of "Injury to R knee 2 days ago, twisted while walking and heard pop. Moreover, in a report dated April 1, 2016 at 5:25 p.m. Claimant explained to Dr. McBrearty at Kaiser that he had been suffering right knee pain for two days.

20. Although the Kaiser records reflect that Claimant called and visited the facility on April 1, 2016, it appears that the records are incorrectly dated. Instead, the records suggest that Claimant visited Kaiser sometime after April 1, 2016 because he recounted that he had injured his right knee at work and his pain had increased over the past 24-48 hours. His account of the incident in the Kaiser records is also consistent with his testimony, the description of Ms. Jimenez and the other medical records. Accordingly, Claimant's work activities on April 1, 2016 caused his right knee medial meniscus tear that warranted medical treatment.

21. Claimant has proven that it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical benefits for his

industrial injury. Claimant explained that on April 1, 2016 he was unable to walk or drive after his fall on the bus. He immediately contacted Employer and was directed to the Lutheran Medical Emergency Department for an evaluation. Claimant subsequently received authorized medical treatment from Lutheran Medical Center and SCL physicians. Based on the medical records and Claimant's credible testimony, Claimant is entitled to receive reasonable, necessary and causally related medical benefits to cure or relieve the effects of his April 1, 2016 right knee medial meniscus tear.

22. Claimant has established that it is more probably true than not that he is entitled to receive TTD benefits for the period April 1, 2016 through December 1, 2016. Claimant credibly explained that he ceased working for Employer after the April 1, 2016 incident because he was unable to perform his rigorous job duties due to his right knee medial meniscus tear. In June 2016 Claimant returned to full-time employment at a veterinary hospital. However, after working at the hospital for approximately three to four weeks, he ceased employment. On December 1, 2016 Claimant obtained full-time employment with another employer.

23. Claimant has not reached MMI, he has not returned to regular or modified employment, he has not received a written release to return to regular employment, and he has not received a written offer to return to employment and failed to begin the employment. Accordingly, based on Claimant's credible testimony and the medical records, Claimant is entitled to receive TTD benefits for the period April 1, 2016, until December 1, 2016 minus any earnings he received while working for the veterinary hospital in June 2016.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right knee medial meniscus tear during the course and scope of his employment with Employer on April 1, 2016. He testified that on April 1, 2016 he loaded residents into a bus for a trip to the movies. After the movie Claimant was “escorting a couple of residents off of the bus.” As he turned to get off the bus his right knee “popped and gave way.” Claimant subsequently slid down a few steps.

Although Ms. Jimenez did not directly observe the incident because she was in the driver's seat of the bus, she corroborated Claimant's account. She specifically heard a sound when Claimant stepped on the bus. He reacted in pain and reached for a handle.

8. As found, the consistent medical records support Claimant's testimony that he tore his right knee medial meniscus while working for Employer on April 1, 2016. On April 2, 2016 Claimant reported to Lutheran Medical Center that at approximately 10:45-11:00 p.m. while working on April 1, 2016 he "twisted his right knee while walking down a flight of four steps on a bus." He recounted that he heard a "pop" and his right knee gave out. Claimant noted that he fell to the ground and immediately suffered right knee pain. On April 4, 2016 Dr. Vanderhorst recorded that on April 1, 2016 at about 11:00 p.m. Claimant was helping residents exit a bus after attending a movie. He was "planted on his right foot and turning to the right when he 'felt a pop' in his right knee which buckled and he fell down several steps to the ground." Claimant suffered immediate right knee pain. Dr. Vanderhorst determined that Claimant's mechanism of injury and right knee symptoms were "compatible with a medial meniscus injury." In assessing causality, Dr. Vanderhorst concluded that Claimant's right knee condition constituted a work-related injury.

9. As found, in contrast, after reviewing Claimant's medical history and conducting a physical examination, Dr. Larson determined that he likely did not suffer an industrial injury in the form of a medial meniscus tear on April 1, 2016. Relying on a medical record from Kaiser dated April 1, 2016, Dr. Larson reasoned that Claimant had suffered a right knee medial meniscus tear prior to his work activities on April 1, 2016. The April 1, 2016 Kaiser record reveals that Claimant sought a right knee evaluation. Between 3:04 and 3:06 p.m. Nurse Gonzales received a call from Claimant. Claimant complained of "Injury to R knee 2 days ago, twisted while walking and heard pop. Moreover, in a report dated April 1, 2016 at 5:25 p.m. Claimant explained to Dr. McBrearty at Kaiser that he had been suffering right knee pain for two days.

10. As found, although the Kaiser records reflect that Claimant called and visited the facility on April 1, 2016, it appears that the records are incorrectly dated. Instead, the records suggest that Claimant visited Kaiser sometime after April 1, 2016 because he recounted that he had injured his right knee at work and his pain had increased over the past 24-48 hours. His account of the incident in the Kaiser records is also consistent with his testimony, the description of Ms. Jimenez and the other medical records. Accordingly, Claimant's work activities on April 1, 2016 caused his right knee medial meniscus tear that warranted medical treatment.

Medical Benefits

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to

produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

12. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

13. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial injury. Claimant explained that on April 1, 2016 he was unable to walk or drive after his fall on the bus. He immediately contacted Employer and was directed to the Lutheran Medical Emergency Department for an evaluation. Claimant subsequently received authorized medical treatment from Lutheran Medical Center and SCL physicians. Based on the medical records and Claimant's credible testimony, Claimant is entitled to receive reasonable, necessary and causally related medical benefits to cure or relieve the effects of his April 1, 2016 right knee medial meniscus tear.

Temporary Total Disability Benefits

14. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1)

the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

15. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TTD benefits for the period April 1, 2016 through December 1, 2016. Claimant credibly explained that he ceased working for Employer after the April 1, 2016 incident because he was unable to perform his rigorous job duties due to his right knee medial meniscus tear. In June 2016 Claimant returned to full-time employment at a veterinary hospital. However, after working at the hospital for approximately three to four weeks, he ceased employment. On December 1, 2016 Claimant obtained full-time employment with another employer.

16. As found, Claimant has not reached MMI, he has not returned to regular or modified employment, he has not received a written release to return to regular employment, and he has not received a written offer to return to employment and failed to begin the employment. Accordingly, based on Claimant's credible testimony and the medical records, Claimant is entitled to receive TTD benefits for the period April 1, 2016, until December 1, 2016 minus any earnings he received while working for the veterinary hospital in June 2016.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable right knee injury on April 1, 2016 while working for Employer.

2. Claimant shall receive reasonable, necessary and related medical benefits designed to cure and relieve the effects of his April 1, 2016 industrial injury.

3. Claimant shall receive TTD benefits for the period April 1, 2016 until December 1, 2016 minus any earnings he received while working for the veterinary hospital in June 2016.

4. Claimant earned an AWW of $801.92.

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 8, 2017.

DIGITAL SIGNATURE.
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

I. Have Respondents produced clear and convincing evidence to overcome the Division Independent Medical Examination ("DIME") opinion of J. Stephen Gray, M.D., that Claimant is entitled to a 17% impairment of the right upper extremity, which would equal a 10% impairment of the whole person?

II. If Respondents cannot prove by clear and convincing evidence the DIME examiner's assignment of impairment is in error, did Claimant prove by a preponderance of the evidence that he sustained functional impairment beyond the arm, at the shoulder, so as to justify conversion of the scheduled impairment rating to a whole person impairment?

III. Did Claimant prove by a preponderance of the evidence that he is entitled to an award of the specific post maximum medical improvement ("MMI") medical benefit of yearly follow up visits with authorized treating physician ("ATP") Michael Simpson, M.D., as recommended by DIME examiner Gray?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant is employed as a route service representative, driver, and deliverer for Employer and has worked for Employer for approximately 5 years.

2. Claimant testified that he had no right or left shoulder symptoms, pain complaints, or work restrictions, prior to his compensable injury of March 8, 2016.

3. On March 8, 2016, Claimant sustained an admitted compensable injury to his right shoulder while performing work for Employer. He was lifting a bundle of uniforms onto a rack, and felt a tear.

4. On March 9, 2016, following his admitted industrial injury, Claimant reported to ATP Nicholas Kurz, D.O., at Concentra, who recorded a present history of illness as follows:

> 03-09-16: R handed Pt presents as an initial WC injury / R shoulder strain that happened last evening while doing his usual duties when lifting 30-40 lb. bundle if uniforms, pt shares that he hear and felt a tear in his R shoulder, felt immediate pain and has been unable to raise it above shoulder height since. Denies and loss of sensation or grip

> strength as well as any previous R shoulder issues, injury or trauma.
>
> Injury History:
>
> Injury Date: 03/08/16
>
> This is the result of lifting.
>
> Occurred while at work.
>
> Complaint of shoulder pain
>
> Injury History: Injury history as previously documented. Pain is located in the right anterior shoulder, right lateral shoulder, right posterior shoulder and right biceps tendon. Onset was immediately after the injury. The symptoms occur constantly. He describes his pain as sharp and aching in nature. He describes this as a current pain level of 6/10.

(Exhibit 7, p. 24).

5. A MRI of the right shoulder was obtained on March 25, 2016, which revealed supraspinatus tendinosis with full thickness tear and an anterior superior labral SLAP (labrum) tear with an associated large septated and lobulated paralabral cyst. (Exhibit I, pp. 31-33).

6. Dr. Michael Simpson first evaluated the patient on April 5, 2016. At that time he reviewed the Claimant's MRI and noted, among other things, that Claimant had moderate osteoarthritis and a pre-existing labral tear secondary to a large paralabral cyst, he opined that this was unrelated to the work injury on March 8, 2016. Accordingly, Dr. Simpson did not treat the labral tear. (Exhibit 9, p. 60).

7. On April 11, 2016, Claimant treated with ATP Walter Larimore, M.D., also at Concentra, and newly assigned ATP Larimore noted at that evaluation:

> No better. No meds. Tolerating work with restrictions. MRI showed large SLAP with cyst (pre-existing, non-work-related), but also tear of SS with 1.5 cm retraction and severe tendinosis of the long head of the biceps. Also with GH effusion and subscapularis tendinosis. Saw Simpson who is planning scope repair of SS, AC decompression and biceps repair. Icing PRN. PT x1 for HEP. Will continue pre-op. Surgery set for 5/5 with Simpson.
>
> * * *
>
> ASSESSMENT

> * * *
>
> 7. Traumatic tear of supraspinatus tendon of right shoulder (840.6) (S46.811A)

(Exhibit 7, pp. 34-35).

8. On May 5, 2016 Claimant underwent surgery with ATP Michael Simpson, M.D., which surgery included:

> 1. Arthroscopic assisted rotator cuff repair right shoulder with suture fixation of subscapularis tendon tear and anchor-based fixation of supraspinatus tear (29827).
>
> 2. Arthroscopic subacromial decompression, right shoulder (29826).
>
> 3. Open biceps tenodesis, right shoulder (23430).

Dr. Simpson did not repair the preexisting labral tear. (Exhibit 9, p. 63).

9. On July 18, 2016, Claimant saw Dr. Simpson for a post-surgical consult to evaluate his condition. Dr. Simpson opined that Claimant was doing "phenomenally well" following surgery, and noted that Claimant presented with no pain, and no need for pain medications. (Exhibit F, p. 24).

10. Following physical therapy on July 27, 2016, Claimant reported back to Dr. Larimore. At that time Claimant reported that he "feels 100% better. No pain. No Meds. Completed PT." (Exhibit C, p. 14). He was released by ATP Larimore at MMI with no impairment rating, and no recommendation for maintenance medical care. (Exhibit 7, p. 55).

11. On September 12, 2016 Claimant returned to Dr. Simpson, the surgeon, who noted:

> He has been released at this point. He is back to work full duty. He is able to do his job very well. He is not having a whole lot of pain. He still notes issues with overhead activities of his shoulder. Specifically, he cannot throw as he has pain with that….
>
> It does appear to me that at least on examination today he does have some limited range of motion, which would result in some degree of permanent partial impairment. In briefly reviewing impairment rating, I would assess he probably has somewhere between 3% and 5% whole person impairment without doing a formal impairment rating. This will be based

> on some limited range of motion he has in abduction and internal rotation and extension.

(Exhibit 9, pp. 70, 71).

12. On September 30, 2016 Respondents filed a Final Admission of Liability attaching the MMI report of ATP Larimore. (Exhibit 3, pp. 5-7).

13. On October 18, 2016 Claimant timely filed an "Objection to Final Admission of Liability" and "Notice and Proposal to Select an IME." (Exhibit 4, pp. 8-9).

14. On November 19, 2016 Claimant filed his "Application for Division Independent Medical Examination (DIME)." (Exhibit 5, pp. 10-11).

15. None of the medical records prior to or leading up to the DIME reveal that Claimant ever had any evidence of crepitus during any pre or post-surgical examinations. (Exhibits C, D, E, G, and H and Exhibits 7, 9, and 10).

16. On February 23, 2017 Claimant was evaluated by J. Stephen Gray, M.D., for a Division of Independent Medical Evaluation ("DIME") where Dr. Gray noted the following pertinent issues:

> CURRENT SYMPTOMATOLOGY: Mr. Richardson complains of intermittent, moderately-severe, throbbing pain that was graded as a 3-5 on a scale of 0-10. He reports increased right shoulder pain with lifting and reaching. His pain increases with driving. He reports that his pain is improved with exercise. Mr. Richardson takes no medication for his pain.
>
> * * *
>
> Examination of the Right Shoulder: There were four well-healed arthroscopy scars on the right shoulder. There was no evidence of laxity, swelling, sulcus sign, bruising, joint effusion, muscle atrophy, or significant boney abnormality. There was some localized tenderness over the right coracoid process and the subacromial outlet. There was constant mild fine crepitus noted over the anterior right shoulder with certain active rotatory movements. This crepitus did not appear to cause significant pain. There was no significant tenderness to palpation over the right shoulder girdle region, trapezius and cervical musculature. Range of motion of the cervical spine appeared to be within normal limits without reported pain. Impingement signs were positive in the right shoulder. Biceps provocation maneuvers were negative.
>
> * * *

ASSESSMENT:

Work-related right shoulder rotator cuff tear with,

1. Right biceps tear, with tendonitis,

2. Development of right shoulder impingement syndrome,

3. Status-post arthroscopic rotator cuff repair with subacromial decompression and biceps tenodesis.

(Exhibit 6, pp.17-19).

17. At the conclusion of the DIME report, Dr. Gray gave the opinion that apportionment was not appropriate, that "maintenance care is indicated in the case," and that Claimant should be "afforded yearly follow up visits with his orthopedic surgeon." (Exhibit 6, p. 20). Further, it was the DIME's opinion that Claimant was entitled to a "17% impairment of the right upper extremity, which would be equal to a 10% impairment of the whole person." *Id.* Nowhere in the DIME report does it indicate that Dr. Gray contacted the ATP to reconcile the range of motion disparities between his DIME and the ATP's.

18. At hearing, Respondents relied upon the testimony of ATP Larimore, who opined that when he released Claimant at MMI on July 27, 2016, Claimant had full range of motion and was not entitled to an impairment rating. The record is unclear if Dr. Larimore performed ROM measurements himself, as is customary, or if he relied upon the measurements taken by Aaron Pieffer, D. PT. It was the opinion of ATP Larimore that there must have been some intervening event that caused Claimant's condition to worsen, although he testified he had no medical records or other documentation to support such a hypothesis.

19. Dr. Larimore articulated several specific concerns regarding the validity of the DIME process by Dr. Gray:

(1) What event caused the crepitus which Dr. Gray noted, which was not noted by any medical providers previously? Why was Claimant given a significant rating for the crepitus, when that should not have been added to his range of motion ("ROM") rating per AMA guidelines?

(2) Did physical therapy continue between his placement at MMI and the DIME?

(3) What effect did the preexisting SLAP lesion have on Dr. Gray's impairment rating for range of motion?

(4) Why was the uninjured left shoulder impairment rating the same as the injured right shoulder rating? Was the normalization ROM method applied correctly?

20. Claimant retained the services of Ronald Swarsen, M.D., who testified and colored in on Demonstrative Exhibit 11 which portions of the shoulder anatomy were addressed by the surgery which had occurred on May 5, 2016.

21. At Claimant's request, Ronald Swarsen, M.D., also performed a medical records review and testified at hearing. At the time of his records review, he did not have Respondent's exhibits to review. Dr. Swarsen testified that the May 5, 2016 surgery consisted of a rotator cuff repair of the right shoulder with suture fixation of subscapularis tendon tear, anchor-based fixation of supraspinatus tear, an arthroscopic subacromial decompression and an open biceps tenodesis. He also testified from the operative report found at Exhibit 9, p. 63, and highlighted the surgical procedures performed on Demonstrative Exhibit 11, using different colored markers for each procedure depicted.

22. Dr. Swarson explained, at least partially, the anomalies between the APT's impairment ratings and those of Dr. Gray. Although not clearly articulated in the DIME, Dr. Swarson stated that it is not at all uncommon for a compensable injury, and associated repair (such as Claimant's) to aggravate a previously asymptomatic SLAP lesion. This would explain the onset of crepitus between the ATP exam and the DIME.

23. Further, Dr. Swarson opined, the AMA guidelines 3.1j do allow an additional rating for crepitus, if it is not duplicative of the range of motion deficit which is due to the compensable repair itself. Stated differently, if it is a "concurrent condition" (as herein) then there is no "double dipping" if the crepitus is due to the now-symptomatic SLAP tear instead of Dr. Simpson's repair work.

24. Dr. Swarson also does not conclude that the noted ROM deficit is necessarily due to the SLAP lesion rather than the compensable injury and subsequent repair.

25. Dr. Swarsen also credibly testified and explained that two surgical procedures which the Claimant underwent with ATP Simpson "were to structures above the glenohumeral joint" where the bones of the arm join the torso. In this case, and as is demonstrated in orange in Exhibit 11, the coracoacromial ligament was cut to allow greater movement, and a portion of the acromion was removed as well. Two situs of repair, therefore, were above the glenohumeral joint.

26. Dr. Swarsen opined that the shoulder is not part of the upper extremity, although one aspect of the functional impairment at the shoulder is measured by arm motion.

27. The Claimant testified the pain limits him in performing various motions including overhead lifting, driving, dressing and personal hygiene.

28. Based on the credible testimony of Dr. Swarsen and the Claimant, as well as the medical records, the Claimant suffered impairment and his functional impairment extends beyond the arm at the shoulder.

29. The ALJ finds that pain and discomfort caused by the industrial injury and consequent surgery caused functional impairment of structures beyond the arm at the shoulder. This functional impairment manifests itself as pain and discomfort, and it impairs the Claimant in performing various movements including overhead lifting.

30. The Claimant proved it is probably more true that not that he sustained functional impairment beyond the arm at the shoulder and is entitled to an award of permanent partial disability benefits based on DIME Gray's rating of 10% whole person. The Claimant stated that he experiences pain in the front anterior portion of the shoulder between the joint and the neck, in the area on the front of his chest between the shoulder and the neck and in the area of the shoulder joint when he moves the arm in various planes.

31. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Gray that Claimant is entitled to a 17% right upper extremity impairment rating, which would be equal to a 10% impairment rating of the whole person. As credibly testified to by both ATP Larimore and Dr. Swarsen, the difference in ratings is simply that of a difference of opinion. The difference in opinion between the physicians does not rise to the level of clear and convincing error.

32. Claimant credibly testified that he would like to have maintenance follow up visits with Dr. Simpson, one of which already occurred post-MMI on September 12, 2016, and he would like to continue those on a yearly basis as recommended by DIME physician Gray.

33. Claimant also displayed 4 surgical scars resulting from the arthroscopic repair to his right shoulder:

A. A 8 cm depressed circle on the dorsal aspect of the shoulder, darker than the surrounding skin.

B. A one inch, 3 mm wide scar near the front of the shoulder.

C. A 1/2 inch, 2mm wide depression on the outside of the shoulder.

D. A 1/2 inch, I mm wide scar on the front of the shoulder.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In evaluating a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

ATP's Concerns about Dr. Gray's DIME

First Onset of Crepitus recorded at DIME

7. There is no evidence in the record of any intervening injury in the months between the final ATP exam and the DIME. Further, Dr. Swarson explained at hearing, to the satisfaction of the ALJ, that it is unsurprising that the crepitus appeared slowly following Claimant's ATP exam, due to aggravation of this previously asymptomatic SLAP lesion. Because the crepitus could be coming from this recently caused condition, instead of the arthroscopically repaired injuries, the additional 12% crepitus rating was appropriately combined with the 6% ROM rating. Dr. Gray refers to Table 17 of the AMA guides, and describes "*constant* mild fine crepitus over the anterior shoulder with certain active rotary movements". Despite his verbal characterization as *mild,* since it was also *constant,* the 20% factor is appropriate on the Joint Crepitation Severity chart. Applied to the shoulder, it yields 12%. Of note, the critical paragraph proscribing "double dipping" for crepitus and directly associated ROM deficits sits squarely between Table 17 and this Chart. It is not "highly probable" that Dr. Gray ignored this language. The ALJ finds that Dr. Gray (as articulated by Dr. Swarson) correctly applied the crepitus rating cumulatively to the 6% ROM rating.

Continuation of Physical Therapy until the DIME

8. While Dr. Larimore wonders, perhaps with valid reason, if physical therapy continued between his final ATP report and the DIME, the record appears to be silent on this issue. What the record does show is a highly motivated Claimant, who demonstrated a desire to get back to baseline as soon as he could, so he could return to work. Nothing in the record before the ALJ on this concern of the ATP renders the DIME results suspect.

Effect of the Preexisting SLAP Lesion on the ROM Rating

9. As explained by Dr. Swarson, it is certainly possible that the ROM deficit could be due to the compensable injury, and not from the SLAP lesion. Or vise versa. Because the SLAP repair was not done, this is simply not knowable with any certainty. Tie goes to the runner here. The ALJ cannot conclude that Dr. Gray's analysis and application of ROM ratings is highly probably incorrect.

"Identical" ROM ratings for Injured vs. Non-Injured Shoulder

10. While the end results are curious, they are not identical, save the final 6% rating. The only figure which matches between the right and left shoulders is 90 degrees of external rotation, with a rating of "0" for each. The others figures are divergent, simply netting out at 6% apiece on the bottom line. The record does not explain how this might have come about, but it is Respondent's burden to show that the DIME got it wrong. The ALJ cannot conclude that is highly probable that normalization was not correctly done, but if not, that proper normalization procedures by the DIME would have yielded a materially different result.

11. Further, the ALJ concludes in this case that the normalization procedure conducted by Dr. Gray is indicative of his further clinical investigation to solve any disparity between his ROM rating and those used by Dr. Larimore. Dr. Larimore speaks highly of the abilities of Aaron Pieffer and apparently adopted Pieffer's ROM measurements as his own (taken the same day, July 27, 2017, in the identical Concentra Suite #100, and dictated 14 minutes apart) (*compare* Exhibit C, p. 15 and Exhibit D, p. 18). No actual ROM measurements appear in Dr. Larimore's MMI report, and nowhere does it appear that anyone at Concentra conducted normalization studies at all. Dr. Gray did so, and consistent with AMA guidelines.

Conversion to Whole Person

12. Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the “injury” is enumerated in the schedule set forth in subsection (2) of the statute, “the employee shall be limited to the medical impairment benefits as specified in subsection (2).” If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall “be limited to medical impairment benefits as specified in subsection (8),” or whole person medical impairment benefits. As used in these statues, the term “injury’ refers to the part of parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term “injury” refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996).

13. Under this test, the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit the claimant’s use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002). Moreover, the AMA Guides’ definitions of the “upper extremity” and the arm and torso do not dictate the “situs of the functional impairment.”

Langton v. Rocky Mountain Health Care Corp., 927 P.2d 883 (Colo. App. 1996); *Lovett v. Big Lots,* W. C. No. 4-657-285 (ICAO November 16, 2007).

14. Section 8-42-107(2)(a), C.R.S., provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c). Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001), *Johnson-Wood v. City of Colorado Springs, supra.*

15. The ALJ concludes the Claimant sustained *functional impairment* beyond the arm at the shoulder and is entitled to the converted 10 percent whole person impairment rating assigned by DIME Gray. The Claimant has also proved that he sustained injury to structures beyond the arm at the shoulder (the coracoacromial ligament, and the acromion itself), and that these injuries have caused ongoing pain that impairs the function of parts of the shoulder located proximal to the arm at the shoulder. His impairment consists of pain in the front and back of the shoulder, limits Claimant's ability to move his arm in various motions, including overhead lifting, putting on his shirt and personal hygiene.

Maintenance Medical Care

16. Respondents are obligated to provide medical treatment reasonably needed to cure and relieve the claimant of the effects of his injury. § 8-42-101(1)(a), C.R.S. The obligation to provide medical benefits is ongoing where there is substantial evidence in the records of supporting this determination that future medical treatment is reasonable and necessary to relieve the effects of the industrial injury, or prevent deterioration of the claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

17. Claimant has sustained his burden to prove by a preponderance of the evidence he is entitled to the maintenance medical benefit of yearly visits with Dr. Simpson, as recommended by DIME physician Gray, as a reasonable treatment to relieve the effects of his admitted industrial injury and prevent deterioration of Claimant's condition. It is causally related and reasonably necessary, especially in light of the fact that Claimant already has had one post MMI maintenance visit.

Disfigurement

18. Claimant has suffered serious, permanent disfigurement to an area of his body normally exposed to public view, entitling Claimant to additional compensation. §8-42-108(1), C.R.S. The ALJ orders that the Insurer shall pay Claimant $1,300.00 for his visible disfigurement as described in the Findings of Fact. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Respondents have failed to overcome DIME Gray's opinion that Claimant sustained a 17% impairment of the right upper extremity, which would equal a 10% impairment of the whole person, from his admitted industrial injury to his right shoulder on March 8, 2016.

2. Claimant has established by a preponderance of the evidence that he sustained functional impairment beyond the arm at the shoulder and is entitled to a permanent partial disability benefit based upon a 10% whole person impairment rating.

3. Claimant has established by a preponderance of the evidence that the DIME physician's recommendation for maintenance medical care follow-ups with the orthopedic surgeon is reasonable, causally related and reasonably necessary to prevent a worsening of Claimant's condition from Claimant's industrial injury.

4. Respondent shall compensate Claimant $1,300.00 for his visible disfigurement as described in the Findings of Fact. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 9, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to post maximum medical improvement (MMI) medical treatment and should be reimbursed for post-MMI physical therapy expenses.

FINDINGS OF FACT

1. Claimant works for Employer as a civil engineer.

2. Claimant suffered an admitted occupational disease in the form of right-sided carpal tunnel syndrome (CTS) with an onset date of October 1, 2013.

3. Claimant underwent extensive conservative treatment. Claimant eventually underwent right-sided CTS decompression on March 4, 2016, performed by S.T. Chamberlain, M.D.

4. Claimant's authorized treating physician (ATP), Marc-Andre Chimonas, M.D., placed Claimant at MMI on June 6, 2016. Dr. Chimonas stated that " [t]he overall pattern with bilateral carpal tunnel syndrome, nodular stenoising tenosynovitis, slightly elevated rheumatoid factor, multiple joint pain is most consistent with an inflammatory condition such as rheumatoid arthritis. Of all these difficulties only the right sided carpal tunnel syndrome meets the division criteria for work-related overuse disorder." Dr. Chimonas determined Claimant had no permanent impairment and no need for post-MMI medical maintenance care. Dr. Chimonas recommended Claimant follow up with her primary care provider for all other medical issues, including what Dr. Chimonas noted may be an underlying inflammatory condition.

5. Respondents filed a Final Admission of Liability (FAL) based upon Dr. Chimonas' determination and denied medical maintenance care. Claimant subsequently requested a Division Independent Medical Examination (DIME).

6. Claimant subsequently returned to Dr. Chamberlain on her own on August 4, 2016. Claimant complained of bilateral wrist and shoulder pain and irritation. Claimant advised Dr. Chamberlain that she had several different opinions about the pain and irritation in her upper limbs and wanted Dr. Chamberlain's advice as to moving forward with a thoracic outlet syndrome (TOS) procedure. Dr. Chamberlain did not believe

Claimant required "any definitive surgical intervention for her thoracic outlet" and advised her that it was merely "a matter of maintenance", she did not appear to require "any definitive treatment" for her symptoms, and gave her a note for physical therapy. Dr. Chamberlain did not address causation for her thoracic outlet symptoms in his August 4, 2016 note.

7. Claimant underwent six sessions of physical therapy at GetWell Physical Therapy for pain in her thoracic spine and brachial plexus disorders between September 13 and September 30, 2016.

8. Carlos Cebrian, M.D., conducted the DIME on September 28, 2016. Dr Cebrian issued a DIME report dated October 18, 2016. Dr. Cebrian concluded that Claimant's only work-related diagnosis was right-sided CTS. Dr. Cebrian found that Claimant's bilateral finger nodules, tenosynovitis, and left CTS are not causally related to the work injury. Dr. Cebrian noted that his examination revealed positive impingement testing bilaterally and possible rotator cuff impingement. Dr. Cebrian opined, however, that Claimant's bilateral shoulder complaints are not causally related to her work. Dr. Cebrian agreed with Dr. Chimonas that Claimant was at MMI on June 6, 2016 and had no permanent impairment. He also found Claimant did not need medical maintenance care and could work in a full and unrestricted capacity.

9. On October 28, 2016, Respondents filed a new FAL based on Dr. Cebrian's DIME report, denying liability for post-MMI medical maintenance benefits.

10. Claimant saw Bennett Machanic, M.D. on January 18, 2017. Dr. Machanic had evaluated Claimant on prior occasions. Dr. Machanic noted that his clinical examination suggested cubital tunnel syndrome bilaterally, left-side CTS findings, and some issues in the brachial plexus. Dr. Machanic opined that Claimant had cumulative trauma disorder in her upper extremities and proposed a surgical approach due to a nerve compression. Dr. Machanic recommended that the treatment be handled in the workers' compensation system. He recommended an EMG, which he performed on March 21, 2017. Dr. Machanic noted that the EMG revealed moderately advanced right and left CTS, pathology over the right lower brachial plexus consistent with possible TOS, and possible TOS or brachial plexus issues on the left. Dr. Machanic noted a worsening of brachial plexus problems.

11. Claimant testified at hearing that since being placed at MMI she has had ongoing problems in her right wrist carpal area and that her pain will radiate up her arm, including her elbow and shoulder. She also testified that she has been undergoing physical therapy which she has paid for post-MMI. Claimant testified that the physical

therapy significantly helps her CTS symptoms, and assists her functionality in the workplace. Claimant further testified that the physical therapy treats both arms from shoulders to wrists.

12. Claimant testified that she is not attempting to overcome the DIME's causation opinion, but is seeking to have medical maintenance care ordered and the post-MMI medical care she has incurred, i.e. the physical therapy from GetWell for her shoulder pain, paid for by the Respondents.

13. The ALJ credits the opinions of Drs. Cebrian and Chimonas over the conflicting opinion of Dr. Machanic and finds that Claimant's only work-related condition is right-sided CTS.

14. The ALJ credits the opinions of Drs. Cebrian and Chimonas over the conflicting opinion of Dr. Machanic and finds that no further medical treatment for Claimant's work-related condition is reasonably necessary.

15. Claimant has failed to prove entitlement to medical maintenance care for her work-related condition by a preponderance of the evidence.

16. Claimant has failed to demonstrate that she is entitled to reimbursement of the medical expenses incurred post-MMI.

17. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive

of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Medical Maintenance Benefits

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993).

As found, Claimant has failed to establish that she is entitled to medical maintenance care. While other medical conditions were noted, Drs. Cebrian and Chimonas credibly opined that such conditions were not work-related, and that the only work-related condition was right-sided CTS. Drs. Cebrian and Chimonas credibly opined that Claimant did not require medical maintenance treatment for her work-related condition. Based on the totality of the evidence, Claimant failed to establish by a

preponderance of the evidence that she is entitled to medical maintenance benefits and reimbursement of physical therapy expenses incurred post-MMI.

ORDER

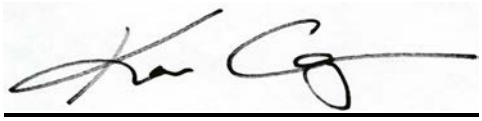
It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she is entitled to post-MMI medical treatment. Claimant's claim for post-MMI maintenance medical treatment and request for reimbursement of post-MMI physical therapy expenses is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 8, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did Claimant prove that he suffered a compensable low back injury on December 20, 2016?

If this claim is deemed compensable, the ALJ will address these additional questions:

2. What is Claimant's average weekly wage (AWW)?

3. Is Claimant entitled to temporary total disability (TTD) benefits commencing December 21, 2016?

4. Is Claimant entitled to a general award of medical benefits?

STIPULATIONS

1. If this claim is compensable, Concentra is the primary authorized provider.

2. If this claim is compensable, Respondents agreed Claimant is entitled to TTD benefits commencing December 21, 2016.

FINDINGS OF FACT

1. Claimant works as a security officer for Employer, stationed at Memorial Hospital. His duties include morgue escort, which is called a "Code 6."

2. On December 20, 2016, Claimant participated in a Code 6 with two funeral home employees, Ty McCulley and Jerry Santos.

3. Claimant retrieved a bagged corpse from the freezer on a hospital gurney and rolled it into position beside the mortuary's gurney. The platform of the hospital gurney is a large metal tray, which can be lifted on the side, causing the body to slide onto the mortuary gurney.

4. Claimant was at the patient's feet, Mr. McCulley was at the head, and Mr. Santos was standing on the opposite side of the mortuary gurney to pull the body onto the gurney. As Claimant and Mr. McCulley lifted the tray, Mr. McCulley let go or lost control of his side, causing the body to shift awkwardly. Claimant injured his back attempting to support the body and prevent it from falling.

5. Claimant escorted Mr. McCulley and Mr. Santos out of the facility, and then verbally reported the injury to his supervisor, Christian Trim. The Employer's First Report of Injury confirms that Claimant reported the injury on December 20, 2016.

Regarding the mechanism of injury, the Employer's First Report states "EE was assisting an outside company carry a deceased patient, EE strained lower back by helping lift him."

6. Claimant finished his shift and went home at approximately 10:00 PM. He did not immediately seek medical treatment because he assumed he had a temporary strain. He took ibuprofen and went to bed.

7. Claimant awoke the next morning with intense low back pain, so he went to his chiropractor, Dr. James Thatcher. Dr. Thatcher's contemporaneous medical record dated December 21, 2016 confirms Claimant's account of the injury. The report notes that at approximately 4:00 PM on December 20, Claimant was lifting a dead body in the hospital and the person lifting the other end "dropped" their side. Claimant developed low back pain "immediately," which was initially "mild" but had progressed to a level of 8/10. Dr. Thatcher diagnosed a lumbar strain and gave Claimant work restrictions of no lifting greater than 10 pounds and no sitting longer than 15 minutes at a time.

8. Employer referred Claimant to Dr. Frank Polanco for authorized treatment. At the initial visit on December 21, Claimant reported "he was assisting in lifting a deceased person and pulled his back when the other person on [sic] his side." Examination of the low back demonstrated tenderness, tightness, muscle spasm and limited range of motion. Dr. Polanco gave Claimant a Toradol injection and recommended physical therapy. He took Claimant off work for through December 24, 2016, and opined Claimant could return to sedentary work starting December 25.

9. Also on December 21, Claimant emailed Mr. Trim a written report of injury. Claimant's email states "McCulley was positioned at the head of the deceased patient, and I was positioned at the feet. As I was attempting to assist McCulley with the transfer of the deceased patient onto the mortuary gurney, McCulley let go of the head of the gurney, which in turn left me with the full weight of the deceased patient, along with the gurney. It was at this time that I sustained the injury to my lower back."

10. Claimant was seen at the Memorial Hospital emergency room on the evening of December 22. He reported that he "works here is a security guard and states that when he was helping lift a body for the morgue x2 days ago, the other individual let go of the body and he held the full weight of the body." Claimant was diagnosed with a lumbar strain and advised to "avoid heavy lifting."

11. Claimant was dissatisfied with Dr. Polanco and was allowed to change providers to Concentra. Claimant first went to Concentra on December 27, 2016 and saw Kenneth Ginsburg, PA-C. Claimant described the same mechanism of injury to PA-C Ginsburg. On examination, Claimant had palpable lumbar muscle spasms and limited range of motion.

12. Claimant had a lumbar MRI on January 11, 2017. The MRI showed a right-sided disc herniation at L1-2 displacing the right L2 nerve root, a herniation with

annular tearing at L4-5 abutting the left L4 and L5 nerve roots, an L5-S1 disc herniation with annular tearing, and straightening of the spine compatible with spasm.

13. Claimant underwent an Independent Medical Examination (IME) with Dr. Timothy O'Brien on April 6, 2017 at Respondents' request. Claimant told Dr. O'Brien he injured his back during a body transfer when a funeral home worker let go of his side of the body. Dr. O'Brien opined Claimant suffered a minor lumbosacral sprain/strain, but that many of his findings were "nonorganic" in nature. He opined Claimant had healed from his minor injury and reached MMI before the April 6 examination. Nonetheless, Dr. O'Brien agreed the mechanism of injury was sufficient to cause at least a temporary strain/sprain of Claimant's lumbar spine.

14. Claimant subsequently underwent an IME with Dr. Timothy Hall on May 5, 2017 at his counsel's request. Claimant reported the same mechanism of injury he had described to other providers. Dr. Hall diagnosed a low back sprain with SI joint involvement. Dr. Hall disagreed with Dr. O'Brien's characterization of Claimant's injury is "minor." Dr. Hall indicated he found nothing "nonorganic" about Claimant's presentation.

15. Ty McCulley and Jerry Santos testified via deposition on behalf of Respondents. Mr. Santos is the brother-in-law of the funeral home's owner. He works "off and on" for the funeral home, filling in where needed, including morgue pickup. Mr. Santos testified nothing out of the ordinary occurred on December 20, 2016 when they retrieved the corpse from Memorial Hospital. Mr. Santos testified the funeral home employees do all the work, and hospital employees "never" touch the bodies did not assist with moving the corpses "in any way."

16. Mr. McCulley works as a funeral director for the funeral home. He is also the owner's nephew. Mr. McCulley testified he and Mr. Santos pulled the body from the hospital gurney to their gurney without assistance. Claimant merely stood on the opposite side of the gurneys to brace them so they did not roll apart. He testified there was no incident regarding the body. Mr. McCulley did not recall Claimant mentioning being in pain or exhibiting any outward symptoms of pain.

17. Both medical experts testified at hearing consistently with their IME reports. Dr. Hall stressed he witnessed no "nonorganic" findings on physical examination such as those observed by Dr. O'Brien. Dr. Hall testified he had reviewed the preinjury chiropractic records that were not available at the time of his IME. He opined that the previous records were essentially irrelevant because there was no question of apportionment and he believed Claimant clearly suffered an injury on December 20, 2016.

18. Dr. O'Brien stood by his opinion that Claimant exhibited significant nonorganic findings on examination. Dr. O'Brien reiterated that Claimant suffered only a minor strain as a result of the incident on December 20, which would have healed quickly.

19. Claimant's testimony is credible and persuasive.

20. Claimant proved by a preponderance of the evidence he suffered a compensable injury on December 20, 2016.

21. For the pay periods ending January 8, 2016 through December 22, 2016, Claimant earned gross wages totaling $28,543.98.

22. Claimant's AWW is $548.92.

23. Claimant has been continuously disabled and suffered a total wage loss since December 21, 2016 as a result of his industrial injury.

24. Claimant has not been put at MMI or released to regular duty by any ATP.

25. Claimant is entitled to TTD benefits commencing December 21, 2016.

26. Claimant is entitled to a general award of reasonable, necessary and related medical treatment.

CONCLUSIONS OF LAW

A. Claimant's low back injury is compensable

To receive compensation or medical benefits, Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation. If a claimant's work aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

In assessing the credibility of witnesses, the ALJ can consider numerous factors including the consistency, reasonableness or plausibility the testimony, the extent to which the testimony is supported or contradicted by other evidence, the motives of the witness, and the possibility of bias, prejudice or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); CJI-Civ. 3:16. In this case, none of the lay witnesses can be considered disinterested. The Claimant obviously has a financial stake in the outcome of the case, but Mr. McCulley and Mr. Santos also have incentive

to protect themselves and their family business from potential liability for causing or contributing to Claimant's injury.

With conflicting testimony from lay witnesses on both sides, the ALJ relied heavily on the contemporaneous medical records, employer records and statements. Claimant has consistently attributed the onset of his back pain to an incident that occurred while moving a body in the morgue. He verbally reported the injury to his supervisor shortly after it happened, and submitted a written report the next day. Over the next two days, Claimant recounted the same history to three different medical providers. At the hearing, Claimant presented as forthright and sincere, describing the event in a manner consistent with the history documented in the medical and employer records.

Additionally, Claimant's physical condition appears to have changed significantly since December 20, 2016. Although Claimant has a history of intermittent low back problems and episodic chiropractic treatment, he was working and performing daily activities without limitation immediately before December 20. In early September 2016, his chiropractor noted Claimant's low back pain was 80% improved with good tolerance for sitting, standing and walking. He was discharged to follow-up "PRN," and required no further treatment until December 21, 2016. By contrast, medical records since the date of injury consistently document severe back pain, limited range of motion and muscle spasm.

The ALJ is persuaded that something happened around December 20 to cause the onset of Claimant's severe symptoms, and there is no persuasive evidence of any nonwork-related trigger. Based on the totality of evidence presented, the ALJ concludes the most likely catalyst for Claimant's symptoms after December 20, 2016 was the work-related incident he described.

B. Claimant's AWW is $549.39

Under § 8-42-102(3), the ALJ has discretion to determine the claimant's AWW by any method that will "fairly" calculate the claimant's typical preinjury earnings. The entire objective of AWW calculation is to arrive at a fair approximation of the claimant's actual wage loss and diminished earning capacity as a result of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant earned gross wages totaling $28,543.98 in the pay periods ending January 8, 2016 through December 22, 2016. This period covers 52 weeks, during which Claimant's wages fluctuated from a low of $426.58 per week to a high of $757.17. Given the variability in Claimant's earnings, the ALJ concludes it is most appropriate to average his wages over a longer period. $28,543.98 ÷ 52 weeks = $549.39.

C. Claimant is entitled to TTD benefits commencing December 21, 2016

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular

working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once the claimant establishes temporary disability, the right to benefits is measured by the degree of the wage loss, not the claimant's willingness to seek employment or the claimant's hypothetical ability to perform modified employment. *Black Roofing Inc. v. West*, 967 P.2d 195 (Colo. App. 1998); *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987).

The persuasive evidence shows that Claimant was disabled by and suffered a wage loss as a direct and proximate consequence of his industrial injury. He has been under restrictions and unable to perform his regular job since December 21, 2016.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). Claimant has not been put at MMI by any ATP, released to regular duty, or returned to work. Although Claimant was released to modified duty, Employer has not offered him any work within his restrictions. Dr. O'Brien's opinion that Claimant is at MMI is legally insufficient to terminate TTD benefits absent a determination of MMI by an ATP or a DIME. *Brown v. Ace Hardware Corp*., W.C. No. 4-791-494 (ICAO, October 22, 2010); *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004); *Chaussart v. City of Boulder*, W.C. No. 4-933-742-02 (ICAO, November 14, 2014). Accordingly, Claimant is entitled to TTD benefits from December 21, 2016 ongoing.

D. Claimant is entitled to medical treatment for the compensable injury

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Having found the claim to be compensable, it follows that Claimant is entitled to all reasonable, necessary, and related treatment for his industrial injury. Claimant requested no specific medical treatment, so the ALJ will only issue a general award of medical benefits.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant TTD benefits at the rate of $366.26 per week commencing December 21, 2016 and continuing until terminated by law.

2. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. Insurer shall cover all reasonable and necessary medical treatment from authorized providers to cure and relieve the effects of Claimant's December 20, 2016 injury.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 10, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-964-260-01

STIPULATION

At the commencement of the hearing, the parties stipulated that Claimant received an overpayment of $14,709.96, for his receipt of TTD benefits between November 10, 2015, and August 17, 2016, which was the period between Claimant release at maximum medical improvement (MMI) and the date the Final Admission of Liability (FAL) was filed pursuant to the DIME physician's report.

REMAINING ISSUES

I. Whether Claimant has established by clear and convincing evidence that Dr. Stieg's impairment rating opinions are highly probably incorrect and if so what is the correct impairment rating associated with Claimant's industrial injury;

II. Whether Respondents have established by a preponderance of the evidence that they are entitled to credit the value of Claimant's 5% impairment rating against the value of continued TTD payments made to Claimant between the original release at MMI, the DIME and the subsequent FAL in addition to an alleged overpayment in temporary disability benefits paid during the time period of October 2, 2014 through November 9, 2015 while Claimant was working for Specialty Sports.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant suffered an admitted injury to his lower back while working for Employer on July 17, 2014.

2. Claimant testified and the initial medical records indicate that he was shoveling sand off a conveyor belt when he felt a pop in his low back. He developed low back pain and difficulty walking prompting him to report the injury and seek treatment.

3. Claimant has had prior back injuries and has been bothered on and off by back pain in the past.

4. On August 29, 2014, an MRI of the lumbar spine was performed which was interpreted as revealing mild degenerative disc disease with facet involvement with mild bilateral neural foraminal narrowing at L2-3 and minimal narrowing at L3-4.

5. A repeat MRI of the lumbar spine was completed on December 10, 2014. The

results were compared to the prior MRI, after which it was noted that there was an increase in synovitis with reactive edema around the L4-5 facet joint with soft tissue edema "tracks" into the left L4-5 foramen, as well as borderline L4-5 central canal stenosis.

6. On December 18, 2014, Dr. Michael Sparr issued a report regarding the results

of an EMG study which he felt contained findings "consistent with a longstanding sensorimotor axonal and demyelinating peripheral neuropathy and completely unrelated to Claimant's July 17, 2014 work injury.

7. Dr. Sparr saw Claimant on January 26, 2015, at which time Dr. Sparr found:

> "He is diffusely tender to even light touch from L1 through the sacrum bilaterally and over diffuse gluteal muscles. This is evident with only very light skin touch. Waddell's are positive today for axial loading, regional pain complaints, diffuse overreaction. . . ."

8. Dr. Sparr went on to note that the findings of Claimant's MRI showed mild degenerative findings which were inconsistent with his pain and numbness complaints.

9. Plain view x-rays of the lumbar spine obtained at Penrose hospital obtained February 18, 2015 demonstrated "evidence of moderate multilevel degenerative disc and facet joint changes throughout the lumbar spine, and 2-3mm of anterolisthesis at L4-5."[1]

10. Claimant underwent several injections, but he testified that "they didn't do any good."

11. During Claimant's course of treatment, Dr. Scott Primack authored three separate reports concerning various treatment modalities recommended by some of Claimant's authorized treating physicians. In a report addressing the reasonableness and necessity of continued injections, Dr. Primack opined that additional injections were not warranted since a previous set of injections proved unhelpful, and non-diagnostic. He also recommended a follow up EMG/Nerve conduction study to confirm the results of Dr. Sparr's findings.

12. A follow up EMG/NCS was performed on June 22, 2015, by Dr. William Seybold, which verified that Claimant continued to exhibit signs of polyneuropathy, not radiculopathy.

13. In considering and comparing Claimant's negative diagnostic response to a transforaminal epidural steroid injection along with the objective results of the EMG/nerve conduction studies with his MRI findings, Dr. Primack opined that

[1] This information is contained in the Division Independent Medical Examination (DIME) report of Dr. Stieg.

Claimant's continued pain complaints were more reasonably related to a previously diagnosed peripheral polyneuropathy.

14. Dr. Primack also testified that internal fear constructs, i.e. pain behavior associated with Claimant's documented; pre-existing, non-work related conditions could influence his level of effort during motion testing and thus, the validity of his lumbar range of motion measurements.

15. Claimant underwent a Functional Capacity Evaluation (FCE) at Excel Physical Therapy (Excel) on November 8, 2015. As part of this evaluation, lumbar range of motion testing was performed. Claimant's range of motion loss pursuant to this testing totaled 16% whole person impairment.

16. Claimant returned to Colorado Springs Health Partners, his authorized providers on November 10, 2015 where he was evaluated by Dr. Shireen Rudderow on November 10, 2015. Dr. Rudderow placed Claimant at maximum medical improvement (MMI) after receiving conservative care for more than a year noting further that a permanent impairment rating would be received within fourteen days.

17. Dr. Robert Baptist, revaluated Claimant for permanent impairment on December 10, 2015. In his report generated after this encounter, Dr. Baptist wrote that he spoke with Claimant regarding his care noting further that all other treatment providers had considered Claimant at or near MMI. Consequently he assumed that Claimant's care was complete, a fact which Claimant understood and accepted. As part of his evaluation, Dr. Baptist indicated that Claimant's medical situation presented as "very complex." It was noted that Claimant was "almost totally refractory to any treatment modalities" and that his prognosis for improvement was poor. According to Dr. Baptist, Claimant's only "hope for improved pain relief was an implantable spinal stimulator which he recommended as maintenance care.

18. As part of his impairment rating, Dr. Baptist relied upon, but slightly altered Claimant's impairment for range of motion loss as determined by the physical therapist during the FCE as Excel. Specifically, Dr. Baptist found that Claimant's loss of lumbar extension equated to 6% impairment, not 5% as calculated by the physical therapist. Consequently, the full amount of impairment for range of motion loss totaled 17% rather than 16%.

19. Dr. Baptist would go on to supplement the range of motion impairment with 7% impairment for a Table 53 diagnosis citing "moderate degenerative changes" as the basis despite that the MRI's noting the presence of "mild degenerative changes." Additionally, Dr. Baptist provided a total of 8% whole person impairment for motor and sensory nerve impairment which he admitted was somewhat of an arbitrary calculation given that the Claimant was "very difficult to assess." Dr. Baptist combined the various components of Claimant's impairment rating reach a final combined whole person impairment rating of 29%.

20. The existence of a polyneuropathy would prompt Dr. Primack to opine that

Claimant's leg pain was not claim related. Accordingly, Dr. Primack did not consider Claimant to be an appropriate candidate for the placement of a spinal cord stimulator as part of this claim as recommended by Dr. Baptist.

21. Respondents timely challenged the 29% rating and initiated the Division Independent Medical Examination (DIME) process. Dr. Richard Stieg was selected as the DIME physician.

22. On June 21, 2016, Claimant attended the requested DIME with Dr. Stieg.

23. Dr. Stieg undertook a review of Claimant's medical records dating back to 1990. He also performed a physical examination and referenced the amount of motion Claimant had in his lumbar spine. Despite Respondents suggestion otherwise, there is a dearth of evidence to suggest that Dr. Stieg took formal lumbar range of motion measurements. He issued his DIME Report on July 15, 2016. In his DIME report Dr. Stieg agreed with Dr. Rudderow's MMI date of November 10, 2015 and concluded that Claimant was entitled to a Table 53 rating of 5%.

24. As part of his physical examination, Dr. Stieg found that Claimant "tender to some degree over both SI joints, but all provocation testing at the hips [was] negative for the production for radicular pain or SI pain." He also noted that Claimant "[exhibited] 4/5 Waddell's signs with increased back pain being reported on simulated axial load and simulated axial rotation . . . ."

25. Though Dr. Stieg specifically noted that Claimant had "very minimal motions of the lumbar spine in flexion/extension and side bending", he did not include any range of motion measurement worksheets serving to demonstrate that formal "testing" was completed, choosing instead to state:

> I am giving the patient a final impairment rating based on his mild to moderate degenerative lumbar disease. He has no objective evidence of radiculopathy to allow me to offer any impairment for neurological findings. His range of motion testing coupled with Waddell's findings, although technically valid is incompatible with the radiology findings. That coupled with clear cut evidence of symptom magnification (positive Waddell's signs) does not allow for any impairment for loss of range of motion.

26. Based upon the evidence presented, the ALJ finds that Dr. Stieg technically invalidated Claimant's lumbar range of motion measurements secondary to his opinion that the measurements were non-physiologic and incongruent with the objective findings on imaging.

27. Respondents filed a Final Admission of Liability (FAL) based on the DIME report of Dr. Stieg on August 19, 2016. In the FAL, Respondents took credit for the value of Claimant's 5% impairment rating against the value of continued TTD payments made to

Claimant between the original release at MMI, the DIME and the subsequent FAL. After taking credit, Claimant was left with an overpayment which, by stipulation of the parties, amounted to $14,709.96. Respondents also reserved the issue of an additional overpayment of TTD benefits noting, "Respondents retain the right to reimbursement of additional overpayment amounts based on claimant's receipt of TTD benefits while maintaining employment."

28. From the date of injury through the date of MMI, Claimant received $50,883.50 in TTD benefits. During the same time period, Claimant was employed at Specialty Sports where he earned a total of $28,549.78. Based upon the evidence presented, two-thirds of the difference between what Claimant would have made in full duty work with Employer and what he made while working at Specialty Sports equals $37,130.89. Because Claimant was paid TTD benefits in the amount of $50,883.50, but was entitled only to temporary partial disability in the amount of $37,130.89, he has been overpaid in TTD in the amount of $13,752.61. Consequently, Respondents have proven that there is an additional overpayment in TTD benefits paid to Claimant while he was working at Specialty Sports. The evidence presented persuades the ALJ that the total amount of overpayment of benefits in this case is equal to $28,462.57 ($14,709.96 + $13,752.61= $28,462.57).

29. Claimant timely objected to Respondents' August 19, 2016 FAL and filed an Application for Hearing endorsing the issue of "overcoming DIME." Respondents timely responded to the application endorsing issues of causation, apportionment, and overpayment.

30. At hearing, Claimant presented the testimony of Dr. John Hughes, who was endorsed as an expert in occupational medicine.

31. Relying primarily on Desk Aid 11, Dr. Hughes testified that Dr. Stieg's failure to attach range of motion worksheets, whether the range of motion measurements were valid or not, to the DIME report left the report incomplete and fatally flawed. Dr. Hughes also noted that the lack of range of motion worksheets coupled with the content of the DIME raises the appearance that formal range of motion testing was not done. Finally, while he agreed that it was within Dr. Stieg's discretion to invalidate range of motion secondary to the presence of significant pain behavior and being non-physiologic, Dr. Hughes suggested that Dr. Stieg erred in failing to reference another complete, but invalid range of motion study as the basis for his decision to invalidate subsequent range of motion and have the Claimant return for a second round of range of motion measurements as provided for by Desk Aid 11.

32. Dr. Scott Primack testified at hearing as an expert in physical medicine with a sub-specialty in electro diagnostic medicine. Dr. Primack testified in support of the findings of Dr. Stieg's DIME report. In his testimony, Dr. Primack explained that Dr. Stieg's nullification and lack of attachment of range of motion measurement was within his discretion, was in accordance with the Division's Level II accreditation, and was consistent with the AMA Guides, Third Edition Revised.

33. Specifically, Dr. Primack testified as follows:

> And you know, whether you want to put in the work sheets or not, the work sheets are going to be invalid, so I don't think that by not having the work sheet it invalidates all of the work that he did, because he went through some pretty extensive notes.

34. After a discussion of the differing reports and findings of the various treatment providers in the record, Dr. Primack testified that the questions concerning validity of Claimant's pain complaints, range of motion measurements, and diagnosis were nothing more than "physician's different opinions."

35. Based upon the evidence presented, the ALJ finds Dr. Hughes' opinions concerning the validity of Dr. Stieg's DIME report more persuasive than the contrary opinions of Dr. Primack. While the record evidence supports clear differences of opinion between Dr. Baptist and Dr. Stieg concerning Claimant's diagnosis, pain complaints and range of motion measurements, the challenges to Dr. Stieg's DIME opinions are based upon his failure to adhere to established methods/protocols regarding the testing and documentation of range of motion measurements. It is undisputed that Dr. Stieg failed to attach range of motion worksheets to his DIME report. Moreover, the evidence presented persuades the ALJ that Dr. Stieg failed to reference another report wherein range of motion was invalidated or schedule Claimant for a second set of range of motion measurements as referenced by Desk Aid 11.

36. The combination of Dr. Stieg's failure to attach worksheets to his DIME report coupled with his failure to reference/accept another report which invalidated range of motion measurements or bring Claimant back for a second set of measurements constitutes clear and convincing evidence that formal range of motion testing was not done in this case rendering the legitimacy of his opinions concerning the degree of impairment associated with range of motion loss in this case suspect and highly probably incorrect. Consequently, Claimant has met his required legal burden to set Dr. Stieg's opinion regarding impairment associated with range of motion loss aside.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or

unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). As found here, Dr. Hughes' opinions are supported by the content of the medical record he reviewed and Desk Aid 11. As such, the ALJ finds Dr. Hughes' opinions credible and convincing. Moreover, there is substantial persuasive evidence to support a conclusion that Dr. Stieg deviated from the accepted methodology of the AMA Guidelines, the tenets set forth by the Division of Worker's Compensation in Desk Aid 11 as well as the principles of the Level II Accreditation Curriculum when he completed the DIME in this case. Consequently, the ALJ rejects Dr. Stieg's opinions regarding range of motion impairment as unpersuasive and highly probably incorrect.

Overcoming the DIME Physician's Impairment Rating

C. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning impairment is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding impairment, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). As found here, the ALJ concurs with Claimant's expert (Dr. Hughes) that Dr. Stieg's failure to follow accepted rating protocols regarding the testing and documentation of range of motion loss/impairment renders the his report incomplete and his opinions regarding range of motion impairment fatally flawed.

E. Desk Aid 11, paragraph 5 reminds providers evaluating range of motion impairment to "attach all applicable work sheets to the narrative report and include this information to all legally concerned parties." More importantly, paragraph 10 provides that "[t]o invalidate spinal range of motion impairment, claimants must have two visits" where "[t]wo sets of three measurements must be taken on each visit (12 measurements total)(emphasis in original). However the tip provides that if a "physician performing a Division IME finds range of motion measurements invalid (due to SLR check or for physiologic reasons) such physician may fulfill this requirement by accepting invalidated measurements from other reports in lieu of bringing the claimant back for a second set of measurements." Nonetheless, the tip notes that the "physician must, however, report his/her own initial sets of measurements", referencing the Level II Accreditation Curriculum for range of motion testing for the spine. As found, Dr. Stieg failed to actually reference any formal range of motion testing measurements in his DIME report or follow any of the aforementioned protocols encouraged by the Division of Worker's Compensation and referenced in the AMA Guides and/or Level II Accreditation Curriculum. Respondents' suggestion that Dr. Stieg's explanation of the reasoning he invalidated the range of motion makes the need to attach worksheets "extraneous and immaterial" is unconvincing as it assumes that formal range of motion testing was done in this case and completely ignores the need to cite to a previous report invalidating range of motion or have the claimant return for a second set of measurements. Here, the convincing evidence presented persuades the undersigned that Dr. Stieg did neither. Consequently, the ALJ concludes the DIME in this case is fatally flawed and the opinion of Dr. Stieg regarding range of motion impairment highly probably incorrect.

F. Where the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). In this case, the undersigned concludes that Dr. Baptist's

impairment rating for spinal disorders, i.e. 7% from Table 53 of the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised*), hereinafter the "AMA Guides", is supported by the record. The written record is replete with reference to moderate degenerative changes revealed by imaging study, including x-ray. Even Dr. Stieg provides the following impression of the lumbar spine: "[m]ild to moderate disc and joint degenerative disease of the lumbar spine without evidence of specific radiculopathy" (emphasis added). Moreover, Dr. Stieg rated Claimant for "mild to moderate degenerative lumbar disease. Regarding the spinal range of motion impairment as determined by Dr. Baptist along with his Table 49 nerve rating is supported by the content of the medical records associated with Claimant's injury, the undersigned concludes that these aspects of Claimant's impairment rating are also supported by the record. While Dr. Baptist calculated 17% impairment for range of motion loss and Claimant has polyneuropathy, Claimant's range of motion measurements were valid and Respondents failed to present evidence of a specific error committed by Dr. Baptist in assigning Table 49 spinal nerve root impairment. Indeed, Dr. Stieg did not opine that Claimant's leg pain was exclusively caused by his polyneuropathy. Rather, he noted simply that the "majority" of Claimant's leg pain was related to polyneuropathy and that while there was a suggestion that Claimant may have radiculitis there was no evidence of radiculopathy. Consequently, he elected not to rate Claimant's leg pain. On the other hand, Dr. Baptist felt that Claimant's imaging supported a finding inflammation and fluid accumulation sufficient to produce an acute radiculopathy. Thus, he elected to rate Claimant's leg pain. Based upon the evidence presented, the ALJ concludes only that there is a difference of opinion between Dr. Baptist and Dr. Stieg as it pertains to these aspects of Claimant's impairment. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Accordingly, the ALJ concludes that Claimant's true impairment ratings causally related to his July 17, 2014 industrial injury is 29% as calculated by Dr. Baptist.

Credits & Overpayments

G. Section 8-40-201(15.5), C.R.S. provides as follows:

> "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability benefits under said articles.

Thus, §8-40-201(15.5), C.R.S. provides for three categories of possible overpayment: (1) a claimant receives money "that exceeds the amount that should have been paid"; (2) money received that a "claimant was not entitled to receive"; and (3) money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. *See Simpson v. Industrial Claim*

Appeals Office, 219 P.3d 354 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010).

H. Respondents bear the burden, by a preponderance of the evidence that Claimant received an overpayment of TTD benefits. Respondents' assertion of the right to recover an overpayment is a factual matter for determination by the ALJ. *Karyn Milazzo v. Total Long-term Care*, *Inc.*, W.C. No. 4-852-795-02, (ICAP Jun. 11, 2014). In this case, the ALJ agrees that Respondents properly preserved the issue of an additional overpayment in their Final Admission and in Response to Claimant's Application for Hearing for Claimant receipt of wages while working at Specialty Sports.

I. Section 8-42-105(3)(b), C.R.S. (2016) mandates termination of TTD benefits when an "employee returns to regular or modified employment." Modified employment is "employment which is modified in accordance with the limitations and restrictions imposed by the attending physician." *Holt v. Hyper Shoppes Colo. Inc.*, W.C. 4-176-897 (ICAP. Nov. 17, 1994). In this case, Claimant was working modified employment within his restrictions at Specialty Sports from October 2, 2014, through November 9, 2015 while receiving TTD. Accordingly, an overpayment occurred because Claimant received TTD benefits in excess of TPD benefits he was entitled to while maintaining employment, and because the excess TTD was "money the Claimant was not entitled to receive." Claimant's undisputed testimony included, in reference to Exhibits A and G:

> Q: This indicates that you received temporary total disability benefits from the period of October 2nd, 2014 to November 9th, 2015. Is that correct?
>
> A: Yes.
>
> Q: And during that period, were you also employed with Specialty Sports?
>
> A: Yes.
>
> Q: And the exhibit -- does Exhibit G accurately reflect the wages you earned during that period of time?
>
> A: Yes.

(Hrg. Tr. 48:25-49:11).

J. It is axiomatic, that when an employee maintains modified employment prior to MMI, Temporary Partial Disability Benefits are the appropriate measure of benefits. *Magnetic Engn'g, Inc. v. Indus. Claim Apps. Office*, 5 P.3d 358, 390 (Colo. App. 2000). Temporary Partial Disability Benefits are awarded at a rate of two third's the difference between Claimant's average weekly wage and those which he was receiving in a modified employment role. §8-42-106(1), C.R.S. (2016). Temporary partial benefits

account for the difference in Claimant's admitted average weekly wage, and the amount of money Claimant earns in a modified duty role. In this case, because Claimant was working modified duty at a wage less than his uncontested admitted average weekly wage, he was entitled to two-thirds of the difference of the wage earned and his admitted AWW. The difference in the amount Claimant received in TTD and that which he was entitled to in TPD was calculated in Respondent's position statement and is not reproduced here for brevity's sake.

ORDER

It is therefore ordered that:

1. The DIME opinions of Dr. Stieg regarding impairment have been overcome and are hereby set aside.

2. Respondents shall pay permanent partial disability benefits to Claimant in accordance with a whole person impairment of 29% as calculated by Dr. Baptist.

3. The stipulation of the parties that Claimant has been overpaid by $14,709.96 is approved. Furthermore, Respondents have proven that an additional overpayment of TTD in the amount of $13,752.61 exists in their favor. Therefore, Respondents are entitled to recover an overpayment in benefits paid to Claimant totaling $28,462.57.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Supplemental Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 10, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether Claimant proved by a preponderance of the evidence that he is entitled to post-MMI maintenance medical care.

FINDINGS OF FACT

1. On November 28, 2014, Claimant sustained an admitted industrial injury while working for Employer. Claimant injured his back while moving luggage. Claimant testified that he felt pain in his neck and down his back.

2. On November 28th, Claimant was evaluated by Candice Sobanski, M.D., the ATP for Employer. Claimant complained of left lower back pain, but he denied radiation of pain into his legs. On the physical exam, Dr. Sobanski found tenderness at level L3 and S1 left paraspinal, as well as left-sided muscle spasms on palpation. Dr. Sobanski diagnosed a lumbar strain, prescribed Ibuprofen for Claimant and ordered physical therapy ("PT").

3. Claimant received PT with Darwin Abrams, PT at Concentra. On December 26, 2014, Claimant reported some improvement, but had mid-back pain. The PT treatments continued. Claimant registered similar complains on January 9 and 30, 2015.

4. Claimant was evaluated by Allison Fall, M.D. on January 23, 2015. Claimant indicated he had right-sided back pain, but no weakness, numbness or tingling in the lower extremities. No visible muscle spasms were found in the thoracic region, however, there was diffuse myofacial tenderness. Claimant's neurological examination was negative. Dr. Fall reviewed Claimant's lumbar MRI, noting there was a disc bulge, which was considered normal for his age. There was no indication of any nerve root compression or other acute abnormality. Dr. Fall's diagnosis was: thoracolumbar myofacial pain. She opined Claimant was deconditioned and not ready for the work he was performing. She recommended PT two times per week for three weeks, but declined to change his work restrictions. Dr. Fall did not prescribe new medications, but decided to review his medications at the next appointment.

5. At the physical therapy appointment on January 30, 2015, Claimant reported he was about the same with his pain at a 7/10. Claimant reported upper back/neck and mid-back pain. The therapist noted Claimant was not making progress towards his goals. His overall progress was slower than expected and he continued to complain of pain which limited his progress.

6. On February 17, 2015, Claimant was re-evaluated by Dr. Fall. He complained of pain in the right thoracic lumbar area. Dr. Fall reviewed Claimant's medications which included Naproxen, ibuprofen, Cyclobenzaprine and Tramadol. Claimant said the only medication which helped his symptoms was Tramadol. Dr. Fall's assessment was thoracolumbar myofascial pain. Dr. Fall administered a trigger point injection and prescribed Gabapentin.

7. Claimant returned to Dr. Sobanski on March 11, 2015, reporting pain 4/10, as well as stiffness. He was not taking any medications. Dr. Sobanski noted diffuse tenderness in the lumbar spine, left and right paraspinal, but not the right sciatic notch. Dr. Sobanski's assessment was L4-L5 disc bulge and lumbar strain. She ordered continued massage and PT, as well as prescribing Cyclobenzaprine.

8. The PT records admitted at hearing documented Claimant received sixteen treatments through March 31, 2015. His medications included Cyclobenzaprine, ibuprofen and Tramadol as of that date. Claimant reported continued back pain at that time.

9. Claimant returned to Dr. Fall for a follow-up on April 28, 2015. Claimant reported pain at 4/10 and said he was not improving. Claimant was still working modified duty. On examination, Dr. Fall noted diffuse complaints of pain in the thoracolumbar region, without correlating findings. There was no spasming and no hypertonicity. Thoracic flexion, rotation, and extension were full. Claimant had no radicular symptoms. Dr. Fall's impression was: thoracolumbar myofascial pain without objective findings. Dr. Fall encouraged Claimant to increase his exercise program and plan to return to regular duty work. She did not schedule Claimant for a follow-up appointment and noted he would follow-up with Concentra. Claimant had no permanent impairment. Dr. Fall documented six additional massage visits were approved. She did not prescribe any medication.

10. There was no evidence in the record that Dr. Fall recommend any further treatment.

11. On May 11, 2015, Claimant was examined by Albert Hattem, M.D. Claimant was complaining of low back pain, but denied radiating leg pain or numbness. Dr. Hattem found slight paraspinous muscle tenderness, full ROM and no neurologic deficits. His impression was: six month history of low back pain in a patient who was employed for one month and had an MRI which was essentially normal. Dr. Hattem referred Claimant for a trial of chiropractic/acupuncture treatments.

12. The ALJ found Claimant did not complain of pain which radiated to his lower extremities to his ATPs.

13. Claimant returned to Dr. Hattem on August 14, 2015. Claimant complained of residual back pain, but no radiating leg pain or numbness. Dr. Hattem determined Claimant was at MMI and had no permanent impairment. He returned Claimant to heavy duty, with a permanent 50 pound lifting limit. Claimant was to

complete the previously authorized chiropractic treatment. No other medical treatment was recommended by Dr. Hattem.

14. There was no evidence in the record that Claimant continued to take prescription medications prescribed by an ATP after August 2015.

15. On March 7, 2016, Claimant underwent a Division of Workers' Compensation Independent Medical Evaluation ("DIME"), which was performed by Gareth Shemesh, M.D. Claimant reported persistent low back pain, especially with activity. He complained of intermittent radiating pain into the lower extremities to the knees. Claimant also reported intermittent numbness and tingling in the same distribution**.** The ALJ notes this was the first report of radicular-type pain. Claimant was taking ibuprofen. On examination, Dr. Shemesh found full range of motion ("ROM") in Claimant's cervical spine. Tenderness to palpation was found in his lumbosacral spine, with limitations in the ROM. Dr. Shemesh assigned a 9% permanent medical impairment.

16. Dr. Shemesh concurred Claimant was at MMI. For maintenance medical care, Dr. Shemesh stated Claimant should continue with active independent home exercises as instructed to him by the physical therapist and continue with over-the-counter NSAIDs as needed.

17. On September 8, 2016, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. The FAL admitted for Dr. Shemesh's medical impairment rating. The FAL denied liability for post-MMI medical benefits.

18. Claimant testified he wished to return to PT for instruction in home exercises. He also wanted to take ibuprofen for his low back pain.

19. As the DIME physician, Dr. Shemesh's opinions regarding maintenance treatment were not binding and not subject to the clear and convincing evidentiary standard. The ALJ determined the opinions of Drs. Hattem and Fall (Claimant's ATPs) were more persuasive regarding the need for treatment after MMI.

20. Claimant failed to establish he was entitled to post-MMI medical benefits. The ALJ was persuaded by the fact that neither of Claimant's ATPs (Drs. Fall and Hattem) recommended further treatment at the time the last evaluated Claimant.

21. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical

benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the focus of the ALJ was on the respective medical opinions on the issue of the need for continuing treatment.

Grover Medical Benefits

The claim for medical treatment beyond the point of maximum medical improvement is governed by *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). In *Grover v. Industrial Commission*, the Colorado Supreme Court authorized maintenance care to maintain MMI or to prevent further deterioration of a Claimant's condition. *Milco Construction v. Cowan,* 860 P.2d 539, 541 (Colo.App. 1992). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended, nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v ICAO*, 992 P.2d 701 (Colo. App. 1999). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993).

Claimant failed to show he was entitled to post-MMI medical benefits. First, there was no evidence in the record that any of the Claimant's ATPs recommended maintenance treatment. (Findings of Fact 8, 9 and 12). No recommendations for post-MMI treatment were made by Dr. Fall, Dr. Hattem or Dr. Sobanski beyond the previously authorized chiropractic treatments. In addition, at the time MMI was confirmed by Dr. Hattem, no medications were prescribed as part of medical maintenance treatment. (Finding of Fact 12). Both Dr. Fall and Dr. Hattem noted minimal objective findings when maintenance medical treatment was considered. (Findings of Fact 8 and 10). The ALJ found Dr. Shemesh's recommendations concerning maintenance treatment were not persuasive. (Finding of Fact 17). In this regard, Dr. Shemesh's opinions regarding post-MMI medical treatment were not entitled to deference, but considered with the opinions of Claimant's authorized treating physicians. The latter opinions were more persuasive the ALJ.

Second, Claimant's testimony, standing alone, did not meet his burden of proof by a preponderance of the evidence that he was entitled to *Grover* medical benefits. Accordingly, Claimant's claim for *Grover* medical benefits fails.

ORDER

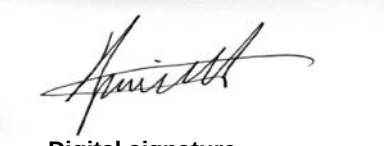
It is therefore ordered that:

1. Claimant's request for *Grover* medical benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 9, 2017



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-440-03

ISSUES

- Whether Respondents have demonstrated by clear and convincing evidence that the Division Independent Medical Examination of Dr. Bennett Machanic, M.D. has been overcome.

- Whether Claimant sustained disfigurement to his right ankle.

STIPULATIONS

- The parties stipulate that if Respondents are unable to overcome the DIME physician's findings that Claimant is entitled to temporary total disability benefits from June 16, 2016 ongoing, subject to applicable offsets including unemployment, and credit for any permanent partial disability benefits previously paid.

- The parties stipulate that the issue of disfigurement for Claimant's antalgic gait, if any, is held in abeyance and the Court will address the issue of Claimant's ankle disfigurement at this hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 32 years old and has worked as a laborer for Employer for 6 to 7 years seasonally washing windows and shoveling snow off rooftops in Avon, Colorado.

2. On March 9, 2015, Claimant suffered compensable work-related injuries when he slipped off a sixteen foot and fell landing on concrete.

3. Claimant was immediately taken to the emergency room at Vail Valley Medical Center where he was diagnosed with an acute fracture of his left tibia, and acute fractures of both the right fibula and the right medial malleolus.

4. The emergency room physician, Dr. Hardenbergh, noted that Claimant fell 16 feet from a ladder and landed directly on his feet on the pavement. Dr. Hardenberg's physical examination of Claimant revealed a full range of motion in his neck and upper extremities. Claimant's back was non-tender on examination. Claimant testified that he complained to Dr. Hardenbergh of pain in his lower back, however the medical record does not include that complaint.

5. Claimant was referred to the on-call orthopedic surgeon, Dr. Richard Cunningham, at Vail Valley Medical Center. Dr. Cunningham recommended a non-surgical course with the left knee fracture, but an open reduction and internal fixation of the medial malleolus fracture and syndesmosis disruption due to the proximal right fibula fracture.

6. Dr. Cunningham noted that Claimant's chief complaint was right ankle and left knee pain. He did not note low back complaints. Further, he indicated that Claimant's accident was consistent with an acute lower extremity injury without further orthopedic complications.

7. On March 9, 2015, Dr. Cunningham Claimant performed the following surgical procedures:

- Open reduction and internal fixation of right displaced medial malleolus fracture

- Right ankle syndesmosis disruption

- Closed treatment of left minimally displaced tibial plateau fracture.

8. Claimant credibly testified that he remained in a wheelchair, non-weight bearing, from March 9, 2015 until his second operation. Claimant's testimony is corroborated by Dr. Cunningham's April 27, 2015 follow-up visit.

9. On May 6, 2015 ATP Cunningham surgically removed the hardware used to stabilize Claimant's ankle. The procedure enabled Claimant to "begin weight-bearing on his right lower extremity."

10. Claimant credibly testified that he had some back pain following his injury, but that his low back pain worsened as he stopped using the wheelchair, moved to crutches, and started physical therapy.

11. On October 12, 2015, ATP Cunningham noted:

> Claimant additionally complains of low back pain. He states that this pain has increased more since his activity and PT has increased over the past few months. Originally, we were focused mainly on his ankle and tibial plateau fracture, but as time has progressed his back pain has become more of an issue. His back pain often interferes with his physical therapy of his ankle and tibial plateau fractures. This is a workman's comp case and he is currently not working.

12. On October 12, 2015, ATP Cunningham's Plan noted, "with his continued low back pain, we've decided to order an MRI of his lumbar spine and refer him to Dr.

Raub for further care of his back pain. Once his MRI is approved, we will see him back to discuss the results.

13. However, on October 15, 2015, Respondents informed Dr. Cunningham that "[t]he lumbar area/back is not part of this claim."

14. On November 2, 2015 ATP Cunningham again noted,

> [Claimant] Complains of weakness of the lower left extremity. Denies any pain medication use at this time. He is not currently in formal physical therapy but following a structure home exercise program. He denies any recent acute injury.
>
> * * *
>
> We would like him to follow-up with a specialist for his continued low back pain. This began following his initial work-related injury and is most likely aggravated with the continued knee pain and antalgic gait.

15. In January 2016, Respondents instructed Claimant to obtain a primary care provider to follow through on care for his claim. Claimant began treating with ATP Gary Petry, M.D., at St. Vincent's Hospital – Leadville Medical Center.

16. On January 12, 2016, Dr. Petry evaluated Claimant and noted that Claimant was following up on his workers' compensation injury and that, "Through Dr. Cunningham trying to get MRI due to increase back pain." Dr. Petry opined that Claimant had back pain related to his "worker's description of accident/injury." Dr. Cunningham assessed low back pain, noting

> Pt is here tdy at request of WC to establish care with a PCP. HE has been followed by Dr. Cunningham for ORIF right ankle that has become symptomatic. In addition he is currently going to PT for the injuries he sustained under his WC case and is having increasing pain of his left knee for which he has a Feb. 8th [2016] am appointment with Dr. Cunningham to f/u. Pt states he has had back pain since the accident and that Dr. Cunningham has been requesting a MRI and F/U with Dr. Raub for his back pain but that WC will not approve.

17. On February 11, 2016 Claimant returned to ATP Cunningham who continued to opine that the low back pain was part of Claimant's work-related diagnosis. Dr. Petry noted:

> [Claimant] presents approximately 11 months status post open reduction internal fixation of a right displaced medial malleolus fracture and right ankle syndesmosis disruption and closed treatment of a left minimally displaced tibial

> plateau fracture following a work-related injury. . . . He reports symptoms in his back, ankle and knee. Pain does wake him at night. He also complains of numbness/tingling and weakness of both legs.

Dr. Petry assessed lumbar back pain with radiculopathy.

18. On February 29, 2016 Claimant returned to Dr. Petry who noted, "[Claimant] also, since the original injury, developed a complaint of back pain. Dr. Cunningham ordered an MRI and referral to Dr. Raub, but Workers' Compensation denied this as he had attempted to order an MRI of his back.

19. On March 16, 2016, Phyllis Pennington, D.O., filling in for Dr. Petry at St. Vincent's Hospital noted that the "back is pending review by W/C" and that Claimant had **"**numbness and tingling that could possibly be a component of the low back injury."

20. In early May, 2016 Claimant underwent a third surgery to remove right ankle hardware. At a follow-up visit with Dr. Cunningham, Claimant still complained of "numbness, tingling and weakness of the bilateral legs."

21. On May 19, 2016, Respondents asked Dr. Cunningham whether Claimant was at MMI. Dr. Cunningham responded that Claimant was expected to reach MMI in 2 to 3 months.

22. On June 16, 2016 ATP Cunningham placed Claimant at MMI. However, he requested that Claimant receive a spine evaluation, he maintained a work-related medical diagnosis of "low back pain," and maintained that Claimant needed to see a spine specialist. His note provides,

> At this point post-surgically, his right ankle and left knee show healing as anticipated. He continues to experience . . . pain to his lumbar spine with symptoms of radiculopathy as well as pain into his right groin. Unfortunately, at this point there is not much else we are able to offer Mr. Chavez in the way of treatment. We will place him at MMI today for workman's [sic] comp and have requested an impairment rating. We have also recommended a spine evaluation with Dr. Raub for lumbar radiculopathy.

23. On June 28, 2016, Dr. Petry also placed Claimant at MMI. However, he continued to assess low back pain.

24. On August 9, 2016, Allison Fall, M.D., evaluated Claimant at Respondents' request. She opined that Claimant had suffered a 5% extremity rating for his knee and a 6% extremity rating for his ankle. But she "did not find a work-related injury to the lumbar spine or the hip."

25. Respondents filed a Final Admission of Liability on two occasions. Claimant timely objected. On September 28, 2016 Claimant file an "Application for a Division Independent Medical Examination."

26. On December 21, 2016, Division independent medical evaluator, Bennett Machanic, M.D., evaluated Claimant. Based on his review of medical records and concerning clinical findings, Dr. Mechanic opined:

- Claimant had reached MMI for his right ankle and left knee.
- not at MMI.
- Claimant's work related injuries included his left knee and right ankle with bony abnormalities, an abnormal gait, difficulties with progressive low back pain greater than approximately 6 months.
- He was concerned about findings in Claimant's right foot which raised questions of secondary tarsal tunnel syndrome and the possibility of radicular dysfunction playing a role.
- He noted that previous physicians had noted problems of lumbar radiculopathy, and that previous attempts to obtain imaging of the lumbar spine had not been successful.

27. Dr. Mechanic did not believe that treatment providers had sufficiently evaluated Claimant's right leg for tarsal tunnel syndrome versus lumbar radiculopathy. He also opined that treatment providers had not evaluated Claimant's low back for secondary complications. Therefore, Claimant was not at MMI and those areas needed to be assessed. Dr. Mechanic proposed MRI films of Claimant's lumbar spine and an EMG nerve conduction study of Claimant's right lower extremity.

28. Claimant credibly testified at hearing that he has not yet had a lumbar MRI as requested by Drs. Cunningham, Petry, and Machanic. He expressed a desire to pursue an MRI and treatment of his lumbar spine.

29. Respondents retained Kathleen D'Angelo, M.D., who issued a Respondent-requested medical evaluation report on April 11, 2016 and a subsequent addendum. Dr. D'Angelo's deposition testimony is consistent with her report. Dr. D'Angelo opined that Claimant misled his physician's by not providing the history from his 2003 to 2005 emergency room visits and that the delay in reporting back symptoms indicated that the lumbar condition is not a work-related condition.

30. Dr. D'Angelo testified that even if Claimant had an antalgic gait, as soon as his gait returned to normal, his lower back symptoms would have

resolved. Therefore, she attributed Claimant's numbness and radicular symptoms to the 2005 car accident.

31. The ALJ finds this opinion not persuasive. No persuasive evidence supports a finding that Claimant ever suffered radicular symptoms after his April 21, 2005 car accident until this claim. Claimant reported no such symptoms and sought no treatment during that time frame. The ALJ finds it highly unlikely that Claimant's lumbar and radicular symptoms are attributable to his 2005 dislocated hip.

32. Respondents' exhibits contain medical records for two emergency room admissions at St. Vincent General Hospital.

- The October 2, 2003 admission involved a drug overdose and complications.

- The April 21, 2005 admission involved a left hip dislocation resulting from an automobile accident in which he was driving under the influence of alcohol. Claimant's dislocation was reduced and Claimant required no follow-up care. Claimant credibly testified he had no ongoing symptoms or medical concerns.

33. Claimant admitted in his testimony that he did not disclose these events to his workers' compensation doctors, Dr. Machanic, Dr. D'Angelo, and Dr. Ramos.

34. The ALJ does not find Dr. D'Angelo's opinions to be persuasive. Claimant's 2003 to 2005 emergency room visits were remote in time, did not involve the same body parts as his work injuries, and Claimant had been symptom free for over a decade. The ALJ finds it more likely than not that Claimant either forgot the other events or reasonably believed the other events were not relevant to the treatment of his work injuries.

35. Claimant retained Joseph Ramos, M.D., to perform a Claimant-requested independent medical evaluation. Dr. Ramos opined that the DIME physician was correct that Claimant was not at MMI for his lumbar condition, and that Claimant's lumbar condition is part of Claimant's admitted industrial injury.

36. Dr. D'Angelo's opinion is not well supported by the medical records of Drs. Cunningham, Petry, Machanic, and Ramos regarding the relatedness of Claimant's lumbar condition. Dr. D'Angelo's opinion is called into question, as she credibly testified in deposition that rarely do physicians make a recommendation for a spine specialist when placing an individual at MMI. Dr. D'Angelo's difference of opinion on whether Claimant's lumbar condition is related to his admitted 16 foot fall does not rise to the level of clear and convincing evidence.

37. Based on the totality of the evidence the ALJ finds and concludes that Respondents have failed to establish that the DIME opinion that Claimant's low back was injured in the course and scope of his employment for Employer when on March 9, 2015 he fell 16 feet, landing on his feet is in error by clear and convincing evidence.

38. Based on the totality of the evidence, the ALJ finds and concludes that the opinions of ATPs Cunningham, Petry, DIME physician Machanic and Claimant's medical evaluator Joseph Ramos that Claimant's low back condition was a result of his May 9, 2015 admitted industrial injury are more credible and persuasive than those of Respondents' experts Drs. D'Angelo and Fall.

39. Claimant has sustained a compensable permanent disfigurement as a result of his admitted injuries. Specifically Claimant has a two and one-half inch, highly discolored, raised and broad irregular scar; and a two and one-quarter inch highly discolored, raised and broad irregular scar on his lower right leg.

40. Any determination concerning other issues is premature at this time, as a matter of fact.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers Compensation Act of Colorado" (Act), Title 8, Articles 40 to 47, C.R.S., is to ensure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to the employers without the necessity of any litigation. C.R.S. § 8-40-102(1). A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Therefore a claimant must prove by a preponderance of the evidence that his injury arose out of and in the course and scope of his employment. C.R.S. § 8-43-201*; City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). Proof that something happened at work, without more, is insufficient to carry burden of proof. *Finn v. Industrial Commission*, 165 Colo. 106 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846. A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

Section 8-42-101(3.7) mandates that physicians rate an injured workers' impairments using the AMA *Guides:* "On and after July 1, 1991, all physical impairment ratings used under articles 40 and 47 of this title shall be based on the revised third edition of the 'American Medical Association Guides to the Evaluation of Permanent Impairment," in effect as of July 1, 1991." *Id.*

Further, a DIME's findings concerning medical impairment are binding unless overcome by clear and convincing evidence. C.R.S. § 8-42-107(8)(b)(III), *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186-90, 189 (Colo. App. 2002).

Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance,' it is evidence that his highly probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980)). Therefore, the party challenging a DIME's conclusion must demonstrate that it is "highly probable" that the DIME's impairment rating or maximum medical improvement (MMI) finding is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998)(citing *Metro Moving & Storage Co. v. Gussert, supra*). A party has met the burden or established that a DIME's impairment rating is incorrect only upon demonstrating that the evidence contradicting the DIME is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

The enhanced burden of proof reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a more reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessments process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med, Inc. v. Industrial Claim Appeals Office, supra.* Thus, it is well established that the DIME's opinion concerning the cause of the claimant's need for additional treatment is an inherent part of the physician's determination. See *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Egan v. Industrial Claim Appeals Office,* 971 P.2d 664 (Colo. App. 1998). Consequently, the DIME's determination of causation is binding unless overcome by clear and convincing evidence.

In this case, the DIME physician has clearly set forth his opinion that Claimant's right leg has not been sufficiently evaluated for tarsal tunnel syndrome versus lumbar radiculopathy and that the low back has not been sufficiently evaluated for secondary complications which developed as part of Claimant's work-related injury. *See*

Claimant's Submission Tab 8, BS 31. In fact, the DIME physician went further to state "in regards to these two areas [right leg – low back] Claimant is 'not at maximum medical improvement' and these complications need to be assessed." *Id.* The DIME physician proposed an MRI of the lumbar spine which MRI had been originally requested by Claimant's ATP on October 12, 2015.

To overcome the DIME doctor's opinion, Respondents were required to present clear and convincing evidence. Respondents have not met this burden through Dr. D'Angelo's testimony or Dr. Fall's one medical report. They were required to produce evidence which showed that it is highly probable that the DIME physician's opinion of causation is incorrect. They failed to meet this burden. See *e. q. Tinker v. Jefferson County School,* W.C. #4-174-632 (ICAO, March 18, 1998). Dr. D'Angelo's testimony that the low back was not injured as part of Claimant's fall from 16 feet is rejected.

As found, Respondents have failed to present evidence which demonstrates that it is highly probable that the DIME's conclusions are incorrect. In the absence of such clear and convincing evidence, the DIME's findings are binding. See C.R.S. § 8-42-107(8)(c), *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

Respondents have failed to prove by clear and convincing evidence that the DIME's opinion of causation as to the Claimant's low back and the DIME's finding of "not at maximum medical improvement" was in error.

As a matter of law, any determinations concerning other issues are premature.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. It is therefore ordered Respondents have failed to prove by clear and convincing evidence the opinions of the DIME physician on Claimant's lumbar symptomatology, right leg and the need for treatment are in error.

2. Claimant is not at MMI.

3. Claimant is entitled to the resumption of temporary total disability benefits from June 16, 2016 ongoing, subject to applicable offsets.

4. Claimant is awarded $1,900 for the two disfiguring scars on his right ankle and is permitted to re-apply for disfigurement benefits on his antalgic gait after placement at MMI, if his condition does not improve.

5. Respondents shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

6. Any issues not determined in this decision are reserved for future determination.

7. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 10, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she sustained a compensable occupational disease to her left upper extremity during the course and scope of her employment with Employer.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

FINDINGS OF FACT

1. Employer owns an apartment complex that consists of 26 buildings. Claimant is a 78 year old female who began working for Employer as a Housekeeper in July 2016. Her job duties involved vacuuming, dusting, scrubbing, climbing ladders, removing trash and other cleaning in apartments. Claimant also cleaned laundry rooms, a clubhouse with a gym and other common areas. She testified that she generally worked about eight hours per day with some overtime.

2. Claimant explained that on approximately November 21, 2016 Regional Maintenance Supervisor Mel Hoffman told her that she would be cleaning the hallways in all 26 buildings on Employer's property in addition to her regular job duties. Cleaning the hallways included scrubbing heater vents, washing all apartment doors, cleaning cobwebs from interior and exterior lighting, vacuuming carpet, sweeping and mopping stairs, washing windows and scrubbing walls.

3. Claimant testified that in December 2016 Mr. Hoffman provided her with a modified schedule that accounted for her additional job duties. She informed Mr. Hoffman that there was too much work for one person and arthritis in her left shoulder and wrist began to flare-up. Furthermore, she remarked that previous employers who had owned the property had employed three housekeepers because of the extensive work required to maintain the facility.

4. From August 1, 2016 to November 30, 2016 Claimant worked an average of 43.1 hours per week. In December 2016 and January 2017 Claimant's average hours slightly decreased to 42.9 and 41.4 hours respectively each week. Claimant's wage records thus reveal that her work hours remained virtually the same despite her increased duties and responsibilities.

5. On December 23, 2016 Claimant visited personal health care provider Megan M. Persson, NP at Lakewood Family Medicine. Claimant reported arthralgias and joint pain. NP Persson noted that Claimant had previously been diagnosed with

osteoporosis in 2014. She diagnosed Claimant with multiple joint pains and suspected rheumatoid arthritis. NP Persson referred Claimant to a rheumatologist and ordered bilateral hand x-rays.

6. On January 4, 2017 Claimant discussed her symptoms with Employer's Disability Manager Kathryn Henderson. Claimant reported that she was having difficulties performing her job duties because of a personal health condition.

7. On January 31, 2017 Claimant reported her left upper extremity injuries to Employer. The First Report of Injury noted that "[Claimant] claimed her work cause[d] her L-shoulder pain due to repetitive scrubbing. [Claimant] has non-ind cond. She is tx for which needs MRI." The transmittal comments with the First Report of Injury noted "This is a non-work related condition. [Claimant] cannot afford her MRI and asked if WC would pay for it."

8. Claimant was directed to Concentra Medical Centers for treatment. She visited Theodore Villavicencio, M.D. for an examination. Dr. Villavicencio noted that Claimant had been performing custodial work for 40 years and had been working for Employer for seven months. He reported that Claimant did not detail any specific mechanism of injury. Dr. Villavicencio remarked that Claimant had a known thyroid disorder and arthritis, had visited her primary care physician, was placed on modified duty and an MRI had been requested. Dr. Villavicencio assessed Claimant with a left shoulder strain. After reviewing her job description he concluded that she did not have a cumulative trauma disorder pursuant to Rule 17 of the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). Dr. Villavicencio reasoned that "I believe this falls more into a lack of fitness for duty given her chronic problems (OA< possible metabolic- thyroid)."

9. On February 7, 2017 Claimant returned to Dr. Villavicencio for an evaluation. He reiterated that Claimant's left upper extremity symptoms were not caused by her work activities for Employer. Dr. Villavicencio determined that Claimant had reached Maximum Medical Improvement (MMI) and released her from care.

10. On March 7, 2017 NP Persson referred Claimant to Jeffrey J. Sabin, M.D. for an orthopedic evaluation. NP Persson commented that Claimant had a history of severe osteoarthritis in her hands and wrists with worsening left shoulder pain.

11. On March 17, 2017 Claimant visited Dr. Sabin for an evaluation. Claimant reported pain in her left shoulder starting in mid-December due to increased work demands and remarked that the pain had steadily progressed. On physical examination Dr. Sabin noted that Claimant exhibited arthritis, back pain, muscle pain, and joint pain and swelling. He diagnosed Claimant with left shoulder rotator cuff impingement tendinitis. Dr. Sabin discussed the natural pathophysiology of Claimant's condition and recommended physical therapy.

12. On May 17, 2017 NP Persson wrote a letter explaining that Claimant's recent medical issues were directly related to the increased demands of her job with

Employer. However, NP Persson did not review Rule 17 criteria, consider Claimant's job description or examine wage records reflecting her work hours.

13. On June 1, 2017 Claimant again visited Dr. Sabin for an examination. He noted that Claimant's MRI results revealed osteoarthritis of the glenohumeral joint, advanced AC joint arthritis and fraying of the posterior superior glenoid labrum. Dr. Sabin explained that Claimant did not have any acute findings and her MRI revealed a long standing degenerative process. He determined that Claimant's left shoulder was simply not in a condition to perform housekeeping work. Nevertheless, Dr. Sabin remarked that Claimant's increased work load likely caused her degenerative changes to become symptomatic. However, Dr. Sabin did not review Rule 17 criteria, consider Claimant's job description or examine wage records reflecting her work hours.

14. On June 26, 2017 Dr. Villavicencio determined that Claimant did not suffer a specific injury while performing her job duties for Employer. He also did not identify any increase in Claimant's work activities based on his discussions with Employer and review of her job description. Dr. Villavicencio concluded that Claimant's injury was not work-related.

15. Claimant has failed to demonstrate that it is more probably true than not that she sustained a compensable occupational disease to her left upper extremity during the course and scope of her employment with Employer. Claimant attributed her left upper extremity symptoms to her increased job duties during November and December 2016. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. However, a review of Claimant's job duties reflects that they lacked the requisite force or repetition to cause her left upper extremity injury.

16. Claimant engaged in a variety of numerous tasks throughout each shift. The record reflects that Claimant's job duties as a Housekeeper involved vacuuming, dusting, scrubbing, climbing ladders, removing trash, and other cleaning in apartments. Claimant also cleaned laundry rooms, a clubhouse with a gym and other common areas. On approximately November 21, 2016 Claimant began cleaning the hallways in all 26 buildings on Employer's property in addition to her regular job duties. Cleaning the hallways included scrubbing heater vents, washing all apartment doors, cleaning cobwebs from interior and exterior lighting, vacuuming carpet, sweeping and mopping stairs, washing windows and scrubbing walls. After reviewing Claimant's job description, Dr. Villavicencio concluded that she did not have a cumulative trauma disorder pursuant to Rule 17 of the *Guidelines*.

17. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. The Primary Risk Factor Definition Table for Force and Repetition/Duration requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per hour or 6 hours of use of hand held tools weighing two pounds or greater. Based on a review of

Claimant's duties as a Housekeeper, she did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*.

18. In contrast, NP Persson and Dr. Sabin determined that Claimant's repetitive job duties caused her left shoulder condition. Dr. Persson specifically noted that Claimant's increased job duties caused her to develop left upper extremity symptoms. Moreover, Dr. Sabin remarked that Claimant's increased work load likely caused her degenerative changes to become symptomatic. However, neither NP Persson nor Dr. Sabin reviewed Rule 17 criteria, considered Claimant's job description or examined wage records reflecting her work hours. Based on a review of Claimant's job duties, considering the persuasive medical records of Dr. Villavicencio and applying the *Guidelines,* Claimant has failed to demonstrate that the hazards of her employment caused, intensified, or, to a reasonable degree, aggravated her left shoulder osteoarthritis. Claimant has failed to prove that her left shoulder condition was directly or proximately caused by her employment or working conditions.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, six hours of supination/pronation with task cycles 30 seconds or less, or awkward posture for at least 50% of a task cycle. Other Primary Risk Factors include computer work for more than seven hours per day or at a non-ergonomically correct work station, continuous mouse use of greater than four hours or use of a handheld vibratory power tool for 6 hours or more. Additional risk factors are six hours of lifting 10 pounds greater than 60 times per hour or six hours using hand held tools weighing two pounds or greater.

7. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p.16. The duration of force and repetition as a primary risk factor must be greater than six hours at 50% of individual maximum force with task cycles of 30 seconds or less.

8. The *Guidelines* also specify that:

> Cumulative trauma related conditions of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures. … The mere presence of a diagnosis that may be associated with cumulative trauma does not presume work-relatedness unless the appropriate work exposure is present. … The normal working age population may have non-specific pain complaints that require minimum treatment and may be considered part of the normal aging process. … [I]n cases where there is no specific diagnosis and corresponding work related etiology, the work-up should generally be performed outside of the workers' compensation system.

W.C.R.P. Rule 17, Exhibit 5, p. 6

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she sustained a compensable occupational disease to her left upper extremity during the course and scope of her employment with Employer. Claimant attributed her left upper extremity symptoms to her increased job duties during November and December 2016. To constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. However, a review of Claimant's job duties reflects that they lacked the requisite force or repetition to cause her left upper extremity injury.

10. As found, Claimant engaged in a variety of numerous tasks throughout each shift. The record reflects that Claimant's job duties as a Housekeeper involved vacuuming, dusting, scrubbing, climbing ladders, removing trash, and other cleaning in apartments. Claimant also cleaned laundry rooms, a clubhouse with a gym and other common areas. On approximately November 21, 2016 Claimant began cleaning the hallways in all 26 buildings on Employer's property in addition to her regular job duties. Cleaning the hallways included scrubbing heater vents, washing all apartment doors, cleaning cobwebs from interior and exterior lighting, vacuuming carpet, sweeping and mopping stairs, washing windows and scrubbing walls. After reviewing Claimant's job description, Dr. Villavicencio concluded that she did not have a cumulative trauma disorder pursuant to Rule 17 of the *Guidelines*.

11. As found, to constitute a cumulative trauma disorder pursuant to the *Guidelines,* Claimant must have worked more than six hours per day with the requisite force and repetition. The Primary Risk Factor Definition Table for Force and Repetition/Duration requires 6 hours of greater than 50% of individual maximum force with task cycles 30 seconds or less, or sufficient force is used for at least 50% of a task cycle. Additional risk factors are 6 hours of lifting 10 pounds greater than 60 times per

hour or 6 hours of use of hand held tools weighing two pounds or greater. Based on a review of Claimant's duties as a Housekeeper, she did not engage in forceful and repetitive activity for an amount of time that meets the minimum threshold in the *Guidelines*.

12. As found, in contrast, NP Persson and Dr. Sabin determined that Claimant's repetitive job duties caused her left shoulder condition. Dr. Persson specifically noted that Claimant's increased job duties caused her to develop left upper extremity symptoms. Moreover, Dr. Sabin remarked that Claimant's increased work load likely caused her degenerative changes to become symptomatic. However, neither NP Persson nor Dr. Sabin reviewed Rule 17 criteria, considered Claimant's job description or examined wage records reflecting her work hours. Based on a review of Claimant's job duties, considering the persuasive medical records of Dr. Villavicencio and applying the *Guidelines,* Claimant has failed to demonstrate that the hazards of her employment caused, intensified, or, to a reasonable degree, aggravated her left shoulder osteoarthritis. Claimant has failed to prove that her left shoulder condition was directly or proximately caused by her employment or working conditions.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 10, 2017.

DIGITAL SIGNATURE.

Peter J. Cannici

Peter J. Cannici

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-440-03

ISSUES

- Whether Respondents have demonstrated by clear and convincing evidence that the Division Independent Medical Examination of Dr. Bennett Machanic, M.D. has been overcome.

- Whether Claimant sustained disfigurement to his right ankle.

STIPULATIONS

- The parties stipulate that if Respondents are unable to overcome the DIME physician's findings that Claimant is entitled to temporary total disability benefits from June 16, 2016 ongoing, subject to applicable offsets including unemployment, and credit for any permanent partial disability benefits previously paid.

- The parties stipulate that the issue of disfigurement for Claimant's antalgic gait, if any, is held in abeyance and the Court will address the issue of Claimant's ankle disfigurement at this hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 32 years old and has worked as a laborer for Employer for 6 to 7 years seasonally washing windows and shoveling snow off rooftops in Avon, Colorado.

2. On March 9, 2015, Claimant suffered compensable work-related injuries when he slipped off a sixteen foot and fell landing on concrete.

3. Claimant was immediately taken to the emergency room at Vail Valley Medical Center where he was diagnosed with an acute fracture of his left tibia, and acute fractures of both the right fibula and the right medial malleolus.

4. The emergency room physician, Dr. Hardenbergh, noted that Claimant fell 16 feet from a ladder and landed directly on his feet on the pavement. Dr. Hardenberg's physical examination of Claimant revealed a full range of motion in his neck and upper extremities. Claimant's back was non-tender on examination. Claimant testified that he complained to Dr. Hardenbergh of pain in his lower back, however the medical record does not include that complaint.

5. Claimant was referred to the on-call orthopedic surgeon, Dr. Richard Cunningham, at Vail Valley Medical Center. Dr. Cunningham recommended a non-surgical course with the left knee fracture, but an open reduction and internal fixation of the medial malleolus fracture and syndesmosis disruption due to the proximal right fibula fracture.

6. Dr. Cunningham noted that Claimant's chief complaint was right ankle and left knee pain. He did not note low back complaints. Further, he indicated that Claimant's accident was consistent with an acute lower extremity injury without further orthopedic complications.

7. On March 9, 2015, Dr. Cunningham Claimant performed the following surgical procedures:

- Open reduction and internal fixation of right displaced medial malleolus fracture

- Right ankle syndesmosis disruption

- Closed treatment of left minimally displaced tibial plateau fracture.

8. Claimant credibly testified that he remained in a wheelchair, non-weight bearing, from March 9, 2015 until his second operation. Claimant's testimony is corroborated by Dr. Cunningham's April 27, 2015 follow-up visit.

9. On May 6, 2015 ATP Cunningham surgically removed the hardware used to stabilize Claimant's ankle. The procedure enabled Claimant to "begin weight-bearing on his right lower extremity."

10. Claimant credibly testified that he had some back pain following his injury, but that his low back pain worsened as he stopped using the wheelchair, moved to crutches, and started physical therapy.

11. On October 12, 2015, ATP Cunningham noted:

> Claimant additionally complains of low back pain. He states that this pain has increased more since his activity and PT has increased over the past few months. Originally, we were focused mainly on his ankle and tibial plateau fracture, but as time has progressed his back pain has become more of an issue. His back pain often interferes with his physical therapy of his ankle and tibial plateau fractures. This is a workman's comp case and he is currently not working.

12. On October 12, 2015, ATP Cunningham's Plan noted, "with his continued low back pain, we've decided to order an MRI of his lumbar spine and refer him to Dr.

Raub for further care of his back pain. Once his MRI is approved, we will see him back to discuss the results.

13. However, on October 15, 2015, Respondents informed Dr. Cunningham that "[t]he lumbar area/back is not part of this claim."

14. On November 2, 2015 ATP Cunningham again noted,

> [Claimant] Complains of weakness of the lower left extremity. Denies any pain medication use at this time. He is not currently in formal physical therapy but following a structure home exercise program. He denies any recent acute injury.
>
> * * *
>
> We would like him to follow-up with a specialist for his continued low back pain. This began following his initial work-related injury and is most likely aggravated with the continued knee pain and antalgic gait.

15. In January 2016, Respondents instructed Claimant to obtain a primary care provider to follow through on care for his claim. Claimant began treating with ATP Gary Petry, M.D., at St. Vincent's Hospital – Leadville Medical Center.

16. On January 12, 2016, Dr. Petry evaluated Claimant and noted that Claimant was following up on his workers' compensation injury and that, "Through Dr. Cunningham trying to get MRI due to increase back pain." Dr. Petry opined that Claimant had back pain related to his "worker's description of accident/injury." Dr. Cunningham assessed low back pain, noting

> Pt is here tdy at request of WC to establish care with a PCP. HE has been followed by Dr. Cunningham for ORIF right ankle that has become symptomatic. In addition he is currently going to PT for the injuries he sustained under his WC case and is having increasing pain of his left knee for which he has a Feb. 8th [2016] am appointment with Dr. Cunningham to f/u. Pt states he has had back pain since the accident and that Dr. Cunningham has been requesting a MRI and F/U with Dr. Raub for his back pain but that WC will not approve.

17. On February 11, 2016 Claimant returned to ATP Cunningham who continued to opine that the low back pain was part of Claimant's work-related diagnosis. Dr. Petry noted:

> [Claimant] presents approximately 11 months status post open reduction internal fixation of a right displaced medial malleolus fracture and right ankle syndesmosis disruption and closed treatment of a left minimally displaced tibial

> plateau fracture following a work-related injury. . . . He reports symptoms in his back, ankle and knee. Pain does wake him at night. He also complains of numbness/tingling and weakness of both legs.

Dr. Petry assessed lumbar back pain with radiculopathy.

18. On February 29, 2016 Claimant returned to Dr. Petry who noted, "[Claimant] also, since the original injury, developed a complaint of back pain. Dr. Cunningham ordered an MRI and referral to Dr. Raub, but Workers' Compensation denied this as he had attempted to order an MRI of his back.

19. On March 16, 2016, Phyllis Pennington, D.O., filling in for Dr. Petry at St. Vincent's Hospital noted that the "back is pending review by W/C" and that Claimant had **"**numbness and tingling that could possibly be a component of the low back injury."

20. In early May, 2016 Claimant underwent a third surgery to remove right ankle hardware. At a follow-up visit with Dr. Cunningham, Claimant still complained of "numbness, tingling and weakness of the bilateral legs."

21. On May 19, 2016, Respondents asked Dr. Cunningham whether Claimant was at MMI. Dr. Cunningham responded that Claimant was expected to reach MMI in 2 to 3 months.

22. On June 16, 2016 ATP Cunningham placed Claimant at MMI. However, he requested that Claimant receive a spine evaluation, he maintained a work-related medical diagnosis of "low back pain," and maintained that Claimant needed to see a spine specialist. His note provides,

> At this point post-surgically, his right ankle and left knee show healing as anticipated. He continues to experience . . . pain to his lumbar spine with symptoms of radiculopathy as well as pain into his right groin. Unfortunately, at this point there is not much else we are able to offer Mr. Chavez in the way of treatment. We will place him at MMI today for workman's [sic] comp and have requested an impairment rating. We have also recommended a spine evaluation with Dr. Raub for lumbar radiculopathy.

23. On June 28, 2016, Dr. Petry also placed Claimant at MMI. However, he continued to assess low back pain.

24. On August 9, 2016, Allison Fall, M.D., evaluated Claimant at Respondents' request. She opined that Claimant had suffered a 5% extremity rating for his knee and a 6% extremity rating for his ankle. But she "did not find a work-related injury to the lumbar spine or the hip."

25. Respondents filed a Final Admission of Liability on two occasions. Claimant timely objected. On September 28, 2016 Claimant file an "Application for a Division Independent Medical Examination."

26. On December 21, 2016, Division independent medical evaluator, Bennett Machanic, M.D., evaluated Claimant. Based on his review of medical records and concerning clinical findings, Dr. Mechanic opined:

- Claimant had reached MMI for his right ankle and left knee.
- not at MMI.
- Claimant's work related injuries included his left knee and right ankle with bony abnormalities, an abnormal gait, difficulties with progressive low back pain greater than approximately 6 months.
- He was concerned about findings in Claimant's right foot which raised questions of secondary tarsal tunnel syndrome and the possibility of radicular dysfunction playing a role.
- He noted that previous physicians had noted problems of lumbar radiculopathy, and that previous attempts to obtain imaging of the lumbar spine had not been successful.

27. Dr. Mechanic did not believe that treatment providers had sufficiently evaluated Claimant's right leg for tarsal tunnel syndrome versus lumbar radiculopathy. He also opined that treatment providers had not evaluated Claimant's low back for secondary complications. Therefore, Claimant was not at MMI and those areas needed to be assessed. Dr. Mechanic proposed MRI films of Claimant's lumbar spine and an EMG nerve conduction study of Claimant's right lower extremity.

28. Claimant credibly testified at hearing that he has not yet had a lumbar MRI as requested by Drs. Cunningham, Petry, and Machanic. He expressed a desire to pursue an MRI and treatment of his lumbar spine.

29. Respondents retained Kathleen D'Angelo, M.D., who issued a Respondent-requested medical evaluation report on April 11, 2016 and a subsequent addendum. Dr. D'Angelo's deposition testimony is consistent with her report. Dr. D'Angelo opined that Claimant misled his physician's by not providing the history from his 2003 to 2005 emergency room visits and that the delay in reporting back symptoms indicated that the lumbar condition is not a work-related condition.

30. Dr. D'Angelo testified that even if Claimant had an antalgic gait, as soon as his gait returned to normal, his lower back symptoms would have

resolved. Therefore, she attributed Claimant's numbness and radicular symptoms to the 2005 car accident.

31. The ALJ finds this opinion not persuasive. No persuasive evidence supports a finding that Claimant ever suffered radicular symptoms after his April 21, 2005 car accident until this claim. Claimant reported no such symptoms and sought no treatment during that time frame. The ALJ finds it highly unlikely that Claimant's lumbar and radicular symptoms are attributable to his 2005 dislocated hip.

32. Respondents' exhibits contain medical records for two emergency room admissions at St. Vincent General Hospital.

- The October 2, 2003 admission involved a drug overdose and complications.

- The April 21, 2005 admission involved a left hip dislocation resulting from an automobile accident in which he was driving under the influence of alcohol. Claimant's dislocation was reduced and Claimant required no follow-up care. Claimant credibly testified he had no ongoing symptoms or medical concerns.

33. Claimant admitted in his testimony that he did not disclose these events to his workers' compensation doctors, Dr. Machanic, Dr. D'Angelo, and Dr. Ramos.

34. The ALJ does not find Dr. D'Angelo's opinions to be persuasive. Claimant's 2003 to 2005 emergency room visits were remote in time, did not involve the same body parts as his work injuries, and Claimant had been symptom free for over a decade. The ALJ finds it more likely than not that Claimant either forgot the other events or reasonably believed the other events were not relevant to the treatment of his work injuries.

35. Claimant retained Joseph Ramos, M.D., to perform a Claimant-requested independent medical evaluation. Dr. Ramos opined that the DIME physician was correct that Claimant was not at MMI for his lumbar condition, and that Claimant's lumbar condition is part of Claimant's admitted industrial injury.

36. Dr. D'Angelo's opinion is not well supported by the medical records of Drs. Cunningham, Petry, Machanic, and Ramos regarding the relatedness of Claimant's lumbar condition. Dr. D'Angelo's opinion is called into question, as she credibly testified in deposition that rarely do physicians make a recommendation for a spine specialist when placing an individual at MMI. Dr. D'Angelo's difference of opinion on whether Claimant's lumbar condition is related to his admitted 16 foot fall does not rise to the level of clear and convincing evidence.

37. Based on the totality of the evidence the ALJ finds and concludes that Respondents have failed to establish that the DIME opinion that Claimant's low back was injured in the course and scope of his employment for Employer when on March 9, 2015 he fell 16 feet, landing on his feet is in error by clear and convincing evidence.

38. Based on the totality of the evidence, the ALJ finds and concludes that the opinions of ATPs Cunningham, Petry, DIME physician Machanic and Claimant's medical evaluator Joseph Ramos that Claimant's low back condition was a result of his May 9, 2015 admitted industrial injury are more credible and persuasive than those of Respondents' experts Drs. D'Angelo and Fall.

39. Claimant has sustained a compensable permanent disfigurement as a result of his admitted injuries. Specifically Claimant has a two and one-half inch, highly discolored, raised and broad irregular scar; and a two and one-quarter inch highly discolored, raised and broad irregular scar on his lower right leg.

40. Any determination concerning other issues is premature at this time, as a matter of fact.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers Compensation Act of Colorado" (Act), Title 8, Articles 40 to 47, C.R.S., is to ensure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to the employers without the necessity of any litigation. C.R.S. § 8-40-102(1). A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Therefore a claimant must prove by a preponderance of the evidence that his injury arose out of and in the course and scope of his employment. C.R.S. § 8-43-201*; City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). Proof that something happened at work, without more, is insufficient to carry burden of proof. *Finn v. Industrial Commission*, 165 Colo. 106 (1968). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846. A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ does not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

Section 8-42-101(3.7) mandates that physicians rate an injured workers' impairments using the AMA *Guides:* "On and after July 1, 1991, all physical impairment ratings used under articles 40 and 47 of this title shall be based on the revised third edition of the 'American Medical Association Guides to the Evaluation of Permanent Impairment," in effect as of July 1, 1991." *Id.*

Further, a DIME's findings concerning medical impairment are binding unless overcome by clear and convincing evidence. C.R.S. § 8-42-107(8)(b)(III), *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186-90, 189 (Colo. App. 2002).

Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance,' it is evidence that his highly probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980)). Therefore, the party challenging a DIME's conclusion must demonstrate that it is "highly probable" that the DIME's impairment rating or maximum medical improvement (MMI) finding is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998)(citing *Metro Moving & Storage Co. v. Gussert, supra*). A party has met the burden or established that a DIME's impairment rating is incorrect only upon demonstrating that the evidence contradicting the DIME is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

The enhanced burden of proof reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a more reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessments process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med, Inc. v. Industrial Claim Appeals Office, supra.* Thus, it is well established that the DIME's opinion concerning the cause of the claimant's need for additional treatment is an inherent part of the physician's determination. See *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Egan v. Industrial Claim Appeals Office,* 971 P.2d 664 (Colo. App. 1998). Consequently, the DIME's determination of causation is binding unless overcome by clear and convincing evidence.

In this case, the DIME physician has clearly set forth his opinion that Claimant's right leg has not been sufficiently evaluated for tarsal tunnel syndrome versus lumbar radiculopathy and that the low back has not been sufficiently evaluated for secondary complications which developed as part of Claimant's work-related injury. *See*

Claimant's Submission Tab 8, BS 31. In fact, the DIME physician went further to state "in regards to these two areas [right leg – low back] Claimant is 'not at maximum medical improvement' and these complications need to be assessed." *Id.* The DIME physician proposed an MRI of the lumbar spine which MRI had been originally requested by Claimant's ATP on October 12, 2015.

To overcome the DIME doctor's opinion, Respondents were required to present clear and convincing evidence. Respondents have not met this burden through Dr. D'Angelo's testimony or Dr. Fall's one medical report. They were required to produce evidence which showed that it is highly probable that the DIME physician's opinion of causation is incorrect. They failed to meet this burden. See *e. q. Tinker v. Jefferson County School,* W.C. #4-174-632 (ICAO, March 18, 1998). Dr. D'Angelo's testimony that the low back was not injured as part of Claimant's fall from 16 feet is rejected.

As found, Respondents have failed to present evidence which demonstrates that it is highly probable that the DIME's conclusions are incorrect. In the absence of such clear and convincing evidence, the DIME's findings are binding. See C.R.S. § 8-42-107(8)(c), *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

Respondents have failed to prove by clear and convincing evidence that the DIME's opinion of causation as to the Claimant's low back and the DIME's finding of "not at maximum medical improvement" was in error.

As a matter of law, any determinations concerning other issues are premature.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. It is therefore ordered Respondents have failed to prove by clear and convincing evidence the opinions of the DIME physician on Claimant's lumbar symptomatology, right leg and the need for treatment are in error.

2. Claimant is not at MMI.

3. Claimant is entitled to the resumption of temporary total disability benefits from June 16, 2016 ongoing, subject to applicable offsets.

4. Claimant is awarded $1,900 for the two disfiguring scars on his right ankle and is permitted to re-apply for disfigurement benefits on his antalgic gait after placement at MMI, if his condition does not improve.

5. Respondents shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

6. Any issues not determined in this decision are reserved for future determination.

7. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 10, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-038-148

ISSUES

- Whether Claimant sustained a compensable work-related injury on January 20, 2017 while working for Employer.

- Whether Claimant is entitled to medical benefits under this claim.

STIPULATIONS

- The parties stipulated that if Claimant's claim is compensable, her average weekly wage is $783.96.

- The parties reserved for future determination the issues of temporary and temporary total disability benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 34 years old and is currently employed by the Colorado Department of Corrections. She works at the Sterling Correctional Facility as a corrections officer in their minimum security section. At hearing, Claimant described her job duties as consisting of "custody control," which includes watching offenders, ensuring that offenders are acting in compliance with the correctional facility's policies, and handling any instances of offender misbehavior or insubordination. Claimant generally works eight and a half-hour shifts for Employer. During Claimant's shifts she generally spends two to three hours on her feet checking on the offenders in their cells and/or completing random "shakedowns," wherein she searches offender's cells for contraband.

2. Claimant testified that she likes her job. She experiences something new every day, and is able to work with a great deal of autonomy, which she enjoys. Claimant's husband also works for Employer, and Claimant testified that she has no intention of leaving her position with the Colorado Department of Corrections.

3. Claimant undergoes routine three and six-month assessments with Employer. Claimant testified that she does well in those assessments and has never been written-up for misconduct of any kind.

4. Claimant contends that she was injured at work on January 20, 2017 during an altercation with an offender who became violent. Claimant testified that at some point after 2:00 p.m. on that date, a new inmate approached Claimant in the unit office to check-in and obtain his cell assignment. Claimant assigned the new inmate a

cell and instructed him to move his belongings to that cell. Shortly thereafter, the new inmate reported back to Claimant that his proposed cellmate would not allow him to move his belongings into the assigned cell. Claimant then called the cellmate into the office to discuss the issue. The cellmate was known to be an aggressive offender capable of assaulting staff. As such, when the inmate became verbally aggressive, Claimant used the intercom system to call for assistance from first responders. Several of Claimant's co-workers and/or supervisors responded to the call, and an altercation, or "use of force," ensued with the inmate.

5. Claimant testified that the first co-workers to respond to her call for assistance were Lieutenant June Poncetta and Sergeant Steven Arfsten. As Lieutenant Poncetta and Sergeant Arfsten attempted to put handcuffs on the insubordinate offender, the offender became violent. Claimant testified that initially, as Lieutenant Poncetta and Sergeant Arfsten were attempting to gain control of the offender, she attempted to assist by using "O.C." on the offender, which is a form of pepper spray. The struggle continued, and additional co-workers arrived to the scene and attempted to assist. Claimant testified that once the offender had been tackled to the ground, she then dropped to the ground and locked her legs around the offender's legs in order to further assist her co-workers. Shortly thereafter, Claimant noticed that other inmates were beginning to congregate around the scene, so she stood back up and verbally instructed the other offenders to re-enter their cells.

6. Claimant testified that immediately after the incident occurred, she had a bruise on her arm and left leg. However, Claimant was optimistic that she would be okay, so she did not initially report any injury to Employer. Instead, Claimant completed her scheduled shift, which ended at 10 p.m., and then went home, where she "[took] it easy" for the remainder of the evening. The next morning, Claimant was very stiff in her back and her bottom was sore. Therefore, she returned to work that morning, reported her injuries to Employer, and completed a report documenting her injuries. At that time, Claimant was still optimistic that she would not require medical treatment. She testified that she reported her injuries to Employer just in case her injuries did eventually require medical attention.

7. A few days after the incident, Claimant did determine that she needed medical attention for her injuries. As such, she contacted Employer and asked where to obtain medical treatment. Pursuant to the direction of Employer, Claimant sought treatment at Banner Health in Sterling, Colorado on January 26, 2017. At that appointment, Claimant notified her medical providers that she suffered from left hip and low back pain from restraining an inmate at work. The medical providers at Banner Health recommended physical therapy, prescribed pain medications, and assigned work restrictions. They also noted in their report that their objective findings were consistent with a work-related mechanism of injury. Claimant testified that she followed-up with Banner Health one more time, but was then forced to discontinue treatment through the workers' compensation system because Respondents denied her claim. Instead, Claimant underwent physical therapy on her own through Apex Network Physical Therapy. At hearing, Claimant testified that the physical therapy has helped. She is not yet feeling completely better, but her pain is no longer constant, as it once was.

Claimant also testified that while she was initially forced to take leave from work due to her work restrictions, she has now returned to work in a full-time capacity.

8. Following the incident with the violent offender on January 20, 2017, the officers involved in the event completed incident reports. Sergeant Nicholas Merrell's incident report states that when he arrived on the scene of the incident, he saw Lieutenant Poncetta, Sergeant Arfsten, Sergeant Navarro, and Corrections Officer Sandoval (Claimant) "with Inmate [Name Redacted] on the ground." Sergeant Merrell also testified at hearing. During his testimony, he initially indicated that he did not see Claimant on the ground with the offender when he arrived to the scene of the incident and that he did not know where Claimant was during the altercation. However, upon further questioning regarding the difference between his testimony at hearing and his written incident report, Sergeant Merrell noted the length of time that has now passed since the incident occurred and indicated that whatever is in his report is correct.

9. Lieutenant June Poncetta also testified at hearing. Lieutenant Poncetta testified that she was hit in the head during the altercation with the violent offender. She also testified that the entire altercation only lasted a matter of seconds, and that during those seconds her primary focus was on restraining the offender. Lieutenant Poncetta testified that she did not see Claimant touch the offender, but also admitted that her recollection of the incident differs from some of the other involved parties, and noted that it is impossible to remember every second of an incident like the one that occurred on January 20, 2017.

10. Christopher Gassaway, who works as a case manager for Employer, was also involved in the altercation and appeared at hearing to testify. Mr. Gassaway testified that "to his knowledge," Claimant was not involved in restraining the offender. However, he also testified that he ran in to assist with the altercation very quickly and did not stop to assess who was present and where, exactly, they were located. Mr. Gassaway did note that *someone* restrained the offender's legs, but he was not entirely sure who that individual was.

11. Sergeant Arfsten, was also involved in the altercation with the offender on January 20, 2017, was also present to testify at hearing. Sergeant Arfsten testified that he was there from the very beginning of the altercation and assisted in the process of bringing the offender down to the ground and restraining him. However, in the course of that process Sergeant Arfsten was hit several times by the offender and as a result he began to bleed from his mouth. He testified that he does not recall seeing Claimant restrain the offender, but he cannot say for certain where she was or what she was doing during the altercation because his primary focus was on the offender. Sergeant Arfsten also testified that someone could have made contact with the offender without his knowledge.

12. At hearing, Sergeant Juan Navarro testified that he works as a supervisor for Employer. At the time that the January 20, 2017 incident began, Sergeant Navarro was walking in the south yard. When he heard a call requesting the assistance of first responders, he reported to Unit 33 where the incident was taking place. Sergeant

Navarro testified that when he arrived, Claimant was at the door of the office giving verbal commands to offenders to get "locked down." However, he noted that he was not present during the entire altercation and he does not have any knowledge regarding Claimant's involvement in the incident prior to his arrival.

13. Finally, Lieutenant Steven Frank testified at hearing. Lieutenant Frank testified that he is a shift leader for Employer. He was present at the Sterling Correctional Facility when the January 20, 2017 incident occurred, but he was not involved in the incident itself. Rather, as a shift leader, he was in charge of reviewing and approving all incident reports completed after the use of force. Lieutenant Frank testified that it is standard protocol for all employees involved in a use of force to complete an incident report. The purpose of those incident reports is to document actions taken by both offenders and staff members, and to hold all individuals involved in a use of force accountable for their actions. Lieutenant Frank testified that it is Employer's policy for all physical contact with an offender that occurs during a use of force to be documented in the subsequent incident reports. He also testified that it is important that each incident report set forth every offender and every staff member involved in the altercation. However, Lieutenant Frank also testified that it would not surprise him to know that several of the incident reports submitted after the January 20, 2017 altercation had omissions and/or errors.

14. Several of the witnesses who testified at hearing admitted that their incident reports were incomplete or contained errors. For example, Sergeant Arfsten testified that Sergeant Navarro was involved in the January 20, 2017 incident, but there is no mention of Sergeant Navarro in his incident report. At hearing, Sergeant Arfsten indicated that his incident report was "just his perspective," and that some things came back to him after he wrote it. Similarly, Sergeant Navarro testified at hearing that at one point during the course of the altercation with the violent offender he held the offender's legs down. However, that physical contact with the offender is not noted in Sergeant Navarro's incident report.

15. Like her co-workers, Claimant completed an incident report following her injury. Claimant's incident report does not note that she was ever in direct physical contact with the offender, as she testified to at hearing. During her testimony, Claimant stated that it is her understanding that incident reports should be "short and sweet."

16. Claimant also testified regarding her medical history at hearing, indicating that prior to the January 20, 2017 incident she was not experiencing any significant pain and was not having any difficulty completing the physical requirements of her work. Claimant did undergo chiropractic adjustments at Lakewood Chiropractic in April 2015 and April 2016, as "tune-ups" done for general maintenance. Claimant noted that she had those adjustments done because she is a 34-year old mother of four children who wears heavy work boots and a 15-pound duty belt at work every day, and that this all takes a toll on her body. Claimant also testified that she has previously been in motor vehicle accidents. However, the last motor vehicle accident in which Claimant was involved took place in 2002. Afterward, Claimant saw a chiropractor a few times, and that treatment completely eliminated her symptoms. At the time of the January 20,

2017 incident, Claimant was not actively seeking treatment for any injuries or body pains.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Compensability

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102 (1), C.R.S.

A claimant bears the burden of proving by a preponderance of the evidence that an injury occurred within the course of, and arose out of, employment with the employer. Section 8-41-301(1), C.R.S.; *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). An injury or condition is in the course of employment if it occurred within time and place limits of employment and during an activity that has some connection with the employee's job-related functions. *Wild West Radio, Inc. V. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury or condition arises out of employment if "there is a causal connection between the duties of employment and the injuries suffered." *Deterts v.Times Pub. Co.,* 38 Colo. App. 48, 552 P.2d 1033 (1976).

A preponderance of the evidence is that which leads the trier-of-fact to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the findings in this Order as unpersuasive.

Claimant has proved to a preponderance of the evidence that she was involved in an altercation with a violent offender while working for Employer on January 20, 2017, and that Claimant's involvement included physical contact with the offender that led to injury. This ALJ finds Claimant to be a credible witness. It is reasonable to believe that Claimant would have jumped in to help her co-workers during a violent altercation with an offender, and that her actions led to injury. Moreover, Claimant has no motive to be dishonest about this incident or her injuries. Claimant credibly testified that she is happily employed by Employer and has no desire to end her employment. In fact, Claimant has continued to work for Employer after this incident occurred in spite of her work restrictions, and after the denial of her claim she paid for her own treatment in order to improve her condition. Such actions are consistent with a worker who did, in fact, sustain an on-the-job injury. Furthermore, the day after the altercation occurred, Claimant reported potential injuries to Employer. Given that at that time she was not seeking medical treatment or benefits of any kind, she had absolutely no motive to lie.

In addition to the fact that Claimant is found to be a credible witness, Claimant's testimony is also persuasive because it was corroborated by Sergeant Nicholas Merrell, whose incident report indicates that when he arrived on the scene of the altercation on January 20, 2017, he witnessed Claimant on the floor with the inmate. Sergeant Merrell had no motive to fabricate any part of his incident report, and there is no reason to question its accuracy. While at hearing Sergeant Merrell's testimony initially contradicted his report, he later admitted that his incident report, which was done immediately after the altercation, is more accurate than his memory six months later.

While Sergeant Merrell's incident report and testimony directly corroborated Claimant's testimony, only a small portion of the testimony from Respondents' other witnesses actually contradicted Claimant with regard to the physical contact she made with the offender on January 20, 2017. In fact, most of Respondents' witnesses admitted that Claimant may have made contact with the offender before they arrived on scene and/or could have made contact with the offender without their knowledge. To the very small extent that Respondents' witnesses' testimony did contradict Claimant's contention that she made contact with the offender and suffered a subsequent injury, their testimony is not credited. This is due to the fact that Respondents' six witnesses' testimony was largely in contradiction with one another regarding the specific details of the incident, and at times contradictory to their own incident reports.

In addition to proving that she was involved in the January 20, 2017 altercation and made contact with the inmate during that altercation, Claimant has also proved to a preponderance of the evidence that she sustained an injury as a result of that incident.

Claimant credibly testified that she is generally healthy, and that she was not suffering from substantial pain of any kind prior to the January 20, 2017 incident. While Claimant did undergo annual chiropractic adjustments, those were done for general medical maintenance and are not indicative of a preexisting condition. Likewise, while Claimant has been involved in motor vehicle accidents in the past, the last one dates back to 2002, and Claimant was not actively treating for any injuries sustained in that accident at the time of the January 20, 2017 incident at work. Aside from the January 20, 2017 incident at work, there is nothing to which it would be reasonable to attribute Claimant's ongoing back, hip, and/or buttocks pain. This is reflected by the records from Banner Health, which indicate that Claimant's symptoms were consistent with a work-related injury. Claimant is deemed to have suffered an injury within the course and scope of her employment with Employer on January 20, 2017, and her workers' compensation claim is therefore compensable.

Medical Benefits

A claimant is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of the injury. § 8-42-101(1)(a), C.R.S.; *Yeck v. Industrial Claims Appeals Office,* 996 P.2d 228 (Colo.App. 1999). A claimant bears the burden to prove by a preponderance of the evidence the causal relationship between the work-related injury and the condition for which treatment is sought. *Snyder v. Industrial Claims Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). Whether the claimant sustained her burden of proof is a question of fact for the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

"Authorization" refers to a medical provider's legal status to treat an injury at the respondents' expense. *Popke v. Industrial Claims Appeals Office*, 797 P.2d 677 (Colo. App. 1997). An employer is responsible for medical treatment when, in the normal progression of treatment, an authorized treating physician refers the claimant to other providers for additional treatment. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo.App. 1985). If a claimant seeks treatment outside the chain of authorized providers, respondents are not required to pay for it. § 8-43-404(7), C.R.S.; and, *Yeck v. Industrial Claims Appeals Office, supra.*

As noted above, Claimant has proved by a preponderance of the evidence that the painful symptoms in her back, buttocks, and/or legs and hip was caused by her involvement in the incident that occurred at work on January 20, 2017. Therefore, Claimant is entitled to medical benefits under this claim. The medical treatment Claimant received at Banner Health was related to the compensable injury and done pursuant to the direction of Employer. That medical treatment is therefore authorized, reasonable, and necessary.

ORDER

1. Claimant suffered a compensable injury while working for Employer on January 20, 2017, and therefore, is entitled to medical benefits.

2. Respondents are responsible for the medical treatment Claimant received from Banner Health following her January 20, 2017 injury.

3. Respondents shall pay for ongoing reasonable and necessary medical treatment needed to cure and relieve the effects of the January 20, 2017 injury.

4. The parties' stipulation with respect to average weekly wage is hereby approved. Claimant's average weekly wage is $783.96 unless and until it is subject to adjustment pursuant to law.

5. All matters not determined herein are reserved for further determination.

6. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 11, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Respondents are permitted to withdraw their General Admissions of Liability having proved, by a preponderance of the evidence, that Claimant did not suffer a compensable industrial injury or occupational disease.

II. Whether Claimant has proven by a preponderance of the evidence that her average weekly wage (AWW) should be increased to reflect pay raises.

FINDINGS OF FACT

1. Claimant began working for Employer as an independent contractor in May 2014. Claimant then became a permanent and direct employee of Employer in December 2014 when she was hired as a full-time material planning analyst. Claimant was subsequently promoted to her current position, senior supply planning craft and innovation analyst. Claimant testified at hearing that her jobs for Employer have been 100% sedentary.

2. Claimant testified that her annual salary at the time of being hired as a permanent employee was $63,000. Claimant's salary was $66,780 as of April 1, 2016, $76,000 as of late January/early February 2017, and $78,003 as of April 1, 2017 and ongoing.

3. Claimant testified that her current job requires working with numbers, tracking figures in spreadsheets, collaborating with other departments on conference calls, and sending and receiving electronic mail messages. Claimant testified that she works eight to eleven hours a day, five days a week, and that 99% of her work is performed at her desk. Claimant estimates that she spends 95% to 98% of her work day at her desk typing, which equates to over seven hours a day. Claimant classifies herself as a "hunt and peck" typist, using all of her fingers to type and looking up and down from the computer screen to the keyboard. Claimant testified she has never had an issue with productivity or production. Claimant testified that she spends almost all of her day in the computer program Microsoft Excel, writing up projects, and setting production schedules. Claimant testified that she multitasks while on telephone calls and is rarely in meetings away from her desk.

4. Claimant is right hand dominant. Claimant testified that she began experiencing pain in her left shoulder and an increase in headaches during the summer of 2014. Claimant reported the symptoms to her manager, who coordinated an ergonomic evaluation of Claimant's workstation. Claimant testified that several changes were made to her workstation, and that those changes alleviated her symptoms for a period of time. Claimant testified that the left-sided pain returned in approximately early 2015. Claimant

testified that she had been moved to a new workstation and was using a conference room chair. Claimant testified that the pain in her left shoulder worsened, and included a burning sensation in her forearm and aching in her shoulder complex and neck. Claimant stated that she initially only experienced the pain occasionally while at work, but that the pain progressed into constant pain by late 2015.

5. A second ergonomic assessment of Claimant's workstation was conducted on January 6, 2016 which found, among other things, Claimant's back was not properly supported, the armrests of her chair interfered with the correct keyboard position, and Claimant's elbow was not at 90 degrees and her wrists were not straight during keying or using the mouse. Claimant was provided a different chair, and the keyboard and mouse were positioned closer to Claimant to avoid reaching.

6. Claimant reported her symptoms to Employer as a workers' compensation injury on January 22, 2016.

7. On January 28, 2016, Philip Smaldone, M.D. evaluated Claimant at Employer's in-house medical facility. Claimant reported to Dr. Smaldone that the injury did not occur on a specific date or time, and that she had been experiencing pain since the summer or fall of 2014 after starting work with Employer. Claimant reported that she had been experiencing a burning sensation in the left anterior shoulder for the past 1 ½ years, and a burning sensation over the left volar forearm for the past six months. On examination, Dr. Smaldone noted tenderness to palpation over the left anterior shoulder and that pressure caused a burning sensation in the shoulder and forearm. Dr. Smaldone noted that the Adson's test and the hyperextension test for thoracic outlet were both negative. Dr. Smaldone assessed work-related median nerve neuritis and released Claimant to work with no restrictions. Dr. Smaldone recommended that Claimant undergo physical therapy and adjust the ergonomic setup of her workstation.

8. A third ergonomic assessment was conducted by McCallum Physical Therapy, P.C. on January 29, 2016. It was noted that Claimant propped on her wrist when typing with the left hand with her left side bent in the trunk, and that Claimant was reaching forward to reach the keyboard and mouse. It was recommended that Claimant receive an adjustable work station, sit on a pad in her chair to increase her height, and install a keyboard tray to lower her desk. Claimant testified that the ergonomic adjustments made in January 2016 reduced her pain but did not resolve her symptoms completely.

9. Dr. Smaldone reevaluated Claimant on February 11, 2016. Claimant reported fewer symptoms after being away from work and with working on her laptop in her lap. On examination, Dr. Smaldone noted tenderness over the left anterior shoulder with pressure "lightening up" over the left forearm. Dr. Smaldone performed an injection in Claimant's left anterior shoulder and noted resolution of shoulder and forearm pain with tingling over the volar distal forearm and wrist. Dr. Smaldone assessed median nerve neuritis possibly related to thoracic outlet syndrome (TOS).

10. Claimant underwent an EMG of her left upper extremity on February 26, 2016, including measures of primal nerve/brachial plexus. John B. Woodward III, M.D. noted that all studies were normal.

11. Claimant attended multiple physical therapy sessions at McCallum Physical Therapy from February 3, 2016 to April 20, 2016. The physical therapy notes document Claimant's symptoms improved at times and worsened at other times.

12. On March 1, 2016, Eric O. Ridings, M.D. conducted an Independent Medical Examination (IME) of Claimant at the request of Respondents. Dr. Ridings reviewed medical records dated January 28, 2016 and February 11, 2016, the February 26, 2016 EMG, and Claimant's job descriptions. Dr. Ridings also performed a physical examination of Claimant. Claimant reported pain at the right anterior shoulder, burning pain in the left distal volar forearm and wrist, and aching pain in the left upper trapezius extending up into the left side of her neck. Claimant reported that the pain in her upper trapezius and left forearm was nearly constant. On physical examination, Dr. Ridings noted tenderness to palpation in the left cervical paraspinals and left scalene, as well as myofascial tightness in the left shoulder elevator muscles and upper interscapular and thracolumbar regions. Dr. Ridings noted a strongly positive Wright's test with radiating symptoms into the volar distal forearm, and negative results for passive and active provocative tests for medial or lateral epicondylitis.

13. Dr. Ridings disagreed with Dr. Smaldone's diagnosis of median neuritis, contending Dr. Smaldone did not perform any provocative tests for median neuritis, nor did the history or physical examination evidence median neuritis. Dr. Ridings opined that Claimant's clinical evaluation was consistent with the diagnosis of myofascial pain syndrome involving the left upper quadrant, and myogenic TOS as a complication of the myofascial pain syndrome.

14. Dr. Ridings opined that the MTG could not be utilized to determine whether Claimant's myogenic TOS is work-related because the MTG do not specifically address Claimant's diagnosis in the tables that discuss risk factors for diagnoses such as carpal tunnel and de Quervain's tenosynovitis. Dr. Ridings therefore opined that the determination of work-relatedness "must rely on the clinical judgment of the evaluating physician, supported by documentation of a mechanism of injury that would deal with these diagnoses." Dr. Ridings further stated,

> The patient reports a history of 1 ½ years of inappropriate ergonomics at her several workstations, with the primary culprit having her keyboard too high for her seated position. This predictably results in the worker tonically elevating his or her shoulders in order to position the hands properly on the keyboard and mouse. This tonic use of the shoulder elevator muscles and associated muscles about the shoulder frequently results in myofascial pain syndrome as in my opinion it has in this case. Additionally, the patient reports being told that she had poor posture leaning forward with rounded shoulders which predictably leads to multiple areas of myofascial pain, and in particular tightness of the pectoralis minor

> muscles. Therefore, unless there is additional information forthcoming refuting the patient's description of her ergonomic evaluations or revealing some injury outside of the workplace, it is my opinion within a reasonable degree of medical probability that the patient's current diagnoses as discussed above are related to her employment at [Employer].

15. Dr. Smaldone reevaluated Claimant on March 23, 2016. Claimant reported pain in the left trapezius area, left posterior neck, left anterior chest, left shoulder, and left forearm. Dr. Smaldone did not perform a physical exam. Dr. Smaldone assessed myofascial pain involving the trapezius and left neck, and TOS leading to left anterior shoulder and chest pain and pain about the left forearm. Claimant deferred a visit to a thoracic specialist.

16. In an ergonomic assessment follow-up note dated April 5, 2016, Christine McCallum, DPT, noted, "All ergonomic changes (chair, posture, keyboard tray, typing style) have not improved patient symptoms or comfort significantly. Recommend that she be allowed to utilize a fully adjustable sit and stand desk." Claimant testified that she received a sit/stand desk in May or June 2016 and that she subsequently stood one to two hours per day at work on average.

17. Claimant returned to Dr. Smaldone for a follow-up evaluation on April 20, 2016. Claimant reported periods of improvement of her symptoms and periods of exacerbation. Dr. Smaldone assessed myofascial pain syndrome and myogenic TOS and referred Claimant to a TOS specialist at University of Colorado Health Science. Dr. Smaldone ordered Claimant to discontinue physical therapy.

18. On April 22, 2016, Respondents filed a General Admission of Liability (GAL) admitting for medical benefits only.

19. Claimant presented to Natalia Glebova, M.D., Ph.D., at University of Colorado Hospital on May 11, 2016. Claimant reported symptoms on the left-side involving pain in the anterior neck region, volar aspect of her upper arm, back of her neck, and trapezius muscle. On examination, Dr. Glebova noted intact motor strength and sensation and a negative Adson's test. Dr. Glebova further noted that she did not review any imaging or laboratory studies. Dr. Glebova opined that Claimant did not have neurogenic TOS and that surgery was not necessary because Claimant was improving with physical therapy and ergonomic modifications. Dr. Glebova referred Claimant to physical therapist Jason Lund for an evaluation noting, "...sometimes he is able to fix whatever muscle imbalance she has developed due to her poor ergonomic situation at work, and that should help her with her symptoms."

20. Claimant underwent chiropractic treatment in June and July 2016. Claimant also resumed physical therapy sessions in July 2016. Claimant testified that she began experiencing right-sided symptoms in approximately July 2016. A physical therapy note dated July 21, 2016 notes Claimant reported pain in her right elbow and forearm. Claimant also reported experiencing a right-sided migraine headache while at work after an intensive needling session in early August 2016. Claimant testified that she believes

the right-sided symptoms occurred because she stopped using her left arm when working.

21. Claimant continued to treat with Dr. Smaldone. On August 25, 2016, Claimant reported that her symptoms were comparable to those at her presentation, and that she was "experiencing pain throughout the day with no relief from any particular posture activity." Dr. Smaldone ordered an MRI of the cervical spine and an EMG, and referred Claimant to Dr. Phillip Engen. At the direction of Dr. Smaldone, Claimant worked part-time for Employer from August 2016 to February 2017, working four hours a day, five days per week.

22. Respondents filed a GAL on September 12, 2016 admitting for medical benefits, temporary total disability (TTD) benefits from August 26, 2016 through August 29, 2016, and temporary partial disability (TPD) benefits from August 30, 2016 and ongoing.

23. Phillip L. Engen, M.D. evaluated Claimant on September 13, 2016. Dr. Engen noted that Claimant's left-sided symptoms had reduced with workstation modification, but that Claimant had developed similar right upper extremity symptoms. On examination, Dr. Engen noted tenderness to palpation over the left shoulder but no allodynia or hyperpathia, a positive Tinel's test over the left brachial plexus of the left scalene and right scalene, positive Adson maneuvers on the left side, and a positive Roos test. Dr. Engen gave the following impression: myogenic TOS, burning pain likely consistent with a neurogenic origin, and probable bilateral symptoms of TOS. Dr. Engen recommended Claimant undergo Feldenkrais physical therapy and see Dr. Sanders. Dr. Engen also recommended Claimant consider receiving a scalene block, a brachial plexus block, and consider a triple phase bone scan to rule in or rule out a sympathetic component.

24. On October 14, 2016, Richard J. Sanders, M.D. evaluated Claimant for left TOS. Claimant complained of pain in her neck, left shoulder girdle, trapezius, upper extremity, anterior chest wall, and axilla, with intermittent paresthesis in the right axilla, forearm, elbow and lesser amount of pain in the right upper arm. Claimant also reported occipital headaches and minimal paresthesis in the left hand with weakness, poor grip, coldness and color changes. Claimant reported that she did not have a history of symptoms prior to the fall of 2014.

25. Dr. Sanders noted the following on examination: right hand grip 75 pounds, left hand grip 70 pounds; no scalene tenderness on the right with moderate tenderness on the left; Tinel's test over plexus negative on the right and positive on the left; no shoulder tenderness on the right and moderate shoulder tenderness on the left; 180 degrees arm abduction on the left with mild tingling at the wrist and hand; full range of motion in the neck; painful head tilt; Tinel sign and Phalen sign of hands negative on the right and positive on the left; Pronator tunnel and radial tunnel Tinel's test negative on the right and positive on the left; numbness and increased tingling in the left hand at different times when abducting the arms to 90 degrees in external rotation.

26. Dr. Sanders further noted that the upper limb tension test was minimally positive on the right and more strongly positive on the left stating,

> This test was comparable to straight leg raising in the lower extremity. Her positive response on the left is indicative of brachial plexus compression either above or below the clavicle in the thoracic outlet or pectoralis minor areas, or in both areas. The mild response on the right suggests a minimal degree of brachial plexus compression on the right side.

27. Dr. Sanders performed a left pectoralis minor block and left scalene block, noting Claimant had a fair response to the left pectoralis minor block, and a good response to the left scalene block. Dr. Sanders gave the following impression: left neurogenic TOS, left neurogenic pectoralis minor syndrome, minimal symptoms of right neurogenic TOS, and possible mild left cubital tunnel syndrome. Dr. Sanders concluded Claimant's left TOS is due to repetitive stress injury at work at a keyboard. Dr. Sanders recommended Claimant continue physical therapy/home exercises, a possible trial of Feldenkrais therapy, changing typing at work, or surgical decompression of the left thoracic outlet and pectoralis minor areas. Dr. Sanders referred Claimant to Dr. Annest, a thoracic outlet specialist.

28. In a medical note dated October 18, 2016, Dr. Smaldone assessed left neurogenic thoracic outlet, left neurogenic pectoralis syndrome, right mild neurogenic TOS, possible left cubital tunnel syndrome.

29. On November 28, 2016, Claimant presented to Stephen J. Annest, M.D. Claimant complained of headaches, pain in her neck, constant left shoulder aching, pinching in the anterior axilla, sharp pain in her left elbow, heat-like discomfort in her forearm, and weakness and fatigue in her hand. After physically examining Claimant, Dr. Annest assessed brachial plexus disorder, left arm pain and neck pain. Dr. Annest noted alternative options to treatment, including Dragon Speak and Feldenkrais therapy. Dr. Annest made a surgical request and requested Feldenkrais physical therapy for Claimant's right TOS.

30. On December 23, 2016, Claimant saw Jason R. Lund, M.S.P.T., at the Ashbaugh Center for Therapy. Mr. Lund noted that Claimant had objective findings consistent with a TOS diagnosis and would benefit from "skilled PT intervention to overcome her repetitive postural dysfunction that has to affecting the thoracic outlet space."

31. On January 22, 2017, Henry J. Roth, M.D. performed an IME of Claimant at the request of Respondents. Dr. Roth issued an IME report on January 31, 2017. Claimant reported to Dr. Roth that she no longer experienced right-sided symptoms, but that the left-sided symptoms continued and were provoked by exercise, prolonged static postures, movement and reaching with the left arm, materials handling, stress, tension, and work. On examination, Dr. Roth noted, in part, normal range of motion, tenderness in the left arm, no tenderness in the epicondyles, and discomfort in the left forearm from cubital tunnel pressure. Dr. Roth diagnosed Claimant with non-work related idiopathic,

nonspecific, widespread left upper quarter myofascial pain syndrome, depression, and sleep disorder. Dr. Roth opined that there was no relationship between Claimant's condition and her work duties, stating that Claimant's "myofascial discomfort and potential secondary myogenic thoracic outlet syndrome symptoms are not related to an injurious work exposure." Dr. Roth noted Claimant's EMG was normal, and referred to myofascial pain as a "universal and mundane condition" that all persons have.

32. Dr. Roth disagreed with Dr. Ridings' contention that the MTG do not apply to myofascial pain stating, "The principles for the evaluation are the same whether one is dealing with the conditions specifically identified in the Cumulative Trauma Risk Factor Tables or not. The question to be answered is, 'Is there sufficient force and repetition to result in an injury." Dr. Roth opined that there was no mechanical injury to a tendon, ligament, muscle or nerve, and no physiologic abnormality. Dr. Roth noted that myofascial pain can be provoked by prolonged static postures and poor postures, but that myofascial pain is not a sustained pathologic injury. Dr. Roth contended that sitting and standing are "normal activities of daily living and are common to all employment." Dr. Roth contended that Claimant had not improved despite "every conceivable ergonomic adjustment" being made, and opined that it was not medically probable that Claimant's work was the cause of her condition. Dr. Roth stated that Claimant's discomfort with prolonged static postures is "an indication of a personal intolerance and personal condition, not a condition caused by performing activities for which she may not be personally suited for comfort." Dr. Roth opined that it was not medically probable that Claimant's posture caused a sustained pathology or anatomic abnormality sufficient to cause neurogenic TOS.

33. Dr. Roth further referred to Exhibit 3 of the MTG, which addresses TOS, and noted that the majority of patients who present with physical symptoms of TOS do not have vascular or neurogenic TOS and their symptoms are caused by myofascial dysfunction. Dr. Roth opined that there were no primary or secondary risk factors identified in Claimant's ergonomic assessments. Dr. Roth recommended against authorization for thoracic outlet surgery.

34. Dr. Roth testified at hearing on behalf of Respondents as an expert in occupational medicine and internal medicine. Dr. Roth is board certified and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Roth testified that there are three types of TOS: vascular, true neurogenic, and disputed/myogenic. Dr. Roth opined that Claimant does not have neurogenic TOS based on two normal EMG nerve conduction studies and the absence of muscle atrophy or loss of innervations. Dr. Roth opined that Claimant has myofascial pain/fibromyalgia. Dr. Roth further opined that Claimant's condition is not work-related and is the result of Claimant's posture and abnormal anatomy. Dr. Roth stated that Claimant's condition being recalcitrant to ergonomic adjustments and treatment indicate her condition is not work-related. Dr. Roth testified that the MTG are applicable in Claimant's case

35. Dr. Roth opined that there was insufficient force and repetition to result in injury. Dr. Roth further testified, "I think that if you – you could have muscle tension and discomfort from – from prolonged static posture, and – and that might be, you know,

work-related, but that's – but that's only work-related to the degree that you have personal intolerance to a particular position, which is certainly, you know, correctable."

36. Respondents filed a third GAL on March 10, 2017, admitting to medical benefits, TTD from August 26, 2016 to August 29, 2016, and TPD from August 30, 2016 to February 26, 2017.

37. On April 10, 2017, Marc M. Treihaft, M.D. conducted an IME of Claimant at the request of Respondents. On examination, Dr. Treihaft noted normal bulk, tone and strength in Claimant's bilateral upper extremities and intact pinprick over the hands. Dr. Treihaft gave the following impression: "[Claimant's] presentation is compatible with a chronic myofascial syndrome of the left upper extremity. The clinical and electrophysiologic evaluations do not establish a diagnosis of neurogenic thoracic outlet syndrome or median neuritis." Dr. Treihaft recommended Claimant continue physical therapy.

38. On May 22, 2017, Dr. Treifhaft testified by deposition on behalf of Respondents as an expert in neurology. Dr. Treihaft is board certified and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Treihaft testified that there is a difference between neurogenic TOS and disputed TOS. Dr. Treihaft testified that neurogenic TOS would be documented on an EMG, and would also be evidenced by abnormal clinical findings, including atrophy of particular muscles in the hand. Dr. Treihaft testified that, per his standpoint, no one has quite understood or can explain disputed/non-neurogenic TOS. Dr. Treihaft testified that there is no definitive marker for disputed TOS, and that myogenic TOS falls into the disputed TOS category. Dr. Treihaft opined that Claimant does not have neurogenic TOS, based on the absence of positive clinical findings on his physical examination and two normal EMG studies. Dr. Treihaft further opined that there was no evidence of neurogenic TOS in the medical records. Dr. Treihaft also disagreed with the diagnosis of non-neurogenic TOS, referring to non-neurogenic TOS as an "indistinct" and "vague entity without good boundaries and without a means of testing for it."

39. On June 5, 2017, Dr. Sanders testified by deposition on behalf of Claimant as an expert in vascular surgery and TOS. Regarding the terminology, Dr. Sanders testified that he does not use the term "disputed" TOS and that most, if not all, doctors who treat TOS have "totally disregarded the separation of neurogenic into disputed and true." Dr. Sanders testified that four provocative maneuvers, muscle blocks and an appropriate nerve test can be used to make a diagnosis of TOS. Dr. Sanders stated that, while he performed all four provocative maneuvers on Claimant, the medical records indicate Drs. Roth, Treihaft and Glebova did not perform any of the provocative maneuvers on Claimant during their examinations. Dr. Sanders further testified that a diagnosis of TOS cannot be definitively ruled out if the provocative maneuvers are not performed.

40. Dr. Sanders stated that the muscle blocks he performed were positive diagnostic findings indicating Claimant probably has TOS and a mild degree of pectoralis minor syndrome on the left side. Dr. Sanders testified that an appropriate

nerve test to determine a diagnosis of TOS would include measurement of the medial antebrachial cutaneous nerve. Dr. Sanders acknowledged that the EMG study conducted by Dr. Woodward included a normal measurement of the medial antebrachial cutaneous nerve, but testified that the test was incomplete because there was no measurement of the right side. Dr. Sanders contended that normal EMG results do not preclude a diagnosis of TOS, stating that the "majority of nerve testing is normal in patients with otherwise proven TOS."

41. Dr. Sanders further testified that he did not disagree with the diagnosis of myofascial pain because Claimant's "myofascial involvement caused pressure against the nerves" and produced Claimant's symptoms. Dr. Sanders testified that Dr. Ridings' diagnosis of myogenic TOS was basically the same as his diagnosis of neurogenic TOS, and the difference was an issue of semantics. Dr. Sanders explained that he referred to Claimant's condition as neurogenic, which describes a nerve being compressed, while Dr. Ridings referred to Claimant's condition as myogenic, which describes the muscle compressing the nerve. Dr. Sanders further contended that Dr. Annest's diagnosis of left brachial plexus entrapment was effectively the same as his diagnosis of neurogenic TOS.

42. Dr. Sanders opined that Claimant's TOS was most likely a repetitive stress injury that resulted from sitting at a keyboard. Dr. Sanders testified that the failure of ergonomic adjustments to fully alleviate Claimant's symptoms did not change his opinion on Claimant's condition or causation Dr. Sanders acknowledged that abnormal anatomy can predispose someone to developing TOS. Dr. Sanders stated that he had not conducted a subsequent physical examination of Claimant, but agreed that Claimant currently does not have symptoms of TOS or cubital tunnel syndrome on the right side, and that he was unsure whether Claimant would, at this point, have positive findings for TOS syndrome on the left side. Reiterating that he has not conducted a subsequent physical examination of Claimant, Dr. Sanders opined that Claimant is now at MMI and no further treatment is indicated. Dr. Sanders attributed Claimant's improvement to a combination of Claimant working part-time during certain period, ergonomic adjustments, and physical therapy.

43. Claimant testified she did not have any prior issues with or treatment for her neck, shoulder or arm. Claimant testified that her pain is currently manageable and the symptoms have calmed, with some burning sensation in her forearm and neck still present. Claimant attributes her improvement to physical therapy and desires to continue with physical therapy as future treatment. Claimant no longer wants to undergo the once-recommended surgery.

44. Claimant's testimony is found credible and persuasive.

45. The ALJ credits the opinions of Drs. Sanders, Ridings, Smaldone, Engen, and Annest over the contradictory opinions of Drs. Roth and Treihaft and finds that Claimant suffered a compensable injury.

46. Respondents have failed to establish by a preponderance of the evidence that Claimant did not sustain a compensable injury and, therefore, are not permitted to withdraw the GALs.

47. Claimant's AWW is as follows for the applicable time periods:

Time Period	**AWW**
January 22, 2016 – March 31, 2016	$1,211.55
April 1, 2016 – January 31, 2017	$1,284.23
February 1, 2017 – March 31, 2017	$1,461.54
April 1, 2017 – Ongoing	$1,500.06

48. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert

testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. V. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability and Withdrawal of a General Admission of Liability

For a claim to be compensable under the Act, a claimant has the burden of proving that at the time of the injury he was performing a service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether a claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The Court of Appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. Section 8-43-201(1), C.R.S.

When evaluating the issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

Respondents seek to modify the issue of compensability as already determined by previously filed GALs. Accordingly, Respondents have the burden of proving by a preponderance of the evidence that Claimant did not sustain a compensable injury.

As found, Respondents have failed to establish, by a preponderance of the evidence, that Claimant did not sustain a compensable injury. The ALJ credited the opinions of Drs. Smaldone, Ridings, Sanders, Engen and Annest, who credibly opined that Claimant's condition is work-related. While there have been different diagnoses, the ALJ concludes that Claimant's work duties caused Claimant's condition or combined with a predisposition to cause the need for treatment. Claimant's condition resulted from the nature of the work she performed. Claimant credibly testified that she typed for seven hours per day. The ergonomic evaluations evidence Claimant was performing her job duties at an ergonomically incorrect workstation. While sitting for several hours may be common, there is insufficient persuasive and credible evidence establishing that typing for seven hours a day at an ergonomically incorrect station is something Claimant would generally exposed to outside of the employment. Claimant credibly opined that she had no issues with her neck, shoulders and back prior to the onset of symptoms.

Based on the totality of the evidence, the ALJ concludes Claimant sustained a compensable injury. Therefore, Respondents have failed to meet their burden of proof and are not permitted to withdraw their previously filed GALs.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, Section 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

Claimant credibly testified that, since the onset of her symptoms, her annual salary increased to $66,780 on April 1, 2016, to $76,000 by February of 2017, and to $78,003 on April 1, 2017. Claimant's testimony with respect to her wages is uncontroverted. The ALJ concludes that a fair approximation of Claimant's wage loss and diminished earning capacity includes Claimant's aforementioned pay increases. Claimant has established entitlement to an increase of her AWW for the applicable time periods as detailed in the above findings of fact.

ORDER

It is therefore ordered that:

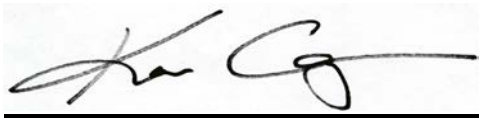
1. Respondents failed to establish by a preponderance of the evidence that Claimant did not sustain a compensable injury. Respondents' request to withdraw their GALs is denied.

2. Claimant earned an AWW of $1,211.55 for the period from January 22, 2016 through March 31, 2016; $1,284.23 for the period from April 1, 2016 through January 31, 2017; $1,461.54 for the period from February 1, 2017 through March 31, 2017; and $1,500.06 from April 1, 2017, ongoing. Claimant's past and future TTD and TPD benefits shall be adjusted and paid accordingly.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 11, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a work related injury on July 25, 2016.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a disfigurement award.

STIPULATIONS

1. The parties stipulated that Claimant's average weekly wage at the time of the injury was $1,869.00.

2. The parties stipulated that if found compensable, Claimant would be entitled to temporary total disability benefits at the maximum benefit rate from July 25, 2016 through August 6, 2016.

FINDINGS OF FACT

1. Claimant is employed by Employer as a Senior Project Manager and has been so employed for approximately six years. Claimant's job duties are primarily sedentary with mostly sitting and performing computer work. Claimant is a salaried employee and her hours of work are typically between 7:00 a.m. and 3:00 p.m. with extra hours as needed. *See* Exhibit D.

2. Claimant receives two 15 minute paid breaks per day and usually combines the two breaks into one 30 minute break.

3. Claimant regularly uses her 30 minute break to walk near and around a one mile loop outside Employer's building. Claimant does so for exercise and general wellness. At times when she is too busy with projects she does not walk but she typically tries to walk 2-3 times per week.

4. Many of Employer's employees walk outside the building and on the one mile loop that Claimant walks. Employees are seen regularly throughout the day walking the same loop that Claimant walks. Employees tell their managers or someone else in their unit when they are leaving. Claimant always told someone when she was leaving to go walk and brought her cell phone with her during her walk so that she could be reached if needed.

5. There are break rooms on each floor of Employer's building and there are some sidewalk paths on Employer's premises, but there are no exercise or gym facilities in the building or on the premises. Many employees thus walk the larger one mile loop during the day for exercise. Employer does a lot to encourage health and wellness and is aware of the walks taken by its employees.

6. On July 25, 2016 Claimant arrived at work at approximately 7:00 a.m. It was her practice in the summer months to take her break earlier in the morning before it got too hot. At approximately 8:00 a.m. Claimant took her break and let someone in her office know that she was heading out to walk and would have her cell phone with her.

7. Claimant walked out the main door of Employer's building, through the employee parking lot, and stepped onto the sidewalk directly in front of Employer's parking lot to begin her walk.

8. Claimant was approximately one or two steps on the sidewalk when an aggressive bird attacked her. The bird came at Claimant from the sky and hit her several times. Claimant attempted to go closer to a nearby tree to get away from the bird but tripped and fell into the nearby road hitting her face and head on the asphalt.

9. The bird had made a similar attack on another employee. The day after this incident, the property management company for Employer's building put out yellow tape to tape off the area of the bird and the apparent bird nest that it was believed the bird was protecting.

10. When Claimant fell into the road, a car driving by stopped and helped her. The driver drove her back into the parking lot and to the main door of her building. When Claimant entered her office building, she told the security officer Gary to call her supervisor. Claimant went into the bathroom to wash off the blood. Claimant's hand was swollen, face was swollen, and she was in pain. Claimant also decided to lie down on the bathroom floor.

11. Employer's human resources supervisor, Kathy Anselmo, came into the bathroom to check on Claimant. There was an attempt to contact Claimant's husband, but ultimately Ms. Anselmo drove Claimant to a nearby urgent care center.

12. Ms. Anselmo initially took Claimant to the second floor of the urgent care center designated for workers' compensation injuries and made a comment that Claimant had sustained a work related injury. Claimant briefly saw Brian McIntyre, D.O. who immediately directed Claimant to the first floor which was the emergency part of the urgent care center. Ms. Anselmo testified at hearing that she believed the injury had happened in the parking lot and was work related but later found out that it had not happened in the parking lot. Ms. Anselmo testified that she turned in all the information to Insurer and that she had no part in the decision to approve or deny the claim.

13. After going to the emergency part of the urgent care center, Claimant was evaluated by Ronald Linton, M.D. It was noted that her facial lacerations were cleaned and sutured, a facial bone CT did not reveal any acute processes or fractures, and that x-rays of the right shoulder and wrist were negative for fractures. Dr. Linton noted his belief that the right shoulder was a contusion, right wrist was likely a sprain or contusion, and that Claimant needed to follow up with her dentist regarding her teeth. *See* Exhibit 4.

14. The next day, on July 26, 2016 Claimant was evaluated by Dr. McIntyre. Claimant reported that she was attacked by a bird and fell into the street. Dr. McIntyre noted that Claimant had received 8 stitches on the outside of her upper lip and 2 stitches on the inner lip. Claimant reported severe pain and swelling in her lip and oozing of the laceration. Claimant reported that she hit her head hard, had a headache and had pain in her right upper central incisor tooth, back of head pain, stiffness/soreness and achiness of her neck, pain in the right hand and wrist, shoulder pain, and upper back pain. Claimant was wearing a sling and wrist splint that was given to her by the emergency urgent care. Claimant also reported that she broke her glasses during the fall. Dr. McIntyre performed a physical examination and diagnosed: laceration of lip; concussion without loss of consciousness; strain of muscle, fascia, and tendon at neck level; strain of muscle(s) and tendon(s) of the rotator cuff of the right shoulder; and contusion of the right wrist. Dr. McIntyre opined that the causes of the problems were related to work activities. Dr. McIntyre ordered right wrist and hand series x-rays, neck x-rays, and referred Claimant to a plastic surgeon for facial laceration evaluation. Dr. McIntyre opined that Claimant had suffered severe injuries from the fall. *See* Exhibits 5, A.

15. On July 29, 2016 Claimant was evaluated by Dr. McIntyre. He noted that the x-rays were all without fracture or dislocation. He again opined that the cause of Claimant's problem was related to work activities, noted her continued pain, and recommended she attend the scheduled plastic surgery visit and dental visit. Dr. McIntyre opined that he was uncertain whether Claimant's wrist was mainly a contusion and strain injury versus a tear of an internal soft tissue structure. *See* Exhibits 5, A.

16. On August 3, 2016 Claimant was evaluated by Dr. McIntyre. He noted that Claimant would return to modified duty the next day. He again opined that the cause of the problems was related to work activities and noted that Claimant was on a walk, on the same side of the street/sidewalk of the building in which she works and that Claimant was participating in a company-sponsored exercise program. *See* Exhibits 5, A.

17. On August 16, 2016 Claimant was evaluated by Dr. McIntyre. Claimant reported improving slightly but with continued weakness and pain in the ulnar wrist region and weakness of grip and difficulty mousing and typing. Claimant reported her shoulder was improving some and that her upper lip was still very painful with intermittent swelling. Claimant reported a painful bite and that she had a dentist appointment the next day. Dr. McIntyre ordered an MRI of Claimant's right wrist and

recommended that Claimant continue with physical therapy and with the scheduled dental appointment. *See* Exhibits 5, A.

18. Claimant continued to treat and was evaluated by a plastic surgeon and dentist. Claimant eventually had her two front teeth replaced by her dentist. Respondents later denied the claim and Claimant stopped physical therapy as she could not continue to afford to pay for treatment. Claimant reports continued pain and problems in her neck, shoulder, hand, and wrist. *See* Exhibits 6, 7.

19. At hearing, Claimant displayed a scar approximately 1 inch in length between her nose and her upper lip that remains white, red, and raised from the injury despite adequate time for healing.

20. Employer promotes health and wellness for all employees and believes in a work/life balance and that a healthy person will be a better employee. To that end, Employer offers each employee an annual $350 wellness reimbursement for qualifying wellness related items (ex. gym membership fees, fitbit, exercise machine, bicycle, etc). Employer also offers health insurance premium discounts if an employee chooses to participate in certain health tests. Employer also offers various health and wellness challenges and programs that are voluntary for employees to participate in.

21. Employer does not get any benefit in their premiums for providing programs to employees, but it is done for the benefit of their employees. Employer never requires or tells employees what programs to do or how to maintain wellness, but offers different things throughout the year as encouragement.

22. At the time of Claimant's injury, Clamant was involved and enrolled in the Global Corporate Challenge (GCC), a health and wellness program offered by Employer. Claimant's participation in this was completely voluntary, but Claimant received emails about the program from Employer, who initiated it for all interested employees.

23. The GCC was a 100 day challenge with employees being able to sign up in teams of seven. The teams and goals would be to increase activity up to 10,000 steps per day. At day 22 of the 100 day challenge, nutritional advice would begin with GCC nutrition. At day 43, psychological wellbeing advice would begin with GCC balance. At day 57, sleep pattern advice would begin with GCC sleep. The goal was to for the employee to beat the "old" them at the end of the 100 day challenge. As part of the challenge, employees who participated were provided with a GCC pulse device to track their daily activity and steps. Claimant testified that she wore the pulse from the time she woke up until the time she went to bed in order to get to the goal of 10,000 steps per day. *See* Exhibits 13, C.

24. Claimant reported that walking the one mile loop outside and near Employer's building helped her to get steps for the GCC. Claimant also testified that

she liked the daily articles from the GCC on nutrition, sleep, mental health, and reducing stress.

25. Employer encouraged the GCC program and wanted their employees to participate but did not require participation.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

In order to recover benefits the claimant must prove by a preponderance of the evidence that her injury was proximately caused by an injury arising out of and in the

course of her employment. *See* § 8-41-301(1)(b) & (c), C.R.S*.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* In order for an employee's action to "arise out of" the employment it is not necessary that the activity be a strict duty or requirement of the employment. Rather if the injury arises out of a risk that is reasonably incidental to the conditions and circumstances under which the employment is usually performed the resulting injury arises out of the employment. *Panera Bread v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006).

Actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water and keeping warm have been held to be incidental to employment under the "personal comfort" doctrine. As an example, injuries sustained on the employer's premises while eating lunch are generally compensable under that doctrine because the employee is at a place he might reasonably be, within the time limits of the employment, and engaged in an activity reasonably incident to the work. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Industrial Commission v. Golden Cycle Corp*., 246 P.2d 902 (Colo. 1952); *Ventura v. Albertsons' Inc.*, 856 P.2d 35 (Colo. App. 1992). Underlying this doctrine is the principle that actions taken to satisfy the employees "personal comfort" are necessary to maintain the employee's health, and are indirectly conducive to the employer's purposes. *Ocean Accident and Guaranty Corp. v. Pallaro*, 180 P. 95 (Colo. 1919). It is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). This includes discretionary activities on the part of the employee which are devoid of any duty component, and are unrelated to any specific benefit to the employer. *City of Boulder v. Streeb*, *supra*; *L.E.L. Construction v. Goode*, 849 P.2d 876 (Colo. App. 1992).

Conversely, if an employee substantially deviates from the mandatory or incidental functions of the employment, such that she is acting for her sole benefit at the time of an injury, the injury is not compensable. *Kater v. Industrial Commission*, 728 P.2d 746 (Colo. App. 1986). In Colorado, the employee is considered to remain in the course and scope of their employment while attending to a personal comfort unless the injury results from a "manifestly reckless or unreasonable hazard, amounting to intentional and willful misconduct, or by disregarding, or disobeying, some warning of danger at the place of the injury or prohibition relating to the thing being done either addressed to the workman or promulgated as a general rule of conduct while on the premises." *Ocean Accident and Guaranty Corp. v. Pallaro, supra; Employers' Mutual Ins. Co. v. Industrial Commission*, 230 P.394 (Colo. 1924).

Respondents argue that at the time of Claimant's injury, Claimant was engaged in a purely personal activity off Employ's premises and was not in the course and scope of employment. Respondents argue that Claimant's actions were a personal and substantial deviation from employment that took Claimant outside of the realm of the personal comfort doctrine. This is not found persuasive. Actions compensable under the personal comfort doctrine include those where the employee is at a place they might reasonably be, within the time limits of employment, and engaged in an activity reasonably incident to the work. Actions taken for one's personal comfort are necessary to maintain health and indirectly are conducive to Employer's goals and purposes. As found above, Claimant works in an office setting, primarily in a sedentary position. Employer encourages wellness and many of Employer's employees take walks around the large loop near Employer's building throughout the day. Claimant does so regularly for exercise and wellness. This is necessary to maintain health and for personal comfort. It is unreasonable for an employer to expect an employee to remain in a sedentary position for 8 hours per day without the need to get up, stretch, or walk. In this case, Employer encouraged such wellness activity both directly through the GCC program, and indirectly through different reimbursement programs they offered. Personal comfort can include eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water, keeping warm, and walking during paid breaks. Walking is an action necessary to satisfy an employee's personal comfort and to maintain an employee's health and is indirectly conducive to an employer's purpose. Claimant has established, by preponderant evidence, that she remained in the course and scope of her employment and that her activity in walking outside Employer's building to begin a short 30 minute walk on the large loop was incidental to her employment and fell within the personal comfort doctrine.

Claimant's activity and walk on the one mile loop is not found to be a substantial deviation from her employment. As found above, there are no exercise facilities on Employer's premises. Claimant's actions were not unreasonable in choosing to get exercise on a paved sidewalk path directly in front of Employer's building. The break Claimant was taking was a short paid break in close proximity to Employer's premises. Employer was aware of Claimant's and other employees' regular breaks that included walking this path and did not restrict the breaks. Weighing all of the evidence, the deviation was not substantial as argued by Respondents and did not take Claimant out of the course and scope of employment.

Additionally, the ALJ also finds that the exercise Claimant was engaged in during work hours is compensable under the factors outlined in *Price v. Industrial Claim Appeals Office of State of Colo.*, 919 P.2d 207, (1996). Respondents argue Claimant was engaged in a recreational activity at the time of her injury due to her participation in GCC and that, therefore, Claimant does not meet the definition of employee at the time of her injury. This is not found persuasive. Section 8-40-301, C.R.S. limits the scope of the term employee to exclude any person while participating in recreational activity, who at such time is relieved of and not performing any duties of employment, regardless of whether such person is utilizing, by discount or otherwise, a pass, ticket, license, permit, or other device as an emolument of employment. At the time of Claimant's injury, she

was not involved in a recreational activity or an activity done for her own enjoyment while not working. Rather, she was in the middle of the work day and was getting some exercise by walking a loop near and around Employer's building. Health and wellness were emphasized and promoted by Employer on a regular basis. Employer encouraged its employees to engage in activities to better their health, relieve stress, and to have a better mental attitude in the performance of their work. The encouragement extended to encouragement to participate in the GCC. Although it was voluntary to sign up for the program, it was encouraged and initiated by Employer. Claimant was participating in the GCC, walked regularly even without the GCC, and through her walks was furthering the business interests of Employer to have healthy and happy employees.

Under certain circumstances, injuries incurred during off-duty exercise mandated or encouraged by an employer might be compensable under the Workers' Compensation Act. *Price v. Industrial Claim Appeals Office of State of Colo.*, 919 P.2d 207, (1996). In order to determine whether an injury suffered by an employee while engaging in an exercise program is compensable under the Workers' Compensation Act, a court should look to the following factors: (1) Whether the injury occurred during working hours; (2) whether the injury occurred on the employer's premises; (3) whether the employer initiated the employee's exercise program; (4) whether the employer exerted any control or direction over the employee's exercise program; and (5) whether the employer stood to benefit from the employee's exercise program. *Id.* Greater weight is given to factors (1) and (2) because these indicia of time and place of injury are particularly strong indicators of whether an injury arose out of and in the course of the employee's employment. *See* Larson, Workmen's Compensation Law § 22.24(b); *Price v. Industrial Claim Appeals Office of State of Colo., supra.*

Here, the ALJ concludes that Claimant's off-duty exercise and the injury sustained is compensable. The injury occurred during Claimant's normal working hours while she was walking just outside Employer's building and while she was exercising in an attempt to maintain her own wellness, which furthers Employer's goals and objectives in having happy and healthy employees. Further, Employer initiated the GCC program in which Claimant was participating at the time and furnished Claimant with a GCC pulse to track her steps. Although Claimant may have been one to two steps off Employer's premises at the time of the injury and although Employer did not exert any control or direction over Claimant's exercise program, the ALJ concludes that the weight of the factors in this case weigh in favor of Claimant. Claimant has established that he injury occurred during working hours, stood to benefit Employer, and occurred while getting steps toward the Employer initiated GCC program. When an employer encourages employees to engage in activities to better their health and wellness and allows employees to take regular walks around a loop near the Employer's premises, an employee can be seen to be furthering the interests of the employer when they take such walks. Here, Claimant sustained an injury while walking which was connected to her participation in Employer's GCC program, and was connected to Employer's overall encouragement of wellness. This injury occurred during the work day and Employer stood to benefit from Claimant's wellness. Therefore, Claimant has met her burden to show that the injury is compensable.

Disfigurement

As a result of her July 25, 2016 work injury, Claimant has visible disfigurement to the body and has sustained serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation *See* § 8-42-108(1), C.R.S. Claimant has a scar approximately 1 inch in length between her nose and her upper lip that remains white, red, and raised from the injury despite adequate time for healing.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she sustained a compensable work related injury on July 25, 2016.

2. Claimant has established by a preponderance of the evidence an entitlement to a disfigurement award. Insurer shall pay Claimant $500.00 for the disfigurement outlined above and shall be given credit for any amount previously paid for disfigurement in connection with this claim.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 10, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-038-148

ISSUES

- Whether Claimant sustained a compensable work-related injury on January 20, 2017 while working for Employer.

- Whether Claimant is entitled to medical benefits under this claim.

STIPULATIONS

- The parties stipulated that if Claimant's claim is compensable, her average weekly wage is $783.96.

- The parties reserved for future determination the issues of temporary and temporary total disability benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 34 years old and is currently employed by the Colorado Department of Corrections. She works at the Sterling Correctional Facility as a corrections officer in their minimum security section. At hearing, Claimant described her job duties as consisting of "custody control," which includes watching offenders, ensuring that offenders are acting in compliance with the correctional facility's policies, and handling any instances of offender misbehavior or insubordination. Claimant generally works eight and a half-hour shifts for Employer. During Claimant's shifts she generally spends two to three hours on her feet checking on the offenders in their cells and/or completing random "shakedowns," wherein she searches offender's cells for contraband.

2. Claimant testified that she likes her job. She experiences something new every day, and is able to work with a great deal of autonomy, which she enjoys. Claimant's husband also works for Employer, and Claimant testified that she has no intention of leaving her position with the Colorado Department of Corrections.

3. Claimant undergoes routine three and six-month assessments with Employer. Claimant testified that she does well in those assessments and has never been written-up for misconduct of any kind.

4. Claimant contends that she was injured at work on January 20, 2017 during an altercation with an offender who became violent. Claimant testified that at some point after 2:00 p.m. on that date, a new inmate approached Claimant in the unit office to check-in and obtain his cell assignment. Claimant assigned the new inmate a

cell and instructed him to move his belongings to that cell. Shortly thereafter, the new inmate reported back to Claimant that his proposed cellmate would not allow him to move his belongings into the assigned cell. Claimant then called the cellmate into the office to discuss the issue. The cellmate was known to be an aggressive offender capable of assaulting staff. As such, when the inmate became verbally aggressive, Claimant used the intercom system to call for assistance from first responders. Several of Claimant's co-workers and/or supervisors responded to the call, and an altercation, or "use of force," ensued with the inmate.

5. Claimant testified that the first co-workers to respond to her call for assistance were Lieutenant June Poncetta and Sergeant Steven Arfsten. As Lieutenant Poncetta and Sergeant Arfsten attempted to put handcuffs on the insubordinate offender, the offender became violent. Claimant testified that initially, as Lieutenant Poncetta and Sergeant Arfsten were attempting to gain control of the offender, she attempted to assist by using "O.C." on the offender, which is a form of pepper spray. The struggle continued, and additional co-workers arrived to the scene and attempted to assist. Claimant testified that once the offender had been tackled to the ground, she then dropped to the ground and locked her legs around the offender's legs in order to further assist her co-workers. Shortly thereafter, Claimant noticed that other inmates were beginning to congregate around the scene, so she stood back up and verbally instructed the other offenders to re-enter their cells.

6. Claimant testified that immediately after the incident occurred, she had a bruise on her arm and left leg. However, Claimant was optimistic that she would be okay, so she did not initially report any injury to Employer. Instead, Claimant completed her scheduled shift, which ended at 10 p.m., and then went home, where she "[took] it easy" for the remainder of the evening. The next morning, Claimant was very stiff in her back and her bottom was sore. Therefore, she returned to work that morning, reported her injuries to Employer, and completed a report documenting her injuries. At that time, Claimant was still optimistic that she would not require medical treatment. She testified that she reported her injuries to Employer just in case her injuries did eventually require medical attention.

7. A few days after the incident, Claimant did determine that she needed medical attention for her injuries. As such, she contacted Employer and asked where to obtain medical treatment. Pursuant to the direction of Employer, Claimant sought treatment at Banner Health in Sterling, Colorado on January 26, 2017. At that appointment, Claimant notified her medical providers that she suffered from left hip and low back pain from restraining an inmate at work. The medical providers at Banner Health recommended physical therapy, prescribed pain medications, and assigned work restrictions. They also noted in their report that their objective findings were consistent with a work-related mechanism of injury. Claimant testified that she followed-up with Banner Health one more time, but was then forced to discontinue treatment through the workers' compensation system because Respondents denied her claim. Instead, Claimant underwent physical therapy on her own through Apex Network Physical Therapy. At hearing, Claimant testified that the physical therapy has helped. She is not yet feeling completely better, but her pain is no longer constant, as it once was.

Claimant also testified that while she was initially forced to take leave from work due to her work restrictions, she has now returned to work in a full-time capacity.

8. Following the incident with the violent offender on January 20, 2017, the officers involved in the event completed incident reports. Sergeant Nicholas Merrell's incident report states that when he arrived on the scene of the incident, he saw Lieutenant Poncetta, Sergeant Arfsten, Sergeant Navarro, and Corrections Officer Sandoval (Claimant) "with Inmate [Name Redacted] on the ground." Sergeant Merrell also testified at hearing. During his testimony, he initially indicated that he did not see Claimant on the ground with the offender when he arrived to the scene of the incident and that he did not know where Claimant was during the altercation. However, upon further questioning regarding the difference between his testimony at hearing and his written incident report, Sergeant Merrell noted the length of time that has now passed since the incident occurred and indicated that whatever is in his report is correct.

9. Lieutenant June Poncetta also testified at hearing. Lieutenant Poncetta testified that she was hit in the head during the altercation with the violent offender. She also testified that the entire altercation only lasted a matter of seconds, and that during those seconds her primary focus was on restraining the offender. Lieutenant Poncetta testified that she did not see Claimant touch the offender, but also admitted that her recollection of the incident differs from some of the other involved parties, and noted that it is impossible to remember every second of an incident like the one that occurred on January 20, 2017.

10. Christopher Gassaway, who works as a case manager for Employer, was also involved in the altercation and appeared at hearing to testify. Mr. Gassaway testified that "to his knowledge," Claimant was not involved in restraining the offender. However, he also testified that he ran in to assist with the altercation very quickly and did not stop to assess who was present and where, exactly, they were located. Mr. Gassaway did note that *someone* restrained the offender's legs, but he was not entirely sure who that individual was.

11. Sergeant Arfsten, was also involved in the altercation with the offender on January 20, 2017, was also present to testify at hearing. Sergeant Arfsten testified that he was there from the very beginning of the altercation and assisted in the process of bringing the offender down to the ground and restraining him. However, in the course of that process Sergeant Arfsten was hit several times by the offender and as a result he began to bleed from his mouth. He testified that he does not recall seeing Claimant restrain the offender, but he cannot say for certain where she was or what she was doing during the altercation because his primary focus was on the offender. Sergeant Arfsten also testified that someone could have made contact with the offender without his knowledge.

12. At hearing, Sergeant Juan Navarro testified that he works as a supervisor for Employer. At the time that the January 20, 2017 incident began, Sergeant Navarro was walking in the south yard. When he heard a call requesting the assistance of first responders, he reported to Unit 33 where the incident was taking place. Sergeant

Navarro testified that when he arrived, Claimant was at the door of the office giving verbal commands to offenders to get "locked down." However, he noted that he was not present during the entire altercation and he does not have any knowledge regarding Claimant's involvement in the incident prior to his arrival.

13. Finally, Lieutenant Steven Frank testified at hearing. Lieutenant Frank testified that he is a shift leader for Employer. He was present at the Sterling Correctional Facility when the January 20, 2017 incident occurred, but he was not involved in the incident itself. Rather, as a shift leader, he was in charge of reviewing and approving all incident reports completed after the use of force. Lieutenant Frank testified that it is standard protocol for all employees involved in a use of force to complete an incident report. The purpose of those incident reports is to document actions taken by both offenders and staff members, and to hold all individuals involved in a use of force accountable for their actions. Lieutenant Frank testified that it is Employer's policy for all physical contact with an offender that occurs during a use of force to be documented in the subsequent incident reports. He also testified that it is important that each incident report set forth every offender and every staff member involved in the altercation. However, Lieutenant Frank also testified that it would not surprise him to know that several of the incident reports submitted after the January 20, 2017 altercation had omissions and/or errors.

14. Several of the witnesses who testified at hearing admitted that their incident reports were incomplete or contained errors. For example, Sergeant Arfsten testified that Sergeant Navarro was involved in the January 20, 2017 incident, but there is no mention of Sergeant Navarro in his incident report. At hearing, Sergeant Arfsten indicated that his incident report was "just his perspective," and that some things came back to him after he wrote it. Similarly, Sergeant Navarro testified at hearing that at one point during the course of the altercation with the violent offender he held the offender's legs down. However, that physical contact with the offender is not noted in Sergeant Navarro's incident report.

15. Like her co-workers, Claimant completed an incident report following her injury. Claimant's incident report does not note that she was ever in direct physical contact with the offender, as she testified to at hearing. During her testimony, Claimant stated that it is her understanding that incident reports should be "short and sweet."

16. Claimant also testified regarding her medical history at hearing, indicating that prior to the January 20, 2017 incident she was not experiencing any significant pain and was not having any difficulty completing the physical requirements of her work. Claimant did undergo chiropractic adjustments at Lakewood Chiropractic in April 2015 and April 2016, as "tune-ups" done for general maintenance. Claimant noted that she had those adjustments done because she is a 34-year old mother of four children who wears heavy work boots and a 15-pound duty belt at work every day, and that this all takes a toll on her body. Claimant also testified that she has previously been in motor vehicle accidents. However, the last motor vehicle accident in which Claimant was involved took place in 2002. Afterward, Claimant saw a chiropractor a few times, and that treatment completely eliminated her symptoms. At the time of the January 20,

2017 incident, Claimant was not actively seeking treatment for any injuries or body pains.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Compensability

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102 (1), C.R.S.

A claimant bears the burden of proving by a preponderance of the evidence that an injury occurred within the course of, and arose out of, employment with the employer. Section 8-41-301(1), C.R.S.; *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985). An injury or condition is in the course of employment if it occurred within time and place limits of employment and during an activity that has some connection with the employee's job-related functions. *Wild West Radio, Inc. V. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury or condition arises out of employment if "there is a causal connection between the duties of employment and the injuries suffered." *Deterts v.Times Pub. Co.,* 38 Colo. App. 48, 552 P.2d 1033 (1976).

A preponderance of the evidence is that which leads the trier-of-fact to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. § 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. *Faulkner v. Indus. Claim Appeals Office*, 12 P3d 844, 846 (Colo. App. 2000); Section 8-41-301(1)(c), C.R.S. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission, 491 P.2d 106 (Colo. App. 1971)*. Reasonable probability exists if the proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985)*. An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n,* 125 Colo. 258, 242 P.2d 600 (1952).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the findings in this Order as unpersuasive.

Claimant has proved to a preponderance of the evidence that she was involved in an altercation with a violent offender while working for Employer on January 20, 2017, and that Claimant's involvement included physical contact with the offender that led to injury. This ALJ finds Claimant to be a credible witness. It is reasonable to believe that Claimant would have jumped in to help her co-workers during a violent altercation with an offender, and that her actions led to injury. Moreover, Claimant has no motive to be dishonest about this incident or her injuries. Claimant credibly testified that she is happily employed by Employer and has no desire to end her employment. In fact, Claimant has continued to work for Employer after this incident occurred in spite of her work restrictions, and after the denial of her claim she paid for her own treatment in order to improve her condition. Such actions are consistent with a worker who did, in fact, sustain an on-the-job injury. Furthermore, the day after the altercation occurred, Claimant reported potential injuries to Employer. Given that at that time she was not seeking medical treatment or benefits of any kind, she had absolutely no motive to lie.

In addition to the fact that Claimant is found to be a credible witness, Claimant's testimony is also persuasive because it was corroborated by Sergeant Nicholas Merrell, whose incident report indicates that when he arrived on the scene of the altercation on January 20, 2017, he witnessed Claimant on the floor with the inmate. Sergeant Merrell had no motive to fabricate any part of his incident report, and there is no reason to question its accuracy. While at hearing Sergeant Merrell's testimony initially contradicted his report, he later admitted that his incident report, which was done immediately after the altercation, is more accurate than his memory six months later.

While Sergeant Merrell's incident report and testimony directly corroborated Claimant's testimony, only a small portion of the testimony from Respondents' other witnesses actually contradicted Claimant with regard to the physical contact she made with the offender on January 20, 2017. In fact, most of Respondents' witnesses admitted that Claimant may have made contact with the offender before they arrived on scene and/or could have made contact with the offender without their knowledge. To the very small extent that Respondents' witnesses' testimony did contradict Claimant's contention that she made contact with the offender and suffered a subsequent injury, their testimony is not credited. This is due to the fact that Respondents' six witnesses' testimony was largely in contradiction with one another regarding the specific details of the incident, and at times contradictory to their own incident reports.

In addition to proving that she was involved in the January 20, 2017 altercation and made contact with the inmate during that altercation, Claimant has also proved to a preponderance of the evidence that she sustained an injury as a result of that incident.

Claimant credibly testified that she is generally healthy, and that she was not suffering from substantial pain of any kind prior to the January 20, 2017 incident. While Claimant did undergo annual chiropractic adjustments, those were done for general medical maintenance and are not indicative of a preexisting condition. Likewise, while Claimant has been involved in motor vehicle accidents in the past, the last one dates back to 2002, and Claimant was not actively treating for any injuries sustained in that accident at the time of the January 20, 2017 incident at work. Aside from the January 20, 2017 incident at work, there is nothing to which it would be reasonable to attribute Claimant's ongoing back, hip, and/or buttocks pain. This is reflected by the records from Banner Health, which indicate that Claimant's symptoms were consistent with a work-related injury. Claimant is deemed to have suffered an injury within the course and scope of her employment with Employer on January 20, 2017, and her workers' compensation claim is therefore compensable.

Medical Benefits

A claimant is entitled to authorized medical treatment that is reasonable and necessary to cure and relieve the effects of the injury. § 8-42-101(1)(a), C.R.S.; *Yeck v. Industrial Claims Appeals Office,* 996 P.2d 228 (Colo.App. 1999). A claimant bears the burden to prove by a preponderance of the evidence the causal relationship between the work-related injury and the condition for which treatment is sought. *Snyder v. Industrial Claims Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). Whether the claimant sustained her burden of proof is a question of fact for the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

"Authorization" refers to a medical provider's legal status to treat an injury at the respondents' expense. *Popke v. Industrial Claims Appeals Office*, 797 P.2d 677 (Colo. App. 1997). An employer is responsible for medical treatment when, in the normal progression of treatment, an authorized treating physician refers the claimant to other providers for additional treatment. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo.App. 1985). If a claimant seeks treatment outside the chain of authorized providers, respondents are not required to pay for it. § 8-43-404(7), C.R.S.; and, *Yeck v. Industrial Claims Appeals Office, supra.*

As noted above, Claimant has proved by a preponderance of the evidence that the painful symptoms in her back, buttocks, and/or legs and hip was caused by her involvement in the incident that occurred at work on January 20, 2017. Therefore, Claimant is entitled to medical benefits under this claim. The medical treatment Claimant received at Banner Health was related to the compensable injury and done pursuant to the direction of Employer. That medical treatment is therefore authorized, reasonable, and necessary.

ORDER

1. Claimant suffered a compensable injury while working for Employer on January 20, 2017, and therefore, is entitled to medical benefits.

2. Respondents are responsible for the medical treatment Claimant received from Banner Health following her January 20, 2017 injury.

3. Respondents shall pay for ongoing reasonable and necessary medical treatment needed to cure and relieve the effects of the January 20, 2017 injury.

4. The parties' stipulation with respect to average weekly wage is hereby approved. Claimant's average weekly wage is $783.96 unless and until it is subject to adjustment pursuant to law.

5. All matters not determined herein are reserved for further determination.

6. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 11, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that referral to a neurosurgeon/neurologist was reasonable, necessary and causally related to his December 7, 2016 back injury.

2. Whether Claimant has proven by a preponderance of the evidence that referral to a pain management specialist was reasonable, necessary and causally related to his December 7, 2016 back injury.

FINDINGS OF FACT

1. Claimant is a 28 year old male who works for Employer as an Assistant General Manager. On December 7, 2016 Claimant suffered an admitted industrial injury to his back while working for Employer. While unloading Christmas trees from a semi-trailer Claimant slipped on a snowy surface. Claimant landed on his back and experienced immediate pain.

2. On December 8, 2016 Claimant visited authorized medical provider Middle Park Medical Center for an evaluation. Dianne Wettersten, PAC noted that Claimant reported 9/10 mid-back pain without radiation. He denied numbness, tingling or weakness in his extremities. X-rays of Claimant's thoracic spine were normal. PAC Wettersten took Claimant off work for the remainder of the week.

3. After receiving additional conservative care Claimant visited Authorized Treating Physician (ATP) Meghan Mont, D.O. at Middle Park Medical Center for an examination on December 22, 2017. Claimant reported that working worsened his back pain. Dr. Mont took Claimant off work and referred him for physical therapy.

4. On January 5, 2017 Claimant visited Mark Paulsen, M.D. at Middle Park Medical Center. Dr. Paulson noted that Claimant experienced severe, sharp, shooting pain to the top of his back that was exacerbated by physical therapy. Dr. Paulsen felt that Claimant's symptoms "are suggestive to me of a skeletal injury, perhaps rib fracture, vertebral fracture etc., thus it would be more appropriate to do a CT scan rather than an MRI."

5. On January 5, 2017 Claimant underwent chest x-rays to rule out a rib injury. The x-rays were negative.

6. On January 6, 2017 Claimant underwent a chest CT scan. The CT scan was normal with no evidence of an acute injury.

7. On January 12, 2017 Claimant visited Dr. Mont for an examination. He reported that his pain level would shoot up so high that it caused him to black out. He also noted that he had been having tingling in his left arm and leg. Dr. Mont noted that Claimant had "possible thoracic spine nerve components. Unclear about paresthesia in the arm and leg.… If explanation not clear, will need specialist consult."

8. On January 20, 2017 Claimant underwent a thoracic MRI. The MRI revealed relatively minor degenerative changes but no evidence of an acute fracture or ligament injury.

9. On January 26, 2017 Dr. Mont referred Claimant for "neurological surgery."

10. On February 2, 2017 Claimant underwent an independent medical examination with John Burris, M.D. Claimant reported 10/10 pain in the mid-back area with no radiation, numbness or tingling. Dr. Burris noted normal vital signs and that Claimant exhibited no apparent distress, communicated with a normal speech pattern and walked with a normal gait. A physical examination was positive only for subjective reports of tenderness. The neurological examination was normal. Dr. Burris diagnosed Claimant with a thoracic strain. He remarked that a thoracic strain typically heals within days to weeks regardless of medical treatment. Dr. Burris concluded that Claimant did not warrant additional medical treatment other than a few sessions of physical therapy because he had a normal physical examination and diagnostic testing.

11. With regard to the neurology request, Dr. Burris determined that the referral was made because Dr. Paulsen and Dr. Mont lacked an explanation for Claimant's pain. Dr. Burris noted that no provider had documented neurologic symptoms or deficits and there was no evidence on diagnostic testing of any disc injury or nerve impingement. He commented that, unless there were specific neurological findings or abnormalities that matched Claimant's examination, a neurology or neurosurgery appointment was not reasonable or necessary. Dr. Burris remarked that, because of the absence of any nerve issues along with benign diagnostic findings, Claimant most likely had a musculoskeletal injury. He recommended treatment through an exercise program and directed Claimant to stay active.

12. On February 10, 2017 Claimant visited Dr. Paulsen for an examination. Claimant reported that his pain worsened every day and he blacks out. He told Dr. Paulsen that he could not work. Claimant could not identify any specific aggravating factors, other than "going to work," and could not describe his blackout spells. Dr. Paulsen specifically commented that Claimant "believes he should not be working as it is clearly making his pain much worse." He determined that the etiology of Claimant's symptoms and severe pain was unclear. Dr. Paulsen also remarked that "I also agree that spine or neurology consultation is appropriate, and we are waiting on approval from the work comp carrier for that."

13. On February 10, 2017 Claimant received an email from Respondent's adjuster Sharmee Jensen explaining that referral for a neurological consultation would

not be authorized. Ms. Jensen stated, "however, you don't have anything wrong with your back that would require any surgery … I am not sure how a neurosurgeon can be of any benefit. Dr. Paulsen or Dr. Mont need to clarify why or how a neurosurgeon would be needed."

14. On February 13, 2017 Ms. Jensen forwarded a copy of Dr. Burris' independent medical examination report to Claimant and emphasized that Respondent would not authorize a referral to a neurologist or neurosurgeon. Ms. Jensen noted that she would also send Dr. Burris' report to Drs. Mont and Paulsen for review.

15. Based on Respondent's denial of a neurosurgery referral Claimant sought recommendations from Middle Park Medical Center. Middle Park Medical Center referred Claimant to Blue Sky Neurology for an evaluation. Claimant subsequently made an appointment to visit Katrina M. Pack, M.D. through his private health insurance.

16. On March 30, 2017 Claimant visited Dr. Pack for an examination. She reviewed Claimant's thoracic MRI and noted relatively mild degenerative changes with no acute injuries. Dr. Pack specifically explained that Claimant's MRI did not reveal any evidence of a fracture, impingement or ligament injury to explain his pain. A neurological examination was normal.

17. On May 25, 2017 Claimant returned to Dr. Pack for an examination. Dr. Pack concluded that Claimant's pain was likely musculoskeletal in nature and referred him to a pain management specialist for additional evaluation. Claimant did not schedule any additional examinations with a neurologist. He has not received any outstanding medical bills from Blue Sky Neurology because bills were paid through his personal health insurance.

18. On June 8, 2017 Dr. Burris conducted a supplemental records review. The review included additional records from Drs. Mont, Paulsen and Pack. Dr. Burris commented that the additional records continued to show Claimant's persistent subjective complaints without objective findings and negative diagnostic work-up were inconsistent with his work injury. He noted that there were no objective findings to support work restrictions or the need for a neurological consultation within the Workers' Compensation claim. Dr. Burris also commented that the treatment recommendations from Dr. Pack, which included a referral to a pain management physician, were not reasonable and necessary.

19. On June 20, 2017 Claimant returned to Dr. Paulsen for an evaluation. He noted that the etiology of Claimant's persistent symptoms remained unclear and there were no objective findings to account for his condition.

20. On June 23, 2017 Claimant underwent a pain management evaluation with Daniel Feldman, M.D. at Integrated Sports and Spine. Dr. Feldman noted that "the [Claimant's] pain is most indicative of thoracic spondylosis but he does have a disc bulging appreciated over T7/8 on his MRI. The [Claimant] may need to consider bilateral

T6/7 and 7/8 facet joint injections for both diagnostic and therapeutic purposes." Claimant's bills from Integrated Sports and Spine were paid through his personal health insurance.

21. Dr. Burris testified at the hearing in this matter. He reiterated that Claimant suffered a thoracic strain on December 7, 2016. However, he has continued to suffer prolonged pain complaints. Dr. Burris explained that there has been no evidence of neurological symptoms or deficits that would warrant a referral to a neurologist within the Workers' Compensation claim. He specified that a neurology referral was not warranted because of the lack of neurological findings and benign diagnostic testing. Finally, Dr. Pack did not find any neurological issues but instead referred Claimant to a different provider for treatment.

22. In addressing Claimant's pain management evaluation with Dr. Feldman, Dr. Burris explained that spondylosis is a general term used to describe back pain with an unknown cause. Because Dr. Feldman had not identified any myelopathy or radiculopathy, Claimant did not have any neurological involvement. Finally, Claimant's small disc bulge was not a pain generator because Dr. Feldman had not recommended an injection at the level of the disc.

23. Claimant has failed to demonstrate that it is more probably true than not that referral to a neurosurgeon/neurologist was reasonable, necessary and causally related to his December 7, 2016 back injury. The record reflects that Claimant's pain complaints to multiple providers have been out of proportion to his physical examinations, inconsistent with observations and unsupported by diagnostic studies. No medical providers have been able to determine a cause of Claimant's severe pain complaints and documented that the etiology of the pain is unknown. Dr. Burris persuasively determined that referral to neurosurgery was made because Dr. Paulsen and Dr. Mont did not have an explanation for Claimant's pain. He noted that no provider had documented neurologic symptoms or deficits and there was no evidence on diagnostic testing of any disc injury or nerve impingement. Dr. Burris commented that, unless there were specific neurological findings or abnormalities that matched Claimant's examination, a neurology or neurosurgery appointment was not reasonable or necessary. He emphasized that a neurology referral was not warranted because of the lack of neurological findings and benign diagnostic testing. Ultimately, neurologist Dr. Pack did not find any neurological issues but instead referred Claimant to a different provider for treatment. Based on the medical records and persuasive opinions of Dr. Burris, Claimant's request for a neurological evaluation is denied.

24. Claimant has failed to prove that it is more probably true than not that referral to a pain management specialist was reasonable, necessary and causally related to his December 7, 2016 back injury. The record reflects that medical providers have been unable to ascertain a cause for Claimant's severe pain complaints. Claimant has undergone extensive examination and diagnostic testing but numerous medical providers have documented that there have been no objective findings to account for Claimant's symptoms. Moreover, Claimant's pain complaints to multiple providers have been out of proportion to his physical examinations and inconsistent with observations.

Furthermore, Dr. Burris persuasively commented that the treatment recommendations from Dr. Pack, which included a referral to a pain management physician, were not reasonable and necessary. He specifically noted that a thoracic strain typically heals within days to weeks regardless of medical treatment. Based on the medical records and persuasive opinions of Dr. Burris, Claimant's request for a pain management evaluation is denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. Claimant is seeking specific medical benefits in the form of referral to a neurologist and pain management specialist. Prior authorization from Respondent

under Rule 16-10 was not required with regard to the neurology consultation because the referral was made by the ATP. W.C.R.P. 16-5(A)(4), 16-10(B); *Sims v. ICAO,* 797 P.2d 777 (Colo.App. 1990). However, Respondent retained the right to contest treatment by a neurologist. Respondent was asked to provide prior authorization for a neurology consultation. However, Respondent advised Claimant and the medical provider that it would not promise to pay for the neurology consultation on the basis that it was not reasonable, necessary or related Claimant's work injury. There is no evidence that Respondent was ever billed by Dr. Pack for Claimant's treatment. Similarly, there is no evidence that Respondent was ever billed by Dr. Feldman for his treatment. Respondent was thus never in a position to authorize or deny the medical bills under Rule 16-11. Accordingly, the issue is not whether the referrals were within the chain of authorized treatment, but whether the resulting consultations were reasonable, necessary and related to Claimant's December 7, 2016 back injury.

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that referral to a neurosurgeon/neurologist was reasonable, necessary and causally related to his December 7, 2016 back injury. The record reflects that Claimant's pain complaints to multiple providers have been out of proportion to his physical examinations, inconsistent with observations and unsupported by diagnostic studies. No medical providers have been able to determine a cause of Claimant's severe pain complaints and documented that the etiology of the pain is unknown. Dr. Burris persuasively determined that referral to neurosurgery was made because Dr. Paulsen and Dr. Mont did not have an explanation for Claimant's pain. He noted that no provider had documented neurologic symptoms or deficits and there was no evidence on diagnostic testing of any disc injury or nerve impingement. Dr. Burris commented that, unless there were specific neurological findings or abnormalities that matched Claimant's examination, a neurology or neurosurgery appointment was not reasonable or necessary. He emphasized that a neurology referral was not warranted because of the lack of neurological findings and benign diagnostic testing. Ultimately, neurologist Dr. Pack did not find any neurological issues but instead referred Claimant to a different provider for treatment. Based on the medical records and persuasive opinions of Dr. Burris, Claimant's request for a neurological evaluation is denied.

7. As found, Claimant has failed to prove by a preponderance of the evidence that referral to a pain management specialist was reasonable, necessary and causally related to his December 7, 2016 back injury. The record reflects that medical providers have been unable to ascertain a cause for Claimant's severe pain complaints. Claimant has undergone extensive examination and diagnostic testing but numerous medical providers have documented that there have been no objective findings to account for Claimant's symptoms. Moreover, Claimant's pain complaints to multiple providers have been out of proportion to his physical examinations and inconsistent with observations. Furthermore, Dr. Burris persuasively commented that the treatment recommendations from Dr. Pack, which included a referral to a pain management physician, were not reasonable and necessary. He specifically noted that a thoracic strain typically heals within days to weeks regardless of medical treatment. Based on the medical records and persuasive opinions of Dr. Burris, Claimant's request for a pain management evaluation is denied.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for referral to a neurosurgeon/neurologist is denied.

2. Claimant's request for referral to a pain management specialist is denied

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 11, 2017.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-035-953-01

ISSUE

- Whether Claimant has proven by a preponderance of the evidence that her right upper extremity conditions are causally related to her work at Employer.

STIPULATION

- If the claim is found compensable, the medical care received by Claimant after November 18, 2016, is reasonably necessary and causally related to the industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer operates large grocery stores. At all times relevant, Claimant worked as an all-purpose clerk primarily performing nighttime stocking of Employer's shelves. Claimant alleges that sometime in June or July 2016, she began to develop shoulder pain as a result of stocking twenty-pound bags of ice and 24-pack and 32-pack cases of water.

2. Claimant testified that between June 2016 and November 2016, she repeatedly reported both the existence of a shoulder injury *and that the shoulder injury was caused by work* to Store Manager Lucas France, Grocery Manager Jamie Smith, Night Crew Foreman Blair Sullivan, and Assistant Store Manager Jodi Chavez. But none of Employer's management personnel completed Employer's Associate Report Packet or sent Claimant for medical treatment. Claimant's testimony in this regard is not consistent with the credible evidence presented at hearing.

3. Employer's Store Manager Lucas France, Grocery Manager Jamie Smith, Night Crew Foreman Blair Sullivan, and Assistant Store Manager Jodi Chavez testified that:

    - Claimant never reported shoulder problems or any type of injury to them,

    - that corporate policy requires management personnel to complete the Associate Incident Report Packet immediately upon being notified of an injury which may be caused by work,

    - and that if Claimant had reported shoulder problems caused by work they would have completed the Associate Incident Report Packet as per corporate policy.

4. On July 21, 2016, Claimant had an appointment with her personal physician, Arazu Wanna, M.D., of Ponderosa Family Physicians. She complained of right shoulder pain existing for the past 3-4 months, gradually increasing in severity. Dr. Wanna assessed Claimant with "right shoulder pain" and "tennis elbow." Dr. Wanna recommended physical therapy and an x-ray of Claimant's right shoulder joint. No persuasive evidence suggests that Claimant presented the medical records or bills from her treatment with Ponderosa Family Physicians to any of her supervisors or store management.

5. On July 22, 2016, Claimant began physical therapy with CACC Physical Therapy. Claimant returned for one additional physical therapy treatment on August 2, 2016. Claimant was discharged from physical therapy for non-compliance on September 6, 2016. The Case History section of the New Patient Health History Form completed by Claimant with Aurora Central Chiropractic indicates that Claimant stopped physical therapy because it "got to [sic] expensive." However, Claimant testified that she stopped attending physical therapy because a male therapist had "pushed down on [her] chest." No persuasive evidence suggests that Claimant presented the physical therapy reports or bills of her treatment with CACC Physical Therapy to any of her supervisors or store management, or otherwise requested payment for physical therapy from Employer.

6. On October 20, 2016, Claimant sought treatment from Aurora Central Chiropractic. The New Patient Health History Form Claimant completed specifically asked the nature of the injury. Claimant did not mark that it was caused by work. Instead, Claimant checked "Other." Claimant also indicated that the party responsible for payment was "E.D. Hough," not Employer. Under the Medical History portion of the New Patient Health History Form, Claimant indicated that her symptoms were not worse during certain times of the day (i.e. she did not indicate working made her symptoms worse) and that the activities that aggravated her symptoms were "reaching back & down."

7. On November 9, 2016, a phone message from Claimant to Ponderosa Family Physicians documents Claimant requested a referral for an MRI for her right shoulder. The November 14, 2016 MRI showed supraspinatus, infraspinatus and subscapularis tendinosis.

8. On November 15, 2016, Claimant returned to Dr. Wanna, the first visit since July 22, 2016 to discuss the MRI results. The note from that visit states that Claimant "wants me to fill out workers comp paperwork, she states that she has a lawyer helping her with this process and was told to bring it here. he hasn't seen someone through her employer at this point for possible work related injury."

9. Dr. Wanna's November 15, 2016, report documents that Claimant "states that the pain is relieved with rest, has noticed that it is worse with heavy lifting at her job . . Notices worsening of symptoms after lifting heavy objects." This history from Claimant on November 15, 2016, given after being advised to see Dr.

Wanna by her attorney, directly conflicts with Claimant's statements to prior treating physicians regarding the effects of rest and activities that caused her pain:

- July 21, 2016, report of Dr. Wanna indicated Claimant "attempted … rest from work at the grocery store" which did not help;

- July 22, 2016, report of CACC Physical Therapy that Claimant had "been on vacation the last two weeks and her pain did not get better" and aggravating factors "computer use, repetitive motion" (not lifting heavy objects);

- October 20, 2016, New Patient Health History Form completed by Claimant, indicating that her symptoms were not worse during certain times of the day (i.e. she did not indicate working made her symptoms worse) and that the activities that aggravated her symptoms were "reaching back & down" (not lifting heavy objects or reaching overhead).

10. The ALJ finds it more likely true than not that Claimant's statements to Dr. Wanna that work caused an increase in symptoms and rest from work caused a relief in her symptoms were made to support a claim for workers' compensation benefits after being advised by her attorney to see Dr. Wanna.

11. On November 16, 2016, Claimant returned to Employer, specifically reporting a work-related injury in June or July 2016, when she was "stocking 20lb/10lb bags of ice and 24 pk & 32 pack water. Used U Boats stocked to shelves and ice chests." Employer completed the Associate Incident Report Packet on that date.

12. On November 16, 2016, Jodi Chavez completed an Employee Incident Witness Form. She stated that "[Claimant] has never stated to me her manager that she hurted [sic] herself. She's been working every week since then with no issues concerning her shoulder." Ms. Chavez's statement is consistent with her hearing testimony that Claimant had not reported an injury to her shoulder.

13. Employer's witnesses credibly testified that Employer's corporate policy requires:

- management personnel to complete the Associate Incident Report Packet immediately upon being notified of an injury.

- management personnel to be trained on an ongoing basis on the issue of how to proceed upon being notified of an injury.

- that the requirement to report work-place injuries is addressed in employee safety meetings and is posted several places throughout the store.

14. The Administrative Law Judge is unable to find credible Claimant's testimony on this point.

15. Medical records establish that Claimant is 5' 1.5'' tall and weighed approximately 126 pounds. Claimant testified that because of her height, the majority of her work involved heavy lifting above shoulder level. Claimant's testimony is not persuasive, as common-sense dictates that the majority of Claimant's lifting necessarily must be below shoulder level.

16. Claimant's job duties require Claimant to break down loads of product shipped to the store on pallets, place the groceries on wheeled carts called "U-boats", wheel the U-boats to an aisle in the store, and then stock the shelves with the groceries. Claimant testified that the pallets "sometimes" were stacked 6 feet high. Thus, even assuming every pallet were stacked 6 feet high, if Claimant were to begin unloading a pallet from the very top to the floor level, half of her work would have required reaching from six feet to three feet (above shoulder level) and the other half of her work would have required reaching from three feet to floor level (below shoulder level). The same holds true for placing items onto the U-boat. Assuming Claimant loaded the U-boat 6 feet high, half of the items would have been placed on an empty U-boat from floor level to three feet high (below shoulder level) and the other half of the items would have been placed from three feet high to six feet high (above shoulder level). Since Claimant testified that she stocked groceries in all sections of the store, then at least half of Claimant's stocking would have been from floor level (bottom shelf) to 3 feet high, and the other half from three feet high to the top shelf. Thus, even assuming that "above shoulder level" was three feet from the ground up to six feet high, the maximum amount of time Claimant spent using her arms above shoulder level would be no greater than 50% of the time she spent stocking.

17. Furthermore, Claimant testified that she used a step stool to place products on the higher shelves. This further lessens her work above shoulder level to less than 17% of the time.

18. Claimant's hearing testimony contradicts statements she made to medical providers prior to hearing.

19. On April 26, 2017, Carlos Cebrian, M.D., performed an Independent Medical Examination of Claimant. Dr. Cebrian testified that Claimant told him that her job duties did not require much overhead activity, and that her stacking of bottled water required her to stack water from floor level to four feet high. Dr. Cebrian's testimony is consistent with his report, which indicates that "[s]he would stack the water 3-4 high, and would stack in shelves or on the floor."

20. Dr. Cebrian testified for Respondents as an expert in occupational medicine. After reviewing Claimant's medical records, interviewing Claimant, and performing an Independent Medical Examination, Dr. Cebrian testified that Claimant's right elbow tendinitis and right shoulder tendinosis were not caused or aggravated by Claimant's job duties.

21. Dr. Cebrian testified that Claimant's supraspinatus, infraspinatus and subscapularis tendinosis means that these three of four tendons in the rotator cuff complex have lost their elasticity due to degeneration over long periods of time. He found nothing unique about the abnormalities in Claimant's shoulder. He explained:

    - Degeneration is not a wear and tear process.
    - Degeneration takes place at a cellular level and is the result of the body's inability to replace normal tissues as one ages.
    - Degeneration is not the result of external trauma to the tissues but rather to the aging of the cells.

22. W.C.R.P. 17, Exhibit 4, Shoulder Injury Medical Treatment Guidelines, state:

    Given all of this information, it is reasonable to consider that there is some evidence for the following causative risk factors for shoulder tendon related pathology:

    - Overhead work consisting of additive time per day of at least 30 minutes/day for a minimum of 5 years.
    - Work that requires shoulder movement at the rate of 15-36 repetitions per minute and no 2 second pauses for 80% of the work cycle.
    - Work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no 2 second pauses for 80% of the work cycle.

23. Dr. Cebrian testified that because Claimant's job duties allow her more than 2 second pauses before performing another shoulder movement for the vast majority of her time working, only the first risk factor relating to overhead work is relevant to a determination of whether the job duties caused an aggravation of Claimant's tendinosis. When analyzing work duties involving overhead activity, Dr. Cebrian stated that it is a "very critical point" to understand that only those activities which result in greater than a 90^{o} angle between the humerous (arm bone) and the upper body result in a potential risk for cumulative trauma to the shoulder joint. The term "additive time per day of at least 30 minutes/day" considers only those few seconds that the arm is in greater than a 90^{o} angle during a stocking motion, not the entire stocking motion from the time the Claimant lifts the item to be stocked until the item is placed on the shelf. Dr. Cebrian testified that based on Claimant's own statements to Dr. Cebrian, Claimant's job duties were well below the 30/minutes per day of "overhead work."

24. On November 16, 2016, Respondent referred Claimant to George Kohake, M.D., who originally opined that he could not state that Claimant's job duties caused or aggravated her shoulder condition because he did not have medical records from

Claimant's primary care physician. Dr. Kohake's January 5, 2017, narrative report makes no mention of causation. However, the WC-164 Form Report from the same date, contains a check in the "Yes" column indicating that objective findings are consistent with history and/or work related mechanism of injury. It appears that the WC 164 Form Report was completed on a computer and bears Dr. Kohake's electronic signature, there is no indication that Dr. Kohake completed the WC 164 Form Report or reviewed it before his digital signature was attached. Dr. Cebrian testified that he does not complete his own WC 164 Form Reports, and opined that it is the practice of most occupational medicine physicians to have nurses or office staff complete the forms. Nothing in Dr. Kohake's narrative report suggests that he engaged in any causation analysis on January 5, 2017, or that he had reviewed the medical records from Claimant's primary care physician, which was the reason he could not state an opinion on causation on November 16, 2016. The ALJ finds that Dr. Kohake's WC 164 Form Report is not persuasive evidence of his opinion on causation.

25. Dr. Cebrian's opinion that Claimant's shoulder condition is not caused or aggravated by her work activities is supported by Claimant's condition not improving despite a two-week vacation in July 2016, and not having worked at all since January 2017. Dr. Cebrian testified that if Claimant's tendinosis were caused or aggravated by her job duties, then he would expect that cessation of those job duties would improve her condition. That Claimant's shoulder tendinosis has not improved is persuasive evidence that Claimant's tendinosis exists independent of her job duties.

26. The ALJ finds that Claimant has not met her burden of proving by a preponderance of the evidence that her right shoulder tendinosis is caused or aggravated by her job duties with Employer.

27. Dr. Cebrian further testified that Claimant's epicondylitis was not caused or aggravated by her job duties. Dr. Cebrian performed a detailed causation assessment based on the Cumulative Trauma Conditions Medical Treatment Guidelines effective March 2, 2017, and the guidelines in effect prior to that date, and concluded that Claimant did not meet either the primary or secondary risk factors for development of epicondylitis under either guideline. Claimant presented no credible evidence from any physician or health care provider to support the premise that Claimant's epicondylitis is caused or aggravated by her job duties. The ALJ finds Dr. Cebrian's opinion to be credible and persuasive.

28. The ALJ finds that Claimant has not met her burden of proving by a preponderance of the evidence that her right elbow condition is caused or aggravated by her job duties with Employer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.(2016). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought." *H&H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *See Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990).

However, the injury must be a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. *Reynolds v. U.S. Airways, Inc*, W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (May 20, 2003). It is the claimant's burden to prove a causal relationship between the industrial injury and the medical condition for which she seeks benefits. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether an industrial injury is the cause of a subsequent need for medical treatment is largely one of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Shoulder. The ALJ concludes that Claimant has not met her burden of proving that her job duties caused or aggravated her shoulder condition. Dr. Cebrian credibly

testified that tendinosis of the shoulder is a degenerative process not caused by "wear and tear" and that Claimant's job duties did not meet the risk factors to prove aggravation of her shoulder condition. Claimant presented no persuasive evidence in rebuttal to Dr. Cebrian's expert opinion. Claimant's case rests primarily on Claimant's own testimony regarding her overhead activities and the job duties as stated in Dr. Cebrian's report. However, Claimant's testimony as to her job duties is not credible, as Claimant's testimony was inconsistent with multiple entries in her medical records prior to the hearing. Dr. Cebrian testified that job duties as calculated by Employer's job description are not a credible estimate of the Claimant's overhead activities because the job duties totaled to 940% which is not possible.

Dr. Cebrian performed a detailed causation analysis based on the best evidence available of Claimant's job duties and application of those job duties to the risk factors found in the Medical Treatment Guidelines. In addition, Dr. Cebrian credibly testified that if Claimant's shoulder tendinosis were caused or aggravated by her job duties, then it would be expected that cessation of those job duties would improve her condition. That Claimant's shoulder tendinosis did not improve after her two-week vacation in July 2016, or since she stopped working in January 2017, is persuasive evidence that Claimant's tendinosis exists independent of her job duties and, therefore is not caused or aggravated by those job duties.

Elbow. The ALJ concludes that Claimant has not sustained her burden of proving that her job duties caused or aggravated her elbow condition. Dr. Cebrian performed a detailed causation assessment based on the Cumulative Trauma Conditions in the Medical Treatment Guidelines effective March 2, 2017, and the guidelines in effect prior to that date. He concluded that Claimant did not meet either the primary or secondary risk factors for development of epicondylitis under either guideline. Claimant presented no persuasive evidence from any physician or health care provider to support the premise that Claimant's epicondylitis is caused or aggravated by her job duties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for benefits is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 14, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-035-953-01

ISSUE

- Whether Claimant has proven by a preponderance of the evidence that her right upper extremity conditions are causally related to her work at Employer.

STIPULATION

- If the claim is found compensable, the medical care received by Claimant after November 18, 2016, is reasonably necessary and causally related to the industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer operates large grocery stores. At all times relevant, Claimant worked as an all-purpose clerk primarily performing nighttime stocking of Employer's shelves. Claimant alleges that sometime in June or July 2016, she began to develop shoulder pain as a result of stocking twenty-pound bags of ice and 24-pack and 32-pack cases of water.

2. Claimant testified that between June 2016 and November 2016, she repeatedly reported both the existence of a shoulder injury *and that the shoulder injury was caused by work* to Store Manager Lucas France, Grocery Manager Jamie Smith, Night Crew Foreman Blair Sullivan, and Assistant Store Manager Jodi Chavez. But none of Employer's management personnel completed Employer's Associate Report Packet or sent Claimant for medical treatment. Claimant's testimony in this regard is not consistent with the credible evidence presented at hearing.

3. Employer's Store Manager Lucas France, Grocery Manager Jamie Smith, Night Crew Foreman Blair Sullivan, and Assistant Store Manager Jodi Chavez testified that:

    - Claimant never reported shoulder problems or any type of injury to them,

    - that corporate policy requires management personnel to complete the Associate Incident Report Packet immediately upon being notified of an injury which may be caused by work,

    - and that if Claimant had reported shoulder problems caused by work they would have completed the Associate Incident Report Packet as per corporate policy.

4. On July 21, 2016, Claimant had an appointment with her personal physician, Arazu Wanna, M.D., of Ponderosa Family Physicians. She complained of right shoulder pain existing for the past 3-4 months, gradually increasing in severity. Dr. Wanna assessed Claimant with "right shoulder pain" and "tennis elbow." Dr. Wanna recommended physical therapy and an x-ray of Claimant's right shoulder joint. No persuasive evidence suggests that Claimant presented the medical records or bills from her treatment with Ponderosa Family Physicians to any of her supervisors or store management.

5. On July 22, 2016, Claimant began physical therapy with CACC Physical Therapy. Claimant returned for one additional physical therapy treatment on August 2, 2016. Claimant was discharged from physical therapy for non-compliance on September 6, 2016. The Case History section of the New Patient Health History Form completed by Claimant with Aurora Central Chiropractic indicates that Claimant stopped physical therapy because it "got to [sic] expensive." However, Claimant testified that she stopped attending physical therapy because a male therapist had "pushed down on [her] chest." No persuasive evidence suggests that Claimant presented the physical therapy reports or bills of her treatment with CACC Physical Therapy to any of her supervisors or store management, or otherwise requested payment for physical therapy from Employer.

6. On October 20, 2016, Claimant sought treatment from Aurora Central Chiropractic. The New Patient Health History Form Claimant completed specifically asked the nature of the injury. Claimant did not mark that it was caused by work. Instead, Claimant checked "Other." Claimant also indicated that the party responsible for payment was "E.D. Hough," not Employer. Under the Medical History portion of the New Patient Health History Form, Claimant indicated that her symptoms were not worse during certain times of the day (i.e. she did not indicate working made her symptoms worse) and that the activities that aggravated her symptoms were "reaching back & down."

7. On November 9, 2016, a phone message from Claimant to Ponderosa Family Physicians documents Claimant requested a referral for an MRI for her right shoulder. The November 14, 2016 MRI showed supraspinatus, infraspinatus and subscapularis tendinosis.

8. On November 15, 2016, Claimant returned to Dr. Wanna, the first visit since July 22, 2016 to discuss the MRI results. The note from that visit states that Claimant "wants me to fill out workers comp paperwork, she states that she has a lawyer helping her with this process and was told to bring it here. he hasn't seen someone through her employer at this point for possible work related injury."

9. Dr. Wanna's November 15, 2016, report documents that Claimant "states that the pain is relieved with rest, has noticed that it is worse with heavy lifting at her job . . Notices worsening of symptoms after lifting heavy objects." This history from Claimant on November 15, 2016, given after being advised to see Dr.

Wanna by her attorney, directly conflicts with Claimant's statements to prior treating physicians regarding the effects of rest and activities that caused her pain:

- July 21, 2016, report of Dr. Wanna indicated Claimant "attempted … rest from work at the grocery store" which did not help;

- July 22, 2016, report of CACC Physical Therapy that Claimant had "been on vacation the last two weeks and her pain did not get better" and aggravating factors "computer use, repetitive motion" (not lifting heavy objects);

- October 20, 2016, New Patient Health History Form completed by Claimant, indicating that her symptoms were not worse during certain times of the day (i.e. she did not indicate working made her symptoms worse) and that the activities that aggravated her symptoms were "reaching back & down" (not lifting heavy objects or reaching overhead).

10. The ALJ finds it more likely true than not that Claimant's statements to Dr. Wanna that work caused an increase in symptoms and rest from work caused a relief in her symptoms were made to support a claim for workers' compensation benefits after being advised by her attorney to see Dr. Wanna.

11. On November 16, 2016, Claimant returned to Employer, specifically reporting a work-related injury in June or July 2016, when she was "stocking 20lb/10lb bags of ice and 24 pk & 32 pack water. Used U Boats stocked to shelves and ice chests." Employer completed the Associate Incident Report Packet on that date.

12. On November 16, 2016, Jodi Chavez completed an Employee Incident Witness Form. She stated that "[Claimant] has never stated to me her manager that she hurted [sic] herself. She's been working every week since then with no issues concerning her shoulder." Ms. Chavez's statement is consistent with her hearing testimony that Claimant had not reported an injury to her shoulder.

13. Employer's witnesses credibly testified that Employer's corporate policy requires:

- management personnel to complete the Associate Incident Report Packet immediately upon being notified of an injury.

- management personnel to be trained on an ongoing basis on the issue of how to proceed upon being notified of an injury.

- that the requirement to report work-place injuries is addressed in employee safety meetings and is posted several places throughout the store.

14. The Administrative Law Judge is unable to find credible Claimant's testimony on this point.

15. Medical records establish that Claimant is 5' 1.5'' tall and weighed approximately 126 pounds. Claimant testified that because of her height, the majority of her work involved heavy lifting above shoulder level. Claimant's testimony is not persuasive, as common-sense dictates that the majority of Claimant's lifting necessarily must be below shoulder level.

16. Claimant's job duties require Claimant to break down loads of product shipped to the store on pallets, place the groceries on wheeled carts called "U-boats", wheel the U-boats to an aisle in the store, and then stock the shelves with the groceries. Claimant testified that the pallets "sometimes" were stacked 6 feet high. Thus, even assuming every pallet were stacked 6 feet high, if Claimant were to begin unloading a pallet from the very top to the floor level, half of her work would have required reaching from six feet to three feet (above shoulder level) and the other half of her work would have required reaching from three feet to floor level (below shoulder level). The same holds true for placing items onto the U-boat. Assuming Claimant loaded the U-boat 6 feet high, half of the items would have been placed on an empty U-boat from floor level to three feet high (below shoulder level) and the other half of the items would have been placed from three feet high to six feet high (above shoulder level). Since Claimant testified that she stocked groceries in all sections of the store, then at least half of Claimant's stocking would have been from floor level (bottom shelf) to 3 feet high, and the other half from three feet high to the top shelf. Thus, even assuming that "above shoulder level" was three feet from the ground up to six feet high, the maximum amount of time Claimant spent using her arms above shoulder level would be no greater than 50% of the time she spent stocking.

17. Furthermore, Claimant testified that she used a step stool to place products on the higher shelves. This further lessens her work above shoulder level to less than 17% of the time.

18. Claimant's hearing testimony contradicts statements she made to medical providers prior to hearing.

19. On April 26, 2017, Carlos Cebrian, M.D., performed an Independent Medical Examination of Claimant. Dr. Cebrian testified that Claimant told him that her job duties did not require much overhead activity, and that her stacking of bottled water required her to stack water from floor level to four feet high. Dr. Cebrian's testimony is consistent with his report, which indicates that "[s]he would stack the water 3-4 high, and would stack in shelves or on the floor."

20. Dr. Cebrian testified for Respondents as an expert in occupational medicine. After reviewing Claimant's medical records, interviewing Claimant, and performing an Independent Medical Examination, Dr. Cebrian testified that Claimant's right elbow tendinitis and right shoulder tendinosis were not caused or aggravated by Claimant's job duties.

21. Dr. Cebrian testified that Claimant's supraspinatus, infraspinatus and subscapularis tendinosis means that these three of four tendons in the rotator cuff complex have lost their elasticity due to degeneration over long periods of time. He found nothing unique about the abnormalities in Claimant's shoulder. He explained:

    - Degeneration is not a wear and tear process.
    - Degeneration takes place at a cellular level and is the result of the body's inability to replace normal tissues as one ages.
    - Degeneration is not the result of external trauma to the tissues but rather to the aging of the cells.

22. W.C.R.P. 17, Exhibit 4, Shoulder Injury Medical Treatment Guidelines, state:

    Given all of this information, it is reasonable to consider that there is some evidence for the following causative risk factors for shoulder tendon related pathology:

    - Overhead work consisting of additive time per day of at least 30 minutes/day for a minimum of 5 years.
    - Work that requires shoulder movement at the rate of 15-36 repetitions per minute and no 2 second pauses for 80% of the work cycle.
    - Work that requires shoulder movement with force 10% or greater of the maximum voluntary force and has no 2 second pauses for 80% of the work cycle.

23. Dr. Cebrian testified that because Claimant's job duties allow her more than 2 second pauses before performing another shoulder movement for the vast majority of her time working, only the first risk factor relating to overhead work is relevant to a determination of whether the job duties caused an aggravation of Claimant's tendinosis. When analyzing work duties involving overhead activity, Dr. Cebrian stated that it is a "very critical point" to understand that only those activities which result in greater than a 90^{o} angle between the humerous (arm bone) and the upper body result in a potential risk for cumulative trauma to the shoulder joint. The term "additive time per day of at least 30 minutes/day" considers only those few seconds that the arm is in greater than a 90^{o} angle during a stocking motion, not the entire stocking motion from the time the Claimant lifts the item to be stocked until the item is placed on the shelf. Dr. Cebrian testified that based on Claimant's own statements to Dr. Cebrian, Claimant's job duties were well below the 30/minutes per day of "overhead work."

24. On November 16, 2016, Respondent referred Claimant to George Kohake, M.D., who originally opined that he could not state that Claimant's job duties caused or aggravated her shoulder condition because he did not have medical records from

Claimant's primary care physician. Dr. Kohake's January 5, 2017, narrative report makes no mention of causation. However, the WC-164 Form Report from the same date, contains a check in the "Yes" column indicating that objective findings are consistent with history and/or work related mechanism of injury. It appears that the WC 164 Form Report was completed on a computer and bears Dr. Kohake's electronic signature, there is no indication that Dr. Kohake completed the WC 164 Form Report or reviewed it before his digital signature was attached. Dr. Cebrian testified that he does not complete his own WC 164 Form Reports, and opined that it is the practice of most occupational medicine physicians to have nurses or office staff complete the forms. Nothing in Dr. Kohake's narrative report suggests that he engaged in any causation analysis on January 5, 2017, or that he had reviewed the medical records from Claimant's primary care physician, which was the reason he could not state an opinion on causation on November 16, 2016. The ALJ finds that Dr. Kohake's WC 164 Form Report is not persuasive evidence of his opinion on causation.

25. Dr. Cebrian's opinion that Claimant's shoulder condition is not caused or aggravated by her work activities is supported by Claimant's condition not improving despite a two-week vacation in July 2016, and not having worked at all since January 2017. Dr. Cebrian testified that if Claimant's tendinosis were caused or aggravated by her job duties, then he would expect that cessation of those job duties would improve her condition. That Claimant's shoulder tendinosis has not improved is persuasive evidence that Claimant's tendinosis exists independent of her job duties.

26. The ALJ finds that Claimant has not met her burden of proving by a preponderance of the evidence that her right shoulder tendinosis is caused or aggravated by her job duties with Employer.

27. Dr. Cebrian further testified that Claimant's epicondylitis was not caused or aggravated by her job duties. Dr. Cebrian performed a detailed causation assessment based on the Cumulative Trauma Conditions Medical Treatment Guidelines effective March 2, 2017, and the guidelines in effect prior to that date, and concluded that Claimant did not meet either the primary or secondary risk factors for development of epicondylitis under either guideline. Claimant presented no credible evidence from any physician or health care provider to support the premise that Claimant's epicondylitis is caused or aggravated by her job duties. The ALJ finds Dr. Cebrian's opinion to be credible and persuasive.

28. The ALJ finds that Claimant has not met her burden of proving by a preponderance of the evidence that her right elbow condition is caused or aggravated by her job duties with Employer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.(2016). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a worker's pre-existing infirmity or disease "to produce the disability for which workers' compensation is sought." *H&H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *See Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990).

However, the injury must be a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. *Reynolds v. U.S. Airways, Inc*, W. C. Nos. 4-352-256, 4-391-859, 4-521-484 (May 20, 2003). It is the claimant's burden to prove a causal relationship between the industrial injury and the medical condition for which she seeks benefits. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether an industrial injury is the cause of a subsequent need for medical treatment is largely one of fact for determination by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Shoulder. The ALJ concludes that Claimant has not met her burden of proving that her job duties caused or aggravated her shoulder condition. Dr. Cebrian credibly

testified that tendinosis of the shoulder is a degenerative process not caused by "wear and tear" and that Claimant's job duties did not meet the risk factors to prove aggravation of her shoulder condition. Claimant presented no persuasive evidence in rebuttal to Dr. Cebrian's expert opinion. Claimant's case rests primarily on Claimant's own testimony regarding her overhead activities and the job duties as stated in Dr. Cebrian's report. However, Claimant's testimony as to her job duties is not credible, as Claimant's testimony was inconsistent with multiple entries in her medical records prior to the hearing. Dr. Cebrian testified that job duties as calculated by Employer's job description are not a credible estimate of the Claimant's overhead activities because the job duties totaled to 940% which is not possible.

Dr. Cebrian performed a detailed causation analysis based on the best evidence available of Claimant's job duties and application of those job duties to the risk factors found in the Medical Treatment Guidelines. In addition, Dr. Cebrian credibly testified that if Claimant's shoulder tendinosis were caused or aggravated by her job duties, then it would be expected that cessation of those job duties would improve her condition. That Claimant's shoulder tendinosis did not improve after her two-week vacation in July 2016, or since she stopped working in January 2017, is persuasive evidence that Claimant's tendinosis exists independent of her job duties and, therefore is not caused or aggravated by those job duties.

Elbow. The ALJ concludes that Claimant has not sustained her burden of proving that her job duties caused or aggravated her elbow condition. Dr. Cebrian performed a detailed causation assessment based on the Cumulative Trauma Conditions in the Medical Treatment Guidelines effective March 2, 2017, and the guidelines in effect prior to that date. He concluded that Claimant did not meet either the primary or secondary risk factors for development of epicondylitis under either guideline. Claimant presented no persuasive evidence from any physician or health care provider to support the premise that Claimant's epicondylitis is caused or aggravated by her job duties.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for benefits is denied and dismissed.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 14, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- **Whether Claimant proved, by a preponderance of the evidence, that the arthroscopy, with subacromial decompression, rotator cuff repair and possible biceps tenodesis, for which Dr. Mark Grossnickle has requested prior surgical authorization is reasonable, necessary and related to the admitted December 29, 2015, work injury?**

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. The Claimant is a 57-year old woman with a January 14, 1960, date of birth. **Exhibit A.**

2. On December 29, 2015, the Claimant was employed by the Respondent Employer as an Assistant Manager. **Tr. 10, ll. 18-19.**

3. Claimant was injured in an admitted accident on December 29, 2015, in the course and scope of her employment with the Respondent Employer. Following the accident, Claimant completed the Employer's First Report of Injury on the Employer's behalf. The Claimant described her injury as occurring when, "She was helping a customer and tripped over a box and fell. States her right foot and second toe presenting complaint; Right toe (second toe), left wrist mechanism of injury; Fall or slip injury, fall, slip or trip, NOC, EE went to NextCare Urgent Care for Treatment". **Exhibit A.**

4. Physician Assistant, Stephan Toth, evaluated Claimant at NextCare Urgent Care on December 29, 2015. Claimant's presenting complaints included left hand and right ankle pain. On physical exam, pertinent negatives included bruising, crepitus, joint instability, numbness, popping, spasms, or tingling in the arms. PA Toth assessed "left wrist pain" and a "left wrist sprain". PA Toth prescribed ice, elevation, Ibuprofen and a wrist brace. Claimant was instructed to use the wrist brace less as her wrist motion became more normal and less painful. **Exhibit I, Bates 84-88.**

5. Claimant returned to NextCare on January 5, 2016, reporting no improvement. Claimant reported a new complaint of radiating pain to the left elbow "similar to previous surgical issues in elbow". The diagnosis remained "strain of left wrist". Claimant was instructed to follow up with the same orthopedist [Dr. Bussy] who previously treated her left elbow complaints for a

pre-existing condition. Due to Claimant's failure to improve, she was also referred to orthopedic surgeon, Dr. Mark Grossnickle. **Exhibit I, Bates 89-92.**

6. Dr. Grossnickle evaluated Claimant on February 3, 2016. **Exhibit K, Bates 119.** On February 3, 2016, Dr. Grossnickle opined, "I think [Claimant] has evidence of irritation of her median nerve, but I also think she is getting tendinitis about her thumb from her injury. Claimant's complaints included pain at the base of the thumb, that would "sometimes" radiate up the forearm into the elbow. ***Id.***

7. Claimant continued to treat with Dr. Grossnickle and the physical therapists to whom he referred her, with ongoing complaints consisting of only wrist and thumb pain with occasional radiation to the elbow.

8. On March 9, 2016, Dr. Grossnickle diagnosed Claimant with deQuervain tendinitis and left-sided trigger thumb. For the first time, there is mention of left shoulder pain. **Exhibit K, Bates 130.**

9. On April 7, 2016, Dr. Grossnickle performed a first dorsal compartment release of the left wrist and a trigger thumb release of the left thumb. **Exhibit K, Bates 139.** Dr. Grossnickle referred Claimant to physical therapy on April 20, 2016. **Exhibit K, Bates 140.**

10. Claimant began physical therapy on May 4, 2016. Her reported complaints were of pain in the left wrist. She reported improvement in her thumb pain with surgery. **Exhibit K, Bates 144, 145.**

11. Claimant continued her treatment with Dr. Grossnickle and the physical therapists to whom he referred her, with the ongoing diagnosis of "left wrist sprain". **Exhibit K, Bates 146 through 177.** Claimant also returned to NextCare on July 28, 2016, "to follow up on left wrist", not having been seen since January 12, 2016. **Exhibit I, Bates 99.** On physical exam, the left wrist and hand had full range of motion, except mild limitation of extension, with tenderness along the ulnar side of the left wrist. **Exhibit I, Bates 101.**

12. On August 24, 2016, Claimant complained of left shoulder "stiffness", which Dr. Grossnickle attributed to disuse of the left hand following surgery. **Exhibit K, Bates 178.**

13. On November 30, 2016, Claimant continued to complain of pain in the anterior aspect of the left shoulder. Dr. Grossnickle opined Claimant had "positive impingement especially over the supraspinatus tendon of her left shoulder. She has full range of motion. She has no anterior inferior posterior instability". Dr. Grossnickle recommended an MRI scan to make sure the Claimant "did not damage" her rotator cuff mechanism in the fall. **Exhibit K, Bates 181.**

14. A January 8, 2017, MRI of the left shoulder was performed at Dr. Grossnickle's request. It was read as showing:

    - Rotator cuff tendinopathy. Shallow partial tearing involving the supraspinatus and subscapularis tendons.
    - Tearing of the superior and posterior glenoid labrum.
    - Glenoid cartilage loss with subchondral cystic changes.

    Exhibit J.

15. On January 18, 2017, Dr. Grossnickle evaluated Claimant and recommended an arthroscopy with subacromial decompression and rotator cuff repair of Claimant's partial tear and possible biceps tenodesis. **Exhibit 5, Bates 113.** Respondents denied the request for prior authorization in compliance with Rule 16-11, W.C.R.P. **Exhibit N, Bates 213.**

16. In connection with their Rule 16-11, W.C.R.P., denial, Respondents obtained an IME, performed by Dr. Timothy O'Brien. **Exhibit M.**

17. On May 15, 2017, Dr. Grossnickle testified by deposition as an expert in the field of orthopedic surgery. In the course of his deposition, Dr. Grossnickle reviewed the results of the January 8, 2017, MRI report. Based on his review of the MRI report, Dr. Grossnickle opined, that, "***In the absence of prior injury***," he would attribute the January 8, 2017, MRI findings to Claimant's December 29, 2015, fall. [**Emphasis supplied.] Grossnickle Depo. Tr. 13, ll. 1-14.** Dr. Grossnickle was also asked the following hypothetical question.

    Q. [By Mr. Kennedy]: All right. Hypothetically, let's say she had those exact MRI findings prior to the fall in December 2015. If she didn't have any symptoms in the shoulder prior to that, in your opinion, what would have caused her symptoms – or excuse me – her condition to become symptomatic?

    A. [By Dr. Grossnickle]: I actually don't think she could have had a labral injury and not be symptomatic. So, in that scenario, I'd have a hard time answering that one to say that for sure. Most people with that type of labral tear would be symptomatic.

    Q. So to confirm, if she did have this labral tear prior to December of 2015, it's your opinion that she would have been symptomatic?

    A. It is, yes.

    Grossnickle Depo. Tr. 18, l. 25, Tr. 19, ll.1 1-14.

18. Dr. Grossnickle testified he based his opinions regarding the relatedness of Claimant's shoulder complaints to the admitted December 29, 2015, accident on

his understanding that the Claimant did not have any shoulder problems until the December 29, 2015, accident. **Grossnickle Depo., Tr. 23, ll. 18-24.** In formulating his opinions in the case, Dr. Grossnickle relied exclusively on the history given to him by Claimant and his evaluations of her. He reviewed no treatment notes from any outside providers other than the September 21, 2016, EMG results provided by Dr. Van DeHoven and some unrelated records from Claimant's primary care provider. **Grossnickle Depo., Tr. 24, ll. 3-25.** Claimant continued to treat with NextCare Urgent Care with complaints of left wrist pain, without improvement.

19. Dr. Grossnickle had no independent knowledge of Claimant's prior surgical history, including any history of prior work-related injuries. **Grossnickle Depo., Tr. 25, ll. 17-22.**

20. In connection with a January 5, 2007, injury to the left hand and arm, Claimant underwent a May 21, 2008, left shoulder MRI arthrogram. **Exhibit D, Bates 25-26.** The May 21, 2008, left shoulder MRI arthrogram was read as showing:

    - Focal tear of the superior labrum beginning at the biceps labral attachment and extending toward the posterior superior labrum.
    - Mild to moderate tendinosis of the supraspinatus and infraspinatus with focal mild interstitial tearing involving the posterior supraspinatus and anterior infraspinatus at the conjoined tendon.
    - Left shoulder impingement.

    Exhibit D.

21. Dr. Grossnickle testified that, other than some tendinopathy and partial tearing of the subscapularis tendon, the findings on the January 8, 2017, MRI are consistent with the findings on the May 21, 2008, MRI. Dr. Grossnickle conceded the findings he considered "new" on the January 8, 2017, MRI could be degenerative in nature. **Grossnickle Depo., Tr. 28, ll. 1-25, Tr. 29, ll. 1-6.**

22. In addition to performing an IME, Respondents' IME, Dr. O'Brien, testified at the July 21, 2017, hearing as a Level II accredited physician with expertise in the fields of orthopedics and orthopedic surgery. Dr. O'Brien credibly testified that when taking into consideration improvements in MRI technology, the findings on the May 21, 2008, MRI, as compared to the January 21, 2017, MRI, are virtually identical. Moreover, any increased desiccation seen on the new exam, over the nine-year time span between the studies, would be expected based on aging alone. **July 21, 2017, Hearing Tr. 56, ll. 12-25.**

23. Dr. Grossnickle testified that if, following the May 21, 2008, MRI, Claimant underwent an additional six to eight weeks of conservative care and continued with symptoms, the surgery currently being recommended is very close to the

same surgery he would have recommended in 2008. **Grossnickle Depo., Tr. 29, ll. 7-23.**

24. After being placed at MMI from her January 5, 2007, industrial injury, the Claimant was limited to no lifting, pushing, pulling or carrying greater than 10 to 15 pounds with the left arm. All work was to be done from knee to chest level, with no repetitive or prolonged flexion of the elbow. **Exhibit F, Bates 45-46.**

25. After being placed at MMI for her January 5, 2007, injury, Claimant continued to complain of left shoulder pain. On October 20, 2008, Claimant presented to North Colorado Health Alliance with left shoulder complaints. **Exhibit G, Bates 47-48.**

26. On November 12, 2013, the Claimant again presented to Colorado Health Alliance complaining of pain at a level 7-9/10 "most days" radiating from the left hand to the shoulder. Claimant indicated she had lifting restrictions of ten pounds "for life". Claimant was referred for physical therapy and instructed to return if she failed to improve. **Exhibit G, Bates 56.**

27. On December 3, 2013, Claimant presented to the Northern Colorado Medical Center Emergency Room complaining of left neck and left shoulder pain. She gave a history of "chronic left arm problems" with limited left shoulder range of motion. **Exhibit H, Bates 71.**

28. Claimant returned to Colorado Health Alliance on December 18, 2013, complaining of limited range of shoulder motion due to pain. She was prescribed Gabapentin and a left shoulder MRI was ordered. Claimant was instructed to complete shoulder exercises daily. **Exhibit G, Bates 59-61.**

29. Claimant testified at hearing that prior to her fall at work on December 29, 2015, she did not have any prior left shoulder problems. However, a review of her medical records demonstrates otherwise. As set forth in her medical records, Claimant had prior chronic left shoulder problems since 2007 or 2008. Therefore, Claimant's testimony regarding the onset of her left shoulder problems and the cause of her left shoulder problems is not found to be credible.

30. Dr. O'Brien credibly testified that the Claimant's diagnosis resulting from the December 29, 2015, work injury was a minor left wrist contusion and strain, consistent with the original diagnosis of NextCare Urgent Care. **July 21, 2017, Hearing Tr. 36, ll. 16-21.** Dr. O'Brien's opinions are supported by PA Toth's initial evaluation, which, on physical examination, noted no findings other than the possibility of some minor swelling, no bruising, no bleeding, no break in the skin and radiographs which were negative for any acute injury. **Hearing Tr. 37, ll. 12-25.**

31. Dr. O'Brien credibly testified it is not medically probable that, if Claimant injured her left shoulder in the December 29, 2015, slip and fall, it would have taken until

March 9, 2016, for the left shoulder complaints to first present. **Hearing Tr. 57, ll. 1-14.**

32. Dr. O'Brien credibly testified it is equally medically improbable that, if Claimant aggravated a pre-existing condition in the December 29, 2015, slip and fall, it would have taken until March 9, 2016, for the left shoulder complaints to present. **Hearing Tr. 57, ll. 15-18.**

33. Dr. O'Brien credibly testified that it is not medically probable the surgery for which Dr. Grossnickle requested prior authorization resulted from the "progressive degeneration" of the Claimant's shoulder joint caused by disuse. Claimant did not injure her shoulder in the December 29, 2015, accident. Claimant had a minor wrist sprain or strain that did not impact the shoulder joint. **Tr. 58, ll. 28-25.** Dr. O'Brien also credibly testified that there is no pathology seen on the 2017 MRI that would require a surgery, and based on his exam findings, a surgery will fail. **Tr. 59, ll. 1-8.** In comparing the two MRIs from May 21, 2008 and January 8, 2017, there is no objective evidence of progressive degeneration in Claimant's left shoulder joint that warrants surgery. **Hearing Tr. 59, ll. 9-13.** The Claimant was not a surgical candidate based on the May 8, 2008, MRI, **Exhibit F, Bates 44.** Dr. O'Brien's opinion that surgery is not reasonable and necessary based on the January 8, 2017, MRI, and his exam findings, is found to be credible and persuasive.

34. Dr. O'Brien's credible and persuasive opinion that the surgery being requested by Dr. Grossnickle is not reasonable, necessary or related to the December 29, 2015, accident, is bolstered by the deposition testimony of Dr. Grossnickle.

35. Dr. Hughes performed an IME on behalf of Claimant. He opined that Claimant's need for left shoulder surgery was due to Claimant's disuse of her shoulder due to her original left wrist injury. However, he also indicated that Claimant presented with an "interesting and somewhat confusing medical history." He also recommended that it would be he helpful to have a radiologist perform a comparison between the prior MRI and current MRI. Regardless of Claimant's "confusing medical history", Dr. Hughes opined that the need for surgery is related to Claimant's disuse of her shoulder. This ALJ does not find Dr. Hughe's opinion to be persuasive or credible. This ALJ does not find it credible that the labrum tear and pathology noted on the 2017 MRI as well as Claimant's alleged increase in shoulder symptoms were caused or aggravated by Claimant not using her left shoulder.

36. Claimant did not injure her left shoulder on December 29, 2015.

37. Claimant did not aggravate or accelerate her preexisting shoulder condition on December 29, 2015.

38. Any disuse of Claimant's left shoulder did not cause, aggravate, or accelerate Claimant's left shoulder condition.

39. The December 29, 2015 work accident – and any disuse – did not cause the need for any medical treatment to be directed towards Claimant's left shoulder.

40. Claimant failed to prove, by a preponderance of the evidence, that the left shoulder surgery, for which Dr. Mark Grossnickle has requested prior authorization is reasonable, necessary and related to the December 29, 2015, slip and fall at the Respondent Employer.

CONCLUSIONS OF LAW

General Legal Principals

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits, including medical benefits, by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

C. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the

testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part, or none, of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical Benefits

The requested arthroscopy, with subacromial decompression, rotator cuff repair and possible biceps tenodesis.

D. Claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

E. The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity, of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

F. Based upon the evidence presented, the ALJ concludes that Claimant has failed to prove by a preponderance of the evidence that the treatment for which Dr. Mark Grossnickle has requested prior authorization, a left shoulder arthroscopy with subacromial decompression, rotator cuff repair and possible biceps tenodesis, is reasonable, necessary and related to the claimant's admitted December 29, 2015, industrial injury.

G. Dr. O'Brien credibly testified that based on Claimant's MRI and his clinical exam findings, Claimant does not need shoulder surgery. Dr. O'Brien also credibly testified that the MRI findings from 2008 and 2017 are basically the same. Dr. O'Brien further testified that the MRI findings are degenerative in nature and were not caused or aggravated by Claimant's December 29, 2015 work accident

or disuse. Therefore, the evidence presented persuades the ALJ that the surgery for which Dr. Grossnickle has requested prior authorization is not reasonable, necessary or related to the industrial injury.

H. In addition, Claimant's testimony was not found to be credible. Claimant denied having shoulder problems prior to December 29, 2015. However, Claimant's medical records demonstrated Claimant had chronic left shoulder problems since 2007 or 2008. Therefore, Claimant's contention about the timing of her shoulder pain and the cause of her shoulder pain was not found to be credible or persuasive.

I. It should also be noted that Dr. Grossnickle was unaware of Claimant's prior shoulder problems. Claimant's failure to provide Dr. Grossnickle a valid history regarding the extent of her prior shoulder problems tainted Dr. Grossnickle's opinions regarding causation. Therefore, any opinion of Dr. Grossnickle in which he opined Claimant's shoulder condition and need for surgery was caused by the December 29, 2015 accident or disuse was found to not be credible or persuasive.

J. As found, Claimant has failed to prove, by a preponderance of the evidence, that the requested arthroscopy, with subacromial decompression, rotator cuff repair and possible biceps tenodesis is reasonable, necessary or related to the December 29, 2015, accident.

I. ORDER

It is therefore Ordered that:

1. Claimant has failed to prove, by a preponderance of the evidence, her need for the requested arthroscopy, with subacromial decompression, rotator cuff repair and possible biceps tenodesis is reasonable, necessary or related to the December 29, 2015, accident.

2. Dr. Grossnickle's request for prior authorization of an operative arthroscopy, with subacromial decompression, rotator cuff repair and possible biceps tenodesis is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 16, 2017

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant is entitled to Temporary Total Disability (TTD) benefits from November 4, 2016 through June 18, 2017, based upon an assertion that a modified duty position extended to him by Employer was outside of the work restrictions imposed upon him by his treating physicians.[1]

II. A determination of Claimant Average Weekly Wage at the time of his admitted left knee/ankle injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant worked for Employer as an over-the-road truck driver hauling chemicals to cement factories. On July 7, 2016, Claimant stepped into a hole after exiting the cab of his truck to conduct a pre-trip inspection twisting his left knee and ankle.

2. Claimant reported his injuries and liability for the same was admitted. Claimant then initiated treatment at Concentra Medical Centers (Concentra) on July 11, 2016.

3. On July 11, 2016, Claimant presented to Concentra with complaints of diffuse left knee pain after a reported "pop" at the time of injury. Physical examination revealed limited range of motion in all planes of movement, grade 2 swelling/effusion, positive medial and lateral McMurray tests along with an equivocal anterior drawer sign leading to a diagnosis by Dr. Randall Jones of a sprain/strain of the left knee and ankle.

4. Claimant was removed from work for the remainder of his July 11, 2016 shift but released to "modified activity" beginning July 12, 2016. Activity modification included working up to 8 hours or greater per day in a seated capacity. Claimant was precluded from driving a company vehicle, was instructed to weight bear as tolerated and to use crutches. He was completely restricted from kneeling and squatting.

5. Claimant was also referred to orthopedic specialist, Dr. Wily Jenkins who evaluated him on July 19, 2016. Dr. Jenkins documented 3+ effusion prompting his recommendation to drain the knee. Following arthrocentesis, Dr. Jenkins injected

[1] The parties stipulated that if Claimant was entitled to TTD benefits that Respondents were entitled to a credit for all Temporary Partial Disability (TPD) benefits paid during the contested time period.

Claimant's left knee with Celestone and Xylocaine. He then recommended continued conservative management, noting further that Claimant was not capable of working in his "usual job capacity." However, Claimant was, according to Dr. Jenkins capable to working in a "completely sedentary capacity if any such work was available to him."

6. On August 29, 2016, Employer, through Lora Smith sent a modified duty position to Dr. Jones for review and approval. The offer identified a position which included duties "all within Claimant's restrictions of "may not drive company vehicle due to functional limitations, must use assistive device-crutch, weigh (sic) bearing as tolerated, no squatting, no kneeling" as assigned to Claimant on August 25, 2016. Based upon a review of the records submitted, the ALJ is unable to identify that Dr. Jones commented on Claimant's restrictions on August 25, 2016. Rather, the last report admitted into evidence commenting on Claimant's restrictions before the modified duty position letter was sent is Dr. Jones' August 16, 2016 clinic note. In his August 16, 2016 report Dr. Jones, in addition to restricting Claimant from driving, kneeling and squatting, noted that Claimant was capable of seated work only. The modified duty offer letter is silent as to the standing requirements necessary to perform the essential functions of the position identified nor does it address Claimant's sitting restriction. Nonetheless, Dr. Jones approved the position on September 2, 2016 and later, the same position, on September 6, 2016.

7. Claimant underwent a second injection of the left knee with Dr. Jenkins on September 13, 2016. Following his injection, Claimant was re-evaluated by Dr. Jones who released him to modified duty in a seated capacity only. Other restrictions remained unchanged from the initial visit of July 11, 2016.

8. Claimant began modified duty at an ARC Thrift Store on September 16, 2016. He testified that he sorted and prepped clothing and other items for re-sale to the public. He reported having to stand for long periods of time while facing clothes and pulling tags. He also testified that he had to squat to place clothing in bins and racks. He testified to increased pain and swelling in the left knee after beginning his modified duty, suggesting that his having to stand and squat were aggravating the condition of the knee.

9. Insurer filed a General Admission of Liability (GAL) beginning temporary partial disability (TPD) benefits on September 23, 2016.

10. On October 11, 2016, Claimant presented to Concentra for a "re-check" of the left knee. He was seen by both Dr. Jones and Dr. Jenkins on this date. Dr. Jones noted that Claimant was standing eight hours in modified duty and that his effusion was "larger." Prior to seeing Dr. Jones, Claimant was evaluated by Dr. Jenkins. Dr. Jenkins noted that corticosteroid injections had failed to provide a great deal of symptom relief. He also noted a "significant amount of swelling" on physical examination, documenting the presence of 3-4+ effusion in the left knee. Dr. Jenkins recommended repeat arthrocentesis. Arthrocentesis withdrew 60 cc's of yellow clear synovial fluid from the knee. Following arthrocentesis an injection of Decadron, Xylocaine and Supartz was

administered. During this encounter Dr. Jenkins also noted that Claimant was "working in a thrift store which entails him being on his feet for the entire workday."

11. Based upon the evidence presented, the ALJ finds that the essential physical functions required of Claimant in the modified duty position extended to him on August 29, 2016, exceeded the restrictions imposed on him by Dr. Jones. Specifically, the ALJ finds that the modified duty position fell outside the requirement that Claimant perform seated work only as documented by Dr. Jones on numerous occasions.

12. Claimant testified that following his October 11, 2016 doctors appointment, his modified duty was changed to include more sitting activity. Nonetheless, he testified that his duties required him to repeatedly get up and down from a seated position and squat down in order to retrieve and/or place items in bins. Based upon the evidence presented, the ALJ finds that Claimant's new modified duty position was not exclusively performed from a seated position as provided for in the October 11, 2016 restrictions imposed by Dr. Jones wherein he noted that Claimant was to engage in "sitting work only." Consequently, the ALJ finds that Claimant's new modified duty also exceeded the restrictions imposed upon him by Dr. Jones.

13. On October 18, 2016, Dr. Jenkins drained the knee for a third time and administered the second of the three injection series of Supartz.

14. On October 25, 2016, Claimant returned to Dr. Jenkins with continued complaints that his left knee was "extremely swollen and painful." Physical examination revealed a recurring "tense effusion" and tenderness in the medial and lateral peripatellar region of the knee. Repeat arthrocentesis was recommended which was completed following sterile Betadine prep. A total of 110 cc's of fluid was removed from the knee after which the final Supartz and Xylocaine injection was administered. Dr. Jenkins noted that Claimant's effusions were "absolutely massive; noting further that "there is no question that [Claimant] is in a significant amount of pain" and is "significantly limited by his problem at the present time."

15. Claimant testified that his persistent worsening pain and swelling beginning around October 11, 2016, became unbearable and interfered with his function. He testified that he verbally reported his pain and dysfunction to his doctors, his modified duty supervisor and his employer. Respondents pointed out that the modified duty offer letter forwarded to Claimant along with the offer provided that Claimant was to contact his assigned supervisor and or Ms. Smith directly if he was being asked to work beyond his restrictions. Respondents suggested that because Claimant did not put his concerns in writing to his assigned supervisor, Ms. Smith or the adjuster assigned to the case and because the medical records are devoid of any specific request from Claimant to change his restrictions/modified duties, that his testimony is unreliable.

16. Despite the change in Claimant's modified duty to accommodate more seated activities, Respondents did not extend an amended modified duty job offer nor did they seek input from Dr. Jones regarding Claimant's physical capacity. Consequently, the ALJ finds that the evidence presented supports a finding that Claimant, while engaging

in additional seated activity, continued to squat up and down repeatedly throughout his work day, not only to stand up and sit down but to place items in bins as described above. The undersigned ALJ is persuaded that this activity continued to aggravate Claimant's underlying knee condition.

17. Claimant testified that he was unable to continue with the activities required to perform his modified duty position after it changed in October, 2016 secondary to pain and continued swelling. Consequently, Claimant testified that he stopped going to work after November 3, 2016.

18. As noted, Respondents suggested that Claimant never informed his physicians, adjuster, modified duty supervisor and/or Employer about his inability to perform his modified job duties. Moreover, Respondents suggested that Claimant stopped appearing for modified duty because he was not being reimbursed for mileage to and from his home and the ARC Thrift Store (ARC) and had no money for gas, assertions that Claimant denied.

19. Claimant submitted a mileage reimbursement request for travel to and from the ARC as well as his physicians' offices. The mileage reimbursement request covers the time period from September 16, 2016 through November 11, 2016. While the request is not dated, the ALJ finds the last date for which reimbursement is requested is November 11, 2016 and the date stamp from Insurer's third party administrator indicates that it was received November 21, 2016. Based upon the dates contained on the reimbursement request, the ALJ finds that the request was, more probably than not, mailed after Claimant stopped appearing for modified duty at the ARC, most likely after November 11, 2016. Furthermore, Claimant's request for mileage reimbursement for travel to/from his modified duty was not denied by the claims representative assigned to the claim until December 13, 2016, long after he stopped appearing for modified duty due to what he testified was a consequence of physical inability. Accordingly, the ALJ finds Respondents suggestion that Claimant stopped showing for modified duty because he was not being reimbursed for travel unpursuasive. The ALJ finds the evidence presented regarding the contention Claimant stopped appearing for modified duty because he had no gas money for travel equally unconvincing. Claimant testified that he raised the issue of having no money for gas at the beginning of his case. The written evidence presented concerning this issue consists a payroll detail for the week of October 9th through October 15th, containing a notation that Claimant did not work for this week long period because he had no money for gas. While Claimant admits that he had no gas for to travel during this week, the balance of the documentary evidence convinces the ALJ that he returned to modified duty work on October 19, 2016 and worked the following days: October 20, 21, 24, 26, 27, 28, 31, and November 1, 2, 3. Moreover, Claimant credibly denied that the travel distance was not the reason he stopped appearing for work. Based upon the totality of the evidence presented, the ALJ is not persuaded that having no money to travel to/from work for a week in early October supports Respondents conclusion that Claimant quit his modified duty position in November for lack of funds to pay for gas.

20. Based upon the content of medical records, the ALJ credits Claimant's testimony to find that the standing and squatting required in his modified duty was outside the restrictions imposed on him by Dr. Jones and was probably irritating his knee causing additional swelling and increased pain. The evidence presented, also persuades the ALJ that Claimant, more probably than not, verbally reported his increased pain, swelling and dysfunction secondary to prolonged standing/repeated squatting to both his physicians and his modified duty supervisor prompting the change in his duties to include more sitting after October 11, 2016. The totality of the evidence presented persuades the undersigned ALJ that Claimant was unable to effectively perform the duties required of his modified duty position and as of November 3, 2016, Employer had not extended to him a modified duty position within his restrictions, including a position that would accommodate seated work only. As found, Respondents' contrary assertions are unconvincing.

21. On December 20, 2016, Dr. Jenkins noted that Claimant was capable of working in a 100% sedentary capacity. No offer of modified duty was extended to Claimant following this appointment.

22. On February 2, 2017, Dr. Jones noted that Claimant was capable of working in a modified duty capacity with restrictions of sitting 75% of the time.

23. On March 2, 2017, Dr. Jones repeated his 75% seated work restriction. Respondents did not extend a modified job offer to Claimant between February 2, 2017 and the March 2, 2017 appointment.

24. On April 3, 2017, Claimant returned to Concentra for evaluation. He was evaluated by Dr. Daniel Peterson on this occasion. Dr. Peterson noted that Claimant was not working as there was no light duty available. On cross examination at hearing, Claimant rejected Respondents' suggestion that modified duty was available based upon the previous positions he had held with the ARC though November 3, 2016, which he testified was not light duty per his restrictions and which he could not tolerate. Dr. Peterson was careful to indicate that Claimant was capable of working modified duty with the following restrictions: "Sitting 75% of the day. May walk briefly and then sit again. Unable to get up and down repeatedly." Despite these specific restrictions, the ALJ is unable to find an amended offer of modified employment extended by Employer after April 3, 2017.

25. Claimant testified that he underwent surgery at the hands of Dr. Jenkins on June 19, 2017. Between June November 4, 2016 and June 18, 2017, Claimant was paid temporary partial disability (TPD) benefits as part of the modified duty work extended to him.

26. In his Supplemental Answer to discovery surrounding the question of Claimant's average weekly wage (AWW), included as part of Claimant's Exhibit 8, Claimant concludes that his AWW is $1,011.64. At the commencement of hearing, Respondents counsel indicated that the wage records obtained and admitted into

evidence support an increase in the AWW above that admitted to in the GAL filed July 21, 2016, September 23, 2016 and July 6, 2017. Respondents specifically acquiesced to the methodology and amount of Claimant's AWW as set forth in Claimant's Supplemental Answer to Interrogatory #6, specifically $1,011.64.

27. Exhibit 8 contains a Second Supplemental Answer concerning the question of Claimant's AWW. As part of his second supplemental answer, Claimant asserts that it is improper to include his first two pay periods (periods ending April 30, 2016 and May 14, 2016) in the calculation of his AWW. As support for his contention Claimant asserts that he did not work the entire pay period ending April 30, 2016, having been hired April 25, 2016. He also notes that he was in training during these pay periods. Consequently, Claimant asserts that the wages earned for the pay periods ending April 30, 2016 and May 14, 2016 do not reflect the wages he would subsequently earn once he began working full time in the field. In considering the evidence concerning Claimant's earnings as a whole, the ALJ finds Claimant's assertions persuasive. Careful review of the record supports that during Claimant's partial week of training and the full training pay period thereafter he earned a total of $1,475.00. Conversely, once released to the field full time Claimant earned $2,600.00 in his first two week pay period ending May 28, 2016. Thereafter Claimant earned consistently more in two weeks while working in the field than he did while in training for the first month of his employment. Accordingly, the ALJ adopts the methodology used to calculate Claimant's AWW as set forth in Claimant's Second Supplemental Answer to Interrogatory #6 to find that Claimant's AWW is $1,217.72. The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his July 7, 2016 work related injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's

testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). As found here, the ALJ credits the testimony of Claimant when superimposed on the content of the medical records to find/conclude that the activity required in the modified duty that Claimant began on September 16, 2016 was outside of his physical capabilities, was likely aggravating the condition of his knee and he informed his physicians and direct modified duty supervisor of the same. The evidence presented supports a reasonable inference that Claimant's duties were then changed. Despite the Claimant to include more seated activity, Claimant testified that he still could not tolerate the required standing/sitting and squatting necessary to continue with his modified duty. The ALJ also finds this testimony credible and supported by the content of the medical records when viewed in their totality. Simply put, Claimant's testimony and the content of the medical records are more persuasive than the contrary suggestions of Respondents that Claimant stopped appearing for modified duty because he was not being reimbursed for mileage and/or had no gas to get to work.

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Claimant's Entitlement to TTD

D. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

E. In this case, Claimant credibly testified and the medical records support that

he was suffering from increased pain and swelling after beginning modified duty activities which the ALJ concludes was outside of the restrictions imposed upon him, namely that he was to work in a seated capacity only. Despite a change in his duties to accommodate additional sitting, the credible evidence persuades the ALJ that Claimant was unable to physically maintain his modified duty. Although Respondents contend that the medical records do not support such a conclusion, the ALJ notes that a medical opinion is not a prerequisite to proving entitlement to temporary disability benefits. As concluded by the Court of Appeals in *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo.App.1997), the testimony of the claimant, if credited, is sufficient to prove causation and inability to work. Such is the case here.

F. Based upon the evidence presented, the ALJ is persuaded that Claimant was "disabled" within the meaning of section 8-42-105, C.R.S. between November 4, 2016 and June 18, 2017, during which time frame he experienced a wage loss beyond the temporary partial disability paid. Indeed, Claimant established that he was unable to perform the modified duty assigned to him and which he began on September 16, 2016. Further, the evidence presented persuades the ALJ that Employer did not offer other suitable modified duty at any time after Claimant was incapable of continuing with modified duty after November 3, 2016. Consequently, the ALJ concludes that Claimant is entitled to TTD benefits beginning November 4, 2016 and continuing through June 18, 2017, after which TTD benefits were initiated as a consequence of Claimant's June 19, 2017 surgery. *See generally*, *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999).

Claimant's Average Weekly Wage

G. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

H. Sections 8-42-102 (3) and (5) (b), C.R.S. (2013), give the ALJ discretion to determine an AWW that will fairly reflect loss of earning capacity. An AWW calculation is designed to compensate for total temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity at the time of his industrial injury comes from the wage records submitted into evidence. As found here, careful review of the record supports that during Claimant's partial week of training and the full training pay period thereafter he earned a total of $1,475.00. However, when released to the field full time Claimant earned $2,600.00 in his first two week pay period ending May 28, 2016. Thereafter Claimant earned consistently more in two weeks while working in the field than he did while in training for the first month of his employment. Accordingly, the ALJ agrees with Claimant that his training wages should not be included in the computation of his AWW as it artificially lowers the wage calculation to reflect a wage that does not approximate

the wage loss and diminished earning capacity at the time of his July 7, 2016 work related injury. Here, the ALJ adopts Claimant's calculations, which outside of the assertion that training wages should be included in the calculation Respondents agree with, to conclude that Claimant's AWW for purposes of this claim is $1,217.72. The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his July 7, 2016, compensable work related injury

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits for the time period extending from November 4, 2017 through June 18, 2017. Respondents are entitled to a credit for all TPD benefits paid during this same time period.

2. Claimant AWW is equal to $1,217.72.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 17, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Did Respondents prove by a preponderance of the evidence that Claimant did not suffer a compensable injury in August 8, 2016, thereby entitling Respondents to withdraw their Admission of Liability?

If the claim is deemed compensable, the ALJ will address the following issues:

2. What is Claimant's average weekly wage (AWW), and should bonuses be included in the AWW calculation?

3. Is Claimant entitled to TTD benefits from October 19, 2016 through November 16, 2016?

4. Is Claimant entitled to medical benefits relating to treatment received in October and November 2016 for gastrointestinal issues?

STIPULATIONS

Based on the stipulations of the parties, the only real issues in dispute are compensability and the average weekly wage. If the claim is compensable, the parties stipulated that Claimant is entitled to TTD from October 19, 2016 through November 16, 2016, and is also entitled to reasonable, necessary, and related medical benefits to treat the industrial injury. Stipulated medical treatment includes Claimant's hospitalization and treatment for a perforated ulcer — including associated complications such as a pulmonary embolism — which likely resulted from medications prescribed by his ATPs.

FINDINGS OF FACT

1. Claimant works as a manager for one of Employer's restaurants in Pueblo Colorado. On August 8, 2016, Claimant slipped on a wet floor and fell on his buttocks. The floor was wet from rain water that had leaked from the roof.

2. Claimant immediately felt pain in his low back but finished his shift. He reported the incident via text message to his supervisor, Bryson Nowack, who asked Claimant to complete an incident report. Claimant took approximately a week to complete the incident report because he was unfamiliar with Employer's online reporting system.

3. Employer did not immediately refer Claimant for medical care after he completed the incident report. Eventually, Respondents sent Claimant to Emergicare for authorized treatment.

4. Claimant received intermittent treatment for chronic low back pain since 2007. He treated with Dr. Ali in Florida from April 2007 to August 2008. Dr. Ali's handwritten notes are minimally legible and relatively sparse, making it difficult to discern exactly what treatment Claimant received. However, it appears Claimant was prescribed narcotic pain medication.

5. There are no other records of treatment for back pain until October 2013, when Claimant saw his primary care provider, FNP Laura Darnell for non-radiating low back pain "x2 days." Claimant described the pain as "worsening" but "mild," at a level of 1-4. The physical examination was essentially normal. Nurse Darnell prescribed cyclobenzaprine for muscle spasm to take "as needed."

6. On December 22, 2015, Claimant went to the Parkview Medical Center emergency room complaining of left buttock pain radiating to the left posterior knee. The pain was "intermittent but persistent for 3 weeks." Claimant said the pain started after trying to catch his daughter off a trampoline. Claimant was prescribed a muscle relaxer and oxycodone as needed.

7. Claimant followed up with Nurse Darnell on December 31, 2015, and reported he had been taking OTC ibuprofen, naproxen, and acetaminophen, which were more helpful than the oxycodone. Ms. Darnell gave Claimant a right SI joint injection.

8. Claimant returned to Nurse Darnell on January 6, 2016, stating that the injection, oxycodone and muscle relaxer did not help his pain. He was still taking large doses of NSAIDs. She prescribed Vicodin and Valium, which Claimant filled that day. Claimant subsequently refilled the medication in April 2016.

9. At his April 21, 2016 appointment with Ms. Darnell, Claimant stated the medications were not helping his pain, but the prior injection had given some relief. Ms. Darnell administered trigger point injections and renewed Claimant's prescriptions.

10. On July 13, 2016, Claimant refilled prescriptions for Vicodin and Valium.

11. Claimant saw Ms. Darnell again on July 20, 2016. Although the primary reason for the appointment was a respiratory viral infection, Ms. Darnell documented Claimant was still having sciatica pain and taking Vicodin and Valium "as needed." He did not want an MRI due to the cost. The physical examination revealed pain to palpation of the lumbar paraspinal musculature and the left SI joint.

12. There is no persuasive evidence that Claimant had any work restrictions or was otherwise limited in his ability to perform routine activities during the time he treated with Ms. Darnell.

13. Claimant saw Dr. Jefferson Loyd at his initial visit to Emergicare on September 3, 2016. Claimant told Dr. Loyd he had fallen on a wet floor at work. He reported low back pain and left leg symptoms at a level of 10/10. He also told Dr. Loyd about his prior history chronic low back pain and left leg "sciatica" which was treated by his primary care provider. On physical examination, Claimant had tenderness of the left

paraspinal musculature and decreased lumbar range of motion. X-rays showed mild to moderate degenerative changes but no fracture. Dr. Loyd referred Claimant for an MRI and prescribed medication. He also imposed work restrictions of no lifting greater than 20 pounds and no repetitive bending.

14. Claimant returned to Emergicare on September 6, 2016 and saw Dr. Flaum. He reported ongoing back pain which he rated at 7/10, worse with activities throughout the day. Dr. Flaum administered trigger point injections, prescribed NSAIDs and prednisone, and referred Claimant for physical therapy.

15. Claimant had a lumbar MRI on September 21, 2016. The MRI showed a left-sided disc extrusion at L4-5 and a central disc protrusion at L5-S1.

16. After reviewing the MRI, Dr. Bradley at Emergicare referred Claimant to Dr. Roger Sung for a surgical spine consultation, although the appointment did not occur at that time, for unknown reasons.

17. At his medical appointments in October 2016 Claimant was reporting pain at the level of 9/10 and 10/10. He noted physical therapy was not helping. Dr. Bradley changed Claimant's restrictions to no more than 10 pounds lifting.

18. On October 19, 2016, Claimant was admitted to Parkview Medical Center in Pueblo for severe epigastric pain. He ultimately underwent emergency surgery for a perforated ulcer, which the parties stipulated was most likely caused by medications prescribed by his ATPs. Claimant was readmitted to the hospital on November 3, 2016 due to complications from the previous surgery, including abdominal abscesses, septic shock, a pulmonary embolus and DVT in his left leg. Claimant was discharged again on November 16, 2016.

19. After his hospitalizations, Claimant continued to treat with Emergicare, with minimal benefit. The medical records reflect ongoing severe symptoms and functional limitations despite escalating dosages and types of pain medication, including fentanyl patches.

20. Respondents filed a General Admission of Liability on January 9, 2017.

21. Due to persistent symptoms and the failure of conservative treatment, Claimant had a surgical consultation with Dr. Sung on March 8, 2017. Dr. Sung recommended an L4-L5 microdiscectomy to address the lower extremity radicular symptoms.

22. Claimant underwent an Independent Medical Examination (IME) with Dr. Frederick Scherr at Respondents' request on April 13, 2017. Dr. Scherr assumed that the incident occurred as Claimant described on August 8, 2016, but opined it did not result in a compensable injury. Dr. Scherr noted the medical records did not support Claimant's assertion that his back pain had resolved before August 8, 2016. Dr. Scherr opined Claimant's symptoms were substantially similar before and after the accident, and the accident did not materially aggravate or accelerate his pre-existing condition.

23. Claimant underwent an IME with Dr. David Yamamoto on June 6, 2017 at the request of his counsel. Dr. Yamamoto disagreed with Dr. Scherr's opinions regarding causation. Dr. Yamamoto characterized Claimant's prior back problems as "minor" and "not at all disabling." Dr. Yamamoto opined Claimant's low back and leg symptoms were "markedly increased" since his fall. Dr. Yamamoto opined that the August 8, 2016 incident significantly aggravated Claimant's pre-existing condition.

24. Both Dr. Scherr and Dr. Yamamoto agreed Claimant's gastrointestinal problems and subsequent associated complications were triggered by medications prescribed by his ATPs.

25. The ALJ credits Dr. Yamamoto's opinion that the August 8, 2016 accident aggravated Claimant's pre-existing condition, proximately causing disability and a need for medical treatment.

26. Respondents failed to prove by a preponderance of the evidence that Claimant did not suffer a compensable injury on August 8, 2016.

27. At the time of the injury, Claimant was earning a biweekly salary of $1,350. Claimant also received periodic bonuses. The bonuses are calculated monthly and are primarily based on a percentage of the store's profit after deductions for general and administrative costs. The bonuses are also based on other criteria such as labor, food, service, cleanliness, and product quality. Bonuses are not guaranteed, and sometimes, a store manager may not receive a bonus due to lack of profit or failure to meet the other criteria. Even if the store is profitable, the bonus can be forfeited entirely if the store fails a "mission-critical evaluation" from the Papa John's corporate office.

28. Claimant's wage records from May 2016 through June 2017 show bonuses ranging from a low of $146.35 to a high of $1,577.95. He received no bonus in December 2016 and January 2017.

29. Claimant's periodic bonuses are a "fringe benefit" rather than "wages."

30. Claimant's AWW is $675, with a corresponding TTD rate of $450.

31. Claimant worked modified duty since his industrial injury, except for the period from October 19, 2016 through November 16, 2016 when he was hospitalized due to his G.I. issues.

32. Based on the parties' stipulation, Claimant is entitled to TTD benefits from October 19, 2016 through November 16, 2016.

33. Based on the parties' stipulation, Claimant is entitled to reasonable, necessary, and related medical benefits to treat the industrial injury, including the hospitalization and treatment for a perforated ulcer and associated complications that likely resulted from medications prescribed by his ATPs.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must suffer an injury arising out of and in the course of employment. Section 8-41-301(1); *see also, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The injury must directly and proximately cause the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

If an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-91-616-03 (ICAO, September 9, 2016).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (ICAO, April 17, 1996).

By filing an admission of liability, the respondents have "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). If the respondents subsequently seek to withdraw the admission of liability, they must prove by a preponderance of the evidence that the claimant did not suffer a compensable injury. *See* § 8-43-201(1) ("a party seeking to modify an issue determined by a general or final admission … shall bear the burden of proof for any such modification.").

As found, Respondents failed to prove that Claimant suffered no compensable injury in the first instance. Although Claimant had pre-existing low back problems, the persuasive evidence demonstrates that the fall on August 8, 2016 aggravated his underlying condition, causing disability and a need for medical treatment.

The ALJ does not doubt that the incident occurred as Claimant described on August 8, 2016. The ALJ found Claimant's description of the accident at hearing to be credible and persuasive. Claimant also consistently recounted the incident to his supervisor and multiple medical providers, and there are no witnesses or other persuasive evidence to contradict Claimant's account.

Whether the accident proximately caused Claimant's need for medical treatment is a closer call. Claimant had a pre-existing history of back problems, and the ALJ is not persuaded by his assertion that the symptoms resolved before the accident. Furthermore, as Respondents point out, Claimant did not seek medical treatment for nearly a month after the accident. Nevertheless, the totality of the evidence persuades the ALJ that the August 8, 2016 accident aggravated Claimant's pre-existing condition and caused him to need more medical treatment than he otherwise would have required based solely on the pre-existing condition. The persuasive evidence demonstrates Claimant's symptoms were worse after the accident than his preinjury baseline. Claimant requested medical treatment because of his worsened symptoms and Employer obliged. The treatment prescribed by Claimant's ATP's has been more aggressive than the care he received through his PCP before the injury.

Moreover, Claimant's functional capacity appears to have deteriorated substantially as a direct and proximate result of the industrial injury. Although Claimant periodically appeared "stiff" before the injury, there is no persuasive evidence that his pre-existing back pain significantly impeded his ability to perform his regular job. By contrast, as a result of the accident, Claimant has been under restrictions and unable to tolerate the full demands of his job.

B. Average weekly wage

Section 8-40-201(19)(a) defines "wages" as the "money rate at which the services rendered are recompensed under the contract for hire in force at the time of the injury." Section 8-40-201(19)(b) provides that the term wages includes the value of certain fringe benefits such as health insurance, and the reasonable value of board, rent, housing, and lodging. But subparagraph (b) also states wages "shall not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19)."

Meeker v. Provenant Health Partners, 929 P.2d 26 (Colo. App. 1996) sets forth the test for determining whether a benefit constitutes "wages" or an unenumerated "similar advantage or fringe benefit." An employer-paid benefit constitutes wages if it has a "reasonable, present-day, cash equivalent value," and the employee has access to the benefit on a "reasonable day-to-day basis," or has "an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances."

The ICAO has applied this test in at least two cases to conclude that bonuses paid under a profit-sharing plan do not constitute "wages." In *Yex v. ABC Supply Company*, W.C. No. 4-910-373-01 (May 16, 2014), the panel upheld the ALJ's conclusion that bonuses paid to the claimant should not be included in the AWW. The panel in *Yex* relied on its prior decision in *Orrell v. Coors Porcelain*, W.C. No. 4-251-934 (May 22, 1997). In *Orrell*, the panel held that the value of a profit-sharing bonus was incipient and had no present-day cash value because it was "entirely contingent" on the employer achieving a profit. As a consequence, the profit-sharing plan was seen as a fringe benefit rather than the claimant's wages. The panel rejected an argument that the profit-sharing bonuses should be included under *Simmonds v. Eastman Kodak Co*., 781 P.2d 140 (Colo. App. 1989). The panel reasoned that *Simmonds* was decided under the predecessor version of the statute, before the 1989 amendments were enacted to reduce the types of employer-paid benefits that can be included in the AWW.

The ALJ cannot appreciate a meaningful distinction between Claimant's bonuses and those disapproved in *Yex* and *Orrell*. The store's profit could not be calculated until the end of the month, and until then, the bonus was contingent. Additional barriers to Claimant's immediate expectation of receiving a bonus were the various criteria used in calculating the bonus such as labor, food, service, cleanliness, and product quality. And the bonus can be forfeited altogether if the store failed a "mission-critical evaluation" from the corporate office. The contingent nature of the bonus is underscored by the fact that Claimant received no bonus in December 2016 or January 2017, and the bonuses he did receive fluctuated widely.

Additionally, Claimant had no immediate expectation of receiving a bonus and did not have access to the funds on a day-to-day basis. Consistent with *Yex* and *Orrell*, the ALJ concludes Claimant's bonuses were not "wages" within the meaning of § 8-40-201(19)(a).

Although the ALJ has discretion to calculate a claimant's AWW to "fairly" compensate a claimant for their actual loss of earning capacity, the ALJ can only consider the claimant's "wages" and fringe benefits specifically enumerated in the statute. The discretion afforded by § 8-42-102(3) relates to the "method" by which the AWW is calculated, rather than the items which may be included. *De Bell v. Ikea*, W.C. No. 5-011-040-02 (July 14, 2017).

Claimant was earning a weekly salary of $675 at the time of his injury. Therefore, Claimant's AWW is $675, with a corresponding TTD rate of $450.

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw their General Admission of Liability is denied and dismissed.

2. Claimant's AWW is $675.

3. Insurer shall pay Claimant TTD benefits at the weekly rate of $450 from October 19, 2016 through November 16, 2016.

4. Insurer shall provide all reasonable and necessary medical treatment to cure and relieve the effects of Claimant's compensable injury, including the charges associated with Claimant's hospitalization and treatment for a perforated ulcer and associated complications.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein (including whether back surgery is reasonable, necessary and related to Claimant's injury) are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 18, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Claimant seeks to prove by a preponderance of the evidence that her right upper extremity condition is causally related to her November 8, 2016 admitted left wrist injury.

2. Claimant seeks reasonable, necessary, and related medical treatment to cure and relieve the right upper extremity symptoms.

3. Does the ALJ have jurisdiction to address the foregoing issues absent a DIME?

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her left wrist as a result of a slip and fall accident on November 8, 2016.

2. Claimant was initially treated at the Penrose St. Francis Hospital emergency room for a comminuted distal radius fracture. She was placed in a splint and referred to Dr. Patrick Devanny, an orthopedic hand specialist.

3. Claimant saw Dr. Devanny the next day, and he recommended surgery.

4. Respondents authorized the surgery, and Claimant underwent an open reduction with internal fixation procedure on November 11, 2016.

5. There is no indication that Employer ever referred Claimant to a specific physician, and Dr. Devanny has been the primary ATP throughout Claimant's course of treatment.

6. Claimant was off work following surgery from November 9, 2016 through January 21, 2017. She returned work on January 22, 2017 with restrictions on use of her left arm. Employer provided Claimant with various modified duties to accommodate her restrictions.

7. Approximately one week after returning to work, Claimant developed pain in her right elbow and forearm. She was ultimately diagnosed with lateral epicondylitis.

8. Claimant contends that the right upper extremity symptoms are a compensable consequence of the November 8 injury, resulting from compensatory overuse of her arm while working modified duty. Respondents dispute that Claimant's right upper extremity symptoms are causally related to her work.

9. Respondents initially admitted liability for Claimant's injury on a "medical only" basis.

10. On June 6, 2017, the parties entered into a stipulation whereby Respondents agreed to pay Claimant $3,652.24 in TTD for November 9, 2016 to December 19, 2016 and December 23, 2016 to January 21, 2017.

11. Claimant underwent an Independent Medical Examination (IME) with Dr. Timothy Hall on May 4, 2017 regarding her right upper extremity symptoms. Dr. Hall diagnosed right-sided lateral epicondylitis with extensor tendonitis. He opined the diagnoses were directly related to compensating for the injured left upper extremity while performing modified duty after surgery. Dr. Hall recommended treatment intended to improve Claimant's condition.

12. Dr. Devanny placed Claimant at MMI on May 5, 2017. His narrative report states:

> [Claimant] is now at MMI and may work without restrictions. The patient has full range of motion with excellent grip strength comparable to the opposite side as well as full range of motion. The aching pain is likely due to hardware which I would not recommend removing until next fall. At least at this point, the patient is [at] MMI with no restrictions. She will follow-up in the office in September for removal of hardware planning.

13. Because of Dr. Devanny's declaration of MMI, the ALJ lacks jurisdiction to consider Claimant's request for additional medical treatment absent a DIME.

CONCLUSIONS OF LAW

A. The ALJ lacks jurisdiction to adjudicate Claimant's request for additional medical benefits absent a DIME

Sections 8-42-107(8)(b)(I)-(III) provide that

> An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement . . . . If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected . . . . A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division.

Taken together, these provisions establish that once an ATP places a claimant at MMI, a DIME is a "mandatory, jurisdictional prerequisite" to a hearing regarding additional medical treatment. *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003).

Absent a completed DIME, the ALJ may not hear or decide any issue that constitutes an actual or constructive challenge to MMI. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995).

The ICAO has repeatedly held that "after MMI [is] declared, the ALJ lack[s] jurisdiction to award or deny medical benefits to cure and relieve the claimant's condition." *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006); *see also Eby v. Wal-Mart Stores Inc*., W.C. No. 4-350-176 (February 14, 2001) ("once an authorized treating physician places the claimant at MMI, and ALJ lacks jurisdiction to award additional medical benefits for the purposes of curing the industrial injury and assisting a claimant to reach MMI unless the claimant undergoes a DIME."); *Anderson-Capranelli v. Republic Industries, Inc*., W.C. No. 4-416-649 (November 25, 2002); *Cass v. Mesa County Valley School District*, W.C. No. 4-69-69 (August 26, 2005) ("[i]f an ATP places the claimant at MMI, and ALJ lacks jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI.").

Subject matter jurisdiction cannot be conferred by consent or waiver. *Hasbrouck v. Industrial Commission*, 685 P.2d 780 (Colo. App. 1984); *Industrial Commission v. Plains Utility Co*., 259 P.2d 282 (Colo. 1953). Although neither party questioned the ALJ's jurisdiction at the hearing, if a court determines it lacks subject matter jurisdiction, it should address the issue *sua sponte*, regardless of whether the parties have raised it. *E.g*., *People in the Interest of J.C.S.*, 169 P.3d 240, 245 (Colo. App. 2007); *Shelter Mutual Ins. Co. v. Mid-Century Ins. Co*., 214 P.3d 489 (Colo. App. 2008).The ALJ subsequently offered the parties an opportunity to brief the issue of jurisdiction, but the parties declined.

McCormick v. Exempla, *supra*, illustrates the futility of rendering a decision at this juncture. In *McCormick*, neither party raised the issue of jurisdiction at the hearing. After receiving an adverse decision from the ALJ, the claimant asserted the ALJ's lack of subject matter jurisdiction for the first time on appeal. The ICAO rejected the respondents' argument that the claimant had waived the issue, noting that a party can assert lack of jurisdiction "at any point in the proceedings." Ultimately, the ICAO agreed with the claimant's argument and vacated the ALJ's decision.

The ALJ acknowledges that a DIME is not a jurisdictional prerequisite to a hearing on a request for post-MMI medical treatment under *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). But Claimant has not characterized the medical treatment she seeks as *Grover*-type benefits. Furthermore, the treatment recommended by Dr. Hall is intended to *improve* Claimant's condition, rather than merely relieve the effects of the injury and prevent deterioration. Based on the evidence presented, the ALJ concludes that awarding the treatment requested by Claimant would constitute a constructive challenge to MMI in circumvention of the DIME process. *See Story v. Industrial Claim Appeals Office*, *supra*.

It makes no sense to issue a decision by which neither party will be bound. Therefore, the Claimant's application for hearing is dismissed for lack of jurisdiction.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits related to her right upper extremity is dismissed, without prejudice, for lack of subject matter jurisdiction.

2. All matters not specifically decided are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 21, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he is entitled to ongoing medical treatment to relieve the effects of his industrial injuries?

2. The specific medical treatments at issue are:

   a. Botox injections

   b. Cervical epidural steroid injections

   c. Bilateral SI joint injections

   d. Prescription medications including Norco (hydrocodone), Nexium, ondansetron, Celebrex, Senna, Imitrex (sumatriptan), tramadol and topical ketoprofen.

   e. Physical therapy

FINDINGS OF FACT

This claim has a long and complex history, and the evidentiary record includes more than 1300 pages of exhibits dating to 1985. Although the ALJ has reviewed all the evidence, it would be neither useful nor desirable to make factual findings regarding the minutiae of Claimant's entire course of treatment during the previous 32 years. Rather, the following findings are intended to distill and highlight the most salient information in the record.

1. Claimant suffered two admittedly compensable injuries in the course and scope of his employment, on December 13, 1985 and April 19, 1991 respectively.

2. On December 13, 1985, Claimant was struck on the side of his head by a 6-7 pound "dummy load" that had fallen from a shelf. Claimant was "stunned" and "dazed" by the incident, but did not lose consciousness. Shortly thereafter, Claimant developed symptoms including headaches, blurred vision, feeling "lightheaded" or "woozy," and difficulty concentrating.

3. Claimant began treating with Dr. Richard Bell, a neurologist, in January 1986. Dr. Bell opined "this gentleman has persistent had symptoms which date back to his head injury almost a month ago. His symptom complex seems to be fairly straightforward and is most consistent with a post-traumatic type of vascular headache syndrome, with associated eye blurring."

4. Claimant treated with Dr. Bell until August 1990 for ongoing symptoms consistent with a head injury. Dr. Bell anticipated Claimant would have ongoing difficulty for many years. Eventually, he referred Claimant to Dr. Roger Davis, a pain management specialist at the Capron Institute for Rehabilitation.

5. Claimant initially saw Dr. Davis in November 1990. At that time, Claimant was also experiencing pain and trigger points in his neck, upper back and trapezius muscles. Dr. Davis diagnosed a mixed headache syndrome with migraines and fibrositis, sleep disturbance, and a closed head injury.

6. In December 1990, Dr. Davis opined Claimant had permanent impairment from the closed head injury from which he "would never fully recover," and two "non-curable" pain syndromes – fibrositis and migraines.

7. On April 19, 1991, Claimant was flying in an airplane for work when the aircraft experienced a sudden altitude change due to turbulence. Claimant experienced a painful popping sensation in his right ear. Claimant's symptoms worsened after this incident, particularly issues with balance/equilibrium.

8. Claimant started treating with Dr. Jeffrey Garrison, a physiatrist, in May 1991. Claimant's symptoms included right-sided head and eye pain, muscle spasms in his neck and back, memory and concentration problems, dizziness and vertigo. Dr. Garrison opined that Claimant's symptoms and cognitive impairments were "consistent with minor brain injury."

9. Claimant was evaluated by Dr. Neiland Olson, an ENT, in July 1991. He complained of decreased hearing, disequilibrium, and tinnitus in the right ear. Dr. Olson initially suspected a fistula, but later testing ruled that out. ABR testing was consistent with a right-sited retrocochlear lesion, and ENG testing showed abnormal pendular tracking, consistent with a central disorder.

10. Claimant underwent a neuropsychological evaluation with Dr. Chris Stewart in July 1992. The test results were "highly suggestive of impairment of higher cortical functions. He exhibits a pattern of impairment on tasks suggesting diffuse cerebral dysfunction involving reduced psychomotor speed impairment and visual motor integration, disrupted attention and impairment of novel problem-solving." Dr. Stewart opined Claimant had suffered significant emotional distress because of the injury and sequelae. He further opined that "while premorbid personality factors may contribute in part to his emotional difficulties, his cognitive deficits and chronic pain clearly have exacerbated any predisposition he may have had for psychological maladjustment."

11. Dr. Garrison testified in a deposition on October 29, 1993. Dr. Garrison opined Claimant's symptoms resulted from the combined effects of the 1985 and 1991 incidents. Dr. Garrison's treatment records reflect similar opinions regarding causation. Dr. Garrison also opined Claimant is not competitively employable because of his injury-related impairments.

12. Dr. Garrison left Colorado Springs in 1993 and referred Claimant to his partner, Dr. Timothy Hall. Dr. Hall was Claimant's primary ATP from 1993 until 2004, and treated diagnoses including a closed head injury, cognitive disturbance, headaches, balance disturbance, vestibular dysfunction, chronic myofascial pain, SI joint dysfunction, and neck pain. Dr. Hall repeatedly documented vertigo, balance problems, and associated falls. Dr. Hall attributed these conditions to the 1985 and 1991 incidents.

13. Dr. Jonathan Woodcock performed an Independent Medical Examination (IME) on August 2, 1994. Dr. Woodcock opined Claimant had "a complicated combination of cognitive, emotional and physical problems. These appear to have started principally with the 1985 head injury and to have increased . . . after his plane ride in 1991." Dr. Woodcock opined that the medical evidence was "consistent with a mild traumatic brain injury with some cognitive and emotional symptoms and disequilibrium following the 1985 incident, gradual subsequent increase in emotional symptoms and pain increasing his impairment and finally producing vocational disability." Ultimately, Dr. Woodcock concluded "I would attribute these factors is secondary sequelae of the 1985 closed head injury. I suspect that he was constitutionally predisposed toward these effects, but that the 1985 injury and its subsequent sequelae lead to stressful symptoms and gradually increasing decompensation on the emotional level."

14. On October 14, 1994, the parties entered into a **"STIPULATION FOR FULL AND FINAL SETTLEMENT AND RELEASE OF ALL CLAIMS."**

15. Paragraph 4 of the settlement agreement provides:

> **Injuries as a result of the [1985 and 1991] accidents . . . include**, but are not limited to, the following:
>
> (a) Head, ears, eyes, neck, back, left hip, and left lower extremity.
>
> (b) Emotional and psychiatric impairment secondary to trauma.
>
> (c) Additional medical impairment as more fully set forth in the reports of the physicians, chiropractors, and other medical vendors who have provided care and treatment for the Claimant's work related injuries. Said reports are incorporated herein by reference.

16. Part of the settlement agreement is devoted to Claimant's ongoing medical needs. Paragraph 5(d) provides, in part:

> The Respondents in W.C. No. 4-109-301 . . . agree to leave medical benefits open for the remainder of the Claimant's life. The Respondents in W.C. No. 4-109-301, agree to pay for all reasonable and necessary medical, surgical, or hospital treatment required by the Claimant arising out of his work-related injuries on December 13, 1985 and April 19, 1991, **including but not limited to, treatment for Claimant's head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and**

> **emotional injuries**. Claimant will not be required to establish whether the care and treatment is causally related to the December 13, 1985 or the April 19, 1991 injuries, as the Respondents and W.C. No. 4-109-301 will be responsible for all ongoing medical care and treatment required by the Claimant's to work-related injuries. (Emphasis added).

17. Paragraph 10 states the settlement agreement "contains the entire agreement between the parties, and the terms herein are contractual and not a mere recital."

18. The Division of Workers' Compensation approved the settlement agreement on November 14, 1994. This agreement constitutes a settlement within the meaning of § 8-43-204 and binds the parties unless reopened based on fraud or mutual mistake of material fact.

19. The ALJ finds the settlement agreement is not ambiguous.

20. Taken together, paragraphs 4 and 5(d) reflect the parties' agreement that Claimant's "head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries" are all compensable body parts under his claims, for which Respondents agreed to provide reasonable and necessary treatment "for the remainder of Claimant's life."

21. The ALJ finds that the language in paragraphs 4 and 5(d) precludes Respondents from asserting that the conditions affecting Claimant's "head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries" are not causally related to the admitted accidents. Respondents retain the right to question whether any particular treatment is "reasonable and necessary."

22. Consistent with the settlement agreement, Respondents covered ongoing medical treatment directed toward Claimant's "head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries" for 20+ years. Respondents' post-settlement behavior reinforces and confirms the ALJ's interpretation of the settlement language.

23. Claimant started receiving cervical epidural injections and bilateral SI joint injections from Dr. Robert Presley in September 2002 on referral from Dr. Hall. The injections provided substantial, albeit temporary, relief of Claimant's symptoms. Claimant received additional injections approximately every 3-4 months.

24. Dr. Mark Meyer took over Claimant's interventional pain management from Dr. Presley in July 2004 and has treated Claimant regularly since then. Dr. Meyer has treated diagnoses including cervical degenerative disc disease with right C5 radiculopathy, bilateral sacroiliac dysfunction, and low back pain. Claimant has continued to benefit from the injections, *i.e.,* approximately 3-4 months of significant pain relief. There is no persuasive evidence of complications or other negative side effects associated with the injections.

25. Dr. William Shaw performed an IME for Respondents on February 26, 2004. Dr. Shaw opined that the vast majority of Claimant's symptoms were nonphysiological and unrelated to the 1985 or 1991 incidents. Dr. Shaw felt Claimant's symptomatology and disability was perpetuated by "a complex confluence of circumstances, including an inattentive insurance carrier, and aggressive attorney, and enabling primary care physician, eager interventionalists, and a host of passive therapy providers." Dr. Shaw opined Claimant "has been caught in a maelstrom since his late 20s and early 30s with resulting severe iatrogenic dysfunction." Dr. Shaw believed the bulk of Claimant's treatment was unnecessary and inappropriate because his problems were primarily psychosomatic.

26. Dr. Hall was removed from Claimant's case in late 2004 as a result of a medical utilization review (MUR). Dr. Timothy Sandell was chosen as Claimant's new ATP to replace Dr. Hall.

27. Dr. Sandell initially evaluated Claimant on November 23, 2004. He was also provided with "5 volumes of medical records to review." Over time, Dr. Sandell reviewed the pertinent portions of the records.

28. Dr. Sandell adjusted somewhat, but largely continued Dr. Hall's treatment regimen. Claimant's treatment has been relatively stable for many years.

29. Claimant underwent an L4-5 discectomy and fusion with Dr. Roger Sung in November 2010. Respondents authorized and covered the surgery. The fusion helped with Claimant's leg symptoms but did not appreciably improve his low back pain.

30. Claimant started treatment with Dr. Lawrence Adams, a neurologist, in June 2011 for his chronic headaches. Dr. Adams tried various medications including gabapentin, Topamax, Lamictal (lamotrigine), sumatriptan, and propranolol. Claimant could not tolerate many of the standard headache medications and had limited benefit from others. Claimant had good response to occipital nerve blocks, but the relief only lasted approximately 3-4 weeks. Additionally, the frequent injections caused a buildup of scar tissue. Therefore, in January 2014, Dr. Adams recommended that Claimant try Botox injections.

31. Claimant began seeing Dr. Adams' partner, Dr. Aparna Komatineni, for Botox injections in February 2014. Dr. Komatineni also started Claimant on Imitrex injections for breakthrough headaches. Claimant receives good pain relief from the Botox injections, which last much longer than the occipital nerve blocks. Dr. Komatineni repeats Botox treatments approximately every three months, an interval that seems to work well for Claimant. Dr. Komatineni has also given Claimant Botox injections in his low back, which have been helpful.

32. Dr. Tashof Bernton performed several IMEs for Respondents between September 2013 and November 2016. Dr. Bernton's opinions are exemplified by the following statements from his reports:

August 13, 2015: "[I]t is abundantly clear that the patient does not require any care which is due to an April 19, 1991, occupational injury at this point in time."

September 11, 2015: "[T]he patient does not require any treatment at this point in time which is due to the occupational injury which occurred in 1985."

September 7, 2016: "There is no basis that the patient requires work-related medical care at this point in time, and the cervical epidural steroid injection and SI joint injections are not required on the basis of any occupational injuries."

November 10, 2016: "[T]he patient currently does not require treatment on a work-related basis for sequelae of either of his occupational injuries, and the complaint currently being treated with the multiple medications and the request for Botox are not work-related.

33. Dr. Bernton testified at the May 4 hearing and in a post-hearing deposition, reiterating and expounding upon the opinions expressed in his reports. In his testimony, Dr. Bernton modified his opinion slightly, stating that it would be reasonable for Respondents to provide a small number of behavioral pain management psychology sessions to "help" Claimant realize his symptoms are all psychosomatic, and help him transition away from active treatment directed to his symptoms. Dr. Bernton opined that either temazepam or clonazepam would be reasonable to treat Claimant's psychological problems, but maintained that all other treatment should be terminated as nonwork-related.

34. Dr. Bernton opined that the 1985 incident was minimal, and to the extent it caused any brain injury "it was on the mildest end of the mild traumatic brain injury spectrum." He believes there is no physiologic basis for any long-term effects from such a "mild" head injury. Similarly, Dr. Bernton opined that the 1991 episode was trivial and caused no injury. Dr. Bernton has opined that Claimant's symptoms are nonphysiological and highly exaggerated. He believes Claimant is most likely misrepresenting his symptoms, but at the very least, his condition is psychosomatic.

35. Dr. Sandell currently prescribes medications including: (1) Norco (hydrocodone) for pain; (2) Nexium for medication-related GI issues; (3) ondansetron for medication-related nausea; (4) Celebrex, an NSAID; (5) ketoprofen, a topical anti-inflammatory; (4) tramadol for pain; (5) temazepam to help with sleep; (6) clonazepam for anxiety; and (7) Senna, a laxative to manage medication-induced constipation.

36. Dr. Sandell persuasively testified that the aforementioned medications effectively manage Claimant's symptoms and maintain his day-to-day functional abilities. When Claimant has been unable to fill his medications due to authorization issues, his pain and anxiety issues have decompensated.

37. Dr. Sandell tries to minimize the number and dosages of Claimant's medications while still maintaining reasonably effective symptom control. Dr. Sandell is

careful to avoid unnecessary or unreasonable cost, while still serving his primary goal of relieving his patient's symptoms.

38. Dr. Sandell has recommended physical therapy approximately once per week, and persuasively testified the therapist provides "some manual therapy that [Claimant] cannot do on his own." Dr. Sandell noted Claimant's condition deteriorates when he does not attend the physical therapy regularly. Although it is unusual for a patient to continue physical therapy for such a long time, Dr. Sandell believes it is appropriate in this case because it helps reduce Claimant's symptoms and maintain function.

39. The persuasive evidence demonstrates that the medical conditions for which Claimant seeks treatment were proximately caused by the 1985 and 1991 accidents.

40. Claimant proved that the medication regimen prescribed by Dr. Sandell is reasonable and necessary treatment for his admitted injuries.

41. It is unclear whether Dr. Sandell or Dr. Komatineni is currently prescribing Imitrex (sumatriptan). In any event, the ALJ finds Imitrex is reasonable and necessary treatment for Claimant's intractable headaches.

42. Claimant proved that periodic Botox injections administered by Dr. Komatineni are reasonable and necessary for his admitted injuries.

43. Claimant proved that periodic cervical ESIs and bilateral SI joint injections provided by Dr. Meyer are reasonable and necessary treatment for his admitted injuries.

44. Claimant proved that ongoing physical therapy is reasonable and necessary treatment for his admitted injuries.

CONCLUSIONS OF LAW

A. The treatment provided by and through Dr. Sandell is causally related to Claimant's admitted injuries.

As found, Claimant proved by a preponderance of the evidence that the medical treatment he seeks is causally related to his admitted industrial injuries. This conclusion is based primarily on two considerations.

First, Respondents voluntarily entered into a binding settlement agreement wherein they agreed to provide all reasonable and necessary treatment for Claimant's "head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries," and agreed to do so "for the remainder of the Claimant's life." The settlement agreement does not simply leave medical benefits open in a generic sense. Rather, it explicitly states defines ongoing work-related treatment to include "treatment for Claimant's head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries." The language in paragraphs 4 and 5(d) precludes

Respondents from asserting that the conditions affecting Claimant's "head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries" are not causally related to the admitted injuries.

Dr. Bernton's opinions regarding causation cannot be squared with the binding agreement Respondents made to cover Claimant's enumerated medical conditions. The appropriate time to question the relatedness of Claimant's "head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries" was **before** Respondents agreed to cover those body parts and conditions "for the remainder of [his] life." Although settlement is entirely voluntary, once a settlement has been agreed to and approved by the Division, it is binding and legally enforceable. The fact that Respondents now regret the terms of a settlement they voluntarily accepted affords no basis to disregard its plain terms.

Second, the persuasive evidence demonstrates that the 1985 and 1991 industrial incidents were the catalysts for Claimant developing headaches, vertigo/dizziness, cognitive deficits, neck pain, SI joint dysfunction and low back pain. Numerous treating and examining providers have opined Claimant's symptoms are related to his accidents, including Dr. Bell, Dr. Davis, Dr. Garrison, Dr. Hall, Dr. Woodcock, Dr. Stewart and Dr. Sandell. Although the precise mechanisms are not entirely clear, the persuasive evidence shows that the incidents at work triggered Claimant's symptoms, particularly headaches, equilibrium/balance issues and chronic myofascial pain. Many of his other physical problems were caused or aggravated by numerous falls related to the well-documented balance issues. The ALJ credits the opinions of Claimant's treating providers over the IMEs. The ALJ rejects Dr. Bernton's opinion that Claimant is either intentionally misrepresenting his symptoms or the symptoms are caused by an unrelated psychological issue. Although psychological factors may play a role in exacerbating Claimant's perception of his symptoms, absent intentional misrepresentation or malingering (which the ALJ does not find to be present) the psychological components are part and parcel of the admitted injuries. Respondents are liable for all conditions and symptoms that were proximately caused by Claimant's accidents, regardless of whether they are unusual or more severe than would be expected from the average worker.

B. Claimant must prove any disputed treatment is reasonable and necessary

The settlement agreement specifically states Respondents will remain liable for "reasonable and necessary" medical treatment for the enumerated conditions. Thus, Claimant must prove by a preponderance of the evidence that any disputed medical treatment is reasonable and necessary. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003); *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO February 12, 2009).

C. The medication regimen prescribed by Dr. Sandell is reasonable and necessary

As found, Claimant proved that the medication regimen prescribed by Dr. Sandell is reasonable and necessary. Dr. Sandell persuasively explained the justification for the medications he is prescribing. The ALJ notes Claimant's pain is primarily managed with non-opioid medication such as Celebrex, tramadol, and Imitrex. Although Claimant uses Norco daily, he is on a relatively low morphine-equivalent dosage, with no persuasive evidence of abuse issues. Dr. Sandell has been mindful to avoid escalating Claimant's medication regimen unnecessarily, and the current list of medications is not out of proportion or excessive considering his myriad injury-related problems. Based on the evidence presented, the ALJ concludes the medications are reasonable and necessary for Claimant's admitted injuries.

D. The periodic Botox injections are reasonable and necessary

Claimant proved by a preponderance of the evidence that the periodic Botox injections are reasonable and necessary treatment for Claimant's intractable headaches. Dr. Komatineni's records convincingly demonstrate that Claimant receives substantial relief from the injections for approximately three months. Although Botox injections are typically not considered a first-line treatment for headaches, Claimant has had side effects or poor results with most standard headache medications. The occipital nerve blocks only helped for approximately three weeks and were causing extensive scar tissue formation. The Botox also helps reduce the pain and dysfunction associated with muscle spasms in his low back. Based on the evidence presented, the ALJ concludes the Botox injections are reasonable and necessary for Claimant's injuries.

E. The injections administered by Dr. Meyer are reasonable and necessary

Claimant proved that the periodic cervical ESIs and SI joint injections are reasonable and necessary. Dr. Meyer's records convincingly demonstrate that Claimant receives substantial relief from the injections for approximately 3-4 months. There is no persuasive evidence of any negative side-effects or other complications. It is likely that the periodic injections reduce Claimant's need for medication to control his pain. Based on the evidence presented, the ALJ concludes the approximately quarterly cervical ESIs and bilateral SI injections are reasonable and necessary.

F. Ongoing physical therapy is reasonable and necessary

As found, Claimant proved that ongoing physical therapy is reasonable and necessary treatment for his admitted injuries. Dr. Sandell persuasively testified the therapist provides "some manual therapy that he cannot do on his own." Dr. Sandell also noted Claimant's condition deteriorates when he does not attend the physical therapy regularly. The therapy helps maintain Claimant's function and decreases medication use. Based on the evidence presented, the ALJ concludes ongoing PT is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Insurer shall pay for all reasonable and necessary medical treatment to relieve the effects of Claimant's injuries including, but not limited to, treatment for Claimant's head, ears, eyes, neck, back, left hip, left lower extremity, and psychological and emotional injuries.

2. Insurer shall pay for the medication regimen prescribed by Dr. Sandell and Dr. Komatineni and/or Dr. Adams, including but not limited to, Norco (hydrocodone), Nexium, ondansetron, Celebrex, topical ketoprofen, tramadol, temazepam, Imitrex, and clonazepam.

3. Insurer shall pay for periodic Botox injections administered by Dr. Komatineni to treat Claimant's headaches and back spasms.

4. Insurer shall pay for periodic cervical ESIs and SI joint injections administered by Dr. Meyer.

5. Insurer shall pay for ongoing PT as prescribed by Dr. Sandell.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: **August 25, 2017**

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** by e-mail addressed as follows:

Stephan Marsh, Esq.
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Division of Workers' Compensation
CDLE_WCOAC_ORDERS@state.co.us

Date: 8-25-17

/S/ Fabiola Mendez
Court Clerk

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his lower back on February 16, 2017

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to a general award of reasonable and necessary medical benefits to treat his lower back.

FINDINGS OF FACT

1. Claimant was hired by Employer in approximately December of 2016 to perform rock mitigation work. Claimant's duties involved mitigation near highways. As part of his duties Claimant would be harnessed into ropes on a rocky mountainside and would knock loose rocks down, drill holes, install rebar, and performed general mitigation to prevent rocks from falling onto cars and the roadway below the assigned work area.

2. In February of 2017 Claimant was assigned to work near Loveland, Colorado on Highway 34. At this location, Claimant would be harnessed in ropes that were anchored at the top. Claimant would walk down the rocky hillside and/or repel down as needed to perform the mitigation work.

3. Claimant was working full time for Employer with no other jobs.

4. On February 16, 2017 Claimant was performing his general duties at the Loveland Highway 34 site. Claimant was on the ropes and harnessed in. There were two other employees above him and one below him on the ground. The employees, including Claimant, were attempting to set a 25 foot rebar into holes that had been drilled. Rope was tied to the rebar to help guide it. Claimant was attempting to help pull the rebar up. The employees above him lost connection and grip of the rebar and let go of it. Claimant didn't want the rebar to slip and hit the employee he knew was below him and he attempted to hold onto it.

5. At this time, Claimant's hips were facing the mountain and he was twisted to the right, holding onto the rebar which was to the right and behind him. Claimant stopped the rebar from falling.

6. Claimant testified that when this happened he had a lot of adrenaline pumping. Claimant testified that when he got off the ropes he noticed a foot drop and that his toes on his left foot were dragging. Claimant testified that his lower back was

painful. Claimant testified that he could barely lift his leg into a truck after this injury and that he had to use his hands to get under his leg to lift it into the vehicle.

7. Claimant worked light duty jobs for the next week, but by the next Friday, he was in too much pain to continue working and took days off work on Friday and Saturday. Sunday was a scheduled day off with no work. The following week, Claimant again worked Monday through Thursday but had too much pain by Friday to work. Claimant then took one full week off work hoping to recover.

8. Employer was aware of the injury and provided light duty work. Employer, however, did not immediately fill out a report of injury or provide Claimant with a designated provider list. In mid March, Employer told Claimant to take another week off and to go see a doctor.

9. On March 13, 2017 Claimant went to Denver Health Medical Center and was evaluated in the emergency room. Claimant was diagnosed with bilateral low back pain with bilateral sciatica, unspecified chronicity, and with left foot drop. It was recommended that Claimant do no heavy lifting, light duty work, and back stretches daily. Claimant was referred to physical therapy and was referred to an orthopedic surgeon for spine evaluation. *See* Exhibit 4.

10. Claimant did not follow up and either was uninsured or had Medicaid coverage at the time.

11. Prior to the February 16, 2017 incident, Claimant had troubles with his back due to a 2014 motor vehicle accident. Claimant testified that his prior problems included 3 fractured vertebrae, 3 compressed vertebrae, and 4 bulged discs. Claimant testified credibly that these all involved his upper back and/or mid thoracic area. Claimant testified credibly that they did not involve his lumbar spine and that he had never had symptoms similar to the symptoms that he has now in his lumbar spine.

12. Claimant indicated that following his 2014 motor vehicle accident he did not undergo a recommended surgery. Claimant testified that despite not undergoing surgery, he recovered and was able to work after the motor vehicle accident. Claimant testified that he passed a pre-employment physical for Employer that included performing step-ups and carrying 100 pounds back and forth.

13. While employed by Employer, Claimant and other co-workers were put up in hotels near the work location. Claimant was roommates with a co-worker. On February 20, 2017, four days after the injury, Claimant and a co-worker were drinking and got into an argument/fight where they ended up wrestling.

14. On March 27, 2017 Claimant filed a worker's claim for compensation. *See* Exhibit A.

15. On April 13, 2017 Respondent filed an employer's first report of injury. *See* Exhibit B.

16. On June 7, 2017 Respondents filed a notice of contest. *See* Exhibits C, 1.

17. On July 12, 2017 Claimant filed an application for expedited hearing. *See* Exhibits D, 2.

18. On July 19, 2017 a notice of expedited hearing was mailed to the parties, including both Employer and Insurer. The notice provided that the hearing was set for August 22, 2017. *See* Exhibits E, 3.

19. Despite having had notice that a claim had been filed in March, 2017 and that an application for expedited hearing had been filed in July of 2017, Respondents did not obtain counsel to represent them on the claim until August 17, 2017 a mere 5 days prior to hearing. Respondents did not file a response to the application for hearing and did not properly endorse any witnesses.

20. Respondent, at hearing, made a general statement about a belief that the adjuster in this case had some unspecified health problems. However, Respondents were unable to establish that good cause existed to allow a continuance or to allow for the late endorsement of witnesses. Weighing the interest of the parties, the ALJ found no good cause and denied Respondent's request for continuance for further investigation including discovery.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's

testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his lower back on February 16, 2017 while in the course and scope of his employment with Employer. Claimant has established that the injury to his lower back was proximately caused by attempting to install rebar during his work mitigating rocks for Employer. At the time of injury, Claimant's hips were facing the mountain and he was twisted attempting to hold on to the rebar that others had lost their grip on. Prior to the injury, Claimant testified credibly that he had no similar symptoms and that he was able to pass a pre-employment physical for Employer. After the injury, Claimant had pain, difficulty walking with a foot drop, and an inability to continue working in his full time regular duties. Despite having worked for Employer since December of 2016 in a job that was physical, Claimant was unable to continue working the same job after February 16, 2017. After the date of injury, Claimant performed light duty work, took several days off due to pain, and eventually discontinued working entirely. Claimant has established, more likely than not, that he sustained a work

related injury to his lower back on February 16, 2017. Respondents point to the fact that Claimant wrestled with a co-worker four days after the injury as evidence that Claimant lacks credibility. Although not advisable to wrestle with a co-worker after drinking when one has an injured low back, the ALJ does not find the fact that wrestling occurred to negate the probability that Claimant sustained an injury while working on the mountain four days prior.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has established that he sustained a compensable work related injury to his lower back. Although there was some testimony about prior back injuries to the upper back and thoracic area, Claimant has established an injury in this case to his lower back with new and different symptoms from those that he had in his upper back following his 2014 motor vehicle accident. Claimant has established an entitlement to reasonable and necessary medical treatment for his lower back as a result of the February 16, 2017 work injury.

ORDER

It is therefore ordered that:

1. Claimant has established that he sustained a compensable injury to his lower back on February 16, 2017

2. Claimant has established that he is entitled to reasonable and necessary medical benefits to treat his lower back injury.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 24, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

PRELIMINARY MATTERS

This matter came before the ALJ on Claimant's January 6, 2017 Application for Hearing endorsing Permanent Total Disability ("PTD") benefits. Respondents' Response to Application for Hearing dated February 6, 2017 endorsed medical benefits. Claimant also filed a subsequent Application for Hearing regarding whether Claimant's physical therapy was reasonable and necessary. The parties attended a prehearing conference before Prehearing Administrative Law Judge ("PALJ") Robert J. Erickson on March 8, 2017 on Claimant's motion to take a post-hearing deposition of Dr. Kathy McCranie, and Respondents' motion to consolidate issues for hearing. Per his prehearing conference order, PALJ Erickson granted Claimant's motion and denied Respondents' motion.

At the onset of the May 24, 2017 hearing, Claimant indicated that the only issue before the ALJ was PTD. Respondents argued that medical benefits, specifically, Claimant's ongoing use of opioid medication, was also an issue before the ALJ. Respondents also mentioned that there was a separate medical benefit issue of whether Claimant's physical therapy was reasonable and necessary. The parties agreed to proceed on both the issue of PTD and whether Claimant's opioid medication regimen is reasonable and necessary. The hearing was not completed on May 24, 2017 and was re-set for July 10, 2017. At the end of the May 24, 2017 hearing, Claimant's counsel proposed that the parties address all of the medical issues, "including this question about the trainer, the medications, out-of-pocket expenses…" Respondents' counsel agreed.

The reasonableness and necessity of lymphedema treatment was argued in Respondents' position statement; however, such issue was not referenced at the beginning or the end of the May 24 or July 10, 2017 hearings. Additionally, Claimant did not present evidence on the issue or argue the issue in Claimant's position statement. As such, the ALJ determines that the issue of whether lymphedema treatment is reasonable, necessary and related to Claimant's industrial injury is not before the court at this time. The parties may confer on the issue and either party may file an Application for Hearing on such issue.

ISSUES

I. Whether Claimant has proven entitlement to PTD benefits by a preponderance of the evidence.

II. Whether Claimant has proven, by a preponderance of the evidence, that his opioid medication regimen, physical therapy, personal training, and massage therapy are reasonable, necessary, and related to the industrial injury.

III. Whether Claimant is entitled to reimbursement of out-of-pocket expenses for physical therapy and massage therapy.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury to his low back on August 25, 1998 while lifting an object out of the trunk of his car. Claimant was forty-four years old on the date of injury. Claimant sustained multilevel lumbar herniated discs at L4-5 and L5-S1 and an annular tear at L3-4. Claimant underwent unsuccessful conservative treatment then underwent a partial laminectomy discectomy on December 26, 2000. Claimant developed scar tissue and his pain worsened. Claimant subsequently underwent a repeat semi-hemilaminectomy, discectomy and foraminotomy on March 19, 2002. Claimant's pain persisted despite numerous additional surgeries and conservative treatment, including, *inter alia*, multiple spinal fusions, cognitive behavioral/biofeedback/relaxation techniques, multiple spinal cord stimulation installations and removals, facet/RF treatments, interventional hardware blocks, and removal of spinal hardware lumbar fusion. Claimant's spine is fused from the sacrum to T-10. Claimant also underwent left and right shoulder replacements. Claimant testified that he has had at least 20 surgeries in connection with the industrial injury.

2. Claimant has been prescribed opioid medication for pain management since he incurred the industrial injury. The type of opioids and the dosages have varied throughout the course of Claimant's treatment. Claimant has been prescribed, among other things, transbuccal fentanyl (Fentora), transdermal fentanyl (Duragestic patches), OxyContin and tapentadol (Nucynta).

3. Since the date of injury to date, Claimant has complained of pain ranging from a 5-10/10, most often at a 7-8/10. Claimant testified that the pain medication does not resolve his pain entirely, but makes the pain tolerable.

4. Throughout his treatment, physicians have recommended both tapering Claimant's opioid medication and continuing the opioid medication. On July 10, 2007, William Shaw, M.D. performed an Independent Medical Examination ("IME") and noted that Claimant was on "unusually high" levels of opioid medication and recommended reduction as tolerated. On July 8, 2008, Brian Reiss, M.D., performed an IME and recommended patient detoxification. On June 19, 2009, Alexander Jacobs, M.D. performed an IME and recommended detoxification with a gradual taper of the "heavy" dose of opioids. On October 9, 2009, Richard L. Stieg, M.D., noted that the "large" amounts opioid medications offered only marginal relief from pain and agreed with the recommendation of inpatient detoxification. On January 7 and 21, 2010, Eric K. Hammerberg, M.D. noted that Dr. Stieg's recommendation of weaning Claimant off narcotics was reasonable if Claimant was interested. However, Dr. Hammerberg stated, "Alternatively, the patient may need to be on narcotics on a permanent basis."

5. On February 1, 2010, Claimant's primary authorized treating provider ("ATP"), Sheldon Goldberg, M.D., noted that there was a plan to taper Claimant's short acting medications. Dr. Goldman participated in a SAMMS conference on April 13, 2013 and

expressed concerns about Claimant's large amount of opioids and indicated the plan was to reduce the transbuccal fentanyl/Fentora. The medical records do not indicate any decrease occurred at that time.

6. On June 13, 2014, Steven L. Wright, M.D. of Colorado Pain and Rehabilitation, LLC evaluated Claimant per a referral by Dr. Goldberg. Dr. Wright noted that Claimant had no addiction issues and that it is "extremely unlikely" Claimant will ever develop an addiction. Dr. Wright noted, "Pain and function benefit are present. Medications are considered necessary for continued benefit." Dr. Wright opined that Claimant's medications were rational and rational in their combination.

7. On July 17, 2014, Kathy McCranie, M.D., performed an IME at the request of Respondents. Claimant rated his pain at 8-9/10. At the time of Dr. McCranie's evaluation, Claimant's prescriptions included, *inter alia*, transbuccal fentanyl/Fentora (short-acting opioid) 4 times per day, fentanyl/Duragesic patches (long-acting opioid) 100 microgram patch every 48 hours and 25 microgram patch every 48 hours, OxyContin (long-acting opioid) 1 every 8 hours, and Nucynta (short-acting opioid) 1 every 8 hours. Dr. McCranie noted that Claimant was on high doses of opioid medications yet continued to report high pain scores stating, "He indicates that these medications do not afford him much, if any relief. In reviewing his medical records there has not been any correlation between escalation of opioid dosing with decrease in pain or improvement in function." Dr. McCranie further noted that Claimant suffered from hyperalgesia in his lower extremities, which Dr. McCranie noted could be a response to the opioids.

8. Referring to the MTG, Dr. McCranie noted that being off of work for more than six months with minimal improvement in function from other active therapies was a relative contraindication for opioid use. Dr. McCranie further noted that Claimant's pain medications exceeded the MTG, which recommend limiting opioids to one long-acting and one-short acting medication. Dr. McCranie further noted that the MTG provide that Fentanyl is not generally recommended for use with musculoskeletal chronic pain, buccal delivered medications should not be used in Claimant's population, and that transdermal medication use is generally not recommended. Dr. McCranie opined that, due to Claimant's lack of functional effect at higher doses or his apparent hyperalgesia, the opioids were not reasonable and necessary and should be tapered.

9. Dr. McCranie performed an additional medical records review on August 14, 2014. Dr. McCranie reviewed Dr. Wright's January 13, 2014 consultation notes. Dr. McCranie disagreed with Dr. Wright's recommendations for continued use of opioid medications, reiterating that the use of Fentora and fentanyl were counter to the recommendations set forth in the MTG. Dr. McCranie recommended that Claimant take only one long-acting and one short-acting opioid medication, and that the medications be tapered.

10. On January 29, 2015, Dr. Goldberg discussed the need to taper off the Fentora (transbuccal fentanyl). He made a referral to physical therapy to determine Claimant's baseline physical capacity in order to have an objective measure of any functional

changes as a result of the tapering. At the initial physical therapy appointment prior to the start of the tapering, Claimant reported difficulty with function, self-care and activities of daily living. He complained of 10/10 pain which decreased to 7/10 after the therapeutic exercises. On February 23, 2015, Claimant reported his legs were really painful and he felt his legs would not support him. He was also complaining of back pain and cramps in his right leg/foot.

11. Beginning February 26, 2015, the Fentora was tapered from 120 to 90 tablets per month. Claimant reported inadequate pain control and decrease in function with the decrease in breakthrough pain medication.

12. On April 8, 2015, Robert Moghim, M.D. performed a Division Independent Medical Examination ("DIME") of Claimant. Dr. Moghim issued a DIME report on April 21, 2015. Claimant reported that his current medication regimen made his pain manageable. At the time, Claimant's medication regimen included, *inter alia*, OxyContin 40mg q8, Nucynta 100mg q8, Fentora Buccal 600ug, Fentanyl 125ug duralgesic, and Lyrica 600 mg daily. Claimant reported being concerned with the focus on Fentora titration, as it helped "change his life for the better." Claimant reported that his least amount of pain was 5/10m which was rare, and that his average pain was a 7/10, "which he is able to deal with so long as his medication regiment remains unaltered."

13. Dr. Moghim noted that Claimant's pathophysiology of the pain transmission and perception pathways were forever altered, and concluded Claimant's prognosis was poor. Dr. Moghim concluded that Claimant has "chronic pain syndrome with clear findings that highlight central sensitization resulting in paresis, sensation loss, ambulatory assistance and hyperthesia/allodynia of the back and legs." Dr. Moghim opined that Claimant required maintenance care in the form of either spinal cord stimulation or maintaining the current drug regimen with physical therapy. Dr. Moghim noted that spinal cord stimulation may be a "very challenging" option due to Claimant's history of extensive back surgeries with extensive scarring. Dr. Moghim also noted that previous spinal cord stimulation generators were removed due to MRI incompatibility, and that previous CT studies evidenced severe spinal stenosis, which typically is a contraindication to neuromodulation. Dr. Moghim noted that, unless the spinal cord stimulator was an option and effective once implemented, he did not recommend changing Claimant's current drug regimen.

14. Dr. Moghim noted that Dr. McCranie recommended discontinuing the opioids based specifically on the MTG. Dr. Moghim acknowledged that the MTG recommend one long-acting and one short-acting opioid medication, and provide that Fentora is rarely used for breakthrough non-cancer chronic pain. However, Dr. Moghim stated that Claimant was an outlier and should not be analyzed with strict adherence to the MTG.

15. Dr. Moghim opined that Claimant was not at MMI, at that Claimant's medications should not be changed or altered, agreeing with Dr. Wright's January 13, 2014 assessment that opioid medications in its current form and dosing "may be the best chance of giving this patient any semblance of a functional life given the lack of so few other treatment options available." Dr. Moghim further noted that denial of

medications could “lead to a significant psychiatric sequealea in this specific subset of patient living with chronic pain.”

16. On April 23, 2015, the Fentora was decreased from 90 to 60 tablets per month. Claimant continued to report increased pain and dysfunction as a result of the decrease in breakthrough pain medication.

17. Dr. Moghim conducted a follow-up DIME of Claimant on July 25, 2016. Dr. Moghim placed Claimant at MMI on June 25, 2016 and assigned a 76% whole person permanent impairment rating. Dr. Moghim reiterated that Claimant’s options were a spinal cord stimulator or maintaining the current drug regimen with physical therapy. Dr. Moghim again opined that Claimant’s medication regimen was acceptable, stating,

> …under usual circumstances I would tend to agree with previous assessments found in the medical records on opioids and chronic pain and very rarely would advocate higher than recommended opioid usages for non cancer chronic pain…But this is an outlier situation as explained herein. Because [Claimant’s] medical course and poor outcome is an outlier situation, I am not certain non cancer opioid guidelines apply to this patient and that strict adherence may do more harm than good.

Dr. Moghim further stated,

> There are significant risks to not adequately treating chronic pain in patients with debilitating functionality and central sensitization phenomenon as I mentioned in my original report. One of the biggest risks can be under treatment of pain symptoms and worsening of functionality. Those risks, along with undertreatment, have been well documented empirically and could lead to significant psychiatric sequelae in this specific subset of patients living with chronic pain which is why this is not a straight forward case.

18. Respondents filed a Final Admission of Liability (“FAL”) on September 6, 2016, admitting that Claimant sustained 76% whole person impairment with an admitted MMI date of July 25, 2016. Respondents admitted for reasonable post-MMI medical care related to the work injury by an ATP. Respondents denied liability for PTD.

19. During a physical therapy session on November 21, 2016, Claimant reported increased pain due to not having enough breakthrough medication. Robert Letendere, PT noted, “His cognitive function impairs his ability to perform independent task (*sic*) with exercise; this also has affected his ability to perform functional testing. His ability to focus on a task is very poor due to his level of pain during exercise or with a specific functional test.”

20. John A. Macurak, M.A. issued vocational evaluation reports of Claimant on November 22, 2016 and December 2, 2016. Mr. Macurak opined that Claimant is unemployable as a result of his August 25, 1998 work injury. Mr. Macurak stated that he was unable to identify any occupation currently listed in the help wanted advertisements

that would be within Claimant's current physical ability or level of skills. Mr. Macurak stated,

> He is unable to engage in his regular duty work assignments and therefore, has lost his ability to earn any wages…Given [Claimant's] extent of his physical limitations, severe pain of 8/10, and working restrictions that have been assigned by his treating and evaluating physicians, which place him in the 'Modified Sedentary' work classification. It is unlikely that he will be capable of securing and maintaining any employment.

21. Dr. McCranie performed an additional medical record review on December 6, 2016, including records from a SAMMS Conference with Dr. Sheldon Goldberg. Dr. McCranie's assessed permanent restrictions, which included the following: no lifting more than ten pounds, limit standing and walking to infrequent with the use of two canes, avoid kneeling and crawling, and avoid or limit bending or squatting. Dr. McCranie is the only physician who provided an opinion as to Claimant's permanent restrictions.

22. Dr. McCranie testified by deposition as an expert in physical medicine and rehabilitation and pain medicine. Dr. McCranie is board certified and Level II accredited by the Colorado Division of Workers' Compensation. Dr. McCranie's testimony was consistent with her reports. Dr. McCranie testified that the Center for Disease Control ("CDC") Guidelines for the Prescription of Opioids recommend keeping opioid dosages under 50 morphine equivalent doses per day (MME/day) and that the recommended maximum is 90 MME/day. She stated that doses over 200 MME/day tripled the chances of a fatal overdose. She testified that the reason the MTG recommend against the use of fentanyl is that it is a very strong drug with a high incidence of overdose. Dr. McCranie stated that in her experience, patients tapering off high levels of opioids do not experience a significant change in their pain levels and might actually improve their level of functioning.

23. Dr. McCranie further testified that Claimant's current morphine equivalent is 525 MME/day which is 5-6 times the recommended maximum. She testified that Claimant is at high risk for a fatal overdose even if he takes his medication exactly as prescribed. She testified his opioid level is not safe and that the minimal pain relief Claimant is receiving does not justify the risk. Dr. McCranie went as far to say that the treatment Claimant is receiving is inappropriate and below the standard of care. Dr. McCranie opined that Claimant's long history of surgeries and chronic pain does not justify his use of opioid medication under the circumstances.

24. Dr. McCranie also stated that the CDC Guidelines and the MTG provide that there should be a clear improvement in function from the opioid use. Dr. McCranie opined that there is no indication that Claimant's function has increased. Dr. McCranie further testified that she does not recommended ongoing passive modalities for Claimant, including physical therapy and massage therapy.

25. Katie Montoya performed a vocational assessment of Claimant on December 14, 2016. Ms. Montoya noted that Claimant's wife reported that his medications are not conducive to productive work. Ms. Montoya further documented, "[Claimant] explained that with his medications, the side effects are minimal at this point, but they result in him having a lower ability to function." Ms. Montoya noted neither Dr. Goldberg nor Dr. Moghim addressed permanent restrictions and stated, "I cannot at this point provide an opinion regarding options for return to work with (*sic*) the consideration as to the opinion of Dr. Goldberg…." Ms. Montoya further stated that Claimant's "subjective report of physical limitations would not be consistent with an ability to work." However, Ms. Montoya noted that Dr. McCranie's opinion allowed for sedentary work. Ms. Montoya opined that Claimant has sedentary level skills for sales and customer service positions, and that such positions are available in the Denver area.

26. On January 16, 2017 Pamela E. Lauer, N.P. at Craig Hospital noted that Claimant became fatigued easily and that, "it takes all day for him to do simple tasks. His pain can be so severe that he is not able to concentrate." NP Lauer opined,

> Due to his significant debilitating back and neuropathic pain, which can be quite distracting for the patient, he has significant difficulty with focus and has to adjust his positioning frequently due to severe discomfort. He is also on significant amounts of pain medication, both routinely and for breakthrough pain, therefore, I do not feel that due to his severe pain and pain management that [Claimant] would be an appropriate candidate for employment.

27. An Interdisciplinary Team Conference was held at Craig Hospital on January 19, 2017 during which it was again determined that Claimant would not be an appropriate candidate for employment "due to severe pain and pain management."

28. On January 18, 2017, Dr. Goldberg noted that Claimant was unable to tolerate any medication tapers at the time. Claimant reported having good pain control 10% of the day. Additional tapering of the Fentora was discontinued due to Claimant's continued reports of pain and dysfunction.

29. On March 22, 2017, Dr. Goldberg attended a SAMMS conference with counsel for Claimant and Respondents. In his notes regarding the SAMMS conference, Dr. Goldberg noted that Respondents indicated the Fentora medication was not indicated by the MTG and questioned the ongoing need for the Fentora. Dr. Goldberg noted that the MTG do not apply to maintenance pain management medications. Dr. Goldberg noted that "[Claimant] has a centralized pain syndrome and an arachnoiditis as well as a spinal cord injury which has been extremely difficult to manage for greater than a decade and that the current medications that he is using is barely maintaining his function." Dr. Goldberg explained that he discontinued the tapering of Fentora because, based on his review of physical therapy records, Claimant's function significantly declined with the decrease in medication. Dr. Goldberg recommended that Claimant undergo a functional capacity evaluation ("FCE") with Kristine Couch, OTR to provide

"as objective as possible evaluation of [Claimant's] abilities from which to make permanent physical restrictions."

30. In a letter to Respondents' counsel dated March 22, 2017, Dr. Goldberg recommended that Claimant transition treatment with a licensed physical therapist to working out three times per week with a personal trainer, and monthly check-in physical therapy visits for at least the next year.

31. Dr. Goldberg's prescription was initially declined. Claimant has paid for the treatment personally. Claimant has spent a total of $265.00 of out-of-pocket expenses for massage therapy and personal training sessions.

32. Claimant testified that he currently works out with a personal trainer twice a week and, while engaging in this treatment, he t must take breakthrough opioid medication because his pain is so severe that he is in tears.

33. Claimant attended over 230 physical therapy sessions beginning April 29, 2013. The physical therapy records evidence that Claimant could complete the physical therapy exercises at times (with medication), and at other times, there was marginal or no significant change in Claimant's function. Claimant's physical therapy sessions included multiple exercises and massage.

34. Claimant underwent a FCE with Ms. Couch on March 24, 2017. Ms. Couch stated that Claimant has excruciating and/or shooting/stabbing pain with an intensity of 8 in his buttocks, foot, lower back, lower leg, upper back, and upper leg. She also noted that Claimant was "frequently observed to fall asleep during paperwork and conversational activities (such as the history and intake portions) of the evaluation…He was observed to frequently lose his train of thought while speaking. He demonstrated significant difficultly accurately following directions for numerous tasks, despite being given verbal direction and demonstration." Ms. Couch further noted that Claimant took oxycodone during the testing, had difficulty completing various tasks, and took multiple due to significant bladder urgency.

35. Ms. Couch's testing revealed that Claimant was able to sit for a maximum of 55 minutes and shifted positions due to pain. Claimant was able to demonstrate standing tolerance of 32 minutes while holding onto objects, including canes. He was able to walk slowly using his canes and was unable to safely walk short distances without their use. Claimant was unable to perform lifting floor to knuckle, and lifting knuckle to shoulder on an occasional basis of five pounds. He was also unable to perform lifting shoulder to overhead on occasional basis. Lifting testing was terminated based on the Claimant's reports of dizziness, low back pain, bilateral lower extremity pain and weakness, buttocks pain and decreased balance.

36. Ms. Couch concluded that Claimant had demonstrated consistent and valid performance in twenty of twenty tests. Claimant's maximum workplace tolerance was less than 4.5 hours. Ms. Couch stated, "[Claimant] completed several tests with errors,

despite being provided with verbal instruction and demonstration. He was unable to identify errors presenting concern for acceptable workplace standards."

37. On April 13, 2017, Mr. Macurak issued an updated vocational evaluation after reviewing additional records, including the January 2017 Craig Hospital medical notes and the March 24, 2017 FCE. Mr. Macurak continued to opine that Claimant is unemployable as a result of the August 25, 1998 work injury.

38. Mr. Macurak testified at hearing on behalf of Claimant as an expert in vocational evaluations. Mr. Macurak testified consistent with his prior reports. Mr. Macurak emphasized Claimant's pain management issues as a significant factor among multiple other factors affecting his ability to earn wages. Mr. Macurak testified that Claimant now has a very difficult time working with others, despite his best attempts. Mr. Macurak stated that Claimant lacked the ability to concentrate, comprehend certain things, and remember technical data formats, and would be a "hindrance" in a customer service capacity. Mr. Macurak again opined that Claimant is incapable of earning any wages in the same or other employment. Based on his vocational research, his personal evaluation of the Claimant, the medical records, and Ms. Couch's FCE, Mr. Macurak opined that the Claimant is permanently and totally disabled. He concluded that the Claimant is unemployable as a result of his August 25, 1998 injury. Mr. Macurak further opined that he was unable to identify any occupation currently available to the Claimant given the totality of human factor analysis within the Claimant's current physical restrictions and current level of skills. He opined that the Claimant would not be able to secure and maintain regular employment; and was unable to identify work the Claimant could perform.

39. Ms. Montoya testified at hearing on behalf of Respondents as an expert in occupational and vocational rehabilitation. Ms. Montoya agreed that the FCE results indicate Claimant cannot perform the full range of sedentary work. Nonetheless, Ms. Montoya considered Claimant's physical restrictions, job history and transferrable skills and opined that there is work reasonably available to Claimant in customer service type positions. Ms. Montoya testified that there are telephonic sales and customer service jobs that Claimant can perform from his home, that are sedentary and allow for changes of position from sitting and standing as necessary.

40. On April 5, 2017, Dr. Goldberg noted that Claimant continued to need pain medications. Dr. Goldberg also prescribed Claimant physical therapy. On May 3, 2017, Dr. Goldberg again noted that he was unable to taper Claimant's mediation at the time due to continual pain.

41. Claimant is a 63-year-old man with a high school education. Claimant completed some college courses but did not obtain a degree. Claimant worked in law enforcement from approximately 1974 to 1981, obtaining certification as a bomb technician. Claimant then began a career in sales and marketing, in which he worked in various capacities until 2010. Claimant was working for Employer as a regional sales manager at the time of injury. Claimant's job included developing and managing sales accounts, providing customer service and technical assistance, and supervising a

regional sales team. Claimant ceased working for Employer in 2000 and subsequently became a partner in another company that sells safety equipment. Claimant testified that, by 2010, he was working five percent of the time and could no longer perform his job.

42. Claimant has been on Social Security Disability Insurance ("SSDI") benefits since 2010. Claimant testified that he has not worked since 2010 and is currently unable to perform his job.

43. Claimant testified that he is constantly in pain, which he described as pins and needles, stabbing and burning sensations. Claimant testified that when he is in pain he does not "hear things straight" and does not accurately write down information in notes. Claimant also testified that he does not sleep well, is constantly tired and easily irritated. Claimant stated that he no longer possesses the "diplomatic skills" he once had.

44. Claimant testified that his pain negatively affects his ability to function, stating,

> A If my pain isn't treated and I've been - - I have that way. I've been that way, when the pain isn't treated, pain takes away your ability to do a lot of things and its your abilities - - takes away your ability to make decisions and issues and, I mean, it's - - I can't - - yeah, I can. Pain takes away just about everything you can think of and the worse pain, the more difficult it is to do anything.
>
> And so do I understand - - the medication has never made it impossible for me to think or to talk about it. But the pain does. I can guarantee right now the pain does.

45. Claimant testified that he ambulates using two canes and can only walk short distances. Claimant was prescribed an electric wheelchair. Claimant testified he also uses a bed similar to a hospital bed, without which he would not be able to get up in the morning. Claimant further testified that he can barely move in the morning and takes a long time to get functional, stating that if he has something to do at 9:00 a.m. he has to get up at 6:00 a.m.

46. The ALJ observed surveillance video of Claimant taken on September 16, 2015, October 26, 2016 and November 26, 2016. Claimant was observed walking his dog and walking to and from a vehicle to various houses or buildings using two canes. Claimant was also observed getting in and out of the passenger seat of a vehicle without assistance and retrieving or placing his canes in the backseat of the vehicle, lifting a backpack from the trunk of a vehicle, and sitting at a restaurant eating with another individual.

47. Claimant testified that he has gone on some personal trips and accompanied his wife on her business trips for his own personal purposes. Claimant testified that he did not perform any work on such trips. Although the company for which Claimant worked after his employment with Employer remains in Claimant's name, Claimant testified he does no work for the company, and receives no salary or dividends.

48. The claimant's demonstrated activities in the surveillance video and testimony regarding Claimant's personal vacations do not persuasively discredit Claimant's premise that he is unable to earn wages in the same or other employment.

49. Claimant's testimony is found credible and persuasive.

50. The ALJ credits the opinion of Mr. Macurak, which is supported by the medical records and Claimant's testimony, over the conflicting opinion of Ms. Montoya and finds that Claimant is unable to earn any wages in the same or other employment. Claimant's industrial injury was a significant causative factor in his current physical and mental limitations, which have rendered Claimant unable to obtain and maintain employment. Employment is not reasonably available to Claimant under his particular circumstances.

51. The ALJ credits the opinions of Drs. Goldberg, Moghim and Wright over the conflicting opinion of Dr. McCranie and finds that Claimant's opioid medication regimen, physical therapy, massage therapy and personal training are reasonable, necessary and related to the August 25, 1998 industrial injury. The medical treatment is reasonably necessary to relieve the effects of Claimant's injury.

52. Claimant has established by a preponderance of the evidence that he is entitled to PTD.

53. Claimant has established by a preponderance of the evidence that the opioid medication regimen, physical therapy, massage therapy and personal training are reasonable, necessary and related, and that he is entitled to reimbursement of the $265.00 out-of-pocket expenses he paid for such treatment.

54. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every

inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Permanently and Totally Disabled

To establish a claim for PTD, the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995).

In weighing whether the claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The ALJ may also consider the claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether the claimant proved inability to earn wages in the same or other

employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

As a matter of public policy, PTD benefits may be awarded even if the claimant has held, or currently holds, some type of post-injury employment where the evidence shows that claimant is not physically able to sustain the post-injury employment, or that such employment is unlikely to become available to claimant in the future in view of the particular circumstances. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

As evidenced by the medical records, Claimant has an extensive and complicated medical history resulting from the industrial injury. The medical evidence, FCE, Mr. Macurak's testimony, and Claimant's testimony credibly establish that Claimant is unable to earn any wages in the same or other employment, and that there is a direct causal relationship between the industrial injury and Claimant's inability to earn wages. While Dr. McCranie restricted Claimant to sedentary work, the FCE results demonstrates Claimant's functional capacity is less than sedentary. As found, Claimant's vacations and demonstrated activities observed by the ALJ on the surveillance video and at hearing did persuasively discredit Claimant's contention that he is permanently and totally disabled.

In addition to Claimant's physical limitations, Claimant also suffers from mental limitations with respect to concentration, focus and comprehension. Claimant credibly testified to these issues, and his testimony is corroborated by the medical records which, on multiple occasions note the effect of Claimant's pain and pain management on his cognitive function. While Claimant once had a successful career in law enforcement and sales/marketing, Claimant's current physical and mental limitations have rendered him unable to earn any wages in the same or other employment. Mr. Macurak credibly opined that there is not employment reasonably available to Claimant that Claimant could obtain and maintain. Based on the totality of the evidence, Claimant has established by a preponderance of the evidence that he is permanently and totally disabled.

Medical Benefits

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a FAL admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and

necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain claimant's condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

As found, the ALJ credited the opinion of Claimant's ATP Dr. Goldberg as to the reasonableness, necessity and relatedness of Claimant's continued use of opioid medications. Dr. Goldberg's opinion is supported by Dr. Moghim's opinion, the medical records, and Claimant's testimony. Although Claimant has struggled with high levels of pain since incurring the industrial injury, Claimant credibly testified that the opioid medications make the pain more tolerable and enable him to function. Attempts at tapering Fentora resulted in increased pain, as reported consistently throughout the medical records. Dr. Goldberg's opinion is corroborated by Dr. Moghim and Dr. Wright. While Claimant is taking more than the recommended dosages of opioid medications, Dr. Moghim credibly opined that Claimant is an outlier. Dr. Goldberg, who has an extensive history of treating Claimant, has deemed Claimant's current opioid medication regimen, along with continued physical therapy and personal training sessions, reasonable and necessary to maintain Claimant's limited functioning.

Based on the totality of the evidence, Claimant has established by a preponderance of the evidence that his current opioid medication regimen, physical therapy, massage therapy, and personal training are reasonably necessary to relieve the effects of Claimant's August 25, 1998 industrial injury. As found, Claimant is entitled to reimbursement of the $265.00 of out-of-pocket expenses paid for such medical treatment.

ORDER

It is therefore ordered that:

1. Claimant is permanently and totally disabled. Respondents shall pay Claimant PTD benefits from June 25, 2016, the date of MMI, and continuing until terminated by law, subject to applicable credits and offsets. These benefits are not subject to a SSDI offset, per Section 8-42-103 (c)(IV), C.R.S., as Claimant is permanently and totally disabled, and the injury on which the PTD award is based occurred prior to Claimant reaching forty-five years of age.

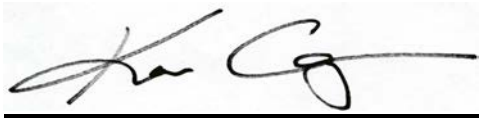
2. Claimant's opioid medication regimen as prescribed by Dr. Goldberg, and the physical therapy, personal training, and massage therapy are reasonable, necessary and related. Respondents shall pay for opioid medication, physical therapy, personal training, and massage therapy as prescribed by Dr. Goldberg or other ATPs. Claimant is entitled to reimbursement of out-of-pocket expenses of $265.00 for such medical treatment.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 25, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

COURSE OF THE PROCEEDINGS

As a preliminary matter, the ALJ advised Claimant regarding the hearing process and cautioned him about representing himself. After being advised, Claimant knowingly and voluntarily waived his right to an attorney, expressing his desire to proceed to hearing without counsel. Claimant also withdrew the issue of permanent partial disability which was not endorsed in his Office of Administrative Courts Rules of Procedure, Rule 10 Application for Hearing but listed on his case information sheet. The Claimant submitted Exhibit 1. Claimant also testified on his own behalf. Respondents submitted Exhibits A-F.

Respondents objected to the proceedings asserting that all issues, including disfigurement were closed by Claimant's failure to file an application for hearing within 30 days of the Amended Final Admission of Liability. The undersigned overruled the objection and elected to proceed with the hearing affording both Claimant had Respondents the opportunity to present evidence in support of their respective claims.

ISSUES

I. Whether Claimant is entitled to disfigurement benefits.

II. Whether the claim is closed by operation of law, for Claimant's failure to object to an Amended Final Admission of Liability within 30 days of its filing, thereby precluding Claimant's entitlement to disfigurement benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as a heavy auto parts delivery driver for Employer. On November 8, 2016, Claimant's left middle finger was caught and crushed between two pallets causing an extensive laceration of the distal pad of the left middle finger.

2. Claimant was treated in the Emergency Room of Memorial Hospital where he received a tetanus shot; his finger was sutured and he was given a prescription for Cephalexin.

3. Claimant subsequently required surgical debridement and was referred to physical therapy to improve the range of motion of the left middle finger post injury.

4. On January 26, 2017, Claimant was placed at maximum medical improvement with permanent impairment by Dr. Randall Jones.

5. Respondents filed a Final Admission of Liability (FAL) dated April 13, 2017 admitting to an 8% rating of the hand. Respondents erroneously calculated the permanent partial disability award using 208 weeks of disability rather than 104 weeks when the injury involves a hand below the wrist. Consequently, Claimant's permanent impairment award was incorrectly calculated to equal $4,907.63.

6. The Division of Workers' Compensation, through Bert Sandoval of the Claims Management Unit issued a letter on May 9, 2017 stating their calculation of the permanent partial disability (PPD) award did not match the admitted amount reflected in the April 13, 2017 FAL, noting further that Respondents "may amend [the] admission per Rule 5-9(A)." Any amended admission was to be filed within 30 days of the April 13, 2017 FAL.

7. In response to the Division's letter, Respondents filed an Amended Final Admission of Liability dated May 11, 2017 admitting for the corrected PPD of $2,453.82. The Amended FAL also contained a notice indicating that any objection to the "benefits admitted or not admitted" must be filed within 30 calendar days or the file would automatically close. Attached to the Amended FAL, was an Objection Form emphasizing that Claimant had 30 calendar days of the date on the FAL to complete the objection form or write a letter to the Division stating his objection. The Objection Form provides direction on requesting a hearing on disputed issues.

8. The Amended FAL was admitted into evidence and careful inspection of the same reflects that $0.00 in disfigurement benefits were paid on the claim. The evidence presented persuades the ALJ that the Amended FAL denied disfigurement benefits. Consequently, the ALJ finds that "disfigurement" constituted a disputed issue which necessitated the filing of an objection along with an Application for Hearing would be necessary to keep open for future determination.

9. Claimant admitted he received the Amended Final Admission but did not respond within 30 days as required because he was hospitalized for an unrelated condition. Relying on advice given to him by the Claims Management Unit, Claimant elected to file an Application for Hearing that he admittedly knew was untimely. The ALJ is not persuaded, based upon the evidence presented, that Claimant's late filing is excusable or due to circumstances beyond his control.

10. Based upon the evidence presented, the undersigned ALJ finds that Claimant failed to file a written objection to the Amended FAL filed May 11, 2017. Furthermore, the evidence presented persuades the ALJ that Claimant failed to file an Application for Hearing within the 30 day deadline as provided for in the

Amended FAL and the Objection Form attached thereto. Rather, Claimant filed an application for hearing for disfigurement only dated June 28, 2017.

11. Based upon the evidence presented, the ALJ finds that Claimant's Workers Compensation Claim assigned Workers' Compensation Claim Number 5-042-455 had automatically closed as to all issues admitted in the May 11, 2017 Amended FAL, including "disfigurement" by the filing of Claimant's June 28, 2017, Application for Hearing- Disfigurement Only.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. As noted, Respondents objected to proceeding with Claimant's disfigurement hearing based upon an assertion that Claimant failed to object to the Amended FAL and file an Application for hearing on disputed issues within 30 days of the date the Amended FAL was filed. Consequently, Respondents maintained that the ALJ lacked jurisdiction to hear the claim for additional disfigurement benefits. Based upon the evidence presented, the ALJ agrees with Respondents.

B. Section 8-43-203(2)(b)(II), C.R.S., provides that a claimant's failure to object to a final admission of liability and request a hearing on any disputed issues that are ripe for hearing or request a Division Independent Medical Examination (DIME) within 30 days will result in automatic closure of the claim concerning all admitted liability. As recognized in *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004), the purpose of the 1998 amendments to §8-42-203(2)(b)(II), C.R.S. requiring the claimant to request a hearing on disputed issues which are ripe for hearing within 30 days of the FAL, was to require the claimant to contest some issue addressed by the FAL concerning which the claimant can present a "legitimate controversy" by stating the "benefit to which he or she is entitled." *Id*. Thus, the statute inherently requires the claimant to provide notice of the issues that may be in controversy within 30 days. In short, the purpose of § 8-43-203(2)(b)(II), C.R.S. is to provide a method for closing claims without a hearing, while affording the claimant notice of the pending closure and an opportunity to object in a timely fashion. *See Tenorio v. Poudre Valley Hospital*, W.C. No. 4-162-954 (March 18, 1999).

C. Once a case has automatically closed by operation of the statute, the issues resolved by the FAL are not subject to further litigation unless they are reopened pursuant to §8-43-303, C.R.S. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). In *Nguyen v. Optima Batteries*, W.C. No. 4-422-565 (November 14, 2000), the Industrial Claim Appeals Panel (ICAO) held that a claimant's failure to file an application for hearing concerning the issue of disfigurement within 30 days after the FAL deprived the ALJ of jurisdiction to award additional benefits that were closed by the FAL. *See also, Dalco*

Industries, Inc. v. Garcia, 867 P.2d 156 (Colo. App. 1993) (provisions of § 8-43-203(2)(b)(II) create jurisdictional barrier to consideration of issues which have been closed by failure to timely contest FAL). It is axiomatic that lack of subject matter jurisdiction may be asserted, as it was in the instant case, at any time. *Hernandez v. Swift Newspapers D/B/A Greeley Publishing Company*, W.C. No. 4-570-620 (ICAO, March 8, 2004). As found here, Claimant had actual notice of the Amended Final Admission of Liability dated May 11, 2017 and yet failed to object to the same and file an application for hearing within 30 days. As a result, all issues, including disfigurement, are closed and the ALJ lacks the jurisdiction to award additional disfigurement benefits in the absence of a petition and order reopening the claim. Section 8-43-303, C.R.S. 2000; *Nguyen v. Optima Batteries, supra.*

ORDER

It is therefore ordered that:

1. Claimant's claim for disfigurement benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 28, 2017

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive Permanent Total Disability (PTD) benefits as a result of admitted industrial injuries that he sustained during the course and scope of his employment with Employer on August 24, 2012.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his August 24, 2012 industrial injuries or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Claimant is a 37 year old male who worked for Employer as a Controls Engineer involved in programming robots. On August 24, 2012 Claimant suffered admitted industrial injuries during the course and scope of his employment. He was adjusting the sensors on a robot and his partner was programming the device. Claimant's partner engaged the robot and a 12 foot long carbon fiber post struck Claimant in the head and left shoulder. Claimant fell to the ground and landed on his stomach. He suffered a fractured skull, a broken left arm, nerve damage to his ear and broken orbital sockets.

2. Claimant underwent conservative medical treatment for his injuries and returned to modified duty work for Employer within approximately two weeks or on September 10, 2012. However, Claimant expressed concerns about Employer's safety protocols and received another job offer to perform mechanical engineering for a firm identified as Fleetwood. Claimant subsequently resigned his employment with Employer and began working for Fleetwood as a Mechanical Engineer on November 12, 2012.

3. Claimant continued to work for Fleetwood through February 4, 2015. During the period Claimant worked approximately 9-10 hours each day in a highly competitive environment. He designed a robotic system that picked up bottles and deposited them in boxes. Claimant also participated on Fleetwood's softball team, completed home projects and engaged in hobbies.

4. On June 11, 2014 Authorized Treating Physician (ATP) Kevin O'Toole, D.O. determined that Claimant had reached Maximum Medical Improvement (MMI) for his August 24, 2012 industrial injuries. Dr. O'Toole assigned Claimant a 15% whole person impairment rating for sleep and arousal disorders. He specifically noted

"fatigue/daytime drowsiness, managed with Provigil." Regarding Claimant's work activities Dr. O'Toole remarked that "he is able to accomplish his demanding work, but feels that he has to make an extra effort."

5. Claimant subsequently visited psychologist Daniel Bruns, PsyD. for an examination. Claimant reported additional concerns about fatigue. Dr. O'Toole thus revoked his MMI determination on July 3, 2014.

6. Dr. O'Toole referred Claimant to psychiatrist Carol Newlin, M.D./PhD. for an examination. Dr. Newlin prescribed the anti-depressant Wellbetrin and Claimant reported a "180-degree turnaround." On July 31, 2014 Dr. Newlin also prescribed the stimulant Adderall for Claimant's day time somnolence. Notably, Claimant had been working as an engineer for almost two years prior to his prescription for Adderall.

7. On August 27, 2014 Claimant visited the University of Colorado Sleep Center for a sleep study. Claimant specifically underwent a sleep latency test to ascertain the length of time it took him to fall asleep. The test revealed that Claimant exhibited a severely reduced average sleep latency time that was consistent with a diagnosis of narcolepsy. On September 10, 2014 sleep specialist Mark Neagle, M.D. determined that Claimant's "history and sleep study/MSLT findings are consistent with a diagnosis of post-traumatic narcolepsy."

8. On May 21, 2015 Claimant visited Sleep Expert Martin I. Reite, M.D. for an evaluation. He reiterated Claimant's diagnosis of narcolepsy and remarked that "hypersomnia was not an immediate response to the [August 24, 2012] injury but appeared about a year later." Dr. Reite queried whether Claimant's narcolepsy was caused by his industrial injury or was "coincidental and might have occurred anyway." He noted that "post-traumatic narcolepsy has been described but has no pathognomic specifiers." Dr. Reite ultimately commented that, from a treatment perspective, the cause of Claimant's narcolepsy was moot.

9. In an undated report Dr. Reite reiterated that Claimant suffers from narcolepsy and remarked that his condition was "most likely post-traumatic in origin." He explained that narcolepsy "is a serious neurological disorder characterized by excessive and sometimes uncontrollable sleepiness as well as a number of other related symptoms of brain dysfunction." He detailed that the causes of narcolepsy are varied and can be "idiopathic (onset with no obvious cause), familial (genetic influence and running in families), or triggered by viral infections or head trauma (as in [Claimant's] case)." Dr. Reite noted that narcolepsy cannot be cured but can be managed through drugs. He stated that Claimant has failed to adequately respond to drug treatment because of his brain damage after his industrial head trauma on August 24, 2012. Dr. Reite concluded that Claimant is seriously disabled as a result of his narcolepsy and his prognosis is "guarded."

10. On August 26, 2015 Dr. O'Toole determined that Claimant had again reached MMI. He assigned Claimant a 55% whole person impairment rating that was to be combined with a 25% mental health rating he had received from Dr. Newlin. Dr.

O'Toole also awarded Claimant medical maintenance benefits in the form of medication management and counseling with Dr. Newlin for one year.

11. On November 25, 2015 Susan Rosenfeld, M.D. Psychiatry & Neurology, reviewed Claimant's records and considered his claim that he was unable to work. She concluded that "the reported symptoms, clinical findings and treatment plan do not support functional impairment from a psychiatric condition which translates into restrictions or limitations."

12. On November 25, 2015 Stephen Selkirk, M.D., Ph.D, Psychiatry & Neurology, reviewed Claimant's medical records and his claim that he was unable to work. Dr. Selkirk stated, "the Claimant has extensive subjective complaints that are not supported by objective data in the medical record." He concluded that Claimant was not impaired from a neurological perspective and believed that no restrictions or limitations were warranted.

13. On November 25, 2015 Akinkumi O. Ogundipe, M.D. Internal Medicine & Nephrology reviewed Claimant's records and considered his ability to work. After discussing the matter with medical providers Dr. Ogundipe concluded that restrictions or limitations were not supported by the record.

14. On December 15, 2015 Claimant underwent an independent medical examination with Kathleen D'Angelo, M.D. Dr. D'Angelo recommended additional testing to confirm Claimant's diagnosis of narcolepsy. She characterized Claimant's presentation at the evaluation as clean shaven, neatly dressed, interactive, knowledgeable and articulate. Based on the detailed, quoted passages in her report, Dr. D'Angelo was impressed with Claimant's clarity and ability to recall his injury. Because of the incongruity between her experience with head trauma and narcolepsy patients compared to Claimant's presentation, she recommended further testing.

15. On February 9, 2016 Claimant underwent a Division Independent Medical Examination (DIME) with Albert Hattem, M.D. Dr. Hattem determined that Claimant reached MMI on August 26, 2015 and assigned a 39% whole person impairment rating. He noted that Claimant should be prohibited from working in a safety-sensitive position. However, he explained that once Claimant tapered off of Adderall he could "gradually re-engage in the work force, beginning at 2-4 hours per day."

16. On April 14, 2016 Neurologist and sub-specialist in Sleep Medicine Lev Grinman reviewed Claimant's medical records and considered whether he was unable to work. He explained that Claimant had some limitations as a result of his narcolepsy, but the condition did not cause complete functional impairment. Dr. Grinman specifically remarked that Claimant's narcolepsy would prohibit him from operating commercial motor vehicles but there were no other work limitations. He determined that the severity and scope of Claimant's reported fatigue and cognitive complaints were not consistent with the severity and scope of his medical conditions and intensity of treatment. Dr. Grinman also addressed the undated letter from Dr. Reite that described Claimant as "seriously disabled." He noted the letter was very general and provided a

standard overview of narcolepsy but did not include specific objective evidence of impairment supporting that Claimant was "seriously disabled."

17. Susan Kenneally, Psy.D. conducted a neuropsychological evaluation of Claimant on October 20, 2016 and November 16, 2016. She evaluated general intelligence, attention-concentration, memory and language skills. Dr. Kenneally also conducted psychological testing. She concluded that the testing did not reveal any residual cognitive impairment associated with Claimant's August 24, 2012 workplace injury. Dr. Kenneally noted that Claimant's traumatic brain injury has not resulted in persistent deficits.

18. Claimant testified that he feels like he has been up all night every day. He commented that his wife and two young children usually wake him when they leave in the morning. However, he remains in bed until between 10:00 a.m. and 12:00 p.m. When he gets out of bed he eats something, lies on the couch and sleeps. Claimant again awakens when his children come home and then lies down until dinner. After dinner Claimant sleeps on the couch until about 8:00 p.m. and stays awake with his wife until 10:00-11:00 p.m. He noted that his current medications include Bupropion (Wellbutrin XL), Destroamphetamine-amphetamine (Adderall XR), Ondansetron (Zofran), Clomipramine and Zolpidem Tartrate (Ambien PO).

19. On November 15, 2016 Claimant's wife awoke him because he had to take his daughter to school. Because he previously had difficulties remaining awake prior to taking his daughter to school, Claimant went to his garage and spent time trying to make a knife as a gift for his brother-in-law's birthday. He used a forge that he had made prior to his injury. Because Claimant had a problem with the forge he turned it off and took his daughter to school. After he dropped her off he tried to buy a type of screw he needed to put the handle on the knife. When the store in Mead did not have the screw he started to drive to Denver. Before he arrived in Denver his wife called and told him the house was on fire. The fire was caused by the Claimant use of the forge.

20. The Mountain View Fire Protection District investigative report quoted Claimant's wife as stating that Claimant is an engineer who works out of the home. She specifically stated that "[Claimant] is self-employed as a mechanical engineer and currently works from home due to a work related injury…they do not keep their vehicles in the garage at all because it is used for [Claimant's] shop and storage." However, Claimant's wife testified that she told the investigator that her husband was an engineer because that is what he went to school for and did for a living. She denied that Claimant worked at home as an engineer and affirmed that he has earned no wages since leaving Fleetwood.

21. On December 20, 2016 the parties conducted the pre-hearing evidentiary deposition of Mark Neagle, M.D. Dr. Neagle testified that he was a sleep medicine specialist who treated Claimant for narcolepsy. He remarked that only about .04 percent of the population has narcolepsy. Dr. Neagle explained that there are many theories about the causes of narcolepsy that include genetics, environment, toxins and viral infections and "we don't know the exact mechanism." Suspected trauma-induced

narcolepsy is even rarer and neither Dr. Neagle nor his experienced colleague had ever seen a case. Dr. Neagle noted that when he attempted to research trauma-induced narcolepsy he was unable to discover "any great explanation."

22. In addressing Claimant's ability to work Dr. Neagle explained that he was concerned about Claimant's capacity to function as a mechanical engineer but could envision a position that would fit his situation. After additional questioning Dr. Neagle acknowledged that Claimant was impaired as an engineer but not from performing other jobs. He specifically stated "[a]ll I can say is he was impaired as an engineer, I think, based on what our discussions were."

23. On December 27, 2016 psychiatrist Robert E. Kleinman, M.D. evaluated Claimant and conducted a medical records review. Dr. Kleinman reviewed the most recent sleep studies and Dr. Kenneally's report. He considered transcripts of interviews with Claimant's co-workers at Fleetwood. Dr. Kleinman also reviewed the Mountain View Fire Protection District investigation report. He determined that Claimant's activity reflected in the report was inconsistent with the representations of function presented to him and other providers. Based on a review of the four co-employee interviews Dr. Kleinman concluded that Claimant's reported issues at Fleetwood were not related to sleepiness or fatigue but to competency. Dr. Kleinman concluded that Claimant's sleep disorder has not resulted in impairment, restrictions or limitations.

24. On December 28, 2016 the parties conducted the pre-hearing evidentiary deposition of Dr. O'Toole. Dr. O'Toole stated that it was prudent to take Claimant off work because he appeared to be deteriorating and "maybe the cognitive workload was impeding his recovery." By the original MMI date, Dr. O'Toole had treated Claimant for very close to two years "so I was surprised by the later diagnosis of narcolepsy and his degraded condition after that." Dr. O'Toole reiterated his opinion that "I support any reasonable recommendation to allow him to regain his work skills and engage in meaningful work activities." He reviewed a list of vocational options prepared by Respondents' vocational expert Roger Ryan. Dr. O'Toole agreed that Claimant was able to perform 22 of 25 listed job descriptions. However, he determined that Claimant could not return to his former job as a mechanical engineer. The jobs approved included: mechanical drafter, information clerk, hardware salesperson, cashier II, telephone solicitor, tutor, appointment clerk, motor vehicle dispatcher, collection clerk, unarmed security guard, production assembler, parking lot attendant, check cashier, ticket taker, restaurant host, sales clerk, janitor, dining room attendant, tool crib attendant, shipping and receiving clerk, and outside deliverer.

25. Dr. O'Toole reviewed Dr. Kleinman's evaluation and the Mountain View Fire Protection District investigation report. He noted that Claimant was apparently performing more activities than he expected. He stated that "[t]he picture that I had been given up to this point was that he was severely disabled. I'm now seeing some evidence that that may not be the case." He remarked that the information regarding disability that he had relied upon was self-reported. Dr. O'Toole noted that the more recent neuropsychiatric assessment showed "pretty normal" function and was inconsistent with Claimant's reports.

26. On January 26, 2017 the parties conducted the pre-hearing evidentiary deposition of Suzanne Kenneally, Psy.D. Dr. Kenneally testified that her testing did not support Claimant's assertion that he is unable to work. She concluded that she could not state with reasonable medical probability that Claimant's narcolepsy was caused by his August 24, 2012 industrial accident. Dr. Kenneally commented that "we don't have those kind of reliable, repeatable markers for narcolepsy, and we certainly have no way to discriminate if it is caused by traumatic brain injury, is caused by genetic history, or is caused by other trauma….I would say the science is out on this about what we can say." Dr. Kenneally determined that the temporal delay in Claimant's onset of sleep disturbance would be "highly atypical and would argue against it being caused by or related to the [traumatic brain injury]."

27. On February 1, 2017 the parties conducted the pre-hearing evidentiary deposition of Martin Reite, M.D. He stated that Claimant reported excessive sleepiness and severe fatigue. Dr. Reite reiterated that the sleep studies showed that Claimant suffered from narcolepsy. During the studies Claimant went into REM sleep within a short time of lying down to take a nap. Dr. Reite remarked that most people take about 90 minutes and do not enter REM sleep during naps because there is not enough time. He concluded that Claimant could not stay awake on a reliable basis and is at a high risk of unpredictable onsets of sleep.

28. Dr. Reite attributed Claimant's narcolepsy to his traumatic head injury on August 24, 2012. He theorized that Claimant suffers from "chronic traumatic encephalopathy" as a result of his industrial injuries. However, he acknowledged that the condition cannot be definitively diagnosed. Dr. Reite also recognized that "chronic traumatic encephalopathy" could not be proven within a reasonable degree of medical probability as the etiology of Claimant's symptoms. He explained that the only etiology that has been proven as the cause of narcolepsy is Orexin neurons in the brain. The Orexin neuroms are possibly an autoimmune phenomenon or genetic in origin. Ultimately, the question of "is it post-traumatic, or coincidental and might have occurred anyway?" cannot be answered. Dr. Reite summarized that "the majority of people with narcolepsy have not had a history of head trauma." and Claimant could have developed narcolepsy without head trauma. He explained that Claimant requires medications for his narcolepsy condition and associated symptoms of depression, daytime sleepiness and fatigue. Finally, the diagnosis of narcolepsy does not include the presumption of total disability.

29. Dr. D'Angelo testified at the hearing in this matter. She instructs the Level II certification class regarding causation analysis under the Colorado Workers' Compensation Act. Dr. D'Angelo was admitted as an expert in occupational medicine, internal medicine and causation analysis. She testified that she conducted research concerning narcolepsy and head trauma. Based upon the limits of the medical community reflected in the research and Claimant's medical record, she could not establish a causal connection between Claimant industrial injury and his development of narcolepsy. Dr. Reite referenced studies during his deposition that he claimed supported proof of medical causation between head trauma and narcolepsy. However, Dr. D'Angelo determined that they do not reach the conclusions asserted by Dr. Reite.

She specifically noted that the articles do not provide an evidence-based conclusion that narcolepsy is caused by head trauma.

30. Dr. D'Angelo explained that the temporal relationship between Claimant's industrial injuries on April 24, 2012 and his development of narcolepsy symptoms more than one year later was extremely important. Because traumatic brain injuries are acutely symptomatic, the delayed onset of Claimant's narcolepsy symptoms suggests an attenuated causal relationship between his accident and the development of narcolepsy. In fact, Claimant obtained a new job as a mechanical engineer after his industrial injuries and performed well. Moreover, the areas of Claimant's brain that were injured on August 24, 2012 were not likely the regions of the brain to produce narcolepsy. Dr. D'Angelo thus characterized Claimant's narcolepsy as an independent non-industrial condition that was not related to his work activities for Employer on August 24, 2012. Moreover, Claimant's need for narcolepsy medications is not related to his work accident.

31. Vocational Expert Katie G. Montoya testified at the hearing in this matter. On May 3, 2016 she prepared a vocational report to assess whether Claimant was able to work and earn wages. Based on her review of Claimant's educational background, prior work experience and medical records, Ms. Montoya concluded that Claimant was unable to earn any wages in any capacity. Ms. Montoya stated that, when determining if someone is capable of working, the ability to show up on time and be productive is required in almost every job. She acknowledged that from a physical standpoint Claimant has no restrictions that would prevent him from working. She stated that she was aware Dr. O'Toole approved a number of possible jobs, but remarked that a person must be hired to actually try a job. Claimant does not possess the level of alertness required to function in a job. Accordingly, Ms. Montoya concluded that Claimant was unable to earn any wages in any capacity.

32. Vocational Expert Roger Ryan testified at the hearing in this matter. On January 5, 2017 he prepared a vocational report to assess whether Claimant was able to work and earn wages in any capacity. Based on his review of Claimant's educational background, prior work experience and medical records, Mr. Ryan concluded that Claimant was able to work and earn wages in a number of different capacities. He noted that Claimant had developed a number of transferable skills based on his significant educational, work and military experience Mr. Ryan emphasized that Claimant's work at Fleetwood as a mechanical engineer after his industrial injuries reflected that he could function productively in the work environment. He saw nothing in Claimant's formal job reviews that narcolepsy was preventing him from completing his job duties at Fleetwood. Mr. Ryan identified a number of varied positions suitable for Claimant. Dr. O'Toole agreed that Claimant was able to perform 22 of 25 listed job descriptions but commented that he could not return to his former job as a mechanical engineer. The jobs approved included: mechanical drafter, information clerk, hardware salesperson, cashier II, telephone solicitor, tutor, appointment clerk, motor vehicle dispatcher, collection clerk, unarmed security guard, production assembler, parking lot attendant, check cashier, ticket taker, restaurant host, sales clerk, janitor, dining room attendant, tool crib attendant, shipping and receiving clerk, and outside deliverer.

Furthermore, Mr. Ryan explained that the preceding jobs did not constitute an exhaustive list and there were a number of suitable jobs for Claimant because of his extensive background and experience. He identified several jobs that Claimant could perform from home including customer service, telephone soliciting, dispatching, drafting and internet tutoring. Mr. Ryan concluded that, based on Claimant's human factors and work restrictions, he maintains the ability to earn wages in a number of positions.

33. On May 30, 2017 the parties conducted the post-hearing rebuttal evidentiary deposition of Dr. O'Toole. Dr. O'Toole clarified his recommendations about whether Claimant was capable of performing any work. He remarked that "[i]n terms of some of the specific recommendations I had, I think I made those too much off-the-cuff and probably without enough deliberation. And I would not make the same recommendations now." However, Dr. O'Toole acknowledged that there is a possibility that Claimant could perform some very limited work. He stated "it's just a matter if he can find the right opportunity, the right employer where productivity is not going to be very great and time demands are not an issue." Dr. O'Toole remarked that his change in recommendations did not completely prohibit work.

34. On June 2, 2017 the parties conducted the post-hearing rebuttal evidentiary deposition of Dr. Neagle. He explained that the temporal delay between the accident and Claimant's complaints of sleepiness did not change his opinion that Claimant's head injury caused him to develop narcolepsy. He also disagreed with Dr. D'Angelo's testimony that the specific area of the brain that can cause narcolepsy was not damaged. Dr. Neagle stated that damage to one specific area of the brain is not necessary to produce narcolepsy. He emphasized that there was no other potential cause for Claimant's development of narcolepsy besides his traumatic brain injury on August 24, 2012. He did not discover any genetic disposition or virus that could have caused Claimant's condition.

35. Claimant has failed to prove that it is more probably true than not that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of the admitted industrial injuries he sustained during the course and scope of his employment with Employer on August 24, 2012. The record reveals that Claimant has developed a number of transferable job skills through education and experience that render him a suitable candidate for a number of employment opportunities. Initially, Claimant suffered significant head injuries while working as a Controls Engineer for Employer on August 24, 2012. He returned to work for Employer about two weeks after his accident, resigned his position and began employment with Fleetwood on November 12, 2012. Claimant continued to work for Fleetwood through February 4, 2015. During the period Claimant worked approximately 9-10 hours each day in a highly competitive environment. Claimant also began to report fatigue and on July 31, 2014 Dr. Newlin prescribed the stimulant Adderall for his day time somnolence. On September 10, 2014 Dr. Neagle determined that Claimant's history and sleep study warranted a diagnosis of narcolepsy. The narcolepsy diagnosis was later confirmed on repeat sleep testing.

36. Although Claimant has been diagnosed with narcolepsy there is conflicting evidence in the record about whether his August 24, 2012 industrial accident caused the condition. Drs. Reite and Neagle detailed that the causes of narcolepsy are varied and can be idiopathic, genetic, triggered by viral infections or the result of head trauma. They both attributed Claimant's narcolepsy to his traumatic head injury on August 24, 2012. However, the bulk of the medical evidence reflects that it is speculative to attribute Claimant's narcolepsy to his industrial accident. Dr. D'Angelo persuasively explained that the temporal relationship between Claimant's industrial injuries on April 24, 2012 and his development of narcolepsy symptoms more than one year later was extremely important. Because traumatic brain injuries are acutely symptomatic, the delayed onset of Claimant's narcolepsy symptoms suggests an attenuated causal relationship between his accident and the development of narcolepsy. Dr. D'Angelo thus characterized Claimant's narcolepsy as an independent non-industrial condition that was not related to his work activities for Employer on August 24, 2012. Dr. Kenneally also persuasively concluded that she could not state with reasonable medical probability that Claimant's narcolepsy was caused by his August 24, 2012 industrial accident. Dr. Kenneally commented that "we don't have those kind of reliable, repeatable markers for narcolepsy, and we certainly have no way to discriminate if it is caused by traumatic brain injury, is caused by genetic history, or is caused by other trauma." Dr. Kenneally determined that the temporal delay in Claimant's onset of sleep disturbance was "highly atypical" and was likely not related to his brain injuries. Accordingly, based on the significant temporal delay between Claimant's injury and development of narcolepsy symptoms as well as the lack of objective evidence connecting Claimant's head injuries to the development of narcolepsy, Claimant has failed to demonstrate that it is more probably true than not that his narcolepsy was caused by his August 24, 2012 industrial accident while working for Employer.

37. Nevertheless, the critical inquiry in this matter is not whether Claimant's narcolepsy was caused by his August 24, 2012 industrial accident but whether he is incapable of earning any wages in any capacity. Claimant has not demonstrated that his industrial injuries constituted a significant causative factor in rendering him unable to earn wages. Claimant has no physical work restrictions and a diagnosis of narcolepsy does not carry a presumption of PTD. Vocational Expert Mr. Ryan concluded that Claimant was able to work and earn wages in a number of different capacities. He noted that Claimant had developed a number of transferable skills based on his significant educational, work and military experience Mr. Ryan emphasized that Claimant's work at Fleetwood as a mechanical engineer after his industrial injuries reflected that he could function productively in the work environment. He identified a number of varied positions suitable for Claimant. Dr. O'Toole agreed that Claimant was able to perform 22 of 25 listed job descriptions. The jobs approved included: mechanical drafter, information clerk, hardware salesperson, cashier II, telephone solicitor, tutor, appointment clerk, motor vehicle dispatcher, collection clerk, unarmed security guard, production assembler, parking lot attendant, check cashier, ticket taker, restaurant host, sales clerk, janitor, dining room attendant, tool crib attendant, shipping and receiving clerk, and outside deliverer. Furthermore, Mr. Ryan explained that the preceding jobs did not constitute an exhaustive list and there were a number of suitable jobs for Claimant because of his extensive background and experience. Based on

Claimant's human factors and work restrictions, he maintains the ability to earn wages in a number of positions.

38. The bulk of the medical evidence supports Mr. Ryan's determination that Claimant has the ability to earn wages in some capacity. Dr. Grinman explained that Claimant had some limitations as a result of his narcolepsy, but the condition did not cause complete functional impairment. He specifically remarked that Claimant's narcolepsy would prohibit him from operating commercial motor vehicles but there were no other work limitations. Furthermore, the record is replete with medical opinions that significant work restrictions are not warranted. Claimant's sleep disorder has not rendered him unable to function or achieve productive employment.

39. In contrast, Vocational Expert Ms. Montoya concluded that Claimant was unable to earn any wages in any capacity. Ms. Montoya stated that, when determining if someone is capable of working, the ability to show up on time and be productive is required in almost every job. She remarked that Claimant does not possess the level of alertness required to function in a job. Moreover, Dr. O'Toole subsequently disavowed the job recommendations that he approved for Dr. Ryan. However, Dr. O'Toole acknowledged that there is a possibility that Claimant could perform some very limited work where productivity was not emphasized and time demands were not an issue. Moreover, Dr. Reite characterized Claimant as "seriously disabled" as a result of his narcolepsy. Finally, Dr. Neagle explained that he was concerned about Claimant's ability to function as a mechanical engineer but acknowledged that Claimant could perform other jobs.

40. Although medical providers disagree about the extent of Claimant's ability to obtain and maintain employment, the record reveals that Claimant has developed a number of transferable job skills through education and experience that render him a suitable candidate for a number of employment opportunities. Considering Claimant's vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions Claimant is capable of earning wages in some capacity. Accordingly, the record reflects that employment exists that is reasonably available to Claimant under his particular circumstances. Accordingly, Claimant's request for PTD benefits is denied and dismissed.

41. Claimant has failed to establish that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his August 24, 2012 industrial injuries or prevent further deterioration of his condition. The medical record reveals that it is speculative to attribute Claimant's narcolepsy to his August 24, 2012 industrial accident. Claimant's current medications include Bupropion (Wellbutrin XL), Destroamphetamine-amphetamine (Adderall XR), Ondansetron (Zofran), Clomipramine and Zolpidem Tartrate (Ambien PO). As Dr. Reite noted, Claimant requires the medications for his narcolepsy condition and associated symptoms of depression, daytime sleepiness and fatigue. However, Dr. D'Angelo explained that Claimant's need for narcolepsy medication is not related to his August 24, 2012 industrial injuries. The significant temporal delay between Claimant's injury and development of narcolepsy symptoms as

well as the lack of objective evidence connecting Claimant's head injuries to the development of narcolepsy suggest that his need for medications is not causally related to his work accident. Accordingly, Claimant's request for medical maintenance benefits in the form of medications to treat his narcolepsy and associated symptoms is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Permanent Total Disability Benefits

4. Prior to 1991 the Act did not define PTD. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 553 (Colo. 1998). Under the prevailing case law standard the ability of a claimant to earn occasional wages or perform certain types of gainful work did not preclude a finding of PTD. *Id.* at 555. A PTD determination prior to 1991 "turned on the claimant's loss of earning capacity or efficiency in some substantial degree in a field of general employment." *Id.*

5. In 1991 the General Assembly added a definition of PTD to the Act. *See* §8-40-201(16.5)(a), C.R.S. Under §8-40-201(16.5)(a), C.R.S. PTD means "the employee is unable to earn any wages in the same or other employment." The new definition of PTD was intended to tighten and restrict eligibility for PTD benefits. *Bymer*, 955 P.2d at 554. A claimant thus cannot obtain PTD benefits if he is capable of earning

wages in any amount. *Id.* at 556. Therefore, to establish a claim for PTD a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. *See* §8-43-201, C.R.S. The phrase, "to earn any wages in the same or other employment," "provides a real and non-illusory bright line rule for the determination whether a claimant has been rendered permanently totally disabled." *Lobb v. Indus. Claim Appeals Office*, 948 P.2d 115, 119 (Colo. App. 1997). Finally, there is no requirement that respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.,* W.C. No. 4-148-050 (ICAP, Sept. 26, 1995*); Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (ICAP, Nov. 23, 1993).

6. The term "employment" is defined in the Workers' Compensation Act in §8-40-201(8), C.R.S. This section states that employment is, "[a]ny trade, occupation, job, position, or process of manufacture or any method of carrying on any trade, occupation, job, position or process of manufacture in which any person may be engaged." Section 8-40-201(19), C.R.S. defines "wages" as the money rate for which the employee is to be compensated for services. For purposes of PTD "any wages" means more than zero. *See McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995) (determining that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving PTD benefits).

7. A claimant must demonstrate that his industrial injuries constituted a "significant causative factor" in order to establish a claim for PTD. *In Re Olinger,* W.C. No. 4-002-881 (ICAP, Mar. 31, 2005). A "significant causative factor" requires a "direct causal relationship" between the industrial injuries and a PTD claim. *In Re of Dickerson,* W.C. No. 4-323-980 (ICAP, July 24, 2006); *see Seifried v. Industrial Comm'n,* 736 P.2d 1262, 1263 (Colo. App. 1986). The preceding test requires the ALJ to ascertain the "residual impairment caused by the industrial injury" and whether the impairment was sufficient to result in PTD without regard to subsequent intervening events. *In Re of Dickerson,* W.C. No. 4-323-980 (ICAP, July 24, 2006). Resolution of the causation issue is a factual determination for the ALJ. *Id.*

8. In ascertaining whether a claimant is able to earn any wages, the ALJ may consider various "human factors," including a claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Bymer*, 955 P.2d at 556; *Holly Nursing v. ICAO,* 992 P.2d 701, 703 (Colo. App. 1999). The critical test, which must be conducted on a case-by-case basis, is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer,* 955 P.2d at 557. Ultimately, the determination of whether a Claimant suffers from a permanent and total disability is an issue of fact for resolution by the ALJ. *In Re Selvage,* W.C. No. 4-486-812 (ICAP, Oct. 9, 2007).

9. As found, Claimant has failed to prove by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of the admitted industrial injuries he sustained during the course and scope of his employment with Employer on August 24, 2012. The record reveals that

Claimant has developed a number of transferable job skills through education and experience that render him a suitable candidate for a number of employment opportunities. Initially, Claimant suffered significant head injuries while working as a Controls Engineer for Employer on August 24, 2012. He returned to work for Employer about two weeks after his accident, resigned his position and began employment with Fleetwood on November 12, 2012. Claimant continued to work for Fleetwood through February 4, 2015. During the period Claimant worked approximately 9-10 hours each day in a highly competitive environment. Claimant also began to report fatigue and on July 31, 2014 Dr. Newlin prescribed the stimulant Adderall for his day time somnolence. On September 10, 2014 Dr. Neagle determined that Claimant's history and sleep study warranted a diagnosis of narcolepsy. The narcolepsy diagnosis was later confirmed on repeat sleep testing.

10. As found, although Claimant has been diagnosed with narcolepsy there is conflicting evidence in the record about whether his August 24, 2012 industrial accident caused the condition. Drs. Reite and Neagle detailed that the causes of narcolepsy are varied and can be idiopathic, genetic, triggered by viral infections or the result of head trauma. They both attributed Claimant's narcolepsy to his traumatic head injury on August 24, 2012. However, the bulk of the medical evidence reflects that it is speculative to attribute Claimant's narcolepsy to his industrial accident. Dr. D'Angelo persuasively explained that the temporal relationship between Claimant's industrial injuries on April 24, 2012 and his development of narcolepsy symptoms more than one year later was extremely important. Because traumatic brain injuries are acutely symptomatic, the delayed onset of Claimant's narcolepsy symptoms suggests an attenuated causal relationship between his accident and the development of narcolepsy. Dr. D'Angelo thus characterized Claimant's narcolepsy as an independent non-industrial condition that was not related to his work activities for Employer on August 24, 2012. Dr. Kenneally also persuasively concluded that she could not state with reasonable medical probability that Claimant's narcolepsy was caused by his August 24, 2012 industrial accident. Dr. Kenneally commented that "we don't have those kind of reliable, repeatable markers for narcolepsy, and we certainly have no way to discriminate if it is caused by traumatic brain injury, is caused by genetic history, or is caused by other trauma." Dr. Kenneally determined that the temporal delay in Claimant's onset of sleep disturbance was "highly atypical" and was likely not related to his brain injuries. Accordingly, based on the significant temporal delay between Claimant's injury and development of narcolepsy symptoms as well as the lack of objective evidence connecting Claimant's head injuries to the development of narcolepsy, Claimant has failed to demonstrate that it is more probably true than not that his narcolepsy was caused by his August 24, 2012 industrial accident while working for Employer.

11. As found, nevertheless, the critical inquiry in this matter is not whether Claimant's narcolepsy was caused by his August 24, 2012 industrial accident but whether he is incapable of earning any wages in any capacity. Claimant has not demonstrated that his industrial injuries constituted a significant causative factor in rendering him unable to earn wages. Claimant has no physical work restrictions and a diagnosis of narcolepsy does not carry a presumption of PTD. Vocational Expert Mr.

Ryan concluded that Claimant was able to work and earn wages in a number of different capacities. He noted that Claimant had developed a number of transferable skills based on his significant educational, work and military experience Mr. Ryan emphasized that Claimant's work at Fleetwood as a mechanical engineer after his industrial injuries reflected that he could function productively in the work environment. He identified a number of varied positions suitable for Claimant. Dr. O'Toole agreed that Claimant was able to perform 22 of 25 listed job descriptions. The jobs approved included: mechanical drafter, information clerk, hardware salesperson, cashier II, telephone solicitor, tutor, appointment clerk, motor vehicle dispatcher, collection clerk, unarmed security guard, production assembler, parking lot attendant, check cashier, ticket taker, restaurant host, sales clerk, janitor, dining room attendant, tool crib attendant, shipping and receiving clerk, and outside deliverer. Furthermore, Mr. Ryan explained that the preceding jobs did not constitute an exhaustive list and there were a number of suitable jobs for Claimant because of his extensive background and experience. Based on Claimant's human factors and work restrictions, he maintains the ability to earn wages in a number of positions.

12. As found, the bulk of the medical evidence supports Mr. Ryan's determination that Claimant has the ability to earn wages in some capacity. Dr. Grinman explained that Claimant had some limitations as a result of his narcolepsy, but the condition did not cause complete functional impairment. He specifically remarked that Claimant's narcolepsy would prohibit him from operating commercial motor vehicles but there were no other work limitations. Furthermore, the record is replete with medical opinions that significant work restrictions are not warranted. Claimant's sleep disorder has not rendered him unable to function or achieve productive employment.

13. As found, in contrast, Vocational Expert Ms. Montoya concluded that Claimant was unable to earn any wages in any capacity. Ms. Montoya stated that, when determining if someone is capable of working, the ability to show up on time and be productive is required in almost every job. She remarked that Claimant does not possess the level of alertness required to function in a job. Moreover, Dr. O'Toole subsequently disavowed the job recommendations that he approved for Dr. Ryan. However, Dr. O'Toole acknowledged that there is a possibility that Claimant could perform some very limited work where productivity was not emphasized and time demands were not an issue. Moreover, Dr. Reite characterized Claimant as "seriously disabled" as a result of his narcolepsy. Finally, Dr. Neagle explained that he was concerned about Claimant's ability to function as a mechanical engineer but acknowledged that Claimant could perform other jobs.

14. As found, although medical providers disagree about the extent of Claimant's ability to obtain and maintain employment, the record reveals that Claimant has developed a number of transferable job skills through education and experience that render him a suitable candidate for a number of employment opportunities. Considering Claimant's vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions Claimant is capable of earning wages in some capacity. Accordingly, the record reflects that employment exists that is reasonably available to Claimant under his particular

circumstances. Accordingly, Claimant's request for PTD benefits is denied and dismissed.

Medical Maintenance Benefits

15. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

16. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his August 24, 2012 industrial injuries or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988). The medical record reveals that it is speculative to attribute Claimant's narcolepsy to his August 24, 2012 industrial accident. Claimant's current medications include Bupropion (Wellbutrin XL), Destroamphetamine-amphetamine (Adderall XR), Ondansetron (Zofran), Clomipramine and Zolpidem Tartrate (Ambien PO). As Dr. Reite noted, Claimant requires the medications for his narcolepsy condition and associated symptoms of depression, daytime sleepiness and fatigue. However, Dr. D'Angelo explained that Claimant's need for narcolepsy medication is not related to his August 24, 2012 industrial injuries. The significant temporal delay between Claimant's injury and development of narcolepsy symptoms as well as the lack of objective evidence connecting Claimant's head injuries to the development of narcolepsy suggest that his need for medications is not causally related to his work accident. Accordingly, Claimant's request for medical maintenance benefits in the form of medications to treat his narcolepsy and associated symptoms is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for PTD benefits is denied and dismissed

2. Claimant's request for medical maintenance benefits for his August 24, 2012 industrial injuries is denied and dismissed.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 28, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable left knee injury during the course and scope of her employment with Employer on August 18, 2014 in case number 4-972-238-02.

2. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Bennett I. Machanic, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) and suffered a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury in case number 5-012-306-01.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary total Disability (TTD) benefits for the period April 13, 2016 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 54 year old female who has worked as a Greenhouse Laborer for Employer since 2009. Claimant filed two Workers' Compensation claims involving her left knee that are the subject of this Order.

August 18, 2014 Date of Injury (Case Number 4-972-238-02)

2. Claimant testified that on August 18, 2014 she suffered a left knee injury during the course of her employment while descending a ladder. While carrying garden materials Claimant misjudged the final rung of the ladder and fell onto both knees. Although Claimant notified her supervisor Jesus Padron of the incident she did not report any injury and declined medical treatment. Claimant subsequently continued to perform her regular job duties until she was laid-off for the season in September 2014. Claimant did not obtain any medical care for her left knee from August through November 2014.

3. Claimant returned to work for Employer in December 2014. On December 24, 2014 Claimant told co-worker Letty Calderon that she was going home from work because her leg hurt. When Ms. Calderon asked Claimant if she fell or hurt herself at work, Claimant stated: "No, this happened at home." Another co-worker, Alma Rodriguez, saw Claimant at work sometime after Christmas. Ms. Rodriguez greeted Claimant and asked her what happened because she was on crutches. Claimant responded that she hurt her leg after tripping on some carpet at home. Claimant stated

that she tried to work with her injured leg, but it hurt too much and she had gone to see her personal care physician.

4. Claimant first sought medical treatment for her left knee on December 26, 2014 through Advanced Urgent Care. She was diagnosed with a synovial/Baker's cyst of the left knee. Claimant noted that she had started having pain in the left knee within the past three days and her symptoms had progressively worsened. The physician concluded that there was "no injury." Claimant did not mention any ladder incident at work on August 18, 2014.

5. On January 2, 2015 Claimant visited knee surgeon Mitchel E. Robinson, M.D. at Panorama Orthopedics & Spine Center for an evaluation. Claimant did not mention any work injury on August 14, 2014. Dr. Robinson documented that Claimant presented with pain, crepitus, swelling, decreased range of motion, stiffness, weakness and instability of the left knee. He reported that Claimant "states that the symptoms have been acute non-traumatic" and "began 1 day ago." A physical examination revealed diffuse tenderness, severe crepitation and a negative McMurray's test of the left knee. An x-ray reflected severe tricompartment osteoarthritis. Dr. Robinson injected Claimant's left knee with cortisone. He commented that Claimant might require a total left knee replacement as her symptoms warranted.

6. On January 9, 2015 Employer completed a First Report of Injury regarding the August 18, 2014 incident. Claimant noted that she fell from a ladder and declined treatment through Employer's designated medical provider. The document also noted that Claimant did not lose any time from work as a result of the August 18, 2014 incident.

7. Based on a referral from Dr. Robinson, Claimant visited knee surgeon Aaron Baxter, M.D. on February 5, 2015 for an examination. Dr. Baxter took a history from Claimant that she "injured her left knee *a* few weeks ago while at work. Since then the knee has continued to be painful. She has difficulty weight bearing. There is increased pain at work." Claimant did not mention that she sustained any injury approximately five months earlier on August 18, 2014 when she was descending a ladder at work.

8. Dr. Baxter diagnosed Claimant with degenerative arthritis of the left knee and discussed the possibility of a total left knee arthroscopy. Dr. Baxter did not determine that the need for a total left knee replacement was work-related. He instead suggested that the procedure should be scheduled outside of the Workers' Compensation system because of Claimant's osteoarthritis. Claimant received a left knee injection that provided some relief. She was scheduled for a total left knee replacement but ultimately declined the procedure. Dr. Baxter recommended a return visit when Claimant's left knee symptoms worsened.

9. On August 10, 2016 Claimant filed a Claim for Workers' Compensation for the August 18, 2014 incident. The claim was assigned case number 4-972-238-02.

10. Claimant has failed to prove that it is more probably true than not that she sustained a compensable left knee injury during the course and scope of her employment with Employer on August 18, 2014 in case number 4-972-238-02. Initially, Claimant told Employer that she had fallen from a ladder but declined medical care. She then continued to work her regular, full duty job until September 2014 when she was laid off for the season. Claimant did not seek medical treatment for her left knee until December 2014. She returned to work on crutches and told two co-workers on that she hurt her left knee at home.

11. On December 26, 2014 Claimant sought treatment through Advanced Urgent Care. Claimant noted that she had started having pain in the left knee within the past three days and her symptoms had progressively worsened. Claimant subsequently visited knee surgeons Drs. Robinson and Baxter in January 2015. Instead, Claimant presented to Dr. Robinson on January 2, 2015 with pain, crepitus, swelling, decreased range of motion, stiffness, weakness and instability on the left knee but failed to mention anything about the ladder incident. Claimant told Dr. Baxter that she had injured her knee at work a few weeks before the January 2015 visit. Drs. Robinson and Baxter determined that Claimant might need a left total knee replacement because of her severe, degenerative osteoarthritis. Claimant did not file a claim for Workers' Compensation until August 10, 2016 or approximately two years after the ladder incident. The significant temporal delay, numerous inconsistencies regarding the date of a left knee injury, failure to mention an August 18, 2014 event to medical providers and significant degenerative osteoarthritis renders it speculative to attribute Claimant's left knee symptoms to a fall from a ladder at work on August 18, 2014. Accordingly, Claimant's claim for Workers' Compensation benefits in case number 4-972-238-02 is denied and dismissed.

April 8, 2016 Date of Injury (Case Number 5-012-306-01)

12. Claimant explained that on April 8, 2016 she was walking briskly near an area with flower pots and pallets while working for Employer. Her right foot caught one of the pallets and she fell to the ground on her hands and knees. Claimant remained on the ground for 10 minutes before being helped up by her supervisor and a coworker. Claimant was unable to complete her shift.

13. On April 12, 2016 Claimant presented to Authorized Treating Physician (ATP) Katherine Drapeau, D.O. at HealthONE Occupational Medicine and Rehabilitation with complaints of bilateral knee pain. Claimant specifically reported anterior and posterior pain in her left knee. Dr. Drapeau noted a prior similar injury in which Claimant fell from a ladder. Claimant reported that she was symptom-free prior to the recent fall and rated her current pain at an 8/10 or 9/10. X-rays of Claimant's left knee revealed degenerative joint disease with several loose bodies as well as mildly decreased medial and lateral joint space. Dr. Drapeau diagnosed Claimant with bilateral knee contusions. She prescribed Naproxen, a knee brace and physical therapy. Dr. Drapeau restricted Claimant to only seated work.

14. On May 10, 2016 Claimant underwent a left knee MRI. The MRI revealed a torn medial meniscus.

15. On May 26, 2016 Claimant visited Christopher Isaacs, M.D. for an orthopedic evaluation. Claimant reported that she tripped over a pallet and fell onto her left knee. Dr. Isaacs reviewed the May 18, 2016 MRI that showed complex tearing of the medial and lateral meniscus, mild degenerative changes of the tibiofemoral joint and more significant degenerative changes at the patellofemoral joint. He diagnosed a symptomatic, torn medial and lateral meniscus of the left knee and mild degenerative joint disease. Dr. Isaacs recommended a knee arthroscopy and debridement.

16. On June 14, 2016 James P. Lindberg, M.D. conducted a Physician Advisor review for Insurer. He determined that Claimant's knee complaints were caused by her pre-existing osteoarthritis. Insurer denied Dr. Isaacs' surgical request.

17. On June 21, 2016 Dr. Isaacs sent an appeal to Insurer requesting authorization for Claimant's surgery. He explained:

> Following the event she underwent an MRI which demonstrated complex tearing of her menisci. On the MRI there is an effusion consistent with recent injury. There is no documentation that she had tearing of her meniscus prior to the date of her injury.
>
> I am in receipt of the denial for surgery from Dr. Lindberg. He is denying surgery based on the fact that she had problems with her knee in the past. However, the extent of the problems was not documented. I am not aware of a prior MRI that shows she had a torn meniscus prior to this injury.

18. On August 15, 2016 Claimant underwent a comprehensive independent medical examination with knee surgeon Jon Erickson, M.D. Dr. Erickson engaged in a Level II accredited causality determination and conducted a thorough medical records review. He determined that Claimant's left knee complaints were caused by advanced, chronic, degenerative and pre-existing tri-compartmental osteoarthritis. There was no objective evidence of worsening or aggravation related to the admitted April 8, 2016 knee contusions.

19. On August 31, 2016 ATP Dr. Drapeau placed Claimant at Maximum Medical Improvement (MMI) effective August 15, 2016 for her left knee. She commented that Claimant did not suffer any permanent impairment or require medical maintenance care. On September 2, 2016 Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Drapeau's MMI and impairment determinations.

20. Claimant challenged Dr. Drapeau's MMI and impairment determinations and sought a Division Independent Medical Examination (DIME). On January 18, 2017 Claimant underwent a DIME with Bennett I. Machanic, M.D. He concluded that Claimant had not reached MMI because she required some form of knee surgery. Dr.

Machanic remarked that “the pivotal event is April 8, 2016 but it is not even clear precisely what happened that day.” He explained:

> I think there were significant degenerative changes in the left knee, but the April 8, 2016, event appears to have been the point where significant pathology and ongoing impairment developed. Unfortunately the medical record is rather conflicting whether Claimant had additional injuries or not. Under the circumstances in the absence of preceding MRI studies and better documentation of other injuries, I must say that we cannot easily apportion this and it is easiest and most rational to place the entire situation as of April 8, 2016, but it is not even clear precisely what happened on that day.

21. Dr. Machanic concluded that Claimant suffers significant left knee problems and requires surgery. However, he did not know whether the surgery involved an arthroscopic procedure or a total left knee replacement because the type of surgery was admittedly “beyond my area of specialization and I would defer the surgical choices to the surgeons.”

22. Dr. Machanic assigned Claimant a 49% left lower extremity rating that converted to a 20% whole person impairment rating. The rating included an impairment for arthritis and a meniscus tear. At the end of his report Dr. Machanic recommended that Claimant have medial meniscus tear surgery because the meniscal tears were consistent with the work injury. Dr. Machanic repeated that “I must caution that there are inconsistencies in the record and it is hard for me to accept at face value that everything that I see clinically today is just related to the one injury of April 8, 2016.”

23. On April 18, 2017 Claimant underwent an independent medical examination with Dr. Lindberg. In addressing causation, Dr. Lindberg determined that Claimant’s left knee MRI did not reflect an acute injury. Dr. Lindberg also did not think Claimant’s injuries were traumatic enough to cause the meniscal tears or that the mechanism of injury was consistent with meniscal tears. He concluded that Claimant’s problem was advanced osteoarthritis secondary to age and patellar malalignment. Contrary to Dr. Machanic’s DIME opinion Dr. Lindberg explained that that there was no evidence of an aggravation, acceleration, or exacerbation because Claimant was already symptomatic. Accordingly, Claimant did not suffer an industrial left knee injury on April 8, 2016.

24. Dr. Erickson testified at the hearing in this matter. He maintained that Claimant’s left knee complaints were caused by advanced, chronic, degenerative and pre-existing tri-compartmental osteoarthritis. There was no objective evidence of worsening or aggravation in Claimant’s left knee related to the admitted April 8, 2016 knee contusions. Dr. Erickson noted that “had this minor injury not occurred to her knee it is more likely than not that her symptoms would be identical to what they are right now.”

25. Dr. Lindberg also testified at the hearing in this matter. He maintained that Claimant's left knee complaints were caused by chronic, degenerative and pre-existing osteoarthritis. There was no objective evidence of worsening or aggravation in Claimant's left knee related to the admitted April 8, 2016 injury. Dr. Lindberg commented that Claimant's left knee MRI revealed a chronic, degenerative condition and not an acute injury. He specifically remarked that Claimant's left knee condition was in the same condition that it would have been absent the April 8, 2016 fall.

26. Dr. Lindberg also addressed Dr. Machanic's DIME determination. He explained that physicians are instructed at the Division of Workers' Compensation Level II training course to perform a causality assessment regarding an injury. However, Dr. Machanic failed to perform a causality assessment, violated the Level II training mandate and thus erred in his DIME determination that Claimant has not reached MMI.

27. On June 6, 2017 the parties conducted the post-hearing evidentiary deposition of Dr. Machanic. Dr. Machanic testified that Claimant suffered a left knee injury on April 8, 2016 and required surgical intervention to alleviate her pain. He deferred to surgeons for a determination of the appropriate type of left knee surgery. Dr. Machanic specifically explained that "I am responding to four orthopedic surgeons, but I'm cast in the role, actually, of the referee because I'm a Level II examiner, so I don't really take sides." Dr. Machanic summarized that Claimant suffered from pre-existing left knee structural problems that made her more susceptible to an injury. However, in the absence of a previous impairment rating apportionment was inappropriate. Finally, Dr. Mechanic explained that, because Claimant had not reached MMI and requires surgery, he only assigned a provisional impairment rating.

28. On June 15, 2017 the parties conducted the post-hearing evidentiary deposition of Dr. Erickson. Dr. Erickson evaluated the cause of Claimant's left knee symptoms. In conducting a causation analysis, he considered diagnostic testing, medical records, subjective complaints and medical literature. Dr. Erickson testified that osteoarthritis of the knee joint and progression of symptoms without injury is detailed in the medical literature. Sometimes arthritic knee pain happens with a specific activity and sometimes the knee just starts hurting. "But the thing that is important is that the osteoarthritis is not going to get better over time. It is going to get worse. And as it gets worse, somewhere in there you are going to start having symptoms, which are unremitting . . ." Claimant's minor work-related knee contusions in April 2016 did not cause her left knee symptoms or accelerate the need for a total knee replacement.

29. Dr. Erickson detailed that Claimant required a total knee replacement prior to her April 8, 2016 injury:

> Dr. Robinson may have opined that somewhere down the road [Claimant] would need a total knee replacement, but we have another medical opinion from Dr. Baxter, when he evaluated her, that in April – or February of 2015, that she needs a total knee. He was ready to proceed with scheduling except she declined the offer. So I don't know how we

can make a cogent argument that if she saw an orthopedic surgeon in February 2015, who, after reviewing her imaging studies and listening to her symptoms, was ready to schedule a total knee replacement. How in the world can we say that now it is the result of this injury on April 8th? It just doesn't float."

30. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Machanic that Claimant has not reached MMI and suffered a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury. Initially, Dr. Machanic concluded that Claimant had not reached MMI for her April 8, 2016 left knee injury because she required some form of knee surgery. However, knee surgeons Drs. Lindberg and Erickson both conducted a thorough records review and engaged in a Level II accredited causality assessment regarding Claimant's continued left knee symptoms. They explained that Claimant's left knee complaints were caused by advanced, chronic, degenerative and pre-existing tri-compartmental osteoarthritis. There was no objective evidence of worsening or aggravation in Claimant's left knee related to the April 8, 2016 admitted industrial injury. In contrast to Dr. Machanic's DIME determination, Claimant reached MMI without any impairment for her April 8, 2016 left knee injury.

31. Drs. Lindberg and Erickson persuasively explained that Dr. Machanic failed to conduct a causality assessment in accordance with the Colorado Division of Worker's Compensation Level II accredited teachings. Dr. Machanic did not provide any analysis to support his conclusion that Claimant's April 8, 2016 injury was the "pivotal event" because it rendered her left knee permanently symptomatic. He also did not explain why he concluded that Claimant's continued symptoms are from the April 8, 2016 incident and not the progression of severe osteoarthritis that Drs. Robinson and Baxter predicted would continue absent subsequent injury. Drs. Lindberg and Erickson persuasively explained that Dr. Machanic, as the DIME physician, was required to analyze causality based upon the Colorado Division of Workers' Compensation Level II accredited teachings, not "pick somebody to believe" and base his opinion on Claimant's statements even when contradicted by the medical records. Notably, Dr. Machanic explained that "we cannot easily apportion this and it is easiest and most rational to place the entire situation as of April 8, 2016, but it is not even clear precisely what happened on that day." Finally, Dr. Machanic erroneously assigned Claimant a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury because her symptoms were the result of the continued progression of severe osteoarthritis.

32. Drs. Lindberg and Erickson persuasively concluded that Dr. Machanic's DIME opinions regarding MMI and permanent impairment were incorrect. Because Claimant's current symptoms are related to the expected progression of the pre-existing and non-work related osteoarthritis, Claimant's is not entitled to a permanent impairment rating. Based on the opinions of Drs. Lindberg and Erickson, Dr. Machanic failed to perform a causality assessment pursuant to the Level II teachings. Instead, Dr. Machanic merely deferred to other doctors because it was the "easiest and most

rational" to attribute Claimant's symptoms to the April 8, 2016 incident. Accordingly, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Machanic's MMI determination and permanent impairment rating were incorrect. Based on the determination of ATP Dr. Drapeau Claimant reached MMI on August 15, 2016 with no permanent impairment.

33. Claimant worked approximately 40 hours per week plus occasional overtime for Employer. She earned $9.46 each hour. In considering Claimant's pay stubs for the period ending January 9, 2016 through April 2, 2016, Claimant earned a total of $7,111.85 from Employer. Dividing $7,111.85 by seven biweekly pay periods yields an AWW of $507.99. Claimant also paid $39.14 each week for health and dental insurance. Adding $507.99 and $39.14 yields a total AWW of $547.13. An AWW of $547.13 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

34. Claimant has demonstrated that it is more probably true than not that she is entitled to receive TTD benefits for the period April 13, 2016 until terminated by statute. Respondents have overcome Dr. Machanic's DIME determination by clear and convincing evidence that Claimant has not reached MMI. ATP Dr. Drapeau persuasively concluded that Claimant reached MMI on August 15, 2016 with no permanent impairment. Claimant's entitlement to TTD benefits terminated by operation of law when she reached MMI. Accordingly, Claimant shall receive TTD benefits for her admitted April 8, 2016 left knee injury for the period April 13, 2016 until she reached MMI on August 15, 2016.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability of August 18, 2014 Date of Injury (Case Number 4-972-238-02)

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable left knee injury during the course and scope of her employment with Employer on August 18, 2014 in case number 4-972-238-02. Initially, Claimant told Employer that she had fallen from a ladder but declined medical care. She then continued to work her regular, full duty job until September 2014 when she was laid off for the season. Claimant did not seek medical treatment for her left knee until December 2014. She returned to work on crutches and told two co-workers on that she hurt her left knee at home.

8. As found, On December 26, 2014 Claimant sought treatment through Advanced Urgent Care. Claimant noted that she had started having pain in the left knee within the past three days and her symptoms had progressively worsened. Claimant subsequently visited knee surgeons Drs. Robinson and Baxter in January 2015. Instead, Claimant presented to Dr. Robinson on January 2, 2015 with pain, crepitus, swelling, decreased range of motion, stiffness, weakness and instability on the left knee but failed to mention anything about the ladder incident. Claimant told Dr. Baxter that she had injured her knee at work a few weeks before the January 2015 visit. Drs. Robinson and Baxter determined that Claimant might need a left total knee replacement because of her severe, degenerative osteoarthritis. Claimant did not file a claim for Workers' Compensation until August 10, 2016 or approximately two years after the ladder incident. The significant temporal delay, numerous inconsistencies regarding the date of a left knee injury, failure to mention an August 18, 2014 event to medical providers and significant degenerative osteoarthritis renders it speculative to attribute Claimant's left knee symptoms to a fall from a ladder at work on August 18, 2014. Accordingly, Claimant's claim for Workers' Compensation benefits in case number 4-972-238-02 is denied and dismissed.

Overcoming the DIME

9. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

10. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 11. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear

and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

12. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Machanic that Claimant has not reached MMI and suffered a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury. Initially, Dr. Machanic concluded that Claimant had not reached MMI for her April 8, 2016 left knee injury because she required some form of knee surgery. However, knee surgeons Drs. Lindberg and Erickson both conducted a thorough records review and engaged in a Level II accredited causality assessment regarding Claimant's continued left knee symptoms. They explained that Claimant's left knee complaints were caused by advanced, chronic, degenerative and pre-existing tri-compartmental osteoarthritis. There was no objective evidence of worsening or aggravation in Claimant's left knee related to the April 8, 2016 admitted industrial injury. In contrast to Dr. Machanic's DIME determination, Claimant reached MMI without any impairment for her April 8, 2016 left knee injury.

13. As found, Drs. Lindberg and Erickson persuasively explained that Dr. Machanic failed to conduct a causality assessment in accordance with the Colorado Division of Worker's Compensation Level II accredited teachings. Dr. Machanic did not provide any analysis to support his conclusion that Claimant's April 8, 2016 injury was the "pivotal event" because it rendered her left knee permanently symptomatic. He also did not explain why he concluded that Claimant's continued symptoms are from the April 8, 2016 incident and not the progression of severe osteoarthritis that Drs. Robinson and Baxter predicted would continue absent subsequent injury. Drs. Lindberg and Erickson persuasively explained that Dr. Machanic, as the DIME physician, was required to analyze causality based upon the Colorado Division of Workers' Compensation Level II accredited teachings, not "pick somebody to believe" and base his opinion on Claimant's statements even when contradicted by the medical records. Notably, Dr. Machanic explained that "we cannot easily apportion this and it is easiest and most rational to place the entire situation as of April 8, 2016, but it is not even clear precisely what happened on that day." Finally, Dr. Machanic erroneously assigned Claimant a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury because her symptoms were the result of the continued progression of severe osteoarthritis.

14. As found, Drs. Lindberg and Erickson persuasively concluded that Dr. Machanic's DIME opinions regarding MMI and permanent impairment were incorrect. Because Claimant's current symptoms are related to the expected progression of the pre-existing and non-work related osteoarthritis, Claimant's is not entitled to a permanent impairment rating. Based on the opinions of Drs. Lindberg and Erickson, Dr. Machanic failed to perform a causality assessment pursuant to the Level II teachings. Instead, Dr. Machanic merely deferred to other doctors because it was the "easiest and most rational" to attribute Claimant's symptoms to the April 8, 2016 incident. Accordingly, Respondents have produced unmistakable evidence free from serious or

substantial doubt that Dr. Machanic's MMI determination and permanent impairment rating were incorrect. Based on the determination of ATP Dr. Drapeau Claimant reached MMI on August 15, 2016 with no permanent impairment.

Average Weekly Wage

15. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007). As found, an AWW of $547.13 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

16. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

17. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive TTD benefits for the period April 13, 2016 until terminated by statute. Respondents have overcome Dr. Machanic's DIME determination by clear and convincing evidence that Claimant has not reached MMI. ATP Dr. Drapeau persuasively concluded that Claimant reached MMI on August 15, 2016 with no permanent impairment. Claimant's entitlement to TTD benefits terminated by operation of law when she reached MMI. Accordingly, Claimant shall receive TTD benefits for her admitted April 8, 2016 left knee injury for the period April 13, 2016 until she reached MMI on August 15, 2016.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's Workers' Compensation claim in case number 4-972-238-02 is denied and dismissed.

2. Respondents have overcome DIME Dr. Machanic's MMI and permanent impairment determinations by clear and convincing evidence. Claimant reached MMI on **August 15, 2016** with no permanent impairment.

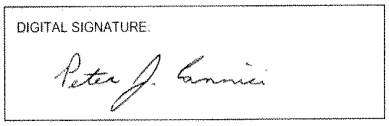
3. Claimant earned an AWW of $547.13.

4. Claimant shall receive TTD benefits for the period April 13, 2016 until she reached MMI on August 15, 2016.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 28, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-016-648-01

ISSUES

- Whether Claimant has established by a preponderance of the evidence that he sustained a compensable industrial injury as the result of an incident which alleged occurred on April 29, 2016; and

- If compensable, whether Claimant proved entitlement to related, reasonable and necessary medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant, a 61-year-old document specialist, has worked for Employer since August 2007. On April 29, 2016, Claimant alleges that he injured his right hip, low back, and right arm when he tripped on a snowbrush while stepping out of a company vehicle.

2. Prior to his alleged April 29, 2016 injury, Claimant had a history of falls and injuries to his low back and hip with associated weakness and muscle atrophy in his right leg. On March 16, 2010, Claimant began treating with Dr. Aschberger due to a slip and fall which occurred at work on February 8, 2010. He complained of right lower extremity weakness, right groin pain, hip pain, and low back pain.

3. On May 17, 2010, Dr. Aschberger found right leg muscle atrophy and weakness when he examined Claimant. He noted Claimant's right leg was smaller compared to his left leg.

4. Imaging studies performed in 2010 revealed a fracture in Claimant's right hip which required surgical repair. However, upon post-surgical examination, Claimant continued to have noted right leg weakness and atrophy. He reported to providers that his right knee would occasionally give out. Claimant was prescribed Lyrica for his persistent right leg, hip, and low back pain.

5. On December 6, 2010, Claimant was placed at MMI and given a 31% lower extremity rating for his right hip and an 11% whole person impairment rating for his lower back. Claimant continued to note significant weakness and atrophy n his right leg.

6. On February 8, 2011, Dr. Gellrick noted in her DIME report that Claimant reported several additional falls to his PCP during a June 18, 2010 examination. Claimant admitted that he had fallen approximately four times due to weakness

in his right leg. Claimant reported an additional fall to Dr. Schwappach during a July 1, 2010 examination.

7. Dr. Gellrick noted during her physical examination that Claimant had multiple abrasions on his left lower extremity from falls due to his right leg weakness and that he had to walk close to walls to avoid falling. She also noted obvious right leg atrophy.

8. On May 5, 2011, Claimant saw Dr. Schwappach for a return examination. Claimant reported that he recently fell down some stairs when his right knee "gave way." Claimant underwent physical therapy and received an injection.

9. Claimant continued to receive maintenance care for his 2010 fall until December 7, 2011, when he experienced his second on-the-job slip and fall with injury to his low back and right hip. Dr. Aschberger noted Claimant was well known to him for persistent right hip pain, low back pain, and right quadriceps atrophy. Dr. Aschberger's January 5, 2012 records note that Claimant had decreased bulk in his right quadriceps.

10. Dr. Aschberger continued to treat Claimant for his December 2011 injury including injections into Claimant's hip and SI joint. Claimant failed to show significant gain from conservative treatment and was recommended to undergo total right hip replacement on May 21, 2013.

11. Claimant continued to note SI joint pain with radiating symptoms into his lower extremity with associated weakness and knee buckling during Dr. Aschberger' June 18, 2013 examination.

12. On April 24, 2014, Claimant noted difficulty ascending stairs and getting in and out of a car and reported needing to assist lifting his right leg with his hand.

13. On May 14, 2014, Dr. Perea examined Claimant noting another fall where Claimant tripped over a step and fell forward injuring his right side.

14. Dr. Schwappach eventually recommended Claimant undergo removal of an osteophyte that had formed around the site of Claimant's surgical plate as he believed it caused Claimant's continued weakness and pain complaints. The procedure was recommended to be approved via internal review. However, Claimant settled his claims prior to undergoing the surgery. Claimant stipulated that he had a 15% whole person impairment to his lumbar spine and a 40% extremity rating impairment to his right hip/leg.

15. On September 18, 2014, at Claimant's last noted workers' compensation appointment for his 2011 injury, he was diagnosed with chronic pain syndrome and his prescription for Lyrica was refilled.

16. On January 27, 2016, two months prior to the alleged date of injury for this claim, Claimant followed up with his primary care provider for chronic pain in his right hip and SI joint. Claimant used Lyrica and Tramadol for pain control.

17. On May 3, 2016, Dr. Danahey at Concentra examined Claimant for his April 29, 2016 fall. X-rays of Claimant's right hip, pelvis and lumbar spine were unremarkable for acute fracture or subluxation. Claimant was diagnosed with a contusion of his right hip, lumbar strain, and a contusion of his right elbow and shoulder. Dr. Danahey recommended Claimant undergo physical therapy and restricted Claimant's lifting to up to 10-pounds occasionally. Employer complied with this restriction and Claimant returned to work at full wages.

18. May 27, 2016, MRI results revealed minimal disc degenerative changes with minimal broad-based disc bulge, bilateral facet arthropathy, and mild epidural lipomatosis at L4-5, with similar findings at L5-S1.

19. On June 20, 2016, Claimant followed up with Dr. Aschberger complaining of pain in his right lower back with radiation of symptoms to the anterolateral thigh with occasional irritation into his foreleg and intermittent tingling into his toes. Dr. Aschberger noted residual weakness with hip flexion on the right.

20. On September 6, 2016, Claimant returned to Dr. Aschberger. Claimant reported a recent increase in pain after a session of dry-needling. Claimant had right-sided pain with facet loading at L4-5 and L5-S1. Dr. Aschberger noted continued findings of SI irritation and an increased amount of irritation with facet irritation. Dr. Aschberger referred Claimant to Dr. Zimmerman for medial branch blocks.

21. On September 29, 2016, Dr. Janssen completed a PA review of the medical branch block request. Dr. Janssen opined Claimant did not meet the criteria for a reassessment for additional injections within 6 months due to not receiving an 80% improvement from prior injections and a lack of objective radiographic findings. As such, Insurer denied the blocks.

22. On December 6, 2016, Dr. Basse completed a Respondents sponsored IME to address causation and whether Claimant had experienced an aggravation of his pre-existing condition. Dr. Basse noted longstanding moderate decreased muscle bulk in his right quadriceps, hamstrings, and gastrocsoleus complex with decreased muscle bulk in the right anterior tibialis and EHL with foot drop. She opined that whatever was causing the muscle atrophy was present prior to his 2010 injury as the distal weakness that was noted immediately after could not have been explained by his diagnosis at the time.

23. Dr. Basse testified that Claimant's distal weakness and right foot drop played a role in Claimants' many falls. She recommended Claimant undergo a complete neurologic examination outside of workers' compensation to locate any progressive or stable lesion that could be treated. Dr. Basse concluded that

whatever was causing Claimant's pain appeared to originate from before his 2010 injury and likely involved the sciatic and femoral nerves without radiculopathy as Claimant's gluteal muscles were not involved. She was unclear whether Claimant had suffered from a new or aggravating condition when he fell on April 29, 2016 as there were no anatomical findings to suggest a new or aggravating condition.

24. Dr. Basse testified via deposition on July 6, 2017. She credibly testified that she reviewed Claimant's medical history dating back to 2010 and opined that Claimant likely suffered from an undiagnosed and non-work-related condition. As support, Dr. Basse noted Claimant underwent extensive treatment to the same body parts and for the same pain complaints without improvement. Likewise, she opined that Claimant's muscle atrophy and weakness were not a result of a slip and fall because Claimant was noted to have atrophy immediately after his initial fall in 2010, and atrophy takes much longer to develop. Instead, she opined that Claimant's foot drop, muscle atrophy, and noted weakness were a likely factor in causing his numerous falls.

25. Dr. Basse also testified Claimant could be suffering from epidural lipomatosis which is a naturally progressing disease which can cause symptoms similar to that Claimant experienced. Dr. Basse noted MRI findings which supported this conclusion.

26. Claimant testified at hearing. Claimant downplayed the number of times he has fallen during the past several years. When first questioned he claimed to have only fallen three times. He testified that the knee buckling and weakness he reported on numerous occasions had only caused him to stumble but not fall to the ground. When confronted with medical records documenting multiple falls, Claimant admitted to falling numerous times due to the weakness in his right leg.

27. When confronted with his April 24, 2014 statement to Dr. Zimmerman that he had to physically assist his right leg when getting in and out of a vehicle, Claimant alleged it was due to his hernia and inguinal nerve issues. However, Claimant had already undergone surgery for both his hernia and inguinal nerve at the time he was required to assist with the movement of his right leg.

28. Claimant acknowledged settling his prior workers' compensation claims and that he did not get treatment, including the recommended surgery.

29. Claimant testified that he continued working full duty for the duration of his alleged 2016 injury and that he continued taking Lyrica at the level prescribed to him in 2010.

30. Claimant has not met his burden of proving by a preponderance of the evidence, that he sustained a compensable injury on April 29, 2016. Claimant has a substantial and documented history of prior falls due to significant weakness in his right leg. These numerous falls have resulted in repeated

complaints to the same body parts with little improvement despite a history of six years of conservative treatment, injections, and surgeries. The ALJ finds Claimant was predisposed to falling prior to the alleged April 29, 2016 fall.

31. The ALJ finds it unlikely Claimant was asymptomatic and without issue prior to the alleged April 29, 2016 fall. Despite Claimant's testimony that he had no issues with his low back or hip for almost two years prior to the alleged date of injury, Claimant has a 40% permanent impairment to his right lower extremity and a 15% whole person permanent impairment to his lumbar spine. Additionally, Claimant was recommended to undergo a third surgical procedure on his right hip. However, when he settled his claims, he did not pursue the recommended surgery. The ALJ finds it unlikely that Claimant's need for surgical intervention resolved without treatment. Rather, it is more likely that his condition continued to progress until the events on April 29, 2016.

32. Likewise, just two months prior to Claimant's alleged work-injury he complained of chronic hip and low back pain which he treated with Tramadol and Lyrica. As such, Claimant's testimony that he was asymptomatic prior to the alleged injury is not persuasive.

33. The more probable explanation for Claimant's fall on April 29, 2016, is that as Claimant shifted his weight onto his right leg, it buckled and gave out, as it had done in the past.

34. Even if Claimant caught his foot on a snowbrush which caused him to fall, Claimant failed to provide any persuasive evidence to support a conclusion that his pre-existing condition was aggravated as a result of an alleged fall.

- Claimant continues to work full duty at full wages.
- The mere presence of pain is not enough to convince this court of a new or aggravated condition.
- Claimant had the same pain complaints as in the past and he continued to take pain medication at the same levels he did prior to the alleged injury.
- Despite numerous treatment modalities, Claimant's condition has failed to improve for over six years and only "resolved" when Claimant accepted settlement and stopped treatment on his own.

These facts lend support to Dr. Basse's opinion that Claimant has an undiagnosed, untreated, and non-work-related condition that needs further evaluation outside of the workers' compensation system and that there simply was no objective evidence to support a new or aggravated injury.

35. As Claimant has failed to prove he suffered a compensable injury, his claim for medical benefits also fails.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

According to C.R.S. §8-43-201, "(a) Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *See also Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the Claimant to prove his entitlement to benefits by a preponderance of the evidence.").

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

In deciding whether the Claimant has met her burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Proof by a preponderance of the evidence requires Claimant to establish that the existence of a contested fact is more probable than its nonexistence. *See Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

A compensable injury is an injury which "arises out of" and "in the course of" employment. *See* C.R.S. §8-41-301(1)(b); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003).

The Claimant must prove a causal nexus between the claimed need for treatment and the work-related occupational disease or injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the industrial exposure caused the symptoms and consequent need for treatment, or that the industrial exposure aggravated or accelerated any pre-existing condition. Rather, the

occurrence of the symptoms may be the result of or natural progression of a pre-existing condition that is unrelated to the employment, or may be attributable to some intervening cause. *See Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); .*F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995).

Purely idiopathic or personal injuries are generally not compensable under the Act, unless an exception applies. *See Velasquez,* 41 Colo. App. at 202–03, 581 P.2d at 749; *see also Irwin*, 695 P.2d at 765. When it comes to idiopathic injuries, the "special hazard" doctrine represents an important exception to the general rule of non-compensability, under which an injury is compensable even if the most direct cause of that injury is a preexisting idiopathic disease or condition so long as a special employment hazard also contributed to the injury. *City of Brighton v. Rodriguez,* 318 P. 3d 496 (Colo. 2014). The ALJ finds no special employment hazard existed at the time of Claimant's fall which contributed to the injury.

The ALJ finds that Claimant did not suffer a compensable injury on April 29, 2016. Rather, Claimant's significant and documented right leg weakness is the more likely cause of Claimant's fall and Claimant failed to prove the existence of any special employment hazard which contributed to the injury.

Claimant bears the burden of proof of showing that medical benefits are causally related to his alleged work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007). Claimant is not entitled to medical care that is not causally related to his work-related injury or is not reasonable or necessary. Respondents do not "implicitly" admit for a disputed condition by paying for medical benefits. *Hays v. Hyper Shoppes*, W.C. No. 4-221-570 (ICAO April 13, 1999). The respondents remain free to contest the compensability of any particular treatment. *Id.* As noted in *Ashburn, supra,* "it has generally been held that payment of medical services is not in itself an admission of liability. This is based on the sound public policy that carriers should be allowed to make voluntary payments without running the risk of being held thereby to have made an irrevocable admission of liability."

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to establish by a preponderance of the evidence that he sustained a compensable injury on April 29, 2016.

2. As the claim is not compensable, Claimant's request for medical benefits is denied and dismissed.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 28, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable lung injury or an aggravation to an alleged pre-existing occupational asthma condition due to claimed repeated exposure to dust, mold, mouse waste and/or bugs as reported on October 28, 2016.

II. If Claimant established that she suffered a compensable injury to her lungs, whether she proved, by a preponderance of the evidence, that she is entitled to reasonable, necessary and related medical treatment to cure and relieve her of the effects of said injury.

III. If Claimant established that she suffered a compensable lung injury, whether she demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability benefits between January 20, 2017 and April 16, 2017.

IV. If Claimant established a compensable injury and if she demonstrated entitlement to temporary disability benefits, what was her average weekly wage at the time of her compensable injury.

Because the ALJ concludes that Claimant failed to establish that she suffered a compensable injury in the first instance or a compensable aggravation of a pre-existing condition, this order does not address issues II-IV.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long time employee of the Department of Corrections having been hired on July 1, 2006. She works as an Administrative Assistant.

2. As it pertains to the issue presented for determination, Claimant has a complicated prior medical history which includes treatment for gastroesophageal reflux disease (GERD), likely associated with a confirmed hiatal hernia and binge drinking. She also has a lengthy cigarette smoking history.

3. On or about January 1, 2010, Claimant was assigned to work at the Four Mile Correctional Center (FMCC) which is part of the larger Canon Minimal Correctional Complex. FMCC houses a fully operational dairy run by the inmates as part of their rehabilitation process.

4. While assigned to the FMCC, Claimant reportedly began to experience respiratory problems, including bouts of bronchitis, post nasal drip, cough and shortness of breath (SOB). Claimant attributed her symptoms to contamination of her workspace from dust and particulates from cow dung and bird droppings which were entering the building by way of the air duct system.

5. On September 18, 2012, Claimant was evaluated by Nurse Practitioner (NP), Lisa Clough who documented the following:

> Has a hx of bronchitis x2 this year. Works for the dept of corrections and has horrible air flow. Always has dust and cow poop blowing and birds droppings. Has been having issues with breathing only while at work. Weekends she is fine. Wants to be tested. Has tried to get a transfer but no one takes her serious. Wants further testing. Has SOB nad (sic) wheezing. Quit smoking in August.

6. Pulmonary Function Tests (PFTs), i.e. spirometry was ordered and completed during Claimant's September 18, 2012 appointment. A smoking history was included as part of the spirometry report. According to the report, Claimant was a smoker of 2 cigarettes per day for 10 years and had quit two years prior to her spirometry testing. According to the spirometry report, Claimant's risk for developing COPD (Chronic Obstructive Pulmonary Disease) was "very high." Claimant's spirometry testing result during her September 18, 2012 appointment was consistent with moderately severe obstruction and her lung age was documented as being greater than 84 years. Claimant was started on Symbicort and given a burst of Prednisone to see if her symptoms would abate.

7. Following her September 18, 2012, appointment Claimant filed a Department of Corrections First report of Injury on September 19, 2012, asserting an occupational disease to her lungs caused by prolonged exposure to dust, dirt and animal feces while working at FMCC. Investigation into Claimant's assertions of exposure to dust and other respiratory irritants was initiated by Employer and she was referred to Centura Centers for Occupational Medicine (CCOM) for evaluation.

8. Claimant was evaluated initially at CCOM on September 19, 2012 by NP Diane Alvies. NP Alvies documented that "almost immediately" with her employment at FMCC, Claimant began to experience "allergy-like symptoms [including] pruritic, watery eyes, cough productive of a yellow/brown mucus, wheezing, sore throat, and a sense of heaviness of her anterior chest." Claimant was noted to be an "off and on smoker", although she reported that she was not currently smoking. Physical examination revealed Claimant's lungs to be clear without dyspnea or wheezing. Work-relatedness was undetermined and Claimant was scheduled for follow-up.

9. Claimant was evaluated by Dr. Richard Nanes on October 4, 2012. She reported being "no better". Dr. Nanes noted that Claimant's lungs were "completely clear to ausculatation." He referred Claimant for evaluation by a pulmonologist.

10. On November 6, 2012, Claimant was evaluated by Dr. Janet R. Suarez of Colorado Pulmonary Associates. Dr. Suarez noted that Claimant was a 51 year old female with a "minimal past medical history in evaluation of cough and shortness of breath." Claimant's abnormal spirometry testing result from September 18, 2012 was noted along with a "normal" spirometry testing result from September 25, 2012. Additional spirometry testing was performed during Claimant's November 6, 2012 appointment which was interpreted by Dr. Suarez as being consistent with a "mild obstructive ventilator defect." A methacholine challenge to six (6) different levels of methacholine failed to demonstrate any evidence of airway hyperactivity. Dr. Suarez opined that Claimant's "history of variable obstruction and improved symptoms when away from work were suggestive of occupational asthma. Consequently, Dr. Suarez recommended environmental testing of the building where Claimant worked. She also recommended that Claimant have no further exposure to the environment suspected of causing her symptoms because "the prognosis in both hypersensitivity pneumonia and occupational asthma is much worse with ongoing exposure."

11. On December 12, 2012, an environmental survey of the building housing Claimant's workspace, as commissioned by Employer, was completed by A.G. Wassenaar, Inc. As part of this study, airborne samples were collected in certain parts of the building, including the air duct filters. Samples collected contained, among other things, fiberglass fibers and "very small amounts of fungus identified as *Cryptococcus neoformans, Chlamydophila psittaci,* and *Histoplasma capsulatum* organisms." Recommendations were made to remove the fiberglass insulation, clean the air duct system and remove the avian droppings from the roof.[1]

12. On December 18, 2012, Claimant presented to the offices of her gastroenterologist with complaints related to ongoing dyspepsia. During her examination, Claimant endorsed the following symptoms: chronic cough, shortness of breath, abdominal pain, and heartburn. It was noted that Claimant was drinking beer and wine four times a week, consuming 3-5 drinks and occasionally more than five drinks per occasion. Based upon the evidence presented, the ALJ finds that Claimant was likely consuming at least 12 beverages containing alcohol and probably more per week. Claimant was assessed as having ongoing dyspepsia in the setting of a hiatal hernia. She was encouraged to stop all alcohol and take a 20 mg dose of Prilosec once daily.

13. Claimant reportedly moved out of the FMCC administration building and into a temporary office in January 2013 while the cleaning and removal of bird droppings and fiberglass insulation were carried out per the recommendations set forth in the A.G. Wassenaar report.[2]

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[1] This information is contained in the records review section of a report authored by Dr. Clarence Henke in response to concerns that Claimant may have developed histoplasmosis while working for FMCC in 2012.

[2] This information is contained in Dr. Schwartz' independent medical examination (IME).

14. On February 15, 2013, Claimant returned to her gastroenterologist for a follow-up concerning her dyspepsia. During this encounter, Claimant reported continued "burping and reflux" indicating further that she would like consider a trial of stronger proton pump inhibitor (PPI) medication. Claimant also saw NP Clough at the Southern Colorado Clinic on February 15, 2013 with continued complaints of "some SOB and fatigue." Claimant reported the she wanted to quit smoking and requested another spirometry test. Based upon the content of NP Clough's February 15, 2013 medical report, the ALJ finds that Claimant, more probably than not, was actively smoking cigarettes.

15. On March 29, 2013, Claimant returned to NP Clough with continued complaints of wheezing and SOB "all the time." NP Clough noted that Claimant had been moved to a new work environment only one day before her appointment. Chest x-rays obtained during this appointment demonstrated Claimant's lungs to be clear. Claimant was referred to an allergist for additional testing.

16. On May 2, 2013, Claimant returned to Dr. Suarez for follow-up. Claimant reported additional occurrences of bronchitis between her visits. She also reported that her work site had changed in the three weeks preceding her appointment. Nonetheless, she described minimal improvement, but no worsening of her ongoing symptoms.[3] Physical examination revealed Claimant's respiratory effort to be normal without the presence of any wheezes, rales, rhonci or auditory stridor. Dr. Suarez opined that Claimant had a "very minimal smoking history to explain the degree of obstruction and abnormality on methacholine challenge."

17. As noted, the only methacholine challenge testing submitted was interpreted by Dr. Suarez as demonstrating "no significant change" in Claimant's FEV1 with administration of 6 increasing levels of methacholine. Nevertheless, Dr. Suarez would go on to write that Claimant had an "abnormal methacholine challenge suggesting at the very minimum reactive airways if not occupational asthma." Dr. Suarez would close her assessment with the following passage:

> Patient appears to have at the very least an allergy to these known exposures and still has not been ruled out for hypersensitivity. She has symptoms compatible with occupational asthma and has not received appropriate therapy for consistent amount of time.

18. Although NP Clough referred her for testing and Dr. Suarez suggests that at the "very least" Claimant has an allergy to dust, bird feathers and droppings, the record evidence submitted is devoid of any allergy testing results to support/confirm such suggestion.

19. Despite noting that Claimant's hypersensitivity to the offending substances

[3] According to Dr. Suarez's note, Claimant continued to have exposure to the FMCC 1-2 times per week while covering lunches or sickness relief for other staff.

had not been determined by the May 2, 2013 appointment, Dr. Suarez would diagnose Claimant as having occupational asthma during a follow-up appointment on June 6, 2013. During this visit Dr. Suarez notes the following history of present illness: "52 y/o female with work exposure to histoplasma and bird dropping who appears to have developed reactive airway disease with abnormal methacholine challenge." Based upon the evidence presented, no additional spirometry or methacholine testing was done between May 2, 2013 and June 6, 2013.

20. The ALJ finds Dr. Suarez' opinions inconsistent, confusing and unpursuasive. On one hand, she interprets the only methacholine challenge testing performed as causing no significant change in Claimant's FEV1 despite exposure to six different levels of methacholine. Yet, on Claimant's May 2, 2013 visit she concludes that this testing is "abnormal." She also indicates that the results of Claimant's methacholine challenge testing suggest that Claimant has, at a minimum, reactive airways if not occupational asthma despite the fact that she determined that there was no significant change in Claimant's FEV1 to increasing levels of methacholine. Finally she opined that Claimant had at the very least an allergy to the substances to which she had been exposed without the benefit of allergy testing results.

21. A May 9, 2013, CT scan of the chest, as recommended by Dr. Suarez, failed to demonstrate any evidence of interstitial lung disease (ILD) or hypersensitivity pneumonia.[4]

22. On June 4, 2013, Claimant was seen in follow-up Dr. Dr. Nanes. Dr. Nanes documented that Claimant had presented to the clinic for manifested symptoms she reported after the air conditioning to the building where she was working was turned on. According to the report from this date of visit, Claimant reported that she developed chest tightness, coughing and a feeling that her throat was closing along with tingling of her lips. Claimant was noted to be anxious, but her lungs were clear and her heart rate and rhythm were "regular." Dr. Nanes opined that Claimant likely had a panic attack rather than an asthma attack. Dr. Suarez disagreed opining that Claimant may have vocal cord dysfunction leading Dr. Nanes to refer Claimant to an ear, nose and throat (ENT) specialist following a follow-up appointment with him on June 20, 2013.

23. Claimant was evaluated ENT Dr. Catherine Considine on July 18, 2013. Dr. Considine anesthetized Claimant's nose and examined her nasopharynx with a flexible scope. Examination revealed "erythema and inflammation" consistent with GERD which was likely related to increased stress.

24. On August 30, 2013, Claimant returned to Dr. Suarez who noted that she had been seen by Dr. Considine and was found to have erythema and inflammation consistent with reflux. Consequently, Dr. Suarez explained how "reflux disease [could] impact both [Claimant's] voice/vocal cords and breathing or coughing."

25. Based upon the totality of the evidence presented, the ALJ finds Dr. Nanes'

[4] See the June 6, 2013 report of Dr. Suarez.

opinion that Claimant's June 4, 2013 symptoms were indicative of a panic attack and not an asthma attack more persuasive than the contrary opinions that Claimant may be experiencing vocal cord dysfunction caused by asthma as espoused by Dr. Suarez.

26. On October 1, 2013, Claimant was seen in follow-up by Dr. Nanes. Dr. Nanes noted that Claimant had been working at "another facility and [was] still having asthma attacks." Consequently, Dr. Nanes recommended an independent medical examination (IME) noting that "[i]t is truly undetermined if the patient does have occupational asthma." Dr. Nanes released Claimant to "return to her original correctional facility to work."

27. Consistent with Dr. Nanes' release, Claimant returned to the site of her exposure sometime in early October 2013. On October 9, 2013, Claimant presented to CCOM for an "unscheduled" appointment at which time she reported that she had returned to work at FMCC and within 20 minutes "started coughing and developing a deep raspy voice."[5] Claimant was seen by Physician Assistant (PA), Thomas Shepard who discussed the situation with her. Claimant wanted her present condition noted for the record. Claimant also noted that she did not want a return visit scheduled with Dr. Nanes and wished to clear up an error in her record about her smoking history. According to Claimant, she was not an "excessive heavy smoker" as suggested in her medical records. Rather, she reportedly smoked "less than a pack of cigarettes in three weeks."

28. Claimant was evaluated by Dr. Anthony Khalifah in an IME setting, as recommended by Dr. Nanes, on October 28, 2013. Dr. Khalifah noted that Claimant was diagnosed with asthma by Dr. Suarez after a "positive methacholine challenge test on review of her records as well as evidence of airflow obstruction on pulmonary function testing." Dr. Khalifah did not repeat any testing and admittedly did not have "full results from Dr. Suarez's office", yet he felt confident that his differential was "identical" to hers. Consequently, he opined that Claimant had active occupational asthma and recommended that Claimant be "assigned to a different work area."

29. Claimant was reevaluated by Dr. Suarez on November 15, 2013. During this appointment, Claimant reported that she developed chest tightness and SOB with cough within 20 minutes of her return to the FMCC building in October. Repeat spirometry testing was completed and the results were interpreted as "normal."

30. On December 10, 2013, Claimant was placed at maximum medical improvement (MMI) by Dr. Nanes. Confusion regarding permanent impairment would ensue based upon the way Dr. Nanes completed Claimant's MMI report. On March 20, 2014, Dr. Nanes clarified that Claimant did not have any permanent impairment as a consequence of her diagnosed asthma. Specifically, he noted that Claimant had a "very well controlled condition and her most recent spirometry studies are within normal range and therefore she would have a 0% rating."

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[5] Claimant would later report to Dr. Schwartz that she SOB, itching in her throat and chest pressure within a day of her return to FMCC, See the IME report of Dr. Schwartz dated May25, 2017.

31. Claimant was moved to the Time Comp Unit facility, away from FMCC from January to March 2014. During this time, Claimant was seated next to a room where old inmate files were being shredded. These files were being broken down, scanned and shredded on a full-time basis at the time. Claimant admitted, during her hearing testimony, that she did not know that old files were being broken down and shredded during this time frame. Claimant had no respiratory complaints during her temporary stint at Time Comp. Around April, Claimant was transferred to the Territorial Correctional Facility away from FMCC.

32. On May 9, 2014, Claimant reported to Dr. Suarez that she needed to use a rescue inhaler and had severe bronchospasm when exposed to triggers such as perfumes and dust. Claimant also reported increased symptoms, including labored breathing and voice changes, after returning to FMCC for a training session.

33. On August 15, 2014, Dr. Suarez noted that Claimant was doing quite well. According to Dr. Suarez, Claimant's symptoms had been "well" controlled with low dose Symbicort for several months. Claimant did not report any symptoms during this appointment and had only used her albuterol medication two times since her last visit.

34. On October 2, 2014, Dr. Clarence Henke completed a records review at the request of Respondents. He did no spirometry or methacholine challenge testing. Following review of the available records, Dr. Henke opined that Claimant had the following diagnoses pertinent to the issues for resolution:

- Chronic asthma caused by long standing history of tobacco use, requiring a long history of pulmonary inhalant medications.

- Onset of occupational asthma conditions in 2010 caused by environmental contaminants in the previous dairy office where she worked for approximately one year. No definite diagnosis of histoplasmosis was made.

- Hiatal hernia with gastroesophageal reflux.

- History of alcohol abuse.

35. Dr. Henke would opine that Claimant suffered an "acute episode of occupational asthma caused by environmental contaminants" as identified by the environmental survey completed by A.G. Wassenaar, while working at FMCC. He also opined that Claimant reached MMI on December 10, 2013 without permanent impairment and that she needed "no specific maintenance medical treatment related to the 2012 occupational asthma condition.

36. On December 11, 2014, Claimant returned to her gastroenterologist for

"clarification" of her medical history due to her "[involvement] in a workplace dispute, due to environmental exposures." According to the report from this date of visit, Claimant's medical records were reviewed and an "incorrect" conclusion had been reached based upon interpretation of the data contained in the records. The report does not mention the subject matter of the records review, what data was reviewed and why any conclusions reached were incorrect. An additional reason for the visit included a recheck of Claimant's dyspepsia. Regarding her GERD, the record notes that Claimant had "resolution of symptoms following dietary modifications and lifestyle changes." Claimant was not taking any medication for her reflux disease.

37. Upon careful inspection of the medical records admitted into evidence, the ALJ finds a paucity of reports to suggest that Claimant sought treatment for either her GERD or asthma like symptoms during 2015.

38. Claimant returned to and began working full time in Time Comp Unit in January 2016. As found at paragraph 30 above, old inmate files were being broken down, scanned and shredded at the Time Comp Unit facility when Claimant was temporarily placed there in 2014. Nonetheless, Claimant had no respiratory complaints at that time. Claimant attributed her lack of symptoms to an unproven belief that any files being shredded were not those stored on the semi-trailers which she asserts exposed her to allergens aggravating her occupational asthma.

39. Claimant testified that she began to notice recurrent respiratory problems around the end of March 2016, when the Time Comp Unit began to take old inmate files off the storage trailers for breakdown and shredding.

40. On April 18, 2016, Claimant returned to NP Clough. During this appointment, Claimant reported "struggling with lumbar back pain" without radicular symptoms but which hurt when Claimant went from sitting to standing. No reports of asthma like symptoms were endorsed by Claimant. A review of systems was completed during which Claimant denied chest pain/discomfort, denied cough and denied SOB. Physical examination revealed her lungs to be "clear bilaterally to auscultation."

41. On May 12, 2016, Claimant returned to NP Clough for follow-up concerning her laboratory panel and for right elbow pain. Claimant complained of periodic zapping chest pain but did not report asthma like symptoms, including SOB or coughing. In addition to zapping chest pain, Claimant was reportedly drinking "a lot of beer." It was also documented that Claimant was smoking. Physical examination revealed clear lungs bilaterally. A 12 lead ECG was interpreted as being normal.

42. On May 17, 2016, Claimant reported that dust associated with the work being done with the old files was exacerbating her preexisting occupational asthma.

43. On May 18, 2016, NP Clough completed paperwork that excused Claimant

from having to tear down and shred old files "due to dust particles that can exacerbate her asthma." Claimant was also excused from scanning old files for what the ALJ finds was the same reason.

44. On May 24, 2016, Claimant presented to CCOM complaining of asthma-like symptoms related to the work on the old files at Time Comp. She was evaluated by PA Steven Quakenbush. Claimant reported that she developed wheezing while shredding dusty old files on May 17, 2016. Shredding new files did not cause similar symptoms. Claimant reported being diagnosed with occupational asthma in 2011. Physical examination was unremarkable. PA Quakenbush determined that there was a "51% chance that [Claimant's] self stated exacerbation of wheezing could have been caused by a number of environmental allergens including those outside the workplace. Consequently, he concluded that Claimant's "problem [did] not appear to be related to work activities."

45. On July 5, 2016, Claimant was offered a transfer to another facility but declined citing the added commute associated with accepting the position.

46. Following a long hiatus, Claimant was reevaluated for right upper quadrant (RUQ) pain and dyspepsia by the PA in her gastroenterologist's office on August 5, 2016. It was noted that Claimant reported a 6 month history of RUQ pain after eating. Although Claimant's dyspepsia was noted to be a long term problem, her symptoms had resolved after dietary modifications and lifestyle changes. Claimant reported taking Omeprazole on an as needed (PRN) basis. On this date of visit, Claimant's reported intake of caffeinated beverages, including coffee, tea and soft drinks was documented at 5-6 times a day. Additionally, Claimant was reportedly smoking ¾ of a pack of cigarettes per day and drinking significant amounts of alcohol.[6] Claimant was encouraged to continue dietary and lifestyle modifications, including moderation of her alcohol intake, and instructed to start taking 20 mg of Omeprazole daily for 4-6 weeks.

47. Based upon the evidence presented, the ALJ finds the record concerning Claimant's smoking history confusing. Review of the available records contain indications that Claimant reported that she quit smoking in 2010, while other records after 2010 indicate Claimant to be a "social" smoker. Moreover, some medical records indicate that Claimant quit smoking in 2013, while other records during this period indicate that Claimant "wanted" to quit in 2013 and that she was a current every day smoker as of June 27, 2013. Still other records indicate that Claimant quit smoking in 2014. Records from 2016 indicate that Claimant was a current smoker. At hearing Claimant testified that she began smoking when she was 15 and stopped when she was 26. She testified that she relapsed and began smoking again in 2008. Between 2008 and 2010, Claimant testified that she would smoke 1 cigarette per day. After 2010 Claimant testified that she would smoke an occasional cigarette and after 2015 she quit smoking altogether. Based upon the evidence presented, the ALJ finds Claimant's assertion that she has not smoked after 2015 dubious.

[6] Per the report from this date of visit, Claimant was drinking 1-2 beers 7 times a week and occasionally more than 5 alcoholic drinks per sitting.

48. Based upon the totality of the evidence presented, including the opinions of Dr. Schwartz, the ALJ finds that Claimant's increased use of caffeine and alcohol probably aggravated her pre-existing GERD/dyspepsia causing associated reflux type symptoms.

49. On August 18, 2016, Claimant treated with her primary care provider for anxiety and depression.

50. On September 19, 2016, Claimant was offered another transfer to a different work site but declined due to personal reasons, including what she testified was a conflict with another person who worked in that facility.

51. On September 23, 2016, Claimant was seen in follow-up by the PA in her gastroenterologist's office. A review of systems reveals that Claimant had ongoing complaints of "abdominal pain and heartburn."

52. On October 13, 2016, Claimant presented to the Southern Colorado Clinic (SCC) where she was evaluated by Dr. Scott DeRutter. Dr. DeRutter noted that Claimant presented with complaints of fever and dry cough of five days duration. Claimant denied SOB, nausea and vomiting. Physical examination revealed Claimant's lungs to be clear bilaterally. She had no respiratory distress. Nonetheless, she was assessed as having acute asthmatic bronchitis.

53. Five days later, on October 18, 2016, Claimant returned to the SCC where she was evaluated for a chief complaint of coughing. Claimant reported that she was not sleeping and had a "terrible cough" along with a sore throat and wheezing. Physical examination revealed wheezing and rhonci in the right and left lung. Claimant was provided with medication and instructed to return to the clinic for worsening symptoms or if her symptoms persisted for greater than 3-5 days.

54. On October 28, 2016, Claimant completed a First Report of Injury asserting that "old files from semi trailers [were] being torn down and scanned approximately 15-30 feet from [her] and the dust and mouse (waste) [was] affecting [her] breathing." According to Claimant's first report, she "had occupational asthma since 2012 from working at the FMCC dairy." Claimant also completed paperwork requested by Broadspire, Respondent Employers third party claims administrator, regarding the incident purportedly causing her symptoms. In that paperwork, Claimant noted the following: "Time release is tearing down/scanning/shredding old inmate files that have been stored in semi-trailers at the downtown warehouse for 15+ years that are dirty, dusty, buggy and full of mice and mice droppings. This takes place approx. 10-20 from my desk and has triggered (several) asthma attacks."

55. Claimant also presented to the Emergency Department at St. Thomas More Hospital on October 28, 2016. She reported chest tightness and difficulty breathing. Physical examination revealed no wheezing or retractions; however, Claimant

demonstrated tight breath sounds in all bases. A differential diagnosis was considered for bronchitis and exacerbation of asthma reactive airway disease. Chest x-rays revealed a normal heart size and pulmonary vascularity and clear lungs leading to an impression that Claimant had no acute findings. The overall impression reached in the emergency room was simply that Claimant had difficulty breathing. The record is devoid of an actual diagnosis of asthma, occupational asthma or asthmatic bronchitis. Claimant was provided steroids and instructed to follow-up with "workman's comp."

56. Three days later, Claimant returned to CCOM in follow-up. In the October 31, 2016 report, it is noted that Claimant presented for complaints of SOB, tightness in her chest and coughing she attributed to her exposure to dust and mouse waste while breaking down old files on October 28, 2016. Claimant reported that around 11:30 am on October 28, 2016, she began wheezing at work from dust that goes "everywhere" while old files are broken down. After taking a history and completing a physical examination, PA Quakenbush stated that a causal link between Claimant's symptoms and her workplace was not known.

57. On November 8, 2016, Claimant returned to CCOM where she was evaluated by PA Quakenbush for continued complaints that dust from old files was affecting her breathing. Physical examination failed to reveal labored breathing, rales, wheezes or rhonci. Claimant was returned to unrestricted duty and instructed to follow-up with Dr. Olson on November 9, 2016.

58. Clamant returned to CCOM on November 9, 2016 where she was evaluated by Dr. Olson. During this evaluation Claimant reported continued coughing "particularly at night." Physical examination revealed stable vital signs and no evidence of respiratory distress. She was assessed as having unspecified asthma and returned to work without restriction.

59. On December 5, 2016, Claimant's workers compensation claim was denied as evidenced by a Notice of Contest (NOC). The NOC indicates that Claimant's illness is not work related.

60. On January 26, 2017, NP Clough indicated that Claimant needed to be placed approximately 40 feet from the shredder being used to shred old files to "avoid inhalation of dust." In the alternative Claimant could be moved to a different room to avoid "asthma triggers." NP Clough also excused Claimant from tearing down, scanning and shredding old files."

61. On May 8, 2017, A.G. Wassenaar, Inc. performed an industrial hygiene test at the Time Comp Unit where the old files forming the basis for the instant claim were being broken down, scanned and shredded. The test was performed with more employees than normal breaking down and scanning the old files. Samples were taken directly from the desk of an employee in the process of breaking down and scanning old files. Samples were also taken adjacent to the paper shredder. Testing results revealed the following: No mouse (MUS m 1) allergen associated with mouse urine

above the limit of detection for the sampling and analytical method used for testing was detected. Similarly, no fungal spores associated with *Stachybotrys* (toxic black mold), *Penicillium/Aspergillus* or *Chaetomium* were identified in the indoor samples collected. Moreover, the mold spores collected in the indoors samples were "consistent with the normal outdoor populations for Colorado and were similar to the mold genera identified on the outdoor comparison sample collected during the sampling event." Accordingly, the industrial hygiene report notes: "Based upon the results of the air samples collected, it does not appear that mold growth was significantly impacting the indoor air quality within the office or paper shredder areas." To the contrary, the report indicates that because the mold spores measured in the indoor samples were "low"; the fungal spores detected within the building probably "originated from [being pulled in from] (entrainment) the outdoor air." Finally, the indoor air samples collected contained detectable levels of skin cells and cellulose (paper) fibers which the industrial hygienist attributed to the high activity and number of people breaking down and shredding old files.

62. On May 25, 2017, Claimant was evaluated by Dr. Jeffrey Schwartz, M.D. at the request of Respondents. Dr. Schwartz is a board-certified pulmonologist. He completed a three-year fellowship in pulmonary medicine and is a fellow of the American College of Chest Physicians. Dr. Schwartz currently serves as the Director of Respiratory Therapy at Presbyterian/St. Luke's Medical Center in Denver and has been practicing pulmonary medicine for 35 years. The ALJ finds Dr. Schwartz to be an expert in the field of pulmonary medicine, including asthma and occupationally induced asthma.

63. As part of his IME, Dr. Schwartz obtained a medical history, reviewed records and completed a physical examination. Dr. Schwartz also performed a spirometry test that showed no evidence of airflow obstruction.

64. Upon completion of his IME, Dr. Schwartz concluded that Dr. Suarez' 2012 Occupational asthma diagnosis was in error as the Claimant had no objective evidence of occupational asthma, nor, in fact, asthma of any etiology. In support of his opinion, Dr. Schwartz noted that the symptoms of asthma (intermittent cough, wheezing, chest tightness, and shortness of breath) are not specific to asthma, hence a formal diagnosis of "asthma" requires substantiation of reversible airflow obstruction as demonstrated on pre- and post-bronchodilator spirometry testing where a patient's post-bronchodilator FEV1 increases by at least 12% compared to the pre-dilator FEV1 or as a "gold standard" to establish the presence of airway hyperactivity when a methacholine test is administered and the patients FEV1 falls more than 20% when subjected to a methacholine dose of at least < 8 mg/ml and more typically at a dosage of < 4 mg/ml. According to Dr. Schwartz, Claimant's medical records did not include evidence that pre and post bronchodilator spirometry testing was performed and Claimant's methacholine test (MCT) was negative for airway hyper-reactivity as Claimant's FEV1 never decreased 20% at any dosage of methacholine even when she was subjected to as much 25 mg/ml of methacholine, the maximum dosage allowable. Nonetheless, Dr. Suarez, as noted at paragraph 18 above, would opine that Claimant had a positive

methacholine test which clearly appears to have had an effect on the opinions of Dr. Khalifah and later Dr. Henke leading them to adopt her occupational asthma diagnosis.

65. Dr. Schwartz noted that occupational asthma (OA) is defined as "asthma due to conditions attributable to work exposures and not to causes outside of work. According to Dr. Schwartz, OA is caused by one of two mechanisms. First when there is a "high-level of exposure to a gas, smoke, fume, or vapor with irritant properties, producing acute damage to the lower airways of the lungs that produces the syndrome referred to as reactive airways dysfunction syndrome (RADS) and second, when there has been "exposure to a 'specific workplace sensitizer, defined as an agent that induces asthma through a mechanism that is associated with a specific immunologic response.'"

66. According to Dr. Schwartz, the presence of objective evidence connecting suspected asthma to the workplace is critical to making a diagnosis of OA. Objective causal evidence is important to making the diagnosis of OA because a patient's perception of occupational exposure is often incorrect and that a compatible history from the patient is insufficient for diagnosis and has a low positive-predictive value.[7] Dr. Schwartz notes in his IME report that Claimant "never suffered a high-level exposure to a potential respiratory irritant and she was never shown to be sensitized (allergic) to any agent in her various workplaces." The ALJ finds these conclusions supported by the evidentiary record.

67. Based upon the evidence submitted to him, the ALJ finds that Dr. Schwartz found the medical record lacking the necessary objective evidence to establish that a workplace exposure aggravated Claimant's asserted asthma. To the contrary, Dr. Schwartz notes that outside of subjective complaints the medical reports are devoid of any objective evidence, e.g. spirometry before and after work or peak flow monitoring which demonstrates that Claimant had airflow obstruction that occurred as a result of her workplace environment. Rather, the record, according to Dr. Schwartz, supports that when Claimant was evaluated on numerous occasions for purported acute symptoms associated with alleged workplace exacerbations, she never presented with the "labored breathing, tachypnea, or wheezing characteristic of an acute asthma attack. For these reasons and because the methacholine challenge test was negative, Dr. Schwartz concluded that Dr. Suarez "misdiagnosed" Claimant with OA.

68. Dr. Schwartz concluded that the source of the Claimant's non-specific respiratory complaints, were unknown, but were possibly related to her underlying "severe" GERD. As support for this opinion, Dr. Schwartz cites to another independent

[7] In support of his opinion, Dr. Schwartz cites to a respiratory disease journal articles. See generally Exhibit C and D attached to the Deposition of Dr. Schwartz. These studies include findings suggesting that people with occupational asthma and people without occupational asthma had an equal chance of feeling better away from the workplace as compared to the workplace as a whole. Consequently, making the diagnosis of OA on history alone is unreliable.

study noting that GERD symptoms, are known to mimic asthma symptoms, particularly nocturnal coughing as reported by Claimant.[8]

69. On June 14, 2017, the parties took the evidentiary deposition of Dr. Schwartz. Dr. Schwartz testified that the majority of asthma sufferers don't know the cause of their condition and that allergy testing is a common way to determine the cause of a particular patient's suspected asthma. He referred to asthma caused by something in the outside environment as extrinsic asthma. He also testified that hereditary factors can cause asthma in connection with, and independent of, extrinsic factors.

70. Dr. Schwartz testified that Claimant's asthma like symptom complex is complicated by the fact that she has suffered from bronchitis and has GERD, both of which cause symptoms similar to asthma. Dr. Schwartz also testified that contemporaneous cigarette smoking would be a more likely cause of the Claimant's complaints and symptoms than any workplace exposure. He also testified that psychological factors could be the cause of the Claimant's subjective complaints, and that anxiety, in particular can cause asthma-like symptoms. Consequently, Dr. Schwartz reiterated his opinion that to make a diagnosis of asthma, it is necessary to objectively demonstrate that there's reversible airway obstruction by either having pre and post bronchodilator spirometry performed or administering a methacholine challenge test. In the case of Claimant, Dr. Schwartz noted that pre and post bronchodilator spirometry testing was not done and he testified further that Claimant's methacholine challenge test was negative. Accordingly, Dr. Schwartz restated his opinion that Claimant has not been proven to have asthma and that Dr. Suarez incorrectly diagnosed her with the same.

71. As it relates to Claimant's current claim asserting exposure to contaminants that caused an allergic and or asthma-like condition, Dr. Schwartz testified: "People aren't allergic to dead skin cells or paper dust. So finding that in an office environment would not at all be unusual, and it wouldn't be deemed contamination." Dr. Schwartz went on to testify that in 35 years of practicing pulmonary and internal medicine, he had never seen an allergy to paper dust or dead skin cells. Regardless, the record evidence is devoid of any testing establishing that Claimant has an allergy to either dead skin cells or paper dust.

72. As noted at ¶ 69, Dr. Schwartz testified that bronchitis can cause asthma-like symptoms. As it relates to her reports of exposure to workplace allergens and her frequent bouts of bronchitis, Dr. Schwartz testified that there is nothing present in the Claimant's workplace that would make her more susceptible to bronchitis.

73. Regarding Claimant's GERD, Dr. Schwartz testified: "And so if she has significant reflux disease, which is not always apparent to the patient, then that is a common cause of asthma-like symptoms that fool the patient and fool doctors many

[8] See page 10 of Dr. Schwartz' IME report, citing Porsbjerg C and Menzies-Gow A. Co-morbidities in severe asthma: Clinical impact and management. Respirology 2017; 22:651-661.

times." GERD attacks are randomly occurring, often without the patient knowing, and can be exacerbated by alcohol and caffeine.

74. Dr. Schwartz testified that the Claimant's presentation to the emergency room on the alleged date of injury was consistent with an episode of GERD as well as the aftermath of smoking.

75. Claimant testified that she had good days and bad days with regard to her respiratory complaints while working at Time Comp, meaning that on some days she had no breathing problems and went about her job without problem. She was unable to predict when she would have good or bad days.

76. Claimant testified that irritants encountered outside of the workplace can cause her to have asthma-like symptoms. According to Claimant, perfumes, household sprays, smoke, dirt, and dust can all trigger her to have the aforementioned symptoms. Consequently, Claimant testified that she will often stay home in order to avoid potential exposure to these irritants.

77. Claimant testified that she has not taken her GERD medication regularly, i.e. daily in many years; however, she keeps it on hand in case she needs it to treat symptoms caused by her hiatal hernia. The ALJ infers from this testimony that Claimant still has symptoms which she associates with her GERD/dyspepsia and hiatal hernia.

78. The Claimant testified that her symptoms have largely resolved since Time Comp moved to a different location over Memorial Day 2017. This improvement is in spite of the old files now being shredded in the same room where she currently works as opposed to a separate room across the hall in the former Time Comp location. Claimant attributes her improvement despite the closer proximity to the shredder to being in a larger work area room with vaulted ceilings and better airflow.

79. Mary Carlson, the Administrator of the Time and Release Operations for the Department of Corrections testified that in 2014, during Claimant's temporary assignment in the Time Comp Unit, old files were being brought in from the storage semi trailers at the facility for breakdown, scanning and shredding. She also testified that outside Claimant's claim, there have been no other claims for respiratory conditions out of the Time Comp Unit office.

80. Diana Bergeman, Claimant's current acting supervisor testified that when Claimant began working as a permanent employee of the Time Comp Unit in January 2016, the scanning and shredding project associated with old inmate files was ongoing. She testified that on average 2-3 transitional modified duty employees were breaking down old files during an eight hour shift.

81. Ms. Bergeman testified that she broke down, scanned and shredded old files for a 5-6 month time period before transitioning to managerial duties and that she currently breaks down and shreds old files on an occasional basis. She also reiterated

that no one other than Claimant has filed a claim for "respiratory-based" conditions arising from work in the Time Comp Unit.

82. Ms. Bergeman testified that she is asthmatic. She testified that she has never had an exacerbation of her asthma while working in the Time Comp Unit.

83. Claimant testified on rebuttal that she did not tear down old files during her temporary assignment with the Time Comp Unit in 2014. She also testified that when she returned to the Time Comp Unit in 2016, she had no involvement in tearing down, shredding and scanning old files for the months of January, February and most of March. At the end of March 2016, Claimant testified that she was placed on the schedule to participate in the breakdown of old files in order to expedite the project. According to Claimant that is when she began having trouble with her lungs.

84. The ALJ finds the opinions expressed by Dr. Schwartz to be credible, persuasive and supported by the evidence presented, including the medical records as well as the articles cited and submitted as part of his deposition. The contrary opinions of Claimant, Dr. Suarez, Dr. Henke and Dr. Khalifah regarding Claimant's diagnosis of OA are less persuasive when the evidence presented in considered in its totality. While the ALJ credits the opinions of Dr. Schwartz regarding whether Claimant was properly diagnosed with OA, the issue presented for determination is whether Claimant has proven that her OA, assuming she was properly diagnosed with the same, was aggravated by breaking down, scanning and shredding inmate files.

85. Based upon the evidence presented as a whole, the ALJ finds that Claimant has failed to establish that she suffered a compensable injury or aggravation of an alleged pre-existing occupational asthma due to repeated exposure to dust, mold, mouse waste and/or bugs as she alleged on October 28, 2016. Consequently, the issues of medical benefits, average weekly wage (AWW) and temporary disability benefits need not be addressed.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact,

after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Schwartz are supported by the medical record and the available medical literature. Accordingly, the ALJ concludes that his opinions are credible and convincing. When the evidentiary record is considered in its totality, the opinions of Dr. Schwartz are more persuasive than the contrary opinions of Drs. Suarez, Henke, Khalifah and Claimant.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. Under the Workers' Compensation Act, an injured employee is entitled to compensation where his/her medical condition is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of "and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus,

an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here there is little question that Claimant produced sufficient evidence to support a conclusion that her symptoms occurred in the scope of employment. Rather, the question for determination here is whether Claimant's alleged asthma or aggravation thereto arises out of her employment.

E. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). Proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained his burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). In this claim, Claimant alleges that she suffered a compensable injury or an aggravation of an alleged pre-existing occupational asthma due to repeated exposure to dust, mold, mouse waste and/or bugs as alleged on October 28, 2016 while breaking down, scanning and shredding old inmate files. According to Claimant, these repeated activities lead to SOB, wheezing, chest tightness and coughing resulting in the need for medical treatment. Based upon the evidence presented, the ALJ concludes that Claimant's claims are rooted in the legal principals surrounding the manifestation of an occupational disease.

G. Section 8-40-201(14), C.R.S. defines "occupational disease" as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as

> a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

H. This section imposes additional proof requirements beyond that required for an accidental injury. An occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of the work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). On the other hand, an accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). An occupational disease arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo. App. 1997). Under the statutory definition, the hazardous conditions of employment need not be the sole cause of the disease. To the contrary, a claimant is entitled to recovery if he/she demonstrates that the hazards of employment cause, intensify, or aggravate, to some reasonable degree, the disability. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). In this case, Claimant asserts that she has pre-existing OA as a consequence of exposure to dust, bird feathers and droppings as well as cow dung at FMCC, which she asserts was triggered by repeated exposure to pulmonary irritants (mold, dust, mouse waste and bugs) while working in the Time Comp Unit. According to Claimant, her repeated exposures at the Time Comp Unit caused "asthma attacks" characterized by SOB, chest tightness, wheezing and coughing. Claimant asserts that these "attacks" are compensable because they are fairly traced to the employment as a proximate cause, and they do not come from a hazard to which Claimant was equally exposed outside of the employment. Simply put, Claimant asserts that the conditions under which her work was preformed caused, aggravated, accelerated, and/or combined with her pre-existing OA giving rise to her symptoms, her need for medical treatment and produce the disability for which benefits are sought. Based upon the totality of the evidence presented, the ALJ is not persuaded.

I. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work or the fact that Claimant may have experienced an onset of symptoms while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. As found here, the totality of the evidence presented, including the medical records and the testimony of Dr. Schwartz establishes that the presence of objective data connecting Claimant's alleged asthma to her workplace is lacking. Specifically, the

necessary testing (pre and post bronchodilator spirometry) to aid in reaching a diagnosis of asthma was not done. Furthermore, Claimant's methacholine challenge test failed to demonstrate changes in Claimant's FEV1 to support Dr. Suarez' conclusion that Claimant has asthma. Finally, there are no results from allergy testing to substantiate that Claimant was shown to be sensitized to any irritant in her various workplaces to support a conclusion that she suffers from occupationally induced asthma. Importantly, the only matter found in the air in the Time Comp Unit but not in the outside environment were dead skin cells and paper dust. The presence of these particulates is expected in any human dwelling and did not exceed normal levels. Crediting the opinions of Dr. Schwartz, the ALJ finds/concludes that dead skin cells and paper dust are not allergens and are not considered contaminants. The presence of these particulates, more probably than not, did not cause of aggravate Claimant's asserted asthma. Indeed, there are other more likely non-industrial explanations for Claimant's non-specific respiratory complaints. It is reported that her mother has asthma. Consequently, she probably has a genetic predisposition to respiratory illness. Furthermore, she has a significant smoking history leading the interpreter of Claimant's initial spirometry to indicate that her risk for developing COPD (Chronic Obstructive Pulmonary Disease) was "very high" and noting her lung age to be greater than 84 years. Claimant was also suffering from anxiety and depression on or around the date of alleged injury and has severe GERD which was likely exacerbated by her caffeine and substantial alcohol consumption as referenced in her medical record on May 12, 2016. Both GERD and anxiety/depression are known to cause symptoms that mimic asthma. Accordingly, the ALJ is not persuaded that Claimant actually suffers from OA or that it was aggravated by her work with old inmate files in the Time Comp Unit.

J. In support of her claims, Claimant argues that there is a temporal connection between her symptoms and her presence at work to establish causation in this matter. However, as explained by a Panel of the Industrial Claims Appeals Office in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), a coincidental correlation between a claimant's work and his symptoms does not mean there is a causal connection between a claimant's injury and his/her work. To the contrary, as noted by the Panel in *Scully* "correlation is not causation." Crediting the opinion of Dr. Schwartz, that objective causal evidence is important to making the diagnosis of OA, the ALJ concludes that Claimant's subjective perception of occupational exposure is unreliable, probably incorrect and fails to establish the request causal connection to establish that she suffered a compensable injury. In this case, Claimant worked in Time Comp for approximately six months while the old files were being broken down without any complaint, with three of these months spent stationed next to the shredder being used to destroy the old files. Since her first complaint of workplace symptomology in March 2016, the Claimant continues to have days at work without breathing problems or respiratory symptoms. She cannot predict when she will have a good day or a bad day despite the old files being broken down consistently on a full-time basis. Time Comp has recently moved to a new location where the shredder being used for the old files is in the same room as the Claimant as compared to its location in a separate room across the hall at the time this claim was asserted. Regardless, the Claimant professes to have no symptoms and a general improvement since moving to this new location.

Claimant presented no persuasive evidence to explain how irritants, which she claims triggers her breathing problems and which are present in the workplace every day only cause her symptoms sporadically. Here, the evidence presented supports a conclusion that Claimant has failed to establish the requisite causal connection between her non-specific respiratory symptoms and her work duties in general and more specifically, based upon the air sampling in the Time Comp Unit, that her employment exposed her to a hazard that was more prevalent in the work place than in everyday life or in other occupations. Claimant's failure to satisfy each element of an occupational disease by a preponderance of credible evidence is fatal to her claim. *Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988). Accordingly, her claim for benefits must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits based is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 8, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether Claimant has established by a preponderance of the evidence that he sustained a compensable industrial injury as the result of an incident which alleged occurred on April 29, 2016; and

- If compensable, whether Claimant proved entitlement to related, reasonable and necessary medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant, a 61-year-old document specialist, has worked for Employer since August 2007. On April 29, 2016, Claimant alleges that he injured his right hip, low back, and right arm when he tripped on a snowbrush while stepping out of a company vehicle.

2. Prior to his alleged April 29, 2016 injury, Claimant had a history of falls and injuries to his low back and hip with associated weakness and muscle atrophy in his right leg. On March 16, 2010, Claimant began treating with Dr. Aschberger due to a slip and fall which occurred at work on February 8, 2010. He complained of right lower extremity weakness, right groin pain, hip pain, and low back pain.

3. On May 17, 2010, Dr. Aschberger found right leg muscle atrophy and weakness when he examined Claimant. He noted Claimant's right leg was smaller compared to his left leg.

4. Imaging studies performed in 2010 revealed a fracture in Claimant's right hip which required surgical repair. However, upon post-surgical examination, Claimant continued to have noted right leg weakness and atrophy. He reported to providers that his right knee would occasionally give out. Claimant was prescribed Lyrica for his persistent right leg, hip, and low back pain.

5. On December 6, 2010, Claimant was placed at MMI and given a 31% lower extremity rating for his right hip and an 11% whole person impairment rating for his lower back. Claimant continued to note significant weakness and atrophy n his right leg.

6. On February 8, 2011, Dr. Gellrick noted in her DIME report that Claimant reported several additional falls to his PCP during a June 18, 2010 examination.

Claimant admitted that he had fallen approximately four times due to weakness in his right leg. Claimant reported an additional fall to Dr. Schwappach during a July 1, 2010 examination.

7. Dr. Gellrick noted during her physical examination that Claimant had multiple abrasions on his left lower extremity from falls due to his right leg weakness and that he had to walk close to walls to avoid falling. She also noted obvious right leg atrophy.

8. On May 5, 2011, Claimant saw Dr. Schwappach for a return examination. Claimant reported that he recently fell down some stairs when his right knee "gave way." Claimant underwent physical therapy and received an injection.

9. Claimant continued to receive maintenance care for his 2010 fall until December 7, 2011, when he experienced his second on-the-job slip and fall with injury to his low back and right hip. Dr. Aschberger noted Claimant was well known to him for persistent right hip pain, low back pain, and right quadriceps atrophy. Dr. Aschberger's January 5, 2012 records note that Claimant had decreased bulk in his right quadriceps.

10. Dr. Aschberger continued to treat Claimant for his December 2011 injury including injections into Claimant's hip and SI joint. Claimant failed to show significant gain from conservative treatment and was recommended to undergo total right hip replacement on May 21, 2013.

11. Claimant continued to note SI joint pain with radiating symptoms into his lower extremity with associated weakness and knee buckling during Dr. Aschberger' June 18, 2013 examination.

12. On April 24, 2014, Claimant noted difficulty ascending stairs and getting in and out of a car and reported needing to assist lifting his right leg with his hand.

13. On May 14, 2014, Dr. Perea examined Claimant noting another fall where Claimant tripped over a step and fell forward injuring his right side.

14. Dr. Schwappach eventually recommended Claimant undergo removal of an osteophyte that had formed around the site of Claimant's surgical plate as he believed it caused Claimant's continued weakness and pain complaints. The procedure was recommended to be approved via internal review. However, Claimant settled his claims prior to undergoing the surgery. Claimant stipulated that he had a 15% whole person impairment to his lumbar spine and a 40% extremity rating impairment to his right hip/leg.

15. On September 18, 2014, at Claimant's last noted workers' compensation appointment for his 2011 injury, he was diagnosed with chronic pain syndrome and his prescription for Lyrica was refilled.

16. On January 27, 2016, two months prior to the alleged date of injury for this claim, Claimant followed up with his primary care provider for chronic pain in his right hip and SI joint. Claimant used Lyrica and Tramadol for pain control.

17. On May 3, 2016, Dr. Danahey at Concentra examined Claimant for his April 29, 2016 fall. X-rays of Claimant's right hip, pelvis and lumbar spine were unremarkable for acute fracture or subluxation. Claimant was diagnosed with a contusion of his right hip, lumbar strain, and a contusion of his right elbow and shoulder. Dr. Danahey recommended Claimant undergo physical therapy and restricted Claimant's lifting to up to 10-pounds occasionally. Employer complied with this restriction and Claimant returned to work at full wages.

18. May 27, 2016, MRI results revealed minimal disc degenerative changes with minimal broad-based disc bulge, bilateral facet arthropathy, and mild epidural lipomatosis at L4-5, with similar findings at L5-S1.

19. On June 20, 2016, Claimant followed up with Dr. Aschberger complaining of pain in his right lower back with radiation of symptoms to the anterolateral thigh with occasional irritation into his foreleg and intermittent tingling into his toes. Dr. Aschberger noted residual weakness with hip flexion on the right.

20. On September 6, 2016, Claimant returned to Dr. Aschberger. Claimant reported a recent increase in pain after a session of dry-needling. Claimant had right-sided pain with facet loading at L4-5 and L5-S1. Dr. Aschberger noted continued findings of SI irritation and an increased amount of irritation with facet irritation. Dr. Aschberger referred Claimant to Dr. Zimmerman for medial branch blocks.

21. On September 29, 2016, Dr. Janssen completed a PA review of the medical branch block request. Dr. Janssen opined Claimant did not meet the criteria for a reassessment for additional injections within 6 months due to not receiving an 80% improvement from prior injections and a lack of objective radiographic findings. As such, Insurer denied the blocks.

22. On December 6, 2016, Dr. Basse completed a Respondents sponsored IME to address causation and whether Claimant had experienced an aggravation of his pre-existing condition. Dr. Basse noted longstanding moderate decreased muscle bulk in his right quadriceps, hamstrings, and gastrocsoleus complex with decreased muscle bulk in the right anterior tibialis and EHL with foot drop. She opined that whatever was causing the muscle atrophy was present prior to his 2010 injury as the distal weakness that was noted immediately after could not have been explained by his diagnosis at the time.

23. Dr. Basse testified that Claimant's distal weakness and right foot drop played a role in Claimants' many falls. She recommended Claimant undergo a complete neurologic examination outside of workers' compensation to locate any progressive or stable lesion that could be treated. Dr. Basse concluded that

whatever was causing Claimant's pain appeared to originate from before his 2010 injury and likely involved the sciatic and femoral nerves without radiculopathy as Claimant's gluteal muscles were not involved. She was unclear whether Claimant had suffered from a new or aggravating condition when he fell on April 29, 2016 as there were no anatomical findings to suggest a new or aggravating condition.

24. Dr. Basse testified via deposition on July 6, 2017. She credibly testified that she reviewed Claimant's medical history dating back to 2010 and opined that Claimant likely suffered from an undiagnosed and non-work-related condition. As support, Dr. Basse noted Claimant underwent extensive treatment to the same body parts and for the same pain complaints without improvement. Likewise, she opined that Claimant's muscle atrophy and weakness were not a result of a slip and fall because Claimant was noted to have atrophy immediately after his initial fall in 2010, and atrophy takes much longer to develop. Instead, she opined that Claimant's foot drop, muscle atrophy, and noted weakness were a likely factor in causing his numerous falls.

25. Dr. Basse also testified Claimant could be suffering from epidural lipomatosis which is a naturally progressing disease which can cause symptoms similar to that Claimant experienced. Dr. Basse noted MRI findings which supported this conclusion.

26. Claimant testified at hearing. Claimant downplayed the number of times he has fallen during the past several years. When first questioned he claimed to have only fallen three times. He testified that the knee buckling and weakness he reported on numerous occasions had only caused him to stumble but not fall to the ground. When confronted with medical records documenting multiple falls, Claimant admitted to falling numerous times due to the weakness in his right leg.

27. When confronted with his April 24, 2014 statement to Dr. Zimmerman that he had to physically assist his right leg when getting in and out of a vehicle, Claimant alleged it was due to his hernia and inguinal nerve issues. However, Claimant had already undergone surgery for both his hernia and inguinal nerve at the time he was required to assist with the movement of his right leg.

28. Claimant acknowledged settling his prior workers' compensation claims and that he did not get treatment, including the recommended surgery.

29. Claimant testified that he continued working full duty for the duration of his alleged 2016 injury and that he continued taking Lyrica at the level prescribed to him in 2010.

30. Claimant has not met his burden of proving by a preponderance of the evidence, that he sustained a compensable injury on April 29, 2016. Claimant has a substantial and documented history of prior falls due to significant weakness in his right leg. These numerous falls have resulted in repeated

complaints to the same body parts with little improvement despite a history of six years of conservative treatment, injections, and surgeries. The ALJ finds Claimant was predisposed to falling prior to the alleged April 29, 2016 fall.

31. The ALJ finds it unlikely Claimant was asymptomatic and without issue prior to the alleged April 29, 2016 fall. Despite Claimant's testimony that he had no issues with his low back or hip for almost two years prior to the alleged date of injury, Claimant has a 40% permanent impairment to his right lower extremity and a 15% whole person permanent impairment to his lumbar spine. Additionally, Claimant was recommended to undergo a third surgical procedure on his right hip. However, when he settled his claims, he did not pursue the recommended surgery. The ALJ finds it unlikely that Claimant's need for surgical intervention resolved without treatment. Rather, it is more likely that his condition continued to progress until the events on April 29, 2016.

32. Likewise, just two months prior to Claimant's alleged work-injury he complained of chronic hip and low back pain which he treated with Tramadol and Lyrica. As such, Claimant's testimony that he was asymptomatic prior to the alleged injury is not persuasive.

33. The more probable explanation for Claimant's fall on April 29, 2016, is that as Claimant shifted his weight onto his right leg, it buckled and gave out, as it had done in the past.

34. Even if Claimant caught his foot on a snowbrush which caused him to fall, Claimant failed to provide any persuasive evidence to support a conclusion that his pre-existing condition was aggravated as a result of an alleged fall.

- Claimant continues to work full duty at full wages.
- The mere presence of pain is not enough to convince this court of a new or aggravated condition.
- Claimant had the same pain complaints as in the past and he continued to take pain medication at the same levels he did prior to the alleged injury.
- Despite numerous treatment modalities, Claimant's condition has failed to improve for over six years and only "resolved" when Claimant accepted settlement and stopped treatment on his own.

These facts lend support to Dr. Basse's opinion that Claimant has an undiagnosed, untreated, and non-work-related condition that needs further evaluation outside of the workers' compensation system and that there simply was no objective evidence to support a new or aggravated injury.

35. As Claimant has failed to prove he suffered a compensable injury, his claim for medical benefits also fails.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

According to C.R.S. §8-43-201, "(a) Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *See also Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the Claimant to prove his entitlement to benefits by a preponderance of the evidence.").

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

In deciding whether the Claimant has met her burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Proof by a preponderance of the evidence requires Claimant to establish that the existence of a contested fact is more probable than its nonexistence. *See Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

A compensable injury is an injury which "arises out of" and "in the course of" employment. *See* C.R.S. §8-41-301(1)(b); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003).

The Claimant must prove a causal nexus between the claimed need for treatment and the work-related occupational disease or injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the industrial exposure caused the symptoms and consequent need for treatment, or that the industrial exposure aggravated or accelerated any pre-existing condition. Rather, the

occurrence of the symptoms may be the result of or natural progression of a pre-existing condition that is unrelated to the employment, or may be attributable to some intervening cause. *See Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); .*F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995).

Purely idiopathic or personal injuries are generally not compensable under the Act, unless an exception applies. *See Velasquez,* 41 Colo. App. at 202–03, 581 P.2d at 749; *see also Irwin*, 695 P.2d at 765. When it comes to idiopathic injuries, the "special hazard" doctrine represents an important exception to the general rule of non-compensability, under which an injury is compensable even if the most direct cause of that injury is a preexisting idiopathic disease or condition so long as a special employment hazard also contributed to the injury. *City of Brighton v. Rodriguez,* 318 P. 3d 496 (Colo. 2014). The ALJ finds no special employment hazard existed at the time of Claimant's fall which contributed to the injury.

The ALJ finds that Claimant did not suffer a compensable injury on April 29, 2016. Rather, Claimant's significant and documented right leg weakness is the more likely cause of Claimant's fall and Claimant failed to prove the existence of any special employment hazard which contributed to the injury.

Claimant bears the burden of proof of showing that medical benefits are causally related to his alleged work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007). Claimant is not entitled to medical care that is not causally related to his work-related injury or is not reasonable or necessary. Respondents do not "implicitly" admit for a disputed condition by paying for medical benefits. *Hays v. Hyper Shoppes*, W.C. No. 4-221-570 (ICAO April 13, 1999). The respondents remain free to contest the compensability of any particular treatment. *Id.* As noted in *Ashburn, supra,* "it has generally been held that payment of medical services is not in itself an admission of liability. This is based on the sound public policy that carriers should be allowed to make voluntary payments without running the risk of being held thereby to have made an irrevocable admission of liability."

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to establish by a preponderance of the evidence that he sustained a compensable injury on April 29, 2016.

2. As the claim is not compensable, Claimant's request for medical benefits is denied and dismissed.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 28, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

#M0ZJ3S6T0D1J3Cv 4

ISSUES

I. Is the left arthroscopic shoulder surgery proposed by Dr. John Pak reasonable, necessary, and related to Claimant's work injury?

II. Did Respondent's comply with W.C.R.P. 16 when denying the request for surgery by Dr. Pak's office?

III. Should Claimant's Average Weekly Wage be adjusted due to the termination of his health insurance benefit?

IV. If the Average Weekly Wage is so adjusted, should Claimant's Temporary Total Disability payments also be so adjusted, and payable on the effective date of the termination of his health insurance benefit?

STIPULATIONS

I. Claimant's Average Weekly Wage is $1008.00, prior to any adjustments which might be made for the loss of health insurance benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant was an apprentice electrician who relocated to Colorado from Texas to work for the Respondent Employer. The Claimant testified that he started his employment in early October of 2016. This is an admitted Worker's Compensation claim.

2. The Claimant is a member of the International Brotherhood of Electrical Workers (union).

3. The Respondent Employer is a union shop for its employees.

4. The stipulated AWW is $1,008, not counting any possible adjustments for health insurance.

5. Claimant testified that he's been an electrician for about 6 years and he testified that this is the first injury he's sustained at work during that time period. Claimant testified that he's never filed a workers' compensation claim prior to this injury.

6. The Claimant testified that he was pulling some heavy gauge wire up to the mezzanine level when he felt and heard a pop, followed by a burning sensation in

the inside area of his left shoulder. He initially thought the sensation would pass and continued to work.

7. The Claimant testified that his left shoulder continued to give him discomfort and increased pain when he was performing his work duties. No other events had occurred since this injury which would have contributed to his current symptoms.

8. The Claimant denied any significant pre-existing shoulder problems. He stated that he had had a motorcycle accident approximately 10 years decade before and had surgery. The Claimant testified that he was able to work and perform recreational activities, without significant restriction or pain prior to the incident at Respondent Employer. Claimant further testified that that the pain symptoms from this workplace accident have been different than anything he has experienced prior. He further testified that he cannot now perform the same work duties that he could prior to this injury, without feeling a risk of further injury.

9. Respondent Employer's employee, Kisi Thompson, testified that she received a telephone call from the Claimant's personal physician, claiming that he had hurt himself at work. Ms. Thompson filled out the Employer's First Report of Accident and sent it to Respondent Insurer. She provided claimant with the list of authorized workers compensations physicians.

10. The Claimant testified that he was initially seen by CCOM, the authorized treating facility, and then referred to Dr. David Weinstein for an orthopedic consultation. Dr. Weinstein had reviewed his MRI films and x-rays. He gave the Claimant a cortisone injection and sent him for 6 weeks of physical therapy. Dr. Weinstein saw the Claimant again in January of 2017. The Claimant stated to Dr. Weinstein at this second visit that his pain was less than it had been, and he had increased range of motion after the therapy and injections. However, Claimant still testified at hearing that, despite some improvement, he still cannot reach out or up with weight, as it still causes pain and popping in his shoulder. He is still unable to perform overhead lifting without significant pain.

11. The Claimant testified that he attended a "second opinion" with Dr. John Pak for a second surgical consultation, approximately one month after seeing Dr. Weinstein. He testified that he wants to move forward with the left arthroscopic shoulder surgery recommended by Dr. Pak because he wants to get back to work.

12. Claims Representative Lee Phillips of the Respondent Insurer testified that the authorized treating physician, Dr. Daniel Olsen of CCOM, indicated that the Claimant was still complaining of pain and requested that the Claimant be seen for a second opinion orthopedic consultation. Mr. Phillips testified that he authorized a one-time evaluation by Dr. Pak. He did not authorize Dr. Pak to begin treating the Claimant.

13. Dr. David Weinstein is a board certified orthopedic surgeon. He identified his curriculum vitae at his deposition which was taken for preservation of testimony and entered into evidence at the time of the hearing. Dr. Weinstein specializes in shoulder and elbow reconstruction. He did a fellowship at Columbia-New York Orthopedic Hospital in New York, New York, in 1992 and 1993. Dr. Weinstein has specialized in shoulder surgery in Colorado since 1992. He has written medical journal articles and presented lectures on shoulder surgery. According to Dr. Weinstein's testimony at deposition, the medical literature does not support performing arthroscopic surgery on Claimants who have pre-existing shoulder instability such as the Claimant presented. He stated in his deposition that the proposed procedure is not reasonable and necessary and would not be effective in relieving the effects of a shoulder injury.

14. Dr. David Weinstein issued his first narrative report on November 18, 2016, after reviewing x-rays and an MRI scan. Dr. Weinstein noted significant underlying pre-existing glenohumeral arthritis in the Claimant's shoulder. [Exhibit "B"] Dr. Weinstein indicated that the glenohumeral arthritis had been present for an extended period of time, even prior to the significant motorcycle accident in approximately 2008.

15. Dr. Weinstein noted that the Claimant's pre-existing changes on his MRI scan represented degenerative arthritis and his symptoms were chronic in nature. He believed (and the ALJ so finds) that the Claimant had aggravated his pre-existing arthritic symptoms in his employment with the Respondent Employer and had an inflammation of the rotator cuff. The ALJ further finds that this preexisting condition is now significantly symptomatic as a result of this work injury.

16. Dr. Weinstein explained to the Claimant that his best treatment option was conservative measures, such as physical therapy and injections. Dr. Weinstein's report [Exhibit "B," page 5] indicated that it was very probable that the Claimant would need shoulder replacement surgery for his pre-existing glenohumeral arthritis, but Dr. Weinstein did not believe that it should be part of his workers' compensation injury. Dr. Weinstein referred the Claimant for physical therapy and saw him again on January 11, 2017. His report from that date [Exhibit "B," page 7] showed marked improvement in both strength and range of motion, according to that report. On that date, Dr. Weinstein reported that the Claimant told him that he "had no problems" prior to his injury. However, Dr. Weinstein stated that this was neither credible nor believable based upon his advanced glenohumeral arthritis. He indicated that it would have been "impossible that he had normal mechanics and a normal shoulder prior to the injury." Based upon the Claimant's improvement, Dr. Weinstein recommended that he complete his physical therapy. Dr. Weinstein also indicated that a "shoulder arthroscopy with removal of osteophytes has very little chance of improvement." Although the Claimant would eventually need shoulder replacement surgery, Dr. Weinstein told the Claimant that this would be due to his pre-existing arthritis. Dr. Weinstein discharged the Claimant and recommended that the Claimant return to his usual working activities and to continue with conservative care.

17. Dr. Weinstein testified that arthroscopic surgery, as proposed by Dr. Pak was not reasonable or necessary and would not benefit the Claimant. Dr. Weinstein has seen other patients with the same type of shoulder instability and pre-existing glenohumeral arthritis. Attempted arthroscopic surgery on these patients was unsuccessful. Dr. Weinstein noted that not only has he written an article on this issue, but there were several other medical journal articles which indicated that arthroscopic surgery was ineffective for curing or relieving shoulder strains and aggravations, such as claimant's condition.

18. An operative report (Exhibit "D) and MRI scans from October of 2008 show that the Claimant had left anterior, superior and posterior labral tears and chondromalacia of the glenoid. Arthroscopic repairs of the labral were undertaken and a chondroplasty was performed of the glenoid at that time.

19. The Claimant saw Dr. John Pak, MD, with Front Range Orthopedics on February 7, 2017 for the authorized "second opinion." Dr. Pak's records (Exhibit 3) show that he diagnosed degenerative joint disease of the left shoulder and recommended a shoulder arthroscopy for debridement, decompression, and chondroplasty. He further stated that this procedure was reasonable, necessary, and related to the workplace injury of October 26, 2016. Dr. Pak opined that the MRI of November 9, 2016 provides evidence of an acute injury as a large effusion can indicate acute injury or aggravation. (Exhibit 3, p. 42). Dr. Pak opined that the work place injury of October 26, 2016 brought about/caused the current need for the requested left shoulder arthroscopy. (Exhibit 3, p. 43). Further, Dr. Pak opined that the need for the left shoulder arthroscopy is not the "natural progression" of a pre-existing condition. *Id.*

20. Dr. Pak sent his recommendation and request for authorization of the arthroscopy to the Respondent Employer, Lee Phillips. Mr. Phillips denied the arthroscopy (Exhibit E) in a handwritten note. Mr. Phillips relied upon the January 2017 narrative report of Dr. Weinstein (Exhibit B pp. 7 - 8] as the medical reason for the denial of care. Mr. Phillips declined to get a third opinion as a "tie breaker" for the necessity of this proposed procedure, deciding instead to let the matter be decided by a hearing.

21. Lee Phillips testified that after he sent the fax to Dr. Pak's office he received a phone call from Dr. Pak's office seeking approval of the requested procedure, but he informed them that the requested procedure was denied in that phone conversation. Lee Phillips testified that he informed Dr. Pak's office that there were two different opinions regarding treatment for Mr. Lucas and that the findings needed to be decided by a hearing. Mr. Phillips testified that he informed Claimant of the denied request for surgery with Dr. Pak, "probably just over the telephone." Mr. Phillips further testified that the written denial regarding Dr. Pak's requested surgery was faxed only to Dr. Pak's office (Claimant did not receive a written denial of Dr. Pak's requested surgery). He testified that he had a "phone discussion" with the Claimant on February 16, 2017.

22. Dr. Pak is an orthopedic surgeon, as evidenced by his capacity as a physician at Front Range Orthopedics, the referral for a second opinion for the need for arthroscopic surgery by Insurer, his familiarity with the procedure he recommended to perform for Claimant, and as referenced by Dr. Castrejon's IME Report. (Findings of Fact ¶ 31).

23. Lee Phillips, credibly testified that he was not presented with all of the records when he received the request for authorization but communicated by telephone that they were going to deny the authorization for surgery based upon Dr. Weinstein's opinions that arthroscopic surgery was not medically appropriate and not reasonable or necessary to cure or relieve the Claimant's industrial injury.

24. The Claimant did return to work with restrictions until he was laid off on approximately January 25, 2017. The Claimant was laid off due to his lack of seniority with the company, being a fairly new employee. The Claimant has not applied for other employment since being laid off. He has applied for unemployment through a former employer in the State of Texas.

25. Prior to his lay off, the Claimant was performing lighter electrical work, but including overhead work with electrical fixtures.

26. The Claimant testified that he had received health insurance benefits which were lost after he was laid off from the Respondent Employer. The Claimant testified that he had "benefits" through his union which included health and accident benefits and life insurance benefits. He testified he was unsure of the nature and extent of his benefits and contributions, but found out through a COBRA letter from the union that his health insurance would be terminated around March 1, 2017. He no longer carries health insurance.

27. Kisi Thompson, the Respondent Employer's representative, testified that the Claimant did not receive health and accident benefits through the Respondent Employer. The Respondent Employer would contribute $2.00 per hour to the union for a benefits package which the union would then provide to Claimant. Ms. Thompson was unaware of the details of the union benefits package in Texas and how much of the $2.00 per hour was attributed to health insurance vs. life insurance. The Respondent Employer was not involved in providing health insurance benefits. This was a strictly a union benefit package, according to the Ms. Thompson's testimony. The ALJ finds this testimony to be credible and accurate.

28. Dr. Daniel Olson is the Authorized Treating Physician in this claim. (Exhibit 1). Dr. Olson diagnosed Claimant with a left shoulder sprain of 10/26/2016 and aggravation of pre-existing glenohumeral degenerative joint disease. (Exhibit 1, p.19). Dr. Olson opined that he agrees with Dr. Pak's recommendation/request for left shoulder arthroscopy in this case as the Claimant "has not returned to baseline + it is reasonable to try + clean up any loose bodies, etc." Dr. Olson further opined that the left shoulder arthroscopy requested by Dr. Pak is reasonable, necessary, and related to

the work place injury of October 26, 2016. (Exhibit 1, p. 20). Dr. Olson opined that the work place injury of October 26, 2016 brought about/caused the current need for the left shoulder arthroscopy requested by Dr. Pak. (Exhibit 1, p. 20). Further, Dr. Olson opined that the need for the left shoulder arthroscopy is not the "natural progression" of a pre-existing condition. *Id.*

29. Dr. Miguel Castrejon performed an Independent Medical Examination in this claim. (Exhibit 7, pp. 56 – 61). Dr. Castrejon reviewed all medical records, examined the Claimant, and issued a medical report. On physical examination, Dr. Castrejon noted scapular winging on the left as well as visible atrophy of the supraspinatus. (Exhibit 7, p. 58).

30. Dr. Castrejon diagnosed Claimant with aggravation of pre-existing glenohumeral osteoarthritis, left shoulder; left shoulder impingement syndrome; and altered shoulder/scapular mechanics. (Exhibit 7, p. 59). Dr. Castrejon opined that "prior to these recent symptoms there is no documentation of ongoing medical care, loss of work time, permanent physical limitation or permanent impairment." (Exhibit 7, pp. 59 – 60).

31. Dr. Castrejon opined that the presence of a large joint effusion in the shoulder (shown on the MRI) supports the presence of an acute on chronic change. (Exhibit 7, p. 60). Dr. Castrejon stated that "when reviewing the comments offered by Dr. Weinstein it is quite clear that, although improved, the Claimant had not yet returned to preinjury level." (Exhibit 7, p. 60).

31. Regarding the recommendation for surgery requested by Dr. Pak, Dr. Castrejon opined:

> "Dr. Pak is also a *fellowship trained shoulder specialist* who offered a professional opinion with regard to the claimant's condition. Dr. Pak went one step further by acknowledging that the claimant was too young to proceed with shoulder replacement yet still required treatment for a condition that remained symptomatic and functionally limiting. The surgical treatment offered by Dr. Pak goes beyond 'removal of osteophytes.' Dr. Pak is proposing a surgical procedure that will address the impingement, loose bodies, and cartilaginous changes. Please note that there is no rotator cuff tear present. To allow the claimant to continue with a shoulder that is clearly abnormal with the presence of loose bodies will only, in all medical probability, lead to rotator cuff and further glenohumeral pathology which would not be in the best interest of this 33 year old individual who may not become a candidate for a total shoulder replacement for many years to come." (Exhibit 7, p. 60)(emphasis added).

32. Dr. Castrejon opined that absent the events of October 26, 2016 “it is my professional opinion that the claimant, would not, at this point in time, require surgical treatment for his condition.” (Exhibit 7, p. 61). Dr. Castrejon further opined that “based upon a review of the medical file and my examination of the claimant it is my professional opinion that the surgical recommendation offered by Dr. Pak is medically reasonable, appropriate, and indicated on an industrial basis.” (Exhibit 7, p. 61). Finally, Dr. Castrejon opined that until surgery can be performed, the Claimant should remain on a modified work status with limitations outlined by Dr. Olson. *Id.*

33. The ALJ finds that Claimant, while an imperfect historian, is sincere and credible in his testimony. Claimant has attempted, in good faith, to provide accurate information to his treatment providers. Dr. Weinstein questions Claimant's statements to him at his second visit regarding Claimant's statement that he had "no problems" prior to the accident. However, Claimant was also candid at the first visit in sharing his preexisting arthritic condition, even noting that it preexisted the motorcycle accident. It is unclear from the existing record if clarification was sought by Dr. Weinstein as to what "no problem" really meant in the context of the conversation. The ALJ finds that Claimant lacks the sophistication and knowledge of the workers compensation laws to attempt to game the system.

34. The ALJ further finds that each medical provider referenced in the exhibits is capable, competent, and sincere in rendering their medical opinions to the best of their respective abilities. Reasonable minds can differ.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers’ Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers’ compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness’ manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the

case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

D. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

E. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

F. In this case, all the medical professionals agree that Claimant, while in the course of his employment, aggravated his preexisting medical condition in his shoulder, and that it is now significantly more symptomatic, requiring medical treatment. This injury was not merely the natural progression of his pre-existing condition, and the ALJ so finds.

Proposed Arthroscopic Surgery

G. Dr. Olson, the Authorized Treating Physician in this claim, Dr. Pak, and Dr. Castrejon have all opined that the surgery recommended by Dr. Pak is reasonable, necessary, and related and should be performed. Dr. Olson has treated the Claimant for nearly a year, is aware of all specifics of Claimant's physical condition, and has reviewed all medical opinions in this matter. Dr. Weinstein has even described Dr. Olson as "an excellent physician." Dr. Olson believes the left shoulder arthroscopy requested by Dr. Pak (a fellowship trained shoulder specialist, according to the IME report of Dr. Castrejon) should be performed in this claim. Specifically, Dr. Olson opined that he agrees with Dr. Pak's recommendation/request for left shoulder arthroscopy in this case as Claimant, "has not returned to baseline + it is reasonable to try + clean up any loose bodies, etc." Dr. Olson and Dr. Pak both opined that the work place injury of October 26, 2016 brought about/caused the current need for the left shoulder arthroscopy requested by Dr. Pak. Further, Dr. Olson and Dr. Pak both opined that the need for the left shoulder arthroscopy is not the "natural progression" of a pre-existing condition.

H. Dr. Castrejon opined that absent the events of October 26, 2016, "it is my professional opinion that the Claimant, would not, at this point in time, require surgical treatment for his condition." Dr. Weinstein even stated in his deposition that that for *mild to moderate* arthritis in a shoulder, "it can respond to a shoulder arthroscopy, for sure." (Weinstein Deposition Transcript P. 24, Lines 8 – 10). Dr. Castrejon stated that "when reviewing the comments offered by Dr. Weinstein it is quite clear that, although improved, the Claimant had not yet returned to preinjury level." Claimant's left shoulder condition, while improved with conservative care, has not returned close to baseline over the past 10 months since the date of injury. It is certainly possible that it never will. Claimant's current left shoulder condition also prevents him from working as an electrician at this time.

I. The medical professionals all agree that at some point, Claimant will be a candidate for shoulder replacement- but not now. It could be years, possibly decades. While sincere and capable in rendering his opinions, Dr. Weinstein can only offer conservative treatment, which has possibly reached the limits of its utility already. In the meantime, Claimant is unable to perform his profession, while he was so able before he was injured at work.

J. Respondents have produced no evidence that Claimant's left shoulder condition was symptomatic prior to this work place accident. Dr. Weinstein did not have Claimant's prior surgical records before rendering his opinion, per his deposition. Claimant is 34 years old and testified that he wants to move forward with the recommended surgery in this claim so he can work again. Only time will tell whether Dr Weinstein- or the other physicians-are correct, but Claimant has earned the right to find out. It's his shoulder. Even if this procedure merely improves his condition, and therefore buys him time to become a candidate for replacement later, the ALJ finds, by

a preponderance of the evidence, that this arthroscopic procedure, as recommended by Dr. Pak, is reasonable, necessary, and related to his work accident.

Compliance with Rule 16

K. Because the arthroscopic procedure has been determined, on its merits, to be reasonable, necessary, and related to the work injury, there is no further need to examine Respondent's compliance with W.C.R.P. 16. On a parenthetical note, it seems anomalous that the adjuster would authorize a "second opinion", from Dr. Pak, and then proceed to disregard it.

Average Weekly Wage

L. C.R.S. §8-40-201 sets forth certain definitions. Included in those definitions, is a definition of "wages." C.R.S. §8-40-201(19)(b) states:

> The term 'wages' includes the amount of the employee's cost of continuing the ***employer's*** group health insurance plan, and, upon termination of the continuation, the employee's cost of conversion to a similar lesser insurance plan . . . . (emphasis added)

Herein, the Respondent/ Employer did not provide a health insurance plan for the Claimant. Pursuant to a collective bargaining agreement, Respondent Employer paid two dollars per hour to the union for Claimant's combined benefits, which include both health insurance and life insurance. The ALJ concludes that the Respondent Employer did not provide a group health insurance plan for the Claimant and, therefore, the statutory definition of "wages" is not triggered for inclusion. The $2.00 per hour contribution was plainly a benefit paid on Claimant's behalf. It ended right along with his employment. It could rightly be defined as employer-funded, or employer- subsidized, but it is not the *employer's* group health insurance plan. It is the union's. If the legislature intended 'wages' to include such a benefit as here, it failed to so define it.

M. Further, there was no evidence presented as to what proportion for health insurance the two dollars per hour covered. Although employer-provided health insurance (not present herein) is a part of wages, life insurance is not. There was no proof as to what amount was attributed to health insurance by the union and what amount may have been applied to other unspecified benefits. Based upon this uncertainty, the Claimant has also failed to meet his burden of proof that the COBRA notice requires the Respondent Employer to include the COBRA benefit in the AWW. There is also, through no fault of anyone, a lack of evidence on how the contribution worked.

N. For the aforementioned reasons, the Claimant's Average Weekly Wage is found by the ALJ to be the stipulated amount of $1008.00. No adjustment is made for Claimant's Temporary Total Disability payments.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the arthroscopic left shoulder surgery as proposed by Dr. Pak, and all associated costs.

2. The Claimant's Average Weekly Wage is $1008.00.

3. No adjustment is made to Claimant's Temporary Total Disability payments.

4. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 21, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-808-859-05

ISSUES

- Whether Claimant proved by a preponderance of the evidence, that her continued treatment with Lyrica, Baclofen and Oxycodone ("opioids") is reasonable, necessary, and related to her workers' compensation claim.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On September 25, 2009, Claimant suffered an industrial injury. Treatment involved four surgical procedures. On May 2, 2010, Claimant underwent a lumbar fusion surgery; on December 7, 2011, she underwent a revision surgery; and in March 2013, a final surgery to remove the fusion screws. Claimant also had a knee surgery on August 30, 2012.

2. Claimant treated with Dr. Ogin for pain management. Dr. Primack, Dr. Ogin's colleague, performed the initial comprehensive evaluation of Claimant, and noted non-physiologic findings with increased pain behaviors.

3. Claimant's providers have prescribed some form of opioid since 2009.

4. On December 11, 2012, Claimant returned to Dr. Ogin for a follow-up appointment. Dr. Ogin noted that Claimant reported diffuse discomfort in her back and legs, despite a "fairly benign" clinical examination and negative diagnostics. At the December 11, 2012 visit, Claimant provided a baseline urine drug screen. The drug screen was negative for all opioids. This surprised Dr. Ogin, as Claimant had stated that she was on Percocet ("oxycodone").

5. In fact, Claimant was being prescribed oxycodone by Dr. Sanidas. Dr. Sanidas had just increased Claimant's prescription from hydrocodone-5mg to oxycodone-10mg. Dr. Fall testified that this was a significant increase of dosage, particularly given that oxycodone is considered more potent than hydrocodone. Dr. Sanidas prescribed Claimant six 10mg oxycodone per day, distributed as 120 pills for a 20-day supply. Dr. Fall testified that this would not be a recommended amount unless immediately after a surgery, as the opioid is short acting and results in a roller coaster effect.

6. Despite this increase in dosage and potency, Claimant finished her 120 pill, 20-day supply in ten or eleven days, given that she tested negative for oxycodone at her December 11, 2012, appointment with Dr. Ogin, and given that it takes three to four days for opioids to get out of the system for a urine analysis.

7. Claimant credibly testified that she did not give away or sell her medication, and that she took every opioid she was prescribed. Accordingly, in this instance Claimant took 120 pills in ten or eleven days: at least eleven or twelve pills a day, instead of her prescribed six pills per day dose. Dr. Fall testified that this is a substantial increase, for the opioid and the Tylenol that is delivered with the opioid. Dr. Fall testified she was surprised Claimant did not have withdrawal symptoms after stopping her usage, and would have expected them to be present. Withdrawal symptoms include cold sweats, diarrhea, anxiety, tremors, and restlessness. However, Claimant did not present with any withdrawal symptoms at her December 11, 2012 appointment with Dr. Ogin, despite having no opioids in her system.

8. Claimant's medical records establish that she completed her hydrocodone ("Vicodin") dose early. On November 15, 2012, Claimant filled her Vicodin prescription, and received a bottle of 120 5mg pills. The pills should have lasted 20-days, until December 5, 2012. Instead, Claimant sought a refill just twelve days later. This would put her at a pace of twelve Vicodin per day, even though she was only prescribed 6, effectively doubling her dose. When asked whether she was noncompliant by taking her medication in this manner, Claimant testified that she was told to take her medication when she needed it. The ALJ is not persuaded by Claimant's testimony that her doctors advised Claimant to take the medication on her own terms.

9. On February 8, 2013, Dr. Ogin placed Claimant at maximum medical improvement, provided an impairment rating, and recommended maintenance treatment for two years. The maintenance treatment was for medication management to treat flares, and included a recommendation for weaning Claimant off oxycodone within the next six to twelve months. When asked whether her physicians had been trying to wean her off opioids since 2013, Claimant testified that no doctor tried to get her off the drug. However, medical records indicate that Dr. Ogin, Dr. Hompland, and Dr. Mason, with whom she also had opioid agreements, suggested or attempted to wean her off the drug.

10. Dr. Ogin diagnosed Claimant with opioid dependency, and noted that periodic urine drug screens would be necessary if Claimant remained on opioids. On March 8, 2013, Dr. Ogin gave Claimant a second drug screen, which was negative for opioids. Dr. Ogin noted the possibility of drug diversion. He further noted that if there are further noncompliance issues he will look to rapidly wean her off opioids.

11. On April 5, 2013, Claimant returned to Dr. Ogin who noted that Claimant received an additional prescription from Dr. Wong, and advised Claimant that she should not receive opioids from any other physicians. Claimant previously agreed with Dr. Ogin that he was the only doctor that would fill her medication. At hearing, Claimant testified inconsistently with the records that she never sought medication from Dr. Wong. In her records review, Dr. Fall noted that Claimant's act was an additional incidence of non-compliance with her opioid agreement.

12. On April 2, 2013, Claimant's attempted to refill her opioid medication at King Soopers but was denied, as her prior prescription should have lasted another week.

13. On May 3, 2013, Claimant returned to Dr. Ogin and reported "she last had a Percocet yesterday." Claimant testified that she never lied to her doctors about her opioid usage. Yet that same day, Claimant underwent a urinalysis drug screen which was negative for opioids. This was Claimant's third failed drug screen.

14. Dr. Ogin further noted that Claimant did not appear in distress or ambulate with difficulty, but that she exhibited "quite a bit" of grimacing and pain behaviors when he formally examined her. Again, he noted that Claimant had pain with superficial palpation, and that she complained of numbness in a nonphysiologic distribution. Nevertheless, Dr. Ogin renewed Claimant's oxycodone prescription.

15. On May 23, 2013, Claimant presented to Dr. Sanidas for treatment. Dr. Sanidas performed a physical examination and noted no muscle spasms. Claimant requested oxycodone from Dr. Sanidas, stating that she ran out early. Dr. Sanidas refused, explaining to Claimant that she had an agreement with Dr. Ogin, and that only he could fill her prescription. At hearing, Claimant testified that she had not sought medication from Dr. Sanidas.

16. Claimant reported to Dr. Sanidas that she no longer wanted to be treated by Dr. Ogin, as he was rude and hurt her back while performing measurements. Dr. Sanidas noted "I am hearing some complaints about Dr. Ogin's care when the patient suddenly cannot get more narcotics." Dr. Sanidas advised Claimant that she would be discharged from care, and provided Claimant a thirty day window to find another treating physician. At her IME with Dr. Fall, Claimant reported that when she was released from care, they no longer wanted to prescribe her medication, but that she was able to get a different pain management doctor.

17. Claimant sought care with Dr. Scott Hompland, who performed an initial evaluation on June 20, 2013. Dr. Hompland specialized in chronic pain management and addiction issues. At that time, Claimant was off oxycodone, gabapentin and muscle relaxants. Claimant told Dr. Hompland that she never used alcohol, and that the pain medication provides 100% relief of her pain. Dr. Hompland performed a physical examination, did not find muscle spasms, and found her sensation intact with only "vague numbness" in her right leg. Dr. Hompland diagnosed Claimant with possible psychological factors affecting her general condition.

18. Claimant discussed and reviewed an opioid agreement with Dr. Hompland, and had no problems or questions with the demands of the agreement. At hearing, however, Claimant testified that she did not recall signing an agreement, and did not recall any doctor advising her of the dangers of opioids. Dr. Hompland discussed prescribing Nucynta, an opioid that has less dependency qualities and is less addicting than oxycodone. Dr. Hompland gave Claimant a baseline urine drug test. On June 26, 2013, Dr. Hompland provided a written report after a telephone conversation

with Claimant's then-attorney, informing them Claimant tested positive for alcohol, despite her prior statement that she did not use alcohol. At hearing, Claimant testified that she remembered that specific day four years ago. Claimant testified that she remembers drinking one beer because she was out of medicine, but that she didn't consider having a beer "drinking," which is why she didn't tell Dr. Hompland. The ALJ noted inconsistency in Claimant's memory: she recalls that she drank one beer on a specific day four years ago, however, she cannot recall her physicians talking to her about her compliance issues, and cannot remember signing three opioid agreements with three separate physicians. Dr. Hompland opined that Claimant was not going into withdrawal, despite not taking her medications. Based on her presentation while off the medication, he opined that Claimant did not need to be prescribed Gabapentin or pain medicines.

19. On August 28, 2013, Claimant presented to Dr. Kristin Mason for a new patient evaluation, complaining of low back pain, and numbness down the back of her legs. Dr. Mason noted that Dr. Ogin terminated his relationship with Claimant due to her overutilization of oxycodone, and that Claimant was currently getting opioids from Dr. Wong. Dr. Mason understood that Claimant was committed to reducing her opioid usage. Dr. Mason and Claimant discussed the fact that opioids work better when taken less often, due to the phenomena of tolerance.

20. Dr. Mason further noted that Claimant was currently taking oxycodone, and was unable to do her previous recreational activities of basketball and running, and was not doing an exercise program. Dr. Fall notes this indicates a poor level of reported function.

21. On August 30, 2013, Dr. Mason performed a medical records review. In her medical records review, Dr. Mason does not discuss Claimant's failed urine drug screens on December 11, 2012, March 8, 2013, and May 3, 2013. Dr. Mason does not discuss Dr. Ogin's or Dr. Sanidas' findings regarding Claimant's non-compliance with her opioid prescriptions. Dr. Mason also did not discuss Claimant seeking opioids from multiple doctors, despite having an opioid agreement with Dr. Ogin. Dr. Mason specifically says that "no major aberrations in her report of the history or her treatment are noted." Dr. Fall, in her records review, notes that there were multiple aberrations in Claimant's compliance with her opioid agreements. The ALJ finds that Dr. Mason failed to identify numerous red flags marking Claimant's non-compliance with this prescription medication.

22. In her records review, Dr. Mason does discuss Dr. Hompland's findings on Claimant's oxycodone overuse. However, she does not discuss his opinion that Claimant required no further medication for her condition.

23. On September 6, 2013, Dr. Mason decided to continue Claimant's treatment with oxycodone, and had Claimant sign an opioid agreement. Claimant testified that she did not recall signing an agreement, and did not recall the doctor advising her of the dangers of opioids.

24. On October 1, 2013, Dr. Mason prescribed Claimant Lyrica. On December 4, 2013, Claimant reported that she was not sure she saw any difference with the higher dose of Lyrica, but that she was taking it regardless.

25. On October 10, 2013, Dr. Ogrodnick performed a Division Independent Medical Examination ("DIME"). Dr. Ogrodnick performed a physical examination, measuring Claimant's flexion and extension, for purposes of rating Claimant's impairment. In his examination, Dr. Ogrodnick noted a non-physiological decrease in flexion and extension, and opined that it was likely due to psychological overlay. Given Claimant's non-physiological self-limiting behavior, he decided to utilize Dr. Ogin's prior measurements in providing his impairment rating.

26. Dr. Ogrodnick agreed with Dr. Ogin's February 8, 2013 date of maximum medical improvement. For maintenance care, Dr. Ogrodnick opined that a repeat EMG was not warranted given Claimant's "migratory non-physiologic leg complaints," and prior negative EMG and CT scans. Instead, Dr. Ogrodnick recommended care with a pain specialist.

27. Respondents filed a Final Admission of Liability on November 25, 2013, admitting to reasonably necessary medical benefits.

28. Claimant followed up with Dr. Mason on February 4, 2014, and reported losing her medications. Claimant also reported increased pain, so Dr. Mason increased Claimant's oxycodone.

29. Respondents' retained Dr. Raschbacher to perform an independent medical examination (RIME) on March 10, 2014. After examining Claimant and her medical records, Dr. Raschbacher noted that Dr. Hompland, Dr. Ogrodnick, and Dr. Mason all documented Claimant's pain behaviors, and that Claimant's subjective complaints were out of proportion to her physiological findings. Thus, he opined that Claimant's subjective reports of her symptomology and functional abilities are not reliable. Dr. Raschbacher opined that despite her complaints, the Claimant could work and was not permanently disabled. Her further noted that patients outside of the workers' compensation system often recovery from a spinal fusion with no permanent restrictions.

30. On September 16, 2014, Dr. Mason prescribed Baclofen for the Claimant, taking Claimant off her prior prescription of diazepam. On October 14, 2014, Claimant reported that she did not believe the Baclofen was helping. Dr. Mason responded by increasing her dose. Dr. Fall testified that if Baclofen is not effective at a therapeutic dose, it is not the type of drug that would be effective at an increased dose. Dr. Mason noted that Claimant was not taking her oxycodone as prescribed, and was self-escalating her dosing. Claimant requested an increased dose of oxycodone. Dr. Mason discussed tolerance and dependency issues with Claimant, and expressed concern whether Claimant could comply with scheduled medication. Nevertheless, Dr. Mason continued Claimant's prescription. At hearing, Claimant testified that her doctors

did not tell her to only take what was prescribed. Clamant testified that her physicians told her to take the medication when she needed it.

31. On December 9, 2014, roughly one month after Dr. Mason discussed Claimant's non-compliance with the oxycodone treatment schedule, Claimant admitted to taking her daily dose all at once, as opposed to once every 12 hours. The ALJ finds that Claimant demonstrates that she is unable to understand or comply with her physician's orders to take the medication as prescribed.

32. On March 27, 2015, Dr. Mason reviewed a surveillance video that depicted Claimant playing with children, squatting and walking while carrying a baby, in no apparent distress. Dr. Mason opined that Claimant typically appeared in "mild" distress in her office, so Claimant did present differently. Dr. Mason further opined that Claimant's occasional lifting restriction should be increased to 15-20 pounds.

33. On September 18, 2015, Dr. Mason discussed Claimant's employability, after Claimant lost her permanent total disability case, and noted that Claimant's English is "actually pretty good." Dr. Fall, in her records review, opined that Claimant's permanent total disability claim while she was on oxycodone documents the lack of functional benefit from the medication.

34. On February 5, 2016, Dr. Mason noted that Claimant failed her prior urine drug screen, and ordered an additional drug screen that day, opining that any further infractions would result in discharge. This was Claimant's fourth failed drug screen. Claimant also admitted to exceeding her prescribed dose. Dr. Mason responded by increasing Claimant's dose, to ensure Claimant no longer exceeded her prescription.

35. Despite Claimant not being on her medication, Dr. Mason noted that her physical examination "is really unchanged." Dr. Mason also noted the Claimant's sensorium, or mental awareness, was clear. The ALJ notes that Claimant is off her medication, and similar to her visit with Dr. Hompland, does not present with withdrawal or other aggravated symptoms.

36. In a September 27, 2016 report, Dr. Mason noted the Claimant's medication was denied based on Dr. Fall's utilization review. Dr. Mason disagreed with the discontinuation of Claimant's medication, based on the "almost certainty" of withdrawal. Dr. Mason does not address the fact that Claimant did not experience withdrawal symptoms in the past when she was off her opioid medication, including as recently as February 5, 2016. Dr. Fall, in her report, noted that Claimant was completely off her opioid medication on four occasions without withdrawal symptoms, therefore Dr. Mason's concerns were unfounded. Dr. Hompland also noted that Claimant had no ongoing need for her medication, given that she was off them and had no withdrawal symptoms.

37. Despite the utilization review, Dr. Mason continued Claimant's medications, including opioids. Dr. Mason began to slowly wean Claimant off opioids. On November 29, 2016, Claimant reported difficulty with the opioid taper. Claimant told

Dr. Mason that she has to care for her grandchildren, and that any further weaning of her pain medication will make it hard for her to meet her family responsibilities. Given Claimant's emotional and functional status, and the fact that Claimant "has a lot going on right now," Dr. Mason stopped the opioid taper.

38. On December 20, 2016, Claimant again told Dr. Mason that she babysits her grandchildren.

39. On April 11, 2017, Dr. Mason noted that she was unsuccessful in weaning Claimant off her opioid medication. Claimant reported being miserable and dysfunctional while off her medication, yet Dr. Fall only noted that Claimant's back is "somewhat more stiff," and did not note muscle spasms or neuropathic pain. Dr. Mason's physical examination mostly noted that Claimant was emotional and worried.

40. At hearing, Claimant testified that her current symptoms were pain, inability to sleep, and being tired. She further testified that her whole body hurt. Claimant testified that the last time she took the three medications in question was after the first week of April. Dr. Fall testified that Claimant suffered these same symptoms when she was on the medication, and that Claimant's depression, difficulty sleeping, and pain were ongoing.

41. Once Claimant stopped taking the opioids, she felt pain in her back, an inability to move because of the pain, and sore arms and legs. Claimant did not report any withdrawal symptoms, such as cold sweats, diarrhea, anxiety, tremors, or restlessness. Dr. Fall testified that it would be surprising for Claimant not to suffer withdrawal.

42. On direct examination, Claimant testified that she cannot do anything she needs to do because she has to sit down and relax. On cross examination, Claimant admitted that she can drive, that she drives her grandchildren to the doctor, and that she babysits her grandchildren. She initially denied being able to clean the house, make food, and wash clothes. However, this was inconsistent with her responses to interrogatories. Claimant then acknowledged that she does perform them "in [her] house."

43. On direct, Claimant testified that she needs her medication because she has full responsibility for eight grandchildren because her daughter-in-law began serving a twenty year sentence in July, 2017. At the time of the hearing, the grandchildren ranged in age from three months to eleven years old, and the infant was born prematurely and with disabilities.

44. Mr. Fuentes, Claimant's husband, testified that Claimant is not the same woman he married, and that she has changed a lot. Mr. Fuentes testified that nothing has been the same since her accident happened in 2009. Mr. Fuentes testified that Claimant is always mad when she doesn't have her pain medication, and that everything bothers her, and that it is probably because of the pain she is in.

45. Mr. Fuentes observed that she does not cook, wash clothes or clean the house the way she used to. However, the medical records indicate that Claimant struggled to complete her household chores even while on the pain medication. Thus, the ALJ finds that Mr. Santos' testimony does not evidence a change related to Claimant's cessation of medication, but rather addresses the effect of her work injury as a whole.

46. Eric, Claimant's son, testified that Claimant has not been the same since her accident in 2009. Eric testified that when Claimant is not on her medication, her mood swings a lot, and she is always irritated. Eric testified that the medication helped with her irritability. Eric testified that he was kicked out of the house because she did not have her medication. Eric testified that he believes his mother is unhappy when she doesn't have her medication because she is in pain. Dr. Fall testified that Claimant's medication does not treat depression.

47. Eric testified that off the medication, Claimant can't be sociable with family and is always just sitting or lying down. However, while Claimant was on opioids, she said she just watched television and took walks, and that she could not stand for 20 minutes before sitting or lying down. Additionally, at the October 10, 2013 DIME, Claimant was on Percocet and complained of the following to Dr. Ogrodnick:

> One day she feels as though she is going crazy and the next day she feels calmed down. The psychologist told her that she is depressed, but she does not agree. She tried antidepressants in the past…[and] admits to crying without reason 4-5 times over the last two weeks. She feels isolated in her own house and is now uncomfortable in the crowds at family reunions. She has lost interest in dancing, basketball and barbeques.

48. Dr. Fall was admitted as an expert in physical medicine and rehabilitation. Dr. Fall is board certified, and has a practice that specializes in the spine, myofascial pain, and chronic pain. As part of her practice Dr. Fall specifically deals with Lyrica, Baclofen and opioids.

49. Dr. Fall testified that Baclofen is used to treat muscle spasticity. During Dr. Fall's IME, when Claimant was not on medication, Dr. Fall performed a physical examination and did not note any evidence of spasms of the muscles. Dr. Fall also reviewed the medical records, and did not find a spasm issue that would call for treatment with Baclofen. Spasms were not documented when Claimant was known to be off her drugs, at her February 8, 2013 appointment with Dr. Ogin, at her June 20, 2013 appointment with Dr.Hompland, or at her February 5, 2016 appointment and April 11, 2017 final appointment with Dr. Mason. Additionally, Dr. Fall opined that Baclofen would not treat any of Claimant's current symptoms, which are pain, an inability to sleep, and feeling tired. Thus, Dr. Fall opined that continued treatment with Baclofen is not reasonable, necessary or related to her injury.

50. Dr. Fall testified that Lyrica is used to treat neuropathic pain, often described as burning, itching, tingling, or a feeling of bugs on the skin. Dr. Fall noted that there has been no documentation of neuropathic pain. Dr. Fall testified that Lyrica is used to treat an identifiable neurogenic or nerve injury, which is not present in this case, as the records document nonphysiologic findings. Throughout Claimant's treatment, there were no findings of neuropathic pain when Claimant was off her medication. Specifically, neither Dr. Ogin, Dr. Hompland, or Dr. Mason noted neuropathic pain. Dr. Fall noted that Claimant reported that her body hurting all over, which Lyrica is not designed to treat. In her records review, Dr. Fall additionally noted that beyond there being no indication for treatment with Lyrica, it was causing side effects. Thus, Dr. Fall opined that continued treatment with Lyrica is not reasonable, necessary or related to her injury.

51. Regarding opioids, Dr. Fall opined that opioids are inherently dangerous because they decrease the respiratory drive, making the body not want to breathe, which can result in death, intentional or not. They additionally present a critical danger to children. Accordingly, they are closely monitored through the use of opioid agreements, which are guidelines for use that the patient must sign. Opioid agreements state that the patient will only get them from one prescriber, that lost or stolen prescriptions will not be refilled early, and that they are to be taken as prescribed.

52. Claimant did not recall signing any opioid agreements, and testified that her physicians allowed her to take as many pills as needed. Dr. Fall testified that Claimant's testimony supports a decision to no longer prescribe opioids. Claimant was given the agreement multiple times, but was unable to comply. Dr. Fall further noted that Dr. Ogin and Dr. Mason specifically talked to Claimant about her issue with self-escalating her dosage, and yet it continued to occur.

53. Dr. Fall testified that failure to comply with an opioid agreement is a basis for cessation of opioid treatment, and noted that Claimant has repeatedly failed to comply with her agreements.

54. Pursuant to the Medical Treatment Guidelines, Dr. Fall testified that a patient must show objective improved function as a result of taking opioids in order for the drug to be prescribed, given its potential for abuse and side effects. Dr. Ogrodnick noted that Claimant, while on the medication, was not dancing or playing basketball. Dr. Mason noted that Claimant, while taking oxycodone, was unable to do her previous recreational activities of basketball and running, and was not doing an exercise program. Dr. Fall noted that while Claimant was on the medication, she claimed to be permanently disabled and unable to work, yet when she was off medication, Claimant wanted to return to work. These medical providers all point to the lack of objectively improved function as a result of taking opioids.

55. Dr. Fall testified that Claimant is not a candidate for long term treatment with opioids. Dr. Fall testified that the risk of harm from the medication in this instance is too great, particularly given Claimant's history of non-compliance, and apparent inability to aprehend her non-compliance.

56. Dr. Fall testified that opioids are no longer needed to treat Claimant's pain. Dr. Fall testified that Claimant's pain is more consistent with a somatic reactivity type of pain, or pain from internalizing emotional distress. Dr. Fall testified that opioids will not resolve Claimant's depression or mood disorder.

57. Dr. Fall testified that treatment with opioids is not reasonable, necessary or related to her work injury. The major concern has been weaning Claimant off the medication, and putting Claimant back on opioids would be contraindicated given her history of non-compliance.

58. The ALJ finds the contemporaneous medical records more persuasive than the Claimant's testimony. The ALJ finds Claimant's subjective reports of pain not reliable. Drs. Raschbacher and Fall both noted subjective complaints which did not correlate with their findings on physical examination. Additionally, every ATP except for Dr. Mason agreed with this assessment. Most persuasive, however, are the findings of the DIME Dr. Ogrodnick. Dr. Ogrodnick noted Claimant's subjective reporting was not reliable, to the extent that he relied on Dr. Ogin's measurements in order to provide an impairment rating.

59. The ALJ finds that continued treatment with Lyrica is not reasonable, necessary, or related to her work injury, as the Claimant did not present with neuropathic pain when she was off of her medication.

60. The ALJ is persuaded by Dr. Hompland's opinion that Claimant did not require continued treatment with opioids or Gabapentin given that he saw her when she was off the drugs, and that treatment with these medications was not indicated. Dr. Hompland's opinion is supported by Claimant's condition each time she presented for an examination while off the medication. Claimant did not present with symptoms that indicated a need for ongoing treatment, nor did she present with symptoms of withdrawal. Additionally, when Claimant was off her medication she did not present with the spasm symptoms that would indicate the need for treatment with Baclofen.

61. The ALJ finds Claimant has demonstrated repeated and serious non-compliance with her opioid intake. Claimant had four negative urine analysis tests when she was supposed to be on opioids. On these occasions when Claimant tested negative for opioids, she did not present with withdrawal symptoms, despite claiming that she took every pill she was prescribed. Drs. Ogin, Sanidas, Hompland, and Mason all specifically talked to Claimant about complying with her opioid intake. Yet at hearing, Claimant testified that she always complied with her prescriptions, and that her physicians advised her to take the medication as she saw fit. The ALJ is not persuaded that this is a language barrier issue, as Dr. Mason's document that Claimant is a "pretty good" English speaker. Thus, the ALJ finds that Claimant's repeated non-compliance, and her inability to apprehend how to properly take her medication, show that continued treatment with opioids is contraindicated.

62. Claimant did not prove by a preponderance of the evidence that opioids improve her function. She testified to babysitting, driving, and doing chores around the

house while off the medication. The records indicate that while on opioids Claimant watched TV, rested, and had difficulty performing chores. Considering Claimant's lack of documented functional improvement, her opioid non-compliance, and her failure to understand how to comply with physician's orders, the ALJ finds that continued treatment with opioids is not reasonable or necessary.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

GENERALLY

A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. §8-43-201 (2013). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201.

This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In addition to determining the sufficiency of the evidence presented, the ALJ evaluates the credibility and probative value of conflicting evidence, including competing experts and inconsistencies in a particular witness' testimony. *Johnson v. ICAO*, 973 P.2d 624, 626 (Colo. App. 1997). In determining credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

MEDICAL BENEFITS

Respondents are only liable for medical treatment that is reasonably necessary to cure and alleviate the effects of the occupational disease. Section 8-42-101(1)(a). The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. ICAO*, 53 P.3d 1192, 1197 (Colo. App. 2002). The claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc.*, 989 P.2d 251, 252 (Colo. App. 1999). Claimant has not proven by a preponderance of the evidence that she suffers spasticity, neuropathic pain, decreased functionality as defined by the Guidelines, or other symptoms that would indicate continued treatment with Baclofen, Lyrica and opioids, and is therefore not entitled to continued treatment with these medications.

Pursuant to the Medical Treatment Guidelines, the following behaviors are frequently seen in drug-abusing patients placed on chronic opioids:

a. **Requesting more refills than scheduled**; Claimant consistently requested early refills
b. **Signs of mood disorders or other psychiatric conditions**; This is well documented throughout her treatment by various ATPs, including Drs. Ptizer, Hompland, Sanidas and Ogrodnick
c. **Feigns or exaggerates physical problems**; Multiple ATPs noted this issue, including Drs. Primack, Ogin, Sanidas and Ogrodnick, as well as IME physicians Drs. Raschbacher and Fall
d. **Pressures physician by eliciting sympathy, guilt or direct threats**; When Dr. Mason began to taper Claimant off Percocet, Claimant told Dr. Mason she needed to care for her grandchildren, so Dr. Mason continued the prescription because Claimant "had a lot going on." Claimant said the same thing to RIME Dr. Fall. Again at hearing, Claimant said she will have to take care of her grandchildren. This ALJ finds that Claimant may have been attempting to elicit sympathy
e. **Subjective complaints exceed objective findings**; Again, noted by Drs. Ogin, Sanidas and Ogrodnick, as well as IME physicians Drs. Raschbacher and Fall
f. **Attempts to transfer care after a doctor refuses to fill prescription(s) for habit forming medication**. Dr. Sanidas notes that Claimant wanted a new ATP after she was refused further opioids

Rule 17, Exhibit 9 Chronic Pain Disorder (F)(7)(g) at 72.

The Medical treatment guidelines state the following regarding long term use of opioids:

> The medications should be clearly linked to improvement of function, not just pain control. All follow-up visits should document the patient's ability to perform routine functions satisfactorily. Examples include the abilities to perform: work tasks, drive safely, pay bills or perform basic math operations, remain alert and upright for 10 hours per day, or participate in normal family and social activities.

Rule 17, Exhibit 9 Chronic Pain Disorder (H)(6)(a) at 111. This ALJ finds that there is sufficient evidence that Claimant is able to function without the medication, and there is not sufficient evidence to document improvement of function.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to prove by a preponderance of the evidence that continued treatment with Baclofen is reasonable, necessary and related to her work injury;

2. Claimant has failed to prove by a preponderance of the evidence that continued treatment with Lyrica is reasonable, necessary and related to her work injury;

3. Claimant has failed to prove by a preponderance of the evidence that continued treatment with oxycodone or other opioids is reasonable, necessary and related to her work injury;

4. All future benefits relating to treatment with these medications are denied.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 29, 2017

/s/ Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did Claimant prove by a preponderance of the evidence that she is permanently and totally disabled?

2. Did Claimant prove by a preponderance of the evidence that she is entitled to a general award of medical benefits after MMI?

3. Disfigurement.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her low back on October 20, 2013 while working as a nurse for Employer.

2. Dr. Daniel Olson at CCOM has been Claimant's primary ATP.

3. After failing conservative care, Claimant underwent a decompression laminectomy at L5-S1 on March 3, 2016 with Dr. Frey. The surgery was helpful, particularly with respect to alleviating her leg symptoms, but she continued to have pain in her low back and sacroiliac joints.

4. On August 31, 2016, Claimant told Dr. Olson she was "pleased" that the leg numbness and tingling had resolved, but was still having some right-sided buttock and low back pain. Dr. Olson referred Claimant to Dr. Stephen Scheper for an SI joint injection.

5. Claimant saw Dr. Scheper on September 14, 2016. Dr. Scheper's report contains conflicting information regarding the severity of Claimant's ongoing back pain. One paragraph says Claimant reported ongoing back pain at a level of 6-7/10, aggravated by bending sitting more than 45 minutes. Later in the report, Dr. Scheper notes "she has been doing much better," and "her low back feels great." Claimant was reportedly walking for exercise regularly. On examination, she was noted to sit comfortably and transition to a standing posture with no difficulty. Standing flexion was unrestricted and painless. Her areas of discomfort were primarily localized to the right L5-S1 facet and the right sacroiliac joint. After reviewing Dr. Frey's operative report, Dr. Scheper recommended a right sacroiliac joint injection.

6. Claimant had the right SI joint injection on October 12, 2016. At the follow-up appointment on November 9, she reported "remarkable" pain relief, although she still had right gluteus pain. Dr. Scheper noted Claimant was "very pleased, and accepting of the likelihood of some chronic low back pain." He advised Claimant to continue her home exercise program and return if her symptoms worsened.

7. Claimant next saw Dr. Olson on December 1, 2016. She reported benefit from the SI joint injection and Dr. Olson recommended ten physical therapy sessions to work on core strengthening and back stabilization. He released Claimant to modified duty with maximum lifting of 10 pounds and no prolonged sitting or frequent bending at the waist.

8. On January 12, 2017, Claimant underwent a "Lift Assessment," which demonstrated an ability to lift and carry 15-20 pounds, depending on position.

9. Dr. Olson placed Claimant at MMI on February 13, 2017. In his Maximum Medical Improvement and Impairment report, Dr. Olson noted that the surgery was "beneficial," and Claimant no longer had leg symptoms. She was still having some SI joint symptoms, and the most recent SI joint injection was providing relief. Dr. Olson calculated a 27% whole person impairment rating. Regarding her permanent work restrictions, Dr. Olson opined "she is limited to 20 pounds lifting on an occasional basis. She may carry 20 pounds. Push 30 pounds. Pull 42 pounds. She should avoid frequent bending at the waist. Pivot and transfer at waist height limited to 20 pounds." He released Claimant from care, noting that "no additional medical [treatment is] anticipated at this time."

10. On June 20, 2017, Claimant's counsel wrote to Dr. Olson and asked him to substantiate several of Claimant's self-described symptoms and limitations. Dr. Olson was noncommittal regarding Claimant's alleged need to miss work intermittently due to fatigue and pain. He was "not sure" whether Claimant would need to leave work and potentially miss the following day. He said the frequency with which Claimant might miss work was "really hard to predict . . . with any high degree of medical probability." Dr. Olson agreed that Claimant can sit for approximately 20-45 minute intervals "depending on the day," and her tolerance for prolonged sitting decreases throughout the day. Dr. Olson opined Claimant needs to change positions as needed.

11. Dr. Olson retracted his previous opinion that Claimant did not require any post-MMI treatment. Specifically, Dr. Olson opined Claimant should retain ongoing access to physician follow-up and SI joint injections to manage flare-ups and maintain her MMI status.

12. Michael Fitzgibbons, MPA, CRC, CDMS, performed a comprehensive vocational evaluation on June 29, 2017 at the request of Claimant's counsel. Claimant described ongoing constant low back pain and occasional numbness in her legs. She also reported depression, leading to a lack of motivation and difficulty leaving her home. She described difficulty with prolonged sitting, standing or walking, needing to change positions frequently. She said she could perform some light household chores with frequent breaks.

13. Mr. Fitzgibbons opined that the limitations outlined by Dr. Olson prevent Claimant from returning to work as a nurse, but would allow her to perform numerous other sedentary and light jobs. But Mr. Fitzgibbons noted other factors that would prevent Claimant from returning to work at any job, such as Dr. Olson's opinion that

Claimant needs to change postures as needed, and her self-reported need to lie down during the day on an unpredictable basis. He opined Claimant's depression would interfere with her ability work. He did not believe Claimant could maintain attendance with sufficient regularity to sustain work. Mr. Fitzgibbons concluded Claimant "does not meet the most basic expectations of competitive employment [and] is unable to resume earning a wage unless her pain and associated symptoms improve significantly."

14. Patricia Anctil, CRC, CDMS, CCM performed a comprehensive vocational evaluation on July 30, 2017 at Respondent's request. Claimant described several adjustments she had made which enable her to complete routine household tasks. She told Ms. Anctil she takes no prescription pain medication, rarely uses OTC medications, and used none for at least a week before the interview.

15. Relying primarily on the limitations outlined by Dr. Olson, Ms. Anctil opined Claimant could return to work in a variety of sedentary and light jobs. Even accounting for a need to change positions as needed, there are many jobs Claimant can do. Although Dr. Olson has not limited the number of hours or days Claimant may work per week, Ms. Anctil also identified part-time employment, which may be appropriate given Claimant's self-reported limitations. Ms. Anctil's report lists numerous sedentary and light occupations, which she described as a representative sample of jobs. Many of the employers have a demonstrated history of accommodating workers with disabilities.

16. Examples of jobs in the Pueblo area that are within Claimant's restrictions and can accommodate a need for postural changes include: customer service representative (Global CallCenter Solutions, Convergys, Innotrac), bank teller (Vectra Bank), telephone support or appointment setter (Sandia Hearing Aid Center), movie theater cashier (Cinemark) and hotel front desk clerk (Super 8 and many others.

17. Ms. Anctil also identified full-time and part-time jobs in the medical field with employers including Innovage, Parkview Medical Center, and Inovalon. Ms. Anctil identified several work-from-home jobs available to Claimant, with employers such as TeleTech@Home, J.Lodge and Asurion. Ms. Anctil noted "based on [Claimant's] subjective reports, at home employment would be an option for her to work a flexible schedule and/or part-time hours."

18. Both vocational experts testified at hearing consistently with their reports.

19. Claimant's assertion that she would miss work in excess of customary tolerances is unpersuasive.

20. Ms. Antcil's opinions regarding Claimant's ability to work and earn wages are credible and persuasive.

21. Claimant failed to prove she is permanently and totally disabled.

22. Dr. Olson's opinions that Claimant needs access to periodic physician follow-up appointments and SI joint injections to maintain her MMI status are credible and persuasive.

23. Claimant proved she is entitled to a general award of post-MMI medical benefits.

24. Claimant has an 8-inch long, irregular and indented surgical scar on the center of her lumbar spine. The ALJ finds that Claimant should be awarded $2,000 for this disfigurement.

CONCLUSIONS OF LAW

A. Permanent Total Disability

A claimant is considered permanently and totally disabled if she cannot "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995). To prove permanent total disability, the claimant need not show that the industrial injury is the sole cause of her inability to earn wages. Rather, the claimant must demonstrate that the industrial injury is a "significant causative factor" in her permanent total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). It is not sufficient that an industrial injury merely creates *some* disability which ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a "direct causal relationship" between the industrial injury and the disability. *Lindner Chevrolet v. Industrial Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995).

In determining whether the claimant can earn wages, the ALJ may consider a wide variety of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant's physical condition, mental abilities, age, employment history, education, training, and the "availability of work" the claimant can perform within her commutable labor market. *Id*. Another human factor is the claimant's ability to obtain and maintain employment within her limitations. *See Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant can get hired and sustain employment. *See e.g., Case v. The Earthgrains Co*., W.C. No. 4-541-544 (ICAO, September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (ICAO, January 16, 1997). If the evidence shows the claimant cannot "sustain" employment, the ALJ can find she is not capable of earning wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001).

As found, Claimant failed to prove she is permanently and totally disabled. Rather, the persuasive evidence demonstrates Claimant can sustain employment in a wide variety of sedentary and light occupations. The work restrictions outlined by Dr. Olson in his February 20, 2017 report are persuasive and consistent with other medical evidence, including the January 12, 2017 Lift Assessment. Dr. Olson subsequently indicated Claimant needs the freedom to shift positions, which is a reasonable addendum given her persistent low back pain. There are many jobs that will accommodate the limitations Dr. Olson has outlined.

The ALJ credits Ms. Anctil's opinion that Claimant can sustain work in a variety of sedentary to light occupations, even considering the need for postural shifts. Ms. Anctil identified several occupations compatible with Claimant's residual functional capacity such as hotel desk clerk, movie theater cashier, and customer service representative. Ms. Anctil persuasively explained that these positions allow workers to alternate positions and change posture as needed. Ms. Anctil also identified several work-from-home jobs with employers such as Innotrac, Convergys, TeleTech@Home and J. Lodge. Some of these employers have a history of hiring people with disabilities, including SSDI recipients through the Ticket to Work Program.

The ALJ is not persuaded by Claimant's assertion that she will be incapacitated and unable to report to work or remain at work several times per month. Although that may happen from time to time, the evidence does not show it will happen with sufficient regularity to prevent Claimant from sustaining work in any job. Claimant does not use any strong pain medication and rarely uses OTC analgesics, which undercuts her allegation of recurrent incapacitating pain. Claimant has not tried to work since MMI, so her estimate of the number of days she might miss from work is largely speculative. The ALJ does not doubt that Claimant still suffers from back pain, but the persuasive evidence does not show her pain is so severe to prevent her from earning any wages in any employment.

Based on the evidence presented, the ALJ concludes Claimant can earn wages and is not permanently and totally disabled.

B. Claimant is entitled to a general award of medical benefits after MMI

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond MMI if the claimant requires further treatment to relieve the effects of the injury or prevent deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

To establish entitlement to *Grover* medical benefits, a claimant must prove that future medical treatment is or will be reasonably necessary to relieve the effects of the injury or to prevent deterioration of their condition. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI to obtain a general award of future medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1989). If the claimant establishes the probability of a need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity. *Hanna, supra*.

As found, Claimant established the probability of a need for future medical treatment, which entitles her to a general award of future medical benefits. Claimant had back surgery because of her admitted injury, and while her condition improved, she still suffers from residual pain. She received significant benefit from an injection in

November 2016, but injections tend to produce temporary, rather than permanent, relief in a case such as this. Dr. Olson reconsidered his initial opinion regarding maintenance care, and believes it is reasonable for Claimant to have access to physician follow-up and injections for flare-ups. The ALJ has credited Dr. Olson's amended opinions in finding that a general award of *Grover* medical benefits is appropriate.

C. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has an 8-inch long, irregular and indented surgical scar on the center of her lumbar spine. The ALJ concludes that Claimant should be awarded $2,000 for this disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent total disability benefits is denied and dismissed.

2. Respondent shall cover reasonable and necessary medical treatment from authorized providers to relieve the effects of Claimant's injury and prevent deterioration of her condition.

3. Respondent shall pay Claimant $2,000 for disfigurement. Respondent may take credit for any disfigurement benefits previously paid to Claimant in this matter.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 29, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Respondents have established that Claimant refused to travel to Colorado for an impairment rating and examination such that no permanent partial disability (PPD) impairment benefits should be awarded pursuant to § 8-42-107(8)(b.5)(I)(B), C.R.S.

STIPULATIONS

1. Claimant was placed at maximum medical improvement (MMI) by her out of state authorized treating provider (ATP), James Brue, M.D. on October 14, 2016.

2. Dr. Brue is not level II accredited in Colorado.

3. Dr. Brue did not meet the requirements of § 8-42-107(8)(b.5)(I)(B), C.R.S. and did not provide Insurer or Respondents the necessary measurements and information pursuant to the 3rd Edition of the AMA Guides within twenty days of placing Claimant at MMI.

4. Respondents arranged for Claimant to travel to Colorado for the purpose of obtaining an impairment rating by a Level II accredited physician. Respondents set up all travel needs including flight, hotel, and ground transportation for Claimant to travel from Ohio to Colorado for a scheduled impairment rating examination and evaluation with Dr. John Burris set for March 16, 2017.

5. If sanctions of attorney's fees and costs are appropriate and ordered in this case, the parties will later agree to the amount owed without ALJ involvement and/or will set a supplemental hearing on the amount of attorney's fees and costs owed.

FINDINGS OF FACT

1. On October 23, 2014 Claimant sustained an admitted injury to her neck and upper back while working for Employer as a flight attendant.

2. Claimant's treatment was managed by physicians in Ohio, and her ATP in Ohio was James Brue, M.D. Dr. Brue is board certified in occupational medicine and has treated occupational patients for almost 30 years. Dr. Brue is not Level II accredited in Colorado, has no relationship with Colorado, and is not familiar with Colorado law.

3. Dr. Brue regularly rates permanent impairment according to the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, as that edition is regularly used and accepted in Ohio.

4. In May of 2015 Dr. Brue was treating Claimant and was working toward releasing her to full duty work. He had planned on releasing her to full duty within a week or so. Shortly thereafter, Claimant alleged an injury to her low back while she was in physical therapy for her neck and upper back injury.

5. Due to the new injury, that Dr. Brue believed occurred while performing treatment for her neck and upper back, Dr. Brue did not release Claimant to full duty and continued to treat Claimant.

6. On October 14, 2016 Dr. Brue placed Claimant at MMI. Dr. Brue did not conduct tests required by the revised 3rd Edition of the AMA Guides to the Evaluation of Permanent Impairment to determine Claimant's medical impairment rating within twenty days.

7. On October 31, 2016 Respondents submitted a letter to Dr. Brue in an effort to obtain an impairment rating for Claimant, inclusive of measurements. Dr. Brue responded on November 2, 2016 with a 21% whole person rating per the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, noting different percentages for the cervical spine, thoracic spine, and lumbar spine. Dr. Brue did not include any range of motion measurements. *See* Exhibit 2.

8. On January 6, 2017 Respondents submitted a letter to John Burris, M.D., a level II provider, noting that Dr. Brue had not listed impairment measurements and was not Level II accredited in Colorado. Respondents asked Dr. Burris perform an impairment rating and requested that he perform the rating at a January 27, 2017 appointment scheduled for Claimant in Colorado. *See* Exhibit 3.

9. On January 19, 2017 a prehearing conference was held between the parties. At the prehearing conference, it was noted that Claimant's provider in Ohio had found her to be at MMI but that he did not conduct, in a timely manner, such tests as required by the 3rd Edition of the AMA Guides to the Evaluation of Permanent Impairment. It was noted that consequently, Respondents had arranged for and would pay for Claimant's return to Colorado for examination. Claimant contended that her restrictions precluded her from returning and that she would require a companion to accompany her if she returned. Respondents had initially moved for an order compelling Claimant's attendance at a scheduled January 27, 2017 evaluation in Colorado. However, at the pre-hearing conference, ***Respondents agreed to reschedule the January 27, 2017 evaluation to take place on or after February 10, 2017 in order to give Dr. Brue additional time to conduct such tests as required by the revised 3rd Edition of the AMA Guides to determine Claimant's medical impairment rating and to submit the test results to Respondents***. The prehearing ALJ ordered that Claimant attend the rescheduled evaluation on or after February 10,

2017 in Colorado unless Respondents received from Dr. Brue, at least one business day prior to the rescheduled appointment in Colorado, such test results as were required by the revised 3rd Edition of the AMA Guides to determine Claimant's medical impairment rating. *See* Exhibit 7.

10. The appointment for evaluation with a level II provider in Colorado was rescheduled for February 24, 2017.

11. On January 30, 2017 Respondents submitted a letter to Dr. Brue. Respondents requested that Dr. Brue perform an impairment rating for Claimant at an upcoming February 3, 2017 appointment. Respondents attached to the letter range of motion worksheets and noted that Colorado law required that a physician provide three range of motion measurements for validity if range of motion impairment was indicated. Respondents also noted that Colorado used the 3rd Edition of the AMA Guides to the Evaluation of Permanent Impairment for impairment ratings and that Dr. Brue was to indicate which edition he used in the impairment rating. *See* Exhibit 4.

12. On February 3, 2017 Claimant was evaluated by Dr. Brue. Dr. Brue noted that Claimant initially injured her cervical and thoracic back when buckled in a stewardess's chair due to severe jarring and bumping. Dr. Brue noted that Claimant underwent extensive physical therapy and was in a work reconditioning and hardening treatment when lifting a heavy suitcase to simulate her activities as a stewardess when she suffered an injury to her lumbar spine with a subsequent herniated disk at L4-L5. Dr. Brue noted that Claimant had continued ongoing pain of the cervical, thoracic, and lumbar spine with numbness and tingling going down into the right lower extremity. *See* Exhibit 1.

13. Dr. Brue performed extensive range of motion testing. Dr. Brue completed the forms submitted by Respondent. Dr. Brue completed Figure 83 for lumbar range of motion, with measurements for lumbar flexion, lumbar extension, straight leg raise (both right and left), lumbar right lateral flexion, and lumbar left lateral flexion. Dr. Brue had three values for each test and noted that each test met validity within ± 10% or 5°. Dr. Brue completed Figure 81 for cervical range of motion with measurements for cervical flexion, cervical extension, cervical right lateral flexion, cervical left lateral flexion, cervical right rotation, and cervical left rotation. Again, Dr. Brue had three values for each test and noted that each test met validity within ± 10% or 5°. Dr. Brue also completed Figure 82 for thoracic range of motion with measurements for angle of minimum kyphosis, thoracic flexion, thoracic right rotation, and thoracic left rotation. There were three values for each test and Dr. Brue noted that each test met validity within ± 10% or 5°. Dr. Brue also completed Figure 84, a spine impairment summary, noting that Claimant had a Table 53 (II)(B) lumbar spine impairment of 5% for the herniated disc at L4-L5. Dr. Brue used the AMA Guides to the Evaluation of Permanent Impairment, 3rd edition and the combined values chart. Dr. Brue opined that Claimant had a 34% whole person impairment for the conditions allowed in the claim pursuant to the 3rd edition. *See* Exhibit 1.

14. Dr. Brue also provided a rating under the 5th edition, which the state of Ohio uses, and opined that the rating under the 5th edition would be 26% whole person impairment. *See* Exhibit 1.

15. Dr. Brue attached his notes that documented the examination and his specific measurements for the lumbar, cervical, and thoracic spine impairment. This information was sent to Respondents. *See* Exhibit 1.

16. On February 14, 2017 Respondents submitted a letter to Dr. Burris. Respondents attached the report from Dr. Brue that included all of Dr. Brue's range of motion measurements including figures 81, 82, 83, and 84 and Dr. Brue's ultimate impairment rating based on the measurements. Respondents asked Dr. Burris to provide an impairment rating based on Dr. Brue's report and Dr. Brue's measurements. Respondents noted that if Dr. Brue's report was insufficient for Dr. Burris to perform an impairment rating, Dr. Burris was to indicate that. The letter noted that the February 24, 2017 appointment could be cancelled if Dr. Burris had enough information to provide an impairment rating. *See* Exhibit 5.

17. On February 15, 2017 an assistant manager at Dr. Burris' office indicated that Dr. Burris needed to see Claimant to perform the impairment rating. There was no indication from the assistant manager as to why Dr. Burris could not perform an impairment rating with the information provided by Dr. Brue. *See* Exhibit B.

18. On February 17, 2017 the parties attended another pre-hearing conference. It was noted that Dr. Burris indicated he needed Claimant to attend the February 24, 2017 appointment and be personally examined. Again, it is not evident why Dr. Burris believed the measurements, worksheets, and rating provided by Dr. Brue was insufficient. Again, Claimant raised the issue that her medical condition prevented her from traveling to Colorado for examination without a companion and her concerns about traveling. The prehearing ALJ ordered that Dr. Brue examine Claimant to determine Claimant's travel status requirements as it related to traveling round trip to Denver for an examination by Dr. Burris. *See* Exhibit 8.

19. On February 22, 2017 Respondents submitted a letter to Dr. Brue noting that Claimant had been scheduled for a medical appointment in Denver, Colorado. Respondents asked Dr. Brue, based on his examination of Claimant and knowledge of her medical treatment, whether Claimant was physically capable of travel roundtrip to Denver, Colorado by air on her own within the permanent work restrictions that he had assigned on or about October 14, 2016. On February 27, 2017 Dr. Brue indicated his answer to the question was "no." *See* Exhibit C.

20. On March 14, 2017 the parties attended another prehearing conference. Claimant again maintained that she was not able to fly by herself to Denver and the prehearing ALJ noted that Dr. Brue indicated Claimant could not travel by air by herself but that he had made no opinion on her ability to travel by other means or with a companion. The prehearing ALJ granted Respondents' motion to compel Claimant to

attend the examination with Dr. Burris in Colorado and allowed Claimant to choose whether she wished to travel by air or Amtrak train. The prehearing ALJ ordered that Respondents provide reasonable travel expenses for Claimant as well as a traveling companion and ordered that Claimant inform respondents if she would be traveling by air or rail and provide any other information required by Respondents to make required reservations. *See* Exhibit 9.

21. Claimant was rescheduled for an appointment with Dr. Burris to be evaluated for an impairment rating on March 17, 2017.

22. Following the prehearing Order and between March 14, 2017 and March 16, 2017, Respondents made travel arrangements for Claimant to fly to Denver on March 16, 2017 and made all necessary ground transportation and hotel arrangements as well so that Claimant could attend the March 17, 2017 appointment.

23. Claimant testified that on March 16, 2016 she attempted to drive to the airport to catch her scheduled flight. Claimant testified that it was a two hour drive from her home to the Columbus, Ohio airport and that while driving she was in so much pain that she pulled over to stretch out and that she just couldn't make it to the airport due to the pain.

24. On June 7, 2017 vocational consultant Katie Montoya issued a report. Ms. Montoya reviewed Claimant's restrictions and limitations imposed by Dr. Brue. Ms. Montoya also reviewed information regarding flight times and modification/assistance provided. Ms. Montoya opined that Claimant had the capacity for both air and train travel and that traveling from Ohio to Denver by air would have been consistent with Claimant's restrictions. Ms. Montoya further noted that if Claimant chose to travel by train, Claimant would be able to sit, stand, or walk as she chose. *See* Exhibit E.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw

plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

PPD Benefits and § 8-42-107(8)(b.5), C.R.S.

The Act provides for the contingency of a claimant living in another state when MMI is reached and the doctor in that state is not Level II accredited. When an authorized treating physician providing primary care who is not accredited under the level II accreditation program makes a determination that an employee has reached MMI and the employee is not a state resident upon reaching MMI, the physician shall, within twenty days after the determination of MMI, determine whether the employee has sustained any permanent impairment and if so, the physician shall conduct such tests as are required by the revised 3rd edition of the AMA Guides to the Evaluation of Permanent Impairment to determine such employees medical impairment rating and shall transmit to Insurer all test results and all relevant medical information. *See* § 8-42-107(8)(b.5)(I)(A), C.R.S. After receipt of the medical information, Insurer has twenty days to appoint a level II accredited physician to determine the employee's medical impairment rating. *See* § 8-42-107(8)(b.5)(I)(C), C.R.S.

The Act also provides that if an employee chooses not to have the authorized treating physician perform such tests or if the information is not transmitted to Insurer in a timely manner, then Insurer shall arrange and pay for the employee to return to Colorado for examination, testing, and rating at the expense of Insurer. The Act provides that if the employee refuses to return to Colorado for examination, no permanent disability benefits shall be awarded. *See* § 8-42-107(8)(b.5)(I)(B), C.R.S.

As found above, Claimant lives in Ohio and is being treated by an occupational physician in Ohio who is not level II accredited in Colorado. Dr. Brue determined that Claimant reached MMI on October 14, 2016. Dr. Brue did not submit tests required

under the 3rd Edition of the AMA Guides to Insurer within twenty days of placing Claimant at MMI as required by statute, and within twenty days only provided an impairment rating under the 5th Edition that did not include range of motion measurements. Since the Respondents did not receive the information required by statute within twenty days, they arranged an appointment for Claimant in Colorado on January 27, 2017 with Dr. Burris, a level II provider, for the purpose of obtaining an impairment rating. Pursuant to statute, had Claimant refused to return to Colorado for examination, no permanent disability benefits would have been able to be awarded.

However, as found above, the parties attended a prehearing conference on January 19, 2017. A that conference, Respondents agreed to reschedule the January 27, 2017 appointment to give Dr. Brue, the out of state provider, additional time to conduct the tests required by the revised 3rd edition of the AMA Guides and to give him time to submit those test results to Respondents. The evaluation with a level II provider in Colorado was rescheduled to February 24, 2017. The prehearing ALJ ordered that Claimant attend the rescheduled evaluation in Colorado unless Respondents received from Dr. Brue, at least one business day prior to the rescheduled appointment in Colorado, such test results as were required by the revised 3rd Edition of the AMA Guides to determine Claimant's medical impairment rating. Respondents sent worksheets to Dr. Brue on January 30, 2017. Dr. Brue conducted the tests required on February 3, 2017 and filled out all of the worksheets. Dr. Brue submitted the results and the impairment rating worksheets, with extensive range of motion measurements, to Respondents. Respondents provided the information to Dr. Burris on February 14, 2017 and the Respondents had the information required more than one business day prior to the scheduled February 24, 2017 appointment. Therefore, Claimant was not under an obligation to attend the February 24, 2017 appointment. For unknown reasons, Dr. Burris indicated through an office manager that he needed to see Claimant in person to perform an impairment rating despite the specific and extensive reports submitted by Dr. Brue.

The Act indicates explicitly that the testing can be performed by an out of state doctor and transmitted to a Level II provider in Colorado for an opinion on impairment. In this case, Dr. Brue performed the tests as requested by Respondents and transmitted the information. Here, instead of requiring Claimant come to Colorado for an impairment rating, Respondents agreed and chose to send worksheets to Dr. Brue and asked him to perform the tests required by the 3rd edition of the AMA Guides. Claimant attended an appointment with Dr. Brue on February 3, 2017, and Dr. Brue transmitted the results as requested. Respondents are now arguing that Claimant should be barred from an award of permanent disability benefits because she refused to return to Colorado for an examination.

This argument is not found persuasive. A bar to permanent impairment benefits on an admitted compensable claim is a severe penalty. The ALJ concludes that the evidence does not indicate a requirement for Claimant to return to Colorado since Respondents agreed, alternatively, that Dr. Brue perform the required testing and transmit it to Respondents. Additionally, Claimant is found credible and persuasive that

she underwent the testing with Dr. Brue and that she did not refuse to return to Colorado for examination. Although there is some testimony and evidence than could result in a different conclusion, Claimant established by preponderant evidence that she attempted to travel to Colorado on March 16, 2017 but was unable to do so due to her pain and limitations. Claimant has not refused to return to Colorado for an examination. Rather, she is limited by her injuries, as supported by information from her treating provider Dr. Brue.

Respondents engaged in conduct indicating at the January 19, 2017 prehearing conference that despite not receiving the required tests from Dr. Brue within twenty days of MMI, they were not requiring Claimant to return to Colorado for testing. Rather, they indicated their intention to allow Claimant to return to Dr. Brue for the testing. Respondents submitted a letter to Dr. Brue asking that he perform the required testing and they provided specific worksheets pursuant to the 3rd edition of the AMA Guides. Claimant attended the set appointment with Dr. Brue and Dr. Brue performed extensive testing and filled out the required worksheets. Dr. Brue transmitted all of this information to Respondents. Respondents knew that because the information was not transmitted by Dr. Brue within twenty days as required by statute, that they could require Claimant to return to Colorado for examination, testing, and rating. Despite this knowledge, Respondents instead voluntarily chose to ask Dr. Brue to provide the correct and required testing.

The ALJ concludes that Respondents have failed to establish that Claimant violated § 8-42-107(8)(b.5)(I)(B), C.R.S. and have failed to establish that Claimant should be barred from permanent disability benefits. Respondents are required to provide the information submitted by Dr. Brue to a level II provider for a determination of impairment rating. It is unclear why Dr. Burris believed the information provided by Dr. Brue was insufficient or why he was unwilling to provide an impairment rating without physically examining Claimant. The information transmitted by Dr. Brue, who is board certified in occupational medicine and has treated occupational injuries for almost 30 years, appears to be exactly the information contemplated by statute and appears to be inclusive of and responsive to Respondents' January 30, 2017 request. If Dr. Burris is unwilling to perform an impairment rating, Respondents may appoint a different level II provider to perform a rating.

If Dr. Burris or another level II provider provides information indicating why the information transmitted by Dr. Brue is insufficient to perform an impairment rating, the parties then would have the ability to seek a hearing to determine whether Dr. Brue shall be required to do more testing or whether Claimant shall be required to come to Colorado. However, at this point, the ALJ concludes that Respondents have the exact information they requested from Dr. Brue on January 30, 2017 and that Respondents have not established that Claimant refused to return to Colorado for examination or that she violated § 8-42-107(8)(b.5)(I)(B), C.R.S. and should be barred from permanent disability benefits

Sanctions

As found above, Claimant did not refuse to travel to Colorado to attend the scheduled appointment on March 16, 2017 with Dr. Burris. Rather, she could not make it to the airport after attempting due to pain and limitations associated with her injury. This is supported by information provided by her treating physician Dr. Brue. Although Respondents incurred costs associated with attorneys' fees, cancellation fees, hotel accommodations, flights, and for the medical appointment itself, the ALJ declines to impose sanctions in this matter and finds Claimant credible and persuasive that she attempted to comply with the pre-hearing order but was unable to do so due to her injury. The opinion of Ms. Montoya is not as credible and persuasive as the opinions and testimony of Dr. Brue and Claimant.

Additionally, it is noted that the parties spent significant time arguing whether or not Claimant was capable of traveling to Colorado. It is unclear why there was no prehearing request to order Dr. Burris to either provide an impairment rating with the information transmitted by Dr. Brue or explain why the information from Dr. Brue was insufficient. The January 19, 2017 prehearing order indicated that Claimant was to travel to Colorado for an examination unless the information required was provided by Dr. Brue. The information was provided by Dr. Brue. Claimant was therefore under no obligation or requirement to travel to Colorado for examination. The subsequent prehearings contemplated Claimant's ability to travel and eventually ordered Claimant to travel to Colorado. However, the ALJ concludes that Claimant was under no obligation to travel to Colorado since the information requested and required under § 8-42-107(8)(b.5)(I)(A), C.R.S. had been provided by Dr. Brue and Respondents had agreed on January 19, 2017 that instead of requiring Claimant to come to Colorado for testing, they would submit a request to Dr. Brue for the required information.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish that Claimant refused to travel to Colorado for an impairment rating and examination such that no permanent partial disability (PPD) impairment benefits should be awarded pursuant to § 8-42-107(8)(b.5)(I)(B), C.R.S.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 29, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1.) Whether Claimant proved by a preponderance of the evidence that his cervical spine condition is related to his September 22, 2015, work injury.

2.) Whether Claimant proved by a preponderance of the evidence that the requested medical benefits, specifically, a two-level anterior cervical disc fusion (ACDF) surgery recommended by Dr. Castro, is related to the September 22, 2015, work injury.

FINDINGS OF FACT

1. Claimant is a 57 year old man who is employed by Employer as a truck driver. Claimant suffered an admitted work injury on Tuesday, September 22, 2015, when he was the restrained driver traveling on I-76 driving a 2014 Volvo semi tractor-trailer loaded with 77,000 pounds of freight traveling at approximately 68 miles per hour. As Claimant observed two vehicles merging onto the highway, he moved his truck to the left lane. The first vehicle merged on to the highway remaining in the right lane, but the second vehicle, a Chevrolet pickup truck with dual rear tires, merged onto the highway and continued into Claimant's lane into the right side of his truck. The truck pushed Claimant's vehicle to the left and Claimant hit the brakes coming to a stop. For a period of time the two vehicles were attached, but they became disengaged as Claimant stopped his truck in the left lane of travel. The other vehicle pulled away, and Claimant moved his truck from the left lane to the right shoulder. Claimant felt scared, fearful and excited. He called his employer and the Colorado State Patrol arrived as Claimant was speaking to the police dispatcher.

2. The state patrol officer directed Claimant to move to a truck stop at the next exit.

3. On September 22, 2015, Claimant returned to the terminal about an hour later and told the safety coordinator that he felt a little sore. Claimant felt this over his entire body. He felt more stress on his lower back and most of the pain was in that area. He went home and watched television feeling stiffness in his entire body. The next day he was able to stretch and work through the stiffness. He reported this to the safety coordinator.

4. Claimant worked his normal schedule for the remainder of the week after the accident. On Thursday, September 24, 2015, Employer assigned Claimant a new truck, and he was sent to California. Claimant continued to feel stiffness during this trip.

5. Claimant delivered his load in California on Saturday, September 26, 2015, and stopped at a truck stop to rest before picking up another load. While in California at a truck stop on Monday, September 28, 2015, Claimant felt a shock travel up his right leg and his right leg went numb. The numbness made it difficult for Claimant to return to his vehicle. Once back to the vehicle, Claimant massaged his leg hoping to reduce the numbness and pain in his leg.

6. Claimant first received medical treatment from an authorized workers' compensation physician, Dr. Michael Ladwig, on Wednesday, September 30, 2015. Claimant testified that he reported to Dr. Ladwig stiffness throughout his entire body. Claimant believes he reported pain in his arms and headaches. Claimant also reported numbness in his legs. Claimant felt pins and needles in his legs as he walked, sat and slept and it was these symptoms that gave him the most concern. Despite Claimant's testimony to the contrary, the medical record does not reflect that Dr. Ladwig noted Claimant's complaints of upper extremity numbness or headache until October 26, 2015, when Dr. Ladwig noted Claimant was experiencing headaches, bilateral numbness and tingling in the arms.

7. It was Claimant's understanding that Dr. Ladwig wanted to focus on symptoms generated from the lumbar spine before addressing Claimant's arm, head and neck symptoms. However, there is no record of a treatment plan delaying cervical treatment as Claimant alleges.

8. Claimant had a MRI of his lumbar spine and was referred to Dr. Olsen on October 29, 2015. Claimant alleges that at Dr. Olsen's first visit, Dr. Olsen did an assessment of his neck including physically moving his head. Claimant alleges that this neck examination shot a lot of pain through his arms. However, Dr. Olsen's October 29, 2015, treatment note form Claimant's initial visit contains no such description of an examination of the cervical spine. On this visit, Claimant reported to Dr. Olsen that he sprained his lumbar spine and contused his forearms. Dr. Olsen further reported that Claimant complained of headaches but related those to his constant pain from his back and right leg.

9. On November 23, 2015, Dr. Olsen noted that Claimant reported concerns of tingling and numbness in his right arm. Dr. Olsen's report reflects that Claimant denied neck pain, reporting only intermittent numbness at periods throughout the day on the right side. Dr. Olsen told Dr. Ladwig he needed an MRI of Claimant's neck on November 23, 2015.

10. A December 2015, cervical MRI showed that Claimant has significant stenosis at C6-7 left-sided and bilaterally at C5-6. The stenosis resulted in nerve compression due to severe foraminal narrowing at C4-5, C6-7, and moderate to severe at foraminal narrowing at C5-6. After the MRI, the focus of Claimant's treatment shifted

to the cervical spine as his pain was increasing. Dr. Ladwig treated Claimant's cervical spine with branch blocks and injections over twelve to fifteen months.

11. Claimant did not suffer from problems with his neck, shooting pains into his arms or numbness and tingling in his arms and hands prior to his work injury. Claimant has not needed any medical treatment for his neck due to causes other than the motor vehicle accident.

12. Respondents filed a General Admission of Liability on April 18, 2016.

13. Claimant treated with Dr. Andrew Castro, M.D. on July 11, 2016. Dr. Castro is board certified by the American Academy of Orthopedic Surgeons, is level II accredited by Colorado's workers' compensation system, and has been serving as an orthopedic specialist for 16 years. Claimant was referred to Dr. Castro by Dr. Ladwig and Dr. Olsen.

14. Claimant reported to Dr. Castro the mechanism of his injury was "the sudden onset of jerking sensations in his neck." Claimant told Dr. Castro he had increasing neck pain two days later and that he has had "constant headaches and neck pain." Dr. Castro diagnosed Claimant with cervical radiculopathy or cervical radiculitis due to Claimant experiencing pain into the arms which travel down the outer arm into the forearm and first and second fingers. Dr. Castro credibly opined that Claimant's symptoms are specific to the C7 dermatome and radiculopathy. Claimant has undergone two cervical MRIs. The first MRI was performed on December 4, 2015, and the second was performed on June 15, 2016. Dr. Castro reviewed both MRI films and reports. Dr. Castro opined that the MRI imaging findings support the symptoms of arm pain, numbness and tingling.

15. Despite the fact that Dr. Castro did not have complete records of Claimant's treatment for this claim, Dr. Castro opined that Claimant's cervical spine condition is work related. Dr. Castro testified that he only had knowledge of the mechanism of injury based on the information Claimant provided him. Dr. Castro opined that Claimant suffered an acute injury that is causing his symptoms or otherwise has caused a prior asymptomatic pre-existing degenerative condition to become symptomatic. Dr. Castro opined that Claimant's disc bulge at C6-7 has the appearance of being an acute disc herniation because it is not accompanied by other degenerative markers, like bone spurs.

16. Claimant underwent EMG nerve studies that were negative. EMGs, however, are tests for nerve damage or irritation. Dr. Castro opined that it is possible to have a lot of pain but still have a negative EMG. Dr. Castro found Claimant to be a credible historian.

17. Dr. Castro opined that headaches can be related to neck pain, though neck pain is not the only symptom of a cervical spine injury. Dr. Castro opined that it is

also possible to have nerve root compression that causes radicular symptoms without neck pain itself.

18. On December 9, 2016, Dr. Castro recommended Claimant undergo a two-level anterior cervical disc fusion (ACDF) at C5-6, C6-7.

19. On December 21, 2016, Dr. James Ogsbury, a physician that also specializes in spine surgery, reviewed Dr. Castro's ACDF recommendation. Dr. Ogsbury recommended against the proposed ACDF procedure because he did not believe Claimant's neck problems and symptoms were causally related to Claimant's work injury. Dr. Ogsbury indicated "that for a situation to be considered causally related to a work-related episode, there must be minimal or no symptoms before [the work injury], the mechanism must be consistent with the symptoms, and then the symptoms must develop within about one month of the work-related episode." Based on the medical records Dr. Ogsbury reviewed, he believed Claimant reported neck symptoms two months after Claimant's date of injury.

20. Dr. Ogsbury further opined in a Utilization Review as an Insurer's advisor that "if [Claimant] developed the symptoms truly within a month of the work-related episode, [it] would then fulfill my criteria of being work related."

21. On March 21, 2017, Dr. Michael Janssen also performed a record review regarding Dr. Castro's ACDF recommendation. Dr. Janssen is a spine surgeon. Dr. Janssen indicated that Claimant started experiencing "nonspecific neck and cervical spine myofascial symptomatology" approximately four week after his work injury. Dr. Janssen opined that subsequent MRIs reflected longstanding age related degenerative disc disease. Dr. Janssen further opined that Dr. Castro's recommendation for a three level cervical fusion is non-occupationally related.

22. Dr. Castro disagreed with Dr. Janssen's assessment of Claimant's symptomatology. Specifically, Dr. Castro opined that Claimant's symptoms are "very specific to the C7 dermatome and radiculopathy. . . ." and therefore not myofascial symptomatology. Dr. Castro opined that myofascial symptomatology would be muscular symptomatology like neck pain or pain in the trapezius and shoulders. Dr. Castro opined that myofascial symptomatology is distinctly different from specific dermatomal pain from a nerve root that is being compressed.

23. Dr. Castro opined that the fact there are no changes between Claimant's two cervical MRI findings does not mean that Claimant's condition is necessarily caused by long-standing anatomical degenerative changes alone, and had Claimant's herniated disc condition improved between the two MRIs being performed, cervical surgery would not be considered. Claimant's condition did not improve between the two MRIs, so the condition that needs to be treated surgically is still present, Castro credibly opined.

24. Dr. Castro disagreed with Dr. Janssen on the issue of whether Claimant's symptoms are now present because an underlying condition was made symptomatic as a result of Claimant's work injury. Dr. Castro opined that Claimant's underlying condition was made symptomatic by the work injury and that Claimant's disc herniation at C6-7 is acute because it does not have bone spurs normally associated with a degenerative condition. Dr. Castro opined that Dr. Castro's opinions were found to be more credible than Dr. Janssen's opinions.

25. On February 24, 2017, Dr. Jeffrey Raschbacher performed an independent medical examination (IME) of Claimant at the request of Respondents. Claimant was seen by Dr. Raschbacher one time. Dr. Raschbacher practices occupational medicine and is not currently board certified. In his deposition testimony, Dr. Raschbacher's was admitted as an expert in occupational medicine without objection. His deposition testimony did not contain information regarding his Level II accreditation by the Division of Workers' Compensation, Department of Labor and Employment.

26. Dr. Raschbacher opined that Claimant's complaints of cervical pain are not related to the work injury. Dr. Raschbacher agreed that prior to his work injury Claimant did not complain of neck pain or radicular symptoms. Dr. Raschbacher noted that Claimant has objective findings showing anatomic abnormalities on his cervical MRIs. Dr. Raschbacher said that reports of cervical pain were made for the first time two months after the September 22, 2015, motor vehicle incident. Dr. Raschbacher opined that because of these factors, Claimant's cervical pain complaints were not relatable to the work injury.

27. Dr. Raschbacher further opined that Claimant's radiologic findings do not prove that Claimant is experiencing pain. The doctor opined that Claimant's radiologic evidence of a herniated disk does not guarantee that Claimant's herniated disk is causing his pain.

28. It is found that Dr. Castro's opinions regarding the relatedness of Claimant's cervical complaints and the recommendation for a two-level anterior cervical disc fusion (ACDF) at C5-6, C6-7 are credible and persuasive. The evidence established that Claimant's onset of symptoms met the standard enunciated by Dr. Ogsbury for determination that the cervical condition is related to the work injury. Dr. Ogsbury opined that symptoms of an acute cervical spine injury in order to be compensable would appear within 30 days of the date of the September 22, 2015, motor vehicle accident.

29. The evidence established that Dr. Ladwig's October 26, 2015, medical record supports Claimant's claim that he reported cervical spine symptoms 34 days after his motor vehicle.

30. Dr. Ladwig's October 26, 2015, medical record reflects "bilateral hand and forearm numbness." This report was "within about one month of the work related

episode." Thus, even the standard established by Respondent's IME, Dr. Ogsbury, has been met by Claimant establishing the causal relationship between the September 22, 2015, work injury and Claimant cervical spine condition.

31. It is found that Dr. Ogsbury and Dr. Castro presented more credible and persuasive opinions regarding the relatedness of Claimant's cervical spine condition than Dr. Janssen and Raschbacher.

32. Claimant was found to be a credible and persuasive witness.

CONCLUSIONS OF LAW

General Legal Principles

33. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is evidence that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S.

34. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

Causation

35. In this case, the primary question is whether Claimant's cervical spine condition is related to the September 22, 2015, motor vehicle accident. Respondents contend that Claimant's cervical spine condition is not related to the work injury and offer the opinions of Dr. Raschbacher, Dr. Janssen, and Dr. Ogsbury in support of their position. Respondents contend that Claimant's condition is degenerative in nature and not causally related. Claimant argues that the evidence established he reported to Dr. Ladwig complaints of cervical spine symptoms including headaches and bilateral hand and forearm numbness from the beginning. Claimant also relies on Dr. Ladwig's medical record of October 26, 2015, to support his claim that he meets the criteria established by Respondents' IME, Dr. Ogsbury, in that his symptoms appeared within four weeks of the work injury.

36. The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

37. In this case, Claimant established by a preponderance of the evidence that his cervical spine condition is related to the work injury of September 22, 2015. Supporting evidence of this conclusion includes Claimant's credible testimony regarding the early onset of his cervical spine symptoms which was corroborated by Dr. Ladwig's October 26, 2015, medical record. Dr. Castro's opinions regarding the relatedness of Claimant's cervical spine symptoms were more credible and persuasive than the opinions of Dr. Janssen and Dr. Raschbacher.

Medical Benefits

38. On December 9, 2016, Dr. Castro recommended Claimant undergo a two-level anterior cervical disc fusion (ACDF) at C5-6, C6-7. The evidence established that this procedure was recommended to address Claimant's cervical spine symptoms.

39. Section 8-42-101(1)(a), supra, provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

40. Respondents thus are liable for authorized medical treatment reasonably necessary to cure and relieve the employee from the effects of the injury. Section 8-42-101, *supra*; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

41. As found, Claimant proved his cervical spine condition is related to the September 22, 2015, work injury. Accordingly, it is concluded that Dr. Castro's recommendation for a two-level anterior cervical disc fusion (ACDF) at C5-6, C6-7 is related to the work injury and therefore Respondents are liable for this medical benefits.

ORDER

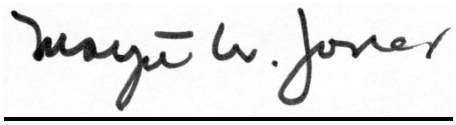
It is therefore ordered that:

1. Respondents shall be liable for reasonably necessary and related medical benefits to cure and relieve Claimant of the effects of the September 22, 2015, work injury, including a two-level anterior cervical disc fusion (ACDF) at C5-6, C6-7.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 29, 2017



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he suffered an injury to his cervical spine arising out of and in the course of his employment with employer on January 27, 2016.

- If the January 27, 2016 injury is found compensable, whether claimant has proven by a preponderance of the evidence that the medical treatment he received prior to August 9, 2016 was authorized.

- If the January 27, 2016 injury is found compensable, whether claimant has proven by a preponderance of the evidence that medical treatment he received prior to August 9, 2016 was reasonable and necessary to relieve him from the effects of the January 27, 2016 injury.

- Whether claimant has proven by a preponderance of the evidence that the C7-T1 interlaiminar epidural steroid injection (ESI) administered by Dr. Cyril Bohachevsky on November 28, 2016 was reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted August 9, 2016 work injury.

- Whether claimant has proven by a preponderance of the evidence that the anterior cervical discectomy and fusion from C5 to C7 recommended by Dr. Douglas Orndorff is reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted August 9, 2016 work injury.

- Whether claimant has demonstrated by a preponderance of the evidence that he is entitled to temporary partial disability (TPD) benefits beginning September 7, 2016 and ongoing.

- If claimant is found to be entitled to TPD benefits, whether respondents have proven by a preponderance of the evidence that claimant is responsible for his termination of employment on September 6, 2016, thereby ending TPD benefits.

- The parties stipulated that claimant's average weekly wage (AWW) is $943.38, through September 30, 2016. The parties also stipulated that beginning October 1, 2016, claimant's AWW is $1,078.33.

FINDINGS OF FACT

1. Claimant worked for employer from January 2014 until September 6, 2016 as the Beverage Manager. In that position, claimant had an office in employer's basement. In the passageway outside claimant's office, the floor slanted. As a result, the passageway had low overhead clearance.

2. Claimant testified that on January 27, 2016, he began walking up the ramp-like walkway while speaking with a coworker, Nicholas Schlau. Claimant testified that when Mr. Schlau asked him a question, claimant turned and in doing so hit his head on the top of the passageway. Claimant testified that he struck his head with such force that he fell to the ground, but did not lose consciousness. Claimant did not report the January 27, 2016 incident to employer at that time. Claimant did not seek medical treatment immediately following the January 27, 2016 incident.

3. Mr. Schlau testified at hearing that he did not observe claimant hit his head or fall in January 2016, but he did see claimant on the ground and assisted him. Mr. Schlau also testified that once claimant was standing Mr. Schlau observed claimant rubbing the top of his head and the back of his neck.

4. On May 4, 2016, claimant sought treatment with Durango Urgent Care and was seen by Michael Guillette, PA-C. At that time, claimant reported that for approximately one month he had intermittent pain in his left shoulder that included numbness and tingling into his fingers on this left hand.

5. An x-ray of claimant's cervical spine taken on May 4, 2016 showed disc space narrowing and small osteophytes at the C5-6 level, and facet joint narrowing and sclerosis at the C7-T1 level. No acute fracture was noted. Mr. Guillette diagnosed cervical disc degeneration, prescribed pain medications, and referred claimant to Spine Colorado.

6. On May 16, 2016, claimant was seen at Spine Colorado by Jamie Nelson, PA-C. At that time claimant reported pain and numbness in his left upper extremity that started "about 5 months ago". Claimant did not report a work related incident to Ms. Nelson on that date. Ms. Nelson diagnosed cervical radiculopathy in the left upper extremity with evidence of disc degeneration at the C5-6 level. Claimant was referred to physical therapy and Ms. Nelson ordered an upper extremity electromyography (EMG) study and a magnetic resonance image (MRI) of claimant's cervical spine.

7. On May 16, 2016, an x-ray of claimant's cervical spine showed moderate disc space height loss at the C5-6 level with no evidence of spondylosis in the cervical spine, with the exception of mild osteophytic spurring at C5-6.

8. Dr. Cyril Bohachevsky conducted an EMG study on May 27, 2016. The EMG showed normal electrophysiologic examination with no evidence of left cervical radiculopathy, no left sensorimotor median neuropathy, and no left ulnar neuropathy at the wrist.

9. On June 1, 2016, an MRI of claimant's cervical spine was performed. On June 10, 2016, Ms. Nelson reviewed the MRI results and noted mild to moderate C5-6 and C6-7 central canal stenosis primarily by broad disc bulge and osteophyte complex; diffuse uncovertebral and facet arthrosis with multilevel forminal stenoses greatest at C5-6 and C6-7; and associated bony reactive change from synovitis and degenerative arthrosis at the right C7-T1 facet joint.

10. Following the MRI, Ms. Nelson diagnosed cervical radiulopathy in the left upper extremity with evidence of severe bilateral foraminal stenosis at C5-6 and C6-7.

11. Claimant returned to Spine Colorado on June 1, 2016 and was seen by Ms. Nelson. At that time claimant had not yet started physical therapy and was provided a prescription to do so. Ms. Nelson also ordered a C7-T1 epidural steroid injection (ESI). On July 12, 2016, Dr. James A. Santos administered an interlaminar epidural injection at C7-T1.

12. On August 8, 2016, claimant returned to Spine Colorado and reported to Ms. Nelson that he was getting relief from the physical therapy and injection. On that date, Ms. Nelson continued to identify claimant's diagnosis as cervical radiulopathy in the left upper extremity with evidence of severe bilateral foraminal stenosis at C5-6 and C6-7. Ms. Nelson provided claimant with work restrictions limiting him to working eight hours per day. Claimant notified Danielle Kirkpatrick, Human Resources Manager with employer, that he had work restrictions. Claimant also testified that although employer knew about his work restrictions, his direct supervisor ignored the restrictions.

13. Claimant testified that he suffered a second injury at work on August 9, 2016. Claimant testified that on that date, he was speaking with someone in the passageway outside his office. While walking up the ramp-like walkway claimant struck the top of his head on the ceiling portion of the passageway. Claimant testified that he immediately felt a jolt of pain in his neck, left shoulder, and left arm.

14. Claimant immediately reported the August 9, 2016 incident to Ms. Kirkpatrick. Employer sent claimant to Durango Urgent Care for treatment and he was seen by Dr. Devon Daney on August 9, 2016. Dr. Daney diagnosed neck pain and exacerbation of cervical stenosis. Dr. Daney restricted claimant from lifting or carrying more than 20 pounds and referred claimant to physical therapy and to Spine Colorado. Claimant testified that he notified Ms. Kirkpatrick of these additional work restrictions. Following the August 9, 2016 work injury, claimant did not miss any work.

15. Claimant testified that on August 12, 2016 he spoke with Patty Button, an adjuster with insurer, regarding the August 9, 2016 incident. Claimant also testified that during that discussion he told Ms. Button about the January 27, 2016 incident.

16. On August 29, 2016, claimant was seen by Ms. Nelson at Spine Colorado. At that time, claimant described the August 9, 2016 incident to Ms. Nelson. Claimant reported pain radiating down below his left shoulder, into his left triceps and down into his left thumb, index and middle fingers. Claimant also reported that physical therapy was helping. Ms. Nelson referred claimant back to physical therapy. Although claimant had described an injury occurring on August 9, 2016, Ms. Nelson continued to identify claimant's diagnosis as cervical radiulopathy in the left upper extremity with evidence of severe bilateral foraminal stenosis at C5-6 and C6-7.

17. Claimant testified that on September 15, 2016 he told Lisa Habegger, adjustor with insurer, about the January 27, 2016 incident. Claimant testified that he believed he had adequately reported the January 27, 2016 incident at that time.

18. On September 28, 2016, respondents sent claimant for an independent medical examination (IME) with Dr. Douglas Scott. Dr. Scott reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with the IME. Following the IME, Dr. Scott issued a report in which he opined that on August 9, 2016 claimant suffered a temporary aggravation of a preexisting condition; specifically cervical neck spondylosis. Dr. Scott further opined that this temporary aggravation would resolve within 6 to 12 weeks. There is no reference to a January 2016 incident in Dr. Scott's September 28, 2016 IME report.

19. On October 16, 2016, claimant reported the January 27, 2016 incident to employer in writing. In that letter claimant referenced his discussions with the insurer's adjustors, Ms. Button and Ms. Habegger.

20. Claimant testified that he did not report the January 2016 incident at the time of the incident because he did not believe he was injured. Later when he began to have shoulder pain he did not connect that pain with the incident in January. When he did connect the two, claimant believed that he had four days to report an injury, and therefore he believed he could no longer report an injury that had occurred months prior. Claimant testified that it was only after he sought legal counsel that he learned that he could still report the January 2016 incident.

21. On October 20, 2016, respondents filed a General Admission of Liability (GAL) for the August 9, 2016 injury and admitted for medical benefits. Respondents have not admitted liability for the alleged January 27, 2016 incident.

22. On November 18, 2016, claimant returned to Spine Colorado and Ms. Nelson ordered a C7-T1 ESI. Spine Colorado requested authorization for this procedure from insurer on November 20, 2016. Dr. Bohachevsky administered the recommended interlaiminar ESI at C7-T1 on November 28, 2016.

23. Dr. Scott performed a medical records review on December 1, 2016 regarding the ESI (which at that time had already been administered) and opined that the ESI was not reasonable medical treatment and not related to claimant's August 9, 2016 work injury. Dr. Scott stated that it is his opinion that the August 9, 2016 injury caused a temporary aggravation of a preexisting condition that resolved by September 30, 2016. Dr. Scott also opined that claimant reached maximum medical improvement (MMI) on September 30, 2016. Dr. Scott also opined that the ESI at C7-T1 is not indicated to treat the temporary aggravation of a preexisting condition. Based upon Dr. Scott's review, respondents denied authorization for the November 28, 2016 ESI.

24. On December 20, 2016, Dr. Douglas Orndorff diagnosed claimant with C5-6 and C6-7 cervical spondylosis, cervical radiulopathy and subjective weakness on the left side. At that time Dr. Orndorff noted that claimant had failed conservative treatment and he recommended that claimant undergo an anterior cervical discectomy and fusion from C5 to C7.

25. Dr. Scott performed a medical records review December 28, 2016 regarding the recommended fusion surgery and opined that the surgery is indicated to treat claimant's chronic degenerative spondylosis and associated nerve root damage that existed prior to the August 9, 2016 injury. Therefore, Dr. Scott opined that the recommended surgery is not related to the work injury. Based upon Dr. Scott's review, respondents denied authorization for the fusion surgery recommended by Dr. Orndorff.

26. On January 26, 2017, claimant returned to Dr. Scott for a second IME. At that time, claimant provided Dr. Scott with a description of the January 27, 2016 incident. On February 9, 2017, Dr. Scott issued an IME report in which he opined that claimant did not suffer a work injury on January 27, 2016. However, Dr. Scott noted that even if claimant had suffered an injury at that time it was a temporary aggravation of an underlying condition and claimant's prognosis following that incident was "excellent". Dr. Scott further opined that although the recommended surgery may be reasonable, it is not necessary because claimant's need for surgery is not related to the August 9, 2016 injury. In support of this opinion, Dr. Scott notes that claimant was "stable" and at MMI on September 30, 2016. Dr. Scott testified by deposition in this matter consistent with his reports.

27. Dr. Orndorff testified by deposition and stated that he believes that claimant suffered injuries to his cervical spine on both January 27, 2016 and August 8, 2016.

28. Claimant resigned from this employment and his last day with the employer was September 6, 2016. Claimant began a new job with Animas Wine and Spirits or September 7, 2016. Claimant testified that his new employment allows him to comply with his current work restrictions.

29. Claimant testified that he resigned from his position with employer because employer was unwilling to allow him to work only eight hours per day as directed by Ms. Nelson. However, claimant did not include this reason in his resignation letter. The ALJ is not persuaded by claimant's testimony regarding the reason for his resignation.

30. Ms. Kirkpatrick testified by deposition in this matter. Ms. Kirkpatrick began working for employer in June 2016. She was not aware of an alleged January work injury until she received claimant's October 16, 2016 letter. Ms. Kirkpatrick agrees that prior to the August 9, 2016 injury claimant notified her of work restrictions involving working only eight hours per day. Ms. Kirkpatrick testified that she believed that claimant was complying with those restrictions.

31. Ms. Kirkpatrick testified that when claimant reported the August 9, 2016 injury to her she provided him a list of medical providers and claimant selected Durango Urgent Care for treatment.

32. Claimant met with Ms. Kirkpatrick on September 6, 2016 for an exit interview. During the exit interview claimant did not list his work injury or work restrictions as reasons for his resignation. Ms. Kirkpatrick testified that claimant did not state that his work injury or related work restrictions were the reason for his resignation. On the contrary, claimant repeatedly told Ms. Kirkpatrick that he was quitting to accept the position at Animas Wine and Spirits because it would allow him more time to spend with his daughter.

33. Claimant testified that his current symptoms include extreme pain in his left shoulder near the scapula with numbness down his left arm into his thumb and first two fingers. He describes the pain as aching and stabbing with a burning in his left triceps. Claimant also testified that he has headaches and stiffness in his neck muscles.

34. Pay records entered into evidence show that while employed with employer claimant was paid a salary of $1,730.16 every two weeks (or $865.38 per week). Claimant testified that he often worked more than 50 hours per week. Pay records from claimant's new employment with Animas Wine and Spirits show that he is paid $801.93 per week and works 45 hours a week. Claimant asserts that he suffered a reduction in earnings when he quit his position with employer and began working for Animas Wine and Spirits.

35. The ALJ does not find claimant's testimony persuasive with regard to an alleged January 27, 2016 work injury. Claimant did not report the alleged January 2016 injury to employer until October 2016, more than a month after his resignation. Additionally, although claimant began seeking medical treatment for his left shoulder in May 2016, the ALJ is not persuaded that claimant was injured at work in January 2016. The ALJ finds that claimant has failed to demonstrate that it is more likely than not that he suffered a compensable injury in January 2016.

36. The ALJ credits the opinion of Ms. Nelson over the contrary opinion of Dr. Scott and finds that claimant has demonstrated that it is more likely than not that the ESI administered on November 28, 2016 was reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 9, 2016 injury.

37. The ALJ credits the opinion of Dr. Orndorff over the contrary opinion of Dr. Scott and finds that the recommended anterior cervical discectomy and fusion from C5 to C7 is related to claimant's August 9, 2016 work injury. The ALJ finds that claimant has demonstrated that it is more likely than not that the recommended surgery is reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 9, 2016 injury.

38. The ALJ credits the payroll records and finds that claimant is not temporarily partially disabled nor has he shown that his work restrictions prevent him from obtaining working. Rather, there is substantial evidence that despite suffering the admitted August 9, 2016 injury, claimant was capable of earning wages immediately after reporting his injury and he continues to be capable of earning wages. Therefore, claimant has failed to establish that it is more likely than not that he is entitled to disability benefits.

39. The ALJ credits Ms. Kirkpatrick's testimony and claimant's resignation letter over claimant's contrary testimony and finds that claimant quit employment with employer to pursue employment that offered a more preferable schedule. The ALJ also finds that claimant's reasons for quitting employment were personal reasons unrelated to the August 9, 2016 work injury. Therefore, claimant exercised some choice or control over the termination of employment. The ALJ finds that respondents have demonstrated that it is more likely than not that claimant is responsible for the termination of his employment with employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering

all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has failed to demonstrate by preponderance of the evidence that he suffered a compensable injury on January 27, 2016. As found, claimant's testimony on this issue is not persuasive.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, claimant has demonstrated by a preponderance of the evidence that the ESI administered on November 28, 2016 was reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted August 9, 2016 work injury. As found, Ms. Nelson's opinion is credible and persuasive on this issue.

7. As found, claimant has demonstrated by a preponderance of the evidence that the recommended anterior cervical discectomy and fusion from C5 to C7 is reasonable medical treatment necessary to cure and relieve claimant from the effects of

the admitted August 9, 2016 work injury. As found, Dr. Orndorff's opinion is credible and persuasive on this issue.

8. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Temporary partial disability payments ordinarily continue until either claimant reaches maximum medical improvement or an attending physician gives claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. *See* 8-42-106, C.R.S.

9. As found, claimant has failed to demonstrate by a preponderance of the evidence that his work injury led to temporary wage loss. As found, claimant began modified employment immediately after reporting the August 9, 2016 work injury and worked his full schedule and received full wages. Claimant continued to work within his work restrictions at a different employer beginning September 7, 2016 with no loss of wages. As found, the payroll records are credible and persuasive.

10. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

11. Although the ALJ has determined that TPD benefits are not appropriate in this matter, the ALJ addresses the issue of claimant's termination of employment on September 6, 2016. As found, respondents have demonstrated by a preponderance of the evidence that claimant was responsible for his termination of employment. As found, Ms. Kirkpatrick's testimony and claimant's resignation letter are credible and persuasive on this issue. Therefore, even if claimant had been eligible for TPD benefits (which he is not) any such benefits would have ended upon his resignation from employment.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensability regarding a January 27, 2016 injury is denied and dismissed.

2. Respondents shall pay for the ESI administered on November 28, 2016.

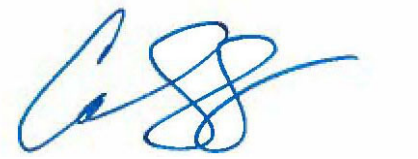
3. Respondents shall pay for the recommended anterior cervical discectomy and fusion from C5 to C7, subject to the Colorado Medical Fee Schedule.

4. Claimant's request for TPD benefits is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: August 30, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, CO 81501

ISSUES

I. Whether Claimant suffered a work-related injury to his left shoulder and neck on August 9, 2016 when he was involved in a motor vehicle accident while driving from Sterling Colorado to Greenwood Village Colorado for a management meeting.

II. Whether Claimant suffered a separate compensable injury to his left shoulder on November 11, 2016, which has been assigned WC. No. 5-046-036.

III. Whether Respondents are liable for Claimant's left shoulder surgery which was performed on January 4, 2017.

IV. Whether Claimant is entitled to temporary total disability benefits starting January 4, 2017.

V. Whether Respondents are liable for Claimant's neck surgery which was performed on May 18, 2017.

VI. Whether Respondents are liable for other medical expenses incurred since August 9, 2016.

VII. Whether Claimant should be penalized for his failure to report his injury pursuant to § 8-43-102(1)(a) from January 4, 2017 through January 30, 2017.

STIPULATIONS

1. W.C. Nos. 5-037-331 (DOI 8/9/2016) and 5-046-036 (DOI 11/16/2016) should be consolidated for purposes of this hearing.

2. If the case is found compensable, the primary authorized treating physician shall be James Hebard, M.D., of Banner Health in Greeley, Colorado.

3. If the case is found compensable, Claimant's average weekly wage is $844.41 and his temporary total disability rate will be $562.94.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was born on May 25, 1967 and was 50 years old at time of hearing.

2. Claimant worked for Grease Monkey International as an automobile mechanic for 23 years.

3. Claimant's average weekly wage is $844.41 and his temporary total disability rate is $562.94.

4. Claimant lives in Sterling Colorado.

5. At time of the accident, Claimant served as store manager of the Sterling, Colorado Grease Monkey shop, acting as a working foreman. Claimant was a salaried employee and earned $844.41 per week.

6. Claimant testified that the job duties of store manager, to a degree, were accurately described in the "Job Description" published by Respondent-Employer in January 2013 (Claimant's Exhibit 20, p. 167). His duties included repairing and maintaining between 15 and 60 cars per day, with an average of 11 to 12 per day. He worked 11 to 12 hours per day, 5 to 6 days per week. He was required to lift and/or move up to 40 pounds, and probably a lot more weight.

7. Although Claimant is a store manager, his job still requires him to perform physical activities such as change oil, move barrels of oil, stock product, and perform other work on cars. As set forth in his formal Job Description, Claimant is required to frequently lift or move up to 40 pounds.

8. Prior to the alleged injury date, Claimant had no difficulty performing his regular duties, which included moving 55 gallon drums of oil, each of which weighed between 400 and 500 pounds, and which involved rolling and sliding them.

9. Part of Claimant's job duties required him to travel from his home in Sterling, Colorado, to mandatory manager meetings once a month. The mandatory meetings were held the first Tuesday of every month. The meetings took place at either the Longmont Colorado office or the Greenwood Village Colorado office. Except for the mandatory management meetings, Claimant normally takes Tuesdays off. However, as a salaried employee, Claimant was being paid to attend the monthly Tuesday management meetings as part of his job as a store manager.

10. The travel to each monthly management meeting was as the express request of Employer and contemplated by Claimant's employment agreement.

11. The management meetings allowed Employer to go over with each store manager the performance of each store. The meetings also allowed each store manager to see how each store was doing compared to other stores. Therefore, Employer benefitted by having Claimant travel and attend each meeting to go over the performance of each store.

12. Employer scheduled a mandatory management meeting for August 9, 2016. The management meeting was scheduled to begin at 7:00 a.m. at Grease Monkey International, Inc., which is located at 7450 East Progress Place, Greenwood Village, Colorado.

13. The distance between Claimant's house in Sterling, Colorado, and Grease Monkey International in Greenwood Village, Colorado, is approximately 150 miles. Therefore, the travel for the mandatory meeting required Claimant to drive 150 miles from Sterling Colorado to Greenwood Village Colorado and then back to Sterling Colorado the same day for a total of approximately 300 miles.

14. Claimant drove in his personal van on the date of the motor vehicle accident. Claimant considered himself to be working that day. Claimant was wearing his Grease Monkey uniform. As a salaried employee he was being paid and working on the day of the accident.

15. On August 9, 2016, Claimant left his home in Sterling Colorado at approximately 3:30 a.m. to travel to and attend the mandatory management meeting. Claimant started driving west on Interstate 76 towards Greenwood Village, Colorado. Claimant was driving a van and driving 75 miles per hour. Claimant was wearing his seatbelt. There is a large grass median that separates the westbound and eastbound lanes of Interstate 76. At approximately 4:00 a.m., at mile marker 101, Claimant observed an eastbound vehicle drive off the highway and into the median and roll a number of times and eject a person towards Claimant's vehicle. To avoid hitting the ejected person, Claimant forcefully turned his steering wheel to the left. This caused Claimant to drive into the grass median. According to Claimant, this caused him to be bounced around like a pinball. Claimant then forcefully turned the steering wheel to the right and ended up back on Interstate 76 heading west bound. His car went up on two wheels before it righted itself. While taking evasive maneuvers, Claimant's left shoulder and head were thrown against the driver's side door causing the driver's side door frame to bend. Claimant's vehicle then came to a stop in the fast lane of westbound Interstate 76. After the accident, Claimant moved his car from the fast lane and pulled up behind the other person's vehicle which had rolled and had ended up in the slow lane of the westbound lane of Interstate 76.

16. Claimant was in travel status on August 9, 2016 when he left his home at approximately 3:30 a.m and at the time of the accident which occurred at approximately 4:00 a.m.

17. After the accident, Claimant got out of his vehicle and saw the person who was ejected get up and then fall down. He was bloody and had a visibly broken leg. Claimant also saw a women get out of the vehicle with a baby. Claimant called 911 and emergency personnel showed up at the scene.

18. Immediately after the accident, Claimant had neck and left shoulder pain. However, Claimant did not ask emergency personnel for medical treatment since they were assisting the person who was ejected and the other passengers of the car that rolled.

19. Shortly after the accident, Claimant used his cell phone to advise Dwain Williams, his immediate supervisor who was also headed to the manager meeting, and Ron Morrow, Jr., a higher level supervisor, that he had been in an accident that morning and that he would not be able to attend the meeting.

20. A reasonably conscientious manager would have recognized the case might result in a claim for compensation. However, neither of his supervisors advised Claimant to file a workers' compensation claim, neither directed Claimant to go to a medical facility for medical treatment, and neither provided Claimant a list of medical providers to treat any work related injuries.

21. Claimant went to his store later on the date of the accident, but he did not work a full day. Claimant suffered neck pain the same day and night of the accident. The pain was at the junction of the head and top of the cervical spine, and that pain registered 5-6 on a 10 point scale. At that time, he also experienced left shoulder pain at about a 3 level. He vomited, had a headache, and self-treated with Biofreeze and Advil.

22. The day after the accident, Claimant woke up unable to move his head because his neck was too stiff. His shoulder was sore, but he thought he had only bruised it.

23. On August 10, 2016, Claimant went to his personal health care provider, Banner Health, and was treated by Bonnie Hablutzel, N.P. According to the medical report from that visit, Claimant complained of headaches, back pain, neck pain, nausea, and vomiting due to a motor vehicle accident the day before.

24. On August 11, 2016, two days after the accident, Claimant reported his accident and physical complaints to Lisa Post, in Human Resources, and sent her pictures of the accident scene. (Claimant's Exhibit 14, pp. 116-118). A reasonably conscientious manager would have recognized the case might result in a claim for compensation. Ms. Post did not direct Claimant to a designated medical provider and did not provide Claimant a list of medical providers to treat his injuries.

25. On a date uncertain, Claimant filed, or had filed on his behalf, an "Accident Investigation Report" in which the author erroneously cited the date of injury as

August 8, 2016, and listed only "left shoulder" as the "body part injured" in the accident. (Claimant's Exhibit 19). The report also indicates Claimant was driving to a manager meeting when he was hurt in an automobile accident. The report was signed by a "supervisor", "DGarwood." Claimant identified the co-signer as Diane Garwood, who works in Human Resources, but he was not certain about the date of filing.

26. By August 11, 2016, Employer had notice of Claimant's accident and injuries and the Employer did not designate any medical providers.

27. On August 16, 2016, Claimant spoke with an adjuster from Progressive. Progressive insures the vehicle that crossed the median and rolled. Claimant told the adjuster from Progressive that he was injured and that his neck, shoulders, and stomach were hurting.

28. Since Employer failed to designate any physicians to treat Claimant, Claimant returned to N.P. Hablutzel for medical treatment on August 16, 2016.

29. On August 16, 2016, Claimant saw N.P. Hablutzel and complained of neck pain, upper back pain, and headaches. Claimant also complained of abdominal pain from the seatbelt.

30. Claimant testified credibly that he routinely told Ms. Hablutzel about his left shoulder pain, and that he also regularly told his physical therapists about that pain as well. However, the physical therapists treated the neck, and did not treat the left shoulder.

31. Claimant injured his neck and left shoulder during the August 9, 2016 motor vehicle accident.

32. Claimant returned work, but he was unable to perform his regular lifting duties. Instead, he relied on his employees to do the tasks involving heavy lifting or overhead work.

33. Due to the August 9, 2016, shoulder injury, Claimant's left shoulder was in a weakened condition.

34. On November 11, 2016, while trying to loosen a bolt with a wrench, Claimant felt a sharp pain in his left shoulder, and his left arm immediately went slack.

35. Claimant reported the incident to his employer, but he did not file a worker's claim for compensation because he thought the injury was related to the MVA incident, which he originally did not consider to be work-related. Again, none of his supervisors or Human Resources personnel at work advised him to file a worker's compensation claim or gave him a list of designated medical providers to treat his left shoulder.

36. N.P. Hablutzel regularly documented neck pain in her visits with Claimant between August 16, 2016 and November 15, 2016. (Claimant's Exhibit 9, pp. 38-83). In her report dated November 15, she noted that Claimant had injured his left shoulder while he raised his left arm to tighten a wrench. (Claimant's Exhibit 9, p. 38).

37. Although Claimant testified that he told N.P. Hablutzel that he also had left shoulder pain after the motor vehicle accident, such complaints are not noted in the medical records until November 15, 2016, when Claimant presented with shoulder pain which he still associated to the motor vehicle accident of August 9, 2016. The report of N.P. Hablutzel dated November 15, 2016, provides: "he was at work and raised it (sic) arm to tighten a wrench and felt a tear, this was the arm already injured in the MVA."

38. Due to ongoing shoulder problems, Claimant sought medical treatment from Dr. Ramon Perez.

39. Immediately before his surgery, Claimant's pain in his left shoulder measured 7-8 on a regular basis, and his left arm was essentially useless.

40. On January 4, 2017, Claimant underwent left shoulder surgery, which was performed by Dr. Perez. Dr. Perez performed a left shoulder arthroscopic rotator cuff repair, subacromial decompression, and debridement of subscapularis partial tear.

41. In his report of January 4, 2017, Dr. Perez stated that Claimant

> [P]resented with a 5 month history of ongoing left shoulder pain after being involved in MVC 8/8/2016. He had pain to neck and left shoulder immediately after the accident however focused on rehab for the cervical spine since he had some motion in the shoulder. He noted difficulty lifting his left arm above his head and was awkward for him but in November 2016 he was at work doing some overhead work developed sharp pain and subsequent definite inability to lift his arm any longer. He had an MRI obtained which revealed a complete supraspinatus rotator cuff tear. We discussed treatment options for this injury and he elected to proceed with surgical repair.

42. This ALJ finds that need for shoulder surgery was caused by the August 9, 2016, auto accident.

43. While Dr. Perez did not prepare a disability report taking Claimant off work until January 13, 2017 (Claimant's Exhibit 8, p. 17), this ALJ finds that Claimant was unable to work effective January 4, 2017, the date of surgery.

44. Claimant did not seek prior authorization from Respondents for the left shoulder surgery. The shoulder surgery occurred before Claimant filed claims for the August 9, 2016 and November 11, 2016 accidents.

45. After Claimant retained a personal injury attorney he realized that he may have a compensable workers' compensation injury. His worker's compensation attorney filed a claim for compensation for the August 9, 2016 accident on January 30, 2017. (Claimant's Exhibit 6). Claimant testified that the claim was filed within "a matter of weeks" of the time he realized that he might have a compensable workers' compensation claim. Claimant specifically stated that he injured his left shoulder and neck during the motor vehicle accident.

46. Claimant erroneously reported his injury date as August 8, 2016 on the "Accident Investigation Report", and on his Claim for Compensation filed by his attorney on January 30, 2017. He testified credibly that he was confused about the correct date when he reported August 8, 2016 as the date of the MVA.

47. The Colorado State Patrol Accident report dated August 9, 2016 provides support for a conclusion that the actual date of accident is August 9, 2016. (Claimant's Exhibit 1).

48. On May 5, 2017, Claimant also filed a separate claim for compensation for the November 11, 2016 incident that occurred when he was using a wrench at work and had an increase in shoulder pain.

49. Respondents filed Notices of Contest for both claims, on February 6, 2017 and May 19, 2017, respectively.

50. Because symptoms of pain, weakness and numbness continued, and quickly worsened, Claimant sought treatment for his neck with Chad Prusmack, M.D. In a report dated April 6, 2017, Dr. Prusmak documented rapidly worsening upper extremity weakness and neuropathy, and noted that Claimant was now dropping items and had a lot of weakness and numbness into the hands particularly and symptoms fairly clearly into the C6 and C7 distributions. (Claimant's Exhibit 7, p. 5).

51. On April 17, 2017, PAC Whatmore issued a report that was signed by PAC Whatmore and Dr. Prusmack. The report indicates that:

> [B]ased on the [Claimant's] failure to improve with conservative care over the last 6 months, his progressive bilateral arm weakness and the presence of severe stenosis bilaterally in the neck, that he should undergo surgery now to address these issues. Dr. Prusmack recommends that the patient undergo a diskectomy of the C5-6 and C6-7 with insertion of artificial disk at both levels. The need for surgery

is associated with the patient's work related injury on 08/09/2016.

52. Dr. Prusmack performed an artificial disk replacement at C5-7 on May 18, 2017. (Claimant's Exhibit 7, p. 1).

53. This ALJ finds Dr. Prusmak's and PA-C Whatmore's reports credible and persuasive that the neck surgery was reasonable, necessary, and related to Claimant's August 9, 2016 motor vehicle accident.

54. Claimant testified that he elected to proceed with cervical surgery without waiting for a hearing on his workers' compensation claim because he was afraid that he would lose the use of both hands.

55. Claimant did not have any problems with his left shoulder, hands or neck before his industrial accident of August 9, 2016.

56. This ALJ finds that the need for neck surgery was caused by the August 9, 2016, auto accident.

57. Claimant gave a recorded statement to an adjustor at Progressive Insurance on March 28, 2017. (Claimant's Exhibit 16). Claimant's description of his activities just prior to, during, and after the MVA is consistent with his testimony at hearing.

58. Dr. Allison Fall performed an Independent Medical Examination on behalf of Respondents. She reviewed Claimant's medical records, interviewed Claimant, and physically examined him. The primary basis of Dr. Fall's opinion is that the mechanism of injury described by Claimant was insufficient to cause a cervical spine trauma or shoulder injury and that Claimant's shoulder condition is preexisting. For example, Claimant stated that the accident caused him to get thrown into the doorframe, in which he hit his left shoulder and head. Claimant further testified that his impact into the doorframe bent the doorframe. He also testified that when he drove into the median, at approximately 75 mph, he was bounced around like a pinball. However, Dr. Fall concluded that the accident did not cause Claimant to be thrown into the doorframe because the nurse practitioner who treated Claimant the day after the accident did not note that Claimant's left shoulder and head hit the door frame. Although Dr. Fall indicates that the nurse practitioner's notes do not indicate Claimant's left shoulder and head hit the doorframe, she does not account for a possible plausible explanation for such in her analysis in determining causation. A plausible explanation could be that such information was not provided to the nurse practitioner, or if it was, it was not written down. It should be noted that the nurse practitioner's notes are very brief and somewhat cryptic. Dr. Fall also fails to address whether the mechanism described by Claimant, if true, would account for Claimant's injuries. Therefore, Dr. Fall's opinion on causation is not found to be persuasive or credible.

59. Dr. Fall also bases her opinion that the shoulder injury is not related based on the fact that there is one medical report dated October 27, 2015 in which Claimant is being treated for his diabetes and complains of left shoulder pain. The medical report states Claimant hurt his shoulder playing basketball. Claimant, however, returned to the doctor on January 26, 2016, for diabetes and a cold and did not complain of left shoulder pain. Claimant again returned to the doctor on February 16, 2016, and did not complain of left shoulder pain. Claimant returned an additional time on March 22, 2016 for knee pain and did not complain of shoulder pain. Moreover, Claimant credibly testified at hearing that he has not played basketball since he was in high school and did not hurt his shoulder playing basketball, or doing anything else, before the auto accident. Dr. Fall did not ask Claimant about the discrepancy and allow Claimant to provide a possible explanation for the note in his medical record and factor that into her causation analysis. Moreover, Dr. Fall did not comment on the fact that Claimant did not complain of any shoulder pain during the three medical appointments he had prior to the motor vehicle accident. Dr. Fall also failed to analyze whether Claimant's auto accident might have aggravated a preexisting shoulder condition. Instead, Dr. Fall notes the discrepancy and concludes Claimant's shoulder condition was preexisting and not related to the auto accident. Therefore, this ALJ does not find Dr. Fall's opinions to be credible or persuasive.

60. Claimant testified credibly that, while he may have told Nurse Hablutzel that his left shoulder hurt when he saw her on October 27, 2015 (Claimant's Exhibit 9, p. 69), he did not tell her that he got it from playing basketball, since he had not played basketball since high school. He testified credibly that he never hurt his left shoulder prior to his accident on August 9, 2016. No medical evidence was presented to suggest that any prior shoulder injury or treatment occurred prior to August 9, 2016, except for Nurse Hablutzel's notation on October 27, 2015.

61. Claimant testified credibly that prior to the August 9, 2016 accident he did not have problems with his hands, elbow, or any part his arms although he had diabetes. He stated that he did have pins and needles and that a couple of his toes were going numb.

62. Claimant never hurt his neck prior to his accident of August 9, 2016.

63. Dr. Perez wrote a disability certificate dated January 13, 2017 indicating that Claimant could not work. (Claimant's Exhibit 8, p. 20). He wrote a second disability certificate taking Claimant off work on February 10, 2017. (Claimant's Exhibit 8, p. 14).

64. Claimant suffered a shoulder injury and neck injury during the August 9, 2016 motor vehicle accident.

65. Claimant verbally notified Employer of his accident and injuries on the day of the accident, August 9, 2016, and two days later, August 11, 2016. Employer failed to designate any medical providers. Therefore, the right of selection passed to

Claimant and Claimant obtained medical treatment on his own. Claimant sought general medical treatment from N.P. Hablutzel. Claimant sought medical treatment for his shoulder from Dr. Perez. Claimant also sought medical treatment for his neck from Dr. Prusmack. Therefore, N.P. Hablutzel, Dr. Perez, and Dr. Prusmack are authorized providers.

66. Claimant's left shoulder injury required surgery. Claimant underwent shoulder surgery on January 4, 2017. The left shoulder surgery obtained by Claimant was reasonable, necessary, and related to the August 9, 2016 accident.

67. Claimant's neck injury also required surgery. Claimant underwent neck surgery on May 18, 2017. The neck surgery obtained by Claimant was reasonable, necessary, and related to the August 9, 2016 accident.

68. After Claimant underwent shoulder surgery on January 4, 2017, Claimant was unable to perform his regular job duties. In addition, after Claimant underwent neck surgery on May 18, 2017, Claimant was unable to perform his regular job duties.

69. There is no evidence in the record from any medical provider that indicates that Claimant is at MMI or is released to his regular job.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and

draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Issue I: Whether Claimant suffered a work-related injury to his left shoulder and neck on August 9, 2016 when he was involved in an automobile accident while driving from Sterling Colorado to Greenwood Village Colorado for a management meeting.

Compensability

In order to recover benefits Claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment. Section 8-41-301(1)(b) & (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where Claimant demonstrates the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra.*

Generally, injuries that occur while a claimant is going to or coming from the place of employment are not considered to have arisen out of and in the course of the employment. *Madden v. Mountain West Fabricators,* 977 P.2d 861 (Colo. 1999). However, various factors may be considered in determining whether travel to and from work arises out of and in the course of employment. These factors include, but are not limited to: (1) whether the travel occurred during working hours; (2) whether the travel

was on or off the employer's premises; (3) whether the travel was contemplated by the employment contract; (4) whether the employment created a special "zone of danger." Thus, an injury sustained during travel initiated at the direct or implied request of the employer, or during travel that confers a benefit on the employer beyond the employee's mere arrival at work is, barring some deviation, sufficient to satisfy the arising out of and in the course of tests because the travel is contemplated by the employment contract. *Id.* at 865.

Therefore, where an employee is in a travel status, as distinguished from simply going to and from work, he is normally within the course of his employment from the time he leaves his home until he returns to it. *Electric Mutual Liability Insurance Co. v. Industrial Commission*, 391 P.2d 677 (Colo. 1964); *O. P. Skaggs Co. v. Nixon*, 72 P.2d 1102 (Colo. 1937). The 'travel status' exception is applicable where an employee is required to travel away from his home city or town on his employer's business. See, e.g., *Employers' Liability Assurance Corp. v. Industrial Commission*, 363 P.2d 646 (Colo. 1961); *Alexander Film Co. v. Industrial Commission*, 319 P.2d 1074 (Colo. 1957); *Tatum-Reese Development Corp. v. Industrial Commission*, 490 P.2d 94, (Colo. App. 1971).

Claimant lives and works in Sterling, Colorado. Claimant manages the Grease Monkey in Sterling, Colorado. As part of his employment, Claimant is required to travel for a mandatory management meeting the first Tuesday of every month. Therefore, attendance and travel to the meeting was at the express request of Employer. The meeting was necessary for Employer to go over the operation and performance of each store with each store manager.

The location of the management meeting varies. On August 9, 2016, Claimant was required to travel and attend the monthly management meeting in Greenwood Village, Colorado, at 7:00 a.m. The location of the meeting was approximately 150 miles from Claimant's home. Claimant left Sterling Colorado at approximately 3:30 a.m. and was driving - traveling - westbound on Interstate 76 towards Greenwood Village Colorado. At approximately 4:00 a.m., while driving – traveling - to the management meeting, Claimant was involved in an automobile accident.

This ALJ concludes that Claimant has proven by a preponderance of the evidence that at the time of the accident, he was in travel status. Therefore, Claimant has established that his auto accident arose out of the course of his employment.

Whether Claimant injured his left shoulder and neck during the August 9, 2016 automobile accident.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates,

accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

This ALJ finds and concludes that Claimant has met his burden to prove, by preponderance of the evidence, that he suffered work-related injuries to his left shoulder and neck on August 9, 2016. That evidence includes the following:

Claimant was involved in a motor vehicle accident on August 9, 2016. While his vehicle did not make contact with another vehicle or a person, he was forced to take evasive actions to avoid striking a person on the highway. In the process he forcefully turned his steering wheel to the left and then to the right while traveling at 75 miles per hour, causing his van to travel precariously in a grassy median and lean up on two wheels. His sudden evasive action also caused his head and body to forcibly strike the driver's door of his vehicle, causing injuries to his left shoulder and neck. The preponderance of the medical evidence, the Colorado State Patrol Traffic Report dated August 9, 2016, photographs of the scene, a recorded statement given to a Progressive Insurance representative, an "Accident Investigation Report", and mobile phone and text record all support Claimant's credible testimony about the details of the accident.

The preponderance of evidence also supports a conclusion that Claimant hurt his left shoulder in the MVA. Claimant reported a left shoulder injury in the 'Accident Investigation Report". While Nurse Hablutzel's records between August 10, 2016 and November 15, 2016 do not refer to a shoulder injury, a report of the latter date does document that Claimant gave a history of a left arm injured in the MVA. Claimant testified credibly that his neck problem was the primary presenting problem between August 9, 2016 and November 11, 2016, that he reported the shoulder problems to Nurse Hablutzel and his physical therapists between those two dates, but that he may not have always reported a left shoulder at every visit. This ALJ finds and concludes that Claimant did suffer a shoulder injury on August 9, 2016 because such an injury is consistent with the mechanism of injury: a sudden, violent blow to the shoulder as it struck the driver's side door when Claimant forcibly turned the steering wheel of his van to avoid striking a person moving toward him.

This ALJ is not persuaded by the opinion of Dr. Fall that a serious left shoulder injury caused by the MVA is questionable given one medical record documenting an alleged basketball injury with accompanying paresthesias. Claimant credibly testified that he never told Nurse Hablutzel that he injured his left shoulder while playing basketball. Even if he reported shoulder problems on one occasion prior to the MVA, the record is devoid of any other evidence that Claimant sought treatment for his left shoulder at any other time prior to the accident, or that he was unable to perform the heavy duties required of an auto mechanic prior to that time. This ALJ finds and

concludes that Dr. Fall's opinion that there is no evidence of a left shoulder injury caused by the incident on August 9, 2016 is not credible.

This ALJ finds and concludes that Claimant suffered a compensable injury to his neck on August 9, 2016. Beginning August 10, 2016, Nurse Hablutzel documented a neck injury, and there is no evidence in her records prior to that time that Claimant reported any neck problems. Dr. Prusmack has documented pathology at C5-6 and C6-7 which he has opined is associated with Claimant's work related injury on August 9, 2016. The record is devoid of any medical records documenting treatment for any pre-existing cervical degenerative problems. Claimant credibly testified that, while he was able to return to work full time, he had to rely on his employees to do the heavy work, which is consistent with his testimony that he continued to have neck problems until he sought treatment with Dr. Prusmack. This ALJ finds it plausible that Claimant injured his neck when he forcefully turned his steering wheel during his evasive maneuvers and struck his head, neck and left side of his body on the driver's side door.

This ALJ does not find credible Dr. Fall's opinion that the only diagnosis which is possibly caused by slamming on the brakes and swerving would have been a mild cervical myofascial or muscular pain and that "there was no significant mechanism of injury to cause a cervical spine trauma." In this regard, this ALJ is persuaded by the uncontroverted testimony of Claimant that he was travelling 75 miles per hour at the time he swerved, causing his van to travel at high speed in the grass median and that he got bounced around like a pinball before he slammed on his brakes. This ALJ finds that such a mechanism was significant enough to cause a serious neck injury that went beyond "a mild cervical myofascial or muscular pain."

The above evidence, taken together, supports a conclusion that Claimant suffered compensable injuries to his left shoulder and neck while in travel status on August 9, 2016.

Issue II. Whether Claimant Sustained a Separate Shoulder Injury on November 11, 2016. This claim has been assigned WC. No. 5-046-036.

Section 8-41-301(1)(c), C.R.S., requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, Claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. See *Subsequent Injury Fund v. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Consistent with this principle Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury.

Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability the disability is a compensable consequence of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Price Mine Service, Inc. v. Industrial Claim Appeals Office,* 64 P.3d936 (Colo. App. 2003); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002). If the injury leaves the body weakened and subject to an opportunistic infection, and the infection results in disability and need for treatment, the disability and need for treatment are proximate results of the industrial injury. *See Johnson v. Industrial Commission,* 148 Colo. 561, 366 P.2d 864 (1961).

On November 11, 2016, Claimant was at work attempting to loosen an oil pan plug with a wrench. While attempting to loosen the oil pan plug, Claimant felt pain and a tear in his left shoulder. Claimant immediately related the pain in his left shoulder to the injury he sustained in the automobile accident on August 9, 2016. The incident that occurred on November 11, 2016 was not a separate and distinct injury. This ALJ concludes that the August 9, 2016 accident and injury to Claimant's shoulder put Claimant's left shoulder in a weakened condition. This ALJ concludes that the additional pain felt on November 11, 2016 was proximately caused by, and relates back to, the August 9, 2016 injury.

Issue III. Whether Respondents are liable for Claimant's left shoulder surgery which was performed on January 4, 2017.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

In this case, Claimant did not have any significant or disabling shoulder problems prior to the automobile accident. After the accident of August 9, 2016, Claimant developed pain and functional limitations in his left shoulder. The accident put Claimant's shoulder in a weakened condition. On November 11, 2016, Claimant was working and felt additional pain in his left shoulder. Claimant then presented to Dr. Perez for treatment. In his report of January 4, 2017, Dr. Perez stated that Claimant

> [P]resented with a 5 month history of ongoing left shoulder pain after being involved in MVC 8/8/2016. He had pain to neck and left shoulder immediately after the accident however focused on rehab for the cervical spine since he had some motion in the shoulder. He noted difficulty lifting his left arm above his head and was awkward for him but in November 2016 he was at work doing some overhead work developed sharp pain and subsequent definite inability to lift his arm any longer. He had an MRI obtained which revealed a complete supraspinatus rotator cuff tear. We discussed treatment options for this injury and he elected to proceed with surgical repair.

Claimant credibly testified that he needed the surgery because he had severe pain and inability to lift his left arm any longer, and that he wanted to get his shoulder repaired as soon as possible so that he could return to work. Accordingly, this ALJ finds and concludes that the left rotator cuff surgery performed by Dr. Perez was reasonably necessary and related to the August 9, 2016 accident.

Therefore, this ALJ concludes that Claimant has proven by a preponderance of the evidence that the shoulder surgery was reasonable, necessary, and related to the August 9, 2016 motor vehicle accident.

Authorized Medical Treatment

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the insurer will compensate the provider for the services rendered. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).

Section 8-43-404(5)(a)(I)(A), applicable to this 2016 injury and claim for benefits, provides that:

> In all cases of injury, the employer or insurer shall provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee.

The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

This statute affords the employer the right to designate at least four physicians and/or corporate providers that are deemed authorized to provide medical treatment.

Consistent with the version of § 8-43-404(5)(a) that was amended in 1997, the current version provides that the employer's right to designate the authorized providers may be lost and the right of selection passed to the Claimant if medical services are not tendered "at the time of injury." *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

Carrier Liability for Medical Services Provided After Notice of Injury

Section 8-42-101(6)(a), C.R.S. provides in relevant part:

> If an employer receives notice of injury or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is…found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer …that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

In this case, Claimant advised Employer that he was involved in an accident while driving from his house in Sterling Colorado to the management meeting in Greenwood Village Colorado. Claimant provided this notice to Ms. Post on August 11, 2016. Although given notice of a work related accident and injury, Employer did not provide Claimant a list of medical providers consistent with C.R.S 8-43-404(5)(a)(I)(A). Therefore, the right of selection passed to Claimant. Claimant selected Dr. Perez to treat his left shoulder and Dr. Perez is authorized.

The left shoulder surgery was reasonable, necessary, and related to the August 9, 2016 accident and was provided by an authorized provider. Therefore, Claimant has established by a preponderance of the evidence that Respondents are liable for the left shoulder surgery performed by Dr. Perez on January 4, 2016.

Issue IV: Whether Claimant is entitled to temporary total disability benefits starting January 4, 2017.

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d

637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Since Claimant had injury-related left shoulder surgery on January 4, 2017, he was unable to work thereafter. Dr. Perez wrote a disability certificate dated January 13, 2017 indicating that Claimant could not work. This ALJ can reasonably infer that Dr. Perez intended to take Claimant off work beginning on the date of surgery. In addition, Claimant had neck surgery on May 18, 2017. Therefore, this ALJ finds and concludes that Claimant has established by a preponderance of the evidence that he is entitled to TTD beginning January 4, 2017 and continuing until ended by further order or by operation of law.

Issue V: Whether Respondents are liable for Claimant's neck surgery performed on May 18, 2017.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

This ALJ is persuaded that cervical surgery is reasonably necessary by the opinion of Dr. Prusmack that Claimant had failed to improve with conservative care for the 6 months before April 17, 2017, that he had progressive bilateral arm weakness and the presence of severe stenosis bilaterally in the neck, and that surgery was necessary to address these issues. This ALJ is also persuaded that cervical surgery was reasonably necessary by the credible testimony of Claimant that he was losing feeling in his hands. This ALJ accepts as credible the opinion of Dr. Prusack that the need for surgery is related to Claimant's work-related injury on August 9, 2016.

Therefore, Claimant has established by a preponderance of the evidence that the May 18, 2017 neck surgery was reasonable, necessary, and related to the August 9, 2016 accident.

Authorized Medical Treatment

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the insurer will compensate the provider for the services rendered. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).

Section 8-43-404(5)(a)(I)(A), applicable to this 2016 injury and claim for benefits, provides that:

> In all cases of injury, the employer or insurer shall provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee.

The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

This statute affords the employer the right to designate at least four physicians and/or corporate providers that are deemed authorized to provide medical treatment. Consistent with the version of § 8-43-404(5)(a) that was amended in 1997, the current version provides that the employer's right to designate the authorized providers may be lost and the right of selection passed to the Claimant if medical services are not tendered "at the time of injury." *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

Claimant had given verbal notice to Employer on August 11, 2016 about his neck injury that occurred while he was driving to the management meeting. Employer failed to designate a medical provider. In addition, Claimant filed a Workers' Claim for

Compensation on January 30, 2017. Therefore, both Employer and Insurer had "notice" within the meaning of Section 8-42-101(6)(a), C.R.S. Neither Employer nor Insurer designated any medical providers to treat Claimant for his August 9, 2016 neck injury. Therefore, the right of selection passed to Claimant and Claimant selected Dr. Prusmack to treat his neck condition and Dr. Prusmack is an authorized provider.

Carrier Liability for Medical Services Provided After Notice of Injury

Section 8-42-101(6)(a), C.R.S. provides in relevant part:

> If an employer receives notice of injury or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is…found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer …that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

After notice of the injury, Respondents failed to furnish reasonable and necessary medical treatment. Claimant ultimately underwent neck surgery on May 18, 2017. The May 18, 2017 neck surgery was reasonable, necessary, and related to the August 9, 2016 accident and provided by an authorized provider.

Therefore, this ALJ finds and concludes that Claimant has established by a preponderance of the evidence that Respondents are liable for the May 18, 2017 neck surgery.

Issue VI: Whether Respondents are liable for other medical expenses incurred since August 9, 2016.

Given that Claimant has met his burden to prove that he suffered a compensable neck injury and left shoulder injury in the August 9, 2016 motor vehicle accident, this ALJ finds and concludes that Respondents are liable for reasonable, necessary, and related medical treatment to cure and relieve Claimant from the effects of his August 9, 2016 industrial accident in which he hurt his left shoulder and neck.

Issue VII: Whether Claimant should be penalized for his failure to report his injury pursuant to 8-43-102(1)(a) from January 4, 2017 through January 30, 2017.

Section 8-43-102(1)(a) provides that an employee that sustains an injury from an accident "shall notify the said employee's employer in writing of the injury within four

days of the occurrence of the injury." If the employee fails to report the injury in writing "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left to the discretion of the ALJ. *LeFou v. Waste Management*, W.C. No. 4-519-354 (I.C.A.O. March 6, 2003).

This ALJ finds and concludes that Claimant, as a reasonable person, did not appreciate the probable compensable nature of his neck and shoulder injuries until a few weeks prior to filing his first written claim for compensation on January 30, 2017 when he spoke to his attorney about such a claim. None of his supervisors or Respondent-Employer Human Resources representatives advised him to file a claim, and none filed one for him, prior to that time. The undated Accident Investigation Report regarding the August 9, 2016 accident makes no reference to a workers' compensation event, although it indicates that Claimant was driving to a manager meeting from Sterling to Denver. This ALJ can reasonably infer that it is not intuitively obvious to a layperson that injuries while traveling are compensable events, and there is no evidence in the record that anyone educated Claimant about his right to workers' compensation benefits until his discussion with an attorney a few weeks before January 3, 2017. In addition, based on Claimant's credible testimony and available records, this ALJ concludes that Respondent-Employer representatives were aware of the August 9, 2016 accident and injuries. Under these circumstances this ALJ finds and concludes that Claimant should not be penalized for late reporting of his injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury to his left shoulder and neck on August 9, 2016.

2. Claimant did not suffer a separate work related injury to his left shoulder on November 11, 2016. Therefore, Claimant's claim for benefits under W.C. No. 5-046-036 is denied and dismissed.

3. Respondents shall pay for Claimant's January 4, 2017, left shoulder surgery pursuant to the Colorado Workers' Compensation Medical Fee Schedule.

4. Respondents shall pay Claimant TTD at the rate of $562.94 as of January 4, 2017.

5. Respondents shall pay for Claimant's May 18, 2017, neck surgery pursuant to the Colorado Workers' Compensation Medical Fee Schedule.

6. Respondents shall pay for Claimant's reasonable, necessary, and related medical treatment for his neck and left shoulder incurred since August 9, 2016.

7. Respondents request for penalties pursuant to Section 8-43-102(1)(a) is denied.

8. Respondents shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

9. Dr. James Hebard, of Banner Health, in Greeley, Colorado, shall be Claimant's primary authorized treating physician.

10. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 30, 2017

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she was disabled from performing her normal job duties and, as a result, potentially entitled to receive temporary total disability ("TTD") benefits beginning March 16, 2017 and continuing.

- If Claimant has proven that she was disabled from performing her regular job duties, whether respondents have proven that Claimant committed a volitional act that led to her termination of employment so that she is not entitled to receive TTD benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant, a 59-year-old female, was employed as a customer service agent for Employer, an aviation service provider that contracts with airlines to perform certain tasks or functions in the aviation industry.

2. Employer has a contract with an airline. The airline requires all customer service agents to attend a two-week training program in Fort Lauderdale, Florida, within the first ninety days of employment to learn how to perform the required duties. Claimant testified she understood this requirement to attend the training within the first ninety days of employment.

3. Claimant was ultimately terminated from employment with the airline on March 16, 2017 for her failure to attend the training. Three training opportunities were scheduled prior to Claimant's admitted injury:

   - Claimant was first scheduled to attend the mandatory training around the end of September and into October 2016. However, the airline canceled that training due to adverse weather conditions.

   - Claimant was subsequently scheduled to attend the mandatory training in November of 2016. The airline postpone that training because of high volume travel.

   - Claimant was scheduled a third time to attend the mandatory training. This training session was to take place in early January 2017. Claimant did not attend this training because she planned on leaving her job with Employer to move to Arkansas to care for her elderly father. She informed the airline in early December 2016 that by January 15, 2017 she would no

longer be working for the airline because she was moving back to Arkansas and had interviews lined up for a job there. "I told them that I didn't want to waste their money, because I didn't know if I was staying."

- Claimant testified that she understood that if Employer could not reschedule her training that she could "be released," and that she "probably wouldn't have a job . . . 'casuse the training is – was mandatory."

4. Claimant sustained an industrial injury to her back on December 14, 2016 while lifting heavy and oversized luggage. Employer provided Claimant's medical treatment.

5. Claimant's injury did not require her to miss time from work. She continued to work light duty and Employer accommodated her work ten to fifteen pound lifting restriction, and provided her seating so she could stand or sit while performing her job duties. Claimant worked for several months between her industrial injury and her termination.

6. Following her December 14, 2016 industrial injury, Claimant decided to remain with Employer. She was offered light duty work based on her restrictions, doing basic functions at the ticket counter.

7. In early February, 2017, Claimant's work restrictions were lifting no more than ten pounds and sitting fifty percent of the time.

8. Two additional training opportunities were scheduled prior to Claimant's termination:

- Dava "Deedee" Mitchell-Wood, Employer's General Manager, asked the airline for an extension for Claimant to attend the mandatory training. The airline granted Ms. Mitchell-Wood's request. Claimant was scheduled to attend the training in February of 2017.
  - Claimant again refused to attend this scheduled and mandatory training, telling Ms. Mitchell-Wood that she would not go to the training because she would have to miss her medical appointments.
  - Claimant did not timely provide a medical note that said she could not attend the training class in February of 2017.
  - As a result, claimant had refused to attend two mandatory trainings without medical support by February of 2017.
- Claimant was scheduled for a fifth time to attend the mandatory training. This time the training was scheduled to take place beginning March 4, 2017.

- Ms. Mitchell-Wood contacted Concentra in Florida and arranged for Claimant to have her medical appointments in Florida during the two weeks she would be at training.

- Claimant failed to attend the training. This was the third time that claimant refused to attend the mandatory training of her own volition.

- Claimant saw Dr. Cava on March 2, 2017. While Dr. Cava's report states that Claimant "should not go to the training class this weekend," no persuasive evidence supports a finding that Claimant provided that documentation to Employer

- Claimant admitted that she did not want to go to the mandatory training in March of 2017.

9. Despite being able to work with no time off after her December, 2016 injury, she refused to attend the mandatory training in January of 2017 because she planned to terminate her employment; and February of 2017 because she could not miss her medical appointments in Colorado. Prior to these two missed trainings, Claimant did not report to Employer that she was unable to attend due to her medical condition.

10. On February 28, 2017, Dr. Cava treated Claimant at a regularly scheduled appointment. At that time she did not restrict Claimant from working her entire shift, allowed her to stand and walk, and provided that Claimant "[s]hould be sitting 75% of the time." The ALJ finds that these restrictions would not have prevented Claimant from taking a four hour flight or participating in training.

11. Forty-six hours later Claimant returned to Dr. Cava for what appears to be an unscheduled visit for a "recheck of injuries." Claimant told Dr. Cava that she did not feel like she could go to the training, and that she did not want to go. Given Claimant's restrictions less than two days before this appointment, the unscheduled visit, and Claimant's acknowledgement that she did not want to attend the March training; the ALJ finds it more likely than not that Dr. Cava then wrote a report recommending that Claimant not attend the training seminar at Claimant's request. This reduces the persuasiveness of Dr. Cava's report.

12. Claimant had been providing Ms. Mitchell-Wood a copy of her restriction notices since she was placed on light duty. However, Claimant did not provide Ms. Mitchell-Wood the March 2, 2017 Concentra medical report where Dr. Cava noted that Claimant should not fly/attend the training seminar.

13. Even during Claimant's termination meeting with Ms. Mitchell-Wood, Claimant did not provide Ms. Mitchell-Wood with the Dr. Cava's March 2, 2017 report.

14. After Claimant failed to attend the March 2017 training, Ms. Mitchell-Wood spoke with the airline and attempted to obtain yet another extension for Claimant to attend the training. The airline informed Ms. Mitchell-Wood that another extension

would not be given because Claimant has exceed the 90-day requirement as she had been on the contract since October 2016.

15. As a result, Ms. Mitchell-Wood terminated Claimant on March 16, 2017. Claimant acknowledged that she knew she would be terminated if she missed the mandatory training.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The termination statutes provide that in cases where a temporarily disabled employee is "responsible for termination of employment, the resulting wage loss shall not be attributed to the on-the-job injury." The concept of responsibility reintroduces the concept of "fault" as it was used in termination cases prior to *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Hence, the issue is whether the claimant engaged in volitional conduct which was the cause of the termination. Conduct is volitional if the claimant exercised some degree of control over the circumstances leading to the termination in light of the totality of the circumstances. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994); *Aguilar v. Matrix Logistic, Inc.*, W.C. No. 4-473-075 (December 5, 2002).

There is no dispute that Claimant failed to attend the mandatory training three times of Claimant's own volition.

Claimant informed Employer that she was not going to attend the December 2016 training because she was going to quit her job in mid-January 2017 and move to Arkansas. She never claimed that the reason for the failure to attend the training was due to her back injury.

Moreover, Claimant was able to work light duty with lifting restrictions of 10-15 pounds and sitting up to at least fifty or seventy five percent of the time. Claimant was able to work after her injury and did not miss time from work due to her injuries. Claimant did not make a claim for temporary disability benefits prior to her termination on March 16, 2017. As a result, Claimant had the capability of functioning well despite her injury.

Ms. Mitchell-Wood contacted the airline and asked for an extension for Claimant to attend another training seminar. The airline agreed and scheduled another training seminar in February of 2017. Claimant again informed Employer that she would not be attending the training. There was no doctor's note recommending that Claimant should not attend the February 2017 training. Instead, Claimant indicated that she did not want to miss her medical appointments. Claimant was still working and did not receive medical clearance to avoid the training.

Employer gave Claimant a last chance to attend the training seminar. The fifth training seminar for Claimant was scheduled for March 4, 2017, and Respondents arranged for Claimant to be able to attend her medical appointments in Florida during the training. The Employer had taken care of the specific concern that allegedly kept Claimant from attending the mandatory training in February.

Claimant indicated that she did not want to attend the training. As a result, she told Dr. Cava that she did not feel like she could go to the training and Dr. Cava wrote a note that Claimant should not fly or attend the training seminar.

The note from Dr. Cava lacks persuasiveness as Claimant was capable of performing light duty work and able to travel forty-six hours earlier. Additionally, Claimant had not previously argued that she could not attend the training due to medical restrictions.

Moreover, Claimant failed to provide Dr. Cava's report to Ms. Mitchell-Wood. She also failed to bring it up during her termination meeting.

After Claimant failed to attend the seminar for the fifth time, Employer had no option but to terminate Claimant because of her refusal to attend the mandatory training. Claimant knew she would be terminated and that the training was mandatory.

Under the circumstances, there is substantial and persuasive evidence that Claimant was responsible for her own termination from employment due to her volitional refusal to attend the mandatory training in Fort Lauderdale, Florida within the 90-day deadline set by the airline and Employer. Accordingly, Claimant is not entitled to TTD benefits following her termination.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The substantial evidence supports the conclusion that Claimant is not entitled to temporary disability benefits from March 16, 2016 to present. Respondents have proven that Claimant was responsible for her termination from employment. As a result, the request for TTD benefits is denied and dismissed with prejudice.

2. All other issues are reserved.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 31, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant proven, by a preponderance of evidence, that he sustained a compensable injury in the course and scope of his employment on December 2, 2016?

II. Has Claimant proven, by a preponderance of evidence, that his admitted claim for his injury which occurred on July 23, 1993 should be reopened, based upon a change in condition?

III. Has Claimant proven, by a preponderance of evidence, that the proposed left-knee arthroplasty is reasonable, necessary and related to either his admitted injury of July 23, 1993 or his alleged injury of December 2, 2016?

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ enters the following Findings of Fact:

Available Medical and Procedural History

1. Claimant sustained an admitted work-related injury to his left-knee on May 21, 1987. According to his treating physician, Dr. Daniel Olson, he hurt his left-knee when he twisted his knee while using a jackhammer. *(*Ex H, p. 21). Diagnoses included repair of the *lateral* meniscus of the left knee and degenerative arthritis of the left knee.

2. In his medical notes, Dr. Olson remarked that claimant had a pre-existing surgery for a non-work related injury to his left-knee. On February 22, 1991, he noted that Claimant had a surgery 16 years prior which "required *removal* of [claimant's] medial meniscus." (*Id.* at p. 22). (emphasis added).

3. On April 21, 1991, Dr. Olson again indicated that Claimant had undergone a medial meniscectomy for his non-work related injury from 16 years ago. (Id at p. 24). He noted that Claimant had undergone a lateral meniscectomy in April of 1989 for his work-related injury. *Id.* He remarked that claimant had post-traumatic arthritis "due to both injuries, with greater proportion to [the] old injury." Claimant was given a 30% lower-extremity impairment rating (12% whole person) for the May 12, 1987 injury. *Id.* He assigned 0% for the injury from the 16-year-old surgery for his *medial* meniscus. *Id.*

4. On April 17, 1991, Dr. Olson noted that Claimant would require indefinite treatment, and stated that he would "probably require a proximal tibial osteotomy within 5 years and a total knee arthroplasty within the next 15 years." (*Id.* at p. 27).

5. Claimant sustained another admitted work-related injury to his left-knee as a result of a motor vehicle accident on July 23, 1993. Claimant returned to Dr. Olsen. (*Id.* at p. 30). On February 8, 1995, Dr. Olson noted that Claimant had his left-knee "scoped." (*Id.* at p. 32). Further detail is limited, but Dr. Olsen further references this injury as "Recent contusion; Arthroscopic removal of loose bodies" (Id. At p.34). No mention is made of any removal of meniscus, or that any torsional force was applied to the knee in this auto accident.

6. Dr. Olson noted that Claimant had marked joint space narrowing, with the medial side, which was "bone on bone", worse than the lateral side. Claimant's diagnosis was "degenerative, traumatic arthritis of the left knee." Dr. Olson further noted that "P: Will no doubt require TKR (total knee replacement) in 10 year time frame." Claimant was cleared to return to regular work.

7. Dr. Olson issued Claimant a new impairment rating on March 10, 1996. He assigned Claimant a 35% lower extremity impairment rating. (*Id.* at p. 35). He apportioned the impairment rating, assigning 30% to the May 21, 1987 injury, and an additional 5% to the July 23, 1993 injury. He again noted that Claimant would need a total knee replacement in the future. (*Id.* at p. 36).

8. Respondents filed a final admission of liability in WC 4-185-568 on March 28, 1997, and admitted to provide post-MMI medical care while reserving their rights to dispute the reasonableness, necessity or relatedness of any future medical care. (Ex. C.)

9. Claimant continued to receive periodic treatment from Dr. Olson after being placed at MMI for his July 23, 1993 injury. He continued to work regular duty. Claimant started taking Celebrex on July 8, 1999. (Ex. H, p. 41). Claimant continued to take Celebrex with good results noted at follow-up visits every six months. Claimant's post-traumatic arthritis was noted as stable on January 14, 2002. (*Id.* at p. 60).

10. On March 1, 2004, Dr. Olson remarked that Claimant had developed "a very slight varus deformity…." (*Id.* at p. 72). A varus deformity was again noted on September 7, 2004. (*Id.* at p. 76).

11. By April 3, 2006, Claimant was beginning to notice instability in his left knee. (*Id.* at p. 89). His pain levels were up to 5-7 out of 10, 60% of the time. Claimant began receiving Synvisc injections in 2009 from Dr. Roger Davis, who noted good relief. (Ex H. p. 110). On March 28, 2013, Dr. Olson noted that Claimant was doing "remarkably well." (*Id.* at p. 125).

12. Dr. Olson noted "more aching as the years go by" on April 17, 2014. Ex. H, p. 134). He was cleared to continue regular duty work. .

13. Claimant returned to Dr. Olson on December 28, 2015. (Ex. H, p.147). He noted that the Synvisc injections from Dr. Davis were not helping as much as before.

Dr. Olson noted that Dr. Davis felt that Claimant would need a total knee replacement soon, and recommended Dr. Shawn Nakamura. Dr. Olson noted that Claimant had a varus deformity, now with inability to fully extend his left knee. Dr. Olson decided to wait six months before considering a referral for an arthroplasty.

14. On June 27, 2016, Dr. Olson stated that Claimant would need a total knee replacement soon, but Claimant wanted to wait until after he retired. (Ex H, at p.150).

15. A separation checklist signed by employer and Claimant note that Claimant's last date of work as December 23, 2016. (Ex. L, pp.184,185). Claimant wrote that he resigned to retire and that it was "time to go."

16. Claimant returned to Dr. Olson on December 27, 2016. (Ex. H, pp.153, 154). Dr. Olson noted that Claimant had recently retired. Dr. Olson referred Claimant to Dr. Nakamura for surgical evaluation. Dr. Olson made no notes of any new injury or incident concerning claimant's left-knee.

17. On January 4, 2017, Claimant was evaluated at Dr. Davis' office. (Ex I, pp. 159-162). Claimant told Dr. Davis that he had a recent worsening in his pain. Dr. Davis stated that Claimant "*denies* any specific re-injuries." (emphasis added). Dr. Davis made no note of any new injury or incident concerning claimant's left-knee. At an earlier appointment with Claimant on April 30, 2009, Dr. Davis had noted that Claimant….has had a long history of left knee pain and poor function, dating back to the initial injury back in his school days with an open *medial arthrotomy in 1973*, and then had subsequent work injuries while working at the CF&I, with the most recent work injury being 7-23-1993…(Ex. 4, p. 28)(emphasis added).

18. Dr. Davis saw Claimant again on January 16, 2017. Again, Dr. Davis made no note of any new injury or incident concerning claimant's left-knee. (Ex. I, p. 163-165). At a visit dated January 23, 2017, Dr. Davis again made no note of any new injury or incident concerning claimant's left-knee. (*Id.* at pp.166-168).

19. Claimant underwent an x-ray of the left-knee on January 26, 2017. (Ex. K, p. 183). It showed complete joint space loss of the medial compartment and "to a lesser extent" the lateral compartment. There was also "extensive degenerative changes to the patellar femoral compartment."

20. Claimant was evaluated by Dr. Shawn Nakamura on January 26, 2017. (Ex. J, p.172-177). Dr. Nakamura noted that Claimant had "medial compartment 100% narrowing, lateral compartment 50% narrowing…." He further noted that Claimant had a significant varus deformity. Claimant told Dr. Nakamura that he "initially injured his left knee back in high school playing football and actually had to have cartilage removed from his left knee. Since that time, he has had four left knee arthroscopies since 1987." Dr. Nakamura made no note of any new injury or incident concerning Claimant's left knee. Dr. Nakamura did not make any indication as to which injury or injuries necessitated the proposed arthroplasty. On February 6, 2017, Dr. Nakamura submitted a request for a left total knee arthroplasty for degenerative joint disease.

21. At a January 30, 2017 visit, Dr. Davis again made no note of any new injury or incident concerning claimant's left-knee. (Ex. I, pp. 170-171).

22. On March 3, 2017, Claimant filed a claim for workers compensation. (Ex. D). He wrote that his date of injury was December 2, 2016. He claimed that he injured his left-knee, and that "physical work made left knee injury *worse."* There was no mention of any particular acute incident. On March 14, 2017, Claimant filed a first report of injury. (Ex. E). Again, claimant stated that physical work made his left knee *worse*, but noted no particular acute incident. (emphasis added).

23. Respondents filed a notice of contest on March 23, 2017. (Ex. F).

24. Dr. James Lindberg performed an IME of Claimant on April 18, 2017. (Ex. G, pp. 17-20). Dr. Lindberg noted that Claimant stated that he had four knee surgeries between his 1987 work-related injury and his work-related automobile accident. Claimant told Dr. Lindberg that on December 2, 2016, "he stepped in a hole with a slight twist to his left knee and started having more symptoms." Claimant told Dr. Lindberg that his left-knee had been "bow-legged" for 16 or 17 years. Physical exam revealed that claimant had "medial instability with a solid end point secondary to his complete loss of joint space on the inside of his knee." Dr. Lindberg noted that his record review began with records beginning with a 2003 visit with Dr. Olson.

25. With respect to his impressions, Dr. Lindberg remarked that Claimant "did not provide any information about an injury in 1973. However, he did have a Worker's Compensation injury in 1987 that required four knee surgeries." Dr. Lindberg indicated that Claimant did have end stage severe osteoarthritis, and indicated that the proposed arthroplasty was related to Claimant's 1987 injury rather than his 1993 injury. He noted that Claimant did not suffer any new work related injury on December 2, 2016, remarking that the "knee was already in dire straits and was at end stage well before this."

26. At a visit dated June 27, 2017, Dr. Olson again made no note of any new injury or incident concerning claimant's left-knee. (Ex. H pp.157–158). Dr. Olson remarked that Claimant's arthritis "stems back to an injury from 1987 but was combined with an injury in 1993."

Claimant's Testimony

27. Claimant testified at hearing. He testified that he hit the front of his knee on the dashboard during the July 23, 1993 automobile collision. Claimant testified that he has had three, not four, surgeries to his left knee.

28. Claimant testified that the pain he felt in his knee as a result of the 1993 accident was in his knee cap. He testified that he returned to work without restrictions after both of his 1987 and 1993 injuries. Claimant testified that his physical limitations got progressively worse after the 1993 accident.

29. Claimant testified that his left-knee became bowed over the last 14 to 15 years.

30. Claimant testified that on December 2, 2016, while at work, he got out of a truck to inspect a valve. He testified that he stepped in a small depression and twisted his left-knee. Claimant admitted that he did not report the injury, stating that he already had an appointment with Dr. Olson on December 27, 2016, and already knew that he would be referred for a total knee replacement.

31. Claimant testified that he sustained the 1976 injury as a result of slipping on a ladder while working at a packing company. He testified that he would have been 19 or 20 years old when he had his procedure as a result of that injury.

32. Claimant testified his job with employer was unionized, that he was union president, and that he was aware of the rules concerning the reporting of injuries. He was aware that employer had a rule that work-related injuries were supposed to be reported when they occurred. Claimant inferred that he did not report the injury because of witnessing "persecution" of other workers who reported injuries. Claimant admitted that he did not tell Dr. Olson about his December 2, 2016 injury when he saw him on December 27, 2016. Claimant testified that he did not recall denying specific re-injury to Dr. Davis.

33. Claimant testified that he knew he was in need of a total knee replacement prior to the December 2, 2016 incident. He admitted that he would have still being treating with Dr. Olson, Dr. Davis, and Dr. Nakamura irrespective of the December 2, 2016 incident. He admitted that he missed no work due to the December 2, 2016 incident. The ALJ finds that Claimant, while sincere overall, is simply an incomplete historian, especially in connection with earlier medical events in his life. Claimant might not accurately recall now exactly many surgeries he has had. His recall of more recent events is far more accurate. During his long relationship with Dr. Olsen, Claimant did his best to provide accurate information at the time he provided it.

Dr. Lindberg's Testimony

34. Dr. James Lindberg testified at hearing. He has been licensed to practice medicine since 1975. He practiced medicine as an orthopedic surgeon, specializing in shoulders, knees, and hips, until 2012. His practice involved performing surgeries on the meniscus as well as total knee replacements. He is level II certified by the Colorado Division of Workers' Compensation. Dr. Lindberg was tendered and accepted as an expert in orthopedic medicine.

35. Dr. Lindberg testified that the records described in his IME report were the records that he had at the time that he issued his original opinion. He testified that he had received additional records since the time that he authored his report. He testified that he has since received reports from Dr. Olson 1991 and 1995 concerning Claimant's impairment ratings.

36. Dr. Lindberg testified that following the 1993 injury, Claimant had a contusion, and underwent an arthroscopy with removal of loose bodies which would have been caused by arthritis. Dr. Lindberg testified that Claimant already had a documented history of knee osteoarthritis prior to his 1993 injury, which Dr. Olson remarked was primarily due to the earlier non-work related injury as opposed to the 1987 injury.

37. Dr. Lindberg testified that the 1993 injury has "virtually nothing" to do with Claimant's need for a total knee replacement. He noted that the critical injury causing the need for the total knee replacement was the non-work related injury necessitating a medial meniscectomy. Dr. Lindberg testified that claimant's medial joint compartment has completely failed and collapsed, and has bone on bone arthritis. With respect to his lateral joint compartment, Dr. Lindberg testified that claimant has some osteophyte formation, but that the arthritis is far worse on the medial side compared to the lateral side.

38. Dr. Lindberg testified that it was impossible to know without additional records, but suspected that Claimant might have also suffered a pre-existing ACL injury which could have rendered claimant susceptible to the development of knee osteoarthritis.

39. Dr. Lindberg testified that Claimant needs a total knee replacement to correct his significant varus deformity secondary to his advanced, end stage posttraumatic arthritis. He testified that to get to Claimant's ten degree varus deformity, claimant had to have erosion of the bone on the medial side of the knee, which is what necessitates Claimant's knee replacement. He testified that generally, total knee replacements are not performed for a 50% loss of joint space as Claimant has on the lateral side.

40. Dr. Lindberg testified that the meniscus acts as cushion between the bones that meet at the knee joint. He explained that removal of the meniscus predisposes an individual to the development of knee arthritis due to the decrease in cushioning. Dr. Lindberg remarked that an arthroscopy addresses, rather than causes, arthritis.

41. Dr. Lindberg remarked that claimant's varus or "bow-legged" deformity is necessarily a result of his medial meniscectomy and subsequent arthritis. Had claimant's more severe arthritis developed on his lateral side, he would have developed a valgus deformity, or "knock-kneed" appearance. Dr. Lindberg further explained that claimant's varus deformity could contribute to patellar-femoral tracking issues, which could account for his more recently noted symptoms or issues in the patella-femoral compartment.

42. Dr. Lindberg testified that meniscectomies performed at a young age almost always result in the need for total knee replacement eventually. Accordingly, Claimant would have likely needed a total knee replacement due to the medial meniscectomy irrespective of the subsequent injuries/surgeries. Dr. Lindberg noted that

based upon the surgical techniques that were typically employed at the time of Claimant's medial meniscectomy (occurring years prior to his 1987 work injury), the entire medial meniscus was likely removed.

43. Dr. Lindberg explained that the imagine studies requested by Dr. Nakamura showed the sides of the knee rather than the front.

44. Dr. Lindberg testified that he accurately recorded what Claimant told him with respect to his pre-existing injuries and surgeries. He testified that had he had Dr. Olson's MMI reports from his work-related injuries, his initial report would have been different. Dr. Lindberg did not have the opportunity to prepare a supplemental report because he was out of the state to deal with a death in his family. The ALJ finds Dr. Lindberg to be credible and persuasive in his analysis and explanation of the available records.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

Generally

A. The purpose of the Workers Compensation Act of Colorado (Act), C.R.S. 8-40-101, *et seq*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *§ 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *§8-41-301(1), C.R.S.; Faulkner v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *§ 8-43-201, C.R.S*. A workers compensation claim is decided on its merits. *§8-43-201, supra.*

B. In accordance with C.R.S. 8-43-215, this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witnesses' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability of the December 2, 2016 Incident

D. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals* Office, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals* Office, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals. Office,* 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones,* 688 P.2d 1116 (Colo. 1984).

E. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

F. The Workers' Compensation Act creates a distinction between an "accident": and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." §8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." And "accident" is the cause and "Injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* WC 4-650-711 (ICAO February 15, 2007).

G. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

H. Claimant has not sustained his burden of proof that he suffered an acute, compensable *injury* on December 2, 2016, for the following reasons:

- He did not tell his employer about this alleged work incident, despite knowing he was required to do so.
- There is no medical opinion that he suffered a new work-related injury; in fact, Claimant denied to Dr. Davis that he had any new injury.
- Claimant missed no work as a result of this incident.
- The incident required no medical treatment; in fact, Claimant did not even tell his ATP of this incident, since Claimant already knew he would need a knee replacement.
- There is no evidence that this incident caused any disability, independent of what he was already experiencing; rather, Claimant continued with the regular course of his existing medical care.

Reopening of the July 23, 1993 Injury

I. Section 8-43-303(1), C.R.S. provides that a Worker's Compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAP, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

J. Claimant has failed to meet his burden of proof that he sustained a change in condition that is causally connected to his July 23, 1993 injury. Claimant's most severe symptoms relate to the *medial* aspect of his left knee. He has 100% loss of joint space in his medial compartment, resulting in a severe varus deformity due to significant bone loss. Dr. Nakamura's assessment also notes that the medial

compartment is in much worse condition than the lateral compartment. There is no medical opinion that Claimant needs a total knee replacement due solely to the issues in his lateral and/or patella-femoral knee compartments. Claimant needs an arthroplasty to correct the severe arthritis in the medial compartment, which was caused by claimant's original medial meniscectomy, which the ALJ finds occurred years before his first work injury in 1987. Dr. Lindberg credibility explained that a meniscectomy at a young age almost always necessitates a total knee replacement later in life, due to the loss of cushioning within the knee joint. There is no evidence that the 1993 injury is the cause of claimant's need for surgery or the deterioration in his medial knee compartment. The surgical record from the arthroscopy is not in evidence, but it is referenced in Dr. Olsen's ongoing records. There is no evidence of what loose bodies were removed in 1993, where they were located, or the degree in arthritic change caused by the surgery, if any. Claimant's position that the 1993 injury or surgery caused his current deteriorated condition, or necessitates the arthroplasty, is unpersuasive. When Dr. Olson rated Claimant for his 1993 injury, he apportioned the vast majority of claimant's impairment to the 1987 work injury.

K. In 1991, prior to the injury Claimant is seeking to reopen, Dr. Olson was already telling Claimant that he would probably need a total knee replacement in the future. At that time, Dr. Olson was also noting that Claimant's arthritis was largely due to his pre-existing non-work related condition, rather than the 1987 work injury. Dr. Olson's opinion supports Dr. Lindberg's conclusion that Claimant was in need of arthroplasty regardless of his 1993 injury, and that his medial compartment arthritis is due to the 1976 injury. There is no evidence that the 1993 injury altered the course of Claimant's treatment or accelerated the deterioration of his medial knee compartment. Claimant's knee would have deteriorated to the point of needing an arthroplasty irrespective of the 1993 accident. Claimant has not shown that his condition deteriorated because of the 1993 traffic accident.

Relatedness of the Proposed Arthroplasty

L. C.R.S. § 8-42-101 (1) (a) provides that respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (May 4, 2007). Therefore, claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

M. Claimant has not shown that the proposed knee replacement surgery is related to either his December 2, 2016 incident or the July 23, 1993 injury. Claimant did not sustain a compensable injury on December 2, 2016 that would entitle him to an award of medical benefits. The surgery was already noted as a high probability before either of these incidents occurred. The ALJ finds that Claimant's proposed arthroplasty, while certainly reasonable and necessary, is now necessitated by his end stage medial compartment arthritis caused by his non-work related injury from the 1970s.

ORDER

It is therefore ordered that:

1. Claimant's request for Workers Compensation benefits as a result of the alleged December 2, 2016 incident is denied and dismissed.

2. Claimant request to reopen Workers' Compensation Claim No. 4-185-568 based upon a change in condition is denied and dismissed.

3. Claimant request for a left knee arthroplasty is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 1, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she was disabled from performing her normal job duties and, as a result, potentially entitled to receive temporary total disability ("TTD") benefits beginning March 16, 2017 and continuing.

- If Claimant has proven that she was disabled from performing her regular job duties, whether respondents have proven that Claimant committed a volitional act that led to her termination of employment so that she is not entitled to receive TTD benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant, a 59-year-old female, was employed as a customer service agent for Employer, an aviation service provider that contracts with airlines to perform certain tasks or functions in the aviation industry.

2. Employer has a contract with an airline. The airline requires all customer service agents to attend a two-week training program in Fort Lauderdale, Florida, within the first ninety days of employment to learn how to perform the required duties. Claimant testified she understood this requirement to attend the training within the first ninety days of employment.

3. Claimant was ultimately terminated from employment with the airline on March 16, 2017 for her failure to attend the training. Three training opportunities were scheduled prior to Claimant's admitted injury:

   - Claimant was first scheduled to attend the mandatory training around the end of September and into October 2016. However, the airline canceled that training due to adverse weather conditions.

   - Claimant was subsequently scheduled to attend the mandatory training in November of 2016. The airline postpone that training because of high volume travel.

   - Claimant was scheduled a third time to attend the mandatory training. This training session was to take place in early January 2017. Claimant did not attend this training because she planned on leaving her job with Employer to move to Arkansas to care for her elderly father. She informed the airline in early December 2016 that by January 15, 2017 she would no

longer be working for the airline because she was moving back to Arkansas and had interviews lined up for a job there. "I told them that I didn't want to waste their money, because I didn't know if I was staying."

- Claimant testified that she understood that if Employer could not reschedule her training that she could "be released," and that she "probably wouldn't have a job . . . 'casuse the training is – was mandatory."

4. Claimant sustained an industrial injury to her back on December 14, 2016 while lifting heavy and oversized luggage. Employer provided Claimant's medical treatment.

5. Claimant's injury did not require her to miss time from work. She continued to work light duty and Employer accommodated her work ten to fifteen pound lifting restriction, and provided her seating so she could stand or sit while performing her job duties. Claimant worked for several months between her industrial injury and her termination.

6. Following her December 14, 2016 industrial injury, Claimant decided to remain with Employer. She was offered light duty work based on her restrictions, doing basic functions at the ticket counter.

7. In early February, 2017, Claimant's work restrictions were lifting no more than ten pounds and sitting fifty percent of the time.

8. Two additional training opportunities were scheduled prior to Claimant's termination:

- Dava "Deedee" Mitchell-Wood, Employer's General Manager, asked the airline for an extension for Claimant to attend the mandatory training. The airline granted Ms. Mitchell-Wood's request. Claimant was scheduled to attend the training in February of 2017.
  - Claimant again refused to attend this scheduled and mandatory training, telling Ms. Mitchell-Wood that she would not go to the training because she would have to miss her medical appointments.
  - Claimant did not timely provide a medical note that said she could not attend the training class in February of 2017.
  - As a result, claimant had refused to attend two mandatory trainings without medical support by February of 2017.
- Claimant was scheduled for a fifth time to attend the mandatory training. This time the training was scheduled to take place beginning March 4, 2017.

- Ms. Mitchell-Wood contacted Concentra in Florida and arranged for Claimant to have her medical appointments in Florida during the two weeks she would be at training.

- Claimant failed to attend the training. This was the third time that claimant refused to attend the mandatory training of her own volition.

- Claimant saw Dr. Cava on March 2, 2017. While Dr. Cava's report states that Claimant "should not go to the training class this weekend," no persuasive evidence supports a finding that Claimant provided that documentation to Employer

- Claimant admitted that she did not want to go to the mandatory training in March of 2017.

9. Despite being able to work with no time off after her December, 2016 injury, she refused to attend the mandatory training in January of 2017 because she planned to terminate her employment; and February of 2017 because she could not miss her medical appointments in Colorado. Prior to these two missed trainings, Claimant did not report to Employer that she was unable to attend due to her medical condition.

10. On February 28, 2017, Dr. Cava treated Claimant at a regularly scheduled appointment. At that time she did not restrict Claimant from working her entire shift, allowed her to stand and walk, and provided that Claimant "[s]hould be sitting 75% of the time." The ALJ finds that these restrictions would not have prevented Claimant from taking a four hour flight or participating in training.

11. Forty-six hours later Claimant returned to Dr. Cava for what appears to be an unscheduled visit for a "recheck of injuries." Claimant told Dr. Cava that she did not feel like she could go to the training, and that she did not want to go. Given Claimant's restrictions less than two days before this appointment, the unscheduled visit, and Claimant's acknowledgement that she did not want to attend the March training; the ALJ finds it more likely than not that Dr. Cava then wrote a report recommending that Claimant not attend the training seminar at Claimant's request. This reduces the persuasiveness of Dr. Cava's report.

12. Claimant had been providing Ms. Mitchell-Wood a copy of her restriction notices since she was placed on light duty. However, Claimant did not provide Ms. Mitchell-Wood the March 2, 2017 Concentra medical report where Dr. Cava noted that Claimant should not fly/attend the training seminar.

13. Even during Claimant's termination meeting with Ms. Mitchell-Wood, Claimant did not provide Ms. Mitchell-Wood with the Dr. Cava's March 2, 2017 report.

14. After Claimant failed to attend the March 2017 training, Ms. Mitchell-Wood spoke with the airline and attempted to obtain yet another extension for Claimant to attend the training. The airline informed Ms. Mitchell-Wood that another extension

would not be given because Claimant has exceed the 90-day requirement as she had been on the contract since October 2016.

15. As a result, Ms. Mitchell-Wood terminated Claimant on March 16, 2017. Claimant acknowledged that she knew she would be terminated if she missed the mandatory training.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The termination statutes provide that in cases where a temporarily disabled employee is "responsible for termination of employment, the resulting wage loss shall not be attributed to the on-the-job injury." The concept of responsibility reintroduces the concept of "fault" as it was used in termination cases prior to *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Hence, the issue is whether the claimant engaged in volitional conduct which was the cause of the termination. Conduct is volitional if the claimant exercised some degree of control over the circumstances leading to the termination in light of the totality of the circumstances. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994); *Aguilar v. Matrix Logistic, Inc.*, W.C. No. 4-473-075 (December 5, 2002).

There is no dispute that Claimant failed to attend the mandatory training three times of Claimant's own volition.

Claimant informed Employer that she was not going to attend the December 2016 training because she was going to quit her job in mid-January 2017 and move to Arkansas. She never claimed that the reason for the failure to attend the training was due to her back injury.

Moreover, Claimant was able to work light duty with lifting restrictions of 10-15 pounds and sitting up to at least fifty or seventy five percent of the time. Claimant was able to work after her injury and did not miss time from work due to her injuries. Claimant did not make a claim for temporary disability benefits prior to her termination on March 16, 2017. As a result, Claimant had the capability of functioning well despite her injury.

Ms. Mitchell-Wood contacted the airline and asked for an extension for Claimant to attend another training seminar. The airline agreed and scheduled another training seminar in February of 2017. Claimant again informed Employer that she would not be attending the training. There was no doctor's note recommending that Claimant should not attend the February 2017 training. Instead, Claimant indicated that she did not want to miss her medical appointments. Claimant was still working and did not receive medical clearance to avoid the training.

Employer gave Claimant a last chance to attend the training seminar. The fifth training seminar for Claimant was scheduled for March 4, 2017, and Respondents arranged for Claimant to be able to attend her medical appointments in Florida during the training. The Employer had taken care of the specific concern that allegedly kept Claimant from attending the mandatory training in February.

Claimant indicated that she did not want to attend the training. As a result, she told Dr. Cava that she did not feel like she could go to the training and Dr. Cava wrote a note that Claimant should not fly or attend the training seminar.

The note from Dr. Cava lacks persuasiveness as Claimant was capable of performing light duty work and able to travel forty-six hours earlier. Additionally, Claimant had not previously argued that she could not attend the training due to medical restrictions.

Moreover, Claimant failed to provide Dr. Cava's report to Ms. Mitchell-Wood. She also failed to bring it up during her termination meeting.

After Claimant failed to attend the seminar for the fifth time, Employer had no option but to terminate Claimant because of her refusal to attend the mandatory training. Claimant knew she would be terminated and that the training was mandatory.

Under the circumstances, there is substantial and persuasive evidence that Claimant was responsible for her own termination from employment due to her volitional refusal to attend the mandatory training in Fort Lauderdale, Florida within the 90-day deadline set by the airline and Employer. Accordingly, Claimant is not entitled to TTD benefits following her termination.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The substantial evidence supports the conclusion that Claimant is not entitled to temporary disability benefits from March 16, 2016 to present. Respondents have proven that Claimant was responsible for her termination from employment. As a result, the request for TTD benefits is denied and dismissed with prejudice.

2. All other issues are reserved.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 31, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant had proven by a preponderance of the evidence that the L5-S1 epidural steroid injection ("ESI") recommended by Colorado Injury and Pain Specialists is reasonable medical treatment necessary to cure and relieve claimant from the effects of the May 6, 2015 work injury.

FINDINGS OF FACT

1. Claimant worked for employer at employer's quarry. On May 6, 2015, claimant suffered crush injuries to his bilateral lower legs. The injury occurred when claimant was cutting marble and a large piece of marble fell and crushed claimant's legs. Claimant immediately underwent multiple surgeries to his lower legs. These surgeries were performed by Dr. Ferdinand Liotta.

2. Following the injury claimant treated with Dan Burnell, PA-C, under the supervision of claimant's authorized treating physician ("ATP") Dr. Kevin Pulsipher. Claimant was first seen by Mr. Burnell on May 28, 2015. On July 24, 2015, Mr. Burnell recorded that claimant was experiencing low back pain. On that same date, Mr. Burnell described claimant's gait as "severely antalgic".

3. On July 1, 2015, Dr. Liotta referred claimant for pain management treatment. Claimant began treating with Colorado Injury and Pain Specialists on August 18, 2015 and was seen by Dr. William James. Dr. James opined that claimant's pain symptoms could be the result of complex regional pain syndrome ("CRPS"). At that time, Dr. James recommended right lumbar sympathetic blocks.

4. Claimant underwent lumbar sympathetic blocks on September 11, 2015, September 18, 2015, and January 18, 2016. Each time the lumbar sympathetic block was administered at the right L3 level.

5. On February 1, 2016, claimant returned to Colorado Injury and Pain Specialists and treated with Elizabeth Crawford, CNP. At that time, claimant reported to Ms. Crawford that he did not wish to receive left sided lumbar sympathetic blocks because he felt that the right sided blocks did not provide much relief.

6. Claimant underwent extensive physical therapy following his surgeries. On January 12, 2016, claimant's physical therapist noted that claimant was complaining of low back pain. At that time claimant's gait was described as "slightly antalgic".

7. On March 16, 2016, claimant returned to Colorado Injury and Pain Specialists and was seen by Dr. Raymond Sohn and reported that he was experiencing back pain. At that time, Dr. Sohn discussed with claimant the possibility of using an implanted spinal cord stimulator ("SCS"). Claimant declined to purse SCS treatment.

8. On April 8, 2016, Dr. Pulsipher determined that claimant had reached maximum medical improvement ("MMI"). Dr. Pulsipher also assessed permanent impairment ratings for both of claimant's legs. Specifically, Dr. Pulsipher assigned an impairment rating of 35% for claimant's left lower extremity and 32% for claimant's right lower extremity. On that same date, Dr. Pulsipher noted that claimant's gait was "mildly antalgic".

9. On June 17, 2016, Ms. Crawford recommended a magnetic resonance image ("MRI") of claimant's lumbar spine to "ensure that the increased weakness in [claimant's] legs is not due to stenosis in his lumbar spine". Thereafter, on July 15, 2016, Ms. Crawford again mentioned the need for an MRI to evaluate whether claimant's leg weakness was caused by radiculopathy.

10. On August 11, 2016, claimant attended a Division-sponsored independent medical examination ("DIME") with Dr. John Hughes. In connection with the DIME, Dr. Hughes reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant. Following the DIME, Dr. Hughes issued a report and opined that claimant had not developed CRPS and no further diagnostic testing was warranted. Dr. Hughes agreed with Dr. Pulsipher that claimant reached MMI on April 8, 2016. Dr. Hughes assessed a permanent impairment rating of 35% for claimant's left lower extremity and a permanent impairment rating of 35% for claimant's right lower extremity.

11. On August 22, 2016, an MRI of claimant's lumbar spine showed degenerative disc changes and a right paracentral bulge at the L5-S1 level with annular tear producing slight impingement on the S1 nerve roots, particularly on the right.

12. On September 9, 2016, Ms. Crawford recommended an epidural steroid injection ("ESI") at the L5-S1 level to treat claimant's radicular symptoms in his legs. Colorado Injury and Pain Specialists requested authorization for the recommended ESI on September 12, 2016.

13. On September 15, 2016, Dr. James Ogsbury reviewed the request for an ESI at the L5-S1 level. Dr. Ogsbury determined that although the recommended injection may be medically reasonable, claimant's low back symptoms are not related to the May 6, 2015 work injury because claimant did not complain of low back pain until 13 months after the injury. Additionally Dr. Ogsbury opined that claimant's altered gait has not caused his low back pain. Based upon Dr. Ogsbury's opinion respondents denied authorization for the lumbar ESI.

14. Based upon Dr. Hughes' August 11, 2016 DIME report, respondents filed a final admission of liability ("FAL") on October 3, 2016 admitting for the MMI date of April 8, 2016 and permanent impairment ratings of 35% right lower extremity and 35% left lower extremity. [1]

15. On November 23, 2016, claimant underwent a functional capacity evaluation ("FCE") with Pat Riley, PT. In her FCE report, Ms. Riley noted that claimant had "gait deviations" that worsened the further claimant walked.

16. Dr. Pulsipher's deposition was taken on April 10, 2017. Dr. Pulsipher testified that the intent of the recommended ESI is to dull the nerve function and minimize pain. Due to claimant's significant pain and particularly given the diagnosis of CRPS, it is Dr. Pulsipher's opinion that blocking that nerve root is a reasonable method of treatment. Dr. Pulsipher also testified that the purpose of the previous lumbar sympathetic blocks was to address the pain claimant has radiating into his right leg. Dr. Pulsipher also testified that claimant's altered gait could have an effect on claimant's low back.

17. The ALJ credits the medical records and finds that claimant was experiencing low back pain as early as July 24, 2015 when he reported it to Mr. Burnell. The ALJ credits the medical records and finds that because of the work injury claimant has an altered gait. The ALJ credits the opinion of Dr. Pulsipher that an altered gait could have an effect on claimant's low back.

18. The ALJ credits the opinions of Dr. Pulsipher and Ms. Crawford over the contrary opinions of Drs. Hughes and Ogsbury and finds that claimant's low back and radicular symptoms are related to the work injury. The ALJ credits the opinions of Dr. Pulsipher and Ms. Crawford over the contrary opinions of Drs. Hughes and Ogsbury and finds that the recommended ESI would provide claimant with some level or relief of these symptoms.

19. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that the recommended ESI is reasonable medical treatment necessary to cure and relieve claimant from the effects of this work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

[1] An amended FAL was filed on April 12, 2017 for purposes of recalculating claimant's temporary total disability ("TTD") benefits based upon an adjusted average weekly wage ("AWW"). There were no changes to claimant's date of MMI or permanent impairment ratings.

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2014). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2014).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has demonstrated by a preponderance of the evidence that his low back and radicular symptoms are related to the May 6, 2015 work injury. As found, the medical records and the opinions of Dr. Pulsipher and Ms. Crawford are credible and persuasive.

6. As found, claimant has demonstrated by a preponderance of the evidence that the recommended L5-S1 ESI is reasonable medical treatment necessary to cure and relieve claimant from the effects of the May 6, 2015 work injury. As found, the opinions of Dr. Pulsipher and Ms. Crawford are credible and persuasive.

ORDER

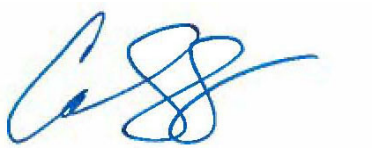
It is therefore ordered that:

1. Respondents shall pay for the recommended ESI at the L5-S1 level, pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: July 3, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Has Claimant sustained any compensable injuries to her cervical spine, lumbar spine, right knee, or from headaches, as a result of a motor vehicle accident occurring on August 5, 2016.

II. If her claims are compensable, what medical reimbursement or payment of unpaid medical bills for treatment already rendered, is reasonable and necessary.

III. If her claims are compensable, what Temporary Partial Disability ("TPD") are payable.

IV. If her claims are compensable, did Claimant fail to timely report her injury to her employer, thus subjecting her to penalties.

STIPULATIONS

At the outset of the hearing, the following Stipulations were reached by the parties, and approved by the ALJ:

1) The motor vehicle accident at issue arose out of, and was in the course of Claimant's employment. The issue at hearing is whether Claimant sustained any actual injury as a result of the MVA.

2) The ALJ is to determine what body parts, if any, were injured in the MVA, and will determine what medical bills qualify for reimbursement or payment.

3) Claimant's average weekly wage prior to the date of injury is $4,196.42 and after the date of injury is $3,952.85, yielding a difference of $243.57 per week. If claimant is determined to be eligible for Temporary Partial Disability benefits, the TPD rate is $162.38.

4) Temporary total disability benefits are not relevant at this time, but both parties reserve the right to litigate the issue of Temporary Total Disability benefits in the future if necessary.

5) Claimant's Authorized Treating Physician ("ATP") is Dr. Daniel Olson.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ enters the following Findings of Fact:

1. Claimant is a home health nurse for Aim Home Health, LLC. She is a registered nurse and provides skilled nursing services to residential clients. She provides this service in the Pueblo, Colorado community.

2. Claimant's employment requires her to travel by motor vehicle to the homes of her clients. During her typical work day, claimant travels from one home to the next of each of her residential clients.

3. On August 5, 2016, Claimant was involved in a motor vehicle accident ("MVA") with a third party, at approximately 2:32 p.m. The MVA occurred while claimant was driving from the home of one residential client to the next. The parties stipulate, and the ALJ so finds, that this accident arose out of, and was in the course of employment.

4. Claimant's wages are based on the number of patients she sees, and the nature of the treatment to be provided. Prior to the date of injury, claimant testified that she saw approximately 20-25 patients per day. After the date of injury, claimant testified that she sees approximately 12 patients. Despite the reduction in the number of patients seen, claimant's wages have dropped by $243.57 per week.

5. Prior to the date of injury, claimant generally worked only Monday through Friday from approximately 7:00 a.m. to approximately 5:30 or 6:00 p.m. Claimant testified that she now works generally 7 days per week, working from approximately 7:00 a.m. to 9:00 p.m.

6. The MVA occurred when a car driven by a third party incorrectly entered the intersection in which claimant was traveling. Claimant testified that she slammed on the brakes with her right foot/leg in an attempt to avoid the collision but was unsuccessful. Claimant estimated her speed prior to employing her brakes to be approximately 20 miles per hour.

7. The airbags, however, did not deploy. The accident report lists the damage to Claimant's car, confined to the right front, as "slight", with no corresponding damage to the undercarriage. According to an IME report by Dr. Ridings, his understanding of airbag deployment is that it might occur at speeds between 8 and 14 mph.

8. The ALJ finds that this MVA (like most) occurred suddenly and unexpectedly. Despite Claimant's good faith in estimating her speed, due to her rapid deceleration, the actual speed at impact was likely far less than 20 mph, perhaps 10 mph or less. Claimant was rightfully focused on the events unfolding in front of her, not her speedometer. The ALJ further finds that Claimant was applying her brake with her right foot, all the way down, through the point of impact.

9. Claimant now alleges to have sustained injuries to her cervical spine, lumbar spine, and right knee in the MVA. Specifically, claimant alleges that her cervical and lumbar spine pain has increased, the frequency and severity of her preexisting headaches have increased, and that she sustained a posterior horn meniscal tear of partial width and partial thickness (a partial meniscal tear), a torn medial patellar retinaculum and probable traumatic chondromalacia, all as a result of the MVA.

10. Claimant testified that following the MVA, she was very concerned about her cervical spine and that when police responded to the scene, she requested to be transported to the emergency department. Claimant was transported by AMR from the scene of the MVA to Parkview emergency department by ambulance.

11. In 2006, Claimant underwent a cervical spine fusion at C5-6. Claimant admitted in her testimony and claimant's medical records clearly demonstrate that claimant has significant preexisting cervical spine injuries for which she has previously undergone a fusion at C5-C6. Claimant acknowledged in her testimony that she has received and continues to receive regular, long time care from pain management specialist, Dr. Brandon Green and his staff, including Nurse Practitioners Jeffrey Johnson and Lisa Clough, far pre-dating the MVA, for significant preexisting conditions in her cervical spine, headaches, and other pain complaints. She further testified, credibly, that it was the preexisting condition in her cervical spine that had caused her immediate concern following this MVA. She as far less focused on other pain she might otherwise have noted.

12. Prior to Claimant's transport by AMR, AMR personnel completed a Pre-Hospital Care Report detailing claimant's pain complaints and concerns. Claimant's stated complaint to AMR personnel was lateral neck pain with some tingling down her left arm. Claimant did not mention any complaints of lower back pain or right knee pain. (Ex A, pp.22, 24).

13. Upon arrival at the Parkview emergency department, Claimant complained only of left sided neck stiffness radiating up toward her occiput and down her left shoulder, with aching at the base of her skull, more left than right. Claimant also reported a brief hit of her elbow and that she had experienced some intermittent tingling of her ring and small fingers of her left hand. The emergency department physician who examined and evaluated claimant, Dr. Elizabeth Skewes, documented that Claimant had no other complaints or findings. (Ex A, p. 18)

14. Claimant did not complain of any right knee pain related to the MVA during her examination and evaluation at Parkview Medical Center emergency department. (Ex. A, pp. 18-21)

15. Claimant testified that she did not undergo any kind of imaging studies, including but not limited to an MRI scan, at the emergency department because "they don't do MRI's in the ER." However, the emergency department records indicate that Dr. Skewes considered imaging studies but deemed there was no clinical indication for

such studies as Claimant had no bony tenderness of her neck and was experiencing only a spasm that had not begun immediately after the MVA but instead had developed in the time frame following the MVA. (Ex. A, p. 20) The ALJ finds that while Claimant may have had a sincere belief that this emergency room did have MRI facilities, she did not hear this from emergency personnel.

16. Claimant testified that following the MVA, she presented to Nurse Practitioner Lisa Clough at Southern Colorado Clinic in the family practice of Dr. Spencer Walker (not with the pain management practice of Dr. Green) on August 8, 2016 for an appointment that had already been scheduled for non-related purposes. She further testified that during this appointment, she reported to Ms. Clough that she had just been involved in an MVA and that she described all of her pain complaints, including right knee pain, to Ms. Clough.

17. Claimant agrees that it is a reasonable standard of practice to document your patient's complaints. She testified that Lisa Clough is a good nurse and she has confidence in her as a good nurse, and that she would expect Ms. Clough to have documented claimant's complaints.

18. Ms. Clough's medical record for the August 9, 2016 medical appointment does not mention the MVA, nor any pain complaints in the cervical spine, lumbar spine and/or right knee. (Ex L, pp. 210-216) Ms. Clough conducted a Review of Systems as well as a physical examination of claimant where it is clearly documented that Claimant *denies* any joint pain, stiffness, muscle weakness and muscle aches, (Ex L, p. 211), and that Claimant was in no acute distress. (Ex L, p. 213)(emphasis added).

19. Claimant returned to Ms. Clough on September 6, 2016 for follow-up on this unrelated medical issue. Just as on August 9, 2016, she reported no complaints of pain or problems with the cervical spine, lumbar spine, or right knee. The patient *denies* joint pain, stiffness, muscle weakness, and muscle aches. (Ex. L, pp. 217-223)(emphasis added).

20. Claimant testified that since her cervical fusion in 2006, she has received and continues to receive medical care from pain management specialist, Dr. Brandon Green, and his staff, including Nurse Practitioners Jeffrey Johnson and Lisa Clough, at St. Mary Corwin Physician Partners. This is supported by the medical records. (Ex. B)

21. Following the MVA, claimant did not seek treatment at St. Mary Corwin Physician Partners until August 30, 2016. On that date, she was examined and evaluated by Nurse Practitioner Jeffrey Johnson. (Ex B, pp. 83-88). On this date, Claimant reported to Mr. Johnson that she had been involved in the MVA (listing date of the MVA as Aug 15) and complained of an exacerbation or flare up of pain in her *neck and lower back.* (Ex B, p. 84). At this visit, Claimant did not express any complaints of *right knee pain* as being related to the MVA. (Ex B, pp. 83-88).

22. Prior to the MVA, Dr. Green's records document that Claimant has a long

history of preexisting, chronic lumbar spine pain, RE B, Bates 41-54, 59-82, as well as right knee pain and complaints. Claimant now denies that she had right knee complaints, but the medical records document otherwise. (Ex B, pp. 65-82):

a. September 16, 2015: Claimant complains of *right knee pain.* It is noted that claimant is to consider a Supartz injection. Medical dictation indicates that claimant complained of bilateral knee pain, with the right knee hurting worse: "Patient also complaints of left knee pain and stiffness however is *not as bad as the right knee* what has sharp shooting pains." (Ex B, p.65).

b. December 14, 2015. Claimant continues to complain of bilateral knee pain, and specifically *right knee pain* for which a Supartz injection continues to be recommended. (Ex. B, p. 71). Medical dictation documents that Claimant specifically complained of right knee pain. (Ex. B, p. 72).

c. March 8, 2016: Claimant continues to complain of bilateral knee pain and specifically *right knee pain.* A Supartz injection is still recommended. (Ex. B, p. 77)

23. On August 30, 2016, when Claimant presented to Dr. Green, her right knee complaints were consistent with her prior complaints. There is no documented change in the nature of Claimant's complaints regarding her right knee nor is there any objective medical change in the right knee on examination following the MVA. (Ex B, pp. 83-88). A referral to Dr. Nakamura is made on this date for claimant's bilateral knee pain, but his referral is made without mention of the MVA. (Ex B, p. 83).

24. Claimant also denied that she has ever had any treatment for her lumbar spine prior to the MVA. However, Dr. Green's records plainly document that Claimant complained regularly of low back pain prior to the MVA, and was referred for physical therapy and for x-rays of the lumbar spine. (Ex B, pp. 41-54, 59-82).

a. July 20, 2015: It is noted in the Assessment Plan that Claimant complains of lumbar spine pain. Claimant was referred for physical therapy. (Ex B, p. 41).

b. July 27, 2015: Lumbar back pain continues to be noted in the Assessment Plan. The History of Present Illness (HPI) documents that, "Today patient presently complaining of … low back pain. Low back pain increased with prolonged sitting and driving in a car." Claimant directed to continue with physical therapy. (Ex B, p. 60).

c. September 16, 2015: Assessment and Plan notes that Claimant continues to complain of lumbar pain and that *she's currently in physical therapy.* Claimant diagnosed with lumbar spondylosis and an *x-ray of claimant's lumbar spine* is ordered. Detailed in the History of Present

Illness (HPI): "[C]hronic neck and mid and low back pain. Patient presently complaining of … *low back pain."* (Ex. B, pp. 65-66).

d. December 15, 2015: In the Assessment and Plan, among other diagnoses, Claimant is diagnosed with lumbar spondylosis with myelopathy and it is noted to be specific in the lumbar region. The Additional Plan Notes indicate that Claimant is being treated with tizanidine for lumbar muscle spasms, that she is continuing in physical therapy for her lumbar spine, that she is given a diagnosis of lumbar spondylosis, and that she is now a candidate for medial branch blocks. (Ex. B, p. 71).

e. March 8, 2016: This record documents that Claimant was returning because of back pain and that Claimant admitted to having lumbar spine pain *that goes up and down* in severity. (Ex. B, pp. 77-78).

25. Claimant admitted in her testimony that she failed to report the MVA as a work injury to her employer until October 25, 2016. RE N. She reported the MVA to employer representative on October 25, 2016 and together claimant and Mr. Musso completed the First Report of Injury. (Ex N).

26. Claimant testified that some time prior to reporting the injury to Mr. Musso, she spoke with a co-worker, Kathy Bueno, about the MVA. Claimant further testified, however, that she knew Ms. Bueno not to be the appropriate person to whom the MVA should be reported and that when she spoke to Ms. Bueno, Claimant was not officially reporting the MVA to the employer.

27. Because neither the employer nor insurer was aware of the MVA until October 25, 2016 when Claimant first reported the work injury, Claimant's first medical appointment with the ATP was on November 8, 2016. (Ex. F, pp. 146-155).

28. The ALJ does find that under the totality of the circumstances, Claimant's reasons for not reporting this work injury sooner, due to confusion on auto liability and medical coverage, are plausible. Claimant was not sufficiently knowledgeable of the workers compensation process to report it right away. This MVA was not withheld from employer in bad faith; it would be in Claimant's best interests to report it at once, had only she known. Nonetheless, an ATP was not assigned until November 8, 2016.

29. In the meantime, Claimant had an MRI on her right knee performed on November 1, 2016 (Ex 4, pp. 143,144). The pertinent findings are as noted:

> FINDINGS: ….Severe chondromalacia of the patella which ***may be*** *acute.* Medial patellar retinaculum is torn. Large somewhat complex *likely* bloody joint effusion.

> Medial compartment: …There is a *significant tear* of the lateral aspect of the posterior horn of the medial meniscus. …
>
> Lateral compartment: The anterior cruciate ligament is poorly defined and findings are *suspicious* for a partial-width, partial thickness tear which ***may be*** *subacute.*
>
> IMPRESSION: Posterior horn medial meniscal tear. …*Subacute* partial-thickness partial-width tear ACL. Large complex joint effusion. … Torn medial patellar retinaculum and *probable* traumatic chondromalacia. Medial femoral condylar and medial tibial plateau contusion. (emphasis added).

30. On November 8, 2016, Claimant was examined and evaluated by Physician's Assistant Teresa Kuhn. Ms. Kuhn documents in the November 8, 2016 medical record at Paragraph 3.b. of the M164 form that causation and relatedness of claimant's pain complaints and symptoms are "Undetermined". (Ex. F, p. 146).

31. During the November 8, 2016 ATP appointment, Claimant reported that following the MVA, *she had continued to work regular duty without restrictions* ***and had no problems doing so*****.** (Ex. F, p. 147)(emphasis added).

32. Ms. Kuhn returned Claimant to work following the November 8, 2016 appointment with no restrictions. (Ex. F, p 146). Ms. Kuhn also made referrals of Claimant to Dr. Green, Dr. Rawat, and Dr. Nakamura on November 8, 2016. (Ex F, pp. 153-155).

33. Claimant presented for treatment at Dr. Shawn Nakamura's office at St. Mary Corwin Physician Partners Orthopedics for a follow-up on her right knee. (Ex 2, pp. 117–121). The right knee MRI was reviewed with Claimant. Dr. Nakamura diagnosed an ACL tear, medial collateral ligament sprain of knee, patellar disorder, and traumatic tear of meniscus of knee. (Ex. 2, p. 122). Arthroscopic surgery was recommended by Dr. Nakamura. Specifically, Dr. Nakamura recommends that a right knee arthroscopy, medial and lateral meniscectomy, and lateral lease be performed.

34. The Orthopedic Surgeon, Dr. Shawn Nakamura, opined in a narrative report dated April 6, 2017 that: "[I]t is more likely than not that Dayna's current right knee injury was caused by the work place accident of August 5, 2016." (Ex 2, p. 122). Dr. Nakamura further opined that: "[T]he August 5, 2016 accident brought about the need for the current treatment" that he has recommended in order to treat Claimant's right knee injury. (Ex. 2, p. 123).

35. It is unclear from the record that Dr. Nakamura had a complete medical history from Claimant, including her complaints of knee pain dating at least to 2015.

36. Claimant was scheduled to return to the ATP on November 22, 2016 but was a no call, no show. The ATP sent correspondence dated November 23, 2016 to Claimant advising her that she was to reschedule her appointment. (Ex. F, p. 156).

37. Following the November 23, 2016 letter, Claimant scheduled and kept an appointment with the ATP on December 13, 2016. On this date, Claimant was evaluated by Dr. Daniel Olson.

38. Dr. Olson documents in the December 13, 2016 medical report that compensability of the claim has been denied by the insurer but that the insurer has authorized medical visits. (Ex F, p. 158). Due to time constraints, Dr. Olson was not able to complete a physical examination of Claimant on this date. Dr. Olson also viewed the MRI report, and noted that it was "significantly abnormal".

39. Dr. Olson assigned temporary work restrictions from December 13, 2016 to January 24, 2017, recommending that Claimant avoid frequent squatting, kneeling and frequent stairs, and that Claimant should avoid single person transfers. The work restrictions recommended by Dr. Olson were effective through January 24, 2017. (Ex. F, p. 158).

40. Claimant was scheduled to return to the ATP on January 24, 2017. Again, she was a no call, no show for that appointment. The ATP's office sent correspondence to Claimant dated January 26, 2017 advising Claimant that she needed to reschedule her appointment or face discharge as a patient. (Ex. F, pp. 162).

41. Claimant was familiar with the process for rescheduling an appointment following a missed appointment, as she had done so previously. (Ex. F, pp. 156, 158) Nevertheless, Claimant failed to reschedule the January 24, 2017 missed appointment and on February 23, 2017, Claimant was discharged for non-compliance. (Ex. F, pp.163-164).

42. Claimant agreed that subsequent to her discharge for non-compliance, her attorney arranged for Claimant's reinstatement of care with Dr. Olson. Claimant testified, however, that she has never made any further appointments with Dr. Olson.

43. No other treating provider has assigned work restrictions to Claimant.

44. Claimant's counsel referred Claimant for an IME with Dr. Miguel Castrejon on February 8, 2017. Dr. Castrejon was admitted as an expert in the field of Physical Medicine & Rehabilitation at the hearing.

45. Dr. Castrejon issued an initial IME report following the February 8, 2017 IME. (Ex 8). Dr. Castrejon testified that when he conducted the IME of Claimant on February 8, 2017, he was under the impression and belief that he had been provided with copies of all of Claimant's medical records relevant to this claim.

46. Dr. Castrejon subsequently was contacted by Claimant's attorney via written correspondence on March 27 and 30, 2017 under cover of which additional medical records pertaining to this claim were sent. (Ex. 8, p. 223). Dr. Castrejon subsequently issued a Supplemental Report based on the additional medical records.

47. Dr. Castrejon testified that upon receipt of the additional medical records transmitted to him by Claimant's counsel on March 27 and 30, 2017, he was under the impression and belief that he had now been provided with copies of all of Claimant's medical records relevant to this claim.

48. In both of Dr. Castrejon's IME report and Supplemental Report, he documents that claimant **denied** any prior *lumbar* spine complaints, pain, or treatment and any prior *right knee* complaints, pain or treatment. (Ex. 8 p. 213)(emphasis added).

49. Dr. Castrejon opined in his reports and testified that it is his medical opinion that the injury to Claimant's right knee was caused by the MVA. He refers to Claimant's MRI of the right knee taken on November 1, 2016 and which shows some trace edema within the patella and joint effusion that may be somewhat bloody, in support of his opinion that the knee was injured in the MVA. (Ex G, p. 170). Dr. Castrejon also testified that he had not seen a bloody joint effusion on an MRI that was not associated with an injury of a non-traumatic nature. Dr. Castrejon also testified that he speculates that Claimant's knee was hyperextended during the MVA, causing the injury to the right knee.

50. Similarly, citing no documented history of prior need for treatment as it pertains to the lumbar spine, Dr. Castrejon opined that Claimant's lumbar spine requires a combination of chiropractic and physical therapy as a result of the MVA. He determined that there was **no injury to Claimant's cervical spine and that Claimant did not require any treatment as related to the MVA for her chronic headaches.** (Ex. 8, pp. 219-222). (emphasis added).

51. Dr. Castrejon admitted that he had received none of Claimant's treatment records documenting prior right knee complaints and treatment and prior lumbar spine complaints and treatment prior to issuing either the IME report or the Supplement Report. Indeed, Dr. Castrejon admitted that he had only received Dr. Green's records just the day prior to the hearing.

52. The ALJ finds that Dr. Castrejon did not have all relevant medical records when conducting his IME of Claimant and in formulating his opinions regarding causation and relatedness.

53. Dr. Castrejon testified and also noted in his reports that Claimant denied prior treatment to the lumbar spine and right knee. On cross examination, Dr. Castrejon admitted that Claimant was untruthful in this regard. The ALJ finds that Claimant was neither truthful with her own IME physician, nor with other treatment providers, regarding her preexisting pain in her right knee and lumbar spine. The ALJ further finds that of all professions, a nurse should be especially cognizant of the need for an accurate medical history at all times during treatment or evaluation. The ALJ further finds that as a nurse, Claimant should have been particularly aware of the need to keep all medical appointments with her ATP.

54. Dr. Castrejon also testified that he was under the impression and belief that Claimant had complained of right knee pain related to the MVA early on in her treatment, citing the referral of claimant to Dr. Nakamura some time prior to Claimant's August 30, 2017 appointment with Dr. Green/Jeffrey Johnson.

55. On cross examination, Dr. Castrejon conceded that he was mistaken and that the referral to Dr. Nakamura by Dr. Green was made on August 30, 2017 for this first time. Claimant had not yet seen Dr. Nakamura or previously registered right knee complaints. (Ex B, p. 83).

56. Dr. Castrejon agreed on cross examination that Claimant did not report any right knee complaints immediately following the MVA when she presented to the emergency department at Parkview Medical Center.

57. Respondents called Dr. Eric Ridings to testify as a medical expert in their case in chief. Dr. Ridings is licensed in the State of Colorado as a medical doctor; he has practiced medicine for 24 years, more than 21 of which have been in the State of Colorado. Dr. Ridings has been Level II accredited since 1997 and is Board Certified in Physical Medicine & Rehabilitation.

58. Dr. Ridings was admitted as an expert in the field of Physical Medicine & Rehabilitation.

59. Dr. Ridings conducted an IME of Claimant on March 1, 2017, after which he issued an IME report. Dr. Ridings issued a supplemental IME report on March 13, 2017 to address the Supplemental Report submitted by Dr. Castrejon. (Ex. C).

60. Prior to the IME, Dr. Ridings received and reviewed all of Claimant's relevant medical records, including but not limited to the records of Dr. Green documenting claimant's preexisting lumbar spine and right knee complaints.

61. While obtaining the Claimant's personal history, Claimant denied any prior lumbar spine or right knee complaints, pain or treatment. (Ex 7, p. 107) Dr. Ridings' review of Claimant's medical records found this to be untrue. The ALJ finds that Claimant's statements regarding preexisting complaints of her right knee and back to Dr. Ridings were not true. The ALJ further finds that, as a nurse, Claimant, of all professionals, knew or should have known that an accurate medical history is of paramount importance in a proper evaluation and treatment plan. Her misstatements to Dr. Ridings were not made of mere carelessness, inadvertence, or lack of sophistication.

62. Claimant provided a description of the mechanism of injury to Dr. Ridings, which he included in his reports. Claimant's description of the mechanism of injury includes her slamming on the brakes with her right foot and leg, with her foot, tibia, and femur all aligned in a straight extension of the right leg. Claimant estimated her speed at approximately 20 mph and she informed Dr. Ridings that there was no airbag

deployment.

63. Dr. Ridings testified that this mechanism of injury, which has been consistently described by Claimant, would not have caused injury to Claimant's right knee. Instead, with the leg in a straight extended position, the axial force of the MVA (the vehicle stops but the body keeps moving forward), would have transmitted up Claimant's straightened leg, moving past the knee and into the hip joint, likely causing injury to the hip joint.

64. Claimant did not sustain any injury to her right hip from this MVA.

65. With regard to Dr. Castrejon's speculation that Claimant's knee hyperextended during the collision, thus contributing to the meniscal tear, Dr. Ridings testified that meniscal tears requires some sort of rotary force or some source form the side. The description of the mechanism of injury consistently given by Claimant is not consistent with any type of rotary or side force and would not have caused a discreet posterior horn tear.

66. Addressing the possible bloody effusion noted on the MRI scan and relied upon by Dr. Castrejon in forming his opinion that the knee injury is related to the MVA, Dr. Ridings testified that the MRI does not definitively identify the white area as blood and it is often difficult to tell whether the whiteness that shows on MRI studies is actually blood on the joint. Assuming, however, that the white area is indicative of blood on the joint, Dr. Ridings testified that the blood present on the scan would still remain from three months earlier, when this MVA occurred.

67. Dr. Ridings further testified that with regard to the diagnosis of probable traumatic chondromalacia as a result of the MVA, there is no possible way claimant could have had such a severe loss of cartilage under the kneecap through this mechanism of injury; the mechanics of a straight leg, such as Claimant described, would not permit any force to the patella and thus, there could be no injury there.

68. Dr. Ridings disagrees with Dr. Castrejon that Claimant sustained any right knee injury in the MVA. Dr. Ridings concurs that the MRI study shows problems in Claimant's right knee.

69. However, he points out that if the injuries identified on the MRI actually occurred as a result of the MVA, Claimant more likely than not would have experienced significant pain and swelling which would have been very evident upon her presentation to the emergency department at Parkview Medical Center. Moreover, he opined that Claimant would not have been able to continue working regular duty with no difficulty as Claimant reported to the ATP on November 8, 2016.

70. With regard to Claimant's lumbar spine, Dr. Ridings testified that Claimant has a significant history of prior lumbar spine complaints and treatment which are, in his expert medical opinion, the source of Claimant's current complaints. Dr. Ridings

referred to longitudinal documentation from Dr. Green's records regarding Claimant's pain scale ratings, which have remained relatively consistent prior to and following the MVA, and the claimant's own admission that she continued to work regular duty without difficulty following the MVA, that Claimant at most may have suffered a temporary exacerbation of her preexisting complaints, but that the MVA did not cause any actual injury, nor did it accelerate or aggravate claimant's prior lumbar spine condition.

71. Dr. Ridings concurs with Dr. Castrejon that Claimant did not sustain injury to her cervical spine as a result of the MVA, and also that Claimant's complaints of headaches is unrelated to the MVA.

72. Dr. Ridings testified that Claimant does not require any work restrictions as related to the MVA and that she is not eligible for any impairment rating, as Claimant sustained no compensable injuries as a result of the MVA.

73. Based on the totality of the records, which Dr. Ridings correctly points out in testimony that Dr. Castrejon did not have when conducting the IME and/or issuing his IME report and Supplemental Reports, that Dr. Castrejon's opinions and conclusions are incomplete.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

Generally

A. The Workers' Compensation Act creates a distinction between an "accident": and an "injury." The term "accident" refers to an "unexpected, unusual, or undersigned occurrence." §8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." And "accident" is the cause and "Injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* WC 4-650-711 (ICAO February 15, 2007).

B. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

C. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to

benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals* Office, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals* Office, 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals. Office,* 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones,* 688 P.2d 1116 (Colo. 1984).

D. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

E. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Thus, if the injury in part contributes to the wage loss, TPD benefits must continue until one of the elements of §8-42-106(2), *supra*, is satisfied. *Champion Auto Body v. Industrial Claim Appeals Office*, *supra.* §8-42-106(2)(a), *supra*, provides that TPD benefits cease when the employee reaches maximum medical improvement.

F. Every employee who sustains an injury resulting from an accident shall notify said employee's employer in writing of the injury within four days of the occurrence of the injury. If the employee fails to report the injury in writing, the employee may lose up to once day's compensation for each day's failure to so report. §8-43-102(1)(a), C.R.S.

G. In deciding whether an injured work has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office, supra*. The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay

witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App., 131, 134 P. 254 (1913*); see also Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. *See Magnetic Engineering Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

H. The weight and credibility to be assigned expert medical opinion is a matter within the fact finding authority of the ALJ. *Cordova v. Indus. Claim Appeals Office, supra.* The ALJ should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education, and may accept all, part, or none of the testimony of a particular medical expert. *See § 8-43-210, C.R.S.; One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. Ap. 1995); *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Indus. Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Claimant's Cervical Spine and Headaches

I. Dr. Castrejon, who is Claimant's retained expert, does not believe that Claimant sustained any compensable injury to her cervical spine or for her headaches. Dr. Ridings concurs with this opinion. The ALJ finds that Claimant did not suffer any compensable injuries to her cervical spine, nor did any headaches result from this MVA.

Claimant's Right Knee Complaints

J. Claimant's medical records make several references to prior, preexisting complaints regarding the right knee. In fact, Claimant's right knee pain was significant enough and so consistent that Claimant's pain doctor, Dr. Green, recommended that Claimant undergo Supartz injections. While Claimant never underwent the injections, the fundamental nature of Claimant's pain complaints of her right knee did not change. Due to the pain symptoms that Claimant had been experiencing for months prior to the MVA, Dr. Green ultimately referred Claimant to Dr. Nakamura, an orthopedic specialist, for evaluation and treatment. The referral to Dr. Nakamura does not appear to be connected to the MVA which is now the subject of this claim.

K. Claimant relies on the medical opinion of Dr. Castrejon to show that she sustained an injury to her right knee in the MVA and that she requires treatment for it. Claimant failed to provide Dr. Castrejon with all relevant medical records until right before the hearing. Dr. Castrejon never had the opportunity to thoroughly review the records, and discuss the records of Claimant's prior complaints and treatment. Claimant was not even verbally forthcoming with her own expert witness in denying her preexisting right knee complaints. Such failure to accurately disclose, from a trained nurse no less, unfairly placed Dr. Castrejon into a professionally untenable position.

L. Conversely, prior to conducting his IME of claimant, Dr. Ridings was provided with all of Claimant's relevant medical records, including Dr. Green's records. In both the AMR records prior to transport of Claimant to Parkview Medical Center emergency department, and the emergency department records, Claimant had not complaints of any right knee pain related to the MVA at all. Claimant made no complaints regarding her right knee as related to the MVA until August 30, 2016, nearly once month following the date of injury. It wasn't until November 1, 2016 that Claimant underwent an MRI scan of the right knee. While the MRI scan does show a partial meniscal tear and possible traumatic chondromalacia, as Dr. Ridings pointed out in his IME reports and in his testimony, the indications on the MRI do not definitively point the MVA itself as the cause of the meniscal tear or chondromalacia. At various times, the MRI report uses the terms "likely", "may be", "probable", "some trace" "suggestive of" and "suspicious". Through no fault of the radiologist, especially given the remote date of this MRI post-injury, Claimant's maladies cannot be objectively linked to the MVA at issue.

M. Claimant has failed to provide by a preponderance of the evidence that she sustained any injuries to her right knee from the MVA. The mechanism of injury described by Claimant indicates that her right leg was extended in a straight line, with the foot, tibia, and femur completely aligned. Thus, when Claimant impacted the other vehicle, the force involved to the right leg was an axial force. Such a force, particularly at this speed, is not likely to cause a meniscal tear, as a meniscal tear generally requires some type of rotary force or a force from the side.

Claimant's Lumbar Spine Complaints

N. Similarly, with regard to Claimant's lumbar spine, Claimant's medical records repeatedly document ongoing lumbar spine complaints. Claimant similarly denied, to both her own IME, as well as Respondent's IME, preexisting lumbar issues. Claimant was already diagnosed with lumbar spondylosis and was referred for physical therapy. Claimant attended physical therapy four times and then self-terminated the sessions. Shortly prior to the MVA, Claimant was still complaining of lumbar spine pain, and had been deemed a candidate for medial branch blocks. Claimant has failed to show, by a preponderance of the evidence, that her lumbar problems arose out of the MVA.

Temporary Partial Disability, Medical Bills Outstanding, and Penalties

O. Claimant has not met her burden of proof in showing any compensable injuries from this MVA. There is no further need to address Temporary Partial Disability benefits, Medical Bills, or Penalties.

ORDER

It is therefore ordered that:

1. Claimant's request for Workers Compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 3, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Respondents January 6, 2017, Final Admission of Liability (FAL) based upon the report of Dr. Daniel Olson placing Claimant at MMI on August 8, 2016 is valid since she was never seen by Dr. Olson.

FINDINGS OF FACT

Based upon the stipulated facts and exhibits submitted, the ALJ enters the following findings:

1. Claimant sustained an admitted injury on June 6, 2016, when a trash dumpster lid closed on her wrist as she was taking out trash in the course of her duties for Employer.

2. Claimant was given a Designated Provider list and elected to pursue medical treatment with Centura Centers for Occupational Medicine (CCOM).

3. At CCOM, PA-C Byrne examined Claimant on August 8, 2016, and opined she had reached maximum medical improvement (MMI) with no impairment and no permanent work restrictions. The authorized treating physician, Dr. Daniel Olson, reviewed PA-C Byrne's report and co-signed a WC164 form with PA-C Byrne that placed Claimant at MMI as of August 8, 2016, with no permanent restrictions, no need for maintenance care and with no permanent impairment.

4. At no time was Claimant personally seen or examined by Dr. Olson, who is Level II accredited. On the date of MMI, Claimant was only seen and examined by PA-C Byrne.

5. Respondents filed a Final Admission of Liability on January 6, 2017, based on the August 8, 2016 medical report co-signed by Dr. Olson and PA-C Byrne.

6. Claimant timely objected to the Final Admission of Liability and filed a Notice and Proposal to Select IME. Claimant also timely filed an Application for Hearing contesting that she was properly placed at MMI by a treating physician. The Division IME process has been held in abeyance pending resolution of Claimant's contention she was not properly placed at MMI.

7. On April 10, 2017, a *Samms* conference was held with Dr. Olson and counsel for both Respondents and Claimant. Dr. Olson confirmed he had never personally examined Claimant and had relied on PA-C Byrne's August 8, 2016 notes and report in arriving at his opinion Claimant was at MMI with no permanent impairment.

8. If this claim had proceeded to hearing as opposed to submission by briefs, Claimant would have testified that she has not fully recovered from her injury and continues to experience pain and limitations on range of motion. Respondents would have maintained their position that the Claimant had fully recovered from her injury and was at MMI.

9. Throughout this claim Claimant has been a resident of the state of Colorado.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. *Section 8-43-201, C.R.S.*

B. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

The Validity of Respondents January 6, 2017 Final Admission of Liability

C. In this case, Claimant argues that she was never properly placed at MMI because she was never examined by her authorized treating physician (ATP), Dr. Olson. Therefore, Claimant contends that the FAL filed January 6, 2017 is *"void ab initio."* Respondents counter that Dr. Olson was not required to personally examine Claimant prior to placing her at MMI without permanent impairment and Respondents' January 6, 2017, Final Admission of Liability based on Dr. Olson's MMI report is valid. Based upon the parties' stipulation concerning the facts and the exhibits submitted, the ALJ concurs with Respondents.

D. The Workers' Compensation Act does not specifically discuss whether an authorized treating physician ("ATP") must personally examine a Claimant when placing her at maximum medical improvement (MMI). Rather, the Act provides only that an ATP shall make the MMI determination. *See* C.R.S. §8-42-107(8)(b)(I). Claimant interprets the Act as requiring the APT to personally examine a claimant to determine MMI. The Workers' Compensation Rules of Procedure (WCRP) also speak to this issue and provide additional direction concerning the issue raised by Claimant.

E. WCRP Rule 16-5(A)(6) regulates the use of Physicians Assistants (PA's) in Colorado Workers' Compensation Claims. WCRP 16-5(A)(6)(a) states: "All Colorado Workers' Compensation claims (medical only or lost time claims) shall have an "authorized treating physician" responsible for all services rendered to an injured worker by any PA or NP." In furtherance of this mandate, WCRP 16-5(A)(6)(d) provides: "For services performed by an NP or a PA, the authorized treating physician must counter sign patient records related to the injured worker's inability to work resulting from the claimed work injury or disease, and the injured worker's ability to return to regular or modified employment. The authorized treating physician also must counter sign Form WC 164. The signature of the physician provider shall serve as a certification that all requirements of this rule have been met." This section suggests that the ATP must countersign documents in three different scenarios: 1) patient records related to worker's inability to work; 2) patient records related to ability to return to work; and 3) a Form WC 164. Thus, this section explicitly permits, and in fact requires, the authorized treating physician to cosign a WC 164.

F. WRCP 16-7(F)(1), mandates the following: "Authorized treating physicians sign (or countersign) and submit to the payer, with their initial and final visit billings, a completed "Physician's Report of Workers' Compensation Injury" (Form WC 164) specifying… (b) The report type as 'closing' when the authorized treating physician (generally the designated or selected physician) managing the total workers' compensation claim of the patient determines the injured worker has reached maximum medical improvement (MMI) for all injuries or diseases covered under this workers' compensation claim, with or without a permanent impairment." Again, this section explicitly permits, and in fact requires, the authorized treating physician to cosign a WC 164.

G. Perhaps most relevant to the matter at hand, the delegation statute, C.R.S. §12-36-106(5)(a), states that a licensed physician may delegate "the authority to perform acts that constitute the practice of medicine and acts that physicians are authorized by law to perform" to licensed physician assistants ("PA"). In concluding that Respondents' January 6, 2017 FAL is valid, the undersigned ALJ finds the Colorado Court of Appeals case of *Sims v. Indus. Claims Appeals Office*, 797 P.2d 777 (Colo. App. 1990), instructive. In *Sims* the Court pronounced the basic rule that PA's can make decisions about a claimant's status without the claimant seeing the ATP. Ms. Sims fell at work; afterwards, the employer referred her to a PA working under the direction of a licensed medical doctor (i.e., the ATP). *Id.* at 779. Upon examination, the PA determined that she was not injured. *Id.* He then referred her to an orthopedic surgeon, who corroborated the PA's findings. *Id.* The PA then released Ms. Sims to work without restrictions. *Id.*

Importantly, the ATP never examined her. *Id.* Ms. Sims argued that the Panel erred in accepting PA's testimony because he was not a medical doctor, and thus the PA's testimony was not competent evidence. *Id.* The Court of Appeals cited C.R.S. §12-36-106(5)(a) in holding that because the PA's supervising doctor delegated the authority to examine patients and make subsequent determinations, the PA's testimony concerning Ms. Sims injury was competent. *Id.* at 779–81.

H. While the facts are not directly aligned with the case at bar, the *Sims* decision signals that PA's are permitted to exercise significant discretion in determining a claimant's medical status without the ATP ever personally seeing the claimant. Indeed in *Sims*, the PA was legally permitted to issue a decision concerning the claimant's medical condition and her ability to work without restriction. Moreover, his testimony regarding the same was considered competent evidence despite his not being a physician and without the claimant ever seeing the ATP. This mirrors what occurred in the matter at hand when Dr. Olson reviewed and adopted PA-C Byrne's decision to place claimant at MMI without impairment. Here, the undersigned ALJ finds and concludes that Dr. Olson's conduct satisfied C.R.S. § 8-42-107(8)(b)(I), WCRP 16-5(A)(6)(d), WCRP 16-7(F)(1) and C.R.S. § 12-36-106(5)(a). Specifically, the ALJ concludes that Dr. Olson reviewed the findings of PA –C Byrnes and approved the same by co-signing the WC 164 form. Accordingly, the ALJ concludes that he, as the ATP made the determination Claimant had reached MMI. As noted, the Act and Rules of Procedure only require the ATP to make the MMI determination but not proscribe the examination methods to reach that decision. Claimant's assertion that Dr. Olson is required to physically examine Claimant to place her at MMI is not supported by any statute, rule or applicable case law. Consequently, the ALJ concludes that the FAL filed January 6, 2017, is valid. Claimant may proceed with her requested DIME.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove, by a preponderance of the evidence, that the January 6, 2017 FAL is invalid.

2. Claimant may proceed with her requested DIME.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 5, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer on September 16, 2016.

2. Whether Claimant has proven by a preponderance of the evidence that the medical treatment he has received was authorized, reasonable and necessary to cure or relieve the effects of his mental impairment.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period November 7, 2016 until terminated by statute.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $477.87 subject to modification based on the status of his fringe benefits from Employer.

FINDINGS OF FACT

1. Claimant worked for Employer as a cashier at a large supermarket. On September 16, 2016 he was taking his afternoon break. He walked outside and sat at a picnic table with co-workers Jainish Patel and Lance Hopkins-Dukes. Claimant sat on one side of the table and his co-workers sat on the opposite side.

2. An unidentified man approached the picnic table. In response to the man Claimant stood up from the table and stated that he was going inside to use the restroom. The man then poked Claimant in the stomach with his finger and directed him to sit back down. The man pulled up his shirt, revealed a "switchblade" knife and held the knife on Claimant's shoulder with the blade facing Claimant's neck. Claimant then pushed the assailant away and walked briskly back into the supermarket. He remarked that his heart was racing and his palms were sweaty. Claimant informed Assistant Store Manager Doug Parker of the knife incident and completed his work shift.

3. Claimant's co-worker Lance Hopkins-Dukes testified at the hearing in this matter. He explained that he was taking a break with Claimant during the September 16, 2016 knife incident. Mr. Hopkins-Dukes remarked that the assailant appeared to be mentally weird or unstable as he approached the picnic table. The assailant pointed a knife at Claimant's neck for approximately two to three seconds with his hand on Claimant's left shoulder. In response to Mr. Hopkins-Dukes' inquiry of "what's that," the perpetrator dropped the knife and Claimant returned to the supermarket. Mr. Hopkins-

Dukes entered the store and informed Mr. Parker that a man was behaving strangely in the outside break area. He commented that Claimant did not express anxiety or stress after the incident.

4. Mr. Parker testified that he was informed of the September 16, 2016 knife incident and went outside to the break area. He observed the assailant behaving oddly and advised him about complaints regarding the knife. The perpetrator then left the area with a friend.

5. Mr. Parker questioned Claimant about the knife episode. Claimant explained that the perpetrator had placed a knife toward his throat but it was not a "big deal" and he was doing fine. Claimant did not appear to be shaking or otherwise behaving anxiously during the discussion. Mr. Parker asked Claimant whether he should call the police but Claimant declined and reiterated that the knife episode was "no big deal."

6. Mr. Parker testified that he sent an e-mail to corporate management notifying them of the incident sometime on September 16, 2016. He received a response to the e-mail the morning of September 17, 2016 that instructed him to obtain statements from the witnesses to the incident. Therefore, Mr. Parker called Claimant to his office and asked him to complete a Voluntary Statement. Despite Claimant's testimony that he immediately began experiencing panic attacks and nightmares as a result of the incident, the Voluntary Statement made no mention of any worsening symptoms, panic attacks, nightmares, or any other issues concerning the incident. Furthermore, Mr. Parker testified that Claimant completed the Statement while in his office and showed no signs of distress at having to recount the events in the statement.

7. Claimant has suffered an extensive previous history of psychological and emotional difficulties. Claimant grew up in foster care and suffered from abuse. He specifically noted relationship difficulties with his mother and father, an incident in which he stabbed his father, his incarceration for the stabbing incident and psychiatric care. He acknowledged a history of depression and Post-Traumatic Stress Disorder (PTSD) that he associated with his childhood. However, he felt he was able to cope and function in his life and at work despite his emotional difficulties.

8. Calie Yaklich testified that for all of 2016 she was the Front-end Manager for Employer. She was responsible for supervising employees working the cash registers, self-checkout stand, service desk and customer service desk. She remarked that she became Claimant's supervisor when Claimant was transferred to a cashier position beginning the last week of September 2015. However, she was familiar with Claimant's psychiatric issues even before becoming his supervisor because she frequently spoke to Claimant while they were on break. Ms. Yaklich commented that Claimant frequently talked to her about "stories from his childhood," his history of abuse and his ongoing psychiatric problems.

9. Claimant originally worked in the produce department for Employer and engaged in very little customer interaction. However, Claimant had a difficult time

dealing with his supervisor so he requested a transfer into a cashier position. Ms. Yaklich remarked that she was concerned about Claimant's transfer to a cashier position because of his "overall attitude," the fact that he "didn't like people" and difficulties in creating the friendly environment Employer required of its employees.

10. Wage records reveal that Claimant's last week in the produce department ended on September 26, 2015. He began working as a cashier for Employer during the week ending October 3, 2015. After his transfer to the cashier position Ms. Yaklich remarked that Claimant consistently had difficulties "interacting with customers in a positive way, carrying a positive attitude, smiling, taking direction from not just me, but his other managers." She commented that during the summer of 2016 Claimant's interaction with customers and attitude had deteriorated to the point where action needed to be taken. Therefore, sometime in July 2016, Ms. Yaklich and Store Manager Dustin Bentley had a meeting with Claimant to discuss their concerns.

11. Claimant acknowledged that he had a meeting with Mr. Bentley and Ms. Yaklich in July, but testified that the meeting occurred in July 2015 instead of July 2016. However, the meeting must have occurred in July 2016 because Claimant was not in the cashier position in July 2015, Ms. Yaklich was not his supervisor in July 2015 and Mr. Bentley did not start working at Employer's Store 18 until December 2015.

12. Mr. Bentley testified that the July 2016 meeting originally started as a "coaching opportunity" to discuss Claimant's attitude and demeanor in the cashier position. However, because Claimant became emotional as the meeting progressed Mr. Bentley asked him how he was feeling. At that point Claimant "started bringing up about the emotional issues he was having, we talked about the fact that he was not sleeping well, he was staying up late, that he mentioned that he would be up really late, 2 – 3 o'clock in the morning walking around, at that point the conversation kinda changed from the coaching opportunity to a discussion about Claimant's emotional state." Claimant was "crying, and talked about things that he had been dealing with in the past, things that he is dealing with currently, at one point he said you would never imagine the things I have to deal with." As a result of Claimant's emotional state, Mr. Bentley informed Claimant that he and Ms. Yaklich were there to support him. Mr. Bentley also reminded Claimant that Employer had a third-party service from which he could seek treatment or support.

13. On August 22, 2016 Claimant sought treatment from Associates in Family Medicine. He visited Physician's Assistant Julie Thornton complaining of fatigue, mild headache, shaky muscles, mild shortness of breath, nausea and vomiting. P.A. Thornton documented that Claimant provided a history of "post traumatic depression that has not responded to medication or therapy." She noted that Claimant "[n]eeds to rest for 48 hours: work on fluid replacements." To address Claimant's fatigue, P.A. Thornton wrote a note taking Claimant off work for approximately 48 hours due to his symptoms of "pharyngitis/fatigue."

14. On September 1, 2016 Claimant returned to Associates in Family Medicine and visited Physician's Assistant Joshua Barber. P.A. Barber specifically

evaluated Claimant for "ongoing fatigue, malaise, insomnia for the past 6-8 months… states he does wake up often…also complains of more recent onset increase in headaches… intermittent rapid heartbeats …" Claimant again mentioned his past medical history of depression and PTSD. P.A. Barber diagnosed "Other fatigue, Other insomnia, Globus sensation, Frequent headaches." Claimant underwent a number of blood and other tests. At the conclusion of the visit Claimant was scheduled for an appointment with a primary care physician for "ongoing evaluation."

15. On September 6, 2016 Claimant returned to Associates in Family Medicine and visited Erin M. Schrunk, M.D. for an examination. Claimant reported that he "[g]oes to bed every night between 10:00 p.m. to midnight, but awakens about 5x/night due to history of abuse. States he wakes up because he is worried about his surroundings and always on 'high alert' due to abuse in his history. Has been to counseling for 5 years." Dr. Schrunk administered the Generalized Anxiety Disorder 7-item scale (GAD-7) to measure Claimant's level of anxiety and the Patient Health Questionnaire (PHQ-9) to measure Claimant's level of depression. She remarked that Claimant exhibited a history of depression and PTSD. Dr. Schrunk diagnosed Claimant with hypersomnolence, PTSD and an acute upper respiratory infection. She began Claimant on antidepressant medication.

16. Claimant testified that his psychological and emotional symptoms worsened over time. He explained that he was eating less, sleeping less, isolating himself, nervous around people and continuing to have severe nightmares and flashbacks. He remarked that his nightmares frequently consisted of being held at knifepoint, being stabbed and having his throat cut. Claimant commented that he began struggling with his job and his emotional issues were much more severe than he had suffered prior to the September 16, 2016 knife incident. Moreover, he stated that it was not unusual to have challenging customers who were annoying or rude, but felt that was just part of the job that he tolerated before September 16, 2016.

17. Claimant felt he needed a couple of weeks off work to regroup. He contacted Employer and received forms to be completed by his doctor. On November 7, 2016 Claimant visited Dr. Schrunk with the disability paperwork from Employer. Dr. Schrunk completed the forms and noted that September 6, 2016 was the approximate date Claimant's condition commenced. Claimant anticipated short-term disability benefits during his two weeks off work. However, when he was not paid for his time off he contacted Employer's Human Resources Department and explained what had happened on September 16, 2016. Human Resources employees told Claimant that the incident involved a Workers' Compensation claim.

18. On December 8, 2016 Claimant completed the requisite Workers' Compensation paperwork. Employer referred Claimant to Concentra Medical Centers for treatment. Pursuant to the Concentra referral, Claimant visited Joel Cohen, Ph.D. on December 15, 2016 and December 29, 2016. Dr. Cohen's comprehensive report dated December 15, 2016 documented Claimant's psychological history, the incident of September 16, 2016 and the deterioration of his mental status. Dr. Cohen commented that Claimant has a long-standing history of chronic PTSD with "symptoms that have

varied in intensity over the course of his life depending upon the circumstances that he finds himself in." He also noted that he did not believe Claimant was receiving psychological counseling at the time of the September 16, 2016 knife incident. Dr. Cohen summarized:

> Again, what I do need to reaffirm is that regardless of his long standing psychological and psychiatric history the fact of the matter is I would suspect that most people when confronted with the situation as he described at the job site would have at least the possibility of transient and anxiety symptoms specific to that incident and hence it is something that I do believe we should justifiably address..

Dr. Cohen acknowledged that Claimant suffered both injury and non-injury related psychological issues. He diagnosed Claimant with an "acute stress reaction" and recommended psychological care as a result of the September 16, 2016 incident.

19. On March 6, 2017 Claimant underwent an independent medical examination with Stephen A. Moe, M.D. Dr. Moe concluded that Claimant's psychological difficulties were not caused by the September 16, 2016 knife incident. He detailed:

> [Claimant's] symptoms of depression and anxiety have been caused by a combination of long standing psychological vulnerabilities, the stress that he experienced while working as a cashier, and unhappiness about events related to his pursuit of compensated disability; consequently, he has misattributed his symptoms to the workplace incident of September 16, 2016.

In support of his opinion, Dr. Moe noted that Claimant's presentation did not change when discussing the events of September 16, 2016. The lack of change suggested a lesser degree of distress than Claimant had described. Furthermore, the cashiering position was difficult for Claimant and he was "stressed out" prior to the incident of September 16, 2016.

20. Dr. Moe recounted Claimant's description of the September 16, 2016 knife incident. He related that Claimant felt Employer did not care about him because his supervisor did not call the police. Dr. Moe noted that Claimant maintained his condition deteriorated in the weeks following the incident and described his symptoms. He also detailed Claimant's significant pre-existing psychiatric history. Based on a comprehensive review of Claimant's psychological history and the September 16, 2016 knife incident Dr. Moe attributed Claimant's psychiatric symptoms to the coalescence of two factors. First, Claimant suffered from the enduring effects of childhood mistreatment. Second, Claimant experienced stress as a result of interpersonal interaction with customers. Dr. Moe explained that the two preceding factors caused emotional distress that was intolerable and caused Claimant to request a leave of absence. However, when Claimant learned that he would not receive income during the leave of absence he initiated a Workers' Compensation claim. Notably, in the weeks

following the September 16, 2016 knife incident Claimant attributed his symptoms to childhood difficulties and work stress. However, reports of the September 16, 2016 knife incident were "conspicuously absent" in Claimant's medical records shortly after the event. Accordingly, Claimant's psychological symptoms were caused by his long-standing psychological vulnerabilities and the stress associated with working as a cashier. Claimant's PTSD and other psychological difficulties were not caused or aggravated by the September 16, 2016 knife incident.

21. On May 7, 2017 Peter Kaplan, PhD testified through an evidentiary deposition in this matter. Dr. Kaplan agreed with Dr. Moe that Claimant suffers from long-standing psychological vulnerabilities. However, contrary to Dr. Moe he did not agree that stress caused by Claimant working as a cashier was a significant factor. Dr. Kaplan stated that he was surprised Dr. Moe did not mention the incident with the knife in his causation analysis. He remarked "[t]hat seemed to be a catalyst for an exacerbation of his emotional response." Dr. Kaplan explained:

> There's pre-trauma factors that suggest a person is going to be more vulnerable to PTSD and that's prior mental disorders, prior trauma and what the prior trauma has done to his cognition, his beliefs, those rules, as well as his view of the world. And, as I said, [Claimant is] fatalistic and the learned helplessness and pessimism. So you take the catalyst and that's going to exacerbate everything.

22. Initially, Dr. Kaplan determined that the September 16, 2016 knife incident was traumatic to Claimant because of his description of the event. He noted that Claimant "fit all of the symptoms of a PTSD client." Dr. Kaplan essentially asserted that, because Claimant suffered PTSD symptoms after the September 16, 2016 incident, the incident must have caused his symptoms. However, Dr. Kaplan failed to sufficiently recognize that Claimant suffered a long history and had again been diagnosed with PTSD by his medical provider 10 days prior to the September 16, 2016 incident. Therefore, Dr. Kaplan failed to adequately address the causal connection between the September 16, 2016 knife incident and his PTSD symptoms. Moreover, contrary to Dr. Kaplan's testimony that Claimant was in denial and suffers from "learned helplessness," Claimant's treatment in August, September, October and November, 2016 reflects that he was not in denial concerning the continued worsening of his psychiatric condition. Instead, Claimant took affirmative steps to improve his psychiatric condition by seeking treatment for his worsening psychiatric condition.

23. On May 9, 2017 the parties conducted the pre-hearing evidentiary deposition of Dr. Moe. Dr. Moe maintained that Claimant's PTSD and other psychological difficulties were not caused by the September 16, 2016 knife incident. He agreed that Claimant suffers from chronic PTSD but disagrees with other providers who have stated the diagnosis is related to the event on September 16, 2016. Dr. Moe testified Claimant was struggling emotionally even before the incident of September 16, 2016. He stated there were two alternatives concerning the event of September 16, 2016: "[w]hat happened after September 16, 2016 was merely a continuation of emotional distress caused by other reasons, or Claimant's pre-existing emotional

distress made him particularly vulnerable such that he reacted especially badly to the trigger of 9/16/16." Dr. Moe reasoned that the first option was the most likely and that the incident of September 16, 2016 did not either cause or aggravate Claimant's PTSD. Dr. Moe emphasized that, if Claimant had never experienced the incident on September 16, 2016, the worsening of his condition could be explained entirely by the recurrence of his pre-existing PTSD symptoms combined with his dissatisfaction with his job duties as a cashier. Dr. Moe summarized that the September 16, 2016 knife incident had nothing "to do with the symptoms and functional problems [Claimant] displayed." Instead, when Claimant learned he would not receive compensation for his time off in November 2016 and would need to file a Workers' Compensation claim to receive paid time off, he created "an entirely new narrative" and attributed the cause of his worsening PTSD symptoms to the knife incident at work.

24. Claimant has failed to establish that it is more probably true than not that he sustained a compensable mental impairment during the course and scope of his employment with Employer on September 16, 2016. Claimant recounted that on September 16, 2016 he was taking an outside break while working as a cashier for Employer. An unidentified man approached Claimant, revealed a "switchblade" knife and held the knife on Claimant's shoulder with the blade facing Claimant's neck. Claimant then pushed the assailant away and walked briskly back into the supermarket. He remarked that his heart was racing and his palms were sweaty. Claimant maintained that his psychological and emotional symptoms worsened over time after the knife incident. He explained that he was eating less, sleeping less, isolating himself, nervous around people and continuing to have severe nightmares and flashbacks. Claimant summarized that he began struggling with his job and his emotional issues became much more severe after the September 16, 2016 knife incident.

25. The mental impairment statute in the Workers' Compensation Act requires a psychologically traumatic event that would evoke significant symptoms of distress in workers in similar circumstances. The record reveals that Claimant has suffered an extensive previous history of psychological and emotional difficulties. Claimant grew up in foster care and suffered abuse. He specifically noted relationship difficulties with his mother and father, an incident in which he stabbed his father, his incarceration for the stabbing incident and psychiatric care. He acknowledged a history of depression and PTSD that he associated with his childhood. After Claimant's transfer to the cashier position in late September 2015 Ms. Yaklich remarked that he consistently had difficulties "interacting with customers in a positive way, carrying a positive attitude, smiling, taking direction from not just me, but his other managers." She commented that during the summer of 2016 Claimant's interaction with customers and attitude had deteriorated to the point where action was required.

26. In a July 2016 meeting with Ms. Yaklich and Mr. Bentley Claimant was "crying, and talked about things that he had been dealing with in the past, things that he is dealing with currently, at one point he said you would never imagine the things I have to deal with." As a result of Claimant's emotional state, Mr. Bentley informed Claimant that he and Ms. Yaklich were there to support him. On August 22, 2016 Claimant sought treatment from Associates in Family Medicine. By September 6, 2016 Claimant

reported to Dr. Schrunk that he awakened approximately five times each night because of his history of abuse. He stated that "he wakes up because he is worried about his surroundings and always on 'high alert' due to abuse in his history. Has been to counseling for 5 years." After psychological assessments Dr. Schrunk remarked that Claimant exhibited a history of depression and PTSD. Dr. Schrunk diagnosed Claimant with hypersomnolence, PTSD and an acute upper respiratory infection.

27. The medical records and testimony reflect that the September 16, 2016 knife incident simply did not constitute a trigger for Claimant's continuing waxing and waning PTSD symptoms. Initially, on the disability paperwork from Employer, Dr. Schrunk noted that September 6, 2016 was the approximate date Claimant's condition commenced. Furthermore, Dr. Cohen commented that Claimant suffered a long-standing history of chronic PTSD with "symptoms that have varied in intensity over the course of his life depending upon the circumstances that he finds himself in." He diagnosed Claimant with an "acute stress reaction" and recommended psychological care as a result of the September 16, 2016 incident. Dr. Moe concluded that Claimant's PTSD and other psychological difficulties were not caused by the September 16, 2016 knife incident. Dr. Moe explained that Claimant was struggling emotionally even before September 16, 2016 and noted two alternatives concerning the knife incident. The event was either a continuation of recurring emotional distress or Claimant's pre-existing emotional distress rendered him susceptible to significant psychological symptoms as a result of the September 16, 2016 incident. Dr. Moe reasoned that the first option was the most likely. Dr. Moe emphasized that, if Claimant had never experienced the incident on September 16, 2016, the worsening of his condition could be explained entirely by the recurrence of his pre-existing PTSD symptoms combined with his dissatisfaction with his job duties as a cashier.

28. In contrast, although Dr. Kaplan acknowledged that Claimant suffers from long-standing psychological difficulties, he determined that the September 16, 2016 knife incident constituted a catalyst for the development of Claimant's significant psychological problems. Furthermore, Claimant's work as a cashier was not a cause of his psychological deterioration. However, Dr. Kaplan failed to sufficiently recognize that Claimant suffered a long history of PTSD that was worsening and had again been diagnosed 10 days prior to the September 16, 2016 incident. Dr. Kaplan simply failed to adequately address the causal connection between the September 16, 2016 knife incident and Claimant's PTSD symptoms. Moreover, contrary to Dr. Kaplan's testimony that Claimant was in denial and suffers from "learned helplessness," Claimant's treatment in August, September, October and November, 2016 reflects that he was not in denial concerning the continued worsening of his psychiatric symptoms. Finally, the bulk of the persuasive medical records and testimony reflect that the knife incident was not a causative factor in the worsening of Claimant's psychiatric condition. Accordingly, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a cashier for Employer on September 16, 2016. Claimant's request for Workers' Compensation benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. The Workers' Compensation Act has authorized recovery for a broad range of physical injuries, but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental

stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19, 2010).

6. Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable mental impairment during the course and scope of his employment with Employer on September 16, 2016. Claimant recounted that on September 16, 2016 he was taking an outside break while working as a cashier for Employer. An unidentified man approached Claimant, revealed a "switchblade" knife and held the knife on Claimant's shoulder with the blade facing Claimant's neck. Claimant then pushed the assailant away and walked briskly back into the supermarket. He remarked that his heart was racing and his palms were sweaty. Claimant maintained that his psychological and emotional symptoms worsened over time after the knife incident. He explained that he was eating less, sleeping less, isolating himself, nervous around people and continuing to have severe nightmares and flashbacks. Claimant summarized that he began struggling with his job and his emotional issues became much more severe after the September 16, 2016 knife incident.

8. As found, the mental impairment statute in the Workers' Compensation Act requires a psychologically traumatic event that would evoke significant symptoms of distress in workers in similar circumstances. The record reveals that Claimant has suffered an extensive previous history of psychological and emotional difficulties.

Claimant grew up in foster care and suffered abuse. He specifically noted relationship difficulties with his mother and father, an incident in which he stabbed his father, his incarceration for the stabbing incident and psychiatric care. He acknowledged a history of depression and PTSD that he associated with his childhood. After Claimant's transfer to the cashier position in late September 2015 Ms. Yaklich remarked that he consistently had difficulties "interacting with customers in a positive way, carrying a positive attitude, smiling, taking direction from not just me, but his other managers." She commented that during the summer of 2016 Claimant's interaction with customers and attitude had deteriorated to the point where action was required.

9. As found, in a July 2016 meeting with Ms. Yaklich and Mr. Bentley Claimant was "crying, and talked about things that he had been dealing with in the past, things that he is dealing with currently, at one point he said you would never imagine the things I have to deal with." As a result of Claimant's emotional state, Mr. Bentley informed Claimant that he and Ms. Yaklich were there to support him. On August 22, 2016 Claimant sought treatment from Associates in Family Medicine. By September 6, 2016 Claimant reported to Dr. Schrunk that he awakened approximately five times each night because of his history of abuse. He stated that "he wakes up because he is worried about his surroundings and always on 'high alert' due to abuse in his history. Has been to counseling for 5 years." After psychological assessments Dr. Schrunk remarked that Claimant exhibited a history of depression and PTSD. Dr. Schrunk diagnosed Claimant with hypersomnolence, PTSD and an acute upper respiratory infection.

10. As found, the medical records and testimony reflect that the September 16, 2016 knife incident simply did not constitute a trigger for Claimant's continuing waxing and waning PTSD symptoms. Initially, on the disability paperwork from Employer, Dr. Schrunk noted that September 6, 2016 was the approximate date Claimant's condition commenced. Furthermore, Dr. Cohen commented that Claimant suffered a long-standing history of chronic PTSD with "symptoms that have varied in intensity over the course of his life depending upon the circumstances that he finds himself in." He diagnosed Claimant with an "acute stress reaction" and recommended psychological care as a result of the September 16, 2016 incident. Dr. Moe concluded that Claimant's PTSD and other psychological difficulties were not caused by the September 16, 2016 knife incident. Dr. Moe explained that Claimant was struggling emotionally even before September 16, 2016 and noted two alternatives concerning the knife incident. The event was either a continuation of recurring emotional distress or Claimant's pre-existing emotional distress rendered him susceptible to significant psychological symptoms as a result of the September 16, 2016 incident. Dr. Moe reasoned that the first option was the most likely. Dr. Moe emphasized that, if Claimant had never experienced the incident on September 16, 2016, the worsening of his condition could be explained entirely by the recurrence of his pre-existing PTSD symptoms combined with his dissatisfaction with his job duties as a cashier.

11. As found, in contrast, although Dr. Kaplan acknowledged that Claimant suffers from long-standing psychological difficulties, he determined that the September

16, 2016 knife incident constituted a catalyst for the development of Claimant's significant psychological problems. Furthermore, Claimant's work as a cashier was not a cause of his psychological deterioration. However, Dr. Kaplan failed to sufficiently recognize that Claimant suffered a long history of PTSD that was worsening and had again been diagnosed 10 days prior to the September 16, 2016 incident. Dr. Kaplan simply failed to adequately address the causal connection between the September 16, 2016 knife incident and Claimant's PTSD symptoms. Moreover, contrary to Dr. Kaplan's testimony that Claimant was in denial and suffers from "learned helplessness," Claimant's treatment in August, September, October and November, 2016 reflects that he was not in denial concerning the continued worsening of his psychiatric symptoms. Finally, the bulk of the persuasive medical records and testimony reflect that the knife incident was not a causative factor in the worsening of Claimant's psychiatric condition. Accordingly, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a cashier for Employer on September 16, 2016. Claimant's request for Workers' Compensation benefits is thus denied and dismissed.

ORDER

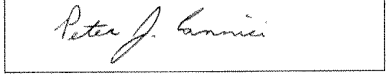
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 5, 2017.

DIGITAL SIGNATURE:



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Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant's Motion to Add Indispensable Parties should be granted pursuant to C.R.C.P. Rule 19.

2. Whether Claimant's Motion to Amend Caption of the Pleadings to reflect the additional Respondent Employers should be granted.

3. Is Claimant entitled to penalties for Respondent's continued violations of the Colorado Workers' Compensation Act and the Orders dated February 16, 2011 and March 5, 2012?

4. Is Claimant entitled to medical benefits to cure and relieve the effects of his industrial injury?

FINDINGS OF FACT

1. On March 9, 2010, Claimant was injured in a car accident while working for Thomas S. Wright, who was President and owner of Wright Group Event Services, Inc. ("Employer"). Claimant was riding in a vehicle owned by Employer which was headed toward a job site to perform party/event services. The vehicle Claimant was riding in was following a second vehicle owned by Employer when the brakes in Claimant's vehicle failed, causing the vehicle to hit the front vehicle and flip. Claimant was injured in the motor vehicle accident.

2. Claimant applied for hearing. Neither Thomas Wright nor Employer filed a Response to the Application for Hearing.

3. On December 23, 2010, a hearing was held in from of ALJ Michael E. Harr. The pleadings for that hearing listed Claimant's employer as "WGSP LLC." "Wright Group Event Services, LLC," was listed as Insurer/Respondents. Mr. Wright appeared pro se to represent WGSP LLC and Wright Group Event Services, LLC. Robert M. Maes represented Claimant. That case was captioned 4-823-822-01.

4. At the December 23, 2010 hearing, Mr. Wright did not dispute that Claimant was injured while performing work for a company Mr. Wright owned. However, he stated that no company named WGSP LLC existed, and that the name Wright Group Event Services, LLC was incorrect: the correct name was Wright Group Event Services Inc. Mr. Wright stated on the record that he was present representing Wright Group Event Services Inc. as President of that entity.

5. At hearing, Mr. Wright stated that Wright Group Event Services Inc. was a party rental business located at 4800 Colorado Boulevard, and that he ran Wright Group Event Services Inc. He raised improper service as a defense, in that the name on the pleading, Wright Group Event Services, LLC, should have been Wright Group Event Services Inc.

6. According to filings with the Colorado Secretary of State's office, Wright Group Event Services, Inc. was formed on February 22, 2005 and dissolved on January 2, 2010. The principal office mailing address was listed as 4800 Colorado Boulevard, Denver, Colorado 80216. Tom Steuart Wright was listed as the registered agent. Exhibit A.

7. Hence, Wright Group Event Services Inc. had been dissolved prior to December 23, 2010 hearing and prior to Mr. Wright's representations to Judge Harr.

8. Mr. Wright further stated on the record that the two trucks that were involved in the car accident on March 9, 2010 in which Claimant was hurt were his.

9. Mr. Wright testified that his company did not have Workers' Compensation insurance at the time of the accident. He further testified that he gave Claimant $100.00 after the accident.

10. At that hearing, Mr. Wright did not disclose that he owned, operated, or was the President, Member, or Manager of a multitude of closely-held entities; all involved in the party and event planning/supply/rental business, many of which existed at the time of the accident and some of which were similarly named, including:

a. WGSP LLC, which was formed on February 28, 2008, and was delinquent as of August 1, 2009. Exhibit N. It had a trade name of Soapoint Graphics. Exhibit B. The description of this entity's business was graphic design and graphic production. *Id.* The registered agent's name was Tom Wright, with a principal office street address and the registered agent's street address both listed as 4800 Colorado Blvd., Denver, CO 80216. Exhibit N.

b. Soapoint Graphics LLC, which filed an Annual Report on March 9, 2009 and March 3, 2010, indicating it was in business at the time of the accident and at the time of the hearing. Annual reports were filed for this entity every year up through 2016.

c. 4800 Colorado Blvd., LLC, formed August 8, 2006 and voluntarily dissolved March 27, 2014. Exhibit C. The registered agent of 4800 Colorado Blvd. LLC is listed as Thomas Wright[1], with the registered agent street address listed as 4800 Colorado Blvd., Denver, CO 80216. *Id.* A statement of dissolution was filed on March 27, 2014. The name and address of the person filing the dissolution was Thomas S. Wright, 1400 Yosemite Street, Denver, CO 80220. 4800 Colorado Blvd., LLC was in business at the time of the accident and at the time of the hearing.

[1] The registered agent was eventually changed to Gerald R. Hendricks, and then back to Thomas S. Wright. *See* Exhibits E and F.

d. WGES, Inc. was formed May 9, 2005 and voluntarily dissolved August 26, 2013. Thomas Wright was the registered agent, with a mailing address listed as 4800 Colorado Blvd., Denver, CO 80216, United States. Exhibit D. Another WGES, Inc. filing listed Susan L. Wright as the registered agent. *Id.* In another filing, Quinten Wright is listed as the registered agent. *Id.* WGES, Inc. was in business at the time of the accident and at the time of the hearing.

e. WGES, LLC was formed May 4, 2009, and voluntarily dissolved on October 23, 2012. Thomas Stewart Wright is listed as the registered agent, with a mailing address of 4800 Colorado Blvd, Denver, CO 80216. The principal office address is also listed as 4800 Colorado Blvd., Denver, CO 80216. Exhibit G. WGES filed documents stating that it conducted business under the name "Guru Graphics." *Id.* WGES, LLC was in business at the time of the accident and at the time of the hearing.

f. The 3730, L.L.C. was incorporated on or around November 5, 2002, with Thomas Wright listed as the registered agent and the initial manager, with all management vested in the manager. The mailing address is listed as 1400 Yosemite Street, Denver CO 80220. Exhibit E.

g. Rent-Rite Super Kegs West Ltd. was formed December 16, 1991 and is in good standing. The registered agent is Thomas S. Wright, with a principal office mailing address of 4800 Colorado Blvd., Denver, CO 80216, and a street address of 1400 Yosemite St., Denver, CO 80220.[2] Exhibit F. Thomas S. Wright is listed as President of Rent-Rite Super Kegs West Ltd. *Id.* Rent-Rite Super Kegs West Ltd. was in business at the time of the accident and at the time of the hearing. Additional secretary of state filings indicate that Rent-Rite Super Kegs West Ltd. uses multiple names under which it conducts business. The person who filed the Secretary of State paperwork listing all of the names under which Rent-Rite Super Kegs West Ltd. conducts business, is Thomas Wright, with the address of 4800 Colorado Blvd., Denver, Co 80216. Ex F. Those other business names are:

    i. Colorado Convention Decorating. The business description of Colorado Convention Decorating is "rentals of equipment." The address of the principal place of business is 4809 Colorado Boulevard, Denver, Colorado 80216.

    ii. Rent Rite Superkegs West Ltd. This business description is listed as manufacturing and sales.

[2] The address of place of business was eventually changed to 3652-54 Marion Street, Denver, CO 80205. Exhibit F.

iii. RentComm Racing Radios. This business description is rental and sales of communications equipment.

iv. Structure Rite.

v. Wright Group Events Services.

vi. Wright Group of Companies.

vii. Wright Group Structures.

viii. Elite International Productions. This business description is listed as "special events, trade shows, structures, rentals."

ix. Wright Security Group. This business description is security systems.

x. Rent Rite West Productions. This business description is listed as rentals of equipment.

xi. The Chairman. The business description is rental and resale of chairs/table/barstools.

xii. Guru Graphics. The business description is reprographics and signage. Exhibit F.

h. GES Rental Services, LLC, formed June 2, 2011 and in good standing. The principal office street addresses and principal office mailing address are both listed as 1400 Yosemite Street, Denver, CO 80220, with Thomas S. Wright as the registered agent. The address of the person who filed the Secretary of State paperwork was listed as 4800 Colorado Blvd., Denver, CO 80216. A subsequent filing states that the registered agent mailing address and the principal office street address both are 4800 Colorado Blvd. Denver, CO 80216. Exhibit K.

i. Yosemite Management LLC, formed January 2, 2014 and in good standing. The registered agent is Thomas Wright. The principal office street address and registered agent's address are both listed as 1400 Yosemite Street, Aurora, CO 80247. The name of the person forming the limited liability company is Thomas S. Wright, with a mailing address of 1400 Yosemite Street, Aurora, Colorado 80247. Exhibit L.

j. Eventus, LTD., formed January 20, 2016 by Thomas Wright. Exhibit M.

11. At the December 23, 2010 hearing, Claimant's counsel requested a 60 day continuance in order to serve what he was led by Mr. Wright to believe was the

proper legal entity, Wright Group Event Services, Inc., which was granted by Judge Harr.

12. The next hearing was held on February 14, 2011 with Judge Harr presiding. Mr. Maes represented Claimant. Mr. Wright did not appear.

13. Mr. Maes submitted a transcript of the December 23, 2010 hearing into evidence at the February 14, 2011 hearing. Judge Harr treated that transcript as follows: "even though I turned that prior hearing into a prehearing conference I can consider this [the transcript] as testimony on the merits for this hearing." Exhibit 3, p.10.

14. On February 16, 2011, ALJ Harr issued a Findings of Fact, Conclusions of Law, and Order in case WC 4-823-822, which was now captioned *Jose Angel Talamantes, Claimant, vs. Wright Group Event Services, Inc., Employer, and Non-Insured, Insurer, Respondent*. Exhibit 4, p.1.

15. Judge Harr ordered the following:

a. Employer to pay Claimant TTD benefits in the amount of $7,165.28;

b. Employer to pay Claimant ongoing TTD benefits at the rate of $47.14 per day until Claimant reached MMI or was released to return to his regular work. This rate included a 50% penalty for Wright Group Event Services, Inc.'s failure to have Workers' Compensation insurance.

c. Employer to pay the costs of Claimant's medical treatment at Denver Health Medical Center; a Dr. Wise; the Inner City Health Center; Diversified Radiology; and Exempla HealthCare;

d. Insurer to pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due;

e. Or, in lieu of payment of the above compensation, Employer to deposit the sum of $11,619.87 with the Division of Workers' Compensation, as trustee; or, file a bond in the sum of $11,619.87 with the Division of Workers' Compensation within ten days of the date of the order;

f. That Employer notify the Division of Workers' Compensation of payments made pursuant to the order; and

g. That the filing of any appeal would not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. Exhibit 4, p.6.

16. On or around July 11, 2011, the Industrial Claim Appeals Office affirmed Judge Harr's February 16, 2011 Order. Exhibit 4. Respondent did not appeal to the Court of Appeals and therefore the February 16, 2011 is a binding, final Order.

17. On February 21, 2012, a hearing in case number 4-823-822-02 was held in front of ALJ Edwin L. Felter. The case was now captioned "*Jose Talamantes, Claimant, v. WGSP, LLC, d/b/a Wright Group Event Services, Inc., Employer, and Non-Insured, Non-Insured Respondent*." Exhibit 6. Claimant was again represented by Mr. Maes. The reason for this hearing was that neither Mr. Wright nor his entities had complied with Judge Harr's order.

18. In his Response to Claimant's Application for this Hearing, Mr. Wright stated "The [Employer] was the unjustly accused. I would like to state, on behalf of my company, that this 'worker' is an illegal alien and was not authorized to work on our job site, therefore I cannot pay him…I dispute any charges that are being presented to me." *Id.* Mr. Wright's time to dispute the charges or present facts concerning Claimant's work for him had passed.

19. On March 5, 2012, Judge Felter issued a Full Findings of Fact, Conclusions of Law and Order. He found that the Respondent(s) had failed to pay disability and medical compensation, and that Claimant, because of his continued and untreated injuries, was unable to return to work. He further found that no physician had cleared Claimant to return to work. Judge Felter noted that Claimant's lack of legal work status did not bar him from receiving workers' compensation benefits.

20. Judge Felter concluded that "the argument and intention reflected by the statements on the Respondent's Response are proof that the violation was a knowing, intentional and willful act. The Respondent knowingly failed to comply with ALJ Harr's order of February 16, 2011…[t]he Respondent's conduct in failing to obey ALJ Harr's decision of February 16, 2011 was objectively unreasonable and unsupported by any rational argument based in law or fact." *Id.*

21. Judge Felter concluded that a penalty of $85.00 per day was appropriate given the delay in the delivery of treatment to Claimant, and given that Respondent, while violating ALJ Harr's order, was still operating its business. *Id.*

22. Judge Felter ordered the following:

a. In addition to complying with Judge Harr's February 16, 2011, Respondent to pay $30,514.00 in penalties, 75% or $22,885.50 payable to the Claimant and 25%, or $7,628.50 payable to the Division of Workers' Compensation;

b. Respondent to pay ongoing penalties of $85.00 per day from February 22, 2012 until it complies with ALJ Harr's February 16, 2012 order;

c. Respondent to pay Claimant $34,505.37 indemnity benefits and penalties, retroactively and forthwith. Additionally, the

Respondent to pay the Division of Workers' Compensation $7,628.50 (25% penalty) retroactively and forthwith;

d. Respondent to pay $540.00 in medical benefits to Claimant for medical costs the Claimant incurred, subject to the Division of workers' compensation medical fee schedule;

e. Respondent to pay Claimant statutory interest at 8% interest per annum on all amounts due and not paid when due. Exhibit 6.

23. Respondent did not appeal Judge Felter's order.

24. Claimant filed a Motion for Entry of Judgment of both Judge Harr and Judge Felter's orders in Denver District Court, case number 2012 CV 7417. Exhibit 7.

25. On June 4, 2013, the District Court Judge granted Claimant's motion, stating:

> It is further ordered that judgment enter in favor of the plaintiff and against Defendants, Wright Group Event Services, LLC. aka, Wright Group Event Services, Inc., aka Thomas Wright, dba WGSPLLC, and in favor of the Plaintiff in the amount of $34,505.37, interest in the amount of $4,376.10, attorneys fees in the amount of $1,875.00 and costs in the amount of $282.00. *Id.*

26. Neither Mr. Wright nor counsel for Mr. Wright appeared in the Denver District Court proceedings. Unknown to Claimant or his counsel, Mr. Wright and his wife, Susan Leigh Wright, had filed a voluntary petition in bankruptcy on November 5, 2012. Hence, the bankruptcy's automatic stay was inadvertently violated.

27. On the bankruptcy petition, Mr. Wright listed the following as other names used by debtor, including married, maiden, and trade names: "aka Stewart Wright; S. Wright; also member, officer, shareholder of: WGES, LLC; Rent Rite Super Kegs West, Ltd.; Wright Group Event Services; Wright Group Event Services, Inc,; and 3730, LLC." Susan Leigh Wright listed another name as Sue Lee Wright. Exhibit 8.

28. On or around November 5, 2012, Mr. Wright, along with his wife, signed a verification of creditor matrix, under the statement "the above named Debtor(s) hereby verified that the attached matrix list of creditors is true and correct to the best of our knowledge." *Id.* Mr. and Mrs. Wright did not list Claimant as a creditor which prevented Claimant from filing a proof of claim, despite the fact that he was one of the 20 largest creditors.

29. Even after Claimant's counsel called Mr. Wright's counsel, Mr. Wright did not amend the matrix of creditors to include Claimant.

30. In December of 2013, Claimant filed a Motion of Creditors to Allow Late Filing of Proof of Claim. *Id.*

31. On March 14, 2014, Mr. Wright voluntarily moved to dismiss the petition for bankruptcy, and on May 13, 2014, the Court issued the dismissal order.

32. On February 9, 2016, Mr. Wright filed a motion to set aside the earlier Denver District Court judgment against Mr. Wright and his affiliated entities due to the violation of the bankruptcy automatic stay. Exhibit 9.

33. Significantly, in the February 9, 2016 motion, Mr. Wright wrote that "'Wright Group Event Services, Inc.' was dissolved in January 2010 and was not doing business when the underlying accident occurred." Exhibit 9, p.2, fn 1. This statement is in direct conflict with Mr. Wright's testimony at the December 23, 2010 hearing in front of Judge Harr, in which he stated that the name Wright Group Event Services, LLC was incorrect, the correct name was Wright Group Services Inc., and that he was present representing Wright Group Event Services Inc. as President of that corporation. In fact, as explained above, the first hearing in front of ALJ Harr had to be continued to a second day of hearing specifically because of Mr. Wright's testimony that Claimant's counsel had served the wrong entity, and that the correct entity was Wright Group Event Services Inc.

34. On March 15, 2016, the Denver District Court judge granted the motion in part (he denied Mr. Wright's request for attorneys fees), and declared that the June 4, 2013 Order of Judgment was void ab initio. *Id.*

35. On July 7, 2016, a different Denver District Court judge issued an order, nunc pro tunc March 15, 2016, in which she ruled that the judgment on June 4, 2013 was vacated as against Defendants Thomas Wright, Wright Group Event Services, LLC, and WGSPLLC. She denied the motion to set aside the judgment as against Defendant Wright Group Event Services, Inc. Exhibit 11.

36. On August 15, 2016, Claimant filed an application for this hearing. He delivered the application for hearing to "Tom Wright, Wright Group Event Services, DBA WGSPLLC, 1400 Yosemite Denver CO 80220" and to Derek Lindenschmidt, Esq., 100 Garfield St., #300, Denver, CO 80206.

37. On August 30, 2016, Claimant's counsel sent a Hearing Confirmation to Duncan Barber, Esq., informing him of the date and time of this hearing.

38. On September 1, 2016, the OAC sent notice of this hearing to Tom Wright at Wright Group Event Services, Inc., 1400 Yosemite, Denver, CO 80220. This notice contained an incorrect hearing date.

39. On September 2, 2016, the OAC sent a corrected notice of this hearing to Tom Wright, Wright Group Event Services, Inc., at 1400 Yosemite, Denver, CO 80220.

40. On November 10, 2016, Claimant's counsel sent a Case Information Sheet to Respondent's counsel, Derek Lindenschmidt.

41. At the November 17, 2016 hearing in this case, neither Respondent nor counsel appeared, despite the fact that counsel Derek Lindenschmidt had entered his appearance in or around December of 2015.

42. At the hearing, it was confirmed, and it is found as fact, that Mr. Wright is currently operating many party and event supply and rental companies under many different names that are going concerns; that he has an active website evidencing these going concerns; and that he has numerous physical assets.

43. Mr. Wright was the principal, has authority to bind Respondent Employer, and has appeared on its behalf. He filed pleadings on behalf of the entity which employed Claimant. Mr. Wright has held himself out as one and the same as Respondent Employer.

44. At the November 17, 2016 hearing, Claimant credibly testified, and it is found as fact, that Claimant has not reached maximum medical improvement, is in pain, has not returned to work, is still medically unable to work, and has never been paid any of the amounts due him. He further credibly testified that a physician has recommended an operation for his back, and that he cannot get the operation. Claimant cannot work or improve his medical condition with back surgery specifically because of Mr. Wright and his industrial injury working for Mr. Wright.

45. Thomas Wright is an indispensable party to this litigation.

46. On November 23, 2016, Derek Lindenschmidt, who had worked at the same firm as Duncan E. Barber, Shapiro Bieging Barber Otteson LLP, filed a Notice of Withdrawal as counsel for Wright Group Event Services, Inc. This notice failed to comply with the requirements for withdrawal under the OACRP and the Colorado Rules of Civil Procedure. No order has been issued allowing Mr. Lindenschmidt's withdrawal.

47. In that same pleading, the following statement appeared: "All further communications and filings should be directed to the following attorney, Duncan E. Barber, who continues to represent the Employer." (emphasis added). No order allowing Mr. Barber's withdrawal has been issued.

48. Respondents have knowingly and willfully violated the previous orders issued by ALJ Harr and ALJ Felter. Respondents have not cured these violations.[3]

49. Evidence and inferences inconsistent with these findings were not persuasive.

[3] The ALJ notes Respondents are subject to continuing penalties for these violations.

CONCLUSIONS OF LAW

General

1. The purpose of the Workers' Compensation Act ("Act") of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

3. In accordance with § 8-43-207, C.R.S., administrative law judges have the power "to determine any controversy concerning any issue arising under the Workers' Compensation Act . . .[t]he powers granted under the hearing provision are broad and extend to all proceedings before an ALJ." *Renaissance Salon v. Industrial Claim Appeals*, 994 P.2d 447, 450 (1999); *Colorado Auto Body, Inc. v. Newton*, 160 Colo. 113, 414 P.2d 480 (1966).

4. Claimant has requested that the following entities be joined in this case; that the corporate veil be pierced as against Mr. Wright; and that the caption in this case be changed to reflect the following as employer-respondents in this case: Thomas S. Wright, individually and as CEO, shareholder, officer and representative of all corporate and business entities registered with the State of Colorado, including Wright Group Event Services, LLC.; Soapoint Graphics, LLC; 4800 Colorado Boulevard, LLC; WGES, Inc.; The 3730, LLC; Rent Rite Super Kegs West, LTD.; WGES, LLC.; Wright Group Ultra Events, LLC; RSLW, LLC; GES Rental Services; LLC, Soapoint Graphics, LLC, aka WGSP LLC; RSLW, LCC; Sutomi, LLC; Eventus, LLC; Yosemite Management, LLC., and trade names used by the above.

Joinder

5. The Colorado Rules of Civil Procedure apply to workers' compensation cases to the extent they are not inconsistent with the provisions of the Workers' Compensation Act. *Renaissance Salon* at 449; *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). The Workers' Compensation Act does not prohibit joinder of parties.

6. C.R.C.P. 19, Joinder of Persons Needed for Just Adjudication, states "[a] person who is properly subject to service of process in the action shall be joined as a party in the action if in his absence complete relief cannot be accorded among those already parties." C.R.C.P.19(a)(1).

7. The ALJ concludes that the entities named in paragraph 10 above are necessary for a just adjudication for Claimant in this matter. Claimant was hurt while working for Respondent seven years ago this March. Despite having two final orders awarding him benefits and medical care, and despite the Act's purpose of assuring quick and efficient delivery of disability and medical benefits to injured workers, Claimant has yet to receive any of the medical care he needs and has yet to see any of the benefits he was lawfully and finally awarded. Claimant has been unable to work, through no fault of his own, for seven years.

8. Mr. Wright, on the other hand, continued and continues to work through a multitude of entities, all involved in one way or the other in the party and event planning and supply business. That business was the business Mr. Wright was in when Claimant was hurt, which Mr. Wright admitted on the record in front of Judge Harr. Claimant was hurt while performing party/event services for Mr. Wright.

9. The ALJ concludes, based on Mr. Wright's actions to date, that one reason Mr. Wright has formed some of these other entities is to avoid responsibility for the legal obligations he has arising from this case. The ALJ makes this conclusion for several reasons, including: Mr. Wright asserted improper service at the hearing in front of Judge Harr, necessitating a delay in adjudication by causing the need for a second hearing to "correct" the name of the employer. However, Mr. Wright's statement about the "correct" name was false. Wright Group Event Services Inc. had already been dissolved, a fact Mr. Wright was quick to remind the Denver District Court in his Motion to Set Aside. Furthermore, Mr. Wright failed to list Claimant as a creditor in his bankruptcy petition, when he clearly knew of Judge Harr and Judge Felter's decisions. Also, Mr. Wright failed to appear at the District Court proceeding. Had he appeared, he could have informed the court of his bankruptcy filing. By failing to appear, Claimant had to spend more time, money and effort due to the automatic stay in bankruptcy that voided the judgments. Mr. Wright withdrew his petition for bankruptcy at a later date. Finally, Mr. Wright failed to appear at the second hearing in front of Judge Harr, despite proper notice; failed to appear at the hearing in from of Judge Felter, despite proper notice; failed to appear at any of the Denver District Court proceedings, and failed to appear at this proceeding, despite the fact that proper notice was sent.

10. In short, the ALJ concludes that Mr. Wright has done everything everything in his power to evade complying with Judge Harr and Judge Felter's orders.

11. The ALJ further concludes, based on Mr. Wright's actions to date, that unless the entities in paragraph 10 of the Findings of Fact are joined in this proceeding, complete relief will never be accorded to Claimant.

Piercing the Corporate Veil

11. To pierce the corporate veil a three-part analysis is required. The court must first determine if the corporate entities or entities are the "alter egos" of the person in question. Factors to consider include:

(1) the corporation is operated as a distinct business entity;

(2) funds and assets are commingled;

(3) adequate corporate records are maintained;

(4) the nature and form of the entity's ownership and control facilitate misuse by an insider;

(5) the business is thinly capitalized;

(6) the corporation is used as a "mere shell";

(7) legal formalities are disregarded; and

(8) corporate funds or assets are used for noncorporate purposes. Phillips, 139 P.3d at 644; Leonard, 63 P.3d at 330. *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 74 (Col. App. 2009).

12. Not all of these factors need be present to establish that the entities are alter egos of the person involved, and the burden of proof is by a preponderance of the evidence. *Id.* The fourth factor above is clearly met: the nature and form of the entities' ownership and control by Mr. Wright facilitated Mr. Wright's misuse of those entities in order to avoid responsibility for the previous judgments. The ALJ concludes that the entities are mere shells for the same reason.

13. The ALJ concludes that Claimant has met his burden of proving that the entities in question, which will be specifically listed below, are the alter ego of Mr. Wright.

14. Secondly, a court must determine "whether justice requires recognizing the substance of the relationship between the person or entity sought to be held liable and the corporation over the form because the corporate fiction was 'used to perpetrate a fraud or defeat a rightful claim.'" *Id*., (citing *Reader v. Dertina & Assocs. Mktg., Inc*., 693 P.2d 398, 399 (Colo.App.1984) for the proposition that piercing the corporate veil is appropriate "where the corporate entity has been used to defeat public convenience, or to justify or protect wrong, fraud, or crime, or in other similar situations where equity requires").

15. Piercing the corporate veil also applies to limited liability companies. *Sheffield Servs. Co. v. Trowbridge*, 211 P.3d 714, 721-22 (Colo. App. 2009).

16. Based on the facts found above, the ALJ concludes that Mr. Wright used the corporate fiction to defeat two rightful claims and to justify and protect the wrongs that occurred. Also, the equities in this case clearly require that the corporate veil be pierced, and therefore the second prong is met.

17. Third, "the court must consider whether an equitable result will be achieved by disregarding the corporate form and holding a shareholder or other insider personally liable for the acts of the business entity." *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 74 (Col. App. 2009); Sheffield, 211 P.3d at 721-22. The goal of this doctrine is achieving an equitable result. *McCallum Family L.L.C. v. Winger* at 74.

18. The ALJ concludes that the third prong has been met as well. The undersigned is persuaded, based on Mr. Wright's actions to date, that without piercing the corporate veil, no equitable resolution will ever be achieved for Claimant. He has been unable to work for almost seven years, is in pain, and requires back surgery that he cannot have, all through no fault of his own and stemming from Mr. Wright's actions.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant's Motion to Add Indispensable Parties is granted pursuant to C.R.C.P. Rule 19. The following entities and individual are joined in this case as employer-respondents: Thomas S. Wright, individually and as CEO, shareholder, officer and representative of all corporate and business entities registered with the State of Colorado, including Wright Group Event Services, LLC.; Soapoint Graphics, LLC; 4800 Colorado Boulevard, LLC; WGES, Inc.; The 3730, LLC; Rent Rite Super Kegs West, LTD.; WGES, LLC.; Wright Group Ultra Events, LLC; RSLW, LLC; GES Rental Services; LLC, Soapoint Graphics, LLC, aka WGSP LLC; RSLW, LCC; Sutomi, LLC; Eventus, LLC; Yosemite Management, LLC., and trade names used by the above.

2. Claimant's Motion to Amend Caption of the Pleadings is granted. The caption of this case shall be amended as of the date of this Order to reflect the joined employer-respondents.

3. Employer-Respondents shall comply with the orders of February 16, 2011 and December 23, 2011 and March 5, 2012.

4. Employer-Respondents shall pay the aggregate amount of on-going benefits and penalties to the Claimant that have accrued from December 23, 2011 to March 5, 2012 and from March 5, 2012 to November 17, 2016.

5. Employer-Respondents shall pay all on-going indemnity, medical benefits and penalties to Claimant.

6. Employer-Respondents shall pay the claimant interest at the rate of 8% per annum on all amounts not paid when due.

7. All matters not determined herein are reserved for future determination.

DATED: July 5, 2017

/s/ Tanya T. Light
_____
Tanya T. Light
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-029-307-01

ISSUES

- Whether Claimant sustained a compensable work injury on October 15, 2016.
- Whether Claimant's implant rupture was causally related to any alleged work injury on October 15, 2016.
- Whether Claimant is owed Temporary Partial Disability benefits between October 15, 2016 and November 8, 2016.
- Whether Claimant is entitled to medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was employed as a package handler for Employer. Her position involved loading trucks to prepare them for delivery.

2. Claimant testified that she sustained a work related injury on October 15, 2016, when a 12" x 12" package landed on her chest, allegedly causing pain and bruising to her right breast.

3. Claimant testified that she did not immediately report the injury because she was embarrassed. Rather, she finished her shift, went home, slept, and called her manager when she woke up. Claimant could not recall who she called to report the injury, but indicated that she left a voicemail for one of her managers.

4. On October 18, 2016, Claimant reported her injury to Michael Bonniwell, Employer's assistant senior manager. Claimant's report did not provide details of the injury and Claimant was unable to identify an exact time, date or location of her alleged injury. When Mr. Bonniwell asked Claimant why she had not reported sooner, Claimant could not explain.

5. When Claimant reported the claim, Mr. Bonniwell gave Claimant Employer's designated provider list. Claimant sought treatment at Good Samaritan Medical Center on October 18, 2016. Claimant's chief concern was that her right breast implant was leaking.

6. Claimant reported having had bruising over her right breast which had resolved by the time of her visit. At hearing, Claimant testified that the bruising was close to the middle of her chest and that the box actually struck both of her breasts.

Three days after the alleged incident, the alleged bruising had already resolved: "she states she had a bruise over the upper inner quadrant of the right breast, which has since resolved." Claimant testified at hearing that on October 18, 2016, the bruise had dissipated, but the area where the bruise was, was still red. However, the emergency room physician at Good Samaritan noted upon physical examination, "[n]o skin redness. No skin break down or open wound."

7. On October 18, 2016, Claimant had a CT scan of her chest. The scan revealed asymmetric implants with irregular left implant and peri-implant complex fluid consistent with implant rupture and peri-implant hematoma and/or silicone. The CT scan did not conclusively establish that there had been any hematoma, or bloody fluid around the implant, as a CT cannot differentiate between the implant fluid, and any other fluids. Claimant's self-report of a soft tissue hematoma or bruising is not confirmed by objective testing or by physical examination.

8. Respondents referred Claimant to treat with Workers Compensation provider Dr. Dean L. Prok whom she saw on October 19, 2016. At that time, Claimant reported that "her right implant was decreasing in size" and related that she "had a CT scan [in the emergency room] that showed a rupture of the *right* implant."

9. Dr. Prok referred Claimant for a plastic surgery evaluation, indicating that he could not determine whether it was more likely than not that Claimant had sustained a work related injury. Dr. Prok indicated that "based on the reported history of a box falling on the chest, the mechanism appears to fit the injury complaint with a ruptured breast implant on that [right] side, but if additional information from the plastic surgery specialist provides suggestion of other causality, this may be reconsidered in the future." At Dr. Prok's initial evaluation, he was under the impression that: 1) the right implant was the ruptured implant, 2) that he was evaluating the relatedness of a right implant rupture, and 3) Claimant had no chest or breast pain or complaints prior to the alleged injury.

10. Claimant reported that she had not had any breast symptoms until the October 15, 2016 box incident. However, on November 3, 2016, Claimant consulted with plastic surgeon William Saber, M.D., and reported that "over the last 3 months … the left [implant] has been harder and harder." Thus, by Claimant's own report, her symptoms began in August, two months prior to the alleged work incident. Claimant also admitted to Respondents' IME physician, Dr. Allison Fall, that prior to the injury she was often unable to sleep on her left side due to breast pain.

11. Dr. Saber noted Claimant to be a moderately reliable historian. He noted Claimant reported that "at one point the left [implant] got firm after the surgery and was massaged by a surgeon and she felt or heard an audible 'pop.'" Dr. Saber noted "no bruises on either breasts or axillae." Dr. Saber indicated that Claimant had evidence of "capsular contracture with pectoralis major muscle displaced superiorly likely due to release and retraction following her surgical procedure and placement of rather large implants."

12. Dr. Saber's initially assessed:

    - "breast implants for poor dimensional match to the patient's frame with a multitude of issues including capsular contracture, rippling, and dissymmetry ….Question relationship of trauma to the above findings."

    - Claimant's implants were over 13 years old, and implant failure increases with age of implants.

    - "the etiology may be due to a combination of large implants, time and possibly trauma."

    - "ruptures are usually silent and it is somewhat of concern to me the degree of pain she had out of proportion of what I would expect with a rupture, though capsular contracture can cause symptoms."

13. Dr. Saber did not believe that the capsular contracture was related to the alleged work injury ("capsular contracture…likely due to release and retraction following her surgical procedure"). Dr. Saber concluded that Claimant's implant rupture was not more likely than not caused by the alleged work injury. To the contrary, he questioned the possible relationship to trauma.

14. On November 7, 2016, Claimant returned to Dr. Prok. At that time, Claimant indicated that "it was uncertain to her whether or not the specialist felt her work-related event was causally related to the problem with her ruptured *right* implant." Claimant also reported that "she was a part-time employee at [Employer] and did not have insurance related to this."

15. On April 19, 2017Dr. Allison Fall conducted a Respondents sponsored independent medical examination of the Claimant. Dr. Fall testified live at hearing. She testified as follows:

    - Prior to her independent medical evaluation, Dr. Fall reviewed the Claimant's prior medical records. At the evaluation, Dr. Fall had the Claimant fill out a medical history questionnaire and performed a physical evaluation.

    - Claimant mentioned in passing that a box fell, hitting her in the chest. However, Claimant did not provide Dr. Fall with a detailed description of the mechanism of injury, and did not explain the alleged injury in the same manner that she testified.

    - Dr. Fall opined that based on medical records and Claimant's reporting, the only injury she may have sustained was potentially a bruise, but that bruising would not require any medical care or treatment.

- Dr. Fall also acknowledged the absence of any objective evidence of bruising in Claimant's medical records.

- Dr. Fall testified that the useful life of implants is around 10 years, and that after 10 years the incidence of silent ruptures is great.

- Dr. Fall testified that based on her research, implant ruptures due to trauma are very rare. If an implant were to rupture based on trauma, Dr. Fall would expect to see severe, deep bruising, that would not resolve in just three days.

- Dr. Fall also noted that based on Claimant's report that the alleged trauma was to her right side, and the alleged bruising was to the right side, she would expect any injury to be localized to that side.

16. Dr. Fall testified, consistent with Dr. Saber's opinions, that silent ruptures do not cause symptoms, although a capsular contracture may. Capsular contracture causes tightness in the breast, and makes rupture of the implant more likely. Both Dr. Fall and Dr. Saber agree that the capsular contracture was preexisting, and not related to any alleged work injury on October 15, 2016.

17. Based on the totality of the evidence, the ALJ finds it is more likely than not that Claimant's implant rupture was due to a capsular contracture that had been symptomatic prior to the alleged work injury.

18. Claimant testified that she could still lift after the injury, and felt that she could still do her job. She was following the doctor's orders by being on modified duty.

19. Claimant admits that she voluntarily resigned on November 8, 2016.

20. This indicates that the Claimant's implant rupture was not likely due to an acute traumatic event. Claimant has since had four different jobs, ranging from production line work to catering.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. §8-41-301. Claimant shoulders the burden of proving by a preponderance of the evidence that she sustained an injury arising out of and within the course of his/her employment. C.R.S. §8-41-301(1), *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page*

v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. C.R.S. §8-43-201.

A "compensable" injury is one that requires medical treatment or causes disability. For a claim to be compensable, a claimant must establish the existence of both an "accident" and an "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). No benefits are owed to a victim of an industrial accident unless the accident results in a compensable "injury." *Wherry v. City and County of Denver*, W.C. 4-475-818, (ICAO March 7, 2002). A "compensable" injury is one which results in an injury requiring medical treatment or causing disability.

In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The fact that a work-related incident may elicit an increase in pain is not enough to establish a compensable aggravation or injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo.App.1985). The mere experience of symptoms at work does not require a finding that employment proximately caused the underlying condition. *Harris v. Golden Peaks Nursing*, W.C. No. 4-680-878 (June 4, 2008); *Cotts v. Exempla*, W.C. No 4-606- 563 (August 18, 2005).

A workers' compensation case is decided on its merits. C.R.S. § 8-43-201. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000). When determining credibility of witnesses, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonable or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

The ALJ finds that Claimant has not met her burden of proving by a preponderance of the evidence that she sustained an injury arising out of and within the course of her employment.

The ALJ finds the Claimant is not a reliable historian for the following reasons:

- Claimant's initial reports of the injury are much less detailed than her testimony at hearing;

- Claimant testified that she called her manager to report the injury after she went home , however she could not identify who she called, and did not relay that information to Mr. Bonniwell when she reported the injury to him, even upon questioning.

- Claimant reported bruising over her right breast to the medical providers, but at hearing reported the bruising was close to the middle of her chest.

- Claimant testified at hearing that the box struck both of her breasts, but reported to her physicians that the box hit her right side.

- Despite Claimant's self-report of bruising, no medical provider noted any bruising or redness on examination.

- Claimant testified she was asymptomatic prior to the alleged injury. However, she reported to Dr. Saber that she had pain in the left breast that prohibited her from sleeping on that side, and also indicated that over the three months prior to the alleged injury her left implant had been increasing in firmness.

The ALJ also considers Claimant's report that she does not have insurance to cover the implant rupture as an underlying motive for her reporting of a work injury.

The ALJ finds that Claimant may have sustained some mild bruising as a result of the October 15, 2016 incident. The ALJ finds, however, that bruises are not compensable injuries requiring medical intervention.

The ALJ credits the testimony, reports, and opinions of Drs. Saber, Prok, and Fall that the alleged work injury on October 15, 2016 did not likely cause her implant rupture.

The ALJ finds that Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant did not sustain a compensable work related injury on October 15, 2016.

2. Claimant's implant rupture was not caused, aggravated or accelerated by any alleged work injury.

3. Claimant's request for medical benefits to cure her implant rupture is denied and dismissed.

4. Claimant's request for temporary total disability benefits is denied and dismissed.

5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 3, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Did Respondents prove by a preponderance of the evidence that Claimant's injury resulted from a willful failure to obey a reasonable safety rule adopted by Employer for the safety of employees?

2. Did Claimant prove by a preponderance of the evidence that his average weekly wage (AWW) should be increased, and if so, by what amount?

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are reached.

1. Claimant is a 56 year old man, born November 18, 1960, weighs 320 lbs. and is employed at Denver International Airport (DIA) for Employer. Claimant has worked for Employer approximately five years. In Claimant's position for Employer, he was required to operate vehicles at DIA and required to ride as a passenger in Employer's vehicles.

2. On November 3, 2016, Claimant was riding as a passenger in a 2011 Toyota Rav 4, an Employer owned vehicle, when he was involved in a rollover accident. The credible evidence presented at hearing established that during the rollover accident Claimant was not wearing a seatbelt.

3. In its "[Employer] Vehicle Driving and Usage Policy," the employer requires that drivers and passengers should "always" wear seat belts while operating employer-owned vehicles during work hours.

4. Claimant credibly testified that he was aware of the Employer's safety belt policy. Claimant claimed that he understood the Employer's written policy to require the driver ensure that they are restrained and that all passengers in the vehicle are restrained also. Claimant further testified that he understood that Employer's seatbelt policy placed all the responsibility on the driver to ensure all riders in the vehicle were belted. Claimant's claim regarding his understanding of the Employer's seat policy was not deemed credible.

5. The ALJ finds that the Employer's written policy regarding seat belt usage of its employees while in the course and scope of their employment in Employers'

vehicles was reasonable and Claimant understood the policy. The Employer policy required that the "Driver shall always wear seat belts and require the same of passengers."

6. Employer provided Claimant with safe driving training upon hire, including training regarding safety belt usage. Claimant admitted that as part of his initial training upon hire for Employer, he took a test regarding training topics. This test, which was signed by Claimant, included a topic on whether seat belt use was a safe driving habit for the Employer. Claimant answered the test question affirmatively that seat belt usage is a safe driving habit for Employer.

7. In addition to this training, Employer provides occasional safety presentations and bulletins to its employees. Some of these bulletins include information regarding safety belt use. Mr. Glen Spies, an Assistant Operations Manager for Employer at DIA, and Mr. Mark Hennessy, Fleet Manager for Employer, were safety trainers who make presentations to employees. Mr. Spies and Mr. Hennessy testified to emphasizing the importance of seatbelt usage during their oral presentations. And, on November 19, 2015, Claimant signed a training bulletin which contained a quiz regarding "Competency." In that bulletin, Claimant answered affirmatively to a question that, "You can maintain safe driving habits by driving the speed limit, fastening your seatbelt, maintaining your vehicle, don't follow too closely behind other vehicles, and take extra care in bad weather."

8. Claimant credibly testified that he is responsible for presenting the safety rules to new employees regarding safe driving habits, including seat belt usage.

9. Claimant maintained that he was wearing his seat belt at the time of the November 3, 2016, motor vehicle accident. Claimant testified the seat belt was fully operational on the date of the accident, however, he could not tell if it was on properly. Claimant testified that when he and the vehicle driver began their trip on November 3, 2016, he distinctly recalled hearing the seatbelt reminder bell ringing in the car and remembered thinking that it was ringing because he was without his seatbelt. He testified that he recalled fastening his seatbelt after hearing the vehicle reminder bell. Claimant testimony was not deemed credible.

10. Immediately after the accident occurred, Mr. Spies responded to the accident site. He explained that the photographs contained in Respondents' Exhibit D were consistent with what he observed when he arrived at the accident site. Specifically, with regard to the seat belts, Mr. Spies testified the driver side seat belt was dangling out the door as depicted in the photo exhibits and the passenger side seat belt had no slack in it as shown in photo exhibits.

11. Mr. Hennessy examined the vehicle after it had been towed from the accident site to a salvage yard in Brighton. He made similar observations of the vehicle seat belts as did Mr. Spies.

12. Mark Passamaneck, a physical engineer and an expert in accident reconstruction, examined the vehicle at the salvage yard. Mr. Passamaneck testified that when he observed the vehicle the seat belts were in the same position as identified in the photo exhibits. He opined that the passage of time and the towing of the vehicle to different locations could not have changed the condition of the seat belts when he examined it.

13. Mr. Passamaneck physically examined the seat belts on both the passenger and driver side of the vehicle. He examined the seat belts for any marks and whether the seat belt was locked in place. Mr. Passamaneck opined that the driver's side seat belt was not damaged in any way and that it had been "pyrotechnically retracted" as a result of the accident, which he explained meant that it was locked in the position it was in at the time of the accident. He further opined that there was sufficient room underneath the driver's side seat belt for an occupant to be in the seat and buckled at the time of the accident.

14. Mr. Passamaneck explained that when a vehicle's airbags are deployed, there is a pyrotechnic device that is in the cabling for the seat belt. And, that pyrotechnic device retracts the seat belt four to six inches, shortening the seat belt, to prevent people from sliding under the seat belt, keeping them pressed into the seat and reducing injury.

15. Regarding the passenger side seat belt, Mr. Passamaneck observed that the belt was taut without any slack. He credibly opined that the passenger seat belt was found tight against the car side pillar at the time of the accident because the passenger was not wearing the seatbelt.

16. Mr. Passamaneck explained that once a seat belt was locked into place by the pyrotechnic mechanism after an accident, the only way to move the seat belt is to physically take the entire seat belt assembly apart and replace the mechanism.

17. Mr. Passamaneck also examined the passenger side seat to confirm the seat belt was not damaged or in bad repair. He found no evidence of malfunctioning. Specifically, Mr. Passamaneck confirmed there was no braking or damaging of the pall in the seat belt buckle.

18. The medical records also establish Claimant had no injury or bruising to his right shoulder or right chest, the area most often injured on a restrained passenger in a motor vehicle accident. Indeed, the records document the accident had no effect on Claimant's right shoulder, which had been surgically repaired eighteen months prior to the accident. Claimant testified he had no bruising or trauma to his right arm and shoulder.

19. As proof Claimant was wearing his seat belt, Claimant proffered a picture of bruising on his left chest and left bicep. Mr. Passamaneck credibly opined that Claimant's left sided chest and arm bruises were consistent with impact rather than restraint by a seat belt. Mr. Passamaneck credibly testified that, in a side impact accident that caused the vehicle to roll over; such as in this case, an unrestrained passenger would hit the roof with the left side of the body causing impact bruising.

20. The conclusion that Claimant lacked credibility regarding his use of the seat belt was further bolstered by Claimant's testimony that Employer never enforced the seatbelt policy and his testimony that debate among employees was ongoing about the necessity of using seatbelts. Claimant contended that since duties often required employees to stop and exit their vehicle every 200 feet, using seatbelts when performing these duties was unreasonable.

21. Finally, Claimant testified that he always pushes his seat way back causing the placement of his seatbelt to be across his chest. Claimant testified that placement of the seatbelt across his chest explains the bruising on his left chest and left arm. Claimant's testimony was not deemed credible and Mr. Passamaneck's explanation of Claimant's pattern of bruising was deemed more credible. Mr. Passamaneck's credibly testified that an unbelted passenger in a rollover accident would hit the roof of the vehicle with his left chest and arm causing the bruising seen on Claimant's left chest and arm.

22. Considering the totality of the evidence, it is found that the weight of the credible evidence supports a finding that Claimant's injuries were caused by Claimant's willful failure to use a safety device and that Claimant willfully failed to obey a reasonable safety rule resulting in a 50% reduction in Claimant's workers' compensation benefits.

23. Respondents have admitted to an average weekly wage of $656.82, which was calculated based upon Claimant's wages for the year prior to the date of injury. The ALJ finds that Claimant's wages during the period of June 3, 2016, through November 4, 2016, is a more fair representation of his earnings. Therefore, the ALJ finds and determines that $744.21 is Claimant's AWW.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law reached.

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that

which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodeneck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office*, 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); a/so see *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App.2008).

4. The totality of the credible and persuasive evidence presented at hearing established that Claimant willfully failed to obey a reasonable rule adopted by Employer for the safety of employees. The "safety rule" penalty is only applicable if the violation is "willful." *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Violation of a rule is not "willful" unless the claimant intentionally did the forbidden act. *Bennett Properties Co. v. Industrial Commission,* 437 P.2d 548 (Colo. 1968); *Stockdale v. Industrial Commission*, 232

P. 669 (Colo. 1925); *Brown v. Great Peaks, Inc*., W.C. No. 4-368-112 (Industrial Claim Appeals Office, July 29, 1999). A violation which is the product of mere negligence, forgetfulness or inadvertence is not "willful." *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (Colo. 1946).

5. The record evidence established that Claimant intentionally failed to wear a seat belt. Claimant was trained in seatbelt usage and was entrusted with the duty to train other employees in seatbelt usage. Claimant, in testimony, expressed doubt about Employer's enforcement of its seatbelt policy and claimed that he and his co-workers felt wearing a seatbelt was unreasonable when performing certain duties. Claimant, at 320 lbs., explains special placement of his seatbelt which was supposed to account for bruising on his left side. Claimant was all over the place in his testimony, at once, claiming to distinctly remember putting on his seatbelt and yet explaining that Employer was lax in enforcement of seatbelt usage and employees thought seatbelt usage was unreasonable.

6. It is concluded that Claimant violated the Employer's reasonable safety rule and did so "willfully." Consequently, Respondents are entitled to a 50% reduction in compensation provide in the Act. Section 8-43-112(1)(b), C.R.S.

7. Claimant established by a preponderance of the evidence that his AWW is $744.21.

ORDER

It is therefore ordered that:

1. Respondents' liability to Claimant for compensation under the Act for the November 3, 2016, injury is reduced by 50%. Section 8-43-112(1)(b), C.R.S.

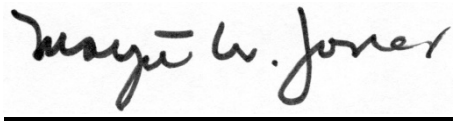
2. Claimant's AWW is $744.21.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 5, 2017_



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Respondents overcame, by clear and convincing evidence, Dr. Jack Rook's DIME opinion that the Claimant sustained 27 percent whole person impairment as a result of the December 1, 2015, accident.

- Whether Claimant proved, by a preponderance of the evidence, that she requires medical treatment to maintain her condition at MMI.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On November 30, 2015, Claimant presented to her primary care provider, Dr. Martin McDermott, for worsening fibromyalgia pain. Claimant complained of difficulty walking and with any movement. Claimant also stated that she had gone to "Urgent Care on Saturday" for lower abdominal pain. "Last week felt like she pulled a muscle in her lower groin area at work while dumping a heavy box in the trash, since then has had intermittent sharp pain." Claimant stated she planned to call workman's [sic] comp about the abdominal pain in case it was related to her injury there. Dr. McDermott noted if Claimant's pain was deemed not work-related, he would pursue an ultrasound or other diagnostics, as indicated.

2. On December 1, 2015, at 5:15 p.m., Claimant presented to Platte Valley Medical Center Emergency Room complaining of abdominal pain. Claimant gave a history of lifting boxes into a dumpster at work that morning and feeling a "tear" in her lower abdomen. Claimant was sent for an ultrasound to rule out a hernia. The ultrasound was read as showing a hematoma, but no hernia. The diagnostic impression included strain of abdominal muscle and abdominal wall hematoma.

3. On December 2, 2015, Claimant, as Employer's Store Manager, completed the Employer's First Report of Injury. On the Employer's First Report, Claimant indicated the injury occurred at 9:15 a.m. Claimant reported her injury was a strain to her abdomen and groin.

4. On December 10, 2015, physician assistant, Kathryn Garver, evaluated Claimant. Claimant gave PA Garver a history of her injury occurring when she was throwing boxes in the dumpster. Claimant reported her pain felt "like a bubble in her stomach that was poking". PA Garver's December 10, 2015, treatment note references "right-sided back pain, without sciatica." On physical exam, Claimant exhibited normal range of right hip motion, with pain on flexion and abduction, normal strength, no bony

tenderness, no swelling, no crepitus, and no deformity. Claimant also exhibited normal lumbar range of motion.

5. Dr. J. Tashof Bernton credibly and persuasively testified it is not medically probable Claimant would have had normal hip range of motion and normal lumbar motion ten days post-injury when her symptoms would have been most severe, and then the dramatically limited lumbar range of motion she demonstrated when Dr. Rook evaluated her two years later. Dr. Bernton explained range of motion loss is greatest when an injury is acute because it is associated with muscle strain, muscle spasm and inflammation. Range of motion then increases over time. Dr. Bernton testified, "The range of motion demonstrated by [Claimant] both by Dr. Rook's evaluation and on [his] evaluation, demonstrated dramatically limited range of motion of the lumbar spine in a fashion, first of all, not consistent with the ability to perform activities of daily living, and secondly, dramatically inconsistent with the records of the initial presentation of this back problem when it would have been at their – when it would have been at its worst."

6. On December 23, 2015, Claimant returned to Platte Valley Medical Center, again complaining of abdominal pain. Claimant reported that she was lifting boxes at work on December 1, 2015, when she "moved wrong" and had resulting right lower quadrant abdominal pain. The report documents the December 1, 2015, emergency department evaluation with a "fairly unremarkable" ultrasound showing a "possible hematoma." Claimant reported the abdominal pain persisting since the date of injury and now radiating to the back and right groin. Claimant underwent an emergent CT scan of the abdomen. On exam, Claimant was "chatting with niece, discussing Christmas dinner." The Emergency Room report documented a diagnostic impression of "abdominal pain" and noted "the patient is overall well-appearing with a nonacute abdominal exam. CT imaging does not reveal any obvious etiology for the patient's symptoms".

7. On December 30, 2015, PA Garver reevaluated Claimant. Claimant also consulted by phone with Dr. Julie Mullen. PA Garver noted, "Her [sic] and I agree based on similar CT findings in May, unlikely her symptoms are related to work. Possible that the work injury may have aggravated an underlying issue. Recommended follow-up for [Claimant] with primary care physician and GYN for evaluation of symptoms." The report notes that Claimant left the appointment before PA Garver finished Claimant's plan and Workers' Compensation paperwork. When the PA later called Claimant, "[Claimant] extremely angry. She is mad that we are dismissing her and making her pay for all her medical bills for something that was not her fault etc etc . . . [Claimant] got off the phone still extremely upset."

8. On December 29, 2015, Dr. McDermott, Claimant's PCP, reevaluated her. His work-related assessment remained "strain of abdominal muscle".

9. On January 7, 2016, Dr. Heather Banks evaluated Claimant. Claimant continued to complain of pain in the abdominal wall. She also complained of "many other symptoms such as numbness, pain, and tingling in the bottom of her feet and hands," which she attributed to the December 1, 2015, injury. Dr. Banks noted Claimant

was “extremely painful, out of proportion to pathology.” Dr. Banks also commented, “[Claimant] is extremely tender/painful given the mechanism of injury and I am wondering if her underlying fibromyalgia is playing into this.”

10. On January 15, 2016, Dr. McDermott first notes Claimant’s severe tenderness in the right SI joint, with difficulty getting up and down from the exam table. Dr. Bernton credibly and persuasively testified that it is not medically probable that severe right SI joint tenderness, with “a lot” of difficulty getting up and down from the exam table, would first present six weeks post-accident if it were related to the December 1, 2015, work injury.

11. On February 11, 2016, Dr. Bernton evaluated Claimant at Respondents’ request. Dr. Bernton opined Claimant’s findings were consistent with an SI joint strain associated with a pre-existing leg length discrepancy. Dr. Bernton credibly opined the original occupational injury was an abdominal wall strain, which has resolved. On the date of his February 11, 2016 evaluation, Claimant’s symptoms were consistent with SI joint strain and possible lumbar disc disease, neither was work-related.

12. Claimant was referred to Michael Simone, DC, for treatment of her December 1, 2015, injuries. Claimant told Dr. Simone that she went to the emergency room where she was told she had torn abdominal muscles. “She said her pain then moved to the right lower back.” Dr. Bernton credibly testified that it is not medically probable an SI joint strain would present as abdominal pain that moved to the low back. “Abdominal pain is not part of the spectrum of SI pain. Period.” On April 18, 2016, when Dr. Simone evaluated Claimant, Claimant could bend to a fairly normal range of motion, at a point in time when she was presumably worse. Dr. Bernton credibly testified, based on the diagnosis of SI joint strain, there is no medical explanation for Claimant’s decrease in range of motion between Dr. Simone’s examination and Dr. Rook’s examination. Dr. Simone last examined Claimant on July 14, 2016, one month prior to her placement at MMI. On that date, her lumbar range of motion was 90 degrees (150 percent of normal); extension was 20 degrees (80 percent of normal); left lateral flexion was 25 degrees (100 percent of normal and increased by 25 percent); Claimant was having minimal pain in the right sacroiliac area; her right lateral flexion was 25 degrees (100 percent of normal); left and right rotation were both 30 degrees (100 percent of normal). These measurements are far in excess of the range of motion as measured by Drs. Rook and Bernton.

1. On July 15, 2016, authorized treating physician, Dr. Brian Williams, placed Claimant at MMI from the December 1, 2015, accident. At the time Dr. Williams placed the claimant at MMI, he opined:

> Back, range of motion for her cervical, thoracic, and lumbar spines were evaluated grossly. By my assessment, was that her flexion, extension, rotation, and lateral flexion were full and normal for all spinal segments. So, I deferred formal measurements.

13. Dr. Bernton credibly testified that, although "eyeballing it" for range of motion is less precise than using an inclinometer, there is a gross difference between either 14 and 25 degrees of lumbar motion and full and normal range of motion." Dr. Bernton credibly testified the range of motion assigned by Dr. Rook was submaximal and not accurate.

14. On July 27, 2016, Insurer filed a Final Admission of Liability for six percent scheduled impairment to Claimant's right hip and denied medical treatment post-MMI, consistent with the opinions of the authorized treating physician, Dr. Brian Williams.

15. Claimant objected to the July 27, 2016, Final Admission and requested a Division IME. Dr. Jack Rook was selected as the Division Examiner. Dr. Rook examined Claimant on November 7, 2016. Based on his review of the medical records and his evaluation of Claimant, Dr. Rook assigned a work-related diagnosis of "right-sided sacroiliac joint dysfunction". He opined Claimant reached MMI on July 15, 2016, consistent with the opinions of the authorized treating physician. Dr. Rook assigned five percent whole person impairment per Table53 (II) (B) for specific disorders of the spine. Dr. Rook also calculated 23 percent whole person impairment for loss of lumbar range of motion. Five percent and 23 percent whole person impairments combine to 27 percent whole person impairment. Dr. Rook made general recommendations for maintenance care to be provided by Claimant's primary care provider, Dr. McDermott.

16. On March 7, 2017, Dr. Bernton re-evaluated Claimant at Respondents' request. Based on his repeat evaluation, Dr. Bernton opined Claimant remained at MMI from the December 1, 2015, work injury, with no work-related restrictions and no need for medical treatment to maintain MMI. Dr. Bernton further credibly opined, that if one were to find Claimant's SI joint complaints work-related (which he does not), it was clear that the range of motion both he and Dr. Rook measured was grossly sub-maximal. Using sub-maximal range of motion to determine permanent physical impairment is inconsistent with the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition, (Revised) (*AMA Guides)* and the instructions of the Division of Workers' Compensation that only maximal range of motion is valid and may be utilized for impairment ratings.

17. Dr. Bernton testified at hearing on Respondents' behalf. Dr. Bernton credibly testified Dr. Rook clearly erred in assigning five percent whole person impairment per Table 53 (II) (B) of *the AMA Guides* for Claimant's alleged SI strain for multiple reasons. Dr. Bernton credibly testified, the *AMA Guides* tell rating physicians that when a medically sufficient evaluation is carried out, the clinical status of the individual will be documented accurately. If the current findings are consistent with the results of previous clinical evaluations performed by other observers, then essentially the findings may be compared with the tables and an impairment rating obtained. The threshold question, though, is to compare the measurements and determine whether

they are consistent with other measurements in the record. If the numbers are not consistent, the rater must explain why. Dr. Rook did not determine whether his measurements were consistent with the record or at least did not explain it in the record as required.

18. Dr. Bernton testified Claimant has a long history of fibromyalgia, has had multiple musculoskeletal complaints over time, and the day before the injury said she had an abdominal strain twisting. Dr. Bernton related concern with the accuracy of Claimant's ability as a historian when the next day Claimant sought treatment reporting that "today, I had an abdominal strain twisting." Further, Claimant initially reported no musculoskeletal complaints, and then ten days later demonstrates some SI problems. Dr. Bernton attributed the SI problems to Claimant's history and of leg length discrepancy, rather than to her work injury finding the later unlikely.

19. Dr. Bernton also credibly testified it is not medically probable Claimant suffered a discrete injury to her right SI joint on December 1, 2015 without experiencing immediate pain in that region. One would not have later onset of pain.

20. Dr. Bernton credibly testified Dr. Rook clearly erred in assigning Claimant 23 percent whole person impairment for loss of lumbar motion for the alleged SI joint strain.

- He explained initially, that as a Division Examiner, you can only rate maximal range of motion. It was clear based on the totality of the evidence the range of motion Claimant demonstrated to Dr. Rook was not her maximal range of motion.

- Twenty-five percent lumbar flexion as Claimant demonstrated to Dr. Rook did not make sense physiologically. Twenty-five degrees flexion is consistent with ankylosing spondylitis, where the spine fuses together and loses the bony ability to flex. It does not happen with an SI joint strain.

- Equally, important, as a Division Examiner, you look through the medical records and evaluate past range of motion measurements. Claimant's range of motion prior to MMI, when her condition was presumably worse, was much greater than that measured by Dr. Rook.

- Dr. Bernton credibly testified the sacroiliac joint is not associated with lumbar flexion, which occurs in the vertebral bodies.

- Dr. Rook failed to verify Claimant's demonstrated range of motion by checking lumbar flexion in different positions, as Dr. Bernton did.

- Dr. Bernton explained that the Division's protocol is to give a patient two opportunities to provide a maximal range of motion. If one range of motion measurement is sub-maximal, the rater should measure again. If the second range of motion is sub-maximal, then range of motion should

not be rated. Dr. Bernton opined that both his and Dr. Rooks' measurements were sub-maximal range of motion measurements.

21. Dr. Bernton watched video surveillance from inside Employer's location which showed Claimant bending to 90 degrees and doing other activities which she reported to medical providers she was unable to do.

22. Dr. Bernton explained that his was not a difference of opinion with Dr. Rook, but rather "it's a difference of opinion between Dr. Rook and reality." "I mean, by looking at the video, you know that [Dr. Rook's] range of motion [measurements] didn't represent her maximum range. Period. End of story. So, it's not just a difference of opinion. It's an incorrect rating."

23. Dr. Rook opined that Claimant would require maintenance care including follow-up with her primary care physician, Dr. McDermott at three to four month intervals, up to two sacroiliac joint injections on an annual basis, and chiropractic care once per month.

24. Claimant did not testify that she desired maintenance care or to the efficacy of any of the treatments recommended by Dr. Rook when they were performed prior to MMI. The records of Claimant's chiropractor, Dr. Simone suggest Claimant's pain complaints are aggravated by her pre-existing fibromyalgia.

25. Dr. Bernton testified Claimant does not have a ratable work-related impairment and she does not require treatment on that basis. Further, per Dr. Bernton, Claimant is going to have problems associated with her leg length discrepancy and fibromyalgia, neither of which is related to the work injury, into the indefinite future. In his opinion, Claimant needs no treatment for the SI problem that is different from the treatment she is already undergoing for fibromyalgia.

26. Dr. Bernton's opinions and testimony of are more credible and persuasive than the opinions of Dr. Rook on diagnosis, permanent physical impairment, and Claimant's need for medical treatment post-MMI.

27. Respondents have overcome Dr. Rook's opinions of on the issue of permanent physical impairment.

28. Claimant has failed to prove, by a preponderance of the evidence, that she requires medical treatment to maintain her condition at MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Legal Principals

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo. App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As found, the ALJ credits the opinions of Dr. Bernton as more credible and persuasive than the opinions of Dr. Rook regarding Claimant's work-related diagnosis, permanent physical impairment and the reasonableness, necessity and relatedness of Claimant's need for medical treatment to maintain her condition at MMI.

Medical Benefits

A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury or to maintain her condition at MMI. *See* § 8-

42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). Based upon the evidence presented, the ALJ concludes that Claimant has failed to prove she requires medical treatment to maintain her condition at MMI.

Overcoming the Division IME

A DIME physician must rate impairment in accordance with the provisions of the *AMA Guides.* Section 8-42-101(3.7), C.R.S.; § 8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003).

The DIME physician's finding of impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(c). Whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating has been overcome by clear and convincing evidence, are issues of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 2002 (Colo. App. 2000).

The *AMA Guides* require that there be a longitudinal history in the treating provider's medical records to establish "causation of impairment."

> To establish that a factor *did* contribute to an impairment must rely on documentation of the circumstances under which the factor was present and verification that the type and magnitude of the factor were sufficient and bore the necessary temporal relationship to the condition. The existence of an impairment does not create a presumption of contribution by a factor with which the impairment is often associated.

AMA Guides to the Evaluation of Permanent Impairment, 3d Ed., Revised, 2.2 [Emphasis in original].

Dr. Bernton credibly testified that Claimant's initial treatment note from Platte Valley Medical Center dated December 1, 2015, is not consistent with her later reports to occupational physicians and fails to establish a longitudinal history and causation of an SI joint injury. Dr. Bernton credibly testified it is not medically probable Claimant would have suffered a discrete injury to the SI joint, which is "heavily innervated," and not have experienced immediate pain symptoms from that injury. As found, Dr. Bernton's opinion, that Claimant did not suffer an injury to her SI joint on December 1,

2015, and Dr. Rook's opinion that she did, are not merely differences of opinion. Dr. Rook clearly erred in assigning a five percent whole person impairment per Table 53 (II) (B), of the *AMA Guides*.

The *AMA Guides* and the Division of Workers' Compensation require that impairment for loss of range of motion be based on a claimant's maximal range of motion. Dr. Bernton credibly testified Dr. Rook's range of motion measurement were sub-maximal and in error. Thus Dr. Rook's assignment of a 23 percent whole person impairment, was clearly error. As found, Dr. Bernton's opinion that Dr. Rook clearly erred in assigning the claimant 23 percent whole person impairment for loss of lumbar motion is credible and persuasive.

Dr. Bernton's opinions on the issue of diagnosis and permanent physical impairment are more credible and persuasive than the opinions of Dr. Rook. Claimant had normal or near normal lumbar range of motion as measured by all providers until Dr. Rook. In connection with Dr. Rook's evaluation, Dr. Rook did not have the benefit of the Battery for Health Improvement-2 testing, performed by Dr. Bernton, which indicated Claimant's pain complaints are probably somatoform in nature. Dr. Rook did not review the in-store security video reviewed by Dr. Bernton, which shows Claimant demonstrating normal lumbar range of motion. Dr. Bernton credibly testified he did not merely have a difference of opinion with Dr. Rook, but that Dr. Rook was clearly wrong in his assessment of permanent physical impairment.

The ALJ concludes the Respondents have overcome the opinions of the Division IME, Dr. Rook, by clear and convincing evidence.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for additional benefits not previously admitted and paid is denied and dismissed.

2. Claimant's request for an award of medical benefits to maintain her condition at MMI is denied and dismissed.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 5, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that his inguinal hernia condition arose out of and in the course of his employment?

- Did Respondents prove Claimant is subject to penalties for a late report of his injury?

FINDINGS OF FACT

1. Claimant has worked for Employer for 21 years.

2. Claimant's job duties include parking and fueling trucks for part of his shift, the other part he loads boxes onto trucks. The boxes come down a chute on to a conveyor, which are then put onto trucks. The packages can weigh anywhere from 2 pounds to 70 pounds. Approximately 10% of the packages are irregular boxes, which can weigh up to 140 pounds.

3. Claimant testified his job required him to load 200 packages per hour. He always exceeded the requirements of his job. The ALJ inferred Claimant's job required a great deal of lifting and twisting.

4. There was no evidence in the record of a prior injury or treatment for a hernia.

5. Claimant testified he had other employment, including Pasco Health Care Services in which he took care of his severely disabled child every other week. He was not required to perform heavy lifting in this job. Claimant also testified he worked for Argus, which provided security for events like concerts. He was not required to lift it in this job. He had not engaged in any activities which required heavy lifting, including remodeling.

6. Claimant testified he was working on January 6, 2017 and felt discomfort, as well as a bulging sensation while loading packages. He could not identify a particular box which caused the discomfort, but said he felt worse as the day went on.

7. Respondents did not introduce evidence to contradict Claimant's testimony that he was loading packages on January 6, 2017. The ALJ concluded Claimant was performing his regular job duties, which included lifting and loading 200 packages per hour for at least 50% of his shift that day.

8. Claimant was not engaged in a remodeling project or other activities which involved heavy lifting at this time.

9. Claimant testified he did not immediately treat for his symptoms. The discomfort got worse. Approximately two weeks later, he went to the doctor for flu symptoms, as he required a doctor's note to return to work. He asked the doctor to check his hernia.

10. Medical records from Rocky Mountain Urgent care, dated January 18, 2017 were admitted and hearing. "Hernia? X 1 week; vomiting, diarrhea X 2 days" were listed as the problem/symptoms. The diagnosis was gastroenteritis and left inguinal hernia. Claimant was given a prescription for Zofran, along with a referral to a surgeon, as the hernia was considered reducible. Claimant was also given work restrictions of no heavy lifting.

11. Claimant testified the doctor at Rocky Mountain told him to report the injury as a work injury.

12. Claimant was referred to Concentra and was evaluated on January 20, 2017 by Lacie Esser, PA and Brian Counts, M.D. In the medical history, Claimant noted it was one or two weeks ago that he noted his left groin area felt strange after lifting/moving packages. On examination, the left inguinal region had fullness, but no bulging. PA Esser's assessment was groin discomfort, left. The report, which was dictated by PA Esser and signed by Dr. Counts, contained the opinion that there was a greater than 50% probability that Claimant's symptoms were related to work. The ALJ credited this opinion. Claimant was referred for an ultrasound. Claimant's restrictions specified he could lift push/pull up to 20 pounds occasionally. Dr. Counts completed a M-164 form on or about January 25, 2017 in which he noted his objective findings were consistent with Claimant's history and/or work-related mechanism of injury illness.

13. An Employer's First Report of Injury was completed on January 21, 2017. This report stated Claimant was loading packages on to a trailer and was completed by Alejandro Gomez.

14. On January 30, 2017, Claimant underwent an ultrasound at Touchstone Imaging. Jeffrey Guyon, M.D. read the films and diagnosed a direct inguinal hernia on the left. The ALJ found this was objective evidence of the hernia.

15. Claimant returned to Concentra on January 26, 2017. At that time, he reported continued pain, slightly worse. He noted swelling and symptoms after a long day of work. PA Esser's assessment was groin discomfort, left; left groin mass. Claimant was referred to a general surgeon.

16. Claimant testified he never had a major injury while working for Employer. He didn't pay that close attention to signs or postings around the office regarding

reporting injuries at work. Claimant did not dispute that he was required to report any injury within four working days. Claimant did not report his work injury within four days, as required.

17. Claimant testified he went to the appointment at the surgeon's office and waited for an hour. The surgeon was running late and Claimant left the office.

18. Claimant requested to see a different surgeon, given his experience with Dr. Weaver.

19. On February 22, 2017, Claimant returned to Concentra and was examined by Jennifer Pula, M.D. Claimant had sharp/shooting pain with the discomfort. On examination, Dr. Pula noted left inguinal nodes were enlarged. Her diagnosis was inguinal hernia, left. Claimant was dispensed Naproxen and referred to a surgeon. The ALJ infers that Dr. Pula was of the opinion Claimant's hernia was work related; hence the surgical referral.

20. On May 10, 2017, Claimant was evaluated by F. Mark Paz, M.D. at the request of Respondent. This evaluation took place after Claimant underwent surgery for repair of the left inguinal hernia. At the time of the evaluation, Claimant reported pain 3/10 in the left inguinal region, but Claimant felt he was improving. Dr. Paz opined that it was not medically probable that the left inguinal hernia was causally related to the reference January 6, 2017 injury date. He stated Claimant did not provide a mechanism of injury, as there was no specific lifting event. Dr. Paz opined Claimant's history was consistent with development of left inguinal region symptoms which were insidious, slowly evolving, with a specific timing of onset, and not associated with a specific event. Dr. Paz believed Claimant should reach MMI at 4-6 weeks following the repair of the inguinal hernia.

21. Dr. Paz testified as an expert in internal medicine and occupational medicine at hearing. He is Level II accredited pursuant to the WCRP. He has treated patients with occupational injuries since 1992.

22. Dr. Paz noted there were two types of hernias, direct and indirect, of which this was the former. A direct hernia can be caused by various activities, including coughing. The hernia is the result of the change of intra-abdominal pressure which causes part of the abdomen to be pushed through the abdominal wall. Dr. Paz testified it would be atypical for Claimant not to experience pain if he had suffered the hernia at work. In reviewing the ultrasound report, Dr. Paz thought the age of Claimant's hernia could be anywhere from 1-2 months. Dr. Paz disagreed with the analysis of Claimant's ATP that there was a greater than 50% probability that his work activities caused the hernia. Dr. Paz stated there was no evidence of a specific incident which caused the hernia. Dr. Paz testified it was not medically probable based on the available information that Claimant's hernia was work-related. On cross-examination, Dr. Paz agreed lifting could cause a hernia, but he thought it was an insidious, slowly evolving condition. The ALJ was not persuaded by Dr. Paz' opinion, as it took a very constrained

view concerning the mechanism of injury, essentially foreclosing any possibility that lifting boxes at work precipitated the hernia.

23. Claimant established by a preponderance of the evidence that lifting at work caused the left inguinal hernia.

24. Respondents established Claimant failed to report his injury within four days. Claimant reported his injury on January 21, 2017.

25. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the credibility of Claimant, as well as Dr. Paz was determinative on the compensability issue.

Compensability of Left Inguinal Hernia

The legal standard applicable to the compensability issue is found in § 8-41-301(1)(c), C.R.S., which provides as a condition for the recovery of workers' compensation benefits the injury must be "proximately caused by an injury or occupational disease arising out of and in the course of the employment". *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014).

A "compensable" injury is one which is disabling and entitles the Claimant to compensation in the form of disability benefits. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). Conversely, no benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury". Id.; § 8-41-301, C.R.S. The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). The ALJ determined Claimant proved he suffered a compensable injury in the case at bench.

As a starting point, Claimant's job with Employer was a physical one; loading packages required lifting and twisting. He testified that he injured himself while moving boxes from the conveyor to a truck. Although, he could not specify which particular box he was lifting, Claimant felt pain while performing his job duties. The evidence admitted at hearing, including Claimant's testimony, established he was performing this job on January 6, 2015. (Findings of Fact 6-7). No contrary evidence was presented. The ALJ credited Claimant's testimony that he experienced symptoms while working on January 6, 2015.

In addition, Claimant's treating physicians offered the opinion that his inguinal hernia was caused by work. The work relatedness of the left inguinal hernia was established in the records of PA Esser/Dr. Counts and Dr. Pula. (Findings of Fact 10, 12, and 19). The ALJ credited those opinions over those offered by Dr. Paz.

In making this determination, the ALJ considered Respondents' argument that Claimant did not prove a precise mechanism of injury. The ALJ concluded Claimant's testimony established by a preponderance of the evidence that he was moving and lifting packages when the hernia occurred, which was supported by the medical evidence. Therefore, Claimant met his burden of proof and showed he sustained a compensable injury.

Penalties for Untimely Reporting

Respondents seek a penalty against Claimant because he failed timely to report the injury in writing as required by § 8-43-102(1)(a), C.R.S. The ALJ concluded Respondents met their burden of proof on this issue. (Findings of Fact 13, 24).

§ 8-43-102(1)(a) provides that an employee that sustains an injury from an accident “shall notify the said employee’s employer in writing of the injury within four days of the occurrence of the injury”. If the employee fails to report the injury in writing “said employee may lose up to one day’s compensation for each day’s failure to so report”. Because the statute uses the word “may,” imposition of a penalty for late reporting is left to the discretion of the ALJ. *LeFou v. Waste Management,* W.C. No. 4-519-354 (I.C.A.O. March 6, 2003).

Based on the evidence before the Court, there was no dispute Claimant delayed in reporting his injury. Accordingly, the ALJ concluded Claimant is subject to a penalty

for late reporting of the work injury. That period of late reporting was 15 days. To the extent Claimant receives indemnity benefits, he shall be penalized one day of compensation for each day he delayed reporting the injury.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable industrial injury while working for Employer

2. Respondents shall provide medical benefits to cure and relieve the effects of Claimant's injury, including the Claimant's treatment at Concentra and the surgery to repair the left inguinal hernia.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 5, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether Respondents overcame, by clear and convincing evidence, Dr. Jack Rook's DIME opinion that the Claimant sustained 27 percent whole person impairment as a result of the December 1, 2015, accident.

- Whether Claimant proved, by a preponderance of the evidence, that she requires medical treatment to maintain her condition at MMI.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On November 30, 2015, Claimant presented to her primary care provider, Dr. Martin McDermott, for worsening fibromyalgia pain. Claimant complained of difficulty walking and with any movement. Claimant also stated that she had gone to "Urgent Care on Saturday" for lower abdominal pain. "Last week felt like she pulled a muscle in her lower groin area at work while dumping a heavy box in the trash, since then has had intermittent sharp pain." Claimant stated she planned to call workman's [sic] comp about the abdominal pain in case it was related to her injury there. Dr. McDermott noted if Claimant's pain was deemed not work-related, he would pursue an ultrasound or other diagnostics, as indicated.

2. On December 1, 2015, at 5:15 p.m., Claimant presented to Platte Valley Medical Center Emergency Room complaining of abdominal pain. Claimant gave a history of lifting boxes into a dumpster at work that morning and feeling a "tear" in her lower abdomen. Claimant was sent for an ultrasound to rule out a hernia. The ultrasound was read as showing a hematoma, but no hernia. The diagnostic impression included strain of abdominal muscle and abdominal wall hematoma.

3. On December 2, 2015, Claimant, as Employer's Store Manager, completed the Employer's First Report of Injury. On the Employer's First Report, Claimant indicated the injury occurred at 9:15 a.m. Claimant reported her injury was a strain to her abdomen and groin.

4. On December 10, 2015, physician assistant, Kathryn Garver, evaluated Claimant. Claimant gave PA Garver a history of her injury occurring when she was throwing boxes in the dumpster. Claimant reported her pain felt "like a bubble in her stomach that was poking". PA Garver's December 10, 2015, treatment note references "right-sided back pain, without sciatica." On physical exam, Claimant exhibited normal range of right hip motion, with pain on flexion and abduction, normal strength, no bony

tenderness, no swelling, no crepitus, and no deformity. Claimant also exhibited normal lumbar range of motion.

5. Dr. J. Tashof Bernton credibly and persuasively testified it is not medically probable Claimant would have had normal hip range of motion and normal lumbar motion ten days post-injury when her symptoms would have been most severe, and then the dramatically limited lumbar range of motion she demonstrated when Dr. Rook evaluated her two years later. Dr. Bernton explained range of motion loss is greatest when an injury is acute because it is associated with muscle strain, muscle spasm and inflammation. Range of motion then increases over time. Dr. Bernton testified, "The range of motion demonstrated by [Claimant] both by Dr. Rook's evaluation and on [his] evaluation, demonstrated dramatically limited range of motion of the lumbar spine in a fashion, first of all, not consistent with the ability to perform activities of daily living, and secondly, dramatically inconsistent with the records of the initial presentation of this back problem when it would have been at their – when it would have been at its worst."

6. On December 23, 2015, Claimant returned to Platte Valley Medical Center, again complaining of abdominal pain. Claimant reported that she was lifting boxes at work on December 1, 2015, when she "moved wrong" and had resulting right lower quadrant abdominal pain. The report documents the December 1, 2015, emergency department evaluation with a "fairly unremarkable" ultrasound showing a "possible hematoma." Claimant reported the abdominal pain persisting since the date of injury and now radiating to the back and right groin. Claimant underwent an emergent CT scan of the abdomen. On exam, Claimant was "chatting with niece, discussing Christmas dinner." The Emergency Room report documented a diagnostic impression of "abdominal pain" and noted "the patient is overall well-appearing with a nonacute abdominal exam. CT imaging does not reveal any obvious etiology for the patient's symptoms".

7. On December 30, 2015, PA Garver reevaluated Claimant. Claimant also consulted by phone with Dr. Julie Mullen. PA Garver noted, "Her [sic] and I agree based on similar CT findings in May, unlikely her symptoms are related to work. Possible that the work injury may have aggravated an underlying issue. Recommended follow-up for [Claimant] with primary care physician and GYN for evaluation of symptoms." The report notes that Claimant left the appointment before PA Garver finished Claimant's plan and Workers' Compensation paperwork. When the PA later called Claimant, "[Claimant] extremely angry. She is mad that we are dismissing her and making her pay for all her medical bills for something that was not her fault etc etc . . . [Claimant] got off the phone still extremely upset."

8. On December 29, 2015, Dr. McDermott, Claimant's PCP, reevaluated her. His work-related assessment remained "strain of abdominal muscle".

9. On January 7, 2016, Dr. Heather Banks evaluated Claimant. Claimant continued to complain of pain in the abdominal wall. She also complained of "many other symptoms such as numbness, pain, and tingling in the bottom of her feet and hands," which she attributed to the December 1, 2015, injury. Dr. Banks noted Claimant

was “extremely painful, out of proportion to pathology.” Dr. Banks also commented, “[Claimant] is extremely tender/painful given the mechanism of injury and I am wondering if her underlying fibromyalgia is playing into this.”

10. On January 15, 2016, Dr. McDermott first notes Claimant’s severe tenderness in the right SI joint, with difficulty getting up and down from the exam table. Dr. Bernton credibly and persuasively testified that it is not medically probable that severe right SI joint tenderness, with “a lot” of difficulty getting up and down from the exam table, would first present six weeks post-accident if it were related to the December 1, 2015, work injury.

11. On February 11, 2016, Dr. Bernton evaluated Claimant at Respondents’ request. Dr. Bernton opined Claimant’s findings were consistent with an SI joint strain associated with a pre-existing leg length discrepancy. Dr. Bernton credibly opined the original occupational injury was an abdominal wall strain, which has resolved. On the date of his February 11, 2016 evaluation, Claimant’s symptoms were consistent with SI joint strain and possible lumbar disc disease, neither was work-related.

12. Claimant was referred to Michael Simone, DC, for treatment of her December 1, 2015, injuries. Claimant told Dr. Simone that she went to the emergency room where she was told she had torn abdominal muscles. “She said her pain then moved to the right lower back.” Dr. Bernton credibly testified that it is not medically probable an SI joint strain would present as abdominal pain that moved to the low back. “Abdominal pain is not part of the spectrum of SI pain. Period.” On April 18, 2016, when Dr. Simone evaluated Claimant, Claimant could bend to a fairly normal range of motion, at a point in time when she was presumably worse. Dr. Bernton credibly testified, based on the diagnosis of SI joint strain, there is no medical explanation for Claimant’s decrease in range of motion between Dr. Simone’s examination and Dr. Rook’s examination. Dr. Simone last examined Claimant on July 14, 2016, one month prior to her placement at MMI. On that date, her lumbar range of motion was 90 degrees (150 percent of normal); extension was 20 degrees (80 percent of normal); left lateral flexion was 25 degrees (100 percent of normal and increased by 25 percent); Claimant was having minimal pain in the right sacroiliac area; her right lateral flexion was 25 degrees (100 percent of normal); left and right rotation were both 30 degrees (100 percent of normal). These measurements are far in excess of the range of motion as measured by Drs. Rook and Bernton.

1. On July 15, 2016, authorized treating physician, Dr. Brian Williams, placed Claimant at MMI from the December 1, 2015, accident. At the time Dr. Williams placed the claimant at MMI, he opined:

> Back, range of motion for her cervical, thoracic, and lumbar spines were evaluated grossly. By my assessment, was that her flexion, extension, rotation, and lateral flexion were full and normal for all spinal segments. So, I deferred formal measurements.

13. Dr. Bernton credibly testified that, although "eyeballing it" for range of motion is less precise than using an inclinometer, there is a gross difference between either 14 and 25 degrees of lumbar motion and full and normal range of motion." Dr. Bernton credibly testified the range of motion assigned by Dr. Rook was submaximal and not accurate.

14. On July 27, 2016, Insurer filed a Final Admission of Liability for six percent scheduled impairment to Claimant's right hip and denied medical treatment post-MMI, consistent with the opinions of the authorized treating physician, Dr. Brian Williams.

15. Claimant objected to the July 27, 2016, Final Admission and requested a Division IME. Dr. Jack Rook was selected as the Division Examiner. Dr. Rook examined Claimant on November 7, 2016. Based on his review of the medical records and his evaluation of Claimant, Dr. Rook assigned a work-related diagnosis of "right-sided sacroiliac joint dysfunction". He opined Claimant reached MMI on July 15, 2016, consistent with the opinions of the authorized treating physician. Dr. Rook assigned five percent whole person impairment per Table53 (II) (B) for specific disorders of the spine. Dr. Rook also calculated 23 percent whole person impairment for loss of lumbar range of motion. Five percent and 23 percent whole person impairments combine to 27 percent whole person impairment. Dr. Rook made general recommendations for maintenance care to be provided by Claimant's primary care provider, Dr. McDermott.

16. On March 7, 2017, Dr. Bernton re-evaluated Claimant at Respondents' request. Based on his repeat evaluation, Dr. Bernton opined Claimant remained at MMI from the December 1, 2015, work injury, with no work-related restrictions and no need for medical treatment to maintain MMI. Dr. Bernton further credibly opined, that if one were to find Claimant's SI joint complaints work-related (which he does not), it was clear that the range of motion both he and Dr. Rook measured was grossly sub-maximal. Using sub-maximal range of motion to determine permanent physical impairment is inconsistent with the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition, (Revised) (*AMA Guides)* and the instructions of the Division of Workers' Compensation that only maximal range of motion is valid and may be utilized for impairment ratings.

17. Dr. Bernton testified at hearing on Respondents' behalf. Dr. Bernton credibly testified Dr. Rook clearly erred in assigning five percent whole person impairment per Table 53 (II) (B) of *the AMA Guides* for Claimant's alleged SI strain for multiple reasons. Dr. Bernton credibly testified, the *AMA Guides* tell rating physicians that when a medically sufficient evaluation is carried out, the clinical status of the individual will be documented accurately. If the current findings are consistent with the results of previous clinical evaluations performed by other observers, then essentially the findings may be compared with the tables and an impairment rating obtained. The threshold question, though, is to compare the measurements and determine whether

they are consistent with other measurements in the record. If the numbers are not consistent, the rater must explain why. Dr. Rook did not determine whether his measurements were consistent with the record or at least did not explain it in the record as required.

18. Dr. Bernton testified Claimant has a long history of fibromyalgia, has had multiple musculoskeletal complaints over time, and the day before the injury said she had an abdominal strain twisting. Dr. Bernton related concern with the accuracy of Claimant's ability as a historian when the next day Claimant sought treatment reporting that "today, I had an abdominal strain twisting." Further, Claimant initially reported no musculoskeletal complaints, and then ten days later demonstrates some SI problems. Dr. Bernton attributed the SI problems to Claimant's history and of leg length discrepancy, rather than to her work injury finding the later unlikely.

19. Dr. Bernton also credibly testified it is not medically probable Claimant suffered a discrete injury to her right SI joint on December 1, 2015 without experiencing immediate pain in that region. One would not have later onset of pain.

20. Dr. Bernton credibly testified Dr. Rook clearly erred in assigning Claimant 23 percent whole person impairment for loss of lumbar motion for the alleged SI joint strain.

- He explained initially, that as a Division Examiner, you can only rate maximal range of motion. It was clear based on the totality of the evidence the range of motion Claimant demonstrated to Dr. Rook was not her maximal range of motion.

- Twenty-five percent lumbar flexion as Claimant demonstrated to Dr. Rook did not make sense physiologically. Twenty-five degrees flexion is consistent with ankylosing spondylitis, where the spine fuses together and loses the bony ability to flex. It does not happen with an SI joint strain.

- Equally, important, as a Division Examiner, you look through the medical records and evaluate past range of motion measurements. Claimant's range of motion prior to MMI, when her condition was presumably worse, was much greater than that measured by Dr. Rook.

- Dr. Bernton credibly testified the sacroiliac joint is not associated with lumbar flexion, which occurs in the vertebral bodies.

- Dr. Rook failed to verify Claimant's demonstrated range of motion by checking lumbar flexion in different positions, as Dr. Bernton did.

- Dr. Bernton explained that the Division's protocol is to give a patient two opportunities to provide a maximal range of motion. If one range of motion measurement is sub-maximal, the rater should measure again. If the second range of motion is sub-maximal, then range of motion should

not be rated. Dr. Bernton opined that both his and Dr. Rooks' measurements were sub-maximal range of motion measurements.

21. Dr. Bernton watched video surveillance from inside Employer's location which showed Claimant bending to 90 degrees and doing other activities which she reported to medical providers she was unable to do.

22. Dr. Bernton explained that his was not a difference of opinion with Dr. Rook, but rather "it's a difference of opinion between Dr. Rook and reality." "I mean, by looking at the video, you know that [Dr. Rook's] range of motion [measurements] didn't represent her maximum range. Period. End of story. So, it's not just a difference of opinion. It's an incorrect rating."

23. Dr. Rook opined that Claimant would require maintenance care including follow-up with her primary care physician, Dr. McDermott at three to four month intervals, up to two sacroiliac joint injections on an annual basis, and chiropractic care once per month.

24. Claimant did not testify that she desired maintenance care or to the efficacy of any of the treatments recommended by Dr. Rook when they were performed prior to MMI. The records of Claimant's chiropractor, Dr. Simone suggest Claimant's pain complaints are aggravated by her pre-existing fibromyalgia.

25. Dr. Bernton testified Claimant does not have a ratable work-related impairment and she does not require treatment on that basis. Further, per Dr. Bernton, Claimant is going to have problems associated with her leg length discrepancy and fibromyalgia, neither of which is related to the work injury, into the indefinite future. In his opinion, Claimant needs no treatment for the SI problem that is different from the treatment she is already undergoing for fibromyalgia.

26. Dr. Bernton's opinions and testimony of are more credible and persuasive than the opinions of Dr. Rook on diagnosis, permanent physical impairment, and Claimant's need for medical treatment post-MMI.

27. Respondents have overcome Dr. Rook's opinions of on the issue of permanent physical impairment.

28. Claimant has failed to prove, by a preponderance of the evidence, that she requires medical treatment to maintain her condition at MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Legal Principals

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo. App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As found, the ALJ credits the opinions of Dr. Bernton as more credible and persuasive than the opinions of Dr. Rook regarding Claimant's work-related diagnosis, permanent physical impairment and the reasonableness, necessity and relatedness of Claimant's need for medical treatment to maintain her condition at MMI.

Medical Benefits

A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury or to maintain her condition at MMI. *See* § 8-

42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). Based upon the evidence presented, the ALJ concludes that Claimant has failed to prove she requires medical treatment to maintain her condition at MMI.

Overcoming the Division IME

A DIME physician must rate impairment in accordance with the provisions of the *AMA Guides.* Section 8-42-101(3.7), C.R.S.; § 8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003).

The DIME physician's finding of impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(c). Whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating has been overcome by clear and convincing evidence, are issues of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 2002 (Colo. App. 2000).

The *AMA Guides* require that there be a longitudinal history in the treating provider's medical records to establish "causation of impairment."

> To establish that a factor *did* contribute to an impairment must rely on documentation of the circumstances under which the factor was present and verification that the type and magnitude of the factor were sufficient and bore the necessary temporal relationship to the condition. The existence of an impairment does not create a presumption of contribution by a factor with which the impairment is often associated.

AMA Guides to the Evaluation of Permanent Impairment, 3d Ed., Revised, 2.2 [Emphasis in original].

Dr. Bernton credibly testified that Claimant's initial treatment note from Platte Valley Medical Center dated December 1, 2015, is not consistent with her later reports to occupational physicians and fails to establish a longitudinal history and causation of an SI joint injury. Dr. Bernton credibly testified it is not medically probable Claimant would have suffered a discrete injury to the SI joint, which is "heavily innervated," and not have experienced immediate pain symptoms from that injury. As found, Dr. Bernton's opinion, that Claimant did not suffer an injury to her SI joint on December 1,

2015, and Dr. Rook's opinion that she did, are not merely differences of opinion. Dr. Rook clearly erred in assigning a five percent whole person impairment per Table 53 (II) (B), of the *AMA Guides*.

The *AMA Guides* and the Division of Workers' Compensation require that impairment for loss of range of motion be based on a claimant's maximal range of motion. Dr. Bernton credibly testified Dr. Rook's range of motion measurement were sub-maximal and in error. Thus Dr. Rook's assignment of a 23 percent whole person impairment, was clearly error. As found, Dr. Bernton's opinion that Dr. Rook clearly erred in assigning the claimant 23 percent whole person impairment for loss of lumbar motion is credible and persuasive.

Dr. Bernton's opinions on the issue of diagnosis and permanent physical impairment are more credible and persuasive than the opinions of Dr. Rook. Claimant had normal or near normal lumbar range of motion as measured by all providers until Dr. Rook. In connection with Dr. Rook's evaluation, Dr. Rook did not have the benefit of the Battery for Health Improvement-2 testing, performed by Dr. Bernton, which indicated Claimant's pain complaints are probably somatoform in nature. Dr. Rook did not review the in-store security video reviewed by Dr. Bernton, which shows Claimant demonstrating normal lumbar range of motion. Dr. Bernton credibly testified he did not merely have a difference of opinion with Dr. Rook, but that Dr. Rook was clearly wrong in his assessment of permanent physical impairment.

The ALJ concludes the Respondents have overcome the opinions of the Division IME, Dr. Rook, by clear and convincing evidence.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for additional benefits not previously admitted and paid is denied and dismissed.

2. Claimant's request for an award of medical benefits to maintain her condition at MMI is denied and dismissed.

3. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 5, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that lower back surgery in the form of a microdiscectomy recommended by William D. Biggs, M.D. is reasonable, necessary and causally related to his January 5, 2017 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 64 year old male who worked for Employer as a Service Manager. His job duties involved delivering fuel, digging trenches, installing gas lines and filling propane tanks.

2. During December 2016 Claimant developed right buttock pain. He visited Justin Green, D.C. for an examination. Claimant had been visiting Dr. Green approximately twice each year since 2000 primarily for upper back and neck pain. Dr. Green noted that Claimant had bone spurs and recommended an MRI. Claimant's symptoms continued to increase during December 2016.

3. On December 31, 2016 Claimant visited the Centura Emergency Room for an evaluation. He received treatment from Maureen Moore, N.P. Claimant told N.P. Moore that "his pain is generally worse at the end of his work day and that for the past week at the end of his work his [pain] became worse and worse causing difficulty sleeping." He further stated that he had "seen his chiropractor multiple times since had no improvement." Claimant's chief complaint was "back pain that began over one week earlier and was "gradually worsening." Claimant did not associate the pain with any known injury and only reported "generalized work." His pain was right-sided and radiated into the right-buttock and right-lower leg. Claimant was diagnosed with sciatica and received a Medrol Prednisone Dosepak. N.P. Moore referred Claimant for a surgical consultation with William D. Biggs, M.D.

4. On January 3, 2017 Claimant returned to Dr. Green for an evaluation. Dr. Green noted lower back pain with right-sided symptoms. The notes suggest that Claimant may have been changing tires and was suffering severe pain. Throughout Dr. Green's notes a box for right-sided symptoms is circled or checked.

5. On January 5, 2017 Claimant was performing a propane leak test at a customer's residence. There were approximately seven inches of snow on the ground and a garden hose was coiled underneath the snow behind Claimant. Claimant stepped backwards, tripped on the garden hose and fell to the ground. When he landed, he struck his hip, thigh or buttocks region on a steel post.

6. Claimant completed the leak test and walked to his truck. When he depressed the accelerator on his truck he immediately experienced shooting pain down his right leg. Claimant estimated that he developed the shooting pain approximately 20-25 minutes after his fall to the ground.

7. On January 9, 2017 Claimant underwent an MRI of the lumbar spine. The MRI revealed disc desiccation with a mild concentric disc bulge and a tiny annular tear at L4-L5. There was also desiccation and a mild concentric disc bulge at L5 -S1. There was also moderate right lateral recess stenosis at L5-S1. The radiologist summarized "degenerative disc disease is worst at L5-S1 where there is a right paracentral disc extrusion causing moderate right lateral recess stenosis and mild mass effect on the transiting right S1 nerve root." The report did not note any acute fracture.

8. On January 16, 2017 Claimant visited Dr. Biggs for an examination. Claimant recounted that, while he was delivering propane for Employer on January 5, 2017, he tripped over a hose that was covered in snow and hit his buttocks on a flange. Claimant remarked that he had been suffering "some sciatic symptoms over the last month" that had been improving, but the January 5, 2017 incident aggravated his condition. Dr. Biggs noted that Claimant had undergone a lumbar MRI. The MRI revealed degeneration at L5-S1 and a disc herniation impinging on the right S1 nerve root. He diagnosed Claimant with a lumbar disc herniation and degeneration at L5-S1. Dr. Biggs recommended an S1 selective nerve root block. He commented that, if the nerve block failed, surgery in the form of a lumbar discectomy at S1 might be warranted.

9. After undergoing a right transforaminal epidural steroid injection on February 9, 2017 Claimant visited James Rafferty, D.O. on February 24, 2017 for an evaluation. Dr. Rafferty noted that Claimant had tripped and fallen on his right buttock while filling a propane tank at work. Claimant reported that he did not respond to the epidural steroid injection and still experiences pain, numbness and tingling over the right buttocks region. He also mentioned persistent weakness in the right lower extremity. Dr. Rafferty diagnosed Claimant with a lumbar disc herniation, including radiculopathy at L5-S1, and referred him back to Dr. Biggs.

10. On February 24, 2017 Claimant returned to Dr. Biggs for an examination. Claimant reported no improvement in his symptoms. On February 28, 2017 Dr. Biggs submitted a surgical authorization request for a L5-S1 microdiscectomy.

11. On March 8, 2017 neurosurgeon James Ogsbury, M.D. conducted a records review of Claimant's case. He determined that Claimant did not likely suffer a new injury on January 5, 2017 and recommended an independent medical examination for a conclusive causality determination. Nevertheless, in addressing causation, Dr. Ogsbury explained:

> [W]ith regard to the issue of causation, the patient clearly has a long history of antecedent low back problems with at least buttock pain and perhaps sciatica and a recent episode of at least buttock pain treated by the chiropractor. Obviously, the patient implied that there was some

> worsening after the fall, but the magnitude of worsening (specifically the difference between the pre-episode clinical status and the post-episode clinical status) is not clear….However, my initial impression is that this sounds like more likely one of the many flares that this patient undergoes and if that is indeed the case (that is, that this is simply part of the long history of intermittent flare-ups of low back pain and sciatica), then this would not be considered a significant exacerbation.

Following Dr. Ogsbury's opinion, Respondents denied Claimant's request for the surgery on March 9, 2017.

12. On March 14, 2017 Dr. Biggs authored a letter appealing the denial of the surgical request. He disagreed with Dr. Ogsbury and explained that Claimant suffered an aggravation of his pre-existing lower back condition when he fell while working on January 5, 2017. Dr. Biggs remarked that "it is clear that [Claimant] herniated the disc at that point." He commented that he did not know if Claimant had a disc herniation prior to January 5, 2017 because there had been no MRI's before the tripping incident. However, he remarked that Claimant "definitely did not have the leg weakness and did not have the severity of symptoms that he was having prior to his trip and fall." Dr. Biggs summarized that "there is no question in my mind" that Claimant suffered a work-related injury on January 5, 2017.

13. On March 31, 2017 Dr. Rafferty authored a letter supporting Dr. Biggs' request for a L5-S1 microdiscectomy. He disagreed with Dr. Ogsbury's determination that Claimant did not require a L5-S1 microdiscectomy to relieve the effects of his January 5, 2017 lower back injury. Dr. Rafferty noted that Claimant suffered an industrial injury on January 5, 2017 while filling a propane tank in his work for Employer. Moreover, Claimant's symptoms were consistent with the January 5, 2017 mechanism of injury. He emphasized that the work incident caused Claimant's symptoms and "[t]hat does not seem to be debatable." Although Dr. Rafferty mentioned that Claimant has suffered minor lower back pain and symptoms in the thoracic region, "it has been many years since [Claimant] has experienced even a minimal amount of low back pain." Dr. Rafferty stated that he disagreed with Dr. Ogsbury's comment that Claimant has suffered a long history of lower back symptoms and a recent episode of possible buttocks pain or sciatica. Furthermore, Dr. Rafferty stated that, even if Claimant suffered from pre-existing lower back symptoms, the January 5, 2017 accident significantly worsened his condition because he began using pain medication and suffered numbness and tingling in his right leg after the event. Finally, in addressing proximate causation Dr. Raffery explained that Claimant would not have developed lower back symptoms in the absence of the January 5, 2017 accident. Accordingly, Dr. Rafferty reasoned that Claimant required an L5-S1 microdiscectomy to relieve the effects of his January 5, 2017 fall while working for Employer.

14. On May 18, 2017 Claimant underwent an independent medical examination with Brian Lambden, M.D. Claimant relayed to Dr. Lambden that he had a history of back pain since 1988 and was previously told by a physician that he had a disc herniation. He told Dr. Lambden that his strength had improved "but he has always

been weak since that time. He says he did okay and basically learned his limits. He would avoid doing heavy work…and he found that he could not ride horses." Dr. Lambden summarized that Claimant had been suffering from back pain dating back to the late 1980's and had "associated weakness, lack of full function, unable to ride a horse without increasing back pain, so he has been dealing with the back pain for quite some time." Dr. Lambden's assessments included "prior history of work injury in 1988 with low back pain and sciatica, supposedly radiating into the left lower extremity with associated weakness and reduced function…." as well as "prior history of chronic waxing and waning back pain for many years…." He also noted the sudden onset of increasing lower back pain on December 1, 2016.

15. In addressing causation, Dr. Lambden remarked that he was having difficulty agreeing with Drs. Biggs and Rafferty. He commented that he was "not completely sure both of these physicians [had] a complete medical history." Dr. Lambden explained that their opinions on causality were not consistent with Claimant's pre-existing medical records. He noted that the records from Dr. Green and the emergency room visit of December 31, 2016 specifically mentioned "escalating pain symptoms radiating into his buttock with pain radiating into the SI and then into the right calf, but also generalized muscle weakness dating back to April 2013."

16. With regard to whether the January 5, 2017 incident caused an exacerbation or aggravation in Claimant's pre-existing condition, Dr. Lambden reasoned:

> Based on my careful analysis and review of records, it would be my opinion that this fall more likely did not aggravate his condition based on the fact that [Claimant] already had a long history of chronic low back pain with intermittent leg pain, which dramatically increased on 12/1/16 with treatment by a chiropractor for the these very same symptoms, followed by an acute emergency room visit on 12/31/16 for these very same symptoms with documented right lower extremity radiculopathy treated with a Medrol Dosepak.

He noted that Claimant was already scheduled to visit Dr. Biggs prior to January 5, 2017 and there was no significant change in his medical course following the trip and fall. Dr. Lambden commented that, although there was no previous lumbar MRI, "it would be more likely than not that Claimant's disc extrusion [was] present" prior to the accident of January 5, 2017.

17. Dr. Lambden concluded that the January 5, 2017 fall did not change the course of Claimant's chronic lower back pain or right lower extremity radiculopathy. He stated that Claimant's only diagnosis related to the January 5, 2017 incident was a right gluteal contusion. Dr. Lambden summarized that the proposed microdiscectomy was not related to the January 5, 2017 incident and Claimant's symptoms were more likely than not related to a pre-existing disc extrusion.

18. Claimant testified at the hearing in this matter. He provided differing accounts of the nature of his pain prior to January 5, 2017. Claimant explained that he did not have lower back pain prior to January 5, 2017 but suffered pain in his buttock or hip. However, Claimant acknowledged that his medical records established a history of lower back pain. He also recognized that he complained of lower back pain to Dr. Green and at the emergency room on December 31, 2016. Nevertheless, Claimant characterized the distinction between buttock pain and back pain as immaterial. He remarked that he was consistent in what he told his medical providers and maintained that he disclosed pre-existing symptoms in his buttock or hip to Drs. Biggs and Rafferty.

19. Dr. Lambden testified at the hearing in this matter consistently with his independent medical examination report. He remarked that the proposed microdiscectomy is not related to Claimant's January 5, 2017 trip and fall. Instead, Dr. Lambden commented that Claimant's need for a microdiscectomy was the result of his pre-existing lower back condition as reflected in the medical records of Dr. Green and the University of Colorado emergency room. He noted that Claimant's lumbar MRI findings were consistent with degenerative changes instead of an acute injury on January 5, 2017. Moreover, Dr. Lambden remarked that Claimant exhibited bilateral lower extremity atrophy. The atrophy supported Dr. Lambden's conclusion that Claimant suffered leg weakness prior to January 5, 2017.

20. Claimant has failed to demonstrate that it is more probably true than not that lower back surgery in the form of a microdiscectomy recommended by Dr. Biggs is causally related to his January 5, 2017 admitted industrial injury. Initially, on January 5, 2017 Claimant was performing a propane leak test at a customer's residence. There were approximately seven inches of snow on the ground and a garden hose was coiled underneath the snow behind Claimant. Claimant stepped backwards, tripped on the garden hose and fell to the ground. He completed the leak test and walked to his truck. When he depressed the accelerator on his truck he immediately experienced shooting pain down his right leg. After conservative medical treatment Claimant underwent a lumbar MRI. The MRI revealed degeneration at L5-S1 and a disc herniation impinging on the right S1 nerve root.

21. On February 28, 2017 Dr. Biggs submitted a surgical authorization request for a L5-S1 microdiscectomy. However, Dr. Ogsbury determined that Claimant did not likely suffer a new injury on January 5, 2017 because of his chronic, prior lower back symptoms. Respondents thus denied the surgical request. Dr. Biggs authored a letter appealing the denial. He disagreed with Dr. Ogsbury and explained that Claimant suffered an aggravation of his pre-existing lower back condition when he fell while working on January 5, 2017. Dr. Biggs remarked that "it is clear that [claimant] herniated the disc at that point." He remarked that Claimant "definitely did not have the leg weakness and did not have the severity of symptoms that he was having prior to his trip and fall." Dr. Rafferty also disagreed with Dr. Ogsbury's determination that Claimant did not require a L5-S1 microdiscectomy to relieve the effects of his January 5, 2017 lower back injury. He noted that Claimant's symptoms were consistent with the January 5, 2017 mechanism of injury. Furthermore, Dr. Rafferty stated that, even if Claimant suffered from pre-existing lower back symptoms, the January 5, 2017 accident

significantly worsened his condition because he began using pain medication and suffered numbness and tingling in his right leg after the event. Finally, in addressing proximate causation Dr. Raffery explained that Claimant would not have developed lower back symptoms in the absence of the January 5, 2017 accident.

22. Dr. Lambden persuasively determined that the January 5, 2017 incident did not aggravate Claimant's condition because he already had a long history of chronic lower back pain with intermittent leg pain. Dr. Lambden remarked that he was having difficulty agreeing with Drs. Rafferty and Biggs because their opinions on causality were not consistent with Claimant's pre-existing medical records. He noted that the records from chiropractor Dr. Green and the emergency room visit of December 31, 2016 specifically mentioned "escalating pain symptoms radiating into his buttock with pain radiating into the S1 and then into the right calf, but also generalized muscle weakness dating back to April 2013." In fact, Claimant visited Dr. Green in December 2016 with complaints of right buttock pain. Claimant's symptoms continued to increase throughout the month. By December 31, 2016 Claimant visited the Centura Emergency Room for an evaluation. He was diagnosed with sciatica and received a Medrol Prednisone Dosepak for his pain. Dr. Lambden concluded that the January 5, 2017 fall did not change the course of Claimant's chronic lower back pain or right lower extremity radiculopathy. He stated that Claimant's only diagnosis related to the January 5, 2017 incident was a right gluteal contusion. Dr. Lambden summarized that the proposed microdiscectomy was not related to the January 5, 2017 incident and Claimant's symptoms were more likely than not related to a pre-existing disc extrusion.

23. The medical records and letters of Drs. Biggs and Rafferty do not reveal that they reviewed or adequately considered the treatment notes from Dr. Green or the December 31, 2016 emergency room visit. In contrast, Dr. Lambden has evaluated the causation aspect of the surgical request with all of the relevant information. Dr. Lambden explained that Claimant's need for a microdiscectomy was not caused by his January 5, 2017 fall. Instead, Claimant's pre-existing medical records reveal increasing lower back pain and right lower extremity radicular symptoms prior to January 5, 2017. Accordingly, the bulk of the persuasive evidence reflects that the microdiscectomy recommended by Dr. Biggs is not causally related to Claimant's January 5, 2017 trip and fall.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that lower back surgery in the form of a microdiscectomy recommended by Dr. Biggs is causally related to his January 5, 2017 admitted industrial injury. Initially, on January 5, 2017 Claimant was performing a propane leak test at a customer's residence. There were approximately seven inches of snow on the ground and a garden hose was coiled underneath the snow behind Claimant. Claimant stepped backwards, tripped on the garden hose and fell to the ground. He completed the leak test and walked to his truck. When he depressed the accelerator on his truck he immediately experienced shooting pain down his right leg. After conservative medical treatment Claimant underwent a lumbar MRI. The MRI revealed degeneration at L5-S1 and a disc herniation impinging on the right S1 nerve root.

6. As found, on February 28, 2017 Dr. Biggs submitted a surgical authorization request for a L5-S1 microdiscectomy. However, Dr. Ogsbury determined that Claimant did not likely suffer a new injury on January 5, 2017 because of his chronic, prior lower back symptoms. Respondents thus denied the surgical request. Dr. Biggs authored a letter appealing the denial. He disagreed with Dr. Ogsbury and explained that Claimant suffered an aggravation of his pre-existing lower back condition when he fell while working on January 5, 2017. Dr. Biggs remarked that "it is clear that [claimant] herniated the disc at that point." He remarked that Claimant "definitely did not

have the leg weakness and did not have the severity of symptoms that he was having prior to his trip and fall." Dr. Rafferty also disagreed with Dr. Ogsbury's determination that Claimant did not require a L5-S1 microdiscectomy to relieve the effects of his January 5, 2017 lower back injury. He noted that Claimant's symptoms were consistent with the January 5, 2017 mechanism of injury. Furthermore, Dr. Rafferty stated that, even if Claimant suffered from pre-existing lower back symptoms, the January 5, 2017 accident significantly worsened his condition because he began using pain medication and suffered numbness and tingling in his right leg after the event. Finally, in addressing proximate causation Dr. Raffery explained that Claimant would not have developed lower back symptoms in the absence of the January 5, 2017 accident.

7. As found, Dr. Lambden persuasively determined that the January 5, 2017 incident did not aggravate Claimant's condition because he already had a long history of chronic lower back pain with intermittent leg pain. Dr. Lambden remarked that he was having difficulty agreeing with Drs. Rafferty and Biggs because their opinions on causality were not consistent with Claimant's pre-existing medical records. He noted that the records from chiropractor Dr. Green and the emergency room visit of December 31, 2016 specifically mentioned "escalating pain symptoms radiating into his buttock with pain radiating into the S1 and then into the right calf, but also generalized muscle weakness dating back to April 2013." In fact, Claimant visited Dr. Green in December 2016 with complaints of right buttock pain. Claimant's symptoms continued to increase throughout the month. By December 31, 2016 Claimant visited the Centura Emergency Room for an evaluation. He was diagnosed with sciatica and received a Medrol Prednisone Dosepak for his pain. Dr. Lambden concluded that the January 5, 2017 fall did not change the course of Claimant's chronic lower back pain or right lower extremity radiculopathy. He stated that Claimant's only diagnosis related to the January 5, 2017 incident was a right gluteal contusion. Dr. Lambden summarized that the proposed microdiscectomy was not related to the January 5, 2017 incident and Claimant's symptoms were more likely than not related to a pre-existing disc extrusion.

8. As found, the medical records and letters of Drs. Biggs and Rafferty do not reveal that they reviewed or adequately considered the treatment notes from Dr. Green or the December 31, 2016 emergency room visit. In contrast, Dr. Lambden has evaluated the causation aspect of the surgical request with all of the relevant information. Dr. Lambden explained that Claimant's need for a microdiscectomy was not caused by his January 5, 2017 fall. Instead, Claimant's pre-existing medical records reveal increasing lower back pain and right lower extremity radicular symptoms prior to January 5, 2017. Accordingly, the bulk of the persuasive evidence reflects that the microdiscectomy recommended by Dr. Biggs is not causally related to Claimant's January 5, 2017 trip and fall.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for a microdiscectomy as recommended by Dr. Biggs is denied and dismissed.

2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 7, 2017.

DIGITAL SIGNATURE.

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

Did Claimant prove that a C4-C7 fusion proposed by Dr. Sung is reasonable and necessary treatment for his admitted injury?

FINDINGS OF FACT

1. Claimant is a firefighter with Employer. He injured his neck on July 21, 2016 while working the scene of a serious motor vehicle accident. He slipped on a piece of plastic and fell backward onto his outstretched right arm. Claimant's head "whipped" backward and to the right, the force of which was magnified by the weight of his 5-6 pound helmet.

2. Claimant immediately felt pain in his neck. Within ten minutes of the incident, Claimant developed "pins and needles" going down his right arm to his thumb and index finger.

3. Employer referred Claimant to Integrity Urgent Care, which has been the primary occupational medicine provider.

4. Claimant had a cervical MRI on July 27, 2016. The radiologist interpreted the MRI as showing: (1) "severe" right-sided facet arthropathy and hypertrophy at C3-4 and C4-5 causing significant stenosis and crowding/impingement of the right C4 and C5 nerve roots; (2) increased T2 signal in and around the C3-4 and C4-5 facet joints; (3) "mild" bilateral facet arthropathy and bony spurring on the left side at C5-6 protruding into the neural foramen and left lateral recess, causing chronic foraminal and lateral recess stenosis with "crowding" of the left C6 nerve; (4) moderate right neural foraminal stenosis and mild right lateral recess stenosis at C6-7 "without nerve compression." The radiologist commented that the right C3-4 and C4-5 facet abnormalities were more pronounced than expected and may be related to trauma. The radiologist suggested a CT scan to further evaluate the facet arthropathy.

5. Claimant saw Dr. Roger Sung for a surgical consultation on August 4, 2016. His physical examination was within normal limits except for mild cervical tenderness. Dr. Sung's interpretation of the MRI differed slightly from that of the radiologist. Dr. Sung noted multilevel degenerative changes with neuroforaminal narrowing on the right side at C4-5, C5-6, and C6-7. Dr. Sung did not comment on the left-side findings the radiologist appreciated at C5-6. Dr. Sung referred Claimant to Dr. Mark Meyer for epidural steroid injections (ESIs) at C4-7. Claimant was eager to return to work as soon as possible, so Dr. Sung released him to modified duty.

6. Claimant's first appointment with Dr. Meyer occurred on August 31, 2016. Claimant reported pain, numbness and tingling at the base of his neck on the right side,

extending into the trapezius and right shoulder, down the right biceps into the right thumb and right index finger. Dr. Meyer noted the imaging studies showed neuroforaminal stenosis and impingement of the right C4, C5, and C6 nerve roots. Dr. Meyer thought he could cover C4 through C8 with a single injection. He recommended Claimant postpone PT because he was in too much pain to tolerate it.

7. Dr. Meyer administered three fluoroscopically-guided cervical ESIs between September 13, 2016 and January 17, 2017. The first injection was targeted at C6-7 and the other two were directed to the C5-6 level. The third injection also included a diagnostic C6 selective nerve root block (SNRB). Claimant had no symptom relief "whatsoever" from the ESIs or the SNRB.

8. Claimant worked modified duty for approximately two months. On October 16, 2016, he was at the scene of another accident and experienced severe pain while trying to help with the Jaws of Life. Claimant's officer noticed his condition and sent him home. He has been off work since then.

9. Claimant saw Dr. Rachel Basse for an Independent Medical Examination (IME) at Respondents' request on November 8, 2016. Claimant was "very frustrated" and "bummed" about being out of work. Claimant was having difficulty sleeping due to his symptoms and had curtailed most recreational activities. Dr. Basse noted a "possible" decreased right biceps reflex. Pinprick sensation was normal. Strength was excellent except "possible slight decrease in the right biceps compared to the left." Claimant was tender at approximately C5-6 in the facet and paraspinal regions, and palpation caused numbness going to the right thumb and index finger.

10. Dr. Basse opined Claimant "has local right approximately C5-6 level symptoms with radiating paresthesias in a C6 distribution. His right biceps reflex is down very slightly and his right biceps strength is also very slightly decreased." Dr. Basse recommended EMG/NCV testing to rule out an acute right C6 radiculopathy. If the EMG were positive, Claimant should consider a transforaminal ESIs at that level. If ESIs did not help, Claimant should return to Dr. Sung for consideration of surgery.

11. Dr. Michael Sparr performed EMG/NCV testing on November 21, 2016. Claimant reported constant radiating pain into the lateral right arm, dorsal forearm, thumb and index finger, with intermittent numbness and tingling. Claimant was exquisitely tender to palpation of the right-side C3-C4, C4-5 and C5-6 facets. Palpation of the facets caused radiating pain in the right upper extremity similar to Claimant's usual symptoms. Claimant's cervical range of motion was significantly limited. Facet loading was "markedly positive." There was significant muscle tension and myofascial tightening of the cervical and parascapular musculature.

12. Dr. Sparr performed an EMG of multiple upper extremity muscles and the cervical paraspinals within the C5, C6, and C7 myotomes. There was normal insertional activity in all upper extremity myotomes with no evidence of acute denervation. Cervical paraspinal denervation was evident at C4-5, C5-6, and C6-7, which Dr. Sparr opined can reflect damage to the posterior primary rami but "is not diagnostic of cervical

radiculopathy in the absence of additional denervation within the upper extremity myotomes." Accordingly, Dr. Sparr characterized the electrodiagnostic study as "essentially normal."

13. Dr. Sparr opined much of Claimant's cervical pain was likely facetogenic, corresponding to the MRI findings. He stated the upper extremity symptoms "are likely triggered by severe facet arthralgias causing profound myofascial tightness and cervical radiculitis, versus somewhat of a myogenic thoracic outlet syndrome." He recommended right-sided facet injections and a course of massage therapy to decrease cervical myofascial tightness.

14. Claimant returned Dr. Sung on January 18, 2017, and reported his right upper extremity symptoms had slowly worsened. Dr. Sung recommended a C4 to C7 discectomy and fusion.

15. Dr. Michael Janssen reviewed the surgical request for Insurer on January 23, 2017. He noted Claimant's extensive degenerative changes predated the injury. Dr. Janssen opined "the surgery in itself may be indicated . . . [n]onetheless, the indications for this surgery . . . are not occupationally related." Dr. Janssen further opined "if the surgeon continues to feel this is appropriate despite a negative EMG and a long-standing chronic condition, it should be approached with caution through his private health care coverage, as more likely than not, it would probably keep this patient from returning to this type of an occupation."

16. Claimant saw Dr. Jack Rook for an IME at the request of his counsel on March 20, 2017. Claimant reported 7/10 right-sided neck pain with severe paresthesias from his neck down the right upper extremity to the thumb and index finger. Physical examination of the right upper extremity revealed a decreased right biceps reflex and decreased pinprick sensation in the thumb and index finger of the right hand. There was palpable spasm and severe tenderness with palpation of the right paracervical musculature, and moderate tenderness of the right upper trapezius. Dr. Rook diagnosed cervical radiculopathy with physical examination findings consistent with involvement of the right C5 and C6 motor nerve roots and the C6 and C7 sensory nerve roots. Dr. Rook also noted the MRI showed right C4 nerve root impingement and evidence of acute injury to the right C3-4 and C4-5 facet joints. Dr. Rook opined the whiplash event and violent right lateral flexion of his head would have caused acute compression of several right-side cervical nerve roots.

17. Dr. Rook disagreed with Dr. Sparr's interpretation of the EMG as normal, because denervation in the paracervical musculature is evidence of a nerve root injury involving at least the posterior ramus motor nerve roots. He opined the upper extremity denervation potentials may have been lost because the EMG was performed so long after the injury. He also noted the EMG results cannot be used to assess the possibility of a C4 radiculopathy because it tested no muscles enervated by the right C4 nerve root. Dr. Rook opined that any surgery may need to include the C3-4 level.

18. Dr. Brian Reiss performed an IME for Respondents on May 17, 2017. Dr. Reiss opined the proposed surgery is unlikely to relieve Claimant's symptoms. He noted that the most severe MRI findings are at C3-4 and C4-5, neither of which has been investigated with facet blocks, medial branch blocks, or ESIs. Dr. Reiss stated there were no significant MRI findings at C5-6 or C6-7 on the right side, and no findings which could account for Claimant's right thumb and index finger numbness. As a result, Dr. Reiss opined that the requested fusion would be very unlikely to relieve Claimant's upper extremity symptoms. Dr. Reiss further opined the proposed fusion would put additional stress on the degenerated C3-4 level and likely cause additional problems in the future. Dr. Reiss opined surgery is premature because Claimant's pain generator has not been adequately identified. He stated there is no good objective evidence to support that Claimant's pain is coming from C5-6 or C6-7, but there it is good objective evidence to conclude Claimant's pain is coming from C3-4 and C4-5.

19. Dr. Reiss proposed an alternate plan beginning with facet blocks at C3-4 and C4-5, which he believes will improve Claimant's symptomatology. However, if the facet blocks are unsuccessful, Claimant should try medial branch blocks at those levels, possibly followed by facet rhizotomies. If those interventions do not help, the next step would be right-side ESIs at C3 and C4. Finally, depending on Claimant's response to the diagnostic (and potentially therapeutic) blocks, Claimant may need a posterior decompressive surgery at C3-4 and C4-5.

20. Dr. Sung testified in a deposition dated May 25, 2017. Dr. Sung reviewed the MRI images and saw compression at C4-5, C5-6, and C6-7 to account for Claimant's radicular symptoms. Dr. Sung disagreed with the radiologist's interpretation of significant nerve compression at C3-4. Dr. Sung agrees that injections targeting C3-4 and C4-5 might help Claimant's axial neck pain, but does not think they will address Claimant's upper extremity symptoms. Dr. Sung opined that a negative EMG does not rule out radiculopathy, and Claimant's lack of response to the previous cervical injections is not necessarily a contraindication to surgery.

21. Dr. Reiss testified at hearing to elaborate on the opinions expressed in his IME report. Although Dr. Reiss did not have the MRI images available during his IME, he reviewed the films before the hearing. Dr. Reiss agreed with the radiologist's interpretation of the MRI and did not see evidence of right-side nerve root compression at C5-6 or C6-7. Dr. Reiss stated the significant findings at C5-6 are actually on the left side. Dr. Reiss opined Claimant's symptoms "mimic" a C6 radiculopathy, but are not a true radiculopathy because there is no compression of the C6 nerve root. Dr. Reiss opined the C6 nerve root may have been temporarily compressed and injured during his accident, which could account for some of Claimant's symptoms in the C6 distribution. But surgery would not relieve those symptoms because there is no ongoing compression of the nerve. Alternatively, Claimant's symptoms may reflect thoracic outlet syndrome or may be caused by tightness and spasm of the cervical muscles. He indicated none of those issues would respond to the proposed fusion.

22. Claimant failed to prove that the C4-C7 fusion proposed by Dr. Sung is reasonable and necessary at this time. The ALJ finds the surgery is not reasonable and

necessary now because Claimant has not tried Dr. Reiss' proposed treatment plan, which has a reasonable prospect of alleviating Claimant's symptoms or further diagnosing his condition.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even after an admission of liability is filed, the respondents retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonable and necessary." Section 8-42-101(1)(a). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The ALJ found this case to be particularly challenging. Claimant is highly credible and obviously motivated to improve his condition so he can resume a normal life. Nobody is disputing that Claimant has significant symptoms, and he is understandably searching for a solution to them. The ALJ is faced with a disagreement between two surgeons, both of whom presented cogent, well-reasoned explanations for their recommendations. The surgery proposed by Dr. Sung may certainly be helpful, but if Dr. Reiss is correct, the surgery will not help at all, and may actually make Claimant worse.

Part of the difficulty in this case is that the MRI is subject to differing interpretations. While MRIs are very useful diagnostic tools, they are not perfect, and more subtle abnormalities can be difficult to interpret definitively. The ALJ is reluctant to second-guess Claimant's treating surgeon, but also hesitant to approve such a major procedure while there are still unexplored options and potential pain generators.

Dr. Reiss' hypothesis can be tested with minimal risk to Claimant and in a relatively short period. If more focused evaluation reveals the C3-4 level is not a significant source of symptoms, Claimant can still pursue surgery in the future. Although the ALJ is sympathetic to Claimant's desire to obtain relief quickly, Claimant does not appear to have the sort of progressive neurological deficits that would require surgery on an urgent basis. Based on the evidence presented, the ALJ concludes it is most appropriate to pursue Dr. Reiss' proposed treatment plan before moving forward with

the proposed fusion. Accordingly, Claimant has failed to prove that a C4-C7 fusion is reasonable and necessary at this time.

This decision is not intended to foreclose Claimant's ability to pursue this or any other surgery at a later date if Dr. Reiss' proposed treatment plan proves unsuccessful.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of a C4-C7 fusion surgery is denied.

2. Respondents shall cover the treatment plan recommended by Dr. Reiss.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm

DATED: July 12, 2017

Patrick C.H. Spencer II

Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-013-808-03

ISSUES

- Whether Claimant established by a preponderance of the evidence that she sustained a compensable occupational disease in the form a right shoulder injury during the course and scope of her employment with Employer?

- Whether Claimant has established by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury?

- Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits beginning on May 6, 2015, until properly terminated under law?

- Whether Claimant was responsible for her termination?

STIPULATIONS

- Claimant earned an Average Weekly Wage (AWW) of $504.15 while working for Employer.

- Claimant has two Colorado workers' compensation claims stemming from the same alleged injury. This Colorado Workers' Compensation Claim, identified as W.C. No. 5-013-808, and W.C. No. 4-992-580. W.C. No. 4-992-580 is merged and consolidated with this claim, W.C. No. 5-013-808-03.

- If this claim is compensable, Respondents are entitled to a dollar for dollar offset of all unemployment insurance benefits Claimant received from the Department of Labor received from after the last date that Claimant worked for the insured, May 5, 2015.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer hired Claimant in January 2008 to work at one of its McDonald's fast food restaurants in Denver, Colorado. Claimant's initial job was crew person, and in January 2013, Employer promoted Claimant to shift manager.

2. When Claimant began employment with Employer her duties included deep frying French fries. This involved physically lifting and moving approximately ten 35 – 40 pound boxes of product from a freezer maintained at zero degrees from a high shelf onto a cart, pushing or pulling the cart to a hot area by the fryers, and lifting bags

of products from the cases into a smaller freezer or into the fryer. Claimant testified that when she became shift manager in 2013 she continued to fry hash browns in the morning and French fries in the afternoon. Claimant had to enter the freezer and return to a hot cooking area for both products. Claimant testified that when the restaurant is busy, she performs any job that needs to be done and had to do whatever her supervisor, Mithzy Saenz, told her to do.

3. Claimant testified that she begins work at 5:30 a.m. and that until other employees come in, she is responsible for working the two drive-through lanes, making coffee, frying hash browns, preparing other food items, and giving food to drive through customers. Her duties also included counting seven cash registers, inspecting the restrooms, checking the location's security, running numerous reports on a computer, going into the two freezers to check their temperatures, checking for past-due products in the freezers, checking inventories, and logging some results by hand into a red book.

4. During the hearing, Claimant relied exclusively on the interpreter. The ALJ observed that Claimant did not watch others in the courtroom as they spoke, but rather focused singly on the interpreter. Additionally, she did not attempt to answer any questions before they were translated into Mandarin. Medical records from April 26, 2016 note that Claimant's son "who is Chinese speaking" provided translation services, and that Claimant spoke "limited English." Claimant was accompanied by a professional interpreter at her Respondents sponsored IME, and at her unemployment benefits hearing.

5. Claimant testified that she began experiencing bilateral shoulder pain beginning in April or May 2014, which is consistent with Employer's first report of injury.

6. On April 1, 2015, Claimant sought medical attention from Dr. Christopher Mote for her bilateral shoulder pain. Dr. Mote provided Claimant a letter explaining that she was experiencing bilateral shoulder pain with reduced range of motion, and was undergoing further testing to determine the cause of her severe pain. The note provided, "She is not to return to work until her next appointment in 7-10 days at which time we will re evaluate her readiness to return to work."

7. Claimant testified that she showed the note to her manager, Mithzy Saenz, explaining that she needed time off and to take medication. Ms. Saenz did not inquire whether Claimant was injured at work, did not refer Claimant to a Workers' Compensation medical provider, and did not complete any report of injury.

8. Claimant associated her symptoms with going from hot areas around the frying equipment to the extreme cold of the freezers, and then back to the hot fryer area. She also attributed her symptoms to lifting heavy boxes of frozen from above shoulder level.

9. Claimant returned to Dr. Mote on April 23, 2015; April 29, 2015; and May 6, 2015. Dr. Mote wrote similar letters after each of these visits noting that Claimant

could not return to a job that required significant lifting or overhead work, and that Claimant was a candidate for short term disability.

10. Claimant testified that she faxed Employer the April 1, 2015, and April 23, 2015, notes and called Employer. Employer did not respond to her faxed notes or return her phone calls. Claimant later faxed the April 29, 2015; and May 6, 2015, notes to Employer's office and left additional phone messages. Again, Employer did not respond to her faxed notes or return her phone calls.

11. Claimant's last day of work was May 5, 2015. She did not return to work after that because Employer would not limit her duties to comply with her doctor's restrictions. Claimant testified that she was forced to leave because of her injury.

12. Claimant testified that Employer did not recognize her work restrictions and had her perform her regular duties. Claimant testified that continuing to work her regular duties caused her symptoms to worsen.

13. On May 18, 2015, Claimant treated with Cherie Reichart, M.D. Dr. Reichart gave Claimant a letter stating that Claimant had a chronic right frozen shoulder and was disabled at that time. Claimant testified she faxed the note to Employer's office and left two phone messages. Again, Employer did not respond.

14. On August 12, 2015, Dr. Reichart referred Claimant for an MRI of her right shoulder. Bao Nguyen, M.D. performed the MRI. His impression was "mild central rotator cuff tendinosis with early/shallow bursal surface fraying of the anterior distal supraspinatus tendon."

15. On August 14, 2015, Dr. Reichart referred Claimant for physical therapy to evaluate and treat Claimant for the problems identified by MRI and for her diagnosis of frozen shoulder. Dr. Reichart referred Claimant to two specific physical therapy offices. Claimant faxed the physical therapy referral to Employer's office. Employer did not respond. Claimant was not able to participate in physical therapy because it is not covered by Medicaid, Claimant's private insurer.

16. On August 17, 2015, Dr. Reichart treated Claimant and provided another letter stating that Claimant was unable to work because of her frozen shoulder.

17. Employer's first report of injury was not completed until August 28, 2015. Employer left numerous questions unanswered, responded "unknown" to seven questions, and incorrectly indicated that Claimant's illness caused her death.

18. Claimant's medical history includes rheumatoid arthritis diagnosed in April 2015 and malnutrition which was not diagnosed until March 2016. The malnutrition diagnosis was accompanied by a diagnosis of chronic pancreatitis. Between March 26, 2016 and April 5, 2016, Claimant was hospitalized at Parker Adventist for the surgical removal of a pancreatic tumor which the ALJ reasonably infers contributed to her malnutrition diagnosis.

19. On March 27, 2017, Claimant underwent a Respondents' sponsored medical examination performed by Linda A. Mitchell, M.D. According to Dr. Mitchell's report, her entire evaluation of Claimant lasted approximately forty minutes. Dr. Mitchell reviewed five medical records and Exhibit N, Claimant's purported job duties, dated June 6, 2016. After examining Claimant, Dr. Mitchell diagnosed bilateral adhesive capsulitis and rheumatoid arthritis. Dr. Mitchell did not address Claimant's right shoulder MRI, or Dr. Nguyen's impression of "mild central rotator cuff tendinosis with early/shallow bursal surface fraying of the anterior distal supraspinatus tendon. Basing her causation analysis on Employer's purported job description; Dr. Mitchell determined Claimant's condition was not work related.

20. Dr. Mitchell testified at hearing as an expert in occupational medicine. The ALJ notes that while Dr. Mitchell graduated from medical school in 1984, she did not complete her residency in occupational medicine until June 1999. Dr. Mitchell has held ten different jobs since graduating from medical school. Dr. Mitchell testified that she did not review x-rays of Claimant's shoulders or the MRI. Rather she noticed that the MRI was negative for acute bony abnormalities. Relying on Exhibit N, Dr. Mitchell opined that Claimant's shoulder problems were not caused by her work duties.

21. On cross examination, Dr. Mitchell acknowledged that Exhibit N did not accurately reflect Claimant's job duties. She also conceded the following:

- Rheumatoid arthritis can be identified on MRI but was not identified on Claimant's MRI. Had it been present, a radiologist would note it.
- Adhesive capsulitis can follow rotator cuff lesions which Claimant had.
- Repetitive lifting and repetitive trauma can cause rotator cuff lesions.
- Claimant's decreased range of motion is consistent with a rotator cuff injury.
- If Claimant had rheumatoid arthritis, she would be more susceptible to further injury by performing her actual job duties.

22. Exhibit N, Claimant's purported job duties, provides that Claimant:

- Never bent her neck
- Never bent at her waist
- Never squatted, climbed, knelt, or crawled
- Never twisted her neck (Employer left blank whether Claimant twisted at the waist)
- Never power grasped with either had

- Never pushed or pulled with either hand
- Never reached above shoulder level
- Never reached below shoulder level
- Never lifts anything
- Never carries anything
- Was not exposed to extremes in temperature

The ALJ finds that Exhibit N is not a credible description of Claimant's job duties. It defies common sense, and Claimant's credible testimony, that Claimant only used her arms at shoulder level and never lifted or carried anything. That Claimant was not required to work in extreme temperatures was directly contradicted by Claimant's credible testimony that she was required to go into two freezers to check their temperatures, and to check for past-due products.

23. Ms. Saenz admitted that as a crew member, Claimant was required to move frozen boxes of food stacked four to five feet high out of the freezers, to lift and carry the boxes to a cart, and to push or pull the cart to the fry area. When asked about Claimant's exposure to extreme temperatures, she acknowledged that the freezers are maintained at zero degrees, but Claimant was exposed to extreme temperatures "only if you consider zero degrees to be extreme."

24. Claimant filed an application for unemployment benefits which was initially denied. Claimant appealed the denial and a hearing was held on April 4, 2016. The hearing officer found that Claimant left her employment because she could not physically perform her job duties, and that Employer's accommodations had been inadequate because Employer still required Claimant to perform duties that required her to reach overhead. The hearing officer further found that Claimant "told her supervisor that she had to quit because she could not do the work," and "if not for her physical inability to perform her job, the Claimant would not have quit." The Hearing officer concluded that Claimant was not at fault for her termination because the circumstances causing it were outside of her control.

25. Ms. Saenz testified on behalf of Respondents that she was Claimant's supervisor from 2013 until Claimant stopped working for Employer, and that she observed Claimant working four or five days a week. Although Ms. Saenz acknowledged that she arrived at work after Claimant, she testified that Claimant never lifted or carried anything at work. She never saw Claimant lift her arms above her head or work in the freezer. She further testified that Claimant was "good at delegating," and that she spoke with Claimant in English "all of the time." Ms. Saenz testified that if Claimant were to have lifted anything, the heaviest items were 35 pound boxes of frozen French fries and 19 pound boxes of hash browns.

26. When asked when Claimant notified her of Claimant's injury, Ms. Saenz responded not by giving a date, but rather by saying that Claimant had asked for a week of vacation a month in advance to have surgery on her arm. No persuasive evidence supports a finding that Claimant had arm surgery.

27. Ms. Saenz testified that before Claimant reported shoulder problems, she "took a lot of pills," and said she had arthritis "all over her body." No persuasive evidence supports Ms. Saenz' testimony. Rather, Claimant was not conclusively diagnosed with rheumatoid arthritis until after reporting her shoulder problems.

28. The ALJ finds that Claimant is an accurate and credible historian. Her testimony was consistent with objective evidence. The ALJ finds Claimant to be credible.

29. The ALJ finds Ms. Saenz not credible. Her testimony that Claimant never lifted or carried anything at work, that Claimant never lifted her arms above her head, and never worked in the freezer is untenable. Ms. Saenz's testimony that Claimant was "good at delegating," and that she spoke with Claimant in English "all of the time," are controverted by Claimant's use of an interpreter at medical appointments, at her unemployment benefits hearing, and in court, and by her consistent presentation throughout the hearing.

30. At the close of the hearing Claimant asked the ALJ whether the Office of Administrative Courts could pay the interpreter's fees.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. C.R.S. § 8-43-201. A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by C.R.S. § 8-40-201(14), as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, C.R.S. § 8-40-201(14) imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*.

When the precipitating cause of an injury is a pre-existing condition that the claimant brings to the workplace, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to contribute to the injury. *In Re Shelton,* W.C. No. 4-724-391 (ICAP, May 30, 2008). The rationale for the rule is that, in the absence of a special hazard, an injury due to the claimant's preexisting condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Id.* A condition does not constitute a "special hazard" if it is "'ubiquitous' in the sense that it is found generally outside of the employment." *In Re Booker,* W.C. No. 4-661-649 (ICAP, May 23, 2007).

The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), the fact that a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship, simply based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his

symptoms does not mean there is a causal connection between the claimant's injury and work activities.

The ALJ concludes that Claimant established by a preponderance of the evidence that she experienced an aggravation or acceleration of a preexisting condition, namely rheumatoid arthritis. The Judge credits Claimant's testimony about her job duties which include lifting, pushing, pulling and exposure to extreme temperatures. The Judge finds Employer's witness and job description to be incredible. And the Judge finds Dr. Mitchell's opinions expressed in her report not persuasive as they are based on Employer's not credible job description. Rather, the Judge credits Dr. Mitchell's testimony on cross examination that (1) Rheumatoid arthritis can be identified on MRI but was not identified on Claimant's MRI. (2) Had it been present, a radiologist would note it. (3) Adhesive capsulitis can follow rotator cuff lesions which Claimant had. (4) Repetitive lifting and repetitive trauma can cause rotator cuff lesions. (5) Claimant's decreased range of motion is consistent with a rotator cuff injury. And (6) If Claimant had rheumatoid arthritis, she would be more susceptible to further injury by performing her actual job duties.

Claimant has established by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

The employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

The ALJ concludes based on the totality of the evidence that Employer did not establish by a preponderance of the evidence that Claimant was responsible for her termination. Rather, the Judge credits Claimant's testimony that Employer gave Claimant duties beyond her restrictions and did not take Claimant off work during her disability. The Judge finds Employer's witness's testimony about encouraging Claimant to work within her restrictions not incredible. The Judge credits Claimant's testimony that she repeatedly provided Employer with copies of her doctor's notes and received no response from Employer. Thus, Respondents have not persuaded the Judge that Claimant was responsible for her termination.

Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits beginning on May 6, 2015, until properly terminated under law.

OAC Rule 21 A provides that all proceedings be conducted in English. A party that does not adequately speak or understand English must arrange for a foreign language interpreter to be present at any hearing. Additionally, the Office of Administrative Courts shall not provide foreign language interpreters. Therefore, the OAC is unable to pay for Claimant's interpreter.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is compensable.

2. Claimant is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. Respondents are responsible for payment for such care from the time she reported her injury until terminated by order or operation of law.

3. Claimant shall receive temporary total disability benefits from April 15, 2015 until terminated by order or operation of law.

4. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

5. Issues not expressly decided herein are reserved to the parties for future determination.

6. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 17, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-013-808-03

ISSUES

- Whether Claimant established by a preponderance of the evidence that she sustained a compensable occupational disease in the form a right shoulder injury during the course and scope of her employment with Employer?

- Whether Claimant has established by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury?

- Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits beginning on May 6, 2015, until properly terminated under law?

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STIPULATIONS

- Claimant earned an Average Weekly Wage (AWW) of $504.15 while working for Employer.

- Claimant has two Colorado workers' compensation claims stemming from the same alleged injury. This Colorado Workers' Compensation Claim, identified as W.C. No. 5-013-808, and W.C. No. 4-992-580. W.C. No. 4-992-580 is merged and consolidated with this claim, W.C. No. 5-013-808-03.

- If this claim is compensable, Respondents are entitled to a dollar for dollar offset of all unemployment insurance benefits Claimant received from the Department of Labor received from after the last date that Claimant worked for the insured, May 5, 2015.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer hired Claimant in January 2008 to work at one of its McDonald's fast food restaurants in Denver, Colorado. Claimant's initial job was crew person, and in January 2013, Employer promoted Claimant to shift manager.

2. When Claimant began employment with Employer her duties included deep frying French fries. This involved physically lifting and moving approximately ten 35 – 40 pound boxes of product from a freezer maintained at zero degrees from a high shelf onto a cart, pushing or pulling the cart to a hot area by the fryers, and lifting bags

of products from the cases into a smaller freezer or into the fryer. Claimant testified that when she became shift manager in 2013 she continued to fry hash browns in the morning and French fries in the afternoon. Claimant had to enter the freezer and return to a hot cooking area for both products. Claimant testified that when the restaurant is busy, she performs any job that needs to be done and had to do whatever her supervisor, Mithzy Saenz, told her to do.

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The ALJ finds that Exhibit N is not a credible description of Claimant's job duties. It defies common sense, and Claimant's credible testimony, that Claimant only used her arms at shoulder level and never lifted or carried anything. That Claimant was not required to work in extreme temperatures was directly contradicted by Claimant's credible testimony that she was required to go into two freezers to check their temperatures, and to check for past-due products.

23. Ms. Saenz admitted that as a crew member, Claimant was required to move frozen boxes of food stacked four to five feet high out of the freezers, to lift and carry the boxes to a cart, and to push or pull the cart to the fry area. When asked about Claimant's exposure to extreme temperatures, she acknowledged that the freezers are maintained at zero degrees, but Claimant was exposed to extreme temperatures "only if you consider zero degrees to be extreme."

24. Claimant filed an application for unemployment benefits which was initially denied. Claimant appealed the denial and a hearing was held on April 4, 2016. The hearing officer found that Claimant left her employment because she could not physically perform her job duties, and that Employer's accommodations had been inadequate because Employer still required Claimant to perform duties that required her to reach overhead. The hearing officer further found that Claimant "told her supervisor that she had to quit because she could not do the work," and "if not for her physical inability to perform her job, the Claimant would not have quit." The Hearing officer concluded that Claimant was not at fault for her termination because the circumstances causing it were outside of her control.

25. Ms. Saenz testified on behalf of Respondents that she was Claimant's supervisor from 2013 until Claimant stopped working for Employer, and that she observed Claimant working four or five days a week. Although Ms. Saenz acknowledged that she arrived at work after Claimant, she testified that Claimant never lifted or carried anything at work. She never saw Claimant lift her arms above her head or work in the freezer. She further testified that Claimant was "good at delegating," and that she spoke with Claimant in English "all of the time." Ms. Saenz testified that if Claimant were to have lifted anything, the heaviest items were 35 pound boxes of frozen French fries and 19 pound boxes of hash browns.

26. When asked when Claimant notified her of Claimant's injury, Ms. Saenz responded not by giving a date, but rather by saying that Claimant had asked for a week of vacation a month in advance to have surgery on her arm. No persuasive evidence supports a finding that Claimant had arm surgery.

27. Ms. Saenz testified that before Claimant reported shoulder problems, she "took a lot of pills," and said she had arthritis "all over her body." No persuasive evidence supports Ms. Saenz' testimony. Rather, Claimant was not conclusively diagnosed with rheumatoid arthritis until after reporting her shoulder problems.

28. The ALJ finds that Claimant is an accurate and credible historian. Her testimony was consistent with objective evidence. The ALJ finds Claimant to be credible.

29. The ALJ finds Ms. Saenz not credible. Her testimony that Claimant never lifted or carried anything at work, that Claimant never lifted her arms above her head, and never worked in the freezer is untenable. Ms. Saenz's testimony that Claimant was "good at delegating," and that she spoke with Claimant in English "all of the time," are controverted by Claimant's use of an interpreter at medical appointments, at her unemployment benefits hearing, and in court, and by her consistent presentation throughout the hearing.

30. At the close of the hearing Claimant asked the ALJ whether the Office of Administrative Courts could pay the interpreter's fees.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. C.R.S. § 8-40-102(1). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. C.R.S. § 8-43-201. A Workers' Compensation case is decided on its merits. C.R.S. § 8-43-201.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by C.R.S. § 8-40-201(14), as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, C.R.S. § 8-40-201(14) imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*.

When the precipitating cause of an injury is a pre-existing condition that the claimant brings to the workplace, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to contribute to the injury. *In Re Shelton,* W.C. No. 4-724-391 (ICAP, May 30, 2008). The rationale for the rule is that, in the absence of a special hazard, an injury due to the claimant's preexisting condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. *Id.* A condition does not constitute a "special hazard" if it is "'ubiquitous' in the sense that it is found generally outside of the employment." *In Re Booker,* W.C. No. 4-661-649 (ICAP, May 23, 2007).

The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), the fact that a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship, simply based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his

symptoms does not mean there is a causal connection between the claimant's injury and work activities.

The ALJ concludes that Claimant established by a preponderance of the evidence that she experienced an aggravation or acceleration of a preexisting condition, namely rheumatoid arthritis. The Judge credits Claimant's testimony about her job duties which include lifting, pushing, pulling and exposure to extreme temperatures. The Judge finds Employer's witness and job description to be incredible. And the Judge finds Dr. Mitchell's opinions expressed in her report not persuasive as they are based on Employer's not credible job description. Rather, the Judge credits Dr. Mitchell's testimony on cross examination that (1) Rheumatoid arthritis can be identified on MRI but was not identified on Claimant's MRI. (2) Had it been present, a radiologist would note it. (3) Adhesive capsulitis can follow rotator cuff lesions which Claimant had. (4) Repetitive lifting and repetitive trauma can cause rotator cuff lesions. (5) Claimant's decreased range of motion is consistent with a rotator cuff injury. And (6) If Claimant had rheumatoid arthritis, she would be more susceptible to further injury by performing her actual job duties.

Claimant has established by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury.

The employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

The ALJ concludes based on the totality of the evidence that Employer did not establish by a preponderance of the evidence that Claimant was responsible for her termination. Rather, the Judge credits Claimant's testimony that Employer gave Claimant duties beyond her restrictions and did not take Claimant off work during her disability. The Judge finds Employer's witness's testimony about encouraging Claimant to work within her restrictions not incredible. The Judge credits Claimant's testimony that she repeatedly provided Employer with copies of her doctor's notes and received no response from Employer. Thus, Respondents have not persuaded the Judge that Claimant was responsible for her termination.

Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits beginning on May 6, 2015, until properly terminated under law.

OAC Rule 21 A provides that all proceedings be conducted in English. A party that does not adequately speak or understand English must arrange for a foreign language interpreter to be present at any hearing. Additionally, the Office of Administrative Courts shall not provide foreign language interpreters. Therefore, the OAC is unable to pay for Claimant's interpreter.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is compensable.

2. Claimant is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. Respondents are responsible for payment for such care from the time she reported her injury until terminated by order or operation of law.

3. Claimant shall receive temporary total disability benefits from April 15, 2015 until terminated by order or operation of law.

4. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

5. Issues not expressly decided herein are reserved to the parties for future determination.

6. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 17, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that additional spinal injections as proposed by Dr. Finn are reasonable and necessary to treat Claimant's industrial injury?

II. Has Claimant shown, by a preponderance of the evidence, that his continued prescriptions for narcotic medications are reasonable and necessary to treat Claimant's industrial injury?

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained a compensable injury to his low back on or about January 19, 2010 as a result of falling off a step ladder.

2. Dr. Kathy McCranie performed an independent medical examination on January 28, 2016. Dr. McCranie issued her report as a result of that IME (Ex A, pp. 11-25). As part of her evaluation, Dr. McCranie performed a medical record review. Dr. McCranie's medical record review appears to document the medical treatment that Claimant has received as a result of this injury up through the IME date. This treatment included surgery by Dr. George Frey on November 1, 2010 (Ex. A, p. 14).

3. Dr. Frey performed a minimally invasive posterior spinal fusion of the L3-L5 levels. At the time of Dr. McCranie's evaluation, Claimant reported taking 3 to 4 tablets of Oxycodone a day, as well as another 3 to 4 tablets of Norco. Dr. McCranie eventually concluded that Claimant's current narcotic regimen was not appropriate and only partially related to his work injury. As such, Dr. McCranie, at that time, recommended that Claimant should be weaned off of his narcotic medication so that Claimant would be on a significantly smaller dose of narcotics.

4. According to the medical record review performed by Dr. McCranie, Claimant saw a neurologist, Dr. Wolff, on August 10, 2015. Following that examination, Dr. Wolff believed that Claimant may have the diagnosis of chronic inflammatory demyelinating polyneuropathy (CIDP). In her January 28, 2016 report, Dr. McCranie was concerned that this potential diagnosis could be contributing to Claimant's overall pain presentation. At hearing, Dr. McCranie confirmed that Claimant developed this potential CIDP subsequent to his work injury.

5. Claimant saw Dr. Marc Treihaft, a neurologist, on September 28, 2016 (Ex. B, pp. 26-35). Following his evaluation, Dr. Treihaft diagnosed Claimant with a severe sensorimotor polyneuropathy with axial greater than demyelinating features. In his report, Dr. Treihaft was of the opinion that Claimant's severe sensorimotor polyneuropathy was not causally related to the work injury. Dr. McCranie has consistently rendered the opinion that this polyneuropathy was not causally related to his work injury (Ex. A, pp. 10, 24).

6. At hearing, Dr. McCranie testified as to the difference between a radiculopathy and a polyneuropathy. Specifically, Dr. McCranie stated that a radiculopathy is a constellation of symptoms that extend into an extremity as a result of a compressed disk of the spine. Polyneuropathy, on the other hand, is a constellation of symptoms (including pain) that are the result of nerve damage more distal to the trunk. As a result, Dr. McCranie is of the opinion that Claimant's current pain complaints are a combination of any residual radiculopathy as a result of his work injury, and the new, subsequently developed polyneuropathy with the onset date of sometime in 2012.

7. Claimant testified as to the complaints that he was having, particularly complaints that he was having in his feet. As Dr. McCranie has noted, the symptoms that Claimant is reporting in his feet are not because of the work injury, but because of the polyneuropathy.

8. Dr. Treihaft indicated that, with regards to his current pain management, he was receiving benefit in the range of 25% for his neuropathic (sensorimotor polyneuropathy) pain (Ex. B, p. 31). As a result, Dr. McCranie, in her report dated November 8, 2016, concurred with Dr. Treihaft's opinion that 25% of Claimant's symptomology was related to his non-work related sensorimotor polyneuropathy and the other 75% was related to his work injury (Ex A, p. 10).

9. Claimant eventually began treating with Dr. Kenneth Finn. As noted in Dr. McCranie's February 14, 2017 clinical note, Dr. Finn performed his initial evaluation on January 9, 2017 (Ex. A, p. 8). Following his examination, Dr. Finn recommended that Claimant undergo a bilateral L5 epidural steroid injection, and if that was not effective, a bilateral L5-S1 facet block. Respondents, through counsel, indicated at hearing that a former authorized treating physician for Claimant, Dr. Clapp, had made a referral to Dr. Finn for treatment.

10. Dr. McCranie, in a report dated February 14, 2017, indicated that the injections that Dr. Finn was recommending would not be considered reasonable and necessary (Ex. A, p. 9). Dr. McCranie noted that Claimant had previously undergone L5-S1 epidural injections at two levels, without any meaningful relief. As a result, he would not be considered a candidate for a repeat steroid epidural injection.

11. With regards to the lumbar facet injections, Dr. McCranie noted that Claimant had previously undergone medial branch blocks for which he had no diagnostic response. At hearing, Dr. McCranie testified as to the similarity between the facet blocks recommended by Dr. Finn, and the previous medial branch blocks that were performed on Claimant. The facet blocks recommended by Dr. Finn can be both diagnostic and therapeutic for facet generated pain. The medial branch blocks, on the other hand, are only considered diagnostic for facet generated pain. Because Claimant did not have significant enough relief of pain following the medial branch blocks, it was Dr. McCranie's opinion that Claimant did not have a pain generator in his facets. This, in turn, would make the facet blocks recommended by Dr. Finn neither medically reasonable nor necessary.

12. Claimant returned to see Dr. McCranie on May 9, 2017 (Ex. A, pp. 1-7). At that point in time, Claimant had reduced his pain medication to the point that he was only taking two Norco tablets per day (Ex. A, p. 3). Dr. McCranie also noted that Claimant's pain levels had actually dropped from his reported pain levels during the January 28, 2016 evaluation. Dr. McCranie also noted that Claimant continued to perform his regular job duties without any limitations.

13. As a result, it was Dr. McCranie's opinion that Claimant should completely wean off his narcotic medication inasmuch as he has demonstrated the ability to do so, and because ongoing consumption of narcotics at this point (seven years post injury) would no longer be considered reasonable and necessary. Specifically, Dr. McCranie believed that Claimant should wean himself completely off his medications in the next 8 to 12 weeks. Thereafter, it would no longer be considered reasonable and necessary for Claimant to be on any kind of narcotic medication for his work-related injury.

14. In her IME report, Dr. McCranie further noted that Claimant's continued usage of opioids and benzodiazepines is not recommended, "due to the incidence of *death* from respiratory depression with this drug combination" (Ex A, p.24)(emphasis added). Further, according to the Medical Treatment Guidelines, Dr. McCranie noted that "only *one* short acting opioid medication should be used for pain management rather than the two used in the case of Mr. Soden" (Ex. A, p. 25)(emphasis added).

15. In the absence of contrary evidence, the ALJ finds the opinions of Dr. McCranie, and those of Dr. Treihaft, to be credible and professionally rendered, if not persuasive in their entirety.

16. Claimant testified at hearing that the pain he is now experiencing was in no way present prior to his industrial injury. He still suffers from "chronic pain". Claimant had had disputes with Dr. Clapp over his continued prescription of opioid medications, and has made efforts, on his own, to wean himself down from prescribed dosages. He believes his condition might be worsening.

17. The ALJ finds Claimant to be a sincere and credible historian (to his own medical providers, to the IME physicians, and in his testimony) in describing, to the best of his abilities, the symptoms he has experienced, and his desire and commitment for the best medical outcome he can achieve.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

A. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. Section 8-42-101. The right to workers' compensation benefits, including medical benefits, however, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment is proximately caused by an injury arising out of an in the course of employment. C.R.S. Section 8-41-301(1)(c); Faulkner v. Industrial Claim Appeals Office, 12 P.3rd 844 (Colo. App. 2000).

B. Respondents are free to challenge the reasonableness and necessity of current or newly requested treatment, notwithstanding its position regarding previous medical care on a case. See Kroupa v. Industrial Claim Appeals Office, 53 P.3rd 192 (Colo. App. 2002). The question of whether a particular medical treatment is reasonable and necessary and/or related to the claim is one of fact for determination from the ALJ. Id.; Walmart Stores Inc. v. Industrial Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999). Claimant continues to bear the burden to prove her right to specific medical benefits. HLJ Management Group, Inc. v. Kim, 804 P.2d 250 (Colo. App. 1990).

C. To further address the concerns raised by Claimant, the ALJ, in drawing these Conclusions of Law, is not foreclosing further medical treatment for Claimant's industrial injury, which might be shown by competent evidence to be reasonable and necessary. Claimant is encouraged to continue working with his Authorized Treating Provider to seek further Workers Compensation benefits. Such treatment might, or might not, be challenged by Respondents when the time arises. If so challenged, this does not constitute "harassment" by Respondents. It is not necessarily a challenge to anyone's integrity. Rather, it is due diligence which Respondent's are legally authorized to exercise. The interplay of prescribed medications-related or not to the injury at issue-may be discussed to determine the most reasonable course of treatment. When Workers Compensation is paying the bills, the ALJ must make certain decisions. Unfortunately, this can become difficult and uncomfortable for an injured worker to navigate, but it is the state of the law, and Claimant is encouraged to participate in any future legal proceedings to the best of his abilities. In the event some future treatment might be denied, Claimant may always seek treatment outside the Workers Compensation system through whatever means are available.

Injections

D. The ALJ concludes that further injections as recommended by Dr. Finn would not be considered reasonable and necessary. The injections which Dr. Finn is recommending are injections that Claimant has had in the past, with no significant therapeutic or diagnostic benefit. Because there was no significant benefit following these prior injections, Dr. McCranie is of the opinion that Claimant would receive significant benefit from any future injections.[1] At hearing, Claimant provided no testimony that he actually wanted to go through with these injections.

E. As noted in Respondents' Application for Hearing, these injections became an issue for a hearing, inasmuch as Dr. Finn had requested prior authorization for these injections. This, in turn, led to Respondents' Application for Hearing in order to comply with Rule 16-10 of the Workers Compensation Rules.

F. The ALJ concludes that further spinal injections for this claim are not longer reasonable and necessary.

Opioid Medications

G. Dr. McCranie, from her initial evaluation, was of the opinion that Claimant needed to be weaned down from his narcotic medication. Claimant has weaned himself on his own, so that he is only taking low levels of narcotic medications at this time. At the same time that Claimant has been reducing his pain medications, his reported pain levels have actually decreased.

H. As such, Dr. McCranie indicated that there was no reason why Claimant needed to continue to be on narcotic medication for this work injury. As such, Dr. McCranie indicated that Claimant should gradually reduce the remaining levels of narcotics that he is taking so that within a period of no more than 12 weeks, he would be completely weaned off his narcotic medication.

I. According Dr. McCranie's reports and testimony, Claimant's residual symptoms as a result of his work injury are now stable. As a result, there is no evidence in the record that Claimant's symptoms resulting from the work injury will somehow worsen in the future.

J. Claimant has subsequently developed a polyneuropathy, unrelated to his work injury. If it goes untreated, according to Dr. McCranie, it will likely worsen over time. Consequently, to the extent that Claimant's ongoing pain presentation may worsen over time, Respondents submit that that increase in

[1] At hearing, Dr. McCranie testified that, based on her review of Dr. Finn's reports, it does not appear that Dr. Finn reviewed any of the medical records documenting the treatment that Claimant had in the past. Dr. McCranie thought this was important inasmuch as these records documented the fact that Claimant received no substantial benefit from previous injections.

pain will be the result of his polyneuropathy, and not as a result of any residuals of his work injury.

K. However, even both of Respondents experts concur that, as of the filing of their respective reports, only 25% of Claimant's existing symptoms are attributable to his recent polyneuropathy. The remaining 75% is still attributable, and therefore related, to the effects of his compensable work injury. The ALJ has neither seen nor heard evidence to the contrary.

L. While Claimant is laudably in the process of weaning himself off of opioids, and there are admitted risks to some of his concurrent medications, the authorized treating physician(s) for Claimant are in the best position to determine when, and how, Claimant will wean himself off these medications. As of this Order, these medications are still 75% related to his work injury. The ALJ will not further prescribe the details of the weaning process.

ORDER

It is therefore ordered that:

1. The spinal injections as recommended by Dr. Finn need not be provided by Respondents.

2. Respondents' request to reduce, and eventually eliminate, Claimant's prescribed narcotic medications is denied and dismissed.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 18, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant proved by a preponderance of the evidence that she suffered a work related injury in the course and scope of her employment for Employer on October 2, 2015; and

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to reasonably necessary and related medical benefits.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Employer is a meat packing company. Claimant is 44 years old female who resides in Greeley, Colorado. Claimant commenced her employment for Employer on May 18, 2015. Claimant work in a department in which her job duties involved packing a beef meat product (menudo) into a plastic bag, placing the bag into a box, confirming the weight of the box to be 10.9 pounds, and pushing the box onto a conveyor belt. Claimant was supervised in this position by Manual Villarreal.

2. Claimant allegedly injured her left shoulder on the job while lifting or pushing five boxes of meat product on October 2, 2017.

3. Mr. Villarreal has worked at the JBS beef plant for 22 years. Mr. Villarreal has performed the same job duties that Claimant was assigned to perform on her alleged date of injury. Mr. Villarreal testified that the job of packing the meat product involves working at about waist height. The job entails the packer taking the meat product, placing it into a plastic bag and then placing the plastic bag into a box. The box is approximately 12" long, 8" wide, and 4" deep. The boxes are filled with meat product while on a scale and weighed to ensure that the weight of the product is 10.9 pounds. The packer then pushes the box forward onto a conveyor belt.

4. Mr. Villarreal testified that occasionally the conveyor gets backed up, and the packer will then need to move a filled box by lifting the box and placing it on a holding table one or two steps to either the right or the left of the packer. Once the conveyor is clear, the box from the holding table is then lifted and placed back onto the packing surface, and then pushed or lifted onto the conveyor. Mr. Villarreal credibly testified that at no time is there any reason for the employee to lift more than one box at a time. The packer is never required to lift the boxes above shoulder height.

5. Mr. Villarreal denies that Claimant informed him of any pain complaints on October 2, 2015, but instead he was made aware of Claimant's pain complaints on October 5, 2015. According to Mr. Villarreal, after Claimant notified him of her shoulder pain on October 5, 2015, he then escorted Claimant to the Employer's Health Services Department (Health Services). An incident report completed by Claimant notes that she was lifting boxes when she noticed pain in her left shoulder. At Health Services on October 5, 2015, Claimant was noted to have full range of motion and full strength in the left upper extremity; Claimant was provided with Ibuprofen and an ice pack to the shoulder area.

6. At Respondents' request, Claimant was evaluated by Dr. Jeffrey Wunder on February 17, 2016. Dr. Wunder provided an independent medical examination report dated February 17, 2016. Dr. Wunder credibly testified at hearing. Dr. Wunder deemed a Board Certified expert in physical medicine and rehabilitation with Level II accreditation through the Colorado Division of Workers' Compensation.

7. Dr. Wunder reviewed Claimant's medical records, including an emergency room record from Poudre Valley Hospital in Fort Collins, Colorado dated October 16, 2015. The emergency room record reflected that Claimant complained of pain in her left shoulder, however, she exhibited full range of motion in the shoulder.

8. On February 17, 2016, Dr. Wunder's examination of Claimant revealed that Claimant complained of diffuse upper extremity pain; complaints that were non-specific for any injury. Dr. Wunder concluded that Claimant does not have a working diagnosis involving her left shoulder. Utilizing the Medical Treatment Guidelines for Shoulder Injuries (MTG), Dr. Wunder analyzed each of Claimant's left shoulder pain complaints for occupational relationship. Dr. Wunder credibly testified that none of Claimant's job activities fall within the categories for an occupational relationship as defined under the MTG.

9. Addressing the findings on Claimant's shoulder MRI of September 7, 2016, Dr. Wunder testified that without consistent objective clinical findings correlating to the MRI findings, the MRI is not of assistance in the causation analysis.

10. Claimant described to Dr. Wunder that her injury occurred while pushing a box of meat product. However, at hearing Claimant testified that her pain started while lifting boxes.

11. Dr. Wunder credibly testified that there are non-organic issues involved in Claimant's presentation. Specifically, Dr. Wunder concluded that Claimant presented with symptom magnification issues, with non-organic finding on neurologic examination and that Claimant's work activities do not meet any of the DOWC guides for any kind of shoulder injury as a result of her work activities.

12. In closing argument, contained in Claimant's post hearing written submission, Claimant contends that the Judge should find that she is entitled to an order awarding payment of past and future medical bills. Claimant also seeks an award

of one and one half years salary because she claims unjust termination of her employment. Claimant asserts additional conditions of her employment, involving allegations of bullying and name calling, that should be redressed in this matter.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are reached.

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

4. Mr. Villarreal credibly testified that the boxes Claimant packed never weighed more than 10.9 pounds. He further credibly testified that the filled box is typically pushed onto the conveyor belt. He testified that occasionally the box is lifted to be placed on a holding table 1 to 2 steps away from Claimant. Mr. Villarreal credibly testified and the court finds that there was no reason for Claimant to lift more than one box at a time as part of the packer job duties.

5. The medical evidence and testimony of Dr. Wunder is credible and persuasive. Dr. Wunder opined that the pain complaints and Claimant's job activities, as described by Claimant, are not the type of activities that result in a medical condition involving the left shoulder. Dr. Wunder persuasively testified that nonoccupational factors are causing Claimant's pain complaints.

6. Claimant has failed to establish that she sustained a compensable injury to her left shoulder. The judge finds that Claimant's job activities are not responsible for her medical condition involving the left shoulder.

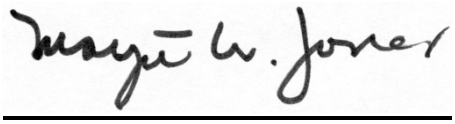
ORDER

It is therefore ordered that:

Claimant's claim for worker's compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 17, 2017



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable injury to his lumbar spine on December 5 and 6, 2016?

II. Has Claimant shown, by a preponderance of the evidence, that his medical expenses to treat his lumbar spine should be paid to the following providers: Concentra, Penrose-St. Francis, American Medical Response, Dr. Daniel Fellhauer, and Actions Potential?

STIPULATIONS

At the outset of the hearing, the parties announced the following Stipulations, which were accepted by the ALJ:

I. Claimant's Average Weekly Wage is $406.75.

II. Should this claim be compensable, the period of Temporary Total Disability shall run from December 7, 2016 through February 9, 2017.

III. The issue of Temporary Partial Disability was withdrawn.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was injured on December 5, 2016 while working as a custodian at NSR Solutions, Inc. He testified that his employer, NSR Solutions, Inc. (hereinafter referred to as "NSR") was awarded the contract to clean various buildings on Peterson Air Force Base in August of 2016. The Claimant testified that as he was cleaning the restroom on December 5, 2016, he attempted to pull a trash bag out of a trash can. He testified that the trash bag became caught on the can resulting in him having to pull harder to release the bag. He eventually pulled the can as well as the trash bag. He testified that when the trash bag got stuck, he felt the immediate onset of pain on the left side in his lumbar spine. Claimant testified that having less time to complete his work contributed to his accident, because he had to work faster.

2. He continued to mop and finish his duties on 12/5/16, believing that the injury was not serious. He stated that he did not report the injury to his employer on 12/5/16

because he thought that if he went home, iced his back and took Ibuprofen, the pain would subside. Although the pain did not subside, the Claimant went to work the next morning, December 6, 2016, and attempted to complete his job duties. He stated that he bent over to clean a urinal, he felt an immediate stab of pain in his lower back and his leg gave out causing him to fall and brace himself against the wall. He testified that the pain was so severe that he was forced to stay in that bent over position until the pain subsided enough that he could make it to the front of the building. He went to the building management office and called his supervisor, Donna Valdez, to report the injury. Upon the recommendation of the building manager, an ambulance was called to transport the Claimant to Penrose-St. Francis Hospital.

3. The Claimant testified that he was given oxycodone and cyclobenzaprine at the emergency room and was discharged later that day. On December 8, 2016, he followed up with Concentra, his employer's authorized treatment provider. The Claimant was seen by Kenneth Ginsburg, P.A. who noted bilateral muscle spasms in the Claimant's lumbar spine as well as tenderness from L1 through L5. He also noted that flexion and extension of the lumbar spine and thoracolumbar sidebending was painful. He diagnosed the Claimant with a lumbar and sacroiliac sprain and prescribed Meloxicam and Methocarbamol.

4. Claimant was referred by P.A. Ginsburg for physical therapy and he took the Claimant off work due the fact that his medications were sedating. (Exh. 12, pp. 1-4). The Claimant continued to receive physical therapy throughout most of December and was seen again at Concentra by P.A. Ginsburg on December 16, 2016. On that date, he returned the Claimant to work with physical restrictions to include lifting no more than 20 pounds occasionally (up to 3 hours per day) and push/pulling up to 20 pounds occasionally (up to 3 hours per day). The Employer was unable to accommodate these restrictions and Claimant remained off work.

5. The Claimant further testified that he previously injured his lumbar spine in 1976 when he fell out of a window. That injury resulted in compression fractures of some of his lumbar vertebra. He still has occasional pain which he attributes to that injury but it has never restricted his activities and he described it as "a different kind of pain" than he has now. He testified that he has consistently worked out and exercised to keep "in shape" and reduce any episodes of back pain from his prior back injury. The Claimant testified he also strained/sprained his lumbar spine in 2010 while at work. This resolved after a round of physical therapy. The Claimant also injured his back in a work-related injury in 2012. Claimant stated that after treatment, the pain resolved, and he has not had any major problems with his back until this injury.

6. On December 27, 2016, Respondents filed a Notice of Contest (citing, without further explanation "Further investigation")(Exh. 3), and the Claimant was notified by Concentra that his physical therapy was discontinued because his case had been closed. The Claimant testified that his condition was improving while he was undergoing physical therapy prior to his claim being closed. Since he felt he still needed treatment, he followed up with his primary care physician, Dr. Daniel Fellhauer.

He saw Dr. Fellhauer on January 9, 2017 who referred him for physical therapy and continued his physical restrictions of no lifting greater than 20 pounds and no excessive repetitive bending, stooping, pushing or pulling for a period of three weeks. The Claimant began physical therapy at Action Potential (Exh. 14) and continued until he could no longer afford the co-pays under his private health insurance. The ALJ finds that his physical therapy and treatment was discontinued by Concentra for non-medical reasons. The ALJ further finds that Claimant's actions were reasonable in seeking alternative treatment, and that he was compliant with his physicians' instructions.

7. On January 26, 2017, the Claimant returned to Concentra for a one time evaluation which the carrier authorized. The medical record from that date notes that the "case was closed by the insurance carrier and apparently he acquired legal assistance and has been authorized for conservative treatment only". Dr. Randall Jones saw Claimant and referred the Claimant for twelve additional physical therapy sessions. Dr. Jones also continued the Claimant's physical restrictions of no lifting greater than 20 pounds occasionally and no pushing or pulling greater than 20 pounds occasionally. On February 9, 2017, the Claimant returned to Concentra and Dr. Jones noted that the Claimant was 80-90% back to pre-injury level" and returned the Claimant to work at his regular duties with no physical restrictions. The Claimant testified at hearing that he returned to work on February 10, 2017 and has continued to work since that time at full duty, being able "to do the trash, the bathrooms, *everything*". (emphasis added).

8. The Claimant was seen by Dr. William Ciccone for an IME at the request of the Respondents on February 22, 2017. Dr. Ciccone testified by deposition on May 3, 3017. Dr. Ciccone also opined that the Claimant sustained a minor strain/strain to his lumbar spine as a result of having to forcefully pull a trash bag out of a trash can. A strain/sprain type injury is consistent with the mechanism of injury that the Claimant described. He opined that the weight of the trash is irrelevant in forming his opinion (Dr. Ciccone Depo. pp. 7-8). Rather, the fact that the liner was stuck and the Claimant had to pull harder to dislodge it was more relevant in forming his opinion. Dr. Ciccone testified that a positive finding in all three of these physical examinations is based on Claimant's subjective complaints. (Dr. Ciccone Depo, pp 4-6). Dr. Ciccone noted that there was no objective evidence that Claimant suffered a strain, and that his findings were based on the mechanism of injury described by Claimant, and the complaints of pain reported by Claimant. (Dr. Ciccone Depo. p8: ll.18-25; p.9: ll.1-4). Dr. Ciccone noted that his findings are also based on the veracity of the Claimant's complaints. (Dr. Ciccone Depo, p.6, ll.8-10).

9. Dr. Ciccone further opined that this injury did not aggravate or accelerate any of the long-standing problems the Claimant had with his back; rather, this was a new injury. He recommended that the Claimant be restarted in PT in order to review an appropriate home exercise program and return to full work duties. (Exh. 10). Dr. Ciccone opined that the Claimant's prior lower back injuries probably made him a little more susceptible to injuring his lower back. (Dr. Ciccone Depo. pp. 10-11).

10. The Claimant was seen by Dr. Timothy Hall for an IME on April 5, 2017. (Exh. 5). Dr. Hall, a board-certified physiatrist testified by evidentiary deposition on behalf of the Claimant. (Exh. 6). Dr. Hall opined to a reasonable degree of medical probability that the Claimant sustained a lumbar spine strain on December 5, 2016 when he attempted to lift the trash can liner and it got stuck. He testified that the mechanism of injury as described by the Claimant was consistent with the Claimant's physical complaints on December 5 and 6, 2016.

11. Dr. Hall noted in his physical exam of the Claimant that there was an asymmetry to the Claimant's posterior superior iliac spines as well as a very tender trigger point to the left quadratus lumborum. The Claimant's sacrotuberous ligaments were tender and the left psoas muscle was tight and tender, inhibiting flexion of the Claimant's hip. (Dr. Hall Depo. p. 8, ll. 1-6). Dr. Hall testified that the asymmetry to the posterior superior spine as well the lack of hip extension is considered to be objective medical findings. (Dr. Hall Depo. p. 13, ll. 14-20). Dr. Hall further opined that he agreed with the Respondent's IME physician, Dr. William Ciccone, regarding the fact that the mechanism of injury as described by the Claimant could result in a strain of one's lumbar spine and/or sacroiliac joint. (Dr. Hall Depo. p. 14, ll. 3-13).

12. Dr. Hall also explained that the day an injury occurs or even the day after an injury occurs, one may not be able to tell an individual sustained an injury simply by observing him. He explained that sprains/strains

> are based on inflammation, and often, it's a day, two, three days after the actual event that the inflammation really develops to the point of creating a lot of symptomatology. So you might not see any signs that someone is in pain the day after an event. Often, you see very little the day of the event, again, because it's like car accidents. You see this all the time when the ambulance gets there, it's like, oh, I'm OK.....the next day, they wake up and they can't get out of bed; and that's about the inflammation. It's the inflammation that causes the pain. So this is–it's not an unusual event or happening to have an event and not be such a big deal. But, then, within the ensuing next couple of days, it becomes a bigger deal." (Dr. Hall Depo. p. 16-17).

Dr. Hall opined that the Claimant's preexisting vertebral fractures which occurred in the 1970's did not play a part in this injury although any soft tissue injuries which occurred at the time of the fractures could create intermittent chronic issues over time and make an individual more susceptible to injury. (Dr. Hall Depo. p. 21, ll. 3-10).

13. Dr. Hall further opined that if Claimant was sitting in a chair after his initial injury while pulling trash out of the bin, you would probably see Claimant "not wanting to sit in one position, wanting to change positions." (Dr. Hall Depo, p.15:18-25; 16:1-8).

14. The Claimant testified that, besides doing his usual job as a custodian, he has also been the Union Shop Steward for his Union for the last six years. He explained

that his job involves protecting his fellow employees and helping them file grievances if they have disputes with the Employer. After the Claimant had finished his custodial duties on 12/5/16, he attended a meeting with Donna Valdez, Nayereh Rassoulpour and Elicia Santisteven. The subject of the meeting was the lack of appropriate time afforded Ms. Santisteven to complete her job duties. In August 2016, NSR was awarded the contract to clean certain buildings on Peterson Air Force Base. The former employer had allowed the employees, including Ms. Santisteven, seven hours to complete their custodial duties. NSR now required that the custodians complete essentially the same duties within five hours. Mr. Estrada felt that five hours was not enough time and admitted that he became very agitated during that meeting, raised his voice and left the meeting before it was concluded. He testified that he did so because he felt that his employer was not listening to the issues and was dismissive of both him and Ms. Santisteven.

15. On November 29, 2016, Claimant, working within his job as the Shop Steward, filed a formal grievance with NSR outlining the employee's issues with the reduced time allowed to complete their duties. (Exh. L, p.166). Claimant drafted a letter to Donna Valdez, the project manager with NSR Solutions. (Exh. L). The letter presented a grievance for Claimant and the other employees that worked in his building, arguing that the employees did not have enough time to complete their tasks, that someone could get injured given the fast work pace, and that "someone is bound to have an accident." (Exhibit L). Claimant testified that he hand-delivered the letter to Donna Valdez, and that his employer did nothing about his complaints. However, the employer did hold a grievance meeting with Claimant on December 5, 2016, to discuss the issues aired in Claimant's November 29, 2016 letter. (Exh. L, letter from Donna Valdez).

16. One issue raised prior to the grievance meeting, as noted in the "Grievance Form" filled out and signed by the aggrieved employee Salvador Estrada, was the "failure of management to recognize and protect the safety of its employees, forcing custodians to work at a frantic pace." (Exh. L). Claimant testified the frantic work pace resulting in an employee getting hurt would be proof that the Respondents' policy was not safe. However, at the grievance meeting several hours after his accident, Claimant did not tell his supervisor or the CEO that he suffered an injury earlier in the day due to the fast work pace.

17. Ms. Rassoulpour testified that during the meeting, Claimant did not show any obvious signs of pain such as grimaces, facial expressions, or verbally indicating that he needed breaks or a rest. During the meeting, Ms. Rassoulpour questioned whether the employees actually did need more time to complete their work. Ms. Rassoulpour proposed switching building assignments of the employees, to ensure employees were familiar with the other buildings.

18. Claimant testified that potentially losing his building assignment did not upset him. Claimant worked in Building 1 for seven years, and has great relationships with the building tenants. Claimant's grievance meeting was less than a month before Christmas. (Exh. L). Unlike other building assignments, in Building 1, Claimant worked in the same property the entire day, and did not have to switch between buildings, which Claimant testified can be a hassle depending on the person.

19. During the meeting, Claimant admits he became “upset” and “angry.” Claimant testified that he was upset because of his workload and the lack of time. Ms. Rassoulpour testified that she told Claimant he would be relocated to another building assignment. Ms. Rassoulpour testified that immediately after she discussed relocating Claimant, he became visibly upset, jumped up, and expressed his displeasure with having employees moved around.

20. Claimant testified that he stood up, gesturing, raised his voice, and left the meeting without permission of his supervisor or the company CEO. In testifying that he ended the meeting, Claimant admitted that he did not have authority to do so, and that the meeting would have to be finished at a later date due to his departure.

21. Claimant testified that he was not concerned about any repercussions for the manner in which he left the meeting. In contrast, Ms. Rassoulpour testified that the manner in which Claimant left the meeting was insubordination, and that she could have punished Claimant.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Worker’s Compensation Act of Colorado (Act), " 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; Faulker v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a worker’s compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A worker’s compensation claim is decided on its merits. *Section 8-43-201, supra.* In accordance with §8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385(Colo.App.2000)*

B. In determining credibility, the ALJ should consider the witness's manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability

C. For an injury to be compensable under the Act, it must arise out of and occur within the course and scope of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. §8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

D. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The existence of a causal relationship between the Claimant's job and his lumbar sprain/strain is a question of fact. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985).*

E. All of the physicians who have examined the Claimant, to include PA Ginsburg and Dr. Randall Jones at Concentra, Dr. William Ciccone and Dr. Timothy Hall have now opined that the Claimant sustained a lumbar strain/sprain on December 5, 2016. This was then aggravated by his cleaning duties on December 6, 2016. This ALJ finds the Claimant's testimony regarding the facts and circumstances of his injury from these dates to be sufficiently credible. The persuasive evidence demonstrates that Claimant injured his lumbar spine on December 5, 2016 which was further aggravated by his custodial duties on December 6, 2016 resulting in his lumbar sprain/strain. While the ALJ is skeptical of Claimant's claims that he was not particularly upset about changing buildings, nor that he was unconcerned about leaving this grievance meeting abruptly, such rationalizations do not overcome the medical evidence. Nor is the possible political motive (calling attention to the faster work pace) sufficient to lead the

ALJ to conclude that his report of injuries was somehow retaliatory. Claimant simply strained his back.

Medical Benefits

F. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, the respondents are only liable for authorized treatment or emergency medical treatment, which may be obtained without prior authorization. See § 8-42-101(1), C.R.S.; *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

G. Claimant sought emergency medical treatment after his back “gave out” while cleaning the urinal on December 6, 2016. He was taken by ambulance (American Medical Response) to Penrose-St. Francis Hospital. This ALJ finds that the treatment rendered by American Medical Response and Penrose-St. Francis was "emergent" in nature because the Claimant’s back pain was so severe that he could hardly ambulate. It was severe enough that an ambulance was called by building management. Respondents are liable for the medical treatment provided by American Medical Response and Penrose-St. Francis Hospital.

H. Authorization refers to a physician’s legal status to treat the industrial injury at the respondents’ expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Once an ATP has been designated, the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office*, 996 p.2d 228 (Colo. App. 1999).

I. Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). Respondents designated Concentra Medical Clinic to attend to the claimed injury pursuant to W.C.R.P. 8-2(A) and C.R.S. § 8-43-404(5)(a)(I)(A). The ALJ concludes that Concentra is the designated provider for this claim. Since this claim is deemed compensable, Respondents are liable for the medical treatment provided by Concentra.

J. The respondent is liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Yeck v. Industrial Claim Appeals Office, 996 P.2d 228 (Colo. App. 1999); Sims v. Industrial*

Claim Appeals Office, 797 P.2d 777 (Colo. App. 1990). Pursuant to § 8-43-404(5)(a), C.R.S., the employer or insurer is afforded the right in the first instance to provide a list of at least three physicians from which list the injured employee may select the physician who attends him. However, § 8-43-404(5)(a), C.R.S. implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. *See Ruybal v. University Health Sciences Center, 768 P.2d 1259 (Colo. App. 1988); Tellez v. Teledyne Water Pic, W.C. No. 3-990-062 (March 24, 1992), aff'd, Teledyne Water Pic v. Industrial Claim Appeals Office, Colo. App. 92CA0643 (Dec. 24, 1992) (NSOP)*. Thus, if the physician selected by the respondent refuses to treat the claimant for non-medical reasons, and the respondent fails to appoint a new treating physician, the right of selection passes to the claimant, and the physician selected by the claimant is authorized. *See Ruybal v. University Health Sciences Center, supra; Teledyne Water Pic v. Industrial Claim Appeals Office, supra; Buhrmann v. University of Colorado Health Sciences Center, W.C. No. 4-253-689 (Nov. 4, 1996); Ragan v Dominion Services, Inc., W.C. No. 4-127-475 (Sept. 3, 1993)*. Whether the ATP refused to treat the claimant for non-medical reasons, whether the insurer had notice of the refusal to treat, and whether the insurer "forthwith" designated a physician who was willing to treat the claimant are questions of fact for resolution by the ALJ. *See Lutz v. Industrial Claim Appeals Office, 24 P.3d 29 (Colo. App. 2000); Ruybal v. University Health Sciences Center, supra; Medina v. La Jara Potato Growers, W.C. No. 4-128-326 (June 1, 1998)*.

K. In this case, the Claimant credibly testified that after he received the Notice of Contest in late December 2016, Concentra notified him that the case had been closed by the insurance carrier and he could not continue treatment at the facility. This is further substantiated by the January 26, 2017 note from PA-C Ginsburg (of Concentra) wherein he noted "ONE TIME EVALUATION TODAY. Case was closed by the insurance carrier and apparently he acquired legal assistance and has been authorized for conservative treatment only". (Exh. 12).

L. The rationale for allowing the passing the right of selection to Claimant is explained, citing *Ruybal*, in *Montano v. Jewish Family Services, W.C. No. 4-396-343 (March 9, 2000).*

> …the purpose of the requirement to designate a physician willing to treat the claimant is to insure that the medical treatment will be considered "authorized" if the claimant succeeds in proving the disputed treatment is compensable (*as found herein*)…(in workers compensation proceedings the term "authorization" refers to a physician's status as a health care provider legally authorized to treat the injured worker). If the Insurer were free to designate an authorized physician who was unwilling to treat the claimant until issues of legal liability were resolved, and the claimant were not then free to select her own authorized physician willing to treat without regard to the Insurer's legal liability, the claimant would be left in a dilemma. Either the claimant would be required to forego treatment until the legal issues are resolved, or the claimant could procure necessary treatment with the understanding that the treatment will never be compensated because it is, by definition,

> unauthorized. The rule established by Ruybal avoids the dilemma by allowing the right of first selection to pass to the claimant where the Insurer fails to designate a physician willing to treat the claimant without regard to issues of legal liability.

M. This ALJ finds that Concentra refused to treat the Claimant for non-medical reasons (denial of the claim by Pinnacol for "Further investigation"); the January 26, 2017 note from Concentra implies that Pinnacol Assurance had knowledge of Concentra's refusal to continue to treat; and Pinnacol did not designate a physician who was willing to treat the Claimant until January 26, 2017. This delay in designation is not deemed to be "forthwith" and this ALJ finds that the right of selection passed to the Claimant as of the end of December 2016, when he was denied treatment. All treatment with Dr. Daniel Fellhauer is deemed authorized and his bills shall be paid by Respondents. As Dr. Fellhauer is an authorized provider, his referral to Action Potential is also deemed authorized. All bills from Action Potential shall be paid by Respondents.

Temporary Total Disability

N. By all accounts, Claimant reached maximum medical improvement on February 10, 2017. He returned to full duty, without restrictions, on this date. By stipulation, since his injuries were compensable, Claimant is owed Temporary Total Disability from December 7, 2016 through February 9, 2017. As noted, Claimant's Average Weekly Wage was stipulated to be $406.75.

ORDER

It is therefore ordered that:

1. Respondents will pay all reasonable and necessary medical expenses from American Medical Response, Penrose-St. Francis Hospital, Concentra, Dr. Daniel Fellhauer, and Action Potential to treat this injury.

2. Respondents will pay temporary total disability benefits from 12/7/16 through 2/9/17, based upon the average weekly wage stipulated to be $406.75.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 20, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that she is entitled to convert her scheduled impairment rating to a whole person award.

- Whether claimant has demonstrated by a preponderance of the evidence that her average weekly wage ("AWW") should be increased to include the cost of health insurance.

- Previously the parties stipulated on the issue of temporary partial disability ("TPD") benefits and an AWW $551.22. Based upon that stipulation, any adjustment to claimant's AWW in this order will only apply to the payment of permanent partial disability ("PPD") benefits.

FINDINGS OF FACT

1. Claimant began her employment with employer on June 1, 1992. She sustained an admitted injury to her right shoulder on January 8, 2014.[1] At the time of the injury claimant was working in the floral department. The injury occurred when the claimant was attempting to use a stem cutter to cut woody stems. Claimant testified that she immediately felt pain in her right shoulder and clavicle.

2. On January 29, 2014, claimant first treated with her authorized treating physician ("ATP") Dr. Patrick O'Meara. Claimant reported to Dr. O'Meara that she had significant swelling and tenderness over the sternoclavicular joint. Dr. O'Meara diagnosed a sprain to claimant's right shoulder and sternoclavicular joint.

3. On March 10, 2014, claimant completed a one-time change of physician from Dr. O'Meara to Dr. Jeffrey Krebs. Claimant was first seen by Dr. Krebs on March 31, 2014. At that time, Dr. Krebs recorded that claimant had tenderness over the right sternoclavicular joint and pain into her right shoulder. Dr. Krebs recommended a magnetic resonance image ("MRI") of claimant's right shoulder. Claimant testified that due to the pain in her right shoulder she could not raise her right arm in March 2014.

4. On May 21, 2014, respondents sent claimant for an independent medical examination ("IME") with Dr. Kathy McCranie. In connection with the IME, Dr. McCranie reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant. During the IME, claimant reported to Dr. McCranie

[1] Early in this claim there was some confusion as to the actual date of claimant's work injury versus the date she reported the injury to employer. The parties agree that the injury occurred on January 8, 2014, even though the recorded date of injury is January 27, 2014.

that she had pain around her right sternum and clavicle with pain in the top and back of her shoulder. Following the IME, Dr. McCranie issued a report in which she opined that it would be necessary to obtain a right shoulder MRI and a work site evaluation.

5. On July 22, 2014, an MRI of claimant's right shoulder showed a mild subacromial/subdeltoid bursitis and mild grade 1 sprain of the acromioclavicular joint ("AC") joint.

6. On August 12, 2014, Dr. McCranie reviewed the MRI results and authored an addendum to her IME report in which she opined that claimant's right shoulder injury was not work related.

7. Claimant did not seek treatment again with Dr. Krebs until November 5, 2015. Claimant testified that she waited to return to Dr. Krebs because she believed employer would not allow her to receive treatment. On November 5, 2015, Dr. Krebs noted palpable crepitus in claimant's right shoulder and "clunking sounds" with internal and external rotation. Dr. Krebs opined that claimant's right shoulder symptoms were caused by her use of the stem cutter at work.

8. Claimant testified that during this claim she has received various modes of treatment including a cortisone shot,[2] physical therapy, massage therapy, and acupuncture. Claimant testified that she received some benefit from the injection, physical therapy, and massage therapy. Claimant has been instructed to continue with a home exercise program.

9. A hearing was previously held on the issues of compensability, medical benefits, and temporary partial disability ("TPD") benefits. On June 13, 2016, Administrative Law Judge Keith Mottram issued an order finding that claimant's January 2014 injury was compensable.

10. Following the determination that claimant's injury was compensable, respondents sent claimant for a mandatory appointment with Dr. Krebs on July 12, 2016. At that time, Dr. Krebs noted that claimant was tender over the right anterior shoulder and the pectoralis major was narrowed "at its point of insertion over the right shoulder laterally".

11. On August 12, 2016, employer offered claimant a full-time position that complied with claimant's work restrictions. Claimant declined that position and did not return to work for employer.

12. On August 29, 2016, an MRI of claimant's right shoulder showed mild subacromial/subdeltoid bursitis, a stable minor interstitial tearing of the anterior supraspinatus tendon and mild acromioclavicular joint degenerative changes.

[2] On October 12, 2016, Dr. Timothy Judkins administered a right subacromial corticosteroid injection.

13. On November 23, 2016, respondents sent claimant for an IME with Dr. Wallace Larson. In connection with the IME, Dr. Larson reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant. At that time, claimant reported her symptoms as pain in the anterior and lateral shoulder and down the right humerus and into the back of the shoulder. Claimant also described to Dr. Larson tenderness throughout her entire right deltoid, trapezius, and right clavicle area. Following the IME, Dr. Larson issued a report in which he opined that claimant's right shoulder symptoms are caused by normal degenerative changes. Dr. Larson also opined that claimant did not have any permanent impairment and could return to full duty work.

14. Dr. Krebs placed claimant at maximum medical improvement ("MMI") on January 11, 2017 and assessed a permanent impairment rating of 15% for claimant's right upper extremity. At that time, Dr. Krebs also released claimant to full duty with no restrictions. Claimant testified that at the time she was placed at MMI she continued to have pain in her right shoulder and clavicle, and swelling in her clavicle.

15. On January 31, 2017, respondent filed a Final Admission of Liability ("FAL") admitting for the MMI date of January 11, 2017 and the impairment rating of 15% for claimant's right upper extremity.

16. On February 9, 2017, claimant timely filed an objection to the FAL and filed the application for hearing in this matter.

17. On March 27, 2017, Dr. Larson was provided with additional medical records and was asked to opine as to whether claimant was entitled to a whole person impairment rating. Dr. Larson opined that because claimant's impairment is limited to her right upper extremity and does not extend beyond that extremity, claimant is not entitled to a whole person impairment rating.

18. Claimant testified that her current symptoms include pain in the "capsule" of her right shoulder and into her clavicle area. Claimant testified that she always has pain following any activity involving her right upper extremity. Claimant described the pain in her shoulder as "pricks of pain and tenderness". In addition, claimant describes pain and swelling in her clavicle. Claimant testified that although she has no pain when she shrugs her right shoulder, she feels a "grainy" sensation when she attempts to rotate that shoulder. Claimant testified that she does not have any pain or issues with the muscles at the base of her neck.

19. Claimant testified that during her employment with employer she had health, dental, and vision insurance coverage for herself, her spouse, and her two stepchildren. On March 1, 2015, employer sent claimant a COBRA[3] notice informing claimant that she had until April 29, 2015 to enroll in continuing health insurance coverage. Per the COBRA letter, the cost of enrollment for claimant and her family was

[3] Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").

$2,014.98 per month (health insurance $1,862.98; dental insurance $130.46; and vision insurance $21.24). This equates to $465.00 per week. Claimant did not purchase this insurance.

20. Claimant testified that she began new employment with Express Employment Professionals ("Express") at the end of March 2017 as a staffing consultant. Claimant testified that she was initially hired on a temporary and part-time basis and currently works "minimal hours". Claimant also testified that her position with Express includes desk work and some office cleaning.

21. Claimant testified that she enrolled in vision insurance with Express for herself and her spouse, but has not enrolled in health or dental insurance with her new employer. Records entered into evidence indicate that the cost for claimant to obtain insurance with Express for herself and her family would be $78.52 per week; ($54.14 per week for medical insurance; $17.82 per week for dental insurance; and $6.56 per week for vision insurance).

22. The ALJ finds claimant's testimony at hearing regarding her symptoms following the work injury to be credible and persuasive. The ALJ notes that claimant's testimony is supported by the medical records. The ALJ credits claimant's testimony and the medical records and finds that claimant has established that it is more likely than not that her injury has resulted in a functional impairment that involves a part of the body that is not contained on the schedule of impairment set forth at Section 8-42-107(2), C.R.S., specifically the pain and swelling in her clavicle.

23. The ALJ credits the March 1, 2015 COBRA letter entered into evidence and finds that the cost to continue insurance for claimant and her family is $2,014.98 per month, or $465.00 per week. The ALJ finds that claimant has demonstrated that it is more likely than not that her AWW should be increased by $465.00 to reflect the cost of continued insurance coverage.

24. The ALJ recognizes that claimant has enrolled in vision insurance with her new employer, Express. However, the ALJ finds no persuasive argument to apply that amount in recalculating claimant's AWW. On the contrary, the ALJ finds that the cost listed in the March 1, 2015 COBRA letter is the accurate cost to claimant for continuing insurance.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2013). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. Section 8-42-107(1) states in pertinent part:

> (a) When an injury results in permanent medical impairment and the employee has an injury or injuries enumerated in the schedule set forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.
>
> (b) When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

4. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his or her body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his or her body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

5. It is the claimant's burden of proof by a preponderance of the evidence to establish both that she suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is the claimant's burden to prove by a preponderance of the evidence the extent of the permanent impairment.

6. As found, claimant has demonstrated by a preponderance of the evidence that she suffered a functional impairment to a part of the body that is not contained on the schedule. As found, claimant has proven by a preponderance of the evidence that she is entitled to an award of permanent impairment benefits based on a conversion to an impairment rating of 9% whole person pursuant to Section 8-42-107(8), C.R.S. As found, claimant's testimony and the medical records are credible and persuasive.

7. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

8. Claimant's AWW must also include the employee's cost of continuing the employer's group health insurance plan, and upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan. Section 8-40-201(19)(b), C.R.S. It is not required that the employee actually purchase the insurance coverage for the AWW to be increased. *Ray v. Industrial Claim Appeals Office*, 124 P.3d 891 (Colo. App. 2005), aff'd. 145 P.3d 661 (Colo. 2006).

9. As found, claimant's AWW shall be increased to reflect the cost of continuation of insurance coverage. Therefore, claimant's AWW shall be increased by $465.00 to an AWW of $1,016.22. As found, the information contained in the March 1, 2015 COBRA letter is credible and persuasive.

ORDER

It is therefore ordered that:

1. Employer shall pay permanent partial disability ("PPD") benefits to claimant based upon an impairment rating of 9% whole person.

2. Claimant's average weekly wage ("AWW") is increased to $1,016.22, but only for purposes of calculating PPD benefits owed to claimant and not to any retroactive temporary disability benefits.

3. Employer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

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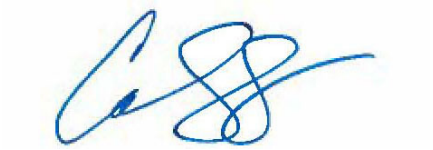
Dated: July 11, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Did Claimant prove by a preponderance of the evidence that she is entitled to an award of the specific post-MMI medical benefit, namely a subarachnoid shunt of the cervical syrinx as requested by ATP Nathan E. Simmons, M.D.?

2. Did Respondent establish by a preponderance of the evidence that all future maintenance medical benefits should be terminated?

FINDINGS OF FACT

1. In 2007, Claimant worked for Employer as an adjunct professor.

2. Claimant's medical history was significant in that she had prior cervical and thoracic pain for which she received treatment. Claimant testified she sustained injuries as a result of playing softball and a motor vehicle accident in 1995. Included in the evidence admitted at hearing were medical reports from her family physician in Virginia.[1]

3. Claimant was seen by Stephen Melhorn, D.O. on March 2, 1995, at which time recurrent neck pain was noted after a motor vehicle accident ("MVA"). By way of history, it was noted Claimant had previously treated the symptoms with Ibuprofen, ice and manipulation therapy with a chiropractor. Dr. Melhorn's impression was cervical and thoracic somatic dysfunction. The medical records documented the fact Claimant received periodic courses of treatment from 1995-2004, including osteopathic manipulative therapy and physical therapy ("PT"). The ALJ noted there was no reference in these records to a diagnosis of or treatment for a cervical syrinx.

4. Claimant also treated for migraine headaches. More particularly, medical records from the Family Practice Specialists of Richmond were admitted at hearing.[2] These records contained no references to cervical pain and/or treatment.

5. On March 7, 2007 (approximately seven weeks before the subject accident), Claimant was evaluated by Joseph Hermann, M.D. for pain in the upper left part of her back. Dr. Hermann's impression was thoracic muscle strain. Claimant was prescribed Soma and OMT treatment.

[1] Exhibit E.

[2] Exhibit F.

6. There was no evidence in the record that Claimant underwent a MRI or CT scan prior to April 2007. Prior to 2008, there was no radiographic evidence that Claimant had cervical syringomyelia.

7. On April 27, 2007, Claimant sustained an admitted industrial injury when she was involved in a motor vehicle accident ("MVA"). She was driving on US 36 after meeting with an intern when she was rear-ended by another vehicle.

8. Claimant testified she injured her neck, low back and shoulders in the collision and was transported by ambulance to the Emergency Department of Exempla Good Samaritan Medical Center. Claimant complained of pain in her cervical spine, as well as a headache. The discharge diagnosis included: closed head injury and motor vehicle accident.

9. Claimant received treatment through Concentra, who was the ATP for Employer. Claimant was initially evaluated by Glenn Petersen, PA on April 26, 2007, who diagnosed cervical, thoracic and lumbar strain. Claimant received conservative care and was initially placed at MMI on July 31, 2007 by Steve Danahey, M.D.[3]

10. An MRI of Claimant's cervical spine was performed on March 31, 2008. The films were read by Jeffrey Guyon, M.D., whose impression was lower cervical and upper thoracic syringomyelia, with septated fluid collection within the cervical cord and marked expansion of the cord as a result. The largest portion of the syrinx was present at C7-T1, but there was also dilatation of the central canal above and below this level, extending to the C2 level and inferiorly into the upper thoracic spine. Posterior disc protrusions were present at C5-6 and C6-7, with mild to moderate canal stenosis and slight compression of the anterior aspect of the cervical cord at these levels. No evidence of subluxation or fracture was identified. Dr. Guyon noted Claimant's history included the fact that the patient sustained a motor vehicle accident one year ago. It was possible that this was posttraumatic, especially given the disc protrusions evident at C5-6 and C6-7.

11. Claimant testified at hearing that the MRI which was done on her cervical spine on March 31, 2008 was the first MRI ever done of her cervical spine. That was the first time she was ever informed she had a cervical syrinx.

12. On May 2, 2008, Claimant was evaluated by James Ogsbury III, MD. At that time, Claimant had complaints of neck pain and shoulder pain, with some weakness and numbness in the left hand. Dr. Ogsbury's impression was cervical spondylosis; neck and left shoulder pain and numbess, work-related; syringomelia C5/6 through T3/4 large, doubt work related. Dr. Ogsbury opined that "[g]iven the magnitude of the syrinx it is very difficult to imagine that the syrinx is related to a traumatic event; it is inconceivable to me that trauma, producing this magnitude of the syrinx, would not produce dramatic symptoms from the beginning". Dr. Ogsbury recommended more PT

[3] All of the 2007 treatment records were not admitted at hearing, but were summarized in Dr. Shogan's record review. [Exhibit 16, p. 67].

and massage therapy. Dr. Ogsbury referred Claimant to Kevin Lillehei, M.D.,[4] but suggested it be done on a private basis.

13. Claimant was evaluated by Dr. Danahey on May 7, 2008. At that time, she reported ongoing pain and discomfort at the base of her neck and her left upper shoulder. Dr. Danahey's diagnoses were: cervical sprain/strain, with questioned left radicular component; syringomyelia, doubt work-related. Dr. Danahey agreed with the referral to Dr. Lillehei, but believed at least the initial evaluation should be through the workers' compensation system. Dr. Danahey requested Dr. Lillehei's opinion on the causation of the syrinx, Claimant's neck complaints, along with the disc bulges. He also restarted Claimant's PT program.

14. On June 16, 2008, Dr. Lillehei evaluated Claimant. He reviewed the MRI scans and noted this appeared to be a non-tumor related cervical syrinx, the etiology of which was unclear. Dr. Lillehei felt this could be secondary to trauma or could very well be iatrogenic with her symptoms exacerbated by the traumatic episode. His plan was to obtain an EMG to rule out the finding of a possible associated radiculopathy from her two-level degenerative disease. This would help determine what symptoms were related to the syrinx.

15. Claimant returned to Dr. Lillehei on July 10, 2008. Claimant had completed the EMG, which showed mild slowing of the median nerve and a new MRI, which was unchanged. Dr. Lillehei opined the cervical syrinx was related to trauma. A disruption of normal spinal fluid had occurred, which can occur from some hemorrhage into the subarachnoid space with secondary adhesions of the arachnid. Dr. Lillehei stated it was possible that this was a pre-existing condition, but nevertheless it was "significantly" exacerbated by her accident. The ALJ was persuaded by this opinion.

16. On December 2, 2008, a General Admission of Liability ("GAL") was filed on behalf of Respondent. In the general remarks section, it was noted this was a revised admission, admitting for medical benefits for a cervical spine syrinx.

17. Claimant returned to Dr. Danahey on December 17, 2008, at which time her symptoms were described as stable. Dr. Danahey noted on the M-164 that Claimant's condition was work-related. Claimant was to undergo an MRI and also return to Dr. Pitzer for trigger point injections.

18. Dr. Danahey determined Claimant reached MMI on February 1, 2009. Claimant sustained no permanent impairment and had no work restrictions. As far as maintenance treatment, Dr. Danahey recommended trigger point injections with Dr. Pitzer, which were performed.

19. On March 2, 2009, a Final Admission of Liability ("FAL") was filed on behalf of Respondent. In the FAL, Respondent admitted for reasonable and necessary medical benefits after MMI.

[4] Dr. Lillehei is a neurosurgeon.

20. Claimant moved to New Hampshire and started treating with Patricia B. Quebada-Clerkin, M.D. at the Dartmouth-Hitchcock Medical Center. Dr. Quebada-Clerkin was an ATP. In the initial note of December 21, 2009, Dr. Quebada-Clerkin documented Claimant's history of being rear-ended in a car accident in 2006. She had persistent bilateral trapezius pain and numbness, more significant on the left. Ultimately, a workup was done (including an MRI), which identified a sizable syrinx from C3 to T5. Dr. Quebada-Clerkin did not have imaging studies available, but the reports specified the syrinx measured approximately 8.7mm. in diameter and was multiseptated, causing some moderate cord expansion**.**

21. Dr. Quebada-Clerkin noted Claimant's symptoms were controlled with conservative therapies. While trigger point injections and other therapies had not worked for her, Botox injections in the trapezius area had given her quite a significant amount of relief. Claimant had no complaints of weakness in her arms or legs. No paresthesias in her arms or legs. No bowel or bladder problems. She had no neck pain, back pin, or lower extremity pain or upper extremity pain. On examination, Claimant had no neurologic dysfunction and brisk reflexes. Dr. Quebada-Clerkin recommended continued conservative therapy and surveillance MRI imaging.

22. Claimant returned to Dr. Quebada-Clerkin on February 8, 2010, at which time she reported no new neurological problems. Dr. Quebada-Clerkin described the syrinx as "post-traumatic". The syrinx was stable and Dr. Quebada-Clerkin was not recommending surgical intervention.

23. On June 22, 2010, Claimant was evaluated by Thomas Ward, M.D. to whom she had been referred by Dr. Quebada-Clerkin for a consultation. Dr. Ward noted Claimant's history of migraines, with aura and without aura, because for several minutes before some of the headaches, the right side of her face would feel odd, which he suspected was sensory aura. She also had a history of being involved in a motor vehicle accident in 2006 after which she developed a post-traumatic syrinx from C3 to T5 and an exacerbation of neck pain, shoulder pain, and worsening of her headaches. The ALJ inferred Dr. Ward believed the MVA worsened exacerbated the syrinx condition in his use of the words "post-traumatic". Dr. Ward noted Claimant had some tendency for her head to pull to the side, so that would be described as a posttraumatic cervical dystonia or torticollis. On examination Claimant had discomfort over the left trapezius, but the posterior paraspinous cervical musculature was not tight. Dr. Ward treated Claimant's migraines by medications and administered a Botox injection in the left trapezius.

24. On February 15, 2011, Claimant underwent a cervical spine MRI and the films were read by John McIntyre, M.D. Dr. McIntyre's findings included: a marked dilatation of the central canal**,** which began minimally at the inferior aspect of C4. Marked dilatation of the canal began at approximately C5-C6 and extended into the thoracic spine. The appearance of the central canal syrinx in the cervical cord was similar to the prior examination. The greatest dimension was in the 11 mm. range and was unchanged in appearance from prior examination at the C7 level. There was no abnormal enhancement. Dr. McIntyre's impression was: 1. Stable appearance of

central cord syrinx in the cervical spine; 2. No mass or abnormal enhancement; 3. disc degenerative changes similar to prior exam; 4. Increase in size of central and left paracentral disc extrusion at T7-T8.

25. On April 1, 2014, Claimant was examined by Peter Quintero, M.D., at the request of Respondent.[5] Claimant complained of numbness in the supraspinatus region, which are varied in severity, as well as a burning sensation. She also had numbness going down her arms. She related she experienced two types of headaches, one of which was a non-migrainous, with variable frequency. She also experienced migraine headaches approximately one time per month. On examination, Dr. Quintero noted normal thoracic curvature, as well as no pain with palpation of thoracic and lumbar sacral spine. Full range of motion was present. Dr. Quintero described Claimant as presenting with a diagnosis of cervical thoracic syringomyelia; neck and proximal left shoulder pain and paresthesias; and recurrent headaches. He divided these conditions into two groups; finding the non-accident related diagnoses included migraine headache disorder; syringomyelia; bilateral epicondylitis; and anxiety. The accident related diagnoses were: muscular contraction headache; exacerbation of syringomyelia. The ALJ was persuaded by Dr. Quintero's opinion that Claimant's migraine headache disorder, epicondilytis and anxiety were not aggravated by the accident.

26. Dr. Quintero noted the syringomyelia may have pre-dated the accident and given her pre-existing history of neck pain and numbness down her arms, these have could have been caused by this condition. However, Dr. Quintero noted with the subsequent development of increased neck pain and numbness of the proximal shoulder and lower back region, it was his opinion that this syringomyelia was made worse by the accident. He did not recommend any additional Botox injections for treatment. Dr. Quintero opined Claimant should be seen at least once a year by Dr. Lillehei or other neurosurgeon to evaluate any possible worsening of the syringomyelia. The ALJ found this opinion concerning causation and the need for maintenance treatment to be persuasive.

27. On January 7, 2014, Nathan E. Simmons, M.D., evaluated Claimant in what was described a follow-up evaluation (the note referenced a prior evaluation in 2012). Claimant had experienced an increase in symptoms after lifting weights.[6] Dr. Simmons reviewed Claimant's recent MRI and noted that "[t]o our review, there has been no significant change in the overall dimensions or scope of the syrinx".[7] He did not recommend any treatment, including surgery. The ALJ concluded that the MRI was objective evidence that the increased pain Claimant experienced while lifting weights was a transitory event and did not aggravate the cervical syrinx.

[5] Dr. Quintero's report documented he was a board-certified neurologist.

[6] This was also referenced in PT notes admitted as Exhibit L, p. 52.

[7] The MRI report was summarized in Exhibit N, pp. 108.

28. The ALJ notes that medical records from the 2011-16 time-frame, which were admitted at hearing documented regular evaluations and treatment for migraine headaches. Gregory Andrecyk, M.D., who was Claimant's family physician, was copied on reports from the various providers who treated Claimant. Claimant regularly took medications for migraines. The ALJ notes there was no evidence in the record Claimant required treatment for what she described to Dr. Quintero as "non-migraine" headaches during 2011-2016. A review of the medical records revealed Claimant did not treat for "contraction" headaches after 2011. Respondent is not liable for treatment of migraine headaches.

29. Claimant testified her neck symptoms have worsened over time. These symptoms were also becoming more frequent. She described the pain as a stabbing pain, which extended to her shoulder.

30. On April 21, 2016, Claimant returned to Dr. Simmons. She reported increasing neuropathic symptoms into her arms, as well as some axial pain. Dr. Simmons noted the syrinx did not look significantly changed in its overall size and configuration. He recommended addressing the syrinx with syringosubarachnoid shunting. The ALJ noted this was the last medical record from Dr. Simmons admitted at hearing and inferred he felt this treatment was the next step in her treatment course after the MVA.

31. Stephen Shogan, M.D. reviewed Claimant's treatment records at Respondent's request. In response to the question of whether the recommended surgery was reasonable, necessary and causally related April 27, 2007 MVA, Dr. Shogan opined it was reasonable to consider undergoing the surgery being recommended. However, he noted this surgery had no guarantee of bringing about relief of Claimant's symptoms and because the syrinx had multiple areas of septation, this could reduce the likelihood of success. Dr. Shogan characterized the causation question as more difficult. He noted Claimant had been experiencing cervical spine pain prior to the accident, which was similar to what she experienced after the MVA. He believed the MVA exacerbated her cervical spine symptoms, but she experienced improvement after the exacerbation. Dr. Shogan also noted Claimant had experienced several exacerbations since the MVA and she was placed at MMI on two occasions. Dr. Shogan thought it was speculative to state the syrinx was related to the MVA and did not believe causation could be stated to a reasonable degree of medical probability.

32. Dr. Shogan opined maintenance treatments including PT, injections and other conservative modalities were reasonable for maintenance and symptom control. He once again noted it was not possible to correlate this need for treatment with the April 27, 2007 MVA.

33. Based upon the totality of the medical evidence, the ALJ concluded the April 27, 2007 MVA exacerbated Claimant's cervical syrinx.

34. Claimant proved the shunt procedure is reasonable and necessary to maintain MMI or prevent the deterioration of her condition (syringomyelia).

35. Claimant has not proven that treatment of migraine headaches, epicondylitis, and anxiety is reasonable and necessary or related to her industrial injury.

36. Respondent failed to prove that post-MMI medical benefits should be terminated.

37. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Grover Medical Benefits

In cases where the Respondents file a FAL admitting for ongoing medical benefits after MMI, it retains the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When Respondent challenges Claimant's request for specific medical treatment, Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether Claimant proved that specific treatment is reasonable and

necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Respondent argued that Claimant most probably had the syrinx condition, which was undiagnosed, before the MVA. Respondent pointed to the cervical spine symptoms and treatment Claimant received before the subject accident as support for this contention. Respondent also averred that, at most, this was a temporary aggravation of the syrinx condition, which was resolved at the time Claimant was placed at MMI. Respondent pointed to the medical evidence in the form of the scans, which showed no change in the syrinx in the intervening nine years since the accident.

A review of the medical records admitted at hearing revealed a divergence of medical opinions on whether the April 27, 2017 MVA exacerbated the cervical syrinx. Claimant relied on the opinions of Dr. Danahey, Lillehei and Quintero. Respondent asserted Dr. Ogsbury's and Shogan's opinions on causation were determinative, as well as the fact that the medical records since the MVA showed no change in the syrinx condition. The ALJ was persuaded that the weight of the evidence established this condition was aggravated and/or accelerated by the MVA. Further, the evidence showed Claimant required treatment, as well as diagnostic testing related to this condition.

In coming to this conclusion, the ALJ relied upon the opinions of Claimant's ATPs. Specifically, Dr. Danahey, initially questioned whether the syrinx condition was aggravated by the MVA and was the cause of her symptoms. (Finding of Fact 13) Dr. Lillehei also questioned the etiology of Claimant's symptoms (Finding of Fact 14.) After additional diagnostic testing, Dr. Lillehei concluded the MVA significantly aggravated the Claimant's syrinx condition (Finding of Fact 15). Dr. Danahey also concluded the syrinx condition was related to the accident. (Finding of Fact 17).

As found, the records of Drs. Quebada-Clerkin and Ward also supported this conclusion. Also, Dr. Quintero opined that the MVA aggravated Claimant's syrinx condition, even though he felt it predated the accident. (Finding of Fact 26). In addition, in continuing to treat the syrinx condition (including the request to perform the surgical shunt procedure), the ALJ inferred that Dr. Simmons opined Claimant's need for further treatment was related to the motor vehicle accident of April 27, 2007. (Finding of Fact 30). Therefore, after treating Claimant and evaluating the objective evidence in the form of diagnostic tests, Claimant's treating physicians concluded that the syrinx condition was work-related. The ALJ credited those opinions.

The ALJ next considered whether the proposed surgical procedure was reasonable and necessary. As determined in Findings of Fact 33-34, the weight of the medical evidence led the ALJ to answer this question in the affirmative and conclude the proposed treatment reasonable and necessary. Even Dr. Shogan (Respondent's expert) supported this conclusion, although he wondered about the efficacy of the proposed procedure. (Finding of Fact 31). Accordingly, Claimant met her burden of proof on this issue and Respondent is required to provide this benefit.

Finally, The ALJ determined Respondent did not meet its burden of proof to withdraw the FAL by establishing it was no longer liable for *Grover* medical benefits. As found, Claimant is entitled to continue to receive treatment for the syrinx condition. However, Respondent is not required to pay for treatment of migraine headaches, epicondylitis and anxiety, which were not caused or aggravated by the accident. (Finding of Fact 35). This includes treatment with Dr. Andrecyk, Claimant's personal physician.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the syrinx treatment recommend by Dr. Simmons, pursuant to the Colorado Workers' Compensation Medical Fee Schedule. Respondent shall pay for treatment following that procedure.

2. Respondent's request for termination of post-MMI medical benefits is denied. Respondent shall continue to provide *Grover* medical benefits for Claimant's syringomyelia condition, including diagnostic testing.

3. Respondent is not required to pay for treatment of migraine headaches, epicondylitis, and anxiety.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 19, 2017

Digital signature

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable left knee injury during the course and scope of her employment with Employer on August 18, 2014 in case number 4-972-238-02.

2. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Bennett I. Machanic, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) and suffered a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury in case number 5-012-306-01.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary total Disability (TTD) benefits for the period April 13, 2016 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 54 year old female who has worked as a Greenhouse Laborer for Employer since 2009. Claimant filed two Workers' Compensation claims involving her left knee that are the subject of this Order.

August 18, 2014 Date of Injury (Case Number 4-972-238-02)

2. Claimant testified that on August 18, 2014 she suffered a left knee injury during the course of her employment while descending a ladder. While carrying garden materials Claimant misjudged the final rung of the ladder and fell onto both knees. Although Claimant notified her supervisor Jesus Padron of the incident she did not report any injury and declined medical treatment. Claimant subsequently continued to perform her regular job duties until she was laid-off for the season in September 2014. Claimant did not obtain any medical care for her left knee from August through November 2014.

3. Claimant returned to work for Employer in December 2014. On December 24, 2014 Claimant told co-worker Letty Calderon that she was going home from work because her leg hurt. When Ms. Calderon asked Claimant if she fell or hurt herself at work, Claimant stated: "No, this happened at home." Another co-worker, Alma Rodriguez, saw Claimant at work sometime after Christmas. Ms. Rodriguez greeted Claimant and asked her what happened because she was on crutches. Claimant responded that she hurt her leg after tripping on some carpet at home. Claimant stated

that she tried to work with her injured leg, but it hurt too much and she had gone to see her personal care physician.

4. Claimant first sought medical treatment for her left knee on December 26, 2014 through Advanced Urgent Care. She was diagnosed with a synovial/Baker's cyst of the left knee. Claimant noted that she had started having pain in the left knee within the past three days and her symptoms had progressively worsened. The physician concluded that there was "no injury." Claimant did not mention any ladder incident at work on August 18, 2014.

5. On January 2, 2015 Claimant visited knee surgeon Mitchel E. Robinson, M.D. at Panorama Orthopedics & Spine Center for an evaluation. Claimant did not mention any work injury on August 14, 2014. Dr. Robinson documented that Claimant presented with pain, crepitus, swelling, decreased range of motion, stiffness, weakness and instability of the left knee. He reported that Claimant "states that the symptoms have been acute non-traumatic" and "began 1 day ago." A physical examination revealed diffuse tenderness, severe crepitation and a negative McMurray's test of the left knee. An x-ray reflected severe tricompartment osteoarthritis. Dr. Robinson injected Claimant's left knee with cortisone. He commented that Claimant might require a total left knee replacement as her symptoms warranted.

6. On January 9, 2015 Employer completed a First Report of Injury regarding the August 18, 2014 incident. Claimant noted that she fell from a ladder and declined treatment through Employer's designated medical provider. The document also noted that Claimant did not lose any time from work as a result of the August 18, 2014 incident.

7. Based on a referral from Dr. Robinson, Claimant visited knee surgeon Aaron Baxter, M.D. on February 5, 2015 for an examination. Dr. Baxter took a history from Claimant that she "injured her left knee *a* few weeks ago while at work. Since then the knee has continued to be painful. She has difficulty weight bearing. There is increased pain at work." Claimant did not mention that she sustained any injury approximately five months earlier on August 18, 2014 when she was descending a ladder at work.

8. Dr. Baxter diagnosed Claimant with degenerative arthritis of the left knee and discussed the possibility of a total left knee arthroscopy. Dr. Baxter did not determine that the need for a total left knee replacement was work-related. He instead suggested that the procedure should be scheduled outside of the Workers' Compensation system because of Claimant's osteoarthritis. Claimant received a left knee injection that provided some relief. She was scheduled for a total left knee replacement but ultimately declined the procedure. Dr. Baxter recommended a return visit when Claimant's left knee symptoms worsened.

9. On August 10, 2016 Claimant filed a Claim for Workers' Compensation for the August 18, 2014 incident. The claim was assigned case number 4-972-238-02.

10. Claimant has failed to prove that it is more probably true than not that she sustained a compensable left knee injury during the course and scope of her employment with Employer on August 18, 2014 in case number 4-972-238-02. Initially, Claimant told Employer that she had fallen from a ladder but declined medical care. She then continued to work her regular, full duty job until September 2014 when she was laid off for the season. Claimant did not seek medical treatment for her left knee until December 2014. She returned to work on crutches and told two co-workers on that she hurt her left knee at home.

11. On December 26, 2014 Claimant sought treatment through Advanced Urgent Care. Claimant noted that she had started having pain in the left knee within the past three days and her symptoms had progressively worsened. Claimant subsequently visited knee surgeons Drs. Robinson and Baxter in January 2015. Instead, Claimant presented to Dr. Robinson on January 2, 2015 with pain, crepitus, swelling, decreased range of motion, stiffness, weakness and instability on the left knee but failed to mention anything about the ladder incident. Claimant told Dr. Baxter that she had injured her knee at work a few weeks before the January 2015 visit. Drs. Robinson and Baxter determined that Claimant might need a left total knee replacement because of her severe, degenerative osteoarthritis. Claimant did not file a claim for Workers' Compensation until August 10, 2016 or approximately two years after the ladder incident. The significant temporal delay, numerous inconsistencies regarding the date of a left knee injury, failure to mention an August 18, 2014 event to medical providers and significant degenerative osteoarthritis renders it speculative to attribute Claimant's left knee symptoms to a fall from a ladder at work on August 18, 2014. Accordingly, Claimant's claim for Workers' Compensation benefits in case number 4-972-238-02 is denied and dismissed.

April 8, 2016 Date of Injury (Case Number 5-012-306-01)

12. Claimant explained that on April 8, 2016 she was walking briskly near an area with flower pots and pallets while working for Employer. Her right foot caught one of the pallets and she fell to the ground on her hands and knees. Claimant remained on the ground for 10 minutes before being helped up by her supervisor and a coworker. Claimant was unable to complete her shift.

13. On April 12, 2016 Claimant presented to Authorized Treating Physician (ATP) Katherine Drapeau, D.O. at HealthONE Occupational Medicine and Rehabilitation with complaints of bilateral knee pain. Claimant specifically reported anterior and posterior pain in her left knee. Dr. Drapeau noted a prior similar injury in which Claimant fell from a ladder. Claimant reported that she was symptom-free prior to the recent fall and rated her current pain at an 8/10 or 9/10. X-rays of Claimant's left knee revealed degenerative joint disease with several loose bodies as well as mildly decreased medial and lateral joint space. Dr. Drapeau diagnosed Claimant with bilateral knee contusions. She prescribed Naproxen, a knee brace and physical therapy. Dr. Drapeau restricted Claimant to only seated work.

14. On May 10, 2016 Claimant underwent a left knee MRI. The MRI revealed a torn medial meniscus.

15. On May 26, 2016 Claimant visited Christopher Isaacs, M.D. for an orthopedic evaluation. Claimant reported that she tripped over a pallet and fell onto her left knee. Dr. Isaacs reviewed the May 18, 2016 MRI that showed complex tearing of the medial and lateral meniscus, mild degenerative changes of the tibiofemoral joint and more significant degenerative changes at the patellofemoral joint. He diagnosed a symptomatic, torn medial and lateral meniscus of the left knee and mild degenerative joint disease. Dr. Isaacs recommended a knee arthroscopy and debridement.

16. On June 14, 2016 James P. Lindberg, M.D. conducted a Physician Advisor review for Insurer. He determined that Claimant's knee complaints were caused by her pre-existing osteoarthritis. Insurer denied Dr. Isaacs' surgical request.

17. On June 21, 2016 Dr. Isaacs sent an appeal to Insurer requesting authorization for Claimant's surgery. He explained:

> Following the event she underwent an MRI which demonstrated complex tearing of her menisci. On the MRI there is an effusion consistent with recent injury. There is no documentation that she had tearing of her meniscus prior to the date of her injury.
>
> I am in receipt of the denial for surgery from Dr. Lindberg. He is denying surgery based on the fact that she had problems with her knee in the past. However, the extent of the problems was not documented. I am not aware of a prior MRI that shows she had a torn meniscus prior to this injury.

18. On August 15, 2016 Claimant underwent a comprehensive independent medical examination with knee surgeon Jon Erickson, M.D. Dr. Erickson engaged in a Level II accredited causality determination and conducted a thorough medical records review. He determined that Claimant's left knee complaints were caused by advanced, chronic, degenerative and pre-existing tri-compartmental osteoarthritis. There was no objective evidence of worsening or aggravation related to the admitted April 8, 2016 knee contusions.

19. On August 31, 2016 ATP Dr. Drapeau placed Claimant at Maximum Medical Improvement (MMI) effective August 15, 2016 for her left knee. She commented that Claimant did not suffer any permanent impairment or require medical maintenance care. On September 2, 2016 Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Drapeau's MMI and impairment determinations.

20. Claimant challenged Dr. Drapeau's MMI and impairment determinations and sought a Division Independent Medical Examination (DIME). On January 18, 2017 Claimant underwent a DIME with Bennett I. Machanic, M.D. He concluded that Claimant had not reached MMI because she required some form of knee surgery. Dr.

Machanic remarked that "the pivotal event is April 8, 2016 but it is not even clear precisely what happened that day." He explained:

> I think there were significant degenerative changes in the left knee, but the April 8, 2016, event appears to have been the point where significant pathology and ongoing impairment developed. Unfortunately the medical record is rather conflicting whether Claimant had additional injuries or not. Under the circumstances in the absence of preceding MRI studies and better documentation of other injuries, I must say that we cannot easily apportion this and it is easiest and most rational to place the entire situation as of April 8, 2016, but it is not even clear precisely what happened on that day.

21. Dr. Machanic concluded that Claimant suffers significant left knee problems and requires surgery. However, he did not know whether the surgery involved an arthroscopic procedure or a total left knee replacement because the type of surgery was admittedly "beyond my area of specialization and I would defer the surgical choices to the surgeons."

22. Dr. Machanic assigned Claimant a 49% left lower extremity rating that converted to a 20% whole person impairment rating. The rating included an impairment for arthritis and a meniscus tear. At the end of his report Dr. Machanic recommended that Claimant have medial meniscus tear surgery because the meniscal tears were consistent with the work injury. Dr. Machanic repeated that "I must caution that there are inconsistencies in the record and it is hard for me to accept at face value that everything that I see clinically today is just related to the one injury of April 8, 2016."

23. On April 18, 2017 Claimant underwent an independent medical examination with Dr. Lindberg. In addressing causation, Dr. Lindberg determined that Claimant's left knee MRI did not reflect an acute injury. Dr. Lindberg also did not think Claimant's injuries were traumatic enough to cause the meniscal tears or that the mechanism of injury was consistent with meniscal tears. He concluded that Claimant's problem was advanced osteoarthritis secondary to age and patellar malalignment. Contrary to Dr. Machanic's DIME opinion Dr. Lindberg explained that that there was no evidence of an aggravation, acceleration, or exacerbation because Claimant was already symptomatic. Accordingly, Claimant did not suffer an industrial left knee injury on April 8, 2016.

24. Dr. Erickson testified at the hearing in this matter. He maintained that Claimant's left knee complaints were caused by advanced, chronic, degenerative and pre-existing tri-compartmental osteoarthritis. There was no objective evidence of worsening or aggravation in Claimant's left knee related to the admitted April 8, 2016 knee contusions. Dr. Erickson noted that "had this minor injury not occurred to her knee it is more likely than not that her symptoms would be identical to what they are right now."

25. Dr. Lindberg also testified at the hearing in this matter. He maintained that Claimant's left knee complaints were caused by chronic, degenerative and pre-existing osteoarthritis. There was no objective evidence of worsening or aggravation in Claimant's left knee related to the admitted April 8, 2016 injury. Dr. Lindberg commented that Claimant's left knee MRI revealed a chronic, degenerative condition and not an acute injury. He specifically remarked that Claimant's left knee condition was in the same condition that it would have been absent the April 8, 2016 fall.

26. Dr. Lindberg also addressed Dr. Machanic's DIME determination. He explained that physicians are instructed at the Division of Workers' Compensation Level II training course to perform a causality assessment regarding an injury. However, Dr. Machanic failed to perform a causality assessment, violated the Level II training mandate and thus erred in his DIME determination that Claimant has not reached MMI.

27. On June 6, 2017 the parties conducted the post-hearing evidentiary deposition of Dr. Machanic. Dr. Machanic testified that Claimant suffered a left knee injury on April 8, 2016 and required surgical intervention to alleviate her pain. He deferred to surgeons for a determination of the appropriate type of left knee surgery. Dr. Machanic specifically explained that "I am responding to four orthopedic surgeons, but I'm cast in the role, actually, of the referee because I'm a Level II examiner, so I don't really take sides." Dr. Machanic summarized that Claimant suffered from pre-existing left knee structural problems that made her more susceptible to an injury. However, in the absence of a previous impairment rating apportionment was inappropriate. Finally, Dr. Mechanic explained that, because Claimant had not reached MMI and requires surgery, he only assigned a provisional impairment rating.

28. On June 15, 2017 the parties conducted the post-hearing evidentiary deposition of Dr. Erickson. Dr. Erickson evaluated the cause of Claimant's left knee symptoms. In conducting a causation analysis, he considered diagnostic testing, medical records, subjective complaints and medical literature. Dr. Erickson testified that osteoarthritis of the knee joint and progression of symptoms without injury is detailed in the medical literature. Sometimes arthritic knee pain happens with a specific activity and sometimes the knee just starts hurting. "But the thing that is important is that the osteoarthritis is not going to get better over time. It is going to get worse. And as it gets worse, somewhere in there you are going to start having symptoms, which are unremitting . . ." Claimant's minor work-related knee contusions in April 2016 did not cause her left knee symptoms or accelerate the need for a total knee replacement.

29. Dr. Erickson detailed that Claimant required a total knee replacement prior to her April 8, 2016 injury:

> Dr. Robinson may have opined that somewhere down the road [Claimant] would need a total knee replacement, but we have another medical opinion from Dr. Baxter, when he evaluated her, that in April – or February of 2015, that she needs a total knee. He was ready to proceed with scheduling except she declined the offer. So I don't know how we can make a cogent argument that if she saw an orthopedic surgeon in

February 2015, who, after reviewing her imaging studies and listening to her symptoms, was ready to schedule a total knee replacement. How in the world can we say that now it is the result of this injury on April 8th? It just doesn't float."

30. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Machanic that Claimant has not reached MMI and suffered a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury. Initially, Dr. Machanic concluded that Claimant had not reached MMI for her April 8, 2016 left knee injury because she required some form of knee surgery. However, knee surgeons Drs. Lindberg and Erickson both conducted a thorough records review and engaged in a Level II accredited causality assessment regarding Claimant's continued left knee symptoms. They explained that Claimant's left knee complaints were caused by advanced, chronic, degenerative and pre-existing tri-compartmental osteoarthritis. There was no objective evidence of worsening or aggravation in Claimant's left knee related to the April 8, 2016 admitted industrial injury. In contrast to Dr. Machanic's DIME determination, Claimant reached MMI without any impairment for her April 8, 2016 left knee injury.

31. Drs. Lindberg and Erickson persuasively explained that Dr. Machanic failed to conduct a causality assessment in accordance with the Colorado Division of Worker's Compensation Level II accredited teachings. Dr. Machanic did not provide any analysis to support his conclusion that Claimant's April 8, 2016 injury was the "pivotal event" because it rendered her left knee permanently symptomatic. He also did not explain why he concluded that Claimant's continued symptoms are from the April 8, 2016 incident and not the progression of severe osteoarthritis that Drs. Robinson and Baxter predicted would continue absent subsequent injury. Drs. Lindberg and Erickson persuasively explained that Dr. Machanic, as the DIME physician, was required to analyze causality based upon the Colorado Division of Workers' Compensation Level II accredited teachings, not "pick somebody to believe" and base his opinion on Claimant's statements even when contradicted by the medical records. Notably, Dr. Machanic explained that "we cannot easily apportion this and it is easiest and most rational to place the entire situation as of April 8, 2016, but it is not even clear precisely what happened on that day." Finally, Dr. Machanic erroneously assigned Claimant a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury because her symptoms were the result of the continued progression of severe osteoarthritis.

32. Drs. Lindberg and Erickson persuasively concluded that Dr. Machanic's DIME opinions regarding MMI and permanent impairment were incorrect. Because Claimant's current symptoms are related to the expected progression of the pre-existing and non-work related osteoarthritis, Claimant's is not entitled to a permanent impairment rating. Based on the opinions of Drs. Lindberg and Erickson, Dr. Machanic failed to perform a causality assessment pursuant to the Level II teachings. Instead, Dr. Machanic merely deferred to other doctors because it was the "easiest and most rational" to attribute Claimant's symptoms to the April 8, 2016 incident. Accordingly, Respondents have produced unmistakable evidence free from serious or substantial

doubt that Dr. Machanic's MMI determination and permanent impairment rating were incorrect. Based on the determination of ATP Dr. Drapeau Claimant reached MMI on August 15, 2016 with no permanent impairment.

33. Claimant worked approximately 40 hours per week plus occasional overtime for Employer. She earned $9.46 each hour. In considering Claimant's pay stubs for the period ending January 9, 2016 through April 2, 2016, Claimant earned a total of $7,111.85 from Employer. Dividing $7,111.85 by seven biweekly pay periods yields an AWW of $507.99. Claimant also paid $39.14 each week for health and dental insurance. Adding $507.99 and $39.14 yields a total AWW of $547.13. An AWW of $547.13 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

34. Claimant has demonstrated that it is more probably true than not that she is entitled to receive TTD benefits for the period April 13, 2016 until terminated by statute. Respondents have overcome Dr. Machanic's DIME determination by clear and convincing evidence that Claimant has not reached MMI. ATP Dr. Drapeau persuasively concluded that Claimant reached MMI on August 15, 2016 with no permanent impairment. Claimant's entitlement to TTD benefits terminated by operation of law when she reached MMI. Accordingly, Claimant shall receive TTD benefits for her admitted April 8, 2016 left knee injury for the period April 13, 2016 until she reached MMI on August 15, 2016.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability of August 18, 2014 Date of Injury (Case Number 4-972-238-02)

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable left knee injury during the course and scope of her employment with Employer on August 18, 2014 in case number 4-972-238-02. Initially, Claimant told Employer that she had fallen from a ladder but declined medical care. She then continued to work her regular, full duty job until September 2014 when she was laid off for the season. Claimant did not seek medical treatment for her left knee until December 2014. She returned to work on crutches and told two co-workers on that she hurt her left knee at home.

8. As found, On December 26, 2014 Claimant sought treatment through Advanced Urgent Care. Claimant noted that she had started having pain in the left knee within the past three days and her symptoms had progressively worsened. Claimant subsequently visited knee surgeons Drs. Robinson and Baxter in January 2015. Instead, Claimant presented to Dr. Robinson on January 2, 2015 with pain, crepitus, swelling, decreased range of motion, stiffness, weakness and instability on the left knee but failed to mention anything about the ladder incident. Claimant told Dr. Baxter that she had injured her knee at work a few weeks before the January 2015 visit. Drs. Robinson and Baxter determined that Claimant might need a left total knee replacement because of her severe, degenerative osteoarthritis. Claimant did not file a claim for Workers' Compensation until August 10, 2016 or approximately two years after the ladder incident. The significant temporal delay, numerous inconsistencies regarding the date of a left knee injury, failure to mention an August 18, 2014 event to medical providers and significant degenerative osteoarthritis renders it speculative to attribute Claimant's left knee symptoms to a fall from a ladder at work on August 18, 2014. Accordingly, Claimant's claim for Workers' Compensation benefits in case number 4-972-238-02 is denied and dismissed.

Overcoming the DIME

9. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

10. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 11. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear

and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

12. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Machanic that Claimant has not reached MMI and suffered a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury. Initially, Dr. Machanic concluded that Claimant had not reached MMI for her April 8, 2016 left knee injury because she required some form of knee surgery. However, knee surgeons Drs. Lindberg and Erickson both conducted a thorough records review and engaged in a Level II accredited causality assessment regarding Claimant's continued left knee symptoms. They explained that Claimant's left knee complaints were caused by advanced, chronic, degenerative and pre-existing tri-compartmental osteoarthritis. There was no objective evidence of worsening or aggravation in Claimant's left knee related to the April 8, 2016 admitted industrial injury. In contrast to Dr. Machanic's DIME determination, Claimant reached MMI without any impairment for her April 8, 2016 left knee injury.

13. As found, Drs. Lindberg and Erickson persuasively explained that Dr. Machanic failed to conduct a causality assessment in accordance with the Colorado Division of Worker's Compensation Level II accredited teachings. Dr. Machanic did not provide any analysis to support his conclusion that Claimant's April 8, 2016 injury was the "pivotal event" because it rendered her left knee permanently symptomatic. He also did not explain why he concluded that Claimant's continued symptoms are from the April 8, 2016 incident and not the progression of severe osteoarthritis that Drs. Robinson and Baxter predicted would continue absent subsequent injury. Drs. Lindberg and Erickson persuasively explained that Dr. Machanic, as the DIME physician, was required to analyze causality based upon the Colorado Division of Workers' Compensation Level II accredited teachings, not "pick somebody to believe" and base his opinion on Claimant's statements even when contradicted by the medical records. Notably, Dr. Machanic explained that "we cannot easily apportion this and it is easiest and most rational to place the entire situation as of April 8, 2016, but it is not even clear precisely what happened on that day." Finally, Dr. Machanic erroneously assigned Claimant a 20% whole person impairment rating as a result of her April 8, 2016 admitted left knee injury because her symptoms were the result of the continued progression of severe osteoarthritis.

14. As found, Drs. Lindberg and Erickson persuasively concluded that Dr. Machanic's DIME opinions regarding MMI and permanent impairment were incorrect. Because Claimant's current symptoms are related to the expected progression of the pre-existing and non-work related osteoarthritis, Claimant's is not entitled to a permanent impairment rating. Based on the opinions of Drs. Lindberg and Erickson, Dr. Machanic failed to perform a causality assessment pursuant to the Level II teachings. Instead, Dr. Machanic merely deferred to other doctors because it was the "easiest and most rational" to attribute Claimant's symptoms to the April 8, 2016 incident. Accordingly, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Machanic's MMI determination and permanent impairment

rating were incorrect. Based on the determination of ATP Dr. Drapeau Claimant reached MMI on August 15, 2016 with no permanent impairment.

Average Weekly Wage

15. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007). As found, an AWW of $1200.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity. As found, an AWW of $547.13 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

16. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

17. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive TTD benefits for the period April 13, 2016 until terminated by statute. Respondents have overcome Dr. Machanic's DIME determination by clear and convincing evidence that Claimant has not reached MMI. ATP Dr. Drapeau persuasively concluded that Claimant reached MMI on August 15, 2016 with no permanent impairment. Claimant's entitlement to TTD benefits terminated by operation of law when she reached MMI. Accordingly, Claimant shall receive TTD benefits for her admitted April 8, 2016 left knee injury for the period April 13, 2016 until she reached MMI on August 15, 2016.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's Workers' Compensation claim in case number 4-972-238-02 is denied and dismissed.

2. Respondents have overcome DIME Dr. Machanic's MMI and permanent impairment determinations by clear and convincing evidence. Claimant reached MMI on April 15, 2016 with no permanent impairment.

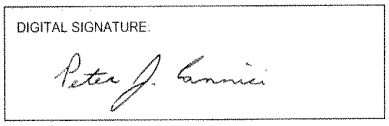
3. Claimant earned an AWW of $547.13.

4. Claimant shall receive TTD benefits for the period April 13, 2016 until she reached MMI on August 15, 2016.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 21, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a work related injury, trigger finger of the right thumb, in the course and scope of her employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a general award of reasonable and necessary medical benefits to treat trigger finger of the right thumb.

PRELIMINARY ISSUES

Claimant failed to respond to Respondents' interrogatories and failed to respond even after an order to compel was issued. Respondents filed a motion to strike Claimant's application for hearing with prejudice. After hearing from the parties, and although Claimant showed no good cause for failing to comply with the order, the ALJ denied the motion and found that striking the application with prejudice was too harsh a sanction. Respondents then elected to proceed with hearing.

Claimant was self-represented and was provided an advisement. Claimant elected to proceed with the hearing.

FINDINGS OF FACT

1. Claimant works for Employer as a child support technician and has been so employed since August of 2001.

2. Claimant's job is primarily sedentary at a computer desk. Claimant believes that her daily work activities of typing and using a mouse caused pain in her right thumb.

3. Claimant began to experience pain in her right thumb in December of 2016 but did not make any report to Employer until February of 2017 because the pain was not as constant. On February 1, 2017 Claimant reported to her supervisor that she believed she had a work related injury from repetitive motion. *See* Exhibit B.

4. Employer referred Claimant for treatment.

5. On February 6, 2017 Claimant was evaluated by Hyeongdo Kim, M.D. Claimant reported that on January 12, 2017 while working, her right thumb suddenly felt

funny and locked up with 7-8/10 pain. Claimant reported that since then her right thumb was constantly sore and frequently locked. Claimant reported that the pain was on the right thumb down to the base of the thumb with numbness and tingling but no radiation. Claimant reported trouble grabbing things, clicking her car remote button, and brushing her teeth. Claimant reported that the pain woke her up in the middle of the night and that she had ordered a brace for her thumb which helped to not exacerbate her symptoms. On examination, Dr. Kim noted tenderness to palpation along the palmer and dorsal surface of the right thumb with mild edema vs. hypertrophy on the right thenar eminence and that the range of motion of the right thumb was limited by locking on the DIP joint. Dr. Kim found the examination to be suspicious for trigger thumb. Dr. Kim performed a review of Claimant's work duties and home hobbies that revealed no cumulative trauma. Dr. Kim noted that Claimant had no use of hand tools for extended amount of hours and that Claimant was not exposed to repetition and force of greater than 1 kg with cycle time of less than 1 minute or awkward posture. *See* Exhibit F.

6. Dr. Kim opined that Claimant's work duties lacked risk factors for developing trigger finger. Dr. Kim opined that Claimant's problem was not work related and recommended Claimant follow up with a primary care physician. *See* Exhibit F.

7. On February 14, 2017 Respondents filed a Notice of Contest indicating the claim was contested/denied as the injury/illness was not work related. *See* Exhibit C.

8. On February 21, 2017 Claimant filed an Application for Hearing. *See* Exhibit D.

9. On May 30, 2017 a job demands analysis (JDA) was performed by vocational evaluator Joseph Blythe. Mr. Blythe observed Claimant perform her normal job duties for a period of four hours. Mr. Blythe issued a report dated June 2, 2017. *See* Exhibit I.

10. Mr. Blythe found that Claimant's job involved frequent fingering, 34% to 66% frequency which he noted in the comments involved a variety of activities such as using a computer mouse, keyboard, writing, telephone, cell phone, and processing documents. *See* Exhibit I.

11. Mr. Blythe found in his four hour observation period that Claimant used the mouse for 1 hour and 25 minutes, and used the keyboard for 1 hour and 8 minutes. He extrapolated this to be 21.4 minutes of mouse use per hour and 17.1 minutes of keyboard use per hour. As Claimant works an 8 hour work day, he concluded that Claimant would use the mouse for 2.9 hours in an 8 hour day and would use the keyboard for 2.3 hours in an 8 hour day. *See* Exhibit I.

12. On June 27, 2017 Jonathan Sollender, M.D. performed a records review of Claimant's case. Dr. Sollender reviewed the Colorado Division of Workers' Compensation Medical Treatment Guidelines for work-relatedness of a cumulative

trauma condition and reviewed the JDA performed by Mr. Blythe. Dr. Sollender opined that the JDA showed that Claimant did not have a single occupational risk factor present that could naturally lead to the development of a cumulative trauma condition. Dr. Sollender opined that mousing with the right hand for 2.9 hours per day was below the 4 hour threshold considered significant for development of cumulative trauma disorders. *See* Exhibit G.

13. Dr. Sollender opined that with no occupational risk factors present during the JDA observation at Claimant's work site, Claimant's diagnoses would not be logically related to her occupational exposure. Dr. Sollender noted that triggering of the thumb would be expected to occur from a significant repetitive exposure to active flexion and extension of the thumb and would not be anticipated to occur from mousing and that the amount performed by Claimant was below the cumulative trauma standards. Dr. Sollender opined that Claimant's work was neither repetitive, forceful, awkward, and did not involve lengthy computing skills to cause right upper extremity symptoms and Dr. Sollender recommended denying the claim based on lack of work relatedness. *See* Exhibit G.

14. Dr. Sollender testified at hearing consistent with his written report. Dr. Sollender opined that Claimant had trigger finger of the right thumb. Dr. Sollender opined that Claimant had no primary or secondary risk factors from her employment that would lead to the development of work related right trigger finger. Dr. Sollender opined that there was no causal relationship to Claimant's work and that there was insufficient combination of force and repetition in Claimant's work. Dr. Sollender opined that typing or tapping a key did not involve sufficient force and was clearly not 2 pounds of force.

15. Claimant maintained at hearing that due the number of years she worked at the position for Employer and because she had no other injuries, the right thumb trigger finger was work related. Claimant indicated that she disagreed with Dr. Sollender and with the research in the medical treatment guidelines. Claimant contributed her typing and carrying stuff to have caused her injury. Claimant indicated that she underwent surgery in April of 2017 for the right trigger finger and that she was now able to bend her thumb and was continuing to do self therapy.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An occupational disease is a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. *See* § 8-40-201(14), C.R.S. A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999); *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). In deciding whether the Claimant has met his burden of proof, the ALJ is empowered to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant has failed to meet her burden of proof to establish that her trigger finger of the right thumb was directly and proximately caused by her employment duties or her working conditions. The JDA concluded that Claimant's position did not meet the requirements under the medical treatment guidelines for any primary or secondary risk factors. The ALJ finds credible and persuasive that the amount of time spent performing activities is not significant enough to cause trigger finger. The testimony of Mr. Blythe and Dr. Sollender is found credible and persuasive. The JDA and the amount of time spent on activities was derived from direct observation of Claimant in her normal work capacity. The ultimate opinion of Dr. Sollender that the condition is not work related is found credible and persuasive, and is consistent with the JDA, the medical treatment guidelines, and the opinion of Dr. Kim. Although Claimant believes her condition to be work related, her belief does not meet the burden of proof to establish a work related condition. The claim is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a work related injury to her right upper extremity/trigger finger in the course and scope of her employment with Employer. The claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 24, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

The issue whether Claimant proved by a preponderance of the evidence that the need for surgery to his left knee relates to the December 10, 2015, work injury was raised for consideration.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. Claimant is a 57 year old man who had worked for Employer as a technical analyst. Claimant's duties required him to travel to offices in Weld County and set up computer stations. Claimant had been working for Employer as a technical analyst for eighteen months.

2. In 1996, Claimant underwent left knee surgery, an ACL reconstruction and meniscectomy with Dr. Papilion.

3. On December 10, 2015, Claimant sustained a compensable injury to his left lower extremity when he walked into a handicap rail and folded over the rail. The railing's height was approximately at Claimant's mid thigh.

4. On December 10, 2015, Claimant worked the remainder of his scheduled work duties and went home. After a few hours, he noticed significant swelling in his leg and sought attention in the emergency room.

5. At the emergency room, Claimant's chief complaint consisted of "left midthigh pain after walking into an unseen guardrail." While in the emergency room, Claimant reported lower extremity pain with an onset of approximately four hours prior and reported that his symptoms were worsening. Claimant reported a direct blow to his left thigh when he ran into a guardrail, striking the left thigh on the edge of the guardrail. Claimant did not report left knee pain, but rather lower extremity pain. While in the emergency room, Claimant underwent x-rays to his lower extremity, which did not reveal any fractures of the femur. The radiologist also commented that the left knee showed severe tricompartmental osteoarthritis with loose bodies. Claimant was discharged with instructions regarding a lower extremity contusion.

6. Respondents admitted liability and provided Claimant with temporary disability benefits as well as medical benefits. Claimant treated primarily under the direction of Dr. Keefe and Physician Assistant Malcolm Slaton at Workwell

Occupational. Claimant initially saw Dr. Keefe on December 18, 2015. Specifically, Claimant reported "as part of his work duties on December 10, 2015, he was carrying a box outside and did not see a guardrail and ran into it, with the main point of impact being the left upper leg, which was the height of the guardrail. As he hit the rail, he fell forward over rail and was able to push back over the rail with his hands on the ground to recover his position." At that time, Claimant reported swelling in the left upper thigh, which had gone down slightly, as well as swelling around his left knee. Claimant did not report left knee pain.

7. On December 29, 2015, Claimant returned to Dr. Keefe and reported that the left lower extremity swelling had resolved, but Claimant reported pain and "clicking" in his left knee. Dr. Keefe recommended physical therapy. On January 22, 2016, Claimant underwent a physical therapy evaluation at Workwell. Claimant reported that his right knee was also starting to hurt.

8. On January 29, 2016, Claimant underwent an MRI of the left knee, which revealed: (1) Extensive, complex tearing, likely chiefly degenerative in nature, of nearly the entirety of the medial and lateral menisci; (2) Severe medial compartment chondral degenerative changes, with full thickness loss of articular cartilage throughout nearly the entirety of the medial compartment. Moderate to severe chondral degenerative changes were also present along the central/medial aspect of the lateral compartment; (3) Abnormal appearance to patient's ACL graft, chronic full thickness disruption is suspected.

9. On February 4, 2016, Claimant saw Dr. Keefe, who noted that Claimant underwent the MRI to the left knee, which revealed severe degenerative changes and medial and lateral meniscal tears, probably on a degenerative basis. Dr. Keefe noted that he could not determine how much of Claimant's condition is caused by the work injury. Dr. Keefe noted that he would check with the orthopedist for his formal recommendations regarding the knee. He noted that if there was a proposed surgery, determination of work relatedness would be controversial. Dr. Keefe further noted that the only remaining issue is Claimant's knee pain which he opined was explained by what is seen on MRI.

10. On February 24, 2016, Claimant returned to Dr. Keefe. Dr. Keefe noted that Claimant's MRI showed significant severe degenerative changes that would need to be addressed by an orthopedist. Dr. Keefe repeated his opinion that the relatedness of the left knee condition would be controversial and because of the knee degenerative condition the findings in the knee are not work related.

11. On March 31, 2016, Claimant underwent x-rays to the left knee, which revealed: (1) Severe osteoarthritis at the medial compartment of the left knee, with bone on bone articulation of the medial femoral condyle and medial tibial plateau with subchondral cysts and ostephytes at this joint space.

12. On April 19, 2016, Claimant saw Dr. Papilion, who noted that Claimant was known to him from a previous ACL reconstruction and meniscectomy in his left knee in 1996. Dr. Papilion noted that Claimant had done well with both of these knee surgeries.

13. Claimant reported that he sustained an acute injury on December 10, 2015, when a railing struck him in the anterior left thigh. Claimant reported that he hyperextended his hip and had immediate pain and swelling. He noted that x-rays were taken which revealed no significant evidence for fracture but there were early degenerative changes in both hips, and severe degenerative changes in both knees, left much greater than the right. He noted an MRI of the left knee revealed full thickness chondral loss tricompartmental throughout with severe degenerative changes. There was felt to be chronic disruption of the ACL graft.

14. Dr. Papilion noted that Claimant had several physicians treating, including occupational medicine, as well as orthopedic surgeons Dr. Scott Dhupar and Dr. Thomas Pazik. Dr. Papilion further noted that the other treaters opined that Claimant has severe osteoarthritis in both knees preexisting the work injury. Dr. Papilion noted that Claimant states that he was asymptomatic prior to the work injury.

15. Upon physical examination, Dr. Papilion recommended an MRI with regard to Claimant's left hip which he opined was related to the work injury of December 10, 2015. However, with regard to the left knee, Dr. Papilion diagnosed end-stage degenerative osteoarthritis and opined that Claimant did not injure the knee in the work-related incident. Despite the fact that Claimant denies symptoms prior to the work incident, Dr. Papilion opined that there was clear evidence on x-rays of severe degenerative changes and Claimant is an excellent candidate for bilateral total knee arthroplasty covered through Claimant's private health insurance.

16. On June 21, 2016, Claimant saw Dr. Papilion who reported that Claimant had undergone his MRI of the left hip, which revealed complex tearing of the anterior superior acetabular labrum, as well as early degenerative changes in the hip. Dr. Papilion referred Claimant to Dr. Newman. In regard to the left knee, Dr. Papilion opined that Claimant has significant degenerative changes with various deformities in his left knee. Claimant was placed in a medial unloader ACL brace. The doctor further opined that Claimant is a candidate for total knee arthroplasty unrelated to the work injury of December 2015. On June 27, 2016, Claimant saw Dr. Newman who noted significant degeneration in the left knee, and due to the fact that Claimant's left knee is the most symptomatically, Dr. Newman intended to address the knee first.

17. On September 14, 2016, Dr. Newman opined that Claimant's need for a left hip arthroscopy related to the work-related injury as such injury aggravated Claimant's preexisting condition in his left hip.

18. On October 11, 2016, Claimant underwent the initial evaluation for physical therapy for the left hip with Todd Smith. Claimant did not report to the physical therapist injuring his knee at the time of the work-related injury to his left hip.

19. On his own, Claimant sought treatment with Dr. Hale on November 16, 2016, as it pertained to his bilateral knee pain. Claimant initially reported a history of multiple knee injuries in the past. Claimant had meniscal treatment of the right knee, as well as a delayed reconstruction of the left knee ACL, as well as meniscal pathology. Over time he has noted significant increasing knee pain, as well as overall bowlegged deformity of both lower extremities. The pain started to inhibit his activities of daily living. Claimant had good relief with anti-inflammatory medications, however, these medications no longer provide relief. Claimant underwent a steroid injection and a series of viscosupplementation in each knee in the past.

20. Claimant did not report any type of work-related injury to the left knee to Dr. Hale. Dr. Hale opined that Claimant's pain was concordant with his x-ray findings, that the left knee is worse than the right and that both are well within the spectrum of replacement based solely on x-ray.

21. On November 1, 2016, Claimant saw Dr. Keefe who noted that the knee surgery would take precedent over the hip. Claimant underwent a bilateral total knee replacement with Dr. Hale on November 28, 2016. Dr. Hale's medical records are devoid of information regarding an injury to the left knee.

22. Subsequent to surgery, Claimant was hospitalized at Northern Colorado Rehabilitation Hospital for approximately eight days from December 1, 2016 to December 9, 2016 (R. Ex. G). According to such records, Claimant reported a history of severe chronic osteoarthritis with no mention of any type of left knee injury (R. Ex. C; pp.120-153).

23. On March 8, 2017, Claimant saw Physician Assistant (PA) Slaton who reported that Claimant continued to have postsurgical problems associated with his bilateral knee replacements. On April 11, 2017, PA Slaton noted that Claimant was having significant problems associated with his knees and these symptoms were not work related.

24. On March 13, 2017, Dr. Bisgard performed an independent medical evaluation at Respondent's request. Claimant reported the mechanism of injury that he walked directly into the rail and struck his upper left thigh. Claimant reported immediate pain in his left thigh area. He reported resuming his work day despite the pain in the left lower extremity.

25. Dr. Bisgard conducted a detailed medical records review and physical examination of the Claimant. She concluded, based upon a reasonable degree of medical probability, that the previously asymptomatic pathology in Claimant's left hip became symptomatic as a result of the work injury, and therefore considered it work-

related. However, with regard to Claimant's left knee and the need for surgery, she opined that the need for surgery was not due to the work injury. Dr. Bisgard opined that the mechanism of injury involved Claimant's upper thigh, there was no direct blow to either knee and, based on the diagnostic studies, the need for knee surgery was not due to an aggravation or acceleration of Claimant's pre-existing condition caused by his December 2015 work injury.

26. At hearing, Claimant testified that he hyperextended his left knee at the time of the injury. However, this report of hyperextension of the left knee is inconsistent with Claimant's report of the mechanism of injury to Dr. Bisgard, Dr. Keefe, Dr. Papilion, his emergency room providers, Dr. Hale, and to his physical therapist. Claimant testimony was not deemed credible.

27. Claimant claimed he reported hyperextension of the left knee to the emergency room providers and that the emergency room records are not accurate in that the records do make mention of hyperextension. Claimant's testimony in this regard is not deemed credible.

28. Claimant testified, contrary to his reports to a physical therapist and Dr. Hale, that he did not undergo any type of Synvisc injections but only received one cortisone injection. Yet, records reflect that on October 11, 2016, a physical therapist noted that Claimant reported being offered Synvisc injections by his primary care provider and Claimant reported to Dr. Hale on November 16, 2016, that he had undergone a series of viscosupplementation injections in each knee in the past.

29. During Claimant's nine-day hospitalization at Northern Colorado Rehabilitation Hospital records do not reflect any type of work-related injury or fall to the knee.

30. Dr. Bisgard was admitted as an expert in occupational medicine. Dr. Bisgard provided credible and persuasive medical testimony regarding the causation and need for a total knee replacement to Claimant's left knee. Dr. Bisgard testified that Claimant sustained a very significant hematoma to his left upper thigh, and an injury involving his groin, which permanently aggravated an underlying osteoarthritic condition in his hip and he also sustained a labral tear of the hip, which was directly due to the work incident. However, Dr. Bisgard opined that he did not sustain an aggravation to his underlying left knee condition at the time of the work injury. Dr. Bisgard credibly opined that Claimant's underlying knee condition was very severe and longstanding, but that also, the MRI revealed evidence of a chronic breakdown of the prior ACL surgery that Dr. Papilion performed. Dr. Bisgard also testified that she placed weight on Dr. Papilion's opinion regarding causation, who she noted had the information that Claimant denied any symptoms in the left knee leading up to the December 10, 2015, work-related injury, but still maintained the opinion that such surgery should be carried out outside the Workers' Compensation system.

31. Dr. Bisgard further explained that in this particular case, the mechanism of injury is the most important factor and Claimant simply did not impact his left knee at the time of the work-related injury. Dr. Bisgard explained that looking strictly at the mechanism of injury, Claimant's development of symptoms throughout his entire leg due to the significant hematoma certainly existed and that gravity would pull that swelling down, causing significant swelling throughout the entire leg. However, Dr. Bisgard testified that does not correlate to a specific injury to the left knee and Dr. Bisgard received no report of hyperextension of the left knee nor did she find such a report in the medical records.

32. Dr. Bisgard relied upon Dr. Hale's November 16, 2016, initial report in support of her opinion that Claimant was going to require bilateral knee replacements, and such was a matter of time. She explained that the causation question is whether or not the work event accelerated the need for the total knee replacement. Dr. Bisgard relies on Dr. Hale's analysis of the x-rays showing findings so significant he recommended surgery on the bilateral knees, even though the right knee was asymptomatic.

33. Dr. Bisgard testified that she agreed with PA Slaton, as well as Dr. Papilion, that the need for Claimant's left bilateral knee replacement did not relate to the work injury. Dr. Bisgard credibly opined within a reasonable degree of medical probability, Claimant was a surgical candidate for a left total knee replacement prior to the work injury and would have required this surgery regardless of the injury to the hip.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, et seq., C.R.S. (2016), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The Act's legislative declaration balances the interests of claimants and employers. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2005). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See Prudential Insurance Co. v. Cline, 98 Colo. 275, 57

P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. A claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. See Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). "[I]f a disability were 95% attributable to a pre-existing, but stable condition, and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling." *Seifried v. Industrial Com'n of State of Colo*., 736 P.2d 1262, 1263 (Colo. App. 1986). However, an injury must be "significant" in that it must bear a direct causal relationship between the precipitating event and the resulting disability. *Colorado Fuel and Iron Corp. v. Industrial Commission*, 380 P 2d 28 (Colo. 1963). In this case, Claimant did not sustain an injury to the left knee. Rather, as documented in the medical records submitted, Claimant sustained an injury to his upper thigh and hip, not the knee. While Claimant reported pain in his entire left leg, such pain was due to swelling as explained during Dr. Bisgard's testimony. There is no credible or persuasive evidence linking Claimant's leg swelling to the need for surgery to address the preexisting severe osteoarthritis.

4. A compensable injury may be the result of an industrial aggravation of a pre-existing condition so long as the aggravation is the proximate cause of the disability or need for treatment. *H&H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). However, the question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3rd 637 (Colo. App. 2001).

5. Respondent concedes that Claimant sustained a compensable injury to his left thigh and hip as a result of an aggravation of a preexisting arthritic condition in his left hip. However, the evidence taken as a whole reflects that Claimant suffers from a preexisting severe chronic left knee condition. According to Dr. Bisgard, the treatment recommended for the left knee condition subsequent to the work injury mirrored that treatment that Claimant required prior to the work injury, a total knee replacement. Dr. Bisgard credibly testified that Claimant's preexisting severe osteoarthritis demonstrated upon MRI and x-ray the need for surgery. As such, while the work injury may have exacerbated Claimant's symptoms in the hip and increased symptoms in the knee due to swelling, the need for surgery was inevitable and the injury did not aggravate or contribute to such condition requiring surgery. This is supported by the opinions of Claimant's treating orthopedist, Dr. Papilion, his treating physician, Dr. Keefe and PA Slaton.

6. Accordingly, it is concluded that Claimant failed to establish a causative relationship between the December 10, 2015, work injury to the left thigh and hip and the need for a total left knee replacement. As such, Respondents are not liable for the cost of Claimant's left knee surgery.

ORDER

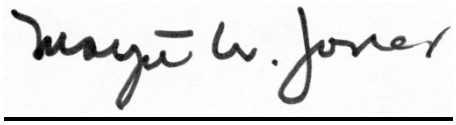
It is therefore ordered that:

Claimant's claim is denied and dismissed.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 24, 2017



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right knee on January 9, 2016.

2. If Claimant has established a compensable injury, whether Claimant has established by a preponderance of the evidence that her subsequently treated mental health condition is causally related to the January 9, 2016 knee injury.

3. If Claimant has established a compensable injury, whether Claimant has established by a preponderance of the evidence that she is entitled to all reasonable, necessary, and related medical treatment for her right knee injury and mental health condition.

4. If Claimant has established a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability ("TTD") benefits for the following time periods: January 10, 2016; February 25, 2016 through February 29, 2016; March 11, 2016 through March 14, 2016; March 25, 2016 through May 31, 2016; October 4, 2016 through October 12, 2016; October 27, 2016 through December 26, 2016; and January 23, 2017 through Claimant's date of maximum medical improvement ("MMI") of April 10, 2017.

5. If Claimant is entitled to TTD benefits, whether Respondents are entitled to an offset for short-term and long-term disability benefits paid to Claimant.

STIPULATIONS

1. The parties have stipulated to an average weekly wage of $571.31.

2. The parties have stipulated to Dr. Mary Zickefoose as the authorized treating provider.

3. The parties have stipulated that Claimant has received a monthly long-term disability benefit beginning February 7, 2017 and ongoing.

FINDINGS OF FACT

1. Claimant began working for Employer in February 2014 as a clerical specialist. Claimant subsequently began cross-training to become a healthcare technician which included assisting nurses with patients. On January 9, 2016, Claimant was assisting a nurse transporting a patient to an operating room. The patient was lying in an electric hospital bed. While the nurse was pushing the hospital bed into the elevator, the bed struck the medial side of Claimant's right knee. Claimant testified that her knee hyper-

extended and hit the elevator wall, and that she felt pain and soreness. Claimant reported the incident to the charge nurse and clerk and received same-day treatment at Employer's on-site urgent care clinic. Medical records from the on-site clinic note tenderness in Claimant's right knee over the medial joint line with no swelling or ecchymoses. Claimant was diagnosed with a knee contusion and provided an ice pack, knee brace, and ibuprofen. No work restrictions were noted.

2. On January 11, 2016, Claimant presented to Lori Szczukowski, M.D. at the Center for Occupational Safety and Health at OHSC. Claimant reported that a co-worker drove an electronic bed into the elevator which "shoved [Claimant's] right knee and pinned it between the bed and the elevator." Dr. Szczukowski noted Claimant did not finish her shift on January 9, 2016 "Because the knee hurt so much she was sent home," and further noted Claimant did not work on January 10, 2016. Claimant complained of continuing knee pain. On physical examination, Dr. Szczukowski noted tenderness on the medial aspect of Claimant's right knee across the joint line superior and inferior to the joint, and limited range of motion. Dr. Szczukowski further noted that there was no swelling, deformity, or ligament instability. Dr. Szczukowski assessed a right knee contusion and released Claimant to work with restrictions, noting Claimant needed to be able to apply cryotherapy.

3. Claimant underwent an MRI of her right knee without contrast on February 22, 2016. The MRI revealed mild edema in the superior lateral aspect of Hoffa's fat pad consistent with patellofemoral syndrome. Scott Tomsick, M.D. noted normal cruciate and collateral ligaments, normal menisci, and no joint effusion or internal derangement.

4. On February 24, 2016, Ann Dickson, M.D. evaluated Claimant at Denver Health Medical Center. Claimant complained of worsening pain located mostly in the medial side of her right knee. Claimant denied any numbness or radicular symptoms. Claimant reported a history of being physically active prior to the injury, including climbing the incline in Colorado Springs on a regular basis. Dr. Dickson noted Claimant wore a knee brace, used ice occasionally, and took over-the-counter Tylenol. Dr. Dickson further noted Claimant called out sick from work "on several occasions because she did not feel that she can sit all night long on her job." On physical examination, Dr. Dickson noted tenderness over the medial aspect of the right knee, no edema, no erythema and no effusion. Dr. Dickson remarked that the MRI showed signs of patellofemoral syndrome on the lateral side, noting Claimant's symptoms were primarily on the medial side of her knee. Dr. Dickson further noted that Claimant history of being physically active would account for some of the patellofemoral syndrome. Dr. Dickson assessed Claimant with a right knee contusion and remarked that it was "concerning" Claimant had minimal improvement over a nearly 6-week period. Dr. Dickson recommended physical therapy, anti-inflammatory medication, naproxen, and icing. Dr. Dickson released Claimant to work with the following restrictions: change positions at least every 30 minutes, use supports under chair to elevate leg and extend leg sometimes, no kneeling, crawling, climbing or squatting, no restraint of individuals or lifting patients, and no ladders or working at heights.

5. On March 11, 2016, Claimant presented to Dr. Dickson for an unscheduled visit requesting time off from work. Claimant reported that she found it difficult to work a full 12-hour shift even with Employer accommodating her work restrictions. Dr. Dickson noted Claimant had taken most of the past week off of work on her own recognizance, and that Claimant felt she was receiving negative feedback from her co-workers due to the injury. On examination, Dr. Dickson noted Claimant was tender to palpation in the medial sulcus adjacent to the lower pole of the patella but non-tender along the joint lines and lateral aspect of the knee. Dr. Dickson further noted mild tenderness over the patella diffusely and that there was no edema, erythema, or effusion. Dr. Dickson stated,

> I can find nothing on the knee examination to explain the severity of her symptoms. The MRI, as noted previously, showed a mild patellofemoral syndrome, which in any case is on the lateral aspect of the knee rather than the area of her pain. I have to wonder whether the discord with her colleagues is contributing to her desire to be off work.

Dr. Dickson released Claimant to work with the following restrictions: sedentary at least 20 minutes out of every ½ hour, stand and change positions at least five minutes every ½ hour and continue the prior restrictions for climbing, lifting, kneeling and squatting.

6. On March 15, 2016 Claimant presented to Thomas McDonough, M.D. Claimant reported pain and swelling in her right knee. On examination, Dr. McDonough noted tenderness along the lateral patellar facet and tenderness over the medial retinaculum, no effusion, and no medial or lateral instability. Dr. McDonough opined that Claimant was "essentially normal with the exception of mild edema in the fat pad, felt to be consistent with patellofemoral syndrome." Dr. McDonough assessed knee pain and a knee contusion and referred Claimant back to a workers' compensation physician. Dr. McDonough recommended conservative treatment and a work capacity evaluation.

7. Claimant began physical therapy in mid-March 2016. Claimant continued to report pain in her right knee after multiple physical therapy sessions. On March 21, 2016, David Blair at Denver Health and Hospital Authority referred Claimant to Dr. Michelle Pepper, a pain specialist.

8. On March 24, 2016, Claimant sought treatment with Daniel Wood, M.D., a non-workers' compensation provider. Claimant reported worsening right knee pain on the medial aspect of her patellofemoral border. Claimant reported that nothing improved the pain and that the pain was affecting her ability to sleep and perform full shifts at her job. On examination, Dr. Wood noted extreme tenderness to palpation along the medial border of the patella and no effusion, ecchymosis or obvious deformity. Dr. Wood gave an impression of right knee lateral patellar compression syndrome and recommended Claimant continue physical therapy. Dr. Wood prescribed Claimant indomethacin, and administered the first of three Hyalgan injections. Claimant testified that she asked Dr. Wood to take her off of work, and that she then applied for FMLA leave and short-term disability benefits. Claimant testified that she was on FMLA leave from late March 2016

through May 2016. Claimant testified that there was work available for her in March 2016 that was within her work restrictions.

9. Michelle Pepper, M.D. evaluated Claimant on March 30, 2016. Dr. Pepper noted that the February 2016 MRI demonstrated mild edema in the superolateral Hoffa's fat pad and assessed a sprain of the right knee. Dr. Pepper noted Claimant was off of work to receive an injection. Dr. Pepper noted that the injections Claimant received were to address Claimant's pre-existing, non-work related patellofemoral syndrome, and that the "flare of pain making it difficult for her to go to work today would be considered part of that…" Dr. Pepper further remarked,

> We discussed that she has pain medially along her knee, possibly related to the contusion she suffered from the work injury but certainly should have resolved at this point in time. There is no significant structural abnormality in her knee prohibiting her from returning to work. The findings of edema in the superolateral area of Hoffa's fat pad does not correlate with her medial knee pain. She was released back to work on full duty as of today.

10. Gennet Gemeda at Denver Health Medical Center evaluated Claimant on March 31, 2016 and opined that Claimant's right knee pain was consistent and out of proportion to the history of knee contusion. She prescribed Claimant gabapentin and referred Claimant to behavioral health to learn improved coping techniques.

11. On May 12, 2016, David Blair, M.D. at Denver Health and Hospital Authority noted Claimant's condition was unchanged and stated Claimant "Continues to have somewhat disabling right knee pain in spite of no internal derangement on MRI, PT, injections and the passage of 4 months." He referred Claimant to an orthopedist, Dr. Hewitt.

12. On May 25, 2016, Gabriel Pepper, M.D. at Denver Health and Hospital Authority evaluated Claimant. Claimant reported being very frustrated and knowing something was seriously wrong with her knee and no one could figure it out. He noted Claimant's pain was the same as at time of the initial injury, even after undergoing conservative therapy, NSAIDS, physical therapy, an MRI, a physiatry evaluation, and courses of knee injections. He remarked that Claimant had knee pain with no significant structural abnormality to explain her symptoms. He further noted that, per a recent physiatry evaluation, there were no indications for additional treatment and suggested Claimant may benefit from counseling to better control her chronic pain.

13. On May 25, 2016, Claimant was released to work effective May 31, 2016.

14. On June 3, 2016, Michael Hewitt, M.D. evaluated Claimant. Claimant complained of constant pain with difficulty walking and sleeping. Dr. Hewitt noted that x-ray images demonstrated well-preserved medial, lateral and patellofemoral joint space, no abnormal soft tissue calcification, no patellar tilt or subluxation, and no evidence of a stress fracture. On examination, Dr. Hewitt noted minimal knee effusion, no ligamentous

laxity, diffuse anterior and medial tenderness, and mild pain with patellar compression. Dr. Hewitt diagnosed Claimant with knee pain and stated Claimant's "clinical complaints significantly outweigh the findings on exam and imaging. She does not have evidence of infection." Dr. Hewitt administered a cortisone injection and prescribed vicodin and gapapentin. In a June 7, 2016 medical record, Claimant reported receiving 1.5 days of relief from the injection and then experiencing persistent pain thereafter.

15. Also on June 3, 2016, Edwin Healey, M.D. conducted an Independent Medical Examination ("IME") at the request of Claimant. Dr. Healey conducted a review of limited medical records and performed a physical examination. Claimant reported chronic right medial knee pain with radiation into the patella, thigh and calf. Claimant rated the pain on average as an 8/10. Claimant reported that the gabapentin and vicodin gave her 10% relief, and that a TENS unit previously provided to Claimant gave some relief. Claimant reported having no prior injury to her right knee or experiencing right knee pain prior to the injury. On examination, Dr. Healey noted exquisite tenderness over the right medial joint line and effusion. Dr. Healey diagnosed a right medial knee contusion and right patellofemoral syndrome. Dr. Healey recommended Claimant undergo a right saphenous nerve infrapatellar nerve block to determine if traumatic right infrapatellar nerve neuropathy was the cause of Claimant's ongoing right knee pain and swelling. Dr. Healey further recommended increasing Claimant's gabapentin dosage, starting amitriptyline, and lidoderm patches or neuropathic cream, and undergoing an EMG/nerve conduction velocity study if there was no improvement. Dr. Healey opined that, within a reasonable degree of medical probability, Claimant right knee symptoms were causally and directly related to her January 6, 2016 work-related knee trauma, and that traumatic infrapatellar neuropathy must be ruled out.

16. Dr. Hewitt reevaluated Claimant on June 10, 2016. Dr. Hewitt noted Claimant had symptoms "concerning for possible infrapatellar branch of the saphenous nerve injury." Dr. Hewitt referred Claimant to Dr. Kawasaki to proceed with a diagnostic and therapeutic saphenous nerve block.

17. On June 20, 2016 Carlos Cebrian, M.D. performed an IME of Claimant at the request of Respondents. Dr. Cebrian issued an IME report dated July 7, 2016. Dr. Cebrian reviewed Claimant's medical records and physically examined Claimant. On examination, Dr. Cebrian noted tenderness to palpation on the medial tibial plateau and no swelling, bruising or redness. As pre-existing, non-work-related conditions, Dr. Cebrian assessed, among other things, right lateral patellofemoral syndrome, depression, and anxiety. Dr. Cebrian assessed a work-related right knee contusion. Dr. Cebrian further opined that it was possible Claimant also sustained an injury to her infrapatellar saphenous nerve. Dr. Cebrian noted that the mechanism of injury could lead to injury of the infrapatellar saphenous nerve, that Claimant's symptoms in the medial aspect of the knee fit with the distribution of the infrapatellar saphenous nerve, and that the nerve "can be injured without significant swelling if the nerve is contacted directly." Dr. Cebrian recommended Claimant receive an infrapatellar saphenous nerve injection for diagnostic and possibly therapeutic purposes. Dr. Cebrian opined that "A positive response would occur if there was complete or almost complete relief from the pain documented with functional improvement." Dr. Cebrian cautioned that the

performing physician should be "very careful in determining a positive response," based on Claimant's responses to prior injections, noting the need for demonstrated and documented functional improvement. Dr. Cebrian stated that if there was a diagnostic response to the nerve injection, his medically probable opinion was that Claimant sustained an injury to the infrapatellar saphenous nerve as a result the January 9, 2016 incident. Dr. Cebrian noted that if the injection was not diagnostic, no further treatment was required, and that Claimant, at most, sustained a knee contusion.

18. Claimant presented to M. Susan Zickefoose, M.D. at Denver Health and Hospital Authority on July 19 and July 21, 2016. Claimant reported continued knee pain that she described as a burning pain in the medial superior aspect of her knee. Claimant reported that she could not concentrate or work when the pain became severe. Claimant reported being frustrated because her knee was not improving and because "everything has been placed on hold." During a follow-up evaluation on August 2, 2016, Claimant reported having suicidal thoughts. Dr. Zickefoose assessed single episode major depressive disorder and recommended that Claimant attend a consultation with a clinical psychologist, Dr. La Certe. Dr. Zickefoose also recommended Claimant see a pain specialist, referred Claimant for a nerve block, and continued Claimant's modified work restrictions.

19. Claimant attempted to commit suicide on August 3, 2016 by taking an overdose of prescription medications. Claimant testified that she attempted to commit suicide and wanted to "give up" because she felt as though nothing was working to address her pain.

20. Claimant presented to Usama Ghazi, D.O. on August 4, 2016 to address the suspected infrapatellar saphenous nerve neuralgia. Dr. Ghazi noted Claimant's recent suicide attempt. Claimant informed Dr. Ghazi that she was "not necessarily trying to kill herself but wanted relief." Claimant reported swelling, increased warmth and coolness, darkening of color of the skin, and difficulty with flexion, extension, prolonged weight bearing, and walking for more than 15 minutes. On examination, Dr. Ghazi noted edema and hyperemia along the medial aspect and the infrapatellar aspect of the right knee. Dr. Ghazi noted tenderness over the knee and the pes anserine bursa with no patellar tenderness. Dr. Ghazi further noted,

> Anterior femoral cutaneous nerve is minimally tender to palpation radiating to the superior aspect of the patella. It is the saphenous nerve that has the most sensitivity with light touch causing pain over the medial aspect of the shin and the infrapatellar branches on the medial and lateral aspects of the underside of the patella…Palpation of the adductor hiatus where the saphenous nerve exits the adductor musculature is exquisitely tender and radiates into the medial patella, inferior patella, and down the medial shin.

Dr. Ghazi gave an impression of right-sided neuritis of the right knee involving the right saphenous nerve distribution and right infrapatellar branch distribution, inferior and medial patellar pain secondary to infrapatellar neuralgia, and pes anserine bursitis. Dr. Ghazi further stated,

> Edema and temperature changes noted on examination today with hyperesthesia and allodynia reported subjectively, suggestive of possible sympathetic-mediated pain/complex regional pain syndrome/neurogenic inflammation (regardless of clinical diagnosis, there is objective clinical evidence consistent with at the very least neurogenic edema and some sympathetic abnormalities in this area.

Dr. Ghazi performed a right saphenous nerve block and a right infrapatellar nerve block. Claimant reported 100% relief of the burning sensation in her knee. Dr. Ghazi noted reduction in swelling and resolution of the hyperemia. Claimant reported 0/10 pain to heavy palpation along the adductor hiatus, medial knee and infrapatellar branch. Claimant also reported no pain with standing, ambulating, squatting, kneeling and crawling. Dr. Ghazi recommended Claimant cease the use of gabapentin and provided Claimant samples of horizant and meloxicam. Dr. Ghazi also scheduled Claimant for two right-sided lumbar sympathetic blocks and saphenous nerve blocks to be performed simultaneously.

21. On August 29, 2016, Daniel James White, M.D. at Denver Health Medical Center noted Claimant knee pain was stable at a 5/10 and that Claimant was considering returning to work.

22. On August 22 and August 30, 2016, Lance La Certe, Psy.D. performed a behavioral medicine evaluation of Claimant. Dr. La Certe issued a report dated August 30, 2016. Dr. La Certe reviewed Claimant medical records, conducted diagnostic interview, and administered objective tests. Claimant reported to Dr. La Certe that she experienced a burning pain to the medial aspect of her right knee, which she rated at a 5/10. Dr. La Certe noted that the nerve block performed by Dr. Ghazi reduced Claimant's pain from 8/10 to 5/10, and allowed Claimant to get four to five hours of sleep as compared to prior periods of no sleep. Claimant denied any previous psychological history. Regarding the objective tests performed, Dr. La Certe noted Claimant scored higher than 76% of patients asked to fake bad. Dr. La Certe further noted Claimant had an extreme level of reported somatic complaints, scoring higher than 99% of patients. Dr. La Certe noted Claimant's borderline personality trait scores were higher than 95% of patients, and that her anxiety and depression scores were within the average range for pain patients.

23. Dr. La Certe diagnosed Claimant with claim-related single-episode major depressive disorder and medial right knee pain. Dr. La Certe also noted "R/O pain disorder affecting other medical condition (claim related)…" Dr. La Certe noted that his objective tests corroborated his clinical impressions, stating,

> Her extreme level of somatic complaints does not appear reasonable given the nature of a focal injury. Most significant are item responses consistent with Borderline characteristics. These findings help explain my observations of a somewhat dramatic presentation. They also help explain why she has had such extreme responses (suicidality) to a single injury.

Dr. La Certe opined that there were a number of risk factors affecting the outcome of Claimant's injury, which Dr. La Certe stated included, but were not limited to:

> …acute pain which has transitioned to chronic; her unresolved anger related to her perception she has been treated incompetently for many months, told by at least one provider the pain was 'in her head', and not having been listened to; a dramatic presentation; possible character pathology; there presence of an attorney with the possibility of litigation; severe depression with suicidal acting out; lack of psychological sophistication and insight, accompanied by an absence of adaptive coping skills.

Dr. La Certe referred Claimant for psychological/behavioral medicine treatment, estimating Claimant would need 14-16 sessions of cognitive-behavioral treatment.

24. Dr. Ghazi performed a second right lumbar sympathetic block and right saphenous and infrapatellar nerve block on September 8, 2016. Dr. Ghazi noted the following post-injection findings, in part:

> Temperature increased to 81.2 degrees in the right leg with marked vasodilation, erythema, and warmth in the right leg consistent with successful sympathetic blockade…Tinel's test over the saphenous nerve at the adductor hiatus and medial joint line and Tinel's over the infrapatellar branch of the medial aspect of the joint line of the knee went from positive preoperatively to negative postoperatively. Postoperative pain level was 0/10 at rest with palpation and Tinel's versus preoperative pain levels of 5/10 at rest and 8/10 during palpation and Tinel's of the saphenous and infrapatellar branches.

Dr. Ghazi noted Claimant had "remarkable improvements in both mood and outlook," and that Claimant felt "the last set of injections have been remarkably beneficial in reducing the overall sensitivity and swelling, and she notes that she does not have edema constantly over the knee anymore…" Claimant reported at least 80% reduction in her overall symptomatology and severity since receiving the prior injection.

25. Claimant continued to treat with Dr. La Certe. On September 16, 2016, Dr. La Certe noted Claimant had suicidal and homicidal ideations, and had been experiencing auditory hallucinations since January or February 2016, which Claimant described as a dial tone sound and then beeping. Dr. La Certe noted that there were some mild, psychotic processes associated with Claimant's major depressive disorder. On September 19, 2016, Claimant reported pain at 3-4/10. Claimant reported an absence of auditory hallucinations and and denied homicidal and suicidal thoughts, relating her improvement to the reduction in pain. As of September 27, 2016, Claimant reported that the auditory hallucinations returned and that her pain was at a 4/10.

26. Dr. Ghazi performed a third right saphenous nerve block and right stellate ganglion block on September 22, 2016. Dr. Ghazi noted the following pre-operative

diagnoses: complex regional pain syndrome ("CRPS") of the right lower extremity, neuritis of right thigh, knee and patella, right saphenous neuralgia, and infrapatellar neuralgia. Dr. Ghazi concluded Claimant had 100% anesthetic relief following the repeat lumbar sympathetic block and repeat right saphenous nerve block. Dr. Ghazi noted Claimant's mood was remarkably improved, and that Claimant could be placed at MMI if she was doing well at a follow-up visit.

27. On October 3, 2016, Dr. La Certe noted Claimant's mental status had dramatically improved due to a combination of stable sleep and the absence of pain. Dr. La Certe noted that he would release Claimant back to work if Claimant's improved mental status continued into the next week.

28. During a follow-up evaluation with Dr. Zickefoose on October 4, 2016, Claimant reported pain at a 2/10, and that she had been pain-free for two days prior. Dr. Zickefoose opined that Claimant's condition had improved and that Claimant was doing well both physically and emotionally, noting that, however, Claimant still "gets angry." Dr. Zickefoose anticipated releasing Claimant to modified duty at the next visit and full duty in two to three weeks.

29. On October 5, 2016, Dr. La Certe noted absence of leg pain, stable sleep, and the absence of auditory hallucinations. Claimant reported continuing problems with anxiety, irritability and anger. Dr. La Certe noted that if Claimant's improved mental status remained he would set up a return to work structure beginning within the next one to two days.

30. Claimant attended a follow-up evaluation with Dr. Ghazi on October 10, 2016. Claimant rated her pain at a 2/10. Claimant reported feeling optimistic and that the injections had "given her real hope." Claimant reported she was not severely depressed or experiencing anxiety. On physical examination, Dr. Ghazi noted mild tenderness and pain in the knee with no edema. Dr. Ghazi gave the following impression: patellofemoral pain on right knee with hoffitis, complex regional pain syndrome ("CRPS") of the right knee involving saphenous and infrapatellar branch, and resolution of edema in the anterior right knee with significant but incomplete reduction of neuralgia. Dr. Ghazi recommended Claimant receive one final set of injections.

31. On October 11, 2016, Claimant reported to Dr. La Certe that she was experiencing a return of suicidal ideations. Dr. La Certe noted, "Claimant's mental status remains brittle despite significant improvement in her claimant's related physical pain."

32. On October 12, 2016, Dr. Zickefoose released Claimant to modified duty working six hours a day for three days a week, day shift only. Claimant reported improved sleep to Dr. La Certe on October 13, 2016. On October 18, 2016, Claimant reported increased pain levels at a 4/10 and admitted having brief suicidal thoughts after coming in contact with a gunshot wound patient at work.

33. On October 25, 2016, Claimant reported having flashbacks to her suicide attempt. Dr. La Certe opined that there appeared to be a direct correlation with the

increase of Claimant's flashbacks and Claimant's return to work, and took Claimant' off of work for at least the next six to eight weeks, remarking that Claimant's mental status was "too brittle."

34. On October 26, 2016, Claimant reported having no pain in her right knee since the previous Thursday. Dr. Zickefoose noted, "Patient believes she may not need the last set of injections but we will to see if they are approved and then decide if she wants to have them done."

35. Also on October 26, 2016, Dr. Cebrian issued a Rule 16 Occupational Health Consultation report regarding whether Dr. Ghazi's request for a repeat right lumbar sympathetic block and right saphenous nerve block were medically reasonable, necessary and related to the January 9, 2016 claim. Dr. Cebrian reviewed additional medical records and opined that Claimant did not have CRPS. Dr. Cebrian referred to the Colorado Division of Workers' Compensation Medical Treatment Guidelines ("MTG") for diagnosing CRPS and opined that Claimant did not meet the clinical diagnosis of CRPS. Dr. Cebrian noted that, because Claimant did not meet the clinical diagnosis of CRPS under the MTG, there was no need to pursue testing to confirm the diagnosis. Dr. Cebrian opined that the lumbar sympathetic blocks should never have been performed, and that further lumbar sympathetic blocks and saphenous or infrapatellar nerve blocks were not medically reasonable or necessary. Dr. Cebrian referred to Claimant's mental condition as a "larger issue" and opined that Claimant's "Subjective responses to injections or other invasive procedures during this time are fraught with unreliable responses." Dr. Cebrian recommended Claimant undergo a psychiatric IME.

36. In a medical note dated November 10, 2016, Dr. Zickefoose noted Claimant was not having knee pain and deemed Claimant's right knee pain and "other specified mononeuropathies" of Claimant's right lower limb had resolved.

37. On November 25, 2016, Robert Kleinman, M.D. performed a psychiatric IME of Claimant at the request of Respondents. Dr. Kleinman reviewed Claimant's medical records and conducted a psychiatric interview of Claimant. Claimant reported that she began getting depressed in March 2016 and that "She felt like her life was over because she thought that her knee would never get better." Claimant related her depression to her knee pain and not getting what Claimant deemed to be adequate treatment for her knee. Claimant reported being irritable, experiencing nightmares and flashbacks, and hearing a beeping sound in her head. Claimant reported that she "loved her life and had no worries before the injury," and that she did not receive any psychiatric treatment prior to the injury. Dr. Kleinman questioned Claimant regarding a February 17, 2015 Antepartum Record Problem List which documented that Claimant complained of being depressed since 2009 and had a history of anxiety. The medical record further noted Claimant declined speaking to a social worker or psychologist, and that she was not on medication. Claimant denied to Dr. Kleinman that she had been since 2009 and explained that the depression in 2015 could have been due to relationship problems with her then-boyfriend.

38. Dr. Kleinman opined that Claimant had a history of depression and anxiety, and noted it was logical to consider Claimant has somatoform disorder. Dr. Kleinman opined that Claimant "roots of depression go back to her personality," and referred to psychological testing completed by Dr. La Certe, which indicated the presence of somatization, borderline personality disorder characteristics, and faking bad. Dr. Kleinman diagnosed Claimant with borderline personality traits, persistent depressive disorder by history, major depressive disorder, and psychological factors affecting mental condition. Dr. Kleinman opined that Claimant's physical complaints were out of proportion to the objective medical findings, and that Claimant's depression was out of proportion to the injury. Dr. Kleinman further opined that Claimant's hallucinations and depression were unrelated to the work injury stating, "It is illogical to consider that her pain was causing depression when her pain is not supported by objective findings. It is more likely that the pre-existing condition of depression with characteristics of a borderline personality disorder is responsible for the exaggerated physical complaints." Dr. Kleinman opined that Claimant's "borderline personality characteristics and depression pre-disposed her to the dramatic presentation that followed the occupational incident."

39. Dr. Kleinman further opined that Claimant was at MMI regarding her mental health as of October 4, 2016, and that Claimant did not have any psychological restrictions or limitations preventing her from returning to work. Dr. Kleinman opined that secondary gain was responsible for Claimant's presentation and prolonged recovery stating, "The major contributing factors to [Claimant's] presentation are her pre-existing and untreated depression and anxiety and her untreated borderline personality traits. The elevator incident was not a contributing factor to the current emotional complaints."

40. On November 30, 2016 Dr. Cebrian issued a Supplemental IME Report after reviewing additional medical records and physically examining Claimant. Dr. Cebrian again opined that Claimant does not have CRPS and that her patellofemoral syndrome is not work-related. Dr. Cebrian opined that it is not medically probable Claimant sustained an injury to her infrapatellar saphenous nerve, based on Claimant's unreliable responses to multiple different types of injections. Dr. Cebrian referenced Dr. La Certe's and Dr. Kleinman's evaluations, and agreed with Dr. Kleinman that Claimant has somatoform disorder. Regarding Dr. Ghazi performing an injection on Claimant the day following Claimant's suicide attempt, Dr. Cebrian stated, "It would be impossible to accurately assess her response to treatment that relied on primarily a subjective response due to her emotionally vulnerable state, that in her opinion, was tied to her injury." Dr. Cebrian opined that it was not possible to accurately assess Claimant's responses to the injections due to the somatoform disorder, and that Claimant's positive and short-lived responses to different injections were not based on treating any physical pathology. Dr. Cebrian again opined that Claimant's claim-related condition is at most a right knee contusion, that Claimant reached MMI, and that no additional medical treatment was indicated. Dr. Cebrian further opined that there was no medical reason Claimant could not work in a full and unrestricted capacity.

41. On January 5, 2017, Dr. La Certe noted that he processed Claimant's return to work last week. Claimant reported anxiety. Dr. La Certe noted that the helipad, elevator

and SICU were triggers for Claimant at work. Dr. La Certe restricted Claimant to working three days per week, four hours per day.

42. On January 21, 2017, Dr. La Certe noted Claimant experienced returning suicidal ideations, and that her sleep had been significantly compromised by nightmares. Claimant reported pain at a 2/10. Dr. La Certe noted Claimant was no longer preoccupied with the pain and that it did not appear that the pain was contributing to her current emotional state. Dr. La Certe noted that continuing work for Employer involving clinical contact was not appropriate stating, "I do not want her to be in any environment which could expose her to triggers as a result of direct or indirect patient contact." Dr. La Certe took Claimant off of work starting January 23, 2017. Dr. La Certe noted that there was a "strong possibility" that Claimant could not return to Employer's work environment. In a medical note dated January 23, 2017, Dr. Zickefoose noted that, the week prior, Claimant had been exposed to a patient who attempted suicide.

43. Claimant has not worked for Employer since January 23, 2017. Claimant testified at hearing that she missed time at work in January 2017 because she was exposed to a suicidal patient, which caused her own suicidal thoughts and nightmares. Claimant testified that she missed work during periods from February through May 2016 due to being irritable and in pain. Claimant testified that she missed work in October 2016 due to depression. Claimant testified that she is currently not working.

44. Claimant further testified that she did not have any knee problems prior to the January 9, 2016 injury, and no knee injuries subsequent to the January 9, 2016 injury. Claimant testified that she began feeling depressed in May 2016 because the doctors basically told her there was nothing else that could be done for her knee. Claimant testified that she had no prior suicide attempts and had not felt similarly depressed in the past. Claimant testified that she experienced anxiety during a prior period of working as a dispatcher, but that the anxiety had resolved prior to the January 9, 2016 injury. Claimant testified that the physical therapy she received for the knee injury was ineffective, but that the nerve blocks administered by Dr. Ghazi were helpful. Claimant testified that she is doing "way better" now. Claimant testified that she continues to experience some pain but that the pain is not as bad as she previously experienced.

45. Dr. Cebrian testified at hearing on behalf of Respondents as an expert in occupational medicine. Dr. Cebrian opined that, within a reasonable degree of medical probability, Claimant did not sustain any claim-related injury, nor was there any aggravation or acceleration of a pre-existing condition causing the need for treatment. Dr. Cebrian testified that he no longer believes Claimant sustained a knee contusion, referring to the absence of documented swelling or bruising in the medical records from the first few evaluations. Dr. Cebrian further testified that, after receiving information on Claimant's mental health condition, he did not believe Claimant sustained any injury to the saphenous nerve or infrapatellar branch. Dr. Cebrian opined that Claimant's subjective reports are unreliable due to her vulnerable psychological state and somatic complaints. Dr. Cebrian testified that the February 26, 2016 MRI documented patellar femoral syndrome, which was not causally related to the work incident because the

objective findings on the lateral side did not correlate with Claimant's reported symptoms on the medial side. Dr. Cebrian disagreed with Dr. Ghazi's diagnosis of CRPS. Dr. Cebrian testified that the MTG requires an individual must meet three of four categories of clinically positive findings to establish and then confirm the diagnosis with objective testing. Dr. Cebrian testified that Claimant did not reach the lower threshold to establish clinical CRPS.

46. Dr. Cebrian disagreed that Claimant's injury caused her suicide attempt. Dr. Cebrian opined that Claimant's psychological response was out of proportion to a minor injury and was clearly related to pre-existing psychological issues. Dr. Cebrian testified that, as of October 27, 2016, there was no indication of any physical issues preventing Claimant from working. Dr. Cebrian further opined that Claimant's mental triggers to the hospital environment and her auditory hallucinations are unrelated to the knee injury. Dr. Cebrian further testified that, if Claimant did sustain a knee contusion, the initial evaluation and treatment she received was reasonable.

47. Dr. Kleinman testified at hearing on behalf of Respondents as an expert in psychiatry. Dr. Kleinman testified consistent with his IME report. Dr. Kleinman testified that Claimant had history of depression for which she probably should have received prior treatment. Dr. Kleinman opined, within a reasonable degree of medical probability, that Claimant had depression, somatoform disorder, borderline personality traits, and a pain disorder. Dr. Kleinman indicated Claimant was faking bad. Dr. Kleinman opined that Claimant's psychological issues, including the suicide and the need for psychological medication, were pre-existing and not causally related to the knee injury. Dr. Kleinman testified that one could expect some situational depression after an injury, but that it was illogical to see this degree of depression and suicidality as a result of a minor injury with few objective findings. Dr. Kleinman opined that Claimant has poor coping skills and that her psychological issues are a result of Claimant's borderline personality traits and not the knee injury. Dr. Kleinman further opined that Claimant's "pre-existing predisposition" caused the somatoform disorder, and that her pre-existing condition is "ineffective coping." Dr. Kleinman testified that depression can affect how people report their symptoms and responses to treatment, and that Claimant's positive responses to Dr. Ghazi's injections could be a placebo, or could be due to Claimant's psychological issues.

48. Dr. La Certe testified at hearing on behalf of Claimant as an expert in psychology. Dr. La Certe testified consistent with his reports and medical notes. Dr. La Certe opined that, within a reasonable degree of medical probability, Claimant's psychological issues, including her depression, are related to the January 9, 2016 knee injury. Dr. La Certe testified Claimant had some prior reactive depression to a pregnancy in 2015, and had been on Xanax in 2011 for an anxiety attack; however, he was unaware of any going psychological conditions leading up to the January 9, 2016 injury. Dr. La Certe testified that Claimant worked for Employer for 2.5 years prior to the injury without any difficulty functioning. Dr. La Certe opined that Claimant was psychologically unsophisticated and had no coping mechanisms, and that such factors could result in a minor injury being catastrophic. Dr. La Certe characterized Claimant's psychological condition as a pre-disposition, and testified that her psychological

condition affected Claimant's ability to heal from the injury and her ability to return work. Dr. La Certe opined that Claimant's suicide attempt was directly related to the knee injury. Dr. La Certe agreed Claimant had a pain disorder, but disagreed Claimant was motivated by secondary gain. Dr. La Certe further opined that Claimant's mental health characteristics exacerbated the injury. Dr. La Certe testified that Claimant still requires additional mental health treatment and cannot return to work for Employer, as triggers present in the clinical work environment cause a regression in Claimant's mental status.

49. Debby Esler testified at hearing on behalf of Respondents. Ms. Esler works for Employer as a Workers' Compensation Insurance Specialist. Ms. Esler testified that Claimant's work restrictions were communicated to her supervisors. Ms. Esler testified that Employer was able to accommodate Dr. Dickson's February 24, 2016 work restrictions and that work was available for Claimant from February 25-29, 2016. Ms. Esler further testified that work accommodating Claimant's March 11, 2016, March 21, 2016, April 7, 2016, May 12, 2016 and October 4, 2016 restrictions was available for Claimant. Ms. Esler testified that Claimant had been working on and off for Employer after January 9 2016, and that Employer extended the June 2, 2016 written modified job offer to Claimant as a formal offer. Ms. Esler testified that no job offer in writing was made in writing to Claimant prior to such time, and that that Employer has not sent Claimant an offer of modified duty since she last worked for Employer in January 2017. Ms. Esler testified that Claimant is no longer employed with Employer because Employer could not accommodate restrictions prohibiting her from working in a clinical environment.

50. Ms. Esler testified that Claimant was paid $404.96 per week in short-term disability benefits from April 7, 2016 through May 31, 2016, and $354.02 per week in short-term disability benefits from August 5, 2016 through December 17, 2016. Ms. Esler testified that the short-term disability premium and long-term disability premium is fully-funded by Employer.

51. Claimant's testimony is found credible and persuasive.

52. The opinions of Drs. Ghazi, La Certe and other treating physicians are found more credible and persuasive than the contradictory opinions of Drs. Cebrian, Kleinman, and Glenova.

53. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right knee on January 9, 2016 and that her mental condition was a natural consequence of the compensable knee injury.

54. Claimant has proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment related to Claimant's right knee injury and resulting mental health condition.

55. Claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits for the periods January 10, 2016; February 25, 2016 through February 29, 2016; March 11, 2016 through March 14, 2016; March 25, 2016 through May 31, 2016;

October 4, 2016 through October 12, 2016; October 27, 2016 through December 26, 2016; and January 23, 2017 through April 10, 2017.

56. Respondents are entitled to offset any TTD benefits paid to Claimant as a consequence of her receipt of short-term disability and long-term disability benefits.

57. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimtn was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An employer is responsible for the direct and natural consequences which flow from a compensable injury. *Vanadium Corp. Of America,* 307 P.2d 454 (Colo. 1957); *Hembry v. ICAO,* 878 P.2d 114, 115 (Colo. App. 1995). Whether a causal connection exists between the work-related injury and subsequent injury is a question of fact. *Baca v. Helm,* 682 P.2d 474 (Colo.1984); *Hembry v. Indus. Claim Appeals Office of State of Colo.*, 878 P.2d 114, 115 (Colo. App. 1994).

When evaluating this issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

Right Knee Injury

As found, Claimant established by a preponderance of the evidence that she sustained a compensable right knee injury on January 9, 2016. Drs. Szczukowsi, Dickson, McDonough and Healey credibly opined that Claimant sustained a work-related right knee contusion. Claimant's symptoms were located in the area where she was struck on the knee by the hospital bed. Per multiple physicians, Claimant continued to report knee symptoms long after the knee contusion should have resolved, and there were no objective findings on the MRI of significant abnormality. However, it was not until approximately six months after the date of injury that the possibility of a saphenous and infrapatellar nerve injury was suggested. Dr. Ghazi credibly opined that Claimant sustained work-related CRPS involving saphenous neuralgia and infrapatellar neuralgia. The medical records document a decrease in physical symptoms and an increase in functional improvement after Claimant received injections performed by Dr. Ghazi to address the saphenous neuralgia and infrapatellar neuralgia. Claimant also credibly testified that the injections performed by Dr. Ghazi were helpful. Moreover, although Dr.

Cebrian ultimately opined that Claimant did not sustain a saphenous or infrapatellar nerve injury, Dr. Cebrian stated in his initial IME report that the mechanism of injury could have caused a saphenous nerve injury, and that Claimant's symptoms could be consistent with a saphenous nerve injury. While Dr. Cebrian deemed Claimant's positive response to Dr. Ghazi's injections to be unreliable due to Claimant's mental condition, the ALJ is not persuaded Claimant's reported relief from the injections is wholly unreliable. Regarding Claimant's patellofemoral syndrome, the ALJ credits the opinions of Drs. Dickson, McDonough, Wood, and Pepper that such condition is pre-existing and not work-related.

Mental Health Condition

As found, Claimant established by a preponderance of the evidence that her mental condition is a direct and natural consequence that flowed proximately from the January 9, 2016 industrial injury. Dr. La Certe credibly testified that the knee injury combined with Claimant's pre-existing psychological issues to cause Claimant's depression, suicide attempt, and the need for mental health treatment. Claimant credibly refuted a history of depression and ongoing psychological issues or treatment leading up to the work injury. It was not until after the January 9, 2016 work injury that Claimant's mental health condition deteriorated to the point of requiring mental health treatment. Claimant credibly testified that the pain from the injury caused her depression and suicide attempt. The ALJ is persuaded the industrial injury combined with Claimant's pre-existing poor coping mechanisms and borderline personality traits to produce the need for mental health treatment.

Medical Benefits

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable and necessary medical treatment related to the January 9, 2016 industrial injury, including treatment for the right knee injury as well as treatment for Claimant's mental health as related to the right knee injury.

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d

542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found, Claimant has proved by a preponderance of the evidence that she is entitled to TTD benefits for periods January 10, 2016; February 25, 2016 through February 29, 2016; March 11, 2016 through March 14, 2016; March 25, 2016 through May 31, 2016; October 4, 2016 through October 12, 2016; October 27, 2016 through December 26, 2016; and January 23, 2017 through April 10, 2017. Claimant credibly testified that she missed work during such time periods either due to pain, irritability or depression resulting from the work injury. Consequently, Claimant was “disabled” within the meaning of Section 8-42-105, C.R.S. and is entitled to TTD benefits. Although Respondents presented evidence that there was work available to Claimant within her restrictions until October 4, 2016, Respondents failed to provide Claimant with a valid modified job offer aside from the June 2, 2016 offer, which became invalid when Claimant’s restrictions dropped from working twelve hours per day to eight hours per day on July 7, 2016. The ALJ concludes Claimant was physically and/or mentally restricted from her usual job duties, and no valid modified employment was offered to Claimant for the time periods listed herein. Because Claimant’s period of disability lasted longer than two weeks from the date she left work as a consequence of her injury, TTD is recoverable from the date Claimant first left work, January 10, 2016. See Section 8-42-103(1)(b), C.R.S.

Offsets

Pursuant to Section 8-42-103(1)(d)(I), C.R.S., the aggregate benefits payable to a claimant for TTD shall be reduced, but not below zero, “by an amount equal as nearly as practical” to the amount of any benefits paid to a Claimant under any disability plan financed in whole or in part by the employer, subject to the following limitations:

(A) Where the employee has contributed to the . . . disability plan, benefits shall be reduced . . . *in an amount proportional to the employer's percentage of total contributions to the employer . . . disability plan.*

(B) Where the employer . . . disability plan provides by its terms that benefits are precluded there under in whole or in part if benefits are awarded under articles 40 to 47 of this title, the reduction provided in paragraph (d) shall not be applicable to the extent of the amount so precluded.

The "offsets" provided for under Section 8-42-103(1)(d)(I), C.R.S. are statutory in nature. Consequently, respondents are entitled to apply the provisions of Section 8-42-103(1)(d)(I), C.R.S and offset the TTD benefits to be paid to Claimant if the circumstances raised by Section 8-42-103(1)(d)(I), C.R.S. otherwise apply to the case.

As found, Claimant is entitled to TTD benefits and received periodic short-term and long-term disability benefits under an employer sponsored disability plan. Ms. Esler credibly testified Claimant did not contribute to the disability plan. Respondents are entitled to applicable offsets for short-term and long-term disability paid to Claimant.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right knee on January 9, 2016 and that her subsequent mental health condition is a compensable consequence of the original knee injury.

2. Claimant is entitled to all reasonable, necessary, and related medical treatment for her right knee and mental health condition.

3. Respondents shall pay Claimant TTD for the periods of January 10, 2016; February 25, 2016 through February 29, 2016; March 11, 2016 through March 14, 2016; March 25, 2016 through May 31, 2016; October 4, 2016 through October 12, 2016; October 27, 2016 through December 26, 2016; and January 3, 2017 through April 10, 2017.

4. Respondents are entitled to offset Claimant's TTD for short-term disability benefits and long-term disability benefits received by Claimant during the applicable time periods.

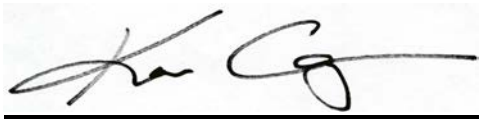
5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 25, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he is entitled to an award of penalties from Respondent, for a violation of §8-43-401(2)(a), C.R.S.?

II. Has Claimant shown, by a preponderance of the evidence, that he is entitled to an award of penalties from Respondent, for a violation of §8-43-304(1), C.R.S.?

III. Have Respondents shown, by a preponderance of the evidence, the affirmative defense afforded by §8-43-304(4), C.R.S., that Claimant has filed to state, with the required specificity, the grounds on which any claimed penalty is being asserted under §8-43-304(1), C.R.S.?

STIPULATIONS

As noted, the parties have stipulated to the following facts, which the ALJ accepts and finds to be true:

1. The claimant was injured in an admitted accident in the course and scope of his employment with the Respondent Employer on December 5, 2013.

2. The claimant was placed at maximum medical improvement by authorized treating physician, Dr. Albert Hattem, on October 13, 2015.

3. Dr. Hattem assigned seventeen percent scheduled impairment to the claimant's left upper extremity resulting from the industrial injury.

4. The carrier filed an October 20, 2015, Final Admission admitting liability consistent with Dr. Hattem's opinions on MMI, impairment and the claimant's need for medical treatment post-MMI and commenced payment of PPD.

5. The claimant timely objected and requested a Division IME.

6. Dr. Miguel Castrejon was selected as the Division Examiner. Dr. Castrejon examined the claimant on April 6, 2016.

7. Dr. Castrejon agreed with the October 13, 2015, MMI date, but assigned 27 percent scheduled impairment to the claimant's left upper extremity injuries.

8. Twenty-seven percent scheduled impairment has a value of $15,449.61.

9. As of the date of the Division IME, $5,423.40 in PPD had been paid to the claimant.

10. The carrier filed a May 20, 2016, Amended Final Admission consistent with Dr. Castrejon's opinions on MMI and permanent physical impairment.

11. On May 24, 2016, the carrier issued a lump sum payment of $5,722.08 in PPD to the claimant.

12. On January 25, 2017, the claimant, through counsel, filed an Application for Hearing endorsing the issue of penalties, "C.R.S. 8-43-304(1) Violated provision of Workers' Compensation Act by failing to pay PPD owed. C.R.S. 8-43-401(2)(a) Failed to pay PPD benefits owed."

13. No additional PPD benefits were paid to claimant until March 14, 2017, when a lump sum payment of $3,504.13 was made by the carrier.

14. On June 23, 2017, a final payment of $732.77 was issued to the claimant by the carrier.

ADDITIONAL FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Additional Findings of Fact:

1. From the Exhibits tendered and admitted, the ALJ has drawn certain inferences, and concludes that certain errors were committed by the adjuster(s) while processing this claim. The FAL erroneously indicates that $9727.52 *had been previously paid* to Claimant, based upon the 17% rating originally assigned. Such amount would have paid the claim in full, had it been timely paid. The revised 27% rating agreed upon yielded a total, revised award of $15,449.61.

2. The above inference is made as follows: 9727.52 divided by 15,449.61 yields the identical ratio (.6296) as dividing 17 by 27. Thus, the adjuster erroneously believed that the claim had previously been paid in full by paying $9727.52, based on the 17% rating. The new balance due (in the eyes of the adjuster, based upon the revised 27% rating) would now be $5,722.08. This was indeed paid on 5-24-16, 6 days after the FAL was issued. The adjuster thus believed the obligation was paid in full on this date. It wasn't.

3. In fact, at the time of the FAL, only $5423.40 had been paid on the claim. Adding the payment of 5-24-16 of $5722.08 yielded an actual balance due of $4304.13. Based upon the evidence admitted herein (disregarding withdrawn exhibits), Respondent was placed on notice of this deficiency when the Application for penalties was filed on 1-25-17.

4. Respondent was then neither timely nor accurate in rectifying the problem. On 3-14-17, the adjuster then paid out $3,504.13, erroneously believing, once again, that this would bring the balance to zero. It would have, had the additional $800 previously

paid to Claimant been for PPD. It wasn't. That $800 had been paid (promptly, at least) on 1-21-16 to settle the companion *disfigurement* claim. The adjuster had now erroneously credited the PPD account for this $800.

5. Thus, in reality, a balance still remained of $800 for the admitted PPD portion of the claim, as of 3-14-17. For reasons unclear from the record, on the FAL remarks, the adjuster had claimed an *offset* of $50.**8**4 (despite putting $50.**5**4 on the overpayment line-yet another mistake, albeit minor). Five days before the hearing, on 6-23-17 the adjuster made an additional PPD payment of $732.77.

6. Inexplicably, this still left a balance of $16.39, which (according to Claimant's position statement, but not in the exhibits) was paid on 7-17-17. Thus, on said date, post hearing, the PPD was truly, finally paid in full (giving this adjuster the benefit of the doubt that Respondents were ever actually entitled to an offset of $50.84; if not, that's yet *another* mistake). For clarity, a summary chart, prepared by the ALJ, follows as an additional Finding of Fact.

7. A number of terms possibly come to mind regarding the handling of this file: negligent, inexperienced, overworked, indifferent, perhaps even reckless- *but not willful. Willful* would imply some financial motive, and a level of attention to the file which is plainly not present here. The ALJ finds that the actions of Respondent, aggravating though they might be, were not willful.

	Erroneous*	Actual
5-20-2016 FAL	15,449.61	15,449.61
(prior payments under 17% rating-Error #1)*	(9,727.53)*	(5,423.40)
balance owed	5,722.08	10,026.61
"final" payment 5-24-16	(5,722.08)	(5,722.08)
Balance as of 5-24-16	-0-	4,304.13
1-25-17 App filed- (Adjuster put on notice)	4,304.13	
3-14-17 (error #2 by adjuster)*		
(applied $800 disfig to PPD)	(800.00)*	
(actually paid out)	(3,504.13)	(3504.13)
Balance STILL owed due to error #2	-0-	800.00
Offset claimed on FAL (unexplained)		(50.84)
6-23-17 payment		(732.77)
Balance due 6-28-17 Hearing Date		16.39
7-17-17 FINAL payment (per Claimant's Position Stmt)		(16.39)
Actual balance today		-0-

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Penalties under C.R.S 8-43-401(2)(a)

D. Penalties under § 8–43–401(2)(a) are awarded for the "willful withholding" of permanent partial disability benefits. In the context of the Act, the term "willful" has been defined to mean acting with deliberate intent. *City of Las Animas v. Maupin,* 804 P.2d 285 (Colo.App.1990). The failure to timely pay PPD benefits does not subject the Respondent Insurer to penalties unless the failure is the result of its deliberate intent. Further, "willful and wanton misconduct connotes acts or omissions that extend beyond

mere unreasonableness". *See generally, Terror Mining Co. v. Roter,* 866 P.2d 929, 933-934 (Colo. 1994). Conduct which is the result of mere carelessness, negligence, forgetfulness, remissness or oversight does not rise to the level of willful action. *See Johnson v. Denver Tramway Corp*., 115 Colo. 214, 171 P.2d 410 (1946).

E. The party asserting a proposition carries the burden of proof. Further, consideration should be given to which party would prevail in the absence of any evidence on the subject. *Cowin and Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). The claimant, as the proponent for imposition of a penalty, carried the burden of proof to establish that the insurer's failure to timely pay permanent partial disability benefits was willful. *See Johnson v. Denver Tramway Corp, supra*.

F. Claimant presented insufficient evidence concerning the reasons for the Insurer's late payment of PPD, and no persuasive evidence that the Insurer acted "willfully" in its failure to timely pay permanent partial disability benefits. In the absence of evidence to the contrary, the insurer's conduct could have been the result of any number of reasons, such as mere carelessness, oversight, or negligence, which would not subject it to a penalty under § 8-43-401(2)(a), C.R.S. The claimant failed to meet his burden of proving the Insurer willfully withheld payment of permanent partial disability benefits.

Penalties under C.R.S. 8-43-304(1) and (4)

G. Section 8-43-304(4), C.R.S., provides, in relevant part, "In any application for hearing for any penalty pursuant to subsection (1) of this section, the applicant ***shall state*** with specificity the grounds on which the penalty is being asserted." (Emphasis added) This section imposes a specific statutory pleading standard for penalty claims with which the claimant failed to comply.

H. Under Rule 8(A), O.A.C.R.P., the parties to a workers' compensation proceeding are required to use the Application for Hearing and Notice to Set form provided by the OAC, or on a substantially similar form. The Application for Hearing form generated by the Colorado Office of Administrative Courts requires the party seeking penalties to set forth "the dates on which you claim the violation began and ended".

I. Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise shall be construed accordingly. Section 2-4-101, C.R.S. The use of the word "shall" in a legislative enactment is presumed to connote a mandatory meaning. *Burns v. Board of Assessment Appeals of State of Colorado,* 820 P.2d 1175 (Colo.App. 1991).

J. Claimant's Application for Hearing only adequately notified Respondents of a claimed violation of section 8-43-401(2)(a), C.R.S., which provides for a specific penalty, stating, that should an insurer *willfully withhold* permanent partial disability benefits within 30 days of when due, the insurer or self-insured employer shall pay a

penalty to the division of ten percent of the amount of such benefits due. Other than section 8-43-401(2)(a), C.R.S., the Claimant failed to state with specificity any specific statutory section under which penalties were sought. The Claimant failed to set forth the date any claimed violation for an award of general penalties began and ended in his Application for Hearing.

K. The general penalty provision contained in section 8-43-304(1),C.R.S., sets forth four categories of conduct and authorizes the imposition of the described penalties when an employer or insurer: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, *for which no penalty has been specifically provided,* or (4) fails, neglects or refuses to obey any lawful order of the director or the panel. *See Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001). The limiting phrase contained in § 8-43-304(1), C.R.S., "for which no penalty has been specifically provided" modifies the first three categories, but does not modify the fourth category, which is disobeying a lawful *order. Holliday v. Bestop, Inc., supra.; Pena v. Industrial Claim Appeals Office,* 111 P.3d 84 (Colo.App. 2005). The term *"order"* as used in § 8-43-304(1), C.R.S. includes a rule or regulation. See § 8-40-201(15), C.R.S.; *Holliday v. Bestop, Inc., supra; Paint Connection Plus v. Industrial Claim Appeals Office,* 240 P.3d 429 (Colo.App. 2010). The only penalty the claimant pled was a violation of §8-43-401(2)(a), C.R.S. That cause of action has been addressed herein, with a finding that the conduct was not "willful".

L. A violation of "articles 40 to 47 of this title" precedes the alternative penalty clause and is thereby subject to its limitations. *In the Matter of the Claim of Pamela K. Ringler v. King Soopers,* W.C. 4-121-888-11 (March 13, 2013) (2013 WL 1164346) citing *Barbieri v. Helzberg's Diamond Shops,* W.C. No. 4-679-315 (September 25, 2008).

M. Section 8-43-304(1) is a residual penalty clause which applies when no other provision of the Act prescribes a penalty for the conduct in question. *Holliday v. Industrial Claim Appeals Office,* 997 P.2d 1212 (Colo. App. 1999), *cert. granted,* May 15, 2000; *Sears v. Penrose Hospital,* 942 P.2d 1345 (Colo. App. 1997). Section 8-43-402(2)(a), C.R.S. 1999, provides that an insurer which "willfully withholds permanent partial disability benefits" within thirty days of when due, "must pay a penalty to the division of ten percent of the amount of such benefits due." At the commencement of the hearing, the Claimant's representative specifically stated the basis of the claim for penalties was "nonpayment of" permanent partial disability benefits." This statement was entirely consistent with the issues endorsed on the Claimant's Application for Hearing, which noted the basis of the claim for penalties was the insurer's alleged failure to pay permanent partial disability benefits. *See, In the Matter of the Claim of Patricia J. al-Hafeez v. Futurecall Telemarketing West, Inc.,* W. C. No. 4-206-420, 2000 WL 1138206, at *5 (July 24, 2000).

N. Additional case law provides guidance on the specificity required to plead a violation of the general penalty provision. In *In the Matter of the Claim of Halimo Salad*

v. JBS USA, LLC, W.C. No. 4-886-842-06 (March 27, 2014), Claimant alleged penalties for

> [f]iling or relying on false and fraudulent Entry of Appearance and other pleadings and correspondence to conceal, advance, and further longstanding fraud involving designation of non-existent employer in this and other countless other workers' compensation matters and in likewise fraudulently claiming it's a "clerical error", contrary to 8-43-304(1) and 8-43-402.

Respondents moved for summary judgment, requesting that Claimant's application be stricken for failure to identify the alleged fraudulent practices, the specific documents which support Claimant's contentions, or identify the dates the alleged violations began and ended. The ALJ granted summary judgment. In upholding summary judgment, the ICAO noted that Claimant never identified the statute, rule, or order which was allegedly violated by Respondent's errors. Further, Claimant failed to reference how such errors were implicated in her penalty claim. Nor did Claimant specify which filings were at issue, or how Respondent's actions impacted her claim in any manner.

O. Further guidance for the specificity required in requesting penalties under 8-43-304 can be found in *In the Matter of the Claim of Curtis Lovett v. Stroup Insurance Services,* W.C. No. 4-808-092-04 (August 30, 2013). Claimant in *Lovett* sought medical benefits, and claimed penalties for "violation of Rule 16 regarding medical denials for preauthorization with completed request". Respondents replied to the penalty claim by stating in their Response "Failure to state grounds with specific or clarity, §8-43-304(4), CRS." The ALJ denied the request for penalties, noting that the instructions on the Application for Hearing advise the party to "Describe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended."

P. In upholding the ALJ, the ICAO noted that "violation of rule 16 regarding medical denials for preauthorization with completed request" does not state the basis for a penalty. "To the extent the claimant alleged a violation of the procedures established in Rule 16 governing such a denial, the claimant is required to cite the specific procedure involved. This is a requirement of §8-43-304(4) *and the OAC application instructions.* (emphasis added). Those instructions also request a statement of the dates on which it is claimed the violation began and ended." The ICAO concluded that *Lovett* had failed to satisfy any of the three pleading conditions.

Q. Respondents met their burden of proving the affirmative defense set forth in section 8-43-304(4), C.R.S., failure to set forth with specificity the grounds on which the penalty being sought under section 8-43-304(1), C.R.S. was being asserted. The purpose of the specificity requirement not only allows Respondents the opportunity to properly defend the claim at hearing; properly pled, an Application for penalties would allow Respondents to meet the laudatory goal of correcting any problems promptly. Presumably, this is what any reasonable Claimant would seek, instead of a windfall. The general penalty sought by claimant herein under section 8-43-304(1), C.R.S., is therefore precluded.

ORDER

It is therefore ordered that:

1. Claimant's request for penalties pursuant to §8-43-401(2)(a) is denied and dismissed.

2. Claimant's request for penalties pursuant to §8-43-304(1) is denied and dismissed for failure to plead with sufficient specificity.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 25, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stanley H. Ginsburg, M.D. that she reached Maximum Medical Improvement (MMI) on October 26, 2015 as a result of her September 21, 2014 admitted right shoulder injury.

2. If Claimant is at MMI, whether she has established by a preponderance of the evidence that DIME Dr. Ginsburg's 6% scheduled impairment rating for her admitted right shoulder injury was incorrect.

3. Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to withdraw their June 8, 2016 Final Admission of Liability (FAL) that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's September 21, 2014 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Claimant worked as a Cashier for Employer. On September 21, 2014 she suffered an admitted industrial injury to her right shoulder. While Claimant was lifting a 36-pack of water her right arm jerked downward and she experienced immediate pain.

2. Claimant began receiving conservative treatment from Authorized Treating Physician (ATP) Thomas White, M.D. An MRI revealed a complete tear to a portion of Claimant's supraspinatus tendon. Dr. White referred Claimant to Robert Hunter, M.D. for a surgical consultation.

3. On March 23, 2015 Claimant underwent right shoulder surgery. Dr. Hunter performed a right shoulder rotator cuff repair and AC joint resection decompression with acromioplasty.

4. Claimant underwent post-operative conservative treatment and physical therapy for several months. She explained that while she was undergoing physical therapy she developed left shoulder pain. Claimant did not recall when her left shoulder began to hurt and did not correlate any specific injury to her symptoms. Instead, Claimant contends that her left shoulder complaints were caused by overcompensation after her right shoulder surgery. She commented that her left shoulder pain is progressively worsening and her right shoulder symptoms are worse than they were before surgery.

5. On October 26, 2015 Dr. White concluded that Claimant had reached Maximum Medical Improvement (MMI) for her September 21, 2014 admitted right shoulder injury. Dr. White released Claimant from care without impairment or the need for maintenance treatment. He explained to Claimant that it might take up to one year for complete recovery from surgery because of her age and history of injury. Dr. White explained that continuing numbness and difficulties that Claimant was experiencing in both shoulders was not work-related.

6. Claimant challenged Dr. White's MMI and impairment determinations and sought a Division Independent Medical Examination (DIME). On March 31, 2016 Claimant underwent a DIME with Stanley H. Ginsburg, M.D. Dr. Ginsburg agreed with Dr. White that Claimant had reached MMI for her right shoulder on October 26, 2015 and her left shoulder complaints were not work-related. Dr. Ginsburg disagreed with Dr. White's 0% permanent impairment rating and assigned a 6% scheduled impairment for Claimant's right shoulder range of motion deficits. He also noted that Claimant was entitled to medical maintenance care.

7. On June 8, 2016 Respondents field an Amended FAL consistent with Dr. Ginsburg's MMI determination and impairment rating. The FAL also recognized that Claimant was entitled to receive medical maintenance benefits.

8. On June 14, 2016 Claimant underwent an independent medical examination with Timothy Hall, M.D. Dr. Hall disagreed with Dr. Ginsburg's findings and concluded that Claimant had not reached MMI. He determined that Claimant's left shoulder complaints were work related due to overcompensation following surgery and she required additional medical treatment for both shoulders. Dr. Hall also provided Claimant with a 16% scheduled impairment rating for the right shoulder. He noted that Dr. Ginsburg failed to include a 10% rating for resection of the bone performed during shoulder surgery in addition to a range of motion impairment.

9. On June 17, 2016 Claimant underwent a second right shoulder MRI. The MRI revealed an intact supraspinatus tendon and evidence of tendinopathy with no objective evidence of additional tearing or fraying.

10. On September 21, 2016 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian performed a physical examination and medical records review. He agreed with Drs. White and Ginsburg that Claimant had reached MMI on October 26, 2015 and her left shoulder complaints were not work-related. Dr. Cebrian remarked that Claimant had poor posture with rounded shoulders and kyphosis of the cervical spine. He noted that Claimant had not been working for several months. There was no explanation for her continued left shoulder symptoms because her activities lacked the combination of repetition and force to produce an injury. Dr. Cebrian agreed with the 6% scheduled impairment rating for Claimant's right shoulder assigned by Dr. Ginsburg. He noted that Dr. Ginsburg correctly did not assign an additional impairment for a distal clavicle resection because Claimant had undergone an acromioplasty. Dr. Cebrian explained that an acromioplasty is a minor shaving of the bone that is different from a resection of the bone.

11. Dr. Hall testified at the hearing in this matter. He maintained that Claimant had not reached MMI and required additional left shoulder treatment. Dr. Hall commented that overcompensation was a common condition with shoulder injuries and Claimant had guarded her right shoulder following surgery. He noted that Claimant warranted an additional 10% scheduled impairment rating for a distal clavicle resection. Dr. Hall remarked that a 10% rating for a distal clavicle resection was mandatory pursuant to the Colorado Division of Workers' Compensation *Impairment Rating Tips* (*Impairment Rating Tips*).

12. Claimant also testified at the hearing in this matter. She explained that she continues to suffer pain in both of her shoulders. Claimant acknowledged that she has not worked for Employer since January 2016 but her pain symptoms continue to worsen.

13. Dr. Cebrian testified at the hearing in this matter. He agreed with Dr. Ginsburg that Claimant reached MMI on October 26, 2015 and warranted a 6% scheduled impairment rating for her right shoulder injury. However, Dr. Cebrian disagreed with Dr. Ginsburg that Claimant required medical maintenance treatment. He explained that Claimant suffered from kyphosis and would continue to experience pain due to degenerative, age-related factors.

14. Dr. Cebrian also explained that Dr. Hall incorrectly concluded that Claimant's left shoulder condition was causally related to her September 21, 2014 injury. He commented that Claimant did not mention any left shoulder symptoms prior to reaching MMI. Moreover, he disagreed with Dr. Hall that Claimant warranted a 16% extremity rating for her right shoulder injury based on range of motion deficits and the distal clavicle resection. Although Dr. Cebrian acknowledged that Claimant was entitled to a 6% extremity impairment rating for range of motion deficits, the additional 10% rating noted by Dr. Hall was inappropriate. Relying on the *Impairment Rating Tips,* Dr. Cebrian commented that it is not mandatory to assign a 10% rating based on the specific procedure. Instead, Dr. Cebrian noted that the rating physician has discretion to assign the additional impairment "if" warranted and based on the total clinical picture. He specifically commented that the *Impairment Rating Tips* are designed to capture all possible surgical outcomes. Notably, a physician can assign "up to" an additional 10% impairment. Dr. Cebrian concluded that the additional impairment was not warranted.

15. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that she reached MMI on October 26, 2015 as a result of her September 21, 2014 admitted right shoulder injury. Initially, Dr. Ginsburg agreed with ATP Dr. White that Claimant had reached MMI for her right shoulder on October 26, 2015 and her left shoulder complaints were not work-related. Moreover, Dr. Cebrian agreed with Drs. White and Ginsburg that Claimant had reached MMI on October 26, 2015 and her left shoulder complaints were not work-related. Dr. Cebrian remarked that Claimant had poor posture with rounded shoulders and kyphosis of the cervical spine. He noted that Claimant had not been working for several months. There was no explanation for her continued left shoulder symptoms because her activities lacked the requisite repetition and force to produce an injury.

16. In contrast, Dr. Hall disagreed with Dr. Ginsburg's findings and concluded that Claimant had not reached MMI. He determined that Claimant's left shoulder complaints were work-related due to overcompensation following surgery and she required additional medical treatment for both shoulders. However, Dr. Hall did not detail how Dr. Ginsburg erred in determining that Claimant reached MMI on October 26, 2015 or otherwise incorrectly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's MMI determination was incorrect.

17. Claimant has failed to establish that it is more probably true than not that DIME Dr. Ginsburg's 6% scheduled impairment rating for her admitted right shoulder injury was incorrect. Initially, Dr. Ginsburg assigned a 6% scheduled impairment rating for Claimant's right shoulder range of motion deficits. In contrast, Dr. Hall noted that Claimant warranted an additional 10% scheduled rating for a distal clavicle resection. He remarked that a 10% rating for a distal clavicle resection was mandatory pursuant to the *Impairment Rating Tips*. Nevertheless, Dr. Hall acknowledged that only a small portion of the bone was shaved during the surgical procedure.

18. Dr. Cebrian persuasively agreed with Dr. Ginsburg that Claimant warranted a 6% scheduled impairment rating for her admitted right shoulder injury. He disagreed with Dr. Hall that Claimant warranted a 16% extremity rating for her right shoulder injury based on range of motion deficits and the distal clavicle resection. Specifically, the additional 10% rating noted by Dr. Hall was inappropriate. Relying on the *Impairment Rating Tips,* Dr. Cebrian commented that it is not mandatory to issue a 10% rating based on the specific procedure. Instead, Dr. Cebrian noted that the rating physician has discretion to assign the additional impairment "if" warranted and based on the total clinical picture. Dr. Cebrian specifically commented that the *Impairment Rating Tips* are designed to capture all possible surgical outcomes. Notably, a physician can assign "up to" an additional 10% impairment. The record thus reveals that Dr. Ginsburg properly exercised his discretion by assigning a 6% scheduled impairment rating for Claimant's admitted right shoulder injury.

19. Respondents have established that it is more probably true than not that they are entitled to withdraw their June 8, 2016 FAL that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's September 21, 2014 industrial injury or prevent further deterioration of her condition. ATP Dr. White placed Claimant at MMI on October 26, 2015 without the need for maintenance treatment. He had explained to Claimant that it might take up to one year for complete recovery from surgery because of her age and history of injury. Dr. White remarked that continuing numbness and difficulties that Claimant was experiencing in her shoulders was not work-related. Dr. Cebrian also determined that Claimant did not require medical maintenance treatment. He explained that Claimant suffered from kyphosis and would continue to experience pain due to degenerative, age-related factors. Although Dr. Ginsburg recommended medical maintenance treatment, the persuasive opinions of Drs. White and Cebrian reflect that additional care will not likely relieve the effects of Claimant's September 21, 2014 industrial injury or

prevent further deterioration of her condition. Respondents are thus permitted to withdraw their admission for medical maintenance treatment in the June 8, 2016 FAL.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly

applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. However, the DIME provisions of §8-42-107(8)(c), C.R.S. only apply in cases of whole body impairment. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664, 666 (Colo. App. 1998). The percentage rating for scheduled benefits is determined based simply upon the preponderance of the evidence standard. *See In Re Baran,* W.C. No. 4-906-018 (ICAP, Oct. 16, 2015). Because Dr. Ginsburg assigned a right shoulder extremity impairment rating, the preponderance standard applies in evaluating her permanent impairment.

8. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that she reached MMI on October 26, 2015 as a result of her September 21, 2014 admitted right shoulder injury. Initially, Dr. Ginsburg agreed with ATP Dr. White that Claimant had reached MMI for her right shoulder on October 26, 2015 and her left shoulder complaints were not work-related. Moreover, Dr. Cebrian agreed with Drs. White and Ginsburg that Claimant had reached MMI on October 26, 2015 and her left shoulder complaints were not work-related. Dr. Cebrian remarked that Claimant had poor posture with rounded shoulders and kyphosis of the cervical spine. He noted that Claimant had not been working for several months. There was no explanation for her continued left shoulder symptoms because her activities lacked the requisite repetition and force to produce an injury.

9. As found, in contrast, Dr. Hall disagreed with Dr. Ginsburg's findings and concluded that Claimant had not reached MMI. He determined that Claimant's left shoulder complaints were work-related due to overcompensation following surgery and she required additional medical treatment for both shoulders. However, Dr. Hall did not detail how Dr. Ginsburg erred in determining that Claimant reached MMI on October 26, 2015 or otherwise incorrectly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's MMI determination was incorrect.

10. As found, Claimant has failed to establish by a preponderance of the evidence that DIME Dr. Ginsburg's 6% scheduled impairment rating for her admitted right shoulder injury was incorrect. Initially, Dr. Ginsburg assigned a 6% scheduled impairment rating for Claimant's right shoulder range of motion deficits. In contrast, Dr. Hall noted that Claimant warranted an additional 10% scheduled rating for a distal clavicle resection. He remarked that a 10% rating for a distal clavicle resection was mandatory pursuant to the *Impairment Rating Tips*. Nevertheless, Dr. Hall acknowledged that only a small portion of the bone was shaved during the surgical procedure.

11. As found, Dr. Cebrian persuasively agreed with Dr. Ginsburg that Claimant warranted a 6% scheduled impairment rating for his admitted right shoulder injury. He disagreed with Dr. Hall that Claimant warranted a 16% extremity rating for her right shoulder injury based on range of motion deficits and the distal clavicle resection. Specifically, the additional 10% rating noted by Dr. Hall was inappropriate. Relying on the *Impairment Rating Tips,* Dr. Cebrian commented that it is not mandatory to issue a 10% rating based on the specific procedure. Instead, Dr. Cebrian noted that the rating physician has discretion to assign the additional impairment "if" warranted and based on the total clinical picture. Dr. Cebrian specifically commented that the *Impairment Rating Tips* are designed to capture all possible surgical outcomes. Notably, a physician can assign "up to" an additional 10% impairment. The record thus reveals that Dr. Ginsburg properly exercised his discretion by assigning a 6% scheduled impairment rating for Claimant's admitted right shoulder injury.

Withdrawing the FAL/Medical Maintenance Benefits

12. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

13. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2015),

C.R.S. On February 18, 2008 Respondents filed a FAL in response to Dr. Crosby's MMI and impairment determinations. The FAL also specified that Claimant was entitled to receive reasonable, necessary and related medical benefits. In order to withdraw the FAL Respondents thus have the burden of proving by a preponderance of the evidence that Claimant is not entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her April 18, 2005 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

14. As found, Respondents have established that it is more probably true than not that they are entitled to withdraw their June 8, 2016 FAL that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's September 21, 2014 industrial injury or prevent further deterioration of her condition. ATP Dr. White placed Claimant at MMI on October 26, 2015 without the need for maintenance treatment. He had explained to Claimant that it might take up to one year for complete recovery from surgery because of her age and history of injury. Dr. White remarked that continuing numbness and difficulties that Claimant was experiencing in her shoulders was not work-related. Dr. Cebrian also determined that Claimant did not require medical maintenance treatment. He explained that Claimant suffered from kyphosis and would continue to experience pain due to degenerative, age-related factors. Although Dr. Ginsburg recommended medical maintenance treatment, the persuasive opinions of Drs. White and Cebrian reflect that additional care will not likely relieve the effects of Claimant's September 21, 2014 industrial injury or prevent further deterioration of her condition.. Respondents are thus permitted to withdraw their admission for medical maintenance treatment in the June 8, 2016 FAL.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to overcome the DIME opinion of Dr. Ginsburg. She reached MMI on October 26, 2015.

2. Claimant sustained a 6% scheduled impairment for her right shoulder as a result of her September 21, 2014 injury.

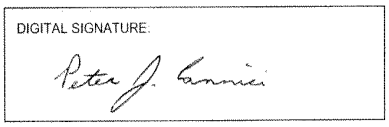
3. Respondents are permitted to withdraw their admission for medical maintenance treatment in the June 8, 2016 FAL.

4. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20)

days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 25, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left foot injury during the course and scope of his employment with Employer on December 19, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his left foot injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant is precluded from receiving indemnity benefits because he was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

FINDINGS OF FACT

1. Claimant began employment with Employer as a Seasonal Worker in approximately October 2015. His job duties involved working in the stockroom, sorting boxes and unloading inventory from truck deliveries.

2. On October 19, 2015 Claimant received an Employee Handbook that detailed Employer's various employment policies. The Handbook specifically outlined the duty of an employee to immediately report an occupational injury to a manager. Claimant confirmed his receipt and acknowledgment of these policies by his signature on October 19, 2015 and hearing testimony.

3. On November 10, 2015 Claimant reported to Manager Jeremy Waldorff that he had tripped over some boxes, landed on his left hand and forearm and was experiencing soreness. Employer directed Claimant to NextCare Urgent Care for medical treatment. He was diagnosed with a left hand crush injury. After conservative care he reached Maximum Medical Improvement (MMI) on January 10, 2015.

4. Claimant testified that on December 10, 2015 he arrived at work to find the warehouse dark and devoid of other employees. He reported to his station and began sorting inventory. Claimant explained that as he was working at a sorting table he was suddenly struck from behind on his left side at knee level by a two-wheeled cart. He immediately experienced pain in his left knee and "let out a yell." Claimant rubbed his left knee area for approximately five minutes to alleviate the pain. He did not turn around to see who had struck him because something was telling him it would not be

safe to turn around. He speculated that he might have been struck by a coworker who had been disciplined due to Claimant's November 10, 2015 injury. The coworker had been angry and planning to get back at him for reporting the injury.

5. As the day progressed Claimant began to experience severe pain in both feet and had difficulty walking. Claimant completed his shift and went home. He did not report his left leg injury.

6. On December 29, 2015 Claimant visited Next Care Urgent Care for an evaluation. He reported aching and swelling in his left foot that had started approximately four weeks earlier. Claimant had been moving boxes when his feet began to hurt. His left leg was also very swollen. The report specified that "there was no injury." Claimant was diagnosed with "edema of the left lower extremity."

7. Mr. Waldorff testified that Claimant called him on December 17, 2015 and advised that he would not be reporting to work for the rest of the week because his feet had swelled. Mr. Waldorff responded that he would thus see Claimant on Monday, December 21, 2015. However, Claimant did not report to work on either December 21, 2015 or December 22, 2015. He was thus terminated effective December 22, 2015.

8. Mr. Waldorff did not hear from Claimant again until January 25, 2016. He received a letter at employer's store asserting Claimant was injured between November 13, 2015 and December 4, 2015. Mr. Waldorff testified that he checked with his co-managers and Claimant's coworkers, but no one was aware of Claimant's left leg injury. Finally, no employee or manager had been disciplined for Claimant's November 10, 2015 injury.

9. Henry J. Roth, M.D. testified at the hearing in this matter. He reviewed Claimant's medical records and remarked that Claimant's first medical visit after the December 10, 2015 event did not include a description of the mechanism of injury. Moreover, Dr. Roth commented that a June 24, 2016 MRI reviewed by an orthopedist at Claimant's personal medical provider Kaiser Permanente did not reveal any fracture in Claimant's left lower extremity. Furthermore, Claimant's contention that he was struck at knee level by a cart would not have caused heel and foot pain. Dr. Roth explained that Claimant suffered from bilateral lower extremity and foot symptoms. Claimant specifically exhibited swelling in both feet that suggested a disease process or vascular compromise in his legs. Dr. Roth summarized that Claimant did not suffer an acute injury and his lower extremity symptoms are not related to his work activities for Employer on December 10, 2015.

10. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable left foot injury during the course and scope of his employment with Employer on December 10, 2015. Claimant explained that while working at a sorting table on December 10, 2015 he was suddenly struck from behind on his left side at knee level by a two-wheeled cart. He immediately experienced pain in his left knee and "let out a yell." However, the medical records, testimony and

persuasive medical opinion of Dr. Roth reflect that Claimant did not suffer an acute injury while at work on December 10, 2015.

11. On December 29, 2015 Claimant visited Next Care Urgent Care for an evaluation. He reported aching and swelling in his left foot that had started approximately four weeks earlier. Claimant had been moving boxes when his feet began to hurt. His left leg was also very swollen. Claimant was diagnosed with "edema of the left lower extremity." On January 25, 2016 Mr. Waldorff received a letter at employer's store asserting Claimant was injured between November 13, 2015 and December 4, 2015. Mr. Waldorff testified that he checked with his co-managers and Claimant's coworkers, but no one was aware of Claimant's left leg injury. Furthermore, an MRI of Claimant's left lower extremity did not reveal any acute fracture. Finally, Dr. Roth persuasively explained that Claimant suffered from bilateral lower extremity and foot symptoms. Claimant specifically exhibited swelling in both feet that suggested a disease process or vascular compromise in his legs. Dr. Roth summarized that Claimant did not suffer an acute injury and his lower extremity symptoms are not related to his work activities for Employer on December 10, 2015. Accordingly, Claimant's work activities on December 10, 2015 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable left foot injury during the course and scope of his employment with Employer on December 10, 2015. Claimant explained that while working at a sorting table on December 10, 2015 he was suddenly struck from behind on his left side at knee level by a two-wheeled cart. He immediately experienced pain in his left knee and "let out a yell." However, the medical records, testimony and persuasive medical opinion of Dr. Roth reflect that Claimant did not suffer an acute injury while at work on December 10, 2015.

8. As found, on December 29, 2015 Claimant visited Next Care Urgent Care for an evaluation. He reported aching and swelling in his left foot that had started approximately four weeks earlier. Claimant had been moving boxes when his feet began to hurt. His left leg was also very swollen. Claimant was diagnosed with "edema of the left lower extremity." On January 25, 2016 Mr. Waldorff received a letter at employer's store asserting Claimant was injured between November 13, 2015 and

December 4, 2015. Mr. Waldorff testified that he checked with his co-managers and Claimant's coworkers, but no one was aware of Claimant's left leg injury. Furthermore, an MRI of Claimant's left lower extremity did not reveal any acute fracture. Finally, Dr. Roth persuasively explained that Claimant suffered from bilateral lower extremity and foot symptoms. Claimant specifically exhibited swelling in both feet that suggested a disease process or vascular compromise in his legs. Dr. Roth summarized that Claimant did not suffer an acute injury and his lower extremity symptoms are not related to his work activities for Employer on December 10, 2015. Accordingly, Claimant's work activities on December 10, 2015 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 27, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on June 21, 2015.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to a general award of reasonable and necessary medical benefits to treat his June 21, 2015 injury.

STIPULATIONS

1. Claimant's average weekly wage is $856.52.

FINDINGS OF FACT

1. Claimant was employed by Employer as a night crew foreman and was employed by Employer for approximately 11 years.

2. Claimant alleges that on June 21, 2015, Employer's power jack was unavailable and he was using and moving a manual jack to unload a trailer when he felt a pop in his left shoulder and sustained an injury.

3. Claimant testified that prior to June 21, 2015 he had problems with both of his shoulders that were moderate and that he was able to work with the problems. Claimant testified that his pain became severe on June 21, 2015 when he felt the pop in his left shoulder and that he then contacted his own physician Dr. Weinerman for treatment. Claimant testified that Dr. Weinerman had previously treated Claimant's knees.

4. Claimant also alleges that he reported the injury to his supervisor on June 21, 2015 and that he was told that he needed to see the company doctor.

5. On the Workers' Claim for Compensation form, Claimant indicated that he was unloading a trailer with a manual jack on June 21, 2015 and was pulling a heavy skid off the trailer when he heard a pop in his left shoulder. *See* Exhibits 1, A.

6. Claimant was referred by Employer for treatment and was evaluated at Health One on June 22, 2015. At this visit, Claimant did not report that he was injured the day prior on June 21, 2015. Rather, he reported that he was injured nearly one month prior on May 27, 2015 while pulling a heavy manual jack and pulling backwards when he felt a sharp sudden pain in the left shoulder. Claimant reported that he had

continued to work but with significant pain and that by the end of the week he decided to see his orthopedist, Dr. Weinerman who recommended an MRI. *See* Exhibit H.

7. The records of Dr. Weinerman show that Claimant had treatment beginning in mid May of 2015 for his bilateral shoulder problems.

8. On May 19, 2015 Claimant was evaluated by Dr. Weinerman for bilateral shoulder pain. On the patient medical history form, Claimant noted the onset of symptoms as January of 2015, that the symptoms were not due to an accident or workers comp issue, and that his pain was sharp and radiating at a level of 9.5/10. Claimant reported to Dr. Weinerman that he had bilateral shoulder pain with the left shoulder worse. Claimant reported that his pain was aggravated by activities of daily living and denied any specific injury to the shoulder. Claimant reported that the shoulder pain had been on and off for years and that he was supposed to get an MRI done several years ago but did not. Dr. Weinerman found positive neer impingement signs, positive Obrien's tests, and recommended that Claimant undergo bilateral shoulder MRIs. Dr. Weinerman noted he would see Claimant after the MRIs were obtained, diagnosed impingement syndrome, and recommended no reaching above shoulder level. *See* Exhibits 5, D.

9. On June 1, 2015 Claimant underwent MRI scans of his left shoulder and his right shoulder that were interpreted by Bao Nguyen, M.D.

10. For the left shoulder MRI, Dr. Nguyen provided the impression of: central rotator cuff tendinosis with high-grade partial tearing of the undersurfaces of the distal supraspinatus and some anterior fibers of the infraspinatus tendon; curved acromion and arthritic AC joint; type IV SLAP lesion and nearly ruptured long biceps tendon along its intracapsular segment; some fraying of the distal subscapularis tendon. *See* Exhibits 6, G.

11. For the right shoulder MRI, Dr. Nguyen compared it to the prior November, 2013 MRI and noted that several issues were again seen. Dr. Nguyen provided the impression of: central rotator cuff tendinosis with high grade partial tearing of both distal supraspinatus and infraspinatus tendons; narrowed coracoacromial outlet due to a laterally downsloping curved acromion and a severely arthritic acromioclavicular joint; tear of the anterosuperior labrum with some tear propagation into the biceps anchor; fraying of the long biceps tendon at the far left lateral rotator interval; intratendinous fissuring of the upper distal fibers of the subscapularis tendon; and a small concave deformity of the posterolateral surface of the humeral head, suggesting a possible non acute Hills Sachs lesion. *See* Exhibits 7, G.

12. On June 11, 2015 Claimant was evaluated by Dr. Weinerman to follow up on the bilateral shoulder MRIs. Dr. Weinerman found abnormal partial articular surface rotator cuff tear type IV SLAP lesions and shoulder bursitis, bilaterally. Dr. Weinerman diagnosed chronic SLAP tears and chronic partial rotator cuff tears. Bilateral ultrasound guided shoulder injections were performed at this visit by Dr. Weinerman and he

recommended that Claimant complete a home exercise program and provided restrictions of no reaching above the shoulder level. *See* Exhibits 5, E.

13. Despite Claimant's testimony and reports that he saw Dr. Weinerman either after the June 21, 2015 alleged incident, or a week after a May 27, 2015 incident, the records reflect that his first visit with Dr. Weinerman was on May 19, 2015. Additionally, at the May 19, 2015 visit Claimant reported both that his severe pain had begun in January of 2015 and that he had problems with his shoulders on and off for years.

14. Claimant's history shows that he was evaluated for shoulder pain and impingement in the fall of 2013. In November of 2013 Claimant underwent an MRI of his right shoulder that showed: central rotator cuff tendinosis; a high grade partial tear of the distal supraspinatus tendon; severely arthritic acromioclavicular joint; a laterally downsloping acromion; a possible tear of the anterosuperior labrum with extension into the biceps anchor suggesting a type IV SLAP lesion; and suspected small partial tear of the long biceps tendon at the far left lateral rotator interval. It was noted that Claimant was unable to tolerate the full MRI scan due to claustrophobia and that a supplemental study would be performed. There is no evidence that the November 2013 MRI was rescheduled or that additional images were taken until Dr. Weinerman ordered the more recent June 1, 2015 bilateral shoulder MRIs. *See* Exhibits 5, G.

15. Claimant's history also shows degenerative problems in his knees dating back to 2008. *See* Exhibit G.

16. Ten days after the June 11, 2015 bilateral shoulder injections performed by Dr. Weinerman, Claimant alleges that he sustained the work related injury at question in this claim.

17. In the incident report completed by Employer, the description of the incident/injury is listed both as damage over time from push-pulling u-boats and as unloading a truck with a jack on June 21, 2015. An assistant store manager provided a written statement indicating that Claimant came into the store on June 21, 2015 with a doctor's note explaining that Claimant had pain in his shoulder from, over time, pulling boats, cages, and using the manual jack when the power jack was not working. Claimant's doctor's paperwork was dated June 1, 2015. Claimant was asked why he waited to file a claim and Claimant reported that the issue wasn't bothering him until the other day. It was explained to Claimant that he could not return to work until he was released and that he needed to see a workman's comp doctor. *See* Exhibit K.

18. Shortly after the alleged June 21, 2015 work injury, Claimant resigned from his employment with Employer. Claimant submitted a resignation letter effective July 4, 2015. Claimant had intended and planned to retire before the alleged work injury happened as he was 62 years old and had been waiting for his youngest child to finish college. *See* Exhibits 10, J.

19. On August 13, 2015 Claimant was evaluated at the Denver Arthritis Clinic for inflammatory polyarthropathy. *See* Exhibit H.

20. On August 20, 2015, Insurer denied the claim for injury/illness not being work related and indicated pre-existing bilateral shoulder problems. *See* Exhibit 3.

21. On October 1, 2015 Dr. Weinerman issued a letter indicating that Claimant was being seen for left shoulder pain and that he believed it was from years of repetitive overhead use of Claimant's arm at work. *See* Exhibit 5.

22. On January 10, 2016 Claimant submitted a letter to claims adjuster, Sharmie Jensen. Claimant reported that his orthopedic specialist, Dr. Weinerman disagreed with the decision to deny Claimant's workers' compensation claim and that Dr. Weinerman believed that the work duties over the last 10 years with Employer were the cause of Claimant's left shoulder symptoms and findings. In the letter, Claimant stated that his symptoms in the left shoulder began in May of 2015 and that he was initially not sure of the source of the left shoulder pain but that the symptoms significantly worsened on May 27, 2015 when he was pulling a loaded pallet of grocery products with a manual pallet jack and felt a sharp pain in the left upper shoulder. *See* Exhibit 4.

23. On November 2, 2016 Claimant underwent an independent medical examination performed by Wallace Larson, M.D. Claimant reported that he was unloading a delivery on June 21, 2015 when he pulled a skid off a trailer with a manual jack and felt something pop in his left shoulder. Claimant reported that he had continued shoulder pain and continued to work light duty with a 20 pound limit and was restricted from lifting above his head. Claimant reported that he went to orthopedic surgeon Dr. Weinerman, that an MRI was performed, and that he was told he would eventually need surgery. Claimant reported that he had received at least three injections that took away half of the pain but that it flared up at night. *See* Exhibits 8, H.

24. Claimant reported to Dr. Larson that he had some prior sore aching in his left shoulder but not bad enough to seek any treatment and that he had no prior treatment but soreness that may have been present since early 2014. Claimant reported that his right shoulder was okay. Claimant reported that he retired in July of 2015 and that it was too difficult to continue. On examination, Dr. Larson found reduced range of motion and painful rotation, tenderness, positive impingement tests, positive speed's tests, and that Claimant was somewhat weaker on the left side compared to the right. *See* Exhibits 8, H.

25. After reviewing medical records Dr. Larson opined that Claimant did not have a workers' compensation injury. Dr. Larson noted that the medical records showed bilateral shoulder pain that was aggravated by activities of daily living and found similar degenerative changes in both of Claimant's shoulders including degenerative changes of the rotator cuffs and likely bilateral SLAP tears. Dr. Larson opined that the medical records including the May 19, 2015 record of Dr. Weinerman indicate a chronic

process aggravated by activities of daily living with no specific episode of trauma. Dr. Larson opined that Claimant did not have industrial causation but had degenerative changes in both of his shoulders. *See* Exhibits 8, H.

26. On March 2, 2017 Dr. Weinerman issued a consultation note. In the note he indicated that he disagreed with Dr. Larson's finding and opined that he did not think there was any question that the injury Claimant sustained at work when unloading groceries and pulling a skid with a manual jack was part of the problem. Dr. Weinerman opined that Claimant may have had some pre-existing shoulder problems including some possible rotator cuff pathology, but that there was no question that the injury exacerbated the condition and caused Claimant the need to come in for evaluation and caused significant permanent damage to the left rotator cuff beyond what Claimant was experiencing before the injury. Dr. Weinerman opined that Claimant's rotator cuff injury was exacerbated by the injury significantly and that surgery was a potential option. *See* Exhibit 5.

27. Claimant's testimony is not found credible or persuasive. Claimant's reports of date of injury vary from May 27, 2015 to June 21, 2015 and his reports of onset of pain and symptoms are not clear or consistent throughout the claim.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned

expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet his burden to establish that he sustained a work related left shoulder injury on June 21, 2015. Claimant also has not established that he aggravated or accelerated what is shown by medical records to be a severe pre-existing left shoulder condition such to produce disability or the need for medical treatment. As found above, it is unclear from the testimony and various records what the actual date of injury is. Claimant testified and is claiming a specific injury and incident on June 21, 2015 where he alleges his left shoulder popped while unloading a trailer. However, he provided this same alleged mechanism of injury explanation with an injury date of May 27, 2015 to both Health One and to Insurer. The records reflect that Claimant went to Dr. Weinerman on May 19, 2015 prior to either the reported May 27 or June 21 incident date and that on May 19, 2015 Claimant reported that his pain was 9.5/10 and had

begun in January of 2015 with no specific incident or injury. Claimant also reported to Dr. Weinerman that he had pain in his shoulders that had been on and off for years.

As found above, a 2013 MRI of the right shoulder showed severe problems. Although there was no MRI of the left shoulder in 2013, the June 1, 2015 MRI of the left shoulder shows severe degenerative problems in the left shoulder that pre-date the incident which allegedly occurred 20 days after the MRI was performed. Dr. Larson's opinion that Claimant does not have a workers' compensation injury is found credible and persuasive. Dr. Larson noted similar degenerative changes in both the left shoulder and right shoulder including the degenerative changes in the rotator cuffs and bilateral SLAP tears. Dr. Larson opined credibly that the medical records indicate a chronic process and that there was no industrial causation. As found above, Claimant had bilateral shoulder injections prior to June 21, 2015, Claimant had 9.5/10 pain prior to June 21, 2015, and Claimant had restrictions on his ability to lift overhead or work prior to June 21, 2015.

Although Claimant is alleging a specific incident on June 21, 2015 that caused him injury or the need for medical treatment, Claimant is not found credible or persuasive. Rather, the evidence establishes that Claimant had ongoing shoulder problems that he reported had been on and off for several years, Claimant had reported that the severe pain in the left shoulder began in January of 2015, and Claimant had received significant treatment in the months just prior to this alleged injury. Claimant is not found credible that an incident occurred on June 21, 2015 aggravating his condition or accelerating his need for treatment. Rather, Claimant had severe pre-existing problems with his left shoulder that pre-dated June 21, 2015 and Claimant has failed to establish a causal connection to his employment duties.

The opinions of Dr. Weinerman on causation are not found persuasive. Initially in October of 2015 Dr. Weinerman issued a letter indicating that he believed Claimant's left shoulder pain was from years of repetitive overhead use of Claimant's arm at work. However, Claimant is not alleging an occupational disease in this case, but rather that a specific injury occurred. Later, in March of 2017, Dr. Weinerman issued a consultation note in response to Dr. Larson's IME report. In this note, Dr. Weinerman opined that although Claimant may have had some pre-existing shoulder problems including some possible rotator cuff pathology, the injury at work exacerbated the underlying problems and caused Claimant to come in for evaluation and caused Claimant further damage to the rotator cuff beyond what Claimant was experiencing before the injury occurred. Dr. Weinerman appears to be unaware that Claimant came in for evaluation, underwent MRIs, and received injections prior to the alleged injury in this case. It was not the alleged injury on June 21, 2015 that caused Claimant to come in for evaluation. Rather, it was Claimant's underlying pre-existing shoulder problems and as he told Dr. Weinerman at the May 19, 2015 appointment, the severe pain and problems dated back to at least January of 2015. Dr. Weinerman fails to account for the discrepancies in dates of the injury, treatment, and onset of severe pain and thus is not found persuasive.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury on June 21, 2015.

2. Claimant therefore is not entitled to an award of medical benefits and his claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 26, 2017,

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-962-740-06

ISSUES

- Whether Respondents overcame the Division IME Report of Clarence Henke, M.D. dated January 12, 2017, as it pertains to MMI, PPD, and relatedness of Claimant's cervical spine treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On September 25, 2014 and September 26, 2014, Claimant sustained admitted work related injuries to her neck, right arm, and right shoulder.

2. The mechanism of injury Claimant reported to Dr. Freutter, who prepared a Physician's Report of Workers' Compensation Injury, was that she was standing on a ladder holding a steel and Plexiglas shelf over her head on the palm of her right hand. She reported that the shelf weighed "40 pounds or more," but testified at hearing that the shelf weighed ninety pounds. On September 27, 2014, Claimant reported that she was "installing shelf on ladder approx. 12' in air."

3. Claimant's injury complaints evolved over time.

- On September 27, 2014, when Claimant first sought treatment, she complained of right arm and shoulder pain, rating it as 6/10. On physical examination, her neck was supple and non-tender. X-rays of Claimant's right shoulder revealed no acute fracture or dislocation, mild degenerative arthritis of her acromioclavicular joint, and osteopenia. Her provider diagnosed a right shoulder sprain and right elbow neuropathy.

- On December 12, 2014, Levi Miller, D.O. noted that Claimant's chief complaints were of right elbow pain, weakness, and numbness. Claimant exhibited full range of motion and Dr. Miller ruled out cervical radiculopathy and other cervical spine injuries as Claimant's EMG and MRI studies and her physical examination did not support any diagnosis.

- On January 13, 2015, Flory Kreutter, M.D., noted that Claimant's cervical spine was very sensitive to light touch.

- On June 24, 2015, Claimant presented to Dr. Fall with neck pain as her chief complaint, followed by right shoulder and right elbow pain. Dr. Fall noted that Claimant exhibited "significant pain behaviors, rendering her examination nearly impossible." It appeared that Claimant was "voluntarily

guarding throughout the examination, and she gave poor effort with strength testing."

- On August 9, 2016, Dr. Fall noted that Claimant was no longer complaining of pain and numbness in her right arm.

4. Claimant's mental health status was identified as a potential or actual cause of her symptoms by her treatment providers.

- On October 4, 2014, Dr. Kreutter noted Claimant's anxiety and depression.

- On January 14, 2015, Dr. Kreutter twice noted, "Need to do a mental health screening to determine any underlying problems which could contribute to [her condition]."

- On June 24, 2015, Dr. Fall's assessment included, "Rule out somatoform disorder, conversion disorder, factitious disorder, or other psychological issues playing a role in her presentation and perceived disability." Dr. Fall recommended Claimant undergo a psychological evaluation.

- On April 11, 2016, Claimant failed to appear for a Demand Psychological Evaluation with Ron Carbaugh, Psy.D.

- On August 9, 2016 Dr. Fall's impressions included, "Rule out somatoform or conversion disorder." Dr. Fall recommended Claimant pursue treatment through her primary care provider for consideration of psychiatric referral for somatoform or conversion disorder.

- Several of Claimant's treatment providers noted that her objective findings were not consistent with her high levels of pain, and that Claimant exhibited pain behaviors.

- Several of Claimant's treatment providers noted that her complaints did not follow dermatome patterns and that her pain complaints did not make sense physiologically.

- Claimant refused to complete the DIME Summary Sheet prior to her examination.

- When asked whether she would attend a mental health evaluation, Claimant refused to answer.

5. Dr. Michael Horner primarily treated Claimant's neck and shoulder, while Dr. James Johnson primarily treated Claimant's shoulder and arm.

6. On March 14, 2016, Dr. Johnson wrote that Claimant's primary problem was her neck injury and that her shoulder was a minor concern.

7. On June 6, 2016, Dr. Homer noted that Claimant might be at MMI depending on her reaction to Botox injections which Dr. Horner was administering that day. "If she does not respond to the Botox treatment done at today's visit, then she will be at maximum medical improvement." Claimant had a serious negative reaction to the injections.

8. On June 24, 2015, Allison Fall, M.D., performed a second Respondents sponsored IME. Dr. Fall reported that Claimant was at MMI without impairment, and that there was no work-related injury to Claimant's cervical spine. Dr. Fall supported this conclusion by detailing Claimant's mechanism(s) of injury and Claimant's initial emergency room complaints.

9. On June 28, 2016, Dr. Horner answered a letter sent to him by Respondents' counsel opining that Claimant was at MMI for her cervical spine, but not for any other injury for which he had treatment appointments scheduled.

10. On August 9, 2016, Claimant returned to Dr. Fall for a follow-up IME.

11. On November 7, 2016, Claimant returned to Dr. Johnson for additional treatment. At that time, he opined that her primary source of symptoms was from her scapula-thoracic bursa.

12. On March 13, 2017, Claimant returned to Dr. Johnson who requested a repeat MRI of Claimant's right shoulder.

13. Although Dr. Homer placed Claimant's cervical spine injury at MMI on June 28, 2016, neither Dr. Homer nor Dr. Johnson placed Claimant at MMI for her other injuries after twenty-four months of treatment. Respondents applied for and obtained a "24 Month" DIME.

14. On December 27, 2017, Dr. Clarence E. Henke performed Claimant's DIME evaluation. He was instructed to examine and evaluate Claimant's right shoulder and right upper extremity, and to address the issues of MMI, impairment rating, and whether any further medical treatment would be necessary.

15. In his January 12, 2017 report, Dr. Henke determined Claimant was not at MMI for her neck and right upper extremity injuries.

16. Dr. Henke's report and conclusions are flawed in the following ways:

- Claimant testified at Hearing that Dr. Henke spoke with her husband regarding her claim, and Respondents contend that such conduct violates Rule 11-6(A). That rule specifically provides as follows: "(A) During the IME process, there shall be no communication allowed between the parties and the IME physician unless approved by the Director, or an administrative law judge. Any violation may result in cancellation of the IME." Rule 11-6(A) ensures that the opinion of the IME physician is perceived to be unbiased because it is not influenced by unregulated

communications from either party. *See Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172, 1178 (Colo. App. 2005). Because Claimant's husband is not a party to this case, the ALJ finds no Rule 11-6(A) violation.

- Dr. Henke did not rate any impairment, a required step in the DIME process.

- Dr. Henke's findings pertaining to MMI and Claimant's cervical spine are not supported by meaningful analysis.

- Dr. Henke's examination and report were completed without having numerous relevant and necessary medical records, including Dr. Fall's August 9, 2016 IME Report. Claimant also refused to complete the DIME Summary Sheet prior to her examination. Without having all of the medical records at his disposal, especially Dr. Fall's second IME Report, Dr. Henke could not provide complete and accurate findings. Dr. Fall opined in her second IME report, among other things, that Claimant's cervical spine complaints were not related to the work related injury, that Claimant was at MMI without impairment, and that no further intervention was needed.

- Dr. Henke failed to provide any details or analysis as to why Claimant is not at MMI, or what needs to be done for Claimant to reach MMI.

- Dr. Henke recommended that Claimant should follow-up with Dr. Johnson for further orthopedic evaluation and treatment recommendations, which could include surgical intervention. Dr. Henke failed to state what body part Claimant should follow up with, what type of orthopedic evaluation Claimant needs, or why further orthopedic evaluation is necessary, despite nearly three years of treatment without any perceived benefit. Additionally, none of Claimant's treatment providers have recommended surgery, while several have found surgical intervention to be contraindicated.

17. Dr. Fall credibly testified that not only was Claimant at MMI without impairment, but that there was no work-related injury to Claimant's cervical spine.

- Dr. Fall supported this conclusion by detailing the mechanism(s) of injury and the initial complaints by Claimant at the emergency room.

- Despite nearly three years of extensive treatment, Claimant's function has not improved and her pain has worsened. Dr. Fall credibly testified that the objective findings on the MRIs, EMGs, and x-ray reports do not support Claimant's subjective pain complaints or reasons why Claimant claims the necessity of the arm sling.

18. Dr. Fall credibly testified that Claimant does not have CRPS, that none of the records state she has CRPS, that no provider has stated she currently has CRPS, and that Claimant does not meet the criteria for a CRPS diagnosis.

- Dr. Fall credibly testified that Claimant's medical records include no documentation of allodynia, vasomotor (temperature asymmetry and/or skin or color changes), sudomotor changes, such as edema and sweating changes, or motor or trophic changes with motor dysfunction, such as tremor, or dystonia.

- Dr. Fall testified that in the clinical evaluation, there also must be one sign and two more categories, with those categories being: sensory, vasomotor, sudomotor/edema, and motor/trophic. Dr. Fall stated Claimant did not meet these criteria as well.

- Dr. Fall further testified that the two IMEs she performed on Claimant did not document findings consistent with clinical CRPS, Dr. Horner's examinations have not documented findings consistent with clinical CRPS, and the DIME physician did not document findings consistent with CRPS. Nor did the DIME physician diagnose CRPS. Dr. Johnson noted only that Claimant could have CRPS in the future, but did not find that Claimant clinically had it at the time he saw her.

- Dr. Fall testified that psychological evaluations are indicated in any workup of CRPS to rule out any other underlying issues, but Claimant failed to comply with this recommendation and refused to appear for her demand psychological evaluation that was scheduled with Dr. Carbaugh on April 11, 2016. Dr. Fall concurred with Dr. Kreutter's opinion that there was a lack of known "dermatomes" and that Claimant should seek psychological examination.

19. None of Claimant's treatment provided any relief.

- Claimant reported to Dr. Henke that medications, rest, physical therapy, and injections "have not provided any relief." Also, Claimant stated "that she had achieved only 2% of her pre-injury level of health and [was] continuing to regress in her recovery."

- Claimant reported to Dr. Miller that she had no improvement from any of her initial treatments.

- On August 9, 2016, Claimant reported to Dr. Fall that her pain was alleviated by "nothing."

- Claimant's treatment included oral and topical medications, extensive physical therapy, home exercise programs, chiropractic care, trigger point injections, Botox injections, dry needling, and deep tissue massage.

Claimant testified without equivocation that all of the treatment she received was of no help. Further, none of her symptoms had improved since the date of her injury, they had only grown worse.

20. Claimant was equivocal about further treatment. When asked if she would like more injections, Claimant responded that she could not answer because she did not know which ones. When asked if she would proceed with surgery if it were offered, she responded, "That would depend on the outcome."

21. Claimant's presentation at hearing was inconsistent. As Dr. Fall testified, Claimant became rigid and "fixed" when she testified; in comparison to the more fluid and fuller range of motion she exhibited when she sat at counsel's table. The ALJ made the same observation.

22. The ALJ finds Claimant not credible. She exaggerated her pain and symptoms. Claimant's refusal to undergo a psychological examination, her testimony that no treatment has provided any relief, and her ambivalence about additional treatment undermines her credibility concerning the presence of an actual injury. Additionally, several of Claimant's treatment providers found no objective evidence to support Claimant's complaints of non-physiologic and subjective severe pain. This finding is further supported by Claimant's inconsistent presentation at hearing.

23. The ALJ finds Dr. Fall's analysis and opinions to be more well-informed, thorough, credible and persuasive than those of DIME Dr. Henke.

24. The ALJ finds that Respondents have overcome by clear and convincing evidence the DIME doctor's opinions on the issues of MMI, PPD, and the relatedness of Claimant's cervical spine treatment.

25. ATP, Dr. Homer, placed Claimant's cervical spine injury at MMI on June 28, 2016. Claimant received no impairment rating for her cervical spine injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. bvApp. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The finding of a DIME physician concerning MMI or a claimant's medical impairment rating is binding on the parties unless it is overcome by clear and convincing evidence. C.R.S. 8-42-107(8)(b)(III). Clear and convincing evidence is that which is "highly probable and free from serious or substantial doubt." Thus, the party challenging the DIME physician's finding must produce evidence contradicting the DIME which is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995*); Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002).

Respondents have produced evidence contradicting the DIME which the ALJ finds is unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician is incorrect. The DIME doctor reviewed only a portion of Claimant's medical records and failed to consider Dr. Fall's second IME report. He did not rate any impairment as required. Dr. Henke failed to provide any details or analysis as to why Claimant is not at MMI, or what needs to be done for Claimant to reach MMI. Dr. Henke failed to state what body part Claimant should follow up with, what type of orthopedic evaluation Claimant needs, or why further orthopedic evaluation is necessary, despite nearly three years of treatment without any perceived benefit.

The determination of MMI must be made by an authorized treating physician. § 8-42-107(8)(b)(I), C.R.S.; *Town of Ignacio v. ICAO*, 70 p.3d 513 (Colo. App. 2002). The ALJ concludes that ATP Dr. Homer placed Claimant's cervical spine injury at MMI on June 28, 2016, with no impairment.

The ALJ credits Dr. Fall's opinion and other providers' concerns that the source of Claimant's symptoms may be the result of a psychological disorder. The ALJ has found Claimant (1) has failed to respond to multiple treatments for nearly three years, (2) has inadequate objective findings to support her high levels of pain, (3) is ambiguous about pursuing further treatment, and (4) has refused to submit to a psychological evaluation. The ALJ concludes that a psychological evaluation is required to evaluate whether any further treatment is related to or reasonably necessary to cure and relieve Claimant from the effects of her right upper extremity injuries.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have overcome the Division IME Report of Clarence Henke, M.D., dated January 12, 2017, by clear and convincing evidence, as it pertains to MMI, PPD, and relatedness of Claimant's cervical spine treatment.

2. Claimant reached MMI as of June 28, 2016, and without permanent impairment. As a result, Claimant does not require any further treatment with regard to her cervical spine.

3. Claimant shall attend a Psychological Evaluation with Ron Carbaugh, Psy.D., within thirty days of service of this Order.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 27, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable injury on October 17, 2016.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to a general award of reasonable and necessary medical benefits to treat her October 17, 2016 injury.

STIPULATIONS

1. Claimant's average weekly wage is $520.00.

FINDINGS OF FACT

1. Claimant was employed by Employer as a housekeeper. Her duties included entering rooms after patients left, cleaning the rooms, changing the sheets, and preparing the rooms for new patients. Employer's job description notes a heavy physical workload with physical requirements including: pushing, pulling, and lifting up to 50 pounds; and standing, walking, bending, pushing, kneeling, and stooping. *See* Exhibit 15.

2. Claimant alleges that on October 17, 2016 she arrived to work and checked the board to know which patients would be checking out and which rooms would need to be cleaned that shift.

3. Claimant testified that she went to the closet and realized that she would need more sheets. Claimant testified that she went to the clean linen closet and took out a package of heavy sheets, put the package on her right shoulder, and went through the hallways to get to a cart where she typically put clean linens. Claimant testified that the cart was higher than her and that she needed to push her right shoulder upward to get the sheets onto the cart. Claimant alleges she felt a pulling in her shoulder and neck at that time with no pain and that she kept working.

4. Claimant testified that she first felt pain 2-3 days later and that the pain increased daily. Claimant reported that she sent a text message to her supervisor on October 23, 2016 reporting the incident since she could no longer bear the pain and that on October 24, 2016 while at work she made a report of the injury and was referred for treatment.

5. Prior to her alleged injury, Claimant had been evaluated by her primary care provider on December 2, 2015 and October 5, 2016.

6. On December 2, 2015 Claimant was evaluated by Luz Marcela Serrano, M.D. Claimant reported that she worked in housekeeping for Employer and that she had developed pain on her upper extremities that started on her shoulders and radiated to both arms. Claimant reported moderate pain and that it was waking her from sleep. Claimant reported no heavy lifting or trauma. Claimant reported pain on the biceps region bilaterally, that she was unable to sleep on her sides, and a noticed decreased in strength. Dr. Serrano noted review of systems positive for myalgias, back pain, and joint pain and that Claimant had pain on examination in the cervical spine, paraspinal muscles, and medial and lateral epicondylitis bilaterally. Dr. Serrano ordered x-rays of Claimant's cervical spine that were noted to be negative with no significant arthritis but mild degenerative joint disease. Dr. Serrano assessed: acquired hypothyroidism; myalgia and myositis; radicular pain; paresthesias; prediabetes; and morbid obesity. *See* Exhibit D.

7. On October 5, 2016 Claimant was evaluated by Dr. Serrano. It was noted that Claimant presented for joint pain. Claimant reported bilateral upper extremity pain with an onset of three weeks prior in the biceps region radiating down to wrists with constant pain. Claimant reported working in housekeeping with heavy lifting. Claimant also complained of blurry vision. Dr. Serrano assessed: myalgia; pain in both upper extremities; visual disturbance; pre-diabetes; acquired hypothyroidism; bmi 39.0-39.9 adult; and generalized abdominal pain. Dr. Serrano opined that Claimant had an unclear etiology for her myalgias but suspected it was due to the line of work and heavy lifting. Dr. Serrano completed lab work. *See* Exhibit D.

8. On October 6, 2016 Dr. Serrano called Claimant to notify Claimant that the lab work showed normal kidney and liver functions, worsening pre-diabetes, and hypothyroidism. Dr. Serrano noted that there was no need to adjust Claimant's medications. Dr. Serrano noted that overall the labs were normal and that Dr. Serrano could not explain Claimant's body aches but that she suspected it may be associated with the type of work Claimant does. *See* Exhibit D.

9. Approximately two weeks after this visit with Dr. Serrano, Claimant alleges the work injury. After reporting the alleged October 17, 2016 injury on October 24, 2016, Claimant was referred for treatment and went initially to Rocky Mountain Urgent Care.

10. Claimant was evaluated on October 24, 2016 at Rocky Mountain Urgent Care by Michelle Baker, PA-C. Claimant reported pain in her right arm and back from carrying a packet of 100 sheets on October 17, 2016. Claimant reported that two days after lifting the heavy package of sheets she developed pain. PA Baker recommended a sling, rest, voltaren, and diclofenac. PA Baker referred Claimant to see a workers' compensation physician for follow-up. *See* Exhibits C, 9.

11. On November 3, 2016 Claimant was evaluated by Devin Jacobs, PA-C. Claimant reported that on October 17, 2016 she was carrying a package of sheets that weighed approximately 30 pounds on top of her right shoulder. Claimant reported that she threw the sheets off her right shoulder with a mild twinge of discomfort which gradually got worse. PA Jacobs noted tenderness to palpation to the right rhomboids, and muscle tension with mild spasm. He found pain in abduction range of motion and in internal rotation right midline spine. Claimant's cervical spine was noted to have no tenderness and full range of motion. PA Jacobs assessed strain of right shoulder, provided work restrictions, and referred Claimant for physical therapy. *See* Exhibits B, 10.

12. On November 7, 2016 Claimant underwent physical therapy with Patrick Morrissey, PT. PT Morrissey noted that Claimant's right shoulder strain correlated with her impairments including active range of motion, pain, and muscle performance. *See* Exhibit 11.

13. On November 9, 2016 Claimant was evaluated by PA Jacobs. Claimant reported continued pain in the lateral and posterior shoulder with occasional radiation to the right mid upper arm. Claimant reported overall feeling better but that the pain that morning had been worse than yesterday. Claimant reported spasms at night and that her pain level was 6/10. PA Jacobs noted under review of systems: muscle pain; joint swelling, and joint stiffness. He continued to assess strain of right shoulder and continued work restrictions. *See* Exhibits B, 10.

14. On December 7, 2016 Claimant was evaluated by Dr. Serrano. Claimant reported being injured on October 17, 2016 at work after grabbing sheets from a supply office and lifting onto her right shoulder and that she developed pain four days after the heavy lifting in the mid back. Claimant reported pain in the mid back, limited range of motion with trouble twisting, and pain on the right trapezius and radiating to the forearm. Claimant reported no longer being covered by workman's comp for unclear reasons and that she wanted to have a personal evaluation because she still had pain. Dr. Serrano found Claimant positive for myalgias, back pain, joint pain, and neck pain. On examination Dr. Serrano found that the right shoulder exhibited decreased range of motion, tenderness, pain, spasm, and decreased strength. Dr. Serrano assessed right shoulder injury/muscle strain and recommended work restrictions and physical therapy. *See* Exhibits D, 12.

15. On January 16, 2017 Claimant was evaluated by Dr. Serrano. Claimant reported that her symptoms improved as long as she was doing physical therapy. Claimant reported that at work her restrictions were not being followed. Claimant reported that her work, pain, and shoulder symptoms were having an effect on her mood. Dr. Serrano continued to assess right shoulder injury/muscle strain, continued work restrictions, and noted her anticipation that Claimant would be able to return to work without restrictions once Claimant finished physical therapy in six more weeks. Dr. Serrano noted Claimant's low score on the depression assessment and strongly

advised Claimant to start depression medications. Claimant indicated that she wanted to do natural methods first. *See* Exhibits D, 12.

16. On January 31, 2017 Claimant was evaluated by Timothy Lewan, M.D. Claimant reported being there for depression symptoms that had been constant and ongoing for several weeks. Claimant reported being angry at times and that her blood pressure was mildly elevated and significantly elevated at work that she attributed to being so mad. Dr. Lewan assessed: moderate episode of recurrent major depressive disorder, anxiety, and elevated blood pressure. Claimant reported wanting to restart Zoloft and that she had success with Zoloft in the past. Dr. Lewan noted that counseling could be helpful and that Claimant was to follow up with Dr. Serrano. *See* Exhibit 12.

17. On March 13, 2017 Claimant was evaluated by Dr. Serrano. Dr. Serrano noted that Claimant was present for headaches and blood pressure concerns and that Claimant was seen a few weeks ago after developing headaches and high blood pressure while at work and was found to have major depressive disorder and was prescribed Zoloft. Claimant reported that she did not take the Zoloft because she was concerned about side effects. Claimant reported being stressed about a workman's comp case and potential outcomes and lawyer fees. Dr. Serrano assessed headache, sleep disturbance, moderate episode of recurrent major depressive disorder, elevated blood pressure, pre-diabetes, and acquired hypothyroidism. *See* Exhibit 12.

18. On April 10, 2017 Claimant was evaluated by Dr. Serrano. Claimant reported that her headaches were better, that she had been laid off work, and that she felt that her health was better. Dr. Serrano recommended follow up for depression and headaches in about six weeks, that Claimant continue medications, and that it may be okay to discharge Claimant and suspected stress may have been cause of headaches. *See* Exhibit 12.

19. On June 13, 2017 Claimant underwent an independent medical evaluation performed by Lawrence Lesnak, M.D. Claimant reported that on October 17, 2016 while working she had obtained a package of clean sheets, lifted them and placed them onto the top of her right shoulder and walked through several hallways. Claimant reported that she was in the process of leaning forward to let the package of clean sheets slide off her shoulder onto a nearby cart when she felt a sudden pop in her right suprascapular region but that other than the pop she had no initial symptoms. Claimant reported that approximately three days later she began to notice some right sided lower thoracic/infrascapular pains, right suprascapular pains, and some diffuse right arm pains. Claimant indicated that she was referred to physical therapy which helped a little bit but that she soon found out her claim had been denied. *See* Exhibits A, 13.

20. Claimant reported that she went to her primary care provider in December because of her ongoing symptoms and that her primary provider recommended physical therapy and medications and again Claimant reported that the physical therapy seemed to help. Claimant also reported that during this time she noticed her depression

becoming much worse. Claimant reported frequent muscle cramping in her right suprascapular region and right inferior scapular region typically occurring late in the afternoon or evening hours with intermittent popping sensations involving her right shoulder whenever she moves in certain directions. Claimant reported frequent cramping sensations and some pain involving her right posterior upper arm that seemed to be associated with any type of overhead activities. Claimant reported no history of prior right upper back, capular/suprascapular, shoulder, or right upper extremity symptoms or injuries. *See* Exhibits A, 13.

21. Dr. Lesnak reviewed medical records and performed a physical examination. Dr. Lesnak opined that there did not appear to be any medical evidence to suggest that Claimant sustained any type of injurious event during work hours on October 17, 2016. Dr. Lesnak noted that the reported mechanism of injury would place no anatomic stresses on the Claimant's right shoulder and an injury could not have occurred based on the specific incident Claimant alleges occurred. Dr. Lesnak also opined that if Claimant had sustained an acute soft tissue or bony injury, she would have had symptoms immediately and not three days later and that a three day period was not consistent with any type of injurious event. Dr. Lesnak also noted that Claimant clearly had similar symptomatology documented by her primary care provider just 12 days prior to the alleged incident as well as similar symptoms documented in December of 2015 and that they were noted without trauma. *See* Exhibits A, 13.

22. As part of the independent medical evaluation, Claimant also underwent a computerized outcome assessment. Dr. Lesnak noted that Claimant scored a 39 on the modified zung depression index and an 18 on the modified somatic pain questionnaire. Dr. Lesnak opined that scores placed Claimant in the distressed depressive category for psychosocial functioning. Dr. Lesnak also noted scores from the Dallas Pain Questionnaire. Dr. Lesnak opined that the test results suggested that there were significant psychosocial factors that were influencing Claimant's symptoms, recovery, and perceived function. Dr. Lesnak opined that the extremely high level of somatic pain complaints reported may suggest an underlying somatization/somataform disorder. Dr. Lesnak opined that patients with extremely high levels of somatic pain complaints are often times very unreliable and that the reproducible objective findings must be relied upon rather than the subjective complaints in these types of patients. Dr. Lesnak opined that Claimant also had a long history of chronic depression and had discontinued high dose antidepressant medications on her own in early 2016. Dr. Lesnak suspected that Claimant had progressive depressive symptoms resulting in worsening somatic pain complaints that were completely unrelated to any job activities. *See* Exhibits A, 13.

23. Dr. Lesnak testified at hearing consistent with his written report. Dr. Lesnak reported that Claimant demonstrated the actual mechanism of injury at the evaluation and that her testimony at hearing was completely different than what she had reported to him at the evaluation. Dr. Lesnak also noted that Claimant had denied to him that she had any prior symptoms involving her right shoulder or right upper extremity, despite diffuse neck, bilateral shoulder, and bilateral upper extremity

symptoms noted in the medical records in December of 2015 and again 12 days prior to the alleged injury. Dr. Lesnak noted that Claimant had also denied prior problems at Rocky Mountain Urgent Care and at Concentra.

24. Dr. Lesnak's opinions are found credible and persuasive.

25. Jonathan Guenther, Employer's director of plant operations testified at hearing. After the alleged injury was reported, Mr. Guenther attempted to find footage of the injury on the facility's video system. Mr. Guenther checked the location, date, and time reported by Claimant but did not find footage to match Claimant's report. Mr. Guenther also checked footage throughout the entire shift from different areas of the facility and also on days before and after the 17th. Mr. Guenther was able to view Claimant in the videos, but did not see any footage of Claimant carrying a package on her right shoulder in his review. After reviewing footage, Mr. Guenther went back to Claimant to verify he was looking at the right time and place. Mr. Guenther testified credibly that he was trying to help Claimant to find the incident to show she was injured. Despite his attempts, Mr. Guenther was unable to find any footage of the alleged injury.

26. Claimant, overall, is not found credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned

expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to meet her burden of proof to establish that she sustained a work related injury on October 17, 2016. Claimant's testimony and reports to medical providers about the mechanism of injury are inconsistent. Claimant also failed to report to various medical providers that she had bilateral upper extremity symptoms that she had been treating for prior to her alleged injury. Dr. Lesnak is found credible and persuasive that the injury could not have occurred as alleged due to the lack of anatomic stresses on the right shoulder. He also is credible that if any acute injury had occurred, Claimant would have had more immediate symptoms rather than a 2-3 day delay of onset. The ALJ finds Claimant not to be credible or persuasive. Claimant, as found above, failed to report pre-existing problems of diffuse pain in her bilateral extremities, prior shoulder pain, and prior neck pain to providers despite having had

such significant pain that it prevented her from sleeping and required diagnostic imaging. Claimant also has psychosocial issues including possible somatoaform and chronic depression which can impact her perception and makes her subjective complaints unreliable. Additionally, despite attempting to find video footage Mr. Guenther was unable to view the incident that Claimant alleges occurred. Dr. Lesnak addressed the issues of credibility and psychosocial issues along with his opinions on mechanism of injury and delay in onset of symptoms. Dr. Lesnak's opinion that there was no work related injury is credible and persuasive and consistent with the weight of the overall evidence. Claimant has failed to meet her burden.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury on October 17, 2016.

2. Claimant therefore is not entitled to an award of medical benefits and her claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 31, 2017,

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome Dr. Allison Fall's Division IME opinions regarding causation and permanent medical impairment?

II. Whether Claimant has established, by a preponderance of the evidence, that he is permanently and totally disabled as a consequence of the admitted work related injuries he sustained on December 30, 2006?

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to maintenance medical benefits?

IV. Whether Claimant is entitled to an award of disfigurement benefits pursuant to C.R.S. § 8-42-108?

FINDINGS OF FACT

This claim has been the subject of considerable prior litigation with hearings taking place before ALJ Martin Stuber on September 29, November 21 and November 22, 2011. Following those hearings, ALJ Stuber issued an order on December 30, 2011, which meticulously sets forth the factual background surrounding Claimant's work related accident, the injuries sustained in that accident and the treatment received therefore. Having carefully reviewed the evidentiary record, including the aforementioned deposition transcripts, the undersigned ALJ finds support for Judge Stuber's factual findings. Consequently, the undersigned adopts the content of ALJ Stuber's December 30, 2011 order to find as follows:

1. Claimant worked for Employer as a commercial truck driver. On December 30, 2006, Claimant rear ended another semi truck at 40 mph while driving eastbound in snow and ice on Interstate 80 near Ogallala, Nebraska when another semi unexpectedly moved into his lane of traffic. Claimant attempted to stop but hit the back of the other semi and impacted the windshield with his face. He was not wearing a seat belt.

2. Claimant was transported to an emergency room (ER) in Ogallala where an initial Glasgow Coma Scale score was a perfect 15 but slipped to 14/15 due to some confusion. Claimant was intubated to protect his airway and a CT scan was performed. The CT revealed a Le Fort II fracture of the basal skull and fractures of the right facial and nasal bones. Claimant was subsequently transported by life flight to a hospital in Scottsbluff, Nebraska for higher level care.

3. Upon arrival in Scottsbluff assessment revealed facial lacerations and "massive facial swelling" which prevented Claimant's eyes from opening. The CT scan obtained in Ogallala was interpreted as demonstrating multiple facial fractures that would likely require open reduction and internal fixation (ORIF) surgery. Claimant was admitted to the intensive care unit and a facial trauma surgeon was consulted.

4. On December 31, 2006, Dr. James Massey diagnosed Claimant with Le Fort II-III fractures. Claimant was taken to the operating room where Dr. Massey he performed an ORIF procedure with fixation plates to reconstruct the facial bones.

5. On January 5, 2007, Claimant reported complaints of vertical diplopia. Ophthalmological consultation was requested and Claimant was assessed with a mild vertical deviation by Dr. Jud Martin for which observation was suggested.

6. On January 7, 2007, Dr. Oscar Sanchez from rehabilitation services was consulted to assess Claimant's rehabilitative upon discharge. Dr. Sanchez diagnosed Claimant with a right, mild traumatic brain injury (hereafter "TBI") and questioned whether Claimant had mild cognitive deficits. He also noted that Claimant suffered cervicalgia with muscle spasms/whiplash in addition to a questionable C5-C6 anterolisthesis without spinal cord injury.

7. Claimant has a prior history of injury to the head and neck. On July 4, 2005 Claimant fell in a shower and sustained a mild concussion, neck and back sprain while working for Crete Carriers. A head CT on that date was normal with normal gray/white matter configuration and no abnormal parenchymal attenuation density. CT of the neck demonstrated mild degeneration in lumbar and cervical spines. He was released without impairment, but was terminated by Crete Carriers due to dysfunctional behavior. Claimant was then hired by Employer on December 27, 2005 as an over the road truck driver. Claimant worked for Employer without incident until the automobile accident on December 30, 2006.

8. Following his December 30, 2006 MVA, Claimant returned to Colorado Springs where he underwent an MRI of the cervical spine which demonstrated displacement at C5-C6 and ligament injury at C5 through C7.

9. A neuropsychological evaluation conducted by David Hopkins, Ph.D., on Jan. 15 & 18, 2007, noted that Claimant had prior depression that had been stable on Zoloft for about two years. He concluded there was moderate neurobehavioral dysfunction, consistent with acute TBI, with evidence for coup-countercoup pattern of dysfunction. He recommended psychotherapy and cognitive rehabilitation.

10. On January 22, 2007, Dr. Leppard examined Claimant, who reported the history of the accident including Claimant having struck his face. Following the collision he recalled "taking off his seat belt, and being dazed in a fog." Dr. Leppard noted that Claimant had suffered Le Fort II/III facial fractures, which had been surgically repaired by Dr. James Massey on December 31, 2006. She also noted that he had been

diagnosed with traumatic brain injury and that x-rays had been "suspicious for C5-6 anterolisthesis and an MRI of the cervical spine was performed showing an interspinous ligament injury starting at C5-6 and extending through T1-2." Dr. Leppard referred Claimant for speech therapy.

11. Claimant initially improved with the speech therapy, but he then regressed. By May 8, 2007, Dr. Leppard noted that Claimant had problems completing sentences. She also observed right hand waxing and tremor. Dr. Leppard suspended therapy and referred claimant to Dr. Dale Mann for psychological evaluation.

12. On June 1, 2007, Dr. Leppard questioned whether Claimant was suffering seizures and referred him to Dr. William Herrera at Colorado Springs Neurological Associates. On June 11, 2007, Dr. Herrera examined Claimant, who complained of "persistent episodes of dizziness, lightheadedness and intense headaches with nausea." Claimant reported a history in the last six weeks of tremors of the hands. Dr. Herrera diagnosed postconcussion syndrome, memory loss and tremor. Dr. Herrera referred Claimant for an electroencephalogram ("EEG"). The initial August 2, 2007, EEG at Memorial Hospital was normal with no seizure activity.

13. Claimant was seen in follow up by ENT Cameron Shaw, M.D. on August 7, 2007, complaining of progressive ringing in his ears. Dr. Shaw assessed tinnitus, hearing loss and balance issues. On March 7, 2008 testing indicated hearing loss in both ears. Dr. Shaw diagnosed Claimant with "[l]abyrinthine dysfunction secondary to head trauma" and tinnitus. He recommended hearing aids.

14. Claimant was seen by Dale Mann, Ph.D., for repeat neuropsychological testing on Nov. 5, 2007 which showed severe impairment of attention and language; moderate impairment of executive functioning; mild to moderate impairment of memory; and mild impairment of spatial functioning. Validity was questioned, but Claimant's testing results were viewed as being consistent with cognitive deficits magnified by issues associated with pain and depression.

15. On February 14, 2008, an MRI of Claimant's brain was obtained. The MRI revealed multiple areas of increased T2 signal involving the subcortical white matter on both sides and slightly more pronounced in the frontal regions, unchanged compared to the March 2007 MRI.

16. On April 17, 2008, Dr. Randolph Robinson performed jaw surgery on Claimant. Following this hospitalization, Claimant had an episode of dizziness and was hospitalized on May 2, 2008. A second EEG was performed, which Dr. Eric Foltz interpreted as normal.

17. On July 29, 2008, neurologist Eric Foltz, M.D. saw Claimant for an epilepsy consult. He noted Claimant began having seizures following surgery to wire his jaw shut in April of 2008. Dr. Foltz diagnosed epilepsy, TBI, weakness and confusion. Dr. Foltz recommended in home skilled nursing care. A long term video EEG on October 6

to 8, 2008 noted slowing in both hemispheres of the brain and Dr. Foltz noted "frontal temporal sharp waves interlictally."

18. Dr. Leppard referred Claimant to Antony Ricci, Ph.D. for psychotherapy. Dr. Ricci evaluated Claimant on August 7, 2008. Dr. Ricci diagnosed Post Traumatic Stress Disorder ("PTSD") and required immediate and urgent care to address symptoms associated with PTSD and post concussive difficulties, as well as ongoing chronic pain.

19. Dr. Leppard would subsequently withdraw as Claimant's treating provider due to concerns that her treatment relationship with Claimant had become antagonistic. Dr. Thomas Higginbotham agreed to act as Claimant's primary authorized treating provider (ATP). On October 14, 2008, Dr. Higginbotham examined Claimant and prescribed 24/7 skilled nursing care by his wife, who is a registered nurse. On December 19, 2008, Dr. Higginbotham completed a medical records review and recommended, among other things, further follow up with the Epilepsy Center at University Hospital in Denver as well as continued follow up with his neurologists in Colorado Springs. As part of this treatment plan, Dr. Higginbotham referred Claimant to Dr. Laura Strom at the Epilepsy Center in Denver. In discussing his seizures, Dr. Higginbotham indicated that Claimant had "uncontrolled and persistent" seizures, which were still under evaluation. Similar to his testimony at hearing, Dr. Higginbotham previously reported that he visited Claimant in his home and noted absent type seizures while he was there.

20. On Sept. 1, 2008, Dr. Anthony Ricci, Ph.D. reported significant balance difficulties, inability to follow discussion and disorientation in all spheres. In a letter dated Sept. 23, 2008, Claimant was noted to be "seriously dysfunctional" in activities of daily living and perceived that he was a burden to society and his family.

21. On February 2, 2009, Dr. Higginbotham documented in his clinical note that Claimant had three to four seizures in his office requiring that he be taken to the emergency room. Dr. Higginbotham noted continued instability due to his seizure activity. Emergency room records documented tonic clonic seizures and that Claimant had bitten his tongue. The February 3, 2009, EEG at Memorial Hospital was read as normal. Claimant was transported to University Hospital at that time.

22. Claimant underwent a video-monitored EEG at University Hospital in Denver under the direction of Dr. Strom. Dr. Strom reported that the February 4, 2009, EEG did not show seizure activity; however, she noted "some bifrontal sharp waves, which are rare." Additionally, she recorded that during the sleep state "there is also some evidence of interictal epileptiform discharges." A video EEG on February 6 and 7, 2009, was interpreted by Dr. Chantal O'Brien as abnormal due to moderate to severe theta delta slowing. Claimant was maintained on anti-seizure medications during his entire hospitalization.

23. On May 12, 2009, Claimant underwent another video EEG at University Hospital. Dr. Archana Shrestha reported no EEG changes that correlated with any

events. He concluded that Claimant had nonepileptic seizures. Dr. Mark Spitz agreed that the observed events were nonepileptic. He noted, however, that cyanotic events reported by Claimant's wife were probable epileptic events.

24. On July 28, 2009, Dr. Higginbotham noted that Claimant had been experiencing serious seizure activities which, according to his wife, caused him to turn blue and that one of the seizures had caused him to break an upper incisor.

25. Dr. Ricci observed "a series of clonic tonic seizures in [his] office that went on for about 15 minutes" on July 30, 2009. He recorded that "[t]he nature of the activity appears to start with the upper quadrant, primarily on the left. There appears to be violent irregular movement starting with the left extremity, quickly moving to the right, and then proceeding down the trunk to involving both the lower extremities. He clearly lost awareness during most of the experience, but did appear to recover on three occasions before relapsing into another series of clonic/tonic movements with loss of awareness and function."

26. On August 18, 2009, Dr. Woodcock performed a neurological evaluation, upon referral by Dr. Higginbotham. Dr. Woodcock concluded that Claimant's movements, shaking, tremors, and many of his seizures were part of a regressive psychological state. Dr. Woodcock noted that, even if Claimant has actual neurological seizures, many of the seizures were psychogenic.

27. On August 20, 2009, Dr. Strom met with Claimant and noted that he had been monitored by the Epilepsy monitoring unit and that numerous nonepileptic events had been captured. Her impression was that he had "severe bifrontal encephalomalacia due to motor vehicle accident head injury. He has seizures and I think nonepileptic seizures." She also thought that he had a movement disorder. She noted that Claimant's case was complex in trying to sort out what was biological and what was volitional.

28. On September 30, 2009, Dr. Higginbotham noted improvement in Claimant's seizures, which he attributed to the medication Vimpat which had been prescribed by Dr. Strom. He also noted that when Claimant sat for extended periods of time, he would experience tremors of his hands and arms and that his eyes would roll back. Voice commands and shaking were required to rouse him and then he appeared startled and unable to comprehend what had just occurred.

29. On Oct. 30, 2009, Dr. Ricci noted that Dr. Jonathan Woodcock had made observations of poor acceptance and denial, similar to his, and also reported that Claimant had a "syncope/seizure event" while leaving his office.

30. Claimant was seen by Urologist Richard Walsh, M.D., on Dec. 24, 2009 for urinary urgency and incontinency. Dr. Walsh opined that Claimant's 2006 injury was the sole contributing factor for his symptoms. Dr. Walsh testified by deposition, as a urology expert, that Claimant was having 3 to 4 incontinence episodes per day and up

to 7 episodes at night. Dr. Walsh diagnosed him with neurogenic bladder resulting from a TBI. He indicated that neurogenic bladder can be caused by any sort of head trauma with damage to the cerebrum which is the front portion of the brain. He tried medication and peripheral nerve stimulation unsuccessfully, which is not unusual. The only remaining options for Claimant are botox injections in the groin area multiple times per year or a sacral nerve stimulator implanted under the skin, and Claimant would need ongoing care.

31. On March 3, 2010, Dr. Higginbotham again witnessed what he described as a "classic tonic/clonic seizure" at Dr. Kania's office which is near his own. He indicated that Claimant "was having one of his more typical tonic/clonic seizures with some confusion afterwards." He also noted that when he saw Claimant in the emergency room following this event, Claimant was "upset then confused." Claimant expressed frustration and anger at the treatment he had received from emergency personnel, and Dr. Higginbotham noted that "[s]ubacute postictal aggression in patients with epilepsy after frontal head injury has been described in the literature."

32. On May 25, 2010, Dr. Higginbotham's office note reflects that Claimant was having significant problems with concentration, walking and lifting his feet off of the floor, extending his legs, continued diplopia, poor balance and photosensitivity. He requested a neuro-optometry assessment at that time.

33. On July 28, 2010, Claimant was witnessed to have a tonic clonic seizure during an outpatient MRI at University Hospital. He was described as having a loss of consciousness followed by 15 to 20 minutes of confusion. The nurse described that she "[a]rrived to find pt side lying on stretcher, tremulous esp to head & upper torso, wretching with some bldtinged [sic] emesis." Dr. Strom discussed the MRI findings in her clinic note of August 27, 2010. She indicated that the MRI "showed some generalized sulcal and ventricular prominence, which is mild to moderate and nonspecific. There were some scattered punctate patchy foci of T2 hyperintensities subcortical and periventricular, pretty consistent with chronic white matter infarct or some other microangiopathic ischemic related changes." She also noted that in examining Claimant, there was cognitive slowing and that he had to be reoriented to the discussion as it was clear he stopped listening to the conversation. "

34. An MRI was conducted at the request of Dr. Strom on July 29, 2010. The test indicated that the "T2 signal brightening are in the subcortical, periventricular and deep white matter. These are consistent with chronic white matter infarcts and/or other microangiopathic ischemic-related changes."

35. A video EEG on July 28 and 29, 2010, was interpreted by Dr. Shrestha as showing no EEG changes in connection with nonepileptic head and arm shaking.

36. On August 6, 2010, Dr. Thwaites, a neuropsychologist, performed an independent medical examination ("IME") for respondents. Dr. Thwaites diagnosed a mild TBI, but noted that it would not be associated with the level of neurological

symptoms reported by Claimant. He thought that it was unusual to have later onset of seizures after a mild TBI. He could not make sense of the entirety of Claimant's case and suggested additional diagnostic study.

37. On August 24, 2010, Dr. Phillips, a neurologist specializing in epilepsy, performed an IME for respondents. In her November 6, 2010, report, Dr. Phillips concluded that Claimant did not have epilepsy. She noted that his numerous EEGs did not correlate with any seizures and that his history and clinical examination did not indicate that he had epilepsy. She concluded that Claimant had nonepileptic psychogenic seizures and nonphysiologic tremors. Dr. Phillips noted that Claimant had a preexisting history of depression and did not think that his work injury caused his psychiatric issues. She strongly suspected a volitional component, but deferred to a psychiatrist. Dr. Phillips subsequently supplemented her report by noting that the February 4-5, 2009 EEG was abnormally slow, but that it was due to sleep and multiple drugs being administered. She reiterated that the EEG did not show epileptiform discharges. She agreed that frontal lobe epilepsy can be difficult to diagnose and are often confused with psychogenic nonepileptic seizures. She disagreed that the February 2009 increase of sharp waves on the EEG indicated seizure activity.

38. On October 13, 2010, Dr. Michael Saxerud, O.D., conducted a vision evaluation for diplopia resulting from the accident on December 30, 2006. Dr. Saxerud indicated that a combination of base out prism for the horizontal strabismus and vertical prism for the vertical strabismus improved claimant's vision. He could look ahead while walking instead of at his feet. He also bent over to view a small piece of paper on the floor and indicated that he could now see it clearly and without double vision. While looking at the paper, Claimant began having a seizure that lasted approximately 30 minutes and was witnessed by Dr. Saxerud.

39. On November 5, 2010, Dr. Strom indicated that claimant was experiencing increased tremor and that any kind of stimulation caused him to have greater tremor, increased vision problems and lowered energy levels. Dr. Strom opined that the tremor was "probably consistent with autonomic overdrive rather than on the basis of ganglia movement disorder. Seizures, of course, are controlled fairly well on his antiepileptic drugs and the use of Valium p.r.n."

40. On Nov. 11, 2010 Dr. Higginbotham noted improvement with the prism glasses.

41. On February 8, 2011, Dr. Ricci responded to the IME report by Dr. Phillips and disagreed with her conclusions, noting that Claimant had suffered chronic clonic tonic seizures in his office on several occasions. Supporting this opinion, Dr. Ricci indicated that Claimant had "lost awareness and presented with all prodromal and postictal attendant patterns."

42. On April 20, 2011, Dr. Saxerud determined that Claimant's vision had improved with the prism glasses; however, he was still suffering from minor seizures and was only able to wear the glasses for 10 to 15 minutes at a time. He determined that the

improvement made was as much as he could provide.

43. On April 11, 2011, Dr. Stephen Moe, a psychiatrist, performed an IME for respondents. Dr. Moe noted that Claimant appeared to be cognitively-impaired during the first part of the interview, but Claimant then became angry and fluent during the latter part of the interview. Dr. Moe concluded that Claimant had an intentional adoption of an illness role, probably due to a factitious disorder rather than malingering. Dr. Moe acknowledged that it was possible that Claimant had conversion disorder, especially for his seizures, for which he needed additional psychiatric treatment. He suggested that Dr. Strom acknowledge that Claimant did not have epilepsy, remove his medications, and that Dr. Higginbotham and Dr. Ricci refer Claimant for a behavioral therapy program. He suggested that they be removed as ATP if they refuse.

44. A sleep assessment was conducted by Dr. Jean Tsai of the University of Colorado Hospital on June 8, 2011. She found that repetitive movements caused tremors of Claimant's entire body, he could not get out of a chair without using his walking stick, and he had difficulty walking. She indicated that contributing factors to his sleep difficulties included TBI, which has been reported to cause a hyper arousal state that is resulting in insomnia. She thought that some of the movements at night may be a result of the stimulus related tremors that he has while awake. She recommended trying to treat his sleep apnea in an effort to improve his sleep.

45. On June 9, 2011, Dr. Ricci responded to Dr. Moe's IME report. He concluded that Claimant had suffered a mild to moderate TBI with increasing cognitive impairment following surgery. He noted efforts to introduce biofeedback and trauma reduction techniques; however, Claimant had been unable to maintain focus due to overstimulation and pain associated with his physical injuries. Dr. Ricci opined, contrary to the conclusions of Dr. Moe, that Claimant had sustained a coup-contra coup "frontal dysexecutive syndrome, worsened by repeat trauma following facial surgery with anesthesia cognitive changes (POCD), falls which have produced additional trauma, and psychological factors (including PTSD) superimposed on unique personality features with 'black and white' thinking, denial, escapism, and poor acceptance of disability. Also contributory are the chronic pain features and non-restorative poor quality sleep."

46. On June 13, 2011, Claimant was examined by Dr. Benzi Kluger, a tremor specialist at University Hospital in Denver. He noted that the tremor at rest was larger than typical for Parkinson's Disease, but with similar frequency. He indicated that the tremor was "present in both extremities, but that with specific maneuvers, such as holding his hands out in front of him or holding them close underneath his chin, but not touching, as well as with finger-nose-finger, the tremor becomes more and more pronounced, with higher and higher amplitude." He determined that Claimant suffered from Holmes Tremor "which is a tremor that can be the result of an injury to either the cerebellum or cerebellar outflow tracts." He prescribed the medication Sinemet to treat the condition.

47. On June 30, 2011, Dr. Higginbotham placed Claimant at maximum medical improvement ("MMI"). He determined that Claimant had sustained a 95% impairment rating based upon multiple conditions he associated with the work injury, including impairments associated with brain disorders, injuries to the cervical spine, right shoulder, carpal tunnel, vision and hearing, cardiopulmonary disorder, endocrine disorder, gastrointestinal disorder and mental/behavioral dysfunction. He recommended life care planning and indicated that Claimant would need indefinite care with planning to include long term care possibly in a skilled facility. He found no apportionment for Claimant's condition. Respondents would seek a Division Independent Medical Examination (DIME) contesting Dr. Higginbotham's opinions regarding permanent impairment.

48. On June 30, 2011, Dr. L. Barton Goldman, a physiatrist, performed an IME for Respondents. Dr. Goldman agreed with the conclusions of Dr. Phillips and noted that Dr. Strom and Dr. Higginbotham had not had the advantage of being able to read all of the voluminous medical records in this case. He agreed that Claimant suffered a mild TBI, with mild to moderate residual impairment, but probably did not suffer epilepsy. Dr. Goldman suggested that concerted effort be made to assess and treat Claimant's psychiatric difficulties. He agreed with Dr. Moe's recommendation for a week-long day treatment program. He recommended that 24/7 nursing care be evaluated in the context of the day treatment program. Dr. Goldman would go on to testify at the prior hearing before ALJ Stuber. As part of his December 30, 2011 order, ALJ Stuber noted that Dr. Goldman "thought that claimant's condition was consistent with factitious disorder, for which treatment would only make it worse. He thought that the psychogenic seizures were not caused by the work injury, but the work injury merely unmasked claimant's coping mechanism."

49. On an unknown date in the summer of 2011, Claimant's wife separated from him and ceased to provide his 24/7 nursing care. A professional nursing service took over responsibility for such care.

50. Alexander Jacobs, M.D. performed the requested DIME on Dec. 14, 2011. He spent over one hundred hours reviewing medical records dating back to 2000. Dr. Jacobs determined Claimant was at MMI on July 1, 2011 for his shoulder, neck diplopia and carpal tunnel syndrome, but not for his brain, central nervous system and psychiatric conditions noting that Claimant clearly had problems with judgment, performing complex tasks and problem solving when challenged. He assigned an advisory combined impairment rating of 41% whole person.

51. As noted, a hearing spanning three days was held before ALJ Stuber after which he issued an order on December 30, 2011 addressing Respondents request to withdraw additional treatment for Claimant's work related injuries. In denying the request ALJ Stuber found:

> Respondents have failed to prove by a preponderance of the evidence that claimant needs no additional medical treatment for his admitted work

> injuries. In spite of the voluminous medical records and testimony over three days of hearing, this case is focused on the existence or absence of epilepsy. Two of the expert witnesses have probative evidence about that issue: Dr. Strom and Dr. Phillips. Both are highly respected neurologists who specialize in epilepsy. Dr. Strom, the ATP, works at a specialized research hospital. Dr. Strom's testimony is persuasive that her real-time reading of the video EEG demonstrates sharp waves that are a "footprint" of frontal lobe seizure activity; although she concedes that they are not actual seizures at that time. Dr. Phillips disagrees with Dr. Strom's interpretation of the EEG data. Dr. Phillips, however, only had access to portions of the EEG that were archived by a technician. Dr. Strom had access to all of the digital EEG data in real-time. Dr. Strom simply has better information from which to draw her conclusions. The record evidence demonstrates that claimant probably has some epileptic seizures, for which he needs the medical treatment provided by Dr. Strom, Dr. Higginbotham, and Dr. Ricci. Clearly, without any dispute, claimant has enormous psychological problems for which he also needs ongoing medical treatment. Dr. Ricci particularly is providing that expert rehabilitation psychological intervention. Respondents argue that the treatment has not worked, indicating that it is not reasonable. The vast weight of the record evidence, however, is that treatment of psychogenic seizures is very difficult and not terribly successful. The record evidence demonstrates that the correct protocol is to provide psychotherapy, as provided by Dr. Ricci. As Dr. Goldman noted, this is a very complex case and every medical provider or IME physician should be receptive to differing opinions to determine what truly is the best treatment plan for claimant. Respondents' proposed plan of terminating all treatment based upon the absence of any neurologic or subconscious psychogenic component to claimant's condition is not persuasive. Perhaps in future days, additional data will inform the physicians. The current record evidence does not support respondents' proposal to terminate treatment.

52. In a February 13, 2012, report, Dr. Higginbotham disagreed with the Dr. Jacobs' 20% impairment for the brain because Claimant required constant supervision. He also thought there should be ratings for tinnitus, equilibrium and autonomic nervous system dysfunction.

53. On April 16, 2012, cardiologist David Rosenbaum, M.D., who was seeing Claimant for syncope indicated that Claimant's condition was mostly related to seizures and TBI. On April 25, 2014, he noted the syncope seemed to be improved and seizures were better with his medications and medical marijuana. On December 12, 2014, Dr. Rosenbaum noted that he was now stable concerning the syncope with medication.

54. On February 16, 2013, Dr. Strom concluded some of the seizures were non-epileptic. She noted improved sleep with the use of marijuana. On February 28, 2013, Dr. Higginbotham noted a decrease in seizures and that medical marijuana had been useful for "anxiety, insomnia, seizures, and pain." By August 21, 2014, Nurse

Practitioner (NP), Carol Hennessy indicated that Claimant was stable with regard to epilepsy.

55. On April 1, 2014, nursing care had been discontinued for about two weeks. Claimant was doing "pretty well" and was happy to be more independent with no major seizures since March.

56. On May 21, 2014, Dr. Seaman, D.D.S., M.S., issued a letter indicating that Claimant's dental treatment was related to the accident and was currently maintenance care.

57. On March 7, 2016, Dr. Higginbotham issued permanent work restrictions. On July 12, 2016, he noted that Claimant could walk a short time without his staff. He encouraged Claimant to walk more without his staff.

58. On September 7, 2016, Dr. Allison Fall performed a follow-up DIME. She noted that Claimant specifically reported a diagnosis of PTSD that is allegedly related to his December 30, 2006 work incident. During his DIME Claimant failed to disclose a prior history/diagnosis of PTSD occurring around 1990 when he was employed as a law enforcement officer by the New Mexico State Patrol.[1]

59. Following her examination, Dr. Fall prepared a written report wherein she opined that Claimant was at MMI as of July 1, 2011 with a 12% whole person permanent impairment rating for cervical pain and rigidity. Dr. Fall specifically opined that the neck was the only work-related condition on this claim and that there was no need for medical restrictions or further treatment related to the work injury. She felt that Claimant's non-epileptiform seizures and possible conversion or factitious disorder are not work-related diagnoses. She opined that there was no permanent impairment for a traumatic brain injury based upon lack of correlating objective findings. She also concluded that Claimant's psychiatry diagnosis was pre-existing, and although he may have had a temporary exacerbation, there is no permanent impairment regarding his psychiatric condition. Finally, Dr. Fall did not believe there was any need for further medical treatment or work restrictions based upon the injury of December 30, 2016.

60. On Dec. 27, 2016, a long term EEG captured eight seizures, all nonepileptic. Claimant's remaining seizure medications were discontinued and group therapy was ordered for treatment of nonepileptic seizures.

61. On February 14, 2017, Dr. Strom reviewed Dr. Fall's DIME report and issued a rebuttal indicating that Claimant's posture and head movements were consistent with neck and back pain and that his balance disturbance was chronic partially due to poor eye sight, but when well rested he could ambulate fairly well. She noted that TBI is a common cause of Holmes Tremor and pointed out that Le Fort II and III fractures are known to be markers for increased risk of head injury due to mechanical forces

[1] Claimant worked for the New Mexico State Patrol for 14 years. He was terminated 1991 due to a psychological condition.

necessary to produce the fracture. She concluded that Claimant does not have factitious disorder because his condition lacks volition. She indicated that opinions that Claimant did not have epilepsy at any time are wrong since two EEG's captured interlictal markers of seizures. She also noted improvement with cognition, attention, reduced startle response, headaches and tremor over time.

62. Dr. Stom, testified by deposition as an expert in epileptology on February 27, 2017. She indicated that the bifrontal sharp waves are a footprint of an epileptic seizure. She did not understand how Dr. Phillips could have looked at a similar MRI and say there was no evidence of shearing and did not think it would have been reasonable for Dr. Phillips to reach a different conclusion than she in this regard. She testified that Le Fort fractures are severe fractures and require a lot of force to produce. She indicated Claimant suffered a coup countercoup injury which can result in axonal shearing and cause confusion and mild to moderate cognitive impairment. She noted Claimant has white matter disease, also known as ischemia or diffuse axonal injury, which can be caused by trauma such as a Le Fort fracture, and shows up as white spots on MRI imaging. Dr. Strom noted it is common for people to have epileptic and nonepileptic seizures. Based upon the Dec. 2016 EEG she determined that Claimant no longer has epileptic seizures and now only has nonepileptic seizures resulting from a conversion disorder, which she described is a nonvolitional psychological condition as opposed to a factious disorder which she opined was a volitional disorder. She confirmed that a person can begin with epileptic seizures which can diminish over time. She has seen improvement in Claimant's condition. Currently she sees more good days walking, more tolerance to light, lowered startle response, his tremor seems to have resolved and his sleep has improved. He manages his attention and the headaches better. She did not agree that all treatment should be discontinued and indicated that Claimant could regress in terms of his headaches and tremors if botox treatment were discontinued. With regard to future treatment she was not sure about the nonepileptic seizures but thought he would continue to need headache treatment and balance issues would likely continue.

63. Henry Roth, M.D., testified by deposition as an expert in occupational medicine. entirely upon a record review. Dr. Roth concluded that Claimant sustained no brain injury or impairment for the same. He also felt that Claimant had no impairment for psychiatric conditions or low back pain. He generally agreed with Dr. Fall's DIME report but felt that Claimant's neck condition was also pre-existing. On cross examination, he admitted that there had been no seizures prior to the 2006 work injury. He did not review EEG's, only reports, and admitted his analysis of secondary gain factors was speculation. He agreed IME's should be fair, impartial, unbiased, and should not favor the position of one party or the party paying the bill. He agreed IME's and record reviewers should be thorough, which involved reviewing all medical records, and that DIME's should have the same standards as IME's. He agreed information favorable to an opposing party should not be left out of reports but was cross examined concerning communication with an attorney in a prior case where he discussed leaving such information out of his report. He admitted the records referenced in his report were the only ones he reviewed and he had not requested additional records and there were no

medical or Employer records of atypical behavior involving Claimant from August of 2005 to December 30, 2006. He agreed that Claimant's motor vehicle accident was a significant mechanism of injury but had only reviewed IME reports completed prior to the 2011 Hearing and Dr. Jacob's DIME. After that date, he had not reviewed any records from 2010 to 2014, and only some of the totality of records generated by Claimant's physicians between 2014 and the time of his records review. He did not review any of the rebuttal reports issued by Claimant's providers. He indicated it took him 40 hours to complete his review and report.

64. Dr. Fall testified by deposition as an expert in physical medicine and rehabilitation (physiatry) on March 9, 2017. She reiterated her opinion that Claimant's nonepileptic seizures, which her report indicates are claim-related, were actually not claim related. She indicated that it did not appear to her that Claimant had a significant head injury, did not have seizures and never should have been on seizure medication. She endorsed the opinions of the RIME epileptologist, Barbara Phillips, M.D. as more convincing than Claimant's epilep-tologist, Dr. Strom, though she did not recall reviewing Dr. Phillips' report. She deferred to Dr. Moe regarding factitious disorder. She determined Claimant had suffered a mild TBI, but believed it should have resolved within three months. She concluded that balance issues, headaches, or other symptoms were not claim-related and gave no impairment for TBI. She was unable to determine if he had dental injuries and declined to associate urinary condition with the work injury. She determined the date of MMI to be the date that the prior DIME, Dr. Jacobs, conducted his evaluation because she did not find impairment for brain injury, the central nervous system or psychiatric condition which she determined were pre-existing conditions. She believed Claimant could have had a brief aggravation of pre-existing anxiety or depression, but that there was no evidence of ongoing psychiatric issues. She rated Claimant's neck because she thought it was plausible it could have been injured and he did have ongoing cervical complaints. She declined medical maintenance. She agreed that a DIME should be fair, impartial, unbiased, thorough and should take all pertinent information into account. She agreed that a large volume of records does not diminish the DIME's responsibility to provide an accurate evaluation. She endorsed reviewing a box of medical records for about five hours, but could not say what percentage she "flipped" through. She admitted that the main IME's reviewed were Dr. Roth and Dr. Jacobs. She did not know that Dr. Phillips, Dr. Roth and Dr. Thwaites were not treating physicians and admitted that she relied heavily upon the RIME physician's conclusions. She relied upon Dr. Moe for the conclusion that Claimant's tremor was volitional and not caused by the work injury. She thought Dr. Roth had performed an extensive medical records review but did not know that he had only reviewed IME's and the original DIME up to 2012, had reviewed no records between 2012 to 2014 and did not review the majority of the records from 2014 to 2016. She had no knowledge of multiple medical reports from providers and was even unaware of the providers themselves. She did not know providers had witnessed seizure activity of Claimant, that a cardiologist had diagnosed syncope related to dysfunctional blood pressure associated with traumatic brain injury, that a urologist had diagnosed neurogenic bladder associated with traumatic brain injury, or that the ENT, had concluded Claimant's balance issues stemmed from the work injury and that he

would have tinnitus for the remainder of his life. She did not rate Claimant for tinnitus because it was a pre-existing condition, but could not identify any record indicating the presence of tinnitus prior to the work injury. She indicated Claimant never had epilepsy, but was unfamiliar with what signs epileptologists look for on EEG and did not know that two neurologists had documented residual effects of epileptiform discharges on EEGs.

65. Thomas Higginbotham, D.O. testified at hearing as an expert in occupational and environmental medicine consistent with his records. When he first met Claimant, he had several kinds of seizures, was on multiple seizure medications and received Valium injections when they became too intense. He was photosensitive, had double vision, difficulty communicating, sonosensitivity, tremors and he had poor sleep. He did not walk normally and needed an assistive device and 24/7 nursing care. Dr. Higginbotham noted that it takes a lot of force to cause a Le Fort II and III fracture and opined that Claimant suffered a coup-countercoup injury in the collision which caused axonal shearing. The coup injury would have caused the frontal lobe (which controls personality, mood, judgment and impulsivity) to impact with the front of the skull. The countercoup injury would have caused the occipital lobe (which controls vision and balance) to impact the back of the skull. He indicated axonal shearing could affect the autonomic nervous system controlling bodily functions such as taste, smell and hearing. He thought Claimant's headaches came from the face or his neck problems. He reviewed a CT of Claimant done on July 4, 2005 and noted that it was normal with no abnormalities. He indicated that there was no evidence of white matter hyperintensities and when compared to the Aug. 21, 2008 CT, he noted mild diffuse atrophy and scattered foci of white matter which indicated to him that there had been a change since the 2005 CT. He confirmed that the white matter intensities would be expected with diffuse axonal injury. He endorsed Claimant's use of prism glasses to bring the midline of vision into the right perspective and indicated this was consistent with occipital injury. With regard to the video surveillance, he indicated that the footage showing Claimant walking without his staff and glasses was different than he had seen in the office, but he saw a couple of times that Claimant lost his balance, then regained it quickly. He noted that he has encouraged Claimant to walk without his staff in the last year or two.

66. With regard to Dr. Fall's DIME report, Dr. Higginbotham believed there were gross misperceptions about Claimant's multiple conditions. He concluded she had relied upon RIME reports for her opinion. In noting that she took six hours to review medical records he indicated it took him 20 hours and he knew the case and had seen Mr. Sanchez around 120 times since he began treating him. He noted that records providers such as Dr. Shaw, Dr. Rosenbaum, Dr. Walsh, Dr. Salcetti, Dr. Seaman and Dr. Ricci were not reviewed and she had not reviewed many of his own notes. He disagreed with the DIME that Claimant did not suffer from a seizure disorder and noted there was no prior history of seizures. He disagreed that Mr. Sanchez did not have impairment for a brain injury because that has been the center of Claimant's care. Dr. Higginbotham felt that Dr. Roth's report had no merit, was incomplete and biased because he started from the premise that Mr. Sanchez was a liar, which was unfounded.

67. Dr. Higginbotham's diagnosis was initial epileptiform seizures which recently became nonepileptic only, photosensitivity, sonosensitivity, motion sensitivity, balance dysfunction, autonomic dysfunction related to the head injury, disordered breathing with obstructive sleep apnea due to nasal fractures, some ongoing movement disorder patterns, neurogenic bladder, tinnitus, post traumatic visual syndrome, chronic pain and adjustment reactions with depression and anxiety. He noted Claimant is receiving an increased dose of Zoloft compared to his pre-accident dose. Dr. Higginbotham noted improvement with decreased seizures, photosensitivity, sonosensitivity and motion sensitivity; the movement disorder is improved; headaches continue but have improved with botox; the cervical, thoracic and lumbar muscle tension has improved; he is better emotionally and behaviorally; his blood pressure is better controlled and sleep is better. He indicated that on bad days Claimant will present as very imbalanced and wears his tinted glasses. On good days he does not wear his glasses and is more capable of conversation. He recently revised Claimant's impairment rating with current knowledge and assigned 47% whole person impairment due to improvement. Regarding the differences between his rating and the DIME's, he indicated that the primary difference is the DIME's failure to recognize the brain injury and disequilibrium. He noted Claimant is on half the medications now than in the past and that the DIME did not address the blood pressure, GI issues, Claimant's constant pain, or the three-drug combination for mood and depression. He disagreed with the DIME that Claimant does not need ongoing care for medication management and treatment. He indicated that all treatment has been reasonable and related to the December 30, 2006 automobile collision.

68. Dr. Anthony Ricci, Ph.D. testified consistent with his records as an expert in psychology and rehabilitation psychology. He described Claimant's initial presentation as highly dysfunctional with significant anxiety, depression, paranoia and situational adjustment. Claimant was initially incapable of performing daily activities without monitoring and was legally incompetent. He had vision changes, tinnitus, smell changes, balance, tracking, memory loss, attention and focus problems. He couldn't sustain a logical thought process or adapt to changing cognitive environments. He had flashbacks and nightmares of the accident and aftermath, and multiple surgeries made his condition worse. Dr. Ricci testified that the pre-existing depression had no impact upon his treatment or evaluation. He witnessed seizures in his office on two occasions, the second of which was stopped with injection of Valium by Claimant's wife. His initial diagnosis was post traumatic stress disorder (PTSD) which he believed was superimposed on other neurologic and personality issues. He noted prior findings of PTSD which he indicated is difficult to treat because it is permanent, so the goal is to achieve remission. According to Dr. Ricci, PTSD can be rekindled by another traumatic event such as the December 30, 2006 accident. He also diagnosed adjustment disorder due to denial of his disability. He testified that Claimant's treatment has been successful and he had managed to reach a state of semi-independence as a result. For future care he expects Claimant will need continued medication management and possible psychological intervention if he has a regression in his recovery.

69. Dr. Ricci disagreed with Dr. Fall and Dr. Moe that factitious disorder was an

appropriate diagnosis because Claimant was not acting volitionally. He agreed with Dr. Moe that Claimant had suffered a mild TBI, but did not find any benefit in the report because Dr. Moe was not adding any new information. He agreed with Dr. Strom that Claimant's nonepileptic seizures were a result of conversion disorder which is a non-volitional physical manifestation of seizures due to a psychological condition. He noted PTSD is a triggering factor for conversion disorder. He agreed that there is no such thing as a mild TBI because the injury can affect people differently and result in severe symptomology. He believed Dr. Moe's conclusion that the tremor was intentional was incorrect based upon the Holmes tremor diagnosis and successful treatment.

70. Ryan Sanchez, Claimant's son, testified that he was 15 or 16 years old at the time that his father was injured. Prior to the injury Mr. Sanchez described his father as being an avid reader and very outgoing socially. Claimant was described as very fit and active. He liked doing hobbies and outside doing work around the house. Mr. Sanchez never saw balance problems prior to the work injury.

71. According to Ryan Sanchez, the family drove to Nebraska following the accident. He described seeing his father on a breathing tube with a severely swollen face. When his father regained consciousness, he noticed more erratic, aggressive, irritable and impulsive behavior. Claimant stopped reading and exercising. He would have minor seizures due to auditory stimuli. Claimant had difficulty moving around and when he got over stimulated, he would become very aggressive or would shut down. He had memory and balance problems, pain complaints in his back, dry mouth and headaches. Claimant had insomnia and the family would take shifts to monitor him at night. Mr. Sanchez witnessed seizures on multiple occasions and described tonic/clonic movements. Other seizures were described as absence events. Botox has improved his headaches until it starts wearing off. On good days Mr. Sanchez noted that Claimant could pass as normal for a period of time, but on bad days he will lie in bed most of the day and does very little. Claimant's connections with his family have suffered and he described his father as losing most everything due to personality changes. Per Mr. Sanchez, Claimant can walk without his walking stick for short periods of time, but his balance deteriorates as the day goes on.

72. Christine Helton testified that she first met Claimant as one of his nurses in 2012. She generally spent Monday, Tuesday and Wednesday with him for 12 to 18 hours a day. She described him being difficult, demanding and obstinate when she first met him and described witnessing tonic/clonic seizures during the day and heavy nighttime seizures right after he fell to sleep in 2012 into 2013. With night seizures he would sometimes lose control of his bowel and urinary functions and she would clean him and change the sheets while he continued sleeping. In 2012 and 2013 she saw an average of three medium seizures and a violent seizure as he would go into deeper REM sleep. She described Claimant as determined to get better and noted that he would push himself in activities. When he became overly tired he had more difficulty with his walk, gait and instability, and his hands would shake. She had to monitor activities such as gardening to make sure he didn't get too hot. He had difficulty with his own finances which necessitated setting up a reminder system. She did see short term memory

deficits. Botox helped with headaches but wore off over time and his headache complaints increased as it wore off. The nurses helped him organize and take his medications. She would get behind him to prevent him from falling, especially on stairs, and when he got tired, she would see him have more difficulty communicating and interacting.

73. Regarding improvement, Ms. Helton noted that Claimant's walk became more steady in about the middle of 2014 and when nursing was discontinued he was almost entirely independent with his activities of daily living (ADL's). She has seen improvement in his balance and impulsiveness and noted he can walk without his staff and appear normal to the casual observer at times. She noted reduction in his seizures in the last part of 2014 through 2015, including a significant reduction in seizures while he slept. The nursing staff worked with him to gain independence by showing him how to use a calendar, sort and dispense his own medicine, as well as walk and shower safely. He is usually better between the hours of 9:00 a.m. to 2:00 p.m. and after that she generally sees his gait become worse, he stumbles, is more forgetful and has increased pain in the neck.

74. Claimant testified briefly on his own behalf and indicated that his current therapy regarding nonepileptic seizures was to help him learn how to recognize triggers and better control his seizures which he identified as pain, sickness such as the flu, fatigue, significant stress and overdoing his activities. Lack of sleep resulted in inability to function. He gave credit to his physicians and support system for his improvement and keeping him out of a nursing home. Finally, he testified to receiving bills from providers which identify him as the obligor and are related to his worker's compensation claim. (Index, Ex. 12.) He was asked to identify a record on cross examination and the ALJ was able to observe difficulty reading as he placed a blank sheet of paper below every line to keep from losing his place and the longer he read the document, a noticeable shake of his extremities was observed.

75. Stephen Moe, M.D., testified by deposition on March 24, 2017, as a retained psychiatric expert for Respondents. He had not seen the Claimant since his report in 2011. He testified consistent with his original report with unchanged opinions. Under cross examination he agreed that Claimant had confusion and likely did not trust him. He confirmed that it takes significant force to cause the type of fractures sustained by Claimant but was unsure about a brain injury from a coup-countercoup mechanism. He agreed that white and gray matter have different densities and would travel at different speeds from the same impact which could cause diffuse axonal shearing. According to ALJ Stuber's December 30, 2011 order, Dr. Moe previously testified that the MRI of Claimant's brain only demonstrated "chronic hypertensive white matter changes" suggesting that Claimant did not have axonal shearing caused by his MVA. Nonetheless, Dr. Moe testified during his deposition that a coup-countercoup injury can damage the connections responsible for smooth movement of extremities, tremors can develop as a result of trauma and he had observed Claimant's hands begin to shake when they were lifted off of his lap.

76. During his March 24, 2017 deposition, Dr. More admitted that conversion disorder is usually precipitated by a stressful or traumatic event and can be associated with seizures. He testified at the previous hearing that Claimant probably suffered from factious disorder "because he was intentionally adopting the illness role due to emotional needs"; although he conceded that Claimant could be suffering from a "subconscious conversion disorder." He agreed PTSD symptoms can go into remission.

77. With regard to the brain, Dr. Moe agreed that the frontal lobes are responsible for functions such as mood, personality, adjustment, interpersonal behaviors, attention, foresight, inhibition and inappropriate behavior. He also agreed that brain trauma can affect any function of the brain with symptoms including excessive or disturbed sleep, inattention, difficulty concentrating, impaired memory, faulty judgment, depression, irritability, emotional outbursts, tinnitus, vision problems, inability to multi-task, slowed thinking, balance, dizziness and is associated with headaches. He believed Claimant had extremely limited interpersonal skills and lacked the ability to assess his own behavior. He described Claimant as regressed and childish, noted that he would ramble without making a point and was angry and refused to accept that he could not be fixed which Dr. Moe believed reflected genuine distress concerning his condition. Regarding depression, he admitted that brain trauma can make preexisting depression worse.

78. During the prior hearing before ALJ Stuber, Dr. Moe testified that Dr. Strom had "grossly erroneous history and was incorrect in diagnosing epilepsy." During his March 24, 2017 deposition, Dr. Moe confessed that he was not an epileptologist and that he did not know that Dr. Strom had access to the entire EEG record and Dr. Phillips did not. He also conceded that he was unaware that Dr. Strom and Dr. Foltz had seen sharp waves on EEG. He agreed that patients can have both epileptic and nonepileptic seizures, and that it is not unusual for individuals to have delayed onset of seizures, up to years, after a traumatic injury. He didn't know that seizures had decreased in frequency and severity over the last five years or that the sleep disturbance had improved. He admitted he did not know how much improvement Claimant had over that period. He was not aware of any records indicating Respondents had any concerns about Claimant in the year before his injury. Finally, he agreed that each time a person has a concussion; there is the risk of more severe results from subsequent concussions contrary to Dr. Fall.

79. At hearing, Michael Fitzgibbons, MPA, CRC, CDMS, testified as a vocational expert. He testified that he found Claimant difficult to interview because he had a hard time presenting information in a chronological fashion and had difficulty staying on point. According to Mr. Fitzgibbons, Claimant tried to cooperate but had difficulty responding to questions and seemed confused. He had a splint in his mouth which made it difficult for him to speak. Mr. Sanchez did poorly on academic testing with a 7.5 grade equivalency in word reading and 4.3 grade equivalency in math. He was unable to do all of the academic testing due to Claimant's difficulty seeing words even with glasses on. His effort was valid. He discussed the July 2005 work injury and indicated those

records didn't mention any impairment or work restrictions which caused him to conclude that it had no effect upon Claimant's ability to work. Indeed, based upon the evidence presented the ALJ finds that Claimant returned to full duty work after the 2005 work related incident.

80. Mr. Fitzgibbons testified that Claimant would soon be 63 years of age and that workers in that category are least likely to be hired and most likely to be unemployed and the obvious mental difficulties; seizures and physical limitations would make Claimant incapable of obtaining and maintaining gainful employment. Other factors which influenced his opinion included lack of transportation since Claimant cannot drive and that he hasn't worked since 2006.

81. Katie Montoya, MS, QRC, testified consistent with her report as a vocational expert. The substance of her testimony was that if Claimant's physicians are credited, Claimant is permanently and totally disabled. On the other hand, if the DIME opinion and Respondents retained experts were credited, then Claimant would only have 12% cervical impairment and no restrictions leading Ms. Montoya to conclude that Claimant would be capable of earning wages. She agreed with the conclusion that this is a medical case, not a vocational case.

82. Respondents obtained surveillance video tape of Claimant's activities during February and March 2016. Review of the video tape reveals Claimant to walk, sit, and bend all without the use of an assistive device, i.e. his walking stick. On one occasion Claimant is observed to run awkwardly for 3-5 strides. While Claimant walks for extended periods, the ALJ finds that his gait pattern slow and mildly guarded, especially during video obtained in February. The ALJ finds the video tape inconsistent with Claimant's endorsed balance problems. Nonetheless, the video tape does not provide insight into Claimant's cognitive capabilities or psychological symptoms and is therefore of limited value in determining whether Claimant is capable of earning any wage in the same of other employment.

83. Based upon the evidence presented, the ALJ finds that Dr. Fall erred in concluding that Claimant's neck was the only work-related condition associated with Claimant's December 30, 2006 work accident and that there was no need for medical restrictions or further treatment related to the work injury. The ALJ finds that Dr. Fall also clearly erred when she opined that Claimant's non-epileptiform seizures and possible conversion or factitious disorder are not work-related diagnoses and that there was no permanent impairment for a traumatic brain injury. While Dr. Fall has strong feelings about the cause of Claimant's cognitive dissonance and psychological symptoms as well as his need for treatment, the foundation for her opinions rests upon an abbreviated review of the medical records generated in this case. As presented, the evidence persuades the ALJ that Dr. Fall's opinions regarding causality and impairment have been overcome.

84. The ALJ credits the opinions of Dr. Higginbotham, Dr. Strom, Dr. Mann and Dr. Ricci to find that Claimant's December 2006 MVA probably resulted in a coup-counter

coup injury causing axonal shearing sufficient to render Claimant mildly to moderately brain injured. Based upon the evidence presented the ALJ is also persuaded that a traumatic brain injury and a rekindling of Claimant's prior PTSD resulting in the manifestation of a separate psychological condition, i.e. a factitious and/or conversion disorder best explains the enormity of his ongoing symptoms, especially his profound psychological dysfunction. Dr. Goldman stated it best when he opined that Claimant's work injury "unmasked" Claimant's poor coping mechanisms resulting in the development of psychogenic seizures. The opinions of Dr. Fall, Dr. Moe, Dr. Roth, Dr. Phillips and Greg Thwaites are simply not persuasive when the evidence is considered as a whole. In crediting the opinions of Claimant's treating physicians, the ALJ finds that Claimant, per the persuasive testimony of Michael Fitzgibbons is currently unable to earn a wage in the same or any other employment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the voluminous record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). As found here, the opinions of Drs. Higginbotham, Ricci, Strom, Walsh and Mann are supported by the totality of the record evidence submitted for consideration. Conversely, the opinions expressed by Dr. Fall, Dr. Roth, Dr. Phillips, Dr. Moe and Dr. Thwaites are not convincing when the entire record is considered. Accordingly, the ALJ concludes that the opinions of Claimant's treating physicians are more persuasive than those of Respondents retained experts and Dr. Fall, who relied principally upon those opinions.

Overcoming the DIME as to Causation and Permanent Medical Impairment

C. A DIME physician's findings of causation, MMI and whole person impairment are binding on the parties unless overcome by "clear and convincing evidence." *Section 8-42-107(8)(b)(III), C.R.S.*; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In this case the evidence presented persuades the ALJ that Dr. Fall failed to adhere to the responsibilities that she endorsed were important when completing a Division sponsored IME. The ALJ finds Dr. Fall's suggestion that five hours of review were all that were necessary to reach a fair, impartial and unbiased opinion in this case dubious given that the record evidence is in excess of 2,000 pages. Indeed, testimony from other physicians, including treating providers, a prior DIME physician and other retained experts, who reviewed Claimant's records indicated a time investment ranging from 100 hours by Dr. Jacobs, in 2011, 20 hours by Dr. Higginbotham who is intimately familiar with the Claimant having seen/evaluated Claimant in excess of 100 times, and 40 hours for an incomplete records review by Dr. Roth. Based upon her testimony and the DIME report itself, the ALJ concludes that Dr. Fall simply "flipped" through medical records and relied upon the Respondent IME's to reach what she defends is an independent and unbiased opinion. While she agreed that voluminous records do not diminish the DIME's responsibilities, she failed to review even a minority of Claimant's treating physician's reports. Rather, she relied heavily upon a clearly limited record review of Dr. Roth, which he admitted did not include treating physician records prior to 2014 and was based upon prior Respondent IME's from the 2011 litigation, and the report from Dr. Jacobs from 2011. She was not aware of multiple diagnoses from multiple providers finding traumatic brain injury with severe symptoms such as neurogenic bladder, syncope related to dysfunctional blood pressure, sleep dysfunction, and multiple seizures observed by multiple physicians. She did not recognize the improvement Claimant has made in the last five years, and did not rate tinnitus because she thought it was a preexisting condition, which it was not, nor could she identify a record indicating it was. She disregarded the findings and specialties of multiple physicians at the University of Colorado Hospital including Dr. Tsai, a neurologist with specialty in sleep disorders, and Dr. Kluger, a neurologist with a specialty in movement disorders who diagnosed Holmes tremor and successfully treated it and Claimant's headaches with Botox. She disregarded Dr. Strom and failed to consider the fact that

Dr. Strom had a complete EEG record and thus better evidence concerning Claimant's seizure activity, even though she had a prior deposition of Dr. Strom from 2011. Moreover, she indicated Claimant never had epilepsy, but was unfamiliar with what signs epileptologists look for on EEG and did not know that two separate neurologists had documented residual effects of epileptiform discharges on EEGs.

E. Considering Dr. Fall's deposition testimony along with the medical opinions of Dr. Higginbotham, Dr. Ricci and Dr. Strom and comparing them to the entire record evidence submitted, the ALJ concludes that Dr. Fall's opinions concerning the cause of Claimant's cognitive and psychological conditions as well as her opinion concerning impairment are based upon a truncated records review and thus represent an incomplete understanding of the case. Contrary to Dr. Fall's suggestion, pre-existing mental weakness and individual hypersensitivity do not result in forfeiture of compensation. *Ice v. Industrial Commission of Colorado,* 120 Colo. 144, 207 P.2d 963 (1949); *Peterson v. ENT Federal Credit Union*, 827 P.2d 621 (Colo.App. 1992). A claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). As found here, Claimant's traumatic MVA, more probably than not, resulted in a mild to moderate TBI which combined with (rekindled) Claimant's preexisting PTSD to in the words of Dr. Goldman, "unmask" poor psychological coping skills, resulting in psychogenic seizures and other dysfunctional behavior. Because the ALJ concludes that Dr. Fall's opinions concerning the cause of Claimant's cognitive and psychological conditions/impairment are based upon an incomplete understaning of the interplay betweeen those conditions in this case, the ALJ finds/concludes that her opinions are mistaken and highly probably incorrect. Accordingly, Respondents have presented clear and convincing evidence to overcome Dr. Fall's opinions concerning causation and impairment.

F. Where the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital,* W.C. No. 4-336-566 (September 5, 2001). In this case, the ALJ adopts Dr. Higginbotham's recently revised 47% whole person impairment rating. Based upon the evidence presented, the ALJ finds and concludes that Dr. Higginbotham accurately assessed and rated all pathologies causally related to this claim.

Permanent Total Disability

G. Under the applicable law, Claimant is permanently and totally disabled if he is

unable to "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In *McKinney*, the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a Claimant from receiving permanent total disability benefits. If wages can be earned in some modified, sedentary or part-time employment, a Claimant is not permanently and totally disabled for the purpose of the statute. See also *Christie v. Coors Transportation*, 933 P.2d 1330 (Colorado 1997).

H. Moreover, there is no requirement that Respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd., *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not, that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a Claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995).

I. To prove permanent total disability, a claimant is not required to establish that an industrial injury is the sole cause of his/her inability to earn wages. However, the claimant must demonstrate that the industrial injury is a "significant causative factor" in his/her permanent total disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). It is not sufficient that an industrial injury create some disability that ultimately contributes to permanent total disability. To the contrary, *Seifried* requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), *rev 'd on other grounds; Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333 (Colo. 1996). If a claimant's permanent total disability is the result of an independent, intervening, nonindustrial condition, then the industrial injury may not be a significant causative factor. *Post Printing and Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934); *Heggar v. Watts-Hardy Dairy,* 685 P.2d 235 (Colo. App. 1984); *but see, Varra v. Micro Motion*, W.C. No. 3-980-567 (Industrial Claim Appeals Office, May 27, 1994)(timing of the onset of the nonindustrial disability is not dispositive) and *Buster v. Walt Witt*, W.C. Nos. 3-962-930 & 3-975-719 (ICAO, March 27, 1992)(permanent total disability award for combination of industrial injury and subsequent symptoms of preexisting latent congenital condition). As found here, Claimant's industrial injury is a significant causative factor in his inability to earn a wage. The ALJ concludes that Claimant's permanent total disability flows directly from his December 30, 2006 work related TBI which combined with his pre-

existing but asymptomatic PTSD to “unmask” maladaptive coping strategies resulting in either a work related factious or conversion disorder. Based upon the medical record evidence, the ALJ concludes that the combined effect of the cognitive deficits caused directly by Claimant’s TBI and the psychiatric and behavioral components caused by Claimant’s rekindled (aggravated) PTSD render Claimant unable to earn any wages in the same or other employment.

J. In concluding that Claimant has proven that he is permanently totally disabled (PTD), the ALJ has considered a wide range of factors including age, work experience and training, education, Claimant’s physical condition and mental abilities and the availability of work that he can perform. *Weld County School District v. Bymer*, 955 P.2d 550 (1998). As noted, Claimant is approaching 63 years of age. He has obvious mental difficulties, seizures, whether epileptiform or not and physical limitations which, if credited make him incapable of obtaining and maintaining gainful employment. Even Ms. Montoya, Respondents retained vocational expert, agrees that if the opinions of Claimant’s treating physicians are accepted, Claimant is PTD. As found, the ALJ specifically credits the opinions of Dr. Higginbotham, Dr. Ricci and Dr. Strom in concluding that Claimant is PTD.

Maintenance Medical Benefits

K. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*."

L. Nevertheless, *Grover* provided, “[B]efore an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease.” While claimant does not have to prove the need for a specific medical benefit at this time, and respondents remain free to contest the reasonable necessity of any future care, claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra*. Claimant has made such a showing in this case. Here, the persuasive evidence establishes that Claimant continues to suffer from the effects of neuro-cognitive symptoms which would likely be ameliorated by additional neuropsychological counseling and medication. ALJ Stuber reached a similar conclusion following hearing when he noted that while the treatment of psychogenic seizures was “very difficult and not terribly successful”, the record evidence demonstrates that the correct protocol is to provide psychotherapy, as provided by Dr. Ricci. Accordingly, ALJ Stuber denied Respondents’ proposed plan of terminating all treatment based upon the absence of any neurologic or subconscious psychogenic component to Claimant’s condition as unpersuasive.

Disfigurement

M. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement", as used in the statute, contemplates that there be an "observable impairment of the natural person." In this case, Claimant asserts that his photophobia regularly necessitates wearing sunglasses indoors which he claims is disfiguring. He also claims that his poor balance and need to use an assistive device constitutes disfigurement. Finally he claims that he wears a dental splint making communication difficulties obvious, and has tremor with activities such as reading or shaking a person's hand. Consequently, Claimant argues that his disfigurement falls within the category of cases involving disfiguring movements primarily. Having listened to Claimant's testimony and having viewed the video tape and observed Claimant's movements in and around the Courtroom, the ALJ is not persuaded that Claimant has any credible observable impairment of his natural person. While he wore sunglasses at hearing and used a walking stick, he did not need the same during the time when he was videotaped. Moreover, the ALJ was able to discern Claimant's testimony without difficulty and the ALJ did not observe any tremor affecting his hands during hearing. While Claimant obviously believes that his injury has caused multiple areas of disfigurement, the ALJ concludes that this belief, more probably than not, is also rooted in and explained by Claimant's maladaptive psychiatric condition which has probably resulted in the development of psychogenic seizures. Consequently, the ALJ declines to award any additional compensation for Claimant's perceived, but unfounded disfigurement.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside Dr. Fall's DIME opinions regarding causation and permanent impairment is GRANTED. The 12% whole person impairment assigned by Dr. Fall is set aside and replaced by the 47% impairment rating assigned by Dr. Higginbotham on February 7, 2017.

2. Claimant has proven that he is Permanently Totally Disabled (PTD).

3. Respondents shall provide all reasonable necessary and related treatment to cure and relieve the Claimant from the effects of his December 30, 2006 work-related injury. Respondents remain free to challenge any future request for treatment on the grounds that it is not reasonable, unnecessary or unrelated to Claimant's industrial injury.

4. Claimant request for disfigurement benefits is denied and dismissed.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 1, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the June 1, 2016 cataract surgery performed by Howard Amiel, M.D. was causally related to his February 25, 2016 work injury.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to an award for disfigurement.

FINDINGS OF FACT

1. Claimant is employed by Employer as a second step gas fitter apprentice. Claimant has been employed by Employer for approximately three years.

2. On February 25, 2016 Claimant was so employed and was assigned to install a large rotary gas meter at a location that was surrounded by fencing. Claimant and a co-worker had to dismantle and remove a section of fencing.

3. While removing the fencing, Claimant was crouched down and an eight foot long, round, galvanized steel pole fell striking Claimant on the right side of his face. The blow caused a laceration above Claimant's right eyebrow and an abrasion on the right side of Claimant's nose.

4. Claimant was bleeding profusely, and was transported by his coworker to an urgent care center operated by the University of Colorado.

5. At the urgent care center, Claimant was evaluated by Mark Loeb, M.D. Claimant reported that a fence post fell and hit him above the right eye and caused a laceration. Dr. Loeb also noted a small scrape/abrasion on the right side of Claimant's nose, right nasal ala that did not need treatment. Dr. Loeb closed the laceration above Claimant's right eyebrow with six interrupted sutures. Dr. Loeb noted the plan to return in about five days to see James Rafferty, M.D. for suture removal. *See* Exhibits 1, E.

6. As a result of the injury, Claimant has a scar above his right eyebrow that measures between ½ of an inch to ¾ of an inch in length. The scar, at the time of hearing, remained white, red, and discolored from Claimant's normal skin tone despite adequate time for healing.

7. On March 1, 2016 Claimant was evaluated by Janet Gelman, P.A. PA Gelman removed Claimant's sutures and noted slight gaping so placed steri strips. PA Gelman recommended Claimant return in one week for follow up with Dr. Rafferty. *See* Exhibits 1, E.

8. On March 10, 2016 Claimant was evaluated by James Rafferty, M.D. Claimant reported that he was struck in the right side of his face with a fence post. Claimant reported doing very well and having no problems with his laceration. Claimant reported, however, that he had developed some visual acuity issues and visual blurring recently and that he had an appointment with his optometrist for further evaluation later in the week. Claimant reported that he was ready for discharge for the facial laceration. Dr. Rafferty assessed a ¾ inch laceration of the face due to work related trauma. Dr. Rafferty opined that Claimant was at maximum medical improvement with no permanent impairment, no need for maintenance care, and that Claimant was clear for full duty work. *See* Exhibits 1, E.

9. On April 2, 2016 Claimant was evaluated by Susan Miller, O.D. Dr. Miller found that Claimant had visually significant cataracts and referred Claimant to Howard Amiel, M.D. (ophthalmologist) for surgery evaluation, noting the reason for referral was for cataract with a history of trauma in February of 2016. *See* Exhibits 2, F.

10. On April 14, 2016 Claimant was evaluated by Tom Cruse, O.D. Claimant reported that approximately six weeks prior, he was hit on the right eyebrow and saw flashes after this happened and a big floater central in his right eye. Claimant reported blurred vision and altered depth perception in his right eye and difficulty reading in both eyes. Dr. Cruse found on examination that Claimant had a posterior subcapsular cataract at 2+ in the right eye, and a posterior subcapsular cataract at trace in the left eye. Dr. Cruse diagnosed posterior subcapsular polar age-related cataracts, bilaterally. Dr. Cruse noted the treatment plan of cataract surgery with Dr. Amiel. *See* Exhibits 3, H.

11. On April 26, 2016 Claimant returned to Dr. Rafferty for evaluation. Dr. Rafferty noted that following the last visit Claimant had been diagnosed with a right eye cataract and that surgery had been recommended. Claimant reported that he was advised to report to Dr. Rafferty for further evaluation because of a belief that the cataract might be related to the February 25, 2016 work injury. Dr. Rafferty assessed ¾ inch laceration of the face, resolved and bilateral cataracts right greater than left. Dr. Rafferty opined that the cataracts were possibly work related. Dr. Rafferty noted that even though traumatic cataracts are uncommon, trauma to the face or eye can result in cataracts. Dr. Rafferty noted that he did not know the amount of force that must be applied to the face before one could develop a cataract from the force and Dr. Rafferty recommended an opinion from an ophthalmologist if causation was being questioned. *See* Exhibits 1, E.

12. Dr. Rafferty noted that the aging process can contribute to cataracts, but that Claimant was a relatively young man at the age of 56. Dr. Rafferty noted no history of diabetes, chronic steroid use, or disease of the eye. Dr. Rafferty noted that UV radiation can play a role in cataracts, but that it could not be quantified. Dr. Rafferty noted that the temporal relationship between the event that occurred on February 25, 2016 and the onset of Claimant's visual blurring increases the likelihood that Claimant's

cataract was work related. Dr. Rafferty provided a work restriction of no commercial driving due to monocular vision. *See* Exhibits 1, E.

13. On June 1, 2016 Claimant underwent cataract surgery performed by Dr. Amiel. Dr. Amiel provided a surgical report but did not provide a causation analysis. The operative report indicates that Claimant presented with a progressive decrease of vision in the right eye with a visually significant cataract and that surgery was recommended. *See* Exhibits 4, G.

14. Claimant proceeded with the cataract surgery under his private health insurance but is requesting reimbursement of expenses for the surgery under workers' compensation.

15. On June 9, 2016 Claimant was evaluated by Dr. Rafferty. Claimant reported that the cataract surgery went very well and that his vision was much improved and essentially back to normal. Dr. Rafferty opined that the right eye cataract was work related since facial trauma can cause cataracts, Claimant had no known non-occupational risk factors for cataract development, and there was a strong temporal relationship between the work related event on February 25, 2016 and the development of the right eye cataract. *See* Exhibit 1.

16. On June 21, 2016 Claimant was evaluated by Dr. Rafferty. Claimant reported that he was discharged from care with his ophthalmologist and that he had no pain or problems with his eye or vision. Dr. Rafferty continued his opinion that the right eye cataract was work related. Dr. Rafferty placed Claimant at MMI that day, opined that there was no need for maintenance care, opined that Claimant had no permanent impairment, and opined that Claimant could perform full duty work. *See* Exhibits 1, E.

17. On June 30, 2016 Dr. Cruse issued a letter indicating that six weeks prior to Claimant's April 14, 2016 examination, Claimant was hit on the right brow with a metal object while on a work site. Dr. Cruse noted that Claimant presented with a posterior capsular cataract that warranted cataract surgery with Dr. Amiel. Dr. Cruse opined that a posterior capsular cataract in a patient of Claimant's age was most likely due to the trauma Claimant sustained on the work site. *See* Exhibit 3.

18. On August 22, 2016 Kenneth Kauvar, M.D. (ophthalmologist) performed a medical records review. Dr. Kauvar noted that Claimant had a laceration on his face due to blunt trauma, but not on his eyelid or eye. Dr. Kauvar noted that Claimant had posterior subcapsular cataracts in both eyes, with the right slightly worse than the left and that the degree of difference between Claimant's cataracts in each eye was typical for age related subcapsular cataracts. Dr. Kauvar noted that it would be unusual for the two to be the same since usually one eye progresses faster than the other eye. Dr. Kauvar noted that although Claimant was only 56 years old, Claimant was in the normal age range for age related cataracts to develop. Dr. Kauvar opined that trauma to an eye can cause the development of a cataract, however, the trauma needed to be a severe direct blow to the eye and would be expected to have noted eye changes such

as intraocular bleeding, a torn iris, a retinal tear, a corneal abrasion, a corneal laceration, increased intraocular pressure, or other findings. Dr. Kauvar opined that none of these types of findings were noted in Claimant at the time of injury or in later examinations. *See* Exhibits 5, D.

19. Dr. Kauvar noted that Claimant's only right eye changes were a posterior subcapsular cataract that was also noted in Claimant's other eye even though Claimant had no trauma to the left side of his face or to his left eye. Dr. Kauvar opined that it was as likely as not that Claimant's trauma to the right face did not cause or aggravate beyond its normal progression the development of the cataract in Claimant's right eye. Dr. Kauvar opined that the need for cataract surgery was not solely related to the workers' compensation claim. *See* Exhibits 5, D.

20. On December 12, 2016 Glen Gunderson, O.D. issued a letter. Dr. Gunderson indicated that he had known Claimant for more than five years and personally vouched for Claimant's moral character and integrity. Dr. Gunderson also noted that he had recently retired from general optometry practice after 42 years and had diagnosed many cataracts resulting from eye or orbital trauma. Dr. Gunderson opined that in most all cases, the formation of cataract occurring in one eye was attributable to trauma resulting in uveitis and reduced vision. Dr. Gunderson noted that Claimant reported that the right eye vision started to deteriorate within two weeks following a work related forcible blow to the right temporal area. Dr. Gunderson opined that unless another cause for intraocular inflammation or disease was documented, monocular cataract formation in a young man would be attributed to trauma. *See* Exhibit 6.

21. On January 30, 2017 Claimant underwent an independent medical examination performed by Chester Roe, M.D. (ophthalmologist). Dr. Roe, in error, did not digitally record the examination. A re-examination was performed by Dr. Roe on February 21, 2017 and was recorded. Dr. Roe issued his report on February 28, 2017.

22. Claimant reported to Dr. Roe that an eight foot long galvanized fence pole struck him on the right brow causing a laceration and that he was knocked over when it happened. Claimant reported that his vision started to get blurry in the right eye 7-10 days after the injury and that he had surgery and no longer has any problems with his right eye. Dr. Roe reviewed medical records and performed an eye examination. Dr. Roe opined that it was medically probable that Claimant's right eye cataract was not caused by the February 25, 2016 on-the-job forehead laceration injury. *See* Exhibits 13, A.

23. Dr. Roe opined that Dr. Rafferty was the least qualified physician from an eye standpoint to make a judgment regarding eye injury causation, that the optometrists were the next most qualified, but that the most qualified to comment on causation of cataract etiology and surgery would be the operating ophthalmologist Dr. Amiel, the record reviewing ophthalmologist Dr. Kauvar, and himself as an ophthalmologist. Dr. Roe opined that it was significantly less than 50% likely that the on-the-job injury caused

Claimant's right cataract. Despite the correlation in time soon after the laceration/injury, Dr. Roe opined that the forehead laceration did not cause right cataract progression and Dr. Roe noted that Claimant had the same type of cataract in the left eye and that the trauma/laceration to "near" the right eye, though it caused a laceration, was not significant to the right eye itself. *See* Exhibits 5, D.

24. Claimant testified at hearing that prior to his work related injury he had no vision problems or issues and had never sought vision treatment. Claimant testified that shortly after his work injury, he had blurry vision and a floater in his right eye that was not present before the injury. Claimant reported that he underwent cataract surgery because he wanted to be able to drive a commercial vehicle again and that not having a commercial driver's license would jeopardize his job. Claimant testified that three weeks after the cataract surgery, he was back to normal and full duty work and that his vision was back to where it was prior to the work injury. Claimant is credible and persuasive.

25. Dr. Roe testified at hearing consistent with his report. Dr. Roe opined that Claimant was in the normal age range to develop cataracts, and that by a persons 60's, nearly everyone has trace cataracts. Dr. Roe noted the range from trace to 4+ and that Claimant had trace in the left eye and 2+ in the right eye. Dr. Roe opined that often trauma related cataracts are anterior but can be posterior. Dr. Roe opined that the timing was coincidental only because Claimant had no trauma to the eye itself in the work injury and that trauma related cataracts tend to happen with direct and severe trauma to the eye. Dr. Roe noted that Claimant's injury was not severe like in other trauma related cataracts. Dr. Roe opined that Claimant's left eye will most likely continue to progress and require surgery as well in Claimant's lifetime.

26. Dr. Roe indicated that he did not know exactly where the rest of the pole that struck Claimant was. He also opined that in 10-30% of cases, a person can develop posterior subcapsular cataracts and go from no symptoms to the symptoms Clamant had in a period of two weeks. Dr. Roe noted that the average age for cataract surgery in the United States was 69 and that only 10-15% of the patients he operated on were under the age of 60.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Cataract Surgery

Respondents are required to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. Claimant must establish by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden to establish by a preponderance of the evidence a causal relationship between his February 25, 2016 work injury and his cataract surgery. The opinions of the authorized treating provider Dr. Rafferty and of optometrist Dr. Cruse are found credible and persuasive. Their opinions are further consistent with the

opinions of both ophthalmologists who acknowledge that trauma can cause cataracts. Although Dr. Cruse is an optometrist and not an ophthalmologist and does not perform cataract surgery, he is well qualified to diagnose and opine on the causation of cataracts.

As found above, Claimant was not just struck on face as it has been characterized at different points. Claimant had a laceration above his right eyebrow that required six sutures and he also had an abrasion on the right side of his nose. Claimant was struck both above his right eyebrow and on the right side of his nose with significant enough force to cause a laceration and abrasion. The positioning of the blow, striking both above his right eyebrow and on the right side of his nose necessarily involves his right eye area. Claimant's testimony is credible that he had no prior symptoms or problems with his vision and that he had never before sought treatment for vision problems. Claimant, prior to the injury, had no work restrictions and had the ability to drive a commercial vehicle. The opinion of Dr. Rafferty that the injury was work related was based on three things: that facial trauma can cause cataracts, that Claimant had no other non-occupational risk factors for cataract development, and that there was a strong temporal relationship between the work injury and the onset of cataract symptoms. Dr. Cruse, similarly opined that the development of a posterior capsular cataract in a patient of Claimant's age was most likely due to the trauma Claimant sustained on the work site. These opinions are persuasive.

Dr. Kauvar characterized the injury as just a laceration on the face, not on the eyelid or eye. However, as found above Claimant had not only a laceration just above his right eyebrow, he also had an abrasion on the right side of his nose. Dr. Kauvar's opinions are based, in part, on his belief that there was no trauma or direct blow to the eye. Similarly, Dr. Roe opined that the timing was coincidental only because Claimant had no trauma to the eye itself in the work injury and that a trauma related cataract tends to happen with direct and severe trauma to the eye. The opinions of Dr. Roe and Kauvar are not found as credible and persuasive as the credible persuasive opinions of Dr. Cruse, Dr. Rafferty, and the credible testimony of Claimant.

The ALJ finds after weighing all the evidence that Claimant has established more likely than not that he sustained trauma to his right eye significant enough to cause his right eye cataract and the need for surgery to cure and relieve the right eye cataract. Claimant is credible and persuasive and the ALJ does not agree that the symptoms Claimant experienced shortly after his work injury where he was struck and had a laceration above his right eyebrow and abrasion on the right side of his nose were merely coincidental. Rather, the ALJ finds persuasive that the trauma caused the need for cataract surgery and treatment to the right eye. Although Claimant has a trace cataract in the left eye, at the time of the work injury he had no symptoms in either his right or left eye and had not required treatment. Following the injury and the trauma to his right eye area, Claimant had 2+ cataract in the right eye and trace cataract in the left eye and he first began having symptoms in his right eye. Claimant has established that the trauma from the work injury more likely than not caused his symptoms and need for treatment of the right eye cataract.

Disfigurement

As found above, as a result of his February 25, 2016 work injury, Claimant has visible disfigurement to the body. The disfigurement includes one scar above Claimant's right eyebrow that measures between ½ of an inch and ¾ of an inch in length and remains white, red, and discolored from Claimant's normal skin tone despite adequate time for healing. Claimant has therefore established that he has sustained serious permanent disfigurement to areas of his body normally exposed to public view, and that he is entitled to additional compensation. *See* § 8-42-108(1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that the June 1, 2016 cataract surgery performed by Howard Amiel, M.D. is causally related to his February 25, 2016 work injury.

2. Claimant has established by a preponderance of the evidence an entitlement to an award for disfigurement. Insurer shall pay Claimant $400.00 for the disfigurement outlined above. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 1, 2017, /s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-881-225-06

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

A hearing on the merits in the above-referenced matter is scheduled for July 27, 2017, in Denver, Colorado, on the issue of Re-Opening. On May 23, 2017, the Respondents filed a " Motion for Summary Judgment, "alleging, *inter alia,* that Claimant's claim was closed by operation of law; and, that a case that has never been determined to be compensable cannot be reopened. Attached to the Respondents' Motion were Exhibits A through I. On May 31, 2017, the Claimant filed his "Response to Respondents' Motion for Summary Judgment." Attachment to the Claimant's Objection was Exhibit 1 [the Pre-Hearing Order of Pre-Hearing Administrative Law Judge (PALJ) John H. Sandberg, dated march 29, 2017. The Response does not clearly allege that a genuine issue of disputed material fact exists, other than a "worsening of condition" in a case that has never been determined to be compensable. Moreover, the Response contains legal argument concerning why a fully contested case should be re-opened when the alleged compensable injury has worsened.

The matter was assigned to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for decision on the Respondent's Motion for Summary Judgment and the Claimant's Objection. Both matters were deemed submitted for decision on June 1, 2017.

Respondents' Exhibits A through I were attached to the Motion for Summary Judgment. Claimant's Exhibit 1 was attached to the Response.

ISSUES FOR SUMMARY JUDGMENT

The issues to be determined by this decision concern whether there are genuine issues of disputed material fact concerning

The Respondents bear the burden of proof, by a preponderance of the evidence of establishing that there is no genuine issue of disputed material fact concerning the above-mentioned issues and that they are entitled to summary judgment as a matter of law.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

1. This matter arises out of an alleged work-related injury that occurred on or about January 18, 2012.

2. The Claimant filed a timely Claimant's Workers' Compensation Claim with the Division of Workers' Compensation (DOWC) within the Two-Year limitation prescribed by the Workers' Compensation Act.

3. The Respondents denied liability and compensability of the claim and filed and served a Notice of Contest with Colorado Division of Workers' Compensation on March 15, 2012 (Exhibit A, attached to the Motion).

4. On September 21, 2012, Respondents filed and served a Petition to Close Claim for Failure to Prosecute, pursuant to Colorado Workers' Compensation Rules of Procedure (WCRP) Rule 7-1(C), 7 CCR 1101-3 (Exhibit B, attached to Motion).

5. On October 9, 2012, the Director of the Colorado Division of Workers' Compensation (DOWC) entered an Order to Show Cause requiring the Claimant to tell the DOWC what recent effort had been made to pursue his workers' compensation claim. The Order to Show Cause was served on Claimant and notified him that a response was required to be filed within 30 days of the date of the certificate of mailing or the claim would be automatically closed. The Order also indicated that "if your case is closed after 30 days, you have the right to petition to reopen your case as set for [sic] in § 8-43-303, C.R.S." (Exhibit C, attached to Motion).

6. The Claimant never responded to the October 9, 2012 Order to Show Cause entered by the DOWC Director. The Claimant never filed a Petition to Review the Order. Therefore, pursuant to the terms of the Order, the Claimant's claim was deemed automatically closed.

7. The Claimant took no further action on his claim and no activity on the claim occurred for over two years until November 25, 2014 when counsel for Claimant entered his appearance with the DOWC.

8. The Claimant filed an Application for Hearing on December 1, 2014. The issues endorsed for hearing included: compensability, temporary disability benefits, medical benefits, and average weekly wage (AWW). This hearing was never set (Exhibit D, attached to Motion).

9. The Claimant filed a second Application for Hearing, dated September 14, 2015. The same issues of compensability, temporary disability benefits, medical benefits, and AWW were endorsed for hearing (Exhibit D, attached to Motion).

10. The parties appeared by and through their counsel on February 3, 2016 in the Office of Administrative Courts (OAC) before ALJ Laura Broniak. At the hearing, the September 14, 2015 Application for Hearing was stricken without prejudice because the claim was closed pursuant to the October 9, 2012 Order to Show Cause. .

11. The Claimant subsequently filed a Petition to Re-open on June 1, 2016. The basis for the Petition to Re-open was a "change of medical condition." Attached to the Petition was a medical report from William H. Miller III, M.D., dated February 12, 2015 (Exhibit E, attached to Motion).

12. The Claimant filed a third Application for Hearing on June 22, 2016; and, in addition to the issues of compensability, temporary disability benefits, medical benefits, and AWW, the issue of "Petition to Re-Open" was also endorsed. A hearing was never set (Exhibit F, attached to Motion).

13. The Claimant filed additional Applications for Hearings on November 19, 2016 and February 22, 2017 endorsing the issues of compensability, temporary disability benefits, medical benefits, and AWW. The issue of Petition to Re-open, however, was not endorsed (Exhibit G, attached to Motion).

14. A pre-hearing conference was held on March 27, 2017, before PALJ) John H. Sandberg. Respondents moved to strike the Claimant's February 22, 2017, Application for Hearing and dismiss the claim with prejudice. The PALJ correctly determined that the issues of compensability, temporary benefits, medical benefits, and WW were not ripe for adjudication because the claim was closed pursuant to the October 9, 2012, Order to Show Cause entered by the Director of the DOWC. The

February 22, 2017, Application for Hearing was stricken. The PALJ declined to dismiss the claim with prejudice because a Petition to Re-open would (or could) present issues of fact to be resolved by a merits judge at the OAC (Exhibit H, attached to the Motion).

15. On April 5, 2017, the Claimant filed another Application for Hearing endorsing only the issue of "Petition to Re-Open Claim." A hearing has been set with the OAC and it is currently scheduled to commence on July 27, 2017 on the issue of Claimant's Petition to Re-open (Exhibit I, attached to Motion).

16. Although raising an interesting legal argument, the Claimant's Response to the Motion for Summary Judgment fails to persuasively allege that the Motion should be denied because there is a genuine issue of disputed material fact.

Ultimate Facts

17. The ALJ infers and finds that there is no "changed condition," as a basis for re-opening until and unless "compensability" has been determined by admission or determination by an ALJ. The question arises "re-opening what?"

18. There has been no **award** of any sort as of the present time.

19. The Respondents have proven, by a preponderance of the evidence that there is no genuine, disputed issue of material fact; and, that they are entitled to summary judgment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, Exhibits A through I were attached to the Respondent's Motion, consisting of

pleadings and other official documents. Exhibit 1 was attached to the Claimant's Response (PALJ Sandberg's Pre-hearing order), however, the Response fails to set forth alleged facts illustrating that there are genuine issues of disputed material fact.

b. Pursuant to Office of Administrative Courts (OACRP), Rule 17, 1 CCR 104-1, summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. As found, the Claimant's Response presents a legal argument for re-opening a matter where "compensability" has not yet been determined, but it fails to set forth alleged facts illustrating that a genuine issue of disputed material fact exists.

Re-Opening

c. Section 8-43-303 (1), C.R.S., provides: "At any time within six years after the date of injury…an administrative law judge may…review and reopen any **award** (emphasis supplied)." § 8-43-303 (2 (a) provides that a matter may be re-opened at any time within two years after the date of the last…benefits become due and payable. As found, there has never been an **award** of any benefits because "compensability" remains a contested issue. *See Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo App. 2002).

d. The purpose of the "change of condition" ground for re-opening is to allow for equitable adjustments to **awards** of benefits if conditions change over time. *Ward v. Ward*, 928 P.2d 739 (Colo. App. 1996)[*citing to Mascitelli v. Giuliano & Sons Coal Co.,* 157 Colo. 240, 402 P.2d 192 (1965)]. A change in condition refers to a "change in the condition of the original **compensable** injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1083 (Colo. App. 2002). The "change in condition" ground, therefore, refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which **can be causally connected to the original compensable injury** (emphasis supplied)." *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002); *Chavez v. Indus. Comm'n*, 714 P.2d 1328, 1330 (Colo.App.1985). A "change of condition" for purposes of the re-opening statute does not apply to changes in the economic circumstances of a claimant. Rather, a "change in condition" refers to a change in claimant's "physical or mental condition resulting from the **compensable** (emphasis supplied) injury and not a change in economic conditions[.]" *Lucero v. Climax Moybdenum Co.,* 732 P.2d 642, 648 (Colo. 1987).

e. Adopting the position taken in *Larson's Workers' Compensation Law*, 8 Larson's Workers' Compensation Law § 131.03(2)(a)(2001), the Colorado Court of Appeals held that the original finding of causation cannot be challenged in re-opening or post-re-opening proceedings. *City and County of Denver, Indus. Claim Appeals Office*, 58 P.3d 1162, 1164 (Colo. App. 2002). In fact, the court in *City and County of Denver* specifically quoted Larson's indicating "reopening based on a change of condition does

not permit re-litigation of every potential issue…neither party can raise original issues such as work-connection, employee or employer status, *occurrence of a compensable accident*, and degree of disability at the time of the first award [emphasis added]. *Id.* In the present case, as found, the Claimant filed a Petition to Re-Open a denied claim based on a change of medical condition on June 1, 2016. Claimant attached a medical report from Dr. Miller that purportedly supports the Petition to Re-open resulting from a change of medical condition. The denied claim was previously closed by the Director of the DOWC in his Order to Show Cause dated October 9, 2012. The Claimant is now attempting to obtain an order re-opening a closed claim that was never found or admitted to be compensable in the first place.

f. In order for the Claimant to re-open his claim pursuant to §8-43-303, C.R.S. based on a change of condition, it must be established that Claimant previously sustained a compensable injury. As found, the Respondents never admitted liability for benefits or filed any admission. Rather, a Notice of Contest was filed and it is undisputed that the underlying compensability of the claim has always been denied by the Respondents and never found compensable.

Genuine Issue of Disputed Material Fact

g. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, there are **no** genuine issues of disputed material fact concerning whether there has been an **award** of benefits.

h. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Claimant's Response to Respondents' Motion for Summary Judgment fails to show specific facts that there are genuine disputed issues of material fact.

Limitations/ Housekeeping Mechanisms of the Law

i. While the operation of statutes, rules and orders of the Director of the DOWC may seem unfair in their implementation, the law needs "housekeeping" devices to end cases once and for all when there has been no meaningful action over a protracted period of time. As found, the Claimant repeatedly failed to prosecute his claim to the point that rules for dismissal were invoked by the Respondents and the Director of the DOWC ultimately entered a "Show Cause Order," the terms of which

provided for dismissal if good cause was not shown within 30-days. As found, on September 21, 2012, Respondents filed and served a Petition to Close Claim for Failure to Prosecute, pursuant to Colorado Workers' Compensation Rules of Procedure (WCRP) Rule 7-1(C), 7 CCR 1101-3 (Exhibit B, attached to Motion). On October 9, 2012, the Director of the DOWC entered an Order to Show Cause requiring the Claimant to tell the DOWC what recent effort had been made to pursue his workers' compensation claim. The Order to Show Cause was served on Claimant and notified him that a response was required to be filed within 30 days of the date of the certificate of mailing or the claim would be automatically closed. The Order also indicated that "if your case is closed after 30 days, you have the right to petition to reopen your case as set for [sic] in § 8-43-303, C.R.S." (Exhibit C, attached to Motion). Thereafter, the Claimant never responded to the October 9, 2012 Order to Show Cause entered by the DOWC Director. The Claimant never filed a Petition to Review the Order. Therefore, pursuant to the terms of the Order, the Claimant's claim was deemed automatically closed. The Claimant took no further action on his claim and no activity on the claim occurred for over two years until November 25, 2014 when counsel for Claimant entered his appearance with the DOWC. In the same manner that a "statute of limitations" is designed to bring closure and finality on stale claims, so are the rules and the DOWC Director's Order to Show Cause, the consequences of not doing so in a timely fashion are a dismissal of the claim. As the late U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., advised a litigant, "a statute of limitations has nothing to do with justice or fairness, it is a housekeeping mechanism of the law and this is a court of law, not a court of justice." Expressed another way, "Let be finale of seem" ("The Emperor of Ice Cream," *Collected Poems of Wallace Stevens*).

Burden of Proof

j. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Respondents have satisfied their burden of proof that there is **no** genuine issue of disputed material fact.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent's Motion for Summary Judgment is hereby granted.

B. The presently set hearing of July 27, 2017, is hereby vacated.

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203**.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order Granting Summary Judgment in Favor of Respondents** on this_____day of June 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.sjord

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury on or about March 1, 2015.

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to medical benefits as a result of a compensable work injury occurring on or about March 1, 2015.

STIPULATIONS

At the outset of the hearing, the parties stipulated that Temporary Total Disability was not an issue for hearing, and that the issue of Average Weekly Wage would be held in abeyance, pending the outcome of this hearing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant's husband, and de jure employer, was deemed disabled following a lumbar fusion surgery, which occurred in late January 2015. At hearing, Claimant cited a number of unspecified reasons for her husband's total incapacity. Claimant started working full-time as a caretaker for her husband on February 1, 2015 through a government assisted program.

2. On March 1, 2015, Claimant alleges she suffered a work injury in the course and scope of her employment. Claimant testified "On March 1st, I was helping [my husband] out of bed and our hands slipped apart and he fell back on the back and I fell backwards into the entertainment center."

3. Claimant stated she immediately "had stingers," which were "throughout the whole right side of my body from my neck down to my toes." Claimant reported there were not only "stingers," but, "stabbing pain and stiffness and I couldn't really move for a little while."

4. At hearing, Claimant initially testified that she went to Dr. Johnson "within a couple of days" after her alleged injury on March 1, 2015.

5. Despite Claimant's statement that she sought treatment from Dr. Johnson a couple of days after the alleged injury, the record contains no medical evidence that Claimant sought medical attention on the date of injury, or the days following injury.

6. Claimant later testified that in fact, she did not seek treatment until she saw Dr. Pak on October 19, 2015.

7. Over three and a half months after Claimant suffered this alleged injury, she applied for Social Security Disability Benefits (SSDI). On July 7, 2015, the Social Security Administration (SSA) issued a Disability Determination and Transmittal. (Ex. V, p. 266) The SSA denied Claimant's request for benefits and stated, "clmnt alleges she became disabled on 4/12/2012, however, clmnt has been working as a home health care nurse and earned $20,743.19 in 2013 and works this year (2015) 28 hours per week and earns $2000.00 per month." (Ex. V, p. 270)

8. Claimant's June 21, 2015 application for SSDI benefits makes no mention of a March 1, 2015 injury. (Ex. V)

9. Claimant testified at hearing that she also received unemployment benefits in 2014.

10. After Claimant was denied SSDI benefits, a First Report of Injury was then completed on October 6, 2015. (Ex. A)

11. On October 19, 2015, Claimant sought treatment for the first time for her alleged March 1, 2015 work injury. She met with Dr. John Pak who reported Claimant stated, "she was lifting [her husband] out of bed and she felt a shock of pain going through shoulder." (Ex O, p. 171) Claimant's report to Dr. Pak of how her injury initially occurred did not include a report that she fell backward into an entertainment center.

12. Claimant's complaints to Dr. Pak on October 19, 2015 were limited to the right shoulder. Dr. Pak assessed Claimant with "shoulder pain," bursitis of the shoulder and scapulalgia. Dr. Pak administered a corticosteroid injection to the right shoulder. He referred Claimant for an x-ray and to begin physical therapy. (Ex. O, pp. 171-173)

13. The x-ray of the right shoulder requested by Dr. Pak was performed. It revealed type II acromion, but was otherwise normal. (Ex. O, p. 173)

14. Claimant also underwent a cervical spine x-ray which demonstrated multilevel degenerative disc changes and arthritis. (Ex. O, p. 176)

15. On November 17, 2015, (now over eight months after her alleged injury), Claimant began reporting left shoulder pain. (Ex. O, p. 178)

16. On March 4, 2016, Claimant underwent a surgical evaluation with Dr. Joseph Ilig. After examining Claimant and her medical records, he opined "Patient has nonspecific radiating right arm pain infrequently with primarily right paraspinal and upper sternocleidomastoid soreness. Her examination is benign." (Ex. S, p.

233) Dr. Ilig found “no indication for neurosurgical intervention given the benign appearance of her MRI with minimal degenerative changes.” Claimant sought a refill of her oxycodone prescription from Dr. Ilig during the consultation, but Dr. Ilig declined Claimant’s request, since Claimant was not a surgical candidate. (Ex. S, p. 233) Though Dr. Ilig found Claimant was not a surgical candidate, he did want to rule out any radiculitis in the upper extremities “albeit unlikely.” He referred Claimant for EMG studies. (Ex. S, p. 233)

17. Claimant underwent the EMG testing with Dr. Gregory Ales on April 4, 2016. The results were normal other than chronic reinnervation in the left triceps muscle. (Ex. S, p. 238)

18. After Dr. Ilig reviewed Claimant’s EMG results and again opining the Claimant is not a surgical candidate, he referred Claimant to Dr. Scott Ross for a physiatric consultation. When Dr. Ross examined Claimant, she indicated her right shoulder issues had resolved, but Claimant indicated she “has been still left with left-sided neck pain that radiates into the shoulder blade and into the trapezie." Dr. Ross recommended a left-sided medial branch block. She was also able to receive a prescription for oxycodone. (Ex. T, pp.242, 243)

19. Claimant did not miss work following her alleged injury and continued to earn full wages as demonstrated by her wage earnings. (Exs. H & I)

20. Respondents retained Dr. Robert Messenbaugh to perform an Independent Medical Examination (IME). After examining Claimant and her medical records, Dr. Messenbaugh concluded in his report:

> “It is my opinion that Ms. Dizmang sustained no injury to her cervical spine, right shoulder, low back, or left elbow as a result of any events of March 1, 2015. I simply find no proof or documentation that Ms. Dizmang sustained any injuries from March 1, 2015 other than the fact that she says that she has sustained injuries.” (Ex. U, p. 258)

21. Dr. Messenbaugh was deposed on September 27, 2016. (Ex. J) He testified at the deposition consistent with the opinions contained in his report, but did further elaborate on a variety of issues.

22. Claimant failed to seek medical treatment for seven and a half months after the alleged injury. Dr. Messenbaugh testified that he believes injured workers generally seek treatment shortly after an acute injury. “That’s certainly my experience. And absolutely that would be what I would do and what I think any reasonable person, particularly under the circumstances of a Workers’ compensation accident, would have done and would have experienced issues and been concerned sufficiently to have sought medical evaluation and medical treatment.” (*Deposition Transcript of Dr. Robert Messenbaugh* (hereinafter Depo. T) 7:25-8:6)

23. Dr. Messenbaugh also noted the inconsistent pain complaints provided by Claimant throughout her treatment history. After Claimant initially saw Dr. Pak for only right shoulder issues on October 19, 2016, Claimant reported to her physical therapist she had neck pain. Dr. Messenbaugh opined this "would be inconsistent, in my opinion with her having sustained a neck injury on March 1, 2015." (Depo. T. 14:2-4) He elaborated, stating, "I think you would have [neck] symptoms immediately. I mean, even with a day or whatever they had arisen, again, I would have expected someone to report such an event. That was not reported." (Depo. T. 19-23)

24. Despite Claimant's inconsistent neck pain complaints, Dr. Messenbaugh still analyzed Claimant's MRI imaging of the cervical spine. He stated that those images "are those of degenerative change, not of an acute accident, traumatic change, or alteration in the pathology." (Depo. T. 18:8-14)

25. Dr. Messenbaugh also addressed Claimant's complaints of radiating pain down her right arm. " [The EMG results] were normal, failing to show any evidence of any pathology involving her cervical spine nerve roots. Those go into her hand included, and these were normal…..Her complaints are subjective. The EMG is the objective evidence to demonstrate there was no actual injury to the cervical nerve roots." (Depo. T. 19:13-23)

26. In the IME report, Claimant "reported that she had injured her low back on March 1, 2015, yet in her medical records I do not find objective evidence or for that matter subjective indications that she had injured her lower back on March 1, 2015." (Ex. U, p. 257)

27. The medical records following Claimant's alleged injury do not mention low back pain. Claimant has, however, reported prior issues with her low back. Claimant complained of "back pain leg pain – all over" on December 27, 2010 while seeking treatment in Farmington, N.M. (Ex. K, p.146)

28. A July 14, 2014 note indicated Claimant "admits to long-term low back pain without radiculopathy. Also complaining of knee and ankle pain bilaterally again with longtime symptoms." (Ex. U, p. 152)

29. Claimant's low back pain complaints prior to injury were apparently sufficient to warrant an x-ray of the lumbar spine on July 14, 2014. (R. Ex. M)

30. By the time Claimant was examined by Dr. Messenbaugh in August 2016, Claimant's pain complaints from her eighteen month old alleged injury had expanded to include "pain in the right side of her body from her neck to her toes and also her left arm. She stated that she had itching all the time, that she couldn't remember things, and that she had difficulty in grasping with her fingers and that they felt weak." (Depo. T. 25:21-26:10)

31. Dr. Messenbaugh found Claimant's history of varying and increasing pain complaints throughout the body concerning. "My concerns also are that her symptoms seem to be ever expanding, changing, going from – Dr. Pak says from shoulder and then to neck. And here we are beyond seven and a half months after a reported event of March '15 and then she later has complaints of the opposite left shoulder. And then she has complaints of low back at a later date. It all just seems to be highly inconsistent. "(Depo. T. 29:11-18)

32. Claimant has demonstrated inconsistent complaints throughout her treatment for her alleged work injuries. On her first visit, (over seven and a half months after the alleged injury) Claimant only complained of right shoulder pain. As her treatment progressed, her reported symptoms increased. She then began complaining of left extremity pain, neck pain, and low back pain. Claimant also complained of skin irritation and insomnia. Medical treating providers conducted a variety of tests, none of which demonstrated any acute injury. As such, the only evidence to support Claimant's report of injury on March 1, 2015 is Claimant's own reports. This ALJ is persuaded by the opinions of Dr. Messenbaugh who found these types of pain complaints are inconsistent with an injury on March 1, 2015.

33. The ALJ finds the contemporaneous medical records, and Dr. Messenbaugh's opinions, more persuasive than the testimony of Claimant. Claimant's failure to seek treatment for an acute injury for seven and a half months raises serious concerns with Claimant's credibility. This ALJ is persuaded by the testimony of Dr. Messenbaugh who found Claimant's failure to seek treatment to be unreasonable and inconsistent with an acute injury which occurred on March 1, 2015.

34. The ALJ finds Claimant's credibility is further compromised by documentation demonstrating she is regularly seeking a variety of benefits. These include receipt of unemployment benefits in 2014, an application for SSDI benefits in 2015 (and prior to her seeking treatment for the alleged March 1, 2015 injury), and her ongoing receipt of income as her husband's paid caretaker with no apparent supervision or oversight.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to Assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

D. In order to recover benefits a claimant must prove that she sustained a compensable injury. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work-related functions. *Finn v. Indus. Comm'n,* 165 Colo. 106, 437 P.2d 542 (1968). It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. *Ramsdell v. Horn,* 781 P.2d 150 (Colo. App. 1989).

E. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*,12 P.3d at 846.

F. Based on Claimant's failure to seek medical treatment for seven and a half months, her inconsistency in reporting her alleged symptoms, the lack of objective findings to support her allegation that she suffered any injury on March 1, 2015, and Dr. Messenbaugh's credible testimony finding there is no objective evidence that a work injury occurred, this ALJ finds Claimant failed to sustain her burden of proving, by a preponderance of the evidence, that she sustained a compensable work injury.

Medical Benefits

G. Respondents are only liable for medical treatment that is reasonably necessary to cure and alleviate the effects of the occupational disease. Section 8-42-101(1)(a). The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. ICAO*, 53 P.3d 1192, 1197 (Colo. App. 2002). The Claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc.*, 989 P.2d 251, 252 (Colo. App. 1999). Claimant failed to prove, by a preponderance of the evidence, that she suffered a compensable injury and is, therefore, not entitled to any medical benefits.

ORDER

It is therefore ordered that:

1. Claimant does not have a compensable claim. Her request for medical benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 5, 2017

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether Claimant's hearing loss and tinnitus is causally related to his industrial injury.

- Whether Claimant's need for hearing aids is reasonable, necessary, and related to Claimant's industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is presently a 53-year-old male who worked for Employer as a lab technician. Claimant's job involved cleaning and repairing high end mineral specimens.

2. On December 9, 2015, Claimant sustained an admitted work injury. Claimant was changing the oil for a large vacuum chamber when he hit his head on a piece of metal. (Exhibits (Ex.) 1 and 2.) Claimant testified that within a few days of hitting his head that he had a constant, high pitch ringing in his ears, left worse than right. He described an immediate hearing loss, because he could not hear his roommate speaking to him and he often had to ask his roommate to repeat himself.

3. On December 9, 2015—the date of injury—Claimant was treated at Colorado Internal Medicine by Dr. Goldsmith. Dr. Goldsmith's report indicates Claimant hit his left forehead, causing swelling and a bruise above the left side of his forehead. Claimant reported feeling mildly dizzy and off balance. Claimant denied headache or muscle weakness. Dr. Goldsmith's exam revealed a 2.5 cm contusion above the left forehead. However, his exam also revealed Claimant's hearing was intact to conversational voice in both ears. Dr. Goldsmith's report does not indicate Claimant complained of ringing in the ears or tinnitus. (Ex. F at 15-16.)

4. On December 17, 2015, Claimant returned to Colorado Internal Medicine. He was seen by Mario Capocelli, PA-C. The report from this appointment indicates Claimant stated that he was dizzy, feeling off, and had headaches. PA-C Capocelli reported Claimant's hearing was intact to conversational voice in both ears. (Ex. F at 17-18.)

5. On January 5, 2016, Claimant returned to Colorado Internal Medicine for a third time. Dr. Goldsmith also reported Claimant's hearing was intact to conversational voice in both ears; he reported no ringing in Claimant's ears, and an otoscopic exam revealed the tympanic membrane appearance was within normal limits. (Ex. F at 20-

21.) Following this examination, Claimant was referred to neurologist, Dr. Pamela Kinder.

6. Claimant's first evaluation with Dr. Kinder occurred on January 19, 2016. Claimant testified that when he first saw Dr. Kinder his main concern was migraines, speech, and other issues. Claimant testified that he was not concerned with his hearing loss or the ringing in his ears.

7. Dr. Kinder's January 19, 2016, report indicates Claimant had no hearing loss and no ringing in his ears. (Ex. G at 26.) Dr. Kinder also wrote that Claimant's hearing was intact to voice. (Ex. G at 27.)

8. The first report of Claimant having ringing in his ears did not occur until January 27, 2016, when Claimant presented for physical therapy. (Ex. 7 at 112.) This is approximately 49 days after Claimant hit his head. There is no report of hearing loss.

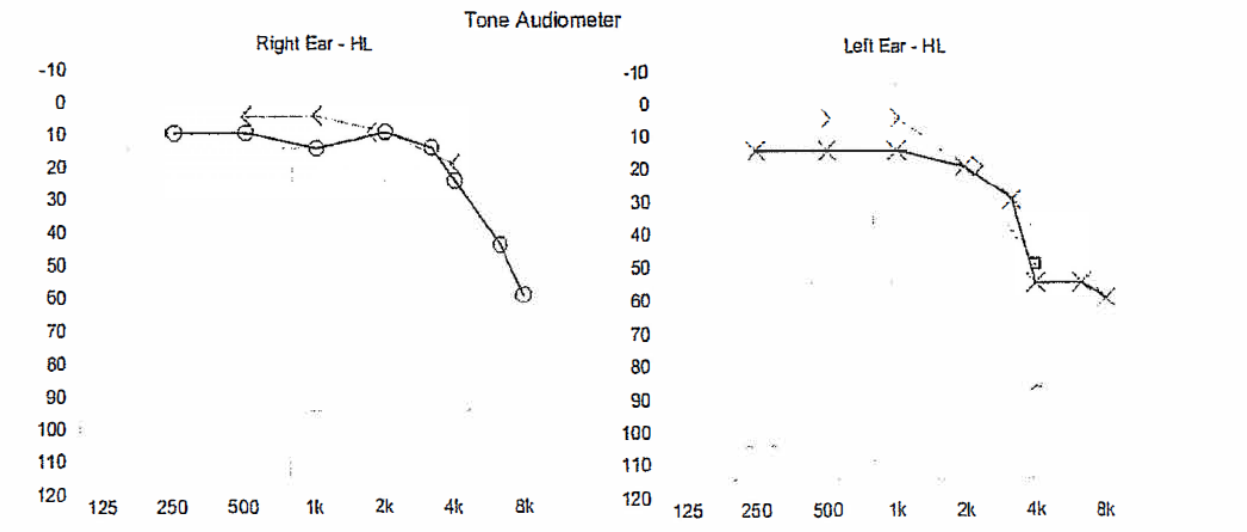
9. On February 9, 2016, Claimant returned to Dr. Kinder. At this appointment, Claimant complained of having a high-pitched whistling noise in his left ear.

10. Claimant continued receiving various treatments directed towards his postconcussional syndrome.

11. Dr. Kinder referred Claimant to Rocky Mountain ENT and Associates to evaluate Claimant's hearing and tinnitus.

12. On September 8, 2016, Claimant underwent a hearing test at Rocky Mountain ENT. The Hearing test involved an audiogram, tympanogram, and speech recognition. Claimant testified that he was referred to Rocky Mountain ENT Associates by Dr. Kinder. Dr. Scott Sharp and audiologist Dr. Amy Umansky are physicians at Rocky Mountain ENT.

a. The audiogram involves a series of sounds played at different frequencies. The evaluator charts the ability of the patient to hear sounds at different intensities and frequencies. Test results are documented on a graph with the vertical axis showing the intensity of sound—softer sounds (-10 decibels) are at the top of the axis and louder sounds (120 decibels) at the bottom of the axis. The Y-axis or horizontal axis, documents frequency or pitch of the sound measured in hertz—lower sounds towards the right of each graph measured starting at 125 hertz, and higher pitch sounds up to 8000 hertz. Claimant's audiogram test results were:



(Ex. I at 51.)

b. Claimant's speech recognition scores were noted to be at 20 decibels, the same on the right and left. (Ex. I at 51.)

c. Claimant's word recognition scores were 96% on the right ear, and 100% for the left ear. (Ex. I at 51.)

d. Claimant had a type A Tympanogram indicating no damage to the ear drum, or fluid being present in the ear.

13. The results listed on the Rocky Mountain ENT hearing test for both the right and left ears were normal sloping to moderate sensioneural hearing loss with excellent word recognition and type A Tympanogram. (Ex. I at 51.)

14. Dr. Sharp reviewed the hearing test results and recommended "amplification and a hearing aid consult because of bilateral hearing loss." (Ex. I at 53.)

15. On September 8, 2016, Dr. Umansky requested authorization from Respondents for a hearing aid consult for: (1) asymmetrical sensorineural *hearing loss of both ears*; and (2) tinnitus, *bilateral*.

16. On September 16, 2016, Respondents denied Dr. Umansky's request for a hearing aid consult and treatment related to binaural hearing loss and tinnitus. (Ex. I at 54.)

17. On September 28, 2016, Dr. Sharp wrote a letter "to whom it may concern." The letter stated Claimant had an audiogram that showed normal sloping to moderate sensorineural hearing loss bilaterally with excellent word recognition, and that "there was a strong chance that the injury contributed in some ways to his [Claimant's] issues and symptoms." (Ex. I at 55.)

18. On December 5, 2016, Dr. Alan Lipkin evaluated Claimant. Dr. Lipkin is board certified in the field of Otolaryngology and is Colorado Division of Workers Compensation Level II accredited. (Ex. K and L.)

19. Dr. Lipkin performed similar hearing tests to those done by Rocky Mountain ENT, with similar results. Dr. Lipkin's report concluded that Claimant,

> has bilateral symmetrical high frequency sensorineural hearing loss of a configuration that is commonly seen in the non-injured population. It cannot be said, to a reasonable degree of medical probability, that his injury caused his hearing loss. Hearing aids were recommended elsewhere – I would not generally recommend hearing aids for this type of high frequency hearing loss, which is at frequencies above those in speech. Hearing aids are not necessitated by his injury.

(Ex. L at 99.)

20. On December 6, 2016, Dr. Kinder reported that she believed Claimant was at maximum medical improvement for the work injury. She reported that in addition to headaches and memory loss that Claimant had left sided tinnitus and hearing loss. (Ex. H at 39.) Because Dr. Kinder is not Level II accredited she referred Claimant to Dr. L. Barton Goldman for determination of permanent impairment.

21. In a report dated January 17, 2017, Dr. L. Barton Goldman reviewed the reports and hearing tests from Dr. Sharp and Dr. Lipkin's office. Dr. Goldman concluded that the audiometric data was similar, but that Dr. Lipkin's interpretation of the data is more medically probable. When considering Claimant's impairment for the work injury, Dr. Goldman wrote,

> Per our level II accreditation curriculum and The Guides to the Evaluation of Permanent Impairment, third edition revised, of the American Medical Association, in the absence of clearly post concussive hearing loss on audiometry, it is not medially probable to provide an impairment rating for tinnitus.

(Ex. J at 62.) Within the same report, Dr. Goldman opined that only two conditions were work-related injury:

> (1) status post-concussion with post concussive syndrome, primarily manifested with post-traumatic headaches; and (2) anxiety disorder, pre-existing and aggravated possible sleep dysfunction and deconditioning.

(Ex. J at 63 and 71.)

22. According to the Department of Labor, Division of Workers Compensation

Impairment Rating Tips, Updated January 2011,

> **Tinnitus**: … Tinnitus impairment can only be provided when a hearing loss and impairment is documented.

23. Because Dr. Goldman determined Claimant has not sustained a post-concussive hearing loss, he determined Claimant could not have sustained occupationally related tinnitus.

24. On January 20, 2017, Dr. Goldman evaluated Claimant. According to Dr. Goldman, Claimant "believes Dr. Lipkin gave him the same feedback pretty much that Dr. Sharp had provided, indicating that the patient's audiometric findings might be due to age." (Ex. J at 68.)

25. On March 15, 2017, Dr. Kinder agreed with Dr. Goldman that Claimant had not sustained hearing loss related to this work injury. (Ex. H at 46-48.)

26. At hearing, Dr. Sharp testified. Dr. Sharp was accepted as an expert in ear, nose, and throat surgery. Dr. Sharp testified that Claimant has normal sloping high frequency sensioneural hearing loss. Dr. Sharp explained that tinnitus is highly correlated to the frequency of a person's hearing loss. (Hearing Tr. 8:40:10 – 8:40:50.)

27. Dr. Sharp testified that Claimant may have a condition known as Presbycusis, or age-related hearing loss. Presbycusis occurs when a person has hearing loss at higher frequencies.

28. Dr. Sharp testified that in 7% to 12% of persons afflicted with tinnitus the cause of the tinnitus is a head injury or whiplash. This ALJ finds that accepting Dr. Sharp's testimony that the cause in 7% to 12% of persons afflicted with tinnitus have the condition because of a head injury or whiplash, then the inverse of Dr. Sharp's testimony is also true: that the cause of 88% to 93% of persons with tinnitus have the condition from causes unrelated to a head injury or whiplash.

29. Dr. Sharp also testified that Claimant does not have a conductive element to his hearing loss. Dr. Sharp explained that a conductive element to hearing loss would involve a broken ear bone, ear wax, or a broken ear drum. A conductive hearing loss could be caused by trauma. Dr. Sharp testified that Claimant's work injury was due to trauma—a head strike—and that there was no conductive element to Claimant's hearing loss.

30. Dr. Sharp explained the audiogram, he explained that speech frequencies are between 500 and 2000 hertz, at an intensity of 0 to 25 decibels. Claimant's right and left ear hearing was normal at the speech frequencies; Claimant's hearing loss occurs at frequencies higher than those in speech.

31. Dr. Sharp testified that high frequency hearing loss is commonly seen in

persons over the age of 50, and that high frequency hearing loss is the associated pattern that is seen in age related hearing loss.

32. Dr. Sharp also testified that tinnitus is related to hearing loss. Dr. Sharp testified as to the relationship between hearing loss and tinnitus. Dr. Sharp testified that:

> [T]here is very strong correlation between hearing loss pattern and what the tinnitus pattern is. For example, as we start to lose our hearing in the high frequencies or somebody loses their hearing in the high frequencies, it is most common for them to develop high-frequency ringing. And what's thought to be happening there is because the brain in not getting normal sound input at that frequency level, the brain will actually create a sound to fill that in, and that's where the ringing can come from.

33. This ALJ credits that portion of Dr. Sharp's testimony which indicates there is a strong relationship between hearing loss causing tinnitus.

34. Dr. Sharp also testified that hearing aids can help alleviate the effects of tinnitus. Dr. Sharp testified that because high frequency hearing loss can result in high frequency tinnitus, increasing the high frequency levels through the use of a hearing aid can bring the lost frequencies back to a normal range and thereby improve the tinnitus. In other words, replacing the lost frequencies, which are thought to be the cause of the tinnitus, through the use of a hearing aid can alleviate the tinnitus.

35. When asked about the cause of Claimant's hearing loss, and therefore the most likely cause of Claimant's tinnitus, Dr. Sharp did not provide a cogent answer. He deferred at one point to the neurologist for a neurological reason for the hearing loss. He then went on to testify that 7-12% of people with tinnitus have a history of a closed head injury or whiplash type injury and Claimant had both. However, as stated above, Dr. Sharp also testified that Claimant's hearing loss was consistent with someone who had age related high frequency hearing loss and hearing loss is associated with causing tinnitus. He also testified that Claimant's tinnitus could be caused by a combination of factors, such as Claimant's hearing loss and his closed head injury. Then, Dr. Sharp concluded that the there was a "strong chance that the injury contributed in some way to the symptoms he presented to my office with."

36. This ALJ does not credit Dr. Sharp's opinion that the injury contributed to Claimant's hearing loss and tinnitus. As stated above, Dr. Sharp could not provide a clear and credible opinion as to the cause of Claimant's hearing loss and tinnitus.

37. Dr. Lipkin also testified at hearing. Dr. Lipkin was qualified as an expert in otolaryngology, with a specialty in ear, nose, and throat, and a concentration in hearing loss. Dr. Lipkin is Level II accredited pursuant to the W.C.R.P. Dr. Lipkin explained there are different types of hearing loss: conductive and neural. He also explained that

hearing loss can occur at different frequencies and can impact a person's ability to discriminate words. Dr. Lipkin testified that he has treated thousands of patients with tinnitus and high frequency sensioneural hearing loss.

38. Dr. Lipkin explained that tinnitus is a perception of a noise inside a person's ear or head, and that tinnitus can be either objective or subjective. Dr. Lipkin testified that objective tinnitus, is a dangerous condition and occurs when a physician can hear ringing in a person's head with the use of stethoscope, an example of this condition would be a brain aneurism. On the other hand, Dr. Lipkin testified that subjective tinnitus is more common, and occurs when a patient hears a noise in their ears that others cannot hear. Dr. Lipkin explained it is common for persons with high frequency sensioneural hearing loss to have tinnitus, and that high frequency hearing loss occurs without any type of specific injury. Dr. Lipkin testified that Claimant has subjective tinnitus.

39. Dr. Lipkin agreed with Dr. Sharp that Claimant has high frequency sensioneural hearing loss. Dr. Lipkin explained that high frequency hearing loss is a hearing loss that is commonly seen in the general population for persons over the age of 40, especially those over the age of 50. Dr. Lipkin explained that Claimant's speech recognition, his ability to discriminate words and his tympanogram result was normal.

40. Dr. Lipkin explained that if you took a random sampling of 52-year-old persons, high frequency sensioneural hearing loss would be a common pattern of hearing loss within those persons, and those persons would have no history of injury.

41. Dr. Lipkin testified that he would not recommend hearing aids for Clamant because the audiograms by both his office and Dr. Sharp's office show that Claimant can understand conversation in speech frequencies and that claimant can word discriminate. Claimant's right ear word recognition score was at 96%; left ear word recognition score was 100%. As a result, Dr. Lipkin concluded, hearing aids are not medically necessary.

42. Dr. Lipkin also explained that persons with post concussive hearing loss can have different types of hearing loss including a sudden loss of all hearing that could be associated with a serious injury such as a skull fracture. In general, however, he would anticipate that a person who sustained a post-concussive hearing loss, their audiogram show a flat, across the board, hearing loss as opposed to the sloping hearing loss seen on Claimant's audiogram.

43. Dr. Lipkin testified that to a reasonable degree of medical probability that Claimant's hearing loss and tinnitus is not the result of December 9, 2015 work injury.

44. The ALJ has weighed the evidence and finds the opinions of Dr. Lipkin to be persuasive, and credits his testimony over the testimony of Dr. Sharp. This ALJ finds Dr. Lipkin's, opinions, credentials and expertise to be very convincing.

45. The ALJ finds persuasive Dr. Lipkin's opinion that Claimant has a normal sloping high frequency sensioneural hearing loss that is commonly seen in the general population for persons over the age of 40. Dr. Lipkin explained that Claimant has a subjective form of tinnitus and Dr. Sharp offered that 88% to 93% of all persons with tinnitus have the condition without any type of head injury or whiplash. The ALJ also finds Dr. Goldman and Dr. Kinder's opinion that claimant did not sustain a work-related hearing loss persuasive.

46. The audiogram and word recognition tests from both Dr. Lipkin and Dr. Sharp's office were similar. Both office's tests show that Claimant has normal hearing within the speech frequencies with word recognition scores at 96% for the right ear and 100% for the left ear. Dr. Lipkin explained that hearing aids are supposed to help a person understand things better, but Claimant already has excellent speech discrimination, so there is no medical necessity to amplify Claimant's ability to understand others.

47. The ALJ finds that Claimant's hearing loss was not caused by his work accident.

48. The ALJ finds that Claimant's hearing loss is age-related.

49. The ALJ finds that Claimant's age-related hearing loss is the most likely cause of his tinnitus.

50. The ALJ has considered all evidence contrary to the opinions of Dr. Lipkin, Dr. Kinder, and Dr. Goldman—including, but not limited to Claimant's statements of subjective worsening of his hearing and tinnitus. The ALJ has determined that all evidence contrary to the opinions of Dr. Lipkin, Dr. Kinder, and Dr. Goldman's are less persuasive and are not credited.

CONCLUSIONS OF LAW

General Provisions

The purpose of the Workers' Compensation Act of Colorado, C.R.S. § 8-40-101, et seq., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record

may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the ALJ considers, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008).

Medical Benefits

Respondents are required to provide medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. C.R.S. § 8-42-101(1) (2016); *Snyder v. ICAO*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally-related to an industrial injury is one of fact. *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).

The issue for the ALJ's determination is whether Claimant has proven by a preponderance of the evidence that his hearing loss and tinnitus are causally related to his work injury, and if so, whether the hearing aids recommended by Dr. Sharp constitute treatment which is reasonably necessary and causally related to the work injury. Claimant has failed to meet this burden.

The ALJ finds that the totality of the evidence demonstrates it is more likely than not that Claimant's hearing loss and tinnitus is not related to his work injury, because (1) there was a significant delay in his reporting of symptoms; and (2) the opinions of Dr. Lipikin, the ATP Dr. Kinder, and Dr. Goldman are authoritative and convincing.

First, immediately following his work injury, Claimant sought treatment with his personal providers at Colorado Internal Medicine Center—he saw them on three occasions for the work injury December 9 and 17, 2015; and January 5, 2016. Claimant did not report any hearing loss or tinnitus. Claimant was then referred to Dr. Kinder, and Dr. Kinder's initial report of January 19, 2016, did not indicate any report of hearing loss or tinnitus.

Next, Claimant underwent comprehensive hearing tests at Rocky Mountain ENT (similar tests and results were performed by Dr. Lipkin's office). Hearing tests included an audiogram, word recognition, and a tympanogram. Audiogram test results showed that claimant had normal hearing within the speech frequencies (250 to 2000 hertz), and difficulty hearing in both the right and left ear for higher pitch (higher frequency) sounds. The audiogram recorded that Claimant required a greater intensity sound (higher decibels) to hear higher pitch/frequencies (sounds with a pitch of 4000 hertz or more) in both the left and right ear. On the audiogram, Claimant's ability to hear higher pitches required a higher intensity sound, and thus resulted in a downward sloping curve. However, Claimant's speech recognition scores were good and nearly equal for right and left ear. Claimant alleges left worse than right hearing loss, yet word recognition

scores was slightly better on the left ear: 100% score; versus a 96% score on the right ear.

Dr. Lipkin and Dr. Sharp agreed Claimant's hearing loss was of a sensiorneural high frequency nature. The hearing loss on audiogram was described as "normal sloping," and the diagnosis was considered the same for the right and left ear. Dr. Lipkin persuasively explained Claimant's high frequency sensioneural hearing loss is commonly seen in the general population for persons over the age of 40, let alone persons for persons over the age of 50. Claimant is 52 years old, and Claimant's hearing loss would be common in a general sampling of 52 year old persons randomly selected off the street. Further, if Claimant had sustained a post-concussive hearing loss, Dr. Lipkin explained that Claimant's hearing loss on audiogram would not be only high frequency in nature and charted on the audiogram downward sloping, but he would expect the audiogram chart to show a more flat-lined hearing loss.

Both Dr. Lipkin and Dr. Sharp agree that tinnitus is a symptom of high frequency sensioneural hearing loss. Dr. Lipkin's authoritative opinion that Claimant's hearing loss is unrelated to claimant's work injury is shared by both Dr. Goldman and the ATP, Dr. Kinder. Dr. Goldman additionally pointed out that for tinnitus to be considered an impairment under the AMA Guides and DOWC Rating Tips an injured worker must have a clear post concussive hearing loss on audiogram, which Dr. Lipkin indicated Claimant did not have.

Therefore, while Claimant sustained a compensable injury, a preponderance of the evidence does not support Claimant's hearing loss and tinnitus as work related injuries or conditions. *Snyder,* 942 P.2d 1337. Claimant has failed to sustain his burden of proof. *See* C.R.S. § 8-40-102(1).

ORDER

Based upon the preceding Findings of Fact and Conclusions of Law, Respondents request that the ALJ enter the following order:

1. Claimant's hearing loss and tinnitus is not causally related to his industrial accident.

2. Claimant's request for medical benefits in the form of hearing aids is denied and dismissed.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 6-6-17

Glen B. Goldman
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has established by a preponderance of the evidence that he sustained a compensable industrial injury as the result of incidents that occurred on March 5, 2014 and March 11, 2014.

- Whether Claimant's claim is barred by the statute of limitations pursuant to C.R.S. 8-43-103(2).

- Whether Claimant's lumbar surgery performed by Dr. Rauzzino on October 6, 2016 and October 7, 2016, was authorized, reasonably necessary, and related to the March 2014 work incidents.

- Whether Respondents are liable for Claimant's surgery pursuant to 8-42-101(6).

- Whether Dr. Dawn Baker and Dr. Michael Rauzzino are authorized treating physicians.

- Whether Claimant has established by a preponderance of the evidence that he is entitled to TTD benefits for the requested time frame of October 6, 2016 – March 31, 2017.

- Average Weekly Wage.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is 67 years of age. His date of birth is October 2, 1949.

2. Claimant testified that he is 5'11" and weighs approximately 220 lbs.

3. Claimant alleges he suffered a work related injury on March 5, 2014 and March 11, 2014 to his right knee and back.

4. Claimant's preexisting conditions, symptoms, and treatment are as follows:

- In 1984, Claimant had a severe disc herniation with sciatica. Claimant underwent a laminectomy. Claimant's 1984 back injury, which resulted in surgery, caused symptoms which waxed and waned.

- During August of 2001, Claimant was involved in an accident in which he was hit by a van and thrown 12 feet. Due to the accident, Claimant had back pain with associated bilateral leg pain.

- On August 28, 2001, Claimant underwent an MRI of his lumbar spine due to his low back pain and bilateral leg pain. The MRI showed the prior right laminectomy and disc surgery at the L5-S1 level as well as granulation tissue around the right S1 nerve root proximally.

- On September 24, 2001, Claimant presented to Littleton Internal Medicine. Claimant complained of left knee pain and right foot numbness. Claimant returned on October 29, 2001, and complained of bilateral knee pain and indicated he could not kneel.

- On December 6, 2002, Claimant returned again to Littleton Internal Medicine and complained of bilateral knee pain.

- On September 30, 2003, Claimant presented to Littleton Internal Medicine and complained of right hip and lower back pain which he had had for the last 2 weeks.

- On December 1, 2006, Claimant presented to Dr. Tameira Hollander due to falling on his left knee. Claimant complained of fleeting pains in both knees prior to his fall. Dr. Hollander thought the knee pain was due to arthritis.

- On April 16, 2010, Claimant presented to Dr. Joseph Ladika for chronic sciatica, which Claimant had had for over 20 years. Claimant complained of chronic right sided calf atrophy and numbness in the middle two toes as well as some new pain in the ball of his foot. On May 26, 2010, Claimant returned to Dr. Ladika and complained of new right toe pain.

- On May 24, 2012, Claimant returned to Dr. Ladika due to lower back pain. Claimant complained of low back pain on the right side for 7-8 days. The pain was severe enough to interfere with his sleep. Claimant had left sided back pain which radiated down the left side of his leg to his hamstring and to his to knee. Claimant also had unremitting back pain on the right side.

- On July 24, 2013, Claimant was evaluated by Dr. Ladika and complained of bilateral knee pain. He complained of knee pain on a daily basis including pain with climbing stairs which caused him to become unstable due to pain. Claimant also complained of swelling in his right knee.

- On or about February 5, 2014, Claimant injured his right knee. The symptoms continued for about three weeks. Due to the injury, Claimant had to rest his right knee and ice his right knee. These symptoms continued until approximately February 26, 2014.

5. Before March 5, 2014, Claimant had complained of daily bilateral knee pain. Claimant had also complained of back pain with symptoms that radiated bilaterally.

6. Claimant was hired as a Service Advisor with Respondent Employer, Denver Automotive Group dba Empire, in July 2012. [Respondents' Exhibit AA, p. 411]

7. Upon hire, Claimant was provided with various written employment policies. This included "Policies Concerning Work-Related Accidents, Injuries or Illnesses." [Exh. AA, pp.417-418] This information identified the Employer's designated medical providers. The policy clearly states: "If an unauthorized medical provider treats an employee, the employee will be responsible for payment of said treatment." [Exh. AA, p. 417] On July 10,2012, Claimant signed a document acknowledging receipt: "…I UNDERSTAND THAT MY EMPLOYER HAS DESIGNATED CERTAIN MEDICAL PROVIDERS AS THE PRIMARY PROVIDER FOR ALL WORK-RELATED ACCIDENTS/INJURIES/ILLNESS. I UNDERSTAND THAT IF I DO NOT RECEIVE MY MEDICAL CARE FROM THE AUTHORIZED MEDICAL PROVIDERS, I WILL BE HELD FINANCIALLY RESPONSIBLE FOR THE COST OF THAT CARE." [Exh. AA, p. 418]

8. On February 5, 2014, just one month before the incident at work, Claimant injured his right knee. [Exh. J, p. 28] The nature and extent of this injury is not clear. However, the medical records establish Claimant had symptoms for about three weeks. [Exh. J, p. 28] The medical records also indicate Claimant had to rest his knee and ice his knee. [Exh. J, p. 28] The ALJ infers from this medical report that Claimant also had swelling in his right knee during this time. This ALJ finds that Claimant's right knee symptoms of pain and swelling continued up through about February 26, 2014.

9. Claimant testified that on the morning of March 5, 2014, he was removing snow from the service drive at the dealership. He slipped on some oil that was mixed in with the snow. Claimant did not fall, but described hyperextending his right knee. The incident was reported to the Employer that day, and Claimant was provided with a choice of designated medical providers. Claimant elected to go to Union Medical, which was one of the provider choices. [Exh. AA, p. 417]

10. Claimant was initially evaluated by Erin Lay, PA-C at Union Medical on March 6, 2014. [Resp. Exh. J, pp. 28-30] The following history was noted: "Patient states that yesterday, he was mopping the floor of the service department when his left foot slipped in a puddle of oil. Patient states that he did not fall, but rather landed on his right foot with his right knee hyperextended. Patient states that he developed knee pain and swelling…Patient describes the knee pain as a constant aching, rated at about a

3/10…Pain also localized in low back. Patient with history of chronic low back pain stemming from lumbar spine laminectomy in 1984. Patient states current discomfort slightly above baseline…Patient states that approximately one month ago, he had a similar injury to his right knee…." [Exh. J, p. 28] Ms. Lay ordered x-rays of Claimant's right knee and lumbar spine; provided Claimant with crutches and a neoprene sleeve for his knee; and prescribed medication. Temporary work restrictions were imposed.

11. Claimant underwent an IME with Dr. Ridings on March 23, 2017. During the IME, Claimant denied hurting his right knee one month before the March 5, 2014 incident at work. Claimant also denied that he had pain for three weeks after hurting his knee in February of 2014. Claimant's contention that he did not injure his knee one month before the incident at work and did not have symptoms for three weeks is not found to be credible.

12. Claimant completed a medical history questionnaire at his initial appointment with Union Medical. [Exh. J, pp. 25-26] He indicated that he had a prior back injury with a laminectomy in 1984. He reported having bilateral numbness or tingling in his "R & L feet x yrs." Claimant was noted to be a smoker, and had smoked a ½ pack of cigarettes per day for 40 years.

13. On March 6, 2014, the employer completed a Workers' Compensation First Report of Injury. There is, however, no credible evidence that it was filed with the Division.

14. Claimant testified that he missed two days of work due to the March 5, 2014 incident. Because there was no testimony or evidence presented to the contrary, this ALJ credits Claimant's testimony regarding the time he missed from work.

15. During a follow-up appointment on March 10, 2014, Erin Lay, PA-C reported: "Patient underwent an x-ray of the right knee which showed patellofemoral osteoarthritis and possible osteochondral lesion. X-ray of the lumbar spine showed chronic degenerative changes including mild retrolisthesis of L1 on L2 and L2 on L3. Also noted was moderately severe to severe disc height loss at L5-S1…as well as schlerotic facet arthrosis present at multiple levels…" [Exh. J, p. 31] Ms. Lay went on to comment: "Patient does state that with use of crutches, he has soreness in the right hip area, localized in the groin. Patient has a history of degenerative joint disease that flares occasionally following a motor vehicle accident several years ago…Patient states that his low back pain has returned to baseline…" Ms. Lay referred Claimant for an MRI of his right knee and x-rays of the lumbar spine with flexion and extension views. [Exh. J, pp. 35-36]

16. On March 11, 2014, Claimant was descending some stairs at work while using his crutches and lost his balance and missed the last 3 steps. Claimant did not fall, but landed hard on both feet. The incident did not cause much back pain that day. Claimant worked the remainder of the day.

17. Claimant returned to Union Medical the following day, March 12, 2014. The report from that date provides: "Since his previous evaluation here, patient states that he has developed acute low back pain. Patient states that he was descending stairs yesterday on his crutches when he missed the last 3 steps. Patient states he landed on his feet, but since then has had increased severe low back pain…localized in his low back radiating out to the right and left. He denies pain in the right and left lower extremity." [Exh. J, p. 37] Ms. Lay referred Claimant to St. Anthony's emergency department for pain control.

18. The Emergency Department report from St. Anthony's dated March 12, 2014 reflects: "Patient states that yesterday he was descending stairs at his home on crutches when he lost his balance on the crutches and landed hard on his bilateral feet on a lower step. Patient reports that he reinjured his lower back in the incident yesterday. Patient did not fall or sustain any direct trauma to the back… Patient denies leg weakness, leg paralysis, or leg paresthesias. He denies bowel or bladder dysfunction. Patient reports he was evaluated at his Workers Compensation Clinic this morning and they referred him to the ER for further evaluation and pain control…" [Exh. K, p. 76] Claimant was given a prescription for pain medication. The emergency room provider noted: "I did offer the patient pain management here in the ER, however the patient reports that he needs to drive home to Centennial…He would prefer to drive home and take medication when he gets home." [Exh. K, p. 78] The report further states: "…My suspicion for serious pathology is low…There is no indication for emergent MRI…The patient has a normal neurologic exam…The patient will be treated conservatively for a suspected musculoskeletal origin of back pain…" [p. 78]

19. The incident on March 11, 2014 did not cause Claimant to suffer from any leg weakness, leg paralysis, or leg paresthesias. Claimant's neurological examination was normal. The diagnosis at that time was most likely a muscle strain of his lower back. The incident of March 11, 2014 did not aggravate or accelerate Claimant's underlying back condition.

20. Claimant testified that he missed two days of work due to the March 11, 2014 incident. Because there was no testimony or evidence presented to the contrary, this ALJ credits Claimant's testimony regarding the time he missed from work.

21. Claimant underwent an IME with Dr. Ridings on March 23, 2017, and explained the March 11, 2014 incident while using crutches. Claimant alleged that instead of just missing a few steps, he actually jumped 12 feet horizontally and landed 5 feet below where he began. Such story, according to Dr. Ridings, was unbelievable. This ALJ does not credit Claimant's version of events regarding the March 11, 2014 incident on crutches as described to Dr. Ridings. Instead, this ALJ credits Dr. Ridings' opinion that Claimant's revised story about jumping 12 feet horizontally and landing 5 feet below his take off point is not credible.

22. A report dated March 18, 2014 from Union Medical states: "Pain diagram reviewed, 4/10 … localized in the low back and right knee…Patient underwent MRI of

right knee which showed severe patellofemoral arthrosis with prominent subchondral cystic change in the lateral trochlea. Preserved menisci and ligamentous structures were seen as well a tiny joint effusion. Patient underwent flexion and extension x-rays of lumbar spine which showed no alignment abnormality, but advanced chronic degenerative disc disease and facet arthropathy at L5-S1…." [Exh. J, p. 45] Claimant was referred for physical therapy and for instruction on home exercise. Diagnoses included: Right knee strain, right knee DJD, low back strain, low back DDD. [Exh. J, p. 46]

23. Claimant was seen by Dr. Frederick Paz at Union Medical on April 8, 2014. [Exh. J, pp. 54-57] Dr. Paz noted: "Patient reports pre-existing conditions including 'periodically' with back pain and right knee with the 'typical arthritis' symptoms. History of laminectomy in the 1980s with history of sciatica. Prior history of numbness in the right foot." [p. 54] Dr. Paz referred Claimant to Dr. Horan for an orthopedic consult of his right knee. He referred Claimant to Dr. Shih for a physiatry consult regarding his low back. At an appointment on April 18, 2014, Dr. Paz referred Claimant to Dr. Reilly for a pain management consultation and to Gib Beaver for biofeedback. [Exh. J, pp. 58, 60]

24. Claimant was evaluated by Dr. Franklin Shih on April 14, 2014. [Resp. Exh. L] Dr. Shih noted the following history from Claimant: "Jaydee indicates that he had had a back injury several years ago with back and right lower extremity complaints. He had surgery for that… He did have what sounds like an impairment at that time. He does note some ongoing intermittent back discomfort and numbness in the right foot. Post that he did have some permanent restrictions and ongoing limitations associated with that…" Under the "Assessment" section of his report, Dr. Shih states: "1. Status post reported work injury with increase in low back symptomatology, predominant mechanical presentation, multifactorial degenerative changes noted on radiographic studies. 2. Right knee pain, DJD noted on radiographic studies." [Exh. L, p. 82] Dr. Shih discussed potential treatment options for Claimant's back, such as pool therapy, physical therapy, and acupuncture. They discussed it was also possible that with improvement of his altered gait from his knee, Claimant's back pain may likewise improve. Dr. Shih did not say one way or another if these various treatment modalities would be related to the work incident(s). On his M164 form accompanying the April 14th narrative, Dr. Shih did not respond to the question of whether Claimant's objective findings were consistent with the alleged mechanism of injury. [p. 84]

25. In the April 14, 2014 report, Dr. Shih commented: "Jaydee did discuss significant frustration with work. I think it may be useful to have him seen by a psychologist and biofeedback to help him deal with other factors that can be playing back into his pain complaints." [Exh. L, p. 83]

26. Regarding a follow up appointment, Dr. Shih stated: "4 m for pt. to call to schedule." [Exh. L, p. 84] Claimant made no attempt to follow up with Dr. Shih. He did not return to Dr. Shih after the initial April 14, 2014 appointment.

27. Dr. Steven Horan (orthopedist) evaluated Claimant's right knee on April 16, 2014. [Resp. Exh. M] He reviewed the radiographs, which showed severe degenerative joint disease in the patellofemoral compartment. [Exh. M, p. 93] Treatment options were discussed, and Claimant opted to proceed with an injection. At no time does Dr. Horan suggest that Claimant's right knee condition was work-related.

28. Claimant returned to Union Medical again on May 9, 2014: "Since his previous evaluation, patient states that his condition has improved. Pain diagram reviewed, 3/10 on VAS localized in the lower back and right knee. Patient attributes benefit to twice weekly physical therapy, which he has restarted. Patient states he is also compliant with his home exercise plan. He is awaiting receipt of TENS Unit through physical therapy… Patient is working, remaining within his restrictions with no problem… Patient will follow up with Dr. Horan as scheduled. Will follow up with Dr. Shih as scheduled. Patient declines referral to Dr. Reilly for pain management consultation of Gib Beaver for biofeedback consultation at this time…" [Exh. H, p. 63]

29. Claimant returned to Dr. Horan on May 28, 2014: "He says the injection given in his right knee may have helped a lot. He says he is about 40% better than he was when I saw him, but he is not excited about receiving another injection…ASSESSMENT: Degenerative joint disease, pain improved with physical therapy and previous injection." [Exh. M, p. 99] Under the section of his report captioned "PLAN," Dr. Horan states: "At this time, the patient wants to hold off on any injection, and I am fine with that. He thinks physical therapy is the way to go, and I am also fine with that." [p. 93] Again, there is no indication by Dr. Horan that he is attributing the severe DJD in the knee to a work injury. On the M164 form dated May 28th, Dr. Horan does not list anything in the section for "Work Related Medical Diagnosis." Under "Treatment Plan," he wrote: "DOING OK …DJD…DOES NOT WANT TO REPEAT INJECTIONS." [p. 101]

30. In a report dated June 6, 2014, Erin Lay, PA-C, at Union Medical states: "Patient presents today verbalizing his wish to transfer his care to a facility that is closer to his home… This office will assist with this…" [Exh. J, p. 71] The pain diagram completed by Claimant on June 6, 2014 indicates a pain level of **2/10**. [p. 72]

31. Clamant testified at hearing that the reason he wanted a change of physician was to be closer to a facility by his new job.

32. Claimant voluntarily resigned his employment with Respondent Employer on June 9, 2014 to accept another job. [Exh. AA, p. 426] He began working full-time as a Service Adviser for a different dealership (Suss Buick GMC) on or about June 17, 2014. [Resp. Exh. BB]

33. On July 31, 2014, the claims representative from the Insurer sent a letter to Union Medical: "This letter is to notify Union Medical that Mr. Fehrer has used his One-Time Change of Physician request to Concentra. Effective July 30, 2014, Union Medical is no longer an authorized treating provider for Mr. Jaydee Fehrer…" [Exh. J, p.

74(a)]

34. Claimant was evaluated on August 8, 2014 by Hanna Bodkin, PA-C, at a Concentra facility on Iliff Avenue in Aurora. [Resp. Exh. O, pp. 170-173] Assessment included a lumbar sprain and right knee sprain. A referral was made for physical therapy. Claimant was released to regular duty, with a projected MMI date of November 8, 2014.

35. It should be noted that when Claimant was seen at Concentra in August 2014, he had been working at his new job for several weeks. According to the August 8th report, Claimant's pain had increased since going to work for Suss Buick GMC. The PA-C from Concentra noted: "Standing and walking on feet all day makes back worse. At end of day he is in the most pain. Pain in back is constant 6/10. Right knee constant 4/10. Patient has had MRI of right knee (arthritis), lumbar x-ray negative.

36. A M164 form from Concentra dated August 8, 2014 indicates that Claimant had a return appointment scheduled for August 22, 2014. [Exh. O, p. 173] Claimant no-showed for that appointment. When Claimant did not reschedule, the claims representative from the Insurer scheduled a demand appointment for November 5, 2014. [Exh. O, p. 173(a)] Claimant did not attend the November 5th demand appointment. He eventually returned to Concentra on November 18, 2014 and was seen by Dr. Jennifer Huldin. Dr. Huldin reported: "…had MRI that showed arthritis, was treated with PT that he has not been seen for since August, he is not interested in surgery for the arthritis, has just adjusted his life so he does not need to kneel, doing regular work, no restrictions." Although Dr. Huldin did not specifically mention Claimant's back in her narrative report, she presumably considered that condition because the diagnoses listed on the "Physician Work Status Activity Report" include: "Lumbar Strain, Osteoarthrosis, and Knee/leg sprain." [p. 176] Dr. Huldin placed Claimant at MMI on November 18, 2014, with no permanent impairment. [p. 175] Claimant was released to regular duty with no permanent restrictions. [p. 175] The M164 form from Dr. Huldin indicates that no maintenance care was required. [Exh. O, p. 177]

37. At hearing, Claimant testified that he did not attempt to follow up with his authorized treating physicians because he preferred to see his own doctors. Claimant's primary care physicians are New West Physicians/Arapahoe Internal Medicine. Claimant has treated with both Dr. Joseph Ladika and Dr. Dawn Baker with this group over the years. [Resp. Exh. S, T] Therefore, Claimant intentionally sought unauthorized treatment with Dr. Ladika and Dr. Baker.

38. Between November 18, 2014 and February 21, 2016, Claimant did not seek any treatment directed towards his low back or right knee. During this time, Dr. Baker, Claimant's personal physician, evaluated Claimant multiple times for various non-work related medical conditions.

39. On February 22, 2016 (more than 15 months after being placed at MMI by Concentra), Claimant saw Dr. Baker for complaints of left ankle pain, joint pain in the knee, leg weakness, and lower back pain. [Resp. Exh. T, pp. 232-234] Dr. Baker's assessment included knee pain "likely due to degenerative arthritis and strain," low back pain with right leg numbness, right third and fourth toe pain and left ankle pain "possibly arthritis v. tendonitis." [p. 232] The following history is provided in Dr. Baker's February 22, 2016 report: "He reports that his R knee pain that is moderate has been ongoing x 2 years. Lately the pain has been constant and worsened in severity. Has noticed intermittent swelling on and off the past few weeks. No injury that he recalls. He has been on his feet a lot at work…5 days ago he was walking at work when he felt severe pain in his R lateral hip/low back radiating past the knee…That evening he did have some pain radiating across the low back w/ bending…He had recurrence of mild back pain this morning – mild pain radiating across the back… No injury of the back. He had been doing some moderately heavy lifting prior to the start of the pain 5 days ago." [Exh. T, p. 233] It is significant to note that at this point, Claimant had been working for his new employer (Suss) for over 1 ½ years.

40. Claimant did not require any medical treatment for his back since being placed at MMI on November 18, 2014 until he engaged in heavy lifting in February of 2016.

41. Dr. Baker injected Claimant's right knee on February 29, 2016. Claimant's low back pain with right leg weakness was noted to be improving. Dr. Baker commented that prolonged standing caused back and leg pain.

42. In a report dated March 14, 2016, Dr. Baker states: "Patient is here for worsening of chronic low back pain over the past 3 days…Pt reports LBP with radiation into the groin on the right side that is going into the medial thigh for the past 48 hours associated with leg weakness again." [Exh. T, p. 242]

43. In a report dated March 28, 2016, Dr. Baker stated: "He has decided to go through Workmen's Comp." [p. 244] Claimant reported that he had fallen in the garage at home while getting out of his car. He was experiencing right wrist pain, shoulder pain, and neck pain. The right knee and back were noted to be moderate to severely painful. [p. 248]

44. Claimant filed a Worker's Claim for Compensation on April 7, 2016. The WC Claim is date stamped received by the Division on April 7, 2016. [Resp. Exh. B] Along with his claim form, Claimant sent a letter to the Division: "I could not take the pain I was in from my Low Back and lower joints, I went to my General Doctor…When I called Heather Hawkins 2 weeks after March 4th 2016, claims representative with Pinnacol Assurance about my condition, Heather Hawkins told me there was a statue of limitations, which I was past 2 weeks. I asked Ms. Hawkins if there was someone I could talk to, she gave me your phone number. She said I could apply to reopen…" [Exh. B, p. 3]

45. The Insurer filed a Notice of Contest on April 21, 2016, referencing the statute of limitations. [Resp. Exh. C] The standard advisement information was included with the Notice of Contest. [Exh. C, pp. 5-6]

46. Dr. Baker referred Claimant to Dr. Solsberg, who performed a translaminar L4-5 and L5-S1 epidural steroid injection on May 9, 2016. [Resp. Exh. U] Dr. Solsberg mentioned Claimant's history of a prior laminectomy and noted scars from the prior surgery. [Exh. U, p. 315]

47. On June 6, 2016, Dr. Baker commented that Claimant was to call Dr. Tim Lehman at Panorama for his knee pain. With respect to Claimant's back pain, Dr. Baker stated: "See neurosurgeon for a surgery consult. I recommend Dr. Rauzzino or Dr. Guiot." [Exh. T, p. 254] The June 6th report reflects: "He did have a complete weakness/giving out of R leg about 2 weeks ago when he dropped his can and bent over to pick it up…Reports he saw a PA that came into his job that thought she would be able to help him. She told him that he needed surgery…" [p. 255] At this point, Claimant would have been working for Suss for approximately 2 years**.** On July 11, 2016, Claimant conveyed to Dr. Baker that he "would like a handicap sticker." [p. 265]

48. In June of 2016, Claimant was transported by ambulance to Littleton Adventist Hospital, where he was diagnosed with viral meningitis. [Resp. Exh. V, W] CT scans were performed of the head and brain. At the time of his discharge on June 20, 2016, Claimant was instructed to follow up with Infectious Disease in 1 week. [Exh. W, p. 343] Claimant subsequently returned to the emergency department on August 1, 2016 with ongoing symptoms related to the meningitis. The E.R. report mentions: "Pt takes oxycodone for chronic back pain. States was scheduled for a back CT today but has to cancel. States his back pain is at baseline, denies any change. Reports chronic leg numbness but no focal weakness. Reports hx of laminectomy in 1984. No recent trauma." [p. 347]

49. On August 22, 2016, Dr. Baker reported that Claimant was experiencing depression due to his recent health problems (meningitis). She recommended counseling. [Exh. T, pp. 279-280]

50. Claimant was evaluated by Dr. Rauzzino at Front Range Spine & Neuro-Surgery on July 25, 2016. [Resp. Exh. X] The referring physician is listed as Dr. Dawn Baker. Claimant's primary insurance is listed Blue Cross/Blue Shield, which is his health insurance. [Exh. X, pp. 354, 363] Dr. Rauzzino noted the following under the Assessment section of his report: "This is a pleasant 66-year-old male with primarily L5-S1 significant disc space collapse from prior laminectomy with bilateral foraminal stenosis of the L5 nerve root." [p. 356] In his discussion of the diagnostic studies, Dr. Rauzzino states: "MRI of the lumbar spine from Health Images on 03/16/16 shows bilateral foraminal narrowing at L5-S1 with postoperative changes secondary to laminectomy. There is significant disc space collapse. He also has degenerative changes of his lumbar spine that are most significant at L2-3 with type 1 Modic changes." [p. 356]

51. Respondents arranged for Claimant to be evaluated by Dr. Albert Hattem on August 17, 2016 for purposes of an IME. [Resp. Exh. Y] Dr. Hattem completed a comprehensive medical records review in conjunction with his examination. Claimant suggested to Dr. Hattem that he had not been able to return for medical treatment between August and November 2014 because of his new job (with Suss). He told Dr. Hattem that he "was also very dissatisfied with Pinnacol" during this time. [Exh. Y, p. 376] Claimant said that he did not return for any further care for his low back and right knee after November 2014 "because he did not want to miss any work." [p. 376] The ALJ notes Claimant did seek treatment with Dr. Baker on his own after November 2014, with no apparent concerns about missing work for those appointments.

52. Dr. Hattem opined that the low back and right knee symptoms that Claimant reported at the time of his evaluation were not causally related to the March 2014 work incident(s). He cited multiple reasons in support of his opinion. [Exh. Y, pp. 385-386] He explained the fairly minor mechanism of injury in March 2014 would not likely cause chronic pain for more than 2 years. He noted that Claimant had a preexisting history of low back pain including surgery. On May 24, 2012, less than two years prior to the current injury, he complained to Dr. Ladika of low back pain for one week with radiation down the left side to the knee. Claimant had also reported a history of preexisting chronic low back pain to Erin Lay, PA-C at Union Medical on March 6, 2014, and to Dr. Shih on April 14, 2014. Claimant also reported a preexisting history of bilateral knee arthritic pain. Dr. Hattem noted that the lumbar MRI and right knee MRI demonstrated only degenerative changes. Claimant has smoked for more than 40 years. Dr. Hattem indicated that there is a positive correlation between cigarette smoking and knee osteoarthritis. Claimant is also obese, with a BMI of 40.6. Dr. Hattem stated there is a positive correlation between obesity and low back pain. Dr. Hattem also pointed out that when Claimant saw Dr. Huldin in November 2014, he reported that he had been doing his regular work without restrictions. His gait was normal and his right knee exam was essentially normal. Dr. Huldin, therefore, released Claimant to full duty, the capacity in which he had already been working, and released him from care. Therefore, Dr. Hattem agreed that Claimant reached MMI in November of 2014 due to both minor work related accidents of March 5, 2014 and March 11, 2014 and the need for treatment after November of 2014 was not related to either of the minor accidents that occurred on March 5, 2014 and March 11, 2014. This ALJ credits Dr. Hattem's opinions and finds that Claimant's need for medical treatment after November 18, 2014 is not related to the industrial accident of March 5, 2014 or March 11, 2014.

53. Claimant underwent lumbar surgery with Dr. Rauzzino on October 6, 2016. [Exh. X, pp.357-359] The preoperative and postoperative diagnosis was documented as: "L5-S1 degenerative disc disease with stenosis, instability, and severe disk space collapse with foraminal stenosis." [p. 357] The records reflect that Dr. Rauzzino performed an additional procedure on October 7, 2016. [pp. 360-362] At the time of his surgery, Claimant was working full time for Suss.

54. During a post-op appointment on November 3, 2016, Dr. Rauzzino reported: "He is about 4 weeks status post anterior and posterior lumbar fusion surgery. Overall, he is doing much better and has about 20% improvement… He sometimes will get pain going down the back of his legs. He still has numbness on the bottom of his feet." Per this report, Claimant continued to smoke ½ pack of cigarettes a day. The insurance provider information listed at the top of the November 3rd report is "**CO BLUE SHIELD**." [Exh. X, p. 364] Dr. Rauzzino recommended that Claimant continue with his home physical therapy exercises. In a follow-up report dated December 28, 2016, Dr. Rauzzino indicated that Clamant could return to work in about 3 weeks. [p. 366]

55. Claimant filed an Application for Hearing on December 21, 2016, more than two months after undergoing surgery with Dr. Rauzzino through his private insurance. [Resp. Exh. F] The issues endorsed were compensability, medical benefits (authorized provider; reasonably necessary), AWW, and TTD/TPD from March 6, 2014 and ongoing. [*Note: Claimant's counsel subsequently clarified at hearing that they were seeking TTD benefits from October 6, 2016- March 31, 2017. March 31st was the date that Claimant's counsel estimated Claimant returned to work following surgery*.] Respondents filed their Response to Application on January 20, 2017. [Resp. Exh. G]

56. In addition to his post-operative follow ups with Dr. Rauzzino, Claimant continued to see his primary care physician (Dr. Baker). A report dated December 29, 2016 from Dr. Baker says: "Improved status post lumbar surgery. Continued low back pain is now moderate. Weakness is improving significantly…Continue Physical Therapy… Will extend FMLA paperwork to January 25th." [Exh. T, p. 304]

57. A report dated January 20, 2017 from Dr. Baker reflects: "Improved status post lumbar surgery…Continue daily back and leg stretches… He states he has had headache for the past week. He is under a lot of stress with his daughter… He has been feeling mildly anxious and mildly depressed…he would like to see a therapist." [Exh. T, pp. 307-308] A report dated February 17, 2017 from Dr. Baker indicates that she planned to coordinate a sleep study. [p. 312]

58. Dr. William Miller performed an IME on January 19, 2017 at the request of Claimant's counsel. Dr. Miller provided a somewhat cursory discussion of his review of the medical records. He "estimated" an impairment rating for Claimant's lumbar spine, which included a Table 53 rating for the surgery with Dr. Rauzzino. On page 5 of his report, Dr. Miller offered his "rebuttal" to the IME opinion of Dr. Hattem. Dr. Miller suggested that "Mr. Fehrer is deemed 'to be determined' in regards to MMI for his right knee, despite the clear MMI determination by the designated provider (Concentra) on November 18, 2014. Dr. Miller also opined that Claimant is not at MMI for his "untreated mental health issues." It is not apparent from Dr. Miller's report if he was aware of the references in the medical records to stressors in Claimant's personal life involving family members. This ALJ does not find Dr. Miller's report to be persuasive regarding the issues before the Court.

59. Claimant returned to Dr. Rauzzino on March 1, 2017: "…here today for follow-up about 5 months status post anterior/posterior lumbar fusion. He notes about 75% improvement but continues to have some aching in his lower back…He feels improvement and is ready to get back to work, although he is quite concerned at this time because his brother is in hospice…He will return to work next week…" [Exh. X, p. 367]

60. Claimant was evaluated by Dr. Eric Ridings on March 23, 2017 at the Request of Respondents. [Resp. Exh. Z] Like Dr. Hattem, Dr. Ridings performed a comprehensive records review in conjunction with his evaluation of Claimant. Dr. Ridings commented in the course of his report: "Dr. Rauzzino's notes clearly relate the patient's need for surgery to his longstanding degenerative changes at L5-S1, having had a laminectomy/discectomy at that level more than 30 years earlier." [Exh. Z, p. 407] Dr. Ridings indicated that on physical examination, Claimant's knees were equivalent in appearance. He did not discern any swelling of the right knee despite Claimant's contention that it was swollen. There was no ligamentous laxity at either knee on examination, nor was there any crepitus. [p. 409] Dr. Ridings concluded: "It is my opinion within a reasonable degree of medical probability that Mr. Fehrer was appropriately placed at maximum medical improvement November 18, 2014, and remained at MMI for his work injury subsequently. The patient developed new complaints of radiating, radicular-type paresthesias down the bilateral lower extremities many months after this case, which was a year after he stopped working for the employer under this claim…The mechanism of injury in the initial incident only 'slightly' increased his low back pain above baseline even the next day when he was evaluated initially, and at most the mechanism of injury would be expected to have caused a lumbar strain, if that. I agree with the lack of an impairment rating for the lumbar spine when he was placed at MMI…As discussed above, the objective diagnosis for the patient's ongoing right knee pain is patellofemoral syndrome. This was not caused, aggravated, or accelerated by the patient's work injury. It is unclear what anatomic injury the patient had to his knee in the original injury, which was described as a knee hyperextension, which would not have involved the patellofemoral joint…" [p. 409] In the closing paragraph of his report, Dr. Ridings reiterates: "The patient's symptoms are unrelated to his work injury and should continue to receive care outside the workers' compensation system. He does not require any further evaluation, treatment, or maintenance care under workers' compensation." [Exh. Z, p. 410] This ALJ credits Dr. Ridings' opinion that Claimant's need for medical treatment after November 18, 2014 is not related to the March 5, 2014 or March 11, 2014 work accident.

61. Dr. Hattem testified at hearing. He is Level II accredited and was offered and accepted as an expert in the area of occupational medicine. Dr. Hattem confirmed that he had been provided with a copy of Respondents' hearing exhibits prior to hearing, and had reviewed those records – including records for dates of service subsequent to his IME. Dr. Hattem confirmed that he had been provided with a copy of Claimant's IME report from Dr. William Miller on April 17, 2017 (the day before hearing) and had an opportunity to review that report. Dr. Hattem testified in further detail regarding his medical opinions, including that Claimant was properly placed at MMI on November 18,

2014 by the designated provider; that Claimant's lumbar surgery with Dr. Rauzzino in October 2016 was reasonably necessary but was not related to the March 2014 claim; and that his IME opinion was supported by the opinion of Dr. Ridings. Dr. Hattem testified that the IME report from Dr. Miller had not caused him to change his medical opinions in any way. This ALJ credits Dr. Hattem's opinions that Claimant's need for medical treatment after November 18, 2014 is not related to his industrial accident of March 5, 2014 or March 11, 2014.

62. Claimant testified at hearing regarding the extent of his knee and back pain before March 5, 2014. Claimant minimized his prior knee and back symptoms. Claimant's testimony regarding the extent of his symptoms before the March 5, 2014 accident is not found to be credible. However, this ALJ finds that the incidents of March 5, 2014 and March 11, 2014 did increase Claimant's right knee pain and back pain and necessitated the need for medical treatment. Therefore, this ALJ finds that Claimant suffered a compensable injury to his right knee on March 5, 2014 and low back on March 11, 2014.

63. This ALJ also finds that the each compensable injury was minor and that the need for medical treatment after November 18, 2014, the date Claimant was placed at MMI, is not related to the incident of March 5, 2014 or March 11, 2014.

64. To the extent that conflicts exist in this case in the medical opinions of various physicians, those conflicts are resolved in favor of the opinions of Dr. Hattem, Dr. Ridings, and Dr. Huldin. The medical analysis and IME opinion of Dr. Miller is not found to be persuasive.

68. At the time of the accident, Claimant was earning $6,500.00 per month, which equates to an average weekly wage of $1,500.00.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Principles

Claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

At the hearing, Respondents' counsel did not dispute the fact that Claimant suffered an injury on March 5, 2014 or March 11, 2014. Respondents' counsel did, however, dispute the extent of the injuries sustained on March 5, and March 11, 2014.

On the other hand, Respondents did dispute compensability in their post hearing position statement.

This ALJ finds that Claimant suffered a compensable injury to his right knee on March 5, 2014 which necessitated the need for medical treatment. Although this injury was minor, Claimant was provided medical treatment which included crutches. Then, on March 11, 2014, Claimant lost his balance while going down some stairs while using his crutches and landed hard on his feet. This incident, which relates to the March 5, 2014 incident, also caused a compensable injury, although minor, to Claimant's low back and necessitated the need for medical treatment.

The March 11, 2014 incident arose out of the original March 5, 2014 incident. Therefore, the March 11, 2014 incident is not a separate claim.

Statute of Limitations

Section 8-43-103(2), C.R.S. 2014, provides that the right to workers' compensation benefits is barred unless a formal claim is filed within two years after the

injury. Section § 8-43-103(2) further provides that this statute of limitations shall not begin to run against the claim of the injured employee in cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of the Workers' Compensation Act, until the required report has been filed with the Division.

The employer's statutory duty to report the injury to the Division refers to the reporting requirements established by § 8-43-101(1), C.R.S., and § 8-43-103(1), C.R.S. *City of Englewood v. Industrial Claim Appeals Office,* 954 P.2d 640 (Colo. App. 1998). Section 8-43-101(1) requires that an employer report to the Division within ten days after notice of an injury that results in "lost time from work … in excess of three shifts or three calendar days." The duty to report a lost-time injury to the Division arises even if the employer initially reported a no-lost-time injury to its insurer. *City of Englewood v. Industrial Claim Appeals Office, supra*.

In this case, Claimant suffered a work related injury on March 5, 2014. Claimant does not dispute the date of his claim. Therefore, Claimant was required to file a claim by March 5, 2016. Claimant filed a claim for compensation on April 7, 2016, approximately 33 days after the 2 year statute of limitations ran.

However, the statute of limitations is tolled if the Employer has notice of the injury and fails to report the lost time injury to the Division. In this case, the Employer had notice of the injury and Claimant missed more than 3 days from work. Therefore, pursuant to Section 8-43-101(1), the Employer was required to report the injury to the Division. The Employer did complete an Employer's First Report of Injury. Respondents and Claimant both tendered an Employer's First Report of Injury to the Court. However, neither party submitted any evidence that it was actually filed with the Division. See *Finkenbinder v. Jefferson County Government,* W.C. No. 4-661-714 (ICAO July 13, 2006)(The mere submission of an Employer's First Report of Injury to the ALJ was insufficient to establish that it was actually filed with the Division.) Therefore, there is insufficient evidence to establish that Employer gave proper notice to the Division. Thus, the statute of limitations is tolled and Claimant's claim for compensation was timely.

Medical Benefits

The threshold medical benefit issue before this ALJ is whether the back surgery performed by Dr. Rauzzino on October 6, 2016 and October 7, 2016 is casually related to Claimant's work accident of March 5, 2014 or March 11, 2014.

Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805

P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish that the back surgery performed by Dr. Rauzzino was related to his industrial injury. First, Claimant suffered a very minor injury to his low back. Second, Claimant did not have any back problems for which he sought medical treatment after he was placed at MMI on November 18, 2014 until February 22, 2016. Then, on February 22, 2016, Claimant presented to his personal physician and complained of back pain due to heavy lifting 5 days earlier. Third, Claimant's treating surgeon, Dr. Rauzzino, related the severe degenerative changes at the L5-S1 level, for which surgery was performed, to Claimant's discectomy 30 years earlier.

In addition, as set forth by Dr. Ridings in his IME, after Claimant was placed at MMI on November 18, 2014, Claimant developed new complaints in February or March of 2016, of radiating, radicular type paresthesias down both lower extremities. According to Dr. Ridings, Claimant had not had any such complaints earlier in his course of treatment as documented in the medical records.

Dr. Ridings went on to state that it is well within a reasonable degree of medical probability that Claimant's back pain and radicular complaints in 2016, for which Claimant underwent surgery, were not related to his work injury given that the radiating symptoms did not begin for a couple of years after the work accident.

Dr. Ridings also indicated in his report that the incident that occurred on March 11, 2014 was a minor event. Claimant essentially missed a few steps while coming down a staircase on crutches without falling. Claimant, however, described the March 11, 2014 incident to Dr. Ridings quite differently. Claimant alleged that instead of just missing a few steps, he actually jumped 12 feet horizontally and landed 5 feet below where he began. Such story, according to Dr. Ridings, was unbelievable. This ALJ does not credit Claimant's version of events regarding the March 11, 2014 incident as described to Dr. Ridings.

This ALJ finds Dr. Ridings' opinions credible and persuasive. This ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that his worsening of condition and need for medical treatment after November 18, 2014 is related to his industrial accident. Therefore, the surgery performed by Dr. Rauzzino is not related to Claimant's industrial accident.

Authorized Provider – Reimbursement Pursuant to 8-42-101(6)

Claimant's attorney conceded at hearing that Dr. Rauzzino is not authorized. He also conceded in his position statement that Claimant's PCP, Dr. Baker, is not authorized. Therefore, Dr. Rauzzino and Dr. Baker are not authorized.

Claimant, however, is requesting the Insurer be ordered to reimburse Claimant's personal insurer for the cost of surgery pursuant to 8-42-101(6). Claimant is also asking to be reimbursed for any out of pocket expenses he has incurred for his back surgery pursuant to the same statute.

Because this ALJ has concluded that the need for medical treatment and the surgery is not related to Claimant's industrial accident, the issue of reimbursement pursuant to 8-42-101(6) is moot.

Reasonable and Necessary

Because the need for back surgery is not related to Claimant's industrial injury, whether the surgery provided by Dr. Rauzzino was reasonable and necessary is moot.

Temporary Total Disability Benefits.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused his disability. *See* El Paso County Department of Social Services v. Donn, 865 P.2d 877 (Colo.App.1993).

In this case, Claimant is seeking temporary disability benefits from October 6, 2016 to March 31, 2017 due to the time he missed from work after his condition worsened and he underwent back surgery. Because Claimant's worsening of condition and need for back surgery is not related to his industrial injury, he is not entitled to temporary disability benefits.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

As found, Claimant was earning $6,500 per month at the time of his injury. Therefore, Claimant's average weekly wage is $1,500.00 per week.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable industrial injury to his right knee and low back as a result of the incidents that occurred on March 5, 2014 and March 11, 2014.

2. Claimant's claim is not barred by the statute of limitations.

3. Claimant's request for medical benefits is denied and dismissed. Claimant's need for medical treatment after November 18, 2014 is not related to his industrial accident.

4. Claimant's claim for temporary total disability benefits is denied and dismissed.

5. Claimant's average weekly wage is $1,500.00.

6. Dr. Baker and Dr. Rauzzino are not authorized providers.

7. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 6-6-17

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the left shoulder magnetic resonance image ("MRI") recommended by Dr. Jeffrey Krebs is reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted June 23, 2016 work injury.

- Whether claimant has proven by a preponderance of the evidence that dental treatment for claimant's #30 tooth, as recommended by Dr. Connor Rivers and Dr. Dorsha Boisen, is reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted June 23, 2016 work injury.

FINDINGS OF FACT

1. Claimant began his employment with employer on May 15, 2016 as a truck driver. Claimant's job duties included delivering freight to customers. Claimant suffered an admitted work injury on June 23, 2016. Claimant testified that the injury occurred while he was unloading hard wood flooring for a customer. The customer wanted the flooring unloaded by hand. To unload by hand, claimant stood in his work truck and handed bundles of the flooring to an employee of the customer.

2. Claimant testified that during this unloading process his right small finger got caught in one of the bands holding the hardwood flooring together. While claimant was attempting to remove his finger, the person assisting him pulled the flooring. Claimant testified that this caused him to twist to the left and fall backwards into the truck injuring his back, left shoulder, right knee, and abdomen. Claimant also testified that while falling he bit down and cracked his #30 tooth and a filling "fell out" of that tooth. The body parts at issue in this order are claimant's left shoulder and #30 tooth.

3. Claimant timely reported the incident to employer on June 24, 2016. Claimant first treated at Mountain Peaks Urgent Care on July 1, 2016. On that date claimant was seen by Elizabeth Singleton, PA-C. Claimant reported to Ms. Singleton that he was injured when he "was twisting and lifting" and felt a pop in this lower back. Ms. Singleton recorded claimant's complaints as pain in his low back with radiating pain down his right leg and into his right knee. In the July 1, 2016 medical record there is no indication that claimant was having left shoulder symptoms or issues with his teeth. Claimant testified that he told Ms. Singleton that he had pain in his tooth and left shoulder and he does not know why Ms. Singleton did not record those complaints in her report.

4. Thereafter, employer instructed claimant to see Dr. David Olson with Pavilion Family Medicine. Claimant first treated with Dr. Olson on August 15, 2016. On that date claimant reported to Dr. Olson that he was unloading pallets of material when his hand got caught in the strap and he "jarred his left shoulder", twisted his back and his right knee gave out. Claimant also reported to Dr. Olson that while he was falling he "bit down hard" and "knocked out a filling on tooth #31[*sic*]".[1]

5. On October 5, 2016, Dr. Brian Mathwich reviewed requests for authorization for treatment of claimant's left shoulder treatment and dental treatment. Dr. Mathwich opined that claimant's left shoulder and tooth were not injured during the June 23, 2016 work injury. In support of this opinion, Dr. Mathwich noted that claimant did not report any left shoulder or tooth issues to his medical providers until six weeks after the reported injury. Based upon Dr. Mathwich's opinions respondents denied authorization for left shoulder treatment and dental treatment.

6. On September 21, 2016 claimant requested a change of physician to Dr. Jeffrey Krebs. Claimant first saw Dr. Krebs on November 3, 2016. Claimant reported to Dr. Krebs that he was injured when he fell over while unloading freight. The symptoms claimant reported to Dr. Krebs were a broken tooth, left shoulder pain, lower center back discomfort, a hernia, and injury to his right knee. On that date, Dr. Krebs opined that claimant may have a torn rotator cuff in his left shoulder. Dr. Krebs recommended a magnetic resonance ("MRI") image of claimant's left shoulder.

7. Although claimant initially mentioned his broken tooth to Dr. Krebs on November 3, 2016, Dr. Krebs did not examine claimant's mouth on that date. Dr. Krebs authored an addendum to the November 3, 2016 medical record in which he stated that claimant's mouth was not examined because of the focus on other injured body parts. Claimant returned to Dr. Krebs on November 17, 2016. On that date, Dr. Krebs recorded that claimant had a "fractured off molar" on the right lower side and referred claimant to Black Canyon Dental for consultation.

8. Claimant was seen by Dr. Connor Rivers at Black Canyon Dental on December 2, 2016. Dr. Rivers noted that claimant's #30 tooth was fractured and opined that the tooth was "non-restorable". Dr. Rivers recommended treatment that included extracting the tooth followed by a bone graft and implant. Dr. Rivers noted that in his opinion the decay in claimant's #30 tooth was present prior to claimant's injury but it was "possible that the fall did cause the tooth to fracture further".

9. Claimant testified that Dr. Rivers referred him to oral surgeon Dr. Dorsha Boisen for consultation. Claimant was seen by Dr. Boisen on March 29, 2017. Dr. Boisen recorded that claimant's #30 tooth was fractured and "non-restorable". Dr. Boisen recommended extracting the tooth, graft the ridge with "bottled bone product", and implant a new tooth.

[1] Claimant testified that it is his right second molar (#30 tooth) that is in need of treatment and not his #31 tooth.

10. Respondents sent claimant for an independent medical examination ("IME") with Dr. John Raschbacher on February 21, 2017. Dr. Raschbacher reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the IME. Following the IME, Dr. Raschbacher issued a report in which he opined that claimant's left shoulder pain and #30 tooth injury are not related to the June 23, 2016 work injury. In support of his opinion, Dr. Raschbacher pointed to claimant's different descriptions of the June 23, 2016 event. Dr. Raschbacher also opined that claimant failed to report any issues with his tooth or his left shoulder until well after the incident. With regard to claimant's tooth, Dr. Raschbacher noted that during the IME he observed that claimant has a corresponding broken molar on the left side, mirroring the broken #30 tooth.

11. Dr. Raschbacher testified at hearing and confirmed his opinion that claimant's left shoulder pain and broken tooth are not related to the work injury. Dr. Raschbacher testified that claimant had prior issues with his #30 tooth as indicated by the dental records. Dr. Raschbacher also testified that it is his opinion that claimant's subjective complaints are out of sync with the objective medical findings. Dr. Raschbacher testified that it is his opinion that claimant was inconsistent in the description of the injury he reported to his various medical providers.

12. On cross examination claimant testified that he was "not exactly consistent" in describing the June 23, 2016 injury to his medical providers.

13. Claimant's dental records indicate that on October 8, 2015 claimant was seen by Dr. Stacey Laiminger at Community Dental. On that date, claimant told Dr. Laiminger that he was ready to address his dental issues. In that same record, it is noted that claimant needed crowns on tooth #19 and tooth #30.

14. Claimant returned to Community Dental on October 11, 2016 for "a restorative appointment" for the #30 tooth and was seen by Dr. Bob Johnson. A medical record from that date indicates that claimant's condition had "no changes" since his appointment one year prior. Dr. Johnson noted that claimant's tooth #30 had "deep caries at the level of furcation" and recommended extraction. The dental record does not include any indication that claimant's #30 tooth was cracked or broken. Nor is there any mention of claimant's June 2016 fall at work.

15. With regard to claimant's left shoulder, the ALJ credits the medical records and the opinion of Dr. Raschbacher over the contrary opinion of Dr. Krebs and finds that claimant has failed to show that it is more likely than not that his left shoulder symptoms are related to his fall at work on June 23, 2016. The ALJ finds that it is more likely that if claimant had experienced pain in his left shoulder he would not have waited six weeks to report it to his medical providers. The ALJ credits Dr. Raschbacher's opinion and finds that claimant has also failed to demonstrate that it is more likely than not that the recommended left shoulder MRI is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

16. With regard to claimant's #30 tooth, the ALJ credits the medical records and the opinion of Dr. Raschbacher over the contrary opinion of Dr. Rivers and finds that claimant has failed to demonstrate that it is more likely than not that his #30 tooth was injured on June 23, 2016. The ALJ finds that it is more likely that if claimant had experienced pain in his #30 tooth on June 23, 2016, he would have made mention of it to his medical providers and not wait six weeks to report a cracked or broken tooth.

17. The ALJ further notes that well before the work injury claimant was having issues with his #30 tooth and intended to have it crowned when he was seen at Community Dental on October 8, 2015. There is insufficient persuasive evidence in the record to support a finding that the June 23, 2016 work injury caused claimant's now broken tooth. In addition, the ALJ finds that the June 23, 2016 fall at work did not aggravate, accelerate, or combine with the pre-existing decayed condition of claimant's #30 tooth to necessitate medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment.

See H & H Warehouse v. Vicory, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, claimant has failed to demonstrate by a preponderance of the evidence that his left shoulder symptoms are related to his fall at work on June 23, 2016. Therefore, the recommended left shoulder MRI is not reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, the medical records and the opinion of Dr. Raschbacher are credible and persuasive on this issue.

7. As found, claimant has failed to demonstrate by a preponderance of the evidence that the damage to his #30 tooth is related to the June 23, 2016 work injury. As found, the June 23, 2016 work injury did not aggravate, accelerate, or combine with the pre-existing decayed condition of claimant's #30 tooth to necessitate medical treatment. As found, claimant has failed to demonstrate by a preponderance of the evidence that the dental treatment recommended by Dr. Rivers is reasonable and necessary to cure and relieve claimant from the effects of the work injury. As found, the medical records and the opinion of Dr. Raschbacher are credible and persuasive on this issue.

ORDER

It is therefore ordered that:

1. Claimant's request for treatment for his left shoulder, and specifically a left shoulder MRI, is denied and dismissed.

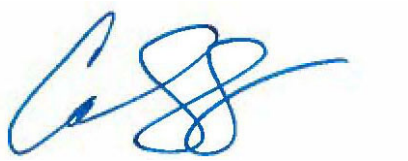
2. Claimant's request for dental treatment for his #30 tooth is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 7, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether Claimant is entitled to a general award of maintenance medical treatment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. This is an admitted claim.

2. Claimant was involved in a work related accident on October 17, 2012.

3. Claimant injured his neck.

4. Claimant was diagnosed as suffering from cervical stenosis, cervicalgia, and cervical radiculopathy.

5. Claimant failed to respond to conservative treatment measures including, but not limited to, physical therapy, anti-inflammatories, and epidural steroid injections.

6. Claimant came under the care of Dr. Bryan Castro, a surgeon. Since Claimant's condition did not improve, Dr. Castro recommended surgery in the form of a spinal fusion.

7. Dr. Castro was deposed on April 21, 2017 regarding the reasonable and necessary medical treatment Claimant would require after his spinal fusion. Dr. Castro testified regarding his treatment protocol for spinal fusion patients, which included Claimant.

8. Dr. Castro testified that Claimant's post surgical treatment would include follow up medical evaluations, including x-rays, at specified intervals, to determine the status of Claimant's medical condition and fusion. The post surgical intervals for Dr. Castro to evaluate Claimant and take x-rays were six weeks, three months, six months, and 12 months.

9. Dr. Castro also testified that if a case closes before the one year period, the Claimant should be provided maintenance medical treatment, consistent with his treatment protocols, in the form of follow up medical appointment(s) and x-rays,

so he can evaluate the Claimant's medical condition and determine the status of the spinal fusion.

10. On August 27, 2015, Dr. Castro performed a two-level spinal fusion on Claimant's cervical spine at C5-C7.

11. On September 11, 2015, Claimant returned to Dr. Castro for his first post surgical evaluation. Cervical spine AP and lateral x-rays were taken and showed postoperative changes of the anterior cervical discectomy and fusion at C5-C7 with instrumentation in good position and well fixed.

12. On October 9, 2015, Claimant returned to Dr. Castro. Claimant was approximately 6 weeks out from his surgery. Cervical spine AP and lateral x-rays were performed and highlighted postoperative changes of anterior cervical discectomy and fusion at C5-C7. According to Dr. Castro's report, the instrumentation was in good position and well fixed. There was also evidence of some good early bony fusion present. The medical report also indicates that the x-rays look great and that Claimant will be seen in 6 weeks for his 3 month postoperative appointment.

13. On November 20, 2015, Claimant returned to Dr. Castro for his three month post surgical evaluation. Claimant complained of pain in his neck and shoulders. He also complained of having trouble holding onto a water bottle with his left hand due to weakness. His right arm symptoms, however, were getting better. It was noted that Claimant did have right arm symptoms for 2 ½ years prior to his surgery. Claimant was advised to follow up with Dr. Danahey, his primary workers' compensation provider. Claimant was also advised to follow up with Dr. Castro in another 3 months for another postoperative visit. Therefore, Claimant's next scheduled appointment with Dr. Castro should have been around February 27, 2016.

14. On January 12, 2016, Claimant was evaluated by Dr. Burris, instead of Dr. Danahey. Dr. Burris indicated Claimant had been released by his treating surgeon, Dr. Castro. However, Dr. Castro testified that he had not released Claimant from his care at that time because Claimant still needed to follow up with him to evaluate Claimant's spinal fusion.

15. Dr. Burris testified at hearing. Dr. Burris stated that he is familiar with Dr. Castro's treatment protocols for his spinal fusion patients, which included Claimant. Dr. Burris testified that any release by Dr. Castro, would be subject to the Claimant following up with Dr. Castro and being evaluated and having x-rays taken at specific intervals. Dr. Burris acknowledged that Dr. Castro's post surgical intervals were to occur at approximately two weeks, six weeks, three months, six months, and twelve months. Dr. Burris also testified that the follow up evaluations and x-rays required by Dr. Castro appear reasonable and necessary.

16. Claimant did not return to Dr. Castro around February 27, 2016, which would have been approximately six months after surgery.

17. On March 8, 2016, Dr. Castro issued a report indicating that he had not seen Claimant since November 20, 2015.

18. On April 5, 2016, Dr. Burris placed Claimant at MMI. Although Dr. Burris knew Claimant still had to follow up with Dr. Castro to be evaluated and have x-rays taken, Dr. Burris indicated in his April 5, 2016 medical report that Claimant did not need any maintenance medical treatment. Dr. Burris also restated that Dr. Castro had released Claimant from his care. However, as testified to by Dr. Castro, he had not released Claimant from his care as of April 5, 2016. In fact, Dr. Castro has never released Claimant from his care.

19. Claimant had surgery on August 27, 2015 and was placed at MMI April 5, 2016, which is 7 months and 9 days after his surgery.

20. At the time Claimant was placed at MMI, Dr. Castro had not released Claimant from his care. At the time Claimant was placed at MMI, Dr. Castro still wanted Claimant to follow up with him to have his six month and 12 month follow up evaluation and x-rays of his cervical spine to determine the status of Claimant's fusion and to determine whether any additional treatment was reasonable and necessary.

21. Dr. Castro testified that even if a patient is completely asymptomatic, he wants to see his patients for at least one year for x-rays to monitor the fusion process. Dr. Castro testified that even if Claimant was not experiencing symptoms does not mean he may not have been experiencing problems with his fusion. By way of example, Dr. Castro indicated as a smoker, Claimant may have had a relapse which could result in the fusion not "taking," which further supports maintenance treatment. Dr. Castro also opined that maintenance medical benefits, including evaluations and x-rays, were reasonable and necessary for Claimant.

22. The opinions of Dr. Castro are found credible and persuasive.

23. At the time Claimant was placed at MMI, he still needed maintenance medical treatment to evaluate his underlying condition. Therefore, maintenance medical treatment was reasonable and necessary at the time Claimant was placed at MMI.

24. To date, Claimant has not had his six month or one year post surgical evaluation(s) and x-rays, with Dr. Castro, in order for Dr. Castro to determine the status of Claimant's fusion.

25. Claimant testified at hearing that he is having additional symptoms and would like to follow up with Dr. Castro to determine the status of his spinal fusion.

26. Claimant attempted to schedule an appointment with Dr. Castro for maintenance medical treatment. However, the Insurer would not authorize the appointment.

27. Claimant's testimony is found to be credible and persuasive.

28. On November 8, 2016, Respondents filed a final admission of liability and denied maintenance medical treatment.

29. At the time Claimant was placed at MMI, Claimant needed maintenance medical treatment in the form of medical evaluations and x-rays to relieve him from the effects of the industrial injury or to prevent further deterioration of his condition.

30. Claimant currently needs maintenance medical treatment in the form of an evaluation by Dr. Castro and x-rays to determine the status of his neck condition and fusion.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Section 8-42-101(1), C.R.S., requires the employer or insurer to provide medical benefits which are reasonable and necessary to cure and relieve the industrial injury. See *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). However, this obligation terminates at maximum medical improvement, and after that point, Claimant may obtain future medical benefits only to maintain maximum medical improvement or to prevent a deterioration of his condition. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

Claimant is entitled to *Grover*-type medical benefits where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary "to relieve a claimant from the effects of an [industrial] injury" or prevent further deterioration of the claimant's condition. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

Moreover, an award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999).

Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). In establishing entitlement to *Grover*-type benefits, Claimant is not required to prove that a "particular" or "specific course of treatment" is anticipated. *See Stollmeyer v. Industrial Claim Appeals Office, supra*. Furthermore, there is no distinction between "active treatment" and "diagnostic procedures." *See Brock v. Jack Brach and Sons Trucking*, W.C. No. 3-107-451, December 15, 1995; *Atwood v. Western Slope*

Industries, W.C. No. 3-069-135, November 28, 1994 (medical monitoring compensable). To the contrary, the court has held that once Claimant establishes a need for future medical treatment, "such medical treatment irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or prevent deterioration of the claimant's present condition." *See Milco Construction v. Cowan*, 860 P.2d 542.

In this case, at the time Claimant was placed at MMI, it had only been 7 months since his surgery. Therefore, according to Dr. Castro, Claimant needed specific medical treatment, post MMI, to evaluate and determine the status of his fusion. As testified to by Dr. Castro, at the time Claimant was placed at MMI, Claimant needed to have, at a minimum, his one year post surgical evaluation by Dr. Castro and x-rays to determine the status of his fusion.

In addition, Dr. Burris also testified that the need for Claimant to have a follow up appointment and x-rays with Dr. Castro, after Claimant was placed at MMI, was reasonable and necessary.

Therefore, this ALJ concludes that at the time Claimant was placed at MMI he required maintenance medical treatment.

Respondents argue that an evaluation and x-rays do not meet the definition of maintenance medical treatment. This ALJ has considered such argument and rejects such argument. The post MMI treatment, in the form of an evaluation, and x-rays, is reasonable and necessary medical treatment which is intended to relieve Claimant from the effects of his injury or prevent further deterioration of Claimant's condition. Thus, this ALJ concludes that Claimant has proven by a preponderance of the evidence his entitlement to maintenance medical treatment after MMI.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is entitled to maintenance medical treatment.

2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 6-7-17

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Respondents met their burden of proof to establish Claimant willfully violated a safety rule adopted by Employer, allowing a 50% reduction of his indemnity benefits.

FINDINGS OF FACT

1. Claimant began work for Employer in February, 2015. He was employed as a drywall finisher.

2. On February 18, 2015, Claimant signed an acknowledgement of receipt of the Employee Handbook. [1] This acknowledgement was written in English.

3. The Employee Handbook set forth Employer's safety policy. More particularly, Section 503 is entitled Safety/Hazcom Program. That section provided in pertinent part:

> "To assist in providing a safe and healthful work environment for employees, customers and visitors, RMD has established a workplace safety/hazcom program. This program is a top priority for RMD and exists to insure our employees complete their work assignment safely. We have a ZERO tolerance policy for safety violations. Disciplinary actions up to and including termination will occur for all safety violations. The safety manager has responsibility for implementing, administering, monitoring, evaluating and modifying the safety program to insure its effectiveness. The success of this program depends on the support of management, and the awareness and compliance of all employees. ...
>
> New employees receive an initial safety orientation upon hire. Field employees and supervisors receive monthly workplace safety training. The training covers potential safety and health hazards, and safe work practices and procedures to eliminate injuries and behaviors that lead to injury.
>
> Each employee is expected to obey all safety rules and exercise caution in all work activities. Upon entering the work area **each time**, employees are required to identify, record, correct and report any unsafe condition to their supervisor. RMD's on-site safety checklist is provided on all job sites to help meet these requirements. All unsafe work areas or conditions must be corrected before work begins. Employees who violate safety standards, who cause hazardous or

[1] Exhibit H.

dangerous situations, or fail to report or, where appropriate, remedy such situations, may be subject to disciplinary action up to and including termination of employment."

4. Claimant's new hire orientation checklist (in Spanish) was admitted into evidence. Claimant initialed and dated this document on February 18, 2015. This form confirmed Claimant received a copy of the Employer's Safety and Hazard Communication Program. (Both English and Spanish versions of this booklet were admitted at hearing).[2]

5. The Safety and Hazard Communication Program set forth requirements with regard to safety on the job. These were:

"A. Survey the job site to identify any potentially hazardous conditions and report them to your supervisor immediately.
...

D. Clear the work area of debris before you start and maintain this condition while working, especially if you are using benches, ladders, scaffold or stilts.
…

H. Report any unsafe condition to your supervisor immediately. Never take chances.

Awareness

A. It is the responsibility of each employee to be aware of:
…

2). The conditions of the work area and the potential risks associated therewith.

B. Report all unsafe workers, activities and conditions to your supervisor immediately".

6. Employer had written safety policies in force at the time Claimant was injured.

7. Claimant participated in safety meetings while working for Employer. More particularly, he attended safety meetings on March 27, 2015, October 30, 2015, and September 25, 2016. The subject of the October 30, 2015 meeting was Stilt Safety and Fall Protection. Claimant completed a quiz after that training and answered all of the questions correctly.

[2] Exhibit G.

8. Dustin Matson testified at hearing. He works as the safety manager for Employer, a position he has held for three years. In that capacity, he worked with the safety committee to develop safety policies and procedures for enforcing those policies. Mr. Matson noted safety is discussed as part of Employer's new hire orientation. As part of the process, keeping the job sites clean is discussed, as the drywall business is a messy industry. Mr. Matson testified there was a safety checklist on every job site. Employees are to do a safety walk in the house before they start work and if a hazard is seen, all employees have the authority to stop work at the site, until the hazard is reported and/or corrected. Employer's safety booklet discussed putting drywall scraps in the center of the room. Mr. Matson stated Claimant would have been aware of these policies. Mr. Matson stated Employer conducts regular safety meetings and employees are quizzed about what is discussed. The meetings are conducted in Spanish and English. Mr. Matson testified he also conducts unannounced job site visits to insure safety rules are followed.

9. Maximino Preciado[3] testified at hearing. He has worked for Employer for twenty-two years. He knew Claimant through work, although did not work with him directly. He worked that day at the house where Claimant was injured, arriving around 8 a.m. The house was dirty with scrap on the floor, but he was able to do his job which was installing corner bead. Claimant arrived around 11 a.m. and Mr. Preciado finished his work, leaving the job site.

10. Mr. Preciado said stilts were not supposed to be used unless the floor was completely clean. This was company policy. He watched videos and the company continually reminded them of that rule. Mr. Preciado said he asked Claimant if he was going to work because of the condition of the house. Mr. Preciado admitted he had never not worked in the house because it was in that condition. On cross-examination, Mr. Preciado admitted using stilts on two or three occasions when the floors had not been completely scrapped. This included the house where Claimant was injured. The ALJ notes Mr. Preciado's testimony supported the finding that employees had previously violated this safety rule with no consequences.

11. Hermanagildo Segovia testified on behalf of Respondents. He has worked as a drywall finisher for 4 1/2 years. This is the same job as Claimant and he wears stilts. Mr. Segovia confirmed there were safety rules concerning stilts; specifically, the work area had to be clean while wearing stilts. Stilts were also not to be worn on stairs. Mr. Segovia testified he had worked in houses that were not cleaned. If possible, he would try to work on the scaffold in the garage. However, he testified that he has worn stilts in the areas which are dirty. However, he said he doesn't always wear stilts in the areas where it is dirty.

12. Michael Herrera testified on behalf of Respondents. He has worked for Employer for ten years as a supervisor. Claimant reported directly to him and he would

[3] Mr. Preciado prepared a written statement in Spanish (undated), which was admitted at hearing, along with a translation. The statement corroborated Mr. Preciado's testimony. He also said Claimant asked when the scrappers were going to come and also told him he needed to get some hours.

act as an interpreter on occasion because he spoke Spanish. This included safety meetings. Mr. Herrera testified the safety rules concerning wearing stilts required that you not walk on stairs and not in areas where there was debris or other trip and fall hazards. Claimant would have been aware of these rules. Mr. Herrera confirmed that his work crew has worked in houses that had not been scrapped. Mr. Herrera said what should be done in that situation is doing the work that is low, which does not require stilts. He said they always direct the employees to work as carefully as possible.

13. Mr. Herrera had not written any employee up for violating safety rules, but has verbally instructed employees. The ALJ concluded from this testimony that Employer acquiesced in a violations of the safety policy. He has told employees to first complete the work that does not require stilts. He further testified that there would never be a backlash for an employee who refused to work in unsafe conditions. He confirmed that employees are paid on a piece-rate basis, when they complete the house. The ALJ inferred this created an incentive to complete the jobs as expeditiously as possible.

14. Claimant testified he received the Employee Handbook and copies of the policies concerning use of stilts. He also confirmed his attendance at the safety meeting when wearing stilts had been discussed. The ALJ finds Claimant was advised of the policy which required him to work in an area clear of debris while wearing stilts.

15. On February 20, 2016 (Saturday), Claimant was working at a house located at 15416 W. 49th Drive. Claimant testified the house was dirty when he got there. Claimant testified that, in his experience with working for Employer, he would very often see other employees working on stilts on jobsites that had yet to be scrapped. He called his supervisor, Mike (Herrera), as he wanted to know when they were going to come to clean the house. (In his report of injury, he noted that he tried to call Mr. Herrera at 10:51 a.m.)

16. Claimant testified that he completed the low work, as he had been trained. He tried to call Mr. Herrera again, but there was no answer. It was at this point in time he began using the stilts in the areas that had not been scrapped. There was a lot of scrap and he was not thinking of cleaning everything. He testified that he exercised caution as he had been told. The ALJ found Claimant to be a credible witness. Claimant fell over debris while he was on the stilts and was injured.

17. Claimant testified that he did not think about violating a safety rule when he began working on the stilts. He felt it was normal and he just began working. As a finisher, Claimant said they would go ahead and do their job. This was the same for Herman. The ALJ infers from this testimony Claimant did not volitionally or intentionally violate the rule concerning using stilts when debris was on the floor.

18. Ismael Herrera Martinez testified as a witness for Claimant. He explained that he worked for Employer for approximately four years under the direct supervision of Michael Herrera. He was aware of the safety rule against wearing stilts in a house that had not been scrapped. Mr. Martinez testified that if a job site was not scrapped, he

would contact Mr. Herrera, who would then instruct him to wait for the people who cleaned the house. Sometimes the cleaners would take two or three hours. Sometimes they would not come until the next day. When the latter situation occurred, they would do their work, most of which required stilts. He had worked in houses that were not scrapped. He said sometimes employees were afraid to call the supervisor about the house not being clean, as they wouldn't get more work.

19. Mr. Matson completed a safety audit the day after Claimant was injured. There was no safety checklist present at the house. He inspected the house and noted the presence of hazards including electrical cord and construction material. Mr. Matson described the condition of the house as "atrocious". The house was unsafe to use stilts. He also met with Claimant at the time the report of injury was completed. Mr. Matson testified Claimant agreed that the injury could have been prevented had he made the decision not to use the stilts. Mr. Matson testified that he had not had an employee make a decision to work in a house like this. He had had not reprimanded an employee for not moving debris to the middle of the room.

20. There was no evidence of action taken by Mr. Matson to discipline employee(s) for the failure to post the safety checklist on the jobsite where Claimant was injured. The ALJ noted this was an example of Employer not enforcing a safety policy.

21. An Employer's First Report of Injury was completed on February 22, 2016. It specified Claimant was injured while wearing stilts in a home with drywall debris and tripping hazards everywhere. Claimant received an Employee Warning/Suspension Notice on February 22, 2016 for the failure to follow company policy.[4]

22. Ismael Herrera was not disciplined by Employer for a violation of the safety policies- using stilts where there was debris on the floor. The ALJ noted this was an example of Employer not enforcing a safety policy.

23. Photographs of the accident site were admitted at hearing.[5] These were part of the audit report prepared by Mr. Matson. These depicted pieces of drywall scrap, cord, as well as drywall mud on the floor in the room where Claimant fell.

24. On March 11, 2016, a General Admission of Liability ("GAL") was filed on behalf of Respondents, admitting for wage and medical benefits. That GAL took a 50% penalty on Claimant's TTD benefits for a safety rule violation.

25. A revised GAL was filed on April 15, 2016, admitting for temporary partial disability benefits. A 50% penalty was taken on those benefits for a safety rule violation.

[4] Exhibit A.

[5] Exhibits E and F.

26. The ALJ finds Respondents failed to prove Claimant willfully violated a safety rule.

27. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the credibility of Claimant, as well as Employers was determinative of the question whether there was a willful violation of a safety rule.

Willful Violation of a Safety Rule

Section 8-42-112(1)(b), C.R.S. governs the imposition of a penalty for a violation of a safety rule. That section provides for a 50 percent reduction in Claimant's compensation when Respondents prove "the injury is caused by the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee". The question of whether the Respondents met their burden and proved a willful safety rule violation by a preponderance of the evidence is generally one of fact for determination by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995).

In *Lori's Family Dining*, Claimant was engaged in horseplay with co-employees, which escalated to an altercation. Claimant was injured when he fell and broke his arm. The employer prohibited horseplay and had warned employees against such conduct.

Employer's policies required three written warnings before termination. The ALJ declined to impose a 50% penalty for a safety rule violation on the grounds that employer had not enforced safety rule, which was affirmed by the Industrial Claim Appeals Office. The Colorado Court of Appeals considered whether the denial of the penalty was appropriate under those circumstances. Justice Hume noted the most frequent ground for rejecting a penalty for violation of a safety rule was the "lack of enforcement of the rule or policy by an employer with knowledge of and acquiescence in its violation". *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d at 719.

As a starting point, the ALJ first concluded Employer had a written safety policy in force at the time Claimant was injured. (Finding of Fact 6). This policy was expressed in the Employee handbook, as well as Employer's Safety and Hazard Communication Program. (Findings of Fact 3, 5). The specific policy at issue was the Safety and Hazard Communication Program, which required employees to: "Clear the work area of debris before you start and maintain this condition while working, especially if you are using benches, ladders, scaffold or stilts". (Finding of Fact 5).

As determined in Findings of Fact 2-4, 6-8, Employer took many steps to insure its new employees were informed of the policies and the safety rules were reinforced throughout their employment. Claimant's testimony confirmed that he was aware of Employer's safety rules. The ALJ concluded that Claimant received both the Employee Handbook and the safety policies. He also participated in safety meetings in which the subject of safety practices while using stilts were discussed. Therefore, Respondents proved there was a safety rule which was communicated to employees, including Claimant. That does not end the inquiry, however. The ALJ next considered whether Employer enforced the subject safety policy.

Second, there was evidence that Employer had not enforced the safety rule. First, there was direct evidence in the form of witness testimony (Mr. Preciado, Mr. Segovia, and Mr. Martinez-Herrera), which established employees worked on jobsites with rooms that had debris on the floor, in violation of the policy. (Findings of Fact 10-12, 22). Claimant's testimony also corroborated this fact. (Finding of Fact 15).

Moreover, Mr. Herrera, who was in a supervisory position, confirmed the fact that employees had worked using stilts on jobsites where there was debris on the floor and he had not disciplined any employee for a violation of the company policy. (Finding of Fact 13).

No contrary evidence was introduced to refute this. Mr. Matson also testified that company policy required a safety checklist to be present at the jobsite. In fact, no such checklist present at the location where Claimant was injured. This was further evidence of the lack of enforcement of safety rules by Employer. Thus, while the facts before the ALJ established that while Employer had an established policy, which was communicated to employees, the Employer acquiesced in the violations of the policy. This fits within *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office, supra*, and its

progeny. Under these circumstances, Respondents were not entitled to reduce Claimant's benefits for violation of the safety rule.

Additional support for the conclusion that Respondents were not entitled to a reduction of benefits was found in the determination by the ALJ that Claimant did not willfully violate the safety rule. Respondents were required to show Claimant's conduct was willful, that is; he knew the rule, then intentionally did what the rule prohibited. *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 140, 437 P.2d 548, 551 (1968). On this element, Respondents failed to meet their burden. As used in this statute, the word "willful" means "with deliberate intent", *City of Las Animas v. Maupin*, 804 P.2d 285, 286 (Colo. App. 1990) [citation omitted], or "the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences." *Johnson v. Denver Tramway Corp.*, 115 Colo. 214, 222, 171 P.2d 410, 414 (1946) (emphasis omitted)[quoting 1 William R. Schneider, *The Law of Workmen's Compensation* § 282, at 876 (2d ed. 1932)].

The evidence admitted at hearing led the ALJ to conclude that Respondents failed to establish a willful violation of the safety rule. (Finding of Fact 26). Respondents correctly noted that Colorado law does not require them to prove Claimant had the rule in mind and decided to violate it to establish a willful violation of a safety rule. *Bennett Props. Co. v. Indus. Comm'n*, *supra,*165 Colo. 135; *Scott Triplett, v. Evergreen Builders, Inc, and St. Paul Fire and Marine Ins. Co.,* W. C. No. 4-576-463. (ICAO May 11, 2004). However, Respondents were required to show that Claimant's conduct in violating the safety rule was intentional, which requires a deliberate decision on the part of Claimant. *Scott Triplett, v. Evergreen Builders, Inc, and St. Paul Fire and Marine Ins. Co.* That was not what the evidence showed in the case at bench.

Claimant's testimony supported this finding when he testified that he was not focused on the safety rule when he used the stilts in the area where there were drywall pieces and other debris on the job site. He was simply focusing on completing the tasks, which was persuasive to the ALJ. (Finding of Fact 17). Claimant's testimony was credible and also buttressed by the fact that he had violated the safety rule on other occasions, with the goal of getting the job done. In addition, Claimant testified he tried to call Mr. Herrera when he saw the condition of the jobsite. Thus, he tried to comply with one part of the policy, which was to advise his supervisor of the unsafe condition of the workplace. These facts led the ALJ to conclude Claimant was simply trying to finish the job that day and not intentionally violating the safety rule. He was not performing his job duties with the knowledge that it was likely to result in serious injury or with reckless disregard of the consequences. Under these circumstances, imposition of a penalty for a violation of a safety rule was not warranted.

ORDER

IT IS ORDERED:

1. Respondents have failed to prove Claimant willfully violated a safety rule. Claimant is entitled to receive 100% of his indemnity benefits.

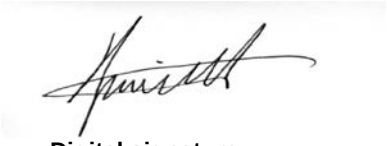
2. Respondents shall pay 100% of Claimant's indemnity benefits.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 7, 2017



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on November 28, 2016.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical treatment from both Midtown Occupational Health Services and Kaiser Permanente for his industrial injury.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,234.00.

FINDINGS OF FACT

1. Claimant worked for Employer as a Truck Driver. His job duties involved delivering, loading and unloading freight to commercial and residential establishments. Claimant testified that on November 28, 2016 he was delivering a crate to a painting company known as Preferred Painting. The crate was approximately 10-12 feet long, two feet wide and weighed about 1200 pounds.

2. Claimant explained that he used a pallet jack to move the crate to the back of his trailer. As he was pulling the crate backwards he tripped on a small step near the end of his trailer. Claimant fell approximately five feet off the trailer onto concrete and landed on his back. He remarked that he immediately developed pain above his tailbone area. Although he remained on the ground for a while, he was able to get up with some assistance. Claimant did not immediately seek medical treatment.

3. Jose Olivas testified at the hearing in this matter and corroborated Claimant's account of the November 28, 2016 incident. Mr. Olivas explained that he resides in Juarez, Mexico and was visiting relatives in the Denver, Colorado Metropolitan area in November 2016. He noted that his brother-in-law worked for Preferred Painting and they were visiting the business on November 28, 2016. While Mr. Olivas was in the parking lot, he noticed Claimant using a pallet jack to unload merchandise from a truck. Claimant tripped as he was walking backwards, fell to the ground and landed on his back. Mr. Olivas assisted Claimant after the incident. Claimant subsequently completed his merchandise delivery to Preferred Painting.

4. Claimant's pain subsequently intensified so that it was primarily located in his lower back area. On December 6, 2016 he completed a First Report of Injury with Employer. Claimant specified that while he was unloading a crate from his trailer he hit

a step on the side of the tailgate, lost his balance and fell to the ground. He reported a lower back strain, a headache and neck pain. Claimant chose to receive medical treatment through Midtown Occupational Health Services.

5. On December 6, 2016 Claimant visited Authorized Treating Physician (ATP) Lon Noel, M.D. at Midtown Occupational Health Services. Claimant recounted that on November 28, 2016 he tripped and fell while pulling a crate off the back of his delivery trailer. He fell approximately five feet and landed on his back. Claimant reported that his lower back pain had intensified since the incident and he was experiencing "pins and needles" feelings in the fingertips of both hands. He remarked that he did not suffer a head injury or loss of consciousness during the incident. Dr. Noel commented that Claimant's cervical spine x-rays revealed minimal osteoarthritis but were otherwise unremarkable. He diagnosed Claimant with a cervical strain and a lumbosacral contusion/strain. Dr. Noel recommended massage therapy, physical therapy, a home exercise program and Ibuprofen as needed.

6. On December 23, 2016 Claimant returned to Dr. Noel for an examination. Claimant reported that he was experiencing back spasms, tightness and pain across his lower back area. He was performing full duty employment but became uncomfortable by the end of each shift. Dr. Noel continued to diagnose Claimant with a cervical strain and a lumbosacral contusion/strain with improvement. He expected that Claimant would reach or approach Maximum Medical Improvement (MMI) by January 2, 2017. Claimant subsequently underwent physical therapy approximately two times each week through Midtown Occupational Health Services.

7. On December 28, 2016 Respondents filed a Notice of Contest challenging Claimant's claim for Workers' Compensation benefits. Although Claimant had scheduled a number of physical therapy appointments they were cancelled by Midtown Occupational Health Services.

8. Claimant subsequently obtained medical treatment for his lower back condition through personal medical provider Kaiser Permanente. On January 16, 2017 Claimant explained to Isaac D. Pierre, M.D. that he had fallen off a truck and landed on his back approximately six weeks earlier while delivering a crate. Dr. Pierre remarked that x-rays revealed a "possible acute compression fracture." Claimant subsequently underwent physical therapy with Kaiser Permanente for his lower back symptoms.

9. On March 29, 2017 Kaiser physicians referred Claimant for an MRI of his lower back area. The MRI revealed a compression fracture at T12 and a superior and plate compression fracture at L2.

10. On April 3, 2017 the parties conducted the pre-hearing evidentiary deposition of Lon Noel, M.D. Claimant visited Dr. Noel's office on December 6, 2016 with lower back symptoms. Claimant reported that on November 28, 2016 he had fallen approximately five feet onto the ground after he tripped while unloading a crate from his work trailer. He specifically landed on the lower part of his back slightly above his tailbone. Dr. Noel remarked that Claimant's delayed reporting of the accident raised a

"red flag" as the whether the incident occurred. Claimant also completed his regular job duties from the date of the incident until he visited Dr. Noel for treatment. Nevertheless, Dr. Noel determined that, based on Claimant's history and physical examination, his lower back symptoms were probably caused by the November 28, 2016 fall.

11. Dr. Noel explained that Claimant also visited him for an evaluation on December 23, 2016. Claimant had continued to work his normal job duties prior to the visit. His symptoms had improved and he only required medical maintenance care. Dr. Noel acknowledged that Claimant had probably reached MMI by the time of the December 23, 2016 examination. However, Dr. Noel also recognized that by December 23, 2016 Claimant's physical findings warranted additional medical treatment. Claimant did not return to Dr. Noel for further medical care.

12. Claimant has demonstrated that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on November 28, 2016. Claimant credibly explained that on November 28, 2016 he was delivering a crate to a painting company known as Preferred Painting. Claimant explained that he used a pallet jack to move the crate to the back of his trailer. As he was pulling the crate backwards he tripped on a small step near the end of his trailer. Claimant fell approximately five feet off the trailer onto concrete and landed on his back. He suffered pain in his upper tailbone and lower back area. Mr. Olivas credibly corroborated Claimant's account of the accident. While Mr. Olivas was in the Preferred Painting parking lot, he noticed Claimant using a pallet jack to unload merchandise from a truck. Claimant tripped as he was walking backwards, fell to the ground and landed on his back. Mr. Olivas assisted Claimant after the incident.

13. Claimant's description of the accident in the medical records also supports his testimony that he suffered a compensable industrial injury on November 28, 2016. Claimant consistently maintained that on November 28, 2016 he had fallen approximately five feet onto the ground after he tripped while unloading a crate from his work trailer. He specifically landed on the lower part of his back slightly above his tailbone. In contrast to Claimant's consistent account, Dr. Noel expressed concerns about whether the November 28, 2016 incident actually occurred based on Claimant's delayed reporting and continued work activities after the incident. Nevertheless, Dr. Noel acknowledged that, based on Claimant's history and physical examination, his lower back symptoms were probably caused by the November 28, 2016 fall. Accordingly, Claimant's employment activities on November 28, 2016 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

14. Claimant has proven that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical treatment from Midtown Occupational Health Services. . On December 6, 2016 Claimant completed a First Report of Injury with Employer. He chose to receive medical treatment through Midtown Occupational Health Services. Claimant obtained medical treatment in the form of diagnostic procedures and physical therapy. Claimant's treatment was reasonable,

necessary and related to his November 28, 2016 industrial injury. Accordingly, Respondent is financially responsible for Claimant's authorized medical treatment through Midtown Occupational Health Services.

15. Claimant has failed to prove that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical treatment from Kaiser Permanente. On December 28, 2016 Respondent filed a Notice of Contest challenging Claimant's claim for Workers' Compensation benefits. Although Claimant had scheduled a number of physical therapy appointments they were cancelled by Midtown Occupational Health Services. Claimant subsequently obtained medical treatment for his lower back condition through personal medical provider Kaiser Permanente. He underwent physical therapy and an MRI for his lower back symptoms. The MRI revealed a compression fracture at T12 and a superior and plate compression fracture at L2.

16. The record creates a reasonable inference that Midtown Occupational Health Services cancelled Claimant's scheduled physical therapy visits because Respondent had filed a Notice of Contest challenging Claimant's claim for Workers' Compensation benefits. However, it is speculative to infer that Insurer had notice of whether Midtown Occupational Health Services refused to treat Claimant. Furthermore, the record is also devoid of evidence about whether Insurer "forthwith" designated a physician who was willing to treat Claimant. Therefore, Claimant's treatment from personal medical provider Kaiser Permanente was not authorized. Accordingly, Respondent is not financially responsible for Claimant's medical treatment for his November 28, 2016 industrial lower back injury through personal medical provider Kaiser Permanente.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on November 28, 2016. Claimant credibly explained that on November 28, 2016 he was delivering a crate to a painting company known as Preferred Painting. Claimant explained that he used a pallet jack to move the crate to the back of his trailer. As he was pulling the crate backwards he tripped on a small step

near the end of his trailer. Claimant fell approximately five feet off the trailer onto concrete and landed on his back. He suffered pain in his upper tailbone and lower back area. Mr. Olivas credibly corroborated Claimant's account of the accident. While Mr. Olivas was in the Preferred Painting parking lot, he noticed Claimant using a pallet jack to unload merchandise from a truck. Claimant tripped as he was walking backwards, fell to the ground and landed on his back. Mr. Olivas assisted Claimant after the incident.

8. As found, Claimant's description of the accident in the medical records also supports his testimony that he suffered a compensable industrial injury on November 28, 2016. Claimant consistently maintained that on November 28, 2016 he had fallen approximately five feet onto the ground after he tripped while unloading a crate from his work trailer. He specifically landed on the lower part of his back slightly above his tailbone. In contrast to Claimant's consistent account, Dr. Noel expressed concerns about whether the November 28, 2016 incident actually occurred based on Claimant's delayed reporting and continued work activities after the incident. Nevertheless, Dr. Noel acknowledged that, based on Claimant's history and physical examination, his lower back symptoms were probably caused by the November 28, 2016 fall. Accordingly, Claimant's employment activities on November 28, 2016 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

Medical Benefits

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

10. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

11. Section 8-43-404(5)(a)(I)(A), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, §8-43-404(5), C.R.S. implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. *See Ruybal v. University Health Sciences Center*, 768 P.2d 1259, 1260 (Colo. App. 1988). If the employer fails to timely tender the services of a physician, the right of selection passes to the claimant and the selected physician becomes an ATP. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAP, Sept. 3, 2008). Whether the ATP refused to treat the claimant for non-medical reasons, whether the insurer received notice of the refusal to treat and whether the insurer "forthwith" designated a physician who was willing to treat the claimant are questions of fact for resolution by the ALJ. *Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAP, Sept. 3, 2008); *see Ruybal*, 768 P.2d at 1260.

12. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical treatment from Midtown Occupational Health Services. . On December 6, 2016 Claimant completed a First Report of Injury with Employer. He chose to receive medical treatment through Midtown Occupational Health Services. Claimant obtained medical treatment in the form of diagnostic procedures and physical therapy. Claimant's treatment was reasonable, necessary and related to his November 28, 2016 industrial injury. Accordingly, Respondent is financially responsible for Claimant's authorized medical treatment through Midtown Occupational Health Services.

13. As found, Claimant has failed to prove by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical treatment from Kaiser Permanente. On December 28, 2016 Respondent filed a Notice of Contest challenging Claimant's claim for Workers' Compensation benefits. Although Claimant had scheduled a number of physical therapy appointments they were cancelled by Midtown Occupational Health Services. Claimant subsequently obtained medical treatment for his lower back condition through personal medical provider Kaiser Permanente. He underwent physical therapy and an MRI for his lower back symptoms. The MRI revealed a compression fracture at T12 and a superior and plate compression fracture at L2.

14. As found, the record creates a reasonable inference that Midtown Occupational Health Services cancelled Claimant's scheduled physical therapy visits because Respondent had filed a Notice of Contest challenging Claimant's claim for Workers' Compensation benefits. However, it is speculative to infer that Insurer had notice of whether Midtown Occupational Health Services refused to treat Claimant. Furthermore, the record is also devoid of evidence about whether Insurer "forthwith" designated a physician who was willing to treat Claimant. Therefore, Claimant's treatment from personal medical provider Kaiser Permanente was not authorized. Accordingly, Respondent is not financially responsible for Claimant's medical treatment for his November 28, 2016 industrial lower back injury through personal medical provider Kaiser Permanente.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable lower back injury during the course and scope of his employment with Employer on November 28, 2016.

2. Respondent is financially responsible for Claimant's authorized, reasonable and necessary medical treatment from Midtown Occupational Health Services.

3. Respondent is not financially responsible for Claimant's medical care for his November 28, 2016 industrial lower back injury through personal medical provider Kaiser Permanente.

4. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 7, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-017-418-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 9, 2017 and May 9, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 3/9/17, Courtroom 1, beginning at 1:30 PM and ending at 5:00 PM; and, 5/9/17, Courtroom 1, beginning at 8:30 AM, and ending at 11:00 AM).

Claimant's Exhibits through 15 were admitted into evidence, without objection. Respondents' Exhibits A through N were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief was filed, electronically, on May 26, 2017. Respondents' answer brief was filed, electronically, on June 5, 2017. No timely reply brief was filed. The matter was deemed submitted for decision on June 8, 2017.

ISSUES

The issues to be determined by this decision concern whether the Claimant suffered a compensable occupational disease of hypersensitivity pneumonitis (HP), with

a date of last injurious exposure of November 9, 2015. If compensable, the parties stipulated to several matters as found herein below.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated and the ALJ finds that the Claimant's average weekly wage (AWW) is $1,286.64, if the case is compensable.

2. The parties further stipulated and the ALJ finds, if the case is compensable, that the Claimant is entitled to temporary total disability (TTD) benefits from December 30, 2015, until terminated by law, subject to an offset for unemployment insurance (UI) benefits received.

3. The parties also stipulated and the ALJ finds, if compensable, that the authorized treating physicians (ATPs) in this case are the doctors at Platte Valley Medical Center, Platte Valley Internal Medicine, National Jewish Health, and Aviation and Occupational Medicine.

4. Additionally, the parties stipulated and the ALJ finds that there was a roof leak near the Claimant's work area, which was abated between September and October 7, 2015.

Hypersensitivity Pneumonitis

5. The Employer is a small Commerce City, Colorado, business that sells, rents, and repairs golf carts. The Claimant is a 58-year-old man who worked for the Employer as a golf cart mechanic from March 31, 2014, until November 7, 2015.

6. The Claimant worked as a mechanic for the Employer and had been working for approximately a year and a half when he suffered the onset of a respiratory condition which made it impossible for him to continue work.

7. On November 4, 2015, the Claimant became suddenly and acutely ill. On November 7, 2015, he stopped working for the Employer in anticipation of non-industrial shoulder surgery. The Claimant, however, was not cleared for surgery because he was exhibiting hemoptysis (bloody cough), and was being treated for bronchopneumonia. When his respiratory symptoms did not resolve, he was referred to National Jewish

Health. He last worked for the Employer on November 9, 2015, however, he claims work-related temporary disability from December 30, 2015, as stipulated and found herein above, because that was the date that National Jewish restricted him from returning to work.

8. The Claimant has a history of respiratory problems. He has been treated for chronic sinusitis, hyperlipidemia, and bronchitis (Respondents' Exhibit E, bates stamp 8, 10). He also has a history of having an acute upper respiratory infection and cough, for which he was successfully treated with 50 mg dosage of prednisone (Respondents' Exhibit G, bates stamp 63 – 67). The present claim is based on an alleged work-related aggravation/acceleration of his pre-existing predisposition to respiratory problems.

9. The medical records establish that the Claimant had seen his family doctor, James Meyer, M.D., on December 26, 2015, who stated that the Claimant had symptoms of increased mucous, fever and cough (Respondents' Exhibit E, bates stamp 24). The Claimant was referred to National Jewish Hospital and he was seen there for the first time by Anthony Gerber, M.D., on December 18, 2015. Dr. Gerber initiated a course of prednisone.

10. The testimony of lay witnesses, as well as the medical records establish that the Claimant suffered an acute onset of apparent sinusitis and bronchitis in November 2015. This had been preceded by a history of coughing. Based on the totality of the evidence, the ALJ infers and finds that the Claimant's hypersensitivity pneumonitis (HP) had been latent for a period of time, contrary to the opinion of the Respondents' Independent Medical Examiner (IME), Jeffrey Schwartz, M.D., who stated the opinion that HP would require a sudden and immediate onset that was not demonstrated by the Claimant. Dr. Schwartz's opinion is contrary to the observations of the Court of Appeals in *Union Carbide Corp. v. Indus. Claim Appeals Office,* 128 P.3d 319 (Colo. App. 2005), the applicability of which is discussed herein below.

11. The Claimant was treated at Platte Valley Medical Center on November 11, 2015, with a history of hemoptysis (blood stained sputum) which had been intermittent in the past, but had become frequent. *Id*., bates stamp 27. The Claimant was sent for a CT scan which showed "ground-glass appearing soft nodular areas in both the left upper and right upper lobe." *Id.* Up to that date, the Claimant was on antibiotics for bronchitis. Dr. Meyer noted that the Claimant had potential exposures which included welding and woodwork. *Id*., bates stamp 24.

12. When Dr. Gerber saw the Claimant on December 18, 2015, he was of the opinion that the Claimant presented with classic hypersensitivity pneumonitis (HP). According to Dr. Gerber, this was supported by the traditional features of the disease, including hypoxemia, shortness of breath, and head cheese appearance on his CAT scan with mosaic profusion and centrilobulr nodules.

13. Dr. Gerber's opinion was:

ASSESSMENT PLAN:

> However, I think that the weight of the evidence is still strongly suggestive of hypersensitivity pneumonitis. In particular given the myriad of potential exposures that are possible at the patient's workplace. The patient is actually rather ill. The oxygen saturations are low, but do recover with oxygen, so I do not think he needs to be acutely admitted. I do think he needs therapy with immunosuppression and complete avoidance of potential exposure to whatever is precipitating this disorder. Given the workplace exposures, that is the chief culprit and I have advised the patient to stay home from work and have written a note outlining that plan, which he can provide to his employer.

(Claimant's Exhibit 9, bates stamp 129)

14. On December 24, 2015, Evans Fernandez, M.D., at National Jewish noted that the Claimant had undergone a high resolution CT pattern highly suggestive of HP (Claimant's Exhibit 9).

15. Dr. Fernandez took a history from the Claimant which described the Claimant's home and work environments. At work, the Claimant is exposed to painting and cleaning solvents, as well as cutting, welding and grinding. Also, the Claimant was exposed to dirt and mud on golf carts. Dr. Fernandez noted that the Claimant had no mold, mildew, or water damage exposure at home. Dr. Fernandez was of the opinion that based on the Claimant's CT scan and his occupational exposures the Claimant had "*subacute HP*" (Respondents' Exhibit I, bates stamp 121).

16. Dr. Fernandez agreed that the Claimant should continue his prednisone regime. Dr. Fernandez stated that HP commonly stems from an exposure which is associated with multiple different antigens as opposed to isolated ones. *Id.*, bates stamp 114.

17. Ultimately, the Claimant was referred to Annyce Mayer, M.D., a pulmonologist at National Jewish, who saw the Claimant on January 7, 2016, for an occupational/environmental consultation. *Id.,* bates stamp 98. She became the Claimant's authorized treating physician (ATP).

18. Dr. Mayer noted that the Claimant described usual exposure to debris on covered golf carts arriving from a variety of locations. This included stock shows, carried hay and dirt. These were variably wet before they were driven into his work place. Thus, according to Dr. Mayer, there were likely organic antigens from this,

although difficult to conceptually quantify. *Id.,* bates stamp 104. ATP Dr. Mayer was of the opinion that the Claimant should not return to work and scheduled a follow-up appointment for him at National Jewish.

19. During the course of treatment at National Jewish from December 8, 2015 through early 2016, the Claimant underwent several CT examinations (Claimant's Exhibit 7).

. 20. In her report, ATP Dr. Mayer described the nature of the Claimant's work surroundings (Claimant's Exhibit 10, bates stamp 154). She was of the opinion that the Claimant's job included exposure to various antigens. Her assessment was:

> ASSESSMENT:
>
> 1. Hypersensitivity pneumonitis, work-related in my opinion on a medical probably basis due to organic antigen in the workplace, with consistent symptoms, physiologic findings, and radiographic imaging, confirmed in my opinion by dramatic improvement and clinical resolution following course of immunosuppressive therapy and removal from exposure. There was organic antigen exposure, not only from the grass and debris covered golf carts that became wet when driving in through the wash area and water on the floors, but in addition to mold exposure due to leaking roof and onset of symptoms after roof repair that caused water to come down into the dry wall and ceiling beams with musty smell that lasted for weeks and the mold was never remediated.
>
> 2. Rhinitis, with ongoing symptoms induced by chemical smells.
>
> 3. Hypercholesterolemia.
>
> 4. Prednisone0induced weight gain.

Id., bates stamp 155.

21. In her report of August 29, 2016, ATP Dr. Mayer established that the Claimant was at maximum medical improvement (MMI), with an impairment rating. She recommended that the Claimant avoid future exposure to reactive chemicals known to cause HP. *Id.*, bates stamp 156.

The Claimant's Testimony

22. The Claimant testified that he had been given a release to return to work with restrictions by ATP Dr. Mayer which he presented to the Employer's witness, Misty. Kemmit, on February 11, 2016 (Claimant's Exhibit 15). Kemmit denied receiving this.

The Claimant's testimony, however, was credible, and the ALJ finds that he provided this release to Kemmit, asking her to place this in his Employee file. He also testified that he was told that he had been replaced and therefore was no longer eligible to return to work. The ALJ infers and finds that Kermit was mistaken in her denial and, therefore, her denial is lacking in credibility.

23. The parties agreed that there had been flooding in May 2015 at the Employer's shop. The Employer's witness, Misty Kemmit, testified that the leakage did not affect the shop/work area where the Claimant works. Kermit's office is not in the shop. The Claimant credibly testified that the leaking from the roof also occurred in the shop/work area and had also occurred several times while the roof was being repaired. The ALJ finds the Claimant more credible than Kemmit in this regard.

24. Kemmit testified that the Employer's roof was repaired in September and October 2015, and that the roof repair was complete on October 7, 2015. When Industrial Hygienist Gifford inspected the shop, the roof had been repaired for several months. Kemmit explained that she was never informed that there was mold that required remediation, and no mold remediation was performed at the Employer's shop. Kemmit stated that in November 2015, she was ill, and that other employees showed symptoms of being sick. She did not further explain how she and others were ill in November 2015. The ALJ infers and finds that her testimony in this regard fits into Dr. Schwartz's opinion concerning alleged "community-based pneumonia." The ALJ further finds that her testimony is Insufficient to support Dr. Schwartz's speculative opinion. Indeed, the totality of Kermit's testimony categorically contradicts the Claimant's testimony and supports every aspect of the Respondents' theory, without missing a beat. For this reason, the ALJ finds the Claimant's testimony more credible than Kermit's testimony.

Respondents' Independent Medical Examiner (IME), Jeffrey Schwartz, M.D.

25. The Respondents introduced the testimony of pulmonary expert Dr. Schwartz. Dr. Schwartz disagreed with both the diagnosis made of HP by National Jewish and its treatment there. He was of the opinion that there had not been adequate and competent evaluation to allow the rendering of the diagnosis of HP. His opinion is contrary to, and conflicts, with the opinions of three physicians at National Jewish.

26. Dr. Schwartz disagreed with the doctors at National Jewish concerning their diagnostic procedure. Dr. Schwartz initially was of the opinion that the Claimant should have undergone a broncoalviolar lavage (BAL) to establish the presence of antigens. Contrary to IME Dr. Schwartz's opinion, ATP Dr. Mayer credibly testified that the BAL was not appropriate because the Claimant had been started on prednisone initially by Dr. Gerber in December 2015. Once a Prednisone regime has commenced a BAL will not provide diagnostic clarity. Dr. Schwartz eventually agreed with this.

27. Dr. Schwartz claimed that none of the doctors at National Jewish appear to have reviewed the Claimant's medical records. In an entirely inappropriate analogy, Dr. Schwartz criticized the doctors at National Jewish by describing their results as akin

to Denmark's Hans Christian Anderson's *The Emperor's New Clothes*. Such a figure of speech raises the question concerning which doctors have the Emperor's new clothes—Dr. Schwartz or the doctors at national Jewish (in fact, the Emperor had no clothes but wanted his subjects to believe that he did). Dr. Schwartz's comment is surprising in light of the past medical history found in the records contained in the Respondents' own exhibits (*See* Respondents' Exhibit I, bates stamp 89 to 166, specifically 189 to 192, 118 to 122, 124 to 132, 151, 152 and 156 to 160).

28. Dr. Schwartz was also critical of the fact that a diagnosis was made without returning the Claimant to the workplace (presumably as an experiment to see if the Claimant would get sick again or not). Such an experiment would be in violation of the Claimant's ATP'S restrictions. The evidence is that the Claimant was not permitted to return to the workplace at the end of December 2015, and could not have done so because he was terminated by the Employer. Thereafter, Dr. Schwartz also asserted that the doctors at National Jewish were not "appropriately circumspect in their failure to acknowledge that the Claimant has organic exposures which are common to millions of American workers" (Respondents' Exhibit N, bates stamp 217).

29. Although Dr. Schwartz recognized that the Claimant is presently without a respiratory disease condition, he rendered no opinion on whether treatment rendered by National Jewish created this status. He asserts that the Claimant's etiology arose from an infectious source, specifically a community acquired pneumonia. Dr. Schwartz did not specify the source of this alleged "community-based peumonitis," such as the streets of Denver, the workplace, etc. e implied that co-workers may have been sick as Kemmit indicated. The Claimant's medical providers at National Jewish disagree with Dr. Schwartz. Further, when Dr. Schwartz speculated about how this community acquired infection occurred, he speculated it was "**possibly (emphasis added)** related to a "sick family member" that accompanied him at doctor appointments. There was no persuasive evidence to this effect. *Id*.

30. Dr. Schwartz also criticized ATP Dr. Mayer for not ordering a "standard evaluation of his workplace," (Respondents' Exhibit N, bates stamp 218). The Claimant , however, did not have access to the workplace, the Employer was represented by counsel and ATP Dr. Mayer had no authority to gain access to the premises. Despite this fact, Dr. Schwartz speculated, without an evidentiary basis, what ATP Dr. Mayer would have found at the workplace had she performed an evaluation.

31. The ALJ infers and finds that a great part of IME Dr. Schwartz's testimony can be characterized as an attempt to thoroughly discredit National Jewish Hospital and the three doctors there who tested and treated the Claimant. Dr. Schwartz's opinion concerning alleged "community-based pneumonitis" is speculation without any foundation. Indeed, Dr. Schwartz's characterization of National Jewish and the three doctors who treated the Claimant is an insult to National Jewish, without any firm basis in logic or medicine. The ALJ finds that Dr. Schwartz's ultimate opinions are lacking in credibility.

32. According to Dr. Schwartz, the Claimant did not meet the required symptoms of HP, and instead contracted community acquired pneumonia (CAP). The Respondent relied on the testimony of Jeffrey Schwartz, M.D., to attempt to refute the testimony of Dr. Mayer and Dr. Fernandez. Dr. Schwartz concluded that HP would require a sudden and immediate onset that was not demonstrated by the Claimant, and the doctors at National Jewish had erred by proceeding to treatment rather than completing further diagnostic steps. Dr. Schwartz stated the opinion that the CAP was non-occupational, and could have been contracted by family members or others in the community. Additionally, Dr. Schwartz stated that the Claimant's worsening condition after leaving work is not consistent with HP, but rather CAP. The ALJ finds Dr. Schwatrz's opinion in this regard to be speculative and lacking in credibility.

33. There is no persuasive evidence of anyone else in the Claimant's family being sick or having CAP. The Respondent offers some evidence that other members of the Employer's organization were out sick at the same time the Claimant left work, but this evidence is speculative and there is no evidence of these employees seeking treatment or any medical records establishing illness at that time. The Claimant's failure to show improvement once leaving work is not dispositive of HP. The Court of Appeals observed in *Union Carbide Corp. v. Indus. Claim Appeals office,* 128 P.3d 319 (Colo. App. 2005) that occupational diseases can produce symptoms remote from the last exposure. Thus, the Respondents have failed to establish the existence of a non-industrial cause of the Claimant's disease, in the face of Claimant's prima facie showing.

Joseph D. Gifford, Industrial Hygienist

34. Gifford testified as an environmental hygiene expert. His opinion relied on his site visit which did not evidence antigen presence. He also relied on the information he received from the Employer that rain water leakage damage had not affected the Claimant's work area. He also testified that when he visited the Employer's site **one year** after the Claimant's diagnosis of HP, the golf carts coming in were clean, with the exception of a slight covering of dust, after they had been driven from a graveled area outside of the shop. He did not see the golf carts with grass, dirt, hay and other antigens as described by the Claimant to ATP Dr. Mayer. The ALJ finds that the opinion of Industrial Hygienist Gifford, formed on the basis of a worksite evaluation one year after the Claimant's last injurious exposure to antigens at the worksite, not relevant to the date of last injurious exposure because the circumstances were different one year earlier, *e.g.,* there was a leaky roof which had been fixed months before Gifford's inspection of the worksite and he did not observe the same traffic and circumstances involving golf carts that existed one year earlier. There is no persuasive evidence that conditions at the Employer's workplace remained unchanged for a year. It would be a fallacious assumption that conditions remained unchanged. Consequently, the ALJ discounts Gifford's opinions

Occupational Disease of Hypersensitivity Peneumonitis

35. The Claimant sustained the occupational disease of hypersensitivity pneumonitis, which amounts to an aggravation/acceleration of his pre-existing, underlying respiratory problems and prevent him from returning to his former workplace. The ALJ finds that Dr. Schwartz's theory of alleged "community-based pneumonia" is speculative and any support for it by Kermit's testimony that she and others were sick in November 2015 is a weak foundation without any linking nexus to Dr. Schwartz's theory. The ALJ further finds that the Claimant's hypersensitive pneumonitis directly resulted from his employment and the conditions under which his work was performed, and can be seen to have followed as a natural incident of his work and as a result of the exposure occasioned by the nature of his employment, and can be fairly traced to his employment as a proximate cause and which did not come from a hazard to which he would have been equally exposed outside of his employment. There was no persuasive evidence of an exposure anywhere other than the Claimant's workplace. Indeed, the Claimant had **no** exposure to mold, mildew, or water damage at his home. Therefore, there was no "peculiar risk" that the Claimant faced hazards outside of his employment with the Employer that equaled his exposure at work.

Last Injurious Exposure

36. The Claimant's date of last injurious exposure was November 9, 2015, during fiscal year (FY) 2015/2016

Average Weekly Wage (AWW)

37. As stipulated and found, the Claimant's AWW is $1,286.64, which yields a TTD benefit rate of $857.75 per week, or $122.54 per day, which is less than the statutory cap for FY 2015/2016, the period during which the Claimant's last injurious exposure occurred..

Temporary Total Disability

38. The Claimant's ATP declared him to be at maximum medical improvement as of August 29, 2016. As stipulated and found, the Claimant was temporarily and totally disabled from December 30, 2015 through August 28, 2016, both dates inclusive, a total of 243 days..Aggregate past due TTD benefits for this period equal $29, 777.22, however, 100% of the UI benefits from March 26, 2016 through August 28, 2016, both dates inclusive, a total of 156 days, are subject to offset, in the aggregate amount of $12, 301.71, for net, past due TTD benefits of $17, 475.51.

Unemployment Insurance (UI) Benefits

39. The Claimant filed for, and received, UI benefits in the amount of $552.00 a week, beginning March 26, 2016 through September 11, 2016, both dates inclusive, a total of 169 days (Claimant's Exhibit 13)., as referenced herein above in Finding No. 36.

Ultimate Findings

40. The ALJ finds the testimony of ATP Dr. Mayer, as well as the reports from the doctors at National Jewish Hospital, to be credible and rejects the opinion of Dr. Schwartz that the Claimant does not suffer HP as lacking in credibility. Also, as found, the Claimant's testimony was persuasive and credible. Also, it was more credible than the testimony of Misty Kermit.

41. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of the physicians at National Jewish and to reject the IME opinion of Dr. Schwartz.

42. The Claimant has proven, by a preponderance of the evidence that he sustained the occupational disease of hypersensitivity pneumonitis, which amounted to an aggravation/acceleration of his underlying predisposition to respiratory problems, and his last injurious exposure was on his last day of work, November 9, 2015.

43. As stipulated and found, the authorized treating physicians (ATPs) in this case are the doctors at Platte Valley Medical Center, Platte Valley Internal Medicine, National Jewish Health, and Aviation and Occupational Medicine. Further, in light of the determination that the Claimant has sustained a compensable occupational disease, these authorized medical providers care and treatment was causally related to the Claimant's compensable hypersensitivity pneumonitis and reasonably necessary to cure and relieve the effects thereof.

44. As stipulated and found, the Claimant's AWW is $1,286.64, which yields a TTD benefit rate of $857.75 per week, or $122.54 per day, which is less than the statutory cap for FY 2015/2016, the period during which the Claimant's last injurious exposure occurred..

45. As further stipulated and found, the Claimant was temporarily and totally disabled from December 30, 2015 through August 28, 2016, both dates inclusive, a total of 243 days.. Aggregate past due TTD benefits for this period equal $29, 777.22, however, 100% of the UI benefits from March 26, 2016 through August 28, 2016, both dates inclusive, a total of 156 days, in the aggregate amount of $12, 301.71, are subject to offset, for net, past due TTD benefits of $17, 475.51.

46. As found, the Claimant received UI benefits in the amount of $552.00 a week, beginning March 26, 2016 through August 28, 2016, both dates inclusive, a total of 156 days, in the aggregate amount of $12, 301.71.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the testimony of ATP Dr. Mayer, as well as the reports from the doctors at National Jewish Hospital, was more credible than the opinion of Dr. Schwartz-- that the Claimant does not suffer HP. Also, as found, the Claimant's testimony was persuasive and credible. It was more credible than the testimony of Misty Kermit.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005).

Also see Martinez v. Indus. Claim Appeals Office, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of the physicians at National Jewish and to reject the IME opinion of Dr. Schwartz.

Occupational Disease

c. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). As found, Claimant has proven an occupational disease with a date of last injurious exposure of November 9, 2015. As found herein above, Dr. Schwartz stated the opinion that HP would require a sudden and immediate onset that was not demonstrated by the Claimant. The Court of Appeals in *Union Carbide Corp. v. Indus. Claim Appeals Office,* 128 P.3d 319 (Colo. App. 2005), stated that an occupational disease **typically** can involve long latency periods, and can produce symptoms remote from the last hazardous exposure. In *Union Carbide,* the claimant died of silicosis or pneumoconiosis caused by exposure to radioactive materials. Nonetheless, the observation concerning long latency periods is still *aprpos* to the facts in the present case insofar as it tends to refute Dr. Schwartz's opinion concerning "sudden onset."

Average Weekly Wage (AWW)

d. . An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. As stipulated and found, the Claimant's AWW is $1,286.64, which yields a TTD benefit rate of $857.75 per week, or $122.54 per day, which is less than the statutory cap for FY 2015/2016, the period during which the Claimant's last injurious exposure occurred.

Temporary Total Disability (TTD)

e. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals Office (ICAO), December 18, 2000]. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring in modified employment or modified employment is no longer made available, and there is no actual return to work), TPD and TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As stipulated and found, the Claimant was temporarily and totally disabled from December 30, 2015 through August 28, 2016, both dates inclusive, a total of 243 days.. Aggregate past due TTD benefits for this period equal $29, 777.22, however, 100% of the UI benefits from March 26, 2016 through August 28, 2016, both dates inclusive, a total of 156 days, in the aggregate amount of $12, 301.71, are subject to offset, for net, past due TTD benefits of $17, 475.51.

Unemployment Insurance (UI) Offset

f. Section 8-42-103 (1)(f), C.R.S., provides for a 100% offset for UI benefits received. As found, the Claimant received UI benefits in the amount of $552.00 a week, beginning March 26, 2016 through August 28, 2016, both dates inclusive, a total of 156 days, in the aggregate amount of $12, 301.71.

Burden of Proof

g. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products,*

Inc., W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to the compensability of the occupational disease of hypersensitivity pneumonitis; medical benefits; AWW; and TTD. The respondents have sustained their burden with respect to the UI offset.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized medical care and treatment for the Claimant's compensable occupational disease of hypersensitivity pneumonitis, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits of $857.75 per week, or $122.54 per day, less the 100% Unemployment Insurance benefit Offset, from December 30, 2015 through August 28, 2016, both dates inclusive, a total of 243 days. Aggregate past due TTD benefits for this period equal $29, 777.22, however, 100% of the UI benefits from March 26, 2016 through August 28, 2016, both dates inclusive, a total of 156 days, in the aggregate amount of $12, 301.71, are subject to offset, for net, past due TTD benefits of $17, 475.51, which are payable retroactively and forthwith.

C. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

D. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUE

I. Has Respondent, by clear and convincing evidence, overcome the DIME opinion of Dr. Jenks on the issue of MMI and relatedness of Claimant's lower back condition to the admitted work injury of August 21, 2015.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Employer operates a hog farm in southern Colorado. Claimant worked for Employer for approximately seven years, performing various tasks, including cleaning the facilities. Claimant suffered a work-related injury to his right knee on August 21, 2015 when he fell while "spraying the "barn storm" in a crate used to house one the hogs. Claimant stepped with his left knee over into the crate. His left leg slipped and he came down hard on his right knee against the top edge of the crate." (Respondents' Exhibit (R. Ex.) C, p. 008)

2. Claimant first sought treatment for his work injury on August 24, 2015 with Dr. Terrence Lakin, D.O. and Terry Schwarz, PA-C, at Southern Colorado Clinic. Claimant was diagnosed with a right knee contusion, or right knee sprain. (R. Ex. C, p. 008)

3. Claimant returned to Southern Colorado Clinic on August 26, 2015. Claimant's pain complaints focused on the right knee. No mention of low back pain was mentioned by Claimant. Examination of Claimant's spine was noted to be "nontender, moves about without difficulty." (R. Ex. C, pp. 0011-0012)

4. Claimant again returned to Southern Colorado Clinic on September 10, 2015; September 28, 2015; October 5, 2015; October 6, 2015; October 20, 2015; and October 27, 2015; for treatment of his right knee injury. On none of these dates do the records show that Claimant complained to any medical provider of back pain. (R. Ex. C) During the October 27, 2015 examination at Southern Colorado Clinic, Claimant's spine was again examined. The spine examination demonstrated "no tenderness lumbar." (R. Ex. C, p. 0039)

5. Claimant had also been attending physical therapy, all focused on his right knee injury. Claimant met with Kent Madsen at Physical Therapy Plus, Inc. on September 22, 2015; September 29, 2015; October 6, 2015; October 8, 2015; October 13, 2015; October 15, 2015; October 22, 2015; October 26, 2015; and

October 29, 2015. Claimant made no low back complaints during any of these 9 physical therapy sessions. (R. Ex. F)

6. On October 13, 2015, Dr. Davis conducted an initial orthopedic evaluation. Dr. Davis examined Claimant's back and noted Claimant "*denies* back pain." (R. Ex. E, p. 0088) Dr. Davis further noted the state of Claimant's low back and stated in his notes, "Bilateral hips with symmetrical nontender range of motion. Lumbosacral spine is nontender with negative straight leg raise bilateral lower extremities." (R. Ex. E, bates 89)

7. Dr. Davis also noted on this date that Claimant "understands and speaks partial English. Translator used for assistance today" (R. Ex. E, p. 089)

8. Claimant again denied back pain during an October 30, 2015 examination with Dr. Davis. The right knee was still the sole complaint. (R. Ex. E, p. 0093)

9. After nearly three months of treatment for his August 21, 2015 work injury and 20 meetings with treating providers with no mention of low back pain (or outright denial of back pain), Claimant first complained of low back pain at a physical therapy appointment. On Claimant's November 10, 2015, Claimant's physical therapist, Kent Madsen, notes "Chief Complaint: right sided low back pain greater than right knee pain." (R. Ex. F, p. 059)

10. At Claimant's November 16, 2015 visit to Dr. Terrence Lakin at Southern Colorado Clinic, he complained of "back pain." (R. Ex. C, p. 048) Claimant was diagnosed with possible sacroiliac joint dysfunction. (Id)

11. Despite pain complaints at his November 16, 2015 appointment with Dr. Lakin, Claimant did not indicate his low back hurt on the pain diagram he completed. (R. Ex. C, p. 50)

12. In a note from a December 22, 2015 note from Southern Colorado Clinic, Claimant's wallet was discussed. It was described as a "large wallet at least ½" thick in right back pocket. Ttp in right SI and paraspinal lumbars." (R. Ex. C, p.0058) Also on December 22, 2015, Dr. Lakin advised Claimant of his opinions as to whether his low back issues are related to his August 21, 2015. Dr. Lakin stated:

> "Any further evaluation of his lumbar for his present claim would not be reasonable. They may certain pursue care with her [sic] primary care provider and/or continue on with physical therapy or chiropractic care outside of the Worker's Comp. system. Or they have methods of pursuing appeal's for lumbar care, but my opinion at this time because it does it does not reach my level of causality to support that appeal. " (R. Ex C, p.0059)

During the December 22, 2015 visit, Dr. Lakin also advised Claimant to eliminate having a large wallet in his back pocket. (R. Ex. C, p. 59)

13. A February 22, 2016 note from Southern Colorado Clinic indicates Claimant's low back was still painful, but Claimant "understands that it's not covered by WC." (R. Ex. C, p. 0 67)

14. Dr. Lakin placed Claimant at maximum medical improvement for his August 21, 2015 work injury on February 26, 2016. Dr. Lakin assigned no permanent impairment. (R. Ex. C, p. 0078)

15. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Lakin's report on March 1, 2016. (R. Ex. A) This FAL admitted to no permanent impairment.

16. Claimant timely objected to Respondents' Final Admission of Liability and Applied for a Division IME. Dr. Jeffrey Jenks was named as the physician to conduct the examination.

17. Claimant testified that, in the interim, he was able to perform his duties with Employer until July, 2016, at which time his back pain would not allow him to continue working.

18. Dr. Jenks conducted the Division IME on September 20, 2016. (R. Ex. I) In his two-page report, Dr. Jenks found Claimant was not at maximum medical improvement for his lower back and required further treatment for an L5-S1 disc extrusion, which had been noted in an MRI. He also found Claimant is at maximum medical improvement for his knee condition and found Claimant suffered no permanent impairment for the knee injury.

19. Dr. Jenks' DIME report does not outline Claimant's medical history, other than to note "negative otherwise".

20. Dr. Jenks' DIME report does not include any oral history from Claimant himself detailing his lower back complaints.

21. Dr. Jenks' DIME report makes no independent findings as to why *he* believes the medical history supports a finding that Claimant's low back issues are causally related to his August 21, 2015 work injury.

22. Dr. Jenks' license to practice medicine in Colorado was summarily suspended on January 12, 2017. (R. Ex. B) The Board of Medical Examiners stated, "The Panel has objective and reasonable grounds to believe and finds that Respondent (Dr. Jenks) deliberately and willfully violated the Medical Practice Act and/or the public health, safety, or welfare imperatively requires emergency action." (R. Ex. B) It was further noted that "Respondent [Dr. Jenks] has a physical or mental illness that renders Respondent unsafe to practice in the absence of treatment and monitoring, and that Respondent is noncompliant with treatment recommendations and monitoring" (Id). The nature and timing of this suspension is confirmed with Claimant's own Exhibit 5.

23. No further information on this suspension, or the particular reasons there for, exists in the record herein. One might reasonably infer (and the ALJ does so infer) that whatever issues Dr. Jenks was experiencing did not occur overnight. The possibility cannot be entirely discounted that Dr. Jenks personal issues might have overlapped with the time period encompassing his DIME examination.

24. After Dr. Jenks issued his report finding Claimant was not at maximum medical improvement, Respondents filed an Application for Hearing to overcome his opinions.

25. At the hearing on April 27, 2017, Claimant testified on his own behalf through an interpreter. Claimant testified that when he first went to Southern Colorado Clinic, he went with a secretary from the employer. Claimant testified he did complete a pain diagram on the date of injury, but the secretary told him to not indicate his back was hurting. Claimant also testified he told Mr. Schwartz, the physician assistant who examined him, that his low back hurt and asked to circle the low back on his pain diagram. Claimant testified Mr. Schwartz also told him he could not circle the low back on his pain diagram.

26. Claimant testified that at numerous subsequent visits to Southern Colorado Clinic, he continued to complain of low back pain, but was rebuffed by medical professionals in his efforts to be allowed to document it via pain diagrams, or be examined for it.

27. Claimant also testified that he complained of low back pain to Dr. Davis. Dr. Davis' report dated 10-13-15 indicates that Claimant "denies back pain" (R. Ex E, p. 88)

28. At the request of Claimant, Dr. Castrejon performed an IME, and issued a report finding Claimant’s low back condition to be related to his August 2015 work injury. This IME was performed prior to the DIME of Dr. Jenks. (C. Ex. 4)

29. Dr. Castrejon’s report does not include an analysis of the first two months of treatment for this work injury. Dr. Castrejon indicated he did not review any medical records prior to October 2015. (*Deposition Transcript of Dr. Miguel Castrejon*.) The reasons for this are unclear from the record.

30. Dr. Castrejon’s report indicated he believes Claimant’s mechanism of injury is consistent with the pathology indicated on the May 2016 MRI. Dr. Castrejon also testified he has not reviewed any MRIs prior to August 2015, nor is he aware of Claimant's medical history prior to the injury.

31. Respondents retained Dr. Eric Ridings, an expert in physical medicine and rehabilitation, to perform a Respondent's Independent Medical Examination (RIME).

32. After examining Claimant and the relevant medical records, Dr. Ridings issued a report, which found:

> "the Division examiner was clearly in error in determining that the patient was not at MMI because of a need to treat his lumbar spine complaints….the patient did not report any injury to his low back for the first two months of his claim…..in his very brief Division IME report, Dr. Jenks provided no reasoning to overrule the opinion of the treating physician on this point. The entirety of [Dr. Jenks'] lumbosacral examination beyond noting a normal neurologic exam was noting a normal neurologic exam was that the patient told him that he had pain on palpation and with range of motion. Given that I find Mr. Hernandez to have minimal credibility, this is entirely insufficient to establish an intellectual basis to include the lumbar spine under this claim. No objective abnormalities of the lumbar spine or lower extremities were documented." (R. Ex. J, p. 0128)

33. Dr. Ridings' report noted Claimant demonstrated five out of five Waddell's signs on examination. At hearing, Dr. Ridings explained "if one had three out of five Waddell's signs, as they've come to be called, or, obviously, more than three, there is a – anticipated that there is some non-physiologic overlay or contribution to the severity of the patient's low back pain complaints."

34. On examination, Dr. Ridings noted Claimant's radiculopathy complaints and his difficulty determining the source of the complaints based on his analysis of Claimant's records. At hearing, Dr. Ridings elaborated on his confusion regarding Claimant's complaints. "We know that additionally because of the lumbar MRI scan, which while they do show a disc herniation at L5-S1 and disc protrusion at L4-5, neither of those were in contact with the nerve root. Also, the patient had a lumbar epidural steroid injection, which didn't help him. So if there were some swelling that maybe might be less well visualized on the MRI that nevertheless was compressing nerve roots, you would expect that to have been diminished temporarily by the epidural, and that didn't happen. There was no response."

35. Dr. Ridings testified at hearing about how important a review of contemporaneous medical records is to formulating a causation opinion. "In my opinion it is quite important. The early medical records are created at a time close to – typically, close to the injury in question, when the – the patient would have the best recollection and be able to give the most thorough history, I would think, or the most accurate history of what had happened to him or her." An analysis of the medical records early in Claimant's treatment was not conducted by Dr. Castrejon while formulating his opinions regarding the low back.

36. Dr. Riding's report specifically addressed Claimant's statement that he complained of low back pain to his treating physicians since August 2015, yet

failed to document his complaints and refused to allow him to indicate low back pain on his pain diagrams. “Well, I mean, I – I certainly have never done that. I don’t know why an occupational medicine clinic would do that anyways, because it's not in their self-interest. The more body parts you have to treat – and you’re getting fee for service in workers’ compensation – the more money you would stand to make in future visits and procedures…..One would hope that anyone who entered the medical field as a physician would have, as his or her primary goal, the treatment of patients who present to you in distress in one way or another.” Dr. Ridings also stated, “A provider wouldn’t say we can’t write down that this part of your body was injured when you said it was injured, you know, three days ago. I – I don’t – that doesn’t make any sense whatsoever.”

37. With regard to Claimant’s allegation that treating providers forced him to throw out a pain diagram indicating he suffered from low back pain, Dr. Ridings stated he had never heard of an instance where this occurred and stated, “No, and that would not be legal. That would be destruction of a medical record, and you’re not allowed to do that.”

38. Claimant’s assertion that the treating providers at Southern Colorado Clinic, Dr. Davis, and his physical therapist all ignored his low back pain complaints for the two months is otherwise unsubstantiated in the medical records and entirely contrary to common medical practices. The ALJ does not find Claimant's assertion of these events to be credible.

39. On cross examination, Claimant ultimately testified that he made low back complaints to each of his four treating providers at each visit during the two months following injury. These alleged complaints for over 20 visits are documented nowhere in the contemporaneous medical records.

40. The contemporaneous medical records admitted into evidence reflect a more likely series of events, to wit: Claimant did not complain of low back pain, nor did he have low back pain prior to November 2015. Dr. Ridings agreed at hearing and stated, “For multiple reasons, as outlined in my discussion section and in bracketed comments throughout the report, I thought it was more likely that the medical records were accurate. And we’ve gone over some of those discrepancies – and there are a few more that we did not go over – that caused me to be of the opinion that [Claimant] was not a credible medical historian.”

41. This ALJ finds the opinions of Claimant’s treating provider, the medical records in evidence, and Dr. Ridings’ opinions to be more persuasive-by clear and convincing evidence-than the opinions of Drs. Castrejon and Jenks on the issue of relatedness of any lower back injuries to Claimant's work injury.

42. This ALJ finds Dr. Jenks’ report and findings regarding MMI and the relatedness of Claimant’s low back condition highly probable to be in error. Claimant is at maximum medical improvement for the only compensable body part in this claim, to wit: the right knee condition, with no permanent impairment.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME Opinion of Dr. Jenks Regarding Relatedness and MMI

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and*

Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

> A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony, if provided. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

G. There are several serious problems with the underlying manner in which Dr. Jenks formed his opinions on the relation of Claimant's back complaints to the admitted injury:

> 1. His review of Claimant's medical history was cursory, at best. Instead of reading the MRI report from 5-7-16, Dr. Jenks simply relies upon the IME conclusions of Dr. Castrejon in interpreting the results. As was noted by Dr. Ridings (but not by Dr. Castrejon or Jenks), "no nerve root sheath displacement was noted" by the radiologist. Thus there was no objective evidence for radiculopathy at the time of the MRI report, nor is there evidence of same at this time.
>
> 2. Without further analysis, Dr. Jenks simply states that Claimant's lumbar complaints beginning in November, 2015, were "attributed to him doing more bending at the waist while working due to his ongoing right knee pain." The

report is entirely unclear who made this attribution, but it is not due to Dr. Jenks independent analysis. *There is no analysis.* As again noted by Dr. Ridings, the right knee sprain originally suffered by Claimant had largely healed by the time Claimant began to complain of back issues. Dr. Jenks did not address the findings of the original ATP provider (no reference to the ATP exists at all in the DIME report, except for referencing his MMI date), who also declined to find Claimant's back complaints to be related to the original work injury.

3. Dr. Jenks appears to have relied upon Claimant's oral history of the injury and symptoms. Once again, as noted by Dr. Ridings, Claimant is not a reliable historian. Claimant failed to report back pain for almost three months after the injury, but now states that he did so, only to be ignored or rebuffed by a series of medical providers. Dr. Jenks' DIME does not indicate that a detailed oral history of Claimant's symptoms was taken at all.

4. Of greatest significance is that Claimant's own theory of relatedness of his work injury to his back problem is wholly inconsistent with the theory being posited by Dr. Jenks' DIME. Dr. Jenks (in cursory fashion), attributes the disc extrusion to Claimant bending at the waist while favoring his injured right knee. This, of necessity, would have developed over time, which might otherwise explain the delay in Claimant experiencing symptoms in this back. However, *Claimant's own sworn testimony undercuts this.* Claimant insists that he experienced back pain at the instant he fell, and at every medical visit in the weeks and months following. If Claimant is now to be believed, then Dr. Jenks is plainly wrong on causation and relatedness.

H. Lastly, one cannot view the unfortunate circumstances surrounding Dr. Jenks in a total vacuum. While insufficient on a stand-alone basis to overcome a DIME opinion, these circumstances (undetailed as they are) do constitute a possible explanation for the deficiencies in Dr. Jenks' DIME report.

I. The ALJ concludes that the DIME by Dr. Jenks has now been overcome by clear and convincing evidence on the issue of the relatedness of Claimant's back complaints to the original admitted claim for his right knee. While Claimant might well benefit from further treatment for his lumbar spine, he was properly placed at MMI for his industrial accident by Dr. Lakin.

J. The ALJ finds that the opinions of his ATP, and those of Dr. Ridings, are more persuasive than those of Dr. Jenks, Dr. Castrejon, and the Claimant himself. The ALJ concludes that Claimant's back complaints are not related to his industrial injury, and further finds that he is at MMI for his right knee, which comprises the compensable injury in this case.

ORDER

It is therefore ordered that:

1. By clear and convincing evidence, it is highly probable that the DIME opinion of Dr. Jenks is incorrect. Respondent has met its burden.

2. Claimant was properly placed at maximum medical improvement on February 26, 2016 by his authorized treatment provider for the injury to his right knee.

3. Claimant's claim for Workers Compensation benefits for his lower back is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 8, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Respondents have established by a preponderance of the evidence that medical maintenance benefits should be terminated and that further medical maintenance treatment is no longer reasonable, necessary, or related to Claimant's October 1, 1999 work injury.

PRELIMINARY MATTERS

The hearing commenced at 1:30 p.m. and self-represented Claimant was not present. The ALJ noted that Claimant would be given 15 minutes and that if he had not arrived by 1:45, the hearing would go back on record. At 1:45 the record was continued. Claimant was still not present. The ALJ found proper notice of hearing and that in addition to the notice of hearing, several other orders in the case had been sent to Claimant, Claimant had appeared at a recent pre-hearing conference, and that Claimant had proper notice of the date and time of the proceeding.

After notice was found to be proper, Respondents counsel indicated that he had a phone number for Claimant and offered to call Claimant to try to figure out where Claimant was and if he was on his way. The ALJ agreed and went off record. At 1:53 the ALJ went back on record and Respondent counsel indicated a voice message had been left for self-represented Claimant and that he had not received a return call during the short recess. The proceeding began without Claimant present as notice was proper.

During Respondents opening statement, self-represented Claimant called Respondents counsel. Claimant was placed on speaker phone in the courtroom. Claimant did not provide a persuasive explanation as to why he was not present. The ALJ again indicated the notice and the history of the claim including Claimant's presence at a recent pre-hearing conference. The ALJ allowed Claimant to appear by phone for the remainder of the proceeding.

The ALJ also inquired as to whether Claimant wished to retain counsel. Claimant indicated a past attempt, but that he would rather just continue with the hearing. After confirming Claimant's intent to be self-represented, the proceeding continued. Respondent counsel started over with his opening statement. Self-represented Claimant participated in the remainder of the proceeding by phone.

FINDINGS OF FACT

1. Claimant sustained an admitted work related injury on October 1, 1999 while employed by Employer as a truck driver.

2. On that date, Claimant missed a step while in the front portion of a semi-trailer and fell backward injuring his neck, mid back, and lower back.

3. Claimant underwent two cervical surgeries prior to being placed at maximum medical improvement, a cervical laminectomy from C3-C6 on March 3, 2000 and also an anterior cervical discectomy of C3-4 and C4-5 with anterior plate fixation and allograft fusion on July 9, 2001.

4. Claimant had a C5-6 fusion that pre-existed the October 1, 1999 work injury. His prior fusion was noted to be stable during the course of treatment for the October 1, 1999 work injury.

5. On September 17, 2002 Claimant was placed at maximum medical improvement. In June of 2003, Claimant had removal of spinal hardware from his left neck. Claimant has not had any further cervical surgeries since June of 2003.

6. On April 22, 2003 Respondents filed a final admission of liability. Respondents admitted for authorized reasonable and necessary medical care related to the injury. *See* Exhibit A.

7. On August 6, 2003 Claimant reached a settlement with Respondents in regard to this injury. The settlement provided that all claims for compensation and benefits under the Act, except for medical benefits, were resolved by a lump sum payment. The settlement provided that Claimant's entitlement to authorized, reasonable, and necessary medical care causally related to the industrial injury was to continue. *See* Exhibit B.

8. On November 28, 2016 Claimant underwent an Independent Medical Evaluation performed by Carlos Cebrian, M.D. Claimant reported that after his injury and that through the years he was managed primarily with medications including opioids and muscle relaxers. Claimant reported an incident on August 8, 2011 where he was working (not for Employer) and unloading a truck when a block of ice hit him on the head, "knocked him silly," and made his neck hurt. Claimant also reported in November of 2015 that he had an episode where he could not keep his legs still and they were jerking and that he received an injection. Claimant reported that he had been told he had bone spurs in his lumbar spine that needed to be removed and that he had bad arthritis throughout his back. *See* Exhibit C.

9. Claimant reported that he had been on heavy pain medications but that since he started seeing Dr. Simon in Kansas City he had been taking primarily tramadol and muscle relaxers and that if he does not need them, he will not take them. He reported that he sees Dr. Simon every three months for pain management. Claimant reported that his primary problems were neck pain and low back pain. Claimant's medications were listed as: voltaren gel four to five times per day on his shoulders and upper back; baclofen four times per day; soma three times per day; tizanidine three

times per day; tramadol 50 mg two to three times per day; tramadol 200 mg as needed; and pravastatin. *See* Exhibit C.

10. Dr. Cebrian reviewed medical records and performed a physical examination. Dr. Cebrian opined that Claimant was properly placed maximum medical improvement on September 17, 2002. Dr. Cebrian opined that the claim related conditions included a cervical strain with aggravation of cervical disc degeneration and a transverse process fracture at L1. *See* Exhibit C.

11. Dr. Cebrian opined that Claimant had a longstanding history of lumbar spine pain due to degenerative disc disease and that Claimant's claim-related lumbar spine injury was a transverse process fracture at L1 that had long since stabilized. Dr. Cebrian noted that Claimant's increased pain complaints in the lumbar spine started in 2006 and opined that the ongoing lumbar pain complaints were not related to the transverse process fracture at L1 that Claimant sustained in the work injury. Dr. Cebrian noted that a lower extremity EMG performed in April of 2014 revealed chronic L5-S1 radiculopathy bilaterally with no neuropathy and that a lumbar MRI performed in November of 2015 revealed a mild right sided neural foraminal narrowing at L5-S1 due to moderate facet joint arthrosis and minimal posterior end plate spurring and a thickening and/or clumping of the transiting nerve roots at the level of L5 through the sacrum. Dr. Cebrian opined that in the 17 years since the work injury, Claimant had aged from 49 to 66 and that aging and the passage of time had an effect on lumbar disc pathology. Dr. Cebrian opined that any ongoing lumbar spine complaints were not proximately related to the L1 transverse process fracture Claimant suffered in October of 1999. *See* Exhibit C.

12. Dr. Cebrian also opined that Claimant's ongoing cervical spine complaints were not related to the October 1, 1999 claim. Dr. Cebrian noted that Claimant had a pre-existing C5-6 fusion and a pre-existing history of cervical spine disease. Dr. Cebrian opined that medical evaluations demonstrated improvement in Claimant's cervical spine condition with the last documented cervical MRI in August of 2011 no longer showing any spinal cord signal abnormality including contusions or myelomalacia when early MRIs had shown some spinal cord contusion or myelomalacia. Dr. Cebrian also noted that the passage of 17 years from the original injury and the aging from 49 to 66 had an effect on cervical disc pathology due to the natural history of cervical discs and not due to the work injury. In addition to the pre-existing cervical history and fusion, Dr. Cebrian also pointed out two intervening events including an August 8, 2011 event where Claimant was hit on the head with a block of ice and required treatment and a November 2015 event where Claimant was seen in the emergency room with an acute onset of neck and back pain with difficulty walking. Dr. Cebrian opined that neither intervening event was causally related to the October 1, 1999 work injury. *See* Exhibit C.

13. Dr. Cebrian noted that Claimant had been able to own a trucking company and occasionally drive an 18-wheeler for several years which exposed him to different and varied physical tasks. He opined that Claimant's ongoing cervical and lumbar spine

complaints and need for treatment were no longer causally related to the October 1, 1999 claim and that no additional treatment should be provided under the claim. *See* Exhibit C.

14. Dr. Cebrian opined that even if it were determined that the ongoing complaints were causally related to the October 1, 1999 injury, the continuation of medications was not medically reasonable or necessary. *See* Exhibit C.

15. Dr. Cebrian opined that voltaren gel was FDA approved for acute pain due to minor strains, pains, and contusions and for relief from pain due to osteoarthritis of the joints amenable to topical treatment such as the hands or knees. Dr. Cebrian opined that long term use was not indicated for cervical or lumbar degenerative disc disease and that the gel should be discontinued under the October 1, 1999 claim. *See* Exhibit C.

16. Dr. Cebrian noted that Claimant was taking three different muscle relaxers including Baclofen, Soma, and Tizanidine. Dr. Cebrian noted that the medical treatment guidelines in Colorado do not recommend chronic use of any muscle relaxer. Dr. Cebrian opined that muscle relaxers were most useful for acute musculoskeletal injuries or exacerbation of injuries. Dr. Cebrian opined that muscle relaxers should be reserved for acute use or for exacerbation of conditions and that the goal in treatment should not be to use them on a chronic basis and that regular daily stretching and the use of a theracane would help decrease muscle spasms. Dr. Cebrian recommended discontinuing the muscle relaxers under the claim under the supervision of a physician over a period of 30 days. *See* Exhibit C.

17. Dr. Cebrian opined that Tramadol had a side effect of causing impaired alertness and should be used with caution in combination with other sedating medications and opined that Claimant could choose to continue with Tramadol outside of the workers' compensation system. *See* Exhibit C.

18. Dr. Cebrian testified at hearing consistent with his report. Dr. Cebrian opined that the injury Claimant sustained in October of 1999 was an L1 fracture and a cervical spine strain and aggravation of Claimant's prior cervical fusion. Dr. Cebrian opined that the need for any further medical treatment was not related to the October 1999 work injury and that the medications Claimant was still taking were not related to the work injury and also were not reasonable or necessary. Dr. Cebrian opined that Claimant's L1 fracture had healed and that the cervical spine was aggravated but that Claimant improved and that the area of problems now were different areas and levels than what Claimant had at the time of the injury in 1999.

19. Claimant testified at hearing that the initial problems of tight muscles and a stiff neck had not changed since his work injury and that he understands that the problems will never change. Claimant reported that his symptoms come and go and that he uses creams and medications when needed along with heating pads and hot showers. Claimant indicated that he did not care if workers' compensation paid for his

medications as long as social security disability would cover them. Claimant did not identify how the continued medications are related to his October 1, 1999 work injury. Claimant did not identify or explain how the October 1, 1999 work injury changed the symptoms in his cervical spine or how treatment for the injury changed any of his symptoms.

20. Respondents credibly pointed to objective evidence showing healing of and improvement in the work related injuries and Dr. Cebrian is found persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Maintenance Medical Benefits

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." *See* § 8-42-101(1)(a), C.R.S. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

It is well settled that where the respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission, supra,* the respondents are not precluded from later contesting their liability for a particular treatment. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). If the respondents contest liability for a particular medical benefit, Claimant must prove that the contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009).

Where, however, the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for such a modification. *See* § 8-43-201(1), C.R.S.; *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO June 5, 2013). Where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, respondents bear the burden of proof to prove that such treatment is not reasonable, necessary, or related. *Id*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838-01, (ICAO October 1, 2013).

Respondents have challenged the ongoing maintenance treatment that Claimant is receiving under the claim as not being reasonable, necessary, and causally related to the October 1, 1999 work injury. As found above, the only ongoing maintenance treatments are continued medications including muscle relaxers, anti-inflammatory medications, and pain medications. Respondents are seeking to terminate the previously admitted maintenance medical benefits admitted by both a final admission of liability and in a settlement agreement. Respondents thus bear the burden of proof to prove that further treatment is not reasonable, necessary, or related to Claimant's October 1, 1999 injury.

Respondents have met their burden by a preponderance of the evidence to establish, more likely than not, that continued maintenance treatment is not reasonable, necessary, or causally related to Claimant's October 1, 1999 work injury. The opinions of Dr. Cebrian are found credible and persuasive. As found above, in the work injury, Claimant sustained an L1 fracture which has long since healed. Dr. Cebrian is found credible and persuasive that the L1 fracture requires no further maintenance treatment.

Further, Claimant's problems in the lower back that exist now are in areas unrelated to the L1 fracture and no further maintenance treatment is needed for the L1 fracture. Additionally, Dr. Cebrian is found credible and persuasive that the ongoing medications and treatment to the cervical spine is not reasonable, necessary, or related to the October 1, 1999 work injury. As Dr. Cebrian noted, prior to the work injury Claimant had significant pre-existing cervical spine problems including degeneration and a cervical spine fusion at C5-6. MRI evaluations showed that after the work related injury there was some spinal cord contusion or myelomalacia but more recent MRIs and one completed in August of 2011 no longer show any spinal cord signal abnormality including contusion or myelomalacia. Additionally, Claimant over the past 17 years has aged from 49 to 66 where a natural history of cervical disc pathology in someone with a pre-existing fusion and pre-existing degenerative disc disease would be expected to naturally progress. Claimant also sustained two intervening events including an August 8, 2011 event where he was hit on the head with a block of ice and required treatment. Dr. Cebrian's conclusions after a review of the total medical evidence are persuasive that further treatment is not causally related to the October 1, 1999 work injury. Respondents have met their burden.

Dr. Cebrian is further found credible and persuasive that continued short term maintenance is necessary to taper Claimant off the muscle relaxers, under the supervision of a physician for a period of 30 days. Claimant's dependence on muscle relaxers began as a result of the work related injury and he has been prescribed muscle relaxers under the claim for many years. Although Respondents have met their burden and are no longer responsible for medical maintenance treatment, they are ordered to provide short term maintenance treatment to taper Claimant off muscle relaxers.

ORDER

It is therefore ordered that:

1. Respondents have met their burden to establish that further medical maintenance treatment is not reasonable, necessary, or related to Claimant's October 1, 1999 work injury.

2. Respondents shall be liable for the cost of tapering Claimant off muscle relaxers under the supervision of a physician for a period of 30 days as recommended by Dr. Cebrian.

3. If Claimant chooses to continue to take muscle relaxers due to other non-claim related conditions, Respondents shall not be liable for the cost of tapering Claimant off muscle relaxers and shall be allowed to terminate all maintenance medical treatment.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 8, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The issues determined by this decision involve Claimant's entitlement to additional maintenance medical treatment benefits. The specific questions answered are:

I. Whether Claimant has proven by the preponderance of the evidence that her ongoing need for lumbar ESI injections, SI joint injections, and/or Flector patches as recommended/prescribed by Dr. Timothy Sandell is related to Claimant's admitted industrial injury and if so;

II. Whether such treatment modalities are reasonable and necessary.

PROCEDURAL MATTERS

At the outset of the hearing, the parties agreed that the Colorado workers' compensation medical fee schedule applied to any medical benefit awarded. The ALJ approved the stipulation.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing evidentiary deposition testimony of Dr. Sandell and Dr. Larson, the ALJ enters the following findings of fact:

1. Claimant was working for Employer on November 22, 2014 when she slipped and fell while pulling a rack of rolls from the freezer landing on her back and buttocks. Claimant had another slip and fall within the course and scope of her employment with Employer on January 30, 2016. This claim was consolidated with the November 22, 2014 claim for all purposes by Order of ALJ Donald E. Walsh dated June 14, 2016.

2. Claimant was first seen by Physician Assistant (PA), Jocelyn Cavender on November 22, 2014 at which time Claimant was experiencing back pain bilaterally, in the sacroiliac region right more than left with pain radiating to the right buttock and right thigh. Claimant was also experiencing paresthesia. Physical examination revealed, in part, tenderness in the right paraspinal and right sciatic notch. X-rays taken on this day were unremarkable. Ms. Gallegos was prescribed medication and physical therapy.

3. Claimant was next seen by PA Cavender on November 26, 2014 with continued complaints of back and tailbone pain with tingling and numbness down her right

leg. PA Cavender diagnosed Claimant with coccyx contusion, acute back pain, radiculopathy, and sacroiliac strain. PA Cavender prescribed medication and a donut cushion.

4. On December 19, 2014, Claimant was seen by Dr. Walter Larimore with continued complaints of low back pain with numbness and burning in her right leg. Dr. Larimore performed a physical examination which revealed tenderness in the lumbar spine, bilateral paraspinals, and right and left sciatic notch. Palpation revealed bilateral muscle spasm. Dr. Larimore's diagnoses were acute back pain, coccyx contusion, radiculopathy, sacroiliac strain, spasm of lumbar paraspinous muscle, and lumbar strain. Dr. Larimore continued with the medication previously prescribed and ordered physical therapy.

5. Claimant was re-evaluated by Dr. Daniel Peterson on January 16, 2015. On this date Claimant was still having low back pain with continued numbness/tingling down the right leg to the foot. Dr. Peterson performed a physical examination and noted tenderness in the SI joint right greater than left, positive pain in right SI joint with pressure on ASIS, as well as pain with SI joint compression. Dr. Peterson diagnosed lumbar strain, sacroiliac strain, and radiculopathy. Dr. Peterson referred Claimant to Dr. Blau and Dr. Jenks for consideration of a SI injection or an epidural steroid injection (ESI).

6. Dr. Eric Ridings evaluated Claimant at Respondents request on April 27, 2015. During his independent medical examination (IME) Claimant reported that her worst pain was over the sacrum bilaterally with radiation to the right buttock and down the posterior right lower extremity with associated tingling in the right leg. Claimant was also experiencing pain at the right lumbosacral junction with sitting. Physical examination revealed significant pain over the sacrum, right worse than left. Dr. Ridings also noted tenderness throughout the lumbar spine and in the bilateral paraspinals with the most severe pain over the sacrum and right buttock. Dr. Ridings opined that the mechanics of the injury, i.e. falling backwards and landing on her sacral/buttock region and low back could cause a sacral or coccygeal fracture, SI joint dysfunction, disc herniation and/or lumbosacral strain. Dr. Ridings opined that Claimant sustained a lumbosacral strain and likely a L4-5 disc herniation to the right with impingement upon the L5 nerve root. Dr. Ridings recommended that Claimant have an evaluation by a physiatrist. He also felt that a lumbar ESI may be indicated.

7. On June 11, 2015, Claimant was seen by physiatrist Dr. Timothy Sandell. During this evaluation, Claimant reported to ongoing pain in the right buttock and sacral region with radiation anteriorly into the groin and posteriorly down the leg to the mid calf. Claimant also told Dr. Sandell that she was having some numbness in the buttock and down the back of her leg. Dr. Sandell noted that a lumbar MRI scan of May 29, 2015, showed mild to moderate bilateral neural foraminal narrowing at L4-5 secondary to a circumferential disc bulge and facet joint arthritis. Physical examination revealed focal tenderness in the right sciatic notch

as well as in the right SI joint with more mild diffuse tenderness in the gluteal muscles. Dr. Sandell noted decreased range of motion with active flexion and extension and a positive right straight leg raise test. Dr. Sandell diagnosed low back pain with right lower extremity symptoms. He also suspected a right L5 radiculopathy and felt there was a possible right sacroilitis. Dr. Sandell recommended an ESI and, depending upon Claimant's response to an SI joint injection, consideration of an EMG.

8. On June 23, 2015, Claimant presented to Dr. Michael Rauzzino for a neurosurgical evaluation. Dr. Rauzzino's physical examination revealed "exquisite tenderness over the right SI joint." In addition, it was noted that Claimant had pain with compression and distraction of her pelvis. Dr. Rauzzino's assessment was status post work related accident on November 22, 2014, after a slip and fall with a right SI joint strain and lumbar spondylosis at L4-L5. Dr. Rauzzino opined that Claimant had a right SI joint strain and felt this was her pain generator. Dr. Rauzzino referred Claimant for a right SI joint injection as well as a formal course of physical therapy to start after the injection.

9. On August 10, 2015, Claimant had a L4-5 ESI. Claimant returned to Dr. Sandell on September 11, 2015, and told him that she was doing better. Although she was having much less leg pain, she was still having episodes of leg weakness with a pressure type pain and more focal pain in the low back and coccyx area. Dr. Sandell specifically noted that in regard to her radicular pain, Claimant was approximately 80% better. Dr. Sandell's impression at that time was right L-5 radiculopathy improved and possible sacroilitis, right greater than left. Dr. Sandell noted that while Claimant did well with the ESI he suspected Claimant may be having more musculoskeletal pain and SI joint involvement. He therefore recommended bilateral SI joint injections.

10. On November 23, 2015, Claimant returned to Dr. Sandell having undergone an ESI on November 9, 2015. On this date, Claimant reported a reduction in leg pain but continued right low back/SI joint discomfort and occasional groin pain. Dr. Sandell specifically noted that Claimant's radicular pain was 85% better. Physical examination was positive for ASSI/SI mobility techniques of inferior rotation and compression. Claimant also had a positive Gaenslen's sign. Dr. Sandell's impression was low back pain with right L5 radicular symptoms that have responded well to the recent ESI but highly suggestive of right sacroilitis given today's evaluation. Dr. Sandell recommended a right SI joint injection.

11. On December 14, 2015, Claimant underwent a right SI joint injection. In a follow up visit on December 28, 2015, Claimant told Dr. Sandell's PA-C Jamie Case that she noticed a reduction in her pain although she is not completely pain free. Physical examination revealed continued tenderness with palpation of the right SI joint but normal tone in the lumbar paraspinals and gluteal muscles. The impression reached was low back pain with history of right L-3 radicular symptoms which responded well to ESIs done in November 2015, and right sacroilitis to a mild degree also responding to the December 2015 SI injection.

During this encounter Claimant also advised PA-C Case that she did not want to continue with oral medications. As a result, Claimant given an option of using Flector patches.

12. On February 8, 2016, Claimant experienced a flare up of her back hip/pelvis pain after a fall she suffered at work on January 30, 2016. She presented to PA-C Case where she gave a history of increased pain after having a slip and fall at work. Physical examination revealed tenderness with even light palpation of the right SI joint with referred pain to the right groin. The treatment plan for Claimant at that visit was to continue with Flector patches and undergo a right SI joint injection and a right L4-5 ESI.

13. In a letter to Insurer dated February 19, 2016, Dr. Sandell wrote that Claimant had suffered a flare up in hip and back pain since her recent fall and that the hip pain does wrap around the right hip consistent with the L3 dermatome, i.e. she has had a flare in the L3 radicular pain. In addition, this letter makes clear that Claimant is actively engaged in a physical therapy program and had had 80%-90% reduction in her pain from prior ESIs.

14. Claimant underwent a right SI joint injection on February 29, 2016, which provided 80% reduction of her pain according to Dr. Sandell's office note of March 14, 2016. This same note revealed that the Flector patches were providing benefit to Claimant. Consequently, her prescription was renewed.

15. Claimant was seen by PA-C Case on October 25, 2016. On this date of visit, Claimant reported a recurrence of pain down the right lower extremity, mostly in the L3-4 distribution. Physical examination was positive for a "jumping/ducking" response with palpation of the SI joints, right greater than left and tenderness with palpation in the lumbar paraspinals and gluteal muscles. It was also noted that Claimant lumbosacral range of motion with flexion and extension with flexion was guarded and caused increased low back pain across the waist. It was recommended that Claimant undergo a repeat lumbar ESI.

16. Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Jeffrey Jenks on October 27, 2016. Dr. Jenks' report indicates that Claimant exhibited "monumental" amounts of pain behavior during the physical examination. Dr. Jenks' impression was severe low back and right leg pain with very marked symptom magnification and multiple Waddell's signs. He noted that her MRI was essentially for her age and that her lumbrosacral range of motion measurements were completely invalid. Consequently, Dr. Jenks opined that Claimant had no permanent impairment or need for permanent work restrictions. Dr. Jenks' report is silent as to maintenance medical care.

17. Claimant last saw Dr. Sandell on December 8, 2016. Following this encounter, Dr. Sandell noted that Claimant had a history of good response to three previous epidural injections with the last occurring December 2015. He also noted that Claimant had had a more recent SI joint injection that had provided some benefit.

He continued to opine that Claimant would benefit from ESI on a maintenance basis given Claimant's response to prior ESIs.

18. Claimant was evaluated by Dr. Wallace Larson on April 12, 2016, and March 8, 2017, at the request of Respondents.

19. Dr. Larson's April 12, 2016, report reflects his understanding that Claimant had been getting "injections in the sacroiliac joint" on the right side which took away apparently 80% of the pain. Claimant told Dr. Larson that she was having a variety of problems including back pain and coccygeal area pain radiating to the right buttock. Physical examination revealed in part, tenderness to the entire thoracic and lumbar spine as well as in the right area of the buttocks. Claimant was also reporting pain with attempted lumbar spine range of motion. The range of motion testing was discontinued due to Claimant becoming tearful and reporting severe pain. Dr. Larson's report does not outline any specific testing for SI joint dysfunction. As part of his evaluation, Dr. Larson also reviewed the medical records from Concentra, Dr. Ridings, and Dr. Sandell. Ultimately Dr. Larson opined that Claimant had marked pain behavior, needed no further care, and was at MMI without impairment.

20. Dr. Larson's report of March 8, 2017, indicates that physical examination revealed diffuse tenderness of the right cervical, thoracic and lumbar spine. Attempts to obtain valid range of motion measurements failed and it was noted that Claimant had jerking motion when she bent over. Straight leg raise on the right was limited to 20 degrees with reports of right posterior thigh pain and limited to 45 degrees on the left side with hamstring tightness. Following additional records review, Dr. Larson reiterated his opinion that Claimant did not have ratable impairment as a consequence of her industrial injury. In concluding as much, Dr. Larson noted: "The patient has not had any identified specific injuries. She has had pain out of proportion to any physical findings and pain not explained by physical examination. Additionally, her stated disability is inconsistent with the activity seen on surveillance video." Regarding Claimant's need for maintenance medical treatment, Dr. Larson noted: The patient has multiple nonphysiologic signs and symptoms. Interventional for (sic) other treatments are not appropriate ways of addressing these nonphysiologic symptoms."

21. Claimant testified that the SI joint injections and the ESIs provided 80% to 85% relief and allowed her to function both at work and in her daily activities. She also testified that the Flector patches prescribed by Dr. Sandell help ameliorate her pain symptoms. Claimant testified that she continued to work at Employer up until approximately October, 2016, at which time she was placed on a leave of absence. Claimant testified that she continues to have low back pain radiating down the right leg which she tries to control through the use of Flector patches.

22. Dr. Sandell testified as an expert in the field of physical medicine and rehabilitation Dr. Sandell testified that he has been treating Claimant for

approximately two years for right sided low back pain which radiates down her right leg. Dr. Sandell said that at Claimant's first visit on June 11, 2015, physical examination revealed tenderness in the low back, the SI notch, tenderness around the SI joint and a positive straight leg raise test on the right. Dr. Sandell testified that tenderness of the sciatic notch and a positive straight leg raise test may be indicative of irritation of the sciatic nerve on one of the nerves going to the sciatic nerve. Dr. Sandell further testified that SI provocation maneuvers including Patrick's test and Gaenslen's sign were positive indicating there was an SI joint problem. Dr. Sandell went on to testify that he initially recommended the ESI both as a diagnostic tool as well as a therapeutic tool and that while the first ESI relieved Claimant's leg pain by 80 percent she still continued to have pain in a focal spot in the low back and therefore felt that there may be some SI joint involvement contributing to her symptom complex. Dr. Sandell explained that an SI joint injection was eventually done on December 14, 2015, which resulted in good reduction in her pain. Dr. Sandell also testified that Claimant's pain is multifactorial probably coming from both the L4-5 level of the lumbar spine and her SI joint. In terms of the Flector patches, Dr. Sandell testified that Claimant receives relief from their use and should use them as needed to help relieve pain. Dr. Sandell testified that the Flector patches are basically a NSAID which delivers the medication through the skin. Dr. Sandell ultimately opined in his deposition that the ESI, the SI joint injections, and the Flector patches are reasonable and necessary to alleviate Claimant's symptoms related to her work injury.

23. Upon cross examination, Dr. Sandell admitted that he did not strictly follow the treatment guidelines in that he did not have Claimant keep a pain diary or perform any functional testing thirty minutes past injection. However, Dr. Sandell went on to explain that in his opinion, it is hard to objectively measure one's pain and that since Claimant received 80 to 85 percent relief from the injections they are still reasonable and necessary. In addition, Dr. Sandell testified that the treatment guidelines are only guidelines and that the treating physician must still use his or her best clinical judgment in formulating a treatment plan. He also testified that Claimant has had conservative care for her work related injuries which did not provide much relief. Therefore, he felt that the SI joint injections and the ESI's are reasonable and necessary to provide pain relief and otherwise alleviate the ongoing effects of Claimants work injuries. Finally, Dr. Sandell testified that in his evaluation and in his review of the notes, he did not think that Claimant exhibited any pain behaviors except during the October 25, 2016 appointment when she had a "ducking and jumping" response to palpation of the SI joint.

24. Dr. Wallace Larson testified by deposition as an expert in orthopedic surgery. Dr. Larson testified consistent with his April 12, 2016, and March 8, 2017, reports. Dr. Larson testified that when he examined Claimant it was not possible to complete range of motion measurements due to her non-anatomical findings and pain behaviors. Dr. Larson further testified that Claimant is not in need of

maintenance care for her work injuries. Specifically he opined that she did not need injections or Flector patches. Dr. Larson explained that in his opinion Dr. Sandell's reports are not consistent with the medical treatment guidelines in that these reports do not establish a diagnosis of sciatica or something close to sciatica and do not establish functional goals or measuring outcomes in terms of performance. Dr. Larson opined that Claimant's statements that she got 80 to 85 percent improvement and was able to be more functional are not an adequate basis to consider further injections. Dr. Larson also testified that Flector patches are not appropriate or medically indicated on the grounds that there is no specific anatomic diagnosis and Claimant has multiple non-anatomic findings.

25. Upon cross examination Dr. Larson agreed that the mechanism of injury as described by Claimant could cause an injury to her low back including her SI joint. Dr. Larson also testified that when he does a physical examination he notes in his report the tests he did and whether they are positive or negative but admitted that none of the standard tests to determine if there is a potential SI joint problem were in his report. Dr. Larson also agreed that Dr. Rauzzino's diagnosis of Claimant's condition as a SI joint strain could be a specific diagnosis. Dr. Larson also agreed that SI joint problems can cause pain for months and even years and that at times SI joint problems require injections. Dr. Larson agreed that the guidelines state that the DOWC Guidelines are not to be used to limit post maximum medical improvement care and that reasonable doctors can have reasonable differences of opinion as to a diagnosis and treatment plan.

26. Based upon the totality of the evidence presented, the ALJ finds the opinions expressed by Dr. Jenks and Dr. Larson credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the voluminous record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

B. In determining credibility, the ALJ should consider the witness' manner and

demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. Here, Claimant's subjective symptoms form the basis for her contention that she is entitled to maintenance medical benefits. However, the evidence presented persuades the ALJ that Claimant's subjective reports of her symptoms are not, as both Dr. Jenks and Dr. Larson found, credible or related to anatomic, objective findings. As Dr. Larson testified, Claimant had general, diffuse, wide-ranging, non-specific, and non-anatomic symptoms at both appointments that were unchanged. Moreover, Claimant demonstrated bizarre, non-anatomic jerking movements during the March 8, 2017 examination that could not be explained based on any injury or diagnosis. Additionally, substantial pain behaviors were documented during the April 12, 2016, IME where Claimant was noted to be, "a poor historian, where she was noted to move very slowly especially to the supine position. The demonstrated pain behavior also included jerking back and forth on attempted range of motion testing of the lumbar spine. There were exaggerated responses on palpation of multiple areas including the thoracic and lumbar spine as well as the right shoulder and right elbow." Based upon the record evidence and his examination, Dr. Larson concluded Claimant, "[had] misrepresented her abilities and [had] not been honest at the time of examination." In determining credibility the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). Based upon the evidence presented, the ALJ credits the opinions of Dr. Jenks in addition to the testimony of Dr. Larson to conclude that Claimant is not a reliable medical historian. Claimant's testimony concerning her subjective symptoms is substantially eroded by the lack of objective findings and the bizarre pain behaviors demonstrated during physical examination with both Dr. Jenks and Dr. Larson.

Maintenance Medical Benefits

C. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment. If the claimant reaches this threshold, the court stated that the ALJ should enter "a general order, similar to that described in *Grover*."

D. Nevertheless, *Grover* provided, "[B]efore an order for future medical benefits maybe entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." While claimant does not have to prove the need for a specific medical benefit at this time, and respondents remain free to contest the reasonable necessity of any future care, claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra*.

E. In this case, Claimant asserts that she has proven by a preponderance of the evidence that her subjective symptoms she now experiences entitles her to an award of maintenance medical benefits to maintain maximum medical improvement (MMI). The undersigned ALJ is not persuaded. Claimant attained MMI for her injury covered by this claim on June 7, 2016, as found by Albert Hattem, M.D. Claimant does not challenge her MMI status or the opinion from the DIME provider, Jeffrey Jenks, M.D. that Dr. Hattem's MMI determination is correct. Importantly, Claimant testified at hearing she is now experiencing the same symptoms, in the same body parts, in the same intensity, as she was when she reached MMI. This, despite the fact that she has not received maintenance medical benefits for, as she testified at hearing, several months. This consistency is confirmed by Dr. Larson's findings that claimant's range of motion testing revealed very similar range of motion between claimant's first appointment with him on April 12, 2016, and March 8, 2017. He wrote in his report of March 8, 2017, that she reported that her symptoms were the same at that appointment as they had been when he saw claimant in 2016. Based upon the evidence presented, the ALJ is persuaded that these level, consistent symptoms over time without the need for maintenance care demonstrate that no ongoing treatment is required to maintain Claimant at MMI.

F. Dr. Larson addressed the DOWC's medical treatment guidelines for the treatment of low back pain during his testimony, and explained that in order to provide medical treatment, and specifically the injections claimant now seeks, one needs to have the subjective symptoms be correlated with anatomic and objective findings. According to Dr. Larson, it is not appropriate to provide injections and medication simply because Claimant subjectively claims to have improvement with non-anatomic and non-physiologic symptoms. Dr. Larson's opinions, findings and conclusions are buttressed by those made by Jeffrey Jenks, M.D. in the Division IME report claimant does not dispute. As noted above, Dr. Jenks' impression was, "[V]ery marked symptom magnification and multiple Waddell's signs" in a Claimant whose MRI was normal for her age. Without objective findings on multiple examinations and with exaggerated, but unchanged symptoms since MMI in a claimant who has not been asked to keep a pain diary or perform functional testing after injection, the ALJ concludes that performing additional injections is not reasonable or necessary.

ORDER

It is therefore ordered that:

1. Claimant's request for additional maintenance medical treatment benefits, including additional injection therapy and Flector patch prescriptions is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 8, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Did Claimant prove by a preponderance of the evidence that she suffered a compensable injury on May 6, 2016?

2. If Claimant's injury is compensable, was the treatment she received between May 7 2016 and June 27, 2016 reasonable, necessary, related and authorized?

3. If Claimant's injury is compensable, does the ALJ have jurisdiction to adjudicate medical benefits after June 27, 2016?

STIPULATIONS

The parties agreed to reserve AWW, temporary disability benefits, and defenses to temporary disability benefits, including whether Claimant is responsible for termination of her employment.

FINDINGS OF FACT

1. Claimant worked a general merchandise clerk at Employer's Store #43 in Pueblo. On May 6, 2016 she was working as a cashier because the store was short-staffed.

2. Claimant felt pain in her back when she reached down to move a heavy item on the lower shelf a shopping cart to reach the UPC code. She could not take a break for several hours because the store was so busy. When she got her break, she went upstairs to the employee lounge and took a Tylenol. She then returned to work and finished her shift.

3. Claimant did not report the incident or her symptoms to anyone at the store that day. She assumed she had suffered a strain that would resolve quickly.

4. After her shift, Claimant went home, took a bath, and went to bed because her back was hurting. She awoke at 3:00 AM "in excruciating pain." She called the store, but no one answered. She called again at 4:02 AM and spoke to one of the night crew supervisors. She told him she was going to the emergency room because she was having severe back pain. Shortly thereafter, she spoke with her supervisor Josh Olson, and told him she was going to the emergency room. Claimant told Mr. Olson she hurt her back at work the day before.

5. Claimant went to the Parkview Medical Center ER the morning of May 7, complaining of "achy, sharp, and spasming" low back pain. The ER report states: "she has intermittently had some back soreness related to a relatively new job at a grocery

store. She states that in general this soreness has improved with time and the more she works the better she does. Yesterday at work, she did an unusual job for her at the checking stand at the grocery store. This involves a lot of twisting motion. Denies fall [or other] acute traumatic episode." She had tenderness to palpation of the bilateral SI areas and the lumbar paraspinal musculature. The ER physician (Dr. Krier) did not think x-rays or a CT scan would likely provide useful information, and advised Claimant "most patients with this condition improve with time and pain control along with eventual strengthening and PT." Dr. Krier suggested an MRI might be warranted if Claimant's symptoms did not improve. Claimant was given injections and oral medications which helped her pain. She was discharged with prescriptions for Percocet, Valium, ibuprofen and Lidoderm patches, and advised to follow up with her primary care provider. She was also taken off work until May 11, 2016.

6. After she left the ER, Claimant spoke with Mr. Olson by telephone and explained she would follow up with her personal physician the following Monday. Mr. Olson did not refer Claimant to a designated provider, nor did he pass the information on to higher-level managers at the store.

7. Claimant saw PA Todd Knauf at Summit Medical Clinic on May 10, 2016 in follow up from the ER visit. She told PA Knauf she had been to the ER on Saturday (May 6) for back pain. The treatment note contains no coherent history, and little useful information. There is no mention of any incident at work.

8. Claimant had lumbar x-rays on May 11, 2016 at Parkwest Imaging Center which showed mild degenerative changes but no acute bony abnormality.

9. On May 17, 2016 PA Knauf authored a letter stating Claimant "will need to stay off work until May 30th due to an injury to her back."

10. Claimant followed up with PA Knauf regarding her back pain on May 23, 2016. She reported 6/10 pain in the low back, radiating to the right groin and right side. She said the pain in her right leg felt like "a pinched nerve" and "her right leg sometimes feels kinda numb." PA Knauf referred Claimant for a lumbar MRI.

11. Claimant underwent a lumbar MRI on June 10, 2016 at Parkwest. At L2-3 there was a minimal broad-based posterior disk bulge and mild left neural foraminal stenosis. At L5-S1 there was a small broad-based left posterolateral disc herniation or bulge which abuts and minimally displaces the left S1 nerve root posteriorly, without definite root compression. The MRI also showed diffuse degenerative disc disease.

12. On June 16, 2016 PA Knauf wrote a letter stating Claimant "has a herniated disc and until further notice she is unable to return to work."

13. After learning the results of the MRI, Claimant decided she was no longer willing to pursue medical treatment through Medicaid. She went to the store on June 23 and completed injury-related paperwork with Scott Anger, the assistant store manager. Claimant filled out an Associate Work Related Injury/Illness Report and described the injury as "was lifting, twisting and turning, I think around 2:00 PM. Had problems even

sitting for breaks. Not sure if it was large bag of dog food on bottom of cart or Morton salt." Claimant also stated "I told Josh Olson of my condition as soon as I was released from [the] E.R. that I was at work the day before on May 6th that I was sore and uncomfortable most of the day. [I] thought that I pulled a muscle at work. Came home and took a bath, went to bed and woke up and extreme pain. Informed him I would follow up with [my] regular doctor on Monday and get back with them."

14. Arnold Decesaro was the manager of Store #43 at the time of Claimant's injury. He transferred to a different store shortly after the date of injury. On June 23 Mr. Decesaro since an email to Mr. Anger stating "[Claimant] told me she had back issues. She never told me she had hurt her back at work. When I was working at [store] #43, I told Sue Foster to send [Claimant] an AWAL letter because she never returned my call. [Claimant] told me that it was a pulled muscle."

15. Mr. Anger completed a Questionable Claim form stating "[Claimant] told the mgr at the time she had back issues and she never told him she hurt her back at work." The manager Mr. Anger referenced on the form was Ms. Decesaro.

16. Mr. Anger gave Claimant a list of four designated providers on June 23, from which Claimant chose CCOM.

17. Claimant saw Theresa Kuhn, NP at CCOM on June 27, 2016. Under "PATIENT DESCRIPTION OF INJURY" NP Kuhn's report states: "pt. states – cashiering turned a bag of dog [food] and felt pain in lower back." The "HISTORY OF PRESENT ILLNESS" section of the report contains some contradictory information regarding the bag of dog food: "on May 6, 2016 she was assigned to work as a cashier standing at the grocery store, something that was not her usual job task, and she said that she developed back pain afterward. She does not recall any specific injury during the day when she was working. She did say that she had to lift a 50-pound bag of dog food during the shift but did not have any significant pain and was able to continue her day without problem. She reports the next day her 'back was killing her' . . . ."

18. In reconciling the conflicting information in NP Kuhn's report, the ALJ finds it more likely that Claimant associated the onset of her back pain with turning the bag of dog food, because she had done so in her written injury report the day before. It is not plausible that Claimant would tell Employer her pain started after moving a bag of dog food or salt but directly contradict herself the next day at CCOM.

19. NP Kuhn opined it was "difficult to pinpoint this as being work-related as she did not have a specific event that contributed to her back pain." She released Claimant from treatment at MMI with no impairment and no work restrictions. Dr. Daniel Olson's signature is affixed to the bottom of the accompanying WC 164 form.

20. At the hearing Claimant's counsel agreed that, for purposes of this decision, the June 27, 2016 report from CCOM constitutes a determination of MMI by an ATP.

21. Claimant returned to PA Knauf and was referred to Dr. Benjamin Massey for lumbar epidural steroid injections.

22. Claimant saw Dr. Massey on July 26, 2016. She told Dr. Massey "on 05/06/2016 when she was bending over at King Soopers to flip a box and check it out she had the onset of pain in the back radiating into the right lower extremity that was bad enough to where she apparently had to go to the emergency room and ever since then she has had intermittent problems with pain."

23. Dr. Castrejon performed an Independent Medical Examination (IME) at Claimant's request on October 26, 2016. Claimant told Dr. Castrejon she did not recall a specific event, but she was performing repetitive bending, stooping and rotational motions, "and at one point was flipping bags of dog food on the bottom of a cart to scan when the symptoms worsened." Dr. Castrejon considered Claimant "a reliable historian." Dr. Castrejon opined "in all medical probability the activities described on May 6, 2016 resulted in a straining injury to the lumbar spine and the MRI changes that were seen at L5-S1." Dr. Castrejon opined Claimant is not at MMI and requires additional evaluation and treatment, including consultation with a spine surgeon.

24. Dr. Henry Roth performed an IME at Respondent's request on December 13, 2016. Claimant gave Dr. Roth a substantially similar history to what she told Dr. Castrejon. She indicated she needed to scan a UPC code on a 50-pound bag of dog food on the underside of the shopping cart. She described bending over, twisting and flipping the bag to expose the UPC code. She stated she felt a pulling sensation in the center of her lower back at that time. Based solely on his review of medical records, Dr. Roth opined that Claimant's low back problems were not caused by her work on May 6, 2016. He stated "the medical documentation indicates no specific injury or event associated with" her symptoms. But, Dr. Roth also noted Claimant "provides a different history [at the IME]. She is now very definite that the onset of discomfort occurred of the specific time, in relation to specific materials handling at work." Dr. Roth opined,

> [Claimant's] spinal anatomy identified by MRI is incidental and unrelated to [her] claim. However, her back pain, per her history, had its onset at a specific time at work and in relationship to a specific work activity. **PER THE HISTORY PROVIDED BY [CLAIMANT], EVALUATION AND TREATMENT UNDER WORKERS' COMPENSATION IS REASONABLE AND APPROPRIATE.**" (Bold, capitals in original).

25. Dr. Roth stated he was "not in any position to debate or reconcile the discrepancy between the reviewed medical documentation and [Claimant's] history of the present illness," but added "I did find [Claimant] to be genuine and sincere."

26. Dr. Roth opined Claimant is not at MMI, although he was skeptical she would receive significant benefit from further treatment.

27. Dr. Roth testified at hearing and Dr. Castrejon testified in a post-hearing deposition. Both testified consistently with the opinions expressed in their reports.

28. Although Claimant has a prior history of low back pain, her condition clearly worsened on May 6, 2016. There is no record of Claimant seeking any treatment for back pain for at least 3 ½ years before the injury at work.

29. Claimant has proven by a preponderance of the evidence that she suffered a compensable low back injury on May 6, 2016.

30. Medical treatment Claimant received between May 7, 2016 and June 27, 2016 was reasonable, necessary, and causally related to her compensable injury.

31. The treatment Claimant received at the Parkview ER resulted from a bona fide emergency.

32. Claimant's direct supervisor had sufficient knowledge as of May 7, 2016 to lead a reasonably conscientious manager to believe Claimant might have sustained a compensable injury.

33. Employer did not tender medical treatment when it first received notice of the injury, and the right of selection passed to Claimant.

34. Summit Medical Clinic and PA Knauf are authorized providers.

35. CCOM and Dr. Olson are authorized providers.

36. The ALJ lacks jurisdiction to adjudicate medical benefits after June 27, 2016, because Claimant was placed at MMI by an authorized treating physician.

CONCLUSIONS OF LAW

A. Claimant's low back injury is compensable

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions. *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury "arises out of" employment when it had its origin in an employee's work related functions and is sufficiently related to those functions to be considered part of the employment. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). There is no presumption that an injury which occurs at work "arises out of" the employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968).

The claimant must prove that an injury proximately caused the condition for which benefits are sought. Section 8-41-301(1)(c); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim*

Appeals Office, 942 P.2d 1337 (Colo. App. 1997). For an injury to be compensable, there must be a "sufficient nexus" between the employment and the injury. *In re Question Submitted by the U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimants or respondents. Section 8-43-201.

A claimant is not required to identify the precise moment of injury, as long as she proves that the injury was caused by her work. *Hubbard v. City Market*, W.C. No. 4-934-698-01 (ICAO, November 21, 2014). Although an injury must "be traceable to a definite cause, time and place," this can be established by showing a "causal connection between the type of work, the date the pain began, and the place of employment." *Martin Marietta Corporation v. Faulk*, 407 P.2d 348, 349 (Colo. 1965).

The fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation if work-related activities aggravate, accelerate, or combine with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949).

The mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Cotts v. Exempla*, W.C. No. 4-606-563 (ICAO, August 18, 2005). Rather, when a claimant experiences symptoms at work, the ALJ must determine whether the subsequent need for treatment was caused by an industrial aggravation of a preexisting condition or was due to the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

As found, Claimant proved by a preponderance of the evidence she injured her back work on May 6, 2016. Although there are some discrepancies in the record regarding the description of the injury, the totality of evidence demonstrates that Claimant's back pain was triggered by her work activities. Claimant has consistently attributed the onset of symptoms to her work on May 6. Every statement in the evidentiary record that came directly from Claimant relates the onset of back pain to moving heavy items on the bottom of a cart while cashiering. The conflicting histories in medical records were provided by providers summarizing what she said. On balance, the descriptions of the onset of symptoms in the medical are sufficiently consistent with Claimant's direct statements to support the conclusion that her symptoms are causally related to her work. Dr. Roth agrees that the history Claimant provided supports a determination that she sustained a compensable injury. Having credited Claimant's version of events, it follows Claimant proved a compensable injury.

B. Emergency treatment at Parkview ER was authorized

As a general rule, an employer is only liable for "authorized" medical treatment. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a physician's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances of the particular case. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (ICAO, January 12, 2010).

As found, Claimant's treatment at the Parkview ER on May 7 resulted from a bona fide emergency. Claimant awoke at 3:00 AM with severe and debilitating back pain. Given the early hour, it was reasonable for Claimant to seek treatment at the emergency room.

C. Summit Medical Clinic and PA Knauf are authorized

Section 8-43-404(5)(a)(I)(A) gives the employer the right to select an authorized treating physician "in the first instance." If the employer does not designate a treating physician "forthwith" upon receiving notice of the injury the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565, 567 (Colo. App. 1987). The employer's obligation to tender medical treatment is triggered by "some knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Jones v. Adolph Coors Co*., 689 P.2d 681, 684 (Colo. App. 1984).

Claimant testified that she told her direct supervisor, Josh Olson, on May 7, 2016 she had injured her back at work the previous day. Respondent presented no direct testimony to contradict Claimant's testimony. Mr. Olson did not testify, and neither Mr. Anger nor Mr. Decesaro has firsthand knowledge of the conversations between Claimant and Mr. Olson. Therefore, the ALJ has credited Claimant's testimony in finding that she verbally notified Mr. Olson of her injury on May 7.

Claimant's notice to Mr. Olson was sufficient to trigger Employer's duty to offer medical treatment. *See e.g*., § 8-43-102(1.5)(a) (notice of injury can be given to "employee's foreman, superintendent, manager," or "other person in charge"); *Frank v. Industrial Commission*, 43 P.2d 158 (Colo. 1935); *Ferris v. King Soopers, Inc.*, W.C. No. 3-884-707 & 3-895-561 (ICAO, April 5, 1990); *Zanini v. King Soopers*, W.C. No. 3-870-72 & 3-887-766 (ICAO, December 4, 1989).

Employer did not offer medical treatment until June 23, 2016. As a result, the right of selection passed to Claimant, and she chose to receive treatment from her

primary care providers. PA-C Knauf and Summit Medical Clinic were authorized as of Claimant's May 10, 2016 appointment.

D. CCOM and Dr. Olson are authorized

Claimant may, and often do, have multiple ATPs. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). *Portillo v. Shoco Oil-Samhill-Oil*, W.C. No. 4-942-783-01 (ICAO, May 1, 2017). Aside from the initial "selection" as provided in § 8-43-404(5)(a), a physician may become authorized if the "employer has expressly or impliedly conveyed to the employee the impression" that the physician is authorized. *Bestway v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

Employer gave Claimant a list of designated providers on June 23, 2016, and she chose to seek treatment from CCOM. Therefore, CCOM was added to the chain of ATPs by virtue of Employer's referral.

E. The ALJ lacks jurisdiction to adjudicate medical benefits after June 27, 2016

Dr. Olson placed Claimant at MMI at her initial visit on June 27, 2016. Any ATP may place a claimant at MMI, and the ALJ does not have jurisdiction to question that determination absent a DIME, even if other ATPs disagree the claimant is at MMI. Section 8-42-107(8)(a); *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002).

Once there has been a determination of MMI by an ATP, the ALJ has no jurisdiction to award additional medical benefits intended to cure the injury without a DIME. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (ICAO, January 27, 2006); *Cass v. Mesa County Valley School District*, W.C. No. 4-629-629 (ICAO, August 26, 2005). Therefore, this Order does not address Claimant's entitlement to medical treatment after June 27, 2016.

ORDER

It is therefore ordered that:

1. Claimant's claim for a low back injury on May 6, 2016 is compensable.

2. Respondent shall pay for the May 7, 2016 treatment at Parkview ER.

3. Respondent shall pay for treatment Claimant received between May 10, 2016 and June 27, 2016 from Summit Medical Clinic, Parkwest Imaging and CCOM.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 9, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether Respondents overcame the opinion of the DIME physician on MMI and permanent medical impairment.
- Whether Claimant's hip condition was causally related to the accident.
- If Respondents sustained their burden of proof, what, if any, was Claimant's permanent medical impairment?
- Is the proposed medical treatment for Claimant's hip reasonable, necessary and related to her injury?

FINDINGS OF FACT

1. Claimant was working for Employer in Colorado as a civil engineer.

2. There was no evidence in the record which showed Claimant had a history of injuries to her cervical or lumbosacral spine, or her lower extremities.[1] There was no evidence Claimant treated for symptoms in any of these areas before October 23, 2012.

3. Claimant suffered an admitted industrial injury on October 23, 2012 when she was injured in a motor vehicle accident ("MVA") while working for Employer. Claimant was sitting in the passenger seat when the vehicle in which she was riding was rear-ended. The airbags deployed.

4. Claimant testified that she does not fully remember the details of the accident. Claimant recalled crawling out of the driver's side of the vehicle, but did not remember riding to or checking into the hospital. Claimant testified that she remembered waking up during the MRI, but does not remember any conversations with hospital staff.

5. Claimant was treated at Littleton Adventist Hospital. The intake report noted Claimant did not recall the accident, she just remembered seeing taillights and then being pushed back by an airbag. A CT scan of the patient's head, neck, and facial bones was done. The report also noted there was a concern given Claimant's headache and left-sided neck pain, so a CT angiogram was obtained. Claimant was evaluated by Andrew Knaut, M.D., Ph.D., whose diagnosis was: 1) Motor vehicle accident; 2) concussion, and 3) left inferior orbital wall fracture. The ALJ notes Claimant had no complaints of lower extremity pain at the emergency department.

[1] Treatment records for Claimant from 2008 were admitted. These contained a pain diagram for the low back. However, there was no evidence in these documents of a diagnosis or treatment Claimant received for her low back.

6. Following her injury, Claimant returned home to New Mexico. Claimant testified that upon returning to New Mexico she was most concerned about the persistent numbness on the left side of her face and constant headaches. She was worried about these symptoms. The ALJ credited Claimant's testimony that these symptoms were her main focus at this point in time. Claimant also stated her physical activities were limited.

7. Claimant testified she experienced in pain in her thigh a couple of weeks later, which was sometime around Thanksgiving. She could not cross her legs. When she increased her activities, this caused an increase in symptoms in her legs and lower back. Claimant said she had never experienced symptoms in her thighs/hips before the accident.

8. On November 30, 2012, Claimant was evaluated by Mark Berger, M.D. at New Mexico Neurology. At that time, she was complaining of headaches, although these were improving. She also reported neck pain since the accident, as well as left facial numbness. Dr. Berger's neurological examination was normal. His impression was: headaches following trauma on October 23, 2012, which were most compatible with post-traumatic headaches. Dr. Berger noted there was no evidence for other neurological processes causing the head pain, based upon the CT scan. Dr. Berger also diagnosed neck pain and left facial numbness, which was not improving. He wanted to proceed with a somatosensory evoked potential study of the trigeminal nerves to evaluate the function of the trigeminal nerve. He opined her neck pain was musculoskeletal in origin due to the cervical strain and prescribed physical therapy ("PT"). For the left orbital fracture, he stated an ENT evaluation was required. The ALJ notes Claimant made no reference to hip or thigh pain during this evaluation.

9. Medical records from MD Urgent Care in New Mexico were admitted at hearing. On February 28, 2013, Claimant was evaluated at that facility and she reported having moderate pain in both thighs since Thanksgiving. In the history section, it was noted Claimant was running 4-5 days /week, but she had no pain with running or at rest. Stretching was not helping. Normal hip range of motion ("ROM") was noted at this evaluation. Claimant's adductor muscles were noted to be very tight. X-rays were taken of Claimant's right and left femur, but no abnormalities were noted. Claimant was advised to obtain an orthopedic evaluation. Claimant was also to begin an exercise program, received independent exercise instruction, and range of motion/stretching.

10. Claimant returned to MD Urgent Care on March 20, 2013, complaining of neck pain and headaches, of two days duration. Claimant was given a prescription, as well as written instructions and discharged.

11. On March 21, 2013, Claimant was evaluated by orthopedic surgeon Paul Legant, M.D. Claimant identified the problem as pain on the inside of both thighs. The ALJ notes Claimant left blank whether the symptoms were related to an auto accident, but in the subject of history section, Dr. Legant noted she had been in a car accident around Halloween and had experienced symptoms since Thanksgiving. Claimant described the symptoms as sometimes dull, sometimes sharp in nature, with the biggest

problem when she attempted to cross her legs. Dr. Legant noted there was no pain with internal or external rotation of her hips, as well as no edema nor erythmia. She had full and equal range of motion for both lower extremities. Dr. Legant's assessment was bilateral thigh pain-etiology unknown. He referred Claimant to a neurologist.

12. On May 7, 2013, Claimant was evaluated by John Campa, III, M.D. Her chief complaint was intermittent, sharp shooting pain to the bilateral proximal thigh region. Claimant reported the symptoms began spontaneously, initially in the left thigh and then occurring in the right thigh in January 2013. These have been worsening over time. Claimant's history of a MVA and endometriosis was noted, along with her diabetes. In her pain diagram, Claimant indicated she felt pain over C6, C7, T8 and L2. On examination, Dr. Campa noted muscle spasm in Claimant's cervical spine and shoulders, as well as the thoraco/lumbar spine. In the section entitled etiology, Dr. Campa noted the following needed to be considered: bilateral, position/stretch related medial, proximal thigh pain, likely related to bilateral obturator nerve compression/entrapment the level of pelvic brim, secondary to recurrent endometrial implants. This opinion was persuasive to the ALJ. He also opined the following needed to be ruled out: C5-6 spinal segmental lesion, mid T spine spinal segmental lesion, lumbosacral spinal segmental lesion, right thyroid lobe lesion; identify polyneuropathy likely diabetic in origin. Dr. Campa performed extensive electrodiagnostic testing in each of those areas.

13. Claimant moved to South Dakota and treated at the Creekside Medical Clinic. Claimant was evaluated on June 14, 2013 by Stephen Sachs, PA-C reporting worsening, limited ROM to both hips and occasional pain to medial thighs. On examination, her hips were noted to have limited external rotation and slightly decreased internal rotation due to pain along the medial thighs. X-rays were negative. The diagnosis of backache was added. There was no record treatment Claimant received at this facility.

14. Claimant began treating with Stuart Johnson, D.C. on July 12, 2013. Dr. Johnson recorded that, after the motor vehicle accident on Thanksgiving, Claimant couldn't cross her left leg over the right and had sharp pains over the left medial thigh. He further recorded that, the air bag deployed and hit her, jarring her, which may have aggravated her lower back, as well as her neck and thigh. She advised that a prior MRI of the low back was negative. Chiropractor Johnson treated Claimant's cervical and lumbar spine on 45 occasions from July 12, 2013 through January 21, 2014. The records indicated Claimant subjectively reported symptom relief.

15. Claimant returned to PA-C Sachs September 23, 2013, however, this appointment was concerned with issues related to type one diabetes mellitus, ketoacidosis and abnormal electrolytes. On December 2, 2013, Claimant was evaluated by Jana Doorman, PA-C. She was complaining of persistent low back pain, bilateral hip pain and medial thigh pain, which she said was present since the October 23, 2012 accident. PA-C Doorman felt the bilateral hip pain, with medial thigh pain and low back pain was related to an SI joint radiculopathy.

16. Claimant then moved to Alabama and received chiropractic manipulation from Amanda Holland D.C. for cervical, thoracic and lumbar complaints from February 5, 2014 through August 25, 2014. She received a total of 35 treatments, which provided temporary symptomatic relief.

17. Claimant was examined by John Johnson, M.D. (neurosurgeon) on March 18, 2014. On this date, Claimant had problems moving her hips, crossing her legs, but denied constant back pain, describing it as intermittent. Claimant described a sharp pain in to her buttock and into her hip, and some pain in the anterior medial thigh with radiation. Upon examination, the doctor recorded she was unable to cross her hips left over right or right over left. Dr. Johnson reviewed the prior lumbar MRI scan dated June 18, 2013, noting there was no evidence of a disc herniation, stenosis or neural foraminal narrowing. His impression was: bilateral hip pain with decreased range of motion and low back pain. Dr Johnson corresponded with chiropractor Amanda Holland indicating that he could not explain Claimant's symptoms. However, he noted that she is an insulin-dependent diabetic and Claimant thought she was having avascular necrosis of her hips. Therefore, he recommended securing an MRI of the pelvis to rule out avascular necrosis of the hips. He noted that he encouraged her to seek out a PCP and possibly consider a rheumatology evaluation, as he did not see any structural abnormality.

18. On April 26, 2014, an MRI of the Claimant's pelvis was done. The impression of James Mann, M.D., the attending radiologist, was: no evidence of a recent stress or traumatic fracture. There is no evidence of osteonecrosis in either femoral head. The articular cartilage was grossly unremarkable. No definite acetabular labral tear identified. If clinical concern for labral pathology, consider MR arthrogram of the symptomatic hip for further evaluation.

19. After reviewing the MRI of the pelvis, Dr. Johnson issued a follow-up report dated May 6, 2014, wherein he stated that he had reviewed the MRI, and that is was fairly unrevealing, specifically that there was no evidence of avascular necrosis of the hips. He found nothing of a surgical nature.

20. On July 21, 2014, a Worker's Claim for Compensation was filed on behalf of Claimant. In the Worker's Claim, it was alleged Claimant's low back and lower extremities, neck/upper back and face were injured in the accident.

21. A General Admission of Liability ("GAL") was filed on behalf of Respondents on August 26, 2014. The GAL admitted for medical benefits.

22. On October 8, 2014, Peter Quintero, M.D., a neurologist, examined Claimant at the request of Respondents. Claimant was continuing to complain of sharp inner thigh pain with certain activities such as crossing the legs. She also reported complaints of low back pain 3/10, neck and mild mid-back pain, as well as headaches. Clamant did not specifically report hip pain. Dr. Quintero's accident related diagnoses were: cervical strain injury with secondary myofascial pain syndrome; thoracic strain injury with secondary myofascial pain syndrome; lumbosacral strain injury with

secondary myofascial pain syndrome; left orbital fracture-resolved; muscular contraction headaches; and concussion-resolved. These diagnoses led the ALJ to conclude Claimant injured these areas of her body. Dr. Quintero opined that due to the delayed nature of Claimant's reported inner thigh pain and the mechanism of injury, he could not relate these symptoms to the motor vehicle accident. Dr. Quintero thought it was most likely Claimant sustained strain injuries to these areas of her body, but would have had a good prognosis for a full recovery. Dr. Quintero believed Claimant suffered an injury to her gracillis muscles. The most common cause of injury to the gracillis muscles or adductors was a sports injury, such as running. The mechanics of a motor vehicle accident would not explain injury to this muscle group. The ALJ credited this opinion.

23. Dr. Quintero opined that Claimant likely sustained myofascial strains to her spine and that she had attained MMI from those strains, without resultant impairment. Dr. Quintero was at a loss to explain why she would be continuing to report pain some two years after the motor vehicle accident. Although Dr. Quintero described full ROM in Claimant's back and spine, there was no evidence Dr. Quintero performed ROM testing with dual inclinometers as part of his evaluation.

24. In January, 2015, Claimant was evaluated by Carol Krause, M.D. in North Dakota. She had cervical and lumbosacral pain, as well as pain in both thighs. Dr. Krause opined that her current symptoms were related to the MVA. Claimant was given treatment suggestions and was to continue treating with the chiropractor, Dr. Ness.

25. On May 28, 2015, Claimant underwent a DOWC IME ("DIME") with Christopher Ryan, M.D. At that time, Claimant was complaining of pain in her hips which was present when she crossed her legs. Dr. Ryan noted she had been running about 10 miles per week, but then slowed down considerably. Despite slowing her running, she developed symptoms in her left proximal thigh. She also had pain in the cervical-occipital junction, as well as low back pain. On examination, Claimant had moderate rigidity involving her cervical region, as well as limitations in her range of motion. Dr. Ryan performed ROM testing using dual inclinometers, as required by the *AMA Guides*[2]. In the lumbar spine, she had an oblique pelvis, with slightly elevated posterior/superior iliac spine on the left and hypomobile left sacroiliac joint. Dr. Ryan noted Claimant had fairly normal range of motion in flexion and extension of her hips, with slight limitation. Abduction was normal, but adduction was only to neutral bilaterally. He also performed ROM measurements on Claimant's lumbar spine.
Dr. Ryan noted Claimant did not have significant pain behaviors. The ALJ notes these ratings met validity criteria, as found by Dr. Ryan.

26. Dr. Ryan's diagnostic impressions included: cervical-occipital dysfunction, lumbopelvic dysfunction both of which were secondary to the vehicle accident. He also described Claimant's intrinsic hip pathology as uncharacterized. The ALJ inferred Dr. Ryan had a question regarding the causation of the hip symptoms. Dr. Ryan assigned 13% to Claimant's cervical spine, which included a Table 53 specific disorder, as well as loss of range of motion. He assigned a 10 % whole person impairment to Claimant's

[2] AMA Guides to the Evaluation of Permanent Impairment (3rd Ed. Rev.)

lumbar spine including both of those components. Dr. Ryan assigned a 25% right lower extremity rating and a 25% left lower extremity rating, which converted to a 19% whole person rating. These ratings were valid and done pursuant to the *AMA Guides*. The ALJ was persuaded that Claimant sustained a permanent medical impairment to the4 cervical and lumbar spine.

27. Dr. Ryan opined Claimant was not at MMI, as he felt Claimant's overall condition, including the impairment ratings could be improved. He recommended an MR arthrogram of Claimant's hips bilaterally, both of which should be evaluated by an orthopedist. He believed Claimant's impairment rating could be improved upon with further treatment, including manual therapy.

28. On October 15, 2015, Dr. Quintero issued an Addendum Report after reviewing Dr. Ryan's DIME report and the records from Dr. Krause. He disagreed with Dr. Ryan attributing not only the thigh pain to the industrial injury, but also the mid-back and low back pain, again due to the documented delay in reporting of these symptoms, as evidenced by the medical reports. Dr. Quintero opined that only the headaches and neck pain are logically related to the industrial motor vehicle accident.

29. On November 12, 2015, Claimant was evaluated by Keith Anderson, D.O., FAAPMR. Her two complaints were the fact that she could not adduct her legs because a pain in the adductor muscles, along with pain in the cervical and lumbar spine, without radicular symptoms. It was noted Claimant had seen multiple doctors, had received PT and chiropractic care. The latter helped for short periods of time. Dr. Anderson evaluated Claimant's spine and noted she did not have gross scoliosis, but tenderness was noted in her cervical spine. She had pain with deep palpation in the lumbar paraspinals. He opined Claimant had myofascial pain from the motor vehicle accident and recommended pool therapy, as well as a good exercise program and avoiding medications.

30. On November 20, 2015, Dr. Anderson responded to questions posed by Respondents' counsel. More particularly, Dr. Anderson stated:

> Question: What is your diagnosis of this claimant's current condition?
>
> Answer: Status post work related injury (1) fractured left inferior orbital wall (2) myofascial pain affecting the cervical and lumbar area with bilateral adductor pain.
>
> Question: What if any of these diagnosis are related to October 23, 2012 motor vehicle accident?
>
> Answer: Both are related to her motor vehicle accident.

31. Dr. Anderson concluded Claimant was at MMI. The ALJ noted Dr. Anderson did not provide his analysis as to why the bilateral adductor pain was causally

related to the MVA, including addressing the evaluation done by Dr. Ryan. The ALJ was persuaded that Claimant was at MMI at the time she was evaluated by Dr. Anderson based upon the totality of the medical evidence.[3]

32. The records admitted at hearing documented Claimant had received extensive treatment as of November 12, 2015. This included chiropractic treatment with Dr. Johnson from July 12, 2013 through January 21, 2014. [Exhibit 12]. She also received PT from October 24, 2013 through January 14, 2014. [Exhibit 11]. Claimant also received treatment with Dr. Holland from February 5, 2014 through August 25, 2014. [Exhibit 14]. Claimant also received chiropractic manipulation and therapy with Dr. Ness from July 30, 2015 through September 24, 2015. [Exhibit 16]. When she was evaluated by various physicians, including orthopedic surgeons, she was instructed as to home exercises. Based upon this evidence, the ALJ concluded Claimant was at MMI as of November 12, 2015.

33. Claimant was evaluated by Lawrence Lesnak, M.D. on January 25, 2016. Claimant reported her current symptoms were constant neck, midline low lumbar pain and bilateral proximal medial thigh pains with certain movements of her thighs, again reporting an inability to cross her legs. Upon examination of the spine, full thoracic range of motion was noted and Claimant was able to forward flex her chin to her chest with no symptoms whatsoever. However, during cervical spine range of motion testing, he believed Claimant self-limited her forward flexion to only 40 degrees due to complaints of moderate proximal posterior neck pain. Claimant achieved full range of motion in all other planes. Hip range of motion was full for both hip joints. He found generalized tenderness over the cervical paraspinal musculature and suboccipital regions bilaterally, without trigger points or muscle spasms. The ALJ notes there was no evidence Dr. Lesnak performed a complete evaluation of Claimant's cervical and lumbar impairment pursuant to the *AMA Guides.*

34. Claimant also returned to Dr. Ryan for a follow-up DIME on January 25, 2016. He reviewed supplemental reports from Drs. Quintero and Anderson. On examination, Claimant was uncomfortable, which Dr. Ryan attributed to travel. She had restrictions in her cervical spine, both on flexion and extension. In the lumbopelvic region, she had an elevation of the left posterior/superior iliac spine, compared to the right and the depression of the left anterior/superior fine compared to the left. She also had minimal motion in the left SI joint. Claimant complained pain in her groin when Faber testing was performed. Dr. Ryan noted his impressions remained the same as when he first saw Claimant. She had cervical-occipital dysfunction, as well as lumbo-pelvic dysfunction; both of which he thought most medically probable these were the results of the MVA. Claimant had what Dr. Ryan described as undiagnosed hip pathology, which he believed was an intrinsic injury to her hip joints, possibly a labral tear. He agreed with the radiologist's recommendation of an MR arthrogram. Dr. Ryan also opined Claimant should have ongoing follow-up with a manual therapist. Finally he

[3] The ALJ notes Dr. Anderson opined Claimant was at MMI as of one year after her accident-November 23, 2013. However, the medical evidence documented Claimant received extensive treatment after that time.

recommended a prescription for a topical preparation for her neck-PLO gel containing ketoprofen, ketamine, gabapentin and cyclobenzaprine. He did not believe Claimant was at MMI.

35. Claimant was evaluated on April 12, 2016 by H. Alexander Cobb, M.D. He evaluated her for bilateral hip pain, which she reported developed two weeks after the motor vehicle accident. The ALJ notes this report of history was inaccurate, as well as the fact that the vehicle which Claimant was riding hit another car. X-rays taken of Claimant's pelvis and both hips showed no dysplastic features in either hip or pelvis. Dr. Cobb's impression was a potential labral tear in both the left and right hips. He ordered an MRI arthrogram. The ALJ notes Dr. Cobb indicated the labral tears were non-traumatic, which raised the question of whether the MVA caused same.

36. Claimant underwent an MRI and arthrogram of the left and right hips on May 4, 2016. The procedure was performed by Raymond Armstrong, M.D., whose impression was: negative arthrogram left hip. The MRI films were also read by Dr. Armstrong, who noted a tear at the superior acetabular labrum of the left hip. He also noted an anterior right acetabular labral tear, but no evidence of occult right hip fracture or osteonecrosis. No femoral acetabular impingement was noted. Dr. Armstrong's impression was superior/inferior left acetabular labrum tear; complex, left adnexal cyst. His impression was the same for the right hip. These were the latest medical records admitted at hearing.

37. Claimant testified she continues to have pain in her inner thighs and cannot cross her legs. She also has low back and neck pain. She described this as an ache.

38. Dr. Lesnak, who is board certified in Physical Medicine and Rehabilitation and Osteopathic Medicine testified at hearing. He is Level II accredited pursuant to the WCRP. Dr. Lesnak testified consistently with his IME report. He concluded Claimant did not have lower extremity pain complaints at the Littleton Hospital. Dr. Lesnak noted Claimant’s hip and thigh complaints took some time to develop. Dr. Lesnak acknowledged that the most recent MRI of the hips showed small labral tears in the exact position on both sides. However, he pointed out that Claimant did not always have symptoms of hip pathology. When he examined her on January 25, 2016, she had no symptoms of hip pathology, but did complain of inner thigh pains. Dr. Lesnak did not believe Claimant’s thigh symptoms were related to the accident. The delay in onset caused him to question the relatedness of this condition. He stated Claimant did not require further treatment. He testified Dr. Ryan was in error regarding the cause of Claimant’s hip and thigh pain. He opined Claimant was at MMI and sustained no permanent impairment. He opined Dr. Ryan had erred in his conclusions regarding the need for treatment.

39. Dr. Lesnak also disagreed with Dr. Ryan’s opinion that Claimant suffered permanent pathology of the cervical spine that is causally related to the

industrial injury. Dr. Lesnak stated Claimant became symptom free with respect to her cervical spine symptoms in February/March 2013, as documented by the MD Urgent Care notes. However, the ALJ noted Claimant continued to report symptoms to her providers, which extended through 2015. Dr. Lesnak opined Dr. Ryan committed clear error in rating Claimant's cervical spine, as per the *AMA Guides*, because there was no ratable pathology and no Table 53, diagnosis. If there was no Table 53 rating, Dr. Lesnak stated it was not permissible pursuant to Level II Accredited training to provide a range of motion rating. This was why he believed Dr. Ryan's 13% rating was in error. Dr. Lesnak offered a similar opinion concerning Claimant's lumbar spine. He testified no rating warranted for this area of Claimant's body under the *AMA Guides*. The ALJ was not persuaded by Dr. Lesnak's testimony regarding whether Claimant sustained an injury to her cervical and lumbar spine and whether she had a permanent medical impairment. The ALJ concluded Claimant met the criteria for a permanent medical impairment.

40. Dr. Quintero testified as an expert at hearing. He is a board certified neurologist. Dr. Quintero opined that Claimant's inner thigh pain was not related to the industrial motor vehicle accident. Dr. Quintero also noted when she was examined by Dr. Berger on November 30, 2012, although she reported new neck pain, she did not mention inner thigh pain, back or hip pain. Dr. Quintero said the etiology of Claimant's inner thigh pain was mechanical, in that it was not constant. Based on the location of her pain, he believed it followed the distribution of the gracillis muscle, especially since the symptoms consistent with aggravation of this muscle group are problems with crossing of the legs. Dr. Quintero testified that in fact, running without adequate stretching is the most common cause of injury to the gracillis muscle.

41. Dr. Ryan, who is board certified in Physical Medicine and Rehabilitation and Osteopathic Medicine, testified at hearing. He is Level II accredited pursuant to the WCRP. He testified regarding both of his examinations of Claimant. Dr. Ryan testified consistently with the findings made during both of his evaluations of Claimant. Dr. Ryan testified Claimant required additional treatment, which was the basis for his finding that Claimant was not at MMI. However, the ALJ was not persuaded by his testimony on this subject. He testified the ratings he performed with regard to the cervical and lumbar spine were done pursuant to the *AMA Guides.* The ratings were performed in accordance with the training Level II accredited physicians receive. The ALJ credited Dr. Ryan's findings with regard to Claimant's cervical and lumbar spine.

42. Based upon the totality of the evidence, the ALJ finds Respondents overcame Dr. Ryan's opinion as to whether Claimant was at MMI.

43. Claimant was at MMI as of November 12, 2015, when she was examined by Dr. Anderson.

44. The ALJ concluded Respondents overcame Dr. Ryan's opinion regarding the cause of her thigh and hip pain. Her pain complaints were not related to the injuries she sustained on October 23, 2012.

45. Claimant did not prove she was entitled to additional medical benefits in the form of treatment for her hips and thighs.

46. The evidence admitted at hearing documented an injury to and treatment for Claimant's cervical spine. Claimant sustained a permanent medical impairment to her cervical spine as a result of her industrial injury. The ALJ concluded Claimant sustained 13% rating to her cervical spine based upon the findings of Dr. Ryan.

47. The evidence in the record documented an injury to and treatment for Claimant's lumbar spine. Claimant sustained a permanent medical impairment to her lumbar spine as a result of her industrial injury. The ALJ concluded Claimant sustained 15% rating to her lumbar spine based upon the findings of Dr. Ryan.

48. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Claimant, as well as the various health care providers who testified as experts, bore directly on the issue of overcoming the DIME.

Legal Standard for Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Respondents overcame Dr. Ryan's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence". § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. As noted below, the ALJ was persuaded by the evidence presented that Dr. Ryan's' opinions were incorrect. Therefore, Respondents met their burden of proof with regard to the issue of MMI and whether Claimant's hip and thigh pain were related to the industrial injury.

Causation

There was a significant question regarding the cause of Claimant's pain complaints in her thighs, as well as both hips, as documented by the extensive medical evidence and expert opinions admitted at hearing. There was a divergence of opinions by the physicians as to the cause of these symptoms. The ALJ concluded Dr. Ryan's analysis was not complete as to the cause of Claimant thigh pain and his opinion was overcome. First, Dr. Ryan did not fully analyze the findings made by Dr. Campa, who attributed the thigh complaints to Claimant's endometriosis. (Finding of Fact 12). Dr. Campa performed extensive testing to support his conclusions. Dr. Campa's opinion on the subject was persuasive to the ALJ.

Second, Dr. Quintero also raised Claimant's running as a potential cause for the pain complaints in her thighs. (Finding of Fact 22). Claimant's symptoms did not arise

for more than two months after the MVA, during which time she was running. Dr. Ryan's first DIME report also noted pain complaints after Claimant was running and there was at least some indication that Claimant continued to run. Additional support for this conclusion came in the form of Dr. Cobb's opinion, who noted Claimant's hip pain was non-traumatic.

Based on the evidence, the ALJ was persuaded that Claimant's running could have been a factor in these pain complaints. Dr. Ryan, although he noted Claimant had reduced her running, did not provide a cogent explanation as to why Claimant's hip and thigh symptoms occurred. Dr. Ryan did not directly address the opinions of Dr. Quintero on this subject, nor did he discuss the delay in onset of these symptoms. He also appeared to summarily conclude the lower extremity symptoms were related to the MVA, without a great deal of analysis. Furthermore, Dr. Ryan did not provide an explanation as to the delay in onset of hip symptoms. This gave rise to doubts about his opinions on causation and led the ALJ to conclude that his conclusions were not supported by the evidence. Therefore, Respondents met their burden on this issue.

MMI

Dr. Ryan's conclusions regarding MMI were also overcome in this case. In particular, his treatment recommendations were essentially the same between the two DIME reports. However, Dr. Ryan did not provide an explication as to why, after the extensive PT and chiropractic treatment Claimant received, that further manual therapy was in order. Also, his use of the phrase "maintaining her condition" in the first report led the ALJ to question whether this was pre-versus post-MMI treatment.[4] In addition, after the follow-up DIME with Dr. Ryan, Claimant underwent an MRI and arthrogram on both hips, which was one of the reasons Dr. Ryan concluded she was not at MMI.

Dr. Ryan's testimony at the hearing did not dispel the questions concerning MMI. (Finding of Fact 41). Therefore the ALJ concluded Respondents met their burden and introduced sufficient evidence to overcome Dr. Ryan's conclusion regarding MMI.

The ALJ concluded Claimant was at MMI as of the November 12, 2015 appointment with Dr. Anderson. (Finding of Fact 43). This conclusion is based on the fact that Claimant had extensive treatment for the cervical and lumbar spine, including PT and chiropractic therapies. (Findings of Fact 14, 16, 24, and 32). There was no evidence in the record that Claimant required additional treatment to cure and relieve the effects of her injuries to the cervical and lumbar spine. Accordingly, she was at MMI for those conditions. Given the ALJ's conclusion that the Claimant's hip and thigh condition were not related to the industrial injury, the question whether she was at MMI for those conditions is moot.

Impairment

The evidence led the ALJ to conclude Claimant injured her cervical and lumbar spine in the subject MVA. As found, Claimant complained of pain in her neck, starting

[4] Exhibit 4, p. 16.

with her treatment in the immediate aftermath of the accident. This started with the Littleton Hospital E.D. (Finding of Fact 5). Claimant's complaints of pain in the cervical spine were consistent throughout her treatment over the next couple of years. Drs. Berger and Campa diagnosed Claimant with cervical pain and opined she required treatment. (Findings of Fact 8 and 12).

Claimant's symptoms were documented when she required treatment while living in South Dakota and Alabama. Multiple physicians documented cervical symptoms, noting objective evidence of those symptoms. Claimant required treatment for these symptoms. These symptoms continued to the end of 2015, when Claimant was examined by Dr. Anderson. (Findings of Fact 29-30). Claimant continued to experience symptoms in this area of her body, which she testified to at hearing. The ALJ was persuaded Claimant met the criteria under the *AMA Guides* for an impairment rating to her cervical spine. More particularly, she had in excess of six months of pain/rigidity in her cervical spine which qualified her to receive a rating, pursuant to Table 53 II (B).

Likewise, Claimant had pain in her lumbar spine, which was reflected in the medical records admitted at hearing. The ALJ credited the opinions of those physicians, who opined these symptoms were related to the motor vehicle accident. There was objective evidence of injuries to these areas of the body in these records, which led the ALJ to conclude Claimant was entitled to an impairment rating for both the cervical and lumbar spine. (Findings of Fact 46-47). In this regard, Dr. Ryan's opinion regarding Claimant's medical him impairment was persuasive to the ALJ. He performed an evaluation of both the cervical and lumbar spine and the ALJ has adopted those impairment ratings.

In coming to this conclusion, the ALJ considered Respondents' argument that Claimant had, at most, a minor injury and no impairment to the cervical or lumbar spine. Respondents asserted no lesion was noted at the emergency department on the days of the accident. Respondents relied upon to the IME reports, as well the testimony of Dr. Lesnak. They also cited Dr. Quintero's reports and testimony. The ALJ concluded Dr. Quintero's accident related diagnoses provided factual support for the conclusion that Claimant injured these areas of her body. (Finding of Fact 22). Although Dr. Quintero testified he did not believe Claimant sustained a permanent medical impairment, there was no evidence before the Court that he performed an evaluation of permanent impairment (including ROM testing) pursuant to the *AMA Guides*. (Findings of Fact 22-23).

As found, Dr. Lesnak's testimony regarding Claimant's cervical and lumbar spine was erroneous in that he noted Claimant did not initially have symptoms to her spine. Dr. Lesnak also testified that Claimant's cervical symptoms had essentially resolved by February-March 2013. This was contradicted by the medical records admitted at hearing, and the ALJ credited the opinions of Claimant's ATPs concerning symptoms in the neck and low back. In addition, the fact there was no lesion was noted on the CT scan the day of the accident does not preclude a permanent impairment, particularly

where the evidence showed Claimant had symptoms and required treatment for an extended period of time. The ALJ did not find his testimony persuasive.

As found, these doctors documented symptoms and treatment for Claimant's cervical and lumbar spine over the course of many months. The medical records admitted at hearing document symptoms and objective findings made by Claimant's ATPs for more than two years after the accident. (See Findings of Fact 8, 10, 12, 13-17, 19, 24). Claimant also credibly testified that these symptoms continued for this period of time.

Accordingly, there was sufficient evidence to support the rating assigned by Dr. Ryan to Claimant's cervical and lumbar spine. In this regard, the ALJ concluded the ratings done by Dr. Ryan were correct and comported with the *AMA Guides*, specifically Table 53 II (B). Claimant met the criteria for a permanency rating for pain and rigidity in both the cervical and lumbar spine. Dr. Ryan's report and testimony were the most persuasive on this subject. Based upon the plethora of records documenting these symptoms, Dr. Lesnak's analysis regarding a potential injury to these areas of the body was exiguous, to say the least.

The ALJ concluded Claimant sustained a permanent medical impairment to her cervical and lumbar spine and is entitled to benefits for that impairment. Dr. Ryan's rating was valid and prepared pursuant to the AMA Guides. (Finding of Fact 25). Claimant is entitled to receive PPD benefits based upon that rating.

ORDER

IT IS ORDERED:

1. Respondents shall pay PPD benefits to Claimant, based upon the 13% rating to her cervical spine.

2. Respondents shall pay PPD benefits to Claimant, based upon the 15% rating to her lumbar spine.

3. Claimant's request for additional medical benefits to treat her hips or thighs is denied and dismissed.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 8, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant established by a preponderance of the evidence that his left knee condition is related to the July 2, 2015, work injury; and

2. Whether Claimant established by a preponderance of the evidence that the recommendation for left knee meniscectomy is reasonably necessary and related medical treatment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The parties stipulate and agree that Dr. Lindberg's testimony was not properly recorded at hearing and thus a transcript of his testimony was not prepared. Respondents' Exhibit R is offered in lieu of a transcript of Dr. James Lindberg's live testimony at hearing.

2. Claimant is a 59-year-old fireplace installer who worked for Employer. On July 2, 2015, Claimant injured himself at work when he fell approximately 4 feet off of a ladder to a cement floor while installing a fireplace.

3. Claimant reported to University of Colorado Health Emergency Room on July 2, 2015, complaining of left shoulder pain and left knee pain. All x-rays were negative for acute fracture but did show significant glenohumeral joint arthrosis.

4. Claimant returned to work on July 6, 2015, and was placed on light-duty. Claimant's light-duty job assignment required him to drive to and inspect up to 16 different sites per day. Claimant admitted that during his initial return to work in July 2015, that he would sometimes use a company vehicle that was a stick shift in order to complete these tasks. Claimant continued this light-duty assignment until his shoulder surgery on March 4, 2016.

5. Upon return examination on July 8, 2015, with Dr. Jeffrey Winkler, Claimant complained of continued shoulder pain and indicated his knee was feeling better than during the previous examination, but definitely still in pain. Examination of Claimant's left knee revealed no effusion, full range of motion, negative varus/valgus, negative Lachmans and limping gait

6. During Claimant's fourth physical therapy session on July 29, 2015, he reported 0/10 pain in his left knee with some noted pain while descending stairs, standing on uneven surfaces, or kneeling. Examination of Claimant's left knee revealed full range of motion and negative findings during anterior drawer testing, varus testing, valgus testing and Lachman testing. Claimant was recommended to continue a home exercise program for his left knee.

7. Claimant returned for evaluation with his primary provider at Concentra on August 26, 2015. Physical examination of Claimant's left knee again revealed full range of motion with negative findings during anterior drawer testing, varus testing, valgus testing, and Lachman testing.

8. On October 16, 2015, Claimant reported to Concentra for evaluation and reported complete resolution of pain in his left knee without any associated symptoms. Notes indicated that Claimant reported 0/10 pain and "reports no exacerbating factors."

9. Claimant presented for physical therapy treatment on November 24, 2015, reporting 0/10 pain in his left knee. Due to Claimant's lack of left knee complaints, during Claimant's second round of physical therapy, he required 16 sessions of physical therapy directed at his shoulder.

10. On December 31, 2015, Claimant returned for his final round of physical therapy at Concentra. Claimant reported 0/10 pain in his knee without any noted tenderness to palpation. Claimant tested negative for: anterior draw sign, varus test, valgus test, Lachman test, and apprehension test. His left knee joint mobility was "normal and pain free," with full range of motion and pain free movement in all plains. Claimant was noted to have met 100% of his goals related to recovery of his left knee.

11. Claimant followed up with Dr. Pineiro on January 6, 2016. Examination of Claimant's left knee revealed no deformities or tenderness to touch. Claimant had full range of motion and normal strength was noted in his left knee.

12. Claimant was recommended to undergo left total shoulder arthroplasty which was completed by Dr. Grey on March 4, 2016. Claimant began a third round of physical therapy for his shoulder on March 15, 2016. Claimant did not mention his left knee in any of the 33 subsequent physical therapy sessions.

13. Claimant followed up with Dr. Pineiro on May 9, 2016, for full evaluation. Claimant indicated that his shoulder was felling better with physical therapy and did not mention his left knee. Dr. Pineiro placed Claimant on restrictions regarding his left shoulder and was silent regarding Claimant's left knee. Claimant was released to light duty and he returned to modified duty on May 24, 2016.

14. Chris Tenan credibly testified to Claimant's light-duty activities.

Claimant's light-duty position required him to watch training videos and also clean approximately 50 fireplaces that were spread out over a 3,000 square foot facility. According to Mr. Tenan, cleaning the fireplaces required Claimant to get on his knees or flex at the knees as some of the fireplaces were located close to the ground. Mr. Tenan testified that Claimant was able to complete this light-duty task for 3 months 40 hour per week without once mentioning any left knee complaints.

15. Upon physical examination with Dr. Pineiro on June 15, 2016, Claimant reported that he was back to light-duty and tolerating it well. During that examination, Claimant indicated that he was not in any pain regarding his left shoulder and no mention is made of Claimant's left knee. Claimant was recommended to complete his physical therapy at which point, Claimant would be given an impairment rating.

16. On August 11, 2016, Claimant was laid-off from his position at Employer as there was no longer a position open for him. Claimant testified that he had no other job lined up, that he has not worked since being laid off and that he continues to receive a bi-weekly check from Respondents.

17. Claimant returned for an evaluation with Dr. Pineiro on September 2, 2016. At this appointment, Claimant claimed to have not been very active since his surgery 6 months prior and that about a month ago he started to notice left knee pain that radiated into his foot. During testimony, Claimant denied that his work activity had been increased during the fall of 2016 and actually testified that his work activity was lessening at that time. Dr. Pinero opined that Claimant was at MMI for his left shoulder, but the doctor ordered an MRI of the left knee because of Claimant's complaints of increased left knee pain.

18. MRI results taken on September 13, 2016, demonstrated a complex tear of the posterior horn and body of the medial meniscus with a partial tear/high-grade sprain of Claimant's ACL. Claimant also had degenerative changes most prominent in the patellofemoral compartment. Marrow edema was found posteriorly within the lateral tibial plateau. The radiologist noted that the marrow edema found on the MRI results "may be from a recent injury."

19. Claimant was examined by Dr. Martin from the Orthopaedic & Spine Center of the Rockies on October 17, 2016. Claimant reported that he had continuous and persistent pain and a numb feeling almost like "an explosion of discomfort that is intermittent with twisting or stepping down." He also noted getting in and out of his truck caused him pain. Physical examination of Claimant's left knee now revealed limited range of motion due to pain, significant positive Lachman's findings, positive pivot shift on the left, medial joint line tenderness and positive McMurray's test. Dr. Martin requested surgery as a result of his review of the MRI findings from September 13, 2016.

20. On October 28, 2016, Claimant returned for examination with Dr. Pineiro. Dr. Pineiro thought Claimant's knee injury was a result of the "contusion" from his work-

injury and that Claimant's knee was overlooked in the process. Dr. Pineiro noted that instead of a full review of all of Claimant's medical records, her opinions and conclusions were based on Claimant's subjective description of the mechanism of injury and pain history.

21. Dr. Hattem conducted a review of the requested surgery on October 13, 2016, and recommended that the procedure be denied as Claimant's knee condition was unrelated to his work injury. Dr. Hattem reasoned Claimant's left knee strain had fully resolved as Claimant reported resolution of knee pain and test results were negative for injury. Likewise, for multiple months following the injury, Claimant never complained of knee pain. Furthermore, the left knee MRI taken on September 13, 2016, demonstrated edema which was suggestive of a recent injury. Dr. Hattem opined that an intervening injury had taken place and thus, the surgery was unrelated to Claimant's work-injury.

22. Dr. Hattem credibly testified that Claimant's current left knee complaints were unrelated to his initial work injury for a number of reasons. Prior to testifying, Dr. Hattem reviewed all medical records submitted as exhibit by Respondents. Dr. Hattem testified that had the initial injury caused the pathology seen in the September 13, 2016, MRI of Claimant's left knee, he would have reported knee complaints to his providers upon his return to work in May 2016. Instead, Dr. Hattem noted Claimant had returned to work for almost four months prior to complaining to a provider about his knee, despite several full examinations and opportunities via pain diagrams. He likewise discounted Dr. Pineiro's explanation of shoulder pain masking Claimant's knee pain as the medical records demonstrated Claimant to be in very little pain following his shoulder surgery.

23. Dr. Hattem testified that any injury to Claimant's knee that was a result of the July 2, 2015, injury, had fully resolved by November or December of 2015 as Claimant received conservative treatment and noted complete resolution of his pain. It was Dr. Hattem's expert opinion that had the injury on July 2, 2015, caused the pathology seen on the September 13, 2016, MRI, Claimant would have experienced continuous pain and that activities of daily living would have caused Claimant to experience symptoms.

24. Dr. James Lindberg completed an IME of Claimant on February 28, 2017, where he reviewed all of Claimant's medical records, including the MRI imaging taken on September 13, 2016. Dr. Lindberg is a Board certified orthopedic surgeon who recently retired from the practice of surgery. He currently performs orthopedic consultations. Dr. Lindberg was qualified at hearing as an expert in orthopedic surgery. He credibly testified that something had recently happened to Claimant's knee to cause the findings upon his examination.

25. Dr. Lindberg noted numerous doctors who failed to note any instability in Claimant's left knee after the initial injury. However, upon presentation at Dr. Martin's office in September of 2016 and during the IME evaluation in February 2017, Claimant complained of massive instability and test results found instability at a level not before

seen during Claimant's multiple and extensive physical examinations. Dr. Lindberg also noted Claimant's changing presentation with his providers when he complained of posterior knee pain on September 2, 2016, only to complain of anterior knee pain on October 15, 2016 and then both anterior and posterior pain on November 11, 2016.

26. Dr. Lindberg also credibly testified that the MRI findings on the September 13, 2016, were new and that medical records confirmed this opinion for a number of reasons. First, Dr. Lindberg agreed with the radiologist that there were findings of edema in Claimant's left knee which were indicative of a new ACL injury. Second, Dr. Lindberg pointed to numerous negative findings during multiple prior examinations of the valgus test, the Vargas test, the Lachman's test and that Claimant was now testing positive for those findings. It was Dr. Lindberg's opinion that there was no medical explanation which could account for the new findings, other than an intervening injury.

27. Dr. Lindberg agreed with Dr. Hattem in his opinion that a lack of pain complaints for a period of nine months indicated that the MRI findings were not caused by the July 2, 2015, injury. Dr. Lindberg opined that the type of tear that Claimant had would not have resolved with the level of inactivity Claimant described to him. It was Dr. Lindberg's opinion that had Claimant had the meniscus tear since July 2, 2015, any and all activities of daily living requiring the use of his left knee would have caused Claimant symptoms/pain. Dr. Lindberg opined that no level of inactivity, short of being completely bed-ridden, would have allowed Claimant to remain asymptomatic for nine months had Claimant had the pathology seen on the September 13, 2016, MRI since July 2, 2015.

28. Dr. Lindberg also disagreed with the opinions of Dr. Pineiro and Dr. Martin that Claimant's shoulder pain caused him to not mention his knee pain. Dr. Lindberg noted that his review showed Claimant had done remarkably well after his shoulder replacement surgery and that there were no indications Claimant could not identify knee pain at the same time his shoulder was hurting. He also agreed that Claimant was most likely at MMI in December 2015 as all of his symptoms had resolved with conservative treatment and that had Claimant had significant pathology all along, his symptoms would not have subsided with physical therapy.

29. Furthermore, Dr. Lindberg noted that the proposed surgery by Dr. Martin would not be reasonable or necessary as it would likely cause increased instability in Claimant's knee. It was his opinion that addressing the meniscus without also operating on the ACL would only cause further problems in Claimant's knee and that it was his recommendation that no surgery be performed.

30. The opinions of Drs. Albert Hattem and James Lindberg are more credible and persuasive than the opinions of Drs. Rosalind Pinero and Dale R. Martin.

31. Claimant's current left knee condition is not causally related to the July 2, 2015, work injury.

32. Accordingly, Claimant's claim for medical treatment of the left knee

condition, the left knee meniscectomy as recommended by Dr. Martin, is not reasonably necessary and related medical treatment.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ reaches the following Conclusions of Law:

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. To sustain a finding in a claimant's favor, the claimant must do more than put the mind of the trier of fact in a state of equilibrium. If the evidence presented weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof. *People v. Taylor*, 618 P.2d 1127 (Colo. 1980). *See also, Charnes v. Robinson*, 772 P.2d 62 (Colo. 1989). Proof by a preponderance of the evidence requires a claimant to establish that the existence of a contested fact is more probable than its nonexistence. *See Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 (ICAO March 20, 2002).

4. The respondents are liable for medical treatment that is reasonably necessary to cure and/or relieve an injured worker from the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. An admission of liability does not amount to an admission that all subsequent medical treatment is causally related to the industrial injury or that all subsequent treatment is reasonably necessary. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondent retains the right to challenge the cause of the need for continuing treatment and the reasonable necessity of specific

treatment. *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003). The claimant must prove a causal nexus between the claimed disability and need for medical treatment and the work related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant has met the burden to establish the requisite causal connection and whether the medical treatment sought is reasonably necessary is one of fact for the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Putnam v. Putnam & Associates*, W.C. No. 4-120-307 (August 14, 2003).

5. The overwhelming weight of the credible evidence shows Claimant failed to prove that the incident on July 2, 2015, caused the need for the recommended surgery by Dr. Martin. Claimant contends that he was so inactive and in so much pain from his shoulder, that he was unable to notice his knee pain for a period of nine months. This explanation is not persuasive.

6. Claimant made conflicting report to medical professionals about his alleged increased activities around July of 2016. And, then during testimony, Claimant testified that his activity level at that time was actually decreasing.

7. The experts that have fully reviewed this claim, Drs. Lindberg and Hattem, credibly opined that if Claimant had the condition that was seen on the September 13, 2016, MRI throughout the entirety of his claim, Claimant would not have had a period of nine months where he felt no pain and had no associated left knee symptoms. The experts opined that no amount of inactivity, short of being bed-ridden would have allowed Claimant to be asymptomatic for nine months. Dr. Lindberg conclusively testified that with the derangement seen on the September 13, 2016, MRI, Claimant would have noticed aggravation of his condition conducting regular activities of daily living. Claimant attended 49 appointments between December 31, 2015, and September 2, 2016, without mentioning left knee symptoms.

8. The evidence showed Claimant to be active during his return to work. Upon his return after surgery, Claimant started cleaning fireplaces in Employers' 3,000 square foot facility on May 24, 2016. To perform these duties Claimant had to kneel and flex his knees. If claimant had a significant meniscus tear as a result of the July 2, 2015, fall, he would have certainly reported pain in his knee at that time and had plenty of opportunities to do so via pain diagrams and physical examinations. However, the medical records are completely devoid of any left knee complaints for at least 3 months after he had been completing this work and while working 40 hours per week.

9. Evidence further established that Claimant was very active when he returned to work four days after the initial injury. Had the July 2, 2015, injury caused the significant meniscus pathology later seen on MRI imaging, he would not have reported continued and progressive improvement of his knee symptoms. Dr. Lindberg credibly testified that the meniscus injury seen on the September 13, 2016, MRI would not get better with physical therapy, yet, records reflect that Claimant continued to get better.

10. The court believes Dr. Lindberg's testimony that something else happened to Claimant's left knee after the initial work injury. It was clear to him that Claimant's knee had changed since the date of injury and that this was confirmed by the multiple objective findings. Dr. Lindberg opined that there was conclusive evidence that something else had happened to Claimant's knee as it made no medical sense that Claimant would be asymptomatic for nine months and then suddenly appear with significant and different findings upon examination.

11. Conservative treatment cured Claimant of the effects of the injury at the end of December 2015 and no further diagnostic testing or treatment was needed. Had Claimant only injured his left shoulder, he would have been placed at MMI and released without impairment. However, only because Claimant had left knee complaints, did his claim stay open.

12. Dr. Martin's opinion that the chronic ACL tear and medical meniscus tear was caused at the time of injury, 16 months prior was not found to be credible or persuasive. Dr. Martin recommended Claimant undergo a meniscectomy of his left knee. However, Dr. Lindberg credibly testified that had Claimant had the left knee injury on July 2, 2015, that was seen in the MRI taken on September 13, 2016, none of the tests conducted on prior examinations would have been negative. Instead, Dr. Lindberg points to examinations where Claimant tested negative for Lachman with absolutely no mention of instability for at least 12 months. Had Claimant had an ACL injury from the beginning, Claimant would have had positive findings during multiple objective tests.

13. Based on the testimony and the medical records, Claimant failed to meet his burden to establish by a preponderance of the evidence that his left knee condition is related to the July 2, 2015, work injury. Likewise, Claimant failed to establish by a preponderance of the evidence that the recommendation for left knee meniscectomy is reasonably necessary and related medical treatment.

ORDER

It is therefore ordered that:

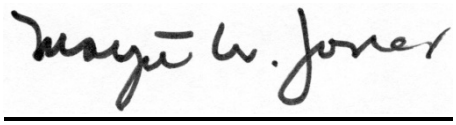
1. Claimant claim for the left knee injury is denied and dismissed.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For

statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 9, 2017



Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant established by a preponderance of the evidence that his claim is compensable.

- Whether Claimant established by a preponderance of the evidence that the medical treatment he received was reasonably needed and provided by an authorized treating physician.

- Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability compensation.

- Whether Respondents established by a preponderance of the evidence that Claimant was responsible for the termination of his employment.

FINDINGS OF FACT

1. Claimant began employment as a nightshift stocker in July of 2016. Prior to that time, Claimant had been a stay-at-home father, taking care of his children and his girlfriend's children. He testified that he took the job with Employer on the night shift so that he could be available to watch his children during the day when his girlfriend was at work. Claimant's typical shift was 10:00 p.m. to 6:00 a.m.

2. Claimant testified that he was performing his usual stocking duties on the evening of October 17 or the early morning of October 18, when he was setting down a case of soup cans and felt pain in his right forearm. He claims that there was a large lump on the outside of his forearm, near his elbow. Claimant testified that he massaged the "lump" until it receded and told his supervisor, "Kenny," that he was having pain in his forearm. Kenny told Claimant that he could leave work and go to the emergency room.

3. Claimant did not go to the hospital on the morning of October 18 but left work early for home. He testified that he applied ice to the area.

4. Claimant was not scheduled to work on the following day, but returned to work on October 20 for his usual shift and resumed his regular duties.

5. Claimant testified that on October 28, 2016, he was using a pallet jack to move a pallet of paper products and bottled water. He testified that the forks on the jack abruptly fell, stopping the pallet and jerking his right arm. He testified that the action aggravated his right forearm where he had had pain on the evening of October 17 or early morning of October 18, 2016.

6. Claimant testified that he told his supervisor, Josh, about the October 28, 2016 incident, and was told he could go home. He testified that he also discussed his situation with another supervisor, Justin Anderson. He told Justin Anderson that he was a hemophiliac and preferred treating with his specialist, Dr. Wang, to treating with a workers' compensation doctor because he thought his injury might be related to his

hemophilia. Claimant returned to his personal physician for blood disorder treatments. Claimant testified that he was given "factor VIII" shots for his complications from hemophilia and that he had previously received those types of injections.

7. Claimant testified that he brought the doctor's note releasing him from work and provided it to Assistant Store Manager, Anna Sherrod. She filled out Employer's First Report of Accident and referred Claimant to the workers' compensation medical provider, Dr. Prok.

8. Claimant admitted at hearing that he still does not have a diagnosis of what caused the pain in his forearm, despite seeing his personal blood disorder doctors and the workers' compensation doctor.

9. Claimant testified that Ms. Sherrod called him and told him that he was going to be given day shift light duty work within his restrictions. Claimant inquired why he would have to work on the day shift, instead of his usual night shift. Ms. Sherrod informed him that a manager had to be present when injured employees return to work with restrictions. Claimant protested and indicated that he could not work days. Ms. Sherrod told him that he was on the schedule to start the following Monday at 9:00 a.m. Claimant testified that he called in at 9:00 a.m. on Monday morning and told them that he would not be coming in. He did not return to work. After several missed shifts, Employer terminated Claimant.

10. An undated written statement by one of the Claimant's supervisors, Justin Anderson, summarizes the circumstances of Claimant's alleged injuries. The statement noted that Claimant did have pain in his arm and was told to leave work and go to a hospital by his night crew foreman, "Kenny." Claimant did not go to a hospital or see a doctor but returned to work after a regularly scheduled day off. The written statement confirms that there was an incident of pain reported which appears to be the October 28, 2016 alleged incident with the forklift. Mr. Anderson indicates that he instructed Claimant how to report an on-the-job injury. Mr. Anderson related that Claimant told him that he had a special condition and wanted to be seen by his own doctor who specializes in blood disorders. According to the written statement, Claimant declined to file a report of an on-the-job injury because he thought "his arm may be related to his pre-existing condition and needed his specialist to check it out."

11. Ms. Sherrod testified by telephone at the hearing. She confirmed that she was Employer's HR representative and assistant manager at the store. She testified that she was made aware of Claimant having an incident of pain in his forearm on two different occasions. Ms. Sherrod indicated that she filled out the Employer's First Report of Accident and sent it off to the Sedgwick CMS, the workers' compensation third-party administrator for the Employer. Ms. Sherrod confirmed that she did not decide whether or not Claimant's condition was work-related, and that such a decision was for Sedgwick CMS's to make.

12. Ms. Sherrod testified that she told Claimant she could arrange for light duty work within the physical restrictions assigned by his treating physicians. Claimant

protested that he did not want to work the day shift because it conflicted with his childcare schedule. Ms. Sherrod told him that he had to work on a shift where a manager could monitor his work within his physical restrictions. She told him that he would be placed on the day shift and could report the following Monday morning at 9:00 a.m. Ms. Sherrod testified that Claimant called on Monday at 9:00 a.m. and said he would not be returning to his employment.

13. The record contains documents regarding Respondent's investigation into Claimant's alleged injury and the forms which Ms. Sherrod sent to Sedgwick CMS. Employer's records included a October 4, 2016 written warning for failing to show up or call when he was going to miss a shift. This exhibit also contains a termination form dated December 5, 2016, terminating the Claimant for failing to return to work for scheduled shifts.

14. Employer provided answers to specific questions for Sedgwick CMS as part of the reporting of the alleged incident indicating that Employers' personnel questioned the validity of the claim and indicated that Claimant had indicated to his supervisor that he thought the problem was not work-related but rather was related to a pre-existing condition that was acting up.

15. Dr. Mark Paz, who conducted a Respondents-sponsored IME, testified at hearing and his narrative report was also entered into evidence. Dr. Paz is a medical doctor licensed to practice in the State of Colorado, specializing in internal medicine and occupational medicine. Dr. Paz is Level II certified. Dr. Paz performed the Independent Medical Evaluation on March 22, 2017 and reviewed all medical records, which are set forth in his narrative report April 7, 2017.

16. Dr. Paz took a detailed history from Claimant about how the alleged injuries occurred. He also reviewed Claimant's employment records. Dr. Paz testified that Claimant claimed that on October 18, 2016, he lifted a case of soup cans, set them down, and experienced pain in his right arm. Claimant explained that he developed a "bulge" in his proximal right forearm and had pain.

17. Claimant described an incident on October 28, 2016, which occurred while he was using a pallet jack. Claimant demonstrated for Dr. Paz how he was pulling the pallet jack with its handle when the pallet jack unexpectedly lowered a few inches and jerked his right forearm, causing pain and swelling in the immediate area. Claimant also demonstrated his movements while testifying at hearing.

18. Based upon Claimant's description and demonstration of how both incidents occurred, Dr. Paz opined there was no mechanism of injury to cause an injury to the proximal forearm below the elbow. He explained that the flexor and extensor muscles in the forearm have specific flexion and extension functions while performing certain actions. Based upon Claimant's demonstration, Dr. Paz opined, within a reasonable degree of medical probability, that the claimed area of musculature would not have been injured or even utilized when Claimant moved the case of soup or pulled the palette jack. Dr. Paz testified that neither Claimant's medical records nor his

description set forth a mechanism of injury that would explain his subjective symptoms. He further opined that there had been inadequate diagnostic testing.

19. Dr. Paz testified that on March 22, 2017, when he examined Claimant, Claimant had no objective indication of injury and could have returned to his pre-injury employment without restriction of activity.

20. Dr. Paz opined that Claimant did not have a workers' compensation injury. He explained that according to the Level II physicians' accreditation curriculum, the mechanism-of-injury must correlate with both a medical diagnosis and findings. Dr. Paz testified that the two incidents described on October 18 and October 28 do not correlate with a mechanism of injury to the right forearm extensor muscle. He testified that that history is inconsistent with the proximal extensor compartment swelling and subjective complaints of pain. He also noted inconsistency in the exposure descriptions in the medical records. Dr. Paz opined that the physical mechanics of lifting a case of soup cans or pulling a pallet were not congruent with a right forearm inter-muscular bleed. Dr. Paz did not believe that the bulge could have been explained on the basis of an injury or hemophilia in the absence of direct trauma to the extensor muscle of the right upper extremity. He further stated, in both his testimony and his narrative report, that no medical treatment was necessary or reasonable for a work-related incident.

21. The ALJ finds Dr. Paz' opinions to be credible and persuasive.. Dr. Paz opined Claimant's right arm pain and injury claims are not supported by objective findings on physical examination or in the medical records. He also noted that the physical examination history was inconsistent with Claimant's reported functional limitations. Finally, Dr. Paz noted that Claimant reported that he had been wearing a splint and keeping his right upper extremity immobilized. However, on examined there was no disuse atrophy and the right upper extremity was, in fact, larger in circumference than his left. The lack of atrophy and larger circumference of the right forearm indicated that the right upper extremity was being used and had not been immobilized.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been either an injury or an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

An industrial injury has to both occur in the "course of employment" and must also "arise out of" employment duties. The latter deals with a causal connection between the employment and the injury. *General Cable Co. v. Industrial Claims*

Appeals Office, 878 P.2d 118 (Colo. App. 1994). The mere happening of an injury on-the-job does not satisfy both requirements of compensability. *Morrison v. Industrial Claims Appeals Panel,* 760 P.2d 654 (Colo. App. 1988).

As found, Claimant failed to demonstrate, by a preponderance of the evidence, that he suffered a disabling injury to his right forearm arising out of his employment with Employer. According to the written statement of his supervisor, Claimant himself declined to make a report of a work-related injury because he thought that his pre-existing blood disorder might be the explanation for the pain he was experiencing. He did not report a work-related injury, on October 18, 2016 and, according to the written statement of his supervisor, Justin Anderson, Claimant was uncertain as to whether his forearm pain was related to a work-related incident after the October 28, 2016 pallet jack incident. The medical evidence also does not support a disabling work-related injury. Claimant admitted in his testimony that he does not have a firm diagnosis of his subjective pain complaints, after having been treated by his blood disorder physicians and the designated workers' compensation physician.

As found, Dr. Paz's opinions are found to be credible and persuasive regarding the lack of a mechanism-of-injury. Dr. Paz' testimony that the symptoms and the location of swelling on the Claimant's forearm cannot be explained by the movements of lifting and setting down a case of soup or pulling a pallet jack, based upon the muscles involved in the flexion and extension functions while performing these tasks. Dr. Paz credibly explained that the mechanism-of-injury has to be consistent with the diagnosis and objective findings. There is no specific work-related diagnosis of Claimant's condition found in the medical records, according to Dr. Paz's credible testimony at hearing.

As found, Claimant's pain sensation after performing duties at his employment, does not necessarily compel a conclusion that a work-related injury has occurred. The medical records show prior complaints of pain in 2015 where Claimant sought treatment for his blood disorder physicians. Those records reveal that Claimant had complaints of pain which he could not correlate with any specific trauma or mechanism of injury. He eventually theorized that performing some sanding maneuvers may have started the complaints of pain back in 2015. Similarly, in these incidents, Claimant appears to have been uncertain of what was causing his pain, compelling him to go to his own blood disorder physicians for initial treatment and evaluation.

Section 8-42-105(4), C.R.S., provides:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

It is undisputed that Employer offered Claimant employment within his restrictions and scheduled him for light duty employment. Claimant failed to report for the scheduled light duty employment, and after several missed shifts Employer

eventually terminated Claimant, pursuant to Employer's policies. The ALJ acknowledges that Claimant may have had child care issues if he worked the day shift. However, balancing the factors involved, Claimant was responsible for his own termination. The question of whether the claimant acted volitionally or exercised a degree of control over the circumstances of the termination is ordinarily one of fact for the ALJ. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004). Employer offered employment within Claimant's physical restrictions and Claimant declined to accept that offer and remain off work. Under these circumstances, temporary disability benefits should not be awarded.

In addition to all of these factors, Claimant's credibility is questionable. Although he claims to have immobilized his arm before his independent medical examination, physical findings were that the arm had not been immobilized as claimed. The Claimant also made documented statements to his supervisors that he was unsure if he had been injured and that his symptoms of pain might be related to his blood disorder.

As found, Claimant has failed to demonstrate that his employment activities on either October 18 or 28, 2016 caused a work related injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant did not sustain a compensable work related injury on October 18 or 28, 2016.

2. Claimant's claim is denied and dismissed.

3. Issues not expressly decided herein are reserved to the parties for future determination.

4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 12, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he suffered a compensable injury on August 2, 2016 arising out of and in the course and scope of his employment with employer.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the left shoulder surgery performed Dr. Harris on December 15, 2016 was reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 work injury.

FINDINGS OF FACT

1. Claimant works for employer as an electrician. Claimant testified that on August 2, 2016 he injured his left shoulder while he was installing light fixtures. Claimant further testified that the injury occurred when he was lifting a light fixture above his head for installation and felt a pop and pain in his left shoulder. Claimant testified that because of the pain he was unable to lift his left arm.

2. Claimant testified that he has had prior issues with his left shoulder. Claimant testified that many years ago he slipped on ice and injured his left shoulder. Claimant testified that he was able to continue working following that incident.

3. The medical records indicate that in March 2014 claimant had another fall resulting in a left shoulder injury. On March 4, 2014, claimant sought treatment with Dr. Michael Vargas because of pain he was having in his left shoulder. At that time, Dr. Vargas ordered x-rays of claimant's left shoulder which showed probable degeneration of the supraspinatus tendon with chronic cortical changes at the greater tuberosity.

4. On March 12, 2014, claimant was seen by Dr. Robert Derkash who diagnosed left shoulder impingement with rotator cuff tear. Dr. Derkash opined that the rotator cuff tear was "significant" and discussed with claimant the possibility of surgery. Claimant chose not to pursue surgery at that time. Claimant testified that following the March 2014 injury he was able to return to full duty work.

5. Claimant testified that the pain he experienced on August 2, 2016 was different from his two prior left shoulder issues. Claimant described that the difference was that on August 2, 2016, he felt a pop followed by pain and the inability to lift his left arm.

6. Claimant reported the August 2, 2016 incident to employer on that same date. The following day, August 3, 2016, claimant notified employer that he believed that he needed to see a doctor. Employer referred claimant to Dr. Dennis Eicher.

7. Claimant first treated with Dr. Eicher on August 5, 2016. Claimant reported to Dr. Eicher that he had felt left shoulder pain and discomfort since August 3, 2016. Claimant also told Dr. Eicher that he had "been doing a lot of overhead work and then he started getting pain and discomfort". Dr. Eicher diagnosed left shoulder impingement and referred claimant to physical therapy. On August 5, 2016, claimant began physical therapy with Emily VanGorp, DPT with Personal Rehabilitation Center.

8. On September 22, 2016, claimant returned to Dr. Eicher and reported that he was still having left shoulder pain in the 4 out of 10, and 6 out of 10 levels. On that date, Dr. Eicher ordered a magnetic resonance image ("MRI") of claimant's left shoulder and referred claimant to Dr. Derkash with Grand River Primary Care for an orthopedic consultation.

9. On September 30, 2016, an MRI of claimant's left shoulder showed full thickness tears of the supraspinatus and infraspinatus tendons and medial retraction of the supraspinatus tendon.

10. On October 4, 2016, claimant was seen by Dr. Frank Kopich who also practices at Grand River Primary Care. Claimant reported to Dr. Kopich that at the time of the injury he "felt an acute episode of pain". Dr. Kopich opined that claimant had an acute exacerbation of a chronic rotator cuff tear, but that the tear was likely "unrepairable". Dr. Kopich referred claimant to Dr. Norman Harris for a second opinion.

11. On November 18, 2016, claimant was seen by Dr. Harris. Claimant reported to Dr. Harris that he injured his left shoulder when he was doing some overhead work and felt a pop in his shoulder followed by pain and weakness. Dr. Harris opined that the muscle atrophy of the supraspinatus tendon, as identified on the MRI, indicated an "acute or chronic" injury to claimant's rotator cuff. Dr. Harris recommended claimant undergo rotator cuff repair surgery.

12. On December 15, 2016, Dr. Harris performed a left shoulder arthroscopy with arthroscopic subacromial decompression and partial repair of claimant's left rotator cuff. Claimant testified that his left shoulder is better since he underwent surgery.

13. On December 19, 2016, Dr. Christopher Issacs performed a physician advisor review and opined that claimant's left shoulder complaints are the result of a chronic condition. In support of this opinion, Dr. Issacs pointed to the MRI results that showed significant muscle atrophy and significant fatty infiltration of the muscles. Dr. Issacs opined that these findings are indicative of a "long-standing and not an acute injury" that "likely predated the work injury". Respondents denied claimant's claim and have denied authorization for the recommended left shoulder surgery.

14. At the request of respondents, Dr. Wallace Larson performed a review of claimant's medical records. Dr. Larson authored a report dated April 4, 2017 in which he opined that claimant's left shoulder complaints are the result of a preexisting condition that is unrelated to claimant's occupational exposure. Dr. Larson further opined that this preexisting condition was not aggravated or accelerated by claimant's work related activities in August 2016.

15. Dr. Larson testified by deposition and confirmed his opinion that claimant's left shoulder injury is not work related, but instead the result of a preexisting condition. Dr. Larson testified that the findings on the MRI show a chronic condition. In support of his opinion, Dr. Larson pointed to the muscle atrophy and fatty infiltration noted on the MRI results and opined that such findings will typically take a number of months to occur. In addition, Dr. Larson indicated that the retraction of the rotator cuff is typically seen as a chronic tear.

16. The ALJ credits the medical records and the opinion of Dr. Kopich over the contrary opinions of Drs. Issacs and Larson and finds that claimant suffered an acute injury that exacerbated his preexisting left shoulder condition.

17. The ALJ credits claimant's testimony and finds that although he had two prior injuries to his left shoulder, he was able to perform all of his job duties following those injuries. It was only after the August 2, 2016 work injury that claimant experienced pain and the inability to lift his left arm. The ALJ finds that claimant has demonstrated that it is more likely than not that while working overhead on August 2, 2016, he aggravated or accelerated a preexisting condition in his left shoulder resulting in the need for medical treatment.

18. The ALJ credits the claimant's testimony and finds that his shoulder has improved since the December 2016 surgery. The ALJ credits the opinion of Dr. Harris over the contrary opinion of Dr. Larson and finds that claimant has demonstrated that it is more likely than not that the surgery performed by Dr. Harris on December 15, 2016 was reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.* Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury on August 2, 2016 arising out of and in the course and scope of his employment with employer. As found, claimant's testimony and the opinion of Dr. Kopich are credible and persuasive.

5. As found, claimant has demonstrated by a preponderance of the evidence that the left shoulder surgery performed by Dr. Harris on December 15, 2016 was reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 2, 2016 work injury. As found, claimant's testimony and the opinion of Dr. Harris are credible and persuasive.

ORDER

It is therefore ordered that:

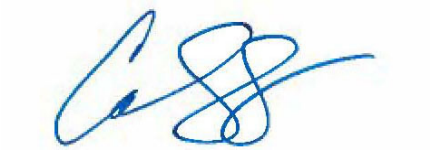
1. Claimant has established by a preponderance of the evidence that he sustained a compensable injury on August 2, 2016.

2. Respondents shall pay for claimant's left shoulder surgery performed by Dr. Harris on December 15, 2016.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 13, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Peter Millett is reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted February 14, 2014 work injury.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his right shoulder on February 14, 2014. Claimant testified that the injury occurred when he attempted to move a large boulder from the road. Claimant testified that while attempting to push the boulder he felt a popping in his right shoulder.

2. Claimant timely reported the February 14, 2014 injury to employer. Employer sent claimant for medical treatment at La Plata Family Medicine. Claimant treated at La Plata Family Medicine on February 24, 2014 and was seen by his authorized treating physician ("ATP") Dr. Brad Lyons. During this workers' compensation claim Dr. Lyons has prescribed pain medications for claimant and referred him to physical therapy. Since first treating with Dr. Lyons claimant has attended over 100 physical therapy appointments.

3. Dr. Lyons referred claimant to Dr. Gareth Hammond for a surgical consultation. Claimant was first seen by Dr. Hammond on March 19, 2014. At that time Dr. Hammond opined that claimant had a possible shoulder sprain or a partial injury to his supraspinatus and biceps tendon. Dr. Hammond ordered a magnetic resonance image ("MRI") of claimant's right shoulder. The MRI was taken on April 11, 2014 and showed a "questionable" tear along the posterior and superior labrum.

4. On April 24, 2014, Dr. Hammond administered a glenohumeral joint injection. On April 29, 2014, claimant reported to Dr. Hammond that the injection did not provide any pain relief.

5. Thereafter, Dr. Hammond recommended claimant undergo surgery. On May 27, 2014, Dr. Hammond performed a right shoulder arthroscopy with superior labrum tear from anterior to posterior ("SLAP") repair.

6. Following the May 2014 surgery claimant continued to have right shoulder pain.

7. On August 6, 2014, Dr. Hammond administered an injection in claimant's bicipital groove area. Claimant reported to Dr. Hammond on August 18, 2014 that the injection was "minimally helpful".

8. Dr. Hammond ordered another MRI of claimant's right shoulder which was done on August 25, 2014, and showed the surgical changes from the May 27, 2014 SLAP repair as well as tendinosis of the biceps tendon.

9. On September 29, 2014, Dr. Hammond opined that claimant had residual bicipital tenosynovitis following the SLAP repair. At that time, Dr. Hammond recommended tenodesis of the biceps, but determined that that procedure should not be performed until at least six months after the May 2014 surgery.

10. On January 9, 2015, claimant was seen by Dr. Kane Anderson for a second opinion regarding his right shoulder. Dr. Anderson opined that claimant could benefit from a revision right shoulder arthroscopy with biceps tenotomy or tenodesis. As between pursuing biceps tenotomy versus tenodesis, Dr. Anderson indicated a preference for tenodesis.

11. On June 29, 2015, Dr. Hammond performed a subpectoral biceps tenodesis, debridement of the glenohumeral joint, and subacrominal bursectomy and decompression.

12. In a medical record dated July 6, 2014, Dr. Hammond recorded that during surgery he determined that claimant had full thickness cartilage lesions on the glenoid, the ovoid, and the humeral head. In that same medical record, Dr. Hammond noted that claimant's biceps was "diseased" and during surgery was relocated to a subpectoral area.

13. Following the June 2015 surgery, claimant continued to have right shoulder pain.

14. Dr. Hammond referred claimant to Dr. Peter Millett for further consultation. Claimant was first seen by Dr. Millett on January 19, 2016. Dr. Millett ordered an MRI of claimant's right shoulder. On January 21, 2016 an MRI showed moderate rotator cuff tenidonosis and chondral thinning along the superior medial to lateral aspect of the humeral head. Based upon these MRI results Dr. Millett recommended further surgery.

15. On February 17, 2016, Dr. Millett performed a right revision subacrominal decompression and partial acromioplasty with glenohumeral debridement, joint aspiration and deep tissue biopsies.

16. The tissue biopsies taken during the February 17, 2016 surgery were positive for Propionibacterium acnes ("P. acnes") bacteria. Upon learning of the infection, Dr. Millett referred claimant to infectious disease specialist Dr. Jennifer Rupp. Dr. Rupp immediately began treating the P. Acnes infection with antibiotics.

17. Following the February 2016 surgery claimant continued to have right shoulder pain.

18. On May 17, 2016, Dr. Millett recommended that claimant undergo another surgery. Specifically, Dr. Millett has recommended a right shoulder arthroscopy with subcoracoid decompression, debridement, and evaluation of the subscapularis for possible subscapularis repair.

19. Dr. Millett testified by deposition in this matter and stated his opinion that claimant's right shoulder symptoms are related to the February 14, 2014 work injury and related surgeries. Dr. Millett testified that it is his opinion that claimant could benefit from the recommended surgery both in addressing the arthritis in claimant's right shoulder and determining whether the infection has been eradicated. Dr. Millett also testified that the proposed surgery can give claimant some pain relief and functional improvement which would prevent the need for further surgery.

20. Respondent sent claimant for an independent medical examination ("IME") with Dr. Scott Primack on July 6, 2016. In connection with the IME, Dr. Primack reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant. Dr. Primack issued a report in which he summarized his findings and opined that a fourth right shoulder surgery would not be useful to claimant. Dr. Primack recommended claimant undergo electromyography and nerve conduction studies ("EMG/NCS") and focus on pain management.

21. On September 14, 2016, Dr. James Santos performed an EMG/NCS of claimant's right hand, arm, and shoulder. Dr. Santos determined that it was a normal electrophysiologic examination.

22. Claimant attended a second IME with Dr. Primack on March 13, 2017. In his second IME report Dr. Primack reiterated his opinion that the surgery recommended by Dr. Millett was not reasonable in treating claimant's right shoulder symptoms. In that March 2007 report Dr. Primack opined that claimant would not do well with any type of surgical intervention. Dr. Primack noted that claimant has had over 100 physical therapy appointments without any improvement in his condition. In addition, Dr. Primack pointed to claimant's diagnoses of depression and anxiety as indicators that claimant's pain indicators may be more psychologically relevant. Based upon Dr. Primack's IME reports respondent denied authorization for the surgery recommended by Dr. Millett.

23. Dr. Primack testified by deposition in this matter and confirmed his opinions as outlined in his two IME reports. Dr. Primack continues to opine that the fourth surgery that has been recommended by Dr. Millett is neither reasonable nor necessary to treat claimant's right shoulder symptoms. Dr. Primack noted that the shoulder has already been debrided and decompressed, so to perform that same procedure again would be unnecessary. Dr. Primack also testified that it is his opinion that claimant suffers from psychosocial issues that would impact his ability to fully recover from surgery.

24. Claimant testified that since his February 14, 2014 injury he has continued to have pain in the front of his right shoulder. The medical records corroborate claimant's testimony in this regard as he has consistently complained of pain in the anterior of his right shoulder. Claimant also testified that his right shoulder pain is like "pins and needles" and "always aches".

25. The ALJ credits the medical records, claimant's testimony, and the opinion of Dr. Millett over the contrary opinion of Dr. Primack and finds that claimant has shown that it is more likely than not that the recommended surgery is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. The ALJ is not persuaded by Dr. Primack's opinion that claimant's mental health diagnoses make the surgery unreasonable.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2013). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has proven by a preponderance of the evidence that the right shoulder arthroscopy with subcoracoid decompression, debridement, and evaluation of the subscapularis for possible subscapularis repair as recommended by Dr. Millett is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

ORDER

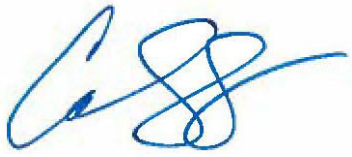
It is therefore ordered that:

1. Respondent shall pay for the right shoulder surgery recommended by Dr. Millett, pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: June 13, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-900-412-09

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 10, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 5/10/17, Courtroom 1, beginning at 8:30 AM, and ending at 9:30 AM).

Claimant's Exhibits 1 through 2 were admitted into evidence, without objection. Respondents' Exhibits A through G were admitted into evidence, without objection. The evidentiary depositions of Mark S. Failinger, M.D.,was taken on May 1, 2017, and a written transcript thereof was filed; and, the evidentiary deposition of Linda S. Mitchell, M.D., was taken on May 16, 2017, and a written transcript thereof was filed.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief was filed on May 31, 2017. Respondent's answer brief was filed on June 5, 2017. No timely reply brief was filed and the matter was deemed submitted for decision on June 8, 2017.

ISSUES

The issues to be determined by this decision concern the Claimant's request for a conversion of scheduled extremity ratings, admitted in the Final Admission of Liability (FAL), which were based on the Division Independent Medical Examiner's (DIME's)

ratings, to a whole person rating. This matter involves an occupational disease of both upper extremities from repetitive activities at work; and, bodily disfigurement.

When accepting the four corners of the DIME's opinions, the Claimant's burden of proof for a conversion is by a preponderance of the evidence. Also, the burden for a disfigurement award is preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant has been employed by the Employer as a stock clerk for over thirty-five years. His job involves unloading delivery trucks, stocking product in coolers and on shelves, reorganizing shelves, and cleaning. Much of his job involves repetitive lifting to heights that are at shoulder level or above.

2. The latest amended Final Admission of liability (FAL), dated December 1, 2016, admits for 11% of the left upper extremity (LUE) AND 15% of the right upper extremity (RUE), pursuant to the ratings of Division independent medical Examiner (DIME) Jonathan Bloch, D.O.

3. In March 2008, the Claimant went to his primary health care physician (PCP) at Foothills Family Medicine with complaints of right shoulder pain for approximately one year. He indicated that he had pressure under his shoulder blade. He did not report any specific injury or incident that led to the shoulder pain.

4. The Claimant was seen by Mitchell Seemann, M.D., a shoulder surgeon at Panorama Orthopedics, on April 14, 2008. The Claimant reported similar problems to Dr. Seemann as had been reported to his PCP; ongoing shoulder pain of about one year located around the scapula. The Claimant told Dr. Seemann that his pain was aggravated by lifting, pushing, pulling and reaching. Dr. Seemann diagnosed the Claimant with subscapular bursitis and said that his symptoms were "most likely related to continued repetitive motion." Dr. Seemann referred the Claimant for physical therapy.

5. On January 26, 2012, the Claimant returned to Panorama Orthopedics with right shoulder complaints over the last several years and was evaluated by Eric Stahl, M.D., another shoulder surgeon. The Claimant again reported that his right shoulder would hurt while lifting, reaching, and with overhead activities. The Claimant still worked for the Employer doing the repetitive lifting associated with his job at that time. Dr. Stahl diagnosed the Claimant with a suspected rotator cuff tear and referred

the Claimant for an MRI (magnetic resonance imaging). The MRI was performed on February 17, 2012 and it confirmed Dr. Stahl's suspicions. Dr. Stahl recommended surgery to repair the torn rotator cuff.

6. In September 2012, the Claimant began having left shoulder problems at work while lifting cases of milk. Thereafter, he reported a work-related occupational disease involving both shoulders. The Respondent denied the claim on October 11, 2012. The Respondent obtained an independent medical examination (IME) from Linda Mitchell, M.D. Dr. Mitchell attributed the Claimant's chronic shoulder problems to age related degeneration and stated the opinion that his thirty-plus years of repetitive lifting at his job with the Employer did not significantly contribute to the condition. The matter proceeded to hearing in front of ALJ Michael Harr on May 7, 2013. ALJ Harr found Dr. Mitchell's opinions unpersuasive and credited the opinions of multiple treating physicians. ALJ Harr entered his Specific Findings of Fact, Conclusions of Law and Order on June 25, 2013, finding that Claimant had a compensable occupational disease (OD) involving both shoulders.

The Occupational Disease

7. Christian Updike, M.D., at Health One Occupational Medicine and Rehabilitation was assigned as the Claimant's authorized treating physician (ATP). Dr. Updike referred the Claimant to orthopedic surgeon Mark S.Failinger, M.D. Dr. Failinger performed surgery on the Claimant's right shoulder on January 21, 2014 to repair tears involving the infraspinatus and supraspinatus rotator cuff muscles. Dr. Failinger also addressed a torn labrum during the procedure and performed a subacromial decompression and release of the coracoacromial ligament to address impingement.

8. The Claimant remained off work for ten days following the January 21, 2014 surgery and then returned to work with the Employer. Claimant participated in post-surgical physical therapy between February 2014 and July 2014. Claimant was also followed by Dr. Updike and Dr. Failinger during this time.

9. A repeat MRI was performed on the Claimant's left shoulder in October 2014. The MRI was interpreted as showing a intrasubstance tear of the supraspinatus muscle without evidence of a full thickness tear. Dr. Failinger was of the opinion that the Claimant's left shoulder did not require surgery. Dr. Updike placed the Claimant at maximum medical improvement (MMI), effective December 1, 2014, and assigned a 9% rating for Claimant's left shoulder (LUE) and a 4% rating for Claimant's right shoulder (RUE). Dr. Updike also assigned permanent work restrictions of no repetitive lifting over twenty-five pounds and no lifting of any kind over forty pounds.

Posture of the Present Dispute/DIME by Jonathan Bloch, D.O.

10. Respondent filed a Final Admission of Liability (FAL) on December 11, 2014 consistent with Dr. Updike's opinions.

11. The Claimant objected to the FAL and requested a DIME. Dr. Bloch was assigned as the DIME physician. Prior to Dr. Bloch's evaluation, the Claimant obtained a second surgical opinion of his left shoulder from Mitchell Seemann, M.D., on March 20, 2015. Dr. Seemann recommended proceeding with left shoulder surgery to repair the partial tear because the Claimant's left shoulder symptoms had not responded to conservative care and the symptoms were significant enough to cause him to be on limited duty at work.

12. Dr. Bloch performed the DIME on April 10, 2015, and was of the opinion that Claimant was not at MMI for his left shoulder. The claim was subsequently reopened.

13. Dr. Seemann performed surgery on Claimant's left shoulder on February 5, 2016. Dr. Seemann repaired the supraspinatus tear and also recessed the coracoacromial ligament and performed a subacromial decompression. The Clamant remained off work for six weeks and three days following the second surgery and then returned to a clerk position with the Employer. The Claimant again participated in post-surgical physical therapy and was again followed by Dr. Updike.

14. Dr. Updike placed the Claimant back at MMI, effective September 15, 2016. Dr. Updike deferred to the previously assigned 4% RUE rating, assigned at the time of the first MMI determination. Dr. Updike repeated the impairment evaluation for Claimant's left shoulder and assigned a 6% LUE rating. Dr. Updike indicated that the Claimant was "essentially" performing his "customary duties" at work, and therefore, did not assign any permanent work restrictions.

15. Dr. Bloch performed a follow up DIME evaluation on October 17, 2016. The Claimant reported to Dr. Bloch ongoing shoulder symptoms with increased use of his shoulders. The Claimant also reported occasional numbness in his arms. Dr. Bloch repeated his impairment evaluation and assigned a 15% RUE rating for Claimant's right shoulder and an 11% LUE rating for Claimant's left shoulder. As required by the American Medical Association *Guides to the Evaluation of Permanent Impairment,* 3rd. Ed., Rev., Dr. Bloch mechanically converted that the extremity ratings into a 15% whole person rating. Dr. Bloch expressed no opinion as to whether a whole person rating or an extremity rating was more appropriate. Dr. Bloch found that the Claimant reached MMI on September 8, 2016.

The Claimant's Testimony

16. The Claimant testified at hearing that he has returned to work for the Employer, but he is not in the dairy clerk position he was in prior to the admitted onset of the occupational disease. In his current role, the Claimant is doing less lifting overall and little to no overhead lifting. He continues to have symptoms in his shoulders and across his upper back and into his neck. The Claimant described the symptoms as tightness, pain and spasm. Claimant stated that he will occasionally have headaches. He will also occasionally have numbness that extends down his arms. Claimant indicated that his ongoing symptoms increase with increased use of his shoulders; which is usually in connection with his work for the Employer. His increased symptoms will interfere with his sleep. He has not been able to return to all of the personal extracurricular activities he participated in prior to this claim.

17. The Claimant testified that he has symptoms in his shoulders, across his upper back and the top of his shoulders, and into his neck, and that his symptoms interfere with his sleep. The Claimant's testimony, however, is not consistent with the medical records. The Claimant attended at least 48 physical therapy visits for his right shoulder between February and July 21, 2014, and an additional 25 physical therapy visits for his left shoulder in 2016 (Claimant's Exhibit 17). There is no persuasive evidence that the Claimant ever complained of pain into his neck or trouble with sleeping in the 73 physical therapy visits.

18. Contrary to the Claimant's testimony, on May 13, 2015, Dr. Failinger documented that the Claimant's discomfort did not interfere with his sleep, and that the Claimant had full painless arc of cervical range of motion in al
Planes (Respondent's Exhibit F, pp. 45-46). Dr. Failinger testified that he actually palpated the Claimant's periscapular muscles and the rhomboid muscles and found no tenderness and no pain (Failinger Depo, pp. 79:ln.11; 81, ln.16). In all of Dr. Updilke's records, there is no persuasive evidence that the Claimant ever complained of pain into his neck or trouble sleeping to Dr. Updike (Claimant's Exhibit 16).

Evidentiary Depositions

19. Deposition testimony from Dr. Failinger was submitted post-hearing. Dr. Failinger was asked to review his operative report and Dr. Seemann's operative report and discuss the structures involved in Claimant's two surgeries. Dr. Failinger stated that the infraspinatus and supraspinatus tears in Claimant's right shoulder were located at the greater tuberosity. Dr. Failinger explained that the greater tuberosity is the location on the top of the humerus where the rotator cuff muscles attach. Dr. Failinger indicated that the infraspinatus and supraspinatus tendons come together at the greater

tuberosity and that Claimant had torn these tendons away from the bone and that the tendons were retracting up and away from the humerus towards the glenoid. Dr. Failinger further explained that the infraspinatus and supraspinatus muscles run from the top of the humerus either across the top of the shoulder (supraspinatus) or across the upper back (infraspinatus) and attach the scapula. Dr. Failinger testified that the supraspinatus tear in Claimant's left shoulder was also at the greater tuberosity and that the supraspinatus in Claimant's left shoulder was also retracting up and away from the humerus towards the glenoid.

20. Dr. Failinger explained that the labrum is a piece of cartilage attached to the glenoid and that the glenoid is the part of the scapula that joins with the humerus to form the glenohumeral joint. Dr. Failinger testified that the coracoacromial ligament attaches between the acromion and coracoid process and is medial to the glenohumeral joint (on the torso). Dr. Failinger explained that the coracoacromial ligament is released or recessed to create more space between the acromion and the rotator cuff muscles to prevent "impingement," a condition where the acromion rubs on the rotator cuff muscles leading to damage. Dr. Failinger explained that a subacromial decompression involves shaving down bone on the underside of the acromion to also create more space between the rotator cuff muscles and the acromion to prevent impingement.

21. Dr. Failinger indicated that it is not uncommon for patients with shoulder conditions similar to the Claimant's, and surgeries like those Claimant had performed, to have ongoing symptoms. Dr. Failinger indicated that the symptoms described by the Claimant – pain across the top of the shoulders and upper back, tightness in the upper back, shoulders and neck, and headaches, are common. Dr. Failinger did **not** render any explicit opinions concerning the situs of functional impairment.

22. Dr. Failinger testified that both he and Dr. Seeman performed surgery to parts of the Claimant's body which were not on the arm. Dr. Failinger testified, however, that those parts of the surgery which he performed to the areas of the Claimant's body not on the arm did not impair the Claimant's function:

Q: Okay. So my point, though, is that when you – or my question is, when you debrided it, did you change the function of the labrum at all?
A: No, I didn't really -- minimally. The things that are degenerative are worthless, so we just cleaned up what was needed to make it look prettier, but really didn't change structurally anything.
Q: So when you were done with the debridement, functionally the labrum was going to -- it was going to function the same way as it did beforehand, maybe even a little better, right?
A: Yeah. The thought is -- the idea is if you clean up the edges, you helpfully arrest or slow up the degenerative process. A pair of jeans, you know it's fraying. You clean the edges and maybe it won't start ripping quicker -- that's the thought -- and cause symptoms in the future.

[Failinger Depo, p. 61:lns.3-19].

Q: So functionally, would releasing that coracoacromial ligament affect [Claimant's] function at all?
A: Not in the short term.
Q: And what do you mean -- what do you consider "short term"?
A: In the next few years. Probably a couple of few years at least, is the hope.
Q: And what might happen in the long term?
A: Well, if he continues to have this tendon tear larger and larger, what happens is the humeral head doesn't have a rotator cuff to keep it down, so it starts to rise up, and it rises up and starts to bang up underneath the acromion there. And if there's nothing in the front, the subscapularis holding it, it can actually come out -- start coming out toward the front, and that coracoacromial ligament, if it wasn't functioning, would no longer help keep it in that area right below the acromion.
Q: That's a possibility, correct?
A: That's a possibility, yes.
Q: And you have no information right now that is actually occurring, correct?
A: Correct.
Q: And you have no information that that will occur in the future?
A: Correct.
Q: And you said that he had a small hook anteriorly, and that's on the acromion, right?
A: Correct.
Q: And then you flattened that out, which means, again, you just -- well, I guess it wouldn't be debriding it -- it would be to -- well, what would you call it? Is it debriding or . . .
A: Yeah. I mean, it's -- we don't generally use that term. That's a good point. What else would you use? Well, us cutting bone obvious -- cutting off bone is what you're really doing, making a little more so-called space in that area.
Q: And that wouldn't change the function of acromion at all?
A: No, not at all.

[Failinger Depo, pp. 66-67].

In addition, Dr. Failinger's repair of the right rotator cuff entailed anchoring the supraspinatus and infraspinatus tendons to the humerus (the arm bone) by use of anchors driving into the humerus at the greater tubercle:

Q: So when you place those anchors, you're actually drilling into the bone?
A: Correct.
Q: Into the humeral -- or into the humerus at the greater tubercle?
A: Yes.

23. The ALJ infers and finds that Dr. Failinger's opinions do not support a situs of functional impairment going into the trunk of the Claimant's body. Moreover, they support a situs of functional impairment in both upper extremities.

Second IME by Dr. Mitchell

24. At the request of the Respondent, Dr. Mitchell performed a second IME on March 6, 2017. Dr. Mitchell's report was admitted into evidence, as was Dr. Mitchell's post-hearing deposition testimony. Dr. Mitchell documented that the Claimant complained of ongoing complaints involving his shoulders and that the aching in his left shoulder "radiates towards the neck." Dr. Mitchell documented that she found tightness in Claimant's levators bilaterally and his left scalenes on physical exam. During her testimony, Dr. Mitchell explained that the levators and scalenes are muscles that run along either side of the neck. Dr. Mitchell testified that the tightness in Claimant's scalenes and levators is likely referred symptoms from Claimant's shoulders. Dr. Mitchell agreed that the Claimant's ongoing shoulder complaints are typical for someone with injuries and surgeries like Claimant's. Dr. Mitchell's testimony regarding the location of the infraspinatus and supraspinatus muscles, the acromion, the labrum, and the coracoacromial ligament was consistent with Dr. Failinger's testimony. Dr. Mitchell testified that she did not believe Claimant's impairment should be awarded as a whole person award because Claimant's complaints were "very minimal, limited to the shoulder, and … they don't affect any of his activities." Dr. Mitchell's opinion is inconsistent with the Claimant's testimony, but consistent with DIME Dr. Bloch not placing any permanent restrictions on the Claimant, "…he is functioning well and safely in his job without limitations."

Bodily Disfigurement

25. Claimant has surgical scars on both shoulders from the two surgeries performed during this claim by Dr. Failinger and Dr. Seemann. The scars on the right shoulder consist of three small white scars from the arthroscopic portals and a white line running down the front of Claimant's shoulder. The scars on the left shoulder consist of three small white scars from the arthroscopic portals. The scars are plainly visible to public view.

Ultimate Findings

26. The Claimant's testimony concerning problems sleeping and pain going through his neck is inconsistent with the aggregate medical records. There is no convincing support for pain and problems going into the Claimant's neck or his problems sleeping. Consequently, the ALJ does not find the Claimant's testimony in this regard credible. The only credible evidence concerning restricted job duties is the

Claimant's testimony as to how his job has changed. The Claimant would have the ALJ infer that the doctors who did not give him restrictions had his present job duties in mind. The doctors, however, were aware of his pre-injury job duties and none of them qualified their opinions concerning "no restrictions." Further, the ALJ infers and finds the deposition testimony of Dr. Failinger does not support a situs of functional impairment beyond the upper extremities, and Dr. Failinger's testimony is highly persuasive and credible. Also, the DIME opinion of Dr. Bloch, which is credible and persuasive, does not support a situs of functional impairment beyond the upper extremities.

27. Between conflicting opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Failinger and Dr. Bloch and to reject any opinions to the contrary.

28. Accepting the four corners of DIME Dr. Bloch's opinions, especially because he does **not** opine that a whole person rating is more appropriate than his extremity ratings, plus the finding herein above that Dr. Bloch's opinions do not support a plausible inference that the situs of functional impairment transcends the upper extremities, the ALJ finds that it is more likely than not that the situs of the Claimant's functional impairment is in both upper extremities. Therefore, the Claimant has failed to prove, by a preponderance of the evidence that a conversion to a whole person rating is warranted.

29. Claimant has surgical scars on both shoulders from the two surgeries performed during this claim by Dr. Failinger and Dr. Seemann. The scars on the right shoulder consist of three small white scars from the arthroscopic portals and a white line running down the front of Claimant's shoulder. The scars on the left shoulder consist of three small white scars from the arthroscopic portals. The scars are plainly visible to public view.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines

the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony concerning problems sleeping and pain going through his neck is inconsistent with the aggregate medical records. There is no convincing support for pain and problems going into the Claimant's neck or his problems sleeping. Consequently, the ALJ does not find the Claimant's testimony in this regard credible. The only credible evidence concerning restricted job duties is the Claimant's testimony as to how his job has changed. The Claimant would have the ALJ infer that the doctors who did not give him restrictions had his present job duties in mind. The doctors, however, were aware of his pre-injury job duties and none of them qualified their opinions concerning "no restrictions." Further, the ALJ infers and finds the deposition testimony of Dr. Failinger does not support a situs of functional impairment beyond the upper extremities, and Dr. Failinger's testimony is highly persuasive and credible. Also, the DIME opinion of Dr. Bloch, which is credible and persuasive, does not support a situs of functional impairment beyond the upper extremities.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial**

evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Failinger and Dr. Bloch and to reject any opinions to the contrary.

Conversion from Extremity to Whole Person Rating

c. It is well-established that the question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8) (c), C.R.S. is one of fact for determination by the ALJ. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). In resolving this question, the ALJ must determine the site of a claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the physical injury itself. *Langston v. Rocky Mountain Healthcare Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Further, pain and discomfort which limit a claimant's ability to use a portion of her body may be considered "functional impairment" for purposes of determining whether an injury is on or off the schedule. *Also see, Fresquez v. Montrose School District RE-1J,* W.C. No. 4-969-602-01 [Indus. Claim Appeals Office (ICAO), April 14, 2017]. For a conversion, the party seeking it must accept the four corners of an ATP's or DIME'S opinion letter. The standard of proof is then "preponderance of the evidence." As found, accepting the four corners of DIME Dr. Bloch's opinions, especially because he does **not** opine that a whole person rating is more appropriate than his extremity ratings, plus the finding herein above that Dr. Bloch's opinions do not support a plausible inference that the situs of functional impairment transcends the upper extremities, the ALJ finds that it is more likely than not that the situs of the Claimant's functional impairment is in both upper extremities. Therefore, the Claimant has failed to prove, by a preponderance of the evidence that a conversion to a whole person rating is warranted.

Bodily Disfigurement

d. Section 8-42-108(1), C.R.S., provides that if an employee is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, in addition to all other compensation benefits provided...the director may allow compensation not to exceed four thousand dollars to the employee who suffers such disfigurement. The limitation on disfigurement awards are adjusted every July 1st by the percentage adjustment made by the director to the state average weekly wage. § 8-42-108(3), C.R.S. (2016). Disfigurement benefits are awarded for the observable

consequences of an industrial injury. *Arkin v. Indus. Comm'n*, 145 Colo. 463. 358 P.2d 879 (1961). As found, the Claimant has surgical scars on both shoulders from the two surgeries performed during this claim by Dr. Failinger and Dr. Seemann, and the scars are plainly visible to public view. The scars on the right shoulder consist of three small white scars from the arthroscopic portals and a white line running down the front of Claimant's shoulder. The scars on the left shoulder consist of three small white scars from the arthroscopic portals. The scars are plainly visible to public view.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden with respect to the conversion to whole person. The Claimant has sustained his burden with respect to bodily disfigurement.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for a conversion from scheduled ratings to whole person ratings are hereby denied and dismissed.

B. The latest, amended Final Admission of Liability, dated December 1, 2016, is hereby approved and adopted as if fully restated herein.

C. For and account of the Claimant's bodily disfigurement as herein above described, the Respondent shall pay the Claimant, in one lump sum, in addition to other benefits due and payable, the sum of $2,500.00

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Whether Claimant has produced clear and convincing evidence to overcome the permanent impairment rating assigned by DIME physician Lloyd Thurston, D.O.

II. Whether claimant has proven by a preponderance of the evidence that she is entitled to maintenance medical treatment after being placed at maximum medical improvement ("MMI").

FINDINGS OF FACT

1. Employer, a temporary staffing agency, placed Claimant on an assignment cleaning office buildings. Claimant sustained an admitted industrial injury to her lower back on November 13, 2015 while lifting a bucket of mop water.

2. Claimant initially treated at the emergency room at St. Mary's Medical Center. On November 13, 2015, Claimant reported feeling a pop and pain radiating down both legs. Maria Green Kallman, PA-C, noted limited range of motion in Claimant's back and negative straight leg raise findings. PA-C Kallman diagnosed lumbar strain/sprain. An x-ray demonstrated no acute fracture or vertebral body malalignment. PA-C Kallman prescribed Vicodin and Flexeril.

3. Claimant subsequently treated with Theodore Sofish, M.D. at Grand Valley Occupational Medicine. Dr. Sofish first evaluated Claimant on November 16, 2015. Dr. Sofish noted Claimant had a slight antalgic gait and pain to the low lumbar sacral area bilaterally. Dr. Sofish noted forward flexion of 30 degrees and dorsiflex to neutral. Dr. Sofish further noted Claimant was able to toe heel and squat on a limited basis. Dr. Sofish assessed Claimant with a work-related lumbar sprain.

4. Dr. Sofish reevaluated Claimant on November 20, 2015. Claimant presented with an antalgic gait. Dr. Sofish noted forward flexion of 20 degrees and dorsiflex to neutral. Dr. Sofish prescribed Percocet and recommended Claimant begin physical therapy.

5. Claimant returned to Dr. Sofish for a follow-up evaluation on November 25, 2015. Claimant reported pain at a 9/10 in severity in the low lumbar area and down her left leg. Dr. Sofish noted an antalgic gait, "very limited range of motion of the lumbar spine in all planes," paresthesias, and pain to the left thigh. Dr. Sofish assessed lumbar sprain and probable left radiculopathy. In December 4, 2015 medical notes, Dr. Sofish ordered an MRI.

6. On December 7, 2015, Claimant underwent an MRI of the lumbar spine. The MRI demonstrated loss of water content, mild facet hypertrophy, a small central disc

protrusion minimally asymmetric to the left at L4-L5, and a small right paracentral disc protrusion at L5-S1 just abutting the traversing nerve root.

7. Dr. Sofish reevaluated Claimant on December 15, 2015. Claimant reported pain at a 7/10 in severity in her left thoracic lumbar paraspinal musculature, right flank, and lumbar sacral area, with pain in the buttocks and down the left thigh. Dr. Sofish noted an antalgic gait and "very limited" toe heel squat and dorsi flexion. Dr. Sofish noted that the December 7, 2015 MRI revealed small herniations at L4 and L5. Dr. Sofish assessed thoracic lumbar sprain and degenerative disc disease of the lumbosacral spine. Dr. Sofish recommended Claimant continue physical therapy and taking prescribed medications.

8. Claimant returned to Dr. Sofish for a follow-up evaluation on December 22, 2015. Claimant reported pain at a 7/10 in severity in the thoracic lumbar area and left leg. Dr. Sofish noted an antalgic gait with forward flexion at 20 degrees and dorsiflex to neutral. Dr. Sofish assessed thoracic lumbar sprain, left leg radiculopathy and left patellar tendinitis. Dr. Sofish referred Claimant to physiatrist Dr. Price. Dr. Sofish commented, "She seems to have gotten worse than better over the past few weeks," and remarked that he was at a loss to explain why.

9. Claimant continued to treat with Dr. Sofish, reporting pain at a 8-10/10 in severity. Dr. Sofish continued to note limited range of motion. Claimant presented with her own cane, crutches, and back brace at different evaluations. As Claimant had not improved, Dr. Sofish referred Claimant to Dr. Mistry for a neurological evaluation.

10. Ellen Price, D.O. evaluated Claimant on January 26, 2016. Dr. Price noted Claimant had only attended two physical therapy sessions because it was too painful. Claimant reported experiencing intermittent left leg pain. Dr. Price noted that Claimant presented with a cane. Claimant reported pain in her midback, low back, and left leg at a 90/100 in severity. Dr. Price noted Claimant had some pain presentations and 3/5 Waddell signs. On examination, Dr. Price noted decreased sensation in the left leg and decreased breakaway strength in the left dorsiflexor and hamstring. Dr. Price further noted flexion of 20 degrees and extension ofabout 10 degrees. Dr. Price assessed low back pain, small disc protrusions at L5-5 and L5-S1, history of somatization of pain, history of lumbar myofascial pain, and history of pain disorder. Dr. Price referred Claimant to Dr. Cohen for pain management. Dr. Price also recommended Claimant attend additional physical therapy sessions, undergo acupuncture, and receive three epidural injections from Dr. Lewis.

11. Dilaawar Mistry, M.D. evaluated Claimant on January 27, 2016. On examination, Dr. Mistry noted trunk flexion of 45 degrees, and positive seated straight leg raise findings. Dr. Mistry noted that the hip exam and special range of motion tests were limited "due to apprehension due to guarding and due to pain." Dr. Mistry assessed lumbar disc herniation with radiculopathy. Dr. Mistry recommended Claimant attend a surgical consultation with neurosurgeon Robert Replogle, M.D.

12. Dr. Replogle evaluated Claimant on February 2, 2016. Claimant presented with an antalgic gait, using a cane. Dr. Replogle noted Claimant was unable to walk on heels and toes without difficulty. Dr. Replogle further noted normal range of motion in Claimant's back and decreased range of motion in Claimant's left hip. Dr. Replogle remarked that the December 7, 2015 MRI showed no evidence of nerve root impingement. Dr. Replogle commented that Claimant's "lumbar spine really does not seem to be the source of the majority of her symptoms," and opined that Claimant's symptoms were more consistent with pathology of the left hip.

13. Dr. Price reevaluated Claimant on February 9, 2016. Claimant reported pain at a 9/10 in severity. On examination, Dr. Price noted myofascial trigger points in the lumbar spine and at the sacroiliac joints, with evidence of Waddell signs. Dr. Price noted Claimant had no pain with the seated straight leg raise to 90 degrees, but pain in the supine position and with the FABER maneuver. Dr. Price assessed a history of low back pain, history of myofascial pain, history of pain disorder, somatization, and two small central disk protrusions at L5-5 and L5-S1. Dr. Price performed acupuncture on Claimant and recommended physical therapy, including pool therapy.

14. Claimant saw Todd Ousley, PA-C on February 17, 2016. Claimant presented with a left-sided antalgic gait and cane. PA-C Ousley noted positive straight leg test findings and limited lumbar range of motion in all directions secondary to pain. PA-C Ousley remarked, "She is only able to extend to about neutral position and is unwilling to really demonstrate much in the way of forward flexion other than about 10 degrees." PA-C Ousley noted that February 17, 2016 x-rays evidenced mild loss of disk height at the L4-5 and L5-S1 levels, and that the MRI of Claimant's lumbar spine revealed mild broad based disk protrusion at L4-5 and primarily right-sided disk protrusion at L5-S1. PA-C Ousley assessed L4-5 and L5-S1 disk degeneration with disk displacement and left leg radiculopathy. PA-C Ousley noted that Claimant's "pain and symptoms do assume (*sic*) a bit out of proportion to her imaging findings." PA-C Ousley recommended Claimant undergo a left-sided transforaminal epidural steroid injection.

15. Claimant returned to Dr. Price for a follow-up evaluation on February 22, 2016. Dr. Price noted that acupuncture was not helping Claimant and that three sessions of physical therapy seemed to make Claimant worse. Claimant presented with an antalgic gait. Dr. Price noted 4/5 Waddell signs, negative seated straight leg raise findings, and positive straight leg raise findings in the supine position. Dr. Price further noted there was no evidence of radiculopathy. Dr. Price remarked, "It is very difficult to evaluate her because of kinesophobia." Dr. Price further remarked, "I am concerned she has a pain disorder." Dr. Price performed additional acupuncture on Claimant with electrical stimulation.

16. On March 3, 2016, Claimant received a left-sided L5-5 and L5-S1 transforaminal epidural steroid injection, administered by Kirk Clifford, M.D. Dr. Clifford opined that Claimant's low back was not the source of her pain, and that Claimant's issue was not a "primary back problem or internal issue with the back."

17. Claimant underwent electrodiagnostic (EMG) testing on March 7, 2016. Robert Frazho, M.D. noted that Claimant's electrodiagnostic testing was normal, stating, "There is no electrodiagnostic evidence of lower extremity radiculopathy, lumbosacral plexopathy, peroneal mononeuropathy, or periperhal neuropathy." Dr. Frazho further noted Claimant's MRI revealed minimal findings, including a small central disk protrusion at L4-5, and small right paracentral disk protrusion at L5-S1, with no significant displacement.

18. Dr. Sofish reevaluated Claimant on March 11, 2016. Claimant presented with a limp, back brace, and cane. Claimant reported pain at a 9/10 in severity in her thoracic lumbar spine, left thigh, and leg. Dr. Sofish noted that an MRI of Claimant's left hip and EMG of left leg were negative. Dr. Sofish further noted positive piriformis signs on the left thigh.

19. Dr. Price reevaluated Claimant on March 17, 2016. Dr. Price noted that eight sessions of physical therapy made Claimant worse. Claimant reported that "everything hurt." Dr. Price noted 4/5 Waddell signs and "lots of pain behaviors." Dr. Price further noted, "She moves very gingerly around the room, but she has 90 degrees of straight leg raising in the seated position, 20 degrees supine." Dr. Price assessed history of low back pain with evidence of a "very small" disk protrusion at L4-5, severe somatization, pain disorder, and severe depression. Dr. Price performed a laser treatment on Claimant. Dr. Price recommended Claimant wean off the opioids and opined that Claimant could be at maximum medical improvement (MMI) in about 4 to 6 weeks.

20. On March 18, 2016, Claimant attended a psychological consultation with Joel Cohen, Ph.D. Dr. Cohen noted Claimant presented with moderate to severe pain behavior. Dr. Cohen further noted Claimant was sedentary and not doing any exercise at home. Dr. Cohen remarked that Claimant manifested "substantial indications for a disability mindset which is going to limit response to treatment and limit efforts at reactivation." Dr. Cohen assessed behavioral chronic pain syndrome, somatic symptom disorder, and adjustment reaction with depressed mood. Dr. Cohen remarked, "Her depression is not atypical in the chronic pain population but in her case and couple with the guarding and bracing behavior is limiting her response to physical treatment and augmenting her perception of pain and her perception of pain related disability." Dr. Cohen recommended Claimant adhere to a structured exercise program, take antidepressants, and attend at least 8 sessions of psychotherapy and biofeedback.

21. Claimant attended multiple subsequent psychotherapy sessions with Dr. Cohen, who referred to Claimant as being "substantially preoccupied somatically." On April 29, 2016, Dr. Cohen noted there were "significant somatoform elements to her presentation coupled with avoidant pain behaviors in the form of guarding and bracing and a clearly established disability mindset." Dr. Cohen opined that Claimant was a poor candidate for any major interventions.

22. Raymond Sohn, D.O. evaluated Claimant on April 7, 2016. Claimant presented with an antalgic gait and a cane. Dr. Sohn noted limited range of motion in the lumbar spine due to pain, positive lumbar facet loading on both sides, positive straight leg

raising on both sides, and negative Waddell's signs. Dr. Sohn further noted that internal rotation of Claimant's femur resulted in deep buttocks pain. Dr. Sohn diagnosed radiculopathy in the lumbosacral region, intervertebral disc disorders with radiculopathy in the lumbosacral region, and lesion of the sciatic nerve. Dr. Sohn opined that Claimant's "pain may be secondary to bilateral piriformis syndrome, but given her back pain and MRI findings, I suspect that there is still a back component to her pain." Dr. Sohn recommended that Claimant receive bilateral piriformis injections and possibly an epidural steroid injection. Claimant reci

23. Dr. Price reevaluated Claimant on April 13, 2016. Claimant reported having no response from the epidural steroid injections. Claimant reported pain at an 8/10 in severity. On examination, Dr. Price noted tenderness in both sacroiliac joints and in the piriformis, and pain with the FABER maneuver. Dr. Price noted that the pain started at 90 degrees in the seated position and about 30 degrees in the supine position. Dr. Price noted Claimant had pain behaviors. Dr. Price included possible piriformis syndrome and sacroilitis with her prior assessments of Claimant. Dr. Price recommended that Claimant undergo a piriformis injection, continue counseling, and continue taking Cymablta. Dr. Price remarked,

> I am not sure if anything will really help her. I do not think surgery is an option for her. She does need to continue doing her exercise. She will follow up again in about a month. Hopefully, we will be able to determine an impairment rating at that time.

24. On April 21, 2016, Claimant received a left piriformis injection, administered by William James, M.D.

25. Claimant returned to Dr. Price for a follow-up evaluation on April 27, 2016. Claimant reported that the epidural steroid injections and piriformis injection did not help. Claimant reported experiencing constant pain at a 9/10 in severity. Claimant reported she was unable to do a lot of activities and could only walk for 15 minutes without sitting down. Dr. Price noted pain behaviors and 4/5 Waddell signs. Dr. Price noted Claimant was unable to do the FABER maneuvers bilaterally. Dr. Price further noted Claimant had no pain with straight leg raising to 90 degrees in seated position, but pain to about 40 degrees bilaterally in the supine position. Dr. Price recommended that Claimant undergo transforaminal injections, continue counseling with Dr. Cohen, and stay on Cymbalta. Dr. Price opined that Claimant was close to MMI.

26. Claimant returned to Dr. Mistry for a follow-up evaluation on May 4, 2016. Regarding the April 12, 2016 left piriformis injection, Dr. Mistry noted Claimant "had analgesia for ~ 3 hours followed by recurrent sciatica."

27. Dr. Price reevaluated Claimant on May 11, 2016. Dr. Price noted that continued physical therapy sessions worsened Claimant's pain and remarked, "She states in fact just about everything makes her pain worse." Claimant reported pain at an 8/10 in severity in both legs, and that her left leg was entirely numb. Dr. Price remarked that Claimant "has a lot of somatic complaints and a lot of pain behaviors." On examination,

Dr. Price noted pain with straight leg raising at 90 degrees and 20 degrees bilaterally in the supine position. Dr. Price recommended Claimant undergo one additional epidural steroid injection and then be placed at MMI if the injection did not help.

28. Dr. Sofish conducted a follow-up evaluation of Claimant on June 13, 2016. Claimant reported pain at a 9/10 in severity. Claimant presented with an antalgic gait. On examination, Dr. Sofish noted 45 degree forward flexion and dorsiflex to neutral. Dr. Sofish also noted Claimant was able to toe heel and squat on a limited basis due to pain. Dr. Sofish further noted that a repeat MRI demonstrated stable degenerative disc disease and L4-5 and L5-S1, and stable appearance of the right paracentral disc protrusion at L4-5 causing right lateral recess stenosis and posterior displacement of the traversing right-sided S1 nerve root. Dr. Sofish noted that Claimant seemed improved compared to previous presentations but there remained "a great deal of pain behavior."

29. On June 21, 2016, Dr. Price reevaluated Claimant and placed Claimant at MMI. Claimant reported experiencing constant pain at a 10/10 in severity. Dr. Price noted 3/5 positive Waddell signs with axial loading and pseudorotation. Dr. Price noted the following dual inclinometer measurements: "Lumbar flexion was 22 degrees. Lumbar extension was 10. Tightest straight leg raising was 40. Left lateral bending was 19 and right was 20." Dr. Price noted that the range of motion measurements were found to be valid. Dr. Price assigned a 20% total combined whole person impairment rating. Dr. Price assigned a 7% impairment for the two small disc protrusions under Table 53 (II)(C) of the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised (the "AMA Guides"), and a 14% impairment rating for range of motion loss. Dr. Price remarked, "I do not think that there is much more we can really do for her. She may still benefit from an epidural at some time in the future. She may need to continue on the Cymbalta; however, it is not really helping her much."

30. Dr. Sofish reevaluated Claimant on July 18, 2016. Claimant reported pain at a 9/10 in severity. Dr. Sofish noted forward flexion to 45 degrees and dorsiflexion to neutral. Dr. Sofish noted Claimant was able to toe and heel with mild difficulty and unable to squat. Dr. Sofish noted Claimant had not improved and agreed Claimant was at MMI. Dr Sofish noted that he agreed with Dr. Price's disability evaluation. Dr. Sofish opined that Claimant "may need continued Mobic and Cymbalta as well as psychological counseling with Dr. Cohen."

31. On October 12, 2016, Lloyd Thurston, M.D. conducted a Division Independent Medical Examination (DIME) of Claimant. Dr. Thurston issued a DIME report on October 20, 2016. Claimant reported that her pain was between a 4-7 out of 10 in severity. Dr. Thurston noted Claimant had a "peculiar" antalgic gait. Dr. Thurston noted that the seated straight leg raise was negative to 90 degrees on the right hip, 60 degrees of flexion on the left hip with no radicular symptoms and "subjective complaints" of low back and hip pain. Dr. Thurston noted Claimant did not demonstrate a positive straight leg raising sign of the left leg. Dr. Thurston noted FABERE maneuver of the left hip resulted in a complaint of pain. Dr. Thurston remarked, "Her lumbar range of motion measurements was (*sic*) extremely limited even after warm-up. Her range of motion

measurements were consistent during warm-up, with distraction, and during the exam with the Acumar dual digital inclinometers. They are significantly lower than those obtained by Dr. Price on 6/21/2016." Dr. Thurston further remarked, "She was unable or unwilling to extend her spine beyond neutral making facet loading impossible." Dr. Thurston noted that strength testing of both lower extremities demonstrated nonphysiologic findings. Dr. Thurston further noted 3/5 positive Waddell signs.

32. Dr. Thurston noted Claimant's medical records evidenced symptom magnification, indicating Claimant's subjective complaints were not consistent with objective findings. Dr. Thurston opined that the significant pain reported by Claimant could not be confirmed or quantified. Dr. Thurston noted that Claimant's pain levels remained excessive and essentially unchanged since the injury, which Dr. Thurston opined was not physiologic. Dr. Thurston further noted that Claimant had not improved with multiple appropriate modalities of treatment.

33. Dr. Thurston included in his DIME report the following section from the sixth edition of the AMA Guides, titled Rating without Objective Findings:

> "The examiner must base impairment rating on objective factors to the fullest extent possible. Patient subjectivity during the examination process itself may potentially contribute to the inconsistency of examination findings and test results; for example a patient may self-limit during the assessment of range of motion to exert submaximal effort on manual strength testing because of pain and/or apprehension. Such 'symptom magnification' (the display of exaggerated pain behavior and self-inhibition of effort out of proportion to the observable pathology), when detected, should be appropriately discounted by the examiner without impugning the patient for being unmotivated or malingering. When such findings clearly appear to conflict with what is expected according to established medical principles, they must not be used to justify an impairment rating.

34. Dr. Thurston also referred to the Malingering Guidelines from the American Psychiatric Association and opined that Claimant satisfied at least two of the four criteria for malingering. Dr. Thurston opined, within a reasonable degree of medical probability, that "[Claimant's presentation is consistent with the formal guidelines for the assessment of malingering. Those guidelines consequently mandate that a strong suspicion of malingering should be adopted for this examinee."

35. Dr. Thurston further opined that, within a reasonable degree of medical probability, a permanent impairment rating, restrictions, and additional maintenance treatment for Claimant's low back were not indicated or appropriate. Dr. Thurston noted that his opinion was based on Claimant's "mechanism of injury, the lack of objective findings, lack of significant abnormality on imaging and diagnostic studies, and the fact her subjective complaints are out of proportion to the mechanism of injury." Dr. Thurston opined that the MRI did not demonstrate significant underlying pathology which would explain Claimant's symptoms. Dr. Thurston opined that the degenerative

disc disease in L4-5 and L5-S1is pre-existing, age-related, and not the source of Claimant's pain. Dr. Thurston stated,

> Her range of motion is moot because she does not have underlying pathology (the fact that she has degenerative spondylosis and complains bitterly of pain does not mean she meets the criteria for impairment rating). It is my medical opinion her condition is properly represented by II.A. of table 53.

36. Respondents filed a Final Admission of Liability (FAL) on November 7, 2016, denied liability for medical treatment and/or medications after MMI.

37. On February 13, 2017, Elizabeth Bisgard, M.D., M.P.H., conducted an Independent Medical Examination (IME) at the request of Respondents. Dr. Bisgard issued an IME report dated February 21, 2017. Claimant reported pain at 6 or 7/10 in severity. On examination, Dr. Bisgard noted minimal forward flexion of the lumbar spine with no extension, minimal right side bending, and no left side bending. Dr. Bisgard noted seated straight leg raise at 90 degrees and pain with supine straight leg raise at 20 degrees. Dr. Bisgard noted Claimant was able to heel walk and unable to toe walk, and that Claimant presented with a pronounced antalgic gait favoring her right leg. Dr. Bisgard noted that there were nonphysiologic neurologic symptoms to palpation on the anterior superior iliac spine and midflank area. Dr. Bisgard further noted positive Waddell's signs and remarked that Claimant pain was out of proportion to her examination. Dr. Bisgard diagnosed lumbar strain with unexplained ongoing pain and nonphysiologic findings. Dr. Bisgard agreed with Dr. Thurston's assessment that an impairment rating, activity restrictions, and maintenance care are not appropriate. Dr. Bisgard remarked,

> [Dr. Thurston] provided a thorough and detailed explanation as to why [Claimant] does not qualify for an Impairment Rating under the AMA Guides. There is no medical explanation for her pain; it is out of portion to her exam and diagnostic studies. Her responses to various treatments defies logic or medical explanation. Dr. Thurston did not err in his opinion or methodology. He appropriately pointed out concerns regarding malingering and somatoform disorder; I share his concerns based on my own findings.

38. Dr. Bisgard testified at hearing as an expert in occupational medicine. Dr. Bisgard is board certified in occupational medicine and is Level II accredited by the Division of Workers' Compensation. Dr. Bisgard testified consistent with her IME report. Dr. Bisgard opined that Claimant did not sustain any permanent impairment. Dr. Bisgard acknowledged there were objective findings on the MRIs of small disc protrusions and mild facet hypertrophy, but opined that the findings were normal, age-related wear and tear. Referring to Table 53(II)(B), Dr. Bisgard acknowledged that Claimant sustained a medically documented injury with six months of pain and degenerative changes; however, Dr. Bisgard testified that meeting such criteria did not in and of itself qualify Claimant for an automatic impairment rating. Dr. Bisgard testified

that examiners are required to consider the mechanism of injury, pathology, objective criteria and subjective criteria, which all must match. Dr. Bisgard testified that, per the Colorado Division of Workers' Compensation Medical Treatment Guidelines, ("MTG") objective findings are required to support MRI findings. Dr. Bisgard opined that there were no objective findings establishing that the MRI findings were anything other than age-related wear and tear. Dr. Bisgard testified that there was no medical explanation for Claimant's pain behaviors and failure to improve, and that her pain behaviors were out of proportion to the objective findings.

39. Dr. Bisgard testified that there was a strong possibility of malingering in Claimant's case. Dr. Bisgard acknowledged that there is a difference between somatoform disorder and malingering, and that illness behavior does not preclude the existence of an actual defined injury.

40. Dr. Bisgard further testified that it is important to consider the AMA Guides and the MTG in conjunction with each other. Dr. Bisgard testified that, per the MTG, it is necessary to establish a Table 53 diagnosis before considering range of motion. Upon establishing a Table 53 diagnosis, examiners are required to perform inclinometer measurements for range of motion. Dr. Bisgard testified that the Division of Workers' Compensation suggests performing two sets of measurements, but that there are situations in which examiners are not required to perform two sets, such as when the range of motion is nonphysiologic or there are extreme pain behaviors. Dr. Bisgard testified that and examiner should give an explanation if he or she does not perform a second set of measurements. Dr. Bisgard testified that Dr. Thurston did not perform two sets of measurements and that she did not take any range of motion measurements because Claimant did not qualify for a Table 53 diagnosis.

41. Dr. Price testified by deposition on March 6, 2017. Dr. Price testified as an expert in physical medicine and rehabilitation. Dr. Price is Level II accredited by the Colorado Division of Workers' Compensation and is board certified in physical medicine and rehabilitation. Dr. Price testified that she reviewed Dr. Thurston's DIME report and Dr. Bisgard's IME report. Dr. Price testified that the disk protrusion constitutes a medical explanation for Claimant's pain, and that the MRI findings were objective evidence of a disk protrusion. Dr. Price testified that a "protrusion is more like a herniation," and is not just a disk bulge.

42. Dr. Price testified that she assigned a 7% impairment rating under Table 53 (II)(C) because of Claimant's disc protrusions, and a 14% impairment rating for range of motion. Dr. Price testified that you are entitled to a Table 53 rating for a lumbar sprain/strain, and that Table 53(II)(B) can be used for sacroiliac joint pain and severe muscle spasms.

43. Dr. Price opined that the disk protrusion caused some permanent problems for Claimant. Dr. Price disagreed with Dr. Thurston's conclusion that the MRI findings were age-related, opining that you do not generally find disk protrusions in a 41-year old.

44. Dr. Price testified that Dr. Thurston was required to do two sets of range of motion measurements and, if found to be invalid, bring Claimant back for a repeat test. Dr. Price testified that she disagreed with Dr. Thurston's diagnosis of malingering and explained the difference between malingering and somatization. Dr. Thurston testified that somatization did not mean an impairment rating was not warranted.

45. Claimant testified that she continues to experience constant pain in her lower back, hips and left leg, at a 6 or 7/10 in severity. Claimant testified that she can sit for approximately 30 minutes, stand for 15 minutes, walk for 20 minutes, and lift approximately five pounds. Claimant testified that she cannot bend her back completely. Claimant testified that she drives and has a handicap sticker. Claimant testified that she can no longer mop or sweep, but can do other light chores. Claimant testified that she returned to work for Employer in August 2016 and was assigned to hold a sign outside of the office. Claimant testified that she was subsequently let go by Employer.

46. The ALJ credits the testimony and opinions of Drs. Thurston and Bisgard over the contrary testimony and opinion of Dr. Price.

47. Claimant failed to overcome Dr. Thurston's DIME opinion on impairment by clear and convincing evidence.

48. Claimant failed to prove that she is entitled to post-MMI maintenance medical benefits by a preponderance of the evidence.

49. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary

to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Overcoming the DIME Physician's Opinion on Permanent Impairment

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; Section 8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on

the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

As found, Claimant failed to overcome the DIME physician's impairment rating by clear and convincing evidence. Dr. Thurston determined Claimant sustained a zero percent impairment rating based on his review of medical records, objective tests, and his own physical examination of Claimant. Dr. Thurston opined tthere was no significant underlying pathology, and that the MRI findings were age-related, pre-existing and not the source of Claimant's pain. Dr. Thurston performed range of motion measurements, but explained that he considered such measurements moot because there was no underlying pathology. Dr. Thurston considered Claimant's somatization and possible malingering in his analysis of permanent impairment. Although Dr. Thurston cited to the sixth edition of the AMA Guides when discussing malingering, Dr. Thurston ultimately referred to Table 53 (II)(A) when finding that no permanent impairment rating was warranted. Dr. Price's disagreement with Dr. Thurston's impairment rating represents a mere difference of opinion, which is insufficient to overcome the DIME. Dr. Thurston's opinion is shared by Dr. Bisgard and supported by the medical records. Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Thurston's zero percent impairment rating was incorrect.

Medical Maintenance Benefits

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits

should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As found, Claimant failed to establish by a preponderance of the evidence that she is entitled to medical maintenance benefits. As noted throughout Claimant's medical records, Claimant underwent various modalities of treatments, including physical therapy, medications, and injections, all of which were ineffective. Drs. Thurston and Bisgard credibly opined additional maintenance medical care is not indicated or appropriate for Claimant.

ORDER

It is therefore ordered that:

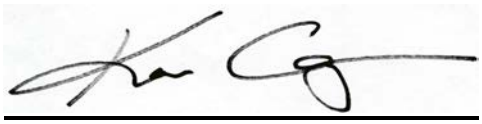
I. Claimant failed to overcome the DIME physician's 0% impairment rating by clear and convincing evidence.

II. Claimant failed to establish an entitlement to post-MMI maintenance medical benefits by a preponderance of the evidence.

III. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 12, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained an occupational disease or injury to her right shoulder arising out of an in the course and scope of her employment with employer.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received from Grand River Health Medical Clinic (Mark Quinn, PA-C), Dr. Robert Adams, and Dr. Bruce Lippman was authorized medical treatment.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received from Grand River Health Medical Clinic (Mark Quinn, PA-C), Dr. Robert Adams, and Dr. Bruce Lippman was reasonable and necessary to cure and relieve claimant from the effects of the work injury.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that employer failed to provide a designated provider list to claimant that complies with Section 8-43-404(5)(a)(I)(A), C.R.S., and as a result, the choice of physician passed to claimant.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to Temporary Partial Disability ("TPD") benefits beginning December 1, 2016 and ongoing.

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

- If claimant has proven a compensable injury, whether respondent has proven by a preponderance of the evidence that penalties should be assessed pursuant to Section 8-43-102(1)(A), C.R.S. for claimant's failure to timely report the injury.

FINDINGS OF FACT

1. Claimant has worked for employer since April 2013 and began working in the floral department in February 2016. Claimant's job duties in the floral department include breaking down loads of cut flowers and live plants. The cut flowers come in buckets of water that must be lifted out of boxes and placed in the cut flower cooler. In addition, the water must be refreshed in these buckets.

2. Claimant testified that live plants also arrive in boxes that must be unloaded. The plants are the placed on display shelves and hung from "A-frames". In the summer claimant is also responsible for stocking live plants in an outdoor green house. At all times claimant is tasked with watering all live plants.

3. Claimant testified that watering is typically done on Tuesdays and Sundays. On a watering day claimant may spend up to three hours of her eight hour shift watering these plants. Watering duties increase during the summer when the greenhouse is used and at Christmas time when employer receives large orders of poinsettias. Claimant testified that she used a watering wand with a trigger to water plants that were on shelving above shoulder height. Claimant estimates that of her assigned watering duties 40 to 45 percent is done above shoulder height.

4. Claimant testified that in late summer 2016 she noticed pain in her right shoulder when she performed overhead work, such as the overhead watering. Claimant did not initially seek medical treatment because she thought she could "work through it".

5. On December 1, 2016, claimant reported to employer that she believed she had injured her right shoulder. Claimant testified that she made a report at that time because her shoulder was not getting better and she felt that she needed medical treatment.

6. On December 1, 2016, employer provided claimant with a Designated Medical Providers List that included four medical providers claimant could see for treatment. The list included Grand River Occupational Health Services located at 201 Sipprelle Drive in Parachute, Colorado; Grand River Health Medical Clinic located at 501 Airport Road in Rifle, Colorado; Dr. Laurie Marbas with Grand River Health Clinic in Rifle, also located at 501 Airport Road in Rifle, Colorado; and Dr. Scott Rollins located at 58128 Highway 330 in Collbran, Colorado.

7. On December 1, 2016, claimant signed the Designated Medical Providers List that indicated that she would seek treatment at Grand River Health Medical Clinic.

8. On December 8, 2016, claimant was seen by Mark Quinn, PA-C at Grand River Health Medical Clinic. Claimant reported to Mr. Quinn that she had experienced progressively worsening right shoulder pain over the last year. Mr. Quinn diagnosed rotator cuff tendonitis and restricted claimant from lifting, pushing, pulling, or carrying over 20 pounds. Mr. Quinn also referred claimant to physical therapy for a consultation.

9. On February 22, 2017, claimant requested a one time change of physician from Mr. Quinn "c/o Deborah Brown MD" to Dr. Bruce Lippman, Sr. Respondent denied claimant's change of physician because Dr. Lippman was not included on the Designated Medical Providers List.

10. On February 28, 2017, claimant submitted another one time change of physician. In this notice, claimant indicated that she would be changing from Mr. Quinn "c/o Deborah Brown MD" to Dr. Laurie Marbas.

11. Dr. Marbas testified at hearing that in December 2016 she had moved from the Rifle, Colorado area to Boca Raton, Florida. Respondents did not authorize any treatment with Dr. Marbas because she was practicing in Florida at the time claimant submitted the notice of change of physician.

12. On March 1, 2017, claimant sought treatment with Dr. Robert Adams. Claimant testified that she wanted to see an orthopedic surgeon to address her right shoulder issues because Mr. Quinn was not a doctor. Claimant testified that she was not referred to Dr. Adams, but found his contact information in the yellow pages.

13. At her first appointment with Dr. Adams claimant reported that she started having anterior shoulder pain during the summer and that she is "more active" in the summer. Dr. Adams diagnosed right shoulder biceps tendonitis and ordered a magnetic resonance image ("MRI") of claimant's right shoulder.

14. On March 8, 2017, an MRI of claimant's right shoulder showed a partial thickness tear of the infraspinatus tendon, fluid in the bicipital tendon sheath, fluid in the subacromial/subdeltoid bursa, and moderate degenerative changes in the AC joint.

15. Following the March 8, 2017 MRI, Dr. Adams opined that claimant had "obvious biceps tendonitis" and recommended ice, anti-inflammatory medication, and rest.

16. Claimant did not return to Mr. Quinn or Dr. Adams for treatment. Instead, on April 14, 2017, claimant sought treatment with Dr. Lippman. Claimant testified that she went to see Dr. Lippman because he has treated her children in the past. On April 14, 2017, Dr. Lippman restricted claimant from work for three weeks. At that time, Dr. Lippman opined that claimant had tendonitis in her right shoulder. Claimant testified that she has not returned to work since April 14, 2017.

17. Claimant testified that between December 1, 2016 and April 14, 2017 she missed "a few" days of work because of right shoulder pain. Claimant testified that she would call employer and notify them that she would not be at work because her shoulder was causing her pain.

18. On April 19, 2017, respondent sent claimant for an independent medical examination ("IME") with Dr. Tashof Bernton. Dr. Bernton reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the IME. Following the IME, Dr. Bernton issued a report in which he opined that that claimant did not suffer an acute injury to her right shoulder. Dr. Bernton also opined claimant's right shoulder symptoms were not work related.

19. Dr. Bernton testified by deposition in this matter and confirmed his opinion that claimant's right shoulder symptoms were not the result of an acute injury and were not caused by claimant's work duties. Dr. Bernton testified that claimant has biciptial tendonitis and a biceps tendon tear. Dr. Bernton explained that a biceps tendon tear can occur either acutely or on a degenerative basis. Dr. Bernton testified that based upon his review of the medical records and claimant's description of her work duties it is his opinion that claimant's biceps tendon tear occurred on a degenerative basis. Dr. Bernton also testified that a biceps tendon tear is not a noted diagnosis in the repetitive motion section of the Colorado Workers' Compensation Treatment Guidelines.

20. Claimant testified that in December 2016 her hours varied and she was paid $12.75 per hour. Based upon the payroll records entered into evidence the claimant was paid on a weekly basis with pay periods ending on a Saturday. Claimant's wages during the eight weeks prior to her report of injury on December 1, 2016 totaled $3,078.53. The ALJ calculates claimant's average weekly wage ("AWW") to be $384.82.

21. The ALJ credits the medical records and the opinion of Dr. Bernton and finds that claimant did not suffer an acute injury to her right shoulder. The ALJ further credits the opinion of Dr. Bernton and finds that claimant's work activities did not cause an occupational disease or repetitive motion disorder of her right shoulder. Although, claimant testified that 40 to 50 percent of her watering duties were done overhead, claimant also performed other job duties that did not include overhead work. The ALJ is not persuaded that the overhead watering performed by claimant caused an occupational injury to claimant's right shoulder. The ALJ credits the opinion of Dr. Bernton and finds that claimant's right shoulder biceps tendon tear occurred on a degenerative basis.

22. The ALJ finds that claimant has failed to demonstrate that it is more likely that not that she suffered an occupational disease or industrial injury that arose out of and in the course and scope of her employment. The ALJ also finds that claimant has failed to demonstrate that it is more likely than not that her work activities aggravated, accelerated, or combined with a preexisting condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. As found, claimant has failed to demonstrate by a preponderance of the evidence that she sustained an occupational disease or injury to her right shoulder arising out of and in the course and scope of her employment with employer. As found, the medical records and Dr. Bernton's opinions are credible and persuasive.

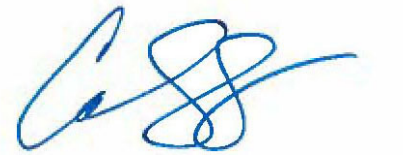
ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: June 14, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did Claimant prove by a preponderance of the evidence that his right trigger finger condition is a compensable component of the admitted August 7, 2015 work injury?

- If Claimant has proven that his right trigger finger condition is a compensable component of the admitted injury, did Claimant prove by a preponderance of the evidence that he is no longer at MMI?

FINDINGS OF FACT

1. Claimant testified that he never had symptoms in his right trigger finger before his industrial injury. There was no evidence in the record documenting any treatment for his right hand or trigger finger before August 7, 2015.

2. On August 7, 2015, Claimant sustained an admitted industrial injury while working for Employer. Claimant was working as a service technician and hurt his right shoulder while doing an alignment. He was using a wrench and separating two parts when he hurt his shoulder. Claimant testified his pain gradually increased after the injury.

3. Claimant first sought treatment on August 10, 2015 and was evaluated at Ann Marie Latch, PA-C at Urgent Care. Shoulder pain was noted on motion and the diagnosis was: shoulder sprain.

4. Claimant was evaluated on August 12, 2015 by Theodore Villavicencio, M.D. at Concentra, the ATP for Employer. At that time, he had pain in the right upper, posterior shoulder. On examination, restricted range of motion ("ROM") was noted. Dr. Villavicencio's assessment was right shoulder strain and he referred Claimant for physical therapy ("PT"). Claimant's work restrictions were: no lifting no greater than 30 pounds.

5. Claimant returned to Dr. Villavicencio on August 26, 2015. Claimant complained of continuing pain in the right shoulder. On examination positive Neer and speed tests were noted. Dr. Villavicencio's assessment remained the same, as did Claimant's work restrictions. Dr. Villavicencio referred Claimant for an MR arthrogram.

6. On September 4, 2015, Dr. Villavicencio evaluated Claimant, who complained of persistent pain in the lateral shoulder area, which was worse with activities. Dr. Villavicencio's assessment was right shoulder strain/sprain. Claimant's

PT was to continue. Claimant was referred to Joel Gonzales, M.D. for an orthopedic evaluation.

7. Claimant's PT records were admitted at hearing. Claimant received 14 PT sessions at Concentra physical therapy from August 12, 2015 through September 21, 2015.[1] The PT was overseen by Joshua Simon, PT. These treatments were focused on Claimant's right shoulder.

8. On September 16, 2015, Claimant underwent an MRI. The MRI showed a tear of the labrum, ossified loose body, full thickness chondral defect on the posterior surface of the glenoid. Claimant's right shoulder also had moderate arthritis.

9. The ALJ notes in the initial evaluations of Claimant by Dr. Villavicencio and Dr. Gonzales, no complaints referable to the right hand were documented.

10. On September 24, 2015, Claimant was evaluated by Dr. Gonzalez, who noted slight stiffness with range of motion in his right shoulder. Forward flexion was limited to 160° and external rotation was limited to 60°. Claimant had pain and weakness with resisted speed and Yergason testing. He also had positive Neer and Hawkins impingement maneuvers. Dr. Gonzalez' impression was: right shoulder underlying ostoarthritis about the glenohumeral joint; right shoulder loose body; degeneration of the labrum, associated with his shoulder arthritis; new rotator cuff tear and weakness on exam. Dr. Gonzalez discussed surgery with Claimant.

11. On September 30, 2015, Claimant underwent an arthroscopic debridement and arthroscopic subacromial decompression in the right shoulder, which was performed by Dr. Gonzales. The pre- and post-operative diagnoses were the same: rotator cuff tear and degenerative joint disease with outlet impingement, right shoulder. He was followed by Dr. Gonzalez, who ordered physical therapy as part of his post-operative course of treatment.

12. Following his surgery, Claimant began PT at Panther physical therapy on October 8, 2015.[2] The treatment included therapeutic exercises in activity, neuromuscular rehabilitation, manual therapy and patient education. Claimant received physical therapy for the next seven months through March 2016.

13. Dr. Villavicencio followed Claimant after his surgery, starting on October 20, 2015. Claimant's work restrictions were continued. These remained in place after the October 27, November 11 and December 17, 2015 appointments.

14. Claimant testified he injured right hand/trigger finger in February 2016 while doing PT at Panther Physical Therapy. He was using the battle ropes, which were 12-15 feet long. He also used the kettle bells. He said when he woke up the next day,

[1] Exhibit I.

[2] Exhibit K.

he could not straighten his finger. There was no reference to a trigger finger issue in the medical records before February 2016.

15. The ALJ reviewed Claimant's extensive physical therapy records to determine when he complained of right trigger finger symptoms. The PT treatments from October 8, 2015 through February 1, 2016 were focused on Claimant's shoulder. There were no notations related to trigger finger symptoms. There were references in the PT records to symptoms attributable to various activities. For example, on November 16, 2015, Claimant reported that he overdid it raking leaves, feeling symptoms in his shoulder.[3] Those symptoms lasted until November 23, 2015. Claimant also experienced increased symptoms on December 23, 2015 while putting up cabinets.[4] On December 30, 2015, Claimant reported symptoms while unloading wood.[5] On January 20, 2016, Claimant had symptoms which he attributed to chipping ice.[6] Also, on January 29, 2016, Claimant had a strained feeling in his shoulder due to his sleeping position.[7]

16. Claimant initially downplayed these symptoms on cross-examination. When the specific records were referenced, Claimant testified he participated in the foregoing activities. He also admitted these required use of his right hand.

17. The first reference to his trigger finger was they were February 1, 2016. In particular, DPT Kueser documented that Claimant reported soreness into shoulder blade and deltoid, along with occasional trigger finger on right hand. The note did not identify what caused these symptoms. More particularly, there was no reference attributing the trigger finger symptoms to the rope exercises. Ms. Kueser did not state that the PT caused those symptoms. There was no reference to any treatment he received for the trigger finger. The same complaint was reported in the Panther PT records on February 3, 2016. However, no trigger finger symptoms were described in the February 8, 2016 note. On February 10 2016, Claimant noted his shoulder was OK and he had occasional trigger finger symptoms. He thought this might be related to shoulder positioning.

18. Dr. Villavicencio examined Claimant on February 11, 2016. At that time, persistent pain in the lateral shoulder area, as well as right upper extremity paresthesias was noted. In addition, Claimant noted two weeks ago he had a sudden onset of right middle trigger finger symptoms. Dr. Villavicencio's assessment was S/P rotator cuff repair; right shoulder strain. The ALJ notes Dr. Villavicencio made no diagnosis related to the trigger finger, nor was any treatment recommended.

[3] Exhibit K, pp. 213-214.

[4] Exhibit K, pp. 234-235.

[5] Exhibit K, pp. 236-237.

[6] Exhibit K, pp. 246-247.

[7] Exhibit K, pp. 252-253.

19. In the February 15, 2016 Panther PT record, Claimant was said to be unsure why the trigger finger occurred. On February 17, 2016, Claimant noted 70-75% improvement in the shoulder, however, Claimant's biggest concerns were bilateral hand swelling and trigger finger symptoms that seemed to come on with certain positions. In her assessment, DPT Kueser noted Claimant's hand/finger symptoms were non-provokable during clinic tasks but a large concern for patient.[8] Claimant was advised to address this with the doctor at an upcoming appointment. The ALJ notes this raises an issue whether the trigger finger symptoms were primarily subjective complaints, as opposed to being based on objective findings. Also, there was no explanation provided why Claimant experienced swelling in both hands.

20. On February 23, 2016, Claimant returned to Dr. Gonzalez. Dr. Gonzalez noted Claimant developed triggering in his long right finger after doing a rope exercise in physical therapy. The problem went away after he stopped doing the exercise. Dr. Gonzalez noted this problem would be monitored. In the follow-up evaluation done by Dr. Gonzalez on March 15, 2016, no trigger finger symptoms were noted.

21. On February 24, 2016, following his medical appointment, Claimant told DPT Kueser they would keep an eye on the trigger finger as he may need an injection. He continued to participate in PT treatments.

22. Claimant returned to Dr. Villavicencio on February 25, 2016. The sudden onset of right middle trigger finger symptoms one month ago while doing a new exercise in physical therapy was noted. Dr. Villavicencio recorded the PT notes were not available. Claimant had no past problems with trigger finger, no surgeries of the hand/wrist. On examination, Dr. Villavicencio noted triggering of right middle finger at the A1 area. There was no specific diagnosis related to the trigger finger made as part of Dr. Villavicencio's assessment. The evaluations performed at March 29, 2016 and April 26, 2016 had the same assessment and findings by Dr. Villavicencio. No treatment for Claimant's trigger finger was recommended.

23. There were no further references to trigger finger symptoms in the balance of the Panther PT records. This included Claimant's treatment sessions on February 26 and 29; March 2, 9, 11, 16, 23 and 25, 2016.[9] Claimant received physical therapy at Panther Physical Therapy through March 25, 2016. He received a total 51 PT sessions at this facility. The discharge summary was prepared by DPT Kueser.

24. Claimant returned Concentra for physical therapy on April 12, 2016. He was evaluated by Brea Salvin, who noted a history of trigger finger recently ("a few months ago"); this symptom was noted to come and go. Claimant's PT plan included therapeutic exercises such as stretching, strengthening to address the impairments of range of motion and muscle performance. Other therapeutic activities included lifting,

[8] Exhibit K, p. 264.

[9] Exhibit K, pp. 270-289.

pushing, pulling, carrying, gripping to address the ability to perform the identified essential functions. Manual therapy such as joint and mobilization was to be provided.

25. Claimant underwent physical therapy on April 15, 19, 22 and 25, 2016 at Concentra. There were no references to trigger finger symptoms in those notes. In addition, Claimant's grip strength was tested by a dynamometer at each session. The ALJ inferred Claimant would have reported trigger finger symptoms during this treatment, if he had been experiencing same.

26. Claimant was evaluated on May 9, 2016 by Dr. Villavicencio. At that time, he reported he was still dealing with trigger finger on the right-hand. Dr. Villavicencio once again noted the PT notes were not available to review. Dr. Villavicencio's assessment was: right shoulder strain; S/P rotator cuff repair; and trigger finger of the right hand. He referred Claimant to a hand specialist, Dr. Clinkscales to evaluate and treat the trigger finger.

27. On September 13, 2016, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. The FAL was based upon Dr. Villavicencio's finding Claimant reached MMI as of July 13, 2016. Dr. Villavicencio assigned a 6% whole person medical impairment rating. The FAL admitted for reasonable and necessary post-MMI medical treatment by an ATP.

28. Claimant underwent an independent medical examination on October 21, 2016, which was performed by F. Mark Paz, M.D. at the request of Respondents. At the time of the evaluation, Claimant recorded that the pain in his right hand was 3/10 to 6/10. Claimant said he could not grip firmly, his middle finger got caught, which then popped loose with stabbing pain. On examination, Dr. Paz noted tenderness with clicking at the palmar surface of the right third metacarpal during active flexion and extension. Slight tenderness to palpation was noted in the same region at the location of the third MCP joint.

29. Dr. Paz' assessment was: right shoulder degenerative joint disease; right shoulder rotator cuff degenerative tear; right shoulder loose-body; right-hand trigger finger; right upper extremity paresthesias. Dr. Paz opined that it was not medically probable that the right-hand trigger finger was causally related to the August 7, 2015. Most trigger finger conditions had no specific etiology and were classified as idiopathic. Dr. Paz‘analysis was based upon an evaluation of the State of Colorado, Cumulative Trauma Conditions, Medical Treatment Guidelines, Rule 17, Exhibit 5 . He opined there was no strong or good evidence regarding cumulative exposure associated with Claimant's development of trigger finger.

30. There was no evidence in the record that Claimant objected to the FAL, including requesting a Division of Workers’ Compensation Independent Medical Examination. (“DIME”) on the question of MMI.

31. Claimant testified that he has not received any treatment for the trigger finger. He also was currently working full duty with no restrictions and has been able to perform the duties required at his employment.

32. Dr. Paz testified at hearing as an expert in internal medicine, with a focus on occupational injuries. He is also Level II accredited pursuant to the WCRP. Dr. Paz noted he first examined Claimant on October 21, 2016 and reviewed his findings and opinions. Dr. Paz testified that a trigger finger was a stenosis of the flex or tendon up on the palmar surface a band there are two tendons in the finger, one of which is deep and one is superficial. The deep one goes to the end of the finger and the deeper one penetrates, flexes, and pulls the proximal portion of the finger. Dr. Paz described the anatomy of the finger, when the tendon contracts, it flexes the finger.

33. Dr. Paz testified that most trigger fingers were allopathic; meaning there was no explanation for them. Dr. Paz stated that he did not believe Claimant's trigger finger was caused by PT.[10] Dr. Paz analyzed whether repetitive activities could have caused Claimant's trigger finger. He noted Claimant's physical therapy sessions lasted 45 minutes three times a week. Dr. Paz testified that this would not meet the requirement for a compensable repetitive exposure under the Medical Treatment Guidelines. Dr. Paz credibly testified that it was more medically probable that Claimant's remodeling which consisted of carrying dry wall and cabinets, using a knife to cut dry wall, and using a drill to screw in the dry wall would cause a trigger finger condition as opposed 45-minute physical therapy sessions. Dr. Paz also noted that Claimant did not have trigger finger complaints when he was undergoing work-hardening, which was physically more demanding than PT. The ALJ credited Dr. Paz' testimony that the trigger finger symptoms were not caused by Claimant's PT.

34. Claimant testified he continues to have problems with his trigger finger. It bothers him every day.

35. Claimant failed to prove that his right trigger finger was a compensable injury.

36. Claimant failed to establish he was no longer at MMI with regard to his shoulder.

37. Claimant is entitled to post-MMI medical benefits, as admitted in the FAL.

38. Evidence and inferences inconsistent with these findings were not persuasive.

[10] Hearing Transcript, p. 64:14-17.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the credibility of Claimant, as well as Dr. Paz was determinative on the compensability issue.

Compensability of Trigger Finger

The legal standard applicable to the compensability issue is found in § 8-41-301(1)(c), C.R.S., which provides as a condition for the recovery of workers' compensation benefits the injury must be "proximately caused by an injury or occupational disease arising out of and in the course of the employment". *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014).

A "compensable" injury is one which is disabling and entitles the Claimant to compensation in the form of disability benefits. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). Conversely, no benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury". Id.; § 8-41-301, C.R.S. The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant asserted he injured his trigger finger while participating in physical therapy to rehabilitate his shoulder. Claimant argued that since this injury occurred while he was receiving treatment, it was compensable. Claimant correctly noted that

such injuries are compensable. The ALJ notes such an injury under the quasi-course of employment doctrine.

In Colorado, the quasi-course of employment doctrine has been applied to certain activities of Claimant following a compensable injury. *Employers Fire Insurance Co. v. Lumbermens Mutual Casualty Co*., 964 P. 2d 591 (Colo. App. 1998). This doctrine has been the basis for expanding what is considered compensable, beyond what would ordinarily be the time and space limits of employment, when it occurs after an industrial injury. The rationale articulated by Colorado courts is that but for the compensable injury, Clamant would not have undertaken those activities. The trip to the physician's office became part of the employment contract. *Excel Corp. v. Indus. Claim Appeals Office,* 860 P.2d 1393, 1394 (Colo. App. 1993). Since the employer is required to provide medical treatment after an industrial injury, liability for injuries sustained while travelling to an appointment to treat for the injuries is compensable because these activities would not have been undertaken but for the compensable injury. *Price Mine Service, Inc. v. Industrial Claim Appeals Office*, 64 P.3d 936, 938 (Colo. App. 2003).

Accordingly, the quasi-course of employment doctrine has been extended to injuries sustained by Claimants while traveling to and from treatment provided by an authorized provider under various factual scenarios*. Excel Corp. v. Indus. Claim Appeals Office, supra,* 860 P.2d at 1394-1395. [Claimant's slip and fall while leaving physical therapy was deemed compensable as part of the quasi-course of employment doctrine. The activity of going to the medical appointment was considered "an implied part of the employment contract", since Claimant would not have been going to the doctor but for the compensable injury.]*; Price Mine Service, Inc. v. Industrial Claim Appeals Office*, *supra* 64 P.3d at 938. [The injuries sustained by Claimant in an MVA after authorized medical treatment was compensable as part of the original injury and the insurer on the risk was liable under quasi-course of employment doctrine. The Court specifically held under this doctrine "the second injury was not an intervening event which would relieve the employer of liability".]; *Turner v. Industrial Claims Appeals Office*, 111 P.3d 534 (Colo. App. 2004) [Claimant's injuries from MVA after a vocational evaluation appointment were found compensable, despite the fact Claimant had stopped for lunch after the appointment].

However, Claimant was still required to prove that it was his activities while participating in physical therapy that caused the injury. *Loofbourrow v. Industrial Claim Appeals Office*, *supra,* 321 P.3d at 553. As found, the ALJ was not persuaded that such activities were the cause of the trigger finger symptoms.

As a starting point, there was evidence in the record that Claimant developed trigger finger symptoms in February 2016. Claimant's ATPs (Dr. Gonzalez and Dr. Villavicencio) documented the presence of symptoms. In addition, there was a record of trigger finger symptoms in the PT records. (Findings of Fact 17, 19, 21, and 24).

However, Claimant failed to meet his burden of proof that using the ropes while undergoing PT caused the trigger finger. The ALJ's rationale was twofold. First, the

mere presence of trigger finger symptoms did not establish Claimant's PT exercises as the cause. As found, Claimant's trigger finger symptoms were periodic. He also testified that when he experienced pain, he stopped using the ropes. Yet his report of symptoms continued over the next few PT visits and then not at all. Claimant also participated in extensive activity (i.e. removing cabinets, stacking wood and hanging drywall), which were potential causes of trigger finger symptoms. The ALJ found Claimant did not proffer evidence that explained why the symptoms continued after he ceased doing the rope exercises. Under these facts it was equally likely that his remodeling activities were the cause of the trigger finger.

Second, there was no expert medical opinion presented by Claimant (within a reasonable degree of medical probability) that established PT as the cause of his trigger finger. Neither ATP clearly enunciated such an opinion. Therefore, there was an absence of expert testimony which supported Claimant's argument on causation.

By contrast, Dr. Paz testified the etiology of a trigger finger is idiopathic or can be the result of repetitive activities. As found, the Dr. Paz' testimony regarding the cause of Claimant's trigger finger symptoms was persuasive to the ALJ. (Finding of Fact 33). Claimant's trigger finger symptoms were not consistent. In addition, Claimant has returned to work full duty and no evidence of continued symptoms (as reflected in the medical records) was introduced.

Based upon the totality of evidence in the record, the ALJ concluded Claimant failed to prove his trigger finger symptoms are compensable.

MMI

Claimant did not present evidence that he was no longer at MMI with regard to his right shoulder. Moreover, he did not request a DIME on this question. (Finding of Fact 30). An ATP makes the initial finding of MMI, and assigns an impairment rating if appropriate. If a party wishes to challenge the ATP's MMI determination, the impairment rating, or both, the party must request a DIME in accordance with the procedures established in § 8-42-107.2, C.R.S. 2004. § 8-42-107(8)(b)(II), C.R.S. 2004; § 8-42-107(8)(c), C.R.S. 2004; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002). Without a request for DIME in the record, the ALJ determined he remains at MMI for his right shoulder. (Finding of Fact 36).

In light of the ALJ's conclusion that Claimant's trigger finger was not compensable, the question whether he was at MMI for this condition was moot.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits for a right trigger finger is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 9, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-996-945-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS ON STATUTE OF LIMITATIONS AND GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON SANCTIONS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

No hearing on the merits in the above-referenced matter has yet been scheduled. On May 15, 2017, the Claimant filed an Application for Hearing on several issues, including compensability, medical benefits and penalties versus the Respondents for alleged violation of § 8-43-203, C.R.S. and Rule 5-2 (D) of the Workers' Compensation Rules of Procedure (WCRP), 7 CCR 1101-3. On May 24, 2017, the Respondents filed a Motion for Summary Judgment, with attached exhibits A through C and 7. On June 12, 2017, the Claimant filed an Objection to Respondents' Motion for Summary Judgment and Claimant's Motion for Sanctions, with attached exhibits including the Claimant's Affidavit.

The matter was assigned to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for decision on the Respondent's Motion for Summary Judgment and the Claimant's Objection. Both matters were deemed submitted for decision on June 12, 2017.

Respondents' Exhibits A through C and 7 were attached to the Motion for Summary Judgment. Unmarked exhibits, including the Claimant's Affidavit, were attached to the Claimant's Objection.

ISSUES FOR SUMMARY JUDGMENT

The issues to be determined by this decision concern whether there are genuine issues of disputed material fact concerning whether the Claimant filed her Workers' Claim for Compensation beyond the Two-Year Statute of Limitations; whether the Claimant had a reasonable excuse which would extend the Statute of Limitations to three years; and, whether there is a genuine issue of disputed material fact concerning the Claimant's request for sanctions against the Respondents.

The Respondents bear the burden of proof, by a preponderance of the evidence of establishing that there is no genuine issue of disputed material fact concerning the Two-Year Statute of Limitations. The Claimant bears the burden, by preponderant evidence of establishing that there is a genuine issue of disputed material fact concerning whether there is a reasonable excuse which would extend the Statute to three years. Also, the Claimant bears the burden on her Motion for Sanctions.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings/Posture

1. . On May 15, 2017, the Claimant filed an Application for Hearing on several issues, including compensability, medical benefits and penalties versus the Respondents for alleged violation of § 8-43-203, C.R.S. and Rule 5-2 (D) of the Workers' Compensation Rules of Procedure (WCRP), 7 CCR 1101-3. No hearing is presently set.

2. Respondents allege that summary judgment is appropriate because there is no genuine issue of disputed material fact that the Claimant sustained a right knee injury, while working at home, on June 7, 2013 and did not file a Workers' Claim for Compensation until October 20, 2015, more than two years after the alleged injury. Claimant allegedly slipped on an ice cube while getting a drink of water.

3. The Claimant's Affidavit, attached to the Objection, reveals that the Claimant reported her right-knee injury at home, after logging into her work computer, to her supervisor, Denitrice Medina, who was located in Connecticut. The Employer's First Report was not filed until December 23, 2015.

4. The Respondents did not pay Claimant's medical bills or otherwise admit liability by their actions.

5. Respondents filed a Notice of Contest, dated January 8, 2016.

6. The Claimant filed an Application for Hearing on January 23, 2016. The hearing was scheduled for March 22, 2016, but the parties agreed to vacate the hearing to schedule a settlement conference.

7. The settlement conference was scheduled for April 29, 2016, but was cancelled at the request of Claimant's counsel.

8. The Claimant filed her first Application for Hearing on October 19, 2016, endorsing the issues of compensability, medical benefits, and penalties against the Respondents as herein above described.

9. The hearing was set for February 1, 2017, however, during a pre-hearing conference on January 10, 2017, the parties agreed to continue the hearing and it was cancelled.

10. The present Application for Hearing was filed on May 15, 2017.

Findings/Statute of Limitations

11. The ALJ finds that there is no genuine issue of disputed material fact concerning the fact that the Claimant filed her Worker's Claim for Compensation more than two years after her alleged injury.

12. Attached to the Claimant's Objection to Motion for Summary Judgment is the Claimant's Affidavit, which lays out the facts of her June 7, 2013, right knee injury and, by implication, reveals that the Claimant was oblivious about a workers' compensation claim.

13. In the Objection, Claimant through counsel asserts that she did not become aware of the nature, seriousness and probable compensable character of her injury until she saw a lawyer on or about October 20, 2015, at which time she filed a Workers' Claim for Compensation.

Claimant's Motion for Sanctions

14. The Claimant's Objection is replete with scurrilous accusations against Respondents' counsel, and insulting adjectival characterizations of the Respondents'

pleadings, which have no place in our system of jurisprudence. This use of invective does nothing to resolve the merits of the Motion for Summary Judgment. Indeed, the invective creates an unwarranted distraction that lessens the overall credibility of the Objection. Nonetheless, the Objection reveals that there are genuine issues of disputed material fact, *i.e:,* (1) was the two-year statute tolled until the Employer's First Report was filed; and, (2) was the two-year statute extended to three-years by virtue of the fact that the Claimant allegedly, as a reasonable person, did not recognize the nature, seriousness and probable compensable nature of her right knee injury until October 20, 2015.

15. Claimant, through counsel, in the Motion for Sanctions implies that the Motion for Summary judgment was filed "for an improper purpose, such as to harass or cause unnecessary delay." This implication is without foundation, frivolous and wholly without merit. Allegations or implications in reckless disregard of the actual facts have no place in our system of jurisprudence.

16. The ALJ finds that there is no genuine issue of disputed material fact concerning the Claimant's Motion for Sanctions; and, in light of the resolution of the Motion for Summary Judgment, the ALJ finds that the Motion for sanctions borders on the frivolous and is without merit.

Ultimate Findings

17. The totality of the pleadings and evidence establishes, by preponderant evidence that there are genuine issues of disputed material fact concerning whether or not there was a tolling of the statute of limitations, which can only be resolved in an evidentiary hearing.

18. There is no genuine issue of disputed material fact that the Claimant's Motion for Sanctions lacks merit. Therefore, summary judgment in favor of the Respondents on this issue is appropriate.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d

231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, there were appropriate attachments to the Motion for Summary Judgment and to the Claimant's Objection. The Objection sets forth alleged facts illustrating that there are genuine issues of disputed material fact *i.e:,* (1) was the two-year statute tolled until the Employer's First Report was filed; and, (2) was the two-year statute extended to three-years by virtue of the fact that the Claimant allegedly, as a reasonable person, did not recognize the nature, seriousness and probable compensable nature of her right knee injury until October 20, 2015.

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b. Pursuant to Office of Administrative Courts (OACRP), Rule 17, 1 CCR 104-1, summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. As found, there are genuine issues of disputed material fact concerning the tolling of the statute of limitations. There are no genuine issues of disputed material fact that the Claimant's Motion for sanctions is without merit.

Tolling of Statute of Limitations

c. The statute of limitations does not begin to run until the Employer files a First Report of Injury. *Halliburton Services v. Miller,* 720 P.2d 571 (Colo. 1986); *City of Englewood v. Indus. Claim Appeals Office,* 954 P.2d 640 (Colo. App. 1998). As found, the First Report of Injury was dated December 23, 2015, despite the Employer being aware of the Claimant's right knee injury as of June 7, 2013. The Workers' Claim for Compensation was filed on October 20, 2015 Genuine issues of disputed material fact exist concerning the tolling of the statute, which surrounds the First Report of Injury.

d. The workers' compensation statute of limitations begins to run when an injured worker, as a reasonable person, recognizes the nature, seriousness and probable compensable nature of the injury, *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). When a worker recognizes the compensable nature of the injury is a fact question, which must be resolved as the result of an evidentiary hearing. *Richmond v. Indus. Comm'n,* 33 Colo. App. 21, 513 P.2d 1088 (1973).

Claimant's Motion for Sanctions

e. In the Motion for Sanctions, Claimant's counsel refers to Rule 11, C.R.C.P., which stands for the general proposition that a motion for summary judgment must be well grounded in fact. In fact, Rule 11 deals with the signing of pleadings. Rule 56, C.R.C.P., deals with summary judgment. The Colorado Rules of Civil Procedure

apply in workers' compensation cases insofar as they are not inconsistent with workers' compensation rules of procedure. *Nova v. Indus. Claim Appeals office,* 754 P.2d 800 (Colo. App. 1988). In the present case, as found, Claimant, implies that the Motion for Summary judgment was filed "for an improper purpose, such as to harass or cause unnecessary delay." This implication is without foundation, frivolous and wholly without merit. Allegations or implications in reckless disregard of the actual facts have no place in our system of jurisprudence. Indeed, counsel should put the motion in front of a mirror to determine which party should be the subject of sanctions. As further found, there is no genuine issue of disputed material fact concerning the Claimant's Motion for Sanctions; and, in light of the resolution of the Motion for Summary Judgment, the Motion for Sanctions borders on the frivolous and is without merit.

Genuine Issues of Disputed Material Fact

f. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, there are genuine issues of disputed material fact concerning the tolling of the statute of limitations.

g. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Claimant's Objection to Respondents' Motion for Summary Judgment shows specific facts that there are genuine disputed issues of material fact.

Burden of Proof

h. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Respondents have failed to satisfy their burden of proof that there is **no** genuine issue of disputed material fact concerning the statute of limitations. The totality of the evidence establishes that there is no genuine issue of disputed material fact concerning the Claimant's Motion for Sanctions and it should be denied and dismissed.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent's Motion for Summary Judgment is hereby denied and dismissed.

B. The Claimant's Motion for Sanctions is hereby denied and dismissed.

C. The Claimant may set the above-captioned matter for hearing on the issues designated in his latest Application for Hearing.

D. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

ISSUES

- Whether Claimant established by a preponderance of the evidence that he suffered a compensable work injury.
- Whether Claimant established by a preponderance of the evidence entitlement to medical benefits.
- Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits from August 26, 2016 through ongoing.
- Whether Respondent's established by a preponderance of the evidence that Claimant was at fault for his termination.
- Claimant's average weekly wage (AWW).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant began working for Employer in June 2016 as a bore machine operator which involved tasks associated with building underground tunnels.

2. Claimant is a high school graduate and has attended some college courses. He can read and write in English and indicated on medical forms that English is his preferred language.

3. On August 25, 2016, at approximately 11:00 a.m., Claimant was standing on rails which were chained to an excavator. Though it was variously described, the ALJ finds that as the excavator began pulling, the chains snapped causing the rails to drop back down to the ground. The rails were approximately six inches from the ground. When the rails dropped, Claimant also dropped approximately six inches, landing on his feet.

4. Claimant's shift on the date of the alleged incident began at approximately 7:00 a.m. Although Claimant testified that he felt immediate pain in his back and hip, he worked his regular 10-hour shift. He did not report the incident or being injured from the incident.

5. Claimant testified that his foreman, Easer Lopez, witnessed the incident and laughed at him. Mr. Lopez, however, testified by phone and through the interpreter that he did not witness the incident and was on the far side of the job site when Claimant alleges it occurred. Mr. Lopez also testified that he would not laugh at an

employee, including Claimant, who had a work accident. The ALJ finds the testimony of Mr. Lopez to be more credible and persuasive than that of Claimant for reasons discussed more fully below.

6. According to Claimant, the pain in his low back worsened later in the day and continued to worsen during the night. Claimant claims he informed Mr. Lopez on Friday, August 26th that he was hurting from the day before. Mr. Lopez, though, testified that Claimant worked his regular shift on Friday, August 26th and did not appear to be injured. At the end of his shift on Friday, Claimant told Mr. Lopez his back hurt but Claimant said nothing about his pain being related to a work incident or injury. Notwithstanding, Mr. Lopez offered to send Claimant to Employer's designated medical provider. Claimant declined medical care.

7. Employer has a policy that all employees who are going to be absent or late to work must call-in and advise the Employer by 7:00 a.m. on the day of the anticipated absence or tardiness.

8. On Monday, August 29, 2017 at 11:14 a.m. Claimant sought medical treatment at the Medical Center of Aurora (MCA) complaining of thoracic and lumbar pain from a "fall" at work. On exam, Claimant had full lumbar and cervical range of motion and normal thoracic and lumbar spine X-rays. Claimant was diagnosed with a thoracic and lumbar spine strain and released to modified work with restrictions for "that day."

9. Claimant did not call into work by 7:00 a.m. on August 29 to tell Employer that he would be late. Rather, Raul Cardenas, Employer's superintendant, called Claimant on August 29th when Claimant failed to report for work. Claimant did not answer. Later in the day, Claimant texted Mr. Cardenas that he was going to see a doctor.

10. Consequently, Employer gave Claimant an unexcused absence. Claimant had two previous unexcused absences, one on June 20, 2016 and the other on August 20, 2016 when he was in jail. Claimant admitted to one prior unexcused absence but testified that his mother had called Employer to report him absent by 7:00 a.m. on June 20, 2016, so that absence should have been excused. Mr. Cardenas testified that he recalled Claimant's mother calling in that day, but she did not call to report him absent. Instead, she was looking for Claimant to see if he had reported to work because she did not know his whereabouts.

11. On August 29, 2016, Employer gave Claimant a written warning/disciplinary report documenting Claimant's unexcused absences for June 20, 2016 and August 20 and 29, 2016.

12. After his August 29 visit to AMC, Claimant submitted the paperwork from his visit to Employer. Having learned that Claimant was claiming a work injury, Employer sent Claimant to its designated medical provider, Concentra. Per Employer's written policy, Claimant underwent a mandatory drug test that all employees must take

after reporting an alleged work accident. Claimant admitted to using cocaine on Saturday, August 27, 2016. On September 1, 2016, Claimant's test results were confirmed as positive for cocaine.

13. Pursuant to Employer's no tolerance drug policy, testing positive in a post-accident drug screen for the presence of controlled substances is grounds for immediate discharge from employment. A positive test alone, regardless of when the illegal substance was used, results in immediate discharge.

14. Claimant was aware of both Employer's no tolerance drug policy and the attendance policy. Donna Hale, Employer's Human Resource Director, testified that she provided the written policy to Claimant during his employment orientation. Claimant testified that he was not aware that illegal drug use when he was not working was prohibited. During his orientation, Claimant was able to ask questions. He asked an unrelated question re mileage, but did not ask about Employer's no tolerance drug or attendance policies. Mr. Cardenas testified that it was also common knowledge amongst the employees that Employer's drug policy was one of no tolerance.

15. On September 6, 2016, Employer terminated Claimant's employment because he both tested positive for cocaine and had three unexcused absences on June 20 and August 20 and 29, 2016. Ms. Hale testified that Employer would have terminated Claimant for either reason independently. The ALJ finds that Claimant was responsible for his termination on September 6, 2016.

16. Employer paid Claimant his final wages on September 2, 2016, for the period ending on August 28, 2016, the last day Claimant actually worked. Although Employer offered modified duty to Claimant, Claimant refused to return to work and acknowledged in writing that he decided to take unpaid leave on September 1 and 2, 2016. The ALJ finds that Claimant did not suffer a work-related wage loss from the date of the alleged injury through the date of termination.

17. On September 1, 2016, Claimant sought care at Concentra where his medical provider diagnosed a thoracic myofascial strain and a lumbosacral strain based upon history and mechanism of injury "obtained directly from the patient." Despite having tested positive for cocaine two days earlier, Claimant reported that he did not use drugs.

18. Claimant began physical therapy on September 7, 2016, complaining of low back and left buttock pain, but by his third visit on September 15, 2016, the physical therapist documented that Claimant reported he "was almost back to normal and wanted to stay and get released from care." The physical therapist noted that Claimant "has been non-compliant with physical therapy visits." Physical therapy notes provide that Claimant:

- Had missed three or four by his seventh scheduled visit and had "multiple reschedules and 'lates'."

- Was non compliant with his home exercise program; and

- His lack of progress and compliance led to Claimant's further physical therapy being "put on hold."

19. By September 23, 2016, the physical therapist documented Claimant reporting "that his back is feeling much better and that he has most of the motion back in it," and that "his back feels almost 100% better."

20. On September 23, 2016 Claimant's Concentra provider evaluated Claimant and documented Claimant had full lumbar range of motion with no spasm and his lumbar spine was non-tender. Claimant complained of pain with a click in his left hip. On September 30, 2016, Dr. Draper from Concentra reported that Claimant's left hip MRI revealed an anterior labral tear.

21. On October 17, 2016, John Schwappach, M.D., a hip surgeon, evaluated Claimant and suggested arthroscopic repair of the labral injury. Dr. Schwappach documented that Claimant was standing on rails at work when the rails uncoupled and Claimant was "thrown in the air landing on his left side." The ALJ finds Dr. Schwappach misapprehended Claimant's actual mechanism of injury.

22. On October 25, 2016, Insurer filed a notice of contest while continuing to pay for Claimant's medical care with his authorized treating physicians. Claimant did not specify what medical benefits he was seeking at hearing other than hip surgery; however, Dr. Schwappach did not submit a request for prior authorization, thus the ALJ may not order authorization for hip surgery.

23. On December 2, 2012, Concentra assigned Claimant work restrictions of:

- lifting up to 10 pounds occasionally,

- pushing/pulling 20 pounds occasionally,

- sitting 80% of the time,

- no squatting,

- no kneeling,

- no climbing ladders,

- may not work at heights, ground work only,

- and no driving a company vehicle.

24. Claimant testified that he worked on cars prior to his injury, but could no longer do so because he was unable to bend over. According to Claimant, the injury affected his everyday life. Claimant testified that his pain and restrictions rendered him

unable to work, work on cars, play sports, play with his kids in the back yard or at a park.

25. On December 5, 2016 Respondents recorded four hours of video surveillance. The videotape shows Claimant walking outdoors, working on his SUV, and repeatedly bending at the waist. Claimant squats, gets up from squatting to standing without apparent difficulty, kneels on his left knee with his right leg extended, and reaches under his vehicle. Claimant is shown getting under his SUV on his back with his right hip flexed and maintaining that position before standing. While working on his vehicle, Claimant is squatting, kneeling, bending, lying on his back with his hip flexed, and moving into and out of these positions without apparent difficulty or distress. He was videotaped lifting and carrying a bumper off his SUV and flexing at the waist to 90 degrees or greater without apparent difficulty. Claimant also climbed onto the tailgate of his SUV and knelt, squatted and bent multiple times throughout the 4 hour surveillance tape. In contrast to his presentation at medical appointments, Claimant did not limp at any point during the four hour period of time.

26. On December 9, 2016, Concentra assigned work restrictions of "no squatting and/or kneeling, may lift up to 10 pounds occasionally (up to 3 hours per day), may push/pull up to 20 pounds occasionally, and may not drive a company vehicle due to functional limitations."

27. On December 30, 2016, treating physiatrist Scott J. Primack, D.O., reported that during his examination on that day, Claimant went from stand to sit and from sit to stand in "somewhat of a guarded fashion," and that surgery was recommended because Claimant was experiencing ongoing left hip discomfort.

28. On January 10, 2017, Dr. Primack reported that Claimant underwent a urine drug test and tested positive for cocaine, and negative for opiates even though Dr. Primack had prescribed 80 Vicodin tablets during the previous thirty days. That same day, Claimant reported that he had not used cocaine since August 2016. Dr. Primack stopped prescribing all narcotics as Claimant was "clearly noncompliant," using cocaine with his prescribed opioid medication.

29. Also on January 10, 2017, Dr. Cohen saw Claimant for a psychological consultation. Claimant reported having a fourth DUI conviction for which he was awaiting sentencing. Claimant also reported to Drs. Cohen and Gray a history of cocaine and methamphetamine abuse. Dr. Cohen remarked that Claimant "was not an ideal candidate for routine narcotic management based on his significant history."

30. On February 13, 2017 Claimant underwent an IME with Elisabeth Bisgard, M.D. Claimant told Dr. Bisgard he was unable to sit or stand for one hour, after which he had to alternate positions due to hip pain. He could walk for 2 hours, after which he had to alternate his position due to hip pain. Claimant also reported that he "always walks with a limp." Dr. Bisgard reviewed the surveillance video in its entirety and reported that Claimant was more functional on video than he had related to her and to his treating physicians.

31. Dr. Bisgard noted that Claimant answered "No" to an interrogatory that asked whether Claimant had ever pled guilty or been convicted of a crime other than a traffic violation. However, Claimant told Dr. Bisgard that he had spent five years in prison. Later, Dr. Bisgard received records from one of Claimant's previous employers which included a copy of a criminal background check that employer had conducted before hiring Claimant. The records noted Claimant's guilty pleas to charges of "felony theft from a person" and "misdemeanor drinking." And Claimant's convictions for DUIs, drinking and driving after revocation of his license, and drinking in a vehicle.

32. Dr. Bisgard is the only physician who conducted a causality determination required by Level II Accreditation teachings. In addition to the surveillance, Dr. Bisgard reviewed all of Claimant's medical records and Claimant's signed answers to interrogatories. She was present at hearing for the testimony of Claimant and Employer's witnesses. Dr. Bisgard opined that Claimant did not sustain any work injury. Dr. Bisgard based her opinion on the following criteria:

- Claimant's testimony was inconsistent with that all Employer witnesses.
- Claimant's mechanism was inconsistent with his labral tear.
- The surveillance recording directly contradicted Claimant's testimony regarding his level of functioning and his statements to his treating physicians about his abilities.
- Claimant's normal clinical examinations and normal lumbar and thoracic range of motion immediately after the alleged injury.
- Claimant's different reports regarding mechanism of injury and his late reporting of hip pain.

Dr. Bisgard concluded and opined that more likely than not, Claimant was not injured at work, even assuming an incident as described by Claimant had occurred. The labral tear, according to Dr. Bisgard, was not consistent with Claimant's reported mechanism of injury and was not work-related.

33. Alternatively, Dr. Bisgard opined that at most, and giving Claimant the benefit of the doubt (which Dr. Bisgard did not do), Claimant would have had a mild thoracic-lumbar strain for which he reached MMI on September 20, 2016 when his symptoms resolved for his back issues, with no impairment and no need for medical maintenance care. Dr. Bisgard explained that she selected this MMI date because it was in between September 15, 2016, the third PT visit where Claimant stated he "was almost back to normal and wanted to stay and get released from care" and September 23, 2016, when the physical therapist documented Claimant's report "that his back is feeling much better and that he has most of the motion back in it" and that "his back feels almost 100% better."

34. Dr. Bisgard also noted that Claimant had a non-work related inguinal hernia. She opined that given Claimant's admitted illegal drug use the day after the alleged injury (and before he sought treatment), and the records that Claimant used illegal drugs, including cocaine and meth, on other occasions as well, raised the question of whether Claimant actually sustained an injury at work or at an event outside of work between the night of August 26 and August 29, 2016, or some other time.

35. It appears from his record that Dr. Schwappach, who found the labral tear work related, was under the false impression that Claimant had fallen directly onto his left side. His October 17, 2016 note provides that Claimant "was thrown in the air landing on his left side."

36. On March 7, 2017, Claimant underwent an IME with J. Stephen Gray, M.D. Dr. Gray is the only physician who assessed "possible left direct or inguinal hernia" as related to the alleged work injury, a contention Claimant himself has not made. According to Dr. Gray, given the "violent nature of the industrial accident", even if the hernia and/or the left hip labral tear were pre-existing, the violent work injury would have exacerbated if not permanently aggravated these conditions. The ALJ finds that Dr. Gray misapprehended the actual mechanism of injury by relying on Claimant's exaggerated report.

37. Dr. Gray did not view the surveillance video or address it in his report, and he appears to have "cut and pasted" a large part of Dr. Bisgard's IME report into his own. Dr. Gray reported that Claimant was on narcotics for pain for the first 2-3 weeks post alleged injury, which may have masked his left hip pain. However, the records document that Claimant was given 6 tablets of Norco and the next documented prescription is not until November 8, 2016, over two months post-alleged injury. Dr. Gray also seems to be unaware that Claimant's authorized treating physician opined that Claimant did not have a work injury of any kind and that Claimant's supervisors denied witnessing the purported incident. The ALJ rejects Dr. Gray's opinion because Dr. Gray did not review all of Claimant's medical records or view any of the surveillance. Dr. Gray's understanding of Claimant's pain medication usage is also incorrect.

38. On March 10, 2017 Dr. Primack, having read Dr. Bisgard's report and reviewed Claimant's file, opined that Claimant had not sustained a work related injury. And even if he had, Claimant reached MMI on September 20, 2016 without impairment. Dr. Primack wrote, "I'm still quite concerned regarding [Claimant's] drug abuse. This clearly confounds the entire medical treatment."

39. Based on the totality of the evidence, the ALJ finds Claimant NOT credible.

40. Based on the totality of the evidence, the ALJ finds Claimant did not meet his burden of establishing by a preponderance of the evidence that he suffered a compensable work injury.

41. Based on the totality of the evidence, the ALJ finds Claimant did not meet his burden of establishing by a preponderance of the evidence entitlement to medical benefits.

42. Based on the totality of the evidence, the ALJ finds Claimant did not meet his burden of establishing by a preponderance of the evidence entitlement to temporary total disability benefits.

43. Based on the totality of the evidence, the ALJ finds Respondents met their burden of establishing by a preponderance of the evidence that Claimant was at fault for his termination.

44. Because the ALJ has found Claimant did not meet his burden of establishing by a preponderance of the evidence entitlement to temporary total disability benefits, the ALJ need not reach the remaining issue of Claimant's AWW.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, a claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1) (c) C.R.S. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v.*

Industrial Claim Appeals Office, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant failed to meet his burden of proving a work injury. As found, the ALJ is persuaded by the testimony of Mr. Lopez and Mr. Cardenas that they did not witness the alleged work incident. Rather, they observed Claimant working his regular shift for hours after the alleged 11:00 a.m. incident on Thursday and all day Friday. The ALJ rejects Claimant's testimony as not credible. Claimant testified that he was unable to work on cars and had limited ability to bend and kneel but 4 hours of surveillance was submitted showing Claimant repeatedly bending, kneeling, lifting and engage in other activity while he worked on his SUV. The timing of the surveillance, December 5, 2016, was right after Concentra reiterated Claimant's work restrictions of limit lifting to 10 pounds occasionally, push/pull 20 pounds occasionally, should be sitting 80% of the time, no squatting, no kneeling, no climbing ladders, may not work at heights, ground work only and no driving a company vehicle. Moreover, Claimant has a potential inguinal hernia that no provider (except Claimant's IME, Dr. Gray), has opined is work-related. Even Claimant himself has not alleged this hernia is work-related. The ALJ is persuaded by Dr. Bisgard's Level II causality determination that considering the totality of the evidence, including Claimant's illicit drug use, Claimant's injuries cannot be correlated to the alleged work incident. Dr. Primack, after considering the entire picture when it was made available to him, agreed with Dr. Bisgard and opined that he too did not believe Claimant sustained a work injury of any kind. Consequently, Claimant's workers' compensation claim is denied and dismissed.

Because the ALJ has found and concluded that Claimant did not suffer a work injury, and based on the totality of the evidence, Claimant is not entitled to receive medical or compensatory benefits. Additionally, when a temporarily disabled Claimant is responsible for termination of his employment, the resulting wage loss may not be attributed to the work injury. *See* § 8-42-103 (1) (g), §8-42-105 (4), C.R.S. An employee is responsible for termination if the employee precipitated the employment termination by a volitional act which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (ICAO, 2001). The determination of Claimant's responsibility for the termination of employment is not related to the concept of culpability, but requires only a "volitional act," or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corporation*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). As found, Claimant was responsible for his termination on September 6, 2016 for the positive cocaine test and the 3 unexcused absences. Claimant did not suffer a work-related wage loss from the date of the alleged injury through the date of termination. Claimant's claim for TTD and/or TPD benefits is denied and dismissed. Claimant's claim for temporary total disability benefits is denied and dismissed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's workers' compensation claim is denied and dismissed.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 15, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-741-639-06

ISSUES

- Whether Respondents have overcome by clear and convincing evidence the DIME's determination that Claimant sustained bilateral carpal tunnel syndrome ("CTS") and resulting chronic regional pain syndrome ("CRPS") as a result of her November 10, 2006 work injury.

- Whether Respondents have overcome by clear and convincing evidence the DIME's impairment rating.

- Whether Respondents have overcome by clear and convincing evidence the DIME's date of MMI.

- Whether Claimant has proven by a preponderance of the evidence that she is entitled to ongoing maintenance medical benefits.

STIPULATIONS

- The parties stipulated that the average weekly wage is $725.00.

- The parties stipulated that the following issues are held in abeyance and reserved for future determination: temporary total and temporary partial disability benefits, permanent total disability benefits, benefits cap, offsets, and overpayment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant sustained an admitted industrial injury when she fell at work on November 10, 2006.

2. On November 11, 2006, Wayne Draper, M.D., examined Claimant at Boulder Community Hospital (BCH). Claimant's "chief complaint" was pain in both hands for 1 day. Claimant gave a history that on the previous day she tripped and fell forward bracing herself with both hands. She reported pain in both hands with the right worse than the left. There was also "slight discomfort in the muscles of the left neck." There was "tingling" in the left middle finger with "minimal discomfort at the base of the left thumb." The note, which was written by a nurse, states Claimant reported "having carpal tunnel previously." On examination there was "slight tenderness noted to palpation over the palmer aspect at the base of the left thumb." The right hand was "swollen and ecchymotic over the 4th and 5th metacarpal areas dorsally." X-rays revealed a fracture of the proximal phalanx of the right 5th finger. The diagnoses included

- Fracture, proximal phalanx right 5th finger;
- Contusion of the right hand;
- Contusion of the left hand; and
- Left trapezius strain.

3. On November 20, 2006, Claimant saw a physical therapist at BCH who diagnosed left shoulder strain. Claimant reported problems of decreased strength in the left shoulder, tenderness in the left biceps tendon, and numbness in the left middle finger.

4. On February 26, 2007, Justin Green, M.D. examined Claimant. Claimant gave a history of "severe night time dysthesia affecting the left arm." She dated the "onset to following a fall where she hyperextended her wrists on 11-10-07" [sic]. On physical examination Dr. Green noted a "positive left carpal Tinel's sign." He performed EMG studies which revealed "absent median sensory responses, a markedly prolonged median motor distal latency, and prolonged median F-wave." Dr. Green assessed the electrodiagnostic results as evidence of moderate, median mononeuropathy at the left wrist (carpal tunnel syndrome), without denervation. There was no evidence of left upper extremity radiculopathy.

5. On May 2, 2007, Claimant returned to Dr. Green. Claimant reported "moderately severe, diffuse, dysthetic left arm pain that radiated up or down from her shoulder to her hand. She reported lesser complaints of similar paresthesia affecting the right hand. Dr. Green noted that examination of Claimant's upper extremities did not reveal clear sudomotor changes and there was no significant color change. There were equivocal Adson's signs for non-specific paresthesia bilaterally. Claimant also had a positive left carpal Tinel's sign and an "absent" right carpal Tinel's sign. There were negative Phalen's signs. Dr. Green assessed moderate left CTS, rule out right CTS and a history of bilateral wrist extension injuries. Dr. Green wrote Claimant had a "consistent mechanism of injury that may have led to traumatic carpal tunnel syndromes (TCRPS)." Dr. Green recommended EMG/nerve conduction studies for the right upper extremity and repeat studies of the left extremity to rule out a worsening condition.

6. On May 16, 2007, Dr. Green performed additional EMG studies of Claimant's right and left upper extremities. As a result he assessed electrodiagnostic evidence of a "moderate, median neuropathy at the right wrist (CTS), without denervation" and continued nerve conduction study evidence to suggest the presence of a moderate, median, mononeuropathy at the left wrist (CTS)."

7. On June 12, 2007 Kelley Wear-Maggitti, M.D. performed a left carpal tunnel release surgery and noted the presence of inflammation of the median nerve with "scarring and adhesions."

8. On June 19, 2007, Dr. Wear-Maggitti reported Claimant had no complaints and was very satisfied by the results of the left carpal tunnel release surgery. Claimant expressed a desire to undergo a right carpal tunnel release surgery.

9. On October 9, 2007 Dr. Wear-Maggitti performed a right carpal tunnel release surgery. The operative report notes there was a "significant amount of scar tissue encompassing the median nerve" and a neurolysis was performed to release the nerve from the scar tissue.

10. On November 20, 2007, Claimant reported to Dr. Wear-Maggitti that she was having a lot of pain in her right palm, a lot of numbness up her right arm, and problems with trigger fingers.

11. On February 6, 2008, Dr. Green noted Claimant was reporting increased dysthesia to light touch over the palm and distal right forearm and numbness over the tips of her fingers. Dr. Green noted "mild allodynia" to light stroking over the volar aspect of the right palm and distal forearm without swelling or pseudomotor changes. Dr. Green noted that Claimant's third EMG testing evidenced continued median mononeuropathy at the right wrist and that Claimant tolerated the test poorly because it caused her pain. Dr. Green assessed delayed recovery from right carpal tunnel release surgery and "rule out possible complex regional pain syndrome affecting the right hand and arm." Dr. Green referred Claimant for a triple phase bone scan and stated he would refer her for a stellate ganglion block if the test was normal.

12. On February 14, 2008, Claimant underwent a three phase bone scan of her distal forearms through her hands. The radiologist reported that the flow and blood pool images were normal. However, there was asymmetric slightly more prominent periarticular uptake about multiple right finger joints suggestive of chronic regional pain syndrome (CRPS).

13. On March 31, 2008, Melody Denham, M.D., examined Claimant on referral from Dr. Green. Dr. Denham noted Claimant had undergone a right-sided carpal tunnel release and had "had a complicated course since." Claimant reported experiencing pain in the right hand and wrist with "some extension up toward the elbow and shoulder." On examination Dr. Denham noted "some obvious atrophic changes" of the right hand and "marked allodynia over the area of the" surgical scar. Dr. Denham noted compromised range of motion of the right hand and wrist, and markedly decreased motor strength involving her fingers. Dr. Denham reviewed the triple phase bone scan results and noted "asymmetric uptake with a particular increased uptake in the right hand consistent with" CRPS. Dr. Denham assessed CRPS of the right upper extremity and recommended a stellate ganglion block (SGB).

14. Between March 31, 2008 and May 27, 2008, Dr. Denham performed four SGB's. On May 27, 2008 the doctor wrote Claimant had "undergone prior stellate ganglion blocks which have seemed to have given her temporal benefit."

However, Dr. Denham wrote it was "unclear at this juncture whether or not she has had protracted benefits, as her condition continues to be quite severe." Dr. Denham opined that if Claimant did not receive protracted benefit from the May 27 SGB, it might be necessary to consider other treatment options.

15. On June 9, 2008, Dr. Green noted Claimant had undergone four SGB's and stated that her "pain most recently dropped from 9/10 to 4/10." He recorded a diagnosis of CRPS of the right upper extremity and noted there had been "discussion concerning possible spinal cord stimulation."

16. On September 3, 2008, Dr. Green noted that with "the abnormal bone scan in February, I feel this is reasonable support for the presence of [CRS] in this case."

17. Dr. Floyd Ring, who is an expert in pain management, performed a record review for Respondents on October 3, 2008 to determine if Claimant was a candidate for an SCS. He found that Claimant had a work-related injury resulting in CTS. Dr. Ring stated that the bone scan and response to blocks "indicate a likelihood of CRPS, which is addressed in the [Medical Treatment] guidelines." He recommended delay in SCS placement until psychologist Dr. DiSorbio felt Claimant was ready for the procedure.

18. On January 12, 2009, Dr. Denham noted Claimant was reporting symptoms in both hands and in her feet.

19. On February 12, 2009, Bradley Vilims, M.D. examined Claimant and assessed CRPS type II "beginning in the right upper extremity, but mirroring to the left and now with symptoms consistent with extension into the lower extremities." Dr. Vilims diagnosed bilateral upper extremity CRPS and a positive bone scan with the "characteristic pulling (sic.) and changes on a triple phase that is consistent with her current diagnosis." Dr. Vilims indicated he would "begin the process for a cervical spinal cord stimulator trial."

20. On April 3, 2009, Dr. Vilims performed a procedure described as installation of a percutaneous spinal cord stimulator and intracanal cervical nerve root stimulator. The procedure initially provided good relief but Claimant reported developing severe pain and ultimately the trial was terminated.

21. On May 21, 2009, Gianacarlo Barolat, M.D. examined Claimant. Dr. Barolat noted Claimant's history of reflex sympathetic dystrophy (RSD) that began on the right and "traveled to her left upper extremity, then approximately three months ago spread to the lower extremities." Dr. Barolat noted Claimant gave a history of her "legs giving out" and that it had occurred three times over the prior week. Dr. Barolat assessed CRPS.

22. Prior to approving the spinal cord stimulator implantation, Respondents hired Dr. Vaughn Cohan to evaluate Claimant's case. He stated that Claimant began to exhibit signs and symptoms of bilateral CTS one month after her accident. Dr. Cohan noted that, following her CTS surgeries, Claimant developed CRPS in her

upper extremity and lower extremities. Dr. Cohan concluded that Claimant's previous treatment had been medically necessary. He agreed with Dr. Baralat's recommendation to proceed with the SCS implantation and concluded the procedure was appropriate. He based his opinions on evidence-based medicine guidelines to a reasonable degree of clinical certainty.

23. Prior to approving the spinal cord stimulator implantation, Respondents also hired Dr. Floyd Ring, an expert in pain management, to perform a record review to determine if Claimant was a candidate for a SCS. Dr. Ring found that Claimant had a work-related injury resulting in CTS. Dr. Ring opined that the bone scan and response to blocks "indicate a likelihood of CRPS, which is addressed in the [Medical Treatment] guidelines." He recommended delay in SCS placement until psychologist Dr. DiSorbio felt Claimant was ready for the procedure.

24. On July 29, 2009, Claimant came under the care of Jeffrey Kesten, M.D. Dr. Kesten is board certified in physical medicine and rehabilitation, pain medicine, and addiction medicine. He is level II accredited. Dr. Kesten examined Claimant and noted "her right hand is hypopigmented" compared to her left hand. There was no evidence of bilateral upper extremity hair and/or nail abnormalities, temperature abnormalities, muscle atrophy, or sudomotor changes. Dr. Kesten diagnosed bilateral shoulder upper extremity pain, a history of bilateral hand contusions, a right fifth proximal versus middle phalanx fracture, bilateral carpal tunnel syndrome, bilateral upper extremity CRPS II, and worsening of premorbid depression.

25. On August 10, 2009 Dr. Kesten noted similar findings to those he reported on July 29, 2009.

26. On August 11, 2009, Dr. Barolat performed a procedure described as the implantation of "two cervical spinal cord stimulation leads." This was for a diagnosis of RSD of the upper and lower extremities. A permanent stimulator was implanted on August 18, 2011. While Claimant initially did well, she ultimately suffered an infection and on September 18, 2009, the stimulator was removed.

ATP MMI and IMPAIRMENT RATING

27. On October 4, 2010, Dr. Kesten authored a report in which he "deemed" Claimant to have reached maximum medical improvement (MMI). He opined she had sustained a whole person impairment of 50% based on her CRPS. He explained that "per" the Division of Workers' Compensation (DOWC) he used the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) (AMA Guides) p. 109 Table 1 (for spinal cord and brain impairment values) to rate the CRPS.

28. On October 25, 2010, Dr. Kesten authored a report in which he stated Claimant remained at MMI. However, Dr. Kesten noted that he asked Claimant about her "recent lower extremity pain and balance problems." Claimant reported that she fell "quite frequently." She also reported that she fell and injured her right shoulder "in approximately September 2010" and was experiencing severe and persistent shoulder pain. Dr. Kesten wrote that considering the October 19, 2010 MRI findings he was going to refer Claimant to Thomas Mann, M.D., for a surgical consultation. This referral is inconsistent with a finding of MMI.

29. On December 8, 2010, Dr. Mann performed surgery on Claimant's right shoulder to repair a "large rotator cuff tear." The operative report notes Claimant had a long history of upper extremity and shoulder pain and suffered a "more recent fall and trauma that increased her pain and disability."

30. On February 8, 2011, Dr. Kesten noted that he received an inquiry from Insurer's adjuster asking whether he placed Claimant at MMI on October 10, 2004, and if so, requesting an impairment rating. The adjuster also asked whether Dr. Kesten had "rescinded" MMI. In this note Dr. Kesten stated that Claimant was deemed to be at MMI on October 4, 2010 with a 50% whole person impairment rating. He also noted that Claimant had undergone right shoulder surgery with Dr. Mann and was instructed to continue her "enrollment in a course of postoperative … physical therapy at Avista Therapy Center."

31. At a prior hearing on this claim ("the -04 hearing") Respondents conceded that they received Dr. Kesten's February 28, 2011 report on August 15, 2011.

32. On October 25, 2011, Dr. Kesten signed a Physician's Report of Worker's Compensation Injury (WC164) indicating Claimant reached MMI on October 4, 2010 with a 50% impairment rating.

33. On January 17, 2012, Dr. Kesten issued a report in which he determined Claimant had a 26 % upper extremity impairment rating for the right upper extremity. He stated that this rating converts to 16 % whole person impairment. He combined this rating with the prior 50% impairment rating for CRPS resulting in an "updated 58% whole person impairment rating" as of January 17, 2012.

DR. CEBRIAN'S PURPORTED DIME

34. In October 2010, Sandra O'Brien, Insurer's adjuster assigned to this claim considered obtaining a Respondents sponsored independent medical examination (RIME) from Dr. Carlos Cebrian or Dr. Jutta Worwag. However, Claimant advised Ms. O'Brien that she had been placed at MMI and the anticipated RIME did not take place.

35. In February 2012, Evelyn Bonham became Insurer's adjuster on this claim. Ms. Bonham received Dr. Kesten's January 17, 2012 report on April 18, 2012 and disagreed with his 58% whole person impairment rating. Ms. Bonham wrote in her adjuster's notes that she did not believe Dr. Kesten's rating should be

accepted and that she believed a DIME should be requested. She also indicated that she believed it was necessary to obtain a RIME to have another report to send to the DIME.

36. On April 24, 2013, Ms Bonham noted in the file that she contacted "Vickie at Exam Works" and requested an IME, "preferably with Dr. Cebrian."

37. On April 25, 2012, Ms. Bonham filed an N&P with the DOWC. The N&P indicated disagreement with Dr. Kesten's reports of January 17, 2012 and April 12, 2012 and proposed Dr. Allison Fall or Dr. Cebrian conduct the DIME.

38. In May 2012, Insurer attempted to schedule a DIME purporting that Dr. Worwag was the agreed upon DIME. When the DIME could not be scheduled with Dr. Worwag, Ms. Bonham scheduled the DIME with Dr. Cebrian and filed an amended application.

39. On June 27, 2012 Dr. Cebrian performed the purported DIME and on July 14, 2012 issued his report. Dr. Cebrian opined that Claimant's "claim-related" diagnoses are right fifth finger non-displaced fracture, contusion of the left and right hands, and left trapezius strain. Dr. Cebrian opined Claimant reached MMI for these conditions on October 4, 2010.

40. In his report Dr. Cebrian opined Claimant's left-sided CTS was not causally related to the November 10, 2006 industrial injury. In support of this conclusion Dr. Cebrian explained

    - That although Claimant had "some initial complaints" of tingling in the fourth and fifth fingers of the left hand, these were not "documented again until" February 9, 2007.

    - That although the February 26, 2007 EMG revealed moderate median nerve compression, all of Claimant's symptoms were in the "ulnar distribution."

    - Claimant's left median nerve compression was "incidental" to the injury and there "was not a physiological correlation between subjective complaints and the objective findings."

41. In his report Dr. Cebrian opined Claimant's right CTS was not related to the November 10, 2006 industrial injury. He explained that Claimant did not complain of right-sided paresthesias until May 2007. Dr. Cebrian opined there "was not a physiological or temporal correlation between the subjective complaints and the objective findings."

42. Dr. Cebrian suggested that the CTS documented in the EMG's could be due to another cause, i.e., age, sex, diabetes, recent pregnancy, arthritis or pre-existing hypothyroidism. However, Dr. Gellrick and Dr. Kesten testified that two arthritis tests after the injury ruled out arthritis; there was no documentation of CTS

secondary to Claimant's hypothyroidism either prior or subsequent to her work injury; the EMG's did not find the injury to the nerve that one would see as a result of hypothyroidism; and none of the other possible causes had changed between the date of injury and the EMG. Dr. Cebrian did no causation analysis to support his hypothesis and he could not document a specific cause that had intervened or changed between the date of the work injury and the EMG in support of his claim that the CTS developed from something other than the fall at work. Dr Cebrian admitted that no treating doctor attributed Claimant's CTS to any of Dr. Cebrian's possible causes.

43. In his report Dr. Cebrian opined Claimant does not have CRPS within the meaning of the AMA Guides Rule 17, Exhibit 7 (d) for the following reasons:

    - the February 14, 2008 triple phase bone scan was "suggestive of CRPS but the findings were minimal."

    - the "multiple stellate ganglion blocks were performed without protracted relief."

    - because "there was no protracted relief with the sympathetic blocks and there was not more than one positive diagnostic test" it was not medically probable that Claimant met the "diagnostic criteria for a diagnosis of CRPS."

    Based on the determination that Claimant did not meet the criteria for a diagnosis of CRPS, Dr. Cebrian opined Claimant was not entitled to a rating for this condition under the AMA Guides.

44. In his report Dr. Cebrian opined Claimant injured her right shoulder when she fell sometime in "June 2010." He opined there was no information in the record that this fall was the result of an injury-related condition. He further stated that no tests were done to establish that Claimant has CRPS in the lower extremities. He opined the falls that led to Claimant's right shoulder condition were not related to the November 2006 industrial injury.

45. Dr. Cebrian opined that Claimant has permanent impairment secondary to the placement and removal of the spinal cord stimulator "as she has persistent pain from the procedure." Dr. Cebrian opined this condition entitled Claimant to a 4% whole person impairment rating under Table 53IIB of the AMA Guides.

46. Dr. Cebrian disagreed with Dr. Kesten's recommendation for a second orthopedic consultation with respect to Claimant's right shoulder. He explained Claimant does not want this procedure and in any event the likelihood of improving function as a result of another rotator cuff repair is minimal. Dr. Cebrian opined Claimant's medications were compromising her ability to function, negatively affecting her condition, and contributing to her depression.

He recommended discontinuation of medications over the next six months under the supervision of a physician.

47. Dr. Kesten has treated Claimant for the past seven years. He reviewed Claimant's medical records from 1996 through the date of hearing, including both of Dr. Pitzer's reports, Dr. Cebrian's report, transcripts of the hearing before ALJ Cain, the depositions of Drs. Pitzer and Cebrian and Insurer's adjuster, his prior testimony, Claimant's deposition, Dr. Gelrick's report, and her deposition testimony.

48. Dr. Kesten disagreed with Dr. Cebrian's opinion that Claimant did not develop left and right-sided TCTS as a result of the November 10, 2006 industrial injury. With regard to the left-sided TCTS Dr. Kesten found there was a "physiologic correlation as well as a consistent mechanism of injury in which the symptoms presented in a temporal fashion." Dr. Kesten disagreed with Dr. Cebrian's statement that after "some initial complaints" of tingling in the fourth and fifth fingers of the left hand, these symptoms were not "documented again until" February 9, 2007. Dr. Kesten noted that on November 11, 2006 Claimant reported some tingling in the left middle finger. The ALJ finds Dr. Cebrian's focus on this one symptom to be more a reflection of his bias toward Respondents than an indication that this symptom was somehow more significant than any other.

49. Dr. Kesten disagreed with Dr. Cebrian that the November 11, 2006 examination indicated an ulnar nerve injury. Dr. Kesten explained that on November 11 no sensory nerve deficits were noted in either the median or the ulnar nerve distributions. Dr. Kesten opined that from the date of the injury through February 9, 2007 Claimant reported symptoms that constituted "warning signs" of TCTS including numbness and tingling of the third through the fifth fingers, swelling and tenderness over the thenar eminence, and proximal radiating symptoms into the arm. Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten to be more reliable and persuasive than that of Dr. Cebrian.

50. Dr. Kesten disagreed with Dr. Cebrian's opinion that the left-sided median nerve compression findings on electrodiagnostic testing were "incidental" because Claimant's symptoms were in the ulnar nerve distribution and the subjective complaints were inconsistent with the objective findings. Dr. Kesten stated that CTS symptoms may appear in any and all fingers and can appear proximally or "up the arm" from the carpal tunnel. Dr. Kesten also noted that the nerve conduction studies performed by Dr. Green on February 26, 2007 evaluated the ulnar nerve and it was normal. Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten to be more reliable and persuasive than that of Dr. Cebrian.

51. Dr. Kesten also disagreed with Dr. Cebrian's view that the right-sided CTS was not related to the industrial injury. Dr. Kesten explained that the mechanism of injury involved hyperextension of the right wrist and that Claimant demonstrated swelling and ecchymosis on November 11, 2006 when she was seen at BCH.

Dr. Kesten testified he agreed with Dr. Green's May 2, 2007 statement that Claimant has a "consistent mechanism of injury that may have led to traumatic carpal tunnel syndromes." Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten and the causation analysis of Dr. Green to be more reliable and persuasive than that of Dr. Cebrian.

52. Dr. Kesten testified in the -04 hearing that he disagreed with Dr. Cebrian's opinion that Claimant does not have CRPS. Dr. Kesten explained that, contrary to Dr. Cebrian's assertions, Claimant meets the diagnostic criteria for a diagnosis of CRPS under the current version of the Medical Treatment Guidelines (MTG) for Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy. Dr. Kesten explained that the MTG make a distinction between "clinical CRPS" and "confirmed CRPS." He stated that under the MTG, clinical CRPS may be treated with less invasive procedures while confirmed CRPS may be treated with invasive or complex treatment. In any event, Dr. Kesten disagreed with Dr. Cebrian's opinion that Claimant has not had two "positive" tests sufficient to diagnose confirmed CRPS. He explained that in his opinion the findings on the triple phase bone scan were not "minimal" as suggested by Dr. Cebrian. He further opined Claimant exhibited positive responses to the SGB's performed by Dr. Denham and that nothing in the MTG requires that the relief from SGB's be "protracted" in order to constitute a positive diagnostic test. Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten to be more reliable and persuasive than that of Dr. Cebrian.

53. Dr. Kesten opined in the -04 hearing that Claimant's CRPS probably "traveled" from her upper extremities to the lower extremities. He stated that this phenomenon is documented in the literature and is "thought to be a reflection of the centralization of this pathological process." Dr. Kesten opined that the traveling of the CRPS to the lower extremities likely compromised Claimant's lower extremity function causing her to experience numerous falls, including the fall that led to shoulder injury and surgery performed by Dr. Mann. Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten to be reliable and persuasive.

54. Dr. Kesten testified in the -04 hearing that after he initially placed Claimant at MMI in October 2010 he continued to treat her. He further stated that after initially placing her at MMI he referred her for treatment to Dr. Mann for evaluation and treatment of her shoulder. Dr. Kesten explained that in January 2012 he issued a second impairment rating taking into account the shoulder injury and rating her for a "fairly complex" full thickness tear of the rotator cuff.

55. In the -04 hearing, ALJ Cain determined

    - Dr. Kesten did not place the claimant at MMI until at least January 17, 2012, when he issued the impairment rating for the right shoulder.

- Claimant never "agreed" with Ms. Bonham to allow Dr. Cebrian to act as the DIME physician.

- Insurer considered Dr. Cebrian to be a desirable DIME candidate because he would render opinions favorable to the insurer's views on issues including impairment and MMI.

- no valid DIME has been conducted and filed with DOWC.

See Cain Order dated December 1, 2014.

56. Respondents petitioned for review of the order. The petition was denied because the Cain Order was not a final order subject to review.

57. Dr. Kesten continued treating Claimant. Claimant also was treated at Holistic Family Practice. April 20, 2015, and July 27, 2015 notes continue to reflect Claimant's CRPS symptoms and diagnosis.

DR. PITZER RIME

58. Dr. Pitzer reviewed Claimant's medical records through the time of Dr. Cebrian's report. In his December 5, 2012 report, Dr. Pitzer agreed with Dr. Cebrian that Claimant's CTS was not related to her work injury. He reasoned

- No research studies related CTS to hand or wrist bruising;

- Claimant's CTS studies showed moderate CTS which he opined was more consistent with prolonged compression;

- Claimant's pain developed and increased with her CT release surgery.

59. At Respondents' request Dr. Pitzer performed a second records review and opined that it was more probable that Claimant's CTS was attributable to predisposing factors than to her work injury. He opined that Claimant's CTS and CRPS were not related to her work injury. Respondents deposed Dr. Pitzer on June 4, 2014. He testified that

- Claimant was not exposed to any work related risk factors for CTS.

- Claimant had predisposing factors including obesity and hypothyroidism.

- Moderate to severe mirror-image bilateral CTS such as Claimant's typically relates to predisposing risk factors versus trauma.

60. Dr. Pitzer did not examine Claimant and based his opinions solely on his incomplete records review. He was unsure whether he reviewed the actual EMG studies or relied on the report, and he did not review the records for physiological abnormalities.

61. For the past ten years approximately thirty-five percent of Dr. Pitzer's testimony has been for Respondents' counsel's firm. Ninety-six percent of Dr. Pitzer's testimony has been favorable to respondents.

62. While Dr. Pitzer is highly credentialed, his testimony was couched in terms of what "typically" occurs, he was unfamiliar with aspects of Claimant's physical examination findings, and his opinions were more about typical CTS and less about Claimant's case. For example, Dr. Pitzer stated that "most" nerve root trauma gets better with time, and "most" chronic compression neuropathies get worse over time. Based on that typical scenario, he opined that Claimant's EMG's were consistent with chronic carpal tunnel syndrome since they did not show improvement over time. DIME Dr. Gellrick testified that Dr. Pitzer's opinion is contrary to the MTG for CTS which recognize fluctuation in symptoms and on EMG tests.

63. Based on the totality of the evidence the ALJ is not persuaded by Dr. Pitzer's opinions.

DR. GELLRICK DIME

64. Dr. Gellrick was ultimately selected as the DIME. She physically examined Claimant on July 24, 2015. Dr. Gellrick also performed a thorough, extensive and detailed record review. In her report dated August 7, 2015, Dr. Gellrick assigned October 4, 2010 as the MMI date.

65. Dr. Gellrick agreed with the opinions of Drs. Kesten and Green that Claimant's CTS was caused by and related to her work injury. Dr. Gellrick agreed with the same doctors that Claimant went on to develop CRPS based on the results from her triple-phase bone scan, her reaction to the stellate ganglion blocks, and her clinical diagnosis.

66. Dr. Gellrick agreed with the opinion of Dr. Floyd Ring, who performed two record reviews for Respondents, that Claimant had CRPS and that the spinal cord stimulator and related surgeries were reasonably necessary to treat Claimant's condition.

67. Dr. Gellrick disagreed with Dr. Kesten's opinion that Claimant had CRPS in her lower extremities because the diagnosis was not supported by diagnostic testing and no physical examination had been performed.

68. Dr. Gellrick rated Claimant's impairment at 46% whole person – 45% physical impairment for CRPS, plus 1% psychiatric impairment for worsened depression.

69. Based on the totality of the evidence, the ALJ finds these opinions of Dr. Gellrick to be credible and persuasive.

CLAIMANT'S TESTIMONY

70. Claimant testified both by deposition dated October 7, 2014, and at hearing. Respondents' counsel called Claimant as their first witness and attempted to impeach her credibility with questions about the BCH intake form, a notation in one of Dr. Yee's records, the 2004 FCE related to her back injury, and surveillance video taken of Claimant. The ALJ finds Claimant's testimony to be credible for the following reasons:

- The BCH intake form that mentions "she does report having carpal tunnel previously" was dictated by someone other than Dr. Draper and it does not appear that Dr. Draper reviewed or signed the note. The notation is contrary to the numerous medical records which contain no mention of a carpel tunnel diagnosis or treatment prior to Claimant's work injury. The notation is also contradicted by Claimant's ability to perform the job duties she was assigned and her other recreational activities. The ALJ finds this notation to be unreliable and not persuasive evidence either that Claimant had carpel tunnel prior to her work injury or that Claimant was not consistent in her reporting.

- Dr. Yee treated Claimant in August 2003 for an unrelated back injury. His note from that visit states that Claimant "has had episodic left upper extremity and numbness in her forearm and hand." However, Claimant had no upper extremity weakness and the neurologic examination of Claimant's upper extremities revealed no motor or sensory deficits. The ALJ finds Dr. Yee's notation, when taken in context, is not persuasive evidence either that Claimant had carpel tunnel prior to her work injury or that Claimant was not consistent in her reporting.

- Claimant underwent a functional capacity evaluation (FCE) in 2004 related to her back injury. Part of the FCE involved a "hand function sort." While it was unclear during much of the hearing whether Claimant actually performed the activities mentioned, the ALJ finds that the activities were not performed. Rather, it seems Claimant was given a one-page form listing sixty-two activities and was asked to rate on a scale of 1 - 5 what she perceived her ability to do the activity was. One being "able" and five being "unable." While Respondents made much of Claimant's rating as 3 (restricted) such activities as "picking up small coins," and "sorting a deck of cards;" Claimant rated as 1 such activities as "use fork and knife," "cut a coupon," "pick out a paper clip," and "peel a potato." The one page form did not attach visual cues used during the sort. The ALJ finds the hand function sort to be unreliable and not persuasive evidence either that Claimant had carpel tunnel prior to her work injury or that Claimant was not consistent in her reporting.

71. Respondents showed video surveillance they had taken of Claimant which showed her entering and exiting her car, carrying a water bottle and light bag,

and drinking coffee among other things, in an apparent attempt to discredit Claimant's limitations. However, Claimant testified that she was able to do the activities shown and more because her right arm is not paralyzed. She explained that she has difficulty with fine hand movements such as writing and balancing a fork in her right hand. She further testified that her hands are shaky and that she is unable to make pottery as she had before the injury. Because she cannot raise her right arm, she has her hair washed at a salon. Both Drs. Kesten and Gelrick testified that they were not surprised that Claimant was able to perform the activities shown on the video and that the activities were within Claimant's medical abilities.

72. Drs. Gelrick, Kesten, Pitzer, and Cebrian all acknowledged that Claimant had not been diagnosed with or treated for CTS.

73. The ALJ attributes any inconsistencies in Claimant's testimony to Respondents' counsel's manner of questioning, the complexity and duration both of her treatment and of this litigation, and the passage of time. The ALJ finds Claimant to be credible.

74. Based on the totality of the evidence, the ALJ finds that Respondents have not met their burden of proving by clear and convincing evidence that Dr. Gellrick was incorrect in determining that Claimant sustained bilateral CTS and resulting CRPS as a result of her November 10, 2006 work injury.

75. Based on the totality of the evidence, the ALJ finds that Respondents have not met their burden of proving by clear and convincing evidence that Dr. Gellrick was incorrect in determining Claimant's impairment rating.

76. Based on the totality of the evidence, the ALJ finds that Respondents have not met their burden of proving by clear and convincing evidence that Dr. Gellrick was incorrect by assigning October 4, 2010 as the MMI date.

77. Based on the totality of the evidence, the ALJ finds that Respondents have not met their burden of proving by a preponderance of the evidence that Claimant is not entitled to ongoing maintenance medical benefits.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

It is in the ALJ's sole prerogative to assess the credibility of the witnesses and the probative value of the evidence to determine whether the claimant has met her burden of proof. *Dover Elevator Co. v. Indus. Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). It is within an ALJ's purview to assess the relative weight and credibility of various opinions. *See Kraft v. Medlogic Global Corp., et al.*, W.C. No. 4-412-711 (ICAO, Mar. 15, 2001) (citing *Rockwell Internat'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990)). Additionally, if an individual expert's opinion contains contradictions or is subject to multiple interpretations, the ALJ may resolve the conflict by crediting only a portion of the opinion, or discrediting the opinion in its entirety. *See Kraft*, W.C. No. 4-412-711; *Johnson v. Indus. Claim Appeals Office,* 973 P.2d 624 (Colo. App. 1997).

A Division IME's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the Division IME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see also Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

Whether or not a party overcomes the Division IME is a question of fact for determination by the ALJ. § 8-43-301(8), C.R.S.; *Wackenhurt Corp. v. Indus. Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO, Aug. 18, 2004).

As a matter of law Dr. Gellrick's opinions on the issues of causation, MMI, and impairment are binding unless overcome by clear and convincing evidence. While Respondents offered the opinions of Drs. Cebrian and Pitzer for that purpose, the ALJ specifically found that their opinions were biased, based on limited information, and not persuasive. Additionally, Dr. Gellrick's opinions were supported by the opinions and findings of Drs. Kesten, Ring, Vilims, Cohan, Draper, Denham, Wear-Magitti, and Green.

A Claimant has the right to maintenance medical treatment that is reasonably necessary to relieve the effects of the industrial injury or prevent future deterioration of the claimant's work-related condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

If the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that she will suffer a greater disability than she has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or prevent deterioration of the claimant's present condition. *Milco Construction v. Cowan*, P.2d 539, 542 (Colo. App. 1992).

The ALJ credits the opinions of Drs. Gelrick and Kester regarding maintenance medical care. Dr. Kesten testified that Claimant's current treatment for her CRPS includes medication; hand and wrist brace/splint; home biofeedback, a paraffin unit; ColdPac; TENS unit; attending modified yoga; and using treadmill at Orange Theory.

Dr. Gellrick agreed with Dr. Kesten's maintenance medical care, including home treatment and use of opioids, and she agreed that stopping Claimant's medications would worsen Claimant's symptoms.

Dr. Gellrick testified that Claimant should try to do home exercises, yoga, and walk her dogs or walk in the gym since those activities increase her function. Dr. Kesten testified that if Claimant did not go to yoga, walk on a treadmill, and follow Dr. Kesten's multimodal treatment plan, then Claimant's functioning would decline. Dr. Kesten's recommended care is reasonable, and necessary to relieve the effects of the industrial injury and prevent deterioration of Claimant's condition.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. As a result of Claimant's November 10, 2006 admitted injury, she developed CTS the treatment for which caused Claimant to develop CRPS in her upper extremities.

2. Claimant reached MMI on 10/4/10 with a whole person impairment of 45% for CRPS and a 1% psychological impairment due to worsened depression.

3. Claimant's stipulated AWW is $725, which results in a TTD amount of $483.33.

4. Respondents shall pay Claimant PPD to the statutory cap based upon the 45% whole person and 1% psychological impairments at the TTD rate of $483.33, less any TTD, TPD, and SSDI offsets.

5. Claimant requires ongoing maintenance medical care to relieve her from the effects of the injury. Dr. Kesten's treatment, as outlined in his testimony, is reasonably necessary and related to her admitted work injury and shall continue.

6. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

7. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 9, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-003-400-05

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insure /Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 18, 2017 and June 5, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 5/18/17, Courtroom 1, beginning at 8:30 AM, and ending at 12:00 PM; and 6/5/17, Courtroom 1, beginning at 1:30 PM, and ending at 3:00 PM).

Claimant's Exhibits through 11 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on June 12, 2017. No timely objections were filed and the matter was deemed submitted for decision on June 16, 2017. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The sole issue to be determined by this decision concerns whether or not the Claimant is permanently and totally disabled (PTD); and, post maximum medical improvement maintenance medical benefits.

The Claimant bears the burden of proof, by a preponderance of the evidence on both issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant is currently seventy-one years of age (date of birth, September 3, 1945). She did not complete high school, however, she received a GED certificate later in life.

2. The Claimant began working for Respondent the Employer on December 1, 1999, and she performed a variety of tasks but was primarily a van driver for patients. Her job duties included helping disabled patient onto the van and occasionally lifting up to 75 lbs.

3. Ultimately, the Respondents filed an amended Final Admission of Liability (FAL), dated January 5, 2017, admitting liability for 14% whole person permanent partial disability (PPD), pursuant to the opinion of Stephen. D. Lindenbaum, M.D., the Division Independent Medical Examiner (DIME) [Exhibit 4]. Respondents admitted for an average weekly wage (AWW) of $542.94.

The Injury

4. The Claimant suffered an admitted low back injury on January 4, 2016, when she slipped on ice and twisted her lower back. She was referred for medical treatment with Dean Prok, M.D. and then she was referred to Nicholas K. Olsen, D.O.

5. The Claimant continued working thereafter until she was terminated on January 14, 2016, for alleged attendance violations. The Claimant currently receives $969.90 per month for Social Security retirement benefits, which are not subject to offset.

6. The Claimant was first placed at maximum medical improvement (MMI) with a zero impairment and thereafter underwent a DIME with Dr. Lindenbaum on December 9, 2016.

7. DIME Dr. Lindenbaum gave the Claimant a 14% whole person permanent medical impairment which was admitted by the Respondents as herein above found. The undisputed MMI date is July 11, 2016. *Id*., bates stamp 12.

8. In his report, dated December 9, 2016, DIME Dr. Lindenbaum stated the opinion that the Claimant has injury- related permanent functional restrictions impacting her ability to function in the work place. He was of the opinion that the Claimant might be able to perform sedentary work, but only if it did not involve any "significant lifting, bending, or stooping. She would not be able to drive a car based on the fact that she is having a lot of issues with her mentation" [Claimant's Exhibit 3. bates stamp 15]. The ALJ finds that it is important to separate the Claimant's physical limitations from her mental limitations. The evidence, in fact, established that the Claimant can drive on a limited basis, however, Dr. Lindenbaum's physical restrictions would prevent the Claimant from performing her pre-injury job duties, in addition to driving

9. The totality of the medical records establishes that the Claimant had a variety of pre-existing medical problems. These problems have been treated at Kaiser and have included right and left hand pain and weakness in August 2011 [Respondents' Exhibit E, bates stamp 132); right hand pain, weakness, numbness and tingling, accompanied by itching on October 20, 2011, [*Id*., bates stamp 136]; hyperventilation with leg and arm numbness on January 17, 2012 [*Id*., bates stamp 138); and, left leg pain accompanied by ringing in her ears, April 28, 2015 [*Id*., bates stamp 141].

10. Despite the Claimant's prior medical problems, she continued to work full duty and was considered to be an "extremely valuable employee" by the Employer one and a half months prior to her injury [Claimant's Exhibit 11, bates stamp 211]. Thus, approximately seven weeks prior to her January 4, 2016, admitted injury, the Claimant received a performance evaluation on November 12, 2015. According to the summary of the evaluation she was reported by the Employer to be "an extremely valuable employee to [the Employer]" Id. [While recent occupational mistakes and attendance problems were listed in the evaluation, the Claimant's most recent concerns were said to revolve around personal matters outside of her job. *Id*.] At that time, according to the Claimant, she was able to perform all of the essential functions of her job, despite occasional pain. The ALJ infers and finds that it would be speculative as to when, if ever, the Claimant could not perform her job because of "recent occupational mistakes" and "attendance problems." It is not speculative but firmly established that Dr. Lindenbaum's physical restrictions, which the ALJ finds more credible than all other opinions to the contrary, would prevent the Claimant from performing her pre-injury job.

11. Authorized Treating Physicians (ATPs) Dr. Pork and Dr. Olsen stated that the Claimant has no restrictions related to her January 4, 2016 injury. For the reasons stated herein below, the ALJ does not find these opinions in this regard credible. It is more likely than not that DIME Dr. Lindenbaum's physical restrictions are more credible. The testimony of Dr. Jacobs is that any restrictions that the Claimant has are the result of pre-existing conditions. For the reasons stated herein below, the ALJ finds Dr. Jacobs' opinions lacking in credibility. Their explanations are heavily premised on the

Claimant's "mentation" problems. The ALJ rejects their opinions in favor of DIME Dr. Lindenbaum's opinion, which outweighs their opinions by preponderant evidence.

12. The DIME's opinion on causation, degree of permanent medical impairment, and MMI has been accepted by the Respondents. It has not been sought to be overcome. DIME Dr. Lindenbaum is of the opinion that the Claimant's work related injury has caused a work related permanent medical impairment of 14% whole person, and that the Claimant requires physical restrictions, in addition to any problems that may relate to her mental status. The ALJ finds the opinion of DIME Dr. Lindenbaum concerning the Claimant's restrictions highly persuasive and credible; and, the ALJ soundly rejects the opinions of Dr. Olsen, Dr. Prok and Alexander Jacobs, M.D.

The Claimant's Statements/Functional Capacity Evaluation (FCE)

13. The ALJ finds the Claimant's testimony persuasive and credible. In observing the Claimant at hearing, the ALJ did not see any unusual behavior. Her testimony did not seem to support the "dementia" opinion of Respondents' independent Medical Examiner (IME), Alexander Jacobs, M.D.

14. Over the years of treatment at Kaiser Permanente, the Claimant has occasionally stated that she looked forward to retiring. Regardless of these statements, she did not act on this possibility and continued to work despite her prior physical problems. Indeed, the ALJ takes administrative notice of the fact that someone who is 70 years of age, with a GED and no further education, may look forward to retirement. This alone does not prove an ulterior motive to gain a PTD award, or that retirement is imminent.

15. The Claimant underwent an FCE with. Kristine Couch OTR (occupational therapist) on March 29, 2017. Couch established that the Claimant is limited to sedentary work. According to Couch's work simulation program, the Claimant was non-competitive for reach, crouching/squatting reach, kneeling to standing and back reach, standing position reach, stooping displacement reach, and upper level reach [Claimant's Exhibit 8, bates stamp 150, 151]. Additionally, Couch stated that the Claimant's left foot was noted to catch when stepping forward after she was asked to perform indoor walking tests. *Id*., bates stamp 154. Finally, the Claimant's knuckle to shoulder lifting was limited to 15 lbs. and shoulder to overhead 5 lbs. with lifting and carrying limited to 10 lbs. *Id*., bates stamp 156. Couch evaluated the validity of the Claimant's effort which demonstrated consistency in 19 of 20 tests. *Id*., bates stamp 154, 200]. Couch did not evaluate the Claimant's "mentation" problems –only her physical limitations.

Respondents' Independent Medical Examination (IME) by Alexander Jacobs, M.D.

16. On the Respondents' behalf, Dr. Jacobs performed an IME on the Claimant on or about April 3, 2017. In a 58-page report, Dr. Jacobs concluded that "neither the back pain nor the cervical symptoms are related to the on-the-job injury **in any way, shape or form** (emphasis supplied). As the poet said, "methinks the he protesteth too much." Based on this characterization, the ALJ infers that Dr. Jacobs has indicated an investment in an outcome of non-causal relatedness. Indeed, his opinion in this regard is contrary to the DIME physician's causal opinion, and Dr. Jacobs' opinion does not make it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Lindenbaum was wrong in his causal opinion. Dr. Jacobs also testified at the hearing. He is board certified in Internal Medicine and Geriatrics. Without adequately explaining the basis of his opinion, he stated that the Claimant's "cognitive difficulties are related to some type of dementia." He speculates that this may be related to "Alzheimer's or multi-infarct dementia." Dr. Jacobs does not give a firm diagnosis in this regard nor does he make any appropriate referrals for the Claimant's alleged "dementia." He further states that this is "not in any way, shape or form related to her January 4, 2016 slip and 'non-fall"—an interesting choice of words. Lastly, Dr. Jacobs states the opinion that any work restrictions the Claimant has are "due to her non-injury diagnosis." He had no recommendations for treatment for work-related conditions.

17. The ALJ infers and finds that Dr. Jacobs has categorically rendered opinions that: (1) the Claimant never suffered a compensable injury on January 4, 2016 as admitted and which resulted in 14% whole person PPD; (2) most of the Claimant's problems are attributable to alleged "dementia," although Dr. Jacobs did not do a full work up to firm up a diagnosis of 'dementia" or "Alzheimer's," and none of the Claimant's restrictions are attributable to her work injury "in any way, shape, or form." Indeed, in his testimony at hear, Dr. Jacobs mixed medical opinions with legal conclusion, *e.g."* "the work injury did not "aggravate or accelerate" the Claimant's condition. From an overall standpoint, the ALJ infers and finds that Dr. Jacobs became an effective advocate for the Respondents' theory of the case, thus, his credibility was compromised. Indeed, the ALJ finds that Dr. Jacobs' opinions, categorically, are lacking in credibility and, therefore, are rejected.

Vocational Evaluation of John Macurak

18. The Claimant was evaluated by vocational expert John Macurak at the request of the Claimant. Macurak issued several reports and testified at the hearing [Claimant's Exhibit 9]. His most recent report was completed on April 25, 2017, after he reviewed the FCE performed by Kristine Couch. Macurak was of the opinion that the Claimant was unable to earn any wages in the same or other employment as a result of her January 4, 2016, injury, given the extent of her physical limitations, the work

restrictions assigned, her advanced age, and her limited education [*Id*., bates stamp 189]. Macurak noted that the Claimant had limited computer skills (online banking only) and her limited education and advanced age precluded her from earning wages in unknown employment. The ALJ finds Macurak's opinion highly persuasive and credible; and, it outweighs the vocational opinions of Respondents' IME Dr. Jacobs and Respondents' Vocational Evaluator, Katie Montoya.

Vocational Evaluation of Katie Montoya.

19. The Claimant was evaluated by Katie Montoya at the request of the Respondents. Montoya agreed that the Claimant is limited to a sedentary work capacity. There was no persuasive evidence that the Claimant had ever worked in sedentary work, or had transferrable skills to work in sedentary work. Montoya conceded that the Claimant's pre-injury job is characterized as "heavy" work. Montoya's opinion, however, was that the Claimant is employable, based on the opinions of Dr. Olsen, Dr. Prok and Dr. Jacobs who attribute the Claimant's current limitations to pre-existing, non-injury related, restrictions. As found, herein above, these doctors' opinions have been determined to lack credibility. Montoya testified that she did **not** rely on the restrictions given by DIME Dr. Lindenbaum or the limitations arising from Kristine Couch's FCE, although she was aware of both. The ALJ finds that Montoya's reliance on the opinions of Dr. Prok, Dr. Olsen and Dr. Jacobs was misplaced and for this reason, her ultimate opinion, like a house of cards, collapses. Indeed, Montoya did **no** labor market surveys to see if there was any sedentary work that the Claimant could do. The ALJ rejects the opinion of Katie. Montoya as unpersuasive and lacking in overall credibility.

Permanent Total Disability

19. The Claimant is unable to earn any wages in the same or other employment in her commutable labor market. The "full responsibility rule," applicable to claims for permanent total disability benefits, provides that the industrial injury need not be the sole cause of a claimant's permanent total disability. Under the rule, when an "employer hires an employee who, by reason of a pre-existing condition or by reason of a prior injury, is to some extent disabled, he takes the person with such handicap," and the employer should be liable for a "full award of benefits" if a subsequent industrial injury combines with the pre-existing disability to produce permanent total disability. As found, the Claimant was able to perform the full range of her job duties before the admitted injury of January 4, 2016. Afterwards, DIME Dr. Lindenbaum gave her physical restrictions whereby she could not perform her pre-injury job duties. She has not worked since she was terminated from employment on January 14, 2016, 10-days after her admitted injury, nor has she earned any wages or been capable of earning any wages.

20. Considering the Claimant's "human factors," including her age of 70; her work history and/or lack of any significant work history; her general physical condition; her education (a GED with no special training); her mental ability, prior training and experience, and the availability of work that she could perform. There is no persuasive evidence of any work the Claimant could perform. There is no persuasive evidence that employment exists or is available in the Claimant's competitive job market, which the Claimant can perform on a reasonably sustainable basis. As found, the Claimant has proven that she is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to her, and this inability is attributable to the admitted injury of January 4, 2016. She could do her job until then and she could not to it afterwards. The Respondents imply that a confluence of the Claimant's pre-existing conditions, including Dr. Jacobs' alleged opinion of "dementia," coincidentally, ripened whereby the Claimant could not work after her admitted injury. This argument is not well taken by the ALJ.

Maintenance Medical Care and Treatment After MMI

21. Any maintenance medical care and treatment to maintain the Claimant at MMI (after July 11, 2016) and prevent a deterioration of her physical condition is causally related to the admitted injury of January 4, 2016 and reasonably necessary. Also, if at the hands of previously authorized medical providers, it is authorized.

Ultimate Findings

22. The ALJ finds that the Claimant's testimony was straight-forward and credible. The permanent medical impairment and physical restrictions, as found herein above, of DIME Dr. Lindenbaum are persuasive and credible. Based on the totality of the evidence, the ultimate opinions of Dr. Prok and Dr. Olsen are lacking in credibility. The ultimate opinions of Dr. Jacobs are significantly lacking in credibility. The vocational opinions, for the reasons found herein above, of John Macurak are more persuasive and credible than the vocational opinions of Katie Montoya.

23. Between conflicting opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the vocational opinion of John Macurak, and to reject the vocational opinion of Katie Montoya. Also, the ALJ makes a rational choice to accept DIME Dr. Lindenbaum's opinions, and to reject the opinions of Dr. Jacobs, Dr. Prok, and Dr. Olsen.

24. The Claimant has proven, by a preponderance of the evidence that she is permanently and totally disabled on account of her admitted injury, and that she is unable to earn any wages in the same or other employment in her competitive labor market, on a reasonably sustainable basis. Regardless of the fact that the Claimant's admitted injury is not the sole cause of her permanent total disability, the admitted injury

is “the straw that broke the camel’s back.” The ALJ finds that the admitted injury was, indeed, a significant causative factor in the Claimant’s PTD.

25. The Claimant has proven, by preponderant evidence to entitlement to post-MMI maintenance medical benefits for her physical injuries, after July 11, 2016, to maintain her at MMI and to prevent a deterioration of her condition

26. It has been admitted that the Claimant’s AWW is $542.94, 2/3rds of which is $361.96 (the weekly PTD rate), or $51.71 per day.

27. On the date of the Claimant’s admitted injury, January 4, 2016, she was 70 years old. Her federal Social Security benefits were retirement benefits, not disability benefits, and are, therefore, not subject to offset.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness’ testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness’ testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness’ special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad

discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible and DIME Dr. Lindenbaum's opinions concerning the Claimant's physical restrictions were credible. The opinions of Dr. Jacobs, Dr. Prok, and Dr. Olsen were lacking in credibility as herein above found. As further found, the vocational opinuions of John Macurak were more credible and persuasive than the vocational opinions of Katie Montoya, which in and of themselves, are dispositive of the PTD issue.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, the ALJ made a rational choice, based on substantial evidence, to accept the vocational opinion of John Macurak, and to reject the vocational opinion of Katie Montoya. Also, the ALJ made a rational choice to accept DIME Dr. Lindenbaum's opinions, and to reject the opinions of Dr. Jacobs, Dr. Prok, and Dr. Olsen.

Permanent Total Disability

c. An employee is permanently and totally disabled if she/he is unable to earn any wages in the same or other employment. § 8-40-201(16.5) (a) C.R.S. The "full responsibility rule," applicable to claims for permanent total disability benefits, provides that the industrial injury need not be the sole cause of a claimant's permanent total disability. Under the rule, when an "employer hires an employee who, by reason of a pre-existing condition or by reason of a prior injury, is to some extent disabled, he takes the person with such handicap," and the employer is liable for a "full award of benefits" if a subsequent industrial injury combines with the pre-existing disability to produce permanent total disability. See *United Airlines, Inc. v. Indus. Claim Appeals*

Office, 993 P.2d 1152, 1154-1155 (Colo. 2000). The only exception to the established rule is where the industrial injury is not a significant causative factor in a claimant's disability. See *Seifried v. Indus. Comm'n,* 736 P.2d 1262 (Colo. App. 1986) [the claimant suffered from several pre-existing ailments, and the treating physician opined that the claimant had reached maximum medical improvement, and concluded that the claimant remained disabled because of non-occupational factors—in *Siefried,* the pre-existing factors contributed 95% to the PTD and the industrial injury only 5%].; *Lindner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995). *See also Holly Nursing Care Center v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). In the present case, as found, the Claimant's admitted physical injuries which resulted in 14% permanent medical impairment, **significantly** contributed to her PTD. Consequently, *Siefried* is inapplicable to the facts in the present case.

d. In determining whether a claimant is permanently and totally disabled, an ALJ may consider a claimant's "human factors," including the claimant's age, work history, general physical condition, education, mental ability, prior training and experience*,* and the availability of work that the claimant could perform. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998*); Joslin's Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The critical test is whether employment exists that is reasonably available to a claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. *See Joslins Dry Goods Company v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). As found, the Claimant has proven that she is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to her. Permanent total disability does not need to be proven by medical evidence. *See Baldwin Construction, Inc. v. Indus. Claim Appeals Office,* 937 P.2d 895 (Colo. App. 1997). *Calvert v. Roadway Express, Inc.,* W.C. No. 4-355-715 [Indus. Claim Appeals Office (ICAO), November 27, 2002]; *In re Claim of Randy Blocker v. Express Personnel,* W.C. No. 4-622-069-04 (ICAO, July 1, 2013). As further found, the Claimant's "human factors," including her age of 70; her work history and/or lack of any significant work history; her general physical condition; her education (a GED with no special training); her mental ability; prior training and experience;*,* and, the lack of persuasive evidence about the availability of work that she could perform support the conclusion that she is permanently and totally disabled.. There is no persuasive evidence of any work the Claimant could perform. There is no persuasive evidence that employment exists or is available in the Claimant's competitive job market, which the Claimant can perform on a reasonably sustainable basis. As found, the Claimant has proven that she is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to her, and this inability is attributable to the admitted injury of January 4, 2016. She could do her job

until then and she could not to it afterwards. The Respondents imply that a confluence of the Claimant's pre-existing conditions, including Dr. Jacobs' alleged opinion of "dementia," coincidentally, ripened whereby the Claimant could not work after her admitted injury. This argument is rejected.

e. Under § 8-40-201(16,5)(a), C.R.S., the overall objective is to determine whether, in view of all these human factors and vocational factors, employment is "reasonably available to a claimant under his or her particular circumstances." *Weld County Sch. Dist. RE-12 v. Bymer, supra* at 558. Also see *Joslin's Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P. 3d 866 (Colo. App. 2001). This requires a determination of whether employment is available in the competitive job market which the Claimant can perform on a reasonably sustainable basis. Here such employment is not available to the Claimant and the Respondents have failed to show that it is. Rather, the Claimant has proven that she is not capable of earning wages in the same or other employment.

Post-MMI Maintenance Medical Benefits

f. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address the admitted physical injury

Social Security Retirement Benefits

g. Section 8-42-103 (1) (c)(I), C.R.S., provides for an offset of one-half of Federal Social Security Disability benefits. If the Claimant is receiving straight retirement benefits on her own account, there is no offset. If she is receiving Survivor's benefits there may be an offset allowable.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on the issue of permanent total disability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's admitted physical injuries to maintain her at maximum medical improvement and to prevent a deterioration of her condition, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Respondents hall pay the Claimant permanent total disability benefits of $361.96 per week, or $51.71 per day from July 11, 2016 for the rest of the Claimant's natural life. The period between the maximum medical improvement date of July 11, 2016 and the last session of the hearing , June 5, 2017, both dates inclusive, is 330 days. Past due permanent total disability benefits equal $17,064.30, however, Respondents may take a credit for all permanent partial disability benefits paid pursuant to the latest Final Admission of Liability, dated January 5, 2017. Further, beyond the credit period, Respondents shall continue to pay the Claimant permanent total disability benefits of $361.96 per week for the rest of the Claimant's natural life.

C. If the Claimant is receiving Federal Social Security Retirement benefits, pursuant to her own account, there shall be no offset. If she is receiving Survivor's benefits, considering the fact that she has been receiving Social Security benefits after

her retirement age, there could be an offset equaling the differential between her retirement benefits on her own account and survivors' benefits.

D. Respondents shall pay the Claimant interest at the rate of eight percent (8%) per annum on all indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Whether Claimant established by a preponderance of the evidence that he suffered a compensable work injury.
- Whether Claimant established by a preponderance of the evidence entitlement to medical benefits.
- Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits from August 26, 2016 through ongoing.
- Whether Respondent's established by a preponderance of the evidence that Claimant was at fault for his termination.
- Claimant's average weekly wage (AWW).

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant began working for Employer in June 2016 as a bore machine operator which involved tasks associated with building underground tunnels.

2. Claimant is a high school graduate and has attended some college courses. He can read and write in English and indicated on medical forms that English is his preferred language.

3. On August 25, 2016, at approximately 11:00 a.m., Claimant was standing on rails which were chained to an excavator. Though it was variously described, the ALJ finds that as the excavator began pulling, the chains snapped causing the rails to drop back down to the ground. The rails were approximately six inches from the ground. When the rails dropped, Claimant also dropped approximately six inches, landing on his feet.

4. Claimant's shift on the date of the alleged incident began at approximately 7:00 a.m. Although Claimant testified that he felt immediate pain in his back and hip, he worked his regular 10-hour shift. He did not report the incident or being injured from the incident.

5. Claimant testified that his foreman, Easer Lopez, witnessed the incident and laughed at him. Mr. Lopez, however, testified by phone and through the interpreter that he did not witness the incident and was on the far side of the job site when Claimant alleges it occurred. Mr. Lopez also testified that he would not laugh at an

employee, including Claimant, who had a work accident. The ALJ finds the testimony of Mr. Lopez to be more credible and persuasive than that of Claimant for reasons discussed more fully below.

6. According to Claimant, the pain in his low back worsened later in the day and continued to worsen during the night. Claimant claims he informed Mr. Lopez on Friday, August 26th that he was hurting from the day before. Mr. Lopez, though, testified that Claimant worked his regular shift on Friday, August 26th and did not appear to be injured. At the end of his shift on Friday, Claimant told Mr. Lopez his back hurt but Claimant said nothing about his pain being related to a work incident or injury. Notwithstanding, Mr. Lopez offered to send Claimant to Employer's designated medical provider. Claimant declined medical care.

7. Employer has a policy that all employees who are going to be absent or late to work must call-in and advise the Employer by 7:00 a.m. on the day of the anticipated absence or tardiness.

8. On Monday, August 29, 2017 at 11:14 a.m. Claimant sought medical treatment at the Medical Center of Aurora (MCA) complaining of thoracic and lumbar pain from a "fall" at work. On exam, Claimant had full lumbar and cervical range of motion and normal thoracic and lumbar spine X-rays. Claimant was diagnosed with a thoracic and lumbar spine strain and released to modified work with restrictions for "that day."

9. Claimant did not call into work by 7:00 a.m. on August 29 to tell Employer that he would be late. Rather, Raul Cardenas, Employer's superintendant, called Claimant on August 29th when Claimant failed to report for work. Claimant did not answer. Later in the day, Claimant texted Mr. Cardenas that he was going to see a doctor.

10. Consequently, Employer gave Claimant an unexcused absence. Claimant had two previous unexcused absences, one on June 20, 2016 and the other on August 20, 2016 when he was in jail. Claimant admitted to one prior unexcused absence but testified that his mother had called Employer to report him absent by 7:00 a.m. on June 20, 2016, so that absence should have been excused. Mr. Cardenas testified that he recalled Claimant's mother calling in that day, but she did not call to report him absent. Instead, she was looking for Claimant to see if he had reported to work because she did not know his whereabouts.

11. On August 29, 2016, Employer gave Claimant a written warning/disciplinary report documenting Claimant's unexcused absences for June 20, 2016 and August 20 and 29, 2016.

12. After his August 29 visit to AMC, Claimant submitted the paperwork from his visit to Employer. Having learned that Claimant was claiming a work injury, Employer sent Claimant to its designated medical provider, Concentra. Per Employer's written policy, Claimant underwent a mandatory drug test that all employees must take

after reporting an alleged work accident. Claimant admitted to using cocaine on Saturday, August 27, 2016. On September 1, 2016, Claimant's test results were confirmed as positive for cocaine.

13. Pursuant to Employer's no tolerance drug policy, testing positive in a post-accident drug screen for the presence of controlled substances is grounds for immediate discharge from employment. A positive test alone, regardless of when the illegal substance was used, results in immediate discharge.

14. Claimant was aware of both Employer's no tolerance drug policy and the attendance policy. Donna Hale, Employer's Human Resource Director, testified that she provided the written policy to Claimant during his employment orientation. Claimant testified that he was not aware that illegal drug use when he was not working was prohibited. During his orientation, Claimant was able to ask questions. He asked an unrelated question re mileage, but did not ask about Employer's no tolerance drug or attendance policies. Mr. Cardenas testified that it was also common knowledge amongst the employees that Employer's drug policy was one of no tolerance.

15. On September 6, 2016, Employer terminated Claimant's employment because he both tested positive for cocaine and had three unexcused absences on June 20 and August 20 and 29, 2016. Ms. Hale testified that Employer would have terminated Claimant for either reason independently. The ALJ finds that Claimant was responsible for his termination on September 6, 2016.

16. Employer paid Claimant his final wages on September 2, 2016, for the period ending on August 28, 2016, the last day Claimant actually worked. Although Employer offered modified duty to Claimant, Claimant refused to return to work and acknowledged in writing that he decided to take unpaid leave on September 1 and 2, 2016. The ALJ finds that Claimant did not suffer a work-related wage loss from the date of the alleged injury through the date of termination.

17. On September 1, 2016, Claimant sought care at Concentra where his medical provider diagnosed a thoracic myofascial strain and a lumbosacral strain based upon history and mechanism of injury "obtained directly from the patient." Despite having tested positive for cocaine two days earlier, Claimant reported that he did not use drugs.

18. Claimant began physical therapy on September 7, 2016, complaining of low back and left buttock pain, but by his third visit on September 15, 2016, the physical therapist documented that Claimant reported he "was almost back to normal and wanted to stay and get released from care." The physical therapist noted that Claimant "has been non-compliant with physical therapy visits." Physical therapy notes provide that Claimant:

- Had missed three or four by his seventh scheduled visit and had "multiple reschedules and 'lates'."

- Was non compliant with his home exercise program; and

- His lack of progress and compliance led to Claimant's further physical therapy being "put on hold."

19. By September 23, 2016, the physical therapist documented Claimant reporting "that his back is feeling much better and that he has most of the motion back in it," and that "his back feels almost 100% better."

20. On September 23, 2016 Claimant's Concentra provider evaluated Claimant and documented Claimant had full lumbar range of motion with no spasm and his lumbar spine was non-tender. Claimant complained of pain with a click in his left hip. On September 30, 2016, Dr. Draper from Concentra reported that Claimant's left hip MRI revealed an anterior labral tear.

21. On October 17, 2016, John Schwappach, M.D., a hip surgeon, evaluated Claimant and suggested arthroscopic repair of the labral injury. Dr. Schwappach documented that Claimant was standing on rails at work when the rails uncoupled and Claimant was "thrown in the air landing on his left side." The ALJ finds Dr. Schwappach misapprehended Claimant's actual mechanism of injury.

22. On October 25, 2016, Insurer filed a notice of contest while continuing to pay for Claimant's medical care with his authorized treating physicians. Claimant did not specify what medical benefits he was seeking at hearing other than hip surgery; however, Dr. Schwappach did not submit a request for prior authorization, thus the ALJ may not order authorization for hip surgery.

23. On December 2, 2012, Concentra assigned Claimant work restrictions of:

- lifting up to 10 pounds occasionally,

- pushing/pulling 20 pounds occasionally,

- sitting 80% of the time,

- no squatting,

- no kneeling,

- no climbing ladders,

- may not work at heights, ground work only,

- and no driving a company vehicle.

24. Claimant testified that he worked on cars prior to his injury, but could no longer do so because he was unable to bend over. According to Claimant, the injury affected his everyday life. Claimant testified that his pain and restrictions rendered him

unable to work, work on cars, play sports, play with his kids in the back yard or at a park.

25. On December 5, 2016 Respondents recorded four hours of video surveillance. The videotape shows Claimant walking outdoors, working on his SUV, and repeatedly bending at the waist. Claimant squats, gets up from squatting to standing without apparent difficulty, kneels on his left knee with his right leg extended, and reaches under his vehicle. Claimant is shown getting under his SUV on his back with his right hip flexed and maintaining that position before standing. While working on his vehicle, Claimant is squatting, kneeling, bending, lying on his back with his hip flexed, and moving into and out of these positions without apparent difficulty or distress. He was videotaped lifting and carrying a bumper off his SUV and flexing at the waist to 90 degrees or greater without apparent difficulty. Claimant also climbed onto the tailgate of his SUV and knelt, squatted and bent multiple times throughout the 4 hour surveillance tape. In contrast to his presentation at medical appointments, Claimant did not limp at any point during the four hour period of time.

26. On December 9, 2016, Concentra assigned work restrictions of "no squatting and/or kneeling, may lift up to 10 pounds occasionally (up to 3 hours per day), may push/pull up to 20 pounds occasionally, and may not drive a company vehicle due to functional limitations."

27. On December 30, 2016, treating physiatrist Scott J. Primack, D.O., reported that during his examination on that day, Claimant went from stand to sit and from sit to stand in "somewhat of a guarded fashion," and that surgery was recommended because Claimant was experiencing ongoing left hip discomfort.

28. On January 10, 2017, Dr. Primack reported that Claimant underwent a urine drug test and tested positive for cocaine, and negative for opiates even though Dr. Primack had prescribed 80 Vicodin tablets during the previous thirty days. That same day, Claimant reported that he had not used cocaine since August 2016. Dr. Primack stopped prescribing all narcotics as Claimant was "clearly noncompliant," using cocaine with his prescribed opioid medication.

29. Also on January 10, 2017, Dr. Cohen saw Claimant for a psychological consultation. Claimant reported having a fourth DUI conviction for which he was awaiting sentencing. Claimant also reported to Drs. Cohen and Gray a history of cocaine and methamphetamine abuse. Dr. Cohen remarked that Claimant "was not an ideal candidate for routine narcotic management based on his significant history."

30. On February 13, 2017 Claimant underwent an IME with Elisabeth Bisgard, M.D. Claimant told Dr. Bisgard he was unable to sit or stand for one hour, after which he had to alternate positions due to hip pain. He could walk for 2 hours, after which he had to alternate his position due to hip pain. Claimant also reported that he "always walks with a limp." Dr. Bisgard reviewed the surveillance video in its entirety and reported that Claimant was more functional on video than he had related to her and to his treating physicians.

31. Dr. Bisgard noted that Claimant answered "No" to an interrogatory that asked whether Claimant had ever pled guilty or been convicted of a crime other than a traffic violation. However, Claimant told Dr. Bisgard that he had spent five years in prison. Later, Dr. Bisgard received records from one of Claimant's previous employers which included a copy of a criminal background check that employer had conducted before hiring Claimant. The records noted Claimant's guilty pleas to charges of "felony theft from a person" and "misdemeanor drinking." And Claimant's convictions for DUIs, drinking and driving after revocation of his license, and drinking in a vehicle.

32. Dr. Bisgard is the only physician who conducted a causality determination required by Level II Accreditation teachings. In addition to the surveillance, Dr. Bisgard reviewed all of Claimant's medical records and Claimant's signed answers to interrogatories. She was present at hearing for the testimony of Claimant and Employer's witnesses. Dr. Bisgard opined that Claimant did not sustain any work injury. Dr. Bisgard based her opinion on the following criteria:

- Claimant's testimony was inconsistent with that all Employer witnesses.
- Claimant's mechanism was inconsistent with his labral tear.
- The surveillance recording directly contradicted Claimant's testimony regarding his level of functioning and his statements to his treating physicians about his abilities.
- Claimant's normal clinical examinations and normal lumbar and thoracic range of motion immediately after the alleged injury.
- Claimant's different reports regarding mechanism of injury and his late reporting of hip pain.

Dr. Bisgard concluded and opined that more likely than not, Claimant was not injured at work, even assuming an incident as described by Claimant had occurred. The labral tear, according to Dr. Bisgard, was not consistent with Claimant's reported mechanism of injury and was not work-related.

33. Alternatively, Dr. Bisgard opined that at most, and giving Claimant the benefit of the doubt (which Dr. Bisgard did not do), Claimant would have had a mild thoracic-lumbar strain for which he reached MMI on September 20, 2016 when his symptoms resolved for his back issues, with no impairment and no need for medical maintenance care. Dr. Bisgard explained that she selected this MMI date because it was in between September 15, 2016, the third PT visit where Claimant stated he "was almost back to normal and wanted to stay and get released from care" and September 23, 2016, when the physical therapist documented Claimant's report "that his back is feeling much better and that he has most of the motion back in it" and that "his back feels almost 100% better."

34. Dr. Bisgard also noted that Claimant had a non-work related inguinal hernia. She opined that given Claimant's admitted illegal drug use the day after the alleged injury (and before he sought treatment), and the records that Claimant used illegal drugs, including cocaine and meth, on other occasions as well, raised the question of whether Claimant actually sustained an injury at work or at an event outside of work between the night of August 26 and August 29, 2016, or some other time.

35. It appears from his record that Dr. Schwappach, who found the labral tear work related, was under the false impression that Claimant had fallen directly onto his left side. His October 17, 2016 note provides that Claimant "was thrown in the air landing on his left side."

36. On March 7, 2017, Claimant underwent an IME with J. Stephen Gray, M.D. Dr. Gray is the only physician who assessed "possible left direct or inguinal hernia" as related to the alleged work injury, a contention Claimant himself has not made. According to Dr. Gray, given the "violent nature of the industrial accident", even if the hernia and/or the left hip labral tear were pre-existing, the violent work injury would have exacerbated if not permanently aggravated these conditions. The ALJ finds that Dr. Gray misapprehended the actual mechanism of injury by relying on Claimant's exaggerated report.

37. Dr. Gray did not view the surveillance video or address it in his report, and he appears to have "cut and pasted" a large part of Dr. Bisgard's IME report into his own. Dr. Gray reported that Claimant was on narcotics for pain for the first 2-3 weeks post alleged injury, which may have masked his left hip pain. However, the records document that Claimant was given 6 tablets of Norco and the next documented prescription is not until November 8, 2016, over two months post-alleged injury. Dr. Gray also seems to be unaware that Claimant's authorized treating physician opined that Claimant did not have a work injury of any kind and that Claimant's supervisors denied witnessing the purported incident. The ALJ rejects Dr. Gray's opinion because Dr. Gray did not review all of Claimant's medical records or view any of the surveillance. Dr. Gray's understanding of Claimant's pain medication usage is also incorrect.

38. On March 10, 2017 Dr. Primack, having read Dr. Bisgard's report and reviewed Claimant's file, opined that Claimant had not sustained a work related injury. And even if he had, Claimant reached MMI on September 20, 2016 without impairment. Dr. Primack wrote, "I'm still quite concerned regarding [Claimant's] drug abuse. This clearly confounds the entire medical treatment."

39. Based on the totality of the evidence, the ALJ finds Claimant NOT credible.

40. Based on the totality of the evidence, the ALJ finds Claimant did not meet his burden of establishing by a preponderance of the evidence that he suffered a compensable work injury.

41. Based on the totality of the evidence, the ALJ finds Claimant did not meet his burden of establishing by a preponderance of the evidence entitlement to medical benefits.

42. Based on the totality of the evidence, the ALJ finds Claimant did not meet his burden of establishing by a preponderance of the evidence entitlement to temporary total disability benefits.

43. Based on the totality of the evidence, the ALJ finds Respondents met their burden of establishing by a preponderance of the evidence that Claimant was at fault for his termination.

44. Because the ALJ has found Claimant did not meet his burden of establishing by a preponderance of the evidence entitlement to temporary total disability benefits, the ALJ need not reach the remaining issue of Claimant's AWW.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, a claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P. 3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1) (c) C.R.S. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v.*

Industrial Claim Appeals Office, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

Claimant failed to meet his burden of proving a work injury. As found, the ALJ is persuaded by the testimony of Mr. Lopez and Mr. Cardenas that they did not witness the alleged work incident. Rather, they observed Claimant working his regular shift for hours after the alleged 11:00 a.m. incident on Thursday and all day Friday. The ALJ rejects Claimant's testimony as not credible. Claimant testified that he was unable to work on cars and had limited ability to bend and kneel but 4 hours of surveillance was submitted showing Claimant repeatedly bending, kneeling, lifting and engage in other activity while he worked on his SUV. The timing of the surveillance, December 5, 2016, was right after Concentra reiterated Claimant's work restrictions of limit lifting to 10 pounds occasionally, push/pull 20 pounds occasionally, should be sitting 80% of the time, no squatting, no kneeling, no climbing ladders, may not work at heights, ground work only and no driving a company vehicle. Moreover, Claimant has a potential inguinal hernia that no provider (except Claimant's IME, Dr. Gray), has opined is work-related. Even Claimant himself has not alleged this hernia is work-related. The ALJ is persuaded by Dr. Bisgard's Level II causality determination that considering the totality of the evidence, including Claimant's illicit drug use, Claimant's injuries cannot be correlated to the alleged work incident. Dr. Primack, after considering the entire picture when it was made available to him, agreed with Dr. Bisgard and opined that he too did not believe Claimant sustained a work injury of any kind. Consequently, Claimant's workers' compensation claim is denied and dismissed.

Because the ALJ has found and concluded that Claimant did not suffer a work injury, and based on the totality of the evidence, Claimant is not entitled to receive medical or compensatory benefits. Additionally, when a temporarily disabled Claimant is responsible for termination of his employment, the resulting wage loss may not be attributed to the work injury. *See* § 8-42-103 (1) (g), §8-42-105 (4), C.R.S. An employee is responsible for termination if the employee precipitated the employment termination by a volitional act which an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (ICAO, 2001). The determination of Claimant's responsibility for the termination of employment is not related to the concept of culpability, but requires only a "volitional act," or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corporation*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). As found, Claimant was responsible for his termination on September 6, 2016 for the positive cocaine test and the 3 unexcused absences. Claimant did not suffer a work-related wage loss from the date of the alleged injury through the date of termination. Claimant's claim for TTD and/or TPD benefits is denied and dismissed. Claimant's claim for temporary total disability benefits is denied and dismissed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's workers' compensation claim is denied and dismissed.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 15, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant's failure to accept Respondents' offer of modified employment provided grounds to terminate Claimant's temporary disability benefits under Section 8-42-105(4)(b)(II)(C); and

b. Whether the Prehearing Conference Order of June 24, 2016, barring indemnity benefits from June 9, 2016, through August 9, 2016, is affirmed.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are reached.

1. Claimant is a female who was 61 years old at the time of her work related injury on September 25, 2014. Claimant was the assistant manager at a maternity clothing store. Claimant injured her right shoulder and neck on September 25, 2014, while holding a shelf and then moving a ladder at her work. This is an admitted claim.

2. Claimant has been off work since the date of the injury. Claimant received temporary total disability benefits (TTD) from October 1, 2014, through June 1, 2016, temporary partial disability benefits (TPD) from June 2, 2016, through June 8, 2016, and TPD from August 9, 2016, and ongoing. Claimant's admitted average weekly wage is $714.00 and the TTD rate was $476.00.

3. On September 27, 2014, Claimant was seen at the Emergency Department of St. Anthony Hospital. Her chief complaint was right arm pain and shoulder pain. Claimant was diagnosed with ulnar neuropathy at the elbow, trapezius muscle pain, right shoulder sprain and shoulder contusion. Claimant was instructed to follow-up with an orthopedic surgeon. Claimant's right arm was placed in a sling and Claimant was restricted from use of the right upper extremity.

4. Claimant first treated with Dr. Michael Horner for her work injury on March 16, 2015. During the course of her treatment for both her neck and shoulder with Dr. Horner, he provided Claimant with prescriptions, provided referrals and requests for other treatment, performed several injections on Claimant, directed Claimant's care, signed off on Claimant's work restrictions and made determinations as to Claimant's maximum medical improvement (MMI) status.

5. Dr. Horner was Claimant's attending physician for his admitted work injury. Claimant treated with Dr. Horner from March 2015 through April 2016. Claimant testified that she had botox injections from Drs. Horner and James T. Johnson. And, that in June 2016, Dr. Johnson imposed a one pound lifting restriction

6. On May 3, 2016, and May 13, 2016, Respondents sent Claimant what Respondents' purport to be a return to work offer containing a signed Certificate of Service that included, among other things, an offer of modified employment, a detailed job description with job duties, statement of Claimant's hourly wage, a statement of Claimant's hourly work schedule with an example weekly time sheet, and a signed statement from Dr. Horner, Claimant's attending physician, confirming the listed modified employment is within Claimant's physical restrictions. The Employer signed an agreement with the Insurer to pay Claimant's wages in the modified duty position.

7. Claimant was offered modified employment with the charity, Metro Care Ring, a hunger relief agency. The written offer of modified employment advised Claimant that her offsite modified duty work schedule was for 32.5 hours per week paid to Claimant at the rate of $17.10 per hour. Claimant was advised in the offer letter that this offsite modified duty assignment is temporary in nature and not a permanent assignment. The modified duty offer advised Claimant that there would be a site supervisor who was employed by Metro Care Ring and who would be aware of Claimant's restrictions. The letter emphasized that Claimant was responsible for working within her restrictions, not the site supervisor. Claimant was advised that while she worked at the Metro Care Ring she remained an employee of Employer and failure to return to work in this modified duty position would result in unilateral termination of TTD benefits, as provided in "Rule 6 modified duty job offer."

8. Finally, Claimant was advised that a return to work specialist who would not be onsite at the Metro Care Ring employed by the Insurer would be assigned to coordinate the light duty temporary assignment. The offer of modified employment was approved by Dr. Horner for a position at the Metro Care Ring described as greeting participants, signing in participants for hunger relief, creating permanent files, scheduling appointments, answering phones and designating referral for other needs.

9. On May 18, 2016, Claimant attended an orientation for the light duty temporary assignment at the Metro Care Ring. Claimant credibly testified at hearing that, at the orientation, Claimant was informed that her duties at Metro Care Ring in the modified duty position would require her to stock shelves with food items, assist participants to access food items from the shelves, assist participants in carrying their food items to their vehicles, load participants' vehicles and unload trucks. Claimant was scheduled to begin work on June 2, 2016. Claimant's start date was rescheduled. On June 9,

2016, Claimant again did not appear for the modified duty assignment, nor did Claimant

10. Claimant start date was rescheduled in June 2016 and Claimant never appeared for work in the modified duty position. Claimant credibly testified at hearing that she had many reservations about the modified duty offer at the Metro Care Ring. Claimant credibly explained that she was given information at her orientation that indicated her work duties would exceed her work restrictions and therefore Claimant did not appear for work.

11. The ALJ finds that Respondents did not make a bona fide offer of modified employment within the meaning of Section 8-42-105(4). This finding is premised on Claimant's credible and persuasive testimony that her assigned job duties exceeded her restrictions. Thus, the ALJ finds that Claimant's refusal to perform modified job duties outside of her restrictions is reasonable. It is found that it was impracticable within the meaning of Section 8-42-105(4) for Claimant to accept the offer of modified employment when the duties described at her orientation were outside her work restriction and deviated from the Respondents' proposed offer of modified employment. Furthermore, Respondents did not identify, and the ALJ is unaware of any provision of the Act, that permits Respondents to comply with the provision of Section 8-42-105(4), C.R.S. by arranging employment for Claimant with a charity and premising the unilateral termination of indemnity benefits on Claimant's failure to perform the assigned job at the charity.

12. Respondents' moved to compel Claimant's attendance at a June 9, 2016, independent medical examination (IME) with Dr. Allison Fall. Following a May 23, 2016, prehearing conference, a May 23, 2016, prehearing order was entered by Prehearing Administrative Law Judge (PALJ) John Sandberg granting Respondents' motion to compel. The May 23, 2016, prehearing order states that, at the prehearing conference, Respondents represented that Claimant missed previously scheduled IME appointments and the Respondents had incurred cancellation fees and no show fees. The order compelling attendance at Dr. Fall's IME references Respondents' allegation of previously missed medical appointments as providing grounds for the order compelling attendance.

13. Then, on June 24, 2016, another prehearing conference was held with the parties in this matter before PALJ Jeffrey Goldstein. Respondents represented at the prehearing conference that Claimant did not attend the IME appointment with Dr. Fall on June 9, 2016. The IME with Dr. Fall was rescheduled to August 9, 2016. After hearing the arguments of the parties, PALJ Goldstein concluded that Claimant's indemnity benefits were terminated from June 9, 2016, through August 8, 2016, for failure to appear at the IME appointment with Dr. Fall.

14. In reaching the conclusion that Claimant's indemnity benefits should be terminated, PALJ Goldstein noted that PALJ Sandburg entered the order compelling Claimant's attendance at the June 9, 2016, IME appointment and, in the order compelling attendance, ALJ Sandberg noted that Respondents had represented that Claimant failed to appear for other medical appointments. Then, PALJ Goldstein, concluded that Claimant was served with notice of the June 9, 2016, IME with Dr. Fall and had been ordered to attend. PALJ Goldstein further found that even if the order was not served on Claimant by her attorney, the PALJ Goldstein found that Claimant "refused" to attend the ordered IME appointment. PALJ barred Claimant's receipt of indemnity benefits between the dates of the two appointments, June 9, 2016, to August 9, 2016, as a sanction for failing to appear at the June 9, 2016, IME with Dr. Fall.

15. Claimant credibly testified that she did not refuse to attend the appointment with Dr. Fall on June 9, 2016. She testified that she advised her attorney of a scheduling conflict with the June 9 appointment, she further asked him to advise Respondents of her unavailability for the June 9 medical appointment and request a rescheduled appointment. Claimant testified that she was unaware her attorney failed to follow through with her instructions.

16. As found, the ALJ does not find that Claimant refused to attend the IME appointment on June 9, 2016. Claimant credibly explained that she had another medical appointment for an unrelated condition on June 9 and that was her reason for missing the appointment with Dr. Fall. Furthermore, the ALJ does not have evidence that Claimant missed other prior medical appointments and that Respondents incurred cancellation fees for her failure to appear.

17. Since the evidence did not support the conclusion that Claimant refused to attend the medical appointment with Dr. Fall, there is no basis to terminate TTD from June 9, 2016 to August 9, 2016. Therefore, the order of the PALJ is reversed.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered

1. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads

the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

The Offer of Modified Employment

2. Section 8-42-105(3)(d)(I), C.R.S., authorizes the termination of TTD benefits when "the attending physician" gives the claimant a "written release to return to modified employment, such employment is offered in writing, and the employee fails to begin such employment." Because the respondents seek to terminate benefits under this section, they have the burden of proof to establish the factual predicates for application of the statute. *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (I.C.A.O. December 16, 2004), citing *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P.3d 790 (Colo. App. 2000).

3. There may be more than one "the attending physician." *Popke v. Industrial Claim Appeals Office, supra*. If there is a conflict between the attending physicians concerning whether or not the claimant is able to perform modified employment the ALJ may resolve the conflict as a matter of fact. *See Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d 680 (Colo. App. 1999); *Burns v. Robinson Dairy, Inc.,* 911 P.2d 661 (Colo. App. 1995) (concerning physician's release to regular employment). As found, Dr. Horner is the attending physician in this case and he approved Respondents' offer of modified employment at the Metro Care Ring as regards the duties assigned to Claimant in her position at the Metro Care Ring.

4. Claimant contends that Respondents did not have authority to offer modified employment at a separate location not owned and operated by Employer. Furthermore, it is Claimant's contention that her failure to accept the offer of modified employment at a location not owned and operated by the Employer to perform duties outside of her work restrictions did not provide Respondents with a basis to terminate TTD. Respondents contend that its offer of modified employment at the Metro Care Ring complied with the Act in all relevant respects.

5. The Industrial Claim Appeals Office (ICAO) has held that under a proper interpretation of the statute the employment offered to the claimant must be "reasonably available under an objective standard." *Simington v. Assured Transportation & Delivery,* W.C. No. 4-318-208 (I.C.A.O. March 19, 1998). Whether the offered employment was reasonably available under an objective standard is one of fact for determination by the ALJ. *Simington v. Assured Transportation & Delivery,* supra. The statute currently codified at Section 8-42-105(3)(d)(I), provides for termination of temporary disability benefits if the attending physician gives the employee a "written release to return to modified

employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." In a series of decisions, commencing with *Ragan v. Temp Force*, W.C. No. 4-216-579 (June 7, 1996), ICAO has held that Section 8-42-105(3)(d) does not authorize termination of temporary disability benefits when an employer offers work which the claimant cannot, as a practical matter, accept. *See also, Simington v. Assured Transportation, and* Delivery, *supra*; *Belanger v. Keystone Resorts, Inc*., W.C. No. 4-250-114 (October 9, 1997). These decisions hold that the legal test is whether the offered employment is "reasonably available to the claimant under an objective standard." Determination of this issue is one of fact for the ALJ. *Ragan v. Temp Force, supra*.

6. Based on Claimant's credible and persuasive testimony, it is concluded that as a practical matter Claimant could not perform the duties of the position because the duties exceeded Claimant's work restrictions. Failure to appear for work for the modified duty position under these circumstances did not provide a basis to terminate TTD.

7. Furthermore, the ALJ can find no authority for the Respondents' offer of "temporary transitional employment" to Claimant. Claimant's TTD benefits cannot be terminated for Claimant's refusal to work a modified duty position at a charitable organization which is not the Employer in this matter and at a location which is not the Employer's physical business location. Without providing statutory or regulatory authority for Respondents' offer of temporary transitional employment, Respondents argue that the temporary transitional employment was a great fit for Claimant and an effective method of paying indemnity benefits to injured workers.

8. It is concluded that as a practical matter the Metro Care Ring modified employment was not reasonably available to the Claimant. The Act does not provide for indemnity benefits to be paid to an injured worker through the creation of temporary transitional employment opportunities. Claimant was under no obligation to accept modified duty employment with an employer who was not a party to this proceeding and at a location different from the business location of the Employer in this matter. Respondents do not have authority under the Act to terminate indemnity payments or temporary transitional employment payments to Claimant when Claimant did not appear for the position at Metro Care Ring.

PALJ's Order Terminating TTD from June 9, 2016 to August 9, 2016

9. As found, it is concluded that Claimant credibly testified that she did not refuse to comply with the PALJ's order compelling her appearance at the June 9, 2016, IME appointment with Dr. Fall. Claimant credibly and persuasively testified that she had another doctor's appointment on June 9, 2016, told her attorney about the conflict and requested that he inform Respondents of Claimant's need for a rescheduled June 9 appointment with Dr. Fall. The evidence established that Claimant's attorney did not pass along Claimant's message to Respondents.

10. These events, as established by Claimant's credible testimony, did constitute a refusal to comply the PALJ's order compelling her appearance at the June 9, 2016, IME with Dr. Fall. Since Claimant's conduct missing the June 9, 2016 , appointment with Dr. Fall was shown to be a reasonable action absent any disregard or contempt for the PALJ and Respondents, it does not provide grounds to terminate Claimant's indemnity benefits from June 9, 2016, to August 9, 2016.

ORDER

It is therefore ordered that:

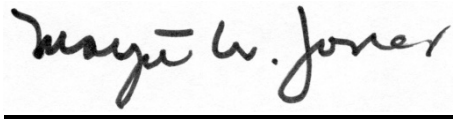
1. Respondents shall be liable to Claimant for TTD from June 2, 2016, and ongoing until terminated by law.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _June 15, 2017



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-999-925-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 13, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 6/13/17, Courtroom 1, beginning at 8:30 AM, and ending at 11:45 AM).

Claimant's Exhibits 1 through 10 were admitted into evidence, without objection, with the exception of Exhibit 6, which was rejected because it was illegible. Respondents' Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a portion of a proposed decision, concerning temporary total disability (TTD) benefits to counsel for the Claimant to be filed, electronically, and a portion of a proposed decision concerning "responsibility for termination" to counsel for the Respondents. After the referral, the ALJ decided to prepare the decision himself without the benefit of portions of the proposed decision. Therefore, the following decision is hereby issued.

ISSUES

The issues to be determined by this decision concern TTD benefits from August 10, 2015 and continuing; and, "responsibility for termination," specifically "job abandonment.

The Claimant bears the burden of proof on the issue of TTD, by a preponderance of the evidence. The Respondents bear the burden on the issue of job abandonment, by preponderant evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant (date-of-birth, April 19, 1979) worked as a manager of one of the Employer's restaurants in August 2015. She had been a store manager for 1 21/2 years.

2. On August 10, 2015, the Claimant sustained an admitted injury to her low back

3. The Respondents filed a General Admission of Liability (GAL), dated December 2, 2016, limited to medical benefits only but admitting for an average weekly wage (AWW) of $769.05, which yields a TTD rate of $512.69 per week, or $73.24 per day.

Temporary Total Disability (TTD)

4. The Claimant first saw James J. Williams, M.D., at the Clinica Colorado on August 11, 2015. Dr. Williams became the Claimant's authorized treating physician (ATP).

5. After the August 11, 2015, visit, Dr. Williams took the Claimant on and off work, by continuously extended the time off work. A review of Dr. Williams' notes reveal that he kept extending the time off work until February 15, 2016 (Respondents' Exhibit E), when he released the Claimant to full duty (Respondents' Exhibit E, bates stamp 057).

6. Claimant timely reported the work-related nature of her injury to Leticia (Lety) Garcia, who was the Claimant's supervisor. Garcia advised the Claimant to take the time she needed to recover. Thereafter, the Claimant would check-in with Garcia by text message (Respondents' Exhibit F) and Garcia told her to take the time she needed.

7. The ALJ infers and finds that Garcia approached the Claimant's admitted work injury in a humane, tolerant and management-effective way, up until it became obvious that the Claimant was not returning to work after her ATP, Dr. Williams, released her to return to work on February b15, 2016, without restrictions.

8. In a text message of October 4, 2015, from the Claimant to Garcia, the Claimant attached a note from Dr. Williams, which took the Claimant off work until August 19, 2015 (Respondents' Exhibit F, bates stamp 66). This was the last note of Dr. Williams' that Garcia received from the Claimant.

9. At one point, the Claimant told Garcia that she wanted to work at one of Manuel's stores (Manuel supervised stores other than the stores that Garcia supervised), but the Claimant never followed through with this desire. Garcia told the Claimant that she would have to talk to Manuel about working at one of his stores.

10. The Claimant admitted that she had answered interrogatories, under oath, that she was seeking TTD benefits from August 10, 2015 through February 15, 2016; and, from December 22, 2016 and continuing.

11. Despite having been released to return to work by her ATP, Dr. Williams, without restrictions, effective February 15, 2016, the Claimant has not worked since the original injury date nor has she earned an wages since that time.

Kristin Mason, M.D.

12. The Claimant came under the care and treatment of Dr. Mason on December 22, 2016. Dr. Mason took the Claimant off work at that time and has not yet released the Claimant to return to work.

Job Abandonment

13. In a written statement, dated January 26, 2016 (Respondents' Exhibit D, bates stamp 40), Lety Garcia indicated that the Claimant said she was returning to work in two months, but the Claimant never did so. Garcia never heard from the Claimant, or anyone else, that the Claimant was going to work for Manuel. Garcia did not thereafter hear from the Claimant. Consequently, Garcia assumed that the Claimant had abandoned her job.

14. The Claimant testified that she still considered herself an employee of the Employer.

15. The ALJ infers and finds that the Claimant, by her actions and inactions, voluntarily abandoned her job within two months or less from the date of Garcia's January 26, 2016 note (Respondents' Exhibit D, bates stamp 40). The ALJ infers and finds that a reasonable person should know that a long pattern of inaction and not communicating with the Employer about returning to work after an unqualified release to return to work by the ATP, as of February 15, 2016, would lead to termination from employment on the basis of job abandonment.

Ultimate Findings

16. The ALJ finds the testimony of Lety Garcia highly persuasive and credible. The Claimant's reasons for not returning to work do not add up and are, therefore, lacking in credibility.

17. Between conflicting testimonies, the ALJ makes a rational choice, based on substantial evidence, to accept the testimony of Lety Garcia and to reject any evidence to the contrary.

18. The Claimant has proven, by a preponderance of the evidence that she was temporarily and totally disabled from August 10, 2015, through February 14, 2016, both dates inclusive, a total of 189 days.

19. The Respondents have proven, by preponderant evidence that the Claimant was responsible for her termination, by virtue of voluntary and willful job abandonment , effective February 15, 2016, that a reasonable person would know or reasonably should know would lead to termination from employment. The ALJ finds a volitional act on the Claimant's part and/ or the exercise of a degree of control by the Claimant over the circumstances leading to termination. She should have returned to work on February 15, 2016, when her ATP, Dr. Williams, released her to return to work without restrictions. At a minimum, she should have let her Employer know that she was returning to work after the unqualified release to return to work.

20. Although the Claimant has proven that she has been temporarily and totally disabled since December 22, 2016, she is not entitled to TTD benefits because of her voluntary and willful job abandonment, effective February 15, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the testimony of Lety Garcia was highly persuasive and credible. The Claimant's reasons for not returning to work do not add up and are, therefore, lacking in credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App.

2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies, the ALJ made a rational choice, based on substantial evidence, to accept the testimony of Lety Garcia and to reject any evidence to the contrary.

Temporary Total Disability

c. To establish entitlement to temporary disability benefits, the Claimant must prove that the industrial injury has caused a "disability," and that she has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). Claimant's termination in this case, effective February 15, 2016, was her fault because she, as a reasonable person, knew or should have known that failure to return to work or communicate with her Employer after her ATP released her to return to work without restrictions would result in her termination from employment,. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, a claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, the Claimant was temporarily and totally disabled from August 10, 2015, through February 14, 2016, both dates inclusive, a total of 189 days. As further found, although she has been temporarily and totally disabled since December 22, 2016, she is not entitled to TTD benefits for this period since she was responsible for her termination by virtue of a voluntary and willful job abandonment, effective February 15 2016.

d. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, modified

employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, the Claimant was temporarily and totally disabled from August 10, 2015, through February 14, 2016, both dates inclusive, a total of 189 days. Although she has been temporarily and totally disabled since December 22, 2016, she is not entitled to TTD benefits for this period since she was responsible for her termination by virtue of a voluntary and willful job abandonment, effective February 15 2016.

Responsibility for Termination

e. Section 8-42-105 (4), C.R.S., provides that an employee responsible for her own termination is not entitled to temporary disability benefits. This statutory provision has been interpreted to mean that "responsibility for termination" must be through a volitional act on the part of the terminated employee. *Colorado Springs Disposal v. Indus. Claim Appeals Office,* 58 P. 3d 1061 (Colo. App. 2002). A finding of fault requires a volitional act or the exercise of a degree of control by a claimant over the circumstances leading to termination. *Gilmore v. Indus. Claim Appeals Office,* 187 P.3d 1129, 1132 (Colo. App. 2008); *Apex Transport, Inc. v. Indus. Claim Appeals Office,* **2014 COA 25.** In determining whether a claimant is responsible, the ALJ may be required to evaluate competing factual theories concerning the actual reason or reasons for the termination. *See Rodriguez v. BMC West*, W.C. No. 4-538-788 [Indus. Claim Appeals Office (ICAO), June 25, 2003]. The Supreme Court has determined that the "responsibility for termination" defense is not absolute and is vitiated when a worsening of condition occurs. *Anderson v. Longmont Toyota,* 102 P. 3d 323 (Colo. 2004). As found, there was a volitional act on the Claimant's part and/ or the exercise of a degree of control by the Claimant over the circumstances leading to termination. She should have returned to work on February 15, 2016, when her ATP, Dr. Williams, released her to return to work without restrictions. At a minimum, she should have let her Employer know that she was returning to work after the unqualified release to return to work.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979).

People v. M.A., 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has proven TTD from August 10, 2015, through February 14, 2016, both dates inclusive, a total of 189 days. The Respondents have proven "responsibility for termination," effective February 15, 2016. In light of this, although the Claimant has been temporarily and totally disabled since December 22, 2016, she is not entitled to TTD benefits from December 22, 2016 onward.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the Claimant temporary total disability benefits from August 10, 2015, through February 14, 2015, both dates inclusive, a total of 189 days, at the rate of $512.69 per week, or $73.24 per day, in the aggregate amount of $13,842.76, which is payable retroactively and forthwith.

B. Any and all claims for temporary disability benefits from February 15, 2016 and continuing are hereby denied and dismissed.

C. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

D. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

FINDINGS OF FACT

1. The *pro se* Claimant filed an Application for Hearing contesting Respondents' Final Admission of Liability with regard to maintenance medical benefits.

2. The record reflects [Exhibit "D"] that there was a prehearing conference at which Prehearing Administrative Law Judge (PALJ); John Steninger issued an Order compelling discovery, specifically requiring the Claimant to answer Respondents' Interrogatories and Requests for Production of Documents.

3. A hearing was held on May 3, 2017 in Colorado Springs, Colorado during which this ALJ presided. At the commencement of the May 3, 2017 hearing, Respondents moved to dismiss the case for Claimant's failure to provide the requested discovery compelled by PALJ Steninger. Claimant argued that he was confused about the Interrogatories, the Requests for Production of Documents and the Order issued by Judge Steninger. Claimant thought the interrogatories constituted the questions that would be asked at the time of the hearing. Despite the PALJ Steninger's clear Order, the undersigned ALJ elected grant Claimant an extension of time of up to 45 days to fully respond to Respondents' Interrogatories and Requests for Production of Documents and proceed to hearing.

4. The new hearing of June 8, 2017 was scheduled by Claimant and Respondents' counsel with the Office of Administrative Courts in Colorado Springs on May 3, 2017.

5. At the May 3, 2017 hearing, the undersigned ALJ gave detailed instructions to Claimant regarding his obligations to provide adequate Responses to the Interrogatories and Requests for Production of Documents. The undersigned also warned Claimant that his failure to fully answer the Interrogatories and Requests for Production of Documents would probably invoke sanctions, including the sanction of dismissal of his claim, with prejudice. Claimant was given a chance to clarify any questions he had regarding the requested discovery with Respondents' counsel and to use the Courtroom for as long as necessary to assure his understanding of what was being asked of him.

6. At the June 8, 2017 hearing, Respondents' counsel represented to the ALJ that no responses had been provided to the Interrogatories and Requests for Production of Documents and that there had been no further contact from Claimant since the May 3, 2017 hearing. Claimant has not been absolved of the duty to respond to Respondents' discovery and the OAC file is devoid of any request of Claimant for

further extensions of time of other relief concerning his obligation to answer the propounded discovery and provide requested documents.

7. The June 8, 2017 hearing was properly noticed by the Office of Administrative Courts.

8. Claimant, having been advised of his obligations to provide written responses to Respondents' Interrogatories and the consequences of not responding to the discovery, has willfully and knowingly failed to provide discovery responses and is in violation of PALJ Steninger's Order compelling discovery and this ALJ's Order compelling the same. Respondents renewed their motion to dismiss the Claimant's claim, with prejudice, for a violation of the Division of Workers' Compensation and Office of Administrative Courts Orders.

9. The ALJ finds that the Claimant has been given adequate opportunities to respond to Respondents' discovery and two extensions of time to provide written responses. The Claimant has failed to comply with the outstanding Orders regarding discovery and was fully advised of the consequences of failing to respond to written Order of the Division of Workers' Compensation and verbal advisements from this ALJ provided during the May 3, 2017 hearing which was continued to June 8, 2017.

CONCLUSIONS OF LAW

A. The ALJ concludes that the Claimant's failure to comply with his discovery obligations and the Orders of the Division of Workers' Compensation and Office of Administrative Courts constitutes a substantial disregard of responsibility to provide discovery under those Orders. W.C.R.P. 9 and C.R.S., §8-43-207(1)(e). The ALJ, therefore, concludes that the appropriate sanction is dismissal of the claim, with prejudice.

B. W.C.R.P. 9-1(E) provides that:

> if any party fails to comply with the provisions of this rule and any action governed by it, the administrative law judge may impose sanctions upon such party pursuant to statute and rule.

C. Claimant's discovery violations are "willful" in that Claimant exhibited "a flagrant disregard of discovery obligations." *Reed v. Industrial Claims Appeals Office,* 13 P.3d 810, 813 (Colo. App. 2000). W.C.R.P. 9-1(G) also provides that the failure to comply with an Order to Compel shall be presumed willful.

D. Whether to impose sanctions and the nature of the sanctions to be imposed are matters within the fact finders' discretion. *Shafer Commercial Seating, Inc. v. Industrial Claim Appeals Office,* 85 P.3d 619 (Colo. App. 2003). The ALJ is given flexibility in choosing the appropriate sanction.

E. In concluding that dismissal of the claim, with prejudice, is an appropriate sanction for Claimant's flagrant disregard of both the verbal advisements of the undersigned ALJ and the written Order of PALJ Steninger compelling discovery, the ALJ finds the case of *John I. Powderly, III v. City of Golden,* W.C. No. 4-936-681-02 (2015), instructive. In *Powderly*, the claimant failed to comply with discovery orders of the Division of Workers' Compensation and subsequent Orders compelling discovery by the merits ALJ at the Office of Administrative Courts. In that case, the Claimant did provide inadequate responses and, after several chances to provide adequate responses, his claims were dismissed with prejudice. Here, there has no attempt by the Claimant to comply with the Orders compelling discovery by both the PALJ and the undersigned ALJ assigned to this case. As noted in *Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991), "[a] court is justified in imposing a sanction which terminates litigation at the discovery phase if a party's disobedience of discovery orders is intentional or deliberate or if the party's conduct manifests either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations." *Sheid v. Hewlett Packard*, 826 P.2d at 399. Here, as in *Powderly*, Claimant has had multiple opportunities to comply with the discovery orders issued by both the Division of Workers Compensation and the Office of Administrative Courts and yet, he has chosen to willfully disregard those orders. Moreover, without explanation Claimant failed to appear for his hearing on the date he set with the assistance of court clerk. Based upon the totality of the circumstances, the willfulness of the violation of the Orders and the flagrant disregard of discovery obligations, the ALJ concludes that the appropriate sanction is dismissal of the claim, with prejudice.

ORDER

IT IS, THEREFORE, ORDERED:

1. Claimant's claim for further benefits under the Colorado Workers' Compensation Act are hereby denied and dismissed.

DATED: June 20, 2017

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

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as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffers from a worsened condition causally related to her January 4, 2011 work related injury to allow a reopening of the claim.

2. If Claimant has established a worsening of condition, whether Claimant has established an entitlement to temporary total disability benefits from September 8, 2016 through January 8, 2017 and from January 24, 2017 and ongoing.

3. If Claimant has established a worsening of condition, whether Claimant is entitled to an additional cervical MRI and additional referral to a physiatrist under the claim.

FINDINGS OF FACT

1. Claimant was employed by Employer as an administrative technician on January 4, 2011.

2. On January 4, 2011 Claimant sustained a fall when she slipped and fell on ice while holding groceries for a breakfast meeting and attempting to reach out to use her key badge to enter the building.

3. Claimant testified that she had scrapes on her knees and right arm and hand and believes that her right extremity took the brunt of the fall.

4. Claimant reported the injury and was referred for medical treatment.

5. After initial conservative treatment, Claimant underwent a right shoulder arthroscopic subacromial decompression and distal clavicle resection on August 4, 2011.

6. Claimant's authorized treating provider, Greg Smith, D.O. placed Claimant at maximum medical improvement (MMI) on June 26, 2012 and provided a 6% scheduled impairment rating for the right upper extremity.

7. On August 13, 2012 Respondents filed a final admission of liability (FAL) consistent with Dr. Smith's opinions on MMI and impairment. *See* Exhibit 1.

8. Claimant objected and requested a division independent medical examination (DIME).

9. On November 30, 2012 Claimant underwent a DIME performed by Kristen Mason, M.D. Dr. Mason concluded that Claimant was not at MMI and recommended that Claimant undergo evaluation of the cervical spine and an EMG study due to concern for cervical radiculopathy. Dr. Mason also wanted to rule out infection. *See* Exhibit U.

10. Following the DIME, Claimant returned to Dr. Smith who ordered an EMG and a cervical MRI. Dr. Smith also referred Claimant to orthopedic surgeon Craig Davis, M.D.

11. On December 20, 2012 Claimant underwent a cervical MRI interpreted by Eduardo Seda, M.D. Dr. Seda provided the impression of mild degenerative disc changes. *See* Exhibits HH, G.

12. On January 25, 2013 Claimant was evaluated by George Schakaraschwili, M.D. Claimant reported occasional numbness down the extensor forearm into the hand affecting mainly the last three fingers and some tingling in her hands at night. Claimant reported some neck pain, with aching from the base of the skull along the right upper trapezius to the shoulder, aching pain in the upper arm, and numbness in the lateral arm and hand with pain at a 5/10 up to an 8/10. Dr. Schakaraschwili performed electro diagnostic studies that were normal with no electrophysiologic evidence of a right cervical radiculopathy or peripheral nerve entrapment in the right upper extremity. *See* Exhibit AA.

13. On March 4, 2013, Claimant was evaluated by Dr. Davis. Dr. Davis performed a physical examination and noted full range of motion of the right shoulder but pain with resisted forward elevation. Dr. Davis found positive Hawkins and neer impingement tests and tenderness over the biceps tendon and around the trapezial area. Dr. Davis assessed: possible residual bicep tendinitis following the shoulder injury and shoulder acromioplasty. Dr. Davis recommended a subacromial and/or intra-articular injection to help localize the site of the pain and opined that if Claimant received significant relief from one or both of the injections, it would be reasonable to consider a biceps tenotomy surgery. *See* Exhibit X.

14. On March 18, 2013 Claimant was evaluated by Dr. Davis. Claimant reported no benefit from her last injection and that she felt like it made her shoulder a little worse. Claimant reported continued pain over the anterior and lateral shoulder area, worse when reaching to the side or overhead. Dr. Davis noted that he did not have the impression that surgery would help Claimant, but that he was concerned about the level of Claimant's pain. *See* Exhibit X.

15. On April 30, 2013 Claimant was evaluated by Dr. Davis. He noted that Claimant was ready to proceed with arthroscopic evaluation with biceps tenotomy. Dr. Davis noted that he would reassess the acromioplasty and look at the rotator cuff and treat any pathology he encountered as appropriate. He noted that hopefully, the surgery would be helpful for Claimant. *See* Exhibit X.

16. On September 10, 2013 Claimant was evaluated by Dr. Davis. Dr. Davis noted that Claimant had finally decided that, despite the uncertainties, she would like to proceed with arthroscopic evaluation of her right shoulder with biceps tenotomy. Dr. Davis noted that Claimant had continued pain in a variety of areas around her shoulder, but somewhat more anterior than posterior. Dr. Davis again discussed risks, benefits, and uncertainties and noted the plan for a simple arthroscopic evaluation with biceps tenotomy. *See* Exhibit X.

17. On October 21, 2013 Claimant underwent a right shoulder partial synovectomy and biceps tenotomy and debridement and subacromial debridement performed by Dr. Davis. Following this second surgery, Claimant underwent physical therapy and massage therapy. *See* Exhibit X.

18. On February 25, 2014 Claimant was evaluated by Dr. Davis. Dr. Davis noted that Claimant was four months postop and reporting that she felt much better than she did before surgery. Dr. Davis found continued slightly decreased strength against resistance in forward elevation and abduction of the right shoulder and some cramping in the biceps which was not uncommon following biceps tenotomy. Dr. Davis released Claimant to occupational medicine and noted Claimant was approaching MMI. *See* Exhibit X.

19. On April 22, 2014 Claimant underwent a functional abilities evaluation (FAE) performed by BTe Technologies. Claimant reported pain levels at a 7/10. Claimant reported increased symptoms with taking off shirts overhead, fastening/unfastening her bra, increased right upper arm cramping while showering, increased symptoms lifting/pouring a gallon of milk, increased right upper extremity symptoms with peeling potatoes, vacuuming, washing windows/mirrors, spasms of right upper arm while loading the dishwasher, right arm cramping with long driving and at times needing to stop/stretch her right arm and shoulder. On right shoulder range of motion testing, Claimant was noted to have the greatest symptom aggravation with internal and external rotation with 39% of normal and 56% of normal respectively. Claimant displayed a normal hand grip strength on the left at 46.9 pounds average force and a hand grip strength on the right of 23.6 pounds average force which was significantly below the considered normal range of 54.2 to 77.4 pounds. *See* Exhibit 10.

20. On April 28, 2014 Claimant was evaluated by Dr. Smith. Dr. Smith assessed status post surgical repair of the right shoulder with re-inflammation and partial tearing and status post right shoulder repair by Dr. Davis on October 21, 2013. Dr. Smith opined that Claimant was at MMI. Dr. Smith performed an impairment rating. Dr. Smith opined that Claimant had a 9% upper extremity impairment. Dr. Smith recommended maintenance care that included Naprosyn twice a day for three years, follow up with Dr. Davis four times per year for three years for any injections needed, and follow up with him five times per year for two years. Dr. Smith also recommended 10 massage therapies per year for the next three years. *See* Exhibit 6.

21. On May 20, 2014 Claimant returned to Dr. Mason for a follow-up DIME. Dr. Mason noted that she previously was concerned about the possibility of cervical radiculopathy and wanted Claimant to have infection ruled out. Claimant reported that she had the additional workup and had a subsequent surgery and that she had generally decreased shoulder pain but sometimes swelling and spasm and that she continued to have some neck pain as well. Claimant reported occasional right upper extremity numbness with massage therapy being the most helpful treatment. Dr. Mason noted a positive history of past depression. Claimant reported generally still having some difficulty sleeping but that it was somewhat better. Dr. Mason reviewed medical records and performed a physical examination. Dr. Mason found right biceps tendon deep reflexes decreased, mild deformity of the right biceps, and very, very minimal weakness of the biceps and deltoids, tenderness over the sternoclavicular area, tenderness over the bicipital area, and reduced range of motion. Dr. Mason opined that Claimant had quite a bit of myofascial banding and tightness in the parascapular and paraspinal muscles in the cervical spine with reduced cervical range of motion with Claimant consistently tighter and more tender on the right side, particularly in the trapezius area. *See* Exhibits U, 8.

22. Dr. Mason opined that Claimant reached MMI on April 24, 2014. Dr. Mason opined that Claimant had some significant cervical myofascial pain as a result of the injury without a specific table 53 diagnosis and opined that she could rate the loss of cervical range of motion without a table 53 diagnosis if it was felt that there was significance to the deficit, which she felt there was. Dr. Mason thus rated the cervical spine impairment at 6% whole person and the right upper extremity impairment at 19% upper extremity. Dr. Mason agreed with Dr. Smith's outline for maintenance care except that she recommended massage once per month and recommended an ergonomic evaluation of the current job site to make sure Claimant did not experience any unnecessary exacerbation. *See* Exhibits U, 8.

23. On July 3, 2014 Respondents filed a FAL consistent with Dr. Mason's May 20, 2014 follow-up DIME. *See* Exhibit 2.

24. On December 5, 2014 Claimant was evaluated by Dr. Smith for her first maintenance visit. Claimant reported taking Naprosyn twice a day had been helping and beneficial. Claimant reported that she was working. Dr. Smith noted on examination that Claimant still had some mild pain against forced resistance above 90 to 100 degrees and decreased range of motion in internal and external rotation. He noted muscle strength was limited on the right side against forced resistance. Dr. Smith found good muscle tone in the trapezius, biceps, and deltoid, although he noted diminished strength. Dr. Smith noted some pain along the cervical spine especially from the right side radiating out laterally to the AC joint and to the situs of the deltoid on the right shoulder. Dr. Smith recommended Claimant continue with massage and with lifting restrictions and that she follow up again in two to three months. *See* Exhibit 6.

25. On March 4, 2015 Claimant was evaluated by Dr. Smith. Claimant reported that she was working as much as she could but having more difficulty than she

had previously. Claimant reported having trouble sleeping with her greatest amount of pain concentrated in the right shoulder region and at the nape of the neck radiating down into the triceps and biceps with a pain level of 5/10. On examination, Dr. Smith noted pain at the subscapular muscle with inflammation and that lifting 90 to 100 degrees elicited pain. Dr. Smith found minimal crepitance, more in the triceps and the biceps itself. Dr. Smith recommended Claimant continue with massage and with lifting restrictions and that she follow up in two to three months. *See* Exhibit 6.

26. On May 29, 2015 Claimant was evaluated by Dr. Smith. Claimant reported that her main pain was that her right arm was sore and that she was now having pain in the bicipital region again. Claimant reported that she was working some light duty but having some difficulty, getting irritated, and feeling somewhat depressed. Claimant reported being tired and down quite a bit especially with the pain in her right arm and her hand and that she felt like she was not getting any better. Claimant reported feeling good for a couple of days and then that the pain may return. Claimant reported on a good day the pain was up to a 5/10 but that it may jump to an 8/10. Claimant reported going to massage once per week and that if she missed a week she was worse. Dr. Smith noted on examination some ropiness in the medial side of her right arm with pain in the biceps insertion site. Dr. Smith noted his concern included Claimant's lack of strength in the right arm with some mild pain radiating up into the nape of her neck and felt it was due to lack of usage. Dr. Smith recommended Claimant get back in the pool for swimming and opined that two to three days of pool therapy would do well for Claimant. Dr. Smith provided Viibryd, an anti-depressant, and continued Claimant's lifting restrictions. Dr. Smith recommended Claimant see Dr. Hawkins for psychological management to see if that helped. *See* Exhibit 6.

27. On July 2, 2015 Claimant was evaluated by Dr. Smith. Claimant reported her chief complaint was still her right shoulder. Claimant reported pain along the ulnar nerve that started under her biceps and went down over the elbow and along the ulnar nerve into her hand. Claimant reported that during the morning, the pain woke her up. Claimant reported not wanting to be on any antidepressants including the Viibryd and that she would prefer to forego the Viibryd if at all possible. Claimant reported taking Vitamin D. Claimant was having difficulty at work with one of her supervisors, had recently received a low mark, and reported that the new supervisor liked to micromanage and was causing stress. Claimant reported that she was going to massage once per week which was beneficial and that she was no longer using the Naproxen unless she had a very bad day. On examination, Dr. Smith found mild carpal tunnel syndrome, and pain on flexion and extension of the right shoulder above 120 degrees. Dr. Smith found muscle spasms in the trapezius and the capitus that was most likely stress related and opined that Claimant was under so much stress that it was causing part of the problem. Dr. Smith assessed increased stress causing some pain with somatic dysfunction. He maintained her work restrictions and recommended she continue the anti-depressant Viibryd but noted that it was up to her. *See* Exhibit 6.

28. On July 17, 2015 Claimant was evaluated by Dr. Davis. Dr. Davis noted he had last seen Claimant in February when he released her following shoulder

debridement and biceps tenotomy and that at the time he released Claimant she was still having a variety of myofascial complaints around her shoulder, although she was getting better. Claimant reported that since February, she continued to have achy pain in her shoulder as well as intermittent cramping of the biceps and that recently she also had been getting tingling in her fingers which was worse at night particularly when lying on the right side. Dr. Davis performed a physical examination and found full range of motion in the shoulder with excellent strength but with some pain with resisted motions and slightly positive impingement signs. Dr. Davis noted that Claimant's right biceps was distally retracted as expected following biceps tenotomy surgery. Dr. Davis found full range of motion of the elbow, wrist, and hand but that the median nerve compression test was positive at the wrist. Dr. Davis provided the impression of: persistent myofascial pain of the right upper extremity following shoulder debridement and biceps tenotomy and some symptoms of early carpal tunnel syndrome. Dr. Davis provided an injection into Claimant's right carpal tunnel. Dr. Davis noted that Claimant seemed to have a lot of myofacial pain in the entire right upper extremity and opined that he was not sure he had much more to add to Claimant's care. Dr. Davis prescribed Vicodin. *See* Exhibits X, 9.

29. On July 30, 2015 Claimant underwent a second FAE performed by BTe Technologies. The overall impressions indicate that Claimant's overall functional capacity and tolerances had declined since the original evaluation in April of 2014. It was noted that Claimant was tearful on several occasions during the testing when discussing limitations and functional status. Claimant reported her lowest pain in the last 30 days at a 6/10 and her highest at a 10/10. Claimant again reported limitations with activities of daily living. On grip strength testing, Claimant had an average force of 37.8 pounds for the left hand which was below the normal range and lower than her prior FAE. Claimant also had an average force of 17.1 pounds for the right hand which was significantly below the normal range and lower than her prior FAE. *See* Exhibit 10.

30. On August 12, 2015 Claimant was evaluated by Dr. Smith. Claimant reported that she was working but only lifting five pounds. Claimant reported having both Vicodin and Naprosyn if she needed it but that she tried not to take it very often. Claimant reported significant pain in her shoulder at an 8/10. Claimant reported that if she touched it in certain areas it almost seemed like a paralysis over the radial nerve for a short period of time and then it released itself. Claimant reported that Dr. Davis felt there was nothing left to do. On examination, Dr. Smith found that Claimant's radial nerve was in spasm. The Phalens test for carpal tunnel was positive. Dr. Smith noted that Claimant's primary care physician might have Claimant do some injections, but that it would not be in Claimant's surgical site. Dr. Smith noted adequate muscle strength but above chest height that Claimant began to have pain. Dr. Smith found no pure radiculopathy or neuropathy unless there was compression of the nerve and found Claimant to have good vascular flow throughout. Dr. Smith continued to assess increased stress causing some pain with somatic dysfunction and noted that Claimant was okay on her medications and would continue working within her restrictions. Dr. Smith noted that Claimant would follow up in three to four weeks at which time he anticipated doing an impairment rating. *See* Exhibit 6.

31. On September 9, 2015 Claimant was evaluated by Dr. Smith. Dr. Smith noted that Claimant had essentially plateaued and that she was not getting better or worse and was ready to be discharged. Dr. Smith noted that Claimant was working. Claimant reported continued weakness in her right hand along with pain in her shoulder and that she was doing well on Lodine medication. Dr. Smith performed an impairment rating and opined that it was at 11% upper extremity impairment without taking her neck into account. Dr. Smith noted that he discussed the case with Claimant's lawyer and that there may be some discussion regarding Claimant's neck but that the neck was not taken into account. Dr. Smith continued to assess increased stress causing some pain with somatic dysfunction. Dr. Smith refilled her Lodine, noted he would follow up with Claimant on an as needed basis, and recommended maintenance with Dr. Davis (including injections, and possible surgical intervention if needed), massage therapy for two years, a one year gym membership, and follow up with him for two years for medication adjustments. *See* Exhibit 6.

32. On November 20, 2015 Claimant was evaluated by Jonathan Bloch, D.O. Claimant reported intolerable diffuse pain radiating throughout the entire right arm from the shoulder to the fingers that was vague. Claimant reported ongoing pain and weakness and that she was now starting to drop things. Dr. Bloch noted that she had a normal EMG in 2013. Dr. Bloch found on examination that Claimant's arm was diffusely tender especially around the wrist region. Dr. Bloch found a little bit of thenar trophy bilaterally as well as mild osteoarthritic deformities. Otherwise, his examination was not remarkable. *See* Exhibit 6.

33. Dr. Bloch opined that Claimant was still at MMI, that there was no change in disposition from MMI except for Claimant's increased subjective pain. Dr. Bloch noted that an EMG would be ordered to see if there was carpal tunnel or cubital tunnel and that should the EMG be unremarkable, Claimant would certainly remain at MMI. For the shoulder, Dr. Bloch noted that it was possible that Claimant was having some myofascial irritations but that Claimant was having that prior to MMI which is the purpose of an impairment rating and permanent work restrictions and that it did not denote any sort of a change from MMI or reason to reopen the case. Dr. Bloch opined that Claimant was still at MMI. Dr. Bloch noted that if the EMG was positive, Claimant might need to open another case for carpal tunnel syndrome but noted that he did not see any cumulative trauma risk for carpal tunnel syndrome per the guidelines. *See* Exhibit 6.

34. On December 1, 2015 Claimant was evaluated by Dr. Davis. Claimant reported no improvement in her right hand following the carpal tunnel injection performed in July. Claimant reported that she thought her arm was getting steadily worse and reported diffuse pain involving her neck, trapezial area, upper back, upper chest and radiation down the upper arm, forearm, and hand involving multiple digits. Claimant reported getting weak without much numbness or tingling. Claimant reported that she was working but having difficulty because she couldn't use her hand. Dr. Davis noted that electrodiagnostic testing had been ordered but was not done yet. On

examination, Dr. Davis found supple range of motion of the shoulder, elbow, wrist, and hand with smooth range of motion and good strength in all muscle groups. Dr. Davis noted that Claimant had pain with resisted motions in just about all directions and tenderness diffusely in the shoulder girdle. Dr. Davis noted subjectively that Claimant's grip was extremely weak compared to the opposite side and that Claimant had some weakness of finger abduction strength. Dr. Davis provided the impression of: diffuse myofascial pain of the entire right upper extremity not well localized to one area. Dr. Davis doubted that the electrodiagnostic testing would show much, but agreed with doing the testing. Dr. Davis noted that it might be worth seeing a rheumatologist outside of the workers' compensation system. Dr. Davis opined that Claimant did not have any sort of surgical problem and released Claimant back to Dr. Smith. Dr. Davis noted that if the nerve study showed something definitive he would be happy to see Claimant again. *See* Exhibits X, 9.

35. On December 22, 2015 Claimant was evaluated by Robert Kawasaki, M.D. Claimant reported that she had pain in her right biceps area since an October 2013 surgery with some shooting pain into her right forearm and entire right hand. Claimant reported difficulty gripping items due to pain in wrists and weakness. Claimant reported some pain with wrist rotation and diffuse wrist pain maximally at the ulnar styloid region. Claimant reported pain in the right shoulder girdle region, pain and burning sensations at the biceps, and aching throbbing sensations throughout her right forearm, wrist and hand. Claimant reported pain levels with a lowest level of 8/10 and highest of 9/10. Dr. Kawasaki performed a physical examination and also conducted an EMG/NCV study. On examination he found some tenderness to palpation in the right posterior cervical musculature into the shoulder girdle and trapezial region and pectoral and interscapular areas, mild limitation with cervical flexion, cervical rotation toward the right and left, and increased pain at the end range of cervical extension. He found tenderness to palpation over the acromioclavicular joint and along the anterior right shoulder region, diffuse tenderness to palpation along the proximal extensor forearm, diffuse tenderness through the wrist along the ulnar styloid, some limitation of wrist motion with flexion, extension, and radial deviation and ulnar deviation. Dr. Kawasaki found positive carpal tunnel compression signs with pain, numbness, and tingling into Claimant's hand and positive tinel's testing at the carpal tunnel region. *See* Exhibits Z, 12.

36. Dr. Kawasaki opined that the EMG/NCV testing was a normal study and that there was no evidence of right cervical radiculopathy, brachial plexopathy, or compression neuropathy. Dr. Kawasaki opined that there was not much more to offer Claimant treatment wise. *See* Exhibits Z, 12.

37. On October 3, 2016 Claimant was evaluated by Dr. Davis. Dr. Davis noted that he had performed a biceps tenotomy in 2014 and that Claimant got a bit better but always had some persistent pain and spasm of the biceps muscle and that he last saw Claimant about a year ago when Claimant had developed some numbness in her hand. Claimant reported that over the last year, she developed gradual loss of the use of her hand with severe pain extending from her neck all the way down her arm with

spasm of the biceps muscle and weakness of the hand and severe pain in all four extremities. Claimant reported that she had been diagnosed by her primary care physician with fibromyalgia. Dr. Davis performed a physical examination and provided the impression of diffuse right upper extremity pain not improved despite extensive treatment both conservative and surgical. Dr. Davis opined that further surgical intervention was not likely to be beneficial. Dr. Davis opined that Claimant had pain in all four extremities which was reminiscent of fibromyalgia and that it would be reasonable to be evaluated by a rheumatologist under private insurance. Dr. Davis released Claimant from his care. *See* Exhibit X.

38. On November 8, 2016 a letter was sent to Robert Broghammer, M.D. from Insurer. The letter noted that Dr. Smith had retired and that Claimant had elected Dr. Broghammer as her new authorized treating physician. The letter asked Dr. Broghammer to indicate which, if any, of Claimant's current diagnoses were related to the original injury; what sorts of treatment, if any, were recommended; and whether the treatment recommendations were considered to be maintenance care. *See* Exhibit V.

39. On November 16, 2016 Dr. Broghammer performed a medical records review and issued a report. Dr. Broghammer opined that Claimant had undergone appropriate treatment and he agreed with the permanent impairment rating assigned by DIME physician Dr. Mason. He assessed Claimant with: remote history of right shoulder scope with acromioplast, distal clavicle excision, and subacromial decompression; remote history of biceps tenotomy; and idiopathic ongoing right upper extremity pain of unclear etiology. Dr. Broghammer opined that Claimant's ongoing subjective complaints of pain and paresthesias regarding the right upper extremity were not related to Claimant's injury. Dr. Broghammer opined that the ongoing subjective symptom complex was not related to the remote injury but was due to other factors unrelated including, but not limited to, psychosocial factors and somatic dysfunction. Dr. Broghammer noted the completely normal workup following the surgeries including a normal cervical MRI and two normal nerve conduction studies. Dr. Broghammer opined that no further treatment was necessary, recommended, or warranted under the auspices of the workers' compensation system. Dr. Broghammer opined that no further treatment was necessary, recommended, or warranted given Claimant's failure to respond to any treatment thus far and given her ongoing and increasing complaints. Dr. Broghammer opined that no further maintenance care was necessary, recommended, or warranted and that there was nothing further to treat. *See* Exhibit V.

40. On December 6, 2016 Claimant visited Dr. Davis to discuss a couple of issues. Claimant reported that her symptoms had not changed. Dr. Davis recommended that Claimant see a physiatrist and specifically recommended Dr. Ogin for pain management and Dr. Bray for rheumatology. Dr. Davis agreed with Claimant that holistic modalities including acupuncture, reflexology, and chiropractic treatment may be of some benefit. Claimant asked about further imaging but Dr. Davis opined that additional imaging was not likely to be of benefit to Claimant. *See* Exhibit 9.

41. On January 4, 2017 Claimant filed a petition to reopen the claim based on worsening and change of condition. Claimant attached Dr. Smith's September 9, 2015 report to the petition. Claimant alleges that her work related condition began worsening in May of 2015 and is requesting her claim be reopened. *See* Exhibit 4.

42. On February 28, 2017 Claimant underwent an independent medical evaluation performed by John Raschbacher, M.D. Claimant reported taking cymbalta and nortriptyline for the past four months. Claimant reported that due to her increased pain levels she had been diagnosed by her primary care physician with fibromyalgia. Claimant reported that she was losing the use of her right upper extremity, got spasms and cramping, and was always in pain. Claimant reported that her pain level was daily at an 8/10. Claimant reported past anxiety and depression for which she underwent treatment. Dr. Raschbacher reviewed medical records and performed a physical examination. Dr. Raschbacher assessed: history of slip and fall with persistent right upper extremity pain complaints. Dr. Raschbacher noted that two days after the reported fall in 2011, Claimant had full range of motion of the right shoulder, 5/5 strength in the right upper extremity, and no outward visible sign of trauma. *See* Exhibit T.

43. Dr. Raschbacher noted that Claimant had been found to be at MMI on multiple occasions by Dr. Smith, although on the third occasion that Dr. Smith found her at MMI it was not clear that the previous MMI was ever rescinded and that it was confusing and not well defined by Dr. Smith. Dr. Raschbacher noted that at the follow up DIME, Dr. Mason opined that Claimant was at MMI as of April 24, 2014. *See* Exhibit T.

44. Dr. Raschbacher agreed with the MMI date of April 24, 2014. Dr. Raschbacher opined that Claimant had not had a change in condition based on an objective basis. Dr. Raschbacher opined that Claimant's subjective complaints were vastly out of proportion to the paucity of objective findings. Dr. Raschbacher noted the great deal of treatment with Claimant's reports of functional abilities that were deteriorated. Dr. Raschbacher opined that any further treatment was not likely to produce changes in Claimant's subjective complaints or reports of functional abilities. Dr. Raschbacher opined that Claimant's reported inability to tolerate a sedentary position did not make much sense medically. *See* Exhibit T.

45. Dr. Raschbacher testified at hearing consistent with his report. Dr. Raschbacher noted that when Claimant was injured in January of 2011 she had no swelling, no lacerations, no bruising, full range of motion at the right shoulder, and no signs of outward trauma. He noted that during surgery, a surgeon went into Claimant's shoulder with a scope and looked/probed and noted no rotator cuff tear at all. Dr. Raschbacher opined that after extensive treatment and after Claimant reached MMI in April of 2014 there was nothing objective to support a worsening. Dr. Raschbacher opined that only Claimant's subjective reports indicate worsening. Dr. Raschbacher opined that there was no objective basis for Claimant's symptoms and that the symptoms she reported did not medically make sense.

46. Dr. Raschbacher noted that Claimant had an unremarkable cervical MRI and two normal EMGs. Dr. Raschbacher noted that Claimant had been diagnosed with fibromyalgia with is a chronic pain condition with spontaneous onset and opined that the fibromyalgia was not caused by surgery or trauma and was not related to Claimant's January, 2011 work injury. Dr. Raschbacher opined that any further treatment was not likely to improve Claimant's condition.

47. Claimant also testified at hearing. Claimant reported that after being placed at MMI in April of 2014, she was still having severe pain and started losing feeling in her right extremity and feeling pain in her forearm and hand that ached and that she believed seemed to be stemming from the clavicle and shoulder. Claimant testified that she saw Dr. Smith because she was having trouble sleeping and because her right arm was getting numb. Claimant testified that she was worse now compared to April of 2014 and that her ability now was less. Claimant testified that she was diagnosed with fibromyalgia and depression and was not sure if the conditions were considered work related by the doctors.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is

subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo.App. 2000).

Reopening and Change of Condition

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of change in condition. The claimant shoulders the burden of proving her condition has changed and her entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S.; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Claimant has failed to meet her burden to establish that her condition has changed sufficient to reopen her claim. Claimant has failed to establish, more likely than not, that there was a change in the condition of her original compensable injury or a change in her physical or mental condition causally related to the January 4, 2011 injury.

As found above, in April of 2014 when Claimant was placed at MMI she reported pain at a 7/10 level, difficulties in many of her activities of daily living, and difficulty sleeping. Claimant was prescribed and was taking Naproxen a non steroid anti-inflammatory. Claimant was noted to have mild deformity in her biceps, had undergone a bicep tenotomy, and Claimant’s cervical spine was rated due to the significant deficit found by DIME physician Dr. Mason. During the period of time Claimant is alleging worsening of her condition, and beginning in May of 2015, Claimant had continued pain that she reported was at a 5/10 and jumped sometimes to 8/10. Claimant had continued deformity noted as “ropiness” in her biceps by Dr. Smith which was consistent with the surgery of bicep tenotomy. In July of 2015 Claimant was noted to no longer be taking Naproxen like she had been taking in April of 2014 when she was placed at MMI.

In July and August of 2015 Dr. Davis noted that Claimant had continued symptoms and persistent pain and did not note any new work related symptoms.

Claimant argues that she had increased pain and symptoms to justify reopening her claim. Claimant points to records from Dr. Smith during May-August of 2015 as well as to the second FAE performed in July of 2015. Claimant argues that her increased subjective reports of pain combined with noted ropiness of her bicep, spasm in the median and ulnar nerve, decreased strength and range of motion in her right upper extremity, diminished FAE ability, and recommendations during this time for psychological counseling and use of Viibryd along with the recommendations for an examination with a physiatrist and EMG studies support her contention that she worsened during this period of time. This is not found persuasive. The ropiness of the bicep is found to be consistent with the tenotomy procedure she underwent prior to this period of time and also consistent with the noted deformity found by the DIME physician at MMI. The spasm of the median and ulnar nerve have not been shown to be causally related to the work injury. Rather, during this time, many physicians noted symptoms and concern for possible carpal tunnel and there has been insufficient evidence to establish that any median or ulnar nerve spasm are causally related to the January 2011 work injury. Claimant also points to the diminished strength, range of motion, and capacity shown by the updated FAE. However, as found above, the FAE documented decreased measurements in both the injured right upper extremity and in the non injured left upper extremity. Although Claimant measured worse during the period of time she alleges a work related worsening, she was also worse all over and not just on her injured right upper extremity. Claimant was having pain and increased symptoms in many body parts during this period of time and has not established that her reduced capacity is, more likely than not, due to the work injury versus non work related conditions affecting the rest of her body.

In addition, during this period of time, Claimant was diagnosed with fibromyalgia and reported to her primary care provider that she had diffuse pain particularly in her back but also in her arms and legs and was found to have diffuse tenderness over the back, arms, and hips. Her providers at Kaiser did not relate the fibromyalgia or the significant pain in several areas of her body to the January 2011 work injury. Additionally, although it was recommended during this time that Claimant undergo additional EMG testing and see a physiatrist, a physiatrist had opined that he had nothing to offer Claimant and EMG testing was normal. The recommendation for psychological counseling and the use of Viibryd, an anti-depressant, also has not been shown to be causally related to the fall Claimant sustained in January of 2011. Claimant has a history of non-work related depression that pre-existed the January, 2011 work injury and there is insufficient evidence to link depression, need for psychological counseling, or the Viibryd to a worsening of her work related condition. Rather, Claimant's depression and/or need for anti-depressants is just as likely related to non injury factors as it is to the January 2011 work injury.

Even if Claimant subjectively has increased pain, Claimant has failed to establish that the increased pain is causally related to her January, 2011 work injury. Rather, the medical records establish that other factors and conditions including possible

neuropathy, possible carpal tunnel, fibromyalgia, depression, and/or somatoform may be playing a role in the subjective reports of increased pain. Claimant has not established that any of these conditions, more likely than not, are related to the fall she sustained in January of 2011. Claimant has been evaluated by multiple medical providers who have not been able to find any objective basis for her continued extensive symptoms. Dr. Davis noted during the period of alleged worsening that Claimant had persistent pain in her right upper extremity and noted only new early symptoms of carpal tunnel. Dr. Davis recommended evaluation by a rheumatologist outside of workers' compensation. Dr. Smith similarly noted radial nerve in spasm, Phalens test for carpal tunnel positive, and also recommended evaluation outside of workers' compensation by a primary care provider for possible carpal tunnel injections noting that it was not at the work related surgical site. The opinions of Dr. Davis and Dr. Smith note non work related conditions contributing to Claimant's subjective reports during this period of alleged worsening. The opinions of Dr. Bloch, Dr. Kawasaki, Dr. Broghammer, and Dr. Raschbacher are found credible and persuasive. Claimant has failed to meet her burden to reopen her claim and has failed to establish a worsening of her work related condition.

Claimant's requests for TTD are denied and dismissed. Similarly, her request for an additional cervical MRI and an additional referral to a physiatrist is denied and dismissed. Claimant has no work related worsening. Additionally, Claimant has already had a normal cervical MRI and has been evaluated by a physiatrist indicating no further treatment recommendations. The specific treatment Claimant is requesting has been undergone and there is no work related worsening established to support additional and repeat testing related to the work injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to meet her burden to show a worsening of condition. Her petition to reopen is denied and dismissed.

2. Claimant's request for TTD benefits, cervical MRI, and referral to a physiatrist are denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 20, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-023-315-01

ISSUES

- Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury on June 27, 2016 arising out of and in the course and scope of employment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 51 year old woman. Employer hired Claimant on December 8, 2015 to work as a full-time associate.

2. Claimant alleges that she sustained an injury to her right shoulder and neck on June 27, 2016, two hours into her shift which began at 8:00 a.m. During testimony, and in her medical records, Claimant alleges she lifted a tray above her head when she felt a pull in her right shoulder and experienced an onset of pain in her neck and right shoulder. Claimant completed her scheduled shift.

3. Respondents denied Claimant's claim.

4. Claimant sustained a prior admitted workplace injury to her right upper extremity on May 5, 2016 (W.C. No. 5-015-194). Claimant initially treated for that injury at Denver Health and complained of pain in her right hand, right forearm, right upper arm, and right shoulder. She initially reported that the injury occurred at home and that there was no mechanism of injury. Claimant later alleged that the injury occurred at work while she was taping cardboard boxes. Insurer admitted liability for Claimant's right hand and wrist injuries, but denied liability for the shoulder. Claimant was placed at MMI on November 4, 2016 for the May 5 claim.

5. In her initial report of the June 27, 2016 incident, which Claimant filed on August 9, 2016, she alleges that she was lifting a "box of sugar" which weighed "15 lbs." At hearing, Claimant testified that the "tray" she was lifting jointly with a co-worker weighed "40 pounds." At the time of the alleged June 27, 2016 incident, Claimant was under work restrictions which limited her lifting to 15 pounds.

6. Claimant filed for a Division IME on the May 5, 2016 injury. In her January 6, 2017 application, Claimant listed the body components for the DIME doctor to evaluate, including "neck pain" and "right shoulder." Claimant included a description of various shoulder injuries which doctors diagnosed during treatment but determined were not work related.

7. On the evening of the alleged June 27 injury, Claimant treated at Denver Health for unrelated symptoms. Her treatment providers diagnosed her condition and discharged her with antibiotics. Claimant did not report an alleged work injury or did Claimant report shoulder or neck pain.

8. At the time of the alleged June 27, 2016 incident, Dr. Bryan Counts was actively treating Claimant for the May 5 admitted injury. At a July 6, 2016 appointment Claimant reported that a prior injection had worsened her symptoms. Claimant complained of pain up to her neck. Records of the visit do not mention any new incident at work.

9. On July 15, 2016 Claimant treated with Dr. Alireza Alijana. Claimant reported radiating pain from her right thumb into her shoulder and neck area, and having "discomfort at work," but was "managing through it." She also reported having functional limitations at home. Again, records of the visit do not mention any new incident at work.

10. On July 22, 2016 Claimant returned to Dr. Counts complaining of pain up to her neck and in her trapezius. She denied frequently extending her neck at work. She reported "mostly sweeping" while on modified duty. Despite her account of her then-present history, again there is no mention of the alleged June 27, 2016 incident. In this report Dr. Counts opined "there may be a cervical component to the right upper extremity pain, but there is no work relatedness to her neck." Dr. Counts opined there was a work related component (with respect to the May 5 admitted claim) to her "shoulder and thumb."

11. A July 27, 2016 MRI of Claimant's right shoulder revealed a full thickness tear of the distal fibers of the supraspinatus tendon. The reading radiologist also noted moderate degenerative changes of the acromioclavicular joint.

12. On August 2, 2016, Claimant told Jonathan Bloch, M.D. that her shoulder pain developed after starting occupational therapy for her wrist. Dr. Block took Claimant's history which did not include the alleged June 27, 2016 work incident. Dr. Block opined "it is not probable the rotator cuff tear happened as a result of the injury of this [May 5] claim."

13. On February 15, 2017 Allison Fall, M.D. evaluated Claimant for a Respondents sponsored independent medical examination. Dr. Fall found no objective evidence of a work incident that occurred on June 27, 2016 that would cause, aggravate, or accelerate a shoulder or neck condition. She noted that Claimant did not report her alleged injury to any of her providers at Concentra and she did not mention an injury to her shoulder when she treated in the emergency room on the alleged date of injury for an unrelated problem.

14. Dr. Fall noted that Claimant complained of right shoulder soreness prior to June 27, 2016. Claimant's family practice reports also identify prior right shoulder and neck

symptoms. Dr. Fall noted Claimant's shoulder examination was unremarkable with no signs of impingement or instability and good range of motion.

15. Claimant told Dr. Fall that she suffers from right carpal tunnel syndrome.

16. Dr. Fall noted a possibility Claimant's shoulder complaints were related to her pre-existing, non-work related, untreated right carpal tunnel syndrome. During her testimony, Dr. Fall strengthened this analysis stating that all of Claimant's current symptoms most likely correlate to the carpal tunnel finding/diagnosis.

17. Dr. Fall opined that there was no injury producing event that occurred on June 27, 2016, meaning that there was not a separate injury or an aggravation of an injury from May 5, 2016.

18. Dr. Fall testified that even if the incident in question occurred exactly as Claimant indicated, it would not have caused Claimant's alleged injuries. Dr. Fall opined that whether Claimant was lifting a 15 pound bag of sugar or co-lifting a 40 pound tray, insufficient forces were present to cause, aggravate or accelerate any rotator cuff condition. Dr. Fall opined that to a reasonable degree of medical probability the incident as alleged by Claimant was insufficient to cause, aggravate, or accelerate any rotator cuff pathology. Dr. Fall opined that to a reasonable degree of medical probably the incident as alleged was insufficient to cause, aggravate, or accelerate any neck pathology.

19. Claimant provided no persuasive medical testimony, either by written report or hearing testimony, which opined the June 27, 2016 alleged incident caused, aggravated, or accelerated any neck or right shoulder condition.

20. The ALJ finds that Claimant has failed to sustain her burden of proof to establish a compensable injury to her right shoulder and neck on June 27, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A Claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the findings above as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

With regard to compensability, section 8-43-201 provides, "A claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence." A claimant always carries the initial burden of proof in a workers' compensation case." *DiCamillo v. Gosney & Sons, Inc.*, W.C. No. 4-328-945 (ICAO, May 21, 1998).

The question of whether Claimant has met her burden of proof to establish a compensable injury is one of fact for determination by the judge. See *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000).

A claimant must prove by a preponderance of the evidence that her injury arose out of the course and scope of her employment. Section 8-41-301(1)(b), C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

Merely feeling pain at work in and of itself is not "compensable." See *Miranda v. Best Western Rio Grande Inn,* W.C. No. 4-663-169 (ICAO, April 11, 2007). "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the Claimant has sustained a compensable injury." *See also F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App 1995).

Dr. Fall credibly testified that even if the incident occurred as alleged by Claimant, it would not have caused the alleged injury. Dr. Fall opined the most medically likely cause of Claimant's right shoulder and neck complaints is Claimant's pre-existing, non work related, carpal tunnel syndrome.

Dr. Fall opined that if Claimant's pain generator is the rotator cuff tear present on imaging studies, the alleged mechanism of injury as testified to by Claimant is insufficient to cause, aggravate, or accelerate said tear. Dr. Fall testified there is no objective evidence to support any injury to Claimant's neck arising out of the alleged incident of June 27, 2016. As Dr. Fall testified, there is no objective evidence that any

incident that may have occurred at work on June 27, 2016 caused, aggravated, or accelerated any condition in claimant's shoulder or neck.

Claimant presented no persuasive medical testimony which contradicted Dr. Fall's credible and persuasive testimony.

The ALJ finds that Claimant has failed to sustain her burden of proof to establish a compensable injury to her right shoulder and neck on June 27, 2016.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits arising out of the alleged June 27, 2016 injury is hereby denied and dismissed.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 20, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-023-315-01

ISSUES

- Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury on June 27, 2016 arising out of and in the course and scope of employment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 51 year old woman. Employer hired Claimant on December 8, 2015 to work as a full-time associate.

2. Claimant alleges that she sustained an injury to her right shoulder and neck on June 27, 2016, two hours into her shift which began at 8:00 a.m. During testimony, and in her medical records, Claimant alleges she lifted a tray above her head when she felt a pull in her right shoulder and experienced an onset of pain in her neck and right shoulder. Claimant completed her scheduled shift.

3. Respondents denied Claimant's claim.

4. Claimant sustained a prior admitted workplace injury to her right upper extremity on May 5, 2016 (W.C. No. 5-015-194). Claimant initially treated for that injury at Denver Health and complained of pain in her right hand, right forearm, right upper arm, and right shoulder. She initially reported that the injury occurred at home and that there was no mechanism of injury. Claimant later alleged that the injury occurred at work while she was taping cardboard boxes. Insurer admitted liability for Claimant's right hand and wrist injuries, but denied liability for the shoulder. Claimant was placed at MMI on November 4, 2016 for the May 5 claim.

5. In her initial report of the June 27, 2016 incident, which Claimant filed on August 9, 2016, she alleges that she was lifting a "box of sugar" which weighed "15 lbs." At hearing, Claimant testified that the "tray" she was lifting jointly with a co-worker weighed "40 pounds." At the time of the alleged June 27, 2016 incident, Claimant was under work restrictions which limited her lifting to 15 pounds.

6. Claimant filed for a Division IME on the May 5, 2016 injury. In her January 6, 2017 application, Claimant listed the body components for the DIME doctor to evaluate, including "neck pain" and "right shoulder." Claimant included a description of various shoulder injuries which doctors diagnosed during treatment but determined were not work related.

7. On the evening of the alleged June 27 injury, Claimant treated at Denver Health for unrelated symptoms. Her treatment providers diagnosed her condition and discharged her with antibiotics. Claimant did not report an alleged work injury or did Claimant report shoulder or neck pain.

8. At the time of the alleged June 27, 2016 incident, Dr. Bryan Counts was actively treating Claimant for the May 5 admitted injury. At a July 6, 2016 appointment Claimant reported that a prior injection had worsened her symptoms. Claimant complained of pain up to her neck. Records of the visit do not mention any new incident at work.

9. On July 15, 2016 Claimant treated with Dr. Alireza Alijana. Claimant reported radiating pain from her right thumb into her shoulder and neck area, and having "discomfort at work," but was "managing through it." She also reported having functional limitations at home. Again, records of the visit do not mention any new incident at work.

10. On July 22, 2016 Claimant returned to Dr. Counts complaining of pain up to her neck and in her trapezius. She denied frequently extending her neck at work. She reported "mostly sweeping" while on modified duty. Despite her account of her then-present history, again there is no mention of the alleged June 27, 2016 incident. In this report Dr. Counts opined "there may be a cervical component to the right upper extremity pain, but there is no work relatedness to her neck." Dr. Counts opined there was a work related component (with respect to the May 5 admitted claim) to her "shoulder and thumb."

11. A July 27, 2016 MRI of Claimant's right shoulder revealed a full thickness tear of the distal fibers of the supraspinatus tendon. The reading radiologist also noted moderate degenerative changes of the acromioclavicular joint.

12. On August 2, 2016, Claimant told Jonathan Bloch, M.D. that her shoulder pain developed after starting occupational therapy for her wrist. Dr. Block took Claimant's history which did not include the alleged June 27, 2016 work incident. Dr. Block opined "it is not probable the rotator cuff tear happened as a result of the injury of this [May 5] claim."

13. On February 15, 2017 Allison Fall, M.D. evaluated Claimant for a Respondents sponsored independent medical examination. Dr. Fall found no objective evidence of a work incident that occurred on June 27, 2016 that would cause, aggravate, or accelerate a shoulder or neck condition. She noted that Claimant did not report her alleged injury to any of her providers at Concentra and she did not mention an injury to her shoulder when she treated in the emergency room on the alleged date of injury for an unrelated problem.

14. Dr. Fall noted that Claimant complained of right shoulder soreness prior to June 27, 2016. Claimant's family practice reports also identify prior right shoulder and neck

symptoms. Dr. Fall noted Claimant's shoulder examination was unremarkable with no signs of impingement or instability and good range of motion.

15. Claimant told Dr. Fall that she suffers from right carpal tunnel syndrome.

16. Dr. Fall noted a possibility Claimant's shoulder complaints were related to her pre-existing, non-work related, untreated right carpal tunnel syndrome. During her testimony, Dr. Fall strengthened this analysis stating that all of Claimant's current symptoms most likely correlate to the carpal tunnel finding/diagnosis.

17. Dr. Fall opined that there was no injury producing event that occurred on June 27, 2016, meaning that there was not a separate injury or an aggravation of an injury from May 5, 2016.

18. Dr. Fall testified that even if the incident in question occurred exactly as Claimant indicated, it would not have caused Claimant's alleged injuries. Dr. Fall opined that whether Claimant was lifting a 15 pound bag of sugar or co-lifting a 40 pound tray, insufficient forces were present to cause, aggravate or accelerate any rotator cuff condition. Dr. Fall opined that to a reasonable degree of medical probability the incident as alleged by Claimant was insufficient to cause, aggravate, or accelerate any rotator cuff pathology. Dr. Fall opined that to a reasonable degree of medical probably the incident as alleged was insufficient to cause, aggravate, or accelerate any neck pathology.

19. Claimant provided no persuasive medical testimony, either by written report or hearing testimony, which opined the June 27, 2016 alleged incident caused, aggravated, or accelerated any neck or right shoulder condition.

20. The ALJ finds that Claimant has failed to sustain her burden of proof to establish a compensable injury to her right shoulder and neck on June 27, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A Claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the findings above as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

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The question of whether Claimant has met her burden of proof to establish a compensable injury is one of fact for determination by the judge. See *Faulkner v. ICAO*, 12 P.3d 844 (Colo. App. 2000).

A claimant must prove by a preponderance of the evidence that her injury arose out of the course and scope of her employment. Section 8-41-301(1)(b), C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury "arises out of and in the course of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the employee's services to the employer. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994).

Merely feeling pain at work in and of itself is not "compensable." See *Miranda v. Best Western Rio Grande Inn,* W.C. No. 4-663-169 (ICAO, April 11, 2007). "An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the Claimant has sustained a compensable injury." *See also F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App 1995).

Dr. Fall credibly testified that even if the incident occurred as alleged by Claimant, it would not have caused the alleged injury. Dr. Fall opined the most medically likely cause of Claimant's right shoulder and neck complaints is Claimant's pre-existing, non work related, carpal tunnel syndrome.

Dr. Fall opined that if Claimant's pain generator is the rotator cuff tear present on imaging studies, the alleged mechanism of injury as testified to by Claimant is insufficient to cause, aggravate, or accelerate said tear. Dr. Fall testified there is no objective evidence to support any injury to Claimant's neck arising out of the alleged incident of June 27, 2016. As Dr. Fall testified, there is no objective evidence that any

incident that may have occurred at work on June 27, 2016 caused, aggravated, or accelerated any condition in claimant's shoulder or neck.

Claimant presented no persuasive medical testimony which contradicted Dr. Fall's credible and persuasive testimony.

The ALJ finds that Claimant has failed to sustain her burden of proof to establish a compensable injury to her right shoulder and neck on June 27, 2016.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for workers' compensation benefits arising out of the alleged June 27, 2016 injury is hereby denied and dismissed.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 20, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did Claimant overcome the DIME regarding MMI and/or impairment by clear and convincing evidence?

2. Did Claimant prove entitlement to a general award of medical benefits after MMI?

3. Did Claimant prove that Depakote prescribed by Dr. Adams and a home health care referral by Dr. Goodell are reasonable and necessary post-MMI treatment?

4. Did Respondents prove an overpayment by a preponderance of the evidence?

STIPULATIONS

The parties bifurcated and reserved the issue of permanent total disability.

FINDINGS OF FACT

1. Claimant worked for Employer as a roughneck on an oil rig. On February 14, 2014, he injured his neck and back in a slip-and-fall accident. He was exiting a bus when he slipped on ice and fell backward, landing on his back. His head was cushioned by snow on the ground, and Claimant did not lose consciousness.

2. Claimant continued to work in various capacities over the next few weeks but was eventually was terminated due to conflicts with his supervisor. Claimant has not worked since March 2014.

3. Claimant first received medical treatment at the San Rafael Hospital on March 14, 2014. He reported neck and back pain, with numbness and tingling in all four extremities. Physical examination was relatively unremarkable except for some soft tissue tenderness. The ER physician opined Claimant's pain was "most likely musculoskeletal." He prescribed Percocet and Flexeril and recommended that Claimant follow-up with his primary care provider.

4. Claimant returned to the ER on March 24, 2016 due to pain. A cervical CT scan showed multilevel degenerative changes and evidence of a prior C5-6 fusion Claimant underwent in approximately 1996. A lumbar CT revealed mild degenerative changes. There was no evidence of any acute injury to either his neck or back. The ER physician opined Claimant's symptoms were likely due to cervical and lumbar strains with associated muscle spasms.

5. The next day, Claimant saw his personal physician, Dr. David Serafini, who ultimately became the primary ATP. Claimant demonstrated difficulty rising from a chair and walked with an antalgic gait. His lumbar flexion was "markedly limited." Dr. Serafini noted weakness in the lower extremities, but he was "unable to determine if decreased strength is secondary to pain or neurological injury." Dr. Serafini ordered cervical and lumbar MRIs and placed Claimant "off work."

6. The MRIs were performed on May 1, 2014. The cervical MRI showed degenerative changes but no acute pathology. The most significant finding was moderate central stenosis and severe left foraminal stenosis at C4-5. There were no apparent problems related to the old C5-6 fusion. The lumbar MRI revealed "mild" multilevel degenerative changes.

7. After receiving the MRI reports, Dr. Serafini referred Claimant to physical therapy. He noted that the "diffuse" weakness in Claimant's lower extremities "appears to be secondary to pain" rather than a neurological problem.

8. Claimant participated in therapy for a few months with no significant benefit. In fact, the PT made Claimant's symptoms worse.

9. Dr. Serafini ordered repeat MRIs on June 17, 2014, which showed findings consistent with the May 2014 imaging.

10. Claimant had a surgical consultation with Dr. Ali Murad on July 9, 2014. Sensory and reflex examinations were normal. Dr. Murad noted Claimant was "not compliant with formal motor testing. Appears to have good muscle bulk in his extremities, moves all extremities equally, reports that any real motor strength testing causes significant pain." He opined that Claimant demonstrated "a non-anatomical neurologic examination, lack of effort on motor testing, [and] pain behavior." Dr. Murad opined that Claimant's radicular symptoms were "in a nondermatomal pattern." Dr. Murad further opined,

> While he has a disc bulge and moderate stenosis at C4-5 (above the previous C5-6 fusion), his symptoms affect multiple dermatomes in the upper and lower extremities. Most of his pain is axial. Lumbar spine MRI does not show any significant pathology. His pain is completely out of proportion to any findings on MRI. He was adamant that the disc bulge is responsible for the symptoms as "it was not present before the fall." I explained to him that disc bulges are very common and are not responsible for the [ ] symptoms. . . . At this point unfortunately there is no structural pathology in his cervical or lumbar spine which would alleviate his pain symptoms. If his symptoms were limited to radiculopathy in C5 distribution and/or myelopathy, then surgery could be considered. This was very frustrating for him. At one point he started to cry. I recommend nonsurgical treatment.

11. On September 30, 2014, Dr. Serafini noted Claimant's wife had recently committed suicide. He had taken on more housekeeping responsibility, which he found "difficult." His neck had almost no range of motion. Dr. Serafini wanted to "exhaust physical evaluation prior to considering emotional causes." He also opined "even if his condition is eventually thought to be psychosomatic, he remains disabled at this time and incapable of returning to his prior employment."

12. Claimant had a second surgical opinion with Dr. Sana Bhatti in January 2015. He reported pain affecting his neck, bilateral shoulders and arms, low back, buttocks, and bilateral lower extremities. He described the pain as "constant" at a level of 8-9/10. His pain was aggravated by routine movements, and relieved by "nothing." He complained of numbness and tingling in the first three digits of his right hand, and the first three toes of his feet. He reported generalized weakness and inability to walk very far despite using a cane. He felt the symptoms were "worsening with time." Examination of the neck revealed significant tenderness to palpation and significantly decreased range of motion "to where he does not move his neck at all."' His back was also tender. Dr. Bhatti could not evaluate motor function "due to significant pain." Dr. Bhatti opined "the etiology of his symptoms is unclear" and asked Claimant to bring the MRI scans so he could review them personally.

13. After reviewing the MRI scans, Dr. Bhatti concluded that "I think these are incidental findings and are not related to [his] symptoms. I feel that we do not have a surgical option." Dr. Bhatti recommended a referral to "pain management."

14. Dr. Serafini apparently left private practice in early 2015, and Dr. Goodell became the primary ATP. Dr. Goodell put Claimant at MMI on July 15, 2015, and referred him to Dr. Douglas McFarland for an impairment rating.

15. Claimant saw Dr. McFarland on August 13, 2015. At the appointment, he reported 9/10 neck pain which prevented him from turning his head to either side. Claimant reported tingling, burning, and numbness in the fingers of both hands. His low back pain level was 6/10. Claimant denied depression and stated his mental status at actually improved since he had stopped taking oxycodone and Valium. Dr. McFarland reviewed Claimant's prior history of a cervical fusion in 1996 and a lumbar spine injury in 2001. Dr. McFarland noted Claimant received impairment ratings for the prior injuries, which combined to 26% whole person.

16. On physical examination, Claimant held his head "rigidly with very little neck movement." He had tenderness of the cervical and lumbar musculature. Sensation was intact in his fingers and feet. Dr. McFarland noted that cervical ROM measurements were "remarkable for the very restricted motion that was shown," although they were internally consistent over three trials. Lumbar ROM was also significantly limited but met internal consistency requirements. Dr. McFarland noted that "the restricted motion of his cervical spine appears out of proportion to the findings on the MRI and there may be a need for further investigation to determine if the measurements are valid." Nevertheless, he utilized the ROM measurements as the basis for the rating. Dr. McFarland calculated an overall 54% whole person impairment

rating, from which he apportioned the prior 26%, resulting in an overall rating of 28%. Dr. McFarland opined, "although there are probably psychological factors affecting [Claimant's] impairment I do not believe that all of this impairment can be attributed to psychological factors. . . . I do not have a reliable means of determining the degree to which psychological factors are affecting this impairment."

17. Dr. McFarland recommended maintenance care including home exercise and medications. At the time of the evaluation, Claimant was taking naproxen and tizanidine, although Dr. McFarland noted other medications might be needed in the future. He also thought it might be useful to obtain a formal psychological evaluation. The expected duration of maintenance care "will likely be for his lifetime."

18. Respondents timely filed a Notice and Proposal for a DIME after receiving Dr. McFarland's rating. Since Respondents requested a DIME, they continue to pay ongoing Temporary Total Disability (TTD) benefits at the weekly rate of $866.36.

19. Dr. Hua Chen saw Claimant for a DIME at Respondents' request on December 31, 2015. Dr. Chen noted that Claimant demonstrated "no movement in [his] neck at all." His lumbar ROM was also very limited. Claimant complained of pain in response to "light palpation" of his neck and back, but Dr. Chen appreciated no spasm or stiffness of the musculature. Claimant had symmetrical but give-way weakness in his distal arms and hands. Sensation was normal to touch and pinprick in the arms, but he had "inconsistent" sensation deficits in both feet.

20. Dr. Chen diagnosed cervical and lumbar strains as a result of the February 2014 injury, with persistent pain and "no response to treatment." Dr. Chen compared a cervical MRI from 2007 to the MRIs from the 2014 injury and stated,

> I do not see new structural damage to his cervical spine from the 2/15/2014 injury. This is the same conclusion from two neurosurgeon's evaluations. I cannot explain why his symptoms of pain and loss of neck mobility are still present after 20 months of minor injury and significantly [more] severe than the original injury which required surgery. I would agree with the previous conclusions from neurosurgeons and Dr. Fall that his symptoms are over reactive.

21. Dr. Chen agreed Claimant reached MMI by July 15, 2015 "after he had evaluations and no response to treatment." She signed a 4% cervical rating and 5% lumbar rating under Table 53 II.B. Cervical ROM measurements were internally consistent but extremely limited. Based on the applicable tables in the *AMA Guides*, the cervical ROM measurements equated to 30% whole person. Lumbar flexion was invalid due to inconsistencies in the SLR protocol. The remaining lumbar measurements were internally consistent and equated to 18% whole person.

22. Dr. Chen did not give Claimant any ROM-based impairment because she believed the measurements were "non-physiological." Therefore, Claimant's final

combined rating was 9% whole person. Dr. Chen further opined Claimant required no maintenance treatment.

23. The DIME Unit notified Dr. Chen she had to offer Claimant the opportunity for a second set of measurements before she could invalidate ROM impairment.

24. Claimant went for repeat ROM measurements on February 15, 2016. His cervical ROM was even more limited than the first time, equating to a 32% whole person rating. His lumbar ROM was slightly increased, but flexion was again invalid. Dr. Chen stated, "again both cervical and lumbar range of motion is extremely limited to [sic] I cannot explain physiologically. He would not actively participate [in] any movement in [his] cervical spine and he had severely limited movement in [his] lower back because of ongoing severe pain. . . . Therefore I will keep my original assessment about his cervical and lumbar conditions."

25. Respondents filed a Final Admission of Liability (FAL) on April 15, 2016 based on Dr. Chen's DIME report. The FAL admitted $59,036.25 in TTD benefits to July 14, 2015, and $21,831.85 of PPD benefits from July 15, 2015 through May 24, 2016. Claimant's PPD award was limited by the applicable statutory cap of $80,868.10.

26. Respondents paid $89,605.47 in TTD benefits from March 25, 2014 through March 17, 2016. Based on the applicable statutory cap, Claimant was overpaid $8,737.37 ($89,605.47 – $80,868.10 = $8,737.37).

27. Claimant has received sporadic treatment since being put at MMI. When he saw Dr. McFarland, he had apparently weaned himself from medications "cold turkey." But in January 2016 Dr. Goodell prescribed narcotic pain medication, a muscle relaxer, and referred Claimant to Dr. Tyler for pain management. Claimant never saw Dr. Tyler, although the reason is not clear from the record. In April 2016, Dr. Goodell offered Claimant a psychology referral to help his pain, but Claimant was "not inclined at this time."

28. Claimant started treating with Dr. Lawrence Adams, a neurologist, in September 2016. Dr. Adams opined Claimant's neck pain was likely musculoskeletal in nature, and "probably represents a torticollis, I'm uncertain as to whether it is a true cervical dystonia." After reviewing x-rays and confirming there was no structural pathology, Dr. Adams prescribed baclofen and later recommended Botox injections.

29. Claimant had Botox injections with Dr. Gregory Ales in September 2016. Initially, he reported no benefit "at all," but he later indicated he "felt a little better" and "can move his neck a little better." Based on the lack of significant response, Dr. Ales did not recommend further Botox treatment.

30. Claimant saw Dr. Adams on February 27, 2017, who noted Claimant could not move his head or neck. Dr. Adams stated that the tightening of Claimant's neck, upper shoulders and upper chest "frankly appears almost voluntary, with distraction, [it] seems to disappear." Dr. Adams recommended a trial of Depakote and propranolol.

31. On March 15, 2017, Claimant told PA-C Christen Kutz he had "some reduction in pain" with the Depakote, and the propranolol was "modestly helpful." Since the Depakote has been somewhat helpful, PA-C Kutz recommended increasing the dose. She also referred Claimant to Amy Alsum, a psychotherapist at Colorado Sport & Spine, for biofeedback and relaxation training.

32. Dr. Fall performed several IMEs and Rule 16 reviews at Respondents' request. She first examined Claimant on December 18, 2014. Dr. Fall noted that Claimant exhibited "severe pain behaviors" which made the physical examination "quite difficult." Claimant demonstrated virtually no cervical or lumbar range of motion. He had 4/5 positive Waddell signs, including overreaction, superficial tenderness to palpation, pain with axial compression, and pain with superficial rotation. He said he could not squat or perform toe raises. Dr. Fall opined his reported sensory changes in the upper and lower extremities were "non-dermatomal." Examination of the musculature revealed no hypertonicity, spasm, or trigger points. Dr. Fall diagnosed neck and back pain out of proportion to objective findings. She also provided a "rule out" diagnosis of somatoform disorder, which she deferred to a psychiatrist. Dr. Fall opined "the most likely factor playing a role in his ongoing complaints is likely psychosomatic, especially given the suicide of his wife." She thought Claimant was at MMI and required no additional treatment on a work-related basis.

33. Dr. Fall examined Claimant again in August 2016. He told her "nothing has changed" since the previous IME. He was still having severe neck, back and extremity symptoms. He also described a "constant headache" which caused him to "lose focus of vision." Dr. Fall opined that the severely restricted cervical ROM measured by Dr. McFarland was "obviously not the true functional range of motion of the cervical spine, which has a one-level fusion and no spasm." Dr. Fall agreed that Dr. Chen appropriately declined to assign ROM impairment because she concluded the measurements were "non-physiological." Dr. Fall opined that Dr. Chen's rating was consistent with the *AMA Guides* and the Level II Accreditation training. Specifically, Dr. Fall opined "in her role as a DIME physician, it was appropriate to utilize her clinical judgment and not utilize the range of motion she measured if she did not find that it was probably his true functional range of motion." Dr. Fall would not have given any rating, but opined it was within Dr. Chen's discretion to assign Table 53 ratings for chronic musculoskeletal pain. She said her disagreement with Dr. Chen on that point was "merely a difference of opinion." Dr. Fall further opined that Claimant required no work restrictions and there was no indication for maintenance care.

34. Claimant saw Dr. Rook for an IME at his counsel's request on August 31, 2016. Claimant reported ongoing severe neck pain and upper extremity symptoms. He also complained of low back pain which was increased by weight-bearing and prolonged sitting. Claimant denied depression and said he was primarily "frustrated" by his lack of improvement and his perceived lack of treatment. On physical examination, Dr. Rook noted Claimant "appeared reasonably comfortable during the history portion of today's evaluation except for the fact that he was unable to move his neck more than a few degrees and any direction." Neurological examination was basically normal. Palpation of the cervical musculature demonstrated "increased muscle tone," but Dr.

Rook did not specifically document spasm. Dr. Rook disagreed with Dr. Chen's determination that Claimant is at MMI, primarily due to the recommendation for a psychological evaluation. Dr. Rook opined it was "by definition" inconsistent for Dr. Chen put Claimant at MMI while simultaneously recommending a psychological evaluation. Dr. Rook also disagreed with Dr. Chen's decision not to include a rating for cervical and lumbar ROM deficits. Dr. Rook noted that Claimant's ROM measurements were sufficiently reproducible on three trials so as to be valid per the *AMA Guides*.

35. Dr. Rook performed a follow-up a record review on April 18, 2017. He opined that the diagnosis of cervical dystonia suggested by Dr. Adams was consistent with a diagnosis of cervical myofascial pain syndrome. Dr. Rook agreed it was reasonable to try Botox, but the injections "did not provide enough pain relief or functional improvement for me to recommend it as a long-term maintenance treatment option." Dr. Rook was "skeptical" whether Claimant would respond positively to dry needling. Dr. Adams had recently recommended a trail of Depakote, which Dr. Rook opined "is a relatively inexpensive medication which might help with his chronic pain as well as his extremity symptoms."

36. Dr. Fall testified at hearing and Dr. Rook testified in a pre-hearing deposition. Their testimony was consistent with the opinions expressed in their respective IME reports. Regarding Dr. Goodell's referral for home health services, Dr. Rook opined "it's not something I would necessarily recommend. You would have to ask Dr. Goodell why he did." Dr. Fall opined that home health services are not reasonable, necessary, or related to Claimant's industrial injury.

37. Dr. Fall persuasively testified that Dr. Chen's decision not to include any ROM-based impairment was within her discretion under the *AMA Guides* and the Level II accreditation training. She opined that the DIME's clinical judgment "trumps everything." If the physician determines there is insufficient objective and anatomical support for a Claimant's demonstrated ROM, the DIME has discretion not to rate it.

38. The opinions of Drs. Goodell, McFarland, Chen and Fall that Claimant reached MMI on July 15, 2015 are credible and persuasive.

39. The ALJ credits Dr. Fall's opinion that Dr. Chen's rating is consistent with the *AMA Guides* and Level II training.

40. The opinions of Drs. Goodell, McFarland, Adams and Rook that Claimant requires ongoing maintenance treatment are credible and persuasive.

41. The opinions of Dr. Adams and Dr. Rook that Depakote is a reasonable treatment option are credible and persuasive.

42. Dr. Goodell's referral for home health care services is not supported by the evidence of record.

43. Claimant failed to overcome the DIME regarding MMI or impairment.

44. Claimant proved by a preponderance of the evidence he requires ongoing medical treatment after MMI to relieve the effects of his injury and prevent deterioration of his condition.

45. Claimant proved that Depakote is reasonable and necessary treatment after MMI.

46. Claimant failed to prove that Dr. Goodell's referral for home health services is reasonable and necessary.

47. Respondents proved an overpayment of $8,737.37.

CONCLUSIONS OF LAW

A. General standards for overcoming a DIME

The DIME's determinations regarding MMI and whole person impairment are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI and impairment findings are incorrect. *Qual-Med*, 961 P.2d at 592. A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002).

It is well established held that "mere differences of medical opinion" do not constitute clear and convincing evidence that the DIME's determination is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (ICAO March 18, 2016); *Javalera v. Monte Vista Head Start, Inc.*, W.C. No. 4-532-166 (ICAO July 19, 2004); *see also Gonzales v. Browning-Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

B. Claimant did not overcome the DIME regarding MMI

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). A finding of MMI is premature if there is a course of treatment that has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). Additionally, a finding that a claimant is not at MMI may rest solely upon recommendations for further diagnostic evaluation if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition to suggest a

course of further treatment. *E.g., Soto v. Corrections Corp*., W.C. No. 4-813-582 (ICAO, October 27, 2011).

Although a recommendation for further diagnostic testing can be a sufficient basis for finding a claimant not at MMI, the ALJ is not aware of any case law which *precludes* a DIME from declaring MMI *merely because* she thinks some further evaluation is appropriate.

Claimant did not prove by clear and convincing evidence that a psychological evaluation has a "reasonable prospect" of diagnosing or defining his condition and suggesting further treatment reasonably expected to improve his situation. Based on the evidence presented, the ALJ finds it unlikely that any information provided by a psychological evaluation would change the course of Claimant's medical condition. Moreover, it is questionable whether Claimant would even submit to a psychological evaluation because he has told more than one physician he is not interested in pursuing mental health treatment. If a claimant declines the only treatment with a reasonable prospect for improving his condition, the claimant is at MMI as a matter of law. *MGM Supply Co. v. Industrial Claim Appeals Office*, 72 P.3d 1001 (Colo. App. 2002).

Dr. Goodell, Dr. McFarland, Dr. Chen, and Dr. Fall all agree that Claimant reached MMI on July 15, 2015. Dr. Rook is the only physician who disagrees with that assessment. The ALJ is persuaded by the convergence of opinion from four treating and examining providers that Claimant is at MMI. Dr. Fall persuasively opined that a psychological evaluation and an EMG as recommended by Dr. Rook could be performed as "maintenance" treatment after MMI. In his deposition, Dr. Rook conceded that a psychological evaluation could be performed as maintenance care. Based on the totality of evidence presented, the ALJ concludes Claimant has not overcome MMI by clear and convincing evidence.

C. Claimant did not overcome the DIME regarding impairment

As found, Claimant failed to overcome the DIME's impairment rating by clear and convincing evidence. Dr. Chen appropriately declined to include ROM deficits in her rating because she believed there were "nonphysiologic." Section 8-42-101(3.7) provides that "a physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings." The DOWC Impairment Rating Tips also state that a DIME may find ROM measurements invalid "for physiologic reasons." Dr. Chen was within her discretion to disqualify the ROM components of the rating she determined were nonphysiologic. *Oldenberg v. First Group America*, W.C. No. 4-640-886 (ICAO, September 3, 2008).

The ALJ notes that the measurements Dr. Chen obtained at the first DIME appointment correspond to a 30% whole person rating. The measurements from the follow-up appointment were even worse, and would result in the highest possible rating (32%) for cervical ROM loss. But Dr. Chen found no anatomic and physiologic basis for such severe ROM deficits. The abnormalities in Claimant's cervical spine imaging do

not reasonably explain Claimant's ROM measurements. Nor did Dr. Chen appreciate any muscle spasm or stiffness on direct palpation of the cervical musculature to objectively substantiate severe soft tissue impairment. Dr. Chen's exam findings are similar to those of Dr. Goodell, Dr. McFarland, and Dr. Fall, who also found no muscle spasm.

Similar reasoning applies to Dr. Chen's rejection of the lumbar ROM measurements. While Claimant's lumbar ROM measurements were not as extreme as the cervical deficits, they were substantially more limited than one would expect from a "strain" type injury. Claimant's lumbar imaging is relatively benign, with only mild degenerative changes which most likely predated the injury.

Admittedly, Dr. McFarland assigned a rating based on largely similar ROM measurements. But he also noted that the cervical ROM measurements were "out of proportion" to the MRI findings, and "further investigation" may be warranted "to determine if the measurements are valid." Even though Dr. McFarland was willing to incorporate the measurements into his rating, that does not mean that Dr. Chen was obliged to do so. The ALJ is not persuaded by Dr. Rook's opinion that Dr. Chen had to assign a ROM rating simply because the measurements met the reproducibility criteria. Whether to give Claimant a ROM-based rating appears to be an issue about which reasonable physicians can disagree. Claimant has merely proven a "difference of opinion," which does not rise to the level of clear and convincing evidence.

D. Medical benefits after MMI

Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond MMI if the claimant needs further treatment to relieve the effects of the injury or prevent deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the employer's right to dispute compensability, reasonableness, or necessity of any particular treatment. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003). If the respondents challenge a request for specific post-MMI medical treatment, the claimant must prove entitlement to the medical benefit(s) at issue by a preponderance of the evidence. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO, February 12, 2009).

The DIME's opinion regarding medical treatment after MMI is not entitled to any special weight, but is simply another medical opinion for the ALJ to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). The fact that a claimant failed to overcome a DIME regarding MMI does not preclude an award of post-MMI medical benefits under the preponderance standard. *Martinez v. K-Mart Corporation*, W.C. No. 4-164-054 (ICAO Sept. 19, 2005).

As found, Claimant proved that he needs ongoing medical treatment to relieve the effects of his injury and prevent deterioration of his condition. Claimant suffers from chronic injury-related neck and back pain that is at least partially relieved by medication. There is no persuasive indication that Claimant abuses his medications. Claimant lives a relatively restricted lifestyle due to his pain but he would likely be even less functional without the benefit of medication. The ALJ is not persuaded by Dr. Fall's opinion that none of Claimant's ongoing symptoms are causally related to his injury. Based on the evidence presented, the ALJ concludes Claimant is entitled to a general award of medical benefits after MMI.

Claimant also proved that Depakote is reasonable and necessary maintenance treatment. Dr. Rook persuasively opined that Depakote has a reasonable chance reducing Claimant's symptoms, at a relatively low cost to Respondents. Although Depakote is primarily an anti-seizure medication, in this case it is being prescribed for an accepted off label use of pain control. Claimant appears to have had some benefit from a limited trial of Depakote, and it is reasonable to try increasing dosages is recommended by Dr. Adams. The medication can certainly be discontinued if it provides no long-term or substantial benefit.

Claimant failed to prove that the "home health referral" made by Dr. Goodell is a reasonable and necessary treatment for his industrial injury. Based on the evidence presented, it is not clear what the recommendation would entail. Dr. Goodell did not elaborate or provide any justification for the request, and its purpose is not readily apparent from the face of the referral. The ALJ does not find Claimant's testimony to be a persuasive substitute for an explanation from the prescribing physician. Dr. Fall opined home health services are not reasonable and necessary, and even Dr. Rook opined "it's not something I would necessarily recommend."

E. Overpayment

Section 8-40-201(15.5) defines an overpayment as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets." The Respondents must prove their entitlement to an overpayment by a preponderance of the evidence. *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

Even if temporary disability benefits were properly payable when the claimant received them, they can subsequently create an overpayment if they extended beyond the MMI date ultimately determined by a DIME. Section 8-40-201(15.5); *Moreno v. Sysco Corporation*, W.C. No. 4-917-763-02 (ICAO, June 24, 2016).

As found, Respondents proved that Claimant received an overpayment of TTD benefits in the amount of $8,737.37. By the time they filed the FAL, Respondents had paid $89,605.47 in TTD benefits. Claimant's indemnity benefits were "capped" at $80,868.10 because his rating is less than 26%. Based on the applicable statutory cap, Claimant was overpaid $8,737.37 ($89,605.47 – $80,868.10 = $8,737.37).

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME's MMI date of July 15, 2015 is denied and dismissed.

2. Claimant's request to overcome the DIME's 9% whole person impairment rating is denied and dismissed.

3. Respondent shall pay for reasonable, necessary, related, and authorized medical benefits after MMI to relieve the effects of Claimant's injury and prevent deterioration of his condition, including Depakote.

4. Claimant's request for home health services requested by Dr. Goodell is denied and dismissed.

5. Respondents may claim an overpayment of $8,737.37.

6. Any issues not determined herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 21, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant has established, by a preponderance of evidence, that her November 7, 2011 claim should be reopened due to a mistake.

II. If there was a mistake, and the claim should be reopened, whether Claimant has demonstrated, by a preponderance of the evidence, that she sustained a compensable injury to her bilateral shoulders, neck, and back on November 7, 2011 in addition to her admitted upper extremity injuries.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following Findings of Fact:

Treatment During Relevant Time Period

1. Claimant slipped and fell at work on November 7, 2011, injuring multiple body parts. (Ex. 6, p. 48). Claimant reported the injury to Employer the same day. The First Report of Injury states "multiple [body] parts" were involved and "multiple injuries" were sustained. Those injuries and body parts were then identified however, only as "both knees, left foot, etc". Claimant worked for employer, N-Link Corporation, from November 2009 through July 31, 2015. Her job title was digital training manager and her job duties consisted of setting up computers in classrooms, signing up soldiers for training and submission of reports.

2. Claimant testified at hearing that her foot became caught on a sidewalk, causing her to fall to the ground. She fell forward and to the left. Her knees struck the ground first, and then her hands, but her hands then slipped out from underneath her, causing the left side of her body to strike the ground. Claimant recalled at hearing experiencing pain "all over [her] body" after the fall, with the primary symptoms coming from the knees, left hip, and both hands. She testified that her upper extremities were the main focus of her pain complaints at the time; however, she recalled beginning to experience upper arm/shoulder, neck, and back pain after the incident.

3. Claimant testified that she assumed a claim was filed with the Insurer after the incident occurred; however, she was never contacted by anybody from the insurer after the first report of injury was filed. Ms. Beatriz Diaz, the current adjuster for this claim, testified at hearing, and confirmed that nobody from the Insurer contacted Claimant until January of 2013.

4. Claimant was seen on November 7, 2011, at Fort Carson Army facility. She complained of pain only in her wrists and left knee. X-rays taken of those body parts were normal. There were no complaints of neck, shoulders, or back. (Exhibit GA; pp. 23A-23 G).

5. Claimant was not represented by an attorney from the time of the November 7, 2011 fall until January of 2015. At no point during this time did Claimant receive a designated provider list from either the Employer or the Insurer. As a result, Claimant sought treatment from Evans Army Community Hospital ("Evans ACH"), as she was not familiar with the Workers Compensation process.

6. A December 5, 2011 note from Evans ACH indicates that Claimant was reporting progressive right hand numbness in pain over the past month. An EMG was requested to better assess the condition. (Ex. 9, p. 75). She was diagnosed with carpal tunnel syndrome by Dr. Karl Brewer by January 17, 2012. In the "Vitals" note written by a Ms. Balinda Block, it states Claimant was having left lower back pain. Dr. Brewer also documented at this appointment that Claimant had recent onset of abdominal pain and "left posterior lower back" pain. Dr. Brewer concluded Claimant had bilateral carpal tunnel syndrome which had failed to resolve with splinting. A steroid injection was then considered.

7. On August 10, 2012, Claimant was seen by Dr. Barbara Hainsworth with a complaint of left shoulder pain, which developed *"last night".* There's no mention of the fall of November 7, 2011 (Exhibit K; pp. 36-41).

8. On September 21, 2012, Claimant was seen for chronic low back pain. It was noted that her back pain occurred when standing, cooking, doing chores, and bending to help her daughter. She was trying to walk for exercise, but the back pain became worse, with pain extending down to her left leg. There was no mention of a November 7, 2011, accident as the cause of her back pain complaints (Exhibit L; pp. 44-45).

9. Claimant now asserts increasing pain in her neck following this fall on November 7, 2011. However, she was evaluated on January 30, 2012, by Dr. White and her neck revealed full range of motion without limitation (Exhibit J; pp. 31-35). On December 3, 2012, Claimant was again evaluated by Dr. White and it was noted she had full range of motion without limitation of her neck and a negative Spurling's exam. (Exhibit N; pp. 49-52)

10. Claimant eventually underwent a bilateral carpal tunnel release with Dr. Chance Henderson at Evans ACH on February 8, 2013. (Ex. 9, p. 118). The August 10, 2012 note from another physician from Evans ACH, Barbara Hainsworth, documents that Claimant "has *developed* left shoulder pain."

11. The medical report mentions chronic back pain for the past 21 years. Claimant explained at hearing that she did have some degree of back "aches" prior to the fall at work, but Claimant now states that the pain became more severe after the

November 7, 2011 fall to the point where it began affecting her ability to function. Recalling the September 21, 2012 note specifically, Claimant testified that she disagreed that she had back pain for the past twenty-one years after her pregnancy. She explained that the pain prior to the fall was basic “achiness” and “tightness” that could be alleviated with stretching and did not restrict her from performing any activities.

12. In a note from another physician at Evans ACH, Dr. Mark Blackley, it was documented on December 11, 2012 that Claimant continued to have severe bilateral wrist pain, but was now also having “some posterior neck pain” at this time. (Ex. 9, p. 111).

13. A second 'First Report of Injury' for Claimant’s November 7, 2011 injury was filed on January 14, 2013. (Ex. 6, p. 50). Insurer's Adjuster, Beatriz Diaz, testified that it was after the filing of this second first report of injury in January of 2013 that somebody from the Insurer first reached out to contact Claimant. A general admission of liability was then filed, accepting liability for the injuries to both hands.

14. Claimant established contact with Ms. Diaz after the February 2013 surgery. She was informed by Ms. Diaz that if she wanted to receive compensation for lost wages, she would need to treat with a workers’ compensation doctor, at which time Ms. Diaz sent Claimant to Dr. Gregg Martyak for treatment. Dr. Martyak was only treating Claimant for her hands and wrists, but not her shoulders, neck, or back.

15. Dr. Martyak opined as of December 31, 2013, that Claimant would likely need a left cubital tunnel release and a revision carpal tunnel release. (Ex. 8, p. 58). On January 27, 2014, Dr. Martyak performed a left revision median nerve neuroplasty at the wrist and a left ulnar nerve neuroplasty at the elbow. *Id.* at 59.

16. Claimant continued treating at Evans ACH for her other conditions that had not yet been accepted as part of her claim. On March 17, 2014, Claimant presented to Dr. Robert Cowan at Evans ACH complaining of bilateral shoulder pain, with pain at the base of the left side of her neck, which was documented as “Pain started after a fall in 2011.” (Ex. 9, p. 123). Her right shoulder pain radiated toward her ear and to the right collarbone area and the left shoulder pain radiated to the base of the left neck. She noted that the pain had started after fall in 2011 and was now 10/10. (Exhibit T; pp. 78-81). This is the first mention of shoulder pain related to the fall in November 7, 2011, a period of almost three years.

17. On May 20, 2014, Claimant was referred to Dr. Bissell for chronic low back pain. She also complained of neck, mid back, and bilateral upper limb pain. He noted that claimant had fallen in November 2011. His diagnosis was status post bilateral carpal tunnel release, cubital tunnel release, chronic low back pain, widespread soft tissue pain syndrome with nonrestorative sleep, cognitive dysfunction and possible fibromyalgia. Her neck and shoulders had full range of motion. Symptoms were noted to be nonspecific and widespread (Exhibit U; p. 86).

18. On June 24, 2014, MRIs were taken of Claimant's lumbar spine (mild degenerative changes), right shoulder (no atrophy of the muscle bellies of the rotator cuff and no tears) and neck (mild degenerative changes). (Exhibit W; pp. 89-91).

19. On July 10, 2014, Dr. Cowan noted that Claimant was reporting shoulder pain caused by a fall on her outstretched hands in November of 2011. (Ex. 9, p. 126). Dr. Cowan concluded that Claimant's shoulder injuries were more likely a result of repetitive stress from work. He also felt Claimant's lower back pain was a repetitive stress injury, and not from the November 2011 fall.

20. On August 14, 2014, Claimant was seen in physical therapy by Stephen Burchfield. Claimant had bilateral clavicular joint inflammation present for one month after a heavy workout at the gym. (Exhibit Z; p. 99).

21. On August 25, 2014, Claimant filed a Worker's Claim for Compensation with CNA for neck, shoulder, and back problems, listing a date of injury of July 10, 2014. Claimant indicated that she was forced to file a new claim. Ms. Diaz testified that based on Dr. Cowan's record of July 10, 2014, the request to file a new claim was based on information from the physician. Furthermore, Claimant filed a Worker's Claim for Compensation with the Division of Worker's Compensation on February 12, 2015, and specifically noted repetitive motion injury to her left wrist, right wrist, and left and right arms. Claimant does not identify any neck or low back issues. (Exhibit GGG: p. 265).

22. X-rays were taken on September 10, 2014, of the left shoulder which showed mild AC joint arthrosis without other abnormality. (Exhibit BB; p. 101).

23. On September 23, 2014, Dr. Bissell performed bilateral L2 through S1 medial branch blocks. (Exhibit CC; pp. 102-103). An intake form of October 22, 2014, shows widespread body pain (Exhibit Y; p. 94).

24. On December 8, 2014, Dr. Bissell injected claimant's right shoulder and on February 8, 2015, he performed an injection of her left shoulder. Dr. Bissell indicated by March 23, 2015, the shoulder conditions he was treating were at MMI with no impairment. (Exhibit DD; pp. 104-105).

25. On March 17, 2015, Claimant was seen by Dr. Bissell for knee complaints and he noted widespread body pain, much of which was due to fibromyalgia. With regard to her low back condition, he did not plan on repeating her lumbar medial branch blocks due to her negative response to the diagnostic injection. He also did not plan to repeat injections to her shoulders. (Exhibit GG; pp. 118-119).

26. On March 23, 2015, Dr. Simon Blau provided ratings for Claimant's elbows and wrists. Dr. Blau provided claimant with a 15% left upper extremity impairment and a 3% right upper extremity impairment. Dr. Blau performed an evaluation of her cervical spine (within normal limits, good range of motion, non-tender to palpation, negative Spurling tests); Upper extremities (no obvious deformities; full range of motion, muscle strength 5/5); and low back (no obvious deformities, non-tender

to palpation, good range of motion, negative straight leg raises). (Exhibit HH; pp. 120-122).

Claimant's Earlier Medical History

27. Claimant has a history of mental or psychological issues. On December 2, 2008, Claimant complained of electrical type shocks from her head down to her feet, numbness on the left side, anxiety, and depression. MRIs of the brain and cervical cord were normal. Dr. Karl Brewer opined that his only explanation would be somatization of anxiety and depression (Exhibit D; pp. 11-13).

28. Claimant also has a history of neck and back complaints. Her low back pain began 21 years prior to 2011, after a pregnancy. Her neck pain began 12 years prior to the date of injury as a result of motor vehicle accident. As of May 25, 2011, claimant was seen in physical therapy for neck, shoulder, and low back pain (Exhibit F; p. 19) (Exhibit L; p. 44).

Testimony Regarding the Claims Process

29. Claimant testified that she contacted Ms. Diaz about her shoulder, neck, and back complaints that she was having at this time which she then attributed to her fall in November of 2011. According to Claimant, Ms. Diaz instructed her to go back to her PCP for additional testing and then call her back. Claimant also testified that she did not experience any other falls in 2011.

30. Claimant testified that she contacted Ms. Diaz again after the additional testing with Dr. Cowan. She said it was Ms. Diaz's suggestion to open a new claim based on the July 10, 2014 note from Dr. Cowan suggesting repetitive stress injuries, and using July 10, 2014 as the date of the injury for the claim for her bilateral shoulders. Claimant ended up filling out a second claim for workers' compensation benefits based on Ms. Diaz's instruction. The First Report of Injury, completed on August 19, 2014, reports injuries to multiple body parts due to repetitive stress. (Ex. 7, p. 51). The handwritten report notes injuries to the neck, shoulder, and back due to repetitive stress. Claimant testified that she had disagreed with her conditions being attributed to repetitive stress, but followed the instruction of Ms. Diaz in filing the claim in this manner.

31. On direct examination, Ms. Diaz testified that Claimant never reported to her that she alleged to have injured her shoulders, neck, and lower back in the November 2011 fall. It was her testimony that she knew nothing about the shoulders, neck, and back, until after the July 10, 2014 claim was already opened, assigned to a different adjuster, and then transferred to her per Claimant's request. Ms. Diaz was specifically asked if she ever instructed Claimant to file a repetitive stress injury claim for the shoulder. She answered, "No, I did not."

32. Ms. Diaz testified that she did email Claimant throughout the claim and confirmed her email address to be Beatriz.Diaz@cna.com. Ms. Diaz was asked about an email dated August 12, 2014 from her email address to the email address of

Claimant that read, “If you feel that these issues with your neck and back are related to a work injury, yes, you’ll need to file a separate claim for these body parts.” Ms. Diaz did not specifically recall that email, as she does not keep her emails for that length of time; however, she conceded, “but I guess I did.”

33. Ms. Diaz said that she emailed Claimant on July 8, 2014, asking about medical records related to the shoulder injuries. Ms. Diaz conceded that she emailed Claimant on May 12, 2014, indicating she would be reviewing the claim to determine if the bilateral shoulders would be an accepted part of the November 11, 2014 claim. Ms. Diaz did not know why these emails were not reflected in the claim notes in her system.

34. Claimant testified that after filing the July 10, 2014 claim, she was again not provided with a designated provider list from either the insurance carrier or the employer. Claimant ended up receiving treatment from Dr. John Bissell for her shoulders, neck, and back through a referral from Dr. Cowan when Respondents failed to provide Claimant with a workers’ compensation physician. Claimant testified that Dr. Bissell began treating Claimant for her back and then also for her shoulders, but never got around to treating her neck. Claimant only stopped treating with Dr. Bissell after she began receiving bills from Dr. Bissell that were not being paid for by Respondents.

35. *Claimant testified that the mistake was not that Dr. Polanco placed her at MMI in 2011. It was not a mistake that Dr. Polanco did not include or rated the neck, shoulder or back.* The mistake, she said, was that those body parts were mistakenly placed under the 2014 claim.

36. A General Admission of Liability was filed on March 20, 2015 for the July 10, 2014 claim. (Ex. 4). Ms. Diaz testified that Respondents accepted liability for Claimant’s bilateral shoulder injuries as part of the July 10, 2014 claim.

Expert Medical Opinions

37. Dr. Martyak placed Claimant at MMI for her bilateral extremity injuries, the accepted injuries under the November 2011 claim, on October 8, 2014. (Ex. 8, p. 69). Dr. Shimon Blau performed the impairment rating for these injuries. (Ex. 12).

38. Claimant subsequently sought a Division Independent Medical Examination (DIME) with Dr. Frank Polanco for the November 2011 claim. The DIME took place on August 24, 2015. (Ex. 13). Dr. Polanco noted at the outset of his report that a second claim was opened in July of 2014 for her back, shoulders, and neck pain. Under the heading, “Current Complaints,” Dr. Polanco only documented those complaints related to the upper extremities. Dr. Polanco affirmed MMI for the bilateral upper extremities and provided impairment ratings for the upper extremities.

39. Respondents filed a Final Admission of Liability on October 14, 2015 for the November 2011 claim after the DIME with Dr. Polanco was concluded. (Ex. 3). Claimant did not object to this final admission to challenge the opinions of Dr. Polanco.

40. Respondents sent a letter to Dr. Bissell on July 1, 2016. In his response, he acknowledges that he had been treating Claimant for her bilateral shoulder conditions as part of the July 10, 2014 claim. He also indicated Claimant was at MMI for the shoulders as of March 23, 2015 with a 0% impairment rating. (Ex. 11, pp. 194-95).

41. Claimant, disagreeing with both MMI and the lack of the impairment rating, then sought a DIME for the July 10, 2014 claim. This was performed by Dr. Caroline Gellrick on November 1, 2016. (Ex. 16). Dr. Gellrick noted, "The patient is symptomatic for headaches, neck pain, midback pain, low back pain, arms, legs dating back to 2011." Claimant reported to Dr. Gellrick that she attributed all of her symptoms to the fall in 2011, and that the July 2014 claim was only opened as a result of the request by Ms. Diaz. Dr. Gellrick then diagnosed Claimant with a bilateral shoulder strain with evidence of positive impingement and a partial rotator cuff tear of the left shoulder, all attributable to the November 2011 fall.

42. Dr. Gellrick opined that Claimant's condition did not meet the criteria for cumulative trauma. (Ex. 16, p. 267). However, "What [Claimant] does meet with a very clear history is falling down on the job site in 2011 injuring the hands, forearms, and both shoulders." She explained that, for a partial rotator cuff tear to occur in that fashion, it usually presents in the form of trauma, such as the fall in 2011 that caused force to jolt up the arms to the shoulders. Dr. Gellrick concluded, "There is no claim that references July 10, 2014." She did provide Claimant with impairment ratings of 8% scheduled for each shoulder, but as a result of the November 2011 claim.

43. It was only after Dr. Gellrick opined that Claimant's conditions were related to the November 7, 2011 fall that an application for hearing was filed to reopen the November 2011 claim based on the bilateral shoulders, neck, and back, erroneously being filed as part of a July 10, 2014 claim. Dr. Gellrick and Claimant agree that this was done in error. (Ex. 1).

44. Dr. Eric Ridings was retained by Respondents to perform an independent medical examination of Claimant. Dr. Ridings opined in his July 11, 2016 report that Claimant did not have any bilateral shoulder condition. Claimant complained of pain in her entire lumbar region, left lower extremity numbness, left shoulder and left neck pain. She also had pain in the left knee and left hip with zero improvement since the date of onset. Her diagram showed diffuse and widespread pain. (Respondents' Exhibit PP; Bate Stamp 146-169).After reviewing her records, it was Dr. Ridings' opinion that claimant's condition was most consistent with fibromyalgia, which is not an occupational condition. This was on top of her bipolar disorder, obsessive-compulsive disorder and anxiety. He noted that regarding upper extremities, particularly shoulders, he did not believe this condition was related to her work. He further stated that her shoulders, neck, mid/low back complaints were most likely contributed to fibromyalgia, or entirely due to fibromyalgia, without any occupational relationship. (Respondents' Exhibit RR; Bate Stamp 146-168).

45. Dr. Ridings was asked to review the medical records and Dr. Gellrick's report and did so on April 3, 2017. He testified that following the accident of November 2011, there were no complaints in the medical records of claimant's shoulders, neck or low back. He noted significant pre-existing conditions and complaints for her low back, her neck and shoulders. Claimant had pre-existing complaints which could not be explained by physical testing or clinical examination and were determined to be somatization. Specifically, one-year post injury in September 2012, claimant had complaints of low back problems as related to exercise, there is no mention of a fall. He indicated the x-rays taken in 2012 were normal for her age. He also agreed with Dr. Bissell that claimant's diagnosis was consistent with fibromyalgia. This is supported by records from Evans Army Hospital in January and February 2017, which notes a long history of fibromyalgia. Dr. Ridings' examination and the pain diagrams were consistent with fibromyalgia, noting 15 of 18 tender points, which is a criterion for diagnosing fibromyalgia.

46. Dr. Ridings issued a subsequent report on April 3, 2017 after issuance of Dr. Gellrick's DIME report. (Ex. 14, pp. 232-40). Dr. Ridings agreed with Dr. Gellrick that falling on outstretched arms "could" cause a rotator cuff tear; however, he felt the November 2011 fall did not do that in this case based on a lack of medical documentation. He did not feel that any of Claimant's shoulder, neck, or back symptoms were related to the November 2011 fall. Dr. Ridings testified by deposition on May 1, 2017 consistently with the information detailed in his multiple reports.

47. Dr. Jack Rook performed an IME of Claimant on July 21, 2016. (Ex. 15, pp. 241-254). Claimant reported to Dr. Rook the same history of events, that she did have some degree of neck and back aches and pains prior to November of 2011, but it was the fall that caused a marked increase in her symptoms. Dr. Rook diagnosed Claimant has having chronic myofascial neck pain, chronic myofascial low back pain with facet mediated pain and left SI joint dysfunction, and chronic pain of both shoulders with impingement of the right shoulder and rotator cuff tearing of the left shoulder. Dr. Rook also agreed that there was no legitimate July 10, 2014 claim, and noted that the medical records for Claimant are simply not well documented. Dr. Rook notes the fact that Claimant was naïve to the workers' compensation system originally and was not assigned an occupational medicine doctor to manage her case. (Ex. 15, p. 253).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the

necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). While mistakes were plainly made by Insurer in processing Claimant's original injuries, the ALJ is not persuaded that she was instructed, effectively against her will, to characterize her injuries as repetitive, if they were not. The ALJ finds the Claimant to be an unreliable medical historian.

Reopening of the November 7, 2011 Claim

D. Section 8-43-303(1), C.R.S. provides that "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition…" *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). The party seeking to reopen bears the burden of proof to establish grounds for reopening. *See Garcia v. Qualtek Manufacturing*, W.C. No. 4-391-294 (ICAO August 13, 2004). When a party seeks to reopen based on a mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981). An ALJ has broad discretionary authority to determine if a workers' compensation claimant has met her burden of proof in support of reopening a closed claim. *Kilpatrick v. Industrial Claims Appeals Office*, 356 P.3d 1008 (Colo. App. 2015) (rehearing denied July 30, 2015). When evaluating whether a mistake justifies reopening, the ALJ may consider whether the mistake could have been rectified or avoided by the timely exercise of a party's rights prior to closure of the claim. Indus.

Comm'n v. Cutshall, 164 Colo. 240, 433 P.2d 765 (1967); Klosterman v. Indus. Comm'n, 694 P.2d 873 (Colo. App. 1984).

E. Pursuant to § 8-43-201(1), C.R.S., the party attempting to modify an issue that previously has been determined by an order or admission of liability bears the burden of proof. *Section 8-43-201(1), C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the 8-43-201 in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

F. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. In this case, Claimant is seeking to modify an issue determined by the October 14, 2015 Final Admission of Liability for W.C. Number 4-913-733-02. Therefore, the burden is on Claimant to determine that she did sustain compensable injuries to her shoulders, neck, and back, as a result of the November 7, 2011 fall. The ALJ concludes that Claimant has not met her burden of proof to establish a compensable injury to her bilateral shoulders, neck, and lower back as a result of the November 7, 2011 fall.

G. Claimant has failed to meet her burden of proving that there was a mistake that her neck, shoulders, and mid/low back were related to the fall of November 7, 2011. The records don't support a causal connection between the incident of November 7, 2011, and claimant's neck, shoulder, and mid/low back complaints. In addition, Claimant has significant pre-existing conditions to include pre-existing chronic back, neck pain and shoulder problems. The ALJ is persuaded that claimant has a non-work-related condition, fibromyalgia. Dr. Ridings and Dr. Bissell opined this condition accounts for her widespread and diffuse pain complaints as noted on multiple providers' pain diagrams.

H. Claimant has also not shown justifiable mistake, which would warrant reopening. If the mistake is simply the extent of Claimant's injury (what body parts are related to the 2011 claim rather than related to 2014 claim), Claimant should have challenged the DIME at the time Respondents' filed the final admission of liability. *See Justiniano v. ICAO*, 2016 COA 83.

I. Dr. Ridings' testimony is persuasive that there was no mistake on the part of Dr. Polanco and Dr. Polanco was correct in determining claimant had reached maximum

medical improvement and correctly rated and included those body parts related to the November 7, 2011 injury. *Claimant even testified to this effect.* The DIME physician reviewed pertinent medical records produced both before and after MMI, and up to the date of the DIME appointment on August 24, 2015.

J. In addition, Claimant reported to Dr. Cowan in March 2014, that her shoulders and back conditions were related to the 2011 fall. It was the doctor - not the adjuster - who disputed the relatedness of the body parts to the 2011 and the 2014 case. Claimant apparently believed, and had the necessary information to dispute the DIME's determination of MMI and rated body parts as of the date of the respondents' FAL. Accordingly, a mistake of fact is not sufficient to justify reopening, where it *could have been corrected* prior to closure of the claim. The relevant medical facts were known to Claimant at the time of closure. No new medical facts have come to light which would justify a reopening, and that would excuse Claimant from failing to contest the Final Admission at the time it was filed. Dr. Ridings noted that nothing had materially changed regarding causation between the DIME with Dr. Polanco and the DIME with Dr. Gellrick.

K. Claimant has failed to show, by a preponderance of the evidence, that there was a mistake which would justify reopening of her claim. She has also failed to show, by a preponderance of the evidence, a causal connection between her fall in November of 2011, and the injuries to additional body parts she now complains of.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen her November 7, 2011 is denied and dismissed.

2. Claimant's claim for medical benefits to treat her shoulders, neck, and lower back under her November 7, 2011 claim is denied and dismissed.

3. Claimant's claim for medical reimbursement for treatment for her shoulders, neck and lower back alleged to be connected to her November 7, 2011 claim is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 23, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-003-400-05

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insure /Respondents.

No further hearings have been held in the above-captioned matter. On June 23, 2017, Respondents filed an "unopposed Motion for Corrected Full Findings of Fact, Conclusions of Law and Order." The decision mailed on June 16, 2017, is hereby corrected.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 18, 2017 and June 5, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 5/18/17, Courtroom 1, beginning at 8:30 AM, and ending at 12:00 PM; and 6/5/17, Courtroom 1, beginning at 1:30 PM, and ending at 3:00 PM).

Claimant's Exhibits through 11 were admitted into evidence, without objection. Respondents' Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on June 12, 2017. No timely objections were filed and the matter was deemed submitted for decision on June 16, 2017. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern whether or not the Claimant is permanently and totally disabled (PTD); and, post maximum medical improvement (MMI) maintenance medical benefits.

The Claimant bears the burden of proof, by a preponderance of the evidence on both issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant is currently seventy-one years of age (date of birth, September 3, 1945). She did not complete high school, however, she received a GED certificate later in life.

2. The Claimant began working for Respondent the Employer on December 1, 1999, and she performed a variety of tasks but was primarily a van driver for patients. Her job duties included helping disabled patient onto the van and occasionally lifting up to 75 lbs.

3. Ultimately, the Respondents filed an amended Final Admission of Liability (FAL), dated January 5, 2017, admitting liability for 14% whole person permanent partial disability (PPD), pursuant to the opinion of Stephen. D. Lindenbaum, M.D., the Division Independent Medical Examiner (DIME) [Exhibit 4]. Respondents admitted for an average weekly wage (AWW) of $542.94.

The Injury

4. The Claimant suffered an admitted low back injury on January 4, 2016, when she slipped on ice and twisted her lower back. She was referred for medical treatment with Dean Prok, M.D. and then she was referred to Nicholas K. Olsen, D.O.

5. The Claimant continued working thereafter until she was terminated on January 14, 2016, for alleged attendance violations. The Claimant currently receives $969.90 per month for Social Security retirement benefits, which are not subject to offset.

6. The Claimant was first placed at maximum medical improvement (MMI) with a zero impairment and thereafter underwent a DIME with Dr. Lindenbaum on December 9, 2016.

7. DIME Dr. Lindenbaum gave the Claimant a 14% whole person permanent medical impairment which was admitted by the Respondents as herein above found. The undisputed MMI date is July 11, 2016. *Id*., bates stamp 12.

8. In his report, dated December 9, 2016, DIME Dr. Lindenbaum stated the opinion that the Claimant has injury- related permanent functional restrictions impacting her ability to function in the work place. He was of the opinion that the Claimant might be able to perform sedentary work, but only if it did not involve any "significant lifting, bending, or stooping. She would not be able to drive a car based on the fact that she is having a lot of issues with her mentation" [Claimant's Exhibit 3. bates stamp 15]. The ALJ finds that it is important to separate the Claimant's physical limitations from her mental limitations. The evidence, in fact, established that the Claimant can drive on a limited basis, however, Dr. Lindenbaum's physical restrictions would prevent the Claimant from performing her pre-injury job duties, in addition to driving

9. The totality of the medical records establishes that the Claimant had a variety of pre-existing medical problems. These problems have been treated at Kaiser and have included right and left hand pain and weakness in August 2011 [Respondents' Exhibit E, bates stamp 132); right hand pain, weakness, numbness and tingling, accompanied by itching on October 20, 2011, [*Id*., bates stamp 136]; hyperventilation with leg and arm numbness on January 17, 2012 [*Id*., bates stamp 138); and, left leg pain accompanied by ringing in her ears, April 28, 2015 [*Id*., bates stamp 141].

10. Despite the Claimant's prior medical problems, she continued to work full duty and was considered to be an "extremely valuable employee" by the Employer one and a half months prior to her injury [Claimant's Exhibit 11, bates stamp 211]. Thus, approximately seven weeks prior to her January 4, 2016, admitted injury, the Claimant received a performance evaluation on November 12, 2015. According to the summary of the evaluation she was reported by the Employer to be "an extremely valuable employee to [the Employer]" Id. [While recent occupational mistakes and attendance problems were listed in the evaluation, the Claimant's most recent concerns were said to revolve around personal matters outside of her job. *Id*.] At that time, according to the Claimant, she was able to perform all of the essential functions of her job, despite occasional pain. The ALJ infers and finds that it would be speculative as to when, if ever, the Claimant could not perform her job because of "recent occupational mistakes" and "attendance problems." It is not speculative but firmly established that Dr. Lindenbaum's physical restrictions, which the ALJ finds more credible than all other opinions to the contrary, would prevent the Claimant from performing her pre-injury job.

11. Authorized Treating Physicians (ATPs) Dr. Pork and Dr. Olsen stated that the Claimant has no restrictions related to her January 4, 2016 injury. For the reasons stated herein below, the ALJ does not find these opinions in this regard credible. It is more likely than not that DIME Dr. Lindenbaum's physical restrictions are more credible. The testimony of Dr. Jacobs is that any restrictions that the Claimant has are the result of pre-existing conditions. For the reasons stated herein below, the ALJ finds Dr. Jacobs' opinions lacking in credibility. Their explanations are heavily premised on the Claimant's "mentation" problems. The ALJ rejects their opinions in favor of DIME Dr. Lindenbaum's opinion, which outweighs their opinions by preponderant evidence.

12. The DIME's opinion on causation, degree of permanent medical impairment, and MMI has been accepted by the Respondents. It has not been sought to be overcome. DIME Dr. Lindenbaum is of the opinion that the Claimant's work related injury has caused a work related permanent medical impairment of 14% whole person, and that the Claimant requires physical restrictions, in addition to any problems that may relate to her mental status. The ALJ finds the opinion of DIME Dr. Lindenbaum concerning the Claimant's restrictions highly persuasive and credible; and, the ALJ soundly rejects the opinions of Dr. Olsen, Dr. Prok and Alexander Jacobs, M.D.

The Claimant's Statements/Functional Capacity Evaluation (FCE)

13. The ALJ finds the Claimant's testimony persuasive and credible. In observing the Claimant at hearing, the ALJ did not see any unusual behavior. Her testimony did not seem to support the "dementia" opinion of Respondents' independent Medical Examiner (IME), Alexander Jacobs, M.D.

14. Over the years of treatment at Kaiser Permanente, the Claimant has occasionally stated that she looked forward to retiring. Regardless of these statements, she did not act on this possibility and continued to work despite her prior physical problems. Indeed, the ALJ takes administrative notice of the fact that someone who is 70 years of age, with a GED and no further education, may look forward to retirement. This alone does not prove an ulterior motive to gain a PTD award, or that retirement is imminent.

15. The Claimant underwent an FCE with. Kristine Couch OTR (occupational therapist) on March 29, 2017. Couch established that the Claimant is limited to sedentary work. According to Couch's work simulation program, the Claimant was non-competitive for reach, crouching/squatting reach, kneeling to standing and back reach, standing position reach, stooping displacement reach, and upper level reach [Claimant's Exhibit 8, bates stamp 150, 151]. Additionally, Couch stated that the Claimant's left foot was noted to catch when stepping forward after she was asked to perform indoor walking tests. *Id*., bates stamp 154. Finally, the Claimant's knuckle to shoulder lifting was limited to 15 lbs. and shoulder to overhead 5 lbs. with lifting and carrying limited to 10 lbs. *Id*., bates stamp 156. Couch evaluated the validity of the

Claimant's effort which demonstrated consistency in 19 of 20 tests. *Id*., bates stamp 154, 200]. Couch did not evaluate the Claimant's "mentation" problems –only her physical limitations.

Respondents' Independent Medical Examination (IME) by Alexander Jacobs, M.D.

16. On the Respondents' behalf, Dr. Jacobs performed an IME on the Claimant on or about April 3, 2017. In a 58-page report, Dr. Jacobs concluded that "neither the back pain nor the cervical symptoms are related to the on-the-job injury **in any way, shape or form** (emphasis supplied). As the poet said, "methinks the he protesteth too much." Based on this characterization, the ALJ infers that Dr. Jacobs has indicated an investment in an outcome of non-causal relatedness. Indeed, his opinion in this regard is contrary to the DIME physician's causal opinion, and Dr. Jacobs' opinion does not make it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Lindenbaum was wrong in his causal opinion. Dr. Jacobs also testified at the hearing. He is board certified in Internal Medicine and Geriatrics. Without adequately explaining the basis of his opinion, he stated that the Claimant's "cognitive difficulties are related to some type of dementia." He speculates that this may be related to "Alzheimer's or multi-infarct dementia." Dr. Jacobs does not give a firm diagnosis in this regard nor does he make any appropriate referrals for the Claimant's alleged "dementia." He further states that this is "not in any way, shape or form related to her January 4, 2016 slip and 'non-fall"—an interesting choice of words. Lastly, Dr. Jacobs states the opinion that any work restrictions the Claimant has are "due to her non-injury diagnosis." He had no recommendations for treatment for work-related conditions.

17. The ALJ infers and finds that Dr. Jacobs has categorically rendered opinions that: (1) the Claimant never suffered a compensable injury on January 4, 2016 as admitted and which resulted in 14% whole person PPD; (2) most of the Claimant's problems are attributable to alleged "dementia," although Dr. Jacobs did not do a full work up to firm up a diagnosis of 'dementia" or "Alzheimer's," and none of the Claimant's restrictions are attributable to her work injury "in any way, shape, or form." Indeed, in his testimony at hear, Dr. Jacobs mixed medical opinions with legal conclusion, *e.g."* "the work injury did not "aggravate or accelerate" the Claimant's condition. From an overall standpoint, the ALJ infers and finds that Dr. Jacobs became an effective advocate for the Respondents' theory of the case, thus, his credibility was compromised. Indeed, the ALJ finds that Dr. Jacobs' opinions, categorically, are lacking in credibility and, therefore, are rejected.

Vocational Evaluation of John Macurak

18. The Claimant was evaluated by vocational expert John Macurak at the request of the Claimant. Macurak issued several reports and testified at the hearing [Claimant's Exhibit 9]. His most recent report was completed on April 25, 2017, after he reviewed the FCE performed by Kristine Couch. Macurak was of the opinion that the Claimant was unable to earn any wages in the same or other employment as a result of her January 4, 2016, injury, given the extent of her physical limitations, the work restrictions assigned, her advanced age, and her limited education [*Id*., bates stamp 189]. Macurak noted that the Claimant had limited computer skills (online banking only) and her limited education and advanced age precluded her from earning wages in unknown employment. The ALJ finds Macurak's opinion highly persuasive and credible; and, it outweighs the vocational opinions of Respondents' IME Dr. Jacobs and Respondents' Vocational Evaluator, Katie Montoya.

Vocational Evaluation of Katie Montoya.

19. The Claimant was evaluated by Katie Montoya at the request of the Respondents. Montoya agreed that the Claimant is limited to a sedentary work capacity. There was no persuasive evidence that the Claimant had ever worked in sedentary work, or had transferrable skills to work in sedentary work. Montoya conceded that the Claimant's pre-injury job is characterized as "heavy" work. Montoya's opinion, however, was that the Claimant is employable, based on the opinions of Dr. Olsen, Dr. Prok and Dr. Jacobs who attribute the Claimant's current limitations to pre-existing, non-injury related, restrictions. As found, herein above, these doctors' opinions have been determined to lack credibility. Montoya testified that she did **not** rely on the restrictions given by DIME Dr. Lindenbaum or the limitations arising from Kristine Couch's FCE, although she was aware of both. The ALJ finds that Montoya's reliance on the opinions of Dr. Prok, Dr. Olsen and Dr. Jacobs was misplaced and for this reason, her ultimate opinion, like a house of cards, collapses. Indeed, Montoya did **no** labor market surveys to see if there was any sedentary work that the Claimant could do. The ALJ rejects the opinion of Katie. Montoya as unpersuasive, and lacking in overall credibility.

Permanent Total Disability

20. The Claimant is unable to earn any wages in the same or other employment in her commutable labor market. The "full responsibility rule," applicable to claims for permanent total disability benefits, provides that the industrial injury need not be the sole cause of a claimant's permanent total disability. Under the rule, when an "employer hires an employee who, by reason of a pre-existing condition or by reason of a prior injury, is to some extent disabled, he takes the person with such handicap," and the employer should be liable for a "full award of benefits" if a subsequent industrial injury combines with the pre-existing disability to produce permanent total disability. As

found, the Claimant was able to perform the full range of her job duties before the admitted injury of January 4, 2016. Afterwards, DIME Dr. Lindenbaum gave her physical restrictions whereby she could not perform her pre-injury job duties. She has not worked since she was terminated from employment on January 14, 2016, 10-days after her admitted injury, nor has she earned any wages or been capable of earning any wages.

21. Considering the Claimant's "human factors," including her age of 70; her work history and/or lack of any significant work history; her general physical condition; her education (a GED with no special training); her mental ability, prior training and experience, and the availability of work that she could perform. There is no persuasive evidence of any work the Claimant could perform. There is no persuasive evidence that employment exists or is available in the Claimant's competitive job market, which the Claimant can perform on a reasonably sustainable basis. As found, the Claimant has proven that she is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to her, and this inability is attributable to the admitted injury of January 4, 2016. She could do her job until then and she could not to it afterwards. The Respondents imply that a confluence of the Claimant's pre-existing conditions, including Dr. Jacobs' alleged opinion of "dementia," coincidentally, ripened whereby the Claimant could not work after her admitted injury. This argument is not well taken by the ALJ.

Medical Care and Treatment

22. Any maintenance medical care and treatment to maintain the Claimant at MMI (after July 11, 2016) and prevent a deterioration of her physical condition is causally related to the admitted injury of January 4, 2016 and reasonably necessary. Also, if at the hands of previously authorized medical providers, it is authorized.

Ultimate Findings

23. The ALJ finds that the Claimant's testimony was straight-forward and credible. The permanent medical impairment and physical restrictions, as found herein above, of DIME Dr. Lindenbaum are persuasive and credible. Based on the totality of the evidence, the ultimate opinions of Dr. Prok and Dr. Olsen are lacking in credibility. The ultimate opinions of Dr. Jacobs are significantly lacking in credibility. The vocational opinions, for the reasons found herein above, of John Macurak are more persuasive and credible than the vocational opinions of Katie Montoya.

24. Between conflicting opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the vocational opinion of John Macurak, and to reject the vocational opinion of Katie Montoya. Also, the ALJ makes a rational choice to accept DIME Dr. Lindenbaum's opinions, and to reject the opinions of Dr. Jacobs, Dr. Prok, and Dr. Olsen.

25. The Claimant has proven, by a preponderance of the evidence that she is permanently and totally disabled on account of her admitted injury, and that she is unable to earn any wages in the same or other employment in her competitive labor market, on a reasonably sustainable basis. Regardless of the fact that the Claimant's admitted injury is not the sole cause of her permanent total disability, the admitted injury is "the straw that broke the camel's back." The ALJ finds that the admitted injury was, indeed, a significant causative factor in the Claimant's PTD.

26. The Claimant has proven, by preponderant evidence to entitlement to post-MMI maintenance medical benefits for her physical injuries, after July 11, 2016, to maintain her at MMI and to prevent a deterioration of her condition

27. It has been admitted that the Claimant's AWW is $542.94, 2/3rds of which is $361.96 (the weekly PTD rate), or $51.71 per day.

28. On the date of the Claimant's admitted injury, January 4, 2016, she was 70 years old. Her federal Social Security benefits were retirement benefits, not disability benefits. She never received any Social Security **disability benefits.**

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions

(this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was credible and DIME Dr. Lindenbaum's opinions concerning the Claimant's physical restrictions were credible. The opinions of Dr. Jacobs, Dr. Prok, and Dr. Olsen were lacking in credibility as herein above found. As further found, the vocational opinuions of John Macurak were more credible and persuasive than the vocational opinions of Katie Montoya, which in and of themselves, are dispositive of the PTD issue.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions, the ALJ made a rational choice, based on substantial evidence, to accept the vocational opinion of John Macurak, and to reject the vocational opinion of Katie Montoya. Also, the ALJ made a rational choice to accept DIME Dr. Lindenbaum's opinions, and to reject the opinions of Dr. Jacobs, Dr. Prok, and Dr. Olsen.

Permanent Total Disability

c. An employee is permanently and totally disabled if she/he is unable to earn any wages in the same or other employment. § 8-40-201(16.5) (a) C.R.S. The "full responsibility rule," applicable to claims for permanent total disability benefits, provides that the industrial injury need not be the sole cause of a claimant's permanent total disability. Under the rule, when an "employer hires an employee who, by reason of a pre-existing condition or by reason of a prior injury, is to some extent disabled, he takes the person with such handicap," and the employer is liable for a "full award of benefits" if a subsequent industrial injury combines with the pre-existing disability to produce permanent total disability. See *United Airlines, Inc. v. Indus. Claim Appeals Office,* 993 P.2d 1152, 1154-1155 (Colo. 2000). The only exception to the established rule is where the industrial injury is not a significant causative factor in a claimant's disability. See *Seifried v. Indus. Comm'n,* 736 P.2d 1262 (Colo. App. 1986) [the claimant suffered from several pre-existing ailments, and the treating physician opined that the claimant had reached maximum medical improvement, and concluded that the claimant remained disabled because of non-occupational factors—in *Siefried,* the pre-existing factors contributed 95% to the PTD and the industrial injury only 5%].; *Lindner Chevrolet v. Indus. Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995). *See also Holly Nursing Care Center v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). In the present case, as found, the Claimant's admitted physical injuries which resulted in 14% permanent medical impairment, **significantly** contributed to her PTD. Consequently, *Siefried* is inapplicable to the facts in the present case.

d. In determining whether a claimant is permanently and totally disabled, an ALJ may consider a claimant's "human factors," including the claimant's age, work history, general physical condition, education, mental ability, prior training and experience, and the availability of work that the claimant could perform. *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998*); Joslin's Dry Goods Co. v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). The term "any wages" means more than zero wages. *See Lobb v. Indus. Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). The critical test is whether employment exists that is reasonably available to a claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. This means whether employment is available in the competitive job market, which a claimant can perform on a reasonably sustainable basis. *See Joslins Dry Goods Company v. Indus. Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). As found, the Claimant has proven that she is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to her. Permanent total disability does not need to be proven by medical evidence. *See Baldwin Construction, Inc. v. Indus. Claim Appeals Office,* 937 P.2d 895 (Colo. App. 1997). *Calvert v. Roadway Express, Inc.,* W.C. No. 4-355-715 [Indus. Claim Appeals Office (ICAO), November 27, 2002]; *In re Claim of Randy Blocker*

v. Express Personnel, W.C. No. 4-622-069-04 (ICAO, July 1, 2013). As further found, the Claimant's "human factors," including her age of 70; her work history and/or lack of any significant work history; her general physical condition; her education (a GED with no special training); her mental ability; prior training and experience;, and, the lack of persuasive evidence about the availability of work that she could perform support the conclusion that she is permanently and totally disabled.. There is no persuasive evidence of any work the Claimant could perform. There is no persuasive evidence that employment exists or is available in the Claimant's competitive job market, which the Claimant can perform on a reasonably sustainable basis. As found, the Claimant has proven that she is incapable of earning wages in the competitive labor market, on a reasonably sustainable basis, and there is no work reasonably available to her, and this inability is attributable to the admitted injury of January 4, 2016. She could do her job until then and she could not to it afterwards. The Respondents imply that a confluence of the Claimant's pre-existing conditions, including Dr. Jacobs' alleged opinion of "dementia," coincidentally, ripened whereby the Claimant could not work after her admitted injury. This argument is rejected.

e. Under § 8-40-201(16,5)(a), C.R.S., the overall objective is to determine whether, in view of all these human factors and vocational factors, employment is "reasonably available to a claimant under his or her particular circumstances." *Weld County Sch. Dist. RE-12 v. Bymer, supra* at 558. Also see *Joslin's Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P. 3d 866 (Colo. App. 2001). This requires a determination of whether employment is available in the competitive job market which the Claimant can perform on a reasonably sustainable basis. Here such employment is not available to the Claimant and the Respondents have failed to show that it is. Rather, the Claimant has proven that she is not capable of earning wages in the same or other employment.

Post-MMI Maintenance Medical Benefits

f. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado*

Kenworth, Inc., W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address the admitted physical injury

Social Security Retirement Benefits

g. Section 8-42-103 (1) (c)(I), C.R.S., provides for an offset of one-half of Federal Social Security Disability benefits. Subsection (c)((I) begins"…where it is determined that periodic **disability** (emphasis supplied) benefits granted by the federal "Old-Age Survivors, and **Disability** (emphasis supplied) Insurance Amendments…." The Subsection provides for an offset of one-half of the Federal benefits. In the Respondents "Motion" for a corrected decision, the Respondents cite *Zerba v. Dillon Companies,* 292 P.l3d 1051, **2012 COA 78,** wherein Division 5 of the Court of Appeals determined that Social Security Retirement benefits (although having nothing to do with **disability**) were subject to the 50% offset. The Court distinguished military pension benefits on the basis that the employer had nothing to do with the military pension. Interestingly, the Employer herein had nothing to do with the Claimant's Social Security Retirement benefits. Underlying the Federal social security offset is the rationale that "double payments" for disability were not appropriate. The ALJ herein is bound to follow legal precedent even if he believes the rationale underlying the precedent is wrong. As found, in this case, the Claimant never received social security **disability** benefits –only **retirement** benefits, which she would have received regardless of her work-related injury –in the same way she would have received an annuity that she funded herself – the difference being that the Federal government and not the Employer paid into the retirement benefits. Judges are under an obligation to follow precedent except in the rarest of circdumstances. *See In Re Kline,* No. 151 (Cal. Comm'n on Jud. Performance, August 19, 1999); *Morrow v. Hood Comm'ns, Inc.,* 59 Cal,. App. 4th 924, 926-27 (Kline, dissenting). Nonetheless, lawyers and judges are under an obligation to criticize what they believe to be wrong decisions. As Abraham Lincoln commented on the *Dred Scott* opinion:

> We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in the instrument itself. More than this would be revolution. But we think the *Dred Scott* decision is **erroneous** (emphasis supplied). We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no resistance to it.

The ALJ herein does not presume to step into Mr. Lincoln's shoes, however, he would implore the appellate courts to re-examine the opinion in *Zerba v. Dillon Companies*. Nonetheless, under *Zerba's* interpretation of § 8-42-103 (1)(c)(I), C.R.S., the Respondents are entitled to offset one-half of the Claimant's Social Security **Retirement** benefits.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on the issue of permanent total disability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the Claimant's admitted physical injuries to maintain her at maximum medical improvement and to prevent a deterioration of her condition, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Respondents hall pay the Claimant permanent total disability benefits of $361.96 per week, or $51.71 per day from July 11, 2016 for the rest of the Claimant's natural life. The period between the maximum medical improvement date of July 11, 2016 and the last session of the hearing , June 5, 2017, both dates inclusive, is 330 days. Past due permanent total disability benefits equal $17,064.30, however, Respondents may take a credit for all permanent partial disability benefits paid pursuant to the latest Final Admission of Liability, dated January 5, 2017. Further, beyond the credit period, Respondents shall continue to pay the Claimant permanent total disability benefits of $361.96 per week for the rest of the Claimant's natural life.

C. **Under the holding in *Zerba v. Dillon Companies,* 292 P.3d 1051 (Colo. App. Div.5 2012), 2012 COA 78,** the Respondents are entitled to offset one-half of the Claimant's federal Social Security **Retirement** benefits unless and until *Zerba* is over-ruled.

D. Respondents shall pay the Claimant interest at the rate of eight percent (8%) per annum on all indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Timothy O. Hall, M.D. that she suffered a 0% permanent impairment rating for her June 18, 2015 admitted lower back injury.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her June 18, 2015 lower back injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. Claimant worked for Employer as a Housekeeper. On June 18, 2015 she was lifting a heavy recycle bag full of cans when she developed lower back pain.

2. Claimant chose to receive medical treatment through Concentra Medical Centers. She underwent conservative care that included injections, physical therapy, diagnostic assessments and massage therapy.

3. On August 7, 2013 Claimant suffered a lower back injury in W.C. No. 4-926-344. On March 21, 2014 John Aschberger, M.D. assigned Claimant a 12% whole person impairment rating for her August 7, 2013 lower back injury. The rating consisted of 5% pursuant to Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) and 7% for range of motion deficits. Claimant settled W.C. No. 4-926-344 on a full and final basis for $28,400.00.

4. On January 18, 2016 Claimant obtained medical treatment for her June 18, 2015 lower back injury from Authorized Treating Physician (ATP) Albert Hattem, M.D. In reviewing Claimant's prior medical history, Dr. Hattem remarked that Claimant had suffered an industrial lower back injury on August 7, 2013. Claimant had undergone a course of conservative treatment including physical therapy, osteopathic manipulation and a lumbar epidural injection. She received a 12% whole person impairment rating consisting of 5% for a Table 53 diagnosis and 7% for range of motion deficits. Upon physical examination Claimant exhibited significant pain behaviors. Dr. Hattem specifically noted that Claimant "winc[ed] and withdr[ew] with slight palpation of the lumbar spine." He remarked that when he instructed Claimant to "forward flex" she "barely moved at all." Claimant's lack of mobility was inconsistent with her relatively normal lumbar MRI. In fact, the lumbar MRI had revealed "only degenerative disc changes at L5-S1 with left S1 root sleeve deformity that [did] not correspond to [her]

right thigh pain." Dr. Hattem commented that Claimant was approaching Maximum Medical Improvement (MMI).

5. On May 9, 2016 Claimant returned to Dr. Hattem for an evaluation. She reported persistent, unchanged lower back pain associated with periodic bilateral leg pain that she rated at a pain level of 9/10. Dr. Hattem remarked that he did not know why Claimant had not returned for an evaluation since her last visit four months earlier. Although she had obtained medication refills she had not scheduled any return appointments. On physical examination, Dr. Hattem noted that "significant pain behaviors [were] evident." He specifically explained that "[w]hen her lumbar spine is only mildly palpated, she winces and withdraws. When instructed to flex, extend or lateral bend her spine, she barely moves more than a few degrees in any plane. Nonphysiologic signs are present."

6. Dr. Hattem noted that Claimant's lumbar MRI had revealed only degenerative disc changes at L5-S1 with left S1 nerve root deformity that did not correspond to her right thigh pain. Moreover, an EMG/nerve conduction study had been normal. Claimant also underwent treatment and diagnostic testing with Dr. Sacha. Dr. Sacha had observed "multiple red flags in [Claimant's] presentation." Finally, Dr. Sacha administered a right L5-S1 transforaminal epidural spinal nerve block that did not provide relief. Dr. Hattem determined that Claimant had reached MMI. He summarized that Claimant's condition had stabilized, an MRI did not demonstrate a surgical lesion and her pain behaviors "support[ed] the conclusion that ongoing physical interventions" would not be beneficial.

7. Dr. Hattem relied on the *AMA Guides* in assigning Claimant a 0% whole person impairment rating for her June 18, 2015 lower back injury. Initially, he assigned Claimant a 5% whole person impairment rating for her lumbar spine based on Table 53 of the *AMA Guides* "for six months of medically documented pain with none to minimal degenerative changes on structural tests." However, he did not assign a rating for abnormal lumbar range of motion because he did not consider Claimant's demonstrated range of motion to be valid. Dr. Hattem specifically explained that when he instructed Claimant to "flex, extend, or lateral bend her lumbar spine, she barely moved more than a few degrees in any plane. This is not consistent with a relatively normal lumbar MRI. Her demonstrated motion is likely self-limited." He thus assigned Claimant a 5% permanent impairment rating for her June 18, 2015 lower back injury.

8. However, Dr. Hattem also considered apportionment pursuant to the *AMA Guides*. On March 21, 2014 Dr. Aschberger had assigned Claimant a 12% whole person impairment rating for her August 7, 2013 lower back injury in W.C. No. 4-926-344. The rating consisted of 5% pursuant to Table 53 and 7% for range of motion deficits. Dr. Hattem thus subtracted Claimant's 5% impairment rating as a result of her August 7, 2013 industrial lower back injury from her 5% rating for her present June 18, 2015 lower back injury. Accordingly, Dr. Hattem assigned Claimant a 0% permanent impairment rating for her June 18, 2015 lower back injury.

9. Dr. Hattem remarked that Claimant would require medical maintenance care. However, he did not detail specific treatment other than a refill of Claimant's Tramadol prescription. Dr. Hattem noted that the medication "may be refilled for an additional three months."

10. On June 7, 2016 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Hattem's May 9, 2016 date of MMI and 0% permanent impairment rating. Respondents also acknowledged that Claimant was entitled to receive medical maintenance benefits for her June 18, 2015 lower back injury.

11. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME). On October 21, 2016 Claimant underwent the DIME with Timothy O. Hall, M.D. Claimant testified that at no time during the impairment evaluation did Dr. Hall ask her to bend forward or side-to-side. She also remarked that she never moved from her chair during the evaluation. Dr. Hall did not examine her but only asked questions.

12. Dr. Hall reviewed Claimant's history of medical treatment and considered her impairment rating for her August 7, 2013 injury. Dr. Hall recorded that Claimant reported more lower back pain than leg pain and pointed to the belt line. He detailed that Claimant "report[ed] it has always been the right leg that hurts. She really can't think of anything that makes the pain better. Just about everything makes it worse, from the sitting, standing, walking or bending." On examination, Dr. Hall also found considerable pain behaviors and noted that Claimant was difficult to examine. He commented that Claimant was able to get on and off the exam table on her own, but "when attempting range of motion, her movements were minimal … She had essentially no extension, maybe 10 degrees of flexion and perhaps 5 degrees of side bending on each side." Dr. Hall determined that, "due to excessive pain behaviors, [Claimant's] range of motion calculation does not meet validity criteria. I cannot give her a reasonable impairment rating for range of motion." Dr. Hall also remarked that Claimant desired additional therapy, but judging from the treatment notes, he doubted that more therapy would impact her condition. He thus did not recommend medical maintenance treatment in the form of physical therapy.

13. The DIME Unit of the Division of Workers' Compensation received Dr. Hall's report and sent him and the parties an "Incomplete Notice – IME Report" on November 9, 2016 along with a letter. The letter pointed out that if a physician chooses to invalidate range of motion, even for reasons other than straight leg raise validity, the *AMA Guides*, Colorado Division of Workers' Compensation *Impairment Rating Tips* (*Impairment Rating Tips*) and Level II curriculum require two visits on two different days for repeat range of motion testing. The DIME Unit also advised Dr. Hall to:

> Keep in mind that you also have the option of accepting invalidated range of motion from other medical reports in lieu of bringing the claimant back for repeat measurements if they were completed in compliance with the *AMA Guides, 3rd Edition, Rev*. If this is the route you chose, it would be helpful to document this in your report. Please review and clarify…

14. On December 12, 2016 Dr. Hall responded to the DIME Unit explaining why he did not provide a rating for range of motion deficits. He detailed that

> I did not do a rating regarding range of motion impairment. Range of motion could not be accomplished in that [Claimant] simply did not move when asked to perform flexion, extension, and side bending. This is inconsistent with her activities of sitting in the chair and getting up and out of the chair, and getting off and on the exam table. She reported pain that kept her from any motion of her lumbar spine.

In specifically responding to the DIME Unit's inquiry regarding invalidation of range of motion measurements, Dr. Hall remarked that Dr. Hattem's range of motion determinations were identical, and inquired whether the use of Dr. Hattem's findings would constitute compliance with the two required measurements. Dr. Hall commented that "[i]f this explanation is sufficient, let me now. If not, I will have her back in." He summarized that "[t]he circumstance is not truly a validity issue. This is an issue of what could be considered exaggerated pain behaviors, making any attempt at objective measurements impossible."

15. The record is devoid of any evidence from the DIME Unit directing additional correspondence from Dr. Hall. Instead, the DIME Unit issued a notice that the DIME report had satisfied minimal completion standards.

16. On January 3, 2017 Insurer filed a FAL consistent with Dr. Hall's determination that Claimant reached MMI on May 9, 2016 with a 0% permanent impairment rating. Respondents also denied medical maintenance benefits for Claimant.

17. Claimant acknowledged that in the period between May 9, 3016 when she reached MMI and her DIME with Dr. Hall on October 21, 2016 she did not visit ATP Dr. Hattem seeking pain medication or treatment. Furthermore, even after the DIME Claimant did not seek additional medical maintenance care from Dr. Hattem. Instead, Claimant explained that she received some physical therapy from Kaiser Permanente for her back.

18. Claimant contends that it is highly probable and free from serious or substantial doubt that Dr. Hall did not follow the procedures outlined by the *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips* regarding the evaluation of range of motion deficits. She specifically asserts that Dr. Hall erred by not performing range of motion measurements using an inclinometer and by failing to bring her back for another appointment to take measurements.

19. Claimant has failed to produce clear and convincing evidence to overcome Dr. Hall's DIME that she suffered a 0% permanent impairment rating for her June 18, 2015 admitted lower back injury. First, the record reveals that Dr. Hall sufficiently complied with the *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips*

regarding the evaluation of range of motion deficits. In responding to the DIME Unit's inquiry regarding invalidation of range of motion measurements, Dr. Hall remarked that Dr. Hattem's range of motion determinations were identical and inquired whether the use of Dr. Hattem's findings would constitute compliance with the two required measurements. Dr. Hall commented that "[i]f this explanation is sufficient, let me know. If not, I will have her back in." The record is devoid of any evidence from the DIME Unit directing additional follow-up from Dr. Hall. Instead, the DIME Unit issued a notice that the DIME report had met their minimal completion standards. By adopting ATP Dr. Hattem's invalidated range of motion measurements Dr. Hall sufficiently complied with the recommendations *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips*.

20. Second, Dr. Hall's technical deviation from the *AMA Guides* does not mandate that his 0% permanent impairment rating was incorrect. Instead, Dr. Hall's deviance from the *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips* in failing to perform range of motion measurements using an inclinometer and recall Claimant for a second visit was warranted based on Claimant's failure to participate in her range of motion evaluation. As Dr. Hall explained in his correspondence to the DIME Unit he did not perform a rating regarding range of motion impairment. He specifically noted that "[r]ange of motion could not be accomplished in that [Claimant] simply did not move when asked to perform flexion, extension, and side bending. This is inconsistent with her activities of sitting in the chair and getting up and out of the chair, and getting off and on the exam table. He summarized that "[t]he circumstance is not truly a validity issue. This is an issue of what could be considered exaggerated pain behaviors, making any attempt at objective measurements impossible." Dr. Hall's failure to strictly adhere to the *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips* when assessing Claimant's range of motion deficits does not constitute unmistakable evidence free from serious or substantial doubt to overcome his opinion that Claimant suffered a 0% permanent impairment rating for her June 18, 2015 admitted lower back injury.

21. Claimant has failed to establish by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her June 18, 2015 lower back injury or prevent further deterioration of her condition. Initially, ATP Dr. Hattem remarked that Claimant would require medical maintenance care. However, he did not detail specific treatment other than a refill of Claimant's Tramadol prescription. Dr. Hattem limited Claimant's Tramadol refills to "an additional three months." Moreover, on the date Claimant reached MMI Dr. Hall commented that Claimant's condition had stabilized, an MRI did not demonstrate a surgical lesion and her pain behaviors "support[ed] the conclusion that ongoing physical interventions" would not be beneficial. Dr. Hall also remarked that Claimant desired additional therapy, but judging from the treatment notes, he doubted that more therapy would impact her condition. He thus did not recommend medical maintenance treatment in the form of physical therapy. Finally, Claimant acknowledged that during the period between May 9, 3016 when she reached MMI and her DIME with Dr. Hall on October 21, 2016 she did not visit ATP Dr. Hattem seeking pain medication or treatment. Furthermore, even after the DIME Claimant did

not seek additional medical maintenance care from Dr. Hattem. Instead, Claimant explained that she received some physical therapy from Kaiser Permanente for her back. Accordingly, Claimant's request for medical maintenance benefits for her June 18, 2015 lower back injury is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may

consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. The Colorado Division of Workers' Compensation *Impairment Rating Tips* (*Impairment Rating Tips*) provide general recommendations for physicians when assigning permanent impairment ratings. In specifically addressing the invalidation of spinal range of motion measurements, the *Impairment Rating Tips* provide that

> claimants must have two visits. Two sets of three measurements must be taken on each visit (12 measurements total). When a physician performing a Division IME finds range of motion measurements invalid (due to SLR check or for physiologic reasons) such physician may fulfill this requirement by accepting invalidated measurements from other reports in lieu of bringing the claimant back for a second set of measurements. The physician must, however, report his/her own initial sets of measurements

See Desk Aid #11, Spinal Rating 10.

8. As found, Claimant contends that it is highly probable and free from serious or substantial doubt that Dr. Hall did not follow the procedures outlined by the *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips* regarding the evaluation of range of motion deficits. She specifically asserts that Dr. Hall erred by not performing range of motion measurements using an inclinometer and by failing to bring her back for another appointment to take measurements.

9. As found, Claimant has failed to produce clear and convincing evidence to overcome Dr. Hall's DIME that she suffered a 0% permanent impairment rating for her June 18, 2015 admitted lower back injury. First, the record reveals that Dr. Hall sufficiently complied with the *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips* regarding the evaluation of range of motion deficits. In responding to the

DIME Unit's inquiry regarding invalidation of range of motion measurements, Dr. Hall remarked that Dr. Hattem's range of motion determinations were identical and inquired whether the use of Dr. Hattem's findings would constitute compliance with the two required measurements. Dr. Hall commented that "[i]f this explanation is sufficient, let me know. If not, I will have her back in." The record is devoid of any evidence from the DIME Unit directing additional follow-up from Dr. Hall. Instead, the DIME Unit issued a notice that the DIME report had met their minimal completion standards. By adopting ATP Dr. Hattem's invalidated range of motion measurements Dr. Hall sufficiently complied with the recommendations *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips*.

10. As found, second, Dr. Hall's technical deviation from the *AMA Guides* does not mandate that his 0% permanent impairment rating was incorrect. Instead, Dr. Hall's deviance from the *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips* in failing to perform range of motion measurements using an inclinometer and recall Claimant for a second visit was warranted based on Claimant's failure to participate in her range of motion evaluation. As Dr. Hall explained in his correspondence to the DIME Unit he did not perform a rating regarding range of motion impairment. He specifically noted that "[r]ange of motion could not be accomplished in that [Claimant] simply did not move when asked to perform flexion, extension, and side bending. This is inconsistent with her activities of sitting in the chair and getting up and out of the chair, and getting off and on the exam table. He summarized that "[t]he circumstance is not truly a validity issue. This is an issue of what could be considered exaggerated pain behaviors, making any attempt at objective measurements impossible." Dr. Hall's failure to strictly adhere to the *AMA Guides,* the Level II Curriculum and the *Impairment Rating Tips* when assessing Claimant's range of motion deficits does not constitute unmistakable evidence free from serious or substantial doubt to overcome his opinion that Claimant suffered a 0% permanent impairment rating for her June 18, 2015 admitted lower back injury.

Medical Maintenance Benefits

11. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

12. As found, Claimant has failed to establish by a preponderance of the evidence that she is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her June 18, 2015 lower back injury or prevent further deterioration of her condition. Initially, ATP Dr. Hattem remarked that Claimant would require medical maintenance care. However, he did not detail specific treatment other than a refill of Claimant's Tramadol prescription. Dr. Hattem limited Claimant's Tramadol refills to "an additional three months." Moreover, on the date Claimant reached MMI Dr. Hall commented that Claimant's condition had stabilized, an MRI did not demonstrate a surgical lesion and her pain behaviors "support[ed] the conclusion that ongoing physical interventions" would not be beneficial. Dr. Hall also remarked that Claimant desired additional therapy, but judging from the treatment notes, he doubted that more therapy would impact her condition. He thus did not recommend medical maintenance treatment in the form of physical therapy. Finally, Claimant acknowledged that during the period between May 9, 3016 when she reached MMI and her DIME with Dr. Hall on October 21, 2016 she did not visit ATP Dr. Hattem seeking pain medication or treatment. Furthermore, even after the DIME Claimant did not seek additional medical maintenance care from Dr. Hattem. Instead, Claimant explained that she received some physical therapy from Kaiser Permanente for her back. Accordingly, Claimant's request for medical maintenance benefits for her June 18, 2015 lower back injury is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

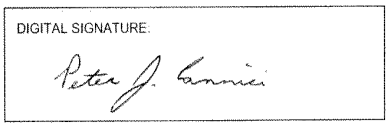
1. Claimant reached MMI on May 9, 2016 with a 0% permanent impairment rating for her June 18, 2015 lower back injury.

2. Claimant's request for medical maintenance benefits for her June 18, 2015 lower back injury is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 23, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-991-178-03

ISSUES

- Whether Claimant established by a preponderance of the evidence that the spinal cord untethering surgical procedure recommended by Scott P. Falci, M.D. is reasonably necessary and related to Claimant's July 23, 2015 industrial injury?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was injured on July 23, 2015 in the course and scope of her employment as assistant produce manager for Employer. On that date, Claimant was pulling a pallet jack loaded to six feet with heavy bags of potatoes. Somebody from behind the pallet began pushing and control of the pallet was lost. As Claimant tried to slow the moving pallet, she turned to face the pallet and was thrown into some double doors. The pallet wheel caught her left shoe, forcing her to fall backwards to the concrete floor on her back and left hip. As a consequence of the industrial accident, Claimant suffered an admitted injury to her low back.

2. Claimant received temporary total disability benefits between August 10, 2015 and January 15, 2016. She returned to reduced hours at work on or about January 16, 2016, at which time she received temporary partial disability benefits. Claimant is currently working part-time for Employer with her same job title but with duties within her restrictions.

3. Claimant initially received conservative care for her back injury, including physical therapy, three injections, and medications.

4. By October 2015, Claimant began experiencing left leg weakness, which increased with activity. She also began experiencing urinary incontinence.

5. Claimant sought treatment from an incontinence specialist, Jamie L. VanOveren, D.O , at the Urology Clinic in Steamboat Springs and Craig. Claimant was seen on December 14, 2015; April 6, 2016; April 11, 2016; May 9, 2016; May 16, 2016, and November 14, 2016. At her last visit, Dr. VanOveren assessed "Bladder hypertonicity" and "Urge and stress incontinence."

6. On October 17, 2015 Claimant underwent an MRI which was interpreted to show that the "conus medullaris [spinal cord] is normal in position just inferior to the L1-2 disk space. The conus is intrinsically normal without evidence of compression of the lower thoracic cord or conus."

7. On April 7, 2016, Claimant treated with Dianne Wetterstein, PAC who noted that Claimant had three injections with Dr. Gronseth, had constant pain in her very low back, and still had urinary incontinence.

8. On May 6, 2016 Claimant treated with William Choi, M.D., who noted that Claimant had been experiencing significant symptoms following a work place injury in July of 2015, including low back pain. Dr. Choi recommended possible surgical intervention for L5-S1, specifically a wide point compression and stabilization procedure to address Claimant's arthropathy and hypertrophy at L5-S1.

9. Sometime before August 2, 2016, Lloyd W. Mobley III, M.D. performed a chart review and concluded: "After reviewing the attached documents, it appears that [Claimant] suffers from low back pain and progressive left leg weakness. . . . . The initial lumbar MRI did not appear to have evidence of a tethered cord. However, [Claimant] has progressive symptoms of leg weakness without any objective cause. It would be reasonable to proceed with initial objective testing."

10. On September 26, 2016, nurse practitioner Maureen A. Preston noted Claimant "has no bladder sensation"; that she is frequently incontinent, especially during the night while she is sleeping; and that she uses a cane as needed.

11. On September 28, 2016, Claimant underwent a neurosurgical consultation with Scott P. Falci, M.D., chief neurosurgical consult at Craig Rehabilitation Hospital. Among other things, Dr. Falci noted the following factors, all of which he considered to be consistent with a low lying tethered spinal cord:

- Claimant believed her legs had become weaker and noted a decreased ability to walk the distances she used to be able to walk;
- Claimant noted increasing difficulty with her bladder;
- Claimant could not be upright and active for long periods of time because her back pain was so severe;
- MR imaging demonstrated a low-lying conus at the mid L2 body level;
- There was no significant central canal stenosis;
- Claimant walked in a stooped over position and found it more difficult to stand in an upright position without exacerbating her low back and gluteal region pain;
- Claimant was more comfortable in a stooped position either standing, sitting, or "curled up somewhat lying down."

12. Dr. Falci recommended an EMG test of Claimant's lower extremities, and a CT scan of her lumbar spine.

13. On September 27, 2016 Claimant underwent a lumbar spine MRI which was read as showing "the tip of the conus medullaris is normal in position and configuration at the L2 level." The MRI also revealed that Claimant had multilevel facet

arthropathy most notable at the L5-S1 level, but apparent through L2-L3. No significant central canal stenosis, significant forminal narrowing, or clear neural impingement were identified.

14. On October 21, 2016 Claimant underwent a left lower extremity EMG which was interpreted as "normal."

15. Also on October 21, 2016 Claimant underwent a lumbar spine CT scan which showed no acute lumbar spine abnormality, but "severe bilateral L5-S1 facet arthropathy."

16. On November 16, 2016 Claimant returned to Dr. Falci. Dr. Falci noted that Claimant's sister believed that Claimant's condition had clearly been progressive; that is, she was progressively losing strength in the lower extremities, unrelated to back pain. In addition, prior to her injury Claimant was able to lift heavy pallets at work and was very physically activity. In contrast, after injury Claimant had difficulty sitting in one position for a period of time, getting out of a chair, taking a shower, or walking, and she had to use her upper extremities to aid in lifting her legs because of weakness after repetitive movement. Dr. Falci attributed these symptoms to Claimant's low-lying conus. He recommended a surgical procedure that involved transection of her filum.

17. On January 3, 2017 Respondents' expert, Stephen H. Shogan, M.D. performed a record review and opined that the procedure recommended by Dr. Falci was of very questionable medical necessity; that a definite progressive deterioration of Claimant's condition is not well documented in her medical records; that Claimant had a normal EMG of the lower extremities; that Claimant's urodynamic evaluation would make a diagnosis of a tethered spinal cord a less likely etiology to her symptoms; and that an L2 location to the conus is not considered outside of normal limits.

18. Dr. Shogan subsequently examined Claimant. In a report dated February 3, 2017, Dr. Shogan stated that he made no objective findings on neurologic testing; that Claimant is currently suffering from a possible fracture of the sacrum, causing pain in the area and associated musculoskeletal pain in the surrounding musculature, and she may be suffering from sacral nerve root dysfunction (possible due to a contusion) which has resulted in urinary incontinence. However, Respondents presented no persuasive evidence to support Dr. Shogun's alternate theories.

19. Dr. Shogun opined that Claimant's left leg weakness and urinary incontinence are related to her work-related injury of July 23, 2015; that he does not believe that Claimant has a tethered spinal cord; that a spinal cord

untethering procedure will not relieve her symptoms; and that he believes that an evaluation by a physical medicine specialist and a comprehensive program of rehabilitation could result in Claimant's restrictions being gradually lifted. However, he did not persuasively explain how additional conservative treatments would help when they had not in the past. Neither did he persuasively address how the passage of additional time would not cause Claimant to experience progressive symptoms.

20. Respondents denied authorization for the recommended surgery.

21. On April 24, 2017, Dr. Falci credibly testified at deposition to the following:

- He is a board certified neurosurgeon who has served as Craig Hospital's chief neurosurgical consultant for twenty-five years.
- The surgery he recommended is a procedure which is used on patients who have progressive loss of function related to their spinal cord both being stretched and sitting lower in the spinal canal than the normal.
- The procedure involved simply cutting the filum, basically fibrous connective tissue, which takes traction off the spinal cord and hopefully stops the progressive loss of function, and allows some recovery.
- Spinal cords do not run the whole length of the spinal column, sometimes ending between the T12-L1 vertebra or even between the L1-L2 vertebra.
- When the end of the spinal cord sits lower than the second lumbar vertebra, it is called a low lying conus medullaris, meaning the tip of the spinal cord sits a little lower than normal.
- A low lying medullaris is associated with progressive symptoms of loss of leg, bowel, and bladder function.

22. Dr. Falci reviewed the September 27, 2016 MRI films and located the tip of the conus at the mid L2 vertebral body level, which based on his clinical experience he considered low-lying. He persuasively explained that a normal EMG does not mean a low-lying conus in not present. Dr. Falci disagreed with Dr. Shogan's opinion that a L2 location of the conus is not considered outside of normal limits. He has seen spinal cords at the mid-body of L2 correlating to loss of function and that, with section; the symptoms were "improving or resting." He saw no structural abnormalities which could cause Claimant's progressive symptoms.

23. Dr. Falci explained that function is lost when the fibrous band [filum] which connects the tip of the spinal cord to the sacrum is short because the spinal cord is minimally but constantly being stretched. The nerve cells, which travel up and down the spinal cord, do not fire as well when stretched. When the filum is cut, the spinal cord, typically, retracts and moves up the spinal column because it is no longer being stretched.

24. The risk of untreated low lying conus is progressive loss of lower extremity, bowel and bladder function. Dr. Falci considered Claimant's report of not feeling her bladder filling and wetting herself to be "substantial," "significant," and "urgent." He does not recommend L5-S1 decompression fusion as offered by Dr. Choi at this time because that procedure is unlikely to alleviate Claimant's urinary incontinence.

25. Dr. Shogan opined that Claimant's condition had not shown a definite progressive deterioration. Dr. Falci, however, found that on physical examination, Claimant had shown multiple levels of leg weakness, and had a urodynamic evaluation of her bladder which confirmed a neurogenic bladder.

26. Dr. Falci opined that Claimant's fall at work further stretched her spinal cord, causing the progression of her symptoms.

27. Dr. Falci opined that the section of Claimant's filum is reasonably necessary to cure or alleviate the symptoms caused by Claimant's work-related fall.

28. Dr. Falci opined that all of the proper diagnostics and conservative therapy modalities have been done, and that no further diagnostics were necessary prior to his recommended surgery.

29. In his deposition taken on April 27, 2017, Dr. Shogan reiterated the opinions expressed in his two reports. He acknowledged that he did not review the actual MRI films in this case and but saw and relied upon the radiologist's report. He was unable to identify any specific treatises or seminar materials to support his opinion that a "classical clinical progression" is required before performing an untethering procedure.

30. The ALJ finds the opinions of Dr. Falci to be more credible and persuasive than those of Dr. Shogun.

31. Claimant credibly testified that the care she has received to date, including medications designed to reduce her urinary incontinence symptoms, has not helped.

She credibly testified that she does not feel her bladder filling, she wears an adult diaper, she wets the bed at night, she often wakes up several times at night to void, she must go the bathroom once an hour while working to avoid accidents, and she has to keep a change of clothes with her in case of accident. She credibly testified that she uses an increasing amount of incontinence supplies. Claimant's testimony is corroborated by Dr. VanOveren's November 14, 2016 report.

32. Claimant credibly testified that she continues to suffer from low back pain and increasing weakness in her left leg despite conservative care. She testified that she now uses a cane outside of work and relies on carts for balance at work. She testified that Employer will not allow her to use a cane at work. Claimant credibly testified that her left leg weakness is increasing over time.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (C.R.S. sections 8-40-101, *et seq.)*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1).

The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents, and a workers' compensation claim shall be decided on its merits. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Ctr. v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

The ALJ finds and concludes that Claimant has met her burden to prove, by a preponderance of the evidence, that Dr. Falci's recommended operative procedure involving a section of her filum (untethering procedure) is reasonably necessary and is related to the admitted industrial accident. In reaching this conclusion, this ALJ is persuaded by the following:

Both neurosurgeons in this case, Drs. Falci and Shogan, agree that Claimant's urinary incontinence and left leg weakness are caused by her fall at work. Therefore, relatedness of these conditions has been established by preponderance of the evidence.

Dr. Falci and Shogan disagree whether Claimant's urinary incontinence is progressing. The ALJ finds credible Claimant's testimony of that she is using more pads, and finds that this fact is an objective measure of the progressive nature of her condition. The ALJ recognizes that feelings of urinary urgency, reports of bathroom visits, and increased usage of pads may be viewed as "subjective complaints," but given the nature of the condition, the ALJ finds it reasonable to accept Claimant's subjective complaints as a basis for accepting Dr. Falci's opinion that the urinary incontinence problem is progressing.

Dr. Falci and Shogan disagree whether Claimant's left leg weakness is progressing. Dr. Shogan could not ascertain any neurologic deficit when he evaluated Claimant, and Claimant's EMG was normal. Nevertheless, Dr. Falci found neurologic deficits upon his exam. In addition, Claimant testified credibly that she has had to increase her use of a cane, she cannot walk as far as she used to walk, and she must rely more heavily on carts at work. The ALJ finds and concludes that the preponderance of evidence supports a conclusion that Claimant's left leg weakness is progressing.

Dr. Falci, MRI radiologists, and Dr. Shogan disagree whether Claimant has a low-lying conus. Dr. Shogan agrees with the interpreting radiologist for the September 27, 2016 MRI that the conus is in a normal position. However, Dr. Shogan, who believes in the importance of reviewing actual films before

performing any surgical procedure, did not review the actual films in this case. Furthermore, Dr. Shogan could not cite any literature which supported his opinion that a conus located at L2 was normal. Dr. Falci, who has served 25 years as the chief neurosurgical consult at Craig Hospital, has reviewed the actual MRI film in this case. Furthermore, Dr. Falci has clinical experience with other patients with coni at the L2 location who experienced similar urinary incontinence and lower extremity weakness problems and who received relief after section of the filum. Therefore, the ALJ finds the opinion of Dr. Falci that Claimant has a low-lying conus to more credible and persuasive than the opinion of Dr. Shogan and the interpretation of the radiologist.

Dr. Shogan did not disagree that a low-lying conus can cause urinary incontinence or leg weakness. Instead, he denied that Claimant has a low-lying conus. His alternative explanation for Claimant's conditions is that she probably has suffered a contusion of the spinal nerves. No other medical provider in this case has offered this same explanation, and Dr. Shogan did not explain why contusion of the spinal nerves would explain Claimant's symptoms as completely and clearly as Dr. Falci did by explaining why a stretched spinal cord causes disrupted nerve function. Dr. Shogan did not provide a persuasive alternative explanation for Claimant's incontinence or left leg weakness, and Dr. Falci provided a credible explanation for Claimant's symptoms. The ALJ finds credible and persuasive Dr. Falci's theory that a stretched spinal cord suffered in her fall at work in conjunction with Claimant's low-lying conus explains why Claimant suffers from urinary incontinence and left leg weakness.

The ALJ is concerned about the possibility of continuing progressive worsening of the urinary incontinence and left leg weakness conditions, and possible right leg weakness and even bowel incontinence as described by Dr. Falci. This ALJ finds and concludes that all reasonable conservative treatment and diagnostics have been exhausted, and is that Claimant's conditions are significant and require urgent care. The ALJ notes that Claimant's description of her urinary incontinence was credible and compelling.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay for a repeat neurosurgical consultation with Dr. Falci and, if he offers a spinal untethering surgery, Respondents shall pay for all reasonable and related pre-operative, operative, and post-operative expenses, according to the Colorado Fee Schedule, that are related to such surgery.

2. All other issues are reserved.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 26, 2017

/s/ Kimberly Turnbow
Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant established by a preponderance of the evidence that the proposed right ulnar nerve transposition and ring finger trigger finger release with excision of cyst along the flexor sheath in the right palm requested by authorized treating physician Craig A. Davis M.D., is reasonable and necessary as well as related to Claimant's admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant's suffered an admitted industrial injury on August 2, 2013 while working as a window washer for Employer. Prior to his injury, Claimant had worked for the Employer for nineteen (19) years and at the time of hearing has now worked for the Employer for twenty-three (23) years. On August 2, 2013 Claimant was travelling in an employee shuttle bus when the driver stopped suddenly, slamming on the brakes. He was holding onto a bar with his right arm and upon impact braced himself with his left arm. His body was moved forward as a result of the vehicle stopping.

2. Claimant described the force as "dramatic" and he almost fell to the ground. Another passenger fell into him and Claimant testified that his body created a "net" when this person fell into him, however, he did not fall to the ground. Claimant felt pain in his back, neck and shoulder, as well as hand tingling and numbness.

3. Claimant testified that before the injury he did not have symptoms or pain in the digits of either his right or left hand and did not require any medical treatment for his right or left hands.

4. Claimant credibly testified that ever since the accident he has had numbness and tingling in both extremities.

5. Claimant was evaluated by authorized treating physician ("ATP") Kristin Mason, M.D., on October 17, 2013, who noted that Claimant was complaining of neck pain and bilateral upper extremity numbness and tingling. Mr. Zarate reported that he would awaken with his hands numb involving all fingers. A positive Tinel's sign was noted over the median nerves at the wrists and ulnar nerves at the elbows. Dr. Mason's assessment was cervical strain with some findings of C6 radiculopathy, as well as bilateral upper extremity paresthesias. She recommended MRIs of the neck and

shoulder as well as electrodiagnostic studies. *See* Claimant's Submission Tab 3, Bate Stamp ("BS") 11, paragraph 6.

6. Mr. Zarate saw Dr. Mason in a follow-up on January 13, 2014 and her assessment was cervical strain with mild C6 radiculitis, bilateral median nerve dysfunction (likely acute), thoracic strain and rotator cuff tear. He underwent shoulder surgery on his left shoulder on January 21, 2014, which was performed by ATP Armodios Hatzidakis, M.D. *See* Claimant's Submission Tab 3, BS 11, paragraph 10.

7. On February 3, 2014, Dr. Mason examined the Claimant after the surgery. He continued to have mild left-sided sensory issues which were unchanged. Dr. Mason saw Claimant on May 5, 2014 at which time he complained of pain and tingling in his hands, particularly bothersome at night. Median nerve sensory loss persisted. He was referred to ATP Thomas Mordick, II, M.D. *See* Claimant's Submission Tab 3, BS 11, paragraph 11.

8. Claimant was evaluated by Dr. Mordick, on May 13, 2014. Claimant complained of numbness and tingling mostly in the long, ring and small fingers on the right hand. He said at times his entire hand goes numb. Dr. Mordick noted that EMG studies showed carpal tunnel syndrome ("CTS"), with the sensory latencies prolonged right (5.2) and minimally prolonged left. Diminished sensation in the median and ulnar nerve distribution was noted upon examination. Dr. Mordick felt that the symptoms would "seem to be more consistent" with Claimant's cervical root compression diagnosis. Claimant was scheduled to have an injection and if the symptoms improved, they would monitor. If the symptoms did not, they would consider CTS release. Dr. Mordick also noted that given the nature of his employment as a window cleaner with heavy manual tasks, this would be appropriately treated as a work-related injury. *See* Claimant's Submission Tab 3, BS 12, paragraph 12.

9. On June 3, 2014, Claimant returned to Dr. Mordick after the neck injection. On physical examination, Dr. Mordick noted continued diminished sensation in the median ulnar nerve distribution right compared to left. Dr. Mordick's assessment was CTS and possible neck cervical root compression. Claimant wished to proceed with the carpal tunnel release on the right. *See* Claimant's Submission Tab 3, BS 12, paragraph 13.

10. On July 2, 2014, Claimant underwent a right carpal tunnel release that was performed by Dr. Mordick. He was examined by Dr. Mason on July 7, 2014 and some improvement in his numbness was reported by Claimant, who was also to begin therapy. *See* Claimant's Submission Tab 3, BS 12, paragraph 14.

11. On October 28, 2015, Claimant underwent surgery for left carpal tunnel release and right index finger and ring finger injections. *See* Claimant's Submission Tab 8, BS 45.

12. On June 27, 2016, Claimant was evaluated by Respondents' retained physician In Sok Yi, M.D., who gave the opinion that:

> For his trigger fingers and bilateral index finger and ring finger, the right side has been treated surgically. I do not believe that this is related to his accident on 08/02/2013. These also developed after the accident. The trigger finger symptoms on the right side did not present itself until 08/25/2014 on his visit to Dr. Mason. This is about a year after is injury. Trigger fingers are very common which I feel that he may have developed on his own, especially since he was not working his regular job within the recent time around the onset.

See Claimant's Submission Tab 8, BS 48.

13. On August 22, 2016, Dr. Mason noted:

> He was having some triggering with the ring finger. Dr. Mordick encouraged him to get more aggressive with range of motion. It is doing somewhat better. He does still have some residual edema in the areas of the incisions. He has been back at work since 6/30/16. Apparently, Dr. Yi on the IME felt that his trigger fingers were not claim related. I do not have a copy of that report, that is the patient's report, but did anticipate that he would need ongoing OMT. . . We do have a SAMMS conference scheduled next week.

See Claimant's Submission Tab 6, BS 30.

14. On August 29, 2016 following a SAMMS conference Dr. Mason noted:

> We discussed the outcome of an IME with Dr. Y[i] who felt the patient's trigger fingers were unrelated to the injury. **I was asked my opinion regarding causation and I indicated that I had seen trigger fingers develop post carpal tunnel release in multiple patients and that seemed to be fellow travelers with that and that Dr. Mordick apparently felt so as well.** In any case, he has already had the surgery and will be finishing up his therapy here in the next month.
>
> * * *
>
> **We discussed the fact that the patient does have ulnar neuropathies at both elbows, but at this point does not**

> **wish to follow through with more surgery so that situation will just be monitored**.

See Claimant's Submission Tab 6, BS 32 (Emphasis added).

15. On September 19, 2016, Dr. Mason evaluated Claimant and noted:

> He saw Dr. Mordick who did some injections into the trigger fingers. They hurt more for a few days but are now doing better. He still notes some flexion deformity of digit four and the right. . . He does have some symptoms into his right hand from the ulnar neuropathy but is not certain whether he wants to go forward with surgery at this time or not. He does get numbness particularly in the morning and has not really noticed any lack of coordination but does occasionally drop things from the hand.
>
> * * *
>
> ASSESSMENT
>
> Status post bilateral carpal tunnel release with development of trigger fingers on the right, now status post release of those 06/15/16.
>
> * * *
>
> We did discuss what recovery from ulnar decompression would look like – probably a 3-4 month recover – somewhere in between a rotator cuff repair and a carpal tunnel release.

See Claimant's Submission Tab 6, BS 33.

16. On October 17, 2017, Claimant again treated with Dr. Mason who noted on her physical exam:

> He continues to lack full extension of digit four on the right hand. He does now have recurrent nodular growth in the area of the flexor tendon sheath in the palmar crease and that area is quite sensitive between the nodule and the MCP joint. No triggering currently.
>
> * * *

> I am going to refer him back to Dr. Davis for a second opinion regarding the recurrence of the nodule in his hand. I am not sure whether this would respond to further therapy and/or injection. It is possible that some of the contracture is on the basis of his ulnar neuropathy I am just not sure.

See Claimant's Submission Tab 6, BS 34.

17. On November 4, 2016 Claimant was evaluated at Colorado Orthopedic Consultants by Timothy Abbott, physician's assistant ("PA") for ATP Craig Davis, M.D., who issued the following assessment:

> Problem #1: Stiffness and tenderness following trigger finger release.
>
> He was advised that waiting a little bit for repeat injection seems reasonable. The next step after that could be repeat surgery, flexor tenosynovectomy, but he may have the same problems with scar tissue formation. Therefore, he agrees to wait about 6 weeks and follow up with Dr. Davis to discuss injection.
>
> * * *
>
> Problem #2: Bilateral cubital tunnel syndrome
>
> When he follows up with Dr. Davis he will try to bring his nerve studies with him and we can go over his options at that time.
>
> * * *
>
> Problem: Trigger Finger
>
> Assessed: 11/04/2016
>
> Patient is following up from a second opinion possible bilateral ulnar neuropathy and bilateral trigger fingers. Since his last visit he return to Dr. Mordick for trigger finger release of the right index and the ring fingers. He apparently developed some scar tissue after surgery and subsequently had injection into the flexor tendon sheaths which helped significantly. Stiffness and pain in the index finger completely resolved. However he has continued stiffness and some tenderness along the ring finger flexor tendon sheath. Pain improved significantly in the ring finger however. Dr. Mordick recommended waiting a couple of months and trying a repeat injection.

> He continues to have fairly constant numbness and tingling in the bilateral ulnar 2 digits, right greater than left.

See Claimant's Submission Tab 7, BS 40.

18. On November 17, 2016, Claimant returned to Dr. Mason who noted:

> He did see Dr. Davis who recommends follow-up in six weeks with injection into the fourth palmar trigger finger. His index finger on the right continues to do well. He resumed maintenance OMT on 11/10 and that is going well. They did some trigger point injections. He is not anxious to consider more surgery on his hand. He is hoping that the injection will be helpful. Dr. Davis also gave him some Meloxicam.
>
> PHYSICAL EXAM: He still has a nodular growth in the area of the flexor tendon sheath at the palmar crease of the fourth finger and is tender there and at the MCP joint. It is not exactly triggering. He has free movement of the index finger with no pain or nodule. He has some trigger points in the trapezius on the left.
>
> * * *
>
> Status post bilateral carpal tunnel release with the development of right trigger fingers, now status post release of index and ring fingers 06/15/16 with scar tissue causing ongoing pain for the ring finger.

See Claimant's Submission Tab 6, BS 35.

19. On December 22, 2016, Claimant again evaluated with Dr. Mason who noted:

> Dr. Davis had contacted me earlier this week. **He thinks he has a cyst on his fourth finger flexor tendon and is recommending surgery to remove that because the patient is still having pain in the area. He is also recommending an ulnar transposition on the right because of ulnar neuropathy at the elbow. . . Unfortunately, I believe on the very first EMG the ulnar nerve was not studied because the focus was the carpal tunnels and cervical radiculopathy on the left.**
>
> * * *
>
> **He continues to have a nodular growth in the area of the flexor tendon sheath at the palmar crease of the fourth finger with tenderness and pain at that area. Positive**

> **Tinel's at the right elbow**, and ulnar distribution sensory loss. So far, not really much in the way of weakness.
>
> * * *
>
> Status post bilateral carpal tunnel release with the development of right trigger fingers, now status post release of index and ring trigger fingers with cystic development on the ring finger that remains symptomatic.
>
> * * *
>
> Dr. Davis has made a surgical recommendation with authorization pending. I will plan to follow up with the patient in four weeks.

See Claimant's Submission Tab 6, BS 36 (Emphasis added).

20. On January 17, 2017, Dr. Davis appealed the denial of his request for surgery on Claimant dated December 27, 2016 noting:

> First of all, the request for surgery on the **left side was in erro**r. We are actually requesting authorization for surgery on the **right side including right ulnar nerve transposition and ring finger trigger finger release with excision of cyst along the flexor sheath in the right palm.**

See Respondents' Submission Tab C, BS 13 (Emphasis added).

21. On December 30, 2016 after Dr. Davis' original request for surgery was denied, Claimant filed an Application for Hearing. *See* Claimant's Submission Tab 1, BS 1-5.

22. On February 24, 2017 Respondents' filed a timely Response to Claimant's Application. *See* Claimant's Submission Tab 2, BS 6-7.

23. On March 28, 2017, Respondents' expert In Sok Yi did a record review opining that:

> I have reviewed his records that were provided and I have also reviewed Dr. Davis' last request on January 17, 2017, where he requested a right cubital tunnel release with transposition with ring finger trigger release. At this point, I have also reviewed my previous IME which I felt at that time after reviewing his records that both his carpal tunnel syndrome and cubital tunnel syndrome are related to this injury sustained on 08/02/13. However, at this point I still feel that his trigger finger on the right is not related to his

> accident given the fact that the injury occurred on 08/02/2013 and his first documented symptoms were not presented until 09/29/215 when he was examined by Dr. Mordick. **Given the fact that his symptoms did not present themselves until two years after the initial incident, I do not feel that this is related to his accident.**

See Claimant's Submission Tab 9, BS 49 (Emphasis added).

24. Dr. Yi concluded that Claimant's carpal tunnel and cubital tunnel syndrome are related. Dr. Yi's conclusions, however, regarding the trigger finger are based on the inaccurate statement that Claimant did not have symptoms until two years after the initial accident and, therefore, he believed the request by Dr. Davis for surgery was not related to the admitted industrial injury.

25. The medical records reflect, however, that Claimant has consistently complained of bilateral numbness in his hands and fingers, as reflected in the medical records and determined by a previous Administrative Law Judge. *See* Claimant's Submission 3, BS 11, paragraph 6.

26. Claimant credibly testified that his bilateral upper extremity numbness and tingling went away in the thumb, index finger and middle finger following his carpal tunnel surgeries, but has remained in both the ring and index fingers of both hands. The symptoms Claimant complains of have been present and consistent ever since Claimant's admitted industrial injury.

27. Claimant testified at hearing that he wanted the right ulnar nerve transposition and ring finger trigger release with excision of cyst along the flexor sheath of the right palm.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General

A. The purpose of the Workers' Compensation Act of Colorado (Act), §8-40-101, *et seq.,* C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. Section 8-43-201(1). Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after

considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979).

B. A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

C. The ALJs resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2007; *City and County of Denver School District 1 v. Industrial Commission,* 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995).

Medical Benefits

D. Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company, W.* C. No. 4-445-060 (February 22, 2002).

E. In this case, the issue is whether the proposed treatment is reasonable and necessary, as well as related to the injury. The ALJ evaluated both the mechanism of Claimant's injury, his symptoms, the opinions of his treating physicians, along the medical opinions of Respondents' experts. Each of the proposed courses of treatment is reviewed, *infra.*

F. Respondents contend that the surgery recommended by Dr. Davis is not necessary or related because the symptoms did not develop immediately following the injury. This is in fact not the case as the symptoms have been present since Claimant’s injury.

G. Additionally Dr. Davis and Dr. Mason confirmed the progression of Claimant’s symptoms from the date of injury and are consistent with the care now being recommended by Dr. Davis.

H. There is objective evidence that Claimant had no symptoms in either extremity prior to his admitted industrial injury.

I. Respondents are liable if the employment-related activities aggravate, accelerate or combine with a pre-existing condition to cause a need for medical treatment. Section 8-41-301(1)(c), C.R.S.; *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). In this case, the evidence leads the ALJ to conclude that while Claimant may have had an underlying asymptomatic condition, it was the admitted industrial injury of August 2, 2013 that caused his symptoms and the need for treatment.

J. The ALJ concludes Claimant has satisfied his burden with regard to the need for right ulnar nerve transposition and ring finger trigger release with the excision of cyst along the flexor sheath in the right palm, as requested by Dr. Davis and the proposed surgeries are reasonable, necessary and causally related.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

a. Respondent shall pay the cost, pursuant to the Colorado Medical Fee Schedule, of the right ulnar nerve transposition and ring finger trigger release with the excision of cyst along the flexor sheath in the right palm, requested by Dr. Davis and concurred in by Dr. Mason.

b. The right ulnar nerve transposition and ring finger trigger release with the excision of cyst along the flexor sheath in the right palm is found to be reasonable and necessary.

c. Insurer shall authorize the proposed right ulnar nerve transposition and ring finger trigger release with the excision of cyst along the flexor sheath in the right palm for the right upper extremity.

d. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 6-26-17

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did Claimant prove she suffered a compensable injury on June 12, 2015?

If the claim is compensable, the ALJ will address the following additional issues:

2. Is Claimant entitled to medical benefits?

3. Is Claimant entitled to TTD benefits from December 17, 2016 to April 24, 2017?

4. Should Claimant's TTD benefits be reduced due to "late reporting"?

5. Was Claimant responsible for the termination of her employment?

FINDINGS OF FACT

1. Claimant worked for Employer as a waitress. Her claim involves an alleged injury on June 12, 2015. Claimant testified she injured her right shoulder and burned her leg while helping a coworker remove a large pan of meat from a hot oven. Claimant testified the pan tipped and boiling water poured on her leg. She yelled out in pain and "jerked" her right shoulder.

2. Claimant did not immediately seek treatment for the injury. The closest contemporary medical record is dated two months later when Claimant saw FNP Virginia Gillispie at Pueblo Community Health Center. Claimant's primary physical complaints related to her knees, but she also reported "increased pain of R shoulder w/o injury." Physical examination of the shoulder was normal, and Claimant had full "pain-free range of motion." Claimant was diagnosed with "pain in multiple joints" and prescribed meloxicam to use as needed.

3. Claimant returned to Nurse Gillispie on October 2, 2015 and reported the meloxicam did not help her shoulder pain. The report notes that Claimant works as a waitress and "tries to carry all heavy items w/ L arm instead." She had tenderness of the right shoulder, but no atrophy, crepitus or asymmetry. Shoulder range of motion was full but painful. Claimant declined a referral to physical therapy. Nurse Gillispie recommended discontinuing the meloxicam and prescribed sulindac and lidocaine patches.

4. On January 22, 2016, Claimant reported her right shoulder pain occurred "occasionally" and was "worsening." The report further states "Context: there is no injury." Nurse Gillispie prescribed tramadol and referred Claimant for physical therapy.

5. Claimant had an initial PT evaluation on January 25, 2016. The history is described as "R chronic shoulder pain. Patient is unsure of any mechanism of injury."

The report notes Claimant "worked with a roofing company 2 years ago and then was involved in the care of her mother requiring transferring. Currently her husband had back surgery so she helps him transfer also. Patient currently works as a waitress using L arm for her tray." The ALJ infers that the therapist was investigating the potential etiology of the shoulder problems, but there is no mention of an incident with a pan of meat. Claimant also completed an intake form which included the question "is this a work-related injury?" to which she answered "no."

6. Nurse Gillispie's February 4, 2016 report states Claimant had an appointment for an orthopedic evaluation that evening, but the ALJ was not given any report from an orthopedist on or around that date.

7. Claimant next saw Nurse Gillispie on July 25, 2016. Her shoulder pain was worse because she "just returned from a camping trip in South Dakota. The weather was fairly cold [and the] patient was sleeping on an air mattress on the ground. Does not recall any trauma to the area. Remotely approximately 20 years ago patient did get some glass in the shoulder from [a] candlestick which was surgically removed." There was still no mention of any work-related injury.

8. On July 29 Claimant reported her shoulder pain "may have flared after camping trip and short staffing at work; no acute trauma." Physical examination showed positive impingement sign and decreased range of motion. Nurse Gillispie recommended an injection.

9. Nurse Gillispie's September 22, 2016 report states "Context: there is an injury. Trauma type: direct blow, occurred doing recreational activities, 23 years ago on 09/22/1993." Claimant also stated she "had blunt trauma to R shoulder involving FB (glass) lodged into tissue, 25 stitches required. This occurred in her 20s." Claimant's urine drug screen was negative for tramadol she had been prescribed but was positive for oxycodone. Claimant told Nurse Gillispie she ran out of tramadol "early" and "tried her boyfriend's Percocet." Nurse Gillispie counseled Claimant against taking other people's medications, ordered an MRI and referred her for an orthopedic evaluation.

10. Claimant had the right shoulder MRI on October 11, 2016. The history described in the radiologist's report is "fell on right shoulder." The MRI showed multiple rotator cuff tears and severe tendinopathy. There was also a degenerative labral tear and severe AC joint arthritis.

11. Claimant saw Dr. Mark Porter for an orthopedic evaluation on November 14, 2016. Dr. Porter's report contains the first reference to a work-related cause for Claimant's shoulder problem: "she believes her symptoms began when she was lifting heavy cookware at work." Dr. Porter diagnosed a "nontraumatic" rotator cuff tear. He gave Claimant a cortisone injection, which provided immediate pain relief.

12. Claimant filed a Workers' Claim for Compensation on November 28, 2016.

13. On December 16, 2016, Claimant followed up with Dr. Porter's partner, Dr. Richard Likes. The cortisone injection had worn off, and she was interested in surgery.

She told Dr. Likes she hurt the shoulder at work lifting a heavy pot full of hot water. Dr. Likes thought surgery was appropriate given Claimant's long-standing symptoms and the failure of conservative treatment.

14. Claimant had arthroscopic shoulder surgery on January 12, 2017. There were multiple tears, including a diffuse tear of the biceps tendon, a partial tear of the subscapularis, degenerative labral tears, and a full-thickness tear of the supraspinatus. Dr. Likes noted extensive supraspinatus tendinopathy, with diffuse fraying and a "chronically degenerative appearance."

15. At hearing, Claimant identified the co-worker involved in the alleged incident as Rosalinda Montoya. Claimant testified she pulled up her pant leg and showed the burned area to Ms. Montoya. She testified her pants were loose, which enabled her to pull the leg all the way up to expose her thigh. She testified she also told the restaurant owner, Paul Cordova, Jr. about the incident and showed him the burn. She testified Mr. Cordova Jr. "just looked at it and walked away" without saying anything. Claimant testified she told Paul Cordova Sr. about the incident approximately two weeks later and he "did not say a word."

16. At hearing, Claimant demonstrated an area of discoloration on her right thigh she alleges is a burn scar from the incident. The area was not obviously or unmistakably a burn scar, and could have resulted from something else.

17. Ms. Montoya, Paul Cordova Sr., and Mr. Cordova Jr. testified at hearing. Each witness disputed Claimant's description of events. Ms. Montoya does not recall Claimant spilling hot water on her leg or exclaiming in pain. Mr. Cordova Jr. does not recall Claimant reporting any injury to her leg or shoulder in June 2015. Mr. Cordova Sr. does not recall Claimant telling him about the injury.

18. Claimant failed to prove by a preponderance of the evidence that she suffered a compensable injury on June 12, 2015.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The

facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

As found, Claimant failed to prove that she suffered a compensable injury on June 12, 2015. Claimant's testimony regarding the alleged incident is directly refuted by multiple witnesses. Ms. Montoya does not recall any incident or Claimant burning her leg. Mr. Cordova Jr. does not recall Claimant reporting any injury in June 2015. Mr. Cordova Sr. does not recall the alleged conversation approximately two weeks later. Nor do the medical records substantiate Claimant's claim. Claimant did not seek medical treatment for her shoulder until more than two months after the alleged incident. When she sought treatment, she did not mention a work-related injury and even denied a traumatic origin on at least one occasion. Notably, the records document the shoulder injury Claimant suffered in the early 90s, so she clearly discussed the etiology of her problems with providers. The first documentation of the alleged incident is in November 2016, almost a year and a half after the claimed date of injury. At the time, despite Claimant's reporting an incident at work, Dr. Porter diagnosed a "nontraumatic" rotator cuff tear.

Claimant suffered from internal derangement of her shoulder, but the pathology most likely reflected long-standing degenerative changes that could have become symptomatic at any time without injury.

ORDER

It is therefore ordered that:

Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 27, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-016-151-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 20, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 6/20/17, Courtroom 1, beginning at 8:30 AM, and ending at 10:00 AM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection, with the exception of Exhibit 2 whereby the Respondents' objection was sustained in part and Exhibit 2 was only admitted for the limited purpose of showing a timely reporting of an alleged work-related injury. Respondents' Exhibits A through F were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on June 25, 2017. On June 27, 2017, the Respondents filed an objection concerning the referral to John Burris,M.D. On the same date, the Claimant did not object to the Respondents' objection. After a consideration of the proposed decision and the objection thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability and medical benefits.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant is a service technician for the Employer. He has worked for the Employer for approximately 17 years.

2. On April 7, 2016, the Claimant was running cord during a service call and as he stood up he experienced a drastic increase in pain in his back that required him to lay down on the floor of the customer's house.

3. The Claimant was wearing his tool belt over his shoulder at the time of the injury.

4. The Claimant reported the injury around 2:00 PM on April 7, 2016 to Darren Carnegie. Carnegie was the Claimant's supervisor on April 7. 2016.

5. The Claimant again reported his injury on April 8, 2016 to his supervisor Michael Samsel. Claimant emailed Samsel and stated "I was working on a phone jack for DSL moving cords behind a stand in the process of bending up and down I felt a severe pain in my back. The pain didn't go away but, rather got worse as the day went along" (Claimant's Exhibit 2, p. 2).

6. The Respondents filed a Notice of Contest on June 15, 2016 (Claimant's Exhibit 1, p. 1).

Medical

7. Following his reported injury, the Respondents directed the Claimant to Concentra for medical treatment. Carrie J. Burns, M.D., was first assigned as Claimant's authorized treating provider (ATP).

8. The Claimant was initially evaluated by Dr. Burns on April 8, 2016 whereby she assigned work restrictions as well as prescribed physical therapy and

medications (Claimant's Exhibit 3, pp. 3-5). The Claimant did not previously have any work restrictions.

9. Dr. Burns M164 work sheet, issued on April 16, 2016, confirms that the Claimant's condition is work related (Claimant's Exhibit 3, p. 8). Dr. Burns continued to assign work restrictions to the Claimant as well as prescribe physical therapy (PT) and medications.

10. On April 21, 2016, the Claimant was prescribed chiropractic treatment (Claimant's Exhibit 3, p. 14).

11. On April 28, 2016, the Claimant began chiropractic treatment with Dr. Richard Mobus, D.C (Claimant's Exhibit 5, pp. 48-49).

12. By May 6, 2016, the Claimant continued to receive work restrictions and complain of symptoms in his lower back (Claimant's Exhibit 3, pp. 21-22). On May 19, 2016, the Claimant was referred for a surgical consultation with Michael Rauzzino, M.D (Claimant's Exhibit 3, p. 25).

13. On May 31, 2016, the Claimant was evaluated by Dr. Rauzzino who stated, "this is a very nice gentleman with low back injury at work" (Claimant's Exhibit 4, p. 45). In his corresponding report Dr. Razzing states, "There is no simple easy surgery one would do to give a more (*sic*) rate of success at this point and be best served by further conservative care. I have recommended that he see Dr. Shimon Blau for consideration of SI joint injection versus epidura." (Claimant's Exhibit 4, p. 45).

14. On June 14, 2016, the Claimant received a right SI injection as performed by Shimon Blau, M.D (Claimant's Exhibit 6, p. 53). Dr. Blau's report states Claimant "had a work related injury which occurred on 4/7/16 while working for Century Link. He was bending down and squatting while working with some wire, and when he stood up, he felt sudden right –sided lower back pain (Claimant's Exhibit 6, p. 53).

15. The subsequent Concentra record states that Claimant had no relief from the injection of June 14, 2016 and massage therapy was then prescribed (*See* Claimant's Exhibit 3, p. 39).

16. The Claimant was again evaluated by Dr. Blau on July 12, 2016. In his corresponding report Dr. Blau recommended right L4-5 and L5-S1 injections (Claimant's Exhibit 6, p. 58).

17. Concentra, the authorized provider, referred the Claimant to John Burris, M.D. On August 9, 2016, the Claimant was evaluated by Dr. Burris. Dr. Burris was another ATP, associated with Concentra for delayed recovery matters.. In his corresponding report, Dr. Burris states that Claimant "works for CenturyLink and was at

a customer's home moving objects about when he stood up from a kneeling position developing the acute onset of low back pain" (Claimant's Exhibit 7, p. 63). Dr. Burris further states "we are awaiting the upcoming facet injections for diagnostic clarify. Further recommendations will come after the results of the upcoming injection" (Claimant's Exhibit 7, p.64). Dr. Burris continued to assign work restrictions for the Claimant.

18. In his report of August 10, 2016, Dr. Blau reiterated his recommendation for the right L4-5 and L5-S1 facet injections and stated "I would hold off on placing him at MMI (maximum medical improvement) until after we see how he does following the facet injection." (Claimant's Exhibit 6, p. 60). The Claimant received the recommended injections on August 23, 2016.

19. Dr. Blau's report of September 14, 2016 states that the facet injections "helped for the first couple of days but then the pain returned" (Claimant's Exhibit 6, p. 61). Dr. Blau then recommended right L3-4, L4-5, L5-S1 medial branch block (Claimant's Exhibit 6, p. 62).

20. The Claimant returned to Dr. Burris on October 25, 2016. On that date, Dr. Burris placed the Claimant at MMI without any permanent restrictions or impairment (Claimant's Exhibit 7, p. 65). Dr. Burris recommended post-MMI maintenance treatment in the form of "6 sessions of massage therapy over the next 3 months on an as-needed basis" (Claimant's Exhibit 7, p. 66). The Claimant had been assigned work restrictions from April 8, 2016 to the October 25, 2016 MMI appointment with Dr.Burris.

21. The Claimant was again evaluated by Dr. Burris on April 25, 2016. Dr. Burris' corresponding report stated that the Claimant "remains at MMI with no impairment" (Claimant's Exhibit 7, p. 69).

22. The Claimant attended approximately 11 sessions of PT from April 8, 2016 to the October 25, 2016 finding of MMI.

23. The Respondents authorized all of Claimant's recommended treatment despite the filing of the Notice of Contest, neither admitting or denying liability.

24. The Claimant timely sought medical treatment at Concentra after which he treated with Dr. Burns, Dr. Blau, Dr. Richard Morbus, D.C. Dr. Rauzzino, and Dr. Burris. The medical records from each of the Claimant's ATPs consistently corroborate the Claimant's mechanism of injury. Furthermore, the medical providers issued treatment recommendations which they attributed to Claimant's April 7, 2016 mechanism of injury.

25. Although the Claimant's medical records from 2009 to December 2015 sporadically reference complaints of low back pain (*See* Respondents' Exhibit C), however, over that time period the Claimant received none to minimal treatment related to his lower back. Further, in that time period the Claimant did not receive any work restrictions.

26. The Claimant credibly testified that his symptoms drastically increased following the April 7, 2016. Claimant's testimony is corroborated by the medical records, which demonstrate a drastic increase in treatment following his April 7, 2016 event. The Claimant's prior medical records from 2009 to April 7, 2016 demonstrate no active treatment or work restrictions despite periodic references of low back symptoms.

Ultimate Findings

27. The Claimant's testimony regarding the mechanism of injury is credible. The Claimant timely notified a supervisory individual with the Employer of his injury on April 7, 2016 and in an email he authored on April 8, 2016 (Claimant's Exhibit 2). The medical records following the Claimant's date of injury corroborate the Claimant's testimony concerning the mechanism of injury. The Claimant's testimony was persuasive and credible.

28. The ALJ infers and finds that the event of April 7, 2016 constituted a compensable aggravation and acceleration of the Claimant's underlying back condition. Therefore, the Claimant sustained a compensable lower back injury on April 7, 2016 arising out of the course and scope of his employment.

29. Following his April 7, 2016 injury, the Claimant was directed to Concentra, which is the Respondents authorized medical provider. Further, all the subsequent referrals were within the appropriate chain of authorized referrals. Therefore, all of the Claimant's medical care and treatment was authorized, causally related and reasonably necessary to cure and relieve the effects of the April 7, 2016 compensable injury.

30. As found, the ALJ credits the medical record in demonstrating the compensability of Claimant's April 7, 2016 injury. All of Claimant's medical providers prescribed treatment and work restrictions based on the Claimant's reported mechanism of injury. During the course of treatment, all of the Claimant's treating providers prescribed treatment and work restrictions that they attributed directly to the Claimant's April 7, 2016 industrial injury.

31. All of the Claimant's medical care and treatment for his low back injury of April 7, 2016, was authorized, within the chain of authorized referrals, causally related, and reasonably necessary to cure and relieve the effects of the injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, medical opinion supporting a compensable aggravation/acceleration of the Claimant's pre-existing low back condition is, essentially, undisputed. *See Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the Claimant's testimony was credible, and corroborated by the medical record.

Compensability

b. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a pre-existing condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a pre-existing condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the event of April 7, 2016 aggravated and accelerated the Claimant's pre-existing degenerative back condition and, thus, was a compensable event.

Medical

c. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravation of his back condition on February 28, 2005. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, all of the Claimant's medical care and treatment for his low back injury of April 7, 2016, was authorized, within the chain of authorized referrals, causally related, and reasonably necessary to cure and relieve the effects of the injury.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden with respect to compensability and medical benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of Claimant's medical care and treatment attributable to the compensable injury of April 7, 2016, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision,

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of June 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

I. Whether Claimant has shown, by a preponderance of the evidence, that she sustained a work injury on or about October 1, 2014, which arose out of, and occurred in the course of, her employment as a police officer.

II. If Claimant suffered a compensable injury, as noted above, has she shown, by a preponderance of the evidence, that she is entitled to medical benefits, including right shoulder surgery which was performed on December 1, 2014.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant was hired as a police officer by City of Colorado Springs Police Department ("CSPD") in 1992. She worked initially as a patrol officer and later as a detective, first in property crimes, then in homicide. She was a sworn employee.

2. In December of 2013, CSPD announced the "roll out" of a mandatory Physical Abilities Test (PAT) for all sworn employees. (Ex 1; Ex A). The stated goal of this program was "to improve employee wellness and to ensure officer safety." (Ex. 1 p. 20). Employer's stated policy was "…to encourage physical fitness for our employees as a means of promoting personal wellness and officer safety. Sworn police officers have a duty to the public to maintain an acceptable level of general health and physical fitness regardless of age, rank or duty assignment. Such fitness provides long-term health benefits while being beneficial to the day-to-day effectiveness and readiness of the Colorado Springs Police Department. Additionally, such fitness levels help officers meet the stress and rigors of a challenging job." Employer's policy further included; "All sworn officers of the Colorado Springs Police Department *will maintain satisfactory health and physical fitness in order to minimize lost time and to perform their duties effectively.* The City of Colorado Springs *offers* a wellness program designed to increase employee productivity and morale while decreasing absenteeism. A number of incentives are offered to encourage employees to participate. Participation in this city program is *voluntary*…" (Ex 1, p. 15)(emphasis added).

3. The PAT had four parts; (1) Sit-ups, (2) Push-ups, (3) Illinois agility, and (4) Beep test. A scoring mechanism was in place for each part of the test. (Ex. 1, p. 8, 9; Ex A). CSPD explained, "…To successfully pass the fitness test, an officer must score a minimum of 20 points during the 4 exercises. With that in mind, officers must score at least 1 point on each exercise. This scoring system allows an officer to have a

lower score on one or more tests but still be able to pass the battery of tests by scoring higher in the remaining exercises…" (Ex. 1, p. 9).

4. Any officer who failed the PAT would have to retake it within prescribed amounts of time. Failure to pass the PAT would lead to disciplinary measures including termination of employment. A plain reading of the memo would lead the reader to conclude that failure to eventually pass the PAT would inevitably result in termination as a sworn officer. During the allowable 'grace period' to pass, promotional opportunities were restricted (Ex 1., p. 18).

5. CSPD partnered with Penrose-St. Francis Hospital to provide a variety of health and fitness resources to assist its officers in passing the PAT test. Programs offered by Penrose-St. Francis included personal training with certified personal trainers; access to gyms located at Penrose Hospital and St. Francis Medical Center; access to fitness classes; and wellness coaching. (Ex 1, p. 11). Also offered was participation in "Club OS…an online, confidential fitness platform that allows you to easily schedule a variety of activities including: group fitness classes, gym orientations and personal training as well as interact with fitness experts and obtain nutrition and exercise guidance."

6. CSPD made these resources available to Claimant at no cost to her. If Claimant were confident of a passing score come test time, no physical training of any sort would be required. Anything short of total confidence in a passing score would necessitate some sort of workout regimen to prepare for the PAT. Claimant's utilization of the specific resources offered by CSPD was voluntary. Obtaining a level of fitness sufficient to pass the PAT was not.

7. After learning of the details of the PAT, Claimant was not confident she could pass the push-up portion of the test because she lacked upper body strength. She was also concerned about the portion of the test that involved running, due to the fact she had a partial knee replacement the year before.

8. Claimant hoped to take the PAT in the last quarter of 2014, in order to allow herself plenty of time to prepare for the test. As part of her preparation and training, Claimant worked out with other officers early in the morning before her shift started. In the basement of the police operations center they lifted weights, practiced sit-ups and push-ups, and did circuit training. They set up a beep test and an agility test on the roof of the police parking garage. Claimant and other officers engaged in this training approximately three days per week. Claimant's shift was 7:00 a.m. to 4:00 p.m. If her physical training sessions extended past 7:00 a.m., she would work late in order to make up for it. There was no penalty attached to appearing after the standard shift time began, so long as Claimant was working out to prepare for the PAT.

9. Additionally, Claimant availed herself of Employer's partnership with Penrose-St. Francis. She participated in the offered exercise classes, worked out in their gym, and utilized the services of a personal trainer named Erin, at no cost to

Claimant. Her goal was to increase her shoulder strength so she could pass the push-up portion of the mandatory PAT.

10. Claimant was not paid for the time she spent training and preparing for Employer's mandatory PAT. She began this training and preparation approximately 2-3 months prior to her injury on October 1, 2014. Claimant was performing push-ups on a regular basis during this time, and she had no pain, problems, or difficulty with her right shoulder. The record is unclear if the appropriate physical form for performing pushups was used in the weeks leading up to Claimant's injury, as she was practicing them with fellow officers only. Claimant had only worked with the personal trainer (who could presumably more closely monitor safe pushup form) on one or two prior occasions before she was hurt. The record is unclear if proper physical form was discussed or noted on those date(s).

11. According to the deposition testimony of Dr. Nicholas Olsen, MD., if a person goes 'too low' (described as placing one's elbows past 90 degrees) during pushups, then.

> ..They don't actually touch the floor down, or they're going too low. You simply put the arm in a hyperextended position and it can strain more likely your labrum and your anterior capsule but can *also irritate the rotator cuff* and *cause tendonosis specifically in the supraspinatus* or infraspinatus and possibly bursitis. (Olsen Depo, p.23. lines 18-24)(emphasis added).

12. Claimant presented at Penrose-St. Francis on October 1, 2014 for a training session with Erin. Erin wanted to assess how many push-ups Claimant could do. Claimant warmed up on a treadmill for 10-15 minutes. She then got into position to perform push-ups. While performing the first push-up, Claimant testified that her right shoulder "popped" and she experienced immediate pain.

13. Erin attended to Claimant and told her she probably should not do anything else. Claimant did not work out further that day. Claimant went to work and told other detectives that she had injured her shoulder. Claimant filled out an accident report on November 3, 2014. The report indicates Claimant's injury happened at 7:15 a.m. (Ex 1, p. 6).

14. Claimant testified she would not have been working out and training with other officers and with her personal trainer if not for Employer's mandatory PAT. Claimant testified she would not have been doing a push-up with the personal trainer on October 1, 2014 were it not for Employer's mandatory PAT. Apart from the one push-up on October 1, 2014, Claimant is aware of nothing else that could have injured her right shoulder. Claimant was unaware of any other injury to her shoulder prior to this date. Nothing had been symptomatic previously.

15. Claimant saw Dr. Geoffrey Doner on October 23, 2014 (Ex D, p. 40). At that time, Claimant stated that while she was doing a pushup, she felt a pop in her right

shoulder. Dr. Doner did not appear to perform any kind of causality analysis as to whether a single pushup would have caused a rotator cuff tear. Indeed, nowhere in Dr. Doner's reports is there any kind of determination made by him that the single pushup caused a rotator cuff tear. The ALJ finds that it is not necessarily surprising that Dr. Doner would not make that kind of causality analysis, as he was not acting as Claimant's ATP.

16. Claimant continued working until she underwent right shoulder surgery on December 1, 2014. Dr. Geoffrey Doner performed right shoulder rotator cuff repair with subacromial decompression and distal clavicle excision. (Ex 5. pp. 63, 64). Claimant returned to light duty work in the homicide department on December 16, 2014. The light duty work was to expire on July 28, 2015, but Claimant was granted an extension until October 28, 2015. (Ex. 1., p. 5).

17. Claimant would have had to take and pass the PAT in order to return to regular duty. Claimant did not take the PAT because she remained unable to perform push-ups. She retired effective October 23, 2015. (Ex 1, p. 4). Claimant was then hired by Employer as Civilian Criminal Investigator effective October 26, 2015, and she continues to work in that position.

18. Sergeant Charles Rabideau was Claimant's direct supervisor in the homicide unit. Sergeant Rabideau has been employed with the Police Department for 27 years, and has known Claimant for over 20 years. He described Claimant as an excellent detective who never demonstrated any performance problems.

19. Sergeant Rabideau testified Claimant reported the injury to him shortly after it occurred, and gave him the accident report she filled out. The form is dated 11-3-14, some 33 days after the injury. (Ex 1, pg. 6). He gave the report to then-Lieutenant Adrian Vasquez. Vasquez later returned the report form to Sergeant Rabideau and told him Claimant's injury was "not a covered injury." Sergeant Rabideau returned the form, and relayed Vasquez' information, to Claimant. Claimant then sought treatment through her own private medical insurance.

20. Sergeant Rabideau credibly testified the Employer benefits from having a physically fit police force. He explained that; "…there's many benefits, not only to the individual employee and their health and welfare, not only as active police officers to – to be as physically fit as they possibly can be for their lifestyle – being healthy going into retirement, being healthy during their careers. And then, ultimately – and probably, in my personal opinion, the highest priority – is their safety on the streets when they're working as officers."

21. Given the fact that their employment could be terminated for failure to pass the PAT, Sergeant Rabideau confirmed that police officers are highly motivated to be successful in the PAT. The ALJ finds Sergeant Rabideau's testimony credible and persuasive.

22. Dr. Nicholas Olsen performed an independent medical evaluation of Claimant on March 7, 2017 (Ex C). Following his examination, Dr. Olsen, in his report, opined that it was 'medically impossible' that Claimant performing a single pushup would result in a 90% tear of her rotator cuff-which was the degree of tear noted by Dr. Doner during the original surgery.

23. Dr. Olsen, in his April 26, 2017 deposition, provided further explanation as to his opinion that a single pushup would not have caused a 90% rotator cuff tear. Specifically, Dr. Olsen noted that the typical trauma that would cause a rotator cuff tear is a fall on the shoulder (Olsen Depo. p. 6). Dr. Olsen explained that the act of a pushup, whether performed correctly or incorrectly, puts no specific stress on the rotator cuff (Olsen Depo. p. 7). Although the rotator cuff is engaged in the act of stabilization, the rotator cuff, he opines, is not put in a position to be injured. Consequently, he opined would be medically impossible for a single pushup to cause a massive tear such as what Claimant had in October 2014.

24. Dr. Olsen went on to testify that the rotator cuff is exposed to an injury when someone falls and lands directly on it. Such a fall creates a high energy, high traumatic force that is applied across the shoulder joint. This high energy has to be absorbed some place and, in the case of the fall, it typically tears the rotator cuff. However, in performing a pushup, there are no high energy forces, whether the pushup is performed with correct or incorrect mechanisms. As such, a pushup would not create a high energy force that would cause a massive tear that Claimant had in October 2014 (Olsen Depo., p. 9). However, in earlier testimony, Dr. Olsen that while a fall is the most common mechanism of injury for a torn rotator cuff,

> …And one can also get a rotator cuff for idiopathic reasons, simply degeneration over time; and *the rotator cuff tears on its own* without any trauma. (Olsen depo, p 6. lines 5-9)(emphasis added).

25. In his deposition, Dr. Olsen was also asked whether this one pushup would be considered the “straw that broke the camel’s back” (Olsen Depo. pp. 12-13). In response, Dr. Olsen stated the following:

> Well, the history tells us that Ms. Adelbush denied any pain leading up to October 1, 2014. She denied any difficulty. She did not report going to see a physical therapist or doctor. She said she was simply, you know, was limited to doing 12 pushups, not because of pain, because that was the most she could do; and, at the suggestion of her coworker or supervisor, went to work with a trainer, and had no pain the day that she went in to the training episode. No pain with warming up, which tells me that she had a healthy rotator cuff up until she did that first pushup, per her history; and then all of the sudden there is this massive rotator cuff tear which just doesn’t make any sense. It is medically impossible.

26. Dr. Olsen was then asked the following questions for which he gave the following response:

> Q. If someone has a 70-80% rotator cuff tear – this was a 90%, let's just say that it goes up to 70-80%, is that person going to be able to not have any problems or any limits in functioning with that kind of tear?
>
> A. No. You fully expect them to be symptomatic. You anticipate that that person may complain for months leading up to that, and through the training, doing those activities; and the reason, you know, for the tear, there would be a declining function over a period of time.

27. Claimant later saw Dr. Ronald Hollis on October 7, 2016 (Ex. E, pp. 55-57). At that time, Claimant reported that, while walking her dog, her dog pulled on her arm with the leash, which resulted in excruciating pain in her right shoulder. Claimant had a repeat MRI which showed a complete tear of her rotator cuff (Ex. E p. 49). As a result, Dr. Hollis performed a total shoulder replacement on October 27, 2016 (Ex. E, pp. 46-48). Dr. Olsen testified that the October 2016 dog leash incident caused a repeat rotator cuff tear (Olsen Depo. pp. 14-15). Claimant's October 27, 2016 surgery (total shoulder replacement) was caused by the October 2016 dog leash incident.

28. The ALJ credits Claimant's testimony as being credible and consistent with the evidence presented at hearing, regarding her participation in the Penrose St. Francis program, the PAT, and her motivation to participate. The ALJ further credits Claimant's testimony, and finds her credible, regarding all medical history given to her medical providers, and the symptoms she now describes. The ALJ is not convinced that Claimant's injuries as described are medically impossible, or that Claimant is somehow concealing a separate injury to her shoulder from a fall occurring on some other occasion.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo 1972).

Compensability

F. In order to be compensable under the Workers' Compensation Act, an injury must arise out of and in the course of the employee's employment. C.R.S. §8-41-301(1). An activity arises out of and in the course of employment when it is sufficiently interrelated to the conditions and circumstances under which the employee generally performs his job functions that the activity may reasonably be characterized as an incident of employment, although the activity itself is not a strict employment requirement and does not confer an express benefit on the employer. *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985).

G. Prior to 1996, Colorado courts had not determined whether injuries sustained by an employee who is engaged in off-duty exercise that is mandated or

encouraged by an employer are compensable. In *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996), the Supreme Court did so and held that in order to determine whether an injury suffered by an employee while engaging in an exercise program is compensable, a court should look to the following factors;

(1) whether the injury occurred during working hours;
(2) whether the injury occurred on the employer's premises;
(3) whether the employer initiated the employee's exercise program;
(4) whether the employer exerted any control or direction over the employee's exercise program; and
(5) whether the employer stood to benefit from the employee's exercise program.

H. The Court noted greater weight should be given to factors (1) and (2) "because these indicia of time and place of injury are particularly strong indicators of whether an injury arose out of and in the course of the employee's employment." *Price*, supra, at 210, 211. An injured worker is not required to prove each of the 5 factors of the *Price* test, as they are not conjunctive requirements. *Wackenhut v. Industrial Claim Appeals Office*, 975 P.2d 1131, 1134 (Colo. App. 1997).

I. The ALJ now considers each of the *Price* factors (especially as compared with Jeannine Eltrich) with respect to the facts of this case;

(1) Claimant's injury occurred at 7:15 a.m. Claimant's normal shift started at 7:00 a.m., and ended at 4:00 p.m. Claimant testified she was allowed to make up the time, with no penalty, if her exercise activities extended into her normal shift. Thus, while the injury occurred during standard "working hours" Claimant was not paid for the time she spent exercising. Her "work hours" were thus flexible, and could vary, at least somewhat, by the day. *The ALJ finds this injury did not occur during working hours.*

(2) The injury did not occur on Employer's premise, but rather at Penrose-St. Francis; a facility that Employer 'partnered' with and made available to Claimant specifically for working out in preparation for the PAT. Employer encouraged Claimant to utilize the facilities at Penrose-St. Francis to prepare for the PAT. Employer provided a personal trainer for Claimant to use at the facility. Claimant utilized the facility and the trainer free of charge. Despite the usage of the term 'partnership' by CSPD in its memo, however, a *legal partnership* was not contemplated to the degree which would imply common ownership, control, or even influence over Penrose St. Francis' facilities by CSPD. Rather, the 'partnership' herein was simply of the nature commonly seen in ad hoc joint marketing and promotional efforts between unrelated entities. Examples would include a radio station 'partnering' with a promoter to publicize a concert, or a sports team 'partnering' with certain sports-related product brands. Thus, while the specific location where Claimant was injured was plainly encouraged by CSPD, it cannot be inferred that Penrose St. Francis' facilities were under the

control of CSPD, much less its ownership. *Thus, the ALJ finds that this injury did not occur on employer's premises.*

(3) While participation in the training to prepare for the PAT was voluntary, Employer initiated the training by making the following available to Claimant at no cost and encouraging her participation; personal training with certified personal trainers; access to gyms located at Penrose-St. Francis; access to Penrose-St. Francis fitness classes; and wellness coaching. *The ALJ finds that the employer initiated the Claimant's exercise program.*

(4) While accommodations were even made to Claimant's work schedule to facilitate working out at Penrose St. Francis' facilities, there is no evidence in the record to support a claim that CSPD exerted *control or direction* over Claimant's exercise program. While the rubric for passing the fitness test was plainly spelled out in the CSPD memos, Claimant was free, in preparing for the PAT, to tailor the time, frequency, scope, intensity, and focus of her training program at Penrose St. Francis. She was free to focus exclusively on pushups, or obtain a barely passing score (of a "1"), then focus on making up the points on other aspects of the PAT. Once confident of a cumulative passing grade, Claimant would have been free to continue her usage of the facilities, even with an eye towards a healthy retirement. *The ALJ finds that CSPD did not exercise significant control or direction over Claimant's exercise program.*

(5) As confirmed by Sergeant Rabideau's testimony, Employer stood to benefit from having Claimant in good physical condition. As confirmed by Employer's written policies, having its officers physically fit helped them to minimize lost time and to perform their duties effectively. As noted, Employer's wellness program was "designed to increase employee productivity and morale while decreasing absenteeism." While Claimant would obviously benefit from being physically fit, Employer did too. *The ALJ finds that the employer stood to benefit from the employee's exercise program.*

J. As noted per *Wackenhut*, supra, Claimant is not required to prove each of the 5 *Price* factors. As noted, however, if factors (1) and (2) are not met, the strength of factors (3), (4), and (5) must be able to overcome the absence of the former. Factor (4) already goes to CSPD.

K. As noted in *Price* [and applied to Eltrich, looking at factor (3)], the Northglenn Police Department also *initiated* the exercise program at issue. As further noted in Price [also applied to Eltrich, looking at factor (5)], the Northglenn Police *stood to benefit* from Claimant's participation in the exercise program. However, as was noted further, fitness was already a qualification for being a police officer; thus a favorable finding of factor (5) was simply accorded little weight, compared with all the others. While Claimant herein is entirely credible and sympathetic, the facts of her case are not sufficiently distinguishable from those of Jeanne Eltrich to lead to a different result.

Taken as a whole, the factors in *Price*, as applied to Claimant herein, do not support a compensable injury.

Policy Considerations cited by Respondent

L. Respondents go further in asking the ALJ to consider the negative effects of an adverse ruling, thus resulting in a "flood of new claims" for other litigants. Given the plain directive of *Price* (still binding precedent, and specific to police exercise programs), such policy analysis is not necessary, beyond weighing the five enumerated factors. The ALJ declines to so engage. The dictates in *Price* are sufficient to determine this matter.

Dual Purpose Doctrine

M. Similarly, if the factors in *Price* cannot be met, Claimant seeks to bypass *Price* altogether, citing older cases (some from other jurisdictions) involving a "Dual Purpose". While 'Dual Purpose' remains generally viable, *Price* and its similar line of cases implicitly address those policy considerations, and with great specificity as applied to matters of off-duty police exercise. Factor (5) already addresses this specific point, and *Price* states it is but one of five factors in the analysis, and less powerful than (1) and (2). Price is still binding law on the case at issue, and the ALJ declines to deviate there from.

Medical Benefits

N. Because the claim is not compensable under *Price* and related cases, the medical causation issue, and the need for treatment, need not be addressed.

ORDER

It is therefore ordered that:

1. Claimants request for Workers Compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 27, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment on December 20, 2016 precluding his entitlement to temporary total disability (TTD) benefits after this date.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant sustained an admitted compensable on the job injury while working in the course and scope as an electrician for Employer on November 28, 2016. Specifically, Claimant sustained electrical injuries to his head, brain and shoulder when he was exposed to 12,000 volts of electrical current while working on a high voltage switch at Evans Arm Hospital.

2. Claimant lost consciousness and could not be separated from the electrical current for approximately one minute. He sustained third degree burns to his scalp and shoulder. He also suffered from an intercranial bleed (epidural hematoma) and a subsequent MERSA infection as a complication of the skin grafting necessary to treat the severe burns estimated to cover 1.5 – 2.0 % of Claimant's total body surface area (TBSA).

3. Claimant was transported to Memorial Hospital Emergency Room (ER) for trauma workup. Although he was conscious upon arrival to the ER, Claimant was confused and complaining of pain in his head and shoulder. Claimant was subsequently airlifted to the University of Colorado Health Center for higher level burn care and as noted his hospital course was complicated by the discovery of an epidural hematoma "associated with some short term memory loss, balance challenges, and [headaches] HA's".

4. Upon being transferred to the University of Colorado Health Center on November 28, 2016, a urinalysis (UA) was completed which revealed the presence of cannabinoids.

5. Insurer became aware of Claimant's positive drug test in early December 2016. An email message from Marchelle L. Robinson to Bill Tuten, Employer's Safety Manager dated December 7, 2016 notes that Claimant's drug screen was positive for marijuana. Ms. Robinson inquired of Mr. Tuten as to whether Employer had a "written employment policy against drug use." Mr. Tuten responded in the affirmative, sending Ms. Robinson copies of the New Hire Employment Policies and Rules initialed by

Claimant, excerpts from Employer's Employee Handbook and Employer's Drug and Alcohol Policy.

6. In a December 9, 2016 medical report authored by Dr. Zachary Wilson, Claimant reported that he used illicit drugs, including marijuana.

7. On December 19, 2016, Ms. Robinson sent an email to Mr. Tuten confirming that Employer had a written policy regarding the use of drugs and that Claimant's UA of November 28, 2016 was an indication that Claimant had violated Employer's policy. Douglas Berwick, Employer's President responded by indicating that Ms. Robinson's conclusion was "correct."

8. Employer terminated Claimant's employment on December 20, 2016 for a violation of their substance abuse policy.

9. Insurer filed a General Admission of Liability on December 20, 2016 taking a 50% reduction in TTD benefits for violation of safety policy. The propriety of the safety rule violation is not before the ALJ. Rather, the only issue before the ALJ is whether Respondents have proven, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment on December 20, 2016 precluding entitlement to further temporary total disability (TTD) benefits after this date.

10. A post accident, post termination UA was performed on December 26, 2016. Claimant's sample tested positive for marijuana. As it relates to the question before the ALJ, this test result carries little probative value as the test was performed after Claimant had been terminated.

11. On February 13, 2017, Respondents though their attorney, filed a Petition to Modify, Terminate or Suspend Compensation (Petition) requesting that Claimant's ongoing TTD benefits be terminated in accordance with C.R.S. § 8-42-105(4) and § 8-42-103(1)(g). Claimant objected to Respondents' Petition and the matter was set to proceed to hearing on Respondents' Expedited Application for Hearing filed March 14, 2017.

12. Claimant was evaluated by Dr. Cynthia Lund on April 19, 2017. During this appointment Claimant reported that he used marijuana "daily."

13. Review of the employment records submitted reveals that Employer has a written policy that it "practices a drug-free workplace" and that "compliance with the [drug-free workplace] is a mandatory condition of employment." In their drug-free workplace policy Employer specifically establishes that it does not recognize Colorado's Amendment 64 with regards to marijuana use.

14. Employer's Safety Handbook provides that "[d]rug and alcohol testing shall adhere to the Drug and Alcohol Testing Program Policy between the I.B.E.W. Local Union #113 and the Southern Colorado Chapter of N.E.C.A." Based upon the evidence

presented, the ALJ finds that Employer adopted the drug testing policies/protocols of the Union as set forth in the Collective Bargaining Agreement (CBA).

15. Douglas Berwick testified that because Employer is a Federal contractor frequently performing work on federal installations, Employer follows federal standards rather than the state standards regarding the use of controlled substances. Because marijuana is considered a banned controlled substance by Federal policy, Mr. Berwick testified that Employer can terminate employees who are using marijuana even if they have a medical marijuana card authorizing state use.

16. Mr. Berwick testified that Employer's drug policy is "zero-tolerance" because they are a federal contractor and safety is of paramount importance. He explained that Employer uses this approach because, in their line of work, employees have to have full mental capacity when working with dangerous electrical current. He testified that employees are informed of this policy upon hiring and that the company participates in random pre and post-work accident drug testing. Mr. Berwick also testified that, it makes no difference regarding the amount of controlled substance that is found in an employee's system or whether the controlled substance was ingested voluntarily or unknowingly (although he indicated that in an involuntary situation, i.e. someone being drugged unwittingly, an employee could challenge the termination). If an employee tests positive for any controlled substance, including marijuana, the presence alone will suffice to initiate disciplinary action according to Mr. Berwick.

17. Mr. Berwick also testified that Employer's zero-tolerance policy is a "24 hour policy" and applies to off-hour consumption of illegal substances. Again, he testified that this policy was adopted because of the dangers associated with working with high voltage electricity. In regard to off-hour consumption Employer's drug policy provides: "[t]he use of illegal drugs, abuse of legal prescription medications, or alcohol prior to working hours is prohibited. Failure to comply will result in appropriate disciplinary actions up to and including termination." Finally, Mr. Berwick testified that it is standard Employer policy to conduct post accident drug testing, as was the case here.

18. The aforementioned policies as contained in Employer's Employment Policies and Rules were initialed by Claimant. Moreover, Claimant acknowledged that he received and understood the company policies and work rules by signing the document on March 15, 2016. The copy signed by Claimant is maintained in his personnel file.

19. Bill Tuten testified that Employer's policies apply independently of union policies. According to Mr. Tuten, the Union, which is an independent entity that electricians can join, drafted their own policies regarding the use of controlled substances. He testified that portions of the union's policies were incorporated into Employer's policies, but that the employer had not adopted all of the union's policies. As noted at paragraph No. 14 above, Employer specifically adopted by reference into their safety handbook that drug and alcohol testing would adhere to the testing policy established by the Union and N.E.C.A, (National Electrical Contractors Association).

20. Mr. Tuten testified that, regardless of how the drug test was conducted and whether or not it complied with the Union policies, the employer was permitted to terminate an employee with a positive drug test because "it's still our company's policy that [employees] be drug-free." Mr. Tuten clarified his testimony to indicate that Employer was permitted to terminate an employee under the provisions of its policies and safety rules even if there was not strict adherence to the Union workplace policies. He testified if Claimant wanted to challenge the termination, then he could bring that challenge to the Union.

21. The ALJ finds from the testimony and review of the admitted hearing exhibits that the drug testing in this case was not performed according to the policies and procedures adopted by Employer as set forth in the CBA with the Union. Based upon the evidence presented, there is no indication that the testing was performed by a certified laboratory as provided for by the Employer/Union agreement. Rather, the testing was performed at the hospital shortly after Claimant was airlifted to the University of Colorado Health Center for admission into the burn unit. The evidence presented persuades the ALJ that Claimant did not consent to testing of his urine for forsensic purposes. Rather, the testing was likely completed as part of Claimant's routine treatment for his electrical injuries. Moreover, after a "positive" drug test result has been documented, the agreement between Employer and the Union sets forth certain steps to be followed regarding preservation and retesting of the original sample by a certified laboratory of the employee's choosing and at his/her expense. While Claimant's medical condition likely prevented his request for retesting within 72 hours as set forth in the Employer/Union agreement, he argues the procedures for retesting were nonetheless not followed, seemingly in an effort to raise questions regarding the validity of his testing result vis-à-vis his termination.[1] On one hand Claimant argues that according to Section 7(c) of the collective bargaining agreement no adverse employment action can be taken unless the appropriate testing procedures set forth in the CBA are followed. On the other hand, Claimant recognizes that the question for determination is whether he performed a "volitional act", specifically the use of marijuana which resulted in his termination. In this regard, Claimant argues that the evidence presented as to how the ingestion of the controlled substance occurred, as shown by a positive drug test result, is speculative and therefore amounts to conjecture. Because Respondents did not follow the adopted testing procedures set forth in the CBA and based upon the assertion that the evidence regarding how the ingestion of a controlled substance occurred is speculative, Claimant argues that Respondents have failed to prove by a preponderance of the evidence that Claimant is responsible for the termination of his employment. The ALJ is not persuaded.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

[1] As noted, the propriety of Respondents' imposition of a safety rule violation penalty for producing a positive drug test result is not before the ALJ.

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). In this case, the ALJ credits the testimony of Mr. Berwick and Mr. Tuten regarding the independent nature of Employer's zero tolerance substance abuse policy and its application to the claimant as credible and persuasive. Nonetheless, the question of whether Claimant performed a volitional act which resulted in his termination must be addressed.

Termination for Cause & Claimant's Entitlement to Ongoing TTD

D. As Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply regarding his continued entitlement to TTD benefits. These identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement

of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002). Simply put, if a claimant is responsible for his/her termination of employment, the wage loss which is the consequence of claimant's actions, shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* W.C. No. 4-465-839 (ICAO February 13, 2002). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo.App. 2000).

E. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control by a claimant over the circumstances leading to the termination." *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008)(citing *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo. App. 1994). This is a factual determination for the ALJ. *Padilla*, 902 P.2d at 416. An employee is "responsible" if the employee precipitated the employment termination by a committing a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996)(unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008).

F. Despite legalization of marijuana in Colorado, the Colorado courts have reiterated that an employer may terminate an employee for drug use. *See, e.g., Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015); *Bolerjack v. Water Edge Pond Service*, W.C. 4-905-434 (I.C.A.O. 2014). In the seminal case of *Coats*, the Colorado Supreme Court considered a wrongful termination action where an employee was terminated after a random drug test came back positive for marijuana. In that case, the employer terminated the employee under their zero-tolerance policy. The employee argued that he was licensed by Colorado to use medical marijuana and that his use was off-premises. The Colorado Supreme Court found the termination was lawful because even state-licensed marijuana use was not lawful activity as it related to the employment. *Bolerjack*, an I.C.A.O. case, on the other hand, applies this exact reasoning to the termination of TTD post-termination of employment in the workers' compensation context. As found here, Employer has a strict drug-free policy that specifically prohibited off-hours drug use, including marijuana. Also, as found, a violation of this employer policy could result in termination of employment. Claimant initialed and signed off on these guiding principles and no evidence was presented that Claimant did not comprehend these policies. Based upon the evidence presented, the ALJ concludes that Claimant, more probably than not, was aware that use of marijuana was prohibited and that use of the same could result in the termination of his employment as an electrician for Employer.

G. To the extent that Claimant asserts that failure to follow the drug testing

protocols set forth in the CBA precludes a determination that he was responsible for his termination, since Section 7(c) of the protocols that no adverse employment action can be taken unless the appropriate testing procedures set forth in the CBA are followed, the ALJ is not persuaded. See generally, *Keil v. Industrial Claim Appeals Office*, 847 P.2d 235 (Colo.App. 1993)(employer's failure to follow its established discipline procedures did not prohibit a determination that an employee was responsible for termination). To the contrary, as noted in *Keil*, the dispositive issue in all cases is whether the employee performed a volitional act or otherwise exercised a degree of control over the circumstances resulting in discharge.

H. To the extent that Claimant suggests that he may have ingested/inhaled marijuana involuntarily and that there is not a "scintilla" of evidence in the record supporting a conclusion that he engaged in a voluntary act that was responsible for his positive cannabis test result, the ALJ is equally unconvinced. In addition to his positive test result, the record evidence contains affirmative statements made by the Claimant shortly after the accident where he conceded that he uses illicit drugs, including marijuana. Additional statements against interest were made by Claimant after his termination indicating that he used marijuana daily. These statements coupled with two positive test results for marijuana support a reasonable inference that Claimant's use of marijuana was volitional and deliberate.

I. Considering the entire evidentiary record, the ALJ concludes that Claimant exercised a degree of control over the circumstances resulting in his termination by volitionally choosing to use marijuana in direct contravention of Employers drug policy. The ALJ concludes that any employee would reasonably expect such actions could likely result in the loss of employment given the policies Claimant acknowledged and accepted when he began his employment with Employer. Because his termination was not compelled by the natural consequence of the work injury, Claimant is "responsible" for his job separation and his claim for TTD benefits is permanently barred. *Blair v. Art C. Klein Construction Inc., supra.; Longmont Toyota, Inc.*, *supra*.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that Claimant is responsible for the termination of his employment with Berwick Electric Company. For this reason his claim for TTD benefits is barred and the same is hereby denied and dismissed. The Petition to Modify, Terminate or Suspend Benefits is hereby GRANTED.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 27, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Gregory Reichhardt, M.D. that he reached Maximum Medical Improvement (MMI) on April 7, 2016 and suffered a 5% neurologic impairment and a 3% psychological impairment as a result of his August 25, 2015 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as the driver of an "impact truck" at a freeway construction sites. The impact truck Claimant operated is also referred to as a truck-mounted impact attenuator, crash cushion or crash attenuator. The vehicle consists of a flatbed semi with an attachment at the rear of the truck that lowers to the pavement. When the trailer attachment is deployed a safe zone in front of the impact truck is created for highway workers on the road. The trailer is also an energy directing and absorbing structure. The design of the vehicle Claimant operated prevents vehicles from entering areas where workers are on the ground. As Claimant explained, the trailer essentially becomes a portable "guardrail" that catches the colliding vehicle in an energy absorbing structure.

2. On August 25, 2015 Claimant deployed his impact truck on I-70 to create a safety zone for road construction on the highway. A Dodge Ram pickup truck traveling at highway speeds between 60 and 80 mph collided with the rear of Claimant's impact truck. As designed, the trailer protected workers on the ground and absorbed the impact of the truck striking the crash attenuator. Claimant noted that his chest struck the steering wheel and his head hit a glass panel behind the driver's seat. He remarked that he suffered a brief loss of consciousness as a result of the impact.

3. Claimant was transported by ambulance to St. Anthony Hospital after the accident with complaints of a headache, pain in the left chest musculature and left upper quadrant pain. He was diagnosed with the following: (1) a concussion; (2) blunt chest trauma; and (3) blunt abdominal trauma. After multiple CT scans and other diagnostic tests Claimant was discharged on August 26, 2015.

4. Claimant subsequently received medical treatment through HealthOne Occupational Medicine and Rehabilitation. He initially received treatment from Brandon Schreiber, PA-C but on October 22, 2015 visited Authorized Treating Physician (ATP) Matthew R. Lugliani, M.D. for an initial evaluation. Dr. Lugliani diagnosed Claimant with a traumatic brain injury, visual disturbances, a liver laceration and a lumbar strain. He prescribed medications and referred Claimant for pain management treatment and

physical therapy. Dr. Lugliani permitted Claimant to return to modified work in the form of seated duty.

5. On December 18, 2015 Claimant visited Barry A. Ogin, M.D. for a pain management evaluation. Dr. Ogin reviewed Claimant's brain MRI taken on December 4, 2015. He noted the development of chronic, small vessel ischemic disease in Claimant's brain but no evidence of acute trauma

6. After receiving additional conservative medical treatment, including extensive neurological testing, Claimant returned to Dr. Lugliani for an evaluation on April 7, 2016. Dr. Lugliani reported that Claimant had resumed full duty employment without complications and was not taking any medications. He assessed Claimant with a traumatic brain injury, depression and hypertension. Dr. Lugliani noted that Claimant's subjective complaints were minimal, his objective complaints were benign and he could work full duty with no restrictions. He concluded that Claimant had reached Maximum Medical Improvement (MMI) with no permanent impairment. Dr. Lugliani recommended a six month follow-up examination with Dr. Ogin if Claimant experienced any flare-ups in his condition.

7. Claimant challenged Dr. Lugliani's MMI and impairment determinations through a Division Independent Medical Examination (DIME). On August 19, 2016 Claimant underwent a DIME with Gregory Reichhardt, M.D. Claimant reported continuing headaches, depression and anxiety. Dr. Reichhardt noted that Claimant had suffered pre-existing depression and anxiety and was taking antidepressant medication at the time of his industrial injuries. Dr. Reichhardt commented that Claimant was tolerating full-time, regular duty employment.

8. Dr. Reichhardt determined that Claimant suffered a traumatic brain injury and an aggravation of his pre-existing anxiety and depression as a result of the August 25, 2015 accident. He agreed with Dr. Lugliani that Claimant had reached MMI on April 7, 2016. Dr. Reichhardt commented that Claimant's pain and anxiety interfered with his sleep. He also noted that Claimant's social functioning had decreased because of increased levels of irritability. Dr. Reichhardt remarked that Claimant warranted a functional score of 1.5 or a 3% psychological, whole person impairment. In rating Claimant's traumatic brain injury, Dr. Reichhardt relied on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). He specifically considered Table 1, page 109 of the *AMA Guides* in rating Claimant for episodic neurologic disorders and assigned a 5% whole person impairment. Combining Claimant's 3% psychological impairment with his 5% neurologic impairment yields a total 8% whole person rating as a result of the August 25, 2015 accident. Finally, Dr. Reichhardt concluded that Claimant warranted medical maintenance benefits in the form of medication management for his headaches. He also recommended eight visits with a psychologist and six visits with a physician or neurologist.

9. On March 29, 2017 Claimant underwent an independent medical examination with Lynn Parry, M.D. After reviewing Claimant's medical records, Dr. Parry concluded that Claimant had not reached MMI. She noted that Claimant had

suffered a post-traumatic stress reaction based on his reports to Drs. Lugliani and Ogin. Dr. Parry explained that Claimant's stress reaction had not been addressed. Moreover, although Dr. Reichhardt had remarked that Claimant's condition had worsened since MMI, he exercised judgment to include his recommendations as medical maintenance treatment. However, Dr. Parry commented that Dr. Reichhardt's medical maintenance recommendations had not been completed. She diagnosed Claimant with the following: (1) a mild traumatic brain injury/post-concussive syndrome; (2) post-concussive headaches/migraines; (3) post-traumatic stress disorder; and (4) mood liability secondary to the traumatic brain injury. Dr. Parry assigned Claimant a 20% whole person impairment rating for his emotional liability under Table 1 of the *AMA Guides*. She commented that she rated Claimant's emotional liability under Table 1 "rather than combining an additional mental impairment with his impairment secondary to his brain injury."

10. Dr. Parry testified at the hearing in this matter. She maintained that Claimant had not reached MMI and warranted a 20% permanent impairment rating for his August 5, 2015 industrial injuries. Dr. Parry explained that Claimant's condition had worsened since his DIME with Dr. Reichhardt. He suffered a traumatic brain injury on August 25, 2015 that caused a wide range of cognitive and emotional difficulties. She noted that the industrial accident exacerbated Claimant's pre-existing anxiety condition. Dr. Parry explained that Claimant specifically suffers from post-traumatic stress disorder and impulse control issues that did not exist prior to the August 25, 2015 accident.

11. Dr. Parry detailed that Dr. Reichhardt rated Claimant for both psychological and neurological impairments. Dr. Reichhardt assigned Claimant a total 8% whole person impairment rating. However, she explained that she would have assigned Claimant a single 20% whole person impairment rating for his emotional liability. Dr. Parry acknowledged that the *AMA Guides* permit a great deal of flexibility in assigning psychological impairments and Dr. Reichhardt's rating was not incorrect. She simply would have rated Claimant differently pursuant to the *AMA Guides*. Finally, Dr. Parry explained that Claimant requires medical maintenance treatment in the form of medications and psychological counseling as a result of the August 25, 2015 accident.

12. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Reichhardt that he reached MMI on April 7, 2016 and suffered a 5% neurologic impairment and a 3% psychological impairment as a result of his August 25, 2015 admitted industrial injuries. On August 25, 2015 Claimant was injured when a pickup truck traveling at highway speeds between 60 and 80 mph collided with the rear of his impact truck. Claimant commented that his chest struck the steering wheel and his head hit a glass panel behind the driver's seat. He remarked that he suffered a brief loss of consciousness as a result of the impact. ATP Dr. Lugliani diagnosed Claimant with a traumatic brain injury, visual disturbances, a liver laceration and a lumbar strain. He prescribed medications and referred Claimant for pain management treatment and physical therapy. After receiving additional conservative medical treatment, including extensive neurological testing, Dr. Lugliani reported that Claimant had resumed full duty employment without complications and was not taking any medications. Dr. Lugliani noted that Claimant's subjective complaints were minimal, his objective complaints were

benign and he could work full duty with no restrictions. He concluded that Claimant had reached MMI on April 7, 2016 with no permanent impairment.

13. On August 19, 2016 DIME Dr. Reichhardt determined that Claimant suffered a traumatic brain injury and an aggravation of his pre-existing anxiety and depression as a result of the August 25, 2015 accident. He agreed with Dr. Lugliani that Claimant had reached MMI on April 7, 2016. Dr. Reichhardt remarked that Claimant warranted a functional score of 1.5 or a 3% psychological, whole person impairment. He specifically considered Table 1, page 109 of the *AMA Guides* in rating Claimant for episodic neurologic disorders and assigned a 5% whole person impairment. Combining Claimant's 3% psychological impairment with his 5% neurologic impairment yields a total 8% whole person rating as a result of the August 25, 2015 accident.

14. In contrast, Dr. Parry concluded that Claimant had not reached MMI for his August 25, 2015 industrial injuries. She assigned Claimant a 20% whole person impairment rating for his emotional liability under Table 1 of the *AMA Guides*. Dr. Parry commented that she rated Claimant's emotional liability under Table 1 "rather than combining an additional mental impairment with his impairment secondary to his brain injury." She remarked that the *AMA Guides* permit a great deal of flexibility in assigning psychological impairments. Dr. Parry acknowledged that Dr. Reichhardt's total 8% whole person rating for both psychological and neurological impairments was not incorrect. She simply would have rated Claimant differently pursuant to the *AMA Guides*. The record reveals that Dr. Reichhardt properly exercised his discretion pursuant to the *AMA Guides* in combining Claimant's 3% psychological impairment with his 5% neurologic impairment for a total 8% whole person rating as a result of the August 25, 2015 accident. Dr. Parry simply disagreed with Dr. Reichhardt's MMI and impairment determinations. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Reichhardt's MMI determination and 8% whole person impairment rating were incorrect.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Reichhardt that he reached MMI on April 7, 2016 and suffered a 5% neurologic impairment and a 3% psychological impairment as a result of his August 25, 2015 admitted industrial injuries. On August 25, 2015 Claimant was injured when a pickup truck traveling at highway speeds between 60 and 80 mph collided with the rear of his impact truck. Claimant commented that his chest struck the

steering wheel and his head hit a glass panel behind the driver's seat. He remarked that he suffered a brief loss of consciousness as a result of the impact. ATP Dr. Lugliani diagnosed Claimant with a traumatic brain injury, visual disturbances, a liver laceration and a lumbar strain. He prescribed medications and referred Claimant for pain management treatment and physical therapy. After receiving additional conservative medical treatment, including extensive neurological testing, Dr. Lugliani reported that Claimant had resumed full duty employment without complications and was not taking any medications. Dr. Lugliani noted that Claimant's subjective complaints were minimal, his objective complaints were benign and he could work full duty with no restrictions. He concluded that Claimant had reached MMI on April 7, 2016 with no permanent impairment.

8. As found, on August 19, 2016 DIME Dr. Reichhardt determined that Claimant suffered a traumatic brain injury and an aggravation of his pre-existing anxiety and depression as a result of the August 25, 2015 accident. He agreed with Dr. Lugliani that Claimant had reached MMI on April 7, 2016. Dr. Reichhardt remarked that Claimant warranted a functional score of 1.5 or a 3% psychological, whole person impairment. He specifically considered Table 1, page 109 of the *AMA Guides* in rating Claimant for episodic neurologic disorders and assigned a 5% whole person impairment. Combining Claimant's 3% psychological impairment with his 5% neurologic impairment yields a total 8% whole person rating as a result of the August 25, 2015 accident.

9. As found, in contrast, Dr. Parry concluded that Claimant had not reached MMI for his August 25, 2015 industrial injuries. She assigned Claimant a 20% whole person impairment rating for his emotional liability under Table 1 of the *AMA Guides*. Dr. Parry commented that she rated Claimant's emotional liability under Table 1 "rather than combining an additional mental impairment with his impairment secondary to his brain injury." She remarked that the *AMA Guides* permit a great deal of flexibility in assigning psychological impairments. Dr. Parry acknowledged that Dr. Reichhardt's total 8% whole person rating for both psychological and neurological impairments was not incorrect. She simply would have rated Claimant differently pursuant to the *AMA Guides*. The record reveals that Dr. Reichhardt properly exercised his discretion pursuant to the *AMA Guides* in combining Claimant's 3% psychological impairment with his 5% neurologic impairment for a total 8% whole person rating as a result of the August 25, 2015 accident. Dr. Parry simply disagreed with Dr. Reichhardt's MMI and impairment determinations. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Reichhardt's MMI determination and 8% whole person impairment rating were incorrect.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a 5% neurologic impairment and a 3% psychological impairment for a total 8% whole person rating as a result of his August 25, 2015 admitted industrial injuries.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: June 27, 2017.

DIGITAL SIGNATURE.

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

- Whether Claimant proved by a preponderance of the evidence that the surgery proposed by Steven Seiler M.D. to remove a volar ganglion cyst is reasonable, necessary, and related to her admitted industrial injury.

FINDINGS OF FACT

1. Claimant has worked for Employer for 19 years. She is a supervisor in the cheese department.

2. There was no evidence admitted at hearing that Claimant had a diagnosis or treatment related to her right wrist prior to July 2016. Claimant testified she had never been diagnosed with a cyst prior to her injury.

3. On July 12, 2016, Claimant suffered an admitted industrial injury while working for Employer. She injured her right hand when a cap came off a pipe and brine sprayed on her hand. She tried to replace the cap and brine covered her hand. She lost her balance and hit her right hand when she caught herself. Claimant testified her hand looked like it was covered with plastic and had immediate swelling.

4. Claimant was taken to the emergency room at Colorado Plains Medical Center-Fort Morgan. Claimant reported that while at work she placed her ungloved hand for 30-45 seconds in front of a pipe that was blowing brine, which was kept between 8°-10° Fahrenheit. The ED physician noted Claimant had serous-filled blisters on her hand. Claimant testified she spent six days in the burn unit.

5. Claimant was treated by Kevin Vlahovich, M.D. at Banner Occupational Health Clinic. Claimant was first seen by Dr. Vlahovich on July 22, 2016. At that time, her complaints were pain related to frostbite in the right hand and fingers. Claimant reported no joint pain and she denied any parasthesias. Claimant reported pain of 3/10. She had returned to modified work activity. Dr. Vlahovich observed necrotic tissue throughout the fingers, as well as bleeding. Examination revealed that her skin wounds had mostly closed. His diagnosis was frostbite with tissue necrosis of the right hand-initial encounter. Claimant was given a prescription for Mobic, as well as work restrictions.

6. A General Admission of Liability ("GAL") was filed on behalf of Respondent on July 27, 2016. Respondent admitted for indemnity and medical benefits in the GAL.

7. Dr. Vlahovich oversaw Claimant's treatment over the next several months. She received physical therapy, treatment for her burns and was ultimately referred for an orthopedic evaluation, as she had continued pain in her right hand.

8. On August 10, 2016, Claimant was evaluated by orthopedic surgeon, Steven Seiler, MD. Her main complaint was right middle finger stiffness. On examination, Dr. Seiler noted Claimant's skin showed erythema volar and dorsally over the fingers and the palm. Her wrist extension and flexion were approximately 70°. Dr. Seiler's assessment was frostbite of the right-hand, with post-frostbite contracture of the middle finger. He thought Claimant's main need was for physical therapy to get her finger moving. The ALJ notes Claimant had no complaints specifically referable to the right wrist.

9. On August 29, 2016, Claimant returned to Dr. Vlahovich. Examination of the right hand revealed bright red discoloration over fingers 2/5 up to and including the knuckles. Examination showed that Claimant could nearly make a full fist with all fingers, and with her middle finger, Claimant revealed difficulty bending at the PIP and DIP joints. Additionally, Claimant described mild tenderness over the PIP joint, along with mild tenderness into the forearm. Dr. Vlahovich decreased Claimant's work restrictions from no lift to maximum lift, push, pull, carry of 5 pounds with the right hand to 10 pounds. Dr. Vlahovich discussed long term complications of frostbite with Claimant, including Raynaud's phenomenon, scarring, and arthritis.

10. An amended GAL was filed on October 20, 2016. The GAL reflected to Claimant's return to work with restrictions, which were accommodated by Employer.

11. On November 7, 2016, Claimant underwent an MRI of her right wrist. The films were read by Jay Cook, M.D., whose impression was no abnormality at the level of the radial aspect of the wrist. The digits were intact. No marrow signal abnormality was identified and no synovial fluid collections were present. Claimant had an incomplete tear of the triangular fibrocartilage. Dr. Cook did not report the presence of a cyst in the volar radial aspect of the wrist. Small cysts were noted in the capitate bone, which Dr. Cook felt represented an old injury.

12. Claimant returned to Dr. Seiler on November 16, 2016. Dr. Seiler noted the MRI was not available at the time at the office visit. Claimant's range of motion ("ROM") of her fingers was significantly improved, but she complained of significant wrist pain. Dr. Seiler noted some slight fullness about the volar radial aspect of her wrist. Wrist extension and flexion were approximately 70°.

13. Dr. Seiler's assessment was frostbite of the right hand. Dr. Seiler reviewed the MRI[1], which he said showed a radial ganglion cyst. He noted that an excision of the cyst could be performed. Claimant was to follow-up with his office on an

[1] It was unclear from Dr. Seiler's report whether he viewed the MRI films or was referring to the radiologist's report.

as needed basis. The ALJ noted Dr. Seiler did not offer an opinion that the volar cyst was caused or aggravated by, or related to the industrial injury at this time.

14. On November 30, 2016, Claimant returned to Dr. Vlahovich. Claimant described her pain as 3/10. Dr. Vlahovich recommended that Claimant return to Dr. Seiler for evaluation. (Claimant's Exhibits, pp. 18-20)

15. On December 6, 2016, Dr. Seiler submitted a request for authorization for excision of a volar radial ganglion cyst.

16. On January 11, 2017, Claimant returned to Dr. Vlahovich. Claimant reported her hand got red and feels hot. She had trouble making a fist, as well as pain on the radial side of the wrist and proximal forearm. On examination, Claimant was able to make a full fist, with grip strength of 4/5. Tenderness was noted into the forearm and the radial side wrist-volar aspect. The Finkelstein test was negative. Dr. Vlahovich's diagnosis was frostbite, with tissue necrosis of the right hand, subsequent encounter; pain in right arm; radial styloid tenosynovitis; and adjustment disorder with mixed anxiety and depressed mood. Claimant's restrictions were continued. Conservative treatment for the right wrist was noted. Dr. Vlahovich did not express an opinion with regard to the cause of Claimant's right wrist pain in this report.

17. On February 3, 2017, Dr. Mordick conducted an independent medical examination on behalf of Respondent. On examination, he found no visible swelling or atrophy of the right compared to left upper extremities. Claimant had full range of motion of the elbows, wrists and small joints. Claimant had a negative Finkelstein's test and was not tender over the first extensor compartment on either side. Although there was a note by Dr. Seiler indicating that she had a ganglion cyst that was restricting a range of motion, on Dr. Mordick's examination, he noted Claimant had no restricted range of motion; she had no palpable or visible ganglion cyst, and her MRI showed no evidence of a ganglion cyst. Dr. Mordick concluded this patient had multifocal pain in her right upper extremity, but there was no objective pathology.

18. Dr. Vlahovich responded to a letter from counsel for Respondent on or about February 27, 2017. In particular, he was asked to comment on Dr. Mordick's opinion whether the MRI showed a right ganglion cyst. Dr. Vlahovich disagreed, noting that on sequence six, image nine, a volar a radial ganglion cyst was visible as a white spot adjacent to the radial artery. He said the radiologist did not report this, but it was present on the MRI. Dr. Vlahovich also noted trauma was a common cause of the volar ganglion cyst, but it was unclear whether the cyst was the cause of her pain. Removal of the cyst was a reasonable treatment. Dr. Vlahovich did not believe Claimant was at MMI.

19. X-rays were taken of Claimant's right wrist on March 13, 2017. The films were read by Dr. Cook who compared the films with those taken on August 5, 2016. Dr. Cook's impression was: no evidence for an acute or chronic osseous or joint space injury.

20. Dr. Mordick issued a supplemental report on March 17, 2017 after reviewing the MRI films. He concurred with the radiology report that there was a cyst in the proximal capitate, but there was no evidence of a ganglion cyst/synovial cyst in the volar radial wrist.

21. In Dr. Mordick's assessment, he noted Claimant sustained a frostbite injury to the right upper extremity, which healed uneventfully and had no scarring. He opined an injury like that would not be expected to cause any joint pathology and it was unclear why she was experiencing pain at the MP, PIP and DIP joints of all four digits. With respect to pain complaints in the radial aspect of the right wrist, the orthopedic surgeon indicated a ganglion cyst was restricting her ROM, but Dr. Mordick found no visible or palpable ganglion cyst and there was no MRI evidence of a ganglion cyst. The ALJ credited this opinion, as it was based on Dr. Mordick's evaluation (after he palpated the wrist) and reviewed the MRI films. Since there was no evidence of a ganglion cyst, there was no need to remove it. Dr. Mordick noted ganglion cysts appear to be idiopathic. Under the Colorado Division of Workers' Compensation Medical Treatment Guidelines ("Treatment Guidelines"), if such a cyst was made symptomatic, it was to be treated through the Worker's Compensation system. However, Dr. Mordick reiterated there was no evidence of a ganglion cyst.

22. On April 13, 2017, Dr. Mordick testified by evidentiary deposition. Dr. Mordick noted that his primary area of practice for 25 years has been hand surgery. He is Level II accredited pursuant to the WCRP. After residency, he participated in a hand surgery fellowship at the University of Utah. Additionally, Dr. Mordick is board certified in plastic surgery, with the added qualification of hand surgery. Finally, he is a member of the American Society of Surgery of the Hand. The ALJ accepted Dr. Mordick as an expert in hand surgery.

23. Dr. Mordick testified the ER report did not describe any trauma, other than the frostbite.[2] In addition, the radiologist's report eliminated the likelihood of a volar ganglion cyst. Specifically the report said: "And it says there are no synovial fluid collections identified, so they specifically looked for and stated they don't see a ganglion cyst, as opposed to a report that just doesn't comment on it".[3] Dr. Mordick explained that synovial fluid is the fluid inside the joint and a ganglion cyst is a protrusion off the wrist filled with that fluid.[4] Dr. Mordick testified he routinely reviews MRIs in order to correlate what the board certified radiologist has interpreted.[5] In the present case, Dr.

[2] Deposition ("Dep.") of Dr. Mordick, p. 7:3-8.

[3] Dep. of Dr. Mordick, p. 9:10-13.

[4] Dep. of Dr. Mordick, p. 9:23-25.

[5] Dep. of Dr. Mordick, p.11:3-6.

Mordick testified he reviewed the MRI films, specifically looking for a ganglion cyst and agreed with the radiologist that a volar ganglion cyst was not present.[6]

24. Dr. Mordick testified that when he examined Claimant, the tenderness she described did not correlate to where a cyst would be located. "Generally, ganglion cysts are right at the wrist flexion crease over the thumb side and that is where you are going to -- on the MRI, that one little speck that I did see that I don't think is a ganglion cyst, I think is just a vessel, any fluid filled thing will show up white on that imaging, a vein, an artery, a ganglion cyst, was over at the radial carpal joint more proximal. Her pain is more distal at the scaphoid trapezial joint, as I indicated in my report, and I did not feel any fullness or anything in the area where one would expect a ganglion cyst".[7] Dr. Mordick opined that Claimant's subjective complaints were not consistent with a ganglion cyst and neither was his physical examination.[8] He testified that he did not see anything that was protruding off the wrist. Within a reasonable degree of medical probability, Dr. Mordick opined Claimant did not have a ganglion cyst.

25. On cross-examination, Dr. Mordick agreed Claimant had no prior symptoms or treatment for her right wrist. He also testified that the Treatment Guidelines provided that when a cyst became symptomatic during employment, such a cyst is treated as an employment injury. He also agreed it was reasonable to perform surgery to remove a ganglion cyst. Dr. Mordick testified that in Claimant's case, if Claimant fell at work, started having wrist/hand pain and developed a ganglion cyst, the cyst would be associated with the work-related injury under the Treatment Guidelines. Dr. Mordick testified that if Claimant had a symptomatic ganglion cyst, then Dr. Seiler's request to remove the cyst is reasonable, necessary, and related to Claimant's work injury. However, such a surgery was not necessary. Dr. Mordick noted that it was unknown how ganglion cysts develop or why cysts became symptomatic.[9]

26. Claimant failed to prove that excision of a right wrist ganglion cyst was necessary and related to the industrial injury.

27. Evidence and inferences inconsistent with these findings were not persuasive.

[6] Dep. of Dr. Mordick, pp. 11:17- 12:13.

[7] Dep. of Dr. Mordick, p. 12:12-24.

[8] Dep. of Dr. Mordick, p. 13:1-8.

[9] Dep. of Dr. Mordick, p. 22:14-23:6.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1),C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the credibility of the physicians (and their reports) were determinative of the medical benefits issue.

Medical Benefits-Surgery

Respondent is liable for medical treatment reasonably necessary to cure or relieve the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability, but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

In the case at bench, there was a conflict in the evidence as to whether a radial volar cyst was the cause of Claimant's symptoms. Contrary medical opinions were admitted on the subject. Claimant argued (and there was no evidence to the contrary)

that she never had symptoms, nor required treatment for her right wrist prior to her work injury. Claimant contended this event made the cyst symptomatic and necessitated the surgery. In this regard, Claimant noted that Dr. Seiler concluded there was a ganglion cyst present, based on the MRI. (Finding of Fact 12). Claimant also relied on the opinions of an ATP, Dr. Vlahovich, who initially offered no opinion on causation. (Finding of Fact 16). He then opined the cyst was work-related after receiving Dr. Mordick's report. (Finding of Fact 18).

However, the ALJ was not persuaded that a cyst was the cause of Claimant's wrist symptoms. This was based first on the findings of the radiologist who reviewed the MRI films. Dr. Cook did not record the presence of a cyst. (Finding of Fact 11). Dr. Cook identified small cysts from an old injury were noted in the capitate bone. *Id.* Claimant's x-rays also showed no abnormalities. These reports constituted objective evidence that supported the conclusion no cyst was present.

Second, Dr. Mordick provided expert testimony to the Court and offered an opinion, which diverged from Dr. Vlahovich's. The ALJ credited Dr. Mordick's opinion, as he is Level II accredited and had a particular expertise in hand surgery, the specialty in which he is board-certified. When Dr. Mordick examined Claimant, he did not discern the presence of a cyst in the volar aspect of the wrist. Dr. Mordick also noted Claimant's pain complaints were not supportive of the presence of such a cyst. (Finding of Fact 17). Dr. Mordick reviewed the MRI films and noted there was no evidence of a ganglion cyst/synovial cyst in the volar radial wrist. (Finding of Fact 20). Dr. Mordick also disagreed that the work injury caused a cyst, noting that it was not understood what caused or made cysts symptomatic. (Finding of Fact 25). Thus, Dr. Mordick's opinions were detailed and provided his analysis as to why a cyst was not present. This was more persuasive than the opinions offered by Dr. Vlahovich. Also, the surgeon who requested authorization for the surgery (Dr. Seiler) did not offer an opinion that the injury caused the cyst, aggravated it or that the presence of the cyst was in any related to the industrial injury. (Finding of Fact 12).

On balance, after considering the medical evidence, the ALJ was persuaded by the testimony and reports of Dr. Mordick, as well as Dr. Cook's report. Claimant failed to establish that she had a ganglion cyst or synovial cyst in the volar radial wrist. Accordingly, her request for surgery to remove such a cyst is denied.

ORDER

It is therefore ordered that:

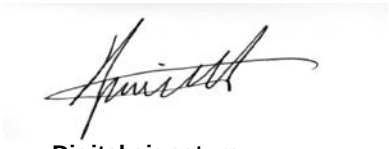
1. Claimant's request for surgery to remove a right ganglion cyst is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 26, 2017



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Timothy L. Nemechek
Administrative Law Judge
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-025-741-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Third-Party Administrator (TPA)

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 22, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 6/22/17, Courtroom 1, beginning at 8:30 AM, and ending at 10:45 AM).

Claimant's Exhibits 1 through 3 were admitted into evidence, without objection. Respondents' Exhibits A through were admitted into evidence, without objection.

At the conclusion of the Respondent's case-in-chief, Claimant's counsel moved for judgment in the nature of a directed verdict, which was granted. Thereupon, the ALJ referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on June 25, 2017. On June 27, 2017, the Respondent filed an objection requesting that the findings concerning the testimony and opinions of their telephonic Independent Medical Examiner (IME), Thomas S. Allems, M.D. OF San Francisco be fleshed out with a little more detail. After a consideration of the proposed decision and the objections thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

Section 8-41-209, C.R.S., creates a rebuttable presumption that disability of a firefighter who has completed five or more years of employment as a firefighter, caused by. Cancer of the digestive system (this includes pancreatic cancer) shall be considered an occupational disease and presumed to result from employment, if at the time of becoming a firefighter, the firefighter underwent a physical exam that failed to reveal substantial evidence of such condition that pre-existed employment as a firefighter. The standards are established in *City of Littleton v. Indus. Claim Appeals Office*, 370 P.3d 157, **2016 CO 25** and *Indus. Claim Appeals Office v. Town of Castle Rock,* 370 P.3d 151, **2016 CO 26.** Consequently the issue is whether the Respondent has rebutted the presumption, essentially, proven that the Claimant did not suffer the compensable occupational disease of pancreatic cancer during the course and scope of his employment as a firefighter for Employer.

The Respondent bears the burden of proof, by preponderant evidence and the burden of going forward.

At the conclusion of the Respondent's case-in-chief, the Claimant moved for a judgment in the nature of a directed verdict on the basis that Respondent's case had **not** overcome the presumption of compensability; and, on the fact that Respondent's case could not get any better at that juncture. Consequently, the ALJ granted the Claimant's Motion.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The parties stipulated, and the ALJ finds, that Claimant qualifies for the presumption of compensability as outlined in §8-41-209, C.R.S. in that Claimant has completed in excess of five or more years of employment as a firefighter and has been diagnosed with pancreatic cancer. The pancreatic cancer is a cancer of the digestive system.

2. The parties further stipulated, and the ALJ finds that if the claim is compensable the treatment directed by authorized treating physician (ATP), Tomm VanderHorst, M.D., is causally related and reasonably necessary to cure and relieve the effects of the pancreatic cancer.

3. The Claimant is a firefighter with the Arvada Fire Protection District and he has been a firefighter for approximately 20 years.

4. The Claimant was first diagnosed with pancreatic cancer on or about September 28, 2016 (See Claimant's Ex 2, p.76).

5. Respondents filed a Notice of Contest, dated September 19, 2016. (Claimant's Ex 1, p.1).

Findings

6. Following his diagnosis, the Claimant began treatment with ATP Dr. VanderHorst. In his report of September 16, 2016, Dr. VanderHorst confirmed the Claimant's pancreatic cancer diagnosis and stated "Based on the information available for consideration at this visit, the presenting injury **is considered work related within a reasonable degree of medical probability** (emphasis supplied)" (Claimant's Ex 3, p. 46). Dr. VanderHorst further was of the opinion: "There being no history or risk exposures consistent with an alternative explanation for his cancer, this is considered a **work-related condition** (emphasis supplied)" (Claimant's Ex 3, p. 46).

7. Dr. VanderHorst stated: "We discussed upcoming care issues. His treatment issues will be managed by his Kaiser physicians. I will help monitor his ability and safety to work" (Claimant's Ex 3, p. 46).

8. Dr. VanderHorst's report of September 30, 2016 reiterates: "Based on the information available for consideration at this visit, the presenting injury **is considered work related within a reasonable degree of medical probability** (emphasis supplied)" (Claimant's Ex 3, p. 50).

9. Dr. VanderHorst confirmed that the Claimant has been employed as a firefighter for more than 5 years; had no evidence of cancer at his pre-employment physical; has no non-employment risk factors for pancreatic cancer; and the pancreas is considered part of the digestive system (Claimant's Ex 3, p. 50).

10. The evidence establishes that the Claimant is and has been a non-smoker.

11. The ALJ finds Dr. VanderHorst's opinions highly persuasive and credible because he has the greatest familiarity with the Claimant's medical case, his opinions are based on first-hand treatment, and his opinions are clearly and cogently articulated.

Respondent's Independent Medical Examiner (IME), Thomas S. Allems, M.D. of San Francisco

12. Dr. Allems performed a telephonic IME interview with the Claimant at Respondent's request. Dr. Allems did not physically examine the Claimant.

13. Dr. Allems is board certified in Occupational Medicine and Internal Medicine. He has no persuasive credentials in Oncology or Epidemiology other than general medical knowledge, yet he claims that Epidemiology is part and parcel of Occupational Medicine. The ALJ infers and finds that any field of medicine "under the sun" is part and parcel of occupational medicine and internal medicine, however, it becomes an issue of weight to be accorded to fields outside of occupational and internal medicine. By way of analogy, ordinarily, physician specialists in one area are not competent to render opinions concerning standard of care in another area. The ALJ finds that his Oncological and Epidemiological opinions are entitled to little weight. His opinions are not based on first-hand knowledge, in contrast to the opinions of Dr. VanderHorst, who has actually been treating the Claimant.

14. Dr. Allems allegedly obtained an employment history from the Claimant over the telephone, but the ALJ finds that this was lacking in critical detail concerning exposures over the last 20 years. In its Objection, the Respondent alleges that Dr. Allems "had a general understanding of the different types of fires to which the Claimant responded during his career as a firefighter as well as his hazmat experience." Having heard Dr. Allems' telephone testimony, the ALJ finds Dr. Allems testimony in this regard sketchy and lacking an in-depth understanding of firefighting, other than Dr. Allems concession that smoke inhalation was a hazard of firefighting and the Claimant (a non-smoker) was bound to have experienced smoke inhalation during his 20 years as a firefighter. Otherwise, Dr. Allems relied on his interpretation of the articles attached to his written report.

15. In his corresponding IME report, Dr. Allems states that the Claimant's pancreatic cancer "was not caused by occupational exposures sustained during his employment … – it is more probably related to nonindustrial factors." (Respondent's Ex C).

16. Dr. Allems testified at the hearing, by telephone, where he was endorsed as an expert in Occupational and Internal Medicine. Dr. Allems is neither an oncologist nor an epidemiologist.

17. At hearing, Dr. Allems conceded that the Claimant did not have a cancer diagnosis prior to his employment as a firefighter. Dr. Allems further conceded that the Claimant has been a firefighter for approximately 20 years; that the Claimant is not a smoker; that the Claimant does not use smokeless tobacco; and, that no member of the Claimant's family has ever been diagnosed with pancreatic cancer.

18. Dr. Allems could **not** provide information as to how many calls the Claimant conducted or what specific exposures Claimant encountered during his 20 years as a firefighter (including Hazmat and Wildfire calls). He could not provide information concerning the Claimant's exposure to smoke while fighting fires.

19. In his corresponding IME report, Dr. Allems cited several studies regarding the propensities of cancer risks in firefighters. Dr. Allems stated, however, that the Claimant did not participate in any of the studies he cited in his report. Dr. Allems further stated that none of the Claimant's calls or exposures were used in any of the studies he cited in his report.

20. Dr. Allems conceded that the firefighters who participated in the studies he cited in his report would not have the exact same exposures as encountered by the Claimant over his 20 year career as a firefighter.

21. Dr. Allems cited the Claimant's diet as a potential non-employment risk factor. Dr. Allems stated that "In [Claimant's] case, his dietary habits would be an identified risk factor for pancreatic cancer (his records refer to him eating a lot of red meat" (Respondent's Ex C, p. 23). When asked to clarify how much red meat the Claimant eats, Dr. Allems testified that he did not know. The ALJ finds that this statement is a compelling example of the generalized nature of Dr. Allems' opinions, thus, lessening the weight to be accorded his opinions.

22. The ALJ finds that Dr. Allems opinions and conclusions are based, almost entirely, on his interpretation of the articles he attached to his report. His expertise in Oncology and Epidemiology is dubious yet his opinions are heavily laden with his interpretation of epidemiological articles. The ALJ finds Dr. Allems' opinions are based, substantially, on hearsay medical articles with few, if any, identifiable opinions of his own. His opinions are neither credible nor persuasive. Dr. Allems bases his conclusions on general assumptions, and sometimes unsupported assumptions, regarding what exposures the Claimant may or may not have encountered over the course of his 20 year career. Dr. Allems further bases his opinions substantially, as found herein above, on generalized studies as opposed to evaluating the Claimant's individualized exposures and causation. Dr. Allems opinions fail to overcome the presumption as outlined in §. 8-41-209, C.R.S., as it pertains to the Claimant's diagnosed pancreatic cancer.

Ultimate Findings

23. The Claimant's testimony was credible and, essentially, undisputed. The ALJ finds the opinions of Dr. VanderHorst substantially more credible than the opinions and testimony of Dr. Allems for the reasons stated herein above.

24. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. VanderHorst and to reject the opinions of Dr. Allems.

25. Section 8-41-209, C.R.S., creates a rebuttable presumption that disability of a firefighter who has completed five or more years of employment as a firefighter, caused by. Cancer of the digestive system (this includes pancreatic cancer) shall be considered an occupational disease and presumed to result from employment, if at the time of becoming a firefighter, the firefighter underwent a physical exam that failed to reveal substantial evidence of such condition that pre-existed employment as a firefighter. The Respondent has failed to rebut the presumption by preponderant evidence as of the conclusion of its case-in-chief. Therefore, a judgment in the nature of a directed verdict was warranted at that juncture.

26. It has been established, by preponderant evidence that the Claimant suffers from the compensable occupational disease of pancreatic cancer the onset of which was on or about September 28, 2016, the date of diagnosis.

27. As stipulated and found where not stipulated, all of the Claimant's medical care and treatment for his pancreatic cancer was and is authorized, within the chain of authorization, causally related, and reasonably necessary to cure and relieve the effects of his pancreatic cancer.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254

(1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the Claimant's testimony was, essentially, undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As further found, the opinions of Dr. VanderHorst are substantially more credible than the opinions and testimony of Dr. Allems for the reasons stated in the Findings of Fact herein above.

b. As found, by way of analogy, ordinarily, physician specialists in one area are not competent to render opinions concerning standard of care in another area. *See Horwitz v. Colorado State Bd. Of Medical Exam'rs,* 716 P.2d 131 (Colo. App. 1985), *cert. denied,* 1986. The ALJ concludes that this is a consideration in weighting the credibility of Dr. Allems' opinions outside his field of occupational and internal medicine.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting

medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. VanderHorst and to reject the opinions of Dr. Allems.

Judgment in the Nature of a Directed Verdict

d. Colo. Rules of Civil Procedure, Rule 41(b) (1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or in the nature of a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966)*; Blea v. Deluxe/Current, Inc.*, W.C. No. 3-940-062 [Indus. Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, the Respondent's case could not get any better as of the conclusion of its case-in-chief and, at that juncture, the Respondent had not rebutted the presumption of compensability, by preponderant evidence.

The Firefighter Presumption

e. As found, the Claimant qualifies for the presumption of compensability as outlined in §8-41-209, C.R.S. in that Claimant has completed in excess of five or more years of employment as a firefighter and has been diagnosed with pancreatic cancer. The pancreatic cancer is a cancer of the digestive system. § 8-41-209, C.R.S., creates a rebuttable presumption that disability of a firefighter who has completed five or more years of employment as a firefighter is caused by the employment as a firefighter. As found, cancer of the digestive system is an occupational disease resulted from the Claimant's employment, as a firefighter. At the time of becoming a firefighter, the Claimant underwent a physical exam that failed to reveal substantial evidence of such condition that pre-existed employment as a firefighter. The standards are established in *City of Littleton v. Indus. Claim Appeals Office*, 370 P.3d 157, **2016 CO 25** and *Indus. Claim Appeals Office v. Town of Castle Rock,* 370 P.3d 151, **2016 CO 26**. In *City of Littleton,* the Supreme Court held that to overcome the presumption, the employer can show, by a preponderance of the medical evidence, either: (1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue (the Respondent's expert, Dr. Allems, conceded that smoke inhalation while fighting fires could cause pancreatic cancer); or (2) that a firefighter's employment did not cause

the particular cancer (the Claimant's ATP, Dr. Vanderhost, who was found more credible than Respondent's expert, Dr. Allems, is of the opinion that the Claimant's work as a firefighter caused the Claimant's pancreatic cancer). Consequently, the Respondent failed to overcome the presumption under the *City of Littleton* test. In *Town of Castle Rock,* the Supreme Court held that an employer could meet its burden of overcoming the presumption by presenting particularized risk-factor evidence indicating that it is more probable that the firefighter's cancer arose from some source other than the firefighter's employment. As found, Respondent presented no credible evidence in this regard other than, perhaps, Dr. Allems' unsupported and incredible "red meat" alleged risk factor. Ultimately, as found, the Respondent failed to overcome the presumption by a preponderance of the evidence.

Burden of Proof

f. The burden of proof is placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Respondent had not satisfied its burden as of the time it rested its case.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant sustained the compensable occupational disease of pancreatic cancer, arising out of his employment as a firefighter for the Employer herein.

B. The Respondent shall pay all the costs of medical care and treatment for the Claimant's pancreatic cancer, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

ISSUES

I. Whether Claimant has established, by a preponderance of the evidence that he is unable to earn a wage in the same or other employment, and is therefore, permanently and totally disabled as a consequence of his admitted December 27, 2012 industrial injury.

II. Whether Respondents proved by a preponderance of the evidence that an overpayment in benefits paid to Claimant exists in their favor.[1]

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant, who is currently a 50-year-old, English speaking male, was employed by Employer as a maintenance worker when he sustained a compensable injury to his groin/lower abdomen on December 27, 2012. As part of completing a service call, Claimant felt a pop/pull in his groin while attempting to lift a 50-80 pound tool box. He reported his injury and liability for the same was admitted. Claimant was referred for medical care.

2. On December 28, 2012, Claimant was evaluated by his authorized treating provider ("ATP"), Shireen Rudderow, M.D. Dr Rudderow ordered an ultrasound which was performed December 31, 2012. The ultrasound revealed no evidence of right inguinal mass or hernia. Claimant continued to experience pain and dysfunction so a second ultrasound was ordered and performed January 3, 2013. This ultrasound revealed a right inguinal hernia. Dr. Rudderow referred Claimant to Khurram Khan, M.D., who performed laparoscopic right inguinal hernia repair with mesh placement on January 23, 2013.

3. Following the surgery, Claimant continued to have significant pain in the upper groin area along with weakness and numbness in his legs. Claimant's ongoing symptoms were aggravated by work and certain movements including walking and twisting.

[1] The undersigned ALJ precluded Respondents from presenting evidence concerning the specific amount and recoupment of any asserted overpayment; however, did not foreclose Respondents right to seek determination of the same through additional hearing based upon the statements of counsel regarding a prehearing conference order issued by Prehearing Administrative Law Judge (PALJ), Jeffrey Goldstein dated May 10, 2017.

4. On April 17, 2013, Claimant underwent CT scan of the abdomen and pelvis, which revealed no evidence of recurrent hernia; however, Claimant's right common femoral vein was slightly larger than the contralateral side. It was felt that this could be a normal finding, but because a deep vein thrombosis ("DVT") could not be ruled out completely, a Doppler ultrasound was performed of the bilateral lower extremities on April 19, 2013, which was negative of DVT.

5. On May 17, 2013, Claimant returned to Dr. Rudderow with complaints of burning pain under his surgical area, shooting pains and bilateral weakness in his legs, numbness in the left foot and tingling into the right testicle. Claimant also reported bladder incontinence, nocturia (twice per night) and increased urinary frequency. Claimant was instructed to see a urologist regarding his urinary symptoms.

6. On June 12, 2013, Claimant was evaluated by Dr. Phillip Ballard who felt Claimant's ongoing groin pain was related to nerve entrapment or scar tissue.

7. On June 18, 2013, Claimant underwent a Functional Capacity Evaluation ("FCE"). During the FCE Claimant reported right testicular/groin and shoulder pain. While he attempted all tasks prescribed, he had "great difficulty with the performance of tasks at low height level positions. Moreover, some tasks such as kneeling, stair climbing and crouching were not tolerable secondary to increased groin and testicular pain.

8. Following the FCE, Dr. Rudderow placed Claimant at maximum medical improvement ("MMI") without impairment on June 27, 2013. Dr. Rudderow recommended permanent work restrictions as follows: ". . . no lifting over 10-20 pounds, no carrying over 10-20 pounds, no pushing/pulling over 10-20 pounds, no walking over 6 hours per day, no standing over 6 hours per day, no sitting over 10 hours per day, and no crawling, kneeling, squatting or climbing."

9. A Final Admission of Liability ("FAL") was filed by Respondents on July 17, 2013. Respondents admitted to an average weekly wage ("AWW") of $814.30. No permanent partial disability ("PPD") benefits were admitted to based upon the report of Dr. Rudderow. Finally the Respondents admitted to maintenance care in the form of prescription medications, including Gabapentin and Ultram for a duration of one year.

10. At the request of Respondents, Carlos Cebrian, M.D., conducted an Independent Medical Exam ("IME") of Claimant on July 18, 2013. Following his evaluation, Dr. Cebrian agreed with Dr. Rudderow that Claimant was appropriately placed at MMI without permanent impairment noting that Claimant did not have evidence of a recurrent hernia and was without palpable abdominal defect. Dr. Cebrian opined that there was "no indication for ilioinguinal nerve ablation and/or explantation of the surgical mesh placed by Dr. Khan on January 23, 2013.

11. Claimant timely objected to the July 17, 2013 FAL on July 29, 2013 and filed an

Application for a Division Independent Medical Examination ("DIME") on August 15, 2013.

12. Dr. Brian Beatty, completed the requested DIME on April 29, 2014. During the DIME, Claimant reported worsening symptoms of right lower abdominal pain radiating into the right testicle. Bending, coughing, sneezing, exercise, prolonged walking and lifting greater than 20 pounds aggravated Claimant's ongoing symptoms.

13. Dr. Beatty placed Claimant at maximum medical improvement ("MMI") on June 27, 2013 and provided a 4% whole person impairment rating; however, he believed that Claimant should obtain a second opinion regarding whether injections and/or additional surgery for mesh excision or an ilioinguinal neurotomy would be appropriate. Dr. Beatty recommended restrictions, including no more than six hours of walking or standing per day, no longer than 15 minutes at a time with a 15 minute break, no lifting, pushing, pulling, or carrying over 20 pounds, and occasional bending at the waist.

14. After completion of the DIME, Respondents filed a second FAL on May 28, 2014, admitting liability for permanent impairment consistent with Dr. Beatty's April 29, 2014 DIME report.

15. On September 23, 2014, Claimant presented to John Sacha, M.D., for a second opinion. During his evaluation, Dr. Sacha noted that Claimant denied pain and had normal sensation in the lower extremities although he continued to endorse "pain localized to the right groin that radiates into the right scrotum with burning, numbness, and tingling." It was also noted that Claimant had suffered a work-related closed head injury in 2001 and a heart attack in April 2014. Following his evaluation, Dr. Sacha reached an impression of ilioinguinal neuropathy which he felt may respond to a "one-time right ilioinguinal radiofrequency procedure." Dr. Sacha also noted because Claimant did not have a recurrent hernia, the chance that his symptoms would improve with repeat surgery was low. Claimant underwent an ilioinguinal radiofrequency neurotomy on October 10, 2014, which provided no improvement.

16. Claimant presented to Michael Crissey, M.D., with a cane on November 17, 2014 for a urology consult. Dr. Crissey completed a thorough examination after which he noted that Claimant had a challenging problem which he could not solve. He recommended the following: "Repeat surgical exploration with lysis and possible mesh removal."[2] "Repeat RFA (radio-frequency ablation) of the inguinal nerve and a trial of Lyrica.

17. On December 22, 2014, Dr. Sacha performed a records review and opined that a repeat radiofrequency for ilioinguinal neuropathy had a very low chance of providing any kind of benefit and recommended no surgical procedures other than home exercise, strengthening program, and a gym pass. Dr. Sacha also opined that a cane was not reasonable, necessary and related to the work injury as a cane for someone that had ilioinguinal neuropathy and was actually contraindicated "because the alteration in gait mechanics will actually contribute to issues with other areas other than the ilioinguinal

[2] Concern was raised for possible hernia recurrence as well as failure to relieve pain.

neuropathy."[3] Dr. Sacha reiterated that Claimant was at MMI and no further active care was indicated.

18. Following Dr. Sacha's records review, Claimant filed an Application for Hearing on January 23, 2015, endorsing reasonable and necessary medical care, AWW, temporary total disability ("TTD"), and overcoming the DIME regarding MMI and PPD. Respondents timely filed a Response to Application for Hearing on January 23, 2015.

19. On February 24, 2015, Claimant was evaluated by Dr. Jeffery Jenks. Claimant described continued pain symptoms in the right groin region with radiation into the right leg aggravated by Valsalva maneuvers and significant depression. Dr. Jenks noted that Claimant had been seen by a number of physicians and that there was a was a disagreement among them as to whether Claimant should have further surgery. Dr. Jenks recommended referral to Bruce Ramshaw, M.D., a nationally known expert for revision surgery for failed herniographies with entrapment of the ilioinguinal nerve.

20. At the request of Respondents, Claimant presented to Dr. Cebrian for a follow-up IME on March 20, 2015. Dr. Cebrian reiterated his opinion that Claimant was appropriately placed at MMI on June 27, 2013, noting further that Claimant's "constellation of symptoms has continued to expand" with reported weakness and collapsing resulting in falls. Dr. Cebrian opined that there was no claim-related physiologic explanation for Claimant's expanding complaints. He also noted that Claimant was no more functional while taking opioid medications than without them. Consequently, he recommended that Claimant be weaned from opioids over the next month. Dr. Cebrian also opined that the restrictions provided by Dr. Beatty were arbitrary and that it was not medically necessary that Claimant limit himself**.** He recommended an increase in Claimant's activity level to help attenuate the nerve response and noted that Claimant was able to work in his medically probable opinion.

21. On April 24, 2015, Respondents requested Dr. Sacha provide an opinion on whether Dr. Jenks' referral to Dr. Ramshaw was medically reasonable, necessary, or related. Dr. Sacha opined that Claimant would not be a good candidate for any type of aggressive interventional procedure, and that Claimant refrain from opioids. Dr. Sacha recommended an aggressive home exercise strengthening and conditioning program.

22. Claimant returned to Dr. Jenks on May 14, 2015, who again referred him to Dr. Ramshaw for evaluation regarding revision surgery status post hernia repair.

23. On May 28, 2015, Respondents requested Dr. Cebrian to conduct a Rule 16 review and provide an opinion on whether Dr. Jenks' referral for an additional surgical consultation was medically reasonable, necessary, or related to Claimant's December 27, 2012 work injury. Dr. Cebrian noted that he agreed with Dr. Sacha that no further surgical treatment was medically reasonable or necessary and the likelihood of any

[3] Dr. Ballard's Office would later respond to a letter affirming the medical necessity and relatedness of Claimant's use of a cane to his industrial injury.

benefit would be extremely low. Accordingly, Dr. Cebrian opined that the referral to Dr. Ramshaw was not medically reasonable or necessary and should be denied.

24. Respondents denied the referral to Dr. Ramshaw prompting Claimant to file an Application for an Expedited Hearing regarding his need for additional medical benefits on June 2, 2015.

25. A hearing was held on May 20, 2015 before ALJ Donald E. Walsh, who denied and dismissed Claimant's request to set aside Dr. Beatty DIME opinions with respect to MMI and PPD. However, Claimant's request to reopen his claim was granted paving the way for Claimant's evaluation by Dr. Ramshaw. ALJ Walsh also ordered Respondents to pay Claimant TTD benefits beginning May 20, 2015 and ongoing until terminated by operation of law and found Claimant's AWW effective October 1, 2013 to be $946.83.

26. Respondents filed a General Admission of Liability ("GAL") on August 7, 2015 consistent with the order of ALJ Walsh.

27. Claimant presented to Dr. Ramshaw on September 3, 2015 for medical evaluation at which time both surgical and nonsurgical options for further treatment were discussed.

28. Approximately one year later, on May 27, 2016, Claimant presented to Dr. Ramshaw for diagnostic laparoscopy with explantation of the right inguinal mesh placed by Dr. Kahn in 2013. Claimant also underwent neurolysis, neurectomy, and laparoscopic assisting right groin nerve blocks with long acting local anesthetic without complication.

29. Following his recovery from surgery, Claimant returned to Dr. Jenks. Dr. Jenks placed Claimant at MMI with 17% whole person impairment on September 6, 2016. As part of his September 6, 2016 report, Dr. Jenks noted that Claimant would be limited permanently to sedentary work with no lifting over 10 pounds; no bending, kneeling, or crawling. He also indicated that Claimant would need to alternate between sitting, standing and walking as needed.

30. On October 28, 2016, Respondents filed a FAL consistent with Dr. Jenks' September 6, 2016 report. The FAL, however, failed to acknowledge the statutory cap on benefits.

31. Claimant filed an Objection to the FAL and an Application for Hearing on November 23, 2016, endorsing compensability, medical benefits, PPD, and Permanent Total Disability ("PTD"). Respondents filed a Response to Application for Hearing on December 5, 2016.

32. At the request of Respondents, Claimant presented to Dr. Cebrian for another

IME on February 6, 2017. Dr. Cebrian opined that Claimant was appropriately placed at MMI by Dr. Jenks on September 6, 2016. Dr. Cebrian opined that the continuation of opioids was not medically reasonable or necessary. Dr. Cebrian also opined that the permanent restrictions imposed by Drs. Beatty and Jenks were excessive and that they relied on Claimant's subjective complaints in setting these restrictions and that Claimant needed to increase his activity.

33. Because the October 28, 2016 FAL did not limit indemnity payments to the statutory cap and because Respondents were paying PPD over the cap, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation ("Petition") on March 1, 2017. Based upon C.R.S. § 8-42-107.5, Respondents requested to suspend compensation for the period from December 9, 2016 and ongoing because Claimant's date of injury was December 27, 2012 with a statutory cap of $78,482.00. Respondents asserted that the statutory cap was met and exceeded on December 9, 2016.

34. After filing their Petition, Respondents filed an Opposed Motion to Endorse Additional Issues for Hearing ("Motion") on March 1, 2017, including termination of payment of indemnity benefits over the statutory cap, credits, overpayments, and reimbursement by Claimant to Insurer of indemnity benefits paid to him over the cap. Claimant filed an Objection to the Petition on March 6, 2017.

35. A preconference hearing was held on March 15, 2017 before Prehearing Administrative Law Judge ("PALJ"), Robert J. Erickson, who, among other things, added Petition to Modify, Terminate, or Suspend Compensation to the issues to be addressed at hearing. However, the Division of Workers' Compensation did not rule on the Motion. On May 3, 2017, Respondents requested a ruling. The Motion was denied. PALJ Goldstein ruled that it was too late to add the issue(s) to the May 18, 2017 hearing, but that another hearing may be held on the issue(s). At the hearing on May 18, 2017, Respondents requested the ALJ reconsider PALJ Goldstein's Order. The undersigned ALJ denied the request.

36. On April 14, 2017, Katie Montoya, a vocational expert evaluated Claimant at Respondents request for purposes of completing a Vocational Assessment. Ms. Montoya obtained a history concerning Claimant's educational and vocational background. This history reveals Claimant completed high school, enlisted in the Air-Force, completing two years of active duty and attended some college. Ms. Montoya performed vocational research and considered the various physical restrictions imposed by the providers involved in this case. Considering the totality of the materials provided her along with her vocational research, Ms. Montoya reached the conclusion that Claimant "maintains the capacity to return to work; however, his alternatives will vary based upon provider considered."

37. Scott Danfelser, the adjuster for this claim, testified that as of May 18, 2017, Respondent-Insurer has paid a total of $90,098.16 in indemnity benefits. Mr. Danfelser testified that recently, ongoing PPD payments stopped because the total amount of PPD was paid, which was above the statutory cap. Mr. Danfelser explained that the

PPD payments were made before the date listed in the FAL because a lump sum in the amount of $10,000.00 was paid to Claimant at Claimant's request, which resulted in PPD being paid in full in advance of the bi-weekly schedule.

38. Dr. Cebrian testified consistent with his IME reports, Additional Addendum Reports, and Reviews, totaling 74 pages. Specifically, Dr. Cebrian testified that it is not medically necessary that Claimant limit his activity and that Claimant is able to work.

39. Based upon his physical evaluations and the thorough review of the medical record, including the results of the FCE and the various aspects of Claimant's treatment, the ALJ finds that Dr. Cebrian is aware of Claimant's physical capabilities. The ALJ finds Dr. Cebrian's testimony credible and persuasive.

40. Katie Montoya, M.S., Q.R.C., vocational consultant, testified consistent with her April 14, 2017 report. Ms. Montoya testified that, based on consideration of Claimant's restrictions and other human factors, he retained the capacity to earn wages. Specifically, Ms. Montoya opined that based on Dr. Cebrian's opinion that Claimant is physically able to engage in work activities, as well as all of the other physicians who provided various opinions of Claimant's physical restrictions, Claimant could go back to any of the work that he previously performed, including fast food, production, driving, office cleaning and maintenance. Consistent with her report, Ms. Montoya testified that a 20-pound lifting limitation would allow for a full range of light classification work activities.

41. Claimant did not produce any vocational assessment or vocational expert testimony tending to establish he is unable to earn any wages in the same or other employment.

42. The ALJ credits the report and testimony of Ms. Montoya to find that the representative sampling of sedentary to light sedentary positions she identified present a number of prospective job positions existing in the local labor market, which afford Claimant the opportunity to earn a wage. Based on the evidence presented, including the report and testimony of Ms Montoya, the ALJ finds that Claimant retains the ability to earn a wage in employment reasonably available to him within his physical restrictions.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. *Section 8-43-201, C.R.S.*

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). The ALJ has considered these factors and concludes, based upon the totality of the evidence presented, that both Dr. Cebrian and Ms. Montoya are credible witnesses. Moreover, the ALJ finds and concludes, based upon the evidence presented, that Ms. Montoya's opinions are more persuasive than the assertion of Claimant that he is incapable of earning any wages.

C. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

Permanent Total Disability

D. Under the applicable law, a claimant is permanently and totally disabled if he/she is unable to "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995). In *McKinney*, the Court held that the ability to earn wages in "any" amount is sufficient to disqualify a claimant from receiving permanent total disability benefits. If wages can be earned in some modified, sedentary or part-time employment, a claimant is not permanently and totally disabled for purposes of the statute. See *also, Christie v. Coors Transportation*, 933 P.2d 1330 (Colorado 1997).

E. Moreover, there is no requirement that Respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. 4-148-050 (September 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (November 23, 1993); *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (December 1998); *Beavers v. Liberty Mutual Fire Ins. Co.*, W.C. No. 4-163-718 (January 13, 1996), aff'd.,

Beavers v. Liberty Mutual Fire Ins. Co., (Colo. App. No. 96 CA0275, September 5, 1996)(not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). To the contrary, a claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that he/she is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998). As long as a claimant can perform any job, even part time, he/she is not permanently totally disabled. *Vigil v. Chet's Market*, W.C. No. 4-110-565 (February 9, 1995). Nonetheless, when determining whether a claimant is capable of earning wages, the ALJ must consider the claimant's unique "human factors", including age, education, work experience, overall physical/mental condition, the labor market where claimant resides and the availability of work within claimant's restrictions, among other things. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The crux of the test is the "existence of employment that is reasonably available to the claimant under his or her particular circumstances." *Id*. at 558. This determination must be made on a "case-by-case basis," and "will necessarily vary according to the particular abilities and surroundings of the claimant (e.g. whether and how far the claimant is able to commute)." *Id*. at 557.

F. For example, in *Duran*, the court considered various factors, including the claimant's education, work history, transferable skills, physical restrictions and level of day to day activities. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (ICAO Sept. 17, 1998). The ALJ credited the respondents' vocational expert, who identified jobs available to the claimant within his restrictions, and concluded that he was capable of earning wages as a janitor or deliverer. *Id*. Therefore, the ALJ denied Claimant's claim for PTD. *Id*. Similarly, in *Hazard-Ross*, the ALJ credited the vocational expert, who testified that numerous jobs were available to the claimant, and concluded that the claimant failed to show that she was unable to earn wages in employment reasonably available to her. *Hazard-Ross v. HIS of Colorado Springs*, W.C. Nos. 4-2321-227 & 4-279-308 (ICAO June 6, 2005). Accordingly, the ALJ denied her claim for PTD benefits. *Id*.

G. Considering the human factors involved in the instant case[4], the ALJ is not convinced that Claimant is incapable of earning any wages in other employment. Rather, while it is more probably true than not, that Claimant is precluded from returning to his former occupation and similar positions, the representative sampling of sedentary to light duty type positions identified by Ms. Montoya as falling within Claimant's physical capabilities present a number of perspective job positions existing in the local labor market affording Claimant the opportunity to earn a wage. Furthermore, the ALJ is also not convinced that Claimant's age and education, in combination with his physical restrictions completely preclude his ability to earn a wage. Per the information contained in Ms. Montoya's report, Claimant has only attempted what the undersigned

[4] As noted, Claimant is 50 years-old and speaks English. According to Ms. Montoya's vocational assessment , which Claimant did not dispute, he completed high school, some college, and was in the military for approximately two years. Claimant lives in Colorado Springs, which is a large metropolitan area with a variety of employment options according to Ms. Montoya.

finds to be a rudimentary job search. In this regard, the ALJ credits the report and testimony of Ms. Montoya to conclude, that while it won't be easy for Claimant to secure employment, his prior work history and military experience will help him compete for and secure any of the jobs identified by Ms. Montoya. Accordingly, Claimant has failed to demonstrate, by a preponderance of the evidence, that he is permanently totally disabled as a consequence of his December 27, 2012 work injury.

Overpayments

H. Section 8-40-201(15.5), C.R.S. provides as follows:

> "Overpayment" means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability benefits under said articles.

Thus, §8-40-201(15.5), C.R.S. provides for three categories of possible overpayment: (1) when a claimant receives money "that exceeds the amount that should have been paid"; (2) money received that a "claimant was not entitled to receive"; and (3) money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. *See Simpson v. Industrial Claim Appeals Office,* 219 P.3d 354 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010).

I. Respondents bear the burden, by a preponderance of the evidence that Claimant received an overpayment of TTD benefits. Respondents' assertion of the right to recover an overpayment is a factual matter for determination by the ALJ. *Karyn Milazzo v. Total Long-term Care*, *Inc.*, W.C. No. 4-852-795-02, (Industrial Claims Appeals Panel June 11, 2014). An ALJ may issue an Order requiring repayment pursuant to § 8-43-207(1)(q), C.R.S. In this case, the ALJ agrees that Respondents that Section 8-42-107.5, C.R.S., limits the amount of compensation a claimant may receive in TTD and PPD benefits depending on the claimant's impairment rating. If a claimant's impairment rating is below 25%, his compensation is limited to $78,482.00 based on a date of injury on and after July 1, 2012. See § 8-42-107.5, C.R.S. Here, Claimant was injured on December 27, 2012, provided a 3% mental impairment and 15% physical impairment, which was admitted to by Respondents. Accordingly, under Section 8-42-107.5, C.R.S., Claimant's compensation, including TTD and PPD benefits, is limited to $78,482.00.

J. Respondents filed a Petition requesting termination of payment of indemnity benefits paid to Claimant over the statutory cap. Claimant objected to Respondents' Petition. Thus, Respondents could not unilaterally stop paying indemnity benefits to Claimant without an order from the court or until the total payment was complete. *See Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAO July 25, 2013). Respondents paid the full value of PPD just prior to hearing and therefore ongoing

payments ended. Now, Respondents have stopped paying indemnity benefits to Claimant. However, the evidence presented persuades the undersigned ALJ that an overpayment in benefits paid to Claimant exists because the statutory cap pursuant to § 8-42-107.5, C.R.S was met and exceeded. Under Section 8-40-201(15.5), C.R.S, there is an overpayment that has been made by Respondents, because Claimant received money that he was not entitled to receive based upon the aforementioned cap on benefits. Respondents may proceed with another hearing on issues concerning the amount and recovery of any overpayment from Claimant per PALJ Goldstein's May 10, 2017 Order.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent total disability benefits is denied and dismissed.

2. An overpayment in indemnity benefits made by Respondents to Claimant for payments over the statutory cap exists in favor of Respondents. Respondents may file a subsequent Application for Hearing seeking determination regarding the specific amount of said overpayment and the right to recoup the same.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 29, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Did Claimant prove by a preponderance of the evidence he suffered a compensable injury to his right elbow on or about January 10, 2016?

FINDINGS OF FACT

1. Claimant works as a steel pourer for Employer. His duties include taking multiple samples of molten steel during each shift. Some samples must be stamped with a four-digit number. While the steel is still hot enough to be relatively malleable, Claimant holds a number stamp against the sample with his left hand and strikes the stamp with a 2.5-pound hammer using his right hand. He repeats the process for each of the other digits for each sample.

2. The record contains several estimates regarding the number of times Claimant strikes the samples during a typical shift, ranging from 90 to over 200. Dr. Ridings calculated 216 hammer strikes during a 12-hour shift, which the ALJ credits for this decision. Each strike takes only one or two seconds, and it typically takes less than 60 seconds to complete the entire marking process. Claimant performs additional hammering motions with a pipe when breaking up crusted steel slag, but there is no persuasive evidence to quantify how many times he performs that activity each shift.

3. Steel-pourers are also required to "throw" rice hull bags onto the steel bath to create a barrier from the surrounding atmosphere. The bags weigh approximately 20-30 pounds, and the worker will throw approximately 10 bags per shift.

4. One of the main duties of a steel-pourer is to simply watch the level of the molten steel, which comprises approximately 50% of a typical work shift.

5. Claimant first noticed pain in his right elbow while hammering samples on January 10, 2016. Claimant was scheduled to be off work the next two days, but by January 13, 2016 he was still having pain over the right lateral epicondyle. He reported the symptoms to his supervisor and was referred to the on-site nurse.

6. Claimant saw the on-site nurse on January 14, 2016. Claimant reported increasing pain in his right elbow for "last 7 days." Claimant that "started at work when hammering and is worse on days that patient works and reduced somewhat when not working." The nurse diagnosed lateral epicondylitis, gave Claimant an epicondylar brace, and instructed him to take ibuprofen regularly.

7. Claimant saw the on-site nurse a few times, and then treated with his primary care provider. On March 7, 2016 Claimant saw Jack Hall, PA-C at Parkview Family Medicine. He reported right lateral epicondylitis pain which he attributed to "repetitive motion at work." He had been wearing a tennis elbow brace without benefit.

PA-C Hall diagnosed medial epicondylitis[1] and polyarticular arthritis. He referred Claimant for a surgical consult with Dr. Farnsworth.

8. Claimant saw Dr. Farnsworth's partner, Dr. Matthew Simonich, on March 23, 2016. He reported progressive right elbow pain for approximately six months. Claimant told Dr. Simonich "he works at the steel mill and swings a 2.5-pound hammer at least 150 times each day and has done so for 10 years. He also cooks a lot and cuts with his right hand." Dr. Simonich diagnosed right lateral epicondylitis which he termed an "overuse injury related to work." There is no discussion of the basis for Dr. Simonich's causation opinion.

9. Dr. Simonich gave Claimant a cortisone injection which provided significant, but temporary, pain relief.

10. Dr. Simonich completed a Physician Certification form in connection with Claimant's request for FMLA leave on April 26, 2016. He indicated Claimant's condition would cause periodic flare-ups that would interfere with his work duties. Dr. Simonich opined that "repetitive hammering motion can re-aggravate lateral epicondylitis."

11. Claimant's symptoms worsened significantly in May 2016, despite having been off work for several weeks. Claimant told Dr. Simonich he did not know why his pain worsened because he "did nothing" with the right arm during that period.

12. Claimant had a second cortisone injection which was not helpful.

13. Dr. Simonich completed another Attending Physician's Statement on May 25, 2016. Dr. Simonich noted Claimant's symptoms "began ~ Sept. 2015," which does not correlate to Claimant's alleged date of injury. Dr. Simonich opined that the lateral epicondylitis was caused by "repetitive hammering motion" at work. There is no analysis regarding the amount of hammering in which Claimant engaged, or the amount required to cause lateral epicondylitis. Dr. Simonich stated Claimant had no specific restrictions but had been "encouraged" to "protect" the elbow.

14. Claimant followed up with Dr. Simonich on July 14, 2016, reporting that the elbow felt "horrible" and "his symptoms have worsened over time." Claimant had been off work for approximately nine weeks. Because of his severe and worsening symptoms, Claimant wanted to pursue surgery.

15. Katie Montoya, a vocational expert, performed a Job Demand Analysis (JDA) of the steel-pourer job on July 6, 2016 at Respondent's request. Ms. Montoya observed a coworker rather than Claimant, but there is no persuasive evidence that the coworker performs the job in a substantially different manner than Claimant. Ms. Montoya concluded that none of the primary or secondary risk factors described in the 2010 version of the CTD MTGs were present.

[1] This is likely a reporting error, because the remainder of the report references lateral epicondylitis.

16. Claimant saw Dr. Eric Ridings on September 7, 2016 for an Independent Medical Examination (IME) at Respondent's request. Dr. Ridings obtained a detailed description of Claimant's work duties, with particular attention to the stamping process. Dr. Ridings agreed with the diagnosis of lateral epicondylitis but did not consider the condition to be caused by Claimant's work. Dr. Ridings opined that "with typical and proper usage of the hammer, I would not expect any significant use of the wrist extensors . . . [which] are the involved anatomic structures in lateral epicondylitis." Dr. Ridings further noted "the patient does not describe activity which from a mechanical standpoint I would expect to cause lateral epicondylitis. By the same token, his described activities do not meet the cumulative trauma disorder guidelines for causation of lateral epicondylitis."

17. Dr. Ridings subsequently reviewed the JDA and issued a supplemental report. Dr. Ridings thought the job description in Ms. Montoya's report was consistent with the history he received from Claimant. Dr. Ridings concluded:

> I see nothing that would cause, aggravate or accelerate lateral epicondylitis. Additionally, Ms. Montoya's report confirms that the patient's job duties did not come close to meeting the primary or secondary risk factors for a cumulative trauma disorder under the Medical Treatment Guidelines. With this confirmatory job demands analysis report, it is my judgment well within a reasonable degree of medical probability that [Claimant's] lateral epicondylitis is not work-related.

18. Mr. Matt Medve, Respondent's asset manager coordinator, testified in a deposition on May 23, 2017. Mr. Medve was Claimant's supervisor on the date of injury. Mr. Medve described the process of imprinting digits on the samples with the hammer. He estimated the steel pourer would typically perform 90 hammer-strikes per shift. A hammer-strike takes seconds to perform on each sample. Mr. Medve also described the use of channel lock pliers and the activity of throwing rice hull bags into the steel bath. Mr. Medve testified that Ms. Montoya's JDA accurately portrays the job duties.

19. Ms. Montoya's JDA report is credible and persuasive.

20. Dr. Ridings' opinions are credible and persuasive.

21. Claimant failed to prove by a preponderance of the evidence that his right lateral epicondylitis is causally related to his employment.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to

find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which he seeks treatment. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, *supra*.

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equally exposing stimulus requirement effectuates the "peculiar risk" test and requires that the hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). In other words, the claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

The mere fact that an employee experiences symptoms while working duties does not compel an inference that the condition was caused by the work. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove that there is a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Director has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure the quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP Rule 17, Exhibit 5 addresses

cumulative trauma conditions including, but not limited to, lateral epicondylitis.[2] The ALJ may consider the MTGs as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (ICAO, January 25, 2011). But the ALJ is not bound by the MTGs when determining whether requested medical treatment is reasonable, necessary, or injury-related. Section 8-43-201(3).

As found, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable work-related injury. The dispositive issue in this case involves medical causation and Claimant did not present sufficient persuasive evidence to prove that his work activities caused him to develop lateral epicondylitis.

Ms. Montoya's report, Mr. Medve's testimony, and even Claimant's own description of his work activities show he is not consistently exposed to epicondylitis risk factors identified in the MTGs.[3] Although the hammer Claimant uses weighs more than two pounds, he does not use it long enough to cross the durational thresholds for the primary risk factors (six hours) or secondary risk factors (three hours). The MTGs state that "hours are calculated by adding the total number of hours per day during which the worker is exposed to the defined risk. Breaks, time performing other activities, and inactive time are not included in the total time." (Rule 17, Ex. 5, § D.3.b). Based on that methodology, Claimant's accumulated time wielding the hammer during a typical shift is well under the threshold considered causative under the MTGs. Indeed, Claimant spends more hours "watching" than performing any other single activity in his job.

Claimant has primarily attributed the development of lateral epicondylitis to hammering steel samples, but the ALJ has also considered whether other job duties are causative. Besides the hammer, Claimant uses other small tools such as channel-lock pliers, a sample testing pole, and a pipe to break up crusted steel. But Claimant presented no persuasive evidence that he accumulates enough hours to reach the level of a primary or secondary risk factor. Claimant's testimony that he uses multiple tools "all day every day" is not supported by other persuasive evidence in the record.

After reviewing all the evidence, the ALJ is not persuaded that any of Claimant's work duties, either singly or in combination, caused his condition. Dr. Ridings persuasively opined that Claimant's lateral epicondylitis was not likely caused by his work. Claimant presented no persuasive evidence to refute the credible expert opinions of Ms. Montoya and Dr. Ridings. The ALJ finds Dr. Simonich's opinions conclusory and unpersuasive. The ALJ acknowledges that a claimant does not have to present expert opinion evidence to establish medical causation, *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990), but the lack of persuasive opinion evidence is a factor the ALJ can consider when evaluating the totality of the evidence. Although the ALJ does not doubt that Claimant's elbow pain started while hammering, that does not convince the ALJ to depart from the evidence-based principles in the MTG causation matrix.

[2] The most current version of the CTD MTGs became effective March 2, 2017.

[3] Ms. Montoya's report addresses the risk factors as defined in the then-current 2010 version of the CTD MTGs. The ALJ notes many of the durational thresholds have been lowered in the 2017 version, particularly with respect to secondary risk factors. The ALJ has considered both versions of the MTGs, and concludes Claimant does not satisfy the criteria of either.

Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury or occupational disease.

ORDER

Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm

DATED: June 13, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-038-431-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 29, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 6/29/17, Courtroom 5, beginning at 1:30 PM and ending at 2:30 PM).

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondents' Exhibits A through D were admitted into evidence, without objection.

A written transcript of the telephonic, evidentiary deposition of Joseph Mwangi, taken on June 19, 2017, was accepted in lieu of his in person testimony at hearing (hereinafter referred to as "Mwangi Depo.," followed by a page number).

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns average weekly wage (AWW).

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant injured his neck in an admitted injury of November 21, 2016.

2. The Respondent filed a General Admission of Liability (GAL), filed February 15, 2017, admitting for medical benefits, an AWW of $1,011.08, temporary partial disability (TPD) benefits from December 25, 2016 through December 29, 2016, at the rate of $14.30 per week; and, temporary total disability (TTD) benefits from December 30, 206 through "ongoing," at the rate of $674.05 per week.

Average Weekly Wage (AWW)

3. Joseph Mwangi, an adjuster for the self-insured Employer, testified that he first calculated the AWW by first excluding the two weeks of unpaid leave that the Claimant had taken in the last 40 weeks, but later added it in (this would decrease the average) because the Claimant had decided to litigate AWW (Mwangi Depo., p. 11). Mwangi stated that the Claimant's hourly wage was $21. The Claimant agreed. Mwangi stated that peak seasons with more overtime occurred within 12 weeks before the admitted injury. Therefore, he felt that 40 weeks before the injury was the fairest measure of the Claimant's AWW. Nonetheless, the 40-weeks before calculation reveals that overtime pay was involved. Ultimately Mwangi calculated the AWW at $1,011.08, which was the Respondent's theory of AWW.

4. The Claimant testified that his hourly wage was $21 an hour, which was corroborated by Mwangi. According to the Claimant, he generally averaged 55 to 56 hours per week (overtime of 15 to 16 hours per week), and he was paid time and a half for overtime. 40 hours per week at $21 an hour calculates to $840 per week. Overtime pay at time and a half equals $30.50 per hour, or $457.50 for 15 hours overtime. The total of this is $1,297.50 as the putative AWW. This mechanistic formula, however, does not fairly reflect the measure of the Claimant's AWW because of fluctuations in

overtime. Although the 12 weeks before his admitted injury may have been a peak season, the ALJ finds that it is the fairest measure of the Claimant's AWW. This was the Claimant's theory of AWW. As reflected in Respondent's Exhibit B, the Claimant's gross earnings for the 12 weeks before the admitted injury, according to Respondent's Exhibit B, were $1,147.07. The ALJ hereby finds that the Claimant's AWW and the best reflection of his temporary wage loss (which would also factor into the formula for permanent disability) is $1,147.07.

Ultimate Findings

5. The ALJ finds the Claimant generally credible, but it is understandable that he lacked specific recollection concerning the fine details of actual hours worked. On the other hand, the ALJ does **not** find Mwangi's methodology for calculating AWW credible, especially in light of the fact that Mwangi decided to "play hardball" by including the two weeks of unpaid leave (which would lessen the overall calculation) once he knew the Claimant was litigating AWW, previously having excluded it on apparent "fairness" grounds.

6. Between conflicting testimonies, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's general testimony and to reject Mwangi's testimony.

7. The ALJ finds that the Claimant's AWW and the best reflection of his temporary wage loss (which would also factor into the formula for permanent disability) is $1,147.07, which yields a TTD rate of $764.71 per week, or $109.24 per day, a differential of $90.66 per week, or $12.95 per day, as compared to the admitted benefits.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within

the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant was generally credible, but it is understandable that he lacked specific recollection concerning the fine details of actual hours worked. On the other hand, the ALJ does **not** find Mwangi's methodology for calculating AWW credible, especially in light of the fact that Mwangi decided to "play hardball" by including the two weeks of unpaid leave (which would lessen the overall calculation) once he knew the Claimant was litigating AWW, having previously excluded the unpaid leave period on apparent "fairness" grounds.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals*

Office, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting testimonies, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's general testimony and to reject Mwangi's testimony.

Average Weekly Wage (AWW)

c. . An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. Ordinarily, the AWW calculation for hourly employees should be determined by multiplying the hourly rate times the number of hours in a day during which the employee was working at the time of injury **or would have worked had the injury not intervened.** § 8-42-102 (2)(d), C.R.S. Consequently, this calculation could have been based on the Claimant's testimony ($21 an hour + $30.50 for 15 hours of overtime = $1,297.50). As found, however, the fairest measure of the Claimant's AWW should be based on gross wages for the 12 weeks before the admitted injury, which equal $1,147.07, yielding a TTD rate of $764.71 per week, or $109.24 per day, a differential of $90.66 per week, or $12.95 per day, as compared to the admitted benefits. The period between the commencement of TTD benefits on December 30, 2016, and the hearing date of June 29, 2017, both dates inclusive, equals 182 days. The aggregate differential on the TTD rate during this period equals $2,356.90.

d. An ALJ has the discretion to determine a claimant's AWW, including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). As found, the Claimant consistently worked overtime at time and a half, and the fairest measure of his AWW is as stated herein above in paragraph c.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As

found, the Claimant has sustained his burden on AWW. As found, the Claimant has proven that his AWW is $1,147.07.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's average weekly wage is hereby re-established at $1,147.07.

B. For the period from the commencement of temporary total disability benefits from December 30, 2016, through June 29, 2017, both dates inclusive, a total of 182 days, the Respondent shall pay the Claimant the differential of $90.66 per week, or $12.95 per day, as compared to the admitted benefits, in the aggregate amount of $2,356.90, which is payable retroactively and forthwith.

C. From June 30, 2017 and continuing until cessation of temporary disability benefits, Respondents shall pay the Claimant $764.71 per week in temporary total disability benefits. The General Admission of Liability, as modified by the herein decision remains in full force and effect.

D. The Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

E. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment with employer on December 2, 2016.

- If claimant has proven a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that medical treatment she received was reasonable and necessary to cure and relieve her from the effects of the December 2, 2016 injury.

- If claimant has proven a compensable injury, what is her average weekly wage ("AWW")?

- If claimant has proven a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that she is entitled to temporary partial disability benefits ("TPD") beginning December 19, 2016 and ongoing.

FINDINGS OF FACT

1. Claimant has worked for employer since September 2009. She has worked as a bartender, cocktail server, and lounge supervisor. Claimant was promoted to the position of lounge supervisor in August 2016.

2. Claimant provided testimony regarding a prior work injury she sustained to her neck in March 2012. While receiving treatment for that 2012 injury, claimant treated with Dr. Craig Stagg. On October 25, 2012, Dr. Stagg placed claimant at maximum medical improvement ("MMI") for the March 2012 injury.

3. After she was placed at MMI for the 2012 injury, claimant received maintenance medical treatment. The medical records entered into evidence indicate that claimant returned to Dr. Stagg on December 18, 2012, May 17, 2013, and February 18, 2014 because of "flare ups" of her neck symptoms. Each time Dr. Stagg referred claimant to physical therapy treatment. After claimant returned to physical therapy Dr. Stagg noted that claimant experienced improvement in her pain symptoms.[1] Although claimant was placed at MMI in October 2012, Dr. Stagg placed claimant on "permanent restrictions" on May 15, 2014 that included a 30 pound limit for lifting, carrying, pushing, and pulling.

[1] See medical records dated January 18, 2013, June 4, 2013, and March 25, 2014, respectively.

4. Claimant testified that she treated these occasional flare ups of neck pain with ice and Tylenol and was able to continue to perform all of her job duties. This testimony is supported by the undisputed fact that claimant was offered the promotion of lounge supervisor in August 2016. At the time of the promotion, claimant was not experiencing any neck or arm pain.

5. Claimant testified that she injured her neck at work on December 2, 2016, while assisting with set up for a banquet. Claimant testified that clean drinking glasses are kept in large racks that are then stacked. Each stack can reach six to six and a half feet from the floor. A rack has a lip that locks into the rack below it so that the racks remain stacked and do not slip. To remove a rack from the top of a stack it is necessary to lift and then turn the rack to remove it from the rack below it.

6. Claimant testified that on December 2, 2016 she attempted to remove one of these glass racks from a stack that was above claimant's shoulder height. While lifting the rack above her shoulder level, claimant felt a sharp pain in her neck that radiated into her shoulders and arms. At that time claimant did not report an incident to employer and completed her shift. Claimant testified that she attempted to self-treat her neck pain with ice because in the past that successfully reduced her neck symptoms.

7. Although she was scheduled to work on December 3, 2016, claimant notified her supervisor that she would not be at work. Claimant testified that she did not report to work on December 3, 2016 because of her neck pain. Claimant reported for her scheduled shift on December 4, 2016, but she continued to have pain in her neck and weakness in her arms on that date. Again claimant attempted to treat these symptoms with ice.

8. Claimant testified that by Monday, December 5, 2016, her pain was not getting better and she determined that she needed to seek medical treatment. Based upon her past treatment with Dr. Stagg, claimant scheduled an appointment with his office. Claimant notified Sarah Austin, Human Resources Director with employer, that she had made the appointment with Dr. Stagg. Claimant testified that because of her prior 2012 neck injury, she had been instructed by employer to inform them if she sought treatment for her neck.

9. Both claimant and Ms. Austin testified that it was initially unclear to them if claimant was expected to report her neck pain as related to the 2012 injury, or report a new incident. Claimant clarified the circumstances of the December 2, 2016 incident and employer instructed her to file a "new claim" on that incident. Employer allowed claimant to retain her scheduled appointment with Dr. Stagg.

10. Claimant was seen by Dr. Stagg on December 8, 2016 and reported to him the details of the December 2, 2016 incident involving lifting the rack of glasses. Claimant also reported radiating pain into both arms and numbness in her hands and fingers. Dr. Stagg diagnosed an acute cervical strain and opined that claimant suffered a new injury on December 2, 2016. Dr. Stagg ordered a cervical x-ray and restricted claimant from work.[2]

11. On December 8, 2016, an x-ray of claimant's cervical spine showed degenerative disc disease at C6-7 with foraminal narrowing. In addition, multilevel facet arthroplathy was noted without evidence of dynamic instability.

12. Following the x-ray, claimant continued to report to Dr. Stagg that she had radiating pain from her neck into both arms and when she tilted her head back she would have lancinating pain into her back and both shoulders. Dr. Stagg ordered a magnetic resonance image ("MRI") of claimant's cervical spine

13. On December 16, 2016 the MRI of claimant's cervical spine showed reversal of the normal cervical lordosis with an unchanged bulge at C4-5 and a discoosteophytic bulge at C6-7 asymmetric to the right with slightly progressive moderate foraminal stenosis, but degenerative. It was further noted that there was no acute disc rupture, hematoma, fracture, or acute alignment abnormality.

14. The December 16, 2016 MRI results were compared with a computerized tomography ("CT") scan taken on July 6, 2012 and an MRI taken on February 24, 2014. Dr. Stagg noted on December 21, 2016 that there were no significant changes between the 2014 MRI and the results from the December 16, 2016 MRI.

15. On December 19, 2016, Dr. Stagg released claimant to return to modified duty. At that time claimant's work restrictions included no lifting, pushing, or pulling of more than five pounds. As of the date of the hearing, claimant continues to work under these restrictions.

16. Claimant testified that because of these current work restrictions she is not able to work as much as she did prior to the December 2, 2016 injury. In addition, because she is working in a primarily clerical position for employer, she is not earning the same amount of tipped income as she did prior to her injury.

17. Claimant testified that she continues to have pain in her neck with ongoing radiating pain and numbness into her arms and hands. Claimant also testified that these current symptoms are different from the symptoms she experienced following the 2012 injury. Claimant testified that her current symptoms are more intense and than her prior symptoms and are not relieved with ice and Tylenol. Claimant testified that she continues to have neck pain and arm weakness.

[2] Claimant was ultimately off from work from December 8, 2016 through December 18, 2016.

18. On January 4, 2017, respondents asked Dr. Albert Hattem to perform a review of claimant's medical records to determine whether her neck issues were caused by an injury on December 2, 2016. Dr. Hattem opined that claimant's current neck symptoms are not related to a new injury on December 2, 2016. In support of this opinion Dr. Hattem also opined that the December 2, 2016 was a minor incident. Dr. Hattem noted that when claimant was placed at MMI in 2012 she complained to Dr. Stagg of neck pain similar to the pain she has now and the recent MRI showed no acute changes to her cervical spine.

19. Respondents sent claimant to Dr. Frederick Scherr for an independent medical examination ("IME") on March 16, 2017. Dr. Scherr reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant. Following the IME, Dr. Scherr issued a report in which he opined that if the December 2, 2016 incident occurred as described by claimant, then that incident "may have caused an exacerbation of her pre-existing cervical issues". Dr. Scherr also noted that in his opinion appropriate treatment for claimant's symptoms would include physical therapy and massage therapy.

20. Dr. Scherr testified by deposition in this matter. Dr. Scherr testified that he diagnosed claimant with a cervical sprain with radicular features. Dr. Scherr also testified that claimant's symptoms were the result of an aggravation of a preexisting or previous injury. In his testimony Dr. Scherr noted that at the IME claimant denied having any previous arm symptoms, but his review of the medical records indicated that claimant did have arm symptoms prior to the December 2016 incident.

21. Respondents point to claimant's renovation of her home during 2016 and a backpacking trip she took in July 2016 as evidence that her neck and arm symptoms were caused by activities outside of work. Claimant testified that she performed some home renovation in the summer of 2016 including painting, tiling, and cleaning. Claimant also testified that while working on the home renovation she was able to work all of her scheduled shifts and perform all of her work duties. Claimant testified that the home renovation was stopped in late September/early October 2016. With regard to the backpacking trip, claimant testified that it was more difficult than she and her daughter had initially believed, but that trip did not cause any neck or arm symptoms and did not limit claimant's ability to perform her work duties. The ALJ finds claimant's testimony on these issues to be credible and persuasive.

22. Claimant's spouse and daughter testified at hearing. The testimony of these witnesses was consistent with claimant's testimony.

23. The ALJ credits claimant's testimony that she had a preexisting neck condition from a 2012 injury, but that her symptoms had improved. The ALJ credits claimant's testimony that prior to the December 2, 2016 injury she was able to perform all of her work duties. The flare ups claimant experienced prior to December 2, 2016 were intermittent and successfully treated with ice and Tylenol.

24. The ALJ credits the opinion of Dr. Stagg that claimant sustained a new injury on December 2, 2016. The ALJ credits the opinion of Dr. Scherr that on December 2, 2016 claimant suffered an exacerbation of her preexisting cervical condition. Based upon these findings, the ALJ finds that claimant has demonstrated that it is more likely than not that she suffered an injury at work on December 2, 2016 that aggravated, accelerated, or combined with her preexisting cervical spine condition, necessitating treatment.

25. Respondents argue that even if the December 2, 2016 incident is deemed a compensable injury, then claimant only experienced a temporary aggravation of a preexisting condition. The ALJ is not persuaded by this argument.

26. Based upon the payroll records entered into evidence, claimant has two pay periods each month. The first is from the 1st to the 15th and the second from the 16th to the last day of the month. The ALJ calculates that for the 8 and 5/7 week period of October 1, 2016 through November 30, 2016, claimant had wages totaling $5,680.06. The ALJ credits these payroll records and finds that claimant's average weekly wage ("AWW") is $651.83; ($5,680.06 ÷ 8.714 weeks = $651.83).

27. The payroll records entered into evidence indicate that claimant averaged approximately 88 hours per pay period prior to December 2, 2016. After the December 2, 2016 work injury, claimant averaged 59 hours per pay period. The ALJ credits these records and finds that claimant has demonstrated that it is more likely than not that she has experienced a reduction in wages following the work injury. The claimant has also shown that it is more likely than not that this reduction in wages was caused by claimant's December 2, 2016 work injury and related work restrictions.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has demonstrated by a preponderance of the evidence that on December 2, 2016 she suffered an injury arising out of and in the course and scope of her employment. As found, the injury claimant sustained on December 2, 2016 aggravated, accelerated, or combined with her preexisting cervical spine condition, necessitating medical treatment. As found, claimant's testimony, the opinions of Dr. Stagg and Dr. Scherr are found to be credible and persuasive.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. As found, claimant suffered a compensable injury on December 2, 2015. Therefore, respondents are liable for the payment of reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. Although claimant has not requested specific medical treatment at this time, the ALJ concludes that respondents are responsible for payment of such medical treatment. As found claimant's testimony is credible and persuasive on this issue.

7. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

8. As found, the ALJ credits the payroll records and concludes that claimant's AWW is $651.83. The ALJ concludes that the 8 and 5/7 week period immediately preceding the December 2, 2016 work injury most accurately reflects claimant's wages at that time.

9. In order to prove entitlement to temporary partial disability ("TPD") benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

10. As found, claimant has demonstrated by a preponderance of the evidence that she has experienced a wage loss as a result of the December 2, 2016 work injury and she is entitled to TPD benefits beginning December 19, 2016 and ongoing. As found, claimant's testimony and the payroll records are credible and persuasive on this issue.

ORDER

It is therefore ordered that:

1. Claimant sustained an injury that arose out of and in the course and scope of her employment with employer on December 2, 2016.

1. Employer shall pay for reasonable and necessary medical treatment related to the December 2, 2016 work injury, pursuant to the Colorado Medical Fee Schedule.

2. Claimant's AWW is $651.83.

3. Claimant is entitled to TPD benefits beginning December 19, 2016 and ongoing until terminated by law.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP.

You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: June 28, 2017

_____

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether the left wrist surgery as proposed by Dr. DeVanny is reasonable, necessary, and related to Claimant's work injury which occurred on May 16, 2016.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 43-year old right-handed male who sustained a work related injury on May 16, 2016 while working for the Respondent/Employer as an apartment maintenance technician. He was loading a washing machine into a truck when he stepped off the back of the tailgate and landed on his right lower extremity. He felt a pop in his right knee at which time his leg gave out and he also landed on his right wrist.

2. Claimant was admitted into the Emergency Department at Penrose St. Francis Hospital shortly after the accident. He stated that he was moving an appliance in the bed of a truck when he tripped and fell off the truck, extending his right hand to try to minimize the impact of the fall while striking his right knee on the ground. He complained of severe pain in the right hand and the right knee. Physical examination showed right wrist deformity and soft tissue swelling of the right leg. Claimant was assessed with a right tibial fracture, right wrist fracture/dislocation, and right scaphoid fracture. There was no mention in the Emergency Department records of any injury to Claimant's left wrist. (Ex. A: pp. 1-2)

3. Orthopedic surgeon Patrick DeVanny, M.D. evaluated Claimant that same day. He did not note any left wrist symptoms in his initial evaluation. He then performed a right distal radial fracture open reduction and internal fixation and right scaphoid waist fracture ORIF to repair the damage to Claimant's right wrist. (Ex. B: pp. 69-73)

4. Following the procedure, Christopher Scott Peeters, M.D., who noted moderate displacement of the distal radial fracture, ulnar styloid fragment, and scaphoid fracture, evaluated Claimant. He did not note any symptoms in Claimant's left wrist. (Ex. C: p 74)

5. Claimant was admitted to the rehabilitation floor of the hospital. In addition to his documented fractures, Claimant was discovered on admission to have uncontrolled type II diabetes for which he began receiving treatment. No documentation exists for a left wrist injury. (Ex. D: p. 80)

6. Following surgery, Claimant spent four days in the hospital and was discharged to Health South Rehabilitation. At the time of discharge Claimant was non-weight bearing on his right leg and was unable to use his right wrist. At the time he was admitted to Health South, Claimant was required to use a wheelchair or a walker to ambulate. While at Health South, Claimant would use his walker to ambulate if he did not have to go too far. In using his walker, Claimant used his left hand exclusively to put weight on his walker and to move it forward. In addition, when Claimant used his wheel chair to get around, he used his left hand and left leg to propel him. At the time he was at Health South, Claimant weighed approximately 240 pounds. Claimant testified that he put a significant amount of weight on his left hand when using his walker. Likewise, when using his wheelchair, Claimant had to use a significant amount of force with his left wrist to propel it. When he got home, Claimant had to use a walker to ambulate. If he left his home, Claimant would use his wheelchair. Just as at Health South, Claimant had to put weight on his left hand and left leg when using his walker. Claimant also used his left hand to propel his wheelchair. *Claimant had not experienced problems with his left wrist before this work injury.*

7. On May 21, 2016, Claimant was noted by Dr. David Richman at Health South to be complaining of right leg and knee pain, right thumb pain, right wrist pain, right calf swelling without tenderness, and range of motion deficits in the right knee and wrist. There was no notation in the records any of pain, swelling, or difficulty in the left wrist. (Ex E: p. 100)

8. On May 31, 2016, Dr. DeVanny followed up postoperatively. He noted that the procedure was healing well. However, he expressed concern that Claimant was weight bearing on his right wrist and forearm, which could reinjure the joint. (Ex G: p. 192)

9. On June 7, 2016, Claimant had a follow-up postoperative visit with Dr. Richard Meinig, who had surgically repaired Claimant's right knee. Dr. Meinig performed a physical systems review noting muscle aches, muscle weakness, and joint pain but no back pain or swelling in the extremities. The doctor noted that Claimant was recovering well from the right tibial-plateau fracture. (Ex. H: p. 194)

10. Claimant returned to Dr. DeVanny on June 21, 2016. Dr. DeVanny noted excellent alignment of the hardware and fracture site of the scaphoid and distal radius. He assessed Claimant with a satisfactory postoperative recovery. He sent Claimant to physical therapy to increase his range of motion. At this visit, there was no mention noted of any issues with Claimant's left wrist. (Ex. I: p. 196)

11. On July 26, 2016, Claimant returned to Dr. DeVanny. Dr. DeVanny noted 'routine' healing. He again expressed concern over Claimant's use of his right hand/wrist, as his splint was noted at this visit to be "in tatters". No left wrist symptoms are noted at this appointment. (Ex. J: p. 199)

12. On August 23, 2016, Claimant returned to Dr. DeVanny. Dr. DeVanny opined that Claimant's right wrist was healing well, but with stiffness. He recommended additional physical therapy. Dr. DeVanny did not document any left wrist symptoms at this visit. (Ex. K: p. 200)

13. On September 8, 2016, Claimant presented to Michael Sparr, M.D., who had taken over Claimant's Workers' Compensation care. Claimant reported that he was loading a washing machine in his Ford F-250 pickup truck and was attempting to push the appliance deeper into the truck bed. He was standing on the tailgate and apparently stepped off the back of the gate and landed hard on his right lower extremity. He felt a pop in his right knee at which time his leg gave out and he fell on his right wrist. Immediately, following the incident he had severe right lower extremity and right wrist pain and an obvious deformity of his right wrist. (Ex. L: pp. 202-205)

14. This report contains the first documentation and evaluation of any left wrist injury in the case. Claimant reported at this time that his symptoms developed approximately one week after the accident, while pushing his wheelchair with his left hand in rehabilitation. Claimant reported that his worst pain at this time was with his left wrist. He described this as a dull achiness over the volar and dorsal aspects of the left wrist. Dr. Sparr assessed Claimant with left wrist tendinitis in addition to Claimant's previously diagnosed conditions. (Ex. L: pp. 202-05)

15. On September 20, 2016, Claimant returned to Dr. DeVanny. This is the first visit *with Dr. DeVanny* where any left-wrist complaints are documented. Dr. DeVanny's examination revealed a positive Finkelstein's test. At this visit, Dr. DeVanny recommended physical therapy to address "left de Quervain's" [tendonitis], instead of surgery. He did not take x-rays at the time. (Ex. M: p. 207)

16. On October 25, 2016, Claimant returned to Dr. DeVanny. He continued to complain of left wrist pain along the dorsoradial aspect and that he [Claimant] was concerned about an 'occult injury'. Physical examination showed tenderness to the snuffbox and pain with passive extension of the wrist. The neurovascular exam was normal. All flexor and extensor tendons were intact. X-rays showed a scaphoid midwaist cyst and 'questionable fracture'. Dr. DeVanny recommended an MRI or CT scan to evaluate Claimant's left wrist. (Ex. N: p. 209)

17. A November 25, 2016 left wrist MRI showed a disruption of the scapholunate ligament with mild widening of the scapholunate interval. Additionally, there were MRI findings consistent with a mild DISI deformity. A non-displaced fracture of the scaphoid waist was suspected. There was mild subluxation of the extensor carpi ulnaris tendon. It was further noted that Claimant had advanced osteoarthritis for his age. (Ex. O: p. 211)

18. On December 6, 2016, Dr. DeVanny again evaluated Claimant. Dr. DeVanny assessed Claimant with a left wrist scaphoid bony bruise with scapholunate ligament disruption. He recommended a proximal row carpectomy, scaphoid excision

and four-corner fusion, and a Brunelli reconstruction to repair the scapholunate ligament. (Ex. P: p. 212)

19. Respondents filed a December 15, 2016 Application for Hearing challenging the requested surgery as not reasonable, necessary, and related to the May 16, 2017 injury. (Ex. R: p. 225)

20. At a post-hearing deposition, Claimant offered Dr. DeVanny as an expert in orthopedic medicine. Dr. DeVanny testified that disruption of the scapholunate ligament, which he suspected here, could not be caused by simple overuse of the wrist. In this case, Claimant favoring the left wrist in rehabilitation would not have caused the very mild DISI deformity shown on Claimant's MRI, nor any of Claimant's other left wrist pathology. It may have elicited *symptoms,* but it would not have *caused* the underlying condition.

21. Dr. DeVanny initially speculated that Claimant might have had an underlying left wrist condition with advanced joint degeneration for his age (*possibly* from a prior injury) that was somehow aggravated in the fall. He went on to testify, however, that it was *debatable* whether Claimant's left wrist condition actually was related to the May 16, 2016 fall.

22. Dr. DeVanny further opined that Claimant likely hurt his left wrist in the fall, but was not focused on any left wrist pain, due to the distracting nature of the far more extreme pain from his right wrist and right knee. He acknowledged missing this left wrist issue initially. Dr. DeVanny further stated that it was unsurprising that Claimant did not initially report his left wrist to emergency room personnel, since "no one remembers what was injured at the time of a fall, it's so quick. They notice the big injuries….(DeVanny transcript, p. 30, l. 13-15)

23. His ultimate opinion was that Claimant likely had some underlying condition in his left wrist, which was then aggravated by the fall. He stated:

> A I believe he probably had some small symptoms that he didn't really pay attention to, and when he fell, it pushed them over the edge to complain.
>
> Q So --
>
> A It aggravated a pre-existing problem.
>
> Q Okay. Now, is this aggravation what we'd call--in our opinion, is this a temporary or a permanent aggravation?
>
> A This is the straw that broke the camel's back, and will be continual. (DeVanny transcript p. 31. L. 4-14)

24. He further opined that, while several other ways exist to treat Claimant's left wrist, he recommended the Brunelli procedure, in part due to Claimant's youth, and to retain his native anatomy in reconstructing the ligament.

25. Claimant testified that he told a nurse in the Penrose Hospital Emergency Room that he had left wrist pain shortly after the accident. However, the emergency room records did not reflect this. (Ex. A: pp. 1-67) Dr. DeVanny testified that this would not be typical. Additionally, Claimant testified that he told Dr. DeVanny of the left wrist symptoms long before Dr. DeVanny documented those symptoms in his medical reports. Dr. DeVanny testified that he would typically document such complaints and would always follow-up on newly reported symptoms at later visits. However, Dr. DeVanny ultimately testified that he did recall Claimant "early on" had told him that his left wrist hurt, and that he felt poorly for "blowing it off" and not documenting his complaints. (DeVanny transcript. p. 66 l. 15-20) Claimant also testified that Dr. DeVanny provided him with a left-wrist brace prior to the September 2016 visit where Dr. DeVanny first documents left wrist symptoms. Dr. DeVanny stated that this was not the case because he always documented such prescriptions “because work comp pays well.”

26. Jonathan Sollender, M.D. performed an independent medical examination of Claimant at Respondents’ request on February 7, 2016. Respondents offered him as a board certified expert in plastic and reconstructive surgery. His practice predominately focuses on surgical repair of hand and upper extremity trauma.

27. Dr. Sollender opined that the mechanism of injury described by Claimant would not have resulted in an injury to Claimant’s left wrist, as the force of the fall was isolated to Claimant’s right knee and right wrist, with significant trauma to both. Additionally, Claimant did not report that he, in fact, struck his left wrist in the fall. Tr. (4/11/17, Hearing Transcript), p. 13, line 15 – line 17. This is further supported by the emergency room physicians who did not note any left wrist symptoms or perform any diagnostic evaluation of that wrist. Indeed, the left wrist was documented until Claimant reported pain to Dr. Sparr. Concerning any injury from overuse of the left wrist, Dr. Sollender opined that documentation showed that Claimant continued to use his right wrist during his recovery and the activities described by Claimant as “overuse” could not have cause the alleged left-wrist injury. Therefore, he found that the left wrist injury was *not* related to Claimant’s work incident. (Ex. Q: p. 218)

28. Dr. Sollender did agree that a majority of scapholunate injuries go undiagnosed or untreated during the acute phase (perhaps 6 weeks after the inciting event) because the patient believes there is only some minor injury to the wrist.

29. Concerning the procedure recommended by Dr. DeVanny, Dr. Sollender opined that, even assuming it was related, it was not reasonable and necessary, as Claimant’s clinical presentation did not demonstrate a rupture of the scapholunate ligament. Claimant’s Watson’s test, which tests for instability of the scapholunate ligament, did not have the telltale sign of a palpable clunk indicative of disruption of that

ligament. Because the scapholunate had not failed, Dr. Sollender concluded that the recommended procedure was not reasonable and necessary, as it did not remedy a condition that Claimant even has. (Ex. Q: p. 218)

30. Accordingly, Dr. Sollender concluded in his initial report that the surgery recommended by Dr. DeVanny was not reasonable, necessary, or related to the May 16, 2016 injury. (Ex. Q: p.218). However, during his deposition testimony, Dr. Sollender stated the following:

> Q Okay. Dr. Sollender, is the proposed Brunelli procedure by Dr. Patrick DeVanny reasonable, necessary, and related to the May 16th, 2016 workers' compensation claim?
>
> A ***Reasonable , yes. Related , no.***
>
> Q And why not?
>
> A For the aforementioned reasons. I see no evidence that he injured his left wrist on May 16, 2016 or thereafter, *as part of his claim.* (Sollender transcript, p. 26 ll. 16-24, emphasis added)

31. Based upon the evidence presented, by a preponderance of the evidence, the ALJ makes the following ultimate factual conclusions:

> I. While Claimant is far from an imperfect historian, he did not experience pain in his left wrist before this accident. He did verbally report his left wrist pain at some point shortly after the injury, but it went undocumented. While he does not describe falling on his left wrist during the accident, this event occurred so suddenly that he might still have injured it during the fall.
>
> II. Regardless of when it occurred, Claimant *now* has a possible fracture of his left scaphoid bone, and a partial tear of the scapholunate ligament, resulting in a mild widening of the scapholunate interval. Due to this work injury, either from the fall itself, or from overuse during the rehab process, his left wrist has now become symptomatic. Dr. DeVanny is more persuasive than Dr. Sollender on the issue of relatedness.
>
> III. This now symptomatic condition is now permanent, and will require surgery to repair it. The treating physician, Dr. DeVanny (with the ultimate concurrence of Dr. Sollender) is in the best position to determine the best way to perform the needed repairs.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law.

Generally

a. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the Claimant nor in favor of the rights of Respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

b. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

c. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Causation

d. The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301 (1)(c); *Faulkner v. ICAO,* 12

P.3d 844, 846 (Colo. App. 2000). Relatedness therefore is a threshold prerequisite to a showing that medical treatment is reasonable and necessary. *Wilkinson v. Wal-Mart Stores, Inc.*, W.C. No. 4-674-582 (Oct. 26, 2007); *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007); *see also Snyder v. ICAO*, 942 P.2d 1337, 1339 (Colo. App. 1997). Where the employer has admitted to a work-related injury and no DIME had taken place, the threshold issue before the ALJ is the extent of the work injury. *LeClair v. Arise Boiler Inspection and Ins. Co.*, W.C. No. 4-871-989-02 (Nov. 16, 2015). In other words, did the admitted work injury proximately cause the injury for which medical benefits are now sought.

e. The issue of causation "is generally one of fact for determination by the ALJ." *Faulkner,* 12 P.3d at 846; *see also H&H Warehouse v. Vicory*, 805 P.2d 1167, 1170 (Colo. App. 1990) "The ALJ has great discretion in determining the facts and deciding ultimate medical issues."

Claimant's possible pre-existing injury to left wrist

f. The mere fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

g. As ultimately found, the facts support a compensable injury to Claimant's left wrist. He had experienced no symptoms in his left wrist before he fell. Then, *either:*

1. Claimant fell on his left wrist and injured it during the fall, but failed to note that fact due to the far more extreme pain in his right wrist and knee. While he did not receive a left wrist brace, he did report his pain to Dr. DeVanny at some point before it was documented in the records, and then to Dr. Sparr.

or:

2. Claimant had indeed (as opined by Dr. Sollender) injured his left wrist before the fall, but it was not symptomatic until after his fall. Maybe the fall itself made it symptomatic, or maybe it became symptomatic as result of overuse during his difficult rehab, or both in combination. His newfound pain was plainly not merely the natural progression of some old injury. The consequences of the fall made it hurt.

Either way, the injury to his left wrist is compensable. Any treatment to his wrist is therefore *related* to his work injury.

Reasonable and Necessary Surgery

h. The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. ICAO, supra*; *Wal-Mart Stores, Inc. v. ICAO,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. C.R.S. § 8-43-301(8). Substantial evidence is that quantum of probative evidence, which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

h. As found, Dr. DeVanny is in the best position to determine whether the proposed surgery is reasonable and necessary to treat Claimant's work injury. To the extent that his recommendations differ from those of Dr. Sollender, Dr. DeVanny is more persuasive. In the final analysis, Dr. Sollender actually appears to have concurred on the *reasonableness* of the proposed surgery; his concerns were primarily those of *relatedness* to the work injury. Relatedness has now been established. By a preponderance of the evidence, the ALJ concludes that the surgery as proposed by Dr. DeVanny is reasonable and necessary to treat this work injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the left wrist surgery as proposed by Dr. Patrick DeVanny.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 14, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant has proven, by a preponderance of the evidence, that she suffered a compensable work injury to her left foot, either as an acute injury, or as an occupational disease in the form of a stress fracture.

II. If this is a compensable claim, is Claimant entitled to reimbursement for medical expenses (and ongoing) for treatment by Dr. Clark Johnson, DPM.

STIPULATIONS

I. In the event this is a compensable claim, the Claimant's Average Weekly Wage is $480.00

II. The issues of Temporary Partial Disability and Temporary Total Disability are held in abeyance, pending the outcome of this hearing.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

Claimant's Testimony

1. Claimant is employed by the Colorado Institute of Mental Health in Pueblo, Colorado as a CNA, responsible for patient care. It is a secured facility, and she is responsible, on average, for monitoring up to 26 patients. Her duties include periodically checking on them, taking them to dinner, the showers, the laundry room, and an open exercise yard. Another co-worker was required to be present at all times.

2. Claimant testified that she spent three fourths, or six (6) hours of her eight (8) hour shift, either walking or standing. She testified that she spent 65% of her time – or four hours out of six – on her feet walking instead of standing. Based on Claimant's characterization of a typical work day, Claimant spent her average work day as follows: Four (4) hours a day walking, two (2) hours a day standing, and two (2) hours a day sitting.

3. Claimant described her pre-injury walking duties at work as requiring walking on tile and indoor-outdoor carpet. She would go up and down two flights of stairs three times per day. The total distance she walked per day was unknown, and would vary depending on the unit she was at. The longest single distance she would walk was four blocks, one way, twice a week. Her job required her to walk outdoors, and indoors, on either tile or indoor/outdoor carpet.

4. While Claimant describes a typical work day requiring her to be on her feet for several hours, she is not required to run, jump, or carry heavy objects. She describes having to "pace" inmates twice a day, i.e., walk at a pace comfortable for the inmates, twice a day. Presumably, the inmates own state of fitness and preferences would dictate the pace to be set. Claimant did not describe frequent scenarios where she was unable to keep up.

5. At the end of a work day, her feet would be swollen and sore. At the end of a typical non-work day, her feet would be "better", and not swollen.

6. Claimant walked around “every day” as part of her normal life. She walked her dog, went up and down stairs, did yard work, watered her lawn, and cared for her ailing father, right up until March 24, 2016.

7. At hearing, Claimant testified that on Thursday, March 24, 2016, she reported to work at 2:53 p.m. At approximately 9:30 p.m. she stood up from a chair and felt a sharp pain and heard a crunch in the top part of her left foot. She had not felt a pain like this previously.

8. She completed her shift, and went home and iced her foot. It was still swollen the next day, but she went in to work. About halfway through her shift, she reported this ongoing pain to her supervisor, who directed her to the charge nurse. An Injury on Job report was completed. She then went to urgent care "on Saturday" [March 26], then PA Terry Schwartz "on Monday" [March 28]. She was ultimately referred to podiatrist Dr. Johnson.

9. The ALJ finds Claimant to be a sincere and credible witness, who has provided, in good faith, accurate information to her health care providers, and to this Court surrounding the event in question, and the symptoms she has experienced.

Medical Treatment for the Stress Fracture - March to August of 2016

10. March 26, 2016: The first physician to see Claimant was Cheryl A. Cavalli, D.O., whom the Claimant saw at the Urgent Care Parker center. (Ex. 1 p. 22). Dr. Cavalli saw the Claimant on March 26, 2016, and held off on making a diagnosis, because she did not have a formal x-ray report at the time. (Ex1 p. 24). Therefore, Dr. Cavalli neither rendered a formal diagnosis, nor did she offer any causation opinions on whether the injury was work-related. An X-ray later showed no acute injury, but “chronic changes” in the left foot were noted. (Ex. C p. 6).

11. April 11, 2016: Claimant is seen by Terrance Lakin, D.O. (Ex. D pp. 22-26.) He was informed of her prior foot pain, and noted “sig spurring in foot. Talonav joint and all other joints.” He stated Claimant had “DJD” and there was no trauma with the injury before he diagnosed Claimant with a non-work related left foot strain. p He closed the claim and referred her to podiatrist Clark Johnson, M.D. p

12. April 12, 2016: Claimant saw Dr. Johnson, who opined Claimant may have a stress fracture and ordered more X-rays. (Ex. 1 p. 4.) Dr. Johnson's reports do not reflect an awareness of any pre-existing complaints that Claimant has had surrounding her feet.

13. May 5, 2016: After looking at an x-ray that revealed a subacute fracture on the 4th metatarsal, (Ex. C p. 5), Dr. Johnson confirmed his diagnosis of a stress fracture of the 4th metatarsal. (Ex. 1 p. 7.) Dr. Johnson specifically noted that he had reviewed x-rays and there was "clinical evidence of stress fracture left 4th metatarsal. Healing bone callus is present and symptoms are improving." (Ex. 1 Pg. 7). In the same note, Dr. Johnson went on to comment on whether the stress fracture was work-related: "This injury could certainly be work-related, after reviewing pt.'s work duties and ADLs. I have encouraged her to contact her adjuster with this information and request that her case be reopened. The injury is likely related to excessive walking as part of her work-related activities." She was returned full work duties, but part time at 4 hours per day.

14. June 28, 2016: Dr. Johnson recommended a DEXA scan to evaluate for osteoporosis. (Ex. 1 p. 13.) However, the record does not show that this was ever completed. (Ex. D p. 3.)

15. August 15, 2016: Dr. Johnson returned Claimant to full work duties. (Ex 1 p. 20.)

16. October 25, 2016: Despite being back at work, Claimant was evaluated for delayed healing. (Ex. D p. 3.) Dr. Johnson noted that Claimant had been using an exogen bone stimulator for 3-6 months and that she had "**known osteoarthritis of the b/l midfeet**." (emphasis added).)

Claimant's Pre-existing Issues

17. Claimant has a history of pre-existing lower extremity issues relevant to this claim:
    a. August 6, 1999: Due to a motor vehicle accident in March, Claimant walked "with some difficulty … with a fairly distinct limp favoring right side." (Ex. G p. 1)
    b. June 20, 2003: During a physical examination, a balance test revealed the "unusual" finding of Claimant having her weight shifted onto her left foot. (Ex F. p. 2); and
    c. 2009-2010: Claimant had pain in her left foot, including in her left midfoot (Ex. D p. 34, 43-51), and x-rays showed generalized osteopenia and other degenerative changes. (Ex. C p. 7.)

18. In 2016, Claimant's feet and condition were a significant issue prior to the alleged date of injury:
    a. February 24, 2016: Claimant went to a chiropractor, and reported pain in her left foot and in all joints. (Ex. B p. 2.) She reported that she had had x-rays done, and a doctor had said something about "deteriorating". This

pain interfered with sleep, and walking hurt. The handwritten notes appear to note "foot pronator".

b. March 16, 2016: Claimant went to University Family Medicine Center for her foot pain. (Ex. E pp. 10-12.) The strength in her right side wasn't as good as it used to be, her feet were involved, and on exam she had a short leg limp that was due to a rotated pelvis. Chiropractic care and calcium were prescribed.

Expert Opinions of Dr. Michael Striplin, MD

19. Dr. Michael Striplin, MD, performed a medical records review on behalf of Respondents, and testified at hearing at an expert witness with a Level II certification in occupational medicine.

20. He testified that Claimant suffered from a stress fracture in the fourth metatarsal of her left foot sometime in the spring of 2016.

21. The following evidence regarding stress fractures was provided by Dr. Striplin:

> Stress fractures "are breaks in bones … that occur over time rather than as the result of acute trauma... Stress fractures may be the result of repetitive forceful activities such as running or jumping, and may occur following an increase in a person's regular exercise routine … and in individuals who are obese … or who have underlying arthritic or metabolic disease. Stress fractures … are more common in females. *Stress* fractures may not appear evidence on x-rays until several weeks…" (Ex. A, p. 4.) On the other hand, *acute* fractures in a metatarsal are visible "immediately."

22. Stress fractures are also "a subtle break in a bone" and are most commonly found in the second and third metatarsals – the bones that tend to bear more weight.

23. He reached the opinion Claimant had not suffered from any work-related stress fracture by *acute* injury. He also opined that standing up from a chair may cause discomfort in a *stress* fracture that already existed, but it would not *cause* a stress fracture – similarly, "simply arising from a seated position in a chair to a standing position would not subject the foot to sufficient force to cause an *acute* fracture."

24. Regarding Claimant's personal risks, Dr. Striplin's report opined that the following non-work related conditions increased Claimant's risk of stress fracture: "being female, being obese, having a short leg limp… and, if symptomatic, arthritic changes." (Ex. A p. 5.) In his testimony, Dr. Striplin expanded the above general opinion by listing and explaining the ways in which Claimant's left foot and condition differed from the general population such that she was more likely to suffer a stress fracture:

a. Weight-Bearing: Claimant's "been found, on physical examination, to have pelvic rotation. She has been found in the past … to tend to preferentially bear weight on her left foot as opposed to her right."

b. Osteopenia: "a precursor to osteoporosis… basically loss of bone calcium… if a person has osteopenia or osteoporosis, that means the bone integrity is weaker than normal bone. And that would increase the risk of developing a stress fracture."

c. Obesity: Obese individuals "submit their feet to more stress during normal ambulation. And these individuals are at higher risk for the development of stress fractures involving the feet."

d. Osteoarthritis: "She has arthritis involving the first metatarsal-phalangeal joint [the big toe]. She also has a spur on the heel bone, which is called the calcaneus." These conditions "would have a tendency for the patient… to shift weight bearing to the lateral aspect of her foot… which would put more stress on the fourth and fifth metatarsals."

e. Overall: The personal risks made Claimant "more predisposed" to have a stress fracture of the left foot than the general population.

25. On the other hand, Dr. Striplin noted that while "strenuous physical activity" such as running was a risk factor for stress fractures, that activity wasn't present in Claimant's job.

26. Dr. Striplin finalized his ultimate opinion by stating that Claimant's March 24, 2016 stress fracture was not work related.

27. The ALJ finds that Dr. Johnson, in good faith, provided the best care and professional advice to Claimant he could. His focus, however, was rightfully on treating Claimant, rather than being concerned with determining causation.

28. The ALJ finds that, given his greater access to the medical records, his Level II accreditation in Occupational Medicine, and his focus on causation, the opinions of Dr. Striplin are more persuasive than those of Dr. Johnson on the issue of causation.

Compensable Injury

29. The Medical Treatment Guidelines ("MTG") provide that a stress fracture can have an occupational relationship from "repetitive, **high impact walking**; running, or jumping." WCRP 17 Ex. 6 p. 61 (emphasis added.) Claimant's job duties do not fit this description. The ALJ finds that Claimant's work contained no *high impact walking* such that it would be considered an exposure making it more likely for Claimant to suffer a work-related stress fracture.

30. Dr. Striplin's opinion specifically addressed the concept of Claimant walking 6 hours per day, and found her walking was not strenuous activity such that it would cause a stress fracture. Furthermore, his opinion matches the guidance of the MTG and is also supported by the opinion of ATP Terrance Lakin, D.O. Dr. Lakin also took into account Claimant's pre-existing issues, while Dr. Johnson apparently had no knowledge of them.

31. Claimant also possessed unique personal risk factors for stress fractures:

    a. Osteopenia: Based on the 2009-2010 X-rays with their finding of osteopenia and Dr. Johnson's recommendation of a DEXA scan, this ALJ infers and finds by a preponderance of the evidence that Claimant had osteopenia in her left foot prior to her 2016 stress fracture. This trait is found to be a personal risk of Claimant's pre-dating her stress fracture that pre-disposed her to a stress fracture.

    b. Limp: Based on the repeated findings dating to 1999 that Claimant had a limp favoring her right side and that she put more weight on her left side, it is found by a preponderance of the evidence that prior to and during the development of her stress fracture, Claimant had a limp that, due to her gait abnormality, put more weight on her left foot than a normal person's gait. Claimant's trait of putting more weight on the outside of her left foot is found to be a personal risk of Claimant's pre-dating her stress fracture such that it uniquely pre-disposed her to a stress fracture of the left foot.

    c. Obesity: Claimant was examined and found obese as of March 16, 2016. This trait is found to be a personal risk of Claimant's pre-dating her stress fracture that pre-disposed her to a stress fracture of the left foot.

32. The ALJ finds that Claimant's walking and standing at work did not constitute a special hazard. Her walking, while it took up four hours of her work day, was interrupted by two hours of sitting and two hours of standing per day. Furthermore, walking is a ubiquitous activity that Claimant did every day outside of work. It does not constitute any special work hazard.

33. Overall, it is therefore found by a preponderance of the evidence that:

    a. Claimant's walking at work was not high impact or otherwise unique, and therefore was a ubiquitous activity that she did as part of her everyday life;

    b. Claimant did not suffer an acute injury at work, nor was her stress fracture aggravated or accelerated by work;

    c. Claimant did not suffer a work-related exposure that would cause a stress fracture.

    d. Even if Claimant was exposed to a work-related hazard resulting in her stress fracture, this claim is still not compensable because:

i. Claimant suffered the injury due to her own personal risks of left foot weight bearing, osteopenia, and obesity; and

ii. Merely walking or standing, ubiquitous activities, do not constitute a special hazard.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability & Causation

D. For an injury to be compensable under the Act, Claimant shoulders the burden of proving by a preponderance of the evidence that his injury arose out of the course and scope of his employment. Section 8-41-301(1), C.R.S. (2004); See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). To meet the "arising out of" requirement Claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered part of the employment contract. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991)

E. The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971). Reasonable probability exists if the proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). An award of benefits may not be based upon or denied upon speculation or conjecture. *Deines Bros. v. Indus. Comm'n*, 125 Colo. 258, 242 P.2d 600 (1952); *Indus. Comm'n v. Havens*, 136 Colo. 111, 134 P.2d 698 (1957).

F. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

G. Under *City of Brighton*, a purely personal injury generally is not compensable under the Act, unless an exception applies. 318 P.3d at 503. Therefore, an injury featuring some contribution from a personal, or idiopathic, characteristic, would fall into the personal risk category, which is "generally not compensable" unless accompanied by a special employment hazard. *Id.* The rationale for the rule is that, in the absence of a special hazard, an injury due to the claimant's pre-existing condition does not bear a sufficient causal relationship to the employment to "arise out of" the employment. A condition does not constitute a special hazard" if it is "ubiquitous in the sense that it is found generally outside of the employment." *In Re Booker,* W.C. No. 4-661-649 (ICAP, May 23, 2007).

H. In this case the Claimant functionally alleged that she suffered an occupational disease. "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

I. The Division's Medical Treatment Guidelines ("MTG") are generally accepted as professional standards for medical care under the Colorado Workers Compensation Act and are to be used by health care providers when working under the Colorado Workers Compensation Act. *See* §8-42-101(3)(b), C.R.S. and *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003). Here, the MTG provide that a stress fracture can have an occupational relationship from "**repetitive, *high impact*** walking**;** running, or jumping." WCRP 17 Ex. 6 p. 61 (emphasis added.) By definition, this cannot be an acute injury. Additionally, the evidence does not support an occupational disease theory.

J. As found, there was no "high impact" walking in Claimant's job, and instead, Claimant walked an unknown distance four hours a day with 2 hours of sitting mixed into her daily activities, which included the ubiquitous activity of daily walking at home and off work. Therefore, there was (a) no occupational exposure at work to anything that would cause the injury; and (b) Claimant also was exposed to walking – a ubiquitous condition – home. As a result, Claimant has not established an occupational disease in the form of a left foot stress fracture.

K. Even if Claimant was able to establish an occupational disease, she still could not claim a compensable injury due to her personal risks. *City of Brighton,* 318 P.3d at 503. Dr. Striplin testified that stress fractures can be caused by underlying non-work related conditions, including osteopenia – a finding of fact that has been upheld as a reasonable basis to deny compensability for stress fractures. See *Vitelia Crispelle v. McDonald's*, W.C. No. 4-116-041 (March 9, 1994) (upholding a denial of compensability based on an ALJ's acceptance of a doctor's opinion that osteopenia and other factors caused a hip stress fracture). Claimant suffered from personal risks that caused her stress fracture, namely osteopenia, osteoarthritis of the feet, obesity, and a limp that put more weight on her left foot. More likely than not, Claimant suffered her stress fracture due to personal risks unique to her, not due to any risk arising out of her work.

L. In the scenario of Claimant establishing a work-relate exposure, her personal risks would make this a non-compensable injury unless she could establish her walking as a special hazard. *In Re Booker,* W.C. No. 4-661-649. No special hazard existed beyond ordinary walking, and therefore even in that scenario she would not have a compensable injury

Medical Benefits

M. The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). Here, this claim is not compensable, so no benefits are owed to Claimant.

ORDER

It is therefore ordered that:

1. Claimant has not proven a compensable claim. Her claim for workers compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 12, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUE

Has Respondent proven by a preponderance of the evidence that Claimant did not suffer a compensable injury, thereby entitling Respondent to withdraw its Admissions of Liability?

FINDINGS OF FACT

1. Claimant works as an Income Maintenance Technician Supervisor for Employer. Her job duties include reviewing cases, preparing reports, entering case data and reviewing cases for authorization. She uses a computer for keyboarding and mousing, and writes a substantial portion of a typical day.

2. In March 2015, Claimant requested treatment for pain in her bilateral wrists. Employer completed an Employer's First Report of Injury on March 9, 2015, describing the mechanism of injury as "continuous use of keyboard, mouse." Employer referred Claimant to Dr. Kevin Rice, who became the primary ATP.

3. Claimant initially saw Dr. Rice on March 13, 2015. She reported progressive wrist pain for the past two years that was now bothering her "all the time." She reported she could not use small pens because of pain in the thumb and lateral wrist. Dr. Rice noted "she is employed as a supervisor and does a lot of paperwork, filling forms out. She also does a lot of computer work when she authorizes cases as she supervises 6 social workers; lately, it bothers her more, worst over the past two weeks." She was tender over the first extensor compartment of the wrists bilaterally, greater on the right. Finkelstein test was equivocal on the right and negative on the left. Dr. Rice requested x-rays and recommended acetaminophen rather than NSAIDs for pain relief, due to her diabetes.

4. Bilateral hand x-rays taken on March 13, 2015 showed mild-to-moderate degenerative changes, particularly involving the first DIP joints.

5. Claimant began occupational therapy (OT) on April 7, 2015. Regarding the mechanism of injury, Claimant reported experiencing "significantly increased pain, especially toward the end of the day, while working. Working entails typing, writing, and mousing." On examination, she was tender to palpation of the bilateral thumb CMC joints. The therapist concluded "the patient presents with symptoms consistent with possible bilateral thumb CMC joint osteoarthritis and digital osteoarthritis. Symptoms are exacerbated by repetitive use at work."

6. On April 14, 2015, Claimant reported some benefit from OT, but still experienced "increased pain toward the end of her workday."

7. Claimant followed up with Dr. Rice on April 23, 2015. She noted Employer was addressing changes to her work site. She exhibited tenderness in the first extensor compartment of the wrist. Dr. Rice diagnosed "osteoarthritis, hands with tendinitis." He splinted her right hand and recommended four additional OT sessions.

8. Claimant returned to OT on May 12, 2015. Her chief complaint was "increased pain with typing and mousing."

9. On May 19, 2015, the occupational therapist reviewed elements of Claimant's workstation. The therapist noted Claimant was "using a gel rest pad in front of her keyboard, and a bulbous mouse rest pad, as well. Both items facilitate increased wrist extension, which is likely contributing to her right ulnar-sided wrist pain secondary to repetitive use of the right ECU." The therapist advised Claimant stop using the rest pads and counseled her to keep her wrists in a neutral position while typing and mousing. Additionally, the therapist thought the height of Claimant's desk might be contributing to her problems.

10. Claimant saw Dr. Rice on July 21, 2015 and reported continued bilateral wrist pain, worse on the right side. The Spica splint on her right hand was contributing to her wrist pain. Finkelstein's test was positive bilaterally, more intense on the right. Dr. Rice assessed tendinitis and arthritis in the thumbs and wrists and referred Claimant for an orthopedic evaluation.

11. Claimant saw Sadie Thomas, an orthopedic PA, on July 23, 2015. Claimant reported that "she works at a computer most of the day and does a lot of typing which aggravates her pain." On examination, she had tenderness to palpation along the thumb extensors, particularly on the right. X-rays showed mild/moderate osteoarthritis of the base of her thumbs. PA Thomas diagnosed tenosynovitis of the thumb, wrist pain, and hand osteoarthritis. Claimant was not interested in aggressive treatment such as cortisone injections. PA Thomas gave Claimant a prescription for Voltaren gel and encouraged additional occupational therapy.

12. Claimant had a second orthopedic evaluation with PA-C Leticia Hollingsworth on October 12, 2015. She reported the pain in her thumbs had improved, but the splint was making her wrist pain worse. PA-C Hollingsworth opined "I think that many of her symptoms are mechanical related to the functions of her job. She states that when she is not working and at home on the weekends, her pain is definitely better."

13. On November 17, 2015, Claimant saw Dr. Rice and reported she had a worksite evaluation and some changes were made to her workstation which she "felt good" about.

14. By January 12, 2016, Claimant was still suffering from persistent right wrist pain, so Dr. Rice ordered an MRI of the right wrist. The MRI was performed on January 27, 2016, and showed a ganglion cyst, but no other significant pathology. After

reviewing the MRI, Dr. Rice referred Claimant to Dr. Karl Larsen, an orthopedic surgeon, for a second opinion.

15. Claimant saw Dr. Larsen on February 29, 2016. Her primary complaints related to the right thumb and wrist. She noted her wrist was "quite sore" at the end of the day. On examination, she was tender over the thumb CMC joint with a positive CMC joint grind test. She was quite tender over the pisiform with a painful pisotriquetral grind test. Dr. Larsen opined that arthritis and associated MP instability accounted for her thumb symptoms. He felt the ganglion cyst shown on MRI was asymptomatic and not an issue. He opined the ulnar-sided wrist discomfort seemed most associated with pisotriquetral arthritis with some associated FCU tendinitis. He administered a pisotriquetral joint injection to try and delineate her pain generator. He also requested a splint that would protect from resting on her pisiform when she was using a computer mouse.

16. On March 30, 2016, Claimant returned to Dr. Larsen and reported ongoing complaints of ulnar-sided wrist pain. The previous injection had provided some benefit, and Dr. Larsen injected her ulnocarpal joint "to see how much this [was] contributing to her discomfort."

17. At her next visit with Dr. Larsen on April 29, Claimant reported the ulnocarpal joint injection had "helped her a lot." On examination, she was markedly tender over the thumb CMC joint and mildly tender over the fovea and pisiform. Dr. Larsen noted Claimant seemed to be doing well with conservative management and was unlikely to improve further with nonsurgical treatment. He indicated if her symptoms were unacceptable or worsened, he would consider a wrist arthroscopy. If that failed, ulnar shortening would be "the final solution." He requested that occupational therapy provide her a custom brace.

18. On June 17, 2016, Claimant returned to Dr. Larsen with ongoing symptoms, primarily ulnar-sided wrist pain. Dr. Larsen recommended wrist arthroscopy to evaluate her TFC and perform a debridement if indicated. He did not think surgery was indicated for her thumb but recommended a CMC joint cortisone injection, which he would administer intraoperatively.

19. Claimant saw Dr. Thomas Mordick on August 5, 2016 for an Independent Medical Examination (IME) at Respondent's request. She told Dr. Mordick that her job involved predominantly keyboarding and mousing. She described the onset of significant symptoms in March 2015, which she said "was exacerbated particularly by typing." She rated her pain as 4/10 at rest and 5-6/10 during an average workday. She described diffuse pain about the wrist, which was most severe in the ulnar aspect. She was not having any significant left hand symptoms.

20. On examination, Claimant was exquisitely tender over the CMC joint of the thumb. She was also exquisitely tender over the pisiform and at the base of the fifth metacarpal. She had some tenderness of the proximal hamate and the TFCC.

21. Dr. Mordick opined that Claimant had “diffuse multifocal areas of wrist tenderness that [] are not consistent with a specific anatomic diagnosis.” Dr. Mordick opined Claimant was not a surgical candidate because there were no objective findings of surgical pathology. Dr. Mordick recommended the discontinuation of treatment, as he believed Claimant was at MMI without a specific work-related diagnosis.

22. Sara Nowotny performed a Physical Demands Analysis & Risk Factor Assessment on September 12, 2016 at Respondent’s request. She concluded Claimant’s job did not expose her to any primary or secondary risk factors for a cumulative trauma injury. Dr. Mordick subsequently reviewed the report and affirmed his opinion that Claimant did not suffer a work-related injury.

23. Respondent applied for a hearing on October 7, 2016, endorsing issues of compensability, medical benefits, reasonably necessary, relatedness of Dr. Larsen’s recommended surgery, and withdrawal of the medical-only General Admission.

24. Dr. Rice placed Claimant at MMI on October 10, 2016 with no permanent impairment or work restrictions. The declaration of MMI appears predicated on Respondent's having denied the requested surgery. His final diagnosis was “persistent right wrist pain secondary to arthritis and tendinitis.” Dr. Rice recommended “maintenance care” including follow-up appointments and the wrist arthroscopy proposed by Dr. Larsen.

25. Respondent filed a Final Admission of Liability on October 18, 2016 based on Dr. Rice’s MMI report. Respondent filed the FAL “due to their statutory obligation only,” and reiterated the intent to go to hearing based on compensability and withdrawal of the admission.

26. Claimant timely objected to the FAL and requested a DIME. On January 23, 2017, PALJ Sandberg issued an order holding the DIME process in abeyance pending adjudication of the issues of compensability and withdrawal of the GAL.

27. Dr. Mordick testified at hearing on behalf of Respondent, reiterating and expounding upon the opinions expressed in his reports. Dr. Mordick opined that the only objective evidence of pathology relates to Claimant’s CMC joint. He opined that her CMC joint osteoarthritis was not work-related. Dr. Mordick referenced the Medical Treatment Guidelines regarding causation of cumulative trauma disorders. He opined that Claimant’s job did not expose her to any primary or secondary risk factors to support a conclusion that work caused her condition.

28. Claimant testified at the hearing. She testified that her thumbs and wrists feel better when she is not at work. Specifically, as the weekend progresses, her hand feels significantly better. Her sympsoms worsen when she returns to work.

29. The causation opinions of Dr. Rice, PA-C Hollingsworth, and Claimant’s occupational therapist are more persuasive than the contrary opinions expressed by Dr. Mordick.

30. Respondent has failed to prove by a preponderance of the evidence that Claimant suffered no compensable work-related injury in the first instance. Rather, the preponderance of persuasive evidence shows Claimant suffered at least a temporary exacerbation of her underlying arthritic condition that was proximately caused by her work duties.

31. Whether the surgery proposed by Dr. Larsen is reasonable, necessary, and causally related to Claimant's employment was not an issue for hearing and is not addressed in this order.

CONCLUSIONS OF LAW

A. Compensability standards

To receive compensation or medical benefits, a claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *see also, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

If an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-91-616-03 (ICAO, September 9, 2016).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused her to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (ICAO, April 17, 1996).

A compensable injury may result from a specific incident or trauma ("accidental injury"), or from an accumulation of workplace exposure ("occupational disease"). *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). An employer is liable for an occupational disease that is caused, aggravated, or accelerated by the claimant's employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A claimant has sustained an occupational disease when the injury is an incident of the work or the result of exposure occasioned by the work and does not come from a hazard to which the worker would have been equally exposed outside of the employment. Section 8-40-201(14).

B. Withdrawal of admissions of liability

When an employer files an admission of liability, the employer has "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). If the employer subsequently seeks to withdraw its admission of liability, it must prove by a preponderance of the evidence that the claimant's injuries were not compensable. *See* § 8-43-201(1) ("a party seeking to modify an issue determined by a general or final admission … shall bear the burden of proof for any such modification.").

As found, Respondent has failed to prove by a preponderance of the evidence that Claimant suffered no compensable injury in the first instance. Although Claimant clearly had pre-existing degenerative changes in her hands and wrists, it appears that her work activities aggravated her underlying condition, at least on a temporary basis. Additionally, Claimant had clinical findings consistent with de Quervain's tenosynovitis, which, if not caused by her work, was at least aggravated by it. A work-related "temporary aggravation" of a pre-existing condition that requires treatment is a legally sufficient basis for a finding of compensability.

In making this determination, the ALJ credits the opinions and observations of Claimant's treating providers. Dr. Rice opined that Claimant "has a defined arthritic condition that is exacerbated by her work activities." Similarly, PA-C Hollingsworth opined that "many of her symptoms are mechanical related to the functions of her job." The occupational therapist, who worked closely with Claimant over an extended period, opined on multiple occasions that aspects of Claimant's work were causing or aggravating her wrist symptoms. The ALJ also credits Claimant's descriptions of aggravating work activities documented in her records and in her testimony. The record reflects that Claimant's symptoms were worse when she worked, and better when she was off work. On the other side of the ledger, there is no persuasive evidence of any non-occupational activities or exposure that are equally or more likely to have aggravated her condition and triggered the need for treatment.

Much of Respondent's argument appears predicated on the theory that Claimant has no current work-related diagnosis, and any further treatment (particularly surgery) is not causally related to her employment. But those issues are inextricably intertwined with the issue of MMI, which will be submitted to the DIME. The ALJ has no authority to determine MMI absent a DIME. The sole issue under consideration is whether Claimant suffered a compensable injury which warranted some medical treatment *in the first instance*. On that score, the ALJ is persuaded that Claimant sustained a compensable injury as a direct and proximate result of her work duties that required evaluation, diagnostic workup, and treatment with conservative measures.

ORDER

It is therefore ordered that:

1. Respondent's request to withdraw their admission of liability is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: **March 1, 2017**

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

(1) Whether Respondent proved by a preponderance of the evidence that the Claimant's C5-C6 Cervical Radiculopathy is not work-related such that they may withdraw their General Admission of Liability in this claim;

(2) If Respondent fails to prove issue (1), whether Claimant proved by a preponderance of evidence that the proposed fusion surgery is reasonable, necessary, and related to her work-injury.

FINDINGS OF FACT

1. Claimant, then age 32, alleged an occupational disease due to cumulative trauma to her right shoulder/cervical spine on September 17, 2014. Respondent initially admitted to this claim by filing a General Admission of Liability on January 11, 2016. On February 17, 2016, Claimant received a recommendation by Dr. Robert Davis for a surgery to include C4-5, C5-6 anterior cervical discectomies and fusions (the "Surgery"). Respondent filed an Application for Hearing disputing the Surgery. After a May 16, 2016 Independent Medical Exam ("IME") by neurosurgeon Michael Rauzzino, M.D. that found there was no work related condition, Respondent then added the issue of withdrawing its general admission to the hearing in this matter.

2. It is undisputed that Claimant's condition was not created by any acute trauma. Claimant had right shoulder pain going back to 2008. Starting in July 2014, Claimant had complained of paresthesia of the right hand into her fingers. She reported gradually increasing pain. By March 2, 2015, she stated her pain was always there to some degree. No medical record ever found Claimant in acute distress. Claimant remained able to play golf and softball without difficulty.

3. Claimant's Authorized Treating Physician is Kevin Rice, M.D. Claimant underwent an EMG in order to assess radiculopathy on March 8, 2015. This objective test was negative according to all physicians, including Dr. Rice and ATP Patrick McLaughlin, M.D. Dr. McLaughlin stated it showed "[n]o evidence [of] peripheral neuropathic process. (Ex. F p. 24-28 & Ex. 6 p. 1.) A negative result means "there is no permanent injury to the nerve that can be measured by the EMG test" indicating the condition was "not that severe."

4. Dr. Rice opined that Claimant's injury was right C6 cervical radiculopathy and that her pain generator was "purely" in her cervical spine. The condition at issue in this claim is right sided cervical radiculopathy due to degenerative changes at

C4-C5 and C5-C6 levels leading to right sided foraminal stenosis/impingement on the right nerve sheath. Dr. Rice and Dr. Rauzzino agreed the changes in her neck are arthritic. Their disagreement on this issue is whether those arthritic changes causing the Radiculopathy are work-related.

5. Overall, Claimant's Radiculopathy symptoms and objective condition did not objectively change after it was diagnosed. In February of 2016, Claimant told her surgeon that her pain and symptoms were "identical" to when he last saw her, which was in July of 2015 according to Dr. Rauzzino's report. For this reason, a repeat MRI in February of 2016 was deemed not necessary "after discussion" with Claimant.

6. Although Claimant alleged increased work related pain, her pain appeared to wax and wane within normal limits without regard to any of her activities:

    a. May 28, 2015: Dr. Rice, soon after his diagnosis, released Claimant to work without restrictions. On June 4, 2015, she told Dr. Rice she was "minimally, if at all better" so her condition did not change while working, and Dr. Rice did not take her off work.

    b. June 8, 2015: Claimant reported "no pain with use of her arm significantly. No pain with any overhead use. She is able to play softball and golf without difficulty."

    c. August 28, 2015: Claimant had worked a 12 hour shift without increase in symptoms.

    d. October 30, 2015: Dr. Rice continued Claimant at work with no restrictions. She was next seen on November 13, 2015, and despite working stated she was doing "quite well" – she had relatively free cervical range of motion, reduced neck pain, and no numbness or tingling.

    e. December 31, 2015: Claimant told her physical therapist that despite being off work for the holidays and having "not performed any activity that may aggravate her symptoms" her neck and shoulder were "more achy today."

    f. February 25, 2016 – September 19, 2016: Claimant worked full duty without restriction, and had no subjective or objective changes.

    g. September 19, 2016: Claimant was "status quo". Despite the lack of any change in her condition. Dr. Rice took Claimant off work completely pending "injections."

    h. October 13, 2016: After being off work for a few weeks, Claimant reported "worsening subjective symptoms."

i. October 28, 2016: Despite being off work for over a month, Claimant was stable neurologically.

j. November 19, 2016: Claimant, now off work for two months, reported persisting pain and radiculopathic paresthesias in the arm.

7. *After* her radiculopathy diagnosis, Claimant joined Cross-Fit. Claimant's name on Facebook was "Tiffany Michelle." Exhibit H shows Claimant deadlifting 265 pounds, a new personal record, on December 2, 2015. Claimant stated "I love crossfit. It pushes me everyday!" Claimant also had a Facebook posting depicting crossfit in October of 2015.

8. Despite performing these sports activities after her radiculopathy diagnosis, Claimant reported no added pain or issue with doing them.

9. Claimant has worked as a dispatcher for the Colorado State Patrol in Alamosa since November of 2007, except for a six month period working for the Department of Corrections. She testified that her job was "highly complex", her duties were a "lot of multitasking" and doing "a lot of things." She was "constantly busy," and answered hundreds of calls a day along with thousands of radio transmissions. She also updated road conditions, dispatched for six counties, answered 911 calls, and entered information at her work station.

10. A picture of Claimant's work station shows that it had 8 monitors arranged in a two vertical by four horizontal stacking. Along with a phone to her left, there were three separate computer mice and three separate keyboards spread out in front of her. Her job required her to be constantly switching between all of the monitors, mice, and keyboards.

11. A Jobsite Ergonomic Evaluation of Claimant's position took place on October 22, 2014. It noted Claimant typically worked 8 hour days five days a week, and her workstation had six monitors, four mice, and three keyboards. Claimant used her phone with a chin rest frequently, and also had no foot rest "because they [dispatchers] move so much in their chair." An analysis of all the risk factors showed that *none were present* other than mouse usage.

12. Dr. Rice, Claimant's ATP and an occupational medicine physician practicing in Alamosa, was qualified as an expert in occupational medicine and physiatry. He opined that these work duties caused Claimant's radiculopathy: the abnormality of her workspace, multitasking, maintaining attention towards different devices, cradling her phone, doing things that created relatively awkward positions. Dr. Rice stated that these activities caused increased tension in her shoulders and neck, irritating the soft tissue structures and joints of her neck, which led to irritation of her nerve tissue. Dr. Rice clarified that he believed "every day that she's at work" Claimant's job duties were irritating her joint, which then caused calcium deposits, which were causing her stenosis and irritating her nerve.

13. Dr. Hall, the retained expert for Claimant, agreed with Dr. Rice's Calcification Theory, and additionally opined that this opinion was within the Medical Treatment Guidelines ("MTG") – although no specific guideline was addressed. Neither physician identified any specific repetitive motion.

14. Dr. Rice reached his causation opinion on June 4, 2015 after the completion of initial testing. In his testimony, he stated he became more certain than not of this theory "early on," within "a few months or so" in early 2015. Despite believing Claimant's work was causing her condition, Dr. Rice released Claimant to work without restrictions for most of 2015 and 2016 until he took her off work in September of 2016.He never issued any restriction or modified her duties prior to taking her off work in late 2016.

15. He explained his failure to take her off work or restrict it because it was (a) better for her in a psychological manner; (b) returning a claimant to work when it is not appearing to actively degrade their situation is best; and (c) for the "common good" because it would be a "hardship for everybody in the Valley" if she didn't work.

16. Dr. Hall is a physiatrist and certified in physical medicine and rehabilitation. He was offered and accepted as an expert in physical medicine and rehabilitation. In his report he had "*not seen the notes from the surgeon*." Despite not having seen the surgeon's reports, he opined that the radiculopathy was work related and that the surgery proposed by Dr. Davis was reasonable, necessary, and related to the alleged work injury. Dr. Hall did not explain or mention the Calcification Theory in his report and appears to have relied upon the contemporaneous appearance of Claimant's pain while she worked for Employer.

17. At Hearing, Dr. Hall agreed with and expanded on Dr. Rice's theory of causation at hearing. He noted Claimant had a straightening of the cervical curvature, or cervical lordosis, which, combined with her extended neck posture due to her duties, created her condition. Dr. Hall suggested that it was "very unusual" for a 33 year old person to have "this level of local degenerative change… without some precipitating or aggravating activity."

18. Dr. Hall stated that the neck joints were particularly vulnerable when in extension, such as in a whiplash car accident. Specifically, that "70 to 80 percent of neck extension occurs at C4-5 and C5-6." Dr. Hall then theorized that this combination of rotation and extension traumatized Claimant's joints. However, he admitted that he had never seen a picture or video of Claimant at work, and that his knowledge of her work place was entirely based on her report and the workplace evaluation.

19. Dr. Hall also opined that Claimant's work station was very different from a "typical workstation for an administrative assistant." Regarding Claimant's out of work activities of cross-fit and golf not causing pain, Dr. Hall thought that those activities create movement, which allows proper blood flow, reducing

inflammation and pain. However, Dr. Hall admitted at Hearing that, due to the unusual circumstances, the cervical degeneration he observed wasn't "something you're going to find in a learned treatise."

20. Dr. Rauzzino is a neurosurgeon that has been in private practice since 2000, and he was qualified as a level II physician and a surgeon with a specialty in neurosurgery. Dr. Rauzzino testified on behalf of Respondent. Of the physicians that testified, Dr. Rauzzino was the only admitted (a) level II physician; (b) surgeon; and (c) expert in neurosurgery.

21. Prior to issuing his report Dr. Rauzzino spent 15 hours reviewing the records and interviewing Claimant.

22. Dr. Rauzzino's opinion was that there "is nothing in [Claimant's] job that causes undue strain, particularly only on the right side of her neck, which would cause discs to degenerate ahead of the other levels of her cervical spine or the left side." Dr. Rauzzino noted that the only identified one-sided activity was Claimant holding her phone with the *left* side of her neck, and that would actually cause more of an issue to the *left* side of her spine, not the injured *right*. He testified that her pain levels had no direct tie to work, and that she sometimes complained of pain "just sitting in the office." Despite these alleged pain issues, he found it significant that she was able to play golf, do cross-fit, ride the elliptical, do sit-ups, and generally be active.

23. Dr. Rauzzino reviewed the medical literature for cervical spine injuries and repetitive use in reaching his opinions. In both his practice and in the medical literature, he did not find evidence supporting the proposition that someone in Claimant's profession would be at risk for the cervical spine injury at issue. He discussed the Medical Treatment Guidelines ("MTG"), and noted that although the cervical guidelines allowed for an occupational disease of the neck, the studies referred to in the MTG discussed specific duties of dentists and simpler office workers such that they were not applicable to this case because, based on the picture of her work station, "Ms. Sebel sits in a chair. She has things that are at or near eye level. There's nothing to suggest that she's in a forced or awkward posture during the day."

24. On the timing of Claimant's pain and its significance, Dr. Rauzzino noted that Claimant's neck pain also occurred while off work. That was significant because "if you're saying the work is what aggravates the condition, then she should be substantially better when her condition is not being aggravated. And that's not the case in this situation."

25. Based on his review of the records, his interview with Claimant, and his knowledge of the MTG, Dr. Rauzzino opined Claimant's job did not cause or accelerate Claimant's radiculopathy. Instead, the cause of this arthritic condition was the general aging of her body, advancing with time, and that the cause of her specific condition was likely genetic.

26. Regarding Claimant's condition and treatment for it, Dr. Rauzzino opined that given her ability to tolerate cross-fit and her active lifestyle, she should have no restrictions and her care should be limited to over the counter medication.

27. Dr. Rauzzino responded to the Hearing testimony in his January deposition:

    a. The Calcification theory does not make biomechanical sense in that there is no scientific evidence to back it up; specifically the identification of any one movement that would have caused the one specific area of her neck to degenerate. There was no activity identified that would put stress on the C5-C6 joint, but not on the other joints above and below.

    b. Claimant's testimony of rapid, complex movement, including her neck, at her job, and the more complex the job, was significant because it was "less likely there would be one repetitive motion" so Claimant's job was not an environment typical of a repetitive motion injury." Further, if the job was affecting Claimant's neck, there should be multiple changes at multiple cervical levels.

    c. He agreed with Dr. Hall there is no scientific study supporting the Calcification Theory. Also, he opined that there was no specific study supporting Dr. Rice's assertion that repetitive motion can cause or accelerate spinal degeneration.

    d. He further opined that Dr. Hall's assertion that it was very unusual for someone 33 years of age such as Claimant to have this level of local degenerative change without an aggravating activity was not accurate. Dr. Rauzzino noted that, as a neurosurgeon, he saw cervical spines on a regular, daily basis, and that he saw "many people that have degeneration and often at one level more so than the other … and it's not due to a specific activity."

    e. Dr. Rauzzino opined that Dr. Hall's testimony that Claimant's work kept her in a relatively extended neck posture was inaccurate due to the amount of neck movement which Claimant testified to doing at work.

    f. He further opined that Dr. Hall's assertion that 70-80% of all neck extension occurs at C4-5 & C5-C6 were "not accurate." Instead, there is "no reason to say that C4 and C5-6 joints have any special biomechanical difference compared to the other joints."

    g. Dr. Hall's allegation that Claimant's C4-C6 joints are particularly vulnerable in extension was "not an accurate statement," per Dr. Rauzzino. Further, he stated that Dr. Hall's use of a car accident as an example of a neck extension injury in explaining the injury at issue was not comparable to this repetitive injury claim.

h. In releasing Claimant to work and allowing her to do cross-fit, Dr. Rice did not act in accordance with his opinion that her situation required surgery and that her job was causing her condition. If Dr. Rice had believed Claimant's job was injuring her, he should have advised her of that continuing to work would do cause injury. Instead, that Dr. Rice's release of Claimant back to work without restriction or modification suggested her job was "a safe environment that wouldn't aggravate or worsen her condition" and that her job was "not the cause of her troubles."

i. Dr. Rauzzino further stated that Claimant's having remained neurologically stable despite working throughout 2015-2016 suggests her condition was not work related.

j. Dr. Rauzzino further stated that Dr. Rice's explanation of the 'good of the community' as one of his reasons for returning Claimant to work was inconsistent with his responsibility to the patient, which does not include the community at large.

28. Although Dr. Davis evaluated Claimant, diagnosed radiculopathy, and recommended the surgery, there is no evidence that Dr. Davis' opined Claimant's Radiculopathy is work related or that he supported the Calcification theory.

29. By a preponderance of the evidence, the ALJ finds Dr. Rauzzino's opinions on causation to be more persuasive than those of Dr. Rice and Dr. Hall. Claimant's radiculopathy is more likely than not to be non-work related.

CONCLUSIONS OF LAW

Withdrawal of a General Admission

1. Under C.R.S. § 8-43-201(1), a party seeking to modify an issue determined by a general admission has the burden to prove by a preponderance of the evidence that such a modification should be made. *City of Brighton v. Rodriguez*, 2014 CO 7, ¶ 3, 318 P.3d 496, 500 (Colo. 2014). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. Where respondents attempt to modify an issue that previously has been determined by an admission of liability, they bear the burden of proof for such modification. *Section 8-43-201(1), C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the statute in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

3. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. The statute serves the same function in regard to maintenance medical benefits. The Supreme Court in *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988), provided that after the respondents had admitted for maintenance medical benefits "the employer retains the right to file a petition to reopen, … for the purpose of either terminating the claimant's right to receive medical benefits or reducing the amount of benefits available to the claimant." The amendments to § 8-43-201(1), C.R.S., then, require that when the respondents seek a ruling at hearing that would serve as "terminating the claimant's right to receive medical benefits," they are seen as seeking to reopen that admission and the burden is theirs. In *Salisbury v. Prowers County School District*, *supra,* the Industrial Claims Panel held that where the effect of the respondents' argument is to terminate previously admitted maintenance medical treatment, the respondents have the burden, pursuant §8-43-201(1), C.R.S., to prove that such treatment is not reasonable, necessary or related to the claimant's industrial injury.

4. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

5. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

Causation

6. The Division's Medical Treatment Guidelines are generally accepted as professional standards for medical care under the Colorado Workers Compensation Act and are to be used by health care providers when working under the Colorado Workers Compensation Act. *See* §8-42-101(3)(b), C.R.S. and *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003).

7. Dr. Rauzzino was correct in stating that WCRP 17 Ex. 5 does not include any reference to any cervical repetitive motion injury. Claimant is also correct that the cervical treatment guidelines contained in WCRP 17, Ex. 8, do mention repetitive motion. This does not mean that Claimant's condition falls within the guidelines. References to repetitive motion in WCRP 17 Ex. 8 in the "relationship to Work and other Activity" section are as follows:

> "Causation of Occupational Neck Pain from Non-Whiplash Events: … In a study of office workers, it was found that workers with **greater range of motion** in cervical flexion and extension were less likely to develop neck pain. … Several studies of administrative workers and dentists suggest that awkward posture over a prolonged period of time may lead to neck pain. There is some evidence that repetitive or precision work, accompanied by prolonged neck **flexion** are likely risk factors for neck pain in the work place. Possible aggravating factors include awkward postures including neck flexion or rotation." WCRP 17, Ex. 8, p. 13 (emphasis added).

8. The MTG do allow for an occupational disease of the neck. WCRP 17, Ex. 8, p. 14. However, the section cited above does is not dispositive for Claimant. First, as Dr. Hall testified, Claimant's position was "not a typical work environment" for an administrative position due to its complexity and constant movement. Second, the bolded part of the MTG that most accurately fits this case shows that Claimant, according to the science based MTG, was less likely to develop neck pain due to her greater range of cervical motion. Third, these studies do not support the Calcification theory, which is a specific diagnosis of radiculopathy allegedly caused by general movement. Instead, they are support that neck pain, a vague condition, can develop for certain very fixed or repetitive workers. As a result, this ALJ finds the MTG supports Respondent's contention that Claimant's job was not the cause of her neck pain.

9. This ALJ generally finds Dr. Rice's opinions unpersuasive for the following reason: If he believed Claimant's work was the cause of her condition, he would have modified her duties or taken her off work completely. Instead, he never modified her duties, and did not take her off work until September of 2016.

10. Dr. Hall issued several underlying opinions: (a) that 33 year old individuals don't get cervical conditions like the Radiculopathy without an underlying activity; (b) that the C4 and C5 joints of the neck handle 70-80% of the extension; and (c) that her neck joints were more vulnerable in extension. On all of those issues, Dr. Rauzzino

disagreed with him. Dr. Rauzzino's testimony is more persuasive than Dr. Hall's on the issue of causation.

11. Dr. Rauzzino's opinion that Claimant's Radiculopathy is solely due to non-work factors such as genetics is more persuasive based on the preponderance of the evidence as follows:

A. No physician ever identified any specific repetitive motion that would cause the specific C6 radiculopathy at issue – instead, Claimant's argument of constant and generalized extended movement would logically cause degeneration throughout Claimant's neck, which does not exist.

B. Dr. Hall alleged Claimant's static position at her desk led to extra stress on her neck. Claimant was constantly moving between numerous individual and different tasks per day. Her job was not static, but instead highly complex with great variation as Claimant moved around between monitors, keyboards, and her headset. She did not spend long periods of time in a static, forced position. In the job site analysis, a footrest was not an option – according to Claimant – because Claimant's feet moved too much, suggesting she was constantly rotating her chair. As Dr. Hall testified, and the MTG confirm, all of that varied movement should have been helping prevent irritation of any one joint, not cause more irritation to any specific joint.

C. Claimant did not get worse while working full duty for most of 2015 and 2016. Her pain arose in 2014, and she was neurologically stable afterwards. As Dr. Rauzzino noted, if Claimant's job was the cause of her condition, it would have continued to get worse as she worked. Instead, it had no impact on her reported pain levels. Although her pain arose while she had a job, that shows merely a correlation, not causation.

D. Although Dr. Davis, Claimant's surgeon, did recommend the surgery, there is no evidence that he agreed as to the theory of causation provided by Claimant's general physical medicine doctors.

12. Here, Dr. Rauzzino's opinion that Claimant's Radiculopathy is not work related and instead is genetic was found to be more persuasive. Further, the part of the Medical Treatment Guidelines most directly applicable to this case state Claimant should not have developed work-related neck pain. Therefore, as found above, Respondent has met its burden of proof, by a preponderance of the evidence, that her Radiculopathy is not work related, and may withdraw its General Admission of Liability in this case.

ORDER

It is therefore ordered that:

1. Respondent is allowed to withdraw its General Admission of Liability. Claimant's claim for the cervical spinal surgery, as proposed, is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 2, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the left total shoulder arthroplasty recommended by Dr. Mitchell Copeland is reasonable medical treatment necessary to cure and relieve claimant from the effects of the December 15, 2015 work injury.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his left shoulder on December 15, 2015. The injury occurred when claimant was attempting to place tire chains on the company vehicle he was operating. Claimant testified that as he lifted the chains over the tire he felt a pain in his left shoulder.

2. Claimant began treating with his authorized treating physician ("ATP") Dr. James McLaughlin, on December 16, 2015. Dr. McLaughlin ordered x-rays and a magnetic resonance image ("MRI") of claimant's left shoulder. Dr. McLaughlin also referred claimant to Dr. Mitchell Copeland for a surgical consultation.

3. On December 16, 2015 an x-ray of claimant's left shoulder showed advanced osteoarthritis with a probable loose body.

4. On December 21, 2015 an MRI of claimant's left shoulder showed severe degenerative changes with a sizable joint effusion and a loose body superior and posterior to the humeral head.

5. Based upon the imaging results, Dr. Copeland informed claimant that he could undergo an arthroscopy and remove the loose body, or pursue a full shoulder replacement. Dr. Copeland recommended the arthroscopy.

6. On May 12, 2016 Dr. Copland performed an arthroscopy on claimant's left shoulder that included arthroscopic repair of a chronic torn supraspinatus, arthroscopic subacromial decompression with acromioplasty, arthroscopic biceps tenotomy and arthroscopic removal of a loose body measuring 19 millimeters.

7. Following the May 12, 2016 surgery claimant received other treatment including physical therapy and range of motion exercises claimant performed at home. However, claimant reported to Dr. Copeland increased pain and decreased range of motion in his left shoulder.

8. On September 8, 2016 an MRI of claimant's left shoulder showed advanced glenohumeral osteoarthritis and a complete tear of the biceps tendon long head from the biceps anchor. Dr. Copeland testified by deposition in this matter and

noted that the biceps tear appearing on the September 8, 2016 MRI was the intentional result of the biceps tenotomy performed on May 12, 2016.

9. Based upon these MRI results, claimant's continued pain, and limited range of motion Dr. Copeland recommended a left total shoulder arthroplasty. Dr. Copeland testified that it is his opinion that claimant's need for the recommended surgery is related to the December 15, 2015 work injury.

10. Dr. Jon Erickson performed a peer review of the recommended arthroplasty and opined that claimant's symptoms are related only to his preexisting advanced glenohumeral osteoarthritis. Based upon Dr. Erickson's opinion respondents denied the recommended surgery.

11. In a medical record dated October 26, 2016 Dr. McLaughlin opined that claimant's need for a full shoulder arthroplasty is due to the December 15, 2015 work injury. Specifically Dr. McLaughlin opined that the work injury permanently aggravated claimant's preexisting degenerative condition in his left shoulder. Dr. McLaughlin testified by deposition in this matter and confirmed his opinion that the December 15, 2015 work injury caused claimant's need for a total shoulder arthroplasty.

12. Claimant testified that prior to the December 15, 2015 work injury he was able to work full duty and did not have pain in his left shoulder joint. Claimant testified that prior to the work injury he experienced instances of stiffness and achiness in his neck that radiated into his shoulder blades, but not into his left shoulder joint. The ALJ finds claimant's testimony on this issue to be credible.

13. Records from claimant's primary care physicians Dr. Gregg Omura and Dr. Craig Hughes indicate that claimant had complaints of bilateral shoulder pain "between the shoulder blades" beginning in January 2011, with a focus on left shoulder pain beginning on January 7, 2014. On September 25, 2014 Dr. Omura administered a lidocaine injection to claimant's left shoulder. In March 2014, Dr. Hughes also recommended physical therapy to address claimant's complaints of left shoulder pain.

14. Chiropractor records entered into evidence indicate that claimant reported pain in his left shoulder blade pain beginning in July 2013.

15. The ALJ credits the claimant's testimony and finds that claimant has demonstrated that it is more likely than not that the December 15, 2015 work injury caused increased pain in claimant's left shoulder and this pain was not resolved by the May 12, 2016 surgery. The ALJ further credits claimant's testimony that he was performing his full duties immediately prior to the December 15, 2015 work injury. Although claimant reported left shoulder pain to his medical providers prior to the injury, it was not until after the December 15, 2015 injury that claimant needed left shoulder surgery.

16. The ALJ credits the medical records and the opinions of Drs. Copeland and McLaughlin over the contrary opinion of Dr. Erickson. Therefore, the ALJ finds that claimant has demonstrated that it is more likely than not that the December 15, 2015

work injury aggravated, accelerated, or combined with claimant's preexisting osteoarthritis necessitating a left full shoulder arthroplasty.

17. The ALJ credits the medical records and the opinions of Drs. Copeland and McLaughlin over the contrary opinion of Dr. Erickson and finds that claimant has demonstrated that it is more likely than not that the recommended left full shoulder arthroplasty is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S., *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury.

Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has demonstrated by a preponderance of the evidence that the left total shoulder arthroplasty recommended by Dr. Copeland is reasonable medical treatment necessary to cure and relieve claimant from the effects of the December 15, 2015 work injury. As found, claimant's testimony, the medical records, and the opinions of Drs. Copeland and McLaughlin are credible and persuasive.

ORDER

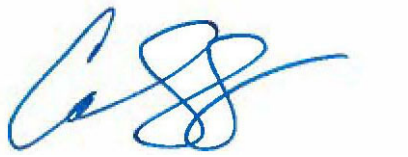
It is therefore ordered that:

1. Respondents shall pay for the recommended left total shoulder arthroplasty pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 1, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

The following issues were raised for consideration at hearing:

1. Whether Claimant sustained his burden of proof to establish that he suffered a work related injury in the course and scope of his employment for the Respondents;

2. Whether Claimant established by a preponderance of the evidence that he is entitled to an order awarding reasonably necessary and related medical benefits;

3. What is Claimant's average weekly wage (AWW);

4. Whether Claimant was disabled from his usual employment by the work related injury and therefore entitled to an award of temporary total disability benefits (TTD) from January 18, 2016, to July 18, 2016; and

5. Whether Claimant is entitled to an award of penalties for Respondents:

    a. Failure to timely admit or deny the claim under Section 8-43-203(1)(a), C.R.S.;

    b. Failure to maintain workers' compensation insurance coverage under Section 8-43-408 to 410, C.R.S.; and

    c. Failure to timely file a first report of injury under Sections 8-43-101 and 8-43-304 and WCRP 5-2.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are reached.

1. On January 18, 2016, Claimant was working as a skilled laborer for Respondents. Claimant suffered a spiral fracture to his left leg (fibula) while helping Respondent, Tommy Lee Carter, carry a washer or dryer down the stairs. Immediately, prior to the injury, Claimant was masking an area for dust protection as part of a job at a private residence.

2. Claimant immediately informed Respondent, Tommy Lee Carter, of the injury. Mr. Carter indicated that "[Claimant] should try to walk it off." Claimant informed Mr.

Carter that he needed medical attention. Mr. Carter did not direct Claimant to a medical provider. Claimant reported for treatment at NextCare Urgent Care.

3. The medical records are consistent with the history of injury provided by Claimant. Claimant was provided with the posterior splint, provided crutches and advised to be non-weight bearing until following up with a specialist. A referral was made to the specialist.

4. Claimant reported to the referred orthopedic specialist beginning on January 22, 2016. Claimant was placed on non-weight bearing at the initial appointment and continued to receive treatment from the specialist until March 28, 2016.

5. Claimant was removed from all work for a period of time by his doctors when he was non-weight bearing. Claimant was unable to return to his regular construction duties until six months after the injury or on July 18, 2016. The work injury impaired Claimant's ability to perform his regular work duties until that date.

6. All of the medical treatment that Claimant has received for his left leg fracture was authorized, reasonable and necessary as a result of the work injury of January 18, 2016.

7. After his initial medical treatment, Claimant contacted Respondents by phone on numerous occasions and left numerous messages. He has not received a response from Respondents or any representative of Respondents.

8. On February 10, 2016, Claimant filed an Employer's First Report of Injury, also referred to as an E-1, with the Division. The Division treated it as a claim for compensation and wrote to Respondents to inquire about worker's compensation coverage. The Division's records did not indicate that Respondents have worker's compensation insurance coverage on the date of the claimed injury. Claimant was copied on this notification, but never received any type of response from Respondents.

9. The Respondents has not filed documentation with the Division or provided Claimant with a notice of contest and E-1.

10. Claimant worked for Respondents, Mr. Carter dba TLC Construction, for approximately one year prior to the injury in question. Claimant was hired through a verbal agreement with Respondent, Timothy Lee Carter, to perform construction work at the rate of $25 per hour. Claimant worked approximately 40 hours a week. Claimant's AWW is $700, which is a fair approximation of Claimant's AWW on the date of injury based on Claimant admission contained in the E-1 report he prepared.

11. Claimant was not paid for the work he performed on the date of injury or for the work he completed in the weeks prior to the injury. Claimant was usually paid in cash personally by Respondent, Mr. Carter, but, on at least one occasion, he was paid via check from Respondent, TLC Construction. Claimant was paid in his own name and the check was signed personally by Respondent, Mr. Carter. Claimant confirmed that he

never operated a construction business during this period of time. Claimant viewed Respondents, Mr. Carter and TLC Construction, as one and the same.

12. Respondents, Mr. Carter and TLC Construction, did not comply with all the requirements for maintaining the corporate form. As of November 1, 2016, Respondent, TLC Construction, was noncompliant with periodic report requirements of the Colorado Secretary of State. Respondent, TLC Construction, became delinquent on December 31, 2016, and is now listed as delinquent by the Colorado Secretary of State as of January 1, 2017.

13. Neither Respondents, Mr. Carter nor TLC Construction, maintained worker's compensation insurance. Therefore, Claimant is entitled to a 50 percent increase in his indemnity benefits.

14. Claimant's work injury prevented him from performing his usual duties of his employment from the date of injury to July 18, 2016. Claimant has established his entitlement to TTD benefits from the date of injury until July 18, 2016. Claimant is not seeking indemnity benefits after that date.

15. Claimant has not been placed at MMI or evaluated for permanent impairment.

16. In regard to the imposition of penalties, Claimant did not offer evidence regarding Respondents' reprehensibility or culpability. With regard to the harm suffered by Claimant as a result of Respondents' lack of insurance, Claimant testified that he has Medicaid and thus was able to obtain medical treatment. He testified to his inability to afford a "Tox-Lock" on his vehicleerate his vehicle as a result.

17. Claimant withdrew the issue of disfigurement from consideration at hearing.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Judge enters the following Conclusions of Law:

General Legal Principles

1. The purpose of the Act is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Respondents, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the Respondents. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. A claimant must prove by a preponderance of the evidence that his injury arose out of the course and scope of his employment with Respondents. *Section 8-41-301(1)(b), C.R.S.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991).

3. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

Employment Status

4. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation … under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee."

6. It is concluded that Claimant was an employee of the Respondents. Claimant established that he was not customarily engaged in the independent trade of construction at the time he was injured. In connection with his employment including the events of January 18, 2016, Claimant only dealt with Mr. Carter. He was the sole owner/operator of the TLC Construction, LLC. It is found and concluded that Mr. Carter, individually, doing business as TLC Construction, was Claimant's employer on the date of injury. Claimant was an employee under the Workers' Compensation Act.

Compensability

7. Claimant established by a preponderance of the unrefuted evidence that he was in the course and scope of his employment on January 18, 2016, when he fractured his left lower leg performing work duties.

TTD and AWW

8. In this case, the evidence established that Claimant did not return to work for the Respondents following his January 18, 2016, work injury and he was disabled from his usual employment from the date of injury to July 18, 2016. Accordingly, it is concluded that Claimant is entitled to an award of TTD from January 18, 2016, to July 18, 2016

9. Claimant contends his average weekly wage is $1000.00. Claimant represented his AWW to be $700.00 on the Employer's First Report of Injury, or E-1, filed by Claimant with the Division of Workers' Compensation on February 10, 2016 Accordingly, it is concluded that Claimant's representation on the E-1 of an AWW of $700.00 was closer in time to the date of his injury and is, therefore, deemed to be a more accurate representation of his wage. It is concluded that Claimant AWW is $700.00 and Claimant's TTD rate is $466.66.

Medical Benefits

10. Pursuant to Section 8-42-101(1)(a), C.R.S., every employer shall furnish all medical treatment necessary at the time of injury or thereafter to cure and relieve employees of the effects of their injury. It is concluded that Claimant received medical treatment from two providers to cure and relieve him of the effects of his work related injury. Claimant established that the treatment he received was reasonably necessary and related to the Claimant's injury. And, all treatment received is found to be authorized given that Respondents did not refer Claimant to a doctor for treatment.

11. Accordingly, it is concluded that Respondents shall be liable for all authorized, reasonably necessary and related medical benefits for Claimant's work related injury.

Penalties

12. The Colorado Court of Appeals in *Dami Hospitality, LLC, v. ICAO, supra,* addresses the issue of excessive penalties citing, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 580, 583 (1996). In the *BMW* case, *supra*, the Supreme Court first articulated factors that should be considered when weighing the reasonableness of a punitive damages award. In deciding whether the constitutional line for an excessive fine "has been crossed," the Court condensed the factors to be considered instructing lower courts to focus on three criteria: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.,* 532 U.S. 424, 432 (2001). *Dami*, *supra*, extends these considerations to workers' compensation matters where civil penalties are imposed and concludes that consideration of the employer's ability to pay should be factored in to determining the propriety of a penalty assessment.

13. In this matter, the record does not contain evidence regarding Respondents' culpability or reprehensible behavior or ability to pay a penalty assessment.. With regard to the harm suffered by Claimant as a result of Respondents' lack of insurance, Claimant testified that he has Medicare and thus was able to obtain medical treatment. He also testified to his inability to pay for a "Tox-Lock" on his personal vehicle.

14. The *Cooper Indus., supra,* factors are examined in the context of the fined Respondents' actual behavior. In this light, it is concluded that the ALJ's award of fines totaling $55,263.30 for failure to be insured, failure to admit or deny the claim and failure to file a first report of injury in the February 23, 2017, full findings is disproportionate in light of the Respondents' actual behavior and should be corrected .

Failure to Maintain Workers' Compensation Insurance

15. In cases where Respondents fail to comply with the insurance provisions of the Act, the amount of compensation or benefits an employee may claim shall be increased by fifty-percent. Section 8-43-408(1), C.R.S. Here, Respondents failed to carry the requisite workers' compensation insurance. As such, the Claimant is entitled to a fifty-percent increase in his compensation or benefits.

16. Claimant's AWW is $700.00, and thus his TTD rate is $466.66. Claimant is entitled to TTD during his period of disability from January 18, 2016, to July 18, 2016, 183 days and 26.14 weeks. Claimant is entitled to an award of TTD in the amount of $12, 498.49. (26.14 weeks X 466.66 AWW.) As found, Claimant's TTD is increased by 50% because of Respondents' failure to maintain workers' compensation insurance. A 50% penalty increase in TTD benefits because of Respondents' lack of workers' compensation insurance is $18,734.24. (50% of 12,489.49/2 = 6,244.75; 12,489.49 + 6,244.75=18,734.24.)

17. Respondents shall be liable to Claimant for TTD increased by 50% for Respondents' failure to maintain workers' compensation insurance. Respondents shall pay Claimant increased TTD in the amount of $18,734.24.

Failure to Admit or Deny the Claim; Failure to File Employer's First Report of Injury

18. Under Section 8-43-203(1), C.R.S., Respondent is required to notify the Division whether Respondent is admitting or contesting the claim within 20 days after a report of injury is filed, or should have been filed. Based on Claimant's credible testimony, Mr. Carter was on notice of the injury on January 18, 2016. Respondents did not file a Notice of Contest within 20 days of written notification of the injury of January 18, 2016. Written notification was sent to Respondents by the Claimant on February 10, 2016, and by the Division on March 7, 2016. To date, neither an Admission nor a Notice of Contest has been filed.

19. Claimant seeks penalties of up to one day's compensation for each day's failure to admit or deny against Respondents from March 27, 2016, (20 days after the March 7, 2016, notice from the Division) and continuing. See Section 8-43-203(2)(a), C.R.S. and Rules 5-2(C) & (D).

20. The ALJ imposes a penalty at the rate of one dollar's compensation for each week's failure to admit or deny. The penalty is imposed for the period from March 27, 2016, to the date of hearing, January 10, 2017, or 290 days. (290 days = 41.42 weeks; 41.42 X $1.00 = $41.42.)

21. Respondents shall be liable to Claimant for a penalty in the amount of $41.42 under Section 8-43-203(1) for failing to admit or deny the claim. The penalty shall be paid 50% to the subsequent injury fund and 50% to Claimant.

22. Respondents also failed to file an Employer's First Report of Injury or E-1 for Claimant's January 18, 2016, injury. See Section 8-43-101(1), C.R.S. and Rule 5-2(B)(2). The date of injury was January 18, 2016, and Respondents' E-1 should have been filed within 10 days after the Claimant's initial 3 days of lost work, on or about January 22, 2016. Claimant seeks penalties of up to $1000 a day for violation of the statute and the rule from ten days after January 22, 2016, or on February 1, 2016, and continuing under the general penalties statute. See Section 8-43-304(1), C.R.S. No E-1 has been filed by Respondents and Claimant seeks penalties against Respondents. The period from February 1, 2016, to January 10, 2017, is 344 days.

23. The ALJ imposes a penalty during this 344 day period of $1.00 per day for a total of $344 (1.00 X 344=344.00) for violation of the Act and the Rule. Fifty percent of the penalty shall be paid to Claimant and 50% shall be paid to the workers' compensation cash fund pursuant to Section 8-44-112(7)(a).

ORDER

It is therefore ordered that:

1. Respondents shall be liable for all reasonably necessary and related medical treatment to cure and relieve Claimant from the effects of the work related injury on January 18, 2016.

2. Respondents shall pay Claimant TTD based on an AWW of $700.00 and a TTD rate of $466.66. Respondents shall pay Claimant TTD increased by a 50% penalty for failure to maintain workers' compensation insurance in the amount of $18,734.24.

3. Respondents shall pay Claimant $41.42 in penalty assessment for failure to admit or deny the claim. Pursuant to Section 8-43-203(2)(a), C.R.S., the penalty shall be paid 50% to the subsequent injury fund and 50% to Claimant.

4. The insurer shall pay Claimant $344.00 in penalty assessment for failure to file an Employer's First Report of Injury. Fifty percent of the penalty shall be paid to Claimant and 50% shall be paid to the workers' compensation cash fund pursuant to Section 8-44-112(7)(a).

5. In lieu of payment of the above compensation and benefits to Claimant, Respondent shall:

   a. Deposit the sum of $18,734.24 with the Division of Workers Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

   b. File a bond in the sum of $18,734.24 with the Division of Workers Compensation within ten (10) days of the date of this order: (1) Signed by two or

more responsible sureties who have received prior approval of the Division of Workers' Compensation or (2) Issued by a surety company authorized to do business in Colorado. The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers Compensation and Claimant of payments made pursuant to this Order.

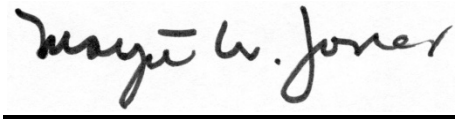
d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43- 408(2), C.R.S. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

6. Respondents shall pay 8% per annum on all amounts of compensation not paid when due.

7. Any issues not resolved in this order are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 3, 2017



Margot W. Jones
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician David Yamamoto, M.D. regarding maximum medical improvement (MMI) and permanent partial disability (PPD) impairment rating.

FINDINGS OF FACT

1. On February 24, 2015, Claimant sustained an admitted injury when she slipped on black ice and fell in Employer's parking lot. Claimant reports that she lost consciousness, came to and called a supervisor from her cell phone, was helped into work by co-workers, and that an ambulance was called. *See* Exhibit F.

2. The initial paramedic records documented a minor contusion to the right posterior parietal region with a superficial abrasion and a left elbow contusion. The Glascow Coma Score ("GCS") was 15/15. A GCS score provides information regarding diagnosis of concussive symptoms and mild traumatic brain injury based on post-trauma behavior. A GCS score of 15 is considered normal. *See* Exhibit G.

3. On February 24, 2015 Claimant was evaluated at the emergency department of St. Anthony North by Paul Meier, PA-C. Claimant reported falling on the ice and striking her head on the pavement. Claimant reported a mild posterior headache, lateral neck pain, and left elbow pain. Claimant denied any chest pain, shortness of breath, abdominal pain, back pain, or any numbness/tingling into the arms or legs. On physical examination it was noted that Claimant had a mild right sided occipital hematoma with minimal tenderness, some tenderness in the lower cervical spine and right paraspinous region, and some tenderness over the left olecranal region in the left elbow. It was noted that Claimant had no thoracic or lumbar spine tenderness and no paraspinal tenderness. A CT scan of her head was normal, a CT scan of the cervical spine showed no acute fracture, and x-rays of the left elbow showed no acute fractures. Claimant was discharged with instructions to use a cool compress to the affected areas, to elevate them, and to use naproxen for inflammation and pain. *See* Exhibit F.

4. On February 26, 2015 Claimant was evaluated at Concentra by Christine O'Neal, PA-C. Claimant reported being injured two days prior when she slipped on ice and fell. Claimant reported being seen at St. Anthony emergency room where x-rays performed were negative. Claimant reported neck and back pain, a mild headache, no vision changes, no dizziness, and no balance problems. Claimant reported that she was taking Naproxen. Claimant reported improvement in neck pain from the day prior, noting only pain in her left side of neck when she turned her head and that the day prior

she had pain in both sides of the neck. Claimant reported minimal lumbar pain. PA O'Neal assessed neck pain, back pain, buttock contusion, and head contusion. Claimant was released to full work duties. A review of her psychiatric presentation during the physical examination was deemed normal. *See* Exhibit D.

5. On March 6, 2015, Claimant was evaluated by PA O'Neal. Claimant reported that her headache pain was gone, that her neck was doing much better, but that her lower back pain had worsened and she was having burning pain in the lower back and down her left buttocks to her left thigh. Claimant reported that her that she was no longer taking medication. The initial diagnosis of head contusion was removed from the ongoing assessment of Claimant's work injuries. *See* Exhibit D.

6. On March 6, 2015 Claimant also underwent an MRI of her lumbar spine interpreted by Charles Wennogle, M.D. as normal with no evidence of acute or chronic fracture or spondylosis. The SI joints were noted to be normal in appearance. *See* Exhibit H.

7. On March 16, 2015, Claimant was evaluated by PA O'Neal. Claimant reported that her neck pain was gone and that her back pain was much improved. Claimant reported pain in the buttocks and legs into the left thigh region. The initial diagnosis of neck pain was removed from the ongoing assessment of work injuries. Headaches were not noted at this evaluation. *See* Exhibit D.

8. On April 3, 2015, Claimant was evaluated by PA O'Neal. Claimant reported that her neck pain was gone and that her back pain was also gone. Claimant reported that her left hip pain persisted. Claimant felt that her pain was improving overall but slowly. A physical examination performed noted full range of motion in her lumbar spine and no neck problems. No headaches were noted at this evaluation. *See* Exhibit D.

9. On April 17, 2015 Claimant was evaluated by Ted Villavicencio, M.D. Claimant was diagnosed with hip bursitis and an injection was performed. On May 8, 2015, Claimant reported that her lower lumbar and left hip pan was improved following the injection. *See* Exhibit D.

10. On May 12, 2015, Claimant was evaluated by Samuel Chan, M.D. Claimant reported a slip and fall onto her left side with significant pain over the left hip and lumbar spine area. Clamant reported that she also had left elbow pain and neck pain. Dr. Chan noted that Claimant was referred to him due to findings consistent with possible sacroiliac joint dysfunction. Dr. Chan noted that x-rays of the SI joint were normal and that a left hip trochanteric bursa injection did help Claimant. Dr. Chan agreed with Dr. Villavicencio that the findings were more consistent with musculoskeletal pain and discussed the importance of following through with an active exercise program. Dr. Chan opined that a sacroiliac joint injection could be considered. *See* Exhibit D.

11. On May 18, 2015, Claimant was evaluated by Dr. Villavicencio. Claimant reported that she now had severe pain in her head. Clamant reported having a headache for the past week with no specific new injury or overuse and that she had not had problems with that area since shortly after the injury. *See* Exhibit D.

12. On May 22, 2015, Claimant was evaluated by Nancy Strain, D.O. Claimant reported that following her work fall she initially had a headache that resolved and that she had no headache again until May 11, 2015. Claimant reported that her low back was better. *See* Exhibit D.

13. In June of 2015 Claimant was evaluated by her primary care physician, who ordered a brain MRI. The brain MRI was performed on June 17, 2015 and was interpreted by Clinton Anderson, M.D. as normal. *See* Exhibit H.

14. On July 1, 2015 Claimant underwent an MRI of her lumbar spine that was interpreted by Robert Liebold, M.D. The impression was mild degenerative changes without central or foraminal stenosis. *See* Exhibit H.

15. On July 14, 2015 Dr. Chan noted that Claimant had some initial diagnostic response to an SI injection performed on July 8, 2015. He opined that if Claimant did not have a more significant response over time, he would deem the injection to be a failure. Dr. Chan also reviewed the MRI of Claimant's lumbar spine and opined that it was essentially normal. *See* Exhibit D.

16. On August 3, 2015, Claimant was evaluated by Darla Draper, M.D. Claimant reported that her headaches had improved and that she now only had occasional mild headaches. *See* Exhibit D.

17. On August 31, 2015, Claimant was evaluated by Dr. Villavicencio. Dr. Villavicencio placed Claimant at MMI with no impairment. Dr. Villavicencio opined that Claimant's physical exam showed that her SI joint pain had decreased and that any additional care could be accomplished under maintenance. *See* Exhibit D.

18. On September 4, 2015 Respondents filed a Final Admission of Liability admitting to a 0% impairment and listing a MMI date of August 31, 2015. Respondents admitted liability for post MMI medical treatment that was reasonable, necessary, and related to the compensable injury. *See* Exhibit I.

19. On September 29, 2015, Claimant was evaluated by Dr. Chan. Dr. Chan opined that Claimant had a normal MRI and a normal neurological examination. Dr. Chan opined that Claimant's findings were most consistent with musculoskeletal pain and that Claimant was to continue to follow through with an active exercise program. Dr. Chan noted the previously recommended SI joint injection could still be performed as maintenance care. *See* Exhibit D.

20. On October 7, 2015 Claimant underwent a SI joint injection performed by Dr. Chan. On October 13, 2015 Claimant was evaluated by Dr. Chan. Dr. Chan opined that Claimant's symptoms were most consistent with musculoskeletal pain and that her prognosis was good if she continued to follow through with an active exercise program. Dr. Chan opined that Claimant remained at MMI and could continue to work full time and full duty. *See* Exhibit D.

21. In response to the Final Admission of Liability, Claimant requested a division independent medical examination (DIME).

22. On December 28, 2015 Claimant underwent a DIME performed by David Yamamoto, M.D. Claimant reported falling onto ice in the parking lot outside of work and losing consciousness. Claimant reported that she currently was experiencing pain in the lower back and sacroiliac joints, ongoing headaches that were present daily, forgetfulness, daily dizziness, depression, suicidal thoughts, daily crying spells/sadness, and decreased libido and social activities. Several of her reports to Dr. Yamamoto were contrary to and new from what she had reported during her treatment with Concentra. *See* Exhibits A, D.

23. Dr. Yamamoto performed a records review. Dr. Yamamoto noted that the medical records showed specific documentation that Claimant's headaches had fully resolved by March 6, 2015 but noted that Claimant reported to him that they were not gone and that Claimant reported seeing her primary care physician for her headaches as well. Dr. Yamamoto assessed: lumbar strain, bilateral sacroiliac dysfunction, post concussive headaches with dizziness and decreased memory, and secondary depression. Dr. Yamamoto opined that Claimant was not at MMI because her depression had not been addressed and she had ongoing post-concussive headaches and dizziness with loss of memory. His specific recommendations included: a neurological evaluation for ongoing headaches and dizziness; a neuropsychological evaluation for post concussive headaches and complaints of memory loss; a psychiatric evaluation for depression; the use of a sacroiliac belt for SI joint dysfunction; and a trial of massage therapy and acupuncture for low back pain. Dr. Yamamoto assessed a provisional permanent impairment of 22% whole person arising out of a Table 53(II)(b) rating of 5%, a range of motion loss for the lumbar spine of 8%, post concussive headaches assessed under episodic neurological disorders of 5%, and a 6% rating for depression. *See* Exhibit A.

24. On June 7, 2016 Claimant underwent an independent medical evaluation performed by Lawrence Lesnak, D.O. Claimant reported diffuse superior buttock pains, occasional left lateral thigh pains, and frequent bifrontal headaches. Dr. Lesnak performed a medical records review and physical examination. Dr. Lesnak opined that Claimant had fairly diffuse pain behaviors during his evaluation, including 4/5 positive Waddell's signs. Dr. Lesnak noted that even gentle brushing of the skin overlying Claimant's low back/superior buttock region reproduced severe pain. Dr. Lesnak noted that the sitting versus supine straight leg raising maneuvers showed dramatic differences and that when distracted, Claimant did not have pain as she did during

official examination activities. Dr. Lesnak opined that Claimant gave extremely poor effort during attempted lumbar spine range of motion activities. Dr. Lesnak opined that Claimant had non physiologic findings that suggested a significant degree of somatization/functional overlay. *See* Exhibit B.

25. Dr. Lesnak opined that any symptoms stemming from a mild closed head injury/cerebral concussion would be initially worse, then get better and not recur. Dr. Lesnak noted, however, that Claimant reported an initial headache that resolved, then recurred several months later and also noted that Claimant had no initial reports of dizziness until more than seven months after the injury that would be non physiologic as related to a mild closed head injury in February of 2015. Dr. Lesnak noted initially Claimant had minimal low back complaints, but then that they became the primary source of Claimant's complaints soon afterward even though an MRI of the lumbar spine showed no abnormalities whatsoever. Dr. Lesnak opined that despite Claimant's current complaints of constant diffuse superior buttock pains, there was absolutely no clinical evidence to suggest that her complaints were related to any SI joint dysfunction, sacroilities, lumbar or sacral radiculitis, radiculopathy, or myelopathy and that the lumbar spine MRI was negative and neurologic examinations were normal. *See* Exhibit B.

26. Dr. Lesnak opined that Claimant was appropriately placed at MMI on August 31, 2015 by Dr. Villavicencio. Dr. Lesnak noted that at that time, Claimant had some residual low back/superior buttock pain complaints but that there was no evidence of any permanent functional impairment related to her injury. Dr. Lesnak opined that Claimant required no further diagnostic testing or interventional treatments. Dr. Lesnak opined that Claimant's complaints of frequent bilateral frontal headaches were completely unrelated to any possible mild closed head injury that may have resulted from the work injury on February 24, 2015 and opined that it did not make any sense that Claimant's headache complaints got better then recurred later. Dr. Lesnak opined that symptoms are worse initially and then improve and resolve with time with that type of injury. Dr. Lesnak opined that Claimant had a very high amount of depressive symptoms and a moderately high amount of somatic pain complaints and that there were significant psychosocial factors influencing Claimant's reported symptoms, recovery, and/or perceived function. Dr. Lesnak opined that Claimant's subjective complaints were somewhat unreliable at best and that therefore, any diagnoses or treatment recommendations needed to be based primarily on reproducible objective findings and not on Claimant's subjective complaints. *See* Exhibit B.

27. Dr. Lesnak opined that Dr. Yamamoto had provided medical opinions based on Claimant's subjective complaints rather than any reproducible objective findings. Dr. Lesnak noted that Dr. Yamamoto did not comment on why his exam findings were so dramatically different compared to all the multiple examinations by healthcare providers at Concentra and by Dr. Chan. Dr. Lesnak opined that Dr. Yamamoto significantly erred in his medical opinions regarding Claimant including specifically his opinion that Claimant was not at MMI and the impairment rating. Dr. Lesnak noted that although Claimant had ongoing subjective complaints, there were no

objective findings to support the subjective complaints and that it appeared to be due to a significant amount of psychosocial factors. Dr. Lesnak opined that the psychosocial factors were completely unrelated to the work injury. Dr. Lesnak opined that the development of worsened symptoms months after the incident was completely non 76physiologic in nature and not supported by any type of medical literature and was not consistent with brain physiology. *See* Exhibit B.

28. Dr. Lesnak opined that Claimant was clearly at MMI and that he completely agreed with Dr. Villavicencio that Claimant did not sustain any type of permanent functional impairment. Dr. Lesnak opined that Dr. Yamamoto erred, did not follow the guidelines and rules set forth in the AMA guidelines, and that Claimant's significant psychosocial factors were not related to the work injury. *See* Exhibit B.

29. On August 12, 2016 Claimant underwent a neuropsychological evaluation performed by Laura Rieffel, Ph.D. Claimant reported that as a result of a slip and fall at work she had ongoing back pain, headaches, and cognitive problems. Dr. Rieffel noted that the referral was to document the presence or absence of any acquired brain injury and to assess Claimant's current cognitive and emotional functioning. Dr. Rieffel performed testing and as part of the overall evaluation she administered to Claimant two free standing measures of effort. Dr. Rieffel opined that Claimant's performance was indicative of inadequate effort and that on one of the measures Claimant's scores were so low that the scores were not probable unless Claimant was intentionally recalling the correct answers and choosing the wrong answers. Dr. Rieffel opined that the Claimant's scores and insufficient effort interfered with a valid assessment of neuropsychological functioning. Dr. Rieffel opined that Claimant had a brief post concussive sequalae that resolved by March 6, 2015 and that it was inconsistent with the course of mild head injury recovery for headaches to resolve for an extended period and then return two months afterwards. Dr. Rieffel opined that any current headaches were totally unrelated to the February 2015 work incident. Dr. Rieffel opined that Claimant intentionally attempted to influence the cognitive test results and thus the scores could not be considered a valid measure of Claimant's actual abilities. *See* Exhibit C.

30. Dr. Rieffel opined that Claimant was magnifying her current symptom reports across the range of somatic, emotional, and cognitive domains and agreed with Dr. Lesnak that Claimant's self-report of symptoms were unreliable. Dr. Rieffel opined that recommendations based on Claimant's subjective reports would result in prolonged/and or unneeded treatment. Dr. Rieffel disagreed with Dr. Yamamoto's recommendations related to psychological/neuropsychological symptoms and opined that the headaches were not associated with the February 2015 work fall. Dr. Rieffel also opined that there was no evidence to support that Claimant's depression was related to the February 2015 work fall. *See* Exhibit C.

31. Dr. Yamamoto, Dr. Lesnak, and Dr. Rieffel all testified in this matter.

32. At hearing, Dr. Yamamoto conceded, after listening to Dr. Rieffel, that Claimant did not have any ongoing cognitive issues as a result of her work injury and that Claimant was at MMI for her cognitive aspects. Dr. Yamamoto also agreed that there was probably not too much more that could be done for Claimant's low back and that Claimant was at MMI for the low back. Dr. Yamamoto's ultimately testified that the only condition not at MMI was Claimant's depression.

33. Dr. Rieffel testified at hearing. Dr. Rieffel opined that based on Claimant's scores, she knew Claimant was over reporting or exaggerating and that Claimant showed inadequate effort. Dr. Rieffel opined that Claimant's scores were statistically not probable unless Claimant was intentionally picking the wrong answers and that if Claimant had closed her eyes and picked answers, she would have done better. Dr. Rieffel opined that there was no indication Claimant had any cognitive impairment as a result of the work injury. Dr. Rieffel opined that the chronology of symptoms was important in a traumatic brain injury situation and that the most severe symptoms would be immediate and would slowly get better. Dr. Rieffel opined that Claimant's reported headaches were not due to the work injury or a mild traumatic brain injury sustained in February of 2015 and that Claimant would not have had immediate headache that went away for several months and then returned. Dr. Rieffel also opined that the dizziness reported to Dr. Yamamoto was again not consistent with the work injury since Claimant had no reported dizziness after the February 2015 work injury.

34. Dr. Rieffel opined that Dr. Yamamoto needed to be cautious in relying on Claimant's subjective reports due to Claimant's symptom magnification. Dr. Rieffel opined that she would not recommend any further treatment for Claimant and that although Claimant might have mild depression, psychological issues of depression would not be related to the February 2015 work injury. She noted that it was possible Claimant suffered a mild traumatic brain injury and that even if a person is just dazed after a fall it can qualify for a mild traumatic brain injury diagnosis. However, she opined that Claimant had a GSC exam of 15, a normal CT scan of the head, and a normal MRI of the brain. Dr. Rieffel noted that blurred vision was not present following the injury and would not be related to the February 2015 work injury. Dr. Rieffel opined overall that the headaches, dizziness, and blurred vision all were not related to the February 2015 work injury.

35. Dr. Rieffel opined there was no information that objectively identified any kind of cognitive impairment that would necessitate treatment. She testified that she disagreed with the recommendations of Dr. Yamamoto because Claimant's documented symptom magnification would require that there be objective evidence she was having psychological or cognitive problems prior to any treatment. She testified no such documentation existed. Dr. Rieffel testified no additional psychological or neuropsychological treatment was appropriate in this claim. Dr. Rieffel also testified at hearing that Claimant did not have any ratable impairment for any neurological condition. Dr. Rieffel also disagreed with Dr. Yamamoto's assessment that depression was work-related. She opined that there was no documentation of depression to providers and that there was no indication of a symptom report that would be consistent

with a psychiatric disorder where you would expect it in the course of the injury recovery.

36. Dr. Lesnak testified by deposition. He opined that Dr. Villavicencio properly placed Claimant at MMI on August 31, 2015 with no impairment. He opined that there was a lack of objective findings in Claimant's case. Dr. Lesnak disagreed with Dr. Yamamoto's recommendation for a SI joint belt and noted there had been a negative diagnostic and therapeutic response to SI joint injections, no diagnosis of sacroilitis, and no pathology demonstrated on studies. Dr. Lesnak opined that it was also non physiologic that Claimant had an initial headache that resolved, then suddenly recurred two and a half months later. Dr. Lesnak opined that symptoms from a mild traumatic brain injury would be initially worse and then would get better. Dr. Lesnak opined that there were no depressive symptoms whatsoever reported by any treating providers until almost four months after MMI when Claimant reported to Dr. Yamamoto that she was depressed.

37. Dr. Lesnak opined that Dr. Yamamoto's assessment of permanent impairment for SI joint dysfunction was inappropriate and in error per the *AMA Guides*. Specifically, Dr. Lesnak opined that Claimant did not have any clinical evidence of ongoing SI joint dysfunction or any Table 53 diagnosis to support a rating. Dr. Lesnak opined for a Table 53(II)(b) diagnosis to be supported, symptomatic disk pathology, nerve root pathology, or exam findings of SI dysfunction needed to be documented. He testified that Claimant did not meet those requirements because she did not have any reproducible exam findings or MRI findings to support a diagnosis under Table 53. Dr. Lesnak testified that Dr. Yamamoto erred by providing an impairment rating based on subjective complaints without any reproducible findings.

38. The opinions of Dr. Lesnak and Dr. Rieffel are found credible and persuasive. Their opinions are consistent with the overall medical documentation and the opinions of Dr. Chan and Dr. Villavicencio.

39. Claimant's reports are not found credible or persuasive. Claimant, as found above, demonstrated significant unreliable reports and test scores. Her subjective reports to providers, including DIME physician Dr. Yamamoto cannot be relied upon to any degree of certainty.

40. Dr. Yamamoto is not found credible or persuasive. Dr. Yamamoto essentially conceded at hearing that Claimant was at MMI for all conditions other than depression. The ALJ concludes that Dr. Yamamoto based a significant amount of his opinions on Claimant's subjective reports without objective findings to support his opinions. This is in error given Claimant's unreliability.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

A DIME's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." *See* § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the DIME physician's opinions are incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (I.C.A.O., Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*.,

W.C. Nos. 4-532-166 & 4-523-097 (I.C.A.O., July 19, 2004). Whether or not a party overcomes the DIME is a question of fact for determination by the ALJ. *See* § 8-43-301(8), C.R.S.; *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (I.C.A.O., Aug. 18, 2004).

The totality of the evidence, including testimony and medical records, establishes that Respondents proved by clear and convincing evidence that Dr. Yamamoto's opinions are clearly erroneous. As found, the opinions of Dr. Lesnak and Dr. Rieffel that the claimant was at MMI with no impairment were not merely a difference of medical opinion and were sufficient to meet Respondents' legal burden. *See Javalera*, W.C. Nos. 4-532-166 & 4-523-097 (I.C.A.O., July 19, 2004). The opinions of Dr. Lesnak and Dr. Rieffel are consistent with the overall medical records, the opinions of Dr. Chan, and the opinions of Dr. Villavicencio. Dr. Yamamoto clearly erred by relying on Claimant's subjective reports that were not consistent with the overall medical records.

As found above, Claimant's subjective reports cannot be relied upon to any degree of certainty. By relying on her reports, Dr. Yamamoto clearly erred. His opinions on MMI, impairment rating, and psychological conditions have been overcome by clear and convincing evidence. Claimant reached MMI on August 31, 2015 with no ratable permanent impairment as assigned by Dr. Villavicencio and supported by the credible opinions of Dr. Lesnak and Dr. Rieffel.

Claimant's only post concussive symptom present two days after the February 2015 work injury was a mild headache that fully resolved by March 6, 2015 and did not recur until May 11, 2015. Any ongoing headaches are not related to the work injury and are inconsistent with the course of a mild head injury. The ALJ does not credit any subjective reports by Claimant that her headaches continued during this time as they are contrary to the overall medical evidence. Dr. Yamamoto clearly erred in finding headaches to be causally related to the work injury or subject to an impairment rating. Dr. Rieffel is credible and persuasive that Claimant has no impairment for cognitive or episodic neurological conditions. Additionally, Dr. Yamamoto erred by diagnosing work related depression based on Claimant's subjective reports when there was no diagnosis or treatment for any type of psychological injury including depression during the course of her treatment. The opinions of Dr. Rieffel and Dr. Lesnak that depression is not work related are found credible and persuasive. The ALJ finds and determines that Respondents have established by clear and convincing evidence that Claimant does not have any impairment for SI joint dysfunction under Table 53 of the *AMA Guides* and is at MMI for that condition with no ratable impairment. Claimant does not have a intervertebral disc lesion or soft tissue lesion and does not qualify for a Table 53 diagnosis. Claimant has no objective pathology in her lumbar spine and Dr. Yamamoto erred by providing a Table 53 rating. The ALJ finds the opinions of Dr. Lesnak and Dr. Rieffel are not merely a difference of opinion from the DIME with regard to MMI, as it is clear Dr. Yamamoto's opinions regarding MMI were colored by his reliance on the claimant's subjective report and was not supported by the objective evidence or the totality of the record.

Dr. Lesnak and Dr. Rieffel's opinions regarding MMI are sufficiently persuasive and credible to overcome the DIME physician's opinion by clear and convincing evidence. The ALJ finds the claimant was at MMI on August 31, 2015 with no permanent impairment.

Medical Maintenance Benefits

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As found above, Respondents admitted liability for post MMI medical treatment that was reasonable, necessary, and related to the compensable injury. Medical records note that Claimant needs to continue an individual exercise program and that additional injections may be done under maintenance care. Dr. Villavicencio also opined when he placed Claimant at MMI that any additional care could be accomplished under maintenance. Claimant has shown, more probably than not, that she may require future medical treatment to relieve the effects of the injury or prevent further deterioration. Claimant has established an entitlement to a general award of medical maintenance benefits. Respondents retain their right to dispute any specific treatment recommendation.

ORDER

It is therefore ordered that:

1. Respondents have overcome the DIME physician's opinion with regard to MMI and impairment by clear and convincing evidence. The claimant is at MMI as of August 31, 2015 with a 0% permanent impairment rating.

2. Claimant has established an entitlement to a general award of medical maintenance benefits.

3. Any issues not determined are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 2, 2017,

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Respondents have established by a preponderance of evidence that the undersigned ALJ's November 4, 2015 Summary Order should be set aside and the case reopened due to fraud or mistake.

II. If the claim is reopened, whether Respondents have demonstrated by a preponderance of the evidence that Claimant did not sustain a compensable injury on February 28, 2015.

III. If Respondents failed to establish that the claim should be reopened for fraud, error or mistake, whether the Division Independent Medical Examiner—Dr. John Douthit—erred in his assignment of a 6% whole person impairment rating.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. While employed as a hair stylist for Employer, Claimant alleged that she suffered an injury to her neck on February 28, 2015. A hearing regarding the compensable nature of this neck injury was held September 29, 2015.

2. The undersigned ALJ issued a Summary Order on November 4, 2015 concluding that Claimant had proven by a preponderance of the evidence that she sustained a compensable aggravation of a pre-existing soft tissue condition of the cervical spine. Critical to the conclusion surrounding compensability was Claimant's testimony that she had been pain free and without the need for medical treatment for an extended period of time prior to the February 28, 2015 work injury. In this regard, the ALJ found and concluded as follows:

> "The evidence presented persuades the ALJ that Claimant's soft tissue condition also pre-existed the claimed injury in this case. Nonetheless, careful review of the record, as submitted, fails to disclose that Claimant received treatment to the neck or upper back in the years leading up to her February 28, 2015 work injury. Importantly, Dr. Lesnak acknowledged on cross examination that he saw no records documenting treatment for Claimant's previous neck injury in 2011, 2012, 2013, 2014, or 2015 prior to the date of injury in question. … Based on the evidence presented, the ALJ concludes that Claimant likely aggravated her pre-existing cervical soft tissue condition. … Given the dearth of records supporting

> cervical treatment or documented cervical complaints of pain from 2011 up through the date of injury in this case, the ALJ is not persuaded by Respondents suggestion that Claimant's prior applications for benefits to the SSA support a finding that Clamant was experiencing cervical pain at the time of the February 28, 2015 incident giving rise to the instant claim. To the contrary, the ALJ concludes, from the evidence presented that Claimant was working full duty at the time of the incident question and was probably asymptomatic from a cervical spine standpoint until she abruptly turned her head in response to be startled."

3. At the hearing in September 2015, the undersigned ALJ specifically noted "the dearth of records supporting cervical treatment or documented cervical complaints of pain from 2011 up through the date of injury."

4. Following this hearing, respondents located additional medical records and history, including records from the Social Security Administration (SSA). Upon receipt of these records, Respondents sought to set aside the November 4, 2015 summary order and reopen the claim on the basis of fraud, asserting that Claimant intentionally misled the court regarding the status of her cervical spine condition in an effort to obtain benefits.

5. The records in question were submitted as part of Respondents exhibit packet and reveal prior efforts to obtain social security disability benefits for cervical disc herniation. The records also outline multiple complaints of cervical pain with resultant treatment, including a visit referencing the status of Claimant's cervical condition only two days before the alleged February 28, 2015 work injury. Specifically, the records reveal the following:

- Claimant was seen at Centura Health ER on May 7, 2008 for neck and back pain following a motor vehicle accident. Claimant's car was at a stop when it was rear-ended by a car going 30 mph. Records note a rollover motor vehicle accident 2 years prior. Claimant was diagnosed with a back strain, cervical strain, "a typical whiplash injury and other symptoms from MVA."

- A cervical spine CT scan from May 7, 2008 revealed a disc bulge or broad-based right paracentral disc protrusion at C5-6 without disc fracture.

- On May 27, 2008, Claimant followed up with her primary care physician, Dr. Ravin, regarding the motor vehicle accident. Dr. Ravin noted that a cervical CT scan had been done and it showed a bulging and ruptured disc at C5-6. Claimant was scheduled to follow-up with a neurosurgeon, Dr. Murk. Claimant complained of persistent neck pain. Dr. Ravin assessed Claimant with somatic dysfunction – cervical/thoracic area and bulging disc at C5-6. He recommended that Claimant follow-up with Dr. Murk and start physical therapy.

- On June 26, 2008, Claimant continued to report a lot of pain and problems with her neck. Claimant had seen Dr. Murk and said he was sending her for a cervical MRI and had referred her to a physiatrist for possible injections.

- Claimant returned to Dr. Ravin on August 7, 2008. Claimant said that Dr. Murk did not want to operate and wanted to treat her conservatively. Dr. Ravin recommended additional physical therapy. Claimant underwent at least three injections in her cervical spine in the C4-C5 disc space by September 2008. Claimant continued to complain of slowly improving neck pain to Dr. Ravin at 7 follow-up appointments from September 11, 2008 to November 14, 2008.

- Claimant applied for Social Security benefits on March 16, 2009. At that point, she completed a disability report. Claimant was asked "What are the illnesses, injuries, or conditions that limit your ability to work?" Claimant responded "Bulging neck vertebrae C4-C5" and other conditions.

- A work activity report was completed by the SSA on April 6, 2009. This report noted that Claimant stopped working as of September 18, 2008 due to her medical problems.

- Claimant completed a pain questionnaire as part of the application for the SSA on May 7, 2009. Claimant was asked to describe the location of her pain and responded neck as one of the body parts. Claimant was also asked how her pain limits her activities and responded that she could not turn her head sideways.

- Dr. R. Terry Jones examined Claimant regarding her SSA application on May 22, 2009. Specific diagnostic impressions were reached by Dr. Jones following Claimant's assessment. Among other conditions, Dr. Jones opined that Claimant suffered from chronic pain in her neck secondary to motor vehicle accidents. She also had a history of fibromyalgia. Regarding her chronic neck pain, Dr. Terry noted that noted that Claimant suffered from 7/10 pain most days with a 10 being the worse possible on the scale and that on the day of her evaluation, Claimant was experiencing 8/10 pain. This pain limited Claimant's sit, stand and walk.

- On July 11, 2009, Dr. Edwin Baca examined Claimant for complaints of chronic neck pain, chronic lower back pain, depression, bipolar, fibromyalgia, and right carpal tunnel syndrome. Claimant told Dr. Baca that all of her problems started approximately 12-13 years ago after a motor vehicle accident in 1997 when she was involved in a 13 car pile-up and her car flipped over and crushed her. She said that was when all the pain in her neck, back, and extremities started. Claimant said that in 2001, she fell down several stairs exacerbating her chronic pain problems. Claimant said she was involved in a second motor vehicle accident in May 2008 that caused a C4-5 bulged disc. Claimant was treating with Dr. Raven for her chronic pain and also for fibromyalgia. Claimant alleged

that her chronic pain and fibromyalgia significantly limited her daily activities and that she had severe difficulty turning her head right or left or driving. Dr. Baca reviewed radiographic images and opined that Claimant had mild posterior disc height loss at C5-6 and findings consistent with subtle facet sclerosis at C4-5,C5-6 and C6-7. He questioned Claimant's diagnosis of fibromyalgia, noted Claimant's responses to trigger point testing were "hyper-exaggerated." Otherwise he diagnosed Claimant with multiple conditions, including chronic neck pain and C4-5 herniated nucleus pulposus.

- Claimant was admitted to Cedar Springs Behavioral Health System from April 16, 2010 to April 26, 2010 due to depression and a suicide attempt. During the hospitalization, Claimant reported neck and non cardiac in origin chest pain. She was sent to the emergency room where her neck pain was treated with medications.

- Dr. John Reasoner examined Claimant on May 8, 2013 for complaints of neck pain, neck stiffness, nausea, vomiting, and headaches after slipping on wet tiles and falling on her back while at work. Dr. Reasoner diagnosed Claimant with a neck sprain/strain.

- A cervical spine x-ray from May 8, 2013 revealed mild degenerative disease at C2-3, C4-5, and C5-6 with mild bony neural foraminal narrowing at C5-6.

- Claimant was seen by Dr. Barbee on February 26, 2015 – two days before the asserted neck injury found compensable by the undersigned ALJ following the September 29, 2015 hearing. In a noted generated from this visit, Claimant was requesting conservative management for several issues. Claimant was noted to have chronic pain and degenerative disc disease for which she was provided with a referral to pain management and physical therapy and provided with a prescription for Norco.

6. Claimant testified that her February 26, 2015 appointment was to establish care for tendinitis in her shoulder rather than for neck pain. The nursing intake section of the report documents a chief complaint of right shoulder and neck pain along with a myriad of other complaints. Claimant specifically noted that she was in the offices because of pain. The history of present illness (HPI) section of the report indicates that Claimant suffers from chronic cervical pain due to two prior motor vehicle accidents prior to 2002 with a disc herniation at C4-5. She also reported that her pain medications and gabapentin had been of little benefit in the past. Consequently, she was given the new prescription for additional Norco at 120 tablets to be taken every 6 hours on an as needed basis for pain. Physical examination of the neck revealed "[c]ervical tenderness with all planes of motion", including "[r]educed active rotation, extension and lateral flexion of neck."

7. During cross-examination, Clamant denied ever being referred for pain

management or physical therapy or getting a prescription for Norco. Claimant also testified that she had not reported having chronic neck pain following two motor vehicle accident prior to 2002 and instead reported a history of thyroid disease to the nurse. Claimant alleged that she did not tell the nurse that gabapentin had been of little benefit to her and that she had not tried gabapentin as it was her husband's prescription.

8. At hearing, Claimant testified that she "did not have any treatment or issues with [her] neck for years other than a little discomfort here and there." The records concerning the condition and treatment of Claimant's neck as referenced above dispel the ALJ of this contention. Rather, the ALJ finds from the records submitted that in 2009 Claimant was alleging, in part, that she had cervical pain so severe and debilitating that she felt compelled to file a claim for social security disability benefits.[1]

9. As part of her February 28, 2015 claim, Claimant presented to Concentra Medical Centers (Concentra) on March 2, 2015, with complaints of neck pain shooting down her right arm. During this visit, Claimant reported that said she had a prior motor vehicle accident in 2007 that completely resolved with 10 visits of physical therapy. She also saw Dr. Rauzzino for a surgical consult as part of her February 28, 2015 neck injury. On March 30, 2015, Claimant told Dr. Rauzzino that her symptoms began on February 28, 2015 when she was mopping and felt her neck pop. Claimant reported a history of a car accident in 2007 but said her symptoms completely resolved and she "was pain free until this most recent incident at work" on February 28, 2015. The report notes as follows: "She was involved in a work-related accident on 02/28/15 and symptom-free prior to that. She has a history of a car accident several years ago, but was asymptomatic for years until this work-related incident." The above referenced records contradict Claimant's assertions to the providers at Concentra and to Dr. Rauzzino. Rather, as noted Claimant remained chronically symptomatic with complaints of neck pain through 2008 and into 2009 prompting her to file a claim for social security disability benefits. She also sought treatment for neck pain in 2013 with Dr. Reasoner after falling at work.

10. Based upon the above referenced medical records, which were unavailable at the September 29, 2015 hearing, the ALJ finds that Claimant misrepresented the history surrounding her cervical spine complaints/symptoms to the providers at Concentra as well as Dr. Rauzzino.

11. The totality of the evidence as presented persuades the ALJ that Claimant

[1]Claimant testified that she did not apply for Social Security benefits. Claimant alleged that her ex-husband applied for the benefits. Claimant testified that she was unable to do anything for herself from September 29, 2009 for over 18 months due to being sick with the swine flu. Review of the application for disability benefits reveals that the application was completed prior to September 29, 2009 and that Claimant signed hand wrote and signed portions of this application. Moreover, Claimant was interviewed in person and examined by multiple physicians as part of the process. Consequently, the ALJ finds Claimant's attempt to pass responsibility for the filing of the SSA disability application, along with any assertion regarding the symptoms or disabilities contained therein, to her ex-husband unpursuasive and misleading.

suffers from chronic neck pain precipitated by preexisting injuries suffered as a consequence of falls and motor vehicle accidents. Despite Claimant's assertion to the contrary, the persuasive evidence demonstrates that she has sought treatment regarding her neck[2] in the years following 2007. Indeed, the records indicate that she saw a providers for neck pain in 2013 after a fall and again in February 2015 just prior to the incident which forms the basis for Respondents request to set aside the ALJ's Summary Order and Reopen the case on the grounds of fraud and mistake. While the Claimant is correct that February 26, 2015 record from Dr. Barbee's office reflects that she was she had complaints of right shoulder pain that belies the complete basis for her visit. The entirety of the record convincingly establishes that Claimant suffers from chronic neck pain and that she was given a prescription for additional amounts of pain medication for the same leading to a reasonable inference that Claimant's neck was symptomatic at the time she presented to Dr. Barbee's office on February 26, 2015. The ALJ is not persuaded, based upon the medical records submitted, that the provider documented an incorrect prior medical history or that Claimant's neck was asymptomatic on February 26, 2015 as she suggested.

12. Following the conclusion by the undersigned ALJ that Claimant had suffered an aggravation of a previously asymptomatic cervical spine condition, Claimant continued to treat with providers at Concentra. Dr. Hattem examined Claimant for an impairment rating on March 24, 2016. Dr. Hattem noted that Claimant reported the development of neck pain while mopping at work on February 28, 2015. For past medical history, Dr. Hattem noted "A 2007 motor vehicle accident. She says she received no treatment following that accident." Dr. Hattem's impression was cervical strain. Dr. Hattem opined that Claimant was at MMI and assessed her with 6% whole person impairment under Table 53 of the AMA Guides. Claimant's range of motion did not contribute to her impairment because her range of motion measurements were non-physiologic and self-limited according to Dr. Hattem.

13. Dr. John Douthit examined Claimant for a Division Independent Medical Examination (DIME) on August 22, 2016. Claimant reported having a prior car accident in 2007 with back and neck injuries. Claimant did not mention any of her other prior injuries or cervical condition. Nonetheless, Dr. Douthit reviewed Claimant's medical records and noted that she had prior complaints of neck pain and a "similar W.C. claim when she suffered a fall at WalMart in 2013 and was treated on May 29th, 2013 by Dr. John Reasoner for neck pain . . . "

14. Dr. Douthit noted that Claimant had multiple complaints over her entire body and substantial pain behavior including heavy breathing, an inability to move, and an out of proportion pain response. Claimant could not move her shoulders and would only lift her arms slightly over her head level with encouragement. Her neck motion was virtually zero with no motion in any direction.

15. Dr. Douthit opined that Claimant's range of motion was invalid due to the pain

[2] Claimant has undergone MRI of the cervical spine which revealed multilevel mild degenerative changes and osteophyte complexes at C4-C5 and C5-C6.

behavior he witnessed which also had been witnessed by Dr. Hattem. Dr. Douthit noted that Claimant could return for repeat range of motion measurements but he would discourage it as additional testing would also be invalid and he did not think she would cooperate with the re-measurements. Dr. Douthit opined that additional treatment would not be effective. He placed Claimant at MMI as of March 24, 2016 with 6% impairment per Table 53.

16. Dr. Lesnak examined Claimant at the request of Respondents on June 30, 2015 and November 3, 2016. Dr. Lesnak noted that on February 26, 2015, Claimant's primary care physician had recorded chronic neck pain dating back to before 2002. Following his November 3, 2016 independent medical examination (IME), Dr. Lesnak noted that Claimant exhibited numerous pain behaviors and nonphysiologic findings, which were also present during his previous evaluation on June 30, 2015. Dr. Lesnak also noted that Dr. Hattem and Dr. Douthit had also reported that Claimant exhibited diffuse and multiple pain behaviors during their examinations.

17. In a report generated following his November 3, 2016 IME, Dr. Lesnak documented that Claimant "clearly" misrepresented her medical history to him, noting as follows:

> One must recall that the medical records clearly report the patient has had chronic neck pains since before 2002, as well as chronic anxiety, depression, PTSD, and fibromyalgia that all predated 02/28/2015. In fact, the patient received a prescription for hydrocodone just two days prior to her previous alleged occupational injury of 02/28/2015. Lastly, she apparently has failed to provide an accurate medical history to her evaluating/treating healthcare providers, seemingly withholding information regarding her chronic pain syndromes, including fibromyalgia and chronic neck pain, as well as her chronic psychiatric disorders as well.

18. Claimant was questioned regarding statements made at her previous September 29, 2015 hearing. She was previously asked whether she had any neck pain in the days leading up to her February 28, 2015 injury, to which she replied "no." At the hearing on January 18, 2017, Claimant was asked if her testimony was correct. Claimant admitted this was correct, asserting that she was not having neck pain *per se* at that time. Claimant also previously testified at the hearing on September 29, 2015 as follows:

> Q: All right. And then the days leading up to the February 28th incident you were experiencing any pain in your neck then?
>
> A: No.

However, as noted above, the medical records persuasively demonstrate that Claimant had neck pain in 2013 and more probably than not had neck pain on February 26, 2015 when she presented to Dr. Barbee's office. Accordingly, the ALJ finds as unconvincing

and unreliable, Claimant's testimony that she had no treatment for her neck and that she was asymptomatic prior to February 28, 2015, when she turned abruptly in response to being startled.

19. Based upon the evidence presented, the ALJ finds that Claimant consciously concealed the true nature of her cervical spine condition at the time of her September 29, 2015 hearing in an effort to mislead the ALJ into finding her asserted neck injury compensable.

20. Based upon the evidence presented, the ALJ finds that Claimant's neck was likely symptomatic on February 28, 2015, as a probable progression of her degenerative disc disease confirmed on MRI and precipitated by prior injuries suffered in preceding falls and motor vehicle accidents. Accordingly, the ALJ has reconsidered his November 4, 2015 Summary Order to find that Claimant did not suffer a compensable aggravation of a previously asymptomatic cervical spine condition. Accordingly, the issue of whether the DIME physician erred in his assignment of a 6% whole person impairment rating need not be addressed further.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

I. General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact

finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this case, the ALJ concludes the evidence presented is persuasive of the fact that Claimant intentionally failed to disclose and purposely, but falsely represented that she had not sought care for nor was her neck symptomatic prior to February 28, 2015. The medical records obtained following the September 29, 2015 hearing, convincingly contradict Claimant's assertions that she was not symptomatic nor did she seek treatment for her neck in the days prior to her asserted February 28, 2015 injury. For these reasons, the ALJ finds/concludes that Claimant's contrary testimony is unpersuasive and unreliable.

II. Setting Aside the November 4, 2015 Summary Order and Reopening of the Claim

D. Section 8-43-303(1, C.R.S. provides that "at any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition…" *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). The party seeking to reopen bears the burden of proof to establish grounds for reopening. *See Garcia v. Qualtek Manufacturing*, W.C. No. 4-391-294 (ICAO August 13, 2004). When a party seeks to reopen based on a mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981). Fraudulent testimony which procures an award or denial of benefits may constitute the type of "mistake" which justifies reopening. *See Lewis v. Sci. Supply Co*., Inc., 897 P.2d 905 (Colo. App. 1995); *Garcia v. Qualtek Mfg.*, supra.

E. Fraud may also justify reopening an otherwise final award of benefits. *See Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995). The elements of fraud were set forth by the Colorado Supreme Court in *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937). In that case, the Court stated: "The constituents of fraud, though manifesting themselves in a multitude of forms, are so well recognized that they may be said to be elementary. They consist of the following:

(1) A false representation of a material existing fact, or representation as to a material existing fact made with a reckless disregard of its truth or falsity; or concealment of a material existing fact, that in equity and good conscience should be disclosed.

(2) Knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose.

(3) Ignorance on the part of the one to whom representations are made or from whom such fact is concealed, of the falsity of the representation or the existence of the fact concealed.

(4) The representation or concealment made or practiced with the intention that it shall be acted upon.

(5) Action on the representation or concealment resulting in damages."

As noted by ICAP in *Essien v. Metro Cab*, W.C. Number 3-853-693 (ICAO August 22, 1991), "[t]he existence of the elements is generally a question of fact for the determination of the ALJ", and because proof of fraud is a factual issue, the ALJ may base his decision on inferences drawn from circumstantial or direct evidence. *See Essien*, supra, citing *Electric Mutual Liability Insurance Co. v. Industrial Commission*, 154 Colo. 491, 391 P.2d 677 (1964). The existence of "fraud" does not necessarily require an intent to deceive. *See Pattridge v. Youmans*, 109 P.2d 646 (Colo. 1941); *Morrison*, 68 P.2d at 458 (fraud requires a false representation or representation made with disregard for the truth); *Alexander v. Midwest Barricade Co., Inc.*, W.C. No. 3-842-739 (I.C.A.O. March 30, 1992).

F. In this case, the ALJ agrees with Respondents that the evidence clearly shows that Claimant, on multiple occasions, told her medical providers that her symptoms following the 2007 motor vehicle accident completely resolved, she did not have pain or symptoms immediately prior to the February 28, 2015 alleged work injury and she did not receive any treatment for her neck during this time. Claimant also testified that she did not receive any medical treatment between 2009 and February 2015 and that in the days leading up to the February 28, 2015 incident, she was not experiencing any pain in her neck. Medical records obtained following the September 29, 2015 hearing belie these assertions. Rather the medical records document that Claimant did in fact continue to have symptoms following the 2007 motor vehicle accident throughout 2008 and 2009. Here, Claimant's symptoms were severe enough that she filed for Social Security benefits. In her application for social security benefits, Claimant alleged that she was disabled and unable to work in part due to chronic neck pain and bulging cervical vertebrae. Claimant later sought emergency room treatment in 2010 for neck pain and was prescribed medications. In 2013, she reinjured her neck when she slipped and fell. She was again prescribed medications. Finally, two days before the work injury, on February 26, 2015, Claimant was seen by Dr. Barbee for multiple issues, including chronic cervical pain. Claimant has alleged that this treatment was only for her shoulder but nursing notes document she was seen for complaints of shoulder and neck pain. Records also note that she has chronic neck pain due to two prior motor vehicle accidents. The physical examination from this appointment date records cervical tenderness with all planes of motion, reduced active rotation, extension, and lateral flexion of the neck. Claimant is then diagnosed with cervical degenerative disc disease and referred for pain management and physical therapy and prescribed Norco. As found it is unlikely that Claimant's treatment providers associated with this visit would take an inaccurate history and/or reach conclusions regarding Claimant's diagnosis based upon an examination of the incorrect body parts forming the basis for such

complaints. Based upon the evidence presented, the ALJ finds/concludes that Claimant's testimony to the court during the September 2015 hearing meets the elements of fraud as outlined above. In short, Claimant testimony constituted a false representation of a material existing fact or concealment of a material existing fact with knowledge on the part of Claimant that her representation was false and ignorance on the part of Respondents and the Court that the representation was false. Moreover, the evidence presented persuades the ALJ that Claimant made the representation and concealed material facts with the intent that the Court act upon it, specifically issuing an Order finding her injury compensable.

G. In reaching this conclusion, the ALJ is mindful of the fact that the false representation must involve the omission of a material fact inducing another to act to his or her detriment. See *Wolford v. Pinnacol Assurance*, 107 P.3d 947 (Colo. 2005). According to Black Law's Dictionary, a material fact is one which is crucial to the interpretation of a phenomenon or a subject matter, or to the determination of an issue at hand. *Black's Law Dictionary* (10th Ed. 2014). Crucial to the determination of whether Claimant suffered a compensable injury, given the pre-existing conditions from which she suffered, was a determination of whether her neck was symptomatic and/or whether she had/was treating at the time of her alleged February 28, 2015 injury. Claimant's testimony regarding the absence of symptoms/treatment and the "dearth" of medical records supporting the same was crucial to the determination of whether Claimant had suffered a compensable aggravation of a pre-existing condition. Consequently, the ALJ rejects the assertion that Claimant's misrepresentation regarding her symptoms and treatment was not "material" to the issuance of the November 4, 2015 order. To the contrary, it was the specific misrepresentation regarding the absence of symptoms/treatment which Claimant had knowledge of and in good conscious failed to disclose that induced the undersigned ALJ to conclude that Claimant had suffered a compensable aggravation of a preexisting condition. Based upon the evidence presented as a whole, the ALJ concludes that Respondents have proven, by a preponderance of evidence, that Claimant's testimony was fraudulent and that the November 4, 2015 Order was induced by Claimant's material misrepresentations and issued by mistake. Accordingly the order shall be reopened.

H. Pursuant to § 8-43-201(1), C.R.S., Respondents bear the burden of proof regarding any attempt to modify an issue that previously has been determined by an order. *Section 8-43-201(1), C.R.S.*; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to the 8-43-201 in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted

> in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

I. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed that burden on the respondents and made such a withdrawal the procedural equivalent of a reopening. In this case, Respondents are seeking to modify an issue determined by the November 4, 2015 Summary Order, specifically compensability. Therefore, the burden is on Respondents to prove that Claimant did not sustain a compensable injury. As found here, the evidence persuades the ALJ that Claimant likely had pre-existing condition and that she was seen by her primary care physician, Dr. Barbee, on February 26, 2015, two days before the alleged work injury, for complaints of cervical pain and right shoulder pain. Claimant had tenderness with all planes of motion and reduced range of motion in the cervical spine. Following the alleged injury on February 28, 2015, Claimant had cervical tenderness at the emergency room. X-rays were benign with only degenerative findings. Subsequent examinations also continued to note only tenderness and limited range of motion. A cervical MRI revealed only degenerative findings with no acute abnormalities and an EMG did not reveal any cervical radiculopathy. Clamant was maintained on medications and ultimately placed at MMI after only 3 sessions of physical therapy. Pain management and physical therapy is the exact treatment that was recommended by Dr. Barbee prior to the alleged work injury. The evidence presented persuades the ALJ that Claimant's neck was likely symptomatic when she saw Dr. Barbee on February 26, 2015 and that the incident occurring two days later is not cause, aggravate or accelerate Claimant's pre-existing condition to cause her symptoms and/or need for treatment. Rather, Claimant's symptoms were likely a manifestation of the natural progression of her pre-existing degenerative disc disease caused by prior falls and car accidents. Accordingly, Respondents have proven by a preponderance of evidence that Claimant did not sustain a compensable injury on February 28, 2015 when she turned her head abruptly in response to being startled.

ORDER

It is therefore ordered that:

1. Respondents have established by a preponderance of evidence that the ALJ's November 4, 2015 Summary Order should be reopened due to fraud and/or mistake.

2. Respondents have demonstrated by a preponderance of the evidence that Claimant did not sustain a compensable injury on February 28, 2015.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 2, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-994-090-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 24, 2016, January 27, 2017 and January 30, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 8/24/16, Courtroom 3, beginning at 1:30 PM, and ending at 3:05 PM; 1/27/17, Courtroom 1, beginning at 8:30 AM, and ending at 3:30 PM; and, 1/30/17, Courtroom 1, beginning at 8:30 AM, and ending at 2:30 PM).

Claimant's Exhibits 1 through 27 were admitted into evidence, without objection, Respondents' Exhibits A through W were admitted into evidence, without objection. Claimant's objection to Respondents' Exhibit X was sustained and it was rejected.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief was filed on February 13, 2017. Respondents' answer brief was filed on February 27, 2017. Claimant's reply brief was filed on March 1, 2017, at which time the matter was deemed submitted for decision.

]ISSUES

The issues to be determined by this decision concern an alleged occupational disease to the Claimant's bilateral upper extremities, with an alleged onset date of November 13, 2014 and an alleged date of last injurious exposure of August 11, 2016; if compensable, medical benefits, average weekly wage (AWW), and temporary partial disability (TPD) benefits from November 23, 2014 and continuing.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Stipulations and Findings Thereon

1. If compensable, the ALJ accepted the following stipulations and makes findings thereon.

2. The Claimant's AWW is $803.67.

3. The Claimant endorsed the issue of TTD on his Application for Hearing. Due to his employment with Aspen Linen Company commencing June 23, 2016, the Claimant is not entitled to TTD benefits. The issue of TTD was withdrawn by Claimant.

4. Claimant is owed TPD benefits from November 23, 2014 and continuing. From November 23, 2014 through December 4, 2016, TPD is owed in the amount of $4,569.92 [*See* Claimant's Exhibit 23]. This amount represents a calculation of TPD prior to any statutory offsets. TPD from December 4, 2016 and continuing would be at a variable rate to be subsequently determined, if the claim is compensable.

5. The Claimant has been receiving short term disability benefits, beginning on August 18, 2016, through a disability policy administered by Unum [Respondents' Exhibit W]. The Employer pays 100% of the premiums of the disability policy, with no contribution of funds from the Claimant. Respondents are entitled to assert a statutory offset against TPD for Claimant's receipt of short term disability benefits commencing

August 18, 2016 until terminated. § 8-42-103(1)(d), C.R.S. Respondents will likewise be entitled to assert a statutory offset for Claimant's receipt of long term disability benefits, if such benefits are granted. As discussed at hearing, there may be an issue of whether reimbursement is owed by Claimant to Unum if the worker's compensation claim is found compensable. If the terms of the disability policy require Claimant to reimburse Unum if benefits are awarded under the worker's compensation claim and Unum pursues reimbursement, Respondent-Insurer (Pinnacol) will agree to then terminate any statutory offset being taken against TPD. If the claim is on an admission of liability by Pinnacol when Unum asserts a right to reimbursement against the Claimant, Pinnacol will agree to amend their admission to reflect a termination of their offset. Pinnacol does not agree to assume any personal responsibilities of Claimant relative to any demand by Unum for reimbursement under the terms of its policy.

6. Any potential award of TPD benefits is subject to garnishment for child support, pursuant to a Notice of Administrative Lien & Attachment served on the Insurer.

Preliminary Findings

7. The Claimant's date of birth is October 28, 1965. He is 51 years of age.

8. The Employer is a company that produces wind turbines used to harness and produce wind energy. The Employer's production plant is located in Brighton, Colorado.

9. The Claimant was initially placed with the Employer in January 2014 through SOS, a temporary staffing agency [Respondents' Exhibit O, pp. 319-321] He was then hired on as a regular employee of the Employer on June 23, 2014 [Respondents' Exhibit O, pp. 317; 331].

10. The Claimant worked as a Production Assembler for the Employer. The written job description for this position reflects: "Assembles nacelles, and their subassemblies following process work instructions (PWIs) and other written and verbal specifications." The job duties and responsibilities are summarized on the job description [Respondents' Exhibit O, pp. 328-330].

11. Production assemblers report to a Production Team Leader [Respondents' Exhibit O, p. 328].

12. The Claimant underwent a post-offer employment physical on January 3, 2014, which was required by the temporary staffing agency. The findings on physical examination included decreased range of motion in both shoulders [Respondents' Exhibit O, p. 322]. Crepitus was noted in the right shoulder as well as the right

hand/wrist [Respondents' Exhibit. O, p. 324]. The Claimant was noted to have decreased range of motion with extension in both the cervical and lumbar spine [*Id.* p. 324].

13. The Post-Offer Employment Evaluation considered all conditions of employment specified by the Employer and the report specifically stated that the Claimant "is capable of performing the essential functions of the position and does not have any present or past conditions/impairment that we believe would pose a significant risk to himself or others should he be placed in the position sought."

The Occupational Disease Claim

14. According to the Claimant, he had not experienced any problems with his upper extremities or neck prior to working for the Employer.

15. The medical records reflect that the Claimant had been involved in a motor vehicle accident in 2013 [Respondents' Exhibit C, p. 6]. When asked about this accident on cross-examination, the Claimant indicated that he "didn't recall."

16. From January 2014 – August 2014, the Claimant worked in the MS2 and MS3 production areas. "MS" stands for "Main Shaft." The Claimant's work schedule was 4 days a week with 10 hour shifts. He was on the night shift, which runs from 5:00 PM to 3:30 AM. There is a 30 minute dinner break; two 15 minute work breaks; and a 6 minute stretch break.

Procedural Posture

17. Rick Hillier filed an Employer's First Report of Injury on November 21, 2014 (Respondents' Exhibit A, p. 1). Rick Hillier is the Environmental Health & Safety Specialist for the Employer. Hillier has a Master of Science in Public Health degree, with an emphasis on industrial hygiene and safety. He has worked in the health and safety field for 36 years and is a certified industrial hygienist.

18. The Respondents filed a Notice of Contest on September 23, 2015 (Respondents' Exhibit B).

Circumstances Leading Up to the Claim

19. The Claimant transferred to the MS1 area in approximately September 2014. His work schedule and breaks remained the same. According to the Claimant, he began to have symptoms in his bilateral elbows in approximately October 2014 while working in MSA.

20. The Claimant did not report his claim to the Employer when his symptoms first developed. He eventually went to his primary care physician (PCP) at Platte River Medical Center on November 13, 2014. Randa Spencer, FNP-C, noted that the Claimant's chief complaints were "hyperlipidemia and arm pain." Nurse Practitioner Spencer directed the Claimant to ICC (Injury Care of Colorado) for further evaluation of his bilateral arm pain. ICC is another facility located in the same building as the PCP's office. ICC is one of the designated medical providers for the Employer. When the Claimant presented to ICC that day, the clinic contacted the Employer to clarify if they were aware that the Claimant was at there for evaluation. The Employer was unaware of this until receiving the call. The Claimant reported a claim to the Employer when felt that his symptoms were becoming disabling and he required a medical evaluation. Claimant advised his QPI (Quality Production Inspector) that he needed to see physician about his complaints of pain and he was advised that he should go ahead. When he consulted his PCP (Primary Care Physician), he was advised that the problems with his upper extremities "were work related" and the provider contacted the Employer.

21. After going to the clinic on November 13, 2014, the Claimant met with Rick Hillier. Hillier is the Environmental Health & Safety Specialist for the Employer. Hillier has a Master of Science in Public Health degree, with an emphasis on industrial hygiene and safety. He has worked in the health and safety field for 36 years and is a certified industrial hygienist. Hillier testified regarding his conversation with the Claimant on November 13, 2014: The Claimant told Hillier that he had been working in the MS2 and 3 areas since joining the company, and that he had moved to MS1 about a month earlier. The Claimant indicated that he had been having some soreness in his elbows and *right* shoulder for the past 3-4 weeks since moving to the MS1 area. He mentioned nothing about his left shoulder. The Claimant told Hillier that he not experienced any physical difficulties while working in MS2 or MS3. He first noticed symptoms after moving to MS1. Hillier asked the Claimant about any personal hobbies outside of work. The Claimant said that he played softball and liked to do automobile repairs and restorations. According to Hillier, the Claimant indicated that he was still doing those hobbies.

22. The Claimant and Hillier walked through the MS1 area on November 13, 2014. The Claimant described his various job tasks, including cleaning grease off the main shafts using rags, scouring pads, and a degreaser. The main shafts were laid out horizontally on a pallet. The height of each main shaft on the pallet was between thigh and chest level. Claimant estimated to Hillier that he spent **10-15 minutes** doing that particular cleaning activity per shaft, and that he typically did 4 shafts during his 10 hour shift. There was a very small amount of overhead work required when cleaning the shafts. A crane was used to raise the main shaft so that the underside could be cleaned, which was not accessible when on the pallet. It took a couple of minutes to clean the underside while it was lifted on the crane. Claimant also described the process of heating up rings for Hillier. There are 3 rings for the main shaft. The

Claimant said that the heavier rings were lifted with a crane, and that the smaller rings may be picked up manually or placed on a cart. During his testimony, Hillier confirmed that there had been a 35 pound maximum single person lift in place at the Employer's work site since 2012. The Claimant never suggested to Hillier that he had been injured due to any lifting tasks in MS1. According to Hillier, there was more than one person working in that area so the Claimant would have help if needed. The Claimant and Hillier also spoke with William Gioia on November 13, 2014, while they were walking through MS1. Gioia is a Production Team Lead. Gioia confirmed that he would be willing to make accommodations for the Claimant if needed. Employees of the Employer are cross-trained so that they can "flex" between different production areas in the plant. Hillier asked the Claimant whether he thought he was physically able to perform his normal work shift on November 13, and the Claimant said "yes." The Claimant told Hillier that he did not know if his symptoms were caused by his work.

Medical

23. The Claimant presented to ICC (Injury Care of Colorado) on November 20, 2014, where he was seen by Heather Roth, PA-C (Respondents' Exhibit. D, p. 40). According to Roth, the Claimant's "injury" was bilateral epicondylitis with possible cubital tunnel syndrome, deQuervain's tenosynovitis, and lateral epicondylitis. Work restrictions were noted.

24. The Claimant followed up with various providers at ICC/ Advanced Urgent Care, including Heather Roth, PA-C, Adam Bonner, PA-C, Julie Parsons, M.D., and Anthony Euser, D.O. (Respondents Exhibit D).

25. The medical report from November 13, 2014 documented that the Claimant was complaining of muscle aches in his bilateral arms that was allegedly work related (Respondents' Exhibit C, p.15-17). It further states that the patient was referred to ICC for further evaluation on his bilateral arm pain. On November 20, 2014, the ICC report directed to the Employer's HR (Human Resources) unit states that the Claimant could not perform tasks that required him to use his "arms" overhead or above shoulder height. The Claimant's bilateral extremities were implicated. The report states:

> The patient will need to avoid doing repetitive motion that involves flexion, extension, pronation, and supination of the bilateral elbows. Additionally, he cannot perform tasks that involve repetitive motion or using his arms overhead. The patient will need to be given duties that involve carrying less than 5 pounds per arm. Additionally the patient should not use any vibratory machinery until he is fully healed. The patient should avoid tasks that involve using his arms above shoulder height.

(Claimant's Exhibit 8, p. 64)
The above medical restrictions with indications of work-relatedness are based on the history given by the Claimant.

26. In a report dated November 20, 2014, Dr. Euser stated:

> I saw [Claimant] in the office today. After obtaining a full medical history and doing a focused physical exam on the patient, I determined that his injury is bilateral epicondylitis with possible cubital tunnel syndrome, deQuevain's tenosynovitis, and lateral epicondylitis. These injuries are determined to be work related based on the job description provided to me by [the Employer] in addition to the history given by the patient….This injury will not permit the employee to perform his job as outlined by the job description form. The patient will need to avoid doing repetitive motion that involves flexion, extension, pronation, and supinations of bilateral elbows. Additionally, he cannot perform tasks that involve repetitive motion or using his arms overhead. The patient will need to be given duties that involve carrying less than 5 pounds per arm. Additionally, the patient should not use any vibratory machinery until he is fully healed. The patient should avoid tasks that involve using his arms above shoulder height….

27. Dr. Euser works at the Claimant's PCP (primary care provider) clinic (Platte River Medical Center) as well as at ICC/Advanced Urgent Care. The Claimant's own IME, Edwin M. Healy, M.D., could not render an opinion that the Claimant's elbow problems were work related.

28. Prior to the onset of the Claimant's disabling problems (which Claimant pinpointed as November 13, 201`4), the Claimant was performed his job for the Employer. After he was given medical restrictions by Dr. Euser, the Employer witnesses stated that the restrictions were honored and the Claimant was assigned light duty tasks. The Claimant disagrees, stating that although William Gioia instructed him not to work beyond his restrictions, the Claimant had to work beyond his restrictions. This was the case until his subsequent supervisor, Craig Aragon, assigned the Claimant very light duties as herein below described.

29. The Claimant was referred for physical therapy (PT) in December 2014. He reported pain in the bilateral elbows with some numbness and tingling in his fingers. He also reported shoulder pain (Respondents' Exhibit E]. On January 13, 2015, the Claimant indicated to the physical therapist that the pain in his elbows had **decreased** and his home exercise program as going well (Respondents' Exhibit E, p. 128].

30. In March 2015, Dr. Parsons referred Claimant to Roberta P. Anderson-Oeser, M.D., at CROM (Colorado Rehabilitation & Occupational Medicine) for evaluation and treatment. At that time, the Claimant was complaining of bilateral shoulder and elbow pain, and bilateral hand paresthesia. The Claimant informed Dr. Anderson-Oeser that despite discontinuing repetitive activity, his pain had not resolved. Dr. Anderson-Oeser referred the Claimant to Scott J. Primack, D.O., at CROM for ultrasounds studies. This observation leads the ALJ to infer that it is more likely that the Claimant's continuing upper extremity problems are due to a natural progression of his underlying condition as opposed to a job related aggravation and acceleration of his underlying pre-existing condition.

31. In a report dated April 3, 2015, Dr. Primack commented that the Claimant's problem had been **insidious in onset** (Respondents' Exhibit G, p. 186). Dr. Primack recommended a regenerative solution that may include stem cells and/or PRP. Dr. Primack performed sonogram studies of the Claimant's bilateral shoulders, the results of which he interpreted to show evidence of a small right full thickness rotator cuff tear and a small left partial thickness rotator cuff tear (Respondents' Exhibit G, p. 192). Dr. Primack noted that the Claimant's **right shoulder** was far more symptomatic that his left. Dr. Primack did not offer an opinion that the Claimant's conditions were caused by his employment with the Employer.

32. The Claimant underwent EMG/Nerve Conduction studies of the bilateral upper extremities with Dr. Anderson-Oeser on July 9, 2015 (Respondents' Exhibit. F, pp. 175-177). The findings were noted to be consistent with a right median neuropathy at the wrist of moderate severity, and a mild left median neuropathy at the wrist.

33. On July 13, 2015, Dr. Parsons' diagnoses included medial epicondylitis, lateral epicondylitis, partial thickness rotator cuff tear, and carpal tunnel syndrome. She recommended wrist splints.

34. Dr. Anderson-Oeser recommended that the Claimant see John Schultz, M.D., for right lateral elbow and right shoulder PRP injections (Respondents'Exhibit F, p. 119). The Claimant underwent a PRP injection in his shoulder and right elbow on August 1, 2015 at the Centeno-Schultz Clinic (Respondents' Exhibit H).

35. On August 13, 2015, Ryan Mansholt, PA-C at ICC referred the Claimant for carpal tunnel injections (Respondents' Exhibit D, p. 101). Mansholt indicated that he would be discussing the case with Dr. Parsons (Respondents' Exhibit D, p. 100).

36. On September 2, 2015, a claims representative from Pinnacol sent correspondence to Dr. Anderson-Oeser requesting that she provide documentation under Rule 17 of the Medical Treatment Guidelines supporting a determination of causation (Respondents' Exhibit F, p. 184). The Claimant and Dr. Parsons were copied on that correspondence.

37. The Claimant commenced PT through ICC in early September 2015 (Respondents' Exhibit I). On September 9, 2015, the Claimant told the physical therapist that he was working light duty. Nonetheless, he reported that he was experiencing increased elbow pain with daily activities, such as opening a jar (Respondents' Exhibit I, p. 200). The physical therapist commented that the Claimant's forward posture was causing his chest to be right and for his thoracic spine to have limited mobility (respondents' Exhibit I, p. 203).

38. The Claimant underwent EMG studies of his bilateral upper extremities which were interpreted to be consistent with bilateral carpal tunnel syndrome. Bryan Gary Wernick, M.D., performed bilateral steroid injections on September 24, 2015 for the carpal tunnel syndrome (Respondents' Exhibit J).

39. On October 10, 2015, Dr. Parsons recommended that the Claimant finish PT and follow up with Dr. Anderson-Oeser. Dr. Parsons stated: "I have asked him to follow up with Physical Medicine and Pain Management for any further treatment options. If none – discussed FCE and permanent restrictions." (Respondents' Exhibit D, p. 102). Dr. Parsons' report indicates that the Claimant was under a 15 lbs. maximum restriction at that time.

Joseph Blythe Job Demands Analysis (JDA)

40. Joseph Blythe testified at hearing. He is a vocational evaluator and a certified rehabilitation counselor (CRC). He is registered with the Dept. of Labor in Colorado, and is also certified by the U.S. Department of Labor. He has done social security work for 20 years. Blythe started performing job analyses in 1986, while writing rehabilitation plans for the State of Colorado. Blythe estimated that he had performed around 2,000 JDAs. Blythe was accepted as an expert in the areas of vocational evaluations and job demand analyses – including the evaluation of job tasks.

41. Blythe performed a JDA in this case on October 14, 2015 (Respondents' Exhibit K). Rick Hillier and William Gioia met with Blythe at the Employer's job site on the morning of October 14, 2015. Hillier confirmed that Blythe signed in at 7:00 AM, and that he and Gioia then escorted Blythe to the MS1 area. Blythe observed a full work cycle (completion of a main shaft) in MS1. He signed out at 10:30 AM. Blythe's report reflects: "Information gathered for this report was obtained from Mr. Rick Hillier, HSE Specialist, and this evaluator's on-site evaluation by observing an alternate worker

complete the same work tasks [Claimant] was undertaking during the period under review. One work cycle was studied for this Risk Factors Assessment" (Respondents' Exhibit K, p. 247).

42. When asked how he obtained the information of the job description listed at the beginning of his report, Blythe explained that it was from the written job description, information from the Employer, and his own observations during the JDA. Blythe was asked how he arrived at the job classification of "Medium," noted in his report. He explained that the classification is based upon the U.S. Department of Labor Guidelines, as well as the Dictionary of Occupational Titles (DOT).

43. Claimant's contends that Blythe's analysis was flawed because he did not observe the Claimant performing the job, or have the Claimant present at the time of JDA so that Claimant could describe to him how he had **personally** performed the job. Blythe explained that a correct JDA, it is not based on describing the job. Rather, it is based on doing/watching. Everything is time based. As long as the worker observed was undertaking a complete work cycle, Blythe explained that is what he needs to see. Blythe confirmed during his testimony that he observed one worker for the entire cycle. He explained that he used three stop watches during the JDA: one to time force, one for handling, and one for awkward posture. If the Claimant had performed the work differently or at a different rate of speed than what Blythe observed, Blythe said that it could "possibly" affect his numbers – but cautioned that this could work both ways. For example, if the Claimant was more efficient and worked quicker when he had performed the job tasks in MS1, the 10 pound lift number might go up – but the **force** number would actually go down if he worked more quickly.

44. At the time that Blythe performed the JDA, the Claimant was under a 15 lbs. restriction from Dr. Parsons. Blythe explained that even if Claimant had been present for the JDA, he would not have been able to physically demonstrate the job tasks. Blythe explained that if an individual is under work restrictions, it is his policy not to observe the injured worker unless the injured worker is able to do the tasks he did during the time period under review.

45. Although the Claimant was not present at the time of the JDA in October 2015, Rick Hillier and William Gioia indicated that they had no concerns that job tasks being performed in MS1 that day and observed by Blythe differed in any way from what the Claimant would have previously performed. Hillier and Gioia noted that the Employer's site is an assembly plant and that the substantive job tasks in the assembly process have not changed.

46. During the JDA, Blythe assessed the physical demands of the job tasks and their frequency (Respondents' Exhibit K, pp. 238-242). During his testimony, Blythe further explained how he arrived at the findings under the various sections of his report. Regarding the "Force/Exertion" section of his report, he explained that the measuring of

force is stop watch dictated (Respondents' Exhibit K, p. 242). During the one full cycle time observed, Blythe explained that there was nothing that fits within the force category at the specific levels and times discussed.

47. Blythe was present in the courtroom to hear Claimant's testimony**.** He also reviewed Claimant's Exhibit 25, which contained Claimant's handwritten changes on the JDA report. Blythe was asked how the net result of his analysis might change if the Claimant were given the benefit of the doubt of every single handwritten change made on Claimant's Exhibit 25. Blythe explained that the only thing that he could see that might change would be the amount of force time. Claimant agreed with him on the lifting, but not on the amount of time for carrying. Blythe explained that once an object is lifted, you look at the amount of time that the object is carried. That is "force time". If Claimant were carrying the weight for longer periods of time, the force time would increase.

48. Blythe noted that the Claimant had listed pushing/pulling of 200 lbs. on Exhibit 25. Blythe explained that he had used a force meter during his analysis, and the level of force suggested by Claimant was not present with the pushing and pulling of the cart. The ALJ finds that the Claimant's lifting description, in light of the totality of the evidenced, is not credible.

49. On cross-examination, Blythe provided further testimony regarding his methodology and report. He explained that his report is divided in "Part A" and "Part B". He explained that "Part A" is done the way he did job analyses when working as a vocational counselor. "Part B" is based on part of Rule 17, which includes 5 categories: force, awkward positioning, computer work, vibration, and cold environment. He confirmed that this information comes from Rule 17, Exhibit 5, of the Medical Treatment Guidelines for cumulative trauma disorders, 7 CCR 1101-3.

50. Claimant's counsel suggested on cross-examination that Blythe's JDA did not include an evaluation for stress on the shoulder because Blythe did not specifically use Rule 17, Exhibit 4. Blythe disagreed. He explained that although he did not use Rule 17, Exhibit 4, of the Medical Treatment Guidelines which discusses the shoulder, his assessment considered activities that put stress on the shoulder – including measurements of force, hand held tools, and pushing/pulling. On re-direct, Blythe further explained what observations he made during his JDA regarding physical activities involving the shoulder. His report addresses 3 types of reaching involving the shoulder: reaching above shoulder level, reaching below the shoulder, and reaching at the shoulder. He explained that this identifies how much time the worker's shoulders were out of a neutral position within those ranges. The frequency for the activity of reaching above shoulder level was noted to be "Rare" (<10%).[Respondents' Exhibit K, p. 239]. Reaching below the shoulders was documented as "Frequent" (34-66%). Reaching at the shoulder level was "Occasional" (10-33%). The fact that Blythe did not

utilize Rule 17, Exhibit 4, of the Medical Treatment Guidelines does not mean that he did not evaluate stress on the shoulder as part of his JDA.

51. The assessment for gripping was "Occasional"(10-33%). Claimant's use of impact tools was "Rare" (<10%). Exposure to vibration was also "Rare" (Respondents' Exhibit K, p. 241). Blythe's findings from his risk factor assessment of force and repetition/duration do not support a hazardous exposure level; nor did the findings from assessment of awkward posture and repetition/duration (Respondents' Exhibit K, pp. 242-246). On re-cross, Claimant's counsel inquired whether Blythe's JDA had measured the level of force for the "scrubbing" task performed in MS1. Blythe confirmed that he had measured the level of force with this activity, which was 17-38 lbs. of force of pulling for the "wax on/wax" off activity.

Further Medical

52. The Claimant underwent a MRI (magnetic resonance imaging) arthrogram of his right shoulder on November 19, 2015. The findings included a full thickness tear of the distal supraspinatus tendon and moderate acromioclavicular joint arthritis (Respondents' Exhibit R, pp. 370-372).

53. On November 19, 2015, Dr. Parsons responded to correspondence from the claims representative and provided her current opinion of medical causation in this case. Dr. Parsons wrote: "I have reviewed the JDA on [Claimant] as well as the Rule 17 Cumulative Trauma Guidelines. I do not find any primary risk factors or any secondary risk factors in this job description that would serve to support a more than 51% probability that the bilateral epicondylitis, bilateral carpal tunnel syndrome, and bilateral shoulder injuries are due to his job activities. I would recommend that [Claimant] be discharged from the workers' compensation system and follow-up with his PCP" (Respondents' Exhibit D, p. 121).

Respondents' Independent Medical Examination (IME) by Jon Erickson, M.D.

54. Dr. Erickson is board certified in orthopedic surgery and is level II accredited. He was accepted as an expert in orthopedic surgery and the evaluation of work-related phenomena. Dr. Erickson evaluated the Claimant on April 11, 2016 at the request of Respondents (Respondents' Exhibit L). The appointment was audio recorded. Dr. Erickson confirmed that the appointment lasted 1 hour and 5 minutes. He personally asked the Claimant about his job duties, which are discussed in detail in Dr. Erickson's report (Respondents' Exhibit L, p. 256). The discussion included representations by the Claimant concerning the amount of time that he spent to clean the rust inhibitor off the main shaft, both at waist level and when the main shaft was raised overhead. The Claimant told Dr. Ericson that the cleaning on the palate took between 10-20 minutes and the cleaning overhead took 5-15 minutes (Respondents' Exhibit L, p. 256). Dr. Erickson also reviewed Joseph Blythe's JDA report. Based on

Claimant's description of his job duties as well as the JDA performed by Blythe, Dr. Erickson was of the opinion that primary or secondary risk factors had not been identified to substantiate an occupationally based cumulative trauma disorder. Dr. Erickson discussed Rule 17, Exhibit 5 of the Medical Treatment Guidelines. Besides the lack of occupational risk factors, Dr. Erickson was of the opinion that the Claimant had not been performing the alleged repetitive activities for a sufficient duration of time. Dr. Erickson cited several medical literature sources at the end of his IME report, including the *AMA Guides to the Evaluation of Permanent Impairment,* 3rd ed., Rev.,, the Medical Treatment Guidelines (including both Rule 17, Exhibit 5 and Rule 17, Exhibit 5), a NIOSH study (which he described as the "gold standard" for occupational medicine), and other sources. Dr. Erickson noted that the NIOSH study identifies occupational risk factors for the shoulder for an occupational disease. Dr. Erickson testified that he recalls asking Claimant about the extent of his overhead activities at work. The Claimant indicated that those activities were minimal to mild. The Claimant would go into an overhead position to clean the bottom 15-20% of the shaft. According to Dr. Erickson, that the only real occupational risk factor for disease in the shoulder for which there is strong evidence is awkward posture and repetition/duration.

55. According to Dr. Erickson, even if Blythe's JDA report was not accurate, it still would really not make a significant difference. Dr. Erickson stated: "We are not really even in the ballpark of an occupational disease in this case." He indicated that there is really nothing in Rule 17, Exhibit 4 discussing the shoulder that would alter the outcome of the JDA by Blythe.

56. Dr. Erickson agrees with Dr. Parsons and Dr. Anderson-Oeser that Claimant's upper extremity conditions are not work related.

57. Dr. Erickson rendered opinions regarding the Claimant's IME report of Edwin M. Healey, M.D., as well as regarding Dr. Healey's testimony. Dr. Healey had indicated that Claimant has a type 2 acromion (a down sloping acromion). Dr. Healey had suggested that this down sloping acromion is associated with impingement syndrome, and that the Claimant was at risk for developing bilateral shoulder impingement and rotator cuff tendinopathy and tears (Respondents' Exhibit M, p. 293). Dr. Erickson indicated the notion of subacromial impingement syndrome does not necessarily correlate with rotator cuff syndrome. Dr. Erickson does not believe that Claimant was predisposed to developing an occupational disease in the shoulder, as suggested by Dr. Healey. Dr. Erickson agreed with Dr. Healey's testimony to the extent that Dr. Healey was of the opinion that the Claimant's bilateral rotator cuff tears and impingement syndrome pre-existed his employment with the Employer herein.. Based on the Medical Treatment Guidelines as well as Blythe's JDA, Dr. Erickson is not persuaded that Claimant's pre-existing shoulder condition was aggravated or accelerated by his employment with the Employer.

58. Dr. Erickson explained that if the Claimant's bilateral upper extremities were work related, he would have expected his symptoms to improve when he was doing light duty or after he stopped working for the Employer. Yet, the Claimant was reporting a pain level of 9/10 to Dr. Robinson in late September 2016 – several weeks after he had stopped working for the Employer.

Claimant's IME by Edwin M. Healey, M.D.

59. Claimant was evaluated by Dr. Healey on May 27, 2016 at the request of Claimant's counsel (Respondents' Exhibit M). During his testimony, Dr. Healey rendered opinions as to causation of the Claimant's wrist condition, elbow condition, and shoulder condition. Dr. Healey was of the opinion that the Claimant's elbow condition (bilateral epicondylitis) is **not** work related within a reasonable degree of medical probability; the wrist condition (mild bilateral carpal tunnel) is **probably** work related; and, the bilateral shoulder condition is work-related. Dr. Healey indicated that the Claimant had a pre-existing shoulder condition but that his job duties aggravated or accelerated the need for shoulder surgery. Dr. Healey cited no medical literature in his report.

Additional Chronology

60. On June 23, 2016, while the Claimant was still working at for the Employer, he started working for another company, Aspen Linen Company, LLC, which is an industrial laundry service. Wage records reflect that the Claimant was working between 24 ½ - 40 hours per pay period (Respondents' Exhibit V).

61. On August 6, 2016, Dr. Euser (PCP) from Platte River Medical Clinic issued a note addressed "To whom this may concern:" "I saw [Claimant] in the office today and due to his *personal injuries* is on some work restrictions. Patient is unable to lift more than 5 lbs, is unable to lift arms above his head and no use repetitive motions…" (Respondents' Exhibit P, p. 354). This note contradicts Dr. Euser's opinion of November 20, 2014, as illustrated in Finding No.26 herein above. Claimant argues that Dr. Euser must have mis-spokne on August 6, 2016, when he noted that the Claimant's visit was for his **personal** injuries. Interestingly, Dr. Euser repeats the same basic work restrictions that he gave the Claimant on November 20, 2014, which the ALJ infers and finds was not Dr. Euser mis-speaking. The ALJ infers and finds that Dr. Euser has demonstrated that he knows the difference between **work-related and personal** injuries. Indeed, Dr. Euser's last characterization of the Claimant's injuries is "personal" injuries. For this reason, the ALJ finds the August 6, 2016 note of Dr. Euser more credible than his November 20, 2014 note.

62. On August 8, 2016, Dr. Anderson-Oeser directed correspondence to the claims representative at Pinnacol: "…*I initially saw the patient on March 16, 2015. At that time he informed that his job activities included repetitive type activities…I did not*

have a job description analysis to determine whether or not the patient was in fact performing excessive repetitive type motions that would cause his upper extremity symptoms. I recently received the Independent Medical Evaluation performed by Dr. Jon Erickson on 04/11/2016. There apparently has been a job description analysis performed and based on the analysis the patient does not meet the criteria for cumulative trauma disorder. Dr. Erickson noted multiple discrepancies in the medical records regarding the patient's overall complaints and physical exam findings. He also noted that the patient had been placed on substantial work restrictions and despite this his pain did not significantly improve; therefore, a causal relationship between his work and upper extremity symptoms could not be made. After reviewing the job demands analysis and Dr. Erickson's report, it is my opinion that within a reasonable degree of medical probability that Mr. Salazar's upper extremity complaints were not caused or aggravated by his work activities…" (Respondents' Exhibit F, p. 185).

63. The Claimant went on FMLA (Family Medical Leave Act) leave from the Employer in mid-August 2016. At that time, he began receiving short term disability (STD) benefits. The Employer's disability policy is administered by Unum (Respondents' Exhibit W). In addition to receiving STD benefits, **the Claimant has continued to work for Aspen Linen Company.** He was vague about his job duties there but he implied that they were lighter than his job duties for the Employer.

64. The Claimant was evaluated by Mitchell S. Robinson, M.D., at Panorama Orthopedics on September 26, 2016 (Respondents' Exhibit S). The Claimant's PCP, Dr. Euser, referred him to Dr. Robinson. Dr. Robinson noted: "…presents to clinic today for evaluation of his bilateral shoulder pain. He states that his symptoms have been ongoing since October 2014. He does not recall one specific event. He believes his pain is a cause of repetitive movement. He notes that his pain is a 9/10 … His pain is worsened with pushing, pulling, lifting, and activities for an extended period of time…" (Respondents' Exhibit S, p. 380). When the Claimant was reporting a pain level of 9/10 (close to the unbearable level), he was working at Aspen Linen. He had stopped working for the Employer nearly 6 weeks earlier. The ALJ finds the Claimant's reported pain level of 9/10 lacking in credibility.

65. The Claimant underwent right shoulder surgery on November 4, 2016 with Dr. Robinson (Respondents' Exhibit T). The Claimant's surgery was covered under his private health insurance, United Healthcare. He has been attending physical therapy post-operatively (Respondents' Exhibit V). Since the surgery, the Claimant has continued to work for Aspen Linen.

Employer Witnesses

66. William Gioia has been employed as a Production Team Leader with the Employer for approximately 7 years. His job duties include, among other things, the supervision of two of the production assembly areas: The Drive Train Zone (which includes BH1, MS1, MS2, and MS3); and the Hub Zone. Gioia was the Production Team Leader of the night shift from late 2014 – July 2015. The night shift is 4 days a week, 5:00 PM – 3:30 AM. Employees on the night shift are given two 15 minute breaks, a 30 minute lunch break, and a 6 minute stretch break. Gioia switched over to Team Leader for the day shift in July 2015, when an opening arose. Gioia confirmed that he was the Claimant's Production Team Leader for approximately 9 months. Gioia is personally familiar with the MS1 area. He indicated that the Claimant worked in the MS1 area from approximately September 2014 until late spring or early summer of 2015. Gioia explained that production assemblers are cross-trained. For example, if you are in MS-1, you are cross-trained in BH1, MS2, and MS3. That way, the employees are able to move back and forth between the areas to provide assistance when needed.

67. Gioia was asked how production levels are tracked by the Employer. He explained that a weekly report is sent out regarding production build plans. It is also available to the employees on a large television screen. According to the Claimant, he was completing between 3-4 main shaft units per shift in MS1 in the fall of 2014. According to Gioia, this information was **not** correct: In the fall of 2014, MS1 was producing anywhere between 1 to 2 ½ main shaft units. This is documented in production build plans. Gioia confirmed that he does have personal knowledge of the build plan numbers because he is the one that sets the pace. When asked specifically about the month of November 2014, Gioia confirmed that 2 ½ units were being completed per shift in MS1. Gioia indicated that during the last two weeks at 2014 and the first week of 2015 no units were produced in MS1. He explained that for the 2 of the 3 weeks, the company was shut down for the holidays.

68. Gioia offered testimony to refute the Claimant's assertion that the Claimant was the only production assembler working in the MS1 area during the time frame of September 2014 through February 2015. Gioia explained that he is able to determine the number of employees assigned to an area because Team Leads look at labor transactions every day: At the beginning of each shift, employees add "job on" work on to the manufacturing orders for the area they are working on. That is tracked on a weekly basis. According to Gioia, there were 2 people assigned to the MS1 area between September 2014 and February 2015. Gioia explained that BH1 and MS1 work in parallel. He testified that there were 2 employees in BH1 and 2 employees in MS1. On occasion according to Gioia, there would be 3 employees total assigned to the 2 areas, and they could move back and forth as necessary. Gioia was asked about the Claimant's testimony that the MS1 area had been short staffed in November 2014.

Gioia stated that they were actually overstaffed in light of their low production rate at that time.

69. Gioia was asked about the job task of cleaning rust inhibitor off of the main shift, using a “wax on/wax off” motion. Gioia stated that although he has not personally performed that job task, he has observed that job task being performed hundreds of times. He agreed with the general description provided by Claimant of the wax on/wax off motion. Gioia was asked how much time that task would be performed at waist level. He said on average, 10 minutes. On occasion, it may take 15 minutes. According to Gioia, the overheard work involved in cleaning the underside shaft, takes approximately 3 to 5 minutes to clean the underside shaft.. Gioia stated that Yamazumi charts are posted on the production floor. These charts are an aid for the Team Leader, QPI, (Quality Processing Inspector) or even a team member to determine how long a task should take. Prior to being a Team Leader, Gioia was a Production Engineering Technician. As the Engineering Technician, it was his job to do the time studies.

70. Gioia explained Claimant’s Exhibit 24, which was the set of photocopies. He indicated that the photo labeled as page # 6 of Exhibit 24 shows an individual cleaning the bottom portion of the main shaft, removing the rust inhibitor. Gioia confirmed that the height of the main shaft can be adjusted, to be raised or lowered to the height that is most comfortable to the individual. Gioia explained how the cleaning of the rings in MS1 differs from the cleaning of the main shaft. The cleaning of the front contact seal ring and the rear contact seal ring is quite easy, according to Gioia. They are packaged with oil, which is wiped off easier without much force. According to Gioia, it takes approximately 1 to 1 ½ minutes to clean the oil off the rings and there are 3 rings per main shaft. According to Gioia, cleaning of the rings does not involve any overhead work. Gioia was also asked about the top page of Exhibit 24, where the Claimant had written weights next to the 3 rings. According to Gioia, the weight of 40 lbs., listed for the front ring is incorrect. The actual weight of that ring is 33.2 lbs.

71. Gioia explained that after a ring is heated to appropriate temperature, a buzzer goes off. The ring is then lifted via a two person lift onto a cart and is then wheeled over to the main shaft. Gioia agrees with the Claimant’s description of then “threading the needle” of the rings onto the main shaft. Gioia was asked how long it takes to “thread the needle” and place a ring onto the main shaft. He indicated that the front ring would take the longest, which would be 20-30 seconds. The other two rings would take 15-20 seconds to place. While a ring is heating, Gioia indicated that the employees in MS1 may be cleaning up trash in the area or preparing the next ring to be heated. They may also just be standing around.

72. Gioia commented on the Claimant’s testimony regarding an impact driver to place bolts into sockets in the MS1 area. According to Gioia testified that this task would take between 3 and 4 minutes per cycle.

73. Gioia testified regarding pages #9 and #10 of Exhibit 24. He explained what tasks were being performed on the 2 pages, which are performed in BH1. Gioia testified that the task portrayed on page 9 (putting in the pins in) takes 5-10 seconds per cycle.

74. When he was the Production Team Leader on the night shift, Gioia was made aware of the Claimant's work restrictions. Gioia personally discussed the restrictions with the Claimant and worked with him to accommodate those restrictions. Gioia would remind the Claimant not to lift anything, for example, exceeding his weight restriction in place at that time. According to Gioa, the Claimant was aware that other individuals were always available to assist him – whether it be another person assigned to MS1 or BH1, or a QPI. Gioia made sure Claimant understood that he was only to do tasks that he was comfortable performing. According to the Claimant, he had to work alone on many occasions. The ALJ resolves this conflict in the testimony in favor of Gioia because Gioia's testimony is consistent with the totality of the evidence and the Claimant's testimony in this regard is not persuasively corroborated or cionsistent with the totality of the evidence.

75. Gioia indicated that while the Claimant was under restrictions, he was allowed to do other light tasks such as QDA (inspections), do keyboard entries, or do craning with an electronic remote control or be a spotter for someone else doing craning. He also laid wires in a cabinet. The Claimant was allowed to sit on a stool for that task. The height of the stool could be raised and lowered as desired. According to Gioia, the Claimant never suggested to him that his work restrictions were not being followed.

76. Gioia met with Joseph Blythe and helped set him up in MS1. He also reviewed Blythe's report. According to Gioia, the JDA report accurately depicted the job duties of a production assembler in the MS1 area. Gioia confirmed that the work content in MS1 has not changed in the time frame that he has worked at the factory. The Claimant's version of his job duties differs from Gioia's version. The ALJ finds Gioia's version of the job duties supported by the totality of the evidence, whereas the Claimant's version is **not** persuasively supported by extrinsic evidence.

77. Craig Aragon, a witness presented by the Respondents, testified that he has been employed with the Employer since October 2010. From October 2010 - July 2015, he worked as a Quality Processing Inspector (QPI). From July 2015 to the present, Aragon has been a Production Team Leader on the night shift. He is personally familiar with the MS1 area. Aragon confirmed that William Gioia was the Production Team Lead on the night shift immediately prior to him. Aragon assumed the role of Team Lead on the night shift when Gioia moved to the day shift, after a Team Lead position opened up there. Aragon confirmed that he was the Claimant's supervisor on the night shift from July 2015 – August 2016, and that the Claimant was a "direct report" to him. Aragon would regularly see the Claimant during the night shift, both at the

beginning of the shift as well as when he made his rounds throughout the night. Aragon was aware of the Claimant's pending worker's compensation claim. Aragon confirmed that the Claimant was working light duty throughout the time frame July 2015 – October 2016, when he was the Claimant's supervisor. When asked about the light duty that Claimant was performing, Aragon testified that he had the Claimant doing "review work" or quality inspections – including quality data entries. The Claimant would type on a keypad and do visual inspections. According to Aragon, the Claimant never suggested from July 2015 – October 2016 that his work restrictions were not being accommodated. Aragon confirmed that the Claimant last worked for the Employer in August 2016, but was uncertain of the exact date. On cross examination, Claimant's counsel asked if the Claimant was also training other employees on occasion in the MS1 or MS2 areas during that time span of July 2015 – August 2016. Aragon indicated that Claimant may train with verbal training instructions. According to Aragon, to his knowledge, the Claimant never did any "hands on" training in MS1 or MS1 during the time frame of July 2015 – August 2016. Any training would have been limited to verbal instructions.

Claimant's Testimony

78. According to the Claimant, the heavier rings were lifted with the crane. But he lifted the 3 rings manually and he used the crane to lift the heavier bearings.

79. The Employer's official Job description states that employees "must occasionally lift and/or move up to 50 pounds" (Respondents' Exhibit O, p. 330). The job description was given to the Claimant and he signed for it on June 23, 2014 upon officially being hired by the Employer. Claimant and Ian Dereus testified that the rings were installed by hand as a single person lift because it was difficult to "thread the needle" (shaft) without damaging the shaft of the nacelles. When clarification was requested concerning whether this changed to a two man job, the Claimant stated that it was not until 2015. The ALJ finds that the totality of the evidence concerning actual job tasks, especially when the Claimant was performing modified duties, differs from the official description.

80. According to the Claimant, Gioia may have stated that he was willing to make accommodations but, according to the Claimant, the Employer was provided with the medical restrictions from ICC, yet they continued to assign him to the MS1 area, which required him to perform allegedly repetitive motions and lifting above 5 lbs. The Employer witnesses dispute that Claimant was required to violate his medical restrictions. Indeed, the JDA, the Respondents' medical experts, and the Employer's witnesses have all indicated that the Claimant's job duties after his restrictions werw modified and/or help was available. The ALJ finds the former witnesses more credible and persuasive than the Claimant in this regard.

81. The Claimant contends that he did **not** discontinue the repetitive activities until he was taken off the MS1 assignment in July 2015 (8 months after being prov*ided* with restrictions). The ALJ infers and finds that the totality of the evidence, especially the weight of credible medical opinion, does **not** support that the Claimant was performing injurious **repetitive** activities during these eight months. .

82. Dr. Primack was of the opinion that the Claimant's problem had been "insidious" in onset. "Insidious" means that it proceeded in a gradual, subtle way, but with harmful effects. *Oxford Dictionary, Oxford University Press.* This opinion can support a "natural progression" of an underlying, pre-existing condition theory, however, it adds **nothing** to the theory of "aggravation and acceleration" of a pre-existing condition.

83. The Claimant argues that the evaluation by Joseph Blythe, who observed a full work cycle as it was being performed by several workers in MS1 one year after the Claimant was injured was somehow defective because it was done a year later. There is no credible support for this argument in the totality of the evidence, other than Claimant's unsupported testimony in this regard. The Claimant makes a point that Blythe did not observe how the work was being performed by Claimant. This argument creates a Catch-22 situation because the Employer cannot have a restricted worker doing tasks from which he is restricted. Blythe did he ask the Claimant how he performed the job, however, Blythe heard the entirety of the Claimant's testimony wherein the Claimant described how he performed his job and Blythe did not change his opinion nor did he indicate that this affected the results of the JDA.. According to the Claimant and Dereus, the Claimant was performing the job on his own, without assistance, with the exception of the craning, from August 2014 through February 2015, when Dereus joined him in the MS1 area.

84. Blythe used a force meter to determine the force of pushing the cart with the bearing cover. On cross examination, however, Blythe indicated that he had only one bearing cover on the cart. According to the Claimant, he would load up to 4 bearing covers on the cart. The Claimant's testimony in this regard does not persuasively refute the results of Blythe's JDA.

85. The Claimant downplayed the fact that he continued playing softball, working on cars and working at the Alpine Laundry. He could not recall the effects of a prior auto accident. At the time of his post-offer employment physical on January 3, 2014, which was required by the temporary staffing agency. the findings on physical examination included decreased range of motion in both shoulders [Respondents' Exhibit O, p. 322]. Crepitus was noted in the right shoulder as well as the right hand/wrist [Respondents' Exhibit. O, p. 324]. The Claimant was noted to have decreased range of motion with extension in both the cervical and lumbar spine. According to the Claimant's testimony, he had no problems prior to claiming a work-related occupational disease to the shoulder, elbows and writs. All of this adds up to a

olack of credibility in the Claimant's claimed occupational disease, allegedly aggravated and accelerated by the conditions of his employment, to which he would not have been equally exposed outside of work.

Claimant's Rebuttal Witness

86. Ian Dereus was called as a rebuttal witness by the Claimant. Dereus testified by telephone. Dereus began working at for the Employer in September 2014. He initially worked in BHI (Bearing House 1). Dereus thought that he worked in BH1 until February 2015, when he was reassigned to MS1. According to Dereus, he trained with the Claimant in MS1 on the night shift. Dereus thought that the Claimant worked in MS1 until the middle or the beginning of 2016. Claimant also asked Dereus about job tasks in the MS2 and MS3 areas. Dereus was asked on direct exam how many units he thought he would typically compete in a shift "including reworks and prototypes", and he said that the number was 4 ½ - 5 units per shift. Dereus suggested that now the number of main shafts completed per shift is less. Dereus' testimony regarding the number of units completed per shift in the fall of 2014 is in conflict with the testimony of both the Claimant and Gioia. When asked if it is common practice for employees working in either BH1 or MS1 to move back and forth when needed, Dereus agreed – but said that in the fall of 2014 they were "completely short staffed at the time." His testimony in this regard is in conflict with the testimony of William Gioia. When asked on cross exam if 20 main shafts were being produced per week in the fall of 2014 (4 per day), Dereus testified that he thought it was more than that – but he could not provide a number. Dereus said that when he was training with Claimant in the MS1 area, he was physically helping the Claimant perform the job duties in MS1. The time frames referenced by Dereus during his testimony were confusing: At one point, he said that he worked with Claimant in MS1 from February 2015 until 2016. This is in conflict with Craig Aragon's testimony that the Claimant was performing light duty from July 2015 – August 2016, which included quality inspections. The ALJ resolves this conflict in favor of Craig Anderson's testimony because it is more detailed and consistent with the totality of the evidence. On cross-exam, Dereus then said that after Claimant "got hurt", the Employer "put him just doing QDA, they put him in MS3." Dereus acknowledged that when the Claimant was doing QDA, the Claimant's role in MS1 was limited to the Claimant being a "spotter" for crane work. This corroborates Anderson's and Gioia's testimony. Dereus also testified on cross-exam that when he was still working in BH1, he would move over or help out to MS1 and help Claimant out – including cleaning of the main shafts and rings for Claimant. Claimant's counsel asked Dereus on direct exam about "prototypes". When asked on cross-exam if he agreed that there was only one prototype at the Employer's site, Dereus said he didn't know. Overall, the ALJ does not find Dereus' testimony regarding production levels credible because it is contrary to the totality of the evidence and sometimes contradicted by the Claimant's testimony. Dereus' testimony concerning the Claimant's light duty job duties is corroborated by the totality of the evidence and, therefore, credible.

Ultimate Findings

87. As found herein above, the expert opinions of IME Dr. Erickson, Dr. Anderson-Oeser, and Dr. Parsons are more persuasive and credible than opinions to the contrary, which are cursory and without persuasive supporting reasoning. In fact, Dr. Euser essentially contradicted his November 20, n2014 opinions in his August 6, 2016 note. Indeed, Dr. Erickson credibly addressed Blythe's JDA, whereas other experts did not deal with the JDA. Indeed, as found herein above, Blythe's JDA is credibly supported by all of the Employer's witnesses and it has not been persuasively undercut by the Claimant's arguments, which are based on the Claimant's self serving description of how he did his job in a manner different than the way it was meant to be done and in a manner that does not make a lot of sense in light of the totality of the evidence.. Indeed, the totality of the Claimant's testimony contains inconsistencies and anomalies that the Claimant failed to persuasively resolve. For these reasons, the ALJ does **not** find the Claimant's testimony persuasive or credible.

88. The Claimant's expert IME, Dr. Healy, was of the opinion that the Claimant's elbow condition (bilateral epicondylitis) is **not** work related within a reasonable degree of medical probability; the wrist condition (mild bilateral carpal tunnel) is **probably** work related; and, the bilateral shoulder condition is work-related. Dr. Healey indicated that the Claimant had a pre-existing shoulder condition but that his job duties aggravated or accelerated the need for shoulder surgery. Dr. Healey cited no medical literature in his report. Dr. Healy's overall opinions were lukewarm and unsupported by any persuasive reasoning. From a medical standpoint, the ALJ finds that the ultimate opinions of IME Dr. Erickson, Dr. Parsons and Dr. Anderson-Oeser are essentially dispositive of the lack of compensability of a work-related occupational disease.

89. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the ultimate opinions of Dr. Erickson, Dr. Parsons and Dr. Anderson-Oeser on causality; and, to reject the opinions of Dr. Healey and all other opinions to the contrary.

90. The Claimant's theory of compensability of an alleged occupational disease is that the Claimant's job duties with the Employer aggravated and accelerated his pre-existing shoulder, elbow and carpal tunnel conditions. As found, the Claimant underwent a post-offer employment physical on January 3, 2014, which was required by the temporary staffing agency. The findings on physical examination included decreased range of motion in both shoulders [Respondents' Exhibit O, p. 322]. Crepitus was noted in the right shoulder as well as the right hand/wrist [Respondents' Exhibit. O, p. 324]. The Claimant was noted to have decreased range of motion with extension in both the cervical and lumbar spine [*Id.* p. 324]. Despite these findings, the Claimant was allowed to do his job and continued doing his job until medical restrictions were

placed on him. On June 23, 2016, while the Claimant was still working at for the Employer, he started working for another company, Aspen Linen Company, LLC, which is an industrial laundry service. He continues to work at Aspen Linen Company, OLLC. Wage records reflect that the Claimant was working at Aspen Linen between 24 ½ - 40 hours per pay period. The Claimant has continued playing softball and he has continued doing substantial work on cars. He downplayed any potential adverse effects from all of these activities. He could not recall the effects of an auto accident in which he was involved, prior to November 2014.

91. It is the Claimant's burden to prove, by preponderant evidence (that it is more likely than not) that his job duties with the Employer caused an aggravation and acceleration of his pre-existing bilateral shoulder, elbow and wrist conditions, which resulted directly from his employment or the conditions under which his work was performed, which followed as a natural incident of the work and as a result of the exposure occasioned by the nature of his employment, and which can be fairly traced to his employment as a proximate cause of the alleged aggravation and acceleration and which does **not** come from a hazard to which he would have been **equally** exposed outside of the employment. Without corroboration, the Claimant claims to have done his job differently than the Employer witnesses and the official job description indicate how it should be done and, if done, as the Employer witnesses said it should be done it would not cause an aggravation and acceleration of the Claimant's bilateral shoulder, elbow and wrist conditions, as supported by the JDA, Dr. Erickson, Dr. Parsons and Dr. Anderson-Oeser. As found, the Claimant was not credible in his job description. For these reasons, the Claimant has failed to prove that it is more likely than not that his job duties with the Employer aggravated and accelerated his pre-existing, bilateral shoulder, elbow and wrist conditions, as opposed to factors outside of work. Therefore, the Claimant has failed to prove a compensable occupational disease by a preponderance of the evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines

the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the expert opinions of IME Dr. Erickson, Dr. Anderson-Oeser, and Dr. Parsons were more persuasive and credible than opinions to the contrary, which were cursory and without persuasive supporting reasoning. Dr. Euser essentially contradicted his November 20, 2014 opinion in his note of August 6, 2016, by characterizing the Claimant's injuries as **personal.** Indeed, Dr. Erickson credibly addressed Joseph Blythe's JDA, whereas other experts did not persuasively deal with the JDA. As found herein above, Blythe's JDA is credibly supported by all of the Employer's witnesses and it was not persuasively undercut by the Claimant's testimony and/or arguments, which were based on the Claimant's self serving description of how he did his job in a manner different than the way it was supposed to have been done in light of the totality of the evidence. As found, the totality of the Claimant's testimony contained many inconsistencies, anomalies and painted an overall picture that did not add up. For these reasons, the ALJ did **not** find the Claimant's testimony persuasive or credible.

b. The Claimant's expert IME, Dr. Healy, was of the opinion that the Claimant's elbow condition (bilateral epicondylitis) was **not** work related within a reasonable degree of medical probability; the wrist condition (mild bilateral carpal tunnel) was **probably** work related; and, the bilateral shoulder condition was work-related. Dr. Healey indicated that the Claimant had a pre-existing shoulder condition but that his job duties aggravated or accelerated the need for shoulder surgery. As found, Dr. Healey cited no medical literature in his report. Dr. Healy's overall opinions were lukewarm and unsupported by any persuasive reasoning. From a medical

standpoint, the ALJ found that the ultimate opinions of IME Dr. Erickson, Dr. Parsons and Dr. Anderson-Oeser were essentially dispositive of the lack of compensability of a work-related occupational disease. As found, Dr. Euser contradicted his November 20, 2014 opinion, concerning work-relatedness, in his note of August 6, 2016, wherein he characterized the Claimant's injuries as **personal**.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the ultimate opinions of Dr. Erickson, Dr. Parsons and Dr. Anderson-Oeser on causality; and, to reject the opinions of Dr. Healey, the November 20, 2014 opinion of Dr. Euser, and all other opinions to the contrary.

Occupational Disease

d. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). As found, the Claimant's job duties with the Employer did not cause an aggravation and acceleration of his pre-existing bilateral shoulder, elbow and wrist conditions, which resulted directly from his employment or the conditions under which his work was performed, which followed as a natural incident of the work and as a result of the exposure occasioned by the nature of his employment. His bilateral shoulder, elbow and wrist conditions cannot be fairly traced to his employment as a proximate

cause of the alleged aggravation and acceleration, and the conditions do **not** come from a hazard to which he would have been **equally** exposed outside of the employment.

Compensability

e. A compensable injury, or occupational disease, is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a pre-existing condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a pre-existing condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant failed to prove that it is more likely than not that his job duties with the Employer aggravated and accelerated his pre-existing, bilateral shoulder, elbow and wrist conditions, as opposed to factors outside of work. Therefore, the Claimant has failed to prove, by a preponderance of the evidence, a compensable occupational disease.

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO),

March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to prove a compensable occupational disease arising out of his job duties with the Employer.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of March 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

I. Did Claimant prove by a preponderance of the evidence that her right shoulder condition is a compensable injury which occurred during the course and scope of her employment?

II. If such compensable shoulder injury occurred, has Claimant shown by a preponderance of the evidence that the medical benefits being sought, including the surgery proposed by Dr. Jinkins are causally related to, and reasonably necessary to treat Claimant's shoulder condition.

III. If such compensable shoulder injury occurred, did Claimant subsequently aggravate her compensable condition by moving her home in August, 2016, such that such aggravation constitutes a superceding, intervening cause which would thereby sever the nexus between her compensable injury and the medical benefits now being sought.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was injured on March 3, 2016 while working as a baker at King Soopers. The Claimant testified that at approximately 3:30 a.m., she was pulling a stack of 100 baking sheets when the top sheet flipped up causing her to lose her balance, stumble back and jerk her right shoulder backwards. The baking sheets had a lip around the edge of the sheets. The Claimant demonstrated at hearing that when the pan flipped up, she stumbled and her arm jerked backward while with her hand raised at or slightly above the height of her head.

2. She initially felt a pull in her right shoulder which the Claimant described as uncomfortable. After the incident, the Claimant testified that it "just didn't feel right". The Claimant explained that the stack of baking sheets sat on a four wheeled frame. She estimated that the stack was approximately two and a half to three feet high. She had to grab and pull on the lip of the top pan to pull the stack out from the table it rested against in order to then push the stack out the back door. These pans were then exchanged for new, clean ones which had arrived.

3. The Claimant testified that after the incident occurred, she continued to move the stack of dirty pans out through the back door of the bakery and then pulled in a new

stack. As she was doing this, she encountered Devin, the night crew foreman, who was one of her supervisors, at the bailer and told him that she thought she may have hurt her shoulder pulling the pans. He gave her no direction as to what to do so she continued working her shift. When her shoulder remained uncomfortable and still did not feel right, she paged Bryan, the general merchandise manager, who was also one of her supervisors.

4. This incident occurred in the middle of the night, and there were no co-workers in the bakery at the time. Her immediate bakery supervisor, Rodney Vanningen was not in the store. Therefore, she went to her other supervisors to report the injury. 5. After explaining to Bryan what happened, he told the Claimant that he needed to call Christine, one of the assistant store managers, at home to determine what to do next. He directed the Claimant to go upstairs to the break room and get some frozen peas to put on her shoulder. He told the Claimant to wait in the break room until he talked to Christine and received further direction as to how to deal with the issue. The Claimant did as she was told and stayed in the break room until approximately 8:00 a.m., waiting for Bryan to return. She testified that he came back once between 3:30 a.m. and 8:00 a.m. to check on her.

6. Claimant reasonably believed that she was to wait in the break room until Bryan came back or Christine began her shift and came to speak with her. When neither Bryan nor Christine returned, the Claimant went downstairs and learned that Bryan had left for the day and that Christine was not yet at work. Shannon Jones, the store manager, had come into the store at approximately 7:00 a.m. but had left for a manager meeting in Pueblo. She did not speak to Shannon about the incident because she assumed that Bryan had already spoken to him about it. She testified that she never saw Christine that day.

7. The Claimant then notified Curtis, the front end manager, of the incident. Curtis helped the Claimant fill out an incident report (Claimant's Ex 1). The Claimant was directed to seek care at Concentra if she felt like she needed to see a doctor. The Claimant testified that she had observed the same thing happen to her bakery manager, Rodney Vanningen, when he grabbed the lip of the top baking sheet and it slipped and flipped up when he attempted to pull the stack towards him. The ALJ finds that under the circumstances Claimant was under right after her injury, that she took all reasonable and appropriate steps to promptly notify her chain of command of this injury.

8. The Claimant testified that when her shoulder did not improve in the ensuing days, she sought treatment at Concentra. The Claimant saw Dr. Jones at Concentra on 3/7/16. Dr. Jones noted that the Claimant injured her shoulder "pulling a cart (on wheels) with a stack of baking sheets. While pulling backwards the top sheet popped off. To avoid it she jerked back with both arms though more the right. Sharp pain right shoulder more in post/triceps area. she is a little better, she does have hx of WC injury right shoulder/knee injury 1-14. The right shoulder healed with PT and no surgery. Right knee did require meniscal repair Dr. Simpson. The shoulder has done fine since."

9. Dr. Jones also noted that the history and mechanism of injury were obtained directly from the patient, unless otherwise noted, and appears to be consistent with presenting symptoms and physical exam. Dr. Jones referred the Claimant to physical therapy.

10. Claimant returned to work without restrictions. On 3/10/16, the Claimant was in the back freezer of the store while a vendor was delivering products, when a stack of boxes fell on her right shoulder and arm. Store management was notified of this occurrence. The Claimant didn't know if this incident made her shoulder condition worse, because her shoulder was still sore from the 3/3/16 incident.

11. On 3/10/16, the same day as the box incident, the Claimant was again seen at Concentra for her right shoulder pain. Dr. Jones noted on 3/10/16 that the Claimant was suffering from increased pain. He also noted the box incident and stated "unfortunately new injury right shoulder. States a stack of boxes fell on top of right shoulder while she was standing, now some increase in pain. States as above not much better anyway as was going to see me today anyway for something for pain. I placed her at MMI for today's injury right shoulder contusion". He further noted that the contusion from the boxes falling "obviously did not help. However, I do not believe that injury in itself will delay MMI of this injury". 12. Dr. Jones referred the Claimant to Dr Wiley Jinkins, an orthopedic surgeon, for treatment of her right shoulder pain. The Claimant underwent an MRI of her right shoulder on 5/4/16 which showed an oblique complete full-thickness tear of the supraspinatus begins just proximal to the footprint insertion and extends over a 22 X 19 mm area with mild reactive the muscle belly. Moderate severe infraspinatus and subscapularis tendinosis with areas of intrasubstance degeneration and fraying but no definable tear. It further showed moderate biceps tendinitis with chronic appearing moderate partial-thickness longitudinal tearing of the intra-articular segment. No subluxation of the tendon on these static images. Finally, it revealed narrowing of the acromion outlet with moderate subacromial subdeltoid bursitis.

13. In an attempt to avoid surgery, Dr. Jinkins gave the Claimant three steroid injections which afforded the Claimant good, albeit temporary, relief of her right shoulder pain. When her pain returned, Dr. Jinkins recommended that the Claimant undergo surgery to repair her torn rotator cuff. In September of 2016, the Claimant's shoulder pain flared up while moving from her apartment to a house. The Claimant testified credibly that she did not lift anything heavy and that she had help from friends to move heavy boxes or furniture. She lifted nothing heavier than the restrictions placed on her by Dr. Jones and Dr. Jinkins.

14. The Claimant did sustain a preexisting injury to her right shoulder on 3/14/14 while working for Environmental Control Systems, when she fell over a forklift onto her right side injuring her right shoulder and right knee. The Claimant was treated by Concentra as well as by Dr. Michael Simpson, an orthopedic surgeon, for both her right knee and shoulder. The Claimant underwent physical therapy on her shoulder after the injury. The 6/5/14 note from Concentra reflects that the Claimant estimated her

shoulder was 98% better. The physical therapy note from that same date reflects the patient stated her shoulder is improving. She has "very little pain, 1/10 level". The physical therapist noted that the Claimant was improving significantly in her shoulder.

15. On 7/15/14, the Claimant again saw Dr. Simpson, for both her knee and right shoulder. He noted that he did not think that the Claimant needed any imaging studies on her right shoulder and did not think the Claimant had any signs or symptoms of rotator cuff tear. He felt that the Claimant's shoulder pain was more a result of impingement. He opined that the Claimant would probably benefit from a subacromial injection which he planned on doing at the time of her right knee surgery.

16. No MRI study has been performed prior to May 4, 2016. The Claimant testified that she had a flare up of right shoulder pain after her right knee surgery on 9/11/14, when she was using crutches for mobility after the surgery. The Claimant testified that this pain, which is referenced in her primary care records on 11/3/14, resolved by December 2014. The Claimant testified that she had no pain in her right shoulder between December 2014 and 5/3/16 nor did she receive any medical treatment to her right shoulder during that time frame. The Claimant testified that she also suffers from diabetes but has never had any problems with her arms or shoulders, of which she is aware is related to her preexisting diabetes.

17. Dr. Anjmun Sharma performed a Division of Labor Independent Medical Evaluation on the Claimant for her 3/14/14 work-related injury at Environmental Control Systems. He assigned a 20% lower extremity impairment for her left knee injury but did not address, nor did he give any impairment rating for the Claimant's right shoulder.

18. Dr. Timothy Hall, a board-certified expert in the field of physical medicine and rehabilitation, testified on behalf of the Claimant. Dr. Hall examined the Claimant on 12/16/16 and reviewed the Claimant's prior medical records back to 2003. Dr. Hall opined, to a reasonable degree of medical probability, that the Claimant's right shoulder pain is related to her industrial injury at King Soopers of 3/3/16. He opined that the dynamic motion of her shoulder into abduction and external rotation caused trauma to her right shoulder joint when she stumbled backwards and jerked her shoulder backwards when the baking sheet slipped. He testified that the mechanism of injury as described by the Claimant is consistent with the Claimant's right shoulder rotator cuff tear, biceps tear and bursitis.

19. Dr. Hall disagreed with the opinion of Dr. Wallace Larson, the Respondent's IME physician on a number of issues. He testified that he disagree with Dr. Larson's categorization of the Claimant's right shoulder pain as a temporary aggravation. Dr. Hall explained that since the Claimant has been symptomatic since the event of 3/3/16, he would not characterize her shoulder injury as temporary. Dr. Hall opined that there is no evidence that the Claimant suffered from a torn rotator cuff in her right shoulder prior to 3/3/16. as there is no diagnostic evidence (such as an MRI) that would support this conclusion. Dr. Hall explained that while the Claimant could have had a preexisting rotator cuff tear, if she did, it was asymptomatic. While it is possible that the Claimant's rotator cuff tear pre-existed this injury, Dr. Hall opined that, based upon his years of

clinical experience, he cannot state to a reasonable degree of medical probability that it preexisted the 3/3/16 injury.

20. The Claimant's lack of pain complaints and medical treatment to her right shoulder between December of 2014 and the injury date of 3/3/16 supports his opinion that the injury of 3/3/16 is the cause of the Claimant's right shoulder injury. He explained that many times, a rotator cuff tear will not, in and of itself, cause immediate pain. Rather, it is the inflammatory process that follows the tear that causes the majority of one's pain. The fact that the Claimant's pain has waxed and waned but never gone away since the 3/3/16 injury is not unusual. He also testified that it is not unusual for an individual to have an impingement syndrome but not have a rotator cuff tear. He has treated many individuals over the years for this type of injury.

21. Dr. Hall explained that the Claimant's preexisting diabetes is not, in his opinion, the *cause* of the Claimant's right shoulder problems, although her preexisting diabetes may be a factor in why the Claimant has not recovered from the 3/3/16 injury thus far. The diabetes may be relevant insofar as it may have made the Claimant more susceptible to injury, since diabetes causes joints and tendons to degenerate quicker than those of a non-diabetic person. This could render a joint to more likely be injured with less traumatic force. Dr. Hall also explained that there was an error on page 3 of his report. In lines 8 and 9 of the second paragraph on the page, it should say "She made it clear to me and the record supports that she has been ***with*** pain since this March 2016 event". He testified that this was simply a typing error and has no effect on his ultimate conclusions.

22. Dr. Hall also opined that he does not feel the event of 3/10/16 (involving the falling boxes) would have worsened the Claimant's shoulder condition because it did not involve *movement* of the shoulder joint. Dr. Hall explained that the Claimant's response to treatment with regards to her 2014 injury was dramatically different from her response to treatment in the 2016 injury, because her condition dramatically improved in 2014 after minimal treatment.

23. Dr. Michael Simpson, a board certified orthopedic surgeon, testified by evidentiary deposition at the request of the Claimant. Dr. Simpson had treated the Claimant for her previous knee and shoulder injuries related to her 3/14/14 industrial injury. Dr. Simpson testified that he mainly treated the Claimant's knee injury but did see the Claimant for a short time with regards to her right shoulder injury. Dr. Simpson's 7/15/14 note reflects that the Claimant's symptoms at that point were consistent with an impingement syndrome. Dr. Simpson explained that even though impingement syndrome falls within the spectrum of rotator cuff pathology, he did not feel that the Claimant's shoulder warranted further diagnostic studies since she wasn't showing signs of a full thickness rotator cuff tear. Such symptoms would include lack of range of motion or weakness. He recommended a subacromial injection, although the record is unclear if this was never accomplished. The Claimant did not return to Dr. Simpson for treatment after July of 2014 for her right shoulder, although she continued to receive treatment for her for her right knee injury.

24. After reviewing the MRI of 5/4/16, Dr. Simpson opined that an individual with those findings (most especially problems with the biceps tendon) would likely have pain in the front of her shoulder, perhaps radiating down into the arm, and pain up at the top of the shoulder, difficulty moving it, difficulty using it above the head. He would also expect somebody like this to be having some weakness or fatigue doing overhead activity. The Claimant showed no signs of weakness, fatigue or traumatic injury to her biceps tendon after the 3/14/14 injury. Usually an individual who has a tear in their biceps tendon has pain which occurs pretty quickly after the injury occurs. Dr. Simpson testified that the mechanism of injury for a biceps tear usually involves a sudden pulling injury. A biceps tear can also occur when the arm is up and behind the body, like when they are throwing a ball, and then this same arm gets pulled. It occurs when an individual's arm is out to the side in an "L" shape, and then there is a backward jerking motion.

25. Claimant's testimony of how this injury occurred is reasonably consistent with the mechanism of injury described by Dr. Simpson. This incident occurred suddenly, and without warning. Claimant had likely performed a similar motion pulling the cart numerous times in the past, but without the tray slipping as it did on this date. Once she began to fall backwards, in that second or two, Claimant's instincts were geared towards avoiding falling backwards and/or getting hit by the tray, rather than being an accurate historian. Time, distance, and the ability to subsequently articulate the precise sequence of events and body position were not at the fore. She is admittedly not expert in biomechanics. Additionally, the Claimant's authorized treating physician at Concentra noted that the mechanism of injury as described by Claimant is consistent with a rotator cuff and biceps tendon tear.

26. Dr. Wallace Larson testified on behalf of the Respondents. Dr. Larson opined the Claimant did not sustain an injury to her right shoulder in the 3/3/16 incident. His opinion is based upon the fact that the movement that the Claimant made with her shoulder is an ordinary activity not beyond the typical motion allowed by a shoulder joint. The fact that the Claimant jerked back when the baking sheet slipped does not change his opinion. He opined the Claimant's rotator cuff tear pre-existed the 3/3/16 incident. However, there is no diagnostic evidence to support this opinion. He further opined that the Claimant's pre-existing diabetes made her more susceptible to degenerative changes, tendinitis and bursitis.

27. Dr. Larson admitted that there are no medical records showing the Claimant received any type of treatment to her right shoulder between December 2014 and March 2016 and no MRI had been done prior to the 3/3/16 injury. Dr. Larson admitted that he could not answer whether the Claimant was asymptomatic during the above-referenced time period since there are no medical records during that time period addressing Claimant's symptoms or lack thereof. He admitted that he would defer to Claimant's testimony with regards to being asymptomatic from December 2014 through March 2016. He also admitted that there are no medical records indicating that Claimant's preexisting diabetes has affected any additional parts of her body. He

testified that a joint with degenerative issues is more likely to be injured than a joint that does not have any degenerative changes.

28. He also admitted that bursitis (one of the findings on the Claimant's MRI of 5/4/16) is an inflammatory process, rather than simply a degenerative process. He could not opine that the active bursitis seen on the 5/4/16 MRI was probably present prior to 3/3/16. Nor could he say that, prior to this injury, the Claimant likely would not have had a diagnosis of bursitis. Dr. Larson additionally opined both in his medical report as well as during his testimony that the incident of 3/3/16 likely resulted in a temporary aggravation of whatever was going on in the Claimant's right shoulder joint. Dr. Larson admits that Claimant's subjective complaints were very different after the 3/3/16 injury.

29. Joe Orman testified on behalf of the Respondents. Mr. Orman is the assistant store manager at the King Soopers location at which Claimant was injured. He testified that he was paged to the back of the store after the boxes fell on the Claimant on 3/10/16. He did not know who paged him but did not believe it was Claimant. He testified that, after the box incident, the Claimant told him on 3/10/16 that she had phoned her doctor at Concentra earlier in the day to obtain a refill of prescription pain medication because of the pain in her right shoulder. The Claimant did not request to be sent back to Concentra for the 3/10/16 incident.

30. Rodney Vanningen testified on behalf of the Respondents. Mr. Vanningen is the bakery manager at the King Soopers location at which Claimant was injured. Mr. Vanningen was not on duty at the time of the incident on 3/3/16. He testified that the baking sheets are usually kept in stacks of 100, which are on a rolling metal apparatus. He estimates the weight of 100 baking sheets to be approximately 75 pounds and about four feet high. He testified that he usually pushes the stack of sheets to move them. If the stack was only two and a half feet high, he admitted he would have had to pull them out from under the table. He once experienced the same thing as the Claimant did while pulling a stack of baking sheets (a sheet slipped and flipped upwards) but felt it was no big deal when it occurred with him. He never instructed the Claimant to only push and never pull a stack of baking sheets.

31. Curtis Korwek testified on behalf of the Respondents. Mr. Korwek is a front end manager at the King Soopers location at which Claimant was injured. He testified that on 3/3/16, the Claimant came to his office between 8:00 a.m. and 8:30 a.m. to report that she had hurt herself in the bakery earlier that morning. The Claimant told him that as she was grabbing some baking pans, the top one released or slipped free and she jerked her shoulder. He estimated a stack of 100 pans to weigh fifty to sixty pounds. He testified that the stack of pans should always be pushed, never pulled. However, he never directed Claimant not to pull the stack of pans.

32. Claimant informed Mr. Korwek that she had earlier notified Devin, as well as Brian Bowman of the injury, but they did not act upon it. She had been waiting in the break room for Mr. Bowman to return, but this never occurred. Mr. Korwek admitted

that Devin and Brian were appropriate supervisors to report the injury to. Mr. Korwek supplied the Claimant with the incident report paperwork located at Claimant's Exhibit 1. He stated that a stack of 100 baking sheets were about three feet high and that they were a little tough to pull. Mr. Korwek did not speak to Devin or Brian about this claim, although they were the first individuals notified of it.

33. Shannon Jones testified on behalf of the Respondents. He is the store manager at the King Soopers location at which the Claimant was injured. Mr. Jones testified that prior to embarking to Pueblo for a meeting of store managers, he remembers seeing Claimant in the break room on 3/3/16, when he arrived at the store between 6:30 a.m. and 7:00 a.m. He testified that Claimant did not say anything to him about the incident, nor did she seem as if she were injured. His normal habit and practice when arriving at work is to personally greet each employee. He does not specifically remember if he spoke to Devin or Brian Bowman that morning. If he did so, neither of them notified him of the Claimant's injury.

34. The ALJ finds the Claimant's testimony to be credible. Her medical reporting for her injuries from 2014, and both from 2016 is consistent with the clinical data available. There is no evidence of medical treatment or complaints for the Claimant's right shoulder between December, 2014 and her injury date of 3/3/16.

35. Claimant also testified about moving her home's belongings in August of 2016. She avoided lifting heavy items, such as furniture or heavy boxes, instead working on lighter items and packing. After this occurred, she reported increased shoulder pain to Dr. Jinkins in September, 2016. Claimant also informed Dr. Jinkins during this office visit that she had help for moving the heavy items, and limited herself to packing and light duties. Nonetheless, she reported increased pain as a result.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers Compensation Act of Colorado (Act), C.R.S. 8-40-101, *et seq*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *§ 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an “injury” arising out of and in the course of employment. *§8-41-301(1), C.R.S.; Faulkner v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo. App. 2001).* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page*

v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *§ 8-43-201, C.R.S*. A workers compensation claim is decided on its merits. *§8-43-201, supra.*

B. In accordance with C.R.S. 8-43-215, this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witnesses' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability

D. As noted, for an injury to be compensable under the Act, it must arise out of and occur within the course and scope of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of *causation*. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. C.R.S 8-43-201, *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

E. The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The existence of a causal relationship between the admitted injury and this Claimant's right shoulder injury is a

question of fact. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985).* Here, the persuasive evidence demonstrates that Claimant injured her right shoulder on March 3, 2016 resulting in a torn rotator cuff and a torn biceps tendon, as well as bursitis of the biceps tendon and subacromium.

F. Under the Act, there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." § 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); see also, § 8-40-201 (2) (injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. Id.; Romero v. Industrial Commission, 632 P.2d 1052 (Colo. App. 1981); Aragon v. CHIMR, et al., W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." Romero, supra; § 8-41-301, C.R.S.

G. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain during, or from an event or incident, at work without sustaining a compensable "injury." This is true, even when the employee is clearly in the course and scope of employment performing a job duty when she experience pain. See Aragon, supra, ("ample evidence" supports ultimate finding that no injury occurred even where a claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, McTaggart-Kerns v. Dell, Inc., W.C. No. 4-915-218 (ICAO, May 29, 2014) (where a claimant involved in motor vehicle accident without resultant injuries suffered no compensable injury). As explained in Scully v. Hooters of Colorado Springs, W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in Scully noted, "[C]orrelation is not causation." Thus, merely because there may be a coincidental correlation between Claimant's work and her symptoms exists in this case does not mean there is a causal connection between Claimant's alleged injury and her work duties.

H. If an industrial injury aggravates, accelerates, or combines with a preexisting condition so as to produce disability and a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997.

I. This ALJ finds that the opinions of Dr. Timothy Hall and Dr. Simpson are more persuasive than those of Dr. Wallace Larson. Dr. Hall's opinion is supported by Dr. Simpson's 7/6/14 note, wherein Dr. Simpson opined that the Claimant was suffering from an impingement in her shoulder *which did not warrant an MRI*. There is no

diagnostic testing prior to the 5/4/16, which would confirm a pre-existing injury to her right shoulder. Further, the DIME physician (for the 3/14/14 injury), Dr. Anjmun Sharma, did not address or assign an impairment rating for the Claimant's *right shoulder,* but he did for her *knee.*

J. Dr. Hall and Simpson's opinions are both consistent with the mechanism of injury as described by the Claimant. Both doctors opined that one would need to either pull something or engage in motion of the shoulder into abduction and external rotation, much like the shoulder would move if one was throwing a ball, to result in an injury to one's biceps and rotator cuff tendons. Claimant's treating physicians at Concentra also felt that the Claimant's mechanism of injury is consistent with the torn rotator cuff and biceps tendon found in her right shoulder.

K. Finally, Dr. Larson admitted that the inflammatory changes seen on the Claimant's MRI probably did not pre-exist the injury of 3/3/16. Dr. Larson admitted that the subjective complaints and findings after the 3/3/16 injury were different than those before the injury. In fact, Dr. Larson admits that the Claimant probably suffered, at a minimum, an exacerbation of her shoulder injury from this work-related occurrence.

L. Regardless of whether a torn rotator cuff (partial or otherwise) pre-existed the occurrence in the bakery on 3/3/16, it is more likely than not that the jerking motion of her shoulder when she stumbled backwards significantly aggravated any preexisting, degenerative conditions in the Claimant's right shoulder. In this case, the ALJ finds that this tear to Claimant's rotator cuff became complete on 3/3/16. Claimant became symptomatic after this date. Her diabetes and relative lack of physical conditioning may well have explained her greater susceptibility to injury than her better conditioned co-worker, who (credibly) declared his similar work incident to be "no big deal". Claimant has proven by a preponderance of the evidence that on 3/3/16 she suffered a compensable injury to her right shoulder arising out of and within the course and scope of her employment at King Soopers.

Intervening, Superceding Cause, and the Need for Medical Care

M. C.R.S. § 8-42-101 (1) (a) provides that respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. Ashburn v. La Plata School District 9R, W.C. No. 3-062-779 (May 4, 2007). Therefore, claimant is not entitled to medical care that is not causally related to her work-related injury or condition. As noted in Bekkouche v. Riviera Electric, W.C. No. 4-514-998 (May 10, 2007), “A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary.” Where the relatedness, reasonableness or necessity of medical treatment is disputed, claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. Ciesiolka v. Allright Colorado, Inc., W.C. No. 4-117-758 (ICAO April 7, 2003).

N. The causation chain and the right to medical benefits may be severed by an efficient intervening event or aggravation. As stated in Baer v. Sherwin Williams, W.C. No. 4-217-692 (ICAO March 7, 1996), an efficient intervening injury which causes claimant's subsequent disability and need for further treatment supports the denial of benefits. See also Metz v. Cornerstone Care Center, W.C. No. 4-151-534 (ICAO March 7, 1994) (claimant's right knee condition which pre-existed an admitted work injury was worsened in an injury on the weekend after the work injury); In Baer v. Sherwin Williams, supra, after the occurrence of an admitted low back injury, claimant suffered a subsequent, intervening, back injury while installing a sprinkler system at home which necessitated surgical repair of a herniated disc that was denied as not causally related to the admitted injury. In Kowal v. JVK Enterprises, Inc., W.C. No. 4-271-333 (ICAO September 20, 1996), claimant injured his neck while wrestling his manager at work, but did not lose any time from work until he experienced severe neck pain while reaching across a restaurant table while away from work, the herniated disc found unrelated to this claim's injury as it was caused by this subsequent unrelated event. All results flowing proximately and naturally from an industrial injury are compensable. Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970) However, compensability ends when a later accident, injury or condition occurs that is related to some intervening, unrelated cause. Post Printing & Publishing Co. v. Erickson, 94 Colo. 382, 30 P.2d 327 (1934). Whether a particular condition is the result of an independent intervening cause is a question of fact for resolution by the ALJ. Owens v. ICAO, 49 P.3d 1187 (Colo. App. 2002).

O. Claimant moved her home belongings in August of 2016. Afterwards, she reported increased pain, coinciding with the move. As has been noted, *correlation is not causation.* Nor does increased pain necessarily equate to an injury. The state of the record is insufficient to conclude that Claimant's activities during her home move somehow necessitated the proposed surgery. The rotator cuff tear was already complete well before the move, as shown in the MRI. The fact that she experienced increased pain during this time period does not show that she was *injured* during this home move. The activities of moving, as described, were not significantly more strenuous than her work routine, which had been ongoing. Her shoulder just hurt more, and helped lead Dr. Jinkins to conclude that this shoulder surgery, previously hoped by all to be avoided, was now advisable. By a preponderance of the evidence, the ALJ finds that this surgery is reasonable and necessary, and related to the compensable claim.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury to her right shoulder on March 3, 2016.

2. Respondents are ordered to pay all reasonable and necessary medical expenses related to this shoulder injury, as recommended by her Authorized Treating Physicians.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether respondent has demonstrated by a preponderance of the evidence that claimant experienced an intervening event sufficient to sever respondent's liability and terminate claimant's maintenance medical care.

- Whether claimant has demonstrated by a preponderance of the evidence that continued medical treatment, including physical therapy and prescription pain medication, constitutes reasonable maintenance medical treatment necessary to maintain claimant at maximum medical improvement ("MMI").

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his low back on January 21, 2008 while shoveling coal during his employment with respondent. During the course of this workers' compensation claim claimant has received physical therapy treatment and takes prescription medications. Claimant testified that he currently takes Oxycontin, Percocet, Valium, and the sleep aide Ambien.

2. In 2012 claimant began employment with Tri State Generation and Transmission ("Tri State") as a utility technician. Claimant testified that he then moved into the position of scrubber operator. Claimant currently works for Tri State as a plant operator.

3. Claimant testified that with each position change at Tri State his work has become less physically demanding. When comparing his current position as a plant operator to the position he held with respondent, claimant testified that his current position is much less physically demanding. Claimant also testified that he is working toward a position in Tri State's training center, which would be even less physically demanding.

4. Following the January 21, 2008 work injury claimant underwent surgery on August 12, 2009. On that date Dr. Timothy Wirt performed a L4-5 discectomy, hemilaminectomy, and facetectomy. Thereafter on August 19, 2010 Dr. Wirt performed a L4-5 fusion with laminectomy, foraminotomy, and discectomy at that level. On December 19, 2011 claimant underwent a left side rhizotomy at the L5-S1 level.

5. Dr. Frederick Scherr placed claimant at MMI on April 13, 2012 and assigned a permanent impairment rating of 18% whole person. Dr. Scherr did not assign any permanent work restrictions and indicated that claimant could return to full duty. On May 23, 2012, respondents filed a Final Admission of Liability ("FAL") admitting to this MMI date and impairment rating.

6. Claimant contested the FAL and requested a Division-sponsored independent medical examination ("DIME"). Dr. Gary Zuehlsdorff performed a DIME on September 11, 2012 and agreed that claimant reached MMI as of April 13, 2012. However, Dr. Zuehlsdorff assigned a permanent impairment rating of 22% whole person. With regard to permanent restrictions, Dr. Zuehlsdorff did not list any restrictions but stated in his report "[a]s previously noted by primary".

7. After being placed at MMI in 2012, claimant continued to complain of low back pain. On May 15, 2014 claimant underwent a L4-5 revision anterior lumbar discectomy and interbody arthrodesis performed by Dr. Joshua Seinfeld.

8. On January 26, 2016, Dr. Zuehlsdorff conducted a follow up DIME in which he placed claimant back at MMI as of that date and assigned a permanent impairment rating of 24% whole person. In the January 26, 2016 DIME report Dr. Zuehlsdorff suggested a "recalibration" of claimant's work restrictions, but did not opine as to any specifics, again deferring to claimant's primary physician. On March 29, 2016 respondent filed a Final Admission of Liability ("FAL") based upon Dr. Zuehlsdorff's January 26, 2016 DIME report and admitted for reasonable and necessary medical benefits post-MMI.

9. Claimant testified that after he was placed at MMI in January 2016 he returned to full duty and has not sustained any additional injury to his low back. Claimant also testified that he continues to have low back pain that radiates into his buttocks and down his left leg to his knee. Claimant testified that these are the same symptoms he had when he was placed at MMI on January 26, 2016.

10. Claimant's post-MMI treatment includes physical therapy and pain medication. Claimant testified that the use of prescription pain medications enable him to function well at work and away from work. Claimant also testified that he exercises at home and continues to seek physical therapy treatment because his physical therapist is able to release muscle spasms, which claimant cannot do on his own. Claimant testified that he goes to physical therapy approximately once every two weeks because of his work schedule. The ALJ finds claimant's testimony to be credible and persuasive.

11. Based upon the physical therapy records entered into evidence at hearing, claimant returned to physical therapy treatment on October 15, 2015 and had 60 visits from that date until December 7, 2016. Of these 60 physical therapy visits, 42 were between claimant's date of MMI and December 7, 2016.

12. On October 31, 2016 Dr. Carlos Cebrian performed a review of claimant's medical records and issued a written report in which he noted that claimant has increased the frequency of physical therapy visits. Dr. Cebrian opined that this increase in physical therapy visits is related to claimant's work for Tri State and not related to the 2008 work injury. Dr. Cebrian also raised concerns regarding claimant's continued use of prescription opioids. Specifically, Dr. Cebrian opined that claimant should discontinue his use of opioids by gradually tapering off his usage.

13. Dr. Cebrian testified at hearing in this matter and confirmed his opinion that claimant's increased physical therapy visits and continued use of opioids point to an intervening event caused by claimant's current employment. Dr. Cebrian testified that the Medical Treatment Guidelines ("the Guidelines") provide for 10 physical therapy visits during the first year after a claimant reaches MMI and five visits per year thereafter. Dr. Cebrian testified that he calculates that claimant attended 49 physical therapy visits in a 14 months period, which exceeds the number of visits allowed under the Guidelines. In his testimony, Dr. Cebrian also reiterated his concerns surrounding claimant's continued opioid use.

14. The ALJ credits claimant's testimony and the medical records and finds that respondent has failed to demonstrate that it is more likely than not that claimant has suffered an intervening event sufficient to sever respondent's liability in this matter. The ALJ specifically finds that claimant has reduced the physical demands of his employment by moving to less physically demanding positions. The ALJ is not persuaded by Dr. Cebrian's opinion. The ALJ finds no persuasive evidence in the record that an intervening event has occurred that has triggered a disability or the need for medical treatment.

15. The ALJ credits claimant's testimony at hearing regarding the therapeutic nature of claimant's post-MMI treatment and finds that this testimony is supported by the medical records entered into evidence.

16. The ALJ finds that although the number of physical therapy treatments claimant has received post-MMI exceeds those allowed under the Guidelines, this ongoing treatment continues to be therapeutic in nature regarding claimant's condition and the evidence establishes that the treatment is necessary for claimant to maintain MMI. Similarly, the ALJ finds that claimant's continued use of prescription pain medications, including opioids, is necessary for claimant to remain at MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S., *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d

385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. The questions of whether an injury arose out of and in the course of employment, whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury, and whether there has been a subsequent intervening event, are generally questions of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996); *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 384, 30 P.2d 327, 328 (1934).

5. As found, respondent has failed to demonstrate by a preponderance of the evidence that claimant suffered an intervening event sufficient to sever respondent's liability. Although the ongoing physical therapy treatment exceeds those allowed under the Guidelines, as found this ongoing treatment continues to be curative in nature regarding claimant's condition and the evidence establishes that the treatment is necessary for claimant to maintain MMI. As found, claimant's testimony and the medical records are credible and persuasive.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

7. The Division's Medical Treatment Guidelines ("the Guidelines") are generally accepted as professional standards for medical care under the Act and are to be used by health care providers when providing care. See Section 8-42-101(3)(b), C.R.S.; *Hall v. ICAO*, 74 P.3d 459 (Colo. App. 2003). The ALJ is not required to grant or deny medical benefits based on the Guidelines and the ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

8. As found, claimant has demonstrated by a preponderance of the evidence that continued physical therapy treatment and use of prescription pain medication is reasonable medical treatment necessary to maintain claimant at MMI. As found, claimant's testimony and the medical records are credible and persuasive.

ORDER

It is therefore ordered that:

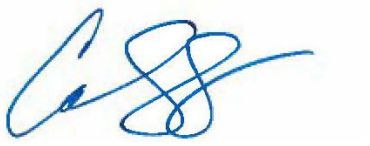
1. Respondent's request for an order severing their liability for ongoing medical treatment is denied and dismissed.

2. Respondents shall continue to pay for claimant's post-MMI maintenance medical treatment including physical therapy and prescription pain medication.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Have Respondents proven by a preponderance of the evidence that Claimant was responsible for termination of her employment on May 31, 2016?

2. Has Claimant proven by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits ongoing since May 31, 2016?

3. Has Claimant proven by a preponderance of the evidence that she is entitled to additional temporary partial disability (TPD) benefits from May 3, 2016 to May 30, 2016?

4. Should Claimant's average weekly wage (AWW) be increased by the cost of continuing her health insurance? If so, what is the amount of the increase?

5. Is Claimant entitled to an order regarding authorization of future prescriptions, even though Respondents are not denying any specific medical benefits at present?

STIPULATIONS

1. The parties stipulated that any increase in Claimant's AWW because of the COBRA continuation cost is effective May 31, 2016.

FINDINGS OF FACT

1. Claimant worked as a patient care advocate for Employer. She suffered an admitted industrial injury on October 16, 2014 as a result of a fall.

2. Insurer paid TTD and TPD benefits at various times since the date of injury. The most recent admitted period of TTD was from April 27, 2016 through May 2, 2016. Insurer subsequently admitted for TPD benefits from May 3, 2016 to July 6, 2016.

3. Claimant started working for Employer in October 2011. Claimant was given access to the Employee Handbook, which, among other things, outlines Employer's policies regarding attendance and progressive discipline. Claimant acknowledged receipt of this information when she was hired.

4. Employer's attendance policy defines four types of attendance events, three of which relate to the disputed issues in this matter: (1) an "absence" is defined as "an occurrence when an individual does not report for work or work his/her scheduled shift"; (2) an "early quit" is defined as "an employee leaving his/her duties prior to the end of their scheduled time without leadership's approval"; (3) a "No Call/No Show" is

defined as “failure to contact the appropriate resource within 2 hours after . . . the scheduled start time.”

5. The attendance policy implements a points system for each occurrence. An absence is one occurrence point. A No Call/No Show is four occurrence points. Occurrence points are accumulated over a rolling six-month period, with varying levels of progressive discipline. For occurrences 1-5, the appropriate action is to coach the employee. For six points, the employee receives a documented verbal corrective action. At eight points, the employee receives a written corrective action. Ten points result in a written final warning, and after twelve points, the employee is terminated.

6. On June 9, 2015, Claimant received a documented verbal warning that her attendance score was 72.2%. Claimant had been absent or left early 11 times in the previous 45 days. Claimant was advised to improve her attendance, or she may face further disciplinary action.

7. Claimant has been under work restrictions since her date of injury. As of May 2, 2016, Claimant was released to modified duty by her ATP, Dr. Daniel Olson. The restrictions limited Claimant to a shift starting no earlier than 6:00 AM, and lasting no longer than six hours, with a 10-minute break every hour.

8. Claimant returned to work on modified duty on May 3, 2016. Although she reported late to work that day, Employer did not assign any occurrence points.

9. Claimant again reported for work late on May 4, 2016, but Employer again did not assign any occurrence points.

10. On May 5, 2016, Claimant saw Dr. Olson and reported an upcoming shift change that would require her to work in the evenings. She told Dr. Olson this was “stressful” because she could not pick up her children.

11. The May 2016 shift change was part of a company-wide shift bid process. Claimant’s supervisor, Michael Sowa, explained that the shift change process affected many employees other than Claimant. Mr. Sowa explained that, while the shift change was inconvenient, it was done to meet Employer’s business needs. “Out of my three employees [affected], they all had reservations about moving to the night shift. You have to explain that it’s business need. It was an enterprise shift. A lot of people were affected. I myself went from the morning shift to an overnight shift. I just made the life-balance accommodations.”

12. Claimant’s first scheduled day of work on the new shift was May 9, 2016. Claimant called off work May 9, May 10, May 11, and May 12, 2016. Claimant was a No Call/No Show on May 14, 2016. Claimant again called off on May 16, 2016.

13. On May 10, 2016, Mr. Sowa gave Claimant a written corrective action pursuant to the attendance policy. Mr. Sowa advised Claimant she had accumulated nine occurrence points as of May 9. He advised her regarding the importance of punctuality, and on the rare instance she needed to call off, she was expected to follow

procedure and appropriately notify her supervisor. Claimant was advised that further attendance issues could result in a final written warning and eventual termination. Claimant electronically acknowledged the warning on May 18, 2016. Notably, of the nine points Claimant had accumulated by May 9, all but one occurrence occurred before the shift change.

14. On May 17, 2016, Claimant participated in a telephone conference with Mr. Sowa and Joshua Madrid, Mr. Sowa's supervisor. The purpose of the telephone conference was "more of a wellness check . . . [because] we've really noticed that you've missed a lot of work. Is everything okay? And then, from there, we moved into concerns for not coming to work. At that point, the daycare concern was raised, and that's when we made the accommodation."

15. After the May 17 telephone conference with her supervisors, Claimant's work hours were shifted one hour "to the right." This meant instead of starting at 2:30 PM and ending at 8:30 PM, Claimant would start her shift at 3:30 PM and end at 9:30 PM. Employer voluntarily implemented the change to accommodate Claimant's childcare needs.

16. Claimant was also advised during the telephone conference she had exceeded the 12 occurrence points allowed before termination. Mr. Sowa testified "we were just kind of discussing the concern that we were outside of the attendance policy, but we would make an exception here, and that we would retain [Claimant's] employment rather than trying to move down the termination path." Mr. Sowa explained that "normally we would have pursued termination after 12 occurrence points." Mr. Sowa explained Employer was bending its rules due to concerns regarding Claimant's injury and limitations. He testified "we were just treading really lightly to make sure that we didn't have any concerns with not meeting those accommodations."

17. Although Claimant testified she does not recall the May 17, 2016 conversation with Mr. Sowa and Mr. Madrid, the meeting is documented in Claimant's contemporaneous personnel record. The ALJ finds the written employment records more reliable than Claimant's memory, particularly given the residual effects of her documented head injury.

18. On May 23, 2016, Mr. Sowa issued a final written warning regarding attendance. He advised Claimant that she had accumulated 20 occurrence points as of May 21, 2016. Despite being eight points over the termination threshold, Employer gave Claimant one last chance to remedy her attendance issues. Claimant was again advised regarding the importance of reporting to work in a timely fashion, and that further violations could result in termination. Claimant electronically acknowledged receiving this warning on May 23, 2016. She was actually late to work that day, but Employer did not assess an occurrence.

19. After receiving her final warning, Claimant missed work on May 24, May 25, May 26, and May 28, 2016, resulting in four additional occurrence points. As a result, Employer terminated Claimant's employment, effective May 31, 2016.

20. Claimant admitted at hearing she understood the absences after May 23 would result in her termination.

21. Claimant alleges she stopped reporting for work because Employer refused to accommodate her work restrictions. Specifically, Claimant alleges she was expected to work eight-hour shifts, despite Dr. Olson's restriction to six-hour shifts.

22. Mr. Sowa and Mr. Madrid credibly testified that Employer intended to modify Claimant's new shift to comply with Dr. Olson's length-of-shift restrictions. Although Claimant's new regular shift was eight and one-half hours long, Employer did not expect her to work longer than the six hours allowed by Dr. Olson.

23. Immediately before her termination, Claimant and members of her family had health insurance under Employer's group plan. She maintained medical, vision, and dental insurance on herself and her children. Claimant's husband was covered for dental and vision only. In accordance with the COBRA notice, the cost of continuing medical insurance on Claimant and her children was $1,083.90 per month. The cost of maintaining family dental coverage was $115.85 per month, and the family vision coverage cost $20.74 per month. This computes to a weekly cost of $281.65.

24. Claimant's husband was not covered for *medical* insurance under Employer's policy at the time of her termination.

25. Claimant is requesting TPD benefits from May 3, 2016 to May 30, 2016. That period has already been admitted per Respondents' November 3, 2016 GAL. (Resp. Ex. E). The GAL provides supporting documentation outlining Respondents' calculation of Claimant's entitlement to TPD benefits. (Resp. Ex. E, p. 9). Respondents' calculations are based on wages Claimant would have earned had she worked the modified duty shifts offered by Employer, consistent with Dr. Olson's six-hour shift restriction.

26. Respondents have proven by a preponderance of the evidence that Claimant was responsible for the termination of her employment.

27. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional TPD benefits from May 3, 2016 to May 30, 2016.

28. Claimant has proven by a preponderance of the evidence that her AWW should be increased by $281.65 to account for (1) the COBRA cost for medical insurance for herself and her children, and, (2) the vision and dental coverage for Claimant, her husband and her children.

29. Effective May 31, 2016, Claimant's AWW is $639.65.

CONCLUSIONS OF LAW

A. Claimant was responsible for her termination

The termination statutes, § 8-42-103(g) and § 8-42-105(4)(a), provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The employer must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). Failure to take action that a reasonably prudent person would take under the circumstances also satisfies the requirement that the claimant has exercised a degree of control over the circumstances resulting in the termination. *Sparks v. Mattas Marine*, W.C. No. 4-98 to-976-01 (ICAO, Sept. 26, 2016).

An employer's policy, particularly one which may lead to discharge for absenteeism without regard to the reasons for the absences, is not determinative of whether a claimant acted volitionally regarding a separation. *See Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. App. 1987). The mere fact that the employer discharged the claimant in accordance with its personnel rules does not automatically establish that the claimant acted volitionally or exercised control over the circumstances of the termination. Rather, the ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (ICAO, March 17, 2004).

Moreover, the term "responsible," as used in the termination statutes, may not be construed in a fashion which undermines the "overall scheme of the Act." *Colorado Springs Disposal v. Industrial Claim Appeals Office, supra,* In *Colorado Springs Disposal* the court held the "word 'responsible' does not refer to an employee's injury or injury-producing activity." The court reasoned that treating a claimant as "responsible" for the loss of employment caused by physical limitations resulting from the compensable injury itself would significantly alter fundamental principles of the Act.

Hence, a claimant does not act "volitionally" or exercise control over the circumstances leading to the termination if the effects of the injury ultimately lead to her termination. *E.g., Kauffman v. Noffsinger* W. C. No. 4-608-836 (ICAO, April 18, 2005);

Blair v. Art C. Klein Construction, Inc., W.C. No. 4-556-576 (ICAO, November 3, 2003); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (ICAO, April 24, 2002).

As found, Respondents have proven that Claimant was responsible for the termination of her employment. Claimant was terminated due to excessive absenteeism, which was not necessitated by her injury. Claimant knew of Employer's attendance policies and was repeatedly warned that additional unexcused absences could lead to her termination. Employer gave Claimant more leeway than was technically required under its policies, as an accommodation for her injuries. Despite Employer's willingness to work with Claimant, Claimant effectively abandoned her employment by refusing to work. Under the circumstances, Employer's decision to terminate her on May 31, 2016 was objectively reasonable.

Claimant alleges she stopped reporting for work because Employer would not accommodate her work restrictions. Specifically, Claimant alleges she was expected to work eight-hour shifts, despite Dr. Olson's restriction to six-hour shifts. But no persuasive evidence corroborates Claimant's position in this regard. In fact, Claimant's allegations are rebutted by the credible and persuasive testimony of Mr. Sowa and Mr. Madrid, who explained Employer intended to modify Claimant's new schedule to comply with Dr. Olson's length-of-shift restrictions. Although Claimant's new regular shift was eight and one-half hours long, Employer modified that schedule and did not expect her to work more than six hours. Although Claimant may have been personally confused regarding Employer's intention regarding her new schedule, any such subjective confusion is not reasonable under an objective standard.

In making this determination, the ALJ acknowledges Dr. Olson's July 29, 2016 opinion that it was "reasonable" for Claimant to refuse her new shift. Dr. Olson's opinion is not persuasive because it is based on the mistaken assumption that Employer required Claimant to work from 2:30 PM to 11:00 PM (8 ½ hours). The evidence adduced at hearing shows that Employer limited Claimant's shift to six hours, and moved her start time to 3:30 PM to accommodate her childcare needs. Based on the totality of persuasive evidence presented, the ALJ concludes that Employer did not require Claimant to exceed her work restrictions.

The attendance issues that lead to Claimant's termination most probably related to her dissatisfaction with her work-life balance under the new schedule, rather than the effects of her industrial injury.

The ALJ is persuaded that Claimant exercised control over the circumstances and that her termination was the result her volitional actions. Accordingly, Claimant was responsible for the termination of her employment.

B. Claimant is not entitled to additional TPD benefits from May 3, 2016 to May 30, 2016

Temporary partial disability (TPD) benefits are payable when a temporarily disabled claimant returns to work at a rate lower than her preinjury wage. Section 8-42-

106. Here, Claimant is requesting a closed period of TPD, from May 3, 2016 to May 30, 2016. That period was already admitted per the November 3, 2016 GAL. Respondents' calculations are based on wages Claimant would have earned had she worked the modified duty shifts Employer offered her. Although Claimant did not actually work the shifts she was offered, she did not provide persuasive evidence that her refusal to work was caused by her injury. Respondents' computational methodology is consistent with case law that effectively allows a credit for wages a claimant *would have* earned from modified duty even if the claimant ultimately declines the work. *E.g., Tarman v. US Transport*, W.C. No. 4-91-955-01 (ICAO, June 2, 2016). Claimant has failed to prove by a preponderance of the evidence that Respondents' calculation of TPD reflected on the November 3, 2016 GAL is incorrect.

C. Claimant's AWW increased to $639.65 effective May 31, 2016 based on her COBRA continuation cost

Section 8-40-201(19)(b) provides that the term "wages" includes "the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan." There is no requirement that a claimant actually purchase insurance for the continuation or conversion cost to be included in their AWW. *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006). Once the employer stops contributing to the claimant's health insurance, the entire cost is included, even if the claimant had previously paid a portion of the insurance during their employment. *Humane Society of Pikes Peak Region v. Industrial Claim Appeals Office*, 26 P.3d 546 (Colo. App. 2001). The statutory reference to "health insurance" includes employer-sponsored dental and vision coverage, as well as medical insurance. *Cortese v. Kaiser Space Products*, W.C. No. 4-171-138 (ICAO, April 8, 2010); *Sickler v. City Market*, W.C. No. 4-638-377 (ICAO, July 25, 2008).

Claimant's health insurance coverage was terminated when she was fired on May 31, 2016. The COBRA notice shows the cost of continuing Employer's coverage, and therefore establishes a *prima facie* case for the appropriate increase in the AWW. To the extent Respondents wish to rely on the lower cost of conversion to a similar or lesser plan, they must prove a specific alternate amount. Although Claimant admitted her husband has "health insurance" through his job, there was no testimony or other evidence regarding whether he also had dental or vision coverage. As reflected by Claimant's COBRA notice, medical, dental, and vision typically constitute separate coverages under the umbrella term "health insurance."[1] Absent additional evidence, the ALJ is not willing to assume that Claimant's husband's "health insurance" through his employer includes dental and vision coverage. Indeed, Claimant's husband was not covered under Employer's medical insurance policy when Claimant's employment was terminated. (Cl. Ex. 9, pp. 173-74). Based on the evidence presented, the ALJ concludes that Claimant's husband likely had medical coverage through his employer

[1] *See e.g.*, *Fortune v. Restaurant Technologies, Inc.*, W.C. No. 4-915-420-01 (ICAO, January 26, 2015); *McGuire v. Family Dollar Stores, Inc.*, W.C. No. 4-738-209 (ICAO, October 13, 2011); *Cortese v. Kaiser Space Products*, W.C. No. 4-171-138 (ICAO, April 8, 2010); *see also* § 10-16-501, C.R.S.

before Claimant was terminated, and simply continued that arrangement after her termination. Moreover, even if Claimant's husband started receiving dental and vision coverage through his employer, there is no evidence regarding the cost of that alternate coverage. Based on the totality of evidence presented, Respondents failed to establish a basis to depart from the cost figures reflected in Claimant's COBRA notice.

As found, Claimant's AWW should be increased by $281.65 to account for her COBRA continuation cost, resulting in an AWW of $639.65 effective May 31, 2016.

D. The ALJ has no authority to issue an advisory opinion regarding authorization of Claimant's future prescriptions

Under § 8-43-201, ALJs have original jurisdiction to hear and decide all matters arising the Workers' Compensation Act. The heading of that section refers to "disputes" arising under the Act. The ICAO has repeatedly stated that "this language restricts ALJs from issuing advisory opinions that do not involve any actual controversy between the litigants." *Reed v. Choice Hotels International*, W.C. No. 4-903-225-01 (ICAO, November 5, 2013); *Franklin v. Colorado Springs School District 11*, W.C. No. 4-436-174 (ICAO, July 25, 2007); *Piltz v. Quality Mitsubis*hi, W.C. No. 4-351-844 (ICAO, December 20, 2001).

Claimant argues that prescription authorizations have been delayed on several occasions in the past. Respondents acknowledge past delays, but assured the ALJ they are working diligently to avoid delays in the future. At the time of the hearing, no specific prescriptions were denied, nor were any prescriptions pending authorization. The ALJ does not see a justiciable issue regarding authorization of Claimant's future prescriptions. Although the ALJ can appreciate Claimant's frustration with the prescription authorization process, the ALJ is not empowered to issue purely "advisory opinions" regarding disputes that may or may not arise at some unspecified time in the future.

ORDER

It is therefore ordered that:

1. Claimant's claim for TTD benefits commencing May 31, 2016 ongoing is denied and dismissed.

2. Claimant's claim for additional TPD benefits from May 3, 2016 to May 30, 2016 is denied and dismissed.

3. Respondents shall adjust Claimant's AWW to $639.65 effective May 31, 2016.

4. Claimant's request for an advisory opinion regarding future prescriptions is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 7, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-011-040-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 22, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 2/22/17, Courtroom 1, beginning at 1:30 PM, and ending at 2:15 PM). No witnesses testified. The parties submitted the case based on stipulations.

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondents' Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant. The proposed decision was filed, electronically, on March 1, 2017. Respondents were given three working days within which to file objections. No timely objections having been filed, the matter was deemed submitted for decision on March 7, 2017. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns the modification of the average weekly wage (AWW) insofar as it factors into the formula for the calculation of whole person permanent partial disability (PPD), contained in§ 8-42-107 (8) (e), C.R.S. The claimed increase is based on the Employers cost of health care and other benefits provided at the time of the injury. The parties provided stipulated facts in lieu of testimony at the hearing.

The Claimant bears the burden of proof, by a preponderance of the evidence on all designated issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, which consisted of Stipulations and the documentary record, the ALJ makes the following Findings of Fact:

1. The Claimant suffered an admitted injury on July 18, 2015 and treated for the injury until being placed at maximum medical improvement (MMI) on June 29, 2016. In the Final Admission of liability (FAL), dated September 23, 2016, the Respondents admitted for 23% whole person PPD with an admitted AWW of $309.78, for aggregate PPD benefits of $18, 999.84, payable at the rate of $206.52 per week from the date of MMI.

2. The Claimant continues to be employed with the Employer, after the MMI date. The Employer continues to provide health insurance and other benefits to the Claimant as of the date of the hearing. The health insurance and other benefits have never been suspended since the date of loss.

3. The Claimant was provided with health insurance and other benefits paid by the Employer. The parties stipulated, and the ALJ finds, that the value of the health insurance benefits is $128.34 per week. Claimant's AWW as admitted does not include the cost of the health benefits.

4. The FAL was based on the whole person impairment rating of Gregory Muench, M.D., and/or Gretchen Brunworth, M.D. The Claimant does not dispute the rating. The rating is 23 % whole person. The Claimant filed a timely objection to the FAL and requested a hearing on the issue of AWW insofar as it factored into the formula for calculating whole person PPD benefits.

5. The Claimant's date of birth is November 19, 1947. As of the MMI date, she was 69 years old. Her temporary total disability (TTD) rate pursuant to the FAL was $206.52. The Employer's cost of health insurance and other benefits provided is $128.34 per week. Since the Employer continues to pay for the Claimant's health insurance and other benefits, the TTD rate is not affected, however, A PPD award is a one-time only award for medical impairment only and loss or gain of earnings is irrelevant to PPD. When the health insurance and fringe benefits are added to the admitted AWW, the AWW for PPD calculations only is $438.12, 2/3rds of which is $292.08, a hypothetical TTD rate, based on the premise that the Claimant may not always receive Employer-paid health benefits and other fringe benefits. Indeed, part of the Claimant's compensation package included Employer-paid health insurance benefits, but the Employer was directly paying these benefits on top of the Claimant's regular earnings.

Ultimate Finding

6. It would be fundamentally unfair if the Claimant's total compensation package equal to $438.12 per week, which included Employer-paid health insurance of $128.34 per week—presumably tax sheltered—did not reflect the measure of his AWW insofar as2.3rds of it factored into the formula for the calculation of PPD (medical impairment) benefits contained in § 8-42-107 (8) (d) and (e), C.R..S., whereby the insurance carrier could "low ball" the Claimant in a PPD award by excluding the value of the health insurance from the formula in calculating whole person PPD. The ALJ hereby exercises his discretion as permitted by the AWW Section of the Workers' Compensation Act (the "Act") for purposes of the PPD formula. Including the health benefits , this calculates to an increased TTD rate of $292.08 per week (for formula purposes only), based on an AWW of $438.12.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Average Weekly Wage for Permanent Partial Disability Calculations

a. Section 8-40-201, C.R.S. defines "wages" as follows:

> (19) (a) "Wages" shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied.

(b) The term "wages" includes the amount of the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan, and gratuities reported to the federal internal revenue service by or for the worker for purposes of filing federal income tax returns and the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19). If, after the injury, the employer continues to pay any advantage or fringe benefit specifically enumerated in this subsection (19), including the cost of health insurance coverage or the cost of the conversion of health insurance coverage, that advantage or benefit shall not be included in the determination of the employee's wages so long as the employer continues to make payment….

b. Section 8-42-102, C.R.S., defines AWW as follows:

(1) The average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation payments. (2) Average weekly wages for the purpose of computing benefits provided in articles 40 to 47 of this title, except as provided in this section, shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which The injured or deceased employee was receiving at the time of the injury, and in the following manner….

(3) Where the foregoing methods of computing the average weekly wage of the employee, by reason of the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable earnings to be fairly computed there under or has been ill or has been self-employed or for any other reason, will not fairly compute the average weekly wage, the division, in each particular case, may compute the average weekly wage

> of said employee in such other manner and by such other method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's average weekly wage.
> .
> (5) (b) Nothing in this subsection (5) alters the discretion of the division or the director (in this case an ALJ) to fairly determine a worker's average weekly wage in accordance with subsection (3) of this section.

c. The entire objective of wage calculation is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. Although AWW generally is determined from the employee's wage at the time of injury, § 8-42-102(2), C.R.S., if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage. § 8-42-102(3), C.R.S.; *see Williams Brothers, Inc. v. Grimm,* 88 Colo. 416, 297 P. 1003 (1931); *Vigil v. Indus. Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992) Campbell v. IBM Corp., 867 P.2d 77 (1993) As found, the ALJ made a discretionary distinction between the addition of the cost of the health benefits for temporary disability, where it is replacing lost wages, and the value of those benefits for the purpose of calculating whole person PPD, a one-time only award that may increase to permanent total disability but never decrease to a lesser degree of PPD award when a claimant gets better. *See City and County of Denver v. Indus. Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002).

d. Under the Act, injuries are classified as either partially or totally disabling and as either temporary or permanent in nature. Temporary disability benefits, whether total or partial, compensate an employee directly for loss of earnings from the date of injury, *Eastman Kodak Co. v. Indus. Comm'n*, 725 P.2d 107 (Colo.App.1986), until such time as the employee's underlying condition has stabilized. Thereafter, a permanently and **partially** disabled individual either gets a one-time only scheduled award or a one-time only whole person award regardless of loss or gain of earning capacity. This award should fairly reflect in the formula what the employee was actually earning (including employer-paid health insurance benefits).

e. The Act is designed to compensate an injured worker for two distinct losses resulting from an industrial injury or occupational disease: the loss of earning capacity based on the concept of disability, and medical and other costs associated with the injury or disease. See 2 A. Larson, *The Law of Workmen's Compensation* § 57.11. While calculation of a claimant's AWW is generally tied to the time of injury, the discretionary exception affords an ALJ the discretion to determine a claimant's AWW,

including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of the injury, but also on other relevant factors when the case's unique circumstances require. In *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (2008) the ALJ did not abuse his discretion when he determined the claimant's AWW, including COBRA insurance, based on her increased earnings and insurance costs at a subsequent employer. If a future employer does not pay health insurance, the injured worker would be on her own to have health insurance. Indeed, the addition of the cost of replacement health insurance is appropriate regardless of whether the employee actually obtains replacement health insurance. *See Ray v. Indus. Claim Appeals Office,* 124 P.3d 891 (Colo. App. 2005); *Avalanche Industries, Inc. v. Clark, supra.* While not squarely on point to the issue at hand, *Ray* is instructive insofar as it sheds light on the underlying intent behind the definition of "wages." Further, "wages" are an underlying consideration in the PPD formula. Otherwise, the TTD rate would not be part of the formula. Indeed, it makes no sense that the underlying intent of this portion of the formula was to mechanistically apply the TTD rate without regard to the employer-paid health benefits.

f. The ALJ concludes that to properly calculate the Claimants AWW for purposes of determining her PPD, the ALJ must use discretionary authority and determine that the Respondents' cost o health insurance benefits should be included and factored into the formula to arrive at a fair and just determination of the Claimant's permanent medical impairment. As long as the Claimant continues working for the Employer, the Employer will presumably continue paying for the Claimant's health insurance. The PPD award is independent of the Claimant continuing to work for the Employer. Why should it be lower and impervious to Employer-paid health insurance. It should not. Moreover, it should be factored into the formula contained in § 8042-107 (8) (d), C.R.S.

g. Under the formula contained in § 8-42-107 (8) (d) and (e), C.R.S., the correct calculation for someone over 60 years of age, under this decision, is: 1 X 400 X $292.08 X 23% (whole person rating) =$26, 871.36, which exceeds the admitted PPD award of $18,999.84 by $7, 871.52.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products,*

Inc., W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on the designated issue.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the Claimant aggregate permanent partial disability benefits of $26, 871.36, which exceeds the admitted aggregate amount of $18, 999.84 by $7,871.52, which is payable retroactively and forthwith.

B. Respondents are entitled to credit for all permanent partial disability benefits paid to date.

C Respondents shall pay the Claimant interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

DATED this_____day of March 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the cervical fusion recommended by Dr. Amir Abtahi is reasonable medical treatment necessary to cure and relieve claimant from the effects of the March 10, 2016 work injury.

- If claimant fails to prove that the recommended surgery is reasonable and necessary, whether claimant has proven by a preponderance of the evidence that the cervical injection recommended by Dr. William Faragher constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the March 10, 2016 work injury.

FINDINGS OF FACT

1. On March 10, 2016, claimant sustained an admitted injury arising out of and in the course of his employment with employer. The injury occurred when the claimant slipped on a wet floor and fell. Claimant testified that he fell on his left side and injured his neck, back, left hip, left shoulder, and left arm. Claimant testified that he felt areas of soreness after the fall.

2. Claimant reported the injury to employer on March 10, 2016 and employer sent claimant for treatment at Peak Family Medicine. On March 16, 2016, claimant began treating with Peak Family Medicine as his authorized treating physician ("ATP") and was seen by Norman Dockins, PA-C. Mr. Dockins referred claimant to physical therapy and to Dr. William Faragher for pain management.

3. On March 21, 2016, claimant began physical therapy with Scott Baadte, PT at Mountain View Therapy. On that date, claimant reported to Mr. Baadte complaints of pain in his back, hip, neck, and shoulder. Claimant continued with physical therapy until September 27, 2016.

4. Claimant testified that although he has had neck pain since the March 10, 2016 work injury, his initial medical treatment was focused on his low and mid back because those areas were causing him the most pain. The ALJ finds claimant's testimony on this issue to be credible and persuasive.

5. The medical records indicate that claimant received treatment for his lumbar and thoracic spine including an interlaminar epidural steroid injection at the T8-9 level on August 1, 2016 and medial branch blocks at the L4, L5, and S1 levels on October 17, 2016.

6. On August 24, 2016, Dr. Faragher reviewed results of a magnetic resonance image (”MRI”) of claimant’s thoracic spine and noted the appearance of advanced degenerative disc disease and stenosis in claimant’s cervical spine. As a result, Dr. Faragher recommended a cervical spine MRI to evaluate potential pain generators in claimant’s neck, bilateral shoulders, and mid back.

7. On September 9, 2016 an MRI of claimant’s cervical spine showed that at the C3-4 level a disc osteophyte complex effacing the left nerve root exit zone with left unconvertebral spurring, resulting in moderate left neural foraminal stenosis. In addition, at the C4-5 level the MRI showed a left paracentral disc osteophyte complex contacting and mildly flattening the ventral aspect of the spinal cord and effacing the left nerve root exit zone. At the C6-7 level there was “a bony ankylosis across the disc versus congenital non-segmentation”.

8. After he reviewed the cervical spine MRI, Dr. Faragher referred claimant back to physical therapy to address his cervical spine. Claimant returned to physical therapy on October 4, 2016.

9. On October 13, 2016, claimant was seen by Mr. Dockins who noted that although claimant had returned to physical therapy for his cervical spine, he continued to have pain in his neck. As a result, Mr. Dockins referred claimant to Dr. Jim Youseff at Spine Colorado. On October 21, 2016 claimant was seen at Spine Colorado by Dr. Abtahi. Claimant reported to Dr. Abtahi that his pain was 6 out of 10 in his neck and radiating into shoulders.

10. Dr. Abtahi reviewed the results of the cervical spine MRI and noted left sided disc herniations at C3-4 and C4-5 resulting in impingement of the exiting nerve root and moderate to severe neuroforminal narrowing. Dr. Abtahi found that claimant had failed conservative treatment and recommended claimant undergo an anterior cervical discectomy and fusion from C3 to C5.

11. On October 29, 2016, a peer review was conducted by Dr. Robert Mack related to the recommended cervical fusion. Dr. Mack opined that claimant’s cervical spine symptoms were not related to claimant’s work injury. In support of this opinion, Dr. Mack noted that the September 9, 2016 MRI showed a congenital fusion at C6-7. Dr. Mack opined that this congenital condition is a factor in the degenerative changes to claimant’s cervical spine. Dr. Mack also opined that because of that congenital condition at C6-7, a fusion from C3 to C5 would put significant added biomechanical stress on the adjacent discs possibly resulting in adjacent segment disease. Based upon Dr. Mack’s opinion, respondents denied the recommended cervical fusion.

12. On December 14, 2016 Dr. Faragher recommended claimant undergo a left interlaminar epidural injection at the C5-6 level.

13. On December 18, 2016, Dr. Mack reviewed the recommendation for a cervical injection. Dr. Mack again opined that claimant’s cervical symptoms are not

related to the March 10, 2016 work injury. Respondents denied the recommended cervical injection.

14. On January 20, 2017, Mr. Dockins noted that the cervical surgery was denied and agreed that the cervical stenosis was not caused by the work injury, but that claimant's March 10, 2016 fall at work could have caused an exacerbation of claimant's cervical stenosis.

15. Claimant testified that his current symptoms include a stabbing and pricking pain in his neck that radiates into his shoulders and upper back. Claimant also testified that he attributes his neck pain to the March 10, 2016 work injury. Claimant testified that prior to the March 10, 2016 work injury he did not have pain in his neck and he was unaware of any congenital condition in his neck.

16. The ALJ credits the medical records, the opinions of claimant's treating providers, and claimant's testimony over the contrary opinion of Dr. Mack and finds that claimant has demonstrated that it is more likely than not that the March 10, 2016 work injury aggravated, accelerated, or combined with claimant's preexisting stenosis in his cervical spine to lead to the need for treatment, including surgery.

17. The ALJ credits the medical records and the opinion of Dr. Abtahi over the contrary opinion of Dr. Mack. Therefore, the ALJ finds that claimant has demonstrated that it is more likely than not that the recommended cervical fusion is reasonable medical treatment necessary to cure and relieve claimant from the effects for the March 10, 2016 work injury.

18. As claimant has met his burden with regard to the recommended fusion surgery, the ALJ does not address the requested alternative treatment of a cervical injection.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d

385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has demonstrated by a preponderance of the evidence that the March 10, 2016 work injury aggravated, accelerated, or combined with claimant's preexisting cervical stenosis, resulting in the need for surgery. As found, the medical records, the opinions of claimant's providers, and claimant's testimony are credible and persuasive on this issue.

6. As found, the claimant has demonstrated by a preponderance of the evidence that the recommended anterior cervical discectomy and fusion from C3 to C5 is reasonable medical treatment necessary to cure and relieve claimant from the effects for the March 10, 2016 work injury. As found, the opinion of Dr. Abtahi is credible and persuasive on this issue.

ORDER

It is therefore ordered that:

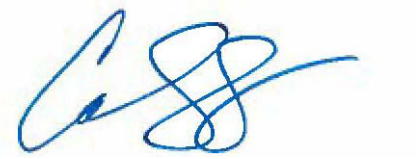
1. Respondents shall pay for the recommended anterior cervical discectomy and fusion from C3 to C5, pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail,

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 8, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that her right knee scheduled impairment rating should be converted to a whole person impairment rating.

II. Whether Claimant has proven by a preponderance of the evidence that her left shoulder scheduled impairment rating should be converted to a whole person impairment rating.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant suffered injuries in a work accident to her right knee and left shoulder on March 11, 2013. The claim was admitted. Claimant has underdone conservative treatment, as well as two surgeries to treat her left shoulder. The first was performed in September, 2014, consisting of a clavicle resection and subacromial decompression. The second was performed in July, 2015, consisting of an arthroscopic debridement, subacromial debridement, and bicep tenodesis. Both were performed by Dr. Armodios Hatzidakis, M.D.

2. Claimant was evaluated by Dr. Ted Villavicencio on December 23, 2013. Claimant reported 7/10 pain in her shoulder. Claimant reported her knee was overall doing well with regular duties. Dr. Villavicencio noted, "Neck: no point tenderness over the cervical spine. Minimally tender with palpation of the left trapezius muscles; normal range of motion in all directions." Following examination, Dr. Villavicencio opined the Claimant had reached MMI. Dr. Villavicencio assigned Claimant with a 14% left upper extremity rating and an 11% right lower extremity rating.

3. Claimant attended a DIME with Dr. William Watson on June 17, 2014. With regards to the Claimant's right knee Dr. Watson noted, "The examinee states she has done fairly well following this and has had minimal difficulties." Claimant reported ongoing left shoulder pain at 6-7/10. Dr. Watson noted both Dr. Mark Failinger and Dr. James Lindberg did not believe Claimant was a surgical candidate due to concerns with recurrence of Complex Regional Pain Syndrome ("CRPS") symptoms following surgery. Claimant's CRPS problems have existed for years, and are not related to the Claimant's March 11, 2013 industrial injuries.

4. Following examination, Dr. Watson opined the Claimant was not at MMI. Dr. Watson opined the claimant should undergo surgical intervention of the left shoulder. Dr. Watson assigned Claimant a provisional 15% upper extremity rating and

did not provide a rating for the Claimant's right knee. The surgeries then proceeded with Dr. Hadzidakis, as noted.

5. Claimant was evaluated by Dr. Scott Richardson on September 3, 2015. Upon examination Dr. Richardson noted the claimant's neck, "Is supple and symmetric with midline trachea and no masses." Dr. Richardson opined the Claimant had reached MMI and assigned claimant a 17% lower extremity rating for the knee.

6. On February 18, 2016 Claimant was evaluated by Claimant's Authorized Treating Physician ("ATP"). Dr. John Burris. Dr. Burris noted the Claimant had a preexisting history of CRPS and ulnar nerve neuropathy. Claimant reported 7/10 pain to the left shoulder region as wells as continued right knee pain.

7. Upon examination Dr. Burris noted, "Neck is supple to palpation, full range of motion in all planes. Left upper extremity neurovascularly intact throughout. At the shoulder, well-healed surgical scar and no unusual swelling or tenderness. Non-tender over clavicle and AC joint. Right lower extremity is neurovascularly intact throughout. Surgical scars at the knee are well-healed with no unusual swelling, erythema or tenderness. No joint effusion present." Following examination Dr. Burris opined the Claimant had reached MMI. Dr. Burris noted, "There have been no significant changes in her functional status or subjective complaints." On April 27, 2016 the Parties stipulated the Claimant had reached MMI for all her work related conditions as of February 18, 2016, pursuant to the opinion of Dr. Burris.

8. The Parties agreed to waive any requirement that Claimant return to Dr. Watson for a follow-up DIME on the issues of MMI and permanent impairment. (Respondent's Ex. A, pg. 1).

9. The Parties stipulated the Claimant's final permanent partial disability rating for her right lower extremity (knee) was 17% scheduled. (Respondent's Ex. A, pg. 2).

10. The Parties stipulated the Claimant's final permanent partial disability rating for her left upper extremity (shoulder) was 15% scheduled. (Respondent's Ex. A, pg. 2).

11. Claimant reserved the right to seek "conversion" of the extremity ratings to a working unit. (Respondent's Ex. A, pg. 2).

12. An Order approving the stipulation was signed and filed on May 6, 2016. (Respondent's Ex. A, pg. 7). Following the Order, and subsequent Final Admission of Liability. Claimant objected and sought to convert both scheduled ratings to whole person.

13. Claimant's ATP, Dr. Burris sat for an evidentiary deposition on September 8, 2016.

14. Dr. Burris testified he became a Level II accredited physician in 1996. Dr. Burris testified he is board certified in occupational medicine as of 1996 and has practiced in the field since. Dr. Burris was admitted as an expert witness in the field of occupational medicine.

15. Dr. Burris testified he had only evaluated and examined the Claimant once, on February 18, 2016 to assess MMI and her impairment ratings. He further testified the claimant had sustained a right knee contusion and a left shoulder strain as a result of the March 11, 2013 industrial accident. Dr. Burris testified the Claimant suffered from CRPS and an ulnar nerve condition which pre-existed the March 11, 2013 industrial injuries.

16. Dr. Burris testified that regarding the claimant's right knee injury there were not a lot of relevant findings. Claimant's range of motion was good and symmetrical with the unaffected leg. She had good motor strength and sensation. Dr. Burris was questioned whether the claimant had any clinical findings or complaints of any altered gait which may have affected her ability to walk or her lower back. Dr. Burris credibly testified, "She didn't complain to me about back pain. She only complained about her continued shoulder pain, she also complained about right knee pain."

17. Dr. Burris viewed Dr. Richardson's MMI report dated September 3, 2015. This report did not contain any discussion of back pain. Dr. Richardson's MMI report was limited to the lower extremity.

18. Dr. Burris was asked the following:

Q: ….do you believe based upon a reasonable degree of medical probability as it relates to the right knee injury, that Ms. Flanigan has any permanent medical impairment that is not limited to the lower extremity?

A: No.

Q: And I understand – you understand better than I do that – that doctors, Level II doctors are instructed when they do an impairment rating, as a matter of course, if they rate an extremity, to give the appropriate conversion for the working unit under the AMA Guides; is that correct?

A: Yes.

Q: And notwithstanding that requirement, in your medical opinion, do you believe that the situs of the functional impairment as a result of a knee injury is limited to the lower extremity?

A: Yes.

Q: Do you feel that there's any functional impairment not expressed on the extremity rating, what we call the schedule of disabilities, to the right lower extremity?

A: No, I don't think there's anything beyond the extremity.

(Burris Depo. pgs. 16-17, lines 17-25).

19. Dr. Burris was asked to review Dr. Watson's DIME report regarding the left shoulder. Dr. Burris testified that Dr. Watson's DIME report limited the Claimant's impairment rating to the upper extremity. Dr. Burris testified, "No, he doesn't talk about anymore proximal involvement. He does talk about the acromioclaviuclar joint in the front and into the trapezius musculature in the back."

20. Dr. Burris was asked to explain the Claimant's symptoms slowing of the ulnar nerve across her elbow. Dr. Burris testified these symptoms were not due to the shoulder injury, but her previous injury.

21. Dr. Burris testified on the date he examined Claimant she had full range of motion in all planes of her cervical spine and she had no limitations of motion in her neck.

22. Dr. Burris did acknowledge that Claimant did suffer from an impairment to her range of motion of her left arm, most notably a deficit in flexion and secondarily, in abduction. He further noted that the repair consisting of the clavicle resection occurred inside of (proximal to) the glenohumeral joint. Further, that the Claimant's loss of range of motion could be due to inflammation of the spinatus and/or supraspinatus tendons, which attach to the neck and scapula, which "can be considered a portion of the torso."

23. Dr. Burris was asked to explain his examination of the Claimant's shoulder. Dr. Burris testified, "So she had some positive findings. She had well-healed surgical scars. Her motor strength is good. Her sensation is good. She's got some loss of motion in the shoulder. She doesn't have a drop-arm sign, which is a good sign that the rotator cuff is functioning. And she did have a positive impingement test, and that's another provocative test where you're pinching the rotator cuff, and that was positive for her. When you go to the functional issues, the main things I look for are the status of the scapula." Dr. Burris testified the Claimant had normal scapula *function.*

24. Dr. Burris was asked to review Dr. Villavicencio's December 23, 2013 MMI report. Dr. Burris testified that Dr. Villavicencio had limited the Claimant's impairment rating to the upper extremity.

25. Dr. Burris was asked, "To your knowledge, and including your own opinions where you indicated there was no additional impairment other than those that had been given before, but in your opinion, your own clinical exam, your review of prior ratings and findings by Dr. Watson and Dr. Villavicencio, are you aware of any evidence

for impairment to Ms. Flanigan's shoulder other than range of motion loss?" Dr. Burris answered, "No."

26. Dr. Burris was then asked the following:

Q: Are you aware of any evidence in this case, based upon a reasonable degree of medical probability, of permanent functional limitations that are not limited to the upper extremity?

A: No.

Q: Again, same question that I had with regard to the lower extremity. In your opinion, at least from a medical point of view, and in your discretion as the authorized treating physician, would you be inclined to convert the upper extremity rating that we've stipulated to, to a working unit rating in this case?

A: You mean the whole person?

Q: A whole person.

A: No.

Q: Okay. And why would that be, Doctor?

A: Because it's not -- it's functionally limited to the extremity.

(Burris Depo. pgs. 28-29, lines 25-16).

27. On redirect examination Dr. Burris was asked the following:

Q: The – the last reference by counsel to numbness and tingling in the fingers and some intermittent neck pain, is that more likely due to the ulnar nerve problem we discussed earlier, not related – not related to this claim?

A: The tingling in the fingers is.

Q: And I think you already testified that on clinical examination and on the EMG there was no evidence – objective evidence of radiculopathy?

A: Correct.

Q: Did you see any evidence in the record or your examination of limitations of function to the neck, the scapula, or the clavicle?

A: No.

(Burris Depo. pgs. 45-46, lines 12-10).

27. The ALJ finds Dr. Burris' testimony to be credible and persuasive.

28. Claimant did not testify, in person or by deposition, about any of her own functional limitations.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a worker's compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a worker's compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A worker's compensation case is decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005).

Conversion

4. Section §8-42-107(1), C.R.S. provides that a claimant is limited to a scheduled disability award if the claimant suffers an "injury or injuries" described on the schedule in C.R.S. §8-42-107(2). Where the claimant suffers an injury not enumerated in C.R.S. §8-42-107(2), the claimant is entitled to whole person impairment benefits under C.R.S. §8-42-107(8). *Strauch v. PSL Swedish Healthcare Sys.*, 917 P.2d 366 (Colo. App. 1996). Thus, scheduled injuries may not be compensated with whole person medical impairment benefits. *United Airlines, Inc. v. ICAO*, 993 P.2d 1152, 1158 (Colo. 2000).

5. Conversion of a scheduled injury rating into a whole person rating is a question of fact for an ALJ and is not a medical determination for the authorized treating physician. *Eacker v. True Value Hardware*, W.C. No. 4-661-379 (ICAO February 15, 2007). The ALJ must determine whether the claimant has proved beyond a preponderance of the evidence that his injury resulted in functional impairment to a portion of the body not listed on the schedule. *O'Connell v. Don's Masonry*, W.C. No. 4-609-719 (ICAO December 28, 2006); *Lovett v. Big Lots*, W.C. No. 4-657-285 (ICAO November 16, 2007) (affirmed at Colo. App. No. 07CA2375).

6. The mere fact that a claimant may have physical injury to *structures* adjacent to the arm does not compel a finding of *functional* impairment beyond the shoulder. *Lovett supra*. Further, a claimant's testimony alone, and without supporting medical testimony or evidence, *may* be enough to support conversion. *Duran v. Big O Tires,* W.C. No. 4-367-183 (ICAO May 23, 2000). *It is not the location of the physical injury or the medical explanation for the loss that determines the issue, but rather where the* ***impairment*** *lies.*

6. Whether a claimant has sustained a scheduled "injury" measured as a "loss of an arm at the shoulder" under C.R.S. § 8-42-107(2)(a), or a whole person impairment compensated under C.R.S. § 8-42-107(8)(c), depends on whether the claimant sustained "functional impairment" beyond the arm at the shoulder. This is true because the term "injury," as used in C.R.S. § 8-42-107(1)(a)-(b), refers to the part or parts of the body which have been impaired or disabled, not the *situs* of the injury itself or the medical reason for the ultimate loss. *Warthen v. ICAO*, 100 P.3d 581 (Colo. App. 2004).

7. Claimant offered no testimony that she suffered a functional impairment beyond the left shoulder or her right knee. Claimant relied upon the medical records from her authorized treating provider and DIME report to support her claim of conversion of the two (2) scheduled injuries; to wit: her right knee and left shoulder.

8. The medical records, combined with Dr. Burris' deposition testimony, do not support the Claimant's assertion that she has experienced a functional impairment beyond the right knee.

9. The medical records, combined with Dr. Burris' deposition testimony, do not support the Claimant's assertion that she has experienced a functional impairment beyond the left shoulder.

10. Claimant has failed to show, by a preponderance of the evidence, that she suffered permanent functional impairment to her whole person, beyond what has been scheduled for her right knee or her left shoulder. Claimant is not entitled to convert either scheduled injury to a whole person impairment.

ORDER

It is therefore ordered that:

1. Claimant's request to convert her right knee scheduled impairment rating to a whole person rating is denied and dismissed.

2. Claimant's request to convert her left shoulder scheduled impairment rating to a whole person rating is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 8, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the right knee arthroscopic debridement and meniscectomy recommended by Dr. Norman Harris is reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 22, 2016 work injury.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his right knee on February 22, 2016. The injury occurred when claimant was working at a job site and his right foot became twisted in an air hose. Claimant testified that at that time he noted sharp pain and swelling in his right knee.

2. Claimant timely reported the injury to employer on February 22, 2016 and employer completed a First Report of Injury on February 23, 2016. On April 5, 2016, employer filed a General Admission of Liability ("GAL") admitting for medical benefits.

3. Claimant testified that in 1985 he underwent a surgery to his right knee that was intended to "clean out" some arthritis. Claimant testified that between the 1985 surgery and the February 22, 2016 work injury he did not have right knee pain.

4. Claimant testified that since the February 22, 2016 work injury he has not missed any work, he continues to perform his normal job duties, and he is able to engage in his personal hobbies of hiking, fishing, and hunting. However, claimant testified that he has right knee pain that worsens throughout the work day.

5. On March 1, 2016 a magnetic resonance image ("MRI") was taken of claimant's right knee and showed a complex tear of the medial meniscus.

6. On March 18, 2016, Dr. Norman Harris discussed treatment options with claimant, including a corticosteroid injection. Claimant declined injections because he is "deathly afraid of needles". As a result, Dr. Harris recommended that claimant undergo a right knee arthroscopic debridement and meniscectomy. In a May 27, 2016 medical report, Dr. Harris found that claimant had failed conservative treatment, including physical therapy, and was a surgical candidate. Respondents have denied the recommended surgery.

7. On July 7, 2016, Dr. Harris authored a letter in which he addressed respondents' denial of the recommended surgery. In that letter Dr. Harris opined that claimant had a new injury to his meniscus on top of old degenerative arthritis.

8. Dr. Jon Erickson and Dr. James Lindberg reviewed claimant's medical records and have both opined that the recommended surgery is not related to claimant's February 22, 2016 work injury. In an April 1, 2016 peer review, Dr. Erickson opined that claimant has a preexisting degenerative medial meniscal tear coupled with advanced osteoarthritis. In that same review, Dr. Erickson noted that results of arthroscopic debridement are "uniformly poor" when the individual has advanced osteoarthritis. Dr. Erickson recommended that claimant undergo a vigorous course of non-operative care including work restrictions and physical therapy treatment focusing on muscle strengthening and range of motion exercises.

9. In a peer review dated October 11, 2016, Dr. Lindberg opined that the claimant's meniscal tear is a progression of his underlying arthritis and not related to the February 22, 2016 work injury.

10. Dr. Lindberg testified at hearing and stated that the surgery claimant underwent in 1985 was a meniscectomy. Dr. Lindberg testified that the findings on the March 1, 2016 MRI are consistent with an old meniscectomy. Specifically, Dr. Lindberg opined that the micro tears in claimant's meniscus are related to the 1985 surgery and not any recent event. Dr. Lindberg also testified that the recommended procedure would likely provide no benefit to claimant.

11. The ALJ notes that claimant continues to perform his normal job duties and engage in his hobbies. Although claimant complains of knee pain, the ALJ credits the opinions of Drs. Erickson and Lindberg that claimant's knee pain is unrelated to the February 22, 2016 work injury. Therefore, the ALJ finds that claimant has failed to demonstrate that it is more likely than not that the February 22, 2016 work injury caused the need for the recommended right knee arthroscopic debridement and meniscectomy.

12. The ALJ credits the opinions of Drs. Erickson and Lindberg over the contrary opinion of Dr. Harris and finds that claimant has failed to demonstrate that it is more likely than not that the February 22, 2016 work injury aggravated, accelerated, or combined with claimant's preexisting osteoarthritis to necessitate surgery.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S., *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has failed to demonstrate by a preponderance of the evidence that the recommended right knee arthroscopic debridement and meniscectomy is reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 22, 2016 work injury. As found, the opinions of Drs. Erickson and Lindberg are credible and persuasive in regard to this issue.

ORDER

It is therefore ordered that:

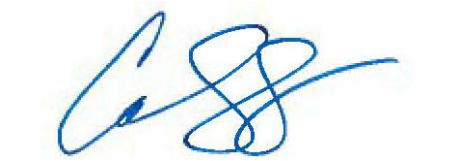
1. Claimant's request for medical benefits consisting of a right knee arthroscopic debridement and meniscectomy is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That

you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Has Claimant proven by a preponderance of the evidence that he is entitled to ongoing treatment for chronic urticaria and immunological symptoms, including omalizumab (Xolair) therapy?

2. Has Claimant proven by a preponderance of the evidence that an April 19, 2016 bill from Quest Diagnostics for lab work is reasonable, necessary, and causally related to his industrial injury?

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on October 25, 2014, while working for Employer as a maintenance technician. He was cleaning a large ice machine with a cleanser that contained phosphoric acid. The acid splashed onto his forearms above his protective gloves, causing chemical burns.

2. Claimant immediately rinsed his arms for approxiately ten minutes. He washed his arms again with soap and water when he arrived home. He applied an OTC antibacterial cream and bandaged his arms.

3. When he awoke the following morning, he had large, painful blisters on his forearms. He discussed the injury with his supervisor who took Claimant to Premier Urgent Care that day.

4. The notes from Premier document chemical burns to Claimant's arms, noting they were red, swollen, and blistered. Claimant was given Silvadene cream, which he applied to his arms.

5. The few days after using the Silvadene cream, Claimant developed an itching, burning rash moving up from his arm to his neck and a portion of his back. He called the clinic later that day to report the symptoms and was instructed to stop using the Silvadene cream.

6. Claimant then started taking Benadryl. Initially, the rash seemed to improve. But several days later he broke out in large hives on multiple areas of his body.

7. Claimant returned to Premier and was instructed to discontinue the Benadryl. Dr. Magnuson at Premier diagnosed dermatitis post chemical burns, and referred Claimant to a dermatologist, Dr. Ron Johnson.

8. Claimant received two steroid injections which helped for approximately two days each time. He was also given a prednisone taper starting at 60 mg, which was not particularly helpful.

9. Dr. Johnson recommended Claimant see an allergy specialist and referred him to Dr. Matthew Bowdish at the William Storms Allergy Clinic.

10. Dr. Bowdish first examined Claimant on January 12, 2015. Dr. Bowdish noted the onset of hives following the Silvadene and Benadryl treatment. Claimant brought pictures of the lesions to his appointment, and Dr. Bowdish stated: "they look like urticarial lesions." Dr. Bowdish noted that Claimant was still breaking out in hives approximately two to three times per week despite discontinuing the Silvadene and Benadryl. Dr. Bowdish diagnosed subacute-going-on-chronic urticaria. He opined that "either the Silvadene or the Benadryl cream promoted some sort of immunologic response that is still sputtering with urticarial lesions that are not very well controlled and not particularly responsive to systemic corticosteroids." Claimant questioned whether he should be tested for an allergy to Silvadene or Benadryl, but Dr. Bowdish felt it was more critical to control the hives first. He recommended an antihistamine/leukotriene regimen and prescribed Singulair and cetirizine. If that did not work, Dr. Bowdish indicated he would consider omalizumab (a.k.a. Xolair) to treat the hives.

11. Claimant returned to Dr. Bowdish on February 24, 2015. He noted his hives were "partially controlled" with cetirizine, but he could not tolerate increased doses. He had previously tried loratadine which was not helpful. The Singulair was not helpful either. On physical examination, Claimant had several urticarial lesions on his left arm, his hands and his chest. Dr. Bowdish diagnosed chronic idiopathic urticaria, which was resistant to multiple antihistamines, leukotriene inhibitors, and systemic steroids. Dr. Bowdish recommended implementing omalizumab therapy. Dr. Bowdish indicated omalizumab would hopefully modulate and suppress Claimant's immune response. The plan was to administer the medication for 6 to 9 months, and then evaluate whether he could stop it. Dr. Bowdish opined Claimant's condition, and the recommended treatment, were "related to workplace issues."

12. Insurer did not authorize the omalizumab. Instead, Insurer's nurse case manager, Nancy McMillan, contacted Dr. Bowdish on March 17, 2015 to discuss the causal connection between the current treatment recommendations and the October 2014 incident. Dr. Bowdish explained disruptions in the immune system causing flareups. He opined that there was "no obvious, 100% way to prove . . . whether this is related to the burn, but certainly given the time course of the symptoms starting 4 days after the burn was treated with Silvadene there is probably some relation." Given Claimant's lack of response and negative reactions to other treatment options, Dr. Bowdish felt omalizumab was the most reasonable next step. Dr. Bowdish assured Ms. McMillan that Claimant had been compliant with treatment, and stated he would make himself available to her or the adjuster to facilitate Claimant's treatment.

13. Claimant underwent an Independent Medical Examination (IME) at Respondents' request with Dr. Tashof Bernton on June 1, 2015. Dr. Bernton opined that symptoms such as rashes, hives, swelling, and difficulty breathing all represent different aspects of a "type 1" allergic reaction, which is characterized by histamine release and mediated by an IgE antibody. Dr. Bernton noted such allergic reactions are typically time-limited, particularly with treatment. But Dr. Bernton noted that occasionally "allergic reactions such as this can go on to chronic urticarial reactions such as this patient had." Dr. Bernton noted there was no prior medical history that would suggest an alternate cause of Claimant's symptoms. Dr. Bernton concluded:

> given the timing of the initial allergic reaction and the characteristics of the history, it is most probable that the chronic urticaria was precipitated by the patient's use of Silvadene cream to treat the work-related injury and the subsequent allergic reaction. I would, therefore, regard this problem as work-related.

14. Despite receiving Dr. Bowdish and Dr. Bernton's opinions, Insurer did not authorize omalizumab.

15. At his August 18, 2015 appointment with Dr. Bowdish, Claimant reported the hives were improved and were occurring less frequently. Dr. Bowdish was "hopeful" that the hives were resolving on their own as they had become more sporadic. Dr. Bowdish opined that if the hives worsened, they would need to reconsider the omalizumab therapy.

16. Claimant was put at MMI June 2016 per Dr. Sharma, and Respondents filed a Final Admission of Liability. Claimant timely objected to the FAL and requested a DIME.

17. On November 30, 2015, Claimant saw Dr. Jack Rook for the DIME. Dr. Rook noted that Claimant had broken out in hives within a few weeks of his MMI evaluation with Dr. Sharma. Claimant reported having "full-blown hives" approximately once per month. He also reported difficulty breathing at times when the allergic symptoms flared. Claimant explained that Insurer had paid for all of his doctor visits, but had not covered the medications. Therefore, he was paying for the medications out of his own pocket. Claimant told Dr. Rook he wanted to try the omalizumab therapy because the ongoing symptoms were "very bothersome."

18. Dr. Rook diagnosed a generalized allergic reaction status post chemical burns to both forearms. He noted, "the allergic reaction is felt to be related to use of Silvadene cream after the chemical burns." Dr. Rook further commented, "all medications prescribed to treat itching and hives should be covered by the workers' compensation insurance carrier. Likewise, if the patient proceeds with the trial of . . . omalizumab, this medication should be covered by the work comp insurance." Given that Claimant continued to have ongoing allergic symptoms, and since all medications recommended by the allergist had not yet been attempted, Dr. Rook opined that

Claimant was not at MMI. Dr. Rook opined, "I recommend that he pursue the medication trial recommended by his allergist."

19. Respondents initially applied for a hearing on the issue of overcoming the DIME, but they withdrew the issue before any hearing occurred. Ultimately, as stated on the record by counsel for Respondents at the commencement of the hearing, Respondents did not challenge Dr. Rook's determination and accepted the results of the DIME.

20. Claimant returned to the William Storm's Allergy Clinic on April 19, 2016 and saw Dr. Bowdish's nurse practitioner, Kathryn Blair. Claimant reported acute swelling of his tongue — "the worst swelling that he has ever had." NP Blair ordered lab work, which was conducted by Quest Diagnostics later that day. Claimant testified at hearing that NP Blair ordered the lab work to investigate why his tongue was swelling.

21. The Quest bill has not been paid, and Quest continues to send Claimant collection notices seeking payment of $539.73.[1]

22. Claimant returned to Dr. Bowdish on June 7, 2016, at which time he thought Respondents had agreed to authorize a trial of omalizumab. Dr. Bowdish was "happy" to learn (albeit mistakenly) that Insurer had agreed to allow the trial of omalizumab. He opined that the only other option would be to try some other immunosuppressive medications, but omalizumab "by far" had the "best side effect profile."

23. Respondents applied for a hearing on August 26, 2016 seeking "an order limiting medical benefits to those causally related to the original injury consistent with the DIME and ATP's opinions." Claimant filed a timely Response endorsing medical benefits, specifically authorization of the Xolair/omalizumab treatment.

24. In preparation for the hearing, Respondents propounded a letter to Dr. Bowdish requesting further opinions regarding causation. In the interim, Dr. Bowdish had left the Storms Allergy Clinic. Dr. Storms responded for Dr. Bowdish, and stated, "After reviewing [Claimant's] chart, I do not believe that Silvadene is the cause of his ongoing urticarial reactions."

25. Claimant subsequently underwent an IME with Dr. Michael Volz on November 17, 2016. Dr. Volz described Claimant's case as "highly complex and involved with multiple factors to consider." Dr. Volz's diagnoses included chronic urticaria (CU) and angioedema (swelling). He indicated it was clearly histaminergic because histamine blockers, montelukast and systemic steroids all helped reduce the manifestations. He opined it is very challenging to determine why the episode began and why the manifestations are being perpetuated. Dr. Volz opined there is "a high degree of medical probability that the chemical exposure was involved in initiating the [disease] process." He felt Dr. Bowdish had done a good job of evaluating and

[1] On September 15, 2016, Quest sent Claimant a "FOURTH" and "FINAL" collection notice, indicating the account would be forwarded to a collection agency if not paid "immediately."

eliminating many other potential causative factors. According to Dr. Volz, Silvadene has been available for many years and is typically well-tolerated by most patients. Although rare, it is medically "plausible" that Silvadene triggered Claimant's reaction. There is limited evidence-based data/literature on this topic. He opined that NSAIDs such as ibuprofen might perpetuate the hives, which could be easily tested by stopping NSAIDs for several days. Dr. Volz also opined Claimant's Vitamin D deficiency is likely contributing to the hives.

26. Regarding treatment, Dr. Volz agreed that omalizumab is a reasonable option and in many cases can lead to a full resolution, sometimes after a single dose. He also opined that further testing could be considered, particularly obtaining a Vitamin D level. Dr. Volz opined that Claimant is not at MMI because "there are opportunities to manage the hives better and possibly to resolution." Dr. Volz recommended that additional testing be completed before Claimant tries omalizumab.

27. Dr. Storms subsequently reviewed Dr. Volz's report and walked back his previous opinion. Dr. Storms stated "since I have never seen this patient … it is impossible for me to give a medical opinion."

28. Dr. Bowdish's opinions regarding the cause of Claimant's condition and appropriate treatment are credible and persuasive.

29. Dr. Volz's opinions are generally credible and persuasive, except for his recommendation to delay implementation of omalizumab treatment for further testing.

30. Claimant's testimony is credible.

31. Claimant has proven by a preponderance of the evidence that additional treatment for his chronic urticaria and immunological symptoms is reasonable, necessary, and causally related to his industrial injury.

32. Claimant has proven by a preponderance of the evidence that omalizumab treatment is reasonable, necessary, and causally related to his industrial injury.

33. The additional testing recommended by Dr. Volz is reasonable and necessary if Claimant wishes to pursue it.

34. The Quest Diagnostics charges dated April 19, 2016 were for reasonable, necessary, related and authorized diagnostic treatment to evaluate Claimant's symptoms and determine a potential course of treatment.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even after an admission of liability

is filed, the respondents retain the right to dispute the relatedness of any particular treatment, because the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must also prove that the requested treatment is reasonable and necessary." Section 8-42-101(1)(a). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201, C.R.S.

As found, Claimant has proven by a preponderance of the evidence that additional treatment for his chronic urticaria and immunological symptoms is reasonable, necessary, and causally related to his industrial injury. Dr. Bowdish consistently opined that Claimant's symptoms were related to his industrial injury. The DIME subsequently found that Claimant's ongoing allergic reactions are causally related to the original work injury, and Claimant will not reach MMI until all the medications and options proposed by his treating allergist are attempted. Dr. Volz agrees that the work exposure "initiated" Claimant's condition, but thinks other factors may now contribute to its perpetuation. Given the convergence of expert medical opinion that the industrial injury precipitated Claimant's condition, the ALJ is not persuaded to sever that causal connection based on supposition that non-occupational factors might be perpetuating the condition. Based on the totality of evidence presented, the ALJ is persuaded that Claimant's industrial injury is the most likely caused of his ongoing symptoms.

Claimant is entitled to reasonable, necessary, and related treatment to cure and relieve his ongoing allergic and immunological problems. At the moment, the only specific medical benefit in dispute is omalizumab. Claimant has tried numerous treatments for his allergic condition, including Silvadene, Benadryl, steroid injections, prednisone, Singulair and cetirizine, without significant benefit. Dr. Bowdish suggested as early as January 2015 that Claimant may require omalizumab at some point to get the hives under control. In February 2015, Dr. Bowdish was ready to implement omalizumab, but Insurer did not authorize the medication. Dr. Bowdish continued to recommend omalizumab through his last note dated June 7, 2016. Dr. Rook and Dr. Volz agree that omalizumab is an appropriate treatment for Claimant.

As found, Claimant has proven by a preponderance of the evidence that omalizumab treatment is reasonable, necessary, and causally related to his industrial injury. The ALJ is not persuaded that Claimant must wait for additional testing before initiating the omalizumab therapy.

Dr. Volz suggested additional testing along with the omalizumab treatment, including testing for levels of vitamin D, B12, folate, iron, vitamin D, methylmalonic acid, in homocysteine, along with testing for the MTHFR gene. The ALJ concludes that additional testing requested by an ATP to further diagnose and treat Claimant's condition, including testing as outlined above, would be reasonable and necessary.

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for omalizumab therapy.

2. Respondents shall pay for all reasonable and necessary medical treatment to cure and relieve the effects of Claimant's injury, including additional diagnostic testing suggested by Dr. Volz if Claimant chooses to pursue same.

3. Respondents shall pay the $539.73 bill from Quest Diagnostics for lab work performed on April 19, 2016. Respondents are encouraged to pay the bill forthwith to mitigate any further damage to Claimant's credit.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the left knee lateral meniscus debridement and chondroplasty surgery recommended by Dr. Braden Mayer is related to Claimant's January 21, 2015 industrial injury.

FINDINGS OF FACT

1. Claimant is a 42 year-old man employed by Employer as a Deputy Sheriff. Claimant has worked for Employer since approximately January 2004. Claimant sustained an admitted industrial injury to his right knee on January 21, 2015 while running down a ramp to respond to an assistance call.

2. Claimant primarily treated under the direction of Brian Beatty, D.O., and Braden Mayer, M.D. Claimant underwent an MRI of the right knee on February 6, 2015, which revealed patellofemoral arthritis, a lateral meniscus tear, and degeneration in the medial meniscus. Dr. Beatty referred Claimant to an orthopedic surgeon, Philip Stull, M.D., who recommended surgery.

3. On March 12, 2015, Claimant underwent a right knee arthroscopy with partial lateral meniscectomy, extensive arthroscopic debridement, and chondroplasty.

4. Claimant continued reporting right knee pain subsequent to the surgery despite being released from treatment by Dr. Stull. Dr. Beatty requested a second orthopedic opinion with Thomas Noonan, M.D., with the Steadman Hawkins Clinic. Dr. Noonan first evaluated Claimant on June 18, 2015. Dr. Noonan noted, in part, tenderness and subtle effusion of the right knee. Regarding the left knee, Dr. Noonan noted good motion and strength, and found Claimant's left knee neurovascularly intact and ligamentously stable. Dr. Noonan impressed right knee pain. Dr. Noonan did not provide an impression for the left knee. With respect to the right knee, Dr. Noonan explained that conservative treatment options could include physical therapy, cortisone injections, and possibly an unloader brace; however, there would likely need to be a total right knee replacement at some point in time due to Claimant's moderate to advanced arthritis that was exacerbated by the work injury.

5. There are no physical examination findings for the left knee or impressions of the left knee noted in the medical records for the subsequent evaluation on August 7, 2015.

6. Claimant began reporting left knee pain as of an evaluation with Dr. Beatty on September 23, 2015. Claimant continued reporting left knee pain in subsequent evaluations, including a January 20, 2016 evaluation with Dr. Beatty in which Claimant

reported that his left knee pain was getting worse than the right knee pain. Claimant attributed the left knee pain to his altered gait.

7. Claimant's antalgic gait is documented in the Physiotherapy Associates physical therapy records, Dr. Beatty's January 30, 2015, February 6, 2015, February 27, 2015, March 20, 2015, October 7, 2015 and January 20, 2016 evaluation notes, and Dr. Noonan's June 18, 2015 evaluation notes.

8. Subsequent to Claimant's report of knee pain in September 2015, the medical records do not include physical examination findings for the left knee or impressions of the left knee until an October 21, 2015 evaluation with Dr. Beatty.

9. On October 21, 2015, Dr. Beatty noted tenderness of the left knee over the distal quad and laterally with no swelling or effusion. Dr. Beatty noted flexion at 135 degrees with full extension. Dr. Beatty did not include an impression of the left knee. Dr. Beatty noted the same exam findings for the left knee on November 4, 2015.

10. There are no physical examination findings for the left knee or impressions of the left knee noted in the medical records for the subsequent November 18, 2015 evaluation.

11. On December 7, 2015, Dr. Mayer reevaluated Claimant and documented patellofemoral irritation of the left knee with no medial or lateral joint line tenderness. Dr. Mayer noted Claimant was ligamentously stable and neurovascularly intact distally with a range of motion from 0 to 130 degrees with pain. Dr. Mayer did not provide an impression for the left knee. Dr. Mayer wrote a new prescription for left knee physical therapy.

12. There are no physical examination findings for the left knee or impressions of the left knee noted in the medical records for the subsequent December 30, 2015 and January 20, 2016 evaluations.

13. On February 15, 2016, Dr. Mayer reevaluated Claimant and noted Claimant's left knee showed "significant patellofemoral rotation with grind and compression, which is the maximal source of his pain." Dr. Mayer found no medial or joint line tenderness. Dr. Mayer commented that Claimant's left knee continued "to be aggravated due to the increased compensation from his contralateral side." Dr. Mayer impressed patellofemoral irritation of the left knee.

14. There are no physical examination findings for the left knee or impressions of the left knee noted in the medical records for the subsequent February 17, 2016 and March 7, 2016 evaluations.

15. Dr. Mayer reevaluated Claimant on March 28, 2016 for a follow-up on Claimant's right knee. Dr. Mayer noted that the physical examination was unchanged from the February 15, 2016 evaluation. Dr. Mayer impressed degenerative joint disease of the right knee and left knee patellofemoral syndrome.

16. There are no physical examination findings for the left knee or impressions of the left knee noted in the medical records for the subsequent the April 18, May 9, and May 16, 2016 evaluations.

17. On June 6, 2016, Douglas C. Scott, M.D., M.P.H., conducted an Independent Medical Evaluation ("IME") at Respondents' request. Dr. Scott issued an IME report on July 4, 2016. Dr. Scott conducted a medical records review and a physical examination. Upon examination, Dr. Scott noted no click with left knee extension, no medial compartment collapse, and no ligamentous laxity. Dr. Scott further noted that Claimant walked without significant antalgia. Dr. Scott assessed probable left knee patellofemoral chondromalacia or osteoarthritis.

18. Dr. Scott opined that Claimant likely aggravated the patellofemoral osteoarthritis and/or chondromalacia of his left knee due to off-weighting his right knee and placing more pressure on his left knee. Dr. Scott further opined that Claimant "probably does not require any specific treatment other than conservative treatment of anti-inflammatory medication, icing, and possibly a knee sleeve."

19. Claimant underwent an MRI of his left knee on July 26, 2016. The history given for the purpose of the MRI was "Left knee pain, grinding, and popping x6-7 months." Craig Stewart, M.D., impressed a complex tear of the lateral meniscus, including a displaced meniscal flap adjacent to the anterior horn and anterior root of the lateral meniscus; parameniscal cysts adjacent to the anterior horn; and mild tricompartmental chondromalacia.

20. Claimant returned to Dr. Mayer for an evaluation of his left knee on August 1, 2016. Dr. Mayer stated that this was a "new problem." Claimant reported that he had wear and tear of his left knee over several years, and that he was now experiencing an "achy pain that awakens him at night." Claimant denied any specific injury or trauma. Claimant reported mechanical clicking in the left knee. Dr. Mayer physically examined Claimant and reviewed the July 26, 2016 MRI. Upon physical examination, Dr. Mayer noted significant lateral joint line tenderness and mild medial joint line tenderness. Dr. Mayer impressed complex lateral meniscus tear with flap component, parameniscal cyst, and mild tricompartmental DJD. Dr. Mayer remarked that the tear was "suspecting to his work and daily activities." Dr. Mayer recommended arthroscopic surgery for lateral meniscus debridement of the flap component, and to evaluate the chondrol surface at the time of surgery for likely chondroplasty.

21. Dr. Scott conducted a review of additional medical records on August 20, 2016. Dr. Scott reviewed the July 26, 2016 MRI of Claimant's left knee and medical records from August 1 and August 9, 2016. Dr. Scott noted,

> "At the June 6, 2016 IME appointment [Claimant] told me that around September 2015 his left knee started hurting above the knee cap to below the knee cap, and he noted pain every time he got up form a chair and was going up and down stairs. With extension of the left knee he felt like it would lock up. These symptoms suggest both patellofemoral syndrome

and a cartilage flap tear. However, [Claimant's] report to me of these symptoms was nine months after his report of left knee pain to Dr. Beatty."

22. Referring to medical literature, Dr. Scott stated acute meniscus injuries are "generally considered to be caused by rotation of the femur on a fixed tibia while weightbearing." Dr. Scott also referenced the Colorado Medical Treatment Guidelines for Lower Extremity Injury, noting that "meniscus injury is a tear, disruption, or avulsion of the medial or lateral meniscus tissue."

23. Dr. Scott opined that Claimant did not sustain a left knee injury knee due to the January 21, 2015 work injury. Dr Scott found no evidence establishing that Claimant's left knee complex degenerative flap tear was due to the January 21, 2015 work injury. Dr. Scott concluded Claimant "probably had a temporary irritation of his left knee underlying and pre-existing patellofemoral chondromalacia with patellofemoral syndrome from placing excessive weight on the left knee," noting Claimant weighed 294 pounds. Dr. Scott noted that the structural diagnostic testing evidenced a complex tear of the lateral meniscus, parameniscal cysts, and mild tricompartmental chondromalacia, opining that those structural findings, were "long standing, chronic, degenerative and pre-existent to the 1/21/2015 work injury."

24. Dr. Scott opined that the requested surgery is reasonable and necessary but not related to Claimant's January 21, 2015 work injury. Dr. Scott noted Claimant did not have an acute injury to the left knee meniscus or cartilage on January 21, 2015. Dr. Scott opined that, while the increased weightbearing on Claimant's left knee may have irritated his pre-existing left knee chondromalacia, the increased weightbearing "did not cause a lateral meniscus tear requiring a debridement of a cartilage defect requiring a chondroplasty."

25. On October 28, 2016, Timothy O. Hall, M.D., conducted an IME at the request of Claimant. Dr. Hall issued an IME report of the same date. Dr. Hall reviewed Claimant's medical records and conducted a physical examination. Dr. Hall noted that Claimant reported occasions during which Claimant's "right knee would buckle and he had to catch himself with the left." Dr. Hall noted that such situations could create the "acute mechanics of a meniscal tear."

26. Dr. Hall opined, within a reasonable degree of medical probability, that the requested surgery was reasonable, necessary and directly related to Claimant's January 21, 2015 injury. Dr. Hall remarked, "If not for that injury, he would not be dealing with the left-sided symptoms." Dr. Hall noted that Claimant's left knee symptoms worsened over time, and that Claimant's weight increased because of the injury. Dr. Hall opined, "One could make an argument that the reason his left knee hurts is this weight gain as much as it is abnormal weightbearing and gait disturbance. All of these factors are contributors and all of them relate to his January 2015 work-related injury."

27. At hearing, Claimant testified that he had no issues performing his work duties prior to January 2015. Claimant testified that he worked 10-12 hour shifts, which

required him to stand for 80-90% of a shift. Claimant's job duties also required walking and running.

28. Claimant testified that he sustained a meniscus tear in his right knee in his early 20's, for which he underwent arthroscopic surgery. Claimant testified that he did not experience subsequent issues with his right knee or require additional treatment on his right knee until the January 21, 2015 work injury. Claimant testified that he did not have any prior left knee injuries or need for treatment for his left knee prior to January 21, 2015. Claimant testified that he has not sustained any injuries since January 21, 2015 that would cause his antalgic gait, or is he aware of any other reasons for the antalgic gait.

29. Claimant testified that, subsequent to the January 21, 2015 work injury, his right knee was always in pain. Claimant testified that since the March 2015 surgery, he has not been able to walk normally. Claimant testified that he feels as though his right knee will "pop out," causing him to stabilize himself with his left leg and require Claimant to place more weight on his left knee. Claimant testified that his left knee did not begin hurting until approximately September 2015. Claimant testified that he currently experiences pain, problems sleeping on his side, and problems walking, all of which he did not experience prior to the January 21, 2015 work injury.

30. Dr. Scott testified at hearing as an expert in occupational medicine. Dr. Scott testified consistent with his July 4, 2016 and August 20, 2016 reports. Dr. Scott testified that the purpose of the recommended surgery was to remove the mensical flap and to reduce pain and mechanical dysfunction. Dr. Scott opined that Claimant's left knee condition was not related to the January 21, 2015 injury or the altered gait. Dr. Scott opined that it was not plausible or probable that weightbearing caused Claimant's cartilage to tear, opining that that meniscus tears usually result from tortion or rotation and require some sort of force. Dr. Scott testified that he has treated patients with altered gaits and those patients did not develop flap tears.

31. Dr. Scott opined that Claimant must have had "some type of twisting event" between June 6, 2015 and September 23, 2015 resulting in the flap tear. Dr. Scott noted that Dr. Mayer referred to Claimant's left knee issues as a "new problem" in his August 1, 2016 medical notes. Dr. Scott testified that a flap tear is acute and not degenerative. Dr. Scott's testimony is contradicted by his August 20, 2016 authored opinion that the structural findings of the July 26, 2016 MRI were degenerative and pre-existed the January 21, 2015 work injury. When asked about the contradiction between his testimony and his medical report, Dr. Scott testified, "So I may have made a mistake or something, but that's what I put."

32. Claimant's testimony is found credible and persuasive.

33. The ALJ credits the opinion of Dr. Hall over the contrary opinion of Dr. Scott and finds that claimant has demonstrated that it is more likely than not that the left knee lateral meniscus debridement and chondroplasty surgery is reasonably necessary and causally related to the January 21, 2015 work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of

conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Reasonable, Necessary and Related Medical Treatment

A claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). If Claimant establishes a causal nexus, Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* Section 8-42-101(1)(a), C.R.S. The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has met his burden to establish that it is more probably true than not that the proposed surgery is reasonable, necessary and related to Claimant's January 21, 2015 admitted industrial injury. Although the medical records document Claimant having reported some "wear and tear" to his left knee, Claimant credibly testified that he did not have any issues with his left knee or need for treatment for his left knee prior to January 21, 2015. Claimant credibly testified that he has not been able to walk normally at any point since the March 2015 surgery, and that on occasion his right knee will become unstable, causing him to put additional stress on his left knee. Claimant did not develop issues with his left knee until overcompensating for several months following the January 21, 2015 work injury, including having to catch himself with his left leg when his right leg would buckle. Dr. Hall credibly opined that such circumstances could cause a meniscus tear in Claimant's left knee. Based on the totality of the evidence, Claimant has established that, more likely than not, the left knee lateral meniscus debridement and chondroplasty surgery is reasonably necessary and causally related to the January 21, 2015 work injury.

ORDER

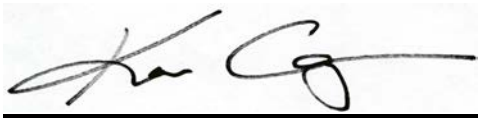
It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that he is entitled to the left knee lateral meniscus debridement and chondroplasty as requested by Dr. Braden Mayer. Respondents shall pay for this procedure.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Respondents have established by a preponderance of the evidence that they are entitled to withdraw their February 8, 2008 Final Admission of Liability (FAL) that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's April 18, 2005 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

FINDINGS OF FACT

1. On November 2, 2016 the Office of Administrative Courts (OAC) mailed a Notice of Hearing to Claimant in this matter. The Notice of Hearing was mailed to the following address on file with the OAC: 3696 Downieville St., Loveland, CO 80538. The Notice of Hearing specified that a hearing was scheduled for February 10, 2017 at 1:00 p.m. at the 19th Judicial District-Weld County Center in Greeley, CO 80631. Furthermore, Respondents properly served Claimant with the Notice of Hearing on December 1, 2016 at her home consistent with the address on file with the OAC. Claimant thus received notice of the scheduled hearing. However, Claimant failed to attend or otherwise participate in the February 10, 2017 hearing.

2. Claimant worked for Employer as a Certified Nursing Assistant. On April 18, 2005 Claimant sustained an admitted industrial injury to her lumbar spine while working in a nursing home. Claimant was transferring a patient from the restroom to the bed when she felt the acute onset of lower back pain.

3. Claimant began conservative medical treatment with her authorized treating physicians and was taken off work. She received substantial conservative care in the form of physical therapy, injections, pain medications and acupuncture.

4. Claimant was not a surgical candidate and Authorized Treating Physician (ATP) John Charbonneau, M.D. determined that she reached Maximum Medical Improvement (MMI) on March 7, 2007. Dr. Charbonneau recommended ongoing medical maintenance care to maintain Claimant at MMI.

5. On December 11, 2011 Claimant underwent a Division Independent medical Examination (DIME) with James Crosby, D.O. Dr. Crosby agreed that Claimant had reached MMI on March 7, 2007 and assigned her a 12% whole person impairment rating for her lumbar spine. Dr. Crosby agreed with the recommendations from Dr. Charbonneau for ongoing medical maintenance care.

6. On February 8, 2008 Respondents filed a Final Admission of Liability (FAL) consistent with the DIME determination of Dr. Crosby. Respondents acknowledged that Claimant was entitled to receive reasonable, necessary and related medical maintenance care.

7. Claimant has been receiving maintenance care from her treating physicians since 2008. Her maintenance care has included office visits, narcotic medications, radiofrequency neurotomies, medical branch block injections and epidural steroid injections.

8. Allison M. Fall, M.D. has evaluated Claimant several times since the inception of the claim and performed several medical records reviews on behalf of Respondents. On January 8, 2015 Dr. Fall specifically addressed Claimant's ongoing medical maintenance care. After considering Claimant's medical history, responses to prior treatment and physical examination, Dr. Fall determined that interventional procedures, such as radiofrequency neurotomy, were not likely to lead to any additional functional benefit. Regarding Claimant's medications, Dr. Fall explained that Norco is no longer effective and Claimant should rely on non-pharmaceutical management of pain rather than opioid medications. She thus recommended a gradual weaning of opioid medications. Dr. Fall summarized that "once [Claimant] has discontinued the opioids, it is my opinion that no further medical maintenance treatment will be indicated provided she continue with a consistent exercise program."

9. Respondents retained an Investigator to conduct video surveillance of Claimant. In April 2016 David Sherrow observed Claimant over the course of several days and videotaped her activities. Investigator Sherrow testified at the hearing in this matter. He specifically explained that he filmed Claimant performing several activities on April 22-23, 2016. Mr. Sherrow commented that Claimant was filmed going to the bank, getting in and out of her car several times, attending yoga classes and running a 5k race. He remarked that Claimant did not appear to have any back pain and moved fluidly without a limp or physical restrictions.

10. Dr. Fall testified at the hearing in this matter. She maintained that Claimant no longer requires medical maintenance care for her April 18, 2005 industrial injury. Dr. Fall explained that there was no objective evidence throughout the medical records that Claimant exhibited functional gains as a result of her medical maintenance treatment. She commented that Claimant's use of Norco and other narcotic medications would not be expected to improve her condition. Dr. Fall further noted that recent urine screens performed in 2016 were inconsistent with Claimant's use of the prescribed narcotic medications. Specifically, the urine screens were negative for the presence of Norco or any other narcotic medications.

11. Dr. Fall reviewed the surveillance footage captured by Mr. Sherrow. She testified that the surveillance further confirmed her opinions that Claimant no longer required any maintenance care relating to her April 18, 2005 injury. Dr. Fall confirmed that the footage showed Claimant moving without any pain behaviors and she was able

to perform several activities inconsistent with her pain complaints. She specifically remarked that Claimant was filmed running a 5k on April 23, 2016. Dr. Fall summarized that Claimant would not be able to perform the activities on the surveillance video if she was suffering chronic, ongoing lumbar spine pain.

12. Respondents have established that it is more probably true than not that they are entitled to withdraw their February 8, 2008 FAL acknowledging reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's April 18, 2005 industrial injury or prevent further deterioration of her condition. On April 18, 2005 Claimant suffered an admitted lumbar spine injury and subsequently underwent substantial medical treatment. She reached MMI on March 7, 2007. DIME physician Dr. Crosby subsequently assigned Claimant a 12% whole person impairment rating. Dr. Crosby agreed with the recommendations from Dr. Charbonneau for ongoing medical maintenance care. Respondents acknowledged continuing medical maintenance care through a February 8, 2008 FAL.

13. Dr. Fall persuasively maintained that Claimant no longer requires medical maintenance care for her April 18, 2005 industrial injury. She explained that there was no objective evidence throughout the medical records that Claimant exhibited functional gains as a result of her medical maintenance treatment. She commented that Claimant's use of Norco and other narcotic medications would not be expected to improve her condition. Dr. Fall further noted that recent urine screens performed in 2016 were inconsistent with Claimant's use of the prescribed narcotic medications. Specifically, the urine screens were negative for the presence of Norco or any other narcotic medications. She also testified that surveillance video further confirmed her opinions that Claimant was no longer in need of any maintenance care relating to her April 18, 2005 injury. Dr. Fall noted that the footage showed Claimant moving without any pain behaviors and she was able to perform several activities inconsistent with her pain complaints. She summarized that Claimant would not be able to perform the activities on the surveillance video if she was suffering chronic, ongoing lumbar spine pain. Accordingly, Respondents are permitted to withdraw their February 8, 2008 FAL acknowledging reasonable, necessary and related medical maintenance benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

5. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2015), C.R.S. On February 18, 2008 Respondents filed a FAL in response to Dr. Crosby's MMI and impairment determinations. The FAL also specified that Claimant was entitled to receive reasonable, necessary and related medical benefits. In order to withdraw the FAL Respondents thus have the burden of proving by a preponderance of the evidence that Claimant is not entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her April 18, 2005 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

6. As found, Respondents have established by a preponderance of the evidence that they are entitled to withdraw their February 8, 2008 FAL acknowledging reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's April 18, 2005 industrial injury or prevent further deterioration of

her condition. On April 18, 2005 Claimant suffered an admitted lumbar spine injury and subsequently underwent substantial medical treatment. She reached MMI on March 7, 2007. DIME physician Dr. Crosby subsequently assigned Claimant a 12% whole person impairment rating. Dr. Crosby agreed with the recommendations from Dr. Charbonneau for ongoing medical maintenance care. Respondents acknowledged continuing medical maintenance care through a February 8, 2008 FAL.

7. As found, Dr. Fall persuasively maintained that Claimant no longer requires medical maintenance care for her April 18, 2005 industrial injury. She explained that there was no objective evidence throughout the medical records that Claimant exhibited functional gains as a result of her medical maintenance treatment. She commented that Claimant's use of Norco and other narcotic medications would not be expected to improve her condition. Dr. Fall further noted that recent urine screens performed in 2016 were inconsistent with Claimant's use of the prescribed narcotic medications. Specifically, the urine screens were negative for the presence of Norco or any other narcotic medications. She also testified that surveillance video further confirmed her opinions that Claimant was no longer in need of any maintenance care relating to her April 18, 2005 injury. Dr. Fall noted that the footage showed Claimant moving without any pain behaviors and she was able to perform several activities inconsistent with her pain complaints. She summarized that Claimant would not be able to perform the activities on the surveillance video if she was suffering chronic, ongoing lumbar spine pain. Accordingly, Respondents are permitted to withdraw their February 8, 2008 FAL acknowledging reasonable, necessary and related medical maintenance benefits.

ORDER

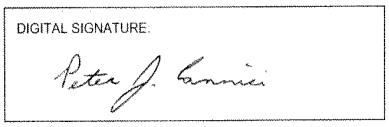
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents are permitted to withdraw their February 8, 2008 FAL acknowledging reasonable, necessary and related medical maintenance benefits.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 9, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUE

The issue raised for consideration is whether the left hip scope labral repair reconstruction-femoral acetabular osteoplasty recommended by Dr. White on July 27, 2016, is reasonable, necessary and related to the work injury.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the following Findings of Fact are entered.

1. On December 12, 2014, Claimant worked for Employer installing a satellite for a television for a customer. He was carrying a ladder that weighed approximately 75 pounds when he felt pain in his back, hips, and groin area. Claimant felt that he pulled something initially. Claimant continued to work.
   1.
2. Later that same day, Claimant carried two cinder blocks each weighing 30 pounds from his truck to the customer's house four times when he noticed more pain in his back, groin area, and hips. Claimant called his supervisor and reported the injury.

3. Claimant's supervisor took him to Concentra the next day. On December 13, 2014. Dr. Danahey notes that on December 12, 2014, Claimant felt pain and tightness in the lower back carrying a cinder block and 22 foot ladder. The doctor recommended physical therapy and restricted Claimant to no lifting more than 10 lbs.

4. On January 16, 2015, Candice Sobanski, M.D. noted that Claimant's pain radiates into hips. And, on February 23, 2015, again Dr. Sobanski noted hip pain, left side worse than right.

5. On March 16, 2015, Catherine Kent, a physical therapist, did manual therapy on Claimant noting tight left internal and external rotation. On March 24, 2015, Claimant went to a different physical therapist than he normally visits. The physical therapist's name was Catherine. At physical therapy, the therapist had Claimant lay on his back while she pulled Claimant's left leg out and then twisted it outward to a 45 degree angle. Claimant felt immediate pain in his left hip. The physical therapist did this exercise three or four times

6. On March 26, 2015, physical therapist Louise Long noted discomfort walking and sitting after last treatment session.

7. On March 30, 2015, nurse practitioner Rosalie Einsphar, noted PT causes Claimant increased pain while attending PT two times per week.

8. On April 13, 2015 Dr. Sobanski noted uncomfortable hip pain after PT the previous week. On April 16, 2015, physical therapist Darla Lopez noted Claimant was sore after the last physical therapy treatment. The physical therapist notes that Claimant's pain could the result of massage or the traction during PT.

9. On July 14, 2015, Dr. Caroline Gellrick noted on physical exam that Claimant's hip exam showed popping in the left hip and positive left anterior groin pain. Claimant had tenderness down to the trochanteric region. Dr. Gellrick recommended an MRI of the hip.

10. On July 20, 2015, Claimant's hip MRI that showed "Small left hip acetabular labral tear anteriorly; mild chondral thinning over the left femoral head and adjacent acetabular roof anteriorly; mild bony prominence of the lateral femoral head neck junction of the left hip and this can predispose patients to cam-type femoroacetabular impingement." (Claimant's Ex. 8 pg. 138).

11. On July 22, 2015, Gellrick noted that Claimant's symptoms corresponded to the MRI's labral tear on the left hip. Dr. Gellrick referred the Claimant to Dr. Schneider who felt that Claimant needed surgery on his shoulder. Claimant had surgery on his shoulder and then Dr. Gellrick referred Claimant to Dr. White to address his hip.

12. On May 18, 2016, Dr. Brian White, M.D. noted that Claimant's left leg was manipulated during physical therapy and Claimant was injured. Dr. White noted that Claimant's hip is the source of his pain. Dr. White opined that a diagnostic injection was reasonable and necessary to confirm that the joint is the source of Claimant's pain. After the confirmatory injection, Dr. White recommended hip arthroscopy as the next reasonable step.

13. On May 26, 2016, a physician's assistant, Shawn Karns, noted that Claimant's diagnostic injection relieved his pain and that Claimant wanted to move forward with scheduling the left hip arthroscopy surgery.

14. On July 27, 2016, Dr. White noted the MRI and the diagnostic injection confirmed a labral tear and that the doctor would perform a hip arthroscopy to reshape the ball and reshape the cuff and perform a labral reconstruction given the chronicity of the symptoms. Dr. White finally noted that Claimant's original injury was probably more related to his back, but during physical therapy Claimant's hip became most symptomatic.

15. Dr. Gellrick opined in her deposition that to a reasonable degree of medical probability the traction that was performed during the physical therapy caused Claimant's labral tear. Dr. Gellrick opined that surgery is reasonable, necessary, and related to the work injury because the injury occurred during

treatment for the primary injury in physical therapy and is compensable to the work injury.

16. In his November 2, 2016, deposition, Dr. White noted that he performed the anterior impingement maneuver and posterior impingement maneuver and that both were basically positive indicating that Claimant has a significant labral tear that is irritated. Dr. White noted the positive diagnostic injection and concluded that he recommends the arthroscopy.

17. It is found and concluded that Dr. White's recommendation for a left hip arthroscopy to reshape the ball and reshape the cuff and possibly perform a labral reconstruction given the chronicity of the symptoms is reasonably necessary and related medical procedure for which Respondents are liable.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are reached.

1. The purpose of the Workers' Compensation Act of Colorado (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of- fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592, P.2d 792 (1979).

2. The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43- 201, C.R.S. The ALJ factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. The ALJ is empowered to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence. *See Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. ICAO*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d (1936). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v.Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). The ALJ has broad discretion to determine the admissibility and weight of evidence based on an expert's knowledge, skill, experience, training and education. See Section 8-43- 210, C.R.S; *One Hour Cleaners v. ICAO,* 914 P.2d 501 (Colo. App. 1995).

COMPENSABILITY

4. To recover workers' compensation benefits, the claimant must prove she suffered a compensable injury. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v.Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London Lancashire Indemnity Co*., 135 Colo. 372, 311 P.2d 705 (1957). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43- 201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

5. Under the quasi-course of employment doctrine, injuries sustained while undergoing or traveling to and from authorized medical treatment are compensable under the quasi-course of employment doctrine even though they occur outside the ordinary time and place limitations of normal employment. *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993). The rationale for this doctrine holds that, because the employer is required to provide reasonable and necessary medical treatment, and because claimant is required to submit to it or risk suspension or termination of benefits, treatment by the authorized physician becomes an implied part of the employment contract. *See Employers Fire Insurance Co. v. Lumbermens Mutual Casualty Co*., 964 P.2d 591 (Colo. App. 1998);

Schreiber v. Brown & Root, Inc., 888 P.2d 274 (Colo. App. 1993). The quasi-course doctrine is designed to attenuate the usual requisites of compensability.

6. Here, Claimant's hip injury that occurred in his course of getting physical therapy for his back is compensable. Claimant visited Concentra following his work-related injury, where he was recommended to physical therapy per Dr. Danahey. Claimant's hip was manipulated during physical therapy, causing intense pain. This pain is well documented in the medical records by other physical therapist, physician's assistant and doctors, beginning on March 26, 2015. Finally, Drs. White and Gellrick in their November 2, 2016, and December 7, 2016, depositions, respectively, opined that it was Claimant's physical therapy that caused the labral tear. Because Claimant would not have undergone physical therapy had it not been for his initial work-related injury, and because Claimant's labral tear occurred during the course of physical therapy, Claimant's hip injury is compensable under the quasi-course of employment doctrine.

MEDICAL BENEFITS

7. Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of a work-related injury. Section 8-42- 101(1) (a), C.R.S. Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work related injury and the condition for which benefits are sought. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

8. Here, Claimant underwent an MRI on July 20, 2015, for his hip pain which revealed a labral tear. Dr. Gellrick referred Claimant to Dr. White for possible hip surgery. Dr. White performed a diagnostic injection to confirm that Claimant's joint was the source of his overall pain. Dr. White noted on May 18, 2016, that if the diagnostic injection took away Claimant's hip pain, it would be appropriate to proceed with the arthroscopy. On May 26, 2016, the diagnostic injection performed on Claimant's hip reduced his pain. Dr. White also noted the improvement in Claimant's hip pain, and recommended proceeding with the arthroscopy. In Dr. Gellrick's deposition she opined that Claimant's left hip condition is caused by physical therapy and is therefore compensable. Thus, Claimant's left hip scope labral repair reconstruction-femoral acetabular osteoplasty is reasonable, necessary, and related medical treatment.

ORDER

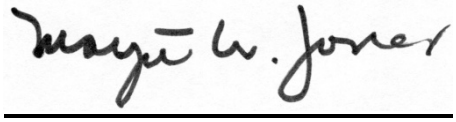
It is therefore ordered that:

Claimant's left hip scope labral repair reconstruction-femoral acetabular osteoplasty recommended by Dr. White on July 27, 2016 is reasonable, necessary, and related to the work injury and shall be authorized by Respondents. Respondents shall be liable for this medical benefit.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 13, 2017



Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on June 18, 2016.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits for his June 18, 2016 work injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

FINDINGS OF FACT

1. Claimant works for Employer as a lead overnight medical technician. Claimant has been so employed since approximately October of 2012. Claimant's normal schedule is from approximately 10:00 p.m. to 6:00 a.m. Claimant is responsible for the building and residents, handling medications, moving patients, and dealing with staff.

2. On June 18, 2016 Claimant alleges that he sustained a work related injury. Claimant alleges that on that night one resident had not been put to bed and that Claimant and his wife (who also was employed by Employer) got the patient ready and transferred her to bed.

3. Claimant alleges that the patient had her arms around his neck and that he had his arms around the patient's waist. Claimant alleges that as he pulled the patient up he heard a pop in his back and had sharp pain in his back. Claimant testified that his back pain lingered throughout the night but was not as sharp as at the time of the incident. Claimant testified that he finished his shift and then had the next two days off of work.

4. Claimant alleges that he returned to work on a Tuesday evening the next week and that his pain had worsened.

5. On June 28, 2016 Claimant was evaluated by Kelly Yde, PA for an ankle injury that he had sustained a few months prior. PA Yde noted that Claimant had poor bone quality but that his left ankle fracture had been treated non operatively. Claimant declined x-rays stating that he was having significant back pain and would not be able to get on and off the x-ray table. *See* Exhibit J.

6. On June 29, 2016 Claimant called Judi Pring, Employer's executive director for the location Claimant worked at. Claimant stated that he had been injured at work and that he wanted to file a claim. Claimant was unable to clearly specify what had happened to cause his injury. Claimant said that the injury had happened the weekend prior, but was unable to give a specific date of injury. Ms. Pring contacted Dana Gill, the business office coordinator to advise Ms. Gill of the call from Claimant.

7. On July 1, 2016 Claimant met with Ms. Gill. Ms. Gill asked Claimant questions about when exactly the injury had occurred and Claimant stated after looking at the calendar behind Ms. Gill's desk, "lets go with the 18th." Ms. Gill asked Claimant why he had not reported the injury immediately and Claimant stated that he was not feeling any pain but that the pain came on a few days later, that he had pain on/off for one week, and that the pain had gotten worse. Claimant was referred for medical treatment.

8. On July 1, 2016 Claimant was evaluated at Concentra by Jennifer Pula, M.D. Claimant reported that he was injured at work on June 18, 2016 and that after transferring a resident from a wheelchair to a bed he felt pain later that night. Claimant reported worsening lower back pain and muscle spasms worse with movement that was bilateral and radiated into his hips. Dr. Pula noted that Claimant was wearing a Butrans patch from a prior ankle injury. Claimant reported feeling similar to a previous back injury and also reported that he had been using a power wheelchair. Dr. Pula noted a history of a lumbar sprain with a transfer of a resident the year prior and that Claimant had physical therapy, massage therapy, and chiropractic treatment and made an 85% recovery. Dr. Pula noted that Claimant was wearing a back brace and using a cane. Dr. Pula assessed lumbar sprain and muscle spasm of back and referred Claimant for chiropractic and acupuncture treatment as well as physical therapy treatment. *See* Exhibits F, 8.

9. On July 8, 2016 Claimant was evaluated Stephen Danahey, M.D. Claimant reported injuring his lower back transferring a patient. Claimant reported that he was not doing well and that he had back spasms on either side of the lower back. Claimant reported a prior back injury two years prior and that he had pretty much recovered from it and was 90% improved and working regular duty when this new injury occurred. Claimant reported having an injury at home six months ago when he fell through a crawl space and aggravated the arthritis in his right hip and that he also fell down the stairs at his home two months ago and fractured his left ankle. Claimant reported that he had been using a cane for the last six months or so. Claimant reported that for the last 4-5 months his pain had been managed by Comprehensive Pain Management in Golden. On examination of the lumbosacral spine Dr. Danahey noted tenderness at the left paraspinal, right paraspinal, right sciatic notch, and left sciatic notch. Dr. Danahey also noted left sided and right sided muscle spasms. Dr. Danahey assessed lumbar sprain, and muscle spasm of back. *See* Exhibits F, 6.

10. On July 13, 2016 Claimant was evaluated by Dr. Danahey. Claimant reported continued pain in the lower back. Dr. Danahey noted that Claimant was

continuing to use a cane on the right. Dr. Danahey referred Claimant to a physical medicine and rehabilitation physiatrist. *See* Exhibits F, 6.

11. On July 25, 2016 Claimant underwent an MRI of his lumbar spine interpreted by Samuel Scutchfield, M.D. The impression was: acute to sub acute compression type fracture of L1 with approximately 50% loss of vertebral body height and minimal retropulsion with mild spinal canal stenosis as a result; lesser acute to sub acute compression type fractures of T11, T12, and L2; prominent chronic deformities of the superior endplates of L4 and L5 with some retropulsion also present; significant spinal canal stenosis at L4-5 due to a combination of retropulsion and degenerative change; and infrarenal aortic aneurysm measuring approximately 4 cm. *See* Exhibits D, 5.

12. On July 25, 2016 Claimant was evaluated by Allison Fall, M.D. Claimant reported assisting a resident from a wheelchair to a bed and that he had his arms underneath the patient's shoulders when he felt a burning in his lower back. Clamant reported that 2.5 years prior he had a lumbar spine injury at work with leg issues and sacroiliac issues and that he got 90% better but was still having some problems. Claimant also reported that 8 months prior he was in a crawl space and fell through aggravating arthritis in his right hip and that he used a wheelchair for four months at work. Claimant reported he then developed left ankle tendinitis from walking funny due to his hip and was seeing a doctor for that when he fell down stairs in April at his home and fractured his left fibula. Claimant reported that at the time of this new injury he was still wearing a boot and had minimal low back pain on and off from his hip problem. Claimant reported that he saw a pain management doctor who was treating his ankle, hip, and minimal low back pain. *See* Exhibits E, 10.

13. Claimant reported that he had recently been diagnosed with osteopenia and that he had arthritis and pain in the right hip. Claimant reported a family history significant for aortic aneurysms in a father and brother and that his father had back fractures. Dr. Fall noted that Claimant ambulated with a cane. Dr. Fall reviewed the MRI films Claimant brought in and noted that there were significant findings. Dr. Fall assessed L1 compression fracture 50% with retropulsion and central stenosis; chronic degenerative changes at L4-5 with retropulsion; and infrarenal aorta measuring 4 cm. Dr. Fall referred Claimant STAT to Dr. Castro, an orthopedic surgeon to ensure Claimant was not causing any further harm to his spine with activities. Dr. Fall advised Claimant to avoid bending, lifting, and twisting. *See* Exhibits E, 10.

14. On July 26, 2016 Claimant was evaluated by Michael Rauzzino, M.D. as Dr. Castro was not available to take a STAT referral. Claimant reported a history of low back pain from a previous injury treated through his primary physician. Claimant reported the acute onset of severe pain on June 18, 2016 when he was transferring a resident from a wheelchair to a bed and felt a pop in his back and that the pain became worse later on during the course of the night. Dr. Rauzzino also noted a history of injury again to Claimant's back last year when transferring a resident and that he made approximately 80-99% recovery from that injury. Dr. Rauzzino noted that an MRI was

completed on July 25, 2016 that showed chronic degenerative changes at L4-5 with stenosis and acute fractures of multiple vertebral bodies including L1, slight signal intensity to T11, a little more T12 and L2, and a fracture of L5. Dr. Rauzzino noted that the L5 fracture was not read on the initial study but that he discussed and confirmed with the radiologist that Claimant in fact had an acute fracture at L5 as well. *See* Exhibits C, 11.

15. Dr. Rauzzino noted that Claimant was using a walker to get around and was in severe back pain. Claimant reported a history of osteopenia and reported taking Percocet and butrans for the chronic back pain. Dr. Rauzzino opined that Claimant had multiple compression fractures due to the lifting injury and opined that Claimant was certainly predisposed to this due to Claimant's osteopenia but that were it not for the work injury, the fractures would not have occurred. Dr. Rauzzino opined thus that they were work related. Dr. Rauzzino opined that Claimant needed to be treated on an expedited basis and recommended kyphoplasty at multiple levels including L1 and T12, potentially L2 and L5 depending how they will do at the time of surgery. Dr. Rauzzino noted that hopefully the surgery could be done in the next few days. Dr. Rauzzino opined that if untreated, given Claimant's osteopenia and his large body habitus, it was likely that the fractures would progress further retropulsing fragments into the canal at which point they might not be able to treat with kyphoplasty alone. *See* Exhibits C, 11.

16. On July 28, 2016 Claimant was evaluated by Dr. Danahey. Dr. Danahey noted that a lumbar MRI had demonstrated an L1 vertebral body fracture with loss of height and retropulsion as well as other acute fractures of L5 as well. Dr. Danahey noted a history of osteopenia. Dr. Danahey noted that Dr. Rauzzino had recommended an urgent kyphoplasty at multiple levels and felt the fractures were related to lifting at work. Dr. Danahey noted that Claimant was wearing a back brace and using a walker. Dr. Danahey assessed lumbar compression fracture and agreed with proceeding with kyphoplasty as soon as possible. *See* Exhibits F, 6.

17. On August 8, 2016 Claimant was evaluated by Dr. Fall. Dr. Fall noted that Claimant had seen neurosurgeon Dr. Rauzzino who had recommended kyphoplasty at multiple levels. Dr. Fall noted that Claimant was in a back brace and using a walker. Dr. Fall assessed multiple compression fractures, thoracic and lumbar spine and recommended that Claimant follow through and try to pursue kyphoplasty surgery through Claimant's personal health insurance and then try to get it covered through workers' compensation. *See* Exhibits E, 10.

18. On August 29, 2016 Claimant underwent X-rays of his lumbar spine interpreted by Vernon Chapman, M.D. Dr. Chapman found: L1, L4, and L5 vertebral compression fractures with stable height loss; interval loss of height of the L2 vertebral body with approximately 40% height loss consistent with an interval compression fracture; lumbar facet degenerative change; diffuse osteopenia; and abdominal aortic aneurysm evident with atherosclerotic calcification. *See* Exhibits D, 5.

19. On August 29, 2016 Claimant was evaluated by Dr. Fall. Claimant reported that he had still not received authorization for the surgery recommended by Dr. Rauzzino and that his private insurance had told him it was work related and that they would not cover it. Dr. Fall assessed multiple compression fractures on top of a chronic low back pain syndrome and underlying osteopenia. *See* Exhibits E, 10.

20. On September 30, 2016 Claimant was evaluated by Sharad Rajpal, M.D. Claimant reported that he was transferring a resident from the wheelchair to the bed when he felt a twinge in his back and that the pain continued and got worse. Claimant reported a prior back injury in 2014 with small residual back pain but not to the same degree that he had now. Dr. Rajpal recommended an updated MRI of Claimant's lumbar spine due to the new x-ray showing a questionable new injury and to determine if Claimant had new fractures before making a final surgical plan. Dr. Rajpal recommended a kyphoplasty at the multiple acute fracture levels and an L4-5 laminectomy. Dr. Rajpal noted Claimant's diagnosis of osteopenia and opined that given Claimant's poor bone quality, instrumentation would not work successfully in Claimant's spine. *See* Exhibit 12.

21. On October 5, 2016 Claimant underwent an MRI of his lumbar spine interpreted by Nancy Benedetti, M.D. The impression was: T12 inferior endplate compression fracture and L3 superior endplate compression fracture new from the prior MRI; compression fractures at T11, L1, L2, L4, and L5 previously seen were nearly completely healed; unchanged severe canal stenosis at L3-4 due to L4 superior endplate retropulsion, ligamentum flavum infolding, and facet hypertrophy which could result in impingement of the traversing cauda equine nerve roots; neural foraminal stenosis moderate bilaterally at L3-4 and moderate on the right at L4-5 which could result in impingement of the exiting bilateral L3 and right L4 nerve roots; and 4 cm infrarenal abdominal aortic aneurysm. *See* Exhibits G, 5.

22. On October 13, 2016 Claimant was evaluated by Dr. Rajpal's PA, Erika Frieberg. PA Frieberg noted that she had reviewed Claimant's new lumbar spine MRI that demonstrated unhealed compression fractures at T11, T12, L1, L2, L3, L4, and L5 and that Claimant had significant stenosis at L3-4. Claimant reported that he would like to proceed with surgery and PA Frieberg noted that surgery would include kyphoplasties at T11, T12, L1, L2, L3, L4, L5 and laminectomy at L3-4. PA Frieberg noted that the plan was discussed with Dr. Rajpal. *See* Exhibits B, 12.

23. On January 9, 2017 Claimant underwent an independent medical evaluation (IME) performed by Elizabeth Bisgard, M.D. Claimant reported that on June 18, 2016 one of the residents had not yet been put to bed and that he and his wife assisted the resident around 11:30 pm. Claimant reported he bent his knees, leaned forward and had the resident put her arms around his neck and that he grabbed around her and grabbed the gait belt near her spine. Claimant reported that as he went to the lift the resident, he straightened his knees and felt a series of pops in his back associated with pain. Claimant reported an immediate sharp pain but described it as not debilitating. Claimant finished his shift. Claimant reported that he then worked the

Saturday/Sunday night shift and left a note on Sunday morning on his supervisor's desk advising her of the injury. Claimant reported that he then had the next two days off and felt a bit better because he took his medications (from his prior injuries) and relaxed. Claimant reported that when he returned to work the following Tuesday night, he felt his back pain progressively worsen and he developed spasms in his back. Dr. Bisgard diagnosed: compression fractures extending from T11 to L5; spinal stenosis; osteoporosis; cardiovascular disease; obesity; sleep apnea; hypogonadism with low testosterone; osteoporosis right hip; and abdominal aortic aneurysm, infrarenal. Dr. Bisgard opined that Claimant had several risk factors for spontaneous compression fractures. She opined that he had been diagnosed with idiopathic osteoporosis on April 14, 206. Dr. Bisgard noted that Claimant had compression fractures shown on the initial MRI scan but that after the first MRI scan, Claimant was taken off work, placed in a back brace, and was sedentary. Despite being sedentary, Dr. Bisgard noted that MRI scan showed new fractures at levels T12, L2, and L3 despite no new trauma and that the new fractures were spontaneous. Dr. Bisgard opined that before rendering an opinion on causality of the compression fractures she wished to review additional information regarding when the injury was reported and what was discussed. She also requested additional medical records including 2014 chiropractic treatment records, records from Dr. Cassera, records from a recent hospitalization, and updated records from Dr. Rajpal. *See* Exhibit A.

24. Claimant has a significant prior history of treatment.

25. In November of 2014 Claimant injured his back when he was transferring a resident from a wheelchair to a toilet. Claimant reported that he received some treatment and that he had pain levels from that injury of 1-3/10 but wanted to be released from care and was placed at maximum medical improvement and discharged without an impairment rating on March 23, 2015. In September of 2015 Claimant was evaluated by his primary care physician for worsening intermittent low back pain for the past month. Claimant reported that the back pain from his November, 2014 injury had never fully resolved and gradually worsened.

26. Claimant had bilateral ankle pain in April of 2015 and saw an orthopedic doctor who was concerned about dense osteopenia. In October of 2015 Claimant fell at home when working in a crawl space and had significant right hip pain and difficulty weight bearing. Claimant began using a walker after this fall. Claimant reported that due to the hip and ankle pain, his gait changed and caused his low back pain to worsen even more.

27. Claimant had a right hip injection after x-rays showed moderate to severe osteoarthritis of the right hip with osteophyte formation. Claimant continued to use a cane for walking, and Claimant was referred for pain management.

28. On February 11, 2016 Claimant was evaluated by pain specialist Eric Mehlberg, M.D. It was noted that Claimant was referred for bilateral ankle pain, joint pain, back pain, and right hip pain. Claimant reported that he had strained his back 1.5

years prior and that he was slowly improving. Claimant reported that the back injury caused extra wear on his hips and ankles and that worsening the situation, he fell about two weeks prior and flared his ankles. Dr. Mehlberg noted that Claimant walked with a walker. Claimant reported that a hip injection gave him good relief for a while. Claimant reported that he had arthritis of the right hip and that he hurt his hip while turning to lift a resident at work. On examination, Dr. Mehlberg noted lumbar/lumbosacral spine spasms, tenderness on palpation, reduced range of motion, pain with palpation, lumbar facet pain on twisting, extension, and tenderness over the facet joints of the lumbar spine bilaterally. Dr. Mehlberg assessed: neuralgia, hip pain, ankle pain, lumbosacral spondylosis without myelopathy, and long term drug therapy. *See* Exhibit I.

29. On March 1, 2016 Claimant was evaluated at the Colorado Center for Bone Research. Claimant reported that he had lost one half of an inch in height. Claimant also indicated that he had osteoporosis or osteopenia, that he had a family history of bone fractures involving his father who had fractures everywhere, and that he smoked one pack of cigarettes per day and that he had been a smoker for 34 years. Claimant was assessed with osteopenia, and the plan was to order labs for bone turnover markers to rule out secondary reasons for bone loss. Claimant was advised that smoking increased the risk of fracture. *See* Exhibit H.

30. On March 10, 2016 Claimant was evaluated by Dr. Mehlberg. Dr. Mehlberg added the assessments of myofascial pain and sacroiliac joint inflamed. On April 7, 2016 Claimant was evaluated by Dr. Mehlberg who assessed lumbosacral spondylosis without myelopathy in the lumbosacral region and recommended low back arthritis exercises. Claimant was also assessed with neuralgia, ankle pain, osteoarthritis, and hip pain. *See* Exhibit I.

31. In April of 2016 Claimant fell down the stairs and sustained injuries to his left ankle and right toes. Claimant sustained a fracture of the distal fibula on the left and right metatarsal fractures of the 2nd and 3rd toes. Claimant reported that he had a great deal of left ankle pain and was non weight bearing on his left ankle. Claimant reported that at home he had to crawl on all fours which put additional stress on his back and caused a gradual increase in his back pain. Claimant returned to work and used a motorized cart to go up and down the hallways to dispense medication. Claimant also continued to use crutches or a walker.

32. On April 14, 2016 Claimant was evaluated by Paul Miller, M.D. Claimant reported that since he had last seen Dr. Miller he had a low-trauma fracture of the distal tibia where he fell down four stairs. Claimant reported that the amount of trauma was not very great. Dr. Miller noted that Claimant also had broken the right metatarsal. Claimant's laboratory work showed again that his total and free testosterone levels were low with a free testosterone of 3.9 compared to a normal range of 7.2 to 24 and with a total testosterone of 236 and normal range of 348 to 1197. *See* Exhibit H.

33. On May 18, 2016 Claimant was evaluated by Dr. Miller. Claimant was assessed with idiopathic hypothalamic hypogonadism and idiopathic osteoporosis with

the low-trauma fracture of the distal left tibia that was being monitored with evidence of healing. Dr. Miller opined that the fracture was probably related to Claimant's hypogonadism. *See* Exhibit H.

34. On May 26, 2016 Claimant was evaluated by Dr. Mehlberg. Claimant reported low back and ankle pain at an 8/10 with his medications. Dr. Mehlberg noted that Claimant walked with a walker and/or cane. On examination, Dr. Mehlberg noted lumbar/lumbosacral spine spasms, tenderness on palpation and reduced range of motion. Dr. Mehlberg noted pain with palpation in the lumbar facet, pain on twisting, extension, and tenderness over the facet joints in the lumbar spine bilaterally. Dr. Mehlberg assessed ankle pain, neuralgia, lumbosacral spondylosis without myelopathy, hip pain, osteoarthritis, and ankle injury. Dr. Mehlberg prescribed norco and a butrans patch for the lumbosacral spondylosis without myelopathy. *See* Exhibit I.

35. On June 23, 2016 Claimant was evaluated by Dr. Mehlberg. Claimant reported his pain level at a 9/10 and that his back was very stiff due to having to hold himself up well at work. Claimant reported that physical therapy had been helping him out and that the butrans patch was really working and reported that he would like to stay on the patch. Claimant did not report any new injury. Claimant's spine examination was the same as his May 26, 2016 examination. Dr. Mehlberg continued the same assessments that were assessed at the May 26, 2016 visit and refilled the norco and butrans patch prescriptions. *See* Exhibit I.

36. On July 28, 2016 Claimant was evaluated by Dr. Mehlberg. Claimant reported that he had again flared his low back with radicular complaints in the lateral legs and left leg weakness. Claimant reported pain at a 9/10 and that he was scheduled for multilevel kypho with Dr. Rauzzino. *See* Exhibit I.

37. Claimant continued to treat with Dr. Mehlberg. Dr. Mehlberg continued his assessments and prescriptions. On November 3, 2016 it was noted that Claimant continued to walk with a walker or cane, that Claimant had flared his low back with radicular complaints in the lateral legs and left leg weakness after a fall at work in June of 2016, and that Claimant was unable to get kyphoplasty surgery yet. Claimant's physical exam of the lumbar spine remained the same and Dr. Mehlberg assessed: spasm, neuralgia, ankle pain, lumbosacral spondylosis without myelopathy, chronic pain syndrome, hip pain, lumbar spondylosis, osteoarthritis, and ankle injury. *See* Exhibit I.

38. Dr. Bisgard testified at hearing. Dr. Bisgard opined that given the different scenarios and histories as to how the incident occurred and the progression of symptoms, she could not accurately rely on the history provided by Claimant. Dr. Bisgard opined that the MRI taken in July of 2016 showed chronic deformity of the end plates with prominent loss of height centrally at the L4 and L5 levels and that those compression fractures clearly pre-existed a June, 2016 work injury. Dr. Bisgard opined that the grade 3 compression fracture at the L1 level was the cause of Claimant's back pain. Dr. Bisgard compared the October, 2016 MRI with the July, 2016 MRI and noted that the T11 acute to subacute compression fracture had fully healed and that the T12

compression fracture at the superior endplate had healed. Dr. Bisgard noted new compression fractures at the inferior endplate of the T12 and at the L-3 level that were not present in July. Dr. Bisgard noted that these new fractures had occurred spontaneously and unrelated to any known trauma. Dr. Bisgard noted that Claimant had been placed in a lumbar brace immobilizing his back and that Claimant had been less active when the new fractures occurred.

39. Dr. Bisgard opined that the compression fracture at L1 could also have occurred spontaneously without trauma. Dr. Bisgard opined that Claimant had compression fractures that had occurred in the past, then developed more compression fractures after June of 2016 in the absence of trauma. Dr. Bisgard noted that she was unable to opine within a reasonable degree of medical probability that the lifting incident at work as reported by Claimant caused any acute compression fractures. Dr. Bisgard opined that someone with an acute compression fracture can remember exactly when/where it happened. Dr. Bisgard noted that when someone goes from 0 pain to 7-9/10 pain acutely, they know exactly when it happened and what they were doing.

40. Claimant's wife, Dianna Bigley testified at hearing. Ms. Bigley reported that she was working with Claimant on June 18, 2016 and that when transferring a resident, Clamant said bad words followed by "I hurt my back." She testified that she was with Claimant when he reported the injury to Ms. Gill and that there was no discussion of the date of injury.

41. Overall, the testimony of Claimant and his wife is not found credible or persuasive. Claimant's testimony is inconsistent with various medical records and reports.

42. The testimony of Ms. Pring, Ms. Gill, and Dr. Bisgard is found credible and persuasive and consistent with the overall medical records.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for

the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish, more likely than not, that he sustained an injury to his back on June 18, 2016. Claimant has also failed to establish that he aggravated his underlying back pain and problems on June 18, 2016. Claimant is not found credible or persuasive. Claimant provided multiple reports of how specifically the injury occurred, Claimant failed to clearly specify to Ms. Pring what had happened to cause an injury when he called her, and Claimant reported inconsistently about when he experienced the onset of pain. Claimant reported to different providers that he had either a pop in his back, a series of pops in his back, a twinge in his back, pain from holding himself up well at work, or a burning in his back. Prior to the alleged incident, Claimant had pain reported at an 8/10, was on norco and a butrans patch, and was using a cane or walker for walking as well as a motorized cart. Although Claimant

reported to Dr. Danahey that he had pretty much recovered from his prior back injury and was 90% improved and working regular duty when this new injury occurred, the records clearly document that Claimant was at a 8/10 pain level, walking with a cane/walker, and that he had significant pain medications and findings on examination in his lumbar spine just prior to the alleged injury.

Significantly, Claimant was evaluated by Dr. Mehlberg on May 26, 2016 with pain from his low back and ankle reported at an 8/10 with medication. Claimant was walking with a walker or cane. Claimant had significant findings on examination in the lumbar spine. At the next appointment with Dr. Mehlberg on June 23, 2016 and 5 days after the alleged new injury, Claimant failed to report a new injury, had a pain level increased only slightly at a 9/10, and had the same findings on examination that he had in May. Claimant also specifically reported to Dr. Mehlberg that his back was stiff from holding himself up well at work. No new injury or new trauma was reported to Dr. Mehlberg. Given Claimant's multiple different reports, Claimant's subjective reports cannot be relied upon as far as what incident caused any fractures. Claimant's symptoms and examinations with Dr. Mehlberg were essentially the same prior to and following the alleged work incident. Additionally, Claimant's wife, Ms. Bigley is also not credible or persuasive. It is not logical to believe her testimony that when speaking with Ms. Gill about the injury and while Ms. Gill was filling out paperwork, there was no conversation at all about the date of injury or when the injury occurred.

Claimant also has significant risk factors for developing fractures without any trauma or incident including his hypogonadism, his osteoporosis, his habit of smoking one pack per day for 34 years, and his family history including his father who suffered from multiple fractures. As found above, Dr. Miller opined that Claimant's low-trauma fracture of the distal left tibia was probably related to Claimant's hypogonadism. Claimant also developed new fractures in between his first MRI in July of 2016 and his second MRI in October of 2016 despite being in a back brace and on restricted activity. These new fractures occurred without any known trauma. It is just as likely that any fractures shown on the July 2016 MRI occurred outside of work and with no known trauma. Claimant is not credible that an incident occurred on June 18, 2016 that created the need for treatment. Although Dr. Rauzzino opined that Claimant had multiple compression fractures due to the lifting injury and opined that Claimant was certainly predisposed to this due to Claimant's osteopenia but that were it not for the work injury, the fractures would not have occurred, Dr. Rauzzino did not appear to have the full medical records noting discrepancies in how Claimant reported the injury, date of injury, onset of symptoms, etc. Since Dr. Rauzzino's opinion was based on Claimant's subjective non credible reports, Dr. Rauzzino's opinion also cannot be relied upon. Dr. Bisgard, overall, is credible and persuasive. Claimant has failed to meet his burden to establish that he sustained a work related injury on June 18, 2016.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and

necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As Claimant has failed to establish that he sustained a compensable work related injury, Respondents are not liable for medical treatment.

TTD

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

As Claimant has failed to establish that he sustained a compensable work related injury, Respondents are not liable for temporary total disability benefits.

ORDER

1. Claimant has failed to meet his burden to establish by a preponderance of the evidence that he sustained a compensable injury on June 18, 2016. The claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 9, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Has Respondent overcome, by clear and convincing evidence, the DIME physician's whole person impairment rating of 9%, based upon injuries to her cervical spine.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was born on January 3, 1982, and was age 35 on the date of the hearing.

2. Claimant's date of injury is May 21, 2015. This is an admitted, compensable claim.

3. Claimant was injured when she was struck in the jaw by a combative patient, while she was working at a skilled nursing unit.

4. Claimant presented at the Penrose St. Francis emergency department and was diagnosed with jaw bruises and a concussion.

5. Five days after the injury she was diagnosed at Concentra with among other things, a mild left cervico-occiptal pain and headache.

6. Claimant complained of cervical pain on visits to her treatment providers in June, July, August, September, and November of 2015. She further complained of neck problems, tightness, to Dr. Hattem in March of 2016.

7. Claimant was also examined on September 8, 2015, by Dr. Jeffrey Jenks, MD. On that date, Dr. Jenks noted that Claimant had "two trigger points in the trapezial ridge bilaterally."

8. Dr. Hattem placed Claimant at Maximum Medical Improvement on March 10, 2016. He states in his records of that visit that Claimant had full range of cervical motion but had, "slight paracervical tenderness." Dr. Hattem gave Claimant a zero impairment rating and released her to full duty.

9. Dr. Higginbotham performed a DIME on September 12, 2016 and gave Claimant a four percent Table 53, II B rating and a five percent rating for ROM deficit which equals a nine percent whole person rating.

10. When applying the Table 53 guidelines to his Figure 81 "Cervical Range of Motion" calculations, Dr. Higginbotham interpolated (and rounded) his cervical flexion figures between the listed "% Impairment of Whole Person" of 0% and 2%, to yield a final Whole Person Cervical Flexion rating of 1%.

11. When applying the Table 56 guidelines to his Figure 81 "Cervical Range of Motion" calculations, Dr. Higginbotham interpolated (and rounded) both his right and left lateral cervical flexion figures between the listed "% Impairment of Whole Person" of 0% and 1%, to yield a final Whole Person Lateral Flexion rating of 1/2% for each of the left and right sides.

12. When applying the Table 57 guidelines to his Figure 81 "Cervical Range of Motion" calculations, Dr. Higginbotham interpolated (and rounded) both his left and right rotational figures between the listed "% Impairment of Whole Person" of 0% and 1%, to yield a final Whole Person Rotational Reading of 1/2% for each of the left and right sides.

13. Dr. Higginbotham extensively documented Claimant's medical history, which was noted by Dr. Ridings as well.

14. On his physical exam he found positive mild bicipital groove tenderness on palpation and tenderness in the neck muscle.

15. Claimant was evaluated by Dr. Ridings who performed an IME at the request of Respondent on December 7, 2016. Dr. Ridings was offered and accepted as a medical expert in physical medicine and rehabilitation, and is Level II accredited.

16. Dr. Ridings found in his exam that Claimant was tender to palpation bilaterally in the neck.

17. In the seated position during Dr. Ridings exam Claimant had increased muscle tone on both sides of the neck.

18. When examined in the prone position Claimant relaxed and her muscle tone was supple but she still complained of pain on palpation.

19. The same finding by Dr. Ridings was made regarding increased tone in the bilateral shoulder elevators when seated but not when prone.

20. Dr. Ridings opines the supple muscle tone while prone was because Claimant was guarding when sitting, not any underlying muscle injury.

21. Dr. Riding did ROM studies on the Claimant's neck and did have deficits equating to a 2% whole person rating compared to Dr. Higginbotham's 5% ROM deficit.

22. Dr. Riding states because the cervical muscles in the neck and the elevators are supple in the prone position the Claimant is not entitled to a Table 53, II B rating which is a precursor to a ROM rating.

23. Claimant has consistently reported tightness in the neck from the time she was under treatment for her neck injury.

24. The reporting of neck tightness by Claimant was from the injury date to Maximum Medical Improvement and during both exams by the DIME physician Dr. Higginbotham and the IME exam by Dr. Ridings.

25. Claimant complained of tenderness palpation from the date of injury to Maximum Medical Improvement and up to and including the DIME by Dr. Higginbotham and the IME by Dr. Ridings.

26. Only Dr. Ridings discussed in his report the difference in neck tightness on palpation between Claimant in the seated position and Claimant in the prone position.

27. Claimant had over six months of complaints of tightness in the cervical neck and gave pain reports when palpated in that area.

28. Dr. Higginbotham found pain when he palpated the cervical area. Dr. Ridings found tightness and pain when he palpated Claimant's neck in the seated position.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (ACT) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. See *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. See §8-43-201(1), C.R.S.

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witnesses' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936). A workers' compensation case is decided on its merits. See §8-43-201, C.R.S. The judge's factual findings concern only evidence and inferences found to be crucial of the issues involved; the judge has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and as rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. Industrial Claims Appeals Office, 5* P.3d 385 (Colo. App) 2000.

DIME Process

3. The findings of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only overcome by clean and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claims Appeals Office,* 134 P.3d. 475, 482 (Colo. App. 1998 App. 1995); *Eller v. Indus. Claim Appeals Office*, 224 P. 3d 397, 400 (Colo. App. 2009). As a matter of diagnosis, the assessment of impairment requires a rating physician to identify and evaluate all losses and restrictions which result from the industrial injury. *Egan v. Indus. Claim Appeals Office,* 971 P. 2d 664 (Colo. App. 1998); *Colorado AFL v. Donlon*, 914 P.2d396 (Colo. App. 1995).

4. A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. §8-42-101(3.7); §8-42-104(8)(c) C.R.S. The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clean and convincing evidence, present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Indus. Claim Appeals Office* 17 P.3d 202 (Colo. App. 2000). Deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2006); *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. Aug. 2, 2005).

Range of Motion figures by the DIME

5. In this case, the ALJ is not persuaded by clear and convincing evidence that the DIME process in calculating Claimant's range of motion has been overcome. The Division of Workers' Compensation "Desk Aid #11-Impairment Rating Tips", General Principles 4 states:

> Impairment Rating "Rounding": Although the AMA Guides *allows* rounding of an impairment rating to the nearest whole number ending in 0 or 5, the Division recommends rounding up or down to the nearest whole number when presenting the ***final rating.*** A number ending in .50 or above should be rounded up. Fractional ratings are not acceptable.

The *final* impairment rating expressed by Dr. Higginbotham was expressed as a whole number. There is nothing in the available literature proscribing the interpolation which Dr. Higginbotham used at arriving at his 1/2% rating for the individual components for cervical range of motion. The ALJ finds the Claimant's combined cervical range of motion Impairment Rating under Figure 81, as calculated by Dr. Higginbotham, to be 5%.

Physiologic Correlation and Rigidity

6. Under Section 8-42-107(8), “For purposes of determining levels of medical impairment, the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation.” §8-42-107(8), C.R.S.; *see* also the Impairment Ratings Tips Sheet (Rev’d July 2016).

7. In this instance, Table 53, II, B requires a medically documented injury (which the ALJ so finds), **and** a minimum of six months of medically documented pain (which the ALJ so finds) **and *rigidity***, with or without spasm…." (emphasis added).

8. Taber's Cyclopedic Medical Dictionary defines "**Rigidity**" as 1. *Tenseness,* immovability: *stiffness*; *inability to bend or be bent.* (emphasis added).

9. The American Heritage Stedman's Medical Dictionary defines "**Rigidity**" as 1. The quality of *stiffness* ***or*** *inflexibility*. (emphasis added).

10. Arguably, the *stiffness* which Claimant consistently reported to her providers for well over six months after her injury might not meet the criteria of anatomic or physiologic correlation.

11. However, the *inflexibility,* which was documented by Dr. Higginbotham's range of motion calculations *does* constitute the needed physiologic correlation. This is so, even if one accepts Dr. Ridings' interpretation (which the ALJ does not) that the guarding he noted with Claimant in the upright position does not constitute rigidity.

12. Further, at least one data point in the records, from September 8, 2015 by Dr. Jenks, notes a trigger point in her trapezial ridge, thus providing further physiologic correlation to her complaints of stiffness.

13. There is thus ample evidence in the records to support the DIME physician's findings of at least 6 months of rigidity.

14. Respondents have not overcome, by clear and convincing evidence, the DIME physician's Table 53 whole person rating of 4%.

15. Claimant's Whole Person Cervical Spinal Impairment Rating is thus 9%.

ORDER

It is therefore ordered that:

1. Claimant's whole person impairment rating is 9%.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 14, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Has Claimant proven by a preponderance of the evidence that he suffered a compensable work-related injury to his left knee on March 7, 2016?

2. Has Claimant proven by a preponderance of the evidence that his left total knee replacement surgery was causally related to his work for Employer?

STIPULATIONS

1. The parties stipulated to an average weekly wage (AWW) of $387.60. The parties also stipulated that if the claim is compensable, Claimant is entitled to a closed period of TTD benefits from April 19, 2016 to July 27, 2016.

FINDINGS OF FACT

1. Claimant works as a ramp agent for Employer at the Colorado Springs Airport. He has worked for Employer in this capacity since 2009.

2. Claimant's work duties include loading and unloading aircraft with baggage and supplies.

3. Luggage in the terminal is loaded by hand onto carts. The carts of luggage are then towed out to the aircraft with a tug. The ramp agents then pull the bags off the carts and load them onto a belt loader which conveys the bags up to the cargo hold of the aircraft. Typically, one ramp agent loads bags at the bottom of the belt loader and one agent is up in the baggage pit of the plane. The process is reversed when unloading aircraft.

4. Employer utilizes three aircraft at the Colorado Springs Airport: the CRJ-200, the CRJ-700, and the ERJ-175. Claimant can stand up in the cargo hold of the CRJ-200 and CRJ-700 and does not have to crawl or get on his knees to load luggage onto those aircraft. However, the ERJ-175 has lower ceilings, which requires Claimant to either sit down or kneel while loading bags. Claimant testified that the ERJ-175 is a relatively new aircraft that Employer has only been using since early 2015.

5. Claimant has substantial pre-existing medical problems which are pertinent to this claim. Claimant was seriously injured in a motor vehicle accident in his 20s. Claimant had a stroke which primarily affected his left side. Claimant continues to suffer from residual left-sided weakness and associated alteration of his gait.

6. Additionally, Claimant has long-standing severe degenerative arthritis in his left knee. On February 3, 2015, while treating at Concentra for a hernia injury, he reported his left knee had been painful for "[a] few months [with] no specific injury." Ten

days later Claimant saw his primary care physician, Dr. James Zimmer, and reported "constant" knee pain and swelling. Dr. Zimmer drained the knee and gave Claimant a cortisone injection. Claimant later told his physical therapist he had left knee pain since 2013.

7. Claimant saw Dr. Eric Jepson, an orthopedic surgeon, regarding his left knee on November 19, 2015. He described difficulty walking long distances due to pain. He told Dr. Jepson that he works at the airport and is on his feet for 10-hour shifts. He reported that the previous cortisone injection was not helpful. On physical examination, he had effusion, reduced range of motion and joint crepitus. X-rays showed "end-stage" degenerative changes of the left knee, including complete obliteration of the medial joint space, osteophytes, and sclerosis. Dr. Jepson discussed a total knee arthroplasty, but believed it was "appropriate to exhaust all conservative options prior to proceeding with knee replacement." Dr. Jepson prescribed an anti-inflammatory (Mobic) and advised Claimant to return for consideration of a steroid injection if the medication was not effective. Dr. Jepson reiterated "[Claimant] understands that he may [need] a knee replacement in the future."

8. Claimant returned to Dr. Jepson's office on December 22, 2015 and requested an injection. He was using a knee brace "as needed." Although Dr. Jepson had previously mentioned a cortisone injection, his PA-C, Robert Peterson, administered a hyaline viscous injection instead.

9. At his next visit with Dr. Jepson on February 4, 2016, Claimant reported that the hyaline injection "offered very little relief." He was taking the Mobic in the morning but "by the time he gets home every night the knee is pretty painful." Claimant reported he works "on his feet all day with a lot of bending, squatting, twisting and uneven ground." Claimant requested another cortisone injection. Dr. Jepson noted "he is getting closer to wanting to proceed with knee replacement. He feels a big portion of this has been the significant work that he has done over time, which is very manual labor work with a lot of twisting, bending, and kneeling." The knee pain was becoming "a bigger and bigger deal and affects every aspect of his life."

10. Claimant testified he believes his left knee was aggravated by activities such as exiting tugs, crouching, kneeling and crawling to load and unload luggage, and standing and walking.

11. In March 2016, Claimant reported an injury to Employer and was directed to Concentra for an evaluation. Claimant saw Dr. Walter Larimore at Concentra on March 7, 2016. Claimant told Dr. Larimore he had jumped off some equipment at work and twisted his left knee."[1] He also told Dr. Larimore that the knee pain worsened during the day and with prolonged standing. Dr. Larimore ordered x-rays, which showed "bone-on-bone" in the medial compartment on the left. There was much less significant arthritis affecting the right knee. Dr. Larimore diagnosed chronic left knee pain and osteoarthritis. He opined "with pre-existing, non-work-related, degenerative knee

[1] Claimant reiterated that history in his sworn answers to interrogatories.

arthritis, and no preceding injury, this would not be considered a work caused injury." Dr. Larimore opined that Claimant was at MMI, and advised him to follow-up with personal physicians.

12. Claimant saw Dr. Jepson again on March 25, 2016 with questions regarding "the etiology of his underlying arthritis." Dr. Jepson opined "I believe his arthritis in his left knee is accumulative of the mechanical abnormality he has dealt with since his stroke causing increased stresses across his knee. [It] is also caused by the manual labor work which he performs on a daily basis. [It] also is attributable to just typical wear and tear."

13. On April 15, 2016, Dr. Jepson's office submitted a request for a left total knee replacement to Employer. In the section of the form that asked whether the injury was work-related, Dr. Jepson checked both yes and no and put a question mark.

14. Dr. Jepson performed a left total knee arthroplasty on May 4, 2016.

15. After surgery, Claimant started physical therapy on May 24, 2016. On the patient history form, Claimant indicated the left knee pain began three years earlier, and continued from 2013 to 2016.

16. Claimant saw Dr. Mark Paz for an Independent Medical Examination (IME) on November 8, 2016 at Respondents' request. Claimant told Dr. Paz he works approximately 34 hours per week, performing activities such as lifting luggage, sorting bags, stepping on and off equipment and servicing airplanes. Claimant told Dr. Paz that the knee pain began in January 2016. The pain occurred daily at work and home. His pain level was typically better when he was off work. Claimant attributed the symptoms to jumping on and off equipment at work. Dr. Paz opined that Claimant's left knee osteoarthritis was not causally related to his work activities. Dr. Paz opined that "the left knee osteoarthritis which required medical treatment as early as February 2015 is attributable to non-occupational exposures." Dr. Paz emphasized the residual effects of the 1986 stroke and resulting neuromuscular deficits. Dr. Paz opined "the resultant abnormal gait and the effects of the abnormal gait on the chondral surfaces of the left knee joint, during the last 30 years, has slowly and progressively applied excessive and unbalanced forces across the left knee joint, causing advanced osteoarthritis and the need for left total knee arthroplasty." which led to altered gait and stressed Claimant's left knee "for the last 30 years." Claimant's work for Employer did not cause, aggravate or accelerate Claimant's underlying condition. Although Dr. Paz agreed that the arthroplasty was reasonable and necessary, he did not believe it was causally related to Claimant's employment.

17. Dr. Paz reiterated and expounded upon his opinions in his hearing testimony. Dr. Paz further testified that the lack of right knee symptoms corroborates his opinion that the advanced left knee osteoarthritis was related to pre-existing left-sided weakness and not employment activities. He explained that a person who is genetically predisposed to osteoarthritis will generally show signs in both knees. Dr. Paz testified that if the employment duties caused or aggravated Claimant's left knee osteoarthritis,

there would be signs of equal or greater issues in the right knee. However, xrays of the right knee showed only mild changes, and the medical records do not document significant right knee symptoms.

18. Dr. Paz testified that the May 4, 2016 surgery was reasonable and necessary but was not related to Claimant's cumulative job duties or any specific incident that occurred in March 2016.

19. Dr. Paz's opinions regarding causation are credible and persuasive.

20. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work-related injury in March 2016.

21. Claimant has failed to prove by a preponderance of the evidence that treatment he received for his left knee, including arthroplasty, was causally related to his employment.

22. The May 4, 2016 arthroplasty resulted from the natural progression of Claimant's pre-existing condition, which was not aggravated or accelerated by his work.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury proximately caused the condition for which benefits are sought. Section 8-41-301(1)(c); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. For an injury to be compensable under the Act, there must be a "sufficient nexus" between the employment and the injury. *In re Question Submitted by the U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

The fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation. If a claimant's work aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). But

the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Cotts v. Exempla*, W.C. No. 4-606-563 (ICAO, August 18, 2005). Rather, when a claimant experiences symptoms at work, the ALJ must determine whether the subsequent need for treatment was caused by an industrial aggravation of a preexisting condition or due to the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

As found, Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left knee. Claimant has alternatively asserted that his injury results from a specific incident on March 3, 2016, or accumulated work exposure. Neither theory of liability is persuasively supported by the evidence. The March 3, 2016 incident of stepping or jumping down from equipment was insignificant and did not aggravate or accelerate Claimant's underlying severe osteoarthritis. Although that incident may have temporarily increased his pain, it did not proximately cause a need for any medical treatment. Claimant's knee was already severely degenerated, constantly painful, and repeatedly irritated by otherwise innocuous, routine activities. Claimant had received no benefit from conservative treatment and was an appropriate candidate for a knee arthroplasty before March 3, 2016. The March 3 incident did not change the type or course of medical treatment needed to treat his condition.

Regarding Claimant's cumulative trauma theory, the ALJ is persuaded by Dr. Paz's opinion that the end-stage arthritis in Claimant's left knee developed over a prolonged period of time independently of his work activities. Dr. Paz explained that Claimant's long-standing left lower extremity weakness and altered gait set the stage for, and eventually precipitated, the severe osteoarthritis. The arthroplasty was the end result of the natural progression of the underlying arthritic condition. Dr. Paz's opinion is supported by the fact that Claimant's left knee is far more degenerated than the right knee, even though both knees were exposed to the same work activities. Dr. Paz's opinions are also supported by Dr. Larimore's determination that Claimant's knee pain is not a work-related condition. Although Dr. Jepson opined that Claimant's arthritis was *partially* due the nature of his work, he also opined it was caused by the longstanding mechanical abnormalities related to Claimant's previous stroke and "just typical wear and tear." When asked whether the arthroplasty was work-related, Dr. Jepson equivocated and responded with a question mark. Based on the evidence presented, the ALJ concludes that Claimant's work was not a proximate cause of his need for knee arthroplasty.

Although Claimant experienced knee pain at work, that is not enough to establish a compensable claim. Claimant had severe "bone-on-bone" degenerative arthritis in his left knee. That degenerative condition would reasonably be expected to cause pain with routine activities such as standing, walking, crouching and crawling, regardless of whether those activities were performed at work or elsewhere.

Based on the evidence presented, the ALJ is not persuaded that Claimant's work caused, aggravated, accelerated, or combined with his pre-existing condition to produce

the need for knee replacement surgery. Rather, the left knee replacement surgery was necessitated by the natural progression of Claimant's underlying, pre-existing osteoarthritis.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and medical benefits regarding his left knee is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 15, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable left knee injury on November 2, 2015.

II. If Claimant has proven by a preponderance of the evidence that she sustained a compensable injury on November 2, 2015, was the surgery performed by Ian Weber, M.D. reasonable, necessary and related to her injury.

STIPULATIONS

1. Claimant's average weekly wage is $569.23.

2. If Claimant has proven by a preponderance of the evidence that she sustained a compensable injury, Claimant is entitled to Temporary Total Disability benefits beginning February 27, 2016, ongoing.

FINDINGS OF FACT

1. Claimant worked for Employer as a Deli Clerk. Claimant worked for Employer in such capacity since May 2012.

2. Claimant testified that during her shift on the morning of November 2, 2015, her left knee went out and hit the concrete floor while she was squatting down to retrieve ingredients from a cabinet. Claimant testified the incident occurred between approximately 6:00 a.m. and 7:00 a.m. Claimant testified that she felt immediate pain and instability and began limping. Claimant continued to work her shift.

3. Claimant initially testified that her left knee "went out" later in her shift, around 11:00 a.m. or 11:30 a.m. Claimant later testified that she dropped a pan and twisted her left knee.

4. Claimant testified that she reported the incident to Peter Vick, Assistant Deli Manager, on November 2, 2015 and to Adam Thao, Assistant Store Manager, on November 3, 2015. Claimant reported to Mr. Thao that she bent to retrieve spices from a cabinet and hit the floor "a little hard." Claimant also reported that her left knee gave out later during her shift. On the Worker's Claim for Compensation Form dated November 20, 2015, in response to the question, "How did the injury occur?" Claimant reported, "Twisted to get out of way." In response to the question "What object or substance directly harmed you?" Claimant replied, "Twisting."

5. Pradeep Rai, M.D., evaluated Claimant on November 3, 2015. Claimant reported that she fell to the floor after her left knee gave out when squatting to retrieve

something from a lower cabinet. Dr. Rai noted an antalgic gait, limited mobility in the left knee, and tightness and tension around the peripatellar area, especially to the superolateral region. Dr. Rai also noted effusion to the superolateral area. Dr. Rai assessed pain to the left knee and ordered an MRI of Claimant's left knee. Dr. Rai instructed Claimant to continue icing the area and taking ibuprofen. Dr. Rai ordered an MRI of the left knee and referred Claimant to orthopedics.

6. Claimant returned to Dr. Rai on November 5, 2015 for clarification regarding her work status and restrictions. Dr. Rai noted that Claimant's gait remained antalgic with limited range of motion. Dr. Rai again assessed pain to left knee. Dr. Rai instructed Claimant to work as tolerated, ice the knee, and continue taking ibuprofen.

7. Claimant underwent an MRI of her left knee on November 8, 2015. Barry G. Hansford, M.D., interpreted the MRI and his impression was, in part:

> 1. Small tricompartmental osetophyte formation with regions of focal full-thickness chondral loss and underlying reactive marrow signal change at the patellofemoral articulation as described above which is compatible with mild osteoarthritis most pronounced at the patellofemoral articulation. 2. There is approximately 2-3 mm hypointense round focus located at the central weightbearing portion of the medial tibiofemoral compartment with associated focal underlying reactive marrow edema at the subjacent tibial plateau. This is suspicious for a small intra-articular body with the subjacent edema likely mechanical in nature. Recommend further evaluation with dedicated knee radiographs. 3. There is focal heterogeneous intermediate to hyperintense somewhat organized appearing signal abnormality along with anterior aspect of the intracondylar notch with adjacent edema within the central portion of Hoffa's fat pad. This constellation of findings may be associated with Hoffa disease/syndrome of the infrapatellar fat pad impingement. Correlate for associated symptoms. 4. Findings suspicious for remote partial injury/mucoid degeneration at the origin of the medial head of the gastrocnemius muscle with associated probable extra and intraosseous soft tissue ganglion formation as detailed above. The region of intraosseous multilobular T2 hyperintense cystic-appearing change within the medial femoral condyle should not be focally symptomatic. Recommend dedicated knee radiographs for further characterization of the intraosseous cystic appearing change at the medial femoral condyle.

8. George Kohake, M.D., evaluated Claimant on November 13, 2015. Dr. Kohake documented that Claimant's November 8, 2015 MRI showed "some tricompartmental osteophyte formation with full-thickness chondral loss and also findings consistent with Hoffa disease/syndrome of the infrapatellar fat pad/impingement." Dr. Kohake noted that there was no swelling or sign of trauma to the left knee. Dr. Kohake further noted Claimant walked with an antalgic gait and was using a knee immoblizer. Dr. Kohake recommended Claimant begin physical therapy and see an orthopedist.

9. John O. Roth, M.D., read the x-rays of Claimants left knee taken on November 13, 2015. Dr. Roth noted moderate joint effusion, mild patellofemoral joint arthritic change, and small calcified intra-articular bodies. Dr. Roth found no acute fracture, and his impression was degenerative changes and effusion.

10. Dr. Rai reevaluated Claimant on November 19, 2015. Claimant reported worsening symptoms. Dr. Rai noted that Claimant's gait remained antalgic, and that her left knee had limited flexion. Dr. Rai remarked that Claimant had a "significant amount of pain to the lateral aspect, along the joint line, of the left knee with a significant amount of tenderness to that area." Dr. Rai assessed pain to the left knee.

11. Claimant returned to Dr. Rai for a follow-up evaluation on November 23, 2015. Dr. Rai remarked that the knee x-ray showed no acute fracture. Dr. Rai summarized the findings from the November 8, 2015 MRI reports. Dr. Rai noted that there was no change since the last exam. Dr. Rai assessed sprain to the left knee and possible arthritis. Dr. Rai recommended that Claimant continue taking ibuprofen. Dr. Rai referred Claimant to another orthopedic surgeon for a second opinion on her MRI, per Claimant's request.

12. Jared J. White, D.O., evaluated Claimant on November 20, 2015. Claimant reported she fell directly onto her knee while at work and had been experiencing anterior and lateral knee pain. Dr. White reviewed the November 13, 2015 x-rays of Claimant's left knee and documented, "There are some loose bodies noted. There is moderate tricompartmental osteoarthritis with mild medial tibial femoral joint space narrowing and patellofemoral chondromalacia. There is a mild lateral patellar tilt. Cystic changes noted of the patella as well as the metaphysis of the mediofemoral condyle." Regarding his review of the November 8, 2016 MRI, Dr. White noted full-thickness chondral loss of the patella facets with subchondral cystic changes of the median ridge of the lateral patella facet. Dr. White also noted an intra-articular loose body and reactive marrow edema of the central weightbearing portion of the medial tibiofemoral compartment. Dr. White assessed chondromalacia of left patellofemoral joint, Hoffa's fat pad disease left knee, osteoarthritis of left knee, knee joint cyst, left multiobluar cyst of mediofemoral condyle, and loose body of the left knee.

13. Dr. White remarked that Claimant's fall likely caused exacerbation of Claimant's chronic knee arthritis and patellofemoral chondral malacia. Dr. White indicated that Claimant was best suited for conservative measures at the time, stating "The patient has well established knee arthritis based on her history, exam and radiographs. This is treated by a conservative approach and surgery is not recommended." Dr. White further remarked, "The goal is to stay active and buy time to eventual surgical procedures will be discussed at a future time based on the initial response to treatment."

14. Respondent denied Claimant's claim on December 1, 2015, stating treatment after December 1, 2015 would not be paid, and referrals to any orthopedics would not be authorized. Respondent filed a Notice of Contest on December 3, 2015.

15. Claimant testified that she continued to experience pain and subsequently sought treatment with Cornerstone Orthopedic.

16. Ian Weber, M.D., evaluated Claimant on February 12, 2016. Referring to x-rays of the left knee taken that day, Dr. Weber noted that there was "not a tremendous amount of arthritic change seen here." Dr. Weber assessed osteoarthritis of the left knee, and left knee pain with evidence of chondromalacia and cartilage thinning. Dr. Weber administered a cortisone injection to Claimant's left knee and referred Claimant to physical therapy. Dr. Weber remarked, "At this point, I told [Claimant] I do not think there is anything on a scope I can take care of."

17. Dr. Weber reevaluated Claimant on March 4, 2016. Dr. Weber documented that the administered cortisone injection was not helpful to Claimant. Claimant reported pain to the inside of her left knee. Dr. Weber noted tenderness on the medial joint line, a normal gait, and no use of an assistive device. Dr. Weber commented, "We went back and reviewed her MRI and I really do not see any bone marrow edema lesions and the meniscus looks fine." Dr. Weber again assessed osteoarthritis of left knee.

18. Dr. Weber reevaluated Claimant on April 8, 2016. Dr. Weber remarked that Claimant continued to experience "pain on the left side," noting tenderness in the medial joint line and medial femoral condyle. Claimant's gait was normal and Claimant was not using an assistive device. Dr. Weber assessed derangement of the left knee. Dr. Weber ordered another MRI of Claimant's left knee commenting, "At this point, I think we should order an MRI and see if we are missing anything. She did have an injury and then it got worse. Make sure this not (*sic*) a bone contusion or some type of cartilage tear or osteochondral lesion."

19. Claimant underwent an MRI of her left knee on April 15, 2016. Charles Wells, M.D., interpreted the MRI. Dr. Wells compared the April 15, 2016 MRI to the November 8, 2015 MRI. Dr. Wells noted:

> Cartilage - Patellofemoral: Diffuse, high-grade cartilage loss along the patella involving the medial facet, median ridge, and lateral facet, cystic change at the median ridge and lateral facet. Mild diffuse loss along the trochlea. Small patellar and trochlear osteophytes. Findings are stable to slightly worsened. Medial compartment: Again seen is a small focus of round hypointense signal at the central weightbearing surface of the medial tibial plateau. This is decreased in size and prominence compared to the prior MRI. However, the bone marrow edema like signal in the subajacent medial tibial plateau has increased. There is mild diffuse cartilage loss along the weightbearing surface with small osteophytes. Lateral compartment: Mild diffuse cartilage thinning with small osteophytes. No focal defect or subchondral cystic change.
>
> Bone Marrow – Again seen in the medial femoral condyle, at the origin of the medial head gastocnemius muscle, is multilobular PFS hyperintense

abnormal signal. This appears to arise from the origin, which is focally disrupted by PDFS hyperintense signal, similar to the prior study.

20. Claimant returned to Dr. Weber for a reevaluation on April 29, 2016. Dr. Weber documented a limp and tenderness in the medial joint line. Claimant was not using an assistive device. Per his review of the April 15, 2016 MRI, Dr. Weber noted Claimant "had a pretty large bone marrow edema right underneath that tibia. There may be a little bit of an intra-articular body on that lateral plateau, but she does have some mild osteoarthritis in the medial and patellofemoral, but again, bone marrow react edema is worse in that medial tibial plateau, indicating a nondisplaced fracture." Dr. Weber commented that the recent MRI showed more reactive bone marrow compared to the November 8, 2015 MRI. Dr. Weber assessed osteoarthritis of right knee and closed displaced fracture of medial condyle of left tibia with delayed healing. Dr. Weber noted that Claimant could receive an injection or a percutaneous fixation of the tibial plateau. Claimant indicated tshe would consider the options.

21. On May 17, 2016, Kathy McCranie, M.D., conducted an Independent Medical Evaluation ("IME") of Claimant at the request of Respondents. Regarding the mechanism of injury, Claimant reported to Dr. McCranie that she hit her knee while kneeling and, approximately one hour later, "jerked away" after dropping some pans. Dr. McCranie performed a medical records review and a physical examination of Claimant. Dr. McCranie impressed status post left knee contusion, osteoarthritis of the left knee, and query closed displaced fracture of the medical condyle of the left tibia.

22. Dr. McCranie stated that additional records would be helpful to determine work-relatedness. Dr. McCranie remarked that the mechanism of injury reported by Claimant could be consistent with a contusion, but that Claimant's underlying degenerative changes would not be work-related. Dr. McCranie noted that the radiographic studies she reviewed did not indicate a closed displaced fracture of the medial condyle of the left tibia, but that further examination of additional records would help determine if there was further injury.

23. Dr. McCranie opined there was no aggravation of a pre-existing condition, and that Claimant's degenerative changes in the knee were not work-related. Dr. Weber opined that, if Claimant did have a work-related fracture, the treatment would involve "immobilization and orthopedic follow-up." Dr. McCranie further opined, "If there is no fracture related to her work-injury, then she would have otherwise reached maximum medical improvement at the time she declined treatment with Dr. White, around November 2015."

24. Dr. Weber reevaluated Claimant on June 24, 2016. Dr. Weber noted Claimant had a normal gait and was not using an assistive device. Dr. Weber remarked that Claimant's pain was on the inside of the knee, noting tenderness in the medial tibia, medial femoral condyle, and medial joint line. Referring to x-rays taken that day of Claimant's lateral knee on the left, hat day, Dr. Weber commented that there were "no real arthritic changes seen there." Regarding previous x-rays, Dr. Weber stated, "She does have DJD on the right, and she does have, based on the MRIs, a subchondral

fracture of her medial tibia on the left that did show worsening from November all the way to April." Dr. Weber assessed closed displaced fracture of medial condyle of left tibia with delayed healing. Dr. Weber recommended an arthroscopy-assisted percutaneous fixation of Claimant's medial tibial plateau on the left knee.

25. On July 25, 2016, Dr. Weber performed an arthroscopic-assisted medial femoral chondroplasty, arthroscopic medial tibial plateau chondroplasty, and a percutaneous fixation of the medial tibial plateau on Claimant's left knee. In the operative report, Dr. Weber incorrectly refers to Claimant being involved in a motor vehicle accident in October. Dr. Weber remarked that Claimant's patellofemoral joint "looked pristine." Dr. Weber noted grade 2 injury to the medial femoral condyle on the weightbearing area and below the tibial surface. Dr. Weber further noted that there was "almost grade 3 and grade 4 damage to cartilage in some spots on the tibial plateau." Dr. Weber documented that he injected 5 ml of calcium phosphate into the area "where she had edematous changes and subchondral fracture seen on the MRI." In the "Hardware Used" section of the report, Dr. Weber stated, "We used 5mL of calcium sulfate injected in the medial tibial plateau under fluoroscopic guidance."

26. Dr. McCranie testified by deposition on July 28, 2016. Dr. McCranie testified as an expert in physical medicine and rehabilitation and pain medicine. Dr. McCranie testified Claimant's medical records documented only anterior and lateral knee pain until the March 4, 2016 evaluation, when Claimant began complaining of medial knee pain. Dr. McCranie stated that medial knee pain was different than the symptoms Claimant experienced after the alleged work injury, and was in a completely different area of the knee.

27. Regarding Dr. Rai's November 3, 2015 evaluation, Dr. McCranie testified that Dr. Rai noted effusion in the superolateral area with no mention of bruising. Dr. McCranie stated that there was no evidence in the November 8th MRI of a fracture of the medial condyle of the left tibia. Dr. McCranie stated that all of the findings on the November 8, 2015 MRI were chronic arthritic findings. Dr. McCranie further testified that the edema in the Hoffa's fat pad area could have become irritated with a strike to that area, but could "also be associated with a chronic problem, so there is not a way for me to tell if it is chronic or acute, but it does correlate with her mechanism of injury."

28. Dr. McCranie opined that, within a reasonable degree of medical probability, there was insufficient evidence of a subchondral fracture of the medial tibia on the left in the medical records she reviewed. Dr. McCranie testified that Dr. Weber's records did not provide an adequate explanation of his diagnosis.

29. Dr. McCranie opined that, within a reasonable of medical probability, Dr. Weber's treatment recommendations were not causally related to the November 2, 2015 incident. Dr. McCranie opined that Claimant sustained a contusion to the anterior and lateral aspect of her knee, which resolved, stating, "According to the MRI, edema that was initially in the anterior portion of the knee was no longer there on the second MRI. So treatment, at this point, is for the patient's underlying osteoarthritis, which is not work related."

30. Dr. McCranie further opined that, within a reasonable degree of medical probability, the November 2, 2015 incident did not aggravate Claimant's underlying osteoarthritis, or cause the osteoarthritis to later become symptomatic on the medial side. Dr. McCranie testified, "there is just no connection between those two things. Osteoarthritis is not aggravated by a contusion." When asked if Dr. Weber's recommended surgery was reasonable and necessary, Dr. McCranie testified, "I'm not a surgeon, so I can't comment on the type of surgery, but those recommendations are not reasonable and necessary for the injury that the patient sustained at work."

31. On cross-examination, Dr. McCranie testified that "a condyle fracture is typically caused by severe trauma", including sports injuries and collision injuries to the knee. Dr. McCranie testified that there was no indication in the medical records of a prior issue with Claimant's left knee.

32. Claimant attended a post-operative evaluation with Dr. Weber on July 29, 2016. Dr. Weber noted that there was no fracture, and remarked that x-rays of Claimant's knee where the percutaneous fixation was performed looked "excellent."

33. Claimant attended a reevaluation with Dr. Weber on August 5, 2016. Claimant reported some pain. Dr. Weber ordered Claimant to return to using two crutches and to attend physical therapy. Dr. Weber issued an addendum to his operative report, dated August 5, 2016. Dr. Weber clarified that Claimant's initial injury occurred "back in October when she was at King Soopers." Dr. Weber indicated that he performed a percutaneous excision of the subchondral area and a knee arthroscopy.

34. Claimant attended a follow-up evaluation with Sallie Gurganus, P.A-C., on September 16, 2016. PA-C Gurganus noted that Claimant was improving. PA-C Gurganus discussed administering another cortisone injection if Claimant's pain did not improve in the next few weeks.

35. Dr. Weber reevaluated Claimant on October 14, 2016. Dr. Weber noted tenderness on the medial joint line, referring to the tenderness as being more "skin tenderness than bone tenderness." Dr. Weber assessed primary osteoarthritis of the left and right knees. Dr. Weber indicated that he was going to arrange for Claimant to receive viscosupplementation.

36. Dr. Timothy S. O'Brien, M.D., conducted a medical record review of Claimant on November 21, 2016. Dr. O'Brien did not physically examine Claimant. Per his review of the November 8, 2016 MRI, Dr. O'Brien noted subchondral marrow edema at the patellofemoral joint and medial tibial plateau consistent with chondromalacia, and effusion consistent with the arthritic process. Dr. O'Brien commented that there was no fracture. Dr. O'Brien remarked that there were "very few changes" with respect to the April 15, 2016 MRI, noting "chondromalacia in the lateral facet of the patellofemoral joint and the medial tibial plateau and medial compartment with subchondral edema in the medial tibial plateau which was relatively unchanged."

37. Dr. O'Brien opined Claimant did not sustain a work-related injury. Dr. O'Brien found that there was no "historical, clinical or MRI scan evidence that this fall resulted in any injury to the knee." Dr. O'Brien concluded that Claimant fell to the ground after an onset of left knee pain, and that the onset of the left knee pain was a "manifestation of her personal health." Dr. O'Brien noted Claimant did not experience significant knee pain until later that day, and did not seek urgent medical attention. Dr. O'Brien further noted that there were no objective findings of a contusion, as there was no bruising, swelling, or disruption in the skin as would be expected. Dr. O'Brien concluded that there was no evidence that there was any acute injury. Dr. O'Brien opined that the bone marrow changes and the effusion were chronic, degenerative, and pre-existing.

38. Dr. O'Brien opined Claimant did not sustain a tibial fracture and that there was no evidence of a fracture of any osseous bone structure of the knee joint. Dr. O'Brien opined that the mechanism of injury would not produce a fracture. Dr. O'Brien opined that Dr. Weber misdiagnosed Claimant, stating "areas of arthritic edema have a fluctuating although typically progressive appearance on MRI scans and should not be misinterpreted as a fractured area."

39. Regarding the lack of prior medical documentation of left knee issues, Dr. O'Brien stated that it was not unusual for Claimant to not have prior medical record documentation of issues with her left knee because Claimant's right knee had historically been her main concern.

40. Dr. O'Brien opined the surgery performed by Dr. Weber was not reasonable or necessary. Dr. O'Brien contended that Dr. Weber did not internally fix a tibial fracture or perform any type of percutaneous fixation as represented, but instead performed a bone grafting procedure. Dr. O'Brien stated that orthopedic surgeons "do not bone graft areas of marrow edema that are an 'epiphenomenon' or sequela of osteoarthritis," and that it is "Illogical to treat the epiphenomenon while leaving the primary pathology," the arthritic process, untreated. Referencing the Second Edition of American Academy of Surgeons Guidelines for the Treatment of Osteoarthritis of the Knee, as well as a medical study in the New England Journal of Medicine, Dr. O'Brien stated that arthroscopic technology should not be utilized to treat osteoarthritis of the knee.

41. Dr. O'Brien further pointed to discrepancies in Dr. Weber's reports, including Dr. Weber referring to Claimant as having been in a motor vehicle accident, and indicating that Claimant's patellofemoral cartilage was "pristine" when the MRI demonstrated full-thickness loss of cartilage. Dr. O'Brien opined that Claimant would reach maximum medical improvement approximately 6-9 months following the surgery, and that radiographs would be necessary to determine if the area healed. Regarding the surgery performed by Dr. Weber, Dr. O'Brien opined that "It is very unlikely that his procedure will perceptibly alter the natural history of this condition."

42. Dr. O'Brien testified at hearing as an expert in orthopedic surgery. Dr. O'Brien testified consistent with his report. Dr. O'Brien opined, within a reasonable

degree of medical probability, Claimant did not suffer an injury on November 2, 2015, and that the treatment provided by Dr. Weber was unreasonable. Dr. O'Brien contended that there are no objective findings of injury, and the medical records evidence chronic changes.

43. Dr. O'Brien testified he "supposed" the mechanism of injury as described by Claimant could lead to a medial tibial plateau fracture, but that he has not personally observed such occurrence in his practice or read about such occurrence in any medical journal. Dr. O'Brien stated that if Claimant did suffer an acute tibial plateau fracture, there was almost 0% chance that Claimant could then get up and walk after the incident. Dr. O'Brien further stated that if there was a medial fracture, Claimant would not have experienced lateral pain.

44. Dr. O'Brien testified the standard of care for a fracture would involve restoring the anatomy, maintaining the anatomy, and rehabilitating. Dr. O'Brien reiterated there was no indication in the operative reports that Dr. Weber installed hardware in Claimant's knee. Dr. O'Brien testified that injecting 5 ccs of calcium phosphate would not be the standard of care for a fracture. Dr. O'Brien further testified that cortisol injection treatment is unreasonable for a fracture because the cortisol would retard the healing.

45. On cross-examination, Dr. O'Brien testified there were no post-operative x-rays to determine whether there were bone grafts. Dr. O'Brien also acknowledged that there was no evidence that Claimant experienced any left knee issues prior to November 2, 2015.

46. Claimant testified she did not have any prior injuries to her left knee, nor had she been under any restrictions for her left knee prior to November 2, 2015. Claimant testified that she underwent right knee surgery in 2010.

47. Claimant testified she last worked for Employer on February 26, 2016. Claimant stated that she has not received an offer of employment to return to work. Claimant testified that her left knee is still weak and requires rehabilitation. Claimant's personal insurance ceased paying for treatment.

48. The ALJ viewed video footage of the deli area taken on November 2, 2015 between 6:00 a.m. and 7:36 a.m. The video depicts Claimant entering the deli area and placing an item on the counter. Claimant bends at the waist to look into a cabinet and then squats for approximately two to three seconds before rising. Claimant appears to then squat again for approximately five to seven seconds. It is unclear from the angle whether Claimant strikes her knee on the ground. Claimant retrieves an item from the cabinet, rises, and places the item on the counter. Claimant then immediately walks to another cabinet, bends slightly at the waist, and retrieves another item. Claimant then walks out of the kitchen area. Claimant is subsequently observed walking back and forth, carrying a box, putting items in an oven and taking items out of an oven, bending at the waist to retrieve other items, and standing while preparing food. At one point,

Claimant appears to wipe up a spill on the ground using a towel. Claimant first uses her right leg to move the towel across the spill, and then her left leg.

49. The ALJ credits the opinions of Drs. McCranie and O'Brien over the contrary opinion of Dr. Weber and finds Claimant failed to demonstrate that it is more likely than not that she sustained a compensable left knee injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, the ALJ concludes that Claimant failed to prove by a preponderance of the evidence that she sustained a compensable left-knee injury. The opinions of Drs. O'Brien and McCranie are found more credible and persuasive than the opinions of Dr. Weber. Dr. O'Brien and Dr. McCranie credibly opined that Claimant's condition is chronic, degenerative, and that there was no work-related aggravation of a pre-existing condition. There is insufficient persuasive evidence Claimant sustained a contusion. There was no bruising noted in the medical records and, to the extent effusion was found, such swelling could be the result of Claimant's chronic condition. The left knee pain experienced by Claimant was the result of Claimant's pre-existing chronic and degenerative condition and was unrelated to the employment.

The ALJ further credits the opinions of Drs. O'Brien and McCranie regarding the alleged fracture. Multiple physicians reviewed MRIs and x-rays of Claimant's left knee and determined there was no fracture. Dr. O'Brien credibly opined that Dr. Weber misdiagnosed Claimant by interpreting arthritic edema as a fracture. Claimant has

failed to establish that, more likely than not, she sustained an injury arising out of and in the scope of this employment.

Medical Benefits

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Claimant failed to establish by a preponderance of the evidence that she sustained an injury to her left knee arising out of and occurring within the course of her employment with Employer. Therefore, her request for medical benefits is denied and dismissed.

ORDER

It is therefore ordered that:

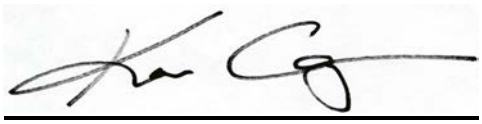
1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable left knee injury. Her claim is denied and dismissed.

1. As Claimant failed to establish that she sustained a compensable injury, her request for medical benefits and temporary total disability is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 13, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Compensability: Whether Claimant proved by a preponderance of the evidence that she experienced an occupational disease in the course and scope of her employment; and

- Medical Benefits: Whether Claimant proved by a preponderance of the evidence that the surgery recommended by Dr. Griggs is reasonable, necessary, and related to Claimant's work-related occupational disease.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant has worked for Employer for 34 years as an assembler.

2. Claimant's regular work shift was Monday through Friday and she worked 8 hours per day. Claimant would sometimes work Monday through Thursday and work 10 hours per day. Regardless of the number of hours she would work per day, Claimant would have a 15 minute break in the morning, a 30 minute break for lunch, and then a 15 minute break in the afternoon.

3. Claimant's job required her to assemble various blood donor packs.

4. The assembly of donor packs was broken down into various tasks. Each assembly worker would work on a particular assembly task for an hour and then switch tasks. Unless Claimant was working a 10 hour day, each assembly task was limited to one hour per day. If Claimant was working a 10 hour day, one assembly task might be done 2 hours per day.

5. The Respondents submitted into evidence a basic job description. The job description indicates Claimant's job requires the use of "repetitive moderate force gripping."

6. A formal job analysis was not performed by Claimant or Respondents specifically setting forth the physical requirements of Claimant's job. Therefore, there was no formal job analysis which set forth the amount of force required to perform each task or the position of Claimant's wrists and elbows while performing each task.

7. Claimant testified and described the repetitive nature of her job before the onset of her upper extremity problems in June or July of 2014. Claimant testified that her assembly job required a lot of repetitive motions with her hands. She demonstrated some of the motions she was required to perform. This demonstration showed Claimant flexing her wrists and gripping and grasping or pinching with her fingers. This also showed Claimant bending her elbows. Although the exact nature of each job task was not explicitly articulated by Claimant, the tasks were repetitive and repeated approximately every 18 seconds. This testimony was credible and persuasive.

8. Claimant testified about the amount of force used to complete some tasks. For example, Claimant discussed a task of preparing "loops" with tubing. She described the task as requiring a pretty good push of the tubing. This task was performed, at most, 2 hours per day since Claimant only performed a particular assembly task for one hour at a time and then she would switch to a different assembly task.

9. Claimant testified about the awkward posture necessary to perform her job due to her chair height and the height of the work station. This testimony was credible and persuasive.

10. Starting around June or July of 2014, Employer increased the production requirements by putting into place a run rate of 202 to 220 donor packs per hour.

11. Around June or July of 2014, Claimant started to develop pain in her upper extremities.

12. On September 29, 2014, Claimant fell at work. Claimant was evaluated by Dr. Sacha on October 7, 2014. While evaluating Claimant for her fall, Dr. Sacha diagnosed Claimant as suffering from carpal tunnel syndrome. The incident in which Claimant fell is part of another workers' compensation claim.

13. After her fall, Claimant was put on restricted duty and taken off the assembly line. Her restricted duty required her to work on braided bearings for about three months. This required her to repetitively pinch the braided bearing to make sure it was properly sealed. Claimant started work on the braided bearings after the alleged onset of her upper extremity complaints in June or July of 2014. After Claimant stopped working on the braided bearings, Claimant performed other non-assembly work for the employer.

14. After Dr. Sacha diagnosed Claimant with carpal tunnel syndrome, Claimant filed a Workers' Claim for Compensation on or about October 21, 2014.

15. On October 21, 2014, Claimant was evaluated by Deana Halat, FNP-BC. Claimant's chief complaint was bilateral hand pain up to her elbows, bilateral shoulder pain, and mid-back pain. Claimant stated that in approximately July of 2014 she started to develop extreme pain in her bilateral upper arms, particularly her hands, which radiated into her elbows. She described it as numbness and

tingling. She stated that she had similar symptoms 10 years ago, but it was limited to her left arm and resolved.

16. Claimant was referred to Dr. Yusuke Wakeshima for EMG and nerve condition studies. Dr. Wakeshima evaluated Claimant on November 11, 2014 and performed an electrodiagnostic study. The study demonstrated findings of mild to moderate carpal tunnel syndrome on the left and borderline ulnar neuropathy at the wrist on the left. The rest of the electrodiagnostic study was unremarkable. Dr. Wakeshima went on to state that it was his opinion that there is a greater than 51% probability that Claimant's current condition is related to her occupation and is most likely related to her cumulative trauma-type injury. He also stated that she does do a significant amount of repetitive motion working on an assembly line, working similar repetitive motions. He opined that there is a greater than 51% probability that her carpal tunnel syndrome is related to her work conditions, due to cumulative trauma conditions. Dr. Wakeshima's opinion regarding the cause of Claimant's condition is found to be persuasive.

17. On December 1, 2014, Claimant returned to Dr. Wakeshima. He diagnosed Claimant as suffering from mild to moderate carpal tunnel syndrome on the left and borderline ulnar neropathy at the wrist on the left.

18. On December 2, 2014, Claimant was evaluated by Dr. Sean Griggs, a hand surgeon. Dr. Griggs diagnosed Claimant with bilateral carpal tunnel syndrome with probable ulnar nerve irritation at the elbows and bilateral shoulder impingement. He recommended physical therapy and injection therapy. Dr. Griggs performed the injection and referred claimant to physical therapy.

19. On December 9, 2014, Claimant was again evaluated by Deana Halat, FNP. Ms. Halat opined that Claimant's pain complaints were related to work activities.

20. On January 6, 2015, Claimant was evaluated by Dr. Griggs. He recommended an MRI of Claimant's left elbow. On January 15, 2015, Dr. Griggs evaluated Claimant and reviewed her MRI findings. He concluded that the MRI showed medial insertional swelling of the triceps, but no tear, and the swelling extended to the superficial margin of the cubital tunnel. He also stated that the EMG nerve conduction study showed mild to moderate carpal tunnel syndrome on the left as well as evidence of ulnar neuropathy at the left wrist. Dr. Griggs diagnosed Claimant as suffering from bilateral carpal tunnel and cubital tunnel syndrome, which had failed conservative management. He went on to recommend that she undergo an endoscopic carpal tunnel release at the left wrist as well as a left cubital tunnel release. He also stated that the conditions were work related. Dr. Grigg's opinion regarding causation is found to be persuasive.

21. Claimant was evaluated by Dr. George Kohake on January 21, 2015. Dr. Kohake assessed Claimant with bilateral upper extremity pain paresthesias, diffuse and nonlocalizing with objective findings on the left, but not the right.

Based upon Claimant's diffuse nonlocalizing pain and lack of objective findings on the right, Dr. Kohake recommended an arthritis profile as well as a second surgical opinion. He also recommended a psychological evaluation.

22. Claimant was evaluated by Dr. Chan on January 22, 2015. Dr. Chan was concerned about whether there was a correlation between Claimant's symptoms and her ongoing subjective pain complaints since Claimant had an injection performed which did not provide any diagnostic or therapeutic improvement.

23. On January 22, 2015, Dr. Griggs requested authorization to perform a left endoscopic carpal tunnel release and a left cubital tunnel release. Based on the positive left sided EMG findings, combined with Dr. Grigg's opinion, this surgery is found to be reasonable and necessary to relieve Claimant from the effects of her occupational disease.

24. On January 30, 2015, Claimant was evaluated by Cynthia Johnsrud, PsyD, Licensed Clinical Psychologist. Dr. Johnsrud determined that Claimant's clinical profiles were within normal limits and did not indicate any psychiatric diagnosis. Therefore, there were no psychological contraindications for surgery.

25. On February 5, 2015, Dr. Wakeshima discussed with Claimant that the surgery being recommended by Dr. Griggs and Dr. Davis would not help her global distribution of pain in the forearm region.

26. On May 8, 2015, Claimant returned to Dr. Wakeshima. According to the office note of that day, Claimant saw Dr. Davis for a second opinion regarding surgery. Dr. Davis concurred that the surgery recommended by Dr. Griggs was reasonable and necessary.

27. On October 1, 2015 Claimant returned to Deana Halat, FNP. Claimant complained of new pain in her left forearm and right forearm.

28. On November 23, 2015 Claimant underwent an IME with Dr. Roth. In his report, Dr. Roth comments on Dr. Wakeshima's opinion of November 11, 2014 that Claimant's carpal tunnel syndrome and cubital tunnel syndrome is related to her work. Dr. Roth stated that:

> I am unable to understand the provider's failure to utilize the medical treatment guidelines with respect to causation analysis. The provider has not performed the requisite evaluation to make a determination of work relatedness. His assessment is presumptuous. There is no information contained herein with respect to the amount of force necessary to perform any specific activity, the frequency cycle with which any specific activities performed nor the duration with which that specific frequency cycle and degree of force are applied. Thus, it is not possible to make any medically probable statement. Carpal tunnel syndrome and

> upper extremity myofascial pain can be secondary to cumulative trauma but are epidemiological ordinary conditions that in the large majority of circumstances are idiopathic and are unique to the individual. This is why a very specific and detailed analysis is necessary before assigning responsibility to a third-party.

29. Dr. Roth also commented on Dr. Davis' opinion that Claimant's carpal tunnel syndrome is related to her work. Dr. Roth stated:

> With respect to causality, Dr. Davis is not unlike the primary care provider indicating that her difficulties could be attributed to her job activities as an assembly worker. That of course does not mean that her symptoms are related to work activities. There is a specific routine to be followed upon which that determination should be based. No provider herein has yet to even bother to ask questions about specific work activities performed. Contrary to the division of labor guidelines, no provider herein has thus far even asked for a formal company job description. No provider herein has asked for a jobsite analysis. Thus, it is my medically probable conclusion, that there is yet no medical records indication/information to support the notion that this person's diffuse and nonspecific complaints are related to any work activity performed. "Assembly" is not a causation assessment. That she has worked for "35 years" is not a causality assessment. In this instance, providers should be hyper vigilant given that she has widespread diffuse nonconforming complaints that do not fit with an of the diagnosis being considered and have been unresponsive to medical treatment. Based on the medical record thus far, in my opinion, it is not reasonable to anticipate that these procedures will result in any sustained benefit in terms of comfort, function, or impairment.

30. This ALJ does not find Dr. Roth's opinions to be credible or persuasive. Although Dr. Roth criticizes each provider for failing to analyze the cause of Claimant's conditions pursuant to the Medical Treatment Guidelines, Dr. Roth fails to perform such an analysis. In essence, Dr. Roth discredits their opinions because they did not follow the MTG, but yet he fails to follow MTG to determine whether Claimant's job caused her condition.

31. Claimant testified her upper extremity symptoms developed contemporaneously with her work and the increase in production requirements that were implemented around June or July of 2014. This ALJ finds the temporal relationship between the increase in production demands and Claimant's symptoms to be credible and persuasive. The evidence showed Claimant's work

caused her left sided carpal tunnel syndrome and cubital tunnel syndrome and necessitated the need for medical treatment.

32. Claimant is currently 59 years old and is right hand dominant. At the onset of her symptoms, Claimant was 57 years old, suffered from hypothyroidism, was obese, and had recently stopped smoking. However, no physician opined that these conditions were the cause of Claimant's left sided carpal tunnel syndrome or left sided cubital tunnel syndrome.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following conclusions of Law are entered.

A. Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

B. Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d

786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

C. Claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990).

D. The Colorado Department of Labor and Employment, Division of Workers' Compensation promulgates rules of procedure pertaining to many aspects of the workers' compensation process. Workers' Compensation Rules of Procedure, 7 CCR 1101-3. Rule 17 contains the Medical Treatment Guidelines (MTG). When evaluating this issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

E. This ALJ concludes that a strict application of the MTG is not appropriate to the specific facts in this case.

F. In this case, the ALJ finds the opinion of Dr. Wakeshima, one of Claimant's treating physicians, to be highly persuasive. Dr. Wakeshima performed an EMG which was positive for left sided carpal tunnel syndrome and left sided ulnar neuropathy at the left wrist. Thereafter, Dr. Wakeshima determined that there was a greater than 51% probability that Claimant's upper extremity problems were related to her work activities. Although Dr. Wakeshima did not specifically reference the MTG, it does appear that he followed the MTG, in part, by providing a specific diagnosis, which was supported by an EMG, and then determined that there was a greater than 51% chance that Claimant's work caused her upper extremity conditions. It also appears that Dr. Wakeshima considered Claimant's specific job tasks since he recommended that an ergonomic evaluation be done to minimize future cumulative trauma.

G. This ALJ also finds persuasive Claimant's testimony regarding the temporal relationship between the onset of her symptoms and the increase in production. Claimant credibly testified that around June of 2014, Claimant's production rate was increased. Claimant credibly testified that shortly after her production rate was increased, her symptoms developed around July of 2014.

H. This ALJ does not credit the testimony of Dr. Roth. Dr. Roth asserts that none of Claimant's medical providers who commented on causation followed the MTG to determine the cause of Claimant's condition. Then, Dr. Roth fails to apply the MTG to determine causation.

I. Claimant has established by a preponderance of the evidence that she suffered an occupational disease arising out of the course and scope of her employment with the Employer.

J. This ALJ concludes that Claimant has proven by a preponderance of the evidence that her upper extremity problems are causally related to her job activities.

K. Respondents are also liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

L. This ALJ also concludes that Claimant has proven by a preponderance of the evidence that the left sided surgery recommended by Dr. Griggs is reasonable, necessary, and related to her work related injury. Claimant had a positive EMG on the left side which was consistent with some, but not all, of Claimant's pain complaints. Therefore, this ALJ concludes that the surgery recommended by Dr. Griggs is to cure and relieve Claimant of the effects of her industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's claim regarding her upper extremity complaints is found to be compensable.

2. Respondents shall pay for reasonable and necessary medical treatment, including, but not limited to, the left sided surgery recommended by Dr. Griggs.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 3-13-17

S/ Glen B. Goldman
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

- What was Claimant's average weekly wage when she was injured while working for Respondent-Employer?

STIPULATION

The parties stipulated that Claimant's average weekly wage was increased by $120.38 per week related to the cost of health insurance premiums under COBRA, beginning on October 1, 2016.

FINDINGS OF FACT

1. On April 17, 2016, Claimant sustained an admitted industrial injury while working for Employer.

2. On her date of injury, Claimant was paid $16.26 per hour.

3. Claimant received a Continuation Coverage Election Notice under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 42 U.S.C. § 300bb-1, et seq. (2010), on or about November 5, 2016. That notice specified the cost of health insurance for Claimant under COBRA was $521.63 per month.

4. Claimant testified she received holiday pay, sick pay, vacation pay, and overtime pay at various times from January 1, 2016 to April 15, 2016. The pay records admitted at hearing documented she received these different types of pay during this time frame.[1] The ALJ inferred this increased her overall compensation.

5. Claimant's statement of earnings and deductions for the pay period ending on April 15, 2016 was admitted at hearing. That document showed Claimant's year to date earnings totaled $12,006.29. This included both regular, overtime, holiday, sick, and vacation pay. As there were 15 weeks Claimant worked prior to her injury, the ALJ determined Claimant's AWW was $800.42 per week.

6. Records admitted at hearing included Archived Time Card Reports, which documented Claimant's wages from April 19, 2015 to April 17, 2016.[2] These documents showed Claimant earned a total of $32,607.37. That total figure divided by 52 weeks resulted in an average weekly wage of $627.06. These records provided a breakdown between overtime and regular pay, although two different amounts were

[1] Exhibit 1.

[2] Exhibit B.

referenced for both regular pay ($16.20 and $16.26) and overtime pay ($24.30 and $24.39). The ALJ notes there was no explanatory information provided for these differing amounts, nor was there a delineation between pay periods, which showed when a pay period began and when it ended.

7. A General Admission of Liability ("GAL") was filed on or about June 14, 2016. In the GAL, Respondents admitted for TTD benefits, based upon an AWW of $627.06.

8. Claimant also testified that she would clock in and out at work. The start of her shift was at 45 minutes past the hour.

9. Claimant satisfied her burden of proof to establish she was entitled to a higher AWW of $800.42 per week.

10. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Administrative Law Judge draws the following conclusions of law:

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

AWW

§ 8-42-102(2), C.R.S., requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily,

hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and affirmed the principle permitting wages to be calculated based on earnings from a subsequent employer and not upon wages earned at the time of injury, as this represented a fairer calculation of Claimant's AWW.

In the case at bar, the ALJ determined that a review of Claimant's actual earnings for the three months before her injury and averaging those weeks was the most fair calculation, as it incorporated the pay for her regular work hours, plus overtime, sick and vacation pay. Therefore, Claimant satisfied her burden of proof and to establish she was entitled to a higher AWW. Claimant's AWW is raised to $800.42 per week [$12,006.29 (gross wages through 4-15-16) divided by 15 weeks=$800.42]

In coming to this conclusion, the ALJ considered using the entire year before the date of injury, as contended by Respondents. As found, the evidence in the record did not provide sufficient delineation of the actual pay periods and used differing amounts for regular pay and overtime pay. Thus, an accurate calculation could not be made as to the earnings using the number of hours Claimant worked per week (alleged to be 37.43 per week). Also, Exhibit B did not provide a sufficient explanation how overtime was calculated over that calendar year. Accordingly, the ALJ determined averaging Claimant's wages over the entire year did not fairly calculate Claimant's AWW. Respondents' other contention that Claimant's AWW was $650.40, based upon the number of hours per week she was hired to work (40 hours/week X $16.26/ hour=

$650.40) was not supported by the evidence, as it did not account for Claimant's overtime, sick and vacation pay.

ORDER

It is therefore ordered that:

1. Claimant's AWW is increased to $800.42 per week for the period of April 19, 2016 to September 30, 2016.

2. Claimant's AWW is increased by $120.38 per week to $920.80 per week beginning on October 1, 2016

3. Respondents shall pay indemnity benefits based upon Claimant's higher AWW.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 14, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-013-545-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 8, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 3/8/17, Courtroom 1, beginning at 8:30 AM, and ending at 12:00 PM).

Claimant's Exhibits 1 through 8 were admitted into evidence, without objection, Respondents' Exhibits A through J were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern: (a) compensability of a low back injury, allegedly occurring at work on February 6, 2016; (b) if the claim is compensable, whether the Claimant is entitled to medical benefits; and (c) if compensable, whether the Claimant is entitled to temporary total disability (TTD) and temporary partial disability (TPD) benefits, overall, from March 24, 2016 and continuing. Respondents raised the affirmative defense that the Claimant was responsible for his

termination of employment, and therefore not entitled to temporary disability benefits after his termination from employment.

The Claimant bears the burden of proof, by a preponderance of the evidence, as to issues (a), (b) and (c). Respondents bear the burden of proof, by a preponderance of the evidence, as to the affirmative defense of responsibility for termination.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings and Stipulations

1. At the commencement of the hearing, the parties stipulated that if the case is compensable, the Claimant's average weekly wage (AWW) is $665.96, resulting in a TTD benefit rate of $443.97 per week; and, that Claimant would be entitled to TTD benefits from April 1, 2016 through October 30, 2016—both dates inclusive—for a total of 213 days, and the ALJ finds accordingly.

2. At the commencement of the hearing, the parties also stipulated that if the case is compensable, the Claimant would be entitled to TPD benefits from March 24, 2016 to March 31, 2016 and from October 31, 2016 to March 8, 2017—both sets of dates inclusive—for a total of 136 days, and the ALJ so finds. The parties have not arrived at a liquidated TPD rate. Therefore, the issue of TPD must be reserved for future decision if the case is compensable.

3. The Claimant (date of birth, January 9,1950) suffered an injury to his back on February 6, 2016, consisting of an aggravation and acceleration of his underlying degenerative disc disease, and this injury occurred in the course and scope of his employment with the Employer herein.

4. The Respondents filed a Notice of Contest on May 2, 2016. The Claimant filed an Application for hearing on November 9, 2016; and, the Respondent filed a Response to Claimant's Application for Hearing on December 8, 2016 (Respondent's Exhibit B, bates stamp 4). The hearing was set for March 8, 2017.

Findings

5. According to the Claimant, the injury on February 6, 2016 occurred at approximately 8:00 AM, while he was walking from his car to the building. He slipped on ice and did a side-to-side split, landing on his buttocks and lower back. This landing caused the Claimant to experience pain in his lower back.

6. On February 6, 2016, immediately after the fall, the Claimant told his supervisor, Chad Raskin, of the fall. Raskin was not called to testify. Claimant then sought treatment at two different authorized clinics. Because it was the weekend, both clinics were closed. The Claimant then returned to work.

7. On February 9, 2016, the Claimant was treated by Katherine Drapeau, D.O. at Healthone Occupational Medicine and Rehabilitation. Dr. Drapeau diagnosed the Claimant with a lumbosacral sprain. Dr. Drapeau referred the Claimant for an MRI (magnetic resonance imaging) and prescribed Medrol dosepak. Thereafter, the Claimant returned to work without restrictions (Claimant's Exhibit 5, bates stamp 13).

Employer Witnesses

8. HR (Human Resources) Administrator Sharon Coffey told the General Manager, Tim Bottoms, of the injury on February 8, 2016. Coffey completed a First Report of Injury on the February 6th incident on February 12, 2016 (Claimant's Exhibit 1, bates stamp 1).

9. Bottoms testified that that he was not notified of the injury until the following week when Coffey completed her report. He testified that the Claimant had informed him on the date of injury that he was returning home to change his clothes because he had [messed himself]. According to the Claimant, he told Bottoms that he was going home to change clothes because his clothes were wet from the fall. It is plausible that the Claimant "messed himself" after the traumatic fall and simply told Bottoms he was going home (in a hurry) to change his clothes without telling Bottoms about the fall.

10. The Claimant has a pre-existing history of lower back and leg pain, primarily in the right leg. He has not lost any time from work and suffered no industrial disability in the past. Respondents, however, argue that the Claimant's incident of February 6, 2016, is not compensable because of his pre-existing degenerative disc disease. As previously found herein above, his back condition was aggravated and accelerated by the incident of February 6, 2016. The weight of the evidence supports this as opposed to a natural progression of the Claimant's degenerative back condition.

Medical

11. On February 25, 2016, the Claimant followed up with Dr. Drapeau. He was referred for a spinal consultation and again was permitted to work without restrictions (Claimant's Exhibit 5, bates stamp 15).

12. On March 17, 2016, the Claimant saw Bryan M. Pereira, M.D. at the Colorado Brain and Spine Institute. Dr. Pereria initially diagnosed the Claimant with lumbar canal stenosis with neurogenic claudication. Dr. Pereria ordered an MRI to confirm this diagnosis (Claimant's Exhibit 6, bates stamp 26). The Claimant underwent the MRI scan on March 31, 2016 (Claimant's Exhibit 7, bates stamp 30).

13. On March 24, 2016, the Claimant followed up at Healthone Occupational Medicine and Rehabilitation with Ryan Otten, M.D. Dr. Otten prescribed Meloxicam and Flexeril for the Claimant, while permitting the Claimant to continue using over the counter pain medication as needed. Dr. Otten allowed the Claimant to return to work, but under restrictions for the amount of time the Claimant could walk, stand, and sit during the day, as well as how much weight the Claimant could lift (Claimant's Exhibit 5, bates stamp 19).

14. Following the above-mentioned appointment with Dr. Otten, the Employer fired the Claimant because he "failed to meet established standards" due to a "lack of productivity" (Respondents' Exhibit C, bates stamp 12). The Employer did not offer the Claimant modified work pursuant to the medical restrictions that Dr. Otten prescribed on his employment. At no time through the present has the Employer offered the Claimant modified work that would accommodate his restrictions. The ALJ infers and finds, coupled with the Claimant's lay testimony, that Dr. Otten is of the opinion that the Claimant's back condition is work-related.

15. On April 18, 2016, Claimant followed up with Dr. Pereria regarding the results of the MRI. The MRI confirmed Dr. Pereria's initial diagnosis, and also indicated that Claimant had a degenerative lumbar spondylolisthesis (Claimant's Exhibit 6, bates stamp 27).

Respondent's Independent Medical Examination (IME) by Douglas C. Scott, M.D.

16. The Claimant was evaluated by Dr. Scott on January 13, 2017 at the request of the Respondents. Dr. Scott testified at hearing as an expert witness.

17. In his report, Dr. Scott stated that Claimant "was aware that he had prior degenerative disc disease, sciatica, and back pain" (Respondents' Exhibit J, bates stamp 82). He also indicated that the Claimant told him that "he has no prior problem with his back and prior to his claimed . . . work injury he had no problems walking or sitting" (Respondents' Exhibit J, bates stamp 80).

18. Dr. Scott concluded that Claimant suffered a possible acute lumbar sprain/strain from the slip and fall at work. Dr. Scott also noted possible temporary exacerbation of prior lumbar chronic condition (Respondents' Exhibit J, bates stamp 82). Dr. Scott attributed the Claimant's current condition to his degenerative disc disease. (Respondents' Exhibit J, bates stamp 83). Dr. Scott's opinion does not contra-indicate a compensable event on February 6, 2016, however, it does not support subsequent consequences thereof, *i.e.,* continued medical treatment and temporary disability. The ALJ finds IME Dr. Scott's opinion concerning the "possible acute lumbar sprain/strain from the slip and fall at work" credible and consistent with the totality of the evidence. Dr. Scott's opinion on the Claimant's current condition does not support a permanent aggravation/acceleration of the Claimant's pre-existing degenerative condition, however, it is contrary to the weight of the medical evidence and inadequately

supported by any reasonably articulated medical rationale. Therefore, the ALJ finds Dr. Scott's IME opinion on the Claimant's current condition, which implies a natural progression of the Claimant's underlying degenerative condition, lacking in credibility and outweighed by the totality of the medical opinions of the Claimant's authorized treating physicians (ATPs), referenced herein above, all of whose opinions support a work-related aggravation/acceleration of the Claimant's underlying pre-existing back condition.

Responsibility for Termination

19. As found herein above, following the above-mentioned appointment with Dr. Otten, the Employer fired Claimant because he "failed to meet established standards" due to a "lack of productivity" (Respondents' Exhibit C, bates stamp 12). The Employer did not offer the Claimant modified work pursuant to the medical restrictions Dr. Otten set on his employment. At no time through the present has the Employer offered the Claimant modified work that would accommodate his restrictions.

20. Bottoms testified that when the Claimant was not meeting his quota of car sales, the Claimant received base pay of minimum wage. Bottoms further testified that the Claimant was less productive than other sales persons, yet the Claimant spent excessive hours at the Employer's work site, collecting minimum wage when he was not meeting his sales' quota, but Bottoms implied that he was altruistic in keeping the Claimant around until, coincidentally, immediately after received Dr. Otten's work restrictions, Bottom's had had enough and finally fired the Claimant for not measuring up to expectations, and not being productive. The ALJ finds Bottioms' testimony lacking in overall credibility as not adding up to common sense notions. Indeed, the ALJ infers and finds that Bottoms immediate reason for firing the Claimant was because Bottoms did not want to provide the Claimant with modified employment. While the Tenth Circuit of the United States is a strong "employment-at-will" jurisdiction--whereby an employer can fire an employee-at-will without consequences as long as the firing is not based on discrimination against a class protected under the civil rights laws, or in breach of a written contract of employment, this is not an employment case but a workers' compensation case. The "responsibility for termination" affirmative defense under the Workers' Compensation Act is a "cat of a different stripe." To make an inroad into the overarching public policy that provides injured workers who are temporarily disabled with temporary disability benefits, a respondent must establish that the employee committed a volitional act, or had a degree of control over the act, that the employee could reasonably know would get him fired. This strict provision makes sense. Not measuring up to performance expectations, absent proof of deliberate slacking off, can hardly be characterized as a volitional act that an employee can reasonably expect will get him fired, although it's possible that an employee who is not measuring up may experience some vague and non-descript job angst. The opposite is also possible. For these reasons, the Respondents have failed to prove their affirmative defense of "responsibility for termination.

Ultimate Findings

21. The Claimant's overall presentation was credible. The implication of Tim P. Bottoms' (the Employer's General Manager) that the Claimant fabricated a claim and was only going home because the Claimant "messed himself" is not well taken without more. Indeed, it is plausible that the Claimant "messed himself" because of the traumatic fall, was in a hurry, and did not say more. The Claimant indicated he was going home because he was wet after the fall into the snow. As found, the opinions of the Claimant's doctors, concerning the causal relatedness of the Claimant's low back injury and the consequences thereof, including the Claimant's present condition, are more credible and persuasive than the opinion of IME Dr. Scott, with the exception of Dr. Scott conceding that it was "possible" that the Claimant experienced a lumbar strain/sprain on February 6, 2016. Other than Dr. Scott, the opinions of the Claimant's ATPs and the testimony of the Claimant credibly support an aggravation/acceleration of the Claimant's underlying pre-existing back condition. There is no evidence that the Claimant was medically restricted before the February 6, 2016 fall. He became medically restricted when Dr. Otten restricted him, after which the Employer fired him.

22. Between the conflicting testimonies of the Claimant and Tim P. Bottoms, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's version of events and to reject Bottoms' version of events. Further, between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, accepts the opinions of the Claimant's ATPs and to rejects Dr. Scott's IME opinions.

23. The event of February 6, 2016 constituted a compensable aggravation and acceleration of the Claimant's underlying back condition. Therefore, the Claimant sustained a compensable back injury on February 6, 2016, arising out of the course and scope of his employment.

24. The Claimant went to the Employer's designated medical provider and received treatment from the provider. Further, all referrals from the authorized provider were within the chain of authorized referrals. Therefore, all of the Claimant's medical care and treatment related to the February 6, 2016 back injury was authorized, causally related and reasonably necessary to cure and relieve the effects thereof.

25. The Claimant's AWW is $665.96, resulting in a temporary total disability (TTD) benefit rate of $443.97 per week. The calculated daily rate is $63.42.

26. The Claimant was temporarily and totally disabled from April 1, 2016 through October 30, 2016—both dates inclusive—a total of 213 days.

27. Pursuant to Stipulation and Finding, the Claimant is entitled to TPD benefits from March 24, 2016 to March 31, 2016 and from October 31, 2016 to March 8, 2017—both sets of dates inclusive—for a total of 136 days, however, no liquidated

wage loss sum to establish a TPD rate has yet been established. Therefore, the issue of TPD must be reserved for future decision.

28. The Respondents failed to prove their affirmative defense of "responsibility for termination," by a preponderance of the evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's overall presentation was credible. The implication of Tim P. Bottoms' (the Employer's General Manager) that the Claimant fabricated a claim and was only going home because the Claimant "messed

himself" was not well taken without more. Indeed, it is plausible that the Claimant "messed himself" because of the traumatic fall, was in a hurry, and did not say more. The Claimant indicated he was going home because he was wet after the fall into the snow. As found, the opinions of the Claimant's doctors, concerning the causal relatedness of the Claimant's low back injury and the consequences thereof, including the Claimant's present condition, were more credible and persuasive than the opinion of IME Dr. Scott, with the exception of Dr. Scott conceding that it was "possible" that the Claimant experienced a lumbar strain/sprain on February 6, 2016. Other than Dr. Scott, the opinions of the Claimant's ATPs and the testimony of the Claimant credibly support an aggravation/acceleration of the Claimant's underlying pre-existing back condition. There was no persuasive evidence that the Claimant was medically restricted before the February 6, 2016 fall. He became medically restricted when Dr. Otten restricted him, after which the Employer fired him.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made rational choices, based on substantial evidence, to accept the Claimant's version of events and to reject Bottoms' version of events; and, to accept the opinions of the Claimant's ATPs and to reject Dr. Scott's IME opinions.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if**

the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the event of February 6, 2016 constituted a compensable aggravation and acceleration of the Claimant's underlying back condition. Therefore, as found, the Claimant sustained a compensable back injury on February 6, 2016, arising out of the course and scope of his employment.

d. Testimony of an injured worker is sufficient to prove causation and inability to work. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). As found herein above, putting the opinions of the Claimant's ATPs together with the Claimant's testimony, the Claimant has proven that he sustained a compensable aggravation/acceleration of his underlying pre-existing back condition on February 6, 2016.

Medical Benefits

e. Because this matter is compensable, Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Pursuant to § 8-43-404 (5) (a) (I) (A), C.R.S., the employer is required to furnish an injured worker a list of at least two physicians or two corporate medical providers, in the first instance. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, the Claimant went to the Employer's designated medical provider and received treatment from that provider. Therefore, all of the Claimant's medical care and treatment related to the February 6, 2016 back injury was authorized.

f. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant*

v. Indus. Claim Appeals Office, 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all referrals from the authorized provider were within the chain of authorized referrals.

g. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to the aggravation/acceleration of his back condition on February 6, 2016. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of his compensable injury.

Average Weekly Wage and Temporary Disability

h. As stipulated and found, the Claimant's AWW is $665.96, which yields a TTD rate of $443.97 per week, or $63.42 per day. As further stipulated and found, the Claimant, on a finding of compensability, is entitled to TTD benefits from April 1, 2016 through October 30, 2016, both dates inclusive, a total of 213 days, in the aggregate amount of $13,508.46.

i. because there is no presently determined liquidated temporary wage loss sum, the issue of TPD must be reserved for future decision.

Burden of Proof

j. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has

sustained his burden on all designated issues. As further found, the Respondents failed to sustain their burden on the affirmative defense of "responsibility for termination."

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay all of the authorized, causally related and reasonably necessary medical expenses related to the Claimant's compensable injury of February 6, 2016, as herein above described with specificity, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Respondents' affirmative defense of "responsibility for termination" is hereby denied and dismissed.

C. The Respondents shall pay the Claimant temporary total disability benefits at the rate of rate of $443.97 per week, or $63.42 per day from April 1, 2016 through October 30, 2016, both dates inclusive, a total of 213 days, in the aggregate amount of $13,508.46, which is payable retroactively and forthwith.

D. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

E. Any and all issues not determined herein, including liquidated temporary partial disability from March 24, 2016 through March 31, 2016 and from October 31, 2016 through the hearing date, March 8, 2017 are reserved for future decision.

DATED this_____day of March 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

I. Whether Claimant established by clear and convincing evidence that the DIME physician erred in determining that he had reached maximum medical improvement (MMI).

II. Whether Claimant established by clear and convincing evidence that the DIME physician erred in concluding that his neck condition was not causally related to his April 4, 2013 fall into a cistern.

III. If Claimant proved that the DIME doctor erred in concluding that his neck condition was not causally related to his April 4, 2013 fall into a cistern, whether he is entitled to an impairment rating for the cervical spine.

IV. If Claimant's cervical spine condition is determined to be related to the April 4, 2013 industrial accident, whether Respondents are liable for additional treatment related expenses for the neck.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Olson and Dr. Hughes, the ALJ enters the following findings of fact:

1. Claimant works as a driller, pump installer and well maintence man for Respondent-Employer.

2. On April 4, 2013, Claimant was involved in a work-related accident, when he fell into a cistern he was assigned to plumb. According to Claimant's testimony, the cistern was equipped with a 24 inch egress hole in which he had placed a ladder so as to climb to the bottom. After attending to his work in the cistern, Claimant attempted to exit the tank via the ladder. Claimant testified that the ladder was not quite tall enough for him to exit easily. Rather, Claimant testified that he had to jump slightly to reach the edge of the opening with his hands so as to pull himself out of the hole. Claimant testified that he had nearly pulled himself out of the hole when, he lost control and fell back into the hole and down to the bottom of the cistern. Claimant testified that he folded his arms up, flipped upside down and landed on his head at the bottom of the cistern. Claimant testified that he was knocked unconscious. Claimant came to and after struggling for some time, was able to get out of the tank. He then called his boss and reported the incident.

3. Following his fall, Claimant undertook a course of care, which included both

conservative treatment and surgical intervention. Claimant's course of care has been prolonged for a variety of reasons, including the need to address post surgical complications from his right rotator cuff repair and the need to treat acute, but non-work related medical conditions.[1]

4. On April 16, 2013, Claimant underwent his first evaluation for the work-related injury by Bernice Barnes, ANP-C at Centura Centers for Occupational Medicine (CCOM). Claimant told Ms. Barnes that after placing his ladder against the side of a cistern that was slightly deeper than his ladder, he attempted to pull himself out of the egress hole when he lost his footing on the ladder and fell back into the tank landing on his elbows. Claimant also reported a stretch injury to his arms and abdomen as he attempted to pull himself from the hole. Claimant did not mention flipping over, landing on his head, or injuring his neck. Claimant completed a pain diagram during this appointment which did not depict any head or neck pain. To the contrary, the pain diagram only depicts aching and stabbing pain in the elbows, the anterior portion of the left hip and front/back of the right shoulder. Claimant also reported that he had taken it easy for a couple of days during which his condition improved until his groin and abdominal pain was aggravated by attempting to get into and out of a small cistern on April 15, 2013, the day before his April 16, 2013 appointment.

5. Physical examination during his April 16, 2013 appointment revealed tenderness in the central lower inguinal area of the abdomen, limited range of motion and tenderness of both shoulders and tenderness of the elbows. Claimant was diagnosed with bilateral shoulder stains, bilateral elbow bruising, and acute abdominal strain. No cervical diagnosis was documented.

6. Claimant has a prior history of neck pain which he has treated with chiropractic adjustment. On February 18, 2010, Claimant completed a pain diagram for Dr. Beth Lancaster, D.C. in which he noted neck pain that had been present "off and on for 6 or 7 years."

7. Chiropractic records between 2/19/2010 and 8/15/2011 establish that Claimant complained of neck pain for which he received chiropractic treatment on at least 14 occasions. Claimant also has a history of falling down a ladder per the chiropractic records on August 12, 2010, which caused low back pain. On August 15, 2011, Claimant reported pain from "head to toe" reportedly due to cattle branding activities.

8. On April 17, 2013, Claimant told physical therapist Mary Bogenschuetz-Bonn, that he "landed with his elbows behind him," "with his shoulders abducted at 90 degrees. No mention of landing on his head or injuring his neck appears in this record. Claimant completed a pain diagram during this appointment which does not reference head or neck pain. Rather, the pain diagram is strikingly similar in terms of the body parts affected by pain to the pain diagram he completed for Bernice Barnes on April 16,

[1] During the course of treatment for his shoulder/elbow injuries, Claimant experienced a bout of acute diverticulitis with mircoperforation which was determined by order of ALJ Donald Walsh to be unrelated to the April 4, 2013 fall or the medications used to treat the Claimant's industrial injuries.

2013. Ms. Bogenschuetz-Bonn did not document a report of loss of consciousness, and diagnosed only right shoulder strain and resolving left shoulder pain.

9. On April 22, 2013, Claimant was seen by George Schwender, M.D. During this appointment, Claimant reported only shoulder, elbow, and abdominal pain. Dr. Schwender did not record a loss of consciousness or diagnose a neck injury.

10. On April 22, 2013, Claimant completed another pain diagram, which did not depict neck pain.

11. On May 1, 2013, Claimant was evaluated by Dr. Richard Nanes who documented continued complaints of left abdominal pain aggravated by a severe cough secondary to flu-like illness. Dr. Nanes also noted continued bilateral shoulder and elbow pain. Absent from this record is any suggestion that Claimant was rendered unconscious or that he injured his head or neck as part of his April 4, 2013 fall. Dr. Nanes assessed Claimant with a "left rectus femoral muscle hematoma, impingement syndrome of the right shoulder, right lateral epicondylitis and contusion of the left elbow. Claimant completed a pain diagram during this appointment that fails to depict pain in his neck. Indeed, the pain diagram is similar to those Claimant had completed previously, endorsing pain in the shoulders, elbows and abdomen.

12. On May 3, 2013 Claimant underwent MRI of the right shoulder which revealed partial tearing of the superior aspect of the supraspinatus tendon as well as an intrasubstance tear of the infraspinatus tendon with partial tear of the tendon at its insertion.

13. On May 8, 2013, Claimant was seen by Karl Larsen, M.D., who recounted the mechanism of injury without recording that Claimant flipped over when he fell, that he lost consciousness or suffered head/neck injuries. Dr. Larsen instead wrote that "the ladder . . . came out from underneath him, causing him to injure both elbows."

14. On May 15, 2013, Claimant returned to Dr. Nanes who noted the results of his right shoulder MRI. A referral was made to an orthopedist for a surgical evaluation concerning the right shoulder. Claimant also completed a pain diagram which did not identify any neck pain. In this pain diagram, Claimant was careful to note that both of his hands "go to sleep if [his] elbow [was] bent."

15. On May 20, 2013, Claimant returned to CCOM where he was evaluated by Ms. Barnes. During this encounter, Claimant reported continued upper extremity symptoms, including pain which was reportedly poorly controlled with over-the-counter Tylenol. No complaints of head or neck pain were documented and Claimant did not depict the same in his pain diagram completed during this appointment.

16. On June 7, 2013, Claimant was evaluated by Ms. Barnes for complaints of feeling feverish 4-5 times a day for as long as 25 minutes and with a temperature as high as 100.5 degrees. Claimant's temperature was recorded as 98.1 degrees as part

of this clinical visit. Ms. Barnes added Robaxin to Claimant's list of medications.

17. On June 13, 2013, Claimant underwent a right upper extremity electromyogram (hereinafter "EMG") performed by William Griffis, D.O., which was negative for cervical radiculopathy. According to Dr. Griffis, Claimant's clinical examination was consistent with a diagnosis of right sided ulnar neuritis at the elbow and right humeral lateral epicondylitis.

18. On June 19, 2013, Claimant completed another pain diagram which did not illustrate neck pain.

19. On July 12, 2013, Claimant underwent right shoulder surgery (rotator cuff tendon repair of the supraspinatus and infraspinatus) as performed by Dr. Alex Romero.[2] Claimant experienced several serious post-surgical complications, including edema in the lower extremities, deep venous thrombosis (DVT), and oxygen desaturation. Claimant also developed a right-sided Horner syndrome which was felt to be related to the interscalene block performed at the time of surgery.[3]

20. On July 18, 2013, Claimant returned to CCOM. A report by an unidentified author outlines Claimant's hospital course for treatment of complications following Claimants' July 12, 2013 surgery. It also casually mentions that Claimant suffered an injury to his neck while trying to pull himself from a cistern. This indication that Claimant suffered a neck injury is the first time such documentation appears in the record since Claimant's April 4, 2013 accident. While the report mentions that Claimant suffered a neck injury, there is a complete lack of documentation that Claimant was suffering from pain in his neck at the time of this appointment. Rather, the report mentions that from his pain diagram Claimant was "experiencing pain postoperatively in the right shoulder and arm which he describes at 100% of the time at a level of 9/10." Careful review of the pain diagram from this date of visit fails to reveal that Claimant was complaining of pain in his neck. Moreover, the record is devoid of any indication that Claimant's neck was physically examined and the author of the report did not offer a cervical spine diagnosis.

21. On July 24, 2013 and July 31, 2013, Claimant completed additional pain diagrams which did not mention neck pain.

22. On September 11, 2013, Claimant followed-up with Dr. Nanes, who did not record neck pain.

23. On October 15, 2013, Claimant underwent a second right shoulder MRI, which was compared to the prior study from May 3, 2013. The October 15, 2013 study revealed that Claimant had suffered a complete rupture of the infraspinatus tendon and surgical attachment in addition to a "near complete tear and avulsion of the surgical

[2] This information is contained in the medical record history section of the DIME report authored by Dr. John Hughes dated June 1, 2016.
[3] See page 2 of Dr. Hughes' DIME report dated June 1, 2016.

attachment of the supraspinatus tendon."

24. On November 13, 2013, Claimant underwent a second shoulder surgery (arthroscopic lysis of adhesions) secondary to continued stiffness.

25. On January 8, 2014, Claimant returned to Dr. Nanes for evaluation with continued complaints of pain in his shoulders and elbows. It was noted that Claimant had approximately 20 degrees of abduction in the right leading Dr. Nanes to opine that Claimant had "once again developed severe adhesive capsulitis and that his right shoulder was "virtually frozen." No mention of neck pain was made nor was there any depiction of the same on Claimant's pain diagram from this date.

26. On January 22, 2014, Claimant was evaluated by orthopedic specialist, Dr. David Weinstein regarding the right shoulder. Dr. Weinstein reported the history of injury as a hyper-abduction of both shoulders. He did not report any mechanism where Claimant flipped over, landing on his head, or losing consciousness during the accident. Moreover, Dr. Weinstein completed a directed examination to the cervical spine which revealed no complaints of midline tenderness and full cervical range of motion (hereinafter "ROM"). He did not diagnose any cervical spine condition.

27. On January 28, 2014, Dr. Griffis administered a second EMG, which was again negative for cervical radiculopathy.

28. On February 24, 2014, Claimant underwent a left shoulder MRI, which revealed a full-thickness tear of the supraspinatus.

29. On April 16, 2014, Claimant completed another pain diagram which did not mention neck pain.

30. On April 23, 2014, Dr. Nanes issued a report in which he related a diagnosis of diverticulitis to Claimant's use of pain medication prescribed for the work-related injury.[4]

31. On May 21, 2014, Claimant underwent a third right shoulder surgery, which was performed by David Weinstein, M.D. Following that procedure, Claimant began reporting headaches, facial numbness, and abnormal tearing in his right eye.

32. On July 2, 2014, Claimant visited Stephen Annest, M.D., who noted some pain extending into the neck as part of a supraclavicular evaluation. Dr. Annest documented a normal cervical examination with full ROM. Dr. Annest felt that Claimant's ongoing shoulder problems were related to a brachial plexus injury.

33. On July 30, 2014, Claimant followed-up with Dr. Weinstein with a primary

[4] As noted, the question of whether Claimants diverticulitis was related to his April 4, 2013, industrial injury was resolved by Summary Order of ALJ Walsh on February 3, 2016. In his order ALJ Walsh concluded that Claimant had failed to establish by a preponderance of the evidence that treatment for his diverticulitis was related to his work related fall.

complaint of numbness in his face and right sided neck pain. According to Dr. Weinstein's note from this date of encounter, Claimant reported that he had been evaluated in Denver (by Dr. Annest) and was informed that he had a brachial neuritis. Dr. Weinstein explained that the alleged brachial neuritis was secondary to previous lack of motion which would resolve over time with stretching. He was unsure of the etiology of Claimant's facial numbness so referred him back to the anesthesiologist to determine whether this was a complication of his block. As noted above, Claimant had previously developed facial symptoms consistent with Horner's syndrome which was felt to be related to an interscalene block performed at the time of his first shoulder surgery. The evidence presented persuades the ALJ that Claimant's facial numbness and abnormal tearing were, more probably than not, related to his Horner's syndrome caused by his interscalene block.

34. On September 22, 2014, Claimant underwent a third right upper extremity EMG, which was performed by Stephen Scheper, D.O., the results of which were again negative for cervical radiculopathy.

35. On December 18, 2014, Claimant was evaluated by Albert Hattem, M.D. at Respondents' request. Dr. Hattem obtained a detailed history of the injury from Claimant. During his interview, Claimant described falling backward into a 6-7 foot deep cistern injuring his shoulders when the ladder his was climbing fell from under him.[5] There is no mention in Dr. Hattem's report that Claimant flipped over and subsequently landed on his head losing consciousness. Claimant reported pain with movement of the left shoulder as well as right shoulder pain. He also reported pain in the elbows and bilateral ulnar digit numbness in addition to right facial numbness. He did not verbalize complaints of neck pain and did not endorse complaints of neck pain specifically in his questionnaire. Rather, Claimant indicated that he had "pain in many areas." The pain diagram completed as part of this independent medical evaluation (IME) reflects burning pain in the right side of the neck. Dr. Hattem did not diagnose a cervical spine injury. He opined that Claimant was at MMI and not a good candidate for further surgical intervention.

36. On February 4, 2015, Claimant was reevaluated by Dr. Weinstein, due to ongoing shoulder pain. Dr. Weinstein did not note any neck pain and again recorded full cervical ROM without tenderness.

37. On March 31, 2015, Claimant was seen by Dr. Sumant Rawat, who noted neck tenderness, but without limitation of movement. Dr. Rawat did not offer a cervical spine diagnosis, but recommended a MRI, which constitutes the first treatment/diagnostic testing directed to the neck since the April 4, 2013 accident. Dr. Rawat also recommended another EMG. The request was denied.

38. On April 17, 2015, Anjmun Sharma, M.D. authored a report in which he

[5] Dr. Hattem conducted a thorough medical records review, noting that Claimant reported to Dr. Romero that he tried to catch himself in the opening of the well with his arms in a "chicken wing" position but was unable to support his weight so fell about 7-8 feet landing on his back.

recommended against a fourth EMG because the three prior studies were negative and Claimant was not a surgical candidate in any event.

39. On April 21, 2015, Claimant underwent an MRI of the brain due to persistent "[r]ight sided facial numbness and right sided eye twitching with throat paralysis. The study was unremarkable without evidence for acute findings.

40. On June 17, 2015, Claimant followed-up with Dr. Nanes, who did not record neck pain or offer a cervical spine diagnosis.

41. On June 17, 2015 and July 29, 2015, Claimant completed pain diagrams which referenced right-sided neck pain in the same location which had been symptomatic in 2010. *Compare Resp. E-64 and Resp. O-143 and 147.*

42. On September 9, 2015, Dr. Nanes referenced neck pain for the first time in his reports, though he still had not diagnosed a cervical spine injury.

43. On December 2, 2015, Dr. Nanes noted that Claimant was "improved (sic) for a cervical MRI" and that there was a question of cervical discogenic pathology with right radiculopathy.

44. Claimant underwent a cervical spine MRI on December 4, 2015, which revealed multilevel degenerative changes, most prominent at C4-5 and C5-6. That same day, Claimant underwent a brachial plexus MRI, which was unremarkable.

45. On December 15, 2015, Claimant followed-up Dr. Rawat, who noted the "extensive disc disease" revealed by the cervical MRI, for which he recommended a neurosurgical consultation.

46. On February 4, 2016, Claimant was seen by Dr. Sana Bhatti upon the referral of Dr. Nanes. During this visit, Claimant described falling into a cistern, landing on his head and losing consciousness. This is the first time that the more recent description of the accident appears in the medical records and is noted to be approximately three years after the date of injury. Dr. Bhatti documented complaints of tenderness over the posterior aspect of the neck and right shoulder along with "sharp pain that radiates to his right arm." He also noted the Claimant's cervical MRI demonstrated right-sided disc herniation at C5-6. Dr. Bhatti also noted that Claimant had undergone "an EMG study," but he did not describe the results (i.e. no findings consistent with radiculopathy revealed). The evidence surrounding Claimant's need for additional electrodiagnostic study persuades the ALJ that Dr. Bhatti was apparently unaware that several EMGs had already been performed as opposed to a single "study." Upon completion of his examination, Dr. Bhatti opined that Claimant's arm pain "may be a right C6 radiculopathy." Treatment, including cervical discectomy and fusion were discussed.

47. On March 2, 2016, Dr. Hattem issued a physician advisor report, in which he opined that Claimant's cervical spine condition was not work-related, due to the

significant delay in seeking treatment for the neck after the accident.

48. On March 17, 2016, Dr. Nanes responded to Claimant's attorney's request for review the file and response to Claimant's assertion that he suffered a neck injury as a consequence of the April 4, 2013 fall. In a letter forwarded to Claimant's counsel, Dr. Nanes wrote: "I have had a chance to review Mr. Marsh's chart. I am in agreement with *your* conclusion that [Claimant] has a neck injury in addition to his other injuries and this is well documented in the chart." (emphasis added). Dr. Nanes seems to believe the alleged neck injury was "related to his fall," as opposed to being secondary to surgery, but the letter is vague and his opinions are unclear.

49. On March 18, 2016, Claimant was seen by Dr. Steven Scheper. Dr. Scheper noted that "[i]nformation from cervical MRI implies [Claimant's] symptoms[6] are very likely coming from C4/5 and C5/6 degenerative disc derangement." Dr. Scheper recommended an epidural steroid injection "prior to any consideration of" neck surgery. Claimant has not undergone an epidural steroid injection.

50. On May 24, 2016, Claimant was seen by Dr. Daniel Olson at CCOM as Dr. Nanes had retired. Dr. Olson diagnosed cervical "spondylosis with radiculopathy."

51. On June 1, 2016, Dr. John Hughes, was selected to perform a twenty-four month Division-sponsored independent medical evaluation (DIME) as provided for in Section 8-42-107(8)(b)(II). Following that examination, Dr. Hughes issued a report outlining his findings and opinions. Dr. Hughes concluded that Claimant reached MMI on December 18, 2014, with a 29% upper extremity rating for the right shoulder and a 2% upper extremity rating for the left shoulder. He did not feel that Claimant had sustained a cervical injury related to the April 4, 2013 fall and did not rate the Claimant for the same.

52. On June 17, 2016, Dr. Olson expressed concern for possible infection in the shoulder based on a blood test which was positive for C-reactive protein ("CRP").

53. On July 12, 2016, Pinnacol filed a final admission of liability based on the opinions of Dr. Hughes.

54. On August 22, 2016, Dr. Olson noted that acupuncture had helped and Claimant was able to discontinue his use of narcotic medication.

55. On September 2, 2016, Claimant was reevaluated by Dr. Weinstein. During this visit, Claimant demonstrated full cervical ROM without tenderness. Claimant reported subjective fevers following acupuncture and it was noted that he had blood testing which had demonstrated a "slightly elevated CRP at 18.1 mg/l." Consequently, Dr. Weinstein obtained x-rays which revealed no evidence of acute osseous abnormality. Based upon his clinical examination and the normal radiographs, Dr. Weinstein opined that there was very little chance for infection. Dr. Weinstein concluded by indicating that

[6] With the exception of Claimant's medial forearm and hand symptoms which Dr. Scheper opined were likely emanating from form a significant ulnat neuropathy at the elbow.

Claimant had maximized his treatment. According to Dr. Weinstein, Claimant was at or near MMI and he did not feel that any further treatment other than pain management and continued home exercises would be of benefit to Claimant.

56. Despite complaints of fever and increased temperatures, which Claimant has reportedly obtained himself, multiple temperatures recorded by Claimant's treating providers since the July 2013 surgery have been below 98.6 degrees. The following temps have been documented: 98.1 on June 7, 2013, 98.3 on July 16, 2013, 98.4 on July 18, 2013, 98.1 on July 31, 2013, 97.9 on November 21, 2014, 98.2 on March 25, 2015, 98.3 on May 13, 2015, 98.0 on July 19, 2015, 98.1 on October 14, 2015, 98.0 degrees on December 2, 2015, 98.0 degrees on January 13, 2016, 97.0 on March 16, 2016, 97.5 on May 24, 2016, 98.1 on June 17, 2016, 97.9 on July 18, 2016, 98.0 on November 7, 2016, and 98.0 on December 5, 2016. A "high" reading of 99.0 degrees was taken over two years ago on January 7, 2015.

57. The evidence presented, including the reports of Dr. Weinstein and Claimant's documented temperatures over the years following surgery, persuade the ALJ that it is unlikely that Claimant has an infection in the right shoulder.

58. Dr. Olson testified via deposition on October 7, 2016. Dr. Olson testified as to his understanding of the injury. He testified that he did not believe that Claimant landed on his head as part of his fall into the cistern. Rather, Dr. Olson understood the mechanism of injury (MOI) as falling backwards onto his back injuring his arm and hitting the back of his head. Regarding Claimant's assertion that he fell on his head, Dr. Olson testified that, while it would not be surprising that Claimant would experience neck pain if he fell and landed on his head, such MOI would be unusual for causing arm injuries which was Claimant's primary complaint. Dr. Olson testified that he disagreed with Dr. Nanes that Claimant sustained a neck injury during the accident, because "the earlier notes don't substantiate that." Rather, Dr. Olson testified that Claimant first documented neck pain on a pain diagram completed September 11, 2013 after his first shoulder operation. Dr. Olson noted that after his first shoulder surgery, Claimant was placed in a sling and that it was not "uncommon to start getting some shoulder and neck complaints" after that. Dr. Olson was also questioned about the potential that Claimant suffered a brachial plexus injury. He testified that the brachial plexus is a bundle of nerves that run from the neck and congregate underneath the arm pit exiting into the arm. According to Dr. Olson, Claimant may have suffered a brachial plexus injury in the fall when his "arms got caught and stretched the nerves." In addition to Dr. Annest's opinion that Claimant's continued shoulder symptoms may be caused by a brachial plexus injury, Dr. Olson testified that a brachial plexus injury may cause pain in the neck and down to the hand.

59. The testimony of Dr. Olson persuades the ALJ that he attributes Claimant's neck pain to muscular structures and the use of his sling which was necessitated by his shoulder surgery rather than falling on his head after slipping back into the cistern. Dr. Olson was careful to clarify that he did not believe that Claimant's degenerative spine condition was caused by his shoulder surgery. Moreover, he clarified that the neck pain

Claimant reported approximately four months after the April 4, 2013 incident, was "muscle pain" and "stiffness" caused by his first shoulder surgery. Dr. Olson never addressed whether Claimant's degenerative condition was aggravated or accelerated by the accident or the resulting surgery.

60. Dr. John Hughes, who is board-certified in the field of occupational medicine, testified via deposition on November 3, 2016. Dr. Hughes testified that it was plausible that Claimant had neck pain as a consequence of "problems around the brachial plexus, which [Claimant] certainly had." Nonetheless, Dr. Hughes testified that he did not believe that Claimant "sustained a cervical spine injury that would meet criteria for a specific disorder impairment rating according to Table 53 of the AMA Guides." Dr. Hughes attributed Claimant's neck pain to complications of Claimant's shoulder surgery. After considering additional information, Dr. Hughes opined that Claimant is at MMI. Dr. Hughes testified that Claimant does not need any further treatment directed at the cervical spine, particularly in light of the full cervical ROM without tenderness documented by Dr. Weinstein. Dr. Hughes further testified that any need for additional cervical spine treatment is more likely than not due to Claimant's underlying degenerative spinal condition and not the work-related injury.

61. Based upon the evidence presented as a whole, the ALJ finds that while Claimant suffers from neck pain, that pain was probably not caused by an injury to the neck or a compensable aggravation/acceleration of a pre-existing degenerative cervical spine condition. Rather, the evidence presented, including the testimony of Dr. Olson and the EMG testing which was negative for cervical radiculopathy persuades the ALJ that Claimant's neck pain was caused by a combination of referred pain from his shoulder secondary to immobility caused by sling use, a possible brachial plexus injury at shoulder level and adhesive capsulitis in addition to the natural progression of his pre-existing degenerative disc disease as revealed on MRI. In reaching this conclusion, the ALJ credits the opinions of Dr. Annest, Dr. Weinstein, Dr. Scheper, Dr. Hughes, Dr. Olson and Dr. Hattem over the contrary opinions of Dr. Nanes.

62. On November 29, 2016, Claimant was evaluated by Armadios Hatzidakis, M.D., who recorded the more recent recitation of the accident where Claimant allegedly fell "directly on top of his head." Claimant was not taking any medications at the time of this visit. Dr. Hatzidakis diagnosed right shoulder rotator cuff deficiency, acromioclavicular joint arthrosis, and possible infection versus an unspecified neurologic issue. He also diagnosed left shoulder strain with rotator cuff pathology and possible biceps lesions. Dr. Hatzidakis recommended a repeat left shoulder MRI, a repeat right shoulder MRI, another right upper extremity EMG, and an aspiration. Dr. Hatzidakis observed mild cervical ROM limitations, but did not offer any treatment recommendations directed at the cervical spine.

63. Claimant testified that he has not worked since 2013, although he still manages his ranch where he has performed several tasks requiring the use of his arms, including modifying a skid loader, operating a skid loader, drilling post holes, moving dirt, and managing cattle.

64. Dr. Hattem testified that he agrees with Dr. Hughes's causation opinion regarding the cervical spine. In this regard, he testified that any muscular neck pain which was caused by the shoulder surgery has resolved, any further neck symptoms are due to the preexisting degenerative condition, and he agrees with Dr. Hughes's opinion that Claimant does not qualify for a cervical spine rating. Dr. Hattem explained that his causation opinion is based on the treatment which Claimant required for preexisting neck pain in 2010 in 2011; the original description of the accident, which did not include falling on his head; the lack of any contemporaneously reported neck pain; the lack of any treatment recommendations for the neck until March 2015; and the "on and off" nature of those symptoms since they began being reported, which he explained is expected in a patient with a preexisting history of degenerative disc disease. As noted above, the ALJ credits these opinions over the contrary opinions of Dr. Nanes.

65. Dr. Hattem testified that he agrees with Dr. Hughes's opinion that Claimant reached MMI for the work-related injury on December 18, 2014, and none of the tests recommended by Dr. Hatzidakis are likely to lead to additional pre-MMI treatment. In this regard, Dr. Hattem testified that three negative EMGs of the right upper extremity have already been performed by two different physicians, and no other physicians are recommending another EMG. He further testified that a left shoulder MRI has already been performed and "we know what the . . . MRI shows; he has a tear there;" Claimant was pleased with his left shoulder condition at the time of his evaluation; and Dr. Hughes did not recommend any additional care for the left shoulder. Dr. Hattem further explained that Claimant has already undergone multiple right shoulder surgeries and would be at high risk for a poor outcome if he undergoes additional surgery. Dr. Hattem testified that he defers to Dr. Weinstein's opinion that Claimant probably does not have a shoulder infection, as 98.6 degrees is considered to be a normal human body temperature and Claimant's consistently normal temperature readings suggest that an infection is unlikely.

66. Claimant has failed to demonstrate by clear and convincing evidence that Dr. Hughes erred when he opined that Claimant had reached MMI for his shoulder injuries and that his cervical condition was not related to the April 4, 2013 industrial accident and as such Claimant did not warrant a cervical spine impairment rating.

67. As Claimant has failed to prove that Dr. Hughes erred in concluding that his cervical spine condition is causally related to his April 4, 2013 industrial accident, Claimant has failed to prove that his need for additional cervical treatment is reasonable, necessary or related to the April 4, 2013 accident.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's testimony regarding the mechanism of injury has changed and expanded with the passage of time. His testimony regarding the MOI is inconsistent with causing both a neck and upper extremity injury according to the persuasive testimony of Dr. Olson. Based upon the totality of the evidence presented, the ALJ concludes that Claimant's testimony regarding the MOI, as well as, his allegation that he sustained a neck injury is unconvincing. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968). As found here, the opinions of Dr. Annest, Dr. Weinstein, Dr. Scheper, Dr. Hughes, Dr. Olson and Dr. Hattem are more persuasive than the contrary opinions of Dr. Nanes.

C. A workers' compensation case is decided on its merits. *Section 8-43-201, C.R.S.* In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive

arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinions are incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). In concluding that Claimant has failed to carry his burden to establish that Dr. Hughes' opinion regarding MMI, the relatedness of Claimant cervical spine condition to the April 4, 2013 incident and his determination to not rate the cervical spine was highly probably incorrect, the ALJ finds the decision expressed in *Andrade* v. *Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005) instructive.

F. In *Andrade* the Colorado Court of Appeals held that a DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. Thus, the court held that an ALJ properly considered DIME physician's deposition testimony where the doctor withdrew his original opinion of impairment after viewing a surveillance video. Similarly, in *Jarosinski* v. *Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002) it was proper for the ALJ to consider a DIME physician's retraction of her original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported. *See also*, *Williams v. Canon City & Royal Gorge Railroad*, W.C. 4-775-399 (ICAO May 12, 2010). In this

case, Claimant argues that Dr. Hughes, during his deposition, essentially changed his opinion regarding the relatedness of his (Claimant's) neck pain to the April 4, 2013 industrial injury because he testified that the neck pain was "related" to a complication of Claimant's shoulder surgery. Claimant asserts that because Dr. Hughes attributes his neck symptoms to a "complication" of his shoulder surgery his neck pain is related to the industrial injury and he is not at MMI for all conditions related to the April 4, 2013 accident. Consequently, Claimant contends that it is premature to determine any disability rating attributable to the cervical spine.

G. In this case, the opinions of Dr. Hughes concerning the relatedness of Claimant's neck symptoms, as expressed in his DIME report and subsequently through his deposition testimony are arguably inconsistent. Consequently, the ALJ must resolve the threshold determination of what the actual opinion of Dr. Hughes is regarding the cause of Claimant's neck symptoms before the question of whether Claimant overcame his opinions concerning MMI can be addressed. If the DIME physician offers ambiguous or conflicting opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5* P.3d 385 (Colo. App. 2000); *Stephens* v. *North and Air Package Express Services,* W. C, No. 4-492-570 (February 16, 2005), *aff'd, Stephens* v. *Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication). In this case, the ALJ concurs with Respondents that Claimant mischaracterized the testimony of Dr. Olson when he asked Dr. Hughes if he agreed with Dr. Olson that Claimant's neck pain was related to complications from shoulder surgery. When asked directly whether Claimant's neck condition was a complication from the surgery he had, Dr. Olson testified that Claimant began complaining of pain after surgery. The ALJ concludes that this statement alone does not provide a sufficient nexus, contrary to Claimant's assertion, to conclude that Claimant's neck condition and subsequent pain was caused, aggravated or accelerated by his fall into the cistern. Indeed, Dr. Olson would go on to testify that the surgery did not cause the degenerative condition revealed by MRI in Claimant's neck and that Claimant had a common complaint of referred muscular neck pain and stiffness secondary to his use of a shoulder sling. Moreover, during questioning concerning whether Claimant's neck pain was a complication of surgery, Dr. Hughes explained only that neck pain can be related to problems around the brachial plexus. Claimant did not have brachial plexus surgery and EMG testing reveals that, if Claimant did sustain a brachial plexus injury it was likely below the neck level as the testing results were negative for cervical radiculopathy. Consequently, to the extent that Dr. Hughes agreed with Dr. Olson that Claimant's neck pain was caused by "complications" of his shoulder surgery, the ALJ finds those "complications to constitute referred neck pain from immobility of the shoulder caused by sling use, a potential brachial plexus injury at shoulder level and adhesive capsulitis in addition to the natural progression of his pre-existing degenerative disc disease as revealed on MRI.

H. To the extent that Dr. Nanes' opinions concerning the relatedness of Claimant's neck pain to his fall into the cistern vary from those expressed by Drs. Olson and Hughes, the ALJ concludes that those divergences constitute a professional

difference of opinion. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). As the evidence presented regarding the cause of Claimant's neck pain amounts to a professional difference of opinion, Claimant has failed to prove that Dr. Hughes' opinions regarding the cause of Claimant's neck pain and entitlement to impairment were highly probably incorrect. Consequently, the request to set aside Dr. Hughes' causality opinion that Claimant did not suffer a cervical injury and is not entitled to an impairment rating for the same must be denied and dismissed. Accordingly, Claimant's entitlement to additional medical treatment for his neck need not be addressed.

I. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Recommendations for future treatment have been discussed by the courts in the context of whether a Claimant is at MMI. "A recommendation for therapies which present a reasonable prospect for improving physical function may be viewed as evidence that the claimant's condition is not stable, and the resulting impairment is not measureable. Therefore, such treatment recommendations are inconsistent with MMI…." *Gebert v. Nordstrom, Inc.*, W.C. No. 4-428-645 (ICAO, June 20, 2003).

J. After considering the totality of the evidence presented, including the medical records and testimony of Dr. Olson and Dr. Hughes, the ALJ concludes that Claimant has failed to produce unmistakable evidence establishing that the Dr. Hughes' determination regarding MMI is highly probably incorrect. Rather, the ALJ concludes that Dr. Hughes accurately determined that no further medical treatment is reasonably expected to improve Claimant's condition. Dr. Hattem convincingly agreed with this determination. Here, Claimant's EMG testing is negative, no additional shoulder surgeries are recommended and Claimant has continued to manage his cattle ranch despite the physically demanding nature of those activities which caused "head to toe" pain in the past. Moreover, the evidence presented persuades the ALJ that the additional tests recommended by Dr. Hatzidakis are neither reasonable nor necessary. Specifically, the recommendation for a shoulder aspiration is unreasonable in light of the convincing evidence that the likelihood of infection is remote based on the negative x-rays, Claimant's normal white blood cell count, and his consistently normal temperature readings post surgery. The ALJ concludes, based upon the persuasive presented that the request for an additional EMG is unnecessary, as three prior EMGs by two different providers were negative for radiculopathy (which reduces the likelihood of a false-negative result), and there is no reliable evidence to suggest that a slightly different EMG will identify previously unrevealed abnormalities. Finally, there is no need for repeat MRIs of either shoulder, because Claimant's objective abnormalities are already well-documented, he did not report any significant left shoulder problems to Drs. Hughes or Hattem, and no providers are recommending additional shoulder surgery. Even if the tests themselves were reasonable and necessary, any associated speculation that they will lead to additional treatment likely to result in improvement in Claimant's condition does not constitute clear and convincing evidence that Dr. Hughes's MMI opinion is wrong.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the opinions of the DIME physician regarding causation, MMI, and permanent impairment are denied and dismissed.

2. Claimant's request for additional permanent partial disability benefits is denied and dismissed.

3. Claimant's request for additional medical benefits for the cervical spine is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 16, 2016

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether claimant had proven by a preponderance of the evidence that the L3-4, L4-5 lumbar foraminotomy, facetectomy, and fusion recommended by Dr. Brian Witwer is reasonable medical treatment necessary to cure and relieve claimant from the effects of the June 2, 2015 work injury.

FINDINGS OF FACT

1. Claimant was involved in an admitted work injury on June 2, 2015. The injury occurred when claimant was involved in a rollover accident while driving a dump truck for employer. Claimant attempted to avoid hitting elk on the road and the tire of the dump truck hit the soft shoulder of the road, causing the truck to roll. Following the June 2, 2015 accident, claimant had abrasions on his low back and he complained of low back pain.

2. Claimant testified that he has a history of low back pain and related surgical treatment. The medical records indicate that on February 16, 2009 claimant underwent a right sided laminotomy with intervertebral discectomy at the L4-5 level. That initial surgery was performed by Dr. Robert Fox.

3. On August 4, 2009, Dr. Witwer performed a fusion at the L4-5 level. On March 9, 2012, Dr. Witwer removed the hardware from the 2009 fusion because the hardware was causing claimant pain. At the time of the 2012 procedure, Dr. Witwer noted that x-rays showed "good position" of the 2009 fusion at the L4-5 level.

4. Claimant testified that following the 2012 hardware removal he recovered and was able to return to full duty work in physically demanding jobs. In May 2012, claimant worked as a crane rigger for a crane company. Claimant testified that while working as a crane rigger, he built a rollercoaster. Video footage of the work claimant did on the rollercoaster in May 2012 was entered into evidence as exhibit 16. In 2014 and 2015, claimant worked as a roustabout in the oil and gas industry.

5. Claimant's medical records indicate instances in which he sought treatment at the emergency room ("ER") for low back pain. On March 30, 2014, claimant sought treatment at the ER for low back pain after moving a piece of heavy furniture. On July 5, 2014 claimant again experienced low back pain after playing volleyball and sought treatment at the ER. Subsequently on January 7, 2015, claimant returned to the ER complaining of low back pain after completing a roofing demolition. Claimant testified that he sought medical treatment at the ER at these times because he did not have a primary care physician. Claimant also testified that in each instance his

low back pain resolved within days. The ALJ finds claimant's testimony regarding this issue to be credible and persuasive.

6. Claimant testified that his current symptoms include pain that radiates from his low back into his hips and buttocks. Claimant testified that prior to the June 2, 2015 work accident he would experience similar pain, but it would resolve with a few days. Claimant testified that his current low back pain is more extensive pain that does not go away, making it difficult to walk, sit, or stand.

7. Dr. Craig Gustafson with Work Partners is claimant's authorized treating physician ("ATP") for this workers' compensation claim. As indicated by the medical records, claimant was typically seen at Dr. Gustafson's office by Daniel Meyer, PA.

8. Following the June 2, 2015 work injury Dr. Gustafson and Mr. Meyer have referred claimant to various modes of treatment including physical therapy, psychotherapy, pain medications, and injections. Claimant testified that he received "targeted" injections from Dr. James Gebhard, but these did not provide him with pain relief.

9. On June 11, 2015, a magnetic resonance image ("MRI") was taken of claimant's lumbar spine and showed multilevel degenerative disease with a circumferential disc bulge at the L3-4 level with a focal protrusion in the left foraminal and lateral region contacting the L3 nerve root.

10. On July 28, 2015, claimant was seen at Dr. Gebhard's office by Todd Ousley, PA-C. During that visit an x-ray was taken of claimant's lumbar spine that showed a left-sided facet joint screw with some evidence of "interbody violation" at the L4-5 level but no obvious interbody bony consolidation. On that same date, Mr. Ousley opined that claimant's pain symptoms were arising from a "disruption" of pseudoarthrosis at the L4-5 level.

11. On August 13, 2015, Dr. Gebhard administered a left sided L3-4 transforaminal epidural injection. Claimant reported to Dr. Gebhard that this injection provided no relief.

12. On October 15, 2015, Dr. Gebhard administered bilateral L4-5 transforaminal epidural injections. Claimant reported to Mr. Meyer with Dr. Gustafson's office that he had approximately two weeks of pain relief after the October injections.

13. On January 18, 2016, Dr. Witwer recommended that claimant undergo a L3-4, L4-5 lumbar foraminotomy, facetectomy, and fusion. Respondents have denied authorization for the recommended surgery.

14. Dr. Witwer testified by deposition in this matter and stated his opinion that the disc herniation at the L3-4 level was likely caused by the June 2, 2015 work accident. Dr. Witwer also testified that because surgical treatment of the disc herniation at L3-4 level is above a previously fused level, it would be necessary to extend the fusion from L3 to L5. In addition, Dr. Witwer opined that although the pseudarthrosis at

the L4-5 level is likely a preexisting condition, it was aggravated by the June 2, 2015 accident, which necessitates the recommended surgery.

15. On May 4, 2016, respondents sent claimant for an independent medical examination ("IME") with Dr. Brian Reiss. Dr. Reiss reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the IME. Following the IME, Dr. Reiss issued a report and opined that the pseudarthrosis at the L4-5 level was symptomatic prior to claimant's June 2, 2015 work injury, but was possibly aggravated by the work injury. With regard to surgical intervention, Dr. Reiss opined that surgery at the L4-5 level may be reasonable to address the pseudarthrosis, but surgery at the L3-4 level would not be reasonable or necessary.

16. On July 14, 2016, a computerized tomography ("CT") scan of claimant's lumbar spine showed that the interbody fusion at L4-5 was "ununited" with possible pseudoarthrosis. In addition, the disc protrusion at the L3-4 level was noted as narrowing the left L3-4 foramen.

17. After reviewing results of claimant's July 14, 2016 CT scan, Dr. Reiss supplemented his May 2016 IME report and reiterated his opinions that surgery at the L3-4 level is not medically reasonable or necessary and claimant's pseudarthrosis at the L4-5 level is not related to the work injury.

18. Dr. Reiss testified by deposition in this matter and stated that it is his opinion that claimant's pain generator has not been identified and that any of the levels in claimant's spine with degenerative discs could be causing claimant's pain. Dr. Reiss also testified that claimant's pain could be myofascial.

19. Claimant's children, Savannah Buza and Alisa Drury, and their mother, Shelia Drury, testified at hearing. These witnesses testified regarding claimant's physical abilities prior to the June 2, 2015 work injury and his limitations since the injury. Prior to the injury claimant was able to run and play with his grandchildren, go fishing and play volleyball with his family. Since the work injury, claimant is unable to do any of those prior activities.

20. Claimant's former employer Rick Rakich testified at hearing that he hired claimant to work in a physically demanding position for his crane company including lifting between 50 and 75 pounds. Mr. Rackish testified that claimant had no back issues or complaints while working for his company.

21. The ALJ credits the medical records, claimant's testimony, and the opinion of Dr. Witwer over the contrary opinion of Dr. Reiss and ALJ finds that claimant has demonstrated that it more likely than not that the June 2, 2015 work injury caused the L3-4 disc herniation and aggravated or accelerated the preexisting pseudarthrosis at the L4-5 level.

22. The ALJ credits the medical records, claimant's testimony, and the opinion of Dr. Witwer over the contrary opinion of Dr. Reiss and finds that claimant has

demonstrated that it is more likely than not that the recommended surgery is reasonable medical treatment necessary to cure and relieve claimant from the effects of the June 2, 2015 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2014). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2014).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has demonstrated by a preponderance of the evidence that the June 2, 2015 work injury caused the L3-4 disc herniation and aggravated or

accelerated the preexisting pseudarthrosis at the L4-5 level. As found, claimant's testimony and the opinions of Dr. Witwer are credible and persuasive on this issue.

6. As found, claimant has demonstrated by preponderance of the evidence that the recommended L3-4, L4-5 lumbar foraminotomy, facetectomy, and fusion is reasonable medical treatment necessary to cure and relieve claimant from the effects of the June 2, 2015 work injury. As found, the medical records, claimant's testimony, and the opinions of Dr. Witwer are credible and persuasive on this issue.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the recommended L3-4, L4-5 lumbar foraminotomy, facetectomy, and fusion, pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 16, 2017

/s/ Cassandra M. Sidanycz

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant is entitled to an award of penalties under C.R.S. 8-43-304, due to Respondent's failure to comply with a statute or rule under the Workers Compensation Act.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was employed as a paralegal for uninsured Respondent. She was injured on May 15, 2015 when a chair she was using collapsed, causing her to fall to the ground. Claimant sustained a concussion as well as orthopedic injuries. Respondent filed a General Admission of Liability as a self-insured party on June 8, 2015, admitting for temporary total disability ("TTD") and medical benefits.

2. Although referenced in Respondent's written Position Statement that the failure to carry Workers Compensation Insurance was due to an accounting error, the actual reason for non coverage is not in the evidentiary record.

3. Nonetheless, Respondent credibly testified, and substantial medical records corroborate, that Respondent has promptly authorized, and paid for, considerable medical treatment for Claimant since the date of injury, up until the dispute at issue. Such treatment included ambulance service, emergency room treatment, an authorized treating physician ("ATP"), and a second ATP upon request, multiple physicians, mental health care, physical therapy, and radiologic services.

4. Claimant treated with various healthcare providers and eventually came under the care of neurologist Bennett Machanic, M.D., on referral from Jeffrey Jenks, M.D., her ATP.

5. Dr. Machanic first met with Claimant on October 18, 2016. He noted, "…She has multiple ongoing problems due to the above on-the-job injury including periodic numbness and drooping of her right face, difficulties with numbness and weakness in the right arm, problems with headaches, difficulties with leg weakness and numbness, but also difficulties with focus, concentration, memory, and episodes of altered consciousness. All of these complexities bring her here to the office today for further evaluation…"

6. Dr. Machanic concluded, "…on May 15, 2015, she had a fall at work, suffered closed head trauma, had a likely cerebral concussion, now may have a

combination of posttraumatic stress disorder and/or posttraumatic encephalopathy although the latter is somewhat difficult for me to objectify. Of great concern to me are the posttraumatic mixed headaches, but even greater concern is the question as to whether she has post traumatic epilepsy. The latter is indeed critical…"

7. Dr. Machanic indicated; "…I would recommend an EMG nerve conduction study of the right arm. I would highly recommend a 3-5 day ambulatory EEG to make certain regarding the possibility of epilepsy and if this study is positive, she will need to be placed on antiepileptic medication. In the interim period of time, she is not to drive a motor vehicle, do activities at heights, use power equipment, swim, or take a bath alone…"

8. On October 19, 2016, Dr. Machanic issued a request for authorization of EMG testing, to be conducted by Dr. Machanic himself, and for EEG testing with "RSC (Redefining Seizure Care)." Claimant's Exhibit 9 contains fax imprints at the top of the page indicating the fax was sent around 4:00 p.m. on October 19, 2016, but the recipients are not shown. The handwritten prescription page indicates that "Blixt" was an intended recipient, with the correct fax number handwritten. The ALJ finds that this Report from Dr. Machanic was faxed to Respondent's Attorney Gerald Blixt on October 19, 2016 in the late afternoon.

9. The ALJ finds that this request arguably exceeded the Medical Treatment Guidelines on two bases: (1) The guidelines specify a "72 hour ambulatory EEG", and not a " 3 to 5 day ambulatory EEG", and (2) The guidelines imply that a "normal EEG" could be a condition precedent to ordering a 72 hour ambulatory EEG. Nonetheless, the ALJ further finds that this authorization request contained sufficient specificity and supporting documentation to comply with W.C.R.P. 16-9(F). If Respondent did not feel that the provider was in compliance with 16-9(F), Respondent failed to so state at the time.

10. Respondent authorized the EMG testing, and Dr. Machanic performed it on December 20, 2016.

11. Respondent did not authorize the ambulatory EEG testing at this time. Instead, Attorney Blixt send a one-page letter ("Blixt letter") on October 31, 2016 to Claimant's Attorney, Royce Mueller, acknowledging phone calls which had been made on Claimant's behalf, as well as a fax letter from Attorney Mueller dated October 28, 2016. The concerns expressed in the Blixt letter included, in summary:

(1). The proposed number of hours-120- for the ambulatory EEG,

(2). The cost of the procedure as proposed-$18, 250.00,

(3). The symptoms noted by Dr. Machanic, which were not previously reflected in Claimant's treatment notes to date, and

(4). His completed contact with a different neurologist, Dr. Bjork, who was willing to provide a "second opinion" regarding the conclusions being drawn by Dr. Machanic.

12. Respondent did not formally contest the request for EEG testing for either non-medical reasons or medical reasons, pursuant to the procedures outlined in W.C.R.P. 16-10(A) or (B), respectively.

13. Claimant then filed an Application for Hearing on October 31, 2016 (the same day as the Blixt letter), seeking medical benefits, authorized provider, reasonably necessary, AWW, TTD, and penalties, endorsing with specificity the failure to properly authorize (or contest) the EEG and EMG as recommended by Dr. Machanic.

14. On January 3, 2017, Dr. Machanic responded to questions from Claimant's counsel. Dr. Machanic answered "YES" in response to the question; "Is it imperative that Ms. Bivings undergo as soon as possible the EEG testing you recommended?" The doctor explained why; "If having post-traumatic seizures, has risk of severe bodily injury." Dr. Machanic was asked; "What is potential impact on Ms. Bivings' health, if any, of the continued delay in authorization of the EEG testing you recommended?" Dr. Machanic responded; "Death, paralysis, severe injury." Dr. Machanic added; "Do not understand delay!" This response was conveyed to Attorney Blixt.

15. On February 2, 2017, Dr. Shell (Dr. Jenks had left the practice at this point) reported, "…At this point I understand that an EEG has been ordered but not approved. I would certainly recommend an EEG to be performed to rule out postraumaticepilepsy." The record is unclear if this letter was conveyed to Respondent.

16. On February 3, 2017, Dr. Machanic submitted another request for authorization of various treatment modalities, including a "3 day ambulatory" EEG. (Claimant's Exbs. pg. 88).

17. Respondent authorized 72 hour ambulatory EEG testing on February 17, 2017.

18. Attorney Cullen Wheelock testified on behalf of Respondent. Ms. Wheelock previously served as an Administrative Law Judge for the State of Colorado for over 15 years. She handled workers' compensation cases. Subsequently she worked for approximately two years as an attorney representing injured workers in Colorado.

19. Respondent, through Ms. Wheelock, testified that Dr. Machanic's initial report dated October 18, 2016 allegedly described "new symptoms" not documented previously, as well as symptoms Claimant allegedly experienced prior to the work injury. Ms. Wheelock testified she conferred with her attorney and decided to obtain a "second opinion."

20. Respondent arranged for Claimant to be examined by its retained physician, Dr. Randall Bjork. However, Dr. Bjork did not see Claimant until December 8, 2016, well past 7 business days after the date Dr. Machanic recommended EEG testing. Respondent testified, with no evidence in rebuttal, that she believed that Claimant did not accept or appear for several earlier appointment dates with Dr. Bjork. Dr. Bjork did not ultimately opine one way or the other regarding the EEG testing Dr. Machanic recommended.

21. At hearing, Respondent asserted Dr. Machanic "changed his prescription to comply with the Medical Treatment Guidelines" on February 3, 2017, and once that happened, she authorized the testing. The record is not clear that Respondent, through counsel, was aware on October 31, 2016, that Dr. Machanic's request did not meet the Medical Treatment Guidelines under W.C.R.P. 17, Exhibit 10, or if later research revealed that fact. Regardless of any provisions of the Medical Treatment Guidelines, Respondent was obligated to either authorize the request, or timely take action pursuant to W.C.R.P. 16-10(A) or (B) if she wished to challenge the request.

22. When asked on direct examination why she waited until February 17, 2017 to finally authorize Dr. Machanic's request for authorization of EEG testing, Ms. Wheelock offered several reasons, including the following: her attorney was out of state; when he returned he had to move out of his office; then he got bronchitis; then he had hernia surgery; she herself was out of the country from January 19 to February 2, 2017; she is a solo practitioner with a domestic relations law practice; and due to their schedules they had difficulty "getting together." The ALJ finds that while these reasons are truthful, they do not constitute legal defenses.

23. Respondent credibly testified she has not practiced workers' compensation law for a number of years, and had not kept with the applicable rule and statute changes. Instead, she relied on her attorney to navigate the system on her behalf, so she could focus on her existing family law practice. On direct examination agreed that ignorance of the applicable workers' compensation rules is no excuse for not complying with them.

24. Respondent admitted she failed to notify Dr. Machanic in writing within 7 business days of her receipt of his request for authorization of EEG testing that she was challenging his request for the testing. Respondent admitted she failed to have Dr. Machanic's request for authorization of EEG testing reviewed by a different physician within 7 business days of her receipt of that request.

25. Respondent failed to timely contest, according to the applicable Rules, Dr. Machanic's request for authorization of EEG testing for either medical reasons or non-medical reasons.

26. Claimant testified that Dr. Machanic wanted her to stop taking her medications in preparation for the EEG testing. When Dr. Machanic first recommended the EEG testing in October, 2016, Claimant was taking Tramadol for pain; sumatriptan for headaches; escitalopram for depression; cyclobenzaprine for muscle spasms;

promethazine for nausea; and Xanax for anxiety. (Claimant's Exbs. pg. 100). Claimant testified that she stopped taking "these medications as instructed by Dr. Machanic", with the expectation that the EEG testing would be timely approved. After ceasing these medications, Claimant says she experienced increased neck and shoulder pain, headaches, anxiety, depression and difficulty sleeping.

27. Dr. Machanic's notes indicate further, however, that he *only* recommended ceasing the sumatriptan (since *it does not work at all* per Claimant), and the tramadol (which helped *"modestly"* for pain, according to Claimant herself). Tramadol could increase the risk of seizures. *At no point do Dr. Machanic's notes recommend Claimant cease taking the other four medications, including those for depression, anxiety, muscle spasms, and difficulty sleeping. These are the very medications prescribed to prevent the very symptoms she now complains of.*

28. Claimant testified that after she reviewed Dr. Machanic's responses to her attorney's questions regarding the urgency of the EEG testing and the fact that continued delay could result in death or paralysis (Claimant's Exbs. pgs. 92-94) she felt "scared to death."

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado (Act), sections 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case 6 must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936) (overruled on other grounds in *Lockwood v. The Travelers Insurance Company*, 498 P.2d 947, 952 (Colo. 1972)).

D. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Penalties

E. Claimant asserts that Respondent failed to comply with W.C.R.P. 16-10(A) and (B) when Respondent did not authorize, or take action to challenge, Dr. Machanic's request for authorization of EEG testing. Claimant seeks penalties under Section 8-43-304(1), C.R.S. for Respondent's failure to comply with W.C.R.P. 16-10(A) or (B), and she asserts she is entitled to a penalty for each day that Respondent failed to authorize the EEG testing. Claimant contends she is entitled to penalties beginning October 31, 2016 (the seventh business day after October 19, 2016, the date on which Dr. Machanic submitted his request for authorization of EEG testing), up to February 17, 2017, the date on which Respondent authorized the EEG testing. This is a period of 109 days.

F. The ALJ notes W.C.R.P. 16-10(F) provides that "Unreasonable delay or denial of prior authorization, as determined by the Director or an administrative law judge, may subject the payer to penalties under the Workers' Compensation Act."

G. Claimant contends she suffered physical and mental harm as a result of Respondent's failure to authorize or challenge Dr. Machanic's request for EEG testing. The ALJ does not concur in this assessment. Had Respondent promptly approved this procedure, certainly some stress while awaiting the procedure would have been prevented. However, Respondent was not obligated to *approve* Dr. Machanic's proposed ambulatory EEG; Respondent was merely obligated to file a legal *response* thereto. Respondent could have contested it, arguably on either medical or non-medical grounds. Ultimately a hearing could have settled this matter as well, but not before a similar period of time had passed as it took to reach the stipulation for coverage. *Claimant discontinued **ALL** her medications-not just the two of marginal or no effectiveness as recommended by Dr. Machanic-* in anticipation of a quick EEG, but this was before a stipulation for coverage could be reached.

H Respondent contends no penalty is warranted because its actions were reasonable. In support of this proposition, Respondent relies on its efforts to obtain a second opinion; the fact that Dr. Machanic issued second request for EEG testing on February 8, 2017; and apparent communication difficulties Respondent had with its attorney towards the end of 2016 and the beginning of 2017. In essence, Respondent claims its actions were reasonable.

I. Whether statutory penalties may be imposed under Section 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1,000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel..." Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable.

J. The ALJ notes that failure to comply with a procedural rule is a failure to obey an "order" within the meaning of Section 8-43-304(1), C.R.S. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231, 234 (Colo. App. 2007)

K The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp*., W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), but see *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

L. The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital*, supra. A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a provision of the Act. If the claimant makes such a prima facie showing, the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital*, supra, *Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999).

M. W.C.R.P. 16-10(A) provides that if the payer wishes to contest a request for prior authorization for non-medical reasons, it must notify the provider and the parties within 7 business days of receipt of the provider's completed request for authorization. ("Non-medical reasons" are defined in W.C.R.P. 16-11(B) and include compensability not having been established, and the services "…are not related to the admitted injury…")

N. However, W.C.R.P. 16-10(A) also states that if the provider explains how the requested procedure is related to the admitted workers' compensation claim, then the payer cannot deny based solely on relatedness without a medical review as required by W.C.R.P. 16-10(B). Dr. Machanic explained how the requested EEG testing was related to the admitted claim, at least in his opinion. Reasonable minds might have differed on Sr. Machanic's conclusion at this time, but if it wanted to properly contest Dr. Machanic's request, Respondent still had to comply with W.C.R.P. 16-10(B).

O. W.C.R.P. 16-10(B) provides that if the payer wishes to contest a request for prior authorization for medical reasons, the payer must, within 7 business days of receipt of the request, have it reviewed by "…a physician or other health care professional…who holds a license and is in the same or similar specialty as would typically manage the medical condition, procedures, or treatment under review…" This did not happen.

P. As was later determined (but not referenced in the Blixt letter), Dr. Machanic's authorization request was arguably outside the Medical Treatment Guidelines on two separate bases. The pertinent provisions of W.C.R.P. 17, Exhibit 10 reads:

> 5. ELECTROENCEPHALOGRAPHY: a. Electroencephalography (EEG):…..
>
> > If during this period there is failure to improve, or the medical condition deteriorates, an EEG may be indicated to assess seizures, focal encephalopathy due to persistent effects of hemorrhage, diffuse encephalopathy due to the injury, or other complicating factors such as hydrocephalus or medications. A ***normal EEG*** does not definitively rule out a seizure disorder. If there is sufficient clinical concern that a seizure disorder may exist ***despite a normal EEG,*** then a ***72 hour ambulatory EEG*** or inpatient video-EEG monitoring *may* be appropriate. (emphasis added).

The records do not indicate that a "normal EEG" was performed before the ambulatory EEG was recommended. Secondly, as was later pointed out, once the EEG was limited to 72 hours, and the communication issues resolved, Respondent acquiesced.

Q. In this case, Claimant made a prima facie showing that Respondent violated W.C.R.P. 16-10(A) and (B) by failing to take timely action to challenge Dr. Machanic's request for authorization of EEG testing. Therefore, the burden of persuasion shifted to Respondent to show that its conduct was reasonable. Respondent did not carry its burden of persuasion to show that its conduct was objectively reasonable, according to established case law.

R. The ALJ concludes that none of the reasons proffered by Respondent for not complying with W.C.R.P. 16-10(A) or (B) were based on a rational argument based in law or fact, as recognized by established case law. Respondent's inaction in the face of a request for authorization of EEG testing was not objectively reasonable.

S. Accordingly, it is concluded that Claimant is entitled to award of penalties under Section 8-43-304(1), C.R.S.

Calculation and Apportionment of the Appropriate Penalty

T. The amount of penalty or fine, if any, is discretionary with the court. Crowell v. Industrial Claim Appeals Office, 2012 WL 503675, (Colo. App 2012)

rehearing denied. The time period between the first business day of noncompliance with the Rules (October 31, 2016), and the date Respondent authorized the procedure at issue (February 17, 2017) is 109 days. Claimant seeks $1000 per each day of noncompliance. In the event penalties are to be awarded, Respondent argues that $25 per day would be more appropriate. In this case, the ALJ will weigh certain aggravating and mitigating factors.

U. In aggravation, the length of time of noncompliance is fairly lengthy. However, since penalties are accrued on each day of noncompliance, that aggravating factor is effectively built into the final penalty amount. Claimant has endured stress by the delays in approving this claim. The public policy objectives of the Workers Compensation Act are furthered when claims adjusters familiar with the process are involved at every step. Then disputes can be resolved in a predictable and orderly process.

V. The lack of ability to communicate between Attorney Blixt (serving essentially as a claims adjuster), his client, Claimant's physician, and Claimant's attorney should not prejudice Claimant. While Claimant was understandably stressed by the delays in the process, there is no evidence of actual harm. If she failed to follow Dr. Machanic's instructions in which medications to stop, Respondent cannot be held accountable for that. While accepting as truthful the reasons set forth by Respondent (moving Mr. Blixt's practice, Mr. Blixt's two serious medical issues, Respondent's vacation plans, Respondent's own domestic practice, etc) for the delays in approval, the ALJ must still impose penalties for each day of noncompliance.

W. Mitigating factors abound, however. Respondent testified credibly that she wants Claimant to get well, and the sooner the better. No one, save Claimant herself, has a greater stake in Claimant's medical outcome. Respondent quickly admitted this claim. Respondent has authorized considerable expenses and consultations with various medical professionals, and has apparently paid them all in good faith, and in anticipation of assisting Claimant.

X. The Blixt letter of October 31, 2016 demonstrates that *the EEG was not being* ***refused.*** It was sent in response to a series of red flags raised in Dr. Machanic's request. 120 hours of ambulatory EEG sounded like a lot, even if it became apparent only at a later date that the actual text of the medical treatment guidelines was not being followed. Any reasonable person in Respondent's position would have concerns. Mr. Blixt had already priced the EEG procedure with the suggested provider, which was a considerable sum. He had reviewed the request in detail, having noted a number of symptoms not previously noted. He had already contacted a physician in a similar specialty for a second opinion. He then inquired if there was an objection to his suggestion. There was, since an Application was filed the same day seeking penalties.

Y. The Blixt letter, along with Respondent's testimony, shows that any initial noncompliance with the Rules, while objectively unreasonable, was not done *willfully* or *intentionally.* Instead, it showed that good faith and diligence was being exercised in an

effort to supply treatment that was reasonable and necessary for Claimant's recovery. Respondent's actions at issue herein fit a pattern of 17 months of responsiveness to Claimant's medical needs. At most, they represented some initial unfamiliarity with the requirements of W.C.R.P. 16-9 and 16-10, and the medical treatment guidelines.

Z. Draconian penalties are simply not warranted under such facts, even if the Respondent were a deep pocketed insurer. This was a precautionary diagnostic procedure, not prescribed treatment which would alleviate pain or injury. Claimant, at this juncture, has not shown physical harm by this delay beyond her own stress of waiting. Respondent could have delayed the process by months anyway, simply by following the Rules correctly. A maximum penalty as being suggested by Claimant would certainly not further the objectives of either party of bringing about her recovery. Indeed, her prospects would be greatly diminished. Given the mitigated nature of these facts, $10.00 per day of noncompliance is appropriate.

AA. The cumulative penalty imposed for this violation is therefore $1,090.00.

BB. Due to the stress suffered by Claimant from the delays in this diagnostic process, this penalty is apportioned to be payable at 100% to Claimant, and 0% payable to the Workers Compensation Cash fund, pursuant to C.R.S. 8-43-304(1).

ORDER

It is therefore ordered that:

1. Respondent shall pay penalties in the total amount of $1,090.00, 100% of which are to be paid to Claimant, and 0% to the Workers Compensation Cash Fund.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 17, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Has Claimant received an overpayment of indemnity benefits?

2. Are Respondents entitled to reduce Claimant's ongoing TTD benefits by 50% to recover an existing overpayment?

FINDINGS OF FACT

The parties stipulated to the following facts, which were accepted by an Order dated January 20, 2017:

1. Claimant sustained an admitted industrial injury to his right knee on January 2, 2007. Claimant later sustained an injury to his left knee as part of this claim. Claimant had total knee replacement surgeries on both knees. As of the date of the parties' stipulation, Claimant was not at MMI and remained on TTD.

2. Claimant's TTD rate is $719.74, the applicable maximum rate. Per § 8-42-107.5, the applicable cap is $120,000 for impairment greater than 25%.

3. Claimant received $16,071 in unemployment benefits from March 7, 2009 through October 31, 2010.

4. Claimant received Social Security Disability Insurance (SSDI) benefits of $486.35 per week, beginning November 1, 2010. The SSDI amount consists of payments to Claimant of $324.35, and payments to Claimant's minor daughter (date of birth September 12, 2005; currently 11 years old) of $162.00 ($324.35 + $162 = $486.35). The SSDI offset is $243.18 per week.

5. Claimant presently receives $476.56 per week in TTD, which reflects the SSDI offset ($719.74 - $242.18 = $476.56).

6. As of September 30, 2016, Claimant was entitled to a total of $212,371.26 in TTD benefits, as outlined in a General Admission of Liability dated October 27, 2016.

7. As of September 30, 2016, Respondents had paid Claimant $231,386.63 in indemnity benefits.

8. On October 31, 2006, Respondents filed a Petition to Modify Compensation, seeking to reduce Claimant's TTD rate by 50% to $238.31 per week, due to the existing overpayment of $19,015.37. Claimant timely objected.

9. A hearing on the overpayment issue was scheduled for January 24, 2017, in Colorado Springs.

10. The parties agreed that a hearing was unnecessary, and the issues could be determined on the submission of briefs, with the stipulations (including the October 27, 2016 General Admission with attachments) being the evidence for consideration.

Based on the stipulated facts, the ALJ makes the following additional findings:

11. As of September 30, 2017, Claimant was overpaid by $19,015.37 ($231,386.63 - $212,371.26 = $19,015.37).

12. Although Respondents reduced Claimant's ongoing TTD payments at some point to recover overpayments, there remains an uncollected overpayment of $19,015.37.

13. The ALJ finds it appropriate for Respondents to prospectively reduce Claimant's weekly TTD benefits by 50% to $238.31 per week to recover the overpayment.

CONCLUSIONS OF LAW

Section 8-42-103(1)(f) provides that TTD benefits shall be reduced by the amount of concurrent unemployment benefits a claimant received. Respondents have a statutory offset of $16,071 for unemployment benefits Claimant received.

Section 8-42-103(1)(c) provides that TTD benefits shall be reduced by one-half of the amount of SSDI benefits payable to a claimant and his dependents. Claimant received $486.35 per week in SSDI benefits commencing November 1, 2010, resulting in a weekly SSDI offset of $243.18 as of that date.

Section 8-40-201(15.5) defines an "overpayment" as:

> money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received to disability or death benefits under said articles."

The statutory definition creates three categories of possible overpayments. One category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid"; the second category is for money received that a "Claimant was not entitled to receive"; and the final category is for money received that "results in duplicate benefits because of offsets." *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd in part on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010).

As found, Claimant has been overpaid $19,015.37. Although Claimant argues he satisfied the overpayment by December 2013, review of the indemnity payment log and

the stipulated facts do not support that assertion. Despite any previous benefit reductions, Claimant remains overpaid by $19,015.37.

The ALJ has discretion to determine the appropriate remedy for an overpayment, including the rate at which to allow recovery of the overpayment, given the totality of the factual circumstances at the time of the ALJ's order. *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994); *Schramek v. Chico's FAS*, W.C. No. 4-601-867 (ICAO, June 14, 2011).

Under the circumstances, the ALJ finds it appropriate for Respondents to prospectively reduce Claimant's weekly TTD benefits by 50% to recoup the overpayment. Although Respondents petitioned to modify Claimant's benefits on October 31, 2016, the ALJ is not persuaded by Respondents' request to take a 100% offset to account for the weeks between October 31, 2016 and the date of this order. The ALJ concludes that would cause an undue hardship on Claimant.

ORDER

1. Respondents may prospectively reduce Claimant's ongoing TTD benefits to $238.31, by filing an Amended GAL following receipt of this Order. The reduction may commence the day after the "paid through" date of the TTD payment immediately preceding the filing of the Amended GAL.

2. All matters not determined herein, including but not limited to resolution of any overpayment that may remain after Claimant's entitlement to TTD benefits terminates, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 17, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-955-695-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 21, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 2/21/17, Courtroom 1, beginning at 1:30 PM, and ending at 3:40 PM).

Claimant's Exhibits 1 through 12 were admitted into evidence, without objection. Respondents' Exhibits A through J were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Respondents' answer brief and opening brief on overcoming the Division Independent Medical Examination (DIME) of David Yamamoto, M.D., was filed, electronically, on February 27, 2017; Claimant's opening brief/answer brief was filed, electronically, on March 6, 2017; Respondents' answer brief (to Claimant's conversion issue)/opening brief on overcoming the DIME was filed on March 9, 2017. Claimant's reply brief was filed on March 15, 2017. Respondents' reply brief, if any was due on March 17, 2016; however, none was timely filed. Consequently, the matter was deemed submitted for decision on March 20, 2017..

ISSUES

The issues to be determined by this decision concern the Respondents' request to overcome the DIME opinions of Dr. Yamamoto; and, the Claimant's alternative request to convert ATP Dr. Hattem's RUE rating to a whole person rating.

The Respondents bear the burden of proof, by clear and convincing evidence, of overcoming the DIME opinion of Dr. Yamamoto. The Claimant bears the burden of proof, by a preponderance of the evidence, on the issue of conversion of the 12% left upper extremity (LUE) rating of ATP Dr. Hattem and, in doing so, must accept the four corners of Dr. Hattem's ultimate opinions.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant sustained an admitted injury to her left upper extremity (LUE) on July 14, 2014. She sustained a fracture of her left proximal humerus which required open reduction and internal fixation of her left humerus. The left humerus is part of the left arm below the shoulder. This procedure was performed by Jared Michalson, M.D., on July 23, 2014.

2. The Respondents filed a Final Admission of Liability (FAL), dated April 14, 2016, admitting for post maximum medical improvement (MMI) medical maintenance benefits; an average weekly wage (AWW) of $748.50; temporary total disability (TTD) benefits of $499 per week through February 11, 2016; and, permanent scheduled impairment of 12% of the LUE with an MMI date of February 12, 2016, pursuant to the recited rating of Matthew Miller, M.D., which actually was the rating of authorized treating physician (ATP) Albert Hattem, M.D.

3. The Claimant filed a timely objection to the FAL, and a Notice and proposal to select a DIME. David Yamamoto, M.D., was selected to perform the DIME.

4. The Claimant underwent three left subacromial bursa injections performed by Dr. Michalson on November 14, 2014, December 9, 2014 and January 15, 2015.

5. Scott Primack, D.O., referred the Claimant to Patrick J. McNair, M.D., for a second orthopedic opinion.

6. The Claimant developed posttraumatic arthrofibrosis of her left shoulder as diagnosed by Dr. McNair. As a result, the Claimant underwent a second surgical procedure performed by Dr. McNair on March 2, 2015. The procedure performed by Dr. McNair included examination under anesthesia of the left shoulder, diagnostic arthroscopy of the left shoulder, extensive lysis of adhesions within the glenohumeral joint, extensive lysis of adhesions of the subacromial space without subacromial decompression and extensive lysis of adhesions in the subdeltoid space. (*See* Claimant's Exhibit 10, pp. 81-85)

7. The Claimant underwent a third surgical procedure on August 31, 2015, performed by Dr. McNair. The procedure included removal of left proximal hardware plate and screws to address persistent hardware pain. (*See* Claimant's Exhibit 11, pp. 86-88). Review of Dr. McNair's report (Claimant's Exhibit 11, p. 87), demonstrates, "I performed an arthroscopic lysis of adhesions and manipulation. We regained range of motion but once range of motion was found, we identified that she had symptomatic hardware" (p. 88) "Once the plate and screw construct was removed the arm was placed through a range of motion and there was no further impingement at the subacromial space. I have reasonable range of motion at this point and did not feel any excessive adhesions."

8. The Claimant was provided with and underwent 45 sessions of physical therapy. She was taught home exercise programs.

9. The Claimant was placed at MMI on February 12, 2016 by Albert Hattem, M.D., an ATP at Concentra Medical Centers. Dr. Hattem rated the Claimant a 12% permanent scheduled rating of her LUE which he converted to a 7% whole person impairment rating, pursuant to the *AMA Guides to the Evaluation of permanent Impairment,* 3rd Ed., Rev. Dr. Hattem noted full cervical range of motion but did not perform formal range of motion testing of the Claimant's cervical spine. Dr. Hattem discharged the Claimant with permanent restrictions of no lifting, push or pull more than 5 pounds using left arm and no use of left arm above chest height. Respondents admitted liability consistent with Dr. Hattem's report, noting in the FAL that the rating and MMI date were pursuant to Dr. Miller's opinions.

Division Independent Medical Examination (DIME) by David Yamamoto, M.D.

10. The Claimant requested and underwent a DIME performed by Dr. Yamamoto. Dr. Yamamoto rated the Claimant at 16% permanent impairment rating for the LUE that could convert to a 10% whole person permanent impairment rating. Dr. Yamamoto also was of the opinion that the Claimant qualified for a permanent impairment rating for her cervical region. Dr. Yamamoto rated the Claimant at 9% whole person permanent impairment for loss of cervical range of motion utilizing the Impairment Rating Tips provided by the Colorado Division of Workers' Compensation, updated July 2016. Dr. Yamamoto agreed with the permanent restrictions provided by

Dr. Hattem. Dr. Yamamoto recommended treatment of the myofascial injury to the Claimant's neck, including possible massage therapy, acupuncture, topical medication and trigger point injections.

Respondents' Independent Medical Examination (IME) by Kathleen D'Angelo, M.D.

11. Claimant underwent an IME with Dr. D'Angelo at the request of Respondents. Dr. D'Angelo issued her report on or about January 26, 2017. Claimant indicated in her history that she had ongoing pain and limitations in her arm, shoulder and neck. This was identified on the Claimant's pain diagram prepared in association with the IME. Dr. D'Angelo asked specific questions about the Claimant's neck, to which Claimant indicated that her neck problems had been going on as part of her left arm and shoulder injury and Claimant would get pain shooting up to her neck with household chores and driving. Nonetheless, Dr. D'Angelo was of the opinion that the Claimant did not qualify for a cervical impairment rating and that her functional limitation was limited to her left arm.

12. According to Dr. D'Angelo adhesive capsulitis is not the severe shoulder pathology as indicated in the Tips. Dr. D'Angelo testified that severe shoulder pathology as used in the Tips refers to osteomyelitis or avascular necrosis. Dr. D'Angelo stated it is not unusual in a diabetic who smokes*, i.e.,* the Claimant, to develop adhesive capsulitis due to disuse of an arm post surgery. While this may create reasonable doubt as to cervical disability, at most, this is a difference of opinion with DIME Dr. Yamamoto, and it does not rise to the level of clear and convincing evidence.

Conversion of LUE Scheduled Rating to Whole Person Rating

13. Conversion is appropriate when permanent impairment is determined at MMI, and since Dr. Yamamoto agreed with the February 12, 2016 date of MMI. The ALJ finds that Dr. Hattem's 12% permanent medical impairment rating of the Claimant's LUE, as it existed at maximum MMI, would be the more appropriate rating to convert as opposed to Dr. Yamamoto's 16% scheduled impairment rating that was found at the DIME for the reasons herein below specified. DIME Dr. Yamamoto and ATP Dr. Hattem have a difference of opinion on the degree of scheduled impairment of the LUE. The ALJ makes a rational choice to accept ATP Dr. Hattem's scheduled rating of 12% LUE and to reject DIME Dr. Yamamoto's scheduled rating of 16% LUE. ATP Dr. Hattem dealt with the Claimant more extensively than Dr. Yamamoto. The next question is should the scheduled rating of 12% LUE be converted to a whole person rating. ATP Dr. Hattem is **not** of the opinion that a conversion of his 12% LUE rating to a whole person rating is appropriate. Consequently, accepting the four corners of Dr. Hattem's opinions, a conversion to a whole person rating has not been proven. Neither is DIME Dr. Yamamoto's scheduled rating. He mechanistically converted his scheduled rating of

16% LUE to 10% whole person, as required by the *AMA Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev., without rendering an opinion that conversion to a whole person rating was appropriate. Therefore, Dr. Yamamoto's reports do not support a conversion. The DIME physician and the ATP are on the level playing field of "preponderant evidence," on the **conversion** issue. The significant difference between ATP Dr. Hattem's rating and DIME Dr. Yamamoto's ratings is that Dr. Hattem declined to rate the Claimant's cervical spine and DIME Dr. Yamamoto rated it.

Overcoming the DIME of David Yamamoto, M.D.

14. As found herein above, Dr. Yamamoto was of the opinion that the Claimant was entitled to a permanent impairment rating to her cervical region. He rated the Claimant's cervical spine at 9% of the whole person permanent impairment for loss of cervical range of motion utilizing the Impairment Rating Tips provided by the Colorado Division of Workers' Compensation, updated July 2016. Dr. Yamamoto agreed with the permanent restrictions provided by Dr. Hattem. Dr. Yamamoto recommended treatment of the myofascial injury to Claimant's neck, including possible massage therapy, acupuncture, topical medication and trigger point injections.

15. Dr. Hattem evaluated the Claimant's cervical spine stating, "the cervical spine demonstrates full range of motion" (*See* Respondents' Exhibit D, pp. 108, 118, 120, 122, 124 and 127). As found herein above, there is a difference of opinion between Dr. Hattem and Dr. Yamamoto, however, this difference of opinion does not rise to the level of making it highly probable, unmistakable and free from serious and substantial doubt that DIME Dr. Yamamoto's rating of the Claimant's cervical spine was in error. By the same token, there is a difference of opinion between IME Dr. D'Angelo and DIME Dr. Yamamoto which does not rise to the level of clear and convincing evidence.

16. Dr. Yamamoto applied the Impairment Rating Tips of the Division of Workers' Compensation (DOWC) in support of issuing a 9% whole person rating for cervical range motion. A physician's application of the Impairment Rating Tips when assessing an impairment rating and any deviation from the Impairment Rating Tips is a factor for the ALJ to consider in assessing the weight the ALJ chooses to give to an impairment rating. The Impairment Rating Tips were admitted into evidence as Respondents' Exhibit J. The Impairment Rating Tips provide for an exception to the requirement of a Table 53 impairment rating pursuant to the *AMA Guides to the Evaluation of Permanent Impairment*, 3rd Edition, Rev. In relevant part the Impairment Rating Tips, under Spinal Rating, provides:

> In unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment may be allowed if well-justified by the clinician.

17. Dr. Yamamoto discusses in great detail the rationale for providing a permanent impairment rating for cervical range of motion. He documented severe shoulder pathology with his assessment of Post Traumatic arthrofibrosis of the left shoulder, status post extensive lysis of adhesions and manipulation under anesthesia. As found, Dr. Yamamoto recommended treatment to the cervical musculature in the nature of massage therapy, acupuncture, topical medication and trigger point injections. He documented ongoing functional loss to the neck as evidence by an inability to work and drive. Dr. Yamamoto was clearly of the opinion that the Claimant sustained loss of function to her cervical musculature as a direct and proximate result of her left arm and shoulder injuries. Referred pain from the primary site of the injury may establish proof of functional impairment to the whole person. Thus, pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for purposes of determining whether an injury is on or off the schedule. Therefore, the site of functional impairment includes the cervical region which is part of the trunk of the body.

18. DIME Dr. Yamamoto performed formal range of motion testing, while the treating physicians at Concentra, including Dr. Hattem, and their referrals, performed cursory evaluations of the Claimant's cervical region, commenting on inspection that Claimant had full range of motion or nearly full range of motion. For these reasons, among other reasons, the ALJ finds Dr. Yamamoto's opinions concerning the cervical impairment more credible and persuasive than all other opinions to the contrary.

19. According to the Claimant, Claimant, she no longer felt safe to drive due to her inability to turn her head, neck pain and stiffness. The Claimant also testified concerning ongoing pain and limitation in her left arm, shoulder and up into the left side of her **neck.** This testimony was consistent with the information provided to Dr. Yamamoto and Dr. D'Angelo and it is credible and persuasive. The Claimant's testimony in this regard is un-refuted and it implicates the trunk of the Claimant's body, corroborates DIME Dr. Yamamoto's cervical rating, and it merits a whole person rating of the cervical spine.

20. The ALJ infers and finds that the situs of functional impairment, as determined by DIME Dr. Yamamoto, is the cervical spine, which he separately rated from the LUE.

Ultimate Findings

21. For the reasons herein above stated, the ALJ finds ATP Dr. Hattem's 12% scheduled rating of the Claimant's LUE more credible and persuasive than Dr. Yamamoto's 16% rating of the LUE for purposes of the **conversion** issue. Nonetheless, the ALJ finds DIME Dr. Yamamoto's whole person rating of 9% for the cervical spine more credible and persuasive than Dr. Hattem's finding full cervical range of motion and not rating the cervical spine; and, more credible and persuasive than IME

Dr. D'Angelo's opinions to the contrary. Also, the Claimant's testimony about his neck limitations in driving and other functions is credible, corroborated by the histories he gave to medical providers and, essentially, undisputed.

22. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinion and cervical spine whole person rating of DIME Dr. Yamamoto and to reject opinions to the contrary. The ALJ, however, accepts ATP Hattem's 12% scheduled rating of the LUE and rejects DIME Dr. Yamamoto's scheduled rating of 16% LUE. Further, conversion to a whole person rating is unwarranted because neither Dr. Hattem nor Dr. Yamamoto expressed an opinion concerning the appropriateness of a conversion as considered separately and distinctly from the cervical rating.

23. The Claimant has failed to prove, by a preponderance of the evidence that conversion of the LUE rating is appropriate, or that DIME Dr. Yamamoto's 16% LUE rating is more appropriate than ATP Dr. Hattem's 12% LUE rating.

24. The Respondents have failed to prove that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Yamamoto's 9% cervical spine whole person rating is in error. Therefore, the Respondents have failed to overcome the DIME by clear and convincing evidence.

25. The Claimant's LUE permanent scheduled impairment and her 9% cervical impairment are two separate and distinct impairments.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The

same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, Dr. Hattem's 12% scheduled rating of the Claimant's LUE was more credible and persuasive than Dr. Yamamoto's 16% rating of the LUE for purposes of the **conversion** issue. Nonetheless, as found, DIME Dr. Yamamoto's whole person rating of 9% for the cervical spine was more credible and persuasive than Dr. Hattem's finding full cervical range of motion and not rating the cervical spine; and, more credible and persuasive than IME Dr. D'Angelo's opinions to the contrary. Also, as found, the Claimant's testimony about his neck limitations in driving and other functions was credible, corroborated by the histories he gave to medical providers and, essentially, undisputed.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals*

Office, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinion and whole person cervical spine rating of DIME Dr. Yamamoto and to reject opinions to the contrary. The ALJ, however, accepted ATP Hattem's 12% scheduled rating of the LUE and rejected DIME Dr. Yamamoto's scheduled rating of 16% LUE. Further, conversion to a whole person rating was unwarranted because neither Dr. Hattem nor Dr. Yamamoto had expressed an opinion concerning the appropriateness of a conversion as considered separately and distinctly from the cervical rating.

Overcoming the DIME of Dr. Yamamoto

c. The party seeking to overcome a DIME physician's opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI is binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). Where the threshold determination of compensability is not an issue, a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). As found, the Respondents failed to prove that it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Yamamoto's 9% whole person cervical spine rating is in error. Therefore, the Respondents have failed to overcome the DIME opinion concerning the cervical spine by clear and convincing evidence. Also, as found, DIME Dr. Yamamoto determined that the situs of the Claimant's cervical impairment was the cervical spine, a part of the trunk of the body (which is separate and distinct from the LUE injury). It is not the situs of the initial injury but the situs of functional impairment that is

determinative of whole person impairment, and this is a factual question to be resolved by the ALJ. *See Strauch v. PSL Swedish Healthcare* but the situs of functional impairment that drives a whole person rating, *Sys* 917 P.2d 366 (Colo. App. 1996).

Scheduled and Whole Person Awards Separate

d. Scheduled and non-scheduled impairments are treated differently for purposes of determining permanent disability. *See Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). § 8-42-107 (7) (b) (II), C.R.S. provides that scheduled injuries shall be separately compensated from whole person injuries. As found, herein above, the LUE injury is separate and distinct from the cervical injury, thus, a separate award for the scheduled LUE injury and the separate cervical injury is warranted.

Burden of Proof with Respect to Conversion of the Scheduled LUE Rating

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain her burden with respect to a conversion of the scheduled LUE rating and with respect to the proposition that Dr. Yamamoto's 16% LUE rating is more appropriate than ATP Dr. Hattem's 12% LUE rating. When the contest is **scheduled rating vs. scheduled rating,** a DIME physician is on the level playing field of "preponderant evidence." And, in this case, it was the Claimant's burden to prove that Dr. Yamamoto's LUE rating of 16% was more appropriate than ATP Dr. Hattem's rating of 12% LUE. The Claimant has also failed to sustain this burden.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Final Admission of Liability is re-affirmed with respect to 12% scheduled rating for the left upper extremity; and, any and all claims for conversion thereof to a whole person rating, or adoption of Dr. Yamamoto's 16% left upper extremity rating are hereby denied and dismissed.

B. For and on account of the Claimant's permanent whole person medical impairment of 9%, the Respondents shall separately pay the Claimant $499.00 per week, retroactively and forthwith, from February 12, 2016, the date of maximum medical improvement, according to the formula contained in § 8-42-107 (8) (d), C.R.S. [9% x 400 x 1.0 x $499.00= $17,964.00].

C. The Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

DATED this_____day of March 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

Division of Workers' Compensation
DIME Unit
Lori.Olmstead@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the left shoulder arthroscopy performed by Dr. Kennan Vance on May 24, 2016 constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 17, 2015 work injury.

- Whether claimant has proven by a preponderance of the evidence that the sacroiliac ("SI") joint fusion recommended by Dr. Kirk Clifford constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 17, 2015 work injury.

FINDINGS OF FACT

1. Claimant has been employed with respondent since 2005. In February 2015 claimant worked at Nisley Elementary School in the severe needs and behavior classroom. Claimant sustained an admitted work injury on February 17, 2015. The injury occurred when claimant tripped and fell outside while following an agitated student across a school playground.

2. Claimant testified that she fell forward onto both hands and both knees. Claimant testified that because she was carrying a radio in her left hand at the time of the fall, she had greater impact on her right side. In addition, claimant scraped her back on a concrete bench. Claimant testified that the body parts impacted by her February 17, 2015 fall included her right elbow, left hip, back, both shoulders, both hands, and both knees. Claimant timely reported the injury to employer and employer sent claimant for treatment with Dr. Craig Stagg as her authorized treating physician ("ATP").

3. Claimant testified that she has a prior history of back pain and scoliosis. On March 19, 2008, Dr. James Gebhard performed an extensive fusion from the T11 level to claimant's sacrum. Claimant testified that following the 2008 fusion surgery she did very well and returned to full duty work.

4. Following the February 17, 2015 work injury, claimant began treating with Dr. Stagg on February 18, 2015 and reported, among other issues, pain in both shoulders. Claimant testified that prior to the February 17, 2015 injury she did not have issues or pain in her shoulders.

5. Claimant suffered a radial head injury to her right elbow, requiring surgery. Claimant's right elbow surgery was performed on February 27, 2015 by Dr. Michael Rooks.

6. Claimant testified that following the elbow surgery she continued to have pain in both shoulders and consistently notified her health care providers of her bilateral shoulder pain. Claimant testified that her right shoulder was addressed first because she had more pain in that shoulder. Claimant testified that she received various modes of treatment for both shoulders including physical therapy, injections, and magnetic resonance imaging ("MRI").

7. Claimant's spouse, Kenneth Simms, testified at hearing. Mr. Simms testified that he attended many of claimant's medical appointments and that claimant complained of bilateral shoulder pain at these appointments.

8. On May 13, 2015, Dr. Stagg referred claimant to Dr. Mark Luker to address claimant's shoulder and knee pain. On June 1, 2015, claimant saw Dr. Luker and he recorded that claimant's chief complaint was right shoulder pain and bilateral knee pain.

9. On September 9, 2015, Dr. Stagg noted that claimant had bilateral shoulder pain. At that time he referred claimant to Dr. Kenneth Vance. Claimant first treated with Dr. Vance on September 14, 2015.

10. On November 12, 2015, an MRI of claimant's right shoulder showed supraspinatus outlet impingement with probable tendinosis of the supraspinatus tendon.

11. On November 12, 2015, an MRI was performed on claimant's left shoulder with findings that suggested supraspinatus outlet impingement, with no evidence of a rotator cuff tear.

12. Based upon these MRI results, Dr. Vance recommended a right shoulder arthroscopy. Respondent authorized surgery to claimant's right shoulder and it was performed by Dr. Vance on December 8, 2015. Claimant testified that during surgery Dr. Vance discovered that she had a rotator cuff tear and a tear of her bicep tendon. The medical records indicate that during the December 18, 2015 surgery it was determined that claimant had a tear of the right supraspinatus that was greater than 70%.

13. Dr. Vance also recommended that claimant undergo a left shoulder arthroscopy given the results of the November 12, 2015 MRI.

14. On January 7, 2016, respondent filed a General Admission of Liability ("GAL").

15. On March 6, 2016, Dr. Wallace Larson performed a medical records review related to the recommended left shoulder arthroscopy and opined that claimant's left shoulder pain is not related to the February 17, 2015 work injury. Based upon Dr. Larson's review respondent denied the left shoulder surgery.

16. Despite respondent's denial, claimant elected to undergo the left shoulder arthroscopy. The surgery was performed by Dr. Vance on May 24, 2016 and it was paid for by claimant and her health insurance, CNIC.

17. On September 27, 2016, respondent sent claimant for an independent medical examination ("IME") with Dr. Larson. Dr. Larson reviewed claimant's medical records, obtained a history from claimant and performed a physical examination in connection with the IME. Following the IME, Dr. Larson issued a report in which he opined that it was medically reasonable for claimant to undergo surgery on her left shoulder. However, Dr. Larson also opined that claimant's left shoulder issues are unrelated to the February 17, 2015 work injury, but rather the result of the natural progression of a preexisting condition.

18. Claimant testified that the focus of the September 27, 2016 IME with Dr. Larson related to her left shoulder. Claimant also testified that although she raised her low back and SI joint issues during the IME, Dr. Larson did not examine her low back or her SI joint.

19. On April 1, 2015, claimant reported to Dr. Stagg that she had significant back pain. Dr. Stagg recorded this back pain as being in claimant's lower thoracic and upper lumbar region. At that time Dr. Stagg referred claimant to Dr. Gebhard regarding her complaints of back pain. Thereafter, on April 27, 2015, claimant reported to Dr. Stagg bilateral foot numbness.

20. Based upon claimant's complaints of back pain, Dr. Gebhard referred claimant for SI joint injections, which claimant received on August 4, 2015. Claimant reported to Dr. Stagg that she had good results from the injection. On March 16, 2016, claimant underwent bilateral SI injections which were administered by Dr. Robert Frazho. Claimant testified that she had several weeks of pain relief following the March 2016 injections. Claimant testified that her current low back symptoms include pain that radiates into her buttocks and legs.

21. On June 9, 2016, claimant was seen by Dr. Gebhard and Jason Bell, PA-C. On that date, Mr. Bell noted that claimant had positive responses to two diagnostic injections. Dr. Gebhard recommended the possibility of an SI joint fusion and referred claimant to Dr. Clifford for consultation because Dr. Clifford has more recent experience with SI fusion techniques. Subsequently, Dr. Clifford recommended claimant undergo fusion of her SI joint.

22. Dr. Larson performed a second medical records review on November 8, 2016 regarding the recommended SI joint fusion. In that review Dr. Larson opined that the recommended SI fusion was not reasonable and not indicated by the Colorado Medical Treatment Guidelines ("the Guidelines"). Based upon Dr. Larson's report, respondent denied the recommended SI fusion.

23. On November 30, 2016, claimant's counsel sent Dr. Clifford a written request to respond to a number of questions regarding the recommended SI fusion. Dr.

Clifford responded in writing on that same date and opined that prior to the work injury claimant was asymptomatic following major spinal surgery and that the fall on February 17, 2015 "irritated" claimant's SI joint.

24. In his November 30, 2016 written response, Dr. Clifford also explained that SI joint fusion is indicated for patients who have SI joint pain with "provocative maneuvers" and experience pain relief from SI joint injections. Dr. Clifford opined that claimant is a candidate for SI joint fusion given her prior spinal fusion, increased SI joint pain, and successful SI joint injections.

25. Dr. Larson testified at hearing in this matter and confirmed his opinion that although the surgery performed on claimant's left shoulder was medically reasonable and necessary, it is not related to the February 17, 2015 work injury. Dr. Larson testified that upon his review of the November 2015 MRI he found tendonitis and bursitis in claimant's left shoulder, which Dr. Larson considers a common degenerative condition.

26. In his testimony Dr. Larson also confirmed his opinion that claimant's SI joint issues are unrelated to the February 17, 2015 work injury, and that the recommended SI joint fusion is not reasonable or necessary medical treatment. Dr. Larson testified that an SI joint fusion is typically recommended when there is an acute injury to the SI joint and is not recommended to treat mechanical low back pain.

27. Dr. Stagg testified by deposition in this matter and stated that it is his opinion that claimant's left shoulder issues are not related to the February 17, 2015 work injury. In support of his opinion, Dr. Stagg testified that it is his understanding that claimant did not begin to complain of left shoulder pain until well after the February 2015 injury.

28. Dr. Stagg also testified that he agrees with Dr. Larson that the recommended SI joint fusion is not reasonable and necessary medical treatment to address claimant's low back pain. Dr. Stagg testified that an SI fusion is typically recommended when there is trauma and disruption of the SI joint, which was not present with claimant's injury.

29. The ALJ credits claimant's testimony and finds that following the February 17, 2015 injury she continued to have bilateral shoulder pain and reported that bilateral shoulder pain to her medical providers. Claimant's testimony in this regard is supported by the medical records and the testimony of claimant's spouse.

30. The ALJ credits claimant's testimony and the opinion of Dr. Vance over the contrary opinion of Dr. Larson and finds that claimant has demonstrated that it is more likely than not that the February 17, 2015 work injury caused claimant's left shoulder issues, necessitating surgery.

31. The ALJ credits claimant's testimony and the opinion of Dr. Vance over the contrary opinion of Dr. Larson and finds that claimant has demonstrated that it is more likely than not that the left shoulder arthroscopy performed by Dr. Vance on May

24, 2016 constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 17, 2015 work injury.

32. The ALJ credits the medical records and the opinions of Dr. Gebhard and Dr. Clifford over the contrary opinions of Dr. Larson and Dr. Stagg and finds that claimant has demonstrated that it is more like than not that claimant's SI joint pain is related to the February 17, 2015 work injury. More specifically, claimant has successfully demonstrated that it is more likely than not that the February 17, 2015 fall at work aggravated, accelerated, or combined with claimant's preexisting SI joint condition to necessitate medical treatment. Based upon claimant's testimony regarding the February 17, 2015 fall, in which she struck her low back on a concrete bench, the ALJ finds that it is it is likely that claimant suffered an injury or aggravation to her SI joint.

33. The ALJ credits the medical records and the opinions of Dr. Gebhard and Dr. Clifford over the contrary opinions of Dr. Larson and Dr. Stagg and finds that claimant has demonstrated that it is more likely than not that the recommended SI fusion is reasonable medical treatment necessary to address claimant's low back pain.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where

the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

4. Respondent is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, claimant has demonstrated by a preponderance of the evidence that the February 17, 2015 work injury included an injury to claimant's left shoulder, necessitating surgery. As found, claimant's testimony and the opinion of Dr. Vance are credible and persuasive on this issue.

6. As found, claimant has demonstrated by a preponderance of the evidence that the left shoulder arthroscopy performed by Dr. Vance on May 24, 2016 constitutes reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 17, 2015 work injury. As found, Dr. Vance's opinion on this matter is credible and persuasive.

7. As found, claimant has demonstrated by a preponderance of the evidence that the February 17, 2015 work injury aggravated, accelerated, or combined with claimant's preexisting SI joint condition, necessitating surgery. As found, the opinions of Dr. Gebhard and Dr. Clifford on this matter are found to be credible and persuasive.

8. As found, claimant has demonstrated by a preponderance of the evidence that the recommended SI joint fusion is reasonable medical treatment necessary to cure and relieve claimant from the effects of the February 17, 2015 work injury. As found, the opinions of Dr. Gebhard and Dr. Clifford on this matter are found to be credible and persuasive.

ORDER

It is therefore ordered that:

1. Respondent shall pay for the left shoulder arthroscopy performed by Dr. Vance on May 24, 2016.

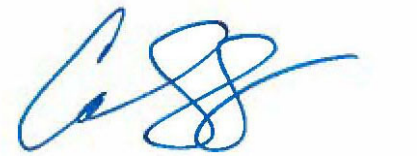
2. Respondent shall pay for the sacroiliac joint fusion recommended by Dr. Clifford, pursuant to the Colorado Medical Fee Schedule.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor,

Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 20, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven, by a preponderance of the evidence, that his claim should be reopened pursuant to Section 8-43-303, C.R.S. based on a change of condition.

- If claimant's claim is reopened, whether claimant has proven, by a preponderance of the evidence, that the lumbar fusion surgery recommended by Dr. Kirk Clifford is reasonable medical treatment necessary to cure and relieve claimant from the effects of the September 6, 2013 work injury.

- At hearing the parties stipulated that if claimant's claim is reopened his average weekly wage ("AWW") is $473.61.

FINDINGS OF FACT

1. Claimant began his employment with employer in 2007 as a utility employee. At that time, employer was a contractor with the public bus system, Grand Valley Transit. When a new entity, Trans Dev, contracted with Grand Valley Transit, claimant continued his employment with Trans Dev in the same utility employee position. Claimant's job duties with both employer and Trans Dev include washing the buses and performing minor maintenance. In addition, claimant removes money boxes containing bus fares from the buses.

2. Claimant suffered an admitted injury to his low back on September 5, 2013 while employed with employer. Claimant testified that the injury occurred during his shift on September 5, 2013. On that date, he was removing a fare box from a bus and when he twisted, he felt a pop in his back. Claimant testified that completed his shift on September 5, 2013 and did not report the incident to employer at that time.

3. Claimant testified that following his shift on September 5, 2013 he went home and went to bed. At approximately 3:00 a.m. claimant was awakened by pain in his low back. Claimant's pain was so intense that it caused him to vomit. Claimant was eventually transported by ambulance to St. Mary's Hospital the morning of September 6, 2013. Claimant testified that at that time his back pain was primarily on his left side, radiating into his left leg, with some leg numbness.

4. On September 6, 2013, claimant notified employer of the work injury. The employer completed an employee injury report and sent claimant for treatment with Dr. J. Robert Gershon as his authorized treating physician ("ATP"). Dr. Gershon diagnosed a lumbar strain with lumbar radiculitus and a disc herniation. He prescribed pain medications and referred claimant to physical therapy.

5. On September 6, 2013, a magnetic resonance image ("MRI") was taken of claimant's lumbar spine. The MRI showed a broad based central and paracentral disc extrusion at the L5-S1 level that was contacting and compressing the traversing left S1 nerve root. At the L2-L3 level the MRI showed a far left lateral disc protrusion contacting the exiting left L2 nerve root.

6. On September 10, 2013, claimant began physical therapy treatment with Grand Junction Therapies.

7. October 9, 2013, an x-ray of claimant's lumbosacral spine showed multilevel degenerative disc disease and s-shaped thoracolumbar scoliosis.

8. Dr. Gershon referred claimant to Dr. Kenneth Lewis for epidural steroid injections. On October 30, 2013, Dr. Lewis administered a left parasagittal interlaminar epidural steroid injection ("ESI") at L2-3. On November 13, 2013, claimant reported to Dr. Lewis pain relief following the injection. On December 19, 2013, Dr. Lewis administered a left parasagittal ESI at L4-5.

9. On January 16, 2014, claimant returned to Dr. Gershon who noted that claimant had good relief from the ESIs. Claimant also reported to Dr. Gershon that he continued to have pain in his low back that he described as "mostly an aching sensation". On that same date, Dr. Gershon placed claimant at maximum medical improvement ("MMI") and released claimant to return to full duty with no work restrictions. Due to the existence of the disc herniation, Dr. Gershon assigned an impairment rating of 5% whole person.

10. On February 21, 2014, respondents filed a Final Admission of Liability ("FAL") admitting for the MMI date of January 16, 2014, the 5% whole person impairment rating, and reasonable, necessary, and related post-MMI medical care. Claimant did not contest the FAL and his claim was closed.

11. Claimant testified that he has continued to have low back pain and leg numbness since he was placed at MMI on January 16, 2014. However, claimant did not seek maintenance medical care for these ongoing pain complaints. Claimant testified that he did not know that such treatment was available to him. Claimant testified that throughout this time he treated at home with ice, heat, and over the counter anti-inflammatory medication, such as Ibuprofen.

12. On February 18, 2016, claimant returned to the emergency room with complaints of low back pain and vomiting. Claimant testified that he worked until 10:00 p.m. the day prior and did not experience a new injury at work or at home. Claimant informed the hospital staff that his pain on February 18, 2016 was similar to the pain he had in September 2013. Medical records from February 18, 2016 indicate that claimant told hospital staff that he had not had any back issues since that 2013 incident. Claimant testified that the medical record is incorrect as he experienced ongoing pain between January 2014 and February 18, 2016.

13. Following the February 18, 2016 incident, employer sent claimant to Dr. Craig Stagg as his ATP. Claimant testified that Dr. Stagg recommended physical therapy and "eventually" surgery.

14. On March 25, 2016, an x-ray of claimant's lumbar spine showed no acute fractures. That same x-ray showed multilevel degenerative disc disease and facet disease with severe degenerative joint disease at the L3-4, L4-5 and L5-S1 level. In addition at the L4 level it was noted that a bony deformity of the superior articulating facet process that appeared to be hypertrophied bone related to L4 bilateral pars defects and severe chronic arthrosis.

15. On March 29, 2016, an MRI of claimant's lumbar spine showed degenerative disc bulges at multiple levels. The MRI showed a central to left paracentral disc extrusion causing moderate to severe left neural foraminal stenosis and moderate central canal stenosis at the L5-S1 level.

16. Following the MRI, Dr. Stagg referred claimant to Dr. Kirk Clifford for a surgical consultation. Claimant was seen by Dr. Clifford on April 13, 2016 and he referred claimant to Dr. Robert Frahzo for evaluation of whether claimant was a candidate for rhizolysis.

17. On May 25, 2016, Dr. Frahzo administered medial branch blocks at the left L2, L3, L4, and L5 levels. Claimant testified that the injection administered by Dr. Frazho was the "worst pain of [claimant's] life". Claimant reported to Dr. Stagg that the injections gave claimant only 30 minutes of pain relief.

18. On June 15, 2016, claimant returned to Dr. Clifford who noted that claimant had failed medial branch blocks and was not a candidate for rhizolysis. Dr. Clifford recommended surgery, specifically an L5-S1 anterior lumbar interbody fusion ("ALIF"), decompression, and restoration of spinal alignment with anterior discectomy.

19. On June 28, 2016, Dr. Thomas Hoffeld reviewed the requested surgery. In his report, Dr. Hoffeld opined that the recommended L5-S1 ALIF with instrumentation was medically reasonable and necessary.

20. Respondents sent claimant for an independent medical examination ("IME") with Dr. Tashof Bernton on July 27, 2016. Dr. Bernton reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the IME. Following the IME, Dr. Bernton issued a report in which he opined that claimant's back pain is not work related and it is not medically reasonable to connect the claimant's February 18, 2016 back and leg pain to the September 2013 work injury. Dr. Bernton also indicated that it is his opinion that the 2013 injury has nothing to do with the 2016 disc herniation, which he believes is a new herniation.

21. With regard to the surgery recommended by Dr. Clifford, Dr. Bernton opined in his IME report that this surgical treatment was not reasonable because claimant had not yet received conservative treatment, (such as epidural steroid

injections), for the 2016 disc herniation. In addition, Dr. Bernton opined that performing a fusion at a level below an L-4 spondylolysis would likely increase stress on the spondylolysis and increase deterioration and instability at that level.

22. On September 7, 2016, a computerized tomography ("CT") scan of claimant's lumbar spine showed a left foraminal lateral disc bulge at the L2-3 level that was possibly impinging on the left L2 nerve; bilateral spondylolysis at L4 and advanced bilateral facet arthrosis at L3 to S1; moderate canal stenosis at L5-S1 with mild canal stenosis at L3-4 and L4-5.

23. On September 29, 2016, claimant filed a Petition to Reopen his claim for workers' compensation benefits on the basis that he suffered a change in medical condition.

24. Dr. Bernton testified at hearing and confirmed his opinion that claimant's current symptoms are not related to the September 6, 2013 work injury. Dr. Bernton also testified that it is his opinion that the work injury claimant sustained on September 6, 2013 was treated with appropriate conservative care and resolved with a good outcome prior to claimant being placed at MMI. Dr. Bernton supports his opinion by noting that claimant had good relief with injections in December 2013 and at MMI claimant was released to full duty without restrictions and no pain medications. Dr. Bernton also testified that claimant has a number of risk factors for acute disc herniation that include being male; middle aged; overweight; and a former long time smoker.

25. Claimant testified that his current symptoms include low back pain that radiates into both legs and into his right knee as well as popping in his back. Claimant also testified that his current pain is worse than it was in January 2014 when he was placed at MMI. Claimant testified that he wants the recommended surgery because he wants to be normal and that it is a struggle for him every day to continue working. Claimant continues to work full time without work restrictions. Claimant testified that although he does not have work restrictions his current supervisor is understanding and allows him to rest as needed during the work day.

26. The ALJ does not find claimant's testimony that he did not know that he could receive post-MMI medical treatment to be credible or persuasive. Claimant received treatment from the date he reported the 2013 injury until he was placed at MMI eleven months later. The ALJ finds that it is more likely that if claimant had experienced the ongoing pain he describes in his testimony he would have sought medical treatment at some point between January 16, 2014 and February 18, 2016.

27. The ALJ credits the opinion of Dr. Bernton and finds that claimant has failed to demonstrate that it is more likely than not that his condition has worsened and his workers' compensation claim should be reopened. The ALJ credits the February 18, 2016 ER record over claimant's contradictory testimony and finds that claimant did not have ongoing back pain between January 2014 and February 18, 2016. The ALJ notes that although claimant may have experienced a worsening of his low back pain as of

February 18 2016, that worsening is unrelated to claimant's September 6, 2013 work injury.

28. As claimant has failed to meet his burden of proof to reopen his claim, the ALJ does not address claimant's request for the recommended lumbar fusion.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a change in condition. Section 8-43-303(1), C.R.S. A change in condition refers to "a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

4. As found, claimant has failed to demonstrate by a preponderance of the evidence that he has suffered a worsening condition to necessitate reopening his claim. As found, the medical records and Dr. Bernton's opinion are credible and persuasive regarding this issue.

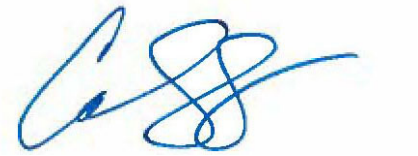
ORDER

It is therefore ordered that:

1. Claimant' request to reopen his claim due to a change of condition is denied and dismissed.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 20, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Has Claimant proven by a preponderance of the evidence that the compounded cream prescribed by her ATP is reasonable and necessary to relieve the effects of her industrial injury?

2. Is Claimant entitled to additional disfigurement benefits beyond those awarded by ALJ Lamphere on July 16, 2014?

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury to her right lower extremity on February 8, 2012 while working for Employer. Because of the injury, Claimant underwent a complicated course of treatment, including three surgeries. Claimant subsequently developed chronic neuropathic pain/complex regional pain syndrome (CRPS) and peroneal neuropathy.

2. She underwent QSART and thermographic testing with Dr. Schakarashwili in 2015, which showed a "high probability for the presence of complex regional pain syndrome." Dr. Schakarashwili noted additional findings related to peroneal neuropathy. He opined it was unnecessary to precisely differentiate the effects of peroneal neuropathy versus CRPS, "since treatment for nerve pain and CRPS is essentially identical."

3. Claimant's condition has been refractory to treatments typically used to treat neuropathic pain/CRPS. She had minimal relief from sympathetic blocks, although had a good response to a peroneal nerve block. Claimant suffers from GERD and GI issues which limit her ability to tolerate oral NSAIDs. For example, Arthrotec (diclofenac) caused "itching and dizziness," and Mobic caused GI distress when she tried it in July 2014. Oral gabapentin was not helpful, and she could not tolerate Lyrica. Claimant has avoided opioids.

4. Because of her pain, Claimant has significant difficulty participating in activities that require ambulation. Despite that, she continues to work full-time for Employer.

5. On November 20, 2015, Claimant's ATP, Dr. George Johnson, prescribed a compound cream to relieve Claimant's pain. The cream consists of: ketoprofen 10%, gabapentin 5%, baclofen 5%, clonidine 0.2%, lidocaine 5%.

6. Initially, as reflected in Dr. Johnson's notes, Claimant did not find the cream to be helpful. But as she credibly explained at hearing, she subsequently appreciated significant benefit from the cream, particularly at night when trying to sleep. The compound cream also helps relieve Claimant's pain at work and while performing

routine activities such as driving and shopping. The decreased pain allows Claimant to be more active.

7. Due to concerns regarding ongoing authorization of the compound cream, Claimant tried over-the-counter lidocaine cream (Aspercreme) in its place.

8. The OTC lidocaine cream was less effective than the prescription compound cream. The numbing sensation from the OTC cream did not last as long and she received less pain relief. Additionally, when Claimant applied the OTC cream to her foot, it caused a "stinging" sensation that she found "irritating." The OTC cream was also less helpful with Claimant's sleep.

9. Claimant refilled the compound cream five times between June 1, 2016 and November 23, 2016 through Injured Worker Pharmacy ("IWP"). IWP's Reimbursement Worksheet shows an outstanding balance of $3,334.60. That amount has not been fee scheduled under WCRP 18-6(N)(4).

10. Dr. Jeffrey Jenks testified in a deposition on August 18, 2016 on behalf of Claimant. Dr. Jenks opined that the compound cream prescribed by Dr. Johnson is "very reasonable."

11. Dr. Henry Roth performed a medical record review on behalf of Respondents on November 14, 2016. Subsequently, Dr. Roth testified in an evidentiary deposition on January 16, 2017, wherein he reiterated and expounded upon the opinions expressed in his report.

12. Dr. Roth opined that the compound cream is not reasonable or necessary. Dr. Roth opined "there really isn't a positive anything known to be gained" by using the compound cream instead of taking the medication orally. He further stated "I would call it snake oil and good salesmanship." Dr. Roth opined that other topical creams may be appropriate, such as Voltaren gel and lidocaine gel. Dr. Roth admitted he had never evaluated or met with Claimant, and did not know she had tried lidocaine cream and compared its effectiveness to the prescription compound cream. Dr. Roth opined that Claimant's positive response to the compound cream may be a placebo effect, and did not change his opinions.

13. Dr. Roth's opinions regarding the compound cream are not persuasive.

14. Claimant has proven by a preponderance of the evidence that the compound cream prescribed by Dr. Johnson is reasonable, necessary and related treatment to relieve the effects of Claimant's industrial injury.

15. Claimant's injury has caused permanent, visible effects which are normally exposed to public view. Claimant has two areas of discoloration/loss of pigmentation on her right foot. The first area is approximately the size of a quarter, and the secondary is approximately the size of the dime. Additionally, Claimant has a significant limp and utilizes a four-point cane to assist with ambulation.

16. Claimant had a prior disfigurement evaluation with ALJ Lamphere on July 15, 2014. ALJ Lamphere considered surgical scarring and generalized swelling about the right ankle. Because of that disfigurement, ALJ Lamphere awarded Claimant $3,200. ALJ Lamphere did not evaluate the aforementioned areas of discoloration or altered gait.

17. The persuasive evidence shows Claimant's gait has worsened since July 2014. Claimant was previously put at MMI by Dr. Johnson on March 30, 2014. On that date, her pain was described as "mild and infrequent." Dr. Johnson specifically noted "she is not limping." The report made no mention of any assistive device.

18. After the disfigurement hearing, Claimant had additional surgery on August 26, 2014. Because of the surgery, she was taken off MMI. Subsequently, Claimant developed chronic neuropathic pain and/or CRPS. Medical records show increased difficulty with activities involving standing and walking because of the CRPS. (E.g., Ex. 3/237; Ex. 4/245; Ex. 5/257; Ex. 6/261; Ex. 7/267; Ex. F/81; Ex. G/83). On November 9, 2015, Dr. Simpson documented that Claimant walked with "[a] limp and [an] antalgic gait."

19. Claimant has proven by a preponderance of the evidence she experienced a change of her medical condition after the July 2014 disfigurement hearing that warrants reopening the issue of disfigurement.

20. The ALJ finds Claimant should be awarded an additional $1,196 for disfigurement.

CONCLUSIONS OF LAW

A. Compounded cream for pain relief

Section 8-42-101(1)(a) provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

Thus, the respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement (MMI) if the claimant requires further care to relieve the effects of the injury or prevent deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability, reasonableness, and necessity of specific treatment. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003). When

the respondents challenge the claimant's request for specific post-MMI medical treatment, the claimant must prove entitlement to the medical benefit(s) at issue by a preponderance of the evidence. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO February 12, 2009).

Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers are required to use the Medical Treatment Guidelines (MTGs) furnishing medical treatment. As the arbiter of disputes regarding treatment, the ALJ may consider the MTGs as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (ICAO, January 25, 2011). But the ALJ is not bound by the MTGs when determining whether requested medical treatment is reasonable, necessary, or injury-related. Section 8-43-201(3).

The persuasive evidence shows that the compound cream has helped reduce Claimant's pain and allow her to be more functional. Dr. Roth speculates that a different formulation may provide similar benefit. Given the inherent difficulty of treating chronic neuropathic pain, the ALJ is loath to terminate a treatment which has been effective in Claimant's particular case, based on supposition that some other treatment may prove equally efficacious.

Dr. Roth relied heavily on the CRPS MTGs to support his opinion, specifically section (G)(j) regarding "Topical drug delivery." That section states:

> ***At the time this guideline was written***, no studies identified evidence for the effectiveness of compounded topical agents other than those recommended above. Therefore, other compounded topical agents are not generally recommended. In rare cases they may be appropriate for patients who prefer a topical medication to chronic opioids or ***have allergies or side effects from other more commonly used oral agents***." (Emphasis added).

The ALJ is not persuaded by Dr. Roth's application of the CRPS MTGs in Claimant's case. The MTGs approve all the individual components of the compound cream if taken in oral form (or topically, in the case of the lidocaine). Claimant has well-documented difficulty tolerating many oral medications, which puts her into the subset of patients who can be appropriate candidates for "other" types of topical medications under the MTGs.

Moreover, Dr. Roth neglected to consider the DOWC's changing view of topical medications since the CRPS MTGs were last updated in December 2011. Since that time, the DOWC has updated other MTGs, including those relating to lower extremity injuries (Rule 17, Exhibit 6) and shoulder injuries (Rule 17, Exhibit 4). Section (F)(9)(k)(iii) of the current lower extremity MTGs provide:

> Other topical agents, including prescription drugs (i.e. lidocaine), prescription compound agents, and prescribed over-the-counter medications (i.e. blue ice), may be useful for pain and inflammation.

The section regarding other topical agents was not present in the previous version of the lower extremity MTGs. Admittedly, the lower extremity MTGs are not as specific to CRPS/neuropathic pain as the CRPS MTGs. Nevertheless, the new language regarding topical drug delivery suggests an evolution in the quality of evidence regarding their effectiveness and counsels against slavish adherence to MTGs written more than five years ago.

Dr. Jenks opined the compound cream is "very reasonable" in Claimant's case. Based on Claimant's positive response to the cream, the ALJ agrees with Dr. Jenks that it is reasonable and necessary to relieve the effects of her injury.

B. Disfigurement

Section 8-42-108(1) entitles a claimant to additional compensation if she is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." The statute establishes two tiers of disfigurement awards with maximum limits based on severity. The disfigurement maximums are adjusted annually by the Director. Based on Claimant's date of injury (February 8, 2012) and the nature of her disfigurement, the maximum disfigurement award is $4,396.

Claimant had a previous disfigurement evaluation with ALJ Lamphere on July 15, 2014. ALJ Lamphere considered surgical scarring and generalized swelling about the right ankle. Because of that evaluation, ALJ Lamphere awarded Claimant $3,200.

At the February 1, 2017 hearing before the undersigned ALJ, Claimant requested additional disfigurement benefits based on two areas of discoloration/loss of pigmentation on the right foot, and alteration of her gait. Respondents objected to an award based on altered gait, on the theory that gait abnormality could have been considered at the July 2014 disfigurement hearing with ALJ Lamphere, and is therefore closed.

As found, Claimant has proven by a preponderance of the evidence that she experienced a change of condition after ALJ Lamphere's July 2014 order that justifies reopening the issue of disfigurement. The medical records corroborate Claimant's testimony that her gait pattern worsened after the previous disfigurement hearing. Dr. Johnson placed Claimant at MMI on March 30, 2014, and on that date, he specifically noted Claimant was "not limping." Claimant had additional surgery on August 26, 2014, and was taken off MMI. Subsequently, she was diagnosed with chronic neuropathic pain and/or CRPS. The medical records reflect significant difficulty with ambulation because of the neuropathic pain. In November 2015, Dr. Simpson documented that she walked with "[a] limp and antalgic gait." The totality of evidence presented persuades the ALJ that Claimant's gait worsened after July 2014.

The disfigurement the ALJ observed at the February 1, 2017 hearing entitles Claimant to an additional disfigurement award of $1,196.

ORDER

It is therefore ordered that:

1. Insurer shall pay for the compound cream as prescribed by Dr. Johnson, pursuant to the WC fee schedule, including the prescriptions Claimant filled from June 2016 through November 2016.

2. Insurer shall pay Claimant an additional $1,196 for disfigurement.

3. All matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 20, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-006-651-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 19, 2017 and March 13, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 1/19/17, Courtroom 1, beginning at 8:30 AM, and ending at 10:15 AM; and, 3/13/17, Courtroom 1, beginning at 1:30 PM, and ending at 2:30 PM).

Claimant's Exhibits through 9 were admitted into evidence, without objection. Respondents' Exhibits A through K were admitted into evidence, without objection.

ISSUE

The sole issue to be determined by this decision concerns the causal relatedness of corneal surgery recommended by Holly D. Kent, M.D., Claimant's treating corneal surgeon, to address a corneal scar, allegedly caused by the Claimant's admitted accident of February 3, 2016.

The Claimant bears the burden of proof, by a preponderance of the evidence.

PRELIMINARY PROCEDURAL MATTER

At the commencement of the January 19, 2017 session of the hearing, counsel for the Respondent indicated that the Respondents had subpoenaed Ron W. Pelton, M.D. Ph.D., as their expert ophthalmologist, and he failed to appear. Dr. Pelton had performed a review in response to a request for prior authorization, filed by the office of Holly D. Kent, M.D. On February 13, 2017, the ALJ entered an order extending the time for the Respondents to produce a transcript of an evidentiary deposition of Dr. Pelton before the next scheduled session of the hearing. Dr. Pelton's evidentiary deposition was taken on February 20, and a written transcript thereof was filed on February 28, 2017. The Claimant presented no rebuttal testimony at the March 13, 2017 session of the hearing. Consequently, the matter was deemed submitted for decision on March 13, 2017.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant is a bus operator for the Employer. She was born on May 6, 1983. Her duties involve driving bus routes.

2. While walking through the Employer's parking lot on February 3, 2016, the Claimant slipped and fell backwards on black ice, hitting her head and sustaining back, neck, left elbow and right finger injuries. The Claimant testified that her right eye was red after the fall. She reported the incident to her Employer immediately and was first seen at the emergency room (ER) of Swedish Hospital where she was evaluated including x-rays, treated and released.

3. The Respondents filed a General Admission of Liability (GAL), dated September 13, 2016, admitting for medical benefits; an average weekly wage (AWW) of $626.21 and temporary total disability (TTD) benefits of $417.47 per week from February 3, 2016 through March 15, 2016; and, from June 14, 2016 through September 8, 2016; and, temporary partial disability (TPD) benefits of $44.14 per week from March 16, 201`6 through June 13, 2016. The Claimant received a full duty release to return to work, effective September 9, 2016.

4. The Claimant saw Brian Beatty, D.O., at Rocky Mountain Medical Group, who became the Claimant's authorized treating physician (ATP). Br. Beatty noted that the Claimant reported some neck stiffness and experiencing blurry vision. Dr. Beatty

diagnosed: (1) head contusion; (2) cervical strain; (3) lumbar strain; (4) left hip contusion; (5) right thumb sprain; and, (6) left elbow contusion. He was of the opinion that the objective findings were consistent with a work-related injury. He was further of the opinion that the Claimant was unable to work at the time.

5. In a follow up report of February 12, 2016, Dr. Beatty noted that the Claimant "continues to show signs of symptom magnification."

The Right Eye

6. On March 3, 2016, Dr. Beatty referred the Claimant to Thomas A. Politzer, O.D., an optometrist, for her "blurry vision." Dr. Politzer first saw the Claimant on April 18, 2016. Dr. Politzer, in a report dated April 19, 2016 (Respondents' Exhibit I, bates stamp 000269), and he stated that the Claimant was only reporting blurred vision only in the right eye. Dr. Politzer noted that the Claimant's "uncorrected distance visual acuities are less than 20/400 for the right eye and 20/70 for the left eye. He further noted that the scar of the Claimant's right eye "does appear to be of longstanding nature." Dr. Politzer was of the opinion that the "scar is the most likely cause of her decreased vision." On June 1, 2016, Dr. Politzer recommended to ATP Dr. Beatty that the Claimant be referred to a medical specialist for her eye.

7. On June 14, 2016, ATP Dr. Beatty referred the Claimant to Barry Ogin, M.D. for the Claimant's neck complaints; and to Holly D. Kent, M.D., a corneal surgeon, for the Claimant's eye complaints.

Holly D. Kent, M.D.

8. Dr. Kent first saw the Claimant on June 8, 2016. She referred the Claimant to Dr. Gallegos for corrective lens. Dr. Gallegos advised Dr. Kent that the Claimant's vision in the right eye could only be corrected to 20/80 and the Claimant needed 20/40 vision to do her job. Therefore, Dr. Gallegos referred the Claimant back to Dr. Kent for evaluation of "possible surgery" (to correct the scarring on the right eye).

9. Dr. Kent has **not** rendered an opinion that the surgery to correct the scarring on the Claimant's right eye is causally related to the injuries of February 3, 2016, or that the event of February 3, 23016 aggravated and accelerated the scarring of the Claimant's right eye. Indeed in the Pelton evidentiary deposition, exhibit 1, Dr. Kent states that 'this type of injury (corneal scarring) rarely happens unless the eye is directly hit. It cannot be from a fall and hitting the back of her head."

10. On July 13, 2016, Dr. Kent's office sent a request for prior authorization to the insurance carrier because the Claimant was scheduled for corneal surgery on August 15, 2016. The request indicates that the Claimant "alleges [this] happened when fell; at work." A timely response to the request for prior authorization was referred to Ron W. Pelton, M.D., Ph.D., a physician who is board certified in Opthamology, who

reviewed medical records and was of the opinion that the medical documentation did not support a causal relationship between the corneal scar of the right eye and the accident (Respondents' Exhibit A). He noted that a corneal graft was necessary to attempt to improve the Claimant's vision and it is reasonable treatment. He further noted that "a corneal graft, like a kidney transplant, requires significant maintenance after the surgery to battle rejection (*Id)*.

11. In his evidentiary deposition, Dr. Pelton stated the opinion that in order for the Claimant to aggravate her corneal scar "there would have to be some direct hit to the eye." Neither the Claimant's testimony nor the medical reports support a direct hit to the Claimant's right eye (Pelton Depo., p. 24, lines 16-21). At one point, Dr. Pelton noted that the Claimant's vision in the right eye was 20/2400, as noted by Dr. Pulitzer (according to Dr. Pelton), which is tantamount to legally blind (Pelton Depo. pp.19, 20).

12. The Claimant's request for prior authorization of the corneal surgery was denied and the matter was set for hearing.

The Corneal Surgery

13. The Claimant's first corneal surgery occurred on September 9, 2016 and it was paid by Medicaid. It corrected her vision to 20/20 and she was released to return to work at full duty, whereby drivers are required to have 20/40 vision. The Claimant is concerned about follow up surgeries and her co-pays.

Ultimate Findings

14. The opinions of Dr. Pelton and Optometrist Dr. Politzer that the Claimant's right corneal scarring was not caused by the fall of February 3, 2016, or aggravated/accelerated thereby, is credible, persuasive and, essentially, un-refuted. Dr. Kent also supports the lack of causal relatedness to the accident of February 3, 2016.

15. The Claimant has failed to prove, by preponderant evidence, a causal relationship between her admitted injuries of February 3, 2016 and any aggravation/acceleration of her corneal scarring, which caused the need for right eye surgery. The weight of persuasive and credible medical opinion is that the right corneal scarring is of long-standing duration and, absent a direct hit to the right eye, the corneal scarring could not be aggravated or accelerated.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the opinions of Dr. Pelton and Optometrist Dr. Politzer that the Claimant's right corneal scarring was not caused by the fall of February 3, 2016, or aggravated/accelerated thereby, is credible, persuasive and, essentially, un-refuted. Dr. Kent also supports the lack of causal relatedness to the accident of February 3, 2016.

Causal Relatedness of Medical Treatment

b. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). As found, the Claimant has failed to establish a causal link between the accident of February 3, 2016 and the need for the corneal surgery.

Burden of Proof

c. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits beyond those admitted. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to satisfy her burden of proof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Any and all claims for payment of the corneal surgery recommended by Holly D. Kent, M.D., are hereby denied and dismissed.

B. The General Admission of Liability, dated September 13, 2016, remains in full force and effect until and unless modification thereof is warranted by law.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of March 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-999-129-04

STIPULATED ISSUES

I. Whether Respondents made an offer of modified duty that complied with statute and rule of procedure to unilaterally terminate Claimant's temporary total disability (TTD) benefits.

II. If Respondent's modified duty offer did not comply with statute and rule of procedure, whether Respondents should be penalized for unilaterally terminating Claimant's TTD benefits.

III. Whether Respondents should be penalized for violating WCRP 5-5(c)(1).

FINDINGS OF FACT

Based upon the written evidence presented, the ALJ enters the following findings of fact:

1. Claimant suffered an admitted injury to his right shoulder on October 20, 2015 while attempting to stabilize a 13 foot I-beam as a machine drilled the beam into the ground.

2. Claimant began conservative treatment and was given work restrictions, which the Employer was able to accommodate. Conservative treatment failed to produce lasting improvement. Consequently, Claimant was taken to surgery on March 5, 2016, where he underwent surgical repair his right shoulder. Claimant was taken off work to recover and Respondents began paying TTD benefits on March 8, 2016.

3. Claimant was released to modified duty on April 27, 2016; however, Employer could not initially accommodate light duty work because Employer's job in Colorado had concluded.

4. On August 3, 2016, Respondents sent a letter to Claimant's treating provider, Dr. Terrance Lakin which provided information regarding a modified job which had been located for Claimant. Respondents requested that Dr. Lakin review the list of identified job tasks for the position and provide feedback to verify that Claimant was able to perform the identified duties in advance of formally offering the modified position to Claimant.

5. Dr. Lakin noted that Claimant was able to perform the tasks identified in the letter by signing the same on August 8, 2016.

6. On August 10, 2016, Employer extended to Claimant an offer of modified duty for

the position identified in the August 3, 2016 letter directed to Dr. Lakin. The position was identified as a Facility Assistant (through a non-profit organization – Habitat for Humanity Restore). The job offer provided that an initial meeting was to be held on August 16, 2016, at 10:30, noting further that the start date was tentative and dependent upon completion of an application for employment and a background check which could take up to 48 hours to clear. Consequently, the offer letter also indicated that the "modified job would begin on Friday, August 19, 2016 at 9:00 a.m." The letter went on to request that Claimant "report for work on this date and time." The offer letter was sent in Spanish and English.

7. Claimant did not report for the initial meeting on August 16, 2016. He did not complete an application, nor did he complete the required background check. Accordingly, Respondents terminated Claimant's TTD benefits via a General Admission of Liability filed on September 6, 2016. Respondent continued to pay temporary partial disability (TPD) benefits of $33.70 based upon the number of hours Claimant was to work in modified duty at the hourly rate identified in modified duty offer letter, i.e. $16.80/hr.

8. On September 9, 2016, Claimant filed a Contested Motion seeking on Order from the Court that TTD benefits continue until a hearing could be held on the issue of the reduction of TTD benefits. On September 23, 2016, ALJ Patrick Spencer denied Claimant's Contested Motion. In his order ALJ Spencer noted that the Industrial Claims Appeals Office (ICAO) has held that § 8-42-105(3)(d) does not allow for termination of temporary disability benefits based upon an offer of modified duty that a claimant "cannot as a practical matter accept." Concluding that the question of whether the offer of modified duty in the instant case was one that Claimant could, as a practical matter, accept was factual in nature, ALJ Spencer denied the motion.

9. On October 3, 2016, Claimant filed a Motion asking the ALJ Spencer to Reconsider his September 23, 2016 Order.

10. On October 4, 2016, Claimant filed an Application for Hearing listing the only issue as penalties for what Claimant perceived to be an improper Rule 6 Modified Job Offer. Claimant has argued the modified job offer was improper as it was a "tentative" offer since Claimant had to complete a background check. The Hearing on Claimant's Application was set for January 12, 2017.

11. On October 19, 2016, ALJ Spencer denied Claimant's Motion for Reconsideration.

12. On November 14, 2016, Respondents filed a General Admission of Liability which increased Claimant's TPD benefits to $375.20. The pay increase occurred because the ICAO affirmed a decision of ALJ Donald E. Walsh that held Claimant's average weekly wage (AWW) was $1,176.00 as opposed to the originally admitted $663.75. Although the new admission increased Claimant's TPD benefits it does not admit for TTD as Respondents continue to rely on Claimant's failure to accept modified duty as the basis for termination of Claimant's TTD benefits.

13. On January 11, 2017, Respondents filed an Unopposed Motion to Vacate the January 12, 2017 hearing date, and instead, submit briefs arguing the parties respective positions (over whether or not a proper WCRP 6 Modified Job Offer existed). The Unopposed Motion was granted on January 13, 2017.

CONCLUSIONS OF LAW

Based upon the aforementioned findings of fact, the ALJ draws the following conclusions of law:

A. CRS § 8-42-105(3)(d)(I) allows for the unilateral termination of TTD benefits when the attending physician gives the employee a release to return to modified employment, the employment is offered to the employee in writing, and the employee fails to begin the employment. Additionally, the procedures for terminating TTD benefits by filing an admission without a hearing are set forth in WCRP 6. Termination of TTD benefits based on an offer of modified duty is governed by WCRP 6-1(A)(4), which provides Respondents may terminate TTD benefits without a hearing by filing an admission of liability with:

- a letter to the claimant or copy of a written offer delivered to the claimant with a signed certificate indicating service, containing both an offer of modified employment setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.

B. Claimant does not dispute that the above requirements were met by Respondents. Rather, Claimant advances an assertion slightly different than the one he argued in his contested motion dated September 9, 2016. In his motion, Claimant contended that the August 10, 2016, Modified Job Offer did not constitute an "actual job offer" because it required Claimant to disclose personal information to a third party (via the required background check). In his Position Statement, Claimant, citing § 24 of the Restatement (Second) of Contracts asserts that the evidence supports a conclusion that there was no offer of modified duty extended because the offer was controlled by a third party who had to approve/accept Claimant after a background check. Consequently, Claimant argues that under the express terms of the modified job offer, no offer was extended because he could not, by his own actions make a binding agreement and conclude the bargain. In support of his contention, Claimant cites to the decision reached in *Sumerel v. Goodyear Tire & Rubber Company,* 232 P.3d 128, 133 (Colo.App. 2009), or more precisely case law cited in *Sumerel*. Specifically, Claimant argues that the legal principals applied in *Bourque v. FDIC*, 42 F.3d 704 (1st Cir.1994), as cited in *Sumerel* is analogous to the situation presented here.

C. In *Bourque*, the plaintiff offered to purchase some real property from the FDIC. The FDIC rejected Plaintiff's offer and made an express counteroffer which informed the plaintiff that all offers were subject to FDIC approval and that if he wanted to accept the counteroffer, he needed to complete a form of purchase and sale agreement that was provided with the counter offer. Plaintiff completed and

signed the necessary forms and returned them to the FDIC. However, the FDIC had received a better offer so refused to go through with the sell to Plaintiff unless he matched the better offer. Plaintiff refused to match the offer and sued to enforce the agreement. The Court rejected the request concluding that the FDIC's counteroffer to match the consideration of the other buyer amounted to an invitation to make another offer, thereby inviting additional negotiations. As such, the Court concluded that the FDIC's counteroffer was not an offer Plaintiff could accept, because it contemplated "further discussion." See, *Citywide Bank v. Herman*, 978 F.Supp. 966 (D.Colo.1997)(where use of qualifying language, such as "proposed resolution" or "potential issue" demonstrates that there is no definitive offer). As noted by the *Sumerel* Court, "there is no offer properly capable of acceptance where the purported offeree 'knows or has reason to know that the person making [the purported offer] does not intend to conclude a bargain until he has made a further manifestation of assent."

D. Relying on these principals, Claimant asserts that the August 10, 2016 modified duty offer letter amounted only to an invitation to initiate "preliminary negotiations" regarding his return to modified duty. Specifically, Claimant contends that the "preliminary negotiations would involve the Claimant agreeing to a background check with a third-party, and then there would be further negotiations involving the third party, depending on whether it found the Claimant acceptable to work at its facility after the background check." Only then, Claimant argues, would there be a possible modified job offer made to the Claimant. Accordingly, Claimant asserts that the modified job offer letter was qualified and one he was "powerless to accept" because additional negotiations were necessary to conclude the bargain. The ALJ is not convinced; concluding that Claimant has misconstrued the language contained in the modified job offer letter and has added an inference unsupported by the plain language of the document. As noted, Claimant asserts that the language in the modified job offer letter suggests that there would be additional negotiations regarding Claimant's return to modified duty for the third party depending on whether it found Claimant acceptable to work at its facility and that no job would be forthcoming unless Claimant "passed" a background check. The ALJ concludes that the contents of the letter do not support such an inference. Rather, the letter, on its face provides that Claimant was extended an offer of modified duty at $16.80/hour, to start August 19, 2016. In order to accept this "offer", Claimant was to meet with the third party on August 16, 2016 to complete an application and a background check. Because the application and background check could take up to 48 hours to "clear", Claimant's start date was "tentative." In order to ensure that Claimant could accept the offer given the delay necessary to process the application and background check, Respondents set Claimant's staring date for August 19, 2016. As noted the start date was made tentative in the event that it took more than 48 hours to process the application/background check. Contrary to Claimant's assertion, the letter does not provide that Claimant would have to pass a background check to be acceptable to the third party. The ALJ finds and concludes that the letter provides only that the offer was dependent upon Claimant's completion of an application and background check, not that he had to pass said background check.

E. Based upon the evidence presented, the ALJ finds and concludes that

Claimant's argument is akin to the line of cases that address when/where an offer of employment/employment contract is entered into. In those cases, it has been held that such 'mere formalities' as completion of paperwork or a drug test or a driving test do not mean a contract of employment was not already formed via an offer and acceptance. *See for example, Huffman v. Multiple Concrete*, W.C. No 4-876-455-03 (February 20, 2013). The ALJ finds/concludes the assertion that the modified offer letter in this case was one Claimant could not accept on the grounds that it was "tentative" because it required a background check which could divulge personal information uncompelling. Background checks are routinely requested when a Claimant is place on modified duty which brings the injured worker into an office setting and in contact with money or the public. See *Derrick Carmichael v. SOS Staffing Services, Inc.*, W.C. 4-654-154 (ICAO, March 20, 2006). Following Claimant's reasoning would mean a modified job offer was "tentative" where a Claimant has to complete an Application (which often calls for personal information) or an I-9 (which does call for personal information) or a W-2 which also calls for personal information. Here, the undersigned ALJ agrees with ALJ Spencer that the September 6, 2016, General Admission of Liability is otherwise compliant with the requirements of WCRP 6-1(A)(4). Because all that was required by statute and rule to constitute a modified job "offer" was properly contained in the August 10, 2016 letter and properly conveyed to Claimant, Respondents were within their rights to terminate Claimant's TTD when he failed to complete an application and otherwise refused to submit to a back ground check. A contrary ruling under the facts of this claim would render meaningless not only the modified job offer process but also C.R.S § 8-42-105(3)(d)(I) and WCRP 6-1 (A)(4).

F. Section 8-43-304(1) identifies four categories of conduct and authorizes the imposition of penalties when an employer or insurer: (1) Violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under §8-43-304(1), supra, requires a two-step analysis. The ALJ must first determine whether the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office,* 916 P.2d 623 (Colo. App. 1995). If the ALJ finds a violation, the ALJ must determine whether the employer's actions which resulted in the violation were objectively reasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). The reasonableness of the employer's action depends on whether it is predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003).

G. The standard for the imposition of penalties is an objective one "measured by the reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676, (Colo.App. 1995). Section 8-43-304 is penal in nature and is to be narrowly and strictly construed. *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174 (Colo. App. 1998). If an employer did not violate a provision of the Act or a rule of procedure, the claim for penalties is properly dismissed. *Montoya v. Industrial Claim Appeals Office*, 203 P.3d 620 (Colo. App. 2008).

H. In this case, Claimant's argument for penalties is not based on a clear and direct violation of a rule or statute. Specifically, he does not argue the attending physician (*did not*) give him a release to return to modified employment; or that the employment (*was not*) offered to him in writing; or that a letter (*was not*) sent to him with a copy of a written offer delivered to him with a signed certificate indicating service, containing both an offer of modified employment setting forth duties, wages and hours with a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions. Instead, his argument for penalties is limited to an argument that the modified job offer was somehow tentative and thus invalid because it called for additional negotiation following completion of a background check. In short, this is based on his interpretation of what constitutes a valid modified job offer which this ALJ finds/concludes is a strained interpretation in this case. Based upon the evidence presented, the ALJ concludes that because Claimant failed to prove that the modified job offer was improper in any way, he failed to establish the disputed conduct constituted a violation of a rule or order. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). Consequently, Claimant's claim for penalties must be denied and dismissed. *See Montoya supra*.

I. Even if a violation occurred, the employer's actions were objectively reasonable as they were predicated on a rational argument based in law or fact, meaning no penalties can be awarded. Claimant also argues penalties are owed as the September 6, 2016 GAL stops TTD benefits as of August 19, 2016, the date Claimant was supposed to start modified employment. However, CRS § 8-42-105(3)(d)(I) clearly allows the termination of TTD benefits as of the date Claimant no shows to modified employment. Finally, Claimant argues that Respondents violated Rule 5-5(C)(1). The evidence presented persuades the ALJ that Claimant failed to state this penalty with specificity. Accordingly, the claimed penalty is denied and dismissed.

ORDER

It is therefore ordered that:

1. Respondents lawfully terminated Claimant's TTD benefits by extending an offer of modified duty that complied with statute and rule of procedure which Claimant failed to accept.

2. Claimant's claims for penalties for violating CRS § 8-42-105(3)(d)(I), WCRP 6-I(A)(4) and WCRP 5-5(c)(1) are denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 22, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-860-080-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 22, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 3/22/17, Courtroom 1, beginning at 8:30 AM, and ending at 10:00 AM).

Claimant's Exhibits 1 through 9 were admitted into evidence, without objection. Respondents' Exhibits A through E were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ took the matter under advisement and hereby issues the following decision.

ISSUE

Prior to the commencement of the hearing, counsel conferred and announced that they wished to enlarge the issue designated in the Case Information Sheet (CIS), which was "causal relatedness and authorization of alleged exercise induced asthma testing." Counsel stated that they wished to enlarge the issue to include the causal relatedness of "exercise induced asthma." Prior to testing, this would be putting "the cart before the horse." Consequently, the issue in this decision concerns the causal relatedness of the testing only and whether the need for the testing is causally related to

arriving at a diagnosis concerning the Claimant's present upper respiratory condition; and, a medical determination of whether the Claimant's condition is work-related in terms of an aggravation/acceleration of the Claimant's breathing problems, *i.e.,* coughing, wheezing, difficulty breathing after each of her surgeries wherein she was placed under general anesthetic (the last of which was in January 2015).

The Claimant bears the burden of proof, by a preponderance of the evidence.

PRELIMINARY MATTER

Jason McCarl, M.D., a pulmonologist at National Jewish Health, made a request for authorization of "an exercise bronchoconstriction study, and methacholine challenge study, and complete pulmonary function testing." Respondents denied the request and filed an Application for Hearing on September 2, 2016; and obtained an Independent Medical Examination by Jeffrey Schwarz, .M.D. On February 14, 2017, Pre-Hearing ALJ (PALJ) Robert J. Erickson denied the Claimant's motion for an extension of time to commence the hearing, however, the Office of Administrative Courts (OAC), ultimately, set the hearing for March 22, 2017, which occurred.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant's date of birth is February 5, 1979, and she was 38 years old on the date of hearing. She worked as an instructor for the Employer, engaged in outdoor instructional activities that were quite physically demanding.

2. The Claimant sustained severe, multiple injuries to her back, lower extremities, left upper extremity (LUE), and a **collapsed lung** on July 5, 2011, when she fell 45 feet while rock climbing in her work for the Employer. Immediately after the fall, the Claimant was taken to Vail Valley Medical Center and then transferred to Denver Health, where she was hospitalized for approximately one week. Since the date of injury, she has undergone nineteen (19) surgeries as a result of the admitted injuries, many of which were under general anesthetic. The last surgery under general anesthetic was in January 2015. She could not begin resuming her previously active lifestyle for approximately four years.

3. Ultimately, the Respondents filed a Final Admission of Liability (FAL), mailed March 24, 2016, admitting for a date of maximum medical improvement (MMI) of December 1, 2015; temporary disability benefits through November 30, 2015; an

average weekly wage (AWW) of $1,36.72; 3% whole person permanent impairment for visual impairment; 34% of the right lower extremity (RLE); 33% of the left lower extremity (LLE); 28% of the LUE: and, post-MMI medical maintenance benefits.

The Claimant's Testimony

4. It is undisputed that the Claimant has had no history of asthma, family or otherwise. She had minor allergies while she lived in Oklahoma (hay fever), prior to the admitted injuries and before to coming to Colorado in 2005. Thereafter, she had no significant breathing, coughing, wheezing or lung problems until after the admitted injuries and the consequent surgeries under general anesthetic.

5. Prior to the admitted injuries, the Claimant pursued an active lifestyle, including high-level aerobic exercises, mountain biking, hiking, backpacking, and snowboarding. She only began returning to these activities in 2016. She had no prior problems with her lungs, unless hay fever is considered a problem.

6. After each of the surgeries under general anesthetic the Claimant has had a prolonged cough that would sometimes last as long as two months but, according to the Claimant, the cough was not related to wheezing or shortness of breath. She was prescribed a Flovent inhaler which was not helpful. She also experienced right, lower, lateral chest pain when exercising. The Claimant has never been a smoker and has had no environmental exposure to irritating dusts or fumes.

7. It is the Claimant's lay opinion that her current lung problems are attributable to the admitted injuries of July 5, 2011, including her lung collapse, and the consequent 19 surgeries thereafter. Although the Claimant cannot render an expert opinion, the circumstantial evidence concerning a before-and-after analysis of her condition is overwhelming and more compelling that the theory of Jeffrey Schwartz, M.D., that the Claimant may have, coincidentally, developed the onset of adult asthma. Yet, Dr. Schwartz stated that testing of reversible airflow obstruction would be necessary to determine in the Claimant had asthma.

8. The Claimant presented straight-forwardly, persuasively and credible. Therefore, the ALJ finds her testimony highly credible and persuasive.

9. The Claimant's authorized treating physician (ATP) Kristin D. Mason, M.D., referred the Claimant to National Jewish Health for her pulmonary problems. The Claimant came under the care of Jason McCarl, M.D., an Assistant Professor of Medicine in the Division of Pulmonary and Critical Care Medicine at National Jewish.

Jason McCarl, M.D.

10. Dr. McCarl first saw the Claimant on June 28, 2016. He took a through history, consistent with the Claimant's testimony at hearing. He noted that the Claimant had a collapsed lung. He noted the Claimant's lung problems since the admitted fall with dyspnea "that can occur after exercise." His impression was that the Claimant had dyspnea "which occurs with exertion, which is "possibly related to exercise-induced asthma." ("Dyspnea" is defined as "difficult or labored breathing" in *Dorland's Illustrated Medical Dictionary,* 26th Ed.); allergic rhinitis/hay fever; and, the history of the admitted fall with numerous fractures including pneumothorax, requiring multiple surgeries and exposure to frequent general anesthesia. At the first visit, Dr. McCarl rendered no opinion concerning the causal relatedness of the need for the "exercise-induced asthma" testing he was recommending (Respondents' Exhibit B, bates stamp 010-012).

Independent Medical Exam (IME) by Jeffrey Schwartz, M.D.

11. Dr. Schwartz performed his IME on September 29, 2016. The ALJ infers and finds that Dr. Schwartz minimized the significance of the Claimant's collapsed lung. He indicated that the diagnosis of exercise-induced asthma depends on a demonstration of reversible airflow obstruction. He indicated that pulmonary testing would be necessary to determine if there was "reversible airflow obstruction " (Respondents' Exhibit A).

12. Dr. Schwartz stated: "However, while it is suspected but **unproven** (emphasis supplied) that [Claimant] has developed adult-onset asthma, her development of asthma would not be causally related to her injuries sustained on 07/05/11." He indicated that there was "no medical evidence her exposure to anesthetic agents from her previous surgeries could cause asthma." Dr. Schwartz did **not,** however, render any opinions concerning whether or not the Claimant's admitted injuries, including the collapsed lung, aggravated/accelerated the Claimant's lung/breathing problems (*Id.*).

13. In a statement that seemingly does not add up, Dr. Schwartz states: "In summary, [Claimant] has symptoms of adult-onset asthma, likely related to her underlying environmental allergies. Without having evidence of reversible airflow obstruction, her diagnosis of asthma is not established." Ultimately, Dr. Schwartz is of the opinion that if the Claimant has asthma, it is not related to her work injuries or the treatment of her injuries over the years, despite his observation that testing for reversible airflow obstruction had not been done (which would establish whether or not the Claimant had asthma). Thereupon, he opines that the Claimant's post-surgical cough "is unclear but is not related to inhaled anesthetic agents but more likely to be related to the upper airway irritation from the intubation with an endotracheal tube (a

consequence of the admitted injuries)." He offers no persuasive explanation for this opinion. Nowhere does Dr. Schwartz address the issue of whether or not the Claimant's lung/breathing problems were aggravated/accelerated by the treatment and consequences of her injuries and the subsequent treatment thereof.. Indeed, the ALJ infers and finds that Dr. Schwartz's overarching theme is that the Claimant coincidentally developed lung/breathing problems independent of and unrelated to the treatment and consequences of her admitted severe injuries. He attributes these problems to her allergies, which consisted of hay fever for which she had no significant problems after moving to Colorado from Oklahoma in 2005.

14. Overall, Dr. Schwartz is unclear about the cause of the Claimant's lung/breathing problems, other than to categorically render unsupported opinions that her problems are not work-related. For the reasons stated herein above and herein below, the ALJ finds the Claimant's testimony, the overwhelming circumstantial evidence that it creates, and the plausible inferences drawn there from more persuasive and credible than the ultimate opinion of Dr. Schwartz, concerning the lack of causal relatedness of the need for exercise-induced asthma testing. On the one hand, Dr. Schwartz cannot rule out asthma without the reversible airflow testing. Yet, on the other hand he is categorically of the opinion that the Claimant does not have asthma. He does not know for sure what the underlying cause of the Claimant's lung/breathing problems are after the admitted injuries. Despite his opinion of lack of causal relatedness, his opinions support the pulmonary testing recommended by Dr. McCarl. Without the benefit of pulmonary testing, the ALJ finds it incredulous to deny work relatedness of the treatment after the admitted injuries causing an aggravation/acceleration of the Claimant's breathing/lung condition, without having the results of the tests recommended by Dr. McCarl. Therefore, the ALJ does not find Dr. Schwartz's precipitous opinion concerning lack of work relatedness credible at this juncture, without the benefit of the results of the tests recommended by Dr. McCarl.

Dr. McCarl After Reading Dr. Schwartz's IME Report

15. In a brief report of January 9, 2017, Dr. McCarl stated: "I agree with Dr. Schwartz (having read Dr. Schwartz report) that any airways disease—in this case, asthma—is unlikely a result of her accident of 2011, or from general anesthesia from previous surgeries." Based on Dr. McCarl's summary statement, without further explanation, the ALJ finds that Dr. McCarl's opinion in this regard stands or falls with Dr. Schwartz's opinion as noted in Finding Nos. 13 and 14 herein above. Thereupon, Dr. McCarl recommended proceeding with an exercise-induced bronchoconstriction study, and methacholine challenge study, and complete pulmonary function testing. Nowhere does Dr. McCarl render an opinion concerning the causal relatedness, or lack thereof, of an aggravation/acceleration of the Claimant's lung/breathing problems as a consequence of the treatment for her admitted injuries, including the collapsed lung. Based on the brevity of Dr. McCarl's report of January 9, 2017 (Respondents' Exhibit B, bates stamp 008), the ALJ infers and finds that the fact that Dr. McCarl is

recommending further testing to determine the actual causes of the Claimant's coughing/lung problems, and whether further testing could determine whether the Claimant's lung/breathing condition is directly or indirectly within the proximate chain of causation from the Claimant's original admitted injuries. The ALJ infers and finds that Dr. McCarl perfunctorily agreed with IME Dr. Schwartz's opinion of lack of causal relatedness, without giving any persuasive explanation or analysis concerning his agreement with Dr. Schwartz. Therefore, Dr. McCall's precipitous opinion, prior to getting the results of his recommended tests, is not credible at this juncture.

Ultimate Findings

16. The Claimant's highly credible testimony establishes compelling circumstantial evidence that her treatment for the admitted injuries (including a collapsed lung and 19 surgeries, many under general anesthetic) could possibly be the cause of her current breathing/lung problems. Therefore, the pulmonary testing recommended by Dr. McCarl is part of the diagnostic procedures to rule in or out the work relatedness of the Claimant's breathing/lung conditions, and arrive at a definitive diagnosis of the Claimant's current breathing/lung condition. As found, without the benefit of the test results, Dr. Schwartz's and Dr. McCarl's precipitous opinions on lack of causality are not credible at this juncture. Indeed, both doctors did not address the issue of whether the Claimant's post-accident treatment and surgeries may have aggravated/accelerated her breathing/lung condition.

17. Between conflicting lay and medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's opinions, the plausible inferences drawn there from and the circumstantial evidence it establishes; and, to reject the precipitous opinions of Dr. Schwartz and Dr. McCarl at this juncture, rendered without the benefit of the pulmonary test results.

18. Before ruling out work-relatedness of an aggravation/acceleration of the Claimant's underlying lung/breathing condition, pulmonary testing is a critical diagnostic step in order to arrive at a definitive determination of work-relatedness or lack thereof.

DISCUSSION

This matter is somewhat unusual because the outcome goes against the grain of routinely deferring to medical opinions on causality issues. As found herein above, IME Dr. Schwartz rendered an opinion that the Claimant's lung/breathing problems were not causally related to the admitted, severe injuries of July 5, 2011, which included a collapsed lung, and the ensuing 19 surgeries, many of which were performed under general anesthetic. Dr. McCarl, who recommended pulmonary testing, essentially, deferred to IME Dr. Schwartz's opinion on lack of causality Both doctors were of the opinion that pulmonary tests were necessary to make a definitive diagnosis of the

Claimant's lung/breathing condition. For this reason, the ALJ found that the two medical opinions were precipitous and, therefore, not credible at this juncture, without the benefit of the pulmonary test results.

By way of analogy, diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. Granted, the issue herein is whether the tests recommended by Dr. McCarl are a "compensable" benefit or, at least diagnostic procedures leading to a determination of whether or not the Claimant's breathing/lung condition is within a proximate causal chain from her admitted injuries. Indeed, the tests are to determine whether the Claimant's lung/breathing condition, or an aggravation/acceleration thereof, is among other things work-related and, if so, would treatment thereof be a "compensable" benefit.

In *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997), the Court of Appeals dealt with an analogous situation wherein the injured worker could proceed no further with medical treatment and evaluations because the employer and the treating physician took the position that because the claimant had resigned her employment, she was **not** entitled to further evaluations. Ultimately, the Court of Appeals concluded that a medical opinion was not necessary to prove causation because imposing such a requirement would be reading something into the statute that was not there. *See Jacoby v. Metro Taxi, Inc.,* 851 P.2d 245 (Colo. App. 1993). § 8-41-301, C.R.S., which specifies the conditions necessary for a compensability determination (this would include the compensability of a medical procedure or diagnostic tests) does **not** provide that a medical opinion is necessary to make such a determination. As observed in *Lymburn*, to require a medical opinion to support a causality determination would be to read something into the statute that does not exist. Consequently, *Lymburn* remains good law.

The facts in the present case are highly unusual because of the severity of the Claimant's injuries, her 19 surgeries, her collapsed lung as a result of the admitted injuries, and a comparison of her breathing/lung condition before and after the surgeries resulting from her admitted injuries. Before the admitted injuries and consequent surgeries, the Claimant could be characterized as a healthy, hearty outdoors person with a very active and physically demanding lifestyle. IME Dr. Schwartz places some importance on the Claimant's allergies in Oklahoma before 2005. It turned out that the allergies consisted of hay fever. It appears that Dr. McCarl "rubber-stamped" Dr. Schwartz's causality opinion and, thereafter, recommended proceeding with the pulmonary tests. The totality of the Claimant's testimony paints a compelling circumstantial picture that her present lung/breathing condition is more than coincidental as Dr. Schwartz implies. Indeed, the Claimant's lay testimony presents compelling and sufficient circumstantial evidence of "cause-and-effect," *i.e.,* the Claimant's four-year

ordeal with 19 surgeries, many under general anesthetic, had a likely effect on her breathing/lung problems.

The ALJ may make a causality determination based on lay testimony, despite medical evidence to the contrary. In the present case, the ALJ is primarily dealing with the Claimant's credibility and the circumstantial evidence it establishes versus the precipitous medical opinions of IME Dr. Schwartz and Dr. McCarl and the fact that they do not address aggravation/acceleration, which may be addressed in pulmonary test results. At present, this case is in the posture of a "probable cause" determination, *i.e.,* probable cause to believe that the Claimant's breathing/lung problems may be in the proximate chain of causation from her admitted injuries, thus, the recommended pulmonary tests are necessary to make a causality determination concerning the Claimant's present breathing/lung condition.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad

discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's lay testimony was highly credible, established circumstantial evidence of the Claimant's before-and-after (the admitted injuries) condition, which warrants the testing recommended by Dr. McCarl, and was essentially undisputed from the factual and chronological progression of the Claimant's lung/breathing problems. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179. As further found, the precipitous opinions of Dr. Schwartz and Dr. McCarl are not credible at this juncture, without the benefit of the results from the pulmonary tests recommended by Dr. McCarl.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting lay and medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's opinion, the plausible inferences drawn there from and the circumstantial evidence it establishes, and to reject the precipitous opinions of Dr. Schwartz and Dr. McCarl at this juncture, rendered without the benefit of the pulmonary test results.

Causal Relatedness of the Need for Recommended Pulmonary Tests

c. Without the benefits of the pulmonary test results (recommended by Dr. McCarl), there should be "no rush to judgment" to rule out work-relatedness (an aggravation/acceleration of an underlying breathing/lung problem). By way of analogy, diagnostic procedures that constitute a compensable medical benefit must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining a

claimant's condition so as to suggest a course of further treatment *See In the Matter of the Claim of William Soto, Claimant,* W.C. No. 4-813-582 [Indus. Claim Appeals Office (ICAO), October 27, 2011]. Granted, the issue herein is whether the tests recommended by Dr. McCarl should be a "compensable" benefit to rule in or out work-relatedness. Indeed, the tests are to determine whether the Claimant's lung/breathing condition, or an aggravation/acceleration thereof, is work-related and, if so, would treatment thereof be a "compensable" benefit.

d. An employer must provide an injured employee with reasonably necessary medical treatment to "cure and relieve the employee from the effects of the injury." § 8-42-101(1) (a), C.R.S. The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). Without the benefit of the pulmonary test results (the tests recommended by Dr. McCarl), we are **not** there yet. Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. Ct. App. 2002). An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority,* 768 P.2d 751 (Colo. App. 1988). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other intervening injury. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Respondents are liable for the "direct and natural consequences" of a work-related injury, including consequential injuries caused by the original compensable injury. *See Travelers Ins. Co. v. Savio*, 806 P.2d 1258 (Colo. 1985). As found, the pulmonary tests recommended by Dr. McCarl are, among other things, for the purpose of diagnosing the Claimant's breathing/lung condition, or an aggravation/acceleration thereof, and to determine whether or not the condition is work-related.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of a medical procedure and/or tests to appropriately diagnose a condition, ruling in or out work-relatedness and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Street,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County*

Bi-Products, Inc., W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on the appropriateness of the pulmonary tests recommended by Dr. McCarl.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondents shall pay the costs of all the pulmonary tests recommended by Jason McCarl, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The issue of work-relatedness, or an aggravation/acceleration, of the Claimant's breathing/lung condition is reserved for future decision.

DATED this_____day of March 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of March 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on August 12, 2016.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to a general award of reasonable and necessary medical benefits.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from September 9, 2016 and ongoing.

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary partial disability (TPD) benefits for various dates between August 12, 2016 and September 8, 2016.

STIPULATIONS

1. Claimant's average weekly wage is $1,089.75.

2. Banner Occupational Health in Loveland, Colorado is an authorized provider.

FINDINGS OF FACT

1. Claimant was employed by Employer as a machinist. Employer is a small machine shop that manufactures small production prototypes. Employer typically has 0-2 employees.

2. In the summer of 2016 Employer had a large job order that needed to be completed on a short timeline. Employer's owner, Jeff Hansen, and Claimant began working 12 hour opposite shifts to keep the machines going 24 hours per day in order to get the order completed. Claimant began working from approximately 8 p.m. to 8 a.m. while Mr. Hansen began working from 8 a.m. to 8 p.m.

3. For approximately two months, Claimant and Mr. Hansen worked 12 hour opposite shifts. When they became closer to completing the large order, Claimant and Mr. Hansen began scaling back their hours and slowing down production because they knew they would be able to meet the deadline.

4. On August 12, 2016 Claimant was working the night shift. At approximately 2:00 a.m. Claimant wheeled out a garbage can full of scrap aluminum

that he estimated weighed close to 100 pounds. Claimant squatted, lifted the can, and twisted to dump the can out in the dumpster when he felt a tweak in his mid back.

5. Claimant felt immediately like he had pulled a muscle. Within a day or two the pain got more intense and by the night of August 13, 2016 Claimant was in significant pain.

6. Claimant had August 13, 2016 off of work. By August 14, 2016 Claimant had reported to Mr. Hansen that he felt like he had pulled a muscle and that he was going to take it easy. Claimant did not request or seek medical treatment.

7. Claimant continued to work his regular schedule and duties but took it easy. Claimant could not work as physically and had to take the scrap metal bin out to the dumpster more frequently so that it did not get as full or weigh as heavy.

8. Approximately one week after the incident, Claimant had difficulty even getting out of bed.

9. On August 23, 2016 Claimant again reported the injury to Mr. Hansen because he had not gotten better and believed the injury was more serious than he initially thought. Mr. Hansen asked Claimant to put the date of the report of initial injury as either August 22 or 23 to comply with his workers' compensation reporting requirements.

10. Mr. Hansen filled out a report of injury, and referred Claimant for medical treatment.

11. On August 24, 2016 Claimant was evaluated at Banner Occupational Health Clinic by James Hebard, M.D. Claimant reported that he was lifting a heavy 100lb. barrel of scrap metal into a dumpster when he felt a tweak in his low back like he had pulled something. Claimant reported thinking it would fade and that he took the rest of the shift easy and rested at home. Claimant reported that the pain persisted and increased with stiffness so he reported the injury when he returned to work on August 15 but continued to try his regular duty and tried to take it easy. Claimant reported that the pain continued so he re-reported the injury and came in for treatment. *See* Exhibit H.

12. Claimant reported to Dr. Hebard that he had a history of chronic low back stiffness since working as a roofer in his teens and that he had routine episodes of low back soreness if he overdid it. Claimant reported having massage therapy and chiropractic treatment once per week for about 7 months. Claimant reported a tailbone contusion in approximately 1999 and also reported a right hand nail gun injury in 2012. Claimant reported pain of 8/10 on the pain scale along his lower back and bilateral hips. Dr. Hebard noted on examination that Claimant had joint pain, joint stiffness, muscle pain, muscle weakness, and back pain. Claimant was mildly tender to palpation over the lumbosacral spine, moved very slow and guarded. Dr. Hebard diagnosed

lumbosacral back strain and lumbar radiculopathy. Claimant was prescribed motrin, flexeril, and norco, was placed on light duty, and was referred for a lumbosacral MRI. *See* Exhibit H.

13. On August 29, 2016 Insurer took a recorded statement from Claimant. Claimant reported that the injury happened two weeks prior to reporting it and that he thought maybe he had just twisted wrong or something so he let it go initially and didn't say anything about it. *See* Exhibit AA.

14. On August 30, 2016 Claimant underwent an MRI of his lumbosacral spine interpreted by Bruce Berkowitz, M.D. Dr. Berkowitz found at level L4/5 a diffuse disc bulge with a superimposed far left lateral disc protrusion and moderate to severe left and mild right neural foraminal stenosis. At level L5/S1 Dr. Berkowitz found a broad based right lateral disc protrusion with a small free disc fragment present within the right central region and moderate right and moderate to severe left neural foraminal stenosis. *See* Exhibit I.

15. On August 31, 2016 Claimant was evaluated by Dr. Hebard. Dr. Hebard referred Claimant for a neurosurgery consultation to review the MRI. Claimant reported continued pain in the low back and bilateral right greater than left hips that had not improved despite medication and light duty work. The Claimant was scheduled to see Dr. Hebard again on September 21, 2016. *See* Exhibit J.

16. On September 8, 2016 Claimant felt increased and sharp pain in his right hip as he bent forward to throw away a piece of scotch brite. Claimant reported to Mr. Hansen that he thought he hurt his hip and that he had called the clinic to get in to see Dr. Hebard early. Claimant demonstrated what he had done when he felt the right hip pain. Mr. Hansen responded "really?" and informed Claimant to go home and tend to his hip and that he could no longer accommodate Claimant's restrictions.

17. Mr. Hansen contacted his insurance carrier to report this information and was instructed to complete another first report of injury. Claimant did not return to work after September 8, 2016.

18. On September 8, 2016 Claimant was evaluated by Dr. Hebard. Claimant reported that his right hip felt 40-50% worse after he bent forward at work, that his low back felt about the same, and that his left hip felt a little bit better. Claimant reported that he was tolerating light duty work without problems by taking things slow and taking his medications. Dr. Hebard noted that the neurosurgery consultation was coming up and that Claimant would return after that consult. *See* Exhibit J.

19. On September 16, 2016 Claimant was evaluated by neurosurgeon Beth Gibbons, M.D. Claimant reported low back and hip pain and mild leg pain. Claimant reported that he thought he injured his back while lifting and that it slowly worsened over the next week. Claimant reported being nearly unable to get out of bed when the pain was at its worst and that it was slightly better. Dr. Gibbons reviewed the MRI and

opined that the MRI showed Claimant's lumbar spine was generally healthy but with mild degenerative changes and areas with small disc herniations. Dr. Gibbons opined that the pain was most likely from the muscles, joints, and ligaments in the lower back and that surgery was not indicated. Dr. Gibbons recommended referral to physical therapy. *See* Exhibit K.

20. On September 29, 2016 Claimant underwent physical therapy. Claimant reported that he had lifted something heavy at work when he felt tightness in his back and thought he had pulled a muscle but that it kept getting worse. Claimant reported no previous back problems and that he performed an active job without difficulty that he could not tolerate now due to stiffness and pain limiting his mobility. *See* Exhibit L.

21. On November 2, 2016 Claimant was evaluated by Alicia Feldman, M.D. Claimant reported that he was lifting a garbage can with scrapped chips in it trying to get it in the big dumpster when he twisted wrong and hurt his thoracic spine. Claimant reported he thought he pulled a muscle but that after a week the pain got so bad that he couldn't get out of bed. Dr. Feldman diagnosed lumbar degenerative disc disease. *See* Exhibit M.

22. On November 7, 2016 Claimant was evaluated by Dr. Hebard. Claimant reported feeling overall about 50% better with some days with no real pain but just uncomfortable versus other days with 2/10 low back pain even at rest. Dr. Hebard continued to assess lumbosacral back strain and lumbar radiculopathy and continued to opine that the cause was related to work activities. *See* Exhibit N.

23. On November 18, 2016 Claimant underwent an independent medical evaluation performed by Douglas Scott, M.D. Claimant reported that prior to August 12, 2016 his back felt good and that he required no treatment. Claimant reported seeing a chiropractor prior to August 12 for adjustments with his last one sometime around February 2016. Claimant reported that he was never in pain, but needed to have his spine adjusted. Claimant reported that on August 12 he was lifting a garbage barrel of scrap metal into the dumpster at work when he felt immediate pain in his mid to lower back. Claimant reported that on September 8, 2016 he felt a sharp nerve like pain in his right hip when throwing some scotch brite pads into a trash container and leaning over at 5 degrees. Claimant could not recall a 2004 injury, could not recall a July 2013 motor vehicle accident, and reported that he had not been seen at Yellowstone Chiropractic in September of 2014 for a 2013 motor vehicle accident. Dr. Scott performed a medical records review and a physical examination. *See* Exhibit A.

24. Dr. Scott opined that Claimant had positive pain behavior that seemed to increase during the interview session. Dr. Scott opined that Claimant's spine was mal-aligned with curvature to the left in the lower thoracic and upper lumbar spine. Dr. Scott noted that Claimant had taut paraspinal musculature with associated tenderness, that Claimant's right shoulder blade was above the left, that Claimant's right iliac crest was above the left, and that the left SI joint was above the right. Dr. Scott also noted positive pelvic and scapular obliquity. Dr. Scott noted that Claimant had medical record

evidence of a pre-existing history of pain and stiffness in the thoracolumbar spine which required periodic chiropractic manipulative adjustment as recently as February 22, 2016 with pain at 8/10 and subluxations at L2 and L5. Dr. Scott noted that the MRI scan findings were suggestive of spondylosis with possible remote disk injury with a dislodged small free disk fragment at L5-S1. Dr. Scott opined that Claimant may have irritated his pre-existing back condition on August 12, 2016 but given the late reporting and his ability to work his regular job for 12 days before reporting, it was possible that Claimant irritated his pre-existing back condition but that the irritation did not persist for more than on the day of August 12, 2016. Dr. Scott opined that the findings on MRI were related to degenerative changes and that no acute structure findings were found to suggest an acute disk injury on August 12. Dr. Scott opined that Claimant should engage in daily home exercise for core strengthening and stretching of the lumbar spine and that Claimant might benefit from chiropractic adjustments or lumbar spine mobilization to correct the curvature in his lumbar spine. *See* Exhibit A.

25. On December 8, 2016 Claimant was evaluated by Dr. Hebard. Claimant reported feeling 100% worse with pain in the middle of his back and Claimant was upset that an MRI of his thoracic spine had been denied. *See* Exhibit Q.

26. On December 16, 2016 Claimant was evaluated at the emergency room of McKee Medical Center. Claimant reported bilateral low back pain that had increased over the last few days. Claimant reported an onset two days prior when he was lifting, turning, bending, and doing laundry at home and that at onset the degree of pain was moderate but that it was now severe. Claimant was provided with pain medications and was advised to follow up with his doctor as scheduled. *See* Exhibit R.

27. Claimant had prior injuries and treatment directed at his back.

28. On June 15, 2004 Claimant was evaluated by Dana Larson, M.D. Claimant reported lifting a 300 pound piece of metal with a coworker and that as he stood up he felt a sharp pain in his left mid back. Claimant reported the pain did not radiate but that it hurt to take a deep breath. Dr. Larson noted acute lumbar muscle spasms on examination. *See* Exhibit B.

29. On June 18, 2004 Claimant was evaluated by Howard Reeve, M.D. Claimant reported lifting a heavy frame when he injured or strained his back and that he was still having a lot of pain. Dr. Reeve recommended physical therapy, medications, an x-ray of the lumbar spine, and light duty work. *See* Exhibit D.

30. On September 23, 2014 Claimant was evaluated at Yellowstone Chiropractic by Ryan Laqua, D.C. Claimant reported aching pain in the upper back in the left and right, in the mid back on the left and right, and moderate pain in the lower back on the left and right. Claimant reported that his pain was persistent and aggravated by working as a card dealer. Dr. Laqua noted restricted range of motion in the cervical, thoracic, and lumbar regions and found subluxations in those areas that were adjusted. On the registration and history form Claimant reported his reason for

visit as his lower back mostly but all of the back, that his back normally hurt, everyday, and that the pain comes when he is dealing cards mostly. *See* Exhibit E.

31. On April 11, 2015 Claimant was evaluated at The Joint chiropractic by Ryan Gebhardt. Claimant reported low back pain at 8/10 and neck and upper back pain at 9/10. Claimant reported the reason for his visit was lower back/shoulders and that the pain was constant for the most part. On the pain diagram Claimant circled the lower and mid back, base of the neck, bilateral hips, and bilateral knees. Claimant reported a history of neck pain/stiffness, shoulder pain/stiffness, low back pain/stiffness, and upper back pain/stiffness. *See* Exhibit F.

32. Claimant continued to treat at The Joint chiropractic between April of 2015 and February of 2016 and treated approximately once per week for approximately 42 total visits. The pain ratings on each visit report remained identical to the first visit. *See* Exhibit F.

33. A few days prior to the alleged August 12, 2016 injury Claimant and Mr. Hansen had a conversation about Claimant's job security. Claimant was interested in buying a home and wished to know whether, if work slowed down, he or another employee would be let go first. Mr. Hansen explained that Claimant would be let go first because the Claimant was paid more and because Mr. Hansen was better able to take over Claimant's job duties without losing production.

34. Claimant testified at hearing. Claimant reported that between his last chiropractic visit in February of 2016 and the alleged injury in August of 2016 that he felt great and was working full time, overtime shifts, and performing his normal job duties including lifting cans full of scrap metal without problem. Claimant reported that he went to the chiropractor for soreness/tightness. Claimant reported that after August 12, 2016 he had trouble lifting the cans and that he was a lot slower at work. Claimant reported that Mr. Hansen told him the injury would be written as reported on August 23 since he had 12-24 hours to report to the insurance company. Claimant testified that Employer did not offer work to accommodate his restrictions after September 8, 2016. Claimant testified that when speaking with Insurer he stuck with the date of the reported injury that Mr. Hansen used because of what Mr. Hansen had told him about the reporting requirements. Claimant testified that he has been receiving unemployment benefits since approximately October of 2016 at a rate of approximately $510.00 per week.

35. Mr. Hansen also testified at hearing. Mr. Hansen testified that the first he had heard about the incident was on August 23, 2016 and that he had no memory of Claimant stating he had tweaked his back on August 12 or August 14. Mr. Hansen agreed that the scrap metal barrels could get up to 100 pounds. Mr. Hansen testified that Claimant reported to him on September 8, 2016 that Claimant had hurt his hip on September 6, 2016 and that he again called Insurer to report and filled out another new report of injury and told Insurer he could not accommodate Claimant's light duty restrictions any longer. Mr. Hansen testified that Claimant returned to day shifts on August 22, 2016 and that he did not notice any lapse in Claimant's production between

August 12, 2016 and August 23, 2016 and also did not notice any problems with Claimant walking or performing any job duties. Mr. Hansen testified that Claimant complained a lot about his back problems when working and that he had to leave early to go see a chiropractor. Mr. Hansen disagreed that Claimant lost hours at work because of the injury. Mr. Hansen testified that Claimant's hours lessened when they caught up on their large order and were able to slow down production and not due to an injury.

36. Dr. Scott also testified at hearing. Dr. Scott opined that Claimant might have irritated a pre-existing condition. However, Dr. Scott noted the prior evaluations and treatment by chiropractors for a pre-existing condition and found it significant that Claimant was able to perform his normal job duties between August 12 and August 23. Dr. Scott opined that usually with an acute work injury, it is immediately painful and reported early because someone knows they have been injured. Dr. Scott opined that Claimant did not sustain an injury to the spine on August 12, 2016 and that it was possible there was no injury or possible there was a strain on that date. Dr. Scott found it probable that no structural injury to the spine occurred, but possible that irritation of a pre-existing condition occurred. Dr. Scott also noted that he found mal-alignment of Claimant's spine on November 18, 2016 that had not been noted or reported earlier by any providers and noted that the mal-alignment was very apparent. Dr. Scott opined that Claimant's mal-alignment was musculature and a muscular imbalance where muscles on one side pull down more than muscles on the other side. Dr. Scott opined that the imbalance could be an indication of a recent acute injury. Dr. Scott agreed that the mechanism of injury made sense for a lumbar spine injury. Dr. Scott also noted that if Claimant had reported the injury within a few days of it occurring, his opinion would change.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. *See* § 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established, more likely than not, that he sustained a compensable injury on August 12, 2016. Claimant is credible and persuasive that on this date he felt a tweak in his back that became more intense within a few days. Claimant is also credible that he reported this to Mr. Hansen by August 14 but that he did not seek medical treatment and just took it easier on the job. Claimant is credible that by August 23, 2016 he had not gotten better and believed the injury was more serious than he initially thought so he made a report and sought treatment. Claimant is also credible that when he did so, Mr. Hansen listed the date of the initial report as August 23 and that he agreed to go along with that as the reporting date due to what Mr. Hansen reported to him as an insurance requirement.

Claimant’s reports of the mechanism of injury have been consistent throughout the claim and are found credible. Claimant’s reports of the onset of pain are also found

credible. Although Claimant has a history of back pain and prior treatment, Claimant was working full duty in a fairly demanding job and was working 12 hour shifts leading up to the injury. Claimant was able to perform his job duties prior to the injury without restriction. Although Claimant had pre-existing issues in his back, the ALJ concludes that Claimant's work duties on August 12, 2016 and the tweak while lifting the can of scrap metal aggravated, accelerated, or combined with Claimant's pre-existing issues to produce both disability and the need for medical treatment that did not exist leading up to August 12. Prior to August 12 Claimant was working long shifts in a fairly demanding job. Afterwards, and due to the injury on August 12, Claimant was unable to continue with his normal duties. Dr. Scott agreed that Claimant may have irritated a pre-existing condition and noted mal-alignment of the spine that could be indicative of a recent acute injury. Notably, in prior chiropractic treatment records over a long period of time, no mal-alignment of the spine was noted. Dr. Scott also based a large part of his opinion on the fact that Claimant did not report the injury within a few days. However, the ALJ credits Claimant's testimony that he advised Employer by August 14 that he had tweaked his back, was going to take it easy, and didn't need treatment. Claimant reasonably believed his back would get better and when it didn't, sought treatment less than two weeks after the injury.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has established that he sustained a compensable work related injury and that he is entitled to a general award of reasonable and necessary medical benefits. Respondents are liable for medical treatment that is reasonable and necessary and retain their right to object to any specific treatment recommendations in the future.

Temporary Total Disability (TTD)

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively

and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

Claimant has established that he sustained a compensable work related injury, and that he had restrictions of body function due to his pain and limitations following the injury and that he sustained wage loss as a result of his limitations and disability. As found above, Employer was unable to accommodate Claimant's restrictions and Claimant's last day of work was September 8, 2016. Claimant has established an entitlement to TTD benefits beginning September 9, 2016 as following that date he left work due to his injury and disability and suffered actual wage loss. As found above, Claimant testified as to his receipt of unemployment insurance benefits and Respondents are entitled to an offset for this.

Temporary Partial Disability (TPD)

Claimant has failed to establish an entitlement to TPD benefits. Although wage records show that beginning August 24, 2016 Claimant's total work hours were reduced and although on some of the dates where he had reduced hours, Claimant had medical appointments, the evidence is also persuasive that at this same time production had slowed down. Claimant has failed to establish a causal connection between any reduced hours and his work injury. It is unclear and insufficient evidence was offered to connect reduced hours on any specific dates to Claimant's injury versus just being due to a slower production schedule.

ORDER

1. Claimant has established by a preponderance of the evidence that he sustained a compensable injury on August 12, 2016.

2. Claimant is entitled to a general award of reasonable and necessary medical benefits to treat his August 12, 2016 injury.

3. Claimant has established an entitlement to TTD benefits from September 9, 2016 and ongoing until terminated by law.

4. Claimant has failed to establish an entitlement to TPD benefits. His claim for TPD on various dates between August 12, 2016 and September 9, 2016 is denied and dismissed.

5. Respondents are entitled to an offset for Claimant's receipt of unemployment benefits.

6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 16, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

Whether Respondent has demonstrated by a preponderance of the evidence that Claimant did not suffer industrial injuries to his lumbar and cervical spines during the course and scope of his employment with Employer on February 20, 2015.

FINDINGS OF FACT

1. Claimant worked for Employer as a Custodian. On February 20, 2015 he was walking through a band room in a school while performing his job duties. Claimant stepped on drumsticks, fell to the floor and landed on his right buttock, right knee and right hip. He got up from the floor and continued to perform his work activities.

2. Claimant explained that he attempted to sit down during a break. However, he experienced significant pain in his tailbone area. He also noted that he began to suffer pain in his right hip and right knee.

3. On February 21, 2015 Claimant visited the Longmont Clinic for an examination. Claimant reported that his worst pain was located in the small of the back and tailbone. He was diagnosed with a closed traumatic fracture of the coccyx with injuries to the right knee and right hip.

4. On February 25, 2015 Claimant visited Firestone Family Medicine for an evaluation. Claudia Williams, M.D. diagnosed Claimant with a right knee injury, a right hip injury and a coccyx fracture/sprain.

5. On February 27, 2015 Claimant returned to Firestone Family Medicine for an examination. Ruth A. Vanderkool, M.D. diagnosed Claimant with coccydynia, right hip pain and right knee pain. She remarked that Claimant's conditions were at least 50% likely to have been caused by his work activities.

6. On March 6, 2015 Claimant again visited Firestone Family Medicine for an evaluation. Dr. Vanderskool diagnosed Claimant with "pain in joint, pelvic region and thigh; pain in joint, lower leg." She noted that Claimant was able to return to modified duty work from March 7, 2015 until March 13, 2015.

7. On May 28, 2015 Claimant returned to Firestone Family Medicine for an examination. Authorized Treating Physician (ATP) Heather Banks, M.D. remarked that Claimant's work-related diagnoses included right knee pain, right hip pain and coccydynia. She released Claimant to regular duty employment with no restrictions.

8. By July 17, 2015 Claimant again visited Dr. Banks for an examination. Dr. Banks reiterated that Claimant's work-related diagnoses included right knee pain, right

hip pain and coccydynia. She noted that Claimant's right hip pain had improved. Dr. Banks commented that Claimant had undergone an orthopedic consultation, received physical therapy and taken medications for his February 20, 2015 industrial injuries. She again released Claimant to regular duty employment with no restrictions.

9. On August 14, 2015 Claimant returned to Dr. Banks for an evaluation. She continued to diagnose him with right knee pain, right hip pain and coccydynia.

10. On September 24, 2015 Claimant again visited Dr. Banks. Dr. Banks noted that Claimant was no longer suffering pain in his coccyx. She explained that Claimant's right hip pain had resolved after an injection and physical therapy had helped his right knee pain. In addressing Claimant's lower back concerns, Dr. Banks stated that Claimant had been suffering symptoms since his August 14, 2015 appointment. Dr. Banks also remarked that Claimant had reported "he does not know if he had this from the beginning because everything else hurt so bad." She also commented that Claimant's back pain began approximately three weeks earlier. Dr. Banks determined that Dr. Vanderkool's first M-164 Form revealed a medical diagnosis of lower back pain. However, she summarized that Claimant "has never complained of low back pain to me before." Dr. Banks specifically characterized Claimant's lower back pain as "new." She speculated that Claimant may not have mentioned lower back pain because he had been sitting for months as his tailbone was healing.

11. Dr. Banks addressed Claimant's lower back symptoms at a November 5, 2015 evaluation. She explained that x-rays revealed degenerative changes to Claimant's "lower lumbar spine with narrowing of L4-5 and L5-S1 but no subluxation or flexion or extension views." Dr. Banks referred Claimant for an MRI.

12. On November 13, 2015 Respondent filed a General Admission of Liability (GAL). The GAL recognized that Claimant was entitled to receive medical benefits, Temporary Total Disability (TTD) benefits and Temporary Partial Disability (TPD) benefits as a result of his February 20, 2015 injuries.

13. Claimant subsequently received bilateral sacroiliac joint injections and medial branch blocks. He also underwent numerous massage therapy sessions directed to his hip, knee, sacral attachment, iliac crest, trochanter-femur attachments and glutral musculature.

14. On March 16, 2016 Claimant returned to Dr. Banks for an evaluation. He reported pain and numbness in his hands. Claimant inquired whether his hand symptoms were related to his fall on February 20, 2015. Dr. Banks responded that his symptoms were unlikely related to the February 20, 2015 incident because he had not previously mentioned them. She also advised Claimant to ask his spine surgeon whether he had suffered a new injury or his symptoms were caused by chronic, long-standing, degenerative disc disease.

15. On April 5, 2016 Claimant underwent C3-C4 and C4-C5 neck surgery. At an April 16, 2016 visit with Dr. Banks Claimant reported that he was uncertain if he had any back pain because he was on "tons" of medication after his neck surgery.

16. On June 30, 2016 Claimant underwent an independent medical examination with Henry J. Roth, M.D. Dr. Roth thoroughly reviewed Claimant's medical records and conducted a physical examination. He concluded that Claimant's lumbar and cervical spine symptoms were not related to the February 20, 2015 industrial incident. Dr. Roth detailed that Claimant did not initially report middle and lower back symptoms after the February 20, 2015 incident. In fact, Claimant did not mention "lumbar discomfort and bilateral sciatica" until September 24, 2015. Dr. Roth specifically remarked that "prior to that point in time there were no complaints of right or left-sided low back, and no left-sided gluteal, hip or leg symptoms." Although Claimant had mentioned to Dr. Vanderkool that he had pain in the small of his back and tailbone on February 21, 2015, an examination did not reveal any "lumbar tenderness on palpation." Dr. Roth commented that on September 24, 2015 Dr. Banks had characterized Claimant's lumbar discomfort as a "new symptom" after treating him since April 3, 2015. Moreover, Dr. Roth commented that Claimant did not mention upper back or cervical pain to Dr. Banks until March 16, 2016. He explained that it was not medically probable that Claimant's lumbar and cervical symptoms "would have escaped 29 medical appointments over a 7 month timeframe."

17. Dr. Roth reasoned that Claimant's November 13, 2015 MRI revealed pre-existing degenerative changes in Claimant's back. The February 20, 2015 incident did not aggravate Claimant's pre-existing, degenerative condition because his symptoms would have manifested shortly after the February 20, 2015 incident instead of failing to appear for approximately seven months. Based on Claimant's delayed onset of back symptoms and degenerative condition Dr. Roth concluded that his lumbar and cervical spine conditions were not caused or aggravated by the February 20, 2015 incident.

18. Claimant testified at the hearing in this matter. He attributed his lumbar and cervical spine symptoms to the February 20, 2015 industrial incident. He explained that he suffered from lower back and coccyx pain immediately after he slipped and fell on the drumsticks at work. However, he was uncertain of the location of his back pain and his coccyx area was the most painful. Claimant explained that, although he had previously experienced muscle spasms in his lower back, after the accident he suffered muscle spasms higher on his back and they occurred with more frequency. Claimant acknowledged that he did not begin to experience neck or cervical pain until the Spring of 2016 but nevertheless attributed his symptoms to the February 20, 2015 incident.

19. Dr. Roth testified at the hearing in this matter. He maintained that the February 20, 2015 incident did not cause, aggravate or accelerate Claimant's lumbar and cervical spine symptoms. He reiterated that it was not medically probable that Claimant's back symptoms would not manifest for approximately seven months after the industrial event. Moreover, Dr. Banks had characterized Claimant's report of lumbar discomfort as a "new" symptom on September 24, 2015. Accordingly, Dr. Roth reasoned that the February 20, 2015 industrial incident did not aggravate, accelerate or

combine with Claimant's February 20, 2015 industrial incident to produce a need for medical treatment.

20. Respondent has demonstrated that it is more probably true than not that Claimant did not suffer industrial injuries to his lumbar and cervical spines during the course and scope of his employment with Employer. On February 20, 2015 Claimant slipped on drumsticks and fell to the floor while performing his job duties. On February 21, 2015 Claimant was diagnosed with a closed traumatic fracture of the coccyx with injuries to the right knee and right hip. Claimant regularly visited ATP Dr. Banks and received significant treatment for his injuries including injections, medial branch blocks and massage therapy. On November 13, 2015 Respondent filed a GAL recognizing that Claimant was entitled to receive medical benefits, TTD benefits and TPD benefits as a result of his February 20, 2015 injuries. On September 24, 2015 Claimant mentioned to Dr. Banks that he had been suffering from lower back pain. Dr. Banks summarized that Claimant had "never complained of low back pain to me before." She specifically characterized Claimant's lower back pain as "new." On March 16, 2016 Claimant noted pain and numbness in his hands. Dr. Banks responded that his symptoms were unlikely related to the February 20, 2015 incident because he had not previously mentioned them. She also advised Claimant to ask his spine surgeon whether he had suffered a new injury or his symptoms were caused by chronic, long-standing, degenerative disc disease.

21. Claimant attributed his lumbar and cervical spine symptoms to the February 20, 2015 industrial incident. He explained that he suffered from lower back and coccyx pain immediately after he slipped and fell on the drumsticks at work. However, he was uncertain of the location of his back pain and his coccyx area was the most painful. Claimant acknowledged that he did not begin to experience neck or cervical pain until the Spring of 2016 but nevertheless attributed his symptoms to the February 20, 2015 incident. In contrast to Claimant's testimony, the medical records reveal that Claimant did not mention lower back pain until approximately seven months after the March 20, 2015 industrial incident. Although Claimant consistently reported right hip, right knee and coccyx symptoms, he did not report cervical or lumbar symptoms. The temporal delay in reporting lumbar and cervical symptoms suggests that they were not caused by the March 20, 2015 incident.

22. The persuasive testimony of Dr. Roth also reveals that Claimant likely did not suffer cervical or lumbar injuries as a result of the February 20, 2015 incident. Dr. Roth detailed that Claimant did not initially report middle and lower back symptoms after the February 20, 2015 incident. In fact, Claimant did not mention "lumbar discomfort and bilateral sciatica" until September 24, 2015. Dr. Roth specifically remarked that "prior to that point in time there were no complaints of right or left-sided low back, and no left-sided gluteal, hip or leg symptoms." Although Claimant had mentioned to Dr. Vanderkool that he had pain in the small of his back and tailbone on February 21, 2015, an examination did not reveal any "lumbar tenderness on palpation." Dr. Roth commented that on September 24, 2015 Dr. Banks had characterized Claimant's lumbar discomfort as a "new symptom" after treating him since April 3, 2015. In fact, Dr. Roth noted that on September 24, 2015 Dr. Banks remarked that Claimant's lumbar

discomfort and “new sensation in the posterior aspect of both the upper legs” had only been present for three weeks. Moreover, Dr. Roth commented that Claimant did not mention upper back or cervical pain to Dr. Banks until March 16, 2016. He thus explained that it was not medically probable that Claimant’s lumbar and cervical symptoms “would have escaped 29 medical appointments over a 7 month timeframe.” He maintained that the February 20, 2015 incident did not cause, aggravate or accelerate Claimant’s lumbar and cervical spine symptoms. Accordingly, based on the medical records, temporal proximity of symptoms, Claimant’s degenerative back condition and the persuasive testimony of Dr. Roth, Respondent has demonstrated that the February 20, 2015 industrial incident did not likely aggravate, accelerate or combine with Claimant’s pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d

571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2016), C.R.S. On November 13, 2015 Respondents filed a GAL recognizing that Claimant was entitled to receive medical benefits, TTD benefits and TPD benefits as a result of his February 20, 2015 industrial injuries. Accordingly, Respondents bear the burden of proving that it is entitled to withdraw the GAL.

8. As found, Respondent has demonstrated by a preponderance of the evidence that Claimant did not suffer industrial injuries to his lumbar and cervical spines during the course and scope of his employment with Employer. On February 20, 2015 Claimant slipped on drumsticks and fell to the floor while performing his job duties. On February 21, 2015 Claimant was diagnosed with a closed traumatic fracture of the coccyx with injuries to the right knee and right hip. Claimant regularly visited ATP Dr. Banks and received significant treatment for his injuries including injections, medial branch blocks and massage therapy. On November 13, 2015 Respondent filed a GAL recognizing that Claimant was entitled to receive medical benefits, TTD benefits and TPD benefits as a result of his February 20, 2015 injuries. On September 24, 2015

Claimant mentioned to Dr. Banks that he had been suffering from lower back pain. Dr. Banks summarized that Claimant had "never complained of low back pain to me before." She specifically characterized Claimant's lower back pain as "new." On March 16, 2016 Claimant noted pain and numbness in his hands. Dr. Banks responded that his symptoms were unlikely related to the February 20, 2015 incident because he had not previously mentioned them. She also advised Claimant to ask his spine surgeon whether he had suffered a new injury or his symptoms were caused by chronic, long-standing, degenerative disc disease.

9. As found, Claimant attributed his lumbar and cervical spine symptoms to the February 20, 2015 industrial incident. He explained that he suffered from lower back and coccyx pain immediately after he slipped and fell on the drumsticks at work. However, he was uncertain of the location of his back pain and his coccyx area was the most painful. Claimant acknowledged that he did not begin to experience neck or cervical pain until the Spring of 2016 but nevertheless attributed his symptoms to the February 20, 2015 incident. In contrast to Claimant's testimony, the medical records reveal that Claimant did not mention lower back pain until approximately seven months after the March 20, 2015 industrial incident. Although Claimant consistently reported right hip, right knee and coccyx symptoms, he did not report cervical or lumbar symptoms. The temporal delay in reporting lumbar and cervical symptoms suggests that they were not caused by the March 20, 2015 incident.

10. As found, the persuasive testimony of Dr. Roth also reveals that Claimant likely did not suffer cervical or lumbar injuries as a result of the February 20, 2015 incident. Dr. Roth detailed that Claimant did not initially report middle and lower back symptoms after the February 20, 2015 incident. In fact, Claimant did not mention "lumbar discomfort and bilateral sciatica" until September 24, 2015. Dr. Roth specifically remarked that "prior to that point in time there were no complaints of right or left-sided low back, and no left-sided gluteal, hip or leg symptoms." Although Claimant had mentioned to Dr. Vanderkool that he had pain in the small of his back and tailbone on February 21, 2015, an examination did not reveal any "lumbar tenderness on palpation." Dr. Roth commented that on September 24, 2015 Dr. Banks had characterized Claimant's lumbar discomfort as a "new symptom" after treating him since April 3, 2015. In fact, Dr. Roth noted that on September 24, 2015 Dr. Banks remarked that Claimant's lumbar discomfort and "new sensation in the posterior aspect of both the upper legs" had only been present for three weeks. Moreover, Dr. Roth commented that Claimant did not mention upper back or cervical pain to Dr. Banks until March 16, 2016. He thus explained that it was not medically probable that Claimant's lumbar and cervical symptoms "would have escaped 29 medical appointments over a 7 month timeframe." He maintained that the February 20, 2015 incident did not cause, aggravate or accelerate Claimant's lumbar and cervical spine symptoms. Accordingly, based on the medical records, temporal proximity of symptoms, Claimant's degenerative back condition and the persuasive testimony of Dr. Roth, Respondent has demonstrated that the February 20, 2015 industrial incident did not likely aggravate, accelerate or combine with Claimant's pre-existing condition to produce a need for medical treatment.

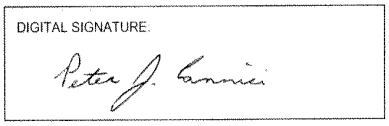
ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: March 21, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to maintenance medical treatment after being placed at maximum medical improvement ("MMI").

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On March 14, 2015, Claimant, who was a lift operator, was seriously injured while skiing at work. Claimant was snowboarding down the mountain after a shift and he unintentionally skied over the edge of a cat walk and struck a tree. He was taken to Vail Valley Medical Center and stabilized. Multiple injuries were noted, including a comminuted fracture of the left scapula, traumatic brain injury, C1 fracture and C2 fracture, left sided pneumothorax, left second rib fracture, left lateral fifth, eighth, ninth, tenth, and eleventh rib fractures, splenic laceration, bilateral sacral fractures, L5 lamina and spinous process fracture, numerous lung contusions and lacerations with partially collapsed left lung, and pneumomediastinum.

2. Due to the severity of his injuries, Claimant was transferred to Denver Health Medical Center Hospital. Further evaluation revealed likely fourth through eleventh rib fractures and left L2-5 transverse process fractures. He was treated conservatively during his inpatient stay at Denver Health Medical Center.

3. On, or about, April 6, 2015, Claimant went back to his home with family in Connecticut. At that time, he was primarily confined to a wheelchair.

4. Claimant was seen and evaluated by Dr. Lauren Burke of Orthopedic Associates of Hartford. At that time, cervical spinal stabilization with fusion was recommended.

5. On June 12, 2015, Claimant underwent ORIF [fusion] of his C2 fracture via an anterior approach, anterior cervical discectomy of C2-3, with use of structural allograft and anterior plating at the C2-3.

6. On follow-up evaluation, it was determined that there was hardware failure.

7. On July 1, 2015, Claimant underwent a revision fusion with replacement of structural allograft at the C2-3 disc space. Thereafter, Claimant continued with conservative strategies, self-management techniques, and slow reintegration to improving activities through a home exercise program.

8. On January 18, 2016, Claimant returned to Dr. Burke. Dr. Burke indicated that she was pleased with Claimant's progress. X-rays were taken and showed some consolidation of the graft and no lucency of the hardware. Dr. Burke advised Claimant to see a spine surgeon the "next year" prior to beginning skiing and to have additional x-rays taken to ensure that he has had fusion.

9. Claimant returned to Colorado.

10. On July 29, 2016, Claimant was placed placed at MMI by Dr. Brian McIntyre. In his July 29, 2016 report, Dr. McIntyre stated the following regarding maintenance care:

> "I strongly encourage an evaluation with a spine surgeon, preferably Dr. Stewart Levy, M.D., prior to any high impact activity or skiing/snowboarding. I am optimistic that after this evaluation, Dr. Levy will be able to opine further on the status of fusion and this may directly impact activity as well as possibility of some future difficulties that he may have in terms of his high fusion level. I am not aware of any known immediate threat to his encountering deterioration in physical functioning over the next 5-10 years, at least.
>
> He is well versed in self-management strategies, as well as further counseling provided today regarding muscle relaxation and self massage as well as local use of muscle rub-benefits. I'm optimistic that he'll be able to stay at MMI, without further need for intervention, or formal therapeutic activities, or medications."

11. On August 15, 2016, Dr. McIntyre issued another report. In this report, he determined Claimant's impairment rating and again commented on maintenance care. Dr. McIntyre again stated:

> I strongly encourage an evaluation with a spine surgeon, preferably Dr. Stewart Levy, M.D., prior to any high impact activity or skiing/snowboarding. I am optimistic that after this evaluation, Dr. Levy will be able to opine further on the status of fusion and this may directly impact activity as well as possibility of some future difficulties that he may have in terms of his high fusion level.

12. Claimant is not currently taking any medications due to his work related injuries.

13. Claimant is able to manage his pain at this time through self massage and other self directed techniques.

14. The medical treatment recommended by Dr. Burke and Dr. McIntrye is post MMI.

15. On January 23, 2017, Respondent authorized Claimant to see Dr. Levy for a one time evaluation. However, as of the date of the hearing, Claimant had not been evaluated by Dr. Levy.

16. Claimant testified that he has to be more careful since his occupational injury as he feels that he is more prone to injury and he cannot engage in all of the same activities that he would prior to the injury. However, the extent of his restrictions and the types of activities he can engage in have not been determined since the status of his fusion is unknown.

17. The care recommended by Dr. Burke and Dr. McIntyre is to maintain maximum medical improvement and can reasonably be expected to prevent a deterioration of Claimant's condition.

18. Dr. McIntyre referred Claimant to a spinal surgeon, Dr. Levy, to evaluate Claimant's spinal fusion to see if it has fused. This is consistent with the recommendation made by Dr. Burke on January 18, 2016, in which she recommended an evaluation the following year with a spine surgeon to make sure Claimant's neck has fused. It is anticipated that Dr. Levy will evaluate the status of Claimant's fusion and render an opinion about Claimant's restrictions based on the status of his fusion.

19. Determining the status of Claimant's fusion, post MMI, is reasonable and necessary to monitor Claimant's work related injury. The status of Claimant's fusion could result in the need for additional treatment. Moreover, the status of Claimant's fusion will be used to determine current restrictions for Claimant.

20. Having a spinal surgeon, such as Dr. Levy, evaluate Claimant post MMI, and determine restrictions is reasonable and necessary to maintain Claimant at MMI and can reasonably be expected to prevent Claimant's condition from deteriorating. Claimant is very active and currently working at Big O Tires, which involves quite a bit of physical lifting, carrying, pushing and pulling. If Claimant's restrictions are not delineated, Claimant could end up engaging in activities that worsen his condition.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Section 8-42-101(1), C.R.S., requires the employer or insurer to provide medical benefits which are reasonable and necessary to cure and relieve the industrial injury. See *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). However, this obligation terminates at maximum medical improvement, and after that point, Claimant may obtain future medical benefits only to maintain maximum medical improvement or to prevent a deterioration of his condition. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

Claimant is entitled to *Grover*-type medical benefits where there is substantial evidence in the record to support a determination that future medical treatment will be reasonable and necessary "to relieve a claimant from the effects of an [industrial] injury" or prevent further deterioration of the claimant's condition. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

Moreover, an award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999).

Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). In establishing entitlement to *Grover*-type benefits, Claimant is not required to prove that a "particular" or "specific course of treatment" is anticipated. *See Stollmeyer v. Industrial Claim Appeals Office, supra*. Furthermore, there is no distinction between "active treatment" and "diagnostic procedures." *See Brock v. Jack Brach and Sons Trucking*, W.C. No. 3-107-451, December 15, 1995; *Atwood v. Western Slope Industries*, W.C. No. 3-069-135, November 28, 1994 (medical monitoring compensable). To the contrary, the court has held that once Claimant establishes a need for future medical treatment, "such medical treatment irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or prevent deterioration of the claimant's present condition." *See Milco Construction v. Cowan*, 860 P.2d 542.

The post MMI treatment recommended by Dr. Burke and Dr. McIntyre is in the form of an evaluation by a spinal surgeon. This evaluation is necessary to determine whether Claimant's fusion has fused. This evaluation is also necessary to determine appropriate restrictions based on Claimant's current condition. The determination of proper restrictions based on Claimant's current condition is necessary to determine the type of activities in which Claimant can participate. The failure to properly evaluate Claimant and determine his current restrictions can reasonably be expected to cause a deterioration of Claimant's condition. Therefore, the post MMI treatment, in the form of

an evaluation, is reasonable and necessary medical treatment which is intended to relieve Claimant from the effects of his injury and prevent further deterioration of Claimant's condition. Thus, this ALJ concludes that Claimant has proven his entitlement to maintenance medical treatment.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Insurer shall provide maintenance medical treatment.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 3-17-17

/s/ Glen B. Goldman
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Determination of a just and equitable allocation of death benefits between Spouse Claimant and Minor Claimant.

2. Determination of proper safeguarding and disposition of Minor Claimant's benefits.

3. Determination of which party is responsible for the payment of the GAL's attorney fees.

FINDINGS OF FACT

1. Decedent worked for Employer as a driver and laborer. Decedent died on April 16, 2014 as a result of injuries arising out of and in the course of his employment.

2. At the time of his death, Spouse Claimant was pregnant with Decedent's son. Minor Claimant was born approximately three months after his father's death and was born on July 23, 2014.

3. Respondents admitted to death benefits for Minor Claimant only. Spouse Claimant contended that she was the common law spouse of Decedent and the matter went to hearing to determine whether or not she was entitled to death benefits.

4. A hearing before ALJ Cain was held on June 19, 2015. In an Order dated November 18, 2015, ALJ Cain found that Spouse Claimant had proven that she became Decedent's common law spouse after she turned 18 and before Decedent's April 16, 2014 death and that she was Decedent's dependent for purposes of § 8-41-501(1)(a), C.R.S. ALJ Cain found and that both she and Minor Claimant were dependents entitled to death benefits. *See* Exhibit A.

5. ALJ Cain ordered that another hearing be set to determine issues including allocation of death benefits between the dependents, proper safeguarding and disposition of the minor child's benefits, and payment of the GAL's attorney fees. *See* Exhibit A.

6. On November 10, 2016 Spouse Claimant applied for hearing on the issue of apportionment of death benefits. *See* Exhibit B.

7. On November 18, 2016 GAL on behalf of Minor Claimant filed a response to the application for hearing endorsing apportionment of death benefits, request for appointment of conservator for Minor Claimant's benefits at the expense of

Respondents, and determination of which party was responsible for payment of reasonable fees and costs of the GAL. *See* Exhibit D.

8. At hearing, Respondents took no position on the allocation of death benefits. Respondents maintained their position that Spouse Claimant was not a dependent and indicated their intent to appeal the decision of ALJ Cain once the benefits were allocated as their first appeal was dismissed as being interlocutory.

9. At hearing, GAL on behalf of Minor Claimant and Respondents submitted a stipulation. Spouse Claimant was not a party to the stipulation. The stipulation requested appointment of a conservator for Minor Claimant. The stipulation indicated that GAL sought a lump sum benefit for Minor Claimant and that the lump sum be deposited in an account of the conservator's choosing subject to withdrawal only upon good cause and with an Order from the Director of the Division of Workers' Compensation or his representative until Minor Claimant's 18th birthday. The stipulation provided that the lump sum benefits be available to Minor Claimant when he turns 18 years of age. The stipulation provided that the conservator provide a report once per year to both the Division of Workers' Compensation and to Spouse Claimant. *See* Exhibit E.

10. GAL requested that Craig Eirich, settlement specialist, be designated as the conservator for Minor Claimant's lump sum proceeds and noted that Mr. Eirich had agreed to act as conservator. *See* Exhibit E.

11. GAL also requested that her fees be paid at the rate of $150.00 per hour and that Insurer be responsible for the fees. GAL and Respondents noted in the stipulation that $150.00 per hour is the rate that Pinnacol Assurance pays for GAL services and that when a GAL is requested or appointed in a case that Pinnacol is involved in, Pinnacol typically pays for the legal services provided by the GAL. *See* Exhibit E.

12. GAL requested that the apportionment of death benefits be split equally between Minor Claimant and Spouse Claimant, with 50% to each.

13. Spouse Claimant was self-represented and agreed that she wished to proceed at hearing without legal counsel. Spouse Claimant requested that the death benefits be allocated 80% to her and 20% to a protected account for her son. Spouse Claimant indicated that she needed more than half of the benefits as requested by GAL so that she could care for her son and herself and indicated her desire to purchase a home.

14. Respondents requested that the GAL fees be split equally between Respondents and Minor Claimant. Respondents noted that although they requested the GAL, they had an ethical obligation to do so because of the potential conflict of interest between Spouse Claimant and Minor Claimant. Respondents argued that Minor Claimant had a great interest in having legal representation and that equity should require splitting the fees.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *See* § 8-43-201(1).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. *See* § 8-43-201(1). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions.

Allocation of death benefits

Section 8-42-121, C.R.S. provides that death benefits shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable. The ALJ has reviewed the positions of the parties and determines that Spouse Claimant's request for 80% of the death benefits is just and equitable. The ALJ determines that a just and equitable split of the death benefits is 80% to Spouse Claimant and 20% to Minor Claimant. As Minor Claimant is only two years of age, and in the care of Spouse Claimant, Spouse Claimant has established that she will have significant costs in raising and caring for Minor Claimant and that a split of benefits in this percentage will assist her in caring for and meeting the everyday basic needs of Minor Claimant. As indicated by the parties in their stipulation, Spouse Claimant has only an 8th grade Mexican education, moved to the United States in March of 2013 to live with Decedent and was supported by Decedent. Although GAL on behalf of Minor Claimant requested a split of 50% to each, this is not found reasonable since the percent that goes to Spouse Claimant also has to be used to meet the basic needs of Minor Claimant for the next 16 years. Setting aside 20% in a protected account for Minor Claimant to access when he turns 18 and providing 80% to Spouse Claimant is sufficient to both provide benefits to Minor Claimant but to also ensure that Minor Claimant's basic needs for the next 16 years are met and this split is deemed just and equitable.

Conservator for Minor Claimant

Section 8-42-122, C.R.S. provides that in all cases of death where the dependents are minor children the director may protect the rights and interests of any dependents that the director deems incapable of fully protecting their own interests by depositing the payments in specific accounts or providing for the manner and method of safeguarding payments due to dependents in such manner as the director sees fit. As Minor Claimant is only two years of age, the ALJ determines that Minor Claimant is incapable of fully protecting his own interests and the ALJ determines that the appointment of a conservator of the estate is appropriate. This appointment of conservator to handle Minor Claimant's death benefits shall continue until Minor Claimant reaches the age of 18. Minor Claimant does not have the capacity to manage his own funds at this time and the GAL has established that the payment of lump sum death benefits and the appointment of a conservator are in Minor Claimant's best interest. GAL has found a specialist who is qualified to be conservator and who has agreed to be conservator for Minor Claimant. The ALJ thus appoints Craig Eirich to be the conservator of Minor Claimant's death benefits until Minor Claimant reaches the age of 18. Respondents shall pay death benefits to Minor Claimant in a lump sum. Mr. Eirich shall deposit the lump sum in an account of his choosing subject to withdrawal only upon good cause and with an Order from the Director of the Division of Workers' Compensation or his representative until Minor Claimant's 18th birthday. Mr. Eirich shall provide an annual statement to Minor Claimant's mother, Spouse Claimant, and to the Division of Workers' Compensation. Such annual statement shall be due June 1, of each year.

Payment of GAL's attorney fees.

Section 8-43-207(1)(l), C.R.S. provides the authority for an ALJ to appoint guardians ad litem, as appropriate, in matters involving dependents' claims and to assess the reasonable fees and costs therefore from one or more of the parties.

Here, a GAL was appointed to represent Minor Claimant's interests. GAL requests to be paid at the rate of $150.00 per hour for services she has provided. The ALJ determines that $150.00 per hour is a reasonable fee for attorney services provided to Minor Claimant and is consistent with the rate paid by another major insurer in Colorado. Further, the ALJ determines that the costs of the GAL services shall be paid for by Insurer. The ALJ determines this to be just and equitable and consistent with the approach of another major Insurer in Colorado.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the ALJ enters the following order:

1. A just and equitable split of death benefits is found to be 80% to Jennifer Munoz Botello and 20% to Jose Balquier Munoz Jr.

2. Respondents shall pay Minor Claimant's death benefits in a lump sum to conservator Craig Eirich. Mr. Eirich shall deposit the lump sum death benefits in an account of his choosing subject to withdrawal only upon good cause AND with an Order from the Director of the Division or Workers' Compensation or his representative until Minor Claimant's 18th birthday. Mr. Eirich shall provide annual statements to the Division of Workers' Compensation and to Jennifer Munoz Botello by June 1 of each year.

3. GAL Janet Frickey shall be paid for her reasonable fees and costs at a rate of $150.00 per hour. Insurer shall pay for these fees. Ms. Frickey shall submit a bill to Insurer within 30 days of the date of this order.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 21, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician Greg Reichhardt, M.D. regarding maximum medical improvement (MMI).

2. Whether Respondents have overcome by clear and convincing evidence the opinion of DIME physician Dr. Reichhardt on permanent partial disability (PPD).

FINDINGS OF FACT

1. Claimant is employed by Employer as a flight attendant.

2. On March 1, 2015 Claimant was on a flight when the airplane hit a patch of turbulence. The turbulence knocked Claimant into the airplane's rear galley door and Claimant's back struck the door's handle.

3. On March 2, 2015 Claimant was evaluated at Concentra by Stephanie Missey, PA-C. Claimant reported dull and aching lower back pain and stiffness without any radiation that began after she was thrown into a door handle when an airplane she was working on hit turbulence. When her vitals were checked by Joshua Urdank, Claimant reported a pain scale level of 5/10. With PA Missey, Claimant reported her pain level as 3/10. Claimant did not report any prior back problems. PA Missey noted on examination that Claimant had tenderness in the lumbar spine (paraspinal, L3, L4, L5, and S1). PA Missey assessed low back strain and muscle spasm and prescribed metaxalone for muscle spasm and naproxen for the low back strain. *See* Exhibit C.

4. On March 4, 2015 Claimant was evaluated by PA Missey. Claimant reported that her symptoms and complaint of back pain had resolved and that she was not taking the medications prescribed since her symptoms had resolved. PA Missey noted on examination that there was no tenderness in the lumbosacral spine and full range of motion. PA Missey also noted normal lordosis and straight leg raises negative bilaterally. Although Claimant reported complete resolution of her symptoms to PA Missey, when Claimant's vitals were checked by Paula Berger, Claimant reported a pain scale level of 2/10. PA Missey opined that Claimant had reached maximum medical improvement (MMI) and released Claimant from care. *See* Exhibit C.

5. On March 4, 2015 Claimant was also evaluated by her primary care provider Marla White, D.O. Claimant reported that she had an injury while at work and during evaluations for that injury her blood pressure was noted to be elevated so she was instructed to follow up with her primary care provider. Dr. White noted that

Claimant had a known history of hypertension but had discontinued medication a few months ago. On review of systems, Dr. White noted that Claimant had no back pain or neck pain and on examination Claimant was noted to have normal range of motion. Dr. White assessed elevated blood pressure, hypertension, and dyslipidemia and recommended restarting blood pressure medications. *See* Exhibit F.

6. On March 22, 2015 Respondents filed a final admission of liability noting a MMI date of March 4, 2015 and noting no impairment. *See* Exhibit 7.

7. Following her **March** 4, 2015 appointment with PA Missey where Claimant reported that her symptoms had resolved, Claimant continued to work her normal duties for Employer.

8. On May 20, 2015 Claimant was evaluated by Dr. White. Claimant reported achy, sharp, tense and tight pain across her lumbar L4 area that she rated as a 4/10 on the pain scale. Claimant reported an onset of low back pain on March 3, 2015 and that it occurred while working. Claimant reported that the low back pain was recurrent but improving slowly. On examination Dr. White noted that Claimant had decreased range of motion in the lumbar back, tenderness in the bilateral S1 joints and the paralumbars, and lumbar back spasm. Dr. White diagnosed acute lumbar sacral strain with a date of injury of March 3, 2015 and referred Claimant to physical therapy. Dr. White prescribed naproxen for the sacral strain, flexeril for the muscle spasms, and increased blood pressure medications. *See* Exhibit F.

9. On June 18, 2015 Claimant underwent x-rays of her lumbar spine that were interpreted by Jonathan Flug, M.D. Dr. Flug provided the impression of grade 2 spondylolisthesis at L5-S1 with severe L5-S1 degenerative disc disease. *See* Exhibits K, 6.

10. On July 6, 2015 Claimant was evaluated at Peachtree Orthopedics by Stephanie Polsinelli, PA-C. Claimant reported midline to bandlike lumbar sacral pain with symptoms that initially began in May of 2015 (sic) while Claimant was working. Claimant reported turbulence while a flight attendant where she was prolonged into the air and landed with her back hitting the bar on the door. Claimant reported working the rest of the evening but that when she went to wake up the next day she could barely move. Claimant reported that she was diagnosed with muscle spasm and given medications and that she let the providers know that her symptoms were not improving but that they did no other treatment. Claimant reported she decided to follow up with her primary care provider who finally performed x-rays in June of 2015 and recommended therapy and evaluation by a spine specialist. Claimant reported she then moved to Atlanta and has not had any treatment thus far. Claimant reported she had continued to work regular duty throughout. Claimant reported having some good days and some severe days where she was unable to get out of bed. Claimant reported having a prior motor vehicle accident several years ago where she was diagnosed with lumbosacral strains as well as bilateral hip strains and treated with a chiropractor for around a year. *See* Exhibits E, 4.

11. PA Polsinelli noted that x-rays were performed out of state by Claimant's primary care provider, but took new x-ray films in the office. PA Polsinelli noted that the films showed a grade 2-3 spondylolisthesis at L5-S1. PA Polsinelli recommended Claimant obtain a lumbar MRI and referred Claimant to physical therapy. *See* Exhibits E, 4.

12. On July 7, 2015 Claimant contacted Lindsey Williams, the insurance claims examiner for the workers' compensation case. Claimant reported that she could not afford treatment and wanted to put her treatment on workers' compensation. Claimant had not contacted Insurer between March 4, 2015 and July 7, 2015 and had not sought to reopen her claim or get additional treatment until this phone conversation in July.

13. On July 14, 2015 Claimant underwent an MRI of her lumbar spine interpreted by Patricia Davis, M.D. Dr. Davis provided the impression of L5-S1 advanced disc space narrowing with grade 2 anterolisthesis, type 1 endplate change, and spondylolisthesis. *See* Exhibits K, 5.

14. On July 27, 2015 Claimant was evaluated by PA Polsinelli. PA Polsinelli noted that Claimant's x-rays and MRI showed that Claimant had lumbar spondylolisthesis at L5-S1 and opined that most likely, Claimant had an acute exacerbation related to this. *See* Exhibits E, 4.

15. On October 8, 2015 Claimant was evaluated by PA Polsinelli. Claimant reported good and bad days since she was last seen with continued bandlike lumbsosacral pain with an achiness feeling of the right hip and cramping occasionally into the right lower extremity. *See* Exhibits E, 4.

16. On December 17, 2015 Claimant was evaluated by PA Polsinelli. Claimant reported that she had been having more bad days than good days and that beginning on November 26, 2015 she had pain that started radiating down the right leg and that since that date the pain had been on a more frequent basis. Treatment options for the spondylolisthesis were discussed and Claimant wished to hold off on any type of injection treatment. *See* Exhibits E, 4.

17. On May 26, 2016 Claimant was evaluated by PA Polsinelli. Claimant reported worsening low back pain and that over the past several weeks she had persistent increasing bandlike lumbosacral pain that occasionally radiated to the hips. PA Polsinelli noted a lengthy conversation about treatment options and noted that Claimant was moving to Denver in three weeks so opined it would be best to continue treatment in Denver. PA Polsinelli noted the possibility of injection or possibly surgery. *See* Exhibits E, 4.

18. On July 1, 2016 Claimant underwent an independent medical examination performed by John Raschbacher, M.D. Claimant reported no past medical history other

than osteoarthritis in the right knee. Claimant reported a motor vehicle accident 4-5 years prior where she had pain at the right hip and no low back pain. Claimant reported that since hitting a door and metal handle with her low back from turbulence, she had symptoms that never went away and had been steady. Claimant reported that the symptoms had been worsening gradually since her injury. Dr. Raschbacher performed a physical examination and reviewed medical records. Dr. Raschbacher assessed history of lumbar contusion and pre-existing non work related lumbar disc disease and spondylolisthesis. Dr. Raschbacher opined that on March 4, 2015 Clamant was appropriately discharged at MMI and he noted that at that time Claimant reported her symptoms had resolved and she had no tenderness and full range of motion. Dr. Raschbacher opined that Claimant was not likely to have a ratable impairment. Dr. Raschbacher recommended additional records be obtained from all of Claimant's prior treatment. *See* Exhibit B.

19. On July 26, 2016 Claimant underwent a Division Independent Medical Evaluation (DIME) performed by Greg Reichhardt, M.D. Claimant reported that due to turbulence she was thrown in the air and hit the aft galley door and her back against a long door handle on March 1, 2015. Claimant reported pain in the lower back that initially was not severe but increased by the following day. Claimant reported that she was treated with medications and discharged and that she continued working but had increased pain. Claimant reported that she tried to go back for treatment at Concentra but that she was denied. Claimant reported that she saw her primary care provider Dr. White and was treated with medication and after x-rays was diagnosed with a slippage in the back. Claimant reported pain in the low back with no radiation down the legs and a pain scale rating of 2/10. Claimant reported no prior back problems. Claimant reported a prior motor vehicle accident where she had groin pain. Dr. Reichhardt noted on review of systems a positive response for anxiety and depression and noted that Claimant described a number of non work related factors contributing, but also that the work injury represented a component. *See* Exhibits A,1.

20. Dr. Reichhardt reviewed medical records from 2011 from Cosak Chiropractic as well as medical records following the March 1, 2015 reported injury. Dr. Reichhardt also performed a physical examination where he noted tenderness to palpation in the lumbar spine at the L4-5 and L5-S1 levels. Dr. Reichhardt provided an impression of low back pain potentially secondary to L5-S1 spondylolisthesis, rule out discitis and symptoms of depression and anxiety potentially related to both work and non work related factors. Dr. Reichhardt opined that Claimant was not at MMI and that further evaluation and treatment of her low back pain and depression was indicated. Dr. Reichhardt opined that it would be appropriate for Claimant to be evaluated with a psychologist to evaluate for depression versus adjustment disorder and that if there was a work related component to Claimant's psychological condition, then pain management counseling would be appropriate. Dr. Reichhardt opined that based on the specific disorder of the spine and the grade 2 spondylolisthesis, Claimant had an 8% whole person impairment. He opined based on range of motion limitations, Claimant had a 5% whole person impairment with a total impairment of 13%. *See* Exhibits A,1.

21. On September 7, 2016 Claimant was evaluated at Rocky Mountain Spine Clinic by John Barker, M.D. Claimant reported being injured as a flight attendant on March 1, 2015 when she was in the air, the airplane hit unexpected turbulence, and she was thrown against a wall. Claimant reported that since that time, she had low back pain as well as some left leg numbness and tingling. Claimant reported being initially seen by workers' compensation where she was told she had a muscle strain and was given muscle relaxers. Claimant reported returning several months later because she was still in pain and that she was told her case was closed. Claimant reported that she saw her primary care provider who ordered x-rays and then told Claimant to see an orthopedic spine specialist immediately. Claimant reported she then moved to Atlanta and saw an orthopedic provider. Claimant reported that she had not had any injections. Dr. Barker reviewed x-rays and noted grade 2 spondylolisthesis at L5-S1 with severe disc space collapse and severe foraminal stenosis at L5-S1. Dr. Barker opined that Claimant had severe spondylolisthesis that was asymptomatic prior to the accident on March 1, 2015. Dr. Barker opined that since the accident, Claimant had developed back pain and left leg symptoms that had failed 18 months of non operative care. Dr. Barker opined that Claimant was a candidate for an L5-S1 TLIF and discussed the surgery with Claimant. *See* Exhibits D, 3.

22. On October 13, 2016 Claimant underwent an independent medical examination performed by David Orgel, M.D. Claimant reported that after her first two visits at Concentra, she returned within the week complaining of ongoing pain but was told that she had to contact her company to have the claim reopened. Claimant reported variable symptoms where at times her pain was absent but at times where she had very significant discomfort. Dr. Orgel noted that chiropractic records showed Claimant was seen in 2011 from January until May for low back pain and neck pain with frontal headache due to a motor vehicle accident. Claimant denied any other issues with her low back and reported that an x-ray obtained at that time did not show any evidence of a spondylolisthesis. Dr. Orgel performed a physical examination. Dr. Orgel noted that Claimant had been treated conservatively but had significant symptoms that interfered with her work and leisure activities and that Claimant wished to proceed with additional interventions including surgery and he therefore opined that Claimant was not at MMI. Dr. Orgel provided an impairment rating of 8% for the grade 2 spondylolisthesis and a 12% range of motion impairment, which he combined for a 19% whole person impairment rating for the back. *See* Exhibit 2.

23. Dr. Orgel noted on his causation analysis that Claimant indicated that her pain had persisted after her claim was closed and that on her return to Concentra she was told to contact her employer. Claimant reported she had an email related to this that Dr. Orgel requested to see. Dr. Orgel also requested to see a copy of an x-ray taken after the 2011 motor vehicle accident since Claimant reported that the x-ray after the motor vehicle accident showed no spondylolisthesis. Dr. Orgel also noted that Claimant reported that she was asymptomatic prior to her injury. Dr. Orgel opined thus, that Claimant had a work related back injury causing a grade 2 spondylolisthesis. Dr. Orgel opined that Claimant had quite a significant in flight injury and that Claimant even reported considered to require a wheelchair. He therefore opined it was reasonable to

state that the spondylolisthesis was the direct result of the work injury and he noted that additional confirmatory information was pending. Dr. Orgel noted that his opinions were based on the information provided and that if more information became available, an additional report could be requested and may or may not change his opinions. *See* Exhibit 2.

24. Prior to the March 1, 2015 work injury, Claimant had multiple prior injuries to her lower back.

25. On January 11, 1993 Claimant was evaluated by Gabriel Olivo, M.D. Claimant reported having an injury the day prior at the lumbosacral area while playing basketball. Dr. Olivo noted a prior history of back injury. Dr. Olivo noted on physical examination that the lumbosacral had moderate paravertebral tenderness with spasm and that the bilateral straight less raises were positive at 30 degrees. Dr. Olivo diagnosed lumbosacral strain, prescribed Flexeril, and referred Claimant to physical therapy. *See* Exhibit J.

26. On December 21, 2010 Claimant was involved in a motor vehicle accident. Claimant had low back pain, and stiff shoulder and neck the next days after her accident. Claimant underwent approximately 30 sessions of chiropractic care with Michael Wilson, DC and at each visit her low back pain and low back treatment was noted. Dr. Wilson noted that Claimant was under his professional care and had been placed on disability from January 5, 2011 through January 20, 2011 for severe low back and neck pain due to an automobile accident. On February 8, 2011 Claimant reported that her lower back pain was not as intense. Dr. Wilson listed diagnoses as including cervical cranial syndrome, thoracic segmental dysfunction, lumbo sacral iliac disorder, and spondylolisthesis. *See* Exhibit I.

27. On August 22, 2012 Claimant was evaluated by Diana Accinelli, M.D. Claimant reported that she was a flight attendant and that while in a hotel in Alabama for work she sat in a chair that collapsed and dropped her on the ground. Claimant reported going to the ER and that x-rays performed were negative. Claimant reported pain across the lower back and also reported that she had been in a car accident on December 27, 2010 and had low back pain that radiated to her hips. Claimant reported pain at a 7/10. *See* Exhibit G.

28. On September 4, 2012 Claimant was evaluated by Gary Hollinger, PA. Claimant reported that on the date of injury she fell out of an office chair because the seat was broken and that she fell onto her lower back. Claimant reported lumbar pain that was 6/10 in intensity and she denied pain radiating into her lower extremities. Claimant reported that in December of 2011 she had a motor vehicle accident and suffered a lumbar strain and she reported that her pain did not completely resolve before the current injury and was usually about a 2/10 in intensity at the end of her workday. *See* Exhibit G.

29. In September of 2012 Claimant underwent three physical therapy sessions. Claimant reported pain in her bilateral low back and right groin from the fall out of the chair. Claimant reported improvement in her symptoms and that she rarely felt any groin pain. Claimant also reported that she continued to feel some low back pain but that the intensity was much reduced. The physical therapist noted the continued low back pain that was persistent and fairly moderate in intensity. *See* Exhibit H.

30. Dr. Raschbacher testified at hearing. Dr. Raschbacher opined that after the initial incident Claimant had no bruising, swelling, or abrasion that objectively indicated an injury and that three days later Claimant reported that she was fine and asymptomatic. Dr. Raschbacher noted that spondylolisthesis is most commonly congenital and that it was clear from the earlier 2011 x-rays that Claimant had this condition before the March 1, 2015 work injury. Dr. Raschbacher opined that a person with spondylolisthesis may or may not have intermittent symptoms. He opined that if the March 1, 2015 work injury had aggravated Claimant's underlying and pre-existing spondylolisthesis, then symptoms would have been present three days later when Claimant reported she was asymptomatic. Dr. Raschbacher noted his concern that Claimant was not truthful with him or with DIME physician Dr. Reichhardt and he opined that Claimant's subjective reports were not reliable.

31. Dr. Raschbacher noted that Claimant saw her primary care provider in May of 2015 and had x-rays where spondylolisthesis was found and that Claimant was told urgently to go to see an orthopedic specialist but that Claimant knew she didn't need to urgently see someone because it was not an emergency and she had the condition since at least 2011. Dr. Raschbacher opined that there was no objective basis to say that the spondylolisthesis was worse due to the airplane turbulence or March 1, 2015 incident and that the airplane turbulence and lower back pain resolved after three days, and then two months later Claimant had symptoms that were unrelated to the airplane turbulence. Dr. Raschbacher opined that any need for surgery related to spondylolisthesis is not work related, that Claimant was at MMI on May 4, 2015 and he agrees with Concentra's date of MMI. Dr. Raschbacher opined that there was no objective basis to say that the pre-existing spondylolisthesis changed due to the work injury and he noted that Claimant did not tell the DIME physician Dr. Reichhardt or Dr. Orgel about her pre-existing back issues. Dr. Raschbacher opined that Claimant had no ratable condition as a result of the work injury and that Dr. Reichhardt did not have an accurate picture or representation of Claimant's prior history when Dr. Reichhardt provided the DIME opinions.

32. Dr. Orgel testified at hearing. Dr. Orgel noted that Claimant had told both him and Dr. Reichhardt that she had no prior back problems. Dr. Orgel noted that the grade II spondylolisthesis was present prior to the work injury and that the 2011 x-ray did show the spondylolisthesis even though Claimant had reported to him that the 2011 x-ray did not show it. He noted that Claimant did not tell the providers that she already knew that she had spondylolisthesis. Dr. Orgel opined that as you age symptoms of spondylolisthesis start being reported. Dr. Orgel changed his opinion that the March 1,

2015 work injury caused spondylolisthesis and instead he opined that the March 1, 2015 work injury aggravated Claimant's underlying and pre-existing spondylolisthesis.

33. Dr. Orgel agreed that Claimant reported no symptoms three days after the March 1, 2015 injury and that she reported the same to her primary care provider. Dr. Orgel noted that Claimant was not asymptomatic before the March 1, 2015 injury, but opined that after the March 1, 2015 injury, Claimant's complaints were accelerated. Dr. Orgel opined that 10-12 days after Concentra closed her claim, Claimant tried to go back but was told her claim was closed. Dr. Orgel opined, however, that Claimant should not have been closed and that she was not at MMI and needed further treatment and surgery.

34. Claimant is not found credible or persuasive. Claimant failed to disclose a significant history of prior low back pain and low back treatment to multiple providers. Claimant also failed to disclose to multiple providers that she had spondylolisthesis prior to this work injury. Claimant testified at hearing that she had no prior back injuries and that her motor vehicle accident required only treatment for her right hip. This testimony is contrary to multiple medical records noting significant low back treatment following the motor vehicle accident. Claimant is not credible that she sought medical treatment at Concentra shortly after being discharged at MMI. Her reports are inconsistent that she went back either a week, or a month later and Claimant overall lacks credibility. Rather, the records show she reported resolution of her symptoms and had new and different symptoms a month and a half later when she presented to her primary care provider on May 20, 2015. Claimant's subjective reports cannot be relied upon to any degree of certainty.

35. The opinions of Dr. Reichhardt, Dr. Barker, and Dr. Orgel are based in large part on Claimant's incredible subjective reports that she was asymptomatic and had no prior back pain before March 1, 2015. The opinions of these medical providers cannot be relied upon as they used incredible information provided by Claimant. Not only did Claimant have a diagnosed and pre-existing spondylolisthesis, she had severe degenerative changes at L5-S1and had intermittent low back pain radiating to her hips for years prior to the March 1, 2015 work injury.

36. Dr. Reichhardt erred in his DIME opinions by relying on incredible information provided by Claimant.

37. The opinion of Dr. Raschbacher, who pointed out many inconsistencies throughout Claimant's reporting and testimony, is found credible and persuasive. Claimant's minor lumbar strain from the March 1, 2015 work injury resolved and Claimant was at MMI a few days later on March 4, 2015. Any new pain reported months later relates to her pre-existing non work related conditions and not to the minor lumbar strain she sustained on March 1, 2015.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME ON MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." *See* § 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. *See* § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO May 20, 2004); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Here, Respondents have overcome DIME physician Dr. Reichhardt's opinion on MMI. Respondents have shown that it is highly probable and free from serious or substantial doubt that Dr. Reichhardt was incorrect in providing an opinion that Claimant had not yet reached MMI for her work related injury. As found above, Claimant provided incorrect and incredible information to Dr. Reichhardt. Claimant denied prior back problems at her DIME. She also reported incredibly to other providers that she could barely move the day after her March 1, 2015 work injury, that she had no prior issues with her back until her March 1, 2015 work injury, and that she did not have spondylolisthesis until her March 1, 2015 work injury. These assertions that Claimant provided to multiple providers are incredible and contrary to multiple medical records. Claimant, as found above, reported that her symptoms had resolved a few days after her March 1, 2015 work injury. Claimant again is incredible that she went back to Concentra and was told her claim was closed shortly after being placed at MMI.

Claimant incredibly and inconsistently claims she went back either a week or a month later to try to get additional treatment. This is not credible. When Claimant sought new treatment on May 20, 2015, her symptoms were different and the findings were completely new and different from findings in early March of 2015. Claimant has pre-existing spondylolisthesis and has had symptomatic low back pain dating back to at least her motor vehicle accident in December of 2010. After her 2010 motor vehicle accident, Claimant had persistent low back pain that she reported in 2012 had never gone away. Similarly, after treatment for her 2012 work injury she reported at her last visit that her low back pain was reduced but was still fairly moderate and persistent. Her pre-existing back pain was not accelerated by the March 1, 2015 work injury. Rather, the minor strain she sustained resolved per her own reports within a few days. Claimant was then back to her baseline of persistent low back pain.

Although the DIME physician noted that he reviewed chiropractic records, his opinions were based in part on Claimant's subjective reports that are not credible. Therefore, his ultimate conclusions cannot be relied upon as they are based in part on incorrect and false information given to him by Claimant. Due to Claimant's significant omissions of her medical history, the DIME physician Dr. Reichhardt's opinions lack credibility. Respondents have established that the DIME physician's opinion that Claimant had not reached MMI were clearly incorrect. For her work related minor lumbar strain, Claimant's symptoms resolved within a few days. Claimant had pre-existing spondylolisthesis, pre-existing severe degenerative disc disease at L5-S1, and a significant prior history of persistent ongoing lower back problems. Claimant's ongoing problems/symptoms are not related to the minor strain of her lower back that she sustained on March 1, 2015 but are related to her pre-existing problems that she failed to disclose to multiple providers. Dr. Raschbacher is found credible and persuasive that Claimant had pre-existing and non work related lumbar disc disease and spondylolisthesis and he has shown that Dr. Reichhardt's opinions were clearly incorrect and relied significantly upon clearly incorrect information given by Claimant. Although Dr. Reichhardt provided an impression that Claimant had low back pain potentially caused by her L5-S1 spondylolisthesis, this is not causally related to her March 1, 2015 work injury and was pre-existing as shown by multiple medical records. Respondents have established by clear and convincing evidence that the DIME erred in relying on Claimant's incredible assertion that she had no prior low back pain. The providers who opined that the work injury aggravated her underlying spondylolisthesis rely heavily on her statement that she was asymptomatic prior to March 1, 2015 which is not found credible or persuasive. Respondents have established by clear and convincing evidence that the DIME erred and that Claimant reached MMI on March 4, 2015 as assigned by the authorized treating provider.

OVERCOMING DIME ON PPD

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which

renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Dr. Reichhardt provided a whole person impairment rating of 13%. This was provided based on the lumbar spine and was based on specific disorder of the spine, item 3A, grade two spondylolisthesis. Based on that, Dr. Reichhardt provided an 8% whole person impairment and then measured range of motion limitations which provided a 5% whole person impairment. However, as found above, Claimant's spondylolisthesis was pre-existing and symptomatic prior to this work injury. As found above, Claimant reached MMI with regard to this injury on March 4, 2015 and the ALJ concludes that Respondents have met their burden to overcome the DIME opinion on the MMI date and that Claimant reached MMI on March 4, 2015 with no impairment. This is consistent with the opinions of Dr. Raschbacher and Claimant's authorized treating provider who are both found credible and persuasive. As of March 4, 2015 Claimant was back to her baseline and the work injury did not cause spondylolisthesis or Claimant's limitations in range of motion. The rating provided by Dr. Reichhardt was in error as it rated a pre-existing condition. Respondents have shown by clear and convincing evidence that the rating provided by Dr. Reichhardt was in error and that Claimant sustained no permanent impairment as a result of the minor work injury.

ORDER

It is therefore ordered that:

1. Respondents have overcome by clear and convincing evidence the opinion of DIME physician Dr. Reichhardt regarding maximum medical improvement. Claimant reached MMI for the work injury on March 4, 2015.

2. Respondents have overcome by clear and convincing evidence the opinion of DIME physician Dr. Reichhardt regarding permanent impairment. Claimant did not sustain any permanent impairment as a result of her March 4, 2015 work injury.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 21, 2017,

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury on June 4, 2015 arising out of and in the course of his employment?
- If compensable, did Claimant prove he was entitled to TTD benefits?
- If compensable, was Claimant's request for medical benefits reasonable, necessary and related to his injury?
- Does Employer's failure to carry workers' compensation insurance subject it to penalties?

FINDINGS OF FACT

1. Claimant testified that he was working within the course and scope of his employment for Employer when he sustained an injury to his right shoulder on June 4, 2015. The ALJ credited this testimony.

2. Claimant's Worker's Claim for Compensation, dated August 6, 2015, specified the injury occurred while Claimant was installing a gutter. It was raining and his foot slipped, which caused him to fall.

3. At the time of the injury, Claimant was being paid an average weekly wage of $560.00 per week. Claimant's TTD rate is $373.33 per week.

4. Claimant reported the injury to the owner of the Employer, Mr. Phillip Lobo, and was advised by Mr. Lobo that Employer did not have workers' compensation insurance coverage.

5. Mr. Lobo instructed Claimant to go to whatever doctor he needed to in order to take care of his physical condition.

6. Claimant missed about 4 or 5 days of work immediately after the accident for which Employer paid him wages and Claimant thereafter returned to work but was restricted in what he could do.

7. Claimant sustained an injury to his hand on the job on July 9, 2015 and by then Employer had obtained workers' compensation insurance coverage. Claimant was paid temporary total disability benefits for that injury from July 10, 2015 to April 18, 2016, at which time that claim was settled on a full and final basis. The ALJ has

reviewed the General Admission of Liability and the Settlement Agreement in that claim, W.C. No. 4-987-707.

8. Claimant received TTD benefits for the July 9, 2015 injury and Claimant testified thereafter all communication with Employer ceased.

9. Claimant had ongoing problems with his right shoulder, which limited his ability to work. Claimant underwent an MRI on July 28, 2015. The films were read by Michael Kershen, M.D., whose impression was: non-displaced fracture of the greater tuberosity, tendinopathy and low grade interstitial tearing of infraspinatus tendon; tendinopthy without tear of the superspinatus and subscapularis tendons of the right shoulder; degeneration and tearing of the superior and posterior superior labrum; mild subacromial subdeltoid bursitis; and degenerative changes of the acromioclavicular joint. Claimant testified that he thought Employer paid for the MRI.

10. Claimant testified he received no further treatment for his shoulder after the MRI.

11. On May 20, 2016, Claimant was examined by Phillip Stull, M.D. Dr. Stull recorded the history of the fall while working for Employer, which had no insurance. Dr. Stull noted Claimant had not been able to get treatment for his shoulder complaints. Upon examination, Dr. Stull determined that Claimant had sustained a torn labrum and impingement of his right shoulder and suggested several treatment options including arthroscopic surgery.

12. Claimant has continued to experience pain and restrictions related to his right shoulder which has gone untreated.

13. No ATP has placed Claimant at MMI.

14. Claimant testified, and the testimony stands unrebutted, that he was unemployed from April 18, 2016 to June 19, 2016 and again from September 17, 2016 through November 30, 2016. The ALJ finds Claimant is entitled to TTD benefits for those separate periods of time.

15. Claimant further testified that for the other periods of time from April 18, 2016 through the date of the hearing that he was gainfully employed, although in pain, and that his earnings exceeded those that he was paid by Employer at the time of injury. Claimant is not seeking TPD benefits for those periods of time.

16. The ALJ finds Claimant has not reached MMI for his right shoulder injury of June 4, 2015 and is entitled to intermittent periods of TTD as a result of the condition of his right shoulder.

17. Claimant further testified that he has not sustained any additional injuries to his right shoulder since the on-the-job injury of June 4, 2015 and that he desires to undergo the care and treatment as recommended by Dr. Stull.

18. The ALJ finds Claimant sustained a compensable industrial injury arising out of and in the course of his employment for Employer on June 4, 2015.

19. The ALJ finds Claimant requires medical treatment to cure and relieve the effects of the June 4, 2015 injury, to be provided by Respondent-Employer.

20. The ALJ finds that the MRI and the care and treatment of Dr. Stull was reasonably necessary, causally related and authorized medical treatment for the compensable industrial injury which Claimant sustained on June 4, 2015.

21. The ALJ further finds Employer was not covered by a policy of workers' compensation insurance coverage on June 4, 2015. Employer is liable to Claimant for the failure to be insured for workers' compensation pursuant to § 8-43-408, C.R.S. and for the 50% penalty pursuant to § 8-43-408(1), C.R.S.

22. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Compensability

The legal standard applicable to the compensability issue is found in § 8-41-301(1)(c), C.R.S., and it provides as a condition for the recovery of workers'

compensation benefits the injury must be "proximately caused by an injury or occupational disease arising out of and in the course of the employment".

The ALJ determined Claimant met his burden of proof and established he sustained an injury proximately caused by the performance of duties arising out of and in the course of his employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). As found, the ALJ credited Claimant's testimony that he was injured arising out of and in the course of his employment on June 4, 2015. (Findings of Fact 1 and 18).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In the case at bench, the ALJ determined Claimant proved he required medical treatment to cure and relieve the effects of the June 4, 2015 injury. (Finding of Fact 19). The MRI of Claimant's right shoulder revealed objective evidence of the injury. (Finding of Fact 9). Further, Dr. Stull opined Claimant required treatment to address the condition of his right shoulder. (Finding of Fact 11). No contrary evidence was introduced at the time of hearing.

Thus, the ALJ determined the proposed treatment recommended by Dr. Stull is reasonable and necessary, as well as related to the injury. (Finding of Fact 21). Respondent-Employer shall provide medical benefits to Claimant for his industrial injury.

TTD

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability; and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily

continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Claimant introduced evidence at hearing that his right shoulder injury caused him to miss time from work and thereafter he was constrained in what he could do. Claimant's testimony established his earning capacity was impaired. (Findings of Fact 6 and 12). Moreover, Dr. Stull's examination documented objective evidence of Claimant's injury which impaired his ability to work. There was also no evidence in the record that an ATP determined Claimant was at MMI. Therefore, Claimant established his entitlement to TTD benefits.

Penalties for Failure to Carry Workers' Compensation Insurance

The ALJ found Respondent–Employer failed to carry workers' compensation insurance and § 8-43-408(1), C.R.S. subjects it to penalties. That section provides in pertinent part:

> "In any case where the employer is subject to the provisions of articles 40 to 47 of this title and at the time of an injury has not complied with the insurance provisions of said articles, or has allowed the required insurance to terminate, or has not effected a renewal thereof, the employee, if injured, or, if killed, the employee's dependents may claim the compensation and benefits provided in said articles, and in any such case the amounts of compensation or benefits provided in said articles shall be increased fifty percent."

As determined in Findings of Fact 4 and 20, Respondent-Employer failed to carry workers' compensation insurance, as required by Colorado law. No contrary evidence was presented at a hearing and indeed, Respondent-Employer failed to participate at the hearing. The failure to carry workers' compensation insurance subjects Respondent-Employer to a 50% penalty under the Act, which will be imposed on the medical and indemnity benefits awarded to Claimant.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable on the job injury arising out of the course of his employment with the non-insured Employer on June 4, 2015.

2. Respondent-Employer shall pay for reasonable and necessary medical treatment in the form of Claimant's treatment with Dr. Stull, as well as all referrals made by Dr. Stull. Respondent-Employer shall pay the bill for the MRI Claimant underwent at

Health Images, pursuant to the Colorado Workers' Compensation Fee Schedule, to the extent that bill was not paid.

3. Respondent-Employer shall pay TTD to Claimant at the rate of $560.00 per week (TTD rate $373.33 X 50% penalty= $560.00) from April 18, 2016 to June 19, 2016 and again from September 17, 2016 through November 30, 2016.

4. Respondent-Employer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 21, 2017

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury on July 25, 2016 arising out of and in the course of her employment?

- If compensable, did Claimant prove she was entitled to medical benefits?

FINDINGS OF FACT

1. Claimant worked as a groundskeeper for Employer, starting on April 12, 2016. Claimant testified she did not work during the first part of 2016, but previously worked cleaning offices.

2. Claimant's job duties included cleaning the hallways, elevators, play area, pool area and dog area. Claimant described her job at Employer as much harder than her previous position.

3. Claimant testified she had no injuries to her low back before working for Employer. She lost no time from her prior job because of problems with her back. There was no evidence in the record which showed Claimant suffered a previous injury to her low back at work.

4. Claimant's records from Kaiser Permanente were admitted, which documented she treated for low back pain after starting with Employer. In particular, Claimant was evaluated by Ray Howe, M.D. on April 15, 2016. At that time, she was evaluated for low back pain, present at the middle-low back. The pain was described as ongoing for the past 1-2 months and had worsened after starting a new job as a groundskeeper. Dr. Howe diagnosed low back pain with bilateral sciatica. Dr. Howe prescribed Naproxen and Prednisone, as well as ordering physical therapy ("PT").

5. Claimant testified the pain she felt at the time of the April 15, 2016 visit was like a cramp. The pain after her injury was more significant.

6. On June 10, 2016, Claimant returned to Kaiser and was evaluated by Todd Landin, M.D., at which time a lumbar MRI and plain films were ordered.

7. Claimant underwent an MRI on June 20, 2016. The radiologist's impression was: approximately 7 mm chronic spondylolytic anterolisthesis of L5/S1; multilevel degenerative disc disease and facet osteoarthropathy changes throughout the lumbar spine as described above; left lateral recess stenosis at L5/S1 could impinge the left S1 nerve root; moderate stenosis of the neural foramina bilaterally at L5/S1 could

impinge the exiting L5 nerve roots on either side.

8. The findings/impression for the x-rays of the lumbar spine were grade one L5-S1 spondylolisthesis, with L5 spondylolyses; marked degenerative disc changes at the L5-S1 level; hypertrophic degenerative joint changes in the articulating facet joints bilaterally at the L4-L5 and L5-S1 levels.

9. Claimant testified she sustained an injury on July 25, 2016. She was cleaning up trash and was in room three. In that room there was a piece of furniture (TV). She retrieved a cart (flat) from downstairs and went to pick up the piece of furniture. No one was helping her at that time. When she lifted the TV stand, it felt like something had pulled in her spine/hip. She felt a bit of pressure on the hip, then continued to work. The ALJ notes there was no contrary evidence in the records to contradict Claimant's testimony this event occurred. Claimant was a credible witness when she described the injury. Claimant testified she did not report the incident that day.

10. On July 27, 2016, Claimant testified she was moving dumpsters, as well as sweeping and mopping. She felt pain in her hip and reported the injury. She reported the injury first to her supervisor (Dion), and then to the manager, Lasarha Pass.

11. Claimant testified she was not referred to an ATP for Employer.

12. Claimant testified she went to the emergency room at North Suburban on July 27, 2016 because of back pain.

13. Claimant was evaluated at Kaiser on August 3, 2016, complaining of back pain. Jennifer Hronkin, M.D. noted Claimant had been at the ER within the past two days and received IV meds. Dr. Hronkin diagnosed lumbar radiculopathy and prescribed Ketorolac and Oxycodone. Claimant was referred to a neurosurgeon for the thoracic and lumbar spine.

14. Claimant returned to Dr. Landin on August 16, 2016. The treatment notes recorded chronic worsening low back pain, with right sided radiation. Dr. Landin's assessment was low back pain with right sciatica. Dr. Landin's notes recorded that Claimant was considered temporarily and totally disabled if Employer could not accommodate the work restrictions. Claimant was advised to follow-up with her employer regarding whether the injury should be treated through workers' compensation. This note leads to the inference by the ALJ that Claimant advised Dr. Landin and/or medical personnel at Kaiser she was injured at work.

15. On August 18, 2016, Claimant was evaluated by Lloyd Thurston, D.O. at Concentra. Dr. Thurston recorded Claimant moved heavy furniture on 7/25 and then had low back pain and radicular symptoms on July 27, 2016. On examination, she had tenderness of the right SI joint, with intact neurovascular function. Dr. Thurston's assessment was: strain of lumbar paraspinal muscle and lumbosacral radiculitis at S1.

Dr. Thurston opined he was 51% certain this was a work-related injury, even though symptoms started two days after the work event. He ordered an MRI and made a referral to a physiatrist. Claimant was given work restrictions of: may lift, push/pull up to 20 pounds up to three hrs./day, occasional bending, may stand and walk frequently. The findings and opinions of Dr. Thurston helped to corroborate Claimant's testimony that she sustained an injury. The ALJ credited Dr. Thurston's opinion.

16. Claimant was offered modified duty on August 19, 2016, which she accepted on August 22, 2016.

17. An MRI was performed on August 31, 2016. The films were read by Robert Leibold, M.D., whose impression was severe right L5-S1 foraminal stenosis; chronic bilateral L5 pars interarticularis defects with grade one anterolisthesis of L5 on S1 and advanced L5-S1 degenerative disc disease.

18. Claimant was evaluated by Frederic Zimmerman, D.O. on September 1, 2016. Her symptoms were right-sided buttock and lumbosacral pain, which radiated down the posterior lateral aspect of her right leg to include her lateral calf. On examination, Dr. Zimmerman noted weakness in the extensor hallucis longi, as well as dorsiflexors and plantar flexors, as demonstrated by rapid fatigue during heel and toe walking. He found decreased sensation to light touch in the right lateral lower leg to include the lateral ankle and foot complex. Dr. Zimmerman's assessment was: lumbosacral spondylolisthesis, grade one with bilateral pars defect; right lower extremity radiculitis; facet arthropathy at the bilateral L5-S one and to a lesser extent L4-L5 levels. His treatment plan was a right L5 plus S1 transforaminal epidural steroid injection ("ESI") and to begin PT.

19. On September 9, 2016, Dr. Thurston evaluated Claimant and continued Claimant's restrictions, as well as beginning her on a course of PT. His assessment was concordant with Dr. Zimmerman's. Claimant returned to Dr. Thurston on October 10, 2016, noting that her symptoms were unchanged. Claimant's lumbar spine had restricted range of motion ("ROM"), but Waddell signs were negative. Dr. Thurston returned Claimant to Dr. Zimmerman for evaluation and treatment.

20. A Worker's Claim for Compensation was prepared by Claimant and signed on October 4, 2016.[1] Claimant testified her daughter helped her complete this form, which described the injury as follows: "I was picking up a TV set from a trash room when I felt pain in lower back". Claimant testified this description was a mistake, as it was a piece of furniture for a T.V.

21. On October 27, 2016, Dr. Zimmerman examined Claimant, who reported a diagnostic response following the ESI. Claimant's pain was essentially resolved other than in the buttock region. She also reported perisacral pain. On examination, Claimant had restrictions in lumbar ROM, along with tenderness directly over bilateral SI joints. Claimant had diffuse myofascial pain in bilateral upper and lower quadrants through the

[1] Exhibit 1.

lumbar paraspinals and gluteus media muscles. Claimant also had a positive fibromyalgia screen. Dr. Zimmerman ordered bilateral SI joints steroid injections for diagnostic and therapeutic purposes, after which time PT would be restarted.

22. Brian Reiss, M.D. testified as an expert in orthopedic surgery, the specialty in which he is board-certified. He is Level II accredited pursuant to the W.C.R.P. Dr. Reiss was present during Claimant's testimony. He reviewed the medical records from Kaiser, as well as Concentra. Dr. Reiss also reviewed the actual films for the MRIs of Claimant's lumbar spine. Dr. Reiss did not examine Claimant and did not prepare a written report.

23. Dr. Reiss opined that while it was possible, it was unlikely Claimant suffered a work-related injury. He based this opinion on the fact the Claimant had back pain prior to working for Employer and the Kaiser Permanente records documented a worsening of her condition. Her symptoms included radiculopathy, which was worsening immediately before her alleged injury. Dr. Reiss testified there was no significant difference between the two MRIs taken. Dr. Reiss believed Claimant's pre-existing low back pain was significant, as evidenced by the fact that both an MRI and plain films were ordered by the physicians at Kaiser. The ALJ credited Dr. Reiss' testimony regarding the condition of Claimant's low back and his opinion regarding similarity in the MRIs. However, Dr. Reiss did not address the potential aggravation of this preexisting condition in Claimant's lumbar spine. More particularly, he did not address whether her work activities could have caused the symptoms as described to Drs. Landin and Thurston. Dr. Reiss also did not discuss the precise mechanism of injury as articulated by Claimant. The ALJ found Dr. Landin's and Dr. Thurston's opinions more persuasive than those of Dr. Reiss, who did not evaluate Claimant.

24. Claimant's testimony that she suffered an injury was credible and persuasive.

25. Claimant proved she sustained an injury to her low back and hip on July 25, 2016 arising out of and in the course of her employment. The injury was caused by her work. Her low back condition was aggravated by her work activities on July 27, 2016.

26. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Compensability

The legal standard applicable to the compensability issue is found in § 8-41-301(1)(c), C.R.S., provides as a condition for the recovery of workers' compensation benefits the injury must be "proximately caused by an injury or occupational disease arising out of and in the course of the employment".

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. ICAO*, 107 P.3d 999, 1001 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury, the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siegfried v. Industrial Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

The ALJ determined Claimant met her burden of proof and established she sustained an injury proximately caused by the performance of duties arising out of and in the course of her employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). As a starting point, Claimant's testimony first established her job with Employer was more physically demanding than her previous position. (Finding of Fact 2). The medical records adduced at hearing proved she experienced symptoms within three days of starting her job. (Finding of Fact 5). The ALJ found Claimant to be a credible witness and credited her testimony in which she described the incident. No contrary evidence was introduced by respondent to rebut this testimony.

Second, Dr. Thurston, the occupational medicine physician at Concentra offered his opinion Claimant's injury was work-related and the ALJ credited this opinion. (Finding of Fact 15). The Concentra treatment records evinced the opinion of those physicians that Claimant suffered a work-related injury. As found in Findings of Fact 18-19, Drs. Thurston and Zimmerman recorded limitations in ROM of Claimant's lumbar spine, which correlated to the injury. Claimant had objective indicia of an injury, as

documented by these physicians. The ALJ was persuaded that Claimant's job duties while working for Employer aggravated her low back.

Based upon the totality of the evidence, the ALJ concluded Claimant sustained a compensable injury on July 25, 206. Although she had preexisting issues with her lumbar spine, this condition was aggravated by her specific job duties that day. This aggravation caused Claimant to require medical treatment and the treating physicians also issued work restrictions.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to her low back and hip arising out of and in the course of her employment on July 25, 2016.

2. Respondents shall provide medical benefits to Claimant.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 15, 2016

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that a fourth epidural steroid injection recommended by Dr. Stanley is reasonable, necessary and related to relieve Claimant from the effects of his admitted February 2, 2015 industrial injury or to prevent deterioration of his condition.

FINDINGS OF FACT

1. Claimant is a 46-year-old man who has been employed with Employer for approximately seven years. On February 2, 2015, Claimant sustained an admitted industrial injury to his low back while moving bags of seed between two palettes.

2. Eric R. Hoyer, M.D. read an MRI of Claimant's lumbar spine on February 23, 2015. Dr. Hoyer's impression was small central disc protrusion and broad-based disc bulge L4-5, and mild broad-based disc bulge asymmetric to the left L5-S1.

3. Claimant received conservative therapy for his back injury, which included chiropractic care, physical therapy, medications, a TENS Unit, and acupuncture.

4. Michael Gesquiere, M.D. administered a translaminar epidural steroid injection ("ESI") to Claimant on August 28, 2015. Dr. Gesquiere noted pre-and-postoperative diagnoses of lumbar herniated nucleus pulposus, lumbar degenerative disc disease, and lumbar radiculopathy. Dr. Gesquiere provided Claimant with a pain journal to document local anesthetic effect.

5. Dr. Gesquiere administered a second translaminar ESI to Claimant on October 14, 2015, along with a diagnostic left L5 selective nerve root block. Dr. Gesquiere noted pre-and-postoperative diagnoses of lumbar radiculopathy, lumbar spinal stenosis, and lumbago. Dr. Gesquiere provided Claimant with a pain journal to document local anesthetic effect.

6. Claimant's authorized treating physician, Scott K. Stanley, M.D., evaluated Claimant on February 10, 2016. Dr. Stanley noted pain, normal strength, muscle tone and symmetric deep tendon reflexes and sensation. Dr. Stanley assessed herniated lumbar disc and herniated nucleus pulposus. Referring to an additional injection, Dr. Stanley remarked, "I think he may periodically need this under maintenance care."

7. Dr. Gesquiere administered a third translaminar ESI on March 2, 2016, along with a left L5 selective nerve root block. Dr. Gesquiere noted pre-and-postoperative diagnoses of lumbar spinal stenosis, lumbar radiculopathy, and low back pain. Dr. Gesquiere provided Claimant with a pain journal to document local anesthetic effect.

8. Claimant testified each injection provided relief for approximately two to four months. On a scale from one to ten, with ten being extreme pain, Claimant rated his pre-injection pain at a level five or six, and his post-injection pain at a level two. Claimant testified his pain has been at a level five or six since the last injection subsided.

9. Dr. Stanley placed Claimant at maximum medical improvement ("MMI") on April 8, 2016. Dr. Stanley referred Claimant to Linda Mitchell, M.D. for an impairment rating.

10. In a note dated May 20, 2016, Dr. Stanley stated,

> [Claimant] underwent epidural steroid injection on March 2, 2016. This provided him with 80% relief. The symptoms improved for about two months. He would like to have another injection. He has not had any other changes in his history. Given that a series of epidural steroid injections could be helpful, I think it is reasonable he undergo this. We will ask his workman's compensation carrier to authorize an additional injection.

11. On May 27, 2016, John Douthit, M.D. conducted a medical records review at the request of Respondents. Dr. Douthit opined the recommended additional injections were not reasonable, necessary or related, as Claimant's medical records did not include diagnostic evidence of radiculopathy or sciatica, and the MRI did not evidence nerve root compression. Dr. Douthit further noted there is no scientific evidence that nerve block injections, other than epidural steroids for nerve root irritation, are effective. Dr. Douthit diagnosed Claimant with mechanical low back pain and opined Claimant was at MMI.

12. Based on Dr. Douthit's report, Respondents denied authorization of the additional ESI recommended by Dr. Stanley.

13. On June 7, 2016, Dr. Mitchell performed an impairment evaluation of Claimant. Dr. Mitchell conducted a medical records review and physical examination. Dr. Mitchell noted no neurologic system impairment. Dr. Mitchell assigned a final combined whole person impairment of 19% under the American Medical Association Guides to the Evaluation of Permanent Impairment, 3rd Edition, Revised.

14. Respondents filed a Final Admission of Liability on August 23, 2016. Respondents admitted liability for the 19% whole person impairment and for reasonable and necessary medical maintenance care. Respondents indicated Claimant reached MMI on April 8, 2015.

15. Claimant filed an Objection to Final Admission of Liability on September 16, 2016.

16. Aaron Wilson, M.D. evaluated Claimant on September 12, 2016. Claimant reported worsening lower back pain with pain radiating to his left and right calves. Claimant reported the epidural steroid injections were helping. Dr. Wilson noted bilateral leg tingling, tenderness to the lumbar spine, and moderately reduced range of motion. Dr. Wilson assessed lumbar region intervertebral disc degeneration.

17. Claimant testified he continues to experience pain in his low back area. Claimant testified he has not experienced any back injuries subsequent to the February 2, 2015 work injury. Claimant is currently taking acetaminophen as needed for pain. Claimant returned to work for Employer in his same capacity, subject to weight restrictions.

18. Claimant testified he wants to receive the injections recommended by Dr. Stanley and he wants Dr. Gesquiere to administer the injections. Claimant testified the injections administered by Dr. Gesquiere were "greatly helpful" and allowed him to function better at work and in his personal life. Claimant testified the injections helped with tasks such as driving, sitting, and working.

19. Claimant testified he has participated in hunting, fishing, camping, four-wheeling, competitive trap shooting, and snowmobiling since the industrial injury.

20. Dr. Douthit testified at hearing as an expert on behalf of Respondents. Dr. Douthit is board certified in orthopedic surgery and Level II accredited with the Division of Workers' Compensation. Dr. Douthit testified consistent with his report. Dr. Douthit indicated Dr. Stanley was recommending an additional ESI with the nerve root block procedure. Dr. Douthit opined, within a reasonable degree of medical probability, the

recommended injection and nerve block procedure are not reasonably necessary to relieve Claimant from the effects of the work-related injury, or to maintain Claimant at his functional state. Dr. Douthit opined the recommended procedure was not necessary in Claimant's case because there is no objective evidence of an inflamed nerve or documentation of functional improvement.

21. Dr. Douthit opined Claimant experienced relief from the prior injections because the injections were placebos, and there was no actual therapeutic effect on the pain.

22. Referring to the Colorado Division of Workers' Compensation Medical Treatment Guidelines for Low Back Pain, Rule 17, Exhibit 1 (the "Guidelines"), Dr. Douthit stated there are no therapeutic or long-term benefits of ESIs. Dr. Douthit acknowledged the Guidelines indicate there are some short-term benefits of ESIs for patients with radicular issues. Referring to the Guidelines, Dr. Douthit testified Claimant did not have clear nerve impingement nor was Claimant a clear candidate for surgery. Dr. Douthit noted the negative straight leg raise findings in Claimant's medical records indicate there was most likely no nerve root impingement.

23. The ALJ took administrative notice of the Low Back Pain Medical Treatment Guidelines, Rule 17, Exhibit 1. The Guidelines provide in pertinent part:

> Regarding short-term benefits from injections, there is strong evidence that epidural steroid injections have a small average short term benefit for leg pain and disability for those with sciatica. Additionally, specific to transforaminal injections, there is good evidence that the addition of steroids to a transforaminal bupivacaine injection has a small effect on patient reported pain and disability. Regarding long-term benefit from injections, there is strong evidence that epidural steroid injections (ESI) do not, on average, provide clinically meaningful long-term improvements in leg pain, back pain, or disability in patients with sciatica (lumbar pain or radiculopathy)…There is strong evidence that ESI has no short or long term benefit for low back pain. A high quality meta-analysis provides additional good evidence against the use of lumbar facet or epidural injections for relief of non-radicular low back pain...There is no proven benefit from adding steroids to local anesthetic spinal injections for most injections, with the possible exception of patients who are strong candidates for surgery based on a herniated disc and clear nerve impingement.

24. The Guidelines also provide instructions for assessing the functional efficacy of a procedure:

> The interpretation of the test results are primarily based on functional change. Symptom reports and pain responses (via a recognized pain scale) before and at an appropriate time period after the injection should also be documented. The diagnostic significance of the test result should be evaluated in conjunction with clinical information and the results of other diagnostic procedures. Injections with local anesthetics of differing duration may be used to support a diagnosis. It is obligatory that sufficient data be accumulated by the examiner performing this procedure such that the diagnostic value of the procedure is evident to other reviewers. This entails documentation of patient response regarding the degree and type of response to specific symptoms. As recommended by the International Spine Intervention Society (ISIS) guidelines, the examiner should identify three or four measurable physical functions, which are currently impaired and can be objectively reassessed 30 minutes or more after the injection. A successful block requires documentation of positive functional changes by trained medical personnel experienced in measuring range of motion or assessing activity performance…To be successful the results should occur within the expected time frame and there should be pain relief of approximately 80% demonstrated by pre and post Visual Analog Scale (VAS) scores. Examples of functional changes may include sitting, walking, and lifting. Additionally, a prospective patient completed pain diary must be recorded as part of the medical record that documents response hourly for a minimum requirement of the first 8 hours post injection or until the block has clearly worn off and preferably for the week following an injection.

25. The Guidelines further provide, "The recommendations in this guideline are for pre-MMI care and are not intended to limit post-MMI treatment."

26. Claimant is found to be credible and persuasive.

27. The ALJ notes the conflicting medical opinions expressed in this case, but finds the opinion expressed by Dr. Stanley to be more credible and persuasive than the contrary opinion of Dr. Douthit.

28. Based on the evidence presented, the ALJ finds Claimant established it is more likely than not the fourth epidural steroid injection recommended by Dr. Stanley is

reasonably necessary and related to relieve Claimant from the effects of his admitted February 2, 2015 industrial injury or to prevent deterioration of his condition.

CONCLUSIONS OF LAW

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. The need for medical treatment may extend beyond the point of maximum medical improvement where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

Pursuant to Workers' Compensation Rule of Procedure 17-2(A) health care practitioners are to use the *Guidelines* when furnishing medical care under the Workers' Compensation Act. *See* §8-42-101(3)(b), C.R.S. The ALJ may also appropriately consider the *Guidelines* as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAP, Jan. 25, 2011). However the ALJ is not required to grant or deny medical benefits based upon the *Guidelines*. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAP, Apr. 27, 2009). The ALJ's consideration of the *Guidelines* may include deviations where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (ICAP, Jan. 25, 2011). There is no requirement for an ALJ to award or deny medical benefits based on the *Guidelines*. *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (ICAP, Apr. 27, 2009); *see Nunn v. United Airlines*, W.C. No. 40785-790 (ICAP, Sept. 9, 2011).

The ALJ concludes Claimant has established, more likely than not, the recommended fourth epidural steroid injection is reasonably necessary and related to relieve Claimant of the effects of the industrial injury or to prevent deterioration of Claimant's condition. As found, the ALJ credits the opinion of Dr. Stanley, who treated Claimant and observed Claimant's success with the administered injections. Dr. Stanley indicated Claimant achieved 80% relief from the injections and contended the injections are reasonable maintenance care. Dr. Douthit reviewed Claimant's medical records but did not physically examine Claimant. Claimant credibly and persuasively testified the injections significantly reduced his pain and allowed better functioning. To the extent Dr. Douthit relied on the Guidelines, the Guidelines clearly state the recommendations therein are for pre-MMI treatment and are not meant to limit post-MMI treatment. As such, Claimant proved by a preponderance of the evidence that the fourth epidural steroid injection recommended by Dr. Stanley is reasonable, necessary and related to relieve Claimant from the effects of his work injury or to prevent deterioration of his condition.

ORDER

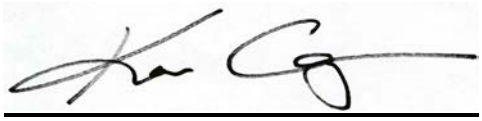
It is therefore ordered that:

1. Claimant's request for authorization of an additional epidural steroid injection as recommended by Dr. Stanley, and to be performed by Dr. Gesquiere, is GRANTED.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 16, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she is entitled to maintenance medical treatment benefits for her August 30, 2007 industrial injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a long time employee of the Colorado Mental Health Institute located in Pueblo (CMHIP), having worked there as a registered nurse (RN) for the past 23 years.

2. As an RN for the CMHIP, Claimant works with patients who have a variety of general medical and psychiatric conditions. Over the course of her employment with the CMHIP, Claimant has suffered a number of work related injuries to her neck. She has also sustained injuries to these same body parts as a result of motor vehicle accidents in 1991, 1994 and 2007. Consequently, Claimant has a complicated workers' compensation claims and medical treatment history that requires clarification before addressing her entitlement to maintenance medical benefits.

3. As noted above, has suffered injuries to her neck from both work and non-work related accidents. In 1991, Clamant had a motor vehicle accident (MVA) with the onset of cervical pain and lower back pain. She was then involved in a second MVA in a 1994, where she again suffered neck and low back pain after being involved in a rollover accident as an unrestrained occupant. An MRI from April 8, 1997, revealed asymmetric disc bulging at C6-7, without other abnormal findings. On December 31, 2003, Claimant was evaluated by Dr. Michael Dallenbach for complaints of neck, upper back and low back pain with radiation into the right lower extremity and right inguinal area after helping a patient sit down after she began to fall. X-rays obtained on January 5, 2004 revealed moderate C6-7 degeneration and mild anterior subluxation of C3 on C4 and C5 on C6. On March 17, 2005, Claimant alleged a work related injury to her neck and back while helping move a patient who was resistant to changing position. During this incident. Claimant reported a pulling sensation in her neck and back which resulted in worsening symptoms the following day. Claimant continued with a course of conservative care which included chiropractic treatment. Due to continued complaints of pain and given the results of her MRI study, she was referred to Dr. Sanjay Jatana. On June 27, 2006, Dr. Jatana noted that Claimant had "failed a long course of conservative treatment with no significant improvement", noting further that Claimant was desirous of definitive treatment. Consequently, Dr. Jatana performed a C6-7

anterior discectomy, bilateral neural foraminotomy with resection of the posterior longitudinal ligament and artificial disc replacement. On March 12, 2007, Claimant was involved in a third motor vehicle accident where she rear-ended a truck while traveling at approximately 45 mph. This incident caused a marked increase in her neck pain and an accompanying decrease in functioning.

4. On August 30, 2007, Claimant sustained injuries to her neck and low back along with an onset of headaches after suffering whiplash type injuries after being forcefully pushed in the chest by a patient.

5. Following the August 30, 2007 incident, Claimant reported three additional workplace incidents/injuries. Those incidents included: (1) An October 5, 2007, injury where an altercation with a patient alleged caused an increase in neck pain, headaches, and an onset of sciatica; (2) an October 29, 2007, incident with injuries of unclear etiology as medical records reflect treatment for an earlier injury; and (3) a March 6, 2008 incident where an elderly patient struck her in the chest causing her to again experience forceful flexion and extension of the cervical spine.

6. On April 14, 2009, Claimant was evaluated by Dr. Rachael Basse at the request of Employer's then third party administrator, Pinnacol Assurance. Dr. Basse was asked to perform the independent medical examination (IME) to address questions regarding Claimant's need for treatment related to her March 17, 2005 injury. In that regard, Claimant had reported to Dr. Basse that she felt she need additional box injections, a replacement splint for her temporomandibular joint (TMJ) dysfunction and ongoing pain medication. Dr. Basse opined that Claimant was at MMI with regard to her March 17, 2005 injury and that it was reasonable to repeat a series of Botox injections on a maintenance basis. She did not feel that there was a temporal relationship between Claimant's need for a TMJ splint and her March 17, 2005 injury. Finally she felt that Claimant's need for ongoing medications were likely partially related to Claimant's March 17, 2005 injury; recommending that Claimant's treating providers identify what pre-injury symptoms Claimant had for which medications were necessary to treat so as to apportion these from her March 17, 2005 related medication needs.

7. In her IME report Dr. Basse documents the following from Claimant's medical records:

- On September 18, 2007, Claimant went to Dr. Caughfield for a reevaluation of her headaches photophobia, nausea, and motion sensitivity. She reported her pain remained localized to the neck and interscapular area. Dr. Caughfield suspected Claimant's headaches were coming from the C2-C3 level with facet involvement and recommended diagnostic medial branch blocks. No mention of the August 30, 2007 incident was made in the report.

- On January 2, 2008, Dr. Dallenbach noted completion of facet and medical branch blocks, which offered some pain relief. The report, however, does not mention the August 30, 2007 incident.

- On May 23, 2008, Claimant presented to Dr. Jill Castro, a physical medicine and rehabilitation specialist, for a new evaluation concerning her March 17, 2005 injury. Claimant again did not report the August 30, 2007 incident during this evaluation but did report neck and upper back pain 6-8/10. She did not report radiating pain or numbness in her upper or lower extremities. Dr. Castro assessed Claimant with cervical strain with underlying degenerative changes status post disc replacement. She questioned radiculitis versus myofascial pain. She recommended against injections or surgery at that time.

8. On April 1, 2010, Dr. John Sacha performed a Division Independent Medical Examination (DIME) regarding Claimant's March 17, 2005 injury. Dr. Sacha opined that Claimant had reached maximum medical improvement (MMI) for her March 17, 2005 injury on March 13, 2007 when she suffered injuries to her neck as a consequence of her subsequent motor vehicle accident occurring March 12, 2007. Regarding Claimant's need for maintenance care, Dr. Sacha specifically noted that "[a]ny and all" treatment beyond that (March 13, 2007) should have been pursued under Claimant's private insurance.

9. On March 7, 2011, the parties entered into a Stipulated Motion to Resolve Issues. The stipulation is multi-faceted involving the worker's compensation claims brought between March 17, 2005 and March 6, 2008. The motion specifically provides that the parties agreed that any treatment necessary to treat Claimant's neck and upper back conditions was not attributable to her March 17, 2005 injury. The stipulation goes on to indicate that the parties agreed that any treatment necessary to treat any "current" neck/back symptoms, which were determined to be work related, would be attributable to the August 30, 2007 injury. Finally, the stipulation documents the parties' agreement to consolidate any work related injury treatment needs necessary as a consequence of Claimant's October 5, 2007, October 29, 2007 and March 6, 2008 injuries under her August 30, 2007 claim. In this regard, the stipulation provides as follows:

> The parties are fully aware that Claimant may have suffered industrial injuries to these same body parts on dates subsequent to August 30, 2007,but that treatment for these body parts necessary to any subsequent industrial injury occurring between August 30, 2007, and the date of this order, including but not limited to WC#4826581, carrier #3432480, DOI October 5, 2007, WC#4826580, carrier #3432474, DOI October 29, 2007, WC#4826578, carrier #3432447, DOI March 6, 2008, will be provided under the August 30, 2007 claim, WC#4826583, carrier #3432381.

10. In the stipulation, Claimant agreed to allow the March 17, 2005 claim to close. Claimant further agreed to withdraw her applications for hearing on the contested October 5, 2007, October 29, 2007, and March 6, 2008 claims. Pursuant to the stipulation, Claimant was to withdraw her Applications for Hearing on these cases and not object to the notices of contest that had been filed on those claims.

11. Claimant purportedly sustained a work related injury to her right low back and lower extremity on December 6, 2011 while attempting to lift 260-pound patient off the floor.

12. On January 15, 2013, Dr. Basse performed a second IME to address questions regarding the August 30, 2007 claim. Following an extensive history and medical records review, Dr. Basse opined that Claimant has experienced "functionally limiting" pain in her neck and shoulder girdle area for almost 20 years and that in the two months prior to the August 30, 2007 injury, Claimant had been seen by both Dr. Dallenbach and Dr. Jatana whose notes described extensive treatment to address waxing and waning pain with flares up of moderate to high intensity. Based upon the medical records reviewed along with the history provided by Claimant, Dr. Basse concluded that the August 30, 2007 incident caused a "temporary, acute aggravation of Claimant's cervical, shoulder girdle, and headache symptoms. For these injuries, Dr. Basse opined that Claimant was at maximum medical improvement (MMI) as of May 23, 2008 based on her visit with Dr. Castro. Dr. Basse opined that there was no permanent impairment from the August 30 incident. She encouraged settlement of the claim and recommended that any maintenance medical treatment take place outside of the workers' compensation system.

13. On May 29, 2013, Dr. Erasmus Morfe performed an 18-month DIME for the August 30, 2007 incident. He assessed Claimant with chronic neck pain, multifactorial without any specific deficits; components of myofascial pain; potentially some underlying structural discomfort; cervicogenic headaches; and prior disc replacement surgery. He noted that treatment had been "appropriate and extensive"; noting further that "anything moving forward would be maintenance care, and that is, in fact, what she was doing with the headache type medications that she listed on her regular medications." He opined that Claimant was at MMI as of January 15, 2013. He agreed with Dr. Basse that "maybe finding a regular PCP who could treat her more locally would be more convenient and might overall help her condition." Contrary to Respondent's suggestion, the ALJ does not interpret the DIME report to indicate that further treatment for Claimant should be done outside the workers' compensation system. Rather, the DIME report simply indicates that Dr. Morfe agreed that with Dr. Basse that "transferring all care to a single provider who knows her and is more conveniently located may help her condition.

14. On September 7, 2013, Dr. Basse performed a third IME to address questions surrounding Claimant's alleged December 6, 2011 injury referenced above. Dr. Basse. Dr. Basse provided an excellent review of the treatment notes surrounding this injury in her IME report. In her report, Dr. Basse notes that Claimant reported lifting

a 260 pound patient from the floor when she developed low back, buttock, and right hip/groin pain. Claimant was referred to physical therapy for this injury which included dry needling. Claimant was placed at MMI for this injury on April 5, 2012 after she elected not to return to physical therapy for additional treatment. Regarding this injury, Dr. Basse agreed with Dr. Olson, Claimant's authorized treating provider, that Claimant had reached MMI on April 5, 2012. She also opined that Claimant did not have permanent impairment and did not require maintenance treatment.

15. Dr. Castrejon completed a DIME on December 5, 2013, taking over for Dr. Morfe as the DIME physician on the case. He opined that, based upon a review of Claimant's file, she sustained only a temporary exacerbation of neck symptoms from the August 30, 2007 incident. According to Dr. Castrejon, the need for treatment for the August 30, 2007 injury was short lived such that by the time of her examination with Dr. Caughfield (on September 18, 2007) her condition had returned to its pre-injury status, as she did not even think to report the incident to Dr. Caughfield.

16. Dr. Castrejon opined that any continuing treatment was related to Claimant's March 12, 2007 motor vehicle accident rather than her August 30, 2007 work injury. In reaching this conclusion Dr. Castrejon noted: "Today the claimant offered a different version of the motor vehicle accident. She indicates that she was stopped, looked down to put away some tea and in so doing let go of the brake. As a result, her vehicle moved forward, impacting the vehicle ahead. She contends that there was no change in terms of her neck symptoms and stated that she was already participating in therapy therefore was not provided with any new and additional therapy as a result of this motor vehicle accident."

17. Dr. Castrejon determined that the medial file belied Claimant's characterization that the March 12, 2007 MVA was a "mild incident." Based upon the treatment records, Dr. Castrejon opined that the March 12, 2007, MVA resulted in a permanent aggravation of her baseline condition. Consequently, ongoing treatment would be related to the MVA and not the August 30, 2007 work related injury. This would include the need for cervical facet medial branch blocks as well as cervical rhizotomy. At the very most, Dr. Castrejon opined that Claimant would have achieved MMI status by May 23, 2008 with her visit to Dr. Castro. As there was no permanent aggravation of Claimant's condition secondary to the event of August 30, 2007, Dr. Castrejon opined that there is no permanent impairment.

18. Based upon a review of the evidentiary record as a whole, the ALJ finds the opinions of Dr. Castrejon to be credible and persuasive.

19. On September 18, 2015, Dr. Castrejon performed a follow-up DIME consisting of a records review only. He reviewed additional medical records, taking into account the October 5, 2007, October 29, 2007, and March 6, 2008 incidents, and updated his opinion on the August 30, 2007 incident. Following this additional review, Dr. Castrejon concluded that Claimant had a long standing history of chronic neck pain that predated her workplace injuries of March 17, 2005 and August 30, 2007. He also

concluded that Claimant's March 12, 2007 motor vehicle accident resulted in a permanent, non-work-related aggravation of her baseline neck condition. Concerning the August 30, 2007 incident, he stated that the incident was relatively minor's especially given that Claimant did not mention it to doctors Caughfield (September 18, 2007), Dallenbach (January 2, 2008), and Castro (May 23, 2008). Therefore, Dr. Castrejon concluded that it was medically probable that the August 30, 2007 incident did not result in any longstanding symptoms or permanent impairment.

20. On March 29, 2016, Dr. Basse performed a fourth IME for the August 30, 2007 injury. She again concluded that the August 30, 2007 injury resulted in a temporary, acute aggravation of Claimant's underlying, prior, or long-standing cervical, shoulder girdle, and headache symptoms. She also evaluated the October 5, 2007, October 29, 2007, and March 6, 2008 incidents, considering them to be temporary aggravations as well. She noted that there was no local trauma with which an anatomic change would be medically probable based on any of these incidents. Dr. Basse continued to maintain May 23, 2008 as the date of MMI for all four incidents. She recommended against medical maintenance treatment for all four dates of injury.

21. Dr. Jeffrey Jenks has treated the Claimant under the worker's compensation system since 2010. He has provided injection therapy and medication management services. On August 5, 2010, Dr. Jenks noted that Claimant had been placed at MMI and that he understood that he was providing maintenance care. Later on August 6, 2013, Dr. Jenks noted Claimant was placed at MMI per an IME for her March 17, 2005 injury on January 15, 2013. He agreed with that date of MMI and opined that Claimant had a 25% impairment rating. Based upon review of his treatment records through August 6, 2013, the ALJ finds that Dr. Jenks was providing care, including injection therapy and medication management for Claimant's March 17, 2005 injury. Thereafter, the records reflect continued maintenance care until December 10, 2015.

22. On December 10, 2015, Claimant was evaluated by Dr. Jenks for complaints of "significantly increased low back and right leg pain" after Claimant's unit flooded prompting her and the other floor nurses to clean up the water with blankets. Dr. Jenks attributed Claimant's increased back and leg pain to "lifting the heavy water soaked blankets, using mops and lifting buckets." Claimant's treatment continued in the form of additional injections and increased medications although it is unclear as to whether the need for this treatment was necessitated by the flooding incident or whether it was "maintenance care" secondary to Claimant's March 17, 2005 injury.

23. At the hearing, Claimant testified that she continues to be plagued by neck and low back symptoms at work. Specifically, Claimant testified that she has difficulty performing duties that require prolonged standing or bending as it places strain on her low back. In addition, Claimant reported that the prolonged sitting necessary to write reports aggravates her neck pain. She reportedly has difficulty concentrating and has occasional trouble with word finding. Although she admits to depression and anxiety, she speculated, perhaps jokingly, that she might have dementia because of her

perceived cognitive deficits. She testified that her job involves a substantial amount of sitting and that in addition to the neck problems she associates with writing reports while sitting, she experiences pain in her buttocks and down her legs after sitting for long period of time. She reported daily headaches which begin at the base of the skull and radiate forward over the top of the head and into the forehead. She also experiences episodes where she will breakdown and cry. In testifying to these ongoing symptoms, Claimant did not directly relate them to the August 30, 2007 or any other work related injury.

24. Claimant is currently taking the following medications: Mobic for arthritis; Lyrica for nerve pain; Cymbalta for depression and nerve pain; Fioricet and Topamax for headaches; and Ambien and Trazadone to improve her sleep pattern/duration. Claimant testified that these medications help cure and relive her of her ongoing symptoms. Without these medications, Claimant testified that she cannot function and would be unable to work.

25. In addition to the above medications, Claimant testified that she had an epidural steroid injection to the neck in the distant past and recently, i.e. last year at L4-5 which proved very helpful in reducing her symptoms. She also reported that physical and massage therapy along with acupuncture and chiropractic treatment were helpful in controlling her symptoms.

26. During, cross-examination, Claimant admitted to a long history of neck and low back pain predating the March 17, 2005 and August 30, 2007 incidents. In addition to the above referenced incidents, Claimant admitted that she was the victim of a domestic violence attack in 1990 where her boyfriend choked her and hit her about the face.

27. On cross-examination she also acknowledged that Drs. Castrejon and Basse had recommended against continued medical treatment related to the August 30, 2007 and the incidents occurring on October 5, 2007, October 29, 2007, and March 6, 2008. Rather, she was aware that these physicians attributed her current need for medical treatment to non-work related conditions. She was unaware of Dr. Morfe's opinions regarding the need for maintenance medical treatment.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

I. General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence

is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of Respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo.App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

II. Claimant's Entitlement to Maintenance Medical Treatment

D. The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*." Even with a general award of maintenance medical benefits, respondents still retain the right to dispute whether the need for medical treatment was caused by the compensable injury or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

E. While a claimant does not have to prove the need for a specific medical

benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, supra. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003).

F. Here, the ALJ credits the opinion of Drs. Castrejon and Basse to find and conclude that Claimant likely had pre-existing symptomatic degenerative changes throughout her neck and back prior to her August 30, 2007 work injury. Indeed in the months leading up to her August 30, 2007 injury, Claimant had seen both Drs. Dallenbach and Jatana for ongoing neck complaints that in 2006 had failed a long course of conservative care prompting Dr. Jatana to perform a cervical artificial disk replacement procedure. More likely than not, Claimant's serious MVA on March 12, 2007 resulted in a permanent aggravation of her baseline condition which was temporarily aggravated further by the relatively minor incident where Claimant was pushed in the chest on August 30, 2007. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo.App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo.App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). So it was with Claimant here; she received care for her temporary aggravation of her pre-existing condition until it resolved and she returned to baseline. While she probably had an ongoing need for treatment, that treatment was, as noted by Dr. Castrejon, convincingly related to her long standing history of chronic neck pain and low back pain that predated her workplace injuries of March 17, 2005 and August 30, 2007. Claimant has not met her burden to show the need for maintenance medical treatment is related to the August 30, 2007, the October 5, 2007, the October 29, 2007, or the March 6, 2008 incidents. Rather, as noted, the ALJ credits the opinions of Drs. Castrejon and Basse to find that these incidents were minor exacerbations that resolved quickly with no need for future treatment. These conclusions are supported by the medical records and the reports of the medical experts who reviewed Claimant's condition. The evidence Claimant presented at the hearing, including the medical records she submitted for injuries sustained after March 6, 2008, do not support a contrary conclusion as these records refer to treatment for other dates of injury not relevant to this case. Consequently, Claimant claim for maintenance medical treatment for injuries claimed August 30, 2007, October 5, 2007, October 29, 2007 and March 6, 2008 must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's claim for post-MMI medical maintenance benefits are related to claims for injury filed August 30, 2007, October 5, 2007, October 29, 2007 and March 6, 2008 is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 27, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on June 30, 2016.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to a general award of reasonable and necessary medical benefits.

FINDINGS OF FACT

1. Employer is a day labor job agency that offers jobs/tickets to eligible workers for work that is available on any given day. Workers line up outside Employer's office early each morning and they receive tickets for day jobs if day jobs are available.

2. Employer has two separate agencies. Ready Construction Services provides day labor tickets on construction jobs that are generally heavier and more physical assignments. Ready Temporary Services provides day labor tickets on jobs that are light industrial work. The two agencies share the same physical office and workers can choose which agency to take job tickets from.

3. Claimant moved to Denver in June of 2016. The day after arriving in Denver, Claimant went to Employer's office to fill out an application and to begin employment. Employer records show that Claimant's date of hire was June 3, 2016. *See* Exhibit A.

4. At Employer's office, Claimant initialed and signed Employer's core policies form. The forms advised that if he sustained a work related injury, Claimant was required to inform his supervisor on site as well as Employer dispatchers as soon as possible and that it was important to report immediately. *See* Exhibit I.

5. Claimant worked for Ready Temporary Services on jobs on the following dates: June 3-4; June 6, June 8-11, June 13-23, June 27, July 1, and July 5-7. Claimant worked for Ready Construction Services on the following dates: June 7, June 24, and June 28-30. Claimant testified that the various work that he performed included a construction site job moving temporary fencing and sand bags, a roofing job, and a job setting up large rugs in activity halls. *See* Exhibit I.

6. Claimant reported that he had no symptoms after the jobs involving the construction site and temporary fencing, roofing, and setting up large rugs.

7. On July 5, 2016 Claimant began a temporary job assignment in an industrial laundromat. Claimant's duties included making sure that each of 7 stalls with

workers all had linen bags for the workers to sort. Claimant had to twist, turn, reach, and lift the laundry bags and then carry them to each stall. Claimant worked at this location for a total of three work days on July 5, 6, and 7.

8. Claimant testified both that during this Laundromat job, he began to experience pain in his right foot and also that he began to have right foot pain at the end of June of 2016. Claimant testified that he waited to report the pain because he was not sure what had caused it.

9. Claimant did not identify any incident that specifically caused the pain in his right foot just that his foot started causing him pain. Claimant alleges that he kept working for three days after the pain came on but that it got to be unbearable with him hobbling, limping, and in such severe pain that he could no longer go to work.

10. On July 11, 2016 Claimant was evaluated by Lorenzo Rodriguez, M.D. Claimant reported right foot pain and swelling that started gradually about one week prior and that he had increased activity with working manual labor through a temp agency. Claimant reported no trauma. Claimant reported to nurse McBride that he was having pain on the dorsal side of his right foot for one month and that his foot became swollen if he was on his feet during the day. Dr. Rodriguez noted on examination that Claimant's right foot was noticeably more edematous than the left foot, that Claimant had mild erythema, and that Claimant was generally worse over the 3rd and 4th metatarsals. Dr. Rodriguez requested an x-ray of the right foot. *See* Exhibit F.

11. On July 11, 2016 Claimant underwent x-rays of the right foot interpreted by Bradford Robinson, M.D. The findings were no fracture or dislocation but minimal soft tissue swelling along the dorsum of the foot at the level of the metatarsals. *See* Exhibit H.

12. Claimant testified that one week later he knew the injury was significant enough to prevent him from working, so he decided to report it to Employer.

13. On July 18, 2016 Claimant reported the injury to Employer. Claimant met with Employer's workers' compensation administrator Travis Pomeroy. At that meeting, Mr. Pomeroy tried to pinpoint when and where the injury had occurred. Claimant said it happened at a construction site job and described fencing and sandbags but could not point to a specific mechanism of injury. Mr. Pomeroy pulled the tickets that Claimant had worked on and the job/ticket involving fencing and sandbags was on June 30, 2016 for Employer Ready Construction.

14. Mr. Pomeroy filled out a first report of injury listing the date of injury as June 30, 2016 and listing the activity as working all day, moving equipment and noted that Claimant could not point to a mechanism of injury. Mr. Pomeroy also referred Claimant for treatment. *See* Exhibit A.

15. On July 18, 2016 Claimant was evaluated at Concentra by Ron Rasis, PA-C. Claimant reported right foot pain for several weeks with an onset of pain on July 6, 2016. Claimant reported that he had been working for a temporary service for five weeks and that several weeks ago he was working a physical job with temporary fencing at a parking lot and that then that he was working in an industrial laundry. Claimant reported that he began developing pain and swelling in his right foot two weeks prior and that he had gradually worsening pain. Claimant denied any single event that caused the pain and also denied any direct trauma to his right foot. Claimant reported that he had pain while walking and swelling that increased over time. On examination, PA Rasis noted that Claimant's foot had diffuse tenderness on the dorsal aspect. PA Rasis assessed acute foot pain, right. *See* Exhibit G.

16. Claimant reported at the time of the onset of his symptoms he was simply working, sleeping, and had no extracurricular activity. Claimant admitted that he never made a report of injury on the job site related to any acute onset of pain. PA Rasis discussed with Claimant that there was no mechanism for an on the job injury, that walking was a ubiquitous activity, and that with no mechanism of injury to support an on the job injury, he was unable to determine causation for an on the job injury. PA Rasis released Claimant from care. *See* Exhibit G.

17. On July 22, 2016 Claimant underwent an MRI of his lower right extremity interpreted by Elizabeth Carpenter, M.D. Dr. Carpenter's impression was a mildly comminuted relatively non displaced second metatarsal neck fracture. Dr. Carpenter noted that the second metatarsal alignment was preserved, that there was a small joint effusion, and diffuse surrounding periosteal reaction and callus formation without evidence to suggest pathologic marrow replacement. Dr. Carpenter found moderate-severe first metatarsophalangeal and sesamoid phalangeal osteoarthritis. Dr. Carpenter also noted diffuse soft tissue edema surrounding the second metatarsal shaft. Dr. Carpenter noted that these findings were not present on the recent right foot radiographs. *See* Exhibit H.

18. On July 27, 2016 Claimant was evaluated by Dr. Rodriguez. Dr. Rodriguez noted that Claimant was there for follow-up on a recent MRI that was notable for a non-displaced 2nd right metatarsal fracture. Dr. Rodriguez noted that Claimant's pain and swelling was improving, but still present. Dr. Rodriguez provided Claimant a boot to keep his foot immobilized and also provided medications. *See* Exhibit F.

19. Dr. Rodriguez testified at hearing. Dr. Rodriguez noted that Claimant reported an onset of new right foot swelling with no trauma to the area. Dr. Rodriguez testified that he was concerned initially about a stress fracture. Dr. Rodriguez opined that a stress fracture might not show up on an x-ray for a couple of weeks and that the July 22 MRI did show a fracture even though the July 11 x-ray did not. Dr. Rodriguez opined that the stress fracture could be from walking or bearing weight. Dr. Rodriguez opined that based on Claimant's subjective reports that the onset was with work activity, he thought that the injury was work related. Dr. Rodriguez testified that new activity or a marked increase in activity including walking or weight bearing could cause a fracture.

20. PA Rasis also testified at hearing. PA Rasis noted that Claimant had reported that some sort of strenuous activity at work had caused his pain. PA Rasis noted that Claimant did not describe a specific onset but just that gradually over time the pain got worse with walking. PA Rasis testified that there was no job related task described as causing the onset of pain. PA Rasis testified that Claimant's reported onset and pain with walking was ubiquitous and that he could not opine that the pain was work related and that he closed the case after the first visit as not work related. PA Rasis was uncertain as to what caused the pain and testified that Claimant's report of just doing stressful work was not sufficient for him to make a causal connection to job duties or to a work related injury. PA Rasis opined that Claimant did not sustain a work related injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the condition for which he seeks medical treatment was proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish, more likely than not, that he sustained a work related injury. Although an MRI on July 22, 2016 showed a second metatarsal fracture, Claimant has failed to establish that this fracture was caused by his employment. Rather, the fracture just as likely could have been caused by non work activities or by the natural progression of a pre-existing condition unrelated to employment. Claimant has failed to establish that the fracture was proximately caused by an injury at work. Claimant's initial reports both to Employer and to medical providers identified no mechanism of injury or acute injury but just an onset of pain over time. Claimant reported to Mr. Pomeroy that his onset of pain began at a job involving fencing and sandbags but later testified that the onset of pain began at an industrial laundromat job. Claimant also reported inconsistently as to the date of the onset of his pain being either June 30, 2016 or July 6, 2016. Claimant did not begin working at the Laundromat until July 5, 2016 and only worked there for three days. Despite this, Claimant also reported that he continued to work for three days after the onset of pain even though records and Employer's testimony shows Claimant only worked three days total at the Laundromat. Despite alleging significant pain that caused him to stop being able to work and that caused severe pain, Claimant also failed to report any injury to Employer until July 18,

2016. Claimant had recently, and within the prior month, signed policies requiring immediate reporting of any injuries. Claimant's actions are inconsistent with someone who sustained a work related injury. Claimant overall is not found persuasive that a work related injury occurred.

The testimony of PA Rasis is found credible and persuasive that no work related mechanism of injury exists and that the injury and second metatarsal fracture is not work related. The opinion of Dr. Rodriguez is not found as persuasive. Dr. Rodriguez based his opinion on Claimant's subjective reports that the pain began at work. However, Claimant's reports are found to be inconsistent as to the date of onset, the job where the onset occurred, and overall cannot be relied upon to any degree of certainty. Therefore, the opinion of Dr. Rodriguez, based on Claimant's subjective reports, also cannot be relied upon to any degree of certainty. Claimant has failed to show, more likely than not, that he sustained a work related injury and his claim is denied and dismissed.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As Claimant has failed to establish that he sustained a compensable work related injury, Respondents are not liable for medical treatment.

ORDER

1. Claimant has failed to meet his burden to establish by a preponderance of the evidence that he sustained a compensable injury on June 30, 2016. The claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 15, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- What was Claimant's average weekly wage when he was injured while working for Employer?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant worked for the employer as a warehouse and logistics employee.

2. Claimant was injured on November 19, 2012.

3. Respondents admitted for an average weekly wage ("AWW") of $772.68.

4. Respondents determined Claimant's AWW by averaging twelve of his weekly pay periods. The 12 pay periods used were September 1, 2012 through November 17, 2012. During these pay periods, Claimant earned $9,272.27. However, during this time Claimant was involved in a house fire and was taking time off from work. Thus, Claimant earned significantly less during the pay periods used by Respondents to calculate his AWW. For example, for the weekly pay period ending September 15, 2012, Claimant earned $0.00 and for the weekly pay period ending September 29, 2012, Claimant earned $8.25. Therefore, the AWW to which Respondents admitted was artificially low.

5. Claimant was hired to work 40 hours per week.

6. Pursuant to the Wage Statement submitted by Respondents dated July 1, 2014, which is after the date of injury, Claimant was paid $24.54 per hour. At 40 hours per week, this equates to an AWW of $981.60.

7. Pursuant to the Wage Statement submitted by Claimant, which is dated October 6, 2016, which is also after the date of injury, his hourly rate is $25.95. At 40 hours per week, this equates to an AWW of $1,038.00.

8. The Wage Statement Summary submitted by Claimant shows the number of hours Claimant worked per week from November 26, 2011 through November 17, 2012, i.e., 52 weeks. As noted, there are some weeks Claimant worked less than 20 hours per week and some weeks in which he worked more than 40 hours.

9. Claimant testified that after his work related injury, he had earned as much as $71,000 per year.

10. Claimant submitted his 2012 W-2. His 2012 W-2 indicated Claimant earned $54,759.36 during 2012. This averages to $1,053.06 per week.

11. It is found that Claimant's average weekly wage is $1,053.06.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Section 8-42-102(2), C.R.S., requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* It would be within the ALJ's discretion to use the wages the Claimant earned the following year in the formulation of the average weekly wage. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008).

In this case, Claimant was injured on November 19, 2012. For the week ending November 17, 2012, Claimant worked 40 hours and was paid $986.81, which is $24.67 per hour. Claimant, however, did not always work 40 hours per week. As set forth in his wage records, Claimant would sometimes work less than 20 hours per week and would sometimes work more than 40 hours per week. For example, for the week ending February 4, 2012, Claimant worked 58.25 hours and earned $1,602.09.

In order to fairly calculate Claimant's AWW, this ALJ believes that the most reasonable method is to average Claimant's earnings during 2012. This will take into consideration Claimant's lower and higher weekly earnings. For 2012, Claimant earned $54,759.36. This equates to an AWW of $1,053.06 per week.

Therefore, this ALJ concludes that Claimant's average weekly wage is $1,053.06.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's AWW is $1,053.06 per week.

2. Insurer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 3-15-17

/s/Glen B. Goldman
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

- Whether Claimant's request for medical benefits (medial branch block) was reasonable, necessary and related to her injury.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on November 7, 2011 while working for Employer. She was pulling a pallet jack, which stopped abruptly and caused pain in her hip and low back.

2. Claimant received medical treatment through Workwell, the ATP for Employer, and was treated by Peter Mars, M.D. Dr. Mars referred Claimant to Roberta Anderson-Oeser, M.D.

3. Dr. Anderson-Oeser first treated Claimant on January 5, 2012 and has provided treatment to her as an ATP since then. Dr. Anderson-Oeser testified as an expert in Physical Medicine and Rehabilitation. The transcript of her deposition, taken on April 4, 2016, was admitted into evidence.[1] Dr. Anderson-Oeser evaluated Claimant prior to her surgery, providing treatment recommendations and work restrictions.

4. On April 18, 2014, Claimant underwent surgery on her left hip, which was performed by Dr. White. Dr. White repaired a left hip labral tear. Dr. Anderson-Oeser testified Claimant has had SI joint problems, facet problems in her low back, as well as piriformis problems. She noted Claimant had periods in which symptoms were under control, then experienced flare-ups, which required treatment.

5. The records admitted at hearing from Dr. Anderson-Oeser documented the fact that she was involved in Claimant's post-surgical care. At the time of the August 12, 2014 evaluation, Dr. Anderson-Oeser noted that Claimant had an overall improvement following the left sacroiliac joint steroid injection. At the October 1, 2014 examination, Claimant reported improvement in her gluteal pain following trigger point injections. However, Claimant had less improvement after the next injection. Dr. Anderson-Oeser continued to oversee Claimant's treatment from October 8, 2014 through April 2016.

6. On January 28, 2015, Claimant was evaluated by Kirk Kindsfater, M.D. At that time, Claimant had low back pain in the area of the SI joint, lateral-based pain and

[1] Exhibit 3.

pain in the groin. On examination, Dr. Kindsfater noted Claimant had no restrictions in the range of motion of her hip, although the numerical values appeared to show some restriction (e.g. flexion to 110 degrees, internal rotation to 40 degrees, rotation to 50 degrees and abduction to about 60 degrees). In Dr. Kindsfater's impression, he noted Claimant had persistent left hip pain 3 1/2 years after the injury and nine months after arthroscopy. The treatment plan was to repeat the MRI to determine whether she had significant effusion and a grade 4 change. Dr. Kindsfater opined it would be unlikely Claimant would have a predictable benefit from hip arthroplasty.

7. In the evaluation of April 16, 2015, Claimant's lumbar range of motion was noted to be restricted on forward flexion and extension. Left hip range of motion was restricted as well. Dr. Anderson-Oeser's impression was: left hip labral status post repair; left sacroiliac joint pain and dysfunction; left hip myofascial pain; chronic opioid usage; left trochanteric bursitis.

8. John Burris, M.D. performed an IME at Respondents' request on December 23, 2015. At that time, Claimant was reporting 5/10 pain in the left low back region, which wrapped around her hip into her groin. On physical examination, Dr. Burris found that, although Claimant had diffuse tenderness over the left lower lumbar region extending over the SI joint, she had functional motion in all planes with the main limitation on forward flexion. She had full extension and lateral bending bilaterally. Claimant was neurologically intact throughout the lower extremities with motor strength 5/5 throughout, deep tendon reflexes-2+ and symmetrical negative seated straight leg raise to 90 degrees bilaterally. Claimant had positive tenderness on the left hip, but negative on the right and negative Waddell's testing. With regard to the left lower extremity, Claimant had normal color, temperature and muscle tone. She had no unusual swelling, arrhythmia or tenderness at the left hip. Claimant was tender in the groin and laterally over the greater trochanter.

9. Dr. Burris' assessment was low back pain and left hip pain. Dr. Burris noted Claimant was diagnosed with femoroacetabular impingement ("FAI"), which was a pre-existing, congenital condition. Her diagnosis of labral tear was more likely than not a direct consequence of her anatomical impingement. Dr. Burris opined that Claimant's left hip condition was not causally related to her work activities on November 7, 2011. He noted there had been no significant documented changes in her subjective complaints or her functional status over the last four years. Dr. Burris opined it was not reasonable to expect she would benefit from any additional active treatment. Therefore, Dr. Burris concluded Claimant was at MMI and sustained no medical impairment as a result of her industrial injury.

10. On January 28, 2016, ATP Terrell Webb, M.D. agreed with Dr. Burris and concluded Claimant reached MMI. He assigned a 0% permanent medical impairment rating and was in agreement with Dr. Burris that Claimant would not benefit from any additional active treatment. The ALJ found Dr. Webb simply adopted Dr. Burris' conclusions both on the issue of impairment and the need for additional treatment.

There was no evidence in the record Dr. Webb evaluated Claimant on this occasion, including performing range of motion testing.

11. Claimant testified she would see Dr. Webb every three-four weeks and he would perform a brief physical exam, but very little in the way of treatment. Dr. Anderson-Oeser testified she was the specialist primarily responsible for Claimant's treatment. She understood Dr. Webb was evaluating Claimant for her work restrictions. She was somewhat surprised Dr. Webb had placed Claimant at MMI when there were still treatment options. Dr. Anderson-Oeser did not believe Claimant was at MMI.

12. Dr. Anderson-Oeser performed a diagnostic/therapeutic injection of the left L4-5 and L5-S1 facet joint on January 8, 2016.

13. On February 5, 2016, Insurer filed a Final Admission of Liability ("FAL").[2] The FAL admitted for ongoing medical benefits after maximum medical improvement. The FAL stated post MMI benefits were admitted: "Reasonable and necessary medical care related to this claim per authorization from authorized treating physician". [3]

14. Dr. Webb evaluated Claimant on February 22, 2016. At that time, Claimant was complaining of left hip pain. Dr. Webb's diagnosis was: sprain of ligaments of lumbar spine, initial encounter; pain in the unspecified hip. Dr. Webb said he concurred with Dr. Burris' assessment and recommendations. Dr. Webb noted despite all of the extensive evaluations and treatment, there had been a little improvement in Claimant's condition. Dr. Webb returned Claimant to her primary care physician for further care and management of her ongoing symptoms.

15. Dr. Anderson-Oeser examined Claimant on February 25, 2016, at which time it was noted Claimant had 80% relief from the previous facet steroid injection.

16. On March 14, 2016, Claimant returned to Dr. Anderson-Oeser, who noted Claimant had restricted ROM in her lumbar spine on examination. Dr. Anderson-Oeser's impression was: left lumbar facet pain and dysfunction; lumbar facet arthropathy; left sacroiliac joint pain and dysfunction; muscle spasms; left hip labral tear, status post repair; left trochanteric bursitis. Dr. Anderson-Oeser noted Claimant recently underwent left L4-5 and L5-S1 facet joint steroid injections with significant improvement of her low back pain. The ALJ notes Dr. Anderson-Oeser recommended diagnostic left L3, L4, L5 medial branch blocks because Claimant's symptoms had returned and a medial branch block was performed at this appointment. This medial branch block was done with Bupivacaine. Claimant reported relief of her symptoms.

[2] There was no evidence in the record that either party challenged the finding of MMI by requesting a DIME.

[3] Exhibit 2.

17. Dr. Anderson-Oeser recommended proceeding with second diagnostic left L3, L4, and L5 medial branch blocks to determine if the medial branches were the primary pain generators. Dr. Anderson-Oeser testified in her deposition that if Claimant had 70% reduction in her pain complaints, these blocks would be diagnostic.[4] Dr. Anderson-Oeser testified if there was no response to the injection, she was not recommending additional injections. If there was a response, she recommended a second set of medial branch blocks to be done with a different anesthetic. This second set was described as "confirmatory", to make sure this was the pain generator and to rule out a placebo response.

18. Dr. Anderson-Oeser testified that if the confirmatory injection was positive, a rhizotomy would be considered. The medial branch injections were for Claimant's back pain, not treatment of the hip.[5] Dr. Anderson-Oeser disagreed that the FAI condition caused Claimant's need for treatment of the hip with Dr. White. The ALJ was persuaded that the treatment recommended by Dr. Anderson-Oeser (the first and second medial branch blocks) were reasonable and necessary. Dr. Anderson-Oeser credibly testified as to her rationale for said treatment and why it was required in this case. The ALJ found Dr. Anderson-Oeser's testimony more credible than that of Dr. Burris.

19. Claimant testified she wishes to have the second medial branch block.

20. On April 5, 2016, Dr. Anderson-Oeser noted she disagreed with Dr. Webb that Claimant had no restrictions and should have been able to return to full duty.

21. Dr. Burris issued a supplemental report, which he signed on April 8, 2016. In this report, he responded to a missive from Respondents' counsel regarding the proposed medial branch blocks at L3, L4 and L5. Dr. Burris opined these were not reasonable, nor necessary and not related to the November 7, 2011 injury. He explained there was no benefit from prior facet injections and Claimant remained at MMI.

22. Claimant returned to Dr. Anderson-Oeser on May 24, 2016. At that time, it was noted she continued to have left sacroiliac, buttocks and hip pain. Claimant was tender over the left sacroiliac joint and continued to have a positive Faber's test. Dr. Anderson-Oeser discussed proceeding with a left SI joint injection for therapeutic purposes with Claimant, who wished to proceed with that injection. Dr. Anderson-Oeser planned to see Claimant back to perform that injection.

23. At hearing, Dr. Burris testified regarding why additional medial branch blocks were not reasonably needed. He stated Claimant had undergone facet injections

[4] Deposition of Dr. Anderson-Oeser, pages 16:21-18:14.

[5] Deposition of Dr. Anderson-Oeser, page 9:13-14.

back in 2012. If the pain generator was in the facets, then the response to the facet blocks would have been positive. Because the response to the facet blocks back in 2012 was negative there is no reasonable medical justification for doing medial branch blocks because there was no reasonable medical expectation that Claimant's pain is being generated by the facet for which medial branch blocks are designed to cure or relieve or maintain maximum medical improvement therefrom. Dr. Burris testified the medial branch blocks were not warranted under the Workers' Compensation Medical Treatment Guidelines.

24. No party contested the determination of MMI.

25. Claimant proved the proposed branch medial block is reasonable, necessary and related to her industrial injury. The ALJ finds the second medial branch block will maintain MMI, as it will prevent deterioration of Claimant's condition.

26. Evidence and inferences contrary to these findings are not credible and persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Proposed Medial Branch Block

In cases where the Respondents file a FAL admitting for ongoing medical benefits after MMI, they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When Respondents challenge Claimant's request for specific medical treatment, Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether Claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, the ALJ was persuaded Claimant satisfied her burden of proof and established the proposed treatment is reasonable and necessary. The ALJ's rationale was two-fold. First, Dr. Anderson-Oeser has been involved in Claimant's treatment since 2012. (Findings of Fact 3, 5, 11, 12, 14-17, 20, 22). The ALJ concluded Dr. Anderson-Oeser was in the best position to evaluate Claimant's need for treatment and found her credible when describing the medial branch block. (Findings of Fact 14 and 17). The ALJ credited her testimony, particularly her explanation concerning the rationale behind the medial branch blocks.

Second, Dr. Burris testified Claimant had no response to the previous facet injections, which was contrary to the evidence. (Finding of Fact 16). Dr. Burris also testified that the proposed treatment was related to Claimant's hip issue and not warranted under the Medical Treatment Guidelines. The ALJ found Dr. Anderson-Oeser to be more credible than Dr. Burris on these issues. (Finding of Fact 18). Both Claimant's testimony and that of Dr. Anderson-Oeser ran counter to Dr. Burris' supposition that she had no positive response to the previous injections, including the first medial branch block. The ALJ was persuaded that the proposed treatment (the first and second medial branch blocks) were reasonable and necessary. Further, the ALJ concluded Claimant's hip and low back symptoms were related to Claimant's industrial injury.

Since there was no evidence before the ALJ that either party requested a DIME, the ALJ declines to find Claimant is no longer at MMI. Therefore, this treatment is to be provided as post-MMI medical treatment. As found, the treatment proposed by Dr. Anderson-Oeser will prevent deterioration of Claimant's condition. The ALJ reasoned this will help Claimant maintain MMI.

This case fits within the ambit of the recent case of *Chisholm v. Walmart*, WC 4-809-103 (January 9, 2017). In that case, Claimant received ongoing physical therapy after MMI as part of maintenance care. A surgeon recommended a reverse total arthroplasty under maintenance care, which was denied by Respondents. The case proceeded to hearing and the ALJ approved the surgery ass reasonable and necessary to "cure and relieve" the effects of the injury. Noting that post-MMI treatment which

maintains MMI or prevents the deterioration of Claimant is approproiate (as opposed to treatment designed to relieve the effects of the industial injury), the panel remanded the case to the ALJ to determine whether the goal of the proposed surgery was to cure the effects of the injury.

In the case at bench, continued relief of Claimant's low back symptoms is potentially provided by the proposed treatment. As such, the medial branch block is appropriate under these facts.

ORDER

It is therefore ordered that:

1. Respondents shall pay for reasonable and necessary medical treatment in the form of the first and second medial branch blocks recommended by Dr. Anderson-Oeser, subject to the Colorado Division of Workers' Compensation Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March16, 2017

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Did Claimant sustain a compensable injury to her right shoulder arising out of, and in the course and scope of, her employment with Respondent on October 9, 2015.

II. Did Respondent prove by a preponderance of the evidence that the General Admission of Liability was improvidently filed, and should now be withdrawn with prospective relief to Respondent.

III. Whether, if the Court concludes Respondent has not proven by a preponderance of the evidence that the General Admission of Liability of April 14, 2016, was improvidently filed and should be withdrawn with prospective relief, Claimant has proven by a preponderance of the evidence that her need for medical benefits directed to her right shoulder, specifically but not limited to the rotator cuff pathology and shoulder surgery proposed by Michael Simpson, M.D. on May 3, 2016, are reasonable, necessary, and causally related to her October 9, 2015, injury.

FINDINGS OF FACT

Based on the evidence and testimony presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant, a clerk at employer's store at 3980 Ivywood in Pueblo, Colorado, was assisting a store customer purchase items at the cash register and front counter on October 9, 2015. The customer wished to purchase a can of chewing tobacco. The store's chewing tobacco display is kept behind the store's cash register and counter, out of the reach of customers, and only a store clerk operating the cash register or working behind the store's front counter can access the chewing tobacco. The cans of chewing tobacco are kept on shelves in the display. When working on the cash register at the store's counter, the clerk's back is turned towards the rack of chewing tobacco products.

2. Claimant testified that on October 9, 2015, she reached her right hand towards the can of the brand of chewing tobacco the customer wanted to purchase. She claimed that as she reached up, she felt a pop, and had pain, in her right shoulder. Claimant was not holding or lifting anything in her hand, when this incident occurred. She reported the incident and symptoms to Ms. Stormy Frank, but felt she could continue working. Ms. Frank testified that anyone reaching for a can of chewing tobacco would need to turn one's body away from the counter and register, toward the rack of tobacco products, to reach for the can of tobacco.

3. Claimant did work the remainder of her scheduled shift for respondent on October 9, 2015. Claimant testified she went home the evening, and her shoulder's symptoms did not improve. She therefore decided to go to EmergiCare's office in Pueblo the next day for an evaluation, as this was the provider she selected as her medical provider in this claim.

4. Claimant saw Ryan Sefcik, D.O. at EmergiCare on October 10, 2015. Dr. Sefcik reported that claimant said she, "[W]as lifting an item at work and felt her right shoulder pop." Dr. Sefcik gave claimant work restrictions, and respondent accommodated those restrictions. Claimant continued to work for employer within her restrictions. Claimant's care then passed to Dr. Douglas Bradley, M.D., who continued as her authorized treating physician ("ATP").

5. Respondent filed a General Admission of Liability for medical benefits only on April 14, 2016. Respondent has paid no indemnity benefits in this claim, and has filed no subsequent admissions. One month later, Respondent filed an Application for Hearing, seeking to withdraw that admission and obtain prospective relief from that admission, on May 13, 2016.

6. Dr. Wallace Larson performed an independent medical examination ("IME") on behalf of Respondent on July 24, 2016. Claimant demonstrated her position to him of how she was reaching for the can of chewing tobacco. Dr. Larson testified, and wrote in his report, that claimant, "[D]emonstrates to me a position of somewhat abduction and external rotation of the right shoulder. She does not demonstrate any severe position of the shoulder."

7. Dr. Bradley admitted when he testified that he did not obtain any detail regarding her positioning and reaching when he treated claimant, "I don't believe I went through anything deeper than for her to reach up initially to grab a tobacco product overhead . . . ." (Bradley depo. pgs. 17-18: 18-2) Dr. Bradley focused on the treatment of claimant's symptoms, and not on assessing, analyzing, and considering anything about the causation of those symptoms (Bradley depo. pg. 18: 5-7).

8. A right shoulder x-ray done October 12, 2015, revealed a, "Normal shoulder." (Resp. Ex. D, pg. 93). A right shoulder MRI performed October 20, 2015, was interpreted to only show, "Small right shoulder effusion." (Resp. Ex. E, pg. 94). Claimant's right shoulder symptoms continued despite conservative care overseen by Dr. Bradley. A second right shoulder MRI done March 28, 2016, was interpreted to Charles Domson, M.D. to show:

> 1. Thinning, tendonosis, and partial articular surface tear to the supraspinatus tendon insertion without retraction. Mild atrophy is noted in the muscle.
> 2. Mild thinning and tendonosis in the infraspinatus tendon without tear.
> 3. Small right glenohumeral joint effusion is noted. (Resp Ex. E., pg. 95)

Dr. Bradley referred Claimant to Michael Simpson, M.D., an orthopedic surgeon, for his opinion regarding further treatment for Claimant's right shoulder.

9. Dr. Simpson saw Claimant on January 11, 2016. Claimant, he wrote, reported, "She was just reaching out away from her body reaching for a can of tobacco. She felt a pop in her arm." (Resp. Ex. C, pg. 86). Claimant's shoulder had full range of motion on his examination.

10. Dr. Simpson saw Claimant again on April 27, 2016. Claimant still had full range of motion. Dr. Simpson believed the MRI revealed, "[A] partial articular surface tear of the supraspinatus insertion without retraction. She has a small glenohumeral effusion." His diagnosis was a partial thickness rotator cuff tear of Claimant's right shoulder, and he recommended that Claimant, "[P]roceed with an arthroscopic evaluation of the shoulder, subacromial decompression, and debridement versus rotator cuff repair." (Resp. Ex. C, pg. 91)

11. Dr. Simpson did not address causation or relatedness in this report. Dr. Simpson's office sought pre-authorization for that surgery on May 3, 2016. Respondent denied authorization for that surgery contending that surgery was not causally related to this claim's October 9, 2015, alleged injury.

12. Wallace Larson, M.D., is a Level II certified provider familiar with causation analysis in workers' compensation claims. He is an orthopedic surgeon specializing in evaluation, treatment, and surgery on the upper extremities including the shoulder joint. Dr. Larson saw Claimant for a medical examination at respondent's request on July 24, 2016. Dr. Larson concluded that the surgery requested by Dr. Simpson was reasonable and necessary, and agreed with Dr. Simpson's diagnosis concerning claimant's right shoulder. Dr. Larson obtained a full history from Claimant, including her detailed description, physical demonstration, and depiction of how she was positioned and how she moved to reach for the can of chewing tobacco when she felt her arm pop. He concluded Claimant's right shoulder condition, diagnosis, and need for medical treatment including the surgery recommended by Dr. Simpson was not causally related to the incident claimant claims occurred at work on October 9, 2015.

13. In response to questions by Respondent's representatives, he explained in his report:

> It is **unlikely** the patient has a work-related diagnosis. She does have subacromial impingement. It is **very unlikely** subacromial impingement was either caused or aggravated by very mild abduction and external rotation of her right shoulder. It is possible, and by history, likely that she **noticed** her right shoulder impingement while she was at work but it is very **unlikely** her occupational exposure caused or aggravated subacromial impingement. The simple act of lifting 2 ounces to 5 ounces of material for placing the arm and very mild abduction external rotation **would not cause** subacromial impingement and certainly without (sic) result in any type of aggravation that would be longstanding. (emphasis added). (Resp. Ex. A, pg. 4).

He concluded, “From a medical standpoint, the patient does not have an occupational disorder.” (Resp. Ex. A, pg. 5)

14. Dr. Larson testified at hearing consistent with this written opinion. He explained that the act of reaching for the can of chewing tobacco, as described and demonstrated by Claimant, would not, and could not, cause any rotator cuff pathology, impingement of the right shoulder, right shoulder bursitis, shoulder trauma, or the changes and findings seen on the right shoulder MRI scans done October 20, 2015, and March 28, 2016. He said that there was no medical support for Claimant’s assertion that there was a shoulder injury caused by her simple, one-time act of reaching at work on October 9, 2015.

15. The MRI scans showed, he explained, degenerative conditions that arise over time. He explained all of claimant’s symptoms and need for medical treatment. These changes clearly existed before October 9, 2015, he testified. Simply reaching for the can of chewing tobacco did not, and could not, place any injurious force on Claimant’s right shoulder joint and rotator cuff. The need for right shoulder surgery is not, he testified, due to Claimant’s reaching for a can of chewing tobacco. She would need that surgery whether she had reached for that can of chewing tobacco or not.

16. Claimant’s attorney took Dr. Simpson’s evidentiary deposition to address the causation and relatedness of Claimant’s right shoulder diagnosis and condition to this claim’s alleged injury. Dr. Simpson clarified that he believed claimant’s symptoms were consistent with an impingement syndrome, and not a rotator cuff pathology (Simpson Depo pg. 16: 8-12). When given a full history, including all facts concerning Claimant’s actions and movements when she was injured on October 9, 2015, and a fuller understanding of the medical records, including Dr. Larson’s medical report, Dr. Simpson testified Claimant’s right shoulder condition was not likely caused by the simple act of reaching for a can of chewing tobacco on October 9, 2015.

17. He testified about the causes of Claimant’s right shoulder’s impingement syndrome and rotator cuff’s partial-thickness tear, “That’s something that’s still open for a lot of debate, what are the causes of impingement, and impingement is seen quite commonly in people as they get over the age of 40. We’ll start seeing more and more problems with shoulder impingement. It’s probably an overuse phenomenon of the rotator cuff.” (Simpson depo. pg. 19: 13-18) “[I]t’s a whole spectrum and it’s probably a multifactorial problem.” (Simpson depo. pg. 20: 7-9) The partial thickness tear seen in claimant’s right shoulder’s rotator cuff, “[U]sually requires weight lifting attached to it.” (Simpson depo. pg. 21: 6-9) Importantly, Dr. Simpson was asked by claimant’s attorney whether the mechanism of injury alleged by claimant in this claim could cause her shoulder’s diagnosis and rotator cuff pathology. Dr. Simpson answered:

> I would say if she was reaching for a can of tobacco, something relatively lightweight, reaching from a shelf, I would not have expected that to cause a partial-thickness rotator cuff tear. (Simpson depo. pgs. 21-22: 24-2).

18. When claimant's attorney asked him to reconsider his answer to assume claimant was facing the opposite direction, and reaching her arm backwards at an angle as Claimant alleged at hearing she did, and as she described to Dr. Larson, he reached a similar conclusion:

> I still don't think that would have led to the actual tear. If there was a traumatic episode that led to the tear, I wouldn't have expected that to be medically probable to cause the tear. (Simpson depo. pg. 22: 14-21)

19. Dr. Simpson stated again that he could not state that the rotator cuff and other pathology seen in the MRI scan of March 28, 2016, and assessed by himself, was due to reaching to retrieve a can of chewing tobacco on October 9, 2015 (Simpson depo,. pg. 23: 10-15). Dr. Simpson said he could and would not say that the allegedly injurious activity on October 9, 2015, caused claimant's right shoulder impingement syndrome (Simpson depo. pg. 27: 12-15). He could not, and did not, state that Claimant's right shoulder diagnosis, pathology, and need for surgery was due to the allegedly injurious single episode of simply reaching at work as alleged by claimant on October 9, 2015.

20. Dr. Sean Griggs is an orthopedic surgeon who performed an IME on behalf of Claimant on March 7, 2016. Dr. Griggs noted in his report that the MRI which he examined was of the humerus, and not of the shoulder joint. He further noted that, based upon the information available, he felt that Claimant may have experienced "some minor trauma to the rotator cuff muscle", with subsequent bursitis. He did not recommend the surgery that even Drs. Simpson and Larson recommended.

21. Dr. Bradley, during his deposition, was asked whether he would defer to Dr. Simpson's opinions and conclusion on causation and relatedness for the right shoulder's diagnosis. He testified that he would defer to Dr. Simpsons' opinion on causation, and on whether the mechanism of injury reported by Claimant in this claim caused claimant's right shoulder condition. "I would defer to that." (Bradley depo. pgs. 18-19: 18-9).

22. The Court finds that the opinions of Dr. Simpson, and Dr. Larson are credible and persuasive. There is no sufficient evidence to rebut or refute their opinions that the cause of Claimant's right shoulder symptoms, diagnoses, pathology, and need for medical treatment including surgery is not and cannot be causally related to the alleged incident in this claim.

23. While the ALJ finds Claimant to be credible at all times pertinent, by a preponderance of the evidence, Respondent has now shown that Claimant sustained no injury to her right shoulder when she reached for the can of chewing tobacco on October 9, 2015. Rather, Claimant experienced crepitus when her shoulder "popped", and pain which manifested itself at that time due to preexisting subacromial abnormalities.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

Generally

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P. 3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things: the consistency or inconsistency of a witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. Prudential Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

4. Where a party presents expert opinions, the weight, and credibility, of the opinions are matters exclusively within the discretion of the ALJ as the fact-finder. Cordova v. Industrial Claim Appeals Office, P.3d (Colo. App. No. 01CA0852, February 28, 2002); Rockwell International v. Turnbull, 802 P.2d 1182 (Colo. App. 1990). To the extent that expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. Colorado Springs Motors, Ltd. v. Industrial Commission, 441, P.2d 21 (Colo. 1968).

Compensability Generally

5. "Claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer; and a workers' compensation case shall be decided on its merits." Qual-Med, Inc. v. Industrial Claim Appeals Office, 961 P.2d 590, 592 (Colo. App. 1998) ("Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); Lerner v. Wal-Mart Stores, Inc., 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence."). Proof by a preponderance of the evidence requires claimant to establish that the existence of a contested fact is more probable than its nonexistence. Hoster v. Weld County Bi-Products, Inc., W.C. No. 4-483-341 (ICAO March 20, 2002).

6. The phrases "arising out of" and "in the course of" are not synonymous and claimant must meet both requirements for the injury to be compensable. Younger v. City and County of Denver, 810 P.2d 647, 649 (Colo. 1991); In re Question Submitted by U.S. Court of Appeals, 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. Popovich v. Irlando, 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. Finn v. Industrial Commission, 165 Colo. 106, 437 P.2d 542 (1968); *see also*, Industrial Commission v. London & Lancashire Indemnity Co., 135 Colo. 372, 311 P.2d 705 (1957).

7. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. C.R.S. § 8-41-301(1) (c); Faulkner v. ICAO, 12 P.3d 844 (Colo. App. 2000). In other words, claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. Wal-Mart Stores v. Industrial Claim Appeals Office, 989 P.2d 521 (Colo. App. 1999); Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997).

8. A compensable industrial accident is one which results in an injury requiring medical treatment or causing disability. H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). To satisfy her burden of proof on compensability, claimant must prove that the industrial accident is the proximate cause of claimant's need for medical treatment or disability. § 8-41-301 (1) (c), C.R.S. An industrial accident is the proximate cause of a claimant's disability if it is the necessary precondition or trigger of the need for medical treatment. Subsequent Injury Fund v. State Compensation Insurance Authority, 768 P.2d 751 (Colo. App. 1988) The question of whether claimant had proven a causal relationship between employment and the alleged injury or disease is one of fact for determination of the ALJ. City of Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997); Metro Moving & Storage v. Gussert, 914 P.2d 411 (Colo. App. 1995)

9. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. Horodyskyj v. Karanian, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while, or in the case of her first elbow injury, shortly after performing job duties, does not mean that she sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985); Parra v. Ideal Concrete, W.C. No. 3-963-659 and 4-179-455 (April 8, 1988); Barba v. RE1J School District, W.C. No. 3-038-941 (June 28, 1991);

Hoffman v. Climax Molybdenum Company, W.C. No. 3-850-024 (December 14, 1989).

10. Under the Act, there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." § 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); see also, § 8-40-201 (2) (injury includes disability resulting from accident). Consequently, a "compensable injury" is one which requires medical treatment or causes disability. Id.; Romero v. Industrial Commission, 632 P.2d 1052 (Colo. App. 1981); Aragon v. CHIMR, et al., W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); H & H Warehouse v. Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." Romero, supra; § 8-41-301, C.R.S.

11. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain during, or from an event or incident, at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty when she experience pain. See Aragon, supra, ("ample evidence" supports ultimate finding that no injury occurred even where a claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, McTaggart-Kerns v. Dell, Inc., W.C. No. 4-915-218 (ICAO, May 29, 2014) (where a claimant involved in motor vehicle accident without resultant injuries suffered no compensable injury). As explained in Scully v. Hooters of Colorado Springs, W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in Scully noted, "[C]orrelation is not causation." Thus, merely because there may be a coincidental correlation between Claimant's work and her symptoms exists in this case does not mean there is a causal connection between Claimant's alleged injury and her work duties.

12. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. In Re Question Submitted by the United States Court of Appeals, 759 P.2d 17 (Colo. 1988); Moorhead Machinery & Boiler Co. v. Del Valle, 934 P.2d 861 (Colo. App. 1996). Moreover, the question of whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Faulkner v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000).

13. Simply because claimant noticed her condition at work is not dispositive of whether claimant sustained a right shoulder injury on October 9, 2015. Claimant's right shoulder had long-standing, degenerative conditions and disease process. As credibly and persuasively opined by Dr. Simpson, and Dr. Larson, the simple of act of reaching

as Claimant reports in this claim did not cause any injury to claimant's right shoulder. That ubiquitous activity places no injurious force or strain on claimant's right shoulder, and could not, and did not, cause any injury to the shoulder joint, including rotator cuff tear, tendonosis, or bursitis. The ALJ concludes claimant's shoulder pathology did not arise out of or in the course and scope of her employment with respondent on October 9, 2015.

The Burden of Proof is on the Respondent who now seeks to withdraw a General Admission of Liability

14. Pursuant to C.R.S 8-43-203(1)(a) an employer must provide notice that liability is admitted or contested within 20 days of the date it becomes aware of a disabling injury. Once an admission of liability is filed, the employer may not unilaterally withdraw it , but rather must continue to make payments consistent with the admission of liability until the ALJ enters an order allowing revocation in full or part. C.R.S 8-43-203(2) (d); HLJ Management Group, Inc. v. Kim, 804 P.2d 250 (Colo. App. 1990).

15. Admissions of liability bind Respondent, subject only to subsequent litigation. H.L.J. Management v. Kim, 804 P.2d 250 (Colo. App. 1990). Once either party endorses an issue for adjudication, prior admissions of liability may be altered, changed or withdrawn on a prospective basis. H.L.J. Management, supra. Respondent may even obtain complete relief, including a finding that no compensable injury ever existed. Faulkner v. Industrial Claim Appeals Office, 12 P.3rd 844 (Colo. App. 2000). Pursuant to C.R.S. Section 8-43-201 (1), Respondent has the burden of withdrawing their April 14, 2016, general admission of liability by a preponderance of the evidence. The ALJ concludes Respondent has met this burden, and that this admission shall be withdrawn and void prospectively. Respondent, the ALJ concludes, shall have no further liability for any benefit in this claim.

16. Since Respondent has now shown that this is not a compensable claim, there is no further need to address the reasonableness and necessity of her proposed shoulder surgery.

ORDER

It is therefore ordered that:

1. Respondent's request to withdraw the April 14, 2016 General Admission of Liability is granted, and Respondent is no longer bound by it.

2. Claimant's claim for further worker's compensation benefits is denied and dismissed. Her claim is no longer compensable.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 28, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Is the DIME's finding that Claimant is not at MMI, based on a diaganosis of CRPS, barred or otherwise limited by the doctrine of issue preclusion based on ALJ Walsh's May 8, 2016 Final Order?

2. If the answer to the first question is no, have Respondents overcome the DIME on the issues of diagnosis and MMI by clear and convincing evidence?

3. Is the repeat lumbar sympathetic block, triple phase bone scan, and replacement H-wave unit recommended by the DIME reasonable and necessary treatment for the admitted industrial injury?

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on April 4, 2014 while delivering food to a customer of Employer. While walking down the customer's driveway, he fell in a pothole, injuring his right knee, right hip and shoulder. Eventually, his hip and shoulder issues resolved, but his right knee pain persisted.

2. Claimant had three previous workers' compensation claims involving the right knee, in 1985, 2004, and 2008. He had an arthroscopic meniscectomy for the 2008 injury and ultimately received a 15% lower extremity impairment rating. The rating included 10% for chondromalacia with crepitus and locking.

3. After the April 2014 injury, Claimant was referred to Plum Creek Medical clinic for authorized treatment. PA-C Bart Keller initially diagnosed a traumatic strain/contusion of the right knee. PA-C Keller referred Claimant for a right knee MRI to evaluate possible internal derangement.

4. Claimant had the right knee MRI on April 21, 2014. It was essentially normal. There was some physiologic joint fluid and a tiny Baker's cyst, but there was no evidence of cartilage abnormality in the medial, lateral, or patellofemoral compartment.

5. PA-C Keller subsequently referred Claimant to Dr. David Oster for an orthopedic evaluation due to "slow resolving" right knee traumatic strain.

6. Claimant saw Dr. Oster on May 12, 2014, who diagnosed a first-degree MCL sprain and recommended continued bracing and physical therapy. By July 2014, Claimant's knee was slightly improved, but still significantly symptomatic. Dr. Oster recommended a repeat MRI with contrast to better see the articular surfaces and the medial meniscus.

7. The MRI with contrast was performed on July 17, 2014. The medial meniscus was normal, aside from "subtle" undersurface scuffing. There was no high-grade chondromalacia in the medial, lateral, or patellofemoral compartment.

8. Dr. Oster subsequently reviewed the MRI images and appreciated a long tongue of synovium underneath the medial facet of the patella. He suspected that impingement of this tongue was causing Claimant's pain. Dr. Oster recommended arthroscopic surgery with debridement of the synovium.

9. Dr. Oster performed arthroscopic surgery on Claimant's right knee on September 18, 2014. Visual inspection inside the knee did not show degenerative pathology. There was no fraying, softening or fissuring of the patellar surface, *i.e.*, no "chondromalacia." Similarly, the articular cartilage in the medial compartment was intact without significant fraying or fissuring. There was some "trace" thinning along the central and lateral aspects of the medial femoral condyle. In the lateral compartment, the articular surfaces were intact without softening or fissuring. There was no significant wear of the trochlea or the anterior aspects of the femoral condyles. The only pathology was a hypertrophied tongue of synovium being impinged underneath the patella, as Dr. Oster had suspected before surgery. Dr. Oster debrided the synovium and concluded the surgery.

10. Unfortunately, Claimant did not receive significant benefit from the surgery. By November 28, 2014, he was still suffering from severe knee pain and relying on crutches to ambulate, so Dr. England at Plum Creek Medical recommended a second opinion with another orthopedic surgeon, Dr. Todd Wente.

11. Claimant saw Dr. Wente on December 10, 2014. He reported ongoing severe anterior and medial knee pain. Claimant was still using crutches to ambulate. Without his crutches, Claimant's gait was severely antalgic favoring the right leg. Visual inspection of the knee was unremarkable. He had tenderness along the medial and lateral joint lines, and more tenderness with palpation of the patellar facets. Dr. Wente achieved full extension of the knee, but it was very painful. Fat pad impingement test was markedly positive. Claimant exhibited moderate diffuse atrophy of the quadriceps and calf muscles. Neurological function was intact. Dr. Wente felt no surgical procedure could improve Claimant's condition. He recommended a Kneehab brace and gave Claimant a cortisone injection. Dr. Wente prescribed a compound cream, and hoped controlling the pain would allow the Claimant to strengthen his knee and normalize his gait pattern. Dr. Wente noted, "I do not think there is a quick fix here."

12. Dr. England subsequently referred Claimant to a pain specialist, Dr. Gretchen Brunworth.

13. Dr. Brunworth first examined Claimant on April 20, 2015. Claimant reported the cortisone injection he received in December 2014 made his knee feel approximately 50% better for a few days. He had a second injection in March 2015 which was not helpful. Claimant described constant aching pain in the posterior aspect of the knee and constant stabbing pain in the anterior aspect of the knee. He reported

swelling, locking, popping, and a feeling of instability. Claimant was using crutches to ambulate and had an antalgic gait when not using the crutches. Physical examination revealed slight effusion of the right knee and slight fullness around the patellar tendon. There was tenderness over the medial joint line and the patellar tendon. The right knee was slightly warm when compared to the left, but there was no obvious color change and no hypersensitivity to touch. Dr. Brunworth noted that Claimant had "significant disability" but appeared to be approaching MMI. She recommended a repeat MRI of the knee "just to make sure we are not missing something before his case is closed." She also recommended a compounded cream, which had been denied in the past. Dr. Brunworth indicated she "would like to get him off the crutches before we close his case."

14. The repeat MRI was performed on May 8, 2015, and showed no significant pathology. The articular cartilage was normal. The radiologist noted there was "no chondromalacia whatsoever." There was no evidence of any inflammatory condition or synovitis. The only notable abnormality was mild to moderate distal quadriceps tendinosis.

15. On May 21, 2015, Dr. Brunworth met with Claimant to review the MRI report. She concluded there was likely nothing else to offer him, and referred Claimant for a functional capacity evaluation in anticipation of MMI.

16. After Claimant's appointment on May 21, Dr. Brunworth had an "uneasy feeling" that she "might be missing something." She noted that Claimant appeared to be an upstanding person, did not appear to be faking anything, and yet was in disabling pain. She was troubled by simply releasing Claimant to live with his situation. Therefore, Dr. Brunworth presented Claimant's case to the partners in her medical practice. Because of that consultation, Dr. Brunworth began to suspect that Claimant suffered from sympathetically mediated pain. Consistent with the Complex Regional Pain Syndrome Medical Treatment Guidelines (CRPS MTGs), Dr. Brunworth recommended a thermogram and QSART testing. Dr. Frank Polanco performed a Rule 16 peer review and agreed the testing should be authorized.

17. Dr. Tashoff Bernton evaluated Claimant and performed thermographic and QSART testing on July 31, 2015. Dr. Bernton's physical examination findings were equivocal regarding CRPS. Specifically, Dr. Benton noted some color differences between the left and right knee, but noted no hair or skin changes other than discoloration. He also documented slight swelling of the right knee and restricted range of motion, which could be related to CRPS but could also be caused by other conditions. Claimant was maximally tender over the anterior prepatellar region but did not have hyperalgesia. Dr. Bernton noted that Claimant's "clinical examination is not particularly impressive with respect to CRPS, but CRPS of the knee often presents with a clinical profile more characterized by restriction of motion and pain than by marked swelling, color changes, hyperalgesia, and other findings which are more prominent and common with distal extremity complex regional pain syndrome. The patient's presentation is more consistent with this usual presentation of CRPS in the knee."

18. The test results supported the diagnosis of CRPS. The thermogram noted temperature asymmetries throughout the right leg. Dr. Bernton opined that the demonstrated temperature asymmetry "is consistent with the diagnosis of complex regional pain syndrome and meets diagnostic criteria." On the QSART testing, Claimant demonstrated significant sudomotor asymmetries, which Dr. Bernton opined "represents high probability of dysautonomia." Dr. Bernton ultimately concluded the combination of Claimant's clinical evaluation and sudomotor test data "represents high probability of complex regional pain syndrome." Dr. Bernton further opined "together with the positive thermographic stress test, [the] patient has two positive objective tests for CRPS, which does meet Colorado Workers' Compensation diagnostic criteria."

19. Dr. Bernton recommended Claimant switch to a compound cream with agents such as ketamine or amitriptyline. He also recommended a trial of sympathetic blocks. Dr. Brunworth referred Claimant to Dr. Usama Ghazi for the first block.

20. Dr. Ghazi performed a right lumbar sympathetic block on August 27, 2015. Dr. Ghazi noted that, post-injection, Claimant had 100% resolution of his erythema, 100% resolution of his edema, and complete resolution of the burning sensation at rest. After the block, Dr. Ghazi noted "I was also able to perform a light and then deep and heavy pressure over the saphenous nerve and geniculate branches without any withdrawal or guarding. The patient still reports that he had some 7/10 pain that was unchanged deep within the knee, which is more of a bony arthritic and pressure like sensation; however, the superficial sensitivity was just completely resolved postop."

21. Two weeks later, Claimant saw Dr. Marc Steinmetz for an Independent Medical Examination (IME) at Respondents' request. Dr. Steinmetz's findings on physical examination did not support a diagnosis of CRPS. Dr. Steinmetz noted no temperature changes, no skin, hair, or color changes, no hypersensitivity or allodynia. The only swelling Dr. Steinmetz noted was "a slight fullness palpable around the knee cap which would represent fluid around the knee cap." Based on his evaluation and review of the records, Dr. Steinmetz concluded that Claimant does not have CRPS. Dr. Steinmetz opined that Claimant does not meet the diagnostic criteria outlined in the CRPS MTGs. Dr. Steinmetz opined the most likely cause of Claimant's symptoms was synovitis and chondromalacia. He opined that the QSART test results represented a "false-positive." Dr. Steinmetz opined that the "main criteria" for CRPS is lack of a better medical explanation. Dr. Steinmetz believed chondromalacia and synovitis provided a "better explanation" for Claimant's symptoms than CRPS. Dr. Steinmetz opined that Claimant was at MMI, and should receive ongoing maintenance care, to include non-narcotic medication, a TENS unit, the H-wave unit, five physical therapy sessions and a gym membership.

22. On October 14, 2015, Dr. Brunworth reevaluated Claimant and reviewed Dr. Steinmetz's IME report. Dr. Brunworth disagreed with Dr. Steinmetz's opinions and conclusions. She noted the objective data from the thermogram and QSART testing was positive for CRPS. She explained that sympathetically-mediated pain in the knee does not always present clinically the way it does in the distal extremities, and clinical signs can be "quite minimal." That is consistent with Dr. Bernton's opinions. She also

noted that Claimant had 100% relief of the edema, erythema, and burning sensation in his knee immediately after the sympathetic block. She reiterated her recommendation of a repeat sympathetic blocks, and possible consideration of a spinal cord stimulator.

23. Dr. England issued a report on October 28, 2015 expressing his disagreements with Dr. Steinmetz's opinions. He agreed with Dr. Brunworth's recommendations.

24. Claimant underwent an IME with Dr. Timothy Hall on January 6, 2016 at the request of his counsel. Dr. Hall stated:

> [O]ne certainly does not think of complex regional pain syndrome simply upon observing [Claimant's] leg. There really is little that would point you in that direction other than the fact that he has pain out of proportion to local pathology. He has a very significant pain reaction to even minimal palpation along the joint line medially or the posterior joint. I think it is important to keep in mind that the definition of sympathetically-mediated pain or complex regional pain syndrome is pain out of proportion to local pathology. . . . The fact that this man cannot weightbear on his leg with a fairly simple diagnosis of synovitis and chondromalacia certainly rises to the level of pain out of proportion to local pathology.

25. Dr. Hall disagreed with Dr. Steinmetz's opinions and agreed with Dr. Brunworth's assessment. Dr. Hall concluded, "from my evaluation, reading of the file, and review of the testing results, he does meet [the] criteria for sympathetically maintained symptomatology/complex regional pain syndrome." Dr. Hall recommended a second sympathetic block, and consideration of a spinal cord stimulator trial.

26. Dr. Brunworth testified at the March 1, 2016 hearing before ALJ Walsh consistently with her previous reports regarding Claimant's condition and her recommendations for treatment. Dr. Brunworth opined the diagnosis of CRPS is supported by Claimant's documented exam findings of swelling, color and temperature changes. She further opined the diagnosis is supported by the positive thermogram, QSART and Claimant's positive response to the sympathetic block. Dr. Brunworth opined Claimant satisfies the diagnostic criteria of the CRPS MTGs. She disagreed with Dr. Steinmetz's characterization of the test results as "false-positives." Dr. Brunworth also disagreed that chondromalacia or synovitis would explain Claimant's symptoms. She testified that she conferred with Dr. Bernton and "he says that there's no way the findings on the thermogram or QSART could be due to synovitis or chondromalacia if they were present. But on the MRI, they're not even present."

27. Dr. Brunworth justified her request for a second sympathetic block, even though Claimant did not have lasting benefit from the first block. She explained that sometimes a second block results in a different response, particularly if the block is attempted either more distally or more proximally. She noted the MTGs state it takes

one to two blocks to gauge effectiveness.[1] She further explained, "sometimes, if you have block on block, you can slowly dampen down those sympathetic nerves."

28. During her testimony, Dr. Brunworth physically examined Claimant's knee. She pointed out some effusion in the knee and testified that she had observed more "significant swelling" when she examined Claimant ten days earlier. She also pointed out the muscle atrophy and subtle color differences. She appreciated no significant temperature differences. Claimant demonstrated no overt signs of allodynia while Dr. Brunworth was examining his knee.

29. Dr. Steinmetz testified at the March 1, 2016 hearing on behalf of Respondents, reiterating and expounding upon the opinions expressed in his IME report. Dr. Steinmetz noted Claimant had previously received a permanent impairment rating for a meniscus injury and chondromalacia. Dr. Steinmetz opined the swelling in Claimant's knee is a result of activity, not a neurological condition. He emphasized that Claimant did not exhibit allodynia on Dr. Brunworth's physical exam at the hearing or his exam at the IME. He reiterated his opinion that Claimant does not satisfy the diagnostic criteria for CRPS in the MTGs. He also discussed the 6th Edition of the *AMA Guides*, which tracks the diagnostic requirements of the MTGs.

30. In an order dated May 8, 2016, ALJ Walsh found that Claimant had failed to prove by a preponderance of the evidence that he suffers from CRPS. Crediting Dr. Steinmetz's opinions, ALJ Walsh ordered that "claimant's request for treatment for a diagnosis of CRPS is denied and dismissed."

31. After receiving ALJ Walsh's order, Respondents wrote to Dr. Brunworth and asked whether Claimant was at MMI. Dr. Brunworth opined she did not believe Claimant was at MMI from a medical perspective but stated "if no further treatment is going to be authorized for CRPS, he would be at MMI at the time of the ALJ's decision." Dr. Brunworth indicated she continued to recommend a spinal cord stimulator trial.

32. Dr. Shimon Blau evaluated Claimant for a DIME on August 3, 2016. Claimant reported ongoing severe pain in his right lower extremity, especially his right knee. He reported symptomatic aggravation with activities such as weightbearing or extended sitting or standing. He told Dr. Blau the H-wave unit had helped his symptoms, but the unit had broken. As a result, he had increased his medication useage.

33. On physical examination, Dr. Blau noted Claimant was in mild distress secondary to right lower extremity pain, particularly with weightbearing. Examination of the right leg was "difficult secondary to extreme guarding." Dr. Blau observed atrophy of the right leg. He documented tenderness to palpation and slight allodynia in the right thigh, knee, and calf. He also observed "slight atrophic changes" in the right leg. Claimant's right leg was "significantly colder to touch when compared to the left side." Right knee range of motion was significantly reduced. Claimant exhibited decreased sensation in the entire right leg. His gait was antalgic and he was using two crutches to

[1] The CRPS MTGs state "[f]or diagnostic testing, use two blocks over a 3-14 day period."

ambulate. Dr. Blau noted Claimant "has extreme difficulty standing, secondary to pain in his right lower extremity with weight bearing. He is unable to fully plant his foot on the floor, and stands with a toe-touch stance on the right."

34. Regarding Claimant's diagnosis, Dr. Blau stated:

> [T]here is disagreement with regards to whether or not the patient meets the criteria for complex regional pain syndrome. Dr. Steinmetz is of the opinion that [Claimant] does not have CRPS, and that the positive QSART and thermogram were false positives. Dr. Brunworth and Dr. Hall disagree with this assessment. I agree with Dr. Brunworth and Dr. Hall that [Claimant] very likely does have a diagnosis of CRPS. The radiologist's report from the most recent right knee MRI performed on 5/8/2015 stated that there was "no chondromalacia whatsoever." This was also negative for synovitis. I do not believe that the fact that [Claimant] can barely walk or put weight on his right lower extremity is due to chondromalacia and/or synovitis. Both his history, as well as findings on physical examination, are consistent with CRPS. He has pain out of proportion to previous diagnostic studies, as well as allodynia and temperature changes in his right lower extremity. In addition, while the lumbar sympathetic block did not provide long lasting improvement, he did have immediate improvement in his pain symptoms following this procedure.

35. Dr. Blau determined that Claimant is not at MMI. He recommended a triple phase bone scan, for further work-up of CRPS. Additionally, Dr. Blau recommended one more lumbar sympathetic block. Dr. Blau recommended that the block be performed by a different physician, who is not a partner of Dr. Brunworth. Dr. Blau emphasized that he considers Dr. Ghazi to be "an excellent physician," and "one of the best interventional list in the state of Colorado." He simply recommended a different physician to ensure there was no question of bias "whatsoever." He recommended that Claimant's H-wave unit be repaired or replaced. Finally, he opined that a spinal cord stimulator trial "should remain on the table . . . as a last resort for treatment."

36. Although he did not believe Claimant was at MMI, Dr. Blau provided an advisory rating of 50% whole person, based on impairment of gait and station.

37. After the DIME, Claimant followed up with Dr. Brunworth. Dr. Brunworth agreed with Dr. Blau's recommendations, and immediately referred Claimant for the bone scan, the sympathetic block with Dr. Vilims, and ordered a new H-wave unit.

38. Claimant returned to Dr. Brunworth on November 15, 2016, reporting no change in his condition. None of the recommended treatment has been authorized by Respondents, and without private insurance, Claimant had no way to obtain treatment.

39. Claimant testified briefly at the hearing before the undersigned ALJ on February 1, 2017. He described pain in the entire right leg. He testified that he drives in a "very limited" manner.

40. Respondents called no witnesses at the February 1, 2017 hearing, but relied on a transcript of Dr. Steinmetz's testimony from the March 1, 2016 hearing with ALJ Walsh. Over Claimant's objection, the undersigned ALJ accepted the transcript to document the issues and arguments that were presented to ALJ Walsh, to maximize judicial economy, and save the parties the expense of calling their experts again.

41. The opinions of Dr. Blau, Dr. Brunworth and Dr. Hall are credible and more persuasive than Dr. Steinmetz's opinions.

42. Issue preclusion does not apply to the DIME's MMI determination, because the issues involved at the present stage of the proceedings are not identical to those considered by ALJ Walsh in 2016.

43. Respondents have failed to overcome the DIME's diagnosis of CRPS by clear and convincing evidence.

44. Respondents have failed to overcome the DIME's determination regarding MMI by clear and convincing evidence.

45. The preponderance of persuasive evidence shows Claimant meets the criteria in the CRPS MTGs for "confirmed CRPS."

46. The CRPS-related treatment recommended by Dr. Blau and Dr. Brunworth is reasonable, necessary, and causally related to Claimant's admitted injury.

CONCLUSIONS OF LAW

1. Issue preclusion does not apply to the DIME's determination of MMI.

The DIME determined that Claimant suffers from CRPS, and found he is not at MMI, pending treatment for CRPS. As previously noted, whether Claimant has CRPS and is entitled to a treatment for the condition — including a lumbar sympathetic block — was the subject of ALJ Walsh's May 8, 2016 final order. ALJ Walsh found that Claimant failed to prove he has CRPS, and therefore denied and dismissed his request for medical treatment related to CRPS.

Respondents argue that the DIME's MMI finding is overcome as a matter of law because it rests a diagnosis and treatment that was previously adjudicated against Claimant in a final order. On the other hand, Claimant argues that the Act allows the DIME to revisit ALJ Walsh's determination when deciding whether Claimant is at MMI, and the prior finding is not binding if a party seeks to overcome the DIME's determination.

Issue preclusion (*i.e.,* collateral estoppel), is an equitable doctrine that bars relitigation of an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999). The doctrine's purpose is to relieve parties of the burdens of multiple lawsuits, to conserve judicial resources, and to promote reliance on and confidence in the judicial system by

preventing inconsistent decisions. *Id*. Although issue preclusion was conceived as a judicial doctrine, it has been extended to administrative proceedings, where it "may bind parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001).

In *Sunny Acres*, the Supreme Court held that issue preclusion bars relitigation of an issue if: (1) the issue sought to be precluded is identical to an issue already determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id*.

In the context of issue preclusion, a full and fair opportunity to litigate the issue requires the availability of procedures in the earlier proceeding commensurate with those in the subsequent proceeding, and that the party against whom issue preclusion is asserted had the same incentive to vigorously assert its position in the previous action. *Id*.

Elements (2)-(4) *Sunny Acres* factors are clearly present here.[2] But the difficult question involves whether the first prong of the test is met. Respondents argue the issues in the two proceedings are identical because ALJ Walsh specifically found Claimant does not have CRPS, and the diagnosis of CRPS was the basis for the DIME's determination that Claimant is not at MMI. ALJ Walsh denied and dismissed Claimant's request for a repeat lumbar sympathetic block,[3] which the DIME specifically recommended as treatment necessary to bring Claimant to MMI. In fact, ALJ Walsh denied any medical treatment "for a diagnosis of CRPS," which arguably covers all treatment the DIME recommended.

In a long series of cases, the ICAO has repeatedly indicated that the DIME's authority to determine MMI and permanent impairment is not constrained by prior ALJ orders. *E.g.*, *Mahana v. Grand County*, W.C. No. 4-430-788 (ICAO, February 15, 2007); *Braun v. Vista Mesa*, W.C. No. 4-637-254 (ICAO, April 15, 2010); *Ortega v. JBS USA*,

[2] The ALJ disagrees with Claimant's argument that the fourth element (similar incentive to litigate in the prior proceeding) is not satisfied. Both parties had substantial incentive to litigate the issues at the prior hearing. Both parties are aware that treatment for CRPS can be very costly. At the time of the prior hearing, Claimant's MMI status appeared to hinge on the outcome of the hearing. Dr. Brunworth had already suggested a spinal cord stimulator as a possible treatment. Respondents had strong incentive to litigate the issues because they were facing significantly higher medical costs and additional indemnity benefits. Likewise, Claimant had a strong incentive to litigate because he stood to lose his indemnity benefits and be left with a debilitating condition with no reasonable prospect of improvement. The importance of the issues at the prior hearing is further evidenced by the fact that each party was willing to incur substantial expert witness fees to present live testimony to ALJ Walsh. The ALJ cannot discern any substantive difference between the parties' incentive to litigate at the two hearings.

[3] At the hearing with ALJ Walsh, the parties agreed Claimant was requesting the compound cream, a sympathetic block, and approval of the psychological screening necessary for a trial spinal cord stimulator." (Tr. 5:3-7; 6:5-6). But the recommendations were all predicated on the diagnosis of CRPS.

W.C. No. 4-804-825 (ICAO, June 27, 2013); *Sanchez v. American Federation of State*, W.C. No. 4-666-226-06 (ICAO, November 27, 2013); *Madrid v. Trinet Group, Inc.*, W.C. No. 4-851-315-03 (ICAO, April 1, 2014); *Jackson v. Select Comfort Corp*., W.C. No. 4-914-418-03 (ICAO, November 16, 2016); *Sharpton v. Prospect Airport Services*, W.C. No. 4-941-721-03 (ICAO, November 29, 2016). The common thread in these cases is that the first prong — identity of issues — is not present.

The facts in *Mahana v. Grand County, supra*, are almost identical to the situation in Claimant's case. In *Mahana*, ALJ Jones had previously determined that the Claimant did not suffer from CRPS and failed to prove that sympathetic blocks were a reasonable and necessary treatment for the industrial injury. Subsequently, the claimant underwent a DIME, which determined that the claimant suffered from sympathetically mediated pain (SMP) or complex regional pain syndrome (CRPS) and recommended sympathetic blocks. The respondents challenged the DIME at a hearing before ALJ Felter. ALJ Felter found the respondents failed to overcome the DIME on MMI and ordered respondents to pay for the sympathetic blocks. The respondents argued ALJ Felter was precluded from adjudicating whether the claimant was entitled to sympathetic blocks because ALJ Jones had previously denied that same treatment in a prior final order.

The ICAO ultimately held that ALJ Jones' final order did not preclude ALJ Felter from readjudicating the claimant's entitlement to medical benefits *in the context of challenging a DIME*. The ICAO stated:

> Affording preclusive effect to ALJ Jones' order regarding the Claimant's diagnosis of CRPS would eviscerate the DIME process designed to permit a party to challenge maximum medical improvement or the extent of permanent impairment. The DIME physician in this case was specifically charged with determining whether the claimant was at maximum medical improvement. . . . As we read the DIME report, it was expressly *because* the claimant was suffering from SMP and expressly *because* she needed the sympathetic blocks to treat that condition that the DIME physician opined that she had not reached maximum medical improvement. **Precluding the DIME physician from stating that opinion regarding maximum medical improvement because a previous ALJ had determined that the medical treatment was not reasonable and necessary would, in our view, impermissibly interfere with the statutory role of the DIME doctor.** (Italics in original, bold emphasis added).

The ICAO has subsequently followed this principle repeatedly in a variety of contexts. For instance, in *Braun v. Vista Mesa, supra*, the ICAO held that a previous ALJ finding that the claimant suffered from thoracic outlet syndrome (TOS) and awarding medical benefits did not preclude the DIME from subsequently determining the claimant did not have TOS and did not require further treatment for TOS.

Similarly, *Madrid v. Trinet Group, Inc., supra*, held that a previous ALJ order denying treatment for symptoms beyond the claimant's elbow as unrelated to the

industrial injury did not preclude the DIME from determining the claimant suffered from CRPS of the entire arm and was not at MMI without a spinal cord stimulator trial.

In *Sanchez v. American Federation of State*, *supra*, a previous ALJ finding that the claimant's low back problems were causally related to his industrial injury was not binding when the DIME later determined that the back issues were not injury-related.

The ICAO revisited this issue and reaffirmed its interpretation of the law several times within the last few months. *Jackson v. Select Comfort Corp*., W.C. No. 4-914-418-03 (ICAO, November 16, 2016); *Sharpton v. Prospect Airport Services*, W.C. No. 4-941-721-03 (ICAO, November 29, 2016); *Holcombe v. FedEx Corp*., 4-824-259-05 (ICAO, May 24, 2017).

Jackson v. Select Comfort Corp., *supra*, involved a situation where an ALJ denied treatment for the claimant's low back/SI joint condition as unrelated to the claimant's industrial injury. The DIME subsequently provided an impairment rating for the lumbar spine/sacroiliitis. A second ALJ found that issue preclusion did not apply, and the respondents had not overcome the DIME's rating. The ICAO affirmed.

Sharpton v. Prospect Airport Services, supra, involved a similar situation, in the context of carpal tunnel syndrome.

Finally, in *Holcombe v. FedEx Corp*., *supra*, an ALJ had found that an elbow surgery recommended by the claimant's treating physicians was not reasonable and necessary. Subsequently, a DIME determined that the claimant was not at MMI, and would not be at MMI until he underwent the elbow surgery that the ALJ had denied. A second ALJ determined that the DIME was not bound by the previous ALJ's decision regarding the surgery, and that respondents failed to overcome the DIME's determination regarding MMI. The ICAO affirmed.

The rule in *Mahana* and the subsequent cases is based on a conclusion that the issues in a hearing challenging a DIME are not "identical" to issues tried in a previous hearing, because the statute creates differing burdens of proof (*i.e*., "preponderance" vs. "clear and convincing") and places the burden on the party challenging the DIME. The ICAO has repeatedly cited *Holnam, Inc. v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2006) as "instructive" on how different burdens of proof impact the application of issue preclusion. In each case, the ICAO stated that issue preclusion did not apply because the issues decided by the first ALJ were not "identical" to the issues addressed by the second ALJ when reviewing a DIME's determination.

In this case, issue preclusion does not apply to the DIME because the issues at the two hearings were not "identical." There were substantive differences in the burdens of proof and the party to whom the burden was assigned. At the first hearing with ALJ Walsh, Claimant had the burden to prove by a preponderance of the evidence that treatment for CRPS was reasonable and necessary. At the current hearing, the statute puts the burden on Respondents to overcome the DIME's determination of MMI by clear and convincing evidence. Although the general subject matter was the same at both

hearings, the specific issues were different due to the different context in which the issues were considered. The fact that Respondents find themselves back in court litigating an issue similar to one they previously won is simply a function of the statutory scheme, which assigns responsibility for determining MMI primarily to physicians, as a *medical* determination, rather than judges as a *legal* decision.

Since there was no identity of issues between the two proceedings, it follows that the DIME was not precluded from determining that Claimant has CRPS and requires treatment for the diagnosis, notwithstanding ALJ Walsh's order. Consequently, the DIME's determination is binding unless overcome by clear and convincing evidence.

2. Respondents failed to overcome the DIME regarding MMI by clear and convincing evidence.

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if there is a course of treatment that has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). Additionally, a finding that a claimant is not at MMI may rest solely upon a recommendation for further diagnostic evaluation. The ICAO has repeatedly held that diagnostic procedures constitute compensable medical benefits that must be provided before MMI if such procedures have a reasonable prospect of diagnosing or defining the claimant's condition so as to suggest a course of further treatment. *E.g., Soto v. Corrections Corp*., W.C. No. 4-813-582 (ICAO, October 27, 2011).

The DIME physician must necessarily engage in a "diagnostic process" in evaluating whether a claimant is at MMI. A determination of MMI inherently involves issues of diagnosis because the DIME must determine what medical conditions exist and which are causally related to the industrial injury. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Hodges v. ATR Collision, Inc*., W.C. No. 4-751-557 (ICAO, August 24, 2010). The DIME's findings regarding diagnosis and causation are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(II); *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007).

The DIME physician's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is "highly probable" that the MMI and impairment findings are incorrect. *Qual-Med*, 961 P.2d at 592.

It is well established held that "mere differences of medical opinion" do not constitute clear and convincing evidence that the DIME's determination is incorrect. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (ICAO March 18, 2016); *Javalera v. Monte Vista Head Start, Inc.*, W.C. No. 4-532-166 (ICAO July 19, 2004); *see also Gonzales v. Browning-Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000).

As found, Respondents have failed to overcome the DIME's determination that Claimant is not at MMI by clear and convincing evidence. The DIME's MMI determination is supported by his own physical examination findings, the objective test data, Claimant's positive response to the sympathetic block administered by Dr. Ghazi, and the credible opinions of Dr. Brunworth, Dr. Bernton, and Dr. Hall.

Respondents' challenge to the DIME rests primarily on Dr. Steinmetz's opinions. The centerpiece of Dr. Steinmetz's argument is that there is a "better explanation" for Claimant's symptoms than CRPS. But the ALJ is persuaded by the opinions of Dr. Blau, Dr. Brunworth, and Dr. Hall that chondromalacia and synovitis do not explain Claimant's severe symptoms. Although Claimant received a prior impairment rating partially attributable to chondromalacia, the MRIs and intraoperative inspection showed no evidence of chondromalacia. Similarly, the May 8, 2015 MRI did not show evidence of synovitis. While it is possible that Claimant has some residual synovitis too subtle to be detected by MRI, it is not plausible that such a mild condition would cause the severe symptomatology from which Claimant suffers.

Admittedly, Claimant has not consistently demonstrated allodynia on examination of his knee, which is somewhat incongruous with the diagnosis of CRPS. But that anomaly is most likely attributable to individual patient variability, and the natural tendency of CRPS signs and symptoms to wax and wane. Claimant demonstrated allodynia on exam by Dr. Blau and Dr. Hall,[4] and the MTGs do not require specific clinical signs to be present on every examination. Moreover, Claimant satisfies the other "Budapest Criteria" in the MTGs, with several documented instances of color changes, temperature asymmetry, swelling and range of motion deficits. Claimant also satisfies the criteria for "confirmed CRPS" under the MTGs. He had positive thermography and QSART testing, and positive response to a sympathetic block. The totality of evidence presented persuades the ALJ that Claimant meets the diagnostic criteria for CRPS, as opined by the DIME, Dr. Brunworth, and Dr. Hall.

3. The CRPS-related treatment recommended by the DIME and Dr. Brunworth is reasonable, necessary and related to Claimant's admitted injury.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where the respondents dispute a

[4] Although Dr. Hall did not use the term "allodynia," he noted Claimant had "a very significant pain reaction to even minimal palpation along the joint line medially or the posterior joint." The ALJ interprets this as synonymous with allodynia.

claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must also prove that the requested treatment is reasonable and necessary. Section 8-42-101(1)(a). The claimant must prove entitlement to benefits by a preponderance of the evidence.

The DIME made several treatment recommendations in the context of determining Claimant is not at MMI. Those recommendations largely track the recommendations made by Dr. Brunworth. ALJ Walsh previously denied the requested treatment because he found Claimant does not have CRPS. But the DIME determined that Claimant does have CRPS, and needs treatment for CRPS to bring him to MMI. Respondents failed to overcome the DIME's findings, including the diagnosis of CRPS.

The DIME report provides critical new and persuasive evidence regarding Claimant's diagnosis that was not available to ALJ Walsh. The preponderance of persuasive evidence in the current record, including the new evidence developed since the hearing before ALJ Walsh, establishes that the treatment recommended by Dr. Blau and Dr. Brunworth is reasonable and necessary to cure and relieve the effects of his admitted injury, and is necessary to bring Claimant to MMI. Therefore, Respondents are liable for treatment of CRPS as recommended by the DIME and Dr. Brunworth.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME regarding MMI is denied and dismissed.

2. Respondents shall pay for all reasonable and necessary treatment to cure and relieve the effects of Claimant's injury, including treatment for CRPS, as recommended by the DIME. At a minimum, Respondents shall pay for at least one repeat lumbar sympathetic block, the triple phase bone scan, and replacement of Claimant's H-wave unit.

3. All matters not expressly determined herein, including whether Claimant is a candidate for a spinal cord stimulator trial, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 29, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether the Claimants' claim for death benefits is barred by the statute of limitations.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Decedent suffered an admitted back injury on August 31, 2011 which became the basis of claim number W.C. 4-867-608.

2. Decedent was eventually placed at maximum medical improvement in claim number W.C. 4-867-608 and applied for hearing on permanent total disability benefits. Hearing was originally scheduled for December 18, 2013.

3. The decedent passed away on November 19, 2013 due to a pulmonary embolism (Respondents Exhibit C, p. 12). A death certificate was issued on November 25, 2013.

4. Counsel for Decedent then vacated the December 18, 2013 hearing, and notified Respondent's attorney of the death. There is nothing in the record indicating that any discussion occurred regarding the cause of death, if compensability was an issue, or if there were any dependents potentially qualified for benefits.

5. The record is then silent until a report was issued by Dr. Hall, the contents of which suggest that his report was being issued at the request of Decedent's dependents (hereafter "Claimants"). The report was based upon medical records in existence at the time of Decedent's death.

6. On March 23, 2015, Dr. Timothy Hall issued this report opining that the decedent's death was related to the August, 2011 work injury.

7. On July 2, 2015, Claimants' attorney sent, via fax, an Entry of Appearance, a Dependents' Notice and Claim for Workers Compensation, and supporting documents totaling 9 pages, to the Office of Administrative Courts ("OAC") in Colorado Springs, Colorado. The "date of injury" is listed as 10-18-12. There is no evidence that the Colorado Springs OAC took any action, or forwarded this documentation to any third party.

8. On November 5, 2015, Claimants' attorney sent, via fax, the same 9 pages to the OAC in Denver, Colorado. There is no evidence that the Denver OAC took any action, or forwarded this documentation to any third party.

9. On December 7, 2015, Claimants' attorney sent, via fax, the same 9 pages to the correct fax number of Division of Workers Compensation ("Division") in Denver, Colorado.

10. On January 7, 2016 the Division of Workers Compensation issued a letter Acknowledging receipt of the Dependents' Notice of death Claim. The enclosed documents contained the Division's date stamp of January 6, 2016.

11. The Division of Workers Compensation forwarded a copy of the claim to Respondent Zurich American Insurance Company.

12. On March 3, 2016, Zurich American Insurance Company filed a notice of contest denying liability for claimant asserting that the claim was barred by the statute of limitations and also that the death is presumed unrelated, pursuant to § 8-41-207.

CONCLUSIONS OF LAW

The claim was not timely filed in the proper forum.

A. The decedent passed away on November 19, 2013. Pursuant to Section 8-41-207 of the Colorado Revised Statutes a notice of claim for compensation under the Workers Compensation Act should have been filed with the Division of Workers Compensation on or before November 19, 2015. This occurred on December 7, 2015. Because the claim was not filed with the Division of Worker's Compensation within two years, Claimants failed to meet the two year filing deadline for the statute of limitations and the claim is time barred. Clubb v. RE Monks, W.C. 4-952-696 (March 31, 2015).

B. Claimants have asserted that the statute of limitations is tolled by inaction on the part of Respondents. Pursuant to the rule of independence the death claim of the dependents is a separate and distinct claim from the underlying worker's compensation claim. C.R.S. 8-41-207 states "in case death occurs more than two years after the date of receiving any injury, such death shall be prima facie presumed not to be due to such injury…." Decedent died on November 19, 2013, which is more than two years after the original date of injury.

C. There is no evidence that Respondents were provided with any information that the death was in any way related to the admitted work injury from August 31, 2011 until the notice of death claim was provided to Respondents in

January of 2016. Nothing triggered any duty on the part of Respondents to file any notice with the Division that the injury in this claim had resulted in a death. To the contrary, Respondents are entitled to the benefit of the statutory presumption that the decedent's November 2013 death was in fact unrelated to her August 2011 work injury.

D. Similarly, there is no evidence that Claimants made Respondents aware that decedent had dependents to pursue a dependents' death claim. As Respondents could not have known of a potential claim for death without knowing the cause of death which could potentially be related to the 2011 work injury, and possibly rebut the presumptions established by § 8-41-207, Respondents had no duty to file any additional report of incident beyond the notices and admissions that had already been filed in claim number W.C. 4-867-608.

All the facts which could reasonably be relied upon to establish compensability - probable or not - were known at the time of Decedent's Death

E. Claimants have relied upon Dr. Hall's 2015 report as the point in time when they realized the "probable compensable nature" of the decedent's death. However, Dr. Hall merely opines in his report that he believes there is a causal link between the cause of death and the work injury. Claimants were constructively aware of the medical reports necessary to ascertain the potentially compensable nature of the claim at the time of the decedent's death. Claimants were aware of both the cause of death and the work injury at the time of Decedent's death. Moreover, they were aware of, and had access to, all of the other medical records reviewed by Dr. Hall in 2013 and thus were constructively aware of the facts that led to his conclusion. There was no additional "treatment" or medical records obtained or developed between 2013 and 2015 that helped claimants further elucidate the cause of decedent's death. *Therefore, claimants knew or should have known the "probable compensable nature" of the injury on the date of death.*

F. The record is silent why Claimants waited until March of 2015 to ask Dr. Hall or any other provider to opine on causation. Claimants *asked* Dr. Hall to review the records and provide a report and offer an opinion on causation. Claimants and/or their counsel must have at least suspected that there might have been a connection between the work injury and the decedent's death. Claimants have not identified any facts that developed between November 19, 2013 and March 16, 2015 (the date of claimants' counsel's letter to Dr. Hall) or any additional medical or other records that were obtained during this period that led to this 2015 request of Dr. Hall. It cannot be presumed that the mere passage of time suddenly made it more or less likely that the death was compensable.

G. Claimants are presumed to know the law. Clubb, supra. In each of the cases referenced by Claimants, there were facts either unknown or undiscoverable to the *injured* (not *deceased*) worker until several months later. Here, Claimants knew all of the information they were ever going to know about the Decedent's death, and could have obtained the additional information to wit: the medical opinion on causation at any time thereafter. To rule as Claimants suggest would essentially negate the statute of limitations altogether, and place the timing of the filing of claims entirely in the hands of a decedent's dependents. They could conceivably wait for years before seeking out medical opinions which would only then establish a "probable compensable nature" of a given death claim. The ALJ finds that the statute of limitations herein began to run on the date of death.

Claimants have not shown good cause to extend the statute of limitations one additional year

H. Section 8-43-103 does allow for a one year extension of time to the statute of limitations where a reasonable excuse exists *and* where the employer's rights have not been prejudiced. Claimants did not meet the two year statute of limitations. Claimants contend that a reasonable excuse does exist to effectively extend it one additional year. Claimants point to the receipt of Dr. Hall's report. Claimants have not established a reasonable excuse based upon the receipt of Dr. Hall's report. Even assuming Claimants had a legitimate excuse for waiting 16 months to obtain a medical opinion (i.e. saving money for the opinion- in this case $300) Claimants could have filed the claim with the Division and waited to file the application for hearing until after the report was received. Therefore, waiting until after March 2015 to file the notice of claim does not constitute a reasonable excuse for the late filing of the Dependent's Notice of Claim. Cf. Gallegos v. Lifecare services W. C. 4-367-958 (March 29, 1999) (lack of corroborating medical evidence does not constitute reasonable excuse).

I. Additionally, Claimants have asserted the filing of the claim with the Office of Administrative Courts should be deemed a timely filing of the claim. It is not. By making this argument, Claimant essentially asserts that the Office of Administrative Courts (OAC) and the Division of Workers Compensation are effectively one and the same. Each entity has its own separate rules of procedures and is consistently identified separately in those rules as well as the Workers Compensation Act. The filing of a document with the incorrect Office of Administrative Courts location does not result in timely filing. See, Lambert v. Sema Construction, W.C. 4-504-756 (March 9, 2006) (mailing Petition to Review to Grand Junction where order required Petition to be filed in Denver resulted in untimely appeal and dismissal of same).

J. Additional case law has held that failure to identify each party separately on a Certificate of Mailing rendered a document deficient. Rivera v. Sheridan School District 2, W.C. 4-919-001 (August 5, 2015). In Rivera, a Petition to Review was denied and dismissed as untimely because the claimant

had failed to identify either the OAC or Division on the Certificate of Mailing. The OAC did receive a copy in the mail, and forwarded a copy to the Division. The date of receipt by the Division was recorded as five days *later* than the date of receipt noted by the OAC, and the Division had no other record of receipt. In order to timely file Notice of Claim, Claimants had to timely file the claim with Division of Workers Compensation, and not with any of the various OAC offices.

K. A claim was faxed to the OAC office in Colorado Springs in July 2, 2015. There is no evidence that the OAC in Colorado Springs forwarded this claim to the Division or did anything to further process this claim. There is no evidence of any actions taken by Claimants or their counsel for the next four months to inquire of the status of the claim. Claimants thereafter faxed the claim, not to the Division of Workers Compensation, but to the OAC in Denver on November 5, 2015, possibly expecting that office to forward the claim to the Division on their behalf. When the Denver office similarly failed to forward the claim, Claimants finally sent the claim to the Division of Workers Compensation. Claimants have provided no explanation for not filing the claim with the Division of Workers Compensation in the first instance. There is no evidence that anyone *misdirected* Claimants in any fashion. There is no evidence of *fraud or mistake of fact.* There is no evidence of some computer error, or serious illness of a key player in the final weeks before the two year statute ran out. Nor have claimants provided any explanation for taking no action for four months after initially filing the claim with OAC in Colorado Springs. And, Claimants have not explained why after initially filing the claim with OAC in Colorado Springs, (who declined to forward the claim to the Division), Claimants thereafter filed the claim with the Denver OAC office (who also declined to forward the claim to the Division) rather than filing the claim with the Division.

L. Whether or not a claimant has shown a reasonable excuse for the late filing of a claim is a discretionary decision for the administrative law judge. Reasonable excuses have been found in cases where employers have knowingly and willfully *misled* claimants about the compensability of injuries. The determining factor if an excuse is reasonable is reasonableness of the Claimant's actions. Here, the Claimants' actions were simply not reasonable. Assuming Claimants did not know that the Office the Administrative Courts was not the equivalent of Division of Workers Compensation, this still would not excuse the late filing. A mistake of law is not a reasonable excuse. Emrich v. Jackson Hewitt, W.C. 4-241-443 (October 27, 1998). Waiting four months to correct this error only to repeat it by re-filing the claim with the OAC in Denver cannot be construed as reasonable. Some action should have been taken to check the status of the claim. A simple telephone call would likely have sufficed. Once action was taken after four months, the claim should have been properly filed with the Division rather than filed with another location within the OAC. These actions were neither reasonable nor excusable under established case law.

M. The delays by Claimants in filing this death claim are not otherwise reasonable or excusable; thus there is no need to address the issue of prejudice alleged by Respondents. Nonetheless, *if* the late filing - by less than one month- were otherwise excused, the ALJ has seen an insufficient showing of prejudice by Respondents. Had Claimants properly filed their claim a month sooner, an autopsy would still have taken well over two years after death to be conducted. An autopsy taken one month earlier under these circumstances would not likely provide additional evidence beneficial to Respondents on the issue of causation. Respondents made no showing that some critical witness or evidence would have become unavailable with the passage of an additional month. Nonetheless, such an analysis is not necessary, as the purpose of the statute of limitations is to avoid the litigation of stale claims in the first place, and the issues inherent in processing them. The steps to process these claims are plainly enumerated in the statutes and Rules, and were not taken in a timely manner.

ORDER

It is therefore ordered that:

1. This case is barred by the statute of limitations. The Claimants' claim for death benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 30, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant prove by a preponderance of the evidence that she suffered a compensable injury on July 21, 2013?
- If compensable, did Claimant's injuries sustained on August 31, 2014 constitute an intervening event?
- Did Claimant prove by a preponderance of the evidence that she suffered a compensable injury on December 22, 2014?
- If compensable, what medical benefits is Claimant entitled to cure and relieve the effects of her injur(ies)?
- Is Claimant entitled to temporary disability benefits?

PROCEDURAL HISTORY

A Notice of Contest was filed for the July 21, 2013 injury on or about September 17, 2013. (W.C. 4-928-974). A Worker's Claim for Compensation was prepared on behalf of Claimant on July 20, 2015. It listed the date of injury/disease as July 21, 2013, noting the injury occurred reaching for and pulling on books and other materials.

On or about October 7, 2015, a Worker's Claim for Compensation was filed on behalf of Claimant for the December 22, 2014 injury. (W.C. 4-995-409). A Notice of Contest for that date of injury was filed on October 23, 2015.

The cases were consolidated by Order on November 3, 2015.

STIPULATION

The parties stipulated that if the claim was found to be compensable, Claimant would be entitled to periods of temporary disability benefits. These periods would be determined by the parties post-hearing. The parties requested a general award of temporary benefits, the specific periods to be determined after an Order was issued.

FINDINGS OF FACT

1. Claimant is employed as a Specialist for Employer. Previously, she worked as a Lead Materials Handler. She has worked for Employer for twenty-two (22) years.

2. A written job description for Material Handler II was admitted into evidence. 40% of the job duties included check-in, 25% was supervisor assistance, 25% was holds and 10% of the job involved shelving. Claimant testified this job description did not include work at the returns desk, although the ALJ infers this was included in the "check-in" category.

3. Claimant testified that first thing in the morning, they would pick up the return materials which were on the floor and put those items into bins. Photographs of the drop room where the bins were located were admitted into evidence. They (Claimant and other librarians) would also take materials from other libraries that were placed in bins and put these in carts. The materials were also checked in at that time. She would write on a white dry erase board the various jobs everyone would be doing for the day. At least two times per day, she would work the return desk, which required her to stand up at the desk which was as high as her solar plexus. She said they had to move quickly, as patrons would be waiting for their books to be checked in, so they could check out other books.

4. Claimant's medical history was significant in that she received treatment for an injury to her right arm in 2007. Treatment records for this injury were admitted into evidence at hearing.[1] On August 8, 2007, Claimant struck the lateral side of her right elbow two times. She was evaluated on August 13, 2007 by Elizabeth Bisgard, M.D., who diagnosed right lateral epicondylitis. Claimant received conservative treatment for this injury, including physical therapy ("PT").

5. Claimant was also referred to Hand Surgery Associates and on October 30. 2007, she was evaluated by In Sok Yi, M.D. Dr. Yi's impression was right lateral epicondylitis after contusion with possible bony contusion. Claimant's x-rays were described as normal. He recommended wearing a splint at night and considered an injection.

6. The treatment notes over the next two months noted Claimant's right lateral epicondylitis was improving. In the last report from Dr. Bisgard admitted at hearing (dated October 23, 2007), she noted Claimant was experiencing pain from acupuncture, which was discontinued. Claimant was given work restrictions of 5-10 pounds lifting, carrying, pushing or pulling. She was also to avoid activity with her right elbow extended.

7. On November 20, 2007, Dr. Yi examined Claimant, at which time he noted improvement in that she was no longer tender over the lateral epicondyles, but tender over the super chondral ridge proximal to the humerus. There was no indication in these records the Claimant was found to have a permanent impairment or permanent restrictions from the August 2007 injury.

8. Claimant testified that there were layoffs which occurred in January 2013. Six (6) people in her department were laid off. Also, Employer also eliminated all of the

[1] Exhibit M.

volunteer positions. This required Claimant and the other individuals to work faster, particularly with regard to checking in books.

9. Claimant's testified her job at the return desk required her to extend her arm out 90° as well as lifting above her shoulder. She had to lift above her shoulder when putting books on shelves. The ALJ inferred these tasks required movement of the shoulder joint.

10. On July 21, 2013, Claimant was working at the return desk. She reached for a stack of books and felt pain in her wrist, arm and shoulder. She reported her injury to her supervisor. Claimant explained her use of the word "repetitive" related to the fact that they had to work at a "crazy, fast pace". The ALJ credited Claimant's testimony that her workload increased after the lay-offs.

11. A computerized report of injury, dated July 23, 2013 was admitted into evidence. Claimant described the injury as a repetitive injury and noted she had an injury to the same arm eight (8) years ago. This injury was described as much more painful. She described the fast pace of work as the problem. This report of injury was made close in time to July 21, 2013.

12. Claimant testified that there was a delay in seeing Dr. Bisgard and she complained to HR and was told they were waiting for approval from insurance. In the employment records admitted at hearing, Claimant e-mailed a Chris Chavez to note there was a delay in getting approval to see Dr. Bisgard and the next available appointment was August 9.[2] Mr. Chavez responded to the effect that, from Employer's perspective, Claimant was authorized to see Dr. Bisgard. This response constitutes agreement by Employer that Claimant's symptoms were to be treated through the workers' compensation system.

13. Claimant was evaluated by Dr. Bisgard on August 9, 2013, whom she had not seen in almost six years. At that time, she was complaining of pain in the anterior portion of her right shoulder and the ulnar side of her right wrist. She noted they had lost six people in the department and canceled volunteers. Claimant said she had been doing a lot of shelving of books, reaching overhead, computer work, mouse work, returns in which she had to work at a fast-pace, along with scanning and work with DVD players. She rated her pain as 8/10. Dr. Bisgard's assessment was right shoulder tendinitis, possible rotator cuff tear; wrist ulnar tendinitis. Claimant was given the right carpal tunnel splint to wear at night and a prescription for Biofreeze spray. Dr. Bisgard issued work restrictions including a maximum of 2 pounds lifting, carrying, pushing/pulling with the right hand of, as well as no overhead reaching.

14. Claimant returned to Dr. Bisgard on September 18, 2013. At that time, she was noted to have improved substantially, with her pain levels down to 3/10. Claimant was still having pain and limited range of motion (in "ROM") with her right shoulder. Claimant was going to physical therapy. Records from Health One

[2] Exhibit 13, p.73.

Rehabilitation document Claimant received physical therapy from August 16, 2013 through September 13, 2013. Dr. Bisgard's assessment was: ulnar wrist tendinitis, improved; right shoulder tendinitis, possible rotator cuff tear. Dr. Bisgard opined that it was less likely she had a rotator cuff tear. The ALJ notes Dr. Bisgard's records confirm there was a concern regarding a potential rotator cuff tear in 2013.

15. Dr. Bisgard reevaluated Claimant on October 11, 2013. After checking with her cardiologist, Claimant was not to do any type of PT modalities such as iontophoresis, electrostimulation or a TENS unit. Dr. Bisgard's diagnosis was the same as the prior appointment An M-164 form completed by Dr. Bisgard confirmed the 5 pound lifting, repetitive lifting, carrying, and pushing/pulling work restrictions. Claimant was also not to reach overhead with the right arm. Dr. Bisgard left blank that portion of the form regarding the work-relatedness of the condition.

16. Claimant testified the treatment helped her wrist and forearm, but the pain in her shoulder remained.

17. On October 25, 2013, a Job Demands Analysis was done by Joe Blythe, M.A. Mr. Blythe conducted the Job Demands Analysis on October 23, 2013. Claimant was present and reviewed her work schedule with him. Mr. Blythe calculated the amount of lifting Claimant did: for a 6.49 hour workday X 11 lifts/hour equaled 72 lifts per workday. For a 7.5 hour workday, it equaled 83 lifts per workday. Mr. Blythe concluded Claimant did not use hand tools or object weighing 10 pounds or more. She did not engage in 3-4 hours of pinching, nor lifting unsupported objects. He also found Claimant totalled 343 cycles per 6.49 hour workday and 397 cycles per 7.5 hour workday of pronation. Mr. Blythe opined there were no risk factors identified at threshold levels for Claimant's position. The ALJ notes Mr. Blythe did not fully describe Claimant's job duties at the beginning of the shift; namely picking up returned library materials and placing same into bins. Mr. Blythe also did not refer to overhead work Claimant performed.

18. On October 29, 2013, a record review was completed by Jonathon Sollender, M.D. on behalf of Insurer. Dr. Sollender did not evaluate Claimant. He noted Claimant had been diagnosed with bilateral tendinitis of the shoulder and right wrist. He reviewed the Job Demands Analysis and noted that Claimant was far below the threshold value necessary for an occupational injury of lifting 60 times per hour for a minimum of four hours. With regard to the risk factors observed, she was observed to pronate approximately 30 cycles per hour, which was far below the required 120 times per hour for minimum four hours. She was noted to perform this pronation task one hour per workday. For computer work, total mouse use was calculated at 2.9 minutes per hour and keyboarding was 1.3 minutes per hour. Dr. Sollender opined Claimant met no primary or secondary risk factors for the development of a cumulative trauma disorder according to the definitions on pages 21 and 22 on WCRP Rule 17 Exhibit 5 of the Cumulative Trauma Conditions. Dr. Sollender stated the job site evaluation found Claimant did not reach above her shoulder except in rare circumstances. He believed

the claim should be denied, as it was not occupational in nature. Dr. Sollender's report made no reference to Claimant's elbow injury in 2007and the resultant treatment.

19. Claimant testified Dr. Bisgard did not request an MRI. Her shoulder continued to bother her. Claimant testified she found out after the worksite evaluation that her claim was going to be denied and referred to Dr. Sollender's report. She contacted Dr. Sollender's office and found out he did not treat shoulder problems. She said was she was very frustrated and felt she was going to the wrong doctor.

20. Claimant then sent an e-mail on November 10, 2013 stating she was "closing" her claim.[3]

21. There was insufficient evidence in the record to establish Claimant's e-mail was a knowing, intelligent, voluntary, unequivocal waiver of her rights to receive benefits under the Colorado Workers' Compensation Act.

22. Claimant testified she went to her family doctor, Sara Corr, M.D. who referred her to Robert Rokicki, M.D. Dr. Rokicki's assessment was severe bursitis of the right shoulder with impingement. He injected her right shoulder with 40 mg of Kenalog. Neither Dr. Corr nor Dr. Rokicki were ATPs within the workers' compensation system. Claimant testified the treatment she received at Dr. Rokicki's office provided symptom relief.

23. Claimant was seen by Dr. Rokicki on January 29, 2014. X-rays of the shoulder were essentially normal, with no significant arthritis. Claimant had a type I acromion. On examination, painful impingement was noted. Dr. Rokicki's assessment was severe bursitis with impingement and he gave her a Kenalog injection. Claimant was not to lift overhead with the right arm and not push or pull more than 50 pounds.

24. Dr. Rokicki's note of January 31, 2014 referred to a right shoulder injury and approved Claimant's return to work, no lifting greater than 20 pounds; no overhead lifting, pushing, or pulling greater than 50 pounds until March 15, 2014.

25. Claimant underwent a PT evaluation at Body Image Physical Therapy and Fitness on February 3, 2014. At that time, it was noted she received a Cortisone injection on January 30, 2014, which helped decrease the pain. Claimant's symptoms were described as consistent with rotator cuff tendinopathy and impingement syndrome. She was to begin manual therapy, neuromuscular reeducation, therapeutic exercise and electrical stimulation. The records admitted at hearing indicated Claimant had PT at this facility and was then discharged on March 25, 2014, after she did not schedule further therapy appointments. This provider was not authorized, as it was treatment outside the workers' compensation system.

[3] Exhibit 13, p. 77.

26. On March 10, 2014, Dr. Corr returned Claimant to work with no restrictions. A representative of Employer noted Claimant's FMLA case would be closed.

27. The ALJ concluded Claimant lost time from work during the period of July 23, 2013 and March 9, 2014. Claimant had work restrictions during this time. There was also evidence Claimant's work hours were reduced. Claimant would not be entitled to temporary disability benefits after March 9th, based upon her return to work without restrictions.

28. No records regarding the amount of time Claimant missed from work in 2014 were admitted at hearing.

29. Claimant was seen by Dr. Rokicki on August 15, 2014, who noted she had a history of severe bursitis of the right shoulder and was seen in January, at which time she had an excellent response to a steroid injection. On examination, Claimant had extreme pain in the right shoulder with any attempts at supraspinatus stress testing. The impingement sign was extremely positive and she had a lack of internal rotation. Dr. Rokicki's assessment was severe bursitis of the right shoulder. He injected the subacromial space with 40 mg. of Kenalog.

30. On August 31, 2014, Claimant was evaluated by Sharon Montes, M.D. Claimant had fallen on a piece of furniture in the house the day before, landed on her right ribs, and then onto her right arm. The treatment note recorded Claimant had received a steroid injection into the right shoulder to treat chronic pain. No instability was noted in the right shoulder, nor was there tenderness over the right shoulder biceps tendon. Dr. Montes' assessment was strain/sprain ribs and shoulder, AC joint. She was told to apply ice to her ribs and shoulders and take a break from the sling.

31. Claimant was reevaluated by Dr. Rokicki on September 8, 2014, who noted the incident where Claimant hit the padded arm of the couch. Claimant had pain in the area or just inferior to the breast, but no ecchymosis. She was able to move her shoulder comfortably, but had pain in the medial scapula. Dr. Rokicki's assessment was severe contusion to the right chest wall and he suspected she might have occult fractures of the ribs. He thought Claimant would be off work for one (1) month and completed an FMLA form.[4] The ALJ notes Dr. Rokicki did not recommend any treatment for Claimant's shoulder.

32. Claimant testified that on December 22, 2014 while working on the returns desk, while Claimant was reaching up and out (pulling very quickly) a heavy stack of books she felt a pull and very bad pain in the right shoulder. Claimant stated this pain has never gone away and was more intense than the previous pain from July 2013. Claimant testified she did not report this injury because she did not think it would do any

[4] Although Dr. Rokicki's notes refer to the rib injury, there were references in the STD/LTD records which indicated Claimant was on FMLA both for her ribs and her shoulder. [Ex. N, p.151-152].

good. Claimant did not report the re-injury until June 30, 2015. There were various e-mails sent by Claimant on June 30, 2015, with responses on behalf of Employer discussing a new claim for re-injury and the denial of the 2013 claim.[5] Most of the discussion in the e-mails related to the 2013 claim. Most significant to the ALJ was the fact Claimant did not reference December 22, 2014 as the date of a new injury or re-injury.

33. On January 27, 2015, Claimant was evaluated by Rudy Kovachevich, M.D., complaining of bilateral shoulder pain. She said her symptoms began approximately one year prior and came on insidiously without specific injury of trauma. The ALJ infers this refers to the July 2013 timeframe when Claimant said she did a lot of repetitive activity at her job in the library and felt that some of this may have come from that. Claimant did not refer to a D.O.I of December 22, 2014. The pain was in the anterior and lateral aspect of the shoulder and radiated down towards the elbow with use. Dr. Kovachevich felt Claimant clinically had evidence of bilateral subacromial bursitis, with likely rotator cuff tendinopathy. His diagnosis was pain, joint/shoulder; bursitis, shoulder. Dr. Kovachevich did not comment on whether Claimant's current symptoms were related to work injur(ies) or repetitive activities at her job. He recommended either conservative management or consideration of surgery. Claimant opted for the former and physical therapy was begun.

34. Claimant advised Employer on January 29, 2015 (by e-mail) that she had reinjured her the shoulder while working the returns desk and wanted to know about reopening her workers' compensation case because it was a re-injury of the same area. The ALJ infers Claimant believed she could "re-open" her claim, despite the earlier e-mail in which she request the claim be closed.

35. On February 17, 2015, Claimant underwent an MRI of the right shoulder. The films were read by Eduardo Seda, M.D., whose impression was supraspinatus, infraspinatus and biceps tendonisis, with full thickness tear at common tendon.

36. Claimant returned to Dr. Kovachevich on February 24, 2015, after having an MRI. On examination, Claimant showed good rotator cuff strength. Dr. Kovachevich noted the rotator cuff was of concern, but the fact Claimant was doing better clinically, militated against surgery. Claimant wanted to continue with conservative treatment.

37. When Dr. Kovachevich saw Claimant on April 9, 2015, her shoulder pain was worse. Dr. Kovachevich felt she need to get back into a routine and therapy. She was also to use a sling for comfort. FMLA paperwork was completed at that time. On April 16, 2015, Claimant was evaluated by Helen March, OT. At that time, Claimant was instructed on shoulder protocol and strengthening exercises. No additional records concerning this treatment were admitted into evidence.

38. Claimant was evaluated by Mark Failinger, M.D. on May 20, 2015 for complaints of right shoulder pain, deteriorating shoulder motion and weakness.

[5]Claimant's Ex. 13, pp.135-136.

Although Dr. Failinger noted full range of motion in the right shoulder, he provided no specific figures for the actual measurements. He also noted one of the goals for PT was to increase the range of motion. Dr. Failinger's assessment was right pain in joint and shoulder region, rotator cuff tear (degenerative), SLAP tear, adhesive capsulitis of the shoulder. He ordered physical therapy for Claimant.

39. Claimant received PT in June and on June 29, 2015 she was reevaluated by Dr. Failinger. Dr. Failinger's diagnosis was the same and he recommended continued PT. Dr. Failinger provided work restrictions of no use of right arm until cleared and if not possible to accommodate, then Claimant should be off work.

40. As noted *supra*, a Worker's Claim for Compensation for the July 21, 2013 date of injury was filed on behalf of Claimant.

41. Claimant applied for short term/long term disability on August 25, 2015 because of her right shoulder problems. She related these problems to an injury that occurred while working on the returns desk, pushing and pulling a heavy stack of books in 2013, with a re-injury in December 2014. On the attending physician's report of August 28, 2015, Claimant noted her condition was work related; also she had requested re-opening and wanted to know if it should be written using the 2013 injury date or 2014 re-injury date. The ALJ notes that Dr. Failinger, who signed the form, checked the box to indicate Claimant's condition was the result of an injury.

42. On January 21, 2016 Claimant was evaluated by John Hughes, M.D. at her request. On examination, Dr. Hughes noted tenderness over the right shoulder. He elicited crepitation, particularly with passively assisted flexion. Claimant did not report she was injured on December 22, 2014 to Dr. Hughes. His assessment was 1) right shoulder sprain/strain sustained on July 21, 2013; 2) Progressive right rotator cuff tendinosis with ultimate development of a full-thickness tear at the common tendon as seen on MRI on February 17, 2015.

43. Dr. Hughes indicated that Claimant had an occupational injury of her right shoulder on July 21, 2013. He noted that this was different than the history documented early on in her care, but the history was straightforward and consistent with the likelihood of a documented right upper extremity injury sustained while handling large piles of books. He was of the opinion that these right shoulder problems were more of an occupational injury than occupational disease mechanism. The ALJ credited Dr. Hughes' opinion that Claimant's condition was in the nature of an injury. Dr. Hughes was of the opinion that the fall at home in August of 2014 was not an intervening injury because of follow up medical evaluation by Dr. Rokicki on September 8, 2014 which documented Claimant's ability to move her shoulder "comfortably". This opinion was less persuasive to the ALJ.

44. Dr. Hughes testified as an expert (by deposition) He has practiced occupational medicine since 1984, was board-certified in occupational medicine in 1988, and Level II accredited since the inception of the program on 1992. He was

involved in the development of the Workers' Compensation Medical Treatment Guidelines ("MTG").

45. Dr. Hughes testified that Dr. Sollender and Dr. Lindberg used the Cumulative Trauma Disorder Guidelines for their causation analysis, which were not the correct guidelines for Claimant's condition and were only tangentially helpful in regards to the shoulder.[6] Dr. Hughes opined that overuse was a factor, but that this was an injury.[7] Dr. Hughes testified that it was his opinion that Claimant's condition was more injury rather than overuse related to the activities of her job.[8]

46. On cross-examination, Dr. Hughes agreed Claimant got worse after the fall at home. He agreed that there was no diagnostic evidence of a tear in the rotator cuff until after the fall at home.[9] He testified that this fall could have re-injured the shoulder. However, Dr. Hughes did not believe the fall was an intervening event.

47. On February 23, 2015, Claimant was evaluated by James Lindberg, M.D. at Respondents' request. Claimant had difficulty doing certain activities and experienced pain at night, which affected her sleep. She had decreased motion of her cervical spine, scapula and decreased left rotation. Dr. Lindberg noted Claimant could flex to 90° actively, extend 45°, abduct 80° and adduct 30°. Claimant could touch her elbows together and had external rotation of 75°, with internal rotation of 90°. Claimant had negative AC pain and the impingement test caused zero pain. Dr. Lindberg's impression was that the Claimant had a rotator cuff tear of her shoulder. He felt that the episodes in which she had pain were relatively trivial, including when she was pulling a stack of books toward herself. Dr. Lindberg stated this, in and of itself, was not going to cause a rotator cuff tear. She did not meet any of the criteria for cumulative trauma on based on the evaluation that Mr. Blythe did. Dr. Lindberg noted it was fascinating that she had intact muscle strength and negative supraspinatus test and negative impingement test, which he had not seen with a rotator cuff tear.

48. Dr. Lindberg did not believe she had an acute rotator cuff tear pulling books toward her in on December 22, 2014. He did not specifically address whether there was an acute injury on July 21, 2013. The ALJ finds this lack of analysis does not rule out a specific event occurring on July 21, 2013. Dr. Lindberg noted Claimant did not meet the criteria for any kind of cumulative trauma disorder of the upper extremity

[6] Hughes Depo p. 22: 13-1.

[7] Respondents cite to Dr. Hughes' testimony where he pointed out Claimant was not on an assembly line like Lucille Ball in the classic "I Love Lucy" episode to support their argument that Claimant had an insufficient occupational exposure. However, this does not refute Dr. Hughes' analysis that Claimant suffered an acute injury interposed on top of a preexisting condition.

[8] Hughes Depo. p. 9: 1-5; 2-17

[9] Hughes Depo. p. 50: 5-20.

and did not think for the treatment need to be rendered out of the workers' compensation system.

49. Dr. Lindberg testified as an expert in orthopedic surgery, the specialty in which he is board-certified. Dr. Lindberg also has special expertise in shoulder surgery, having performed thousands of procedures. He is also Level II accredited pursuant to the WCRP.

50. Dr. Lindberg testified that Claimant did not meet the criteria for an occupational disease, based upon the evaluation done by Mr. Blythe. Dr. Lindberg conceded on cross-examination that Mr. Blythe's testing was done to analyze whether a cumulative trauma disorder could result from Claimant's work activities and did not relate to the shoulder. The MTG for cumulative trauma disorders applied to the elbow and below. The ALJ finds the MTG for cumulative trauma do not apply in this case.

51. Dr. Lindberg testified Claimant had an attritional type rotator cuff tear that was a result of the normal aging process. He said there are studies that noted somewhere between 25 to 30% of people over 60 have torn rotator cuffs that are not symptomatic.[10] Dr. Lindberg also did not believe there was a recognized mechanism of injury for rotator cuff which occurred on July 21, 2013 or December 22, 2014. Dr. Lindberg did not believe the mechanism of pulling books toward her would cause a rotator cuff tear, bursitis or tendinitis.[11] He described this as a "low energy" event. The ALJ credited Dr. Lindberg's testimony regarding the cause of the torn rotator cuff. However, the ALJ notes Dr. Lindberg did not rule out the possibility that the underlying condition of Claimant shoulder was aggravated by her work on July 21, 2013. Dr. Lindberg described Claimant's fall at home as a "high energy" event, which could have aggravated her shoulder condition.[12]

52. Dr. Lindberg stated Claimant did not suffer an occupational injury from repetitive use. This was consistent with the MTG. Dr. Lindberg disagreed with Dr. Hughes' analysis on causation. After reviewing Dr. Bisgard's records, Dr. Lindberg opined the act of pulling a stack of books would not cause tendinitis in the shoulder. The ALJ notes that Dr. Lindberg's testimony left open the possibility that Claimant had a rotator cuff tear that responded to Cortisone injections. This became symptomatic later in 2013 when Claimant, while laboring with an increased workload, injured it on July 21st. Dr. Lindberg believed Claimant needed more treatment in the form of manipulation under anesthesia, which would show whether she has a frozen shoulder and to increase her function.

[10] Hrg Tr., p. 70:19-25.

[11] Hrg Tr., p.70:4-15.

[12] Hrg Tr., p.82:21-22.

53. The ALJ concluded Claimant aggravated the preexisting condition of her right shoulder on July 21, 2013 for which she required treatment. This was compensable under the Colorado Workers' Compensation Act.

54. Claimant injured her shoulder and ribs at home on August 30, 2014. This was an aggravation of her shoulder condition.

55. There was insufficient evidence presented to show Claimant suffered a traumatic injury on December 22, 2014. Claimant did not make a timely report of injury. When she did report the injury (or "re-injury") on June 30, 2015, she did not reference the date of December 22, 2014. No explanation was provided to the ALJ for the delay in reporting this incident, particularly since Claimant was aware of the process for reporting an injury and how to request time off under the FMLA. Claimant did not suffer a compensable injury which occurred on December 22, 2014.

56. Evidence and inferences contrary to these findings were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57

P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Claimant, as well as the various health care providers, bore directly on the issue of compensability.

Compensability

The legal standard applicable to the compensability issue is found in § 8-41-301(1)(c), C.R.S., which provides as a condition for the recovery of workers' compensation benefits the injury must be "proximately caused by an injury or occupational disease arising out of and in the course of the employment". *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014)

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. ICAO*, 107 P.3d 999, 1001 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury, the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siegfried v. Industrial Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986).

Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). As found, Claimant's right shoulder most probably had degenerative or attritional changes, as testified to by Dr. Lindberg. However, it was the combination of the increased workload and the act of pulling a stack of books on July 21, 2013 that caused the preexisting condition to become symptomatic. (Finding of Fact 53).

A "compensable" injury is one which is disabling and entitles the Claimant to compensation in the form of disability benefits. *Id*.; *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). Conversely, no benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury". Id.; § 8-41-301, C.R.S. The question of whether the Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

July 21, 2013

Claimant contends that she sustained a compensable injury on July 2013, which was subsequently re-injured in December 2014. She relied on her testimony as well as the expert testimony of Dr. Hughes to support her claim.

Respondents put forth several arguments as to why the claim was not compensable, starting with the assertion that Claimant's work duties were not sufficient to cause an occupational disease. Respondents relied upon the Job Demands Analysis done by Joe Blythe, as well as the expert testimony of Dr. Lindberg.

The ALJ determined Claimant met her burden of proof and established she sustained an injury proximately caused by the performance of duties arising out of and

in the course of her employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). As a starting point, Claimant's testimony first established that her work load increased after lay-offs occurred. This included work activity involving the right arm (and shoulder). Claimant testified that the act of moving a stack of books caused pain in her shoulder. (Finding of Fact 10). The ALJ found Claimant reported this injury in a timely fashion preparing an electronic report of injury on or about July 23, 2013. (Finding of Fact 11).

Moreover, the ALJ credited Dr. Hughes' testimony that this event was more in the nature of an injury as opposed to a cumulative trauma disorder. (Finding of Fact 43). Dr. Bisgard's assessment of a rotator cur injury also supports this conclusion. (Finding of Fact 13). In coming to this conclusion, the ALJ considered Respondents' argument that Claimant to continually referred to her injury as one which came out of repetitive activities at work. There were multiple references in both Claimant's testimony, as well as reports to physicians that her shoulder pain came from both repetitive activities and the increase pace of work. (Findings of Fact 11, 33, and 41). The ALJ did not credit the analysis of Mr. Blythe or Dr. Sollender as the MTG on which they relied did not apply to the shoulder.

On balance, the ALJ determined that the weight of the evidence led to the conclusion that there was a specific injury which occurred on July 21, 2013. The resultant shoulder pain constituted an aggravation of an underlying degenerative condition, as identified by Dr. Lindberg. The evidence in the record let the ALJ to conclude there was an injury and Claimant was entitled to benefits.

Intervening Injury of August 30, 2014

As found, Claimant's fall at home injured her shoulder. The evidence showed Claimant injured her shoulder in the fall. The ALJ was persuaded by Dr. Lindberg's testimony that this was that the fall was a "high energy" event, which could aggravate the underlying condition of Claimant's shoulder. (Finding of Fact 51). Dr. Hughes did not disagree with the characterization of the fall as a higher energy event.

The ALJ also found that opinion, coupled with the fact that Claimant experienced shoulder symptoms following this injury, was significant in the chain of causation and served to cut-off Respondents' liability for the July 21, 2013 injury. (Finding of Fact 54).

December 22, 2014

The ALJ determined Claimant failed to prove she sustained a new injury on December 22, 2014. There are three reasons for this. First, Claimant did not report a traumatic injury to Employer at a time proximal to the injury. (Finding of Fact 32). The ALJ noted Claimant was well versed in the employer's policies and procedures for both reporting claims, as well as seeking time off, including under the FMLA. (Finding of Fact 55). As determined in Finding of Fact 32-33, 55, there was no evidence before the Court to establish that Claimant discussed an injury or even an increase in symptoms close in time to December 22, 2014.

Second, when Claimant was evaluated by Dr. Hughes, she did not report a discrete traumatic event anytime in December 2014. She described her problem as long standing and referred back to the July 2013 timeframe. Claimant also did not tell Dr. Kovachevich she was injured on December 22, 2014. (Finding of Fact 33). The ALJ found this evidence persuasive.

Third, and finally, when Claimant was evaluated by Dr. Hughes, she did not discuss a separate traumatic event in December 2014. Based upon the totality of evidence before the Court, the ALJ concluded Claimant did not prove she suffered a separate injury on December 22, 2014.

Medical Benefits

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In the case at bench, the ALJ determined Claimant suffered a compensable traumatic injury on July 21, 2013. (Finding of Fact 53). Therefore, Respondents are required to provide medical benefits to Claimant for treatment of her right shoulder from July 21, 2013 through August 31, 2014. This includes treatment with Dr. Bisgard and any referrals made by Dr. Bisgard.

However, as found, Claimant treated outside the workers' compensation system, starting in November 2013. (Finding of Fact 22). Claimant chose to treat with her personal physician, Dr. Corr, along with orthopedic surgeon, Dr. Rokicki. Claimant's treatment with these physicians was not authorized. (Finding of Fact 25). Accordingly, since this treatment was not authorized, Respondents are not required to pay for this treatment.

As found the August 30, 2014 fall at home injured Claimant's shoulder. This event severed the chain of causation and terminated Respondents' liability for benefits under the Workers' Compensation Act. Claimant's need for medical treatment was a result of the fall. In addition, the ALJ determined Claimant's increase at symptoms at work in December 2014 was not the cause of her need for treatment and Respondents are not required to pay medical benefits after Claimant's August 30, 2014 fall.

Waiver

Respondents have argued Claimant waived her right to receive worker's compensation benefits in W.C. case number 4-928-974. In this regard, Respondents contended Claimant's email of November 10, 2013 proved she wished to waive her rights. (Finding of Fact 20).

Claimant may waive her rights under the Worker's Compensation Act, including procedural due process rights. To be effective, a waiver must be "voluntarily, knowingly, and intelligently" made. *Walton v. Industrial Commission*, 738 P.2d 66 (Colo. App. 1987) [citing *Columbine Valley Construction Co. v. Board of Directors*, 626 P.2d 686 Colo. 1981]. To find such a waiver, there has to be sufficient evidence that Claimant knew and understood the rights she was relinquishing. *Id*. Such evidence was not present in the case of bench, including evidence that Claimant's waiver was knowing and intelligent.

As found, there was insufficient evidence to show Claimant's waiver was knowing, intelligent and unequivocal. In this regard, in the text of the email, Claimant said she wanted to in "close" her claim. Later on, Claimant sent another e-mail to Employer requesting to reopen her claim, which evinces a belief that she was not dismissing or withdrawing her claim with prejudice, but had the right to "reopen" it. No evidence was presented to the ALJ regarding whether Claimant fully understood her request, nor was it unequivocal. In fact, the evidence Claimant thought she could reopen her claim which runs counter to any argument of waiver. (Finding of Fact 34). As such, the ALJ declined to find Claimant waived her right to receive benefits.

Temporary Total Disability

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that she left work as a result of the disability; and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Claimant introduced evidence at hearing that she missed time from work in 2013 and had restrictions. However, there were also references to the fact that Employer

accommodated her restrictions. Her hours were also reduced. Claimant also took FMLA leave, although the record was unclear whether this was paid or unpaid. The ALJ concluded Claimant lost time from work as a result of the July 21, 2013 injury. Accordingly, she is entitled to temporary disability benefits, although there was insufficient specific evidence regarding the time periods and whether it would be TTD or TPD benefits.

The parties agreed a general Order for TTD benefits could be issued and they would confer as to the specific periods. Therefore, Claimant is awarded temporary disability benefits from July 21, 2013 through March 9, 2014.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable industrial injury on July 21, 2013.

2. Respondents shall provide medical benefits to Claimant. This includes treatment provided to Claimant by Dr. Bisgard and other health care providers to whom she referred Claimant.

3. Claimant's right to receive medical benefits under the July 21, 2013 claim ended as of August 30, 2014, when she was injured as a result of falling at home.

4. Claimant is entitled to temporary disability benefits from July 21, 2013 through March 9, 2014. Counsel for the parties are ordered to confer regarding what credit, if any, Respondents are entitled to for the salary Claimant received during this period of time. If the parties are unable to reach an agreement, either Claimant or Respondents may file an Application for Hearing on the TTD/TPD issue.

5. Claimant's request for TTD benefits from March 10, 2014 and continuing is denied and dismissed.

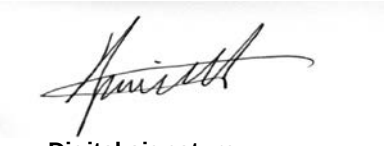
6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 29, 2017



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that bilateral radiofrequency ablations at the L2, L3, L4, and L5 levels as recommended by Dr. Clifford Baker constitute reasonable medical treatment necessary to maintain claimant at maximum medical improvement ("MMI").

FINDINGS OF FACT

1. It is undisputed that claimant suffered an admitted injury to his left sacroiliac ("SI") joint on November 25, 2001.

2. On August 20, 2002, claimant's authorized treating physician ("ATP"), Dr. Randal Jernigan, issued a report in which he placed claimant at MMI as of August 19, 2002 and assigned a permanent impairment rating of 23% whole person.

3. Based upon Dr. Jernigan's report, respondents filed a Final Admission of Liability ("FAL") on August 29, 2002 admitting for the date of MMI and impairment rating. Respondents also admitted for reasonable, necessary, and related maintenance medical treatment "per the 8/20/02 report".

4. On March 22, 2005, Dr. Jernigan noted that in his opinion claimant's maintenance medical treatment should continue for five years post MMI. Dr. Jernigan opined that after five years any continued problems claimant might have would be "more related to arthritic change from [claimant's] usual aging process".

5. On June 12, 2012, claimant returned to Dr. Jernigan and reported that he was doing well and had not had a recurrence of his SI joint pain since "it popped back into place a while back". Thereafter, claimant's SI joint pain returned and he pursued maintenance medical care.

6. On May 23, 2015, respondents sent claimant for an independent medical examination ("IME") with Dr. Michael Rauzzino. Dr. Rauzzino reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the IME. Following the IME, Dr. Rauzzino issued a report in which he opined that claimant's ongoing pain was related to his 2001 left SI joint injury. As a result, Dr. Rauzzino recommended that claimant undergo an SI joint rhizotomy for treatment of that pain. In that same report, Dr. Rauzzino noted that "any additional treatment to [claimant's] lumbar spine related to degenerative disc disease, radiculopathy, or facet arthropathy would be treated outside the scope of workers' compensation".

7. Claimant currently resides in Arizona and is treated by Dr. Clifford Baker with Novaspine Pain Institute. Dr. Clifford has recommended that claimant undergo bilateral radiofrequency ablations (or "rhizotomies") at the L2, L3, L4, and L5 levels. On October 25, 2016, Dr. Clifford requested authorization for these procedures.

8. On November 2, 2016, Dr. Albert Hattem performed a review of claimant's medical records and issued a report in which he opined that the rhizotomies recommended by Dr. Baker would not be related to claimant's 2001 work injury, but rather to age-related degenerative arthritis. Dr. Hattem testified by deposition in this matter and confirmed the opinions contained in his report.

9. On January 24, 2017, Dr. Rauzzino conducted a medical records review related to the radiofrequency ablations recommended by Dr. Clifford. Dr. Rauzzino opined that the recommended radiofrequency ablations would not be reasonable or necessary treatment because the symptoms to be treated are unrelated to claimant's 2001 work injury. Dr. Rauzzino specifically opined that claimant's ongoing low back pain is due to age-related degenerative arthritis and is not related to the 2001 slip-and-fall work injury. Dr. Rauzzino recommended that claimant's maintenance medical treatment should be directed to his left SI joint. Dr. Rauzzino's testimony at hearing was consistent with his 2015 and 2017 reports.

10. Claimant testified at hearing that his current symptoms include back pain that makes it difficult to walk and sit for long periods. Claimant testified that it is his understanding that the recommended ablation procedures from L2 to L5 are intended to address his SI joint pain.

11. At hearing claimant argued that Dr. Rauzzino's current opinions are contrary to the opinion he held at the time of the May 23, 2015 IME report. The ALJ is not persuaded by this assertion. Although Dr. Rauzzino recommended claimant receive treatment in 2015, that treatment was related to claimant's left SI joint. In that 2015 IME report, Dr. Rauzzino clearly indicated his opinion that if pain management "was to extend to any sort of treatment for the facets, stenosis, and/or discs as pain generators or for radicular pain down his legs, this would be done outside the scope of workers' compensation and treatment for these types of symptoms would be unrelated to his original slip-and-fall when he injured the SI joint". The ALJ finds that the position taken by Dr. Rauzzino in 2015 is consistent with his current opinion that the recommended treatment of claimant's lumbar spine is not related to claimant's 2001 injury to his left SI joint.

12. The ALJ credits the medical records and the opinions of Dr. Rauzzino and Dr. Hattem and finds that claimant's current back symptoms are not related to the 2001 work injury. The ALJ also finds that claimant has failed to demonstrate that it is more likely than not that the recommended radiofrequency ablations at the L2, L3, L4, and L5 levels constitute reasonable medical treatment necessary to maintain claimant at MMI.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2001). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2001).

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

4. As found, claimant has failed to demonstrate by a preponderance of the evidence that the need for bilateral radiofrequency ablations at the L2, L3, L4, and L5 levels is un related to claimant's 2001 work injury. As found, the opinions of Drs. Rauzzino and Hattem are credible and persuasive on this issue.

5. As found, claimant has failed to demonstrate by a preponderance of the evidence that the recommended bilateral radiofrequency ablations at the L2, L3, L4, and L5 levels is reasonable medical treatment necessary to maintain claimant at MMI. As found, the opinions of Drs. Rauzzino and Hattem are credible and persuasive on this issue.

ORDER

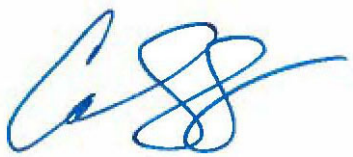
It is therefore ordered that:

1. Respondents are not responsible for payment of the recommended bilateral radiofrequency ablations at the L2, L3, L4, and L5 levels because this treatment is unrelated to claimant's 2001 SI joint injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 27, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, CO 81501

ISSUES

I. Whether Respondents have produced clear and convincing evidence to overcome the permanent impairment rating assigned by the DIME physician, Brian Shea, D.O.

FINDINGS OF FACT

1. Claimant worked for Employer as a Certified Nursing Assistant. Claimant sustained an admitted industrial injury on August 25, 2015 while holding a 300-400 pound patient in an attempt to prevent the patient from rolling off of a bed.

2. Matt Slaton, P.A.-C., evaluated Claimant on August 27, 2015. Claimant complained of bilateral upper arm trapezius and neck pain. PA-C Slaton noted normal range of motion, muscle strength and tone. PA-C Slaton assessed bilateral tenderness, trapezius strain, biceps strain and triceps strain.

3. Rammohan Naidu, P.A.-C, evaluated Claimant on September 2, 2015. Claimant reported pain in her left low back, upper trapezius, and right arm. PA-C Naidu assessed biceps strain, trapezius strain and triceps strain.

4. Catherine Peterson, P.A., evaluated Claimant on September 9, 2016. Claimant presented with a right arm injury. Claimant reported upper posterior shoulder pain and low back pain. PA Peterson noted that Claimant "does not feel back pain has been adequately addressed," and remarked that there were no radicular symptoms of the low back. PA Peterson found tenderness in the rhomboid and trapezius muscle, limited range of motion in all planes, normal shoulder strength bilaterally, and normal tone. With respect to the lumbosacral spine, PA Peterson noted "tenderness at level L5 lumbar spine, left paraspinal and right paraspinal, but not the right sciatic notch and not the left sciatic notch." PA Peterson also noted muscle tightness to paraspinal bilateral and remarked "AROM of 30 degrees and painful." The Waddell test was positive. PA Peterson assessed low back pain, biceps strain, trapezius strain, and triceps strain. PA Peterson ordered an X-ray of Claimant's spine.

5. John D. McArthur, M.D., reviewed the September 9, 2015 X-ray. Regarding Claimant's lumbar spine, Dr. McArthur found that the vertebral body alignment was normal and the vertebral body heights and intervertebral disc spaces were maintained. Dr. McArthur noted that there were no spondylitic changes observed, and that the paravertebral soft tissue was unremarkable. Dr. McArthur impressed "unremarkable lumbar spine. No evidence of acute injury or significant degenerative change."

6. Marie Mueller, N.P., evaluated Claimant on September 14, 2015. Claimant presented with back pain, as well as numbness and tingling in her right upper extremity. Claimant reported pain located in her upper back on the right and in her low back bilaterally. NP Mueller noted tenderness to Claimant's right trapezius muscle, but not the left trapezius muscle, left paraspinal or right paraspinal. NP Mueller also noted no bilateral muscle spasms, or right or left-sided muscle spasms. NP Mueller further noted limited range of motion due to pain in all fields. NP Mueller documented that Claimant had very limited range of motion to lumbar spine. NP Mueller remarked "when she was left in the room waiting as PT was consulted, was sitting without obvious distress, and stood without difficulty." NP Mueller assessed trapezius strain, low back pain, biceps strain and triceps strain.

7. PA-C Naidu reexamined Claimant on September 18, 2015. Claimant again presented with pain to her upper right back and lower back, as well as numbness and tingling to her right upper extremity. PA-C Naidu documented the same findings and same assessment as Claimant's September 14, 2015 evaluation.

8. Christa Dobbs, P.A.-C., evaluated Claimant on September 25, 2015. Claimant reported continuing neck, right arm and left lower back pain. PA-C Dobbs noted limited range of motion in all planes, limited to approximately 90 degrees. Regarding the lumbosacral spine, PA-C Dobbs noted tenderness at level L3-5 left paraspinal, right-sided muscle spasms, and decreased in all ranges to about 20 degrees. PA-C Dobbs assessed low back pain and trapezius strain.

9. Lloyd Thurston, M.D., evaluated Claimant on October 2, 2015. Dr. Thurston commented that Claimant was "limited by pain avoidance behavior" and had "severe pain avoidant behavior." Dr. Thurston remarked, "I reviewed the mechanism of injury and am comfortable this is muscular." Dr. Thurston noted limited range of motion in all planes, documenting the following: "Forward flexion: AROM 60 degrees and PROM 120 degrees. Abduction AROM 60 degrees and PROM 130 degrees. Internal rotation: AROM 40 degrees and PROM 60 degrees. External rotation: AROM 40 degrees and PROM 60 degrees." Dr. Thurston assessed trapezius strain and thoracic myofascial strain.

10. NP Mueller reevaluated Claimant on October 12, 2015. Claimant reported continuing pain to her right upper extremity and low back pain. NP Mueller assessed trapezius strain, thoracic myofascial strain and low back pain.

11. John J. Aschberger, M.D., evaluated Claimant on October 15, 2015. Claimant reported pain at the right trapezius area and right upper back, along with pain at the mid lumbar levels across the low back. Dr. Aschberger noted Claimant was "very hesitant for active range of motion at the shoulder." Impingement testing at the shoulder was negative. Dr. Aschberger assessed right upper quarter myofascial pain, trigger points and myofascial irritation at the infraspinatus and trapezius, rib dysfunction and restriction, brachial plexus neuropathy, and doubt cervical radiculopathy. Dr. Aschberger remarked that Claimant "had a lot of problems with pain management." Dr. Aschberger diagnosed Claimant with a lumbar strain of the low back, commenting, "She

does have low back symptomatology. On examination, she is tight and tender at the mid lumbar paraspinal musculature. I note no significant dysfunction or misalignment in the spine. The pelvis is level. Straight leg raising is tight at 60 degrees with hamstring tightness and pain in the back without radicular symptoms. Further workup does not appear necessary at this point, but that warrants continued monitoring."

12. Dr. Thurston reevaluated Claimant on October 22, 2015. Dr. Thurston documented that Claimant was asking for treatment of the low back and remarked, "I looked back at the initial visit with Matt Slaton and I don't see mention of low back injury so I am not treating that." Dr. Thurston noted tenderness to Claimant's lateral shoulder and normal palpation. Dr. Thurston deferred range of motion tests, noting Claimant had "extensive pain behavior with muscle tenderness." Dr. Thurston assessed thoracic myofascial strain, trapezius strain, and rhomboid muscle strain.

13. Claimant returned to Dr. Aschberger for an evaluation on October 29, 2015. Dr. Aschberger noted that when he questioned Claimant regarding her low back, Claimant "says no", but then reported low back irritation with prolonged standing. Dr. Aschberger noted mild pain with extension and muscular irritation, with no radicular component. Dr. Aschberger commented, "I recommend monitoring for now, and I will need to review the records regarding relatedness. Dr. Thurston did not note any issues of low back pain mentioned in the early records." Dr. Aschberger again mentioned Claimant's pain behaviors. Dr. Aschberger assessed right upper quarter myofascial pain, improved trigger points and rib dysfunction, and less indication of brachial plexus irritation.

14. Claimant returned to NP Mueller for an evaluation on November 9, 2015. NP Mueller assessed triceps strain, trapezius strain, thoracic myofascial strain, rhomboid muscle strain and low back pain.

15. Dr. Aschberger reevaluated Claimant on November 23, 2015. Dr. Aschberger assessed right upper quarter myofascial pain, radiated symptomatology into the upper extremity of uncertain etiology, rib dysfunction, pain management issues, and exaggerated pain behaviors.

16. Dr. Thurston reevaluated Claimant on November 30, 2015 and assessed rhomboid muscle strain, thoracic myofascial strain and trapezius strain.

17. John Burris, M.D., evaluated Claimant on December 31, 2015. Dr. Burris noted that X-rays of Claimant's neck and low back were normal and that there was full range of motion on all planes. Dr. Burris remarked that Claimant was "very somatically focused with significant pain behaviors." Dr. Burris found "no objective findings on her examination other than pain to palpation diffusely without localization." Dr. Burris diagnosed myofascial pain.

18. Dr. Thurston reevaluated Claimant on January 7, 2016. Dr. Thurston again assessed biceps strain, low back pain, rhomboid muscle strain, thoracic myofascial strain, trapezius strain, and triceps strain.

19. Dr. Aschberger reevaluated Claimant on January 25, 2016. Dr. Aschberger remarked that his prior exam of Claimant was complicated by "exaggerated pain behaviors," and that Claimant continued to show "marked pain behaviors." Dr. Aschberger assessed right upper quarter myofascial pain and some radiated symptomatology. Dr. Aschberger noted that electromyographic testing involving biceps and brachioradialis was attempted, but Claimant had poor tolerance to needle assessment and requested termination of the testing.

20. Joel Cohen, Ph.D., conducted psychological evaluation of Claimant on January 29, 2016, June 3, 2016, June 14, 2016 and September 6, 2016. Dr. Cohen opined that Claimant's issues could be more emotional than physiological. Dr. Cohen noted, "I suspect that the extent of pain complaint and overall pain behavior goes well beyond what can be explained from a pathophysiological perspective" and noted that there was "a substantial level of somatoform overlay."

21. Dr. Burris evaluated Claimant on February 11, 2016. Dr. Burris remarked the Claimant remained "very somatically focused" noting, "pain behaviors obscure today's examination." Dr. Burris noted full range of motion in all planes with no localized tenderness. Dr. Burris again diagnosed myofascial pain, commenting that "the patient continues to have no objective findings with extreme pain behaviors present." Dr. Burris placed Claimant at MMI as of February 11, 2016 with a 0% permanent impairment rating. Dr. Burris stated, "At this point, I really have nothing further to offer this patient. Given the level of somatization, I believe she needs to be placed at maximum medical improvement, and further followup and/or treatment can be provided through the maintenance process." Dr. Burris opined that there was "no objective basis for impairment or permanent work restrictions."

22. Claimant returned to Dr. Aschberger for an evaluation on February 18, 2016. Dr. Aschberger noted breakaway weakness and diffuse tenderness on palpation of the upper quarter. Dr. Aschberger noted, "objective examination is difficult due to her marked pain behaviors." Dr. Aschberger assessed right upper quarter pain and some reported radiated symptomatology.

23. Dr. Aschberger reevaluated Claimant on March 7, 2016. Dr. Aschberger documented marked pain behaviors, and noted shoulder abduction and flexion were restricted to 90 degrees. Dr. Aschberger assessed upper quarter pain and radiated symptoms.

24. Respondents filed a Final Admission of Liability ("FAL") on March 7, 2016. The FAL acknowledged Claimant reached MMI as of February 11, 2016, with a 0% permanent impairment rating.

25. Dr. Aschberger reevaluated Claimant on March 31, 2016. Dr. Aschberger noted marked restriction in shoulder range of motion, tenderness in low back, and that Claimant's range of motion was "significantly restricted." Dr. Aschberger assessed right upper quarter pain and radiated symptoms, remarking that the "findings are

predominantly myofascial." Dr. Aschberger remarked, "objectification is difficult, due to her marked pain behaviors."

26. Claimant returned to Dr. Aschberger for a follow-up evaluation on April 19, 2016. Dr. Aschberger noted that Claimant had sustained a new injury with a fracture to her left forearm. Regarding an MRI scan of the right shoulder, Dr. Aschberger noted that there were "findings of mild bursal irregularity with some findings consistent with impingement, but no rotator cuff tear identified." Dr. Aschberger assessed right upper quarter myofascial pain, shoulder pain, left cervical disc protrusions, fracture at the left forearm, significant pain behaviors; and pain management.

27. Dr. Aschberger reevaluated Claimant on June 6, 2016. Dr. Aschberger noted improvement in range of motion and pain behaviors. Dr. Aschberger assessed right upper quarter myofascial pain, shoulder pain, cervical disc protrusion, unrelated forearm fracture, pain behaviors and pain management. Regarding the shoulder, Dr. Aschberger noted Claimant had "some indications of bursitis with the MRI scan and with the exam."

28. Dr. Aschberger reevaluated Claimant on June 27, 2016. Claimant reported pain in her shoulders, low back, forearm, and right leg. Dr. Aschberger again assessed right upper quarter myofascial pain, shoulder pain, cervical disc protrusion, unrelated left forearm fracture, marked pain behaviors, and pain management.

29. Brian T. Shea, D.O., conducted a Division Independent Medical Examination ("DIME") of Claimant on July 18, 2016. Dr. Shea conducted a medical record review and a physical examination of Claimant. Dr. Shea noted that an April 19, 2016 medical record referred to a right shoulder and cervical MRI for which Dr. Shea did not have radiology reports. Dr. Shea noted, however, that he did request and receive radiology IME reports of Claimant's cervical spine and right shoulder. Dr. Shea noted that the MRI of the right shoulder showed mild internal impingement with no tear. Dr. Shea noted he evaluated the lumbar/low back per request of the attorney's office.

30. Dr. Shea's physical examination findings were as follows:

> Neurologically deep tendon reflexes are bilaterally symmetrical in the upper and lower extremities. There are no gross signs of muscle atrophy, motor or sensory deficits. There are no gross thoracic outlet signs or symptoms. Ranges of motion in the right shoulder have 160°of flexion, 40° of extension, 35°of adduction, 130° of abduction, 65° of internal rotation, and 85° of external rotation. Lumber range of motion has 45° of flexion, 23° of extension, 45° of right straight leg raise, 50° of left straight leg raise, 23° of right lateral flexion, and 20° of left lateral flexion. Palpation of upper back, lower neck, and lumbar sacral paraspinal musculatures are all tender to palpation.

31. Dr. Shea assessed lower cervical, thoracic and lumbar sacral myofascial pain syndromes; cervical degenerative disk disease and herniations at C4-5 and C5-6,

as well as reversal of the cervical spine at C5-6; mild right shoulder impingement syndrome; mild lumbar strain; exaggerated pain mannerisms; and adjustment disorder with mixed anxiety and depressed mood. Dr. Shea opined that the assessments regarding Claimant's cervical spine were not related to Claimant's industrial injury. Dr. Shea did not discuss the relatedness of his other assessments.

32. Referring to the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised (the "AMA Guides"), Dr. Shea assigned Claimant a 5% lumbar range of motion impairment, combined with a Specific Disorders Table 53(II)(B) impairment of 5%, totaling a final lumbar whole person impairment of 10%. Dr. Shea also assigned Claimant a 5% right upper extremity rating, converted to a 3% whole person impairment. Dr. Shea combined the impairment ratings for a final combined unapportioned 13% whole person impairment rating. Dr. Shea found Claimant reached MMI as of February 11, 2016. Dr. Shea did not discuss the difference in his findings and opinion versus the findings and opinions of the other physicians who examined Claimant.

33. Dr. Shea recommended maintenance therapy including 3-5 sessions with Dr. Cohen, pool therapy, and one shoulder subacrominal injection by Dr. Aschberger.

34. Claimant attended a follow-up evaluation with Dr. Aschberger on September 6, 2016. Dr. Aschberger noted that an MRI scan of Claimant's shoulder showed mild bursal irregularity and some findings consistent with impingement. Dr. Aschberger noted there were no obvious rotator cuff tears. Dr. Aschberger again referenced Claimant's pain behaviors. On physical examination, Dr. Aschberger noted limited active range of motion at Claimant's right shoulder. Dr. Aschberger assessed right upper quarter myofascial pain and restrictions in shoulder range of motion with shoulder pain. Referencing the AMA Guides, Dr. Aschberger stated, "At present, as there are findings of impingement and she is not demonstrating significant restrictions with the uninvolved left upper extremity, I recommend assigning impairment based on her limitations in range of motion at the right shoulder." Dr. Aschberger recommended a 12% impairment of the upper extremity per the AMA Guides. Dr. Aschberger further noted, "objectification is difficult due to her marked pain behaviors."

35. Dr. Thurston reexamined Claimant on September 20, 2016. Claimant presented with a back injury. Dr. Thurston noted muscle pain, back pain, muscle weakness and night pain. Dr. Thurston assessed rhomboid muscle strain. Dr. Thurston released Claimant to return to full work/activity with no medical maintenance permanent restrictions.

36. On November 10, 2016, Allison M. Fall, M.D., conducted an Independent Medical Examination ("IME") at the request of Respondents. Dr. Fall conducted a review of Claimant's medical records and performed a physical examination. Dr. Fall noted that there was superficial tenderness to palpitation and that Claimant's range of motion was unrestricted, "although with complaints of pain." Dr. Fall noted that Claimant was "extremely guarded with right shoulder range of motion both passively and actively. While she was lying on her back, I was able to passively move her

shoulder to 90 degree of flexion and abduction, although she guarded against that as well." Dr. Fall found no localized finding in the lumbar spine and noted that diagnostic testing had not revealed "a significant abnormality correlating with her symptoms."

37. Dr. Fall opined that, within a reasonable degree of medical probability, Claimant's "ongoing symptomatology and pain complaints are related to an underlying or psychological issue with somatization." Dr. Fall noted that there was not an initial complaint of a lumbar strain. Dr. Fall opined that the documentation did not "support a causal relationship between the low back pain complaints, which are without objective findings, and the initial injury." Dr. Fall assessed initial right upper quadrant pain without residual objective findings and psychological overlay with somatization and secondary gain.

38. Dr. Fall further opined that Dr. Shea erred in assessing a lumbar spine injury, assigning a Table 53 diagnosis, and assigning an impairment rating for the shoulder. Dr. Fall contended Dr. Shea's physical examination did not support a Table 53 diagnosis for the lumbar spine. Dr. Fall also concluded that Dr. Shea based the shoulder impairment rating on Claimant's self-limiting behaviors and not objective findings. Dr. Fall commented that Dr. Shea "noted the nonphysiologic findings and the pain behaviors which would indicate that the right shoulder range of motion he measured was not her true functional range of motion." Dr. Fall opined that the initial strain resolved without sequelae, and that Claimant's continuing issues were somatization.

39. Dr. Fall testified on behalf of Respondents at hearing as an expert in physical medicine and rehabilitation. Dr. Fall is board certified in physical medicine and rehabilitation and is Level II accredited pursuant to the WCRP.

40. Dr. Fall testified consistent with her IME report. Dr. Fall purported that there was no objective physical evidence of a low back injury in the medical records. Dr. Fall indicated findings of tenderness were subjective, and that lmited range of motion did not establish that there was a low back injury. Dr. Fall testified that myofascial pain was generally not a permanent impairment, due to being more temporary in nature. Dr. Fall stated that the multiple references to pain behaviors and somatization throughout Claimant's medical records signaled a behavioral or psychological issue, not objective pathology.

41. Dr. Fall testified that Dr. Aschberger's recommended 12% upper extremity rating was invalidated by his own statement regarding objectification being difficult. Dr. Fall indicated that such statement indicated the rating was not based on true range of motion findings. Dr. Fall stated that MMI should be determined at the time of MMI, not seven months later, as in the Claimant's case.

42. Dr. Fall further testified that Dr. Shea's findings of a limited lumbar range of motion did not justify a permanent impairment rating because range of motion does not determine causation. Dr. Fall stated that Dr. Shea's DIME report did not indicate that his physical exam included any tests or maneuvers to determine shoulder

impingement, nor did Dr. Shea evaluate the contralateral side, as suggested by the Division of Workers' Compensation Impairment Rating Tip Sheet. Dr. Fall testified that Dr. Shea erred by failing to state a Table 53(II)(B) diagnosis, failing to provide a causation analysis, and failing to address the difference in his assessment and opinion and those of the other physicians, as suggested by the AMA Guides.

43. On cross-examination, Dr. Fall testified that myofascial pain, which includes a muscle strain, can be a diagnosis but should not be separately rated under the AMA Guides. Dr. Fall acknowledged that a lumbar strain is a specific pathology.

44. Dr. Aschberger testified by deposition as an expert in physical medicine and rehabilitation. Dr. Aschberger is board certified in physical medicine and rehabilitation and is Level II accredited pursuant to the WCRP.

45. Dr. Aschberger defined secondary gain as "a reward system for continued pain behaviors." Dr. Aschberger indicated Claimant's issues with secondary gain and pain behaviors made it difficult to make an objective assessment, stating, "I can't say that there is not an underlying problem and there is nothing wrong, particularly with the shoulder area, but the severity is difficult to determine based on the physical examination because the physical examination is very guarded and the subjective input I think is not reliable." Dr. Aschberger testified that, when he referred to "breakaway" in his medical notes, he felt that the patient possessed the underlying strength and was giving up. Dr. Aschberger testified that "breakaway" might make it difficult to ascertain "what the true strength is." Dr. Aschberger stated that tenderness is subjective.

46. Dr. Aschberger further stated that his own 12% upper extremity impairment rating was based on Claimant's presentation and active range of motion that day, and that the rating was generous based on Claimant's pain behaviors. With respect to the impairment rating, Dr. Aschberger stated "One option would be to throw it out completely and just say she is too inconsistent to make that determination."

47. Dr. Aschberger testified that there was no objective evidence in his review of Dr. Burris' February 11, 2016 report suggesting Claimant sustained a permanent impairment based on Claimant's industrial injury. When asked about the results of the MRI he ordered, Dr. Aschberger stated the MRI findings were "underwhelming," yet also stated the findings showed tendinosis and "some findings consistent with impingement." Dr. Aschberger further stated there was not a significant tear and there were was no evidence of inflamed tendons.

48. Regarding Claimant's lumbar spine, Dr. Aschberger first testified that he never evaluated or diagnosed Claimant with a lumbar spine condition. Dr. Aschberger subsequently acknowledged in his testimony that he diagnosed Claimant with a lumbar strain of the low back in his October 15, 2015 evaluation.

49. Dr. Aschberger opined that Dr. Shea erred by assigning a permanent impairment rating for the low back and finding Claimant at MMI prior to Claimant undergoing rehabilitation directed at the low back.

50. Regarding the impairment rating of the lumbar spine, the ALJ credits the medical records and opinions of Dr. Fall and Dr. Aschberger over the conflicting opinion of Dr. Shea. There is no objective evidence of a rateable low back injury.

51. The ALJ finds that Respondents have overcome the DIME physician's opinion regarding Claimant's permanent medical impairment rating by clear and convincing evidence.

52. Regarding the impairment rating of the shoulder, the ALJ credits the medical records and opinion of Dr. Shea over the conflicting opinions of Dr. Fall and Dr. Aschberger. Claimant established by a preponderance of the evidence that she sustained a permanent medical impairment to her shoulder.

53. Based on a preponderance of the evidence, Claimant's permanent impairment rating is a 5% scheduled upper extremity impairment.

54. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is

subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME Physician's Opinion

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; Section 8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing that it is highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). Section 8-42-107(8)(c), C.R.S. provides, "For purposes of determining levels of medical impairment, the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings."

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence, present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo.

App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000). As found in the case at bench, Respondents overcame the DIME physician's opinion on permanent medical impairment.

Back Impairment Rating

Respondents contend that Dr. Shea erred in assigning an impairment rating for Claimant's low back. Respondents contend that Dr. Shea did not determine a specific diagnosis under Table 53(II)(B), and that there is no objective evidence of anatomic or physiologic correlation with Claimant's subjective complaints of pain.

Table 53(II)(B) provides for impairments for unoperated intervertebral disc or other soft tissue lesions with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm associated with none to minimal degenerative changes on structural tests.

Based on the evidence presented at the hearing and contained in the record, it is determined that it is highly probable Dr. Shea's permanent impairment rating for Claimant's low back is incorrect. The ALJ credits Dr. Fall and Dr. Aschberger's opinions that there is no objective evidence of a lumbar strain. There is no indication in the records that an MRI of Claimant's lumbar spine was obtained. The X-rays of Claimant's lumbar spine showed no acute injury. Dr. Fall and Dr. Aschberger credibly testified that findings of tenderness and pain are subjective. Dr. Fall and Dr. Aschberger credibly testified that Claimant's pain mannerisms made objectification difficult. Claimant's pain mannerisms were well-documented throughout the medical records, including Dr. Shea's assessment of Claimant.

Dr. Shea based his diagnosis of a mild lumbar strain on range of motion findings, the objectivity of which was credibly called into question by Dr. Fall. Dr. Fall and persuasively demonstrated that Claimant did not have a rateable impairment of the low back due to the absence of objective pathology. Furthermore, the ALJ credits Dr. Fall's testimony finds that Dr. Shea erred in failing to include a causation analysis in his report, and failing to address the differences in his opinion and the opinions of the other physicians.

As Respondents overcame Dr. Shea's impairment rating for the low back, the ALJ is charged with calculating Claimant's impairment rating based on the preponderance of the evidence. As found, there is no objective evidence of a rateable low back injury. Dr. Fall and Dr. Aschberger credibly testified myofascial pain is not ratable pursuant to the AMA Guides. Dr. Burris and Dr. Fall assigned a zero percent impairment rating for the low back. Since there is no objective evidence of anatomic or physiologic correlation with Claimant's subjective complaints of pain regarding the low back, the correct impairment rating for the Claimant's low back is zero.

Once the ALJ determines that the DIME's rating has been overcome, the claimant's correct medical impairment then becomes a question of fact and the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *See Garlets v. Memorial Hosp.*, W.C. No. 4-336-566 (I.C.A.O. Sept. 5, 2001). "The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols." *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-477 (I.C.A.O. Nov. 16, 2006). Once overcame, Claimant has the burden of proof to establish an entitlement to permanent partial disability benefits by a preponderance of the evidence.

Shoulder Impairment Rating

Respondents contend Dr. Shea erred in assigning an impairment rating for Claimant's shoulder. Respondents contend that Claimant's pain mannerisms made it difficult to make an objective assessment upon which to assign a permanent impairment rating.

Claimant proved by a preponderance of the evidence that the medical impairment rating of 5% right upper extremity by Dr. Shea was correct. The ALJ credits the opinion of Dr. Shea, which not only includes limited range of motion findings, but also specifically refers to MRI findings of impingement. Dr. Shea's assessment is supported by Dr. Aschberger's testimony and medical notes referring to findings of impingement. To the extent the limited range of motion measurements were affected by Claimant's pain mannerisms, objective evidence supporting a diagnosis of impingement exists in the medical records. The opinions of Dr. Fall and Dr. Aschberger to the contrary did not persuade the ALJ.

ORDER

It is therefore ordered that:

1. Respondents overcame the DIME physician's impairment rating by clear and convincing evidence. Claimant established she sustained a permanent medical impairment. Based on the preponderance of the evidence, Claimant is assigned a 5% right upper extremity rating.

2. Insurer shall pay Claimant permanent partial disability benefits based on a 5% scheduled upper extremity impairment.

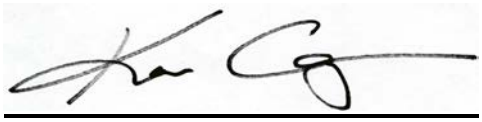
3. Insurer shall pay Claimant interest at a rate of 8% per annum on all compensation benefits not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2017



Administrative Law Judge Kara R. Cayce
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on January 21, 2016.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to a general award of reasonable and necessary medical benefits.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from January 21, 2016 and ongoing.

4. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is 60 years old and is employed by Employer as a Mine Water Technician and works at Employer's Climax mine location.

2. Claimant's scheduled shifts were approximately 12 hours in length beginning at either 6:00 p.m. or 6:00 a.m. Claimant's regular schedule would include working three 12 hour shifts one week for 36 hours/week, then working four 12 hour shifts the next week for 48 hours/week. From July of 2015 through January of 2016 Claimant was off work for non-work related bilateral total knee replacements. Claimant returned to work on January 18, 2016.

3. On January 21, 2016 Claimant was so employed. Claimant had worked from 6:00 p.m. on January 20, 2016 until 6:00 a.m. on January 21, 2016. At approximately 5:45 a.m. Claimant's co-worker Aaron Davis arrived in the control room where Claimant works to take over the job. Mr. Davis is also a Mine Water Technician. Claimant and Mr. Davis discussed what had happened during Claimant's shift and discussed operations. Claimant was easily able to recall information and numbers from his shift and he reminded Mr. Davis of when upcoming samples would need to be taken.

4. After speaking with Mr. Davis, Claimant gathered his coat, lunchbox, and metal paperwork clipboard/box and left. Claimant had a hard hat that he was wearing. Claimant was planning on heading down the stairs to the locker room to put some of his belongings in a locker, to clock out, and to leave for the day.

5. The control room where Claimant works is up several flights of stairs. Shortly after Claimant left the control room, Mr. Davis heard a thud and the tinging sound of Claimant's metal paperwork clipboard/box that sounded like a tin can bouncing

down the stairs. Mr. Davis was in the control room at the computer and he stood up and ran out of the office. Mr. Davis observed Claimant piled up in the corner of the first landing from the top of the staircase. Mr. Davis ran to the telephone to call security and to call a "may day." Mr. Davis told security that Claimant had fallen down the stairs and that they needed an ambulance. Mr. Davis then ran down the stairs to get to Claimant.

6. Mr. Davis did not witness what happened to Claimant. Mr. Davis acknowledged in his testimony that he does not know if Claimant fell down the stairs or if Claimant fell while on the first landing. Mr. Davis, however, believes Claimant did not fall down the stairs, but had an issue on the first landing and fell over against the wall slumping into the corner based on how he found Claimant on the landing and the location of Claimant's scattered paperwork.

7. Mr. Davis found Claimant slumped against the wall on the first landing of the stairs. Claimant's hard hat was either still on his head or close nearby. Claimant's metal paperwork clipboard/box was on the second landing and papers from inside the box were scattered down the next set of stairs between the first landing where Claimant was located and the second landing.

8. The first set of stairs leaving the control room stretch approximately 10 to 12 feet before there is a landing. After the first landing, there is a second steps of sets that stretch approximately 10 to 12 feet in length before there is a second landing.

9. When Mr. Davis got to Claimant, Claimant was convulsing and having trouble breathing. Mr. Davis rolled Claimant onto his side and stretched him out. Claimant was unresponsive. Claimant's breathing then started getting better, he stopped convulsing, and he started drooling. Claimant's eyes rolled back in his head and his eyelids shut and he started snoring as if he had gone to sleep. Mr. Davis believed that Claimant was having a seizure. Mr. Davis' younger brother has seizures and although Mr. Davis has no formal training to diagnose seizure, he believed that was what was going on with Claimant.

10. The response from emergency personnel and the mine security happened quickly. As the first person opened the door, Claimant opened his eyes and was confused as to where he was and what had happened. Claimant tried to stand up and Mr. Davis along with the first responders kept him where he was.

11. Mr. Davis picked up Claimant's scattered paperwork so that it would not be in the way for emergency personnel and the ambulance arrived shortly thereafter.

12. Summit County Ambulance Service arrived at approximately 6:12 a.m. Their notes indicate on assessment that Claimant's face, neck, chest, and spine were unremarkable. They also noted that on arrival Claimant was mildly postictal with no recollection of the event and that Claimant denied pain, dizziness, blurred vision, nausea, headache, or chest pain/discomfort. Claimant's pulse oxygen registered as 79 on room air. Claimant was placed on oxygen to get his oxygen level higher. Notes

indicate that they had been dispatched to a seizure and on arrival found Claimant sitting on the ground in an upright position. Notes also indicate that EMS personnel were advised that Claimant was walking down the stairs at work when co-workers heard a clamor and that when they checked on the noise, they found Claimant seizing on the stairs. Co-workers did not know how many stairs Claimant fell down, if any, but reported that Claimant came out of his seizure quickly after they found him. Claimant was transported to St. Anthony Summit Medical Center's Emergency Department in Frisco, Colorado. *See* Exhibits 12, G.

13. Claimant was evaluated by Marc Doucette, M.D. Dr. Doucette noted that Claimant had a witnessed seizure and fell to the ground with no significant trauma. Dr. Doucette noted no evidence of tongue biting or urinary incontinence. Claimant reported that he did not recall the incident and denied significant alcohol intake and reported that he drinks one or two drinks per night. Claimant reported no previous seizures and that he had been told that he had low oxygen in the past. Dr. Doucette noted that Claimant was at about 75% pulse oximetery on room air and 85-90% on 2 liters of oxygen. Dr. Doucette noted differential diagnoses were considered for a seizure including but not limited to electrolyte abnormality, alcohol withdrawal, medication related, head injury, altitude, hypoxia, and hypoglycemia. *See* Exhibit 13

14. Dr. Doucette noted that at the hospital Claimant had another grand mal seizure lasting about 2 minutes with full clonic tonic activity and tongue biting. Dr. Doucette noted a 15 minute postictal state and that Claimant required some basic airway management including an oral airway. Dr. Doucette opined that he was not sure as to the cause of Claimant's seizures. Dr. Doucette noted that the hypoxia was corrected yet Claimant still had a seizure and opined that Claimant required hospital admission and preferably a transfer to Denver where he could be evaluated by neurology and the pulmonary physicians regarding significant hypoxia, pulmonary embolism, probable pulmonary hypertension, polycythemia thrombocytopenia, and sleep apnea. *See* Exhibit 13.

15. Dr. Doucette indicated that radiology studies showed that Claimant's head CT was negative intracranially but that Claimant had a small right scalp hematoma, that the CT of the chest showed a small right lower lobe pulmonary emboli with low clot burden, and that the ultrasound of the left lower extremity showed deep vein thrombosis involving popliteal and calf veins. *See* Exhibit 13.

16. At 12:40 p.m. Summit County Ambulance Service contacted Claimant again to transport him from St. Anthony Summit Medical Center to St. Anthony Hospital. They noted that Claimant had two seizures and had been diagnosed with deep vein thrombosis in the left leg and pulmonary embolism and that the facility did not have medical specialist/services available, necessitating the transport. *See* Exhibits 23, G.

17. Claimant was evaluated at St. Anthony Hospital by Andrew Levy, M.D. Claimant reported that he had been feeling well until the morning when he was leaving his night shift at the mine and was walking down the stairs and had a witnessed seizure

lasting a few minutes. Claimant reported not remembering anything between walking down the stairs and waking up in the ambulance. Claimant denied any history of alcohol withdrawal or withdrawal seizure. Dr. Levy noted that Claimant had bilateral total knee arthroplasties with the left knee replaced on October 15, 2015 and intermittent swelling beneath the left knee since. Claimant needed 4 liters of oxygen at the hospital. Dr. Levy noted that Claimant had a new onset of seizure x2 and was also found to have deep vein thrombosis, pulmonary embolism, and polycythemia and thrombocytopenia. Dr. Levy assessed seizure and noted differential diagnoses including alcohol withdrawal seizure, new onset seizure from CNS lesion vs. seizure 2/2 stasis and ischemia form polycythemia. Dr. Levy noted that a brain MRI would be obtained to rule out lesion, if negative an EEG would be obtained to see if a source could be location, and he referred Claimant to neurology. *See* Exhibit H.

18. On January 21, 2016 Claimant underwent a CT scan of his head interpreted by Benjamin Aronovitz, M.D. Dr. Aronovitz provided the impression of small lateral right front scalp hematoma without acute intracranial process. *See* Exhibit 15.

19. On January 21, 2016 Claimant underwent an MRI of the brain with and without contrast that was interpreted by Craig Stewart, M.D. Dr. Stewart provided an impression of moderate nonspecific supratentorial white matter signal abnormalities, most commonly seen in the setting of chronic small vessel ischemia. Dr. Stewart found no evidence of intracranial mass, mass effect, or abnormal intracranial enhancement. *See* Exhibit 14.

20. On January 21, 2016 Claimant underwent a CTA of his chest to evaluate the pulmonary embolism that was interpreted by William Berger, M.D. Dr. Berger provided the impression of: right lower lobe pulmonary emboli with relatively minor clot burden; mild cardiomegaly; and hepoatic steatosis with probable splenomegaly. *See* Exhibit 16.

21. On January 22, 2016 Claimant had an orthopedic consultation at the hospital with Brian Morgan, PA-C. PA Morgan noted that Claimant had bilateral total knee replacements with the left knee replacement in October of 2015. PA Morgan noted that Claimant had a fall and a seizure and it was unknown whether the seizure caused the fall or vice versa. Claimant had increased swelling to his left knee after the fall and also reported some pain to the paraspinal muscles on the left side of his neck. On examination, Claimant had tenderness to palpation over the anterior aspect of the shoulder, pain with range of motion anteriorly with forward flexion and also had a large knee effusion on the left. PA Morgan recommended ice, elevation, and compression dressing for the left knee. PA Morgan recommended shoulder x-rays. PA Morgan assessed left shoulder pain- likely rotator cuff injury from the fall, and knee hemathrosis. *See* Exhibit 13.

22. On January 22, 2016 Claimant was evaluated by neurologist Byung Ahn, M.D. Dr. Ahn noted that Claimant had been admitted after a seizure while walking down the stairs at work and after a second seizure at Summit Hospital. Dr. Ahn noted

that Claimant was currently stable with no recurrence of spells and with his only complaint being pain on the left side of the body and limbs from the fall during the seizure. Dr. Ahn noted that the neurological exam was unremarkable, the MRI brain with and without contrast was unremarkable, and that a routine EEG showed no abnormal signals of seizure tendency or active electrographic seizure. Dr. Ahn recommended that Claimant continue Keppra and noted that the Keppra could be slowly tapered off if Claimant remained seizure free for 6-12 months and had resolution of polycythemia. *See* Exhibit 13.

23. A few hours later, Dr. Ahn submitted an addendum to his report that noted it had come to his attention that the Claimant clearly fell down the stairway first and then had his first seizure. Dr. Ahn added respiratory failure and head concussion as the potential etiology of his seizures but noted that polycythemia should be ruled out before attempting to wean off Keppra. *See* Exhibit 13.

24. On January 26, 2016 Claimant was discharged from St. Anthony Hospital by Richard Campbell, M.D. Dr. Campbell listed discharge diagnoses as: new onset seizures; acute on chronic hypoxic respiratory failure; pulmonary embolism; polycythemia due to chronic hypoxia with bone marrow biopsy results pending; thrombocytompenia; hepatomegaly/splenomegaly; left knee hemathrosis; and swelling of tongue, possibly resulting from seizure. Dr. Campbell noted that neurology felt that Claimant should be on Keppra for at least six months and then a decision would be made whether to continue it indefinitely. Dr. Campbell noted that Claimant would require oxygen at discharge. Dr. Campbell noted that Claimant could not drive, be around dangerous machinery, or return to work. *See* Exhibit 13.

25. On February 18, 2016 Claimant was evaluated by Edward Jonassen, M.D. Claimant reported a recent fall where he injured both knees and that he had quite a bit of swelling and bruising involving both knees. Claimant reported bruises to 60% of his body and that he was not certain what had happened and had no recollection of the event but that there was a serious head injury. Dr. Jonassen diagnosed contusion and sprains of both knees status post an un-witnessed fall where Claimant fell a full flight of stairs. Dr. Jonassen opined that most of the pain was due to contusion with resultant swelling and eccymosis. Dr. Jonassen noted that the cause of the fall was uncertain and that it was uncertain whether syncope was involved. *See* Exhibits 12, J.

26. On February 29, 2016 Claimant was evaluated by Irum Basar, M.D. Dr. Basar noted that Claimant had been admitted at St. Anthony after a fall and new onset of seizures and that he had been evaluated by Dr. Ahn and placed on Keppra. Claimant believed Keppra was making his joint pains worse and reported generalized fatigue. Claimant reported having a fall at work from a height of approximately 10 feet and that when a colleague found him he was shaking and having a seizure. Claimant noted that he had bruising and scalp hematoma in the right parietal region and that he had another witnessed generalized tonic clonic seizure at the emergency room in Frisco and was then transported. Claimant reported having tongue bite and bladder incontinence with the second event. Dr. Basar noted that an MRI of the brain and

routine EEGs showed no abnormal signals or active electrographic seizures. Dr. Basar noted that Claimant had no further seizures since discharge from St. Anthony Hospital. Claimant reported no prior history of seizures. Dr. Basar noted that Claimant had been on Allopurinol since July of 2015 for gout. Claimant's oxygen saturation was measured at 91%. Claimant's blood pressure measured 152/82 and Dr. Basar advised Claimant to contact his primary care provider about the high blood pressure. Dr. Basar noted that Claimant had two seizures, one witness in the ER, and also had a closed head injury around the initial event. Dr. Basar noted that Claimant was found to have several other co-morbidities at the time including polycythemia. Dr. Basar recommended continuing the medication to remain seizure free. Dr. Basar was concerned that the Allopurinol could potentially cause myelosuppression as well as seizures and referred Claimant to a rheumatologist for evaluation and management of gout/arthritis. *See* Exhibits 19, K.

27. On March 14, 2016 Dr. Basar completed a work status report for Employer. The report indicated that Claimant had restrictions of no climbing ladders, no use of power tools, and no operating machinery/equipment. Dr. Basar noted that in view of seizure he did not recommend driving, climbing stairs, or using power tools. Dr. Basar also noted that Claimant needed medical clearance from his primary care provider in view of the co-morbidities. *See* Exhibit 19.

28. On March 29, 2016 Claimant was evaluated by Dr. Basar. Claimant reported he had weaned himself off the Keppra as he was convinced that it was causing joint pains and body aches. Dr. Basar noted that Claimant had not used Keppra since March 19 and fortunately had no seizure recurrence. Dr. Basar noted that he had provided a referral to a rheumatologist for management of gout/arthritis but that Claimant did not feel the need to follow through as he felt better after stopping Keppra. Dr. Basar noted that Claimant had no new neurological symptoms. Claimant reported that he wanted to resume work but couldn't due to the driving restriction. Claimant was also unhappy about the restriction on climbing ladders. Dr. Basar noted that Claimant was convinced that the seizure occurred secondary to the fall since he had no prior history of seizures. Dr. Basar noted that although Claimant only had one seizure occurring in the context of a fall and new diagnosis of polycythemia, he was concerned of the risk of recurrence due to the head injury and the generally quoted 30-50% risk of seizure recurrence. Dr. Basar suggested a second opinion from a epileptologist and referred Claimant to neurologist/epileptologist Dr. Elgavish for a second opinion. *See* Exhibit 19.

29. On March 31, 2016 Dr. Basar noted that Claimant still had work restrictions of no climbing ladders, no using power tools, and no driving. Dr. Basar noted that Claimant still needed to be cleared by his primary care physician and that Claimant had been referred to another neurologist for a second opinion. *See* Exhibit 19.

30. On April 19, 2016 Claimant was evaluated by Ro Elgavish, M.D. Dr. Elgavish reviewed the history and performed a physical examination. Dr. Elgavish assessed convulsion. Dr. Elgavish noted that Claimant had one or two seizures on the same day in late January and opined that it was unclear why Claimant fell down the

stairs and that it was possible that it was a mechanical fall not due to a seizure and that hitting his head during the fall is what lead to the acute convulsion in the emergency department later that same day. Dr. Elgavish noted that imaging showed no intracranial findings and that Claimant had no other clear risk factors for epilepsy. Dr. Elgavish opined that following a single acute seizure (or two on the same day) with no intracranial findings on imaging, an anti-epileptic medication was not indicated due to the risk of lifelong anti-epileptic therapy versus the potential benefit. Dr. Elgavish noted that the risk of future seizures was not zero and that Claimant should take appropriate precautions. Dr. Elgavish noted that Claimant was to call his office if Claimant had another seizure and if so then he would strongly urge anti-epileptic therapy. Dr. Elgavish recommended an extended sleep deprived EEG and that if it was abnormal he would almost certainly start anti-epileptic therapy but that if it was normal then Claimant could follow up as needed if Claimant had another seizure. *See* Exhibit 20.

31. On April 20, 2016 Dr. Elgavish wrote a letter indicating that Claimant had been evaluated for a single witnessed seizure event. Dr. Elgavish noted that the only known acute cause for the seizure was a head injury due to the fall itself but that the workup had not yet been completed. Dr. Elgavish noted that the literature on a single unprovoked seizure showed the risk of a second seizure within the next two years was at 42%. Dr. Elgavish opined that Claimant's seizure was probably provoked (due to the fall) and that therefore, the risk of future seizure for Claimant may be lower. Dr. Elgavish noted that there was no way to predict whether Claimant would have a second seizure event and that given the risk it would be appropriate to restrict Claimant's work activities to avoid activities that would place Claimant, coworkers, or others at risk if he were to have a seizure. *See* Exhibit 20.

32. On April 27, 2016 Claimant was evaluated by Dr. Ahn. Dr. Ahn noted a normal awake and asleep electroencephalogram test. *See* Exhibit 21.

33. On May 2, 2016 Claimant was evaluated by Dr. Elgavish. Dr. Elgavish explained to Claimant that in his letter to Employer he tried to be as accurate as possible about the risks associated with Claimant's situation and that he could not tell Employer that Claimant could work with no restrictions. Dr. Elgavish opined that he could not know if/when Claimant may have another seizure and that he could not know that Claimant is no risk in the work-place. *See* Exhibit 20.

34. On May 12, 2016 Claimant underwent a sleep deprived EEG study. Dr. Elgavish opined that the study was normal but noted that the absence of epileptiform findings in the EEG did not rule out the possibility of seizure disorder. *See* Exhibits 20, L.

35. On May 24, 2016 Claimant was evaluated by Dr. Elgavish. Dr. Elgavish again discussed the possible risk of future seizures and advised Claimant to call his office if another seizure occurred. Dr. Elgavish completed short term disability paperwork. Dr. Elgavish noted that he had offered to start an anti-epileptic drug but that Claimant was not interested in starting one and Dr. Elgavish noted that even initiating

an anti-epileptic drug would not completely remove the risk of future seizures. Dr. Elgavish noted the plan was to return to the clinic as needed. *See* Exhibit 20.

36. On July 11, 2016 Claimant returned to Dr. Elgavish to discuss long term disability. Claimant reported that he had not been allowed to return to work due to the possibility that he may have further seizures. Claimant reported having no seizures since the incident January 21, 2016. Dr. Elgavish continued his opinion that the risk of future seizures was not zero. Dr. Elgavish completed the disability paperwork and again noted the plan was for Claimant to return to the clinic as needed. *See* Exhibits 20, M.

37. On December 16, 2016 Claimant underwent an independent medical evaluation performed by Greg Reichhardt, M.D. Claimant reported that in January of 2016 he fell at work after working a 12 hour night shift. Claimant reported leaving the control room and heading down the stairs and that he was found on the landing on the stairs. Claimant had no recollection of the incident until he was being loaded into the ambulance. Claimant reported that he recalled the ambulance ride and parts of the emergency room evaluation at the local hospital. Claimant reported that he had lots of tests but does not remember them all and that his memory of the first day at the hospital was foggy. Claimant reported that he was found to have a blood clot in his leg and clots in the lung and that his oxygen levels were low. Claimant reported that after the incident, he had multiple bruises and fluid on the left knee but that all of the pain problems as a result of the incident had resolved. Claimant reported following up with a neurologist for his seizures and being treated with Keppra but that the side effects were significant and his discontinued using Keppra. Claimant reported that an additional neurologist did not feel that he needed to be on an anticonvulsant and that he had no need for further follow-ups unless he had another seizure. Claimant reported that Dr. Elgavish believed he had a seizure because he hit his head. *See* Exhibit A.

38. Dr. Reichhardt performed a medical records review and a physical examination. Dr. Reichhardt opined that Claimant's presentation raised concerns about an underlying seizure disorder. Dr. Reichhardt noted that Claimant's picture was confusing and that in September of 2012 the providers suspected that Claimant had a syncopal episode as a result of the pain from a ruptured biceps tendon from forcefully pulling and that the conclusion was in part due to a yell heard from Claimant. However, Dr. Reichhardt noted that it was not unusual for patients with generalized tonic clonic seizures to have a vocalization as a result of the seizure itself and that the biceps tendon tear could have occurred as a result of the fall due to a seizure or due to the seizure itself which causes forceful and uncontrolled contraction of the muscles. Dr. Reichhardt noted with the January, 2016 incident Claimant was suspected to have a seizure at work and that although Claimant had several interictal EEGs that did not show seizure activity, it did not exclude an underlying seizure disorder. Dr. Reichhardt opined that it was not medically probable that Claimant sustained a work related injury but that it was more likely that on September 27, 2012 and on January 21, 2016 he had seizures. Dr. Reichhardt noted that Claimant's history of potentially three seizures on two separate days being years apart left Claimant at risk for subsequent seizures. Dr.

Reichhardt noted that Claimant was not having any problems at the current time but that it would be appropriate for Claimant to follow up with a neurologist. Dr. Reichhardt opined that the cause of the seizures was unrelated to work activities and that the seizures occurred coincidental to his work and were not caused by his work and that the seizures were a personal risk. *See* Exhibit A.

39. On December 19, 2016 Claimant underwent an independent medical evaluation performed by William Wagner, M.D. Claimant reported feeling very good and that he had no recurrence of seizures since the January 21 incident. Dr. Wagner reviewed medical records and performed a physical examination. Dr. Wagner noted that Claimant was status post two witnessed generalized tonic clonic seizures associated with a fall and possibly hitting his head in January. Dr. Wagner opined that so far there was no definitive evidence of epilepsy. Dr. Wagner opined that the seizures could have represented immediate impact seizures associated with hitting his head and noted that the etiology of the seizures was uncertain. Dr. Wagner opined that there was also the possibility that this could represent an early manifestation of epilepsy and that the seizures may recur but again noted that it was uncertain. Dr. Wagner opined that the course of seizures was difficult to predict. Dr. Wagner opined that it was possible that Claimant may have a seizure disorder or tendency for recurrent seizures but that it was less likely given Claimant's at least 3 normal EEGs from 2012 to 2016. *See* Exhibits 22, N.

40. Claimant had a prior incident at work in September of 2012 for which the possibility of seizure was evaluated.

41. On September 27, 2012 St. Vincent Hospital Ambulance Services were dispatched for a report of an emergent 56 year old male who had a seizure, hit his head, and was bleeding from the head. Bystanders reported that Claimant was loading a truck, seized, hit his head on a metal bar, had full body convulsions for 3 minutes, and had a postictal period of approximately 10 minutes. Claimant denied a history of seizures, syncope, or heart arrhythmia and stated he had eaten normally but did not have as much water to drink that day. Claimant reported only pain in his head and it was noted that Claimant had no other sign of trauma other than a laceration to his left anterior forehead. *See* Exhibit B.

42. On September 27, 2012 Claimant underwent a CT of his head that was interpreted by Shawn Corey, M.D. Dr. Corey provided the impression of left supraorbital laceration and contusion with no intracranial hemorrhage or hematoma and intact calvarium. *See* Exhibit 2.

43. On September 27, 2012 Claimant underwent a CR of his chest interpreted by Richard Grzybowski, D.O. Dr. Grzybowski provided the impression of minimal bibasilar subsegmental atelectasis with otherwise no acute process shown. *See* Exhibit 3.

44. On October 19, 2012 Claimant was evaluated by Mark Triehaft, M.D. Dr. Triehaft noted Claimant had a history of loss of consciousness and possible seizure on September 27, 2012. Claimant reported that a coworker heard him scream and found that he had fallen on the floor striking the left side of his head and that he had some shaking movements. Dr. Triehaft noted that a CT scan of the head only revealed a left frontal superficial laceration and that an intracranial study was normal. Dr. Triehaft noted that Claimant had also torn his right biceps tendon in this incident. Claimant reported no prior seizures. Dr. Triehaft provided the impression of syncopal spell associated with shaking and noted clinical considerations included: syncopal seizures, postconcussive seizure, and primary seizure disorder. Claimant believed that the biceps tendon rupture occurred prior to the fall and that perhaps the pain of the tear caused syncope. Dr. Triehaft recommended a brain MRI, an EEG, and echocardiogram and holter monitor, absolute driving restriction, and avoidance of all precarious activities. Dr. Triehaft opined that the history did not suggest a CNS encephalitis and he opined that the sequence of events was not clear. Dr. Triehaft noted that it would be worthwhile to speak with the coworker who witnessed the episode. In view of the indeterminate nature of the spell and isolated event, Dr. Triehaft did not institute anti-convulsants. *See* Exhibits 6, C.

45. On October 29, 2012 Claimant underwent a brain MRI that was interpreted by Sean Bryant, M.D. Dr. Bryant provided the impression of mild to moderate microvascular disease with no intracranial mass, fluid collection, or evidence of hemorrhage. Dr. Bryant found no abnormal enhancement intracranially. *See* Exhibit 7.

46. On January 14, 2013 Claimant underwent a neurologic consultation with J. Bradley Gibson, M.D. Dr. Gibson noted that Claimant had been referred because of a possible seizure while at work on September 27, 2012. Claimant reported that he remembers pulling on a strap on that date and that the next thing he remembered was sitting in a chair with a lot of people around him. Claimant reported that a coworker witnessed Claimant pulling on the strap, screaming, and falling, hitting the left side of his lead particularly near his left eyebrow which caused a laceration requiring eight stitches. Claimant's coworker observed some shaking of the extremities but Claimant reported no tongue chewing or incontinence. Claimant reported that at the ER he was aware of severe pain in the right biceps region and that it was noted that his biceps was hanging. Dr. Gibson noted that Claimant suffered a severe biceps muscle tear that was repaired surgically on November 6, 2012. Claimant reported making a good recovery from the biceps muscle tear and that he had no further episodes of loss of consciousness. Claimant reported no prior history of loss of consciousness, fainting, or seizure. Claimant reported vertigo the day after the incident that took about three weeks to resolve. Dr. Gibson opined that it appeared that Claimant had a syncopal episode due to the right biceps muscle tear when pulling on a strap and that the severe pain caused Claimant to lose consciousness, hitting the left side of his head which caused a cerebral concussion. Dr. Gibson opined that the brief shaking of the extremities was probably due to the syncopal episode and/or the direct blow to the head. Dr. Gibson recommended a sleep deprived EEG and an echocardiogram and holter monitor study.

Dr. Gibson agreed that Claimant should not be placed on an anticonvulsant based on the history and neurologic testing. Dr. Gibson noted that the brain MRI scan was essentially normal for Claimant's age. Dr. Gibson opined that if the EEG was essentially normal with no significant epileptiform activity then Claimant could go back to work without restrictions. *See* Exhibit 8.

47. On January 16, 2013 Claimant underwent an EEG performed by Jeffrey Wagner, M.D. Dr. Wagner opined that the study was normal with mild limitations and no evidence of a predisposition to seizure. Dr. Wagner noted that the study did not exclude the possibility for seizure. *See* Exhibit 9.

48. Dr. Reichhardt testified at hearing consistent with his report. Dr. Reichhardt noted a concern that Claimant had an underlying seizure disorder and acknowledged this was a complicated case and that he couldn't be certain that Claimant has a seizure disorder and opined that it was hard to make a diagnosis. However, after reviewing the 2012 incident and the 2016 incidents and the witness statements, Dr. Reichhardt opined that it was medically probable that Claimant had three seizures making it likely that Claimant has a seizure disorder. Dr. Reichhardt opined that Mr. Davis' description of the layout and landing made it likely the event occurred on the landing and not as a result of a fall down the stairs and he also noted that Mr. Domejka indicated there was no force on the strap in 2012 but that Claimant was picking up the strap making the theory of a bicep tear causing syncope causing Claimant to hit his head causing the seizure to be unlikely. Rather, Dr. Reichhardt opined that it was more likely that Claimant had a seizure in 2012 and opined that it was not unusual to have vocalization or yelling at the onset of a seizure and the bicep tear could have been due to the seizure itself and the uncontrolled muscular contractions during the seizure. Dr. Reichhardt agreed that a bicep tendon tear could be painful and could also have caused vocalization. Dr. Reichhardt also agreed that a person can have a post traumatic seizure from falling and striking their head and agreed that Claimant hit his head in both the 2012 incident and the 2016 incident.

49. Dr. Reichhardt acknowledged that all of the testing done did not clearly find or identify the cause of Claimant's seizures but opined that it did not rule out a seizure disorder, but ruled out the more obvious causes of seizures. He agreed that the EEG results made it less likely that Claimant had epilepsy or an underlying seizure disorder, but did not rule it out. Dr. Reichhardt opined that Claimant had several risk factors for seizures including Claimant's use of Allipurinol (prescribed for gout), hypoxia and hyperventilation, sleep deprivation, and alcohol withdrawal. Dr. Reichhardt noted that the neurologists were concerned enough about a seizure disorder to place Claimant on restrictions but not to put him on epilepsy/seizure medications. However, Dr. Reichhardt noted that Dr. Elgovish and Dr. Basar did not analyze fully the 2012 incident or witness statements. Dr. Reichhardt disagreed with neurologist Dr. Gibson's conclusions regarding the 2012 incident. Dr. Reichhardt opined that Claimant's seizures were not work related and that the seizures could have occurred anywhere.

50. Claimant testified that he has not worked since the incident on January 21, 2016 due to his restrictions but that he feels good now and is not seeking any additional treatment. Claimant would like to return to work for Employer. Claimant reported that with the January 21, 2016 incident he injured his right arm, left knee, and head and had a lot of bruising and that he was swollen and bruised and felt "beat up." Claimant reported that he had eaten that day, was hydrated, and that his knees felt fine. Claimant reported that with the September 2012 incident he was loading a truck for Employer and pulling on a strap and that he had no memory of falling and believes he tore his bicep. Claimant testified that the strap was locked into beams and that he remembered pulling on it to straighten it out. This is found credible and consistent to his report to medical providers that the last thing he remembered was pulling on a strap. This is found more persuasive than the testimony of Mr. Domejka. Claimant reported that after 2012 he was fine and did not require medicine, restrictions, and was able to return to full duty work. Claimant reported that he is no longer treating at the present time and that he was just told to return if he has another seizure.

51. John Domejka testified at hearing. Mr. Domejka is a co-worker of Claimant's who was working with Claimant on September 27, 2012. Mr. Domejka recalled the 2012 incident because it had frightened him. Mr. Domejka indicated that he and Claimant were loading moly bags onto a truck with a forklift and that they were behind on that day. Mr. Domejka indicated that on the way into the truck, Claimant bent down to pick up a strap to carry further into the truck and that Claimant screamed "aaaah" like he was in pain and then that Claimant was on the floor of the truck. Mr. Domejka picked up Claimant's radio and called a "may day." Mr. Domejka testified that Claimant was convulsing and moving back and forth for approximately 3 minutes. Mr. Domejka testified that Claimant hit his head and that he remembered blood but that he had no idea if Claimant tore his biceps at that time. The testimony of Claimant that he was pulling on a strap is found more credible than the testimony of Mr. Domejka that Claimant bent down and picked up a strap.

52. The opinions of neurologists who treated Claimant including Dr. Wagner, Dr. Gibson, and Dr. Elgavish are found credible and persuasive. The opinions of Dr. Reichhardt are not found as credible or persuasive. Although Dr. Reichhardt believes Claimant had a seizure causing him to fall on January 21, 2016, this opinion is not persuasive or consistent with the overall medical evidence which was wholly inconclusive and does not establish a seizure disorder caused the fall. The opinions of the neurologists who evaluated Claimant are persuasive that the cause of the fall is unknown.

53. Claimant's fall was due to an unknown cause and despite extensive testing, it is unclear whether Claimant has any medical conditions that specifically caused him to fall on January 21, 2016. Claimant has established that the fall was unexplained.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant must prove by a preponderance of the evidence that her injury was proximately caused by an injury arising out of and in the course of her employment with the employer. Section 8-41-301(1)(b) & (c), C.R.S*.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related

functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968).

Here, Claimant's injury occurred while he was changing shifts and walking down stairs outside of the control room to go to the locker room of Employer's facility to clock out for the day. Claimant was still on duty and on Employer's property and the injury occurred in the course of employment, within the time limits of his employment, and while he was performing activities connected to his work duties. However, the parties dispute whether or not the injury arose out of Claimant's employment.

As found in *City of Brighton v. Rodriguez*, 318 P.3d 496, (Colo. 2014), all risks that cause injury to employees can be placed within three well-established overarching categories: (1) employment risks, which are directly tied to the work itself; (2) personal risks, which are inherently personal or private to the employee him or herself; and (3) neutral risks, which are neither employment related nor personal. Here, Claimant's injury does not fit into the first risk category. There were no specific employment risks that caused Claimant's injury. Claimant's injury occurred while walking down stairs and attempting to head to the locker room to leave for the day. There is no evidence that the stairs were wet or slippery or that there was anything tied to Claimant's job duties that caused a fall when he was leaving the control room and attempting to leave work.

Additionally, the Claimant's fall does not fall into the second risk category. There is insufficient evidence that a personal or personal or preexisting idiopathic illness or medical condition caused Claimant's fall or injury. Although possible that Claimant has a seizure disorder, the ALJ finds the opinions of the neurologists and the objective testing to lack probability that Claimant has an underlying seizure disorder that caused his fall. The neurologists who evaluated Claimant, after significant testing including three separate EEGs between 2012 and 2016, were unable to determine or diagnose a seizure disorder. They were unable to find any significant source of Claimant's fall. As found above, in treatment records for the 2012 incident, neurologist Dr. Gibson opined that he did not believe Claimant had a seizure in the 2012 incident and believed it was a syncopal episode due to severe pain from a biceps muscle tear that caused Claimant to fall and strike his head causing a cerebral concussion. In treatment records for the 2016 incident, neurologist Dr. Wagner opined that the January 21, 2016 incident and seizures could have represented immediate impact seizures associated with Claimant hitting his head or could possibly represent an early manifestation of epilepsy. Dr. Wagner noted it was possible that Claimant may have a seizure disorder or tendency for recurrent seizures but opined that it was less likely given Claimant's at least 3 normal EEGs. Neurologist Dr. Elgavish opined that it was unclear why Claimant fell down the stairs and that it was possible that it was a mechanical fall not due to a seizure and that hitting his head during the fall is what lead to the acute convulsion in the emergency department later that same day. The specialists who evaluated Claimant could not determine that a seizure disorder existed or caused the Claimant to fall. Although they opined it was possible, they also noted the possibility that the fall itself caused Claimant to hit his head and to seize after striking his head. Dr. Wagner noted

that the possible seizure disorder was less likely given the normal objective testing. The ALJ finds this credible and persuasive and find that Claimant has established, more likely than not, that his fall was unexplained.

Under the *City of Brighton* analysis, the third category of risks includes injuries caused by so-called "neutral risks" and are considered neutral because they are not associated with either the employment itself nor with the employee him or herself. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). An unexplained fall necessarily constitutes a neutral risk and because it is neither occupational nor personal and the fall is fundamentally similar to other neutral risks. *City of Brighton v. Rodriguez*, supra. Injuries stemming from neutral risks arise out of employment because they would not have occurred but for employment. *Id*. The employment causally contributed to the injury because it obligated the employee to engage in employment related functions, errands, or duties at the time of injury. *Horodyskyj v. Karanian*, supra. Here, the cause of Claimant's fall and injury is truly unknown. Claimant is credible that he does not have a memory of the event. Mr. Davis did not see the fall or know if Claimant fell down the stairs or seized and then slumped down at the landing. The doctors, who performed significant testing, similarly do not know if Claimant fell and struck his head causing seizures or if Claimant had a seizure that caused the fall. The persuasive and credible evidence is that it is entirely unknown why or how Claimant fell. The fall is not, due to a personal seizure condition. Rather, it has been established by preponderant evidence that the cause of the fall is truly unknown. The fall was not due to an employment related risk or a personal idiopathic risk. Rather, the cause was unknown and despite significant medical testing it remained unknown why or how Claimant fell. The ALJ concludes that Claimant's fall would not have occurred but for the conditions and obligations of his employment, namely the requirement that he leave at the end of his shift and travel down stairs to exit the control room. The conditions and obligations of Claimant's employment placed him on the stairs where he was found after falling. Consequently, the ALJ finds that the record evidence supports a conclusion that Claimant's injury meets the arising out of analysis and finds that Claimant has established a causal connection between his injuries and his work duties.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Claimant has established that he sustained a compensable work injury and that he is entitled to reasonable and necessary medical treatment for his injury. The issue of whether any specific treatment is reasonable or necessary was not before the ALJ. Therefore, the ALJ provides a general award of medical benefits and Respondents retain the right to contest any specific treatment recommendations going forward.

Temporary Total Disability (TTD) Benefits

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

As found above, Claimant has established that he sustained a work related injury on January 21, 2016. As a result of the injury, Claimant suffered disability that lasted more than three work shifts and sustained actual wage loss. Claimant had impairment of wage earning capacity by his inability to resume his prior work due to the restrictions placed on him by medical providers. Therefore, Claimant has established an entitlement to TTD benefits, subject to applicable offsets.

Average Weekly Wage (AWW)

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra*; *Campbell v. IBM Corp.*, *supra*.

The parties have presented insufficient evidence for the ALJ to arrive at a fair approximation of Claimant's AWW. The only documents offered into evidence that reference Claimant's wages are in Exhibits P and R which both reference an average weekly wage of $0. The ALJ logically concludes that Claimant was not working for zero wages. As insufficient evidence exists, the ALJ is unable to determine AWW.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable injury on January 21, 2016.

2. Respondents are liable for reasonable and necessary medical benefits to treat the January 21, 2016 injury.

3. Claimant has established by a preponderance of the evidence an entitlement to TTD benefits, less applicable offsets, beginning January 21, 2016.

4. The ALJ is unable to determine AWW. The parties are ordered to confer and either stipulate to AWW or schedule a hearing on that limited issue.

5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 31, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant's right knee condition is causally related to an episode of heat exhaustion resulting in dehydration and rhabdomyolysis on September 22, 2015.

II. Whether Claimant's need for right knee surgery on April 1, 2016 is related to his September 22, 2015 episode of heat exhaustion and rhabdomyolysis.

III. Whether Claimant is entitled to additional post MMI medical treatment for his rhabdomyolysis.

IV. Whether Claimant's emergency room treatment was reasonable, necessary and related to his September 22, 2015 dehydration episode.

V. Whether Respondents properly designated a medical provider in the first instance.

VI. Whether Claimant is entitled to temporary total disability (TTD) benefits commencing October 14, 2015 and continuing through January 11, 2017.

VII. If Claimant established his entitlement to TTD benefits, what was his average weekly wage (AWW) at the time of injury?

VIII. Penalties, specifically whether:

a. Respondents should be penalized for failure to timely report Claimant's alleged injury as required by C.R.S. § 8-43-103 and WCRP 5-2.

b. Respondents should be penalized for failure to provide a designated provider list pursuant to WCRP 8-2. Specifically, whether the right to select a medical provider to attend to Claimant's injuries in the first instance passed to him.

c. Respondents could properly rely on PA Byrne's opinion that Claimant reached MMI on October 13, 2015 and whether they should be penalized for filing the February 14, 2017 Final Admission of Liability relying in part on the WC 164 Form completed by PA Byrne on October 13, 2015 and counter signed by Dr. Olson on January 23, 2017.

d. Respondents should be penalized for requesting an independent medical examination with Dr. Tashof Bernton in violation of C.R.S. § 8-42-107(8)(b)(II).

Because the ALJ concludes that he does not have jurisdiction to resolve issues I, II, and III, this order does not specifically address these questions.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as a carpenter for Employer. On September 22, 2015 he was assigned to frame the perimeter of the area for a proposed concrete pad upon which a boiler was to be placed. According to Claimant the temperature in the boiler room where he was working was approximately 130 degrees.

2. After completion of his framing work, Claimant testified that he had to proceed to the roof of the boiler room to in order to cut the holes to accommodate the necessary duct work to vent the new boiler. Claimant testified that it was approximately 90 degrees outside and that the roof was very hot.

3. Claimant reported drinking plenty of water in an effort to stay hydrated for what the record evidence indicates was a job lasting two hours.

4. Claimant completed his work shift and returned home at the end of the work day where he ate and retired for the evening. At approximately 10:30 pm, Claimant was awoken from his sleep with painful muscle cramping in both legs which progressed to involve his thighs and abdomen. He also had tingling in his hands and arms. Claimant described his cramping as if all of his muscles were "seizing up."

5. An ambulance was summoned and emergency medical personnel responded to Claimant's address. Upon arrival, Claimant was found lying on a sofa reporting 9/10 pain and hyperventilating. Claimant was given IV fluids and transported to Penrose-St. Francis Emergency Room (ER) where he was evaluated by Dr. Shawna Langstaff who ordered laboratory testing and continued Claimant on IV fluids. Claimant's laboratory testing revealed an "abnormality" according to Dr. Langstaff. Dr. Langstaff noted that the etiology of Claimant's "myalgia was unclear. She noted differential diagnoses of "laboratory abnormality versus arterial compromise versus infectious process versus dehydration." Claimant spent the balance of the evening and the early morning hours of September 23, 2015 in the ER.

6. Based upon the evidence presented, the ALJ finds that Claimant's need for medical transport to the ER constituted a bona fide medical emergency which did not require authorized from Respondents. The treatment rendered in the ER was reasonable and necessary to cure and relieve the Claimant of the direct effects of his dehydration. Consequently, the ALJ finds Respondents liable for payment of the same.

7. Claimant called off work the following morning. He also testified that he sent a text message to his supervisor that he was unable to work to which he reportedly received a message back stating "cool."

8. Claimant testified that he followed-up with his primary care physician (PCP) who performed blood tests and imposed restrictions and excused Claimant from work for a week. While the ALJ can find no medical record which substantiates this portion of

Claimant's testimony, the ALJ notes that Claimant was evaluated by Dr. Tashof Bernton at Respondents request on January 30, 2017. As part of his independent medical examination (IME), Dr. Bernton reviewed reports from Dr. Melissa Voutsalath noting that Claimant was seen in follow-up and referencing her assumption that Claimant's "symptoms [were] related to the extent of dehydration/heat exhaustion" noting further that she expected "daily" improvement. Importantly, Dr. Voutsalath noted that she would check Claimant's CPK level due to Claimant's reports of myalgias. Upon testing, Dr. Bernton noted in his IME report that Claimant's CPK level was manifestly "elevated at 1567 with an upper limit of normal of 196."

9. Based upon the content of Dr. Bernton's IME report, the ALJ credits Claimant's testimony to find that he followed up with his PCP after his dehydration episode and that she took him off work for the balance of the week.

10. The evidence presented persuades the ALJ that Claimant was unable to work as a consequence of his dehydration episode from September 23, 2015 to September 27, 2015, returning to work on Monday, September 28, 2015.

11. As noted, Claimant testified that he returned to work on Monday, September 28, 2015. He testified that he handed the restrictions imposed by Dr. Voutsalath to his foreman. According to Claimant he was not referred to a workers' compensation physician and his restrictions were not accommodated. He added that because he was hardworking and needed a job, he elected to self monitor his job duties in an effort adhere to his restrictions and keep working. Based upon the evidence presented, including Claimant's actions regarding his continued work, the ALJ is not convinced that Claimant provided sufficient information to place his supervisor on notice that he was contending that he injured his muscles and/or right knee in the course and scope of his employment on September 22, 2015 and that he needed additional treatment as a consequence when he returned to work on September 28, 2015.

12. On October 12, 2015, Claimant returned to Dr. Voutsalath who took a blood sample in order to recheck Claimant's CPK level. A letter authored by Dr. Melissa Voutsalath dated October 12, 2015 and addressed "To whom it May Concern" was admitted into evidence. This letter notes Claimant had been under her care and that he was to "perform light duty work only (desk, no heavy lifting, no standing for long periods of time) for the next week." Claimant testified that after seeing Dr. Voutsalath on October 12, 2015 he returned to work and "demanded" to see a doctor for his work injuries. The evidence presented persuades the ALJ that Claimant was then provided information regarding Employer's designated providers and that he elected to proceed to Centura Centers for Occupational Medicine (CCOM) where he was evaluated by Physician Assistant (PA) Steven Byrne on October 13, 2015.

13. Based upon the evidence presented the ALJ finds that Claimant actually reported his September 22, 2015 injury and requested to see a physician on October 12, 2015 after which he elected to proceed to CCOM. Consequently, the ALJ finds that CCOM and the providers within the clinic, including PA Byrne and Dr. Daniel Olson are authorized providers in this case. Conversely, Dr. Voutsalath is not authorized.

Accordingly, the ALJ finds that Respondents are not liable for the treatment she rendered in connection with Claimant's dehydration episode.

14. Claimant was laid off on the morning of October 13, 2015, prior to seeing PA Byrne. He testified that after he was laid off he lost his employer paid health insurance benefit resulting in his paying $1,103.00 per month out of pocket for continued coverage (COBRA). He also testified that he received unemployment insurance benefits (UI) at the rate of $460.00 per week from the date he was laid off and continuing through mid February 2016.

15. During his appointment with PA Byrne, Claimant reported a chief complaint of bilateral knee pain with muscle aching in the thighs. Physical examination revealed tenderness in the entire medial aspect of the thigh without ecchymosis. Claimant also complained of right medial collateral ligament tenderness and pain in the posterior portion of the right knee. There was a mild drawer sign noted but no medial or lateral laxity. X-rays of the right knee were obtained and read was being negative for acute injury. PA Byrne noted that Claimant appeared to have recovered well from the dehydration although he had continued tenderness in the thighs. PA Byrne considered Claimant to be at MMI and did an "open close on this case."

16. On October 14, 2015, David Caraballo completed an "Employer's First Report of Injury." She noted that Claimant was "forming concrete pads for some units" in a boiler room and got dehydrated. The first report indicates that Claimant suffered a "heat injury." Based upon the evidence presented, the ALJ is persuaded that Employer reported Claimant's alleged injury within ten days of receiving notice or having knowledge of said injury pursuant to C.R.S. § 8-43-103 and Worker's Compensation Rule of Procedure 5-2.

17. Claimant has failed to prove by a preponderance of the evidence that Respondents should be penalized for failure to timely report Claimant's alleged injury.

18. Claimant has a prior history of right knee pain. On May 8, 2015, he underwent an MRI of the right knee on the referral of Dr. Jeffery Jenks. The MRI demonstrated evidence of "complex degenerative tearing of the body and posterior horn of the medial meniscus with a horizontal component extending into the inferior articular surface" along with "moderate osteoarthritis of the medial compartment . . ." and "mild patellofemoral joint effusion with minimal chrondromalacia patellae." Claimant came under the care of Dr. John Redfern, an orthopedist who, on July 10, 2015, approximately two months prior to his dehydration episode, performed an arthroscopic right knee partial medial meniscectomy along with a medial plica resection and lateral femoral condyle chondroplasty.

19. On December 9, 2015, Claimant returned to Dr. Redfern due to an "acute onset of severe knee pain and swelling" he had developed "about 3 weeks ago." Claimant denied trauma and reported that laboratory work had been completed by his PCP who informed him that he did not have gout. Visual inspection of the right knee during this encounter revealed "marked swelling without erythema. Physical examination, including

palpation of the right knee was completed and was noted to be positive for "[g]rade II palpable knee effusion" without significant "medial or lateral joint line tenderness. Dr. Redfern did not believe that Claimant had a crystalline arthropathy given his history and examination. Rather, he noted that Claimant's symptoms could be related to an exacerbation of some underlying mild arthritis as it was noted during his arthroscopy that he has some "mild articular cartilage loss."

20. A repeat MRI of the right knee was performed January 21, 2016 at the request of Dr. Redfern. The MRI was interpreted by Dr. Matthew Lowery. The MRI demonstrated abnormal findings including age-indeterminate degenerative fraying/tearing of the medial meniscus, tricompartmental chondromalacia, with near full thickness to full thickness fissuring and adjacent cartilage surface irregularity in the medial compartment of the knee, small fluid collection in the MCL, thought to be related to an old injury, large joint effusion and anterior subcutaneous edema.

21. Dr. Redfern returned Claimant to the operating room on April 1, 2016. As part of his operative note, Dr. Redfern noted: "The patient is a 46-year-old male on whom I had previously performed right knee arthroscopic debridement. He was doing very well until he had an incident of heat exhaustion and he has continued to have pain after this. . . . I have discussed that he does have arthritis. He continues to reiterate that his knee was doing well until this episode of heat exhaustion." Dr. Redfern performed a "right knee arthroscopic chondroplasty, medial femoral condyle and patella."

22. Claimant's prior attorney, Joseph Winston, Esq. wrote to PA Byrne requesting information regarding Claimant's treatment and the relatedness of his need for right knee surgery to the September 22, 2015 dehydration event. PA Byrne responded, noting that Claimant was seen twenty one days after the dehydration incident and that when he was seen, neither he nor the records from Penrose St. Francis Hospital referenced any trauma or mechanism of injury to the extremities. According to PA Byrne, he saw no presentation that would indicate the need for further care, "let alone surgery."

23. On January 23, 2017, Dr. Daniel Olson authored correspondence responding to the question of whether Claimant's September 22, 2015 dehydration "led to or contributed to" his need for the aforementioned April 1, 2016 right knee surgery. Dr. Olson unequivocally opined that dehydration would not cause or aggravate a torn meniscus, noting further that Claimant's x-ray "showed some mild tricompartmental arthritis so if it was a meniscal tear it may have been degenerative in nature." Dr. Olson agreed with PA Byrne that Claimant was at MMI, opining that whatever knee problem Claimant had was "not caused by the dehydration episode." A WC 164 form was completed by PA Byrne placing Claimant at MMI on October 13, 2015. Dr. Olson counter signed the form, albeit after PA Byrne indicated that Claimant was at MMI. Based upon the aforementioned evidence, the ALJ finds that Dr. Olson agrees that Claimant was at MMI as of October 13, 2015 without impairment.

24. On January 26, 2017, Dr. Bernton completed the aforementioned IME. As noted

at paragraph 7 above, Dr. Bernton reviewed records from Claimant's PCP regarding his dehydration episode. Dr. Bernton notes that in comparing Claimant's laboratory results from the initial visit at the ER with Dr. Voutsalath's later blood draw and considering his CPK levels over time it is "evident" that Claimant had "rhabdomyolysis" (damage to muscle tissue due to heat exhaustion) while in the ER on September 22, 2015. During his IME, Dr. Bernton was careful to identify the area of Claimant's ongoing pain as "just above to just below the knee." He also noted that Claimant's knee pain was noted to be worse with walking, standing or sitting too long in addition to kneeling or squatting.

25. Upon completion of his IME which included a review of medical records, a physical examination and a causation analysis, Dr. Bernton opined that Claimant's:

> [e]pisode of acute onset of pain and swelling in mid November 2015 is not related or due to the heat exposure on September 22, 2015. Later MRI of the knee demonstrated advancing degenerative changes with a possible cartilage injury cause chondral flap of the patella.
>
> There is no medical basis for any causation or exacerbation of the degenerative changes in the right knee with the episode of heat exposure and probable rhabdomyolysis.
>
> Claimant's rhabdomyolysis resolved with appropriate treatment with fluids. His BUN and creatinine returned to baseline value. There is no permanent impairment associated with the episode of heat exposure.

26. Dr. Bernton opined further that Claimant is at "maximum medical improvement from his episode of heat exposure. He has no permanent impairment, no restrictions on that basis, and no requirement for further care on a work related basis."

27. Dr. Bernton testified consistently with the opinions expressed in his January 26, 2017 IME report. He explained that rhabdomyolysis does not cause joint problems but can cause kidney problems and in serious cases, vascular and cardiac problems in addition to compartment syndrome. Dr. Bernton explained that in this case, Claimant experienced only mild renal compromise which returned to normal limits relatively soon after with fluid treatment as evidenced by his repeat laboratory testing and his lack of associated symptoms. Consequently, he testified that Claimant did not need further treatment including muscle biopsy, liver or cardiac testing.

28. Dr. Bernton testified that there was no medical connection between Claimant's dehydration episode and his right knee condition. According to Dr. Bernton, Claimant's knee symptoms are related to an independent degenerative osteoarthritis and that it is common to get inflammation in the tendons above and below the knee in the areas Claimant's complains of having pain in. Considering the entire medical record including Claimant's imaging and laboratory data, Dr. Bernton testified that it is not reasonable to believe that there is a problem with Claimant's muscle caused by the effects of rhabdomyolysis. Rather, Dr. Bernton testified that Claimant's ongoing knee/leg pain is likely emanating from his osteoarthritis.

29. Respondents admitted liability for Claimant's rhabdomyolysis based upon the expressed January 23, 2017 opinion of Dr. Olson. On February 14, 2017, Respondents filed a Final Admission of Liability (FAL). Claimant has objected to the FAL and has requested a Division Independent Medical Examination (DIME) which is currently pending. The evidence presented persuades the ALJ that Respondents took no action in furtherance of filing a FAL until they had received a determination of MMI from an authorized treating physician (Dr. Olson) as required by C.R.S. § 8-42-107(8)(b)(I). Accordingly, the ALJ finds that Claimant has failed to prove that Respondents should be penalized for filing the FAL dated February 14, 2017 which relied in part of the October 13, 2015 W.C. 164 form completed by PA Byrne.

30. Claimant submitted wage records indicating that for the pay period ending October 13, 2015 he had earned $800.00. While Claimant argued that he earned, on average $1,000.00 per week, the ALJ finds no corroborating evidence to support this claim. Based upon the evidence presented, the ALJ finds Claimant's AWW to be $800.00.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App.

2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). In this case, Claimant's testimony is generally supported by the record evidence submitted, including the content of Dr. Bernton's IME report. Consequently, the ALJ credits his testimony and concludes that he is a credible witness.

Causality (Relatedness) of Claimant's Right Knee Condition and April 1, 2016 Surgery to the September 22, 2015, Heat Exhaustion, Dehydration and Rhabdomyolysis & Claimant's Entitled to Additional Post-MMI Medical Treatment for his Rhabdomyolysis.

D. Claimant contends that his right knee condition and his April 1, 2016 surgery is causally related to his September 22, 2015, dehydration and rhabdomyolysis. Relying principally upon the opinions of Dr. Olson and Dr. Bernton, Respondent's contend that Claimant's right knee condition, including his need for surgery post MMI is related to the natural and probable progression of a pre-existing condition, i.e. his independent progressive right knee osteoarthritis. Given the uncontested procedural posture of the claim, the ALJ concludes that he does not have jurisdiction to resolve these questions. In concluding as much, the ALJ finds the case of *May B. McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (ICAO January 27, 2006) instructive. In *McCormick*, the Panel held that in the absence of a completed DIME, an ALJ lacks jurisdiction to award or deny medical benefits to cure and relieve a claimant's condition after he/she has been placed at MMI. In reaching this conclusion the Panel noted:

> Pursuant to § 8-42-107(8)(b)(I), C.R.S. 2005, an authorized treating physician shall make the initial determination concerning the date of MMI. Once an authorized treating physician makes a determination of MMI, the termination of medical care is triggered and the ALJ lacks jurisdiction to conduct a hearing concerning the accuracy of the authorized treating physician's determination until a DIME is conducted. §8-42-107(8)(b)(III), C.R.S. 2005; *Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995). The Colorado Supreme Court has noted that the DIME procedure is "the only way for an injured worker to challenge the treating physician's findings -- including MMI, *the availability of post-MMI treatment*, degree of non-scheduled impairments, and whether the impairment was caused by an on-the-job injury...." *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003) (emphasis added).

* * *

> Consistent with this principle, we have stated that "once an authorized treating physician places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits for the purposes of curing the industrial injury and assisting the claimant to reach MMI unless the claimant undergoes a DIME." *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (February 14, 2001). *See also Anderson-Capranelli v. Republic Industries, Inc.*, W.C. No. 4-416-649 (November 25, 2002) (following MMI, "In the absence of a DIME the ALJ lacks jurisdiction to adjudicate a request for additional medical benefits to cure the effects of the injury."); *Toledo-Zavala v. Excel Corp.*, W.C. Nos. 4-534-398, 4-534-399 (November 14, 2003) (same); *Cass v. Mesa County Valley School District*, W.C. No. 4-629-629 (August 26, 2005) ("[I]f an ATP places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI.").
>
> This result is grounded in the principle that a treating physician's finding of MMI necessarily reflects the physician's determination that no further treatment is reasonably expected to improve any of the *compensable components* of the injury, and the authorized treating physician's opinion on the cause of the claimant's condition is inherent to the physician's determination of MMI. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App.1998) We have previously stated that "[d]etermining MMI necessarily requires a physician to ascertain the cause or causes of the claimant's condition in order to decide whether the claimant warrants additional treatment for any work-related problem. Consequently, the issues of whether all work-related conditions are stable and do not require additional treatment are an inherent part of the DIME process...." *Ayala v. Conagra Beef Company*, W.C. No. 4-579-880 (July 22, 2004).

E. Because the current version of the statue in question has not changed and because the ALJ has concluded that Dr. Olson is an authorized treating provider (ATP) who effectively placed Claimant at MMI, the principals announced by the Panel in *McCormick* apply to the facts of this case. Consequently, the ALJ concludes that he does not have jurisdiction to resolve questions regarding MMI, the cause of Claimant's knee condition, the relatedness of his need for surgery to the September 22, 2015 dehydration episode or the need for additional medical treatment to cure and relieve him of any ongoing symptoms related to rhabdomyolysis until completion of the DIME he has requested.

Claimant's Emergency Room Care

F. Medical services provided during a bona fide emergency are an exception to the normal requirement that a claimant obtain authorization for all treatment of the industrial injury. Larson's Workers' Compensation Law, § 94.02[6] (1999); *Sims v. Industrial Claim Appeals Office, 797 P.2d 777* (Colo. App. 1990). There is no precise

legal test for determining the existence of a medical emergency.[1] Rather, the question of whether a claimant has proven a bona fide emergency is dependent on the particular facts and circumstances of the claim. *Timko v. Cub Foods,* W. C. No. 3969-031 (June 29, 2005). In this case, the ALJ is persuaded that the severe dehydration resulting in muscle cramping which affected not only Claimant's ability to walk but also his breathing and which required IV fluid treatment constituted a genuine medical emergency. Consequently, Claimant did not need to obtain prior authorization for the treatment associated with his transport to and treatment in the ER. As the emergent treatment was reasonable, necessary and directly related to Claimant's admitted dehydration episode, Respondents are liable to pay for it.

Claimant's Right to Select a Treatment Provider to Attend to his Rhabdomyolysis & Alleged Knee Injury & Claimant's Request for Penalties for Failure to Provide a Designated Provider List Pursuant to WCRP 8-2(A)(1)

G. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Under §8-43-404(5)(a)(I)(A), C.R.S. 2014 the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973).

H. Under § 8-43-404(5)(a), C.R.S., the employer or insurer is afforded the right in the first instance to select a physician to treat the injury. The statute requires the employer or insurer to "provide a list of at least two physicians, . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list . . .." In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician ... at the time of injury" gives the employee "the right to select a physician or chiropractor." The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo.App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo.

[1] The exception is not limited to situations where life is threatened. *Bunch v. Industrial Claim Appeals Office of State of Colorado,* 148 P.3d 381 (Colo.App.2006).

App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (Industrial Claim Appeals Office, September 6, 2011).

I. In this case, Claimant contends that he had reported his injury to his supervisor on September 28, 2015 after which Respondent-employer took no action to authorize a provider to attend to his injuries. Consequently, Claimant argues that the right to select a provider passed to him and all treatment received prior to this date should properly be covered by Respondents. As found, the ALJ is not persuaded. Instead, the ALJ concludes that Claimant likely returned to work on September 28, 2015 and reported he was having muscle and knee pain, without specifically indicating that it was due to a work related cause and that he could continue to work nonetheless. The evidence presented, including Claimant's actions convinces the ALJ that he probably did not report either that his muscle pain and/or right knee pain was caused by a work related etiology until October 12, 2015 when he received the results of his follow-up blood test and demanded to see a physician. Upon such report, the record evidence supports that Claimant selected CCOM as the facility to attend to his alleged work related condition(s). Accordingly, the ALJ concludes that the right of selection did not pass to Claimant and all care received prior to October 12, 2013 is unauthorized.

J. Regarding his claim for penalties for failure to provide a Rule 8 designated provider list, the evidence presented persuades the ALJ that Claimant more likely than not was provided with one and he chose to proceed to CCOM where he was evaluated by PA Byrne. In the materials admitted into evidence is a facsimile sent to Claimant's wife requesting that she circle the Dr. and facility that attended to Claimant. The ALJ infers from the facsimile that Claimant was initially given a choice of physicians to select from and thereafter was requested to indentify which facility he chose to go to. Consequently, the ALJ concludes that Respondents, more probably than not, followed WCRP Rule 8-2(A)(1) by providing Claimant with a choice of physician/corporate facilities to choose from. Accordingly, his claim for penalties, specifically that he is entitled to a physician of his choosing must be denied and dismissed.

Claimant's Entitlement to TTD

K. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

In this case, Claimant credibly testified and the medical records support that he was suffering from a painful muscle cramping (myalgia) caused by rhabdomyolysis cased by dehydration which resulted in his removal from work by Dr. Voutsalath for the period extending from September 23, 20015 through September 27, 2015. As noted, Claimant returned to work on September 28, 2015 and worked until he was laid off on October 13, 2015. However, as the DIME in this case is pending, the question of whether Claimant is at MMI and entitled to additional TTD benefits for time periods after October 13, 2015, like the questions surrounding entitlement to additional medical treatment, is premature. Consequently, the ALJ declines to address the question of Claimant's entitlement to additional TTD and any adjustment in his AWW for lost fringe benefits benefits after October 13, 2015.

L. Based upon the evidence presented, the ALJ is persuaded that Claimant was "disabled" within the meaning of section 8-42-105, C.R.S. between September 23, 2015 and September 27, 2015, during which time frame he experienced a wage loss. Thus he is entitled to TTD benefits for this time frame. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (Industrial Claim Appeals Office, June 11, 1999). Because the period of disability did not last longer than two weeks from the day Claimant left work as a consequence of the injury, the statutory three day waiting period applies in this case. Applying the three day waiting period makes the first date of eligibility for payment of TTD September 26, 2015. As Claimant returned to work on September 28, 2018, the period of entitlement to TTD terminated on September 27, 2015. Consequently, the ALJ concludes that Claimant is entitled to TTD benefits from September 26th to September 27, 2015.

Claimant's Average Weekly Wage

M. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

N. Section 8-42-102(2), C.R.S., sets forth certain methods of calculating the average weekly wage. Section 8-42-102(2)(d) provides that "[w]here the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from the daily wage in a manner set forth in paragraph (c) of this subsection (2).

O. Section 8-42-102(3), C.R.S., permits the ALJ discretion in the method of calculating the average weekly wage if the nature of the employment or the fact that the injured employee has not worked a sufficient length of time, has been ill or self-employed, or for any other reason, the specific methods do not fairly compute the average weekly wage. *Benchmark/Elite Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008). Here, the wage record

submitted into evidence constitutes the best evidence regarding Claimant's earning at the time of injury. While Claimant argued that he earned on average $1,000.00 per week, Claimant's argument does not constitute evidence. Indeed, the undersigned has carefully reviewed the record evidence and finds no corroborating evidence to substantiate Claimant's assertion that he earned, on average $1,000.00 per week. Based on this evidence presented, the ALJ concludes that Claimant has proven an AWW equal to $800.00. The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his September 22, 2015, work related injury.

Penalties

P. As found above, the ALJ concludes that Claimant's request for penalties for Respondents alleged failure to timely report Claimant's injury as required by C.R.S. § 8-43-103 and WCRP 5-2, for the alleged failure to provide a designated provider list pursuant to WCRP 8-2 and for filing the February 14, 2017 FAL are without merit.

Q. Based upon the evidence presented, the ALJ is also not persuaded that Respondents should be penalized for requesting the January 26, 2017 IME with Dr. Bernton. Claimant contends that the IME was not proper and in contravention of C.R.S. § 8-42-107(8)(b)(II) because 24 months had not passed since the date of injury. Claimant's reliance of the aforementioned statutory provision as a barrier to Respondents seeking an IME with Dr. Bernton is misplaced. The provision cited addresses the requirements necessary to request a Division Independent Medical Examination (DIME) in the event that an authorized treating physician has not placed an injured worker at MMI for more than 24 months since the date of injury. Contrary to Claimant's assertion, the cited statute does not limit when Respondents may request an IME. Indeed C.R.S. § 8-43-404(1)(a), provides that a claimant "shall from time to time submit to an examination by a physician or surgeon . . . which shall be provided and paid for by the employer or insurer . . ." There is no statutory requirement that a Respondents IME (RIME) be conducted after 24 months as suggested by Claimant. A RIME and a 24 month DIME are distinct procedures not to be confused with one another. Since Respondents have not violated C.R.S. § 8-42-107(8)(b)(II) by requesting a RIME inside of 24 months, the claim for penalties must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Questions regarding MMI, the cause of Claimant's knee condition, the relatedness of his need for surgery to the September 22, 2015 dehydration episode and whether Claimant is entitled to additional medical treatment to cure and relieve him of any ongoing symptoms related to rhabdomyolysis are reserved for future determination as the ALJ does not currently have jurisdiction to resolve these issues.

2. Respondents shall pay for all costs associated with Claimant's transport to and treatment received through Penrose St. Francis Emergency Department.

3. Claimant has failed to establish that the right to select a physician passed to him based upon the assertion that Respondent-Employer did not properly designate a medical provider to attend to Claimant's injury in the first instance. Dr. Olson is the authorized treating physician in this case.

4. Dr. Voutsalath's care is deemed unauthorized. Consequently, Respondents are not liable for payment for the care she rendered to Claimant.

5. Claimant's AWW is $800.00.

6. Respondents shall pay temporary total disability benefits (TTD) in accordance with C.R.S. § 8-42-105, beginning September 26, 2015 for a period of two days at a rate of sixty-six and two-thirds percent of Claimant's average weekly wage (AWW), but not to exceed a maximum of ninety-one percent of the state average weekly wage per week. C.R.S.

7. All claims for penalties as asserted are denied and dismissed.

8. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 2, 2017

_____

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-902-219-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 26, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 4/26/17, Courtroom 1, beginning at 1:30 PM, and ending at 3:00 PM).

Hereinafter shall be referred to as the “Claimant." shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 8 were admitted into evidence, without objection. Respondents’ Exhibits A through S were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement in order to prepare a written decision.

ISSUE

The issue to be determined by this decision concerns post maximum medical improvement (MMI) maintenance medical benefits (*Grover medicals*). At the commencement of the hearing, the Claimant withdrew the designated issue of mileage, and the Respondents withdrew the designated issue of overpayments.

The Claimant bears the burden of proof, by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant's date of birth is May 8, 1974, and she was 42 years old on the date of the hearing, and 33 years old on the date of her admitted low back injury.

2. The Claimant sustained an admitted low back injury on January 15, 2008, while working as a manager for the Employer. She was lifting a roll of leather and she reported bilateral intermittent lower extremity paresthesias. She first saw Michael Ladwig, M.D. at the Aviation and Occupational Medicine Clinic on January 22, 2008. Dr. Ladwig diagnosed a dorsal lumbar spine strain. Dr. Ladwig gave the Claimant temporary restrictions of no repetitive lifting, carrying, pushing and pulling. She continued working for the Employer, at full pay, with restrictions, until March 25, 2013, at which time she was let go for reasons unrelated to her injury. Nonetheless, at this time, the Employer no longer made modified work available to the Claimant; the Claimant has not worked since that time; and, the Respondents admitted liability for temporary total disability (TTD) benefits from March 26, 2013 through September 8, 2016 (a little over 3 ½ years), the day before she was admittedly placed at maximum medical improvement (MMI).

3. After March of 2013, the Claimant was placed at MMI and taken off MMI several times. She has had extensive treatment from the date of injury through 2016, including physical therapy, massage therapy, acupuncture. facet injections and a rhizotomy. Indeed, Anjmun Sharma, M.D., the Division Independent Medical Examination (DIME) performed a DIME on the Claimant and issued a report, dated September 9, 2016, which catalogs 41 treatment notes from January 22, 2008 through

September 9, 2016, 2016 (Respondents' Exhibit F, bates stamp 00023 through 00085—62 pages), which are noted to illustrate the extensive treatment the Claimant has received, over the years, for the admitted back injury of January 15, 2008.

4. Prior to the admitted back injury of January 19, 2008, the Claimant had no significant previous history of back problems where she needed extensive medical care or was restricted from working full duty. The Clamant was only 42 years old on the date of the hearing, and she was 33 years old on the date of her injury. She had no prior disabling back problems and she had been able to work fulltime until her injury of January 15, 2008, according to her credible testimony. Thereafter, she was under medical restrictions and her Employer accommodated her restrictions until the Claimant was let go in March 2013. She has been unable to work at her pre-injury job duty since that time; and, she has not worked at all since that time.

5. On October 29, 2008, the Claimant came under the care of doctors at Arbor Occupational Medicine, where she was first treated by Jade Dillon, M.D., who advised the Claimant to go back to work. 10 days after returning to work, the Claimant's symptoms worsened. Thereafter, the Claimant continued under the treatment of David Kistler, M.D., and, subsequently and for the last several years, Sander Orent, M.D. The physicians at Arbor continued to treat the Claimant through 2016 until Dr. Orent retired. After Dr. Orent retired, Lawrence A. Lesnak, D.O., became the Claimant's primary ATP (he had been an ATP along with Dr. Orent before he became the primary ATP).

6. Ultimately, the Respondents filed a Final Admission of Liability (FAL), dated October 25, 2016, admitting for an average weekly wage (AWW) of $623.34; temporary total disability (TTD) benefits of $415.56 per week from March 26, 2013 through September 8, 2016 (a period of over 3 ½ years); for 14% whole person; and **denying** post maximum medical improvement medical maintenance benefits (*Grover* medicals).

The Claimant's Testimony at Hearing

7. The Claimant is relatively young, at present. She was 42 on the date of the hearing, and 33 on the date of her admitted back injury, January 15, 2008. Ever since the admitted injury, she has continued to experience worsening back pain, which has been characterized as chronic. Prior to the admitted injury, she had no disabling back problems. On February 6, 2006, she presented to The Point Sports medicine and Rehabilitation to be examined for physical therapy (PT). She reported bilateral lower extremity pain. This was a one-time only visit and there is no indication that she saw a physician for her complaint. The ALJ infers and finds that the Claimant recovered from this back pain shortly after February 2006 and was able to work full duty without pain until she experienced the admitted injury of January 15, 2008.

8. The Claimant testified persuasively and credibly that she cannot function without the medications that her authorized treating physician (ATP), Lawrence A. Lesnak, D.O., continues to prescribe for her, despite the insurance carrier's refusal to further authorize him after the FAL, declaring the Claimant at MMI on September 9, 2016, was issued. The Claimant's back condition, originally caused by the admitted injury of January 9, 2008, has continued to become worse, according to the Claimant. This is corroborated by the opinions of her ATPs and by the surgical evaluator, Bryan A. Castro, M.D.

Follow Up Division Independent Medical Examination (DIME) of Anjmun Sharma, M.D.

9. Ultimately, a Follow-Up Division Independent Medical Examination (DIME) was performed by Dr. Sharma, and his report is dated September 9, 2016 (Respondents' Exhibit F). Dr. Sharma extensively catalogued the Claimant's medical treatment from 2008 through 2013 (Respondents' Exhibit F, bates stamp 00023 to 000-60). His entries reveal that the Claimant had continuing problems and a need for treatment for the admitted back injury of January b19, 2008.

10. As a result of the Follow Up DIME, Dr. Sharma placed the Claimant at MMI, effective September 9, 2016 and rated her permanent medical impairment at 14% whole person for her back injury. Dr. Sharma, in his Follow-Up DIME Report stated: "No maintenance medical care will be assigned. It is unnecessary." He went on to state: "The injured worker is finishing school. She will likely be **in a low impact (**emphasis supplied) job anyway doing work as an estheticician." The ALJ infers and finds that in not recommending maintenance care, Dr. Sharma's opinion is based heavily on the fact that the Claimant "is finishing school" and "will be in **a low impact job."** The ALJ infers and finds that this undue emphasis on the Claimant's future plans partially undermines the credibility of Dr. Sharma's opinion that the Claimant does not need maintenance care. Further, his opinion in this regard is contrary to the weight of the ATPs' opinions and the Claimant's credible lay testimony concerning how the prescribed medications help her. Contrary to the opinions of the Claimant's ATPs, Dr. Sharma prescribed no work restrictions and was of the opinion that the Claimant was unlikely to deteriorate. The ALJ finds that Dr. Sharma did not give a persuasive explanation for this opinion. There is no elevated standard of proof for a DIME physician's opinions on maintenance medical care and permanent restrictions. The "preponderance of the evidence" standard applies to such opinions; and, the ALJ finds that it is more likely than not that Dr. Sharma is wrong with respect to "no maintenance care and no permanent restrictions," and the Claimant's ATPs are correct in continuing to provide maintenance medical care. Indeed, the Claimant's present ATP, Dr. Lesnak, continues to refill the Claimant's prescriptions despite the fact that the insurance carrier refused to authorize further visits with Dr. Lesnak after the Claimant was placed at MMI, effective September 9, 2016. 2016.

Surgical Evaluation by Bryan A. Castro, M.D. (2014)

11. Dr. Castro first saw the Claimant on June 27, 2014, on a referral from her authorized treating physician (ATP) Sander Orent, M.D. Among other things, Dr. Castro noted that the MRIs highlighted "disc bulging centrally which does cause some mild central canal encroachment." He did not recommend surgery, however, he indicated that the Claimant "would benefit from anti-inflammatories, muscle relaxants…and other conservative modalities as prescribed by Dr. Orent. Dr. Castro noted that the Claimant had lumbar spine pain with an "onset 6 years ago. Severity level is 8. Pain is worsening. In a follow up visit of August 25, 2014, Dr. Castro noted that the Claimant reported that her symptoms were much worse. Dr. Castro assessed "lumboscaral radiculitis" and indicated that further studies were warranted, including a new MRI "since her symptoms have increased significantly over the last several months" (Respondents' Exhibit L).

Authorized Treating Physicians (ATPs) Sander Orent, M.D. and Lawrence A. Lesnak, D.O.

12. At the request of ATP Dr. Orent, an MRI (magnetic resonance imaging) of the Claimant's lumbar spine was performed by Todd D. Greenberg, M.D., on January 28, 2015. It revealed an "annular tear at L4-5, moderate disc dessication, small central protrusion, no neural effacement. Tiny facet cyst left side, outside the canal." Dr. Greenberg concluded that "compared to 05/22/13, there has been no substantial interval change. **Persistent** (emphasis supplied) protrusions at L4-5 and L5-S1."The Claimant has continued to have chronic, debilitating symptoms through the present time. Henry J. Roth, M.D., in his Independent Medical Examination (IME) report of June 13, 2016, makes an isolated, selective reference to this MRI, stating "of particular note is 'no prominent facet arhropathy." Dr. Roth summarily dismisses the other MRI finds concerning disc protrusions.

13. Dr. Orent at Arbor Clinic had been the Claimant's ATP for several years, and on January 8, 2016, his impression was that the Claimant had facet syndrome, .for which he recommended a rhizotomy, which the Claimant underwent. As of April 26, 2016, Dr. Orent was of the opinion that the Claimant required physical therapy twice a week with massage once a week for four weeks. He was of the opinion that the Claimant was "not able to work at this time." (Respondents' Exhibit J, bates stamp 000175). He was of the opinion that "a facet syndrome lumbar spine not at MMI." Dr. Lesnak was also one of the Claimant's ATPs. In a report, dated August 9, 2016, Dr. Orent diagnosed "lumbar facet syndrome," stating that the Claimant was not at MMI because she required further care and her care is in "denial" (by the insurance carrier) [Claimant's Exhibit 4, pp.22-24).

14. Dr. Lesnak scheduled a repeat bilateral L4 and L5 medial facet joint nerve branch RF neurotomy procedure for January 22, 2016, which occurred.

15. As the result of a post-MMI Re-Check, ATP Dr. Lesnak issued a report, dated May 25, 2016 (Claimant's Exhibit 3). The Claimant complained of chronic, recently recurring bilateral low back pain with intermittent mild posterior leg symptoms. This is consistent with the Claimant's testimony art hearing. Indeed, the Claimant testified that she had problems sitting for long periods of time, and the ALJ finds her testimony to be persuasive and credible.

16. Dr. Lesnak has continued the Claimant on the following medications: (1) tramadol 3 times daily for nerves; (2) Gabapentin, 1200 mg. At night to relax; (3) Cymbalta daily for depression; (4) Tizanidine taken every evening for pain; (5) Percocet, used as needed 3 to 4 nights a week—for pain; and, (6) Valium which is used on an as needed basis to 4 weeks at night. The Claimant's lay testimony concerning these medications was compelling. She stated that these medications helped her sleep, and allowed her to be functional.

17. Ultimately, as of April 5, 2017, Dr. Lesnak was of the opinion that continuing pain management was "reasonable, necessary and related medical treatment to maintain [the Claimant's] condition at MMI or to prevent deterioration" (Claimant's Exhibit 3, p. 6). Because Dr. Lesnak has been the Claimant's ATP, and despite the fact that the insurance carrier would authorize no more visits to Dr. Lesnak after the Claimant was placed at MMI on September 9, 2016, the ALJ finds his opinion concerning the Claimant's need for post-MMI medical maintenance treatment compelling and highly credible, since he continued refilling the Claimant's prescriptions despite the fact that he had no workers' compensation obligation to do so.

Independent Medical Examination (IME) BY Henry J. Roth, M.D.

18. At the Respondents' request, Dr. Roth performed an IME on the Claimant and issued a report, dated June 13, 2016 (respondents' Exhibit G). Contrary to the DIME opinion of dr. Sharma, Dr. Roth is of the opinion that he Claimant has no medical impairment as a result of the January 15, 2008 admitted injury He states that that "the advancement of degenerative change in MRIs (magnetic resonance imaging) is **idiopathic** (emphasis supplied) and has also not demonstrated to be causal of her symptoms. Dr. Roth offered no explanation for the advancement of degenerative change in the MRI being "idiopathic." Indeed, *Webster's New World Dictionary* defines "idiopathic" as "a disease whose cause is **unknown** (emphasis supplied)." The ALJ finds that this opinion amounts to a summary dismissal of the MRI results without any persuasive explanation. For this reason, among others, the ALJ does not find Dr. Roth's opinion that the Claimant doesn't require post-MMI medical maintenance care credible. Dr. Roth thereupon diagnosed the Claimant with fibromyalgia (a non work-related condition). Despite his lengthy report, Dr. Roth does not persuasively explain why the Claimant does not continue to need the powerful medications that her ATP, Dr. Lesnak, continues to prescribe and why the Clamant needs these medications in order

to function. The ALJ finds Dr. Roth's opinions to be contrary to the weight and totality of the persuasive evidence and, therefore, not credible.

19. The totality of Dr. Roth's opinions tend to cast doubt on whether the Claimant sustained a compensable injury in the first place. At a minimum, his opinions minimize the effects of the admitted January 15, 2008 injury, and his opinions are that the Claimant suffers from fibromyalgia (there is no persuasive explanation in his report concerning how he arrived at this diagnosis), a non-work related condition, and the Claimant has no permanent work-related impairment. Dr. Roth's opinions are contradicted by the totality of the evidence. Therefore, the ALJ finds that his opinions, including his opinion that no medical maintenance care is warranted are not credible.

William D. Boyd, Ph.D., Clinical Psychologist (2013)

20. Dr. Boyd saw the Claimant eight times, and when he discharged her on August 13, 2013, his diagnosis was "pain disorder with psychological and medical factors; and, adjustment disorder with anxiety and depressed mood, improving" (Respondents' Exhibit M). Correlating Dr. Boyd's diagnosis of pain disorder with…medical factors to the opinions of the Claimant's ATPs and the Claimant's lay testimony, the ALJ finds that the Claimant has been suffering from chronic panic which is a proximate result of the admitted injury of January 9, 2008. Dr. Boyd's opinions are outdated and inconsistent with the DIME's MMI date of September 9, 2016, as admitted in the FAL.

Independent Psychiatric Medical Examination (IME) by Robert E. Kleinman, M.D., Psychiatrist (2014)

21. Dr. Kleinman saw the Claimant on November 5, 2014 for a psychiatric IME. He noted no past psychiatric history. Dr. Kleinman's diagnosis was: "Pain disorder with psychological factors and a medical condition; Adjustment disorder with mixed anxiety and depressed mood." Dr. Kleinman agreed with Dr. Boyd that the Claimant was at psychiatric MMI on August 12, 2013, however, he stated that if the Claimant "cho (*sic*)ses to continue with medication she would have a 1% mental health impairment considering she is on a minimal dose of antidepressant. At hearing, the Claimant testified that she is still on all of the medications prescribed by her ATP, Dr. Lesnak, and they enable her to function. Ultimately, Dr. Kleinman was of the opinion that no further psychological treatment was necessary to maintain the Claimant at MMI. Dr. Kleinman's opinions on MMI are outdated and inconsistent with the DIME's opinion of MMI on September 9, 2016, as admitted in the FAL.

Ultimate Findings

22. The ALJ finds the April 5, 2017 opinion of the Claimant's present ATP, Dr. Lesnak, that the Claimant needs post-MMI medical maintenance care, as supported by all of his reports (Claimant's Exhibit 3), by the Claimant's lay testimony, and by the totality of the evidence is more persuasive and credible than any opinions to the contrary. Indeed, the ALJ finds IME Dr. Roth's opinions lacking in credibility for the reasons specified in Finding No. 16 herein above. Also, the ALJ finds the Claimant's presentation was straight-forward and credible. Her chronic pain, proximately caused by the 2008 back injury, continues to be disabling and real and all of the medications prescribed by Dr. Lesnak, post-MMI, allow her to function.

23. Between conflicting medical opinions, coupled with the Claimant's compelling lay testimony, the ALJ makes a rational choice, based on substantial evidence, to accept the opinion of ATP Dr. Lesnak that the Claimant requires post-MMI medical maintenance care to maintain her condition at MMI and to prevent a deterioration of the Claimant's condition, and to reject all medical opinions to the contrary.

24. The Claimant has proven, by a preponderance of the evidence that she is entitled to post-MMI medical maintenance benefits at the hands of her ATP, Lawrence A. Lesnak, D.O.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions

(this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the April 5, 2017 opinion of the Claimant's present ATP, Dr. Lesnak, that the Claimant needs post-MMI medical maintenance care, as supported by all of his reports (Claimant's Exhibit 3), by the Claimant's lay testimony, and by the totality of the evidence was more persuasive and credible than any opinions to the contrary. Indeed, as found, IME Dr. Roth's opinions were lacking in credibility for the reasons specified in Finding No. 16 herein above. Also, as found, the Claimant's presentation was straight-forward and credible. Her chronic pain, proximately caused by the 2008 back injury, continues to be disabling and real and all of the medications prescribed by Dr. Lesnak, post-MMI, allow her to function.

b. In *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997), the Court of Appeals dealt with a situation wherein the injured worker could proceed no further with medical treatment and evaluations because the employer and the treating physician took the position that because the claimant had resigned her employment, she was **not** entitled to further evaluations. In the present case, the respondents take the position that the Claimant is not entitled to post-MMI medical maintenance treatment, despite the Claimant's compelling evidence of continued and worsening chronic pain, proximately resulting from the admitted injury of 2008. Ultimately, the Court of Appeals concluded that a medical opinion was not necessary to prove causation because imposing such a requirement would be reading something into the statute that was not there. *See Jacoby v. Metro Taxi, Inc.,* 851 P.2d 245 (Colo. App. 1993). § 8-41-301, C.R.S., which specifies the conditions necessary for a compensability determination (this would include the compensability of a medical procedure or diagnostic tests, or post-MMI medical maintenance benefits) does **not** provide that a medical opinion is necessary to make such a determination. As observed in *Lymburn*, to require a medical opinion to support a causality determination would be to read something into the statute that does not exist. Consequently, *Lymburn* remains good law. In the present case, there is more than the Claimant's compelling lay testimony to support post-MMI medical maintenance care. There is the opinion of her ATP, Dr. Lesnak.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, coupled with the Claimant's compelling lay testimony, the ALJ made a rational choice, based on substantial evidence, to accept the opinion of ATP Dr. Lesnak that the Claimant requires post-MMI medical maintenance care to maintain her condition at MMI and to prevent a deterioration of the Claimant's condition and to reject all medical opinions to the contrary.

Post-MMI Medical Maintenance Benefits

d. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. Such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to address the injury. As found, there is substantial evidence, including the opinion of the Claimant's ATP, Dr. Lesnak, and the Claimant's compelling lay testimony that post-MMI maintenance medical care is causally related to the admitted injury of

January 15, 2008 and reasonably necessary to maintain the Claimant at MMI and prevent deterioration of her condition. This post-MMI maintenance treatment should be in the discretion of her ATP, Dr. Lesnak.

The Standard of Proof for DIME R. Sharma's Opinion that the Claimant Does Not Need Post-MMI Medical Maintenance Treatment

e. Beyond the DIME opinion concerning MMI and degree of permanent impairment as required by § 8-42-107 (8), C.R.S., a DIME physician's conclusion that an injured worker's medical problems were components of the injured worker's overall impairment constitutes a part of the diagnostic assessment that comprises the DIME process and, as such the conclusion must be given presumptive effect and can only be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475, 482 (Colo. App. 2005); *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 400 (Colo. App. 2009). In the present case, DIME Dr. Sharma's opinion that the Claimant does not require post-MMI maintenance medical care is not subject to presumptive effect and it is on the level playing field of "preponderance of the evidence."

Burden of Proof

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden on her need for post-MMI medical maintenance benefits, as recommended by her ATP, Dr. Lesnak.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Lawrence A. Lesnak, D.O., is the Claimant's authorized treating physician and the Respondents shall pay the costs of her return visits to him to receive post maximum medical improvement maintenance medical benefits.

B. The Respondents shall pay all the costs of a general award of post maximum medical maintenance care for the admitted injury, rendered in Dr. Lesnak's discretion, subject to the Division of Workers' Compensation medical Fee Schedule, including the costs of all Dr. Lesnak's prescribed medications.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of May 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Whether Claimant established by a preponderance of the evidence that his sternum fracture was work related, and

- Whether Claimant established by a preponderance of the evidence that he is entitled to payment of previously provided medical benefits and those medical benefits are reasonably necessary to cure or relieve the effects of a work related injury.

PROCEDURAL ISSUES

The parties stipulated that Claimant's average weekly wage on April 22, 2016, was $1900.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 47-year-old truck driver and former employee of the Employer.

2. On April 10, 2016, Claimant went on a horse ride with his son. Claimant initially testified that his horse was walking when he dropped the horse's rope and then reached for it. While Claimant was reaching, the horse stopped and Claimant's chest struck the horse's saddle. Claimant subsequently testified the horse was galloping before it stopped. On cross examination, Claimant agreed that the horse was galloping, cantering, and trotting, which, in Claimant's opinion, are all the same speed. Ultimately, Claimant stated the horse was travelling at four-tenths its maximum speed. Claimant testified that when the horse stopped, he struck his chest on the saddle's wooden pommel. This immediately caused pain and a bruise. Claimant was concerned about the bruise and sought medical care. Claimant then testified that the pain was minimal and that he was more concerned about the large bruise.

3. Approximately two hours after the horse-related accident, Claimant's chest pain began to increase. He sought medical treatment on April 11, 2016. Mauricio Waintrub, M.D., treated Claimant and X-rayed Claimant's chest. The X-ray was read as "normal" on that date. Dr. Waintrub did not note any swelling or bruising in his record of the evaluation. He prescribed Norco after Claimant complained of chest pain. Claimant testified that this injury was muscular while the alleged work injury seemed deep in his chest. However, on April 11, 2016, Claimant told Dr. Waintrub his chest felt as though it was "falling from inside." Claimant later reported to Dr. Raschbacher, Respondents' IME, that his chest had a five-inch bruise on April 11, 2016 and that it hurt to breathe.

4. Dr. Waintrub eventually concluded, after a CT scan of Claimant's chest was performed, that Claimant's sternum fracture was present when he examined Claimant on April 11, 2016.

5. No other physician treated Claimant between April 11, 2016 and April 22, 2016.

6. Claimant testified that he had pain symptoms after the April 11, 2016 appointment, but they were not severe and did not bother him. Claimant testified that the pain began to resolve within two days and completely subsided five days after the injury.

7. Claimant testified he never told anyone his horse bucked. However, Christopher Tierney, another of Employer's drivers, testified that he had a conversation with Claimant in the spring of 2016 at the Denver product terminal. Mr. Tierney had noticed Claimant looked sick or hurt while standing at a computer terminal. Claimant told Mr. Tierney he was not doing well because he had been on his horse when it had bucked and thrown Claimant into a trailer. Mr. Tierney reported the conversation to Francis Teter, Employer's fleet manager, within a couple of weeks.

8. At hearing, Mr. Teter testified that he spoke with Mr. Tierney regarding Claimant's statements two to three weeks after the initial report of injury, in May, 2016. Claimant testified that he did not have any difficulty doing his job prior to the work injury, and that he does not know who Christopher Tierney is. Claimant did recall having a brief conversation at an unknown location with unknown driver approximately three days after the horse accident. Claimant testified that he told that person he was only in a little bit of pain.

9. Claimant alleges that he sustained an injury to his sternum while at work on April 22, 2016. At hearing, Claimant testified that on April 22, 2016, he was unloading at a gas station when his hose got stuck in its storage tube mounted to the side of the truck. Claimant left the end he was initially pulling and moved closer to the storage tube. Claimant was approximately two feet from the stuck end of the hose when he grasped the hose with two hands and pulled more forcefully. Once the hose came free, Claimant testified the tip of the hose bent in such a way that it struck him in the chest. Claimant testified he lost his breath for three to four minutes after the hose tip hit him. According to Claimant, the metal tip of the hose that struck his chest weighs 25-30 pounds. However, that testimony was contradicted by Mr. Teter who testified more credibly that the metal tips are cast aluminum and weigh only two pounds.

10. Claimant reported the incident to Employer and sought medical treatment at Advanced Urgent Care ("AUC"). Claimant confirmed that the Employer's designated provider form bore his signature and handwriting, but he did not recall receiving or signing the form.

11. Claimant was treated at AUC by Christopher Wright, PA-C, on April 22, 2016. Claimant testified at hearing that on April 22, 2016, his pain level was 9/10. This

testimony was insistent with his recorded report to Mr. Wright of a pain level of 6/10. Claimant acknowledged that he did not tell Mr. Wright about the April 10, 2016 horse-related injury. Mr. Wright did not record Clamant having any bruising or swelling from the impact of the hose, nor did he impose any work restrictions after the April 22, 2016 examination.

12. Claimant testified that he called AUC to move his next appointment, which was initially on a later date, to April 27, 2016 due to an increased pain. On April 27, 2016, Claimant was evaluated by Julie Parsons, M.D. Claimant acknowledged that he did not tell Dr. Parsons about the horse-related injury because she did not ask him about it. He later admitted that Dr. Parsons did ask about prior chest injuries. Dr. Parsons recorded that Claimant was working full duty and had no skin discoloration. Claimant underwent chest x-rays and the radiologist noted a mass behind Claimant's sternum. Dr. Parsons reviewed the X-ray images and noted a possible non-displaced fracture of the sternum. She sent Claimant to the Emergency Department of North Suburban Medical Center for further evaluation.

13. At North Suburban, Claimant was treated by David Krueger, M.D. and underwent another X-ray and CT scan. The CT scan showed a non-displaced, mildly comminuted fracture of the upper body of the sternum. Claimant did not recall whether he told Dr. Krueger about his April 10, 2016 injury and Dr. Krueger's report does not indicate that Claimant did so.

14. Claimant continued treatment with Dr. Parsons who on May 18, 2016, ordered a repeat X-ray which showed "excellent healing and no displacement." Dr. Parsons ultimately placed Claimant at maximum medical improvement and released him to full duty on May 25, 2016. Throughout her treatment, Dr. Parsons never noted or otherwise indicated that Claimant told her about his horse-related injury.

15. Mr. Teter testified that he was Employer's fleet manager and had been for eleven years. When Mr. Teter hired Claimant , he learned that Claimant participated in Mexican rodeos in his free time. Mr. Teter was out of the office on April 22, 2016, and learned about the hose-related incident when he returned days later. Mr. Teter only had a more in-depth conversation with Claimant after learning that Claimant was experiencing pain. The conversation with Claimant occurred at a Murphy's station in Broomfield, Colorado, and Claimant described to him how the injury had occurred. Mr. Teter testified that the trailer pictured in Respondent's Exhibit U 131 was the trailer assigned to the Claimant when he worked for Employer. It is not possible to stand directly in front of the hose storage tubes due to the position of the loading/unloading fittings on the right side of the trailer. The storage tube for the twenty foot hose is approximately four feet and four inches from the ground. Exhibit U at page 132 shows the four inch hose inside the tube which, to Mr. Teter's knowledge, was not modified between April 2016 and the date the photo was taken. The hose tips, or fittings, are made of cast aluminum, are non-sparking, and weigh "a couple of pounds each." The hoses are made as flexibly as possible, but a twenty foot hose would require at least six feet to bend the tip of the hose back to touch the hose. The hose could not bend back over itself two feet from the end as Claimant alleged.

16. Claimant told Dr. Raschbacher that he has seen other drivers with broken jaws from his alleged mechanism of injury. Mr. Tierney has been in the industry for twelve years and has never known of anyone who broke their jaw with an unloading hose. Mr. Teter has been in the fuel hauling industry for thirty-five years and has never known of a hose breaking a driver's jaw.

17. Dr. Raschbacher testified at hearing as an expert in occupational medicine. Dr. Raschbacher performed a respondents' sponsored independent medical examination of Claimant on December 13, 2016, eight months after the initial horse-related injury. Claimant told Dr. Raschbacher about the April 22, 2016 hose incident, but did not disclose the horse-related injury until Dr. Raschbacher asked him about it directly. Claimant stated the first problem with his chest occurred on April 22, 2016. When describing the horse injury, Claimant did not describe the horse as moving. Dr. Raschbacher testified that he would expect a trauma that results in a sternum fracture to be accompanied by bruising because the force required to fracture the sternum would damage overlying tissue as well. He noted that Claimant's medical records from April 22, 2016 and subsequent appointments did not indicate any bruising, edema, swelling, or ecchymosis.

18. Dr. Raschbacher testified that three X-rays, one on April 11, 2016 and two on April 27, 2016, were not initially interpreted as showing fractures. The CT scan on April 27, 2016 did show a non-displaced, mildly comminuted fracture in the upper sternum. Dr. Raschbacher explained that a CT scan uses more accurate technology than an X-ray and produces a much higher quality image. Dr. Raschbacher agreed with Dr. Piko's report that the previous X-rays are actually consistent with the CT scan and confirm a sternum fracture prior to April 22, 2016. Dr. Raschbacher explained the April 11, 2016 X-ray was underpenetrated, meaning too little energy was applied to easily see detail within or behind the sternum.

19. Even assuming Claimant did hit himself in the chest with a hose, no persuasive evidence supports a finding that this aggravated the pre-existing fracture because Claimant presented no persuasive evidence that the fracture was disrupted. More likely than not the fracture would not have healed between April 10 and April 22, 2016, and anything striking Claimant's chest could cause severe pain. Dr. Raschbacher persuasively testified that even a deep breath could cause Claimant to experience pain.

20. Dr. Raschbacher testified further that he has little doubt that Claimant fractured his sternum on April 10, 2016 and that none of the medical care he received for the sternum fracture was work related.

21. James Piko, M.D., also reviewed Claimants' radiological images and submitted an expert report which was admitted as Exhibit B. Dr. Piko is certified by the American Osteopathic Board of Radiology National Board of Osteopathic Medical Examiners, licensed to practice medicine in Colorado and fifteen other states, and specializes in Musculoskeletal Radiology. Dr. Piko reviewed Claimant's chest X-rays and CT scan and concluded that the sternum fracture was present on April 11, 2016 and unchanged on April 27, 2016. Dr. Piko opined that Claimant did not acutely fracture

his sternum on April 22, 2016.

22. Although certain of Claimant's ATPs associated his injury with the alleged April 22, 2016 incident, the ALJ does not find their opinions persuasive because Claimant did not provide relevant diagnostic information to those physicians.

23. Based on the totality of the evidence, the ALJ finds that Claimant did not establish by a preponderance of the evidence that his injury is work related.

24. Based on the totality of the evidence, the ALJ finds that Claimant did not establish by a preponderance of the evidence that medical benefits he received are reasonably necessary to cure or relieve the effects of a work related injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S., §8-41-301(1) (c). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Id.* at 846. A compensable injury is an injury which "arises out of" and "in the course of" employment. *See* C.R.S. §8-41-301(1) (b).

In deciding whether a claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Credibility is a significant consideration when determining compensability. In assessing credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

An incident which merely elicits pain does not compel a finding that the claimant sustained a compensable aggravation or new injury. Colorado law is clear that the mere increase in pain or increase in symptoms associated with a prior injury does not compel the finding of a new injury or aggravation. *F.R. Orr Construction v. Rinta*, 717 P.2d 965, (Colo. App. 1985). Rather, to receive medical benefits the claimant must establish that the need for "additional medical treatment is proximately caused by the aggravation, and is not simply a direct and natural consequence of the pre-existing condition." *See Merriman v. Indus. Comm.*, 210 P.2d 448, 450 (Colo. 1949) and

Rockwell International v. Turnbull, 802 P.2d 1182 (Colo. App. 1990)). The ALJ must examine the totality of the circumstances to determine whether there is a sufficient nexus between the employment and the injury such that the accident may be said to have occurred in the scope of the Claimant's employment. *City and County of Denver School District No. 1 v. Industrial Commission*, 196 Colo. 131, 581 P.2d 1162 (1978).

In establishing causation, a claimant "must show that the industrial injury bears a 'direct causal relationship between the precipitating event and the resulting disability.'" *See Garcia v. CF&I Steel,* W.C. No. 4-454-548 (ICAO May 14, 2004).

The ALJ concludes that the following persuasive factors support a finding that Claimant did not suffer a new injury or compensable aggravation on April 22, 2016. But rather Claimant's symptoms are the result of a sternal fracture that occurred outside of work.

A preponderance of objective medical evidence supports this conclusion. For example:

- Drs. Piko and Raschbacher opined that Claimant's sternum was fractured on April 10, 2016and remained unchanged by Claimant's alleged work injury.

- Dr. Waintrub opined that Claimant's sternal fracture was present on April 11, 2016.

- Claimant was bruised by the injury from his horse, but was not bruised and showed no other external sign of injury from the alleged April 22, 2016 incident. Mr. Wright noted that there was not even skin discoloration on April 22, 2016. Dr. Raschbacher testified that the amount of force required to fracture a sternum would very likely cause bruising and swelling.

The mechanism of Claimant's injury is inconsistent with the properties of the equipment he was using. For example:

- Respondents' exhibits depict the hose in and partially out of the storage tube on the truck.

- In order for the tip of the hose to strike Claimant as he described, the hose would have had bend in front of Claimant until the tip faced Claimant's chest. Based on the more credible testimony of Employer's witness, the ALJ concludes that the two-foot length of hose in question was not flexible enough to make such a sharp turn, and that the hose could not have struck Claimant as he described.

- Claimant exaggerated the weight of the aluminum fittings on the ends of the hose testifying that the fittings weighed 25-30 pounds. More

persuasive testimony from Employer's witness established that the fittings were made of aluminum and weighed approximately two pounds.

And finally the ALJ concludes that Claimant was not credible for the following reasons:

- Claimant was a poor historian. His testimony was often inconsistent with his responses to interrogatories, his own statements at hearing, and prior statements.

- Claimant was not forthcoming with his medical providers and other doctors by failing to inform them of his April 10, 2016, horse-related injury despite their inquiries about prior chest injuries.

- Claimant was not forthcoming on cross-examination. For example, when Respondents' counsel asked him how fast his horse was moving just before it stopped: (1) Claimant's answers were unspecific; (2) he argued with counsel over linguistics; and (3) he then testified inconsistently that galloping and trotting were the same speed, that a canter is a half-gallop, and that cantering is the same speed as galloping.

- When asked for details about how the injury occurred, Claimant responded, "I can't remember" to at least nine consecutive questions.

- Claimant testified that the horse-related injury was not serious; however, he went to the doctor after the horse injury because he was frightened by a five-inch bruise over his sternum. In addition, despite his denial, his pain was so severe that his doctor prescribed narcotic pain relievers. In contrast, he testified that the symptoms caused by his alleged work injury were more severe. This testimony is contradicted by medical records which note there was not even redness at the alleged site of the injury and that the doctor had Claimant take over-the-counter pain relievers. As Dr. Raschbacher testified, if Claimant had struck his chest hard enough to break his sternum or aggravate the pre-existing fracture one would certainly expect the overlying soft tissue to show at least some sign of the impact.

Thus, the ALJ concludes that Claimant did not suffer a new injury or compensable aggravation on April 22, 2016.

Claimant bears the burden to prove by a preponderance of the evidence that his medical care was reasonably necessary to cure and relieve the effects of an industrial injury. Having concluded that Claimant did not suffer a new injury or compensable aggravation on April 22, 2016, the ALJ is unable to conclude that Claimant established by a preponderance of the evidence that he is entitled to payment of previously provided medical benefits and that those medical benefits are reasonably necessary to cure or relieve the effects of a work related injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to meet his burden of proving by a preponderance of the evidence that he suffered a new injury or a compensable aggravation of a pre-existing injury on April 22, 2016.

2. Claimant's claim is not compensable, and is denied and dismissed.

3. Claimant is not entitled to payment of previously provided medical benefits.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 3, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-695-181-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 4, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 5/4/17, Courtroom 1, beginning at 8:30 AM, and ending at 9:15 AM).

Claimant submitted no exhibits nor were any exchanged with the Respondents, Respondents' Exhibits A through H were admitted into evidence. The ALJ lodged an objection to Respondents' exhibits, which was overruled and the exhibits were admitted into evidence. Copies of Respondents' exhibits were given to the Claimant at the March 7, 2017 prehearing conference before ALJ Goldman, at which time the Claimant gave the following mailing address: 215 South 35, Billings, Montana 59107

At the conclusion of the hearing, the ALJ ruled from the bench and took the matter under advisement in order to prepare the written decision himself without a proposed decision. The ALJ hereby issues the following decision.

ISSUE

The issue to be determined by this decision concerns whether the statute of limitations applies to all of the Claimant's claims.

The Respondents bear the burden of proof, by a preponderance of the evidence on whether the statute of limitations applies to the Claimant's claims.

If the Respondents' satisfy their burden, the Claimant bears the burden of proof, by a preponderance of the evidence, on whether there was a tolling of the statute of limitations.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Notice

1. The Claimant attended the Prehearing Conference in person, held before ALJ Goldman, on March 7, 2017.

2. At the Prehearing Conference, the Claimant gave his mailing address as: 215 South 35, Billings, Montana 59107. Three days later, on March 10, 2017, the Office of Administrative Courts (OAC) mailed to Notice of Hearing to the Claimant at the above-mentioned address. The Notice of Hearing advised the Claimant that the hearing would be held on May 4, 2017, at 8:30 AM, at 1525 Sherman Street, 4th Floor, Denver, CO 80203. The Notice of Hearing was not returned by the U.S. Postal Authorities as undeliverable. Therefore, there is a legal presumption of receipt. The ALJ finds that the Claimant has not overcome this presumption. Therefore, the ALJ finds that the Claimant received legal notice of the May 4, 2017 hearing at 8:30 AM.

3. Although the Claimant was allowed to appear by telephone, he did not phone into the OAC at 8:30 AM, however, the ALJ reached the Claimant on his cell phone, number (406) 478-0790, and the Claimant thereupon testified, under oath, by telephone.

Preliminary Findings

4. The Claimant was born on May 10, 1966 and was 50 years old on the date of the hearing.

5. The Claimant sustained an admitted injury to his right elbow on August 6, 2006.

6. Ultimately, the Respondents filed a Final Admission of Liability (FAL), dated April 19, 2007, admitting for an average weekly wage (AWW) of $340; temporary

total disability (TTD) benefits of $226.67 per week from August 7, 2006 through September 27, 2006; a date of maximum medical improvement (MMI) of October 30, 2006; zero permanent partial disability (PPD); and, denying post-MMI medical maintenance benefits, pursuant to the opinion of Susan Geiger, D.O., one of the Claimant's authorized treating physicians (ATPs).

7. The Claimant failed to file a timely Objection to the FAL and/or a Notice and Proposal to Select a Division Independent Medical Examiner within 30 days as advised on the FAL. Therefore, the Claimant's claim was closed on or about May 21, 2007.

8. The Claimant failed to file a Petition to Re-Open his claim within 6 years of the date of his admitted injury and within 2 years of the date that his last benefits were due and payable.

9. The Claimant filed an Application for Hearing, dated December 16, 2016, nine years after the finality of the FAL, and more than ten years after the date of his admitted injury. Even if the Claimant's Application for Hearing is construed as a Petition to Re-Open, it exceeds the statute of limitations for re-opening. In his Application for hearing, the Claimant designated the issues of compensability, medical benefits and permanent total disability (PTD).

10. The Respondents raised the affirmative defense of "statute of limitations" in their Response to Application for Hearing, dated January 17, 2017.

The Claimant's Testimony at the Hearing

11. The Claimant testified, under oath, that he was working in South Dakota. His Boss, David Kampa, was on the phone call to assist the Claimant. The Claimant gave a new address: c/o David Kampa, P.O. Box 361, Groton, South Dakota 57445.

12. The Claimant testified to numerous injuries beyond the admitted right elbow injury, including back, a bleeding head and hand injuries. According to the Claimant he is still treating for all of these injuries here in the U.S. and in Mexico.

13. The Claimant failed to establish anything that would toll either of the applicable statutes of limitations.

Ultimate Findings

14. The Respondents have proven, by a preponderance of the evidence that all of the Claimant's claims, including claims for medical benefits and permanent total

disability benefits are barred by the applicable statutes of limitations. The last benefits were due and payable on or about October 30, 2007, the MMI date in the FAL. Consequently, if the Claimant's December 16, 2016 Application for Hearing is to be construed an objection to the FAL, the Respondents have proven that it was filed nine years after the FAL. If the Application for Hearing is to be construed as a Petition to Re-Open, Respondents have proven that it was filed more than ten years after the date of injury.

15. The Claimant failed to prove, by preponderant evidence that either applicable statute of limitations was

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Statute of Limitations

a. The Statute of Limitations is an affirmative defense and unless raised, it is waived. *See Kersting v. Indus. Comm'n,* 30 Colo. App. 297, 567 P.2d 394 (1977). To paraphrase the late U.S. Supreme Court Justice Oliver Wendell Holmes, Jr: "It has nothing to do with justice. It is a housekeeping device of the law to clean out old cases." When the time specified in a statute of limitations has passed, it could be conceptualized that there is a conclusive presumption that there will be prejudice to the side on the receiving end of the lawsuit. As found, herein above, the Respondents raised this affirmative defense, litigated it and proved it.

b. Section 8-43-203 (2) (b) (II) (A), C.R.S., provides that if an Objection to a FAL is **not** filed within 30 calendar days "the case will be automatically closed as to the issues admitted in the final admission…." As found, the Claimant did not object to the FAL within 30 calendar days. If his Application for Hearing is to be construed as an objection to the FAL, it was filed nine years after the finality of the FAL.

c. Section 8-43-303 (1), C.R.S., provides that a Petition to Re-Open must be filed within six years after the date of injury. Subsection (2) (a) provides that a Petition to Re-Open must be filed within two years after the last benefits were due and payable.

Tolling of the Statute of Limitations

d. There are exceptions to the two-year statute of limitations under § 8-43-103(2), but they do not apply in this case. For instance, § 8-43-103(2), C.R.S. provides that: "In all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of

[the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee … until the required report has been filed with the division." *Likens v. Dep't of Corrs.*, W.C. No. 4-560-107 (ICAO Feb. 10, 2004). This exception is inapposite to the evidence herein. None of the tolling exceptions to the statute of limitations, contained in § 8-43-101, 102 and 103, C.R.S., are relevant to the facts herein.

e. The Claimant bears the burden of proving, by preponderant evidence, a tolling of the statute of limitations. *See Grant v. Indus. Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). As found, the Claimant failed to satisfy his burden in this regard.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). As found, the Respondents have satisfied their burden on the affirmative defense of both relevant statutes of limitations. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As further found, the Claimant failed to satisfy his burden with respect to a tolling of both relevant statutes of limitations

ORDER

IT IS, THEREFORE, ORDERED THAT:

The Claimant's claims for further benefits in W.C. No. 4-695-181-02, with respect to his admitted injury of August 6, 2006, are barred by the Statute of Limitations and are, therefore, denied and dismissed.

DATED this_____day of May 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of May 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-030-862-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 19, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 4/19/17, Courtroom 1, beginning at 1:30 PM, and ending at 4:45 PM).

Claimant's Exhibits 1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through O were admitted into evidence, without objection, with the exception of Respondents' Exhibit M, pages 116 through 118 to which the Claimant objected on the basis that the Tier 1 Investigator, Steve Yerger, who was not present to testify, recited the details of his interviews with Mitchell Rankin, an Employer-witness who actually testified at hearing. The ALJ sustained the objection to this portion of Respondents' Exhibit M on the basis that it does not qualify as a record of a regularly conducted activity under Rule 803 (6) CRE (Colorado Rules of Evidence). Also, none of the hearsay within the hearsay document qualifies under any exception to the hearsay rule and is therefore inadmissible by virtue of Rule 805, CRE. *See Pomeranz v. McDonald's Corp.,* 821 P.2d 843 (Colo. App. 1991), *aff'd in part, rev'd in part,* 843 P.2d 1315 (Colo. 1993) [testimony based solely on information from another person is inadmissible hearsay]. Although there were no objections to portions of Claimant's Exhibit 13 (a report by Eric B. Tentori, D.O., dated February 1, 2017), the ALJ struck all references contained in his "11-02-16" Note because it referred to Investigator Yeger's

letter (Respondents' Exhibit M, pages 116 through 118, which was rejected as evidence). Also, prior to his telephone testimony, the ALJ gave Dr. Tentori a cautionary instruction not to refer to any of Yeger's information nor could he base any of his opinions on Yeger's information which are contained in Respondents' Exhibit M, pages 116-118. During the course of the hearing the portion of Dr. Tentori's report in which he mentions Yerger's report was also excluded from the evidence (Claimant's Exhibit 13, pages 182 and 183 –the Note of 11/02/16)..

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically on April 25, 2017. Counsel for the Respondents emailed the proposed decision to the wrong email address for counsel for the Claimant: Nicole@coloradolawyer.com , and received a non-delivery notice of April 27, 2017. On May 2, 2017, the Office of Administrative Courts (OAC) emailed the proposed decision to the correct address for counsel for the Claimant: Nicole@coloradolawyer.net The office of Claimant's counsel acknowledged receipt thereof on May 2, 2017. Consequently, Claimant had two days within which to file objections to the proposed decision. The Claimant filed no timely objections. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability and, if compensable, medical benefits and average weekly wage (AWW). The Claimant bears the burden of proof, by a preponderance of the evidence on these issues.

If compensable, the Respondents bear the burden of proof, by preponderant evidence on the issue of offsets.

Because the ALJ hereby determines in this decision that the Claimant did **not** sustain compensable injuries on August 26, 2016, as he alleges, resolution of all other designated issues is moot.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated and the ALJ finds that the Claimant was a **Colorado** employee, subject to the extra-territorial provisions of § 8-41-204, C.R.S. The accident in question occurred near Layton, Utah.

2. Although the parties stipulated and the ALJ found that the Claimant's AWW was $630, the issue is moot in light of the fact that the claim is not compensable.

3. The Claimant was born on September 10, 1946 and was 70 years old on the date of hearing.

4. The Claimant began work for the Employer as an over-the-road (OTR) truck driver in August or September 2016. Prior to the present employment, he had worked as a tour bus driver and a school bus driver. No trailers were involved in these jobs. Neither of these jobs required a CDL license.

5. The Claimant's duties included driving a tractor trailer with loads of items, 7 days a week according to the Claimant, and delivering freight throughout the country. On the date of the alleged injury, he was a trainee to Mitchell ("Mike") J. Rankin, Jr., who testified at the hearing.

The Accident of August 26, 2016

6. While driving through Utah on August 26, 2016 at approximately 6:00 AM, the Claimant was involved in a motor vehicle collision when the semi-truck he was in struck a deer. The Claimant was asleep in the passenger seat at the time of the incident. He testified that he did not recall if he hit his head, but he was jolted awake by the impact. He was resting because he did not feel well as a result of some food he had eaten earlier. He felt that he had some "bad tuna," and he felt light headed and dizzy.

7. Mitchell "Mike" Rankin is a mentor driver for the Employer. As a mentor driver he trains new drivers how to drive and handle a truck on the road while making deliveries. He was the Claimant's mentor driver on August 26, 2016, and he was driving the truck at the time of the accident. He credibly testified that when he hit the deer he came to a slow stop and pulled over on the side of the interstate. He had been trained to react in this manner. Although the Claimant stated that he was asleep at the time of impact and was jolted awake, he testified that he believed that Rankin slammed on the brakes after the impact. According to Rankin, he then awakened the Claimant and told him that they had hit a deer. The impact of the deer caused damage to the radiator making the truck un-drivable, causing it to leak and damaging the front end of the vehicle (Claimant's Exhibit 1). Rankin testified that the Claimant remained sleeping until the vehicle pulled over to the side of the road. Rankin further testified that because of the Claimant's position as a passenger, it would have been impossible for the Claimant to hit his head on the dashboard, as the Claimant had stated. The ALJ resolves these conflicts in the testimony in favor of Rankin because Rankin credibly explained that he had been trained not to slam on the brakes when a large animal was hit, but instead to come to a slow stop and pull over to the side of the road; and, the Claimant could **not** have hit his head on the dashboard. For the reasons herein below

articulated, where the Claimant's version of events does not add up, the ALJ finds Rankin's version of his reaction to the impact credible and the Claimant's version lacking in credibility.

8. Both the Claimant and Rankin waited for a police officer to arrive. The Claimant did not report any injury to Rankin or Officer Martin, who responded to the accident. Rankin was not cited for the incident. Rankin testified that the truck was carrying a full load. Also, he stated he did not hard brake when he saw the deer because if he had done so, the truck would have jack-knifed or tipped over. The truck remained right side up and did not jack-knife. This is shown in the police report diagram (Respondents' Exhibit. M, p.120 and Claimant Exhibit 6, p.10). Rankin's testimony in this regard makes sense and is corroborated by the surrounding circumstances. The Claimant's version, on the other hand, does not make sense, is **not** corroborated by any persuasive evidence. Therefore, the ALJ resolves this conflict in the testimony in favor of Rankin's version of the accident, and against the Claimant's version.

9. The Claimant spoke with Tammy Bowers, the Workers Compensation Manager for the Employer, the day the incident occurred. She has been in this position for 13 years. Bowers testified that the Claimant complained of being lightheaded and experiencing dizziness. Bowers decided to put the Claimant up in an air conditioned motel room in Layton, Utah as a reaction to his complaints of lightheadedness and dizziness. As found herein above, the Claimant felt that he had a "bad tuna sandwich." He did not state that he struck his head. Bowers specifically asked the Claimant if he had any tender spots or marks on his head or anywhere and the Claimant informed her that he did not have any marks, bruising or injuries. It was not until October 2016 that Claimant alleged he had head, neck or right shoulder injuries from the August 26, 2016 accident.

Credibility

10. In an effort to discredit Rankin's credibility, the Claimant testified that he and Rankin had conflict on many things, including the music they listened to when driving. Presumably, the Claimant would have the ALJ infer from this that Rankin had a bias and motive to testify falsely, under oath. The ALJ rejects this implication. On the other hand, Rankin disclaimed any bias or motives against the Claimant; and, stated that the Claimant could listen to the Claimant's music when driving and Rankin could listen to Rankin's music when driving—a compromise that makes sense. Therefore, the ALJ infers no bias or adverse motives against the Claimant on Rankin's part.

11. The Claimant's testimony that he had a "bad tuna" and felt dizzy and lightheaded at the time that he was allegedly injured in the accident, was to address what the Claimant knew he had told Tammy Bowers on the day of the accident when he did **not** report an alleged work-related injury, and Bowers put the Claimant up in an air conditioned motel room in Layton, Utah. The ALJ infers and finds that the Claimant was

"covering his bases," knowing what he had told Bowers on the date of the incident when he did **not** report a work-related injury.

12. The ALJ infers and finds that the Claimant has the greatest interest in the outcome of the litigation, and Rankin does not. Further, the Claimant's testimony contains improbabilities (*e.g.,* that Rankin slammed on the brakes at the moment of impact), his testimony and actions after the accident of August 26, 2016 and not reporting an alleged work-related injury until October 2016 or not seeking medical attention after the incident, are inconsistent with the injuries that the Claimant now claims; and, lastly the Claimant's version of events as found herein above, is unreasonable. On the other hand, Rankin presented credibly. He has no interest in the outcome of the claim; and, his testimony was reasonable, consistent and probably quite accurate. Therefore, the ALJ finds Rankin's testimony credible and the Claimant's testimony lacking in credibility.

Medical

13. The Claimant has had numerous pre-existing injuries and issues involving his head, neck and right shoulder. He did not present any persuasive evidence that showed his pre-existing conditions had worsened, or were aggravated/accelerated, in any way. In fact, radiology records did not reveal any objective evidence of an injury on August 26, 2016 (Respondents' Exhibit F, pp. 74 – 82).

14. Eric Tentori, D.O., evaluated and treated the Claimant in this case. He is an authorized treating provider (ATP). Dr. Tentori testified by telephone that there was no evidence of any injury to Claimant on August 26, 2016. Dr. Tentori carefully avoided basing any part of his opinions on the rejected hearsay of Yeger. Based on the mechanism of injury, Dr. Tentori was of the opinion that the incident was minor and did not cause any need for medical treatment or impairment (Respondents' Exhibit B pp. 6-7 and Dr. Tentori's telephone testimony).

15. Deborah L. Mattingly, M.D., provided a record review of the Claimant's prior conditions in relation to the current claim. She also was of the opinion that the Claimant did not suffer any injury as a result of the minor motor vehicle incident (Respondents' Exhibit C). Dr. Tentori stated that any treatment that Claimant receives should be sought outside of the workers compensation given the lack of evidence of any work-related injury. The ALJ infers and finds that Dr. Tentori, the Claimant's ATP, is of the opinion that the Claimant did not sustain a work-related aggravation/acceleration of his pre-existing conditions by virtue of the minor accident of August 26, 2016.

16. The Claimant did not present any persuasive evidence concerning medical care he required as a result of the accident of August 26, 2016. He also did not present any persuasive evidence of any aggravation/acceleration of any pre-existing conditions.

17. The opinion of ATP Dr. Tentori that the incident on August 26, 2016 was minor and did not cause an injury or, aggravate or accelerate any pre-existing condition is credible, persuasive and, essentially, un-refuted. The radiology records and the medical opinion of Dr. Mattingly corroborate the lack of causal relatedness of any aggravating injury in the incident of August 26, 2016.

Ultimate Findings

18. In assessing credibility, the ALJ must weigh several factors: (1) interest in the outcome of the litigation; the consistency or inconsistency of a witness' testimony; the reasonableness or unreasonableness of the testimony (probability or improbability); the motives of a witness; and, bias or prejudice. As found herein above in Finding No. 11, these factors weighed against the Claimant's credibility and in favor of Rankin's credibility. This matter turns on credibility and because the ALJ finds Rankin credible and the Claimant incredible, the Claimant has failed to support his claim of a work-related injury or aggravation/acceleration of a pre-existing condition, on August 26, 2016.

19. The opinions of ATP Dr. Tentori and Dr. Mattingly are undisputed and they are credible. The Claimant furnished no persuasive medical opinions to the contrary. Therefore, the opinions of ATP Dr. Tentori and Dr. Mattingly are dispositive of the issue of "compensability."

20. The Claimant has failed to prove, by a preponderance of the evidence that he sustained compensable injuries on August 26, 2016, arising out of the accident whereby the truck in which he was a passenger struck a deer.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found herein above in Findings Nos. 9 through 12, the credibility factors weighed against the Claimant's credibility and in favor of Rankin's and Bowers' credibility. This matter turns on credibility and because the ALJ found Rankin and Bowers credible, and the Claimant lacing in credibility, the Claimant has failed to support his claim of a work-related injury or aggravation/acceleration of a pre-existing condition, on August 26, 2016.

b. As found, the opinions of Dr. Tentori and Dr. Mattingly that the Claimant did not sustain work-related injuries on August 26, 2016 are undisputed. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. Further, their opinions are credible and dispositive of the 'compensability" issue.

Sufficiency of Injury to be "Compensable"

c. An "injury" referred to in § 8-41-301, C.R.S., contemplates a **disabling** injury to a claimant's person, not merely a coincidental and non-disabling insult to the body. *See Henderson v. RSI, Inc.,* 824 P.2d 91 (Colo. App. 1991). *Also see Gaudett v. Stationers Distributing Comp*any, W.C. No. 4-135-027 [Indus. Claim Appeals Office (ICAO), April 5, 1993]. The consequences of a work-related incident must require medical treatment or be disabling in order to be sufficient to constitute a compensable event. If an incident is not a significant event resulting in an injury, claimant is not entitled to benefits. *Wherry v. City and County of Denver*, W.C. No. 4-475-818 (ICAO, March 7, 2002). As found, the Claimant did not seek or require medical attention for his claimed injuries after the incident of August 26, 2016. He is not claiming that the "bad tuna" that caused lightheadedness and dizziness was a compensable event. Indeed,

he did not seek medical attention for his alleged upper back injury until after October 2016. The ALJ concludes that the circumstances of the incident of August 26 2016, are insufficient to constitute a compensable injury.

Compensability

d. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a pre-existing condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a pre-existing condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo..App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the truck accident of August 26, 2016 did **not** aggravate or accelerate the Claimant's pre-existing conditions. Therefore, he did **not** sustain compensable injuries on August 26, 2016.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001).

"Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden of proof on "compensability."

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of May 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of May 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-014-029-01

ISSUES

- Whether Claimant established by a preponderance of the evidence that his sternum fracture was work related, and

- Whether Claimant established by a preponderance of the evidence that he is entitled to payment of previously provided medical benefits and those medical benefits are reasonably necessary to cure or relieve the effects of a work related injury.

PROCEDURAL ISSUES

The parties stipulated that Claimant's average weekly wage on April 22, 2016, was $1900.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a 47-year-old truck driver and former employee of the Employer.

2. On April 10, 2016, Claimant went on a horse ride with his son. Claimant initially testified that his horse was walking when he dropped the horse's rope and then reached for it. While Claimant was reaching, the horse stopped and Claimant's chest struck the horse's saddle. Claimant subsequently testified the horse was galloping before it stopped. On cross examination, Claimant agreed that the horse was galloping, cantering, and trotting, which, in Claimant's opinion, are all the same speed. Ultimately, Claimant stated the horse was travelling at four-tenths its maximum speed. Claimant testified that when the horse stopped, he struck his chest on the saddle's wooden pommel. This immediately caused pain and a bruise. Claimant was concerned about the bruise and sought medical care. Claimant then testified that the pain was minimal and that he was more concerned about the large bruise.

3. Approximately two hours after the horse-related accident, Claimant's chest pain began to increase. He sought medical treatment on April 11, 2016. Mauricio Waintrub, M.D., treated Claimant and X-rayed Claimant's chest. The X-ray was read as "normal" on that date. Dr. Waintrub did not note any swelling or bruising in his record of the evaluation. He prescribed Norco after Claimant complained of chest pain. Claimant testified that this injury was muscular while the alleged work injury seemed deep in his chest. However, on April 11, 2016, Claimant told Dr. Waintrub his chest felt as though it was "falling from inside." Claimant later reported to Dr. Raschbacher, Respondents' IME, that his chest had a five-inch bruise on April 11, 2016 and that it hurt to breathe.

4. Dr. Waintrub eventually concluded, after a CT scan of Claimant's chest was performed, that Claimant's sternum fracture was present when he examined Claimant on April 11, 2016.

5. No other physician treated Claimant between April 11, 2016 and April 22, 2016.

6. Claimant testified that he had pain symptoms after the April 11, 2016 appointment, but they were not severe and did not bother him. Claimant testified that the pain began to resolve within two days and completely subsided five days after the injury.

7. Claimant testified he never told anyone his horse bucked. However, Christopher Tierney, another of Employer's drivers, testified that he had a conversation with Claimant in the spring of 2016 at the Denver product terminal. Mr. Tierney had noticed Claimant looked sick or hurt while standing at a computer terminal. Claimant told Mr. Tierney he was not doing well because he had been on his horse when it had bucked and thrown Claimant into a trailer. Mr. Tierney reported the conversation to Francis Teter, Employer's fleet manager, within a couple of weeks.

8. At hearing, Mr. Teter testified that he spoke with Mr. Tierney regarding Claimant's statements two to three weeks after the initial report of injury, in May, 2016. Claimant testified that he did not have any difficulty doing his job prior to the work injury, and that he does not know who Christopher Tierney is. Claimant did recall having a brief conversation at an unknown location with unknown driver approximately three days after the horse accident. Claimant testified that he told that person he was only in a little bit of pain.

9. Claimant alleges that he sustained an injury to his sternum while at work on April 22, 2016. At hearing, Claimant testified that on April 22, 2016, he was unloading at a gas station when his hose got stuck in its storage tube mounted to the side of the truck. Claimant left the end he was initially pulling and moved closer to the storage tube. Claimant was approximately two feet from the stuck end of the hose when he grasped the hose with two hands and pulled more forcefully. Once the hose came free, Claimant testified the tip of the hose bent in such a way that it struck him in the chest. Claimant testified he lost his breath for three to four minutes after the hose tip hit him. According to Claimant, the metal tip of the hose that struck his chest weighs 25-30 pounds. However, that testimony was contradicted by Mr. Teter who testified more credibly that the metal tips are cast aluminum and weigh only two pounds.

10. Claimant reported the incident to Employer and sought medical treatment at Advanced Urgent Care ("AUC"). Claimant confirmed that the Employer's designated provider form bore his signature and handwriting, but he did not recall receiving or signing the form.

11. Claimant was treated at AUC by Christopher Wright, PA-C, on April 22, 2016. Claimant testified at hearing that on April 22, 2016, his pain level was 9/10. This

testimony was insistent with his recorded report to Mr. Wright of a pain level of 6/10. Claimant acknowledged that he did not tell Mr. Wright about the April 10, 2016 horse-related injury. Mr. Wright did not record Clamant having any bruising or swelling from the impact of the hose, nor did he impose any work restrictions after the April 22, 2016 examination.

12. Claimant testified that he called AUC to move his next appointment, which was initially on a later date, to April 27, 2016 due to an increased pain. On April 27, 2016, Claimant was evaluated by Julie Parsons, M.D. Claimant acknowledged that he did not tell Dr. Parsons about the horse-related injury because she did not ask him about it. He later admitted that Dr. Parsons did ask about prior chest injuries. Dr. Parsons recorded that Claimant was working full duty and had no skin discoloration. Claimant underwent chest x-rays and the radiologist noted a mass behind Claimant's sternum. Dr. Parsons reviewed the X-ray images and noted a possible non-displaced fracture of the sternum. She sent Claimant to the Emergency Department of North Suburban Medical Center for further evaluation.

13. At North Suburban, Claimant was treated by David Krueger, M.D. and underwent another X-ray and CT scan. The CT scan showed a non-displaced, mildly comminuted fracture of the upper body of the sternum. Claimant did not recall whether he told Dr. Krueger about his April 10, 2016 injury and Dr. Krueger's report does not indicate that Claimant did so.

14. Claimant continued treatment with Dr. Parsons who on May 18, 2016, ordered a repeat X-ray which showed "excellent healing and no displacement." Dr. Parsons ultimately placed Claimant at maximum medical improvement and released him to full duty on May 25, 2016. Throughout her treatment, Dr. Parsons never noted or otherwise indicated that Claimant told her about his horse-related injury.

15. Mr. Teter testified that he was Employer's fleet manager and had been for eleven years. When Mr. Teter hired Claimant , he learned that Claimant participated in Mexican rodeos in his free time. Mr. Teter was out of the office on April 22, 2016, and learned about the hose-related incident when he returned days later. Mr. Teter only had a more in-depth conversation with Claimant after learning that Claimant was experiencing pain. The conversation with Claimant occurred at a Murphy's station in Broomfield, Colorado, and Claimant described to him how the injury had occurred. Mr. Teter testified that the trailer pictured in Respondent's Exhibit U 131 was the trailer assigned to the Claimant when he worked for Employer. It is not possible to stand directly in front of the hose storage tubes due to the position of the loading/unloading fittings on the right side of the trailer. The storage tube for the twenty foot hose is approximately four feet and four inches from the ground. Exhibit U at page 132 shows the four inch hose inside the tube which, to Mr. Teter's knowledge, was not modified between April 2016 and the date the photo was taken. The hose tips, or fittings, are made of cast aluminum, are non-sparking, and weigh "a couple of pounds each." The hoses are made as flexibly as possible, but a twenty foot hose would require at least six feet to bend the tip of the hose back to touch the hose. The hose could not bend back over itself two feet from the end as Claimant alleged.

16. Claimant told Dr. Raschbacher that he has seen other drivers with broken jaws from his alleged mechanism of injury. Mr. Tierney has been in the industry for twelve years and has never known of anyone who broke their jaw with an unloading hose. Mr. Teter has been in the fuel hauling industry for thirty-five years and has never known of a hose breaking a driver's jaw.

17. Dr. Raschbacher testified at hearing as an expert in occupational medicine. Dr. Raschbacher performed a respondents' sponsored independent medical examination of Claimant on December 13, 2016, eight months after the initial horse-related injury. Claimant told Dr. Raschbacher about the April 22, 2016 hose incident, but did not disclose the horse-related injury until Dr. Raschbacher asked him about it directly. Claimant stated the first problem with his chest occurred on April 22, 2016. When describing the horse injury, Claimant did not describe the horse as moving. Dr. Raschbacher testified that he would expect a trauma that results in a sternum fracture to be accompanied by bruising because the force required to fracture the sternum would damage overlying tissue as well. He noted that Claimant's medical records from April 22, 2016 and subsequent appointments did not indicate any bruising, edema, swelling, or ecchymosis.

18. Dr. Raschbacher testified that three X-rays, one on April 11, 2016 and two on April 27, 2016, were not initially interpreted as showing fractures. The CT scan on April 27, 2016 did show a non-displaced, mildly comminuted fracture in the upper sternum. Dr. Raschbacher explained that a CT scan uses more accurate technology than an X-ray and produces a much higher quality image. Dr. Raschbacher agreed with Dr. Piko's report that the previous X-rays are actually consistent with the CT scan and confirm a sternum fracture prior to April 22, 2016. Dr. Raschbacher explained the April 11, 2016 X-ray was underpenetrated, meaning too little energy was applied to easily see detail within or behind the sternum.

19. Even assuming Claimant did hit himself in the chest with a hose, no persuasive evidence supports a finding that this aggravated the pre-existing fracture because Claimant presented no persuasive evidence that the fracture was disrupted. More likely than not the fracture would not have healed between April 10 and April 22, 2016, and anything striking Claimant's chest could cause severe pain. Dr. Raschbacher persuasively testified that even a deep breath could cause Claimant to experience pain.

20. Dr. Raschbacher testified further that he has little doubt that Claimant fractured his sternum on April 10, 2016 and that none of the medical care he received for the sternum fracture was work related.

21. James Piko, M.D., also reviewed Claimants' radiological images and submitted an expert report which was admitted as Exhibit B. Dr. Piko is certified by the American Osteopathic Board of Radiology National Board of Osteopathic Medical Examiners, licensed to practice medicine in Colorado and fifteen other states, and specializes in Musculoskeletal Radiology. Dr. Piko reviewed Claimant's chest X-rays and CT scan and concluded that the sternum fracture was present on April 11, 2016 and unchanged on April 27, 2016. Dr. Piko opined that Claimant did not acutely fracture

his sternum on April 22, 2016.

22. Although certain of Claimant's ATPs associated his injury with the alleged April 22, 2016 incident, the ALJ does not find their opinions persuasive because Claimant did not provide relevant diagnostic information to those physicians.

23. Based on the totality of the evidence, the ALJ finds that Claimant did not establish by a preponderance of the evidence that his injury is work related.

24. Based on the totality of the evidence, the ALJ finds that Claimant did not establish by a preponderance of the evidence that medical benefits he received are reasonably necessary to cure or relieve the effects of a work related injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S., §8-41-301(1) (c). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Id.* at 846. A compensable injury is an injury which "arises out of" and "in the course of" employment. *See* C.R.S. §8-41-301(1) (b).

In deciding whether a claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Credibility is a significant consideration when determining compensability. In assessing credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

An incident which merely elicits pain does not compel a finding that the claimant sustained a compensable aggravation or new injury. Colorado law is clear that the mere increase in pain or increase in symptoms associated with a prior injury does not compel the finding of a new injury or aggravation. *F.R. Orr Construction v. Rinta*, 717 P.2d 965, (Colo. App. 1985). Rather, to receive medical benefits the claimant must establish that the need for "additional medical treatment is proximately caused by the aggravation, and is not simply a direct and natural consequence of the pre-existing condition." *See Merriman v. Indus. Comm.*, 210 P.2d 448, 450 (Colo. 1949) and

Rockwell International v. Turnbull, 802 P.2d 1182 (Colo. App. 1990)). The ALJ must examine the totality of the circumstances to determine whether there is a sufficient nexus between the employment and the injury such that the accident may be said to have occurred in the scope of the Claimant's employment. *City and County of Denver School District No. 1 v. Industrial Commission*, 196 Colo. 131, 581 P.2d 1162 (1978).

In establishing causation, a claimant "must show that the industrial injury bears a 'direct causal relationship between the precipitating event and the resulting disability.'" *See Garcia v. CF&I Steel,* W.C. No. 4-454-548 (ICAO May 14, 2004).

The ALJ concludes that the following persuasive factors support a finding that Claimant did not suffer a new injury or compensable aggravation on April 22, 2016. But rather Claimant's symptoms are the result of a sternal fracture that occurred outside of work.

A preponderance of objective medical evidence supports this conclusion. For example:

- Drs. Piko and Raschbacher opined that Claimant's sternum was fractured on April 10, 2016and remained unchanged by Claimant's alleged work injury.

- Dr. Waintrub opined that Claimant's sternal fracture was present on April 11, 2016.

- Claimant was bruised by the injury from his horse, but was not bruised and showed no other external sign of injury from the alleged April 22, 2016 incident. Mr. Wright noted that there was not even skin discoloration on April 22, 2016. Dr. Raschbacher testified that the amount of force required to fracture a sternum would very likely cause bruising and swelling.

The mechanism of Claimant's injury is inconsistent with the properties of the equipment he was using. For example:

- Respondents' exhibits depict the hose in and partially out of the storage tube on the truck.

- In order for the tip of the hose to strike Claimant as he described, the hose would have had bend in front of Claimant until the tip faced Claimant's chest. Based on the more credible testimony of Employer's witness, the ALJ concludes that the two-foot length of hose in question was not flexible enough to make such a sharp turn, and that the hose could not have struck Claimant as he described.

- Claimant exaggerated the weight of the aluminum fittings on the ends of the hose testifying that the fittings weighed 25-30 pounds. More

persuasive testimony from Employer's witness established that the fittings were made of aluminum and weighed approximately two pounds.

And finally the ALJ concludes that Claimant was not credible for the following reasons:

- Claimant was a poor historian. His testimony was often inconsistent with his responses to interrogatories, his own statements at hearing, and prior statements.

- Claimant was not forthcoming with his medical providers and other doctors by failing to inform them of his April 10, 2016, horse-related injury despite their inquiries about prior chest injuries.

- Claimant was not forthcoming on cross-examination. For example, when Respondents' counsel asked him how fast his horse was moving just before it stopped: (1) Claimant's answers were unspecific; (2) he argued with counsel over linguistics; and (3) he then testified inconsistently that galloping and trotting were the same speed, that a canter is a half-gallop, and that cantering is the same speed as galloping.

- When asked for details about how the injury occurred, Claimant responded, "I can't remember" to at least nine consecutive questions.

- Claimant testified that the horse-related injury was not serious; however, he went to the doctor after the horse injury because he was frightened by a five-inch bruise over his sternum. In addition, despite his denial, his pain was so severe that his doctor prescribed narcotic pain relievers. In contrast, he testified that the symptoms caused by his alleged work injury were more severe. This testimony is contradicted by medical records which note there was not even redness at the alleged site of the injury and that the doctor had Claimant take over-the-counter pain relievers. As Dr. Raschbacher testified, if Claimant had struck his chest hard enough to break his sternum or aggravate the pre-existing fracture one would certainly expect the overlying soft tissue to show at least some sign of the impact.

Thus, the ALJ concludes that Claimant did not suffer a new injury or compensable aggravation on April 22, 2016.

Claimant bears the burden to prove by a preponderance of the evidence that his medical care was reasonably necessary to cure and relieve the effects of an industrial injury. Having concluded that Claimant did not suffer a new injury or compensable aggravation on April 22, 2016, the ALJ is unable to conclude that Claimant established by a preponderance of the evidence that he is entitled to payment of previously provided medical benefits and that those medical benefits are reasonably necessary to cure or relieve the effects of a work related injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to meet his burden of proving by a preponderance of the evidence that he suffered a new injury or a compensable aggravation of a pre-existing injury on April 22, 2016.

2. Claimant's claim is not compensable, and is denied and dismissed.

3. Claimant is not entitled to payment of previously provided medical benefits.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 3, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his right knee on March 23, 2016.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to a general award of reasonable and necessary medical benefits to treat his right knee.

3. Whether Claimant has established by a preponderance of the evidence that the right knee surgery performed by Dr. Foulk on October 19, 2016 was reasonable, necessary, and related to a compensable right knee injury.

4. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from October 19, 2016 through October 22, 2016.

FINDINGS OF FACT

1. Claimant is 59 years old and works for Employer as an Experience Advisor. Claimant's job duties include greeting customers and communicating with customers who bring their vehicles in for service. Claimant gets the customers' cars to Employer's mechanics, follows up with customers to let them know what is wrong with the vehicles, and performs various service calls to customers.

2. Prior to March 23, 2016 Claimant had no issues with his right knee. Claimant had left knee issues in 2011. In 2011 Claimant was playing tennis and ran after a ball when he had a sharp pain in his left knee. Claimant underwent a meniscal repair and two years later underwent a left total knee arthroplasty.

3. At a Kaiser Permanente evaluation in July of 2011 Claimant reported left knee pain after an injury playing tennis. *See* Exhibit B.

4. On October 6, 2011 Claimant was evaluated by Michael Gallagher, M.D. Claimant reported no significant pain in his left knee prior to July 2011 and that he had had ongoing pain since in the left knee medially, sometimes worse with activity. Dr. Gallagher noted that MRI images demonstrated evidence of significant degenerative joint disease in the left knee with osteophyte formation and medial meniscus tearing. Dr. Gallagher recommended continued conservative management and provided a corticosteroid injection. Dr. Gallagher discussed activity modification and also

discussed the possibility of arthroscopy surgery with meniscectomy. Dr. Gallagher did not recommend surgery given the degenerative changes unless Claimant had significant onset of mechanical symptoms. *See* Exhibits B, 7.

5. On April 5, 2012 Claimant was evaluated by Dimitri Zaronias, M.D. Claimant reported persistent pain on the medial joint line and now having trouble shifting in his left knee. Dr. Zaronias noted mild swelling, medial joint line pain, medial sided pain with McMurray testing, and a minimally affected gait. Dr. Zaronias opined that x-rays showed medial compartment arthritis and that an MRI scan revealed the same with an unstable medial meniscus tear. Dr. Zaronias discussed surgical and non surgical options. Dr. Zaronias noted that the surgery could debride out the torn meniscus and that surgery would potentially eliminate the mechanical symptoms but may not affect the arthritis and that Claimant may still have persistent achiness in the future as the arthritis advances. Claimant wished to proceed with surgery due to his recurring symptoms. *See* Exhibit B.

6. On April 19, 2012 Claimant underwent a left knee partial medial meniscectomy and debridement of patellofemoral joint. Following surgery, Claimant had injections for his osteoarthritis and eventually on February 11, 2014 Claimant underwent a left total knee arthroplasty for his osteoarthritis. Claimant's left knee healed. Claimant's left knee and right knee were both fully functioning and he had no pain or limitations in either knee until March of 2016. *See* Exhibits B, C.

7. On March 23, 2016 Claimant was at work. There had been a big snow storm that day with heavy and wet snow covering the ground. Claimant was at work early and he and some co-workers went outside to shovel the walkways, driveways, and entrance to the store. Claimant shoveled for approximately one hour before coming inside for a coffee break.

8. After coffee, Claimant went back outside and again began shoveling snow. Claimant was pushing the snow with a shovel when he felt a pop in his right knee. At the time he felt the pop he had his left hand forward on the shovel, his left shoulder pointed forward, bent knees, and had his right knee turned out slightly. Claimant felt the pop and a sharp pain that felt like he had been stabbed with a needle.

9. Claimant did not slip or fall. Claimant used the snow shovel to limp back into the building. Claimant reported the incident to pretty much everyone at the office that day, including a human resources person who directed Claimant to report to the safety liaison.

10. Due to the snow storm, there was also a power outage that day and the electronic reporting system for injuries was not up and running. Claimant believes that he made an electronic report of injury approximately two days later.

11. Claimant testified credibly that he wanted to go home and ice his knee and that he didn't immediately want treatment. However, he testified that one week later, his

knee was still not feeling better so he went to Concentra for treatment. Claimant testified credibly that icing and elevating didn't help it much and that he had a constant sensation of a "marble" in his knee.

12. On March 29, 2016 Claimant was evaluated at Concentra by Lloyd Thurston, D.O. Claimant reported a pop in his right knee while shoveling snow on March 23, 2016 and that his knee felt unstable. Claimant reported no prior right knee problems but a prior left knee total knee arthroplasty. Dr. Thurston found tenderness on the lateral joint line, a positive lateral Apleys grind test, and a positive lateral McMurray test. Dr. Thurston assessed tear of the lateral meniscus of the right knee and ordered an MRI of the right knee. *See* Exhibits D, 4.

13. On April 7, 2016 Claimant underwent an MRI of his right knee that was interpreted by Patrick O'Malley, M.D. The impression was: large knee joint effusion; oblique tear of the posterior horn of the medial meniscus contacting the inferior articular surface; multiplanar tear of the body and posterior horn of the lateral meniscus that contacts the superior and inferior articular surfaces; findings consistent with patellar maltracking and excessive lateral pressure syndrome and associated chondromalacia of the patellofemoral compartment; and moderate chondromalacia of the lateral femorotibial compartment. *See* Exhibits E, 5.

14. On April 12, 2016 Claimant was evaluated by Dr. Thurston. Dr. Thurston noted that he discussed the MRI results of an acute meniscus tear and chronic degenerative changes with Claimant. Dr. Thurston assessed right medial meniscus derangement and referred Claimant to an orthopedic specialist. *See* Exhibits D, 4.

15. On April 28, 2016 Claimant was evaluated by orthopedic specialist Douglas Foulk, M.D. Claimant reported a pop in his right knee and that since it felt like he was walking around on a marble. Claimant reported swelling that had persisted since the injury, pain at a 6-7/10, clicking, and catching. Dr. Foulk assessed primary osteoarthritis of the right knee, medial meniscus tear of the right knee, and pain in the right knee. Dr. Foulk reviewed the risks and benefits of surgery and non surgical alternatives. Dr. Foulk opined that Claimant had some osteoarthritis that was present prior to the claim, but opined that the meniscal pathology present would not heal with physical therapy or tincture of time and required surgical intervention. Claimant indicated that he wished to proceed with a right knee arthroscopic partial medial and lateral meniscectomy, chondroplasty. *See* Exhibits F, 1.

16. On May 2, 2016 Dr. Foulk's office submitted a surgery authorization request for right knee arthroscopy with medial and lateral meniscectomy. *See* Exhibit 1.

17. On May 12, 2016 Timothy O'Brien performed a medical records review and issued a report. Dr. O'Brien opined that Claimant was not a candidate for an arthroscopic surgery and disagreed with Dr. Foulk that surgery was reasonable and necessary. Dr. O'Brien opined that Dr. Folk's opinion was unsubstantiated and ran contrary to every epidemiologically valid scientific treatise that had been published in

orthopedic literature since 2002. Dr. O'Brien opined that given the overwhelming scientific evidence proving that an arthroscopic surgery is neither beneficial to a knee that is painful due to osteoarthritis or a knee that is painful due to a degenerative medical or lateral meniscal tear, the surgery was contraindicated. Dr. O'Brien noted that Claimant had a contralateral total knee replacement which spoke to the genetic nature of Claimant's condition. Dr. O'Brien opined that Claimant experienced a temporary aggravation of his pre-existing arthritic condition on the date of his injury and that those types of minor strains and sprains of arthritic knees were commonplace. Dr. O'Brien noted that he had performed nearly 3,000 total knee replacements and had treated tens of thousands of patients with knee osteoarthritis and opined that feeling pain while shoveling snow was not surprising. Dr. O'Brien opined that it was medically probable that Claimant's minor flare of osteoarthritis would resolve within two months and that after his minor injury healed, Claimant would remain a candidate for a total knee arthroplasty just as he was prior to the work injury. *See* Exhibit A.

18. On June 21, 2016 Claimant was evaluated by Dr. Foulk. Dr. Foulk noted that Claimant had returned for further evaluation of right knee pain that was the result of an acute injury at work on March 23, 2016. Claimant reported that the prior cortisone injection had helped alleviate symptoms by 30-50%. Claimant also reported that the surgery had been denied and Dr. Foulk reviewed the denial letter. Dr. Foulk reviewed Dr. O'Brien's report. Dr. Foulk noted that although Dr. O'Brien referred to several articles published in orthopedic surgery based literature, everyone was aware of the statistical weakness of those papers and that orthopedic surgeons managing conditions like Claimant's are aware that many patients do indeed benefit from arthroscopic treatment. Dr. Foulk noted that he was not claimant to attempt to improve Claimant's arthritic component, but was attempting to improve the meniscal component of the problem and noted that Claimant was well aware that the arthritic component would be minimally improved, if at all. *See* Exhibits F, 1.

19. On June 23, 2016 Dr. Foulk's office submitted a second surgery authorization request. *See* Exhibit 1.

20. On October 5, 2016 Dr. O'Brien performed a records review and issued a report. Dr. O'Brien opined that nothing he reviewed more recently had altered his opinion from his May 12, 2016 report and he again opined that the surgery recommended by Dr. Foulk was not reasonable or indicated. Dr. O'Brien opined that a risk/benefit analysis, peer-reviewed literature, and empirical evidence argued against the recommended surgical intervention. Dr. O'Brien noted that although Dr. Foulk indicated that his cited articles were statistically weak that most had achieved Level 1 evidentiary status which is considered the highest level of evidence obtainable. Dr. O'Brien opined that the literature does not contain any articles with a Level 1 or Level 2 evidentiary status that supported Dr. Foulk's recommendation for surgery. Dr. O'Brien opined that the surgery was contraindicated and should not be approved. Dr. O'Brien opined that the degenerative medial meniscal tear that Dr. Foulk was using as the sole indicator for the arthroscopic surgery had been biomechanically inoperative for years and was not a pain generator. Dr. O'Brien opined that it was a pre-existing condition

long prior to the work incident in question and that the work incident only temporarily aggravated the osteoarthritic condition and that Claimant had returned to his pre-injury level of function. Dr. O'Brien opined that Claimant's ongoing symptomatology was due to his osteoarthritis in the knee joint. Dr. O'Brien opined that Claimant was not a candidate for an arthroscopy but possibly was a candidate for a total knee arthroplasty. *See* Exhibit A.

21. On October 19, 2016 Claimant underwent right knee surgery performed by Dr. Foulk. The pre-operation and post-operation diagnoses were: medial femoral condylar chondromalacia, lateral femoral condylar chondromalacia, patellar chondromalacia, chondromalacia of the trochlear groove of the knee, medial tibial plateau chondromalacia, lateral tibial plateau chondromalacia, loose body in the knee joint, and knee synovitis. The procedure performed was: right knee arthroscopic partial medial and partial lateral meniscectomy; right knee arthroscopic chondroplasty of the patella, femoral trochlear groove, medial femoral condyle, lateral femoral condyle, medial condylar surface of the tibial plateau, and lateral condylar surface of the tibial plateau; right knee arthroscopic removal of loose bone of the intercondylar notch compartment; and right knee arthroscopic major synovectomy of the medial, anteromedial, and intercondylar notch compartments. Dr. Foulk found a complex full thickness meniscus tear involving greater than 50% of the posterior horn in the medial compartment, and found a white-white zone full thickness tear involving greater than 50% of the posterior horn in the lateral compartment. *See* Exhibits G, 2.

22. On October 24, 2016 Claimant was evaluated by Dr. Foulk's PA, Maria Hartman. It was noted that the incision was healing well with no signs of infection, that the swelling/effusion was moderate, and that Claimant's pain levels were at 2-3/10. PA Hartman provided work restrictions of light duty, seated or desk position until strength returned to normal. *See* Exhibits F, 1.

23. On November 9, 2016 Claimant underwent physical therapy and reported that his knee was doing well and getting better every day. Claimant reported he was going up and down stairs and was now able to go on a bike ride. *See* Exhibits H, 3.

24. On November 18, 2016 Claimant was evaluated by Dr. Foulk. Claimant reported pain at 1/10 and that physical therapy had been very helpful. Dr. Foulk noted no signs of infection. *See* Exhibits F, 1.

25. On December 7, 2016 Claimant underwent physical therapy and reported that his right knee felt really good and that he was hoping to go skiing that weekend. *See* Exhibits H, 3.

26. On December 20, 2016 Claimant was evaluated by Dr. Foulk. Claimant reported pain as mild, 1/10. Dr. Foulk performed a right knee aspiration and cortisone injection noting the indication for the injection was Claimant's primary osteoarthritis. Dr. Foulk recommended that Claimant continue with formal and home based therapy programs to increase strength. *See* Exhibits F, 1.

27. Claimant testified credibly at hearing. Claimant underwent surgery outside of workers' compensation because he was fed up with the constant pain, swelling, locking, trouble sleeping, and because he was sick of having to rely on pain medications and did not want to become addicted. Claimant's daily activities were difficult and he just wanted his knee fixed.

28. Claimant missed four days of work immediately following the surgery due to this injury. Claimant testified credibly that although he was in pain, he continued to show up for all of his other scheduled shifts and wanted to get back to work quickly after surgery. Claimant's normal pay is twice per month. Since approximately April of 2016, he had received bi-monthly paychecks with a check on the 15th of the month for gross earnings of $3,125.01 and a second check at the end of the month for gross earnings of $2,083.34. Claimant's paychecks for the period of time covering the four missed days show he was paid his normal wages with gross earnings in his October 31, 2016 paycheck (covering October 6, 2016 through October 21, 2016) of $2,083.34 and gross earnings in his November 15, 2016 paycheck (covering October 22, 2016 through November 5, 2016) of $3,125.01. However, these two paychecks also show that he was charged for vacation time of $572.46 and $151.06, respectively. The total vacation time charged of $723.52 shows diminished earning capacity during the four day period at issue. *See* Exhibit 9.

29. Claimant testified credibly that he is extremely satisfied with the results of the surgery, that he is doing much better now, and that he was able to ski multiple times this year. Claimant is still rehabbing his knee, but is doing much better.

30. Dr. O'Brien testified by deposition consistent with his medical reports. Dr. O'Brien opined that all of the MRI findings were degenerative and that the MRI showed no acute injury. Dr. O'Brien opined that no injury occurred and that Claimant's pain was a manifestation of Claimant's arthritis. Dr. O'Brien noted that when Claimant was shoveling and felt knee pain, and even a pop, that was very characteristic of arthritis to have cracks and pops and creaks and crunches. Dr. O'Brien noted that Claimant had arthritic effusion and that arthritic joints have extra water on them and that the subsequent MRI showed no evidence of acute injury and just chronic, longstanding changes due to desiccation and aging. Dr. O'Brien opined that all the factual information in Claimant's case pointed to a manifestation of an underlying condition and not new tissue breakage or yielding. Dr. O'Brien opined that you can treat symptomatic arthritis pain with ice, rest, brace, injections, but that you wouldn't be treating an injury just mitigating arthritic symptoms.

31. Dr. O'Brien also testified that the arthroscopic surgery performed by Dr. Foulk was not reasonable or necessary. Dr. O'Brien opined that scientifically and since about 2002, it is known that arthroscopy doesn't help with arthritis knee pain and that the American Academy of Orthopedic Surgeons no longer supports the use of arthroscopy for arthritic knee pain. He opined that scientific evidence overwhelmingly proves that surgeons shouldn't be scoping arthritic knees anymore. Dr. O'Brien noted

that in Claimant's left knee, Claimant had a scope followed by a left knee total replacement and that the arthroscopy scope was a failure within two years requiring a total knee replacement. Dr. O'Brien opined that with Claimant's recent surgery in October of 2016, Claimant has already required cortisone injections in December of 2016 which signifies another arthroscopic failure. Dr. O'Brien opined that the pain was arthritis pain and that the scope had absolutely no ability to positively impact arthritic pain.

32. Dr. O'Brien opined that the arthroscopic surgery that Claimant underwent on his right knee in October of 2016 did not have a positive medical outcome. He opined that surgical outcomes are judged on longer than a two or three or six month follow up. Dr. O'Brien noted that Claimant was already getting injections following the right knee scope and that Claimant's arthritic right knee is responding the same way that his arthritic left knee responded to a left knee scope. He also opined that a loose body was not an indication to perform a scope in an osteoarthritic knee and that loose bodies are common in osteoarthritic knees, don't provide enough symptomatology to warrant an arthroscopy, and not a reason to perform surgery. Dr. O'Brien further opined that a loose body was not created in March of 2016

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant must prove by a preponderance of the evidence that his injury was proximately caused by an injury arising out of and in the course of his employment with the employer. Section 8-41-301(1)(b) & (c), C.R.S*.; City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Id.* The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968).

Claimant has established, by a preponderance of the evidence that he sustained a compensable injury to his right knee on March 23, 2016. As found above, the injury occurred when Claimant was performing job duties and shoveling wet, heavy snow and felt a pop and immediate pain in his right knee. Prior to March 23, 2016 Claimant had no limitations or problems with his right knee. Following the acute injury at work while shoveling snow, Claimant had functional limitations, pain, and swelling that was not previously present. Although MRI testing showed significant underlying arthritis, Claimant was asymptomatic and has established that he sustained an acute injury to his right knee on March 23, 2016. The opinions of Dr. Thurston that the MRI showed an acute injury and that the injury was work related and the opinion of Dr. Foulk that Claimant sustained an acute injury at work are both found credible and persuasive. Claimant has established that he was in the course of his employment when shoveling snow and that the injury to his right knee arose out of his employment. Respondents' argument that Claimant did not sustain an injury but merely felt the normal symptoms of osteoarthritis is not found credible or persuasive. Rather, the opinions of Dr. Thurston and Dr. Foulk are credible and persuasive that an acute injury occurred. This is consistent with Claimant's credible testimony surrounding his lack of symptoms prior to the injury and his continued symptoms after the injury and is consistent with the medical records documenting pain, swelling, and limitation following the acute incident shoveling snow that did not exist prior to March 23, 2016.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Claimant has established that he sustained a compensable work injury to his right knee and that he is entitled to a general award of reasonable and necessary medical benefits to treat his right knee injury.

Further, the issue of whether the October 19, 2016 right knee arthroplasty performed by Dr. Foulk was reasonable and necessary was also before the undersigned. As found above, Dr. Foulk recommended and requested authorization for surgery twice. Dr. Foulk disagreed with Dr. O'Brien and opined that Claimant's meniscal pathology would not heal with physical therapy and required surgical intervention. Dr. Foulk recognized that the recommended arthroplasty would not improve Claimant's arthritic component, but opined that it would improve the meniscal component of Claimant's problem. This is consistent with the 2012 opinion of Dr. Zaronias who noted that the surgery recommended for Claimant's left knee would potentially eliminate the mechanical symptoms but may not affect the arthritis. Additionally, Dr. Gallagher in 2011 opined that given the degeneration, he did not recommend surgery unless there was a significant onset of mechanical symptoms. Here, Claimant had a significant onset of mechanical symptoms in his right knee and Dr. Foulk's opinion that the surgery was reasonable and necessary to relieve the symptoms (despite Claimant's underlying arthritis) is found credible, persuasive, and consistent with the overall medical records. Prior to surgery Claimant had swelling that persisted following the injury, pain at a 6-7/10, clicking, catching, and feeling of walking around on a marble. Following the arthroscopy surgery, Claimant had increased function, less swelling, and less pain. The hearing in this matter was approximately five months after Claimant's right knee surgery. Claimant testified credibly that he was doing well. Indeed, the arthroscopic surgery cured and relieved the effects of the industrial injury. Although Claimant may require injections and future treatment for his underlying osteoarthritis, Claimant has established that the surgery was reasonable and necessary to cure and relieve the work related injury and to treat the meniscal component of Claimant's problem in the right knee.

Dr. O'Brien's opinions are not found credible or persuasive. Claimant's surgery and the goal of the surgery recommended by and ultimately performed by Dr. Foulk was not to improve Claimant's osteoarthritis or arthritic pain. Rather, the goal was to improve the meniscal component of Claimant's right knee. The surgery performed did so and although Claimant has received injections following surgery to treat his underlying osteoarthritis, the surgery did cure and relieve the symptoms that began acutely on the date of his work injury. Claimant no longer has significant pain, swelling, catching, locking, or a feeling of a marble in his knee like he did prior to the surgical procedure. Claimant's underlying osteoarthritis is certainly still present and may require ongoing injection, treatment, and potentially even surgery, but the work related component was treated appropriately and Claimant has established that the surgery was reasonable and necessary to cure and relieve him from the effects of the work related injury.

Temporary Total Disability (TTD) Benefits

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

As found above, Claimant has established that he sustained a work related injury on March 26, 2016. As a result of the injury, Claimant underwent right knee surgery on October 19, 2016 and subsequently missed work from October 19, 2016 through October 22, 2016. During these four days, Claimant was medically incapacitated as he recovered from surgery and he was unable to work. Claimant has established an impairment to effectively or properly perform his regular employment due to surgery and sustained an impairment of wage earning capacity during this time period. Although Claimant was paid his normal salary during this period of time, he was charged vacation time that, if not for his injury, he otherwise would not have had to use. Therefore, Claimant has established that he sustained wage loss due to his injury and has established an entitlement to TTD benefits during this four day period.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his right knee on March 23, 2016.

2. Claimant is entitled to a general award of reasonable and necessary medical benefits to treat his work related right knee condition.

3. Claimant has established by a preponderance of the evidence that the right knee surgery performed by Dr. Foulk on October

19, 2016 was reasonable, necessary, and related to his compensable right knee injury.

4. Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from October 19, 2016 through October 22, 2016.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 4, 2017

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-946-819-02

ISSUES

- Whether Claimant proved by a preponderance of the evidence that she sustained functional impairment beyond the lower extremity?

- Whether Claimant is entitled to disfigurement benefits and if so, in what amount?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On February 14, 2014, Claimant, a 36-year-old female, was employed by Employer as an advanced ski patroller. While performing job duties that day, Claimant's right ski tip caught on an unidentified object causing her to twist her right knee and experience immediate pain.

2. Claimant sought medical treatment and an MRI revealed a medial meniscus tear. In April 2014, Claimant underwent a partial resection of the posterior horn of the medical meniscus with tear fixation. Claimant underwent a repeat MRI in July 2014, which showed significant internal derangement.

3. In August 2014, Claimant underwent a second surgery, manipulation under anesthesia with arthroscopic medial meniscal region scar revision and medial meniscus trimming. Claimant participated in physical therapy directed towards her right knee, but progressed slowly. In December 2014, Claimant underwent a third MRI. The orthopedic surgeon opined that Claimant suffered from arthrofibrosis affecting her right knee.

4. In January 2015, Claimant underwent a third surgery, a partial medial meniscectomy with lysis of adhesions, chondroplasty and debridement. After the third surgery, Claimant continued with physical therapy which involved using a medial unloader brace, icing machine, and H wave machine.

5. On September 1, 2016, Dr. Brian McIntyre, Claimant's authorized treating physician (ATP), placed Claimant at maximum medical improvement (MMI). Dr. McIntyre assigned a 16% scheduled rating of the lower extremity (3% loss of ROM for flexion, 0% loss of ROM for extension, 8% for medical meniscus and 5% for arthritis for arthrofibrosis). Dr. McIntyre did not assign permanent work restrictions.

6. In this claim Claimant alleges she sustained functional impairment beyond the right lower extremity and requests her scheduled rating be converted to whole person.

7. A review of the medical records submitted by both parties reveals the following. The body part injured due to the work incident was Claimant's right knee. The diagnostics ordered addressed Claimant's right knee. The treating physicians did not request MRIs for Claimant's lumbar spine or hips. Claimant's three surgeries sought to repair and improve the function of Claimant's right knee. Claimant did not undergo any invasive procedures to any body part not found on the lower extremity. At MMI, Claimant's permanent impairment rating included range of motion for the knee and Table 40 knee disorders. Claimant did not receive a permanent rating for any body part not on the schedule of disabilities. The ATP did not assign any permanent restrictions designed to prevent injury to any body part.

8. At hearing, Claimant testified that her right knee injury caused pain in her right hip and lower back due to an altered gait and positioning. Claimant testified that the ice machine and H-wave device negatively impacts her ability to sleep. While Claimant's testimony is credible in this regard, the medical evidence submitted by the parties does not support a determination that functional impairment extends beyond the lower extremity. Respondent submitted the medical records from the date of the final surgery through MMI, including the PT records. While the PT records show extensive treatment, it is limited to the right lower extremity. The PT records do not document Claimant complaining of any body part not on the schedule of disabilities. While some of the exercises performed during PT may impact other body parts, the purpose of the PT was to improve functionality of the right knee, including strengthening and range of motion. The "diagnosis" section of the PT notes consistently listed the right knee and issues related to the right knee, not low back or hip. Further, the subjective complaint section of the PT records does not reference body parts not on the lower extremity. The PT records demonstrate functional impairment of the right lower extremity, but not to body parts extending beyond.

9. Dr. McIntyre, Claimant's ATP, opined that in the six months prior to MMI, Claimant only once referenced in the self-check form, a symptom not on the lower extremity. Claimant testified that she would routinely give the physicians updates regarding her status as to symptoms and conditions related to the knee injury. Consequently, in the six months prior to MMI, the records show Claimant only once experienced any low back and/or hip symptoms, without any follow up or need for treatment. Dr. McIntyre noted that at MMI, Claimant did not complain of any symptoms other than those limited to the right lower extremity. Finally, Dr. McIntyre opined, "I do not know of another body part in which the claimant sustained functional impairment." Dr. McIntyre did note that an altered gait could alter body mechanics. However, at hearing Claimant declined to present evidence of an altered gait when given the opportunity during presentation of disfigurement evidence.

10. Aside from Dr. McIntyre and PT, Claimant was followed by a number of physicians whose records were submitted into evidence. Those records do not persuasively document functional impairment beyond the lower extremity. For example, Dr. Steven Singleton was the treating surgeon. Following the last surgery and prior to MMI, Claimant returned to Dr. Singleton five times. The records from those visits do not reveal complaints to a body part other than the lower extremity. Claimant complained of

knee pain and even ankle pain, but did not disclose any hip and/or SI/lumbar pain. Dr. Singleton's observations regarding recovery and treatment related solely to the lower extremity without reference to other body parts, such as lumbar pain due to altered gait or sleep deprivation. Implicit in this would be a determination that Claimant was not experiencing such symptoms.

11. Similarly, in May 2016, Claimant underwent an IME with Dr. John Douthit. Claimant complained of right knee weakness and pain in the medial aspect of her right knee, especially when extending the knee with motion against resistance. The physical examination revealed that Claimant walked without a limp (this examination was nearly 16 months post-final surgery and four months prior to MMI) while wearing the unloader brace. The examination was "normal" with the exception of Claimant's right knee. After reviewing Claimant's medical records and performing a physical examination of Claimant, Dr. Douthit concluded the only injury was to the right lower extremity. He did not document pain, conditions, symptoms, or functional impairment to any part body above the right lower extremity. Dr. Douthit opined Claimant had not reached MMI as she required additional PT for her right lower extremity.

12. Finally, Dr. Robert Dixon followed Claimant as well after the third surgery. On December 10, 2015 (about one year post-third surgery), Claimant presented to Dr. Dixon complaining of minimal knee pain. The report noted a secondary complaint of shoulder pain. This demonstrates that Claimant would reveal symptoms beyond the lower extremity and Dr. Dixon would record such complaint. The remaining reports from Dr. Dixon do not document any low back or hip complaints, or sleep disorder issues.

13. In summary, the ALJ finds that the medical records presented, including those from Drs. McIntyre, Singleton, Douthit, Dixon and PT notes, do not persuasively show functional impairment to any body part beyond the lower extremity.

14. Aside from the medical evidence, Claimant testified at hearing in support of her request. Claimant credibly testified that as a result of the work injury she can no longer perform many of the same activities she performed prior to the accident. For example, Claimant testified she cannot ski in extreme conditions due to knee pain and lack of strength in her lower extremities. Similarly, Claimant has difficulty walking up and down stairs due to knee pain. Regarding positioning, Claimant testified that after sitting for a number of hours her knee would become stiff and swollen, requiring her to stand and perform self-treatment techniques. Finally, Claimant testified that as a result of knee pain and lack of strength, she cannot enjoy the outdoors as much as she used to. Taken as true, and this ALJ has no reason to discredit Claimant's testimony regarding her limitations, those limitations do not justify conversion of her lower extremity rating to whole person rating. The fact Claimant's activities are more limited now than before due to the work injury is not a basis to find functional impairment beyond the lower extremity. The functional limitations described by Claimant are the result of functional impairment found on the lower extremity (i.e. knee pain, quad strength, knee swelling/stiffness). For this, Claimant received a permanent impairment rating. Claimant did not persuasively establish that her function is limited due to impairment of a body part beyond the lower extremity. Rather, to the extent Claimant

can no longer perform at a level she did prior to the work injury, this is due to the symptoms and conditions on her lower extremity.

15. Similarly, Claimant testified that her sleep is disturbed because she uses an ice machine and H-wave machine. While these devices are no doubt uncomfortable and may interrupt sleep, no persuasive evidence established that their use is permanent or that apart from the devices the work injury resulted in a sleep issue. Importantly, Claimant did not receive a rating for sleep disorder. Nor do the medical records in the year plus prior to MMI reveal complaints of sleep deprivation or treatment for such a condition. Finally, Claimant did not present persuasive evidence that her sleep interruptions somehow impacted her daily activity (i.e. sleeplessness resulted in inability to drive, unable to maintain employment or perform work activities, etc.)

16. Claimant persuasively testified that her activities of daily living are limited due to the work injury. However, this in and of itself is an insufficient basis to convert a scheduled rating to whole person. If Claimant's position were accepted, nearly every injury resulting in a scheduled rating would be converted as such injuries (especially those resulting in permanent work restrictions and/or impairment) necessarily impact an injured workers' performance of ADLs. Accordingly, it is hereby found that while Claimant demonstrated functional impairment, such functional impairment is limited to the lower extremity.

17. The ALJ finds and concludes that as a result of her February 14, 2014, work injury, Claimant has a visible disfigurement to the body consisting of four arthroscopic scars over her right knee. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation under section 8-42-108 (1), C.R.S.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. Section 8-42-107(1)(a). The term "injury" contained in § 8-42-107(1) (a) "refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390, 1391 (Colo. App. 1997). "Functional impairment" may not take any particular form. Accordingly, pain and discomfort which interferes with the ability to use a portion of the body may be considered "impairment." *Maynard v. Pokejoy Construction Co., Inc.*, W.C. No. 4-198-489 (ICAO, August 9, 1996). Depending on the facts of a particular claim, damage to the lower extremity may or may not reflect functional impairment enumerated on the schedule of benefits. See *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

The ICAO has addressed conversion of a lower extremity rating in a number of opinions. In *Colacion v. Excel Corp*, W.C. No. 4-546-219 (3/26/04), claimant sustained a right lateral meniscus tear and received a 17% scheduled rating. The ATP restricted claimant from working in temperatures under 50% and to avoid "impact activities beyond walking and standing." At hearing, claimant sought to convert the scheduled rating to whole person. The ALJ credited Dr. Lesnak's opinion that medical impairment and permanent restrictions cannot be equated because the assignment of permanent restrictions is not a prohibition against the activity, it is a recommendation for preventing further injury. Further, the ALJ found that while pain and discomfort which limits the use of his body might be functional impairment, here, claimant failed to show that the permanent restrictions were designed to relieve that pain and discomfort as opposed to prevent further deterioration of the knee. The ALJ denied claimant's request and the ICAO affirmed.

In *Yakovich v. Dayton Hudson Corp/Target Stores*, W.C. No. 4-638-044 (5/9/07), claimant sustained an injury to her right knee. Claimant proceeded to hearing to convert the scheduled rating to whole person. The ALJ concluded that a review of the medical records showed treatment was directed at problems with the right knee and right lower extremity, not low back. Further, the ALJ concluded that claimant's testimony supported restrictions to the right lower extremity, but not to body parts beyond the lower extremity. Finally, the ALJ found that other than referred pain into the back as a result of the knee injury, the record did not support any actual compromise of function in the torso as opposed to the right lower extremity. The ALJ denied claimant's request and the ICAO affirmed.

Finally, in *Parker v. Home Depot USA*, W.C. No. 4-665-039 (6/27/13), claimant injured both knees. Claimant sought to convert the scheduled rating to whole person. The ALJ denied the request, finding that the medical records supported symptoms to the lower-extremities, but no other body parts beyond the lower extremities. Further, the ALJ noted that while on two occasions claimant complained of hip pain, this did not remove the injury from the schedule because even if the claimant experienced such pain, the situs of the functional impairment remained in her legs. In should be noted, that claimant had undergone both left and right lumbar sympathetic blocks during the course of the claim. The ICAO affirmed.

The same reasoning and result applies here. The medical records reveal treatment directed towards the right knee only. The ATP, surgeon, and physical therapists recommended and provided treatment designed to relieve symptoms and improve function of the right lower extremity. Claimant did not undergo an orthopedic evaluation for the lumbar spine or right hip, nor receive treatment recommendations for any body part not on the schedule of disabilities. Further, the symptoms described by Claimant, as recorded contemporaneously with the records, are limited to the right lower extremity. Finally, as noted by Dr. McIntyre, in the six months prior to MMI, Claimant only once referenced low back/right hip pain. He concluded that Claimant did not sustain functional impairment to any part other than the lower extremity.

While Claimant testified regarding her limited activities resulting from the knee injury, Claimant did not persuasively testify that those activities were limited due to functional impairment to any body part other than the lower extremity. For example, while Claimant complained of pain into her lumbar spine and hip, first, the medical records do not corroborate Claimant's testimony and, second, Claimant failed to persuasively testify that such symptoms limited her function. Rather, to the extent Claimant's is functionally impaired, such impairment is due to the lower extremity symptoms.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Insurer shall pay Claimant $500 for her disfigurement. Insurer shall be credited for any amount previously paid for disfigurement in connection with this claim.

2. Claimant's request to convert the scheduled rating to whole person is denied.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 5, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left shoulder, neck and upper back on June 2, 2016.

II. If Claimant did sustain compensable injuries, whether he established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical treatment to cure and relieve him of the effects of said shoulder, neck and upper back injuries.

III. If Claimant sustained compensable injuries, whether Respondent-Employer properly designated a medical provider pursuant to statue and rule of procedure.

IV. If Claimant established that he sustained compensable injuries on June 2, 2016,

whether he has proven by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits for June 6, 2016, June 7, 2016 and between June 28, 2016 through July 5, 2016.

V. If Claimant established that he sustained compensable shoulder, neck and upper

back injuries on June 2, 2016 and if he is entitled to temporary disability benefits, what was his average weekly wage (AWW) at the time of injury.

Because the undersigned concludes that Claimant failed to prove that he sustained a compensable injury on June 2, 2016, this order does not address questions II-V as set forth above.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant began working for Employer in March of 2015 as a breakfast server. As of June 2, 2016, he continued working as a server for the Employer and was also bartending at night.

2. On June 2, 2016, at approximately 11:15 a.m. Claimant slipped and fell backwards after mopping the breakfast dining room floor. Claimant explained that after breakfast ended he started mopping the floor. Claimant went to obtain the "wet floor" sign to place in the area he had recently mopped. As Claimant stepped back onto the

wet floor, his shoe slipped out from underneath him, causing him to fall backwards. Claimant reached out with his left arm and grabbed the bar counter in attempt to break his fall. Claimant testified that his head and neck went backwards as he caught himself. According to Claimant, he experienced immediate pain in his left shoulder after grabbing and hanging from the bar by his left arm. Claimant testified that it felt like his arm was "pulled out of my socket." Claimant characterized the slip and near fall as "violent."

3. A "Workers Compensation Report Form" was filled out on the day of the injury. Two witness statements were included in the form. One co-worker stated, "I saw a shadow of something fall, backed up and saw [Claimant] and said, 'Did you just fall?' He said, 'Yes.'" Another co-worker stated, "I just heard a boom and saw [Claimant] get up from the floor."

4. Respondents conceded at hearing that the incident did in fact occur; however, it is their position that Claimant's need for treatment after the incident is a continuation of symptoms from a pre-existing condition that was caused by a prior motor vehicle accident (MVA) occurring on September 18, 2015.

5. Claimant testified that after the June 2, 2016 incident, he was advised by the manager on duty (Jannette Greene) that the doctor's office was already closed for the weekend (suggesting that Ms. informed him that he would be unable to see a doctor on June 2, 2016) and to ice the shoulder and if it was not better by Monday to see the worker's compensation provider. During cross examination, Claimant was asked if he refused care at the time of his injury. Claimant did not answer the question, responding instead by indicating that he was told the clinic was closed over the weekend and that he was hoping that his condition would improve during that time. The worker's compensation report form admitted into evidence clearly indicates that Claimant refused care at 11:45 a.m., one-half hour after the incident. Claimant's hearing testimony is internally inconsistent and inconsistent with the worker's compensation report form completed by Ms. Greene.

6. The ALJ takes judicial notice that June 2, 2016 fell on a Thursday.

7. On Sunday, June 5, 2016, Claimant sought treatment at Penrose St. Francis Hospital Emergency Department (ED). Claimant presented to the ED with complaints of headaches and aching in his shoulder and neck. He reported to the providers at the hospital that, on Thursday, he had started falling when he reached out to stop himself from falling with his left arm that resulted in complaints of occipital headaches, neck pain, and left shoulder pain. Physical examination revealed the following:

> Neck: Grossly normal, no cepitus, no larynx TTP" (tenderness to palpation). Spine/Back: No midline C/T/L (cervical/thoracic/lumbar) spine TTP, no paraspinal TTP, no stepoff/deformities.

MSK/Extremities: FROM (functional range of motion), no deformities, no skin changes.

Claimant informed the ED physician that he had prior back pain as a consequence of a prior motor vehicle accident (MVA). Regarding the cause of Claimant's symptoms, the ED doctor noted: "Given the patient's mechanism of injury I think it is extremely unlikely that this represented (sic) when he was in an injury . . ." (emphasis added). As pain was the primary complaint ('major issue") on presentation, Claimant was given a prescription for narcotic pain medication for home use and a sling. He was also instructed to follow up with a primary care provider.

8. Claimant returned to work on Monday, testifying that he took up Ms. Greene offer to see a doctor. Claimant was given a Rule 8 designated provider list on Monday, June 6, 2016 which included two choices of providers: Healthquest Medical Inc. at 1495 Garden of the Gods Road, or Concentra Medical Center at 2322 South Academy Blvd. Claimant selected Dr. Frank Polanco at Healthquest Medical Inc.

9. Claimant first presented to Dr. Polanco on Monday June 6, 2016 where he completed an intake form which asked him to specify his pain levels and the location of his pain. The form documents that Claimant was complaining of left shoulder/arm pain, neck pain, and headaches. His current pain level was 8 out of 10 with his lowest being 7 out of 10 and highest being 9 out of 10. Dr. Polanco assigned work restrictions of no lifting over 25 pounds and no overhead lifting with the left arm. He also referred Claimant to physical therapy. Dr. Polanco specifically informed Claimant not to wear the sling provided in the ED.

10. Claimant's initial physical therapy evaluation with Dr. Polanco's office occurred on June 7, 2016. Claimant again complained of 8/10 pain reported further that he had experienced increased neck pain and a prolonged tension headache since the fall occurred on June 2. He reported that he had been in a "serious car accident in September 2015 and had just finished his physical therapy for his back from that episode." According to the therapy noted, Claimant's reported symptoms were "high in severity and irritability making assessment of any structural deficits challenging. He Claimant was reportedly taking Oxycodone and Ibuprofen 800mg three times a day. The physical therapist noted that Claimant was "fixated on pain any may have psychosocial contributors to recovery." She also felt that Claimant's prognosis for recovery was "fair" provided he fully complied with the prescribed treatment plan. Claimant reported the previous September 2015 MVA to his provider. No barriers to treatment were reported. Rather, it was noted that "all" treatment interventions were well tolerated and that Claimant reported "less pain" after his visit.

11. On June 9, 2016, Claimant returned to Dr. Polanco's office where he was evaluated by Certified Nurse Practitioner (NP), Kathryn Young. Claimant's pain complaints on this visit had expanded to include additional body parts. Not only did Claimant complain of headaches and pain in his neck and shoulder, but also his left elbow as well as his upper and lower back. The pain in the elbow and upper back was

described as sharp and in the case of the upper back "like a knife." According to Claimant, the pain in his upper back "took his breath away." While Claimant now had upper and lower back pain he reported that his headaches were so bad that he had had to leave both of his work shifts early. He also reported that he continued to wear his sling in the morning as it would "relax" his shoulder. Regarding his back pain, Claimant informed NP Young that he was injured approximately three years prior to his slip and near fall incident in a MVA that resulted in back pain. He went on to clarify that he currently had back pain in the same area of his back as caused by the MVA. He also explained that his symptoms from the prior MVA were "pretty much gone" by the time of the incident at work on June 2, 2016. Pain was again reported at a level 8 out of 10.

12. Regarding his prior treatment Claimant reported that he had received a Toradol injection in the ED on June 5, 2016 and that it helped for about an hour and then was no longer helpful. He did not want another injection. He reported taking both Oxycodone and Ibuprofen and while both medications seemed to help a bit with his shoulder pain, neither helped with his headache. It was specifically noted by NP Young that Claimant had received a prescription for narcotics while in the ED and a second Oxycodone prescription from his PCP to address the increase in his back pain. NP Young felt that Claimant's headaches may be a direct consequence of taking Oxycodone itself. Consequently, she instructed Claimant to "STOP" taking it.

13. As noted, Claimant was involved in the MVA on September 18, 2015. He claimed injuries to his back and neck and experienced headaches as a result of this accident. Following his MVA, Claimant went through a neurologic workup with Dr. Gregory Ales on October 7, 2015. In an intake sheet Claimant completed for Dr. Ales, he noted that he was taking "pain medicine." In his report of October 7, 2015, Dr. Ales notes that Claimant presented to the "emergency room and had a CT scan of the head and was told that he had a concussion." According to Dr. Ales, Claimant was released with some narcotic pain medications." Regarding his headaches, Dr. Ales recommended "good headache hygiene" including "getting a good night's sleep, adequate hydration, adequate fluid intake, limited caffeine use and limited abortive use of pain medications." On October 28, 2015, Claimant returned to Dr. Ales reporting intolerance to Tramadol. Acetaminophen and Motrin to control his pain because of "various side effects." He requested that Dr. Ales prescribe narcotic to "control his pain." The request appears to have been denied as Dr. Ales' note reflects "Medications: None."

14. On November 11, 2015, Claimant was evaluated by Dr. Katharine Leppard. She assessed myofascial pain syndrome and recommended Claimant "avoid narcotics." Claimant returned for a follow-up visit to Dr. Leppard on December 8, 2015. Dr. Leppard noted that Claimant had been involved in physical therapy (PT) noting improvement with his neck pain. Nonetheless, Claimant continued to have "significant pain between the shoulder blades. She also noted that Claimant's lumbar MRI demonstrated degenerative disc disease. She referred Claimant for 10 sessions of chiropractic care. There is no mention of continued headaches in Dr. Leppard's notes. Furthermore, her notes are devoid of any reference to Claimant taking narcotic medication.

15. Claimant returned to Dr. Leppard's office on February 19, 2016, reporting new symptoms involving his left arm, including "numbness and a feeling of a funny bone from the left shoulder to the wrist." He reported frustration that his mid back was in constant pain that was interfering with his ability to work one job whereas before his MVA he was pain-free and working two jobs. Physical examination revealed tenderness over the left ulnar nerve and myofascial involvement in the upper trapezius and rhomboids. A February 12, 2016 MRI of the thoracic spine, which demonstrated changes with "Scheuermann's Disease, and a healed compression deformity at T12" was reviewed. Dr. Leppard assessed thoracic pain with underlying mild Scheuermann's Disease and myofascial involvement which she felt could respond to trigger point injections. She also assessed cervical strain with myofascial involvement. Finally, she assessed lumbar strain, noting that Claimant's lumbar MRI demonstrated underlying degenerative disc disease without disc herniation or protrusions. Claimant was to continue with chiropractic care and focus on maintain good posture given the presence of Scheuermann's Disease.

16. As noted, Claimant had been referred to chiropractic care for treatment of the conditions associated with his MVA. Claimant's chiropractic care was directed through Dr. Sean Billings at Premier Alternative Health Center. Claimant's first visit with Dr. Billings on December 14, 2015. He documented cervical pain at a level 8 out of 10 in addition to thoracic pain at a level 8 out of 10. He also referenced that Claimant had occipital headaches at a level 4 out of 10 occurring seven days per week. Claimant continued treating with Dr. Billings for the MVA through April 27, 2016. By the time of his April 27, 2016 appointment, Claimant's neck pain had improved to a level of 1 out of 10. His mid back pain had improved to a level 2 out of 10, and his headache pain to a level of 1out of 10. Nonetheless, the physical therapy records generated during this same time frame demonstrate a more rocky course of care.

17. Claimant's physical therapy records demonstrate waxing and waning symptoms associated with his neck and upper back conditions as well as his headaches. The records reflect periods of limited improvement followed by worsening symptoms likely due to stress, a lack of sleep and limited participation in therapy due to Claimant's medical appointment and job schedules. A sampling of Claimant's therapy records reveals the following:

- On February 4, 2016, Claimant's PT evaluation and treatment plan included care for neck and back pain. It was noted that he had been in a MVA where his vehicle was t-boned. His complaints were of intermittent neck pain and low back pain and mid back pain that was constant. He had pain between his shoulder blades with coughing.

- During a February 19, 2016 examination, Claimant had pain in both arms, on the right arm above the elbows and on the left arm below the elbow to the forearm. He also had pain between the shoulder blades. He also had discomfort in his low back.

- On March 16, 2016, Claimant reported 8/10 level headache pain which improved to a 4/10 level post treatment.

- On April 8, 2015, Claimant reported 4-5/10 level periscapular pain bilaterally which increased with work tasks/lifting. Nonetheless, he felt as though his pain levels were improving overall. He continued to require intermittent verbal cues regarding his need for proper posture.

- On April 15, 2016, continued therapy was recommended at a rate of 2 times a week for four weeks to "work on thoracic extension, strengthening of thoracic musculature to improve posture." Claimant cervical range of motion was documented as being within normal limits (WNL).

- At a May 4, 2016 examination, Claimant reported 4/10 upon waking which increased to 5-6/10 with exercise. He also had a 5/10 headache which decreased to 1/10 after headache mobilization and stimulation for a trigger point. On palpation, his upper back and lower neck area were tender to palpation. Claimant reported that swimming (pool therapy) had helped in the past. The therapist noted that Claimant would be reassessed on his next visit for "possible discharge to pool therapy." It was also noted that Claimant had met 51-75% of his PT goals had been.

- On May 16, 2016, Claimant reported that his headache had "gone away" but that he continued to have 4/10 pain in his neck and his shoulder blades (bilateral medial scapula). He was to see his primary care physician (PCP), Dr. Joseph, whom he had been treating with for his MVA, on June 3, 2016 and continue his chiropractic care. He was discharged from PT to pool therapy.

18. Claimant returned to Dr. Polanco on June 15, 2016. At his initial appointment with Claimant on June 6, 2016, Dr. Polanco did not have the medical records associated with the information contained at ¶¶ 13-17 above. Rather, according to Dr. Polanco, Claimant provided a "very limited and sketchy history" concerning the September 2015 MVA. Consequently, Dr. Polanco requested records. Limited records were received which Dr. Polanco opined revealed a "different description of the treatment and condition [Claimant] was treated for" as a consequence of his MVA. Dr. Polanco took additional history from Claimant during which he (Claimant) noted that he had been evaluated by "multiple physicians and has had extensive treatment for multiple conditions including headaches, neck, upper, mid, lower back pain and left shoulder pain." Consistent with ¶¶ 13-17 above, Dr. Polanco documented that Claimant had been treated by "Dr. Katharine Leppard. Dr. Greg Ales, neurologist, Dr. Joseph, NP Khorn, physical therapy and chiropractic treatment with Dr. Billings." He also noted that Claimant had been referred to but was not participating fully with PT through his offices. Dr. Polanco noted Claimant to sit in a "slouched/slumped position." Based upon the additional records and history received concerning Claimant's MVA and related treatment, Dr. Polanco opined that the claimed conditions arising from the June 2, 2016

slip and near fall were pre-existing. According to Dr. Polanco, "there [was] no indication of a new injury or an aggravation of his prior injury." Rather, Dr. Polanco felt that Claimant's "complaints of neck pain, and back pain [were] ongoing from his prior injury and there [were] [no] clinical findings to support active therapy." Dr. Polanco placed Claimant at maximum medical improvement (MMI) and released him to full duty, noting that Claimant "provided [him] with a very limited and selective history initially that was inconsistent with what [he] . . . learned from the medical records and further investigation. According to Dr. Polanco, Claimant's "presentation [was] highly suggestive of symptom magnification." Dr. Polanco referred Claimant back to his PCP.

19. On June 28, 2016, Claimant returned to Dr. Billings on a self referred basis. He reported injuries to his low back and upper back. He did not report headache. Dr. Billings documented, "[Claimant] has been seen prior in this office for injuries sustain [*sic*] in an MVA but was released earlier this year. Injuries appear to not be related to the MVA."

20. On July 7, 2016, Claimant presented in the ED at Penrose St. Francis Hospital for a chief complaint of "back pain due to a fall x1 month ago aggravated by heavy lifting. The ED noted reflects that Claimant "has a history of chronic lumbar back pain for several years, exacerbated in September last year after a motor vehicle accident most recently after a near fall at work, one month ago." A review of systems indicates that Claimant had "[c]hronic neck pain and lumbar back pain, with occasional left upper extremity radiculopathy." Regarding Claimant's neurological system, the report indicates: "No headache." It was also noted that Claimant had obtained Percocet while in the ED in early June 2016 and that he had received additional Percocet for a total of 48 tablets through June 2016. Physical examination revealed Claimant's neck to be "supple" without midline tenderness. His thoracic and lumbar spine was devoid of significant tenderness although moderate paraspinal tenderness was noted. Based upon Claimant's history and physical examination the ED doctor noted: "No 'red flags' for significant pathology, suspect myofascial strain. Claimant was provided with prescriptions for Etodolac and Robaxin but no Oxycodone.

21. On September 19, 2016, Claimant followed-up with Dr. Joseph. During this visit Claimant complained of having pain in his neck back and arm. The record generated from this date of visit references that Claimant reported pain in the scapula and elbow. He reportedly "demanded" narcotics which were refused.

22. Claimant underwent an IME with Dr. Timothy Hall on November 8, 2016. Upon examination, most of Claimant's symptoms at this time were parascapular on the left lateral neck and into the shoulder on the left. Claimant reported to Dr. Hall that he had returned to work full time without restriction after the MVA and before the June 2, 2016 incident. Dr. Hall diagnosed Claimant with an upper back and neck sprain/strain, a shoulder sprain/strain, and thoracic outlet symptomatology related to the aforementioned sprains/strains.

23. Dr. Hall opined, "From a causation perspective after reviewing the situation with the patient, doing a physical examination and reviewing his record, it is clear that there was a well-documented work-related fall on 06/02/2016 that led to symptoms in his neck, upper back, shoulder, and left arm." Dr. Hall's written opinions were expounded on during his deposition on January 30, 2017 during which he admitted that his opinions were based in part upon the history provided to him by Claimant. He also admitted that his causation opinions were premised on that history being accurate. Despite substantial questioning regarding the content of the medical record generated prior to his alleged worker's compensation injury, Dr. Hall remained of the opinion that Claimant sustained a compensable injury that required medical treatment through the workers' compensation claim.

24. Dr. Polanco testified by deposition on February 23, 2017. It was Dr. Polanco's opinion based on his review of the medical records at the time of his June 9, 2016 examination, that Claimant had given a very sketchy history of the September 2015 MVA. Dr. Polanco testified that once he had a more complete picture of the extent of injuries claimed and treatment received for the MVA, it became clear to him that Claimant had sustained much more serious injuries from the MVA for which he was still treating right up until the time of the reported June 2, 2016 incident at work. Because of this, and based on his examination, Dr. Polanco testified that Claimant had not actually sustained a compensable injury on June 2, 2016. Rather, he explained that the conditions Claimant presented with and the symptoms he complained of were pre-existing and related to the September 2015 MVA without indication of any new injuries or aggravations of the pre-existing injuries. To Dr. Polanco, Claimant never even sustained an injury at work and thus, did not feel that the concept of MMI in the worker's compensation arena applied to this case. Moreover, Dr. Polanco raised concerns that the medical record supported that Claimant was magnifying his symptoms and seeking narcotic pain medication.

25. Jannette Greene testified as the former "Director of Property Operations" for Employer. Ms. Greene testified that she took Claimant's report of injury and offered him immediate medical care, which Claimant refused stating that he was fine. She also contradicted Claimant's assertion that she told Claimant that the clinic was closed and that he should simply ice his injuries. Ms. Greene explained that she would never provide such advice as she has no medical training. Ms. Greene also admitted to interviewing witnesses to the incident reporting their observations in the Worker's Compensation Report Form referenced above. While witnesses were interviewed, these coworkers didn't actually see Claimant slip or fall. Nonetheless, the evidence presented persuades the ALJ that Claimant did slip and catch himself. Indeed Respondents have admitted that an incident occurred at work.

26. Based upon the evidence presented as a whole, the ALJ credits the opinions of Dr. Polanco over the expressed opinions of Dr. Hall to find that Claimant's current symptoms and need for treatment are probably related to a pre-existing myofascial condition that was aggravated by his September 2015 MVA. The evidence presented persuades the ALJ that the symptoms associated with this myofascial

condition have waxed and waned over the past couple of years and that the condition was symptomatic on May 16, 2016, approximately 2 weeks before the June 2, 2016, slip and near fall. Given the totality of the medical record, the ALJ finds Claimant's suggestion that his current symptoms represent a new injury or at least an aggravation of his preexisting condition unconvincing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

I. General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). As found in this case, the ALJ concludes that the evidence presented supports the opinions expressed by Dr. Polanco. Accordingly, the undersigned finds Dr. Polanco credible and more persuasive that Dr. Hall.

Compensability

D. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically mopping a floor in furtherance of his duties as a server for Employer. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The fact that Claimant may have experienced an onset of pain while performing job duties, does not mean that he sustained a work-related injury. An incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

G. Under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury". An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2)(injury includes disability resulting from accident). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.;

Romero v. Industrial Commission, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; §8-41-301, C.R.S.

H. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an "accident" at work without sustaining a compensable "injury." This is true even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supports ultimate finding that no injury occurred even where the claimant experienced pain when struck by a bed she was moving as part of her job duties); see also, *McTaggart-Kerns v. Dell, Inc.,* W.C. No. 4-915-218 (ICAO, May 29, 2014)(where Claimant involved in motor vehicle accident without resultant injuries, no compensable injury occurred). As found above, the ALJ is not persuaded that Claimant's need for neck, upper, mid and low back and headache treatment was caused by his slip and near fall or that this incident caused disability. To the contrary, the evidence presented persuades the ALJ that Claimant suffers from Scheuermann's disease affecting his thoracic spine resulting in poor posture and myofascial consequences in the parascapular muscular of the cervical, mid and low back. These conditions were substantially aggravated by his September 2015 MVA causing protracted symptoms necessitating both physical therapy and chiropractic treatment. While Claimant was discharged from land based physical therapy prior to his June 2, 2016 slip and near fall, he was both symptomatic and in need of pool therapy. Moreover, he was to continue with chiropractic treatment.

I. As explained by a Panel of the Industrial Claims Appeals Office in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), a coincidental correlation between a claimant's work and his symptoms does not mean there is a causal connection between a claimant's injury and his/her work. To the contrary, as noted by the Panel in *Scully* "correlation is not causation." Further, there is no presumption that an employee found injured on the employer's premises is presumably injured from something arising out of his work. *See Finn v. Industrial Commission,* 437 P.2d 542, 544 (Colo. 1968). As presented, the evidence does not support that Claimant sustained an injury to his neck, back and or head on June 2, 2016, causing the need for treatment and/or disability. Rather, when his symptomatic pre-existing myofascial pain syndrome is combined with his fixation on pain (arguably supporting a suggestion that Claimant is symptom magnifying and seeking narcotics), the evidence supports a conclusion that Claimant did not suffer any compensable injuries as a consequence of the June 2, 2016 incident and that psychosocial factors are at play in this case. Regarding his headaches, the ALJ credits the opinion of NP Young to find that Claimant's narcotic medication was probably contributing to rebound headaches. While the ALJ is persuaded that Claimant's pain, including his headaches are genuine and that there was nothing nefarious surrounding his requests for narcotic pain medication as suggested by Dr. Polanco, the record submitted persuades the ALJ that the headaches not unrelated to the slip and near fall incident. Consequently, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that

there is a causal connection between his employment and the resulting conditions for which medical treatment and indemnity benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant failed to establish he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim must be denied and dismissed. Accordingly, the claims for medical and temporary disability benefits need not be addressed further.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is hereby denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 5, 2017

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

STIPULATION

1. Both parties stipulated that the issue of Average Weekly Wage would be held in abeyance, pending a resolution of the contested issues heard at hearing.

ISSUES

I. Whether the Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury as a result of her fall in the employer-supplied parking lot which occurred on or about February 3, 2016.

II. If the claim is compensable, what medical benefits are reasonable, necessary, and related to this claim.

III. If the claim is compensable, has Claimant suffered from one or more intervening causes, either of which is sufficient to sever the causal relationship between the compensable injury and subsequent symptoms Claimant may have experienced.

IV. Whether Claimant has shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability benefits as a result of a compensable injury.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 21-year-old package handler for the Employer who slipped and fell on ice in the employee parking lot as she left work on February 3, 2016. Claimant began working for the Employer on December 12, 2015. Claimant worked the early morning shift from 3:00 a.m. to 9:00 a.m. and worked from 20 to 25 hours per week, at $11.00 per hour.

2. Claimant alleges that, at approximately 8:46 a.m. on February 3, 2016, she was walking through the parking lot after her shift ended and fell onto her rear, tailbone, and low back. Claimant did not hit her head, her neck, her upper back, her hands, her elbows, or any other body part beyond the low back area. Claimant testified that, after she fell, she laid on the ground "for a minute or so," until an unidentified UPS co-worker came over and assisted her in getting up. Claimant testified that this person witnessed the fall.

3. Claimant testified that she did not remember whether she felt immediate pain after the fall as she was in shock. However, Claimant later told Respondents' expert, Dr. Kathleen D'Angelo, that she felt instant pain in her tailbone pursuant to the fall during her IME examination. Respondents' Hearing Exhibits ("RHE") F at 14. After she fell, Claimant left the parking lot and attended her classes at school. Claimant testified that she first began experiencing pain when she left school and returned home. Claimant testified that she first began experiencing pain in her tailbone. Claimant did not report a work injury to UPS on this day and did not seek medical treatment.

4. Claimant reported a work injury to her supervisor at her next shift, on February 4, 2016. Claimant selected SCL Physicians at Wheat Ridge as her provider and saw Andrew Hildner, PA-C, on February 4, 2016, after completing her shift. Claimant presented with complaints of lumbar and sacral pain. RHE G at 49. Claimant denied any "neurological red flag symptoms."

5. Claimant had a normal gait and no bruising or obvious abnormality upon inspection of the lumbar spine. RHE G at 51. Claimant had no sacroiliac joint tenderness. Claimant was tender upon palpation over the inferior sacrum and had bilateral paraspinal tenderness, which had alternating sides in severity throughout the examination.

6. X-ray studies of the pelvis, sacrum, and coccyx showed no evidence of fracture or dislocation and had good anatomical alignment. There was no obvious fracture in the inferior lumbar vertebrae, which also had normal alignment. PA Hildner noted that there were no concerns for a fracture or neurological involvement, and noted that Claimant had good range of motion without complaint, a nonantalgic gait, and was able to sit comfortably during the examination. RHE G at 52. There was no crepitus noted. Claimant was given 20 pound repetitive lifting restrictions for work.

7. Claimant returned to SCL and saw Dr. Ogrodnick on February 8, 2016. RHE G at 53. Claimant reported that she had back and hip pain and had frequent "cracking" in these areas, which felt unnatural to her. Dr. Ogrodnick noted that Claimant had told PA Hildner that she was in shock and couldn't tell what was hurting her. Claimant stated that "she now knows that driving and handwriting causes increased right arm numbness," which she first noticed the evening after her initial visit. Claimant also reported left arm numbness. Claimant testified at hearing that she did not have symptoms in her left arm.

8. Claimant also reported right leg numbness, which she first noticed on February 6, 2016. RHE G at 53. Claimant further complained of urinary incontinence and had called in sick to work. Dr. Ogrodnick noted that Claimant walked with a limp and needed to hold the exam table when walking

on her toes. RHE G at 55. Claimant reported tenderness in her lumbar spine and both sacroiliac joints. Claimant became tearful with passive right hip flexion due to pain in her right buttock. *Id*. Dr. Ogrodnick diagnosed Claimant with a sacral contusion. Dr. Ogrodnick ordered a STAT MRI to eliminate concern for cauda equina syndrome. RHE G at 53.

9. Claimant had two MRI studies of the lumbar spine performed. The record is unclear why the second one occurred. The first study was performed on February 10, 2016. RHE F at 29. The second study was performed on February 11, 2016. Both studies were reviewed and compared by Dr. Michael Preece. The impression of the lumbar spine was normal. RHE H at 80.

10. A follow-up note with Dr. Ogrodnick on February 12, 2016 notes that "plain films" (X-rays) of the pelvis taken that day did not reveal any acute osseous abnormality. RHE G at 56. Dr. Ogrodnick noted that Claimant “chuckled at how she just started crying ‘for no reason’” after the x-ray that day. Claimant told Dr. Ogrodnick that this date was the first time that she experienced pain radiating into her right fifth toe. It was noted in the records that Claimant was working modified duty in a seated capacity. Claimant was positive for memory loss. RHE G at 57. Claimant again presented with a limp. RHE G at 58. Claimant began to cry when lightly palpated in her anterior right iliac crest.

11. Dr. Ogrodnick noted during a February 16, 2016 follow-up visit that Claimant was having a significant emotional response and was at risk for delayed recovery. RHE G at 59. Dr. Ogrodnick noted that Claimant’s Oswetry disability questionnaire score of 56% indicated severe disability. Claimant presented with a limp on this date and reported her leg would become numb if she did not walk in this manner. Claimant reported that she could not stand up straight due to severe pain in her low back. Claimant reported concern about becoming disabled like her parents. Dr. Ogrodnick referred Claimant to a psychologist.

12. Claimant began physical therapy on February 19, 2016. RHE F at 43. The therapist notes indicate that Claimant would benefit from stabilization and strengthening the sacroiliac region.

13. Claimant reported no improvement during a follow-up visit with Dr. Ogrodnick on February 29, 2016. RHE G at 63. Dr. Ogrodnick noted a substantial risk for delayed recovery. Claimant declined psychological treatment, as she felt there was nothing wrong psychologically. Claimant testified that she declined care because she did not believe that Dr. Ogrodnick’s intentions were to help her, because he believed that her physical pain and physical ailments were psychological. Dr. Ogrodnick noted that Claimant smiled frequently throughout the examination and ambulated without a limp. RHE G at 65.

14. Dr. Ogrodnick saw Claimant again on March 15, 2016 and expressed concern about possible somatoform disorder. RHE G at 66. Dr. Ogrodnick noted that Claimant's Oswetry questionnaire results reflected a score near the crippled category, and it was communicated to Claimant that this was highly inconsistent with her normal MRI study. Dr. Ogrodnick noted in the record that he advised Claimant that it was difficult to substantiate ongoing work restrictions due to the lack of objective findings and her inconsistent examinations.

15. Claimant presented to Dr. Tomm Vanderhorst, also at SCLP clinic, on March 16, 2016. RHE G at 69. Claimant was a walk-in evaluation because she had "too much pain with [her] current work." Claimant testified that she saw Dr. Vanderhorst because Dr. Ogrodnick was not available. Dr. Vanderhorst gave Claimant 35 pound lifting restrictions with 30 minutes maximum of standing and walking. RHE G at 70.

16. Claimant returned to see Dr. Ogrodnick on March 21, 2016. RHE G at 72. Dr. Ogrodnick noted that Claimant did not understand the resistance to taking her off work. Claimant reported that she could not even put weight on her right leg. Claimant walked slowly with a short stride and limp. RHE G at 74. Claimant told Dr. Ogrodnick "It's the worst pain I've ever been in in my life". RHE G at 72. Dr. Ogrodnick opined that Claimant's "constellation of symptoms" required a consultation to rule out multiple sclerosis. Claimant last reported to work at the Employer on March 23, 2016. She testified that she was told not to return to work until she had "hundred percent clearance from the doctor."

17. Claimant was then involved in a motor vehicle accident on March 30, 2016. Claimant was taken to St. Anthony Hospital by ambulance. RHE F at 16. Claimant told Dr. D'Angelo during her IME that she felt neck pain immediately. Claimant testified that she had neck and shoulder injuries from the accident, and that she did not have injuries to her lower back, hips, or tailbone as a result of the injury.

18. The emergency room record from St. Anthony's on the date of the accident states that Claimant was rear-ended by another vehicle traveling at low speed. RHE I at 81. It is noted that Claimant was restrained. Claimant claimed that she was thrown forward and "began to feel pain in her neck and back soon thereafter." The nurse's note indicates reports of posterior neck tenderness and low back pain. Claimant denied any extremity numbness or weakness. A CT scan of both the cervical and lumbar spine were obtained. RHE I at 82. There were no acute findings. Both studies were normal and unremarkable. RHE I at 84-85.

19. Dr. Ogrodnick maintained that Claimant's subjective complaints remained inconsistent with her objective findings during Claimant's next visit, on April 4,

2016. RHE G at 75. Claimant did not disclose that she had been involved in a recent motor vehicle accident. Dr. Ogrodnick noted that, despite the examination, Claimant denied any leg pain, numbness, or weakness. Claimant also walked without a limp during this examination. RHE G at 77. Claimant was subsequently discharged from SCL, and Dr. Vanderhorst later indicated that Claimant was discharged, as no further care was authorized. RHE G at 78.

20. As a result of this car accident, Claimant began treatment with Dr. Bethany Wallace at Injury Treatment Centers Lakewood on April 13, 2015. RHE J at 87. Claimant's complaints included the following: cervical strain; neck pain; thoracic sprain and pain; lumbar strain and low back pain; jaw pain; concussion; vertigo; memory loss; insomnia; left elbow pain and contusion; left forearm pain; occipital neuritis; posttraumatic headaches; and cervicogenic headaches. RHE J at 88.

21. Claimant underwent physical therapy treatment with regular follow-up visits with Dr. Wallace. Treatment included therapy for the low back, in addition to the cervical region, and it was noted on at least one occasion that the modalities utilized caused low back pain. RHE J at 100. At cervical MRI performed on April 28, 2017 was returned normal. RHE J at 92-93. Claimant treated with Dr. Wallace through the end of July 2016. RHE J at 108.

22. Claimant saw Dr. Bennett Machanic for an IME commissioned by Claimant on June 13, 2016. Claimant's Hearing Exhibits ("CHE") 8 at 167. Claimant presented with multiple complaints, including: low back pain; numbness over the right leg and right arm; difficulties with memory, focus, and concentration; and significant emotional depression. Dr. Machanic noted that he had been provided "a scanty amount of medical records." Dr. Machanic noted that Claimant had chiropractic care in 2011 and that it was not clear why this was done, but that the treatment nevertheless ended later that year.

23. Claimant told Dr. Machanic that she struck her lower back when she fell on February 3, 2016. CHE 8 at 168. Claimant told Dr. Machanic that she had two MRI studies, one that showed discogenic damage and another that was normal. CHE 8 at 167. Dr. Machanic noted that Claimant had been involved in a motor vehicle accident on March 30, 2016 with an automobile traveling "at a very high rate of speed driven by an intoxicated driver," and that this accident caused increased low back pain and neck pain. Dr. Machanic noted that he did not have medical records beyond March 21, 2016.

24. Upon examination by Dr. Machanic, Claimant complained of non-related neck pain, low back pain affecting the tailbone to the lower right leg, numbness in the right leg, right arm numbness, and weakness in both her leg and arm. CHE 8 at 169. Claimant claimed she dropped objects due to weakness. Claimant further complained of deficits in memory, focus, concentration, and

depression. Dr. Machanic noted that Claimant broke into tears on multiple occasions during his examination. Dr. Machanic measured breakaway weakness in the right leg. Dr. Machanic noted that it was "very clear that [Claimant] can walk without much difficulty on tiptoes, heels, perform tandem and retrogrades."

25. Dr. Machanic opined that Claimant injured her low back pursuant to a slip-and-fall at work. CHE 8 at 170. Dr. Machanic noted progressive symptoms in the right arm and leg and indicated there was right ulnar neuropathy and right meralgia paresthetica. Dr. Machanic opined that there was significant depression and "perhaps some posttraumatic emotional stress." Dr. Machanic stated that the March 30, 2016 motor vehicle accident "apparently caused neck pain" and that it was "not entirely clear" whether this made the work-related injury worse. Notwithstanding, Dr. Machanic stated that "we can separate out issues fairly nicely" based upon the available materials at the time.

26. Dr. Machanic recommended an EMG and nerve conduction studies of the right arm and leg. Dr. Machanic opined that Claimant was not at MMI and did not calculate an impairment rating. Dr. Machanic opined that Claimant had low back pain, right hip pain, and "signs" that right ulnar neuropathy meralgia paresthetica are work-related conditions.

27. In a report dated June 15, 2016, with Ginger K. Spence, LPC, Claimant presented for psychological treatment. RHE K at 109. It was noted that Claimant presented for initial treatment in November 2014 and treated through July 2015. RHE K at 109-110. Claimant denied any legal problems or problems with work or schooling. It is noted that Claimant had significant problems with anxiety and had struggled with anxiety for the majority of her life. Claimant treated for posttraumatic stress disorder and it was noted that this causes clinically significant stress or impairment in social, occupational, and other important areas of functioning.

28. Claimant presented to Dr. D'Angelo for an IME commissioned by Respondents on August 24, 2016. RHE F at 11. Claimant had complaints including: low back pain; buttock pain; right leg pain and numbness; right arm pain and numbness; problems thinking; stress; and bowel inconsistency. RHE F at 12. Claimant reported that she was worse since the injury. Claimant denied having similar or previous problems. RHE F at 13.

29. Dr. D'Angelo recorded Claimant's history of the alleged incident. Claimant stated that she fell and could not remember whether she was helped up by a person who offered assistance. RHE F at 14. Claimant stated that she then went to her car and drove directly to school. Claimant stated that she immediately felt pain in her low back and tailbone, and subsequently favored her right side due to hip pain.

30. Claimant denied having hip pain prior to the incident. Claimant stated that she did not immediately experience hip pain, which developed later. RHE F at 15. Claimant also stated she subsequently noticed symptoms in her right arm and leg. Claimant stated that Dr. Ogrodnick informed her that she had a "perfect" MRI. RHE F at 17. Claimant stated that she was denied further treatment after March of 2016 and that, as a result, "things have gotten worse." RHE F at 17. Claimant stated that she did feel improvement in her hip during physical therapy, but that she didn't feel improvement in the low back because this was not addressed by the therapist. RHE F at 18.

31. Dr. D'Angelo reviewed multiple medical records, including records from Claimant's preexisting medical history. Dr. D'Angelo reviewed records dating back to 2009, some of which reflected a long history of orthopedic issues and complaints. RHE F at 29. Claimant had bilateral foot pain in 2009. Claimant had complaints throughout 2011 of pain in her neck, including headaches, lumbar spine, thoracic spine, and right sacroiliac joint. RHE F at 24-25. These complaints also included pain down the legs. Claimant had complaints of low back pain in 2014 and complaints of bilateral hip pain at this time as well, with no known trauma. RHE F at 27. Claimant also treated for significant anxiety and depression in 2014.

32. Dr. D'Angelo noted that Claimant had numerous delayed onset of symptoms and complaints following her initial medical evaluation at SCL. RHE F at 35. Dr. D'Angelo noted that the location of the symptoms varied and metastasized over time, which was inconsistent with acute trauma and without medical explanation. Dr. D'Angelo opined that these complaints were not substantiated by objective physical or diagnostic findings. Dr. D'Angelo noted that acute traumatic spine injuries are also acutely symptomatic. *Id*. Dr. D'Angelo indicated that, had Claimant developed a lumbar disc herniation or a neurological injury due to the fall, her symptoms would have been evident immediately. Dr. D'Angelo opined that Claimant's somatic symptoms, such as cognitive difficulties, anxiety, and depression, were impossible to explain from the established mechanism injury.

33. Dr. D'Angelo opined that Claimant sustained a contusion of the coccyx with myofascial pain to the lumbar and sacral regions pursuant to the February 3, 2016 fall. RHE F at 36. Dr. D'Angelo opined that Claimant had Somatic Symptom Disorder causing a litany of complaints and that this should be evaluated under private insurance. Dr. D'Angelo opined that Claimant was at MMI with no permanent impairment.

34. Claimant was then involved in a second motor vehicle accident on October 11, 2016. RHE L at 111. This was not disclosed to Respondents through discovery requests. Claimant is represented by an attorney and is pursuing a claim against the allegedly at-fault driver.

35. Medical records from Denver Health on this date note that Claimant was the restrained passenger in a vehicle that was rear-ended at what Emergency Medical Services ("EMS") described as "incredibly low" speeds. RHE L at 111. The record indicates that the impact was so minimal that there was no paint transfer between vehicles. The speed of the impact was characterized as "walking speed." RHE L at 112. Upon EMS arrival, Claimant was found shrieking and sobbing violently, was unwilling to get out of the vehicle, and was not redirectable. EMS treated Claimant with Versed, which Dr. Machanic testified is a tranquilizer/sedative.

36. Claimant was seen in the emergency room approximately 20 minutes after the accident. RHE L at 112. Claimant complained to the emergency room doctor of neck and back pain. Claimant denied a history of anxiety attacks. It was noted that the examination was limited due to Claimant's "hysteria." A physical examination indicated no noted issues with the pelvis, cervical, thoracic, or lumbar spine, no crepitus, deformities, or evidence of trauma. It is noted in the records from that event that "all of the above serious potential etiologies are felt to be highly unlikely based upon the information available and that Claimant's symptoms improved in the emergency room. Claimant was discharged and not given further medications.

37. Claimant testified at hearing that she was still experiencing symptoms. Claimant claimed there was pain radiating from her lumbar spine to her tailbone, with cracking in the low back and hips. Claimant also testified that she still has symptoms of numbness and tingling in her right arm and leg. Claimant also testified that she had issues with frequency and urgency of urination. Claimant related all of these issues to her slip-and-fall.

38. Claimant denied having any injuries to the low back as a result of her motor vehicle accidents. Claimant also denied having received treatment for her low back. Claimant testified that she had not been having any problems with these body parts prior to the slip-and-fall and that the previous chiropractic care that she received was for "maintenance." Claimant testified that she did not have any past pain in her back or in her hip. Claimant testified that Dr. Ogrodnick's medical records from February 18, 2016, where he indicated that he palpated Claimant's iliac crest area, were incorrect and that he did not palpate this area. Claimant testified that there was no point in this claim during which her symptoms improved.

39. Dr. Machanic testified at hearing on behalf of Claimant. Dr. Machanic testified that, at the time of his examination, Claimant had difficulties or "at least complaints" in her back, her right arm and leg, her right elbow, and also with her neck. Dr. Machanic testified that he felt that the neck was not work-related. Dr. Machanic testified that, based upon the records he reviewed, the "most logical answer" to the symptoms pursuant to the fall was a sacroiliac

hip issue. Dr. Machanic also testified that he “suspect[ed] the right elbow was injured at the time of the fall,” as well as the back.

40. Dr. Machanic testified that Claimant had an aggravation of the right femoral cutaneous nerve. Dr. Machanic testified that there was no evidence that the motor vehicle accident affected these symptoms. Dr. Machanic further testified that he could not make a medical distinction between related psychological or emotional issues and those issues which are not related to the claim. Dr. Machanic testified that Claimant’s emotions did compromise interaction during examination but, “for the most part,” he thought that “probably she was a reliable historian.”

41. Dr. Machanic acknowledged that the medical records do not reflect that Claimant fell on either side of her hips, onto her hand, onto her elbows, or onto any other body part other than her low back region. Dr. Machanic acknowledged that Claimant "may or may not" suffer from a somatization disorder. Dr. Machanic had not reviewed the extent of the medical records and was not aware of the second motor vehicle accident at the time of his testimony. Dr. Machanic acknowledged that there were inconsistencies in the medical records concerning Claimant’s reports of her medical history and what the medical history reflects.

42. Dr. D’Angelo testified on behalf of Respondents. Dr. D’Angelo testified that Claimant had a somatoform disorder and a lifelong pattern of presenting frequently to providers with multiple complaints, including bilateral hip, low back, and leg pain, prior to the slip-and-fall. Dr. D’Angelo testified that the only injury Claimant suffered was a contusion to the coccyx and some myofascial irritation. Dr. D’Angelo testified that Claimant had undergone multiple diagnostic tests and that there was no evidence of objective, physiological, structural damage. Dr. D’Angelo testified that the x-ray studies performed showed no objective abnormalities to the coccyx.

43. Dr. D’Angelo testified that Claimant did not have any injury requiring active treatment and that there was “nothing to be done for this,” as there were no positive findings absent subjective complaints of pain. Dr. D’Angelo testified that the femoral cutaneous nerve was purely sensory and could not cause motor weakness, which Claimant had exhibited, and that her presentation and examination findings were inconsistent with an injury to this nerve. Tr. at 117, ll. 6-16.

44. Dr. D’Angelo testified that Claimant’s symptoms would be expected to resolve without treatment. Dr. D’Angelo testified that Claimant should have been at MMI and discharged after the February 21 and 22, 2016 MRI studies showed no evidence of an acute injury. Dr. D’Angelo testified that additional diagnostic testing was not necessary to rule out additional treatment prior to MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Credibility

D. The ALJ finds that Claimant is not reliable as a medical historian, as her account of her prior medical history in testimony and in the medical records is inconsistent with the medical records prior to her February 3, 2016 fall. The Court finds that Claimant is not sufficiently reliable in her account of the symptoms she reportedly experienced from her two motor vehicle accidents. In each instance, Claimant reported some onset or increase in low back pain as identified in the medical records.

E. The ALJ finds Dr. Machanic to be sincere, but insufficiently persuasive. Dr. Machanic's opinion was not based upon the full medical history of the claim and was derived in large part from Claimant herself. Dr. Machanic's testimony regarding clear objective findings and causality was not consistent with his own report, the medical records, the opinion of the treating providers, or his physical examination. Dr. Machanic's opinion regarding causality is not sufficiently persuasive to meet Claimant's burden of proof.

F. Dr. D'Angelo testified persuasively regarding her opinions on causality, impairment, and reasonable, necessary, and related medical treatment.

Compensability

G. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Simply because a claimant experiences symptoms while in the course and scope of their employment does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (April 10, 2008). Claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009).

H. Claimant's did suffer a work-related injury on February 3, 2016 as the result of a slip-and-fall in the icy parking lot after completing her shift. However, her continuing complaints of injury are based purely on subjective complaints without supporting diagnostic evidence. Claimant testified that she did not know whether she had pain after she fell. Claimant's representation to Dr. D'Angelo that she experienced the immediate onset of pain in her back after the fall was inconsistent with her own testimony at hearing, and her representations to PA Hildner upon her initial medical visit. Claimant did not immediately report a work-related injury or treatment and instead drove directly to school, attended her classes for the day, and testified that she did not experience the onset of symptoms until later in the evening.

I. All diagnostic tests performed in the claim were returned negative for any acute injuries or abnormalities. Upon Claimant's initial examination by the treating provider,

there was no evidence of trauma or obvious abnormality of the lumbar spine upon inspection. Claimant denied any neurological symptoms or sacroiliac joint tenderness. X-ray studies of the pelvis, sacrum, and coccyx have consistently been normal. Two MRI studies of the lumbar spine subsequently performed at the request of the treating provider reflected no evidence of any abnormalities or acute findings. A second x-ray of the pelvic region performed on February 12, 2016, at the request of Dr. Ogrodnick, showed no evidence of abnormalities. Additional diagnostics, including a CT scan performed of the lumbar spine after the March 30, 2016 motor vehicle accident, showed no acute findings. There was no evidence of crepitus in the pelvis or lumbar spine. The only initial finding was tenderness reported by Claimant upon palpation over the inferior sacral area. Dr. D'Angelo opined that Claimant simply suffered a contusion with myofascial irritation pursuant to the slip-and-fall that would not require treatment and resolve with the passage of time.

J. Dr. D'Angelo felt that Claimant had a somatoform disorder, pursuant to which Claimant had chronic complaints derived from psychological stressors. Dr. Machanic acknowledged that possibility as well, but stated that that did not mean Claimant did not suffer real injuries. Claimant had a documented preexisting history suggestive of a "lifelong" pattern of multiple complaints involving her lumbar spine, bilateral hips, and lower extremity pain and numbness. Claimant is found not reliable in regard to her account of her medical complaints of pain and dysfunction prior to the incident. Moreover, Claimant's pain behaviors after both of her motor vehicle accidents support the persistence of subjective complaints of pain in multiple body parts, including those allegedly related to her fall, without supporting objective evidence of any acute injury. Conversely, assuming Claimant's reaction to her motor vehicle accidents was genuine, it renders it problematic to apportion her back complaints between her work injury and her traffic accidents-at least one of which is subject to litigation.

K. Claimant's asserted mechanism of injury is not consistent with her complaints. Claimant had an expanding array of complaints that do not correspond to objective evidence in the record. Dr. Ogrodnick noted on multiple occasions that Claimant's subjective complaints did not correlate with objective findings. Claimant fell onto her tailbone/low back/buttocks region. Claimant did not fall onto her side or her hips and did not hit her head, neck, hands, arms, or elbows during the fall. Claimant subsequently developed complaints into her right arm, left arm, right hip, and right leg, without a supporting mechanism for these alleged injuries. Sacroiliac joint pain was not present upon initial examination- which itself occurred a day after the fall- and did not develop until later.

L. Dr. D'Angelo credibly testified that there was no medical explanation for Claimant's symptoms. Dr. D'Angelo's opinion that, if Claimant had an acute injury corresponding with her subjective complaints, her symptoms would have manifested quickly is persuasive. Dr. Machanic's opinion that Claimant suffered right arm ulnar neuropathy is not supported by a causal mechanism anywhere in the medical records or testimony. Likewise, Dr. Machanic's opinion that Claimant had breakaway leg weakness and neurological issues in her right leg as a result of a femoral cutaneous

nerve injury resulting from the fall is not supported by other medical evidence. The ALJ finds Dr. D'Angelo's opinion that an injury to this nerve should not cause breakaway weakness in the leg to be persuasive. The ALJ parenthetically finds that there was no evidence, from Dr. D'Angelo, Dr. Mechanic, or the admitted medical records, to support a psychological or mental injury related to the slip-and-fall.

Medical Benefits

M. Respondents are liable only for those medical benefits which are reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *City of Durango v. Dunagan*, 939 P.2d (Colo. App. 1997). The record must distinctly reflect the medical necessity of any medical treatment needed to cure and relieve an injured employee from the effects of the industrial injury and any ancillary service, care, or treatment as designed to cure and relieve the effects of such industrial injury. *Public Service Co. of Colorado v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 584 (Colo. App. 1999). The question of whether medical treatment is reasonable and necessary is one of fact for determination by an ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims* Office, 989 P.2d 251 (Colo. App. 1999).

N. Treatment for a work injury must not only be reasonable and necessary but must also be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Respondents are permitted to challenge causation and relatedness of the need for any treatment, despite having admitted liability for a claim. *Hanna v. Print Expediters, Inc*. 77 P.3d 863 (Colo. App. 2003); *Snyder v. Industrial Claim Appeals Office of the State of Colo*., 942 P.2d 1337 (Colo. App. 1997). In a dispute over medical benefits that arises after filing an admission of liability, Respondents may assert, based upon subsequent medical reports, that workers' compensation claimant did not establish a threshold requirement of direct causal relationship between the on-the-job injury and need for medical treatment. *Snyder v. Industrial Claim Appeals Office of the State of Colo., supra*. Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Id*.; *see also Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). Causation is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint*, 717 P.2d 965 (Colo. App. 1985).

O. While this fall in the parking lot is a compensable claim, Claimant's reasonable, necessary, and related medical treatment was performed in relation to a sacral/coccyx contusion. As noted previously, Dr. D'Angelo credibly testified that this would have resolved independent of active medical care. Dr. D'Angelo credibly testified that Claimant should have been discharged after multiple diagnostic studies reflected no objective diagnostic evidence of an acute injury in February 2016. The ALJ finds Dr. D'Angelo's opinion that no *further* medical care is reasonable, necessary, or related to the claim to be persuasive. The ALJ finds insufficient evidence to support the relatedness of treatment for Claimant's multiple subjective complaints involving her right

upper extremity, her lower right extremity, her hips, her urinary incontinence and urgency, or her emotional distress. There is no *additional* medical treatment that is reasonable, necessary, or related to this compensable injury.

Intervening Cause/Event

P. While this parking lot fall is a compensable injury, there is substantial evidence in the record to support an intervening cause occurred as a result of the March 30, 2016 motor vehicle accident, as well as the October 11, 2016 motor vehicle accident.

Q. In the event of a compensable injury, an intervening cause may sever the causal relationship between an employee's work injury and the resulting disability. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). An intervening incident that breaks causation between the injury and resulting wage loss means that the employee forfeits both temporary and permanent benefits. *Schlage Lock v. Lahr*, 870 P.2d 615 (Colo. App. 1993). Likewise, an independent medical condition is also not compensated as part of the work-related injury. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002).

R. Claimant sustained two motor vehicle accidents subsequent to her fall on February 3, 2016 and during the course of this claim. The nature of both accidents was similar and involved Claimant being rear-ended by another driver while restrained and seated in a vehicle. While both accidents involved another vehicle traveling at a relatively slow rate of speed and were notably minor, Claimant's subjective complaints pursuant to each accident are nevertheless the same or similar to those prior to the first March 30, 2016 motor vehicle accident, with the exception of the neck. Both accidents involved complaints of the low back and subsequent emotional distress. Of note, Dr. D'Angelo credibly testified that symptoms of neuralgia paresthetica in Claimant's lower extremity would be *more likely* caused by a motor vehicle accident than a slip-and-fall onto the buttocks because of the tightening of the seatbelts across the pelvis.

S. Claimant also treated with Dr. Wallace, who saw Claimant after the first accident, with physical therapy for her lumbar condition. It is at least equally likely that Claimant's alleged ongoing conditions of lumbar and lower extremity radicular numbness were caused or aggravated by the motor vehicle accidents than a result of the natural progression of a compensable slip-and-fall on February 3, 2016. Likewise, given the extent and nature of the emotional reaction to the October 11, 2016 motor vehicle accident, it is more likely than not that any ongoing emotional distress is related to this subsequently occurring automobile accident.

Temporary Total Disability Benefits

T. To qualify for temporary total disability (TTD) benefits, a workers' compensation claimant must establish three conditions: 1) the work injury caused the disability; 2) claimant left work as a result of the injury; and 3) temporary disability is

total and lasts for more than three working days (emphasis added). *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997).

U. The preponderance of the evidence does not establish an ongoing work-related disability.

ORDER

It is therefore ordered that:

1. Claimant's work-related sacral/coccyl contusion has now resolved. There is no ongoing reasonable , necessary, or related medical treatment needed to further treat this injury.

2. Claimant's claim for further treatment for her right arm, leg, hips, or emotional distress is denied and dismissed.

3. Claimant's claim for further medical treatment following her second automobile accident of October 11, 2016 is denied and dismissed.

4. Claimant's claim for temporary disability benefits is denied and dismissed.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 8, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Respondents are liable for payment of medical benefits provided by Mountain States Pathology, Colorado Springs Health Partners, and Diversified Radiology of Colorado, P.C., as a result of her compensable claim which occurred on June 27, 2016.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained an admitted industrial injury on June 27, 2016. As a result of the industrial injury, Claimant received medical care from a variety of medical providers, including Mountain States Pathology, Colorado Springs Health Partners, and Diversified Radiology of Colorado, P.C.

2. Respondents filed a Final Admission of Liability on January 3, 2017, admitting liability for medical benefits, Temporary Total Disability benefits and Permanent Partial Disability benefits. Claimant timely objected to the Final Admission of Liability and set the matter for hearing on payment of medical benefits from various medical providers, including Mountain States Pathology, Colorado Springs Health Partners, and Diversified Radiology of Colorado, P.C.

3. At the hearing, Respondents' counsel represented that Respondents admit liability for the medical care Claimant received from Mountain States Pathology, Colorado Springs Health Partners, and Diversified Radiology of Colorado, P.C.

4. Respondent's counsel further represented that payment for two other providers, Castle Rock Adventist Providers, and Emergency Physicians at Porter Hospital has been admitted by Respondents, and has either been paid, or is in the process of being paid. This representation by counsel is accepted by the ALJ.

5. The record is unclear why payment of these medical bills for this admitted claim has been delayed to date, but the ALJ finds that Respondents are now acting in good faith to rectify this matter in its entirety.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is evidence that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

4. Claimant received medical care from Mountain States Pathology, Colorado Springs Health Partners, and Diversified Radiology of Colorado, P.C. At hearing, Respondents admitted liability for the medical care Claimant received from those providers. Therefore, the Administrative Law Judge finds and concludes that Claimant has sustained her burden of proving by a preponderance of the evidence that Respondents are liable for payment of medical benefits provided by Mountain States Pathology, Colorado Springs Health Partners, and Diversified Radiology of Colorado, P.C.

ORDER

It is therefore ordered that:

1. Respondents shall pay, without further undue delay, for medical benefits provided by Mountain States Pathology, Colorado Springs Health Partners, and Diversified Radiology of Colorado, P.C.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 8, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Respondents have met their burden to prove that Claimant's injury resulted from the willful failure to use a safety device and/or a willful violation of a reasonable safety rule adopted by Employer for Claimant's safety in contravention of C.R.S. §8-42-112(1)(a) and (b), thus entitling Respondents to reduce Claimant's compensation by fifty (50) percent.

II. If Claimant's indemnity benefits are reduced by fifty percent, whether Respondents are entitled to an overpayment based on Claimant's receipt of full indemnity benefits.

STIPULATION

The parties stipulated that Respondents' Exhibit K accurately reflected Claimant's indemnity benefits for the purpose of calculating an overpayment should the ALJ conclude that Claimant willfully failed to use a safety device and/or violated a reasonable safety rule adopted by Employer.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Employer is a heating, ventilation, and air condition ("HVAC") and refrigeration company that services all types of residential and commercial air conditioning units, boilers, and, furnaces. Claimant was hired by Employer as an HVAC technician on March 28, 2016.

2. When Claimant began working for Employer, Patrick Volz, the Employer's owner and founder, worked with Claimant on a daily basis. Mr. Volz always works with new employees to ensure they know Employer's safety rules and how to perform the tasks they are assigned.

3. Mr. Volz testified that safety is of paramount importance to him. Consequently, he testified that he imposes safety rules for his workers. He specifically testified that one of the safety rules he reviews with all new employees is a rule requiring all employees to only use ladders provided to them by Employer ("Ladder Rule").

4. As part of their line of work, Employer services HVAC units that are located on roofs of buildings and recreational vehicles (RVs). According to Mr. Volz, the

Ladder Rule applies whenever an employee needs to climb to a roof to access an HVAC unit. During cross examination, Mr. Volz admitted that the rule has an exception which is that employees are allowed to use ladders that are bolted to the sides of buildings. Per Mr. Volz, the reason for this exception is that employees can be assured that ladders bolted to the sides of buildings are safe because they are inspected by government officials. Mr. Volz also admitted that the "Ladder Rule" was not reduced to writing but claimed it has been in place since the company was founded.

5. The purpose of the Ladder Rule is to guarantee that employees use safe ladders that are sturdy, do not have broken rungs, have the proper weight bearing capacity, and are made from fiberglass to prevent electrical shock. Mr. Volz testified that he is responsible for purchasing Employer's ladders and intentionally purchases fiberglass ladders that meet a 300 pound weight bearing capacity limit and have ice cleats on the legs to prevent them from slipping. According to Mr. Volz, these features render the ladder a "safety device."

6. Employer provides vans to its employees and each van is equipped with at least three ladders of varying heights to enable employees to reach roofs of different heights.

7. Mr. Volz testified that during the first two months of his employment he worked an estimated 25 times along side of Claimant. During this time, Mr. Volz testified that he communicated the Ladder Rule to Claimant on several occasions. He reported that on 3-4 occasions during this time, Claimant tried to use a ladder other than one provided on his van. On these occasions Mr. Volz testified that he counseled Claimant to use the company ladders.

8. On May 27, 2016, shortly before Claimant's injury, Claimant began climbing a ladder on the back of a camper to access the air conditioning unit on the roof. Mr. Volz reminded Claimant of the Ladder Rule and explained to him the camper ladder was unsafe because it was narrow and difficult to climb.

9. Mr. Volz testified that there was no question Claimant knew and understood the rule after it was explained to him. Mr. Volz did not write a formal disciplinary report after this incident because he believed that a verbal warning was sufficient.

10. On June 21, 2016, Claimant was assigned to repair an air conditioning unit located on the roof of a fifth wheel travel trailer. The fifth wheel was approximately ten feet high and was equipped with a ladder that was bolted to the rear of the unit. This ladder descended from the roof downward terminating approximately two feet above ground level. At the end of this ladder was a short two rung swinging extension designed to allow for easy access to the stationary ladder that ran up the back of the RV.

11. Claimant testified that after he had finished servicing the AC unit, he

lowered his tolls to the ground and began to descend the stationary ladder bolted to the back of the RV. He explained that as he traveled down the ladder, his foot got caught between the last rung of the stationary ladder and the RV. As he stepped down with the opposite foot onto the extension it moved causing him to lose his balance, fall and injure his shoulder.

12. At the time Claimant serviced the fifth wheel, his van was equipped with three ladders of different sizes. Claimant testified that for safety reasons he did not put a ladder against the RV in question because the side and roof were slippery and he had seen extension ladders slide off the sides of RVs in the past. According to Claimant, the ladder bolted to the RV and the swinging portion containing the last two rungs was factory made. He assessed it as safe and testified that he would not have climbed it if it was not.

13. Employer testified that there was plenty of space in which to set up a company ladder. According to Mr. Volz there was no reason not to. He also testified that Claimant would not have been injured if he had used an Employer provided ladder because he would not "have been dealing with [a ladder] that was swinging around." Accordingly, Respondents contend that Claimant willfully violated a company policy to always use a company ladder on the job.

14. Claimant testified the he was never instructed not to climb existing ladders. To the contrary, he testified that if there was an existing ladder at the job site that was safe, he and Mr. Volz would climb them "all the time." Per Claimant he climbed non-company ladders "all day-every day." According to Claimant, the first he heard of the Ladder Rule was after he fell and injured his shoulder.

15. John Hogan, an HVAC technician who was hired by Employer after Claimant's fall, testified that when he began working for Employer, Mr. Volz regularly communicated the Ladder Rule to him, explained the importance of the rule, and showed him how to properly set up the ladders. Based on his conversations with other employees, Mr. Hogan believes the Ladder Rule is a well-known safety rule.

16. Mr. Hogan's testimony has limited persuasive effect since he was hired after Claimant and the issue for resolution is what safety rule was in existence at the time Claimant fell, not what rules may have been put into place after Claimant fell.

17. Mariana Vergara, Employer's office manager and business administrator, completed a First Report of Injury on June 21, 2016 based on information Claimant provided to her. The First Report of Injury indicated that Claimant had been provided with safety equipment; however, the First Report fails to document whether it was used.

18. On June 24, 2016, Three days after the incident, Ms. Vergara prepared an Employee Disciplinary Report documenting what she asserted in the report was a violation of safety rules and company policies. In the report, Ms. Vergara noted that Claimant did not use the ladder provided to him by Employer to go up and down the RV.

Rather, he used the ladder located on the back of the RV which she asserted was not a "reliable ladder" and not part of his "safety tools."

19. Employer's Employee Handbook was admitted into evidence. Section 4.5 of the handbook addresses "Safety." The handbook does not specifically address safety concerns surrounding ladders and does not reference ladders as safety devices/equipment. Rather, Section 4.5 provides in pertinent part: "it is the employee's responsibility to take steps to promote safety in the workplace and work in a safe manner. By remaining safety conscious, employees can protect themselves and their coworkers."

20. Mr. Volz inspected the fifth wheel on June 23, 2016, one day before Ms. Vergara wrote him up for violating company policies and not using safety equipment. During his inspection, Ms Volz noticed that the bottom two rungs of the ladder were clamped to the base of the stationary ladder and moved freely when someone stepped on them. Mr. Volz believed that even a strong wind could cause the extension to move. Consequently, Mr. Volz reasoned that the RV ladder was not secure. While he was inspecting the RV and taking pictures, Mr. Volz testified that the owner confronted him and questioned him about the reason he was taking pictures.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385(Colo. App. 2000).

Respondents Contention that a Ladder is a Safety Device

B. Respondents are relying on section 8-42-112(1)(a), C.R.S., which provides in pertinent part that a claimant's temporary total disability benefits (TTD) may be reduced by fifty percent (50%) "where injury is caused by the willful failure of the employee to use safety devices provided by the employer." In this case, the Respondents are alleging that a ladder constitutes a "safety device." The ALJ is not persuaded. In the view of the undersigned, a safety device is an instrumentality intended for a particular safety purpose to prevent injuries. Such devices may include guards, seat belts, a filtered mask to breathe through and safety harnesses. In cases that have addressed the failure of an employee to use a safety device, they have considered the use of whether a claimant failed to use a safety harness while working high above ground. *E.g., Nightingale v. Lowes Home Improvement Warehouse, Inc.*,

W.C. No. 4-912-834-01 (April 3, 2014); *Flores v. American Furniture Warehouse*, W.C. No. 4-939-951-01 (April 30, 2015); *Ramirez v. Unique Endeavors Pajaritos #2, Inc., SJC Building*, W.C. No. 4-882-966-02 (March 10, 2014). Each of the aforementioned items are safety devices because their primary function his to address a specific safety concern to prevent injury. In contrast, a ladder by its very nature, i.e. its intended use raises the risk of injury, especially if used improperly. The undersigned knows of no cases where a ladder was found to be a safety device under this statute and Respondents cite none.

C. The testimony from Mr. Volz that the features of the ladders he provides render them safety devices is unpursuasive. Here, the ladder provided to Claimant was store-bought without modification and available to anyone for purchase. The fact that it may have been made from fiberglass and had cleats does not make it a safety device. The ALJ agrees with Claimant that a ladder is simply a tool designed to assist a workers in getting his/her work done. If a ladder were a considered a safety device merely because it had some enhanced safety features, such a soft grips on a pair of pliers, then any tool provided to a claimant could be considered a safety-device. By asserting that Claimant failed to use a safety device by not using a particular ladder, the Respondents are greatly over-reaching. The primary reason a ladder was provided to Claimant was to assist him in climbing onto roofs, not to protect him from harm. In that regard, the ALJ concludes that a ladder is a tool not a safety device.

Respondents Contention that Claimant Violated a Safety Rule

D. Section 8-42-112(1)(b), C.R.S. 2014, provides for a fifty percent (50%) reduction in benefits if the employee is injured due to a willful violation of a safety rule. The term "willful" connotes deliberate intent, but mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

E. The elements of proving a violation under Section 8-42-112(1)(b) include the following: 1) There must be a safety rule adopted by the employer. 2) The safety rule must be reasonable. 3) The safety rule must be known by the employee; i.e. “brought home” to the employee, and diligently enforced. *Pacific Employers Insurance Co. v Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (Colo. 1943). 4) The meaning and content of the safety rule must be specific, unambiguous and definite, clear and non-conflicting. *Butland v. Industrial Claim Appeal Office*, 754 P.2d 422 (Colo. App 1988). 5) The violation of the safety rule must be willful, done with deliberate intent by the employee. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App 1990).

F. “Under § 8-42-112(1)(b) it is Respondents’ burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule.” *Horton v. JBS Swift and Company*, W.C. No. 4-779-078 (2010); *Strait v. Russell Stover*

Candies, W.C. No. 4-843-592 (2011). The question of whether the respondents carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). Here, the evidence presented persuades the ALJ that Respondents presented sufficient evidence to meet their burden of proof concerning elements 1-2 and 4.[1] Rather, the question presented here is whether the safety rule was diligently enforced and whether Claimant's injuries were caused by his willful failure to adhere to the rule against using any ladder other than those provided by employer. Based upon the evidence presented, the ALJ concludes that Respondents failed to carry their burden regarding these elements.

Employer's Failure to Conscientiously Enforce the Alleged Safety Rule

G. Having concluded that Employer, probably established a safety-rule against use of any other ladder than those provided on his service van, the ALJ turns his attention to whether the rule was diligently enforced. In concluding that Respondents have failed to meet their burden of proof to establish a willful violation of an alleged safety-rule, the ALJ finds the case of *Ronzon v. HCM, Inc.*, W.C. No. 4-914-996-01 (November 6, 2014) instructive. In *Ronzon*, as in this case, the only evidence the employer produced for an alleged safety-rule violation was a write-up against the claimant, after claimant was injured, and not before. Moreover, as in this case, the evidence presented in *Ronzon* persuaded the ALJ that "[t]he employer failed to meet its burden to prove a willful violation of a safety rule because the employer had failed to show that it enforced the safety policy prior to the date of the claimant's injury." In this case, the evidence presented demonstrates the following:

- The only write-up we have regarding the alleged rule is one that occurred after Mr. Messer was injured, and not before. As found above, Claimant was injured on June 21, 2016, but, was written up for a violation of this alleged safety rule is on June 24, 2016.

- Claimant was written up for an argument with his boss over payment for a job leading the ALJ to infer that Employer did not hesitate to write him up for violating company policy. Yet, Respondents failed to establish the existence of any write ups or other enforcement of the alleged safety-rule in question despite Mr. Volz' testimony that he personally saw Claimant violate the alleged safety rule on 3-4 occasions. Respondents presented no explanation for why Claimant was not written up over these violations other than to suggest that Employer did not think a write-up was necessary.

[1] Despite Claimant's concerns that the alleged safety-rule in this case was not reduced to writing, settled case law provides that a safety rule "does not need to be formally adopted, does not have to be in writing, and does not have to be posted for the reduction pursuant to § 8-42-112(1)(b) to apply. Rather, oral warnings, prohibitions, and directions are sufficient if heard and understood by the employee and if given by someone generally in authority." *Id.* A safety rule with exceptions is a legitimate safety rule that compels a reduction in indemnity benefits if the claimant willfully commits an act that is not within those exceptions. *See Stockdale v. Indus. Comm'n*, 232 P. 669, 670 (Colo. 1925) (holding the claimant willfully violated an oral safety rule by crossing a bridge with a full tank of water even though his supervisor testified that he allowed the claimant to cross the bridge with an empty tank).

A suggestion the ALJ finds/concludes unconvincing given the sheer number of alleged violations Claimant committed in the presence of Mr. Volz. Accordingly, the ALJ concludes that the evidence supports a finding/conclusion that if the alleged safety-rule existed in the first instance, Claimant's employer was not enforcing it.

Respondents Failure to Establish a Willful Violation of the Alleged Safety Rule.

H. "An employee's violation of a safety rule need not be considered willful if the employee had some plausible purpose to explain the violation." *Grose v. Riviera Electric*, W.C. No. 4-418-465 (2000). "Generally, an employee's violation of a rule in an attempt to facilitate accomplishment of the employee's business does not constitute willful misconduct." *Id*. "We have previously held that under some circumstances evidence the claimant possessed discretion to circumvent a safety rule might negate a finding of a 'willful' safety rule violation." *Triplett v. Evergreen Builders, Inc.*, W.C. No. 4-576-463 (2004). "Further, the exercise of poor judgment within the realm of the claimant's legitimate discretion might well qualify as mere 'negligence' sufficient to preclude a finding of willfulness." *Id*.

I. Given the fact that Claimant's employer could not even tell us what the alleged safety-rule was, since he first told us that the rule prohibited the use of any non-company ladder, only to admit later on that Claimant could use other ladders, assuming this rule existed, this creates enormous problems for the Respondents. At best, it appears that the so-called safety-rule would have allowed Claimant to decide to climb up and down ladders that are secured to other objects, like buildings and/or RVs. Since the ladder he used was attached to the fifth wheel, then he could not have willfully violated this alleged safety rule by climbing such a ladder given the exception to the rule testified to by Employer. Claimant testified that the ladder appeared safe, was attached, and was a manufactured ladder intended to be used by people to climb onto the roof of the fifth wheel. Furthermore, Claimant testified to a legitimate safety reason for using this ladder – the extension ladder was more dangerous because it could have easily slipped off the sheet-metal surface of the fifth wheel. Under these circumstances, the ALJ concludes that Claimant's violation was done in an attempt to expeditiously facilitate Employers business purposes. At best, the Respondents have shown that perhaps Claimant was negligent in using the ladder bolted to the RV because the bottom two rungs were able to swing freely. Nonetheless, under the facts of this case, the ALJ concludes that this does not reach the level of a willful violation of the purported safety rule. Accordingly, the request for a fifty percent reduction in Claimant's indemnity benefits must be denied and dismissed. Because Respondents have failed to carry their burden to established that Claimant willfully failed to use a safety device and willfully violated a known safety-rule, the claim for overpayments need not be addressed further.

ORDER

It is therefore ordered that:

1. Insurer's request to reduce claimant's compensation benefits by fifty percent

(50%) as provided for by Sections 8-42-112(1)(a) and (b), above is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 9, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, Co 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-956-806-02

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 18, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 1/18/17, Courtroom 1, beginning at 8:30 AM, and ending at 12:00 PM). The hearing concerns the Respondents' request to overcome the Division Independent Medical Examination (DIME) of Gary Zuehlsdorff, D.O. At the conclusion of the hearing, the ALJ ordered a Follow Up DIME because of an ambiguity in Dr. Zuehlsdorff's DIME report, based on the Claimant's testimony at hearing. Dr. Zuehlsdorff performed the Follow Up DIME on April 26, 2017, and filed his report on the same date. A briefing schedule had been established thereafter.

Claimant's Exhibits 1 through 19 were admitted into evidence, without objection, with the exception of Claimant's Exhibit 18 (a recording of an interview by Investigator Mike Whitaker), to which the Respondents' objected. The ALJ hereby sustains the Respondents' objection and rejects Claimant's Exhibit 18. Respondents' Exhibits A through FF were admitted into evidence, without objection. The evidentiary deposition of Mark Robinson, M.D., taken on October 25, 2016, was filed on May 2, 2017 (hereinafter referred to as "Robinson Depo.," followed by a page number).

At the conclusion of the hearing, the ALJ ordered a Follow Up DIME because of an ambiguity in Dr. Zuehlsdorff's DIME report. Dr. Zuehlsdorff performed the Follow Up

DIME on April 26, 2017, and filed a report of the same date. A briefing schedule thereafter was established: Respondents' opening brief was filed on May 2, 2017. The Claimant's answer brief, labeled "Claimant's Proposed Specific Findings of Fact, Conclusions of Law, and Order," was filed on May 8, 2017. Respondents' reply brief was due within two calendar days of the answer brief. There was no timely reply brief and the matter was deemed submitted for decision on May 11, 2015. The ALJ hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns the Respondents' request to overcome the DIME of Gary Zuehlsdorff, D.O., on his findings that the Claimant was at maximum medical improvement (MMI) as of April 26, 2016 and rated at 16% whole person permanent impairment. The Claimant's admitted low back injury date was January 24, 2014. Respondents' theory, contrary to Dr. Zuehlsdorff's opinions, is that the Claimant sustained an effective, independent, intervening cause on August 12, 2015.

The Respondents bear the burden of proof, by clear and convincing evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. This admitted claim stems from an incident that occurred at work on January 24, 2014.[1] Claimant is a firefighter who was conducting ice rescue training on that day. The shore crew pulled her harness, causing her to spin, hitting her back on an ice shelf. She injured her back, and was diagnosed with facet syndrome (Respondents' Exhibit FF, Exhibit A, bates 2; Exhibit C, bates 24).

2. Ultimately, the Respondents filed a Final Admission of Liability (FAL), admitting for an average weekly wage (AWW) of $1,452.36; temporary total disability (TTD) and temporary partial disability (TPD) benefits through September 1, 2014; zero permanent partial disability (PPD) benefits; and denying liability for post maximum medical improvement (MMI) maintenance medical benefits. The Claimant filed a timely objection and Notice and Proposal for Selection of a DIME. Gary Zuehlsdorff, D.O. was selected as the DIME Examiner.

1 The hearing audio for the January 18, 2017 hearing was transcribed and that transcription was submitted to the court. There are references in that transcription to injury date of April 24, 2014 which appear to be the undersigned misspeaking. *E.g. p. 30.*

Sander Orent, M.D., Authorized Treating Physician (ATP)

3. The Claimant's authorized treating physician (ATP) was Sander Orent, M.D (Respondents' Exhibit C). Dr. Orent treated the Claimant following her January 24, 2014 work incident. In his June 24, 2014 note, he noted that the Claimant was doing very well. She had had an "excellent" result from injections and was "virtually pain free" for several days (Respondents' Exhibit C, bates 28). By July 1, 2014, the Claimant was "absolutely pain free" and running four miles (*Id*, bates 30). In their November 11, 2014 encounter, Dr. Orent described the Claimant as "moving into a more asymptomatic state" (*Id*, bates 34). The Claimant had various non-invasive treatments from that point. She was working full time with no restrictions.

4. The Claimant appeared for an appointment with Dr. Orent on August 13, 2015. He described a worsening of condition. The Claimant provided him a history of a new onset of right leg pain in a radicular pattern down her right leg. "This is brand new." According to the report of Dr. Orent, the Claimant did not provide any history of an intervening event on August 12, 2015. According to Dr. Orent: "There have been no aggravating events" (Exhibit Ex. C, bates 40). He noted that "this is brand new. I think this is obviously a worsening of this condition we have been treating her for." Dr. Orent referred the Claimant for an "ASAP MRI (Exhibit C, bates 40-41). Because of "new onset" he provided work restrictions (*Id* bates 42). As found herein below in Finding No. 6, on August 10, 2015, the Claimant had told her physical therapist about increased back pain and pain in the right leg. The physical therapy note is not inconsistent with Dr. Orent's assessment on August 13, 2015 (the day after the August 12, 2015,"fence jumping" incident).

5. The Claimant's MRI (magnetic resonance imaging), conducted on August 13, 2015, was compared with a March 27, 2014, MRI, and showed a new large extrusion at the L5-S1 level, which was now effacing the S1 nerve roots (Respondents' Exhibit. J). In his follow up, Dr. Orent stated that the Claimant's new symptoms were directly related to the new compression of the nerves from the new herniated disc shown on the MRI (Respondents' Exhibit C, bates 44). He took her off work (bates 46). He made referrals for injections and for a surgical evaluation. Based on the totality of the evidence, the ALJ finds that it is highly unlikely that this new phenomenon spontaneously happened along an unbroken chain of natural progression from the admitted January 14, 2014 , back injury.

Physical Therapy Report

6. There were previous complaints of symptoms into the Claimant's right leg. The August 10, 2015 physical therapy report states that the Claimant's back symptoms increased "over the past five days" (Claimant's Exhibit 15, p. 331). The same report outlines that the Claimant presented "now with **R LE radicular complaints**" (emphasis

supplied) and the report further states “PT to recheck MD next Tuesday” (Claimant’s Ex 15, p. 331). Therefore, the record reflects that 2 days before the August 12, 2015 event Claimant had right leg symptoms. The ALJ finds that timing of these complaints are not referenced either by DIME Dr. Zuehlsdorff’s Follow Up DIME Report, nor are they referenced by any other physician. Indeed, they do not account for the new symptoms reflected in the MRI of August 13, 2015, the day after the “fence jumping” incident.

Andrew Castro, M.D.

7. After the August 13, 2015 alleged “worsening,” the Claimant was evaluated by Andrew Castro, M.D., a surgeon, who concluded that conservative treatment would be appropriate (Respondents’ Exhibit D, bates 64). Injections with Lief Sorensen, M.D., were recommended (Respondents’ Exhibit E). The Claimant requested and received a referral for a second surgical opinion. Dr. Orent provided the referral for an evaluation and consultation only to Mark Robinson. M.D (Respondents’ Exhibit C, bates 47, 50). Dr. Orent set a follow up workers’ compensation appointment for September 29, 2015, which did not occur (Respondents’ Exhibit C, bates 52).

Mark Robinson, M.D.

8. The Claimant was seen by Dr. Robinson on September 22, 2015. Without contact with Dr. Orent or the insurance carrier, Dr. Robinson went forward with surgery on September 30, 2015 (Respondents’ Exhibit G, bates 94-96; Exhibit I, Robinson Depo, P. 16 -17). Surgery was aimed at the new large disc excursion identified on the MRI of August 13, 2015 (Respondents’ Exhibit I, bates 56-57). The surgery was approved through the Claimant’s personal health insurance (Respondents’ Exhibit I, bates 95; Robinson Depo, pp.17-18). The surgery was approved by the Claimant’s private health insurance carrier and not her workers’ compensation physicians (Respondents’ Exhibit I, bates 137). (9/24/15: “Spoke to pt she will Dr. Daarud fax over medical H & P and get pt read for her surgery.” [*sic*] *Note:* There was an appointment with ATP Dr. Orent scheduled for September 29, 2015 which claimant did not attend (Respondents’ Exhibit C, bates 52). There was no request for authorization made to the workers’ compensation insurer prior to the surgery (Robinson Depo.; Respondents’ Exhibit I, bates 128). In the Claimant’s answer brief, reference is made to a recorded interview with Investigator Mike Whittaker, offered into evidence as Claimant’s Exhibit 18, which was never admitted into evidence and, therefore, cannot be considered.

9. After the surgery, Dr. Orent was asked about the relatedness of that surgery to the January 24, 2014 work incident and MMI for that work incident. Dr. Orent reviewed the results of the August 13, 2015 MRI and the new symptoms. He concluded that there must have been some new event that caused the L5-S1 disc to herniate. Based upon his experience in treating the Claimant and the history of the claim, he concluded that the Claimant had been at MMI for the January 24, 2014 work incident as of March 24, 2015 (Respondents’ Exhibit C, bates 55). He stated that there was no

impairment resulting from the January 24, 2014 work injury, based upon the "asymptomatic" reports (Respondents' Exhibit C, *Id*, bates 53-54 (See also, Exhibit G, bates 91, "Symptoms subsided until they flared in August leading to surgery").

Gary Zuehlsdorff, M.D., DIME Examiner

10. Dr. Zuehlsdorff evaluated the Claimant as a DIME on April 26, 2016. The opinions in his report did not mention the August 12, 2015 incident that the Claimant later described to Dr. McCranie and Dr. Goldman. Regarding the period between January 24, 2014 and the August 13, 2015 MRI, Dr. Zuehlsdorff's report stated, "**She claims there was no new injury during that time either at work or outside of work"** (emphasis supplied). [Respondents' Exhibit A, bates 6]. Dr. Zuehlsdorff discussed Dr. Orent's finding of MMI and no impairment for the January 24, 2014 injury. He quoted Dr. Orent, who stated, "she had an exacerbation, which she related to a training event." Dr. Zuehlsdorff included the parenthetical comment: "(Actually nothing in the record to suggest this)" [Respondents' Exhibit A, bates 5]. He stated that he found Dr. Orent's MMI report "very confusing." His DIME report states, "there is no evidence anywhere in the record of any additional injury either work or non-work related" (Respondents' Exhibit A, bates 8). The ALJ infers and finds that Dr. Zuehlsdorff's conclusion this regard is at the core of his disagreement with ATP Orent and his opinion that treatment and impairment following the change in the MRI continued to relate to the January 24, 2014 work injury. DIME Dr. Zuehlsdorff provided an MMI date of April 26, 2016 and an impairment rating of 16% whole person. He was of the opinion that the Claimant's surgery by Dr. Robinson was work related. The ALJ finds that DIME Dr. Zuehlsdorff's ultimate conclusions are based on the erroneous assumption that there was no significant intervening event, *i.e.,* the "fence jumping' incident of August 12, 2015. In his follow Up DIME, Dr. Zuehsdorff effectively concluded that the "fence jumping" incident made no significant difference. Again, this conclusion was based on inadequate medical records and an erroneous grasp of the effects of the "fence jumping" incident of August 12, 2015.

11. Following the Claimant's specific description of events on August 12, 2015 to her and a review of the medical records, Dr. McCranie stated the opinion that she was in agreement with the ATP Dr. Orent regarding MMI and impairment. She noted that most treatment had been discontinued by March of 2015. She noted the records showed acute onset of new symptoms of left lower extremity pain, numbness, and weakness, and that this correlated with the new MRI scan finding of a new disc extrusion. She called these MRI findings "distinctly different" from the previous MRI findings. Dr. McCranie was of the opinion that there was a distinct and separate new event that occurred.

Kathy Fine McCranie, M.D.

12. The Claimant was evaluated by Kathy Fine McCranie, M.D., on September 7, 2016. During that evaluation, for the first time, a medical record reflected the Claimant's description of a specific incident that lead to an immediate change in symptoms. During her interview with the Claimant, the Claimant stated that she had a new injury on August 12, 2015, the day prior to her appointment with Dr. Orent. The Claimant described jumping over a fence while on duty fighting a grass fire. "She noted immediate loss of feeling in the lateral aspect of her right calf. She also had immediate onset of right buttock pain, which she described as a searing nerve pain traveling in to the mid-calf. She could not feel where her right foot was placed and she first noted a foot drop at this time" (Respondents' Exhibit. B, bates 12-13). The Claimant provided a similar description to L. Barton Goldman, M.D., in the independent medical examination (IME) he performed on her (Claimant's Exhibit 5). At hearing, however, the Claimant's initial testimony de-emphasized the effect of the August 12, 2015 incident. She called the incident "mundane" and "benign" and described it in those terms. Her prior statement to Dr. McCranie indicated otherwise, "I jumped over a fence, and just – back was just in excruciating pain. I just lost feeling from, like I said, from about mid-calf, around the lateral aspect." This is significantly different from what the Claimant told Dr. Zuehlsdorf at the Follow Up DIME. The ALJ infers and finds that this conflict in descriptions of the "fence jumping" incident, significantly affects the Claimant's credibility on the most critical point of this case.

13. Dr. McCranie testified at hearing. She noted that, without a complete history, Dr. Zuehlsdorff's report is "fatally flawed", and is clearly wrong regarding MMI and permanent impairment attributable to the January 24, 2014 work incident. She also testified that Dr. Zeuhlsdorff's conclusions were clearly wrong, with or without full history. The ALJ finds that there is no serious and substantial doubt that there was an intervening incident that led to changes in the Claimant's spine. The MRI changes are not a "natural progression" of the January 24, 2014 work injury, diagnosed as facet syndrome. There are clear new symptoms and new pathology in August 2015 that were "dramatically different" from the initial work injury. It was those changes that lead to the Claimant being placed off work, the need for new injections and surgery. The Claimant's need for treatment and resulting impairment would not have occurred without whatever occurred on August 12, 2015, to cause that change in pathology. Dr. McCranie testified that these documented changes and resulting treatment are not causally connected to the January 24, 2014 work incident. Surgery was not recommended for the Claimant prior to the August 12, 2015 incident *(*Claimant's Exhibit 26, bates 8-10). Dr. McCranie also concluded, regarding impairment, "As a DIME physician, I'm expected to evaluate just the injury that is in question, In other words, if there is a separate work-related injury, or a subsequent work-related injury, or a prior injury, then that is a separate phenomenon and not taken into consideration with the impairment rating." Dr. McCranie testified that there was clearly an intervening injury that occurred in this case, and that, in her expert opinion, the changes seen on the

second MRI would not have occurred without something happening. For causation purposes, it does not matter if that something is the specific work incident eventually identified by claimant during her IME. Her testimony is that Dr. Zuehlsdorff was clearly wrong in his conclusions.

14. At hearing, the Claimant testified that she described the "fence incident" to Dr. Orent and Dr. Zuehlsdorff. As noted, Dr. Orent's reports do not include discussion of the incident, but Dr. Orent positively remarked that there was no incident, based on what the Claimant did not tell him. The Claimant also indicated to Dr. Goldman that she informed Dr. Orent and Dr. Zuehlsdorff of the incident "but for whatever reason they did not document it" (Claimant's Exhibit 5, bates 23). Because of this ambiguity, the ALJ ordered a follow up DIME, in order for Dr. Zuehlsdorff to clear up the ambiguity. Dr. Zuehlsdorff's resulting March 19, 2017 report was admitted into evidence as Claimant's Exhibit 19. This report states "I asked her in detail why [s]he had not commented this to me in my DIME because I specifically asked her if she had any other incident and she had told me no. The patient had no other real answers to these questions" (Claimant's Exhibit 19). The ALJ finds that Dr. Zuehlsdorff's statements are credible, in this regard, and the Claimant's testimony and statements to evaluators on this point is not credible.

Dr. Zuehlsdorff's Follow Up DIME

15. The Claimant met with Dr. Zuehlsdorff after the hearing, on April 26, 2016 (Report, Claimant's Exhibit 19). By order, Dr. Zuehlsdorff was provided limited additional documentation for his follow up DIME. He did not receive a copy of either Dr. Goldman or Dr. McCranie's reports. He was provided the section of the hearing transcript regarding the Claimant's description of the "fence" event of August 12, 2015, to Dr. McCranie. During their meeting, the Claimant provided her summary of the hearing and opinions of the other doctors to Dr. Zuehlsdorff, including that "Dr. McCranie had simply stated that she was not sure whether or not that incident would be considered new or old but that she had stated to the patient's remembrance that the progression of the MRI did not make sense." The ALJ finds that this is not an accurate representation of Dr. McCranie's opinion or testimony, as found herein above. After their meeting, Dr. Zuehhlsdorff concluded that his DIME opinion did not change, and in coming to that conclusion, he stated that the records of the Employer, regarding the August 12, 2015 incident at work, was central to his opinion. He also relied upon the representation that the Claimant's pain was "in the same distribution of back and right leg" after the August 12, 2015 incident. Because of this, he was of the opinion that her condition was an "exacerbation" of her preexisting injury of January 24, 2014. Medical records show that right leg pain was not present before the change in pathology shown on the August 13, 2015, MRI. The Claimant appeared for an appointment with her long time ATP,, Dr. Orent, on August 13, 2015. She provided him with a history of a new onset of right leg pain in a ridiculer pattern down her right leg. Dr. Orent had stated, long before the issue concerning the August 12, 2015 incident was placed in controversy,, "This is brand new" (Claimant's Exhibit C, bates 40; Dr. Robinson,

Respondents' Exhibit I, bates 105, 129 [As of September 22, 2015, "6 week history of right posterior thigh and posterior lateral calf pain"]; Centura Health Dimensions Pain Management, Ex. E, bates 66, 68 "new severe right leg pain"]; Respondents' Exhibit G, bates 90). Dr. Zuehlsdorff is clearly wrong in his statement, "since it was in the same distribution of back and right leg" and therefore wrong in his reliance upon this premise in his finding that the Claimant did not experience a new injury in August of 2015.

Analysis of the Evidence/Findings

16. The Division of Workers' Compensation (DOWC) Low Back Treatment Guidelines addresses causation, which provide insight into when an intervening injury has occurred. They state, "Most low back cases result from injuries…Clinicians need to ask the following question: "Would the recommended treatment for the condition be the same if the work-related exposure had never occurred?" *Low Back Pain Medical Treatment Guidelines, Principles of Causation of Occupational Low Back Pain, Rule 17, Exhibit 1, p. 12*, 7 CCR 1101-3 (hereinafter the "Guidelines").. Although the ALJ is not bound by the Guidelines, the suggested analysis of the impact of an event vis-à-vis causation is reasonable and helpful in this case.

17. The first MRI that was done following the admitted work injury of January 24, 2014 was on March 27, 2104. The Claimant was treated for her workers' compensation injury by Dr. Orient from April of 2014 onward. She was diagnosed with facet syndrome. The Claimant showed improvement and was described as "asymptomatic" by her Dr. Orient. More than a year later, she reported "brand new" symptoms of radiculopathy down her right leg. The records do not reflect the Claimant reporting any incident that lead to these new symptoms until after the DIME evaluation of Dr. Zuehlsdorff. Regardless, it is undisputed that the second MRI, conducted on August 13, 2015, a day after the August 12, 2015 "fence jumping incident, " showed a new extrusion, and that this new extrusion caused the new symptoms. It is also undisputed that Dr. Robinson's surgery was aimed at this large rightward extrusion at the L5-S1 level, effacing the S1 nerve roots. Dr. Zuehlsdorff's impairment rating for the back was not for facet syndrome but as a result of the surgery that took place and the residual permanent impairment. Now that the Claimant has identified a specific incident, there is a reasonable explanation for the change in pathology, and the question becomes whether the August 12, 2015, incident was an independent, effective intervening event. This entails a mixed question of ultimate fact and conclusion of law.

18. Essentially, the Claimant argues that the herniated disc, reflected on the August 13, 2015 MRI was indirectly caused by the original, admitted injury of January 24, 2014 because the ALJ should draw an inference based on the physical therapy note of August 10, 2015, which states: There were previous complaints of symptoms into the Claimant's right leg. The August 10, 2015 physical therapy report states that the Claimant's back symptoms increased "over the past five days" (Claimant's Exhibit 15, p. 331). The same report outlines that the Claimant presented "now with **R LE radicular**

complaints" (emphasis supplied) and the report further states "PT to recheck MD next Tuesday" (Claimant's Ex 15, p. 331). Therefore, the record reflects that 2 days before the August 12, 2015 event Claimant reported right leg symptoms and increased low back pain. Indeed, this does not account for the significant new symptoms, a herniated disc, reflected in the MRI of August 13, 2015, the day after the "fence jumping" incident. In fact, Dr. Orent was aware of the right leg complaints as of August 13, 2015 before he became aware of the MRI results.

19. According to L. Barton Goldman, M.D: "It is a matter, perhaps, of housekeeping from an administrative or insurer perspective as to whether to close the January 24, 2014 claim and open a new claim as of August 12, 2015, and then apply the impairment rating suggested by Dr. Zuehlsdorff in that regard" (Claimant's Exhibit 5, bates 38). Dr. Goldman's and Dr. Zeuhlsdorff's conclusions are based on the idea that it doesn't matter, as long as the new incident occurred with the same employer. It does matter. This is not merely a housekeeping or administrative question, but a pivotal question of causation to be determined by the ALJ.

20. Dr. Zuehlsdorff concludes that the incident described by the Claimant led only to an "exacerbation" and did not break the causal connection between the Claimant's January 24, 2014 work incident and her need for medical treatment or permanent disability. He relies upon his determination of factual questions, including the existence of reports to the Employer, characterization of the reported August 12, 2015, events as a new or old injury by the Claimant and her Employer, and whether the Claimant's pain was "in the same distribution" before and after the event. In his report, and elsewhere, it is clear that the Claimant had an incident that "dramatically worsened her." Substantial, undisputed evidence indicates that the change in pathology is a "significant" cause of the need for treatment. There is a direct relationship between the August 12, 2015, event and the need for treatment. To the extent that Dr. Zuehlsdorff concluded otherwise, based on the totality of the evidence, it is highly probable, unmistakable, and free from serious and substantial doubt that Dr. Zuehlsdorff was wrong in this regard. To the extent that Dr. Orent's original MMI determination and Dr. McCranie's opinion differ from Dr. Zeuhlsdorff's opinion, Dr. Orent and Dr. McCranie are highly credible because they include recognition of these facts. There is clearly more than a difference of opinion between these two doctors and DIME Dr. Zuehlsdorff.

21. Dr. Orent, the ATP, who is most familiar with the Claimant medical case and her course of treatment, stated, "it seems that there must have been some new event that caused that L5-S1 disc to herniate." At that point, he had no history of an event. Although the Claimant asserts that she told him about a work event on August 12, 2015, this is not credible because she did not tell any of the other providers until her revelation to Dr. McCranie. This was obviously a question asked by Dr. Orent, and a question that was identified as important and re-hashed later. He did not ignore the inquiry of whether something happened. His records reflect that he asked and was told there was nothing. The same occurred with Dr. Zeuhlsdorff. The Claimant's assertions

at hearing that she told DIME Dr. Zuehlsdorff about this event are not corroborated by DIME Dr. Zuehlsdorff and for this reason, among others, the Claimant is not credible in this regard. Her position radically changed in the face of Dr. Zeuhlsdorff's certainly and clear recollection that she did not tell him about the August 12, 2015 incident. When he confronted her, "I did not receive a solid good answer on this" (Claimant's Exhibit 19, p. 4). Dr. Zeuhlsdorff's original criticism of Dr. Orent's finding of an intervening event was that there was no evidence of any event, and the Claimant had denied to him there was an event. Now, there is a described event, and the MRI changes make sense. As originally found by Dr. Orent, the causal connection was severed, and the Claimant was at MMI with no impairment for the January 24, 2014 injury as of March 24, 2014. There was no permanent impairment attributable to that work injury.

22. As found herein above in Finding No. 6, the Claimant argues that an August 10, 2015 (two days before the August 12 "fence jumping" incident), physical therapy note establishes an unbroken chain of causation, in the normal progression, from the original, admitted back injury of January 14, 2014.

23. If there is a separate and new event that has caused the need for medical treatment and disability, that event needs to be treated separately. It needs to be evaluated separately. There has been no opportunity for this to occur. The Claimant has never brought a claim for the work event she now describes occurring on August 12, 2015. She has not exceeded the statute of limitations as of the present time. The Respondents have never had the opportunity to investigate the claim. The Claimant rushed to her surgery by Dr. Robinson, had it approved by her private health insurance carrier, and then informed the Respondents that it had been done. These actions are not consistent with a person who thinks her condition is work related, or a person who was told, as she testified, that she should just treat everything as one work injury. There was no opportunity to explore the relationship of the surgery to the original work injury at the appropriate time. The Claimant then omitted discussion of an intervening event all of the way through the DIME evaluation. The August 13, 2015 MRI makes clear that the August 12, 2015 "fence jumping" event is a distinct, new injury.

24. Dr. Zeuhlsdorff's Follow Up DIME opinion does not address the Claimant's credibility, in a convincing manner, regarding the fact that she had not previously mentioned the August 12, 2015 "fence jumping" incident. He notes that there is new pathology, that Claimant wasn't forthcoming about the history, that she now describes worsened pain in her back and "dramatically worsened" in her leg. The Claimant provided Dr. Zeuhlsdorff with an inaccurate interpretation of the opinions of the other doctors. Based upon his discussion with the Claimant, Dr. Zeuhlsdorff made the conclusion that there was an "exacerbation" and not a new injury [the ALJ infers that "exacerbation" is used as a word of legal art, as opposed to "aggravation/acceleration"]. Dr. Zuehlsdorff's conclusion stands upon unreliable and incomplete information. Dr. Orent and Dr. McCranie have more than a difference of opinion with DIME Dr. Zuehlsdorff. They have reasoned opinions that show Dr. Zeuhlsdorff is clearly wrong in

ignoring a new injury, and lumping everything into one claim as a "housekeeping" matter. As Dr. McCranie testified, "**regardless of what caused the change, there is a change, and a new injury" (**emphasis supplied). This is highly probable, unmistakable, and free from serious and substantial doubt, based upon the clear medical evidence. The causal connection between the January 24, 2014 work injury and the need for medical treatment and impairment was severed on August 12, 2015. The August 13, 2015, MRI clearly and unambiguously reveals a brand new injury and not an exacerbation of the original admitted injury of January 24, 2014, despite the August 10, 2015 physical therapy note indicating pain in the right leg and increased back pain. It is highly unlikely that a natural progression of the effects of the admitted January 24, 2014, injury suddenly produced the August 13, 2015 MRI results.

Ultimate Findings

25. For the reasons enunciated herein above, the ALJ finds the opinions of Dr. Orent and Dr. McCranie, that the August 12, 2015 "fence jumping" incident amounted to a "brand new" injury more credible than DIME Dr. Zuehsdorff's opinion in his Follow Up DIME that the incident was merely an "exacerbation" of the January 24, 2014 admitted injury, which the ALJ infers and finds amounts to an opinion that the direct causal link to the January 24, 2014 injury remained unbroken. As further found herein above, the Claimant's testimony that she told Dr. Orent on August 13, 2015 about the August 12, 2015, incident is not credible. Her testimony that she informed DIME Dr. Zuelsdorff of this incident at the first visit is also not credible.

26. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Orent and Dr. McCranie, and to reject DIME Dr. Zuelsdorff's ultimate DIME and Follow Up DIME opinions.

27. Although the difference between the word "exacerbation" and "aggravation/acceleration" may seem like a subtle play on words, as used by DIME Dr. Zuehlsdorff, the word "exacerbation" is used to mean a non-compensable new event along the pathway of a natural progression of the January 24, 2014 admitted injury. The totality of the evidence reveals that this is highly unlikely, unmistakable, and free from serious and substantial doubt that the August 12, 2015, "fence jumping" incident was not an 'exacerbation" as the word is used by DIME Dr. Zuehlsdorff. "Aggravation/Acceleration" are words of art that indicate a compensable phenomenon in the workers' compensation sense, as demonstrated by the case law in the Conclusions of Law herein below.

28. The Respondents have proven that it is highly likely, unmistakable, and free from serious and substantial doubt, that the Claimant suffered a "brand new injury" on August 12, 2015, which amounts to an independent, effective intervening cause, that broke the direct causal chain from January 24, 2014. Therefore, the Respondents have overcome Dr. Zuehlsdorff's DIME opinions by clear and convincing evidence.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Orent and Dr. McCranie, that the August 12, 2015 "fence jumping" incident amounted to a "brand new" injury were more credible than DIME Dr. Zuehlsdorff's opinion in his Follow Up Dime that the incident was merely an "exacerbation" of the January 24, 2014 admitted injury, which the ALJ infers and finds amounts to an opinion that the direct causal link to the January 24, 2014 injury remained unbroken. As found, the causal link was broken by an effective, intervening

cause, the August 12, 2015 “fence jumping” incident. As further found herein above, the Claimant’s testimony that she told Dr. Orent on August 13, 2015 about the August 12, 2015 incident is not credible. Her testimony that she informed DIME Dr. Zuelsdorff of this incident at the first DIME appointed is disavowed by Dr. Zuehlsdorff, who was credible in this regard. As found, the Claimant was not credible in this regard.

Substantial Evidence

b. An ALJ’s factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is “that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence.” *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ’s resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Orent and Dr. McCranie, and to reject DIME Dr. Zuehlsdorff’s DIME and Follow Up DIME opinions.

Overcoming the DIME Opinions of Dr. Zuehlsdorff

c. The party seeking to overcome a DIME physician’s opinions bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). *Also see Leprino Foods Co. v. Indus. Claim Appeals Office,* 134 P.3d 475 (Colo. App. 2005). The DIME physician's determination of MMI, causal relatedness of related conditions which are part of the permanency evaluation, and degree of permanent impairment are binding unless overcome by "clear and convincing evidence." *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *See also Peregoy v. Indus. Claim Appeals Office,* 87 P.3d 261 (2004); and § 8-42-107(b)-(c), C.R.S. *Also see Whiteside v. Smith,* 67 P.3d 1240 (Colo. 2003). "Clear and convincing evidence" is evidence, which is stronger than preponderance, is unmistakable, makes a fact or facts highly probable or the converse, and is free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert, supra; Leming v. Indus. Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). In

other words, a DIME physician's finding may not be overcome unless the evidence establishes that it is "highly probable" that the DIME physician's opinion is incorrect. *Postelwait v. Midwest Barricade,* 905 P. 2d 21 (Colo. App. 1995). To overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 [Indus. Claim Appeals Office (ICAO), Oct. 4, 2001]. A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.,* W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Bush, Inc.,* W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970).* No compensability exists when a later accident or injury occurs as the direct result of an effective, independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). As found, the August 12, 2015 "fence jumping" incident was an effective, independent intervening cause of the Claimant's subsequent back problems, and it was highly, likely, unmistakable, and free from serious and substantial doubt, based on the totality of the evidence, the Dr. Zuehlsdorff's opinions that there was an "exacerbation" of the Claimant's January 24, 2014 admitted injury, was clearly in error because it amounted to an opinion that there was an unbroken chain of causation from January 24, 2014, when in fact there was an effective, independent, intervening cause, which could amount to an aggravation/acceleration of a pre-existing condition, as opposed to an "exacerbation of the January 24, 2014 admitted injury. Consequently, the Respondents have overcome Dr. Zuehlsdorff's DIME opinions by clear and convincing evidence.

"Exacerbation" Versus "Aggravation/Acceleration"

d. As found, although the difference between "exacerbation" and "aggravation/acceleration" may seem like a subtle play on words, as used by DIME Dr. Zuehlsdorff, the word "exacerbation" is used to mean a non-compensable new event along the pathway of a natural progression. The totality of the evidence reveals that this is highly unlikely, unmistakable, and free from serious and substantial doubt that the August 12, 2015 "fence jumping' incident was not an 'exacerbation" as the word is used by DIME Dr. Zuehlsdorff. The concept of "aggravation/acceleration" in workers' compensation is clear. There is a compensable injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder*

v. Indus. Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's present condition is **not** causally related to the January 24, 2014, admitted injury. If anything, the Respondents almost admit in their opening brief that the August 12, 2015, "fence jumping" incident was a new compensable injury, but they have not had a chance to properly investigate it. For this reason, the argument in the respondents' opening brief does not qualify as a judicial admission. A judicial admission is defined as a "formal, deliberate declaration that a party or his or her counsel makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or facts about which there is no real dispute." *Kempter v. Hurd,* 713 P.2d 1274 (Colo. App. 1986); *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP,* 230 P.3d 1275, 1283 (Colo. App. 2010). Judicial admissions must be unequivocal but become binding once they are made. *Salazar v. American Sterilizer Co.,* 5 P.3d 357 (Colo. App. 2000). *Also see Valdez v. Texas Roadhouse,* W.C. No. 4-366-133 [Industrial Claim Appeals Office (ICAO), January 25, 2001]. Stipulations are a form of judicial admission and are binding on the party who makes them. *Maloney v, Brassfield,* 251 P.3d 1097, 1108 (Colo. App. 2010).

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The opinions of the Division Independent Medical Examiner (DIME), Gary Zuehlsdorff, D.O., having been overcome by clear and convincing evidence, the Final Admission of Liability, dated November 6, 2015 remains in full force and effect.

B. Based on the totality of the evidence, and the Respondents' implied invitation in their opening brief, the Claimant is entitled to file a new workers' compensation claim, arising out of the August 12, 2015 "fence jumping" incident.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of May 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law J

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the C3-4 cervical fusion surgery recommended by Gary Ghiselli, M.D. is reasonable, necessary, and causally related to his June 28, 2015 work injury.

2. Whether Claimant has established by a preponderance of the evidence that medical treatment for his left ankle, left shoulder, right hip, headaches, concussion, cervical spine, lumbar spine, and tinnitus/hearing loss is reasonable, necessary, and causally related to his June 28, 2015 work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a major account manager and has been so employed for approximately 7 years. Claimant's work requires travel.

2. On Sunday evening, June 28, 2015 Claimant was traveling on I-70 westbound in order to be able to be able to work Monday morning. Claimant struck an elk while driving just outside of Glenwood Springs.

3. The Colorado State Patrol traffic accident report indicated that Claimant was traveling westbound in the right lane of traffic when an elk ran onto the roadway and collided with Claimant's vehicle. The report also indicated that Claimant's car traveled approximately ¼ of a mile after the impact and came to a controlled stop on the shoulder of the highway, that the airbag did not deploy, and that the injury severity was evident but non-incapacitating. The vehicle damage was noted to be major on the front right passenger side of the vehicle, on the hood of the vehicle, and in the center of the bumper of the vehicle and was noted to be moderate on the driver's side of the bumper. *See* Exhibit 2.

4. Glenwood Springs Fire Department was dispatched to the scene. Claimant reported that he had been driving at approximately 70 mph when he hit the elk head on. It was noted that the elk hit the front right side of Claimant's vehicle with significant damage but no intrusion into the cab of the vehicle and no airbag deployment. Claimant was awake, alert, and oriented to date, place, person, and situation and denied a loss of consciousness. Claimant reported that he believed he was either struck by something in his vehicle in the back of his head or that he maybe had some whiplash that had caused a severe headache. Claimant reported 8/10 pain that he described as concussion type pain and reported that he was a bit groggy and had a history of head pain due to a skull fracture in his earlier years. On physical examination, Claimant's head was the chief complaint, all vitals were within normal

limits, and all extremities moved equally and normally. Claimant was transported by ambulance to Valley View Hospital emergency department. *See* Exhibit 6.

5. On June 28 and 29, 2015, at the emergency department, Claimant was evaluated by Charlie Abramson, D.O. Claimant reported a chief complaint of headache. Dr. Abramson noted that EMS had described some damage to the front right side of the vehicle but no damage or intrusion to the driver's side and no airbag deployment. Claimant self-extricated and was attempting to flag down vehicles after the accident and upon EMS arrival, Claimant was ambulatory. Claimant reported that he did not lose consciousness and reported no midline neck pain, no chest pain, no pain in his extremities, and no abdominal pain. Claimant denied lower back pain, upper back pain, neck pain, body aches, and leg pain. Claimant reported a headache from the back of his head radiating to the front of his head with an 8/10 intensity. Claimant reported a past medical history including multiple concussions and skull fracture and also reported a prior back fusion and hip surgery. *See* Exhibit 7.

6. On examination, Dr. Abramson found Claimant's neck to be supple and non tender, Claimant's extremities were non-tender, non-swollen, and had full range of motion. Dr. Abramson performed a chest x-ray, EKG, CBC, CMP, and a CT of the head which were all found to be normal. Dr. Abramson noted that given Claimant's headache and history of multiple concussions the CT of the head was done but was negative. Dr. Abramson noted that there was no neck pain initially and that Claimant was NEXUS negative so they did not perform imaging of Claimant's cervical spine. Dr. Abramson noted that over the course of Claimant's emergency room visit, Claimant started to develop some paraspinal pain in the neck. Dr. Abramson noted, however, that when he reassessed Claimant, Claimant had no midline cervical spine pain on palpation, Claimant denied paresthesias, and Claimant's pain was reproducible with palpation of the musculature of the neck and trapezius muscles, which were noted to be in spasm. Dr. Abramson did not feel that radiography was indicated for the abdomen or pelvis. Dr. Abramson noted that Claimant was observed in the ER for over 90 minutes and with medications had marked relief of pain. Dr. Abramson noted that the basic screening labs were unremarkable and that Claimant was stable for discharge. Dr. Abramson discharged Claimant in good condition and gave him Norco and Flexeril. Dr. Abramson recommended that Claimant be reevaluated that week by a physician. Dr. Abramson advised Claimant that he would likely have more muscle aches and back pain the next day. *See* Exhibit 7.

7. A little over one week after the accident and on July 6, 2015 Claimant was evaluated at Concentra by Lori Rossi, M.D. Claimant reported that he was in a car accident where he hit an elk and that his service dog's leash hit him in the back of his head. Claimant reported that it was an 800 pound elk, that it totaled his car, and that he lost consciousness for a few seconds. Claimant reported a headache, cervical pain, and lumbar pain. Claimant reported 15 prior concussions, 3 of which were severe and reported 3 prior lumbar surgeries. On examination, Dr. Rossi noted Claimant's hearing to be grossly normal, Claimant's shoulder strength to be normal bilaterally, and Claimant's mini mental exam to be intact with a score of 27/30. Dr. Rossi noted

decreased lordosis in the cervical spine and tenderness in the cervical spine, left paraspinal, right paraspinal, left trapezius muscle, right trapezius muscle, bilateral muscle spasms, and minimal range of motion in all directions due to pain. Dr. Rossi assessed: concussion with loss of consciousness, cervical strain, lumbar strain, and thoracic strain. Dr. Rossi referred Claimant to neurology due to lack of focus and 15 prior concussions, 3 of which were severe. Dr. Rossi noted that due to Claimant's history of lumbar surgeries and relationship with Dr. Ghiselli she referred him to Dr. Ghiselli. Dr. Rossi also noted that due to the need for high level pain medications and the anticipated possibility of injections, she referred him to a physiatrist. Dr. Rossi anticipated maximum medical improvement (MMI) in 6-8 weeks. *See* Exhibit 8.

8. On July 14, 2015 Claimant underwent MRIs of his cervical and lumbar spine that were both interpreted by Neilesh Gupta, M.D. For the lumbar spine, Dr. Gupta provided the impression of: postsurgical changes related to a L4-S1 posterior fusion; some waviness along the cauda equine nerve roots at the L4 level which may be related to arachnoiditis; and mild degenerative change with mild left foraminal stenosis at L3-4. For the cervical spine, Dr. Gupta provided the impression of: degenerative change likely most significant at C3-4 where there is mild to moderate right and moderate to severe left foraminal stenosis. *See* Exhibit 10.

9. On July 16, 2015 Claimant was evaluated by Gary Ghiselli, M.D. Claimant reported getting zingers or burning down his lateral arms, left greater than right, but did not report any specific fingers involved. Dr. Ghiselli reviewed the July 14 cervical MRI and assessed mild degenerative changes from C4-7, cervicalgia, neck sprain and strain, and opined that there was no need for surgery at that point. *See* Exhibit 11.

10. On July 20, 2015 Claimant was evaluated by neurologist Alexander Zimmer, M.D. Claimant reported being injured in a motor vehicle accident when he struck an elk. Claimant recalled being hit in the back of his head and his vehicle running off the side of the road 300 yards from the site of impact. Claimant thought he may have been struck in the posterior head by a retractable dog leash. Claimant complained of severe headaches from the central and right occiput forward to the right side of ht head and that a headache was present to some degree constantly. Claimant also reported memory problems, intermittent dizziness, feeling off balance when walking, and feeling fatigued much of the time. Claimant reported multiple prior concussions totaling 17 altogether mostly while playing high school and college football. Claimant reported hitting his head in February of 2014 and being off work for three months due to headaches and other symptoms. Dr. Zimmer opined that Claimant's current symptoms, including residual headache, dizziness, and memory problems were consistent with post concussion headache syndrome and opined that Claimant's current injury had occurred on the background of multiple past concussions which may result in a somewhat more prolonged recovery timeframe. Dr. Zimmer opined that the neurological examination was predominantly normal. *See* Exhibit 13.

11. On July 22, 2015 Claimant was evaluated by Shimon Blau, M.D. Claimant reported that he was involved in a work related motor vehicle accident when he struck

an elk and that he had a brief loss of consciousness for about 30 seconds. He reported neck pain radiating into his posterior shoulders as well as "burners" down both arms with numbness and tingling in his left hand and less frequently in his right hand. Dr. Blau provided the impression of: cervical spondylosis/facet syndrome; lumbosacral spondylosis/facet syndrome; and post concussive syndrome. Claimant was referred to physical therapy and Dr. Blau opined that if Claimant's pain symptoms continued, they would consider cervical and/or lumbar facet injections versus medial branch blocks. *See* Exhibit 12.

12. On August 19, 2015 Claimant was evaluated by Dr. Blau. Claimant reported continued neck and lower back pain as well as occasional stingers and burners form his left neck radiating into his left arm. Claimant reported that after physical therapy and massage therapy, he had about 40% improvement in his neck and 30% improvement in his lower back pain. Claimant reported continued headaches that could be debilitating. Dr. Blau recommended continuing physical therapy and massage therapy and recommended bilateral C5-6 and C6-7 facet injections. *See* Exhibit 12.

13. On August 23, 2015 Claimant was evaluated at Sky Ridge Medical Center emergency room after sustaining an unrelated left ankle injury. Claimant reported that two days prior he had been walking his dog when the dog pulled him and caused him to roll his ankle inward. *See* Exhibit C.

14. On September 4, 2015 Claimant was evaluated by Dr. Zimmer. Claimant reported his symptoms were a similar degree as his visit six weeks prior. However, Dr. Zimmer opined that the symptoms of headache, dizziness, and memory issues were somewhat improved. *See* Exhibit 13.

15. On September 24, 2015 Dr. Blau performed bilateral C5-6 and C6-7 facet injections. Prior to the injections, Claimant reported burning and stabbing neck pain at a 5/10 at rest and 10/10 with aggravating activities such as neck movement. Fifteen minutes after the injections, Claimant reported 0/10 pain both at rest and with aggravating activities and reported 100% pain relief. *See* Exhibit 12.

16. On September 30, 2015, Claimant was evaluated by Dr. Blau. Claimant reported that his neck pain was improved significantly but that he continued to have severe headaches. Dr. Blau opined that Claimant's pain symptoms now seemed to be stemming much more from the upper facet joints which also explained the occipital headaches and Dr. Blau recommended bilateral C2-3 and C3-4 facet injections. Dr. Blau noted that the pain in the lower neck region improved significantly following the bilateral C5-6 and C6-7 facet injections. *See* Exhibit 12.

17. On October 14, 2015 Claimant was evaluated by Dr. Rossi. Claimant reported new issues of left ankle pain and swelling that he noticed while walking his dog, cognitive issues, and that his hip felt out of place. Claimant reported continued neck pain and headaches. Dr. Rossi found no appreciable cognitive issues. Dr. Rossi opined that Claimant's case was getting more complex with several new issues and

opined that with the mounting issues she was uncomfortable continuing Claimant's care. Dr. Rossi referred Claimant to Dr. Sacha and opined that she had a great deal of faith in Dr. Sacha's ability to handle such a difficult case along with handling the causality issues. *See* Exhibit 8.

18. On October 20, 2015 Claimant was evaluated by Dr. Ghiselli. Claimant reported that he was getting symptoms into his right hip that he associated with his right total hip arthroplasty slipping. Claimant also reported a left ankle injury that came on shortly after his accident. Claimant reported horrific headaches, facet injections that did not give him significant relief. Dr. Ghiselli noted that more cranial injections were recommended by Dr. Blau and were reasonable to help isolate the source of Claimant's pain. Claimant reported continued burning into his left hand in a non dermatomal pattern and decreased motion in his neck. Dr. Ghiselli strongly recommended injections in Claimant's neck, opined that Claimant was not at MMI, and opined that surgical intervention was not warranted yet. *See* Exhibit 11.

19. On November 4, 2015 Claimant was evaluated by John Sacha, M.D. Claimant reported that he hit an elk and had a brief loss of consciousness. Claimant reported that he had bilateral C5-7 facet injections which gave him no short term relief and no lasting relief and that Dr. Blau had then recommended bilateral C2-5 facet injections that were denied. Claimant reported pain in the bilateral neck and headaches. Claimant also reported pain in the low back and right leg and some localized pain to the right lateral him. Claimant denied having any neck problems in the past. Dr. Sacha provided the impression of: cervical facet syndrome consistent with whiplash syndrome affecting the upper cervical spine; headaches; lumbosacral radiculopathy- unclear if work related; postlaminectomy syndrome; hip complaints; and non work related bipolar and reactive depression. Dr. Sacha noted that he did not have all the medical records to adequately assess whether the low back or hip would be work related and that there was a long history of symptomatology including symptoms up to the time of the work injury. He opined that the neck was clearly work related and that Claimant had cervical facet syndrome primarily in the upper cervical spine. Dr. Sacha did not recommend facet injections in the upper cervical spine but recommended medial branch blocks followed by radiofrequency neurotomy based on the findings. Dr. Sacha noted the plan of performing bilateral C2-C5 medial branch blocks and that if there was a diagnostic response, then radiofrequency neurotomy. Dr. Sacha also noted no evidence of a closed head injury and no sequelae of it. *See* Exhibit 14.

20. On December 24, 2015 Claimant underwent bilateral C2-5 medial branch blocks performed by Dr. Sacha. Claimant reported 100% relief of pain on the right side and 80% on the left side indicating a diagnostic response to the procedure. Dr. Sacha opined that Claimant was a candidate for radiofrequency neurotomy. *See* Exhibit 14.

21. On January 14, 2016 Claimant was evaluated by David Reinhard, M.D. after a request for change of physician. Claimant reported striking a 1000 pound bull elk head on while driving 75 miles per hour. Claimant reported that he was knocked unconscious in the accident. Claimant reported that since the accident he had neck

pain, low back pain, right hip pain and a feeling like his right hip was loose. Claimant reported that his back pain had gotten quite better. Claimant reported ongoing headaches and intermittent burning pain in the left arm with associated numbness. Claimant reported being more forgetful and having decreased short term recall. Claimant reported having a couple of concussions in college football and no prior neck injury. Dr. Reinhard provided the impression of: work related motor vehicle accident; grade three concussions with residual cognitive complaints and headaches; posttraumatic migraine headaches and rule out cognitive disorder; insomnia; cervical strain and sprain with left upper cervical facet syndrome pending a medial branch rhizotomy; left shoulder sprain; left upper extremity pain and numbness of unclear etiology with MRI showing left foraminal narrowing at C3-4; right hip sprain or contusion with preexisting total hip arthroplasty; and lumbar strain due to the accident with a pre existing history of L4 through S1 fusion. *See* Exhibit 16.

22. On January 15, 2016 Claimant underwent bilateral C2-5 radiofrequency neurotomies performed by Dr. Sacha. Claimant reported a pre-procedure rating of 7/10 at rest and 8/10 with provocative maneuvers and a 3/10 at rest and 3/10 with provocative maneuvers at 30 minutes post procedure. *See* Exhibit 14.

23. On January 22, 2016 Claimant was evaluated by Dr. Sacha. Claimant reported that he still had significant post operative pain and Dr. Sacha believed it was probably too early for follow up and that Claimant should start physical therapy and come back. *See* Exhibit 14.

24. On February 4, 2016 Claimant was evaluated by Dr. Reinhard. Claimant reported getting some good relief of his neck pain from the cervical rhizotomy performed by Dr. Sacha. Claimant reported noting his left shoulder pain more. Dr. Reinhard noted that an x-ray of Claimant's right hip showed a normal arthroplasty without evidence of complication. *See* Exhibit 16.

25. On February 18, 2016 Claimant was evaluated by Dr. Reinhard. Dr. Reinhard noted that an MRI of the left shoulder showed mild to moderate attenuation of the supraspinatus tendon along the articular surface with possible small foci of longitudinal full thickness tearing and some accompanying subacromial/deltoid bursitis. Claimant reported that he was still having a lot of bilateral upper neck pain and reported no improvement in his headaches. *See* Exhibit 16.

26. On March 11, 2016 Dr. Sacha discharged Claimant from care for violating the pain contract. Dr. Sacha noted that there were urine findings of amphetamine, and benzodiazepines that were not listed by Claimant as part of his medication regimen and noted that Claimant had a history of multiple physicians giving him opioid analgesics. Claimant reported that he was not taking them, but Dr. Sacha noted that it was a class A offense for receiving controlled substances from multiple sources, that there was opioid-seeking behaviors, and an aberrant history of Adderall prescription refills. Dr. Sacha noted that the radiofrequency procedure had given Claimant no lasting relief Dr. Sacha noted that Claimant was angry and irritable and that Claimant was combative

and insistent on how disabled he was. Dr. Sacha opined that there were significant questions regarding causal relatedness of many of Claimant's ongoing issues. *See* Exhibit 14.

27. On March 17, 2016 Claimant was evaluated by Dr. Reinhard. Claimant reported a lot of upper neck pain bilaterally and a lot of headaches despite the upper cervical facet procedure. Dr. Reinhard noted that Claimant was treating his left ankle through private insurance although it was actually injured in the work related motor vehicle accident and noted that Claimant was scheduled for surgery on March 30. *See* Exhibit 16.

28. Dr. Reinhardt noted that Claimant had left arm pain and weakness as well as numbness and that there was no evidence of nerve root compression other than some left foraminal narrowing at C3-4 on MRI and opined that a lot of the weakness seemed to be stemming from the left shoulder pain. *See* Exhibit 16.

29. April 15, 2016 Claimant suffered a non-work related fall and lost consciousness. He was evaluated at the emergency department of Sky Ridge Medical Center. It was noted claimant was in the parking lot of his orthopedic physician's office for a recheck of his left ankle after a surgery two weeks prior when his scooter slid out from under him causing him to fall. Claimant believed that he hit his head and lost consciousness. A nurse found him slumped against the trunk of his car. Claimant reported bilateral neck pain and burning down both of his arms and legs with tingling. Claimant reported that he had neck pain since a motor vehicle accident in June 2015 but stated his pain was worse after the fall. Claimant reported associated nausea. On exam claimant's neck was diffusely tender to light palpation and sensation was diminished diffusely over his upper extremities. It was noted that while it was a low mechanism injury, based on claimant's degree of pain on examination and associated neurological deficits further imaging was necessary. A CT and MRI of the cervical spine showed no acute trauma and noted minimal degenerative changes within normal limits of claimant's age. Claimant was diagnosed with a cervical strain and post-concussive syndrome. *See* Exhibit 9.

30. On May 9, 2016 Claimant was evaluated by Dr. Reinhard. Claimant reported that he was doing a lot better and that his headaches were not as severe and were less frequent. Claimant reported a recent left shoulder injection helped his left shoulder pain and range of motion. Claimant did not report his recent fall and loss of consciousness three weeks prior. Dr. Reinhard noted that the C3-4 disk was a probable pain generator. Dr. Reinhard noted that the low back pain was back to baseline and that the right hip pain was also essentially back to baseline. Dr. Reinhard opined that Claimant was starting to turn the corner and that the shoulder pain was clearly coming from the rotator cuff although some might be coming from cervical spine referral. *See* Exhibit 16.

31. On May 31, 2016 Claimant was evaluated by Dr. Ghiselli. Claimant reported that a rhizotomy from C2-C4 had not helped and that he had weakness into his

arm and burning in his arm in a nondermatomal pattern. Dr. Ghiselli noted that the increasing neck symptoms into Claimant's left upper extremity had not received significant relief with radiofrequency ablations and that the MRI showed compression of the left C4 nerve root. Dr. Ghiselli recommended a left sided C3-4 transforaminal epidural steroid injection and opined that if there was good anesthetic relief, it would be reasonable to consider surgical intervention to decompress that nerve. *See* Exhibit 11.

32. On June 20, 2016 Claimant was evaluated by Dr. Reinhard. Dr. Reinhard opined that Claimant had a left C3-4 disk osteophyte complex producing severe left neural foraminal narrowing and potential compression of the left C3 nerve root. Claimant reported that his headaches were doing better with most pain prominently in the neck, left suprascapular region, left shoulder, and left arm. Dr. Reinhard referred Claimant to Dr. Ogin for a left C3-4 transforaminal epidural steroid injection. *See* Exhibit 16.

33. On July 12, 2016 Dr. Ogin performed a left C3-4 transforaminal epidural steroid injection (ESI). Claimant reported pre-procedure pain of 6/10 at rest with increased pain with cervical rotation and extension. Post-injection, Claimant reported pain of 0/10 with significant improvement in cervical range of motion particularly with left rotation and extension. Dr. Ogin opined that this was an excellent diagnostic response. *See* Exhibit 15.

34. On July 19, 2016 Claimant was evaluated by Dr. Reinhard. Claimant reported that the ESI reduced his shoulder and neck pain. He reported he was still getting headaches 1-2 times per week. Claimant was to follow-up with Dr. Ghiselli now that he had the ESI regarding possible surgery. Claimant also first reported that he noted tinnitus and hearing changes in his right ear since the injury, which had gotten worse over the past two months. On exam Claimant had good range of motion of his left shoulder with normal strength. Claimant was referred Dr. Carr, ENT doctor, regarding right-sided hearing loss and tinnitus. *See* Exhibit 16.

35. On July 25, 2016 Claimant was evaluated by Patrick Carr, M.D. Claimant reported a 13-month history of constant high-pitched noise in the right ear. Claimant reported severe head trauma during a motor vehicle accident on June 28, 2015 which left him unconscious for 30-40 minutes. He reported the tinnitus had worsened over the last year, with constant noise starting 2-3 months ago. There was no evidence of specific trauma to the right ear. *See* Exhibit BB.

36. On July 27, 2016 Dr. Ghiselli recommended a C3-4 ACDF surgical procedure. *See* Exhibit 4.

37. On August 1, 2016 Claimant underwent an MRI of his cervical spine that was interpreted by David Solsberg, M.D. The impression provided was: moderate left foraminal stenosis seen at C3-4 due to a combination of left foraminal osteophyte; small osteophyte along the anterior margin of left z-joint; no fracture, no ligamentous injury, no cord lesion, and no prevertebral soft tissue swelling. *See* Exhibit 10.

38. On August 7, 2016 Claimant sustained a non work related motor vehicle accident and was taken to Sky Ridge Medical Center emergency department. Claimant was rear ended by another vehicle traveling 15-20 miles per hour. Claimant reported midline cervical pain, left shoulder pain, and left arm pain with tingling. *See* Exhibit C.

39. On August 23, 2016 Claimant was evaluated by Dr. Reinhard. Dr. Reinhard noted that the left C3-4 ESI had produced marked relief of Claimant's neck and shoulder pain but that the follow up recommended surgery had not been authorized. Dr. Reinhard also noted that to make things more complicated, Claimant had aggravation of neck pain in a recent automobile accident. Dr. Reinhard noted he would refer Claimant under Claimant's private insurance for a repeat C3-4 ESI to get Claimant back to his baseline prior to the recent non work related motor vehicle accident. *See* Exhibit 16.

40. On September 8, 2016 Claimant underwent an independent medical evaluation performed by Carlos Cebrian, M.D. Claimant reported hitting an elk with the front of his vehicle and being unconscious for between 30 and 45 minutes. Claimant also reported that he was hit on the back of his head by his service dog's retractable leash. Claimant reported that the first thing he remembered was the paramedics being at the scene and that things were foggy. Claimant reported initial complaints including headaches, neck pain, mid back pain, low back pain, immediate tightness in his left shoulder, and burners down his left arm if he moved his head. Claimant reported that his right hip started hurting one month after the motor vehicle accident and that he also had surgery in March of 2016 on his left ankle that his surgeon said was related to the work motor vehicle accident. Claimant reported daily headaches that started at the back of his head and went to the right side and then to the front. Claimant reported that one month after the accident he started to notice ringing in his left ear that would last for a day or two and that it gradually increased in duration and had been present constantly for three months. Claimant reported that his memory was affected, that he had cognitive difficulty, that his thinking was slowed, that he had difficulty concentrating, that he got distracted easily, and that his fine motor skills were affected. *See* Exhibit 17.

41. Claimant reported having one or two prior concussions playing football and that he also lost consciousness in 2013 after tripping over a box and was treated with cognitive therapy. Claimant reported three prior lumbar spine surgeries, a right hip arthroplasty, left hand surgery, three sinus surgeries, bilateral carpal tunnel surgeries, and a Uvulopalatopharyngoplasty surgery. Dr. Cebrian reviewed extensive medical records and performed a physical examination. Dr. Cebrian opined that Claimant had the following non claim related diagnoses: left carpal tunnel syndrome; right carpal tunnel syndrome; headaches; left knee surgery; hernia surgery; lumbar spine surgeries; right knee; left ankle sprain and chip fracture; gout; right hip arthroplasty; sleep apnea; 10/7/10 motor vehicle accident; cervical spine pain; erectile dysfunction; syncopal episodes; head injuries; bilateral knee pain due to gout; lung nodules; ADHD; PTSD; left ankle sprain; and hemochromatosis. Dr. Cebrian opined that Claimant had the following claim related diagnoses: cervical spine strain; concussion with post-concussion

syndrome; and lumbar strain. Dr. Cebrian opined that Claimant was not at maximum medical improvement. Dr. Cebrian opined that the left ankle was not claim related. Dr. Cebrian opined that the right hip pain and need for treatment was not claim related and noted no reports in the medical records of right hip pain until October 14, 2015 as well as a bone scan and x-rays that show no loosening. Dr. Cebrian opined that it was not medically probable with the temporal delay in the development of right hip complaints that they were related to the June 28, 2015 motor vehicle accident. Dr. Cebrian opined that the complaints of tinnitus were not claim related and that the first documentation of tinnitus was over one year from the accident. Dr. Cebrian opined that Claimant did sustain a concussion as a result of the June 28, 2015 motor vehicle accident but noted the change in reports of loss of consciousness from none to 30 to 45 minutes. Dr. Cebrian noted that the ongoing headache complaints were complicated by Claimant's past history of headaches and concussions, cervical spine injury, pre-existing psychiatric disease and medications, longstanding history of hypertension with headaches, utilization of opioids, poorly treated sleep apnea, multiple past concussions, ADHD and PTSD, and intervening head injury on April 15, 2016, hemochromatosis, and the fact that at the time of the work related accident Claimant was taking both a muscle relaxer and a narcotic. *See* Exhibit 17.

42. Dr. Cebrian recommended neuropsychological testing to separate out what may be related to the June 28, 2015 mild concussion versus what is related to pre-existing psychiatric disease. Dr. Cebrian recommended that Claimant undergo a left upper extremity EMG/NCS to see if there was any cervical nerve root compression. Dr. Cebrian opined that Claimant sustained a lumbar strain that had resolved and that no further treatment was indicated for the lumbar strain. Dr. Cebrian could not state within a reasonable degree of probability that the left shoulder partial supraspinatus tear was related to the June 28, 2015 motor vehicle accident. *See* Exhibit 17.

43. On September 13, 2016 Dr. Ogin performed a left C3-4 transforaminal epidural steroid injection (ESI). Dr. Ogin noted that Claimant previously underwent an ESI in July which was quite helpful and lasted 5-6 weeks before his pain gradually recurred. Claimant reported pre-procedure pain of 5/10 at rest with increased pain at 7/10 with provocative maneuvers and a post-injection pain level of 0/10. Again, Dr. Ogin opined that this was a good diagnostic response. *See* Exhibit 15.

44. On September 27, 2016 Claimant was evaluated by Dr. Reinhard. Claimant reported that the second left C3-4 ESI had helped tremendously. Dr. Reinhard noted Claimant had a surgical recommendation from Dr. Ghiselli and that Claimant had second opinions pending. Dr. Reinhard opined that Claimant had two positive diagnostic and therapeutic left C3-4 transforaminal ESIs. *See* Exhibit 16.

45. On November 15, 2016 Claimant underwent an independent medical evaluation performed by Michael Rauzzino, M.D. Claimant reported that he was bothered most by headaches, followed by ringing in his ear, followed by neck and left shoulder pain. Claimant reported that the headaches start in the back of his head and wrap around to the right side of his face and that he had never had a neurologic

evaluation for his headaches. Claimant reported nerve blocks and facet injections with relief for five to six weeks. Claimant reported that a screw in his lumbar spine fusion was broken in the work related accident and that he had no other trauma so it had to be the accident that broke the screw. Claimant also reported that he hurt his ankle in the accident but that surgery was not covered. Claimant reported that before the work related motor vehicle accident he never had trouble with his neck, shoulder, or arm. *See* Exhibit 18.

46. Dr. Rauzzino reviewed extensive medical records and also performed a physical examination. Dr. Rauzzino noted normal sensory examination at C4, C5, C7, and T1 with normal C6 on the right and decreased C6 on the left. Dr. Rauzzino noted that Claimant had complicated pre-existing medical conditions prior to this work related motor vehicle accident including multiple previous concussions and a prior motor vehicle accident with neck and left arm pain. Dr. Rauzzino noted a pre-existing condition of chronic headaches refractory to treatment and a number of pre-existing neurologic complaints. Dr. Rauzzino also noted the complicated lumbar spine history with multiple lumbar spine surgeries. Dr. Rauzzino noted that after the work related motor vehicle accident, Claimant had multiple complaints primarily related to post-concussive syndrome with headaches and neck pain. Dr. Rauzzino opined that the imaging of Claimant's cervical spine was unrevealing and that there was not an acute structural injury but some chronic degenerative changes. *See* Exhibit 18.

47. Dr. Rauzzino opined that the recommended surgery at C3-4 was not likely to provide significant clinical or functional benefit based on Claimant's complaints, physical examination, radiographic findings, and response to injections. Dr. Rauzzino opined that operating at that level would not significantly improve Claimant's headaches which existed before the work related motor vehicle accident and had been exacerbated since. Dr. Rauzzino noted that the etiology of Claimant's headaches was felt to be related to multiple concussions and that in the work related motor vehicle accident it was possible that Claimant had a concussion that made his headaches worse, however operating on the cervical spine was not likely to improve the headaches. Dr. Rauzzino opined that surgery, especially a cervical fusion, should only be done when there is a significant structural problem that correlates very well with a patient's films, subjective complaints, and physical exam. Dr. Rauzzino noted no acute structural injury existed, that Claimant had normal neurologic examinations, and that the distribution of the C4 nerve root was not consistent with Claimant's reports of zingers into his arms and hands. *See* Exhibit 18.

48. Dr. Rauzzino opined that Claimant had neck pain bilaterally, but that the disease was mainly one sided, not very severe, and was not an acute injury caused by the motor vehicle accident and was a bone spur that pre-existed the work related motor vehicle accident. Dr. Rauzzino opined that while Claimant may have sustained a neck strain or myofascial injury in the car accident, Claimant did not sustain a structural injury to his spine that required surgery. Dr. Rauzzino opined that the surgery was not causally related to the motor vehicle accident and also opined that the surgery was not likely to improve Claimant functionally or clinically. Dr. Rauzzino opined that performing

a cervical fusion with the hopes of relieving Claimant's pre-existing and now exacerbated headaches, was problematic at best. *See* Exhibit 18.

49. Dr. Rauzzino opined that the left shoulder was not related to the motor vehicle accident and also that the right hip and left ankle were not related to the motor vehicle accident. *See* Exhibit 18.

50. Dr. Rauzzino opined that the headaches, myofascial neck pain, and post-concussive symptoms would be related to the motor vehicle accident. Dr. Rauzzino noted that there may be psychological issues in play and that there were some narcotic use issues raised by Dr. Sacha. *See* Exhibit 18.

51. Dr. Rauzzino testified at hearing consistent with his reports. Dr. Rauzzino opined that the MRI images showed chronic degenerative changes and excluded an acute structural injury. Dr. Rauzzino explained that the proposed surgery was to remove the bone spur and relieve pressure on the C4 nerve root and that the surgery was not causally related to the work injury. He opined that there was no acute injury to the cervical spine structure. Dr. Rauzzino also opined that Claimant's preexisting degenerative condition was not exacerbated by the work accident based on Claimant's presentation, symptoms, and the C4 nerve root distribution. Dr. Rauzzino opined that Claimant's report of zingers down the left arm and hand and the weakness Claimant reported did not correlate with a C4 nerve distribution. Dr. Rauzzino also opined that Claimant's report of dramatic improvement following the varied treatment of facet injections, medial branch blocks, and ESI did not met anatomic sense and did not correlate with a C4 nerve root distribution. Dr. Rauzzino opined that the proposed surgery was not work related and also that it was not reasonable or necessary and that there was no reason to believe that the surgery would relieve Claimant's headaches, shoulder pain, neck pain, or zingers.

52. Dr. Rauzzino testified that Claimant may have sustained a cervical strain but that there was no reason for Claimant to still be in pain related to the work accident without an acute structural problem. Dr. Rauzzino testified that the left ankle and right hip were not work related.

53. The testimony and reports of Dr. Rauzzino are found credible, persuasive, detailed, and consistent with the overall medical records and opinions of other physicians. Dr. Rauzzino explained in credible and extensive detail his opinions which are persuasive.

54. Claimant's also testified at hearing. Claimant's testimony, overall, is not found credible or persuasive. Claimant's reports of loss of consciousness vary from reporting no loss immediately following the accident where he came to a controlled stop, got out of his vehicle, and flagged down other cars, to a loss of consciousness from 30-45 minutes. His reports of the size of the elk expanded during the claim. He attempted to tell providers that his left ankle was injured in the motor vehicle accident when in actuality it was injured walking his dog. Claimant's reports to different medical providers

about the extensiveness of his past medical history was also varied. Claimant has not been consistent in his reports and is not found credible.

55. Dr. Reinhard testified by deposition. Dr. Reinhard opined that Claimant was suffering post-traumatic migraine headaches and some residual cognitive difficulties as a result of the work related motor vehicle accident. Dr. Reinhard opined that if Claimant's tinnitus started shortly after the accident as Claimant reported, then it would be related but that if it didn't start until many months later, then it would not be related. Dr. Reinhard noted Claimant's numerous concussions in the past and opined that the impact of the prior history is that Claimant's brain would be more vulnerable to another concussion and typically would thus result in a prolonged or longer course of recovery or a greater potential for residual permanent effects. Dr. Reinhard opined that Claimant sustained a neck injury in the accident. Dr. Reinhard noted that the pain generator identification was tricky, but that based on Claimant's response to the epidural steroid injection at C3-4 there was pretty good evidence that the C3-4 stenosis was a pain generator. Dr. Reinhard opined that the surgery would relieve the symptoms of the nerve root compression, would help with the headaches and neck pain, and would possibly help the arm symptoms. Dr. Reinhard opined that did not physiologically make sense, but that was what had happened with the epidural steroid injection so was expected with the surgery. Dr. Reinhard opined that If Dr. Ghiselli reviewed Dr. Rauzzino's report and cautionary note, and still felt that the C3-4 fusion was a reasonable thing to do, then he would support Dr. Ghiselli's request. Dr. Reinhard opined that the left shoulder was related to the accident but noted that it is difficult to separate out the shoulder when there is also a neck injury and that if in treating the C3-4 spine issues, the shoulder resolves, then he would say that the shoulder was not related and the rotator cuff either resolved or was maybe even pre-existing. He noted that if Claimant continued to have pain and weakness in the left shoulder after the spine issues are treated successfully, then he would be of the opinion that the shoulder was probably present from the accident and was just diagnosed later on because it was a tricky issue to sort out. Dr. Reinhard opined that even if the cervical surgery were not related to the motor vehicle accident, Claimant's cervical spine strain was not yet back to baseline or resolved. Dr. Reinhard agreed that the C3-4 stenosis MRI finding pre-existed the motor vehicle accident in all likelihood.

56. Dr. Cebrian testified by deposition consistent with his reports. Dr. Cebrian opined that no pain generator had been confirmed as the source of Claimant's symptoms and that Claimant had what would be considered a diagnostic response to both facet injections and the ESI which were very different and that the response was inconsistent for purposes of identifying a pain generator. Dr. Cebrian also noted that Claimant failed to report to him at the September 2016 independent medical evaluation that Claimant had been involved in another motor vehicle accident just one month prior. Claimant reported significant symptoms due to the June 2015 work related motor vehicle accident. Dr. Cebrian opined that no further treatment of the cervical spine would relate to the June 2015 work accident and noted no structural changes on the MRI.

57. Dr. Rauzzino, Dr. Cebrian, and Dr. Reinhard all agreed that Claimant's left ankle injury was not work related. The medical records support that Claimant reported no ankle pain following the June 2015 motor vehicle accident and that he reported specifically that he rolled his ankle while walking his dog.

58. Dr. Rauzzino and Dr. Cebrian opined that Claimant's right hip complaints are not causally related to the June 2015 motor vehicle accident and they note no temporal relationship between the start of the right hip complaints and the accident. This is found credible and persuasive.

59. Dr. Cebrian opined that Claimant's tinnitus is not causally related to the June 2015 motor vehicle accident. Dr. Reinhard opined that if Claimant's tinnitus did not start until many months after the work related motor vehicle accident, then it would not be related. Claimant did not make any complaints of tinnitus/hearing issues until over one year from the date of the accident. These opinions that the tinnitus/hearing issues are not causally related to the work accident are credible and persuasive.

60. Claimant's past medical history is extensive. Claimant reported that he has had as many as 15-17 concussions prior to this work injury. Prior to this work related motor vehicle accident, Claimant had reported to the emergency room several times for headaches, neck pain, and intermittent numbness in his left arm consistent with his degenerative neck condition and with his prior history of multiple concussions.

61. In October of 2006, claimant appeared in the ER for headaches which had been ongoing for 3 weeks with 7/10 pain and intermittent numbness in his left arm. *See* Exhibit C.

62. Claimant returned to the ER later in October of 2006 with complaints of neck pain which started 3 weeks before with 7/10 pain, headaches with blurred vision, photophobia and weakness, and left arm numbness in his shoulder and wrist/hand. *See* Exhibit C.

63. In October 2010, Claimant was involved in a low speed motor vehicle accident, at which time he reported neck pain, low back pain, right hip pain, and tingling in his left hand. A CT of claimant's cervical spine showed mild degenerative disk disease at C3-6, without evidence of significant spinal canal or neural foraminal narrowing. *See* Exhibit L.

64. In October of 2011 Claimant had two syncopal episodes on the same day one while driving his car which caused hit to drive into a ditch, the other after showering after the car accident.

65. In December of 2013 Claimant had an unexplained fall while standing in which he hit his head, and resulted in severe neck and headache complaints of 8/10.

66. In January of 2014 Claimant fell and hit his head on the edge of a coffee table and was on bed rest for one month and took months to recover. He reported headaches since that fall located in the right temple, forehead and occipital area, blurred vision, was easily confused, and had balance issues. Gait disturbance and balance issues were still noted in April 2014. *See* Exhibits R, T, O.

67. In February of 2014 claimant reported being in the ER for worsening headache, with dizziness and nausea.

68. Claimant also has an extensive and significant history of prior surgical procedures.

69. Due to chronic low back pain since his college football years, and radiculopathy pain which started in 2008, claimant underwent 3 lumbar spine surgeries which ultimately resulted in an L4-S1 fusion. *See* Exhibit E.

70. Claimant underwent a right total hip replacement in 2010 after reporting pain while undergoing physical therapy following his lumbar spine surgery and being diagnosed with advanced arthritis in his hip. *See* Exhibit I.

71. Claimant also has a history of multiple arthroscopic surgery to both knees and of bilateral carpal tunnel surgeries. *See* Exhibit R.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance*

Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of the industrial injury. *See* § 8-42-101 (1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Where a Claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo.App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo.App. 1997).

Left Ankle

Claimant has failed to meet his burden to establish that the June 28, 2015 motor vehicle accident directly and proximately caused his left ankle condition. Despite Claimant's reports to the contrary, medical records establish that Claimant's left ankle condition is due to an unrelated incident walking his dog and that no causal relationship exists between Claimant's left ankle condition and the June 28, 2015 motor vehicle accident. Claimant, through testimony, conceded this at hearing and any request for medical benefits to treat the left ankle is denied and dismissed.

Right Hip

Claimant has failed to meet his burden to establish that the June 28, 2015 motor vehicle accident directly and proximately caused his right hip condition or caused an aggravation to his underlying right hip condition. The opinions of Dr. Rauzzino and Dr. Cebrian are found credible and persuasive that the right hip complaints are not causally

related to the work injury. Claimant's request for medical benefits to treat his right hip is denied and dismissed

Tinnitus/Hearing Issues

Claimant has failed to meet his burden to establish that the June 28, 2015 motor vehicle accident directly and proximately caused his tinnitus/hearing issues. The opinions of Dr. Rauzzino and Dr. Reinhard are found credible and persuasive. Claimant did not make any reports of hearing issues until approximately one year following the work related motor vehicle accident. Claimant has failed to meet his burden to show a causal connection between the motor vehicle accident and his tinnitus/hearing loss and his request for medical benefits to treat his tinnitus/hearing issues is denied and dismissed.

Left Shoulder

Claimant has failed to meet his burden to establish that the June 28, 2015 motor vehicle accident directly and proximately caused his left shoulder condition. As found above, at the emergency department the day of his injury it was noted that Claimant had no pain in his extremities and Dr. Abramson noted the extremities to be normal with full range of motion. Similarly, one week after the accident, Dr. Rossi noted the strength of the extremities to be normal bilaterally. The opinions of Dr. Cebrian and Dr. Rauzzino are found credible and persuasive that Claimant did not sustain an injury to his left shoulder as a result of the work related motor vehicle accident and Claimant's request for medical benefits to treat his left shoulder is denied and dismissed.

Headaches/Concussion syndrome

Claimant has established that the June 28, 2015 work related motor vehicle accident directly and proximately caused headaches and concussion syndrome. Although Claimant has a significant prior history of concussions and of extremely debilitating headaches, it is credible and persuasive that the work related motor vehicle accident on June 28, 2015 exacerbated his pre-existing condition and caused a new concussion and additional headaches. Claimant has established an entitlement to a general award of reasonable and necessary medical benefits to treat his headaches and concussion syndrome. Claimant has not been placed at MMI for these conditions by a treating provider and the issue of any specific treatment or medical benefit was not before the ALJ.

Lumbar Spine

Claimant has established that the June 28, 2015 work related motor vehicle accident directly and proximately caused an aggravation of his pre-existing lower back condition. Claimant is entitled to a general award of reasonable and necessary medical benefits necessary to treat the aggravation. Claimant has not been placed at MMI for

this condition by a treating provider and the issue of any specific treatment or medical benefit was not before the ALJ.

C3-C4 surgery

Claimant has failed to establish by a preponderance of the evidence that the proposed C3-4 surgery is reasonable, necessary, or causally related to the June 28, 2015 work related motor vehicle accident. As found above, Claimant has pre-existing degenerative changes in his cervical spine shown by MRI that took years to develop and pre-existed the motor vehicle accident. Dr. Rauzzino is credible and persuasive that the cervical MRI excluded an acute chronic incident as the cause of the bony spurring/osteophyte. Dr. Rauzzino explained credibly that the proposed surgery would essentially drill away the bone spur and remove the osteophyte to relieve pressure on the exiting nerve root. Dr. Rauzzino is credible and persuasive that the bone spur/osteophyte took years to develop and was not causally related to the motor vehicle accident. As found above, Claimant has had neck pain and symptoms into his left arm noted in the medical records since approximately 2006 and for years prior to the work related motor vehicle accident. These records of neck pain and left arm tingling/numbness were noted on various occasions between 2006 and 2013. Dr. Rauzzino is credible and persuasive that the June 28, 2015 work related motor vehicle accident did not exacerbate this underlying condition or underlying degeneration and that the proposed surgery is not causally related to the work accident.

Further, the proposed surgery is also not found to be reasonable or necessary. Claimant's subjective reports of symptoms are not found credible, persuasive, and physiologically do not make sense. The credible medical testimony and evidence shows that Claimant's symptoms do not correlate with a C4 nerve root distribution and that C4 has not been sufficiently identified as the pain generator. Dr. Rauzzino opined credibly that C4 was not the pain generator and that Claimant's reported subjective symptoms and relief did not make sense or correlate with the C4 nerve root. Dr. Rauzzino opined that the proposed surgery won't relieve Claimant's symptoms. The ALJ finds persuasive that there is no reason to believe that the proposed surgery will cure and relieve Claimant's symptoms and that the surgery is not reasonable or necessary. Claimant has failed to meet his burden to establish that the C3-C4 surgery is reasonable, necessary, and causally related to his June 28, 2015 motor vehicle accident/work injury.

Cervical Spine

Claimant has established by a preponderance of the evidence that he sustained a strain to the cervical spine as a result of the June 28, 2015 work related motor vehicle accident. Claimant is entitled to a general award of reasonable and necessary medical benefits necessary to treat the cervical strain. The credible medical testimony and evidence establishes that this is the injury to the cervical spine area and that the strain in the motor vehicle accident did not exacerbate or aggravate Claimant's pre-existing degenerative condition or his need for surgery. The testimony of Dr. Rauzzino that

there was no damage to the cervical spine but that the injury sustained was a sore neck/soft tissue injury or strain is credible and persuasive. Claimant has not been placed at MMI for cervical strain by a treating provider and has established an entitlement to a general award of medical benefits to treat the cervical strain.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that medical treatment for his left ankle, right hip, left shoulder, and tinnitus/hearing issues is causally related to his June 28, 2015 work injury. His claim for medical benefits for these conditions is denied and dismissed.

2. Claimant has established by a preponderance of the evidence that medical treatment for his headaches, concussion syndrome, aggravation of his lumbar spine, and cervical strain is causally related to his June 28, 2015 work injury. Claimant is entitled to a general award of reasonable and necessary medical benefits to treat these conditions.

3. Claimant has failed to establish that the recommended C3-C4 surgery is reasonable, necessary, and causally related to his June 28, 2015 work injury. His request for surgery is denied and dismissed.

4. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 10, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge

ISSUES

- Whether Claimant sustained a compensable injury.
- Whether Claimant is entitled to medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Employer has employed Claimant as a plant specialist since 2004. In April 2016 Claimant worked at the Xcel Energy Cherokee Station.

2. Prior to April 25, 2016, Claimant worked 12 hour shifts. As of April 25, 2016, Cherokee Station employees worked 8 hour shifts pursuant to their collective bargaining agreement.

3. Claimant was and continues to be unhappy about the shift change. He alleges that the shift change was implemented in a "punitive manner." He has filed four grievances about the change. The union has dismissed all of grievances.

4. On July 9, 2016, Claimant reported a work-related injury consisting of fatigue and not being able to differentiate between being awake and asleep to his supervisor, Nick Dillon. Claimant reported that he was suffering from "shift work syndrome."

5. Mr. Dillon had Claimant prepare an incident report and provided him with a list of medical providers. Claimant declined to see a physician on that day but did talk to a nurse and a doctor on a helpline. The nurse advised Claimant to take Melatonin and go home to sleep.

6. Mr. Dillon testified at hearing that numerous locations on the designated provider list offered weekend hours and that he offered to take Claimant to a physician. Claimant declined and stated that he wished to continue working.

7. Claimant's union's bargaining agreement requires that if an employee calls off work, their shift be offered to other employees in sequential order. On July 9, 2016, an employee called in and Mr. Dillon went through his list to offer the shift to another employee. When Mr. Dillon came to Claimant, Claimant voluntarily accepted the additional shift. Mr. Dillon testified that he was surprised that Claimant accepted overtime and urged him not to work. Mr. Dillon advised Claimant to go home and take the Melatonin pursuant to the nurse's recommendation. Nevertheless, Claimant chose

to work a double shift the same date he reported fatigue and not being able to differentiate between being awake and asleep.

8. Since reporting the alleged injury, Claimant has lost no time from work. He has continued to work his regular job with Employer and has continued to volunteer for approximately 900 overtime hours per year, as he had before his alleged injury.

9. On July 11, 2016, Ryan Otten, M.D. evaluated Claimant and released him to full duty. Claimant reported to Dr. Otten that his insomnia and fatigue began after April 2016 when the shift change occurred. Dr. Otten prescribed Ambien and Provigil. Clamant testified that he rarely takes Ambien, but that he takes Provigil on the first few days of the day shift and only takes a quarter to half of a pill. Claimant testified that Provigil costs approximately $30 per pill and he believes it should be paid for under this workers' compensation claim.

10. Claimant testified that prior to April 2016 he had no issues with sleepiness and no "lapses of consciousness." Claimant's testimony is contradicted by persuasive medical records, including the following, which persuasively establish that Claimant's hypersomnolence and fatigue pre-existed the shift change.

- On December 4, 2014, Claimant was evaluated by cardiologist, Arif Rohilla, M.D. Dr. Rohilla's notes provide, "[Claimant] has noted unusual fatigue over the past year."

- On March 31, 2015, Claimant again complained of recurring fatigue to Dr. Rohilla.

- On April 29, 2015 Claimant saw pulmonologist Robert E. Benkert, M.D. Dr. Benkert concurred with Claimant's private doctor's diagnosis of untreated obstructive sleep apnea, and observed that Claimant also had poorly controlled bronchial asthma. Dr. Benkert also noted anatomic findings which made it highly probable that Claimant would have disordered breathing. These included extra tissue and crowding in the oropharyngeal airspace, a large neck circumference, and an elevated BMI. Dr. Benkert's impression was:

  > Excessive daytime hypersomnolence probably mostly secondary to untreated sleep disordered breathing. Also, the patient has poorly controlled persistent asthma and there may be a nocturnal component of his asthmatic symptomology which is also interfering with effective and restorative sleep.

- On June 5, 2015 Dr. Benkert evaluated Claimant and attributed his excessive daytime somnolence to obstructive sleep apnea and nocturnal asthma.

- On July 31, 2015 Dr. Benkert evaluated Claimant and attributed his excessive daytime somnolence to obstructive sleep apnea, Claimant's lack of compliance using his positive airway pressure device, Claimant's dogs awakening him, and Claimant's diagnosed nocturnal asthma.

- Dr. Rohilla evaluated Claimant again on September 16, 2015. Dr. Rohilla documented Claimant's history of obstructive sleep apnea, asthma, chronic allergic rhinitis, status post surgery for deviated nasal septum, enlarged nasal turbinates, and chronic bronchitis.

- Dr. Benkert's records from Claimant's September 25, 2015 visit establish that Claimant was being treated for hypersomnolence and that his then 12 hour shifts interfered with his therapy. Dr. Benkert documented Claimant's continued use of Advair and albuterol for his bronchial asthma.

- Dr. Benkert's January 11, 2016 record provides, "Previously established obstructive sleep apnea syndrome . . . his obstructive sleep apnea will be treated and his excessive daytime hypersomnolence which results from untreated obstructive sleep apnea will be treated as well."

11. Dr. Otten's July 11, 2016, report indicates that Claimant advised him that his fatigue problems began shortly after April 25, 2016. The ALJ finds this to be incorrect as Claimant's daytime hypersomnolence had been treated as far back as 2014 while the Claimant was on a 12 hour work schedule.

12. Claimant is unhappy with the change in shift schedules. He believes that his Circadian rhythm has altered due to working eight day as opposed to twelve hours per day. He testified that when he comes off the night shift he is unable to sleep and therefore he does not sleep enough before he starts a day shift. Claimant requests payment for Provigil to keep him awake during his day shift.

13. Mr. Dillon testified at the hearing. He is the Operations Supervisor at the Cherokee plant and has been the Claimant's direct supervisor since November 2015. Prior to April 2016 the plant operated on twelve- hour rotating shifts. In April 2016, the shift was changed to eight hours under the negotiated collective bargaining agreement. Mr. Dillon testified that Claimant was extremely vocal about his objection to the shift change and complained to Mr. Dillon on numerous occasions that it was affecting his Circadian rhythm.

14. Mr. Dillon testified that on July 9, 2016 Claimant told him that he wanted to file a workers' compensation claim because of fatigue and trouble differentiating between being awake and asleep. Mr. Dillon filled out appropriate paperwork and gave Claimant a designated provider list. He also offered to take Claimant to a medical facility on that date but Claimant declined. In addition, Claimant volunteered to work an extra shift on July 9, 2016, despite Mr. Dillon's recommendation that Claimant go home and sleep.

15. Since July 9, 2016, the Claimant has continued to work under Mr. Dillon's supervision. Claimant volunteers for extensive overtime and over the last seven months has never advised Mr. Dillon that he is too fatigued to work or that he is unfit for duty.

16. Jeremy Porter was the Operations Manager at the Cherokee Station beginning September 2015. Mr. Porter testified that when he took over plant operations, employees were working 12 hour shifts. Employees abused the schedule by working 18 to 24 hour shifts. Therefore, under the collective bargaining agreement, the plant changed to eight hour shift on April 25, 2016.

17. The change from the 12 to 8 hour shifts did not add hours to Claimant's schedule. Mr. Porter acknowledged that some employees were unhappy with the change and that Claimant was the most vocal opponent. Claimant filed grievances based on the shift change but the union dismissed them. Other plants that work under the same bargaining agreement work eight hour shifts.

18. Since reporting his alleged workers' compensation injury, Claimant has continued to work overtime. Mr. Porter confirmed that for the current month, Claimant is scheduled to work nine sixteen hour shifts; at least four more double shifts than any other employee.

19. The Claimant has experienced excessive daytime hypersomnolence since at least 2013. His medical providers have attributed it to factors including his twelve hour work schedule, nocturnal asthma, and obstructive sleep apnea. He has been treated for hypersomnolence since at least 2014, prior to any change in his work schedule. Claimant did not disclose this information to Dr. Otten. In addition, despite his allegations of extreme fatigue and daytime hypersomnolence, Claimant has continued to volunteer for and to work more overtime than any other employee at the plant.

20. Claimant does not take melatonin or Ambien to help him sleep. However, he takes Provigil to stay awake during his scheduled shifts and during the many hours of overtime that Claimant volunteers for.

21. The ALJ does not find Claimant to be a credible witness. His testimony was contradicted by his medical records, he failed to disclose his medical history to his workers' compensation provider, and he had motive to file this claim when the union dismissed his four grievances.

22. The ALJ finds the testimony of Messrs. Dillon and Porter to be credible and persuasive.

23. Claimant has not met his burden of establishing by a preponderance of the evidence that he experienced an occupation disease as a result of Employer's changing shifts from twelve to eight hours.

24. Claimant is not entitled to medical benefits.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of respondents. §8-43-201, C.R.S. (2014).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ need not address every piece of evidence or every inference that might lead to conflicting conclusions. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936).

In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determination, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192, 1197 (Colo. App. 2002). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 395 (Colo. App. 2000).

Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of whether the Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d at 846.

Section 8-40-201(14) defines an occupational disease as a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure or occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. The Claimant is alleging that his occupational disease consists of "shift work syndrome" or excessive daytime hypersomnolence. The ALJ finds that the Claimant has failed to sustain his burden of proof in establishing such an occupational disease.

A pre-existing disease or susceptibility to an injury does not disqualify a claim if the employment aggravates, accelerates, or combines with a pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. In this case, the Claimant was suffering from excessive daytime hypersomnolence in 2014 and received treatment through 2016 due to multiple factors. The Claimant has provided no persuasive evidence that going from a twelve hour shift to an eight hour shift in any way aggravated or caused the need for medical treatment. Rather, Claimant requests payment for medication to keep him awake more likely than not is due to his preexisting medical conditions and desire to work overtime.

No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162, Colorado 345, 426 P.2d 194 (Colorado 1967). Claimant has failed to prove any injury or occupational disease that caused disability or the need for medical treatment. No persuasive evidence supports the conclusion that Claimant's need for medication is attributable to an occupational disease arising out of Claimant's employment.

Claimant's alleged injury consists of excessive fatigue and his allegation that he is unable to differentiate between being awake or asleep. However, on the date Claimant reported these alleged symptoms to Mr. Dillon, Claimant not only declined medical care, he also chose to work a double shift. In addition, despite Claimant's unhappiness with eight hour shifts, he continues to volunteer for numerous overtime hours. His allegation that shift change has disrupted his Circadian rhythm is not supported by persuasive evidence.

A Claimant must prove a causal relationship between the injury and the medical treatment that he is seeking. *Schneider v. Industrial Claim Appeals Office*, 942, P.2d 1337 (Colo. App. 1997). Treatment for a condition not caused by employment is not compensable. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002). The ALJ finds that the Claimant has failed to sustain his burden of proof by a preponderance of the evidence that he has sustained an occupational disease, and has

failed to show a causal relationship between his alleged injury and the medical treatment he is seeking.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for compensation is denied and dismissed.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 10, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable mental impairment under Section 8-41-301(2), C.R.S.

II. If Claimant established she suffered a compensable mental impairment, whether the January 2015 motor vehicle accident and December 2014 miscarriage were intervening events which severed the causal relationship between the work injury and Claimant's ongoing symptoms and need for treatment.

III. Whether Karen Hauser, LCSW or Caroline Gellrick, MD is the authorized treating physician.

FINDINGS OF FACT

1. Claimant worked as a personal banker for Employer since 2005. Claimant's job duties included providing service to customers, sales, and "stage-directing," which required Claimant to stand near the entrance of the bank and welcome customers.

2. On November 18, 2014, Claimant was working at the Wells Fargo bank located at 599 South Sable Boulevard. Claimant had been assigned to this branch approximately two months prior. Claimant was scheduled to work from approximately 8:30 a.m. to 6:00 p.m. Claimant arrived to work at approximately 8:15 a.m. or 8:30 a.m. and performed her normal duties throughout the day. Claimant was assigned to stage-direct at approximately 5:00 p.m. or 5:30 p.m.

3. On November 18, 2014, the bank at which Claimant worked was robbed. The perpetrator entered the bank while Claimant was stage-directing and approached Claimant.

4. Claimant testified the perpetrator told Claimant that he knew her and that he had a gun. Claimant testified she believed the perpetrator had her husband and daughter. Claimant did not actually see a gun. Claimant testified the perpetrator took something out of his pocket and struggled to unfold it. Claimant testified she was in a dark area and that she initially struggled to read the note, which asked for no less than $10,000. Claimant testified she started walking to the bank's back area, at which time the perpetrator said "One, two, three, I'm going to shoot." Claimant testified she proceeded to go to the back area of the bank and informed her co-workers of the robbery. Claimant then stayed in the back area while one of her co-workers provided the perpetrator money. Claimant testified she was subsequently in shock and did not know what to do. Claimant testified people were running around and she was worried for her husband and daughter because she did not know where they were.

5. The ALJ reviewed security footage of the robbery. Claimant is observed standing by the entrance of the bank. The perpetrator enters the bank, approaches Claimant and immediately pulls a piece of paper from his left pocket. The perpetrator appears to hand the paper to Claimant then steps backs from Claimant. Claimant appears to read the note and then walks off camera. The perpetrator follows Claimant and appears to have his hands in the pockets of his sweatshirt. The perpetrator is not observed grabbing Claimant. A second camera view shows a customer standing in the lobby area. The perpetrator walks over to the customer and places his left arm around the customer's shoulders while walking the customer to a teller window. The customer removes the perpetrator's arm from around his shoulder. The perpetrator is observed shortly thereafter exiting out of the bank's front entrance. Camera footage from the teller area shows Claimant in the back area with other tellers. A co-worker is observed hugging Claimant and brings Claimant a cup of water. Claimant briefly smiles at the co-worker. Claimant is not observed crying. No one is observed running or screaming.

6. Claimant testified that after the robbery her brain was not functioning, she was constantly afraid, and she continued to think the robber was going to come back and find her. Claimant testified she had panic attacks and anxiety attacks, lost interest in doing things, and lost the will to live.

7. Claimant was approximately three-months pregnant at the time of the robbery.

8. Claimant testified that, prior to the November 18, 2014 robbery, Claimant was not involved in a bank robbery at the 599 South Sable Boulevard branch.

9. Claimant testified she had a good experience working at the 599 South Sable Boulevard location prior to the November 18, 2014 robbery. Claimant testified she loved her job and was performing her job as required.

10. On November 19, 2014, Claimant reported her symptoms to her manager and contacted the Human Resources line. Employer referred Claimant to Karen Hauser, LCSW, through the employee assistance program for experiencing symptoms of trauma in connection with the robbery.

11. No evidence was entered at hearing establishing Claimant was provided a list of designated providers within seven days of Claimant's notification to Employer of her symptoms.

12. Ms. Hauser first evaluated Claimant on November 21, 2014. Ms. Hauser noted Claimant was very tearful, anxious, and worried about the health of her baby. Claimant continued to treat with Ms. Hauser on an almost weekly basis. As of April 2015, Claimant had attended a total of 19 sessions with Ms. Hauser. Ms. Hauser diagnosed Claimant with Posttraumatic Stress Disorder ("PTSD"). Regarding subsequent sessions in November 2014 and December 2014, Ms. Hauser noted Claimant struggled with feelings of fear and anxiety and felt traumatized by the thought of returning to work.

13. On December 2, 2014, Debra D. Baldwin, NP-C, PhD, recommended Claimant refrain from working for 21 days while undergoing counseling.

14. As of December 22, 2014, Claimant was requesting to return to work. Claimant testified she was ready to return to work at such time.

15. Dr. Baldwin recommended Claimant return to modified duty on January 12, 2015, while Claimant continued to undergo counseling.

16. Prior to returning to work, Claimant was involved in a minor motor vehicle accident on January 11, 2015.

17. Claimant was evaluated at Rose Medical Center on January 12, 2015. Claimant underwent an ultrasound which revealed Claimant had suffered a miscarriage at 14 weeks, which was approximately three to four weeks prior to the January 11, 2015 motor vehicle accident. Claimant underwent an ultrasound in December 2015 that was normal.

18. A cytogenetic analysis was performed on the fetal tissue and it was determined that there were no detectable abnormalities of chromosome number or structure.

19. Claimant testified she believes the miscarriage was influenced by the robbery. Claimant testified she let the robber break her. Claimant testified she continues to experience symptoms, that she constantly has images of the robbery, and that she fears the perpetrator is coming back to get her. Claimant testified she is triggered by people who look like the perpetrator and places that remind her of the robbery.

20. In a summary of therapy notes from January 13, 2015, Ms. Hauser noted, "Client learned yesterday her baby had no heartbeat. She is devastated. She will need a DNC. Client unable to cope with the reality of this new trauma. She blames herself for the death. She believes it is due to the stress and trauma she experienced as a result of the robbery."

21. Ms. Hauser noted subsequent counseling sessions with Claimant focused on "dealing with the loss of her baby and the inability to accept this loss." Ms. Hauser remarked, Claimant "continues to experience increased anxiety about the possibility of returning to work even at another branch, but also wants her life to return to normal."

22. In a letter dated January 26, 2015, Ms. Hauser stated, Claimant "was clearly traumatized by the robbery. She was not able to return to work and function effectively due to the trauma and her PCP recommended she take time off." Ms. Hauser also noted Claimant suffered a miscarriage and stated, "[Claimant] continues to be traumatized by all of these events. She has expressed an interest in returning to work but not to same (*sic*) location where the robbery occurred. She continues to struggle emotionally and physically…she continues to experience depression, anxiety, numbness and anger over these event (*sic*)."

23. In a subsequent letter Ms. Hauser remarked Claimant was "highly traumatized by the robbery." Ms. Hauser noted Claimant had been a victim of a robbery at a bank approximately five years earlier. Ms. Hauser stated, "Client continues to struggle with symptoms of trauma which increase significantly when she thinks about returning to

work, especially at the branch where she worked when the robbery occurred." Dr. Hauser further remarked, "She continues to feel traumatized by the robbery and of, course, the loss of her baby."

24. Claimant filed a workers' compensation claim on January 26, 2015, noting "trauma/loss of baby" as the nature of the injury/illness. Claimant indicated a date of injury of November 18, 2014.

25. Dr. Baldwin reevaluated Claimant on February 4, 2015 and noted Claimant continued to be emotionally upset regarding the bank robbery.

26. On February 17, 2015, Claimant's counsel faxed a letter to Insurer requesting the Claimant's workers' compensation claim file. The letter stated, in part,

> Also, it is our understanding that at the time of the injury, [Claimant] was not provided with a designated provider list pursuant to Rule 8-2. It is also our understanding that [Claimant] did not receive an authorized treating physician or designated provider list within seven days after she filed her Workers' Compensation claim form. As such, [Claimant] designates Dr. Caroline Gellrick as her authorized treating physician. In the event that [Claimant] was provided an authorize (sic) treating physician/designated provider list, then please accept this request to change her physician from any prior authorized treating physician to Dr. Caroline Gellrick, for all future medical treatment.

27. Respondents did not respond to the February 17, 2015 letter.

28. On March 16, 2015, Claimant's counsel faxed the same letter to Ms. Karen Sterns with Sedgwick CMS.

29. Samantha Long, Paralegal, testified on behalf of Claimant. Ms. Long credibly testified she received confirmation through a fax report indicating both faxes were transmitted successfully.

30. On March 19, 2015, Respondents' counsel sent a letter to Claimant's counsel rejecting Claimant's request to designate Dr. Caroline Gellrick as Claimant's authorized treating physician and denying any request for a change of physician.

31. Respondents filed a Notice of Contest on March 27, 2015.

32. On April 14, 2015, Lupe Ledezma, Ph.D., performed a psychological evaluation of Claimant. Regarding Claimant's psychosocial history, Dr. Ledezma documented the following, among other things: Claimant was grazed by a gunshot during an attempted carjacking at age 15 or 16, Claimant suffered a miscarriage in May 2013, Claimant underwent gastric bypass surgery in December 2013 and, approximately three years prior, Claimant's daughter suffered an illness which led to significant emotional upset for Claimant. Claimant reported that, after the November 18, 2014 robbery, her primary concern was that her continued emotional distress could harm her unborn child.

Claimant reported that it was difficult for her to get up in the morning and, despite attempts to improve her emotional state, Claimant continued to feel fear and nervousness regarding returning to work. Claimant reported replaying the robbery in her mind and feeling unsafe in public and, since the robbery, experiencing anxiety, nervousness, irritability, and lethargy. Claimant also reported startling easily, having difficulty calming down, crying, and a decreased attention span and ability to concentrate. Dr. Ledezma diagnosed Posttraumatic Stress Disorder ("PTSD") and depression. Dr. Ledezma remarked,

> "[Claimant] is experiencing emotional distress related to the robbery that occurred at work on 11/18/14. While she was not physically injured, she did feel that her life was threatened. Also, she experienced sustained fear and apprehension because the robber was not caught for several days and she feared that he did know her." "She has intrusive memories of the incident and has difficulty talking about it without becoming highly emotionally upset."

Referencing the January 11, 2015 motor vehicle accident, Dr. Ledezma stated,

> "While I do not have access to Ms. Hauser's weekly progress notes, based on a treatment summary submitted by Ms. Hauser, there is indication that the motor vehicle accident and miscarriage exacerbated the psychological symptoms that were already present. Also, her primary care physician diagnosed PTSD and took her off work before the motor vehicle accident or miscarriage occurred."

Dr. Ledezma noted that Claimant suffered a prior miscarriage and previously used psychotropic medications, but that Claimant received treatment and stopped medication before the robbery such that she was able to work without incident or emotional reactivity. Dr. Ledezma concluded that "whatever issues" Claimant had from the prior miscarriage and the prior robbery were resolved. Dr. Ledezma noted Claimant had symptoms of PTSD "well after" the prior incidents of trauma, and before the January 2015 motor vehicle accident. Dr. Ledezma further noted Claimant reported being emotionally upset immediately after the robbery and had requested psychological counseling before the January 2015 motor vehicle accident or the miscarriage. Dr. Ledezma opined that, within a reasonable degree of medical probability, Claimant's psychological symptoms are related to the November 18, 2014 robbery. Dr. Ledezma recommended Claimant refrain from returning to work at the same location, and that Claimant receive, among other things, psychotherapy, and antidepressants. Dr. Ledezma reevaluated Claimant on January 11, 2016 and April 12, 2016, noting Claimant continued to experience problems with attention and concentration, significant anxiety at work, and frequent fear responses.

33. On May 28, 2015, Claimant returned to work for Employer at a different branch. Claimant testified that after she returned to work she was afraid to greet customers at the door because it triggered anxiety and panic attacks.

34. In a June 11, 2015 letter, Dr. Baldwin noted Claimant suffered from PTSD and recommended Claimant not perform stage-directing for six months.

35. Claimant testified her manager pushed her to work the door, stating, "You have to face those demons." Claimant testified that on one occasion, after being required to stage-direct, a customer came up behind her, grabbed her at the hips, and yelled in her ear, "I gotcha now!" Claimant testified that she "just lost it and started running like a crazy woman." Claimant testified that she was trying to recover from the robbery, however the incident accentuated her biggest fear: that the robber was going to come back and get her.

36. After the incident, Claimant's manager requested that she recount everything that had happened to her as a result of the robbery to her co-workers, because it would help her get better. Per Claimant's manager's request, Claimant shared her story with at a staff meeting. Claimant testified that she was nervous and scared, and that every time she talks about the robbery she feels it all over again.

37. Claimant worked from May 28, 2015 to July 8, 2016. Claimant subsequently went on short-term disability.

38. On May 28, 2016, Caroline M. Gellrick, MD conducted an Independent Medical Examination ("IME") at the request of Claimant. Dr. Gellrick conducted a medical records review and performed a physical examination of Claimant. Dr. Gellrick diagnosed work-related PTSD and ongoing depression and anxiety with panic attacks. Dr. Gellrick opined Claimant was not at MMI. Dr. Gellrick recommended Claimant undergo a "second opinion psychological evaluation with consideration for restarting medical management." Dr. Gellrick referred Claimant to Walter Torres, PhD for a full psychological evaluation.

39. Dr. Torres first evaluated Claimant on June 29, 2016. Regarding Claimant's background, Dr. Torres noted, in part, the following: Claimant's twin brother was murdered when she was 25 years old, Claimant was molested by an older brother at age eight or nine. Dr. Torres diagnosed Claimant with PTSD and Depression. Dr. Torres noted that psychological testing performed indicated Claimant was not exaggerating her symptoms. Dr. Torres opined that Claimant developed PTSD in reaction to the robbery. Dr. Torres noted Claimant's background suggests

> …that she may have some greater vulnerability than most others to developing posttraumatic stress disorder in reaction to significant stressors. That being said, there is no evidence that she was experiencing any significant ongoing symptomatology, or certainly any disabling psychological symptoms prior the robbery which was the turning point leading to her current state.

Claimant continued to treat with Dr. Torres for 13 sessions. Claimant reported being depressed. Claimant reported experiencing panic attacks in relation to returning to the workplace or talking to her manager, being afraid at work and resenting the workplace.

Claimant reported that she continued to be afraid of individuals who had the same physical appearance as the perpetrator. There is no mention of Claimant's miscarriage again in Dr. Torres' notes until January 3, 2017. Dr. Torres remarked, "Before the death, and prior to the accident, she was in a very deep depression with very pronounced negative symptoms, deeply dulled, not eating, consumed and oppressed by intensely intrusive post traumatic imagery."

40. Dr. Torres testified at hearing on behalf of Claimant as an expert in psychology. Dr. Torres is a licensed clinical psychologist. Dr. Torres opined that Claimant was not exaggerating her symptoms based on the validity scales of his psychological testing and other medical records he reviewed. Dr. Torres explained inconsistencies between Claimant's recollection of the robbery and the surveillance footage of the incident could be caused by Claimant entering into a state of dissociation resulting from the trauma event. Dr. Torres opined that the robbery caused Claimant's PTSD. Dr. Torres testified that losing a baby "per se is not something that we would recognize as an event that characteristically would lead to posttraumatic stress disorder." Dr. Torres testified that, prior to the robbery, Claimant was functioning fine and that the robbery was a "turning point into a degraded state of functioning." Dr. Torres testified that there was no evidence that, prior to November 18, 2014, Claimant had PTSD or suffered the kinds of dysfunction she currently suffers as a result of the PTSD caused by the robbery. Dr. Torres opined there was no reason to believe Claimant's prior traumatic events triggered Claimant's PTSD condition.

41. Regarding a diagnosis of PTSD, Dr. Torres explained that "the criteria requires that a certain amount of time has passed since the event for the diagnosis of post-traumatic stress disorder to kick in. During the first week or so – and I might be fuzzy on some of these details – you would be calling it acute stress disorder…But if it persists, then we go into post-traumatic stress disorder." Dr. Torres testified that PTSD is multifactorial and always "develops with some contribution from a person's basic dispositions."

42. Dr. Torres testified that women who are subjected to a threat while accompanied by their child are more likely to develop PTSD. Dr. Torres opined that Claimant's pregnancy during the robbery "is a relevant factor her with respect to the genesis of her condition and characteristics." Dr. Torres agreed with Dr. Moe that acute fear is expectable in a robbery like the robbery Claimant experienced. Dr. Torres opined that subsequent events of being grabbed from behind by a customer and being pressured by her manager to self-disclose at a staff meeting aggravated Claimant's condition. Dr. Torres testified Claimant's cognitive functioning continues to be poor due to the severity of Claimant's PTSD. Regarding additional treatment, Dr. Torres opined Claimant required a "clean break" from Employer.

43. On July 8, 2015 Stephen A. Moe, M.D. conducted an IME at the request of Respondents. Dr. Moe issued an IME Report on July 13, 2015. Dr. Moe conducted a psychiatric interview of Claimant and reviewed Claimant's medical records and security footage of the robbery. Claimant reported experiencing a high level of fear during the first six to eight weeks following the robbery, which significantly impacted her ability to

function. Claimant reported that the robbery continued to replay in her mind, and that she experienced panic episodes and crying. Claimant reported feeling nervous and anxious after returning to work. Claimant reported that the first two months post-robbery was when she was doing worse from a psychological perspective post-accident. Claimant reported that the only time she obtained psychiatric treatment was in the wake of her daughter's illness, where she underwent counseling and took an antidepressant. Claimant reported that she ceased taking the Celexa after her first miscarriage.

44. Dr. Moe remarked, "In reflecting on her mental state in the wake of the miscarriage, the patient described feeling different in comparison to the anxiety that had predominated previously. She depicted a grieving process following the miscarriage, starting with a state of disbelief and then processing through feelings of loss."

45. Dr. Moe noted, "[Claimant] was the first to encounter the man who robbed the bank where she worked. She reported the man informed her that he had a gun, and she described the various ways he implicitly threatened to harm her for others in the bank if his demands were not met. Such an experience would be **acutely** distressing to all but the rare individual." [emphasis not added]. Dr. Moe remarked, however, "the question of whether such a experience would cause enduring emotional distress is much less clear." Dr. Moe noted that, as evidenced on the security footage, Claimant did not have physical contact with the perpetrator and was not detained by the perpetrator. Dr. Moe further noted Claimant was not physically harmed, and was subject only to implicit threats by the perpetrator, doing little more than functioning in the role of a messenger. Dr. Moe noted Claimant did not appear severely distressed post-robbery. Dr. Moe opined, "Whereas acute fear is quite expectable, her enduring distress despite numerous benign elements of the incident suggests an important contribution from factors unique to her." Dr. Moe further opined that Claimant's subsequent miscarriage and the experience of employer's response to her symptoms influenced Claimant's symptoms.

46. Dr. Moe opined Claimant merited the diagnosis of PTSD, but questioned whether Claimant's condition was primarily driven by the robbery. Dr. Moe described PTSD as a psychiatric diagnosis included in the Diagnostic and Statistical Manual. Dr. Moe explained that Section 8-41-302(a), C.R.S. sets forth an objective standard in analyzing mental impairment claims stating, "…a potential claimant is barred from establishing an emotional stress Workers' Compensation claim if pre-incident personality traits or life experiences render her uncommonly vulnerable to develop psychiatric symptoms in the wake of a particular workplace event. A worker is also excluded from making a claim if personal stressors are judged to interfere with normal/expectable ways of coping with a particular workplace event."

47. Dr. Moe conducted a follow-up IME evaluation of Claimant and issued a second IME Report on December 12, 2016. Dr. Moe reviewed additional medical records and conducted a follow-up interview of Claimant. Dr. Moe again opined,

> "Establishing the clinical diagnosis of Posttraumatic Stress Disorder (PTSD) is not sufficient to meet the statutory requirement for a mental stress claim, given that the diagnosis of PTSD is based on the so-called 'subjective standard,' whereas the latter must meet an 'objective standard.' Consequently, in the wake of a potentially disturbing experience, the greater the extent to which a worker's psychiatric symptoms are due to idiosyncratic (personal) factors, the less likely it becomes that she will meet the statutory definition of a mental stress claim."

Dr. Moe opined Claimant's assessment of her risk remained "highly distorted" despite "abundant exposure to normalizing and symptom-reducing influences." Dr. Moe opined the elements observed in Claimant's case represented "an uncommon response to any trauma, and they are especially unexpected when the trauma involves the objectively mild features that were present in this case…"

48. Dr. Moe testified at hearing on behalf of Respondents as an expert in psychiatry. Dr. Moe is board certified in psychiatry and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Moe testified consistent with his IME Reports. Dr. Moe reiterated that, while acute fear is expected under the circumstances, Claimant's enduring emotional distress is not. Dr. Moe testified that a typical reaction would involve short-lived distress where an individual's normal defenses and coping mechanisms would subsequently "kick in." Dr. Moe opined that he would expect a person might need "a few days off to collect themselves" and "reassurances the event is being taken seriously." Dr. Moe opined that people would not seek psychotherapy for the features of the type of robbery Claimant experienced, reiterating that the robbery was not a violent or highly threatening situation typically associated with PTSD.

49. Dr. Moe testified that prior traumatic events experienced by Claimant are probably are important factors in Claimant's condition, in addition to her personality, which Dr. Moe described as "very dramatic, expressive, reactive." Dr. Moe opined that Claimant personality is, to him, probably the most important variable in Claimant's situation.

50. Dr. Moe opined that the December 2014 miscarriage caused a new trauma, which he characterized as "not a posttraumatic stress disorder trauma, [but] a loss trauma." Dr. Moe opined Claimant's miscarriage modified her view of the robbery, such that Claimant's "interpretation of the bank robbery [was] for the worse and further interfered with this normal recovery process that we would expect." Dr. Moe testified that there was no causal explanation establishing the robbery caused the miscarriage.

51. Claimant's testimony is found credible and persuasive.

52. The ALJ credits the opinions of Drs. Hauser, Ledezma, Gellrick and Torres over the contrary opinion of Dr. Moe and finds Claimant suffered a compensable mental impairment as a result of the November 18, 2014 robbery.

53. The ALJ finds the January 2015 motor vehicle accident and December 2014 miscarriage were not intervening events that severed the causal relationship between the work incident and Claimant's ongoing symptoms and need for treatment.

54. The right of selection of an authorized treating physician passed to Claimant due to Respondents' failure to provide Claimant a designated provider list within seven days of her notification to Employer of the work-injury.

55. Claimant selected Karen Hauser, LCSW as the authorized treating physician by treating with Ms Hauser for at least 19 sessions.

56. Karen Hauser, LCSW remains the authorized treating physician, as Claimant did not properly request a change of physician.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846. The Workers' Compensation Act has authorized recovery for a broad range of physical injuries, but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAP, Mar. 9, 2011).

Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAP, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAP, Feb. 19, 2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), affd 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4- 728-064 (ICAP, Jan. 6, 2009). Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off,

demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

Recognized Permanent Disability Arising from an Accidental Injury Arising Out of and in the Course and Scope of Employment

Claimant established she sustained a recognized permanent disability from an accidental injury arising out of and in the course and scope of employment. Drs. Hauser, Ledezma, Gellrick and Torres diagnosed Claimant with PTSD and , in some cases, depression. As noted in Dr. Moe's IME Report, PTSD is recognized as a psychiatric diagnosis in the Diagnostic and Statistical Manual of Mental Disorders. In explaining the distinction between acute stress disorder and PTSD, Dr. Torres credibly testified that more persisting trauma results in PTSD. Claimant credibly testified to the persistent and disabling nature of her PTSD and depression, which is further evidenced in Claimant's records.

Drs. Ledezma, Gellrick and Torres credibly opined Claimant's PTSD was caused by the robbery. Claimant credibly testified she began experiencing symptoms of trauma soon after the incident, which is supported by Claimant notifying Employer of her symptoms the following day. Claimant continued to report anxiety and other symptoms of trauma in connection with the robbery, as evidenced in Claimant's records.

The robbery, which the ALJ infers was an unforeseen and unexpected event, occurred while Claimant was working her scheduled shift and performing her usual work duties. Claimant came into contact with the robber by virtue of being assigned to stage-direct during the time period in which the robber entered the bank. Claimant's mental injury occurred in the time and place limits of her employment while performing her normal work duties.

Psychologically Traumatic Event Generally Outside a Worker's Usual Experience That Would Evoke Significant Symptoms of Distress in a Similarly Situated Worker

Respondents assert a diagnosis of PTSD is insufficient to establish a mental stress claim because the diagnosis of PTSD is based on a subjective standard, while the statute requires an objective standard. Respondents further contend Claimant's symptoms are more attributable to idiosyncratic factors than to the robbery, and that the

robbery would not evoke significant symptoms of distress in a similarly situated worker. The ALJ disagrees.

In *Davison*, the Colorado Supreme Court held that the statute requires an expert medical or psychological testimony to prove that the claimant suffered a psychologically traumatic event." However, the court also held that a claimant can use lay or expert testimony, or some combination of the two to prove the traumatic event would evoke significant symptoms of distress in a similarly situated worker. *Davison*, 84 P.3d at 1030. In *City of Loveland Police Depart*., the court found, "A compensable psychologically traumatic event under § 8-41-301(2)(a) must cause a significant, but not necessarily identical, reaction in similarly situated employees. Individual reactions of employees experiencing the same psychologically traumatic event will vary dramatically depending upon the physical and psychological makeup and resilience of the individuals affected." *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 953 (Colo. Ct. App. 2006).

Claimant established she suffered a psychologically traumatic event generally outside a worker's usual experience that would evoke significant symptoms of distress in a similarly situated worker. While Dr. Moe opined the robbery did not have the violent and highly threatening factors typically associated with PTSD, both Dr. Moe and Dr. Torres agreed acute fear would be expected in the circumstances. Moreover, as previously mentioned, Drs. Ledezma, Gellrick and Torres all credibly opined Claimant's symptoms were caused by the robbery.

Dr. Moe opined that the robbery would not evoke enduring stress in a similarly situated worker. Claimant is not required to establish the psychologically traumatic event would cause identical symptoms of distress in a similarly situated worker. As such, the pertinent issue is not whether a similarly situated worker would develop enduring distress, but rather the event itself is psychologically traumatic and would evoke *significant* symptoms of distress. "Significant" in the context of Section 8-41-301(2)(a), C.R.S. has not been legally defined. Dr. Moe's opinion effectively requires the ALJ to interpret the plain and ordinary meaning of "significant" as "enduring." The ALJ is not persuaded "significant" is solely defined by a period of duration. Thus, fear, while limited in time period, can constitute a significant symptom of distress. Claimant's enduring stress goes to the court's position in *City of Loveland Police Depart*. that individual reactions will vary dramatically.

The ALJ is not convinced Claimant's symptoms are more attributable to idiosyncratic factors than to the robbery. Claimant credibly testified she loved her job and was performing her job as required prior to November 18, 2014. Dr. Ledezma credibly opined that "whatever issues" Claimant had from prior traumatic incidents were resolved and noted Claimant was able to work without incident prior to the November 18, 2014 robbery. Further, Dr. Torres credibly testified there was no evidence Claimant was experiencing ongoing symptomatology from prior traumatic events and the robbery was the "turning point" for Claimant.

The ALJ is convinced the robbery was generally outside of a worker's usual experience, as Claimant credibly testified that she had not experienced a robbery at the 599 South Sable Boulevard location prior to November 18, 2014. Records also indicate Claimant experienced only one prior bank robbery approximately five years prior.

Based on a totality of the evidence, Claimant has established by a preponderance of the evidence she suffered a compensable work injury in the form of a mental impairment.

Intervening Injury

All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. An unrelated medical problem may be considered an independent intervening cause even where an industrial injury impacts the treatment choices for the underlying medical condition. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934).

If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 384, 30 P.2d 327, 328 (1934); *Vargus v. United Parcel Service*, W.C. No. 4-325-149 at 3 (ICAO Aug. 29, 2002); *Vandenberg v. Ames Construction*, W.C. No. 4-388-883 at 4 (ICAO Dec. 5, 2007).

Respondents contend that, if Claimant sustained a compensable work-related injury on November 18, 2014, the January 2015 motor vehicle accident and December 2014 miscarriage constitute intervening events that severed the causal relationship between the work injury and Claimant's ongoing symptoms and need for treatment. The ALJ disagrees. Despite some trauma related to the miscarriage, Drs. Ledezma, Gellrick and Torres credibly opined Claimant's PTSD was caused by the robbery. Claimant credibly testified she constantly has images of the perpetrator, and is triggered by people who look like the perpetrator and places that remind her of the robbery. Claimant's records after the miscarriage continue to refer to Claimant reporting fear and anxiety in connection with the robbery and returning to the workplace. As such, the ALJ is not convinced the motor vehicle accident and miscarriage were intervening injuries sufficient to sever the causal relationship between Claimant's work injury, her ongoing symptoms and her need for medical treatment.

Change of Physician

Section 8-43-404(5)(a)(I)(A), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the respondents must provide injured workers with a list of at least four designated medical providers. §8-43-404(5)(a)(I)(A), C.R.S. The

respondents must supply a copy of the written designated provider list to the injured worker "in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." WCRP 8-2(A)(1). The list must include the insurer's contact information "including address, phone number and claims contact information." WCRP 8-2(A)(2).

Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the "services of a physician are not tendered at the time of injury, "the employee shall have the right to select a physician." WCRP 8-2(E) additionally provides that "[i[f the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician" of his choosing. An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). However, in those situations where the claimant has signified, by words or conduct, that he has chosen a physician to treat the industrial injury he has made a physician selection. See *Rivas v Cemex* W.C. No. 4-975-918 (ICAP, Mar. 15, 2016); *Tidwell v. Spence Technologies,* W.C. No. 4-917-514 (ICAP, Mar. 2, 2015); *Pavelko v Southwest Heating & Cooling* W.C. No. 4-897-489 (ICAP, Sept. 4, 2015); *Miller v Rescare, Inc.* W.C. No. 4-761-223 (ICAP, Sept. 16, 2009).

The ALJ concludes the right of selection passed to Claimant. As found, Respondents failed to provide Claimant a designated providers list within seven days of Claimant's notification to Employer of the injury. Nonetheless, Claimant, through her words and conduct, selected Karen Hauser, LCSW by treating with Karen Hauser, LCSW for at least 19 sessions.

The ALJ further concludes Claimant failed to properly request a change of physician. Section 8-43-404(5)(a)(VI)(A), C.R.S. and WCRP 8-7 provide that, in addition to the one-time change of physician allowed within 90 days of injury under Section 8-43-404(5)(a)(III), C.R.S. and WCRP 8-5, an injured worker may submit a written request to change physicians to the insurer or employer's authorized representative. The request must be on the form prescribed by the Division of Workers' Compensation. The insurer or employer's authorized representative then has twenty (20) days from the date of the certificate of service of the request form to grant permission for the change of physician or object in writing.

As found, Claimant's change of physician request was submitted in a February 17, 2015 letter to Insurer addressing other issues. While Respondents failed to object to Claimant's February 17, 2015 letter, the request was not submitted on the form prescribed by the Division. Accordingly, the request to change physicians made on February 17, 2015 was not proper, and Karen Hauser, LCSW, remains the authorized treating physician.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of evidence that she suffered a compensable work-related injury in the form of a mental impairment.

2. The January 2015 motor vehicle accident and December 2014 miscarriage did not constitute intervening events which severed the causal connection to the work injury and Claimant's symptoms and need for treatment.

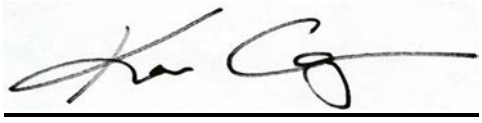
3. Karen Hauser, LCSW, is the authorized treating physician. Respondents shall pay all reasonable, necessary and related medical treatment ordered by or through Karen Hauser, LCSW.

4. Any and all matters not determined herein are reserved for future determination.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 11, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE ON REMAND

1. Whether the claimant has proven, by a preponderance of the evidence, that she is entitled to reopen her claim pursuant to the provisions of section 8-43-303, C.R.S.

ISSUES PREVIOUSLY ADDRESSED

2. Whether the claimant has proven, by a preponderance of the evidence, that she is entitled to an award of medical benefits relating to treatment of her alleged left shoulder injuries, post-MMI.

3. Whether the claimant has proven, by a preponderance of the evidence, that she is entitled to an award of temporary total benefits for the period August 9, 2015 through November 17, 2015.

4. Whether the claimant has proven, by a preponderance of the evidence that she is entitled to an award of permanent partial disability benefits arising out of the September 15, 2014, industrial injury at the Respondent Employer.

5. Whether the claimant has proven, by a preponderance of the evidence, that she was not at MMI on June 15, 2015, contrary to the determination of the authorized treating physician.

6. Whether the claimant has proven, by a preponderance of the evidence, that she is entitled to be reimbursed for medical expenses associated with her left shoulder surgery incurred post-MMI.

7. Whether the Respondents have proven, by a preponderance of the evidence that the claimant is jurisdictionally barred from raising the issues of compensability of the alleged left shoulder injury, medical benefits, TTD, PPD, MMI and "medical reimbursement" per the provisions of sections 8-42-107.2 and 8-43-203(2)(b)(II)(A) and (d), C.R.S.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. The claimant is a right-hand dominant 45-year-old woman with an August 29, 1971, date of birth. **Exhibit G, Bates 50.**

2. The claimant has been employed by the Respondent Employer as a "document controller" since 2006. **Exhibit G, Bates 50.** The claimant presented to Concentra Medical Centers on September 15, 2014, complaining of pain in the left wrist and shoulder. The claimant reported the injury occurred from turning pages and data entry. **Exhibit B, Bates 7.** The claimant gave a history of an insidious onset of left wrist pain "two months ago". According to the claimant, the pain started in the volar aspect of the left wrist and slowly radiated up to the lateral elbow and into the anterior left shoulder. **Exhibit B, Bates 8.** The treating physician, Dr. Daniel Peterson, assessed "wrist sprain, lateral epicondylitis of the left elbow, biceps tendinopathy and impingement syndrome of the shoulder". Dr. Peterson referred the claimant to Genex for a job site analysis to evaluate the claimant's workplace for risk factors for cumulative trauma conditions. He opined, "I have my doubts but does do supination/pronation with left hand turning documents and does rest her elbows on her arm rests…. Certainly has posture issues and body habitus issues…. Ultimately, causality to be determined." Physical therapy and medications were prescribed and the claimant was released to return to regular duty work. **Exhibit B, Bates 9, 10.**

3. On December 3, 2014, Colleen Waterous, M.A., CEAS, QRC, performed a job site analysis of the claimant's work stations, as recommended by Dr. Peterson. The job site analysis included a Physical Demands Analysis and Risk Factor Assessment to determine any risk factors present in the workplace as they related to the claimant's diagnosis, consistent with Colorado's Medical Treatment Guidelines, Rule 17, W.C.R.P., Exhibit 5, Cumulative Trauma Conditions. Based on her evaluation, Ms. Waterous opined that of the fourteen primary and secondary risk factors for cumulative trauma, **none** were present relative to the claimant's job as a document controller. **Exhibit C, Bates 53.**

4. Following the job site analysis, the claimant returned to Concentra Medical Centers on December 15, 2014. Jocelyn Cavender, PAC, evaluated the claimant. On physical examination, the claimant's left shoulder had a normal appearance, with no deformity, no tenderness, full range of motion, normal strength and no signs of impingement. PA Cavender noted the job site analysis showed no risk factors. **Exhibit B, Bates 16.** Physical therapy and medications were continued. The claimant was released to return to regular employment.

5. The claimant continued treating at Concentra for her left wrist, elbow and shoulder pain. The claimant was referred to Dr. Jeffrey Jenks for EMG testing of the left upper extremity. Worley Lynch, PA-C, evaluated the claimant on January 2, 2015. He opined, "Causality still needs to be established under Rule 17, depending on if really does have [cubital] tunnel syndrome or not." **Exhibit B, Bates 20.**

6. Due to the claimant's plateau in physical therapy, PA Cavender referred the claimant for a left shoulder MRI. **Exhibit B, Bates 20.**

7. The left shoulder MRI was performed on January 26, 2015. It was read as showing significant increased signal intensity in the posterior distal muscle fibers of the supraspinatus, which showed a partial thickness tear at the myotendinous junction of a large intrasubstance cyst, together with soft tissue impingement under the acromion, tendinosis in the infraspinatus, and severe tendinosis in the intraarticular portion of the biceps tendon, with thickening. The MRI also showed an anterosupralateral labral tear. **Exhibit B, Bates 35.**

8. Orthopedic surgeon, Dr. Michael Simpson, evaluated the claimant on April 20, 2015. He recommended a left shoulder surgery. **Exhibit B, Bates 45.**

9. On June 4, 2015, the carrier filed a Notice of Contest, disputing compensability of the claimant's alleged shoulder injury. **Exhibit A.**

10. The providers at Concentra continued treating the claimant, who reported gradual, but complete, improvement in her wrist and elbow symptoms. On June 15, 2015, authorized treating physician, Dr. Walter Larimore, placed the claimant at MMI, with no impairment, no work restrictions and no need for medical treatment to maintain MMI. Regarding the claimant's alleged left shoulder complaints, Dr. Larimore opined:

    "After extensive review of her job site evaluation, EMG, MRI and all of the past notes, my opinion is that there is a >50% likelihood that the left shoulder complaints are *not* work-related**." Exhibit B, Bates 45.**

11. The carrier filed a June 29, 2015, Final Admission admitting liability consistent with Dr. Larimore's opinions on causation, MMI, impairment and the claimant's need for medical treatment to maintain MMI.

12. **It is undisputed that the claimant did not object to the June 29, 2015, Final Admission, did not file a Notice and Proposal to Select a DIME and did not file an Application for Hearing on any issues then ripe, including medical benefits.**

13. On July 6, 2015, the claimant sought treatment with her personal provider, Dr. John Pak, at Front Range Orthopedics, outside the worker's compensation system, for her reported left shoulder complaints. Dr. Pak diagnosed a full thickness rotator cuff tear. **Exhibit F, Bates 87.**

14. On August 9, 2016, Dr. Pak performed an arthroscopic subacromial decompression, acromioplasty rotator cuff repair and arthroscopic debridement for shoulder arthritis. **Exhibit F, Bates 94. 95.** There is no

persuasive evidence in the record-including the MRI report which Claimant references- that this surgery was necessitated by a compensable injury.

15. On September 16, 2016, the claimant filed an Application for Hearing endorsing the issues of compensability, medical benefits, Petition to Reopen, TTD, PPD, MMI and "medical reimbursement."

16. The claimant presented no credible evidence, and failed to meet her burden of proving, the treatment provided by Dr. Pak was authorized or related to the admitted work injury of left cubital tunnel syndrome and left lateral epicondylitis. The claimant's request for medical benefits provided outside the Workers' Compensation system to treat her left shoulder complaints is not supported by the applicable law.

17. The claimant provided no credible evidence, and failed to meet her burden of proving entitlement to TTD for the period August 9, 2015 through November 17, 2015. The claimant's request for an award of TTD is not supported by the applicable law.

18. The claimant presented no credible evidence, and failed to meet her burden of proving, that she is entitled to an award of permanent physical impairment as a result of the admitted work injury. The claimant's request for an award of PPD is not supported by the applicable law.

19. Claimant testified that her shoulder has "improved today", compared with when she was placed at MMI by Dr. Larimore. Claimant presented no persuasive *evidence* (credible or otherwise) that her condition had worsened *at any point* since being placed at MMI.

20. Claimant testified about the reason for her reopening as follows:

> Q. Okay. And we're here today basically because you believe you were inappropriately placed at maximum medical improvement, is that right?
>
> A. Yes.
>
> Q. And the reason that you think that you were not at MMI is because you disagree with Dr. Lattimore's (sic) opinion that your left shoulder is not work-related
>
> A. I was still in pain, but yes, I disagreed with him.

21. Claimant presented no persuasive *evidence* (besides her assertion that she *disagreed* with Dr. Larimore's finding of MMI) that Dr. Larimore was *mistaken* or *erred* in his diagnosis, treatment, or placement of Claimant at MMI.

22. Claimant presented no persuasive *evidence* that Dr. Larimore was *mistaken* or *erred* in his opinion that her left shoulder was not work-related.

23. Claimant alleged, but presented no admissible (much less persuasive) *evidence*, that Dr. Larimore, was "coerced" into placing Claimant at MMI.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits, including medical benefits, by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

C The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

D. The claimant has the burden of proving entitlement to benefits, including medical benefits, by a preponderance of the evidence. Section 8-43-201, C.R.S; *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

E. Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury or disease and the condition for which benefits or compensation is sought. *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo.App. 1997). Whether the claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo.App. 1997).

F. Here, as found, Claimant failed to meet her burden of proving that the medical treatment she received for her left shoulder injury was authorized, or related to the admitted work injury.

G. To obtain indemnity benefits, a claimant must prove, by a preponderance of the evidence, that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 639 (Colo. App. 1997). Here, as found, the claimant failed to meet her burden of proving entitlement to indemnity benefits in the form of TTD or PPD.

H. Section 8-42-107.2(2)(b), C.R.S. provides, in relevant part:

(b) If any party disputes a finding or determination of the authorized treating physician, such party shall request the selection of an IME. The requesting party shall notify all other parties in writing of the request, on a form prescribed by the division by rule . . . . Unless such notice and proposal are given within thirty days after the date of mailing of the final admission of liability or the date of mailing or delivery of the disputed finding or determination, as applicable pursuant to paragraph (a) of this subsection (2), the authorized treating physician's findings and determinations shall be binding on all parties and on the division.

I. Sections 8-43-203(2)(b)(II)(A) and 8-43-203(2)(d) provide, in pertinent part:

(II) An admission of liability for final payment of compensation shall include a statement that this is the final admission by the workers' compensation insurance carrier in the case, that the claimant may contest this admission if the claimant feels entitled to more compensation, ... and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not ... contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing....

(d) Once a case is closed pursuant to this subsection (2), the issues closed may only be reopened pursuant to section 8-43-303.

J. Claimant does not seek to reopen on the basis of a *worsening* of her left shoulder condition, nor was sufficient evidence presented that her left shoulder condition had worsened at any time since being placed at MMI by her ATP.

K. Rather, Claimant basis for reopening can best be characterized as an *error or mistake* by her ATP in placing her at MMI, and in opining that her left shoulder injuries were not work related. In reality, Claimant simply disagrees with her ATP. The ALJ finds that there is *no evidence* in support of her claim of an error or mistake by her ATP on the issues of *MMI, causation, or work-*

relatedness. No factual or legal basis for a reopening has been shown by competent evidence.

L. While not necessary in light of the previous Conclusion, the ALJ further finds that Claimant failed to avail herself of the appropriate procedural right to challenge her ATP's conclusions, to wit: requesting a Division Independent Medical Examination. Nothing stood in Claimant's way from requesting a DIME in a timely fashion. No evidence came to light at some later point that was not at her disposal when she disagreed with her ATP's conclusions. Nor would the overall circumstances of this case warrant a reopening, even if such an error or mistake were found to have occurred.

M. The provisions concerning the final admission of liability are part of a statutory scheme to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo.App.1990).

N. The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). In the instant claim, it is undisputed that the ATP, Dr. Walter Larimore, determined that the claimant reached MMI from her industrial injuries on June 15, 2015. Dr. Larimore determined that the injuries caused by the January 23, 2007 accident included only the diagnosed left cubital tunnel and left lateral epicondylitis, and not the left shoulder rotator cuff tear and other findings.

O. It is undisputed that the Respondent Insurer filed a Final Admission of Liability consistent with Dr. Larimore’s opinions on MMI, permanent physical impairment and medical treatment post-MMI. The claimant avers that she was experiencing shoulder symptoms from the date of injury and ongoing. The records reflect the claimant received some treatment for her shoulder complaints within the Workers’ Compensation System. The claimant testified that on June 15, 2015, she did not believe she was at MMI and believed she needed treatment for her shoulder injuries. However, it is undisputed that the claimant did not object to the June 29, 2015, Final Admission of Liability and request a Division IME, disputing Dr. Larimore’s causation determinations.

P. The claimant attempts to frame the issues as those of “compensability” and medical benefits. Contrary to the claimant’s arguments, the existence of a compensable injury is not in question. Indeed, Respondents admitted, in the Final Admission of Liability, that claimant sustained a compensable injury on September 15, 2014, from which she reached MMI on June 15, 2015, with no

impairment, no restrictions and no need for medical treatment to maintain MMI.

Q. Section 8-42-107(8)(c), C.R.S. specifies that, once a claimant reaches MMI, the treating physician "shall determine a medical impairment rating" in accordance with the *AMA Guides*. Thus, the treating physician makes the initial determination of MMI and the degree of impairment. *Colorado AFL-CIO v. Donlon,* 914 P.2d 396 (Colo.App.1995). If the rating is disputed, either party may request a Division IME, and the IME physician's rating is binding unless overcome by clear and convincing evidence.

R. When a Division IME has been requested, a hearing may not take place until the finding of the DIME physician is filed with the Division. *See Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo.App.1998). This statutory IME process was instituted to reduce litigation over MMI and the degree of impairment. *Colorado AFL-CIO v. Donlon, supra*.

S. Whether a particular component of the claimant's overall medical impairment was caused by the industrial injury is an inherent part of the rating process under the AMA Guides. *See Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333 (Colo.1996) (a rating of overall medical impairment necessarily includes consideration of apportionment of the impairment to other causes). Indeed, the AMA Guides specifically require the treating physician to determine the cause or causes of the claimant's overall impairment. *See AMA Guides* Ch. 2.2.

T. The original finding of causation of the claimant's shoulder injuries has already been determined by the ATP. No credible evidence has been presented in rebuttal.

U. Similarly, the issues of TTD, PPD, medical benefits and "medical reimbursement" must be measured from claimant's condition when the claim was closed, as established in the original proceeding, and to her current condition. The ATP addressed the original causation issues by his diagnosis at MMI. That resolution is no longer open to question. *See e.g., City & County of Denver v. Indus. Claim Appeals Office of State*, 58 P.3d 1162, 1164 (Colo. Ct. App. 2002).

V. The claimant's request to reopen her claim to address compensability of the alleged shoulder condition, for medical benefits, TTD, PPD, MMI, and "medical reimbursement" as related to her shoulder disease is denied and dismissed. Claimant has presented no persuasive evidence in support of her request to reopen.

ORDER

It is therefore Ordered that:

1. The claimant's request that her claim be reopened is denied and dismissed.

2. The claimant's request for an Order determining she suffered a left shoulder torn rotator cuff in the course and scope of her employment with the Respondent Employer is denied and dismissed.

3. The claimant's request that she be awarded TTD from August 9, 2015 through November 17, 2015, is denied and dismissed.

4. The claimant's request for an unspecified award of PPD is denied and dismissed.

5. The claimant's request for a new determination that she was not at MMI on June 15, 2015, is denied and dismissed.

6. The claimant's request for an award of medical benefits and "medical reimbursement" in an unspecified amount is denied and dismissed.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 11, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Did Claimant prove by a preponderance of the evidence he suffered a compensable work-related hernia on February 17, 2015 (W.C. No. 4-989-495)?

2. If the hernia is compensable, did Claimant prove that the medical treatment he received for the hernia was authorized, reasonable, necessary, and related to the compensable injury?

3. Did Claimant prove by a preponderance of the evidence he suffered a compensable occupational disease in the form of hearing loss and tinnitus (W.C. No. 4-983-642-04)?

4. If Claimant's hearing problems are compensable, did Claimant prove entitlement to medical benefits related to his hearing loss?

5. Did Claimant prove entitlement to TTD benefits for any period between March 22, 2015 and September 3, 2015?

STIPULATIONS

Any periods of TTD benefits are payable at the rate of $881.65 per week.

FINDINGS OF FACT

1. Claimant worked as a heavy equipment operator for Employer. Claimant worked on the Pueblo Levee project from October 2014 until March 21, 2015.

2. Claimant typically worked 10 hours per day, six days per week.

3. Near the end of his shift on February 17, 2015, Claimant was using the bucket of an excavator to move a fuel tank. In so doing, the fuel line became pinched. Claimant tried to move the tank by hand and felt a painful "pop" in his belly. Claimant finished his shift and went home.

4. That evening, Claimant saw a bulge in his belly while looking in the mirror. He pressed on the bulge and it felt "spongy." He also showed the bulge to his wife.

5. Claimant reported the injury to his supervisor, William Callaway, the next day when he got to work. Mr. Callaway completed an incident report stating Claimant "moved [the] tank by hand and felt a pop in his belly." Mr. Callaway offered to send Claimant to a doctor, but Claimant declined the offer and signed a voluntary waiver of medical treatment. The form also stated, "If I want to be seen by a doctor in the future

regarding this condition, I can, upon request, receive the treatment." A handwritten notation on the form described the condition as "slight pain and bump by belly button."

6. The information available to Mr. Callaway on February 18 would not lead a reasonably conscientious manager to believe Claimant required any medical treatment relating to the incident.

7. Claimant continued working his regular job without limitation until March 21, 2015, when he resigned due to non-injury-related illness and to take another job in California.

8. W.C. No. 4-983-642-04 is an occupational disease claim for bilateral tinnitus and hearing loss. Claimant alleges he suffered hearing damage from operating a John Deere 290 with a broken rear window for several weeks. Claimant testified he began operating the JD 290 "at the end of January" 2015. He testified that the front and rear windshields were broken when he started operating the machine. He testified that the front windshield was temporarily repaired with a piece of plexiglass, but the rear glass remained broken for "a minimum" of four weeks, and probably "closer to six weeks." Claimant testified the engine is directly behind the cab, so he was continuously exposed to loud engine noise. Claimant testified he noticed problems with his hearing "within the first couple of hours" of operating the machine. At no time did Claimant use the available hearing protection. Claimant mentioned nothing about hearing problems to anyone while he worked for Employer. Claimant testified he complained about the broken window to his supervisors on numerous occasions and eventually told Mike Hiltz he would quit if the window were not repaired that day. Claimant testified he documented the broken rear window on his Heavy Equipment Daily Inspection forms "every day." Based on Claimant's alleged timeline, one would expect the broken rear window to be noted on daily inspection reports at least in the last week of January and likely well into February 2015.

9. Employer used two JD 290s on the Pueblo Levee project. One machine had a concrete breaker attachment; the other machine had a bucket. The breaker attachment was not interchangeable between the two machines due to the specific hydraulic plumbing required. The breaker machine is the one alleged to have had the broken window.

10. On March 25, 2015, Claimant saw his family physician, Dr. Roland Sanchez, for bilateral tinnitus. He told Dr. Sanchez he did not recall when the symptoms began.

11. Claimant treated with Dr. Sanchez for abdominal pain and nausea on several occasions in late March and April 2015. Dr. Sanchez's reports do not mention a hernia. Physical examinations of Claimant's abdomen on March 25, April 6, and April 14 were reportedly normal.

12. Claimant saw an audiologist, Dr. Kathleen Romero, on April 22, 2015. He reported "a bilateral decrease in hearing for the past 3-4 months, following a long-term

noise exposure at work." He also reported tinnitus. Testing revealed mild to moderate sensorineural hearing loss bilaterally. Dr. Romero recommended a trial of hearing aids.

13. On April 28, 2015, Dr. Sanchez completed a work status form in conjunction with Claimant's claim for unemployment insurance (UI) benefits. He indicated Claimant could work with no restrictions.

14. Claimant was admitted to Presbyterian Hospital on May 22, 2015 with complaints of nausea, abnormal weight gain and rectal bleeding.[1] There was no mention of an umbilical hernia on exam.

15. Claimant first sought medical treatment specifically related to his hernia on June 24, 2015 with a surgeon, Dr. Kashif Malik. Claimant reported a bulge near his umbilicus that had been "growing" for three months. He stated the bulge was not painful. Physical examination revealed an incarcerated umbilical hernia. Claimant told Dr. Malik he was interested in surgery, but wanted to complete his workup for tinnitus first. Dr. Malik stated "the hernia is not bothering him that much, so we can safely watch it for now until he finishes the other workup."

16. The physical examination and attempted reduction by Dr. Malik caused the hernia to become painful. Claimant returned to Dr. Malik on July 22, 2015 and explained that "he got it with lifting a heavy gas tank at work. He heard a pop, and since then he has noticed a lump and has pain at the region." Because of his ongoing pain, Claimant wished to move forward with surgery. Dr. Malik indicated he would schedule Claimant for an open hernia repair with mesh.

17. Claimant called Employer shortly after his July 22 appointment with Dr. Malik to notify them he needed hernia surgery. Claimant spoke with Employer's safety and health director, Brian Looby. Mr. Looby told Claimant he would file paperwork with Respondent-Insurer and "somebody would be contacting him." Claimant told Mr. Looby he needed "emergency" hernia surgery. Mr. Looby told Claimant if he needed emergency surgery, "that would be at the discretion of his surgeon." Mr. Looby did not refer Claimant to a physician or clinic during or after that telephone conversation.

18. As of the July 2015 telephone conversation, Mr. Looby had information that would lead a reasonably conscientious manager to believe Claimant needed medical treatment related to his February 2015 industrial injury.

19. Within a few days after the telephone conversation, Mr. Looby received copies of forms relating to Claimant's hernia and hearing loss claims. In response to the hearing loss claim, Mr. Looby conducted noise level tests of the equipment Claimant had used. Mr. Looby's tests showed 85 dB outside the machine.

20. Claimant had another hearing evaluation with Dr. Raymond Matteucci on July 1, 2015. Testing revealed neurosensory hearing loss in both ears.

[1] The parties did not submit the hospital records into evidence, but the hospital visit was documented in the report of Respondents' IME, Dr. Ramaswamy.

21. On July 31, 2015, Dr. Romero authored a letter stating "since being exposed to loud noise for a period of time he has bilateral tinnitus and a sensorineural hearing loss in both ears. This type of hearing loss is commonly seen with noise exposure and is generally permanent." She opined the hearing loss would affect Claimant's basic communication abilities, particularly in noisy environments. She recommended bilateral hearing aids on a lifetime basis.

22. Claimant underwent hernia surgery with Dr. Malik on August 3, 2015.

23. On August 5, 2015, Dr. Malik authored a report stating as a result of surgery Claimant had work restrictions of no bending, twisting or lifting greater than 20 pounds and no strenuous activity for at least 2-4 weeks after surgery.

24. Claimant returned to work on September 4, 2015 as a heavy equipment operator for a different employer.

25. Dr. Annu Ramaswamy performed a record review for Respondents on December 21, 2015. Dr. Ramaswamy opined neither the umbilical hernia nor the hearing loss/tinnitus were work-related.

26. William Calloway, the Pueblo Levee project superintendent, testified at the February 17, 2017 hearing. He testified that the front and rear windshields on the JD 290 with the breaker attachment were broken by concrete. He testified they replaced the windshield with plexiglass immediately as a temporary fix and requested permanent repairs from the home office. Mr. Calloway recalled Claimant complained about the broken rear window in one safety meeting. Mr. Calloway estimated the windows were replaced within 7-10 days after he learned they were broken. He was confident the rear window was not broken for 4-6 weeks. He did not recall Claimant stating he was having problems with his hearing due to the noise. Mr. Callaway testified hearing protection was readily available to employees on the project.

27. Claimant's coworker, Dallan Hackett, testified at hearing. Mr. Hackett was operating the JD 290 with the breaker attachment when the front and rear windows were damaged by a flying piece of concrete. He estimated the incident occurred in "the beginning to middle of January 2015." Mr. Hackett testified that the front window was replaced with plexiglass within two days. He testified it took "a month or maybe a little longer" to replace the rear window. Based on that timeline, one would expect the broken rear window would be noted on at least some daily inspection reports between January 15 and January 31, and likely well into February.

28. Michael Atwood, a project manager on the Pueblo Levee project, testified at the hearing. He completed his testimony in a post-hearing evidentiary deposition on March 14, 2017. At the hearing, the ALJ asked Mr. Atwood to produce all of the Heavy Equipment Daily Inspection forms he could find. At his deposition, Mr. Atwood produced approximately 62 forms dated between December 10, 2014 and March 21, 2015 relating to several pieces of equipment Claimant operated on the project. The forms regarding the JD 290G with the breaker attachment showed:

Date	Equipment	Defect Noted?	Operator	Hours
1/19/2015	JD 290G Breaker	No	Co-worker	15.3
1/21/2015	JD 290G Breaker	No	Co-worker	9.6
1/22/2015	JD 290G Breaker	No	Co-worker	9
1/23/2015	JD 290G Breaker	No	Co-worker	10.9
1/24/2015	JD 290G Breaker	No	Co-worker	11.1
1/25/2015	JD 290G Breaker	No	Co-worker	5.9
1/28/2015	JD 290G Breaker	No	Claimant	10.9
1/29/2015	JD 290G Breaker	No	Claimant	10.7
1/30/2015	JD 290G Breaker	No	Claimant	11.5
1/31/2015	JD 290G Breaker	No	Claimant	10
2/2/2015	JD 290G Breaker	No	Claimant	10.6
2/3/2015	JD 290G Breaker	No	Claimant	8.2
2/4/2015	JD 290G Breaker	No	Claimant	9.1
2/5/2015	JD 290G Breaker	No	Co-worker	8
2/6/2015	JD 290G Breaker	No	Co-worker	7.1
2/5/2015	JD 350G LC	No	Claimant	9.8
2/6/2015	JD 350G LC	No	Claimant	6.6
2/7/2015	CAT 349	No	Claimant	8
2/7/2015	JD 350G LC	No	Claimant	7.4
2/9/2015	JD 350G LC	No	Claimant	11.1
2/11/2015	JD 350G LC	No	Claimant	11.6
2/12/2015	JD 350G LC	No	Claimant	11.7
2/13/2015	JD 350G LC	No	Claimant	7.7
2/14/2015	JD 350G LC	No	Claimant	8
2/17/2015	JD 350G LC	No	Claimant	11.3
2/18/2015	JD 350G LC	No	Claimant	10.7
2/19/2015	JD 350G LC	No	Claimant	8.9
2/19/2015	JD 350G LC	No	Claimant	9.5
2/21/2015	JD 350G LC	No	Claimant	9
3/5/2015	JD 350G LC	No	Claimant	9.9
3/6/2015	JD 350G LC	No	Claimant	10.6
3/7/2015	JD 350G LC	No	Claimant	7.3
3/21/2015	JD 350G LC	No	Claimant	5.2

29. Mr. Atwood also produced a Daily Construction Report dated January 14, 2015. The report documents “JD 290 new windshield installed.” Mr. Atwood found no other reports referencing issues with either JD 290 used on the project.

30. Claimant has proven by a preponderance of the evidence he sustained a compensable hernia injury on February 17, 2015.

31. The surgery performed by Dr. Malik on August 3, 2015 was reasonable, necessary and causally related to Claimant's February 17, 2015 accident.

32. Dr. Malik was an authorized treating physician when he performed the surgery.

33. Claimant was not disabled when he voluntarily resigned on March 21, 2015.

34. Claimant failed to prove by a preponderance of the evidence he was disabled before August 3, 2015.

35. Claimant failed to prove entitlement to TTD from March 22, 2015 through August 2, 2015.

36. Claimant was disabled from all work activity as a result of surgery on August 3, 2015 through September 3, 2015.

37. Claimant proved entitlement to TTD benefits from August 3, 2015 through September 3, 2015.

38. Claimant received $4,025 in unemployment insurance (UI) benefits between April 5, 2015 and July 12, 2015. There was no overlap between periods of UI benefits and Claimant's period of temporary disability.

39. Claimant has failed to prove that his hearing loss and tinnitus are causally related to his employment.

CONCLUSIONS OF LAW

A. Compensability standards

To receive compensation or medical benefits, a claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v.*

Industrial Claim Appeals Office, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which he seeks treatment. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, *supra*.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equally exposing stimulus requirement effectuates the "peculiar risk" test and requires that the hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). In other words, the claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

B. Claimant's hernia is compensable

As found, Claimant proved by a preponderance of evidence he suffered a compensable hernia on February 17, 2015. The physical exertion associated with moving the heavy fuel tank was sufficient to injure Claimant's abdominal wall. Claimant felt a painful pop while moving the fuel tank, and observed a "bump by [his] belly button" that evening. Thereafter, he was minimally symptomatic for several months. The hernia

progressively worsened, and was evident when Dr. Malik examined Claimant on June 24, 2015. Palpation of the hernia caused it to become very painful, and surgery was required to repair it.

Admittedly, the ALJ is somewhat puzzled by the normal physical examinations in March, April, and May 2015, and the negative ultrasound in June. But the ALJ is most persuaded by the fact that the incarcerated umbilical hernia Dr. Malik appreciated in June 2015 was in the same location as the small bulge Claimant observed near his belly button shortly after his injury. Considering all the evidence, the ALJ infers Claimant likely tore his abdominal wall when moving the fuel tank on February 17. He probably did not have an incarcerated hernia immediately. Rather, the "spongy" bulge he observed later that evening probably reflected local swelling and inflammation and/or a minor protrusion of abdominal fat. The abdominal wall defect probably enlarged over the next few months due to routine activities of daily living. This is consistent with Claimant's report to Dr. Malik that the hernia had been "growing" for several months. The defect may not have shown up on physical examination in March, April, and May 2015 because it was too small to be detected by an examination while Claimant was reclining on his back. It is also possible that Dr. Sanchez's records are inaccurate due to careless use of the electronic medical record template.[2] In any event, by mid-June 2015, the hernia had become too obvious to miss, and Claimant actively sought treatment for it.

The injury in February 2015 left Claimant's abdominal wall in a weakened state, which eventually progressed to an incarcerated hernia that required surgery. There is no persuasive evidence of any intervening cause sufficient to sever the causal connection to the original incident. Therefore, the ALJ concludes that the incarcerated hernia resulted from the natural progression of the February 17, 2015 injury.

C. Dr. Malik was authorized by August 3, 2015

Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer's duty to designate a physician is triggered by the receipt of information that would lead a reasonably conscientious manager to believe that a compensable claim might be involved. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). The employer must tender medical treatment "forthwith, " or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

In light of Claimant's explicit waiver of medical treatment, the information available to Employer on February 18, 2015 would not lead a reasonably conscientious manager to believe that Claimant had suffered a compensable injury are required medical treatment. The waiver form advised Claimant he could receive medical treatment "upon request." Claimant did not mention his hernia again before his resignation, or at any time before July 2015.

[2] Dr. Sanchez's EMRs appear to be based on the type of template that pre-fills fields as normal unless the provider affirmatively changes the template.

Claimant informed Mr. Looby he needed hernia surgery on or shortly after July 22, 2015. At that point, it was incumbent upon Mr. Looby to refer Claimant for medical treatment if Employer wished to preserve its right to choose the treating physician. It makes no difference that Claimant was not in Colorado at that time. *Ries v. Subway of Cherry Creek*, W.C. No. 4-674-408 (ICAO, January 12, 2011). Mr. Looby told Claimant that Insurer "would be contacting him," but that did not occur. Consequently, the right of selection passed to Claimant. The August 3, 2015 surgery and all subsequent treatment provided by Dr. Malik are authorized.

D. Dr. Malik's treatment was reasonable, necessary and related

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where the respondents dispute a claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonable and necessary. Section 8-42-101(1)(a).

As found, the August 3, 2015 hernia surgery performed by Dr. Malik was reasonable, necessary and causally related to the February 17, 2015 accident.

E. Entitlement to TTD benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

After his injury on February 17, 2015, Claimant continued to work his regular job without limitation for over a month. Claimant voluntarily terminated his employment on March 21, 2015 for reasons unrelated to his injury. Claimant was not "disabled" by the effects of the injury when he stopped working. Moreover, Claimant was responsible for the termination of his employment. See sections 8-42-103(1)(g). These facts are fatal to Claimant's request to commence TTD benefits on March 22, 2015.

To establish entitlement to TTD benefits, Claimant must prove that his condition worsened and caused a wage loss after his resignation. *Anderson v. Longmont Toyota,*

Inc. 102 P.3d 323 (Colo. 2004); *Loza v. Ken's Welding*, 4-712-246 (ICAO, January 7, 2009).

Claimant's testimony that he was primarily "lying on the couch" due to hernia pain starting in April 2015 is not persuasive. There is no documentation of hernia-related limitations or restrictions in the medical records from April through July 2015. In fact, on April 28, 2015 Dr. Sanchez opined Claimant was able to work without restrictions. There are no records to corroborate Claimant's testimony that he went to the emergency room "two or three times because of the pain." When Claimant saw Dr. Malik on June 24, 2015, he decided to delay surgery because the hernia was "not bothering him that much." Claimant was able to work and actively seeking work between April and July 2015, as evidenced by his receipt of unemployment benefits.[3] Claimant failed to prove that he was disabled prior to surgery.

As found, Claimant's condition worsened and caused a wage loss commencing August 3, 2015. Dr. Malik gave Claimant restrictions after surgery that would have prevented him from performing his preinjury work. Although the mere imposition of restrictions does not automatically prove that a claimant's condition has worsened, the ALJ is persuaded that the surgery reasonably required some period of convalescence during which Claimant could not have performed any work. Claimant returned to work quickly after he recovered from surgery, and the ALJ is persuaded he would have returned to work sooner but for the surgery.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). Claimant returned to work on September 4, 2015, thereby terminating his entitlement to TTD benefits under § 8-42-105(3)(b).

F. Claimant's hearing loss and tinnitus are not compensable

As found, Claimant has failed to prove that his bilateral hearing loss and tinnitus are causally related to his employment. Claimant's assertion that he operated a piece of equipment with a broken rear windshield for 4-6 weeks is not supported by other persuasive evidence. Claimant testified the piece of equipment in question was the JD 290 breaker, and Mr. Hackett confirmed the windows became damaged while he was using the machine to break concrete. But the daily equipment inspection reports show Claimant only operated the JD 290 breaker from January 28 through February 4, 2015, at which time he switched over to the JD 350G Excavator. It appears Claimant primarily operated the JD 350G until he resigned on March 21, 2015.

Claimant also testified he documented the broken windshield on his daily inspection forms "every day." But the inspection reports do not corroborate Claimant's testimony. The ALJ could not find a single notation regarding a window defect on any daily inspection report completed by Claimant or his co-workers—much less a multi-week period where it was documented "every day." Although Employer's Daily Construction Report dated January 14, 2015 documents a new windshield was installed

[3] Under § 8-73-107(1)(c)(I) and (g)(I), an individual claiming UI benefits must be "able to work" and "actively seeking work."

on the JD 290, that was well before the time Claimant alleged he was operating the machine with the broken rear window.

Everyone agrees the rear window of the JD 290 was broken for some period, but the dispute involves *how long* it was broken. Claimant has not presented persuasive evidence to support his allegation that the window was broken for 4-6 weeks. Rather, the ALJ credits Mr. Callaway's testimony that the window repaired within 7-10 days after he learned of it.

As for the medical opinion evidence, the ALJ credits Dr. Lipkin's opinion that Claimant's work-related noise exposure was insufficient to cause hearing loss. The ALJ also credits Dr. Lipkin's opinion that Claimant's relatively flat pattern of hearing loss is not typically seen with noise exposure. The ALJ is not persuaded by Dr. Romero's opinion because it was based on the incorrect assumption that Claimant experienced "long-term" noise exposure at work.

Based on the totality of evidence presented, the ALJ concludes Claimant's hearing loss and tinnitus are not causally related to his work for Employer.

ORDER

It is therefore ordered that:

1. Claimant's hernia claim under W.C. No. 4-989-495 is compensable.

2. Insurer shall pay for reasonable and necessary treatment for Claimant's hernia provided by Dr. Malik after July 22, 2015, including the August 3, 2015 surgery and associated charges.

3. Insurer shall pay Claimant TTD benefits at the maximum applicable rate of $881.65 from August 3, 2015 through September 3, 2015.

4. Insurer is not entitled to an offset for unemployment benefits.

5. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. Claimant's claim under W.C. No. 4-983-642 for hearing loss and tinnitus is denied and dismissed.

7. All matters not determined herein relating to W.C. No. 4-989-495 are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 11, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Did Claimant prove by a preponderance of the evidence he suffered a compensable work-related hernia on February 17, 2015 (W.C. No. 4-989-495)?

2. If the hernia is compensable, did Claimant prove that the medical treatment he received for the hernia was authorized, reasonable, necessary, and related to the compensable injury?

3. Did Claimant prove by a preponderance of the evidence he suffered a compensable occupational disease in the form of hearing loss and tinnitus (W.C. No. 4-983-642-04)?

4. If Claimant's hearing problems are compensable, did Claimant prove entitlement to medical benefits related to his hearing loss?

5. Did Claimant prove entitlement to TTD benefits for any period between March 22, 2015 and September 3, 2015?

STIPULATIONS

Any periods of TTD benefits are payable at the rate of $881.65 per week.

FINDINGS OF FACT

1. Claimant worked as a heavy equipment operator for Employer. Claimant worked on the Pueblo Levee project from October 2014 until March 21, 2015.

2. Claimant typically worked 10 hours per day, six days per week.

3. Near the end of his shift on February 17, 2015, Claimant was using the bucket of an excavator to move a fuel tank. In so doing, the fuel line became pinched. Claimant tried to move the tank by hand and felt a painful "pop" in his belly. Claimant finished his shift and went home.

4. That evening, Claimant saw a bulge in his belly while looking in the mirror. He pressed on the bulge and it felt "spongy." He also showed the bulge to his wife.

5. Claimant reported the injury to his supervisor, William Callaway, the next day when he got to work. Mr. Callaway completed an incident report stating Claimant "moved [the] tank by hand and felt a pop in his belly." Mr. Callaway offered to send Claimant to a doctor, but Claimant declined the offer and signed a voluntary waiver of medical treatment. The form also stated, "If I want to be seen by a doctor in the future

regarding this condition, I can, upon request, receive the treatment." A handwritten notation on the form described the condition as "slight pain and bump by belly button."

6. The information available to Mr. Callaway on February 18 would not lead a reasonably conscientious manager to believe Claimant required any medical treatment relating to the incident.

7. Claimant continued working his regular job without limitation until March 21, 2015, when he resigned due to non-injury-related illness and to take another job in California.

8. W.C. No. 4-983-642-04 is an occupational disease claim for bilateral tinnitus and hearing loss. Claimant alleges he suffered hearing damage from operating a John Deere 290 with a broken rear window for several weeks. Claimant testified he began operating the JD 290 "at the end of January" 2015. He testified that the front and rear windshields were broken when he started operating the machine. He testified that the front windshield was temporarily repaired with a piece of plexiglass, but the rear glass remained broken for "a minimum" of four weeks, and probably "closer to six weeks." Claimant testified the engine is directly behind the cab, so he was continuously exposed to loud engine noise. Claimant testified he noticed problems with his hearing "within the first couple of hours" of operating the machine. At no time did Claimant use the available hearing protection. Claimant mentioned nothing about hearing problems to anyone while he worked for Employer. Claimant testified he complained about the broken window to his supervisors on numerous occasions and eventually told Mike Hiltz he would quit if the window were not repaired that day. Claimant testified he documented the broken rear window on his Heavy Equipment Daily Inspection forms "every day." Based on Claimant's alleged timeline, one would expect the broken rear window to be noted on daily inspection reports at least in the last week of January and likely well into February 2015.

9. Employer used two JD 290s on the Pueblo Levee project. One machine had a concrete breaker attachment; the other machine had a bucket. The breaker attachment was not interchangeable between the two machines due to the specific hydraulic plumbing required. The breaker machine is the one alleged to have had the broken window.

10. On March 25, 2015, Claimant saw his family physician, Dr. Roland Sanchez, for bilateral tinnitus. He told Dr. Sanchez he did not recall when the symptoms began.

11. Claimant treated with Dr. Sanchez for abdominal pain and nausea on several occasions in late March and April 2015. Dr. Sanchez's reports do not mention a hernia. Physical examinations of Claimant's abdomen on March 25, April 6, and April 14 were reportedly normal.

12. Claimant saw an audiologist, Dr. Kathleen Romero, on April 22, 2015. He reported "a bilateral decrease in hearing for the past 3-4 months, following a long-term

noise exposure at work." He also reported tinnitus. Testing revealed mild to moderate sensorineural hearing loss bilaterally. Dr. Romero recommended a trial of hearing aids.

13. On April 28, 2015, Dr. Sanchez completed a work status form in conjunction with Claimant's claim for unemployment insurance (UI) benefits. He indicated Claimant could work with no restrictions.

14. Claimant was admitted to Presbyterian Hospital on May 22, 2015 with complaints of nausea, abnormal weight gain and rectal bleeding.[1] There was no mention of an umbilical hernia on exam.

15. Claimant first sought medical treatment specifically related to his hernia on June 24, 2015 with a surgeon, Dr. Kashif Malik. Claimant reported a bulge near his umbilicus that had been "growing" for three months. He stated the bulge was not painful. Physical examination revealed an incarcerated umbilical hernia. Claimant told Dr. Malik he was interested in surgery, but wanted to complete his workup for tinnitus first. Dr. Malik stated "the hernia is not bothering him that much, so we can safely watch it for now until he finishes the other workup."

16. The physical examination and attempted reduction by Dr. Malik caused the hernia to become painful. Claimant returned to Dr. Malik on July 22, 2015 and explained that "he got it with lifting a heavy gas tank at work. He heard a pop, and since then he has noticed a lump and has pain at the region." Because of his ongoing pain, Claimant wished to move forward with surgery. Dr. Malik indicated he would schedule Claimant for an open hernia repair with mesh.

17. Claimant called Employer shortly after his July 22 appointment with Dr. Malik to notify them he needed hernia surgery. Claimant spoke with Employer's safety and health director, Brian Looby. Mr. Looby told Claimant he would file paperwork with Respondent-Insurer and "somebody would be contacting him." Claimant told Mr. Looby he needed "emergency" hernia surgery. Mr. Looby told Claimant if he needed emergency surgery, "that would be at the discretion of his surgeon." Mr. Looby did not refer Claimant to a physician or clinic during or after that telephone conversation.

18. As of the July 2015 telephone conversation, Mr. Looby had information that would lead a reasonably conscientious manager to believe Claimant needed medical treatment related to his February 2015 industrial injury.

19. Within a few days after the telephone conversation, Mr. Looby received copies of forms relating to Claimant's hernia and hearing loss claims. In response to the hearing loss claim, Mr. Looby conducted noise level tests of the equipment Claimant had used. Mr. Looby's tests showed 85 dB outside the machine.

20. Claimant had another hearing evaluation with Dr. Raymond Matteucci on July 1, 2015. Testing revealed neurosensory hearing loss in both ears.

[1] The parties did not submit the hospital records into evidence, but the hospital visit was documented in the report of Respondents' IME, Dr. Ramaswamy.

21. On July 31, 2015, Dr. Romero authored a letter stating "since being exposed to loud noise for a period of time he has bilateral tinnitus and a sensorineural hearing loss in both ears. This type of hearing loss is commonly seen with noise exposure and is generally permanent." She opined the hearing loss would affect Claimant's basic communication abilities, particularly in noisy environments. She recommended bilateral hearing aids on a lifetime basis.

22. Claimant underwent hernia surgery with Dr. Malik on August 3, 2015.

23. On August 5, 2015, Dr. Malik authored a report stating as a result of surgery Claimant had work restrictions of no bending, twisting or lifting greater than 20 pounds and no strenuous activity for at least 2-4 weeks after surgery.

24. Claimant returned to work on September 4, 2015 as a heavy equipment operator for a different employer.

25. Dr. Annu Ramaswamy performed a record review for Respondents on December 21, 2015. Dr. Ramaswamy opined neither the umbilical hernia nor the hearing loss/tinnitus were work-related.

26. William Calloway, the Pueblo Levee project superintendent, testified at the February 17, 2017 hearing. He testified that the front and rear windshields on the JD 290 with the breaker attachment were broken by concrete. He testified they replaced the windshield with plexiglass immediately as a temporary fix and requested permanent repairs from the home office. Mr. Calloway recalled Claimant complained about the broken rear window in one safety meeting. Mr. Calloway estimated the windows were replaced within 7-10 days after he learned they were broken. He was confident the rear window was not broken for 4-6 weeks. He did not recall Claimant stating he was having problems with his hearing due to the noise. Mr. Callaway testified hearing protection was readily available to employees on the project.

27. Claimant's coworker, Dallan Hackett, testified at hearing. Mr. Hackett was operating the JD 290 with the breaker attachment when the front and rear windows were damaged by a flying piece of concrete. He estimated the incident occurred in "the beginning to middle of January 2015." Mr. Hackett testified that the front window was replaced with plexiglass within two days. He testified it took "a month or maybe a little longer" to replace the rear window. Based on that timeline, one would expect the broken rear window would be noted on at least some daily inspection reports between January 15 and January 31, and likely well into February.

28. Michael Atwood, a project manager on the Pueblo Levee project, testified at the hearing. He completed his testimony in a post-hearing evidentiary deposition on March 14, 2017. At the hearing, the ALJ asked Mr. Atwood to produce all of the Heavy Equipment Daily Inspection forms he could find. At his deposition, Mr. Atwood produced approximately 62 forms dated between December 10, 2014 and March 21, 2015 relating to several pieces of equipment Claimant operated on the project. The forms regarding the JD 290G with the breaker attachment showed:

Date	Equipment	Defect Noted?	Operator	Hours
1/19/2015	JD 290G Breaker	No	Co-worker	15.3
1/21/2015	JD 290G Breaker	No	Co-worker	9.6
1/22/2015	JD 290G Breaker	No	Co-worker	9
1/23/2015	JD 290G Breaker	No	Co-worker	10.9
1/24/2015	JD 290G Breaker	No	Co-worker	11.1
1/25/2015	JD 290G Breaker	No	Co-worker	5.9
1/28/2015	JD 290G Breaker	No	Claimant	10.9
1/29/2015	JD 290G Breaker	No	Claimant	10.7
1/30/2015	JD 290G Breaker	No	Claimant	11.5
1/31/2015	JD 290G Breaker	No	Claimant	10
2/2/2015	JD 290G Breaker	No	Claimant	10.6
2/3/2015	JD 290G Breaker	No	Claimant	8.2
2/4/2015	JD 290G Breaker	No	Claimant	9.1
2/5/2015	JD 290G Breaker	No	Co-worker	8
2/6/2015	JD 290G Breaker	No	Co-worker	7.1
2/5/2015	JD 350G LC	No	Claimant	9.8
2/6/2015	JD 350G LC	No	Claimant	6.6
2/7/2015	CAT 349	No	Claimant	8
2/7/2015	JD 350G LC	No	Claimant	7.4
2/9/2015	JD 350G LC	No	Claimant	11.1
2/11/2015	JD 350G LC	No	Claimant	11.6
2/12/2015	JD 350G LC	No	Claimant	11.7
2/13/2015	JD 350G LC	No	Claimant	7.7
2/14/2015	JD 350G LC	No	Claimant	8
2/17/2015	JD 350G LC	No	Claimant	11.3
2/18/2015	JD 350G LC	No	Claimant	10.7
2/19/2015	JD 350G LC	No	Claimant	8.9
2/19/2015	JD 350G LC	No	Claimant	9.5
2/21/2015	JD 350G LC	No	Claimant	9
3/5/2015	JD 350G LC	No	Claimant	9.9
3/6/2015	JD 350G LC	No	Claimant	10.6
3/7/2015	JD 350G LC	No	Claimant	7.3
3/21/2015	JD 350G LC	No	Claimant	5.2

29. Mr. Atwood also produced a Daily Construction Report dated January 14, 2015. The report documents “JD 290 new windshield installed.” Mr. Atwood found no other reports referencing issues with either JD 290 used on the project.

30. Claimant has proven by a preponderance of the evidence he sustained a compensable hernia injury on February 17, 2015.

31. The surgery performed by Dr. Malik on August 3, 2015 was reasonable, necessary and causally related to Claimant's February 17, 2015 accident.

32. Dr. Malik was an authorized treating physician when he performed the surgery.

33. Claimant was not disabled when he voluntarily resigned on March 21, 2015.

34. Claimant failed to prove by a preponderance of the evidence he was disabled before August 3, 2015.

35. Claimant failed to prove entitlement to TTD from March 22, 2015 through August 2, 2015.

36. Claimant was disabled from all work activity as a result of surgery on August 3, 2015 through September 3, 2015.

37. Claimant proved entitlement to TTD benefits from August 3, 2015 through September 3, 2015.

38. Claimant received $4,025 in unemployment insurance (UI) benefits between April 5, 2015 and July 12, 2015. There was no overlap between periods of UI benefits and Claimant's period of temporary disability.

39. Claimant has failed to prove that his hearing loss and tinnitus are causally related to his employment.

CONCLUSIONS OF LAW

A. Compensability standards

To receive compensation or medical benefits, a claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v.*

Industrial Claim Appeals Office, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which he seeks treatment. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, *supra*.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO Aug. 17, 2016).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equally exposing stimulus requirement effectuates the "peculiar risk" test and requires that the hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). In other words, the claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

B. Claimant's hernia is compensable

As found, Claimant proved by a preponderance of evidence he suffered a compensable hernia on February 17, 2015. The physical exertion associated with moving the heavy fuel tank was sufficient to injure Claimant's abdominal wall. Claimant felt a painful pop while moving the fuel tank, and observed a "bump by [his] belly button" that evening. Thereafter, he was minimally symptomatic for several months. The hernia

progressively worsened, and was evident when Dr. Malik examined Claimant on June 24, 2015. Palpation of the hernia caused it to become very painful, and surgery was required to repair it.

Admittedly, the ALJ is somewhat puzzled by the normal physical examinations in March, April, and May 2015, and the negative ultrasound in June. But the ALJ is most persuaded by the fact that the incarcerated umbilical hernia Dr. Malik appreciated in June 2015 was in the same location as the small bulge Claimant observed near his belly button shortly after his injury. Considering all the evidence, the ALJ infers Claimant likely tore his abdominal wall when moving the fuel tank on February 17. He probably did not have an incarcerated hernia immediately. Rather, the "spongy" bulge he observed later that evening probably reflected local swelling and inflammation and/or a minor protrusion of abdominal fat. The abdominal wall defect probably enlarged over the next few months due to routine activities of daily living. This is consistent with Claimant's report to Dr. Malik that the hernia had been "growing" for several months. The defect may not have shown up on physical examination in March, April, and May 2015 because it was too small to be detected by an examination while Claimant was reclining on his back. It is also possible that Dr. Sanchez's records are inaccurate due to careless use of the electronic medical record template.[2] In any event, by mid-June 2015, the hernia had become too obvious to miss, and Claimant actively sought treatment for it.

The injury in February 2015 left Claimant's abdominal wall in a weakened state, which eventually progressed to an incarcerated hernia that required surgery. There is no persuasive evidence of any intervening cause sufficient to sever the causal connection to the original incident. Therefore, the ALJ concludes that the incarcerated hernia resulted from the natural progression of the February 17, 2015 injury.

C. Dr. Malik was authorized by August 3, 2015

Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer's duty to designate a physician is triggered by the receipt of information that would lead a reasonably conscientious manager to believe that a compensable claim might be involved. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). The employer must tender medical treatment "forthwith, " or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

In light of Claimant's explicit waiver of medical treatment, the information available to Employer on February 18, 2015 would not lead a reasonably conscientious manager to believe that Claimant had suffered a compensable injury are required medical treatment. The waiver form advised Claimant he could receive medical treatment "upon request." Claimant did not mention his hernia again before his resignation, or at any time before July 2015.

[2] Dr. Sanchez's EMRs appear to be based on the type of template that pre-fills fields as normal unless the provider affirmatively changes the template.

Claimant informed Mr. Looby he needed hernia surgery on or shortly after July 22, 2015. At that point, it was incumbent upon Mr. Looby to refer Claimant for medical treatment if Employer wished to preserve its right to choose the treating physician. It makes no difference that Claimant was not in Colorado at that time. *Ries v. Subway of Cherry Creek*, W.C. No. 4-674-408 (ICAO, January 12, 2011). Mr. Looby told Claimant that Insurer "would be contacting him," but that did not occur. Consequently, the right of selection passed to Claimant. The August 3, 2015 surgery and all subsequent treatment provided by Dr. Malik are authorized.

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The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where the respondents dispute a claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonable and necessary. Section 8-42-101(1)(a).

As found, the August 3, 2015 hernia surgery performed by Dr. Malik was reasonable, necessary and causally related to the February 17, 2015 accident.

E. Entitlement to TTD benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

After his injury on February 17, 2015, Claimant continued to work his regular job without limitation for over a month. Claimant voluntarily terminated his employment on March 21, 2015 for reasons unrelated to his injury. Claimant was not "disabled" by the effects of the injury when he stopped working. Moreover, Claimant was responsible for the termination of his employment. See sections 8-42-103(1)(g). These facts are fatal to Claimant's request to commence TTD benefits on March 22, 2015.

To establish entitlement to TTD benefits, Claimant must prove that his condition worsened and caused a wage loss after his resignation. *Anderson v. Longmont Toyota,*

Inc. 102 P.3d 323 (Colo. 2004); *Loza v. Ken's Welding*, 4-712-246 (ICAO, January 7, 2009).

Claimant's testimony that he was primarily "lying on the couch" due to hernia pain starting in April 2015 is not persuasive. There is no documentation of hernia-related limitations or restrictions in the medical records from April through July 2015. In fact, on April 28, 2015 Dr. Sanchez opined Claimant was able to work without restrictions. There are no records to corroborate Claimant's testimony that he went to the emergency room "two or three times because of the pain." When Claimant saw Dr. Malik on June 24, 2015, he decided to delay surgery because the hernia was "not bothering him that much." Claimant was able to work and actively seeking work between April and July 2015, as evidenced by his receipt of unemployment benefits.[3] Claimant failed to prove that he was disabled prior to surgery.

As found, Claimant's condition worsened and caused a wage loss commencing August 3, 2015. Dr. Malik gave Claimant restrictions after surgery that would have prevented him from performing his preinjury work. Although the mere imposition of restrictions does not automatically prove that a claimant's condition has worsened, the ALJ is persuaded that the surgery reasonably required some period of convalescence during which Claimant could not have performed any work. Claimant returned to work quickly after he recovered from surgery, and the ALJ is persuaded he would have returned to work sooner but for the surgery.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). Claimant returned to work on September 4, 2015, thereby terminating his entitlement to TTD benefits under § 8-42-105(3)(b).

F. Claimant's hearing loss and tinnitus are not compensable

As found, Claimant has failed to prove that his bilateral hearing loss and tinnitus are causally related to his employment. Claimant's assertion that he operated a piece of equipment with a broken rear windshield for 4-6 weeks is not supported by other persuasive evidence. Claimant testified the piece of equipment in question was the JD 290 breaker, and Mr. Hackett confirmed the windows became damaged while he was using the machine to break concrete. But the daily equipment inspection reports show Claimant only operated the JD 290 breaker from January 28 through February 4, 2015, at which time he switched over to the JD 350G Excavator. It appears Claimant primarily operated the JD 350G until he resigned on March 21, 2015.

Claimant also testified he documented the broken windshield on his daily inspection forms "every day." But the inspection reports do not corroborate Claimant's testimony. The ALJ could not find a single notation regarding a window defect on any daily inspection report completed by Claimant or his co-workers—much less a multi-week period where it was documented "every day." Although Employer's Daily Construction Report dated January 14, 2015 documents a new windshield was installed

[3] Under § 8-73-107(1)(c)(I) and (g)(I), an individual claiming UI benefits must be "able to work" and "actively seeking work."

on the JD 290, that was well before the time Claimant alleged he was operating the machine with the broken rear window.

Everyone agrees the rear window of the JD 290 was broken for some period, but the dispute involves *how long* it was broken. Claimant has not presented persuasive evidence to support his allegation that the window was broken for 4-6 weeks. Rather, the ALJ credits Mr. Callaway's testimony that the window repaired within 7-10 days after he learned of it.

As for the medical opinion evidence, the ALJ credits Dr. Lipkin's opinion that Claimant's work-related noise exposure was insufficient to cause hearing loss. The ALJ also credits Dr. Lipkin's opinion that Claimant's relatively flat pattern of hearing loss is not typically seen with noise exposure. The ALJ is not persuaded by Dr. Romero's opinion because it was based on the incorrect assumption that Claimant experienced "long-term" noise exposure at work.

Based on the totality of evidence presented, the ALJ concludes Claimant's hearing loss and tinnitus are not causally related to his work for Employer.

ORDER

It is therefore ordered that:

1. Claimant's hernia claim under W.C. No. 4-989-495 is compensable.

2. Insurer shall pay for reasonable and necessary treatment for Claimant's hernia provided by Dr. Malik after July 22, 2015, including the August 3, 2015 surgery and associated charges.

3. Insurer shall pay Claimant TTD benefits at the maximum applicable rate of $881.65 from August 3, 2015 through September 3, 2015.

4. Insurer is not entitled to an offset for unemployment benefits.

5. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. Claimant's claim under W.C. No. 4-983-642 for hearing loss and tinnitus is denied and dismissed.

7. All matters not determined herein relating to W.C. No. 4-989-495 are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 11, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues considered by this Supplemental Order are:

1. Whether Respondents complied with Section 8-42-104(5)(a), C.R.S. and W.C.R.P. 5-11(2) by filing an Amended Final Admission of Liability (FAL) for an apportioned rating and attaching to the Amended FAL an award or settlement for the previous injury to the same body part.; and

2. If Respondents failed to comply with Section 8-42-104(5), C.R.S. and W.C.R.P. 5-11(2), can Respondents apportion Claimant's impairment rating.

FINDINGS OF FACT

1. Claimant worked for the Employer as a package car driver. On October 20, 2014, Claimant sustained an admitted industrial injury to her right knee. On the date of injury, Claimant bent down to pick up a box and heard a pop in her right knee.

2. Claimant has a pre-existing history of right knee pain complaints. On June 16, 2008, Claimant injured her right knee while at work with Employer by squatting down to pick up a box. Claimant underwent an MRI, which revealed a medial meniscus tear and chondromalacia. Claimant underwent an arthroscopic chondroplasty to repair the torn meniscus. Claimant was placed at maximum medical improvement (MMI) on October 16, 2008. Claimant was provided with a 15% scheduled impairment rating for the right lower extremity.

3. On October 20, 2014, Claimant underwent her first evaluation with Dr. Ogrodnick at Exempla. Dr. Ogrodnick noted that referring to her 2008 claim, "that was partially successful but painful popping continued." This medical record is contrary to Claimant's in court testimony that she was symptom free following the 2008 surgery.

4. Claimant underwent a surgical procedure on her right knee on December 16, 2014. Claimant had conservative post-operative care and was placed at MMI on June 26, 2015. Claimant was released to full duties at work and was provided with no impairment. Claimant reported 95% improvement and reported no pain. Claimant stated that her knees are tired after work. The physical examination of the right knee revealed full range of motion. Claimant ambulated without a limp and could perform a full deep knee bend without discomfort.

5. Respondents filed a FAL on July 1, 2015. Claimant objected to the FAL and filed a Notice and Proposal to Select a Division independent medical examination (DIME) on July 31, 2015. Dr. Justin Green was selected as the DIME physician and Claimant underwent the DIME on February 10, 2016.

6. When Claimant presented to Dr. Green, she reported ongoing right knee pain. Dr. Green agreed with the MMI date of June 26, 2016. Dr. Green assigned Claimant a 10% scheduled impairment rating for arthritis and a 5% scheduled rating for a posterior horn medial meniscectomy impairment pursuant to Table 40 of the *American Medical Association Guides to the Evaluation of Permanent Impairment,* Third Edition (ed. rev.) (*AMA Guides*). Claimant was also provided with a 9% scheduled rating for range of motion impairment. Dr. Green assigned an unapportioned scheduled impairment rating for Claimant's right lower extremity of 23%

7. Dr. Green addressed apportionment in his DIME report. In the February 10, 2016, DIME report Dr. Green opined that Claimant should receive an apportioned 9% scheduled rating for the right lower extremity for loss of range of motion following apportionment.

8. On March 7, 2016, Respondent filed an Amended FAL admitting liability for the apportioned impairment rating of 9% scheduled impairment. Respondents attached to the Amended FAL Dr. Green's February 10, 2016, DIME report. Respondents did not attach to the Amended FAL an award or settlement for the 2008 claim.

9. Claimant filed an Application for Hearing on April 6, 2016, to overcome the DIME's opinion as to MMI, Permanent Partial Disability (PPD) benefits, and disfigurement. This hearing followed.

CONCLUSIONS OF LAW

1. The purpose of the Act, Section 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979) The facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer and a worker's compensation case shall be decided on its merits. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every

piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

3. In this case, Respondents contend that they are entitled to apportion Claimant's impairment rating. Claimant argues that Respondents have forfeited their right to apportion Claimant's impairment rating because Respondents filed an Amended FAL, only attaching to the Amended FAL the DIME report and not an award or settlement as provided by Section 8-43-104(5)(a), C.R.S.

4. Section 8–42–104(5)(a), C.R.S. states that "the permanent medical impairment rating applicable to the previous injury to the same body part, established by an award or settlement, shall be deduced from the permanent medical impairment rating for the subsequent injury to the same body part." And, W.C.R.P., Rule 5-11(2), further clarifies the requirements of the statute stating that "[i]f a permanent impairment rating is reduced on an admission based on a prior work related injury a copy of the previous award or settlement shall be attached to the admission and must establish that the award or settlement was for the same body part. …"

5. In this case, Respondents had the burden of proof to establish the grounds for apportionment. *Absolute Employment Services, Inc. v. Industrial Claim Appeals Office*, 997 P.2d 1229 (Colo. App. 1999); *Cowin & Company v. Medina,* 860 P.2d 535 (Colo. App. 1992). Respondents offered into evidence Exhibit F, the Amended FAL filed on March 7, 2016. This exhibit did not contain an attachment. Claimant offered into evidence Exhibit 7, which is the Amended FAL with an attachment. The attachment is Dr. Green's February 10, 2016, DIME report.

6. Respondents do not contest that the DIME report was attached to the March 7, 2016, Amended FAL. Respondents contend that W.C.R.P., Rule 5-11(2), is a Division of Workers' Compensation (Division) procedural rule addressing a filing requirement. Respondents argue that the Division's acceptance of the Amended FAL is proof that the Division found the Amended FAL in compliance with its rules.

7. To the contrary, it is concluded that Section 8-42-104(5)(a), C.R.S. is a provision of the Act and not a filing procedure codified in a rule by the Division. The Judge finds no authority to ignore the provisions of the Act. It is concluded that Section 8-42-104(5)(a) is unambiguous and requires a respondent seeking to apportion liability for an injury to the same body part to do so by attaching to the admission a copy of an award or settlement for a prior work injury to the same body part.

8. Since Respondents did not attach an award or settlement to the Amended FAL, the Respondents did not sustain their burden of proof to establish compliance with Section 8-42-104(5), C.R.S. and W.C.R.P. Rule 5-11(2). Since Respondents did not comply with the Act and rule regarding apportionment, Respondents failed to sustain its burden to establish entitlement to the 9% apportioned impairment rating.

ORDER

It is therefore ordered that:

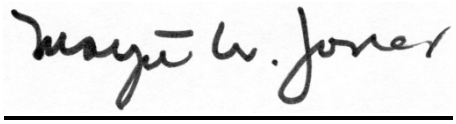
Respondents shall be liable to Claimant for benefits under the Act based on a 23% scheduled impairment

The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: _May 12, 2017___



MARGOT W. JONES
ADMINISTRATIVE LAW JUDGE
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issue addressed by this decision involves Claimant's entitlement to additional medical benefits. The specific question presented is:

I. Whether Claimant has proven, by a preponderance of the evidence, that the L1-S1 fusion procedure requested by Dr. Stanton is reasonable, necessary and related to Claimant's August 4, 2015, admitted industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing evidentiary deposition testimony of Drs. Stanton, Rauzzino and Janssen, the ALJ enters the following findings of fact:

1. Employer is engaged in the business of the installation of commercial HVAC units. Claimant works on the mechanical side of the business. He worked as a pipefitter/welder for employer for approximately 19 years. Claimant's job duties included, among other things obtaining pipes and parts from the warehouse, cutting pipe, welding, climbing ladders, crawling, lifting, working in tight spaces, and other tasks as necessary for the installation of the commercial HVAC units.

2. Claimant sustained an admitted injury to his lumbar spine on August 4, 2015. He stated that he was working in a tight space pushing a pipe upward when he twisted and developed pain in his low back. Based upon his testimony and the content of the record evidence, the ALJ finds Claimant's job to be physically demanding.

3. Claimant worked the remainder of the day on August 4, 2015. On the morning of August 5, 2015, he was in severe pain so presented to Dr. Steve Castle at the Memorial Health System Occupational Health Clinic.

4. Treatment for the August 4, 2015, injury has been prolonged and varied. Claimant has participated in chiropractic treatment and physical therapy. He has also received trigger point injections, medial branch and facet blocks and radiofrequency ablation. Claimant has not yet been placed at maximum medical improvement and continues to receive medical treatment from Dr. Castle and his referrals.

5. Claimant has a history of low back pain and injury to the lumbar spine prior to August 4, 2015. In 2003 he complained of back prompting imaging of the

thoracic and lumbar spine.[1] In 2004 he was involved in a car accident causing severe pain leading to additional imaging. In March 2014, he suffered a work related injury to his low back while he was assisting coworkers move a heavy air conditioning unit which would lead to substantial treatment and additional imaging.

6. As noted, Claimant was treated for his 2014, work injury by Dr. Castle. He also ordered an MRI of the lumbar spine which was completed on March 20, 2014 and demonstrated multilevel degenerative disc and endplate changes, foraminal narrowing and mild to moderate recess and central stenosis at multiple spinal segments.

7. As part of his treatment for his August 4, 2015 work injury, Claimant underwent yet another MRI scan of the lumbar spine on August 12, 2015. This MRI demonstrated moderate degenerative changes of the L1-2 down to L4-5 disc spaces along with loss of lumbar lordosis with mild dextroconvex curvature with the apex of L2-3, which was felt to be suggestive of muscle spasm.

8. Dr. Castle referred Claimant to Dr. Paul Stanton for a surgical consultation. Dr. Stanton evaluated Claimant on December 1, 2015. In his December 1, 2015 report, Dr. Stanton notes that Claimant presented with a "chief complaint of middle and low back pain with pain radiating posteriorly to the ankle on the left leg and numbness through the right thigh." According to Dr. Stanton's report, Claimant's symptoms "originally started approximately 1 year ago, but in the last 4 months have become increasingly more severe." Dr. Stanton assessed "degenerative scoliosis due to asymmetrical collapse of the disk space" as well as "degenerative disk disease throughout [the] lumbar spine."

9. Claimant returned to Dr. Stanton on December 22, 2015 for follow-up. Dr. Stanton noted that Claimant would be a "candidate for lumbar fusion likely L1 through L5 which would realign his spine, improve his scoliosis, foraminal stenosis, and leg pain."

10. On May 18, 2016, Dr. Stanton requested authorization to proceed with a XLIF procedure spanning L1-2, L2-3, L3-4, and L4-5 (a four level fusion) followed by posterior segmental instrumentation and osteotomy for realignment and correction.

11. Respondents denied the request and referred the matter to Dr. Michael Janssen for review in accordance with W.C.R.P. Rule 16. Dr. Janssen issued a written advisory opinion dated May 19, 2016 wherein Dr. Janssen opined that Claimant's MRI's dated March 20, 2014 and August 12, 2015 demonstrated "flatback deformity, a lumbar kyphotic deformity, multilevel degenerative disc disease with facet arthropathy, disc reabsorptive syndrome, and collapse spanning L1-2, L2-3, L3-4, and L4-5." In recommending that the requested surgery be denied, Dr. Janssen noted that Claimant's

[1] An MRI of the lumbar spine obtained June 20, 2003 demonstrated "posterior disc bulging at L4-5, L3-4, and L1-2 with indentation of the thecal sac at these levels, but without signs of herniation of the nucleus pulposus." It also revealed "straightening" of the lumbar lordosis. The MRI of the thoracic spine of the same date was interpreted as demonstrating "age-related degenerative findings" and "posturing of the thoracic curvature which may reflect underlying muscle spasm."

advanced degenerative disease and flatback deformity may be related to a previous IDET procedure as well as Claimant's genetics. Dr. Janssen concluded that Claimant's need for "deformity surgery" was unrelated to Claimant's August 4, 2015 work related injury.

12. At the request of respondents, Dr. Michael Rauzzino conducted an independent medical examination (IME) of Claimant on October 4, 2016. Dr. Rauzzino reviewed claimant's medical records, obtained his personal history and performed his own physical examination of Claimant as part of the IME.

13. Dr. Rauzzino diagnosed Claimant with a lumbar strain consistent with the mechanism of injury described by claimant. He also found claimant to have multi-level lumbar degenerative disk disease, a small amount of lumbar scoliosis and kyphosis, as well as chronic degenerative changes without an acute structural injury to the spine. According to Dr. Rauzzino, these conditions were not work related.

14. Dr. Rauzzino reviewed and compared the MRI scans taken in March 2014 associated with Claimant's 2014 work injury and the MRI scan taken in August 2015 linked to the current claim. He noted that both scans demonstrate a deformed spine but that there was no change in the spinal anatomy between the two scans. Dr. Janssen had reached a similar opinion when he reviewed the MRIs as part of his May 19, 2016 advisory opinion noting as follows: "The key is that there was no interval change between the anatomical studies of the MRI of March 2014 and August 2015."

15. As noted, Dr. Stanton, Dr. Janssen and Dr. Rauzzino all testified via post hearing deposition regarding the question of whether the proposed L1-L5 fusion surgery is reasonable, necessary and related to Claimant's August 4, 2015 industrial injury.

16. Dr. Stanton is an orthopedic surgeon who completed a one year fellowship at The Center for Spine Disorders in La Jolla, California which focused on spinal deformity surgery. He is not Level II accredited in Workers' Compensation nor does he have working knowledge of the Division of Worker's Compensation Medical Treatment Guidelines.

17. Dr. Stanton testified that Claimant's scoliosis and flatback syndrome are long-standing, chronic conditions. According to Dr. Stanton, Claimant's degenerative disc disease and flatback deformity were pre-existing degenerative processes and not caused by his work. Rather, the question according to Dr. Stanton is whether Claimant's pre-existing makeup along with the activity he performed at work caused him to have pain. In answer to this question, Dr. Stanton testified:

> "Likely it's a combination of those two things, a pre-existing degenerative condition exacerbated by some activity, whether it's a trauma or a work injury or what have you, but there's no way to predict that 100 percent of patients that have scoliosis go on to have surgery. In fact, it's a small percent of them that actually end up having to have deformity surgery.")

18. Dr. Stanton went on to explain that the injury Claimant "sustained did not change the overall structural integrity of the spine or change its shape. What it likely did was cause a dynamic movement in the joints in the back of the spine, and that movement caused an escalation of symptoms.

19. During cross examination, Dr. Stanton reiterated his opinion testifying as follows: "I think all I'm saying is that [Claimant] has a pre-existing condition of spine deformity, which is, again, as we've said several times, largely genetic in nature, but it can have some outside contributory causes. He had an incident which he, believably to me, says he had an increase in pain after that incident, so I think that is relevant. I am not saying his work injury caused an acute deformity in his spine."

20. The ALJ infers and finds from Dr. Stanton's testimony that he believes that Claimant suffered a work related aggravation of a pre-existing condition.

21. Dr. Stanton agreed that Claimant's need for the four level fusion is not 100% work related, although he testified that he is not qualified to stratify or apportion the need for the surgery between Claimant's non-work related, long standing, chronic spinal deformity and Claimant's employment. Rather he testified that it was not his job to determine whether a surgery is reasonable, necessary or related to a work injury and whether it should be covered as part of the workers' compensation claim.

22. Dr. Janssen, a fellowship trained orthopedic surgeon with board certifications in both orthopedic surgery and spinal surgery testified that he reviewed Claimant's medical records, including the MRI scans taken in March 2014 for claimant's 2014 work injury and the MRI scan taken in August 2015 in this current claim. He noted that both scans demonstrate a deformed spine but that there was no interval change in the spinal anatomy between the two scans.

23. Dr. Janssen noted that the surgery requested by Dr. Stanton was for the purpose of correction of a flatback deformity. He opined that the spinal deformity is due to multilevel degenerative disk disease and not related to or exacerbated by, Claimant's employment. Therefore, he opined that while the proposed surgery could be considered reasonable, it was not related to the Claimant's August 4, 2015 work injury and should be denied.

24. In support of his opinion that Claimant's need for surgery was unrelated to his August 4, 2015 work injury, Dr. Janssen noted that Claimant had long standing chronic back pain and had been seeing providers for the same for an "extensive" period of time. He noted that Claimant's situation did not present as a case of an "asymptomatic condition [becoming] symptomatic nor is it a case involving an acceleration of a preexisting condition by symptom caused by interval occupation. The ALJ finds support for both opinions in the medical records submitted for review. The records submitted support the fact that Claimant has complained of low back pain since at least 2002 with MRI evidence of loss of his lumbar curve since that time. According

to Dr. Janssen, Claimant's symptoms, which Dr. Stanton proposed surgery to abate, are the consequence of the natural progression of Claimant's "chronic pathology due to the deformity and unfortunate spine disease that he has."

25. Based upon his testimony, the ALJ finds that Dr. Janssen questions the necessity of performing the proposed surgery whether it is considered work related or not. According to Dr. Janssen, the "primary indications for doing this type of major surgery is a progression of the deformity. It's not due to pain." Per Dr. Janssen, if a patient has progression of the deformity then it may be reasonable to this type of surgery to prevent the spine from further progression and the spine becoming like the "Leaning Tower of Pisa." As found above, Dr. Janssen noted Claimant's 2014 and 2015 MRI's fail to demonstrate interval progression of the Claimant's spinal deformity.

26. Dr. Rauzzino, a Level II Accredited, board certified neurosurgeon and the chief of neurosurgery at Skyridge Hospital testified that the surgery proposed by Dr. Stanton is not reasonable, necessary, or related to the work injury.

27. Dr. Rauzzino disagrees with Dr. Stanton and Dr. Janssen that Claimant has flatback deformity. Nonetheless, he testified:

> . . . if you accept that he does have a flat back deformity due to chronic degenerative changes of his lumbar spine, the act of pushing a pipe overhead is not what leads him to have this large corrective surgery.
>
> What leads him to have a long corrective deformity surgery is the, quote, flat back which is something that occurred over time

28. Claimant testified that Dr. Stanton's reason for recommending the surgery is to address his pain and function. Dr. Rauzzino testified that if the purpose for the surgery proposed by Dr. Stanton is to address Claimant's pain there will likely be a very poor outcome.

29. Dr. Rauzzino testified that the surgery proposed by Dr. Stanton will not relieve claimant's pain or improve his functional status. He further testified that the surgery proposed by Dr. Stanton has a much more likely chance of making Claimant's situation worse than what it is currently. Moreover, he testified that a four level fusion is outside the recommendations of the Medical Treatment Guidelines, which recommend, at most, a two level fusion.

30. The Medical Treatment Guidelines require that a pain generator be specifically identified before a surgical fusion is performed. According to both Dr. Janssen and Dr. Rauzzino, Dr. Stanton failed to identify a specific pain generator.

31. Based upon the evidence presented in this case, the ALJ finds the opinions of Dr. Janssen and Dr. Rauzzino credible and more persuasive than the contrary opinions of Dr. Stanton. The ALJ credits the opinions of Dr. Janssen and Dr.

Rauzzino to find that Claimant has failed to establish that his need for surgery as recommended/requested by Dr. Stanton is related to his August 4, 2015 industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201(1), C.R.S.* Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert medical opinion is a matter within the fact finding authority of the ALJ. *Cordova v. Indus. Claim Appeals Office, supra.* The ALJ should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke*, 139 Colo. 305, 338 P.2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See § 8-43-210, C.R.S.; One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. Ap. 1995). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). As found here, the opinions of Drs. Janssen and Rauzzino are credible and more persuasive than those expressed by Dr. Stanton.

C. The Judge's factual findings concern only evidence that is dispositive of

the issues involved; the Judge need not address every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See Magnetic Engineering, Inc. v. ICAO, 5 P.3d 385 (Colo. App. 2000).

Dr. Stanton's Proposed Surgery

D. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

E. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). As found here, Claimant has failed to establish a causal relationship between his low back condition and his August 4, 2015 work injury. Rather, the evidence presented persuades the ALJ that Claimant's pain is emanating from the natural progression of his pre-existing degenerative disc disease and flat back deformity.

F. A pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

G. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). As found in this case, the totality of the evidence presented persuades the ALJ that Claimant's current symptoms and need for treatment, including surgery as requested by Dr. Stanton is causally related to his long standing degenerative disc disease and flat back deformity that is likely driven by genetic predisposition and which has been progression for years. While the ALJ is convinced that Claimant's need for surgery is reasonable and may well be necessary given his current symptoms (despite the contrary testimony of Dr. Janssen and Dr. Rauzzino), the ALJ is not persuaded that the need for surgery is related to Claimant's August 4, 2015 work injury, either as a consequence of an acute trauma or an industrially based aggravation of a pre-existing condition. In so concluding, the undersigned ALJ rejects Dr. Stanton's contrary opinions as unpursuasive.

ORDER

It is therefore ordered that:

1. Claimant has failed to carry his burden to prove that his need for spinal deformity surgery, as recommended/requested by Dr. Stanton, is causally related to his August 4, 2015 work injury. Consequently, Claimant's request for medical benefits, specifically L1-L5 lumbar spinal fusion surgery is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

DATED: May 12, 2017

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That

you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

- Did Claimant suffer a compensable industrial injury on January 14, 2016 while working for Employer?
- Is Claimant entitled to TTD benefits from March and continuing?
- If compensable, was Claimant's medical treatment reasonable, necessary and related to his injury?

FINDINGS OF FACT

1. Claimant was employed as electrical lineman by Employer.

2. Claimant's prior medical history was significant in that he previously suffered an industrial injury on June 28, 2012. Medical records for that injury were admitted at hearing. Claimant injured both shoulders and his neck when he was in a basket being lifted by a crane, which then tipped over and caused him to fall. There were several references in the medical records that Claimant suffered an injury the next day when he fell on his outstretched arms.

3. Medical records related to Claimant's right shoulder were admitted at hearing. In a review of these records, the ALJ concluded that Claimant had symptoms in his right shoulder resulting from the prior injury for which he required treatment. Evidence of this treatment was admitted at hearing. For example, on October 8, 2012, ATP Lloyd Thurston, M.D. noted Claimant's primary problem was left shoulder pain for which surgery was scheduled on October 10, 2012. Dr. Thurston was to see Claimant for re-evaluation of the right shoulder in one week. Dr. Thurston suspected right shoulder sprain/strain and wanted Claimant to begin physical therapy ("PT") the right shoulder.[1]

4. On April 8, 2013, Dr. Thurston concluded Claimant was at MMI and released him without restrictions. Dr. Thurston determined Claimant sustained a 11% scheduled impairment, which converted to a 7% whole person impairment.[2]

5. On October 7, 2013, Claimant underwent a Division IME on the 2012 claim. This examination was performed by Mindy Gehrs, M.D, who noted that the body

[1] This note was summarized by Dr. Gehrs in her October 7, 2013 DIME report.

[2] *Id.*

parts to be evaluated were: left shoulder, right shoulder, cervical spine and right arm.[3] Claimant reported that he had intermittent right shoulder pain. He specifically reported that his right shoulder "grinds and cracks more than the left arm". Dr. Gehrs noted right shoulder pain was referenced in the initial Workwell notes, which was to be addressed later and was not. On examination, Dr. Gehrs found normal range of motion ("ROM") in Claimant's right shoulder. No significant tenderness was noted on the paracervical muscles, upper trapezius or periscapular muscles. Dr. Gehr's assessment was: left shoulder rotator cuff tear, status post repair; right shoulder impingement versus rotator cuff tendinosis; and cervicalgia. She did not believe Claimant had a right shoulder rotator cuff tear. Dr. Gehrs concluded that Claimant was not at MMI for his right shoulder and neck. She opined Claimant's right shoulder symptoms could be addressed with therapy and possibly injections. Dr. Gehrs completed an impairment rating for Claimant's left shoulder only. She assigned an 11% scheduled impairment to this extremity.

6. On January 17, 2014, Claimant presented to Workwell, and was seen by Tom Dickey, PA-C. Claimant's complaints were of right shoulder pain and right-sided neck pain. Claimant reported that his right shoulder pain went down his arm and his left shoulder pain worsened. Dr. Gehrs' DIME report was reviewed. PA-C Dickey's assessment was: disc disorder with myelopathy; impingement syndrome in his right shoulder; rotator cuff tear, left shoulder. Claimant was placed on restricted duty of: any overhead lifting of greater than 50 lbs had to be done with both hands.

7. On February 10, 2014, Claimant was evaluated again by PA-C Dickey, who noted an orthopedic exam was to be scheduled for the right shoulder. He was next seen on April 4, 2014, at which time PA-C Dickey noted Claimant's main concern was the left shoulder, although he had received PT for the right shoulder. The physical therapy notes admitted at hearing documented bilateral shoulder pain.

8. On April 29, 2014, Claimant underwent an MRI on his right shoulder. The films were read by Samuel Fuller, M.D., whose impression was: moderate grade articular surface and intrasubstance partial tearing involving the midportion of the supraspinatus tendon just proximal to the insertion. There was no evidence of a full-thickness rotator cuff tear. Dr. Fuller opined that the findings related to the AC joint and acromion would likely predispose Claimant to subacromial impingement of the rotator cuff. The ALJ notes the MRI constituted objective evidence of a tear present in Claimant's right shoulder.

9. On May 20, 2014, Claimant was examined by Robert Dupper, M.D. Dr. Dupper noted Claimant had full ROM in the right shoulder, but pain at the edges. He had tenderness to palpation of the joint itself, as well as tenderness over the edge of the acromion. Claimant had a negative Neer sign, but mildly positive Hawkins sign. Dr. Dupper's assessment was disc disorder with myelopathy; impingement syndrome, shoulder (presumably right shoulder); rotator cuff tear, shoulder, left-at MMI, S/P surgery. Dr. Dupper noted the cause of Claimant's symptoms was related to work

[3] This was confirmed by the Application for a DIME. Exhibit L.

activities. Claimant was referred to CROM for additional treatment for the right shoulder.

10. On June 2, 2014, Claimant was examined by Rebekah Martin, M.D. at CROM, who was board-certified in Physical Medicine and Rehabilitation. At that time, Claimant was noted to have bilateral shoulder discomfort, with subjective weakness on the left, but more symptomatic on the right. On examination, Claimant had limitations to abduction, causing impingement. Impingement signs were positive for the right shoulder. Dr. Martin's impression was: right shoulder pain with a known articular surface partial supraspinatus tear, with overlying impingement syndrome; left shoulder rotator cuff pathology, now status post rotator cuff surgery done by Dr. Pazic. The left shoulder had residual weakness and range of motion impairment; cervical spine pain of somewhat unclear ideology. The patient recently underwent an MRI. With regard to Claimant's right shoulder, Dr. Martin stated he was an excellent candidate for regenerative medicine. She wanted to pursue PRP initially to see if this would accelerate localized healing, as well as decreased localized pain. Dr. Martin opined this would be a way to avoid surgery. The ALJ notes there was nothing in the record which showed Claimant underwent this treatment.

11. On June 27, 2014, Claimant underwent an independent medical evaluation, which was performed by Mark Steinmetz, MD. Dr. Steinmetz considered various aspects of the June 28, 2012 injury, including the DIME performed by Dr. Gehrs. Claimant complained of aching in his right shoulder joint, over the upper shoulder and near the acromion. Claimant also reported tingling in his right hand. On examination, Dr. Steinmetz noted Claimant's neck was tender all along the spinous processes, with decreased are ROM with rotation on the left. Claimant's right shoulder was tender over the acromion area and there were equivocal impingement findings. ROM of the right shoulder was good, with no crepitus, atrophy or allydonia noted. Dr. Steinmetz' assessment was: incomplete and inconsistent history, including which raised the issue of potential aggravation of neck and right shoulder problems by motorcycle riding; “woefully” incomplete, inaccurate, and misleading history, record review, physical; findings and, therefore invalid conclusions from DIME report; probably 1 or 2 incidences at work involving either lifting, pushing, or falling on his outstretched left arm and resulting in a left shoulder strain or rotator cuff tear; current neck pain , tingling in hands which was not causally related to the June 281 20112 injury. Dr. Steinmetz opined Claimant was entitled to a medical impairment rating for his left shoulder, finding he reached MMI on April 8, 2013. Dr. Steinmetz believed the 11% extremity rating (which converted to a 7% whole person rating) was the correct measure of Claimant’s impairment.

12. On August 6, 2014, David Beard, M.D. examined Claimant, who was complaining of right shoulder pain. He found a mildly positive Hawkins and negative Neer impingement sign. The proximal biceps tendon was nontender. Dr. Bear’s assessment was right shoulder partial-thickness rotator cuff tear, with rotator cuff tendinitis; right shoulder mild AC joint osteoarthritis. Dr. Beard recommended continued conservative management with cuff rehab. Two other options would be a subacromial steroid injections or arthroscopic debridement of the rotator cuff partial thickness

tearing. Dr. Beard advised Claimant he would continue to have problems with his shoulder in his work as a lineman.

13. Claimant returned to Dr. Dupper on September 14, 2015, at which time he noted his right shoulder was bothering him more than the left shoulder. The pain had increased with work activities, since he had been doing more active and overhead work. Claimant said the pain woke him up at night. Tenderness was noted by Dr. Dupper over the biceps tendon and supraspinatus area. Claimant had difficulty reaching across his body and touching his left shoulder with his right hand, as well as a positive Hawkins test and positive empty can test. Dr. Dupper issued work restrictions and recommended Claimant's case be reopened, with the MRI repeated.

14. On October 30, 2015, Claimant was evaluated by Dr. Dupper at which time he reported pain in his right shoulder. He maintained that this injury happened at the time of his fall in June 2012. Dr. Dupper noted Claimant's ability to work was being affected by the shoulder pain, loss of range of motion, and strength.

15. In summary, the ALJ concluded there were a substantial number of records which documented treatment Claimant received for his injured right shoulder before 2016. He continued to have symptoms referable to the right shoulder through 2015. There was no indication in the record that any ATP placed him at MMI for the right shoulder injury.

16. Mr. Grossman testified by way of evidentiary deposition which was taken on August 5, 2016. He worked with Claimant at Employer. He was working on January 14, 2016, doing cleanup. Specifically, they were picking up pieces of equipment called travelers, which was basically a large dolly that weighed 60 to 70 pounds. He and Claimant would pick up the travelers, lift these up over their heads and throw them into a basket on the back of a flatbed truck. Mr. Grossman testified they had been doing this task for an hour or two when Claimant lifted a traveler over his head and said he was in pain. Claimant was not able to continue to do the job for the rest of the day. The testimony of Mr. Grossman corroborated Claimant's version of events on January 14, 2016.

17. In January 2016, Claimant testified he was working for Employer as a lineman. He had worked about one (1) month before his injury. Claimant testified he was injured on January 14, 2016 while loading 70-80 pound travelers onto a trailer. More particularly, Claimant testified he picked the traveler up, pushed it over his head and handed it to a co-worker (Jeremy Grossman) on a trailer. Claimant testified he reported the injury to the foreman, Michael Moore. The ALJ concluded Claimant was performing the job duties as described on this day, as no contrary evidence was introduced at hearing.

18. On February 17, 2016, Dr. Beard evaluated Claimant.[4] In the patient questionnaire form, Claimant noted the accident was caused by twisting/strenuous

[4] Dr. Beard previously treated Claimant, however, only one of those records was admitted at hearing. [Exhibit D, p.31-32.]

movement. Dr. Beard noted Claimant was at work on January 14 when he was lifting 60 lbs and had a sudden onset of shoulder pain associated with a pop. Active range of motion revealed forward flexion of 80°, active abduction of 70°, and external rotation of 60°. Dr. Beard found weakness for resisted supraspinatus testing, a positive Hawkins and negative Neer impingement sign. X-rays revealed no fracture, subluxation or dislocation. Dr. Beard diagnosed probable right rotator cuff tear. He ordered an MRI.

19. On February 19, 2016, an MRI was done on Claimant's right shoulder. The radiologist's impression was: moderate supraspinatus tendinosis, with bursal surface scuffing; no rotator cuff tear was detected; early infraspinatus and subscapularis tendinosis; moderate impingement anatomy, as described; moderate arthrosis at the acromioclavicular joint.

20. Claimant returned to Dr. Beard on March 1, 2016. Dr. Beard reviewed the MRI, which showed some AC arthrosis, but no significant inferior spur formation. Claimant had a small, full-thickness tear in the anterior leading edge of the supraspinatus tendon without significant retraction. Dr. Beard's assessment was: right shoulder full-thickness rotator cuff tear; right shoulder acromial clavicular arthrosis. He recommended proceeding with a right shoulder arthroscopy with acromioplasty and mini open cuff repair. The ALJ noted that this description in the records of a full-thickness right rotator tear was not explained by Dr. Beard, as it did not mirror the MRI report.

21. Claimant underwent surgery on March 11, 2016. Dr. Beard performed the right shoulder arthroscopy with arthroscopic acromioplasty and right shoulder mini open rotator cuff repair.[5] Claimant paid for the procedure due to Respondents' denial of the claim. Claimant testified he has not worked since his surgery.

22. On May 12, 2016, Claimant was examined by Jorge Klajnbart, M.D., at Respondents' request. This was after Claimant underwent surgery on his right shoulder and Dr. Klajnbart did not have the surgical records. Dr. Klajnbart noted the radiographic interpretations almost 2 years apart were almost identical between the April 29, 2014 and February 19, 2016 MRIs. He opined Claimant sustained a soft tissue injury where he felt a pop in his right shoulder on January 14, 2016. The pop sensation could have been some previous scar tissue from his pre-existing tendinopathy and/or the type III curved acromion snapping over the bursal inflamed tissue from this repetitive activity. This type of soft tissue injury to include the rotator cuff tendon injury was typically self-limiting in nature requiring a level of activity modification, rest, medications, and manual medicine in the form of physical therapy and/or osteopathic manipulation or chiropractic treatment. Dr. Klajnbart opined with a high degree of medical probability that the original origin of the right shoulder injury occurred on June 29, 2012 when he put both arms out to stop a fall and sustained a greater left than right shoulder injury.

23. On June 27, 2016, Dr. Klajnbart issued a supplemental report in which he noted a comparison of the MRI of April 29, 2014 and MRI from February 19, 2016

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[5] Exhibit 9, p. 67-70.

demonstrated no evidence of an acute injury on Janury14, 2016. No rotator cuff tear was noted. Dr. Klajnbart noted Claimant had treatment for the right shoulder after the June 28, 2012 injury for three years.

24. At hearing, Dr. Klajnbart testified as an expert in orthopedic surgery, the specialty in which he is board-certified. He is Level II accredited pursuant to the WCRP. Dr. Klajnbart noted Claimant did not indicate he had an acute right shoulder injury when at that time he examined him. Claimant said he was evaluated for right shoulder problems after the injury. Dr. Klajnbart noted Claimant had objective evidence of biceps tendinitis and impingement in the right shoulder. This was seen in the examination on September 14, 2015 (Dr. Dupper). Claimant reported tenderness and had positive Hawkins and empty can tests. The conclusion was that this was a chronic recurring condition and led to a recommendation that an MRI be repeated. Dr. Klajnbart stated that the restrictions in Claimant's right shoulder ROM could be due to several causes, including inflammatory changes of the tendons, tearing of the tendons, patient motivation and/or adhesive capsulitis. Dr. Klajnbart noted Dr. Martin had also recorded right shoulder pain with known articular surface, partial supraspinatus tear with overlying impingement syndrome. This led to a recommendation of regenerative medicine. Dr. Klajnbart opined Claimant was a surgical candidate before the January 2016 injury, although he agreed it was not formally recommended.

25. Dr. Klajnbart also testified regarding the radiological evidence concerning the right shoulder. He testified that there were no significant or objective changes, as shown by the MRIs. The 2016 MRI did not show evidence of an acute injury of the right shoulder. He explained that if someone has an acute injury, oftentimes one will see bony contusion or an increase in the fluid signal. In this case, those indicators of an acute injury were not there. Dr. Klajnbart testified Claimant's surgery was not due to the January 14, 2016 event. What Claimant would have been able to do would have been far different than he described, as he had a retracted rotator cuff when surgery was performed. Dr. Klajnbart also conceded Dr. Beard identified a full-thickness rotator cuff tear. No physician had identified a full-thickness rotator cuff tear before that. Dr. Klajnbart noted the tear could have advanced sometime between 2014 and 2016 when Claimant was complaining of right shoulder symptoms. The ALJ credited Dr. Klajnbart's testimony regarding objective evidence of injury and on causation.

26. Claimant failed to prove that the incident on January 24, 2016 aggravated or accelerated the condition of his right shoulder.

27. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Claimant, as well as the various health care providers, bore directly on the issue of compensability.

Compensability

The legal standard applicable to the compensability issue under these circumstances is found in § 8-41-301(1)(c), C.R.S., which provides that as a condition for the recovery of workers' compensation benefits, the injury must be "proximately caused by an injury or occupational disease arising out of and in the course of the employment". *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014).

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. ICAO*, 107 P.3d 999, 1001 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury, the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siegfried v. Industrial Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167

(Colo. App. 1990). In determining whether Claimant met his burden of proof, the ALJ evaluated the medical records admitted at hearing and considered Claimant's credibility. While the evidence established Claimant was working injury on January 14, 2016 and sustained an injury to his shoulder, this was, at most, a soft tissue injury. The ALJ determined he failed to prove an aggravation or acceleration of the underlying condition of his right arm/shoulder.

As found, Claimant sustained a right shoulder injury in 2012, for which he required treatment. The medical records admitted at hearing documented the rather extensive treatment he received for said injury. The ALJ found Claimant had several evaluations and required treatment for the right shoulder condition. (Findings of Fact 3-13). Claimant required diagnostic testing, including an MRI. (Finding of Fact 8). Claimant's symptoms extended at least until October 2015. (Finding of Fact 13). The treatment records admitted at hearing led the ALJ to conclude that 2012 injury to the right shoulder was significant to the point that it required treatment up to three months before the injury which was the subject of the hearing. Claimant's testimony did not dispel this conclusion.

In this regard, Claimant's credibility concerning the 2012 injury was hurt by inconsistencies between his hearing testimony and the medical records. In his testimony at hearing, Claimant tried to minimize the impact of his right shoulder symptoms, describing it as "some pain". There were several times in the records related to the 2012 injury when Claimant told his treating physicians his right shoulder pain was worse than the left. (Findings of Fact 10, 12). His testimony also diverged from his discovery responses, wherein the latter, he described the pain in his shoulders as "chronic pain". The DIME physician, Dr. Gehrs, concluded Claimant was not at MMI for the right shoulder, which was evidence of the unresolved nature of that condition. Claimant's symptoms led at least one physician to suggest a repeat MRI of the right shoulder. (Finding of Fact 12). In short, Claimant had chronic symptoms in the right shoulder, which continued almost unabated until January 2016.

The inquiry then turned to the events of January 14, 2016. As determined in Findings of Fact 15-16, Claimant's testimony (which was corroborated by Mr. Grossman) established the fact that he experienced pain in his right shoulder that day. He was performing a task for Employer and no contrary evidence was introduced to refute this. Thus, the evidence established Claimant suffered an injury that day while working for Employer. This does not end the inquiry, however. Given his preexisting condition, the ALJ next considered whether this injury met the legal requirements for compensability under the Colorado Workers' Compensation Act.

Stated another way, liability in this case turned on the question of whether Claimant proved he suffered an acute injury that aggravated or accelerated the underlying condition of his right shoulder. The ALJ determined he did not satisfy his burden of proof. The ALJ's reasoning was twofold. First, the objective medical evidence supported the conclusion that the January 14, 2016 incident did not aggravate and/or accelerate the Claimant's right shoulder. A comparison of the two MRIs revealed

the condition of Claimant's shoulder, specifically the supraspinatus tendon, was essentially the same:

April 29, 2014: "moderate grade articular surface and intrasubstance partial tearing involving the mid-portion of the supraspinatus tendon just proximal to the insertion".

February 19, 2016: "moderate supraspinatus tendinosis, with bursal surface scuffing; no rotator cuff tear was detected".

In coming to this conclusion, the ALJ specifically looked at whether there was the presence of a full thickness tear, as argued by Claimant. The MRI reports were the most probative evidence on this issue. No full thickness tear was identified by either radiologist; the first found a partial tear at the insertion of the supraspinatus tendon and the second concluded there was no rotator cuff tear. Dr. Beard's records did not discuss or explain how he then concluded there was a rotator cuff tear. In fact, there was no evidence admitted to amplify Dr. Beard's opinion on this subject. In the absence of evidence which provided more information as to how Dr. Beard came to this conclusion, the ALJ is unable to conclude the January 14, 2106 event caused a full-thickness rotator cuff tear. On this basis, the ALJ concluded the MRI findings were very similar, which was also in accord with Dr. Klajnbart's testimony.

Second, the ALJ credited the testimony of Dr. Klajnbart, who testified there was no evidence of an acute injury. Dr. Klajnbart based this opinion on the MRIs done in 2014 and 2016. (Finding of Fact 25). Accordingly, based upon the evidence before the ALJ, Claimant suffered, at most, a soft tissue injury to his, which was a temporary aggravation. The ALJ determined Claimant did not meet his burden of proof to establish that the January 14, 2016 injury combined with or accelerated the underlying condition of his shoulder to create a disability. (Finding of Fact 26). Therefore, the claim is properly dismissed.

TTD and Medical Benefits

In light the ruling on the issue of compensability, Claimant's request for medical and TTD benefits is denied and dismissed.

ORDER

IT IS ORDERED:

1. Claimant's claim for benefits under WC 5-006-696 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 14, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that pursuant to Section 8-42-101(1)(b), C.R.S. he is entitled to replacement prosthetic devices consisting of 1) a right transradial cable operated prosthesis with a terminal device; and 2) a right transradial electric prosthesis/myoelectric hand.

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his right arm on November 14, 2007. The injury occurred when claimant's right hand was pulled into the planer he was operating while employed at employer's lumber mill. Subsequently, claimant's right hand was amputated above the wrist. During his workers' compensation claim, claimant's authorized treating physician ("ATP") was Dr. Richard McLaughlin. Claimant also treated with Dr. Mitchell Copeland and Dr. Ellen Price.

2. Dr. McLaughlin placed claimant at maximum medical improvement ("MMI") on March 16, 2009 and assigned a permanent impairment rating of 55% whole person. In 2009, claimant received a right transradial cable operated prosthesis with a terminal device ("cable operated")[1]. This cable operated prosthesis is operated by claimant moving his right shoulder to open and close the terminal device.

3. Claimant testified that prior to the work injury, he was right hand dominant. Since the injury claimant has learned to use his left hand and with the use of the right cable operated prosthesis he is able to engage in activities of daily living.

4. Claimant testified that the lumber mill closed down and he is now retired. Claimant's hobbies include hunting, training his bird dog, and wood working. With his current cable operated prosthesis claimant is able to engage in these activities.

5. Claimant testified that his right residual limb has continued to atrophy since he was fitted for his prosthesis in 2009. As a result, claimant's current cable operated prosthesis slides and slips off of his arm, causing discomfort and skin abrasions. Claimant testified that he must wear a number of socks on his residual limb to make up for the atrophy that has occurred, but even with those added layers the prosthesis still slips.

6. Claimant has requested authorization for a new cable operated prosthesis. In addition, claimant has requested authorization for a right transradial electric prosthesis/myoelectric hand ("myoelectic"). A myoelectric prosthesis fits more snuggly

[1] In the records entered into evidence and in witness testimony the terms "cable operated", "body operated", and "body powered" are used interchangeably to describe and identify the nature of claimant's current prosthesis.

to an individual's residual limb and is operated by the individual's use of the flexor and extensor muscles of their forearm.

7. Claimant testified that it is his understanding that the myoelectric prosthesis would provide him with the ability to engage in fine motor movement, allowing him to hold a plate of food, or a drinking glass. In addition, claimant understands that the myoelectric prosthesis would cause less strain on his right shoulder.

8. On May 3, 2016, claimant returned to Dr. McLaughlin. On that date, Dr. McLaughlin recommended a new right upper extremity prosthesis with a terminal device and a myoelectric arm or hand. Dr. McLaughlin noted that claimant needs the new prostheses because the mass of his right forearm had decreased. Dr. McLaughlin referred claimant to Dr. Price for a consultation regarding prostheses.

9. On May 12, 2016, claimant was seen by Dr. Price who opined that claimant needed a new "body powered" prosthesis with a terminal device. Dr. Price also recommended a myoelectric arm or hand so that claimant could perform fine motor activities. On that same date, Dr. Price requested authorization from insurer for both a body powered prosthesis and a myoelectric prosthesis.

10. On September 27, 2016, claimant returned to Dr. Copeland. At that time, Dr. Copeland noted that claimant's right forearm had shrunk. Dr. Copeland opined that claimant was in need of a new right arm prosthesis and that his need was related to the 2007 work injury.

11. Brian Karsten, Board Certified Prosthetist, testified at hearing in this matter regarding the different prostheses requested by claimant. Mr. Karsten is very familiar with claimant's prosthesis because he fabricated it in 2009 and has performed repairs on it since that time. Mr. Karsten testified that given the age of claimant's current prosthesis, it is in poor condition and in need of replacement.

12. Mr. Karsten testified that a cable operated prosthesis is water resistant, dust resistant, and durable. Mr. Karsten testified that for an active male like claimant he recommends a cable operated prosthesis. Mr. Karsten also testified that atrophy to claimant's right residual limb is a normal progression following an amputation.

13. Mr. Karsten testified that in addition to the cable operated prosthesis, he recommends that claimant obtain a myoelectric prosthesis because the myoelectric prosthesis would allow claimant to engage in more fine motor activities. Mr. Karsten admitted that the myoelectric prosthesis is not as durable or "rugged" as the cable operated prosthesis. On cross examination Mr. Karsten testified that if claimant can only have one replacement prosthesis, the cable operated option would provide claimant with the most function.

14. Respondents sent claimant for an independent medical examination ("IME") with Dr. Scott Primack on February 3, 2017. Dr. Primack reviewed claimant's medical records, obtained a history from claimant and performed a physical examination of claimant and claimant's current prosthesis. Following the IME, Dr. Primack issued a report in which he opined that claimant needs a new prosthesis for his right arm and the need for that new prosthesis is related to claimant's November 14, 2007 work injury.

15. Dr. Primack noted in his report that claimant was able to continue working for employer until the lumber mill was closed due to "downsizing". Dr. Primack also opined that a hook/pincer terminal device would be adequate given claimant's high demand and rugged use of his current prosthesis. In Dr. Primack's opinion a myoelectric prosthesis would not provide claimant with improved function and is therefore not necessary.

16. Dr. Primack testified by deposition in this matter and confirmed his opinion that claimant needs a new prosthesis because of the atrophy to his residual limb. Dr. Primack also testified that claimant is a good candidate for a body powered prosthesis and is highly functional with his body powered prosthesis. Dr. Primack indicated that it is his opinion that a myoelectric prosthesis would not increase claimant's function.

17. The ALJ credits the opinions of Drs. McLaughlin, Price, Copeland, and Primack and finds that claimant has experienced an anatomical change to his residual limb that is related to claimant's November 14, 2007 work injury. The ALJ also finds that claimant has demonstrated that it is more likely than not that because of this anatomical change he needs a new prosthesis.

18. The ALJ credits the testimony of Mr. Karsten and claimant and the opinions of Drs. McLaughlin, Price, Copeland, and Primack and finds that claimant has demonstrated that it is more likely than not that a new cable operated prosthesis would improve the function of claimant's right arm.

19. With regard to the myoelectric prosthesis, the ALJ credits the opinion of Dr. Primack over the contrary opinion of Dr. Price and finds that claimant has failed to demonstrate that it is more likely than not that a myoelectric prosthesis would further improve his function beyond the function he will achieve with a cable operated prosthesis.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not

interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2007). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S., *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-101(1)(b), C.R.S., addresses respondents' obligation with regard to prosthetic devices. In this matter, claimant's injury occurred on November 14, 2007, so it is the 2007 version of Section 8-42-101(1)(b), C.R.S., that is applicable with regard to claimant's work injury. In 2007, Section 8-42-101(1)(b), C.R.S. provided, in part:

> "The employee may petition the division for a replacement of any artificial member, . . . or other external prosthetic device . . . upon grounds that the employee has undergone an anatomical change since the previous device was furnished, and that the anatomical change is directly related to and caused by the injury, and that the replacement is necessary to improve the function of each member or part of the body so affected or to relieve pain or discomfort."

5. Statutes are construed to further the intent to render the entire statute effective and to reach a just and reasonable result. Section 2-4-201(1)(b) and (c), C.R.S. Unless subject to a technical or particular meaning, words and phrases in a statute are to be given their plain and ordinary meanings, and phrases should be read in context and construed according to the rules of grammar and common usage. Section 2-4-101, C.R.S.; *Weld County School District RE-12 v. Bymer,* 955 P.2d 550 (Colo. 1998). However, statutory language should not be construed in a manner which produces an absurd result. *Humane Society of the Pikes Peak Region v. Industrial Claim Appeals Office,* 26 P.3d 546 (Colo. App. 2001).

6. In the current case, claimant is requesting two replacement prostheses. Respondents argue that the 2007 version of Section 8-42-101(1)(b), C.R.S. provides for "a replacement" in the singular and not the plural "replacements". The ALJ finds respondents' argument to be persuasive. Under the clear meaning of the statute "a replacement of any artificial member" indicates the singular, not multiple replacements.

Therefore, the ALJ concludes that pursuant to the 2007 version of Section 8-42-101(1)(b), C.R.S., claimant may receive only one replacement prosthesis at this time.

7. The ALJ's ruling on this matter should not be interpreted to mean that the claimant is allowed only one prosthesis for all time. The 2007 version of Section 8-42-101(1)(b), C.R.S. clearly indicates that a new prosthesis may be requested when an anatomical change has occurred "since the previous device was furnished". Therefore, the ALJ concludes that although the 2007 version of the statute allows claimant only one prosthesis at a time, should he undergo further anatomical changes, he would not be precluded from requesting a new prosthesis in the future.

8. As found, claimant has demonstrated by a preponderance of the evidence that he has undergone an anatomical change to his right residual limb that was caused by the work injury. In addition, claimant has demonstrated by a preponderance of the evidence that this anatomical change necessitates a replacement prosthesis. As found, the testimony of claimant and Mr. Karsten and the opinions of Drs. McLaughlin, Price, Copeland, and Primack are credible and persuasive.

9. As found, pursuant to the 2007 version of the statute, claimant may receive a single replacement prosthesis, but not multiple prostheses at this time. As found, claimant has demonstrated by a preponderance of the evidence that a new transradial cable operated prosthesis with a terminal device will improve function of claimant's right arm. As found, the testimony of claimant and Mr. Karsten and the opinions of Drs. McLaughlin, Price, Copeland, and Primack are credible and persuasive on this issue.

10. As found, claimant has failed to demonstrate by a preponderance of the evidence that a myoelectric prosthesis would further improve the function of claimant's right arm beyond the function he will achieve with a cable operated prosthesis. As found, the opinion of Dr. Primack is credible and persuasive on this issue.

ORDER

It is therefore ordered that:

1. Respondents shall pay for a right transradial cable operated prosthesis with a terminal device.

2. Claimant's claim for a right transraidal electric prosthesis/myoelectic hand is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 15, 2017

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he suffered a compensable injury on July 26, 2016 (W.C. No. 5-021-592-01) or August 22, 2016 (W.C. No. 5-024-949-01)?

2. If Claimant proved a compensable injury, is Claimant entitled to medical treatment to cure and relieve the effects of the injury?

3. If Claimant has a compensable injury, did Respondents prove entitlement to a reduction in compensation based on a willful violation of a safety rule?

STIPULATIONS

1. The parties stipulated to an average weekly wage of $725.98.

2. If either claim is compensable, Claimant is entitled to TTD benefits commencing August 23, 2016.

FINDINGS OF FACT

1. Claimant has worked as a merchandise receiving technician in Employer's distribution warehouse since July 2013. His duties include unloading cartons or pallets from trucks and moving merchandise within the warehouse. The job is physically demanding, requiring frequent lifting of up to 50 pounds, and greater weight occasionally. Claimant works the overnight shift from 6:00 PM to 6:00 AM, three days per week.

2. The incident that forms the basis for W.C. 5-021-592-01 occurred during the shift that started on the evening of July 25, 2016. While unloading a trailer, Claimant moved a heavy box that was approximately at shoulder height. Claimant estimated the box weighed 100 pounds. Claimant noticed "some discomfort" and "a little bit of numbing pain" in the middle of his low back, but continued working. He assumed he had just temporarily overexerted his muscles.

3. During his first break at 8:30 PM, Claimant applied an ice pack to his back and took Aleve. Claimant continued working until approximately 3:00 AM, by which time the pain had become "unbearable." A coworker helped him to his vehicle because he had difficulty walking.

4. Claimant went to the Parkview Medical Center ER early in the morning on July 26. He reported a history of "intermittent lower back pain" which worsened "last night" due to "lifting and twisting" at work. Claimant told the ER physician "typically, he can take an Aleve with good pain control, but that did not seem to help this time." The

physician noted pain in the lower lumbar area with some radiation to the bilateral lower extremities depending on his position. Straight leg raise testing was mildly positive at 70°. A lumbar CT showed a disc protrusion at L5. Claimant was prescribed a course of steroids, pain medication, and muscle relaxers.

5. On July 28, 2016, Claimant saw Employer's on-site nurse regarding the episode. He reported that his lower back "was hurting with sharp pains while working normal job functions, moving boxes onto the ART line by lifting and setting the boxes down. . . . He informed me that this is a recurring past injury that is not work-related and he is always wearing a back brace while working, which he was in this case. He denied on-site care at our facility [ ] and was going to seek outside medical help on his own." Claimant was "feeling much better at this time," and declined medical treatment at Respondent's expense. Claimant stated, "he will be following up with his PCP and VA MD for further care."

6. Claimant subsequently returned to work for Employer, performing regular duties and working regular shifts.

7. On the night of August 21, 2016, Claimant worked on "depalletization," which involves placing items onto a conveyor to be sent to the outbound section for loading onto trailers. Claimant completed his full 12-hour shift without difficulty, went home and went to bed. When he awoke at 4:00 PM to get ready for work, he was in such severe pain he had difficulty getting out of bed and standing up. He went to work and told his supervisor he could not work and needed medical attention. Employer's on-site nurse gave Claimant a list of occupational medicine clinics, from which he chose Emergicare.

8. Claimant saw Dr. Agnes Flaum at Emergicare on August 23, 2016. He stated he "threw his lower back out" moving heavy items from pallets to a conveyor. He reported 8/10 pain in his low back with numbness in his right thigh. The physical examination was essentially normal, with only tenderness noted to the L4 and L5 spinous processes. Sensory examination, range of motion, gait, and posture were reported as normal. Claimant was diagnosed with a soft tissue strain and given injections and pain medications. Dr. Flaum imposed work restrictions of no lifting greater than 5 pounds.

9. Claimant returned to Emergicare on August 30, 2016. He reported ongoing low back pain and numbness in the right leg. Dr. Flaum added a diagnosis of sciatica and referred Claimant for an MRI.

10. Claimant underwent thoracic and lumbar MRIs on September 14, 2016. The thoracic MRI showed "minimal" multilevel degenerative changes. The lumbar MRI showed a left paracentral disc protrusion at L5-S1 that approaches and may abut the descending left S1 nerve root. There was mild foraminal narrowing, but no central stenosis.

11. Claimant saw Dr. Douglas Bradley at Emergicare on September 15, 2016. He reported 5/10 pain, numbness in the right leg, weakness, persistent aching and intermittent muscle spasm. Dr. Bradley referred Claimant to Dr. Roger Sung for a surgical evaluation. He also liberalized Claimant's lifting restriction to 25 pounds.

12. On September 27, 2016, Respondent's claims adjuster notified Emergicare that Claimant's claims were denied and no further treatment would be authorized. As a result, Claimant did not see Dr. Sung or return to Emergicare.

13. Claimant has a lengthy history of low back pain, dating to approximately 1992 during his service in the U.S. Army. Claimant experienced episodic flares of low back pain, which he typically treated with pain relievers such as Tylenol, Ibuprofen, Percocet or Darvocet. Claimant retired in 2011 after 22 years of active-duty service. His discharge medical records document he had received treatment related to low back pain and muscle strains. Claimant stated on his DD FORM 2897 that he intended to seek VA disability benefits for conditions including his "lower back." Claimant received a 10% disability rating for service-connected back pain.

14. There are numerous references in the medical records to prior episodes of low back pain. The following list of encounters is illustrative but not exhaustive:

Date	**Provider**	**Note**
28-Apr-1992	PT	2 month history of LBP. L thigh to knee pain w/ numbness
8-Sep-1992	PT	c/o LBP x 8 months due to fall down 150ft embankment.
23-Oct-1992	PT	F/U mechanical LBP
16-Jun-1994	Evans	low back pain last night after lifting boxes
25-Jun-2003	Blanchfield ACH	LPB x 5 days, moving bed around and back started hurting. Spasm on exam. DX lumbar strain
30-Jun-2005	121st GH	Low back pain after doing PT yesterday. DX strain
4-Jul-2006	DDEAMC	Moving, lifting a box of dishes, felt severe pain to L hip and L low back. Appeared in "obvious pain." DX strain
29-Jan-2007	Ft. Gordon	woke up in AM with LBP. DX lumbar strain
26-Mar-2007	Eisenhower AMC	Patient has had lower back pain for about a year. He thinks maybe moving and lifting of boxes may have caused it. He bent over a few days later and the pain started and took him to his knees. SLR + on the R.
25-May-2007	Eisenhower AMC	Receiving chiropractic treatment for chronic low back pain, L4-L5 DDD.
22-Oct-2010	Ft. Gordon	low back pain and muscle spasm, given profile 24 hrs off work
19-Feb-2013	Parkview ER	LBP aggravated last Thursday after lifting a box at work. c/o acute/chronic LBP w/ radiation down into R buttock/leg, tingling in foot. Pain level 9, extreme pain transferring from wheelchair to stretcher.

18-Jan-2015	Parkview ER	Long history of low back pain since being in the military. Has been controlling it conservatively; however a little over a week ago he slipped on ice and fell, landing on his tailbone with immediate onset of low back pain radiating to the right. DX acute on chronic back pain exacerbated by a fall. X-rays showed moderate L4-5 and severe L5-S1 DDD.
5-Oct-2015	McCreight	New patient, lower back pain "going on for 22 years."
18-Oct-2015	Parkview ER	Low back and R leg pain started gradually while doing yardwork.
19-Mar-2016	Parkview ER	LBP 5 days ago was helping a friend do some roofing.

15. Claimant's chronic back pain routinely flares with heavy activity, light activity or no activity.

16. Although Claimant maintained his job with Employer before July 2016, his chronic back pain periodically interfered with his ability to perform his regular duties. Claimant testified "usually, I can work the whole entire shift, no problem — all three days, all three nights. Next week, I'll go in, and I might not be able to work Saturday, or I might not be able to work that Monday shift."

17. Dr. Lawrence Lesnak performed an Independent Medical Examination (IME) at Respondent's request on December 16, 2016. Besides examining and interviewing Claimant, Dr. Lesnak performed an extensive review of Claimant's preinjury medical records. Dr. Lesnak noted Claimant was "quite hesitant" to reveal information regarding prior treatment or injuries during his military service. Dr. Lesnak opined Claimant has suffered from chronic low back pain, buttock pain, hip pain, and leg symptoms for more than 20 years. Claimant told Dr. Lesnak he had no specific medical evaluations or treatment for "many years" before July 2016, which Dr. Lesnak noted was inconsistent with medical records showing treatment at the ER for back pain as recently as March 2016. Dr. Lesnak opined that the September 2016 MRI showed no new or acute pathology caused by Claimant's work activities in July or August 2016. Dr. Lesnak opined Claimant's work activities did not cause, aggravate or accelerate Claimant's chronic pre-existing condition.

18. Dr. Michael Dallenbach performed an IME on December 21, 2016 at Claimant's request. Dr. Dallenbach had a relatively small sampling of medical records to review, primarily dated after Claimant's July 2016 claimed alleged injury. The only preinjury document Dr. Dallenbach reviewed was a May 16, 2012 VA rating decision. Dr. Dallenbach opined that Claimant aggravated his chronic low back pain as a result of his work activities on July 26, 2016 and August 22, 2016. Dr. Dallenbach opined that there was "no evidence" Claimant had "any" impairment or functional limitations before July 26, 2016. Dr. Dallenbach was most impressed by the fact that Claimant maintained a physically demanding job with Employer for three years. Dr. Dallenbach opined Claimant had a well-defined mechanism of injury and his ongoing symptoms were directly related to his work activities in July and August 2016.

19. After the hearing, Dr. Dallenbach had an opportunity to review medical records regarding Claimant's pre-existing condition and treatment. Dr. Dallenbach testified the additional documentation did not change his opinions regarding causation. He testified the additional records support his opinions.

20. There is no persuasive evidence of any structural change to Claimant's spine or other new objective abnormality caused by the July or August work incidents.

21. Claimant described his prior episodes of back pain as "seldom" and "intermittent." Claimant testified he had never felt pain in his low back like the pain and discomfort he experienced on July 26, 2016. Claimant testified his pain had never gotten as bad as 85/100 before July 2016. He testified his worst pain before July 2016 was "maybe 50" out of 100. Claimant did not recall if he ever had numbness in his legs before July 26, 2016. Claimant denied that he had back pain before July 26, 2016 so severe that he needed medical care simply upon waking. Claimant testified that his episodes of back pain during his military service were brought on exclusively by "extensive labor, hard work" or "combat-related" activities. None of these assertions is persuasive.

22. The symptoms Claimant has experienced since July 26, 2016 are substantially the same as those he experienced on a chronic basis for his alleged injury.

23. Dr. Lesnak's opinions are credible and persuasive.

24. Claimant did not prove by a preponderance of the evidence that his work activities in July or August 2016 caused, aggravated, or accelerated his underlying pre-existing condition. Claimant's need for medical treatment and disability since July 2016 reflect the natural progression of Claimant's pre-existing condition.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury proximately caused the condition for which benefits are sought. Section 8-41-301(1)(c); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. For an injury to be compensable under the Act, there must be a "sufficient nexus" between the employment and the injury. *In re Question Submitted by the U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimants or respondents. Section 8-43-201, C.R.S.

The fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation. If a claimant's work aggravates, accelerates, or combines with a preexisting condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949).

But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Cotts v. Exempla*, W.C. No. 4-606-563 (ICAO, August 18, 2005). Rather, when a claimant experiences symptoms at work, the ALJ must determine whether the subsequent need for treatment was caused by an industrial aggravation of a preexisting condition or was due to the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

As found, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury on July 26, 2016 or August 22, 2016. Based on the totality of evidence presented, the ALJ concludes Claimant's work activities were not the proximate cause of his symptoms or his inability to work on or after July 26, 2016. Rather, the persuasive evidence shows that Claimant's symptoms reflect the natural progression of his pre-existing condition, unaffected by his work activities on either July 26, 2016 or August 22, 2016. The mere fact that Claimant's symptoms arose after performing job functions does not prove a causal relationship. The ALJ concludes Claimant suffered no new injury, but merely experienced continuing symptoms from his chronic pre-existing condition. Claimant appeared to recognize this because he told Employer's on-site nurse on July 28 he did not expect Employer to provide medical treatment since this was a "recurring" nonwork-related problem.

The ALJ finds Dr. Lesnak's opinions to be credible and persuasive. Dr. Lesnak's opinions support a finding that Claimant did not sustain a work-related injury on July 26, 2016 or August 22, 2016, nor did he suffer a compensable aggravation of his pre-existing condition. Dr. Lesnak's opinions are consistent with the medical records which document a long-standing pre-existing condition that has been symptomatic for decades.

Based on the totality of evidence presented, the ALJ concludes Claimant failed to prove he suffered a compensable injury on either July 26, 2016 or August 22, 2016.

ORDER

It is therefore ordered that:

1. Claimant's claims for compensation in W.C. No. 5-021-592 and W.C. No. 5-024-949 are denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 15, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he is entitled to conversion of his scheduled upper extremity impairment rating to a whole person impairment rating.

FINDINGS OF FACT

1. Claimant has worked for Employer for approximately 37.5 years in various capacities, including as delivery driver for the last 33 years.

2. Claimant sustained an admitted industrial injury to his left shoulder on June 13, 2013. Claimant incurred the injury while grabbing a door strap for balance in an attempt to prevent from falling off of his delivery truck.

3. Claimant initially treated with James Rafferty, D.O., who first evaluated Claimant on June 17, 2013. Dr. Rafferty initially diagnosed shoulder strain and impingement with a possible rotator cuff tear. Dr. Rafferty noted Claimant's pain was in the anterolateral and superior shoulder.

4. Claimant underwent an MRI of his left shoulder on July 13, 2013. The MRI revealed the following:

> (1) Circumferential labral detachment with tearing into the posterior superior labral substance. Associated high-grade 3x4 mm chondral fissure and delamination in the anterior inferior glenoid. 15 mm wide full-thickness sharply marginated chondral defect in the superior humeral head. Associated synovitis and small joint effusion with capsular thickening and edema. (2) Mild diffuse tendinosis and areas of fraying through the rotator cuff, without rotator cuff tear. (3) Mild narrowing of acromion outlet without bursitis.

5. Dr. Rajesh Bazaz conducted orthopedic evaluations of Claimant on July 26, 2013 and August 5, 2013. Dr. Bazaz opined Claimant's pain was mostly likely coming from the subacromial space. Dr. Bazaz performed a subacromial corticosteroid injection. Dr. Bazaz opined Claimant did not have significant rotator cuff pathology and noted Claimant had residual stiffness/adhesive capsulitis of the shoulder.

6. Thomas J. Noonan, M.D. evaluated Claimant on multiple occasions, beginning August 2, 2013. Dr. Noonan noted loss of motion and mild signs of impingement. Dr. Noonan gave an impression of left shoulder pain, adhesive capsulitis, impingement, mild glenohumeral chondral degenerative change, and degenerative SLAP tear. Dr. Noonan performed two glenohumeral joint injections to Claimant's left shoulder.

7. Dr. Rafferty placed Claimant at maximum medical improvement ("MMI") on January 4, 2014. Dr. Rafferty assigned a 4% impairment rating of the left upper extremity.

8. Claimant returned to Dr. Noonan for a reevaluation on January 10, 2014. Dr. Noonan discussed future treatment options for Claimant, including conservative care, injections, and surgery.

9. On November 25, 2014, Eric O. Ridings, M.D. conducted an Independent Medical Examination ("IME") at the request of Respondents. Respondents specifically requested Dr. Ridings provide an opinion on whether Claimant's 4% left shoulder impairment rating should be a scheduled rating or a whole person rating. On examination, Dr. Ridings noted tenderness through the left side of Claimant's neck across the left shoulder elevators and over the upper interscapular muscles, with pain at the anterior shoulder. Dr. Ridings noted Claimant's range of motion measured less than it did at MMI, and was limited by pain. Dr. Ridings opined that the situs of Claimant's injury is at and distal to the glenohumeral joint. Dr. Ridings remarked, "While he does have some mild impingement in the shoulder (with the location of supraspinatus impingement underneath the acromion, distal to the glenohumeral joint), the patient's primary injury is an aggravation of his preexisting degenerative changes in the glenohumeral joint, with findings of grade 3 chondromalacia and labral tearing as well as some adhesive capsulitis." Dr. Ridings noted that Claimant's symptoms, course, and response to diagnostic and therapeutic injections were all consistent with the situs of injury being in the glenohumeral joint. Dr. Ridings assigned a 4% scheduled impairment rating of the left upper extremity.

10. On January 6, 2015, Bennett I. Machanic, M.D. conducted a Division Independent Medical Examination ("DIME") of Claimant. Claimant complained of pain, stiffness, popping, tingling and weaknesses in his left shoulder. On examination, Dr. Machanic noted "excellent" strength proximally and distally in Claimant's left upper extremity, with no weakness of the shoulder girdle or more distally. Dr. Machanic remarked that Claimant had good range of motion, with the limitations, and that there was no distinct crepitus on range of motion over the shoulder. Dr. Machanic opined Claimant reached maximum medical improvement on January 10, 2014. Dr. Machanic gave Claimant a 12% scheduled impairment rating for loss of range of motion, consistent with a 7% whole person impairment rating.

11. Dr. Bazaz reevaluated Claimant on April 3, 2015. Dr. Bazaz opined that there was "some level of difficulty" in both the subacromial space and the glenohumeral joint because Claimant had improved with injections to those areas.

12. On July 9, 2015, Dr. Ridings conducted a second IME of Claimant at the request of Respondents for the purpose of determining if authorization for left shoulder arthroscopic surgery should be provided. Claimant reported that his symptoms decreased by 90% for two to three months after receiving the intraarticular injections from Dr. Noonan. Claimant reported decreased strength at the left shoulder and some numbness and tingling about the left shoulder and neck, worsened with shoulder use,

including raising his shoulder beyond 90 degrees and rolling onto the left shoulder at night. On examination, Dr. Ridings noted tenderness across the superior and upper posterior shoulder where the neck meets the shoulder and extending over the lateral left shoulder. Dr. Ridings noted positive impingement tests and empty can testing. Dr. Ridings further noted range of motion findings were consistent with adhesive capsulitis. Dr. Ridings opined arthroscopic surgery would be reasonable, necessary and work-related.

13. Dr. Bazaz reevaluated Claimant on September 18, 2015. Dr. Bazaz noted that there was a question as to whether Claimant's lost motion was due to adhesive capsulitis or rather a glenohumeral joint issue. Dr. Bazaz noted there was no obvious rotator cuff or biceps tendon pathology. Dr. Bazaz did not recommend further treatment until a new MRI was obtained.

14. Claimant underwent a repeat MRI on October 12, 2015. The MRI revealed the following:

> (1) Interval progression of the glenohumeral joint osteoarthritis which is now severe. There is a small effusion with synovitis. There is circumferential glenoid labral pathology which includes chronic tearing of the superior, anterior, and inferior labrum. (2) Moderate supraspinatus and infraspinatus tendinosis with articular surface tendon fraying; no discrete tear. (3) Minimal subcapularis tendinosis; no tear. (4) Mild to moderate acromioclavicular joint osteoarthritis.

15. Claimant returned to Dr. Bazaz for a follow-up evaluation on October 19, 2015. Claimant reported soreness in his left shoulder, pain on the front of the shoulder and the top of the shoulder, and lost motion compared to the contralateral side. Dr. Bazaz reviewed the October 12, 2015 MRI and noted, in part, that there was no evidence of partial-thickness or full-thickness rotator cuff pathology and that "chondral irregularity affects the glenoid more than the humeral head." Dr. Bazaz gave an impression of left shoulder arthritis and trauma. Dr. Bazaz opined Claimant's loss of motion was due to glenohumeral joint osteoarthrosis and not adhesive capsulitis.

16. Dr. Noonan reevaluated Claimant on November 5, 2015. Claimant reported generalized pain, weakness and tingling. Claimant reported that reaching overhead and behind his back caused his symptoms to worsen. Dr. Noonan reviewed the October 12, 2015 MRI and noted degenerative changes. On examination, Dr. Noonan noted limited motion. Dr. Noonan impressed left shoulder pain, moderately severe glenohumeral degenerative changes, adhesive capsulitis, impingement, and degenerative labral tearing. Dr. Noonan discussed treatment options including repeat glenohumeral injection, arthroscopic debridement and shoulder replacement.

17. Claimant underwent conservative treatment with Tanya Michelle Kern, M.D. at Stapleton Family Sports March 25, 2016, 2016 to September 12, 2016. Dr. Kern assessed adhesive capsulitis of the left shoulder, impingement syndrome of the left shoulder, and osteoarthritis of the left glenohumeral joint.

18. Dr. Bazaz testified by deposition on August 19, 2016. Dr. Bazaz testified as an expert in orthopedics. Dr. Bazaz is board certified in orthopedic surgery and is Level II accredited by the Colorado Division of Workers' Compensation. Dr. Bazaz testified that Claimant was diagnosed with osteoarthritis, impingement, and adhesive capsulitis. Dr. Bazaz explained that Claimant was diagnosed with adhesive capsulitis in an attempt to explain Claimant's loss of motion, but that he now is not convinced Claimant has adhesive capsulitis. Dr. Bazaz opined that Claimant's arthritis, which progressed from 2013 to 2015, is enough to explain Claimant's loss of motion. Dr. Bazaz testified that Claimant has arthritis to the ball and socket joint, and that the 2013 MRI demonstrated most of the cartilage wear was on the ball part of Claimant's shoulder. Dr. Bazaz testified that Claimant's arthritis is Claimant's biggest issue, followed by impingement and then adhesive capsulitis.

19. On November 9, 2016, Dr. Machanic conducted a follow-up DIME. On examination, Dr. Machanic noted that there were no sensory, motor or reflex abnormalities of the left upper extremity. Dr. Machanic noted Claimant had continuing loss of range of motion and inconstant crepitance on range of motion. Dr. Machanic placed Claimant at MMI as of March 22, 2016. Dr. Machanic noted Claimant had exhausted conservative options and that surgical measures were not considered an option at that time. Dr. Machanic assigned a 16% permanent impairment rating, consistent with a 10% whole person impairment rating.

20. On December 2, 2016, Respondents filed an Amended FAL admitting for a 16% scheduled impairment rating.

21. Claimant testified at hearing. Claimant testified that he did not have surgery on his shoulder. Claimant testified he worked full-duty for basically the entire claim, with no changes in his job duties. Claimant testified that he has complete use of his left arm, but is impeded by his left shoulder. Claimant explained that he uses his left arm, knees and core to lift certain items. Claimant testified that his left shoulder aches and, at times, he experiences a stabbing sensation in the top and front of the left shoulder. Claimant testified he cannot use his left shoulder when lifting objects above his head. Claimant testified he now sleeps for shorter periods of time, and wakes up daily with an aching, and sometimes stabbing, sensation in his left shoulder.

22. Claimant completed a pain diagram at hearing. Claimant indicated on the pain diagram that he experiences pain and aching, as well as a burning sensation and pins and needles sensation in the front, top and back of his left shoulder.

23. At hearing, Claimant demonstrated how his movement is limited when using his left shoulder to reach behind his back and across his body. Claimant testified that when he reaches across his midriff he experiences pain and tightness in his back and over the top of his left shoulder. Claimant testified he is unable to reach behind his back using the left shoulder. Claimant testified he did not experience issues with his left shoulder or left arm prior to the work injury.

24. Claimant's testimony is found credible and persuasive.

25. Dr. Swarsen testified at hearing on behalf of Claimant. Dr. Swarsen testified as an expert in occupational medicine. Dr. Swarsen did not physically examine Claimant or issue a report regarding his review of Claimant's records. Dr. Swarsen testified that the components of the rotator cuff are part of the shoulder and that the humeral head is part of the humerus, which is below the shoulder joint. Dr. Swarsen explained that the glenohumeral joint is the "demarcating line" of the shoulder and the arm. Dr. Swarsen described the subacromial space as a buffer below the acromion of the scapula, above the glenohumeral joint in front of the scapula. Dr. Swarsen testified that the majority of subacromial space is above the shoulder joint and is a part of the shoulder girdle. Dr. Swarsen agreed with Dr. Bazaz that, from a surgical perspective, Claimant did not have any significant rotator cuff pathology and that, more likely than not, the primary source of Claimant's ongoing symptoms is Claimant's osteoarthritis. Dr. Swarsen testified that Claimant has some osteoarthritis on the humeral head, but explained that the osteoarthritis is on both the glenoid side and the humeral side in Claimant's shoulder. Dr. Swarsen testified that the structures impacted by Claimant's work injury are all a part of Claimant's left shoulder girdle, and that the "major portion of all the pathology and injury is above the arm." Dr. Swarsen opined, within a reasonable degree of medical probability, that the site of Claimant's functional impairment is above the shoulder. Dr. Swarsen testified that the areas Claimant identified in the pain diagram completed at hearing are above the glenohumeral joint, including pain in the scapular region. Dr. Swarsen testified that the functional limitations Claimant described are consistent with the type of injury Claimant sustained. Dr. Swarsen further testified that Dr. Machanic's follow-up DIME was consistent with the American Medical Association's Guides to the Evaluation of Permanent Impairment, Third Edition (*Revised*) ("AMA Guides"). Dr. Swarsen opined that it is appropriate to convert Claimant's scheduled impairment rating to a whole person impairment rating because the affected structures are located above the glenohumeral joint.

26. Dr. Swarsen's testimony is found credible and persuasive.

27. As a result of the June 13, 2013 work injury, Claimant sustained functional impairment to his left shoulder that extends beyond his left arm.

28. Claimant has proven by a preponderance of the evidence that he is entitled to conversion of his 16% scheduled left shoulder impairment rating to a 10% whole person impairment rating.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant

shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. V. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Conversion of Medical Impairment Rating

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule, Section 8-42-107(1)(b), C.R.S. provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the

functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Under the "situs of the functional impairment" test there is no requirement that the functional impairment take any particular form. Therefore, pain and discomfort that limit the claimant's ability to use a portion of the body may constitute functional impairment. *Agliaze v. Colorado Cab Co.,* W.C. 4-705-940 (ICAO April 29, 2009); *Johnson-Wood v. City of Colorado Springs,* W.C. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. 4-452-408 (ICAO October 9, 2002).

Section 8-42-107(2)(a), C.R.S. provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits awarded under Section 8-42-107(8)(c), C.R.S. Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs, supra.*

"Functional impairment" is distinct from physical (medical) impairment under the AMA Guides and as noted, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or disabled. *Strauch, supra.* Physical impairment relates to an individual's health status as assessed by medical means. On the other hand, disability or functional impairment pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 658 (Colo. App. 1998). Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc., supra.* Symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with a claimant's ability to use a portion of his body to be considered a functional impairment. *See Mader v. Popejoy Construction Co., Inc.,* W.C. No. 4-198-489 (August 9, 1996). Thus, in order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether Claimant has pain, but whether the injury and the associated pain caused thereby has impacted part of Claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996); *Bernal v. CMHIP*, W.C. No. 4-956-645 (October 5, 2015).

As found, Claimant has established by a preponderance of the evidence that his scheduled 16% left upper extremity impairment rating should be converted to a 10% whole person rating. Claimant demonstrated he suffers functional impairment beyond the left arm at the shoulder as a result of the June 13, 2013 work injury. Claimant

credibly testified as to limitations in his range of motion, an inability to lift items overhead, and pain in the front, top and back of his shoulder, including pain due to sleeping. Dr. Swarsen credibly and persuasively opined that the situs of functional impairment is above the shoulder. Accordingly, Claimant is entitled to a 10% whole person impairment rating for his June 13, 2013 work injury.

ORDER

It is therefore ordered that:

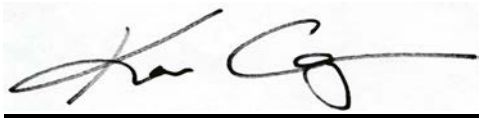
1. Claimant has established by a preponderance of the evidence that he is entitled to entitled to conversion of his 16% scheduled upper extremity impairment rating to a 10% whole person impairment rating. Respondents shall pay Claimant permanent partial disability benefits based upon a whole person conversion of the upper extremity rating. Respondents shall be given credit for permanent partial disability benefits previously paid.

2. The Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 16, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issue presented involves Claimant's entitlement to additional medical benefits. The specific question is:

I. Whether Claimant's request for authorization of a trial of DRG spinal cord stimulation is reasonable and necessary medical treatment to cure and relieve Claimant from the effects of her April 18, 2012 work injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On April 18, 2012, Claimant injured her left ankle in the course and scope of her employment. Liability for the injury was admitted and Claimant undertook what would become a protracted course of treatment involving multiple modalities and providers. Ultimately doctors diagnosed Complex Regional Pain Syndrome (CRPS) involving the left leg raising the issue of whether Claimant would benefit from spinal cord stimulation.

2. On April 24, 2013, Dr. Cathy McCranie recommended that Claimant avoid spinal cord stimulation "if at all possible."

3. Given persistent and intractable leg pain, a request for a trial of spinal cord stimulation was made and on August 1, 2013, Dr. Christopher Malinky performed a percutaneous spinal cord stimulation trial.

4. The trial caused increased pain and by the sixth day, Claimant requested termination of further stimulation. On September 12, 2013, Dr. Matthew Young noted Claimant would not proceed with placement of a permanent spinal stimulator; therefore, he felt that "other options for her complex regional pain syndrome" should be explored.

5. On November 15, 2013, Dr. Robert Kleinman performed a psychiatric evaluation. He noted Claimant had a history of situational depression following events in 2004, 2007, 2008, and 2010. MMPI 2 test results indicated that Claimant had a pattern of misrepresenting herself and that physical complaints might be manifestations of somatization. Dr. Kleinman noted Claimant presented with mild depression and anxiety. Dr. Kleinman diagnosed adjustment disorder with depressed mood, R/O major depression, recurrent, mild, R/O pain disorder associated with psychological factors and a medical condition. Dr. Kleinman did <u>not</u> consider Claimant a good candidate for a spinal cord stimulator. (Exhibit G) (emphasis added)

6. On June 24, 2015, Dr. Mark Meyer reported that Claimant had reached maximum medical improvement (MMI).

7. On August 10, 2015, Dr. Lawrence Lesnak performed a computerized outcome assessment, the goal of which was to identify "potential psychological factors that may be influencing [Claimant's] symptoms and recovery from her previous occupational injury." Multiple subtests were completed that when read together placed Claimant in the "distressed depressive" category for psychosocial functioning and suggested significant psychosocial factors that included an extremely disabled viewpoint of her ability to perform any type of functional activities; results that were inconsistent with her clinical exam.

8. On September 9, 2015, Dr. Young conceded he was not an expert in complex regional pain syndrome and would welcome the "expertise" of Dr. Mark Meyer regarding treatment recommendations.

9. On October 22, 2015, Dr. Timothy Hall, Claimant's independent medical examiner, concluded Claimant had reached maximum medical improvement. Dr. Hall recommended maintenance treatment that included medications, physiatry consultation, warm pool therapy, and counseling. He did not recommend further spinal cord stimulation.

10. Dr. Frank Polanco performed a Division IME on December 17, concluding that Claimant was not at MMI. Dr. Polanco recommended Claimant discontinue Ambien, wean/taper from Methadone, attend 2-3 visits with a physical therapist to develop a home/gym exercise program, join a gym for 3 months, participate in yoga for 3 months, and participate in psychological counseling to address current ideation and weaning from counseling. Dr. Polanco did not include a recommendation for spinal cord stimulation or placement of a spinal cord stimulator.

11. Claimant returned to Dr. Meyer for the treatment recommended by Dr. Polanco. Claimant participated in physical therapy but declined additional psychological counseling. On February 10, 2016, Dr. Meyer noted Claimant "stopped seeing her therapist last month because of a conflict." On March 29, 2016, Dr. Young reported: "Regarding counseling, she has been through counseling for over 3 years now and has had minimal efficacy with that. At this point neither she, nor myself, believe counseling is going to be substantially beneficial for her depression."

12. Dr. Young referred Claimant back to Dr. Christopher Malinky for a follow-up examination and treatment consultation. Dr. Malinky evaluated Claimant on July 21, 2016. Following his examination, Dr. Malinky prepared a report documenting a history of chronic anxiety and depression, noting further that Claimant had mental health treatment with a "completely resolved" response. Dr. Malinky also documented that previous treatment included nerve stimulation therapy which made Claimant "worse." He noted Claimant appeared in no apparent acute or chronic distress. Finally he noted

that physical therapy was not helpful in the past, and that Claimant had been on narcotics chronically and was hospitalized due to over sedation last fall. Dr. Malinky referred Claimant to Amy Alsum, MSW, LCSW for a psychological examination to determine if Claimant is an appropriate candidate for dorsal root ganglion (DRG) spinal cord stimulation.

13. On August 11, 2016, Ms. Alsum, LCSW performed an evaluation regarding the patient's candidacy for the additional spinal cord stimulation trial. Ms. Alsum noted that Claimant went through severe anxiety and depression for two years following her accident and that Claimant treated with Dr. McCormick who diagnosed PTSD. Claimant reported she has a better perspective and has learned to cope with her pain on a day-to-day basis. "A few months ago, she and Dr. McCormick mutually decided that she had completed her work in counseling." According to Ms. Alsum, Claimant previously participated in a spinal cord stimulator trial in 2013, with a Boston Scientific spinal cord stimulator. Ms. Alsum documented that the "trial was unsuccessful because [Claimant] continued to feel more pain as the days went. By the 6th day she asked to remove it." Claimant reportedly felt more mentally prepared for stimulation as she understood "much more about living with chronic pain." She also expressed an understanding that the DRG hardware was "specifically made for people with CRPS." According to Ms. Alsum's note, Claimant had done additional research noting that studies had documented patients may experience up to a 50% reduction in pain but she felt the procedure would be worth it if she enjoyed a 30% reduction. Claimant identified her goals for undergoing spinal cord stimulation as: 1). Decreasing her pain levels. 2). Decreasing her dependence on narcotic medication. 3). Returning to work in some capacity.

14. Ms. Alsum administered the Beck depression inventory and scored Claimant in the mild range of depression. Ms. Alsum also administered the Beck anxiety inventory and scored Claimant in the mild range of anxiety. Ms. Alsum administered the PHQ SADS and scored Claimant in the mild range for somatic symptom severity. Based upon her examination/testing, Ms. Alsum concluded that Claimant was a good candidate for the DRG spinal cord stimulator trial. In her opinion, Claimant had an excellent understanding of the procedure and full confidence in her medical providers. Moreover, she felt that Claimant had realistic expectations for the outcome of the spinal cord stimulator.

15. On August 19, 2016, Respondents denied authorization of the spinal cord stimulator and filed an Application for Hearing on the issue of reasonable, necessary, and related medical care.

16. On October 6, 2016, Dr. Malinky noted a DRG spinal cord stimulator trial is the next treatment for Claimant's condition which was chronic and would not improve without another intervention.

17. On January 19, 2017, physical therapy notes indicated Claimant showed

progress with decreased stiffness and motion, decreased pain, and improved strength and endurance.

18. On September 6, 2016, Suzanne Kenneally, Psy.D. performed an independent psychological assessment, administered tests, and prepared a report. Dr. Kenneally did not consider Claimant a good surgical candidate. Dr. Kenneally based her opinion on her review of multiple prior psychological and psychiatric evaluations and test results that indicated longstanding depression. Claimant's MMPI indicated the presence of depression and somatization and a clear indication of the translation of psychological distress into physical symptomatology. There was good consistency between the MMPI and Claimant's MBMD profile. Claimant's pain sensitivity scale on the MBMD was extremely elevated to a degree indicative of catastrophizing physical symptomatology and pain. The MBMD profile indicated Claimant was unlikely to maintain functional gains following the surgery. These objective psychological test results were consistent with Claimant's prior testing and predictive of failure of the spinal cord stimulation trial previously.

19. In her report, Dr. Kenneally pointed out that on November 14, 2013, Dr. Kleinman administered MMPI-2 testing that indicated elevations in the somatoform scale and depression scale in a pattern that indicated translation of psychological distress into physical symptoms. Dr. Kleinman concluded Claimant was not a good candidate for a spinal cord stimulator. As found above, Claimant proceeded with a trial of stimulation and it failed to reduce the symptoms associated with her CRPS. Rather, it increased Claimant's pain resulting in her request to terminate the trial.

20. Dr. Kenneally also pointed out that Dr. Kaplan administered the MBMD and concluded that Claimant presented with a Pain Disorder with Psychological Factors. The test data indicated significant elevations in the MBMD scales of pain sensitivity, pessimism, marked catastrophizing, and poor adjustment to pain treatment. Despite that, Dr. Kaplan cleared Claimant for spinal cord stimulator surgery that ultimately failed. Dr. McCormick treated Claimant and referenced ongoing depression. Current psychological testing indicated the presence of persistent depressive disorder; although results reflected a modest decline.

21. Dr. Kenneally noted that Ms. Alsum did not perform objective psychological testing and did not discuss Claimant's long-standing depression or somatic symptom disorder, yet concluded that she was a good candidate for spinal cord stimulator surgery. Given the level of elevation seen on testing, Dr. Kenneally recommended a psychiatric medication evaluation because current medications did not appear to be ineffective. Subset testing (Millon Behavioral Medicine Diagnostic) indicated that, at best, Claimant was a fair surgical candidate; however, there were indications that she would have difficulty with compliance and motivation and be unlikely to maintain any functional gains post-surgery. This is the same conclusion arrived at previously by Dr. Kleinman following his evaluation of Claimant in November 2013, after which, Claimant proceeded with the spinal cord stimulator (SCS) trial, which failed. In light of Claimant's previously failed SCS and the consistency between Claimant's prior

testing results and those obtained during her September 6, 2016, independent psychological examination, Dr. Kenneally opined that Claimant would not be a good surgical candidate until her depressive and somatic physiological difficulties resolved.

22. Claimant testified at hearing. Her symptoms reportedly vary from day to day. She admitted she performs activities of daily living; some with difficulty or with modification, but she is able to do them. Claimant testified she does not have trouble coping with chronic pain. She stated that pool therapy alleviates her symptoms, helps her symptoms go away on a temporary basis, and helps strengthen muscle. She testified that she is getting stronger. She agreed with the January 19, 2017, physical therapy note that she had progressed and had decreased stiffness, increased motion, decreased pain, and improved endurance. Claimant testified that she changed medications and has since stopped falling. She testified that her weight has improved, her depression has improved, and her mood is better. According to Claimant, she wants spinal stimulation because she wants her life back, she wants to work again, and she wants to be pain free. Claimant testified that she previously participated in a spinal cord stimulator trial in 2013 but that trial was unsuccessful because she continued to feel more pain as the days went on and by the 6th day she asked the doctor to remove the stimulator. Claimant testified that she feels more mentally prepared for the stimulator now.

23. Dr. Christopher Malinky testified by deposition. Dr. Malinky performed a spinal cord stimulator trial in 2013. Even though Dr. Malinky reported in July 2016, that the previous nerve stimulation therapy resulted in a worse response, he testified that he did not proceed with a permanent implant in 2013, because workers' compensation denied the implant. This is inconsistent with the record evidence and Claimant's testimony that stimulation was increasing her pain and that she did not want to proceed with implantation of a permanent stimulator. Nonetheless, Dr. Malinky testified that he recommended another spinal cord stimulator trial and this time wants to use a DRG stimulator. Dr. Malinky considered Claimant a good candidate for the DRG procedure because she has CRPS of the lower extremity and because she has more friends and family to support her this time. Dr. Malinky admitted that he did not ask Claimant to prepare a pain diagram since 2013; he did not have an indication of the duration or circumstances during which the pain occurred, worsened, or got better; he did not know which activities aggravated or exacerbated or ameliorated or had no effect on her pain levels; he only reviewed medical records from Ms. Alsum and from Dr. Kaplan, and he did not perform a chronologic review of the medical records of other providers; he did not know the extent of medical treatment to date including how much physical therapy, medication, or other treatment Claimant received; he was not aware of her history of current medications; he was not aware of her psychosocial functioning including symptoms of depression or anxiety; finally, he was not aware of her ability to perform activities of daily living or of her overall functional abilities. Dr. Malinky testified that he discussed treatment expectations with Claimant and that most people fall between 50 and 70 percent pain relief. Dr. Malinky acknowledged that the patient should be sent for a standard psychological evaluation by a licensed psychologist or a social worker before a spinal cord stimulator trial occurs. In this case, he referred Claimant to Ms. Alsum, a

social worker. He did not know if specific psychometric testing was recommended or if it was performed. Dr. Malinky testified that the spinal cord stimulator was reasonable and necessary, but he admitted his response was based on a lack of information regarding psychological evaluations.

24. The evidence presented persuades the ALJ that Dr. Malinky based his opinions regarding additional spinal stimulation on an incomplete understanding of Claimant's current medical condition. Consequently, the ALJ finds his opinions regarding the reasonableness and necessity of additional spinal cord stimulation unconvincing.

25. Dr. Suzanne Kenneally, Psy.D. testified at hearing. Dr. Kenneally is an expert in clinical psychology and neuro psychology. Dr. Kenneally reiterated her written opinion that Claimant is not a good candidate for a spinal cord stimulator. Dr. Kenneally based her opinion on multiple factors. According to Dr. Kenneally, the majority of spinal cord stimulator candidates report intolerable pain levels of 8 -10 on a scale of 10 but, in this case, Claimant reported pain levels of 3-6. Moreover, Dr. Kenneally testified that the majority of spinal cord stimulator candidates use extensive medications including narcotics, but in this case, Claimant reduced her medications. Also, Claimant confirmed she continues to improve without the stimulator, and that she is in less pain and presents with more function. Dr. Kenneally testified that the best predictor of future behavior is past behavior, and in this case, it is important to note that the 2013 spinal cord stimulator trial failed because Claimant reported increased pain. Dr. Kenneally pointed out that Claimant testified she thought the 2013 stimulator failed due to lack of social support, but improved social support is not an appropriate psychological reason to proceed with the spinal cord stimulator. Dr. Kenneally referred to test results that identified a clear indication of translation of psychological distress into physical symptomatology and longstanding depression.

26. Dr. Kenneally pointed out that Dr. Malinky relied on a report from Amy Alsum LCSW, but Ms. Alsum is a Social Worker and is not properly credentialed or trained to perform a psychological exam to determine if Claimant is an appropriate candidate for DRG stimulation trial. Dr. Kenneally referenced the Colorado Medical Treatment Guidelines that a psychologist with a PhD, PsyD, EdD credentials, or a physician with Psychiatric MD/DO credentials perform the initial comprehensive evaluation and that Psychometric tests should be administered by psychologists with a PhD, PsyD, or EdD, or health professional working under the supervision of a doctorate level psychologist. Dr. Kenneally pointed out that Ms. Alsum is a Licensed Clinical Social Worker and used a simple screening test, The Beck Depression Inventory® (BDI) that is designed to indicate if further in depth testing is appropriate as the basis for determining whether Claimant was an appropriate candidate for SCS. According to Dr. Kenneally, the BDI is not an appropriate test for determining whether Claimant is a candidate for spinal cord stimulation. In addition, the Beck depression inventory scored Claimant in the mild range of depression, and the Beck anxiety inventory scored Claimant in the mild range of anxiety. Nevertheless, Ms. Alsum concluded that Claimant is a good candidate for the spinal cord stimulator trial.

27. Based upon the evidence presented, the ALJ finds Dr. Kenneally properly credentialed to perform the necessary evaluation to determine Claimant's candidacy for SCS. The record evidence also supports that she performed the appropriate comprehensive evaluation and the test results did not support proceeding with the spinal cord stimulator. Dr. Kenneally testified that the test results indicated the presence of depression and somatization, and the sensitivity scale was extremely elevated and was indicative of catastrophizing of physical symptomatology and pain. Dr. Kenneally testified that only one element of one test indicated that, at best, Claimant was a fair surgical candidate; however, the other elements of her testing indicated that Claimant remained a poor candidate due to concerns about compliance and motivation and the ability to maintain any functional gains post-surgery. Dr. Kenneally pointed out that her conclusions were the same conclusions arrived at by Dr. Kleinman following his evaluation of Claimant in November 2013, at which time Claimant proceeded with the spinal cord stimulator trial that failed. Finally, Dr. Kenneally did not consider Claimant's expectations realistic because she testified at hearing that she wants her life back and wants to be pain free.

28. Conversely, the evidence presented persuades the ALJ that Ms. Alsum is not credentialed to perform the comprehensive evaluation contemplated by the Medical Treatment Guidelines.

29. The ALJ finds the opinions of Dr. Kenneally more persuasive than the contrary opinions of Ms. Alsum.

30. Claimant failed to meet her burden and prove that an additional trial of spinal cord stimulation is reasonable or necessary as contemplated by the Medical Treatment Guidelines.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought, including medical treatment *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact,

after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

C. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968). In this case, the evidence presented persuades the ALJ that Dr. Malinky's opinions are based upon an incomplete understanding of Claimant's current medical situation and the limited knowledge imparted to him by a clinician who is not properly credentialed to determine whether Claimant current presents as a viable candidate for spinal cord stimulation. Moreover, he testified that he did not consider the first stimulator trial a failure despite the fact that Claimant asked him to remove the device due to increasing pain. Accordingly, the ALJ places little weight in his opinions.

D. In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000)

E. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

F. The Medical Treatment Guidelines (Guidelines) are regarded as the

accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). The Guidelines have been accepted in the assessment and treatment of complex regional pain syndrome. The Medical Treatment Guidelines (MTGs) for Complex Regional Pain Syndrome are found in WCRP 17, Exhibit 7. Pertinent portions include:

F. DIAGNOSTIC CRITERIA AND PROCEDURES

11. PERSONALITY/PSYCHOLOGICAL/PSYCHOSOCIAL EVALUATION FOR PAIN MANAGEMENT

. . . Psychometric testing is a valuable component of a consultation to assist the physician in making a more effective treatment plan. There is good evidence (that such testing) can have significant ability to predict medical treatment outcome. Pre-procedure psychiatric/psychological evaluation must be done prior to diagnostic confirmatory testing for a spinal cord stimulation procedure. In many instances, psychological testing has validity comparable to that of commonly used medical tests. All patients who are diagnosed as having CRPS should be referred for a psychosocial evaluation, as well as concomitant interdisciplinary rehabilitation treatment. Even in cases where no diagnosable mental condition is present, these evaluations can identify social, cultural, coping and other variables that may be influencing the patient's recovery process and may be amenable to various treatments including behavioral therapy. As pain is understood to be a biopsychosocial phenomenon, these evaluations should be regarded as an integral part of the assessment of CRPS.

i. Qualifications: a) A psychologist with a PhD, PsyD, EdD credentials, or a physician with Psychiatric MD/DO credentials may perform the initial comprehensive evaluations. It is preferable that these professionals have experience in diagnosing and treating CRPS in injured workers. b) Psychometric tests should be administered by psychologists with a PhD, PsyD, or EdD, or health professionals working under the supervision of a doctorate level psychologist. (emphasis added)

ii. Clinical Evaluation: All CRPS patients should have a clinical evaluation that addresses the following areas: history of Injury; nature of injury; psychosocial circumstances of the injury; current symptomatic complaints; extent of medical corroboration; treatment received and results; compliance with treatment; coping strategies used, including perceived

locus of control, catastrophizing, and risk aversion; perception of medical system and employer; history of response to prescription medications; nature of injury; medical history; psychiatric history; history of alcohol or substance abuse; activities of daily living; previous injuries, including disability, impairment, and compensation; childhood history, including abuse/neglect; educational history; family history, including disability; marital history and other significant adulthood activities and events; legal history, including criminal and civil litigation; employment history; military duty; signs of pre-injury psychological dysfunction; current and past interpersonal relations, support, living situation; financial history; mental status exam including cognition, affect, mood, orientation, thinking, and perception; assessment of any danger posed to self or others; psychological test results, if performed; current psychiatric diagnosis consistent with the standards of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders; pre-existing psychiatric conditions; causality (to address medically probable cause and effect, distinguishing pre-existing psychological symptoms, traits and vulnerabilities from current symptoms).

Tests of Psychological Functioning: Psychometric testing is a valuable component of a consultation to assist the physician in making a more effective treatment plan. Psychometric testing is useful in the assessment of mental conditions, pain conditions, cognitive functioning, treatment planning, vocational planning, and evaluation of treatment effectiveness. While there is no general agreement as to which psychometric tests should be specifically recommended for psychological evaluations of CRPS conditions, standardized tests are preferred over those which are not for assessing diagnosis. Examples of frequently used psychometric tests performed include, but not limited to the following:

i. Comprehensive Inventories for Medical Patients: b) Millon TM Behavioral Medical Diagnostic (MBMD TM):

ii. Comprehensive Psychological Inventories: b) Minnesota Multiphasic Personality Inventory®, 2nd Edition (MMPI-2®). c) Minnesota Multiphasic Personality Inventory®, 2nd Edition Revised Form (MMPI-2®).

v. Brief Specialized Psychiatric Screening Measures: a) Beck Depression Inventory® (BDI). What it measures - Depression. Benefits - Can identify patients needing referral for further assessment and treatment for depression and anxiety, as well as identify patients prone to somatization. Repeated administrations can track progress in treatment for depression, anxiety, and somatic preoccupation. Requires a professional evaluation to verify diagnosis.

H. THERAPEUTIC PROCEDURES – OPERATIVE: When considering operative intervention in CRPS management, the treating physician must carefully consider

the inherent risk and benefit of the procedure. All operative intervention should be based on a positive correlation with clinical findings, the clinical course, and diagnostic tests. A comprehensive assessment of these factors should have led to a specific diagnosis with positive identification of the pathologic condition. Operative treatment is indicated when the natural history of surgically treated lesions is better than the natural history for non-operatively treated lesions. Surgical procedures are seldom meant to be curative and would be employed in conjunction with other treatment modalities for maximum functional benefit. Functional benefit should be objectively measured and includes the following: a. Return-to-work or maintaining work status. b. Fewer restrictions at work or performing activities of daily living. c. Decrease in usage of medications prescribed for the work-related injury. d. Measurable functional gains, such as increased range of motion or a documented increase in strength.

1. NEUROSTIMULATION

a. Description: Spinal cord stimulation (SCS) is the delivery of low-voltage electrical stimulation to the spinal cord or peripheral nerves to inhibit or block the sensation of pain. The system uses implanted electrical leads and a battery powered implanted pulse generator. Some evidence shows that SCS is superior to re-operation and conventional medical management for severely disabled patients who have failed conventional treatment and have Complex Regional Pain Complex Regional Pain Syndrome 97 Syndrome (CRPS I). These findings may persist at three years of follow-up in patients who had an excellent initial response and who are highly motivated. It is particularly important that patients meet all of the indications before a permanent neurostimulator is placed because some literature has shown that workers' compensation patients are less likely to gain significant relief than other patients.

While there is no evidence demonstrating effectiveness for use of SCS with for CRPS II, it is generally accepted that SCS can be used for patients who have this condition. SCS may be most effective in patients with CRPS I or II who have not achieved relief with oral medications, rehabilitation therapy, or therapeutic nerve blocks, and in whom the pain has persisted for longer than 6 months.

c. Surgical Indications: Patients with established CRPS I or II with persistent functionally limiting pain who have failed conservative therapy including active and/or passive therapy, pre-stimulator trial psychiatric evaluation and treatment, medication management, and therapeutic injections. Prior authorization is required. Habituation to opioid analgesics in the absence of a history of addictive behavior does not preclude the use of SCS. Patients with severe psychiatric disorders, and issues of secondary gain are not candidates for the procedure. Approximately, one third to one half of patients who qualify for SCS can expect a substantial reduction in pain relief; however, it may not influence allodynia, and hypesthesia. Patients'

expectations need to be realistic, and therefore, patients should understand that the SCS intervention is not a cure for their pain but rather a masking of their symptomatology which might regress over time. There appears to be a likely benefit of up to 3 years. Patients must meet the following criteria in order to be considered for neurostimulation:

i. Confirmed CRPS I or II who have significant functional limitations from neuropathic pain involving the hand or foot after greater than 6 months of conventional management

ii. A comprehensive psychiatric or psychological evaluation prior to the stimulator trial has been performed. This evaluation should include a standardized detailed personality inventory with validity scales (such as MMPI-2, MMPI-2-RF, or PAI); pain inventory with validity measures (for example, BHI 2, MBMD); clinical interview and complete review of the medical records. (emphasis added) Before proceeding to a spinal stimulator trial the evaluation should find the following:

- No indication of falsifying information, or of invalid response on testing; and

- No primary psychiatric risk factors or "red flags" (e.g. psychosis, active suicidality, or addiction), severe depression. (Note that tolerance and dependence to opioid analgesics are not addictive behaviors and do not preclude implantation); and

- A level of secondary risk factors or "yellow flags" (e.g. moderate depression, job dissatisfaction, dysfunctional pain cognitions) judged to be below the threshold for compromising the patient's ability to benefit from neurostimulation; and

- The patient is cognitively capable of understanding and operating the neurostimulation control device; and

- The patient is cognitively capable of understanding and appreciating the risks and benefits of the procedure; and

- The patient has demonstrated a history of motivation in and adherence to prescribed treatments.

The psychologist or psychiatrist performing these evaluations should not be an employee of the physician performing the implantation. This evaluation must be completed, with favorable findings, before the trial is scheduled. (emphasis added)

ii. All reasonable surgical and non-surgical treatment has been exhausted;

G. As provided for under § 8-43-201(3), the ALJ has "[considered] the medical treatment guidelines adopted under § 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease." In keeping with the MTGs, the ALJ concludes that Dr. Malinky's recommendation/request for additional spinal cord stimulation is premature and currently outside the MTG's, which the ALJ finds no reason to deviate from based on the evidence presented in this case. As noted, the Colorado Medical Treatment Guidelines ("MTG") set forth very specific and extensive guidelines regarding the evaluation of CRPS patients and the use of spinal cord stimulators. Based upon the evidence presented, the ALJ is persuaded that Dr. Malinky failed to comply with the MTG's.

H. The MTG's note that all CRPS patients should undergo a clinical evaluation that addresses many areas. Dr. Malinky was not aware of many of the items he should have, but did not, address. Dr. Malinky admitted that he did not ask Claimant to prepare a pain diagram since 2013; he did not have an indication of the duration or circumstances during which the pain occurred, worsened, or got better; he did not know which activities aggravated or exacerbated or ameliorated or had no effect on her pain levels; he only reviewed medical records from Ms. Alsum and from Dr. Kaplan and he did not perform a chronologic review of the medical records of other providers; he did not know the extent of medical treatment to date including how much physical therapy, medication, or other treatment Claimant received; he was not aware of her history of current medications; he was not aware of her psychosocial functioning including symptoms of depression or anxiety; he was not aware of her ability to perform activities of daily living or of her overall functional abilities. He did not know if specific psychometric testing was recommended or if it was performed.

I. Furthermore, as the MTG's provide, prior to a spinal cord stimulator trial, a comprehensive psychiatric or psychological evaluation by a qualified psychologist with a PhD, PsyD, EdD credentials, or a physician with Psychiatric MD/DO credentials. This evaluation must be completed, with favorable findings, before the trial is scheduled. This evaluation should include a standardized detailed personality inventory with validity scales (such as MMPI-2, MMPI-2-RF, or PAI); pain inventory with validity measures (for example, BHI 2, MBMD); clinical interview and complete review of the medical records. In this case, Dr. Malinky relied on the opinion of Ms. Alsum, whom the ALJ finds is not credentialed to complete the necessary evaluation without the supervision/direction of a doctoral level psychologist. Moreover, Dr. Malinky admittedly did not review all of the medical records. Dr. Malinky testified that the spinal cord stimulator was reasonable and necessary, but he admitted his response was based on a lack of information regarding psychological evaluations.

J. In this case, the ALJ credits the opinions of Dr. Kenneally to find/conclude

that Claimant is currently not a good candidate for the spinal cord stimulator, and Dr. Malinky's recommended surgery is not reasonable or necessary. Dr. Kenneally, Psy.D. preformed an independent psychological assessment, administered tests, and prepared a report. Dr. Kenneally, is properly credentialed and performed the appropriate comprehensive evaluation. Dr. Kenneally based her opinion on her clinical evaluation, her review of multiple prior psychological and psychiatric evaluations, on prior test results that indicated longstanding depression, and on recent test results that indicated the presence of depression and somatization; all of which Dr. Malinky failed to do. According to Dr. Kenneally, there was a good consistency between the MMPI results that indicated the presence of depression and somatization and a clear indication of the translation of psychological distress into physical symptomatology, and the MBMD results that were extremely elevated to a degree indicative of catastrophizing of physical symptomatology and pain and indicated Claimant was unlikely to maintain functional gains following the surgery. Medical records reflect a diagnosis of depression and treatment for depression, and current psychological testing indicated the presence of persistent depressive disorder; although results reflected a modest decline. Dr. Kenneally testified that the best predictor of future behavior is past behavior, and in this case, it is important to note that the 2013 spinal cord stimulator trial failed. According to Dr. Kenneally, the objective psychological test results were consistent with Claimant's failure of a spinal cord stimulator previously and there is no reason to expect a different outcome this time. Also, according to Dr. Kenneally, Claimant is not a good spinal cord stimulator candidate because: the majority of spinal cord stimulator candidates report intolerable pain levels of 8 -10 on a scale of 10, but in this case, Claimant reported pain levels of 3-6; the majority of spinal cord stimulator candidates use extensive medications including narcotics, but in this case, Claimant reduced her medications; and Claimant confirmed she continues to improve without the stimulator and she is in less pain and presents with more function. Dr. Kenneally pointed out that Claimant testified she thought the 2013 stimulator failed due to lack of social support, but improved social support is not an appropriate psychological reason to proceed with the spinal cord stimulator. Dr. Kenneally opined that Dr. Malinky should not rely on Ms. Alsum's report because Ms. Alsum, as a social worker, is not properly credentialed or trained to perform a psychological exam to determine if Claimant is an appropriate candidate for the SCS trail. Finally, Dr. Kenneally did not consider Claimant's expectations realistic because she testified at hearing that she wants her life back and wants to be pain free which is unlikely as provided for by the MTG's.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of a trial of DRG spinal cord stimulation is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St.,

4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

- Whether Claimant's need for heart surgery is casually related to her industrial injury of January 11, 2016, when she slipped and fell on ice at work and cracked a tooth.

- Whether Claimant's heart surgery was reasonable, necessary, and authorized.

- Whether Claimant's request for a change of physician from Dr. Kirk Nelson to Dr. Bennett Machanic should be granted.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. In 2008, prior to her work injury, Claimant developed meningitis and endocarditis which affected her mitral heart valve. This resulted in Claimant having her mitral heart valve replaced with a porcine heart valve in 2008. Due to having an artificial heart valve, Claimant takes antibiotics, prophylactically, before undergoing any dental treatment. This is to prevent Claimant from getting an infection which might lodge in her porcine heart valve.

2. Prior to her work related accident of January 11, 2016, Claimant experienced recurrent heart problems.

3. On March 6, 2015, Claimant presented to Dr. Timothy Colander with complaints of chest pain that began two days ago. Due to Claimant's medical history and current complaints, Dr. Colander referred Claimant to the emergency room.

4. On March 8, 2015, Claimant was evaluated by Dr. Ira Cohen. Dr. Cohen noted that Claimant had a porcine heart valve with a normal life expectancy of 10-15 years. He stated that the valve was at about 70-80% of its expected life. He specifically noted that the life expectancy of the valve tends to be shorter in younger patients, like Claimant, "especially when in the mitral valve position," as was Claimant's. Claimant underwent an echocardiogram which was abnormal. Based on his evaluation of Claimant, he recommended at least yearly echocardiograms to monitor her condition.

5. On March 26, 2015, Claimant presented to Dr. Matthew Lewis with continuing complaints of chest pain which began three weeks ago. Dr. Lewis' report indicated that the prior workup included an echocardiogram which was abnormal and showed mitral regurgitation and aortic stenosis. Dr. Lewis' indicated that he would fill out disability paperwork forms to allow Claimant to be out of work for

the following month to allow Claimant to be evaluated by various specialists and to recover from her chest pain. Therefore, as of March 26, 2015, Claimant's heart valve was not operating normally and was showing signs of wear and tear.

6. On April, 16, 2015, Claimant returned to Dr. Lewis. His assessment was that Claimant was recovering from her chest pain, but that she should have annual echocardiograms to check the status of her heart.

7. On January 11, 2016, Claimant was injured at work when she slipped on some ice and fell and hit her head. According to the medical records, Claimant landed face down. After the fall, she apparently got up, was dazed and confused and was found wandering around the parking lot by a co-worker. She was taken to the emergency room. Her initial complaints were facial and right shoulder pain. She denied loss of consciousness. It was noted that she had an abrasion on the right side of her face. A CT scan was performed on her face/head. It did not show any fractures. Claimant was ultimately released from the emergency room the same day.

8. Respondents admitted liability for Claimant's slip and fall.

9. On January 13, 2016, Claimant was seen at Concentra. The assessment at that time was: a.) Fall from slipping on ice, b.) Neck pain, c.) Parasthesia of the right arm, d.) Right shoulder injury, e.) Right elbow pain, f) Pain in right hand, g) Photosensitivity, h) Dizziness, and, i) Postconcussion syndrome.

10. On January 22, 2016, Claimant was reevaluated at Concentra. The assessment remained basically the same.

11. On January 30, 2016, Claimant went to Jamie Marquez, D.D.S. to have a tooth evaluated because a filling came out. The notes from the visit indicated Claimant's filling came out about a week ago. The notes indicated Claimant did not have any pain but her tooth was sensitive. Dr. Marquez noted a fractured tooth and recommended a crown. The notes specifically state Claimant took antibiotics (clindamycin) prior to the appointment. Dr. Marquez did not note any type of abscess or infection.

12. Claimant and Respondents agree that the tooth fracture is due to the fall.

13. On February 12, 2016, Claimant returned to Dr. Marquez. The notes from this appointment indicate Claimant took antibiotics prior to the appointment. The notes also indicate the tooth was prepped for a crown and Claimant was provided a temporary crown. Dr. Marquez did not note any abscess or infection of the tooth.

14. On February 26, 2016, Claimant returned to Concentra. At this time her complaints included neck pain, back pain, and headaches. She complained of having difficulty sleeping at night. She also complained of both arms going numb

when she lies down. She did not, however, have any tooth pain. She also did not have any signs or symptoms of a fever or infection.

15. On or about March 11, 2016, Claimant came under the care of Dr. David Orgel of U.S. Health Works Medical Group ("U.S. Health Works"). Her chief complaints at that time were headaches, neck pain, vertigo, bilateral upper extremity numbness and some neurocognitive changes. Dr. Orgel's report indicated Claimant had two MRIs of her head. The first MRI was done on 2/10/16. This MRI showed no acute intracranial abnormalities, but there was some evidence that Claimant might have multiple sclerosis. Therefore, another MRI was ordered, with and without contrast. The second MRI was done on 2/29/16 and did not suggest multiple sclerosis, but instead suggested nonspecific white matter changes, probably the sequelae of ischemic small vessel disease. Claimant also underwent an MRI of her right shoulder which showed a bone bruise of the humeral head. There is no mention of Claimant having any type of tooth pain, abscess, or infection. The report from this visit specifically states that Claimant was afebrile and did not have a fever.

16. Dr. Orgel stated the following in his assessment:

> I think at this point, the MRI shows probably ischemic vascular disease from her history of status post valve replacement with perhaps some embolic disease resulting from that but certainly no evidence of multiple sclerosis. This may be contributing to her presentation, but otherwise with the picture of her cheek and the MRI of her shoulder, she clearly had significant trauma to her head and neck and shoulder and I agree with Dr. Hammerberg that this clearly relates to some head trauma sequelae of that, the extent of which is still being determined.

17. On March 17, 2016, Claimant was evaluated by Dr. Sander Orent of U.S. Health Works. Claimant was evaluated for numerous pain complaints. She also indicated that she broke a tooth during the fall. However, Claimant did not complain of any tooth pain. The report specifically states that Claimant did not have a fever. Dr. Orent's assessment at that time was: a) Traumatic carpal tunnel, bilateral, b) Shoulder impingement, right, c) Cervical neck aches, and d) Post-concussive syndrome with vestibular concussion and what looks like an exotropia of the right eye and significant vestibular dysfunction. Dr. Orent went on to say that "[T]his was a very significant mechanism of injury event. She did show me a picture of the abrasion on her cheekbone as well and there was indeed loss of consciousness."

18. On April 5, 2016, Claimant returned to Dr. Orent. Claimant's condition remained unchanged. Among other recommendations, Dr. Orent commented that Claimant needed to get her cracked tooth fixed.

19. On April 6, 2016, Claimant presented to North Suburban Medical Center with a cough, shortness of breath, and a "rice crispy sound in her breathing." The possible diagnosis at that time was community acquired pneumonia and sepsis in the setting of immunocompromised host status. Therefore, she was started on vancomycin. It does not appear that any blood work was performed to confirm Claimant had sepsis.

20. On April 11, 2016, Claimant underwent right and left heart catheterization. She was felt to have critical mitral stenosis.

21. On April 13, 2016, Claimant presented to the emergency department at Rose Hospital and was evaluated by Dr. Michael Schwartz. Dr. Schwartz diagnosed Claimant as suffering from acute hypoxic respiratory failure secondary to cardiogenic pulmonary edema from critical mitral stenosis. Blood cultures were negative for bacterial infection and the MRSA surveillance screen was negative.

22. On April 13, 2016, while in the hospital, Claimant was also evaluated by Dr. Jason Sperling, a heart surgeon. He discussed performing heart surgery on Claimant and replacing her porcine heart valve with a mechanical valve. He also stated that a recent CT scan showed Claimant's aorta was substantially calcified and that clamping during surgery could be challenging and that her stroke risk would be higher.

23. On April 15, 2016, Dr. Sperling performed heart surgery on Claimant. The indication for surgery was "re-do valve replacement based on the diagnosis of bioprosthetic mitral valve degeneration." Dr. Sperling also noted that Claimant's "blood cultures have been negative." The post operative diagnosis was "acute decompensated heart failure and subacute bioprosthetic mitral valve regurgitation, severe, and remote endocarditis." Dr. Sperling noted that the valve itself had a hole in one of the leaflets. It was also noted the valve had vegetation which was removed as well. During the surgery, Dr. Sperling had to cross clamp Claimant's aorta. There was no evidence the heart valve was infected.

24. On April 15, 2016, the heart valve was sent to pathology. The pathology report did not suggest any infection.

25. On April 20, 2016, Claimant underwent another surgery to have a pacemaker installed.

26. On May 24, 2016, Claimant returned to Dr. Orent. Dr. Orent stated that he believed the need for heart surgery was related to Claimant's fall and cracked tooth. Dr. Orent stated:

> In thinking about the causality here what has happened according to the Infectious Disease Specialist is that when Loree fell and broke her upper teeth, she introduced bacteria into the blood stream that then adhered to the porcine valve and created vegetations that created heart failure and the

> necessity for surgical replacement of heart valve. She also had to have a pacemaker put in place. I do think that this is directly causal. The reason is of course being the fact than when she fell someone with a valve replacement, who introduces bacteria into the blood stream, will in fact develop either SBE or ABE and that is what has happened here.

27. This ALJ does not credit Dr. Orent's opinion regarding causation. This ALJ credits the opinion of Dr. Olsovsky, which is set forth later in this opinion, over Dr. Orent's.

28. On May 26, 2016, Claimant was evaluated by Dr. Kristin Thanavaro of Colorado Heart and Vascular. Her assessment and impression was "Endocarditis of mitral valve" with "culture negative endocarditis of previous valve replacement."

29. On June 28, 2016, Claimant returned to Dr. Orent. At that time, her complaints remained unchanged. Dr. Orent went on to state that there was still much that had to be done and addressed. That included the pain she is having in her neck, the lightheadedness and dizziness, the inability to read and the diplopia, the chronic fatigue, the migraine headaches, post traumatic, and the cardiac events.

30. Dr. Orent retired from U.S. Health Works. Thereafter, Claimant's care was transferred to Dr. Nelson of U.S. Health Works.

31. On August 15, 2016, Dr. Sanidas performed an IME on behalf of the Respondents. At this time, Dr. Sanidas was also employed by U.S. Health Works. Dr. Sanidas evaluated a number of issues, including the relatedness of Claimant's heart surgery to her initial fall and cracked tooth. He also rendered an opinion regarding the extent of Claimant's injuries and whether she had reached MMI.

32. Dr. Sanidas reviewed Dr. Orent's statement regarding causation. Dr. Sanidas determined the cracked tooth was not the cause of Claimant's need for heart surgery. He determined the valve merely wore out. Dr. Sanidas stated:

> I have reviewed the issues surrounding the valve replacement surgery and have read the operative report. There is no mention that the vegetations on the valve were causing infection. Per the surgeon's operative note, preoperative and postoperative treatment, and diagnosis, it was stated that there was a hole in the porcine valve which had some vegetation around it, which is not unusual and subsequently the valve breaks down. The surgeon did not find any form of infection which caused the valve to be replaced. The main problem was that the valve was worn out – sometimes they only last perhaps 10-15 years. The patient also has mitral regurgitation, which was the problem.

> This means that the valve was regurgitating the blood as it passed through the valve and it shot back. The surgeon stated clearly that the valve was worn out. Consequently, I conclude that there is no connection between Ms. Shillinger's injury and cracked tooth on Jnuary 11, 2016, with her heart problems and surgery following the injury.
>
> As a matter of fact, the infectious disease specialist did not find any infection in Ms. Shillinger's bloodstream. The bloodstream culture before surgery was negative, as noted by the heart surgeon. Again, the patient took antibiotics to prevent infection before her dental visit.
>
> Comment: This is a very important point, which I have to conclude Dr. Orent was not aware of or did not have this documentation. The fact that the blood cultures were negative shows that the cracked tooth had nothing to do with causing an infection, as there was none. The valve was replaced because it was worn out, and it was also causing regurgitation. The replacement had nothing to do with any infection or subacute bacterial endocarditis.

33. This ALJ credits Dr. Sanidas' opinion. Claimant did not have an infection at the time she underwent heart surgery. Moreover, the heart surgeon did not note that the heart valve showed any signs of infection. As set forth by Dr. Sanidas, the heart surgeon specifically stated in his operative report that she underwent surgery based on the diagnosis of bioprosthetic mitral valve degeneration with negative blood cultures.

34. On October 12, 2016, Claimant was evaluated by Dr. Kirk Nelson, of U.S. Health Works. Dr. Nelson was now working for the same group, U.S. Health Works, as Respondents' IME physician, Dr. Sanidas. According to Dr. Nelson, Claimant's assessment remained the same. However, Dr. Nelson referred Claimant to Dr. Machanic, a neurologist, for evaluation and treatment of her headaches and general neurologic condition.

35. As set forth in the October 12, 2016 report from Dr. Nelson, an issue arose about Claimant undergoing additional diagnostic blood work. Dr. Orgel, who is also at U.S. Health Works, wanted to perform some blood work to look for non-work-related causes to explain Claimant's worsening neurological symptoms. Either Dr. Orgel or Dr. Nelson arranged to have the blood work done in an expedited manner by having blood drawn while Claimant was at another clinic while getting physical therapy. Dr. Orgel thought there might be nutritional deficits which were causing her neurological symptoms. Claimant did not think Dr. Orgel's explanation for doing the additional blood work in such a manner made sense and she cancelled her consent for the additional blood work. This incident caused Claimant to also lose trust in her providers at U.S. Health Works.

36. Claimant testified that Dr. Nelson felt he did not have all of Claimant's medical records and that was impacting his treatment of her. Claimant believed Dr. Nelson's belief that he was missing prior medical records was due to the IME performed by Dr. Sanidas, who was in the same office. This incident caused Claimant to think there was a conflict of interest between her physicians at U.S. Health Works and caused her to lose trust in Dr. Nelson and her providers at U.S. Health Works.

37. At some point, Claimant started recording her medical appointments with Dr. Nelson. Claimant testified that she started recording her appointments with Dr. Nelson so she would remember what was discussed. Claimant alleged that her head injury impairs her ability to remember things that are discussed during her doctor appointments. Regardless of her testimony, this ALJ finds that Claimant started recording her appointments with Dr. Nelson, in part, because she did not trust him.

38. On December 14, 2016, Dr. Nelson became aware of Claimant recording their visits when Claimant dropped her purse at this visit and her recorder fell out of her purse. Dr. Nelson stated:

> The patient dropped her purse on the way out of the exam room and a tape recorder fell out. Apparently, the patient has been secretly taping her visits. If the patient in fact has a significant level of distrust, this will interfere with our ability to help her to recover in the future. We will ask that she inform us if she is going to record the visit.

39. As of December 14, 2016, Dr. Nelson stated that if Claimant has a significant level of distrust, then that will interfere with his ability to help Claimant recover.

40. As of December 14, 2016, Claimant had a significant level of distrust of her physicians at U.S. Health Works, which includes Dr. Nelson.

41. On January 23, 2017, Dr. Machanic issued a report setting forth his opinion regarding the cause of Claimant's heart surgery. Dr. Machanic stated that:

> I would conclude that at the time of the patient's injury … she did injure her tooth. She did suffer a dental infection, which was treated with antibiotics, but it is clear that she subsequently, developed sepsis causing pneumonia and her endocarditis, and this, of course, required the life-saving intervention of replacement of her previously placed porcine mitral valve.

42. This ALJ does not credit Dr. Machanic's opinion. At the time Claimant was treating for her cracked tooth, she was taking antibiotics. Plus, the dentist treating Claimant never mentioned Claimant's tooth became infected. This ALJ also credits Dr. Osolvsky's opinion over Dr. Machanics.

43. Dr. Machanic also testified at hearing. At hearing, Dr. Machanic came up with a new theory that allegedly supported his earlier opinion. Dr. Machanic testified that he reviewed Claimant's pre- and post-surgical brain MRIs. He testified that the second MRI showed the presence scattered multiple areas of small strokes surrounded by bleeding. He said these are classic for emboli – blood clots - that occur from a distance and end up in the brain. In other words, his opinion was that these emboli formed in the heart due to the infection and traveled to the brain. This ALJ, however, does not find Dr. Machanic's opinion to be persuasive in light of the heart surgeon's statements. Dr. Sperling, Claimant's heart surgeon, specifically stated that he was concerned about clamping Claimant's aorta due to the plaque that could be dislodged and cause a stroke. In addition, Dr. Olsovsky testified at hearing that clamping the aorta could have caused the emboli to lodge in the brain and show up on the post-surgical MRI. Therefore, This ALJ finds that the emboli demonstrated on the post-surgical MRI and discussed by Dr. Machanic were caused by the clamping of the aorta during the heart surgery and were not caused by an alleged infection which lodged in Claimant's heart valve.

44. Dr. Hutcherson performed an IME on August 23, 2016. Dr. Hutcherson noted that sinus tachycardia was noted throughout the patient's history and follow ups starting after October of 2014 and it was not treated. Dr. Hutcherson stated that the decision to not treat that condition could have resulted in more strain, stress, and wear on the prosthetic mitral valve. This ALJ credits this portion of Dr. Hutcherson's opinion. This ALJ finds that Claimant's sinus tachycardia increased the wear and tear on Claimant's porcine heart valve and shortened its life expectancy.

45. Dr. Hutcherson also determined that Claimant suffered an infection due to the fall and cracked tooth which resulted in congestive heart failure, pneumonia, and endocarditis which led to the need to replace Claimant's heart valve. This ALJ does not credit this portion of Dr. Hutherson's opinion. This ALJ does not find that Claimant suffered an infection due to her cracked tooth.

46. Dr. Hutcherson issued another report on September 7, 2016. In his report, he reiterated his opinion that Claimant's porcine valve failed due to an infection. As set forth above, this portion of Dr. Hutcherson's opinion is not found to be persuasive by this ALJ.

47. On January 18, 2017, Dr. Mary Olsovsky performed an IME on behalf of Respondents. She opined that the need for heart surgery was not caused by the fall and cracked tooth. Dr. Olsovsky stated that:

> The dental procedures that she underwent did not involve gingival manipulation. Not all dental procedures are associated with the introduction of bacteria into the bloodstream. Only those that traumatize the tissue to an advanced degree are likely to have this outcome. Those are the only procedures for which antibiotic prophylaxis is

> recommended. The procedures that she underwent are not expected to have resulted in trauma to the tissues any more than routine dental maintenance such as brushing and flossing.
>
> Even though the procedures were not high risk and did not require antibiotic prophylaxis by AMA Guidelines, she nonetheless received antibiotic prophylaxis. It is certainly understandable to err on the side of caution, and the patient may not be sure what exactly the dentist has planned. So, having been premedicated, her risk of developing bactermia is further diminished.

48. This ALJ finds Dr. Olsovsky's opinion to be credible. Claimant's dental procedure was not the type that was expected to introduce bacteria into Claimant's bloodstream any more than routine brushing or flossing and prophylactic antibiotics were not necessary. Regardless, Claimant took antibiotics prophylactically and the antibiotics further diminished the risk of any infection from the cracked tooth or dental work.

49. Dr. Olsovsky also stated that the Claimant's presentation was not consistent with that of bacterial endocarditis. According to Dr. Olsovsky, the Claimant had no sequelae that are typical for bacterial endocarditis but rather had a presentation of typical mechanical failure of a mitral valve. Dr. Olsovsky went on to state that the diagnosis of bacterial endocarditis can be difficult to make. Therefore, there is a list of specific criteria that is used to make the diagnosis. These criteria are known as the "Duke Criteria." As set forth in her report, there are two major criteria and five minor criteria. The diagnosis of bacterial endocarditis would be supported if the Claimant met both of the major criteria or one of the major criteria and three minor criteria, or no major criteria and five minor criteria. According to Dr. Olsovsky, Claimant did not meet either of the two major criteria. She went on to state that Claimant only met two of the minor criteria. Therefore, Dr. Olsovsky concluded that she would rate the Claimant's chance of bacterial endocarditis as low. The ALJ finds this evidence to be persuasive in establishing that Claimant did not have bacterial endocarditis.

50. Dr. Olsovsky went on to state that the Claimant's presentation is consistent with that of a mechanical failure, which often presents with symptoms of left-sided heart failure and pulmonary edema over the course of one or two days in a fairly rapidly accelerating pattern. The presentation of bacterial endocarditis can be indolent and usually involves a longer period of time of feeling poorly. The ALJ credits this evidence as establishing that Claimant's heart valve had a mechanical failure which was not related to any type of infection.

51. Dr. Olsovsky also stated that:

> There is previous echocardiographic evidence demonstrating early deterioration of the 8 –year-old bioprosthetic mitral valve. This valve is generally quoted as having a life expectancy of 10 to 15 years. However, it is known that this is likely to be shorter in women and younger patients, and in the mitral valve position. The echocardiogram that she had a year prior to the accident demonstrated deterioration of this valve, with some regurgitation that was perivalvular and was estimated to be moderate. The echocardiogram also showed sclerosis of the native aortic valve, described as moderate-to-severe calcification with reduced mobility resulting in mild-to-moderate stenosis.

52. The ALJ credits this testimony and finds that Claimant's heart valve was nearing the end of its shortened life expectancy due to claimant's age, gender, and position of the valve and was showing signs of wearing out in 2015.

53. Dr. Olsovsky went on to state that the surgical findings also demonstrated that the need for surgery was not due to an infection caused by the broken tooth. Dr. Olsovsky stated:

> The surgical findings upon replacement of the aortic valve describe a bioprosthetic valve that is mechanically destroyed, with deterioration and a hole in the leaflet. There is no overt evidence of bacterial infection. Neither was there a description in the operative report of abscess or infection of the tissues surrounding the valve. The vegetation was described, but this term, even though it sounds consistent with living microorganisms, really describes a mass of other foreign material. Pathologic evaluation showed a foreign material but not a clear infection. There was certainly no description of the typical oscillating sort of mass that is seen with infection.
>
> In summary, it is my opinion that there is more than 50% medical certainty to conclude that the patient's dental work did not result in bacteremia, and therefore an even smaller possibility that the mitral valve replacement was due to bacterial endocarditis. In other words, based on a reasonable degree of medical probability, the patient's need for heart valve replacement surgery was caused by non-work related matters, and was not caused or related to her work-related accident of January 11, 2016, or any medical/dental treatment related thereto.

54. This ALJ credits Dr. Olsovsky's opinions and finds them to be persuasive. This ALJ is persuaded by the fact that there is no credible and persuasive evidence that Claimant's tooth got infected. The records from the dentist do not establish that Claimant's tooth got infected. In addition, there is no credible and persuasive evidence that the dental work caused disruption of the Claimant's gum tissue and somehow seeded the Claimant's blood stream with bacteria which then lodged in her heart valve. As set forth by Dr. Olsovsky, Claimant took prophylactic antibiotics before each dental visit. This ALJ is also persuaded by the fact that the heart surgeon specifically stated that the blood cultures were negative and made no mention that the valve looked like it was damaged by an infection.

55. This ALJ also credits Dr. Olsovsky's opinion that the valve started to show signs of wearing out in 2015 when Claimant underwent an echocardiogram which was abnormal as it related to the mitral valve.

56. This ALJ finds that Claimant's heart valve did not get infected.

57. This ALJ finds that Claimant's cracked tooth had absolutely nothing to do with the need for heart surgery.

58. This ALJ finds that Claimant's mitral heart valve had a mechanical failure due to its age - it merely wore out.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

i. Relatedness of Heart Surgery

In order to impose liability for medical treatment, the need for treatment must be proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(b), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The determination of whether the claimant proved causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant has not proven by a preponderance of the evidence that the need for heart surgery was proximately caused by the January 11, 2016 work injury which resulted in a cracked tooth. This ALJ credited the opinions of Dr. Olsovsky. Dr. Osolvsky's report and testimony established that the most likely cause of Claimant's need for heart surgery was the natural deterioration of the porcine heart valve. The normal life expectancy of a porcine heart valve is 10-15 years. Claimant had the original porcine valve installed around 2008, making it approximately 8 years old at the time it failed. However, according to Dr. Osolvsky, the life expectancy is less for younger patients, women, and for valves in the mitral position. It must be noted, that Dr. Cohen, a treating physician, also stated that Claimant's heart valve has a shorter life expectancy in younger patients and when it's in the mitral position. In this Case, Claimant meets all of the criteria for a shortened life expectancy of the porcine heart valve.

Moreover, Dr. Olsovsky opined that Claimant's heart valve was showing signs of wearing out in 2015 and such opinion was supported by the evidence. Claimant underwent an echocardiogram in 2015. Dr. Lewis' report indicated the 2015 echocardiogram was abnormal and showed mitral regurgitation and aortic stenosis.

The ALJ also credits the opinion of Dr. Olsovsky that Claimant's rapid deterioration is consistent with the mechanical failure of a heart valve and not failure due to an infection.

In addition, this ALJ finds persuasive the fact that Claimant's cracked tooth was not infected combined with the fact that the Claimant's blood cultures came back negative for a bacterial infection at the time of her heart surgery. In addition, according

to Dr. Olsovsky, Claimant did not have bacterial endocarditis when measured by the Duke Criteria.

Dr. Machanic, who testified on behalf of Claimant, indicated that the MRI scans in this case, which were taken pre- and post-heart surgery, demonstrated that Claimant had an infection and the infection caused emboli to lodge in her brain. At first blush, this argument seems to have some merit. However, Dr. Olsovsky credibly testified that the post surgical brain MRI findings could have been caused when the heart surgeon clamped Claimant's aorta which caused the debris or plaque to be dislodged and then settle in Claimant's brain. This testimony is again consistent with the report of Claimant's treating heart surgeon, Dr. Sperling, who said the likelihood of a stroke was increased if he had to clamp her aorta during the surgery because the plaque contained in the aorta could become dislodged. During the surgery, Dr. Sperling did have to clamp her aorta. This ALJ found that the clamping of the aorta cased the emboli which were found on the post surgical MRI of Claimants brain.

Therefore, this ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that her need for heart surgery was causally related to her work accident and cracked tooth.

Because the need for surgery is not related to her industrial accident, the issue of whether the surgery is reasonable, necessary, and authorized is moot.

ii. Change of Physician

Upon a proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. Section 8-43-404(5)(a)(VI), C.R.S. Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. *Loza v. Ken's Welding,* WC 4-712-246 (ICAO January 7, 2009). Claimant may procure a change of physician where he/she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart,* W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of his/her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995). But, where an employee has been receiving adequate medical treatment, courts need not allow a change in physician. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989)

(ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician).

In this case, Claimant has developed a significant level of mistrust of her treating physician, Dr. Nelson, who works at U.S. Health Works. Claimant was being treated by Dr. Orgel and Dr. Orent, of U.S. Healthworks. Then, Respondents retained a physician associated with U.S. Health Works, Dr. Sanidas, to perform an IME. Dr. Sanidas issued an opinion that was contrary to Claimant's position. Claimant's mistrust began to emerge upon Respondents having Dr. Sanidas, who works for the same medical group as her treating physicians, question the cause of Claimant's heart condition and the extent of her injuries. According to Claimant's testimony, Dr. Nelson at some point indicated he did not have all of her medical records. It appeared this knowledge about a lack of prior medical records came about due to Dr. Sanidas' IME being performed in the same medical group, i.e., U.S. Health Works.

Claimant also began to lose trust in the physicians at U.S. Health Works when they wanted to order blood work to look for non-work-related causes of her neurological conditions. Although finding the actual cause of Claimant's neurological problems is not problematic, the manner in which it was done contributed to Claimant's mistrust of her physicians at U.S. Health Works. As found, they requested the blood work to be done while Claimant was attending physical therapy at another facility.

Most importantly, Dr. Nelson specifically stated in his December 14, 2016 report that if the Claimant "has a significant level of distrust, this will interfere with our ability to help her to recover in the future." That statement was made after Dr. Nelson learned Claimant was secretly recording their appointments. Therefore, this ALJ concludes that Dr. Nelson's statement combined with Claimant's level of distrust establishes that a change of physician is appropriate in order to help Claimant recover in a timely manner. Claimant has proven she is entitled to a change of physician.

This ALJ has considered Respondents' arguments regarding the complexity of this case and that getting a new provider might complicate and extend Claimant's treatment. Claimant has requested Dr. Machanic, a neurologist, to become her authorized treating physician. However, Dr. Machanic is already an authorized provider, via a referral from Dr. Nelson. (Although the referral was probably limited to neurological issues, he is still an authorized provider.) Dr. Machanic previously evaluated Claimant on October 25, 2016. As set forth in his detailed report, Dr. Machanic evaluated Claimant for her neurological issues and made numerous treatment recommendations. Thus, he is familiar with Claimant's case and need for treatment and having him treat Claimant should not complicate or extend Claimant's treatment. In addition, Dr. Machanic stated in his report that he would be willing to become involved in Claimant's care.

Therefore, this ALJ concludes that Claimant has met her burden to change physicians to Dr. Machanic. Claimant's request to change physicians from Dr. Nelson to Dr. Machanic is granted.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's need for heart surgery is not casually related to her industrial injury of January 11, 2016, when she slipped and fell on ice at work and cracked a tooth.

2. Claimant's request for a change of physician from Dr. Nelson to Dr. Machanic is granted.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 5-16-17

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician regarding Claimant's permanent impairment rating.

2. Whether Claimant's permanent partial disability (PPD) rating should be calculated based on a scheduled impairment or based on whole person impairment.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to disfigurement benefits.

FINDINGS OF FACT

1. Claimant is employed by Employer as a plant operator.

2. On December 5, 2015 while so employed, Claimant fractured his collar bone when he slipped and fell on ice at work.

3. Claimant was evaluated that day at North Suburban Medical Center Emergency Department. Claimant reported pain in his right shoulder with no neck pain or other pain or loss of consciousness. Tenderness was noted over Claimant's trapezius with limited range of motion with adduction, abduction and external rotation. An x-ray of the right shoulder showed a comminuted and displaced fracture of the distal clavicle. Claimant was discharged home with instructions to follow up. *See* Exhibit 4.

4. On December 7, 2015 Claimant was evaluated at Concentra by Kathryn Bird, D.O. Claimant reported slipping on some ice at work and falling backwards landing on his back. Claimant reported sharp pain at 10/10 that was worse with moving. Dr. Bird assessed fracture of clavicle, right, closed and referred Claimant to an orthopedic specialist. *See* Exhibit 5.

5. On December 8, 2015 Claimant was evaluated by orthopedic specialist Rudy Kovachevich, M.D. Dr. Kovachevich noted that Claimant slipped on ice and landed forcibly onto his right shoulder and scapular region and that Claimant had immediate pain in the anterior lateral chest shoulder. Dr. Kovachevich reviewed ER radiographs that showed evidence of a comminuted and displaced distal clavicle fracture. Claimant reported considerable persistent pain on the anterior lateral aspect of the arm and shoulder region exacerbated with any attempts at arm motion. Dr. Kovachevich noted that it was a significant injury, required surgical intervention, and would not heal with conservative non operative management. Dr. Kovachevich

recommended surgery be performed that week and requested surgical assistance due to the complicated nature of the injury. *See* Exhibit 6.

6. On Dec 11, 2015 Claimant underwent surgery performed by Rudy Kovachevich, M.D. The indications for the procedure noted that Claimant fell on ice at work and sustained a right comminuted distal clavicle fracture and right acromioclavicular dislocation with coracoclavicular ligament tear. The surgery performed was: open reduction, internal fixation of the right comminuted distal clavicle fracture; open reduction and fixation of the right acromioclavicular joint with fixation of the coracoacromial ligaments; and fluoroscopy, right shoulder. *See* Exhibits 8, C.

7. On December 22, 2015 and on March 21, 2016 Claimant underwent x-rays of his right shoulder that showed metal plate and approximately eight screws running from Claimant's shoulder along his clavicle to his neck. *See* Exhibit 11.

8. On January 19, 2016 Claimant was evaluated by Dr. Kovachevich. Dr. Kovachevich noted Claimant was doing well overall and continuing to make progress with therapy. Dr. Kovachevich reviewed x-rays that showed evidence of a stable configuration in good alignment with internal bone formation and no evidence of hardware failure or loosening. *See* Exhibit 11.

9. Between January and March of 2016, Claimant continued to be evaluated at Concentra. Dr. Bird noted that Claimant was doing well with low pain levels reported and recommended Claimant continue with physical therapy. *See* Exhibits 12, 14.

10. On April 4, 2016 Claimant was evaluated by Kathryn Bird, D.O. Claimant reported that his right shoulder was doing well, that he was not having pain, and that he was not taking medications. Claimant circled zero on the pain scale chart. Claimant was noted to be continuing to improve in physical therapy. Dr. Bird recommended that Claimant continued physical therapy and provided a referral for physical therapy two times per week for four weeks. Dr. Bird opined that Claimant could return to full duty work and she anticipated that he would reach maximum medical improvement on May 30, 2016. *See* Exhibits 16, D.

11. On April 25, 2016 Claimant was evaluated by Dr. Bird. Claimant reported again that he was not having any pain and was doing better. Claimant circled zero on the pain scale chart. Claimant reported he was not taking any pain medication and that in physical therapy he could lift 40-50 pounds. Claimant also reported that his shoulder surgeon, Dr. Kovachevich thought that Claimant could return to regular activity. Dr. Bird found full range of motion of the right shoulder on examination. Dr. Bird recommended continuing with physical therapy to ensure strengthening. *See* Exhibits 18, E.

12. On May 12, 2016 Claimant was evaluated by physical therapist (PT) Sarah Peck. Claimant reported doing well and that he felt like he had improved significantly. It was noted that Claimant was being discharged from therapy services as he had achieved the anticipated goals or expected outcomes. The therapist noted for

follow up plans that Claimant was independent with home exercise programs and self care instructions and that he could continue with the program on his own. PT Peck noted that Claimant would still have some limitations with active range of motion of the shoulder and with joint mobility due to the type of repair. *See* Exhibit F.

13. On June 7, 2016 Claimant was evaluated by Dr. Kovachevich. Dr. Kovachevich opined that overall Claimant was doing excellent and continued to make progress in regards to his right arm use and function. It was noted that Claimant had no residual pain and was using his arm for most activities. Dr. Kovachevich noted good range of motion on examination with range of motion nearly symmetrical to the contralateral side with active forward elevation and external rotation. Dr. Kovachevich noted some tight internal rotation, as expected. Dr. Kovachevich opined that Claimant could return to all activities as tolerated with no formal restrictions and discharged Claimant from his care. Dr. Kovachevich opined that Claimant was at maximum medical improvement. *See* Exhibits 19, G.

14. On June 16, 2016 Claimant was evaluated by Jenifer Hammond, M.D. Claimant again reported that he was having no pain. Dr. Hammond noted that Claimant was requesting release from care. Dr. Hammond performed a physical examination and found full range of motion with the only exception noted as painful internal rotation. Dr. Hammond assessed closed fracture of the right clavicle and opined that Claimant had reached MMI. Dr. Hammond released Claimant from care. Dr. Hammond opined that Claimant could perform full duty work with no restrictions and opined that Claimant sustained no permanent impairment. *See* Exhibits 20, H.

15. On June 23, 2016, Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Hammond's June 16, 2016 report. Respondents noted MMI was reached on June 16, 2016 and that there was no impairment as a result of the work injury. *See* Exhibits 2, K.

16. Claimant objected to the final admission of liability and requested a Division Independent Medical Evaluation (DIME).

17. On November 9, 2016 Claimant underwent a DIME performed by Anjmun Sharma, M.D. Claimant reported a slip and fall and distal clavicle fracture. Dr. Sharma reviewed the medical records and performed a physical examination. Dr. Sharma opined that the claim was fairly straightforward with a fall, distal clavicle fracture requiring surgery, and an open reduction internal fixation also involving an AC joint separation reduction. Dr. Sharma opined that, overall, there was a lack of range of motion in the right shoulder and that he believed there was some permanent impairment. Dr. Sharma opined that Claimant had good range of motion with no anterior or posterior shift, strength of 5+ in all planes, no weakness, and no atrophy. Dr. Sharma opined that Dr. Kovachevich had done a commendable job. Dr. Sharma agreed that Claimant reached MMI on June 6, 2016. Dr. Sharma did not recommend any permanent work restrictions and opined that Claimant had done very well and that Claimant's shoulder was very stable. *See* Exhibits 21, B.

18. Dr. Sharma opined that range of motion measurements using the shoulder were most appropriate as the clavicle could not necessarily be measured but was part of the shoulder apparatus. Dr. Sharma measured range of motion as: flexion- 153 degrees, extension – 27 degrees, adduction – 29 degrees, abduction – 154 degrees, internal rotation – 39 degrees, and external rotation – 57 degrees. Dr. Sharma opined that the range of motion impairment for Claimant was 8% under the AMA Guides. Dr. Sharma also opined that Claimant met criteria for a specific disorder of the shoulder, particularly due to the surgery involving the clavicle. Dr. Sharma noted that Claimant did not have a distal clavicle resection nor did Claimant have a subacromial decompression which were the two known and well met criteria documented in the AMA Guides. However, he opined that more importantly, Claimant sustained pathology and trauma to his shoulder and that as a result it would be prudent to assign Claimant an impairment that took into account the clavicular injury. Dr. Sharma opined that the clavicle had a direct effect on the range of motion of the shoulder and that therefore, he was assigning 10% impairment for specific disorder of the shoulder due to the clavicle fracture open reduction internal fixation. Dr. Sharma combined the rating to be 17% upper extremity and then converted the rating to a final whole person impairment rating of 10%. *See* Exhibits 21, B.

19. On December 6, 2016 Respondents applied for hearing on the issue of permanent partial disability benefits and to overcome the DIME. *See* Exhibit L.

20. On February 10, 2017 Claimant underwent an independent medical evaluation (IME) performed by Barry Ogin, M.D. Claimant reported falling on the ice at work and landing on his posterior shoulder and upper back. Dr. Ogin reviewed medical records including the DIME report. Claimant reported that he had continued to do fairly well and work full duty but that he had some notable limitations and compensated in certain ways. Claimant reported that he could not reach all the way up or all the way across his body and that he needed to use two hands to put on his seat belt and had trouble taking off his shirt. Claimant reported some discomfort with prolonged use of his right arm and that his current pain level was a 3/10. Claimant reported that his least pain was a 2/10. Dr. Ogin performed a physical examination and noted reduced shoulder range of motion on the right side particularly true with internal rotation, flexion, and abduction. With a goniometer, range of motion was noted to be flexion – 135 degrees, extension – 35 degrees, abduction – 125 degrees, adduction – 20 degrees, internal rotation – 20 degrees, and external rotation- 50 degrees. *See* Exhibit A.

21. Dr. Ogin noted that of concern, Claimant's range of motion actually seemed worse at the IME than it did at the time of the DIME in November as well as at the time of his discharge from his orthopedic specialist. Dr. Ogin noted that while Claimant had a relatively good recovery regarding the AC joint separation and clavicle fracture, Claimant continued to have significant capsular tightness. Dr. Ogin suspected that the prolonged immobilization around the time of surgery led to capsular tightness and that while Claimant had some significant improvements in range of motion while engaged in active therapy, it had declined some since Claimant's therapy was

discontinued. Dr. Ogin opined that as a result of this decline, Claimant has had to alter how he does basic activities such as putting on a seatbelt or a shirt. Dr. Ogin opined that due to the range of motion deficit an impairment rating for the right shoulder was appropriate. Dr. Ogin opined that no additional impairment was indicated per the medical treatment guidelines for the clavicle fracture itself which was adequately healed and in adequate alignment. Dr. Ogin found a total upper extremity impairment rating of 12% for the range of motion deficits and noted that it was slightly worse than when Claimant was evaluated by Dr. Sharma in November. Dr. Ogin opined that Claimant needed to aggressively start working on range of motion on an independent basis and that the decreased range of motion may be a reflection of guarding the right arm and utilizing it less. *See* Exhibit A.

22. Dr. Ogin noted that DIME physician, Dr. Sharma, had offered Claimant an additional 10% impairment for the clavicle fracture. Dr. Ogin opined that offering an impairment for both range of motion deficit and the clavicle fracture itself was duplicative in nature. Dr. Ogin opined that the AMA Guides did not allow for any additional impairment for the clavicle fracture as the functional deficit from the fracture was incorporated into the range of motion impairment. *See* Exhibit A.

23. Dr. Ogin also opined that the injury was to the right shoulder with the pain localized to the right shoulder and that the range of motion deficit was also limited to the right shoulder. Dr. Ogin opined that there was no cervical pain or decreased cervical range of motion. Dr. Ogin opined that the impairment for the right shoulder should remain a scheduled impairment and should not convert to whole person impairment. Dr. Ogin opined that overall Claimant had an excellent reduction and correction of the comminuted fracture and had done very well clinically. *See* Exhibit A.

24. On February 21, 2017 Claimant underwent an IME performed by John Hughes, M.D. Claimant reported that he was injured when he slipped on ice at work, fell backwards, and struck his right shoulder. Dr. Hughes reviewed medical records, and performed a physical examination. Dr. Hughes noted that the right shoulder surgery and x-rays after surgery showed rather extensive clavicular hardware that appeared to be in good location. On physical examination, Dr. Hughes noted tenderness over the right medial scapular border, a prominent 10.6 cm surgical scar with a prominent exostosis just superior to the scar over the anterior aspect of the right shoulder, and smooth but limited active range of motion in the right shoulder. Dr. Hughes measured: flexion – 98 degrees; extension – 48 degrees; abduction – 102 degrees; adduction – 0 degrees; external rotation – 41 degrees; and internal rotation – 25 degrees. *See* Exhibit 22.

25. Dr. Hughes agreed with Dr. Ogin's concerns about adhesive capsulitis and was concerned with progressive losses in Claimant's active range of motion in the right shoulder. Dr. Hughes questioned MMI as the adhesive capsulitis appeared to represent a worsening of Claimant's injury and he recommended hand surgical reevaluation and follow up imaging to assess for progressive capsulitis. Dr. Hughes agreed with Dr. Sharma's decision to assign specific disorder impairment for complex surgical treatment

in conjunction with the active range of motion losses. Dr. Hughes opined that the range of motion measurements alone did not adequately rate the extent of Claimant's impairment, and agreed with Dr. Sharma that it was correct to combine the range of motion impairment with the specific disorder impairment. *See* Exhibit 22.

26. Dr. Hughes opined that the surgical treatment Claimant underwent involved structures extending beyond the region of the shoulder into the region of the anterior thorax and noted Claimant's continued right scapular dyskinesis and diffuse myofascial pain that extended into the thoracic region from Claimant's right arm. Dr. Hughes opined that merited assignment of permanent impairment in terms of the whole person rather than the upper extremity. Dr. Hughes calculated the impairment at 24% upper extremity including 16% for range of motion and 10% additional for the specific disorder impairment rating and Dr. Hughes converted the 24% upper extremity rating into a whole person rating of 14%. *See* Exhibit 22.

27. Dr. Ogin testified at hearing consistent with his IME report. Dr. Ogin opined that Dr. Sharma erred by awarding an additional 10% impairment due to the clavicle fracture and surgery. Dr. Ogin opined that the AMA Guides for shoulder impairment ratings, beyond range of motion ratings, are very limited with two exceptions that result in an additional rating. Dr. Ogin opined that the exceptions were distal clavicle resection or subacromial decompression and that Claimant did not have either procedure. Dr. Ogin agreed that doctors are allowed some discretion when rating permanent impairment, but that if they use discretion they need to justify their decision and that Dr. Sharma did not justify why an additional 10% was warranted in this case and Dr. Sharma did not cite to a section of the AMA Guides to support his decision to add an additional 10%.

28. Dr. Ogin agreed with the 8% rating provided by Dr. Sharma for range of motion loss and opined that was correct, but that the additional 10% was incorrect. Dr. Sharma opined that the AMA Guides do not provide any rating for clavicle fracture or surgery for the clavicle fracture because the surgery and functional impairment are addressed by the range of motion loss and the 8% rating here addressed it and the additional rating would be duplicative. Dr. Ogin went through the AMA Guides and explained why certain sections do not apply to this case including: no peripheral nervous system disorder, no vascular disorder, no bone or joint disorder, and no musculotendinous disorder. Dr. Ogin opined that Claimant did not have a musculoskeletal system defect where the severity of clinical findings did not correspond to the true extent of the musculoskeletal defect. Dr. Ogin provided an example of a rare situation like an irreparable rotator cuff tear where someone might have good range of motion but a severe tear. Dr. Ogin opined that if you use that section a provider usually states that the range of motion does not adequately reflect the severity of findings and explains why they gave a higher rating and noted that Dr. Sharma did not do. Further, Dr. Ogin opined that Claimant's case was not a rare case, but a very good case with a good outcome and that the range of motion adequately accounted for Claimant's resulting loss. Dr. Ogin opined that the impairment rating tips do not support the additional 10% given by Dr. Sharma and that the correct rating was 8% upper extremity

for the range of motion deficit. Dr. Ogin opined that there was no functional impairment in this case beyond the shoulder or shoulder activities.

29. Claimant testified credibly at hearing. Claimant indicated that his post operation recovery went well and that he had a plate and 8-12 pins/screws put in his right shoulder. Claimant testified that he was working with no restrictions. Claimant showed a scar on his right shoulder measuring approximately 4.5 inches in length that remained white, raised, and discolored from his normal skin tone. Claimant also showed a bump on his clavicle near where the metal plate attached to his right shoulder. Claimant showed his range of motion as slightly limited and testified credibly that he has trouble reaching, climbing a ladder, working with overhead valves, taking off his shirt, buckling his seatbelt, and that his hobbies are different now due to his limitations. Claimant testified credibly that with movement and overhead activities he has pain close to his neck.

30. The AMA Guides to the Evaluation of Permanent Impairment Third Edition (Revised) provide under Section 3.1j, Impairment Due to Other Disorders of the Upper Extremity under "Other Musculoskeletal System Defects" that in rare cases the severity of the clinical findings (e.g. loss of shoulder motion) does not correspond to the true extent of the musculoskeletal defect (e.g. severe and irreparable rotator cuff tear of the shoulder) as demonstrated with a variety of imaging techniques (e.g., MRI or surgical visualization). If the examiner feels that the measured anatomical impairment does not appropriately rate the severity of the patient's condition, an additional impairment can be given at discretion. *See* Exhibit 3.

31. The Division of Workers' Compensation Desk Aid #11- Impairment Rating Tips provides that not all persons with invasive procedures necessarily qualify for a numerical impairment rating and may have a zero percent rating. The tips provide that distal clavicular resection rating is 10% and that in general, for a subacromial arthroplasty if an additional rating is deemed appropriate because "…other factors have not adequately rated the extent of impairment," it should not exceed 10%. *See* Exhibits 3, M.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Whole Person versus Scheduled Impairment

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the “injury” is enumerated in the schedule set forth in subsection (2) of the statute, “the employee shall be limited to the medical impairment benefits as specified in subsection (2).” If the claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides the claimant shall “be limited to medical impairment benefits as specified in subsection (8),” or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002).

Section 8-42-107(2)(a), C.R.S., provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c). Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs, supra.*

Claimant has established that he sustained functional impairment beyond the arm at the shoulder and the right to whole person impairment benefits. Here, not only did Claimant sustain a break in a physiologic structure beyond the arm at the shoulder, but he also has pain and discomfort in his clavicle and neck beyond the arm at the shoulder. This pain and discomfort limits the use of his right arm and shoulder and Claimant's limitations extend into structures beyond the arm at the shoulder. The opinion of Dr. Hughes is found credible and persuasive that Claimant is entitled to a whole person rating. Claimant has met his burden to show that the situs of functional impairment is beyond the arm at the shoulder and that a whole person rating is appropriate in this case.

Overcoming DIME on PPD Impairment Rating

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000). Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009).

Respondents have failed to establish by clear and convincing evidence that the DIME physician's PPD rating in this case is incorrect. As found above, DIME physician

Dr. Sharma noted that an additional 10% rating was appropriate for the clavicle fracture and resultant surgery. The AMA Guides allow additional rating and provides examples of two instances including distal clavicle resection and subacromial decompression where an additional rating of 10% can be given. Including those two examples as types of injuries where an additional rating might be appropriate does not exclude the possibility of other conditions similarly being appropriate for an additional rating. Rather, the AMA Guides provide discretion to the rating physician to make that determination.

Here, at best, the Respondents have merely established a difference of opinion between Dr. Ogin and DIME physician Dr. Sharma that an additional rating is appropriate in Claimant's case. The language allowing the discretion indicates cases like Claimant's where the range of motion of the injured worker might be pretty good and thus might not capture or appropriately rate the severity of the underlying condition. If the rater believes this to be the case, the rater has discretion to give an additional rating. This is what DIME physician Dr. Sharma decided to do in Claimant's case. Claimant has very good range of motion, but had a significant injury with a significant surgery where a metal plate and approximately eight pins/screws were inserted. This procedure and alteration of his musculoskeletal system is arguably more invasive and more severe than a distal clavicle resection surgery (which is given as one example where the extra 10% rating would be appropriate). The AMA Guides essentially allow the rating physician to make a judgment call when the range of motion does not adequately reflect or rate the severity of the condition and allows the rater to provide extra rating. Dr. Sharma felt it appropriate in Claimant's case to do so.

Although Respondents also argue that Dr. Sharma should have justified or explained better his reason for doing so, the ALJ does not find this persuasive. Dr. Sharma expressly noted that Claimant did not have one of the two examples (distal clavicle resection, subacromial decompression) listed in the AMA Guides, but still noted that the extra rating was appropriate and that he was assigning the extra 10% impairment for specific disorder of the shoulder due to the clavicle fracture open reduction internal fixation. Although he does not expressly state that the clavicle fracture open reduction internal fixation is an invasive procedure that altered Claimant's musculoskeletal system justifying the extra rating, this is implied from his other comments explicitly noting Claimant does not have one of the two examples and that the rating was given for the surgery.

Dr. Hughes, as found above, agrees that Dr. Sharma correctly applied the AMA Guides and did not err. Dr. Hughes opined that in Claimant's case, the range of motion did not adequately rate the extent of Claimant's impairment. Dr. Hughes agreed that it was correct to combine range of motion losses with specific disorder impairment since Claimant's range of motion was good and did not adequately represent or rate the extent of Claimant's impairment. Dr. Ogin disagrees and believes that Claimant's range of motion measurements adequately rate the extent of Claimant's impairment. However, the AMA Guides provide discretion to the rating physician. Although Dr. Ogin disagrees with Dr. Sharma and with Dr. Hughes, Respondents have failed to establish

by clear and convincing evidence that Dr. Sharma is incorrect or that he erred when he provided an additional rating. Rather, Dr. Sharma has done what the AMA Guides and the Rating Tips contemplate and specifically allow. He provided an additional rating when he believed the range of motion alone did not adequately represent or rate the extent of Claimant's impairment. This is not found to be in error.

Disfigurement

Section 8-42-108(1), C.R.S provides that "if an employee is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view…the director may allow compensation not to exceed four thousand dollars to the employee who suffers such disfigurement." As found above, as a result of his surgery and the implantation of a metal plate and pins/screws, Claimant has disfigurement that includes a 4.5 inch scar and a bump near his clavicle. The ALJ finds and concludes that Claimant has established an entitlement to a disfigurement award in the amount of $1,850.

ORDER

It is therefore ordered that:

1. Claimant has established that he is entitled to a whole person impairment rating and that the situs of his functional impairment is beyond the arm at the shoulder.

2. Respondents have failed to overcome the opinion of DIME physician Dr. Sharma by clear and convincing evidence. Claimant is entitled to a PPD impairment rating of 10% whole person.

3. Insurer shall pay Claimant $1,850 for the disfigurement outlined above. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 16, 2017,

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Respondents have shown, by a preponderance of the evidence, that Claimant was responsible for her own termination, thus terminating her Temporary Total Disability benefits, effective on her termination date.

II. Whether Claimant has shown, by a preponderance of the evidence, that Cymbalta is reasonably necessary to treat her admitted work injury.

III. Whether Claimant has shown, by a preponderance of the evidence, that Lyrica is reasonably necessary to treat her admitted work injury.

PROCEDURAL CONCLUSION

During the hearing, Claimant's counsel objected to the testimony of Dr. Ramaswamy on the issue of the reasonableness and necessity of the continued use of Lyrica to treat Claimant's work injury. That objection was sustained, as only Cymbalta was endorsed by Respondents on this issue, and Claimant was not prepared to address this issue at hearing.

The post hearing deposition of Dr. Bert Willman was then taken on April 13, 2017 by Claimant. During direct examination, questioning by Claimant actually focused more on the necessity for the continued usage of **Lyrica**, than on Cymbalta. At no point during this deposition was any attempt made to limit Lyrica questions for any purpose; rather Lyrica began as the focus of direct examination.

Taking the hearing record as a whole, the ALJ now finds that the reasonableness and necessity of Lyrica was tried by consent of all parties to the hearing.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant was born on July 7, 1952, and is currently age 64. She has worked for Respondent Walmart for over 30 years in various non-management capacities.

2. Claimant sustained an admitted industrial injury on January 12, 2015. She fell in an icy Walmart parking lot arriving at work, badly injuring her left ankle. She received emergency treatment at Parkview Medical Center, including surgical implantation of a plate with screws.

3. The emergency room summary report for that date lists Cymbalta and Lyrica among Claimant's current medications. (Ex. A, p. 001).

4. On June 22, 2015, David C. Hopkins, PhD, noted that Claimant was on Cymbalta for a pre-existing diagnosis. (Ex. C, p. 0101)

5. On August 25, 2015, Dwight Caughfield, M.D., noted Claimant was already taking pregabalin (generic for Lyrica) and duloxetine (generic for Cymbalta) for her fibromyalgia. (Ex. D, p. 0103)

6. On October 6, 2015, the authorized treating physician ("ATP"), Terrence Lakin, D.O., noted that Claimant persisted with severe pain she stated was unbearable. He also noted she continued taking Lyrica and Cymbalta. (Ex. B, p. 026)

7. On October 19, 2015, Claimant underwent a second surgical procedure to this ankle by Dr. John Shank, for debridement of the area, and to remove the previously placed hardware. Claimant reported ongoing pain to her ankle, in spite of this surgery.

8. On December 9, 2015, Dr. Lakin, released Claimant to return to modified duty for two hours per day, sitting 90% of the two hours, occasionally standing 2–3 minutes at a time. (Ex. B, p. 043) Dr. Lakin explained to Claimant that returning to work with restrictions was therapeutic and just sitting at home worrying about her pain wasn't helping her recover. (Ex. B, p. 049)

9. On December 30, 2015, January 13, 2016, and February 3, 2016, Dr. Lakin again released Claimant to return to modified duty for two hours per day, sitting 90% of the two hours, occasionally standing 2–3 minutes at a time. (Ex. B, pp. 052, 061 and 069) On December 30, 2015, Dr. Lakin noted that Claimant complained of "an extensive list of reasons she can't return to work." He noted that the restrictions he had her on were no different to what she was doing at home, so she should be able to tolerate it without difficulty. He explained to Claimant that returning to work on the limited basis he had laid out was the only way she was going to improve at that point. (Ex. B, p. 057) On January 13, 2016, Dr. Lakin asked Claimant if she tried to go back to work as directed at the last visit. He pointed out to her that her restrictions were for 90% sit-down activities with 2–3 minute intervals of standing, and that she was probably more active at home than what she could be at work. Her response was, "I just hurt too much." (Ex. B, p. 067)

10. Dr. Lakin also left open the possibility of a left ankle fusion or replacement "if warranted in the next three years."

11. On February 4, 2016, personnel manager Sarah called Claimant and advised her Dr. Lakin had released her to modified duty and Employer could accommodate her restrictions. Sarah also advised Claimant of her schedule and that she needed to call if she was not going to come to work. Claimant told Sarah she couldn't stand and she was having a hard time and that Sarah could talk to her attorney. Sarah explained to Claimant that Dr. Lakin had released her to work for two hours in the fitting room and what she should be able to do. Sarah documented this telephone call

in a statement dated 02/04/2016. (Exhibit Q, page 0195) Sarah testified how Employer would go over an injured worker's restrictions with them, making sure both the worker and her supervisors were aware of her restrictions. These restrictions would include activities the worker said they couldn't do, even if the doctor said they could. Sarah testified that she never told Claimant she would be fired because it's not her place to relay anything like that. Sarah's call to Claimant was witnessed by assistant manager Meghan Ruse. (exhibit Q, page 0202)

12. On February 12, 2016, Sarah sent a certified letter to Claimant advising her that three work days of unreported absences were considered job abandonment and that her resignation was being processed. (Ex. Q, p. 0196) On February 22, 2016, Claimant was retroactively granted a leave of absence from September 14, 2015, through February 22, 2016. (Exhibit 1, page 000006) Claimant never came back to work after Sarah's telephone call. She continued to accrue absences/no calls/no shows after February 22, 2016. Claimant was terminated as of March 7, 2016. (Ex. Q, p. 0203)

13. Claimant testified to her opinion that the fitting room job she was offered was not a sit-down job. She also testified to her opinion that Employer would not have provided her with a stool. On cross-examination, Claimant acknowledged that a light-duty job is not the same as a regular job. She also acknowledged that when she went over paperwork for her previous light-duty job, she marked what duties she couldn't do and she was excused from those job duties.

14. Respondents submitted videos of Claimant shopping at another Walmart on January 25, 28, and 31, 2016, during the time Dr. Lakin was advising Claimant to return to modified work and Claimant was telling him she could not work. The videos show Claimant walking and standing without apparent limitation. (Ex. R, S and T) Sarah also testified she had seen Claimant shopping at Hobby Lobby in December, and she was walking without apparent difficulty without an assistive device. (Ex. Q, p. 0195)

15. On February 25, 2016, Claimant underwent a functional capacity evaluation on referral from Dr. Lakin. The FCE demonstrated that Claimant displayed a constant level sitting tolerance and a frequent level standing/walking tolerance of 30 minutes in any one hour time period. (Ex. 4, p. 000016)

16. On February 26, 2016, Dr. Lakin saw Claimant for an impairment rating. (Ex B, p. 077) Dr. Lakin noted that despite continued medication for her fibromyalgia including Lyrica and Cymbalta, Claimant continued to have significant pain. (Ex B, p. 078) Dr. Lakin provided Claimant with permanent restrictions based on the functional capacity evaluation: lifting/carrying to abilities between sedentary light and light; limited bending and lifting from below waist/knee level; constant level sitting tolerance; standing/walking tolerance 30 minutes in any one hour time period; limited/decreased ability to squat, kneel, crawl and stair use; no ladders. (Ex. B, p. 080)

17. Claimant testified Dr. Timms, a rheumatologist, had placed her on Cymbalta several years back, and that she continued to take it uninterruptedly until she quit Employer's insurance, about a year before the hearing. She was still on the

Cymbalta and Lyrica at the time she was let go by Employer. Dr. Timms, Claimant's primary care physician before her injury, had prescribed Cymbalta and Lyrica for her fibromyalgia. Even before her fall, Claimant had all-over body pain that she rated as 7 out of 10.

18. On June 14, 2016, Claimant's primary care physician, Kasey S. McCreight, M.D., noted Claimant was taking Lyrica 150 mg capsule twice a day and Cymbalta 60 mg capsule once a day. (Ex. F, p. 0115)

19. On July 13, 2016, Claimant was seen by Miguel Castrejon, M.D., for a Division IME. (Ex. G, p. 0122) Under present treatment program, Dr. Castrejon noted Claimant's medications included Lyrica 175 mg (sic) and Cymbalta 60 mg. (Ex. G, p. 0123) Under past medical history, Dr. Castrejon noted Claimant had been diagnosed with fibromyalgia and Sjögren's and was using Lyrica prior to this accident. (Ex. G, p. 0124)

20. In this same initial DIME report, Dr. Castrejon found Claimant to not be at MMI, and that she needed additional care and testing to be brought to MMI.

21. On August 29, 2016, Respondents filed a Petition to Terminate Compensation from February 12, 2016, and ongoing. The grounds for Respondents' petition were: "Claimant failed to call or report to work for seven consecutive scheduled days. She had been released to modified duty and work within her restrictions had been offered. TTD should be terminated and TPD reinstated." (Ex. M, p. 0178)

22. Claimant was first seen by Bertram Willman, M.D., on August 30, 2016 for her ongoing pain symptoms, after being referred by Dr. Shank. Under past, family and social history, Dr. Willman noted Claimant's current medications were Cymbalta (duloxetine 60 mg capsule) and Lyrica (pregabalin 75 mg capsule). (Ex. I, p. 0136)

23. Claimant began receiving Social Security retirement benefits in September 2015, having applied August 24, 2015. (Ex. P, p. 0187)

24. On September 27, 2016, Dr. Willman responded to a letter from the adjuster about the medical necessity of Cymbalta for Claimant's work injury. Dr. Willman's response was RSD of LLE (left lower extremity). (Ex. I, p. 0139).

25. On October 3, 2016, Annu Ramaswamy, M.D., prepared a Rule-16 response to the question of whether Cymbalta was reasonable and necessary for Claimant's work-related injury of January 12, 2016. (Ex. J, p. 0140) Dr. Ramaswamy noted in his discussion that it appeared Claimant was already utilizing Cymbalta and Lyrica for fibromyalgia, and that her pain levels since the injury had been quite high despite her use of Lyrica and Cymbalta. He opined that the continued use of Cymbalta would correlate more with treatment for the pre-existing fibromyalgia then a neuropathy diagnosis, given that Claimant had not noticed a significant clinical benefit from utilizing the Cymbalta. He therefore opined that the Cymbalta was not medically reasonable or related to the January 2015 work-related injury. (Ex. J, p. 0141)

26. Claimant was seen for an independent medical examination by Dr. Ramaswamy on December 2, 2016. (Ex. J, p. 0143) Claimant gave a history of fibromyalgia since 1995 and stated she pretty much notes total body pain at a constant level of 7/10. She stated she was placed on Lyrica for fibromyalgia in 2005, and it helped somewhat. She stated she had been taking Cymbalta for at least six months prior to the January 2015 injury, and it gave her some relief. (Ex. J, p. 0146)

27. Dr. Ramaswamy testified that Claimant was utilizing Lyrica and Cymbalta throughout 2015, but her neuropathic pain component was very high, 8/10, so he didn't see a therapeutic effect with that medication for that injury. Dr. Ramaswamy testified his opinion would not change based on Claimant's testimony she stopped taking Cymbalta the first quarter of 2016, because she was taking it throughout 2015 and she was experiencing significant neuropathic pain during that timeframe despite Cymbalta.

28. Dr. Willman testified that his practice was prescribing Vicodin, Tizanidine, and Lyrica, and Claimant's nurse practitioner in Pueblo was prescribing Cymbalta. (Depo trans p. 8, lines 1–13) Dr. Willman testified to his understanding that Claimant had been taking Lyrica for some time before her injury and continued to take it after the work injury. (Depo. trans. P. 25, lines 20–24) Asked why, if Claimant was taking Lyrica for years before her work injury, it suddenly became related to her work injury, Dr. Willman responded: "I have no idea. I honestly don't know. I don't know. I mean that's a good question, I guess, for workers' comp." (Depo. trans. p. 26, lines 20–22) He acknowledged that the Lyrica was treating Claimant's fibromyalgia before, and it's still treating her fibromyalgia. (Depo. trans. p. 26, line 25, to page 27, line 4.) He added that "the treatment for fibromyalgia is a combination of Cymbalta and Lyrica. Those are really considered great drugs for that." (Depo. trans. p. 27, lines 16–19)

29. Dr. Willman further testified, however, that Claimant's prescription for Lyrica (75 milligrams, one tablet three times a day) was for her ankle pain:

> Q. What exactly does the Lyrica do?
>
> A. What the Lyrica will do is cut down on the intensity, the severity, and the frequency of that burning pain that Barbara's experiencing in her left calf and left ankle. (Depo trans, p. 9, lines 9-15).

30. Dr. Willman further testified that the fact that Claimant may have been on Lyrica previously for an unrelated condition does not rule out the potential need for Lyrica as a result of this injury. (Depo trans., pp. 12, 13.)

31. Dr. Willman also stated that "treatment one is making sure she **stays** on neuropathic medicines--Cymbalta, Lyrica--or at least someone's prescribing for her" (Depo trans., p. 19, lines 8-11). He stated that Claimant has "significant neuropathic pain that's probably not going to go away" and that it is certainly "not unheard of" for a patient (such as Claimant) to be placed on both Cymbalta and Lyrica (Depo trans., p. 24, 25). He further clarified that Claimant is now "left with chronic neuropathic pain in

her ankle, not caused by RSD ("Reflex Sympathetic Dystrophy"), and not caused by spinal stenosis."

32. The ALJ finds that while Claimant may have called in to work as instructed for a period of time, it was not reasonable for her to assume she was being terminated based upon a phone call with someone who lacked the authority to terminate her. It was further unreasonable for Claimant to simply presume that Walmart would not provide her a stool to assist her in her modified duties, and therefore she need not attempt to return to work. The ALJ finds that Claimant, despite this unfortunate injury and the pain it has caused, simply lost her desire to work at Walmart any longer, no matter how reasonable the terms. Instead, she began receiving Social Security benefits, and stayed home.

33. The ALJ finds that Claimant was released to return to work with restrictions, and the employer offered Claimant work within her restrictions. Claimant chose not to return to work, and therefore Claimant was responsible for her termination. At all times pertinent, Employer's actions were reasonable. On February 12, 2016, Employer sent Claimant a letter advising her that her resignation was being processed. Claimant's last day at work was March 7, 2016.

34. The ALJ finds that despite Claimant taking Cymbalta and Lyrica before her work injury and continuing to take them after her work injury, that both drugs continue to be reasonable and necessary to alleviate the ongoing pain from this admitted injury to her ankle. The ALJ does not conclude that merely because Cymbalta and Lyrica are treating Claimant's pre-existing fibromyalgia, that they are not now also treating her work injury. The ALJ credits the professional opinion of her treating physician, Dr. Willman, more than that of the IME physician, Dr. Ramaswamy.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., C.R.S. , is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201(1); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (1997). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally: neither in favor of the rights of the claimant nor in favor of the rights of respondents, and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

2. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P. 3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, W.C. No. 4-649-298 (ICAO May 15, 2007).

Claimant's Responsibility for Termination

3. Sections 8-42-103(1)(g) and 8-42-105(4)(a), C.R.S., provide that "In cases where it is determined that the temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The Colorado Court of Appeals has defined the issue of responsibility for termination as an issue of whether the claimant performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995).

4. The procedures for the offer of modified employment specified in W.C.R.P. Rule 6-1(A) only apply when respondents seek to "terminate temporary disability benefits without a hearing ...." *McCloud v. Progressive Insurance*, W.C. No. 4-980-200-01 (ICAO Apr. 1, 2016); *Temple v. Kroll Government Services*, W.C. No. 4-761-187 (ICAO Oct. 14, 2009). When respondents seek to terminate benefits by applying for a hearing, the requirement to include in the offer of employment the duties, wages and hours, and a statement from the treating physician that the duties are within the claimant's physical restrictions, and the requirement to provide the claimant three business days from the receipt of the offer to start the job, as required by Rule 6-1, do not apply. *McCloud, supra.* Section 8-42-105(3)(d)(I), C.R.S., only requires that the physician provide a "written release to return to modified employment" and "such employment is offered to the employee in writing." The physician does not need to approve the actual modified job. *Barnett v. Wal-Mart Stores*, 4-769-486 (ICAO Oct. 27, 2010). *See McCloud, supra*.

5. Dr. Lakin released Claimant to return to modified duty and explained to her that returning to work with restrictions was therapeutic and the only way she was

going to improve at that point. Personnel manager Sarah called Claimant and advised her Dr. Lakin had released her to modified duty, Employer could accommodate her restrictions, she was scheduled to work, and she needed to call in if she was not going to work. Claimant did not even attempt to return to work and did not call in after Sarah's call. Claimant's opinion that the offered job was not a sit-down job is not a credible excuse for her failure to return to work, especially in light of her acknowledged previous experience with the light-duty process in which she was excused from job duties she said she couldn't do. The ALJ finds and concludes Claimant performed a volitional act and exercised a degree of control over the circumstances resulting in termination of her employment when she failed to return to the reasonably offered light-duty work. This occurred on March 7, 2016.

Reasonable and Necessary Medical Benefits

6. For a compensable injury, the respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101. The claimant has the burden of proving entitlement to specific medical benefits. *See* § 8-43-201(1), C.R.S; *Lutz v. Industrial Claim Appeals Office*, 24 P.3d 29, 31 (Colo. App. 2000). Whether the claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

7. Claimant has the burden of proving the prescriptions of Cymbalta and Lyrica remain reasonably necessary to cure and relieve the effects of her January 12, 2015 injury. Claimant was already taking both Cymbalta and Lyrica before her work injury for her fibromyalgia. However, Claimant suffered serious injuries to her left ankle while at work. Despite the fact that reasonable minds mind differ over the effectiveness of these drugs to treat her neuropathic pain- or her fibromyalgia- they present as the best alternative at the present time. ALJ finds that Cymbalta and Lyrica, as prescribed in dosages set by her ATPs, remain a reasonably necessary treatment for Claimant's work injury.

ORDER

It is therefore Ordered that:

1. Claimant was responsible for her own termination, effective March 7, 2016. Her Temporary Total Disability benefits terminated on that date, to be replaced with Temporary Partial Disability benefits at the rate of 75% of the applicable TTD rate until terminated by operation of law.

2. Respondents shall be entitled to a credit for any overpayment of TTD benefits.

3. Respondents will continue to supply Cymbalta to Claimant as recommended by her ATP.

4. Respondents will continue to supply Lyrica to Claimant as recommended by her ATP.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Did Claimant prove by a preponderance of the evidence that his claim should be reopened for medical treatment after MMI?

2. Did Claimant prove that viscosupplementation injections administered by Dr. Purcell are reasonable, necessary, and related medical treatment after MMI?

FINDINGS OF FACT

1. Claimant worked for Employer as the Director of strategic planning. On July 24, 2015, he injured his right knee playing volleyball at a team-building event.

2. Claimant initially saw his primary care physician, and was then referred to Dr. Derek Purcell, an orthopedic surgeon. A right knee MRI on August 31, 2015 showed an ACL tear and a medial meniscus tear.

3. Claimant has a significant history of prior right knee injuries. He tore his ACL in 2007 while he was in the military. He had surgery and recovered well with minimal ongoing problems. He had another right knee injury and 2012, which did not require surgery. He wore a brace and improved with therapy. After the 2012 injury, he returned to full work with no restrictions

4. In October 2015, Employer referred Claimant to CCOM to serve as the primary ATP "gatekeeper."

5. Dr. Purcell performed surgery to repair the ACL and medial meniscus on November 2, 2015. Subsequently, Claimant completed physical therapy and was released to full duty on April 8, 2016.

6. Claimant saw Dr. George Johnson at CCOM on April 18, 2016 for evaluation of MMI and impairment. Claimant complained of infrequent mild pain but was not using any pain medication. He stated his pain was worse when he climbed steps. Physical examination revealed no swelling or effusion of the knee. Claimant could squat to 90° without pain. He had decreased range of motion, but no crepitus. The knee was stable with no laxity or pain. Dr. Johnson assigned a 20% lower extremity rating: 5% for the ACL, 5% for the medial meniscus and 11% for ROM. Dr. Johnson opined Claimant did not require any maintenance care.

7. When he was put at MMI, Claimant had two more post-surgical follow-up appointments scheduled with Dr. Purcell.

8. Respondents filed a Final Admission of Liability (FAL) on May 6, 2016 based on Dr. Johnson's report. The FAL stated "Respondents deny liability for post-MMI medical benefits as not reasonable or necessary per attached report from Dr. Johnson."

9. Claimant spoke with a claims adjuster for Insurer by telephone sometime after receiving the FAL. The adjuster who had been handling Claimant's case since the beginning was on vacation, and he spoke with a different adjuster who was covering the desk. Because of that conversation, Claimant thought that Respondents would cover medical treatment for his knee in the future regardless of the language on the FAL. Claimant did not object to the FAL, and the claim closed.

10. Claimant followed up with Dr. Purcell on June 7, 2016. He reported he was "doing well." Physical examination showed no effusion or other significant abnormality. Claimant was having patellofemoral symptoms due to quadriceps weakness. Dr. Purcell opined the symptoms should improve with time as Claimant continued to work on strengthening. The diagnosis was "status post right knee revision ACL reconstruction with tibialis anterior allograft, partial medial meniscectomy, hardware removal, 11/02/2015."

11. Claimant returned to Dr. Purcell on August 2, 2016. Dr. Purcell noted he was "doing well," but "unfortunately, he continues to have some patellofemoral pain." Physical examination revealed a "trace effusion." Dr. Purcell indicated claimant could start skating and progress to hockey over time. No specific follow-up was scheduled, but Dr. Purcell indicated Claimant could return "on an as-needed basis."

12. Claimant started skating again in mid-September 2016, and subsequently started playing hockey again. As a result of these activities, Claimant began having significant swelling and pain in the right knee.

13. Claimant saw Dr. Purcell again on November 17, 2016. He stated he had been participating in all sports but was having recurrent swelling. On physical examination he had a 1+ effusion. Dr. Purcell opined "[Claimant's] symptoms are most likely consistent with his patellofemoral articular cartilage disease, which [was] seen at the time of surgery." Due to lack of benefit from measures such as icing, NSAIDS, and activity modification, Dr. Purcell recommended viscosupplementation. Dr. Purcell's diagnosis was "right knee patellofemoral osteoarthritis."

14. Insurer paid for the June 7 and August 2, 2016 appointments with Dr. Purcell. Insurer denied the November 17 visit and subsequent treatments.

15. Claimant underwent a series of three viscosupplementation injections on January 10, January 17, and January 24, 2017, under his personal health insurance.

16. Claimant failed to prove that the viscosupplementation injections and appointments with Dr. Purcell on or after November 17, 2016 were causally related to his admitted industrial injury.

17. Claimant failed to prove a basis for reopening his claim.

CONCLUSIONS OF LAW

A. The issue of medical benefits after MMI is closed

Claimant conceded he received the FAL and did not object to it. Ordinarily, that would be sufficient to prove his claim is closed. But Claimant's testimony that the adjuster told him Insurer would cover future medical treatment, coupled with the payment of appointments with Dr. Purcell in June and August 2016, raises a question whether Respondents voluntarily reopened the claim or waived the defense of claim closure. Although Claimant did not explicitly raise this argument, the ALJ finds it was fairly implied by the evidence and arguments presented.

Payment of medical benefits after a claim has closed may or may not constitute a voluntary reopening and waiver of the closure defense, depending on the circumstances. For instance, an insurer may pay for medical evaluations or treatment simply to determine whether a claimant's condition has worsened sufficiently to justify reopening. *Arneson v. Kimzey Casing Service, Inc*., W.C. No. 4-201-940 (ICAO, June 6, 1986). Or the payment may be the result of a mistake. *Id*. The key question is whether the respondents' words or conduct unambiguously manifest intent to reopen the claim or waive its right to insist that Claimant prove a basis for reopening before providing additional benefits.

Waiver is the intentional relinquishment of a known right. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988). A waiver may be explicit, such as when a party orally or in writing abandons an existing right or privilege. Or it may be implied, as when a party engages in conduct which manifests its intent to relinquish the right or privilege or acts inconsistently with its assertion. *Id.* The burden of proof is on the party asserting waiver. *Id*.

The ALJ finds Insurer's conduct was too ambiguous to establish a voluntary reopening or waiver. The fill-in adjuster Claimant spoke with was not even familiar with Claimant's file. Rather than rescinding or waiving the unequivocal denial of future medical stated in the FAL, the covering adjuster was probably explaining Claimant in general terms he would still have the opportunity to pursue further treatment by reopening his claim. Nor does the ALJ find that payment of the two office visits constituted a voluntary reopening. As noted in *Arneson*, there may be many reasons an insurer would cover treatment without agreeing to reopen. Insurer may have covered the June and August 2016 office visits to determine whether Claimant needed any further injury-related treatment. More likely, Insurer simply allowed Claimant to complete his postsurgical orthopedic appointments, with no intention of allowing treatment beyond that. Or the payments may have simply been a mistake on Insurer's part. In any event, the ALJ is unwilling to infer intent to reopen the claim from the evidence presented. The ALJ concludes Claimant did not present sufficient persuasive evidence to prove that Insurer intentionally relinquished its rights regarding reopening or waived the denial of future medical benefits reflected on the FAL. Therefore, the issue of medical benefits after MMI is closed.

B. Legal standards for reopening

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The reopening authority reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and the decision whether to reopen a claim when the statutory criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof on any issue sought to be reopened. Section 8-43-304(4).

In the reopening context, a change in condition refers "to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 741 P.2d 1328, 1330 (Colo. App. 1985). A "mistake" or "error" may refer to a mistake or law or of fact. *Ward v. Azotea Contractors*, 748 P.2d 338 (Colo. 1987). The ALJ has wide discretion to determine whether a mistake has occurred which justifies reopening a claim. *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986).

Even if a claimant proves an error, mistake, or change in condition, he is not automatically entitled to have his claim reopened. Rather, reopening is only appropriate if additional benefits will be awarded. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000).

C. Claimant did not prove the viscosupplementation injections are related to his admitted injury

Claimant's legal theory regarding reopening is not entirely clear, but his arguments and testimony suggest he is asserting a mistake and a change of condition. The ALJ has considered whether any of the statutory grounds for reopening are present. Ultimately, the ALJ concludes there is no basis to reopen the claim because Claimant did not prove the requested medical treatment is causally related to his admitted injury.

Claimant presented no persuasive evidence to prove a causal connection between the viscosupplementation injections and his admitted injury. There is no indication of any recurrent pathology regarding the ACL or meniscus, and Dr. Purcell opined Claimant's ongoing symptoms were related to patellofemoral osteoarthritis. The osteoarthritis most likely predated Claimant's industrial injury, and Claimant presented no persuasive evidence to prove that the injury aggravated, accelerated, or combined with the pre-existing condition to cause his current need for medical treatment. Neither Dr. Purcell nor Dr. Johnson opined the injury aggravated Claimant's preexisting osteoarthritis. Claimant's impairment rating was based on an ACL injury and meniscus

repair under Table 40, but no rating was given for arthritis. The ALJ acknowledges a claimant is not required to present expert opinion to establish medical causation, *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990), but the lack of opinion evidence is a factor the ALJ can consider when evaluating the totality of persuasive evidence.

The ALJ further notes that on November 17 Dr. Purcell changed the diagnosis on from an injury-related diagnosis to "right knee patellofemoral osteoarthritis." The ALJ infers from the change of diagnosis that Dr. Purcell did not believe treatment on or after November 17, 2016 represented a continuation of Claimant's injury, but instead reflected a different condition.

The crux of Claimant's argument is since he did not have chronic knee pain or swelling before his accident, the persistence of those symptoms proves the requisite causal connection. But the ALJ does not find the mere existence of a temporal relationship sufficient to prove that the injury aggravated the Claimant's pre-existing arthritis. Moreover, the evidence shows Claimant had no swelling or evidence of effusion at the time of MMI or on June 7, 2016. The swelling did not become significant until after Claimant returned to skating and playing ice hockey. Ultimately, the swelling is what prompted Claimant to pursue the viscosupplementation injections. Based on the evidence presented, the ALJ finds it more likely that Claimant's osteoarthritis was aggravated by his participation in sports or other vigorous activities, rather that the industrial injury.

Based on the totality of evidence presented, the ALJ concludes Claimant failed to prove by a preponderance of the evidence that medical treatment on or after November 17, 2016 was causally related to his industrial injury.

ORDER

It is therefore ordered that:

Claimant's request to reopen his claim additional for medical benefits after MMI is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues to be determined by this decision are the following:

a) Whether Claimant established by a preponderance of the evidence that he suffered a compensable work related injury on January 5, 2016;

b) What is Claimant's average weekly wage (AWW); and

c) Whether Respondents established by a preponderance of the evidence that Claimant was responsible for his wage loss and therefore not entitled to an award of indemnity benefits.

STIPULATIONS

The parties reached the following stipulations:

a) Claimant's AWW includes the cost of continuing medical coverage in the amount of $119.59 per week, starting on August 1, 2016; and

b) Claimant was employed by Employer at $12-per hour, for 9-hours per day, 4-days per week.

FINDINGS OF FACT

1. Claimant is a 27-year-old day program counselor who worked for Employer starting in October 2015. Claimant's job duties included transportation of mentally handicapped individuals in Employer provided vehicles. On January 5, 2016, Claimant alleges he was assaulted as he transported an autistic individual that was also unable to speak. Claimant reported that the individual became agitated at the sound of a passing siren. The individual calmed down but became agitated again and allegedly struck Claimant in the head 3-5 times. Claimant alleges he worked the remainder of his shift without difficulty.

2. During examination at Concentra on January 6, 2016, Claimant reported he had been punched in the right side of his head and face approximately 3-4 times and had since had a terrible headache with vomiting. Claimant complained of headache, dizziness, memory loss, photophobia, slurred speech, confusion impaired balance and poor coordination. Physician Assistant (PA) Julia Balderson noted no external swelling of the head and that "there is no evidence of trauma." However, Claimant had tenderness to palpation on the *left* side of his head. CT scans were negative for acute

fracture or evidence of acute intracranial injury. Claimant was diagnosed with a closed head injury and was taken off of work until his follow-up appointment on January 7, 2016.

3. Claimant also went to an urgent care facility at Boulder Community Health on January 6, 2016. Upon evaluation, there was again no note of any objective/observable evidence of an acute head injury. Likewise, Claimant denied any back or neck pain.

4. Dr. Joseph Fillmore conducted a "Physician Advisor" review regarding compensability on January 27, 2016. Dr. Fillmore recommended denial of the claim pending further investigation due to a lack of evidence of acute trauma and Claimant's reported history of multiple head injuries.

5. Claimant had been released to restricted duty by the end of January 2016. On April 18, 2016, Claimant attended an examination with PA Balderson. Claimant reported that he was only working ½ shift of the 3 shifts he was cleared for and scheduled to work. Claimant stated that he "should not be working." Per Claimant's request, PA Balderson took him completely off of work due to his subjective presentation of worsening symptoms and complaints.

6. In a letter dated June 15, 2016, Dr. Tentori also questioned Claimant's subjective presentation without objective evidence of injury. As such, Dr. Tentori recommended Claimant return to work; limiting his work day to four hour shifts and then gradually increase his work hours. On June 23, 2016, Claimant was placed on restrictions that allowed him to work four hours per day in a dim, quiet environment and included no driving.

7. Video surveillance obtained in June, July, and November 2016, showed Claimant behaving inconsistent with his subjective complaints. On June 8, 2016, Claimant was observed eating in a restaurant, walking outside on a sunny day and driving his vehicle without the use of sunglasses or any outward signs of disability. On June 18, 2016, Claimant is again surveilled and observed driving and walking outside without the use of sunglasses and in no apparent distress. Around the same time in June 2016, Claimant was unable to complete his neurological examination with Dr. Paul M. Richards, a clinical neuro-psychologist, due to his alleged severe migraine symptoms. And, despite the surveillance video of Claimant operating his vehicle, during Claimant's initial evaluation with Dr. Kimberly Horiuchi on June 28, 2016, Claimant reported that he was not currently driving, as he gets overwhelmed very easily by too much stimulation.

8. On June 24, 2016, Claimant presented at SCL Community Hospital for emergency evaluation for recurrent headaches. The medical report reflects that this was Claimant's third emergency department visit within the month for headache and that Claimant had received 3 prescriptions for opiates per month, in March, April and May, and that these prescriptions all came from different providers.

9. Claimant underwent an IME with Dr. Raschbacher on September 2, 2016. Upon examination and review of medical records, Dr. Raschbacher opined that there was absolutely no evidence to substantiate a work-injury or Claimant's continued severe and subjective pain complaints. He noted that Claimant's ENT and neurological examinations were unremarkable. Claimant did not have objective substantiating factors and no outward sign of trauma. There was no objective indication of a trauma having occurred to Claimant's the head or elsewhere. The doctor also noted that Claimant complained of neck pain approximately 6 weeks after the alleged injury and that if Claimant's neck pain was a result of trauma, it would have manifested itself within 1-2 days after the alleged incident.

10. Dr. Raschbacher credibly testified during deposition to a complete lack of medical evidence or support to substantiate the severity and duration of Claimant's alleged symptoms. Dr. Raschbacher credibly concluded that the force generated by the autistic individual seated next to Claimant would have been insufficient to cause the issues complained of 13 months post-injury and if indeed the punches did cause the symptoms, one would have seen evidence of injury at the site of impact. He also reasoned that the longer Claimant continued to report severe symptoms, the less likely it was that those symptoms could be attributable to the alleged incident because with head injuries, the symptoms are worst at first and then resolve with time.

11. It was Dr. Raschbacher's opinion that the medical records supported the argument that Claimant's alleged symptoms on January 5, 2016, were not new and most likely related to a non-work-related cause. Claimant had been suffering for over 2 months from the exact type of symptoms he was complaining of on January 6, 2016, and had been to urgent care only three days prior to the alleged incident complaining of similar symptoms.

12. Dr. Raschbacher opined that all literature, including the Medical Treatment Guidelines, supported the conclusion that Claimant's symptoms should have resolved after 90 days and, at a minimum, would have decreased since the incident. Instead, Claimant's symptoms progressively worsened and he continued to complain of severe symptomology more than 200 days after the alleged incident.

13. On August 12, 2016, Claimant sought treatment at Jefferson County Health Services, where Claimant reported a January 5, 2016, incident involving a much more vicious assault than had been previously reported. Claimant reported he was struck nine times in the head and rendered unconscious.

14. Claimant testified at hearing providing a clear description of the incident and surrounding actions he took, but then claimed to have developed amnesia hours after the alleged January 5, 2016, incident. Claimant testified that he was able to drive home multiple individuals after the alleged assault without any difficulty and remembered conversations he had with co-workers on January 5, 2016.

15. Claimant's testimony at hearing initially denied experiencing symptoms of dizziness, headaches, vertigo, neck pain and back pain previously. Claimant explained his prior symptoms by claiming a prior ear infection, a respiratory infection, the flu, and pneumonia. Claimant testified that January 5, 2016, was a time of year that brought back his feelings of PTSD and flashbacks, which required hospitalization one year prior.

16. Claimant offered contradictory and unpersuasive testimony regarding his return to the Employer's facility after the alleged incident on January 5, 2016, and whether he remembered the events that occurred or not.

17. Claimant testified that he was cleared to work for 3 hours per shift but that he would rarely ever work that long due to his migraines and admitted that he would leave work if he even thought a migraine was starting to develop.

18. Claimant denied a prior history of alcoholism, drug abuse or addiction when examined by Dr. Raschbacher. However, during testimony, Claimant admitted having prior issues of alcohol abuse, marijuana use, and abuse of klonopin.

19. Dr. Healey testified that he completed an independent medical evaluation of Claimant on October 21, 2016. Dr. Healey's opinions were found to be less credible and persuasive than Dr. Raschbacher because Dr. Raschbacher had more information regarding Claimant's condition than did Dr. Healey.

20. Claimant's girlfriend testified at hearing. She testified that she dated Claimant since the beginning of December 2015, and that he had been sick the entire time they were dating. She testified that she had been to the hospital with Claimant at least 3 separate times prior to the alleged assault and that during these urgent care visits, Claimant was vomiting, complaining of dizziness, headaches, and vertigo.

21. Meredith Hicks credibly testified that she was the direct manager of Claimant during his employment at Employer and directed Claimant's accommodated employment. Ms. Hicks testified that, on the alleged date of injury, she did not observe any type of physical indications of a recent assault and that Claimant was acting consistent with his usual behavior. Ms. Hicks credibly testified that Claimant failed to give proper notice of his absences from work and following counseling regarding Employer's concern about Claimant's attendance, Claimant persisted in being absent and failing to communicate, which continued until his termination from employment.

22. Jeff Rodarti is the Program Coordinator at the Employer. Mr. Rodarti testified that he did not directly supervise Claimant, but Mr. Rodarti prepared a first report of injury involving Claimant's alleged January 5, 2016, injury. Mr. Rodarti testified that he directly interacted with Claimant on the date of injury and that he did not observe evidence of a physical assault.

23. Karen Kalis was the human resources officer for Employer. Ms. Kalis was employed by Employer for 21 years. She credibly testified that Claimant was habitually

absent from his scheduled shifts despite Employer's substantial attempts to accommodate Claimant's ongoing restrictions. Ms. Kalis testified that Employer used extraordinary efforts to bring Claimant back to full employment. Ms. Kalis testified that at least 10 employees of Employer were involved in accommodating and bringing Claimant back to work. However, their efforts were in vain.

24. Ms. Kalis credibly testified that the individual "consumer" who allegedly assaulted Claimant had no prior history of aggression toward any of Employer's staff. Ms. Kalis testified that Claimant was eventually separated from the company due to a variety of reasons. Ms. Kalis credibly testified that as a business, Employer expected all employees regardless of work-injury to attend work when scheduled and to complete the tasks asked of them and that Claimant fell short of this standard from the beginning of his employment.

CONCLUSIONS OF LAW

A. Compensability/Medical Benefits

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. A claimant must prove his entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201(1), C.R.S. Rather, a workers' compensation claim is to be decided on its merits. *Id.*

2. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

3. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

4. A claimant's right to compensation initially hinges upon a determination that the claimant suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Section 8-41-301, C.R.S. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is Claimant's burden to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). There is no presumption that an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968).

5. Once a claimant has established the compensable nature of his work injury, he is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970*);* Section 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

B. Claimant failed to meet his burden to prove it more likely than not that he suffered from a compensable injury on January 5, 2016.

1. The only evidence of a January 5, 2016, injury is Claimant's subjective statement of an alleged assault which was uncorroborated by objective facts and evidence. As shown above, Claimant's testimony, description of the incident, and complaints of continued symptomology are not credible. Claimant misrepresented his

ability to drive to his provider when he stated that he was unable to drive due to being easily over stimulated, only to be observed driving his vehicle without sunglasses for long periods of time just days prior. Claimant exaggerated the January 5, 2016, incident to his mental health providers at Jefferson Center for Mental Health when he told them he had been struck in the head at least 9 times until he was rendered unconscious. Claimant withheld the truth in his reporting about his prior drug usage. Claimant was not truthful when he said he never missed a day of work without notifying the proper personnel and was not truthful when he said he never went home early without telling his supervisors. Further, Claimant was not truthful when he attempted to bolster his claim by alleging that the individual who assaulted him was known to be a violent consumer, when in fact the credible evidence established that the individual had no prior history of aggression.

2. Likewise, Claimant alleges that he suffers from severely debilitating conditions. Yet, every time Claimant was observed on surveillance, he appeared to be functioning without difficulty or the need for sunglasses. Claimant, his father and girlfriend testified that they went on vacation and went on mountain hikes without the need for sunglasses. However, upon presentation to his providers and at hearing, Claimant painted a different picture of himself as a severely disabled individual unable to work for even a hour at a time. Claimant testified that the surveillance happened to show him on "good days," however, if this was true, there would be medical visits documenting Claimant's "good days" as well. Instead, medical records reflect that Claimant complained of subjective complaints of pain at every medical visit attended.

3. Furthermore, there is a complete lack of any corroborating evidence which would support Claimant's claim of injury. MRI results were negative. CT results were negative. Multiple physical examinations were negative and instead of having tenderness on the right side of his head where he alleged being struck, Claimant alleged that he had tenderness on the left side of his head. Claimant denies ever having any tenderness or observable marks of injury on the right side of his face. No logical or medical explanation is offered for this claim.

4. Record evidence shows that Claimant moved to Colorado in July 2015 and began attending urgent care facilities with complaints of headache, vertigo, nausea, and dizziness. Claimant, his father and girlfriend, all claimed during testimony that Claimant had pneumonia for over 6-months in 2015 with resolution of all symptoms the day he alleges the assault took place with new onset of old symptoms all attributed to the assault. This testimony was not deemed credible.

5. Additionally, the credible and persuasive evidence established that Dr. Healey's opinions are based on a subjective description of an incident, without any corroborating evidence, placed within the context of a traumatic whiplash injury or degenerative cervical condition, neither of which conditions were established to exist here.

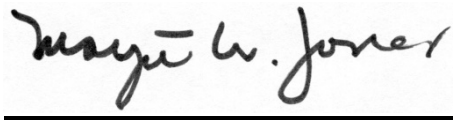
ORDER

It is therefore ordered that:

1. Claimant has failed to meet his burden to prove he suffered from a compensable injury on January 5, 2016. As such, his claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2017_



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether claimant is entitled to an award of penalties pursuant to Section 8-43-304, C.R.S. for Respondent's alleged violation of Section 8-42-107 (8)(b.5)(II), C.R.S. and WCRP 5-5(D)(1)(a), from April 11, 2015 through November 11, 2015.

STIPULATIONS

The parties stipulated at hearing that Respondent sent the February 26, 2015 letter to Meghan Mont, D.O. for the purpose of obtaining Dr. Mont's opinion on whether Claimant had reached maximum medical improvement ("MMI").

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury to his right knee on November 7, 2012 and underwent a partial medial meniscectomy of the right knee in January 2013, performed by Alexander K. Meininger, M.D. Dr. Meininger was an authorized treating physician ("ATP").

2. Claimant subsequently complained of left knee pain and underwent a partial medial meniscectomy performed by Meghan Mont, D.O. Claimant also complained of neck and back pain. Dr. Mont was an ATP.

3. In a report dated November 5, 2013, Dr. Meininger stated, "At this time I feel [Claimant] has plateaued in his recovery of the bilateral knee meniscal injuries." Dr. Meininger noted Claimant had an upcoming appointment with a specialist for his lumbar spine, and stated he "would await those results and/or a lumbar spinal MRI before declaring him at maximum medical improvement." On a WC164 form dated November 5, 2013, Dr. Meininger indicated he anticipated Claimant sustained a permanent impairment.

4. On February 3, 2014, John J. Raschbacher, M.D. conducted an Independent Medical Examination ("IME") at the request of Respondent. Dr. Raschbacher opined Claimant was at MMI for his right knee and that Claimant sustained a 6% lower extremity permanent impairment rating for the right knee. Dr. Raschbacher opined Claimant's left knee, neck and back conditions were not work-related.

5. On March 25, 2014, Respondent sent a letter to Dr. Mont requesting that Dr. Mont review Dr. Raschbacher's IME Report and provide an opinion on whether Claimant's left knee, back pain, and neck pain were causally related to Claimant's right knee industrial injury; whether Claimant had reached MMI for his right knee condition; and whether Claimant sustained any permanent impairment.

6. Dr. Mont responded on April 28, 2014. Dr. Mont indicated Claimant was under the care of Dr. Meininger for his orthopedic injuries and stated, "I think that if he has been cleared by Orthopedics, then an impairment rating for the right knee may be warranted. I am unable to determine his permanent impairment but I think the right knee may have some impairment." Dr. Mont further stated Claimant's back and neck pain could be related to Claimant's initial injury.

7. On May 5, 2014, Respondent filed an Application for Hearing on the issues of compensability, medical benefits, and causation regarding Claimant's left leg, back and neck conditions.

8. Claimant subsequently filed two additional claims alleging a low back injury n January 19, 2014 and a left knee injury on March 22, 2013.

9. ALJ Michelle E. Jones conducted a consolidated hearing on September 11, 2014 and issued a Findings of Fact, Conclusions of Law, and Order on January 22, 2015. ALJ Jones determined Claimant did not suffer a compensable left knee injury, a compensable low back injury, or a compensable neck injury as a consequence of the prior right knee injury. ALJ Jones further concluded Claimant did not sustain a compensable left knee injury on March 22, 2013 or a compensable low back injury on January 19, 2014. ALJ Jones denied and dismissed the claims. Claimant did not file a Petition to Review ALJ Jones' order.

10. On February 26, 2015, Respondent sent a letter to Dr. Mont asking Dr. Mont to indicate whether Claimant had reached MMI. Respondent enclosed a copy of ALJ Jones' order, noting ALJ Jones determined Respondent was not liable for treatment of Claimant's left knee, neck and back conditions. Respondent also included Dr. Meininger's November 5, 2013 report stating, "It appears that Mr. Harris may be at Maximum Medical Improvement for his right knee claim." The letter included a section stating, "[Claimant] is/is not at Maximum Medical Improvement." Dr. Mont was to check the appropriate response. The letter did not request Dr. Mont specify the date of MMI in the event she determined Claimant had reached MMI. The letter did also not make any reference to permanent impairment.

11. Dr. Mont responded to Respondent's letter on March 2, 2015. Dr. Mont marked that Claimant was at MMI. Dr. Mont did not specify a date of MMI or address permanent impairment in her response.

12. Respondent filed a Final Admission of Liability ("FAL") on March 31, 2015, admitting to an MMI date of February 3, 2014 and a 6% right lower extremity permanent impairment rating based on Dr. Raschbacher's February 3, 2014 IME Report.

13. Claimant filed an objection to the March 1, 2015 FAL on April 28, 2015.

14. Respondent sent a letter to Claimant's counsel on April 30, 2015 regarding the March 31, 2015 FAL. In the letter, Respondent referred to an April 7, 2015 e-mail from Claimant's counsel inquiring as to Respondent's basis for the March 31, 2015 FAL. As explanation for the basis of the March 31, 2015 FAL, Respondent's counsel stated:

- On February 26, 2015, I sent a letter to Dr. Mont requesting she provide her opinion on whether Claimant had reached Maximum Medical Improvement;

- On March 2, 2015, Dr. Mont responded to my letter indicating that Claimant was at Maximum Medical Improvement; Dr. Mont is not Level II accredited;

- Dr. Mont did not refer Claimant for an impairment rating within 20 days after the determination of MMI;

- W.C.R.P. 5-5(D)(1)(a) provides 'If the referral is not timely made, the insurer shall refer the claimant to a Level II accredited physician for a medical impairment rating within 40 days after the determination of MMI';

- Dr. Raschbacher already had provided an impairment rating, so Respondent relied upon that impairment rating pursuant to W.C.R.P 5-5(D)(1)(a).

Claimant had contended Respondent needed to send Claimant for a permanent impairment rating at the time of MMI, and alleged Dr. Raschbacher had a conflict of interest. Respondent offered to withdraw the March 31, 2015 FAL and return Claimant to Dr. Raschbacher for an updated impairment rating. Respondent's counsel stated if no response was received within 20 days, he would assume Claimant was proceeding with the procedures to request a Division Independent Medical Examination ("DIME").

15. Claimant filed an Application for Indigent Determination on May 15, 2015.

16. Respondent sent a follow-up letter to Claimant's counsel on May 26, 2015 noting that, since no response had been received from Claimant, Claimant was deemed to have chosen not to return to Dr. Raschbacher consistent with WCRP 5-5(D).

17. Claimant's counsel responded via e-mail on May 26, 2015, asserting Respondent was in a penalty situation by filing the March 31, 2015 FAL based on an impairment rating performed "long before" Claimant was placed at MMI, and by "failing to refer Claimant to a Level II provider within 40 days of the determination of MMI." Claimant's counsel stated he would speak to Claimant if Respondent wanted to negotiate a Level II provider to evaluate Claimant for permanent impairment.

18. In a May 27, 2015 e-mail, Respondent's counsel stated Respondent's intention was to proceed with scheduling a repeat examination with Dr. Raschbacher.

19. ALJ David P. Cain issued an order dated June 5, 2015 determining Claimant was indigent.

20. On June 11, 2015, Respondent scheduled an IME with Dr. Raschbacher for August 5, 2016, which was subsequently changed to July 6, 2015.

21. On June 25, 2015, Claimant filed an application for a Division Independent Medical Examination ("DIME").

22. In a June 30, 2015 e-mail, Claimant's counsel notified Respondent that Claimant was unable to attend the July 6, 2015 appointment with Dr. Raschbacher due to confusion over the amended date.

23. On July 8, 2015, Franklin Shih, M.D. was chosen to perform the DIME, which was scheduled for September 2, 2015.

24. On July 9, 2015, Respondent scheduled an IME with Frank Polanco, M.D., which was conducted on July 28, 2015. Dr. Polanco determined Claimant was at MMI as of November 5, 2013 and assigned a 15% permanent impairment rating.

25. In a letter dated August 17, 2015, Claimant cancelled the DIME appointment with Dr. Shih scheduled for September 2, 2015.

26. Claimant filed an Application for Hearing on August 26, 2015 endorsing, among other issues:

> Penalties from 4/11/15 and continuing pursuant to C.R.S. 8-43-304 and 8-43-305 for violation of C.R.S. 8-42-108(b.5)(II) and W.C.R.P. 5-5(D)(1)(a); Penalties from 3/31/15 and continuing pursuant to C.R.S. 8-43-304 and 8-43-305 for violation of W.C.R.P. 5-5(E)(1). More specifically, respondents failed to refer Claimant to a Level II provider after Claimant was placed at MMI by the ATP, Dr. Mont, on 3/2/15, then proceeded to file a FAL utilizing the schedule impairment rating calculated by respondents IME, Dr. Raschbacher on 2/3/14.

The hearing was set for February 2, 2016.

27. Respondent filed a FAL on October 20, 2015 admitting an MMI date of February 3, 2014 based on Dr. Rashbacher's February 3, 2014 IME, and a 15% permanent impairment rating based on Dr. Polanco's July 28, 2015 IME.

28. On November 11, 2015, Respondent filed a an Amended FAL, admitting to an MMI date of March 2, 2015 based on Dr. Mont's March 2, 2015 response, and a 15% permanent impairment rating based on Dr. Polanco's July 28, 2015 IME. Respondent stated, "Claimant placed at Maximum Medical Improvement by Dr. Mont on March 2, 2015. Dr. Mont not level II accredited so Respondent admits to a 15% lower extremity rating per Dr. Polanco's report dated July 28, 2015, pursuant to W.C.R.P. 5-5(D)(1)(a)."

29. On February 1, 2016, the parties filed a joint motion to withdraw the August 26, 2015 Application for Hearing and to re-file, preserving all issues and defenses. An order was issued granting the motion, vacating the February 2, 2016 hearing.

30. Claimant re-filed an Application for Hearing on February 4, 2016 endorsing, among other issues, penalties. The hearing was set for May 12, 2016.

31. Claimant subsequently filed an unopposed motion for continuance of the hearing set for May 12, 2016. An order dated May 11, 2016 granted the continuance and vacating the May 12, 2016 hearing.

32. On May 23, 2016, Claimant filed an unopposed motion to withdraw the February 4, 2016 Application for Hearing without prejudice. An order dated May 26, 2016 granted the motion to withdraw the application for hearing, preserving the issues.

33. On December 1, 2016, Claimant filed an Application for Hearing endorsing, among other issues, penalties.

34. Sharmie Jensen, Claims Adjuster for Sedgwick Claims Management, testified at hearing. Ms. Jensen testified she has worked as a claims adjuster for 14 years and has experience adjusting Colorado workers' compensation claims. Ms. Jensen testified she has worked on Respondent's account for 10 years, and on Claimant's claim for at least two years. Ms. Jensen testified Dr. Mont was an authorized treating physician and that Dr. Mont referred Claimant to Dr. Meininger for surgery. Ms. Jensen testified that there were no other authorized treating physicians in the chain of referral. Ms. Jensen testified Respondent sent Claimant to Dr. Raschbacher for an IME, and that Dr. Raschbacher was not an authorized treating physician. Ms. Jensen testified Dr. Mont was not Level II accredited and that she was aware a physician needs to be Level II accredited to issue a permanent impairment rating.

35. Ms. Jensen testified no authorized treating physician placed Claimant at MMI prior to March 2, 2015, although she could subjectively interpret language from Dr. Mont and Mr. Meininger as finding MMI. Ms. Jensen testified she filed the March 31, 2015 FAL because Dr. Mont agreed with Dr. Raschbacher's IME rating. When questioned as to why she believed Dr. Mont agreed with Dr. Raschbacher's IME permanent impairment rating, Ms. Jensen referred to Dr. Mont finding Claimant at MMI in her March 2, 2015 response. Ms. Jensen testified Ms. Jensen testified Respondent ultimately sent Claimant for an IME with Dr. Polanco because Claimant was disputing the FALs filed with Dr. Raschbacher's permanent impairment rating and Respondent wanted to resolve the issue. Ms. Jensen testified she did not refer Claimant to a Level II provider for purposes of evaluation permanent impairment within 40 days of March 2, 2015.

36. Respondent violated Section 8-43-304(1), C.R.S. by failing to refer Claimant to a Level II accredited physician within 40 days of the date MMI was determined.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the

rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Penalties

Whether statutory penalties may be imposed under Section 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1,000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (I.C.A.O. August 2, 2006), *but see, Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (standard is less rigorous standard of "unreasonableness"). However, there is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*. A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

Although Claimant endorsed WCRP 5-5(E) violation as an issue on the December 1, 2016 Application for Hearing, both at hearing and in his position statement, Claimant specifically asked for penalties for Respondent's failure to comply with Section 8-42-107 (8)(b.5)(II), C.R.S. and WCRP 5-5(D)(I)(a). Claimant seeks a penalty for the time period from April 11, 2015 through November 11, 2015.

Section 8-42-107(8)(b.5) provides:

> "When an authorized treating physician providing primary care who is not accredited under the level II accreditation program pursuant to section 8-42-101 (3.5) makes a determination that an employee has reached maximum medical improvement, the following procedures shall apply:
>
> (II) If the employee is a state resident, such physician shall, within twenty days after the determination of maximum medical improvement, determine whether the employee has sustained any permanent impairment. *If the employee has sustained any permanent impairment*, such physician shall refer such employee to a level II accredited physician for a medical impairment rating … If the referral is not timely made by the authorized treating physician, the insurer or self-insured employer shall refer the employee to a level II accredited physician within forty days after the determination of maximum medical improvement."

WCRP 5-5(D) provides:

> For all injuries required to be filed with the Division with dates of injury on or after July 1, 1991:
>
> (1) Where the claimant is a state resident at the time of MMI:
>
> (a) When an authorized treating physician providing primary care is not Level II accredited and has determined the claimant has reached MMI *and has sustained any permanent impairment*, such physician shall, within 20 days after the determination of MMI, refer the claimant to a Level II accredited physician for a medical impairment rating. If the referral is not timely made, the insurer shall refer the

> claimant to a Level II accredited physician for a medical impairment rating within 40 days after the determination of MMI.

The ALJ concludes Claimant made a prima facie showing Respondent violated Section 8-42-107(8)(b.5)(II), C.R.S. and WCRP 5-5(D)(1)(a). It is undisputed Claimant was a state resident at the time of reaching MMI, and that Dr. Mont, the ATP placing Claimant at MMI, was not Level II accredited. The parties stipulated Respondent sent Dr. Mont the February 26, 2015 for the specific purpose of obtaining her opinion on MMI. Dr. Mont determined Claimant was at MMI in her March 2, 2015 response to Respondent's February 26, 2016 letter. Per Section 8-42-107(8)(b.5)(II), C.R.S., Dr. Mont was then required, within 20 days after her determination of MMI, to determine whether Claimant sustained any permanent impairment. Dr. Mont did not address permanent impairment in the March 2, 2015 response, nor was any evidence admitted at hearing indicating Dr. Mont did so subsequently. Dr. Mont did not refer Claimant to a Level II physician, nor was there evidence that Respondent requested such an evaluation. The ALJ concludes the prior IME conducted by Dr. Raschbacher did not constitute such a referral.

Respondent notes that Section 8-42-107 (8)(b.5)(II), C.R.S. and WCRP 5-5(D)(1)(a) require a respondent to refer a claimant to a Level II accredited provided only when an ATP determines a claimant has sustained a permanent impairment. Respondent contends that there is no credible evidence Dr. Mont, Dr. Meininger or any other ATP providing primary care opined Claimant sustained any permanent impairment and, as such, no violation of Section 8-42-107 (8)(b.5)(II) C.R.S. or WCRP 5-5(D)(1)(a) occurred.

The ALJ disagrees with this contention. In her April 28, 2014 letter, Dr. Mont indicated she believed Claimant's right knee may have some permanent impairment. Dr. Meininger also stated in the WC164 form dated November 3, 2015 that he anticipated permanent impairment. Furthermore, it is clear Respondent believed an ATP determined Claimant sustained a permanent impairment. Respondent admitted for a permanent impairment rating in the March 31, 2015 FAL. In justifying the basis for admitting to Dr. Raschbacher's permanent impairment rating, Respondent specifically referred to the requirements of WCRP 5-5(D)(1)(a), acknowledging Dr. Mont was not Level II accredited, that she failed to refer Claimant for an impairment rating within 20 days of determining MMI, and that the insurer was then required to refer Claimant to a Level II accredited provider for an impairment rating. Thus, Respondent's contention that no ATP determined Claimant sustained a permanent impairment is undermined by Respondent's own actions. Based on the March 2, 2015 date of MMI, Respondent was required to refer Claimant to a Level II provider by April 13, 2015.[1] Respondent did not refer Claimant to a Level II accredited provider for an impairment rating by April 13, 2015. Respondent's failure to refer Claimant to a Level II accredited provider by April 13, 2015 constitutes a violation of Section 8-42-107 (8)(b.5)(II), C.R.S. and WCRP 5-5(D)(1)(a).

[1] April 13, 2015 is the first business day after 40 days from March 2, 2015.

Respondent's conduct was not objectively reasonable. Respondent was aware Dr. Mont was not a Level II accredited physician. Despite contacting Dr. Mont for the specific purpose of obtaining her opinion on MMI to then file a FAL, Respondent failed to inquire as to Dr. Mont's opinion on permanent impairment. Ms. Jensen testified she filed the March 31, 2015 FAL because she believed Dr. Mont agreed with Dr. Raschbacher's impairment rating, indicating Respondent believed Dr. Mont determined there was a permanent impairment. Respondent attempted to circumvent the requirements of Section 8-72-407(8)(b.5)(II), C.R.S. and WCRP 5-5(D)(1)(a) by admitting to a permanent impairment rating provided by Respondent's IME provided over a year prior to Dr. Mont's determination of MMI. Respondent's actions were objectively unreasonable under the circumstances.

Respondent contends any penalty for the violation is limited to April 11, 2015 through June 11, 2015. Respondent was required to refer Claimant to a Level II accredited provider within 40 days of Dr. Mont's March 2, 2015 determination of MMI, making the deadline April 13, 2015 (the first business day after April 11, 2015). Respondent made a referral to Dr. Raschbacher, a Level II accredited provider, on June 11, 2015. 59 days elapsed between the deadline and Respondent's referral. Respondent's conduct was unreasonable, thereby subjecting Respondent to penalties. While Claimant was dissatisfied with the choice of the Level II accredited provider, the ALJ is persuaded the referral met the requirement of Section 8-42-107 (8)(b.5)(II), C.R.S. and WCRP 5-5(D)(1)(a). While Claimant contends Dr. Raschbacher had a conflict of interest, Claimant did not cite any case law establishing the referral to Dr. Raschbacher violated Section 8-42-107 (8)(b.5)(II), C.R.S. or WCRP 5-5(D)(1)(a).

Accordingly, it is concluded that Claimant is entitled to award of penalties under Section 8-43-304(1), C.R.S. Claimant is awarded $20.00 per day for each of the 59 days after April 13, 2015 for which Respondent failed to refer Claimant to a Level II accredited provider for a permanent impairment rating, or an amount of $1,180.00.

ORDER

It is therefore ordered that:

I. Claimant is awarded penalties under Section 8-43-304(1), C.R.S. for Respondent's failure to comply with Section 8-42-107(8)(b.5)(II), C.R.S. and WCRP 5-5(D)(1)(a). Respondent shall pay Claimant $1,180.00.

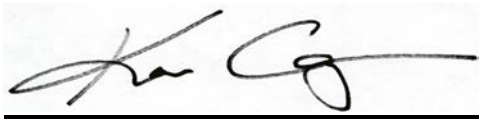
II. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

III. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Respondents overcame the opinion of the DIME physician on MMI and permanent medical impairment.
- Whether Claimant's hip condition was causally related to the accident.
- If Respondents sustained their burden of proof, what, if any, was Claimant's permanent medical impairment?
- Is the proposed medical treatment for Claimant's hip reasonable, necessary and related to her injury?

FINDINGS OF FACT

1. Claimant was working for Employer in Colorado as a civil engineer.

2. There was no evidence in the record which showed Claimant had a history of injuries to her cervical or lumbosacral spine, or her lower extremities.[1] There was no evidence Claimant treated for symptoms in any of these areas before October 23, 2012.

3. Claimant suffered an admitted industrial injury on October 23, 2012 when she was injured in a motor vehicle accident ("MVA") while working for Employer. Claimant was sitting in the passenger seat when the vehicle in which she was riding was rear-ended. The airbags deployed.

4. Claimant testified that she does not fully remember the details of the accident. Claimant recalled crawling out of the driver's side of the vehicle, but did not remember riding to or checking into the hospital. Claimant testified that she remembered waking up during the MRI, but does not remember any conversations with hospital staff.

5. Claimant was treated at Littleton Adventist Hospital. The intake report noted Claimant did not recall the accident, she just remembered seeing taillights and then being pushed back by an airbag. A CT scan of the patient's head, neck, and facial bones was done. The report also noted there was a concern given Claimant's headache and left-sided neck pain, so a CT angiogram was obtained. Claimant was evaluated by Andrew Knaut, M.D., Ph.D., whose diagnosis was: 1) Motor vehicle

[1] Treatment records for Claimant from 2008 were admitted. These contained a pain diagram in the low back. However, there was no evidence in these documents of a diagnosis or treatment Claimant received for her low back.

accident; 2) concussion, and 3) left inferior orbital wall fracture. The ALJ notes Claimant had no complaints of lower extremity pain at the emergency department.

6. Following her injury, Claimant returned home to New Mexico. Claimant testified that upon returning to New Mexico she was most concerned about the persistent numbness on the left side of her face and constant headaches. She was worried about these symptoms. The ALJ credited this testimony that these symptoms were Claimant's main focus at this point in time. Claimant also stated her physical activities were limited.

7. Claimant testified she experienced in pain in her thigh a couple of weeks later, which was sometime around Thanksgiving. She could not cross her legs. When she increased her activities, this caused an increase in symptoms in her legs and lower back. Claimant said she had never experienced symptoms in her thighs/hips before the accident.

8. On November 30, 2012, Claimant was evaluated by Mark Berger, M.D. at New Mexico Neurology. At that time, she was complaining of headaches, although these were improving. She also reported neck pain since the accident, as well as left facial numbness. Dr. Berger's neurological examination was normal. His impression was: headaches following trauma on October 23, 2012, which were most compatible with post-traumatic headaches. Dr. Berger noted there was no evidence for other neurological processes causing the head pain, based upon the CT scan. Dr. Berger also diagnosed neck pain and left facial numbness, which was not improving. He wanted to proceed with a somatosensory evoked potential study of the trigeminal nerves to evaluate the function of the trigeminal nerve. He opined her neck pain was musculoskeletal in origin due to the cervical strain and prescribed physical therapy ("PT"). For the left orbital fracture, he stated an ENT evaluation was required. The ALJ notes Claimant made no reference to hip or thigh pain during this evaluation.

9. Medical records from MD Urgent Care in New Mexico were admitted at hearing. On February 28, 2013, Claimant was evaluated at that facility and she reported having moderate pain in both thighs since Thanksgiving. In the history section, it was noted Claimant was running 4-5 days /week, but she had no pain with running or at rest. Stretching was not helping. Normal hip range of motion ("ROM") was noted at this evaluation. Claimant's adductor muscles were noted to be very tight. X-rays were taken of Claimant's right and left femur, but no abnormalities were noted. Claimant was advised to obtain an orthopedic evaluation. Claimant was also to begin an exercise program, received independent exercise instruction, and range of motion/stretching.

10. Claimant returned to MD Urgent Care on March 20, 2013, complaining of neck pain and headaches, of two days duration. Claimant was given a prescription, as well as written instructions and discharged.

11. On March 21, 2013, Claimant was evaluated by orthopedic surgeon Paul Legant, M.D. Claimant identified the problem as pain on the inside of both thighs. The ALJ notes Claimant left blank whether the symptoms were related to an auto accident,

but in the subject of history section, Dr. Legant noted she had been in a car accident around Halloween and had experienced symptoms since Thanksgiving. Claimant described the symptoms as sometimes dull, sometimes sharp in nature, with the biggest problem when she attempted to cross her legs. Dr. Legant noted there was no pain with internal or external rotation of her hips, as well as no edema nor erythmia. She had full and equal range of motion for both lower extremities. Dr. Legant's assessment was bilateral thigh pain-etiology unknown. He referred Claimant to a neurologist.

12. On May 7, 2013, Claimant was evaluated by John Campa, III, M.D. Her chief complaint was intermittent, sharp shooting pain to the bilateral proximal thigh region. Claimant reported the symptoms began spontaneously, initially in the left thigh and then occurring in the right thigh in January 2013. These have been worsening over time. Claimant's history of a MVA and endometriosis was noted, along with her diabetes. In her pain diagram, Claimant indicated she felt pain over C6, C7, T8 and L2. On examination, Dr. Campa noted muscle spasm in Claimant's cervical spine and shoulders, as well as the thoraco/lumbar spine. In the section entitled etiology, Dr. Campa noted the following needed to be considered: bilateral, position/stretch related medial, proximal thigh pain, likely related to bilateral obturator nerve compression/entrapment the level of pelvic brim, secondary to recurrent endometrial implants. He also opined the following needed to be ruled out: C5-6 spinal segmental legion, mid T spine spinal segmental lesion, lumbosacral spinal segmental lesion, right thyroid lobe lesion; identify polyneuropathy likely diabetic in origin. Dr. Campa performed extensive electrodiagnostic testing in each of those areas.

13. Claimant moved to South Dakota and treated at the Creekside Medical Clinic. Claimant was evaluated on June 14, 2013 by Stephen Sachs, PA-C reporting worsening, limited ROM to both hips and occasional pain to medial thighs. On examination, her hips were noted to have limited external rotation and slightly decreased internal rotation due to pain along the medial thighs. X-rays were negative. The diagnosis of backache was added.

14. Claimant began treating with Stuart Johnson, D.C. on July 12, 2013. Dr. Johnson recorded that, after the motor vehicle accident on Thanksgiving, Claimant couldn't cross her left leg over the right and had sharp pains over the left medial thigh. He further recorded that, the air bag deployed and hit her, jarring her and may have aggravated her lower back, as well as her neck and thigh. She advised that a prior MRI of the low back was negative. Chiropractor Johnson treated Claimant's cervical and lumbar spine on 45 occasions from July 12, 2013 through January 21, 2014. The records indicated Claimant subjectively reported symptom relief.

15. Claimant returned to PA-C Sachs September 23, 2013, however, this appointment was concerned with issues related to type one diabetes mellitus, ketoacidosis and abnormal electrolytes. On December 2, 2013, Claimant was evaluated by Jana Doorman, PA-C. She was complaining of persistent low back pain, bilateral hip pain and medial thigh pain, which she said was present since the October 23, 2012 accident. PA-C Doorman felt the bilateral hip pain, with medial thigh pain and low back pain was related to an SI joint radiculopathy.

16. Claimant then moved to Alabama and received chiropractic manipulation from Amanda Holland D.C. for cervical, thoracic and lumbar complaints from February 5, 2014 through August 25, 2014. She received a total of 35 treatments, which provided temporary symptomatic relief.

17. Claimant was examined by John Johnson, M.D. (neurosurgeon) on March 18, 2014. On this date, Claimant had problems moving her hips, crossing her legs, but denied constant back pain, describing it as intermittent. Claimant described a sharp pain in to her buttock and into her hip, and some pain in the anterior medial thigh with radiation. Upon examination, the doctor recorded she was unable to cross her hips left over right or right over left. Dr. Johnson reviewed the prior lumbar MRI scan dated June 18, 2013, noting there was no evidence of a disc herniation, stenosis or neural foraminal narrowing. His impression was: bilateral hip pain with decreased range of motion and low back pain. Dr Johnson corresponded with chiropractor Amanda Holland indicating that he could not explain Claimant's symptoms. However, he noted that she is an insulin-dependent diabetic and Claimant thought she was having avascular necrosis of her hips. Therefore, he recommended securing an MRI of the pelvis to rule out avascular necrosis of the hips. He noted that he encouraged her to seek out a PCP and possibly consider a rheumatology evaluation, as he did not see any structural abnormality.

18. On April 26, 2014, an MRI of the Claimant's pelvis was done. The impression of James Mann, M.D., the attending radiologist, was: no evidence of a recent stress or traumatic fracture. There is no evidence of osteonecrosis in either femoral head. The articular cartilage was grossly unremarkable. No definite acetabular labral tear identified. If clinical concern for labral pathology, consider MR arthrogram of the symptomatic hip for further evaluation.

19. After reviewing the MRI of the pelvis, Dr. Johnson issued a follow-up report dated May 6, 2014, wherein he stated that he had reviewed the MRI, and that is was fairly unrevealing, specifically that there was no evidence of avascular necrosis of the hips. He found nothing of a surgical nature. On July 21, 2014, a Worker's Claim for Compensation was filed on behalf of Claimant. In the Worker's Claim, it was alleged Claimant's low back and lower extremities, neck/upper back and face were injured in the accident.

20. A General Admission of Liability ("GAL") was filed on behalf of Respondents on August 26, 2014. The GAL admitted for medical benefits.

21. On October 8, 2014, Peter Quintero, M.D., a neurologist, examined Claimant at the request of Respondents. Claimant was continuing to complain of sharp inner thigh pain with certain activities such as crossing the legs. She also reported complaints of low back pain 3/10, neck and mild mid-back pain, as well as headaches. Clamant did not specifically report hip pain. Dr. Quintero's accident related diagnoses were: cervical strain injury with secondary myofascial pain syndrome; thoracic strain injury with secondary myofascial pain syndrome; lumbosacral strain injury with

secondary myofascial pain syndrome; left orbital fracture-resolved; muscular contraction headaches; and concussion-resolved. These diagnoses led the ALJ to conclude Claimatn injured these areas of her body. Dr. Quintero opined that due to the delayed nature of Claimant's reported inner thigh pain and the mechanism of injury, he could not relate these symptoms to the motor vehicle accident. Dr. Quintero thought it was most likely Claimant sustained strain injuries to these areas of her body, but would have had a good prognosis for a full recovery. Dr. Quintero believed Claimant suffered an injury to her gracillis muscles. The most common cause of injury to the gracillis muscles or adductors was a sports injury, such as running. The mechanics of a motor vehicle accident would not explain injury to this muscle group. The ALJ credited this opinion.

22. Dr. Quintero opined that Claimant likely sustained myofascial strains to her spine and that she had attained MMI from those strains, without resultant impairment and that he was at a loss to explain why she would be continuing to report pain some two years after the motor vehicle accident. Although Dr. Quintero described full ROM in Claimant's back and spine, there was no evidence Dr. Quintero performed ROM testing with dual inclinometers as part of his evaluation.

23. In January, 2015, Claimant was evaluated by Carol Krause, M.D. in North Dakota. She had cervical and lumbosacral pain, as well as pain in both thighs. Dr. Krause opined that her current symptoms were related to the MVA. Claimant was given treatment suggestions and was to continue treating with the chiropractor, Dr. Ness.

24. On May 28, 2015, Claimant underwent a DOWC IME ("DIME") with Christopher Ryan, M.D. At that time, Claimant was complaining of pain in her hips which was present when she crossed her legs. Dr. Ryan noted she had been running about 10 miles per week, but then slowed down considerably. Despite slowing her running, she developed symptoms in her left proximal thigh. She also had pain in the cervical-occipital junction, as well as low back pain. On examination, Claimant had moderate rigidity involving her cervical region, as well as limitations in her range of motion. Dr. Ryan performed ROM testing using dual inclinometers, as required by the *AMA Guides*[2]. In the lumbar spine, she had an oblique pelvis, with slightly elevated posterior/superior iliac spine on the left and hypomobile left sacroiliac joint. Dr. Ryan noted Claimant had fairly normal range of motion in flexion and extension of her hips, with slight limitation. Abduction was normal, but adduction was only to neutral bilaterally. He also performed ROM measurements on Claimant's lumbar spine. Dr. Ryan noted Claimant did not have significant pain behaviors. The ALJ notes these ratings met validity criteria, as found by Dr. Ryan.

25. Dr. Ryan's diagnostic impressions included: cervical-occipital dysfunction, lumbopelvic dysfunction both of which were secondary to the vehicle accident. He also described Claimant's intrinsic hip pathology as uncharacterized. The ALJ inferred Dr. Ryan had a question regarding the causation of the hip symptoms. Dr. Ryan assigned 13% to Claimant's cervical spine, which included a Table 53 specific disorder, as well as loss of range of motion. He assigned a 10 % whole person impairment to Claimant's

[2] AMA Guides to the Evaluation of Permanent Impairment (3rd Ed. Rev.)

lumbar spine including both of those components. Dr. Ryan assigned a 25% right lower extremity rating and a 25% left lower extremity rating, which converted to a 19% whole person rating. These ratings were valid and done pursuant to the *AMA Guides*.

26. Dr. Ryan opined Claimant was not at MMI, as he felt Claimant's overall condition, including the impairment ratings could be improved. He recommended an MR arthrogram of Claimant's hips bilaterally, both of which should be evaluated by an orthopedist. He believed Claimant's impairment rating could be improved upon with further treatment, including manual therapy.

27. On October 15, 2015, Dr. Quintero issued an Addendum Report after reviewing Dr. Ryan's DIME report and the records from Dr. Krause. He disagreed with Dr. Ryan attributing not only the thigh pain to the industrial injury, but also the mid-back and low back pain, again due to the documented delay in reporting of these symptoms, as evidenced by the medical reports. Dr. Quintero opined that only the headaches and neck pain are logically related to the industrial motor vehicle accident.

28. On November 12, 2015, Claimant was evaluated by Keith Anderson, D.O., FAAPMR. Her two complaints were the fact that she could not adduct her legs because a pain in the adductor muscles, along with pain in the cervical and lumbar spine, without radicular symptoms. It was noted Claimant had seen multiple doctors, had received PT and chiropractic care. The latter helped for short periods of time. Dr. Anderson evaluated Claimant's spine and noted she did not have gross scoliosis, but tenderness was noted in her cervical spine. She had pain with deep palpation in the lumbar paraspinals. He opined Claimant had myofascial pain from the motor vehicle accident and recommended pool therapy, as well as a good exercise program and avoiding medications.

29. On November 20, 2015, Dr. Anderson responded to questions posed by Respondent's counsel. More particularly, Dr. Anderson stated:

> Question: What is your diagnosis of this claimant's current condition?
> Answer: Status post work related injury (1) fractured left inferior orbital wall (2) myofascial pain affecting the cervical and lumbar area with bilateral adductor pain.
>
> Question: What if any of these diagnosis are related to October 23, 2012 motor vehicle accident?
> Answer: Both are related to her motor vehicle accident.

30. Dr. Anderson concluded Claimant was at MMI. The ALJ noted Dr. Anderson did not provide his analysis as to why the bilateral adductor pain was causally related to the MVA, including addressing the evaluation done by Dr. Ryan.

31. Claimant was evaluated by Lawrence Lesnak, M.D. on January 25, 2016. Claimant reported her current symptoms were constant neck, midline low lumbar pain

and bilateral proximal medial thigh pains with certain movements of her thighs, again reporting an inability to cross her legs. Upon examination of the spine, full thoracic range of motion was noted and Claimant was able to forward flex her chin to her chest with no symptoms whatsoever. However, during cervical spine range of motion testing, he believed Claimant self-limited her forward flexion to only 40 degrees due to complaints of moderate proximal posterior neck pain. Claimant achieved full range of motion in all other planes. Hip range of motion was full for both hip joints. He found generalized tenderness over the cervical paraspinal musculature and suboccipital regions bilaterally, without trigger points or muscle spasms. The ALJ notes there was no evidence Dr. Lesnak performed a complete evaluation of Claimant's cervical and lumbar impairment pursuant to the *AMA Guides.*

32. Claimant also returned to Dr. Ryan for a follow-up DIME on January 25, 2016. He reviewed supplemental reports from Drs. Quintero and Anderson. On examination, Claimant was uncomfortable, which Dr. Ryan attributed to travel. She had restrictions in her cervical spine, both on flexion and extension. In the lumbopelvic region, she had an elevation of the left posterior/superior iliac spine, compared to the right and the depression of the left anterior/superior fine compared to the left. She also had minimal motion in the left SI joint. Claimant had pain in her groin when Faber testing was performed. Dr. Ryan noted his impressions remained the same as when he first saw Claimant. She had cervical-occipital dysfunction, as well as lumbo-pelvic dysfunction; both of which he thought most medically probable these were the results of the MVA. Claimant had what Dr. Ryan described as undiagnosed hip pathology, which he believed was an intrinsic injury to her hip joints, possibly a labral tear. He agreed with the radiologist's recommendation of an MR arthrogram. Dr. Ryan also opined Claimant should have ongoing follow-up with a manual therapist. Finally he recommended a prescription for a topical preparation for her neck-PLO gel containing ketoprofen, ketamine, gabapentin and cyclobenzaprine. He did not believe Claimant was at MMI.

33. Claimant was evaluated on April 12, 2016 by H. Alexander Cobb, M.D. He evaluated her for bilateral hip pain, which she reported developed two weeks after the motor vehicle accident. The ALJ notes this report of history was inaccurate, as well as the fact that the vehicle which Claimant was riding hit another car. X-rays taken of Claimant's pelvis and both hips showed no dysplastic features in either hip or pelvis. Dr. Cobb's impression was a potential labral tear in both the left and right hips. He ordered an MRI arthrogram. The ALJ notes Dr. Cobb indicated the labral tears were non-traumatic, which raises the question of whether the MVA caused same.

34. Claimant underwent an MRI and arthrogram of the left and right hips on May 4, 2016. The procedure was performed by Raymond Armstrong, M.D., whose impression was: negative arthrogram left hip. The MRI films were also read by Dr. Armstrong, who noted a tear at the superior acetabular labrum of the left hip. He also noted an anterior right acetabular labral tear, but no evidence of occult right hip fracture or osteonecrosis. No femoral acetabular impingement was noted. Dr. Armstrong's impression was superior/inferior left acetabular labrum tear; complex, left adnexal cyst.

His impression was the same for the right hip. These were the latest medical records admitted at hearing.

35. Claimant testified she continues to have pain in her inner thighs and cannot cross her legs. She also has low back and neck pain. She described this as an ache.

36. Dr. Lesnak, who is board certified in Physical Medicine and Rehabilitation and Osteopathic Medicine testified at hearing. He is Level II accredited pursuant to the WCRP. Dr. Lesnak testified consistently with his IME report. He concluded Claimant did not have lower extremity pain complaints at the Littleton Hospital. Dr. Lesnak noted Claimant's hip and thigh complaints took some time to develop. Dr. Lesnak acknowledged that the most recent MRI of the hips showed small labral tears in the exact position on both sides. However, he pointed out that Claimant did not always have symptoms of hip pathology. When he examined her on January 25, 2016, she had no symptoms of hip pathology, but did complain of inner thigh complaints. Dr. Lesnak did not believe Claimant's thigh symptoms were related to the accident. The delay in onset caused him to question the relatedness of this condition. He stated Claimant did not require further treatment. He testified Dr. Ryan was in error regarding the cause of Claimant's hip and thigh pain. He opined Claimant was at MMI and sustained no permanent impairment. He opined Dr. Ryan had erred in his conclusions regarding the need for treatment.

37. Dr. Lesnak also disagreed with Dr. Ryan's opinion that Claimant suffered permanent pathology of the cervical spine that is causally related to the industrial injury. Dr. Lesnak stated Claimant became symptom free with respect to her cervical spine symptoms in February/March 2013, as documented by the MD Urgent Care notes. However, the ALJ noted Claimant continued to report symptoms to her providers, which extended through 2015. Dr. Lesnak opined Dr. Ryan committed clear error in rating Claimant's cervical spine, as per the *AMA Guides*, because there was no ratable pathology and no Table 53, diagnosis. If there is no Table 53 rating, Dr. Lesnak stated it was not permissible pursuant to Level II Accredited training to provide a range of motion rating. This was why he believed Dr. Ryan's 13% rating was in error. Dr. Lesnak offered a similar opinion concerning Claimant's lumbar spine. He testified no rating warranted for this area of Claimant's body under the *AMA Guides*. The ALJ was not persuaded by Dr. Lesnak's testimony regarding whether Claimant sustained an injury to her cervical and lumbar spine and whether she had a permanent medical impairment. The ALJ concluded Claimant met the criteria for a permanent medical impairment.

38. Dr. Quintero testified as an expert at hearing. He is a board certified neurologist. Dr. Quintero opined that Claimant's inner thigh pain was not related to the industrial motor vehicle accident and also he noted when she was examined by Dr. Berger on November 30, 2012, although she reported new neck pain,
she did not mention this inner thigh pain, back or hip pain. Dr. Quintero said the etiology of Claimant's inner thigh pain is mechanical, in that it is not

constant. Based on the location of her pain, he believes it follows the distribution of the gracillis muscle, especially since the symptoms consistent with aggravation of this muscle group are problems with crossing of the legs. Dr. Quintero testified that in fact, running without adequate stretching is the most common cause of injury to the gracillis muscle.

39. Dr. Ryan, who is board certified in Physical Medicine and Rehabilitation and Osteopathic Medicine, testified at hearing. He is Level II accredited pursuant to the WCRP. He testified regarding both of his examinations of Claimant. Dr. Ryan testified consistently with the findings made of both of his evaluations of Claimant. Dr. Ryan testified Claimant required additional treatment, which was the basis for his finding that Claimant was not at MMI. However, the ALJ was not persuaded by his testimony on this subject. He testified the ratings he performed with regard to the cervical and lumbar spine were done pursuant to the *AMA Guides.* The ratings were performed in accordance with the training Level II accredited physicians receive. The ALJ credited Dr. Ryan's findings with regard to Claimant's cervical and lumbar spine.

40. Based upon the totality of the evidence, the ALJ finds Respondents overcame Dr. Ryan's opinion as to whether Claimant was at MMI.

41. The ALJ concluded Respondents overcame Dr. Ryan's opinion regarding the cause of her thigh and hip pain. Her pain complaints were not related to the injuries she sustained on October 23, 2012.

42. Claimant did not prove she was entitled to additional medical benefits in the form of treatment for her hips and thighs.

43. The evidence admitted at hearing documented an injury to and treatment for Claimant's cervical spine. Claimant sustained a permanent medical impairment to her cervical spine as a result of her industrial injury. The ALJ concluded Claimant sustained 13% rating to her cervical spine based upon the findings of Dr. Ryan.

44. The evidence in the record documented an injury to and treatment for Claimant's lumbar spine. Claimant sustained a permanent medical impairment to her lumbar spine as a result of her industrial injury. The ALJ concluded Claimant sustained 15% rating to her lumbar spine based upon the findings of Dr. Ryan.

45. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical

benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Claimant, as well as the various health care providers who testified as experts, bore directly on the issue of overcoming the DIME.

Legal Standard for Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Respondents overcame Dr. Ryan's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence". § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. As noted below, Respondents met their burden of proof with regard to the issue of MMI and whether Claimant's hip and thigh pain were related to the industrial injury.

Causation

There was a significant question regarding the cause of Claimant's pain complaints in her thighs, as well as both hips, as documented by the extensive medical evidence and expert opinions admitted at hearing. There was a divergence of opinions by the physicians as to the cause of these symptoms. The ALJ concluded Dr. Ryan's analysis was not complete as to the cause of Claimant thigh pain and his opinion was overcome. First, Dr. Ryan did not fully analyze the findings made by Dr. Campa, who attributed the thigh complaints to Claimant's endometriosis. (Finding of Fact 12). Dr. Campa performed extensive testing to support his conclusions. Dr. Campa's opinion on the subject was persuasive to the ALJ.

Second, Dr. Quintero also raised Claimant's running as a potential cause for the pain complaints in her thighs. (Finding of Fact 21). Claimant's symptoms did not arise for more than two months after the MVA, during which time she was running. Dr. Ryan's first DIME report also noted pain complaints after Claimant was running and there was at least some indication that Claimant continued to run. Additional support for this conclusion came in the form of Dr. Cobb's opinion, who noted Claimant's hip pain was non-traumatic.

Based on the evidence, the ALJ was persuaded that Claimant's running could have been a factor in these pain complaints. Dr. Ryan, although he noted Claimant had reduced her running, did not provide a cogent explanation as to why Claimant's hip and thigh symptoms occurred. Dr. Ryan did not directly address the opinions of Dr. Quintero on this subject, nor did he discuss the delay in onset of these symptoms. He also appeared to summarily conclude the lower extremity symptoms were related to the MVA, without a great deal of analysis. Furthermore, Dr. Ryan did not provide an explanation as to the delay in onset of hip symptoms. This gave rise to doubts about his opinions on causation and led the ALJ to conclude that his conclusions were not supported by the evidence. Therefore, Respondents met their burden on this issue.

MMI

Dr. Ryan's conclusions regarding MMI were also overcome in this case. In particular, his treatment recommendations were essentially the same between the two DIME reports. However, Dr. Ryan did not provide an explication as to why, after the extensive PT and chiropractic treatment Claimant received, that further manual therapy

was in order. Also, his use of the phrase "maintaining her condition" in the first report led the ALJ to question whether this was pre-versus post-MMI treatment.[3] In addition, after the follow-up DIME with Dr. Ryan, Claimant underwent an MRI and arthrogram on both hips, which was one of the reasons Dr. Ryan concluded she was not at MMI.

Dr. Ryan's testimony at the hearing did not dispel the questions concerning MMI. (Finding of Fact 39). Therefore the ALJ concluded Respondents met their burden and introduced sufficient evidence to overcome Dr. Ryan's conclusion regarding MMI.

Impairment

The evidence led the ALJ to conclude Claimant injured her cervical and lumbar spine in the subject MVA. As found, Claimant complained of pain in her neck, starting with her treatment in the immediate aftermath of the accident. This started with the Littleton Hospital E.D. (Finding of Fact 5). Claimant's complaints of pain in the cervical spine were consistent throughout her treatment over the next couple of years. Drs. Berger and Campa diagnosed Claimant with cervical pain and opined she required treatment. (Findings of Fact 8 and 12).

Claimant's symptoms were documented when she required treatment while living in South Dakota and Alabama. Multiple physicians documented cervical symptoms, noting objective evidence of those symptoms. Claimant required for these symptoms. These symptoms continued to the end of 2015, when Claimant was examined by Dr. Anderson. (Findings of Fact 28-29). Claimant continued to experience symptoms in this area of her body, which she testified to at hearing. The ALJ was persuaded Claimant met the criteria under the *AMA Guides* for an impairment rating to her cervical spine. More particularly, she had in excess of six months of pain/rigidity in her cervical spine which qualified her to receive a rating, pursuant to Table 53 II (B).

Likewise, Claimant had pain in her lumbar spine, which was reflected in the medical records admitted at hearing. The ALJ credited the opinions of those physicians, who opined these symptoms were related to the motor vehicle accident. There was objective evidence of injuries to these areas of the body in these records, which led the ALJ to conclude Claimant was entitled to an impairment rating for both the cervical and lumbar spine. (Findings of Fact 43-44). In this regard, Dr. Ryan's opinion regarding Claimant's medical him impairment was persuasive to the ALJ. He performed an evaluation of both the cervical and lumbar spine and the ALJ has adopted those impairment ratings.

In coming to this conclusion, the ALJ considered Respondents' argument that Claimant had, at most, a minor injury and no impairment to the cervical or lumbar spine. Respondents asserted no lesion was noted at the emergency department on the days of the accident. Respondents relied upon to the IME reports, as well the testimony of Dr. Lesnak. They also cited Dr. Quintero's reports and testimony. The ALJ concluded Dr. Quintero's accident related diagnoses provided factual support for the conclusion

[3] Exhibit 4, p. 16.

that Claimant injured these areas of her body. (Finding of Fact 21). Although Dr. Quintero testified he did not believe Claimant sustained a permanent medical impairment, there was no evidence before the Court that he performed an evaluation of permanent impairment (including ROM testing) pursuant to the *AMA Guides*. (Findings of Fact 21-22).

As found, Dr. Lesnak's testimony regarding Claimant's cervical and lumbar spine was erroneous in that he noted Claimant did not initially have symptoms to her spine. Dr. Lesnak also testified that Claimant's cervical symptoms had essentially resolved by February-March 2013. This was contradicted by the medical records admitted at hearing, and the ALJ credited the opinions of Claimant's ATPs concerning symptoms in the neck and low back. In addition, the fact there was no lesion was noted on the CT scan the day of the accident does not preclude a permanent impairment, particularly where the evidence showed Claimant had symptoms and required treatment for an extended period of time. The ALJ did not find his testimony persuasive.

As found, these doctors documented symptoms and treatment for Claimant's cervical and lumbar spine over the course of many months. The medical records admitted at hearing document symptoms and objective findings made by Claimant's ATPs for more than two years after the accident. (See Findings of Fact 8, 10, 12, 13-17, 19, 23, 28-29).

Accordingly, there was sufficient evidence to warrant a rating to Claimant's cervical and lumbar spine. In this regard, the ALJ concluded the ratings done by Dr. Ryan were correct and comported with the *AMA Guides*, specifically Table 53 II (B). Dr. Ryan's report and testimony were the most persuasive on this subject. Based upon the plethora of records documenting these symptoms, Dr. Lesnak's analysis regarding a potential injury to these areas of the body was exiguous, to say the least.

The ALJ concluded Claimant sustained a permanent impairment to her cervical and lumbar spine and is entitled to benefits for that impairment. Dr. Ryan's rating was valid and prepared pursuant to the AMA Guides.

ORDER

IT IS ORDERED:

1. Respondents shall pay PPD benefits to Claimant, based upon the 13% rating to her cervical spine.

2. Respondents shall pay PPD benefits to Claimant, based upon the 15% rating to her lumbar spine.

3. Claimant's request for additional medical benefits to treat her hips or thighs is denied and dismissed.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 16, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

The following issues were raised for consideration at hearing:

a. Whether Claimant suffered a compensable right shoulder injury on April 14, 2014, in the course and scope of employment for Employer; and

b. Whether the right shoulder surgery recommended by Dr. Failinger is reasonably necessary and related to the alleged April 14, 2014, injury.

FINDINGS OF FACT

Having considered the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. This matter comes forward on Claimant's application for hearing raising claims regarding the compensability of the right shoulder April 14, 2014, incident and the reasonableness and necessity of medical treatment for the right shoulder. It is found that Claimant sustained his burden of proof to establish that he suffered a work related injury to the right shoulder on April 14, 2014. However, Claimant failed to sustain his burden of proof to establish by a preponderance of the evidence that the current need for right shoulder surgery is related to the April 14, 2014, injury.

2. Claimant is a fifty-seven year old truck driver for Employer who alleged injuries to his right shoulder stemming from an April 14, 2014, incident. Claimant credibly testified that he injured his right shoulder while unloading a "double door" refrigerator from a truck with a co-worker. Claimant was lowering the refrigerator from the truck when the refrigerator and the dolly pulled. Claimant's co-worker step aside. Claimant, the dolly and refrigerator were pulled down from the truck and Claimant landed on top of the refrigerator.

3. Claimant requested medical treatment for his shoulder four months after the April 14, 2014, work incident. Claimant began treating at Concentra on August 6, 2014. He was attended by Dr. Kathryn Bird. He reported to Dr. Bird that the refrigerator pulled his arm downward. Dr. Bird observed that Claimant exhibited full range of motion. Dr. Bird diagnosed Claimant with shoulder impingement and referred Claimant for physical therapy. She did not provide work restrictions.

4. At Claimant's August 11, 2014, physical therapy appointment, Claimant reported that he experienced a moderate pain in his right shoulder at the end of his swing while playing golf. Claimant also reported experiencing pain when throwing a ball with his right hand. At that appointment, Dr. Bird noted that Claimant exhibited normal muscle strength and tone.

5. Claimant underwent five sessions of physical therapy. At his last session, he reported that he felt 90% improved. The records show that Claimant exhibited normal strength and was able to lift forty pounds with no problems.

6. On September 15, 2014, after Claimant had been released from physical therapy, Claimant returned to Dr. Bird. Claimant reported that his pain was only a one or two out of ten. Dr. Bird noted that Claimant exhibited normal muscle strength and tone, exhibited no tenderness in the right shoulder upon palpitation, and that Claimant had a full range of motion. She placed Claimant at maximum medical improvement (MMI) with no permanent impairment. She also opined that Claimant did not need any maintenance medical care or permanent work restrictions.

7. After being discharged, Claimant continued to work full duty, and even continued to play golf and softball. There are no records of complaints during the next year and a half, and Claimant did not see a doctor again until May 2016.

8. On May 5, 2016, Claimant returned to Dr. Bird complaining of two out of ten right shoulder pain. His complaints included new complaints of pain in the bicipital groove. He told Dr. Bird that his pain caused him difficulty when he played golf. Claimant reported experiencing an achiness with a popping sensation with external rotation. Claimant underwent a right shoulder MRI on May 13, 2016. The MRI showed a partial tear of the supraspinatus and infraspinatus, subluxation or dislocation of the bicep tendon, and acromioclavicular arthritis.

9. On May 26, 2016, Claimant saw Dr. Mark Failinger for an orthopedic evaluation. Dr. Failinger noted that Claimant's right shoulder was injured "three days ago" when helping a coworker lift a refrigerator. Dr. Failinger noted that Claimant underwent six weeks of physical therapy, which did not help at all. He stressed that Claimant did not have any new right shoulder injuries after 2014 and did not have any previous right shoulder injuries before the 2014 incident. He stated that Claimant's strength and range of motion was poor. Dr. Failinger opined that Claimant had a dislocated bicep tendon. He noted that this was evidenced by the fact that Claimant tore the transverse ligament, which causes the bicep tendon to pop out of the groove. He opined that the only option would be surgery. He noted that physical therapy "should not help" Claimant's right shoulder pain, and he

recommended Claimant undergo a biceps tenodesis. Dr. Failinger made no determinations regarding causation.

10. On November 3, 2016, Claimant underwent an independent medical examination (IME) with Dr. Allison Fall. Dr. Fall took Claimant's history, performed a physical examination, and reviewed Claimant's medical records.

11. Claimant told Dr. Fall that, on the date of the alleged injury, Claimant experienced what he described as a "little kink." Claimant reported that he had been able to perform his normal work following his release in 2014, and that he was still able to lift concrete. Claimant reported that his right shoulder symptoms worsened in April 2016, prompting him to seek medical treatment. Dr. Fall observed that it was impossible to determine the age of the MRI findings. She concluded that, based on the lack of documented symptoms between September 2014 and May 2016, it was unlikely that Claimant's need for right shoulder surgery was related to the alleged April 14, 2014, injury.

12. Claimant saw Dr. Michael Hewitt for a second surgical opinion on November 21, 2016. Dr. Hewitt reviewed Claimant's medical records and history. Dr. Hewitt opined that a traction injury would be foreseeable given Claimant's described mechanism of injury, and he therefore concluded that the MRI findings were causally related to the alleged April 14, 2014, injury. He recommended arthroscopic rotator cuff repair and biceps tenodesis.

13. Claimant testified regarding his alleged mechanism of injury, that he felt a "pop" in his shoulder at the time of the alleged injury. Claimant testified that he did not obtain treatment until four months after his alleged injury. He also testified that he did not have any missed time from work and that he obtained relief from physical therapy.

14. Claimant also testified at hearing regarding his involvement with golf. Specifically, he testified that he continued to regularly play golf from September 15, 2014 through May 5, 2016, and that he would play once or twice every two weeks. He stated that he was a right-handed golfer and that he would sometimes experience pain in his shoulder while playing golf.

15. Dr. Fall testified on behalf of Respondent at hearing. Dr. Fall testified regarding the bases for her opinions. Specifically, when asked about whether there was any significance for medical causation attributable to the fact that Claimant waited nearly four months after the alleged injury before pursuing treatment, Dr. Fall noted that such a history is more consistent with a minor strain. She opined that the treatment that Claimant underwent with Dr. Bird was appropriate for such a minor strain, additionally, noting that Claimant responded with very minimal treatment. Dr. Fall also attributed significance to the fact that Claimant did not pursue treatment for

more than a year and a half after being released in September 2014. Specifically, she felt that such a long period of time with no pursuit of treatment, no findings, and no documented complaints cast doubt on the causal relationship between Claimant's alleged April 14, 2014, injury and Claimant's new pain complaints in May 2016.

16. With regard to the alleged mechanism of injury, Dr. Fall testified that Claimant's subluxed biceps tendon could have resulted from anything ranging from acute trauma to overuse, and that biceps tendon dislocations are simply something that happens to men in their fifties. She clarified that an acute injury causing such a dislocation would be due to a traction mechanism of injury, where the arm is pulled backward. However, she noted that, if Claimant had in fact suffered an acute biceps tendon rupture on the date of the alleged injury, Claimant would have experienced immediate pain and bruising such that he would have needed immediate attention at a hospital. Claimant did not exhibit these symptoms, as Dr. Fall observed, and Claimant instead exhibited good strength, good range of motion and low pain levels during his short course of treatment prior to being released in September 2014, which would not be consistent with Claimant's later MRI findings. Furthermore, she noted, a biceps dislocation would have been observable upon physical examination, but there were no records of any such finding in Claimant's 2014 medical records. Thus, Dr. Fall ultimately opined that Claimant's need for surgery could not, within a reasonable degree of medical probability, be related back to the initial alleged injury.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the following Conclusions of Law are entered:

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission*

of Colorado v. Jones, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

The April 2014 work injury

3. The totality of the credible and persuasive evidence in the record established that Claimant suffered a minor muscle strain with impingement on April 14, 2014. The evidence established that Claimant was working in the course and scope of his employment for Employer when he suffered a minor shoulder strain while removing a large piece of heavy equipment from a truck. Claimant underwent a course of conservative treatment and was place at maximum medical improvement in September 2014 with no impairment or restrictions.

The relatedness of Claimant's 2016 need for right shoulder surgery

4. The evidence established that Claimant's right shoulder symptomalogy and MRI findings in 2016 are not causally related to the April 14, 2014 incident. Of significance in support of this conclusion is the fact that Claimant continued working full-duty without treatment or complaints following the April 2014 injury. Dr. Fall credibly testified that the 2016 biceps tendon rupture would have caused immediate pain and bruising such that Claimant would have needed immediate medical attention if the rupture was present in 2014. However, the evidence established that Claimant did not seek medical attention until four months after the 2014 injury and medical records reflect that Claimant exhibited good strength, good range of motion and low pain levels during his short course of treatment prior to being released in September 2014. Then, Claimant waited another 18 months before complaining of the ruptured bicep tendon.

5. Second, Dr. Fall credibly opined that Claimant was able to obtain relief for his shoulder symptoms through physical therapy in 2014 suggesting that his alleged symptoms in 2014 were not due to any biceps dislocation or rotator cuff tear. Thus, if Claimant's original alleged injury had been a torn biceps tendon and partial rotator cuff tear, Claimant would not have obtained relief from physical therapy as was the case following the 2014 injury.

6. Third, the mechanism of injury described by Claimant would not have been consistent with a torn biceps tendon or rotator cuff tear because Claimant's

testimony and all of the medical records recount an alleged mechanism of injury that involves Claimant being pulled forward onto the refrigerator. Based on this explanation, the mechanism of injury would not be a traction injury.

7. Fourth, the physical findings noted in Claimant's medical records in 2014 were not consistent with a biceps tendon rupture. Claimant's 2014 physical examinations revealed full range of motion and normal muscle strength and tone.

8. Last, Claimant's age and his continued regular participation in sports that involved his right shoulder made it unlikely that the biceps tendon dislocation and partially torn rotator cuff could be related to a remote minor muscle strain from April 14, 2014. Claimant's age and regular participation in sports involving the right shoulder, severs the causal connection to Claimant's 2016 right shoulder pain and MRI findings.

ORDER

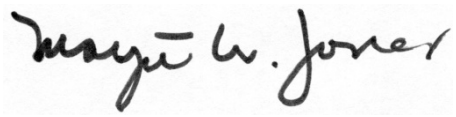
Based upon the foregoing Findings of Fact and Conclusions of Law, the ALJ hereby enters the following Order:

1. Respondent shall be liable for the April 14, 2014, right shoulder injury.

2. Claimant's 2016 claim for a right shoulder surgery is not reasonably necessary or related to the April 2014 work injury and is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 18, 2017



Margot W. Jones, Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a work related injury to her bilateral upper extremities in the course and scope of her employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to a general award of reasonable and necessary medical benefits to treat her bilateral upper extremities.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from July 8, 2016 and ongoing.

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant worked for Employer as an asbestosis abatement technician. Claimant was hired on May 24, 2016 and worked for Employer for approximately 6.5 weeks and until July 8, 2016. During this period of time, Claimant underwent initial training and then was sent to job sites for work shifts. At job sites, Claimant worked approximately 20 total shifts. The shifts were generally close to 8 hours long, with occasional shifts shorter and longer than 8 hours, the shortest being 4.5 hours and the longest being 11.5 hours. *See* Exhibit D.

2. Claimant's assigned job duties included demolition, deconstruction, use of power tools, lifting of 50 pounds, cleaning, removing construction debris, cutting and scraping asbestos, moving equipment, and being able to sit/stand/walk for 8 to 12 hours per day.

3. Workers for Employer typically began projects by sealing off an area using scaffolding, plastic sheeting, and nail guns. They also moved mobile decontamination units into the site, set up portable showers, and set up air evacuation and filtration systems. Once an area was completely sealed off, workers began deconstruction and asbestos removal. The removal is varied with use of many different tools including sawzalls, circular saws, demolition saws, grinders, hand scrapers, screwdrivers, hammers, prybars, and saws. Workers use whatever tools are needed to break down and remove walls, flooring, ceilings, and to get the asbestos contaminated area down to the studs. Workers then pack all the construction debris into plastic, sealed bags which

are double bagged and taped off so that the asbestos containing material does not escape. Workers carry these bags out of the premises.

4. Typically, workers suit up into required protective gear and go into a containment area for approximately 4 hours. They then come out, take off their protective gear, shower, and take a break. When workers go back into the containment area, they must again suit up in protective gear. While in the containment area, the workers can take breaks, talk, and plan what area they are deconstructing and how to go about the process. Workers perform varied tasks inside the containment area depending on the day and where they are at in demolition.

5. During her first week of work, Claimant underwent a pre-employment physical, completed training in asbestos removal, and received certifications for asbestos abatement.

6. On June 2, 2016 Claimant was sent to her first job site which was located at Arapahoe High School. The project had already started when Claimant arrived and she began working with others on a team inside an already set up containment area.

7. At Arapahoe High School, a three story boiler room was being deconstructed. The area had significant metal structures, and sawzalls and grinders were used to cut the metal into smaller pieces for removal. Claimant was assigned to this project for approximately two weeks. Claimant reported during this project she used the sawzall and would use it for 1-3 hours and then would switch off and load the steel out and carry it to the load out area. Claimant reported that she could switch out tasks with others on her crew if her hands hurt. Claimant reported varied use of the sawzall, but that it required a lot of force and a lot of vibration. Claimant reported removing a lot of debris at that project site and that she spent 4 hours removing debris each day. Claimant reported that while using the sawzall she would take her finger off the trigger once a full cut was made to remove the cut piece, then would start again with her finger back on the trigger. Claimant also reported that she broke blades on the sawzall every ten minutes.

8. After the Arapahoe High School project, Claimant was assigned to work at Boulder Rehabilitation Center which was a project that lasted only one day and one work shift.

9. The next project Claimant worked on was at Cavalier Apartments in Boulder. Claimant assisted in setting up the containment area and had to reach, tape, and staple plastic sheeting. Claimant used a stapler and testified that it could take 2-4 hours to hang, tape, and staple the plastic sheeting in a particular area. Once containment was set up Claimant used a crowbar and hammer to take down dry wall, used a scraper while on her knees to remove tiles from the floors, and again assisted in double bagging, taping, and removing debris from the site.

10. Claimant testified that her upper extremities started bothering her two weeks after she started working for Employer, but that she powered through and thought her body was just getting used to construction work. Claimant testified that she continued to power through the pain until she was in tears and couldn't continue and that she then went to the emergency room.

11. On July 8, 2016 Claimant was evaluated at Denver Health Medical Center by Sarah Foss, PA-C. Claimant was diagnosed with carpal tunnel syndrome, unspecified, laterally. Claimant was provided with diclofenac medication and with splints. Claimant was advised to wear the splints for 2-4 weeks and to follow up with primary care. *See* Exhibit 1.

12. On July 11, 2016 Claimant provided Employer with a written statement that indicated she was injured at work and went to the emergency room on July 8 where she was diagnosed with carpal tunnel in both hands. Claimant reported that she started to feel numbness and a lot of pain in her hands a few days prior to going to the emergency room and woke up with major pain on July 8 so she called in to work and went to the emergency room. *See* Exhibit 2.

13. On July 11, 2016 Claimant was evaluated by Braden Reiter, D.O. Claimant reported that she woke up on July 8 and that both hands were bothering her with pain into both hands and into the forearms and numbness in her fingers. Claimant reported that at the emergency room of Denver Health she was diagnosed with carpal tunnel and given wrist splints and diclofenac. Claimant reported continued pain through the hands and that she was working through it, but that when she gets home and takes off her splints, she had increased pain and numbness. Claimant reported no prior injuries to her hands. Claimant denied thyroid disease and denied any aggravating home activities. Claimant reported no prior workers' compensation injuries. Claimant reported smoking half a pack of cigarettes per day. *See* Exhibit 5.

14. Dr. Reiter performed a physical examination and noted bilateral wrists with tenderness through the thenar eminence, radiating to the dorsum of the thumb and along the dorsal radial aspect of the wrist. Dr. Reiter found decreased range of motion of the wrist and positive Finkelstein's bilaterally. Dr. Reiter found grip strength of +4/5 in bilateral hands and diminished sensation in the thumb, index, middle, and ring fingers bilaterally. Dr. Reiter assessed bilateral wrist tenosynovitis. Dr. Reiter provided restrictions of no lifting, grasping, or twisting with hands. Dr. Reiter recommended Claimant continue to wear the thumb spica splints given to her in the emergency room and continue to the diclofenac. Dr. Reiter recommended icing her wrists 15-20 minutes every hour and referred Claimant to occupational therapy 2 times per week for 2-3 weeks. *See* Exhibit 5.

15. On July 12, 2016 Claimant underwent an occupational therapy initial evaluation performed by Christopher Luscia, OTR/L. Claimant reported that over the last week to week and a half she began noticing pain and numbness in her bilateral hands. Claimant reported now that she had numbness all day long. Claimant reported

that she began her current job of asbestos removal five weeks ago and that she had been in jail the two years prior and believed that due to some deconditioning, the job was too hard for her to start initially and created some of her discomfort. Claimant reported no previous medical history to her upper extremities and that prior to going to jail she had worked in the construction business. OTR Luscia performed therapeutic exercises including stretching and noted that due to the severity of pain and Claimant's tolerances, emphasis would be placed on resting and gentle stretching until the pain was more localized. *See* Exhibit 4.

16. Claimant attended occupational therapy on July 14, July 18, July 21, and July 28 with OTR Luscia. By the 28th, Claimant reported that her hands were less uncomfortable during the day, but still woke her up at night. OTR Luscia noted that Claimant had verbalized a slow decrease in symptoms and good replication of her home program and he continued to emphasize gentle stretching. *See* Exhibit 4.

17. On July 18, 2016 Claimant was evaluated by Dr. Reiter. Claimant reported continued pain and numbness in both hands and that it took several hours in the morning after waking for hands to come back from being numb. Dr. Reiter continued the assessment of bilateral wrist tenosynovitis and continued Claimant's work restrictions. Dr. Reiter referred Claimant for EMG/nerve conduction studies of the bilateral upper extremities. *See* Exhibit 5.

18. On July 25, 2016 Claimant was evaluated by Dr. Reiter. Claimant reported increasing pain in the left arm with pin-pricking tingling sensation through the arm and increased pain and numbness into the fingers. Claimant reported that in the right hand the numbness was improved some but that she still had pain in the right arm, hand, and wrist. On examination, Dr. Reiter noted good range of motion in both hands and wrists and decreased sensation in the median nerve distribution on the left hand and right hand, positive Tinel at the wrists bilaterally, and negative Finkelstein bilaterally. Dr. Reiter continued the assessment of bilateral wrist tenosynovitis and continued Claimant's work restrictions. *See* Exhibit 5.

19. On July 27, 2016 a Job Demands Analysis (JDA) was performed by Howard Fallik. Mr. Fallik noted that due to reported medical difficulties, Claimant was not currently working and that another employee performing the same tasks as Claimant performed prior to the onset of her injuries would be the subject. Mr. Fallik found no primary or secondary risk factors present. Mr. Fallik noted that Claimant's job duties included: 20-25% of position - using a crowbar and other tools to remove drywall in preparation for additional tasks involved with the mitigation process, sealing off work area using plastic sheeting and duct tape; 10-20% of position – positioning mobile decontamination unit or portable showers at entrance of work area, positioning portable air evaluation and filtration system inside the work area; 20-25% of position – cutting and scraping asbestos or pain from surfaces using a knife and scraper, shoveling asbestos or paint into plastic disposal bags, and sealing the bags using duct tape as well as loading bags into truck; 5-10% of position – cleaning work area of loose asbestos or paint using vacuum, nylon brushes, rags and dust pain; 5-10% of position

being performing daily equipment checks to ensure they are in proper and safe working condition; 3-5% of position – loading and unloading scrap materials and roll off boxes; and 3-5% of position- cleaning and maintaining tools. *See* Exhibits 3, A.

20. On August 2, 2016 Claimant was evaluated by Dr. Reiter. Claimant reported that her left hand continued to have pain and numbness in the hand and fingers and that she had some pain in the right hand and fingers. Claimant reported that occupational therapy helped for a short period of time but then the pain and numbness returns. On examination, Dr. Reiter noted decreased range of motion of the left wrist and of the right hand and wrist. Dr. Reiter noted diminished sensation in the fingers and hands and positive Tinel's and Phalen's at the right wrist. Dr. Reiter continued the assessment of bilateral wrist tenosynovitis and continued Claimant's work restrictions. Dr. Reiter referred Claimant for a hand specialist evaluation. *See* Exhibit 5.

21. On August 5, 2016 Claimant was evaluated by Eric Hammerberg, M.D. Dr. Hammerberg noted pain and numbness in both Claimant's hands and a clinical examination of bilateral upper extremities that showed intact strength, intact and symmetrical muscle stretch reflexes, decreased sensation to pin over the thumb, index, and long fingers of both hands, positive Tinel's signs over both median nerves at the wrist, and no radicular symptoms with neck movement. Dr. Hammerberg performed electro diagnostic studies of both upper extremities. In the motor conduction test, results outside the specified normal range were found in the left median nerve with reduced amplitude on wrist stimulation. In the sensory conduction test, results outside the specified normal range were found in the: right median digit II nerve with peak latency increased for wrist stimulation; left median digit II nerve with the peak latency increased for wrist stimulation; right median digit III nerve with the peak latency increased for wrist stimulation; left median digit III nerve with the peak latency increased for wrist stimulation; right median ulnar palm nerve with the peak latency increased for ulnar-median segment; and the left median ulnar palm nerve with the peak latency increased for ulnar-median segment. Dr. Hammerberg concluded that the findings were compatible with the clinical diagnosis of bilateral carpal tunnel syndrome and that there was no evidence of cervical radiculopathy. *See* Exhibit 6.

22. On August 9, 2016 a medical records review was performed by Jason Rovak, M.D. Dr. Rovak reviewed the medical chart and the JDA. Dr. Rovak opined that Claimant did not have any risk factors that would be consistent with the development of a cumulative trauma disorder and that she did not meet any primary risk factors including hand tool use, positional risk factors, or exposure risk factors. Dr. Rovak noted that the time studies for risk factors that include four hours of specific activities were all in the roughly one to one and a half hour range. Dr. Rovak opined that since Claimant did not appear to meet criteria for a cumulative trauma disorder, her symptoms would be considered unrelated to her employment. *See* Exhibit B.

23. On November 15, 2016 Claimant underwent an independent medical examination performed by Jonathan Sollender, M.D. Claimant reported that she woke up the morning of July 8 noticing pain in both hands into the forearms with numbness of

her fingers. Claimant reported that her symptoms began with her hands feeling tense and hard to move with numbness that went away and that it began a few weeks after she started to work and that she believed the initial symptoms would go away after she worked more. Dr. Sollender reviewed medical records, the JDA, and performed a physical examination. Claimant reported no other upper extremity injuries prior to this claim. Claimant reported numbness at times, mostly late at night, affecting the left hand more than the right. *See* Exhibit C.

24. Dr. Sollender provided the impression of: left wrist dequervain's tenosynovitis, left wrist TFCC strain, left carpal tunnel syndrome, and right forearm strain and opined that none of Claimant's conditions were work related. Dr. Sollender noted that Claimant had worked only a few short weeks before claiming this condition due to work. Dr. Sollender noted that while highly improbable, a cumulative trauma condition can arise after the first day of work. However, Dr. Sollender noted that the JDA showed work that was neither repetitive, forceful, or awkward and that the observation showed only 1.5 hours of exposure per day which was less than the minimum exposure of 4 hours required to qualify as cumulative trauma disorder. Dr. Sollender opined that the job Claimant performed was not the type which would naturally lead to the development of a cumulative trauma disorder. Dr. Sollender agreed with Dr. Rovak that Claimant's job did not meet the definition for it to lead to a cumulative trauma disorder and recommended denial of the claim based on the lack of work relatedness. *See* Exhibit C.

25. Some prior medical and social security records reference Claimant's bilateral upper extremities.

26. On March 14, 2010 Claimant was evaluated at St. Anthony Hospital Central. Claimant reported that she was assaulted the evening prior. Amongst other complaints, Claimant reported bilateral hand pain with no peripheral tingling, numbness, or weakness. Claimant's extremities were noted to be symmetrical with full range of motion. X-rays of the bilateral hands were performed and showed no evidence of acute osseous injury. The x-rays showed normal joint spaces and a possible old right 5^{th} metacarpal fracture. The diagnosis was assault with minor closed head injury, facial contusion, and bilateral hand contusions. *See* Exhibit G.

27. On April 15, 2014 Claimant was evaluated at Denver Health Medical Center where she walked in. Claimant reported vomiting, fever, and left hand numbness. *See* Exhibit F.

28. On May 5, 2014 Claimant completed a Supplemental Security Income Application. On the functional report, Claimant listed information about her abilities. Claimant reported that her illnesses, injuries, or conditions affected her lifting and using her hands and wrote that her hands got numb every night. Claimant also reported that her hands were numb a lot when she woke up most every morning. *See* Exhibit J.

29. On May 7, 2014 Claimant underwent an adult comprehensive psychiatric consultation performed by Kristi Helvig, Ph.D. It was noted that the evaluation was requested by Colorado Disability Determination Services to determine Claimant's present level of cognitive functioning and mental status. Claimant reported having severe PTSD and that it was hard to focus at her job. Claimant reported her past work included being a blackjack dealer at a casino for 6 years and that afterwards, she worked full time for her husband's construction company from 2000 until 2012, as well as a painter and foreman. Claimant reported that more recently, she had done several self-employed contracts for construction work until 2012. *See* Exhibit I.

30. When asked when she first began to have trouble working, Claimant reported when working for her husband. Claimant reported that due to either working as a blackjack dealer in the past or the current construction work, she would have trouble with her fingers going numb from time to time. Claimant reported that she had applied for work since 2012 but that when she was called in for interviews, she was too scared and did not go. *See* Exhibit I.

31. A determination was made by Social Security that Claimant's condition resulted in some limitations in her ability to perform work related activities but that it was not severe enough to keep her from working and that she was not disabled. See Exhibit J.

32. Dr. Sollender testified at hearing consistent with his report. Dr. Sollender opined that it was important to review both a JDA and Claimant's description of job duties and noted that a JDA will break down the duties that someone might report doing all day. Dr. Sollender opined that there were no primary or secondary risk factors present in Claimant's job even with a lowered threshold of 3 hours under newer guidelines. Dr. Sollender opined that the longest period for a risk factor was 1.5 hours and that Claimant was still 50% or less from any risk factors. Dr. Sollender opined that Claimant had a pattern of hand complaints over the years where she reported her hands being numb. Dr. Sollender noted that diabetes and thyroid issues can lead to carpal tunnel and that Claimant had a family history of both. Dr. Sollender opined that many activities could aggravate the carpal tunnel including dishes, tying shoes, etc.

33. Dr. Sollender testified that use of a sawzall for three hours would be a secondary risk factor, but that the use of vibratory tools requires six hours for it to be a primary risk factor. Dr. Sollender opined that if you used Claimant's description and not the JDA that it would be possible that Claimant had primary and secondary factors, but opined that the JDA and more objective evidence showed that Claimant was not accurate and that he would not use Claimant's description of jobs.

34. One of the owners of Employer's business, Bart McTaggart, testified at hearing. Mr. McTaggart was with the JDA evaluator and saw him observe multiple workers the day of the JDA and testified that multiple stages were going on with areas being prepped and areas being torn down. Mr. McTaggart testified that the tools used on the jobs varied depending on the job and that employees had a variety of tasks that

they performed. Mr. McTaggart testified that the job performed by his employees was not consistent in upper extremity use because the work was so varied and required multiple tasks and that one worker does not stay on one task for multiple hours. Mr. McTaggart testified that inside containment, workers have down time and will stop, talk, strategize on what they are doing, and get instructions. Mr. McTaggart testified that he reviewed the JDA and thought it was accurate.

35. Carmen Lawrence testified at hearing. Ms. Lawrence worked for Employer alongside Claimant and also lived with Claimant in a half-way house. Claimant told Ms. Lawrence that she was a preferred contractor and that she had carpal tunnel from being a contractor for years. Ms. Lawrence testified that it was very apparent at the half-way house that Claimant's wrists bothered her after performing chores. Ms. Lawrence opined that the JDA reflected the job that she and Claimant performed. Ms. Lawrence testified that the workers had down time inside containment, that they took breaks, and that they rotated jobs after getting tired. Ms. Lawrence testified that Claimant used the sawzall 3-4 times total while at the Arapahoe High School job.

36. Claimant testified at hearing. Claimant reported that at the first job at Arapahoe High School she cut with a sawzall which required a lot of force and vibration. She reported that she broke blades on the sawzall every 10 minutes and that she would perform tasks for four hours before changing out. She also reported that she would use the sawzall 1-3 hours and then would sometimes go to take steel to the load out area and that she could switch out if someone else's hands hurt. She reported removing waste at the load out and carrying it to the dumpster, bagging, and duct taping it. She reported spending four hours removing debris. At the apartment job she reported reaching and taping with constant up and down stretching to tape up the containment areas, using a crowbar and hammer to take down dry wall, and being on her knees with a scraper to remove floor tiles. Again, she reported bagging and taping the contaminated materials. Claimant disagreed with parts of the JDA and believed that it gave a basic layout but didn't accurately reflect her job. Claimant testified that she never had carpal tunnel prior to this job.

37. Claimant's testimony, overall, is not found credible or persuasive. The testimony of Ms. Lawrence and Mr. McTaggart is found credible and persuasive. The testimony of Dr. Sollender is found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. *See* § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO

August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

An occupational disease is a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. *See* § 8-40-201(14), C.R.S. A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment duties or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P. 2d 251 (Colo. App. 1999); *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). In deciding whether the Claimant has met his burden of proof, the ALJ is empowered to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

Claimant has failed to meet her burden of proof to establish that her bilateral upper extremity symptoms are directly and proximately caused by her employment duties or her working conditions. As found above, Claimant has a history of symptoms consistent with carpal tunnel including hand numbness. Approximately two years prior to working for Employer, Claimant reported that her hands got numb every night, were numb when she woke up most every morning, and that due to her past work as a blackjack dealer or in construction, she had trouble with her fingers going numb from time to time. The symptoms that Claimant believes are causally related to her employment with Employer are just as likely the result of the natural progression of her pre-existing condition.

Claimant has failed to establish that her employment caused, aggravated, or accelerated the condition. As found above, a JDA was performed by observing a worker with the same job duties as Claimant. The JDA concluded that Claimant's position does not meet the requirements under the medical treatment guidelines for any primary or secondary risk factors. The amount of time spent performing activities is not significant enough to cause bilateral carpal tunnel syndrome or to cause an aggravation or acceleration of bilateral carpal tunnel. The testimony of Mr. McTaggart and Ms. Lawrence that the JDA is an accurate representation of the job duties is found credible and persuasive.

Claimant's testimony is not found credible or persuasive. Claimant testified that she constantly used vibratory tools (sawzall) at the Arapahoe High School job. However, she also later testified that she would be on the sawzall for 1-3 hours, would cut a piece of metal with her finger on the trigger, take her finger off the trigger to kick or push out the piece of metal, then would go back on the trigger. She also testified that

she was breaking blades every 10 minutes which would necessarily require stopping to take out the broken blade and insert/attach a new blade. Although the Claimant is not credible in describing job duties that she claims she was performing "constantly", even assuming arguendo that she was assigned to a sawzall for 3 straight hours, there would be a significant amount of time where she would not be "on the trigger" when she pushed out the metal and changed out the broken blades. During this time, there would be no vibratory forces at play.

Claimant has failed to show that her Employment proximately caused her bilateral upper extremity condition. It is just as likely that Claimant's bilateral condition is the natural progression of a non-work related condition and Claimant has failed to establish a causal relationship to his employment or employment duties. Employment with Employer has not been shown to be the proximate cause and Claimant was equally exposed to hazards that would aggravate her pre-existing condition outside of work. The opinions of Dr. Rovak and Dr. Sollender that her condition is not work related are found credible and persuasive. The opinions of the doctors are consistent with the JDA, the testimony of Mr. McTaggart and Ms. Lawrence, and the Medical Treatment Guidelines. Claimant is not found credible or persuasive and although she reported never having had this type of problem before, the medical records suggest otherwise and point to similar problems for which Claimant sought treatment in 2014. Claimant has failed to meet her burden.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a work related injury to her bilateral upper extremities in the course and scope of her employment with Employer.

2. As Claimant failed to meet her burden to establish a compensable injury, the remaining issues are not addressed. The claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 18, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant established by a preponderance of the evidence that his scheduled upper extremity impairment should be converted to whole person impairment.

II. Whether Respondents have proven by clear and convincing evidence that the DIME physician Dr. Kenneth Finn, M.D., erred in providing impairment for the Claimant's distal clavicular resection.

Because a Division examiners impairment rating is only presumptive regarding whole person impairment and because the ALJ concludes that Claimant failed to prove by a preponderance of the evidence that he suffered a functional impairment beyond the shoulder, the ALJ also considers whether Claimant has proven by a preponderance of the evidence that the scheduled impairment rating given by Dr. Finn is accurate.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works for Employer as a network technician. The job requires Claimant to carry and set up ladders to repair and install DSL and telephone lines. Included in Respondents' submission packet is a job analysis of Claimant's position as a network technician. The job analysis reflects the physical demands of this position fall into the medium/heavy duty category.

2. On May 20, 2015, Claimant injured his neck and left shoulder after he was broad sided by another driver while driving his bucket truck shortly after completing a job.

3. Claimant came under the care of Dr. Terrence Lakin, at the Southern Colorado Clinic. Due to persistent left shoulder pain, Dr. Lakin referred Claimant to Dr. Michael Simpson for a surgical evaluation. Dr. Simpson would go on to perform an arthroscopic rotator cuff repair and subacromial decompression along with a distal clavicle resection on September 3, 2015.

4. Claimant returned to unrestricted full duty work on March 17, 2016. Since this time, Claimant has continued to perform his usual job duties as a network technician without restriction. As noted, Claimant's job as a network technician is a medium to heavy duty job.

5. On June 10, 2016, Dr. Lakin placed Claimant at maximum medical improvement (MMI) with 15% whole person impairment for his cervical spine injury and 23% scheduled impairment for his left shoulder condition. Ten percent (10%) of the 23% scheduled impairment was assigned by Dr. Lakin for the distal clavicle resection. Claimant's 23% scheduled impairment converts to 9% whole person impairment. Dr. Lakin added the whole person impairments to arrive at a combined 23% whole person impairment for this neck and shoulder injuries.

6. Prior to reaching MMI, Claimant completed multiple pain diagrams depicting pain in the left cervical area which radiated up into the head and down the side of the neck into the trapezius. The diagrams also illustrate pain in the anterior part of his shoulder which was noted to radiate distally into the arm. At hearing, Claimant testified consistent with the pain diagrams that he completed for the several months prior to reaching MMI. Claimant confirmed that he attributes his headaches, as well as pain radiating down into his trapezius area to his neck injury. He also testified that he never reported that the pain in his trapezius was a consequence of his shoulder injury.

7. Respondents sought an opinion from Dr. Elizabeth Bisgard. Dr. Bisgard examined Claimant on August 29, 2016 and finalized a report outlining her opinions of September 2, 2016. Regarding Claimant's shoulder impairment which Dr. Bisgard admittedly incorrectly referenced initially as involving Claimant's right side, she opined:

> Dr. Lakin added 10% impairment for the distal clavicle resection. In the *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised*), page 52, Category 3.1-J, "Other Musculoskeletal System Defects," the Division allows the examiner to provide an additional 10% upper extremity rating for distal clavicular resection. However, the *Guides* define the additional rating as follows:
>
> *"In rare cases, the severity of the clinical findings (e.g., loss of shoulder motion) does not correspond to the true extent of the musculoskeletal defect (e.g., severe and irreparable rotator cuff tear of the shoulder), as demonstrated with a variety of imaging techniques (e.g., MRI or surgical visualization). If the examiner feels that measured anatomical impairment does not appropriately rate the severity of the patient's condition, an additional impairment can be given at discretion."*

8. Dr. Bisgard noted that the additional 10% impairment for distal clavicle resection was not given "automatically" and should be awarded as outlined in the Guides. In this case, Dr. Bisgard noted that Claimant had an excellent surgical outcome and had been returned to full duty with "minimal, if any functional limitations." Consequently, Dr. Bisgard opined that Dr. Lakin did not apply the Guides appropriately when he included an additional 10% for Claimant's distal clavicle resection. Dr. Bisgard

also opined that Clamant was entitled to a cervical impairment rating and that Dr. Lakin appropriately calculated the same.

9. Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Kenneth Finn on November 11, 2016. With regards to Claimant's left neck pain, Dr. Finn documented the following:

> He has left-sided only neck pain, constant in nature, fluctuating severity, radiating to the shoulder and scapular region, and into the intrascapular region along the upper trapezial ridge. He notes increased neck pain with cervical extension, left more than right rotation, static positioning and driving activities.

10. With regards to Claimant's left shoulder, Dr. Finn documented that Claimant reported left anterior shoulder pain, constant in nature, fluctuating in severity and aggravated by overhead reaching and/or lifting. Dr. Finn agreed with Dr. Lakin's June 10, 2016 date of MMI. He also assigned separate impairment for the neck and shoulder injuries as follows: 12% whole person impairment for the neck and 16% scheduled impairment for the left shoulder. The 16% scheduled impairment assigned for Claimant's left shoulder converts to 10% whole person impairment. The impairments combine to equate to a 21% whole person rating.

11. As noted by Dr. Finn, 10% of the 16% scheduled rating represents impairment resulting from Claimant's distal clavicle resection. Dr. Finn felt Claimant was entitled to the additional 10% impairment for the distal clavicle resection given the ongoing symptoms associated with his left shoulder.

12. Dr. Finn testified via deposition on February 20, 2017. Dr. Finn testified that given the severity of Claimant's injury, i.e. a large rotator cuff tear coupled with the removal of bone and Claimant's ongoing symptoms and physically demanding job, he exercised his discretion to assign an additional 10% impairment for the distal clavicle resection. According to Dr. Finn, the additional impairment was warranted by the nature of Claimant's injury and the symptoms he continues to experience currently. Nonetheless, he agreed that having post surgical symptoms after injuries such as the one sustained by Claimant was not rare. He also acknowledged that Claimant has been released to return to work without restrictions to his heavy-duty job for some time

13. At hearing, Dr. Bisgard defined certain medical terms relevant to this claim. Specifically, Dr. Bisgard indicated that the term "distal" means "away from." The term "proximal" means "towards." Finally, the glenohumeral joint is the medical term for the actual shoulder joint where the long arm of the bone (humerus) sits into the socket (glenoid) and forms the actual shoulder joint. Given these anatomical definitions, Dr. Bisgard testified the areas that would be considered distal to the glenohumeral joint would be the arm, and areas considered proximal to the glenohumeral joint would be towards the neck, including the trapezius and the thoracic area.

14. As noted above, the medical experts agree that Claimant sustained two separate injuries as a consequence of his May 20, 2015 motor vehicle accident: one to his neck and one to his left shoulder. Dr. Bisgard testified that the diagnosis for Claimant's neck injury would be cervical facet arthrosis and the diagnosis for Claimant's shoulder injury includes a rotator cuff tear of the supraspinatus as well as some impingement.

15. Dr. Bisgard testified that the symptoms that Claimant reported to Dr. Finn for both his neck and left shoulder conditions were consistent with what Claimant told her. Dr. Bisgard also testified that Claimant's testimony at hearing regarding the location of his symptoms for both his neck and left shoulder were consistent with what he told her during her evaluation. Finally, Dr. Bisgard, after reviewing a May 16, 2016 pain diagram, indicated that Claimant's illustration concerning the location of his neck and left shoulder pain complaints were consistent with what he told her during her evaluation. As outlined above, Claimant has headaches as a result of this injury; however, Dr. Bisgard testified that Claimant's headaches were the result of his neck injury, and not his left shoulder injury. Claimant's pain diagrams support Dr. Bisgard's opinions.

16. Dr. Bisgard testified that to the extent that Claimant claims functional impairment as a consequence of his injuries, his left shoulder injury did not result in any kind of functional impairment that would be considered proximal to the glenohumeral joint. Dr. Bisgard explained as follows:

> Whatever proximal symptoms he has [are] a result of the cervical injury, not the left shoulder. Again, we have two distinct areas [the left shoulder, and the neck]. The symptoms proximal to the glenohumeral joint are a result of the neck injury and were appropriately rated under the neck injury.

17. As support that any functional impairment is secondary to Claimant's cervical spine condition and not his shoulder, Dr. Bisgard pointed to Claimant's continued need for medical treatment to address his neck condition, including the recommendation for a rhizotomy and additional trigger point injections. Finally, Dr. Bisgard testified that when a patient undergoes a distal clavicle resection the surgery is performed at the level of the glenohumeral joint and not proximal thereto. Dr. Bisgard located the level of the distal clavicle by diagramming its location on Respondents' Exhibit N.

18. Dr. Bisgard reiterated her opinion that Claimant had had an excellent outcome following his surgery and that his case did not present as rare, i.e. one where the clinical findings did not correspond to the true extent of the musculoskeletal defect warranting the additional impairment for the distal clavicle resection surgery. In response to Dr. Finn's justification for providing the additional 10% impairment rating, specifically Claimant's reports of ongoing limitations and symptoms, Dr. Bisgard noted that these were likely emanating from the neck, and not from the shoulder.

19. Dr. Bisgard indicated that the term "double dipping" refers to giving two

impairment ratings for essentially the same thing. Dr. Bisgard testified that in light of Claimant's cervical impairment converting the shoulder rating to a whole person rating would amount to double dipping. In reaching this opinion, Dr. Bisgard testified that converting something from a shoulder to a whole person, in this case, would be considered double-dipping because any symptoms Claimant is having proximal to the glenohumeral joint are coming from the neck.

20. The ALJ credits the opinions of Dr. Bisgard to find that Claimant's left shoulder impairment is limited to a scheduled disability award and that Dr. Finn erred when he assigned an additional 10% scheduled impairment for the distal clavicle resection.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), Section 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As found here, the opinions of Dr. Bisgard are supported by the evidentiary record and are more persuasive than the contrary opinions of Dr. Finn.

Conversion

D. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a shoulder injury, the question is whether the claimant has sustained functional impairment beyond the arm at the shoulder.

E. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. On the other hand, disability or "functional impairment", pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7,2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Albertson's LLC, W.C. No. 4-692-947 (June 30, 2008*). Accordingly, "referred pain from the primary situs of the industrial injury to another part of the body may establish proof of functional impairment to the whole person." *Hernandez v.*

Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005). Nonetheless, symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), aff'd *Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). In order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether the claimant has pain, but whether the injury has impacted part of the claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Consequently, the ALJ concludes that an injury to the structures which make up the shoulder may or may not result in functional impairment beyond the arm. See generally, *Walker v. Jim Fucco Motor Co, supra; Strauch v. PSL Swedish Healthcare System, supra; Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996)

F. Based upon the evidence presented, the ALJ finds that Claimant has failed to meet his burden to establish that he has sustained functional impairment beyond the arm at the shoulder warranting conversion of his scheduled impairment to impairment of the whole person. In this case, the record evidence (pain diagrams) supports that Claimant has consistently noted that, as a result of his left shoulder injury he has symptoms that begin in the anterior part of his shoulder and go down into his left arm. As it pertains to the left shoulder injury, the evidence presented persuades the ALJ that Claimant does not have any symptoms that would be considered proximal to the glenohumeral joint. Rather, crediting the opinion of Dr. Bisgard the ALJ concludes that to the extent that Claimant has symptoms proximal to the shoulder, those symptoms are emanating from his cervical injury, not his left shoulder and that conversion of the scheduled impairment associated with the shoulder injury to whole person impairment would result in a clear case of double dipping. Furthermore, the evidence presented establishes that Claimant has returned to full unrestricted duty in a medium to heavy duty job that requires transport and set up ladders and pull wire. While Claimant may have continued pain in areas of the body beyond the shoulder, i.e. the trapezius, mid and upper back, the totality of the evidence presented persuades the ALJ that these symptoms have not caused "functional impairment" or disability. Indeed, Claimant's functional capacity, as demonstrated, substantially erodes his claims that the injury has resulted in a decreased capacity to meet his personal, social or occupational demands. Based upon a totality of the evidence presented, the ALJ concludes that the situs of Claimant's functional impairment does not extend beyond the arm at the shoulder. Consequently, the ALJ concludes that Claimant has failed to carry his burden to establish that his shoulder injury has resulted in a functional loss that would support an award of permanent disability benefits as a whole person.

Claimant's Entitlement to the 10% Impairment for the Distal Clavicle Resection

G. As found, above, the AMA Guidelines, although allowing a rating physician discretion to provide an additional impairment rating for distal clavicle resection surgery, only provides for that additional impairment rating if, in rare cases, the range of motion impairment rating does not adequately address the extent of a patient's functional impairment. In this case, Claimant has had an excellent surgical outcome, even by Dr. Finn's account. He has returned to a heavy-duty job and has continued to perform that job. No physician has provided Claimant any permanent restrictions as a result of his shoulder injury. Respondents contend that this is not a rare case in which Claimant should be entitled to additional impairment rating for his shoulder injury. Based upon the evidence presented, the ALJ agrees. While Dr. Finn explained that Claimant continues to experience symptoms associated with his left shoulder injury, he conceded that reports of post surgical pain following rehabilitation and MMI is a common occurrence. Moreover, he conceded that Claimant did not have an irreparable rotator cuff tear. Rather he had a moderate injury to the shoulder. Based upon the evidence presented, the ALJ infers that Dr. Finn does not believe that Claimant's range of motion impairment accounted for true the "true" impairment associated with this injury because of ongoing pain complaints.

H. As noted above, the AMA Guides provide that in "rare cases, the severity of the clinical findings do not correspond to the true extent of the musculoskeletal defect." Claimant failed to establish such severity of findings in this case. Rather, the ALJ concludes that the evidence presented supports that Claimant's physically demanding job rather than the pathology he suffered as a consequence of his industrial injury is probably contributing to his ongoing pain complaints. Consequently, the ALJ concludes that the range of motion deficits recorded by Dr. Finn probably accurately reflect the impairment associated with Claimant's musculoskeletal defect, i.e. his rotator cuff tear. Based upon the evidence presented, the ALJ credits the opinions of Dr. Bisgard to find/conclude that Dr. Finn did not appropriately apply the relevant sections of the AMA Guides when he assigned additional impairment for Claimant's distal clavicle resection. Simply put, Dr. Finn assigned an additional 10% impairment for pain associated with continued heavy work after a moderate injury which responded well to surgical intervention. The ALJ concludes that Dr. Finn's decision to assign additional impairment was not in compliance with the "rare" circumstance contemplated by the AMA Guides a constitutes an abuse of his discretion.

ORDER

It is therefore ordered that:

1. Because Respondents are not contesting the cervical impairment provided by Dr. Finn (12%), Claimant is entitled to a PPD award based on a 12% impairment rating of the whole person.

2. Because Claimant has not proven by a preponderance of the evidence that he suffered any functional impairment beyond the shoulder, Claimant's left shoulder PPD award is limited a scheduled disability impairment rating. Regarding this award, Claimant has failed to prove, by a preponderance of the evidence presented, that he is

entitled to an additional 10% impairment for the distal clavicle resection surgery. Consequently, Claimant's scheduled impairment of the left shoulder is limited to 8% impairment for loss of range of motion.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 19, 2017

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203	
In the Matter of the Workers' Compensation Claim of: **LORENZO A. GALINDO ORNELAS,** Claimant, vs. **ROCKY MOUNTAIN DRYWALL,** Employer, and **PINNACOL ASSURANCE,** Insurer, Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-008-105-01**

SUMMARY ORDER

Hearing in this matter was held on September 1, 2016 in Courtroom 4 of the Office of Administrative Courts before Administrative Law Judge Timothy L. Nemechek. Claimant was present and represented by Aaron Kennedy, Esq. Respondents were represented by Alexandra V. Dietzgen, Esq. The proceedings were digitally recorded from 1:30 p.m. to 4:25 p.m.

Respondents' Exhibits A-R were admitted without objection. Claimant's Exhibits 1-8 were admitted without objection. The record remained open for post–hearing submissions. Claimant and Respondents submitted timely Position Statements. A hearing transcript was lodged with the Court on October 15, 2016.

The issue for determination was: (a) whether Respondents met their burden of proof to establish Claimant willfully violated a safety rule adopted by Employer, allowing a 50% reduction of his indemnity benefits.

1. Claimant began work for Employer in February, 2015. He was employed as a drywall finisher.

2. On February 18, 2015, Claimant signed an acknowledgement of receipt of the Employee Handbook. [1] This acknowledgement was written in English.

3. The Employee Handbook set forth Employer's safety policy. More particularly, Section 503 is entitled Safety/Hazcom Program. That section provided in pertinent part:

> "To assist in providing a safe and healthful work environment for employees, customers and visitors, RMD has established a workplace safety/hazcom program. This program is a top priority for RMD and exists to insure our employees complete their work assignment safely. We have a ZERO tolerance

[1] Exhibit H.

policy for safety violations. Disciplinary actions up to and including termination will occur for all safety violations. The safety manager has responsibility for implementing, administering, monitoring, evaluating and modifying the safety program to insure its effectiveness. The success of this program depends on the support of management, and the awareness and compliance of all employees.
...

New employees receive an initial safety orientation upon hire. Field employees and supervisors receive monthly workplace safety training. The training covers potential safety and health hazards, and safe work practices and procedures to eliminate injuries and behaviors that lead to injury.

Each employee is expected to obey all safety rules and exercise caution in all work activities. Upon entering the work area **each time**, employees are required to identify, record, correct and report any unsafe condition to their supervisor. RMD's on-site safety checklist is provided on all job sites to help meet these requirements. All unsafe work areas or conditions must be corrected before work begins. Employees who violate safety standards, who cause hazardous or dangerous situations, or fail to report or, where appropriate, remedy such situations, may be subject to disciplinary action up to and including termination of employment."

4. Claimant's new hire orientation checklist (in Spanish) was admitted into evidence. Claimant initialed and dated this document on February 18, 2015. This form confirmed Claimant received a copy of the Employer's Safety and Hazard Communication Program. (Both English and Spanish versions of this booklet were admitted at hearing).[2]

5. The Safety and Hazard Communication Program set forth requirements with regard to safety on the job. These were:

"A. Survey the job site to identify any potentially hazardous conditions and report them to your supervisor immediately.
...

D. Clear the work area of debris before you start and maintain this condition while working, especially if you are using benches, ladders, scaffold or stilts.
…

H. Report any unsafe condition to your supervisor immediately. Never take chances.

Awareness

[2] Exhibit G.

A. It is the responsibility of each employee to be aware of:

…

2). The conditions of the work area and the potential risks associated therewith.

B. Report all unsafe workers, activities and conditions to your supervisor immediately".

6. Claimant participated in safety meetings while working for Employer. More particularly, he attended safety meetings on March 27, 2015, October 30, 2015, and September 25, 2016. The subject of the October 30, 2015 meeting was Stilt Safety and Fall Protection. Claimant completed a quiz after that training and answered all of the questions correctly.

7. Dustin Matson testified at hearing. He works as the safety manager for Employer, a position he has held for three years. In that capacity, he worked with the safety committee to develop safety policies and procedures for enforcing those policies. Mr. Matson noted safety is discussed as part of Employer's new hire orientation. As part of the process, keeping the job sites clean is discussed, as the drywall business is a messy industry. Mr. Matson testified there was a safety checklist on every job site. Employees are to do a safety walk in the house before they start work and if a hazard is seen, all employees have the authority to stop work at the site, until the hazard is reported and/or corrected. Employer's safety booklet discussed putting drywall scraps in the center of the room. Mr. Matson stated Claimant would have been aware of these policies. Mr. Matson stated Employer conducts regular safety meetings and employees are quizzed about what is discussed. The meetings are conducted in Spanish and English. Mr. Matson testified he also conducts unannounced job site visits to insure safety rules are followed.

8. Maximino Preciado[3] testified at hearing. He has worked for Employer for twenty-two years. He knew Claimant through work, although did not work with him directly. He worked that day at the house where Claimant was injured, arriving around 8 a.m. The house was dirty with scrap on the floor, but he was able to do his job which was installing corner bead. Claimant arrived around 11 a.m. and Mr. Preciado finished his work, leaving the job site. Mr. Preciado said stilts were not supposed to be used unless the floor was completely clean. This was company policy. He watched videos and the company continually reminded them of that rule. Mr. Preciado said he asked Claimant if he was going to work because of the condition of the house. Mr. Preciado admitted he had never not worked in the house because it was in that condition. On cross-examination, Mr. Preciado admitted using stilts on two or three occasions when the floors had not been completely scrapped. This included the house where Claimant

[3] Mr. Preciado prepared a written statement in Spanish (undated), which was admitted at hearing, along with a translation. The statement corroborated Mr. Preciado's testimony. He also said Claimant asked when the scrappers were going to come and also told him he needed to get some hours.

was injured. The ALJ notes Mr. Preciado's testimony supported the finding that employees had previously violated this safety rule with no consequences.

9. Hermanagildo Segovia testified on behalf of Respondents. He has worked as a drywall finisher for 4 1/2 years. This is the same job as Claimant and he wears stilts. Mr. Segovia confirmed there were safety rules concerning stilts; specifically, the work area had to be clean while wearing stilts. Stilts were also not to be worn on stairs. Mr. Segovia testified he had worked in houses that were not cleaned. If possible, he would try to work on the scaffold in the garage. However, he testified that he has worn stilts in the areas which are dirty. However, he said he doesn't always wear stilts in the areas where it is dirty.

10. Michael Herrera testified on behalf of Respondents. He has worked for Employer for ten years as a supervisor. Claimant reported directly to him and he would act as an interpreter on occasion because he spoke Spanish. This included safety meetings. Mr. Herrera testified the safety rules concerning wearing stilts required that you not walk on stairs and not in areas where there was debris or other trip and fall hazards. Claimant would have been aware of these rules. Mr. Herrera confirmed that his work crew has worked in houses that had not been scrapped. This includes doing the work that is low, which does not require stilts. He said they always direct the employees to work as carefully as possible. Mr. Herrera had not written any employee up for violating safety rules, but has verbally instructed employees. The ALJ concluded from this testimony that Employer acquiesced in a violations of the safety policy. He has told employees to first complete the work that does not require stilts. He further testified that there would never be a backlash for an employee who refused to work in unsafe conditions. He confirmed that employees are paid on a piece-rate basis, when they complete the house.

11. Claimant testified he received the Employee Handbook and copies of the policies concerning use of stilts. He also confirmed his attendance at the safety meeting when wearing stilts had been discussed. The ALJ finds Claimant was advised of the policy which required him to work in an area clear of debris while wearing stilts.

12. On February 20, 2016 (Saturday), Claimant was working at a house located at 15416 W. 49th Drive. Claimant testified the house was dirty when he got there. Claimant testified that, in his experience with working for Employer, he would very often see other employees working on stilts on jobsites that had yet to be scrapped. He called his supervisor, Mike (Herrera), as he wanted to know when they were going to come to clean the house. In his report of injury, he noted that he tried to call Mr. Herrera at 10:51 a.m. Claimant testified that he completed the low work, as he had been trained. He tried to call Mr. Herrera again, but there was no answer. It was at this point in time he began using the stilts in the areas that had not been scrapped. There was a lot of scarp and he was not thinking of cleaning everything. He testified that he exercised caution as he had been told. Claimant fell while he was on the stilts and was injured.

13. Claimant testified that he did not think about violating a safety rule when

he began working on the stilts. He felt it was normal and he just began working. As a finisher, Claimant said they would go ahead and do their job. This was the same for Herman. The ALJ infers from this testimony Claimant did not volitionally or intentionally violate the rule concerning using stilts when debris was on the floor.

14. Ismael Herrera Martinez testified as a witness for Claimant. He explained that he worked for Employer for approximately four years under the direct supervision of Michael Herrera. He was aware of the safety rule against wearing stilts in a house that had not been scrapped. Mr. Martinez testified that if a job site was not scrapped, he would contact Mr. Herrera, who would then instruct him to wait for the people who cleaned the house. Sometimes the cleaners would take two or three hours. Sometimes they would not come until the next day. When the latter situation occurred, they would do their work, most of which required stilts. He had worked in houses that were not scrapped. He said sometimes employees were afraid to call the supervisor about the house not being clean, as they wouldn't get more work.

15. Mr. Matson completed a safety audit the day after Claimant was injured. There was no safety checklist present at the house. He inspected the house and noted the presence of hazards including electrical cord and construction material. Mr. Matson described the condition of the house as "atrocious". The house was unsafe to use stilts. He also met with Claimant at the time the report of injury was completed. Mr. Matson testified Claimant agreed that the injury could have been prevented had he made the decision not to use the stilts. Mr. Matson testified that he had not had an employee make a decision to work in a house like this. He had had not reprimanded an employee for moving debris to the middle of the room.

16. An Employer's First Report of Injury was completed on February 22, 2016. It specified Claimant was injured while wearing stilts in a home with drywall debris and tripping hazards everywhere. Claimant received an Employee Warning/Suspension Notice on February 22, 2016 for the failure to follow company policy.[4]

17. Photographs of the accident site were admitted at hearing.[5] These were part of the audit report prepared by Mr. Matson. These depicted pieces of drywall scrap, cord, as well as drywall mud on the floor in the room where Claimant fell.

18. On March 11, 2016, a General Admission of Liability ("GAL") was filed on behalf of Respondents, admitting for wage and medical benefits. That GAL took a 50% penalty on Claimant's TTD benefits for a safety rule violation.

19. A revised GAL was filed on April 15, 2016, admitting for temporary partial disability benefits. A 50% penalty was taken on those benefits for a safety rule violation.

[4] Exhibit A.

[5] Exhibits E and F.

20. The ALJ finds Respondents failed to prove Claimant willfully violated safety rule.

21. Section 8-42-112(1)(b), C.R.S. governs the imposition of a penalty for a violation of a safety rule. That section provides for a 50 percent reduction in Claimant's compensation when Respondents prove "the injury is caused by the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee". The question of whether the Respondents met their burden and proved a willful safety rule violation by a preponderance of the evidence is generally one of fact for determination by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995).

22. In *Lori's Family Dining*, Claimant was engaged in horseplay with co-employees, which escalated to an altercation. Claimant was injured when he fell and broke his arm. The employer prohibited horseplay and had warned employees against such conduct. Employer's policies required three written warnings before termination. The ALJ declined to impose a 50% penalty for a safety rule violation on the grounds that employer had not enforced safety rule, which was affirmed by the Industrial Claim Appeals Office. The Colorado Court of Appeals considered whether the denial of the penalty was appropriate under those circumstances. Justice Hume noted the most frequent ground for rejecting a penalty for violation of a safety rule was the "lack of enforcement of the rule or policy by an employer with knowledge of and acquiescence in its violation". *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d at 719.

23. As a starting point, the ALJ concluded Employer had a written safety policy in force at the time Claimant was injured. This policy was expressed in the Employee handbook, as well as Employer's Safety and Hazard Communication Program. The specific policy at issue was the Safety and Hazard Communication Program, which required employees to: "Clear the work area of debris before you start and maintain this condition while working, especially if you are using benches, ladders, scaffold or stilts". Employer took many steps to insure its new employees were informed of the policy and the policy was reinforced throughout their employment. The ALJ concluded that Claimant received both the Employee Handbook and the safety policies. He also participated in safety meetings in which the subject of safety practices while using stilts were discussed. Therefore, Respondents proved there was a safety rule which was communicated to employees, including Claimant.

24. In the case at bench, there was evidence that Employer had not enforced the safety rule. First was direct evidence in the form of witness testimony (Mr. Preciado, Mr. Segovia, and Mr. Martinez-Herrera), which established employees worked on jobsites with rooms that had debris on the floor, in violation of the policy. Claimant's testimony also corroborated this fact.

25. Second, Mr. Herrera, who was in a supervisory position, confirmed this occurred and he had not disciplined any employee for a violation of the company policy.

No contrary evidence was introduced to refute this. Mr. Matson also testified that company policy required a safety checklist to be present at the jobsite. In fact, no such checklist present at the location where Claimant was injured. This was further evidence of the lack of enforcement of safety rules by Employer. Thus, while the facts before the ALJ established that while Employer had an established policy, which was communicated to employees, the Employer acquiesced in the violations of the policy. Under these circumstances, Respondents were not entitled to reduce Claimant's benefits for violation of the safety rule.

26. Additional support for the conclusion that Respondents were not entitled to a reduction of benefits was found in the determination by the ALJ that Claimant did not willfully violate the safety rule. Respondents were required to show Claimant's conduct was willful, that is he knew the rule, then intentionally did what the rule prohibited. *Bennett Props. Co. v. Indus. Comm'n*, 165 Colo. 135, 140, 437 P.2d 548, 551 (1968). On this element, Respondents failed to meet their burden. As used in this statute, the word "willful" means "with deliberate intent", *City of Las Animas v. Maupin*, 804 P.2d 285, 286 (Colo. App. 1990)[citation omitted], or "the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences." *Johnson v. Denver Tramway Corp.*, 115 Colo. 214, 222, 171 P.2d 410, 414 (1946)(emphasis omitted)[quoting 1 William R. Schneider, *The Law of Workmen's Compensation* § 282, at 876 (2d ed. 1932)].

27. The evidence admitted at hearing led the ALJ to conclude that Respondents failed to establish a willful violation of the safety rule. Claimant's testimony was part of this conclusion when he testified that he was not thinking of the safety rule when he used the stilts in the area where there was drywall scrap. He was simply focusing on completing the tasks, which was persuasive to the ALJ. Claimant's testimony was credible and also buttressed by the fact that he had violated the safety rule on other occasions, with the goal of getting the job done. In addition, Claimant testified he tried to call Mr. Herrera when he saw the condition of the jobsite. Thus, he tried to comply with one part of the policy, which was to advise his supervisor of the unsafe condition of the workplace. Under these circumstances, imposition of a penalty for a violation of a safety rule was not warranted.

Order

IT IS ORDERED:

1. Respondents have failed to prove Claimant willfully violated a safety rule. Claimant is entitled to receive 100% of his indemnity benefits.

2. Respondents shall pay 100% of Claimant's indemnity benefits.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

DATED: May 19, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

This decision is final and not subject to appeal unless a full order is requested. The Request shall be made at the Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203 within seven working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a Request for Specific Findings of Fact and Conclusions of Law is made, counsel for Claimant or Respondents may submit proposed (Amended) Specific Findings of Fact, Conclusions of Law, and Order that substantially incorporates the above findings of fact and conclusions of law within five working days from the date of the Request. The proposed order must be submitted by e-mail in Word or Rich Text format to oac-dvr@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

CERTIFICATE OF MAILING OR SERVICE

I hereby certify that I have served true and correct copies of the foregoing **SUMMARY ORDER** by depositing same in the U.S. Mail, or by e-mail addressed as follows:

Aaron Kennedy Esq.
McDivitt Law Firm, P.C.
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Alexandra V. Dietzgen Esq.
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Date: 05/22/2017

/s/ Jenna Brantley
Court Clerk

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered bilateral foot injuries during the course and scope of his employment with Employer on November 24, 2015.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his foot symptoms.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period December 1, 2015 through January 19, 2016.

STIPULATIONS

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1022.80.

FINDINGS OF FACT

1. Claimant works for Employer as a Security Guard. His typical shift lasted from 6:00 a.m. until 2:00 p.m. Claimant explained that his job duties included patrolling the perimeter of a Federal Building located in Lakewood, Colorado. His schedule involved sitting at his desk inside for an hour performing office work and patrolling the perimeter of the building for an hour throughout his work shift.

2. On November 24, 2015 Claimant arrived for his shift at approximately 5:40 a.m. and began his first outside perimeter patrol at 7:00 a.m. Claimant was wearing a new pair of work boots that had been issued by Employer. He subsequently experienced tenderness and soreness in the fourth toe of his left foot.

3. On November 26, 2015 Claimant noticed black or purple discoloration and swelling of his fourth left toe and informed Employer of his injury. Employer directed Claimant to the Swedish Hospital Emergency Room in Denver, Colorado for treatment. Medical providers determined that he had suffered frostbite and an infection of the toe. They advised him to consult a specialist.

4. On December 1, 2015 Claimant visited Kirk Holmboe, D.O. Dr. Holmboe recounted that Claimant had previously suffered an episode of frostbite to the fourth toe of his left foot in 2006 when he was working a seasonal position for a different employer. The condition healed after a course of conservative treatment. Claimant subsequently suffered a recurrence of frostbite to the fourth toe on his left foot in 2009.

Although physicians considered toe amputation, surgery was not performed and the condition again healed through conservative treatment. Dr. Holmboe diagnosed Claimant with frostbite of the fourth toe on the left foot. Claimant considered a possible amputation of the toe because of the recurring nature of the problem.

5. On December 2, 2015 Claimant visited Stuart H. Myers, M.D. at Colorado Orthopedic Consultants for an examination. Dr. Myers remarked that Claimant had suffered frostbite on both feet. He commented that "[t]his issue has been present on and off for years" and the "flares are related to walking out of doors when it is cold at work." After discussing treatment options, Claimant elected to proceed with surgical amputation. Dr. Myers noted that amputation was reasonable because "the problem would almost certainly recur as it has been doing for years." Insurer denied the subsequent surgical request based on a lack of documentation that the procedure was reasonable, necessary and related to Claimant's work activities.

6. On December 23, 2015 Claimant again visited Dr. Holmboe for an evaluation. Dr. Holmboe explained that Claimant's work activities were one of a number of contributing factors that caused his frostbite. He specifically noted factors including cold temperatures, new work boots that may not have been warm enough and applied pressure to Claimant's toe, generally decreased blood flow and possible peripheral vascular disease.

7. On January 20, 2016 Claimant returned to Dr. Holmboe for an examination. Dr. Holmboe recounted that Claimant had been wearing thermal waterproof boots at work in cold temperatures without any problems. He also commented that Claimant had received peripheral vasodilator medication from his personal physician. Upon examination Claimant's wound on the fourth toe of his left foot was healing and three toes on his right foot were in the process of healing. Dr. Holmboe continued to diagnose Claimant with frostbite and released him to full duty employment.

8. On February 5, 2016 Claimant again visited Dr. Holmboe for an evaluation. Dr. Holmboe diagnosed Claimant with "apparent frostbite" of both feet and noted that his toes were healing. He advised Claimant that "there may be more to this than simply cold exposure and he might "have some other vascular issues even in addition to possible Raynaud's." Dr. Holmboe released Claimant at Maximum Medical Improvement (MMI) with no permanent impairment.

9. On February 17, 2016 Claimant underwent an independent medical examination with Michael R. Striplin, M.D. Dr. Striplin reviewed Claimant's medical history and conducted a physical examination. He recounted that Claimant worked as an armed Security Guard for Employer and was required to conduct an hourly outside perimeter patrol. On November 24, 2015 Claimant performed his routine patrols while wearing a new pair of work boots that had been issued by Employer. He noticed tenderness and soreness in his fourth left toe at some point during his shift and subsequently observed discoloration and swelling in the toe. Dr. Striplin remarked that Claimant exhibited symptoms in his left fourth toe and his right second, third and fourth

toes. In reviewing Claimant's medical records Dr. Striplin stated that Claimant had developed frostbite on the fourth toe of his left foot while working for a seasonal employer in 2005. Claimant was also diagnosed with Reynaud's phenomenon. Between 2005 and 2009 Claimant continued to suffer periodic discomfort and discoloration of the fourth toe on his left foot. In 2009 Claimant again suffered frostbite to the toe and subsequently experienced episodic discomfort and discoloration.

10. Dr. Striplin concluded that Claimant likely did not suffer frostbite to both feet while performing his job duties for Employer on November 24, 2015. He explained that the medical records reflect that Claimant has suffered from an unspecified peripheral vascular disease with recurring symptoms for more than a decade. Claimant has not received a specific diagnosis about the type of peripheral vascular disease and there can be a number of causes for the disorder. In addressing whether Claimant specifically suffered frostbite while performing his work activities on November 24, 2015 Dr. Striplin considered the outside temperatures for the date. He noted that on November 24, 2015 in Denver, Colorado between 5:53 a.m. and 2:53 p.m. the temperature ranged from a low of 37 degrees to a high of 63 degrees. Frostbite occurs as a result of the formation of ice crystals in the skin or subcutaneous tissues as a result of exposed skin when the air temperature is below freezing. Dr. Striplin reasoned that, because the air temperatures remained above freezing on November 24, 2015, Claimant likely did not suffer frostbite as a result of his work activities.

11. On December 28, 2016 Claimant visited Anne H. Hanson, M.D. of Advanced Dermatology for an evaluation. Claimant reported soreness, discoloration and infection of the left dorsal foot. The symptoms were darkening, swollen, painful, irregular, changing in color and mild in severity. Dr. Hanson remarked that the soreness, discoloration and infection had been present for 10 years. She explained that purple skin lesions on Claimant's toes began in 2006 and have increased in frequency and severity. Dr. Hanson determined that Claimant suffers from the tissue disorder of pernio. Chilblains or pernio is an abnormal vascular response that occurs when a predisposed individual suffers tissue damage caused by exposure to cold and humidity. The condition is often confused with frostbite and is characterized by redness, inflammation, blistering and ulceration of the affected extremities. Dr. Hanson commented that Claimant also suffered Reynaud's disorder prior to the development of skin lesions. She prescribed medications and sought confirmation of pernio through laboratory testing. Subsequent testing revealed that Claimant suffers pernio in his left foot.

12. Claimant testified at the hearing in this matter. He explained that, while working for Employer as a Security Guard, he rotated between staffing the security desk for one hour and patrolling the grounds outside the facility for one hour. On November 24, 2015 Claimant suffered right foot symptoms during his shift. Although Claimant acknowledged that he had previously suffered frostbite and lesions on his feet, he explained that his work activities on November 24, 2015 caused him to develop pernio on his left foot. Claimant was taken off work on December 1, 2015 and returned to full duty on January 19, 2016. He explained that during his time off work he developed

symptoms in his right foot that were similar to the symptoms he was experiencing in his left foot.

13. Dr. Striplin testified at the hearing in this matter. He maintained that Claimant's work activities on November 24, 2015 did not aggravate or accelerate his underlying peripheral vascular disease and cause a need for medical treatment. Dr. Striplin did not dispute the pernio diagnosis but determined that Claimant's work activities did not cause the disorder. He explained that pernio can be idiopathic or caused by an underlying tissue disorder. The condition is typically transient and does not cause the development of tissue necrosis. Dr. Striplin noted that, if an individual suffers repeated episodes of pernio, physicians should consider an underlying systemic disease.

14. Dr. Striplin testified that in order for an individual to suffer an aggravation of pernio he would have to be exposed to cold and damp, humid conditions. However, Claimant presented no evidence to suggest that he was exposed to damp, humid conditions on November 24, 2015. Dr. Striplin remarked that Claimant told him his socks were dry at the time of the injury. In fact, Claimant commented that he did not notice any symptoms until he was home on the night of November 24, 2015. Claimant's delayed development of symptoms reflects that his condition was also not related to his work activities for Employer. Finally, Dr. Striplin explained that the development of pernio symptoms in Claimant's right foot while he was not working suggests that he suffers from an underlying condition that may simply have become symptomatic on November 24, 2015.

15. Claimant has failed to demonstrate that it is more probably true than not that he suffered bilateral foot injuries during the course and scope of his employment with Employer on November 24, 2015. Claimant asserts that on November 24, 2015 he was performing his job duties as a Security Guard for Employer by conducting an hourly patrol of the perimeter of his building. On November 26, 2015 Claimant noticed black or purple discoloration and swelling of his fourth left toe and informed Employer of his injury. Although Claimant was initially diagnosed with frostbite, Dr. Hanson determined that Claimant suffers from the tissue disorder of pernio. Chilblains or pernio is an abnormal vascular response that occurs when a predisposed individual suffers tissue damage caused by exposure to cold and humidity. Claimant was taken off work on December 1, 2015 and placed back to full work duty on January 19, 2016. During his time off from work he developed symptoms in his right foot that were similar to the symptoms he was experiencing in his left foot. Although Claimant suffers from pernio, the medical records and persuasive testimony of Dr. Striplin reflect that his disorder was not caused, aggravated or accelerated by his work activities for Employer on November 24, 2015.

16. The medical records reflect that Claimant has suffered from an unspecified peripheral vascular disease with recurring symptoms for more than a decade. Claimant developed frostbite on the fourth toe of his left foot while working for a seasonal employer in 2005. Claimant was also diagnosed with Reynaud's phenomenon. Between 2005 and 2009 he continued to suffer periodic discomfort and

discoloration of the fourth toe on his left foot. In 2009 Claimant again suffered frostbite to the toe and subsequently experienced episodic discomfort and discoloration. As Dr. Hanson noted, Claimant's toe soreness, discoloration and infection had been present for 10 years. She explained that purple skin lesions on Claimant's toes began in 2006 and have increased in frequency and severity.

17. Dr. Striplin persuasively maintained that Claimant's work activities on November 24, 2015 did not aggravate or accelerate his underlying peripheral vascular disease and cause a need for medical treatment. Dr. Striplin did not dispute the pernio diagnosis but determined that Claimant's work activities did not cause the disorder. He explained that pernio can be idiopathic or caused by an underlying tissue disorder. The condition is typically transient and does not cause the development of tissue necrosis. Dr. Striplin noted that, if an individual suffers repeated episodes of pernio, physicians should consider an underlying systemic disease. For an individual to have an aggravation of pernio he would have to be exposed to cold and damp conditions. However, Claimant presented no evidence to suggest that he was exposed to cold or damp conditions on November 24, 2015. Dr. Striplin remarked that Claimant told him his socks were dry at the time of the injury. In fact, Claimant commented that he did not notice any symptoms until after he went home on the night of November 24, 2015. Although Claimant developed pernio symptoms subsequent to his work activities on November 24, 2015, he has failed to demonstrate that his condition was caused by his work activities. Because Claimant has suffered unspecified peripheral vascular disease with recurring symptoms for more than a decade, his underlying condition may simply have become symptomatic on November 24, 2015. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered bilateral foot injuries during the course and scope of his employment with Employer on November 24, 2015. Claimant asserts that on November 24, 2015 he was performing his job duties as a Security Guard for Employer by conducting an hourly patrol of the perimeter of his building. On November 26, 2015 Claimant noticed black or purple discoloration and swelling of his fourth left toe and informed Employer of his injury. Although Claimant was initially diagnosed with frostbite, Dr. Hanson determined that Claimant suffers from the tissue disorder of

pernio. Chilblains or pernio is an abnormal vascular response that occurs when a predisposed individual suffers tissue damage caused by exposure to cold and humidity. Claimant was taken off work on December 1, 2015 and placed back to full work duty on January 19, 2016. During his time off from work he developed symptoms in his right foot that were similar to the symptoms he was experiencing in his left foot. Although Claimant suffers from pernio, the medical records and persuasive testimony of Dr. Striplin reflect that his disorder was not caused, aggravated or accelerated by his work activities for Employer on November 24, 2015.

8. As found, the medical records reflect that Claimant has suffered from an unspecified peripheral vascular disease with recurring symptoms for more than a decade. Claimant developed frostbite on the fourth toe of his left foot while working for a seasonal employer in 2005. Claimant was also diagnosed with Reynaud's phenomenon. Between 2005 and 2009 he continued to suffer periodic discomfort and discoloration of the fourth toe on his left foot. In 2009 Claimant again suffered frostbite to the toe and subsequently experienced episodic discomfort and discoloration. As Dr. Hanson noted, Claimant's toe soreness, discoloration and infection had been present for 10 years. She explained that purple skin lesions on Claimant's toes began in 2006 and have increased in frequency and severity.

9. As found, Dr. Striplin persuasively maintained that Claimant's work activities on November 24, 2015 did not aggravate or accelerate his underlying peripheral vascular disease and cause a need for medical treatment. Dr. Striplin did not dispute the pernio diagnosis but determined that Claimant's work activities did not cause the disorder. He explained that pernio can be idiopathic or caused by an underlying tissue disorder. The condition is typically transient and does not cause the development of tissue necrosis. Dr. Striplin noted that, if an individual suffers repeated episodes of pernio, physicians should consider an underlying systemic disease. For an individual to have an aggravation of pernio he would have to be exposed to cold and damp conditions. However, Claimant presented no evidence to suggest that he was exposed to cold or damp conditions on November 24, 2015. Dr. Striplin remarked that Claimant told him his socks were dry at the time of the injury. In fact, Claimant commented that he did not notice any symptoms until after he went home on the night of November 24, 2015. Although Claimant developed pernio symptoms subsequent to his work activities on November 24, 2015, he has failed to demonstrate that his condition was caused by his work activities. Because Claimant has suffered unspecified peripheral vascular disease with recurring symptoms for more than a decade, his underlying condition may simply have become symptomatic on November 24, 2015. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

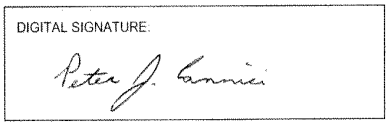
ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: May 19, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

- Whether claimant has overcome, by clear and convincing evidence, the findings of the Division-sponsored independent medical examination ("DIME") physician regarding maximum medical improvement ("MMI") and permanent impairment rating.

- If claimant has overcome the findings of the DIME physician, whether claimant has proven by a preponderance of the evidence that she is entitled to an award of permanent partial disability ("PPD") benefits.

FINDINGS OF FACT

1. Claimant is employed with employer as a licensed psychiatric technician. On June 14, 2015, claimant suffered an admitted injury to her upper back. Claimant testified that the injury occurred when she crawled under a table to reach an item. While claimant was under the table a client's forearm and elbow struck claimant's upper back and left shoulder. Claimant timely reported the injury to employer and she was sent for treatment at Work Partners as her authorized treating physician ("ATP").

2. Claimant testified that her symptoms from the June 14, 2015 work injury included extreme pain in her upper back and left arm, with numbness down her left arm and up into the left side of her neck and left ear.

3. Claimant began treating with Work Partners on June 17, 2015 and was seen by Daniel Meyer, PA, under the supervision of Dr. Craig Gustafson. Mr. Meyer diagnosed a contusion to claimant's interscapular region, and myofacial syndrome of her thoracic spine. Mr. Meyer referred claimant for six sessions of chiropractic treatment. In addition, claimant was instructed to take over the counter nonsteroidal anti-inflammatory drugs ("NSAIDS") and to alternate ice and heat. Mr. Meyer released claimant to return to full duty work with no work restrictions.

4. On July 25, 2015, claimant suffered an admitted injury to her low back. Claimant testified that the July 25, 2015 injury occurred when she was attempting to administer medication to a client who was having a seizure. During that process, claimant felt pain in her left hip and low back. Claimant timely reported the July 25, 2015 injury to employer and was sent back to Work Partners as her ATP for that new injury.

5. On July 28, 2015, claimant was first seen at Work Partners for the July 25, 2015 injury. She was seen by Erica Herrera, PA-C, under the supervision of Dr. Gustafson. On that date, claimant was placed on restricted duty with a 25 pound lifting restriction and limited bending and twisting. Following the July 25, 2015 injury

claimant's treatment included physical therapy and injections. Ms. Herrera also referred claimant to Colorado Injury and Pain Specialists.

6. On November 16, 2015, claimant was placed at maximum medical improvement ("MMI") for the June 14, 2015 work injury. At that time claimant had no work restrictions and no impairment rating.

7. Claimant testified that when she was placed at MMI in November 2015, she continued to have pain and numbness in her left arm and into her fingers and up her neck and the left side of her head. Claimant testified that she did not pursue additional treatment for her upper back and left arm pain because she believed that her case was closed.

8. On November 10, 2015, claimant was first seen at Colorado Injury and Pain Specialists by Dr. Scott Campbell. Claimant reported to Dr. Campbell that she had experienced mid-thoracic pain since June, but that pain had progressively improved. She also reported that since July she had hip and lower back pain with radicular pain that extended below her knee into her ankle. Dr. Campbell determined that claimant's pain was likely sacroiliac ("SI") joint pain and opined that a she could benefit from an SI injection.

9. On November 23, 2015, Dr. Campbell administered a left SI joint injection. On December 8, 2015, claimant reported to Dr. Campbell that she had five hours of good pain relief from the November 23, 2015 injection. Based upon claimant's response to that injection, Dr. Campbell determined that she would be a good candidate for another SI injection.

10. On December 14, 2015, Dr. Campbell administered another left SI joint injection. On December 29, 2015, claimant reported to Dr. Campbell that she continued to have relief from the December 14, 2015 injection.

11. On December 22, 2015, a magnetic resonance image ("MRI") of claimant's lumbar spine showed advanced facet arthrosis at the L4-5 and L5-S1 levels.

12. On January 1, 2015, claimant reported to Ms. Herrera that Dr. Campbell had recommended "burning some nerves". Ms. Herrera recorded that claimant did not wish to pursue radiofrequency ablation.

13. On January 26, 2016, claimant was seen by Elizabeth Crawford, CNP with Colorado Injury and Pain Specialists. At that time, claimant reported that the injections continued to provide her with pain relief. Ms. Crawford recommended medial branch blocks at the L4-5 and L5-S1 levels, which claimant declined.

14. On February 22, 2016, claimant was placed at maximum medical improvement ("MMI") for the July 25, 2015 work injury with no work restrictions and no permanent impairment rating. At that time, Ms. Herrera recommended that claimant continue with core and hip strengthening and refilled claimant's prescription for Lidocaine patches and a TENS unit for ongoing maintenance treatment.

15. On July 13, 2016, respondent filed a Final Admission of Liability ("FAL") for the June 14, 2015 work injury admitting for the MMI date of November 16, 2015 and no permanent impairment rating.

16. On July 13, 2016, respondent also filed a FAL for the July 25, 2015 work injury admitting for the MMI date of February 22, 2016 and no permanent impairment rating.

17. On July 20, 2016, claimant filed an Objection to FAL and Notice and Proposal to Select an Independent Medical Examiner ("IME") regarding the June 14, 2015, and an Objection to FAL and Notice and Proposal to Select an IME regarding the July 25, 2015 injury.

18. On July 29, 2016, claimant filed an Application for a Division Independent Medical Examination ("DIME") that addressed both the June 14, 2015 and July 25, 2015 injuries. On August 30, 2016, claimant filed an Amended Application for a DIME addressing both injuries. The body parts and conditions to be evaluated were listed in the Amended Application for a DIME as low back, mid back, sciatic pain with radicular symptoms, upper back, ribs, and shoulder.

19. On September 30, 2016, Dr. Thomas Moore performed a DIME. Dr. Moore reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the DIME. Dr. Moore issued a report in which he summarized his findings and opined that claimant had reached maximum medical improvement ("MMI") on November 16, 2015 for the June 14, 2015 injury; and on February 22, 2016 for the July 25, 2015 injury.

20. In his DIME report, Dr. Moore determined an impairment rating of 3% whole person for claimant's thoracic spine range of motion. For claimant's range of motion for her lumbar spine, Dr. Moore assigned an impairment rating of 2% whole person. This resulted in a total impairment rating of 5% whole person. In determining this impairment rating, Dr. Moore did not include any impairment rating from Table 53 of the AMA Guides.[1]

21. On October 13, 2016, the Division of Workers' Compensation ("the Division") sent an "incomplete notice" to Dr. Moore regarding his DIME report. Specifically, the Division noted that Dr. Moore included two MMI dates and had not identified any Table 53 diagnoses.

22. On October 19, 2016, Dr. Moore issued an addendum to his DIME report in which he determined that claimant had no Table 53 diagnosis and therefore did not have any permanent impairment rating for either work injury. In this addendum, Dr. Moore did not explain why claimant did not have a Table 53 diagnosis for either injury.

[1] *American Medical Association Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised) in effect as of July 1, 1991.

23. On November 2, 2016, respondent filed a FAL regarding the June 14, 2015 work injury and admitting for the MMI date of November 16, 2015 and no impairment rating.

24. On January 11, 2017, Dr. Jeffery Krebs performed an independent medical examination ("IME") of claimant. Dr. Krebs reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant. Following the IME, Dr. Krebs authored a report in which he opined that claimant had reached MMI with regard to the July 25, 2014 injury to her lumbar spine. Based upon range of motion measurements and a Table 53 II(B) diagnosis, Dr. Krebs assessed a permanent impairment rating of 11% whole person for claimant's lumbar spine.

25. Table 53 II(B) identifies impairment ratings for "Intervertebral disc or other soft-tissue lesions" that are "[u]noperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm associated with *none-to-minimal* degenerative changes on structural tests". (Emphasis in the original).

26. Dr. Krebs noted in his report that no studies had been taken of claimant's shoulder or thoracic spine. Therefore, he opined that he was not to assess an impairment rating on claimant's thoracic spine.

27. Claimant testified that she continues to have the same symptoms she had when she was placed at MMI in November 2015 and in February 2016. Claimant continues to use her Lidocaine patches, and treats her pain with ice, heat, massage therapy, and chiropractic therapy.

28. The ALJ notes that Dr. Moore first assessed an impairment rating of 5% whole person, and then later determined no impairment rating. However, Dr. Moore's addendum to the DIME report is silent as to why he believes that claimant does not have a Table 53 diagnosis.

29. The ALJ credits claimant's testimony and the medical records and finds that claimant has demonstrated that she has continued to have pain and receive treatment for at least six months following her injuries and after being placed at maximum medical improvement ("MMI").

30. The ALJ credits the medical records and the opinion of Dr. Krebs and finds that claimant has demonstrated that it is highly probable that she has a permanent impairment to her lumbar spine. The ALJ adopts Dr. Krebs' finding of a permanent impairment rating of 11% whole person related to claimant's lumbar spine.

31. The ALJ credits Dr. Moore's initial thoracic spine range of motion measurements and finds that claimant has a 3% whole person impairment for her thoracic spine. It has been established by the medical records that claimant has had six months of medical documented pain for her thoracic spine with "none-to-minimal degenerative changes". The ALJ finds that an impairment rating for claimant's thoracic spine can be assessed even in the absence of imaging as the Table 53 II(B) rating

includes none to minimal degenerative changes. The ALJ adds the 3% range of motion rating to a Table 53 rating of 2% whole person, resulting in a thoracic spine whole person rating of 5%. When this is added to the 11% impairment for claimant's lumbar spine it results in a total whole person rating of 15%.[2]

32. The ALJ finds that the difference in impairment ratings as assessed by Dr. Moore and Dr. Krebs constitute more than just a mere difference of medical opinion. Dr. Moore erred in not assessing a Table 53 impairment rating as it is clear that claimant has a Table 53 II(B) diagnosis (unoperated injury with at least six months of pain and treatment).

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S., *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free

[2] Totals determined by referring to the combined values chart in the AMA Guides.

from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

4. When a DIME physician issues conflicting or ambiguous opinions concerning whether or not the claimant has reached MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

5. As found, Dr. Moore issued conflicting opinions when he first assessed a permanent impairment rating of 5% whole person with no mention of Table 53, then later retracted that impairment rating with no explanation as to why he found no Table 53 diagnosis. While the ALJ recognizes the general deference to a DIME physician's opinion regarding permanent impairment, here Dr. Moore erred in failing to include a Table 53 diagnosis for either claimant's lumbar injury or thoracic injury.

6. As found, claimant has overcome the opinion of the DIME physician by clear and convincing evidence that she has a permanent impairment to her lumbar spine and to her thoracic spine. As found, Dr. Krebs opinion, the medical records, and claimant's testimony are credible and persuasive.

7. As found, claimant has demonstrated by a preponderance of the evidence that the permanent impairment to her lumbar spine is 11% whole person. As found, the medical records and the opinion of Dr. Krebs are found to be credible and persuasive on this issue.

8. As found, claimant has demonstrated by a preponderance of the evidence that that she has a permanent impairment to her thoracic spine of 5%. As found, claimant's total impairment rating is 15% whole person.

ORDER

It is therefore ordered that:

1. Claimant has overcome the opinions of the DIME physician by clear and convincing evidence with regard to the issue of permanent impairment.

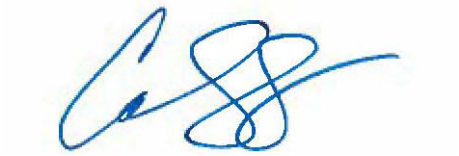
2. Respondent shall pay PPD benefits based upon a permanent impairment rating of 15% whole person.

3. Respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 22, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether Claimant proved by a preponderance of the evidence that he suffered an occupational disease in the form of bilateral carpal tunnel syndrome.

STIPULATIONS

The parties stipulated that if it is found that Claimant's bilateral carpal tunnel syndrome is compensable, Dr. Davis is an authorized provider and the surgery recommended by Dr. Davis is reasonable and necessary.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant has worked for Employer as a truck driver for approximately 14 years. Claimant's job requires him to drive a semi-truck which carries approximately 24-28 pallets of groceries. In addition to driving the truck to its destination, Claimant is also required to unload the pallets off the truck at each grocery store.

2. Claimant credibly testified that when delivering groceries, and depending on his route, he can spend about 20% of each day driving and up to 80% of each day unloading the pallets from the truck.

3. Claimant testified at hearing that he uses a pallet jack to unload and move each pallet of groceries from the truck to a particular location in each grocery store. According to Claimant, he might have to move a pallet a short distance from the truck or almost up to a block.

4. Claimant's Exhibit 9 shows a picture of the pallet jack used by Claimant. As noted, the pallet jack has two handles upon which Claimant must grasp and turn by flexing and extending his wrist(s) to operate.

5. Claimant testified at hearing regarding the operation of the pallet jack. Claimant also demonstrated the hand movements necessary to operate the pallet jack. Claimant testified and demonstrated that using the pallet jack required him to grab the handles of the pallet jack and then flex and extend his wrists to direct the pallet jack towards its intended location. The motion used by Claimant is similar to the motion used to operate the accelerator on a motorcycle, except

Claimant has to flex and extend his wrist to make the pallet jack go forward and backward.

6. Claimant credibly testified that it takes approximately 10-20 minutes to unload and move each pallet to its intended destination at each store. Thus, Claimant is flexing and extending one or both of his wrists for approximately 10-20 minutes while unloading each pallet and moving it to its intended location with the pallet jack. Therefore, it takes on average 15 minutes to unload and move each pallet. Claimant unloads and moves between 24 and 28 pallets per day when driving. Consequently, Claimant can spend up to approximately 6 to 7 hours per day flexing and extending his wrists while using the pallet jack.

7. Claimant credibly testified that his symptoms occur mostly at work.

8. When Claimant is not delivering groceries, but merely moving trailers, i.e., switching, he does not use the pallet jack. The number of days per week Claimant spends switching trailers has varied since about 2013.

9. On August 3, 2010, Claimant presented to his personal physician at Kaiser complaining that both hands were getting tingly. Claimant stated that he gets the symptoms while driving his car. Claimant also stated that although he "does mouse a lot", such activity did not cause his symptoms.

10. On August 2, 2012, Claimant again presented to Kaiser due to hand numbness. Although Claimant stated that his symptoms would occur while scratching lottery tickets or using a mouse, he also stated that he is a truck driver and his job requires the use of a pallet jack, which required "lots of wrist turning." Therefore, by August of 2012, Claimant associated using the pallet jack with his wrist problems.

11. On March 16, 2015, Claimant returned to Kaiser due to bilateral hand numbness and tingling. The medical report indicated that Claimant is still driving a truck.

12. On May 26, 2015, Claimant underwent an EMG. The conclusion was severe bilateral median neuropathy.

13. On July 10, 2015, Claimant returned to Kaiser complaining of bilateral hand symptoms. Claimant was diagnosed as suffering from bilateral carpal tunnel syndrome. The medical report from this visit indicated that Claimant drives a truck.

14. On December 16, 2016, Claimant was evaluated by Dr. Kirk Holmboe. Dr. Holmboe obtained a detailed description of Claimant's job. Claimant described working approximately 50 hours per week. Claimant stated that his schedule at that time involved driving and delivering groceries 3 days per week and moving or "switching" trailers 2 days per week. Claimant also described using an electric pallet jack to unload the palletized groceries. Dr. Holbroe assessed Claimant as

suffering from bilateral carpal tunnel syndrome. To assist in determining causation Dr. Holmboe attempted to obtain a worksite evaluation.

15. On January 8, 2016, Claimant was again evaluated by Dr. Holmboe. He stated the Employer would not allow someone to ride with Claimant to perform a worksite evaluation. Therefore, a worksite evaluation could not be obtained. Dr. Holmboe again obtained Claimant's work history and job responsibilities. The history obtained by Dr. Holmboe indicated Claimant delivers groceries 3 nights per week. He went on to state that on the nights Claimant delivers groceries, he spends about 70% of his time, out of a 8-12 hour shift, moving pallets of groceries using a pallet jack. Dr. Holmboe also stated that the pallet jack is "steered and operated by handles which place the patient's wrist both in flexion and extension, and he uses both hands at various times to do this." According to the history obtained by Dr. Holbroe, Claimant was also required to "lift product that has come off the pallet, which does involve some heavier lifting." Dr. Holmboe went on to state that:

> Based on his description of the job and the fact that he is using these handles to control forward and backward movement of this Pallet Jack and steer with his hands greater than 4 hours per day, this would be a work-related condition, since using a computer mouse more than 4 hours a day constitutes enough to have this type of injury be work related.

16. This ALJ credits Dr. Holmboe's opinion that Claimant's bilateral carpal tunnel syndrome is work related.

17. On April 7, 2016, Claimant underwent an Independent Medical Examination ("IME") which was performed by Dr. Phillip Heyman. Dr. Heyman agreed Claimant had bilateral carpal tunnel syndrome and that surgery was reasonable and necessary. Dr. Heyman commented on causation. Dr. Heyman stated in his report that:

> The patient's job as he describes it is quite physical, I would not classify him as injured. There are many people who drive and unload trucks who do not have carpal tunnel syndrome. Furthermore, carpal tunnel syndrome frequently is present in this patient's age distribution irrespective of activity. If I would estimate a contribution of repetitive lifting to his current condition, I would say 10% but that is completely arbitrary.

18. This ALJ does not find Dr. Heyman's opinion regarding causation to be persuasive. First, Dr. Heyman said Claimant is not injured. He then says that carpal tunnel syndrome can be idiopathic and arbitrarily determines 10% of Claimant's condition was caused by Claimant's repetitive lifting at work. Second,

Dr. Heyman did not understand Claimant's job duties. Dr. Heyman stated that Claimant's repetitive lifting at work contributed to the development of his carpal tunnel syndrome. However, Claimant's job did not require a lot of repetitive lifting. As indicated by Claimant, and as set forth in Claimant's prior medical records, Claimant used a pallet jack to unload the trucks. Lastly, Dr. Heyman did not address how the use of the pallet jack might have caused Claimant's carpal tunnel syndrome. Consequently, because Dr. Heyman did not have a good understanding of Claimant's job duties and did not analyze Claimant's actual job duties his opinion was not persuasive.

19. On October 19, 2016, Dr. Wallace Larson performed an IME on behalf of Respondents. Claimant reported to Dr. Larson that using the pallet jack at work caused numbness, tingling, and swelling in his hands. According to the report, Claimant reported working approximately 10-14 hours per day, with driving making up approximately 3 hours per day and the rest spent unloading pallets with the pallet jack.

20. Dr. Larson analyzed the cause of Claimant's carpal tunnel syndrome by using the Medical Treatment Guidelines ("MTG"). Dr. Larson concluded that Claimant's job did not entail either a primary or secondary risk factor which is known to cause carpal tunnel syndrome. Therefore, he opined that Claimant's job did not cause his carpal tunnel syndrome.

21. However, Dr. Larson's opinion regarding the application of the MTG to the facts of this case is not clear. Dr. Larson appeared to state in his report that in order for Claimant's use of the pallet jack to be considered a primary risk factor under the MTG and the possible cause of Claimant's carpal tunnel syndrome, Claimant would have had to have used the pallet jack with his wrists flexed or extended for at least 6 hours per day and use more than 50% of his maximum force with task cycles of 30 seconds. Dr. Larson also appeared to state in his report that in order for the use of the pallet jack to be considered a secondary risk factor under the MTG, Claimant would have had to have used the pallet jack for more than 4 hours per day and use greater than 50% of his maximum force with task cycles of 30 seconds or less. Based on Claimant's testimony, this ALJ concludes that Claimant did use the pallet jack, with his wrists flexed, or extended, in excess of 4-6 hours per day when driving and delivering pallets of groceries. Thus, Dr. Larson did not evaluate Claimant's actual job duties in relation to the MTG.

22. Claimant credibly testified that while unloading trucks, he would spend up to 80% of his day using the pallet jack. The pallet jack required Claimant to flex and extend each wrist on a continuous basis while moving the pallet to its intended destination in the store. Although the exact force was not specifically articulated by Claimant, this ALJ infers that the force was sufficient enough, when combined with the flexing and extending of his wrist, to cause Claimant's bilateral carpal tunnel syndrome.

23. Claimant's use of the pallet jack caused his bilateral carpal tunnel syndrome.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The Claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The question of whether the Claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

The Colorado Department of Labor and Employment, Division of Workers' Compensation promulgates rules of procedure pertaining to many aspects of the workers' compensation process. Workers' Compensation Rules of Procedure, 7 CCR 1101-3. Rule 17 contains the Medical Treatment Guidelines ("MTG"). When evaluating this issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

Dr. Larson testified that pursuant to the MTG Claimant's job duties did not cause his bilateral carpal tunnel syndrome. Dr. Larson testified that Claimant's job duties did

not meet the primary or secondary risk factors which are known to cause carpal tunnel syndrome. Therefore, Dr. Larson concluded that Claimant's carpal tunnel syndrome was not caused by his job. This ALJ does not find Dr. Larson's opinion to be persuasive. This ALJ concludes that a strict application of the MTG is not appropriate to the specific facts of this case. Therefore, whether Claimant's job tasks met the primary or secondary risk factors as set forth in the MTG is not dispositive. As found by this ALJ, Claimant spent 6-7 hours per day operating the pallet jack and this required Claimant to flex and extend his wrists during that time and this caused his bilateral carpal tunnel syndrome.

This ALJ is aware that a strict application of the causation analysis set forth in the MTG could lead to the conclusion that Claimant's bilateral carpal tunnel syndrome was not caused by his work. However, this ALJ does not find the MTG to be dispositive regarding causation as applied to the facts of this case.

Dr. Holmboe is one of the few treating physicians who obtained an accurate job description from Claimant. After getting a proper job description from Claimant, Dr. Holmbroe stated: "Based on his description of the job and the fact that he is using these handles to control forward and backward movement of this Pallet Jack and steer with his hands greater than 4 hours per day, this would be a work-related condition …" This ALJ credits Dr. Holmboe's opinion that Claimant's bilateral carpal tunnel syndrome was caused by his work.

Claimant credibly testified that while unloading trucks, he would spend up to 80% of his day using the pallet jack. Depending on the day, Claimant could spend 6-7 hours using the pallet jack. Claimant's use of the pallet jack required him to flex and extend each wrist on a continuous basis while moving each pallet from the delivery truck to its intended destination in the grocery store. Claimant also credibly testified that his symptoms occurred mostly at work.

This ALJ concludes that Claimant's job activities of using the pallet jack did cause his bilateral carpal tunnel syndrome.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's bilateral carpal tunnel syndrome was caused by his work for the employer and is compensable.

2. Respondent shall provide medical benefits in the form of the surgery recommended by Dr. Davis to treat Claimant's bilateral carpal tunnel syndrome.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 5-22-17

_____
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable industrial injury.

2. If compensable, whether Claimant has established by a preponderance of the evidence that the medical treatment by Greeley Medical Clinic, University of Colorado Health - Longmont Clinic, and their referrals was reasonably necessary, related and authorized.

3. If compensable, whether the December 2014 slip and fall incident or the May 2015 motor vehicle accident were intervening events which severed the causal relationship between the work injury and Claimant's symptoms and need for treatment.

4. If compensable, whether Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits ("TTD") from November 7, 2015 to March 14, 2016 and from April 4, 2016, ongoing.

5. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for the termination of her employment.

STIPULATIONS

1. Claimant initially selected Dr. Cathy Smith with Banner Occupational Medicine as her authorized treating physician.

2. Claimant was discharged by Dr. Smith on December 4, 2014.

3. After being discharged by Dr. Smith, Claimant then sought care at the Greeley Medical Clinic. The Greeley Medical Clinic referred Claimant to Dr. Sunil Jani at the University of Colorado Health – Longmont Clinic.

FINDINGS OF FACT

1. Claimant worked for Employer for approximately 18 years as a short rib trimmer. Claimant's job duties involved trimming fat from pieces of short rib. Per Employer's Physical Job Demands Summary for Claimant's position, the average time for cutting the meat product is 6.5 seconds with 9.5 seconds of rest. The summary states that the worker's elbow is flexed at a 40-60 degree angle, with neck flexion of 0-10 degrees and lateral flexion of 0-5 degrees. The summary notes that the weight of the meat product averages approximately 2.3 pounds.

2. The court viewed a video of Claimant performing her regular job duties on November 5, 2015. Claimant grabbed the meat product from the conveyor belt using a hook in her left hand and used a knife in her right hand to trim fat from the meat product. Claimant used a cutting motion away from the body with her knife. Claimant then tossed the meat product back onto the conveyor belt. The product on the conveyer is positioned just above waist level. Claimant testified that the activity seen on the video is the same activity she performed on September 30, 2014.

3. On Tuesday, September 30, 2014, Claimant testified that she felt a pull or tear in her right shoulder while performing her regular job duties. Claimant testified that the meat product was frozen and that her knife was dull despite sharpening the knife throughout her shift. Claimant testified that she was unable to work the remainder of her shift, and reported the incident to her supervisor. Claimant testified that nothing was done by Employer that day, and she subsequently returned to working her same job duties.

4. Myrna Rizo testified at hearing on behalf of Respondents. Ms. Rizo works for Employer as a Quality Assurance Superintendent. Ms. Rizo supervised Claimant. Ms. Rizo testified that Employer sharpens employee knives three times per day and also allows employees to sharpen their own knives. Ms. Rizo testified that Claimant always kept her knife sharp. Ms. Rizo testified that the frozen meat was difficult to cut and required a lot of strength. Ms. Rizo testified that frozen meat may be an issue is "not really" an issue on Tuesdays unless there was a three-day weekend.

5. On October 6, 2014, Employer sent Claimant to see a nurse at Employer's health facilities. Claimant reported pain in her right shoulder. Claimant reported that the meat was tough on the day of the incident and that she could not keep her knife sharp enough.

6. Employer provided Claimant a designated provider list with three medical providers. Claimant chose Banner Occupational Medicine. Claimant initialed and signed the designated providers' list on October 6, 2014.

7. Ken Frisbie, PA-C, with Banner Occupational Medicine, evaluated Claimant on October 14, 2014. Claimant reported an onset of pain in her right shoulder while trimming meat. PA-C Frisbie noted limited and painful active range of motion in the right shoulder and a painful negative empty can testing on the right. PA-C Frisbie diagnosed right shoulder pain, muscle spasm, and right hand strain. PA-C Frisbie released Claimant to work light duty and recommended physical therapy.

8. Cathy Smith, M.D., with Banner Occupational Medicine, evaluated Claimant on November 13, 2014. Claimant reported that she experienced a sudden onset of pain in her right shoulder while performing her work. Dr. Smith diagnosed right shoulder pain, muscle spasm, and right hand strain. Dr. Smith released Claimant to restricted duty. Dr. Smith remarked that she needed to review video of Claimant's job duties for further evaluation.

9. Dr. Smith reevaluated Claimant on December 4, 2014. Dr. Smith and Claimant reviewed a video of a worker performing Claimant's job duties. Regarding the use of the shoulder, Dr. Smith noted, "The strokes do slightly flex the right shoulder, but not more than 45 degrees rarely." Dr. Smith noted that the worker in the video threw the meat product onto an upper conveyor, which Claimant reported was no longer a part of the process. Dr. Smith noted that x-rays of Claimant's right shoulder revealed acromioclavicular joint degenerative changes. Dr. Smith diagnosed right shoulder pain, muscle spasm and right hand strain. Dr. Smith recommended Claimant return to regular duty. Dr. Smith opined that Claimant's right shoulder symptoms were not work-related. Dr. Smith remarked,

> At this point, the video does not correlate with her current complaints over the AC area and anterior shoulder since she never reaches more than 45 degrees from the body with the right arm and working time does not fall within the definition of repetitive or forceful. X-rays do show degenerative changes at the AC joint, which could be the cause of her current complaints.

Dr. Smith discharged Claimant and advised Claimant that further treatment for the right shoulder would need to be continued with her primary care physician.

10. Claimant was involved in a slip and fall accident in her bathtub in December 2014. Claimant testified that she went to the hospital because she hit the left side of her head when she fell.

11. After being discharged by Dr. Smith, Claimant sought treatment for her right shoulder with a primary care physician at Greeley Medical Clinic. Claimant was first evaluated on February 20, 2015 and diagnosed with shoulder pain.

12. Claimant was involved in a low-speed motor vehicle accident on May 18, 2015. A North Colorado Medical Center Ambulance Report of the same date notes Claimant complained of midline neck pain, midline thoracic back pain, and right shoulder pain. The report notes Claimant was wearing a seatbelt and that the airbags did not deploy. Claimant was seen in the North Colorado Medical Center following the motor vehicle accident. Claimant complained of right shoulder and neck/back pain. Claimant was diagnosed with a back sprain, cervical sprain, and contusion.

13. On June 16, 2015, Claimant returned to Greeley Medical Clinic for a follow-up evaluation and underwent x-rays of the right shoulder. The x-rays revealed mild acromioclavicular degenerative change. On examination, Joshua Snyder, M.D. noted positive impingement signs and a positive empty can test. Dr. Snyder diagnosed right shoulder impingement/rotator cuff tendonitis and recommended Claimant hold off on physical therapy.

14. On July 13, 2015, Gregory Denzel, D.O. with Greeley Medical Clinic evaluated Claimant in connection with the May 18, 2015 motor vehicle accident. Claimant

reported pain in the right side of collar bone and low back pain. Dr. Denzel assessed low back pain, thoracic strain, and injury of shoulder region.

15. Claimant underwent an MRI on July 30, 2015. Stanley Weinstein, M.D., gave the following impression:

> (1) Examination is limited by motion. Mild tendinosis of the distal supraspinatus, subcapularis and infraspinatus tendons with no high-grade rotator cuff tear identified. (2) Acromioclavicular joint morphology with proliferative change and inferior spurring likely causing impingement. (3) Mild tendinosis of the biceps tendon over its intra-articular course. (4) Vague diffuse low signal within the visualized bony skeleton on T1-weighted images can be seen with tobacco use. Other marrow infiltrative processes cannot be entirely excluded.

16. Claimant continued to treat with Greeley Medical Clinic. On October 13 2015, Christopher Ellis, PA-C, referred Claimant for a surgical consultation with Sunil Jani, M.D, with Orthopedics at Longmont Clinic.

17. Dr. Jani first evaluated Claimant on October 14, 2015. Dr. Jani noted Claimant presented for right shoulder pain that had been occurring for one year in connection with a work incident in September 2014. On examination, Dr. Jani noted a positive empty can test and positive signs for impingement. Dr. Jani assessed biceps tendonitis on the right, acromioclavicular joint arthritis, and bursitis of the right shoulder. Dr. Jani ordered a second MRI.

18. On November 4, 2015 Claimant underwent a second MRI and attended a follow-up evaluation with Dr. Jani. The MRI revealed partial tearing and tendinosis of supraspinatus, AC arthritis, and biceps tendinitis. Dr. Jani assessed incomplete tear of right rotator cuff, biceps tendonitis on the right, and arthritis of right acromioclavicular joint. Dr. Jani recommended surgery.

19. On November 11, 2015, Dr. Jani performed an arthroscopic right shoulder extensive debridement, subacromial decompression, distal clavicle excision with open biceps tenodesis. In the Operative Report, Dr. Jani noted the following post-operative diagnoses: right shoulder impingement/bursitis, partial rotator cuff tear, AC joint arthritis, biceps partial tear/tendinopathy, and labral tears.

20. On December 23, 2015, John S. Hughes, M.D. conducted an Independent Medical Examination ("IME") at the request of Claimant. Dr. Hughes issued an IME report of the same date. Dr. Hughes performed a medical records review and physically examined Claimant. Claimant reported that, on September 30, 2014, Employer was shorthanded and the meat was more frozen than usual, which required more exertion than normal. Claimant reported feeling a sudden onset of "something stuck" in her right shoulder, then right shoulder pain. Claimant reported having "very-little" pre-existing problems with her right shoulder, which Dr. Hughes noted was consistent with the medical record documentation he reviewed. Dr. Hughes noted that there was no

documentation of significant right shoulder pain or problems. Dr. Hughes assessed "Work-related right shoulder sprain/strain sustained on September 30, 2014, with development of partial rotator cuff tears and tendinopathy, as well as tendinopathy of the biceps long head tendon, partial labral tearing, and development of right shoulder impingement syndrome."

21. Dr. Hughes opined that Claimant suffered an occupational injury, rather than an occupational disease. Dr. Hughes noted Claimant's history was consistent with what PA-C Frisbie recorded in his October 14, 2014 report. Dr. Hughes opined that there were no alternate explanations for Claimant's right shoulder issues, noting Claimant did not have associated diabetic tendinopathy of the rotator cuff complex, and no significant past medical history of right shoulder problems. Dr. Hughes determined Claimant had not reached maximum medical improvement and further opined that Claimant's medical treatment had all been reasonable, necessary and related.

22. On January 4, 2016, Jeffrey A. Wunder, M.D. conducted an IME at the request of Respondents. Dr. Wunder conducted a medical records review and physically examined Claimant. Dr. Wunder also reviewed video of Claimant performing her job duties and Employer's Physical Job Demands Summary. Dr. Wunder noted that he did not observe any significant amount of abduction or external rotation of Claimant's right shoulder, with the exception of a few degrees. Claimant reported to Dr. Wunder that she had right shoulder pain since 1999. Claimant reported that conservative treatment calmed her symptoms but that the symptoms never resolved. Claimant reported that she took medications in order to work. Dr. Wunder gave an impression of chronic right shoulder pain related to underlying osteoarthritis/degenerative change and probable bilateral carpal tunnel syndrome not work-related to the September 30, 2014 incident.

23. Dr. Wunder opined that Claimant had an "industrial illness" and not an industrial injury, based on the longevity of Claimant's symptoms. Dr. Wunder opined, within a reasonable degree of medical probability, that Claimant did not have a work-related shoulder condition. Dr. Wunder noted Claimant's job required minimal use of her right shoulder, and did not require significant abduction or internal rotation, overhead activities, or use of her arm at a prolonged extended or overhead position. Dr. Wunder noted that Claimant's x-rays demonstrated degenerative osteoarthritis, and opined that the job activities observed in the video could not cause, exacerbate or result in the advanced degenerative change in Claimant's shoulder. Dr. Wunder opined Claimant had degenerative osteoarthritis of the right shoulder with no significant rotator cuff pathology. Dr. Wunder agreed with Dr. Smith that it was unlikely Claimant's job duties contributed to Claimant's symptoms. Dr. Wunder noted that protocols for cumulative trauma disorder for the right upper extremity contained in the Colorado Division of Workers' Compensation Medical Treatment Guidelines (the "Guidelines") emphasize force and position as primary risk factors, and opined that such risk factors were not present in Claimant's case. Dr. Wunder noted that the MRIs did not evidence an acute injury and the operative report did not evidence significant rotator cuff injury. Dr. Wunder concluded that "The only reasonable pain generator, therefore, would have been the degenerative disease in her AC joint and glenohumeral joint."

24. Dr. Wunder testified at hearing on behalf of Respondents. Dr. Wunder testified as an expert in physical medicine and rehabilitation. Dr. Wunder is board certified in physical medicine and rehabilitation and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Wunder formerly served as the Medical Director at Employer's beef plant. Dr. Wunder testified consistent with his January 4, 2016 IME report. Dr. Wunder opined that, within a reasonable degree of medical probability, Claimant's shoulder condition is the result of cumulative trauma and is not work-related. Dr. Wunder disagreed with Dr. Hughes' contention that Claimant had no history of right shoulder issues, and disagreed that Claimant sustained an acute injury. Dr. Wunder testified that Claimant's use of her right shoulder on the job would not have resulted in cumulative trauma, as her shoulder primarily remained neutral when performing her job duties. Dr. Wunder testified that frozen meat product was not an issue after Mondays and that, even if the meat product was frozen, Claimant's job duties would not have resulted in injury to her shoulder. Dr. Wunder opined that the risk factors for AC joint problems, impingement, and rotator cuff pathology noted in the Guidelines were not present in Claimant's case. Dr. Wunder testified that there is no indication cumulative trauma disorder pre-disposes an individual to further cumulative trauma disorder.

25. Dr. Wunder testified that, based on Claimant's reported history, Claimant had a long history of shoulder issues. Dr. Wunder acknowledged he did not review any medical records substantiating Claimant's reported history. Dr. Wunder testified that the May 2015 blurred the causation of Claimant's shoulder pain.

26. Dr. Smith reviewed Dr. Hughes' December 23, 2015 IME report and authored a letter dated January 21, 2016. Dr. Smith disagreed with Dr. Hughes' opinion that Claimant suffered an acute sprain/strain to the right shoulder that then caused Claimant to develop a partial rotator cuff tear, tendinopathy, partial labral tear, and development of impingement syndrome. Dr. Smith referred to the Guidelines for determining work-related causality. Dr. Smith opined that Claimant's mechanism of injury and review of the video of work activities did not fall within the Guidelines for causality of AC joint sprain or strain, impingement, rotator cuff tears or labral tears.

27. Dr. Smith testified by deposition on August 10, 2016. Dr. Smith testified as an expert in occupational medicine. Dr. Smith is board certified in occupational medicine and Level II accredited by the Colorado Division of Workers' Compensation. Dr. Smith opined that, within a reasonable degree of medical probability, Claimant's right shoulder symptoms are not work-related. Dr. Smith testified that she initially evaluated Claimant based on Claimant's report of a sudden onset of pain, but that she subsequently analyzed Claimant's case as a cumulative trauma. Dr. Smith testified she agreed with Dr. Wunder's analysis regarding causation and his assessment of the cumulative trauma disorders under the Guidelines. Dr. Smith testified she agreed with the diagnoses set forth by Dr. Hughes in his December 23, 2015 report and Dr. Hughes' description of the November 2015 MRI findings. However, Dr. Smith testified that none of the Dr. Hughes' diagnoses would be causally related to Claimant's work activity when applied to the Guidelines. Dr. Smith testified that Claimant's job did not involve work above chest level, any repetitive reaching, or any heavy lifting over her head or above

chest level. Dr. Smith testified that the sharpness of the knife did not cause any tears or damage to Claimant's shoulder.

28. Dr. Smith testified that Claimant's history of right shoulder pain, as reported to Dr. Wunder, indicated Claimant had a degenerative problem as part of the aging process. Dr. Smith testified that it would be normal to see "these kind of degenerative changes" in a 51 year old. Dr. Smith opined that Claimant's job activities did not cause, accelerate or aggravate her preexisting shoulder condition. Dr. Smith testified that individuals can develop asymptomatic partial rotator cuff tears with age. Dr. Smith testified that repetitive motion should not cause damage to a rotator cuff. Dr. Smith testified that the surgery performed by Dr. Jani was warranted based on what was noted at the time of the arthroscopic evaluation.

29. Dr. Smith testified that the December 2014 slip and fall in the shower could have caused myofascial pain in Claimant's upper back and neck. Dr. Smith acknowledged there was no indication in the medical records that Claimant complained of right shoulder pain in the medical records from the slip and fall. Dr. Smith testified that, if Claimant fell on her right shoulder or if her arm was outstretched during the fall, such positions could result in shoulder injury. Dr. Smith testified that the medical records reflect Claimant complained of right shoulder, neck and back pain after the May 18, 2015 motor vehicle accident. Dr. Smith testified that the right shoulder pain could have been caused by the motor vehicle accident. Dr. Smith testified that the seatbelt, airbags, or an attempt by Claimant to steady herself on the dashboard could have caused injury to the right shoulder. Dr. Smith acknowledged there was nothing in the medical records indicating Claimant fell on her shoulder or onto an outstretched arm, or that she was hit with an airbag during the motor vehicle accident.

30. Claimant subsequently treated with Kristin Mason, M.D. with Rehabilitation Associates of Colorado, P.C. Dr. Mason first evaluated Claimant on June 9, 2016.

31. Dr. Mason conducted a medical records review and authored a letter dated January 18, 2017. Dr. Mason acknowledged Claimant had some underlying AC arthropathy and impingement; however, Dr. Mason opined that specific work activities exacerbated Claimant's condition, leading to the need for surgery. Dr. Mason remarked,

> While [Claimant] certainly had some degree of underlying degenerative change in her shoulder, she also has a very repetitive job and had some change in her working conditions, i.e., a dull knife and increased volume as well as more frozen meat that required increased force to be exerted and she became symptomatic.

32. Dr. Mason noted that, per the Guidelines, overhead work is a primary risk factor for shoulder injuries but not the only risk factor, "particularly in the presence of underlying anatomical predisposition." Dr. Mason noted Claimant had previous overuse type injuries to the same extremity and stated, "Generally speaking, if someone has repetitive or cumulative trauma disorder to one part of a limb, it is more likely that they

may also develop repetitive trauma to another part of the limb." Dr. Mason opined, "…it is likely that the cause of the injury was not the repetitive trauma but that the ongoing need for repetitious work may have prevented her from recovering from the acute event."

33. Claimant was off of work from November 8, 2015 through March 14, 2016 in connection with the right shoulder surgery.

34. Isabel Garcia testified at hearing on behalf of Respondents. Ms. Garcia has worked for Employer as a Human Resources Coordinator since 2008. Ms. Garcia testified that, following Claimant's November 2015 surgery, Claimant received 12 weeks of short-term disability payments at $280.00 per week. Claimant then took unpaid leave until returning to work on or around March 15, 2016. Ms. Garcia testified that, on or around April 5, 2016, Claimant informed Human Resources that she could no longer perform her job duties due to pain in her arm. Ms. Garcia testified that Claimant was informed that she needed to provide documentation from her physician to Employer within two weeks. Ms. Garcia testified Claimant failed to provide any documentation from her physician as requested by Ms. Garcia. Ms. Garcia testified that she attempted to call Claimant on at least three occasions, and did not receive any communication from Claimant. Ms. Garcia testified that Employer did not have any documentation substantiating the need for a leave of absence and discharged Claimant for violation of Employer's no-call, no-show policy. Ms. Garcia testified that the last documentation in Claimant's file is from March 14, 2016 showing no work restrictions.

35. Claimant testified that she last worked for Employer on April 4, 2016. Claimant testified she obtained a letter from Dr. Jani on April 4, 2016 regarding work restrictions and gave the letter to Human Resources. Claimant testified that she was informed she could not return to work with her restrictions. Claimant testified she did not receive any notice from Employer of her termination. Claimant testified she became aware of her termination when she received notification from her health insurance company that she no longer had health insurance coverage. Claimant testified that she did not receive any letters from Ms. Garcia.

36. Claimant's medical records include medical notes from an April 4, 2016 evaluation by Dr. Jani. Claimant reported worsening of her shoulder pain since returning to work. Dr. Jani documented that he gave Claimant a note outlining her work restrictions. Dr. Jani restricted Claimant from lifting, scraping, performing repetitive motions, using a knife, and operating heavy machinery.

37. Claimant's testimony is found credible and persuasive.

38. The ALJ credits the medical opinions of Drs. Hughes and Mason over the contradictory medical opinions of Drs. Wunder and Smith and finds Claimant suffered an acute industrial injury to her shoulder on September 30, 2014.

39. Claimant has established by a preponderance of the evidence that she sustained a compensable injury and is entitled to reasonably necessary and related medical benefits to cure or relieve the effects of the industrial injury.

40. Claimant has established by a preponderance of the evidence that the medical treatment Greeley Medical Clinic, Longmont Clinic, and their referrals was reasonably necessary, related and authorized.

41. The December 2014 and May 2015 motor vehicle accidents were not sufficient intervening events that severed the causal relationship between the work injury and Claimant's ongoing symptoms and need for treatment.

42. Respondents failed to establish by a preponderance of the evidence that Claimant was responsible for her termination.

43. Claimant established by a preponderance of the evidence that she is entitled to receive temporary total disability benefits from November 8, 2015 through March 14, 2016, and April 5, 2016 and ongoing.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S. (the "Act"), is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability

A claimant is required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *See, Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the

employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

When evaluating this issue of causation the ALJ may consider the provisions of the Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the Guidelines are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

Claimant has proven by a preponderance of the evidence she suffered a compensable injury. Dr. Hughes and Mason credibly and persuasively opined that Claimant sustained an acute industrial injury on September 30, 2014. Claimant credibly testified that on that date, she felt a pull or tear in her right shoulder and an onset of pain. Claimant also credibly testified that the meat product was frozen that day and she was having difficulty maintaining a sharp knife. While Claimant had underlying degenerative conditions, the ALJ is persuaded the industrial injury combined with Claimant's underlying conditions, causing her symptoms and the need for medical treatment.

Reasonable, Necessary and Related Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

As found, Claimant established that she sustained a compensable industrial injury. Accordingly, Claimant has established an entitlement to reasonably necessary and related medical treatment for her injury. Dr. Hughes credibly and persuasively opined that the treatment Claimant received was reasonable, necessary and related. As found, Claimant's medical treatment, including the right shoulder surgery performed by Dr. Jani and the resulting treatment, was reasonably necessary and related to the industrial injury.

Authorized Provider

Treatment is compensable under the Act where it is provided by an "authorized treating physician." *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Popke v. Industrial Claim Appeals Office,* 944 P.2d 677 (Colo. App. 1997).

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to a claimant with the expectation that the provider will be compensated by the insurer for providing treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).

Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an authorized treating physician ("ATP") refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). If an ATP refers a claimant to the claimant's personal physician based on the mistaken conclusion that a particular condition is not work related, the referral may be considered valid because the risk of mistake falls on the employer. *Cabela v. industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. No. 07CA2528, November 13, 2008). Whether an ATP has made a referral in the normal progression of authorized treatment is normally a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

The parties stipulated that Claimant initially chose Dr. Smith as her ATP, that Dr. Smith discharged Claimant from her care on December 4, 2014, and that Claimant subsequently sought treatment at Greeley Medical Clinic. As found, Dr. Smith ceased treating Claimant based on her determination that Claimant's right shoulder condition was not work-related. Dr. Smith referred Claimant to her primary care physician for any further treatment of her right shoulder condition outside of the workers' compensation claim. Claimant subsequently sought treatment at Greeley Medical Clinic and was referred to treatment within that facility, as well as to Longmont Clinic and to Dr. Jani for surgery. As the initial ATP, Dr. Smith's referral to Claimant's primary care doctor effectively made Greeley Medical Clinic and any referrals from that provider "authorized" for the purposes of this claim. Respondents are, therefore responsible for all reasonable, necessary and related care provided by Greeley Medical Clinic, Longmont Clinic, and any other referrals made by those providers.

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a

complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in Section 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*. TTD benefits shall continue until the employee returns to regular or modified employment. *See* Section 8-42-105(3)(b), C.R.S.

As found, Claimant established by a preponderance of the evidence that her industrial injury caused a disability lasting longer than three work shifts. Claimant was off of work from November 8, 2015 through March 14, 2016 as a result of the right shoulder surgery. Claimant then returned to work from March 15, 2016 to April 4, 2016. Claimant has not worked for Employer since April 4, 2016.

Responsibility for Termination

Sections 8-42-105(4), C.R.S and 8-42-103(1)(g), C.R.S. (the "termination statutes") provide a claimant who is responsible for his termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *In re of George,* W.C. No. 4-690-400 (ICAP July 20, 2006). The termination statutes provide that, in cases where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAP Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to his termination if the effects of the injury prevent him from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAP Apr. 21, 2006). Therefore, to establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

Respondents failed to establish by a preponderance of the evidence that Claimant is responsible for her termination. The ALJ credits Claimant's testimony over the testimony of Isabel Garcia. Employer terminated Claimant because Employer deemed Claimant to be in violation of its no-call, no-show policy after not returning to work and allegedly failing to provide requested medical documentation. Claimant credibly testified she provided Employer an April 4, 2016 letter from Dr. Jani regarding work restrictions and was not made aware of her termination until she learned her health insurance had been cancelled. The ALJ is not persuaded that, under the totality of the circumstances, Claimant committed a volitional act or exercised some control over her termination. Accordingly, Claimant is entitled to TTD benefits beginning November 8, 2015 through March 14, 2016, and from April 5, 2016 and ongoing.

ORDER

It is therefore ordered that:

1. Claimant established by a preponderance of the evidence that she sustained a compensable industrial injury on September 30, 2014.

2. Claimant has established by a preponderance of the evidence that the medical treatment by Greeley Medical Clinic, University of Colorado Health - Longmont Clinic, and their referrals was reasonably necessary, related and authorized. Respondents shall pay the costs of all authorized, reasonably necessary and related treatment for Claimant's right shoulder injury, including the right shoulder surgery performed by Dr. Jani.

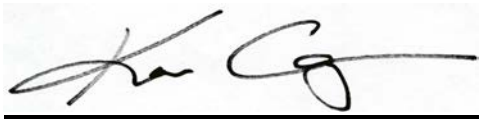
3. Respondents shall pay TTD benefits to the claimant for the period from November 8, 2015 through March 14, 2016 and from April 5, 2016 until terminated by law. The amounts of such TTD benefits are not determined at this time, pending determination of an average weekly wage and any applicable offsets.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 22, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Did Claimant prove by a preponderance of the evidence that she suffered a compensable injury to her right knee on December 1, 2016?

If Claimant's injury is compensable, the ALJ will address the following additional issues:

2. Was the treatment provided by Dr. Patterson reasonable, necessary, related, and authorized?

3. Did Claimant prove entitlement to TTD benefits?

4. Did Respondents prove Claimant was responsible for the termination of her employment?

FINDINGS OF FACT

1. Claimant worked for Employer as nursing home aide. Her general duties included assisting residents, cleaning, and carrying laundry. On December 1, 2016, Claimant was descending a flight of stairs at work when she felt a painful "pop" in her right knee. She grabbed the handrail, but did not fall.

2. The staircase is "L" shaped, and the pop occurred when Claimant stepped down onto the landing in the middle of the staircase. There was nothing unusual or defective about the stairs.

3. Although there is an elevator at the facility, the employees routinely use the stairs because they are quicker and more efficient than the relatively slow elevator.

4. After the injury, Claimant worked the remainder of her shift with pain. When she got home, she noted the knee was swollen.

5. Claimant called her supervisor, Maryanne Hammond, during the evening of December 2, and asked if she could see a doctor for the injury. Since it was after hours, Ms. Hammond instructed Claimant to go to the emergency room rather than Employer's regular provider, CCOM.

6. Claimant was evaluated by Marcia Coberly, NP at the St. Thomas More Emergency Room on December 3, 2016. She reported she felt her right knee "pop" while walking at work. She denied any direct injury, fall, or twisting of the knee. Claimant had been icing the knee and taking ibuprofen with no relief. Her pain was worse with weightbearing. On physical examination, there was no significant swelling or effusion. There was moderate tenderness above the patella. NP Coberly's differential diagnosis included a sprain, fracture, meniscus injury or soft tissue injury. She gave Claimant a

knee immobilizer brace, and advised her to increase the dose of ibuprofen. She instructed Claimant to follow up with Dr. Jacob Patterson, an orthopedist, if she was not better in 7 to 10 days. NP Coberly gave Claimant work restrictions of no prolonged standing, walking, or stair climbing, and no lifting more than 20 pounds for two weeks.

7. Claimant's husband, Mike Kevilus, took the work restrictions to Ms. Hammond at Employer's facility.

8. Claimant returned to work on December 5 and worked a full eight-hour shift under the restrictions. Claimant was not scheduled on December 6. Ms. Hammond excused Claimant from work on December 7 so she could attend her appointment with Dr. Patterson.

9. Claimant saw Dr. Patterson on December 7, 2016. She told Dr. Patterson her right knee popped while she was going down stairs at work. Physical examination of the knee revealed tenderness in the proximal gastroc muscle area, patellofemoral crepitus. and some quadriceps weakness. Dr. Patterson diagnosed a possible gastroc muscle injury, but also noted "she does have a significant knee derangement on exam. He recommended that Claimant use the elevator and avoid stairs for two weeks. He also limited Claimant to five-hour shifts. Claimant texted the restrictions to Ms. Hammond after the appointment.

10. Ms. Hammond spoke with a representative of Insurer by telephone on the morning of December 8. Ms. Hammond stated she had no reason to doubt Claimant's word that the injury happened at work. The insurance representative "thought" Insurer was planning to deny the claim, but would be calling Claimant later in the day.

11. Claimant was scheduled to work a shift starting at 2:00 PM on December 8, but she did not report to work. Claimant did not call in or otherwise notify Employer before her shift that she would not be reporting to work. Ms. Hammond texted Claimant at approximately 2:10 PM and asked if she was on her way. Claimant responded via text stating, "For someone who claims to be a Godly Christian woman you sure do know how to cheat and lie to your employees. Please have a nice day. Perhaps you will be kinder to others in the future who never did you any wrong and just tried to do the best job possible. Goodbye."

12. Employer has a strict "zero-tolerance" no call/no show attendance policy. Ms. Hammond referred to it is "no call, no show, no job." Claimant was aware of that policy when she failed to call in or report to work on December 8, 2016. Claimant was terminated effective December 8 in conformity with Employer's established policy.

13. Claimant went to the St. Thomas More ER again on January 11, 2017 complaining of significant pain. She was having difficulty weightbearing and was using a cane to ambulate. NP Coberly initially thought Claimant's symptoms might indicate a DVT, but an ultrasound of the right leg was negative for DVT. NP Coberly recommended physical therapy, but Claimant said she would wait until her January 16 appointment with Dr. Patterson before trying physical therapy.

14. Claimant returned to Dr. Patterson on January 16, 2017. She was limping, having significant discomfort, and did not feel she was improving. Dr. Patterson opined "I felt she might have a gastroc muscle injury on 1st visit, but she has not improved. Recommend [an] MRI scan."

15. Claimant had a right knee MRI on January 27, 2017. It showed moderate osteoarthritis of the patellofemoral and medial joint spaces, and a central free body. The ligaments and menisci were intact.

16. The pre-existing degenerative changes in Claimant's knee were asymptomatic prior to December 1, 2016.

17. Dr. Patterson gave Claimant two different work restriction forms, both of which are ostensibly dated December 7, 2016. Exhibit 2 states Claimant was restricted to five-hour shifts, no stairs, must use the elevator for two weeks. Exhibit 3 states claimant was to be "off work until reevaluated. 1-16-17." Based on the other evidence in the record, the ALJ finds that Ex. 2 was completed on December 7, 2016 and Ex. 3 was probably completed on January 16, 2017. The restrictions on Exhibit 2 match those outlined in Dr. Patterson's December 7 narrative report. Claimant testified that Dr. Patterson gave her restrictions at her first appointment, and took her off work at the next appointment because she was not improving. Claimant's next appointment after December 7 was January 16. The notation "1-16-17" on Exhibit 3 likely reflects the date the form was completed. Alternatively, Exhibit 3 was generated at an undocumented appointment between December 7 and January 16. In any event, it came into existence after Claimant had been terminated.

18. By the time Dr. Patterson took Claimant off work, she had already voluntarily abandoned her job.

19. Claimant testified Ms. Hammond refused to accommodate her restrictions because insurer had denied the claim. The ALJ does not find Claimant's testimony on this point to be credible or persuasive. Rather, the ALJ is persuaded that Employer was willing and able to accommodate Claimant's restrictions.

20. Dr. Patterson performed arthroscopic surgery on February 23, 2017. Intraoperative inspection showed grade 3 condylar injury on the medial femoral condyle, and grade 3 fissuring of the patella. Both areas were stabilized with the ArthroWand. The menisci and ligaments were intact. For unknown reasons, the operative report does not mention the loose body.

21. Claimant has continued to have significant problems with her knee after surgery.

22. Dr. Tashof Bernton performed an Independent Medical Examination (IME) at Respondents' request on March 20, 2017. Dr. Bernton opined Claimant's initial injury appears to be a cartilage loose body in the knee, possibly related to osteitis dissecans or degenerative arthritis. Dr. Bernton opined that both conditions are "of unknown etiology (idiopathic)." Dr. Bernton opined that the loose body was a "spontaneous"

occurrence, He further opined, “the precipitant for it is not known,” and the episode “could equally have occurred while walking on the level or even in a seated position or reclining.” Accordingly, Dr. Bernton opined that Claimant’s knee pathology was not causally related to her employment.

23. Dr. Bernton opined Claimant is not at MMI and requires further evaluation and treatment for her persistent knee symptomatology. Given his opinion that Claimant did not have a work-related injury, he opined further treatment should be pursued outside of the workers’ compensation claim.

24. Dr. Bernton testified at hearing consistent with his report. Dr. Bernton testified that the loose body seen on the MRI likely represents a piece of degenerated cartilage that broke away from the surface of the bone. Dr. Bernton testified the pop in Claimant’s knee followed by the immediate onset of pain and joint effusion indicates that the loose body became dislodged when claimant took the step she described on December 1, 2016. Specifically, he opined, “We know that the time that it occurred was when she was walking down the stairs. I think that’s reasonable from her symptoms.” He also stated, “There is no question she had sudden onset of pathology of the knee that resulted in problems.”

25. Dr. Bernton reiterated his opinion that Claimant’s injury was “spontaneous” and its cause is “unknown.” Dr. Bernton testified “the foreign body coming off can occur at rest, it can occur when walking . . . it can even occur while sleeping. It’s just something that happens. . . . It’s not precipitated by anything. It’s just a piece of the joint cartilage that falls off.”

26. The ALJ is persuaded by Dr. Bernton’s opinion that Claimant’s sudden onset of symptoms on December 1, 2016 was related to a piece of cartilage becoming dislodged as she descended the stairs. The ALJ is not persuaded by Dr. Bernton’s opinion that the precipitating cause of the loose body is unknown and unknowable.

27. The loose body was precipitated by the act of stepping down on a stair on December 1, 2016 while performing her work duties.

28. Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her right knee on December 1, 2016.

29. The St. Thomas More ER was authorized by virtue of the referral from Ms. Hammond on December 2, 2016. Dr. Pattison is authorized by referral from the ER.

30. The treatment Claimant has received from the ER and Dr. Patterson, including surgery, was reasonable, necessary, and causally related to Claimant’s compensable injury.

31. The ALJ is persuaded by Dr. Bernton’s opinion that Claimant requires additional evaluation and treatment related to her right knee.

32. Ms. Hammond’s testimony is credible and persuasive.

33. Respondents proved by a preponderance of the evidence that Claimant was responsible for the termination of her employment on December 8, 2016.

CONCLUSIONS OF LAW

A. Claimant's knee injury is compensable

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions. *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury "arises out of" employment when it had its origin in an employee's work related functions and is sufficiently related to those functions to be considered part of the employment. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). There is no presumption that an injury which occurs at work "arises out of" the employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968).

The claimant must prove that an injury proximately caused the condition for which benefits are sought. Section 8-41-301(1)(c); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). For an injury to be compensable, there must be a "sufficient nexus" between the employment and the injury. *In re Question Submitted by the U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimants or respondents. Section 8-43-201.

The fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation if work-related activities aggravate, accelerate, or combine with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But if the injury is "precipitated by" a pre-existing condition that the claimant brings into the workplace, the injury is not compensable unless it was the result of a "special hazard." *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Gaskins v. Golden Automotive Group*, LLC, W.C. No. 4-374-591 (ICAO, August 6, 1999) (the injury was not compensable when a pre-existing condition because the claimant to stumble on concrete stairs because stairs were a ubiquitous condition).

A claimant is not required to show that their work activity is the sole cause of an injury, and an otherwise compensable work injury does not cease to arise out of employment merely because it is partially attributable to a pre-existing physical infirmity.

Rather, an injury which results from the concurrence of a pre-existing condition and a hazard of employment is compensable. Thus, even if the direct cause of an accident is the employee's pre-existing idiopathic disease or condition, the resulting disability is compensable if the conditions or circumstances of employment contributed to the accident or to the injuries sustained by the employee. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1982).

In this case, Claimant's knee injury clearly occurred "in the course of" her work. The dispositive question is whether the injury "arose out of" her employment.

Dr. Bernton argues the loose body could have become dislodged while Claimant was at any location performing any activity, or even at rest. The problem with that argument is the pathology did not develop at home or while Claimant was at rest. Rather, the injury was triggered by a specific step Claimant took while descending stairs in furtherance of her job duties. As such, the injury was "precipitated" by Claimant's work activity rather than the pre-existing condition. Claimant's knee was likely in a weakened state before the incident, which allowed it to become injured by the otherwise relatively innocuous activity of walking down the stairs. But an "employer must take the employee as it finds [her] so that the employer is responsible for any increased disability resulting to an employee from a pre-existing weakened condition." *Cowin & Co. v. Medina*, 860 P.2d 535, 538 (Colo. App.1992). The ALJ is persuaded that Claimant's pre-existing condition probably made her more susceptible to injury but the injury ultimately was caused by her work activity.

Respondents cite *Gutierrez v. Wal-Mart Stores*, W.C. No. 4-432-838 (ICAO, November 30, 2000) as support for their position that Claimant's knee injury did not arise out of her employment. But the ALJ finds *Gutierrez* to be distinguishable from Claimant's case. In *Gutierrez*, the claimant's pre-existing arthritis was symptomatic before the injury, and the pre-existing condition precipitated the injury. By contrast, Claimant's pre-existing degenerative arthritis was latent and asymptomatic before the incident at work on December 1, 2016, and became symptomatic as the direct result of stepping down a stair.

The ALJ finds Claimant's case more analogous to the situation in *Reinhard v. Pikes Peak Broadcasting Co*., W.C. No. 4-114-050 (ICAO, May 20, 1993). The claimant in *Reinhard* was walking down a flight of stairs to a room where his next job assignment was posted. As he turned the corner at the bottom of the stairs he felt a pop in his back. The injury was deemed compensable because it had its origin in the distinctly work-related activity of descending the stairs. The ICAO noted the mere fact that "the claimant's injury could have occurred from similar activities outside the scope of employment did not compel the ALJ to conclude that the claimant's injury was not compensable."

Since the ALJ has concluded that Claimant's injury was precipitated by her employment activities rather than by the pre-existing condition, the "special hazard" rules do not apply. Accordingly, it is immaterial whether the stairs were defective in any way or constituted a "ubiquitous condition."

B. Medical benefits

At the commencement of the hearing, Respondents' counsel indicated medical benefit issues would "fall into place" based on the determination of compensability. Respondents have raised no serious question regarding whether the treatment Claimant has received for her right knee was reasonable and necessary. The primary dispute is whether the treatment was proximately caused by a work-related injury. Having resolved the compensability question in Claimant's favor, it necessarily follows that the treatment she received for her right knee is reasonable and necessary.

C. Claimant was responsible for termination of her employment

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Section 8-42-103(1)(g) provides that a claimant who might otherwise be considered temporarily disabled is not eligible for TTD benefits if he or she was "responsible for termination of employment." *Kerstiens v. All American Four Wheel Drive*, W.C. No. 4-865-825-04 (ICAO, August 1, 2013) ("the legislature intended that the termination from employment be a potential factor both in the threshold entitlement determination and in the termination of temporary total disability benefits once begun.").

The employer must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The mere fact that the employer discharged the claimant in accordance with its personnel rules does not automatically establish that the claimant acted volitionally or exercised control over the circumstances of the termination. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. App. 1987). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents proved by a preponderance of the evidence that Claimant was responsible for termination of her employment. The persuasive evidence shows that Claimant abandoned her job after she learned insurer had denied her claim. Claimant was upset because she assumed Ms. Hammond had sabotaged her claim. Ms. Hammond's credible and persuasive testimony shows her assumption was incorrect. Regardless, Claimant admitted she was aware of Employer's "no call, no show, no job" policy. The ALJ is not persuaded by Claimant's assertion that Employer was unwilling to accommodate her restrictions. Employer was willing to accommodate Claimant's restrictions and would have done so had Claimant not abandoned her job. Claimant failed to return to work of her own volition, and therefore was responsible for the termination of her employment within the meaning of § 8-42-103(1)(g). Accordingly, Claimant's request for TTD benefits commencing December 8, 2016 must be denied.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right knee injury on December 1, 2016 is compensable.

2. Respondents shall pay for reasonable and necessary medical treatment to cure and relieve the effects of Claimant's right knee injury, including the treatment from St. Thomas More ER and Dr. Patterson.

3. Claimant's claim for TTD benefits commencing December 8, 2016 is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 23, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Respondent's have shown, by clear and convincing evidence, that the DIME by Dr. Castrejon has been overcome; specifically the findings that Claimant is not at MMI for his admitted May 10, 2016 work injury, and that Claimant's need for surgery and ongoing treatment was causally related to this injury.

STIPULATION

The parties agreed that the issues of Temporary Total Disability and Temporary Partial Disability would be held in abeyance, pending the outcome of the above issues.

FINDINGS OF FACT

Based on the testimony and evidence presented at hearing, the undersigned ALJ enters the following Findings of Fact:

1. Claimant has worked as a detention deputy for the Pueblo County Sheriff's Office since January, 2015. Claimant sustained an admitted injury to his left wrist and hand on May 10, 2016 while in the course and scope of his employment as a deputy, while bringing an unruly inmate into compliance. During this struggle, Claimant fell onto his left hand, which was in a fist upon impact with the floor. His fist "rolled in", and his wrist absorbed much of the impact.

2. Claimant first received treatment for his injury on May 13, 2016 when he presented to Centura Centers for Occupational Medicine ("CCOM"). (Clmt. Ex. 5, pp. 16-22). On the intake form, Claimant explained that he sustained an injury occurred during a "use of force" against an inmate resulting in symptoms of wrist and hand pain, loss of strength, etc. He indicated that he was presently experiencing pain at a level 8 out of 10 at least 90% of the time. Physical examination of Claimant by Theresa Kuhn, N.P., documented limited range of motion of the left wrist, limited grip strength of the left wrist, and tenderness to palpation along the left distal ulna and radius, third fourth and fifth metacarpal bones of the left hand, and the left small finger. Nurse Kuhn further documented that although Claimant was able to finish his work on May 10, he was assigned different duties at work because of his inability to perform the duties of his job due to the wrist pain.

3. An x-ray of Claimant's wrist was taken on May 13, 2017. The x-ray revealed these findings:

> There is an old unhealed fracture of the scaphoid. There is partial collapse of the scaphoid with associated cystic changes. Mild fragmentation. There is mild degenerative change of the scapholunate articulation. Partial collapse of the proximal carpal row. These findings all appear chronic in nature. *A more acute **reinjury** is not excluded.* (emphasis added)

4. Nurse Kuhn stated in her report that "the patient reports that he is a boxer and has had *chronic* left wrist discomfort." (Clmt. Ex. 5, p. 22). Nevertheless, she indicated, "I believe that [Claimant] did sprain the wrist and he has an acute exacerbation of a pre-existing condition in regard to the wrist pain."

5. Claimant credibly testified at hearing that Nurse Kuhn's documentation of "*chronic* left wrist discomfort" was misleading and taken out of context. Claimant testified that he explained to Nurse Kuhn that he grew up being physically active and was involved in contact sports such as wrestling, boxing, and football. He was explaining his current pain to her in the context of his previous injuries and knowing the difference between the usual pain associated with those activities versus the kind of pain that is constant and does not go away. He also explained that he has had various injuries to his wrists in the past with those sports, along with many other body parts, but nothing he would have verbalized to the nurse practitioner would be called a *"chronic"* problem.

6. Claimant specifically, and credibly, denied having any daily wrist pain in the days and weeks leading up to May 10, 2016.

7. Nurse Kuhn provided Claimant with restrictions of no use of the left arm or hand after Claimant's initial visit with her. (Clmt. Ex. 5, p. 22). Claimant continued to have severe left wrist pain at his May 20, 2016 appointment with Nurse Kuhn. She referred him to an orthopedic surgeon, Dr. Karl Larsen, for further evaluation.

8. Claimant was first examined by Dr. Larsen on May 27, 2016. (Clmt. Ex. 6, pp. 69-71). Dr. Larsen stated in his report that the scaphoid non-union had clearly predated the work injury; however, Dr. Larsen did not comment at this time whether the work incident caused the dormant scaphoid non-union to become symptomatic. Dr. Larsen did document on his July 11, 2016 examination that Claimant "appears to have aggravated his scaphoid nonunion advanced collapse arthritis." He advised Claimant that, if he felt he did not have any significant problems with his wrist prior to the work injury, he should submit this to the workers' compensation insurance carrier to see if they would cover it.

9. Claimant followed up with CCOM on August 4, 2016, this time being examined by Dr. George Schwender. (Clmt. Ex. 5, pp. 59-60). He noted that Claimant underwent treatment, including occupational therapy, which only caused his symptoms to worsen. Claimant remained unable to perform his job duties and was formally restricted to no lifting or carrying more than 5 pounds with the left hand. Claimant was instructed to follow up with Dr. Larsen.

10. Dr. Larsen examined Claimant again on August 10, 2016. It was his opinion that all conservative options had been exhausted and it was time for surgery to correct the problem. (Clmt. Ex. 6, p. 76). Dr. Larsen sought prior authorization for this surgery from Respondents on August 16, 2016.

11. Respondents sent medical records to Dr. Jonathan Sollender to perform a records review regarding Claimant's injury and his need for surgery. (Clmt. Ex. 7, pp. 81-83). Dr. Sollender ultimately opined in his August 25, 2016 report, that Claimant's need for surgery was not work related. It was his opinion, based on Nurse Kuhn's note regarding "*chronic* left wrist discomfort," that Claimant had ongoing pain from his underlying condition that was present prior to the May 10, 2016 incident at work and that the surgery would not be related to the work incident.

12. Claimant returned to Dr. Schwender on September 1, 2016. Claimant informed Dr. Schwender that the surgery had been denied by Respondents and that he intended to pursue the surgery under his own insurance. (Clmt. Ex. 5, p. 61). Based on this information, Dr. Schwender then placed Claimant at MMI with no restrictions and no permanent impairment rating.

13. On September 7, 2016, Respondents filed a Final Admission of Liability, based upon Nurse Kuhn and Dr. Olson's opinion of September 1, 2016 that Claimant was at MMI, with no permanent impairment.

14. Claimant underwent surgery with Dr. Larsen on September 13, 2016. (Clmt. Ex. 8). Dr. Larsen performed excision of the terminal branch of the anterior and posterior interosseous nerves of the left wrist, a left radial styloid excision, and a left distal pole scaphoid excision. Claimant followed up with Dr. Larsen on September 26, 2016, and his condition was progressing well. (Clmt. Ex. 6, p. 78).

15. Claimant challenged the MMI determination and sought a Division Independent Medical Examination. This was performed by Dr. Miguel Castrejon on November 29, 2016. (Clmt. Ex. 9). Dr. Castrejon took a detailed history from Claimant, including discussion regarding Claimant's ability to perform his job before and after May 10, 2016. He documented that Claimant had a physically demanding job that required restraining inmates, physical training including obstacle courses, and even the lifting of inmates that could exceed 300 pounds. Dr. Castrejon further documented the fact that Claimant passed his physical examination prior to joining the Pueblo Sheriff's Office, which included physically demanding training exercises such as handcuffing, restraining, and take downs. Moreover, Claimant worked physically demanding jobs

prior to his employment with the Employer, including working on an oil rig and as a sand blaster for Vestas. Claimant reported to Dr. Castrejon that he had been able to perform all of these jobs with no limitations and did not require any treatment for his wrist that he could recall after a 2001 motorcycle accident that was treated with nothing more than a brace. After the work injury, Claimant could not even perform his physical therapy without increased pain, let alone perform the duties of his job that he was able to prior to May 10, 2016.

16. Dr. Castrejon's diagnosis of Claimant's condition was "left wrist contusion/sprain resulting in permanent aggravation of underlying previously asymptomatic degenerative condition." (Clmt. Ex. 9, p. 93). Dr. Castrejon provided a detailed causation analysis. Dr. Castrejon acknowledged that Claimant's scaphoid fracture likely occurred during the motorcycle accident in 2001. Despite having the fracture which pre-existed his employment with the Pueblo Sheriff, Dr. Castrejon reasoned that Claimant had been employed with the Pueblo Sheriff for approximately 16 months prior to the occurrence of the injury. Dr. Castrejon correctly pointed out, "At no time during the course of his pre-employment and post-employment activities is there documentation of left wrist/hand pain nor had he required medical attention or experienced a loss of worktime."

17. Dr. Castrejon noted Claimant's lack of functional loss of the wrist and its lack of an effect on his employment prior to May 10, 2016 in coming to his final conclusion that, "it is quite clear that the event of May 10, 2016 has resulted in a permanent aggravation of the claimant's pre-existing wrist condition. This condition has not returned to pre-injury level and has resulted in the need for surgical treatment."

18. Dr. Castrejon addressed Dr. Larsen's original May 27, 2016 opinion in his DIME report. (Clmt. Ex. 9, p. 94). Dr. Castrejon pointed out that Dr. Larsen correctly stated that the scaphoid fracture was pre-existing; however, Dr. Larsen initially failed to mention whether the work event aggravated the underlying condition. Dr. Castrejon then noted that Dr. Larsen did subsequently suggest, on July 11, 2016, that the May 10, 2016 event was indeed an aggravating factor.

19. Dr. Castrejon was clear in his conclusions and rationale. Dr. Castrejon correctly stated in his causation analysis that a condition does not need to be caused by work. Rather, "If the job performed by the claimant aggravates a pre-existing non work related condition and renders the condition more symptomatic and, in this case, more painful to the point where it interferes with the employee's work, the employee is entitled to medical care under the Colorado Workers' Compensation Act." (Clmt. Ex. 9, p. 95).

20. Dr. Sollender issued a subsequent report on February 14, 2017 after his review of Dr. Castrejon's DIME report. (Clmt. Ex. 7, pp. 84-86). Dr. Sollender argued that Dr. Castrejon failed to address Dr. Kuhn's note of prior "*chronic* wrist discomfort" in coming to his analysis. However, regardless of whether Claimant had periodic "discomfort" prior to the May 10, 2016 work incident, Dr. Castrejon was clearly of the

opinion that the work incident “render[ed] the condition more symptomatic.” (Clmt. Ex. 9, p. 95).

21. Dr. Sollender further argued that Dr. Castrejon never rationalized Dr. Larsen’s initial opinion that the condition was *chronic*. (Clmt. Ex. 7, p. 85). However, a reading of Dr. Castrejon’s causation analysis shows that Dr. Castrejon did in fact directly address this. (Clmt. Ex. 9, p. 94). Several times in his IME report, Dr. Sollender references, and emphasizes, the May 13, 2016 note from "Dr. (sic) Kuhn" (referencing *"chronic"*) in determining that Claimant’s condition was pre-existing and unrelated to his work activities. (Clmt. Ex. 7, p. 86). Dr. Sollender did not provide any commentary regarding Claimant’s significant increase in reported wrist symptoms after May 10, 2016 or the causation for increase in said symptoms.

22. Additional medical records pre-dating Claimant’s May 10, 2016 injury were obtained subsequent to the DIME, and subsequent to Dr. Sollender’s February 2017 records review. These are the medical records from Parkview Medical Center from 2010, and the DIME report from Dr. Timothy Sandell for Claimant’s unrelated May 24, 2014 left shoulder injury. (Resp. Exs. H, I).

23. The Parkview Medical Records document that Claimant went to the emergency room at Parkview on April 5, 2010. The stated complaints upon arrival were “HEADACHE, FACIAL PAIN, RT ANKLE PAIN.” (Resp. Ex. I, p. 111). The “primary impression” as indicated by the emergency room physician was a concussion. During Claimant’s course of treatment, an x-ray of his left wrist was performed. It documented the existence of the scaphoid fracture in the wrist. The fracture was “of unknown age.” It was suggested that an MRI “may be useful.”

24. Claimant testified at hearing that he did not remember the April 5, 2010 emergency room visit to Parkview. After reviewing some of the medical records at hearing, Claimant “briefly recall[ed]” having been seen at Parkview Hospital that day. He explained that he was at work for a previous employer when an angry customer came into his store and assaulted him, resulting in a fight between him and the customer. He testified that he went to the emergency room to get checked out because he had a lot of cuts and abrasions from the fight. When asked about whether his left wrist was injured, Claimant responded, “I don’t honestly specifically remember.” He testified that he had other body parts in considerable pain, such as his face that had a large lump on it from the fight. Claimant’s testimony is consistent with the records from Parkview that document his presenting complaints to be a headache, facial pain, and ankle pain, along with the primary diagnosis of a concussion.

25. Claimant testified that he did not seek additional treatment for his wrist after April 5, 2010 because he “didn’t have any real pain.” Claimant’s testimony is consistent with the lack of treatment notes for the left wrist between April 5, 2010 and May 10, 2016.

26. The DIME report from Dr. Sandell is dated September 23, 2015. (Resp. Ex. H, pp. 92-98). Claimant's primarily complaint at the time of this examination was his left shoulder pain. During the physical examination, it was noted that there was "some weakness" related to pain when he was checking supination, pronation, flexion, and extension of Claimant's left wrist with no focal muscle atrophy noted. There is no further documentation of Claimant's left wrist condition and it was not mentioned in Dr. Sandell's list of diagnoses.

27. Claimant testified at hearing that he did not specifically recall the DIME with Dr. Sandell from the previous claim. Claimant was asked about this record documenting "some weakness related to pain" on physical examination with provocative maneuvers of the wrist. As Claimant did not remember the examination itself, he similarly did not recall the left wrist examination. However, Claimant did testify that if his wrist pain at the time of the DIME with Dr. Sandell was comparable to his wrist pain after May 10, 2015, he definitely would have remembered the examination.

28. Dr. Sollender testified at hearing on behalf of Respondents. It was his opinion that Claimant's May 10, 2016 injury at work did not cause or accelerate Claimant's need for surgery on the wrist. Dr. Sollender supported his opinion by stating, "based on looking at the X-ray, it was clear to me that this was a chronic ongoing condition."

29. Dr. Sollender placed significant weight on Nurse Kuhn's note of "*chronic* wrist discomfort" and the newly reviewed DIME report of Dr. Sandell documenting "some weakness" in his testimony that was offered at hearing. Dr. Sollender was of the opinion that Dr. Castrejon erred in his opinion because Dr. Castrejon did not have Dr. Sandell's 2015 report or the Parkview records from 2010. Dr. Sollender clarified his opinion by pointing out that Claimant denied wrist symptoms after the motorcycle accident and up until the May 10, 2016 incident, and that the Parkview and Dr. Sandell records contradict Claimant's statements.

30. Dr. Sollender was asked about the significance of Claimant being able to continue performing his full duties at work prior to May 10, 2016 and if that impacted his analysis. Dr. Sollender stated that most people probably work with some degree of an ache or pain that they are not talking about and that Claimant was most likely just working through pain. The ALJ finds this analysis to be unpersuasive, in that it minimizes the significant pain Claimant has experienced since the moment his injury occurred.

31. Claimant testified that he began working for the Employer on January 5, 2015. Upon hire, Claimant was required to take an extensive physical examination that included, but not limited to, lifting a crate of weights above his head, pushing a weighted sled, range of motions tests on both of his wrists, and a series of push-ups. Claimant passed the pre-employment physical and no concerns about his physical were brought to his attention by the Employer. Claimant denied any significant wrist pain at that time. Claimant continued to work with the Employer from his date of hire in January of 2015

through the work injury on May 10, 2016 and denied any other injuries or altercations outside of work during that time period.

32. Claimant explained his job requires him to deal with violent offenders on a frequent basis and routinely requires the use of extreme physical force to accomplish the fundamental aspects of his employment. Claimant explained that he recalls at least 30 separate altercations while performing his job that required either physical restraint of grown men or actually engaging them in physical combat. Claimant stated that optimal conditions allow for him to simply take the violent inmate to the ground, restrain then, and handcuff them. Other events have involved Claimant being punched, kicked, thrown down, having his arm yanked on, etc. Claimant was never restricted from performing this physically demanding job due to his left wrist prior to May 10, 2016. After Claimant was first examined for his injury, he was given severely limiting restrictions of no lifting whatsoever with the left arm. Those restrictions were eventually changed to no lifting of more than five pounds. The ALJ finds Claimant to be sincere and credible in his descriptions of events, if an imperfect historian.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and

draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds Claimant to be sincere and credible.

Overcoming the DIME

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001).

E. The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* W.C. No. 4-782-625 (ICAO, May 24, 2010).

F. The ALJ concludes that the evidence presented demonstrates a mere difference of opinion between physicians and does not amount to evidence that leads the ALJ to conclude Dr. Castrejon's opinion was highly probably incorrect. The evidence presented at hearing by Respondents does not amount to evidence that unmistakably demonstrates that the incident on May 10, 2016 did not aggravate Claimant's underlying condition. Specifically, the ALJ finds that far too much emphasis was placed by the IME Doctor Sollender on the notes of Nurse Practitioner Kuhn, who characterized Claimant's left wrist complaints as being "chronic". The term "chronic" is a medical term of art, and one with which Claimant was not familiar, while he was - in physical distress - providing a brief medical history to Nurse Practitioner Kuhn. It is

doubtful he used the term "chronic" at all; rather, Nurse Kuhn was likely 'filling in blanks' which she felt were appropriate at that moment. The term "chronic" then became embedded in Claimant's medical records.

G. Claimant does not dispute that old scaphoid fracture and nonunion revealed on the May 13, 2016 x-ray pre-existed Claimant's May 10, 2016 work injury. This fracture likely occurred when Claimant was in a motorcycle accident many years prior. However, there is little evidence to suggest Claimant's left wrist condition was anything more than occasionally, and less severely, symptomatic prior to May 10, 2016. The Parkview records from 2010 document that Claimant presented to the emergency room after an assault with a primary diagnosis of a concussion. An x-ray of his left wrist was performed and it did reveal the fracture to be present at that time. Although the fracture was present, Claimant's complaints upon admission were a headache, facial pain, and right ankle pain. If ever the occasion existed to complain of severe pain to his left wrist, it was while he was being treated for this 2010 work injury. Instead, this left wrist fracture was discovered while Claimant was being treated for his multiple presenting complaints. Claimant testified credibly that he went to the emergency room in 2010 primarily for the wounds to his face and that he did not follow up for any treatment for the left wrist because he did not recall having any significant symptoms of the left wrist after this event.

H. The other medical record prior to May 10, 2016 that documents Claimant's prior left wrist condition is Dr. Sandell's September 23, 2015 DIME report. The report provides little information regarding the state of Claimant's left wrist at this time, aside from the fact that there was "some weakness" in the left wrist at that time during physical examination of the wrist. The primary complaint was an injured scapula, also on the left side. It is unsurprising that some pain going down this same arm would be reported. The physical examination included checking Claimant's left wrist supination, pronation, flexion, and extension.

I. Although Dr. Sollender relies on this report in support of his opinions, the ALJ finds that this report further support's the opinions of Dr. Castrejon. This report suggests that, as of September 23, 2015, Claimant's left wrist was, at most, mildly symptomatic and was not interfering with Claimant's functional abilities. As Claimant testified, if his left wrist condition as it existed after May 10, 2016 was present at the time of the September 23, 2015 examination, Dr. Sandell's report would certainly have documented more than "some weakness" of the left wrist upon physical examination.

J. Respondents' expert testified at the hearing that Claimant likely had some degree of symptoms to his left wrist prior to May 10, 2016, and because he was not asymptomatic, the surgery is not causally related to the work injury. The ALJ agrees that given Claimant's history and the findings on the x-ray, he may have had some varying degree of left wrist pain and varying range of motion loss prior to May 10, 2016. However, that does not address the central issue of whether the incident at work significantly *aggravated or accelerated* Claimant's need for treatment.

K. Nor does it address the fact that an individual's functional abilities must be taken into account when assessing whether a condition has been permanently aggravated. As Dr. Castrejon explained in his report, Claimant had no discernible loss of function or limitations of the left wrist prior to May 10, 2016 as evidenced by Claimant's ability to perform the full duties of his employment. Although Claimant's condition could have been treated surgically prior to May 10, 2016, there is no indication his condition warranted the invasive surgery due to his lack of symptoms and nearly full function. It was the work injury of May 10, 2016 that turned Claimant's relatively asymptomatic condition into a condition that had to be treated surgically.

L. "[I]f a disability were 95% attributable to a pre-existing, but stable condition, and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling." *Seifried v. Industrial Com'n of State of Colo.*, 736 P.2d 1262, 1263 (Colo. App. 1986). However, an injury must be "significant" in that it must bear a direct causal relationship between the precipitating event and the resulting disability, *Colorado Fuel and Iron Corp. v. Industrial Commission*, 380 P 2d 28 (Colo. 1963). In this case, the injury from the fall onto his wrist that Claimant suffered was *significant.*

M. The ALJ finds that Claimant's old scaphoid fracture was a pre-existing, but otherwise stable, and largely asymptomatic, condition. This condition did not become disabling until May 10, 2016, and was a direct result of the significant, compensable work event. It is for this reason the ALJ concludes that Respondents have failed to meet their burden by clear and convincing evidence to establish Dr. Castrejon erred in his opinion that Claimant's need for surgery was causally related to the admitted injury.

ORDER

It is therefore Ordered that:

1. Respondents have not shown, by clear and convincing evidence, that the DIME of Dr. Castrejon has been overcome. Claimant is not yet at Maximum Medical Improvement. His left wrist injuries are related to the work injury of May 10, 2016.

2. Respondents are liable for all expenses related to the September 13, 2016 surgery performed by Dr. Larson, and any aftercare needed.

3. Respondents are liable for all reasonable, necessary, and related treatment to being Claimant to Maximum Medical Improvement.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 23, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado springs, Colorado 80906

ISSUES

- Did Respondents overcome the Division IME regarding the date of MMI and Impairment?
- Whether Dr. Peter Reusswig and Dr. Anton Zaryanov are authorized medical providers.
- Is Claimant is entitled to a change of physician, specifically to Dr. Peter Reusswig and Dr. Anton Zaryanov, if they are not authorized medical providers?
- Whether Claimant is entitled to temporary total disability benefits from May 26, 2016 to August 1, 2016

STIPULATIONS

1. The parties agreed to reserve the issue of maintenance medical treatment.

2. Claimant was not disputing that he reached MMI on August 1, 2016.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant started working for the employer on January 11, 2013 as a fabricator/ pipefitter.

2. Claimant's job required him to lift more than 20 pounds. It required him to lift and carry 51-75 pounds occasionally and 31 to 45 pounds frequently. It also required flexion and extension of his neck.

3. Prior to March 18, 2015, Claimant did not have any pain or symptoms regarding his neck.

4. On March 18, 2015, Claimant was attempting to tighten a chain vice onto a portable rotator. The rotator weighs approximately 800 pounds. While Claimant was jerking back on the bar to tighten the chain vice, the portable rotator moved or slipped and he felt a pop and a burning pain in his neck.

5. Although Respondent's denied liability for the claim, they provided medical treatment to Claimant up through July 23, 2015.

6. The matter proceeded to hearing before Administrative Law Judge Broniak on February 22, 2016. Judge Broniak issued an Order dated May 13, 2016 and found the claim compensable. Judge Broniak concluded that Claimant aggravated his pre-existing cervical spine condition while in the course and scope of his employment. She did not, however, determine any other issues.

7. Claimant testified at the first hearing that at the time of the injury, he believed his neck symptoms would go away and felt he could "tough it out." He also testified that he finished his shift the day he was injured but his neck continued to hurt through the remainder of his shift and through the night. At this time, Claimant did not have any radicular symptoms.

8. On March 19, 2015, Claimant still felt neck pain. Once he arrived at work, he reported the injury to his foreman. The employer asked him whether he wanted to see a doctor but he declined. Claimant thought that his neck would get better and wanted to continue working.

9. On March 19, 2015, Claimant signed a Designated Medical Provider form and selected "Midtown Occupational Health Services."

10. On March 20, 2015, (Friday) Claimant took the day off from work hoping he would feel better by Monday. He did not feel better on Monday and the Employer allowed him to work light duty. Claimant continued to decline medical treatment thinking if he took it easy for a couple of weeks, his symptoms would go away.

11. After two weeks of light duty, Claimant attempted to return to regular duty on April 8, 2015. Claimant was unable to return to full duty because of his neck pain so he requested medical care.

12. On April 8, 2015, Claimant went to Midtown Occupational Health Services where he was evaluated by Dr. Lawrence Cedillo. According to Dr. Cedillo's report, Claimant denied any prior neck injuries and stated that he has "neck problems secondary to trying to secure a chain vice onto non-fixed rotator weighing approximately 700-800 pounds, using a [sic] manual tools, and in the process, the rotator moved, and he experienced pain in regard to the neck at that time." Dr. Cedillo documented some range of motion limitations in Claimant's neck. Dr. Cedillo opined that Claimant likely had myofascial discomfort, mechanical in

nature, and "more likely than not related to date of injury occurring above as described through his present employer and thus work related."

13. Dr. Cedillo completed a form indicating Claimant was released to work without restrictions. However, as found by ALJ Broniak, Dr. Cedillo testified at the February 22, 2016 hearing that the Employer has a light duty work program and Dr. Cedillo trusts the Employer will provide light duty when necessary so he does not issue formal restrictions in any claim involving this Employer. Therefore, although Dr. Cedillo put in writing that Claimant did not have any work restrictions, Claimant did have work restrictions due to his injury and the restrictions were conveyed to his employer.

14. On April 13, 2015, Claimant returned to Dr. Cedillo complaining of increasing neck pain. Although Claimant did not have any radicular symptoms, Dr. Cedillo wanted to rule out a discogenic etiology for Claimant's pain. Therefore, Dr. Cedillo ordered an MRI.

15. On April 15, 2015, Claimant underwent an MRI. The MRI revealed mild spondylostenosis most notable at the C3-4 level, due to a leftward disc osteophyte complex and moderate left foraminal stenosis and rightward stenosis, most notable also at the C3-4 level. The MRI also revealed a C5-6 moderate left disc-osteophyte complex and foraminal stenosis.

16. On April 22, 2015, Claimant returned to Dr. Cedillo. He stated in his report that the MRI showed a right stenosis at the C3-4 and mild spondylostenosis at the C3-4 due to a left disk osteophyte complex and moderate left foraminal stenosis secondary to the same. Dr. Cedillo did not reference the C5-6 moderate left disc-osteophyte complex and foraminal stenosis as described in the MRI. Dr. Cedillo's assessment remained mainly the same, although he added Claimant's MRI was positive for preexisting degenerative changes. At this time, Claimant did not have any radicular symptoms into his upper extremities.

17. On May 6, 2015, Claimant returned to Dr. Cedillo. Claimant stated that the massage therapy caused numbness and tingling down his left upper extremity and into his forearm. Due to his upper extremity symptoms, Dr. Cedillo referred Claimant to Dr. Lesnak for an EMG/electrodiagnostic study.

18. On May 20, 2015, Claimant was evaluated by Dr. Lesnak. Claimant's complaints included constant neck pain with intermittent/frequent pain and tingling sensations throughout his left arm and hand. Claimant also complained of occasional and mild symptoms involving his right upper extremity. Dr. Lesnak performed an electrodiagnostic study of Claimant's left upper extremity. The study was normal. Dr. Lesnak stated that although the electrodiagnostic study showed no evidence of any type of neurologic abnormalities, Claimant had evidence of at least a left-sided cervical radiculitis, primarily involving the C6 or possibly C7 nerve roots. Therefore, Dr. Lesnak prescribed Claimant a Medrol Dosepak. Dr. Lesnak also prescribed Percocet for Claimant. Claimant did not,

however, tell Dr. Lesnak that he was already taking Percocet for a preexisting low back condition.

19. On May 22, 2015, Claimant saw Dr. Mark Flannigan, his personal physician, for his chronic preexisting low back pain. Claimant was prescribed Percocet for his back pain. The medical report dated May 22, 2015 also notes Claimant was prescribed Percocet by Dr. Flannigan on April 23, 2015.

20. On June 4, 2015, Claimant returned to Dr. Lesnak, complaining of progressing and worsening pain. Claimant's pain complaints included progressive left greater than right neck pain and persistent tingling sensations throughout his left upper extremity. Claimant also started to increase his pain medication usage. Although Claimant was instructed to take the Percocet 1-2 tablets at bedtime, Claimant was taking 2 tablets, twice daily. In addition to Dr. Lesnak prescribing Claimant Percocet, Dr. Flannigan was also prescribing Claimant Percocet. Dr. Lesnak was concerned about psychosocial issues due to Claimant's progressive symptoms despite treatment and the minimal findings seen on Claimant's exam and recent diagnostic testing. He was also concerned about Claimant taking more Percocet than what was prescribed.

21. On June 5, 2015, Claimant underwent a drug screen. The drug screen was negative for all substances, including opiates.

22. On June 18, 2015 surveillance video of Claimant shows Claimant leaving work. Claimant does not appear to be in any apparent distress. Claimant is moving fluidly and without any apparent problems with his neck. Claimant is also seen backing his truck out of a parking space and freely and fluidly moving his neck.

23. On June 18, 2015, Claimant returned to Dr. Cedillo. Claimant advised Dr. Cedillo that he has persistent discomfort on a constant basis and rated his pain at about a 4 to 9 out of 10.

24. On June 27, 2015, there is surveillance video of Claimant. The surveillance shows Claimant on a cell phone moving freely and fluidly and not in any apparent distress.

25. On June 30, 2015, Claimant was evaluated by Dr. Gentile for osteopathic manipulation and treatment. Claimant complained of pain with any movement of his head, left to right. This is inconsistent with the surveillance video obtained on June 18, 2015 and June 27, 2015. At this appointment, Claimant indicated that he recently had a firework explode in his right hand. Claimant was casted from his right hand to his elbow. The firework explosion apparently fractured Claimant's right wrist.

26. On July 9, 2015, Claimant returned to Dr. Cedilo. At this time, Claimant had a pinching sensation in his neck with twisting and turning. Claimant denied any pain, paresthesias, numbness, or tingling down the left upper extremity.

27. On July 23, 2015, Claimant returned to Dr. Cedillo. He placed Claimant at MMI without impairment and released Claimant to full duty without any restrictions. Dr. Cedillo also stated the following in his report:

> ASSESSMENT: Persistent complaint of cervical, upper trapezial discomfort with occasional numbness in left upper extremity. Previous plain film x-ray of 04/08/2015 negative and normal for acute bony abnormalities. MRI on 04/15/2015 positive for preexisting, no-work-related degenerative changes. EMG and nerve conduction study of left upper extremity on 05/20/15 negative and normal. Patient feels worse since last visit and since date of injury. All appears to be myofascial in nature, with lack of objective correlation to his subjective complaints as pertains to the injury of 03/19/2015. Thus, in my opinion he is at MMI.

28. Dr. Cedillo went on to state in his July 23, 2015 report that it was his opinion that Claimant's current subjective complaints were out of proportion to the objective findings and Claimant's current complaints were not work related. Therefore, Dr. Cedillo directed Claimant to follow up outside the workers' compensation system for further care as deemed necessary.

29. Dr. Cedillo testified at the February 22, 2016 hearing. Dr. Cedillo testified that on July 23, 2015, he determined Claimant did not suffer a work related injury. Therefore, on July 23, 2015 he placed Claimant at MMI, returned Claimant to full duty, and did not provide an impairment rating. Dr. Cedillo also testified that he recommended Claimant follow up outside the workers' compensation system with his private physician for further care as deemed necessary since he did not think the claim was work related.

30. On August 17, 2015, Claimant returned to his personal physician, Dr. Mark Flannigan, as directed by Dr. Cedillo. Claimant complained of back and neck pain. Dr. Flannigan suggested Claimant should see a spine specialist. He also suggested Claimant should see a chronic pain specialist if the spine specialist could not offer him any relief. Therefore, Dr. Flannigan referred Claimant for an orthopedic consultation for his neck with the Center for Spinal Disorders.

31. On August 26, 2015, Claimant was evaluated by Dr. Zaryanov, a spinal surgeon, at the Center for Spinal Disorders. His assessment was neck pain, cervical spondylosis with left upper extremity radiculopathy, and cervical degenerative disc disease. Dr. Zaryanov referred Claimant to Dr. Peter Reusswig, at Colorado Pain Management for treatment, including injections.

32. On October 1, 2015, Claimant was evaluated by Dr. Reusswig. Dr. Reusswig indicated Claimant was working full duty, without restrictions, as of 2.5 weeks ago, but was not doing his job well. Dr. Reusswig noted "some intermittent numbness in Claimant's left upper extremity in a C6,7 dermatome pattern" and recommended an epidural steroid injection.

33. On October 16, 2015, Dr. Reusswig performed an epidural steroid injection at the C7-T1 level with spread up to C5. Claimant's pain went from an 8 to a 5. Dr. Reusswig renewed Claimant's prescription for Percocet.

34. On October 19, 2015, Claimant was released to full duty, without restrictions, by Dr. Reuesswig's physician's assistant, Amanda Condon.

35. On November 2, 2015, Claimant returned to Dr. Zaryanov. Claimant continued to fail non-operative treatment. Dr. Zaryanov recommended repeat EMG of the left upper extremity due to Claimant's intermittent sensory changes and a repeat MRI.

36. On November 5, 2015, Claimant returned to Dr. Reusswig. Claimant stated he had no more pain in his left arm after the steroid injection. But, he still had significant left neck and shoulder pain which was aggravated by work as a pipefitter when Claimant wore a 15 pound headgear with sustained left head tilt and slight flexion.

37. On November 13, 2015, Dr. Reusswig performed left sided facet injections at the C4-5, 5-6, and 6-7 levels. These injections apparently reduced Claimant's pain down to a 5/10, roughly 40%. The notes indicate that although Claimant was prescribed 2 oxycodone per day, Claimant had taken up to 6. Claimant was advised and warned that using too much medication could lead to respiratory depression and death.

38. On November 13, 2015, Claimant underwent a repeat MRI of his cervical spine. The MRI demonstrated, among other things, a small left paracentral disc protrusion and endplate osteophyte at C5-6.

39. On November 17, 2015, Claimant was evaluated by Dr. Reusswig. He stated the MRI showed C3-4, C5-6 and possibly C6-7 disc herniations. He also stated Claimant increased his oxycodone on his own and against doctor's orders by going from 45mg to 120mg in a matter of two weeks. Dr. Reusswig did note that Claimant was continuing to work full duty.

40. Although Dr. Reuswigg stated the MRI showed possible C3-4, C5-6 and possibly C6-7 disc herniations, Dr. Rauzino, who performed an IME on behalf of Respondents disagreed.

41. On December 1, 2015, Claimant underwent repeat EMG and electrodiagnostic studies of his left upper extremity which were performed by Dr. Leimbach. This study showed findings most consistent with a mild C6 radiculopathy.

42. On December 8, 2015, Claimant was evaluated by Dr. Reusswig and he recommended additional cervical transforaminal injections at the C5-6 level.

43. On December 16, 2015, Claimant was evaluated by Dr. Zaryanov. He indicated Claimant received some relief from the injections. However, Dr. Zaryanov

indicated that Claimant may be a candidate for a C5-6 decompression followed by a total disc replacement versus a fusion.

44. On December 16, 2015 Dr. Cebrian performed an IME and issued a report dated January 14, 2016. Dr. Cebrian diagnosed Claimant as suffering from chronic pre-existing lumbar spine pain and chronic opioid dependence which was not claim related. He also opined that Claimant's neck condition and pain complaints were not causally related to Claimant's job activities.

45. On January 4, 2016, Claimant underwent injections by Dr. Reusswig at the C5-6 level. Claimant returned to Dr. Reusswig on January 6, 2016 and indicated the injections provided about a 50% reduction in pain. Claimant also stated that work continued to aggravate his neck pain. Claimant was instructed to follow up with Dr. Zaryanov.

46. On February 2, 2016, Claimant was evaluated by Dr. Zaryanov. He stated that Claimant continued to be miserable and was taking high doses of narcotics that were irritating his stomach. Dr. Zaryanov indicated Claimant has failed multiple non-operative modalities including multiple injections, physical therapy, and medications. He also indicated Claimant was unable to work. Therefore, Dr. Zaryanov recommended surgery. Although he recommended surgery, Dr. Zaryanov indicated that the surgery is not a good answer for Claimant's axial neck pain.

47. On February 4, 2016, Claimant returned to Dr. Reusswig. He indicated that the injections did not have any long term results. Claimant said his pain was back to baseline.

48. On March 3, 2016, Claimant returned to Dr. Reusswig's office and was evaluated by Joseph Shankland, P.A. Claimant was working and indicated that his neck pain continued to get worse.

49. During March of 2016, Claimant was laid off from his job.

50. On May 26, 2016, Claimant was provided work restrictions via Dr. Reuswigg's office. There restrictions were: limit lifting to 20 pounds, no flexion or extension of neck, (looking down or up) or constant lateral rotation (looking side to side), no pushing or pulling. The work restrictions issued on May 26, 2016 prevented Claimant from performing his regular job.

51. On June 23, 2016, Claimant returned to Dr. Reusswig's office and was evaluated by Jonathan Karsten, PA-C. Claimant complained of increased neck pain. Claimant also admitted to overusing his oxycodone. Claimant was 10 days early on his need for a refill. Claimant made reference to going to another doctor. PA-C Karsten, also made reference that some of Claimant's urinalyses were not showing the presence of oxycodone. PA-C Karsten indicated Claimant might need an evaluation by a psychologist to determine if Claimant was a good candidate for continued opiate therapy.

52. On July 1, 2016, Claimant returned to Dr. Reusswig. Claimant indicated he was laid off and his pain has been better. Dr. Reusswig discussed the negative urinalyses with Claimant and subjected Claimant to random pill counts to confirm proper narcotic usage.

53. On July 12, 2016, surveillance of Claimant shows Claimant walking around outside of a house fluidly and without any indication of any neck problems. Claimant is turning his neck side to side looking around without hesitation and in no apparent distress. Claimant is also seen moving a truck. Claimant appears to move his neck fluidly and is not in any distress.

54. On August 1, 2016, Claimant underwent an IME with Dr. John Hughes. Dr. Hughes diagnosed Claimant as suffering from a cervical sprain with left radicular symptomatology. He did not think Claimant was at MMI. Dr. Hughes thought that Claimant might be a surgical candidate. He provided Claimant a provisional impairment rating of 20%. The rating did not take into account any possible impairment stemming from any left cervical radiculopathy.

55. On August 1, 2016, Claimant returned to Dr. Reusswigg's Physician Assistant, Mr. Shankland. At this appointment, it was determined that that there would be no change in Claimant's medication regimen. Mr. Shankland also noted that Claimant appeared to be using the medication appropriately and without evidence of misuse or diversion. There was no mention of referring Claimant to a psychologist to determine if he was a good candidate for opiate treatment.

56. On August 29, 2016, Dr. Cebrian issued a supplemental report commenting on whether Claimant was appropriately placed at MMI on July 23, 2015. Dr. Cebrian's report provides that Claimant was appropriately placed at MMI on July 23, 2015. Dr. Cebrian stated in his report that, at most, Claimant sustained a strain with a temporary aggravation of his underlying cervical degenerative disc disease. According to Dr. Cebrian, Claimant had some mild and intermittent paresthesias that started two months after the incident and resolved by July 9, 2015. He also stated that Claimant had a negative EMG as found by Dr. Lesnak on May 20, 2015 and that the MRI findings on April 15, 2014 revealed degenerative changes with primary abnormality at C3-4. He also stated that Claimant's symptoms increased after being placed at MMI on July 23, 2015. Dr. Cebrian went on to state that after July 2015, there was objective evidence of changing pathology as Dr. Reusswig indicated that the new MRI revealed disc herniations at C3-4,C5-6 and C6-7, which were not seen previously. Additionally, the second EMG/NCS performed by Dr. Leimbach on December 1, 2015 revealed a C6 radiculopathy which was not previously present.

57. Dr. Cebrian testified consistently with his reports. In essence, Dr. Cebrian testified that Claimant had cervical spine pathology in late 2015, including changes to the MRI and new EMG findings that cannot be related to the March 19, 2015 injury as there was a significant temporal delay in the development of these new objective findings.

58. On August 30, 2016, Claimant was evaluated by Joseph Shankland, PA. Claimant indicated he was having difficulty finding work within his work restrictions.

59. On September 9, 2016, Dr. Cebrian issued a Supplemental Report after watching surveillance of Claimant dated July 11-12, 2016. Based on the surveillance, Dr. Cebrian reaffirmed his opinion that Claimant was appropriately placed at MMI on July 23, 2015.

60. On September 19, 2016, Dr. John Hughes issued a report on behalf of Claimant. In his report, he addressed the fact that Claimant's initial neurodiagnostics were "negative and normal" and then subsequent testing performed by Dr. Leimbach progressed to being positive and were most consistent with a mild left C6 radiculopathy. Dr. Hughes explained that it was his opinion that Claimant's left C6 nerve root was particularly vulnerable to a contusion-mechanism injury sustained as a result of a cervical spine sprain/strain injury. According to Dr. Hughes, the initial electrodiagnostic tests were done too early to detect the emerging radiculopathy, as suspected clinically, with symptoms of cervical spine pain with radiation into the left arm and associated left upper extremity symptoms of numbness and tingling. This ALJ credits the opinion of Dr. Hughes regarding his explanation for why Claimant's subsequent EMG/NCS showed a C6 radiculopathy compared to the initial test which was negative.

61. On October 3, 2016, Claimant underwent a Division IME which was performed by Dr. Stephen Gray. Dr. Gray's assessment of Claimant was:

> 1) Work related cervicothoracic strain, with:
>
> a. Imaging evidence of C5-6 disc protrusion with osteophyte,
>
> b. Clinincal evidence of left sided C6 cervical radiculopathy, and
>
> c. Imaging evidence of pre-existing right stenosis C3-4 and mild spondylostenosis C3-4 due to a left disc osteophyte complex and moderate left foraminal stenosis.

62. Dr. Gray provided Claimant with a 17% whole person impairment rating. Dr. Gray found Claimant had a 6% whole person impairment rating pursuant to table 53, IIC for Specific Disorders of the cervical spine due to cervical spine degenerative changes considered to be associated with Claimant's left upper extremity radiculopathy. Dr. Gray provided Claimant a 3% whole person impairment rating for the loss of function to Claimant's left upper extremity due to his left sided radiculopathy. Dr. Gray also provided Claimant an 8% impairment rating for the loss of range of motion to his cervical spine. (Although Dr. Gray indicated in his report that he was providing Claimant 8% for his lumbar spine,

Dr. Gray used the proper cervical range of motion worksheet for Claimant's cervical spine.)

63. Dr. Gray also determined Claimant reached MMI on August 1, 2016, which is the date Claimant underwent the IME with Dr. Hughes. Dr. Gray appears to have selected that date because it appeared active care had stopped and Claimant's condition did not have any significant changes since his IME with Dr. Hughes.

64. On October 3, 2016, the date of the Division IME, surveillance of Claimant was obtained. The surveillance shows claimant walking and using a cell phone. He is also seen driving. Claimant does not exhibit any pain behaviors regarding his neck.

65. On October 4, 2016, additional surveillance of Claimant was obtained. He is also seen driving and gets involved in a minor car accident. Claimant does not exhibit any pain behaviors regarding his neck. Claimant, however, seems to exhibit slightly less neck movement, overall, compared to the other motorist or police officer.

66. On February 7, 2017, Claimant underwent an IME with Dr. Michael Rauzzino. Dr. Rauzzino reviewed Claimant's medical records as well as the surveillance of Claimant. Dr. Rauzzino concluded that Claimant does not have clinical evidence of a C6 radiculopathy. He concluded that this is borne out not only by his examination, but by the examination of Dr. Zaryanov and the patient's other treating providers. According to Dr. Rauzzino, Claimant does not have neck pain that specifically radiates in a C6 distribution into his thumb and index finger. Claimant has some neck pain that radiates into his arm diffusely and it is the last two digits of his hand that are affected. Claimant also had normal motor and sensory examination by Dr. Rauzzino, Dr. Zaryanov, and by Dr. Gray. Dr. Rauzino concluded that there is no evidence of a C6 radiculopathy based on the Claimant's examination and reports of symptomatology. Therefore, Dr. Rauzzino concluded that Claimant does not have any left upper extremity impairment. Dr. Rauzino did state that if one was to give Claimant a Table 53 diagnosis, then that diagnosis and range of motion would be appropriate per workers' compensation, but there would not be impairment relatable to the left upper extremity. Dr. Rauzinno also discussed the apparent change in MRI findings between the first MRI of April 15, 2015 and the second MRI of November 13, 2015. Dr. Rauzino indicated that:

> I have reviewed the first MRI of the cervical spine done at Denver Integrated Imaging South and the follow up MRI done at Health Images later that year. Both studies suggest chronic degenerative changes without acute-structural injury to the cervical spine. The initial MRI dated 04/15/15 was remarkable for a left C5-6 disc-osteophyte complex with foraminal stenosis and at C3-C4 a broad-based disc-osteophyte complex with left foraminal stenosis. At the

> conclusion of the report, C5-C6 was not noted specifically. It appears that the treating providers ran with the dictated conclusion of the report which indicated disease at C3-C4 and did not note the pathology present at C5-C6. This is chronic degenerative change and not acute injury.

67. The ALJ finds that based on Dr. Rauzzino's opinion, there was little difference between the first MRI and the second MRI.

68. At hearing, Dr. Cebrian testified that Claimant is not entitled to an impairment rating. He also testified that Dr. Gray erred and misapplied the AMA Guides in providing Claimant a 3 percent impairment rating pursuant to Table 12 for a left upper extremity C6 radiculopathy. Dr. Cebrian testified that in order to assign impairment pursuant to Table 12, Claimant must have a specific diagnosis and objective pathology that correlates with the diagnosis. According to Dr. Cebrian, Dr. Gray documented in his examination that Claimant had a normal neurological examination of his left upper extremity because he had normal sensation and normal muscle strength. Therefore, according to Dr. Cebrian, Dr. Gray erred by assigning an impairment rating for a neurological impairment of the left upper extremity.

69. Respondents failed to overcome the opinion of the DIME physician, Dr. Gray.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Principles

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), *supra*.

The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimant nor in favor of the rights of respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence

that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Overcoming the Division IME

Maximum Medical Improvement

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000).

In this case the Division Examiner, Dr. Gray, placed Claimant at MMI on August 1, 2016. As found, after Claimant was placed at MMI by Dr. Cedillo on July 23, 2015, Claimant started treating with Dr. Zaryanov, a surgeon, and Dr. Reusswig, a pain specialist. First, Claimant underwent a surgical evaluation by Dr. Zaryanov. Since Claimant was not thought to be a surgical candidate at that time, Dr. Zaryanov referred Claimant to Dr. Reusswig for injections. The injections were for diagnostic and therapeutic purposes. The injections continued until approximately January of 2016. Once the injections stopped, Dr. Reusswig and his Physician Assistants were managing Claimant's pain with narcotics. Claimant's narcotic treatment was difficult. There were signs of narcotic abuse. Claimant ran out of his narcotic medication on a number of occasions. In addition, some of Claimant's urinalyses' have been negative. Whether the

negative urinalysis' demonstrates Claimant used too much and ran out of medication early or was diverting his narcotics is unknown.

Regardless, on June 23, 2016, Dr. Reusswig's Physician Assistant was considering sending Claimant to a psychologist to determine whether Claimant was a good candidate for continued opiate treatment. Then, Claimant returned to Dr. Reusswigg's Physician Assistant, Mr. Shankland, for an evaluation on August 1, 2016. At that time, there was to be no change in Claimant's medication. Mr. Shankland also noted that Claimant appeared to be using the medication appropriately and without evidence of misuse or diversion. There was no mention of referring Claimant to a psychologist to determine if he was a good candidate for opiate treatment. Therefore, Claimant was receiving treatment that was intended to cure and relieve Claimant from the effects of his work accident up through August 1, 2016. Therefore, it was reasonable for Dr. Gray to determine Claimant reached MMI on August 1, 2016.

Respondents contend Claimant reached MMI on July 23, 2015 as found by Dr. Cedillo, Cebrian and Dr. Rauzinno. However, the evidence presented through these doctors is merely a difference of opinion regarding the date Claimant reached MMI. Their opinions do not constitute clear and convincing evidence demonstrating Dr. Gray is wrong about the date of MMI. Therefore, this ALJ concludes that Claimant reached MMI on August 1, 2016.

Impairment Rating

A DIME physician must apply the AMA Guides when determining the Claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the Claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

In this case, Dr. Gray provided Claimant a 17% whole person impairment rating. The rating is comprised of three components. The first component is the Table 53 rating. Dr. Gray provided Claimant a 6% Table 53 IIC rating, for "Specific Disorders" due to Claimant's cervical spine injury with degenerative changes considered to be associated with the left upper extremity C6 radiculopathy. Respondents failed to present clear and convincing evidence demonstrating Dr. Gray erred by providing Claimant a 6% rating pursuant to Table 53 IIC. Even Dr. Rauzino, Respondent's IME, indicated that one could provide Claimant a rating pursuant to Table 53. The ALJ is aware that Dr. Cebrian is of the opinion that Claimant merely suffered a temporary aggravation of his preexisting condition and returned to baseline with no impairment on July 23, 2015 and that Claimant's current complaints and symptoms are not related to the industrial accident. This ALJ, however, does not find Dr. Cebrian's opinion to be persuasive. As found, Dr. Hughes provided a reasonable explanation as to why Claimant's initial EMG was negative and second EMG was positive. In addition, Dr. Rauzzino provided a reasonable explanation for why there appeared to be a difference between the first MRI and the second MRI. Therefore, Dr. Gray properly followed the AMA Guides in providing Claimant a 6% Table 53 IIC rating and the Respondents have failed to overcome this portion of his rating by clear and convincing evidence.

The second component of the impairment rating is range of motion. Dr. Gray provided Claimant an 8% rating for range of motion deficits. Again, even Dr. Rauzzino stated that if a Table 53 rating is provided, Claimant would be entitled to a rating for any decreased range of motion. The issue in this case regarding Claimant's range of motion is whether the rating accurately reflects Claimant's decreased range of motion when compared to the surveillance video of Claimant. The surveillance video, for the most part, shows Claimant moving his neck freely and fluidly without any indication of a neck problem. However, the surveillance of Claimant after the minor motor vehicle accident on October 4, 2016 does not show Claimant moving his neck as freely as the other motorist or police officer. In addition, there was no credible testimony offered at hearing, which rose to the level of clear and convincing evidence, indicating that the range of motion demonstrated by Claimant during the surveillance showed Claimant having more range of motion than what was measured and rated by Dr. Gray. There was testimony that Claimant had pain behaviors during various examinations and appeared different when being evaluated, but no one provided credible and persuasive

evidence which rose to the level of clear and convincing evidence that the video showed Claimant exceeding the range of motion measured by Dr. Gray.

The focus for this ALJ is whether Dr. Gray properly followed the AMA Guides in evaluating Claimant's range of motion. Although some measurements obtained by Dr. Gray were not valid, Dr. Gray ultimately got valid range of motion measurements as required by the AMA Guides. Therefore, Dr. Gray properly followed the AMA Guides in measuring Claimant's decreased range of motion and providing an 8% rating for Claimant's decreased range of motion. Thus, Respondents have failed to overcome this portion of Dr. Gray's rating by clear and convincing evidence.

The third component of the rating is the neurologic component for loss of sensation with or without pain regarding Claimant's left upper extremity due to any radiculopathy. In this case, Dr. Gray determined Claimant had a C6 radiculopathy causing decreased sensation with or without pain and was entitled to a 3% rating pursuant to Table 12 and Table 10 of the AMA Guides.

Dr. Rauzzino indicated in his report that Claimant is not entitled to a Table 12 and Table 10 rating because the Claimant "does not have neck pain that specifically radiates in a C6 distribution into his thumb and index finger. Dr. Cebrian provided a similar opinion.

The AMA Guides provide at page 41 the method that must be followed when providing an impairment rating for radiculopathy. The AMA Guides do not require the Claimant's radicular symptoms to follow a "specific" C6 distribution. The method provides:

> It is necessary for the physician to establish as accurately as possible the anatomic distribution of sensory and motor loss and verify that the distribution relates to a specific peripheral spinal nerve or nerves before determining the percentage of permanent impairment. The diagnosis is based firmly on the patient's signs and symptoms. The physician should take a complete history, do a thorough medical and neurological examination, and use appropriate laboratory aids to characterize the pain, discomfort, and loss of sensation occurring in the areas innervated by the affected nerve, and to determine the degree of muscle power and find motor control that has been lost.

As stated, the AMA guides do not require the examiner to determine the dermatomal pattern with exact specificity. The AMA Guides require the physician to determine "as accurately as possible the anatomic distribution of sensory and motor loss and verify that the distribution relates to a specific peripheral spinal nerve or nerves before determining the percentage of impairment." It seems that the AMA Guides recognize that not all injuries will follow a classic anatomical distribution and there is some discretion or judgment involved in determining whether to rate a decrease in sensation or pain due to radicular symptoms that radiate into an upper extremity.

In this case, it appears Dr. Gray relied on the information contained in Claimant's medical records and on his physical examination to conclude that Claimant has a ratable impairment under Table 10 and Table 12 of the AMA Guides. For example, Claimant complained of left upper extremity sensory symptoms that radiated into this left upper extremity. In addition, Dr. Lesnak determined Claimant had radicular symptoms that appeared to follow a C6 distribution. Dr. Reusswig also stated on October 1, 2015 the Claimant had some intermittent numbness in the left C6-7 dermatomes. In addition, the November 13, 2015 MRI demonstrated a small left paracentral disc protrusion and endplate osteophyte at the C5-6 level. Lastly, Claimant underwent an EMG on December 1, 2015 which was abnormal and was consistent with a mild C6 radiculopathy.

In this case, Dr. Gray determined Claimant had signs and symptoms of a C6 radiculopathy which were rateable, even though Claimant's sensory and strength findings were normal when he evaluated Claimant. There is merely a difference of opinion as to whether Claimant is entitled to the 3% rating for his left upper extremity symptoms under the AMA Guides. Respondents have also failed to overcome this portion of the impairment by clear and convincing evidence rating as well.

Therefore, Respondents have failed to overcome Dr. Gray's opinion by clear and convincing evidence.

Authorized Medical Providers

Authorized providers include those medical providers to whom Claimant is directly referred by the employer, as well as providers to whom an ATP refers Claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). If an ATP refers Claimant to Claimant's personal physician based on the mistaken conclusion that a particular condition is not work related, the referral may be considered valid because the risk of mistake falls on the employer. *Cabela v. industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. No. 07CA2528, November 13, 2008). Whether an ATP has made a referral in the normal progression of authorized treatment is normally a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

This case is very similar to the facts in *Cabela*. In this Case, Dr. Cedillo referred Claimant to his personal physician under the mistaken belief that Claimant did not suffer a work related injury. After Dr. Cedillo referred Claimant to his personal physicican for his neck condition, Claimant went to his personal physician, Dr. Flannigan, for treatment of his neck condition. Thereafter, Dr. Flannigan referred Claimant to Dr. Zaryanov and Dr. Zaryanov referred Claimant to Dr. Reusswig. Then, Judge Broniak determined Claimant did suffer a work related injury to his cervical spine. Judge Broniak found that Claimant aggravated his pre-existing cervical spine condition. Therefore, Drs. Flannigan, Zaryanov and Dr. Reusswig are authorized providers.

However, the issue as to whether all of the treatment provided by Drs. Flannigan, Zaryanov, or Reusswig was reasonable, necessary, and related was not before this ALJ.

Change of Physician

Claimant requested a change of physician to Drs. Zaryanov and Dr. Reusswig. Because both doctors are authorized, this issue is moot.

Temporary Disability Benefits

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

In this case, Claimant was laid off from his employment in March of 2016. Then, on May 26, 2016, Claimant was provided work restrictions, through Dr. Reusswig, which precluded Claimant from lifting more than 20 pounds. The restrictions also precluded Claimant from doing activities which would require flexion and extension of his neck. Claimant's job duties required him to lift more than 20 pounds and also required flexion and extension of his neck. In addition, Claimant testified that his neck condition hindered his ability to perform his regular job. Therefore, Claimant's work restrictions precluded Claimant from performing his regular work duties during the time period at issue and contributed to his wage loss.

This ALJ is aware that a return to full duty by the attending physician can be a bar to temporary disability benefits. However, as found by Judge Broniak and this ALJ Dr. Cedillo did not release Claimant to full duty. Dr. Cedillo testified that even though he indicated in writing that Claimant was released to full duty, he conveyed restrictions to the employer and the employer abided by the restrictions. Therefore, this ALJ concludes that Dr. Cedillo did not release Claimant to full duty.

In addition, there may be more than one "the attending physician." *Popke v. Industrial Claim Appeals Office, supra*. If there is a conflict between the attending physicians concerning whether or not Claimant has been released to full duty, the ALJ may resolve the conflict as a matter of fact. *See Bestway Concrete v. Industrial Claim Appeals Office,* 984 P.2d 680 (Colo. App. 1999); *Burns v. Robinson Dairy, Inc.,* 911 P.2d 661 (Colo. App. 1995) (concerning physician's release to regular employment).

This ALJ concludes that Dr. Reusswig is one of the attending physicians. This ALJ also concludes that Dr. Reusswig issued new work restrictions on May 26, 2016, which was after Claimant was laid off. These new restrictions precluded Claimant from performing his regular job and contributed to his wage loss.

Therefore, Claimant is entitled to temporary disability benefits from May 26, 2016, the date new restrictions were issued, until he was placed at MMI on August 1, 2016.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have failed to overcome the Division IME of Dr. Gray regarding MMI and Impairment.

2. Claimant reached MMI on August 1, 2016.

3. Claimant sustained a 17% whole person impairment rating of his cervical spine.

4. Drs. Zarryanov and Reusswig are authorized providers.

5. Claimant is entitled to TTD from May 26, 2016 to August 1, 2016, less any applicable offsets.

6. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor,

Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 5-22-17

_____

Glen B. Goldman
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant proved by a preponderance of the evidence that she sustained a functional impairment beyond the arm, at the shoulder, so as to justify conversion of the scheduled impairment rating to whole person impairment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a licensed psychiatric technician. Claimant works with people who have developmental disabilities.

2. On August 30, 2015 the Claimant sustained a compensable injury to her left shoulder while performing work as an employee for Employer.

3. The Claimant credibly testified at hearing, that she had no left shoulder symptoms, pain complaints or work restrictions prior to her compensable injury of August 30, 2015. This testimony was consistent with the medical records.

4. On August 31, 2015, following her admitted industrial injury, the Claimant reported to authorized treating physician ("ATP") John P. Ogrodnick, M.D., at SCL Physicians – Wheat Ridge, who recorded a present history of illness as follows, which written history was consistent with the Claimant's testimony:

> This 35 year old female reports sitting at her desk yesterday when a resident at WRC came up behind her and started touching her. She use her feet to push off the counter and stand up. She had to push the adult male away from her and gained some distance by getting behind the counter. The resident then reached over and grabbed her lanier which is designed to break off and it did. Finally the resident threw a computer at her. Coworkers intervened and she stepped out of the facility. It was outside that she noticed a sharp left shoulder pain. She finished her shift and presented to Lutheran ER where shoulder x-rays were negative. She went home and took some Tylenol.

See Claimant's Submission Tab 5, Bate Stamp ("BS") 15-16.

5. The Claimant continued to treat with ATP Ogrodnick prior to surgery with ATP William J. Ciccone, M.D., on May 5, 2016.

6. Prior to the surgery the Claimant had consistent complaints of pain at 4/10 in her anterior left shoulder (see Tab 5, BS 24), pain with "left shoulder abduction" (see Tab 5, BS 28), and pain when waking is getting worse at night. See Claimant's Submission Tab 5, BS 30.

7. Prior to authorizing surgery, Respondent retained the services of Stephen D. Lindenbaum, M.D., to opine on whether the surgery requested by ATP Ciccone was appropriate and Respondent's retained expert Lindenbaum gave the opinion that:

> 1. What injuries if any did the claimant sustain in the accident in the injury of August 2015?
>
> The answer to that is I think she sustained an injury to her left shoulder that has presented as an impingement syndrome. This would involve damage to the tendons of the shoulder which has been documented both on a clinical exam as well as MRI**.**
>
> * * *
>
> 3. Is the proposed surgery reasonable, necessary, and related to the claimant's work injury of August 30, 2015?
>
> The answer to that question is yes. I think this patient has shown evidence of impingement which occurred based on the history from the incident of August 2015. It think the surgery is reasonable based on the fact the patient was having continued pain with activity of overhead or away from her body.

See Claimant's Submission Tab 7, BS 108 (Emphasis added).

8. On May 5, 2016 the Claimant underwent left shoulder surgery, which surgery included:

    1. Left shoulder impingement.
    2. Arthroscopic distal clavicle resection.

See Claimant's Submission Tab 6, BS 82.

9. The Claimant retained the services of Ronald Swarsen, M.D., who testified and colored in on Demonstrative Exhibit 12 what portions of the shoulder anatomy were addressed by the surgery which occurred on May 5, 2016.

10. Following the Claimant's surgery, her symptoms improved but remained in the left shoulder area, both posteriorly and anteriorly.

11. On May 18, 2016 the initial physical therapy reports from SCL Physicians – Wheat Ridge indicate that the Claimant had muscular tightness on her left shoulder in the pecs and at the area of incision. *See* Claimant's Submission Tab 8, BS 110.

12. On May 20, 2016 the physical therapist at SCL Physicians noted that the Claimant was "a little sore" and that she "attempted to sleep in bed and rolled over on it." *See* Claimant's Submission Tab 8, BS 113.

13. On May 24, 2016 the physical therapist at SCL Physicians noted that the only comfortable way for the Claimant to sleep was on her right side. *See* Claimant's Submission Tab 8, BS 114.

14. On May 31, 2016 following surgery with ATP Ciconne, the Claimant was still reporting having constant 4/10 left shoulder pain, mostly anterior. *See* Tab 5, BS 37.

15. On June 8, 2016 the Claimant reported to physical therapy complaining of stiffness in her left shoulder. *See* Claimant's Submission Tab 8, BS 116.

16. On June 21, 2016 ATP Ciconne requested 8 more therapy sessions and ATP Ogrodnick discussed with the Claimant "the potential adverse ramifications of permanent restrictions, including loss of employment." *See* Claimant's Submission Tab 5, BS 40. During the visit the Claimant described her pain as 3/10 "constant left anterior shoulder pain" and indicated that she now can "sleep on the left side as long as it is at a slight angle." *See* Claimant's Submission Tab 5, BS 37.

17. On August 25, 2016, at the direction of ATP Ogrodnick, the Claimant was evaluated by ATP Nirav R. Shah, M.D., for the ongoing pain in her left shoulder who noted:

> Antoinette is a new patient in the clinic today being seen for her left shoulder pain which began on 8/30/15 when she was grabbed on the shoulder and forcibly pushed down at work. She visits today as a referral from Dr. Ogrodnick.
>
> * * *

> The shoulder pain is characterized as a dull aching. The shoulder pain is described as being located in the proximal arm. The shoulder pain is aggravated by overhead activity and lifting. Relieving factors include physical therapy.
>
> * * *
>
> The patient is a 36 year old female who presents for a Recheck of Shoulder pain. The course has been recurrent. The shoulder pain is mild to moderate (4/10). The shoulder pain is characterized as a dull aching. The shoulder pain is described as being located in the proximal arm. The shoulder pain is aggravated by physical activity and any movement. Relieving factors include subacromial cortisone injection temporarily.

See Claimant's Submission Tab 9, BS 132 and136 (Emphasis added).

18. On September 22, 2016 ATP Shah noted:

> Antoinette returns to the office today for follow up on her left shoulder pain. She received a cortisone injection at her last visit on 9/8/16.
>
> The patient is a 36 year old female who presents for a Recheck of Shoulder pain. The course has been without change. The shoulder pain is mild to moderate (4/10). The shoulder pain is characterized as a dull aching. The shoulder pain is described as being located in the proximal arm and deep posterior. The shoulder pain is aggravated by any movement. Relieving factors include medications (cortisone injection x 1 day).
>
> * * *
>
> Exam and diagnosis was again discussed with the patient and her husband and all questions answered. Both cortisone injections provided some temporary relief of pain. Previous MRI was concerning for potential labral pathology. Options discussed. Recommend MRI arthrogram to evaluate further.

See Claimant's Submission Tab 9, BS 138-139 (Emphasis added).

19. On October 13, 2016 ATP Shah noted:

> The patient is a 36 year old female who presents for a Recheck of Shoulder pain. The course has been without change. The shoulder pain is mild to moderate. The shoulder pain is characterized as a sharp stabbing. The shoulder pain is described as being located in the deep posterior, deep anterior and left shoulder. The shoulder pain is aggravated physical activity and any movement. Relieving factors include rest and medication. Previous medication use has included Cortisone injections intra-articular and Cortisone injections extra-articular.

See Claimant's Submission Tab 9, BS 140 (Emphasis added).

20. On November 3, 2016 ATP Ogrodnick noted:

> Antoinette Garcia-Bates is a 36yr female who reports she has been back to full duty and her symptoms have not worsened. Somedays after her shift she is sore. The most challenging part of job is reaching up shelves to grab medications. She only needed three ibuprofens over past week. She would like to stay in full duty and make this her last visits to clinic.

See Claimant's Submission Tab 5, BS 59 (Emphasis added).

21. On November 3, 2016 ATP Ogrodnick assigned a 17% left upper extremity impairment rating which converted to a 10% whole person impairment rating.

22. On November 17, 2016 Respondent filed a Final Admission of Liability which accepted ATP Ogrodnick's impairment rating and denying maintenance medical care. *See* Claimant's Submission Tab 3, BS 4-11.

23. On December 6, 2016 the Claimant filed a Response to the Final Admission of Liability noting the Claimant:

> [H]ereby accepts the rating of permanent medical impairment stated in the Final Admission of Liability dated November 17, 2016, but maintains it is not an extremity impairment but rather a whole person impairment based upon the situs of functional impairment . . .

See Claimant's Submission Tab 4, BS 12.

24. At hearing Claimant contended that she was not challenging the impairment rating assigned by ATP Ogrodnick, but maintained the situs of functional impairment reflected it should be a whole person impairment rating.

25. At Claimant's request, Dr. Ronald Swarsen performed a medical records review and testified at hearing. Dr. Swarsen testified that the May 5, 2016 surgery consisted of an arthroscopic incision, a subacromial decompression and a distal clavicle resection. He also testified from the operative report found at Claimant's Submission Tab 6 BS 82, and highlighted the surgical procedures performed on Demonstrative Exhibit 12.

26. Dr. Swarsen stated the Claimant's current complaints of ongoing pain are consistent with the surgical procedures she underwent. Dr. Swarsen testified it is common for patients that have shoulder surgery, such as the Claimant, to develop pain in the shoulder joint and it is consistent with what the Claimant describes. Dr. Swarsen stated that pain is subjective but can affect function.

27. Dr. Swarsen also credibly testified and explained that the surgery which the Claimant underwent with ATP Ciccone "where to structures above the glenohumeral joint" where the bones of the arm join the torso.

28. Dr. Swarsen explained that all surgical repairs made to the Claimant's rotator cuff were proximal to the glenohumeral joint. The surgery also involved the clavicle. Dr. Swarsen believed, and the Judge agrees, that the shoulder is not part of the upper extremity, although one aspect of the functional impairment at the shoulder is measured by arm motion.

29. The Claimant credibly testified the pain limits her in performing various motions including overhead lifting, driving and dressing.

30. Based on the credible testimony of Dr. Swarsen and the Claimant, as well as the medical records, the Claimant's functional impairment extends beyond the arm at the shoulder.

31. The ALJ finds that pain and discomfort caused by the industrial injury and consequent surgery caused functional impairment of structures beyond Claimant's arm at the shoulder. This functional impairment manifests itself as pain and discomfort and it impairs the Claimant in performing various movements including overhead lifting.

32. The Claimant proved it is probably more true than not that she sustained functional impairment beyond the arm at the shoulder and is entitled to an award of permanent partial disability benefits based on ATP Ogrodnick's rating of 10% whole person. The Claimant stated that she experiences pain in the front anterior portion of the shoulder between the joint and the neck, in

the area on the front of her chest between the shoulder and the neck and in the area of the shoulder joint when she moves the arm in various planes.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

B. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' compensation case is decided on its merits. Section 8-43-201. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. Claimant argues that Dr. Ogrodnick's rating of 17 percent of the left upper extremity should be converted to its whole person equivalent of 10 percent. The ALJ agrees with this contention.

D. Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If Claimant sustains an injury not found on the schedule § 8-42-107(1)(b), C.R.S., provides Claimant shall "be limited to medical impairment benefits as

specified in subsection (8)," or whole person medical impairment benefits. As used in these statues, the term "injury' refers to the part of parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996).

E. Under this test, the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit the claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002). Moreover, the AMA Guides' definitions of the "upper extremity" and the arm and torso do not dictate the "situs of the functional impairment." *Langton v. Rocky Mountain Health Care Corp.,* 927 P.2d 883 (Colo. App. 1996); *Lovett v. Big Lots,* W. C. No. 4-657-285 (ICAO November 16, 2007).

F. Section 8-42-107(2)(a), C.R.S., provides for scheduled compensation based on "loss of an arm at the shoulder." Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c). Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001), *Johnson-Wood v. City of Colorado Springs, supra.*

G. The ALJ concludes Claimant sustained functional impairment beyond the arm at the shoulder and is entitled to the converted 10 percent whole person impairment rating assigned by ATP Ogrodnick. Claimant has proven that she sustained injury to structures beyond the arm at the shoulder, and that these injuries have caused ongoing pain that impairs the function of parts of the shoulder located proximal to the arm at the shoulder. The impairment consists primarily of pain in the front and back of the shoulder that limits Claimant's ability to move the arm in various motions, including overhead lifting.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. It is therefore ordered the insurer shall pay permanent partial disability benefits based on upon a 10% whole person impairment rating.

2. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

3. Any issues not determined in this decision are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: 5-23-17

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that her condition has worsened warranting reopening under § 8-43-303(1), C.R.S.

- If Claimant proved a worsening of condition, was the surgery performed by ATP orthopedic surgeon (Brian White, M.D.) reasonable, necessary, and related?

- Whether the Claimant has shown that she is entitled to temporary disability from the date of filing of the Petition to Reopen on March 22, 2016, ongoing.

- Whether sanctions should be imposed against Claimant for spoliation of evidence.

PROCEDURAL STATUS

On May 4, 2017, Claimant filed a Motion for Corrected Order. Claimant requested the Findings of Fact, Conclusion of Law and Order be amended to include grant of the Petition to Reopen in the Order section. Respondents filed their Response, arguing that Corrected Order was not necessary. The Motion is granted, as the ALJ found Claimant's condition worsened..

FINDINGS OF FACT

1. Claimant suffered an admitted right hip injury on October 28, 2010 while working for Employer. A baggage cart pinned Claimant against a belt loader and she suffered injuries to her right hip and lower extremity.

2. Claimant has been treated by doctors at OccuMed Colorado ("Occumed") throughout the claim, including John J. Raschbacher, M.D., Greg Smith, D.O. and Jonathon Bloch, D.O.

3. Claimant received extensive treatment for the right hip injury, including four (4) surgeries. The first surgery was an arthroscopic labral repair, acetabuloplasty and femoral osteoplasty performed by Derek Johnson, M.D. on May 18, 2011.

4. On May 30, 2012, Claimant was initially evaluated by Brian White, M.D. On examination, she had significant pain with the anterior impingement maneuver on the right side. The x-rays showed evidence of reactive Cam morphology on the proximal femur. Dr. White's assessment was incomplete healing of labral repair, with

some residual impingement and potentially early avascular necrosis. The ALJ noted this was an indication that the avascular necrosis developed following the arthroscopy, suggesting a causal link. He postulated that Claimant's pain was coming from the incomplete healing of her labral repair. He referred Claimant to Cynthia Kelly, M.D.

5. On July 11, 2012, Claimant was re-evaluated by Dr. White, whose assessment was avascular necrosis, with failed previous hip arthroscopy and residual impingement. Dr. White noted Dr. Kelly would proceed with the avascular necrosis procedure, to be followed by the hip arthroscopy and femoracetabular osteoplasty and labral reconstruction.

6. The second procedure was a right femoral head decompression and attempted vascularized free fibula flap performed by Cynthia Kelly, M.D. on October 12, 2012. This procedure was done to address osteonecrosis of the right femoral head. This procedure could not be completed because the blood vessels were different sizes.

7. On January 24, 2013, Dr. White performed a third procedure, which was a revision-right hip arthrosopy, including acetabular rim trimming, labral reconstruction and injection of platelet rich plasma.

8. After her third surgery, Claimant underwent a course of physical therapy ("PT") and was followed by the physicians at Occumed. Dr. White evaluated Claimant at regular intervals.

9. On January 8, 2014, Dr. White evaluated Claimant for a follow up visit. On examination, he noted that Claimant's overall range of motion was good, but painful, particularly with both internal and external rotation. A review of the x-rays showed no evidence of progression of the avascular process, however, there was cloudiness to the femoral head. Dr. White's assessment was failed revision hip arthroscopy, as well as a vascular salvage procedure. Claimant was noted to have progressive pain. Dr. White did not think there was much to be done for Claimant, with the most efficient treatment being a total hip replacement. He described this procedure as sub optimal given her age. Claimant testified that they discussed the total hip replacement, but Dr. White didn't want her to have this procedure at age 30.

10. On April 20, 2015, Claimant was evaluated by Douglas Scott, M.D. At the time, she noted her right hip popped and was painful. She also had pain in her left hip because she favored her right hip. Dr. Scott prepared a comprehensive review of Claimant's treatment records. On examination, right hip flexion was limited by pain to 100° and right hip abduction was decreased compared to the left. Right hip adduction and extension were also decreased compared to the left, as was external rotation. Dr. Scott commented that in many respects Claimant appeared to have failed surgical treatment of her right hip condition. She had partly failed to respond to therapeutic measures and he opined she needed a full psychological assessment before proceeding with any type of further surgical procedures.

11. In Dr. Scott's opinion, Claimant's condition was probably stable and it was appropriate to consider whether she was at MMI. He recommended Claimant be referred to a 24 month Division IME to address MMI, ratable impairment, maintenance treatment, whether a total hip arthroplasty was reasonable and necessary; an evaluation of the ongoing prescription-pain medication and benzodiazepamines, as well as whether continued massage therapy was reasonable and necessary. The ALJ noted Dr. Scott, at least in this report, did not offer a definitive opinion regarding whether Claimant was at MMI or whether a total hip replacement, reasonable and necessary and related to the injury.

12. Dr. Scott issued an addendum report on May 23, 2015.[1] He opined Claimant had reached maximum medical improvement and her hip was stable. He believed she had probable permanent medical impairment of the right hip pursuant to the AMA Guides to the Evaluation of Permanent Impairment (3rd Ed. Rev.).

13. On July 7, 2015, Respondents filed a Final Admission of Liability ("FAL"), admitting Claimant had a 17% scheduled medical impairment related to her hip, as found by Dr. Bloch. However, no PPD benefits were paid, as Claimant received in excess of the $75,000.00 statutory cap. Respondents claimed an overpayment of $79,137.79 against future benefits.

14. The FAL admitted for maintenance medical benefits based upon the recommendations of Dr. Bloch. In his June 18, 2015 report[2], Dr. Bloch stated Claimant was to follow up with her surgeon as regularly scheduled, although there was no active management and really just post surgical follow-ups. Claimant was noted to continue to take reasonable amounts of narcotics and controlled benzodiazepine type substances which were to be managed by a pain management specialist.

15. Claimant returned to Dr. Smith, on September 11, 2015. She had a great deal of pain in her left hip, lumbar region and right calf, most likely due to antalgic gait. Her pain level was 6-7/10. Claimant had been experiencing these symptoms for two weeks. Dr. Smith's assessment was status post-hip reconstruction. He prescribed additional massage therapy twice a week for 4 to 6 weeks and plan to see Claimant in follow up in 3 to 4 weeks. Dr. Smith stated he did not know that he was not sure when Claimant would be at MMI, which led the ALJ to infer that he did not believe she was at MMI at the time of this appointment. On the WCM164 form, no notation was made about MMI.

16. Claimant returned to Occumed on October 5, 2015 and was evaluated by Kevin Page, PA-C. At that time, Claimant was noted to have an antalgic gait, but no detailed evaluation took place. PA-C Page thought Claimant was at MMI and should be under maintenance for pain management.

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[1] As found infra, Dr. Scott testified he issued this supplemental report upon receipt of additional medical records. However, those documents were not in the record.

[2] Dr. Bloch referred to an addendum report from the physician who performed the DIME. However, that report was not introduced into evidence.

17. Claimant returned to Dr. Smith, on October 27, 2015 and the WCM164 noted she was at MMI, with a neurological evaluation, EMG and MRI of the right leg ordered.

18. On October 27, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported ongoing pain. Dr. Bloch opined that her case required more workup including: an EMG of the right lower extremity, a repeat hip MRI for stability, a three-phase bone scan to make sure there was no CRPS, and a neuropsychological evaluation. Dr. Bloch noted he would be hard pressed to say that Claimant needed a hip replacement without any current imaging. Dr. Bloch opined that otherwise, Claimant was still at MMI and would have ongoing tests while at MMI, but should the tests show anything positive it could change the MMI status. Dr. Bloch requested referrals for Claimant to have neuropsychological testing, an MRI of her right hip, an EMG of her right leg, and massage therapy.[3]

19. On November 10, 2015 Claimant was evaluated by Dr. Bloch. Claimant reported not doing well and having increased pain. Dr. Bloch opined that Claimant was still at MMI, that he would refer Claimant for pain management, and noted that they had asked for an EMG, a repeat MRI, and a neuropsychiatric evaluation as testing post MMI to make sure that none of the findings would change Claimant's MMI status. The inference drawn from this report and the one from 10-27-15, is that Dr. Bloch questioned whether Claimant was still at MMI.

20. Evidence of Claimant's physical activity level in November 2015 was admitted at hearing. This evidence was in the form of video surveillance, which documented Claimant shopping at Costco and performing various tasks. Claimant also shoveled snow the next day. The ALJ notes this raised the question whether Claimant exaggerated her physical capabilities when she was being evaluated by physicians during this period of time. The ALJ also notes there was no evidence admitted hearing as to Claimant's exact physical restrictions during this time.

21. Claimant testified that she went to the emergency room because of pain in her hip a couple of days before the prior hearing (mid-December 2015),. Pain was radiating down the right side of her leg. Claimant testified the pain was much worse than in June 2015, when she was placed at MMI.

22. Claimant testified in the December 10, 2015 hearing before ALJ Jones that she wanted the hip replacement done to be able to stop taking pain pills and be more of a mom to her daughter.[4] Claimant also testified when the symptoms were bad, her foot would go numb, she would experience burning pins and needles and it felt like someone was taking an ice pick to her hip. She could not get comfortable.

[3] These medical benefits were denied by ALJ Jones' Findings of Fact, Conclusions of Law and Order, dated March 28, 2016-Claimant's Exhibit 7; Respondents' Exhibit A.

[4] Exhibit 13.

23. Claimant returned to Dr. White on December 23, 2015. She was described as getting progressively worse. Claimant had pain with range of motion of the hip, which did not move well. Dr. White noted nerve pain going down her distal fibula and leg. The ALJ found this was evidence of a worsening of Claimant's condition. Some narrowing was also noted on x-rays which were taken at that evaluation. Dr. White's assessment was failed revision hip arthroscopy, as well as core decompression. He stated the only option was a total hip replacement and discussed all the risks, benefits and alternatives of the surgery. The decision was made to proceed with the total hip replacement.

24. On March 22, 2016, Claimant filed a Petition to Reopen, as well as an Application for Hearing. The Petition to Reopen alleged a worsening of condition and attached the request for authorization of proposed right total hip arthroplasty.

25. Respondents scheduled a follow-up IME for June 28, 2016. Claimant failed to appear for this appointment.

26. Claimant testified she was out of town attending her daughter's graduation immediately before the appointment with Dr. Scott was set to take place. Claimant testified the letter was sent on the June 15, 2016 to her attorney's office and then sent to her the next day. The fax confirmation reflected the letter was faxed June 14, 2016. Claimant learned of the IME two hours after she was supposed to be there. Claimant testified she called her attorney's office to inquire what to do.

27. Under these facts, the ALJ determined Claimant did not engage in intentional conduct which led to her missing the appointment with Dr. Scott.

28. Claimant testified that prior to the hip replacement surgery, she was in a lot of pain. She had difficulty walking. The injection done by Dr. White provided relief, but her pain got worse after the injection began wearing off. Claimant decided to undergo the total hip replacement because her symptoms had gotten to a point that she could not tolerate.

29. On July 5, 2016, Dr. White performed a right hip total arthroplasty. In the indications for the surgery, he noted that after Claimant's initial hip arthroscopy, she developed avascular necrosis. An attempted joint salvage, with a combination of hip arthroscopy conversion to labral reconstruction, as well as cord compression was tried. A vascularized free fibula was tried, but the vessel size was not appropriate proximally for this and could not be completed. Even after these procedures, Claimant continued to have pain, although she had short-term relief from a steroid injection. The pre-operative and post-operative diagnosis was: right hip failed attempted salvage from a vascular necrosis and to hip arthroscopy, with continued hip pain, no other joint salvage solution. Claimant testified the surgery has provided her relief.

30. The ALJ credited the opinions of Dr. White, who has treated Claimant since 2012. Dr. White's records documented a worsening of Claimant's condition.

31. On August 12, 2016, letters were sent by counsel for Respondent-Insurer to Porter Hospital and ATI Physical Therapy denying liability for medical expenses from July 5-8, 2016.

32. There was no evidence in the record that Claimant was placed at MMI after the surgery.

33. On August 17, 2016, Dr. Scott reviewed additional medical records at the request of Respondents. The question posed to Dr. Scott was whether the July 5, 2016 right total hip replacement (arthroplasty) was reasonable, necessary and related to Claimant's October 28, 2010 work injury. Dr. Scott opined the July 5, 2016 right total hip arthroplasty (per the Colorado Medical Treatment Guidelines) was probably reasonable and necessary to treat Claimant's osteonecrosis of the right femur. If the osteonecrosis resulted from May 18, 2011 right hip arthroplasty and the procedure was performed to address her work injury related labral tear, then it was related to the work injury. Dr. Scott stated: if the osteonecrosis did not result from the May 18, 2011 right hip arthroplasty, it was not related to the work injury. The ALJ noted there was no evidence in the record that Claimant had a diagnosis of avascular necrosis prior to the 2011 arthroplasty. The arthroscopy caused the avascular necrosis. Based on the totality of the medical evidence, including Dr. Scott's opinion, the ALJ found the total hip arthroplasty was reasonable, necessary and related to Claimant's industrial injury.

34. Dr. Scott testified at hearing as an expert in occupational medicine. He is also Level II accredited pursuant to the WCRP. Dr. Scott stated he first examined Claimant on April 20, 2015 and issued a report. After receiving additional medical records, he opined that Claimant was at MMI, which was actually before Dr. Bloch concluded Claimant was at MMI.

35. Dr. Scott noted that since he was not able to examine Claimant on June 28, 2016, he could not determine whether there was actually a worsening of her condition. However, he reviewed the medical records and opined that there was nothing specific about March 22, 2016, which showed a worsening of Claimant's condition. This is because the doctors had previously discussed a total hip replacement with her. Dr. Scott concluded Claimant knew by the December 10, 2015 hearing that she needed a hip replacement. Dr. Scott also noted that she was taking medications, including Percocet and had continuing pain complaints and her hip. Dr. Scott characterized this process as osteoarthritis after Claimant developed avascular necrosis. Dr. Scott never testified that the avasular necrosis was not related to Claimant‘s industrial injury and the first surgical procedure. On cross-examination, Dr. Scott admitted he did not know whether Claimant had numbness and tingling down her leg\ prior to December 2015. The ALJ finds this was a new symptom.

36. Claimant's reported symptoms worsened over time, as documented by the medical records admitted at hearing.

37. Claimant's hip arthroplasty was reasonable, necessary and related to her industrial injury.

38. Claimant's hip arthroplasty was required to prevent a deterioration of her condition.

39. There was no evidence of increased work restrictions or wage loss tied to Claimant's worsening of condition. As of the date of hearing, Claimant has not worked for five years.

40. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Claimant, as well as the various health care providers, bore directly on the issue of reopening.

Reopening

Section 8-43-303(1), C.R.S. authorizes an ALJ to reopen any award within six years after the date of injury on a number of grounds, including error, mistake, or a change in condition. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). A change in condition refers either "to a change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury". *Chavez v. Industrial Comm'n*, 714 P.2d 1328, 1330 (Colo. App. 1985).

The reopening authority granted ALJs by § 8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ". *Cordova v. Industrial Claim Appeals Office*, 55 P.3d at 189. The party seeking reopening bears "the burden of proof as to any issue sought to be reopened". § 8-43-303(4), C.R.S.

The medical evidence before the Court led to the conclusion that Claimant's symptoms worsened after MMI. As a starting point, the evidence established her 2011 hip arthroscopy did not resolve her symptoms. (Finding of Fact 3). Dr. White described this as "incomplete healing" of her labral repair. (Finding of Fact 4). The evidence also showed Claimant developed avascular necrosis a short time after the first surgery and required surgery performed by Dr. Kelly. (Findings of Fact 4-6). The ALJ concluded the avascular necrosis developed as a result of the injury and the initial surgery because of its proximity in time, the inferences drawn from the medical records and the lack of contrary evidence. (Finding of Fact 33).

Claimant then underwent two surgical procedures to try to resolve the avascular necrosis, which were not successful and her symptoms persisted. (Findings of Fact 3 and 6). Claimant underwent a further surgery, a revision right hip arthroscopy. (Finding of Fact 7). However, she continued to have right hip symptoms, which continued through the determination of MMI. Evidence of Claimant's worsening condition post-MMI was admitted at hearing. Dr. Smith noted worsening symptoms on September 11, 2015. (Finding of Fact 15). Additional evidence of increased came in the form of Dr. Bloch's evaluations on October 27, and November 10, 2015 wherein Dr. Bloch raised the issue of whether Claimant remained at MMI. (Findings of Fact 18-19).

As found, Claimant then returned to Dr. White, who noted worsening of symptoms, including radiating pain down the right leg. (Finding of Fact 23). He performed an injection, which provided symptom relief. Claimant experienced a recrudescence of the symptoms after the injection was performed. The ALJ credited Claimant's testimony that her pain was worsened, which necessitated a trip to the emergency room.

In coming to this conclusion, the ALJ considered Respondents' contention that the medical evidence of worsening was simply based on Claimant's subjective report of increased symptoms. Respondents urged the ALJ to find Claimant not to be credible as

a witness with regard to pain complaints, pointing to the video evidence before the Court. Respondents also cited the determination previously made by ALJ Jones with regard to Claimant's credibility.

The ALJ declines to reach the conclusion that because Claimant did not credibly report her symptoms, there was insufficient evidence of a worsening of condition. As noted above, physicians including Drs. Bloch, Smith, and White made treatment recommendations based upon Claimant's report of symptoms. In addition, there was objective evidence of avascular necrosis, which ATPs identified as a cause of Claimant's symptoms. This led to treatment these ATPS provided to Claimant. Ultimately this resulted in the surgical recommendation made by Dr. White. The conclusion to be drawn from the various doctors' recommendations is that they were concerned about a worsening of Claimant's condition. Furthermore, Claimant's testimony supports the conclusion that her condition had worsened. She had previously declined to undergo an arthroplasty, however, her symptoms reach the point that she opted for this procedure.

Therefore, based on the evidence before the ALJ, including the foregoing medical records and Claimant's testimony, Claimant met her burden of proof and established her condition worsened.

Medical Benefits

Whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). In order to determine this question, the ALJ considered whether Claimant was no longer at MMI and, thus the total hip replacement was treatment to cure and relieve the effects of Claimant's industrial injury or whether this was post-MMI treatment to prevent deterioration of Claimant's condition. The ALJ determined this condition fell within the latter category. First, there was no evidence in the form of a report from an ATP which conclusively said Claimant was no longer at MMI.

Second, surgical procedures can be considered post-MMI treatment to prevent deterioration. As found, Claimant met her burden of proving the surgery was required to prevent a deterioration of her symptoms. As the Colorado Court of Appeals articulated in *Milco Construction v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992):

> "If the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury, or to prevent deterioration of the Claimant's present condition. "

Milco Construction v. Cowa, supra, was followed by *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995), which reaffirmed the principle that a particular course of treatment can be ordered following MMI to prevent

deterioration of Claimant's condition. See also *Sanchez v. Lafarge Corporation,* 2004 WL 1944689 (ICAO August 27, 2004).

Here, substantial evidence supported the conclusion that the hip replacement was required to prevent the deterioration of Claimant's condition. As found, the surgical recommendation was made after Claimant had reached MMI, but Dr. White was not initially inclined to recommend the procedure and Claimant followed that recommendation. (Finding of Fact 23). Claimant's symptoms worsened as reflected the medical records, including a new symptom of radiating pain down the right leg. This culminated in Claimant undergoing the total hip arthroplasty.

The ALJ notes that Dr. Scott's testimony at hearing did not refute that the hip replacement surgery was reasonable and necessary. Dr. Scott also noted in his August 17, 2016 report that if the avascular necrosis resulted from May 18, 2011 right hip arthroplasty and the procedure was performed to address her work injury related labral tear; then it was related to the work injury. The ALJ concluded there was a causal relationship between the arthroscopy and Claimant's development of avascular necrosis. The medical evidence showed that Claimant underwent treatment, including surgeries, because of the failed labral repair.

She ultimately underwent the total hip arthroplasty because of her continued symptoms. Thus, the ALJ concluded the medical evidence admitted at hearing supported the conclusion the hip replacement was required to prevent further deterioration of Claimant's condition. Respondents are liable for said treatment.

Temporary Total Disability

Claimant alleges she is entitled to TTD benefits as a result of her worsened condition. In *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997), the Court held that in order to receive TTD benefits after reopening based on a change of condition, the Claimant must show increased restrictions that result in "greater impact on the Claimant's temporary work capacity than he had originally sustained as a result of the" industrial injury. 954 P.2d at 639-640.

The question of whether Claimant proved a worsened condition and whether this caused increased impairment of earning capacity presents a question of fact for the ALJ. *Giammarino v. Contemporary Services Corp.,* W.C. No. 4-546-027 (ICAO November 22, 2006). There is no requirement that Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). However, the ALJ may consider whether the worsened condition has resulted in the imposition of additional medical restrictions. *Giammarino v. Contemporary Services Corp., supra.*

In the case at bench, the ALJ determined Claimant's condition had worsened and her testimony supported this conclusion. However, there was no evidence before the ALJ which documented Claimant's work restrictions had increased after MMI or when

the Petition to Reopen was filed. In fact, there was no evidence concerning post-MMI Claimant's restrictions in the record at all.[5] Even though Claimant was arguably restricted from work after the total hip replacement, she had not been working for five years. (Finding of Fact 38). Thus, there was no evidence which established a link between her latest surgery and a loss of wages. This lack of direct evidence of a wage loss attributable to the worsening of condition leads to the ALJ's conclusion Claimant is not entitled to wage benefits. Accordingly, the ALJ determined Claimant failed to establish an entitlement to TTD benefits as a result of the Petition to Reopen and/or worsening of condition.

Spoliation

Respondents seek sanctions for Claimant's alleged spoliation of evidence. More particularly, Respondents alleged Claimant's failure to attend the June 28, 2016 IME with Dr. Scott deprived them of the opportunity to examine Claimant before she had the total hip replacement. Respondents argued this constituted spoliation of evidence, as her condition was changed after the surgery. Response requested an adverse inference to be drawn from the claimed spoliation of evidence.

The Colorado Supreme Court articulated the legal standard for evaluating a claim of spoliation in *Aloi v. Union Pacific Railroad Corporation*, 129 P.3d 999 (2006). In that case, Plaintiff, who was a conductor, was injured when he tripped and fell while descending interior stairs on the locomotive. There was a loose rubber mat, which he identified as a tripping hazard on an engineering report. Plaintiff notified Defendant that a personal injury claim was going to be filed within one week of the accident and thus, Defendant knew a claim was going to be pursued. In the course of discovery, Plaintiff requested documents related to inspections and maintenance, however, Defendant failed to retain the relevant report, which was destroyed.

The trial court granted Plaintiff's request for an instruction to the jury that it could draw an adverse inference that the evidence contained in the missing documents was unfavorable to Defendant. The Colorado Supreme Court considered whether in order to receive the adverse instruction, the proponent had to demonstrate the evidence was destroyed in bad faith, as opposed to willfully. The Court held that it was not necessary for the trial court to make a finding that the evidence was destroyed in bad faith, rather a showing of willful conduct was required. 129 P.3d at 1003. See also W*estern Fire Truck v. Emergency One*, 134 P. 3d 570, 576 (Colo. App. 2006).

As determined in Findings of Fact 25-26, Respondents failed to make the requisite showing of willful or intentional conduct on the part of Claimant. Accordingly, the ALJ declined to draw an adverse inference against Claimant that the IME would have provided contrary evidence to the claim that her condition worsened.

[5] Dr. Bloch issued restrictions as of June 18, 2015.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is GRANTED.

2. Respondents are liable for the treatment provided by Dr. White and Porter Hospital, including the total hip arthroplasty. These shall be paid pursuant to the Workers' Compensation Fee Schedule.

3. Respondents shall provide medical benefits to Claimant through authorized treating physicians until she is released from care. These medical benefits are to be provided as post-MMI maintenance benefits.

4. Claimant's request for TTD benefits is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm

DATED: May 24, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-034-260-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 10, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 5/10/17, Courtroom 1, beginning at 1:30 PM, and ending at 4:00 PM).

Claimant's Exhibits 1 through were admitted into evidence, without objection. Respondents' Exhibits A through G were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant's opening brief was filed, electronically, on May 16, 2017. Respondents' answer brief was filed, electronically, on May 23, 2017. The Claimant waived the prerogative of filing of a reply brief. Consequently, the matter was submitted for decision on May 23, 2017. The ALJ hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern compensability of a bilateral inguinal hernia, allegedly sustained in late October 2016; and, if compensable, medical benefits, average weekly wage (AWW), temporary total disability (TTD) benefits

from December 12, 2016 and continuing, and the Respondents' right to a 100% offset for unemployment insurance (UI) benefits.

The Claimant bears the burden of proof on all issues by a preponderance of the evidence. The Respondents bear the burden of proof on entitlement to the unemployment insurance (UI) benefit offset, which they have satisfied.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds, if the claim is compensable, the period of temporary total disability (TTD) commenced on December 12, 2016 and is ongoing until terminated by law.

2. Also, if compensable, the parties stipulated, and the ALJ finds, that the Claimant's authorized treating provider (ATP) is Concentra and all those within the chain of referrals, including John Weaver, M.D., who performed the hernia repair surgery. Respondents' denied authorization of the surgery on the ground of "causal relatedness" because they were contesting compensability.

3. Prior to October of 2016, the Claimant had no ongoing symptoms or functional limitations in his bilateral inguinal groin area and he had worked, full duty, without restrictions since his date of hire by the Employer, as a roofer, on September 22, 2016 (Claimant's Exhibit Tab 4, bates stamp 10).

4. Before being hired by the Employer, the Claimant had previously been examined by another potential employer's physician in February of 2016 and was found to have no symptoms and/or hernias at that time, and he passed a "Functional Test" which included lifting 80 pounds, carrying 80 pounds 250 feet, lifting 65 pounds from 12 to 72 inches, lifting 80 pounds from 1 to 48 inches and lifting in excess of 125 pounds (Claimant's Exhibit 3, bates stamp 6-9).

5. The Claimant adamantly testified that on **October 18, 2016**, while working as a roofer for the Employer, he was carrying some light material when he tripped over several conduit pipes on a flat roof and felt a pull in his groin area. Employer time cards for the Claimant reflect that he worked at the City of Lonetree Municipal Building on October 16, 17, 19 and 20, 2016, but not on October 18, 2017 (Respondents' Exhibit E, p. 42B). Knowing what the timecards showed and did not show, the Claimant was still adamant that his injury occurred on October 18, 2016. The Claimant had no explanation for the discrepancy in the Employer's timecards. The ALJ infers and finds, under the circumstances, that Claimant would have to be mentally impaired to be adamant that the date of injury was October 18, 2016, he was lying with no reasonable

explanation for the discrepancy in the timecards, or he was **mistaken** about the actual date of the injury. Under the circumstances, the ALJ infers and finds that the Claimant was mistaken about the actual date of injury.

6. The Respondents argue that the above-mentioned discrepancy concerning the date of injury, along with a discrepancy concerning the date of the Claimant's emergency room (ER) visit, and his felony conviction for a Class 6 Felony within the last five years (a seller giving false information to a pawnbroker) [Respondents' Exhibit G—certified copy of conviction], that the Claimant's credibility has been undermined to the point that he has failed to prove that his inguinal hernia was work-related. All of the Respondents' arguments deal with collateral impeachment of credibility. The ALJ infers that the maxim, *falsus in uno, falsus in omnibus* (false in one thing, false in all) is appealing but simplistic and not always accurate. In the real world, one can lack credibility in some matters and be truthful in other matters. It is for the ALJ to sift through the credibility matters to make such determinations.

7. The ALJ finds that there are several anomalies in the Employer's time records (as more thoroughly found herein below), which confuse the matter of dates surrounding the alleged injury, when the Claimant worked, when the Claimant was terminated from employment, and when the Claimant first sought medical care

8. The Claimant stated that following his injury, he attempted to contact his Employer to obtain medical care and was unsuccessful until he reached out to the Employer's headquarters in Phoenix, Arizona, and eventually filled out an Employee's First Report of Injury (Claimant's Exhibit 5).

9. The Employer maintains that it was first notified of the Claimant's injury on November 8, 2016, when the Claimant filled out an "Employee Accident Report " (Respondents' Exhibit E, bates stamp 37-38). Steven Batt, who testified at hearing as the workers' compensation specialist for the Employer handling claims all over the nation for the Employer, filed the Employer's First Report of Injury with the State of Colorado on December 7, 2016. He maintained that the Employer was notified of the injury on October 18, 2016 and that the Employer was notified that: "EE [Claimant] not present at time of call. Caller alleges a month and ½ ago (from the December 7, 2016 date of the First Report of Injury) EE was picking up trash and moving materials when he tripped over some conduit pipes and landed on them causing a contusion to his left lower" (Claimant's Exhibit 5, bates stamp 1). The ALJ infers and finds that Batt's reference to an injury on October 18, 2016, confused the Claimant about the date of injury. There is no discrepancy in the Claimant's description of the mechanism of injury.

10. The Claimant's first and only evaluation for a hernia following his October of 2016 injury was at the ER of Denver Health and Hospitals (DHH) on November 10, 2016, where he was diagnosed with bilateral inguinal hernias. According to the Claimant, his Employer would not send him to a doctor *(*Claimant's Exhibit 8,bates stamp 17-32, specifically, bates stamp 31). The Claimant told Batt that he went to DHH on November 7—another anomaly concerning the dates.

11. the Claimant's payroll status change forms entered into evidence by the Employer, do not correspond with the Claimant's pay dates, for example the pay records reflect the Claimant worked the week of October 15, 2016 earning gross pay of $616 for 38.50 hours worked (Respondents' Exhibit E, bates stamp 42). Yet, those same payroll records indicate that the Claimant last worked on October 15, 2016 and had voluntarily resigned for "no call/no show" on that date, but was reinstated on October 20, 2016 (Respondents' Exhibit E, bates stamp 40). If the Claimant worked 38.50 hours the week of October 15, 2016, he worked on October 20, 2016. The Respondents' witness, Batt, offered no reasonable explanation for this discrepancy. Indeed, although Batts indicated that he designed the nationwide timekeeping system (he is in Phoenix, Arizona), the ALJ finds his overall testimony confusing and lacking in reliability. Indeed, the ALJ infers and finds that the payroll records received into evidence are not reliable.

. 12. The Employer's payroll status documents further reflect that on October 20, 2016 the Claimant was involuntarily terminated for "no call/no show" on October 26th, 27th and 28th which were dates after the Claimant's injury and after the Employer's form was filled out (Respondents' Exhibit E, bates stamp 39). This disconnect in the payroll records further buttresses the fact that the payroll records are **not** reliable.

The Injury

13. Despite the discrepancies in dates on both sides dates, the ALJ finds that in late October 2016 the Claimant sustained an injury to his bilateral groin area in the course and scope of employment for his Employer. On that day, he was stepping over a conduit pipe, tripped and felt a pull in his groin area. As the night progressed and time progressed over the ensuing days, his groin pain worsened.

14. The fact that the payroll records do not reflect pay on October 18, 2016, but reflect pay dates on the 19th and 20th of October is an unexplained anomaly that is not dispositive of whether the Claimant had an injury on the job. As found herein above from the Employer's own payroll status change forms dates recorded by the Employer are confusing and unreliable. For example, on one payroll date the Claimant's last day worked was October 15, 2016 and yet for that week he worked 38.5 hours, according to the Employer's payroll records The Claimant was terminated again on October 20, 2016, two days after his alleged injury of October 18, 2016 for a "no call/no show" -- six days later.

15. The Claimant's "Employee Accident Report" (Respondents' Exhibit E, as well as the Employer's First Report of Injury, are consistent in their description of the Claimant's injury, although neither document uses the same date of injury.

Average Weekly Wage (AWW)

16. The Claimant was hired by the Employer on September 22, 2016, on a verbal contract of hire, based on $16.00 an hour for a 40 hour week as a roofer. He was expected to be available to work 40 hours per week and some of the payroll records

corroborate work approximating 40 hours per week. The verbal contract of hire yields an AWW of $640, and the ALJ so finds (Claimant's Exhibit 4, bates stamp10). The Respondents argue that the Claimant's AWW should be based upon his actual earnings from the date of hire, but they did not propose an AWW. The ALJ finds that the fairest indicator of the Claimant's AWW should be based on the contract of hire and not on a mechanistic calculation, using wage records that reflect erratic and sporadic fluctuations, despite the fact that the Claimant was expected to be available to work 40 hours + per week. Consequently, the ALJ finds the Claimant's AWW is $640, which yields a TTD benefit of $426.66 per week, or $60.95 per day.

Medical

17. The Respondents' designated physicians all render the opinion that the Claimant's condition arose from work (For example, Claimant's Exhibit 9, bates stamp 39 -- authorized treating physician (ATP) Bryan D. Counts, M.D.; bates stamp 52 and ATP Jonathan Bloch, D.O). Their opinions are dependent on the history given them by the Claimant. The ATPs, however, were of the opinion that the mechanism of injury as described by the Claimant caused the bilateral inguinal hernias. Consequently, their opinions stand or fall on determinations concerning the Claimant's credibility concerning the job related event. Although, the Respondents maintain that the Claimant has not shown that ii is more likely than not that he sustained the bilateral inguinal hernia at work, they offer no other plausible explanation (of course, they are not required to do so—they can stand on the position of putting the Claimant on his proof)

18. The medical records clearly reveal that the Claimant had bilateral hernias which were repaired by ATP John S. Weaver, M.D., on January 11, 2017, after the surgery was denied by the Respondents, but approved by Medicaid (Claimant's Exhibit 10, bates stamp 65).

19. The Claimant's ATPs have placed him on work restrictions whereby he could not work in his pre-injury employment as a roofer. These restrictions continue as of the present time.

20. None of the Claimant's ATPS have placed him at maximum medical improvement (MMI) as of the present time.

21. The Claimant has not worked or earned wages since December 12, 2016.

Temporary Total Disability

22. As found herein above, at the commencement of the hearing, the parties stipulated, and the ALJ found, if the claim was compensable, the period of temporary total disability (TTD) commenced on December 12, 2016 and is ongoing until terminated by law.

Respondents' Independent Medical Examiner (IME), Lawrence Lesnak, D.O.

23. Dr. Lesnak, D.O. did not examine the Claimant but performed a medical records review and stated the opinion that the Claimant's injury could not have occurred the way the Claimant described it, as it did not involve forceful Valsalva maneuver, even

though Dr. Lesnak on cross examination at hearing testified that the body would tighten to prevent itself from falling from a trip. He explained the Valsalva Maneuver as a very forceful overhead motion--not tripping and falling, yet he conceded that it was possible that tripping and falling and attempting to catch oneself could cause the requisite amount of pressure on the groin to cause a hernia or hernias. Dr. Lesnak's opinions are contrary to the opinions of the Claimant's ATPs. The ALJ infers and finds that Dr. Lesnak's overall opinion does not rule out bilateral inguinal hernias, caused by the Claimant's mechanism of injury. The ALJ finds the opinions of the Claimant's ATPs, concerning the mechanism of injury, as described by the Claimant, as the cause of the Claimant's bilateral inguinal hernias, more persuasive and credible than Dr. Lesnak's ultimate opinion.

Credibility

24. According to the Claimant, he had no bilateral inguinal symptoms prior to October of 2016 and he has not worked since that time. His testimony is consistent with the medical records, which only reflect three previous hernia injuries, all of which had been surgically repaired and after which Claimant was cleared for heavy lifting by Lon Noel, M.D., on February 2, 2016 (Claimant's Exhibit 3, bates stamp 6-9). The Claimant verbally informed the headquarters of the Employer of his injury as testified to by Steven Batt, which resulted in the Employer filing an "Employer's First Report of Injury." The fact that the First Report of Injury, as well as the Claimant's "Employee Accident Report" contained different dates does not significantly detract from the fact that there is no other evidence presented as to how the Claimant developed his bilateral hernias other than his trip at work. The Respondents' expert, Dr. Lesnak only rendered the opinion that the trip did not cause the hernias, yet he left open the possibility in response to a question on cross-examination. He offered no other plausible explanation for the Claimant's bilateral inguinal hernias.

25. The medical records reflected that the Claimant required surgery after the incident of October 2016, had the surgery and that the surgery repaired the two bilateral inguinal hernias.

26. On November 8, 2016, after the Claimant's employment was terminated, he returned to the Employer to report an injury. In his handwriting, he indicated that he did not previously report this injury to his Employer. He also indicated that he had already gone to the doctor at DHH and was told he needed follow up. He adamantly testified that this document was filled out on November 8, 2016 and he equivocally testified that he looked at a calendar to fill in the date on this document (Respondents' Exhibit E, bates stamp: 38; Hearing. Transcript, p. 52, lines. 17-19: "I guess I looked at a calendar – before I signed it in their office. I do remember that. I remember that. I looked at a calendar specifically in the office at Progressive. That's where I got the date from"). The ALJ infers and finds that there is no adequate explanation for the anomaly in dates, but the Claimant knew what Batt was recording and, nonetheless, insisted that he had gone to DHH, despite the DHH record reflecting November 10, 2016. The ALJ infers and finds that the Claimant was mistaken on his dates.

27. Steven Batt testified that he was informed about the alleged injury via the "Employee Accident Report" on or about November 8, 2016 and that he knew this based on the receipt of the document via email (Hearing. Transcript, pp. 57-58, 59-60).

28. DHH records establish that the Claimant did not actually seek out any medical treatment until November 10, 2016, two days after he said that he had seen a doctor prior to November 8, 2016. He had informed the Employer in his handwriting that he had already seen a doctor as of November 8, 2016. (Respondents' Exhibit. B, bates stamp 4; and, Exhibit E, bates stamp 38). The Claimant knew of this discrepancy yet he said he had sought medical treatment as of November 8th. Again, he would have to have been mentally impaired, was lying, or he was mistaken on this point. The ALJ infers and finds that the Claimant was mistaken on this date.

29. The Claimant did not mention regarding his prior hernias. He stated that he had injured this exact part of the body twenty years ago, at age 16, while not mentioning the fact that he had undergone a surgical repair of his right hernia about one year prior to the reporting of the injury (Respondents' Exhibit. E, bates stamp 38; Exhibit D:, bates stamp 33; and, Hearing. Transcript p. 13, lines. 14-17). While this omission is troublesome, the fact remains that the Claimant had fully recovered from the right hernia repair and he was able to work full time at the heavy job of roofing, immediately prior to the incident of late October 2016.

30. The Claimant was convicted a sixth-degree felony, within the past five years, for knowingly providing false information to a pawnbroker regarding the sale of items on September 18, 2015. The Claimant was placed on a one year probation. While this felony conviction reflects on "honesty," and is relevant to that extent, it does not undermine the totality of the evidence that the Claimant was able to work, full duty as a roofer, until late October 2016, when he actually experienced a bilateral inguinal hernia. He gave a consistent history of the mechanism of his injury to all of his medical providers; and, the Respondents' argue, by implication, that the ALJ should infer that the Claimant was injured elsewhere, outside of work. There was no persuasive evidence, however, concerning any non-work related activities where the Claimant could have sustained bilateral inguinal hernias. Convicted felons cannot be deemed liars in all respects. Their testimony must be measured against consistencies on major points, *e.g.,* the mechanism of injury, against a backdrop of the totality of the evidence including medical evidence, and not on discrepancies on dates (which exist on both sides), and a felony conviction of furnishing false information to a pawnbroker.

31. The ALJ finds the part of the Claimant's testimony that he sustained the bilateral inguinal hernias in late October 2016, credible despite the anomalies and inconsistencies in his testimony. To find that he sustained the hernias elsewhere, in a non-work related activity, would border on speculation under the circumstances.

Unemployment Insurance (UI) Benefit Offset

32. The Claimant received UI benefits in the amount of $60 per week from January 29, 2017 (week ending February 4, 2017) through the week ending on April 1,

2017, which yields a net TTD benefit for this period of $$366.66 per week, or $52.38 per day.

Ultimate Findings

33. Despite the areas from which the Claimant's credibility is detracted, *e.g.,* his felony conviction for a crime implicating dishonesty and the discrepancies in the dates he gave for the injury and his first medical visit, plus his failure to mention a right hernia surgery to the Respondents a year before the date of injury, which as found, is not precise, the ALJ finds the core of his testimony concerning the mechanics of his **bilateral** hernias credible and establishing a work-related injury in late October 2016. Further, the Claimant's description of the mechanics of his injury has been consistent and credible, and it supports the work-related opinions of his ATPs. On the other hand, the ALJ finds Respondent's IME, Dr. Lesnak's, opinion lacking in credibility because he did not persuasively explain when the described mechanics of injury made it impossible for the Claimant to sustain bilateral inguinal hernias, yet he conceded on cross-examination that it was possible.

34. Between conflicting medical opinions, the ALJ accepts the opinions of the Claimant's ATPs, based on substantial evidence, and rejects the opinion of Respondents' IME Dr. Lesnak.

35. The medical records, coupled with the sectors of the Claimant's testimony, which have been found credible, with the exception on the discrepancy on dates (on both sides), establishes that he sustained work-related bilateral inguinal hernias in late October 2016. He has proven by a preponderance of the evidence that he sustained compensable, bilateral hernias in late October 2016. At the very least, his pre-existing disposition to hernias was aggravated and accelerated by the work-related event. He has proven that the medical care by the Claimant's ATPs was, and is, reasonably necessary to cure and relieve the effects of his injury, and causally related to his compensable, bilateral inguinal hernias.

36. The Claimant has proven by a preponderance of the evidence that he has earned no wages since he was placed on restrictions by the Employer's designated medical providers at Concentra on December 12, 2016. As stipulated and found herein above, he has been temporarily and totally disabled since December 12, 2016.

37. As found herein above, the Claimant's AWW is $640, which yields a weekly TTED rate $426.66, or $60.95 per day.

38. The Claimant has not yet been declared to be at MMI and he .has not been released to unrestricted work, nor has the Employer offered the Claimant a modified-duty job, thus, he has met all the prerequisites for an entitlement to TTD benefits.

39. Since his first ER visit on November 10, 2016 as found, it was stipulated and found that the Claimant's medical care at Concentra thereafter was authorized if the claim was compensable. Although Surgeon Dr. Weaver's surgery was denied on the basis that the Respondents were challenging causal relatedness and

compensability, Dr. Weaver was within the authorized chain of referrals from Concentra and now that the claim has been determined compensable, Dr. Weaver's bilateral hernia repair of January 11, 2017 was authorized, causally related, and reasonably necessary to cure and relieve the Claimant's condition

40. The Claimant has proven by a preponderance of the evidence that the ER visit at Denver Health on November 10, 2016 was an emergency situation.

41. The Claimant has proven by a preponderance of the evidence that the medical care rendered by the medical providers at Concentra Medical Center and their referral to John Weaver, M.D., at U.S. Medical Group is reasonably necessary and causally related to the bilateral inguinal hernias suffered in the course and scope of the Claimant's employment in late October 2016.

42. As found , the Claimant was a full-time roofer and the best indicator of the his temporary wage loss should be based on the contract for hire, thus, the Claimant's AWW is $640.

43. As found, the Claimant received UI benefits in the amount of $60 per week from January 29, 2017 (week ending February 4, 2017) through the week ending on April 1, 2017, which yields a net TTD benefit for this period of $366.66 per week, or $52.38 per day.

44. The Claimant is entitled to TTD benefits from December 12, 2016 and continuing at two-thirds of his AWW, which is $426.67 a week or $60.95 a day, from December 12, 2016 ongoing, subject to applicable offsets until terminated pursuant to statute is warranted, excluding the period from January 29, 2017 through April 1, 2017, both dates inclusive, a total of 63 days, during which time he is entitled to net TTD benefits of $368.66 per week, or $52.38 per day, in the aggregate subtotal amount of $3,299.34.

45. For the period from December 12, 2016 through January 28, 2017, both dates inclusive, a subtotal of 47 days, the Claimant is entitled to TTD benefits of $426.67 per week, or $60.95 per day, in the aggregate subtotal amount of $2,864.65. From April 2, 2017 through the hearing date of May 10, 2017, both dates inclusive, a total of 39 days, the Claimant is entitled to TTD benefits of $426.67 per week, or $60.95 per day, in the aggregate subtotal amount of $2,377.05. As of the hearing date, the Claimant is entitled to a grand total of past due TTD benefits in the amount of $8,541.04.

46. From May 11, 2017 and continuing until any of the conditions for the cessation of TTD benefits as prescribed by law occur, the Claimant is entitled to continuing TTD benefits of $426.67 per week.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning *v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, despite the areas from which the Claimant's credibility is detracted, *e.g.,* his felony conviction for a crime implicating dishonesty and the discrepancies in the dates (there are also discrepancies in the Employer's records, as found herein above) he provided for the date of injury and his first medical visit, plus his failure to mention a right hernia surgery a year before the date of injury to the Respondents, which as found herein above, is not precise, the ALJ found the core of the Claimant's testimony concerning the mechanics of his **bilateral** hernias credible and establishing a work-related injury in late October 2016. Further, the Claimant's description of the mechanics of the injury, as found, has been consistent and credible, and it supports the work-related opinions of his ATPs. On the other hand, as found, Respondent's IME, Dr. Lesnak's, opinion was lacking in credibility because he did not persuasively explain why the described mechanics of injury made it impossible for the

Claimant to sustain bilateral inguinal hernias, yet he conceded on cross-examination that it was possible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ accepted the opinions of the Claimant's ATPs, based on substantial evidence, and rejected the opinion of Respondents' IME Dr. Lesnak.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's pre-existing disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150

(Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the medical records, coupled with the credible sectors of the Claimant's testimony, with the exception on the discrepancy on dates (on both sides), establishes that he sustained work-related bilateral inguinal hernias in late October 2016. He has proven by a preponderance of the evidence that he sustained compensable, bilateral hernias in late October 2016. At the very least, his pre-existing disposition to hernias was aggravated and accelerated by the work-related event

Medical

d. It has been stipulated and found that Concentra, and its referrals, was an authorized medical provider, however, the issues of reasonable necessity and causal relatedness needed to be resolved. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant's medical treatment is causally related to his compensable, bilateral inguinal hernias of late October 2016. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary to cure and relieve the effects of his compensable injury.

Emergency Room Visit of November 10, 2016

e. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant attempted to reach the Employer for a medical referral, beginning in late October 2016 and did not get the referral until he was referred to Concentra on December 12, 2016. As found, the November 10, 2016 ER visit was of an emergent nature.

Average Weekly Wage

f. An AWW calculation is designed to compensate for **total** temporary wage loss. *Pizza Hut v. Indus. Claim Appeals Office,* 18 P. 3d 867 (Colo. App. 2001). *See* § 8-42-102, C.R.S. An ALJ has the discretion to determine a claimant's AWW, including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of injury, but also on other relevant factors when the case's unique circumstances require, including a determination based on increased earnings and insurance costs at a subsequent employer. *Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). In the present case, as found, the fairest approximation of the Claimant's AWW was

based on the contract of hire, which was $16 an hour for a 40-hour week, equaling $640.

Temporary Total Disability and UI Offset

g. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 [Indus. Claim Appeals office (ICAO), December 18, 2000]. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. Indeed, as stipulated and found, if the case was determined compensable, which it has been, the Claimant has been temporarily and totally disabled since December 12, 2016 and continuing.

h. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring, modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm'n,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dortch,* 799 P. 2d 461 (Colo. App. 1990). As found, it was stipulated and found, if the case was determined compensable, which it has been, the Claimant has been temporarily and totally disabled since December 12, 2016 and continuing.

i. Pursuant to § 8-42-103 (1) (f), C.R.S., the Respondents are entitled to a 100% offset for UI benefits. As found, the Claimant received UI benefits in the amount of $60 per week from January 29, 2017 (week ending February 4, 2017) through the week ending on April 1, 2017, which yields a net TTD benefit for this period of $366.66 per week, or $52.38 per day, after the 100% offset.

Burden of Proof

j. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer*

v. Indus. Claim Appeals.Office, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden of proof on all issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents shall pay the costs of all authorized, reasonably necessary and causally related medical care and treatment for the Claimant's bilateral inguinal hernias, including the surgery performed by John Weaver, M.D., subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Respondents shall pay the Claimant temporary total disability benefits of $426.67 a week or $60.95 a day, from December 12, 2016 ongoing, subject to applicable offsets until terminated pursuant to statute is warranted, excluding the period from January 29, 2017 through April 1, 2017, both dates inclusive, a total of 63 days, during which time he is entitled to net TTD benefits of $368.66 per week, or $52.38 per day, in the aggregate subtotal amount of $3,299.34, which is payable retroactively and forthwith.

C. For the period from December 12, 2016 through January 28, 2017, both dates inclusive, a subtotal of 47 days, Respondents shall pay the Claimant temporary total disability benefits of $426.67 per week, or $60.95 per day, in the aggregate subtotal amount of $2,864.65, which is payable retroactively and forthwith.

D. From April 2, 2017 through the hearing date of May 10, 2017, both dates inclusive, a total of 39 days, Respondents shall pay the Claimant temporary total disability benefits of $426.67 per week, or $60.95 per day, in the aggregate subtotal amount of $2,377.05, which is payable retroactively and forthwith.

E. As of the hearing date, Respondents shall pay the Claimant a grand total of past due temporary total disability benefits in the amount of $8,541.04, which encompasses all of the amounts in paragraphs B, C, and D above.

F. From May 11, 2017 and continuing until any of the conditions for the cessation of temporary total disability benefits as prescribed by law occur,

Respondents shall continue to pay the Claimant temporary total disability benefits of $426.67 per week.

G. Respondents shall pay the Claimant statutory interest in the amount of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

H. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of May 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of May 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-010-403-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 11, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 5/11/17, Courtroom 1, beginning at 1:30 PM, and ending at 5:00 PM).

Claimant's Exhibits 1 through 14 were admitted into evidence, without objection, Respondents' Exhibits A through J were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule: Claimant's opening brief was filed on May 16, 2017. Respondents' answer brief was filed on May 19, 2017. No timely reply brief was filed. The matter was deemed submitted for decision on May 24, 2017.

ISSUES

The issues to be determined by this decision concern compensability of an incident of March 3, 2016, involving an alleged shock by the Claimant's headset; and, if compensable, medical benefits, average weekly wage (AWW), and temporary total disability (TTD) benefits from March 3, 2016 and continuing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds if the case is compensable the Claimant is entitled to medical and TTD benefits, however, since the ALJ determines as herein below found, the case is **not** compensable. Therefore, the stipulation and findings thereon is moot.

2. At the time of the alleged injury, the Claimant worked as a customer service representative in a call center for Otterbox, a client of the Employer (the Employer is a temporary staffing agency).

3. The Respondents denied liability for the Claimant's alleged injuries.

The Incident

4. On March 3, 2016, the Claimant alleges that she was on a call with a customer and wearing a wireless headset when she heard a "buzz" and felt an electrical "zap" from her headset. She alleges that she sustained a work related injury after she was "electrocuted" by her headset. Following the incident, the Claimant alleged a myriad of symptoms, including headaches, sensitivity to light and sound, slurred speech, chest pain, arm pain, and foot pain.

Testing of the Headset

5. The headset was examined by Jeffrey Sellon, P.E., CFEI, CVFI (a professional electrical engineer) and an exemplar headset was tested. Sellon authored a report wherein he concluded that the headset in question was not capable of delivering an electrical shock (Respondents' Exhibit I, pp.102-121).

6. Sellon examined both the actual wireless headset the Claimant had been wearing at the time of the incident and an exemplar headset, provided to him in order to complete destructive testing (the actual headset was necessarily destroyed it its testing). The exemplar headset was identical to the subject headset and base unit with the exception of an identification label sticker (Respondents' Exhibit I p. 103).

7. Sellon thoroughly tested both the actual headset worn by the Claimant and the exemplar headsets. He concluded the following: (1) the headset casing and soft

ear pad cushions were made on non-conductive plastic; (2) the headset was being worn at the time of the incident and not connected to the charging base, power supply, or telephone cable; (3) the battery in the headset was rated a low 3.7 volts which is only 12% of the "safe" voltage level of 30 for humans; (4) human skin has a relatively high resistance to the flow of electricity; (5) the headset assembly screws that were metal were imbedded in non-conductive plastic and no exposed metal parts on the headset could come in contact with human skin; ;6) without multiple faults within the headset, no circuit could be created to transmit a shock,(7) the headset worked immediately after the reported shock; (8) a short or fault within the headset would not have generated voltage higher than 3.7 vpc. Sellon's ultimate conclusion were the even if there were electrical faults within the subject headset, the conditions of electrical shock were not present from a 3.7 vpc battery(Respondents' Exhibit I pp.. 106-107).

8. The Claimant submitted no persuasive facts into evidence to challenge the chain of custody reflected in Sellon's Report. Indeed, a headset is not fungible matter where a "chain of custody" is important. The Claimant raised arguments concerning the chain of custody, for the first time, in her opening brief. Pictures of the headset tested were included in Sellon's Report (Respondents' Exhibit I, pp. 112 – 119). The Claimant did not testify that the pictured headset was different from the headset she was wearing at the time of the incident. The Claimant presented no persuasive evidence in rebuttal to Sellon's opinions.

The Claimant's Prior Head Injury

9. According to the Claimant, she sustained a prior injury head injury in March of 2011 when she hit her head against a boat following a dive in rough waters. According to the Claimant, her symptoms resolved within a few months. The Claimant's chiropractic records demonstrate that she was treating for a variety of symptoms subsequent to the boating injury between April 5, 2011 through April 8, 2013, a period of approximately two years (Respondents' Exhibit A pp. 2-16). Included in these symptoms and complaints were discussions of memory issues, headaches, depression, the feeling of spinning, phonophobia and photophobia (sound and light sensitivity).

10. At the hearing, the Claimant was allowed to wear sunglasses and a large hat to shield her from the light.

Medical Treatment Prior to the Incident in Question

11. The Claimant treated with Allison Gray, M.D. at Kaiser Permanente on September 23, 2015. This visit occurred approximately six months prior to the Claimant's alleged date of injury. Dr. Gray reported that the Claimant sustained a head injury in March of 2011. Following that injury, the Claimant suffered from headaches, nausea, photophobia, and phonophobia. Dr. Gray noted that the Claimant had difficulty with math skills following the 2011 injury and that it took a long time for the photophobia

and phonophobia to improve. According to Dr. Gray, “since March of 2011, she states that she has had difficulty with her memory.” The Claimant also reported difficulty with cognitive exercises. Dr. Gray assessed a mild cognitive impairment related to recent psychosocial stress and the mild traumatic brain injury she sustained in March of 2011 (Respondents’ Exhibit G, pp. 83, 84). The Claimant’s concerns expressed to Dr. Gray were sufficient for Dr. Gray to refer the Claimant for neuropsychological testing.

Aftermath of the March 3, 2016 Incident

12. When the Claimant presented to the hospital following the alleged “electrocution” incident on March 3, 2016, she told her treating providers that she was “shocked” by her wireless headset. She was referred to James Rafferty, D.O., who became her authorized treating physician (ATP) for her workers’ compensation claim. Dr. Rafferty treated the Claimant from March 3, 2016 through May 17, 2016. In his multiple reports, Dr. Rafferty states “although the temporal association between [Claimant’s] event at work and the onset of her symptoms supports work-relatedness, I do not yet have enough information to determine with any reasonable degree of certainty whether she had an exposure to an electrical current in the workplace” [Dr. Rafferty recommended that an evaluation be conducted with an expert familiar with electrical currents to determine whether an exposure occurred.(Respondents’ Exhibit C, p. 46).

13. Whereas Dr. Rafferty mentions the possibility of “electrostatic charges,” he states that those charges “cannot be quantified” and he does not make any statement concerning an opinion that the source of the Claimant’s injury is an electrostatic charge (Respondents’ Exhibit C, p. 46).

Claimant’s Independent Medical Examination (IME) by Bennett Machanic, M.D.

14. The Claimant was evaluated by Dr. Machanic on August 31, 2016. Dr. Machanic stated that “according to her history, her headset short circuited causing an electrical shock like sensation.” (Claimant’s Exhibit 11). At no point does Dr. Machanic undertake a causation analysis in his report and his conclusions and recommendations are predicated on the assumption that the Claimant sustained an electrical shock from her headset. Dr. Machanic’s opinions are based entirely on the history given to him by the Claimant. Consequently, his opinions are “no better” than the history given to him by the Claimant. Dr. Machanic noted “this raises questions again of the extent of the electrical type of process.” As found in Engineer Selon's opinions there was **no** injuring electrical process.

Neuropsycholgical Evaluation by Gregory Thwaites, Ph.D.

15. As part of the assessment of the March 3, 2016 incident, the Claimant underwent a neuropsychological analysis with Dr. Thwaites, on June 21, 2016

(Respondents' Exhibit D, pp. 57-67). Dr. Thwaites noted that the Claimant performed at near chance levels on a formal test of effort and motivation. Further, he noted that the Claimant's performance was well below the performance of patients with advanced dementia. He stated: "So in addition to her unusual presentation in interview and symptom reporting, her performance on a formal test of effort and motivation is rather impaired. Her profile of cognitive test results across measures is implausible and suggest a functional aspect to her presentation" (Respondents' Exhibit D, pp. 61-62).

Respondents' Independent Medical Examination (IME) by Eric O. Ridings, M.D.

16. At the Respondents' request, the Claimant was evaluated by Dr. Ridings on May 24, 2016 (Respondents' Exhibit H). Dr. Ridings was of the opinion that the Claimant did not sustain any injury from her wireless headset on March 3, 2016. "In my medical opinion, the patient's constellation of complaints cannot be taken at face value. There is no injury or disease process that can cause such a widespread and variable pattern of symptoms" (Respondents' Exhibit H, p. 99).

17. After Engineer Jeffrey L. Sellon and Dr. Ridings issued their reports, the Claimant alleged that she suffered from "acoustic shock disorder." While no testimony concerning "acoustic shock disorder" was offered at the hearing, to address these allegations, Dr. Ridings issued a supplemental report and noted that his search of the National Institute of Health sponsored US National Library of Medicine Database returned no articles on "Acoustic Shock Disorder." Dr. Ridings was of the opinion that it is not probable that "Acoustic Shock Disorder" is an actual medical condition. "Even in the unlikely event that such a condition exists, [Claimant] at no point in her course claimed injury from a sudden loud sound, but rather claimed that she felt an electrical shock shooting across her head. This is not consistent with the descriptions of 'acoustic shock injury' that I found" (Respondents' Exhibit H, p. 86).

18. There are no medical opinions in this case that the Claimant sustained an "acoustic shock" incident or sustained an electrostatic charge incident.

19. According to Dr. Ridings, the Claimant's symptoms did not make any medical sense given the alleged mechanism of injury. Dr. Ridings was asked to offer an explanation for the Claimant's alleged symptoms. He responded: "Psychiatric, that the patient is delusional, malingering, that the patient for reasons of secondary gain of whatever sort fabricated this entire history [The ALJ takes administrative notice of the fact that Division of Workers' Compensation (DOWC) Level 2 Accredited physicians may render psychiatric opinions and any objections thereto would go to weight]. Conceivably, the patient could have another psychological diagnosis such as severe anxiety with somatization to a marked degree. Beyond that…there just isn't a medical explanation for how physiologically, any of these complaints could happen the way she stated, much less all of them." Despite Dr. Ridings' extreme characterization of the Claimant's present condition, the ALJ finds his explanation credible.

20. According to Dr. Ridings, no objective test revealed any physical problem with the Claimant. He noted that the Claimant has no physical injury to her ears. MRI (magnetic resonance imaging) scans of her brain were normal. In the first three visits after her alleged injury, all of her testing was essentially normal. Dr. Ridings points out that the Claimant later alleged slurred speech, but that her initial treating providers did not note this in their records (*See* Respondents' Exhibits B and F).

21. According to Dr. Ridings, the Claimant had severe co-morbid conditions, including anxiety and a prior traumatic head injury. Dr. Ridings observed that the Claimant's symptoms and complaints following the March 3, 2016 incident were nearly identical to the symptoms following the 2011 head injury.

22. Dr. Ridings was the only medical provider who performed a causation analysis in this matter as outlined by the Level II training and accreditation course. He stated that the other medical providers in this matter appeared to predicate their opinions, to the extent any such causation opinions were expressed, on the Claimant's history that she received an electrical shock injury from her headset. Because Engineer Sellon concluded that an electrical shock was not possible, and because the Claimant's constellation of symptoms could not be explained by an electrical shock incident, Dr. Ridings concluded and that the Claimant's symptoms are not related to the headset incident.

23. Dr. Ridings testified that contrary to the Claimant's contentions, none of the Claimant's treating physicians rendered opinions in their reports that the Claimant's symptoms were work related. He noted that just because a physician orders a test, it should not be construed to imply that the physician believes that the symptoms are work related.

24. Dr. Ridings reviewed Dr. Machanic's report and stated that Dr. Machanic's report seemed to be premised on the idea that the Claimant had actually suffered an electrical injury to her head. Even so, when asked to break down Dr. Machanic's actual opinion during testimony, Dr. Ridings noted that there was "hemming and hawing" in the report and Dr. Ridings indicated that he would not give it much weight.

25. Dr. Ridings was of the opinion, to a reasonable degree of medical probability, that there was no "incident" on March 3, 2016 to explain the Claimant's present symptoms. He was of the opinion that the headset did not cause the Claimant's symptoms and complaints. He further rendered the opinion that the Claimant's pre-existing conditions were not aggravated or accelerated by the incident on March 3, 2016.

Analysis of the Evidence

26. The Claimant initially alleged that she was "electrocuted" by her headset. This is what she told all of her medical providers happened. Her medical providers provided treatment based upon the Claimant's history that she was electrocuted. The un-rebutted forensic evidence by Engineer Sellon establishes that this was not possible.

27. At hearing, the Claimant reported that the effects of her March of 2011 injury cleared up within a few months. In fact, the Claimant was treated at Kaiser for lingering effects of this injury in late 2015, for approximately two years. The Claimant testified that she has not been able to sit in the sun for any amount of time since the incident and that she has difficulty walking and with her balance – so much so that she uses a motorized cart when shopping at Wal-mart. She also testified that she has to wear a hat and sunglasses, even inside, due to sensitivity to light. As found herein above, the ALJ allowed her to wear sunglasses and a hat throughout the hearing. Dr. Ridings reviewed surveillance from April 5, 2016, approximately one month after the incident in question, which showed the Claimant walking through Wal-mart with ease (and without a hat) and walking outside in her yard, unassisted, without a hat. Dr. Ridings noted that she was able to carry her Wal-mart purchases in one hand and was able to walk without any difficulties with balance despite the extra weight on one side. This is inconsistent with the Claimant's testimony and her allegations to her physicians; and, it is inconsistent with her presentation at the hearing.

28. Dr. Ridings also noted in his report and during his hearing testimony that the Claimant's performance on physical evaluation displayed numerous inconsistencies and inorganic findings. Dr. Ridings stated that he agreed with Dr. Thwaites that there was a "functional" element to the Claimant's symptom presentation – meaning that the Claimant was potentially making up or exaggerating symptoms.

29. As found by Engineer Sellon, the headset in question did not cause any electrical injury to the Claimant (Respondents' Exhibit I, p. 107). It was not capable of doing so, according to Sellon. In her Position Statement, the Claimant alleges that the testing was done on an exemplar headset and cannot be relied upon. Sellon noted in his report that the exemplar was identical to the headset in question other than an identification label. He also evaluated the actual headset (Respondents' Exhibit I, p. 103). Further, Sellon noted "it is therefore reasonable to conclude that the conditions for electric shock were not present from the 3.7 V_{DC} battery located in the subject wireless headset even if there were electrical faults within the non-conductive headset" (Respondents' Exhibit. I, p. 107).

30. The Claimant alleges in her opening brief that Engineer Sellon's report was flawed, and that the flawed findings carried over to Dr. Ridings' reports. Claimant had no objections to the admissibility of Engineer Sellon's Report. The ALJ finds that the Claimant waived any objection to the admissibility of Sellon's Report. Although the

Claimant raised the idea of lack of a chain of custody, she did not pursue this argument. Indeed, as found herein above, Engineer Sellon tested the actual headset used by the Claimant, which was destroyed in the testing, and he tested an identical exemplar. The headsets tested were not fungible matter. Consequently, the "chain of custody" argument is a 'red herring" that is not relevant to an appropriate analysis of Sellon's testing.

31. The testimony of Grant Conquest, called on the Claimant's behalf, supports the reality of the Claimant's symptoms, according to Conquest, however, it adds nothing to a causal analysis of the Claimant's present condition. Claimant's attempt to qualify Conquest as an expert in electrical matters was rejected.

32. There is no persuasive physical evidence that the Claimant sustained any injury at all. Every test conducted in an attempt to explain her symptoms has been normal. According to Dr. Ridings, "it is my opinion within a reasonable degree of medical probability that any shock that a battery leaving no visible signs and no reproducible physical abnormalities could not account for the patient's symptoms" (Respondents' Exhibit H, p. 100]). The Claimant has failed to show that she would not have sustained any injury "but for" the use of the headset.

33. The mere fact that a claimant experiences symptoms while performing work does not require an inference that there has been an injury or an aggravation or acceleration of a preexisting condition, and the ALJ hereby declines to draw such an inference.

34. The Claimant argues that she may have sustained an injury as a result of an electrostatic charge. While Dr. Rafferty was of the opinion that the Claimant may have been exposed to an electrostatic charge, he did not diagnose the Claimant with an injury as a result of an electrostatic charge. No persuasive medical evidence of any kind was submitted to support an injury by electrostatic shock. According to Dr. Ridings, there was no evidence of any injury from electrostatic shock, "Acoustic Shock Disorder" or electrocution. Dr. Ridings specifically testified that to propose that the Claimant's alleged multi-faceted injuries were attributable to an electrostatic charge was "ridiculous."

Ultimate Findings

35. There are no persuasive medical opinions supporting the Claimant's claim for workers' compensation benefits. Her ATP, Dr. Rafferty, rendered an opinion concerning "possibilities," not probabilities. As found herein above, the Claimant's IME, Dr. Machanic, rendered an opinion based exclusively on the history given to him by the Claimant; and, his opinion is no better than the history given to him by the Claimant. The ALJ finds that the persuasive and credible medical opinion of Dr. Ridings on causal relatedness is thorough, in accord with the prescribed causal analysis methods of the

Division of Workers' Compensation Level 2 Training; and, it is, therefore highly persuasive and credible. The ALJ finds that the Claimant's testimony has major inconsistencies; and, the magnitude of her present, manifested symptoms neither add up nor do they make medical or engineering sense in relation to the "headset" incident. The ALJ, therefore, finds the Claimant's testimony lacking in credibility. As found herein above, the testimony of Grant Conquest adds nothing to the causal analysis of the Claimant's present condition.

36. Between any conflicting evidence, the ALJ makes a rational choice to accept the expert opinion of Dr. Ridings, which is dispositive, and to reject any opinions or evidence to the contrary.

37. The Claimant alleges in her opening brief that Engineer Sellon's Report was flawed, and that the flawed findings carried over to Dr. Ridings' reports. Sellon's Report was admitted into evidence without objection by the Claimant. Dr. Ridings was entitled to rely, in part, on Sellon's Report

38. The Claimant has failed to prove, by a preponderance of the evidence that she sustained compensable injuries arising out of the course and scope of her employment (the "headset" incident) on March 3, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or

inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, there are no persuasive medical opinions supporting the Claimant's claim for workers' compensation benefits. Her ATP, Dr. Rafferty, renders an opinion concerning "possibilities," not probabilities. As found herein above, the Claimant's IME, Dr. Machanic, rendered an opinion based exclusively on the history given to him by the Claimant. As further found, the persuasive and credible medical opinion of Dr. Ridings on causal relatedness is thorough, in accord with the prescribed causal analysis methods of the Division of Workers' Compensation Level 2 Training; and, it is, therefore highly persuasive and credible. Also, as found, the Claimant's testimony has major inconsistencies; and, the magnitude of her present, manifested symptoms neither add up nor do they make sense in relation to the "headset" incident. As found, the Claimant's testimony was lacking in credibility. Also as found, the testimony of Grant Conquest added nothing to the causal analysis of the Claimant's present condition.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between any conflicting

evidence, the ALJ made a rational choice to accept the expert opinion of Dr. Ridings, which is dispositive, and to reject any opinions or evidence to the contrary.

Evidentiary Matter/ Report of Engineer Sellon

c. As found, the Claimant alleges in her opening brief that Engineer Sellon's Report was flawed, and that the flawed findings carried over to Dr. Ridings' reports. As further found, Engineer Sellon's Report was admitted into evidence without objection by the Claimant. If the Claimant felt that the report was flawed, she should have raised these concerns before the report was admitted into evidence with no objection. Pursuant to the Industrial Claim Appeals Office's (ICAO's) decision in *Moore v. Gard'n-Wise Distributors, Inc.*, W.C. No. 4-677-680 (ICAO, January 3, 2008), it is incumbent on a party to object to evidence prior to its admission. If the party does not raise these issues at the time the evidence is introduced, the party waives any objection to the admissibility of evidence. Whether there is a complete chain of custody is a matter to be resolved by the court prior to admitting the evidence. *People v. Atencio,* 565 P.2d 921, 924 (Colo. 1977). As found, however, the "chain of custody" argument in the present case is a "red herring" and irrelevant.

Compensability

d. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** (creating somewhat of a presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. The Claimant argues that something happened to the Claimant at work and, therefore, it was a compensable phenomenon under the holding in *Rodriguez.* The flaw in this argument is that the Claimant failed to prove that the "headset" injured her and that her present condition is attributed to the alleged incident of March 3, 2016. Therefore, as found, the Claimant did not sustain a compensable injury or an aggravation/acceleration of her pre-existing head injury of 2011 in the boating accident.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-34 (ICAO, March 20, 2002). *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain her4 burden of proof on the issue of compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this_____day of May 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of May 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Did Respondents sustain their burden to overcome the DIME physician's opinion on whether Claimant's bilateral shoulder condition was caused by the September 3, 2013 accident?

- Did Respondents sustain their burden to overcome the DIME physician's opinion on whether Claimant was at maximum medical improvement ("MMI") for bilateral shoulder injuries?

STIPULATION

Claimant's lower extremity injuries, including whether he was at MMI for those injuries, whether he sustained a permanent medical impairment, and disfigurement are not at issue for this hearing and are the subject of a previous Stipulation between the parties. This Stipulation was accepted and approved by the ALJ.

FINDINGS OF FACT

1. Claimant worked for Employer as a plating specialist. In this job, he applied nickel-based plating on tools. After that, the tools are placed in a vat with hot oil, which is part of the finishing process.

2. Prior to September 3, 2013, Claimant had not injured either his right or left shoulder. He had not treated for shoulder issues prior to his industrial injury. Medical records from Tarshis Gary, M.D. and Mark Fraley, M.D. at Express Care Plus were admitted into evidence. These physicians saw Claimant for routine illnesses and physicals from 1995-2015. A majority of these records were office notes and lab reports, containing the results of blood testing and the like.

3. Claimant has a diagnosis of type 2 diabetes, which has been controlled by insulin. The ALJ notes there were no references to shoulder pain or any treatment to Claimant's upper extremities (including both shoulders) in those records. No evidence of a prior traumatic injury to either shoulder was introduced into evidence.

4. Claimant sustained an admitted industrial injury on September 3, 2013, when he fell into a vat containing the hot finishing oil. Claimant testified he was standing on top of a tank, which had steam coming off the top. The surface was slippery and he lost his balance, falling into the vat. The temperature of the oil in the vat was 165°.

5. Claimant's supervisor, who was also present, pulled him out the vat. Claimant testified his hands were raised and supervisor bent down to help him get out of the vat. He though his supervisor grabbed his hands/arms or wrist, pulling him from the vat. He was not sure where exactly his boss grabbed him, but said it was not under his arms. He then fell onto a catwalk, which was three to four feet below the tank.

6. Claimant sustained second and third degree burns to his lower extremities. Claimant was taken by ambulance to Penrose St. Francis Hospital where he was initially treated for burns to the lower extremities.[1] Claimant was then transported to the University of Colorado Hospital-burn center ("UCH"). Claimant testified he was in excruciating pain. The medications Claimant was given at the hospital that day included Oxycodone, Dilaudid and Fetanyl. Extensive treatment records from the University of Colorado were admitted at hearing.[2]

7. On September 6, 2013, Claimant underwent skin grafts on both legs from bilateral anterior and lateral thigh sites. The surgery was performed by Michael Schurr. M.D., whose diagnosis was circumferential bilateral lower extremity deep second-degree burns between the knee and ankle. Dr. Schurr noted Claimant had 2nd and 3rd degree burns over 12% of his total body surface area. Claimant remained at the University of Colorado Hospital burn/trauma intensive care unit through September 19, 2013. During that time Claimant was administered heavy IV pain medication, including Fentanyl, and Oxycodone. Records from that hospital stay documented the fact Claimant was taking narcotic medications the entire time.[3] Claimant testified at hearing that he did not recall much from this period of time.

8. Claimant was released from the hospital on September 19, 2013, but was subsequently readmitted on September 24, 2013. Claimant was followed by Gordon Lindberg, M.D. Between September 19, 2013 and September 24, 2013 Claimant was sent home with Oxycodone and OxyContin. Dr. Lindberg noted that Claimant's pain was not controlled well.[4] Upon readmission there was suspicion that Claimant's bilateral lower extremity wounds were possibly infected, that there was skin graft failure and it was recommended that a portion of the skin grafts be redone. Due to his increased level of pain, Claimant was continued to take Oxycontin and Oxycodone. Claimant underwent surgery to revise the skin grafts on September 30, 2013, which was performed by Dr. Lindberg.

[1] Respondents Exhibit I.

[2] Claimant's submissions included 186 pages of records from that hospital. Respondents tendered 1214 pages from the University of Colorado which were admitted at hearing. These records show the treatment was focused on Claimant's lower extremities. However, the ALJ notes Claimant was continuously taking Oxycodone and Oxycontin throughout this period of time.

[3] Respondents' Exhibit H, pp.1075 – 1572.

[4] Claimant's Exhibit 2, page 50.

9. Claimant remained hospitalized through October 19, 2013. On his discharge, Claimant was taking Morphine, Oxycodone and Oxycontin. Claimant's pain medications were continued during the period he was discharged from UCH burn unit.

10. Claimant was again admitted to the University of Colorado on November 21, 2013 with painful left leg swelling which had worsened over the previous two days. Claimant was evaluated by Brandon Chapman, M.D., who diagnosed deep venous thrombosis. The burn floor admission notes indicate that Claimant remained on OxyContin and Oxycodone, Morphine and other medications. In the discharge summary, Dr. Lindberg and Yu Peng, M.D. noted Claimant was to continue on Morphine, Oxycontin and Oxycodone.[5]

11. By the end of December 2013, Claimant's condition finally improved. However, he remained on morphine, Oxycodone extended-release, Oxycodone immediate release of 15 mg and Oxycontin immediate release of 5 mg.[6] Claimant's prescriptions for these medications were continued through January 2014. Julie Henderson, N.P. completed an assessment on December 31, 201, including discussing pain control. Dr. Lindberg prescribed refills of Oxycodone extended-release, Morphine and Oxycodone 5 mg immediate release on January 27, 2014

12. Claimant testified that during and after the three hospitalizations he was taking pain medications. The ALJ notes the hospital records support Claimant's testimony that he was taking pain-killers throughout this time. He was not moving around, spending much of the time in bed or on the couch. His focus was on his legs, including the skin grafts. He felt some pain in his shoulders after his injury, on the right side more than the left.

13. Claimant began receiving PT at Physiotherapy Associates, starting on January 6, 2014. At the outset of this treatment, Claimant's lower extremities were the focus of the treatment. This included increasing Claimant's ROM, strength, weight-bearing and gait. Starting in May 2014 there were references in the PT reports to treatment of the right shoulder. This course of PT treatment continued through October 14, 2014. The PT notes documented improvement in Claimant's lower extremities. At the time of discharge, Claimant's goals for treatment of shoulder were said to have been met.

14. Claimant returned for a follow-up at UCH burn center on March 19, 2014. By that time Claimant's prescription with Oxycodone had been weaned down and his legs were continuing to improve. NP Henderson noted on March 19, 2014, Claimant was "having right shoulder pain with a clicking sound that he has had since the accident. He did suffer a fall when he got burned. Worker's Comp. told him to follow up here for shoulder pain."

[5] Claimant's Exhibit 2, pp.119-120.

[6] Claimant's Exhibit 2, pages 122–123.

15. On April 17, 2014 Claimant was evaluated by Deborah Saint-Phard, M.D. at University of Colorado Hospital. The pain was localized to the top of his right shoulder. The progress notes of April 17, 2014 indicate, "onset of right shoulder pain 9/2/13 – initial injury came from being pulled out of a tank then fell on catwalk".

16. Mark Osborne, M.D. also evaluated Claimant that day and assessed right shoulder pain and decreased range of motion most likely secondary to adhesive capsulitis. Claimant was referred for physical therapy for range of motion exercises for the right shoulder. A joint steroid injection was also considered. In that same consultation note, under HPI, Dr. Osborne's note reflects that Claimant was evaluated with left shoulder pain that was present since approximately December 2013. "He claims that once his pain began to decrease he noticed decreased range of motion in his right shoulder and a dull pain.… His pain is 6/10 in intensity and dull in nature. He claims that the pain is severe enough that it wakes him from sleep".[7]

17. Claimant was referred by Respondents for evaluation to Frank Polanco, M.D., which occurred on May 1, 2014. On examination, Claimant had limited range of motion of the right shoulder, as compared to the left. Dr. Polanco's assessment was: right shoulder strain, likely related to Claimant's supervisor pull him out of the vat by his arms. Dr. Polanco felt that Claimant had a strain and possible tendinitis or a partial thickness rotator cuff tear. On the WCM 164 form, Dr. Polanco's opinion was this showed evidence of causal relationship to his work-related claim. He further recommended conservative treatment over the course of 4 to 6 weeks initially. Claimant returned to full-time light duty work in May 2014 with Employer. Claimant continues to work full time with Employer.

18. On May 12, 2014, Claimant was examined by Alfred C. Lotman, M.D. at the request of Respondents. At that time, pain was noted with compression of both the right and left trapezius muscles. Claimant advised Dr. Lotman he had been dealing with this since the date of the injury, doing home exercises. No loss of motion in either shoulder was detected. He had slight crepitation with range of motion of the left shoulder. No positive findings were detected on stability, rotator cuff, or impingement testing. Claimant's right shoulder was distinctly lower than his left. Dr. Lotman's orthopedic opinion was that Claimant's shoulder complaints were not related to the date of the work injury. A significant amount of time had elapsed from the date of injury to Claimant's first report/mention of pain in his right shoulder. Claimant told him that he developed left shoulder pain the past Friday while at work. Claimant stated his left shoulder was now more symptomatic, which Dr. Lotman could not explain without a recent traumatic injury.

19. On May 23, 2014, Claimant was seen for follow-up by Paula M. Hornberger, PA-C in Dr. Polanco's office, who evaluated Claimant's lower and upper extremities. In the pain diagram, Claimant noted pain in his left shoulder, which was also reflected in the questionnaire. Restrictions in Claimant's ROM for the right shoulder were noted. The left shoulder had normal ROM. The diagnosis was lower

[7] Claimant's Exhibit 2, page 169.

extremity burns and right shoulder strain, and it was noted Claimant was waiting to begin treatment. PA-C Hornberger evaluated Claimant on June 20, 2014, but there was no indication that his upper extremities were evaluated.

20. On July 19, 2014, Claimant was examined by Dr. Polanco, whose diagnostic impression was 2nd and 3rd degree burns lower legs; DVT resolved. Dr. Polanco concluded Claimant was at MMI and assigned a medical impairment rating pursuant to the *AMA Guides* to his lower extremities. There was no indication that Dr. Polanco examined Claimant's shoulders at this time. The ALJ also notes Dr. Polanco did not offer an opinion regarding Claimant's left shoulder.

21. On July 9, 2015, Dr. Shank performed the DIME. Claimant advised he was working on the date of injury and fell into the oil vat. His supervisor grabbed him beneath his axilla bilaterally and forcefully pulled him out of the vat at the time of injury. He was diagnosed with burns and treated at the University of Colorado. Claimant said he had increasing shoulder pain, worse on the right than left, mostly with overhead activities. Claimant had mild pain with impingement and with the Hawkins test. Tenderness was noted about the rotator cuff insertion and bicipital true groove. Mild pain was found with Speed's test. Claimant had no evidence of a frozen shoulder bilaterally.

22. Dr. Shank opined Claimant was not at MMI with regard to his upper extremities. The medical records documented increasing shoulder pain throughout his post-injury course and the mechanism of injury coincided with his complaints of pain, stiffness, and limitations with his bilateral shoulders. Dr. Shank suggested he be referred to an upper extremity orthopedic surgeon for evaluation of his bilateral shoulder injuries and consider an injection, as well as an MRI and physical therapy program.

23. On October 13, 2015 Wallace Larson, M.D. prepared a record review on behalf of Respondents. Dr. Larson opined Claimant's shoulder complaints were not related to the date of work injury. Dr. Larson noted a significant amount of time elapsed from the date of injury to his first report/mention of pain in his shoulders. Dr. Larson stated a physical examination was not necessary to determine causal relatedness, or lack thereof. The ALJ finds Dr. Larson's opinions were less credible than those expressed by Dr. Shank because he did not examine Claimant. Also, Dr. Larson did not analyze the mechanism of injury as described by Claimant and whether this could have injured both shoulders.

24. Dr. Lotman testified as an expert in orthopedic surgery at hearing. He is Level II accredited pursuant to the WCRP. Dr. Lotman noted Claimant sustained a severe injury on September 3, 2013 when he fell in the vat, which caused 2nd and 3rd degree burns on his lower extremities. Dr. Lotman did not focus on the lower extremities and offered no opinions as to Claimant's treatment of these areas. His focus was on the causality and relatedness of Claimant's right shoulder complaints. Dr. Lotman noted that Claimant has diabetes, which can be a factor in shoulder conditions such as tendinitis. The ALJ was not persuaded by this opinion of diabetes as a potential cause, as there was no evidence that Claimant required treatment for tendinitis

in any part of his body prior to September 3, 2013. Dr. Lotman opined that was less of a chance of injury if Claimant was pulled out of the vat by the supervisor under the axilla (armpits).

25. Dr. Lotman disagreed that the narcotics would have masked the pain in Claimant's shoulder. He noted Claimant would have had to use his upper extremities to get in and out of the bed at the hospital. Dr. Lotman believed Claimant would have experienced symptoms at the hospital, which would have been reported to many of the observers. On cross-examination, Dr. Lotman admitted that he had not reviewed Dr. Polanco's records before the hearing.

26. Dr. Shank testified as an expert witness in orthopedic surgery, the specialty in which he is board-certified. He conducted the DIME on May 12, 2015. He noted Claimant told him that he was more focused on his burns and that treatment, but had pain at least in his right shoulder from the beginning. Dr. Shank said when he examined Claimant there was tenderness around the rotator cuff insertion and mild stiffness. Dr. Shank testified there positive results/pain with the impingement and Hawkin's tests. Dr. Shank opined this was some evidence that there may be rotator cuff pathology present, whether it was inflammation or a tear.

27. On the issue of causation, Dr. Shank opined Claimant's description of being pulled out of the vat could have caused the injuries, as described. Dr. Shank noted that his report initially noted Claimant had been lifted up by his armpits. He noted that if Claimant was pulled out by his arm(s) or wrists(s), an injury was more likely. More particularly, Dr. Shank testified as follows:

> "I think that would make me think that it was probably more likely that he could have injured his shoulder from the mechanism that you described. I mean, if somebody picks somebody up underneath the axilla or beneath the armpits, I think the mechanism would be less likely. So I think if somebody's grabbing somebody out of a vat of oil forcibly by their hand or their arms, I mean, it can certainly cause some sort of internal derangement within their shoulder, whether it be the labrum or the rotator cuff or something else".[8]

Dr. Shank described this as an unusual mechanism, specifically a forced axial load. Dr. Shank believed there was sufficient information to determine that his injury caused Claimant's shoulder pain. The ALJ found Dr. Shank's testimony on causation to be credible.

28. Dr. Shank explained further that he determined Claimant was not at MMI for the shoulders, as he did not have a lot of work up for those areas of the body. Dr. Shank disagreed with Dr. Larson's opinion expressed in the latter's chart review; specifically that there was no objective indication of trauma to the shoulder. Dr. Shank once again noted when Claimant was extracted from the vat, this was "trauma". Dr. Shank disagreed that Claimant's diabetes was a potential cause of adhesive capsulitis.

[8] Shank deposition, pp.7:23-8:7.

Dr. Shank noted Claimant did not have adhesive capsulitis at the time he examined him. Dr. Shank also believed the extensive pain medication Claimant had during the time he was undergoing grafting procedures would have affected his report of pain to his shoulders.

29. Dr. Shank also reviewed the IME report from Dr. Lotman. Dr. Lotman's conclusions did not change Dr. Shank's opinions. Dr. Shank testified that within a reasonable degree of probability, Claimant's bilateral shoulder condition occurred as a result of his injuries while working for Employer and was not at MMI for those injuries. The ALJ credited Dr. Shank's opinion, as his reasoning was sound and supported by the medical evidence. Dr. Shank credibly testified regarding the etiology of Claimant's shoulder complaints.

30. Respondents failed to overcome the opinions of Dr. Shank by clear and convincing evidence with regard to the cause of Claimant's bilateral shoulder problems and whether Claimant was at MMI. Dr. Larson's and Dr. Lotman's conclusions constitute a difference of opinion and did not constitute sufficient evidence to overcome Dr. Shank's opinions.

31. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1),C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Respondents' medical experts, the DIME physician, as well as Claimant was at the heart of the issue set for determination.

Overcoming DIME Physician's Opinion on Causation and MMI

A DIME physician's finding that a party has or has not reached MMI is binding on the parties, unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Clear and convincing evidence means "evidence which is stronger than a mere 'preponderance'; it is evidence that his highly probable and free from serious and substantial doubt." *Metro Moving & Storage Co v. Gussert, supra*, 914 P.2d at 414 (citing CJI-Civ. 3d 3:2 (1988); *DiLeo v. Kotlnow*, 200 Colo. 119, 613 P.2d 318 (1980). A party meets this burden only by demonstrating that the evidence contradicting the DIME's MMI is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002)[citing *DiLeo v. Koltnow, supra*]. The enhanced burden of proof imposed by § 8-42-108(b)(III), C.R.S., reflects an underlying assumption that the DIME, having been selected by an independent and unbiased tribunal, will provide a reliable medical opinion. *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998).

A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the Claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the Claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990). In this case, the DIME physician's opinion did not so much concern the need for additional treatment, but projected a future date for MMI after an evaluation by the ATP.

In this case, the controversy centered on Dr. Shank's determination that Claimant sustained an injury to both shoulders and was not at MMI, requiring additional treatment.

Causation

As a starting point, there was no dispute the Claimant suffered severe injuries on September 3, 2013 which included the 2nd and 3rd degree burns to his lower extremities. (Findings of Fact 4-6). He was hospitalized, first at Penrose Hospital, then at the University of Colorado Hospital. As found, Claimant underwent various surgical procedure, had significant complications and was prescribed narcotic medications

during and after his hospitalizations. Claimant received extensive treatment for his burns in the ensuing three months. Claimant testified he had symptoms in his shoulders in the aftermath of the September 3, 2013 accident, but he was focused on his lower extremities.

The ALJ concluded Respondents failed to overcome the opinions of Dr. Shank with regard to the question of whether the incident on September 3, 2013 caused bilateral shoulder injuries. First, the ALJ found Dr. Shank was a credible witness in the testimony he provided after the hearing. In this regard, Dr. Shank had the benefit of all of the medical records, which he reviewed and which became the basis of his medical testimony. Dr. Shank stated the mechanism of Claimant being pulled out by his wrist/arms was more likely to cause an injury. (Finding of Fact 27). The ALJ concluded that the mechanism of injury could have caused an injury to both shoulders, crediting Dr. Shank's testimony.

Second, the conclusion that Claimant suffered an injury to both shoulders was supported by evidence in the record in the form of the evaluations and treatment provided by Dr. Polanco. Claimant's pain diagrams and questionnaire admitted at hearing provided evidence to the ALJ that Claimant had pain complaints to both upper extremities. Dr. Polanco specifically opined that Claimant injured his right shoulder. (Finding of Fact 17). Also, and there was no evidence in the record that Dr. Polanco ever analyzed the efficacy of the PT Claimant received since he put Claimant at MMI on July 19, 2014. (Finding of Fact 19).

Third, the ALJ was persuaded by the testimony of Claimant that he suffered an injury to both shoulders. The ALJ found Claimant to be credible while testifying on this subject. Specifically Claimant testified that, in the aftermath of the accident, including the hospitalizations, his focus was on the treatment of his legs. (Finding of Fact 12). He did not engage in much by way of activity during this period of time. *Id.*

In coming to this conclusion, the ALJ considered Respondents' arguments that Dr. Shank erred in his conclusions after performing the DIME and failed to apply the *AMA Guides*. Respondents contended that clear error was present in Dr. Shank's analysis of the mechanism of injury. However, as found, Dr. Shank's testimony analysis of both potential mechanisms of injury was persuasive to the ALJ. In addition, there was objective evidence of bilateral shoulder injuries in the form of Dr. Polanco's records, which was not specifically addressed by Respondents.

Respondents made the argument that the delay in report of shoulder symptoms was persuasive evidence that Dr. Shank's conclusions were erroneous. Respondents introduced voluminous records of Claimant's hospitalizations and the expert opinions of Drs. Lotman and Larson to support their argument. However, the ALJ was not persuaded by these opinions. (Findings of Fact 23-24). In fact, the introduction of the hospital records supported Claimant's argument that he was taking substantial amounts of narcotics and focused more on the treatment of his lower extremities. (Finding of Fact 6, fn. 2). Although Dr. Lotman disagreed that narcotics would mask Claimant's

shoulder symptoms, he did not provide much by way of analysis. At most, the opinions of Respondents' experts constituted a difference of opinion on the issue of causation. (Finding of Fact 30).

Respondents also faulted Dr. Shank's analysis for the failure to analyze the impact of Claimant's insulin-dependent diabetes on the condition of both shoulders. Once again, Dr. Shank was asked this specific question and ruled out any role diabetes may have played when he testified. Also, there was no evidence in the record that Claimant required treatment before the accident or developed tendinitis or any other condition because of the diabetes. In fact, the evidence revealed Claimant was active, including engaging in the physical activity of refereeing basketball games. Accordingly, ALJ concluded that the evidence introduced by Respondents did not introduce the sufficient quantum of evidence required to overcome Dr. Shank's opinions

MMI

As found, Respondents also failed to overcome Dr. Shank's opinions on MMI. As found, Dr. Polanco as the ATP did not provide an opinion regarding whether Claimant's treatment for his shoulders was complete. The July 29, 2014 report contained no indication that Dr. Polanco evaluated Claimant's shoulders to determine whether he was at MMI or sustained a permanent medical impairment. The ALJ concluded Claimant continues to require treatment for his bilateral shoulder condition, as opined by Dr. Shank. (Finding of Fact 22).

ORDER

It is therefore ordered that:

1. Claimant is not at MMI.

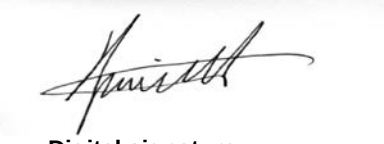
2. Respondents shall provide treatment to Claimant for his left and right shoulders until he reaches MMI.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 21, 2017



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

I. Whether Claimant has shown, by a preponderance of the evidence, that she is entitled to additional temporary disability benefits as a result of her admitted work injury.

II. If Claimant is entitled to additional temporary disability benefits, has Respondent shown, by a preponderance of the evidence, that Claimant was responsible for her own termination of employment.

III. If Claimant is entitled to additional temporary disability benefits, is Respondent entitled to offset such benefits due to Claimant's receipt of unemployment benefits.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant was hired as a client care aide I, starting on February 16, 2016. (Claimant's Exhibit 2, pp. 17 & 19). Claimant was paid a monthly salary of $1,908.00.

2. At the time she was hired, the Claimant was advised that she would be placed on a probationary status for a twelve month period, which would end on February 16, 2017. (Claimant's Exhibit 2, p. 19).

3. The job of a client care aide I required the Claimant to provide assistance to patients, many of whom were confined to wheel chairs. This work involved assisting the patients with transfers from their wheel chair to a bed, or to assist them with bathing or using the restroom. This required her to be able to support patients weighing up to two hundred pounds or more, either by herself or with the help of another aide.

4. Before starting work on February 16, 2016, the record does not show that the Claimant had problems with her left knee, low back or hips. Furthermore, before her injury on March 25, 2016, Claimant alleges she was physically able to do her regular employment, and the record does not show otherwise.

5. On March 25, 2016, the Claimant suffered an admitted work-related injury when she was assisting another aide in transferring a patient from a wheel chair to his bed. Claimant lifted the patient's upper body while the other aide took control over the patient's legs. As they proceeded to move the patient towards his bed, the aide that was assisting the Claimant tripped over the

wheel chair. This caused an unexpected shift in the patient's weight, which resulted in an injury to the Claimant, including to her left knee.

6. After the injury, the Claimant reported it to her Employer and filled out a form documenting the injury. (Claimant's Exhibit 2, p. 22).

7. Claimant sought treatment at Parkview Medical Center's emergency room. (Claimant's Exhibit 8, p. 65).

8. After the accident, the Claimant was unable to continue her regular employment. Respondents filed a general admission on April 15, 2016, admitting to the payment of temporary total disability (TTD) benefits starting on March 26, 2016. (Claimant's Exhibit 11, p. 97).

9. While the Claimant was unable to perform her regular duties, the Respondents did inquire of Claimant's then treating physician, Dr. Terrence Lakin, D.O., whether the Claimant could perform modified work involving answering telephones, making copies, sorting documents, scanning and faxing, as well as data entry. (Claimant's Exhibit 2, p. 27). Dr. Lakin approved the duties for this modified employment on April 27, 2016.

10. As a result of the modified job offer, the Respondents started paying the Claimant temporary partial disability (TPD) benefits on April 20, 2016. (Claimant's Exhibit 11, p. 98).

11. The Respondents continued to pay TPD benefits until the Claimant was placed at MMI on May 20, 2016. On May 27, 2016, Respondents filed a final admission of liability, based on Claimant's then treating physician, Nicholas Kurz. (Claimant's Exhibit 11, P. 98). The final admission admitted for no permanent impairment, and also documented the termination of TPD benefits as of May 5, 2016. Claimant was released by Dr. Kurtz to full duty, with no work restrictions.

12. Dr Kurtz also stated that "the patient has been returned to their DOI baseline", and is advised to "follow-up with their PCP for this non-work related condition" (Claimant's Exhibit 3, p. 38).

13. Claimant had already presented to the Pueblo Community Health Center on May 11, 2017 for this issue. A MRI was discussed as a possibility if things did not improve. Pain medication was prescribed.

14. Claimant returned to Pueblo Community Health Center on May 24, 2017 (and after Dr. Kurz recommended follow-up with her PCP). She was treated by Erin Ordway, ***PA-C.*** At this time, it was discussed that the workers comp case was closed.

15. On June 6, 2016, Erin Ordway, ***PA-C,*** wrote a letter, addressed "to whom it may concern" recommending light duty, without significant lifting (>5 lbs), until Claimant had at least two weeks of physical therapy, after which a re-evaluation was recommended before a return to full duty. (Claimant's Exhibit 10, p. 92).

16. Claimant was once again seen at the Pueblo Community Health Center on August 2, 2016, this time by Dylan Devries, ***PAC*****.** Pain prescriptions were refilled, with an MRI being referred.

17. Nowhere in the records of any of Claimant's visit to Pueblo Community Health center is any mention that Claimant saw a *physician*, or that either *PAC* was operating under the direction or supervision of a *physician* in treating Claimant.

18. After being placed at MMI, the Respondents no longer offered the Claimant any modified work.

19. After Respondents filed a final admission of liability based on Dr. Kurz's opinion, the Claimant objected to the final admission and requested a Division-sponsored independent medical examination (DIME). The DIME was conducted by Dr. Miguel Castrejon on September 27, 2016. (Claimant's Exhibits 1, P. 1). Dr. Castrejon performed an examination of the Claimant as well as a review of the medical history. (Claimant's Exhibits 1, pp. 1-11). Dr. Castrejon conclusions differed from those of Dr. Kurz. The relevant language from Dr. Castrejon's report is referenced below:

> Dr. Kurz noted an examination that was "inconsistently reproducible" and provided a final impression of muscle strain of the left knee and lumbar pain on palpation. I do not see, in his physical examination, that Dr. Kurz evaluated the claimant for SI nor facet mediated pain. There were no nerve tension signs, as I observed today. It appears that Dr. Kurz then made the decision to place the claimant at maximum medical improvement primarily on the basis of inconsistent findings versus attempting to pursue in (sic) obtaining an adequate diagnosis. This examiner notes that it is the responsibility of the workers' compensation carrier to ensure that an accurate diagnosis and treatment plan can be established. This would not appear to have been the case. This examiner notes that at no time prior to her release was the claimant referred for any specialized imaging or electrodiagnostic studies. Unlike the examination
> by Dr. Kurz, my examination of the claimant today was consistent.
>
> In my professional opinion, the mechanism of injury is consistent with the claimant's presenting complaints for lumbar strain with involvement of the left sacroiliac joint for which treatment has not been provided.

> An MRI of the left knee was also obtained following her release by Dr. Kurz.
> The study revealed findings suggestive for a quadriceps tendonitis at the insertion of the patella. There was also reported to be a mild resulting bony
> edema of the lateral tibial plateau….The claimant's examination today of the left knee consisted of an antalgic gait, anterior knee pain with some medial joint line but negative McMurray's maneuver and mild decrease in motion. In my professional opinion, the mechanism of injury would be consistent with a straining injury to the left knee that involved the distal quadriceps tendon for which additional treatment focal to this condition is indicated.
>
> Based on my examination of the claimant, it is my professional opinion that the claimant is not at maximum medical improvement. This recommendation is made based upon the diagnosis of a left sacroiliac joint dysfunction that has not been diagnosed nor treated, as well as persistent knee pain for which additional focused treatment is indicated.

(Claimant's Exhibits 1, pp. 9 & 10).

20. The DIME physician, Dr. Castrejon, did not offer an opinion on Claimant's ability to return to work, with or without restrictions.

21. As a result of Dr. Castrejon's *'not at MMI'* opinion, Respondents filed a General Admission of Liability and authorized further medical treatment. (Respondent's Exhibit D)

22. Claimant returned to Dr. Kurz on January 23, 2017. Dr. Kurz continued Claimant's release to return to work full duty, without any restrictions. (Exhibit F, p. 083).

23. Claimant's care was then transferred to Dr. Centi. Claimant saw Dr. Centi on February 23, 2017, March 10, 2017, March 24, 2017, and April 7, 2017. At every visit, Dr. Centi continued Claimant's release to full duty with no restrictions. (Exhibit H and Exhibit 4, p. 49)

24. Claimant voluntarily resigned her employment with Employer effective August 10, 2016. (Exhibit J) Claimant was given the option to appeal the acceptance of her resignation if she felt that she was forced or coerced to resign. (Exhibit J, p. 101) Claimant testified that she did not appeal.

25. Claimant received unemployment benefits for the week ending September 17, 2016 through the week ending October 15, 2016 totaling $938.00. (Exhibit I).

26. Claimant began working for YWCA on February 21, 2017. (Exhibit 6)

27. The ALJ finds that no Authorized Treating *Physician* has placed any work restrictions on Claimant since Dr. Kurtz returned Claimant to full duty on May 20, 2017.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

B. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

Temporary Disability Benefits-Release by ATP

D. §8-42-105(3), C.R.S. provides, in relevant part, that temporary total disability benefits shall continue until Claimant reaches MMI, the employee returns to regular or modified employment, *or the attending physician gives the employee a written release to return to regular employment.* Once it is established that the attending physician has released a claimant to full duty, "the opinion of the attending physician carries

conclusive effect with respect to a claimant's ability to perform regular employment." *Bestway Concrete v. Indus. Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995). In light of an attending physician's opinion releasing a claimant to full duty, "any evidence concerning claimant's self-evaluation of her ability to perform her job is irrelevant and should be disregarded by the ALJ." *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Burns, supra*.

E. Dr. Kurz, the *authorized treating physician* in this case, released Claimant to return to work with no restrictions when he placed her at MMI. Even though the DIME physician opined that Claimant was not at MMI, the attending physicians for Claimant's worker's compensation claim have continued to release Claimant to return to work with no restrictions. The DIME physician did not opine, nor was he authorized to opine, on Claimant's work restrictions.

F. Dr. Kurz' referral-for Claimant's same injuries-to Claimant's PCP (due to his belief that her claim was outside the Workers Comp system) opened the door to a conflicting opinion by another Authorized Treating Physician. *Cabela V. Industrial Claims Appeals Panel*, 198 P 3d 1277 (Colo. App 2008). However, Claimant was never evaluated or treated by a *physician* at Pueblo Community Health Center. Claimant's work restrictions recommended by her PA-C did not come under the direct supervision and control of a physician. The facts herein are also distinguishable from the case cited by Claimant in support: *Bassett v. Echo Canyon,* W.C NO. 4-260-804 (1997). In *Bassett,* sufficient evidence existed in the record to conclude that the physician's assistant (PA) worked directly with the ATP in examining and treating that Claimant, and in placing work restrictions on the Claimant. No such evidence exists in this record. To the extent that Erin Ordway, PA-C might be deemed to be acting under the direct supervision and control of a physician, the ALJ gives greater weight to the opinions of Drs. Kurz and Centi. Claimant has not shown, by a preponderance of the evidence, that she was unable to return to work without restrictions.

G. Claimant's TTD benefits thus terminated when Dr. Kurz first released her to return with no work restrictions.

Claimant's Responsibility for Termination

H. §8-42-103(1)(g), C.R.S. and §8-42-105(4), C.R.S., provide that if a Claimant is "responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." *See also, Colo. Springs Disposal v. Martinez*, 58 P.3d 1061 (Colo. App. 2002). Thus, if a Claimant is responsible for her termination, she is not entitled to recover temporary disability benefits for wage loss. *Padilla v. Digital Equip. Corp.*, 902 P.2d 414 (Colo. App. 1994). A Claimant is responsible for her termination where she is "at fault" for causing a separation in her employment. A finding of "fault" requires a volitional act or the exercise of a degree of control by a claimant over the circumstances resulting in the termination. *Padilla, supra.* This is a factual determination for the ALJ. *Padilla, supra.* Respondents have shown, by a

preponderance of the evidence, that Claimant voluntarily resigned her employment and did not appeal the acceptance of her resignation. Claimant is responsible for her wage loss after August 10, 2016 and is not entitled to temporary disability benefits after that date.

I. For the foregoing reasons, it is not necessary to address the issue of offsets due to unemployment compensation.

ORDER

It is therefore ordered that:

1. Claimant's request for additional temporary disability benefits is denied and dismissed.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 26, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician Greg Reichhardt, M.D. regarding Claimant's maximum medical improvement (MMI) date and Claimant's permanent partial disability (PPD) impairment rating.

FINDINGS OF FACT

1. Claimant was employed by Employer as a foreman at the time of the admitted work injury. Claimant, at time of hearing, worked for the City and County of Denver in the traffic division.

2. On January 24, 2013, Claimant sustained an admitted work injury while employed by Employer. On that date, Claimant was struck in the head with a metal cap weighing approximately 15 pounds that fell from a traffic light pole approximately 30 feet high. The impact caused Claimant to lose consciousness, vomit, and seize. Claimant was transported emergently to Denver Health Medical Center (DHMC).

3. At DHMC Claimant underwent an emergent CT scan that showed a bilateral temporal bone fracture extending into the coronal suture, a right sided temporal fracture extending into the auditory canal and middle ear, a moderate right-sided subdural hematoma with compression of the brain and ventricles in the subarachnoid spaces, and small bi-frontal temporal hemorrhagic contusions with a small amount of subarachnoid hemorrhage. Claimant was taken directly to the operating room and underwent a right frontoparietal temporal decompressive craniectomy, removal of right hemispheric subdural hematoma, and evaluation of temporal contusion.

4. Post operatively, Claimant was diagnosed with severe traumatic brain injury, right-sided subdural hematoma, and malignant intracranial hypertension and was placed in a protective unit. Claimant had multiple follow up diagnostic studies and remained in the intensive care until until January 31, 2013.

5. On January 31, 2013 he was transferred to Craig Hospital where he underwent physical therapy, occupational therapy, and speech therapy. At Craig, Claimant's memory came back, he became ambulatory, he did very well with rehabilitation, and he made significant gains with cognition. On March 1, 2013 Claimant was discharged from Craig Hospital.

6. On March 6, 2013 Claimant was evaluated by Jim Schraa, Psy.D. Dr. Schraa opined that Claimant presented as doing well on initial testing with the exception of verbal memory and that the weakest subtest score was in the coding subtest which

fell in the mildly impaired range, consistent with Claimant's closed head injury. Dr. Schraa opined that Claimant presented as having strong ongoing cognitive recovery and that the major challenge appeared to be with family stressors. Claimant reported that he had conflict with his significant other over the years. *See* Exhibits A, 9.

7. On March 8, 2013 Claimant was evaluated by Dr. Schraa. Claimant reported no new cognitive problems or changes in mood but that his outlook on life had changed due to his injury. Claimant reported that his significant other was reactive to his questions regarding what he wanted to do with his future. Dr. Schraa opined that it was likely that they would need ongoing marital therapy. *See* Exhibit 9.

8. On May 2, 2013 Claimant was evaluated by Dr. Schraa. Dr. Schraa noted Claimant's desire to return to work but that neurosurgery had a restriction on his ability to work. Claimant reported that he had always had some marital issues but that he was less willing to entertain demands from his significant other. Again, Dr. Schraa noted that marital therapy appeared indicated. *See* Exhibit 9.

9. On June 21, 2013 Claimant was evaluated by Ron Carbaugh, Psy. D. Dr. Carbaugh noted that Claimant was referred for assessment of anger issues directly related to his January 2013 work injury. Claimant appeared somewhat anxious and at times frustrated and near tears. Claimant felt ready to return to work but had not yet been released by his care providers. Dr. Carbaugh noted that Claimant had made quite rapid recovery from a physical as well as cognitive standpoint but that Claimant expressed some frustration and ongoing irritability. Dr. Carbaugh noted some underlying anxiety during clinical interview. Dr. Carbaugh provided diagnostic impressions of probable personality traits or coping style affecting rehabilitation, and adjustment disorder. Dr. Carbaugh recommended adjustment counseling directly related to the work injury. *See* Exhibit 6.

10. On August 13, 2013 Claimant underwent a neuropsychological assessment performed by Suzanne Kenneally, Psy.D. Claimant reported his current physical symptoms as right frontal headache, daily right sided neck pain. He reported his cognitive symptoms as irritable, needing to keep a calendar, and being impulsive with spending. Dr. Kenneally opined that Claimant's IQ score was within the statistical interval indicative of average to above average IQ for general intelligence. In attention and concentration, Dr. Kenneally opined that Claimant's performance was from the average to superior range. She opined that on memory functioning Claimant's scores represented above average functioning and that he performed in the superior range for language skills. She opined that Claimant appeared to be functioning in the average to above average range across the majorities of modalities tested and that despite the severity of his injury, Claimant appeared to have made a significant and complete recovery. *See* Exhibits B, 8.

11. Dr. Kenneally noted some elevation indicating social alienation with antisocial behavior and indication of possible impulse control. Dr. Kenneally opined that it was likely that as Claimant continued to recovery, his psychological distress would

resolve. Dr. Kenneally opined that the current tests showed no residual cognitive impairment and had strong intact cognitive functioning. She provided the diagnostic impression of major neurocognitive disorder due to traumatic brain injury with resolution of cognitive defects. *See* Exhibits B, 8.

12. On February 13, 2014 Claimant was evaluated by Dr. Carbaugh. Claimant presented in an open and straightforward manner and reported being frustrated with how he perceived that his current company was treating him. Dr. Carbaugh opined that Claimant could be placed at MMI from a psychological standpoint at any time that Claimant's medical care concluded. Dr. Carbaugh noted that the calculation of an impairment rating would be complex given the multiple issues involved but that Claimant did not appear to have any work restrictions from a psychological standpoint. Dr. Carbaugh noted that if Dr. Plotkin placed Claimant at MMI, he would recommend 4-6 sessions of maintenance psychological follow up on an as needed basis. *See* Exhibit 6.

13. On April 29, 2014 Claimant was evaluated by Dr. Carbaugh. Dr. Carbaugh noted that Claimant appeared to be approaching MMI and had been referred out for the actual impairment rating process. Claimant believed that his medical treatment had run its course and was hopeful to put the workers' compensation issues behind him. Claimant was open in discussing psychological issues and was appreciative that follow up psychological sessions would be recommended as part of his maintenance care. Dr. Carbaugh opined that Claimant could certainly be considered at MMI from a psychological standpoint and Dr. Carbaugh recommended 4-6 sessions as maintenance on an as needed basis. *See* Exhibit 6.

14. On June 10, 2014 Claimant was evaluated by neurologist Richard Stieg, M.D. Dr. Stieg noted that Claimant had been referred by Dr. Plotkin for an independent impairment rating. Dr. Stieg reviewed medical records and performed a physical examination. Dr. Stieg provided the impression of: traumatic brain injury, post traumatic vision syndrome, adjustment disorder due to the work injury, post traumatic headache disorder, and disfigurement due to cranioplasty. Dr. Stieg opined that the permanent impairment from a neurologic standpoint was for post traumatic headaches and provided a 5% whole person impairment rating for episodic neurological symptoms. Dr. Stieg opined that additional impairment might be considered for posttraumatic vision disturbance and for disfigurement if Dr. Carbaugh felt that played a role in the adjustment disorder and was permanent but that it did not appear to be an issue per his review of Dr. Carbaugh's records. *See* Exhibits C, 7.

15. On July 9, 2014 Claimant was evaluated by Dr. Plotkin. Claimant felt that he was doing well but had occasional bilateral frontal headaches. Claimant also reported occasional discomfort near the anterior aspect of the cranioplasty on the right, some occasional fluid buildup near the anterior aspect of the cranioplasty, that his vision was not as good as it was prior to the injury, and that his sense of taste and smell seemed off. Claimant also reported getting frustrated at times, which was also a pre-injury trait and that he had some self consciousness because of the disfigurement on

the right side of his head. Dr. Plotkin performed a physical examination. Dr. Plotkin assessed: traumatic brain injury; skull fractures; hemorrhagic contusions; subdural and subarachnoid hemorrhages; status post craniectomy; status post cranioplasty times two; and adjustment disorder. Dr. Plotkin opined that Claimant reached MMI on July 9, 2014 and that Claimant had suffered a serious head injury and had made an excellent recovery. Dr. Plotkin opined that Claimant had comprehensive rehabilitation and had completed medical care. *See* Exhibits D, 5.

16. Dr. Plotkin opined that there were three components to Claimant's impairment assessment: neurologic, psychiatric, and disfigurement. Dr. Plotkin noted that Dr. Stieg performed a neurologic impairment rating and determined that Claimant had permanent impairment on the basis of posttraumatic headaches with a 5% whole person rating. Dr. Plotkin also noted that he contacted Dr. Carbaugh by phone to review the case and that Dr. Carbaugh noted that Claimant had stress and felt socially uncomfortable because of the disfigurement and that Claimant had a tendency to "hold it in" and had some anger and stress. Dr. Carbaugh felt that Claimant's psychological stress was not only related to the disfigurement. Dr. Plotkin noted that Claimant was referred to a psychiatric evaluation with Dr. Gutterman who evaluated Claimant and determined a 4% permanent partial impairment related to Claimant's adjustment disorder. Dr. Plotkin noted that he consulted the AMA Guides and that the determination of permanent impairment based on disfigurement was somewhat difficult to determine in this case but that Claimant's disfigurement was significant and played a critical role in his physical, psychological, and emotional wellbeing. Dr. Plotkin opined that under Table 1 on page 241, Claimant would likely fall under mild impairment and provided a 10% whole person impairment rating for disfigurement. Dr. Plotkin opined that this impairment rating was separate and unrelated to the psychological impairment which was primarily related to Claimant's adjustment disorder. *See* Exhibits D, 5.

17. Dr. Plotkin opined, therefore, that Claimant had whole person impairment of: 10% for disfigurement; 5% for neurologic impairment; and 4% for psychological impairment. Dr. Plotkin combined these values to come up with an 18% impairment of the whole person. Dr. Plotkin recommended the following maintenance care: rechecks with the primary occupational medicine physician as needed, follow up with the neurologist regarding seizure activity and anti-seizure medication, neurosurgical follow up as needed, follow up with optometrist as warranted, psychological counseling with Dr. Carbaugh for up to five additional sessions, and maintenance medications. *See* Exhibits D, 5.

18. Respondents filed a final admission of liability (FAL) consistent with Dr. Plotkin's report. Claimant objected and requested a DIME.

19. On July 11, 2014 Claimant was evaluated by neurologist Kirsten Nielsen, M.D. Dr. Nielsen noted that Claimant had a generalized seizure on the date of his work injury and had last been seen by her in January. Claimant reported no recurrence of seizure activity and that he had been driving and working full time. Claimant reported occasional bi-frontal headaches, made worse by stress. Claimant admitted to anxiety

attacks once per day. Dr. Nielsen performed a physical examination and noted that two negative EEGs had been performed on January 17, 2014 and on January 10, 2014. Dr. Nielsen noted that Claimant's anti-seizure medication was being tolerated well and that Claimant remained seizure free. *See* Exhibit 4.

20. On July 28, 2014 Claimant underwent an individual psychiatric consultation with Gary Gutterman, M.D. Claimant reported some psychological effects due to his head injury and that he was self-conscious about his cranium which had a dent in the middle and scars on the side of his head. Claimant reported that he wears a cap in order to cover up his head. Claimant reported being more frustrated and irritable in various situations and that he was more cautious and apprehensive at work and is worried about being reinjured. Claimant reported being more protective of his daughter and that he was worried that she might be injured in some way. Claimant reported nightmares at times and on occasion recurrent memories of what occurred. Dr. Gutterman opined that Claimant continued to experience a mild adjustment disorder as a result of his work injury, altered body image, and prior brain injury but that Claimant overall was doing reasonably well considering the significant injury that occurred. Dr. Gutterman opined that Claimant had experienced a 4% permanent partial mental impairment. Dr. Gutterman noted that Claimant was doing reasonably well without psychotropics and believed that the adjustment disorder would probably persist indefinitely given the type of injury that Claimant experienced. *See* Exhibits E, 3.

21. On January 12, 2015 Claimant underwent a DIME performed by Greg Reichhardt, M.D. Claimant reported that while taking down a traffic light pole, the pole hit him and knocked his helmet off. Claimant reported that a 15 pound metal cap then fell approximately 30 feet and hit him in the head and that his first memory afterwards was a couple of days later in the hospital. Claimant reported being self conscious about his injury and that it impacted his emotions and that he wore a hat to cover it up and was concerned about having to work in an environment where he would not wear a hat. Claimant reported decreased sense of taste and smell, pain above his nose, bilateral frontal headaches, pain over the lower thoracic area, and some symptoms of anxiety and depression. Claimant reported that his social functioning was interfered with and that he was more irritable and is nervous about injury and re-injury, had difficulty managing conflicts, and had decreased memory. Dr. Reichhardt reviewed medical records and performed a physical examination. *See* Exhibits F, 2.

22. Dr. Reichhardt provided the impression of: traumatic brain injury, post-traumatic headache; temporomandibular joint symptoms; thoracic pain; decreased sense of taste and smell; and visual symptoms including refractive change. Dr. Reichhardt opined that Claimant was at MMI and had reached MMI on June 9, 2014. Dr. Reichhardt recommended six follow up visits with a physician per year and cosmetic surgery for the temporal defect or the hypertrophic scar tissue anterior to the ear. Also, as maintenance, Dr. Reichhardt recommended any further surgery or treatment to address the PEEK flap. Dr. Reichhardt opined that Claimant sustained a 22% whole person impairment with 5% for traumatic brain injury, 10% for disfigurement/mental behavior, 3% for olfactory, and 5% for spinal impairment. Dr. Reichhardt noted that in

terms of Claimant's disfigurement, the AMA Guides indicate that if impairment due to disfigurement does exist, it usually manifested by a change in behavior such as an individual's withdrawal from society and should be evaluated in accordance with the criteria set in chapter 14 and Dr. Reichhardt opined that it was appropriate to give Claimant a rating for this according to Table 1, page 241. Dr. Reichhardt noted that Claimant was not given a separate psychiatric impairment rating, as it was used for the disfigurement rating. *See* Exhibits F, 2.

23. On January 27, 2015 Respondents filed a FAL consistent with Dr. Reichhardt's DIME report. *See* Exhibit 10.

24. On October 26, 2015 Claimant underwent an Independent Medical Examination (IME) performed by Elizabeth Bisgard, M.D. Claimant reported still having pain over the fracture site of the skull and popping over the allograft with different activities with occasional debilitating headaches. Claimant reported intermittent stabbing, aching pain in his lower thoracic spine. Dr. Bisgard reviewed medical records and performed a physical examination. Dr. Bisgard diagnosed: traumatic brain injury; skull fracture; moderate right subdural hematoma with compression of ventricle and subarachnoid spice, bi-temporal and bi-frontal hemorrhagic contusion; small subarachnoid hemorrhages; insomnia; back pain; and right upper extremity cephalic medial cubital and left basilica vein thrombosis. Dr. Bisgard agreed with Dr. Plotkin and Dr. Reichhardt that Claimant reached MMI on June 9, 2014. Dr. Bisgard also opined that Dr. Reichhardt calculated the impairment rating in accordance with the AMA Guides and made no error in his calculation. *See* Exhibits G, 1.

25. Dr. Bisgard agreed that a 5% whole person impairment was appropriate for the headache and 3% appropriate for the olfactory nerve loss. Dr. Bisgard noted that Dr. Reichhardt included the psychological impairment as part of the disfigurement, which was a method acceptable under the AMA Guides. Dr. Bisgard opined that she personally would not have included a 5% rating for the thoracic spine since the records reflected no mention of back pain for several months, but opined that Dr. Reichhardt did not err by including the thoracic spine. Dr. Bisgard opined that it would be appropriate for Claimant to have 8-10 maintenance treatments with a female psychologist. She also opined that Dr. Reichhardt's recommendations for maintenance for additional cosmetic surgery or revision of the PEEK allograft or for anti-seizure medications were appropriate. *See* Exhibits G, 1.

26. On April 5, 2016 Claimant underwent a psychological evaluation performed by Walter Torres, Ph.D. Dr. Torres noted that Claimant had been referred by his attorney for an evaluation to determine the presence of any injury related psychological conditions and impairment and the psychological impairment ratings that any such conditions and impairments would warrant. Dr. Torres reviewed medical records, interviewed Claimant, and performed psychological testing. Dr. Torres provided the diagnostic impression of adjustment disorder with depression and anxiety and alcohol use disorder. *See* Exhibit 13.

27. Dr. Torres opined that Claimant's symptoms of anxiety with panic attacks, pervasive self-doubt, persistent rumination and grave worry, social withdrawal, dysphoric emotionality, diminished sexual interest, and diminished motivation to enjoy previously enjoyed activities were due to his injury. Dr. Torres opined that Claimant avoided disclosure of his emotional dysfunction due to shame and immaturity when Claimant's treatment was active but that the pressure of Claimant's worries, distress, and symptoms had tended in the more recent months to overwhelm Claimant. Dr. Torres opined that Claimant was in need of psychological therapy now that he was more open and realistic and that the therapy should target the unrealistic conviction that Claimant developed about his destiny to develop dementia and the disfigurement, and shame through exposure and desensitization. *See* Exhibit 13.

28. Dr. Torres recommended 10 psychotherapeutic sessions. Dr. Torres opined that given that Claimant's underlying symptoms had not resolved in the course of previous treatment Claimant never reached MMI or alternatively, that Claimant had deteriorated and was no longer at MMI. Dr. Torres performed a mental impairment rating worksheet based on Claimant's psychological condition as it existed on the date of the evaluation. Dr. Torres assigned a 14% psychiatric impairment with impairment for sexual function, sleep, interpersonal relationships, communicating effectively with others, recreational activities, managing complex interactions with others, memory, and ability to set realistic goals. *See* Exhibit 13.

29. Dr. Bisgard testified by deposition consistent with her IME report. Dr. Bisgard opined that the DIME physician, Dr. Reichhardt, made no errors in the impairment rating and that the impairment rating provided by Dr. Reichhardt was supported by the AMA Guides. Dr. Bisgard opined that she would not have included the thoracic spine like Dr. Reichhardt did, but that he did not err. Dr. Bisgard opined that the DIME accounted for psychiatric impairment. Dr. Bisgard agreed that Claimant had reached MMI, consistent with the opinions of Dr. Plotkin and Dr. Reichhardt. Dr. Bisgard noted that although Dr. Torres provided several areas of rating, Claimant had pre-existing issues with: anger and impulse control, relationships, and alcoholism. Dr. Bisgard noted that Dr. Torres was the only evaluator outside the opinions that were similar including opinions from Dr. Carbaugh, Dr. Kenneally, Dr. Gutterman, Dr. Stieg, Dr. Plotkin, Dr. Reichhardt, and Dr. Nielson.

30. Dr. Bisgard noted that Dr. Gutterman had provided a 4% impairment rating for the adjustment disorder and that Dr. Plotkin used that plus a 10% impairment rating for disfigurement and that Dr. Plotkin provided the disfigurement rating alongside the psych rating. However, Dr. Bisgard noted that the DIME physician only provided the 10% disfigurement rating and did not provide a separate psych rating. Dr. Bisgard opined that awarding the mental impairment on top of the disfigurement impairment would be considered double-dipping. Dr. Bisgard opined that Dr. Reichhardt was not wrong and made no errors in calculating Claimant's impairment. Dr. Bisgard noted that Dr. Torres disagreed, but that Dr. Torres was not a level II accredited physician and that there was only a different opinion and no error by Dr. Reichhardt.

31. Claimant testified at hearing that he was a different person now and following his work injury and that he is now self-conscious, has anxiety, and has panic attacks. Claimant testified that he is irritable and impulsive now. Claimant testified that he put on a face with his psychological treatment with Dr. Carbaugh but that he was emotional and open with Dr. Bisgard. Claimant testified that he struggles now with communication and that he no longer has confidence like he used to have.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME ON MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." *See* § 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. *See* § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Here, Claimant has failed to overcome the opinion of DIME physician Dr. Reichhardt on MMI by clear and convincing evidence. Rather, the opinion of Dr. Reichhardt on MMI is supported by consistent opinions from the authorized treating provider Dr. Plotkin, and from the treating psychologist Dr. Carbaugh. Dr. Bisgard also provided an opinion on MMI consistent with the DIME physician. Here, Claimant argues that due to the report of Dr. Torres, he has overcome the DIME physician's opinion on MMI by clear and convincing evidence. However, the ALJ disagrees and finds that Dr. Torres' opinion is merely a difference of opinion from multiple other providers. As found above, Dr. Carbaugh opined as early as February of 2014 that Claimant was at MMI from a psychological standpoint. Dr. Carbaugh found Claimant to be open in discussing psychological issues and also noted in his evaluation that Claimant did have a tendency to "hold it in" and had some anger, stress, and felt socially uncomfortable because of the disfigurement. Many providers recommended maintenance psychological visits to continue working on issues, but the only provider who opined that Claimant was not at MMI from a psychological standpoint was Dr. Torres. As found above, Dr. Gutterman noted that Claimant's adjustment disorder would probably persist indefinitely given the type of significant injury Claimant sustained.

Claimant's psychological issues, including adjustment disorder and disfigurement had become stable with no further treatment reasonably expected to improve these conditions at the point he was placed at MMI by DIME physician Dr. Reichhardt. Claimant was noted by many providers to be doing reasonably well despite the significant injury he sustained and Claimant was stable from a psychological standpoint when he was placed at MMI. Although he was not back to normal and had remaining psychological issues, these issues were found by Dr. Reichhardt to be stable at and MMI. This determination is consistent with the overall records and with the determination of MMI made by Dr. Reichhardt. Claimant has failed to show that it is highly probable that Dr. Reichhardt was incorrect in assigning MMI.

OVERCOMING DIME ON PPD

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Dr. Reichhardt provided a whole person impairment rating of 22%. This was provided based on: 5% for traumatic brain injury; 10% for disfigurement; 3% for olfactory; and 5% for spinal. The authorized treating provider, Dr. Plotkin provided an 18% whole person impairment rating based on: 5% for traumatic brain injury, 10% for

disfigurement, and 4% for psychiatric. Dr. Plotkin did not include any rating for olfactory or spinal. Dr. Reichhardt did not include any rating for psychiatric. Dr. Reichhardt specifically noted the reason why he declined to rate psychiatric in his DIME report. He opined that under the AMA Guides, if impairment due to disfigurement exists, it usually is manifested by a change in behavior such as an individual's withdrawal from society and should be evaluated in accordance with the criteria set in chapter 14. Dr. Reichhardt opined that it was appropriate to give Claimant a rating for this according to Table 1, page 241, hence the 10% whole person disfigurement rating. Dr. Reichhardt also noted in his DIME report Claimant was not given a separate psychiatric impairment rating, as it was used for the disfigurement rating. Dr. Bisgard opined that this was not an error and that rating for both in Claimant's case would be considered "double dipping."

Dr. Torres believed that Claimant's psychiatric rating was 14% whole person. However, Dr. Torres based this rating, in part, on several psychiatric issues that pre-existed the injury as shown by prior medical records. The opinion of Dr. Torres is not found credible or persuasive. Further, Dr. Torres merely showed a difference of opinion from the DIME physician on what the appropriate rating was and what conditions were causally related to Claimant's psychiatric rating. Dr. Torres did not point out error in Dr. Reichhardt's calculation of impairment. Similarly, although Dr. Plotkin believed that Claimant warranted an impairment rating for disfigurement separate and unrelated to the psychiatric impairment due to Claimant's adjustment disorder, Dr. Plotkin failed to identify error in Dr. Reichhardt's determination that the psychiatric impairment was included in the disfigurement rating. The providers in this case seem to disagree but as opined by Dr. Bisgard, there is merely a difference in opinion as to whether Claimant has a separate ratable psychiatric condition or whether his adjustment disorder is appropriately rating within the disfigurement rating. As Claimant ahs failed to show error in Dr. Reichhardt's rating, and has merely shown difference of opinion, Claimant has failed to meet his burden.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome by clear and convincing evidence the opinion of the DIME physician Dr. Reichhardt on MMI and PPD.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 25, 2017,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. What is the true opinion of Division Independent Medical Examination ("DIME") physician , Brian Beatty, D.O., regarding Claimant's permanent impairment?

2. If Dr. Beatty's true opinion is that Claimant sustained a 20% whole person permanent impairment rating, has Claimant overcome the DIME physician's opinion by clear and convincing evidence?

3. If Dr. Beatty's true opinion is that Claimant sustained a 33% whole person permanent impairment rating, have Respondents overcome the DIME physician's opinion by clear and convincing evidence?

4. Whether wages paid to Claimant during a period of modified duty should be considered temporary total disability for purposes of the statutory benefit cap set forth in Section 8-42-107.5, C.R.S.

FINDINGS OF FACT

1. On November 13, 2014, Claimant sustained an admitted industrial injury when a 300-pound cylinder of ammonia fell on top of her. Claimant sustained lumbar transverse process fractures at T12, L1 and L2, an avulsion fracture to her left ring finger, a nasal fracture, rib fractures, liver laceration and a concussion.

2. Claimant was hospitalized at St. Anthony's hospital. Upon her release, Claimant treated primarily with Theodore Villavicencio, M.D. Claimant also treated with Eric Tentori, M.D., Samuel Chan, M.D., Philip Yarnell, M.D, and John Mark Disorbio, Ed.D., among others.

3. Claimant underwent treatment over the course of several months, including physical therapy and work hardening.

4. In December 2014, Dr. Villavicencio released Claimant to work modified duty. Claimant returned to work sometime thereafter. Claimant testified that she attempted to return to work as a driver soon after her injury and that she suffered a setback resulting in her physicians changing her restrictions. As of a March 13, 2015 evaluation, Claimant's restrictions included no commercial driving. Dr. Villavicencio allowed Claimant to return to driving in early April 2017; however, by the April 27, 2015 evaluation, Claimant was again restricted from commercial driving.

5. Claimant credibly testified that she continued to work light duty until the employer stopped giving her things to do. Claimant testified that she was required to, and did, stay in touch with the employer on a daily basis to see if they were going to have her

come in for any light duty work. Claimant testified she was expected to come in if there was work for her, and that she was available to do so in such event. Claimant testified that she also submitted timesheets. Claimant indicated that the inability to drive the commercial vehicles was the biggest impediment to her returning. As of August 18, 2015, Claimant was still on restrictions of 20 pounds lifting, and no driving or riding in a company vehicle.

6. Between August 1, 2015 and November 22, 2015, Claimant continued to receive her regular wages while on light duty restrictions and not receiving work from Employer. Claimant was subsequently placed back on temporary total disability. Employer paid Claimant $14,324.63 in wages during such time period. If claimant had received temporary total disability ("TTD") benefits instead of wages during this same time period, she would have received $12,301.58.

7. In March 2015, Dr. Villavicencio referred Claimant to Dr. Chan. Dr. Chan documented continuing concerns regarding underlying psychological issues of Claimant. On April 20, 2015, Dr. Chan remarked, "Today, the patient had a rather significant reaction to her emotional distress, which leads one to believe that the ongoing symptoms could be psychosomatically influenced." In a May 4, 2015 medical note, Dr. Chan noted, "the concern is whether there is underlying somatization." On May 11, 2015, Dr. Chan remarked, "I do feel that there is definitely an underlying psychological component to the patient's pain complaint." In a January 12, 2016 medical note, Dr. Chan commented, "…I do feel that there is a significant amount of underlying psychological dysfunction that might impede the patient's recovery as well as affect her presentation."

8. In October 2015, Dr. Villavicencio referred Claimant to Dr. Disorbio. Dr. Disorbio conducted a psychological evaluation of Claimant on October 28, 2015 and issued a report dated November 5, 2015. Dr. Disorbio diagnosed Claimant with pain disorder with psychological factors, somatization features and denied dependency. Claimant attended multiple follow-up sessions with Dr. Disorbio from February 2016 to September 2016.

9. On March 8, 2016, Claimant underwent a functional capacity evaluation with Concentra. Catherine Kent, BSc.PT, noted limited range of motion. Ms. Kent noted that Claimant put forth full effort, and that Claimant's pain could have affected Claimant while making functional decisions.

10. On March 11, 2016, Dr. Chan conducted a follow-up evaluation of Claimant. Dr. Chan determined Claimant had reached maximum medical improvement ("MMI") as of March 11, 2016. Dr. Chan noted the following lumbar range of motion findings, measured using the double inclinometer method:

- T12 range of motion/sacral range of motion: 110/56, 118/60, 120/80
- Lumbar extension: 32/6, 35/9, 36/10
- Straight leg raising on the right: 72, 69, 68
- Straight leg raising on the left: 82, 79, 77

- Lumbar right lateral flexion: 20/3, 23/2, 25/2
- Lumbar left lateral flexion: 21/5, 20/1, 27/4

11. Per American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) ("AMA Guides"), Dr. Chan assigned a 15% whole person impairment rating under Table 53(I)(B) for the lumbar transverse process fractures. Dr. Chan assigned a 0% whole person impairment rating for range of motion. Dr. Chan assigned a 5% whole person impairment rating for the liver contusion. Dr. Chan also assigned a 29% left ring finger impairment rating, which converted to a 3% hand impairment, which converted to a 2% upper extremity impairment rating, which converted to a 1% whole person impairment rating. Dr. Chan assigned a total whole person impairment rating of 20%.

12. Dr. Chan testified by deposition on March 14, 2017. Dr. Chan testified as an expert in physiatry. Dr. Chan testified that he assigned a 15% whole person impairment rating for the lumbar spine based on Claimant sustaining three transverse process fractures. Dr. Chan testified that he did not assign an impairment rating for range of motion because there were no deficits in Claimant's lumbar range of motion. Dr. Chan testified that he had no reason to disagree with Dr. Disorbio's 2% psychiatric impairment rating and that he would have combined the psychiatric impairment rating with his own had Dr. Disorbio's rating occurred prior to his own.

13. Dr. Chan testified he spent approximately 15 to 20 minutes during his March 11, 2016 examination taking history and performing the range of motion measurements. Dr. Chan testified that he typically takes each measurement and then records the measurement. Dr. Chan testified that he used the double inclinometer method set forth by the Division of Workers' Compensation, and contended the measurements were valid. Dr. Chan testified he felt consistent effort was given by Claimant.

14. Dr. Chan testified that range of motion differs by day and effort, and that an examiner shoulder use range of motion measurements taken the day of, if valid, "regardless of what the other measurements have been before or after…" When asked if it is normal to see range of motion deficits with transverse process fractures, Dr. Chan testified "Not necessarily. The transverse process fracture and range of motion oftentimes is a rotation, which is not part of the calculation of impairment rating, unfortunately. And it's the extension and rotation that usually causes people more discomfort." Dr. Chan testified that it is recommended a DIME physician use their own range of motion calculations and perform a second set if determined invalid; however, Dr. Chan testified that, if a DIME physician determines range of motion measurements to be invalid, it is within his or her discretion to determine what measurements to use.

15. On March 21, 2016, Stephen A. Moe, M.D., conducted a psychiatric Independent Medical Examination "(IME") of Claimant at the request of Respondents. Dr. Moe opined it was probable that, since early 2015, non-physical factors were primarily responsible for Claimant's physical symptoms and impacted her functioning.

16. On September 22 2016, Brian Beatty, D.O. conducted a Division Independent Medical Examination ("DIME") and issued a DIME report. On examination, Dr. Beatty noted the following lumbar range of motion findings: "Flexion 20 degrees, extension 5 degrees, side bending right 15 degrees and side bending left 20 degrees. The patient has a negative straight leg raise to 65 degrees on the right and 65 degrees on the left." Dr. Beatty used an inclinometer for the measurements. Dr. Beatty assigned a 33% combined whole person impairment rating under the AMA Guides, consisting of a 28% whole person impairment rating for the lumbar spine, combined with a 5% whole person impairment rating for a liver contusion, and a 1% whole person impairment for a left ring finger injury. Dr. Beatty noted that his lumbar spine impairment rating consisted of a 15% whole person impairment rating under Table 53, and a 15% whole person impairment for loss of range of motion. Dr. Beatty remarked,

> My impairment was essentially the same as Dr. Chan's impairment except for one difference and that was for the range of motion where Dr. Chan found a 0% impairment and I found a 15% impairment. I felt that when I was taking the range of motion measurements that the patient may have been trying to manipulate the numbers by keeping her back straight though she was still moving her hips. There I would defer to Dr. Chan's impairment which is accurate and valid giving the patient a final impairment of 20% per Dr. Chan's calculations.

17. Despite including such comment in his report, on the Examiner's Summary Sheet, Dr. Beatty noted a 28% whole person spine impairment rating and assigned a final combined whole person impairment rating of 33%.

18. Dr. Beatty issued an Amended DIME report on October 12, 2016. Dr. Beatty clarified that he was assigning a total 20% whole person impairment, based on a 15% whole person impairment rating for the lumbar spine, combined with a 5% whole person impairment rating for the liver contusion, and a 1% whole person impairment rating for the left ring finger. On an amended Examiner's Summary Sheet, Dr. Beatty updated the 28% whole person spine rating to reflect a 15% whole person spine rating and the final combined whole person impairment rating to 20%, referencing Dr. Chan's evaluation.

19. Based on Dr. Beatty's initial DIME report and amended DIME report, the ALJ finds that the 20% whole person impairment rating is Dr. Beatty's true and final opinion. As Claimant is challenging the 20% whole person impairment rating, Claimant has the burden of proof to overcome Dr. Beatty's opinion by clear and convincing evidence.

20. On January 20, 2017, Sherry Young, OTR conducted a functional capacity evaluation of Claimant. Ms. Young issued a report dated February 1, 2017. Ms. Young remarked that Claimant's lumbar range of motion was "quite limited." Ms. Young found lumbar flexion at 80/55, 75/50 and 75/50, lumbar extension at 10/0, 10 and 7, right straight leg raising at 70 all three times, left straight leg raising at 60, 55, and 60, lumbar right lateral flexion at 16/0, 20/5 and 20/5 and lumbar left lateral flexion at 15/5, 12/5 and 15/5.

21. Ms. Young documented that she used two hand-held inclinometers to perform the measurements. Ms. Young found Claimant's results valid. Ms. Young remarked that Claimant was putting forth full and consistent effort.

22. On February 7, 2017, John S. Hughes, M.D. conducted an IME at the request of Claimant. Dr. Hughes noted the following regarding his examination of the lumbar spine:

> Curvatures are normal, and there us tenderness posteriorly over the left SI joint. Like Dr. Beatty, I note [Claimant's] flexion uses a 'bow,' with maximum sacral flexion 60 degrees and true lumbar flexion only 22 degrees. Also, like Dr. Beatty, I note right-in-excess-of-left lateral flexion restriction at 9 versus 14 degrees respectively. Lumbar spine extension is measured at 9 degrees in the seated position, and in the supine position, straight leg raise testing is 52 degrees over the right, 67 degrees over the left.

23. Dr. Hughes noted that Dr. Beatty's reduced range of motion findings of the lumbar spine were consistent with his findings and Ms. Young's findings. Dr. Hughes remarked,

> It seems highly implausible to me that an individual with 3-level transverse process fractures of the lumbar spine would have recovery of full lumbar spine ranges of motion, as noted by Dr. Chan. In review of medical record documentation currently available to me, I did not find any other examination that documented 'normal' lumbar spine ranges of motion. With this type of multilevel lumbar spine fracture, it is quite common for individuals to compensate by developing a technique of forward flexion, using the hip flexors and sparing the lumbar spine. This 'bow' maneuver is adaptive and appears consistent throughout [Claimant's] lumbar spine examinations, including the one done by Dr. Beatty on September 22, 2016.

24. Dr. Hughes assigned a 15% Table 53 whole person impairment rating and a 17% whole person impairment rating based on deficits in Claimant's lumbar range of motion. Dr. Hughes agreed Claimant should be assigned an impairment rating for her ring finger and for the liver contusion.

25. Dr. Hughes opined that Claimant was not exaggerating her symptoms, noting the similarity between his findings and Dr. Beatty's findings. Regarding Dr. Beatty's use of Dr. Chan's range of motion measurements, Dr. Hughes stated, "I disagree with Dr. Beatty's decision to use Dr. Chan's range of motion findings as there is biological plausibility for [Claimant's] lumbar spine range of motion limitations."

26. Dr. Hughes testified at hearing as an expert in occupational medicine. Dr. Hughes testified consistent with his IME report. Dr. Hughes agreed with the impairment

rating for the liver, the ring finger, and the 15% impairment rating for the transverse process fractures.

27. Dr. Hughes testified that there was inter-observational and intra-observational consistency of Claimant's lumbar range of motion findings. Dr. Hughes testified that Claimant consistently manifested a "bowing sort of maneuver" with forward flexion, as well as reduced right lateral flexion compared to left lateral flexion. Dr. Hughes opined that Claimant was giving valid and consistent effort. Dr. Hughes testified that his findings were consistent with Dr. Beatty's findings, which were substantially similar with Ms. Young's overall findings, with the exception of lateral flexion. Dr. Hughes testified that he did not see any other written inclinometric worksheet that indicated normal range of motion, and those that failed to include specific data did not provide an objective data point.

28. Dr. Hughes opined that Claimant should be assigned a permanent impairment rating for deficits in lumbar range of motion. Dr. Hughes testified that it was biologically plausible that the three transverse process fractures, though healed, impaired Claimant's range of motion to a measurable degree. Dr. Hughes acknowledged that, on occasion, transverse process fractures heal with full function and with no ongoing complaints of pain.

29. Dr. Hughes testified that the Division of Workers' Compensation Impairment Rating Tips encourage examiners to perform repeat measurements if he or she determines "something is off" with the measurements. Dr. Hughes testified that the examiner is permitted to adopt findings by another examiner or by the attending physician, and that the examiner shoulder fully explain his or her rationale for doing so. Dr. Hughes opined that, to his satisfaction, Dr. Beatty did not fully explain his rationale for using Dr. Chan's measurements. Dr. Hughes stated,

> I would agree with Dr. Beatty in the process that Dr. Beatty was employing, to look back at previous examination findings. And if they are more plausible than your findings, you may adopt those findings. But he really has a clinical burden of proof to bear if he is going against other manifestations such as a biological plausibility of a multilevel fracture having recovery of full range motion.

30. Dr. Hughes acknowledged that Dr. Beatty had the discretion to use Dr. Chan's range of motion measurements, and that it was not mandatory for Dr. Beatty to bring Claimant back for a repeat evaluation Dr. Hughes further testified that Dr. Chan filled out the range of motion worksheet as required, and that he had no reason to believe Dr. Chan made up his numbers.

31. Claimant testified that she spent approximately one hour and fifteen minutes with Dr. Beatty, who used a device to measure her and explained each of the tests. Claimant testified Dr. Beatty asked her to perform the range of motion tests three times. Claimant testified that her March 2016 exam with Dr. Chan took five to ten minutes, and that Dr. Chan had her bend forward once or twice. Claimant testified that she did not

observe Dr. Chan writing down any information. Claimant testified that the functional capacity tests took upwards of three hours. Claimant testified that she performed all of the tests to the best of her ability.

32. Claimant's medical records document varied lumbar range of motion. Dr. Villavicencio noted Claimant had full range of motion of the lumbosacral spine on December 16, 2014, January 13, 2015, January 30, 2015, and September 10, 2015. Dr. Villavicencio did not document any specific range of motion measurements on such dates. On February 12, 2015, Christine O'Neal, PA-C noted Claimant's flexion in the lumbar spine was 80 degrees, extension 20 degrees, left and right thoracic side-bending each at 20 degrees, and left and right thoracolumbar rotation each at 40 degrees. On March 4, 2015 and March 13, 2015, Dr. Villavicencio noted lumbar flexion of 60 degrees and extension of 0 degrees. On March 24, 2015, Michael Noce, M.D. noted Claimant had full lumbar range of motion. On April 27, 2015 and May 6, 2015, Dr. Villavicencio noted Claimant's lumbar flexion was 70 degrees, extension at 20 degrees, and the left and right thoracolumbar side-bending each at 15 degrees. On May 20, 2015, orthopedic surgeon Bryan Andrew Castro, M.D., remarked that Claimant had "good lumbar range of motion with forward bending, extension, lateral bending, and rotation." On June 16, 2015, July 7, 2015, and July 14, 2015, Dr. Villavicencio noted lumbar flexion of between 70-80 degrees and extension of 20 degrees.

33. The ALJ credits the opinion of Drs. Chan and Beatty over the contradictory opinion of Dr. Hughes as to Claimant's permanent impairment rating, and finds Claimant did not overcome the DIME physician's opinion by clear and convincing evidence.

34. The wages paid to Claimant during a period of modified duty should not be considered temporary total disability for purposes of the statutory benefit cap set forth in Section 8-42-107.5, C.R.S.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App.

2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

The True Opinion of the DIME Physician and Burden of Proof

The DIME physician's findings include his or her subsequent opinions, as well as his or her initial report. *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328, 330 (Colo. App. 2005). If a DIME physician issues conflicting or ambiguous opinions concerning MMI or impairment, it is the ALJ's province to determine the Division IME's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Rainwater v. Sutphin*, WC 4-815 042-04 (ICAO September 9, 2014). Once the ALJ determines the true opinion of the DIME physician, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence.

As found, Dr. Beatty's true opinion regarding Claimant's permanent impairment is that Claimant sustained a combined 20% whole person impairment rating, consisting of a 15% Table 53(I)(B) rating, a 5% whole person impairment rating for the liver contusion, and a 1% whole person impairment rating for the left ring finger. In his September 22, 2016 report, Dr. Beatty specifically stated that he was assigning Claimant a 20% final impairment based on Dr. Chan's calculations. Dr. Beatty explained that he was deferring to Dr. Chan's impairment rating regarding range of motion because he felt Claimant may have been trying to manipulate the numbers. While Dr. Beatty assigned a 33% final combined whole person permanent impairment rating on the Examiner's Summary Sheet, Dr. Beatty addressed any ambiguity by amending the Examiner's Summary Sheet to reflect a final combined whole person impairment rating of 20%, as referenced in his report.

As Claimant is challenging the 20% impairment rating, Claimant has the burden of proof to overcome Dr. Beatty's opinion by clear and convincing evidence.

Overcoming the DIME Physician's Opinion

A DIME's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the DIME's findings are incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME's opinion, "there must be evidence that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; Section 8-42-107(8)(c), C.R.S. Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence, present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO, April 3, 2009).

In *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000), the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

As found, Claimant failed to overcome Dr. Beatty's 20% permanent impairment rating by clear and convincing evidence. While Dr. Beatty noted that his own range of motion measurements supported a 15% range of motion impairment rating, Dr. Beatty chose to exclude his measurements based on his determination that Claimant may have been attempting to manipulate the measurements. Dr. Chan credibly testified that his range of motion measurements were valid. It was within Dr. Beatty's discretion to

use Dr. Chan's range of motion measurements under the circumstances. In his DIME report, Dr. Beatty provided an explanation as to why he elected to defer to Dr. Chan's range of motion measurements and impairment rating. Both full and limited range of motion were noted throughout Claimant's medical records. The crux of Claimant's argument lies in Dr. Hughes' opinion that it is biologically plausible that the transverse process fractures sustained by Claimant impaired Claimant's range of motion to a measurable degree. The ALJ concludes that the evidence presented demonstrates a mere difference of opinion between physicians and does not establish that it is highly probable Dr. Beatty erred in his assessment of Claimant's permanent impairment.

Applying the TTD Equivalent of Paid Wages to the Statutory Benefit Cap

Section 8-42-107.5, C.R.S., provides:

> No claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. No claimant whose impairment rating is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payments and permanent partial disability payments. For the purposes of this section, any mental impairment rating shall be combined with the physical impairment rating to establish a claimant's impairment rating for determining the applicable cap. For injuries sustained on and after January 1, 2012, the director shall adjust these limits on the amount of compensation for combined temporary disability payments and permanent partial disability payments on July 1, 2011, and each July 1 thereafter, by the percentage of adjustment made by the director to the state average weekly wage pursuant to section 8-47-106.

Section 8-42-105(3), C.R.S. provides, in relevant part:

> Temporary total disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement; (b) The employee returns to regular or modified employment; (c) The attending physician gives the employee a written release to return to regular employment; or (d) (I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

Respondents seek to have the TTD equivalent of the wages paid by Employer to Claimant during a period of modified duty included in the statutory benefit cap for temporary and permanent disability. Respondents contend Claimant is attempting to obtain a double recovery, and that any obligation of Respondents to pay TTD benefits was satisfied by paying Claimant wages in lieu of TTD. Respondents argue that Claimant did not sustain any wage loss between August 1, 2015 and November 22, 2015, and therefore should not be allowed to recover both wages and TTD.

Respondents cite *City and County of Denver v. Thomas*, 176 Colo. 483, 491 P.2d 573 (1971) and *Matthew McCurry v. Weatherford Int'l. Inc*., W.C. No. 4-851-156 (Jan. 18, 2007) in support of their contention.

In *City and County of Denver,* Denver firemen and policemen sought a ruling stating they were entitled to workers' compensation benefits in addition to their full salaries during the first year of disability. The court determined that a specific charter amendment allowing policemen to receive both their full salary and workers' compensation benefits during the first year of disability did not apply to firemen and, as such, the firemen were not entitled to workers' compensation benefits in addition to full salaries payable during the first year of disability. In *McCurry,* the employer paid Claimant base wages for a period of temporary disability during which Claimant had also been entitled to receive short-term disability benefits solely funded by the employer. The parties entered into a stipulation that the insurer would reimburse employer for the amount paid by employer during such time period, and that the payments by employer were equivalent to TTD benefits. The ALJ determined claimant was paid for lost wages and respondents' obligation to pay TTD benefits had been satisfied.

Both cases are factually distinct from the case at bench. Here, Employer paid Claimant her full wages while on modified duty, despite Employer not providing Claimant work. Claimant credibly testified that she was required to check-in with Employer for work and that she did so on a daily basis. Claimant also credibly testified that she was expected to work if needed, and that she was available to do so. No evidence was presented to the contrary. Claimant would not be entitled to TTD benefits upon returning to modified duty for Employer and being paid full wages during such time period. Claimant argues, and the ALJ agrees, that the cap on the combination of temporary total disability and permanent partial disability does not apply to wages paid while on modified duty in this circumstance, as the statute clearly refers to only temporary disability or permanent partial disability.

Section 8-42-124, C.R.S., in part, provides that an insurer may pay an employer the temporary total disability owed Claimant if the employer has a wage continuation plan. The statute states, in relevant part:

> (3) Such payments shall be paid directly to the employer during the period of time that such employer continues to pay a sum in excess of the temporary total disability benefits prescribed by articles 40 to 47 of this title and has not charged any earned vacation leave, sick leave, or other similar benefits to any employee so disabled and for so long as such employee is eligible for temporary disability benefits under the provisions of articles 40 to 47 of this title. The payment of such moneys to an employer shall constitute the payment of compensation or benefits to the employee in accordance with the provisions of section 8-42-103.
>
> (8) If any employer who pays to an injured employee a sum in excess of the temporary total disability benefits prescribed by articles 40 to 47 of this

> title and who has not charged the employee with any earned vacation leave, sick leave, or other similar benefits seeks to have assigned the compensation benefits otherwise due the injured employee as provided in this section, the employer shall notify the employee of said request at the same time the employer makes the request of the director or insurance carrier or both.

WCRP Rule 1-7 provides that "(A) An employer who wishes to pay salary or wages in lieu of temporary disability benefits may apply to the Director for authorization to proceed pursuant to §8-42-124(2), C.R.S."

While Respondents contend they paid Claimant wages in lieu of TTD, no evidence was presented establishing Employer sought or obtained authorization for a wage continuation plan. Employer paid Claimant wages during a period of modified duty during which Claimant was expected to work. Accordingly, the TTD equivalent of wages paid to Claimant for modified duty in these circumstances should not be included in the limits on temporary and permanent benefits.

ORDER

It is therefore ordered that:

1. The true opinion of the DIME physician, Dr. Beatty, is that Claimant sustained a 20% whole person permanent impairment rating.

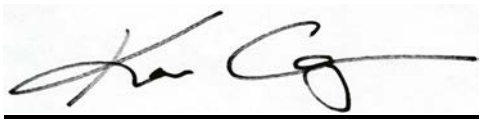
2. Claimant failed to overcome the DIME physician's opinion on permanent impairment by clear and convincing evidence.

3. The TTD equivalent of wages paid to Claimant while on modified duty from August 1, 2016 to November 22, 2016 shall not be applied toward the statutory benefit cap pursuant to Section 8-42-107.5, C.R.S.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 26, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-000-253-03

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 23, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 5/23/17, Courtroom 1, beginning at 8:30 AM, and ending at 11:00 AM).

Claimant's Exhibits1 through 11(which is a demonstrative anatomical chart marked by Ronald Swarsen, M.D., the Claimant's expert) were admitted into evidence, without objection. Respondents' Exhibits A through K were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondent, to be filed, electronically, within 5 working days, giving the Claimant 2 working days within which to file objections. After the referral, the ALJ decided to prepare the decision himself, without the benefit of a proposed decision. Consequently, the matter was deemed submitted for decision as of May 23, 2017.

ISSUE

The sole issue to be determined by this decision concerns the Claimant's request to convert the admission in the Amended Final Admission of Liability (FAL), dated January 17, 2017, for 9% of the right upper extremity (RUE), based on the rating of the Division Independent medical Examiner (DIME), John Douthit, M.D., which was automatically converted to 5% whole person, pursuant to the requirements of the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. At the commencement of the hearing, the Claimant withdrew the issue of medical benefits.

If the Claimant accepts the four corners of DIME Dr. Douthit's opinion concerning permanent medical impairment (PPD), the Claimant's burden of proof is by a "preponderance of the evidence" because a conversion does not involve a challenge to a DIME's opinions on degree of permanent impairment, maximum medical improvement (MMI), or causal relatedness of related conditions that are part and parcel of the DIME rating process and must be given presumptive effect whereby the standard of proof is "clear and convincing" evidence. *See* § 8-42-107 (8) (b) (III), C.R.S. Consequently, the Claimant's burden of proof is by a "preponderance of the evidence."

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Respondents' filed an Amended FAL, dated January 17, 2017, admitting for an average weekly wage (AWW) of $1,717.32, an MMI date of June 13, 2016, PPD of 9% of the RUE, pursuant to the rating of DIME Dr. Douthit, and denying post-MMI maintenance medical benefits.

2. The Claimant (date of birth, March 23, 1984) received an injury to his RUE on November 30, 2015, while working as a delivery driver for the Employer. He was lifting a package from ground level up to a dock, slightly above waist level, when felt considerable pain in his right shoulder.

3. On December 1, 2015, the Claimant came under the care of Brian Williams, M.D., at SCL Occupational Medicine. Dr. Williams became the Claimant's

authorized treating physician (ATP) and he referred the Claimant for an MRI (magnetic resonance imaging) of the right shoulder.

4. After Dr. Williams received the results of the MRI of the right shoulder, he referred the Claimant to Surgeon Thomas Mann, M.D., who performed surgery on the Claimant's right shoulder on January 20, 2016.

5. As a result of the surgery, Dr. Mann found "a well preserved glenohumeral joint." He indicated that: "There was a SLAP tear extending from about the 10:00 to 3:00 position. Ronald Swarsen, M.D., the Claimant's Independent Medical Records Review (IME) expert, indicated the same thing. Dr. Mann indicated that "the tear extended into the labral tissue slightly more significantly just behind the biceps." He further indicated that the biceps anchor was grossly intact other than the tear. He noted no other lesions.

6. Ultimately, the Claimant's ATP, Dr. Williams, released the Claimant to return to work at full duty, with no restrictions; no permanent impairment; no maintenance care recommended; and, Dr. Williams place the Claimant at MMI, all effective June 13, 2016. Thereafter, a DIME was requested and Dr. Douthit was selected as the DIME physician.

Division Independent Medical Examination (DIME) by John Douthit, M.D.

7. Dr. Douthit performed the DIME on November 14, 2016 (Respondents' Exhibit F). Dr. Douthit noted that the Claimant's general health was good. Dr. Douthit further noted that the Claimant had been returned to work without restriction. He noted a loss of strength in the Claimant's right arm. Ultimately, Dr. Douthit agreed with the ATP's date of MMI, and he rated the Claimant at 9% RUE, which the ALJ finds he mechanistically converted to 5% whole person, pursuant to the requirements of the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 3rd Ed., Rev. Dr. Douthit makes no indication that a whole person rating was more appropriate than the scheduled rating of 9% RUE, which the Respondents admitted.

Claimant's Independent Medical Records Reviewer, Ronald Swarsen, M.D.

8. Dr. Swarsen did not prepare or submit a written report, however, he was qualified and testified as an expert on work-related injuries. He is fully Level 2 Accredited by the Division of Workers' Compensation (DOWC).

9. Dr. Swarsen was of the opinion that the Claimant's injury was at the glenoid labrum (above the shoulder). Dr. Swarsen extensively marked Claimant's Exhibit 11 in red, green and blue (glenohumeral joint) to illustrate "pain" and what he believed to be the site of functional impairment. It was Dr. Swarsen's opinion that the site of functional impairment was above the shoulder. Other than his anatomical

exposition, Dr. Swarsen did not persuasively contradict the totality of the evidence, both lay and other medical evidence, concerning the site of functional impairment.

Respondents' Independent Medical Examiner (DIME), F. Mark Paz, M.D.

10. Dr. Paz actually examined the Claimant on August 31, 2016, and submitted a written report (Respondents' Exhibit E). He is fully Level 2 Accredited by the DOWC and he testified as an expert at hearing on behalf of the Respondents.

11. Dr. Paz is of the opinion that the Claimant's right shoulder condition is clinically stable and he reached MMI on June 13, 2016. Dr. Paz rated the Claimant at 9% RUE. He noted that there were no restrictions for the Claimant to obtain his CDL (commercial drivers' license) from the Department of Transportation, which requires an applicant to be able to hook and unhook trailers from semis, place chains on semis, and other rigorous activities. The Claimant actually received his CDL sometime after his surgery for the admitted injury. An applicant must pass a physical exam. Dr. Paz actually performs such physical exams.

12. Dr.Paz was of the opinion that the Claimant did not require permanent physical restrictions and that the Claimant was "engaged in his usual duties and activities." The Claimant re-affirmed this in his hearing testimony. Dr. Paz further indicated that the Claimant "does not require medical maintenance."

13. The ALJ finds that Dr. Paz more clearly addresses the Claimant's lack of functional limitations beyond the right shoulder than does Dr. Swarsen. Indeed, Dr. Swarsen focuses on the anatomy (Claimant's Exhibits 10 and 11) and does not persuasively address functional limitations beyond the shoulder. For this reason, the ALJ finds Dr. Paz's opinions more persuasive and credible than the opinions of Dr. Swarsen.

The Claimant

14. According to the Claimant, he has returned to his former job at full duty. Although he did not mention neck early on to his medical providers, he later mentioned it and testified that he had neck pain. He did not persuasively indicate any functional problems concerning his neck. His counsel asked him if he could carry things on his shoulder, and the Claimant said he would not do this.

15. The ALJ finds that the totality of the Claimant's testimony does not support functional limitations beyond the RUE. Although the Claimant's counsel argues concerning the disconnect between the schedule (at or below the shoulder) and the glenohumeral joint and the *AMA Guides,* the test is the "situs of functional impairment," which can include pain that limits the function of other body parts transcending the

shoulder, or in the trunk of the body. There is no persuasive evidence that there are such functional limitations.

Ultimate Findings

16. As found herein above, the opinions of Dr. Paz more clearly address the Claimant's lack of functional limitations beyond the right shoulder than do the opinions of Dr. Swarsen. Indeed, Dr. Swarsen focuses on the anatomy (Claimant's Exhibits 10 and 11) and did not persuasively address functional limitations beyond the shoulder. For this reason, the ALJ finds Dr. Paz's opinions more persuasive and credible than the opinions of Dr. Swarsen. The ALJ further finds the Claimant's testimony concerning his later experienced neck problems weak and attenuated. Otherwise, his testimony was straight-forward and credible concerning his return to a full duty regimen.

17. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Dr. Paz and to reject the opinion of Dr. Swarsen. Further, the ALJ finds that DIME Dr. Douthit did not comment on the appropriateness of a conversion to a whole person rating. Therefore, the ALJ infers and finds that Dr. Douthit considered his RUE rating appropriate. This rating is corroborated by Dr. Paz.

18. The situs of the Claimant's function impairment is the right upper extremity (RUE).

19. The Claimant has failed to prove, by a preponderance of the evidence that the situs of his functional impairment transcends the RUE, and that a conversion to a whole person rating is appropriate in this case.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558

(Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Paz more clearly addressed the Claimant's lack of functional limitations beyond the right shoulder than did the opinions of Dr. Swarsen. Indeed, Dr. Swarsen focused on the anatomy (Claimant's Exhibits 10 and 11) and did not persuasively address functional limitations beyond the right shoulder. For this reason, the ALJ found Dr. Paz's opinions more persuasive and credible than the opinions of Dr. Swarsen. The ALJ further found the Claimant's testimony concerning his later experienced neck problems weak and attenuated. Otherwise, his testimony was straight-forward and credible concerning his return to a full duty regimen.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals*

Office, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Paz and to reject the opinions of Dr. Swarsen. Further, the ALJ found that DIME Dr. Douthit did not comment on the appropriateness of a conversion to a whole person rating. Therefore, the ALJ inferred and found that Dr. Douthit considered his RUE rating appropriate. This rating was corroborated by Dr. Paz.

Conversion From Scheduled to Whole Person Rating

c. It is well-established that the question of whether a claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8) (c), C.R.S. is one of fact for determination by the ALJ. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2000). In resolving this question, the ALJ must determine the site of the claimant's "functional impairment," and the site of the functional impairment is not necessarily the site of the physical injury itself. *Langston v. Rocky Mountain Healthcare Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Further, pain and discomfort which limit a claimant's ability to use a portion of her body may be considered "functional impairment" for purposes of determining whether an injury is on or off the schedule. *Also see, Fresquez v. Montrose School District RE-1J,* W.C. No. 4-969-602-01 [Indus. Claim Appeals Office (ICAO). April 14, 2017]. For a conversion, the party seeking it must accept the four corners of an ATP's or DIME'S opinion letter. The standard of proof is then "preponderance of the evidence." As found, the situs of the Claimant's functional impairment is the right upper extremity and it does not persuasively carry over to the trunk of the body.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to satisfy his burden of proof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant's request for a conversion from the scheduled admission of 9% of the right upper extremity to 5% of the whole person is hereby denied and dismissed.

B. The Amended Final Admission of Liability, dated January 17, 2017, is hereby approved and adopted as if fully restated herein.

DATED this_____day of May 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order** on this_____day of May 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.ord

ISSUES

- Whether Claimant suffered a compensable injury on December 10, 2014.
- Whether Claimant is entitled to temporary disability benefits.
- Whether Claimant should be penalized for not timely reporting his injury in writing.
- What is Claimant's average weekly wage.
- Medical Benefits (authorized provider, reasonably necessary.)
- Whether the policy of insurance between Pinnacol Assurance and Viart Construction, Inc., is void ab initio.
- Whether Custom Onsite, Inc. is the statutory employer of Claimant.
- Whether Custom On Site, Inc., has standing to assert any claims or defenses against Pinnacol Assurance's attempt to void the policy between Viart Construction and Pinnacol Assurance.
- Whether Pinnacol Assurance should be estopped from voiding the policy between Pinnacol Assurance and Viart Construction.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. C&E Construction ("C&E") provided construction framing services.
2. C&E was owned by Elvia Hernandez a/k/a Elvia Zavala, a/k/a Elvia Hernandez Zavala, ("Elvia"), and Claudio Torres Jr.
3. C&E was operated by Elvia and Claudio Torres Sr.
4. Claimant began working for C&E during 2011. According to Claudio Torres, Jr., C&E ceased operations during 2013. However, whether C&E continued doing business after 2013 is not known.

5. C&E was insured by Pinnacol Assurance ("Pinnacol"). The last period of time in which C&E was insured through Pinnacol was February 1, 2013 through May 29, 2013. The policy was cancelled for non-payment.

6. Viart Construction was incorporated on December 17, 2013. Viart Construction ("Viart") was owned and/or operated by Elvia and Claudio Torres Sr. Viart was the alter ego of C&E Construction.

7. Custom On Site was hired by Haselden Construction to provide commercial framing services for the Morning Star project in Boulder Colorado. The Morning Star project encompassed the building of a senior citizen home.

8. To complete the framing services for the Morning Star project, Custom On Site sub-contracted with Viart the framing work during 2014.

9. Claimant testified he never knew the exact corporate entity for which he worked. Claimant was always paid in cash. Claimant was under the impression that he worked for Elvia and Claudio Torres Sr., or C&E.

10. On December 10, 2014, Claimant was working for Viart and was working at the Morning Star project.

11. Claimant testified that he injured his back on December 10, 2014 while lifting a framed wall with Claudio Torres, Jr., and two other employees at the Morning Star project. Mr. Torres Jr. testified at hearing that he did not work at the Morning Star project on December 10, 2014. This ALJ credits Mr. Torres' testimony over Claimant's testimony and finds that Claimant was not working with Mr. Torres on December 10, 2014 and that Claimant did not lift a wall on that day with Mr. Torres.

12. Claimant testified that he reported his injury to Mr. Torres Jr. the same day. Mr. Torres testified that Claimant did not report an injury to him at any time. This ALJ credits Mr. Torres' testimony over Claimant's and finds that Claimant did not report an injury to Mr. Torres on December 10, 2014 or at any other time.

13. Claimant testified that the day after the accident he was contacted by Claudio Torres Sr. and taken to get a massage for his back. Claimant testified the massage did not help very much. Claimant, however, answered discovery and indicated that the day after the alleged accident he went to the emergency room to get medical treatment but could not see a doctor. Claimant's hearing testimony is inconsistent with his interrogatory answer. Plus, Claimant's contention in his answers to interrogatories that he went to the emergency room but could not see a doctor is also not credible.

14. Claimant testified that he attempted to return to work on Monday, December 15, 2014, but had to leave due to the pain. He further stated that after leaving work on Monday, he waited for Mr. Torres, Sr., to contact him about receiving medical treatment. After not hearing from Mr. Torres, Sr., Claimant stated he sought

medical treatment on his own. Claimant, however, did not seek medical treatment until December 26, 2014. Again, Claimant's hearing testimony is inconsistent with his answers to discovery in which he stated he went to the emergency room the day after the alleged accident and could not see a doctor.

15. Claimant testified that he did not return to work after December 15, 2014 and is seeking temporary total disability benefits from December 16, 2014 forward. Mr. Torres Jr. testified that Claimant was still working after December 15, 2014 because Claimant was present when Mr. Torres. handed out jackets to the Viart employees around Christmas of 2014. This ALJ credits Mr. Torres' testimony and finds that Claimant continued working after December 15, 2014. Claimant's testimony that he did not work after December 15, 2014 is not credible.

16. On December 26, 2014, Claimant went to St. Anthony Hospital North. The medical records indicate Claimant complained of low back pain for 3 months. The medical records also indicate Claimant has had intermittent lumbar back pain for the past 2-3 weeks after heavy lifting. Claimant was cross examined about that portion of the medical record which indicates he had back pain for 3 months. Claimant testified that the hospital must have gotten the information wrong because he does not speak English and he had his 11 year old daughter act as an interpreter. The medical records, however, indicate that an interpreter was used via telephone. Therefore, Claimant's testimony that the inconsistency in the medical records was due to his daughter acting as an interpreter is not credible since the hospital provided an interpreter.

17. On December 29, 2014, Claimant went to North Metro Chiropractic. The records indicate Claimant was injured on December 8, 2014 and not December 10, 2014. Claimant was cross examined about the discrepancy regarding the date of injury. Claimant testified that the provider must have written it down wrong. Claimant's testimony is again found to not be credible.

18. During 2014 and part of 2015, Claimant was on probation for driving under the influence of alcohol. Claimant testified that as part of his probation, he had to prove he was employed. Therefore, Claimant requested Claudio Torres Jr., the partial owner of C&E, to provide Claimant a letter confirming his employment. On January 23, 2015 a letter was issued on C&E Construction's letterhead stating Claimant was working for C&E Construction and has been an employee since March 15, 2011. The letter was signed by "Elvia Hernandez, Owner." Although C&E Construction allegedly ceased doing business in 2013, this cannot be confirmed. But, it is doubtful that Mr. Torres' Jr. would have assisted Claimant in getting the letter confirming Claimant's employment with C&E Construction as of January 23, 2015 if Claimant had not worked since December 15, 2014. Therefore, the letter dated January 23, 2015 is inconsistent with Claimant's testimony that he did not work after December 15, 2014.

19. The January 23, 2015 letter is also impacts Claimant's credibility. If Claimant had not been working since December 15, 2014, why is Claimant providing a

letter to his probation officer on January 23, 2015 indicating that he is currently working?

20. During January and February of 2015, Claimant was seen by Claudio Torres, Jr. working at another jobsite in Colorado Springs, Colorado. Therefore, contrary to Claimant's assertion that he did not work after December 15, 2014, Claimant continued to work after his alleged back injury of December 10, 2014.

21. On April 1, 2015, Claimant returned to St. Anthony Hospital North. The medical records indicate

> Patient states 3 days ago he was pulling upward on an object when he felt a sudden pop and pain in his back. Patient is noticing radiation of pain into both thighs. Patient is noticing a numbness and tingling sensation in both feet.

22. The April 1, 2015 medical report indicates Claimant injured himself three days ago and now has symptoms that radiate into his lower extremities. This medical report is inconsistent with Claimant's contention that he injured himself on December 10, 2014.

23. Claimant's testimony is not credible.

24. Claimant did not injure his back during the course and scope of his employment on December 10, 2014.

25. Because Claimant failed to prove that he injured his back during the course and scope of his employment, this ALJ is not making any findings of fact regarding the other issues raised by the parties since those issues are moot.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimants nor in favor of the rights of respondents. Section 8-43-201.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. Section 8-43-201, *supra*. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant has failed to prove by a preponderance of the evidence that he suffered a work related injury on December 10, 2014. As found, Claimant's version of events is not found to be credible.

Because Claimant's claim for benefits is found to not be compensable, the additional issues raised by the various parties are moot.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 5-30-17

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he suffered a compensable back and neck injury on September 8, 2016 arising out of and in the course of his employment.

- Whether Claimant is entitled to reasonable and necessary medical treatment as a consequence of his injury sustained on September 8, 2016.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant began his employment with Morgan County as a Deputy Sheriff on or about September 1, 2014.

2. Claimant testified that he sustained an injury to his back and neck in the course and scope of his employment on September 8, 2016. Claimant stated the following at hearing:

> My shift partner, John Reedle, had picked that pursuit up at the county line, and we pursued that suspect through Morgan 24 County on I-76. We exited Morgan County up into Logan County, northbound on I-76, and we eventually got the suspect vehicle 1 stopped just south of Sterling on I-76. The way the pursuit ended, I ended up pulling up on the driver's side of the vehicle to pin shut the back door to prevent anyone in the back of the back of the car from getting out of the car. I exited my vehicle with my patrol -- or duty weapon drawn and pointed at the suspect, and ordered him to exit the vehicle. He complied with that order, and I ordered him to get on the ground. He complied with that order and laid down in front of my patrol car. I holstered my weapon at that time and approached the vehicle. I bent down, put my hands on the suspect. And when I did that, to place him custody, he drew his arms underneath him and was, then, laying on his arms, and would not give me his arms so that he could be placed into custody. A short struggle ensued as we tried to get his arms out from underneath him. Finally, after pain compliance techniques, we were able to get him in handcuffs I stood up at that time

> looked around to, kind of, get my bearings and what was happening around me when I realized my car was in the middle of I-76 on the right lane, and we were directly on the ground in front of my car, and I was in fear for my safety and the suspect's safety. If that -- my patrol car got hit, we would either be seriously injured or killed. At that point, I needed to get him out of traffic and get myself out of traffic. I bent down, grabbed the suspect by his 2 arms, and pulled him up, and I felt a pop in my back." (Hearing Tr Pgs 11-13).

3. Claimant testified that getting in a fight with a suspect is very intense. Claimant testified that:

> The amount of adrenaline and mental focus required is greater than, I think, what a normal person would see on the street. Your adrenaline just starts pumping so fast, because you never know what that suspect is capable of, if they're there to take your life. So almost every fight, you go into it as if you're fighting for your life." (Hearing Tr. Pg. 13).

4. Following the altercation Claimant described his symptoms progression. Claimant testified that:

> I felt the pop in my back, and I -- I made mental note of it, because it was -- it was something I had never felt before, and it was new. As we went through the night, I started feeling sore. That was something that was not uncommon for being in that kind of altercation. It's -- whenever you have something that's strenuous, it was normal to feel like that, so I, kind of, dismissed that. Went through the night, ended up going home. Was still sore when I got home. Really didn't think much of it until I woke up the next morning, and I had exponential increase in pain. I had extreme pain in my lower back. I had pain at the base of my neck. I had pain and a stabbing feeling going down my legs, numbness. (Hearing Tr. Pg. 14).

5. Regarding his symptom progression Claimant stated that:

> Whatever that pop was. The -- the adrenaline that I was feeling, I do believe, from my experience in law enforcement, is why I didn't start feeling anything until later that night. It's not uncommon, based on altercations, fights, pursuits, and other things I've been in in my career. (Hearing Tr. Pg. 27).

6. Claimant testified that he reported his injury the following day to Sergeant Griggs.

7. In the week following the altercation Claimant testified that his symptoms persisted. Claimant stated "The pain was basically on par with how it was when I woke up the morning after I had the extreme pain in my back, shooting pain and numbness in my legs, along with pain at the base of my skull." (Hearing Tr. Pg. 14).

8. Claimant then sought medical treatment when:

> After working and realizing that the pain that I was in was greatly impeding my ability to function at full capacity as a patrol office, and that it was a danger to myself, and it was a danger to the other officers that I serve with and the public, I decided it was time to go see what was wrong and what was going on with my back. (Hearing Tr. Pg. 15).

9. Prior to his employment with Morgan County, Claimant had a back injury in 2011 while working for the police department in Bicknell Indiana. The back injury resulted in Claimant having a lumbar fusion at the L5-S1 level in 2011. After the fusion, Claimant was returned to full duty in 2011. On February 27, 2012, Claimant was placed at MMI and was complaining of only occasional back pain.

10. Due to ongoing back pain, Claimant was prescribed and used a utility vest to carry his equipment while working in Bicknell Indiana. This was instead of wearing his equipment on a belt.

11. Claimant moved to Colorado around 2013. Claimant testified that once moving to Colorado he wanted to find a primary care physician who could monitor his back. Claimant testified that he found Dr. Hoppe and made an appointment with Dr. Hoppe because he was experiencing a stuffy and runny nose and wanted that to be assessed. He also testified that he wanted to get an x-ray of his back so that his new primary care physician would have a working knowledge of his back.

12. On December 16, 2013, Claimant was evaluated by Dr. Hoppe for a pre-employment physical. There is no mention of any back pain during this visit. Claimant was cleared for work.

13. On February 13, 2014, prior to Claimant's employment with Morgan County, Claimant was again evaluated by Dr. Hoppe. Claimant complained of back pain with shooting pains into his left leg. Claimant was prescribed Vicodin and Relefan. Claimant also complained of a stuffy nose.

14. On June 4, 2014, Claimant was again evaluated by Dr. Hoppe. The top of the medical note states: "Discuss back surgery complications from 2011." Claimant complained of chronic low grade back pain with numbness and shooting pains on

the left side. Due to Claimant's complaints, Dr. Hoppe recommended an MRI of Claimant's lumbar spine.

15. Claimant's testimony that he was not having any back problems prior to working for Morgan County and that he merely scheduled an appointment with Dr. Hoppe to have a local doctor be familiar with his back is not credible. Claimant was having back problems on February 13, 2014 and June 4, 2014.

16. On August 21, 2014, Claimant underwent a pre-employment physical with Dr. Charles Lehman. Claimant advised Dr. Lehman about his fusion in 2011. Claimant did not, however, indicate he was having any back problems. Therefore, Claimant was cleared to work for Morgan County without any restrictions.

17. On September 1, 2014, three months after being evaluated by Dr. Hoppe for complications from his back surgery, Claimant was hired by Morgan County as a Deputy Sherriff.

18. On September 29, 2015, approximately one year after he was hired by Morgan County, Claimant presented to Dr. Lisa Statz complaining of moderate back pain which Claimant stated started 4 months ago. Claimant stated that wearing his work belt aggravated his back symptoms and that he only felt symptoms when wearing his work belt. Claimant was complaining of numbness and tingling in his lower extremities. Dr. Statz' assessment was lumbar radiculopathy. Claimant was prescribed meloxicam and tramadol. He was also prescribed a load-bearing vest to carry his tactical equipment instead of using his belt. Dr. Statz also recommended an MRI of his low back.

19. On October 20, 2015, Claimant returned to Dr. Statz. Claimant was assessed as suffering from intervertebral disc disorders with radiculopathy. Claimant complained of moderate symptoms which occurred daily. He still complained of low back pain. Claimant's MRI was reviewed and he was advised to follow up with a neurosurgeon.

20. On December 1, 2015, Claimant returned to Dr. Statz. Although Claimant was wearing a duty vest, he still complained of ongoing persistent low back pain. Claimant was prescribed a lidocaine patch, lorazepam, meloxicam, tramadol, and Voltaren.

21. On December 7, 2015, Claimant was evaluated by Dr. Beth Gibbons, for a neurosurgical evaluation. Claimant reported to Dr. Gibbons he was doing great after his prior back surgery until he moved to Colorado. He stated that he initially thought his back problems were being caused by wearing a police utility belt, but once he switched to a tactical vest, he continued having back problems. Claimant also reported his left leg giving out during August or September. Dr. Gibbons noted that Claimant was having numbness in both of his legs and that

Claimant's pain level was a 4/10. Claimant also complained of left sided neck pain. He said his neck hurts when he has back pain.

22. Dr. Gibbons noted that Claimant was "developing L4-L5 hypermobility which can happen above a fused level." She went on to state that: "This is causing lumbar facet pain and most likely is causing the majority of your lumbar pain. You can get numbness without pain into the buttocks and legs from this issue as well. You have a normal neurological exam and there is no evidence of disc herniation or nerve impingement."

23. Dr. Gibbons did not think Claimant was a surgical candidate. Dr. Gibbons recommended Claimant see a pain interventionalist who could provide diagnostic and/or therapeutic steroid injections to help Claimant's pain. She also recommended physical therapy.

24. On February 3, 2016, Claimant was again evaluated by Dr. Statz. Claimant complained of persistent low back pain. Claimant denied any aggravating factors or relieving factors.

25. On February 16, 2016, Claimant was evaluated by Dr. Julie Quickert. Claimant was referred to Dr. Quickert by Dr. Kai Stobbe, of Dr. Gibbon's office, for evaluation and treatment of lumbar facet pain. According to Dr. Quickert's report, Claimant stated the pain started in 2010 after an injury. Claimant rated his pain at a 2/10 up to 8/10. Claimant stated that the pain was worse after sitting for long shifts at work. The pain was described as a constant, sharp, shooting, stabbing, throbbing, dull and burning. He described the pain as beginning in the low back and radiating bilaterally to his thighs and hips. He indicated that sitting, running, and bending worsened his pain. Claimant also stated that the back pain was interfering with activities of daily living such as work, sleep, recreation, and exercise. The report also indicates Claimant had a MRI on October 8, 2015, which showed disc pathology and lumbar spondylopathy L1-L2 through L5-S1. Dr. Quickert noted strength to the bilateral lower extremities was normal, heel/toe walk was normal, straight leg raise was negative bilaterally, Faber test was negative bilaterally, and the Kemp's test resulted in slight increase in pain bilaterally. Dr. Quickert stated that because Claimant had not had pain relief with conservative therapy, she recommended bilateral L3-L4 MBB, i.e., medial branch block. She stated that if Claimant had a good response to the MBB, then Claimant might benefit from a rhizotomy.

26. Claimant testified that his duty vest dramatically helped his back pain. This ALJ credits this testimony since Claimant did not seek treatment for his back between February 16, 2016 and September 29, 2016.

27. On September 29, 2016, Claimant was evaluated Nancy Samples, NP. The notes from that evaluation indicate Claimant stated that his back symptoms were aggravated by wearing a gun belt and that they improved once he began wearing a vest. The notes indicate that Claimant was able to resume most of his normal

activities but that Claimant reinjured his low back on September 16, 2016 while chasing and physically restraining a suspect. Claimant stated he heard a pop in his back and has had worsening pain since that time with radiation into his left leg and has been having difficulty performing his normal duties. Claimant did not complain of any neck pain. Claimant was diagnosed as suffering from left lumbar radiculopathy. Claimant was also assigned work restrictions of "no work for the next 1 week. Avoid lifting, twisting, bending." (Claimant's Ex 4, Pg. 14).

28. On October 7, 2016, Claimant presented to Dr. Statz. The report states that Claimant was in pursuit of a suspect a few weeks ago when he had the sudden onset of neck and back pain. He was diagnosed with cervicalgia and lumbar radiculopathy.

29. On October 7, 2016, Claimant underwent x-rays of his lumbar spine and cervical spine.

30. On October 14, 2016, Claimant was evaluated by Dr. Statz. Claimant stated his symptoms improved since being off work. Claimant did not feel he could physically do his job as a police officer any longer.

31. On October 14, 2016, Claimant underwent an MRI of his cervical spine. The MRI was normal.

32. On October 25, 2016, Claimant returned to Dr. Statz. Claimant was still having back pain and neck pain. The doctor thought Claimant's neck pain was due to Claimant guarding from his back pain.

33. Dr. Nicholas Olsen performed an IME on behalf of Respondents. Dr. Olsen determined that Claimant did not sustain a compensable injury to his back or neck. Dr. Olsen stated that:

> [Claimant] denied pain prior to the Summer and Fall of 2015. There are two medical records from Wayne Hoppe, M.D. The first is on 2/13/14 noting some back pain – wants an x-ray – some days much pain… light shooting pain in the left leg. Pain was great enough to receive prescription medications including Relefan and Vicodin. On 6/4/14, three months before taking his job with Morgan County Sherriff's Office, he returned to Dr. Hoppe noting "Some persistent numbness and shooting pain on the left side, chronic low back pain." Dr. Hoppe recommended an MRI of the lumbar spine to be completed… There is no indication in the medical records that the MRI had been completed or indication that [Claimant] had returned to Dr. Hoppe for a follow up evaluation. It is clear from reviewing these records that [Claimant's] symptoms he experiences today are similar to those he was reporting to Dr. Hoppe in June of 2014.

Based on his report of symptoms in June 2014, it is not surprising that he had complaints of lower back pain as he began his job with Morgan County Sherriff. While employed in Bicknell Indiana, he required a load bearing vest. He fought to receive the same kind of vest once working with the Morgan County Sherriff's office. Dr. Statz's first evaluation on 9/29/15 noted symptoms were "chronic and poorly controlled." There is no specific injury reported in Dr. Statz initial evaluation of 9/29/15. She did not have the benefit of reviewing Dr. Hoppe's medical records from the prior Summer of 2014 when making her assessments and recommendations.

When [Claimant] finally reports an aggravation of his symptoms on 9/8/16, they are similar symptoms reported to both Dr. Hoppe and later Kai Stobbe, PA-C/Beth Gibbons, M.D. on 10/7/16 are an extension of [Claimant's] longstanding complaints first documented by Dr. Hoppe. It is interesting to note that after the events of 9/8/16 that [Claimant] did not feel anything specifically. He explained this it was due to the fact "adrenaline was pumping hard." He described a pop as though he cracked his knuckles but did not notice any pain at that moment. Two hours later, he states he was a little bit sore. The type of soreness he described is on the same scale as his baseline discomfort reported throughout the medical records beginning with Dr. Hoppe's records. In fact, when he returns to Dr. Statz on 10/14/16, it is noted "having good resolution of symptoms off work."

In summary, the current symptoms described by [Claimant] detailed in Dr. Statz records do not document a distinct injury occurring on the events of 9/8/16 but rather a continuation of his symptoms that started in the Summer prior to his employment with Morgan County.

. . .

There is no injury to the cervical spine. There is no report of a cervical spine injury in Nancy Sample's M.D.'s note, the first physician to evaluate [Claimant] after the 9/18/16 incident. Dr. Statz provided him the benefit of the doubt and ordered an MRI of his cervical spine. The study completed on 10/4/16 is a normal cervical MRI. There is no diagnosis or findings to suggest a cervical diagnosis in need of treatment.

34. This ALJ does not credit Dr. Olsen's opinions regarding the cause of Claimant's back pain. Although Claimant did have prior chronic back pain, Claimant testified that his back pain got worse after the September 8, 2016 incident. This ALJ credits Claimant's testimony regarding the worsening of his condition and symptoms after the September 8, 2016 incident.

35. This ALJ does, however, credit Dr. Olsen's opinion that Claimant did not suffer a discreet injury to his neck on September 8, 2016. When Claimant was first evaluated by N.P. Samples, Claimant did not mention any neck pain. Plus, Claimant had neck pain prior to the September 8, 2016 incident. This ALJ is not persuaded by the evidence that Claimant injured his neck or aggravated a preexisting neck condition during the incident of September 8, 2016.

36. Claimant testified that his current back symptoms are different than those he discussed with Dr. Hoppe in 2014. Claimant testified "those symptoms were not things that impeded my life. They were not things that, you know, I -- would jerk me out of what I might be doing, as they are now." (Hearing Tr. Pg. 22).

37. At hearing Claimant compared his symptoms prior to the altercation to those subsequent. Claimant testified:

> Before the altercation, the -- the pain was minimal at best. If -- I if had any pain, it was low, low on the scale, and it did not impact me. After my altercation, the pain was continuous. It didn't go away. It was high on the pain scale relative to what I knew in relation to pain for my back. (Hearing Tr. Pg. 20).

38. Regarding functionality, Claimant testified that:

> Before the altercation, I was fully functional, in my eyes. I was able to get in and out of my patrol car on duty without issues. I was able to participate in events with my family, go to my step-kids' ballgames, go to their -- the triathlons for knowledge. I was able to go to the gym, to go hiking. I'd go walking. Just function in a normal capacity with my family. Since the injury, the pain has prohibited me from doing a lot of those things. I can no longer stand for extended periods of time without increased pain. Hiking, walking is something that I'm unable to do, and simple tasks, such as putting my socks on, is something that I actually have to work on, because leaning straight over is painful. (Hearing Tr. Pg. 21).

39. Claimant testified regarding his back symptoms prior to his date of injury versus his current symptoms. Claimant stated:

> Prior, I was able to function in full capacity prior to that. The vest helped. That fixed the issues I was having with the pain around my incision site. I was able to function on-duty. I was able to function off-duty. The pain was low, once again, relative to what I knew. And then, after, my functionality on-duty and off-duty decreased greatly. (Hearing Tr. Pg. 22).

40. This ALJ credits Claimant's testimony that his back symptoms got worse after the September 8, 2016 incident.

41. Claimant suffered an injury to his back on September 8, 2016 when he aggravated his preexisting back condition.

42. Claimant did not suffer an injury to his neck on September 8, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Principles

Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant credibly testified about the September 8, 2016 incident. Claimant credibly testified that during the September 8, 2016 incident, while subduing the suspect and picking him up from the busy highway, he felt a pop in his back. Claimant credibly testified that the incident caused his back pain to increase later that night and that it was much worse the following morning. Although Claimant's testimony regarding his lack of back symptoms prior to his employment with the Employer is not found to be credible, the existence of a pre-existing condition does not prevent a Claimant from establishing a compensable injury if the work accident aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

In this case, the evidence showed Claimant's accident of September 8, 2016, aggravated Claimant's pre-existing back condition and necessitated the need for medical treatment. In addition, due to the injury, N.P. Samples took Claimant off of work for 1 week.

Therefore, Claimant suffered a compensable injury to his low back on September 8, 2016.

Claimant also alleges that he injured his neck on September 8, 2016. However, when Claimant first sought medical treatment for his work related accident on September 29, 2016, Claimant did not complain of any neck pain. Moreover, on October 25, 2016, Dr. Statz described Claimant's neck pain as being secondary to guarding from his back pain. Lastly, Dr. Olsen stated in his report that there is no diagnosis or findings to suggest a cervical diagnosis in need of treatment.

Therefore, this ALJ concludes that Claimant has failed to establish that he suffered a distinct and compensable injury to his neck due to the September 8, 2016 work accident.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). Pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

This ALJ concludes that that Claimant aggravated his underlying back condition on September 8, 2016 and the aggravation necessitated the need for medical treatment. Therefore, Claimant is entitled to reasonable and necessary medical treatment as a consequence of his back injury sustained on September 8, 2016.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's suffered a compensable injury to his back on September 8, 2016.

2. Claimant did not suffer a compensable injury to his neck on September 8, 2016.

3. Respondent shall provide Claimant reasonable and necessary medical treatment to treat Claimant's back.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 5-30-17

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-971-726-06

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

A hearing on the merits in the above-referenced matter is scheduled for July 11, 2017, in Denver, Colorado, on several issues, including medical benefits, including post maximum medical improvement (MMI) medical maintenance benefits; permanent partial disability (PPD) benefits and overcoming the Division Independent Medical Examination (DIME). On May 4, 2017, the Respondents filed an "Opposed Motion for Summary Judgment, alleging, *inter alia,* that Claimant's Application for hearing and the issues endorsed therein, including overcoming the DIME, were barred pursuant to § 8-43-203and the Pre-Hearing Conference Order of Pre-Hearing Administrative Law Judge (PALJ) Michael J. Barbo. Attached to the Respondents' Motion were Exhibits A through Q. On May 30, 2017, the Claimant filed "Claimant's Objection to Respondents' Opposed Motion for Summary Judgment, alleging, *inter alia*, that there was a disputed issue of material fact that required the evidentiary hearing of July 11, 2016, to wit, whether the Claimant "substantially complied with PALJ Barbo's July 19, 2016 Pre-Hearing Conference Order. Attached to the Claimant's Objection were Exhibits 1 through 14.

The matter was assigned to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for decision on the Respondent's Motion for Summary Judgment and the Claimant's Objection. Both matters were deemed submitted for decision on May 30, 2017.

ISSUES FOR SUMMARY JUDGMENT

The issues to be determined by this decision concern whether there are genuine issues of disputed material fact concerning whether the Claimant "substantially complied" with PALJ Barbo's Pre-Hearing Conference Order of July 19, 2016. The larger issue is whether the Claimant is entitled to an evidentiary hearing on the issues designated in her Application for Hearing, or whether the Claimant waived that right by violating PALJ Barbo's Pre-Hearing Conference Order.

The Respondents bear the burden of proof, by a preponderance of the evidence of establishing that there is no genuine issue of disputed material fact concerning the above-mentioned issues and that they are entitled to summary judgment as a matter of law.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings/Posture

1. This case involves a January 6, 2015 admitted injury to multiple body parts, including the Claimant's right lower extremity (RLE).

2. The Claimant timely filed an Application for Hearing to overcome the DIME's findings. On July 19, 2016, PALJ Michael J. Barbo issued an order holding the DIME in abeyance pending the determination of whether additional diagnostic testing was reasonably necessary and causally related to the Claimant's admitted injury. In his Order, PALJ Barbo stated, "If neither party appeals the decision then within 7 days from receipt of the order regarding the additional diagnostics, the claimant shall file an application for hearing on the issues ripe for hearing, including overcoming the DIME opinion."

3. On October 31, 2016, Office of Administrative Courts (OAC) ALJ Keith Motram issued his Findings of Fact, Conclusions of Law, and Order, determining the diagnostic testing at issue was reasonably necessary, and causally related to the Claimant's industrial injury of January 6, 2015.

4. On November 21, 2016 , the Claimant filed an Application for Hearing on the issues of overcoming the DIME, post-MMI medical maintenance benefits and PPD. On May 4, 2017,

5. On May 7, 2017, the Respondents moved for Summary Judgment to strike the Claimant's Application for Hearing and the issue of overcoming the DIME. The Respondents allege that the Claimant failed to comply with § 8-43-203, C.R.S., and PALJ Barbo's July 19, 2016 Pre-Hearing Conference Order. Because a disputed issue of material facts exists as to whether Claimant complied with and/or substantially complied with PALJ Barbo's July 19, 2016 Pre-Hearing Conference Order, the Respondents' Opposed Motion for Summary Judgment is hereby denied as found and concluded herein below.

Findings/History

6. As found herein above, the Claimant sustained an injury to multiple body parts, including her RLE. On March 5, 2015, the Respondents filed a General Admission of Liability (GAL) [Claimant's Exhibit 1, attached to the Claimant's Objection].

7. On October 12, 2015, the Respondents filed a Final Admission of Liability (FAL) [Claimant's Exhibit 2]. On November 9, 2015, the Claimant filed a timely objection to the FAL and filed a Notice and Proposal to Select an Independent Medical Examiner (DIME) [Claimant's Exhibit 3].

8. On February 10, 2016, the Claimant underwent a DIME with Susan Santilli, M.D., who was of the opinion that the Claimant was at MMI and that she had permanent impairment. Dr. Santilli also recommended that the Claimant undergo additional diagnostic testing regarding her ongoing RLE complaints [Claimant's Exhibit 4].

9. On February 23, 2016, the Respondents filed a new FAL, based on DIME Dr. Santilli's findings. The Respondents also admitted for medical benefits after MMI [Claimant's Exhibit 5].

10. On March 24, 2016, the Claimant objected to the FAL and applied for a hearing on reasonably necessary medical benefits, including authorization of a referral to Scott Primack, D.O; authorization of an EMG recommended by Dr. Santilli; and, PPD benefits, including overcoming the DIME's findings regarding MMI and the impairment rating [Claimant's Exhibit 6]. Hearing was scheduled for July 21, 2016 [Claimant's Exhibit 7].

11. On July 19, 2016, a Pre-Hearing Conference was held before PALJ Michael J. Barbo on the Claimant's request to withdraw her Application for Hearing without prejudice. PALJ Barbo granted the Claimant's Motion and ordered:

> Whether the DIME opinion is correct or incorrect, the issue of the additional diagnostic testing needs to be resolved. The

> injection itself may provide the necessary information to resolve the additional issue, or at least most of them.
>
> Within 7 days from the date of this prehearing the claimant shall file a new application for hearing on the issue regarding the additional diagnostic injection which has been recommended. All setting requirements are waived.
>
> The issue of overcoming the DIME is held in abeyance until the determination of the additional diagnostic testing is resolved. Upon receipt of the order regarding the additional diagnostics the parties shall confer. If neither party appeals the decision then within 7 days from the receipt of the order regarding the additional diagnostics, the claimant shall file an application for hearing on the issues ripe for hearing, including overcoming the DIME opinion. Otherwise, upon completion of the appeal process the claimant shall within 7 days from the final order on appeal, file an application for hearing on all issues ripe for determination, including overcoming the DIME opinion.

[Claimant's Exhibit 8].

12. On July 25, 2016, the Claimant applied for a hearing on reasonably necessary medical benefits, including authorization of a nerve block injection recommended by Levi Miller, M.D [Claimant's Exhibit 9].

13. On October 13, 2016, a hearing was held before ALJ Keith E. Mottram. On October 31, 2016, ALJ Mottram issued an Order determining "Respondents shall pay for the reasonable medical treatment necessary to prevent Claimant from further deterioration of her physical condition, including but not limited to the femoral cutaneous nerve block treatment provided by Dr. Miller." At the end of his Order, ALJ Mottram ordered, "All matters not determined herein are reserved for future determination." Additionally, ALJ Mottram stated:

> If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

> it within twenty (20) days after mailing or service of the order of the judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S.

[Claimant's Exhibit 10].

14. On November 21, 2016, Claimant's counsel conferred with Respondents' counsel regarding whether Respondents were going to appeal ALJ Mottram's October 31, 2016 Order [Claimant's Exhibit 11]. The Respondents confirmed they were not going to appeal ALJ Mottram's Order [Claimant's Exhibit 12].

15. Also, on November 21, 2016, the Claimant applied for a hearing on reasonably necessary medical benefits, including post-MMI medical benefits, and PPD benefits, including overcoming the DIME's findings regarding MMI and the impairment rating. [Claimant's Exhibit 13]. Hearing is presently scheduled for July 11, 2017 [Claimant's Exhibit 14].

16. On May 4, 2017, the Respondents moved for Summary Judgment, alleging that the Claimant's Application for Hearing and the issues endorsed therein, including overcoming the DIME, were "barred as a matter of law pursuant to C.R.S. section 8-43-203 and PALJ Barbo's Pre-Hearing Conference Order. "

Ultimate Finding

17. There exists a genuine, disputed issue of material fact, *i.e.,* whether the Claimant "substantially" complied with PALJ Barbo's Pre-Hearing Order, and now seeks her day in court. More importantly, there is a legal issue of whether or not a PALJ, by Pre-Hearing Order, can extend discretionary times (to follow through on challenging a DIME) to the point when if the time is exceeded, a jurisdictional situation is created whereby an injured worker, who "substantially" complies is "out in the cold" as the Philip Nolan of injured workers—the person without a remedy.

Respondents; Arguments

Respondents argue that under § 8-43-203, C.R.S., a claim will automatically close as to the issues admitted in the FAL if the Claimant does not request a DIME or file an Application for Hearing on issues ripe for adjudication within thirty (30) days of the date of the FAL. § 8-43-203(2)(b)(II); C.R.S. *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004); *Drykopp v. Indus. Claim Appeals Office*, 30 P.3d 821, 822 (Colo. App. 2001).

In the present case, a FAL, dated October 12, 2015, was filed by Respondents consistent with the DIME. Thereafter, the Claimant filed an Application for Hearing to

overcome the DIME. That legal action of filing the Application for Hearing to overcome the DIME preserved that issue for adjudication. A hearing was then set on the issue. Two days before the hearing, the Claimant moved to withdraw the Application for Hearing without prejudice, on the ground that a diagnostic test may provide necessary information to help with the issue of overcoming the DIME. PALJ Barbo granted the withdrawal of the Application for Hearing, without prejudice to re-filing. A test had occurred and had been paid for by the Respondents. Additionally, PALJ Barbo's Order included specific requirements for the Claimant to have the ability to attempt to overcome the DIME opinion in the future. Nonetheless, a hearing was held on whether the diagnostic test was causally related to the admitted injury. ALJ Mottram found that it was causally related, in his decision, emailed to the parties on October 31, 2016.

PALJ Barbo, in his Order, required that if neither party appealed ALJ Mottram's decision**, within 7 days** from its receipt, regarding the additional diagnostics, the Claimant was required to file an Application for Hearing on the issues ripe for hearing, including overcoming the DIME opinion, if she wished to proceed on the issue(s). Essentially, by Pre-Hearing Order, PALJ Barbo modified the statutory time limits to appeal an ALJ decision, prescribed by § 8-43-301 (2), C.R.S., which is 20 days. According to PALJ Barbo's Order, the Claimant should have re-filed the Application for Hearing by November 7, 2016. The Application for Hearing was filed on November 21, 2016, 20-days after ALJ Mottram's decision was emailed to the parties (the 20th day fell on a Sunday, thus, the 20 days was up on November 21, 2016).

The Respondents argue that there was no request by the Claimant to PALJ Barbo to reconsider his Order and extend the statutory review time and change the date upon which Claimant was required to file an Application for Hearing to overcome the DIME. The respondents argue that there was no request by the Claimant, made to PALJ Barbo, to clarify the date if she or her attorney believed that it was unclear. Respondents further argue that If there was any issue regarding the finalization of ALJ Mottram's decision, that should have been addressed through conferral by Claimant's attorney with Respondents' attorney, as allegedly contemplated in PALJ Barbo's Order.

Pursuant to PALJ Barbo's Order, the issue of overcoming the DIME was ripe for adjudication and the deadline for filing an Application for Hearing, imposed by PALJ Barbo, statutory time limits notwithstanding, In fact, the issue of overcoming the DIME was ripe for adjudication and hearing on July 21, 2016. Finally, the Respondents argue that the filing of the Application for Hearing on November 21, 2016 on the issues ripe, including overcoming the DIME, was in violation of PALJ Barbo's Order and should be dismissed, statutory provisions notwithstanding. The ALJ herein does not find that Respondents' arguments persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, Exhibits A through Q were attached to the Respondent's Motion, consisting of pleadings and other official documents.

b. Pursuant to Office of Administrative Courts (OACRP), Rule 17, 1 CCR 104-1, summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. As found, there are genuine issues of disputed material fact concerning whether the Claimant "substantially" complied with PALJ Barbo's Order and statutory provisions for challenging a DIME.

Jurisdictional Time Limits

c. In the present case, PALJ Barbo extended the statutory time for the Claimant to challenge the DIME. PALJ Barbo's outermost time limit after holding the time to apply for hearing to challenge the DIME in abeyance, as argued by the Respondents, was November 7, 2016. As found, the Claimant applied for a hearing on November 21, 2016. § 8-43-203 (2) (b) (II) (A), C.R.S., provides that a party has 30-days to contest a FAL in writing and apply for a hearing on ripe issues. The Claimant contested the FAL in 20-days and applied for a hearing (PALJ party had shortened the statutory time limit to 7 days). It is not within the judicial power (or administrative law power) to exclude from a statute that which the legislature expressly includes. *Martin v. Montezuma-Cortez Sch. Dist. RE-1,* 841 P.2d 237 (Colo. 1992). In the present case, pursuant to § 8-43-203 (2) (b) (II) (A), the legislature intended to give parties 30 days to appeal. PALJ Barbo gave the Claimant 7 days to either appeal ALJ Mottram's decision or apply for a hearing. The Claimant complied with the statute but not with PALJ Barbo's Order, which he neither had jurisdiction nor authority to shorten the statutory time limits.

Genuine Issue of Disputed Material Fact

d. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, there are genuine issues of disputed material fact concerning "substantial" compliance with PALJ Barbo's Order and its interface with statutory provisions.

e. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Claimant's Objection to Respondents' Motion for Summary Judgment shows specific facts that there are genuine disputed issues of material fact.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Respondents have failed to satisfy their burden of proof that there is **no** genuine issue of disputed fact.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent's Motion for Summary Judgment is hereby denied and dismissed.

B. The presently set hearing of July 11, 2017, shall proceed.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of May 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order Denying Summary Judgment in Favor of Respondents** on this_____day of May 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.sjord

ISSUES

- Did Claimant prove by a preponderance of the evidence that he is entitled to TTD benefits beginning June 22, 2016 and ongoing?

- Whether Claimant proved by a preponderance of the evidence that the left shoulder surgery requested by Ryan Hartman, M.D. is reasonable, necessary, and related to the industrial injury.

- Did Respondents prove by a preponderance of the evidence that Claimant's claim for ongoing medical and TTD benefits are barred by the defense of an intervening event?

STIPULATION

The parties stipulated Claimant's average weekly wage was $1,014.15. The ALJ accepted the Stipulation.

FINDINGS OF FACT

1. There was no evidence in the record which showed Claimant sustained an injury to his left shoulder before July 20, 2015.

2. On April 23, 2013, Claimant underwent a pre-employment physical, which was performed by Charles Lehman, M.D. No abnormalities were noted.

3. Claimant was hired by Employer in June 2015. His work varied from the job duties of a laborer to those of an operator. The typical job duties of a laborer include physically demanding tasks such as shoveling, digging, hauling, etc. As an operator, he would operate the heavy machinery used to lay pipelines.

4. Claimant sustained a compensable injury to his left shoulder on July 20, 2015.[1] Claimant testified he picked up two water valve boxes and threw them into the back of a pickup truck. Claimant did not hear a pop, but the pain in his left shoulder progressed to the point where he was not able to use his arm that evening.

5. Claimant reported the injury to the superintendent, Scott Crawford, at the end of the day.

[1] At the outset of the hearing counsel for Respondents confirmed a General Admission of Liability was filed.

6. Claimant testified he first saw a doctor on July 25, 2015. He explained the delay in seeking treatment because he did not want to "cause [Employer] a workmans' comp case, if it wasn't a real injury". He had discussed with representatives of Employer that he would wait a week to see if the shoulder would heal on its own.

7. Medical records from University of Colorado Health ("UCH") on July 27, 2015 were admitted at hearing. Claimant was examined by Jeannette Mercer, M.D. On examination Dr. Mercer documented that Claimant's left pectoralis, rhomboid, and trapezius muscles were all tender to palpation. Any movement to the shoulder was very painful and diagnosis was "severe" left shoulder strain. Dr. Mercer did not request any x-rays or other imaging. She instructed Claimant to wear a sling, heat the shoulder, and to follow the work restrictions of no use of the left arm at all.

8. An Employer's First Report of Injury (handwritten) was completed by Claimant on July 27, 2015. It documented that he injured his shoulder while lifting. On July 28, 2015, a typewritten E-1 was completed by Jackie Gottschalk on behalf of Employer.[2]

9. On August 12, 2015, Claimant returned to UCH and was evaluated by Dr. O'Toole. Claimant described his pain as 1-2/10 and was noted to have completed four physical therapy ("PT") visits. Tenderness was noted to deep palpation in the rotator cuff insertion. Full flexion, abduction and internal rotation was found. Dr. O'Toole's assessment was: left shoulder sprain, improving; MMI anticipated in three-six weeks. Claimant was returned to full duty.

10. Claimant returned to Dr. O'Toole on September 18, 2015. He said there was "no change" in his condition. He had been unable to schedule his massage therapy appointments due to a stressful situation at home. Claimant reported that he was "tolerating" his work activities, although he was experiencing discomfort in his shoulder after holding his left arm extended in front of him while operating a front-end loader at work for extended periods of time. On examination, Dr. O'Toole found restricted right cervical rotation, tenderness of the left trapezius over the top of the left shoulder and medial to the shoulder blade. The Hawkins and Jobe tests were negative. Dr. O'Toole's assessment was: thoracic somatic dysfunction; left trapezius and deltoid strains. Claimant received osteopathic manipulative therapy at Dr. O'Toole's office and medical massage therapy was to begin. MMI was projected to be in two weeks. Claimant had no work restrictions.

11. Claimant testified he worked for Employer until the end of September 2015. He gave his two week notice, then withdrew it. At the end of the two week period, his employment was terminated, as the company had hired a replacement.

12. Claimant was scheduled for an appointment with Dr. O'Toole on October 2, 2015, but did not attend that appointment. Claimant testified that he went to a

[2] Respondents' Exhibit H.

massage therapy appointment after the September visit with Dr. O'Toole, but did not receive any relief of his shoulder pain from the therapy.

13. Claimant went to work for a new employer (Griffin Construction) 3-4 weeks later. Claimant rested his shoulder, but continued to have pain. That job involved building pole barns. Claimant testified he informed his new employer of his shoulder condition. While Claimant was working for this employer, he took precautions not to re-injure his left shoulder. He would not use his left arm to lift and there were two co-employees who would help. Claimant noted they used scissor lifts when putting up the trusses. Claimant testified he did not suffer a new injury to his shoulder while working for Griffin. The ALJ credited Claimant's testimony and found him to be a credible witness.

14. Claimant left Griffin on or about December 24, 2015. Claimant testified he did not sustain any new injury to his left shoulder after leaving Griffin. There was a 3-4 month delay before he started working for a new company, Timberline Insulation. He continued to experience pain in his left shoulder. Claimant testified he told this new employer about his shoulder condition. He had a helper do the "grunt" work.

15. Claimant was involved in an automobile accident in either December 2015 or January 2016. The accident occurred in a parking lot when he turned too sharply and hit the passenger side door. The airbags did not deploy and Claimant did not receive any medical treatment. There was no evidence introduced that Claimant was injured in the collision.

16. Claimant returned to Dr. O'Toole on April 26, 2016. The medical note documents: "[Claimant] returns for reevaluation. He says that his left shoulder has continued to hurt and that [it] is more painful with overhead work. He denies new injury".[3] Claimant did not receive additional PT, massage therapy and had not done home exercises. Dr. O'Toole noted Claimant's left shoulder was elevated, with tenderness noted over the mid trapezius. No posterior tenderness was found, but the Hawkins impingement test was positive. Dr. O'Toole's assessment was: thoracic myofacial strain, subsequent encounter. PT was prescribed, but no work restrictions were issued. The WCM 164 noted Claimant was not at MMI.

17. After Claimant received five dry needling treatments, he returned to Dr. O'Toole on June 3, 2016. Tenderness was noted at the anterior acromion, along with a painful arc on abduction. Claimant had full range of motion ("ROM"). An MRI was ordered. Dr. O'Toole's treatment plan included additional PT and resumption of home exercises. Claimant was not at MMI, but had no work restrictions.

18. On June 14, 2016, Claimant underwent an MRI. The films were read by Andrew Mills, M.D., whose impression was: mild inferior labral tearing, and mild subacromial/subdeltoid bursitis. Minimal tendinopathy was noted distal to the infraspinatus.

[3] Claimant's Ex. 6, p. 34.

19. Claimant returned to Dr. O'Toole on June 17, 2016. Claimant's pain level was 7/10. Claimant had full ROM to 160 degrees on abduction. Dr. O'Toole's assessment was: shoulder impingement syndrome, left. He referred Claimant for an orthopedic evaluation.

20. On June 22, 2016, Claimant was examined by Thomas Sachtleben, M.D. at the Orthopedic & Spine Center of the Rockies. Claimant reported the July 20, 2015 injury as the cause of his symptoms. The record specifically states, "[Claimant] is avoiding heavy lifting and rarely has to do any overhead activities at his current job site". Dr. Sachtleben diagnosed Claimant with a left shoulder labral tear. On examination, Dr. Sachtleben found good rotator cuff strength, documented negative supraspinatus and Hawkins tests, and a positive crank test. Dr. Sachtleben performed a steroid injection, which improved the left shoulder ROM. Claimant was given restrictions of no repetitive lifting over 25 pounds and no overhead activities with his injured extremity.

21. Claimant testified Timberline did not have a light duty job and his employment ended when he received the above restrictions.

22. Claimant has not worked since his employment with Timberline ended.

23. On June 28, 2016, Claimant returned to Dr. O'Toole. On examination, Dr. O'Toole documented that the left shoulder was not tender to palpation and found abduction restricted. The Hawkins and Jobe tests were negative, but the Crank test was positive. Dr. O'Toole's assessment was: shoulder strain, left, subsequent encounter; labral tear of shoulder, left, subsequent encounter. He referred Claimant for PT and to orthopedic surgery.

24. No ATP, including Dr. O'Toole, has placed Claimant at MMI

25. Claimant was seen by a second orthopedist, Steven Seiler, M.D. on July 19, 2016. Claimant reported the same history to Dr. Seiler: an injury to his left shoulder while working for Employer one year prior. Dr. Seiler noted the O'Brien's test was positive, along with tenderness to palpation on the trapezius. Positive impingement was found with the Neer and Hawkins tests. Dr. Seiler assessment was: continued shoulder pain one year after injury and nondisplaced labral tears. Dr. Seiler referred Claimant to one of his partners who specialized in labral injuries.

26. A Notice of Contest was filed on behalf of Respondents on August 1, 2016.[4]

27. On September 12, 2016, Ryan Hartman, M.D. examined Claimant, who complained of pain in the anterior and lateral aspect of his shoulder, as well as periscapular pain. Dr. Hartman noted tenderness to palpation of the trapezius, limited ROM on the left side, as well as positive impingement findings with Neer and Hawkins tests. Dr. Hartman's diagnoses were: left shoulder work-related injury with

[4] At the hearing, it was noted that a med-only General Admission of Liability was filed. [Hearing transcript pp.3:19-22, 4:1-8].

impingement findings; left shoulder possible mild instability with a small anteroinferior labral tear. Dr. Hartman described the impingement as "fairly remarkable". Dr. Hartman recommended a left shoulder examination under anesthesia, arthroscopy with plans for subacromial bursectomy, less likely need for acromioplasty and probable anteroinferior labral repair, depending on findings at the time of the surgery. The ALJ inferred that Dr. Hartman concluded Claimant's need for surgery was related to the July 20, 2015 injury.

28. Claimant was examined by Timothy Hall, M.D. on November 16, 2016, at the request of his attorney. Dr. Hall reviewed the available medical records and noted Claimant's left shoulder was forward and elevated. He had restrictions in his neck ROM, with no evidence of full-thickness rotator cuff tear. Labral maneuvers were difficult because of diffuse pain. Pain was noted with anything over 90°. Dr. Hall's diagnoses were: probable impingement syndrome/subacromial bursitis; possible symptomatic labral tear; diffuse mild facial pain in the parascapular area, left side. Dr. Hall opined within a reasonable degree of medical probability that Claimant's left-sided shoulder symptoms were related to the injury which occurred in July 2015 at work. He recommended a subacromial bursa injection for both diagnostic and therapeutic purposes. If there was benefit from the injection, he suggested acromioplasty/decompression of the area due to the impingement syndrome.

29. Dr. O'Toole testified as an expert witness in occupational medicine, the specialty in which he is board certified. He is Level II accredited pursuant to the WCRP. Dr. O'Toole testified he treated Claimant for his work injury, starting on August 12, 2015. Dr. O'Toole noted the MRI showed mild tearing of the inferior labrum in the shoulder and bursitis. His assessment was shoulder impingement and he noted the bursitis was more consistent with impingement. It was "possible" that the labral tearing occurred with the lifting injury or it may have been pre-existing. It was also possible that the labral tearing could have occurred after Claimant was no longer working for Employer. Dr. O'Toole said the tenderness he appreciated when he first examined Claimant was consistent with tendinopathy of the supraspinatus tendon.[5]

30. Dr. O'Toole confirmed he did not see Claimant after the September 18, 2015 appointment until April 2016. He specifically asked Claimant if he suffered a new injury in the interim, which Claimant denied. On cross-examination, Dr. O'Toole indicated that Claimant had a positive Hawkins Impingement sign on April 26, 2016 that he did not note previously, and that likely "something" changed between September 2015 and April 2016.[6] When asked about Claimant's absence of treatment and subsequent employment being deemed a new injury, Dr. O'Toole responded, "I think it's quite possible."[7] Dr. O'Toole then indicated he "believed so" that Claimant may have

[5] O'Toole deposition, p. 11:3-8.

[6] O'Toole deposition, pp. 23:15 – 24:23.

[7] O'Toole deposition, pp. 25:15 – 26:5.

been at MMI prior to his subsequent work exposure.[8] When asked if he then thought Claimant's surgery was unrelated to his work with Employer, he answered, "I think so". Dr. O'Toole was asked what amount of Claimant's subsequent overhead work might have prompted his new symptoms: "I don't have a certain threshold, I guess. I'd have to look at it in light of other factors…Sounds like I didn't investigate that as thoroughly since the case was never closed as I might have. So yeah. I don't know".[9] The ALJ found Dr. O'Toole's testimony to be equivocal.

31. Claimant suffered a compensable industrial injury on July 20, 2015.

32. Claimant suffered no new injury after leaving his employment with Employer.

33. Respondents failed to meet their burden of proof that Claimant's left shoulder was injured or worsened by an intervening event.

34. Claimant is entitled to receive medical benefits to cure and relieve the effects of the July 20, 2015 industrial injury.

35. Claimant is entitled to receive TTD benefits from June 22, 2016 and continuing, as he has not worked since that time.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

[8] O'Toole deposition, p. 27:16-25.

[9] O'Toole deposition, p. 32:5-7.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Claimant, as well as Dr. O'Toole and Dr. Hall bore directly on the issue of causation.

Subsequent Intervening Event

Whether a particular condition is the result of an independent intervening cause is a question of fact for resolution by the ALJ. *See Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo.App.2000). The existence of an "intervening event" is an affirmative defense to Respondents' liability. Consequently, it is the Respondents' burden to prove that Claimant's condition is attributable to a subsequent intervening injury and not the industrial injury.

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment, such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball*, 474 P.2d 622 (1970); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. *Post Printing & Publishing Co. v. Erickson,* 30 P.2d 327 (1934).

In the case at bench, the evidence established Claimant suffered a compensable injury on July 20, 2015. (Finding of Fact 31). Claimant was working for Employer at the time and hurt his left shoulder. No contrary evidence was introduced to refute the conclusion that Claimant's original injury arose out of the work he was performing for Employer. Indeed, Respondents initially paid for his medical treatment under a reservation of rights and then subsequently filed a med-only GAL.

As determined in Findings of Fact 7, 9-10, the ALJ concluded Claimant required treatment for the left shoulder injury, which was provided by Dr. Mercer and O'Toole. This treatment was required to cure and relieve the effects of the July 20, 2015 injury. Respondents are liable for said treatment, as it was to cure and relieve the effects of the industrial injury.

The dispute in this case centered on whether Claimant either suffered a new injury or aggravation of his left shoulder condition after he left the employment of Employer. The ALJ concluded the evidence supported a determination that no such intervening event or subsequent injury occurred. (Findings of Fact 32-33). In this regard, the ALJ credited Claimant's testimony that he did not sustain a new injury while working for two subsequent employers. The evidence established Claimant advised

both employers of his left shoulder condition, and with regard to at least one employer, he had assistance, so as not to aggravate the injury. Claimant also testified that he continued to have pain in his left shoulder. (Finding of Fact 14).

The second area of support for the conclusion that Claimant's left shoulder condition was a result of the July 20, 2015 injury was found in the medical evidence. Medical evidence established Claimant had symptoms of impingement in the left shoulder. The objective evidence in the form of the MRI documented such impingement.

In addition, Claimant's treating orthopedic surgeons reported positive impingement in Claimant's left shoulder. (Findings of Fact 25 and 27). Claimant's IME physician also supported this conclusion. (Finding of Fact 28). The ALJ concluded this impingement result was a result of the July 20, 2015 injury.

In making this determination, the ALJ considered Respondents' contention that a subsequent intervening event served to cut-off their liability, as Claimant's left shoulder worsened. The ALJ concluded there was insufficient evidence offered by Respondents to support this affirmative defense. Although there was a gap in Claimant's treatment, no evidence of a subsequent injury was introduced. The MVA referenced by Respondents did not cause any injury to Claimant. (Finding of Fact 15). Also, Respondents did not introduce evidence to show Claimant's work for the subsequent employers was the cause of his increased symptoms. The ALJ credited Claimant's testimony that his symptoms continued uninterrupted from the time of his injury. (Finding of Fact 13-14). Claimant also testified that he had help while working for Griffin. (Finding of Fact 13). After that, he also had help and was not engaged in overhead work while working for Timberline. (Finding of Fact 14).

In addition, there was no evidence (as documented by the medical records), which showed Claimant's job duties caused the increase of symptoms in Claimant's left shoulder. Respondents pointed to Dr. O'Toole's testimony supporting their argument. However, Dr. O'Toole tergiversated greatly while testifying. On direct examination, he opined that the impingement syndrome was a result of the July 2015 injury. Then on cross-examination, Dr. O'Toole agreed that Claimant was almost at MMI and that he should have looked at the issue of a potential subsequent injury more closely. On balance, it cannot be said the Dr. O'Toole's testimony established Respondents' defense of an intervening event.

This case is distinguished from those in which there was evidence where Claimant suffered a subsequent traumatic injury. The Colorado Supreme Court held in *Post Printing & Publishing Co. v. Erickson, supra,* Claimant was not entitled to increased benefits where there was no evidence that the original knee injury caused him to fall and fracture an ankle. The Court noted:

> "Undoubtedly, any natural development of an industrial injury, uninfluenced by an independent intervening cause, should be attributed to such injury as a part of the loss to be compensated….Upon the happening of a later accident like the

one involved here, due to an efficient intervening cause, and not arising out of or in the course of employment, the law does not contemplate that the original compensation shall be increased merely because the later accident might or might or would not have happened if the employee had retained all of his former physical powers". 94 Colo. at 384.

Courts following the *Post Printing & Publishing Co.* case have analyzed the causation issue and required Respondents to provide treatment for those conditions which followed as a natural consequence of the industrial injury. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188-1189 (Colo. App. 2002). Where a condition occurs independently of the industrial injury and Claimant requires treatment for that condition, Respondents are not required to pay for said treatment. *Owens v. Industrial Claim Appeals Office, supra,* 49 P.3d at 1189. However, where treatment such as a surgery is a natural consequence of the industrial injury Respondents are liable for that treatment. *Id.*

In the instant case, the evidence established Claimant's compensable injury led to his need for medical treatment. There was insufficient evidence introduced of an intervening injury. The ALJ concluded it was equally likely that Claimant's original injury never completely healed. Accordingly, Claimant's need for continuing treatment, including the surgery proposed by Dr. Hartman, is a direct consequence of the July 20, 2015 injury.

TTD Benefits

As found, there is no evidence Claimant returned to work after his employment with the third employer-Timberline. He has not been placed at MMI by any ATP and requires additional treatment. Therefore, Claimant established that he is entitled to receive TTD benefits.

Medical Benefits

Since the ALJ concluded there was no subsequent intervening event, Respondents are required to provide medical benefits to Claimant to cure and relieve the effects of his injury. This includes the surgery recommended by Dr. Hartman.

ORDER

It is therefore ordered that:

1. Respondents shall provide medical benefits to Claimant to cure and relieve the effects of the July 20, 2015 industrial injury. This includes the surgery proposed by Dr. Hartman

2. Respondents shall pay TTD benefits to Claimant from June 22, 2016 until terminated by law. TTD shall be paid at the rate of $676.10 per week.

3. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 28, 2017

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES[1]

- Did Respondent sustain its burden to overcome the DIME physician's (Kristin Mason, M.D.) opinion that Claimant was not at MMI?
- Is Claimant entitled to medical benefits?
- Is Claimant entitled to change physicians to Ronald Hollis, M.D.?
- Is Claimant entitled to temporary total disability benefits from July 1, 2015 and continuing?

FINDINGS OF FACT

1. Claimant worked as a Health Care Tech II for Employer.

2. Prior to December 10, 2014, Claimant had not injured her left shoulder. There was no evidence in the record documenting any treatment to the left shoulder before December 2014.

3. On December 10, 2014, Claimant sustained an admitted industrial injury while stepping down from a bus. Claimant fell on her outstretched left arm. She testified she felt pain in her left shoulder.

4. Claimant sought treatment the next day (December 11, 2014) at Concentra and was evaluated by Kenneth Ginsburg, P.A. X-rays were taken that day and showed no bony abnormalities and mild degenerative changes of the acromioclavicular joint. PA Ginsburg's assessment was: fall, accidental; contusion of left shoulder or upper extremity; and left shoulder strain. Prescriptions for Naproxen and Orphenadrine were given to Claimant and physical therapy ("PT") was ordered.

5. Claimant testified she returned to work after her injury and performed modified duty for Employer.

6. From December 11, 2014 to April 7, 2015, Claimant received conservative treatment, including PT, acupuncture, and chiropractic manipulation at Concentra. In the evaluation which took place on January 27, 2015, PA Ginsburg noted improvement but continued Claimant's work restrictions. These included no lifting of more than 5 lbs. with left arm, no reaching away from the body and no lifting above shoulder level.

[1] The parties agreed to reserve this issue of average weekly wage ("AWW").

7. A patient status report from Terrence Thomas, D.C. at Absolute Health Center, dated February 9, 2015 was admitted into evidence. Claimant returned to Dr. Thomas, reporting left-sided paraspinal pain along the medial border of her shoulder blade. She indicated her average pain level was 3/10 and she reported 70% improvement since the injury. Claimant received manual therapy, including neuromuscular reeducation and kinetic activities, along with cryotherapy. Claimant was also instructed on stabilization, strengthening exercises and released from treatment.

8. At the time of her evaluation on February 17, 2015, PA Ginsburg recorded Claimant had completed chiropractic treatments, but was experiencing shoulder joint pain with abduction. Claimant's work restrictions were kept in place and she was referred for an orthopedic evaluation.

9. On March 3, 2015, Claimant was evaluated by Wiley Jinkins, M.D., who conducted the orthopedic consultation. At the evaluation, Claimant reported a pain level of 3/10. On examination, Claimant's left shoulder was positive for impingement, with positive Neer, Hawkins and O'Brien signs. There was no conclusive evidence of instability or adhesive capsulitis. Moderate tenderness to deep palpation in the area of the bicipital groove was noted. Dr. Jinkins' impression was: strain of the left shoulder, with possible internal derangement (rotator cuff tear). Dr. Jinkins performed an injection and recommended an MRI.

10. On March 12, 2015, Claimant underwent an MRI on her left shoulder. The films were read by Dennis Wilcox, M.D., whose impression was small undersurface partial-thickness tear of the subscapularis tendon; atrophy of the subscapularis muscle; acromioclavicular arthrosis with a small undersurface osteophyte of the distal clavicle; glenohumeral joint effusion. The ALJ concluded these were degenerative changes in Claimant's left shoulder. The ALJ concluded that the findings of arthrosis and the presence of an osteophyte referred to degenerative changes, which was confirmed by Dr. Larson's testimony.

11. Claimant completed a separation form on or about March 19, 2015.[2] Her last day of work was listed as June 5, 2015. The reason given was "retirement (effective July 1, 2015)". There was no reference in this form to Claimant's shoulder condition, nor was there reference to Claimant's medical condition as the reason for retirement. There was no evidence in the record that Claimant lost time from work through July 1, 2015. The ALJ inferred Claimant retired of her own volition.

12. Claimant testified she felt 85% improvement when Dr. Jinkins released her on May 12, 2015 and this treatment note emphasized she could return if her symptoms returned. Dr. Jinkins referred Claimant to PA Ginsburg for a confirmation of MMI and impairment.[3]

[2] Exhibit H.

[3] It is unclear why Dr. Jinkins referred Claimant back to PA Ginsburg, however, she was subsequently evaluated by Dr. Jones.

13. Claimant was also evaluated by Randall Jones, M.D. at Concentra on May 12, 2015. He referenced Dr. Jinkins' evaluation of the same day. In the examination, he found no tenderness and full range of motion ("ROM") in Claimant's left shoulder. He described the left shoulder as comparable to the right in all planes. Claimant was released from care at maximum medical improvement. The M164, dated May 15, 2015 noted Claimant was at MMI, released to return to work with no restrictions and sustained no permanent impairment.[4]

14. Claimant testified that because of her shoulder pain she would not have been able to perform signing for deaf students, which was required as part of her job duties. She experienced increased pain in her shoulder by July 2015. Claimant testified she would not have been able to perform these job duties had she returned to school on July 1, 2015.

15. Claimant is not entitled to TTD benefits from July 1, 2015 to December 9, 2015 based upon the return to work issued note by Dr. Jones and her voluntary retirement. There was no evidence Claimant had restrictions during this period of time.

16. Claimant testified the pain in her shoulder worsened in September/October 2015. Claimant did not fall or injure her left shoulder between May and October 2015. The ALJ credited Claimant's testimony and found she had increasing symptoms in her left shoulder. She did not receive any further treatment at Concentra after May 2015. Claimant stated the adjuster (Jackie Slade) told her no further treatment was going to be provided.

17. Claimant then went to Dr. Hollis, who had been recommended by a physician treating her husband. Dr. Hollis first evaluated her on October 21, 2015. There was no evidence in the record that Claimant was referred to Dr. Hollis by an ATP, nor was he in the chain of referrals within the workers' compensation system. Therefore, Dr. Hollis was not an ATP, as that term is defined by the Colorado Worker's Compensation Act.

18. When Claimant was evaluated by Dr. Hollis on October 21, 2015, he noted Claimant's pain had progressed to the point that it was affecting activities of daily living, including sleeping. She put her pain level at 7/10. On the intake form, Claimant noted the current pain/injury started in June 2015. She stated the pain had been present for four (4) months. On examination, "pretty significant" pain was noted upon palpation at the biceps tendon. Loss of strength was also noted. Dr. Hollis' assessment was complete tear of the left rotator cuff. It was unclear from this report whether Dr. Hollis had a complete set of records for Claimant. In his testimony at hearing, Dr. Hollis confirmed he did not.

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[4] Respondent's post-hearing submission and discussions at the outset of the hearing confirmed no Final Admission of Liability ("FAL") was filed initially, as this was non-lost time claim. An FAL was filed November 12, 2015. [Hrg. Tr., pp. 7:4-7, 8:4-7]

19. Dr. Hollis authored a letter dated November 6, 2015 noting Claimant had an injury at work in December 2014. The letter specified that at the time of the work up, Claimant indicated she had an MRI that showed a rotator cuff tear per her report and she was told at the time her condition would not improve by repairing it. Claimant delayed having surgery and continued to have problems with the shoulder. Dr. Hollis noted he evaluated Claimant on October 21, 2015, at which time he discussed an arthroscopic repair of the rotator cuff. Dr. Hollis expressed a concern about waiting too long, which might prevent a repair. Dr. Hollis opined based on the knowledge he had Claimant's condition was caused by the injury back in December 2014, noting "with no prior injuries to that I do feel that the problem that causes injury and thus does fall under the workman's comp a scenario". The ALJ inferred Dr. Hollis was relying on Claimant's report of her history and did not have the MRI report at the time this letter was written. Dr. Hollis surgical recommendations were based upon his clinical findings made at the time of the October 21, 2015 evaluation.

20. On December 10, 2015, Dr. Hollis performed surgery on Claimant's left shoulder. The indications for the surgery were described by Dr. Hollis as: "long-standing left shoulder problems, then Claimant was diagnosed over a year ago with an injury". The pre-and post-operative diagnoses were the same, namely; left shoulder rotator cuff repair; left shoulder extensive partial proximal biceps tendon tear; and labral fraying degenerative type 2. Dr. Hollis performed a left shoulder arthroscopic extensive glenohumeral debridement, left shoulder acromial decompression, and left shoulder open subpectoral biceps tenodesis. In the surgical report, Dr. Hollis noted the supraspinatus and infraspinatus showed an intact tendon, but the upper portion of the subscapularis was torn and retracted past the point of repair. Type 2 degenerative fraying was also noted in the posterior labrum. The ALJ infers Claimant had work restrictions as a result of the surgery.

21. As a result of Claimant's December 10, 2015 surgery, she was precluded from working. There was no evidence in the record that Claimant returned to employment after her surgery. The ALJ concluded Claimant is entitled to TTD benefits, beginning on December 10, 2015.

22. Claimant returned to Dr. Hollis for post surgical follow-up on December 18, 2015 and January 15, 2016. Claimant was receiving PT at Colorado Sports and Spine and was doing ROM exercises.

23. Claimant underwent a DOWC IME ("DIME") on March 22, 2016, which was performed by Kristin Mason, M.D. Claimant's course of treatment was reviewed, including the injections performed by Dr. Jinkins. Dr. Mason noted Claimant retired in July and had improved. Then her symptoms increased. On examination, weakness was noted in Claimant's left deltoid, infraspinatus and supraspinatus. She was also tender over the bicipital groove more than the common rotator cuff tendon and AC. No obvious atrophy was noted and Claimant had good scapular mobility. Claimant had myofascial findings in the rhomboids, levator scapulae, as well as the trapezius on the left side.

24. Dr. Mason's assessment was: status post fall on outstretched hand, with full-thickness retracted subscapularis tear. She felt this appeared on Claimant's initial MRI as partial-thickness. In the absence of trauma, Dr. Mason opined Claimant had "ongoing impingement and spurring, which completed that tear somewhat after she was placed at MMI". The ALJ was not persuaded by this opinion as the opinions of Dr. Larson and Dr. Hollis were more persuasive as to the cause of the tearing. Dr. Mason opined Claimant's current condition was related to the event of December 10, 2014. This ultimate opinion by Dr. Mason was persuasive. The ALJ noted Dr. Mason did not provide a great deal of analysis regarding her ultimate opinion. Dr. Mason determined Claimant was not at MMI, including that she needed ongoing PT and follow-up with her surgeon. The ALJ credited Dr. Mason's opinion on whether Claimant was at MMI. Dr. Mason found if Claimant was at MMI, she would receive a 21% upper extremity rating, which converted to a 13% whole person impairment.

25. Claimant returned to Dr. Hollis on April 1, 2016. Claimant was found to be improving, particularly with regard to motion and strength. Claimant placed her pain level at 2/10. Claimant's treatment was to continue in the form of therapy gold on a home program. Claimant could return on an as needed basis, but had no long-term restrictions. The ALJ notes Dr. Hollis did not release Claimant to full duty work and there was no statement of MMI.

26. Wallace Larson, M.D. conducted a medical record review on behalf of Respondent. He did not examine Claimant. Dr. Wallace issued a report, dated June 29, 2016 based upon his review of treatment records through April 1, 2016. Dr. Wallace noted the records did not indicate any previous problems with Claimant's left shoulder and her employment was not suggestive of any repetitive use type disorder. He noted Claimant's condition was most consistent with degenerative change within her left shoulder, which was a non-work-related condition. Responding directly to Dr. Mason's opinion that impingement and spurring completed the tear, Dr. Wallace noted it was possible she had ongoing impingement and spurring, but this would be a degenerative condition rather than a work after related condition. He noted the medical literature was some inclusive as to whether not impingement is the source of rotator cuff tears.

27. Dr. Larson stated it did not appear Dr. Mason considered non-work related degenerative processes in her opinion. He felt Dr. Mason's opinion that this was work related was incorrect to a reasonable degree of medical probability. Dr. Wallace opined Claimant remained at MMI for her work related condition, as of May 12, 2015. Finally, Dr. Wallace opined Claimant's post-MMI surgery was not related to her work injury, nor was it reasonable and necessary to cure and relieve the effects of the work injury.

28. Dr. Larson testified as an expert in orthopedic surgery, with a subspecialty in hand and upper extremity surgery. He is Level II accredited pursuant to the WCRP. Dr. Larson testified regarding the surgery Claimant underwent, noting that the subscapularis tendon was torn and Dr. Hollis was not able to repair it. The more common type of rotator cuff tear occurred at the top part of the supraspinatus tendon. Dr. Larson opined that the tear occurred over a prolonged period of time due to the

aging process. Dr. Larson did not believe the degenerative process was affected by the original work injury. He stated the tear completed in between the time of her MRI (March 12, 2015) and the surgery (December 10, 2015). The ALJ notes there were slightly more than seven months between these two events.

29. Dr. Larson did not believe Claimant's subacromial impingement would have affected the subscapularis tendon that fully tore. Dr. Larson noted that Dr. Mason may have been under the impression that the supraspinatus tendon was the one that ruptured. There are some cases where impingement causes a supraspinatus tendon to tear and then that extends into other tendons such as the subscapularis and infraspinatus tendon, but that was not the case for Claimant. The most common way rotator cuffs tear in people Claimant's age was when the tendon weakened. Dr. Larson testified Claimant's pattern of slowly worsening pain fit the pattern of ongoing degenerative process, although he agreed a fall can cause a partial tear of the rotator cuff. There was no evidence of trauma in the MRI. He testified it was more likely the fall would cause a full thickness tear, as opposed to a partial tear.

30. Dr. Hollis testified as an expert orthopedic surgery, with a subspecialty in surgery at the shoulder and elbows. Dr. Hollis noted he first examined Claimant in October 2015 and obtained the history from Claimant herself. He did not have the MRI at that point. Dr. Hollis opined that Claimant's fall in December 2014 caused the partial tear as shown on the March 12, 2015 MRI. This was based on the lack of prior injuries, the fall and then extensive pain she experienced after the fall. Dr. Hollis disagreed with Dr. Mason that impingement was involved with the partial thickness tear, noting that eventually Dr. Mason concluded that the fall caused the need for the surgery. In this regard, he agreed with Dr. Larson that the impingement did not cause the tear. He postulated that Claimant's report of 85% relief was a result of the steroid shot.

31. Dr. Hollis provided an explanation as to the description of the full thickness tear that he found when surgery was performed, as opposed to the partial thickness tear as described the MRI report. Dr. Hollis review the MRI films prior to the surgery. More particularly, Dr. Hollis testified a partial thickness tear will enlarge over time, which caused the bicipital changes in the groove. He also explained the description of a "full tear" can be described in two ways. Some physicians use that to describe the whole tendon pulled off, but that was not this case. A portion of the tendon was pulled off; thus, it didn't involve Claimant's entire scapularis, rather the upper portion was torn, with the other half remaining. Dr. Hollis found the biceps tendon had degenerative tearing, which was "very common" with a subscapularis tear that sits there for a length of time-in this case 11 months. The ALJ credited this opinion and found Dr. Hollis to be more persuasive than Dr. Larson.

32. Dr. Hollis testified Claimant would have been mobile within six weeks of the surgery. He opined Claimant would have been released to return to work within three months or about mid-February 2016.[5] She would have a 5-10 pound lifting

[5] Hrg, Tr. pp. 77:10-17.

restriction. Dr. Hollis last saw Claimant on April 1, 2016 and noted he was pleased with her results and she had no long-term restrictions.

33. The ALJ concluded the December 10, 2014 fall aggravated Claimant's pre-existing condition, causing her to experience symptoms in the left shoulder. Based upon the totality of the evidence, including the expert opinions, the ALJ concluded the condition of Claimant's left rotator cuff was aggravated by the December 10, 2014 fall.

34. Respondent established Dr. Mason's opinion that the impingement and spurring caused Claimant's rotator cuff tear to complete the tear was erroneous. However, that was only one facet of her analysis. Dr. Mason's ultimate conclusion that Claimant's condition was related to the December 10, 2014 fall was correct. Respondent also did not overcome Dr. Mason's ultimate conclusion regarding MMI.

35. Claimant's fall and the injury she sustained led to Claimant's need for surgery performed by Dr. Hollis.

36. Respondent is liable for medical benefits provided by the ATPs and their referrals to cure and relieve the effects of this injury.

37. Claimant failed to establish she sustained a wage loss related to her industrial injury from December 10, 2014 through December 9, 2015.

38. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. Generally, the Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary

to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the credibility of Dr. Larson and Dr. Hollis were determinative of whether Dr. Mason's opinions were overcome.

Legal Standard for Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Respondents overcame Dr. Mason's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S.; *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. As noted below, Respondent met its burden of proof as to one aspect of Dr. Mason's opinion, but not as to her ultimate conclusion.

Causation and MMI

There was a significant question regarding the cause of Claimant's shoulder condition, namely whether it was the result of a degenerative process as opposed to the

trauma. The ALJ concluded Dr. Mason's analysis was erroneous as the cause of Claimant's full thickness subscapularis tear. (Finding of Fact 24). There was also some ambiguity in the use of the term-full-thickness tear, which was clarified by Dr. Hollis. (Finding of Fact 31). Both physician experts who testified at hearing were in agreement on this point; namely that impingement and spurring would not cause the tear. These opinions were more persuasive than that offered by Dr. Mason. Accordingly, Respondent met its burden of proof on at least one aspect of Dr. Mason's opinion.

However, Dr. Mason's ultimate conclusion that the fall caused Claimant's left rotator cuff to become symptomatic was correct. (Finding of Fact 24). This conclusion was supported by the medical evidence and the expert testimony of Dr. Hollis. (Finding of Fact 30). On this point, the ALJ credited the expert opinion of Dr. Hollis, who treated Claimant and performed the surgery. As found, Dr. Hollis credibly explained the terminology used regarding the partial tear (described in the MRI report) versus the full thickness tear referenced in the operative report. (Finding of Fact 31). The ALJ also credited his opinion regarding what caused the fraying of the biceps tendon in the groove. *Id.*

In addition, the ALJ concluded Dr. Mason's opinion regarding MMI was correct. (Finding of Fact 24). The ALJ credited Dr. Mason's opinion that Claimant required additional treatment to reach MMI. On this point, both Dr. Hollis' and Dr. Mason's opinions were more persuasive than those offered by Dr. Larson. In coming to this conclusion, the ALJ considered Respondent's argument that it was only the degenerative process in Claimant's shoulder that worsened after May 2015, which ultimately led to her need for surgery. Respondent also suggested that the facts of this case were more akin to post–MMI worsening, asserting this was a functional equivalent of a Petition to Reopen. Respondent cited *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000) for the proposition that DIME opinions on worsening do not require clear and convincing evidence to overcome.[6]

As the Court noted in *Leprino Foods v. Indus. Claim Apps. Office, supra,* 134 P.3d at 482: "As required by § 8-42-107(8), C.R.S. 2005, a DIME physician's opinions are given presumptive effect. Both determinations require the DIME physician to assess, as matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury". The ALJ looked at Dr. Mason's opinions on causation as a whole, concluding that Respondents adduced insufficient evidence to overcome her ultimate opinions. Therefore, a DIME physician's determinations concerning causation are binding unless overcome by clear and convincing evidence.

To reach the conclusion suggested by Respondent requires the ALJ to find that the fall did not worsen her condition, rather it was only the degenerative process which worsened. This artificially circumscribes what the evidence revealed about Claimant's shoulder; namely even though there were degenerative changes, these were aggravated by the December 10, 2014 fall. The conclusion that only the degenerative

[6] Footnote 2, p. 12 of Respondent's proposed Findings of Fact, Conclusions of Law and Order.

condition caused the rotator cuff tear was not supported by the medical evidence or expert opinions offered by Dr. Hollis.

Temporary Total Disability

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that she left work as a result of the disability; and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). § 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*.

The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that Claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Claimant argued she was entitled to TTD benefits starting on July 1, 2015. She testified at hearing she would not have been able to perform her job duties, specifically signing. However, in May 2015, Claimant was returned to work by Dr. Jones who said she was at MMI and had no restrictions. (Findings of Fact 13 and 15). Claimant did not introduce any evidence that she was taken off work after seeing Dr. Jones. Nor was there evidence in the record that an ATP issued work restrictions after Dr. Jones returned her to full duty. Based upon the evidence before the Court, Claimant failed to establish to meet her burden of proof to establish an entitlement to TTD benefits from July 1 through December 9, 2015.

However, the ALJ inferred Claimant would not have been able to work after her surgery. (Finding of Fact 21). The ALJ found that Claimant could not have worked for Employer or any other entity for some period of time. Thus, she would have been temporarily and totally disabled, at least for some period of time. Claimant therefore satisfied her burden of proof that she is entitled to TTD, beginning on December 10, 2015.

The ALJ next turned to the question of whether TTD is due and owing for a closed period of time (as suggested by Respondent) or is continuing (as argued by Claimant). This is complicated by the fact Claimant voluntarily retired and her employment ended July 1, 2015. There was no reference to Claimant's physical condition in the separation form. Also, there was no evidence before the ALJ that Respondent–Employer could not have continued to accommodate Claimant, as it had done from her injury to when she retired.

As the record now stands, there is no direct evidence that any of the statutory bases for terminating TTD were met. § 8-42-105(3), C.R.S. The ALJ reviewed the testimony of Dr. Hollis, who confirmed Claimant had no restrictions and could return to him as needed. (Finding of Fact 32). However, this is something short of a full-duty release to return to work. Also, Dr. Hollis did not complete a WCM 164 confirming MMI and/or a full duty release. Therefore, Claimant is entitled to TTD benefits from December 10, 2015, until terminated by law.[7]

Change of Physician

Claimant argued that she was denied treatment for non-medical reasons and, therefore, Dr. Hollis became an ATP by operation of law. More particularly, Claimant testified that the adjuster refused to allow her to return to Concentra. Claimant was not specific as to when this refusal occurred. This contradicted the written evidence, namely, the records of Dr. Jinkins, who noted Claimant could return to his office at any time. There also was no evidence in the record that Claimant ever requested a change of physician in writing.

As found, Claimant was attempting to change physicians after her ATP found her to be at MMI. Such an attempt to change physicians contravenes § 8-43-404 (III)(A), C.R.S.

The ALJ also notes, effective July 1, 2014, § 8-43-404 (10) (b), C.R.S. provides that the Employer may designate a new authorized physician within 15 calendar days following receipt of a written notice from the injured employee or his/her legal representative "that an authorized physician refused to provide medical treatment to the injured employee … for nonmedical reasons …". The written notice must be sent by certified mail, return receipt requested.

Here, there is no evidence or allegation that the Claimant ever sent such a written notice to Respondent. Accordingly, Claimant did not prove she is entitled to a change of physician under these circumstances.

ORDER

IT IS ORDERED:

[7] Respondents may be entitled to an offset for Claimant's receipt of retirement payments. In the interests of justice, the ALJ determines it is appropriate to order counsel for the parties to confer on this issue, as well as AWW.

1. Respondent shall provide medical benefits to Claimant through authorized treating physicians until she reaches MMI.

2. Respondent is not liable for the treatment provided by Dr. Hollis, as he was not an ATP.

3. Claimant's request for TTD benefits from July 1, 2015 through December 9, 2015 is denied and dismissed.

4. Respondent shall pay Claimant TTD benefits from December 10, 2015 and continuing. Respondent may be entitled to an offset for retirement benefits paid during this time. Counsel for Claimant and Respondent shall confer on this issue, as well as AWW. If no agreement is reached, either party may file an Application for Hearing on these issues.

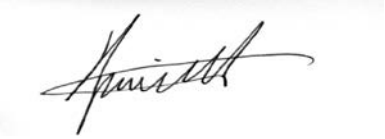
5. Respondent shall pay interest on all benefits not paid when due.

6. Claimant's request for change of physician is denied and dismissed

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 30, 2017



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_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-968-201-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer/Respondents.

A hearing on the merits in the above-referenced matter is scheduled for August 3, 2017, in Denver, Colorado, on several issues, including medical benefits, including average weekly wage (AWW); temporary partial disability (TPD) benefits; temporary total disability (TTD) benefits; and, permanent partial disability (PPD) benefits. On May 15, 2017, the Respondents filed an "Opposed Motion for Summary Judgment, "alleging, *inter alia,* that Claimant's temporary disability benefits should be suspended because the Claimant "has refused to apply for Federal Social Security Disability (SSDI) benefits as required by § 8-42-103 (1)(c)(I), C.R.S. Attached to the Respondents' Motion were Exhibits A through J. On May 30, 2017, the Claimant filed his "Objection to Respondents' Opposed Motion." There were no attachments accompanying the Claimant's Objection.

The matter was assigned to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for decision on the Respondent's Motion for Summary Judgment and the Claimant's Objection. Both matters were deemed submitted for decision on May 31, 2017.

Respondents' Exhibits A through J were attached to the Motion for Summary Judgment. No exhibits were attached to the Claimant's Objection.

ISSUES FOR SUMMARY JUDGMENT

The issues to be determined by this decision concern whether there are genuine issues of disputed material fact concerning whether the Claimant 's temporary disability benefits should be suspended because he has not applied for SSDI benefits as required by § 8-42-103 (1)(c)(I), C.R.S. There is a genuine issue of disputed material fact, *i.e.,* did the Claimant have good cause for not applying for SSDI benefits. An evidentiary hearing is required to resolve this issue.

The Respondents bear the burden of proof, by a preponderance of the evidence of establishing that there is no genuine issue of disputed material fact concerning the above-mentioned issues and that they are entitled to summary judgment as a matter of law. Further, the Respondents bear the burden of proof, by preponderant evidence, on their request to suspend the Claimant's temporary disability benefits.

Because Pre-Hearing ALJ (PALJ) Rob Erickson ordered the Claimant to apply for SSDI benefits by Order of January 24, 2017, and since the Division of Workers' Compensation (DOWC) denied the Respondents' Petition to Suspend benefits (February 15, 2017) until the Claimant applied for SSDI benefits, both matters are considered as an appeal of PALJ Erickson's Order and the DOWC denial of the Petition to Suspend Benefits.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings/Posture

1. On March 8, 2017, the Respondents filed an Amended Application for Hearing, endorsing the issue of suspension of benefits until the Claimant applies for periodic SSDI benefits. The hearing is presently set for August 3, 2017

2. Respondents allege that summary judgment is appropriate because it is undisputed that the "Respondents requested that the Claimant apply for SSDI benefits and the Claimant has refused to do so,

Findings/History

3. On June 20, 2013, the Employer hired the Claimant to work as a dishwasher.

4. On September 21, 2014, the Claimant sustained an admitted lumbar spine injury.

5. Following the admitted injury, the Claimant worked modified duty.

6. On September 15, 2015, the Denver restaurant went out of business. The Claimant remained on work restrictions and the Respondents started paying the Claimant TTD benefits, effective September 15, 2015. The Respondents filed a General Admission of Liability (GAL), dated September 28, 2015, admitting for medical benefits; an average weekly wage (AWW) of $266.70; and, TTD benefits of $177.80 per week from September 15, 2015 ongoing (Exhibit A, attached to Motion).

7. On August 25, 2016, the Claimant was placed at maximum medical improvement (MMI), with an 18% whole person rating.

8. On December 19, 2016, the Respondents requested that the Claimant apply for SSDI benefits (Exhibit B, attached to Motion).

The SSDI Controversy

9. On January 4, 2017, Claimant's counsel advised the Respondents that the Claimant would **not** apply for SSDI benefits because the Claimant was not eligible under the Social Security number for which he was receiving wages (Exhibit C, attached to Motion).

10. A pre-hearing conference was held before PALJ Rob Erickson on January 24, 2017. As a result of the pre-hearing conference, PALJ Erickson ordered the Claimant to apply for SSDI benefits. The herein appeal of the PALJ order ensued.

11. On February 15, 2017, the DOWC administratively denied the Respondents Petition to Suspend benefits. The herein appeal ensued.

12. On March 3, 2017, after a Division Independent medical Exam (DIME), the DIME physician rated the Claimant at 19% whole person.

13. On May 10, 2017, the Respondents filed the herein Motion for Summary Judgment,

14. In response to the Motion for Summary Judgment, the Claimant filed an Objection on May 30, 2017, alleging, *inter alia*, that there is a genuine issue of disputed material fact, *i.e.,* that the Claimant does not satisfy the conditions for receipt of SSDI benefits under 42 U.S.C.A. 405 (c)(2)(F); and, that the Claimant is aware of his ineligibility and fears that any application for SSDI benefits "may constitute the fraudulent act of intentionally misrepresenting entitlement to benefits.

15. There are genuine issues of disputed material fact concerning whether the had good reason for not applying for SSDI benefits, by virtue of being faced with the Hobson's Choice of filing an application for SSDI benefits, without satisfactory proof of a valid social security number, or filing under his present inaccurate social security number; or, filing under an inaccurate social security number, thus, risking self-incrimination; or, not filing and losing his TTD benefits.

Ultimate Fact

16. Unless the Respondents can demonstrate that the Claimant **is, in fact, eligible** for SSDI benefits, outside the content of an evidentiary hearing; or, in the alternative, the Claimant waives his Fifth Amendment rights under the U.S. Constitution and files an entirely truthful application for SSDI benefits, thus, opening himself up to criminal prosecution, thus, making a Hobson's Choice, there is a genuine issue of disputed material fact.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, Exhibits A through J were attached to the Respondent's Motion, consisting of pleadings and other official documents. There were no attachments to the Claimant's Objection, however, the Objection sets forth alleged facts illustrating that there are genuine issues of disputed material fact.

b. Pursuant to Office of Administrative Courts (OACRP), Rule 17, 1 CCR 104-1, summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. As found, there are genuine issues of disputed material fact concerning whether the had good reason for not applying for SSDI benefits, by virtue of being faced with the Hobson's Choice of filing an application for SSDI benefits, without satisfactory proof of a valid social security number, or filing under his present inaccurate social security number; or, not filing and losing his TTD benefits.

Hobson's Choice/Self-Incrimination or Loss of TTD Benefits

c. As found, there are genuine issues of disputed material fact concerning whether the had good reason for not applying for SSDI benefits, by virtue of being faced with the Hobson's Choice of filing an application for SSDI benefits, without satisfactory proof of a valid social security number; filing under his present inaccurate social security number, thus, risking self-incrimination;; or, not filing and losing his TTD benefits. Almost 50 years ago, the U.S. Supreme Court held that an illegal gambler did **not** have to make the Hobson's Choice between self-incrimination for illegal gambling and failing to register and pay taxes to the IRS on the gambler's earnings. *See Marchetti v. U.S.,* 390 U.S. 39, 88 S. Ct. 697, 19 L.Ed.2d 889 (1968).

Genuine Issue of Disputed Material Fact

d. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. Ct. App. 1996). As found, there are genuine issues of disputed material fact concerning alleged good reasons for the Claimant **not** applying for SSDI benefits.

e. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, the Claimant's Objection to Respondents' Motion for Summary Judgment shows specific facts that there are genuine disputed issues of material fact.

Burden of Proof

f. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Respondents have failed to satisfy their burden of proof that there is **no** genuine issue of disputed material fact.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent's Motion for Summary Judgment is hereby denied and dismissed.

B. The presently set hearing of August 3, 2017, shall proceed.

C. Any and all issues not determined herein are reserved for future decision.

DATED this_____day of June 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

This decision of the administrative law judge does not grant or deny a benefit or a penalty and may not be subject to a Petition to Review. Parties should refer to § 8-43-301(2), C.R.S., and other applicable law regarding Petitions to Review. If a Petition to Review is filed, *see* Rule 26, OACRP, for further information regarding the procedure to be followed.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order Denying Summary Judgment in Favor of Respondents** on this_____day of May 2017, electronically in PDF format, addressed to:

Division of Workers' Compensation
cdle_wcoac_orders@state.co.us

_____
Court Clerk

Wc.sjord

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that the right knee surgery recommended by Dr. Tomas Pevny is reasonable medical treatment necessary to cure and relieve claimant from the effects of the admitted September 2, 2016 work injury.

FINDINGS OF FACT

1. Claimant is employed with employer as the maintenance supervisor for the school district. Claimant's position involves overseeing all maintenance at the elementary school, middle school, and high school. Claimant testified that his job duties include heavy lifting, a great deal of walking, frequent use of stairs and ladders, and repairing equipment (such as vacuums, floor buffers, and snow blowers).

2. Claimant suffered an admitted injury on September 2, 2016. Claimant testified that the injury occurred when he slipped and fell on a newly painted sidewalk that was wet with rain. Claimant testified that when he fell he lost consciousness for approximately 30 minutes and he injured his head, back, and right knee. Claimant also testified that his right leg is weakened because he suffered from polio as a child.

3. Claimant timely reported the September 2, 2016 injury to employer and received medical treatment at Aspen Valley Hospital on that date. Dr. John Glismann treated claimant at the hospital and diagnosed a concussion, right knee contusion and lumbar spine contusion. On that same date, x-rays of claimant's right knee showed a suspected nondepressed medial tibial plateau fracture. Claimant testified that he was told that he would be "better by Monday". Claimant reported to work for his next scheduled shift, but did not feel well. Claimant sought treatment with the school nurse and was instructed to see his doctor.

4. On September 7, 2016, claimant was first seen by his authorized treating physician ("ATP"), Dr. Glenn Kotz. At that time, claimant complained of headache, neck pain, altered cognition, and right knee pain. With regard to claimant's right knee, Dr. Kotz diagnosed internal derangement.

5. On October 17, 2016, a magnetic resonance image ("MRI") of claimant's right knee showed complex tears in the posterior horn medial meniscus and a chronic anterior cruciate ligament ("ACL") tear.

6. Following the MRI, Dr. Kotz referred claimant for a surgical consultation with Dr. Tomas Pevny who claimant saw on November 22, 2016. During the exam, Dr. Pevny observed a mild effusion in claimant's right knee. On that same date, claimant reported to Dr. Pevny that he developed significant pain and instability in his right knee after the September 2, 2016 fall. Dr. Pevny recommended claimant undergo right knee arthroscopy with debridement, right knee ACL revision using patella tendon cadaveric graft, medial meniscectomy, and possible medial cruciate ligament ("MCL") repair.

7. The medical records entered into evidence demonstrate that Dr. Pevny performed two surgeries on claimant's right knee in 2008. On January 3, 2008, Dr. Pevny performed a right ACL reconstruction and partial lateral meniscectomy. Then on April 24, 2008, claimant underwent a right ACL revision and an MCL reconstruction.

8. In a medical record dated November 4, 2008, claimant reported to Dr. Pevny that he did not feel any instability while using his right knee brace and he was able to work when wearing the brace. On that same date, Dr. Pevny released claimant to return to full duty work, with his knee brace. Claimant testified that following his second 2008 surgery, he was able to perform all of his normal job duties.

9. On December 22, 2016, Dr. Pevny opined that claimant is a surgical candidate because of the instability in his right knee. In that same letter Dr. Pevny noted that prior to the injury claimant "was doing well", but after the injury had "gross instability" in his right knee. In that same December 22, 2016 letter, Dr. Pevny indicated his opinion that the recommended surgery will improve claimant's function and allow him to return to work.

10. On December 2, 2016, January 6, 2017, and February 2, 2017, Dr. Jon Erickson reviewed claimant's medical records. Following each review, Dr. Erickson authored reports in which he opined that the recommended right knee surgery was not related to claimant's September 2, 2016 work injury. In his December 2, 2016 report, Dr. Erickson stated that it is his opinion that claimant suffered a minor knee injury on September 2, 2016 and that surgical intervention would be treating a preexisting condition.

11. Dr. Erickson noted in his February 2, 2017 report that there was no indication of an acute injury in the December 2016 MRI. Dr. Erickson also noted that claimant had no edema or soft tissue inflammation and that both the tibial and femoral tunnels have been "completely filled in with bone". Dr. Erickson further opined that claimant's right knee "had been devoid of an ACL for a lengthy period of time". Based upon Dr. Erickson's reports respondents denied authorization for the recommended right knee surgery.

12. Respondents sent claimant for an independent medical examination ("IME") with Dr. Jeffrey Raschbacher on April 18, 2017. In connection with the IME, Dr. Raschbacher reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant. Following the IME, Dr. Raschbacher issued a report in which he opined that the recommended ACL reconstruction and

meniscectomy is not related to claimant's September 2, 2016 work injury. In support of his opinion, Dr. Raschbacher noted that claimant had no swelling at the time of the injury, which Dr. Raschbacher opines should have been present at that time. Dr. Raschbacher also noted in report that claimant's range of motion has deteriorated since the injury and the radiologic findings are described as "chronic".

13. The ALJ credits claimant's testimony and the medical records and finds that although claimant had preexisting right knee issues, it was not until the fall on September 2, 2016 that claimant began to experience symptoms of pain and instability.

14. The ALJ credits the medical records, claimant's testimony, and the opinion of Dr. Pevny over the contrary opinions of Drs. Erickson and Raschbacher and finds that claimant has demonstrated that it is more likely than not that the September 2, 2016 work injury resulted in the need for surgery to his right knee. The ALJ finds that claimant has demonstrated that it is more likely than not that the September 2, 2016 fall aggravated and accelerated claimant's preexisting right knee condition which has led to the need for surgical intervention.

15. The ALJ credits the medical records and the opinion of Dr. Pevny and finds that claimant has demonstrated that it is more likely than not that the recommended surgery will improve claimant's function and is necessary to relieve claimant from the effects of the September 2, 2016 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2016). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

4. A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.* Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, claimant has demonstrated by a preponderance of the evidence that the September 2, 2016 work injury aggravated, accelerated or combined with claimant's preexisting right knee condition, necessitating medical treatment.

7. As found, claimant has demonstrated by a preponderance of the evidence that the right knee surgery recommended by Dr. Pevny is reasonable medical treatment necessary to cure and relieve claimant from the effects of the September 2, 2016 work injury. As found, the medical records, Dr. Pevny's opinions, and claimant's testimony are credible and persuasive.

ORDER

It is therefore ordered that:

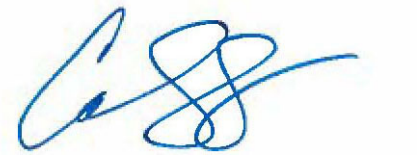
1. Respondents shall pay for the right knee surgery recommended by Dr. Pevny, pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP.

You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: May 31, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician Greg Reichhardt, M.D. regarding Claimant's maximum medical improvement (MMI) date and Claimant's permanent partial disability (PPD) impairment rating.

FINDINGS OF FACT

1. Claimant was employed by Employer as a foreman at the time of the admitted work injury. Claimant, at time of hearing, worked for the City and County of Denver in the traffic division.

2. On January 24, 2013, Claimant sustained an admitted work injury while employed by Employer. On that date, Claimant was struck in the head with a metal cap weighing approximately 15 pounds that fell from a traffic light pole approximately 30 feet high. The impact caused Claimant to lose consciousness, vomit, and seize. Claimant was transported emergently to Denver Health Medical Center (DHMC).

3. At DHMC Claimant underwent an emergent CT scan that showed a bilateral temporal bone fracture extending into the coronal suture, a right sided temporal fracture extending into the auditory canal and middle ear, a moderate right-sided subdural hematoma with compression of the brain and ventricles in the subarachnoid spaces, and small bi-frontal temporal hemorrhagic contusions with a small amount of subarachnoid hemorrhage. Claimant was taken directly to the operating room and underwent a right frontoparietal temporal decompressive craniectomy, removal of right hemispheric subdural hematoma, and evaluation of temporal contusion.

4. Post operatively, Claimant was diagnosed with severe traumatic brain injury, right-sided subdural hematoma, and malignant intracranial hypertension and was placed in a protective unit. Claimant had multiple follow up diagnostic studies and remained in the intensive care until until January 31, 2013.

5. On January 31, 2013 he was transferred to Craig Hospital where he underwent physical therapy, occupational therapy, and speech therapy. At Craig, Claimant's memory came back, he became ambulatory, he did very well with rehabilitation, and he made significant gains with cognition. On March 1, 2013 Claimant was discharged from Craig Hospital.

6. On March 6, 2013 Claimant was evaluated by Jim Schraa, Psy.D. Dr. Schraa opined that Claimant presented as doing well on initial testing with the exception of verbal memory and that the weakest subtest score was in the coding subtest which

fell in the mildly impaired range, consistent with Claimant's closed head injury. Dr. Schraa opined that Claimant presented as having strong ongoing cognitive recovery and that the major challenge appeared to be with family stressors. Claimant reported that he had conflict with his significant other over the years. *See* Exhibits A, 9.

7. On March 8, 2013 Claimant was evaluated by Dr. Schraa. Claimant reported no new cognitive problems or changes in mood but that his outlook on life had changed due to his injury. Claimant reported that his significant other was reactive to his questions regarding what he wanted to do with his future. Dr. Schraa opined that it was likely that they would need ongoing marital therapy. *See* Exhibit 9.

8. On May 2, 2013 Claimant was evaluated by Dr. Schraa. Dr. Schraa noted Claimant's desire to return to work but that neurosurgery had a restriction on his ability to work. Claimant reported that he had always had some marital issues but that he was less willing to entertain demands from his significant other. Again, Dr. Schraa noted that marital therapy appeared indicated. *See* Exhibit 9.

9. On June 21, 2013 Claimant was evaluated by Ron Carbaugh, Psy. D. Dr. Carbaugh noted that Claimant was referred for assessment of anger issues directly related to his January 2013 work injury. Claimant appeared somewhat anxious and at times frustrated and near tears. Claimant felt ready to return to work but had not yet been released by his care providers. Dr. Carbaugh noted that Claimant had made quite rapid recovery from a physical as well as cognitive standpoint but that Claimant expressed some frustration and ongoing irritability. Dr. Carbaugh noted some underlying anxiety during clinical interview. Dr. Carbaugh provided diagnostic impressions of probable personality traits or coping style affecting rehabilitation, and adjustment disorder. Dr. Carbaugh recommended adjustment counseling directly related to the work injury. *See* Exhibit 6.

10. On August 13, 2013 Claimant underwent a neuropsychological assessment performed by Suzanne Kenneally, Psy.D. Claimant reported his current physical symptoms as right frontal headache, daily right sided neck pain. He reported his cognitive symptoms as irritable, needing to keep a calendar, and being impulsive with spending. Dr. Kenneally opined that Claimant's IQ score was within the statistical interval indicative of average to above average IQ for general intelligence. In attention and concentration, Dr. Kenneally opined that Claimant's performance was from the average to superior range. She opined that on memory functioning Claimant's scores represented above average functioning and that he performed in the superior range for language skills. She opined that Claimant appeared to be functioning in the average to above average range across the majorities of modalities tested and that despite the severity of his injury, Claimant appeared to have made a significant and complete recovery. *See* Exhibits B, 8.

11. Dr. Kenneally noted some elevation indicating social alienation with antisocial behavior and indication of possible impulse control. Dr. Kenneally opined that it was likely that as Claimant continued to recovery, his psychological distress would

resolve. Dr. Kenneally opined that the current tests showed no residual cognitive impairment and had strong intact cognitive functioning. She provided the diagnostic impression of major neurocognitive disorder due to traumatic brain injury with resolution of cognitive defects. *See* Exhibits B, 8.

12. On February 13, 2014 Claimant was evaluated by Dr. Carbaugh. Claimant presented in an open and straightforward manner and reported being frustrated with how he perceived that his current company was treating him. Dr. Carbaugh opined that Claimant could be placed at MMI from a psychological standpoint at any time that Claimant's medical care concluded. Dr. Carbaugh noted that the calculation of an impairment rating would be complex given the multiple issues involved but that Claimant did not appear to have any work restrictions from a psychological standpoint. Dr. Carbaugh noted that if Dr. Plotkin placed Claimant at MMI, he would recommend 4-6 sessions of maintenance psychological follow up on an as needed basis. *See* Exhibit 6.

13. On April 29, 2014 Claimant was evaluated by Dr. Carbaugh. Dr. Carbaugh noted that Claimant appeared to be approaching MMI and had been referred out for the actual impairment rating process. Claimant believed that his medical treatment had run its course and was hopeful to put the workers' compensation issues behind him. Claimant was open in discussing psychological issues and was appreciative that follow up psychological sessions would be recommended as part of his maintenance care. Dr. Carbaugh opined that Claimant could certainly be considered at MMI from a psychological standpoint and Dr. Carbaugh recommended 4-6 sessions as maintenance on an as needed basis. *See* Exhibit 6.

14. On June 10, 2014 Claimant was evaluated by neurologist Richard Stieg, M.D. Dr. Stieg noted that Claimant had been referred by Dr. Plotkin for an independent impairment rating. Dr. Stieg reviewed medical records and performed a physical examination. Dr. Stieg provided the impression of: traumatic brain injury, post traumatic vision syndrome, adjustment disorder due to the work injury, post traumatic headache disorder, and disfigurement due to cranioplasty. Dr. Stieg opined that the permanent impairment from a neurologic standpoint was for post traumatic headaches and provided a 5% whole person impairment rating for episodic neurological symptoms. Dr. Stieg opined that additional impairment might be considered for posttraumatic vision disturbance and for disfigurement if Dr. Carbaugh felt that played a role in the adjustment disorder and was permanent but that it did not appear to be an issue per his review of Dr. Carbaugh's records. *See* Exhibits C, 7.

15. On July 9, 2014 Claimant was evaluated by Dr. Plotkin. Claimant felt that he was doing well but had occasional bilateral frontal headaches. Claimant also reported occasional discomfort near the anterior aspect of the cranioplasty on the right, some occasional fluid buildup near the anterior aspect of the cranioplasty, that his vision was not as good as it was prior to the injury, and that his sense of taste and smell seemed off. Claimant also reported getting frustrated at times, which was also a pre-injury trait and that he had some self consciousness because of the disfigurement on

the right side of his head. Dr. Plotkin performed a physical examination. Dr. Plotkin assessed: traumatic brain injury; skull fractures; hemorrhagic contusions; subdural and subarachnoid hemorrhages; status post craniectomy; status post cranioplasty times two; and adjustment disorder. Dr. Plotkin opined that Claimant reached MMI on July 9, 2014 and that Claimant had suffered a serious head injury and had made an excellent recovery. Dr. Plotkin opined that Claimant had comprehensive rehabilitation and had completed medical care. *See* Exhibits D, 5.

16. Dr. Plotkin opined that there were three components to Claimant's impairment assessment: neurologic, psychiatric, and disfigurement. Dr. Plotkin noted that Dr. Stieg performed a neurologic impairment rating and determined that Claimant had permanent impairment on the basis of posttraumatic headaches with a 5% whole person rating. Dr. Plotkin also noted that he contacted Dr. Carbaugh by phone to review the case and that Dr. Carbaugh noted that Claimant had stress and felt socially uncomfortable because of the disfigurement and that Claimant had a tendency to "hold it in" and had some anger and stress. Dr. Carbaugh felt that Claimant's psychological stress was not only related to the disfigurement. Dr. Plotkin noted that Claimant was referred to a psychiatric evaluation with Dr. Gutterman who evaluated Claimant and determined a 4% permanent partial impairment related to Claimant's adjustment disorder. Dr. Plotkin noted that he consulted the AMA Guides and that the determination of permanent impairment based on disfigurement was somewhat difficult to determine in this case but that Claimant's disfigurement was significant and played a critical role in his physical, psychological, and emotional wellbeing. Dr. Plotkin opined that under Table 1 on page 241, Claimant would likely fall under mild impairment and provided a 10% whole person impairment rating for disfigurement. Dr. Plotkin opined that this impairment rating was separate and unrelated to the psychological impairment which was primarily related to Claimant's adjustment disorder. *See* Exhibits D, 5.

17. Dr. Plotkin opined, therefore, that Claimant had whole person impairment of: 10% for disfigurement; 5% for neurologic impairment; and 4% for psychological impairment. Dr. Plotkin combined these values to come up with an 18% impairment of the whole person. Dr. Plotkin recommended the following maintenance care: rechecks with the primary occupational medicine physician as needed, follow up with the neurologist regarding seizure activity and anti-seizure medication, neurosurgical follow up as needed, follow up with optometrist as warranted, psychological counseling with Dr. Carbaugh for up to five additional sessions, and maintenance medications. *See* Exhibits D, 5.

18. Respondents filed a final admission of liability (FAL) consistent with Dr. Plotkin's report. Claimant objected and requested a DIME.

19. On July 11, 2014 Claimant was evaluated by neurologist Kirsten Nielsen, M.D. Dr. Nielsen noted that Claimant had a generalized seizure on the date of his work injury and had last been seen by her in January. Claimant reported no recurrence of seizure activity and that he had been driving and working full time. Claimant reported occasional bi-frontal headaches, made worse by stress. Claimant admitted to anxiety

attacks once per day. Dr. Nielsen performed a physical examination and noted that two negative EEGs had been performed on January 17, 2014 and on January 10, 2014. Dr. Nielsen noted that Claimant's anti-seizure medication was being tolerated well and that Claimant remained seizure free. *See* Exhibit 4.

20. On July 28, 2014 Claimant underwent an individual psychiatric consultation with Gary Gutterman, M.D. Claimant reported some psychological effects due to his head injury and that he was self-conscious about his cranium which had a dent in the middle and scars on the side of his head. Claimant reported that he wears a cap in order to cover up his head. Claimant reported being more frustrated and irritable in various situations and that he was more cautious and apprehensive at work and is worried about being reinjured. Claimant reported being more protective of his daughter and that he was worried that she might be injured in some way. Claimant reported nightmares at times and on occasion recurrent memories of what occurred. Dr. Gutterman opined that Claimant continued to experience a mild adjustment disorder as a result of his work injury, altered body image, and prior brain injury but that Claimant overall was doing reasonably well considering the significant injury that occurred. Dr. Gutterman opined that Claimant had experienced a 4% permanent partial mental impairment. Dr. Gutterman noted that Claimant was doing reasonably well without psychotropics and believed that the adjustment disorder would probably persist indefinitely given the type of injury that Claimant experienced. *See* Exhibits E, 3.

21. On January 12, 2015 Claimant underwent a DIME performed by Greg Reichhardt, M.D. Claimant reported that while taking down a traffic light pole, the pole hit him and knocked his helmet off. Claimant reported that a 15 pound metal cap then fell approximately 30 feet and hit him in the head and that his first memory afterwards was a couple of days later in the hospital. Claimant reported being self conscious about his injury and that it impacted his emotions and that he wore a hat to cover it up and was concerned about having to work in an environment where he would not wear a hat. Claimant reported decreased sense of taste and smell, pain above his nose, bilateral frontal headaches, pain over the lower thoracic area, and some symptoms of anxiety and depression. Claimant reported that his social functioning was interfered with and that he was more irritable and is nervous about injury and re-injury, had difficulty managing conflicts, and had decreased memory. Dr. Reichhardt reviewed medical records and performed a physical examination. *See* Exhibits F, 2.

22. Dr. Reichhardt provided the impression of: traumatic brain injury, post-traumatic headache; temporomandibular joint symptoms; thoracic pain; decreased sense of taste and smell; and visual symptoms including refractive change. Dr. Reichhardt opined that Claimant was at MMI and had reached MMI on June 9, 2014. Dr. Reichhardt recommended six follow up visits with a physician per year and cosmetic surgery for the temporal defect or the hypertrophic scar tissue anterior to the ear. Also, as maintenance, Dr. Reichhardt recommended any further surgery or treatment to address the PEEK flap. Dr. Reichhardt opined that Claimant sustained a 22% whole person impairment with 5% for traumatic brain injury, 10% for disfigurement/mental behavior, 3% for olfactory, and 5% for spinal impairment. Dr. Reichhardt noted that in

terms of Claimant's disfigurement, the AMA Guides indicate that if impairment due to disfigurement does exist, it usually manifested by a change in behavior such as an individual's withdrawal from society and should be evaluated in accordance with the criteria set in chapter 14 and Dr. Reichhardt opined that it was appropriate to give Claimant a rating for this according to Table 1, page 241. Dr. Reichhardt noted that Claimant was not given a separate psychiatric impairment rating, as it was used for the disfigurement rating. *See* Exhibits F, 2.

23. On January 27, 2015 Respondents filed a FAL consistent with Dr. Reichhardt's DIME report. *See* Exhibit 10.

24. On October 26, 2015 Claimant underwent an Independent Medical Examination (IME) performed by Elizabeth Bisgard, M.D. Claimant reported still having pain over the fracture site of the skull and popping over the allograft with different activities with occasional debilitating headaches. Claimant reported intermittent stabbing, aching pain in his lower thoracic spine. Dr. Bisgard reviewed medical records and performed a physical examination. Dr. Bisgard diagnosed: traumatic brain injury; skull fracture; moderate right subdural hematoma with compression of ventricle and subarachnoid spice, bi-temporal and bi-frontal hemorrhagic contusion; small subarachnoid hemorrhages; insomnia; back pain; and right upper extremity cephalic medial cubital and left basilica vein thrombosis. Dr. Bisgard agreed with Dr. Plotkin and Dr. Reichhardt that Claimant reached MMI on June 9, 2014. Dr. Bisgard also opined that Dr. Reichhardt calculated the impairment rating in accordance with the AMA Guides and made no error in his calculation. *See* Exhibits G, 1.

25. Dr. Bisgard agreed that a 5% whole person impairment was appropriate for the headache and 3% appropriate for the olfactory nerve loss. Dr. Bisgard noted that Dr. Reichhardt included the psychological impairment as part of the disfigurement, which was a method acceptable under the AMA Guides. Dr. Bisgard opined that she personally would not have included a 5% rating for the thoracic spine since the records reflected no mention of back pain for several months, but opined that Dr. Reichhardt did not err by including the thoracic spine. Dr. Bisgard opined that it would be appropriate for Claimant to have 8-10 maintenance treatments with a female psychologist. She also opined that Dr. Reichhardt's recommendations for maintenance for additional cosmetic surgery or revision of the PEEK allograft or for anti-seizure medications were appropriate. *See* Exhibits G, 1.

26. On April 5, 2016 Claimant underwent a psychological evaluation performed by Walter Torres, Ph.D. Dr. Torres noted that Claimant had been referred by his attorney for an evaluation to determine the presence of any injury related psychological conditions and impairment and the psychological impairment ratings that any such conditions and impairments would warrant. Dr. Torres reviewed medical records, interviewed Claimant, and performed psychological testing. Dr. Torres provided the diagnostic impression of adjustment disorder with depression and anxiety and alcohol use disorder. *See* Exhibit 13.

27. Dr. Torres opined that Claimant's symptoms of anxiety with panic attacks, pervasive self-doubt, persistent rumination and grave worry, social withdrawal, dysphoric emotionality, diminished sexual interest, and diminished motivation to enjoy previously enjoyed activities were due to his injury. Dr. Torres opined that Claimant avoided disclosure of his emotional dysfunction due to shame and immaturity when Claimant's treatment was active but that the pressure of Claimant's worries, distress, and symptoms had tended in the more recent months to overwhelm Claimant. Dr. Torres opined that Claimant was in need of psychological therapy now that he was more open and realistic and that the therapy should target the unrealistic conviction that Claimant developed about his destiny to develop dementia and the disfigurement, and shame through exposure and desensitization. *See* Exhibit 13.

28. Dr. Torres recommended 10 psychotherapeutic sessions. Dr. Torres opined that given that Claimant's underlying symptoms had not resolved in the course of previous treatment Claimant never reached MMI or alternatively, that Claimant had deteriorated and was no longer at MMI. Dr. Torres performed a mental impairment rating worksheet based on Claimant's psychological condition as it existed on the date of the evaluation. Dr. Torres assigned a 14% psychiatric impairment with impairment for sexual function, sleep, interpersonal relationships, communicating effectively with others, recreational activities, managing complex interactions with others, memory, and ability to set realistic goals. *See* Exhibit 13.

29. Dr. Bisgard testified by deposition consistent with her IME report. Dr. Bisgard opined that the DIME physician, Dr. Reichhardt, made no errors in the impairment rating and that the impairment rating provided by Dr. Reichhardt was supported by the AMA Guides. Dr. Bisgard opined that she would not have included the thoracic spine like Dr. Reichhardt did, but that he did not err. Dr. Bisgard opined that the DIME accounted for psychiatric impairment. Dr. Bisgard agreed that Claimant had reached MMI, consistent with the opinions of Dr. Plotkin and Dr. Reichhardt. Dr. Bisgard noted that although Dr. Torres provided several areas of rating, Claimant had pre-existing issues with: anger and impulse control, relationships, and alcoholism. Dr. Bisgard noted that Dr. Torres was the only evaluator outside the opinions that were similar including opinions from Dr. Carbaugh, Dr. Kenneally, Dr. Gutterman, Dr. Stieg, Dr. Plotkin, Dr. Reichhardt, and Dr. Nielson.

30. Dr. Bisgard noted that Dr. Gutterman had provided a 4% impairment rating for the adjustment disorder and that Dr. Plotkin used that plus a 10% impairment rating for disfigurement and that Dr. Plotkin provided the disfigurement rating alongside the psych rating. However, Dr. Bisgard noted that the DIME physician only provided the 10% disfigurement rating and did not provide a separate psych rating. Dr. Bisgard opined that awarding the mental impairment on top of the disfigurement impairment would be considered double-dipping. Dr. Bisgard opined that Dr. Reichhardt was not wrong and made no errors in calculating Claimant's impairment. Dr. Bisgard noted that Dr. Torres disagreed, but that Dr. Torres was not a level II accredited physician and that there was only a different opinion and no error by Dr. Reichhardt.

31. Claimant testified at hearing that he was a different person now and following his work injury and that he is now self-conscious, has anxiety, and has panic attacks. Claimant testified that he is irritable and impulsive now. Claimant testified that he put on a face with his psychological treatment with Dr. Carbaugh but that he was emotional and open with Dr. Bisgard. Claimant testified that he struggles now with communication and that he no longer has confidence like he used to have.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME ON MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." *See* § 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. *See* § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Here, Claimant has failed to overcome the opinion of DIME physician Dr. Reichhardt on MMI by clear and convincing evidence. Rather, the opinion of Dr. Reichhardt on MMI is supported by consistent opinions from the authorized treating provider Dr. Plotkin, and from the treating psychologist Dr. Carbaugh. Dr. Bisgard also provided an opinion on MMI consistent with the DIME physician. Here, Claimant argues that due to the report of Dr. Torres, he has overcome the DIME physician's opinion on MMI by clear and convincing evidence. However, the ALJ disagrees and finds that Dr. Torres' opinion is merely a difference of opinion from multiple other providers. As found above, Dr. Carbaugh opined as early as February of 2014 that Claimant was at MMI from a psychological standpoint. Dr. Carbaugh found Claimant to be open in discussing psychological issues and also noted in his evaluation that Claimant did have a tendency to "hold it in" and had some anger, stress, and felt socially uncomfortable because of the disfigurement. Many providers recommended maintenance psychological visits to continue working on issues, but the only provider who opined that Claimant was not at MMI from a psychological standpoint was Dr. Torres. As found above, Dr. Gutterman noted that Claimant's adjustment disorder would probably persist indefinitely given the type of significant injury Claimant sustained.

Claimant's psychological issues, including adjustment disorder and disfigurement had become stable with no further treatment reasonably expected to improve these conditions at the point he was placed at MMI by DIME physician Dr. Reichhardt. Claimant was noted by many providers to be doing reasonably well despite the significant injury he sustained and Claimant was stable from a psychological standpoint when he was placed at MMI. Although he was not back to normal and had remaining psychological issues, these issues were found by Dr. Reichhardt to be stable at and MMI. This determination is consistent with the overall records and with the determination of MMI made by Dr. Reichhardt. Claimant has failed to show that it is highly probable that Dr. Reichhardt was incorrect in assigning MMI.

OVERCOMING DIME ON PPD

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. *See* § 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

Dr. Reichhardt provided a whole person impairment rating of 22%. This was provided based on: 5% for traumatic brain injury; 10% for disfigurement; 3% for olfactory; and 5% for spinal. The authorized treating provider, Dr. Plotkin provided an 18% whole person impairment rating based on: 5% for traumatic brain injury, 10% for

disfigurement, and 4% for psychiatric. Dr. Plotkin did not include any rating for olfactory or spinal. Dr. Reichhardt did not include any rating for psychiatric. Dr. Reichhardt specifically noted the reason why he declined to rate psychiatric in his DIME report. He opined that under the AMA Guides, if impairment due to disfigurement exists, it usually is manifested by a change in behavior such as an individual's withdrawal from society and should be evaluated in accordance with the criteria set in chapter 14. Dr. Reichhardt opined that it was appropriate to give Claimant a rating for this according to Table 1, page 241, hence the 10% whole person disfigurement rating. Dr. Reichhardt also noted in his DIME report Claimant was not given a separate psychiatric impairment rating, as it was used for the disfigurement rating. Dr. Bisgard opined that this was not an error and that rating for both in Claimant's case would be considered "double dipping."

Dr. Torres believed that Claimant's psychiatric rating was 14% whole person. However, Dr. Torres based this rating, in part, on several psychiatric issues that pre-existed the injury as shown by prior medical records. The opinion of Dr. Torres is not found credible or persuasive. Further, Dr. Torres merely showed a difference of opinion from the DIME physician on what the appropriate rating was and what conditions were causally related to Claimant's psychiatric rating. Dr. Torres did not point out error in Dr. Reichhardt's calculation of impairment. Similarly, although Dr. Plotkin believed that Claimant warranted an impairment rating for disfigurement separate and unrelated to the psychiatric impairment due to Claimant's adjustment disorder, Dr. Plotkin failed to identify error in Dr. Reichhardt's determination that the psychiatric impairment was included in the disfigurement rating. The providers in this case seem to disagree but as opined by Dr. Bisgard, there is merely a difference in opinion as to whether Claimant has a separate ratable psychiatric condition or whether his adjustment disorder is appropriately rating within the disfigurement rating. As Claimant ahs failed to show error in Dr. Reichhardt's rating, and has merely shown difference of opinion, Claimant has failed to meet his burden.

ORDER

It is therefore ordered that:

1. Claimant has failed to overcome by clear and convincing evidence the opinion of the DIME physician Dr. Reichhardt on MMI and PPD.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 25, 2017,

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-741-639-06

ISSUES

- Whether Respondents have overcome by clear and convincing evidence the DIME's determination that Claimant sustained bilateral carpal tunnel syndrome ("CTS") and resulting chronic regional pain syndrome ("CRPS") as a result of her November 10, 2006 work injury.

- Whether Respondents have overcome by clear and convincing evidence the DIME's impairment rating.

- Whether Respondents have overcome by clear and convincing evidence the DIME's date of MMI.

- Whether Claimant has proven by a preponderance of the evidence that she is entitled to ongoing maintenance medical benefits.

STIPULATIONS

- The parties stipulated that the average weekly wage is $725.00.

- The parties stipulated that the following issues are held in abeyance and reserved for future determination: temporary total and temporary partial disability benefits, permanent total disability benefits, benefits cap, offsets, and overpayment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant sustained an admitted industrial injury when she fell at work on November 10, 2006.

2. On November 11, 2006, Wayne Draper, M.D., examined Claimant at Boulder Community Hospital (BCH). Claimant's "chief complaint" was pain in both hands for 1 day. Claimant gave a history that on the previous day she tripped and fell forward bracing herself with both hands. She reported pain in both hands with the right worse than the left. There was also "slight discomfort in the muscles of the left neck." There was "tingling" in the left middle finger with "minimal discomfort at the base of the left thumb." The note, which was written by a nurse, states Claimant reported "having carpal tunnel previously." On examination there was "slight tenderness noted to palpation over the palmer aspect at the base of the left thumb." The right hand was "swollen and ecchymotic over the 4th and 5th metacarpal areas dorsally." X-rays revealed a fracture of the proximal phalanx of the right 5th finger. The diagnoses included

- Fracture, proximal phalanx right 5th finger;
- Contusion of the right hand;
- Contusion of the left hand; and
- Left trapezius strain.

3. On November 20, 2006, Claimant saw a physical therapist at BCH who diagnosed left shoulder strain. Claimant reported problems of decreased strength in the left shoulder, tenderness in the left biceps tendon, and numbness in the left middle finger.

4. On February 26, 2007, Justin Green, M.D. examined Claimant. Claimant gave a history of "severe night time dysthesia affecting the left arm." She dated the "onset to following a fall where she hyperextended her wrists on 11-10-07" [sic]. On physical examination Dr. Green noted a "positive left carpal Tinel's sign." He performed EMG studies which revealed "absent median sensory responses, a markedly prolonged median motor distal latency, and prolonged median F-wave." Dr. Green assessed the electrodiagnostic results as evidence of moderate, median mononeuropathy at the left wrist (carpal tunnel syndrome), without denervation. There was no evidence of left upper extremity radiculopathy.

5. On May 2, 2007, Claimant returned to Dr. Green. Claimant reported "moderately severe, diffuse, dysthetic left arm pain that radiated up or down from her shoulder to her hand. She reported lesser complaints of similar paresthesia affecting the right hand. Dr. Green noted that examination of Claimant's upper extremities did not reveal clear sudomotor changes and there was no significant color change. There were equivocal Adson's signs for non-specific paresthesia bilaterally. Claimant also had a positive left carpal Tinel's sign and an "absent" right carpal Tinel's sign. There were negative Phalen's signs. Dr. Green assessed moderate left CTS, rule out right CTS and a history of bilateral wrist extension injuries. Dr. Green wrote Claimant had a "consistent mechanism of injury that may have led to traumatic carpal tunnel syndromes (TCRPS)." Dr. Green recommended EMG/nerve conduction studies for the right upper extremity and repeat studies of the left extremity to rule out a worsening condition.

6. On May 16, 2007, Dr. Green performed additional EMG studies of Claimant's right and left upper extremities. As a result he assessed electrodiagnostic evidence of a "moderate, median neuropathy at the right wrist (CTS), without denervation" and continued nerve conduction study evidence to suggest the presence of a moderate, median, mononeuropathy at the left wrist (CTS)."

7. On June 12, 2007 Kelley Wear-Maggitti, M.D. performed a left carpal tunnel release surgery and noted the presence of inflammation of the median nerve with "scarring and adhesions."

8. On June 19, 2007, Dr. Wear-Maggitti reported Claimant had no complaints and was very satisfied by the results of the left carpal tunnel release surgery. Claimant expressed a desire to undergo a right carpal tunnel release surgery.

9. On October 9, 2007 Dr. Wear-Maggitti performed a right carpal tunnel release surgery. The operative report notes there was a "significant amount of scar tissue encompassing the median nerve" and a neurolysis was performed to release the nerve from the scar tissue.

10. On November 20, 2007, Claimant reported to Dr. Wear-Maggitti that she was having a lot of pain in her right palm, a lot of numbness up her right arm, and problems with trigger fingers.

11. On February 6, 2008, Dr. Green noted Claimant was reporting increased dysthesia to light touch over the palm and distal right forearm and numbness over the tips of her fingers. Dr. Green noted "mild allodynia" to light stroking over the volar aspect of the right palm and distal forearm without swelling or pseudomotor changes. Dr. Green noted that Claimant's third EMG testing evidenced continued median mononeuropathy at the right wrist and that Claimant tolerated the test poorly because it caused her pain. Dr. Green assessed delayed recovery from right carpal tunnel release surgery and "rule out possible complex regional pain syndrome affecting the right hand and arm." Dr. Green referred Claimant for a triple phase bone scan and stated he would refer her for a stellate ganglion block if the test was normal.

12. On February 14, 2008, Claimant underwent a three phase bone scan of her distal forearms through her hands. The radiologist reported that the flow and blood pool images were normal. However, there was asymmetric slightly more prominent periarticular uptake about multiple right finger joints suggestive of chronic regional pain syndrome (CRPS).

13. On March 31, 2008, Melody Denham, M.D., examined Claimant on referral from Dr. Green. Dr. Denham noted Claimant had undergone a right-sided carpal tunnel release and had "had a complicated course since." Claimant reported experiencing pain in the right hand and wrist with "some extension up toward the elbow and shoulder." On examination Dr. Denham noted "some obvious atrophic changes" of the right hand and "marked allodynia over the area of the" surgical scar. Dr. Denham noted compromised range of motion of the right hand and wrist, and markedly decreased motor strength involving her fingers. Dr. Denham reviewed the triple phase bone scan results and noted "asymmetric uptake with a particular increased uptake in the right hand consistent with" CRPS. Dr. Denham assessed CRPS of the right upper extremity and recommended a stellate ganglion block (SGB).

14. Between March 31, 2008 and May 27, 2008, Dr. Denham performed four SGB's. On May 27, 2008 the doctor wrote Claimant had "undergone prior stellate ganglion blocks which have seemed to have given her temporal benefit."

However, Dr. Denham wrote it was "unclear at this juncture whether or not she has had protracted benefits, as her condition continues to be quite severe." Dr. Denham opined that if Claimant did not receive protracted benefit from the May 27 SGB, it might be necessary to consider other treatment options.

15. On June 9, 2008, Dr. Green noted Claimant had undergone four SGB's and stated that her "pain most recently dropped from 9/10 to 4/10." He recorded a diagnosis of CRPS of the right upper extremity and noted there had been "discussion concerning possible spinal cord stimulation."

16. On September 3, 2008, Dr. Green noted that with "the abnormal bone scan in February, I feel this is reasonable support for the presence of [CRS] in this case."

17. Dr. Floyd Ring, who is an expert in pain management, performed a record review for Respondents on October 3, 2008 to determine if Claimant was a candidate for an SCS. He found that Claimant had a work-related injury resulting in CTS. Dr. Ring stated that the bone scan and response to blocks "indicate a likelihood of CRPS, which is addressed in the [Medical Treatment] guidelines." He recommended delay in SCS placement until psychologist Dr. DiSorbio felt Claimant was ready for the procedure.

18. On January 12, 2009, Dr. Denham noted Claimant was reporting symptoms in both hands and in her feet.

19. On February 12, 2009, Bradley Vilims, M.D. examined Claimant and assessed CRPS type II "beginning in the right upper extremity, but mirroring to the left and now with symptoms consistent with extension into the lower extremities." Dr. Vilims diagnosed bilateral upper extremity CRPS and a positive bone scan with the "characteristic pulling (sic.) and changes on a triple phase that is consistent with her current diagnosis." Dr. Vilims indicated he would "begin the process for a cervical spinal cord stimulator trial."

20. On April 3, 2009, Dr. Vilims performed a procedure described as installation of a percutaneous spinal cord stimulator and intracanal cervical nerve root stimulator. The procedure initially provided good relief but Claimant reported developing severe pain and ultimately the trial was terminated.

21. On May 21, 2009, Gianacarlo Barolat, M.D. examined Claimant. Dr. Barolat noted Claimant's history of reflex sympathetic dystrophy (RSD) that began on the right and "traveled to her left upper extremity, then approximately three months ago spread to the lower extremities." Dr. Barolat noted Claimant gave a history of her "legs giving out" and that it had occurred three times over the prior week. Dr. Barolat assessed CRPS.

22. Prior to approving the spinal cord stimulator implantation, Respondents hired Dr. Vaughn Cohan to evaluate Claimant's case. He stated that Claimant began to exhibit signs and symptoms of bilateral CTS one month after her accident. Dr. Cohan noted that, following her CTS surgeries, Claimant developed CRPS in her

upper extremity and lower extremities. Dr. Cohan concluded that Claimant's previous treatment had been medically necessary. He agreed with Dr. Baralat's recommendation to proceed with the SCS implantation and concluded the procedure was appropriate. He based his opinions on evidence-based medicine guidelines to a reasonable degree of clinical certainty.

23. Prior to approving the spinal cord stimulator implantation, Respondents also hired Dr. Floyd Ring, an expert in pain management, to perform a record review to determine if Claimant was a candidate for a SCS. Dr. Ring found that Claimant had a work-related injury resulting in CTS. Dr. Ring opined that the bone scan and response to blocks "indicate a likelihood of CRPS, which is addressed in the [Medical Treatment] guidelines." He recommended delay in SCS placement until psychologist Dr. DiSorbio felt Claimant was ready for the procedure.

24. On July 29, 2009, Claimant came under the care of Jeffrey Kesten, M.D. Dr. Kesten is board certified in physical medicine and rehabilitation, pain medicine, and addiction medicine. He is level II accredited. Dr. Kesten examined Claimant and noted "her right hand is hypopigmented" compared to her left hand. There was no evidence of bilateral upper extremity hair and/or nail abnormalities, temperature abnormalities, muscle atrophy, or sudomotor changes. Dr. Kesten diagnosed bilateral shoulder upper extremity pain, a history of bilateral hand contusions, a right fifth proximal versus middle phalanx fracture, bilateral carpal tunnel syndrome, bilateral upper extremity CRPS II, and worsening of premorbid depression.

25. On August 10, 2009 Dr. Kesten noted similar findings to those he reported on July 29, 2009.

26. On August 11, 2009, Dr. Barolat performed a procedure described as the implantation of "two cervical spinal cord stimulation leads." This was for a diagnosis of RSD of the upper and lower extremities. A permanent stimulator was implanted on August 18, 2011. While Claimant initially did well, she ultimately suffered an infection and on September 18, 2009, the stimulator was removed.

ATP MMI and IMPAIRMENT RATING

27. On October 4, 2010, Dr. Kesten authored a report in which he "deemed" Claimant to have reached maximum medical improvement (MMI). He opined she had sustained a whole person impairment of 50% based on her CRPS. He explained that "per" the Division of Workers' Compensation (DOWC) he used the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) (AMA Guides) p. 109 Table 1 (for spinal cord and brain impairment values) to rate the CRPS.

28. On October 25, 2010, Dr. Kesten authored a report in which he stated Claimant remained at MMI. However, Dr. Kesten noted that he asked Claimant about her "recent lower extremity pain and balance problems." Claimant reported that she fell "quite frequently." She also reported that she fell and injured her right shoulder "in approximately September 2010" and was experiencing severe and persistent shoulder pain. Dr. Kesten wrote that considering the October 19, 2010 MRI findings he was going to refer Claimant to Thomas Mann, M.D., for a surgical consultation. This referral is inconsistent with a finding of MMI.

29. On December 8, 2010, Dr. Mann performed surgery on Claimant's right shoulder to repair a "large rotator cuff tear." The operative report notes Claimant had a long history of upper extremity and shoulder pain and suffered a "more recent fall and trauma that increased her pain and disability."

30. On February 8, 2011, Dr. Kesten noted that he received an inquiry from Insurer's adjuster asking whether he placed Claimant at MMI on October 10, 2004, and if so, requesting an impairment rating. The adjuster also asked whether Dr. Kesten had "rescinded" MMI. In this note Dr. Kesten stated that Claimant was deemed to be at MMI on October 4, 2010 with a 50% whole person impairment rating. He also noted that Claimant had undergone right shoulder surgery with Dr. Mann and was instructed to continue her "enrollment in a course of postoperative … physical therapy at Avista Therapy Center."

31. At a prior hearing on this claim ("the -04 hearing") Respondents conceded that they received Dr. Kesten's February 28, 2011 report on August 15, 2011.

32. On October 25, 2011, Dr. Kesten signed a Physician's Report of Worker's Compensation Injury (WC164) indicating Claimant reached MMI on October 4, 2010 with a 50% impairment rating.

33. On January 17, 2012, Dr. Kesten issued a report in which he determined Claimant had a 26 % upper extremity impairment rating for the right upper extremity. He stated that this rating converts to 16 % whole person impairment. He combined this rating with the prior 50% impairment rating for CRPS resulting in an "updated 58% whole person impairment rating" as of January 17, 2012.

DR. CEBRIAN'S PURPORTED DIME

34. In October 2010, Sandra O'Brien, Insurer's adjuster assigned to this claim considered obtaining a Respondents sponsored independent medical examination (RIME) from Dr. Carlos Cebrian or Dr. Jutta Worwag. However, Claimant advised Ms. O'Brien that she had been placed at MMI and the anticipated RIME did not take place.

35. In February 2012, Evelyn Bonham became Insurer's adjuster on this claim. Ms. Bonham received Dr. Kesten's January 17, 2012 report on April 18, 2012 and disagreed with his 58% whole person impairment rating. Ms. Bonham wrote in her adjuster's notes that she did not believe Dr. Kesten's rating should be

accepted and that she believed a DIME should be requested. She also indicated that she believed it was necessary to obtain a RIME to have another report to send to the DIME.

36. On April 24, 2013, Ms Bonham noted in the file that she contacted "Vickie at Exam Works" and requested an IME, "preferably with Dr. Cebrian."

37. On April 25, 2012, Ms. Bonham filed an N&P with the DOWC. The N&P indicated disagreement with Dr. Kesten's reports of January 17, 2012 and April 12, 2012 and proposed Dr. Allison Fall or Dr. Cebrian conduct the DIME.

38. In May 2012, Insurer attempted to schedule a DIME purporting that Dr. Worwag was the agreed upon DIME. When the DIME could not be scheduled with Dr. Worwag, Ms. Bonham scheduled the DIME with Dr. Cebrian and filed an amended application.

39. On June 27, 2012 Dr. Cebrian performed the purported DIME and on July 14, 2012 issued his report. Dr. Cebrian opined that Claimant's "claim-related" diagnoses are right fifth finger non-displaced fracture, contusion of the left and right hands, and left trapezius strain. Dr. Cebrian opined Claimant reached MMI for these conditions on October 4, 2010.

40. In his report Dr. Cebrian opined Claimant's left-sided CTS was not causally related to the November 10, 2006 industrial injury. In support of this conclusion Dr. Cebrian explained

    - That although Claimant had "some initial complaints" of tingling in the fourth and fifth fingers of the left hand, these were not "documented again until" February 9, 2007.

    - That although the February 26, 2007 EMG revealed moderate median nerve compression, all of Claimant's symptoms were in the "ulnar distribution."

    - Claimant's left median nerve compression was "incidental" to the injury and there "was not a physiological correlation between subjective complaints and the objective findings."

41. In his report Dr. Cebrian opined Claimant's right CTS was not related to the November 10, 2006 industrial injury. He explained that Claimant did not complain of right-sided paresthesias until May 2007. Dr. Cebrian opined there "was not a physiological or temporal correlation between the subjective complaints and the objective findings."

42. Dr. Cebrian suggested that the CTS documented in the EMG's could be due to another cause, i.e., age, sex, diabetes, recent pregnancy, arthritis or pre-existing hypothyroidism. However, Dr. Gellrick and Dr. Kesten testified that two arthritis tests after the injury ruled out arthritis; there was no documentation of CTS

secondary to Claimant's hypothyroidism either prior or subsequent to her work injury; the EMG's did not find the injury to the nerve that one would see as a result of hypothyroidism; and none of the other possible causes had changed between the date of injury and the EMG. Dr. Cebrian did no causation analysis to support his hypothesis and he could not document a specific cause that had intervened or changed between the date of the work injury and the EMG in support of his claim that the CTS developed from something other than the fall at work. Dr Cebrian admitted that no treating doctor attributed Claimant's CTS to any of Dr. Cebrian's possible causes.

43. In his report Dr. Cebrian opined Claimant does not have CRPS within the meaning of the AMA Guides Rule 17, Exhibit 7 (d) for the following reasons:

    - the February 14, 2008 triple phase bone scan was "suggestive of CRPS but the findings were minimal."

    - the "multiple stellate ganglion blocks were performed without protracted relief."

    - because "there was no protracted relief with the sympathetic blocks and there was not more than one positive diagnostic test" it was not medically probable that Claimant met the "diagnostic criteria for a diagnosis of CRPS."

    Based on the determination that Claimant did not meet the criteria for a diagnosis of CRPS, Dr. Cebrian opined Claimant was not entitled to a rating for this condition under the AMA Guides.

44. In his report Dr. Cebrian opined Claimant injured her right shoulder when she fell sometime in "June 2010." He opined there was no information in the record that this fall was the result of an injury-related condition. He further stated that no tests were done to establish that Claimant has CRPS in the lower extremities. He opined the falls that led to Claimant's right shoulder condition were not related to the November 2006 industrial injury.

45. Dr. Cebrian opined that Claimant has permanent impairment secondary to the placement and removal of the spinal cord stimulator "as she has persistent pain from the procedure." Dr. Cebrian opined this condition entitled Claimant to a 4% whole person impairment rating under Table 53IIB of the AMA Guides.

46. Dr. Cebrian disagreed with Dr. Kesten's recommendation for a second orthopedic consultation with respect to Claimant's right shoulder. He explained Claimant does not want this procedure and in any event the likelihood of improving function as a result of another rotator cuff repair is minimal. Dr. Cebrian opined Claimant's medications were compromising her ability to function, negatively affecting her condition, and contributing to her depression.

He recommended discontinuation of medications over the next six months under the supervision of a physician.

47. Dr. Kesten has treated Claimant for the past seven years. He reviewed Claimant's medical records from 1996 through the date of hearing, including both of Dr. Pitzer's reports, Dr. Cebrian's report, transcripts of the hearing before ALJ Cain, the depositions of Drs. Pitzer and Cebrian and Insurer's adjuster, his prior testimony, Claimant's deposition, Dr. Gelrick's report, and her deposition testimony.

48. Dr. Kesten disagreed with Dr. Cebrian's opinion that Claimant did not develop left and right-sided TCTS as a result of the November 10, 2006 industrial injury. With regard to the left-sided TCTS Dr. Kesten found there was a "physiologic correlation as well as a consistent mechanism of injury in which the symptoms presented in a temporal fashion." Dr. Kesten disagreed with Dr. Cebrian's statement that after "some initial complaints" of tingling in the fourth and fifth fingers of the left hand, these symptoms were not "documented again until" February 9, 2007. Dr. Kesten noted that on November 11, 2006 Claimant reported some tingling in the left middle finger. The ALJ finds Dr. Cebrian's focus on this one symptom to be more a reflection of his bias toward Respondents than an indication that this symptom was somehow more significant than any other.

49. Dr. Kesten disagreed with Dr. Cebrian that the November 11, 2006 examination indicated an ulnar nerve injury. Dr. Kesten explained that on November 11 no sensory nerve deficits were noted in either the median or the ulnar nerve distributions. Dr. Kesten opined that from the date of the injury through February 9, 2007 Claimant reported symptoms that constituted "warning signs" of TCTS including numbness and tingling of the third through the fifth fingers, swelling and tenderness over the thenar eminence, and proximal radiating symptoms into the arm. Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten to be more reliable and persuasive than that of Dr. Cebrian.

50. Dr. Kesten disagreed with Dr. Cebrian's opinion that the left-sided median nerve compression findings on electrodiagnostic testing were "incidental" because Claimant's symptoms were in the ulnar nerve distribution and the subjective complaints were inconsistent with the objective findings. Dr. Kesten stated that CTS symptoms may appear in any and all fingers and can appear proximally or "up the arm" from the carpal tunnel. Dr. Kesten also noted that the nerve conduction studies performed by Dr. Green on February 26, 2007 evaluated the ulnar nerve and it was normal. Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten to be more reliable and persuasive than that of Dr. Cebrian.

51. Dr. Kesten also disagreed with Dr. Cebrian's view that the right-sided CTS was not related to the industrial injury. Dr. Kesten explained that the mechanism of injury involved hyperextension of the right wrist and that Claimant demonstrated swelling and ecchymosis on November 11, 2006 when she was seen at BCH.

Dr. Kesten testified he agreed with Dr. Green's May 2, 2007 statement that Claimant has a "consistent mechanism of injury that may have led to traumatic carpal tunnel syndromes." Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten and the causation analysis of Dr. Green to be more reliable and persuasive than that of Dr. Cebrian.

52. Dr. Kesten testified in the -04 hearing that he disagreed with Dr. Cebrian's opinion that Claimant does not have CRPS. Dr. Kesten explained that, contrary to Dr. Cebrian's assertions, Claimant meets the diagnostic criteria for a diagnosis of CRPS under the current version of the Medical Treatment Guidelines (MTG) for Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy. Dr. Kesten explained that the MTG make a distinction between "clinical CRPS" and "confirmed CRPS." He stated that under the MTG, clinical CRPS may be treated with less invasive procedures while confirmed CRPS may be treated with invasive or complex treatment. In any event, Dr. Kesten disagreed with Dr. Cebrian's opinion that Claimant has not had two "positive" tests sufficient to diagnose confirmed CRPS. He explained that in his opinion the findings on the triple phase bone scan were not "minimal" as suggested by Dr. Cebrian. He further opined Claimant exhibited positive responses to the SGB's performed by Dr. Denham and that nothing in the MTG requires that the relief from SGB's be "protracted" in order to constitute a positive diagnostic test. Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten to be more reliable and persuasive than that of Dr. Cebrian.

53. Dr. Kesten opined in the -04 hearing that Claimant's CRPS probably "traveled" from her upper extremities to the lower extremities. He stated that this phenomenon is documented in the literature and is "thought to be a reflection of the centralization of this pathological process." Dr. Kesten opined that the traveling of the CRPS to the lower extremities likely compromised Claimant's lower extremity function causing her to experience numerous falls, including the fall that led to shoulder injury and surgery performed by Dr. Mann. Based on the totality of the evidence, the ALJ finds this opinion of Dr. Kesten to be reliable and persuasive.

54. Dr. Kesten testified in the -04 hearing that after he initially placed Claimant at MMI in October 2010 he continued to treat her. He further stated that after initially placing her at MMI he referred her for treatment to Dr. Mann for evaluation and treatment of her shoulder. Dr. Kesten explained that in January 2012 he issued a second impairment rating taking into account the shoulder injury and rating her for a "fairly complex" full thickness tear of the rotator cuff.

55. In the -04 hearing, ALJ Cain determined

    - Dr. Kesten did not place the claimant at MMI until at least January 17, 2012, when he issued the impairment rating for the right shoulder.

- Claimant never "agreed" with Ms. Bonham to allow Dr. Cebrian to act as the DIME physician.

- Insurer considered Dr. Cebrian to be a desirable DIME candidate because he would render opinions favorable to the insurer's views on issues including impairment and MMI.

- no valid DIME has been conducted and filed with DOWC.

See Cain Order dated December 1, 2014.

56. Respondents petitioned for review of the order. The petition was denied because the Cain Order was not a final order subject to review.

57. Dr. Kesten continued treating Claimant. Claimant also was treated at Holistic Family Practice. April 20, 2015, and July 27, 2015 notes continue to reflect Claimant's CRPS symptoms and diagnosis.

DR. PITZER RIME

58. Dr. Pitzer reviewed Claimant's medical records through the time of Dr. Cebrian's report. In his December 5, 2012 report, Dr. Pitzer agreed with Dr. Cebrian that Claimant's CTS was not related to her work injury. He reasoned

- No research studies related CTS to hand or wrist bruising;

- Claimant's CTS studies showed moderate CTS which he opined was more consistent with prolonged compression;

- Claimant's pain developed and increased with her CT release surgery.

59. At Respondents' request Dr. Pitzer performed a second records review and opined that it was more probable that Claimant's CTS was attributable to predisposing factors than to her work injury. He opined that Claimant's CTS and CRPS were not related to her work injury. Respondents deposed Dr. Pitzer on June 4, 2014. He testified that

- Claimant was not exposed to any work related risk factors for CTS.

- Claimant had predisposing factors including obesity and hypothyroidism.

- Moderate to severe mirror-image bilateral CTS such as Claimant's typically relates to predisposing risk factors versus trauma.

60. Dr. Pitzer did not examine Claimant and based his opinions solely on his incomplete records review. He was unsure whether he reviewed the actual EMG studies or relied on the report, and he did not review the records for physiological abnormalities.

61. For the past ten years approximately thirty-five percent of Dr. Pitzer's testimony has been for Respondents' counsel's firm. Ninety-six percent of Dr. Pitzer's testimony has been favorable to respondents.

62. While Dr. Pitzer is highly credentialed, his testimony was couched in terms of what "typically" occurs, he was unfamiliar with aspects of Claimant's physical examination findings, and his opinions were more about typical CTS and less about Claimant's case. For example, Dr. Pitzer stated that "most" nerve root trauma gets better with time, and "most" chronic compression neuropathies get worse over time. Based on that typical scenario, he opined that Claimant's EMG's were consistent with chronic carpal tunnel syndrome since they did not show improvement over time. DIME Dr. Gellrick testified that Dr. Pitzer's opinion is contrary to the MTG for CTS which recognize fluctuation in symptoms and on EMG tests.

63. Based on the totality of the evidence the ALJ is not persuaded by Dr. Pitzer's opinions.

DR. GELLRICK DIME

64. Dr. Gellrick was ultimately selected as the DIME. She physically examined Claimant on July 24, 2015. Dr. Gellrick also performed a thorough, extensive and detailed record review. In her report dated August 7, 2015, Dr. Gellrick assigned October 4, 2010 as the MMI date.

65. Dr. Gellrick agreed with the opinions of Drs. Kesten and Green that Claimant's CTS was caused by and related to her work injury. Dr. Gellrick agreed with the same doctors that Claimant went on to develop CRPS based on the results from her triple-phase bone scan, her reaction to the stellate ganglion blocks, and her clinical diagnosis.

66. Dr. Gellrick agreed with the opinion of Dr. Floyd Ring, who performed two record reviews for Respondents, that Claimant had CRPS and that the spinal cord stimulator and related surgeries were reasonably necessary to treat Claimant's condition.

67. Dr. Gellrick disagreed with Dr. Kesten's opinion that Claimant had CRPS in her lower extremities because the diagnosis was not supported by diagnostic testing and no physical examination had been performed.

68. Dr. Gellrick rated Claimant's impairment at 46% whole person – 45% physical impairment for CRPS, plus 1% psychiatric impairment for worsened depression.

69. Based on the totality of the evidence, the ALJ finds these opinions of Dr. Gellrick to be credible and persuasive.

CLAIMANT'S TESTIMONY

70. Claimant testified both by deposition dated October 7, 2014, and at hearing. Respondents' counsel called Claimant as their first witness and attempted to impeach her credibility with questions about the BCH intake form, a notation in one of Dr. Yee's records, the 2004 FCE related to her back injury, and surveillance video taken of Claimant. The ALJ finds Claimant's testimony to be credible for the following reasons:

- The BCH intake form that mentions "she does report having carpal tunnel previously" was dictated by someone other than Dr. Draper and it does not appear that Dr. Draper reviewed or signed the note. The notation is contrary to the numerous medical records which contain no mention of a carpel tunnel diagnosis or treatment prior to Claimant's work injury. The notation is also contradicted by Claimant's ability to perform the job duties she was assigned and her other recreational activities. The ALJ finds this notation to be unreliable and not persuasive evidence either that Claimant had carpel tunnel prior to her work injury or that Claimant was not consistent in her reporting.

- Dr. Yee treated Claimant in August 2003 for an unrelated back injury. His note from that visit states that Claimant "has had episodic left upper extremity and numbness in her forearm and hand." However, Claimant had no upper extremity weakness and the neurologic examination of Claimant's upper extremities revealed no motor or sensory deficits. The ALJ finds Dr. Yee's notation, when taken in context, is not persuasive evidence either that Claimant had carpel tunnel prior to her work injury or that Claimant was not consistent in her reporting.

- Claimant underwent a functional capacity evaluation (FCE) in 2004 related to her back injury. Part of the FCE involved a "hand function sort." While it was unclear during much of the hearing whether Claimant actually performed the activities mentioned, the ALJ finds that the activities were not performed. Rather, it seems Claimant was given a one-page form listing sixty-two activities and was asked to rate on a scale of 1 - 5 what she perceived her ability to do the activity was. One being "able" and five being "unable." While Respondents made much of Claimant's rating as 3 (restricted) such activities as "picking up small coins," and "sorting a deck of cards;" Claimant rated as 1 such activities as "use fork and knife," "cut a coupon," "pick out a paper clip," and "peel a potato." The one page form did not attach visual cues used during the sort. The ALJ finds the hand function sort to be unreliable and not persuasive evidence either that Claimant had carpel tunnel prior to her work injury or that Claimant was not consistent in her reporting.

71. Respondents showed video surveillance they had taken of Claimant which showed her entering and exiting her car, carrying a water bottle and light bag,

and drinking coffee among other things, in an apparent attempt to discredit Claimant's limitations. However, Claimant testified that she was able to do the activities shown and more because her right arm is not paralyzed. She explained that she has difficulty with fine hand movements such as writing and balancing a fork in her right hand. She further testified that her hands are shaky and that she is unable to make pottery as she had before the injury. Because she cannot raise her right arm, she has her hair washed at a salon. Both Drs. Kesten and Gelrick testified that they were not surprised that Claimant was able to perform the activities shown on the video and that the activities were within Claimant's medical abilities.

72. Drs. Gelrick, Kesten, Pitzer, and Cebrian all acknowledged that Claimant had not been diagnosed with or treated for CTS.

73. The ALJ attributes any inconsistencies in Claimant's testimony to Respondents' counsel's manner of questioning, the complexity and duration both of her treatment and of this litigation, and the passage of time. The ALJ finds Claimant to be credible.

74. Based on the totality of the evidence, the ALJ finds that Respondents have not met their burden of proving by clear and convincing evidence that Dr. Gellrick was incorrect in determining that Claimant sustained bilateral CTS and resulting CRPS as a result of her November 10, 2006 work injury.

75. Based on the totality of the evidence, the ALJ finds that Respondents have not met their burden of proving by clear and convincing evidence that Dr. Gellrick was incorrect in determining Claimant's impairment rating.

76. Based on the totality of the evidence, the ALJ finds that Respondents have not met their burden of proving by clear and convincing evidence that Dr. Gellrick was incorrect by assigning October 4, 2010 as the MMI date.

77. Based on the totality of the evidence, the ALJ finds that Respondents have not met their burden of proving by a preponderance of the evidence that Claimant is not entitled to ongoing maintenance medical benefits.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

It is in the ALJ's sole prerogative to assess the credibility of the witnesses and the probative value of the evidence to determine whether the claimant has met her burden of proof. *Dover Elevator Co. v. Indus. Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). It is within an ALJ's purview to assess the relative weight and credibility of various opinions. *See Kraft v. Medlogic Global Corp., et al.*, W.C. No. 4-412-711 (ICAO, Mar. 15, 2001) (citing *Rockwell Internat'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990)). Additionally, if an individual expert's opinion contains contradictions or is subject to multiple interpretations, the ALJ may resolve the conflict by crediting only a portion of the opinion, or discrediting the opinion in its entirety. *See Kraft*, W.C. No. 4-412-711; *Johnson v. Indus. Claim Appeals Office,* 973 P.2d 624 (Colo. App. 1997).

A Division IME's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." § 8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" that the Division IME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see also Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

Whether or not a party overcomes the Division IME is a question of fact for determination by the ALJ. § 8-43-301(8), C.R.S.; *Wackenhurt Corp. v. Indus. Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO, Aug. 18, 2004).

As a matter of law Dr. Gellrick's opinions on the issues of causation, MMI, and impairment are binding unless overcome by clear and convincing evidence. While Respondents offered the opinions of Drs. Cebrian and Pitzer for that purpose, the ALJ specifically found that their opinions were biased, based on limited information, and not persuasive. Additionally, Dr. Gellrick's opinions were supported by the opinions and findings of Drs. Kesten, Ring, Vilims, Cohan, Draper, Denham, Wear-Magitti, and Green.

A Claimant has the right to maintenance medical treatment that is reasonably necessary to relieve the effects of the industrial injury or prevent future deterioration of the claimant's work-related condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

If the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that she will suffer a greater disability than she has sustained thus far, such medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or prevent deterioration of the claimant's present condition. *Milco Construction v. Cowan*, P.2d 539, 542 (Colo. App. 1992).

The ALJ credits the opinions of Drs. Gelrick and Kester regarding maintenance medical care. Dr. Kesten testified that Claimant's current treatment for her CRPS includes medication; hand and wrist brace/splint; home biofeedback, a paraffin unit; ColdPac; TENS unit; attending modified yoga; and using treadmill at Orange Theory.

Dr. Gellrick agreed with Dr. Kesten's maintenance medical care, including home treatment and use of opioids, and she agreed that stopping Claimant's medications would worsen Claimant's symptoms.

Dr. Gellrick testified that Claimant should try to do home exercises, yoga, and walk her dogs or walk in the gym since those activities increase her function. Dr. Kesten testified that if Claimant did not go to yoga, walk on a treadmill, and follow Dr. Kesten's multimodal treatment plan, then Claimant's functioning would decline. Dr. Kesten's recommended care is reasonable, and necessary to relieve the effects of the industrial injury and prevent deterioration of Claimant's condition.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. As a result of Claimant's November 10, 2006 admitted injury, she developed CTS the treatment for which caused Claimant to develop CRPS in her upper extremities.

2. Claimant reached MMI on 10/4/10 with a whole person impairment of 45% for CRPS and a 1% psychological impairment due to worsened depression.

3. Claimant's stipulated AWW is $725, which results in a TTD amount of $483.33.

4. Respondents shall pay Claimant PPD to the statutory cap based upon the 45% whole person and 1% psychological impairments at the TTD rate of $483.33, less any TTD, TPD, and SSDI offsets.

5. Claimant requires ongoing maintenance medical care to relieve her from the effects of the injury. Dr. Kesten's treatment, as outlined in his testimony, is reasonably necessary and related to her admitted work injury and shall continue.

6. Insurer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

7. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 9, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Did Claimant prove by a preponderance of the evidence that he injured his left knee while working for Employer on or about August 12, 2016?

FINDINGS OF FACT

1. Claimant works as a landscaper for Employer. Claimant alleges he injured his left knee as a result of his work duties in August 2016.

2. On his Worker's Claim for Compensation form, Claimant alleged an August 17, 2016 date of injury. At the hearing, Claimant amended his alleged date of injury to August 12, 2016.

3. Claimant's native and primary language is Spanish. Claimant's exact level of English-language fluency is unclear, but for purposes of this decision, the ALJ assumes Claimant speaks and understands minimal English.

4. Claimant sought treatment for his left knee on August 17, 2016 at the Memorial Hospital Emergency Room. The corresponding medical record indicates an interpreter was present. Claimant's primary complaint was left lower extremity pain "after a fall." The report states Claimant "tripped over a 2 x 4 on Friday."[1] He was having pain in both legs, worse on the left, which he said had "been ongoing [since] the weekend." Physical examination revealed mild effusion of the left knee with overlying ecchymosis. The knee was tender to palpation of the lateral joint line. X-rays of the left knee showed mild degenerative changes, but no acute fracture or dislocation. A "large joint effusion" was present. The ER physician diagnosed likely lateral meniscus injury of the left knee. He gave Claimant a brace and instructed him to follow up with orthopedic surgery.

5. Don Holstead is Employer's primary owner, and is actively involved in the company's day-to-day operations.

6. Within a few days after the ER visit, Claimant (or someone on his behalf) told Mr. Holstead his knee was hurting. No one mentioned a work injury. Mr. Holstead took Claimant to Alliance Urgent Care on August 24, 2016. Mr. Holstead utilizes Alliance Urgent Care to treat his employees, in part, because they have a Spanish-speaking provider. Mr. Holstead credibly testified he was unaware Claimant was claiming a work injury when he took him to Alliance.

[1] The immediately preceding Friday was August 12, 2016.

7. Upon arrival at Alliance Urgent Care, Claimant was evaluated by Mario Aragon, PA, NP. PA Aragon's report indicates "the patient states that approximately a week ago he twisted his knee when he stepped on a rock." Claimant reported his knee was very swollen and he was having difficulty walking on the left leg. He had tried ibuprofen with little to no relief. Physical examination of the left knee demonstrated a positive McMurray's sign and mild swelling. PA Aragon opined "I'm concerned that the patient has suffered a meniscus tear, therefore I am ordering an MRI." He prescribed prednisone and asked Claimant to follow-up after the MRI.

8. Neither party submitted the MRI report into evidence. Nevertheless, based on the evidence presented, the ALJ finds Claimant has a meniscal tear in his left knee.

9. Claimant filed a Workers' Claim for Compensation on November 18, 2016. Claimant described the mechanism of injury as: "I was carrying a pole over 100 lbs, and stepped in water and twisted. The poles [sic] weight fell on me when I twisted." Claimant described the location of the accident as: "Not sure, it was track [sic] homes in Colorado Springs." Claimant stated he reported the injury to "Julio Dorado, Jr. and he informed the boss."

10. At the hearing, Claimant testified he twisted his knee when he stepped on dog feces while carrying a fence post.

11. In his hearing testimony and pretrial discovery responses, Claimant stated the accident occurred at the Wolf Ranch development in Colorado Springs.

12. On February 22, 2017, Julio Dorado, Jr., Juan Dorado, and Clemente Ramirez stated in writing that they "did not witness or see [Claimant] get hurt at any time while working with him."

13. On March 3, 2017, Julio Dorado, Jr., Juan Dorado, Jesus Yanez, and Clemente Ramirez signed affidavits stating they had no knowledge of Claimant's alleged accident. Each coworker stated they did not witness Claimant injure himself while working, Claimant did not tell them he injured himself while working, and they did not hear Claimant tell anyone else he injured himself while working.

14. Julio Dorado, Jr. testified at the hearing. Mr. Dorado, Jr. is Claimant's direct supervisor. Mr. Dorado, Jr. did not witness Claimant's alleged accident. Mr. Dorado, Jr. recalled he and Claimant worked on fences at some time, but could not remember the date. Mr. Dorado, Jr. did not recall any time Claimant was injured while working on fences. Mr. Dorado, Jr. recalled being told Claimant was injured at some point, but could not remember when he was told that. Mr. Dorado, Jr. saw Claimant limping at some time, but did not know when or how Claimant hurt his knee. At some unknown date, Claimant told Mr. Dorado, Jr. he was hurt at work carrying a post.

15. Clemente Ramirez, Claimant's co-worker, testified at the hearing. Claimant told Mr. Ramirez he hurt his knee when he slipped or tripped. Mr. Ramirez could not recall the date of Claimant's statement, but "the day that he told me, we were putting down plants."

16. Jesus Yanez, Claimant's co-worker, testified at the hearing. Mr. Yanez typically delivers materials to Employer's various job sites. Mr. Yanez drove Claimant to Memorial ER on August 17. Claimant did not tell Mr. Yanez how or where he hurt his knee. Mr. Yanez interpreted the affidavits to the other Spanish-speaking coworkers "word-for-word" and "line by line." Mr. Yanez testified the crew spent 2-3 days working at the Canyon Ridge MHP project. He did not recall any fence posts or fencing materials on that project.

17. None of the witnesses could recall when they first learned of Claimant's alleged injury, but the ALJ infers it was well after the fact.

18. Claimant testified he injured his left knee working on a fence project at Wolf Ranch. He testified he stepped on dog feces and twisted his left knee while carrying a fence post. He testified he told "both" coworkers with whom he was working that day. Claimant identified another coworker, Joaquin, who allegedly witnessed the accident. Claimant testified he told Mr. Dorado, Jr. he had injured his leg that day.

19. Although Claimant has worked on projects at Wolf Ranch for Employer in the past, none of the projects were on or around Claimant's alleged date of injury. Employer had no jobs at Wolf Ranch during the week ending August 12, 2016. Based on Employer's business records, the crews did no fence work at Wolf Ranch "at any time close to" August 12.

20. On August 12, 2016, Employer's crews were working at the Canyon Ridge Mobile Home Park, performing various tasks such as removing trees, installing new plants and mulching. The Canyon Ridge MHP job entailed no fence building or repair.

21. None of the employees worked on August 17, 2016, because Mr. Holstead and his wife were out of town attending a wedding.

22. Claimant has failed to prove by a preponderance of the evidence that he injured his left knee while working for Employer.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The

facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The employer is liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to medical benefits is disputed, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, *supra*.

As found, Claimant has failed to prove by a preponderance of the evidence that he injured his knee at work on or about August 12, 2016. There are simply too many inconsistencies in the record to give Claimant's testimony or allegations significant weight. Every description of the alleged incident in the record is different—including Claimant's description at hearing. Claimant testified he stepped on dog feces. On the WC Claim form, Claimant stated he slipped on water. The ER physician documented he tripped on a 2 x 4. The urgent care report describes the incident as stepping on a rock. Although Claimant appeared sincere in his testimony at hearing, the testimony is not supported by other persuasive evidence. Claimant alleged that Mr. Dorado, Jr. and Mr. Ramirez witnessed his accident, but neither witness corroborated that allegation. No witness recalled Claimant being hurt or claiming an injury on any job involving fencing. Claimant suggests his coworkers were intimidated or coerced into signing their affidavits, but there is no persuasive evidence to support that supposition.

Claimant stated his injury occurred at Wolf Ranch. The medical records indicate Claimant's knee problems started on or about August 12, but Claimant was not working at the Wolf Ranch property on that date—or even that week. Claimant was working at the Canyon Ridge MHP the week of August 12, 2016, and that project involved no fence building or repair. Ultimately, the persuasive evidence fails to prove that Claimant injured his left knee at work on or about August 12, 2016.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 2, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he has suffered a work injury arising out of, and in the scope of, his employment?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ makes the following findings of fact:

1. The Claimant alleges that he sustained injuries to his back while performing his duties, cleaning rental cars on November 4, 2015. At the time, he was working approximately 20 hours per week over three non-consecutive days. He began work for Employer in August, 2015.

2. The Claimant went to Touchstone Health Care West on November 6, 2015 with complaints of "Back pain that started *1 week ago* has gotten worse in the 2 days." Claimant also stated: "Never had issue before." Claimant did not indicate at this visit that the condition was work related. (emphasis added)(Claimant's Exhibit 1, p.16)

3. Claimant was seen in follow up on November 12, 2015. At that time, he states that he has started a workers compensation claim. On this trip, he does not state how he injured himself to the medical provider. The clinical notes state:

> He is real depressed due to his limitations. He has lost multiple jobs due to the fact that he cannot physically do the work…He cannot remember all the jobs that he has lost *due to his back* in the past." (emphasis added). (Claimant's Ex. 1, p. 8)

4. The medical records submitted documented prior back pain and treatment for that pain. The available medical records start on February 15, 2011 when he was seen at Southern Colorado Clinic for back pain. Claimant stated:

> 11-7-07 Fall of (sic) 12' ladder on back and Right leg." He provided a pain diagram which showed burning and stabbing pain in the low back and into the right leg. It also showed the level of pain as an "8" on a scale of 1 to 10. (Respondent's Ex. A).

5. Claimant reports back pain on 6-7-2013. Claimant was seen at Centura Health and the Nurse Practitioner noted chronic low back pain:

> ..patient has a long gistory (sic) of back pain- he had been doing light maintenance-he was lifting cement bags-it does not happen the day of the activity-but then the next day-He states his L3-4-5 are stage "4"-…the pain is strictly in his lower back-no radiation…(Respondent's Ex. E, p.24).

6. The records from 7/8/13, 11/17/14, and 2/8/15 all note "chronic back pain" as a complaint. (Claimant's Ex. 1)

7. Additionally, Claimant's chief complaint in a visit to Centura Health on 10/12/2011 was "Memory Loss, Depression, Ringing in ears". (Claimant's Exhibit 1, p. 135).

8. Claimant underwent an MRI on 12/17/2015. The results were interpreted by Dr. Michael P. O'Neill to read, in conclusion:

> 1. Mild, degenerative disc disease is scattered throughout the lumbar spine.
>
> 2. At the L4-L5 level, disc space narrowing, and mild, circumferential spondylatic bulge is noted, with mild, bilateral neural foraminal narrowing, right greater than left. There is no central canal stenosis.
>
> 3. At the L4-L5 level, mild to moderate circumferential disc bulge is noted without disc protrusion or central canal stenosis.

(Claimant's Ex. 4, p. 195).

9. Claimant's testimony at hearing can be summarized, as follows: As a detailer for rental cars, he was expected to clean cars to prepare them for the next renter. At first, detailers were expected to perform these tasks in 12 minutes per car. This figure was lowered by Employer, eventually to 2 minutes per car. While at work on the day of his reported injury, Claimant was twisting his body at an odd angle to vacuum the rear portion of a Camaro, and felt extreme pain in his lower back, for which he sought treatment. He was returned to modified duty driving and delivering cars. He feels better in this capacity, but still reports an inflamed lower back.

9. Claimant was seen by Dr. Timothy O'Brien, an orthopedic surgeon for an IME. He saw the Claimant on April 26, 2016. Based on his examination of the Claimant and review of the medical records, he noted that Claimant is a poor historian, and the reliability of his self reported symptoms is suspect.

10. In the conclusion of his report, Dr. O'Brien's findings can be summarized:

> In my opinion, Mr. Dove did not sustain a work-related injury….Mr. Dove….has essentially a normal exam given his age….He is at no more risk for injury than any other member of his age group. (Respondent's Ex. B, p. 13).

In response to a question for an impairment rating, Dr. O'Brien notes:

> There is no work injury and, therefore, there is no impairment. Mr. Dove has an incurable, relentlessly progressive age-related genetically induced multilevel lumbar degeneration which by its very nature is expected to result in episodic pain. These episodes of pain….are not the result of any injury; rather these episodes of pain are in fact an expected episode of manifestation in Mr. Dove's underlying multilevel lumbosacral spondylosis.

11. Dr. O'Brien testified consistent with his report. He further noted that two months of cleaning cars as described by Claimant would not aggravate any pre-existing condition which Claimant may have suffered from.

12. Claimant has inherent limitations in his recall of events, by his own admission. Despite those limitations, the ALJ finds Claimant to be *sincere* in his testimony, but insufficiently *reliable* to establish that a compensable injury occurred.

13. Dr. O'Brien, in both his report, and live testimony, is persuasive on the issue of compensability at issue in this case.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-01,*et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; Faulker v.*

Industrial Claim Appeals Office, 12 P.3d 844 (Colo.App. 2000); City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Pacesetter Corp. v. Collett, 33 P.3d 1230 (Colo.App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, *84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Compensability

D. As noted, for an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that an injury which occurs in the course of a worker's employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2006; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

E. The existence of a causal relationship between the Claimant's employment and any injuries suffered is a question of fact. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985).* The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

F. Here, the persuasive evidence demonstrates that Claimant has had a longstanding pre-existing degenerative lumber condition. The mechanism he describes which resulted in pain to his lower back did not result in an *injury*; instead, it was the periodic manifestation of his degenerative spinal condition already in existence. He did not aggravate, creating a new *injury* beyond temporary pain, this pre-existing condition while working for Employer.

G. Claimant has not met his burden of proof that he suffered a compensable injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers compensation benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 6, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether Claimant sustained on an injury on August 23, 2015, in the course and scope of her employment with employer.

- Whether claimant is entitled to temporary total disability benefits.

- Whether employer was covered by workers' compensation insurance on the date of injury.

- Whether employer notified the Division of Workers' Compensation of claimant's injury and lost time after she missed three work shifts.

- Whether employer filed a notice of contest or an admission of liability after employer became aware of claimant's loss of three days' time from her injury.

- Whether penalties should be assessed pursuant to the Act for:

    - Failure to carry workers' compensation insurance pursuant to section 8-43-408(1);

    - Failure to timely report claimant's injury to the Division of Workers' Compensation pursuant to sections 8-43-101 and 8-43-103;

    - Failure to pay medical bills timely pursuant to section 8-43-304(1); and

    - Failure to admit or deny claimant's claim pursuant to section 8-43-203(2).

- ✓ The issue of temporary partial disability was held in abeyance.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. The Administrative Law Judge specifically finds that notice of the hearing was properly served on the employer. Claimant testified that Raul Gonzales was employer's Director of Operations and "second in command" of the company behind employer's owner. The ALJ takes judicial notice of Secretary of State records which list Mr. Gonzales as employer's registered agent for service of process. Employer is found to be operating a business in the State of Colorado and subject to the provisions of the Colorado statutes governing workers' compensation.

2. On August 23, 2015, employer employed claimant as an event manager at the Denver Convention Center. One of claimant's job duties was washing and putting away containers. She testified that while she was cleaning a glass container, it broke. The broken glass cut her right hand between her fingers and her wrist on the top side of her hand. Claimant suffered an injury to her right hand in the course and scope of her employment.

3. The ALJ finds that claimant suffered a compensable injury.

4. A coworker immediately drove claimant to Denver Health Medical Center (DHMC) where she received emergency treatment, x-rays, and was admitted overnight. The severity of the injury required a hand specialist to evaluate claimant's severed tendon. A provider sutured claimant's hand and scheduled her to return the following week. Claimant incurred costs of at least $2,557.33 for that hospital visit.

5. Claimant notified employer of her injury by calling Mr. Gonzales from the emergency room.

6. For over one month, Mr. Gonzales represented to claimant that employer had workers' compensation insurance and that he would provide her with policy details. However, he never provided claimant with coverage information.

7. Employer represented to claimant that it would reimburse her for payments she made to DGMC and for her co-payments, but failed to do so. Employer also represented that it would pay DGMC directly and in full by March 16, 2016, but failed to do so.

8. Claimant was unable to finish her shift on August 23, 2015, and unable to work the following three days due to her injury. Claimant is entitled to temporary total disability benefits for that period of time.

9. Employer was required by statute to report claimant's injury to the Division of Workers' Compensation within ten days of the third shift missed. Upon review of the Division of Workers' Compensation file, the ALJ finds that employer did not provide such notice to the division at the time it was due, and had not provided such notice through the date of hearing.

10. Employer was required by statute to notify the Division of Workers' Compensation and claimant whether the injury was admitted or denied by filing either an admission of liability or a notice of contest within twenty days of learning that claimant suffered an injury that resulted in her missing three work shifts. Upon review of the Division of Workers' Compensation file, the ALJ finds employer filed neither an admission of liability nor a notice of contest on this claim at the time such were due, and has not done so through the date of the hearing.

11. Claimant underwent surgery on August 31, 2015. The following procedures were performed:

- Irrigation and debridement of claimant's left hand wound down to the tendon;

- Repair of claimant's left extensor digitorum comminus tendon to index and long fingers;

- Repair of claimant's left hand extensor imdicis proprius tendon;

- Repair of claimant's left hand extensor carpi radialis brevis tendon.

The cost for the surgery alone was at least $10,790.83.

12. Claimant was unable to work the day of the surgery and the four following days because of her injury. Claimant is entitled to temporary total disability benefits for that period of time.

13. Post surgery, claimant participated in physical and occupational therapy at DHMC. The purposes of the therapy were scar management, soft tissue mobilization, range of motion, and strengthening. Claimant's therapy also included prescription medication and equipment. Claimant incurred medical bills in the following amounts for her physical and occupational therapy.

• 9/15/2015		$601.28
• 9/25/2015	9/29/2015	$543.24
• 10/06/2015		$500.72
• 11/17/2015		$150.02
• 12/04/2015	12/28/2015	$831.02
	TOTAL	$2,626.28

14. The ALJ finds claimant's DHMC treatment providers and any referred providers are claimant's authorized treating providers.

15. The ALJ finds claimant's treatments at DHMC and at any referred providers were reasonably needed to treat, cure, and relieve claimant from the effects of her injury.

16. Claimant testified credibly that her annual salary was $42,000. The ALJ finds that claimant's average weekly wage is $807.69, and her weekly temporary disability rate $538.46.

17. The Division of Workers' Compensation records establish that employer was not insured for workers compensation at the time of claimant's injury. Claimant testified that Mr. Gonzales initially told her employer did have workers' compensation

insurance. However, he did not provide proof of insurance, and eventually admitted that employer did not carry workers' compensation insurance on the date of her injury.

18. The ALJ finds that employer was not insured for workers' compensation on the date Claimant was injured.

19. The Division of Workers' Compensation records establish that employer did not timely report claimant's injury and had failed to report such injury by the date of hearing.

20. The Division of Workers' Compensation records establish that employer did not timely admit or deny claimant's claim and had failed to do so by the date of hearing.

21. Claimant filed her application for hearing on September 6, 2016, seeking penalties, among other things. Because employer assured claimant for at least one month that it had workers' compensation insurance, the ALJ finds that Claimant's filed her request for penalties within one year of when she knew or reasonably should have known of the facts giving rise to possible penalties.

22. The ALJ specifically finds claimant to be a credible witness whose testimony was consistent with records in evidence.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Claimant has the initial burden to prove by a preponderance of evidence that her condition arose out of and in the course of her employment. Section 8-41-301(1)(c); *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). Here Claimant has satisfied her burden that she suffered a compensable injury in the course and scope of her employment with employer.

Section 8-42-101(1)(a), C.R.S. provides that employers are liable for authorized medical treatment which is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Thus, employer is liable for all of claimant's treatment at DHMC or at any referred provider all of which the ALJ has found to be reasonable and necessary. Employer is entitled to an offset for any amounts it has previously paid.

Section 8-42-105, C.R.S., provides that in the case of temporary total disability of more than three days in duration, the employee shall receive sixty-six and two-thirds percent of their average weekly wage for the duration of their total disability. The ALJ has found that claimant was temporarily totally disabled for the three days following her injury and for the four days following her surgery. The ALJ has also found claimant's weekly temporary disability rate to be $538.46. Thus, claimant is entitled to $753.84 in temporary total disability benefits.

An employer who has not complied with the insurance provisions of the Act at the time an employee is injured is subject to a fifty percent increase in the compensation and benefits provided in articles forty to forty-seven of the Act. Section 8-43-408(1). Here, the ALJ has found, based on claimant's credible testimony and review of the Division's files, that employer was not in compliance with the insurance provisions of the Act. Therefore, claimant is entitled to increase by fifty percent the amounts of compensation and benefits awarded in this order.

Section 8-43-103(1) of the Act requires employers to notify the division in writing of an injury for which compensation and benefits are payable. Notice is required within ten days after the injury. Here, employer was required to notify the division of claimant's August 23, 2015 injury by September 2, 2015. As found, employer did not timely notify the Division of claimant's injury, and had not notified the division as of the date of the hearing. The ALJ finds and concludes that employer violated section 8-43-103(1) of the Act.

No specific penalty has been provided for violation of section 8-43-103(1), thus the penalty provisions of section 8-43-304 apply. That section provides that an employer who violates a provision of articles 40 through 47 of the Act shall be punished by a fine of not more than $1,000 per day for each such offense. The ALJ has discretion to apportion the fine, in whole or in part, between the aggrieved party and the workers' compensation cash fund. The ALJ found employer failed to timely notify the division in writing of claimant's injury and that its failure to do so continued through the date of hearing. The ALJ assesses a fine of $100 dollars per day from August 26, 2015 through the date of hearing, February 21, 2017, apportioned 100% to claimant.

Employers are required to notify in writing both the division and the injured employee whether liability for a claim is admitted or denied. Section 8-43-203(1)(a), C.R.S. Such notice is required with twenty days after a report of injury should have been filed with the Division. *Id.* Pursuant to subsection (2)(a), if such notice is not filed, the employer may become liable for up to one day's compensation for each day's failure to so notify. Employer was required to notify claimant and the Division whether the claim was admitted or denied by September 22, 2015. Employers' liability is capped at the aggregate amount of three hundred sixty five days' compensation.

Based on the totality of the evidence the ALJ found employer filed neither an admission of liability nor a notice of contest on this claim at the time such were due, and had not done so through the date of the hearing. The purposes of requiring employers to admit or deny liability are to notify the claimant that she is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so that the Division may exercise its administrative oversight of the claims process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). The ALJ concludes that employer is liable for the aggregate amount of three hundred sixty five days' compensation. As required by section 8-43-203(2)(a), employer shall pay fifty percent of this penalty to claimant and fifty percent to the Subsequent Injury Fund.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's August 23, 2015 injury is compensable.

2. Employer shall pay all medical expenses reasonable, necessary and related to her August 23, 2015, injury specifically all those of Denver Health and their referrals beginning August 23rd, 2015 and continuing until treatment is completed and Claimant is placed at maximum medical improvement by an authorized treating physician. From the date of injury through the date of hearing this amount equaled $15,974.44. This amount is increased by 50% for employer's failure to carry workers' compensation insurance in violation of C.R.S. section 8-43-408(1), resulting in the amount of **$23,961.66**.

3. Employer shall pay Claimant temporary total disability for seven days at the rate of $115.38 per day for a total of $753.84 in temporary total disability benefits. This amount is increased by 50% for employer's failure to carry workers' compensation insurance in violation of C.R.S. section 8-43-408(1), resulting in the amount of **$1,130.76**.

4. In lieu of payment of the above compensation and benefits to Claimant, employer shall:

a. Deposit the sum of **$25,092.42** with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, Attn: Sue Sobolik, Special Funds Unit, 633 17th St, Suite 900, Denver, CO, 80202, or

b. File a bond in the sum of **$25,092.42** with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless the agreement or order authorizing distribution of the principal provides otherwise.

5. Employer shall pay claimant **$54,500.00** for violation of section 8-43-103(1), requiring employer to report claimant's injury to the Division.

6. Employer shall pay a penalty for failure to admit or deny liability for a period of 365 days at the rate of one days' compensation for each day, a total of **$42,000**, with 50% paid to Claimant ($21,000) and 50% paid to the Subsequent Injury Fund ($21,000).

7. Employer shall pay claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

8. All other issues including but not limited to, temporary partial disability, permanent partial disability and disfigurement are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 2, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant suffered a compensable injury to her neck on August 24, 2016.
- Whether Claimant is entitled to reasonable, necessary, and related medical treatment.
- Whether the surgery performed by Dr. Kimball is reasonable, necessary, and related.
- Whether Claimant is entitled to temporary total disability benefits from August 31, 2016 through January 1, 2017 and May 1, 2017 through May 22, 2017.
- Whether Claimant is at-fault for her wage loss.
- Whether Claimant should be penalized for not reporting her injury in writing pursuant to 8-43-102(1).

STIPULATIONS

The parties stipulated that Claimant's average weekly wage is $461.54.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was an employee of Planet Cheer. Claimant started working for Planet Cheer on June 1, 2016.
2. Planet Cheer provides cheering and gymnastic training to its students. Claimant worked as a tumbling and cheer coach. Claimant coached Employer's students. In addition to her coaching duties, Claimant also agreed to help Employer with social media and marketing.
3. Claimant's average weekly wage is $461.54.
4. Claimant contends that she injured her neck on August 24, 2016, while working and demonstrating a gymnastic move. Claimant contends the accident caused a herniated disc at C5/6 and necessitated the need for disc replacement surgery.

5. Claimant's job was physically demanding. Among other things, Claimant's job required her to lift and spot students and demonstrate various gymnastic and cheer moves.

6. On August 24, 2016, Claimant, who was 31 years old, was working for the Employer coaching various students.

7. The area in which Claimant was working on August 24, 2016, was under video surveillance. Claimant's Exhibit 20, contains surveillance video of Claimant working. The time stamp on the video is from 8:47.43 until 9:00.37.

8. The video shows Claimant assisting various students with their tumbling exercises. For example, at 8:55.55, Claimant is seen assisting a student with her tumbling exercise and then demonstrating a move in which she is seen flexing and extending her neck. Then, at 8:57.40, the time of the alleged accident, Claimant is seen demonstrating a landing in which Claimant is seen jumping on the trampoline and going backwards and landing on her feet on a thick mat. The incident at 8:57.40 seems insignificant. Claimant, however, credibly testified that the incident at 8:57.40 caused her to feel a pop and crunch in her neck when she landed. Claimant testified that she experienced pain in her neck and shoulders after the incident in which she was demonstrating a landing. According to Claimant "everything locked up." Consistent with Claimant's testimony, the video shows Claimant rubbing her shoulder and neck area about 5 seconds after she landed and walking around the gym. Shortly thereafter, Claimant is seen lying down and appears to be in pain.

9. Respondents' Exhibit DD contains additional surveillance video on the same day. At approximately 9:02.00 Claimant is seen getting some pills out of a drawer at work for her neck pain. Claimant is then seen using a foam roller on her neck. At 9:10.35, Claimant is back in the gym and rubbing the right side of her neck. At 9:11.58, Claimant is seen moving her shoulder and neck in an attempt to loosen up her neck. This additional surveillance supports Claimant's contention that she injured herself at work while demonstrating a landing.

10. Claimant's hearing testimony regarding the mechanism of injury, when combined with the video surveillance, is found to be credible and persuasive.

11. Within minutes of the injury, Claimant verbally reported the incident to the Employer, Amanda Shaw. Ms. Shaw is the owner of Planet Cheer.

12. There is additional surveillance the following day, August 25, 2016, of Claimant working. Claimant does not appear to be as active and fluid as she was before the work accident.

13. On Friday, August 26, 2016, Claimant met with Employer – Ms. Shaw - at Planet Cheer to discuss her work accident and injury. Instead of referring Claimant to a medical provider, Employer – Ms. Shaw - asked Claimant to sign a release ("the Release") and certify that she was physically capable of performing her job as a

cheer and tumbling coach/instructor. (Claimant's Exhibit 3.) The Release also required Claimant to release Employer from any liability for any injury incurred during any squad related activity or any coaching of private lessons. Claimant took the Release, but did not sign it. She merely folded it up and put it away and went back to work.

14. On August 27, 2016, Employer – Ms. Shaw - sent Claimant a text message asking Claimant if she was going to sign the Release by Monday, August 29th 2016. Due to numerous concerns regarding the Release, Claimant did not sign it by Monday, August 29, 2016. One reason Claimant did not sign the Release was because she was injured and the Release required Claimant to certify that she was physically capable of performing her job and Claimant was not able to physically perform her job.

15. On August 29, 2016, after not receiving the Release from Claimant, Employer – Ms. Shaw - decided to terminate Claimant.

16. On August 30, 2016, Claimant was terminated from her employment. Claimant received an email from Employer – Ms. Shaw - with a letter attached regarding her termination. The letter was from the Ms. Shaw. According to the attached letter, Claimant was terminated for the following reasons:

> Your extreme disrespect towards coaches, my athletes and me.
>
> You are very argumentative since being employed by Planet Cheer. You find it necessary to argue in front of the kids and parents. You were verbally reprimanded several times.
>
> You are unwilling to follow the direction of my company and work as a team.
>
> You did not perform the job function of improving our marketing and social media presence with Shannon. Your efforts, if any, were highly ineffective.
>
> You had inappropriate behavior with the athletes.
>
> You spoke negatively to athletes about other coaches and Planet Cheer.
>
> You received several complaints from parents that viewed your poor attitude and behavior.
>
> You had "No Shows" for practice without proper notification.
>
> You took advantage of being a salaried employee and did not take the position seriously.

17. Although Ms. Shaw cited numerous reasons for Claimant's termination, Ms. Shaw never formally wrote Claimant up for any of the reasons set forth in the letter. Ms. Shaw contended she discussed these issues with Claimant and advised her that she might not be able to continue working at Planet Cheer if the behavior continued. Claimant, however, denied the contentions set forth in the August 30, 2016 letter and denied she was warned by Ms. Shaw that she was in jeopardy of losing her employment based on her behavior.

18. There was, however, an ongoing disagreement between Claimant and Ms. Shaw regarding how to spot the gymnasts when they were performing stunts. The exact date this disagreement arose is not clear. But, the disagreement arose during June of 2016. Both Ms. Shaw and Claimant are level 1-5 accredited through the USASF. Claimant thought the spotting method used by Planet Cheer was not consistent with her training and the USASF and was not safe. Therefore, she started teaching the students her spotting method. Employer, however, wanted the students to use her spotting method, which she thought was safe and consistent with the USASF. Using different spotting methods was confusing for the students and increased the likelihood of an accident and injury. Therefore, Ms. Shaw advised Claimant to use Ms. Shaw's method. Claimant, however, continued to use her spotting method. Caitlyn Wyatt, another Planet Cheer employee, also testified that teaching the different spotting techniques was causing problems.

19. Ms. Shaw testified that she also hired Claimant to help market Planet Cheer through social media and other means. Ms. Shaw testified that Claimant failed to effectively work on marketing tasks. She testified that she started looking to replace Claimant around the beginning of July, 2016.

20. This ALJ finds that Claimant and Ms. Shaw did not have a good working relationship. The primary dispute between Ms. Shaw and Claimant arose out of the difference of opinion they had regarding how to spot students when they were performing stunts. This ALJ also finds that another problem Ms. Shaw had with Claimant involved marketing issues. Ms. Shaw expected Claimant to provide more help with marketing. Claimant did underperform in her marketing responsibilities. However, this ALJ finds that the tipping point and reason for Claimant's termination was Claimant's refusal to sign the Release. This ALJ finds Claimant had a reasonable basis to not sign the release. Among other things, the Release required Claimant to certify that she was physically able to perform her job. Claimant, however, had just been injured and was unable to fully perform her job. In addition, Claimant had legitimate questions regarding the legality of the Release. Consequently, Claimant's concerns about signing the release and refusal to sign the release became inextricably intertwined with her work injury and her legitimate questions regarding the legality of the Release. Therefore, this ALJ finds that Claimant's refusal to sign the Release was reasonable.

21. On August 30, 2016, Claimant presented to the emergency room due to ongoing neck pain. As set forth in the medical report, Claimant stated that:

> She is a cheerleading instructor and while spotting one of her students during a trick on the trampoline she turned her head and felt a pulling sensation in her neck with a gradual subsequent development of bilateral muscle soreness that has gotten progressively worse.

Claimant was diagnosed as suffering from a cervical strain and muscle spasm. However, the differential diagnosis included the possibility of a cervical disc herniation.

22. On August 31, 2016, Claimant was evaluated by her primary care physician Dr. Stuart Kassan of Colorado Arthritis Associates. Dr. Kassan follows Claimant for her Lupus. Claimant complained of a fair amount of joint pain and also mentioned that she "twisted her neck at work and was seen in the emergency room." Due to her neck pain, Dr. Kassan ordered a cervical spine MRI.

23. On August 31, 2016, Claimant also completed a Worker's Claim for Compensation. Claimant indicated on the Claim form that just before the accident she was "spotting athletes from trampoline onto landing." She also indicated that the injury occurred when she went to "transfer body weight from mat to tramp, felt pop in neck w/ extreme pain." Claimant also indicated that she immediately reported the injury to Ms. Shaw, her employer.

24. Upon the filing of her Workers' Claim for Compensation, neither Employer nor Insurer provided Claimant a list of medical providers who were willing to treat her alleged work injury. Therefore, Claimant continued treating with Dr. Kassan and Dr. Kassan became an authorized treating physician.

25. As of August 31, 2016, Claimant was unable to perform all functions of her job duties due to her neck injury and associated pain.

26. On September 9, 2016, Employer received written notice of the injury.

27. On September 19, 2016, Claimant underwent an MRI. The MRI showed "degenerative changes, most pronounced at the C5-C6, where a left foraminal disc protrusion superimposed on a disc bulge results in mild-to-moderate left neural foraminal narrowing, with probable minimal mass effect on the left C6 nerve root."

28. On September 20, 2016, Insurer filed a Notice of Contest.

29. Claimant's primary treating physician, Dr. Kassan, referred Claimant to Dr. J. Paul Elliott for a neurosurgical evaluation.

30. On November 11, 2016, Claimant was evaluated by Dr. Elliott. Dr. Elliott's report indicates Claimant:

> [P]resents with a 3 week history of neck pain radiating bilaterally into her upper extremities and extending into her 1^{st}-3^{rd} digits. She reports being on a trampoline while she was spotting someone during cheer practice and states that when she landed she felt pain and crunching in her neck. She reports neck pain radiating towards the base of her skull and into her forehead. She describes her pain as pins and needles and also reports numbness in her upper back muscles.

31. On December 13, 2016, Claimant was again seen by Dr. Elliott, who evaluated Claimant for ongoing neck pain and bilateral upper extremity paresthesias in no specific dermatomal distribution. At that time, Claimant remained without focal motor or sensory deficits or signs of myelpathy. Her x-rays did not demonstrate any instability. He did indicate that he reviewed her MRI which showed a left greater than right C5/6 foraminal stenosis secondary to a disc herniation. Dr. Elliott indicated that if conservative treatment failed to improve her condition, Claimant may be a candidate for a C5/6 disc replacement. This ALJ credits Dr. Elliott's opinion in finding that Claimant suffered from a disc herniation and that Claimant is a candidate for a C5/6 disc replacement should conservative treatment fail to improve her symptoms.

32. On December 14, 2016, Dr. Brian Reiss performed an IME on behalf of Respondents. Dr. Reiss evaluated Claimant and reviewed her medical records as well as the surveillance video. Dr. Riess concluded that based on his review of the video, he did not see any specific activity around the time of the commencement of her symptomatology that would have been sufficient to cause a herniated disc. According to Dr. Reiss, herniated discs can and do occur without any specific trauma. He went on to indicate that "the natural history of the degenerative process oftentimes leads to herniated disks which become symptomatic without any relationship to the activity being performed." He went on to state that in this situation, the patient began having pain and the pain may or may not be related to the herniated disc. He also stated that if the pain is secondary to the herniated disc, then the herniation of the disc probably caused the pain but there was no specific work activity that caused the disc herniation. He concluded that in this case, the patient's herniated disc and subsequent development of pain are probably not related to her work activity. He further stated that he believes "the patient's symptoms are not work-related and therefore treatment of her condition should be considered unrelated to her work." This ALJ does not find Dr. Reiss' opinions to be credible or persuasive in light of Claimant's testimony and the surveillance video.

33. On January 7, 2017, Claimant was again evaluated by Dr. Elliott. According to Dr. Elliott's report, Claimant "reported being on a trampoline while she was

spotting someone during cheer practice and states that when she landed, she felt pain and crunching in her neck." Dr. Elliott diagnosed Claimant as suffering from a cervical disc herniation with radiculopathy. He recommended an epidural steroid injection. Claimant underwent an epidural steroid injection. The injection did not improve her symptoms. This ALJ finds Dr. Elliott's opinion to be credible and persuasive in determining that Claimant suffered a cervical disc herniation with radiculopathy.

34. On January 26, 2017, Claimant was reevaluated by Dr. Elliott. Due to Claimant's failure to improve with conservative treatment and worsening symptoms, he recommended Claimant undergo a C5-6 anterior cervical discectomy and fusion to halt her neurologic decline.

35. On February 2, 2017, Dr. Michael Janssen performed a records review. He addressed whether the need for surgery was reasonable, necessary, and related to the alleged incident at work. Dr. Janssen relied heavily on Dr. Reiss' opinion in which Dr. Reiss, after reviewing the surveillance video of the incident, determined that the mechanism of injury did not seem sufficient enough to cause a cervical disc herniation. Therefore, Dr. Janssen concluded that while the surgery might be reasonable and necessary, the condition was not work related. It should be noted that Dr. Janssen also stated that surgery should be approached with caution since Claimant's anatomical symptoms and findings were not consistent with the MRI findings. This ALJ does not find Dr. Janssen's opinion regarding causation to be credible or persuasive since Dr. Janssen relied up on Dr. Reiss' opinion. In essence, Dr. Janssen deferred to Dr. Reiss regarding causation.

36. On February 3, 2017, Insurer denied authorizing the surgery, stating that the condition for which the surgery was being recommended was not compensable and the condition for which the care is requested in not related to the injury/illness for which they have admitted liability. It should be noted that the Insurer did not admit liability for any condition.

37. On February 22, 2017, Claimant presented to the emergency department due to neck and upper back pain. Claimant stated that she has had chronic pain since a workers' compensation trampoline accident. Claimant stated that she was scheduled for surgery this month but her claim was denied. She complained of pain every day, but stated that her symptoms have been exacerbated over the past two days. Claimant complained of a sharp, burning pain down her arms bilaterally to the elbows. Claimant also complained of experiencing numbness, tingling, and burning in her upper extremities that has become worse over the last few months, but has been present ever since the injury.

38. On March 6, 2017, Dr. Reiss issued a supplemental report after reviewing additional medical records. The records included an x-ray taken in 2016. Dr. Reiss concluded that the x-ray appeared to show an osteophyte at the inferior posterior margin of C5 which gives the appearance of retrolisthesis. Therefore,

he did not think there was significant motion on flexion-extension and no significant retrolisthesis at C5-6. He went on to state that the osteophyte "is indicative of a preexisting degeneration at that level and the bulging seen on the MRI may actually represent spur formation rather than disc protrusion. This also further supports my conclusions that there was a lack of injury from her work incident." This ALJ does not find Dr. Reiss' opinions to be credible or persuasive that Claimant does not have a herniated cervical disc or that she did not suffer an injury at work.

39. Dr. Elliott was not in Claimant's network of providers under her insurance and she had to find another surgeon. Therefore, Dr. Elliott referred Claimant to Dr. Kimball, another surgeon, who was in Claimant's insurance network.

40. On March 30, 2107, Claimant was evaluated by Dr. Kimball. In his report, Dr. Kimball noted that Claimant suffered an injury on a trampoline and was complaining of neck pain that was radiating into both shoulders, left greater than right, and pain and muscle spasm in her neck, left greater than right, as well as twitching in her muscles throughout her left arm and neck. Claimant was also complaining of numbness and generalized weakness in both upper extremities, which was worse in her 1st and 2nd digits bilaterally.

41. Dr. Kimball assessed Claimant as suffering from cervical disc disorder at the C5-C6 level with radiculopathy. He also set forth the following in his assessment regarding Claimant's diagnosis and treatment recommendations:

> [D]isc disruption, disc herniation and failure of disc at C5/6 with mild retrolisthesis at this level with healthy appearing facets, there is no anterolisthesis and I believe this is a result of her disc failure and not due to facet posterior ligamentous complex failure. I believe the retrolisthesis will reduce with disc height restoration. She has maximized conservative Tx, I do not believe she is a good candidate for fusion at her age and her risk of developing ALD is very high requiring additional surgery. She has exhausted conservative mgt. I recommend a C5/6 TDR [total disc replacement] with more constrained device like at PRO Disc C."

42. This ALJ finds Dr. Kimball's opinions to be credible and persuasive in that Claimant suffered a disc herniation at the C5/6 level and that a total disc replacement was reasonable, necessary and related to Claimant's August 24, 2016 work accident and injury.

43. On May 1, 2017, Dr. Kimball performed surgery on Claimant. He performed a disc replacement at the C5-C6 level.

44. On May 18, 2017, approximately 3 weeks after her surgery, Claimant returned to Dr. Kimball and reported a 50-70% improvement in her symptoms. On June 8,

2017, approximately 6 weeks after her surgery, Claimant returned to Dr. Kimball, and reported an approximate 85% improvement in her symptoms. Claimant's marked improvement after the surgery is persuasive that the surgery performed by Dr. Kimball was reasonable, necessary, and related to Claimant's August 24, 2016 work accident and injury.

45. Before the surveillance video was provided to Claimant, Claimant answered discovery regarding how she allegedly got hurt at work. The discovery was sent to Claimant on December 19, 2016. Although her answers are not signed and dated, Claimant admitted to answering them at hearing. Claimant stated that she was injured when:

> On August 24, 2016, I was spotting an athlete at the Planet Cheer Cheerleading Center. The athlete was working on the trampoline. I was on the trampoline itself. After putting this child down I hurt my neck stepping back onto the trampoline. This occurred when the trampoline sank and my neck got hurt. I reported my injury to the owner. I was hurt on a Wednesday and I went to the ER the following Monday, to the best of my recollection."

46. Claimant's first answers to discovery are inconsistent with her testimony at hearing and the surveillance video.

47. Claimant also answered discovery regarding whether she had any prior injuries. Claimant denied having any prior neck injuries. However, during cross examination, it was brought out that Claimant did injure her neck during a snowboarding accident in 2008 and had treated for prior neck problems. As pointed out by Respondents, Claimant was seen by Dr. Joshua Renkin, a neurologist, on May 28, 2008, and on two other occasions, for neck pain and other neurological concerns.

48. At her first visit with Dr. Renkin on May 28, 2008, Claimant complained of falling 2-4 months earlier and hitting her head. She also complained of having a knot on her neck which was painful and that she also had some crunchiness in her neck. However, upon closer inspection of Dr. Renkin's records, it appears that Dr. Renkin was primarily evaluating Claimant for a possible neurological disorder, such as multiple sclerosis. As set forth in his initial report, the primary reason for the evaluation was a concern about an abnormality on her cervical spine MRI and some tingling in her left arm. An MRI was taken and showed a linear hyperintensity at C5-6 of unclear etiology. However, on December 8, 2008, Dr. Renkin evaluated Claimant a third time after performing another MRI. It should be noted that Claimant did complain of having a lot of neck pain at this visit, but she associated the neck pain with spending a lot of time at her computer studying for exams. Dr. Renkin concluded that the repeat MRI was normal and there was nothing more he could do. Therefore, he recommended Claimant treat

her ongoing neck pain conservatively, which included ergonomic adjustment of her computer work and massage therapy.

49. Although Dr. Renkin released Claimant from his care, Claimant did continue having neck pain as set forth in the medical records of her primary treating physician, Dr. Kassan. For example, on June 16, 2009, Claimant complained of having increased cervical spine symptoms over the last 10 days. Due to her complaints, Dr. Kassan ordered a new cervical spine MRI, which was performed on June 24, 2009. Dr. Kassan also referred Claimant to Dr. Chad Hartley, a neurosurgeon. On August 28, 2009, Dr. Kassan noted some tenderness over Claimant's cervical spine. However, he did note that his review of the June 24, 2009 MRI showed no change from the October 24, 2008 MRI. Then, on April 27, 2010, Claimant was again complaining of cervical spine pain and symptoms in one of her hands.

50. On September 16, 2011, Claimant returned to Dr. Kassan. Claimant still complained of paresthesias in her upper extremities. Dr. Kassan noted that another MRI was performed on September 7, 2011 showing mild cervical spondylosis. He went on to state that there was no evidence of nerve or cord compression. He again recommended Claimant see Dr. Chad Hartley, a neurosurgeon. On November 29, 2011, Claimant was again seen by Dr. Kassan. Claimant complained of neck pain, but yet indicated she had not seen Dr. Hartley, the neurosurgeon. On December 11, 2012, Claimant was evaluated by Dr. Kassan and it was noted that she had some paraspinal tenderness of her cervical spine.

51. Claimant testified that she did not schedule an appointment to see Dr. Hartley, the neurosurgeon, because her condition improved.

52. Claimant's first answers to discovery regarding a lack of any prior neck injuries or symptoms were inconsistent with Claimant's medical history. Claimant's medical records demonstrate she had neck symptoms before her work accident.

53. Claimant answered interrogatories again on June 6, 2016. Claimant stated this time that she injured her neck while demonstrating a skill on the trampoline. Claimant also set forth information regarding her prior neck problems as set forth in Dr. Rankin's medical records. These answers were provided after Claimant obtained the surveillance video and Dr. Rankin's records. Therefore, Claimant conformed her answers to be consistent with the evidence that had been obtained which was inconsistent with her initial answers to discovery.

54. Dr. Reiss testified at hearing. Dr. Reiss is a board certified orthopedic surgeon and was qualified as an expert witness. Dr. Reiss testified consistent with his reports. He also testified that most herniated discs occur spontaneously due to degeneration and without a precipitating event. In other words, discs herniate without any cause, other than degeneration due to wear and tear, irrespective of activity. For example, he testified that people can wake up with a herniated disc.

He also testified that a disc can herniate while someone is merely tying their shoe. Dr. Reiss testified that it's not the event of tying one's shoe that causes the disc to herniate, but the degenerative process which causes the disc to herniate at that time. According to Dr. Reiss, there is always pressure on a disc and that, plus degeneration, causes them to herniate. Dr. Reiss also stated that the pain from a herniated does not always correlate with the specific time at which the disc herniates and that the pain close in time to an event does not mean that the event caused the herniation.

55. In this case, Claimant alleges the accident and injury in question occurred at 8:57.40. In this case, Dr. Reiss reviewed the surveillance video. He testified that it was very unlikely that the activity Claimant was performing at 8:57.40 caused the disc to herniate. Dr. Reiss further testified that the activity he observed Claimant engaged in at 8:57.40 would not have placed any additional pressure on Claimant's cervical spine and disc. According to Dr. Reiss, the pressure placed on the disc would have been no more than activities of daily living.

56. He further testified that he did not think the surgery performed by Dr. Kimball was reasonable and necessary to alleviate Claimant's upper extremity problems since they did not follow a C5-6 distribution. He was not convinced that Claimant was suffering from a herniated disc at the C5-C6 level. He also did not think performing the surgery for pain was reasonable and necessary. In essence, Dr. Reiss did not think a cervical disc replacement surgery was warranted for pain complaints which were not accompanied by anatomical weakness which correlated with the MRI findings. In other words, Dr. Reiss did not think that Claimant's pain complaints, without anatomical correlation justified the procedure. However, on cross examination, Dr. Reiss admitted that performing such a procedure for pain alone did not fall below the standard of care in this community. He testified that while he may not perform the surgery based on the findings, it was not below the standard of care to perform the surgery based upon Claimant's pain complaints. In addition, Dr. Reiss refused to consider Claimant's improvement in symptoms after the surgery in rendering his opinion as to whether the surgery was reasonable and necessary.

57. In light of the medical records of Dr. Kimball and Dr. Elliott, combined with Claimant's testimony and the surveillance video, this ALJ does not find Dr. Reiss' opinions to be credible or persuasive.

58. Claimant did not seek treatment for any neck complaints from November 23, 2015 until August 30, 2016.

59. On cross examination, Claimant was asked about the different statements contained in various medical records regarding how she got hurt. For example, the August 30, 2016 emergency room report indicates that Claimant was injured "while spotting one of her students during a trick on the trampoline she turned her head and felt a pulling sensation in her neck with a gradual subsequent development of bilateral muscle soreness that has gotten progressively worse."

Then, the August 31, 2016 medical note of Dr. Kassan indicates Claimant has increased cervical spine symptoms since "twisting at work." Thereafter, on January 7, 2017, Dr. Elliott's medical report indicates Claimant was on a trampoline and while spotting someone, she hurt her neck. Claimant testified that although she consistently described the incident to each medical provider, the words used by each medical provider were not her words, but the words chosen by the medical provider to describe the incident.

60. Caitlyn Wyatt, a current employee of Planet Cheer, testified at hearing. She is a tumbling and cheer coach. She testified that she was working on August 24, 2016 when Claimant alleged she injured her neck. Ms. Wyatt testified that Claimant told her that her neck and back would seize up due to her lupus. She also testified that Claimant did not say that her August 24, 2016 neck problems were caused by work.

ULTIMATE FINDINGS OF FACT

61. This ALJ finds that on August 24, 2016, Claimant injured her neck at work while demonstrating a landing. Claimant's injury included a herniated disc at the C5-C6 level. This ALJ finds that the critical event of demonstrating a landing caused Claimant to suffer a disc herniation at such time and place.

62. Claimant reported her work accident and injury to Employer on August 24, 2016 and August 26, 2016. Claimant also reported her injury in writing on August 31, 2016 when she completed and filed a Workers' Claim for Compensation.

63. The employer received written notice of the injury on September 9, 2016.

64. Claimant's injury necessitated the need for medical treatment.

65. Employer failed to timely provide Claimant a list of medical providers who were willing to treat Claimant for her work related injury. Therefore, the right of selection to select a treating physician passed to Claimant. Claimant selected Dr. Kassan to treat her work related injury. Dr. Kassan then referred Claimant to Dr. Elliott, a surgeon. However, because Dr. Elliott was not in Claimant's personal insurance network, Dr. Elliott referred Claimant to Dr. Kimball who was in Claimant's insurance network. Therefore, Dr. Kassan, Elliott, and Kimball are authorized providers.

66. Claimant's work injury impaired her ability to perform her regular job and obtain employment after she was terminated on August 30, 2016. Therefore, Claimant's wage loss was caused by her injury.

67. Claimant was terminated from her employment on August 30, 2016 because she refused to sign the Release which, among other things, required Claimant to certify that she was physically capable of performing her job. Claimant was unable to physically perform her job because she was injured. Claimant's refusal

to sign the Release was reasonable. Therefore, Claimant was not at-fault for her termination and wage loss.

68. Claimant's injury required surgery in the form of a total disc replacement at the C5-C6 level. The disc replacement surgery performed by Dr. Kimball on May 1, 2017 was reasonable, necessary, and related to Claimant's August 24, 2016 work accident and injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

Claimant was required to prove by a preponderance of the evidence that at the time of the injury she was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

This ALJ is cognizant that Claimant is not a reliable historian. For example, Claimant did not set forth a consistent mechanism of injury in her answers to discovery. In addition, Claimant's medical records do not set forth a consistent mechanism of injury when compared to the surveillance video. However, the inconsistencies can be attributed to a combination of how Claimant described the mechanism of injury each time based on her own memory and the words chosen by each medical provider when they wrote down Claimant's description of the injury. It must be borne in mind that inconsistencies are not uncommon to the adversary process which, of necessity, must rely upon the sometimes contradictory and often incomplete testimony of human observers in attempting to reconstruct the historical facts underlying an event. *See People v. Brassfield*, 652 P.2d 588, (Colo. 1982).

There is, however, surveillance video of Claimant at the instant she contends she was injured. The surveillance video shows Claimant demonstrating a move on the trampoline and landing mat. Within 5 seconds of landing on the mat, Claimant is seen rubbing her neck and shoulder area. Soon thereafter, Claimant is seen laying on the floor and appears to be in pain. In addition to the surveillance, Claimant did testify that upon landing on the mat, she felt the immediate onset of pain in her neck and shoulders and "everything locked up." Claimant's testimony is consistent with the surveillance video. And, although Claimant appears to have conformed her testimony and second

set of answers to discovery to be consistent with the surveillance video, her testimony at hearing regarding how she was injured and what she felt at the time of injury was found to be credible in light of the surveillance video.

This ALJ is also mindful that the incident shown on the surveillance video seems insignificant. Moreover, Dr. Reiss testified that the incident in question did not put any more stress on Claimant's disc than activities of daily living. According to Dr. Reiss, if Claimant has a disc herniation, it was caused by mere degeneration and has nothing to do with work. However, this ALJ did not find Dr. Reiss' testimony to be credible or persuasive in that work had nothing to do with Claimant's neck injury. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). For example, in *H & H Warehouse v. Vicory, supra,* Claimant had an undetected cancerous growth in his arm. While at work a door was suddenly and unexpectedly opened which startled Claimant and caused him to hastily move his arm. The minor incident resulted in Claimant breaking his humerus. The Court found that "Claimant's fractured humerus resulted from a combination of abnormal motion in response to a startling stimulus, and the pre-existing weakness in the bone resulting from the cancer condition." *H & H Vicory* at 1169. The Court also stated that if "the critical event arises out of employment and 'but for' this event, the injury would not have occurred at such time and place, then the requirements of the Workers' Compensation Act have been met." Id.

This ALJ concludes that Claimant has proven by a preponderance of the evidence that she injured her neck on August 24, 2016 and suffered a herniated disc. Claimant's disc herniation was caused by Claimant demonstrating a landing. This ALJ further concludes that but for Claimant demonstrating the landing, the disc herniation would not have occurred at such time and place. Therefore, Claimant has proven by a preponderance of the evidence that her neck injury and disc herniation was caused by her work activities of demonstrating a landing.

Medical Benefits

General Medical Benefits

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical

certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

This ALJ concludes that Claimant's work accident and injury of August 24, 2016 caused Claimant's C5-6 disc herniation. Due to her disc herniation, Claimant required medical treatment in the form of evaluations, physical therapy, and surgery. Therefore, this ALJ concludes that Claimant has proven by a preponderance of the evidence that she is entitled to medical treatment to treat her neck injury and disc herniation.

Whether Claimant's neck surgery was reasonable, necessary, and related.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant underwent conservative treatment in the form of physical therapy and an injection. As noted by Dr. Kimball, despite conservative treatment, Claimant continued having neck pain that was radiating into both shoulders, left greater than right, and pain and muscle spasm in her neck, left greater than right, as well as twitching in her muscles throughout her left arm and neck. Claimant was also complaining of numbness and generalized weakness in both upper extremities, which was worse in her 1st and 2nd digits bilaterally.

Although Claimant's paresthesias did not correlate with the MRI findings, Dr. Kimball, assessed Claimant as suffering from cervical disc disorder at the C5-C6 level with radiculopathy. He also set forth the following in his assessment regarding Claimant's diagnosis and treatment recommendations:

> [D]isc disruption, disc herniation and failure of disc at C5/6 with mild retrolisthesis at this level with healthy appearing facets, there is no anterolisthesis and I believe this is a result of her disc failure and not due to facet posterior ligamentous complex failure. I believe the retrolisthesis will reduce with disc height restoration. She has maximized conservative Tx, I do not believe she is a good candidate for fusion at her age and her risk of developing ALD is very high requiring additional surgery. She has exhausted conservative mgt. I recommend a C5/6 TDR [total disc replacement] with more constrained device like at PRO Disc C."

This ALJ found Dr. Kimball's opinion to be credible and persuasive in that Claimant suffered a disc herniation at the C5/6 level and that a total disc replacement was reasonable and necessary to treat Claimant's symptoms which included pain and paresthesias into her upper extremities.

In addition, on June 8, 2017, approximately 5 weeks after the surgery, Claimant reported an approximate 85% improvement in her symptoms.

Dr. Reiss testified that the neck surgery performed by Dr. Kimball was not reasonable and necessary. Dr. Reiss testified that in his opinion, a disc replacement surgery is not reasonable and necessary in Claimant's case because Claimant's complaints did not correlate with her MRI findings. In addition, Dr. Reiss testified that the surgery was being recommended to primarily to treat Claimant's neck pain and that in his opinion a disc replacement surgery is not reasonable to treat neck pain. Dr. Reiss was asked about Claimant's improvement in symptoms and whether that provided additional evidence to support Claimant's claim that the surgery was reasonable and necessary. Dr. Reiss was unwilling to use the post operative evidence of Claimant's improvement in rendering his opinion as to whether the surgery was reasonable and necessary. Consequently, Dr. Reiss' opinion was not found to be credible or persuasive by this ALJ.

Therefore, this ALJ concludes that Claimant has proven by a preponderance of the evidence that the neck surgery performed by Dr. Kimball on May 1, 2017, which consisted of a C5/6 total disc replacement was reasonable, necessary, and related to Claimant's August 24, 2016 work accident and injury.

Authorized Providers

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to Claimant with the expectation that the insurer will compensate the provider for the services rendered. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995).

Section 8-43-404(5)(a)(I)(A), applicable to this injury and claim for benefits, provides that:

> In all cases of injury, the employer or insurer shall provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers, where available, in the first instance, from which list an injured employee may select the physician who attends said injured employee.

The statute further provides that if "the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor."

This statute affords the employer the right to designate at least four physicians and/or corporate providers that are deemed authorized to provide medical treatment. Consistent with the version of § 8-43-404(5)(a) that was amended in 1997, the current version provides that the employer's right to designate the authorized providers may be lost and the right of selection passed to the claimant if medical services are not tendered "at the time of injury." *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987).

The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006). Medical treatment that a claimant receives prior to the time the employer is provided with sufficient knowledge of a potential claim for compensation is not authorized; therefore, such treatment is not compensable. *Bunch v. Industrial Claim Appeals Office, supra*.

In this case, Claimant advised Employer, Amanda Shaw, on the day of the accident and on August 26, 2016, that she hurt her neck while working. Ms. Shaw, as a reasonably conscientious manager, should have recognized that the August 24, 2016 incident might result in a claim for compensation. In fact, after the incident, on August 26, 2016, Employer wanted Claimant to sign a Release indicating Claimant was physically capable of performing her job. In addition, Claimant filed a Workers' Claim for Compensation. Upon filing a Claim, neither Employer nor Insurer provided Claimant a list of medical providers. Under these circumstances, this ALJ finds that Employer was provided notice of the injury and did not designate any medical providers. Therefore, this ALJ finds that the right of selection passed to Claimant.

Claimant went to her personal physician, Dr. Kassan, to treat her neck complaints. Therefore, Dr. Kassan became Claimant's authorized treating physician. Dr. Kassan referred Claimant to Dr. Elliott for a neurosurgical evaluation. Therefore, Dr. Elliott became authorized. Dr. Elliott, however, was not in Claimant's network of providers. Therefore, Dr. Elliott referred Claimant to Dr. Kimball. Thus, Dr. Kimball became an authorized provider. Therefore, Claimant has proven by a preponderance of the evidence that Drs. Kassan, Elliott, and Kimball are authorized providers.

Temporary Total Disability Benefits.

Whether Claimant is entitled to TTD

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra.*

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

Claimant is requesting temporary total disability (TTD) benefits from August 31, 2016, when she completed her Workers' Claim for Compensation, through January 1, 2017, when she returned to employment. Claimant is also requesting TTD from May 1, 2017, when she underwent surgery, through May 22, 2017, when she returned to employment.

In this case, Claimant's job was physically demanding. Claimant's job required her to lift and spot students and demonstrate various cheer and gymnastic moves. Claimant's injury, which includes a cervical herniated disc, prevented Claimant from performing her regular job duties. Claimant was terminated from her employment on August 30, 2016. Claimant's injury prevented her from performing her regular job duties and impaired her ability to find replacement employment. Therefore, Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits.

Claimant is entitled to TTD from August 31, 2016, the day after she was terminated and the day she completed her Workers' Claim for Compensation through January 1, 2017, the date Claimant found replacement employment. Claimant is also entitled to TTD from May 1, 2017, the date she underwent neck surgery, until May 22, 2017, the date she returned to employment.

Whether claimant is at-fault for her wage loss.

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp*., W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In Colorado Springs Disposal v. Industrial Claim Appeals Office, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1994), opinion after remand, 908 P.2d 1185 (Colo. App. 1995); Brinsfield v. Excel Corp., supra.

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, *supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, *supra*.

In this case, Employer – Ms. Shaw - and Claimant did not have a good working relationship. There was an ongoing dispute between Ms. Shaw and Claimant regarding the spotting technique Claimant was teaching the students. However, once Claimant was injured, Employer wanted Claimant to sign a Release which indicated Claimant could physically perform her job. Once Claimant refused to sign the Release, Employer terminated Claimant. This ALJ found that the tipping point for Claimant's termination was Claimant's refusal to sign the Release. This ALJ, however, determined that Claimant's refusal to sign the Release was reasonable. Therefore, Claimant is not at-fault for her termination and subsequent wage loss.

Penalty for Late Reporting

The respondents seek a penalty against the claimant because the claimant failed timely to report the injury in writing as required by § 8-43-102(1)(a), C.R.S.

Section 8-43-102(1)(a) provides that an employee that sustains an injury from an accident "shall notify the said employee's employer in writing of the injury within four days of the occurrence of the injury." If the employee fails to report the injury in writing "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left to the discretion of the ALJ. *LeFou v. Waste Management*, W.C. No. 4-519-354 (I.C.A.O. March 6, 2003).

In this case, Claimant advised Employer she was hurt on August 24, 2016, the date of the accident. In addition, Claimant completed a Workers' Claim for Compensation on August 31, 2016. Although the date the Workers' Claim for Compensation was filed is not clear from the record, it appears it was filed close in time to when it was completed since Respondents filed a Notice of Contest on September 20, 2016. Employer acknowledges receipt of the Workers' Claim for Compensation on September 9, 2016. This ALJ concludes that the delay in reporting the injury in writing did not prejudice Respondents. For example, it did not extend Claimant's period of disability benefits since Employer knew about the injury the day it happened. Therefore, based on the circumstances of this case, this ALJ concludes that any delay in reporting the injury in writing does not warrant the imposition of a penalty in this case.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury to her neck on August 24, 2016.

2. Respondents shall provide to Claimant reasonable and necessary medical treatment which is related to the August 24, 2016 work accident.

3. Drs. Kassan, Elliott, and Kimball are authorized medical providers.

4. The neck surgery performed by Dr. Kimball was reasonable, necessary, and related to Claimant's industrial accident and injury. Respondents shall pay for Claimant's neck surgery pursuant to the Colorado Workers' Compensation Medical Fee Schedule.

5. Respondents shall pay Claimant TTD from August 31, 2016 through January 1, 2017 and from May 1, 2017 through May 22, 2017 at the rate

of $307.69 per week based on her stipulated average weekly wage of $461.54.

6. Respondents request for a late reporting penalty pursuant to Section 8-43-102(1)(a) is denied.

7. Insurer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

8. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 1, 2017

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on September 11, 2016.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial lower back injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) and Temporary Partial Disability (TPD) benefits for the period September 12, 2016 until terminated by statute.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is a 20 year old male who worked for Employer as a Night Stocker. His job duties involved unloading freight and stocking shelves. Claimant worked the night shift for approximately 30 hours each week.

2. Claimant initially earned $12.00 per hour plus a $2.00 per hour bonus for working the night shift or a total of $14.00 each hour. He earned gross wages in the amount of $14,801.28 for the 253 days or 36.14 weeks from January 1, 2016 through his last full pay period ending on September 10, 2016.. Dividing the gross wages by 36.14 weeks or $14,801.28/36.14 equals an AWW of $409.55. However, on November 6, 2016 Claimant received a raise to $12.75 per hour plus the $2.00 per hour bonus for working the night shift. By April 23, 2017 Claimant received a raise to $13.09 per hour plus the $2.00 per hour bonus for a total of $15.09 each hour. Reviewing Claimant's wage records and considering his raises yields an AWW of $518.57. An AWW of $518.57 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3. On September 11, 2016 Claimant was working in an aisle of Employer's retail store to stock merchandise. Some of the items he stocked were in boxes and other items were placed onto three-wheeled industrial carts by warehouse employees and pushed or placed into the aisles of the store. Claimant testified that around 12:00 a.m. he was stocking a shelf with merchandise. As he was straightening up he struck his back on one of the fully loaded industrial carts. Claimant believed that the cart likely rolled up behind him because he had not noticed the cart when he began stocking the

lowest shelf. However, Claimant was uncertain whether the cart was rolling or stationary when he struck his back.

4. Claimant's co-worker Taren Lutes was stocking shelves with Claimant on September 11, 2016. He was approximately four feet away from Claimant. Mr. Lutes explained that Claimant straightened up and struck his lower back on the front bar of the industrial cart. Although he was uncertain whether the cart was stationary or moving at the time of the impact, he remarked that the collision was strong enough to raise the front wheels of the cart approximately three to four inches off the ground. Mr. Lutes noted that Claimant cursed loudly when he struck his back on the cart.

5. Flow Team Lead and Claimant's supervisor Jon Kisch testified that he was working in the same aisle as Claimant and Mr. Lutes on September 11, 2016. Mr. Kisch explained that the industrial cart was already in the aisle when he began stocking shelves. He remarked that, although he was working only about seven feet away from Claimant, he did not hear the approximately 100 pound cart strike the floor during the incident. He also did not hear Claimant curse in pain after the accident. Mr. Kisch did not directly witness the incident and did not know Claimant had been injured until Mr. Lutes stated "[Claimant just hit his back on the cart. Looks like he's hurt."

6. Claimant explained that after the accident he suffered moderate back pain but completed his work shift. However, his pain worsened over the next several days and he missed scheduled work shifts because of his back injury. Claimant attempted to return to work on September 14, 2016 but has since been unable to return to full duty employment.

7. On September 16, 2016 Claimant visited the Boulder Community Hospital Emergency Room for an evaluation. Claimant reported that he was hit by a shopping cart in his lower back two days earlier. He was assessed with "back pain, back contusion" and received Motrin for his pain.

8. Claimant returned to the Boulder Community Hospital Emergency Room on September 17, 2016. He reported that he was struck in the buttocks area by a rolling shopping cart while bending over in a parking lot one day earlier. The medical record reflects that Claimant had "a minor abrasion to his right hip, no contusion or deformity in the sacral area."

9. Claimant recounted that he had always engaged in a number of outdoor activities including soccer, hiking, tennis, snowboarding and basketball. He had suffered several lower back injuries while participating in his physical activities, but they had all resolved by the time of the September 11, 2016 incident. The prior lower back incidents occurred in 2009, 2012 and 2013. Claimant visited a physician or chiropractor for treatment after each of the injuries and received pain medication for about six months after one of the accidents. Nevertheless, he returned to full activity and did not have any back problems for about three years prior to the September 11, 2016 lower back injury.

10. Claimant reported his lower back injury to Employer and was referred to Concentra Medical Centers for treatment. On September 28, 2016 Claimant underwent a lower back MRI. The MRI revealed a shallow right disc protrusion at L3-L4 and minor disc degeneration with minimal broad-based posterior disc protrusion at L4-L5.

11. On September 29, 2016 Claimant visited Concentra for treatment. A physical examination revealed tenderness and muscle spasms in his lower back area. Claimant was limited to working four hours each day, no lifting in excess of 20 pounds on an occasional basis and sitting 50% of the time. Concentra referred Claimant to John Sacha, M.D. for additional evaluation and treatment.

12. On October 10, 2016 Claimant visited Dr. Sacha for an examination. Claimant reported that he had been struck in the back by a rolling metal cart at work. After a physical examination Dr. Sacha diagnosed Claimant with lumbosacral radiculopathy. He recommended "bilateral L5 and S1 transforaminal epidural injections/spinal nerve blocks. This will be diagnostic and therapeutic." Dr. Sacha renewed Claimant's Tramadol prescription, began Lyrica and discontinued Naproxen.

13. On November 9, 2016 Claimant returned to Dr. Sacha for an evaluation. Dr. Sacha noted that his request for an epidural steroid injection had been denied. He commented that Claimant "was a good candidate for the procedure especially based on having radicular findings that corresponded to the findings on his MRI which corresponded to his physical examination."

14. On January 18, 2016 Dr. Sacha appealed the denial of his request for an epidural steroid injection. He detailed that Claimant's physical examination was consistent with radicular pain. On January 31, 2017 Insurer again denied Dr. Sacha's request for bilateral L5 and S1 epidural steroid injections. The denial was based on non-medical reasons that included a failure to demonstrate compensability and an untimely appeal.

15. On March 23, 2017 Claimant underwent an independent medical examination with John R. Burris, M.D. Dr. Burris also examined the exact type of cart involved in the September 11, 2016 incident. He concluded that the September 11, 2016 event did not cause Claimant any disability or need for medical treatment.

16. Based on his experience and review of the medical records Dr. Burris determined that the forces involved from the cart rolling and hitting Claimant were insufficient to cause bodily harm. He explained that there was no way for a cart rolling on a flat surface to build up sufficient velocity to generate the type of energy that would be expected to cause damage to bodily tissues. He further explained that there was a "push bar" going across the front of the cart and that in a collision the force would be distributed across the surface that was contacted. He noted for example that a sharp object causes a different effect than a blunt object with the same amount of force. Here, the bar would have distributed the force across a much broader area so there was less likelihood of a potential injury.

17. In addressing the scenario in which Claimant squatted, straightened up and struck the stationary cart, Dr. Burris explained that the forces were insufficient to cause a need for medical treatment. He specifically detailed that, if Claimant was as close to the cart as noted by the witnesses, the broad bar that he struck would have distributed the forces and was unlikely to cause damage.

18. On April 12, 2017 Dr. Sacha administered a bilateral L5-S1 epidural steroid injection with nerve blocks. The procedure was paid for through Claimant's private health insurance. At the conclusion of the injection Dr. Sacha remarked that Claimant had obtained greater than 90% relief from pain and thus demonstrated a diagnostic response.

19. On May 3, 2017 Dr. Sacha authored a letter explaining that Claimant's lower back symptoms were caused by the September 11, 2016 industrial accident. He remarked that Claimant's lower back and leg complaints had been consistent to all medical providers. Dr. Sacha commented that Claimant suffered a specific injury with trauma to his lower back. There were witnesses to the incident and the forces were so strong that when the cart struck him the wheels rolled up off the ground. He detailed that Claimant has exhibited consistent lower back and leg pain with no non-physiologic behaviors. Dr. Sacha summarized that all of the data, including Claimant's injury report, examination findings, consistency of symptoms and lack of treatment for back pain over the prior two years, suggested that Claimant suffered a compensable lower back injury on September 11, 2016.

20. On May 16, 2017 Claimant underwent an independent medical examination with John S. Hughes, M.D. Dr. Hughes also testified at the hearing in this matter. He diagnosed Claimant with a lumbar spine strain/sprain that had occurred on September 11, 2016. Claimant developed radicular lower back pain that had improved with epidural steroid injections. Dr. Hughes commented that Claimant simply presented with a "straightforward history of work-related lumbar spine injury with the development of bilateral radiculitis." He agreed with Dr. Sacha that Claimant had suffered a compensable lower back injury while working for Employer on September 11, 2016. He disagreed with Dr. Burris that the forces and mechanism of injury were insufficient to cause bodily harm. Dr. Hughes commented that Claimant had a "long slender torso that I believe increases his vulnerability to lumbar spine injury. His responses to treatment have been consistent with a radicular pain generator and I believe he is tracking toward a full functional recovery."

21. Dr. Burris testified at the hearing in this matter. He is a Board Certified expert in occupational medicine and is also Level II accredited by the Division of Workers' Compensation. Dr. Burris possesses both bachelor's and master's of science degrees in mechanical engineering and previously worked as a senior engineer. He was accepted as an expert in both occupational medicine and mechanical engineering.

22. Dr. Burris maintained that Claimant did not suffer a compensable industrial injury or require medical treatment as a result of a September 11, 2016 accident at work. He reiterated that the forces involved from the cart rolling and hitting Claimant

were insufficient to cause an industrial lower back injury. Dr. Burris disagreed with Dr. Sacha's causation opinion because it was predicated on the assumption that, "when the cart hit [Claimant] in the back, the back wheels rolled up off the ground." He remarked that there was simply insufficient force during the incident to lift an approximately 100 pound cart off the ground. Furthermore, Dr. Burris disagreed with Dr. Hughes' causation analysis because there was insufficient force from striking the cart to cause Claimant's lumbar spine injury. Accordingly, Dr. Burris summarized that Claimant did not suffer an injury or require any medical treatment as a result of the September 11, 2016 work incident.

23. Claimant has demonstrated that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on September 11, 2016. Claimant explained that, while stocking shelves with merchandise, he straightened up and struck his back on a fully loaded industrial cart. Co-worker Mr. Lutes corroborated Claimant's account of the accident and explained that Claimant straightened up and struck his lower back on the front bar of the industrial cart. Although there is some discrepancy in the medical records about the precise details of the accident and Claimant and Mr. Lutes were uncertain whether the cart was stationary or moving, the record reflects that Claimant injured his lower back when he contacted the industrial cart on September 11, 2016.

24. The medical evidence reflects that Claimant suffered an industrial lower back injury while working for Employer on September 11, 2016. Dr. Sacha persuasively explained that Claimant's lower back symptoms were caused by the September 11, 2016 industrial accident. He remarked that Claimant's lower back and leg complaints had been consistent to all medical providers. Dr. Sacha commented that Claimant suffered a specific injury with trauma to his lower back. He detailed that Claimant has exhibited consistent lower back and leg pain with no non-physiologic behaviors. Dr. Sacha summarized that all of the data, including Claimant's injury report, examination findings, consistency of symptoms and lack of treatment for back pain over the prior two years, suggested that Claimant suffered a compensable lower back injury on September 11, 2016. Furthermore, Dr. Hughes commented that Claimant simply presented with a "straightforward history of work-related lumbar spine injury with the development of bilateral radiculitis." Dr. Hughes agreed with Dr. Sacha that Claimant had suffered a compensable lower back injury while working for Employer on September 11, 2016.

25. In contrast, Dr. Burris maintained that Claimant did not suffer a compensable industrial injury or require medical treatment as a result of a September 11, 2016 accident at work. Based on his expertise in mechanical engineering Dr. Burris determined that the forces involved from the cart striking Claimant were insufficient to cause bodily harm. He explained that there was no way for a cart rolling on a flat surface to build up sufficient velocity to generate the type of energy that would cause damage to bodily tissues. He further explained that there was a "push bar" going across the front of the cart and in a collision the force would be distributed across the surface that was contacted. In addressing the scenario in which Claimant squatted, straightened up and struck the stationary cart, Dr. Burris explained that the forces were

insufficient to cause a need for medical treatment. He specifically detailed that, if Claimant was as close to the cart as noted by the witnesses, the broad bar that he struck would have distributed the forces.

26. Despite Dr. Burris' opinion, the medical records and persuasive opinions of Drs. Sacha and Hughes demonstrate that Claimant suffered a compensable lower back injury when he made contact with the industrial cart on September 11, 2016. Specifically, Dr. Hughes disagreed with Dr. Burris that the forces and mechanism of injury were insufficient to cause bodily harm. He commented that Claimant had a long slender torso that increased his vulnerability to a lumbar spine injury. Dr. Hughes remarked that Claimant's responses to treatment have been consistent with a radicular pain generator. Accordingly, Claimant has demonstrated that it is more probably true than not that the September 11, 2016 industrial accident aggravated, accelerated or combined with his pre-existing lower back condition to produce a need for medical treatment.

27. Claimant has proven that it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial lower back injury. Claimant twice sought medical treatment for lower back symptoms at the Boulder Community Hospital Emergency Room within one week of the accident. He subsequently reported his lower back injury to Employer and was directed to Concentra for treatment. Claimant received authorized medical care through Concentra and Dr. Sacha. Although Respondent denied Dr. Sacha's request for an epidural steroid injection, he administered a bilateral L5-S1 epidural steroid injection with nerve blocks on April 12, 2017. The procedure was paid for through Claimant's private health insurance. At the conclusion of the injection Dr. Sacha remarked that Claimant had obtained greater that 90% relief from pain and thus demonstrated a diagnostic response. Based on the persuasive medical records and Claimant's testimony, Claimant is entitled to receive reasonable, necessary and causally related medical benefits to cure or relieve the effects of his September 11, 2016 lower back injury. Respondent is thus financially responsible for Claimant's lower back medical treatment including the epidural steroid injection from Dr. Sacha.

28. Claimant has established that it is more probably true than not that he is entitled to receive TTD and TPD benefits for the period September 12, 2016 until terminated by statute. Claimant explained that he attempted to return to work on September 14, 2016 but has since been unable to return to full duty employment. On September 29, 2016 Claimant received restrictions that limited him to working four hours each day, lifting no more than 20 pounds on an occasional basis and sitting 50% of the time. Because Claimant has not reached Maximum Medical Improvement (MMI) he is entitled to receive TTD and TPD benefits for the period September 12, 2016 until terminated by statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on September 11, 2016. Claimant explained that, while stocking shelves with merchandise, he straightened up and struck his back on a fully loaded industrial cart. Co-worker Mr. Lutes corroborated Claimant's account of the accident and explained that Claimant straightened up and struck his lower back on the front bar of the industrial cart. Although there is some discrepancy in the medical records about the precise details of the accident and Claimant and Mr. Lutes were uncertain whether the cart was stationary or moving, the record reflects that Claimant injured his lower back when he contacted the industrial cart on September 11, 2016.

8. As found, the medical evidence reflects that Claimant suffered an industrial lower back injury while working for Employer on September 11, 2016. Dr. Sacha persuasively explained that Claimant's lower back symptoms were caused by the September 11, 2016 industrial accident. He remarked that Claimant's lower back and leg complaints had been consistent to all medical providers. Dr. Sacha commented that Claimant suffered a specific injury with trauma to his lower back. He detailed that Claimant has exhibited consistent lower back and leg pain with no non-physiologic behaviors. Dr. Sacha summarized that all of the data, including Claimant's injury report, examination findings, consistency of symptoms and lack of treatment for back pain over the prior two years, suggested that Claimant suffered a compensable lower back injury on September 11, 2016. Furthermore, Dr. Hughes commented that Claimant simply presented with a "straightforward history of work-related lumbar spine injury with the development of bilateral radiculitis." Dr. Hughes agreed with Dr. Sacha that Claimant had suffered a compensable lower back injury while working for Employer on September 11, 2016.

9. As found, in contrast, Dr. Burris maintained that Claimant did not suffer a compensable industrial injury or require medical treatment as a result of a September 11, 2016 accident at work. Based on his expertise in mechanical engineering Dr. Burris determined that the forces involved from the cart striking Claimant were insufficient to cause bodily harm. He explained that there was no way for a cart rolling on a flat surface to build up sufficient velocity to generate the type of energy that would cause damage to bodily tissues. He further explained that there was a "push bar" going

across the front of the cart and in a collision the force would be distributed across the surface that was contacted. In addressing the scenario in which Claimant squatted, straightened up and struck the stationary cart, Dr. Burris explained that the forces were insufficient to cause a need for medical treatment. He specifically detailed that, if Claimant was as close to the cart as noted by the witnesses, the broad bar that he struck would have distributed the forces.

10. As found, despite Dr. Burris' opinion, the medical records and persuasive opinions of Drs. Sacha and Hughes demonstrate that Claimant suffered a compensable lower back injury when he made contact with the industrial cart on September 11, 2016. Specifically, Dr. Hughes disagreed with Dr. Burris that the forces and mechanism of injury were insufficient to cause bodily harm. He commented that Claimant had a long slender torso that increased his vulnerability to a lumbar spine injury. Dr. Hughes remarked that Claimant's responses to treatment have been consistent with a radicular pain generator. Accordingly, Claimant has demonstrated that it is more probably true than not that the September 11, 2016 industrial accident aggravated, accelerated or combined with his pre-existing lower back condition to produce a need for medical treatment.

Medical Benefits

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAP, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAP, Nov. 13, 2000).

12. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the insurer will compensate the provider. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the employer directly refers the claimant and those to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office,* 902 P.2d 854 (Colo. App. 1995).

13. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial lower back injury. Claimant twice sought medical treatment for lower back

symptoms at the Boulder Community Hospital Emergency Room within one week of the accident. He subsequently reported his lower back injury to Employer and was directed to Concentra for treatment. Claimant received authorized medical care through Concentra and Dr. Sacha. Although Respondent denied Dr. Sacha's request for an epidural steroid injection, he administered a bilateral L5-S1 epidural steroid injection with nerve blocks on April 12, 2017. The procedure was paid for through Claimant's private health insurance. At the conclusion of the injection Dr. Sacha remarked that Claimant had obtained greater that 90% relief from pain and thus demonstrated a diagnostic response. Based on the persuasive medical records and Claimant's testimony, Claimant is entitled to receive reasonable, necessary and causally related medical benefits to cure or relieve the effects of his September 11, 2016 lower back injury. Respondent is thus financially responsible for Claimant's lower back medical treatment including the epidural steroid injection from Dr. Sacha.

Temporary Total/Partial Disability Benefits

14. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

15. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TTD and TPD benefits for the period September 12, 2016 until terminated by statute. Claimant explained that he attempted to return to work on September 14, 2016 but has since been unable to return to full duty employment. On September 29, 2016 Claimant received restrictions that limited him to working four hours each day, lifting no more than 20 pounds on an occasional basis and sitting 50% of the time. Because Claimant has not reached Maximum Medical Improvement (MMI)

he is entitled to receive TTD and TPD benefits for the period September 12, 2016 until terminated by statute.

Average Weekly Wage

16. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield,* W.C. No. 4-651-471 (ICAP, Mar. 5, 2007). As found, An AWW of $518.57 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable lower back injury on September 11, 2016 while working for Employer.

2. Claimant shall receive reasonable, necessary and related medical benefits designed to cure and relieve the effects of his September 11, 2016 industrial injury.

3. Claimant shall receive TTD and TPD benefits for the period September 12, 2016 until terminated by statute.

4. Claimant earned an AWW of $518.57.

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge;

and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 5, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Did Respondent overcome the DIME's determination that Claimant is not at MMI by clear and convincing evidence?

2. Did Claimant prove by a preponderance of the evidence that he is entitled to a second surgical evaluation?

3. If Respondents overcome the DIME, did Claimant prove by a preponderance of the evidence that he has 11% upper extremity impairment?

FINDINGS OF FACT

1. Claimant worked as a warehouse employee for Employer. He suffered an admitted injury to his left elbow while lifting heavy shingles on September 10, 2015. He was moving bundles of shingles and experienced a pop in the left elbow with immediate pain and swelling.

2. Employer referred Claimant to Concentra Medical Centers for authorized treatment. At the initial evaluation, Dr. Lori Ross documented swelling of the left elbow, tenderness of the lateral epicondyle and reduced range of motion in all planes. Treating providers also observed swelling at several other appointments, which provides objective evidence of an injury to Claimant's left elbow.

3. Claimant received treatment through Concentra for diagnoses including left elbow strain, left radial nerve irritation, and left lateral epicondylitis. Claimant underwent conservative care including injections, pain medications, Lidoderm patches, splinting and bracing, and physical therapy, without substantial benefit.

4. An MRI of the left elbow on November 16, 2015 revealed a partial tear in the left superficial common extensor tendon.

5. An EMG performed on December 1, 2015 suggested mild left radial tunnel syndrome.

6. Claimant saw Dr. Hart, a hand surgeon, on several occasions. Dr. Hart initially thought Claimant's presentation was more consistent with radial tunnel syndrome rather than epicondylitis. He administered two radial tunnel injections which provided only short term relief. On February 4, 2016, Dr. Hart expressed concern that "we may not have the accurate diagnosis, since neither injection offered him any significant long-term relief, and I am concerned that if we undertake a radial tunnel release, it may not alleviate his symptoms." Dr. Hart recommended repeat EMG testing before making a final determination regarding surgery.

7. There was a gap in Claimant's treatment between February and August 2016 due to a dispute regarding whether he suffered an intervening injury. The issue went to hearing before ALJ Broniak on July 19, 2016, who found there was no intervening event and denied Respondents' request to terminate TTD benefits.

8. When Claimant resumed treatment at Concentra, he saw a new physician, Dr. Nicholas Kurz.

9. Dr. Kenneth Finn performed the repeat EMG on August 30, 2016. The testing was normal with no evidence of radial or ulnar nerve entrapment.

10. Claimant followed up with Dr. Hart on September 8, 2016 to review the EMG results. Dr. Hart revised his diagnosis and opined that Claimant likely has "a persistent case of lateral epicondylitis." Dr. Hart opined "it is reasonable at this point in time since we now have a normal nerve test to consider only releasing his left lateral epicondyle and debridement of the proximal origin of the ECRB tendon. Hopefully, that will alleviate some of his lateral epicondylar and proximal forearm pain." Dr. Hart estimated a 65% to 75% success rate for lateral epicondylitis surgery.

11. Claimant underwent a left lateral epicondylar release with exostectomy on October 4, 2016.

12. Claimant did not receive significant benefit from the surgery, and post-surgery medical records reflect significant ongoing pain and limitations.

13. Claimant saw Dr. Kurz on November 8, 2016, reporting severe elbow pain with light touch and minimal use of the upper extremity. Dr. Kurz recommended a second opinion with a different hand specialist, Dr. Kobayashi or Dr. Larsen. He also referred Claimant for a pain psychology evaluation with Dr. Staudenmayer.

14. The referrals were submitted to Respondents for authorization, but there is no indication they were approved.

15. Claimant returned to Dr. Kurz on November 29, 2016, and reported ongoing severe pain. Dr. Kurz opined that Claimant's pain appeared exaggerated and "out of proportion" to the physical exam. Dr. Kurz put Claimant at MMI with no impairment and released him to work without restrictions.

16. Claimant saw Dr. Thomas Higginbotham for a DIME on February 5, 2017. Dr. Higginbotham diagnosed an elbow strain/sprain with structural diagnostic evidence of partial tearing of the superficial common extensor tendon at its origin. Dr. Higginbotham also suspected subluxation of the proximal radioulnar joint with ongoing annular ligamentous sprain. Dr. Higginbotham opined Claimant is not at MMI "due to persistence of moderately severe pain and limitations and function of the left elbow. He merits a second orthopedic opinion as requested by his treating providers."

17. Respondents obtained video surveillance of Claimant in April and May 2017. A portion of the video shows Claimant entering and exiting a convenience store

and driving away. Another portion shows Claimant walking in the parking lot of a grocery-type store with a young girl, presumably his daughter. The bulk of the video footage was taken inside a nightclub where Claimant apparently works as a DJ. Most of the nightclub video is dark and shot from a distance, although there are a few segments with relatively clear views of Claimant. He appears to move his left arm freely, with no visible evidence of pain or limitation. He does not lift anything heavy or perform any forceful gripping activities.

18. Claimant saw Dr. Mark Failinger for an Independent Medical Examination (IME) at Respondents' request on May 8, 2017. Claimant reported persistent pain and weakness in the left elbow, worsened by gripping or lifting more than 6 pounds. He said the pain in the elbow was perhaps worse after the surgery. He indicated his range of motion had improved, but his functional ability remained about the same.

19. Based on his examination and review of Claimant's records, Dr. Failinger considered Claimant "very believable" and a "straightforward historian." Initially, he was inclined to agree with Dr. Higginbotham's recommendation for a second surgical opinion. But Dr. Failinger's impression changed dramatically after viewing the surveillance footage. He opined there was a "significant mismatch" between Claimant's appearance in the video and his presentation at the IME. Ultimately, Dr. Failinger agreed with Dr. Kurz that Claimant was at MMI on November 29, 2016 with no impairment.

20. Respondents failed to present clear and convincing evidence to overcome the DIME's determination that Claimant is not at MMI.

21. Claimant proved by a preponderance of the evidence that a second opinion as recommended by Dr. Higginbotham is reasonable and necessary treatment for his admitted injury.

CONCLUSIONS OF LAW

A. Respondents did not overcome the DIME's determination regarding MMI

The DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). This is a higher standard of proof than the typical "preponderance" standard. Clear and convincing evidence is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). Therefore, the party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI finding is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). A finding of MMI is premature if a course of

treatment has “a reasonable prospect of success” and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). Additionally, a finding that a claimant is not at MMI may rest solely upon recommendations for further diagnostic evaluation if such procedures have a reasonable prospect of diagnosing or defining the claimant’s condition to suggest a course of further treatment. *E.g., Soto v. Corrections Corp*., W.C. No. 4-813-582 (ICAO, October 27, 2011).

As found, Respondents failed to overcome the DIME’s MMI determination by clear and convincing evidence. The medical evidence consistently documents ongoing symptoms and limitations associated with Claimant’s September 2015 work injury. Claimant had objective evidence of injury and ultimately underwent surgery, but remains symptomatic. The evaluation recommended by Dr. Higginbotham is essentially diagnostic, and ICAO has repeatedly held that “diagnostic procedures constitute compensable medical benefits that must be provided prior to MMI if such procedures have a reasonable prospect of diagnosing or defining the claimant’s condition so as to suggest the course of further treatment.” *E.g., Watier-Yerkman v. Da Vita*, W.C. No. 4-882-517-02 (January 12, 2015); *Soto v. Corrections Corp. of America*, W.C. No. 4-831-582 (October 27, 2011); *Jacobson v. American Industrial Service*, W.C. No. 4-487-349 (April 24, 2007).

The surveillance video is the lynchpin of Respondents’ argument. Dr. Failinger initially agreed that a second opinion was reasonable, but changed his mind after viewing the video. Admittedly, the surveillance video depicts Claimant using his left arm with no apparent difficulty or pain, which gives the ALJ pause regarding the veracity of Claimant’s pain complaints. But the activities Claimant performs in the video are relatively minimal, and do not require significant lifting or forceful gripping with his left arm. Furthermore, most of the video was taken from a distance in a darkened nightclub, which makes it difficult for the ALJ to draw definitive conclusions regarding Claimant’s true level of function. Clear and convincing evidence must be “unmistakable and free from serious and substantial doubt,” and the ALJ does not find the video sufficient to overcome the DIME’s determination, particularly when juxtaposed against the persuasive medical evidence.

B. A second opinion is reasonable and necessary

The respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Where the respondents dispute a claimant’s entitlement to medical benefits, the claimant must prove that the requested treatment is reasonable, necessary, and causally related to the injury. Section 8-42-101(1)(a); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

A DIME’s recommendation regarding specific treatment is not entitled to presumptive weight, but is simply another medical opinion to consider when evaluating all the evidence under the preponderance standard. *Goff v. Schwan’s Home Services*,

W.C. No. 4-947-921-03 (August 9, 2017); *Holcombe v. FedEx Corp*., W.C. No. 4-824-259-05 (March 24, 2017); *Duplissis v. Shepard's*, W.C. No. 4-508-725 (December 3, 2002).

As found, Claimant proved by a preponderance of the evidence that a second surgical opinion is reasonable and necessary treatment for his injury. Claimant remains symptomatic despite conservative treatment and surgery. Dr. Kurz's initial decision to refer Claimant for a second opinion with a different hand specialist was reasonable and appropriate at the time. There is no persuasive justification for Dr. Kurz's decision to abruptly discharge Claimant barely three weeks later without even allowing him to complete the evaluation.

Based on the totality of evidence presented, the ALJ concludes that a second surgical opinion with Dr. Larsen or Dr. Kobayashi is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME regarding MMI is denied and dismissed.

2. Respondents shall pay for reasonable and necessary treatment to cure and relieve the effects of Claimant's injury and bring him to MMI, including a second surgical opinion with Dr. Larsen or Dr. Kobayashi.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 7, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Respondents prove by clear and convincing evidence that the impairment rating assigned to Claimant by the Division IME physician, David Yamamoto, M.D. was incorrect?

- Has Claimant proven by a preponderance of the evidence that he is entitled to ongoing medical treatment for the work injury?

FINDINGS OF FACT

1. Claimant has worked for Employer for thirty-five years. At the time of his injury, Claimant was a wastewater operator.

2. Claimant's medical history was significant in that he previously received treatment for cervical spine disc degeneration, spondylolosis and chronic pain. Medical records were admitted which documented treatment Claimant received for these conditions.

3. Claimant sustained injuries when he fell from his bike in approximately July 2009. X-rays were taken of Claimant's cervical and thoracic spine; and a head CT was also done. The films showed no abnormalities.

4. Records from Kaiser Permanente, beginning on August 18, 2009 were admitted into evidence. At that time, Claimant was complaining of headaches and double vision following the bike accident. In the follow-up appointment on August 24, 2009, Claimant's symptoms were listed as headache and neck pain. Claimant described the headaches as starting in the upper back and radiating forward to the school. He was given a referral to neurology.

5. On September 10, 2009, Claimant was evaluated by a neurologist, C. Mindy Menake-Wiener, M.D. At that time, Claimant reported his headaches were better, but he had chronic intermittent numbness of the right upper extremity, which was worse while riding his bicycle. He also was complaining of diplopia. On examination, tenderness was noted in the left paraspinal region, but flexion and extension of the neck produced no symptoms. Dr. Menake-Wiener's impression was the Claimant had post concussive headaches that appeared to improve dramatically with chiropractic manipulation. There was no clinical history to suggest nerve impingement and Claimant's neurological evaluation was normal. Dr. Menake-Wiener opined Claimant had carpal tunnel syndrome, worse on the left and the right. She was unsure about the etiology of his visual complaints. The ALJ notes there was no reference to a loss of

range of motion ("ROM") in Claimant's cervical spine and a majority of this treatment note was concerned with the other parts of Claimant's body.

6. The evidence in the record documented that Claimant received chiropractic treatments for his cervical spine in the year before the July 24, 2014 injury. More particularly, he treated with Randy Kochevar, D.C. Claimant first treated with Dr. Kochevar on August 26, 2009, following the bicycle accident. Claimant complained of headaches, upper extremity and neck pain. Claimant received a multiple treatments in the months following the bicycle accident. Claimant returned to Dr. Kochevar on December 26, 2012, December 6, 2013 and March 28, 2014. These records documented an increase in Claimant's neck pain at these appointments and he received chiropractic treatments at that time. The ALJ found these records document at the fact Claimant received chiropractic treatments to coincide with the increase of headache and neck symptoms. These symptoms appeared to wax and wane, as there were intervals of time in which Claimant received no treatment. The last appointment with Dr. Kochevar was approximately three months before Claimant's industrial injury. These records documented neck stiffness and soreness, as well as symptoms related to migraines.

7. Additional records from Kaiser Permanente documented that Claimant treated on three occasions[1] for cervical symptoms in the one-year time frame before the July 24, 2014 accident. Christine Munson M.D. at Kaiser Permanente evaluated Claimant on August 13, 2013 for neck pain that began in 2009. Claimant reported that he had been obtaining chiropractic care with only temporary relief, acupuncture with only temporary relief, and physical therapy with only temporary relief. Claimant underwent a cervical facet injection at the C3-4 level on August 21, 2013. On October 23, 2013, Claimant returned to Kaiser Permanente and was evaluated by Cynthia Gacnic, M.D. At that time, Claimant complained of ongoing neck pain. Claimant reported the facet injection which was performed earlier did not help. Claimant was taking Flexeril and Ultram. The ALJ found these records did not document ongoing treatment with the doctors at Kaiser. The ALJ inferred Claimant sought treatment when he experienced an increase in symptoms. There was no indication in the record that any physician at Kaiser Permanente restricted Claimant's work activities.

8. Claimant testified that prior to his industrial injury, he felt pain at the base of his neck, which he related to migraines. He agreed that he felt neck and shoulder pain following the bike accident in 2009. Claimant downplayed his prior treatment both to his treating physicians and while testifying. This negative affected Claimant's credibility.

9. On July 24, 2014, Claimant sustained an admitted industrial injury when he fell at work. More particularly, he slipped and fell on polymer which was on the floor.

[1] A progress note from Scott Clemensen, M.D. at Kaiser (dated June 15, 2014) was admitted into evidence. This note referred to symptoms of weakness and lightheadedness after a bike ride. Chronic neck pain was listed as part of the active problem list, but there was no evaluation of the neck, nor treatment rendered thereto. An electrocardiogram and metabolic evaluation were ordered.

10. Claimant testified he felt pain in his in his neck and back after he fell. This included the area just above his shoulders. He also experienced migraine headaches for which he received treatment. Claimant testified the pain after his work injury was different than his previous pain.[2]

11. Claimant was evaluated on July 25, 2014 by Jeffrey Hawke, M.D. Dr. Hawke noted increased tone and tenderness to the trapezius muscle bellies, as well as their cervical and scapular extensions bilaterally. The axial compression and Spurling's tests were negative. No misalignment, asymmetry, defects or fusion were noted. Increased tone and tenderness were also noted in the thoracic spine. Dr. Hawke's assessment was: acute cervical, thoracic and lumbar strain; and right shoulder contusion. Dr. Hawke described the causality as work-related and completed a WCM-164 which noted same. He recommended a physical therapy ("PT"), as well as prescribing Naproxen and Cyclobenzaprine.

12. Claimant returned to Dr. Hawke on August 4, 2014. Claimant advised Dr. Hawke he was most worried about his neck, which was injured in the bike accident and he was now experiencing pain in the left shoulder. Dr. Hawke's diagnosis remained the same and Claimant was scheduled for a trigger point injection followed by a myofascial release.

13. Dr. Hawke followed Claimant for the next two months and determined he reached MMI on October 8, 2014. Dr. Hawke's assessment was: cervical thoracic strain, with chronic myofascial pain; lumbar strain with chronic myofascial pain and right shoulder contusion.

14. Claimant was evaluated by Roberta Anderson-Oeser, M.D. on August 6, 2014. Dr. Anderson-Oeser noted Claimant had a history of a cervical injury in 2009 for which he tried injection therapy, which was of no help, as well as chiropractic treatment which helped his symptoms. The ALJ concluded from this note Claimant disclosed his history of prior neck pain related to the bicycle accident and the treatment he received for those symptoms to Dr. Anderson-Oeser.

15. At the time of his evaluation with Dr. Anderson-Oeser, Claimant was complaining of cervical, thoracic, low back and right shoulder pain. On examination, palpable spasms in the cervical and thoracic paraspinals were noted. Claimant had palpable trigger points within the upper trapezius, splenius capitis, lavator scapulae and rhomboids bilaterally. Restricted cervical range of motion was noted. Claimant had tenderness over the right acromioclavicular joint. Dr. Anderson-Oeser's impressions were cervicothoracic strain, lumbar strain, right shoulder contusion and myofascial pain. She administered trigger point injections and advised Claimant to continue PT. The ALJ inferred Dr. Anderson-Oeser was of the opinion that Claimant required this treatment because of the industrial injury.

[2] Hearing Transcript ("Hrg. Tr.") p. 62:16-25.

16. A letter of medical necessity, dated July 29, 2014 and signed by Dr. Anderson-Oeser, was admitted into evidence. It requested purchase of a Flex-IT device for improvement of range of motion. There was no other evidence admitted at hearing regarding additional post-MMI treatment. Respondent did not introduce evidence that this device was not reasonable or necessary, however, it is not clear whether Claimant received this device.

17. On December 31, 2014, Claimant returned to Dr. Anderson-Oeser. He complained of pain in the posterior cervical and shoulder girdle region. Claimant had been see in the emergency room and a cervical MRI was ordered. Dr. Anderson-Oeser compared Claimant's 2012 and 2014 MRI, noting there were no significant changes. Dr. Anderson-Oeser's impression was cervicalgia; cervical degenerative disc disease and foraminal stenosis; thoracic strain; lumbar strain; and myofascial pain. Dr. Anderson-Oeser implicitly confirmed the prior determination of MMI made by Dr. Hawke. Dr. Anderson-Oeser did not schedule a follow-up visit, opining Claimant had treated adequately for his work injury.

19. On April 16, 2015, Claimant underwent an MRI of his thoracic lumbar spine. The films were read by Samuel Ahn, MD., which showed mild degenerative changes at T7-8, T8-9 and T10-11. Claimant's lumbar spine showed congenital spinal stenosis, exacerbated by chronic degenerative changes.

20. Claimant received psychological treatment with Ron Carbaugh, Psy. D. from April 10, 2015 through January 5, 2016. This included cognitive and behavioral therapy, as well as biofeedback treatment provided by Dr. Rebecca Hawkins. Dr. Carbaugh determined Claimant was at MMI from a psychological standpoint on January 5, 2016. The final diagnostic impressions were: somatic symptom disorder and persistent depressive disorder. Dr. Carbaugh did not recommend further psychological treatment.

18. Claimant returned to Dr. Anderson-Oeser on May on May 5, 2015. Claimant had been placed at MMI, with no impairment by Dr. Hawke with no impairment and no physical restrictions. He continued to have pain in the cervical, thoracic and lumbar spine. Claimant had tenderness over the cervical facet joints, paraspinal muscles and bilateral shoulder girdle muscles. Cervical range of motion was restricted with extension. Claimant's thoracic and lumbar ROM were within normal limits. Dr. Anderson-Oeser's impression was cervicalgia, degenerative disc disease of the cervical spine, cervical stenosis, thoracic strain, lumbar strain, and myofascial pain. Dr. Anderson-Oeser advised Claimant he had pre-existing cervical spine spondylosis and generative disc disease. She prescribed three sessions of cervical traction and recommended Claimant continue to see a pain psychologist for management of chronic pain.

19. Claimant was evaluated by Dr. Anderson-Oeser on June 22, 2015. Her diagnoses remained the same. Claimant reported a fairly high level of pain in the cervical, threats of the lumbar region. Claimant was receiving biofeedback, chiropractic

treatment and massage therapy. Dr. Anderson-Oeser wrote a prescription for four additional chiropractic visits and massage. She opined Claimant was at MMI for the work injury. A copy of Dr. Anderson-Oeser's prescription for treatment with Dr. Kochevar was admitted into evidence. This represented evidence to the ALJ that Dr. Anderson was aware of Claimant's treatment with this chiropractor.

20. On July 2, 2015, Claimant was seen for an initial evaluation with Brooks Comforti, D.O. Dr. Comforti's assessment included delayed recovery following the work related injury; chronic cervical and thoracic pain, localized myofascial pain reaction, history of depressive symptoms, somatic dysfunction. Dr. Comforti began Claimant on a program of osteopathic manipulative treatment in conjunction with modification progression of the independent exercise regimen. Records were admitted which documented the OMT treatment with Dr. Comforti through July 30, 2015.

21. Claimant was reevaluated by Dr. Anderson on the August 11, 2015. He had completed his biofeedback, which was somewhat helpful and was using a TENS unit, as well as taking Cymbalta and tizanidine. Claimant's cervical range of motion was minimally restricted and he had for ROM of the shoulders, elbows and wrists. Tenderness was noted over the lumbar paraspinal muscles, but no palpable trigger points were found. Lumbar ROM was within normal limits. Dr. Anderson-Oeser's impression remained the same as September 22, 2015 and Claimant remained at MMI.

22. On September 22, 2015, Claimant returned to Dr. Anderson-Oeser, at which time he reported ongoing pain in his neck and shoulder region. Claimant was using biofeedback, ice/heat and a TENS unit. Dr. Anderson-Oeser refilled his prescriptions, noting Claimant remained at full duty.

23. The ALJ concluded Claimant received treatment in the form of PT, chiropractic treatments, massage therapy, acupuncture and OMT through multiple health care providers from July 2014 through September 2015. Claimant subjectively reported some improvement in the final three months of treatment. The treatment was more extensive than what he received prior to the industrial injury, including after the bicycle accident in 2009.

24. There was no evidence admitted which showed Claimant returned to Dr. Anderson-Oeser or another ATP for further treatment after September 2015. No ATP opined Claimant needed treatment after MMI.

25. On December 8, 2015, Dr. Yamamoto performed a Division of Worker's Compensation independent medical examination (“DIME”). Claimant's current symptoms were listed as tightness in his neck and shoulders, as well as mid and lower back pain. He experienced tingling and numbness in the upper extremities, as well as depression and anxiety. His ability to stand and lift was limited. Tenderness was found over the paraspinal muscles of the mid-thoracic spine and lumbar spine. He also noted Claimant had reduced his bicycling after the injury and modified his work activities.

Dr. Yamamoto's assessment was: cervical strain, with persistent symptoms; pre-existing degenerative cervical spine changes; myofascial pain syndrome of the trapezii; and myofacial pain syndrome of the back and lower back.

26. Dr. Yamamoto found moderately decreased range of motion in Claimant's cervical spine, documenting the measurements he made in the worksheets attached to his report.

27. Dr. Yamamoto agreed Claimant reached MMI as of July 27, 2015 and assigned a 14% whole person impairment, which included 10% for loss of range of motion and 4% for a Table 53 (II) B specific disorder. As to this component of the rating, Dr. Yamamoto noted Claimant had over six months of medically documented pain and rigidity, which qualified him for this impairment. Dr. Yamamoto specifically stated he assigned a II(B) impairment as opposed to a II(C) impairment because there was no significant change on the MRI of the cervical spine done in 2012 compared with the 2014 cervical MRI. The ALJ concluded this was some evidence Dr. Yamamoto was generally aware of Claimant's prior cervical symptoms. Dr. Yamamoto did not reference records from Kaiser Permanente and Dr. Kochevar. The ALJ also notes Dr. Yamamoto's ROM measurements were valid; a fact which was not disputed by Respondent. Dr. Yamamoto concluded Claimant's headaches were pre-existing and were not ratable. He found Claimant's bilateral and shoulder pain were related to his myofascial pain syndrome. Dr. Yamamoto concluded Claimant had no psychological or lumbar impairment.

28. Dr. Yamamoto recommended maintenance treatment in the form of a trial of Baclofen and noted Claimant should remain on Cymbalta and either tizanadine or baclofen. He opined Claimant should receive 12 massage therapy and chiropractic appointments over the next 12 months. The ALJ concluded Claimant's ATP-s were in the best positon to determine what treatment, if any, Claimant required after MMI.

29. On March 28, 2016, Dr. Hughes performed an IME at the request of Claimant. At that time, Claimant had no paraspinous hypertonicity in the cervical spine, but reduced ROM. Spurling's maneuver was negative bilaterally. Claimant's lumbar spine had normal curvature and bilateral lumbar hypertonicity. He had reduced lumbar ranges of motion. Dr. Hughes' assessment was: past history of a post-traumatic headache disorder existing prior to July 24, 2014; work-related fall with multiple injuries sustained on July 24, 2014; cervical spine sprain/strain secondary to number two, with persistence of mechanical cervical spine pain; lumbar spine myofascial pain, also secondary to number two with persistence of mechanical lumbar pain.

30. Dr. Hughes opined Claimant sustained a cervical spine injury on July 24, 2014, meriting assignment of permanent impairment. In this regard, he believed Dr. Yamamoto correctly used Table 53 (of the *AMA Guides*) when he assigned a specific disorder impairment of 4% whole person. Dr. Hughes noted Claimant developed lumbar spine pain after the injury, which he characterized as more intermittent in nature. He agreed the date of MMI was July 27, 2015. He also agreed Claimant did not sustain

a permanent impairment to his lumbar spine and no permanent impairment for an injury-related psychiatric condition. Dr. Hughes disagreed with Dr. Yamamoto regarding impairment for worsening of Claimant's headaches. He recommended a review of pre-injury records and records from early on, as he was unable estimate permanent impairment stemming from a worsening of the pre-existing headaches. Dr. Hughes concurred with Dr. Yamamoto's recommendations regarding maintenance care.

31. Dr. Hughes testified at hearing as an expert in Occupational Medicine, the specialty in which he was board-certified. He is Level II accredited pursuant to the WCRP. Dr. Hughes' testimony was consistent with his findings at the time he performed the IME of Claimant. He reviewed the medical records available at that time of the IME, as well as additional records from Drs. Olsen, Kochevar and Kaiser Permanente at the time of his deposition. Dr. Hughes agreed Claimant did not provide exhaustive detail regarding his prior treatment. After reviewing the additional records, Dr. Hughes opined Claimant sustained a permanent impairment to his cervical spine.

32. Dr. Hughes offered the following opinion regarding Claimant's medical impairment rating:

> "I feel that within a reasonable degree of medical probability there was a medically documented injury to the cervical spine sustained as a result of the slip and fall injury of July 24th, 2014. I feel that there is adequate documentation through the present time, or at least through March 28, 2016, of continuing cervical spine pain. I agree that there is no discernible change in MRI structural status compared to prior to the work-related cervical spine injury, and that there are range of motion losses that exist after the work related injury.
>
> And while there's mention of range of motion losses in records from prior to the work-related injury, there is no quantification of same and there is also no documentation that this condition was independently disabling. The pre-existing condition was not an occupational condition, and so under the Division's decision worksheet, basically dealing with apportionment, this would not meet criteria for apportionment of permanent impairment."

33. Dr. Hughes' testimony was persuasive to the ALJ.

34. Dr. Hughes opined Claimant's prior neck pain was not independently disabling. Dr. Hughes opined there was not a medically documented injury sustained to the lumbar spine and Claimant did not have a ratable impairment with respect to that area. This was also true for the mid-back or thoracic spine. The ALJ noted Dr. Hughes' conclusions were concordant with Dr. Yamamoto's opinion.

35. Nicholas Olsen, M.D. testified as an expert witness at hearing. He is board certified in Physical Medicine and Rehabilitation, as well as Level II accredited pursuant to the WCRP. Dr. Olsen testified regarding the IME he performed on March 9, 2016 and noted he received additional medical records for Claimant's prior treatment

after completing the IME (in approximately May). He then received Dr. Hughes' report in June. Dr. Olsen said Claimant told him he was functioning fine, had no problems in the months and years before 2014. Dr. Olsen testified Claimant stated he did not have any neck pain leading up to the July 24, 2014 incident. Dr. Olsen testified Claimant identified headache pain, as well as pain in his upper trapezius and middle back. Dr. Olsen stated Claimant was not always direct in responding to his questions and he was asked several times about prior neck pain. Dr. Olsen believed Claimant intentionally left out his prior neck pain. He testified: "It is not something that would easily be forgotten and described as an honest mistake. It was very intentionally left out." [3]

36. Claimant told Dr. Olsen he was receiving chiropractic and treatment in 2014 relative to his migraine headaches, but denied receiving treatment for neck pain. Dr. Olsen testified that based upon his review of records from Dr. Kochevar and Kaiser, Claimant experienced neck symptoms which were persistent became chronic or progressive. As of the summer of 2013, Dr. Olsen believed Claimant's neck pain was getting worse. Dr. Olsen disagreed with Dr. Hughes that Claimant's prior neck pain was not independently disabling. He pointed to a note from Dr. Kochevar documenting the reduced ROM and difficulty looking up at work. The ALJ notes there was no reference to lost time or physical restrictions in this note. Dr. Olsen agreed with Dr. Hughes' opinion that there was no interval change between the two MRIs. Dr. Olsen also testified Claimant would have qualified for an impairment rating prior to July 24, 2014. He noted although there were no specifics regarding limitations in ROM, the records documented limitations in right and left lateral bending, as well as extension.

37. Dr. Olsen stated it was error for Dr. Yamamoto to provide an impairment rating where he did not have all the records and Claimant did not provide detail regarding his prior treatment. Dr. Olsen believed the records form Dr. Kochevar and Kaiser would have been critical to Dr. Yamamoto's evaluation. Dr. Olson believed Claimant had an exacerbation of symptoms after the July 24, 2014 incident and then returned to baseline. He opined Claimant did not require any further medical treatment. On cross-examination, Dr. Olsen agreed Table 53(II)(B) of the *AMA Guides* provided for a medical impairment rating of 4% for six months of medically documented pain and minimal to no changes between imaging. Both Dr. Hughes and Dr. Yamamoto opined Claimant was entitled to an impairment rating based upon this provision. Dr. Olsen agreed he assigned an impairment rating to Claimant under the same section of the *AMA Guides i*n his March 2016, report. Dr. Olsen disagreed with that conclusion. The ALJ found the opinions of Drs. Yamamoto and Dr. Hughes to be more persuasive than those offered by Dr. Olsen.

38. Respondent failed to overcome Dr. Yamamoto's opinions by clear and convincing evidence.

39. Claimant failed to satisfy his burden of proof to show an entitlement to post-MMI medical benefits.

[3] Hr. Tr. p. 34:10-14.

40. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, the ALJ focused on the respective medical opinions on the issue of whether Dr. Yamamoto's opinions were overcome by clear and convincing evidence.

Legal Standard for Overcoming the DIME

In resolving the issues, the ALJ notes the question of whether Respondents overcame Dr. Yamamoto's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence". § 8-42-107(8)(b)(III), C.R.S.; *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007). Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). The mere difference of medical opinions does not constitute clear and convincing evidence to overcome the

opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO Nov. 17, 2000).

The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Apps. Office*, 961 P.2d 590 (Colo. App. 1998). Since the DIME physician is required to identify and evaluate all losses and restrictions that result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Id*. The elevated burden is evidence of the Colorado Legislature's intent to limit overcoming the DIME physician's opinion to those cases where it is more probable than not that the opinion was incorrect

As noted below, the ALJ concluded that Dr. Yamamoto's opinions were not overcome with regard to Claimant's impairment rating. The ALJ's rationale was two-fold; first, the medical evidence supported Dr. Yamamoto's conclusion that Claimant sustained a permanent impairment as a result of the July 24, 2014 industrial injury. As a starting point, Claimant sustained an admitted industrial injury for which he required treatment. Dr. Anderson-Oeser oversaw this treatment and made objective findings during her evaluations of Claimant that led the ALJ to conclude his work injury necessitated said treatment. (Findings of Fact 14-17).

In his report, Dr. Yamamoto concluded Claimant sustained an industrial injury and met the criteria for permanent medical impairment. Dr. Yamamoto's report included a medical records summary, including documenting the treatment with Dr. Anderson-Oeser, whose reports noted least a portion of Claimant's treatment before the July 2014 injury. Dr. Yamamoto also referenced the 2012 MRI, which was indicative of his awareness of Claimant's prior cervical issues. (Finding of Fact 27). In addition, Dr. Yamamoto's rating was based upon valid range of motion measurements, as well as Table 53 of the *AMA Guides*. (Finding of Fact 21). Respondent did not adduce evidence to contradict this fact. (Finding of Fact 23). Dr. Yamamoto provided a specific rationale as to why Claimant was rated under Table 53 II(B) as opposed to Table 53 II(C), which lent credence to his opinions on permanency. Dr. Yamamoto also considered Claimant's psychological condition, the lumbar spine and upper extremities, as well as the issue of apportionment. He concluded that Claimant had no permanent impairment in these areas and there was no apportionment.

Dr. Yamamoto' conclusions were buttressed by the opinions offered by Dr. Hughes, who agreed Claimant had a permanent impairment to his cervical spine. More particularly, Dr. Hughes testified that Claimant met the criteria for an impairment rating. (Finding of Fact 26). Dr. Hughes also observed that while Claimant could potentially have been entitled to an impairment rating for his prior injuries, there was no evidence that this condition was independently disabling. (Finding of Fact 26). The ALJ credited Dr. Hughes' opinions and found these to be more persuasive than Dr. Olsen.

Second, the ALJ considered Respondent's argument that Claimant's failure to fully disclose his prior history and the lack of records in the possession of Dr. Yamamoto vitiated his opinion regarding permanency. As determined in Findings of Fact 27 and 31, Claimant did not provide extensive detail to Drs. Yamamoto and Hughes, regarding his prior cervical treatment. Dr. Olsen also noted Claimant did not provide detail reading his prior treatment and testified that Claimant intentionally withheld that information. (Finding of Fact 35). Several of the physicians noted Claimant was a poor historian. The ALJ also found Claimant downplayed his prior neck symptoms and treatment, as well as relating these to migraine headaches. While this negatively impacted Claimant's credibility, it did not refute the findings made by Dr. Yamamoto. Ultimately, although there was evidence Dr. Yamamoto did not have all the records related to Claimant's prior treatment, the ALJ determined this did not invalidate the medical impairment rating.

It was unrefuted that Claimant was injured on July 24, 2014 when he fell at work. The ALJ determined Dr. Yamamoto had information regarding the condition of Claimant's cervical spine sufficient to allow him to fully evaluate Claimant. There were references to Claimant's MRI in 2012, which Dr. Yamamoto compared with the 2014 MRI. Further, Dr. Yamamoto's DIME report documented the fact that he had Dr. Anderson-Oeser's records, which discussed the prior cervical treatment. Dr. Yamamoto examined Claimant and determined he had a ratable medical impairment to his cervical spine, pursuant to the *AMA Guides*. Dr. Yamamoto also concluded there was no apportionment. Dr. Yamamoto's conclusions were supported by the testimony of Dr. Hughes, who even though he did not have all of the prior records, concluded Claimant sustained a permanent medical impairment as a result of his industrial injury. (Findings of Fact 31-32). On balance, the ALJ was persuaded Dr. Yamamoto had sufficient information regarding Claimant's prior conditions and treatment to correctly assess his medical impairment.

Therefore, at most, Dr. Olsen's opinions were contraposed to those offered by Dr. Yamamoto and Dr. Hughes. Dr. Olsen's opinions were simply a difference of opinion between medical professionals and did not constitute sufficient evidence to overcome the DIME. This was not sufficient to persuade the ALJ that Dr. Yamamoto's conclusions were more probably incorrect or not supported by the medical evidence.

Grover Medical Benefits

The claim for medical treatment beyond the point of maximum medical improvement is governed by *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). In *Grover v. Industrial Commission*, the Colorado Supreme Court authorized maintenance care to maintain MMI or to prevent further deterioration of a Claimant's condition. *Milco Construction v. Cowan,* 860 P.2d 539, 541 (Colo. App. 1992). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended, nor a finding that Claimant is actually receiving medical treatment*. Holly Nursing Care Center v ICAO*, 992 P.2d 701 (Colo. App. 1999). Claimant must prove entitlement to *Grover* medical benefits by a

preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993).

Claimant failed to show he was entitled to post-MMI medical benefits. First, there was no evidence in the record that any of the Claimant's ATPs recommended maintenance treatment. (Finding of Fact 18). No recommendations for post-MMI treatment were made by either Dr. Hawke or Dr. Anderson-Oeser. *Id.* In addition, there was no persuasive evidence in the record that Claimant received treatment after September 2015 that was related to the July 2014 industrial injury.

Second, the opinions offered by Dr. Yamamoto (as the DIME physician) were not entitled to any special deference and the ALJ concluded Claimant's ATPs were in the best position to determine his need for maintenance medical treatment. (Finding of Fact 24). Accordingly, The ALJ determined Claimant failed to meet his burden of proof on this issue and was not entitled to *Grover* medical benefits.

ORDER

It is therefore ordered:

1. Respondent shall pay PPD benefits to Claimant based on Dr. Yamamoto's 14% medical impairment rating.

2. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

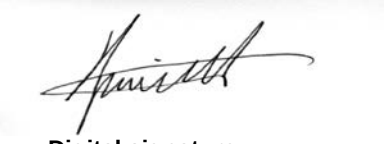
3. Claimant's request for post-MMI medical benefits is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a

petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 5, 2017



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-036-817-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

,

Employer,

and

Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on August 23, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 8/23-17, Courtroom 1, beginning at 1:30 PM, and ending at 4:00 PM).

Hereinafter shall be referred to as the “Claimant." shall be referred to as the “Respondent” or “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 10 were admitted into evidence, without objection. Respondents’ Exhibits A through K were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred

preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on August 30, 2017. No timely objections were filed. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision are whether the Claimant sustained a compensable right shoulder injury and/or a compensable aggravation/acceleration of a pre-existing right shoulder condition on January 19, 2017; if so, is the Claimant entitled to medical benefits, including the right shoulder surgery recommended by Cary Motz, M.D. [an authorized treating physician (ATP)] on February 22, 2017.

The Claimant bears the burden of proof by "a preponderance of the evidence" on all issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. On January 19, 2017, the Claimant injured her right shoulder while attempting to open a door during a fire drill. She entered the doorway, reached back with her right arm extended away from her body, pushed the bar on the door, and felt a pop in her right shoulder and immediate right shoulder pain. She immediately felt excruciating right shoulder pain and could not raise her arm to 40 degrees. That same day, she went to the Castle Rock emergency room (ER) and reported right shoulder pain and the circumstances surrounding her injury (Claimant's Exhibit 5, pp. 9-17). The Claimant reported that on January 15, 2017, she lifted a vacuum at home and felt right shoulder pain and then on January 19, 2017, she attempted to push open the door and felt increased right shoulder pain. *Id*.

2. The Claimant reported her injury to the Employer immediately following the injury and completed an incident report the following morning. On January 24, 2017, the Respondent filed an Employer's First Report of Injury (Claimant's Exhibit 1, p. 1). On February 8, 2017, the Respondent filed a Notice of Contest (Claimant's Exhibit 2, p. 2). On April 26, 2017, the Claimant filed an Application for Hearing (Claimant's Exhibit 3, pp. 3-5). On May 26, 2017, the Respondent filed a Response to Claimant's Application for Hearing (Claimant's Exhibit 4, pp. 9-17). The Hearing was set and occurred on August 23, 2017.

3. On January 19, 2017, the Claimant sustained a right shoulder injury arising out of and in the course and scope of her employment with the Employer. Additionally, the right shoulder surgery recommended by Dr. Motz on February 22, 2017, is reasonably necessary and causally related to her January 19, 2017 work-related injury. Dr. Motz is one of the Claimant's ATPs.

Nicole Leitch, Certified Physician's Assistant (PA-C), and Kathryn Bird, D.O. - Authorized Treating Physicians (ATPs) at Concentra

4. On January 22, 2017, the Claimant treated at Concentra with Physician Assistant (PA) Nicole Leitch and reported that on January 15, 2017, she picked up a vacuum that weighed approximately 10-12 pounds and had immediate soreness in her right shoulder. PA Leitch noted that the Claimant attempted to continue vacuuming but had to stop. The Claimant disagrees with this note. Indeed, the Claimant was insistent (to no avail) that PA Leitch correct the note because the Claimant continued vacuuming after the incident. The Claimant reported that her right shoulder soreness gradually improved throughout the week. She also reported that she did not have any problems with movement or range of motion (ROM). The Claimant reported that on January 19, 2017, she attempted to push open a locked door with a release bar and heard a pop in her right shoulder. She reported that she had immediate pain in her right shoulder and arm and that her pain was significantly worse than it was on Sunday, and that she now had loss of ROM. She reported that her pain levels have remained the same since the injury on the January 19th. On physical examination, PA Leitch noted that the Claimant had 45 degrees of forward flexion. PA Leitch assigned work restrictions and referred the Claimant for physical therapy (PT) [Claimant's Exhibit 6, pp. 18-23]. At hearing, the Claimant testified that she told PA Leitch that she was able to continue vacuuming on January 15, 2017. The Claimant also testified that about six weeks after her January 22, 2017 appointment she received a copy of PA Leitch's report and that she went to Concentra and asked PA Leitch to change her report, but she would not do it. The ALJ infers and finds that the Claimant's request to PA Leitch to change her note is a credibility enhancer for the Claimant's version of the January 15 events. The ALJ makes a rational decision, based on substantial evidence, to accept the Claimant's version of events, *i.e.,* that she was able to continue vacuuming on January 15.

5. On January 25, 2017, the Claimant treated with Kathryn Bird, D.O., and reported the January 15 and January 19 incidents. Dr. Bird stated that she did not think pushing a door would be a mechanism of injury that would cause a rotator cuff tear. Dr. Bird did not further explain this statement/conclusion. Dr. Bird referred the Claimant to Cary Motz, M.D., an orthopedic surgeon (Claimant's Exhibit 6, pp. 24-26).

6. On February 8, 2017, the Claimant treated with Dr. Bird and reported ongoing right shoulder pain. She reported that PT has been helpful but that she was still sore. Dr. Bird noted that she reviewed Dr. Motz's report, and he was of the opinion that

Claimant did, in fact, sustain a work-related injury. Dr. Bird referred the Claimant for an MRI (magnetic resonance imaging) [Claimant's Exhibit 6, pp. 27-31].

7. On March 23, 2017, the Claimant treated with Dr. Bird, who noted that the surgery recommended by Dr. Motz was denied (by the self-insured Employer). Dr. Bird placed the Claimant at MMI (maximum medical improvement); gave the Claimant an impairment rating and told the Claimant to come back when her claim is reinstated (Claimant's Exhibit 6, pp. 36-41). The ALJ infers and finds that Dr. Bird placed the Claimant at MMI solely because the claim was denied by the self-insured Employer—on legal grounds, not medical grounds.. The ALJ infers that Dr. Bird's finding of MMI involves a medico-legal judgment, which Dr. Bird surrendered to a faceless "apparatchik" of the self-insured Employer.

8. From January 25, 2017, through February 15, 2017, the Claimant underwent six physical therapy sessions (Claimant's Exhibit 9, pp. 64-84).

Cary Motz, M.D. – Claimant's Authorized Surgeon

9. On January 31, 2017, the Claimant treated with Dr. Motz and reported both the January 15 and January 19 incidents and her ongoing pain complaints. Dr. Motz stated that, "It is certainly possible that she could tear her rotator cuff pushing on a heavy door, and I believe that this work injury resulted in the injury to her shoulder." The ALJ finds that Dr. Motz rendered an opinion, to a reasonable degree of medical probability, that the Claimant sustained a compensable injury to her right shoulder in the "door pushing" incident of January 19.Dr. Motz recommended a right shoulder MRI. He added, "I do not believe the prior injury four days before had any significant effect on her shoulder, as there was a clear new event on 01/19/2017 that precipitated the ER visit and subsequent treatment" (Claimant's Exhibit 8, pp. 55-57). Dr. Motz's causality opinion conflicts with Dr. Bird's opinion. Based on substantial evidence, the ALJ makes a rational decision to accept Dr. Motz's causality opinion and to reject Dr. Bird's causality opinion.

10. On February 21, 2017, the Claimant treated with Dr. Motz and reported ongoing right shoulder pain, weakness, difficulty lifting, especially over the shoulder, and problems sleeping. Dr. Motz noted that he reviewed the Claimant's right shoulder MRI, which revealed an acute on chronic rotator cuff tear. Dr. Motz recommended right shoulder arthroscopy with debridement and repair. On February 22, 2017, Dr. Motz requested authorization for surgery (Claimant's Exhibit 8, pp. 58-61).

Annu Ramaswamy, M.D.

11. On May 9, 2017, the Claimant treated with Dr. Ramaswamy and reported the circumstances surrounding the January 15 and January 19, 2017 right shoulder incidents. She told Dr. Ramaswamy that after the January 15, 2017 incident she

continued vacuuming (about one hour). She reported that she felt like she pulled a muscle, and she did not seek medical attention because the pain was not severe. Regarding the January 19, 2017 incident, the Claimant reported that she felt a pop in her right shoulder and immediate pain and range of motion loss. She reported that she could not move her right arm and had to use her left arm to lift her right arm. She reported ongoing problems with overhead maneuvers and right shoulder weakness. Dr. Ramaswamy stated he reviewed the MRI, which revealed acute tendon tears in the setting of chronic tendon tears. Dr. Ramaswamy deferred making a causality determination until he reviewed the Claimant's medical records and the right shoulder MRI with a radiologist (Claimant's Exhibit 7, pp. 42-46).

12. On May 25, 2017, the Claimant again treated with Dr. Ramaswamy, who noted that he spoke with Dr. Seda, a radiologist who reviewed Claimant's MRI, and the MRI revealed chronic rotator cuff tears with acute inflammation. Again, Dr. Ramaswamy pointed out that the MRI revealed acute tendon tears in the setting of chronic tendon tears. On physical examination, Dr. Ramaswamy noted impingement testing was positive. Dr. Ramaswamy stated the opinion that pushing open a door would not correlate with the mechanism of injury for a rotator cuff tear acutely. He was of the opinion that the January 19, 2017 incident "likely caused a mild right shoulder strain at best given the acute range of motion loss in the shoulder" (Claimant's Exhibit 7, Pp. 47-54). The ALJ infers and finds that Dr. Ramaswamy's ultimate opinion supports an aggravation of any pre-existing condition, however, insofar as it conflicts with Dr. Motz's causality opinion, the ALJ makes a rational decision to reject Dr. Ramaswamy's opinion on lack of causality and to accept Dr. Motz's opinion.

Right Shoulder MRI

13. On February 13, 2017, the Claimant had a right shoulder MRI, which revealed acute superimposed on chronic full-thickness supraspinatus and infraspinatus tendon tears with edema extending along the muscles (Claimant's Exhibit 10, pp. 85-86).

William Ciccone, M.D. – Respondent's Independent Medical Examiner (IME)

14. On March 1, 2017, William J. Ciccone, II, M.D., completed a records review and recommended that the surgery recommended by Dr. Motz be denied because "it is not clear that the Claimant sustained a work-related injury." Dr. Ciccone stated the opinion that the surgery recommended by Dr. Motz is reasonably necessary but not related to the January 19, 2017 incident. Dr. Ciccone stated the right shoulder MRI revealed an acute on chronic rotator cuff injury, but he could not determine if it was related to the January 15 or the January 19 event. Dr. Ciccone was of the opinion that pushing open a door could not cause a significant shoulder injury (Respondent's Exhibit G, pp. 31-33).

15. On July 5, 2017, Dr. Ciccone completed an IME at Respondent's request. He reviewed the Claimant's medical records and performed a physical examination. The Claimant reported both the January 15 and January 19 incidents. On physical examination, Dr. Ciccone noted that the Claimant's right upper extremity (RUE) is extremely weak with external rotation and supraspinatus strength testing. Dr. Ciccone found positive Hawkins, Neer's, and impingement signs. He also noted a positive bear hug test and positive O'Brien's test. He noted that the Claimant has grinding and clicking in her shoulder with range of motion. Dr. Ciccone stated the opinion that

> the request for right shoulder arthroscopy and rotator cuff repair should be denied by worker's compensation insurance (a legal recommendation). I do not believe that the claimant suffered a work related injury. The act of pushing a bar to open a well-functioning door is not an injury, but rather an act of daily activity.

Dr. Ciccone was of the opinion that the right shoulder MRI revealed evidence of an acute muscle strain but no evidence of an acute tendon injury (Respondent's Exhibit G, pp. 34-40).

16. At the hearing, Dr. Ciccone testified consistently with his March 1 and July 5, 2017 reports. He testified as an expert in the field of orthopedic surgery and sports medicine. Regarding the January 19, 2017 incident, Dr. Ciccone rendered the opinion that the Claimant sustained a minor sprain or strain about her right shoulder rotator cuff. He stated the opinion that the incident at work in no way aggravated or caused increased tearing of the chronic appearing rotator cuff tear. Dr. Ciccone testified that he reviewed the Claimant's right shoulder MRI, which showed chronic rotator cuff tears. Dr. Ciccone stated the evidence of muscle and tendon atrophy on the MRI shows that the rotator cuff tears are chronic. Dr. Ciccone testified the MRI did reveal muscle tears (i.e. tendons connect muscle to bones and the acute injury is shown at the muscle), which is evidence of an acute injury. Dr. Ciccone was of the opinion that the January 19, 2017 incident did not cause a rotator cuff tear, and the Claimant's mechanism of injury is not an accepted way to cause a rotator cuff tear. He did not explain what was "an accepted way to cause a rotator cuff tear." Dr. Ciccone was of the opinion that the Claimant's acute muscle strain healed and that her current symptoms are related to her pre-existing degenerative condition. His underlying explanation was significantly lacking. Indeed, Dr. Motz articulated a persuasive underlying explanation for the causal relatedness of the January 19 "door" incident. Dr. Ciccone testified that at the time of the IME, the Claimant had almost full range of motion in her right shoulder. Dr. Ciccone was of the opinion that right shoulder surgery recommended by Dr. Motz is reasonably necessary, but not related to the Claimant's January 19, 2107 work-related injury. Dr. Ciccone stated that despite having full ROM, the Claimant still has decreased function in her right shoulder, evidenced by her inability to write on the white board with her right arm extended away from her body or overhead and her extreme weakness. Dr. Ciccone is not aware of the Claimant having any similar symptoms prior to January 19, 2017. Dr.

Ciccone also testified that even though a person has chronic rotator cuff pathology, it does not mean the person is having shoulder pain or functional limitation and does not mean someone needs treatment. Based on substantial evidence, the ALJ makes a rational decision to accept Dr. Motz's opinion and to reject Dr. Ciccone's opinion on causality.

The Claimant

17. Claimant has worked at the Employer's high school as a mathematics teacher for thirteen years. She teaches algebra and trigometric pre-calculus. On Sunday, January 15, 2017, four days prior to her work-related injury, the Claimant was vacuuming and turned to pick up the vacuum-cleaner to walk up the stairs, lifted it with her right arm, and felt right shoulder pain. She did not hear a pop in her shoulder. Despite what it says in PA Leitch's January 22, 2017 report, Claimant testified that while her shoulder initially hurt, she did, in fact, continue vacuuming. The ALJ finds that PA Leitch's January 22, 2017 report is wrong and that about six weeks later, when the Claimant finally received a copy of the initial medical report, she called the PA who treated her and asked her to change what was in her report, but the PA would not change it. According to the Claimant, her right shoulder hurt but that it did not hurt that bad, and she was not in severe pain on January 15. She did not go to the ER (emergency room) or to a doctor because she did not think it was that bad. Prior to the incident of January 15, the Claimant never had any issues with her right shoulder, including no right shoulder pain or other symptoms and no prior right shoulder treatment. The Claimant returned to work on Monday, January 16, 2017, and worked January 16, 17, 18, and 19, without any issues with her right shoulder. She did not have any issues doing her job, including no issues writing on the white board. She had slight pain in her right shoulder, but nothing like the pain after the incident on January 19, 2017. The Claimant did not have any problems washing her hair or putting on her clothes and did not have any problems with personal hygiene after the January 15, 2017 incident and before the January 19, 2017 incident.

18. On January 19, 2017, the Claimant was outside with hundreds of students assisting with a fire drill. She was leading the students back into the school, and the students were only using one of two doors. When the Claimant approached the doors, only the door on the left was open. She reached out with her right arm to open the door right, pulled on the handle, but the door was locked. She then entered the school through the left door, slightly turned, and reached back with her right arm to push open the door on the right. When she pushed on the bar with her outstretched right arm to open the door, she felt a pop in her right shoulder and instantly had significant, excruciating right shoulder pain. She continued into the building and ran into a student who tried to give her a high five because he did well on a test, and she was not able to do it. When the Claimant returned to her classroom to finish her last class of the day, she could not raise her right arm and had to use her left arm to lift up her right arm. The Claimant demonstrated for the ALJ that after the injury she could not lift her right arm to

40 degrees. In the four days before January 19, 2017 (and after the January 15, 2017 incident), the Claimant did not have any problems lifting her arm or using her arm above her head, other than slight pain. After the January 19, 2017 incident, the Claimant could not raise her right arm up without assistance from her left arm and could not write on the white board. According to the Claimant, the January 19, 2017 incident was the most excruciating pain she has had in years. The Claimant reported the injury to her department chair, Rodney Oosterhouse, and other colleagues immediately after the injury, even before she continued teaching her last class. The Claimant finished her last period, left the school, and drove straight to the ER at Castle Rock Adventist Hospital. She reported both the January 15 and January 19 incidents to the ER physicians and she was referred to an orthopedic surgeon. She reported the injury in writing to the Employer the next morning, January 20, 2017. She went to Concentra, the Emp0loyer's workers' compensation provider, on Sunday, January 22, 2017, and reported the January 15 and January 19 incidents.

19. The Claimant continues to have decreased strength in her right shoulder and is still unable to use her right arm extended away from her body or overhead. When teaching, she is still unable to write on the white board with her arm extended away from her body or overhead. She did not have any problems doing these activities prior to January 19, 2017. The evidence concerning her before and after condition is convincing.

Ultimate Findings

20. The ALJ finds the opinions of Dr. Motz, an authorized treating surgeon, consistent with the Claimant's version of events on January 19, 2017; carefully articulated; and, more persuasive and credible than all other medical opinions to the contrary, for the reasons herein above specified. Further, the ALJ finds the Claimant's testimony credible and persuasive. She felt strongly enough about PA Leitch's erroneous note that the "Claimant stopped vacuuming" on January 15, that the Claimant was insistent that PA Leitch correct the note because the Claimant continued vacuuming. As found herein above, this fact enhances the Claimant's credibility. Otherwise, the Claimant's testimony was straight-forward, credible, and for the most part undisputed.

21. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the causality and other opinions of Dr. Motz, and to reject other medical opinions to the contrary, including the opinion of IME Dr. Ciccone.

22. The ALJ finds that the Claimant has proven, by a preponderance of the evidence that she sustained a compensable aggravation of any underlying chronic and/or degenerative right shoulder condition on January 19, 2017, in the "door" incident, and this arose out of the course and scope of her employment for the Employer herein.

23. The ALJ finds that all of the Claimant's medical care and treatment for her work-related right shoulder injury of January 19, 2017, was authorized because the Claimant went to the Employer-designated medical provider; Concentra; and, it was within the chain of authorized referrals because all referrals, reflected in the evidence, emanated from Concentra, including the referral to Dr. Motz.

24. The ALJ finds that all of the medical care and treatment for the Claimant's compensable right shoulder injury of January 19, 2017, was and is causally related thereto and reasonably necessary to cure and relieve the effects thereof.

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CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, this ALJ makes the following Conclusion of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Apps. Office*, 183 P.3d 784 (Colo. App. 2008); *Kroupa v. Indus. Claim Apps. Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9TH Cir. 1977). The ALJ determines the credibility of witnesses. *Arenas v. Indus. Claim Apps. Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Apps. Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Apps. Office*, 297 p.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lat witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. 131, 134 P. 254 (1913); *also see Heinicke v. Indus Claim Apps. Office*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistently or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke*, 139 Colo. 305, 228 P.2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on

an expert's knowledge, skill, experience, training, and education. *See* § 8-43-210, C.R.S.; *One Hour Cleaners v. Indus. Claim Apps. Office*, 914 P.2d 501 (Colo. App. 1995). As found, *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury*, 62 ALR 2d 1179, maintaining that the fact-finder is not free to disregard un-contradicted testimony. As found, Claimant's testimony and Dr. Motz's opinion are credible, persuasive and convincing.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Pain Connection Plus v. Indus. Claim Apps. Office*, 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Apps. Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Apps. Office*, 131 P.3d 1172 (Colo. App. 2005); *also see Martinez v. Indus. Claim Apps. Office*, 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by substantial evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact-finder to weigh the evidence and resolve contradictions in the evidence. *See Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus Claim Apps. Office*, 224 P.3d 397, 399-400 (Colo. App. 2009). As found, the ALJ made rational choices, based on substantial evidence, to accept the Claimant's testimony and to accept Dr. Motz's causality opinion and recommendation of causally-related surgery; and, to reject Dr. Ramaswamy's, Dr. Ciccone's, and Dr. Bird's opinions.

Compensability

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought. §** 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health* 21 *Laboratories v. Indus. Claim Appeals* Office, 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals* Office, 942 P.2d 1337 (Colo. App. 1997).

Also see § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225334 (ICAO, April 7, 1998). As found, the January 19, 2017 incident permanently aggravated and accelerated the Claimant's underlying asymptomatic right shoulder condition. Therefore, she sustained a compensable injury to her right shoulder on January 19, 2017.

Medical Benefits

d. Because this matter is compensable, Respondent is liable for medical treatment that is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(a), C.R.S.; *Snyder v. Indus. Claim. Apps. Office*, 942 P.2d 1337 (Colo. App. 1997). To be a compensable benefit, medical care and treatment must be causally related to an industrial injury. *Dependable Cleaners v. Vasquez*, 883 P.2d 583 (Colo. App. 1994). As found, the Claimant's need for the right shoulder surgery recommended by Dr. Motz on February 27, 2017, is causally related to the Claimant's January 19, 2017, work-related injury. Additionally, medical treatment must be reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101(1)(a), C.R.S.; *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P.2d 864 (1935); *Sims v. Indus. Claim Apps. Office*, 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's need for the right shoulder surgery recommended by Dr. Motz on February 22, 2017, is reasonably necessary to cure and relieve the effects of Claimant's January 19, 2017 work-related injury.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing his entitlement to benefits. §§ 8-43-201 & 8-43-210, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Apps. Office*, 12 P.3d 844 (Colo. App. 2000); *Lutz v. Indus Claim Apps. Office*, 24 P.3d 29 (Colo. App. 2000); *Kieckkhafer v. Indus. Claim Apps. Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Crowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim. Apps. Office (ICAO), March 20, 2002]; *also see Ortiz v. Principi*, 274 P.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim App. Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained her burden of proving, by a preponderance of the evidence that she sustained a compensable injury on January 19, 2017; and, the right shoulder surgery recommended by Dr. Motz on February 22, 2017, is reasonably necessary to cure and relieve the effects of that injury;, and, causally related to it.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent shall pay all the costs of causally related and reasonably necessary medical care and treatment for the Claimant's compensable right shoulder injury of January 19, 2017, including the right shoulder surgery recommended by Dr. Motz on February 22, 2017, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. Any and all issues not determined herein are reserved for future decision..

DATED this 7 day of September 2017.

/s/ Edwin L. Felter, Jr.
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the Order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the Order, as indicated on the certificate of mailing or service; otherwise, the Judge's Order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the Order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, see § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a Petition to Review at http://www.colorado.gov/dpa/oac/forms-WC.htm.**

ISSUES

I. Whether Claimant is entitled to ongoing Temporary Total Disability payments, beginning November 19, 2015?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed for SkyWest Airlines (Employer) for ten years. Claimant's job title was a ramp agent. On May 16, 2015, Claimant injured both of his shoulders while lifting bags in the bag room and loading them onto a cart.

2. Respondents filed a General Admission of Liability on June 30, 2015, and admitted to medical benefits and temporary total disability benefits (TTD). Respondents' have admitted to TTD benefits only from May 19, 2015 to June 22, 2015.

3. On June 19, 2015, his authorized treating (ATP) physician at Concentra, Dr. Peterson, changed Claimant's temporary work restrictions to no lifting over thirty pounds, no pushing or pulling over sixty pounds, and no reaching above shoulders. (Ex. 4, p. 23). Claimant testified that he returned to work between June 19, 2015 and July 22, 2015. Claimant testified that the only reason he was on light duty is because he talked to his doctor and asked the doctor to raise his restrictions up to thirty pounds. He testified that Employer would not let him work light duty with any restrictions limiting lifting to under thirty pounds.

4. On July 22, 2015, Claimant retired from Employer. This was exactly 10 years from his original date of hire, and the first date he could retire and be eligible for travel benefits. Claimant testified that he retired because he could no longer do his job. Claimant testified that he had eight surgeries in eight years. He testified that this work injury was a bad one and he wasn't able to lift anymore or help people on the ramp.

5. Claimant testified that when he retired from SkyWest he only received flight benefits; in effect, discounted airfares on United Airlines, which are also available to current employees. Claimant testified that he did not have a 401(k) or pension with SkyWest.

6. Claimant testified that he was planning on getting another less physically demanding job after he retired. He has not sought employment since retiring, as he has not reached "full medical improvement" (sic), and does not yet know what work he will be capable of doing moving forward. Claimant testified that he was still going through physical therapy and then he found out he needed surgery on both rotator cuffs.

7. On November 19, 2015, Dr. Wiley Jinkins performed an arthroscopic biceps tenodesis, subacromial decompression, and distal clavicle resection surgery on Claimant's right shoulder. (Ex. 5, p. 108).

8. On November 30, 2015, Claimant was evaluated by ATP Dr. Randall Jones of Concentra (Ex. 4, p. 51-53). Dr. Jones assigned work restrictions of "no work".

9. On December 31, 2015, Dr. Jones continued Claimant's restrictions of "no work". (Ex. 4, pp. 54-56).

10. On March 25, 2016, Dr. Jones assigned Claimant temporary work restrictions of lifting up to ten pounds occasionally, push/pull up to ten pounds occasionally, and no reaching above shoulders with affected extremities. (Ex. 4, pp.58-61).

11. On April 25, 2016, Dr. Jones continued Claimant's temporary work restrictions at lifting up to ten pounds occasionally, push/pull up to ten pounds occasionally, and no reaching above shoulders with affected extremities. (Ex. 4, pp.63-65).

12. On April 28, 2016, Dr. Jinkins performed an arthroscopic subacromial decompression, arthroscopic soft tissue tenodesis, and limited distal clavicle resection surgery on his left shoulder. (Ex. 5, p. 111).

13. On May 23, 2016, Dr. Jones evaluated Claimant. (Ex. 4, pp. 66-69). Dr. Jones assigned temporary work restrictions of lifting up to ten pounds, push/pull up to ten pounds, no reaching above shoulder with affected extremities, unable to use power/impact/vibratory tool with left upper extremity, wear splint/brace on left upper extremity.

14. On June 7, 2016, Claimant was evaluated by Dr. Jinkins. (Ex. 5, p. 115). Dr. Jinkins noted that Claimant was making progress with left shoulder, but was having increased problems with his right shoulder. It was noted that Claimant attributed the increased symptoms in the right shoulder to favoring that shoulder. It was noted that Claimant is "not working and, once again, it will be recalled that [Claimant] "retired" *from his* ***previous*** *job* and *is not planning to return to his* ***same line of work."*** *(emphasis added).*

15. On June 23, 2016, Claimant was once again evaluated by Dr. Jones. (Ex. 4, pp. 72-74). Dr. Jones assigned temporary work restrictions of lifting up to ten pounds occasionally, push/pull up to ten pounds occasionally, no reaching above shoulders with affected extremities, unable to use power/impact/vibratory tool with left upper extremity, wear splint/brace on left upper extremity.

16. On August 2, 2016, Claimant was evaluated by Dr. Jinkins. (Ex. 5, pp. 117-118). Dr. Jinkins noted that he felt that Claimant was "able to work at the present time in a 100% sedentary capacity with no lifting over 2 pounds and nothing over waist high if any such work was available to him."

17. On August 3, 2016, Claimant returned for a follow-up appointment with Dr. Jones. (Ex. 4, pp. 75-78). Dr. Jones notes that Claimant's temporary work restrictions are no lifting over ten pounds occasionally, push/pull up to ten pounds occasionally, no reaching above shoulder with affected extremities, unable to use power/impact/vibratory tool with left upper extremity, wear splint/brace with left upper extremity.

18. On September 7, 2016, Dr. Jones again examined Claimant. (Ex. 4, pp. 80-83). Dr. Jones assigned Claimant temporary work restrictions of no lifting over twenty pounds occasionally, push/pull up to twenty pounds occasionally, no reaching above shoulder with affected extremities, unable to use power/impact/vibratory tool with left upper extremity, wear splint/brace with left upper extremity constantly.

19. On October 7, 2016, Dr. Jones examined Claimant. (Ex. 4, pp. 85-88). Dr. Jones continued Claimant's temporary work restrictions which had been assigned during the September 7, 2016 visit.

20. On December 21, 2016, Claimant was evaluated by Dr. Jinkins. (Ex. 5, pp. 119-120). Dr. Jinkins recommended repeat right and left rotator cuff repair surgeries.

21. On December 29, 2016, Dr. Jones examined Claimant. (Ex. 4, pp. 92-93). Dr. Jones continued Claimant's temporary work restrictions.

22. On February 9, 2017, Dr. Jones examined Claimant. (Ex. 4, pp. 94- 98). Dr. Jones continued Claimant's temporary work restrictions.

23. On February 16, 2017, Claimant underwent a right rotator cuff repair, open subacromial decompression/acromioplasty surgery. (Ex. 5, p. 121). The surgery was performed by Dr. Jinkins.

24. On March 9, 2017, Claimant was examined by Dr. Peterson. (Ex. 4, pp. 99-103). Dr. Peterson assigned Claimant temporary work restrictions of lifting up to twenty pounds occasionally, push/pull up to twenty pounds occasionally, no reaching above shoulders, unable to use power/impact/vibratory tool with left and right upper extremity, wear sling on right upper extremity constantly, no use of right upper extremity.

25. On May 10, 2017, Dr. Peterson examined Claimant. (Ex. 4, pp. 104-107). Dr. Peterson changed Claimant's temporary work restrictions to lifting up to five pounds occasionally, push/pull up to five pounds occasionally, no reaching above shoulders with affected extremities, unable to use power/impact/vibratory tool with right and left upper extremities. During this visit, Dr. Peterson noted that

Claimant was thinking about retiring *from his job* in July. (Ex. B, p. 12)(emphasis added).

26. On May 15, 2017, Claimant underwent a left repeat acromioplasty, rotator cuff repair, and release of the coracoacromial ligament. (Ex. 5, p. 124).

27. At hearing, Claimant testified that he was not able to return to employment after any of the four surgeries that he had for his right and left shoulder. Claimant testified that his restrictions changed right after having the first surgery on November 19, 2015. Claimant testified that to his understanding, his current work restrictions are 'no lifting over twenty pounds'.

28. Claimant testified that he has not received any form of income since he stopped working for Employer. Claimant testified that he suffered wage loss due to not being able to work. Claimant testified that at the time that he left Employer he did not foresee that he was going to need four surgeries.

29. Claimant testified that he wasn't sure he was going to retire before the injury occurred on May 16, 2015, but he was contemplating retiring before the injury occurred, due to having sustained several work injuries at this job. He stated he was just unable to continue this line of work. He was hoping to find something less physically demanding, like Bass Pro, but even then he was concerned about his ability to meet their lifting requirements.

30. At hearing, Brenda Fage testified at Respondents' request. Ms. Fage testified that she is a workers' comp analyst for Employer. Ms. Fage testified that she very closely tracks workers' comp claims that occur at Employer. Ms. Fage testified that Employer does not offer any pension benefits. She testified that Employer offers a travel benefit which is based on seniority. She testified that the travel benefit means that the retired employee can have access to flying on a reduced cost through United Airlines. She testified that active employees get the travel benefit as well.

31. Ms. Fage testified regarding Employer's return to work policy after work injuries. She testified that:

> When an injured employee has an injury, and they are given restrictions from the medical provider, if those restrictions are something that can be accommodated at the current station where they are working, they are able to come back to modified duty on a transitional work agreement for 90 days.

32. Ms. Fage testified that employees are allowed to work for 90 days during the transitional work agreement. She testified that after a surgery the transitional work agreement is effectively reset, and a new 90 day period starts. She testified that after the 90 days is up, the employee is taken off work until the restrictions are full duty release. The Transitional Work Assignment did not have to be in the same line of work that the injured worker was performing before being injured.

33. Ms. Fage testified that once a SkyWest employee decided to retire, they would notify their current manager. The manager would start the process with SkyWest headquarters to get the retirement packet to apply for retirement. The entire process takes approximately one week to complete.

34. Ms. Fage testified that if Claimant was still working for Employer currently she would have approached his manager to see if he could have accommodated Claimant's restrictions. Claimant's status upon leaving Skywest was that he was "eligible for rehire".

35. The ALJ finds both Claimant and Ms. Fage to be credible and sincere in their respective testimony. There are no significant conflicts which must be resolved.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a witness. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, both witnesses are credible. The conclusions to draw are based on legal principles, instead of credibility.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Temporary Total Disability

D. To receive temporary disability benefits, the claimant must prove the injury caused the disability. Section 8-42-103 (1), C.R.S. 2001; PDM Molding, Inc. v. Stanberg, 898 P. 2d 542 (Colo. 1995). As stated in PDM, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P. 2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with §8-42-105(3)(a)-(d), C.R.S. 2001. Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. Jorge Saenz Rico v. Yellow Transportation, Inc. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office,* 942 P. 2d 1209 (Colo. App. 1996).

E. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury or disease caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P. 2d 542 (Colo. 1995). The term disability connotes two elements: (1) Medical incapacity evidences by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric,* 971 P. 2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Murphy,* 964 P. 2d (Colo. App. 1998).

Voluntary Separation

F. Where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury. In *Colorado Springs Disposal v. Industrial Claim appeals Office,* 58 P. 3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of fault. In this context fault requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Padilla v. Digital Equipment Corp.,* 902 P. 2d 414 (Colo. App. 1995) *opinion after remand* 908 P. 2d 1185 (Colo. App. 1985). That determination must be based upon an examination of the totality of circumstances. *Id.*

The burden to show that the claimant was responsible for her discharge is on the respondents. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 18 P. 3d 790 (Colo. App. 2000).

G. In this case, Claimant voluntarily retired from Employer on July 22, 2015. The question is whether or not Claimant's condition worsened due to natural progression of the industrial injury that occurred while Claimant worked for Employer. In *Anderson v. Longmont Toyota*, the Colorado Supreme Court held that "Section 8-42-2015(4) bars TTD wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury incurred during the employment causes the wage loss." *Anderson v. Longmont Toyota*, 102 P. 3d 323 (Colo. Sup. 2004).

H. In *Anderson*, the Colorado Supreme Court agreed with the ICAO's conclusion on two separate cases, *Anderson* and *Krause*, that:

> [A] worsened condition rendered [Anderson] unable to perform the job. Similarly, after he left the modified employment, [Krause] experienced a worsening of condition that required surgery and prevented him from returning to work. In both situations, because the worsened condition and not the termination of employment caused the wage losses, the ICAO concluded that the claimants were entitled to TTD benefits.
> *Id*. at 331.

I. Claimant retired from Employer on July 22, 2015. The only benefit that he received when he retired was flight benefits. He did not receive a 401(k) or pension. He testified that he intended to return to some type of employment in the future, but wanted to work in an area that was less physically demanding. He did not foresee that he was going to have to undergo four surgeries at the time that he retired from Employer. The initial surgery on November 19, 2015 rendered Claimant unable to work. Like the Claimants in *Anderson*, the worsened condition of surgeries has prevented Claimant from returning to work, and it still does.

J. In *Grisbaum v. Industrial Claim Appeals*, in June 2001 the claimant suffered a compensable injury and continued to work with no restrictions. *Grisbaum v. Industrial Claim Appeals Office, 109 P.3d 1054*. In January 2002 the claimant voluntarily resigned from his employment while still under treatment for the work-related injury. In March 2002 the claimant was restricted to light duty because his condition was worsening. In May 2002, the claimant was taken off work completely. In September 2002 and November 2002 the claimant underwent surgeries. The Court of Appeals held that "[b]ecause the ALJ found that the *industrial injury* caused claimant's inability to work beginning in May 2002, we conclude claimant is entitled to an award of TTD benefits even though his resignation was voluntary."

K. Like the Claimant in *Grisbaum*, Claimant voluntarily retired. Afterwards, Claimant's condition worsened and required four surgeries. He was unable to work as of November 19, 2015. He has not been able to return to work due to the repeated surgeries. All four surgeries are related to the work injury. Therefore, the ALJ finds that the industrial injury caused Claimant's inability to work beginning on November 19, 2015 and Claimant is entitled to TTD benefits even though his original resignation for Skywest was voluntary. The ALJ does not adopt Respondent's argument that the "very definition of retirement is to leave one's job and cease working [altogether]." Thousands of individuals 'retire' after 20 years in the military, then seek work in civilian capacity. Such persons never intend to cease working altogether. Others 'retire' from professional sports, but then seek different work better suited to their physical abilities. Claimant was 56 years old when he retired from Skywest. He did not retire from the workforce; he retired from Skywest. Claimant then wanted something better suited to his declining physical abilities. Something like Bass Pro.

Offered Work Restrictions/Worsening of Condition

L. Respondents argue that Claimant should not be entitled to TTD benefits, because Employer would have accommodated his restrictions had he not retired. Ms. Fage's testified that Employer will only accommodate injured workers' work restrictions for 90 days. Afterwards, the injured worker would remain out of work until released to full duty work. She testified that there is a "reset" button of 90 days after a surgery. Claimant was out of work on restrictions for more than 90 days between surgeries. Had Claimant not retired the initial 90 day period would have expired at the end of September, 2015. Claimant's first surgery was on November 19, 2015. Therefore, Claimant would have been off work completely; thus entitled to TTD benefits before the surgery took place on November 19, 2015. Even if Claimant continued to work for SkyWest, he would be entitled to TTD benefits for a period of time between each surgery. Claimant would be entitled to ongoing TTD benefits, as he is still on work restrictions, and it has been more than 90 days since his last surgery.

M. Respondents argue that Employer would have been able to accommodate Claimant's work restrictions had he still been employed for Employer. Ms. Fage testified that if Claimant had still been employed by Employer, she would have contact the manager in his department to inquire about modified work within Claimant's restrictions. She did not testify that she actually contacted Claimant's manager and asked about modified work. In the past, this has not always been the case with other injuries. While she credibly testified that she believed that there likely would have been modified work available for Claimant, her testimony regarding accommodated work within Claimant's restrictions during this time period is based on speculation.

N. The preponderance of the evidence has established that Claimant suffered a worsening of condition requiring him to remain off work beginning on November 19, 2015. Claimant suffered a worsening of condition each time he underwent the four surgeries on his right and left shoulders. Therefore, regardless of what might have

been offered as temporary work restrictions, Claimant is entitled to ongoing TTD benefits beginning on November 19, 2015.

ORDER

It is therefore ordered that:

1. Claimant is entitled to ongoing Temporary Total Disability benefits, beginning on November 19, 2015.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 11, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-505-378-04

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS ON STATUTE OF LIMITATIONS

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

,

Employer,

and

Insured Respondent.

A hearing on the merits is scheduled for November 17, 2017, in Greeley, Colorado. A status conference is scheduled for November 15, 2017.

The matter was assigned to Edwin L. Felter, Jr., Administrative Law Judge (ALJ) for decision on the Respondent's Motion for Summary Judgment, filed on August 22, 2017, and the Claimant's Objection thereto, filed on August 24, 2017. Both matters were deemed submitted for decision on August 29, 2017.

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Hereinafter shall be referred to as the "Claimant." shall be referred to as the "Employer." All other parties shall be referred to by name.

Respondents' Exhibits A and B were attached to the Motion for Summary Judgment. There were no attachments to the Claimant's Objection to Respondent's Motion for Summary Judgment.

ISSUE FOR SUMMARY JUDGMENT

The issue to be determined by this decision concerns whether there is a genuine issue of disputed material fact concerning whether the Claimant's claim for post maximum medical improvement (MMI) medical benefits [*Grover* medical benefits] is barred by the statute of limitations.

The Respondents bear the burden of proof, by a preponderance of the evidence of establishing that there is no genuine issue of disputed material fact concerning the Statute of Limitations. The Claimant bears the burden, by preponderant evidence of establishing that there is a genuine issue of disputed material fact concerning whether the statute of limitations was tolled.

FINDINGS OF FACT

Based on the undisputed evidence contained in the file, pleadings and exhibits, the ALJ makes the following Findings of Fact:

Preliminary Findings/Posture

1. The Claimant was employed by the Respondent and sustained a hearing loss with a date of injury of May 31, 2001.

2. The Claimant's claim was admitted and Respondent paid medical benefits and permanent partial disability (PPD) benefits to the Claimant.

3. Respondent filed a Final Admission of Liability (FAL) on December 2, 2002, admitting for a 2.8% binaural hearing loss and denying post-MMI medical maintenance benefits.

4. Respondent filed an Amended FAL, dated July 5, 2005, which also denied post-MMI medical maintenance benefits.

5. Despite the denial of post-MMI medical maintenance benefits, the Respondent paid some additional medical benefits to Claimant, including some maintenance supplies for the Claimant's hearing aids. The last medical benefits paid were in 2016.

6. The Claimant filed **no** timely Objections to either FAL, nor did he file an Application for Hearing in 2002 or in 2005.

Findings/Statute of Limitations

7. The Claimant filed an Application for Hearing on July 25, 2017, on issues of reasonably necessary medical benefits and "admitted *Grover* medical benefits."

8. The Claimant recently requested additional medical benefits for his hearing loss claim/hearing aids, which was denied, based on the Respondent's position that any further claim for medical benefits is barred by the statute of limitations.

9. Under § 8-43-303(1), C.R.S., at any time within six years after the date of injury, the ALJ may reopen a claim. § 8-43-303(2)(b) provides that, at any time within two years after the date the last medical benefits become due and payable, the ALJ may reopen the claim only as to medical benefits.

10. There is no argument that this claim was closed by FALs, which denied post-MMI medical maintenance care.

11. It is undisputed that the Claimant has not filed a Petition to Reopen.

12. The Claimant's Application for Hearing, dated July 25, 2017, alleges entitlement to "*Grover* medical benefits" based upon the proposition that medical maintenance benefits are still open because the Respondent paid some additional medical benefits after the denials of post-MMI medical maintenance benefits in the FALs. The Claimant's implied theory is that the Respondent. Has subsequently waived its former denials or, in the alternative, is stopped from persisting in the Respondent's denials of post-MMI medical maintenance benefits by virtue of paying the benefits after the statute of limitations has run,

13. At the time the Claimant reported his work-related injury, the Employer had no notice of a "lost time" injury or a permanently disabling injury.

Tolling of Statute of Limitations

14. In his Objection, the Claimant does **not** allege that the statute of limitations was tolled in any way.

15. The ALJ infers and finds that above-referenced claim was not a "lost-time" claim. Indeed, the Claimant in his Objection makes no showing of a "lost-time' injury or a failure of the Respondent to file an Employer's First Report of Injury, which could affect a tolling of the statute of limitations.

16. The ALJ infers and finds that the Respondent admitted and paid the Claimant's medical benefits until the admitted date of MMI, December 9, 2002; and, the respondent paid some additional medical benefits to the Claimant after its denial of post-MMI medical maintenance benefits. The ALJ infers and finds that these subsequent payments were voluntary and gratuitous and did not amount to a voluntary re-opening of the Claimant's case.

Ultimate Findings

17. The totality of the pleadings and evidence establishes, by preponderant evidence that there is no genuine issue of disputed material fact concerning whether or not the statute of limitations has run on post-MMI medical maintenance benefits..

18. There is no evidence that the statute of limitations was tolled because of legal tolling provisions. Moreover, the Claimant argues that the statute was tolled because the Respondent paid additional post-MMI medical maintenance benefits after the finality of the FALs. As found, there was **no** voluntary re-opening by the Respondent by virtue of the fact that it voluntarily and gratuitously paid some additional medical benefits after the finality of the FALs, denying post-MMI medical maintenance benefits.

19. The ALJ finds that any claims for additional post-MMI medical maintenance benefits are barred by the relevant statutes of limitations,

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Summary Judgment

a. Pursuant to Office of Administrative Courts Rules of Procedure (OACP) Rule 17, 1 CCR 1101-3, "any party may file a motion for summary judgment seeking resolution of any endorsed issue for hearing." Summary judgment may be sought in a workers' compensation proceeding. *See Fera v. Indus. Claim Appeals Office,* 169 P.3d 231, 232 (Colo. App. 2007). The OAC Rule allows a party to support its Motion with affidavits, transcripts of testimony, medical reports, or employer records. A motion for summary judgment may be supported by pleadings, depositions, answers to interrogatories, and admissions on file. C.R.C.P. 56; *See also Nova v. Indus. Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988) [C.R.C.P. and C.R.E. apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act]. As found, the FALS were attached to the Motion for Summary Judgment. There were **no** attachments to the Claimant's Objection.

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b. Pursuant to Office of Administrative Courts (OACRP), Rule 17, 1 CCR 104-1, summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. As found, there are **no** genuine issues of disputed material fact concerning the applicability of the relevant statutes of limitations; and, the tolling of the statute of limitations.

Tolling of Statute of Limitations

c. The workers' compensation statute of limitations begins to run when an injured worker, as a reasonable person, recognizes the nature, seriousness and probable compensable nature of the injury, *City of Boulder v. Payne,* 162 Colo. 345, 426 P.2d 194 (1967). When a worker recognizes the compensable nature of the injury is a fact question, which must be resolved as the result of an evidentiary hearing. *Richmond v. Indus. Comm'n,* 33 Colo. App. 21, 513 P.2d 1088 (1973). As found, the relevant statutes of limitations were **not** tolled by any relevant tolling principles.

d. As found, the Claimant filed an Application for Hearing on the issue of entitlement to additional medical maintenance benefits. He did not file a Petition to Re-open. If he had filed a Petition to Reopen, it would be barred by the statute of limitations. § 8-43-303(1), C.R.S., provides that within six years after the date of injury any "award" may be reopened on the grounds of change of condition. § 8-43-303(2)(b) provides that within two years after the date the last medical benefit becomes due and payable, the ALJ "may reopen an award only as to medical benefits" based on change of condition.

e. § 8-43-103(2), C.R.S., states in part that "the payment of medical care cannot be considered payment of compensation or medical benefits." See also *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

f. In *Arneson v. Kimzey Casing Service, Inc.,* W.C. No. 4-201-940 [Indus. Claim Appeals Office (ICAO), June 6, 1996], ICAO determined that respondents might pay for medical examinations and treatment after claim closure in an effort to discover whether claimant's condition has worsened sufficiently to reopen the claim. ICAO, in *Richard Dowrey v. Hilton Hotel,* W.C. No. 3-114-127 (ICAO, November 19, 2003), reiterated that respondents' action in paying for medical treatment after closure of the claim did not constitute a waiver of the right to require the claimant to prove the statutory grounds for re-opening when the claimant sought an order requiring respondents to pay for treatment. The Claimant herein is arguing that Respondent's voluntary payment of medical benefits means that the Respondent waived its right under the Act and voluntarily "reopened" the case. Both case law and the Act contra-indicate this argument. Voluntary payment of medical benefits by the Respondent does not reopen the claim or vitiate the Claimant's duty to file a Petition to Reopen. See also *Snyder v. Indust. Claim Appeals Office, supra*; *Rodolfo Morin v. ACE Hardware and*

Fidelity & Guaranty Insurance Co., W.C. No. 4-906-748-04 (ICAO, May 6, 2014). Under the statute, payments made for treatment are not considered an admissions of liability and do not waive the jurisdictional requirement to file a Petition to Reopen to obtain additional medical benefits.

Genuine Issues of Disputed Material Fact

g. Summary judgment is appropriate when the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). This rule allows the parties to pierce the formal allegation of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. See *Drake v. Tyner*, 914 P.2d 519 (Colo. App. 1996). As found, there are **no** genuine issues of disputed material fact concerning the applicability of the statute of limitations or the tolling thereof.

h. Once the moving party shows specific facts probative of a right to judgment, it becomes necessary for the non-moving party to set forth facts showing that there is a genuine issue for hearing. *See Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980). As found, The Respondent's Motion and attachments show that they have a right to summary judgment. The Claimant's Objection fails to counter with an averment that there are any genuine issues of disputed material fact concerning the tolling of the relevant statutes of limitation.

i. There are exceptions to the two-year statute of limitations under § 8-43-103(2), but they do not apply in this case. For instance, § 8-43-103(2), C.R.S., provides: "In all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of [the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee … until the required report has been filed with the division. *Likens v. Dep't of Corrs*, W.C. No. 4-560-107 (ICAO Feb. 10, 2004). This applies to alleged "lost time" or "permanently disabling injuries of which an employer has notice. As found, the Employer had **no** notice of "lost time' injuries in either W.C. No. 5-025-140-01 or W.C. No. 5-025-409-02.

j. Finally, § 8-43-103(2), C.R.S., indicates that the statute of limitations will not apply to a claimant "if it is established to the satisfaction of the director within three years after the injury…that a reasonable excuse exists for the failure to file such notice claiming compensation and if the employer's rights have not been prejudiced.'" As found, the Claimant's claims were filed more than three years after he, as a reasonable person, knew or should have known, of the serious and probable compensable nature of his claims to post-MMI medical maintenance care.

k. There was **no** tolling of the statute of limitations due to any failure to report the injury on the part of Employer. § 8-43-102(2), C.R.S., provides that the statute of limitations is tolled where an employer does not "report said injury to the division as required by the provisions of [the Workers' Compensation Act]." Thus, where no report was required to be filed, the statute of limitations is not tolled. As found, the Employer herein did not know of a claimed "lost time" injury until September 7, 2016 or thereafter, a time beyond the relevant statutes of limitation.

l. The statutory reporting requirements are set out in § 8-43-101, C.R.S. *See Grant v. Indus. Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). § 8-43-101(1), C.R.S., requires that the within ten days after notice of knowledge that an employee had contracted a permanently physically impairing injury or lost-time injury, the employer shall file a report with the division. *Pierce-Kouyate v. Wilson's of Colo. Ltd.*, W.C. No. 4-717-784 (ICAO Nov. 21, 2007). A "lost time injury" is defined as one that causes the claimant to miss more than three work shifts or three calendar days of work, and the employer's notice is measured by the "reasonably conscientious manager" standard. *Grant,* 740 P.2d at 531. There is no requirement to file a First Report of Injury, however, where the employer has no notice or knowledge that a claimant had a lost-time injury or permanent physical impairment. *Pierce-Kouyate v. Wilson's of Colo. Ltd., supra.* The claimant bears the burden of establishing the tolling of the statute of limitations. Regardless, there was no persuasive evidence of the tolling of the Statute of Limitations. *Grant*, 740 P.2d at 532. As found, the Claimant failed to prove that there was a tolling of the statute of Limitations.

Burden of Proof

m. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). That burden is "preponderance of the evidence." A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). As found, the Respondent satisfied its burden of proof that there is **no** genuine issue of disputed material fact concerning the applicability of the relevant statutes of limitations. The Claimant failed to satisfy his burden on the alleged "tolling" of, or waiver of the relevant statutes of limitations.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Respondent's Motion for Summary Judgment is hereby granted.

B. Any and all claims for post-maximum medical improvement maintenance benefits are hereby denied and dismissed.

C. The hearing of November 17, 2017 is hereby vacated.

DATED this 11 day of September 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203**.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. (as amended, SB 09-070). For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

CERTIFICATE OF SERVICE

I hereby certify that I have sent true and correct copies of the foregoing **Full Findings of Fact, Conclusions of Law and Order Granting Summary Judgment in Favor of Respondents** on this_____day of September 2017, electronically in PDF format, addressed to:

Tama L. Levine, Esq.
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_____
Court Clerk

Wc.roberts.vernon.sjord

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with employer.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received following the injury was reasonable and necessary to cure and relieve claimant from the effects of the work injury.

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received following the injury was authorized medical treatment.

- If claimant has proven a compensable injury, what is claimant's average weekly wage (AWW)?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

- Whether claimant has proven by a preponderance of the evidence that he is entitled to a 50% increase in any indemnity benefits, pursuant to Section 8-43-408(1), C.R.S., for employer's failure to maintain workers' compensation insurance.

FINDINGS OF FACT

1. In 2016, employer operated a trucking company in Commerce City, Colorado. Ms. Moran testified that the employer's company is incorporated in Colorado. Claimant traveled to Colorado to complete employment paperwork when he was hired by employer.

2. Claimant was employed by employer as a truck driver. Claimant's job duties included picking up and delivering loads. Employer assigned these specific loads to claimant. During his employment, claimant was paid $1,600.00 per week.

3. On September 1, 2016, claimant was driving one of employer's trucks in Arizona when he was involved in a serious motor vehicle accident. It is undisputed that at the time of the accident claimant was operating employer's vehicle at the direction of employer. It is undisputed that the cause of the accident is unknown.

4. Based upon the law enforcement reports entered into evidence, claimant was unconscious at the scene of the accident and flown to Lake Havasu Regional Medical Center. Claimant was then flown to Abrazo West Valley Hospital and admitted with severe injuries including "a brain bleed and a cervical fracture". Claimant remained in a coma for a period of time. Employer was aware that claimant was involved in the September 1, 2016 motor vehicle accident. Ms. Moran testified that she remained in constant communication with claimant's spouse regarding claimant's condition. Claimant has not returned to work since the September 1, 2016 accident.

5. Respondent agrees that the medical treatment claimant received following the September 1, 2016 accident was reasonable and necessary medical treatment. At the hearing, claimant submitted evidence of a total of $3,793.17 in unpaid medical bills.

6. The ALJ credits the evidence presented at hearing and finds that claimant has demonstrated that it is more likely than not that he suffered a compensable injury on September 1, 2016 arising out of and in the course and scope of his employment with employer.

7. Based upon the evidence entered at hearing, the ALJ finds that employer did not have workers' compensation insurance at the time of claimant's injury on September 1, 2016. The ALJ credits the evidence presented and finds that claimant has demonstrated that it is more likely than not that employer was subject to the Colorado Workers' Compensation Act at the time of claimant's work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., (2016). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2016).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

4. As found, claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course and scope of his employment with employer when he was involved in a motor vehicle accident while operating the employer's vehicle on September 1, 2016.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, it is undisputed that the medical treatment claimant received following the September 1, 2016 work injury was reasonable and necessary to cure and relieve claimant from the effects of the injury. Therefore, the ALJ concludes that claimant has demonstrated by a preponderance of the evidence that medical treatment he received following the work injury was reasonable, necessary, and related to that injury.

7. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

8. As found, claimant received medical care on an emergent basis following the September 1, 2016 work injury. As found, employer was aware of claimant's medical condition following the injury. The ALJ concludes that claimant has proven by a

preponderance of the evidence that the medical treatment he received following the September 1, 2016 injury was authorized medical treatment.

9. To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

10. As found, claimant has not worked since the September 1, 2016 work injury. The ALJ concludes that claimant's compensable injury resulted in claimant's inability to work. Therefore, claimant has demonstrated by a preponderance of the evidence that he is entitled to TTD benefits beginning September 1, 2016, and ongoing until terminated by law.

11. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

12. Based upon the evidence, the ALJ concludes that claimant's AWW is $1,600.00.

13. Section 8-43-408(1) C.R.S., provides that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits provided in said articles shall be increased fifty percent.

14. As found, claimant has proven by a preponderance of the evidence that employer was not insured for workers' compensation at the time of his injury. As found, claimant's compensation and benefits shall be increased by fifty percent pursuant to Section 8-43-408(1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury on September 1, 2016 while employed with employer.

2. Respondent shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the September 1, 2016 work injury.

3. Respondent is liable for payment of TTD benefits beginning on September 1, 2016, and ongoing until terminated by law.

4. Claimant's TTD benefits shall be calculated using an average weekly wage of $1,600.00.

5. Claimant is entitled to a 50% increase to benefits and compensation because of employer's failure to carry workers' compensation insurance, pursuant to Section 8-42-408(1), C.R.S.

6. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

8. In lieu of payment of the above compensation and benefits to the claimant, the Respondent-Employer shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $57,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee;

OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $57,000.00 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

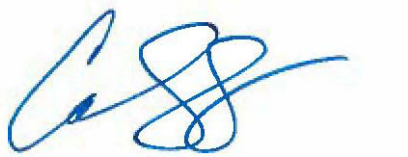
The bond shall guarantee payment of the compensation and benefits awarded.

It is further ordered that the Respondent-Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

It is further ordered that the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: September 12, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, CO 81501

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-935-211-03

ISSUE

- Whether Respondents have met their burden of proving by a preponderance of the evidence that previously admitted medical maintenance benefits are not causally related to the occupational injury that occurred on November 15, 2013.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant is a teacher for the Cherry Creek School District.

2. On November 15, 2013, Claimant suffered a compensable injury when she stumbled to the ground after a student suddenly opened a door knocking Claimant backward.

3. Prior to the injury, Claimant had suffered prior back and head injuries related to horseback riding and motor vehicle accidents, and had a long history of depression.

4. On July 14, 2014, the initial ATP, Dr. Rashbacher, discharged Claimant from care at MMI with no work restrictions and no impairment. At discharge, Dr. Raschbacher noted that Claimant "is working with horses extensively," and that he was "medically not well able to explain" her ongoing arm symptoms "but that in any event, no further treatment or intervention would likely be necessary." Dr. Raschbacher did recommend continuing with the anti-depressant Citalopram on a regular basis for a couple of months and maintenance follow-ups with Rebecca Hawkins, Ph.D.

5. On January 6, 2015, a Division Independent Medical Examiner, John Sacha, M.D., evaluated Claimant and found Claimant was not at MMI, stating that "I do not find significant evidence of a closed-head injury at this point," but suspecting a cervical facet syndrome.

6. After the initial DIME, ATP Alisa Koval, M.D, provided additional treatment. On September 8, 2015, Dr. Koval placed Claimant at MMI and returned Claimant to full duty with no work restrictions. At that point, Dr. Koval recommended as maintenance care massage therapy, medications, specialist follow-ups, chiropractic care and use of supplements.

7. On October 14, 2015, DIME physician, John Sacha, M.D., placed Claimant at MMI with no work restrictions and released her to full duty. Dr. Sacha diagnosed cervical facet syndrome, adjustment disorder versus reactive depression, and possible history of a concussion.

8. Dr. Sacha recommended ongoing maintenance care "over the next one to two years." Dr. Sacha's recommendations for maintenance medical care also included chiropractic care and use of medications, and added acupuncture and a gym membership. Dr. Sacha, however, disagreed with the use of supplements for maintenance.

9. Post MMI, Claimant received ongoing medical maintenance directed by Dr. Koval. Maintenance treatment included psychiatric care from Steven Dworetsky, M.D., psychological counseling from Glenn M. Kaplan, Ph.D., and Lawrence Haburchak, Psy.D., and specialist care for Claimant's alleged mild traumatic brain injury from Susan Ladley, M.D. Claimant additionally received chiropractic care and massage therapy.

10. On November 10, 2015, at the first maintenance visit, Dr. Koval recommended massage therapy, chiropractic care, and continued to manage Claimant's medications.

11. Dr. Koval continued this maintenance regimen, and by April 4, 2016, added a trial of psychotherapy with Glenn Kaplan, Ph.D.

12. As of June 7, 2016, Dr. Koval's maintenance plan no longer included referrals for chiropractic care.

13. On August 3, 2016, Dr. Koval added a referral to Susan Ladley, M.D., for evaluation in addition to continuing massage therapy and psychotherapy with Dr. Kaplan, who in July had concluded that Claimant was ready for discharge planning.

14. Claimant, apparently not accepting Dr. Kaplan's recommendations, self-referred to Lawrence Haburchak, Psy.D., a rehab psychologist regarding her panic symptoms Dr. Koval expanded Claimant's maintenance referral to include treatment with Dr. Haburchak, and added Steven Dworetsky, M.D., for medication management. Insurer authorized maintenance treatment with both Dr. Haburchak and Dr. Dworetsky

15. Additionally, Claimant began receiving maintenance treatment from Dr. Ladley in August of 2016. Thus, after being placed at MMI, Claimant's maintenance treatment expanded to include four new medical professionals: Dr. Kaplan, Dr. Ladley, Dr. Haburchak, and Dr. Dworetsky.

16. By December 20, 2016, Dr. Koval recognized that Claimant's physical complaints (primarily, chronic neck pain and headaches) were well controlled, and she continued to struggle with mental health issues. Dr. Koval noted that Claimant "is very close to reaching the baseline at which she lived prior to the incident, and I am optimistic that with continued psychotherapy and medication management she will get there."

17. In February 2017, Dr. Koval recommended Claimant follow-up with Dr. Haburchak for therapy and with Dr. Dworetsky for continued medication management.

18. On February 27, 2017, Dr. Ladley discharged Claimant from her care, noting that her services are no longer required and focus wwould be with psych specialists.

19. On May 5, 2017, Dr. Koval noted that Claimant's chronic neck pain was "well-controlled" and that the "symptoms of anxiety & claustrophobia, [are] also well-controlled by her maintenance regimen per Dr. Dworetsky." Claimant continued to work full duty. Dr. Koval assessment as of May, 2017 included intractable pain in the cervical region and an anxiety disorder. Dr. Koval's only recommended treatment plan was to follow-up with Dr. Dworetsky for medication management.

20. On December 13, 2016, Robert Kelinman, M.D., conducted a psychiatric independent medical examination of Claimant. In addition to the examination, Dr. Kleinman obtained a medical history from the Claimant, and completed a comprehensive review and summary of Claimant's medical records. Dr. Kelinman's report is dated December 18, 2016.

21. Dr. Kleinman noted in his report and testified at hearing that Claimant provided an inaccurate psychiatric history when she claimed not having depression before 2010 or any treatment for depression before 2010.

22. Persuasive medical record show that Claimant was taking the anti-depressant Citalopram in December, 2008, for a prior episode of depression. Claimant continued taking anti-depressant medications throughout medical encounters on April 8, 2009, May 4, 2009, and July 1, 2009 at which time Bupropion was added. This anti-depressant medication continues on September 25, 2009, November 17, 2009, February 22, 2010, and July 15, 2010. Medical records from July 2010 indicate that Claimant's Citalopram dosage Claimant was increased from 20 mg to 40 mg. Also of note, this medical appointment was to evaluation Claimant's post-concussion syndrome after falling off a horse and hitting a fence post with her head.

23. By August 23, 2010, Claimant carried a diagnosis of chronic depression. And, shortly after Claimant's July 2010 head injury, Claimant ran her truck into a ditch while not wearing a seat belt and hit her head again. Her symptoms after this MVA included memory problems, an inability to remember names, difficulty following tasks, and word finding. Claimant later attributed these symptoms to the work-related injury.

24. September 3, 2010 medical records noted Claimant was continuing to take anti-depressant medications. In November 2010, two of Claimant's grandparents passed away. She experienced other psychological stressors including a medical bill incurred when her dog was kicked by a horse, her husband's unemployment, and a bankruptcy filing. Claimant continued on the same anti-depressant medication regimen. At that time, Claimant's symptoms included lack of sleep, feeling overwhelmed, anxiety, depression and improving memory loss.

25. In April 2011, Claimant reported severe depression and continued on the anti-depressants. Claimant's records do not indicate whether or when Claimant

discontinued with anti-depressant medication. However, on April 25, 2013, seven months before her work-related injury, Claimant's "Patient Active Problem List" included "DEPRESSSION."

26. Dr. Kleinman opined that Claimant's underreporting of her history of depression would lead medical providers and examiners to underestimate her history of depression, which would in turn affect their ability to correctly diagnose and treat Claimant.

27. The ALJ finds that Claimant's report of the injury and immediate aftermath varied and were not consistent with her hearing testimony. Specifically, her initial reports did not include any head trauma but later Claimant reported not only head trauma but also loss of consciousness. Objective medical testing for a head injury was read as normal. Claimant initially reported falling onto her bottom but later reported "flying across the hallway," and "landing fifteen feet away." Dr. Kleinman opined Claimant's inaccurate history of the injury led to the "pursuit of a neurocognitive disorder [that] has delayed her recovery and likely created an iatrogenic element." Dr. Kleinman's opinion is consistent with the evaluations of two neuropsychologists: Suzanne Kenneally, Psy.D., and Rebecca Hawkins, Ph.D., who both assessed at worst an "uncomplicated concussion."

28. On March 27, 2014, Dr. Kenneally evaluated Claimant and concluded that Claimant experienced a simple, uncomplicated concussion. Dr. Kenneally diagnosed Claimant with a Major Depressive Disorder with Anxious Distress, Moderate. Claimant under reported her history of depression to Dr. Kenneally, stating only that "she saw a psychotherapist for two to three sessions" after the death of her grandparents. According to Dr. Kenneally's evaluation and valid testing: "[Claimant's] MCMI-III profile indicated that her depression may be long standing in nature, predating the 11/15/2013 workplace injury."

29. Dr. Hawkins found the same confounding pre-existing history. Claimant reported to Dr. Hawkins a history of "one prior depressive episode that lasted approximately one year." However, testing indicated "an almost total absence of psychological dysfunction" on the "Self-Disclosure" testing, leading Dr. Hawkins to note that Claimant's reporting should be questioned. Dr. Hawkins assessed "very mild, intermittent symptoms of depression in addition to isolated symptoms of anxiety," but noted that that although a diagnosis of a Major Depressive Disorder was appropriate, the "prior history of depression would instead suggest that such was a recurrence."

30. With respect to a head injury, Dr. Hawkins noted that Claimant had "significant Psychological Factors Adversely Affecting Physical Complaint (316) that contributed to her delayed recovery," and that the ongoing subjective complaints "are more likely to be associated with non injury-related psychological factors."

31. In December 2016, based on his review of the record and independent evaluation, Dr. Kleinman concluded that Claimant "has now seen four psychologists, and is entering a third course of treatment. It is my recommendation that she have a

limited number of appointments with Dr. Haburchak and then terminate treatment for the workers' compensation injury." Dr. Kleinman specifically recommended four to six sessions of therapy over no more than two months. Dr. Haburchak provided four sessions of psychotherapy after Dr. Kleinman's recommendation between December 22, 2016 and February 2, 2017.

32. With respect to medications, Dr. Kleinman recommended continued medications "with appointments every two weeks for one month, then no more than monthly for no more than 5 months." Dr. Kleinman further explained that based "on the recurrent nature of her disorder, medications should be continued longer but such lengthier treatment would be outside of workers' compensation." Dr. Dworetsky monitored Claimant's medications for six months between December 2016 and May 2017.

33. At hearing, Dr. Kleinman testified that the treatment provided since his December 2016 evaluation completed the maintenance treatment related to the recurrent depressive episode, anxiety, and other psychiatric symptoms caused by the work-related injury. Dr. Kleinman also explained in detail that any future recurrence of depression or psychiatric symptoms is not related to the work-related injury.

34. L. Barton Goldman, M.D., also completed an independent review of Claimant's medical records and opined that further treatment of the inconsistent physical symptoms would "be misdirected and relatively harmful." Dr. Goldman agreed with Dr. Kleinman's recommendations stating that any ongoing "psychological and psychiatric maintenance very likely does now fall outside the scope of this claim and should be managed through Ms. Bolton's private physicians." With specific reference to the neck and musculoskeletal complaints, "any additional care required for those somatic complaints would also be best managed outside the scope of this claim."

35. Claimant did not appear for the hearing and no testimony was offered on Claimant's behalf.

36. The ALJ finds that Respondents have met their burden of proving by a preponderance of the evidence that previously admitted medical maintenance benefits are not causally related to the occupational injury that occurred on November 15, 2013.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), §§8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201.

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. (1996 Cum.Supp.); *see Popovich v. Irlando,* 811 P.2d 379 (Colo.1991).

With respect to maintenance medical benefits after MMI, once a claimant establishes the probability of a need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 866 (Colo. App. 2003).

Here, Respondents filed an FAL admitting for maintenance medical treatment pursuant to *Grover*. Respondents are not precluded from contesting their liability for a particular treatment or generally for any ongoing maintenance treatment. When respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury. See *Grover*, 759 P.2d at 712; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Where respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for such modification. Section 8-43-201(1), C.R.S.

Here, Respondents seek an end to all medical maintenance treatment, and therefore Respondents bear the burden by a preponderance of the evidence to show why they are no longer responsible for maintenance medical benefits in general. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

No persuasive evidence supports the need for ongoing medical treatment for Claimant’s physical complaints. Claimant’s ATP Dr. Koval has stated that Claimant’s physical complaints are under control. Dr. Ladley released Claimant from care, and Dr. Koval’s current recommendation is only for monitoring medications with the psychiatrist Dr. Dworetsky. According to Dr. Goldman, any physical complaints should now be managed outside the workers’ compensation system. And, Claimant has offered no persuasive evidence to support the need for maintenance treatment to address any ongoing physical complaints.

With respect to Claimant’s need for ongoing psychiatric maintenance care, the preponderance of evidence supports Respondents’ position ending that care. Dr. Koval recommends continued monitoring of medications by a psychiatrist. But, even Dr. Koval in December 2016 anticipated that Claimant was returning to her pre-injury baseline, stating then that Claimant “is very close to reaching the baseline at which she lived prior to the incident, and I am optimistic that with continued psychotherapy and medication management she will get there.”

Persuasive evidence establishes that Claimant suffered from long-standing psychiatric issues, including depression and anxiety, before the work related injury. Even if Claimant was not taking anti-depressant medications after April 2011, medical records show that on April 25, 2013, seven months before the work-related injury, Claimant's "Patient Active Problem List" included "DEPRESSSION." The ALJ finds and concludes that more likely than not, Claimant's psychiatric symptoms had not abated prior to her work injury.

No persuasive evidence supports a finding that Claimant's symptoms were substantially different in kind or intensity after her work injury. Claimant did not testify or offer evidence that her psychological problems were different after the work injury. Nor is there persuasive medical evidence suggesting that Claimant's symptoms were of a significantly different type, regardless of diagnosis. Physicians Dr. Hawkins and Dr. Kenneally described long-standing and recurring depression and anxiety. The recurrent depression and anxiety symptoms existed prior to the work related injury and most likely were caused by variable stressors, including unknown triggers before 2008, horse accidents that caused concussions, a motor vehicle accident that caused a concussion, and the combination of deaths in the family, her dog getting kicked by a horse, and financial difficulties. Doctors Hawkins, Kenneally, Kleinman, and Godlman, all recognized the long-standing problems and symptoms recurred due to her post traumatic stress or adjustment disorder after the work-related injury.

The ALJ finds persuasive Dr. Kleinman's opinion that Claimant suffers from recurrent episodes of depression and anxiety, and that those episodes are no longer causally related to the adjustment or post-traumatic stress disorder following the work injury. Claimant offered no persuasive evidence to dispute Dr. Kleinman's opinion. Nor has Claimant testified or offered any persuasive evidence to support that any alleged ongoing psychiatric symptoms are related to her work injury.

Dr. Kleinman's opinion that Claimant's current symptoms are recurrent depressive episodes and anxiety unrelated to the work injury is supported by the evaluations of two treating neuropsychologists. Dr. Kenneally found that Claimant's depression was long standing in nature and predated the workplace injury. Dr. Hawkins also found that Claimant's depression was recurrant. And, both Dr. Kenneally and Dr. Hawkins arrived at these conclusions despite being handicapped by Claimant providing an inaccurate and incomplete mental health history.

Additionally, the ALJ concludes, based on a totality of the evidence, that whatever ongoing problems Claimant alleges, Claimant functions at the same baseline level she functioned at before the work injury. Claimant continues to work as a school teacher without restriction. Claimant has also returned to competitive horse jumping, an activity that requires high levels of complex planning and activities. Her participation in this activity is consistent with her return to her pre-injury baseline and that any ongoing care is not related to the work injury.

The ALJ concludes that Respondents have met their burden of proving by a preponderance of the evidence that previously admitted medical maintenance benefits are not causally related to the occupational injury that occurred on November 15, 2013.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents' liability for ongoing maintenance treatment for Claimant's work related injury is hereby terminated.

2. Issues not expressly decided herein are reserved to the parties for future determination.

3. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 12, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Is Claimant's claim for post-MMI medical benefits, including treatment with Dr. Weinstein, Dr. Olson, and a change of physician, barred by the Stipulation approved on April 26, 2016?

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his right shoulder on May 22, 2014.

2. Dr. Daniel Olson has been Claimant's primary ATP throughout his course of treatment.

3. Dr. David Weinstein performed a rotator cuff and biceps tendon repair on December 12, 2014.

4. On July 27, 2015, Dr. Olson put Claimant at MMI with an 8% whole person rating. Dr. Olson's July 29, 2015 MMI report contains the following recommendation regarding post-MMI medical care: "He will require the cyclobenzaprine for the next 12 months. He is also [to] continue his conditioning on an independent basis in the post rehabilitation program."

5. Respondents filed a Final Admission of Liability on August 4, 2015 based on Dr. Olson's report. The FAL stated "Respondents admit for authorized [post-MMI medical] benefits per the report from Dr. Olson dated 07/29/2015. Any benefits not specifically admitted are denied."

6. Claimant timely objected to the FAL and requested a DIME.

7. Claimant saw Dr. Miguel Castrejon for the DIME in December 2015. Dr. Castrejon's report stated, "Maintenance care as recommended by Dr. Olson is medically reasonable."

8. Respondents filed a second FAL on January 22, 2016, with identical language regarding medical benefits after MMI: "Respondents admit for authorized benefits per the report from Dr. Olson dated 07/29/2015. Any benefits not specifically admitted are denied."

9. Claimant timely objected to the FAL, and requested a hearing on issues of whole person impairment, disfigurement, and "medical benefits after MMI." A hearing on Claimant's application was scheduled for June 2, 2016.

10. Before the hearing, the parties executed a Stipulation to Resolve Ripe Issues. The Stipulation included the following provisions:

> Parties are desirous of resolving ***all ripe endorsed and unendorsed issues*** specifically in relation to this claim, W.C. No. 4-954-886, without the vagaries of litigation.
>
> Parties agree that the hearing set for 1:00 PM in Pueblo on June 2, 2016 should be canceled, and that ***all ripe issues that are or could have been endorsed for that hearing in relation to this claim are resolved by this Stipulation***. (Emphasis added).

11. The stipulation was signed by the parties on April 21, 2016 and approved by ALJ Walsh on April 26, 2016.

12. Several months later, Claimant requested additional medical benefits beyond those referenced on the January 22, 2016 FAL. Respondents denied Claimant's request, and applied for a hearing, seeking enforcement of the Stipulation.

13. To resolve the issues set for hearing, Respondents authorized a one-time the evaluation with Dr. Weinstein. Respondents explicitly stated they were not waiving any defenses or enforcement of the prior Stipulation.

14. Claimant saw Dr. Weinstein on November 23, 2016 and described progressive discomfort and popping in the shoulder over the previous 4-6 months. Dr. Weinstein diagnosed right scapulothoracic myofascial inflammation with bursitis. He recommended a scapulothoracic cortisone injection followed by 4 to 6 weeks of physical therapy.

15. Claimant returned to Dr. Weinstein on January 13, 2017. His symptoms were unchanged since his last visit and the cortisone injection had given only minimal relief. Dr. Weinstein opined Claimant's symptoms were consistent with myofascial inflammation of his scapular rotators and posterior rotator cuff muscles. He did not think Claimant required any surgery. He gave Claimant another cortisone injection and recommended he continue his home exercise program. Dr. Weinstein further opined Claimant "may benefit from 1-2 cortisone injections over the next year."

16. Claimant requested additional medical treatment, which Respondents denied based on the Stipulation.

17. The Stipulation is not ambiguous.

18. Claimant's requests for medical treatment from Dr. Weinstein and further follow-up with Dr. Olson and a change of physician are foreclosed by the Stipulation and the January 22, 2016 FAL. Claimant's claim is closed with respect to medical benefits beyond those specifically delineated in the FAL.

CONCLUSIONS OF LAW

A final admission closes all admitted issues unless the claimant requests a hearing "on any disputed issues that are ripe for hearing" within 30 days of the final admission. Section 8-43-203(2)(b)(II)(A). The January 22, 2016 FAL admitted only for post-MMI treatment as described in Dr. Olson's July 29, 2015 report and denied anything else. Although Claimant preserved his right to seek a general award of post-MMI treatment by timely requesting a hearing, he subsequently relinquished that right by entering into the Stipulation to Resolve Ripe Issues.

A stipulation incorporated into a decree precludes a party from advancing legal contentions contrary to the plain and unambiguous terms of the agreement. *USI Props. East, Inc. v. Simpson*, 938 P.2d 168 (Colo. 1997). The Stipulation unambiguously states its purpose was to resolve "all ripe issues that are or could have been endorsed for [ ] hearing in relation to this claim." Claimant had endorsed the issue of "medical benefits after MMI," so the only way the issue could remain open despite the Stipulation is if it was not "ripe."

An issue is "ripe for hearing" if it is addressed in a final admission and the legal prerequisites to adjudicating the issue (such as MMI and permanent impairment determinations) are complete. "Ripeness" concerns whether an issue is subject to adjudication under the statute, not whether a party is prepared to litigate the issue. *E.g., Franklin v. Colorado Springs School District #11*, W.C. No. 4-436-174 (February 24, 2004); *Chavez v. Cargill, Inc*. W.C. No. 4-421-748 (November 1, 2002).

Claimant's entitlement to a general award of medical benefits after MMI was ripe for adjudication when he requested a hearing to challenge the January 22, 2016 FAL. A claimant is entitled to a general award of post-MMI medical benefits if there is substantial evidence to show that future treatment is reasonably necessary to relieve the effects of the injury or prevent deterioration of his condition. Section 8-42-107(8)(f); *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters*, 77 P.3d 863 (Colo. App. 2003). The issue of *Grover* medical benefits must be addressed when permanency is determined or it is waived. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1982).

Claimant argues that additional treatment beyond that listed in Dr. Olson's July 29, 2015 report was not ripe because no other treatment was recommended by the time of the Stipulation. But that was no bar to pursuing a general award of *Grover* medical benefits at that time. Indeed, a claimant need not be receiving any treatment at the time of MMI to obtain a general award of future medical benefits. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1989). Rather, the claimant must only prove he is likely to require *some* form of treatment in the future. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

There was no legal impediment to pursuing a general award of *Grover* medical benefits at the June 2, 2016 hearing. Therefore, the issue was "ripe," and is now closed by the Stipulation and the January 22, 2016 FAL, subject to statutory reopening.

ORDER

It is therefore ordered that:

1. Claimant's claim is closed for medical benefits not referenced on the January 22, 2016 FAL, subject to statutory reopening.

2. Claimant's request for additional medical benefits after MMI, including treatment with Dr. Weinstein, Dr. Olson and a change of physician, is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 12, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

The issue raised for consideration at hearing is whether Claimant sustained his burden of proof to establish that he is entitled to post maximum medical improvement (MMI) medical benefits.

STIPULATION OF FACT

1. The parties agreed that Claimant's average weekly wage was the $200 per week admitted by Respondents in the Final Admission of Liability dated March 11, 2016, which creates an overpayment of permanent partial disability benefits of $11,136.12.

FINDINGS OF FACT

1. Claimant sustained an injury while employed by Employer on March 17, 2014, claiming injuries to his head in a fall on ice while at work.

2. Following the injury, Claimant received treatment with Dr. Kirk Nelson with Concentra, and his referral, Dr. John Aschberger. It is undisputed Claimant last treated with Dr. Nelson for his industrial injury on May 22, 2015, shortly after Claimant was placed at maximum medical improvement (MMI). It is undisputed that Dr. Nelson did not make recommendations for ongoing medical treatment for Claimant's cervical spine.

3. Claimant last treated with Dr. Aschberger on March 28, 2016, who diagnosed chronic low back pain, recommended a repeat MRI scan and prescribed Robaxin for Claimant's low back condition. Dr. Aschberger made no recommendations for further maintenance care in relation to Claimant's cervical spine.

4. Dr. Aschberger and Dr. Nelson did not recommend any specific maintenance care for the Claimant's cervical spine condition. Claimant did not request a specific medical care in relation to his cervical spine, and indeed, none has been recommended by his attending physicians since his placement at MMI.

5. Claimant underwent an independent medical examination (IME) with Dr. Brian Lambden on March 28, 2016. Dr. Lambden opined that Claimant's chronic low back condition was related to his aging process and congenital spondylosis and not his industrial injury. He further declined to recommend any medical maintenance care.

6. Claimant underwent a DIME with Dr. John Tyler on August 3, 2016. Dr. Tyler opined that Claimant had reached MMI on April 15, 2015, and that his ongoing lower back complaints were not related to his industrial injury. Specifically, Dr. Tyler opined "I do not find convincing evidence of any ongoing residual symptomatology to the lumbar spine that I feel is directly related to the industrial injury of March, 2014."

7. Respondents filed a Final Admission of Liability (FAL) on December 2, 2016.

8. Claimant did not challenge the finding of the DIME examiner establishing that his present lower back complaints are not related to his March 17, 2014, industrial injury. Instead, Claimant seeks authorization for post-MMI medical maintenance benefits as the same were denied by Respondents on the FAL.

9. It is undisputed that Claimant did not testify as to any specific treatment post MMI he is seeking to have authorized or as to any specific treatment he has requested since his DIME that has been denied by Respondents. Instead, he is seeking an Order for maintenance care based on his treatment with Dr. Aschberger and what was recommended prior to the DIME completion.

10. It is undisputed that Claimant has not seen any physician since the DIME was completed in August, 2016.

CONCLUSIONS OF LAW

General Legal Principles

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is evidence that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936).

3. In this case, the primary question is whether Claimant proved by a preponderance that he is entitled to an order awarding maintenance medical benefits. The Act addresses medical benefits in Section 8-42-101(1)(a), C.R.S., which provides:

> Every employer … shall furnish … such medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury.

4. The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain his/her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

5. Claimant failed to sustain his burden of proof to establish entitlement to an order awarding post MMI medical benefits. The ALJ finds the Division independent medical examination (DIME) report of Dr. John Tyler that Claimant's chronic low back condition is not related to his March 2014 industrial injury binding and persuasive. Claimant did not seek to overcome the DIME report of Dr. Tyler with respect to his determination of causation of the low back condition by clear and convincing evidence, thus Dr. Tyler's opinion concerning causation of Claimant's injuries and symptoms is binding on this Court.

6. The ALJ is further persuaded by the opinion of Dr. Brian Lambden who likewise does not attribute the cause of Claimant's present chronic low back pain to his March 2014 industrial injury.

7. The ALJ is further persuaded by the opinions of both Dr. John Aschberger and Dr. Kirk Nelson, who did not recommend any specific maintenance care for the Claimant's cervical spine condition. Claimant did not request a specific medical care in relation to his cervical spine, and indeed, none has been recommended by his attending physicians since his placement at MMI.

8. The only treatment Dr. Aschberger recommended prior to the DIME was treatment to address Claimant's chronic low back pain. As Claimant's chronic low back condition is not work related, his treatment to address this condition is likewise not related to Claimant's industrial injury, thus is not authorized.

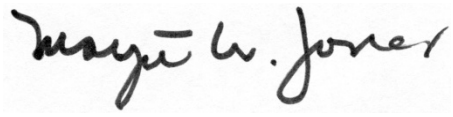
ORDER

1. Claimant's claim for *Grover* medical benefits is denied and dismissed.

2. Any and all issues not determined herein are reserved for future decision.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 12, 2017



Margot W. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on December 22, 2016.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial cervical spine injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) and Temporary Partial Disability (TPD) benefits for the period December 26, 2016 through July 30, 2017.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is a 43 year old male who worked for Employer as a Manufacturing Specialist III.

2. Claimant testified that on December 22, 2016 he was attempting to remove a large spool from a calibration meter as part of his job duties. The spool weighed approximately 36 pounds and was located in an area above Claimant's shoulders. Claimant explained that he used "all of his force" to move the spool up and down and back and forth to loosen it from the calibration meter. Claimant positioned his head at a right angle to look up at the spool and experienced a "pop" or "click" in his right neck and shoulder area. However, he remarked that he did not suffer immediate pain radiating into his arms. The incident occurred between 11:30 a.m. and 12:00 p.m. Claimant completed his shift and went home at about 2:00 p.m.

3. On December 23, 2016 Claimant awoke to significant pain between his neck and right shoulder. The pain also extended down through his right arm.

4. Because Claimant's pain would not subside he sought medical care with Janet Tameren, M.D. at American Family Urgent Care on December 25, 2016. Dr. Tameren noted that Claimant did not report an injury. Claimant stated he had "no known injury" and commented that he "moved furniture a month ago but doesn't think it's related to the pain."

5. On December 27, 2016 Claimant sought treatment at the Sky Ridge Medical Center Emergency Department with Heather Groth, M.D. Claimant complained of right shoulder pain that had radiated through his neck and down his right arm for the

past two weeks. The pain became worse over the past two days. The record contains no report of an incident at work and specifically provides that the pain was "not related to exertion."

6. On December 29, 2017 Claimant contacted Employer's short-term disability carrier UNUM. A representative of UNUM inquired whether Claimant had suffered a work-related accident or injury. Claimant denied that his symptoms were caused by his work activities.

7. Claimant's co-worker Nick Patel testified at the hearing in this matter. He explained that he was working about three feet perpendicular to Claimant on December 22, 2016. While Claimant was removing a spool he complained of pain and stated "see, you can be my witness." Mr. Patel commented that Claimant had been complaining of pain for approximately one month or longer prior to the December 22, 2016 incident.

8. Employer's Operations Supervisor James Benson testified that on December 27, 2016 he received a voicemail message from Claimant noting that he was going to a hospital. Claimant did not specify any work injury or accident that necessitated a hospital visit.

9. Mr. Benson also remarked that he received a voicemail message from Claimant on January 4, 2017. Claimant advised that he would return to work on January 9, 2017 but did not suggest that he had suffered an injury at work.

10. Employer's Human Resources Business Partner Susan Townsend testified at the hearing in this matter. She explained that Claimant contacted her on December 28, 2016 stating that he was suffering severe pain and would not make it to work. Claimant commented that he did not know what had caused his symptoms.

11. On January 9, 2017 Claimant reported to Mr. Benson that he had suffered a work-related injury to his right neck area. Employer directed Claimant to Concentra Medical Centers for evaluation and treatment.

12. On January 9, 2017 Claimant visited Felix Meza M.D. at Concentra for an examination. Claimant explained that on December 22, 2016 he was removing a spool overhead at work when he experienced a burning sensation in his neck area. When he pulled down the approximately 30 pound spool he felt a "pop" in his neck. Claimant completed his work shift but suffered sharp pain in his neck, shoulder and arm region on the following day. Cervical spine x-rays were normal. Dr. Meza diagnosed Claimant with neck, thoracic spine and shoulder pain. He also noted a cervical radiculopathy. Dr. Meza prescribed physical therapy and medications. He assigned work restrictions of no overhead lifting and no lifting in excess of 25 pounds to waist level.

13. On January 30, 2017 Claimant underwent an MRI of his cervical spine. The MRI revealed a large right paracentral and subarticular zone disc extrusion at C6-C7. The extrusion likely caused severe narrowing of the right recess and impingement of the exiting right C7 nerve root.

14. On February 6, 2017 Claimant visited Dr. Meza for an examination. Claimant reported continuing neck pain. Dr. Meza assigned restrictions of no use of the right arm, no overhead activity and only seated work.

15. On March 16, 2017 Claimant visited Thomas Puschak, M.D. at Panorama Orthopedics and Spine Center for an examination. Claimant reported that he suffered a work injury in December 2016 when "he was pushing, pulling and shifting a spool, weighed about 36 pounds, kind of at shoulder maybe held high, little bit higher back and forth, to and fro, got into some awkward positions, felt a pop in his neck and had severe unremitting radicular symptoms down the right arm."

16. On July 31, 2017 Dr. Puschak testified through a pre-hearing evidentiary deposition in this matter. He acknowledged that he had not taken any classes through the Division of Workers' Compensation regarding causation analysis and was not Level II accredited. Dr. Puschak also recognized that his information consisted of his March 16, 2017 report and documents that he received from Claimant's counsel during the deposition. Nevertheless, he concluded that Claimant's described mechanism of injury could cause, worsen or aggravate a herniated disc.

17. Dr. Puschak acknowledged that Claimant had not mentioned he had been experiencing cervical symptoms in the weeks prior to the December 22, 2016 industrial incident. He noted that Claimant's failure to disclose prior symptoms "cloud[ed]" his opinion about whether the condition was work-related. Dr. Puschak also recognized that, in the absence of a comprehensive review of all of Claimant's records and statements, his causation analysis was even "more cloudy." He remarked that herniated discs do not require trauma but can arise spontaneously from everyday activities.

18. Henry Roth, M.D. testified at the hearing in this matter. Dr. Roth was accepted as an expert in occupational and internal medicine. He is also an expert on the Division of Workers' Compensation Medical Treatment Guidelines and Level II accredited. Dr. Roth reviewed Claimant's medical records and the deposition of Dr. Puschak.

19. Dr. Roth explained that Claimant suffers from cervical spinal stenosis. Spinal stenosis is a degenerative condition that usually presents gradually and spontaneously. Symptoms tend to wax and wane over time. Dr. Roth summarized that Claimant's spinal stenosis and disc herniation were not caused or aggravated by his work activities for Employer on December 22, 2016. He noted that Claimant's pain complaints constituted the manifestation of symptoms that existed prior to the industrial spool incident.

20. Dr. Roth reasoned that the medical documentation reflecting numbness down Claimant's arm prior to December 22, 2016 was important for his causation analysis because it reflected likely idiopathic spinal stenosis and degenerative changes. Claimant did not sustain a new or different injury as a result of his work activities on

December 22, 2016. Furthermore, Dr. Roth noted that the medical records revealed Claimant was unaware of the exact onset or reasons for his cervical symptoms.

21. In specifically addressing Claimant's mechanism of injury on December 22, 2016 Dr. Roth commented that there was nothing specific about his work activities that would have caused his cervical spine injuries. He remarked that the equipment upon which Claimant was working was not overhead but instead about 30 degrees above shoulder height. Accordingly, Claimant's work activities in removing the spool were unlikely to have caused his cervical spine injuries.

22. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on December 22, 2016. Initially, Claimant testified that he experienced a "pop" or "click" in his right neck and shoulder area after removing a spool from a calibration meter. He awoke to significant pain between his neck and right shoulder on the following morning. The pain also extended down through his right arm. However, the medical records reveal that Claimant did not likely suffer an industrial cervical spine injury while working for Employer on December 22, 2016.

23. On a December 25, 2016 visit with Dr. Tameren Claimant did not report an injury. Claimant stated he had "no known injury" and noted that he "moved furniture a month ago but doesn't think it's related to the pain." Two days later at the Sky Ridge Medical Center Emergency Department Claimant complained of right shoulder pain that had radiated through his neck and down his right arm for the past two weeks. The pain became worse over the past two days. The record contains no report of an incident at work. On December 29, 2016 a representative of UNUM contacted Claimant and he denied his symptoms were caused by his work activities. Furthermore, Claimant's co-worker Mr. Patel remarked that while Claimant was removing a spool on December 22, 2016 he complained of pain and stated "see, you can be my witness." Mr. Patel commented that Claimant had been complaining of pain for approximately one month or longer prior to the accident. Finally, although Claimant contacted Employer representatives Mr. Benson and Ms. Townsend within two weeks of December 22, 2016 about missing work, he did not attribute his injuries to any work incident.

24. The persuasive testimony of Dr. Roth also suggests that Claimant did not likely suffer a cervical spine injury at work on December 22, 2016. Dr. Roth explained that Claimant suffers from cervical spinal stenosis. Spinal stenosis is a degenerative condition that usually presents gradually and spontaneously. Symptoms tend to wax and wane over time. Dr. Roth summarized that Claimant's spinal stenosis and disc herniation were not caused or aggravated by his work activities for Employer on December 22, 2016. Claimant's symptoms constituted the natural progression of a degenerative process. In contrast, Dr. Puschak concluded that Claimant's described mechanism of injury could cause, worsen or aggravate a herniated disc. However, he acknowledged that Claimant had failed to mention he had been experiencing cervical symptoms in the weeks prior to the December 22, 2016 industrial incident. Dr. Puschak noted that Claimant's failure to disclose prior symptoms "cloud[ed]" his opinion about whether the condition was work-related. Accordingly, based on the medical records,

credible witness testimony and persuasive opinion of Dr. Roth, Claimant's work activities on December 22, 2016 did not aggravate, accelerate or combine with his pre-existing cervical spine condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition

or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable cervical spine injury during the course and scope of his employment with Employer on December 22, 2016. Initially, Claimant testified that he experienced a "pop" or "click" in his right neck and shoulder area after removing a spool from a calibration meter. He awoke to significant pain between his neck and right shoulder on the following morning. The pain also extended down through his right arm. However, the medical records reveal that Claimant did not likely suffer an industrial cervical spine injury while working for Employer on December 22, 2016.

8. As found, on a December 25, 2016 visit with Dr. Tameren Claimant did not report an injury. Claimant stated he had "no known injury" and noted that he "moved furniture a month ago but doesn't think it's related to the pain." Two days later at the Sky Ridge Medical Center Emergency Department Claimant complained of right shoulder pain that had radiated through his neck and down his right arm for the past two weeks. The pain became worse over the past two days. The record contains no report of an incident at work. On December 29, 2016 a representative of UNUM contacted Claimant and he denied his symptoms were caused by his work activities. Furthermore, Claimant's co-worker Mr. Patel remarked that while Claimant was removing a spool on December 22, 2016 he complained of pain and stated "see, you can be my witness." Mr. Patel commented that Claimant had been complaining of pain for approximately one month or longer prior to the accident. Finally, although Claimant contacted Employer representatives Mr. Benson and Ms. Townsend within two weeks of December 22, 2016 about missing work, he did not attribute his injuries to any work incident.

9. As found, the persuasive testimony of Dr. Roth also suggests that Claimant did not likely suffer a cervical spine injury at work on December 22, 2016. Dr. Roth explained that Claimant suffers from cervical spinal stenosis. Spinal stenosis is a degenerative condition that usually presents gradually and spontaneously. Symptoms tend to wax and wane over time. Dr. Roth summarized that Claimant's spinal stenosis and disc herniation were not caused or aggravated by his work activities for Employer

on December 22, 2016. Claimant's symptoms constituted the natural progression of a degenerative process. In contrast, Dr. Puschak concluded that Claimant's described mechanism of injury could cause, worsen or aggravate a herniated disc. However, he acknowledged that Claimant had failed to mention he had been experiencing cervical symptoms in the weeks prior to the December 22, 2016 industrial incident. Dr. Puschak noted that Claimant's failure to disclose prior symptoms "cloud[ed]" his opinion about whether the condition was work-related. Accordingly, based on the medical records, credible witness testimony and persuasive opinion of Dr. Roth, Claimant's work activities on December 22, 2016 did not aggravate, accelerate or combine with his pre-existing cervical spine condition to produce a need for medical treatment.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

.Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 12, 2017.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

I. What are the specific repayment terms of a $97,614.12 overpayment of temporary total disability ("TTD") benefits paid to Claimant?

FINDINGS OF FACT

1. Claimant suffered admitted industrial injuries on May 9, 2012.

2. Respondents filed a General Admission of Liability ("GAL") on August 14, 2012 admitting for TTD benefits beginning on July 16, 2012 at $732.57 per week.

3. On October 20, 2014, Claimant underwent a 24-month Division Independent Medical Examination ("DIME") at the request of Respondents. Dr. Brian Beatty determined Claimant reached maximum medical improvement ("MMI") as of June 15, 2012 and assigned a 16% whole person impairment rating.

4. Dr. Beatty subsequently reviewed video surveillance of Claimant and medical records and issued a supplemental DIME report on January 27, 2015. Dr. Beatty concluded Claimant reached MMI as of June 15, 2012 with a 0% whole person impairment rating.

5. Respondents filed a Final Admission of Liability ("FAL") on February 13, 2015 based on Dr. Beatty's January 27, 2015 supplemental DIME report. Respondents asserted an overpayment of TTD benefits in the amount of $97,641.12.

6. ALJ Cannici held a hearing on June 30, 2015 on multiple issues, including whether Respondents were entitled to recover an overpayment in the amount of $97,641.12. ALJ Cannici issued a Findings of Fact, Conclusions of Law, and Order on February 11, 2016 which, among other things, denied Respondents' request to recover an overpayment in the amount of $97,641.12.

7. Respondents appealed ALJ Cannici's February 11, 2016 order to the Industrial Claim Appeals Office ("ICAO") on multiple grounds. ICAO set aside ALJ Cannici's February 11, 2016 order and remanded the matter for further findings and a new order.

8. ALJ Cannici issued a Findings of Fact, Conclusions of Law and Order on Remand ("Remand Order") on September 23, 2016. ALJ Cannici found that Employer established by a preponderance of the evidence that they are entitled to recover an overpayment of TTD benefits. ALJ Cannici stated,

> …because of the retroactive MMI determination, Claimant had received TTD benefits from July 16, 2012 and continuing for a total of $97,641.12.

> The TTD benefits that Respondents paid after June 15, 2012 constituted an overpayment. Claimant's challenge to the $97,641.12 overpayment was predicated on the invalidity of Dr. Beatty's MMI and impairment determinations. However, Claimant has failed to produce unmistakable evidence that Dr. Beatty's MMI and impairment determinations were incorrect.

ALJ Cannici ordered that Respondents are entitled to recovery of the $97,641.12 overpayment. ALJ Cannici did not address the specific repayment terms of the overpayment, finding that evidence about repayment terms was not presented.

9. Respondents and Claimant appealed AJ Cannici's Remand Order. Respondents appealed solely on the grounds that the Remand Order did not specifically state how Claimant will repay the overpayment.

10. ICAO issued its Final Order on January 31, 2017. ICAO affirmed ALJ Cannici's September 23, 2016 Remand Order and stated as follows: "Because the ALJ's Order contemplates the possibility of future litigation concerning the repayment terms of the overpayment, it is not currently final reviewable on this issue."

11. Neither party appealed the ICAO order. Claimant failed to submit any evidence of an appeal and stipulated to this fact on the record. As a result, the order that Respondents are entitled to recover an overpayment from Claimant in the amount of $97,641.12 is now final.

12. Respondents filed an Application for Hearing ("AFH") on March 30, 2017 endorsing the sole issue of the repayment terms of the overpayment. Claimant stated in the Response to Application for Hearing that respondents cannot collect the overpayment.

13. At hearing before ALJ Cayce on July 25, 2017, counsel for Respondents and Claimant made brief arguments regarding the issue of overpayment and repayment terms. No testimony was presented by either party. Other than Claimant's average weekly wage ("AWW") included in the February 13, 2015 FAL, no evidence was presented regarding Claimant's financial situation, such as Claimant's current income and financial responsibilities. Per the February 13, 2015 FAL, Claimant's AWW is $1,098.86.

14. Respondents request repayment at the rate at which Claimant was paid TTD benefits, $732.57 per week or $1,465.14 every two weeks. Claimant made no request as to a repayment amount or schedule.

15. Considering Claimant's AWW, the circumstances and amount of overpayment, and absent further evidence regarding Claimant's financial situation, the ALJ finds that a payment of $250.00 per month is reasonable.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Overpayment

Claimant contends that Respondents have the burden of proving entitlement to specific repayment terms. Claimant further asserts that there is no statutory direction or clear guidance in case law regarding whether an overpayment of TTD benefits must be repaid retroactively, how to treat various forms of overpayments, and the terms of repayment. Respondents further contend that it is against public interest to award retroactive payments of TTD benefits.

Section 8-43-207(1)(q), C.R.S. grants ALJs the authority to require repayment of overpayments. The term "overpayment" is defined in Section 8-40-201(15.5), C.R.S. as

> money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

"Generally, an 'overpayment' is anything that has been 'paid' but is not 'owing as a matter of law.'" *Cooper v. Indus. Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005). In *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, 232 P.3d 777 (Colo. 2010), the Court considered the statutory definition of "overpayment" in Section 8-40-201(15.5), C.R.S. and found it provided for three distinct categories of overpayment:

> …one category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid"; the second category is for money received that a "claimant was not entitled to receive"; and the final category is for money received that "results in duplicate benefits because of offsets that reduce disability or death benefits" payable under articles 40 to 47 of Title 8. § 8-40-201(15.5). See *Simpson*, 219 P.3d at 359.

As found, ALJ Cannici ordered that Respondents are entitled to recover an overpayment from Claimant in the amount of $97,641.12. It is undisputed that Claimant did not appeal ICAO's order affirming ALJ Cannici's Remand Order. As such, the order that Respondents are entitled to recover a $97,641.12 overpayment of TTD benefits is final.

Orders for the retroactive repayment of benefits have been upheld on multiple occasions by ICAO and the Court of Appeals. *See Simpson v. Indus. Claim Appeals Office, supra*; *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, (Colo. App. 2000); *Josue v. Indus. Claim Appeals Office*, Colo. App. No. 16CA1036 (March 2, 2017)(unpublished); *Stroman v. Southway Services, Inc.*, W. C. No. 4-366-989 (August 31, 1999); *In re Claim of Haney,* W.C. No. 4-796-763 (ICAO, July 28, 2011); *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (ICAO, July 25, 2013)*; In re Claim of Heffner*, W.C. No 4-869-417-02 (ICAO 2016).

The ALJ has the discretion to determine repayment terms. *See Louisiana Pacific Corporation v. Smith*, 881 P.2d 456 (Colo. App. 1994) (holding that the ALJ did not abuse his discretion by prorating the repayment over claimant's expected life span where the recovery rate was not mandated by statute and the ALJ's order was supported by substantial evidence and plausible inferences drawn from conflicts in the record); *Smith, supra* ("Concerning claimant's assertion that the recoupment schedule in onerous, the ALJ has discretion to fashion a remedy, and claimant has not demonstrated any abuse of that discretion*"); In re Claim of Schramek,* W.C. No. 4-601-867 (2001); *In re Claim of Reekstin-Martinez*, W.C. No. 4-832-902 (May 9, 2013).

Regarding Claimant's argument as to public policy, the ALJ is not persuaded the retroactive repayment of an overpayment of TTD benefits is a violation of public policy. The court in *Josue* addressed a public policy argument similar that the argument made here by Claimant. The Court noted the following regarding claimant's argument in *Josue*:

> Claimant also contends that requiring him to repay the overpayment violates both the Act's beneficent purpose and public policy. He argues that awarding employer an overpayment has the effect of 'making an injured worker responsible for a subsequent determination of medical authorization, or risk having to pay subsistence TTD benefits, subject to recoupment.' He also asserts that he is essentially being punished for following his doctor's orders and should not be held accountable for a later determination that the doctor's actions were unauthorized. *Josue, supra.*

The Court was not persuaded, noting that the legislature intended for employers to recoup overpayments and "anticipated that in some circumstances those overpayments would arise from benefits that may have been due and owing when paid." The Court further stated,

> Although we do not disagree that paying back benefits can be difficult for claimants, we note that the alternative – obtaining an order on contested claimants before payments are made in order to avoid an overpayment – would likely impose an even greater burden on claimants. As employer points out, if employers are unable to recoup benefits later found to be improper, 'they would be less willing to grant benefits in the first instance without thorough investigation and litigation.' Such circumstances could leave disabled claimants with no income while they wait for resolution of any challenges to their benefits. Conversely, if employers have no means to recoup overpayments, claimants could be emboldened to delay litigation or resolution in order to continue receiving benefits they know an employer will not be able to recoup. Neither of these scenarios conforms with the legislative purpose of the Act. *Id.*

The ALJ agrees with the reasoning set forth in *Josue* regarding the public policy argument.

As found, Claimant did not present any testimony or evidence regarding Claimant's financial situation, nor did Claimant make any request as to a repayment amount or schedule. The only evidence of Claimant's financial situation was the AWW of $1,098.86 noted in the FAL. Respondents requested at hearing that Claimant be ordered to repay the overpayment at a rate of $732.57 per week or $1,465.14 every two weeks. Respondents contend that, due to the large amount of the overpayment, a nominal repayment schedule would be inappropriate. While the ALJ acknowledges the substantial amount of the overpayment, the ALJ deems repayment at a rate of $732.57 per week unreasonable. As found, a payment of $250.00 per month is reasonable considering Claimant's AWW and the circumstances and amount of overpayment. Accordingly, Claimant shall repay Respondents $250.00 per month in overpaid TTD benefits until recovered in full.

ORDER

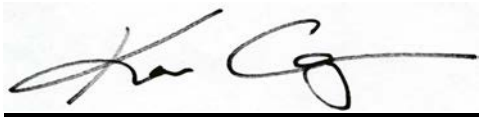
It is therefore ordered that:

1. Claimant shall repay Respondents an overpayment of $97,641.12 in TTD benefits at a rate of $250.00 per month until recovered in full.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 12, 2017



Administrative Law Judge Kara R. Cayce
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-031-105-01

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

,

Claimant,

v.

Non-Insured Employer,

and

,

Non-Insured Employer,

Non-Insured Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 8, 2017, and August 28, 2017, in Denver, Colorado. The hearing was digitally recorded (reference: 6/8/17, Courtroom 1, beginning at 8:30 AM, and ending at 3:05 PM; and, 8/28/17, Courtroom 1, beginning at 8:30 AM, and ending at 6:00 PM). Astrid DeVos of InterVoz served as the Spanish/English Interpreter at the June 8 session of the hearing. Mari Welch served as the Spanish/English Interpreter at the August 28 session of the hearing.

The Claimant was present in person and represented by Respondent was represented by at the June 8 session of the hearing; and, by at the August 28 session of the hearing. Despite receiving legal notice of the June 8 session of the hearing, failed to appear at the June 8

session of the hearing and, therefore, waived his appearance. He did, however, appear at the August 28 session of the hearing and he was self-represented,

Hereinafter shall be referred to as the "Claimant." Jose shall be referred to as "Employer G." shall be referred to as "Employer P." All other parties shall be referred to by name.

Claimant's Exhibits 1-13 were admitted into evidence without objection. Exhibits 13a, 14, 15 and 16 were admitted into evidence after Claimant laid foundation. Respondents Exhibits A, B and D were admitted into evidence, without objection. The ALJ reserved ruling on Exhibit C. Ultimately, Exhibits C, and E through G were rejected.

The hearing was bifurcated, within the course of one proceeding, first on the issue of "independent contractor" versus "employee," wherein both non-insured Respondents bear the burden of proof, by a preponderance of the evidence; and, second, if the Claimant was determined to be an "employee," the issues of compensability of the September 12, 2016 injury; and, if compensable, medical benefits and temporary total disability (TTD) benefits from September 12, 2016 and continuing. The Claimant bears the burden of proof, by preponderant evidence on the later issues. The third issue is whether Employer G and Employer P are jointly and severally liable for workers' compensation benefits.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on September 8, 2017. Non-Insured Respondents P and G were given two working days within which to file objections. The Respondents filed no timely objections. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern: (1) whether the Claimant was an "independent contractor," or an "employee" at the time of his left wrist fracture and right hip sprain of September 12, 2016; (2) if he was an "employee," whether he sustained compensable injuries, arising out of the course and scope of employment, on September 12, 2016; (3) if he sustained compensable injuries, whether he is entitled to medical benefits and TTD benefits from September 12, 2016 and continuing; and, are both non-insured Respondents jointly and severally liable for workers' compensation benefits under established case law.

Respondents bear the burden of proof, by a preponderance of the evidence on the "independent contractor" issue. The Claimant bears the burden on all other issues,, by preponderant evidence on.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

"Independent Contractor" Versus "Employee"

1. The Claimant was hired by Employer G in 2005, seasonally. He was last hired by Employer G for the season beginning May, 2016. The season would be approximately from May through November. Employer G would provide the Claimant with an air pistol, a hose and a harness to complete his job. Employer G would decide what hours the Claimant would work and he would have another worker, Denis Ayala, picked Claimant up from his home and took him to the job site. Employer G decided how much the Claimant was paid. Employer G would split the funds among his workers and the Claimant had no control over how the funds were split. Employer G had the right to terminate the Claimant's services at any time, and in fact, did fire him on one occasion. If the Claimant decided he did not like a particular job, Employer G would get mad and fire him. Although the Claimant was a trained roofer, Employer G oversaw and supervised all the work he completed. The Claimant has never negotiated a contract to perform roofing work with a homeowner or business. He has always been a laborer working for someone else. While working for Employer G, the Claimant did not work for other employers. Employer G made the overall decisions during working hours and the Claimant was instructed by Employer G to comply with any instructions given by Bryan K. Taylor, the principal of Employer P (the alleged statutory employer, or co-employer) while Taylor was on the jobsite. The Claimant was one of several workers engaged by Employer G to work on the 2500 South Madison Street job. A crew of 4 individuals was needed to perform the roofing job. Jose Fredy Guillen, the principal of Employer G, was one of the four crew members. This was corroborated by a coworker, Serge Velazquez. Guillen referred to the crew as "amigos," and the ALJ refers to the crew as the "four amigos."

2. Serge Velazquez, the Claimant's co-worker, testified that Employer G and Denis Ayala would also pick the Claimant up to go to the jobsite. Employer G would make the decision of how much money the Claimant would get paid and Employer G would supervise the Claimant. Employer G would obtain the contracts; would establish when "the three other amigos" would be picked up to take them to the jobsite; would provide tools such as harnesses and compressors; would decide how much the workers would be paid; and, Employer G would supervise the work being performed. Employer G would establish what work to perform and when According to Velazquez, Ayala would take the Claimant to work and Velasquez never saw the Claimant be driven

by his wife to work. Velasquez further stated that Employer G decided everything, including what he would be paid. Employer G would pay Velasquez $300 per day.

3. Ayala considered himself a laborer and an employee. Ayala was not present when Claimant was hired [though Ayala later contradicted himself by stating he completed an independent contractor form (which the ALJ finds lacking in credibility)]. For the job at 2500 Madison, Ayala was paid $400 per day. . He would sometimes drive for Employer G. Ayala would be the one to collect the workers. Ayala further stated that Employer G would provide tools like the compressor and that Employer G had specific hours they were required to work. According to Ayala, Employer G would supervise his work and decided what times he would work. Ayala further stated that he had never contracted to perform a roofing job on his own as Employer G would obtain the contracts. Ayala has no business of his own. He would work with Employer G exclusively when there was work and when there was no work, he would do side jobs.

4. Efrain Mundo is the owner of Mundo Construction. Mundo provides roofing services. Mundo testified that Claimant worked for him several years ago. Mundo called Claimant an" independent contractor," without a satisfactory underlying explanation. The Claimant, however, worked under Mundo's employee, Jorge, who controlled the hours he would work, would provide tools like harnesses, would work exclusively for Mundo. , Claimant did not have his own company, and Claimant did not set his own rate of pay. Therefore, Claimant was an employee of Mundo Construction notwithstanding the title he was given for the work he performed.

5. Guillen testified that he would tell the other three how the hiring company wanted the work to be done when they contracted for roofing work. Employer P would hire Employer G, and then, according to Guilin, Guillen would involve the other three workers. Guillen would look at the house and tell the other three how to do the job. Guillen stated that Claimant at one point walked off the job and Guillen later told him that he could not come back to work. Guillen used his vehicle to drive all four of them to work in a 4-door Chevrolet 2500 truck. He had his personal equipment and tools in the truck, and Ayala would take the vehicle home with him sometimes. Guillen paid for the gas and he instructed Ayala to pick up Guillen first and then the others. Guillen admitted he had written some texts to the Claimant, after the injury, agreeing to pay his medical bills and money per week (Claimant's Exhibit 14). Guillen admitted that he wrote on a Facebook site that Claimant "worked for him" (Claimant's Exhibit 15). Guillen wrote the post because he was upset that Claimant was suing Employer P.

6. Guillen described the group of four roofers as "amigos," which the ALJ finds entirely lacking in credibility in light of Claimant's Exhibit 15, a copy of a text message from Guillen to Alfredo Garcia (in Spanish but translated at hearing by Interpreter Welch) wherein Guillen, one of the "four amigos" texted: " A ese puto no lo contraten asi poco demand a mi patron les aviso guys mucho cuidado co ese conpa (Translation: "be extremely careful with this 'fucker' and don't hire him "). Indeed, other

than the few damning admissions made by Guillen, the ALJ infers and finds that his testimony amount to an incredible conscious effort to evade responsibility for an employee injured on the job. His offer to pay the Claimant's hospital bills and $400 per week goes far beyond commonsensical altruistic intentions, especially in light of the "four amigos" fiction, and it amounts to a tacit admission of liability by an employer for the Claimant's injuries, which the ALJ hereby infers and finds.

7. There was no written document indicating that the Claimant was an "independent contractor." Therefore, there is no presumption to be overcome. Respondents have failed to prove that the Claimant was an independent contractor. The pertinent facts establish, to the contrary, that the Claimant was acting as an employee for Employer. The evidence establishes that the Claimant is an employee:

(A) Claimant worked exclusively for the Employer while the Employer had work. He worked during the roofing season, which would typically be from about May through November in any particular year. He started with the Employer in approximately 2005. The Claimant worked exclusively for the Employer from May 2016 through the date of his injury of September 12, 2016.

(B) The Claimant, Velazquez and Ayala, testified that Employer G supervised their work. Employer G specifically instructed the Claimant that Bryan Taylor (the principal of Employer P) was in charge when he was not on site and was instructed to follow his instructions.

(C) Each roofer was paid differently for their work. Ayala was paid $400 per day, Velazquez was paid $300 per day and Claimant $250 per day. Although the rates varied between individuals, the ALJ infers and finds that the Claimant was paid based on time and work performed as opposed to receiving a lump sum.

(D) Employer G had exclusive control to terminate the Claimant. The Claimant understood that if he had rejected any particular part of a project, he would have been terminated. And indeed, the Claimant was previously terminated and rehired the following season by Employer G on one prior occasion. Further, the Claimant had no authority to employ, control, or discharge assistants.

(E) Employer G was the one to initially direct the Claimant in performing the specific work of a roofer at the job site where the Claimant was injured.

(F) Employer G provided tools to the Claimant including the air pistol, the hose, the harness and compressor. The Claimant used some of his personal small tools brought in a bag. The tools provided by the Employer

were used all the time on job sites and the work performed could not be completed without the tools supplied by Employer G.

(G) As corroborated by Velazquez and Ayala, Employer G set the hours. In fact, Employer G would have his employee, Ayala, pick the others up from their homes and take them to the jobsite. They were picked up between 7:00 AM. to 8:00 AM. and worked until completion, sometimes to 8:00 PM. or 9:00 PM. By picking up the Claimant, Employer G had exclusive control of the time of performance. This also required the Claimant to work exclusively for Employer G under subpart (A) above, since the Claimant would have been unable to work for another employer without transportation or freedom to leave the job site.

(H) The Claimant was paid directly by Employer G, in cash personally, and the Claimant did not have a company to whom the funds were paid. Employer G determined how much the Claimant received for the work performed.

(I) The Claimant has never owned a business of his own or contracted for services at any time. Neither have the two coworkers that testified, despite testifying for Respondents that they were "independent contractors." They did not exercise control over the work they were performing for Employer G.

Based on the aforementioned facts, the preponderance of the evidence establishes that the Claimant was an "employee" at the time of his injury on September 12, 2016. An analysis under the "control" test shows that Respondents failed to prove that the Claimant was an "independent contractor" because Employer G exhibited exclusive control on several factors including the pay rate, right to terminate without liability, right to control assistants, and time of performance. In addition, Employer G exhibited control by providing necessary tools and requiring exclusivity for Employer G when Employer G dictated the hours worked. .Respondents also failed to show that the Claimant was an" independent contractor" under the relative nature of work test. The "relative nature of the work" test balances the nature of the Claimant's work in relation to the regular business of the employer contains the following elements: the character of the Claimant's work or business – how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on – and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from

contracting for the completion of a particular job. The Claimant's relationship to Employer G satisfies all of the above elements.

8. Bryan Taylor, the principal of Employer P, negotiates the roofing contracts as a general contractor, and then hires "subcontractors who perform the labor side of roofing tear offs and installations." According to Taylor (who is also a licensed and experienced roofer), Taylor hired Employer G as a subcontractor to perform a roof installation at 2500 South Madison Street. The Claimant was injured while working for Employer G, pursuant to a roofing contract that Employer G and Taylor negotiated, and this was a regular part of the business of both Employer P and Employer G. The Claimant was hired as part of his normal seasonal hire with Employer G in May 2016. The Claimant was **not** hired for the particular job at 2500 South Madison Street, but as a regular seasonal employee of Employer G. Therefore, the duration of engagement between the Claimant and Employer G was sufficient to establish a working relationship that is distinguished from completion of the particular job at 2500 South Madison Street. Consequently, Respondents failed to show, by a preponderance of the evidence that the Claimant was an" independent contractor. "

9. The Claimant was terminated by Employer G on at least one prior occasion for not attending work. Respondents claimed that Claimant was not required to work exclusively for Employer G and that he was "free to accept or deny any particular roofing project." Respondents also noted, however, that every job required a team of four to complete (the so called "four amigos'), and Employer G's employee, Denis Ayala, would give the Claimant a ride to work. Further, for all practical purposes the Claimant was not "free" to leave without the transportation provided by Ayala. Respondents argue that the Claimant was contracted on a per-job basis and not a salaried or hourly employee. For all intents and purposes, this is either compensation based on time or piece-work. Respondents concede that Claimant was paid by the square. Respondents thus concede that the Claimant was not paid an upfront agreed-upon lump sum, but rather based on his performance for piece work. Compensation based on time or piece-work is usually consistent with the status of an "employee," and not an "independent contractor. "

10. Respondents do not distinguish between **tools** and **equipmen**t but claim that Employer G only supplied equipment. The evidence establishes that Claimant was supplied a compressor, an air pistol, rope, and a harness. These kinds of tools were used on every job. There is no distinction between the two in this case. Respondents also argue that the work hours were at the discretion of the Claimant. As discussed above, the Claimant was at the mercy of Employer G by virtue of the fact that Ayala picked him up from his home and drove him to and from the job site. The Claimant did not enjoy the "benefits of being an independent contractor" by controlling his hours or the jobs he accepted, but was under the control of Employer. Finally, Respondents

argue that the Claimant customarily engaged in an independent trade. As support, Respondents cite Efrain Undo's testimony that the Claimant contacted him in November 2016 asking for work. This testimony is consistent with Claimant's testimony related to his seasonal work. The Claimant typically worked exclusively for Employer off and on from May through November since 2005.

11. Therefore, Respondents have failed to prove, by a preponderance of evidence that Claimant was an "independent contractor." The Claimant was an employee of Employer G. This ALJ issued a decision from the bench that Claimant is an employee of Employer G, not and independent contractor. Following this determination, the hearing proceeded on the remaining issues.

Compensability

12. Jose Freddy Guillen owns Employer G but it is not a corporation registered with the State of Colorado, he is the sole proprietor of the business. He received payment personally for work performed for Employer P (Claimant's Exhibit 16).

13. The Claimant worked for Employer G for various years as a seasonal worker. He was last hired by Employer G in May 2016 and worked for Employer G through September 12, 2016, the date of the injury.

14. On September 12, 2016, at approximately 2:00 PM., the Claimant sustained a closed fracture to his left wrist and a sprain to his right hip during the course and scope of his employment when a stack of approximately 36 plywood boards fell on him (Claimant's Exhibits 1 and 13a). The Claimant had been unloading plywood from the trailer, which were stacked on either side. Each piece weighed about 10 to 13 lbs. The Claimant went inside the trailer to get a sheet of plywood, when he pulled it, in the middle of the trailer in between the two large stacks, the trailer moved, and the stack of plywood fell on Claimant. The trailer belonged to Taylor. The ALJ infers and finds that Taylor, the principal of Employer P, was in a relationship with Employer g that strongly resembled a partnership.

15. The Claimant was employed as a laborer by Employer G, intermittently from 2005 to 2016, until his injury. Employer G hired the Claimant in Atlanta, Georgia. Over the years, the Claimant worked for Employer in 10 different states. The Claimant worked for other construction companies during the seasonal periods that the Claimant did not work for Employer G and Employer P. The Claimant's schedule was set by Employer G. Employer P obtained clients, and provided all the materials and tools, except for small, personal tools belonging to the Claimant.

16. The Claimant first called Employer G, then an ambulance. Taylor arrived at the job site and drove the Claimant to the emergency room (ER) at Porter Adventist Hospital. Taylor left the Claimant at the hospital and told the Claimant's wife to meet him there. The ALJ finds that Taylor, by his actions, implicitly authorized the Claimant's emergent care at the Porter ER.

Medical Care and Treatment

17. The Claimant was treated in the ER where they documented a history of injury to the left wrist and hand when he was trying to move 35-45 sheets of plywood. He was diagnosed with a left wrist fracture. The X-ray showed a comminuted intra-articular fracture of the distal radius, an ulnar styloid fracture and mild widening of the scapholunate interval suggesting ligamentous injury. The Claimant was referred to Carlton Clinkscales, M.D., at Hand Surgery Associates, for follow-up care (Claimant's Exhibit 11).

18. On September 15, 2016, Sean M. Griggs, M.D., of Hand Surgery Associates examined the Claimant and diagnosed him with a closed "fracture of unspecified carpal bone, left wrist." Dr. Griggs became the Claimant's authorized treating physician (ATP). Dr. Griggs recommended an open reduction with internal fixation and Claimant elected to undergo surgery. The health history and intake reflected that the Claimant was sent from the Porter ER and that Claimant was inside a trailer moving materials when he was injured (Claimant's Exhibit 12)

19. On September 16, 2016, Dr. Griggs performed surgery to repair the Claimant's left wrist, with no complications. Dr. Griggs noted, in relevant part, "There was significant comminution. There was a large fragment displaced dorsally…The patient was noted to have a significant impaction injury to the joint surface" (Claimant's Exhibit 12) The intraoperatively X-ray views taken of the Claimant's left wrist showed anatomic reduction of the fracture with a radial styloid pin plate positioned anatomically. The joint surface appeared to be reconstructed. The ulnar styloid appeared to be well-reduced (Exhibit 12).

20. On September 19, 2016, the Claimant returned to see Dr. Griggs for a postoperative follow-up visit. The Claimant had developed blisters between his fingers and a mild fracture blister near his incision. Claimant was noted to have clean pin sites, and a new dressing was applied (Claimant's Exhibit 12). On September 26, 2016, the Claimant returned to Dr. Griggs for a physical examination and three views of the left wrist were obtained. The examination demonstrated benign incisions and "near anatomic reduction of his fracture. There is a plate and K wire fixation." Dr. Griggs recommended a long-arm cast, with follow-up in two weeks with X-ray. Dr. Griggs also imposed work restrictions of "No use of his left upper extremity" (Claimant's Exhibit 12).

21. On October 10, 2016, Dr. Griggs examined the Claimant. The physical examination revealed that the Claimant's pin sites were benign, his incision was healed, and the Claimant was neurologically intact. The X-rays demonstrated no change in fracture alignment or position and that his hardware was well-positioned. The two dorsal k wires were removed without complication and a short-arm cast was applied. The Claimant's work restrictions remained, "No use of the left hand." (Claimant's Exhibit 12) On October 24, 2016, the Claimant's physical examination showed that his fracture was consolidated, with no change in the position or alignment of the hardware, and that the Claimant's ulna styloid was well-positioned. Dr. Griggs prescribed physical therapy (PT) two times per week for four weeks. The Claimant's restrictions were lessened to lifting, carrying 2 lbs and to wear his splint at all times (Claimant's Exhibit 12). Dr. Griggs is of the opinion that the treatment recommended is causally related to the injury of September 12, 2016.

22. The Claimant received PT treatment from Babett Lobban, O.T. (Occupational Therapist) at Hand Surgery Associates on October 27 and November 14, 2016. On November 14, 2016, over eight weeks after his surgery, the Claimant continued to experience "stiffness of left hand, not elsewhere classified" and "[p]ain in left wrist" (Claimant's Exhibit 12)

23. The Claimant discontinued medical care due to denial of service and the debt incurred. He has not been treated by anyone else. He has had no other injuries or accidents since his work injury of September 12, 2016. He continues to experience pain in both wrists and cannot put much weight on his hands or arms. Guillen told Claimant that he would pay for the medical bills. According to the Claimant, he was not able to return to work from September 12, 2016 through April 19, 2017 because of the medical restrictions imposed upon him by his ATP. Claimant returned to light duty work on April 20, 2017 for another employer.

24. The Claimant was never provided a Designated Provider List (DPL) pursuant to Workers' Compensation Rules of Procedure (WCRP), Rule 8-2, 7 CCR 1101-3.

25. The ALJ finds that the Respondents failed to show designation of a medical provider. Indeed, Taylor took the Claimant to the Porter ER, which provided emergent services, and then referred the Claimant to Hand Surgery Associates, where he was first seen by Dr. Clinkscales and next treated by Dr. Griggs, who became the Claimant's ATP. Dr. Griggs referred the Claimant to PT, which was provided by O.T. Lobban of Hand Surgery Associates. Therefore, selection passed to the Claimant. Here, the Claimant reported the injury and selected Dr. Griggs. Therefore, Dr. Griggs is an authorized treating physician. All of the Claimant's medical care and treatment for his injuries of September 12, 201`6 was authorized and within the authorized chain of referrals.

26. To date, the Claimant has received evaluations at the Porter ER, and at Hand Surgery Associates with Dr. Griggs and the PT by O.T. Lobban. The Claimant had surgery on September 16, 2016. Dr. Griggs last saw the Claimant on October 24, 2016 due to Claimant's lack of funds. Dr. Griggs last provided the Claimant restrictions of 2 lbs. lifting. Claimant only saw the PT therapist twice. These treatments were reasonably necessary to cure and relieve the effects of the September 12, 2016 compensable injury and they are causally related the Claimant's injuries sustained during the course and scope of his employment.

Average Weekly Wage (AWW)

27. While working for Employer G, the Claimant was paid approximately $250 per day. He was not sure that he was paid the same amount as the other workers but that is what Guillen told the workers. According to the Claimant, he generally earned from $1,100 to $1,300 per week. According to Guillen, his employees would go find other work when he did not have work. According to the Claimant, sometimes he would earn $550 in three days.

28. For the job at 2500 S. Madison Street, Employer P paid Employer G a first installment of $2,300 and a second installment of $735.00 for a total of $3,035.00, which if divided by 4 would be $758.75 (Claimant's Exhibit 16). The job took 2 days. According to Taylor, in a period of 3 weeks, Employer G had 11 days of work from Employer P. Taylor did not know whether or not the Claimant would get other jobs when Employer G did not have work, that Employer G did have other employment and that the 11 days may not have been the only source of income for the Claimant.

29. Because the default method will not fairly establish the Claimant's AWW in this case, the discretionary method is appropriate to use in order to arrive at a fair approximation of the Claimant's temporary wage loss. The Claimant's earnings averaged $1,072.72 a week. This is based on the Claimant's testimony that Claimant would sometimes earn $550 in 3 days. Employer P agreed. Taylor stated that in a three week period Employer G had worked for Employer P a total of 11 days. This is roughly 53% of 21 days. Therefore, Claimant's AWW is calculated as $550 times 4 divided by 53% times 92% to reach the $1,072.72, which is hereby established as the Claimant's AWW.

Temporary Total Disability

30. As of the last session of the hearing on August 28, 2017, the Claimant had not been released to return to work without restrictions; had not been declared to be at maximum medical improvement; had not returned to any work nor was he able to do so; and, he had not earned any wages. Therefore, he was sustaining a 100% temporary

wage loss, and he was temporarily and totally disabled from September 12, 2016, through April 19, 2017, both dates inclusive, a total of 220 days.

Temporary Partial Disability (TPD) After April 19, 2017

31. The Claimant did not return to work, at all, from September 12, 2016 through April 19, 2017, because of the medical restrictions imposed upon him by his ATP, Dr. Griggs. The Claimant returned to light duty work on April 20, 2017 for another employer. These restrictions resulted in Claimant being unable to perform his regular employment and the restrictions were a direct result of the injury that Claimant sustained when he fractured his left arm on September 12, 2016. Therefore, depending on his wages at the light duty work, he may be entitled to TPD benefits after April 19, 2017.

32. Respondents argue that the Claimant had earnings additional earnings after April 20, 2017 by virtue of his wife's food business, which entailed selling food from the couple's car at roofing sites. The Claimant would accompany his wife while his wife made and sold Mexican food. His wife bought all the materials, prepared all the food, did all the cooking, handled the money and the Claimant only accompanied her because she was afraid to be alone.-- her food business was of a short duration – approximately three months. This was confirmed by Maria Pedrosa, his wife. Her testimony is undisputed and it makes sense. Therefore, the ALJ is not free to disregard it. Consequently, the ALJ finds that the Claimant had no earnings attributable to his wife's food business.

33. At present, there is insufficient evidence to establish the Claimant's temporary wage loss when he was working light duty for another employer and still under restrictions.

Joint and Several Liability of Employer G and Employer P

34. Bryan Taylor co-owns Employer P, a small contracting business, with his wife. According to Taylor, Employer P is a contracting company that provides exterior home repair, including roofing, painting, windows, and gutter repair (Hrg. Tr. p. 25:1-26:1-3). Taylor would from time to time contract with Employer G to perform specific roofing jobs for Employer P. Taylor indicated that Employer P has contracted with Employer G to work on various jobs since 2005. (Hrg. Tr. p. 34:24-35:1). In September 2016, Jerry McManus contracted with Employer P to perform roof replacement on his house located at 2500 South Madison Street in Denver, Colorado.(Hrg. Tr. p. 34:6-10). Employer P, in turn, contracted with Employer G to obtain a crew to perform the roofing work (Hrg. Tr. 34:11- 23).

35. According to Taylor, part of his business involved roofing. He went on to state that he is the owner jointly with his wife (Hrg. Tr. p. 26:1-2 and p. 28:12-25). He

stated that he is very involved in every aspect of the work. (Tr. p. 31:23-25). Taylor personally did roofing work (Hrg. Tr. p. 32:1-7). He hires others to help when he needs it, such as Employer G to do roofing tear off and installation, and perform some of the labor. He does some of the labor himself. (Hrg. Tr. p. 32:9-25). Taylor negotiated the roofing contract with McManus at 2500 S. Madison Street in Denver (Hrg. Tr. p. 33:19-21 and p. 34:6-13). For the project in question, Taylor hired Employer G, and Employer G would hire the help he would need to complete the job (Hrg. Tr. p. 34:13-25).

Penalty for Failure to Insure for Workers' Compensation

36. Both Employer G and Employer P failed to insure their liability for Workers' Compensation and are, therefore, jointly and severally liable for a 50% penalty on all indemnity benefits.

Ultimate Findings

37. The Respondents failed to prove, by a preponderance of the evidence that the Claimant was an "independent contractor" on the date of his injuries on September 12, 2016.

38. The Claimant has proven, by preponderant evidence that he was an "employee" of Employer G and indirectly of Employer P; and Employers G and P were employers as defined by the Workers' Compensation Act.

39. Both Respondents failed to insure their liability for Workers' Compensation on the date of the Claimant's injury, September 12, 2016.

40. The Claimant's testimony, supporting the proposition that he was an "employee" on the date of his injury is, essentially, corroborated by Velasquez and Ayala, and it is persuasive and credible. The testimony of Jose Fredy Guillen is riddled with conceptual inconsistencies and improbablities in light of the totality of the evidence. The ALJ, therefore, finds that the testimony of Guillen is **not**.credible. Bryan Taylor's testimony neither supports nor detracts from the proposition that the Claimant was an "employee" and not an "independent contractor." All of the medical opinions in evidence are undisputed, persuasive and credible.

41. Between the conflicting testimonies of the Claimant and Guillen, the ALJ makes a rational choice, based on substantial evidence, to accept the Claimant's testimony and to reject Guillen's testimony.

42. The Claimant sustained compensable injuries to his left wrist, arising out of the course and scope of his employment, on September 12, 2016.

43. All of the Claimant's medical care and treatment was first of an emergent nature at the Porter ER; and, subsequently authorized and within the chain of authorized referrals; causally related to the September 12, 2016 compensable injury; and, reasonably necessary to cure and relieve the effects of that injury.

44. The Claimant's AWW is $1,072.66, which ordinarily would yield a TTD rate of $715.10 per week, however, penalized by 50% penalty for failure to insure yields a TTD rate of $1,07266 per week, 0r $153.24 per day.

45. The Claimant was temporarily and totally disabled from September 12, 2016, through April 19, 2017, both dates inclusive, a total of 220 days.

46. Further evidence is required on the precise amount of the Claimant's temporary wage loss from April 20, 2017, through the present time.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an

expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* S 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the medical opinions in the evidence were undisputed, inherently reasonable and credible. Therefore, the ALJ accepts them as fact. *See, Annotation, Comment: Credibility of Witness Giving Un-contradicted Testimony as Matter for Court or Jury,* 62 ALR 2d 1179, maintaining that the fact finder is not free to disregard un-contradicted testimony. As found, the Claimant's testimony, supporting the proposition that he was an "employee" on the date of his injury is, essentially, corroborated by Velasquez and Ayala, and it was persuasive and credible. The testimony of Jose Fredy Guillen was riddled with conceptual inconsistencies and improbablities in light of the totality of the evidence. As found, the testimony of Guillen was **not**.credible. Bryan Taylor's testimony neither supported nor detracted from the proposition that the Claimant was an "employee" and not an "independent contractor."

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between the conflicting testimonies of the Claimant and Guillen, the ALJ made a rational choice, based on substantial evidence, to accept the Claimant's testimony and to reject Guillen's testimony.

"Independent Contractor" versus "Employee"

c. Section 8-40-202(2)(b)(III), C.R.S., provides that the existence of any one of the factors listed in the statute is not conclusive. It is not necessary to satisfy all nine criteria in order to demonstrate that an individual is or is not an employee. *Nelson v.*

Indus. Claims Appeals Office, 981 P.2d 210, 212 (Colo. App. 1998) [holding that a finding that two of the nine criteria were not satisfied did not preclude the ALJ from concluding that the Claimant was working as an independent contractor]. The reverse is also true. The definition of an "employee" is broad and was so intended by the General Assembly. *Indus. Comm'n v. Valley Chip & Supply Co.*, 133 Colo. 258, 293 P.2d 972 (1956). There are two tests for determining whether a worker is an actual employee or an independent contractor: the "control" test, and the "relative nature of the work" test. *Stampados v. Colorado D & S Enterprises, Inc.,* 833 P.2d 815, 817 (Colo.App. 1992). If either test is satisfied, the worker is an employee. Id. at 817. Under the control test, the most important point in determining whether an individual is an independent contractor or an employee is the right of either to terminate the relationship without liability. *Indus. Comm'n v. Valley Chip & Supply Co*., supra at 974; see also *Indus. Comm'n v. Hammond*, 236 P. 1006 (Colo. 1925); *Brush Hay Milling Co. v. Small*, 388 P.2d 84 (Colo. 1963); *Faith Realty & Dev. Co. v. Indus. Comm'n*, 460 P.2d 228 (Colo. 1969). It is the power of control, not the fact of control that is the principal factor in distinguishing an employee (servant) from a contractor. *Indus. Comm'n v. Valley Chip & Supply Co.,* supra at 974. The right immediately to discharge involves the right to control. *Indus. Comm'n v. Bonfils*, 241 P. 735, 736 (Colo. 1925). Where compensation is based upon time or piece the workman is usually an employee and where it is based upon a lump sum for the task he is usually a contractor. *Brush Hay & Mill. Co. v. Small*, supra at page 87.

d. As found, Respondents failed to prove that the Claimant was an independent contractor. The pertinent facts established, to the contrary, that the Claimant was acting as an employee for Employer. The evidence shows that Claimant is an employee:

> (J) Claimant worked exclusively for Employer while Employer had work. He worked during the roofing season, which would typically be from about May through November in any particular year. He started with Employer in approximately 2005. Claimant worked exclusively for Employer from May 2016 through the day of his injury of September 12, 2016.
>
> (K) Claimant, Mr. Velazquez and Mr. Ayala, testified that Employer supervised their work. Employer specifically instructed Claimant that Mr. Taylor was in charge when he was not on site and was instructed to follow his instructions.
>
> (L) Each worker was paid differently for their work. Mr. Ayala was paid $400 per day, Mr. Velazquez was paid $300 per day and Claimant $250 per day. Although the rates varied between individuals, it is clear from the witnesses' testimonies that Claimant was paid based on time and work performed as opposed to receiving a lump sum.

(M) Employer had exclusive control to terminate Claimant. The Claimant understood that if he had rejected any particular part of a project, he would have been fired. And indeed, Claimant was previously fired and rehired the following season by Employer on one prior occasion. Further, Claimant had no authority to employ, control, or discharge assistants.

(N) Employer was the one to initially train Claimant to perform the work of a roofer.

(O) Employer provided tools to the Claimant including the air pistol, the hose, the harness and compressor. Claimant used some of his personal small tools brought in a bag. The tools provided by Employer were used all the time on job sites and the work performed could not be completed without the tools supplied by Employer.

(P) As testified by Claimant, Mr. Velazquez and Mr. Ayala, Employer set the hours. In fact, Employer would have his employee, Mr. Ayala pick them up from their homes and take them to the jobsite. They were picked up between 7:00 a.m. to 8:00 a.m. and worked until completion, sometimes to 8:00 p.m. or 9:00 p.m. By picking up the Claimant, Employer had exclusive control of the time of performance. This also required Claimant to work exclusively for Employer under subpart (A) above, since Claimant would have been unable to work for another employer without transportation or freedom to leave the job site.

(Q) Claimant was paid directly by Employer in cash personally and Claimant did not have a company to whom the funds were paid. Employer determined how much he received for the work performed. Claimant was paid based on time as opposed to receiving a lump sum.

(R) Claimant has never owned a business of his own or contracted for services at any time. Neither have the two coworkers that testified, despite curiously testifying for Respondents that they were independent contractors. They did not exercise control over the work they were performing for Guillen.

As found, the Claimant was an employee at the time of his injury on September 12, 2016. An analysis under the "control" test established that Respondents failed to prove that the Claimant was an independent contractor because Employer exhibited exclusive control on several factors including pay rate, right to terminate without liability, right to control assistants, and time of performance. In addition, Employer exhibited control by

providing necessary tools and requiring exclusivity for Employer when Employer dictated the hours worked.

e. Respondents also failed to show that Claimant was an independent contractor under the "relative nature of work" test. The "relative nature of the work" test balances the nature of the Claimant's work in relation to the regular business of the employer. *Brush Hay & Mill. Co. v. Small*, 154Colo. 11, 388 P,.2d 84 (1963). It contains the following elements: the character of the Claimant's work or business – how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on – and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job. *Brush Hay & Mill. Co. v. Small*, *supra* at page 87.

f. Section 8-40-202(2)(b)(III), C.R.S., provides that existence of any one of the factors listed in the statute is not conclusive. It is not necessary to satisfy all nine criteria in order to demonstrate that an individual is or is not an employee. *Nelson v. Indus. Claims Appeals Office*, 981 P.2d 210, 212 (Colo. App. 1998) [holding that a finding that two of the nine criteria were not satisfied did not preclude the ALJ from concluding that the Claimant was working as an independent contractor]. The reverse is also true. The definition of an "employee" is broad and was so intended by the General Assembly. *Indus. Comm'n v. Valley Chip & Supply Co.*, *supra* at 974. There are two tests for determining whether a worker is an actual employee or an independent contractor: the "control" test, and the "relative nature of the work" test. *Stampados v. Colorado D & S Enterprises, Inc., supra* at 817. If either test is satisfied, the worker is an employee. *Id.* at 817. Under the control test, the most important point in determining whether an individual is an independent contractor or an employee is the right of either to terminate the relationship without liability. *Indus. Comm'n v. Valley Chip & Supply Co*., supra at 974; see also *Indus. Comm'n v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Brush Hay Milling Co. v. Small*, *supra*; *Faith Realty & Dev. Co. v. Indus. Comm'n*, 170 Colo. 215, 460 P.2d 228 (1969). It is the power of control, not the fact of control that is the principal factor in distinguishing an employee (servant) from a contractor. *Indus. Comm'n v. Valley Chip & Supply Co.,* supra at 974. The right immediately to discharge involves the right to control. *Indus. Comm'n v. Bonfils*, 78 Colo. 306, 241 P. 735, 736 (1925). Where compensation is based upon time or piece the workman is usually an employee and where it is based upon a lump sum for the task he is usually a contractor. *Brush Hay & Mill. Co. v. Small*, supra at page 87. As found, the Claimant was an "employee" on the date of his compensable injury, September 12, 2016.

Compensability

g. In order for an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Office,* 919 P.2d 207, 210, 210 (Colo. 1996). An injury "arises out of' employment if it would not have occurred **but for** the fact that the conditions and obligations of employment placed the employee in a position that he or she was injured." *See City of Brighton v. Rodriguez,* 318 P.3d 496, **2014 CO 7** [presumption that an injury arises out of employment when an unexplained injury occurs during the course of employment. Thereupon, it is incumbent to show that non-work related factors caused the injury]. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1) (c), C.R.S. *See Faulkner v. Indus. Claim Appeals Office,* 24 P.3d 844 (Colo. App. 2000)*; Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 399 (Colo. App. 2009); *Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277, 1279 (Colo. App. 2008). The question of causation is generally one of fact for determination by an ALJ. *Faulkner* at 846; *Eller* at 399-400. As found, the Claimant sustained a compensable injury to his left wrist on September 12, 2016, arising out of the course and scope of his employment for the Employers herein.

Failure to Designate Medical Provider

h. An employer's right of first selection of a medical provider is triggered when the employer has knowledge of the accompanying facts connecting the injury to the employment. *Jones v. Adolph Coors Co.,* 689 P. 2d 681 (Colo. App. 1984). An employer must tender medical treatment forthwith on notice of an injury or its right of first selection passes to the injured worker. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). As found, Employer G and Employer P did not furnish the Claimant with a list of designated providers. Also, as found, Bryan Taylor of Employer P, by choosing to take the Claimant to the Porter ER, implicitly, by his actions, selected the Porter ER as the first medical provider.

i. Section 8-43-404(5)(a)(I)(A), C.R.S. provides:

> In all cases of injury, the employer or insurer shall provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers or a combination thereof where available, in the first instance, from which list an injured employee may select the physician who attends the injured employee.

Further, WCRP, Rule 8-2(A) provides:

> When an employer has notice of an on-the-job injury, the employer or insurer shall provide the injured worker with a written list of designated providers from which the injured worker may select a physician or corporate medical provider. For purposes of this rule 8, the list will be referred to as the designated provider list.

WCRP Rule 8-2(A)(1) states that "a copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." Here, Claimant requested help with his claim but was not provided with a designated provider list in a written verifiable manner. Therefore, WCRP Rule 8-2-(E) applies in this matter, which states: "If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing." As found, Employer G and Employer P admitted they knew of the accident the same day of the accident. Respondents failed to designate a medical provider. Therefore, the right of selection passed to the Claimant. Here, Claimant reported the injury and selected Dr. Griggs. Therefore, Dr. Griggs is an authorized treating physician (ATP).

Medical Benefits

j. Because this matter is compensable, Respondents are liable for medical treatment which is reasonably necessary to cure or relieve the effects of an industrial injury. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). As found, the Porter ER provided emergent care. A medical emergency allows an injured worker the right to obtain treatment without undergoing the delay inherent in notifying the employer and awaiting approval. However, once the emergency has ended, the employee must give notice to the employer of the need for continuing care. *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

k. Respondents are liable for medical treatment which is causally related and reasonably necessary to cure or relieve the effects of an industrial injury if a claim is compensable. § 8-42-101(1) (a), C.R.S; *Snyder v. Indus. Claim Appeals Offic*e, 942 P.2d 1337 (Colo. App. 1997). The evidence must establish the causal connection with reasonable probability, not medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 30 Colo. App. 224, 491 P.2d 106 (1971). Reasonable probability exists if the proposition is supported by substantial evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). As found, all of the Claimant's medical care and treatment for his compensable left wrist injuries of September 12, 2016, is causally related thereto and reasonably necessary to cure and relieve the effects thereof. *See also Dependable Cleaners v. Vasquez,* 883 P.2d 583 (Colo. App. 1994). As found, Dr. Griggs was of the opinion that the treatment recommended is related to the injury of September 12, 2016. Also, medical treatment must be reasonably necessary to cure

and relieve the effects of the industrial occupational injury. § 8-42-101(1) (a), C.R.S; *Morey Mercantile v. Flynt*, 97 Colo. 163, 47 P.2d 864 (1935); *Sims v. Indus. Claim Appeals Offi*ce, 797 P.2d 777 (Colo. App. 1990). The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). To date, Claimant has received evaluations at the emergency room and at Hand Surgery Associates with Dr. Griggs and the therapist. Claimant had surgery on September 16, 2016. Dr. Griggs last saw Claimant on October 24, 2016 due to Claimant's lack of funds. Dr. Griggs last provided Claimant restrictions of 2 lbs. lifting. Claimant only saw the therapist twice. These treatments are reasonably necessary to cure and relieve the effects of the September 12, 2016 compensable injury and they are causally related to the Claimant's injuries sustained during the course and scope of his employment, and reasonably necessary to cure and relieve the effects thereof.

l. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). When an ATP refers an injured worker to his personal physician, under the mistaken belief that the claim was not compensable, the referral was nonetheless within the chain of authorized referrals and, thus, subsequent treatment was authorized. *See Cabela v. Indus. Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008). As found, all referrals from Hand Surgery Associates, Dr. Clinkscales, and Dr. Griggs, including the referral to .O.T. Lobban, were within the authorized chain of referrals.

Average Weekly Wage

m. the term "average weekly wage" (AWW) is a key part of the formula used to calculate compensation for injured workers, and it is based upon the definition of "wages" provided at § 8-40-201(19)., C.R.S. *See Indus. Claim Appeals Office v. Ray*, 145 P.3d 661 (Colo. 2006). To determine a claimant's AWW, the ALJ may choose from two different methods set forth in § 8-42-102. The first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." § 8-42-102(2). The default provision in § 8-42-102(2)(a)-(f), lists six different formulas for conducting this calculation. Pursuant to § 8-42-102(5)(a), the phrase "at the time of injury" in subsection (2) requires the AWW to be determined using the wage earned on the date of the employee's accident. The second method for calculating a Claimant's AWW, referred to as the "discretionary exception," applies when the default provision will not fairly compute the employee's AWW. § 8-42-102(3). In such a circumstance, the ALJ has discretion to compute the AWW of a Claimant in such other manner and by such other method as will, based

upon the facts presented, fairly determine the employee's AWW. *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010).

n. The overall objective of calculating AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Coates, Reid & Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No 7*, W.C. No. 4-240-475 [Indus. Claim Appeals Office (ICAO), May 7, 1997]; *Vigil v. Indus. Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992). Because the default method will not fairly compute the Claimant's AWW in this case, the discretionary method is appropriate to use in order to arrive at a fair approximation of the Claimant's temporary wage loss. His earnings averaged $1,072.72. This is based on the Claimant's testimony that he would sometimes earn $550 in 3 days. As found, Employer P agreed. Taylor stated that in a three week period Employer G had worked for Employer P a total of 11 days. This is roughly 53% of 21 days. Therefore, Claimant's AWW is calculated as $550 times 4 divided by 53% times 92% to reach the $1,072.72, which ordinarily yields a TTD rate of $715.14, but penalized by 50% for failure to insure, the TTD rate is $1,072.72 per week, or $153.25 per day.

Penalty for Failure to Insure:

o. Section 8-43-408, C.R.S., addresses employers who, at the time of the injury, are uninsured. § 8-43-408(1). It states, in pertinent part:

> In any case where the employer is subject to the provisions of articles 40 to 47 of this title and at the time of an injury has not complied with the insurance provisions …,the employee, if injured, … in any such case the amounts of compensation or benefits provided in said articles shall be increased fifty percent.

As found, Employers G and P were non-insured. Therefore, all indemnity benefits to Claimant should be increased by 50%.

Temporary Disability Benefits

p. To establish entitlement to temporary disability benefits, a claimant must prove that the industrial injury has caused a "disability," and that he has suffered a wage loss that, "to some degree," is the result of the industrial disability. § 8-42-103(1), C.R.S; *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). When a temporarily disabled employee loses his employment for other reasons which are not his responsibility, the causal relationship between the industrial injury and the wage loss necessarily continues. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair his opportunity to obtain employment at pre-

injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December 18, 2000). There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish her physical disability. See *Lymburn v. Symbois Logic*, 952 P.2d 831 (Colo. App. 1997). Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Id*. As found, As found, the Claimant was temporarily and totally disabled from September 12, 2016, through April 19, 2017, both dates inclusive, a total of 220 days.

q. Once the prerequisites for TTD are met (*e.g.,* no release to return to full duty, MMI has not been reached, a temporary wage loss is occurring; modified employment is not made available, and there is no actual return to work), TTD benefits are designed to compensate for temporary wage loss. TTD benefits are designed to compensate for a 100% temporary wage loss. *See Eastman Kodak Co. v. Industrial Commission,* 725 P. 2d 107 (Colo. App. 1986); *City of Aurora v. Dutch,* 799 P. 2d 461 (Colo. App. 1990). As found, aggregate past due TTD benefits from September 12, 2016, through April 19, 2017, both dates inclusive, a total of 220 days, equal $33,715.00.

r. As found, TPD benefits after April 20, 2017, must be ascertained at a later time.

Statutory Employer and/or Employer P

s. The Statutory Employer Statute, § 8-41-401(1)(a), C.R.S., provides, in pertinent part:

> Any [entity] operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor ... shall be construed to be an employer as defined in articles 40 to 47 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting there from to said lessees, sublessees, contractors, and subcontractors and their employees....

This provision prevents employers from avoiding responsibility to pay workers' compensation benefits by conducting their business through a separate, uninsured employer. *Finlay v. Storage Technology Corp*., 764 P.2d 62, 64 (Colo.1988). In turn, § 8-41-401(2), C.R.S., provides statutory employers concomitant immunity from suit if the injured worker's direct employer carries workers' compensation insurance. So the spirit of the law is that employers should not avoid liability by hiring out work. Further, the statute at § 8-41-401(1)(a), C.R.S., is to prevent employers from avoiding responsibility under the workers' compensation act by contracting out their regular work to non-insured contractors rather than hiring the worker directly. *Winer's Pumping Units v. Emerald Gas Operating Co.,* 936 P.2d 627, 629 (Colo.App.1997). Under § 8-41-

401(1)(a), C.R.S., a company which is engaged in business by leasing or contracting out part or all of its work to a subcontractor is the employer of the employees of the subcontractor and is liable for the injuries of employees of the subcontractors, unless the subcontractor is insured. As found, Employer P is in the business of contracting with home owner for roofing contracts. Bryan Taylor, the owner of Employer P, agreed that he had hired Employer G, subcontracting some of its roofing work. The Claimant was an employee of Employer G and Employer P.

Joint and Several Liability

t. The holding in *Sechler v. Pastore et al.,* 103 Colo. 139, 84 P.2d 61 (1938) was also echoed in *Archer Freight Lines, Inc. v. Horn Transp., Inc.,* 32 Colo. App. 412, 514 P.2d 330 (1973) as the case most on point. While *Sechler* is 79 years old, the opinion has not been overruled. It is still good law. In *Sechler* the Claimant sustained a compensable injury on March 11, 1937. Previous to this time the general contractor, Pastore, had entered into an agreement with the Sechler Electric Company for the installation of electric outlets in a house being constructed by Pastore in Denver, Colorado. At the time of the injury, the Claimant, an electrician, was engaged in making such installments as an employee of the Sechler Electric Company. Neither the employer nor the contractor carried workers' compensation insurance. After a number of hearings, the Industrial Commission ordered that both the Sechler Electric Company and Pastore pay compensation to the Claimant. The lower court issued an order affirming the award of the Industrial Commission in all respects and with the further adjudication that the liability for the payment of compensation as between the employer and the contractor was therein fixed as a primary liability against the former and a secondary liability against the latter. The Industrial Commission was directed to modify its award accordingly. The Supreme Court, however, found that in the case of a compensable injury to an employee of the subcontractor, there is no express statutory authority to determine or fix a comparative degree of liability for the compensation as between the subcontractor employer and the contractor. *Index Mines Corporation v. Indus. Comm'n*, 82 Colo. 272, 259 P. 1036 (Colo. 1927). *American Radiator Company v. Franzen* [81 Colo. 161], 254 P. 160 (Colo. 1927). The Supreme Court in *Sechler* further stated that the primary purpose of the Workers' Compensation Act is to expeditiously provide an award of compensation in favor of an injured employee against all persons who may be liable therefore. Proceedings should not be hampered or delayed by the adjudication of collateral issues relating to degrees of liability of the parties made responsible by the statute for the payment of compensation. Such a determination may well involve questions of contractual obligations or even equitable considerations between the responsible parties, of no concern to the injured employee, and, if involved, should be resolved by a court in an independent proceeding in which the employee should not be required to participate. The Colorado Supreme Court found the Connecticut Supreme Court persuasive in *Johnson v. Mortenson*, 110 Conn. 221, 147 A. 705, 66 A.L.R. 1428, at page 707 that stated:

> The better view and practice of the compensation commissioners appears to have been to regard their jurisdiction as limited to determination of the right of the employee to compensation and as to who is liable therefore to such Claimant, leaving the rights and liabilities between those held jointly liable to the Claimant 'to be worked out in such proceedings, among). They stated that the jurisdiction in a workers' compensation matter is limited to a determination of the right of an employee to compensation and to a determination of who is liable for the award under the statute. Collateral issues relating to the contractual rights and liabilities between the employers are of no concern to the employee and should be resolved by a court in an independent proceeding in which the employee should not be required to participate.

These cases were followed in *Herman Hernandez v. MDR Roofing, Inc., Alliance Construction & Restoration, Inc., Norma Patricia Hoff, et al*. W.C. No. 4-850-627-03, (ICAO, September 20, 2013) The decision was affirmed in *Pinnacol Assurance v. Norma Patricia Hoff et. al.,* 375 P.3d 1214 (Colo. 2016). In the underlying decision, the court concluded that, in addition to MDR, who was the Claimant's direct employer, Hoff and Alliance, were Claimant's statutory employers under §§ 8-41-402 and 8-41-401 of the Workers' Compensation Act. The ALJ then concluded that Hoff, Alliance, and MDR should pay for the Claimant's medical and temporary disability benefits. Finding that none of these three parties had a workers' compensation insurance policy in effect on the date of injury, the ALJ held them jointly liable for Claimant's benefits. The ALJ ordered each of the non-insured employers to post bond in the amount of $50,000. In its petition to review, MDR asserted that the ALJ erred in finding MDR jointly liable for the Claimant's loss. The court disagreed with MDR. *Coffey v. Curry Graham d/b/a Affordable Roofing*, W.C. No. 3-909-714 (ICAO, January 24, 1991). See also *Sechler v. Pastore*, *supra.* In the prior underlying ICAO Final Order, the panel instructed the ALJ that pursuant to *Sechler*, the non-insured statutory employers bear joint liability. As found, Bryan Taylor, through his company, Employer P, contracted Employer G and its employees, to perform his contracted roofing work. Whether this arrangement was a joint venture or whether Employer P was the general contractor is irrelevant as, both are non-insured. Therefore they are jointly and severally liable for the Claimant's workers' compensation benefits.

Burden of Proof

u. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App.

2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the jointly and severally liable Respondents failed to sustain their burden of proof that the Claimant was an "independent contractor." The Claimant sustained his burden on the issues of being an "employee" of non-insured entities; compensability; medical benefits; AWW; and, TTD from September 12, 2016, through April 19, 2017

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant was an employee of Employer G. Respondents G and P failed to prove that the Claimant was an independent contractor.

B. Employer G is not a corporation but a sole proprietorship. Therefore, Jose Fredy Guillen is personally liable for benefits to the Claimant, jointly and severally with Employer P.

C. Employer P, is the statutory employer and/or indirect employer of the Claimant. It is a corporation.

D. The Claimant sustained a compensable injury to his left wrist and right hip during the course and scope of his employment on September 12, 2016.

E. Both Employer G and Employer P failed to comply with the insurance provisions of the Workers' Compensation Act because they did not have workers' compensation insurance as required by law. Therefore, Claimant has established that the amount of compensation and benefits due to him are increased by 50%.

F. Respondents are jointly and severally liable and shall pay the costs of causally related and reasonably necessary medical care and treatment to cure and relieve him of the effects of the Claimant's compensable injuries, provided by ATPs, including Porter Hospital, Focus Hand and Arm Surgery Center, Carlton Clinkscales,

M.D., Sean M. Griggs, M.D., at Hand Surgery Associates, and O.T. Babett Lobban, subject to the Division of Workers' Compensation Medical Fee Schedule. The Claimant paid some of his medical bills in order to receive medical care. Pursuant to § 8-42-101(6)(b), C.R.S., Respondents, jointly and severally, shall reimburse Claimant for 100% of the medical benefits paid by Claimant in the amount of $5,320 (*See* Claimant's Exhibit 12.).

G. Because both Employers are jointly and severally liable for payment of Claimant's medical costs associated with his compensable injuries of September 12, 2016, no medical provider shall seek to recover such costs from the Claimant under pain of penalty pursuant to. § 8-42-101(4), C.R.S.

H. The Claimant's average weekly wage is $1,072.72.

I. Both Respondents, jointly and severally, shall pay the Claimant temporary total disability benefits of $1,072.66 (penalized by 50% for failure to insure The Claimant's AWW is $1,072.66, which yields a TTD rate of $1,072.66 per week, or $153.24 per day. For the period from September 12, 2016 until April 19, 2017, when Claimant started a light duty job despite his restrictions, a total of 220 days both Respondents shall pay the Claimant aggregate past due benefits in the amount of $33,715.00, which is payable retroactively and forthwith.

J. Both Respondents, jointly and severally, shall pay the Claimant interest at the rate of eight percent (8%) per annum on all amounts of indemnity benefits due and not paid when due.

K. In lieu of payment of the above compensation and benefits to the Claimant, both Respondents shall:

1. Within ten (10) days of the date of service of this order, deposit the amount of $39,032.17 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee; OR

2. Within ten (10) days of the date of service of this order, file a bond in the amount of $60,000.00 with the Division of Workers' Compensation;

(a) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(b) Issued by a surety company authorized to do business in the State of Colorado. The bond shall guarantee payment of the compensation and benefits awarded.

L. Both Respondents, jointly and severally, shall notify the Division of Workers' Compensation of payments made pursuant to this order.

M. The filing of any appeal, including a petition to review, shall not relieve the both Respondents, jointly and severally, of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

N. Any and all issues not determined herein, including the issues of temporary partial disability after April 20, 2017 and permanent disability are reserved for future decision.

DATED this_____day of September 2017.

_____
EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she sustained a compensable injury to her lower back and/or left hip on or about June 25, 2015?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable, necessary, and related treatment for her lower back and/or left hip for the incident which occurred on or about June 25, 2015?

III. Has Claimant shown that Respondents are subject to penalties pursuant to §8-43-203(2)(a) C.R.S., for failure to timely admit or deny her claim for workers compensation benefits?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following Findings of Fact:

1. Claimant worked for employer, N-Link Corporation, from November 2009, through July 31, 2015, after which she was laid off for lack of work. Her job included managing 17 computers in classrooms and servicing servers, to include installing batteries.

2. On June 25, 2015. Claimant was sitting cross-legged on the floor, holding a large battery in front of her. She was attempting to place this battery into the battery rack, which was about a foot off the floor. Claimant was sliding the battery into the rack when the battery slipped, dropping several inches before she could regain a proper grip. Claimant testified that she "jolted" forward to try to catch it. The battery was above her lap and didn't actually strike the Claimant, or the floor. Claimant asserts that she felt immediate 8-9/10 pain to her lower left lumbar region, buttocks and into her thigh.

3. While Claimant admitted having previous lower back injuries and ongoing symptoms, she denied having the left gluteal and left leg symptoms prior to this incident, and feels that this incident aggravated her underlying lower back condition.

4. An incident report was filed by Claimant the following afternoon (Ex. 3). On this report, Claimant states that she was "*trying to get an appointment with* my *doctor*" (emphasis added). Claimant continued to work her regular employment until her layoff on July 31, 2015. Claimant ultimately filed a workers' claim for compensation, and on December 8, 2016 the Division of Workers Compensation notified Respondents via letter that a position must be taken within 20 days. Claimant testified that TriCare had declined treatment, stating that this incident was a work-related injury.

5. The Claims adjuster, Beatrice Diaz, testified that Claimant was provided a designated provider list by the employer, not by her. Ms. Diaz testified that she reached out to Claimant on July 2, 2015, July 6, 2015 and also sent a letter to claimant on July 6, 2015. Ms. Diaz also attempted to contact Claimant on July 14, 2015. Ms. Diaz received no responses from any attempted contacts. She then "internally closed" this claim.

6. Claimant testified that the providers on the list would not accept an appointment and therefore, she contacted Ms. Diaz regarding further care with Dr. Bissell. However, Ms. Diaz testified that Claimant did not contact her regarding further care from the designated provider list or treatment with Dr. Bissell for the June 25, 2015 case. Dr. Bissell was only authorized for treatment for the July 10, 2014 case.

7. Following Claimant's layoff on July 31, 2015, Claimant applied and received unemployment benefits from August 10, 2015 through January 30, 2016 (Ex. HHH). At hearing, Claimant did not deny that in order to maintain her unemployment benefits, she had to be physically able to work, keep work logs and that she did apply for jobs during that period of time.

8. Claimant has a lengthy history of back complaints. Her low back pain complaints began 21 years prior to 2011, after a pregnancy. As of May 25, 2011, Claimant was seen in physical therapy for neck, shoulder, and low back pain (Ex. D; p. 14).

9. On September 21, 2012, Claimant was seen for chronic low back pain. It was noted that her back pain occurred when standing, cooking, doing chores, and bending to help her daughter. She was trying to walk for exercise, but the back pain became worse, *with pain in her left hip extending down her left leg* (Ex. H, pp. 35-36)(emphasis added).

10. A series of low back x-rays was performed on October 1, 2012. In the comments for the Reason for Order, it was noted that "*[Claimant] had low back pain* for years. *The back pain is present most of the time. It is* severe *now, with pain extending down the* left *leg"* (Ex. I, pp. 38-39)(emphasis added).

11. On May 20, 2014, Claimant was referred to Dr. Bissell for evaluation of chronic low back pain. She also complained of neck, mid back, and bilateral upper limb pain. Dr. Bissell noted that Claimant had fallen in November 2011. With regard to her low back, his diagnosis was "chronic low back pain, widespread soft tissue pain syndrome with nonrestorative sleep and cognitive dysfunction, query fibromyalgia. Today's symptoms are nonspecific and widespread." (Ex. M; pp. 52-54).

12. On June 24, 2015, MRIs were taken of Claimant's lumbar spine, which showed mild degenerative changes (Ex. N; p. 55).

13. On July 10, 2014, Robert Cowan PA-C, noted that since Claimant fell in November (2011) and did not develop pain until March or April (2014), it was unlikely

that the pain was directly related to the fall. He opined her shoulder pain was a repetitive stress injury rather than acute trauma. He also related her low back pain to myofascial pain syndrome, likely related to a repetitive stress injury rather than an acute injury (Ex. O; p. 56).

14. On September 23, 2014, Dr. Bissell performed bilateral L2 through S1 medial branch blocks (Ex. Q; pp. 65-66). An intake diagram of October 22, 2014, shows widespread body pain (Ex. P; p. 60).

15. On March 17, 2015, Claimant was again seen by Dr. Bissell and again he noted widespread body pain, much of which was due to fibromyalgia. With regard to her low back condition, he did not plan on repeating her lumbar medial branch blocks due to her negative response to the diagnostic injection (Ex. T; p. 79).

16. Dr. Bissell saw Claimant on April 14, 2015, and she was requesting a repeat of the medial branch blocks to her mid and low back. "Pain 8/10; normal daily pain 6/10; 20% improvement with medication" (Ex. V, pp. 86-87).

17. On June 9, 2015, (now two weeks prior to the incident at issue), Claimant saw Dr. Bissell for mid to low back pain and he ordered an L2-S1 radiofrequency neurotomy (RFN) (Ex. W; pp. 89-90).

18. Following the incident of June 25, 2015, Claimant had contact with providers at Evans Army facility on June 25, 2015, June 30, 2015, July 1, 2015, and July 20, 2015. At none of these appointments does Claimant mention this incident. (Ex. X, p. 92) (Ex. Y, p. 93) (Ex. Z, p. 94) (Ex. AA, p. 95).

19. On July 22, 2015, Claimant received left L2-S1 medial branch RFN procedures from Dr. Bissell. It was noted that she had "recalcitrant *low back pain* unresponsive to conservative management." (Ex. BB, p. 96) Claimant makes no mention of the July 25, 2015 event at this appointment.

20. Claimant was again seen in by Dr. Bissell's office on August 10, 2015, September 17, 2015, October 19, 2015, December 15, 2015 and December 17, 2015. None of those visits note a June 25, 2015 event (Ex. DD, EE, GG, HH, II). Claimant did not treat for her low back after December 17, 2015.

21. Claimant was first seen by Dr. Eric Ridings on July 11, 2016. Dr. Ridings performed an Independent Medical Examination ("IME") at that employer's request with regard to the July 10, 2014, workers' compensation claim. Claimant completed a questionnaire at the time of that IME. She noted that her problems began as a result of the fall at work in 2011, which caused severe pain and other issues in her back, neck, and shoulders. She also completed a pain diagram, which showed pain in the left lower extremity and top of the left hip (Ex.TT, pp 148, 152). There was no mention at this IME of a June 25, 2015 event.

22. Dr. Rook performed an IME at Claimant's request on July 21, 2016. In his report, Dr. Rook also noted that Claimant was having low back pain since 1991. Claimant noted that she had compounded creams for her neck and her low back, which she used often off and on for years and found them helpful. After her fall in 2011, she had marked increase in neck and low back pain and the compounded creams were no longer effective. He diagnosed (among other things) Claimant with chronic low back pain, myofascial pain syndrome, component of facet mediated pain, left-sided sacroiliac joint dysfunction, and negative lower extremity neurological examination. Dr. Rook did not opine that Claimant's back, neck or shoulder complaints were related to the 2011 claim or the 2014 claim. There is no mention of the June 25, 2015, event as a possible cause of her low back complaints (Ex. UU, pp. 153-165).

23. Claimant requested a Division IME ("DIME") for her July 10, 2014 injury. She was assigned to Dr. Caroline Gellrick MD. The DIME took place on November 1, 2016. In Dr. Gellrick's history, it was noted that Claimant had low back pain, 75% in the back and 25% in her leg. The symptoms dated back to 2011 after a fall at work. She specifically noted that Claimant had no new injuries, no car accidents and no slip and falls. Her pain level was 7/10. Activities that make the pain worse include walking, sitting, standing, exercise, bending, working, cleaning, pulling, lifting, and pushing. She can sit for 1 to 2 hours, stand for 10 minutes, drive for 20 minutes, walk for 10 minutes. Claimant states that she stays in bed most of the time. (Ex. WW; pp. 184-185).

24. Dr. Gellrick further noted in her DIME that "the medical records supplied are replete the numerous complaints of fibromyalgias and musculoskeletal pains which predated 2014. There were numerous references to fibromyalgia seen in the Evans Army medical records of Fort Carson." (Ex. WW; p 187).

25. In comparison, on May 20, 2014, (one year prior to the date of this incident), Claimant had reported to Dr. Bissell 8/10 pain currently, 6/10 at rest and 9/10 pain with activity. Any strength training aggravates her pain, as do most household chores. She estimates she can sit for more than 1 hour, stand for 10 minutes and walk for 10 minutes, walking increases her back pain, which is alleviated by sitting, but not by cessation of walking (Ex. M, p. 52).

26. Dr. Ridings performed an IME on April 11, 2017, for this case at issue. Claimant also completed a pain diagram, similar to the one completed at her DIME on July 11, 2016. Claimant reported to Dr. Ridings that she felt excruciating pain in her left lower lumbar and left buttock area following this event. After describing the incident to Dr. Ridings, it was his opinion that the mechanism of injury as described would not cause an injury. Claimant indicated she was seen by Dr. Bissell for injuries related to her 2011 worker's compensation claim, but could not recall when she reported the 2015 injury to Dr. Bissell's office. Claimant also could not recall whether she developed left lower leg symptoms before or after the battery incident (Ex. CCC, pp. 217-218).

27. Dr. Ridings provided a deposition on August 16, 2017 for this case. He testified that an incident at work or pain on the job does not necessarily constitute an injury. Dr.

Ridings' testified that there was no significant reported change in pain, treatment or functionality before and then after the June 25, 2015 event. His opinion, based on a reasonable degree of medical probability, is that Claimant did not sustain a work-related injury on or about June 25, 2015. Extensive medical records by many providers did not reference a June 25, 2015 injury. Rather, Claimant's history showed many years of widespread severe pain throughout most of her body. Until recently, Claimant has asserted that her low back, left hip and leg pain were a result of a 2011 fall (Ex. CCC, p. 222; Ex. TT, p. 152).

28. Beatrice Diaz acknowledged that Insurer received the workers' claim for compensation on December 14, 2016, and she was confused due to the multiple claims and was waiting for a workers' compensation claim number. She was on vacation over the holidays and then in January 2017, insurer's computers were down for a time.

29. The Director of Workers Compensation then sent a notice to Respondents on February 10, 2017 that they had yet to take a position pursuant to § 8-43-203 C.R.S. and WCRP 5-2(D). Respondents were ordered to take a position within 15 days. Respondents then filed their Notice of Contest on February 15, 2017. (Ex. HHH)

CONCLUSIONS OF LAW

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the Respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's

testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Compensability

D. The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, WC 4-650-711 (ICAO February 15, 2007).

E. The mere fact that a Claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007), the panel stated "[p]ain is a typical symptom caused by the aggravation of pre-existing condition."

F. However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of a natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Renta*, 717 P.2d 965 (Colo. App. 1995).

G. Claimant may have sustained an *incident* at work, but did not sustain a compensable *injury.* Although Claimant stated she sought treatment with the designated provider at Concentra who allegedly refused to treat her, she never contacted the insurer or employer for a different provider. Dr. Ridings' testimony is persuasive that it is unlikely that the mechanism of injury described by claimant could have caused an industrial injury. Claimant missed no time from, applied for unemployment upon her termination from employment, met the requirements to maintain her unemployment benefits and sought employment. In addition, there is no mention of this injury to any provider, no significant change in pain levels, no change in level of function and no change in recommended treatment prior to and after the alleged June 25, 2015 event. Moreover, Claimant had previously insisted that her back problems were related to a 2011 fall as reported to Dr. Rook in July 2016, Dr. Ridings in July 2016 and Dr. Gellrick in November 2016.

H. Claimant has failed meet her burden of proving that she sustained an injury on June 25, 2015. The records do not support a causal connection between the incident of June 25, 2015, and Claimant's low back complaints. In addition, Claimant has significant pre-existing low back complaints, which were actively treated with medial branch blocks and a suggested radiofrequency neurotomy as late as June 9, 2015. Dr. Ridings and Dr. Bissell have opined that Claimant has fibromyalgia, which accounts for her widespread and diffuse pain complaints as noted on multiple providers' pain diagrams. Her DIME doctor in an earlier case also noted the numerous references to fibromyalgia in her medical records.

Penalties and Medical Benefits

I. Claimant asserts a penalty pursuant to § 8-43–202(2)(a) for failure to file a position within 20 days after claim for worker's compensation benefits has been filed pursuant to 8-43 202 (1)(a) and 5-2(D). Section 8-43-203 (2) (a) provides:

> If such notice is not filed as provided in subsection (1), the employer or, if insured, the employer's insurance carrier, as the case may be, may become liable to the claimant, *if the claimant is successful on the claim of compensation,* for up to one day's compensation for each day's failure so notified……(emphasis added).

J. If the Claimant fails to prove compensability, the penalty is not applicable. *Muragara v. Sears Roebuck and Company*, W.C. 4-726-134 and W.C. 4-712-263 (ICAO September 8, 2015).

K. The ALJ has found that Claimant has failed to prove a compensable injury, which occurred on June 25, 2015. Therefore, medical benefits and penalties need not be further addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers compensation benefits is denied and dismissed.

2. Claimant's claim for penalties is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 13, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she is entitled to prescription medication, specifically Percocet, Tizanidine, Lyrica, Lidopro Cream, Celebrex, and Trintellix.

II. Whether Claimant is entitled to costs pursuant to C.R.S. § 8-42-101(5).

STIPULATIONS

The parties stipulated that there are no unpaid and contested medical benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant worked for Respondent as a bus aid.

2. On April 28, 2014, Claimant suffered a compensable injury while lifting a 15-20 pound child out of a car-seat. Claimant bent forward and twisted and felt a pop in her mid-lumbosacral area. At the time of the injury, Claimant had the immediate onset of low back pain with bilateral lower extremity numbness and tingling.

3. Claimant came under the care of Dr. Mathwich and underwent conservative treatment for a back strain. Her treatment included physical therapy, chiropractic care, acupuncture, and modified duty. Claimant did not improve with conservative treatment. Therefore, she was sent to physiatry for evaluation and treatment.

4. After being sent to physiatry, Claimant underwent facet joint injections, epidural steroid injections, and medial branch blocks. None of the injections or blocks gave her significant relief.

5. On October 15, 2014, Claimant underwent an MRI. The MRI showed severe levoscoliosis and multilevel degenerative disc disease.

6. Claimant was evaluated by two orthopedic surgeons. Both agreed that Claimant could benefit from surgery. There were, however, concerns about her heavy smoking history, psychosocial issues, and depression. Claimant was also

evaluated by Dr. Castro. Dr. Castro did not think Claimant was a good surgical candidate.

7. After her work related injury, Claimant's mood changed. She became edgy and depressed.

8. On February 19, 2015, Claimant underwent a psychological evaluation by Ron Carbaugh, Psy.D. He reported a history of depression and anxiety without a history of intensive psychotherapy and that she had been given an antidepressant in the past. Psychometric testing was suggestive of longstanding depression. The testing also indicated Claimant's "profile suggests she is preoccupied with her bodily functions and her health, with a tendency at times to overreact to real medical issues and to complain about relatively minor ailments. She may solicit more attention than may be called for from healthcare personnel." The testing also indicated that "She is extremely sensitive to changes in her physical symptoms that may result in complaints without a medical basis." Based on his evaluation, Dr. Carbaugh determined that Claimant was a poor surgical candidate.

9. Dr. Carbaugh's report also indicated that the testing shows that her somatization score is close to the average for a pain patient. His report goes on to provide that "Individuals with a clearly defined organic basis for pain often respond in this manner." Dr. Carbgaugh diagnosed Claimant as suffering from a somatic symptom disorder.

10. Claimant was also evaluated and treated by Joel Cohen, Ph.D. In his initial evaluation, Dr. Cohen indicated that a good bit of Claimant's depression centered on the loss of two children after their births. However, after considering Claimant's preexisting depression, he still determined a portion of Claimant's depression was due to her work related injury. Dr. Cohen determined that Claimant was suffering from an injury related diagnosis of adjustment reaction with mixed features including both anxiety and depression. In light of his diagnosis, he recommended that Claimant be evaluated for the use of antidepressants, even though she had not responded well to them in the past.

11. Claimant was evaluated and treated by Dr. Gutterman, a psychiatrist. Dr. Gutterman prescribed Claimant Trintellix for her work related depression and anxiety. Since taking the Trintellix, Claimant's mood has improved.

12. Claimant also came under the care of Dr. Anderson-Oeser. Dr. Anderson-Oeser treated Claimant for her pain complaints and managed her prescription medication.

13. Due to her work related injury, Claimant suffers from depression, anxiety, chronic back pain, muscle spasms, and neuropathic pain into her lower extremities.

14. Claimant did not undergo back surgery.

15. On March 30, 2016, Claimant was placed at maximum medical improvement by Dr. Mathwich. Dr. Mathwich recommended maintenance medical treatment.

16. On April 29, 2016, Respondent filed a final admission of liability and admitted for reasonable, necessary, and related maintenance medical benefits.

17. Dr. Anderson-Oeser has prescribed the following medication to treat Claimant's work related injury as maintenance medical treatment:

    a. Percocet,

    b. Tizanidine,

    c. Lyrica,

    d. Lidopro cream, and

    e. Celebrex.

18. Respondents have been paying for Claimant's maintenance medical treatment, including the prescription medication at issue. Therefore, as stipulated to by the parties, there are no unpaid and contested medical benefits.

19. Dr. Anderson-Oeser testified at hearing regarding the purpose of each medication and its effectiveness for Claimant.

20. Dr. Anderson-Oeser testified that she is prescribing Percocet for Claimant's chronic back pain. She testified that the Percocet is reducing Claimant's back pain and increasing Claimant's functioning. Dr. Anderson-Oeser indicated that Claimant might be bed ridden without the Percocet.

21. Dr. Anderson-Oeser also testified that she is prescribing the Tizanidine to treat Claimant's muscle spasms. She testified that the Tizanidine is reducing Claimant's muscle spasms and increasing Claimant's functioning.

22. Dr. Anderson-Oeser testified that she is prescribing the Lyrica to treat Claimant's neuropathic pain. She also testified that the Lyrica is reducing Claimant's neuropathic pain and increasing Claimant's functioning.

23. Dr. Anderson-Oeser testified that she is prescribing the Lidopro cream to help treat Claimant's back pain and reduce the amount of Percocet Claimant uses. She testified that the Lidopro cream is reducing Claimant's pain complaints and increasing her functioning.

24. Dr. Anderson-Oeser also testified that she is prescribing Claimant Celebrex for her back pain. She testified that the Celebrex is reducing Claimant's back pain, reducing the amount of Percocet that is necessary, and is increasing Claimant's functioning.

25. Dr. Anderson-Oeser testified that the purpose of Claimant's current medication regimen is to make Claimant as functional as possible with the least amount of opioid (Percocet) medication. She also testified that the current medication regimen has increased Claimant's ability to function and perform specific activities of daily living.

26. This ALJ finds Dr. Anderson-Oeser's testimony to be credible and persuasive.

27. This ALJ finds that each medication which is being prescribed by Dr. Anderson-Oeser is part of a comprehensive pharmacological plan to decrease Claimant's chronic pain and increase Claimant's functioning and ability to perform activities of daily living.

28. Claimant testified regarding the benefit of each medication. Claimant testified that the Percocet minimizes her back pain and allows her to be more functional. She also stated that the Percocet allows her to do laundry, dishes, and take care of her 6 year-old son. This includes getting him ready for school and keeping him occupied. The Percocet also helps Claimant maintain her pilates routine. If she misses a dose of Percocet, she has more pain and more stiffness.

29. Claimant testified that the Tizanidine reduces her muscle spasms and increases her functioning. Claimant also testified that the Lyrica has reduced her neuropathic pain and increased her functioning. She also testified that the Lidopro cream decreases her pain in the morning when she first gets up and before the Percocet starts to work. Claimant further testified that the Celebrex helps to reduce her pain and reduce her use of Percocet. Since starting the Celebrex, Claimant has decreased her use of Percocet.

30. Claimant also testified that the Trintellix, which is prescribed by Dr. Gutterman makes her feel better and that she's less grouchy.

31. Claimant reported to Dr. Anderson-Oeser that her current medication regimen is 50% effective at controlling her symptoms.

32. Claimant's testimony is found to be credible and persuasive that each medication being prescribed is reducing her symptoms and increasing her functioning.

33. Each medication which is currently being prescribed by Dr. Anderson-Oeser is reducing Claimant's pain and increasing Claimant's level of functioning. Due to the combination of each medication being prescribed, Claimant has less pain and is able to do more activities of daily living. Due to the medication being prescribed, Claimant is able to care for her child, wash dishes, participate in pilates, and engage in other activities of daily living.

34. This ALJ finds that each medication which is being prescribed at this time is increasing Claimant's functioning and ability to perform activities of daily living.

35. Respondents had Claimant evaluated by Dr. Wunder. Dr. Wunder issued a report and testified at hearing. Dr. Wunder is of the opinion that the medication being prescribed by Dr. Anderson-Oeser is not reasonable and necessary. He is also of the opinion that the medication being prescribed by Dr. Gutterman is not reasonable, necessary, or related to Claimant's work related injury.

36. Dr. Wunder indicated that the literature indicates that the use of opioids – Percocet - to treat non-malignant chronic pain has no known benefit. Dr. Wunder, however, does not cite to this literature. Dr. Wunder also indicated that Claimant should be weaned from her Percocet over a two week period. But, Dr. Wunder was not aware of Claimant's current dosage.

37. The Director's Medical Treatment Guidelines, Rule 17, exhibit 9, pg. 68, warn that the use of narcotics to manage chronic pain "is fraught with controversy and lack of scientific research." Moreover, the Medical Treatment Guidelines indicate that "Extreme caution should be used in prescribing controlled substances for workers with one or more 'relative contraindications.'" Claimant has sleep apnea which is a "relative contraindication." *See* Medical Treatment Guidelines, Rule 17, exhibit 9, pg. 76. Therefore, pursuant to the Medical Treatment Guidelines, extreme caution should be used in prescribing opioids for Claimant. However, the Medical Treatment Guidelines do not prohibit the use to opioids to treat non-malignant chronic pain.

38. Dr. Wunder also indicated that the use of Lyrica for neurogenic pain is not supported by Claimant's evaluations, which includes Claimant's electrodiagnostic studies which were normal. However, Dr. Anderson-Oeser credibly testified that Claimant has had neurological findings and complaints which support the use of Lyrica. In addition, Claimant credibly testified that the Lyrica reduces her neuropathic pain complaints of tingling in her lower extremities and burning in her feet.

39. Dr. Wunder also indicated that the use of Tizanidine for muscle spasms was not reasonable and necessary. Claimant credibly testified that the Tizanidine reduces her muscle spasms and increases her functioning.

40. Dr. Wunder also indicated that Trintellix is not reasonable, necessary, or related. Dr. Wunder indicated that Claimant's depression is not related to her industrial injury. Dr. Wunder stated that it is not reasonable to conclude that her depression was caused by such a minor injury. Claimant, however, credibly testified that her injury has contributed to her poor mood and that the Trintellix is making her feel better.

41. Dr. Wunder also testified that the Lidopro cream is not reasonable and necessary because the cream is probably not penetrating Claimant's adipose tissue and is therefore not working. Claimant, however, credibly testified that the Lidopro cream works and reduces her pain in the morning before her Percocet starts to work.

42. Claimant currently suffers from chronic back and neuropathic pain due to her work related injury. Dr. Wunder did not propose any meaningful medication or treatment regimen to manage Claimant's current pain complaints and dysfunction.

43. This ALJ does not find Dr. Wunder's opinions to be persuasive.

44. The Percocet, Tizanidine, Lyrica, Lidopro cream, Celebrex, and Trintellix is reasonable and necessary and related to Claimant's work related injury at this time.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. Section 8-43-201, *supra*.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

I. Whether Claimant has proven by a preponderance of the evidence that she is entitled to prescription medication, specifically Percocet, Tizanidine, Lyrica, Lidopro Cream, Celebrex, and Trintellix.

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where Respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When Respondents challenge Claimant's request for specific medical treatment Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether Claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In this case, Claimant credibly testified that the medication regimen, as a whole, is reducing her pain and increasing her functioning and ability to perform activities of daily living. The combination of medication being prescribed by Drs. Gutterman, and Anderson-Oeser, allows Claimant to get out bed, take care of her six year old child, do laundry, wash dishes, participate in pilates and perform other activities of daily living.

Dr. Anderson-Oeser also credibly testified that the medication regimen, as whole, is reducing Claimant's pain complaints and increasing her ability to perform activities of daily living. As found, the current medication regimen allows Claimant to take care of her son, do laundry, wash dishes, participate in pilates and perform other activities of daily living. Dr. Anderson-Oeser also testified that Claimant's mood is better.

Dr. Wunder's opinions were not found to be persuasive by this ALJ. As found, Dr. Wunder did not find any of the current medication at issue to be reasonable, necessary, and related to Claimant's work related injury. Moreover, Dr. Wunder did not propose any meaningful medication or treatment regimen to manage Claimant's current pain complaints and dysfunction. Therefore, his opinions were not found to be persuasive.

Claimant has established by a preponderance of the evidence that the present medication regimen is currently reasonable, necessary, and related to Claimant's industrial accident. Therefore, this ALJ concludes that Claimant has established that

the Percocet, Tizanidine, Lyrica, Lidopro cream, Celebrex, and Trintellix are currently reasonable, necessary and related to treat her from the effects of her industrial injury.

II. Whether Claimant is entitled to costs pursuant to C.R.S. § 8-42-101(5).

Claimant seeks application of § 8-42-101(5), C.R.S. This subsection provides that if a party applies for a hearing regarding entitlement to medical maintenance benefits that are unpaid and contested, and such benefits are admitted fewer than 20 days before hearing (or ordered after the application for hearing is filed), the Claimant receives costs incurred in pursuing the medical benefits.

In this case, the parties stipulated that at the time of hearing, there were no maintenance medical benefits that were "unpaid and contested." Respondent continued to pay for Claimant's medication, but contested their ongoing liability for such. Therefore, because there were no unpaid medical benefits, this ALJ concludes that costs cannot be awarded under Section 8-42-101(5).

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondent shall pay for Claimant's Percocet, Tizanidine, Lyrica, Lidopro cream, Celebrex, and Trintellix.

2. Claimant's request for costs pursuant to 8-42-101(5) is denied and dismissed.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 9-15-17

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Justin Green, M.D. that .she has not reached Maximum Medical Improvement (MMI) as a result of her admitted December 3, 2015 lower back injury.

FINDINGS OF FACT

1. Claimant worked as a Pet Stylist for Employer. On December 3, 2015 she suffered an admitted industrial injury to her lower back. While Claimant was attempting to lift a dog she developed lower back pain that radiated into her legs.

2. On January 27, 2016 Claimant visited Dean L. Prok, M.D. for an examination. He assigned work restrictions, prescribed physical therapy and referred her for pain management treatment.

3. Claimant continued to receive medical treatment for her lower back through authorized providers. On April 26, 2016 she visited Franklin Shih, M.D. for an evaluation. Dr. Shih recommended a lumbar MRI and remarked that "if there is no significant anatomic pathology that would be a contraindication to chiropractic, I would recommend a trial of 6 sessions."

4. Although the MRI recommended by Dr. Shih was not performed Claimant continued to receive treatment for her December 3, 2015 lower back injury. On July 27, 2016 Authorized Treating Physician (ATP) Kevin O'Toole, M.D. determined that Claimant had not reached Maximum Medical Improvement (MMI) because she required a lumbar MRI "to evaluate for spinal or disc abnormalities."

5. By October 26, 2016 Dr. O'Toole determined that Claimant had reached MMI despite the lack of a lumbar MRI. He noted that Claimant could return to full duty employment with no work restrictions. Dr. O'Toole noted that Claimant had reached MMI on March 9, 2016 with no permanent impairment and did not require medical maintenance treatment.

6. On November 1, 2016 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. O'Toole's MMI and impairment determinations. The FAL also noted an overpayment of $4,773.70.

7. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME).

8. On March 3, 2017 John R. Burris, M.D. performed a records review ofm Claimant's case. He determined that Claimant had suffered a lumbar soft tissue strain with no evidence of radiculopathy on December 3, 2015. Dr. Burris noted that the natural progression of Claimant's symptoms suggests improvement over days or weeks regardless of medical treatment.

9. On March 20, 2017 Claimant underwent a DIME with Justin D. Green, M.D. Dr. Green concluded that Claimant had not reached MMI. He agreed with Dr. Shih's recommendation of April 26, 2016 that Claimant required a lumbar spine MRI "to rule out any other significant structural abnormality or impairment."

10. Respondents subsequently filed an Application for Hearing and sought to overcome Dr. Greene's MMI determination.

11. .On July 7, 2017 Claimant underwent a lumbar MRI pursuant to DIME Dr. Green's recommendation. The MRI revealed intervertebral disc dessication at multiple levels. The diagnostic testing also revealed multiple other abnormalities including broad=based disc bulges, mild facet hypertrophy and annular tears.

12. On July 12, 2017 Claimant returned to Dr. Shih for an evaluation. After reviewing the results of the lumbar MRI report Dr. Shih remarked "I see nothing that I would recommend we pursue more aggressively with injections or surgery." He noted that Claimant had reached MMI but was unable to complete an impairment rating because of invalid range of motion measurements. Although Dr. Shih asked Claimant to return for range of motion measurements in one week Respondents refused to authorize a return visit.

13. On July 20, 2017 Dr. Burris issued an additional report. He explained that Claimant's lumbar MRI revealed degenerative changes of annular tears and disc bulges that did not cause her symptoms. Dr. Burris emphasized that the MRI also did not reflect any acute changes in Claimant's lumbar spine. He summarized that there were no objective findings that supported an impairment rating for the December 3, 2015 incident.

14. Dr. Burris testified at the hearing in this mater. BEGIN HERE.

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2. Claimant began receiving conservative treatment from Authorized Treating Physician (ATP) Thomas White, M.D. An MRI revealed a complete tear to a portion of Claimant's supraspinatus tendon. Dr. White referred Claimant to Robert Hunter, M.D. for a surgical consultation.

3. On March 23, 2015 Claimant underwent right shoulder surgery. Dr. Hunter performed a right shoulder rotator cuff repair and AC joint resection decompression with acromioplasty.

4. Claimant underwent post-operative conservative treatment and physical therapy for several months. She explained that while she was undergoing physical therapy she developed left shoulder pain. Claimant did not recall when her left shoulder began to hurt and did not correlate any specific injury to her symptoms. Instead, Claimant contends that her left shoulder complaints were caused by overcompensation after her right shoulder surgery. She commented that her left shoulder pain is progressively worsening and her right shoulder symptoms are worse than they were before surgery.

5. On October 26, 2015 Dr. White concluded that Claimant had reached Maximum Medical Improvement (MMI) for her September 21, 2014 admitted right shoulder injury. Dr. White released Claimant from care without impairment or the need for maintenance treatment. He explained to Claimant that it might take up to one year for complete recovery from surgery because of her age and history of injury. Dr. White explained that continuing numbness and difficulties that Claimant was experiencing in both shoulders was not work-related.

6. Claimant challenged Dr. White's MMI and impairment determinations and sought a Division Independent Medical Examination (DIME). On March 31, 2016 Claimant underwent a DIME with Stanley H. Ginsburg, M.D. Dr. Ginsburg agreed with Dr. White that Claimant had reached MMI for her right shoulder on October 26, 2015 and her left shoulder complaints were not work-related. Dr. Ginsburg disagreed with Dr. White's 0% permanent impairment rating and assigned a 6% scheduled impairment for Claimant's right shoulder range of motion deficits. He also noted that Claimant was entitled to medical maintenance care.

7. On June 8, 2016 Respondents field an Amended FAL consistent with Dr. Ginsburg's MMI determination and impairment rating. The FAL also recognized that Claimant was entitled to receive medical maintenance benefits.

8. On June 14, 2016 Claimant underwent an independent medical examination with Timothy Hall, M.D. Dr. Hall disagreed with Dr. Ginsburg's findings and concluded that Claimant had not reached MMI. He determined that Claimant's left shoulder complaints were work related due to overcompensation following surgery and she required additional medical treatment for both shoulders. Dr. Hall also provided Claimant with a 16% scheduled impairment rating for the right shoulder. He noted that Dr. Ginsburg failed to include a 10% rating for resection of the bone performed during shoulder surgery in addition to a range of motion impairment.

9. On June 17, 2016 Claimant underwent a second right shoulder MRI. The MRI revealed an intact supraspinatus tendon and evidence of tendinopathy with no objective evidence of additional tearing or fraying.

10. On September 21, 2016 Claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian performed a physical examination and medical records review. He agreed with Drs. White and Ginsburg that Claimant had reached MMI on October 26, 2015 and her left shoulder complaints were not work-

related. Dr. Cebrian remarked that Claimant had poor posture with rounded shoulders and kyphosis of the cervical spine. He noted that Claimant had not been working for several months. There was no explanation for her continued left shoulder symptoms because her activities lacked the combination of repetition and force to produce an injury. Dr. Cebrian agreed with the 6% scheduled impairment rating for Claimant's right shoulder assigned by Dr. Ginsburg. He noted that Dr. Ginsburg correctly did not assign an additional impairment for a distal clavicle resection because Claimant had undergone an acromioplasty. Dr. Cebrian explained that an acromioplasty is a minor shaving of the bone that is different from a resection of the bone.

11. Dr. Hall testified at the hearing in this matter. He maintained that Claimant had not reached MMI and required additional left shoulder treatment. Dr. Hall commented that overcompensation was a common condition with shoulder injuries and Claimant had guarded her right shoulder following surgery. He noted that Claimant warranted an additional 10% scheduled impairment rating for a distal clavicle resection. Dr. Hall remarked that a 10% rating for a distal clavicle resection was mandatory pursuant to the Colorado Division of Workers' Compensation *Impairment Rating Tips* (*Impairment Rating Tips*).

12. Claimant also testified at the hearing in this matter. She explained that she continues to suffer pain in both of her shoulders. Claimant acknowledged that she has not worked for Employer since January 2016 but her pain symptoms continue to worsen.

13. Dr. Cebrian testified at the hearing in this matter. He agreed with Dr. Ginsburg that Claimant reached MMI on October 26, 2015 and warranted a 6% scheduled impairment rating for her right shoulder injury. However, Dr. Cebrian disagreed with Dr. Ginsburg that Claimant required medical maintenance treatment. He explained that Claimant suffered from kyphosis and would continue to experience pain due to degenerative, age-related factors.

14. Dr. Cebrian also explained that Dr. Hall incorrectly concluded that Claimant's left shoulder condition was causally related to her September 21, 2014 injury. He commented that Claimant did not mention any left shoulder symptoms prior to reaching MMI. Moreover, he disagreed with Dr. Hall that Claimant warranted a 16% extremity rating for her right shoulder injury based on range of motion deficits and the distal clavicle resection. Although Dr. Cebrian acknowledged that Claimant was entitled to a 6% extremity impairment rating for range of motion deficits, the additional 10% rating noted by Dr. Hall was inappropriate. Relying on the *Impairment Rating Tips,* Dr. Cebrian commented that it is not mandatory to assign a 10% rating based on the specific procedure. Instead, Dr. Cebrian noted that the rating physician has discretion to assign the additional impairment "if" warranted and based on the total clinical picture. He specifically commented that the *Impairment Rating Tips* are designed to capture all possible surgical outcomes. Notably, a physician can assign "up to" an additional 10% impairment. Dr. Cebrian concluded that the additional impairment was not warranted.

15. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that she reached MMI on October 26, 2015 as a result of her September 21, 2014 admitted right shoulder injury. Initially, Dr. Ginsburg agreed with ATP Dr. White that Claimant had reached MMI for her right shoulder on October 26, 2015 and her left shoulder complaints were not work-related. Moreover, Dr. Cebrian agreed with Drs. White and Ginsburg that Claimant had reached MMI on October 26, 2015 and her left shoulder complaints were not work-related. Dr. Cebrian remarked that Claimant had poor posture with rounded shoulders and kyphosis of the cervical spine. He noted that Claimant had not been working for several months. There was no explanation for her continued left shoulder symptoms because her activities lacked the requisite repetition and force to produce an injury.

16. In contrast, Dr. Hall disagreed with Dr. Ginsburg's findings and concluded that Claimant had not reached MMI. He determined that Claimant's left shoulder complaints were work-related due to overcompensation following surgery and she required additional medical treatment for both shoulders. However, Dr. Hall did not detail how Dr. Ginsburg erred in determining that Claimant reached MMI on October 26, 2015 or otherwise incorrectly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's MMI determination was incorrect.

17. Claimant has failed to establish that it is more probably true than not that DIME Dr. Ginsburg's 6% scheduled impairment rating for her admitted right shoulder injury was incorrect. Initially, Dr. Ginsburg assigned a 6% scheduled impairment rating for Claimant's right shoulder range of motion deficits. In contrast, Dr. Hall noted that Claimant warranted an additional 10% scheduled rating for a distal clavicle resection. He remarked that a 10% rating for a distal clavicle resection was mandatory pursuant to the *Impairment Rating Tips*. Nevertheless, Dr. Hall acknowledged that only a small portion of the bone was shaved during the surgical procedure.

18. Dr. Cebrian persuasively agreed with Dr. Ginsburg that Claimant warranted a 6% scheduled impairment rating for her admitted right shoulder injury. He disagreed with Dr. Hall that Claimant warranted a 16% extremity rating for her right shoulder injury based on range of motion deficits and the distal clavicle resection. Specifically, the additional 10% rating noted by Dr. Hall was inappropriate. Relying on the *Impairment Rating Tips,* Dr. Cebrian commented that it is not mandatory to issue a 10% rating based on the specific procedure. Instead, Dr. Cebrian noted that the rating physician has discretion to assign the additional impairment "if" warranted and based on the total clinical picture. Dr. Cebrian specifically commented that the *Impairment Rating Tips* are designed to capture all possible surgical outcomes. Notably, a physician can assign "up to" an additional 10% impairment. The record thus reveals that Dr. Ginsburg properly exercised his discretion by assigning a 6% scheduled impairment rating for Claimant's admitted right shoulder injury.

19. Respondents have established that it is more probably true than not that they are entitled to withdraw their June 8, 2016 FAL that acknowledged reasonable,

necessary and related medical maintenance benefits designed to relieve the effects of Claimant's September 21, 2014 industrial injury or prevent further deterioration of her condition. ATP Dr. White placed Claimant at MMI on October 26, 2015 without the need for maintenance treatment. He had explained to Claimant that it might take up to one year for complete recovery from surgery because of her age and history of injury. Dr. White remarked that continuing numbness and difficulties that Claimant was experiencing in her shoulders was not work-related. Dr. Cebrian also determined that Claimant did not require medical maintenance treatment. He explained that Claimant suffered from kyphosis and would continue to experience pain due to degenerative, age-related factors. Although Dr. Ginsburg recommended medical maintenance treatment, the persuasive opinions of Drs. White and Cebrian reflect that additional care will not likely relieve the effects of Claimant's September 21, 2014 industrial injury or prevent further deterioration of her condition. Respondents are thus permitted to withdraw their admission for medical maintenance treatment in the June 8, 2016 FAL.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's

determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. However, the DIME provisions of §8-42-107(8)(c), C.R.S. only apply in cases of whole body impairment. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664, 666 (Colo. App. 1998). The percentage rating for scheduled benefits is determined based simply upon the preponderance of the evidence standard. *See In Re Baran,* W.C. No. 4-906-018 (ICAP, Oct. 16, 2015). Because Dr. Ginsburg assigned a right shoulder extremity impairment rating, the preponderance standard applies in evaluating her permanent impairment.

8. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that she reached MMI on October 26, 2015 as a result of her September 21, 2014 admitted right shoulder injury. Initially, Dr. Ginsburg agreed with ATP Dr. White that Claimant had reached MMI for her right shoulder on October 26, 2015 and her left shoulder complaints were not work-related. Moreover, Dr. Cebrian agreed with Drs. White and Ginsburg that Claimant had reached MMI on October 26, 2015 and her left shoulder complaints were not work-related. Dr. Cebrian remarked that Claimant had poor posture with rounded shoulders and kyphosis of the cervical spine. He noted that Claimant had not been working for several months. There was no explanation for her continued left shoulder symptoms because her activities lacked the requisite repetition and force to produce an injury.

9. As found, in contrast, Dr. Hall disagreed with Dr. Ginsburg's findings and concluded that Claimant had not reached MMI. He determined that Claimant's left shoulder complaints were work-related due to overcompensation following surgery and she required additional medical treatment for both shoulders. However, Dr. Hall did not detail how Dr. Ginsburg erred in determining that Claimant reached MMI on October 26, 2015 or otherwise incorrectly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's MMI determination was incorrect.

10. As found, Claimant has failed to establish by a preponderance of the evidence that DIME Dr. Ginsburg's 6% scheduled impairment rating for her admitted right shoulder injury was incorrect. Initially, Dr. Ginsburg assigned a 6% scheduled impairment rating for Claimant's right shoulder range of motion deficits. In contrast, Dr. Hall noted that Claimant warranted an additional 10% scheduled rating for a distal clavicle resection. He remarked that a 10% rating for a distal clavicle resection was mandatory pursuant to the *Impairment Rating Tips*. Nevertheless, Dr. Hall acknowledged that only a small portion of the bone was shaved during the surgical procedure.

11. As found, Dr. Cebrian persuasively agreed with Dr. Ginsburg that Claimant warranted a 6% scheduled impairment rating for his admitted right shoulder injury. He disagreed with Dr. Hall that Claimant warranted a 16% extremity rating for her right shoulder injury based on range of motion deficits and the distal clavicle resection. Specifically, the additional 10% rating noted by Dr. Hall was inappropriate. Relying on the *Impairment Rating Tips,* Dr. Cebrian commented that it is not mandatory to issue a 10% rating based on the specific procedure. Instead, Dr. Cebrian noted that the rating physician has discretion to assign the additional impairment "if" warranted and based on the total clinical picture. Dr. Cebrian specifically commented that the *Impairment Rating Tips* are designed to capture all possible surgical outcomes. Notably, a physician can assign "up to" an additional 10% impairment. The record thus reveals that Dr. Ginsburg properly exercised his discretion by assigning a 6% scheduled impairment rating for Claimant's admitted right shoulder injury.

Withdrawing the FAL/Medical Maintenance Benefits

12. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of

fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

13. The court of appeals has previously concluded that the burden of proof to establish compensability remained on the claimant even when an employer was attempting to withdraw an admission of liability. However, the Colorado Workers' Compensation Act has since been amended to change the burden of proof when respondents are attempting to withdraw admissions of liability. Specifically, respondents must now prove by a preponderance of evidence that the claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1) (2015), C.R.S. On February 18, 2008 Respondents filed a FAL in response to Dr. Crosby's MMI and impairment determinations. The FAL also specified that Claimant was entitled to receive reasonable, necessary and related medical benefits. In order to withdraw the FAL Respondents thus have the burden of proving by a preponderance of the evidence that Claimant is not entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of her April 18, 2005 industrial injury or prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

14. As found, Respondents have established that it is more probably true than not that they are entitled to withdraw their June 8, 2016 FAL that acknowledged reasonable, necessary and related medical maintenance benefits designed to relieve the effects of Claimant's September 21, 2014 industrial injury or prevent further deterioration of her condition. ATP Dr. White placed Claimant at MMI on October 26, 2015 without the need for maintenance treatment. He had explained to Claimant that it might take up to one year for complete recovery from surgery because of her age and history of injury. Dr. White remarked that continuing numbness and difficulties that Claimant was experiencing in her shoulders was not work-related. Dr. Cebrian also determined that Claimant did not require medical maintenance treatment. He explained that Claimant suffered from kyphosis and would continue to experience pain due to degenerative, age-related factors. Although Dr. Ginsburg recommended medical maintenance treatment, the persuasive opinions of Drs. White and Cebrian reflect that additional care will not likely relieve the effects of Claimant's September 21, 2014 industrial injury or prevent further deterioration of her condition.. Respondents are thus permitted to withdraw their admission for medical maintenance treatment in the June 8, 2016 FAL.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to overcome the DIME opinion of Dr. Ginsburg. She reached MMI on October 26, 2015.

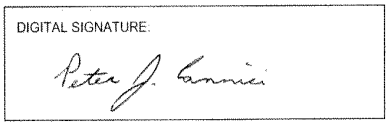
2. Claimant sustained a 6% scheduled impairment for her right shoulder as a result of her September 21, 2014 injury.

3. Respondents are permitted to withdraw their admission for medical maintenance treatment in the June 8, 2016 FAL.

4. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 25, 2017.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

- Whether claimant had proven by a preponderance of the evidence that he suffered a compensable injury arising out of and in the course and scope of his employment with employer on September 10, 2016.

- If claimant's injury is found compensable, whether claimant had proven by a preponderance of the evidence that medical treatment he received for the September 10, 2016 injury was reasonable, necessary, and authorized.

- If claimant's medical treatment is found to be reasonable, necessary, and authorized, whether claimant had proven by a preponderance of the evidence that respondent shall reimburse Medicaid pursuant to Section 8-42-101(6)(a) and (b), C.R.S.

- If claimant's injury is found compensable, what is claimant's average weekly wage (AWW)?

- If claimant's injury is found compensable, whether claimant had proven by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits for the period of September 10, 2016 through May 6, 2017.

- If claimant's injury is found compensable, whether claimant had proven by a preponderance of the evidence that he is entitled to a 50% increase in any indemnity benefits, pursuant to Section 8-43-408(1), C.R.S., for employer's failure to maintain workers' compensation insurance.

- Whether claimant has shown by a preponderance of the evidence that penalties should be assessed pursuant to Section 8-43-304, C.R.S. for respondent's failure comply with two orders to compel discovery responses.

FINDINGS OF FACT

1. Claimant currently resides in Montrose, Colorado. He has experience working as a carpenter and framer. Claimant met employer in August 2016 and began providing services to employer at that time. Claimant testified that his job duties included supervising the employer's crew. Claimant provided work on a roofing project, a redwood deck project, and a job that involved removing siding.

2. Claimant testified that employer paid him between $1,200.00 and $1,400.00 per week. Claimant was paid by check and these checks were issued to claimant's name. The amount paid to claimant was determined by Mr. Medina.

3. Claimant testified that he previously ran a framing business while living in Fort Collins, Colorado. However, when claimant moved from the Fort Collins area to Montrose, he sold that business to his son.

4. On September 10, 2016, claimant was working at the job involving removing siding from a residence[1]. It is undisputed that claimant was at that job location at that direction of respondent. It is also undisputed that claimant was injured while working at that job site on September 10, 2016.

5. Claimant testified that he sustained an injury on September 10, 2016 when he was standing on a ladder. The ladder slipped and claimant's right leg became caught in the ladder, injuring claimant's right ankle. Claimant was transported from the job site to Montrose Memorial Hospital by the homeowner's brother.

6. It is undisputed that employer was notified of claimant's injury. Mr. Media testified that he visited claimant at the hospital. Mr. Media and claimant both testified that Mr. Medina did not provide claimant with a list of medical providers at any time after learning of claimant's injury.

7. Claimant testified that since his injury he has had four surgeries on his right foot and ankle. These surgeries were performed by Dr. Tim Judkins. The first surgery was performed on September 10, 2016 and involved external fixation of a right pilon fracture. On September 20, 2016, Dr. Judkins performed an open reduction and internal fixation of claimant's distal tibia and fibula. Thereafter, claimant developed an infection and returned to surgery on February 21, 2017. On that date, Dr. Judkins removed the right medial distal tibial plate and performed irrigation and debridement of the right distal tibia wound. When the infection did not resolve, claimant returned to surgery for the fourth time on March 3, 2017 for removal of the remaining hardware and irrigation and debridement of the skin, subcutaneous, fascia, and bone.

8. Claimant testified that medical expenses related to the September 10, 2016 injury have been paid for by Medicaid. Claimant requests an order requiring respondent to reimburse Medicaid for those expenses.

9. Claimant testified that he did not work between the date of his injury on September 10, 2016 and May 6, 2017. Beginning on May 7, 2017, claimant began working for Jim Bob Homes. As of the date of the hearing, claimant is self employed. Claimant also testified that at the time of the September 10, 2016 injury he was not self employed. The ALJ finds claimant's testimony to be credible and persuasive.

10. Mr. Media testified at hearing that his company did not have workers' compensation insurance at the time of claimant's September 10, 2016 injury.

[1] The parties refer to the September 10, 2016 job site as "the job at Nancy's".

11. On May 2, 2017, claimant filed a motion to compel discovery responses in this matter. As of that date, respondent had not filed a response to claimant's application for hearing and had not responded to interrogatories submitted by claimant. On May 16, 2017, ALJ Keith Mottram granted claimant's motion to compel.

12. Thereafter on August 15, 2017, ALJ Sidanycz granted claimant's second motion to compel discovery responses. As of August 15, 2017, respondent had not complied with ALJ Mottram's May 16, 2017 order. At the commencement of the hearing on June 15, 2017, ALJ Sidanycz issued an order from the bench that penalties would be assessed and summarized in the ALJ's full order.

13. At the August 24, 2017 hearing Mr. Medina agreed that he had received the interrogatories and the orders compelling him to respond. Mr. Medina admitted that he had not answered the interrogatories.

14. The ALJ credits claimant's testimony and finds that claimant has demonstrated that it is more likely than not that he sustained an injury while working for employer on September 10, 2016.

15. The ALJ credits the medical records entered into evidence and finds that claimant has demonstrated that it is more likely than not that the medical treatment claimant received following the September 10, 2016 injury was reasonable and necessary to cure and relieve claimant from the effects of the work injury.

16. The ALJ credits claimant's testimony and finds that upon learning of claimant's injury respondent did not provide claimant with a list of medical providers. The ALJ further credits claimant's testimony and finds that claimant has demonstrated that it is more likely than not that the choice of medical provider passed to claimant.

17. The ALJ credits claimant's testimony and finds that claimant has demonstrated that it is more likely than not that reasonable and necessary medical treatment related to claimant's September 10, 2016 work injury was paid for by Medicaid.

18. The ALJ credits claimant's testimony and finds that he was paid an average of $1,300.00 per week while working for respondent. The ALJ finds that claimant has demonstrated that it is more likely than not that his AWW at the time of the injury was $1,300.00.

19. The ALJ credits claimant's testimony and finds that claimant has demonstrated that it is more likely than not that he was unable to work for from September 10, 2016 through May 6, 2017. The ALJ further credits claimant's testimony and finds that claimant has demonstrated that it is more likely than not that claimant's September 10, 2016 work injury led to his inability to work during that time.

20. The ALJ credits Mr. Media's testimony and finds that claimant has demonstrated that it is more likely than not that respondent did not have workers' compensation insurance on September 10, 2016.

21. The ALJ credits the procedural records and finds that claimant has demonstrated that it is more likely than not that prior to the August 24, 2016 hearing respondent failed to comply with two orders to compel discovery responses.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2015). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2015).

4. Section 8-40-202(2)(a), C.R.S., provides that an individual performing services for pay for another is deemed to be an employee:

> "unless such individual is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

5. In this matter, respondent was prevented from asserting affirmative defenses at hearing because of discovery violations. Despite this, some evidence was presented at hearing regarding the relationship between claimant and respondent. The ALJ has considered that evidence and concludes that claimant was employed by respondent. There is no persuasive evidence that claimant was customarily engaged in an independent trade, occupation, or business. Furthermore, the ALJ is persuaded that claimant was subject to respondent's direction and control in the performance of his work.

6. Respondent argues in his position statement that claimant was not an employee of respondent because no documentation has been presented to show an employment relationship. The ALJ is not persuaded by this argument. Under the Colorado Workers' Compensation Act an individual performing work for another is presumed to be an employee unless the evidence shows otherwise. In this case the lack of "employee" related paperwork does not negate the statutory presumption of employment.

7. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

8. As found, claimant has demonstrated by a preponderance of the evidence that he sustained a compensable injury on September 10, 2016 that arose out of and in the course and scope of his employment with respondent. As found, claimant's testimony is credible and persuasive.

9. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

10. As found, the medical treatment claimant received following the September 10, 2016 work injury was reasonable and necessary to cure and relieve claimant from the effects of the work injury. As found, the medical records are credible and persuasive.

11. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury,

the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

12. As found, upon learning of claimant's work injury respondent failed to provide claimant with a list of medical providers. Therefore, claimant has demonstrated by a preponderance of the evidence that the choice of medical provider passed to claimant. Therefore, the medical treatment claimant received following his work injury (including treatment provided by Montrose Memorial Hospital and Dr. Judkins) was authorized medical treatment. Claimant's testimony and Mr. Medina's testimony is credible and persuasive on this issue.

13. Section 8-42-101(6)(a) and (b), C.R.S. provides, in pertinent part:

> "If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical expenses, for the costs of reasonable and necessary treatment that was provided."

14. As found, claimant's reasonable and necessary medical treatment following the September 10, 2016 work injury was paid for by Medicaid. Therefore, respondent shall reimburse Medicaid for those costs of reasonable and necessary medical treatment. As found, claimant's testimony is credible and persuasive on this issue.

15. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

16. As found, claimant's AWW at the time of the injury was $1,300.00. The testimony of claimant is found to be credible and persuasive on this issue.

17. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S.,

supra, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

18. As found, claimant was unable to work from September 10, 2016 through May 6, 2017. As found, claimant's inability to work was caused by the September 10, 2016 work injury. Therefore, claimant is entitled to TTD benefits for the period of September 10, 2016 through May 6, 2017.

19. Section 8-43-408(1) C.R.S., provides that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits provided in said articles shall be increased fifty percent.

20. As found, respondent did not comply with the Colorado Workers' Compensation Act by failing to obtain and maintain workers' compensation insurance. Therefore, claimant's compensation in this claim shall be increased by 50%.

21. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that any employer or insurer:

> "who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel…, or fails, neglects, or refuses to obey any lawful order…, shall be subject to … a fine of not more than one thousand dollars per day for each such offense."

This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

22. Before penalties may be assessed the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S*. City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo.

App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

23. An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." *See* Section 8-40-201(15), C.R.S. The fine shall be apportioned in whole or part at the discretion of the director or administrative law judge between the aggrieved party and the workers' compensation cash fund created in Section 8-44-112, C.R.S. with the amount apportioned to the aggrieved party being a minimum of fifty percent of any penalty assessed. *See* Section 8-43-304, C.R.S. In addition, Section 8-43-305 C.R.S. provides that each day a party engages in the violation is construed as a separate offense.

24. In this case, claimant seeks penalties for respondent's failure to comply with two separate court orders directing respondent to respond to interrogatories presented by claimant. As found, respondent received the interrogatories in this matter and the motions to compel. Respondent admitted that he did not respond to the discovery requests as ordered. The ALJ concludes that respondent violated two orders. The ALJ also concludes that respondent's failure to act was not reasonable. Therefore penalties are appropriate in this matter.

25. As found, respondent failed to comply with both the May 16, 2017 order to compel and the August 15, 2017 order to compel. Respondent failed to comply with these orders from May 16, 2017 until the hearing date of August 24, 2017. The ALJ calculates this to be a total of 101 days. Respondent shall pay a penalty of $50 per day totaling $5,050.00 in penalties. Of that total, 100% shall be paid to claimant and no payment shall be paid to the subsequent injury fund.

ORDER

It is therefore ordered that:

1. Claimant's suffered a compensable injury on September 10, 2016 that arose out of and in the course and scope of his employment with respondent.

2. Respondent is responsible for payment of reasonable medical treatment necessary to cure and relieve claimant from the effects of the September 10, 2016 work injury.

3. Respondent shall reimburse Medicaid for the cost of reasonable and necessary medical treatment related to claimant's September 10, 2016 work injury.

4. Claimant's average weekly wage (AWW) is $1,300.00.

5. Respondents shall pay claimant temporary total disability (TTD) benefits for the period of September 10, 2016 through May 6, 2017.

6. Claimant's benefits shall be increased by 50% because of respondent's failure to obtain and maintain workers' compensation insurance.

7. Employer shall be liable to claimant for 101 days of penalties at the rate of $50.00 per day, totaling $5,050.00. Of that total, 100% shall be paid to claimant and no payment shall be paid to the subsequent injury fund.

8. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. In lieu of payment of the above compensation and benefits to the claimant, the Respondent-Employer shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $40,000.00 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Sue Sobolik/Trustee;

OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $40,000.00 with the Division of Workers' Compensation:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

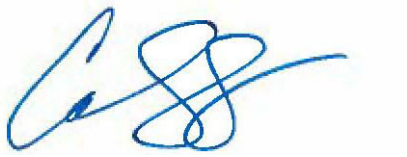
10. It is further ordered that the Respondent-Employer shall notify the Division of Workers' Compensation of payments made pursuant to this order.

11. It is further ordered that the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail,

as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 18, 2017



_____

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, CO 81501

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffers functional impairment off the schedule of injuries set forth by § 8-42-107, C.R.S. and is entitled to permanent partial disability benefits based on a whole person conversion of the upper extremity rating.

STIPULATIONS

1. Respondents agree to pay temporary partial disability benefits to Claimant in the amount of $11.57 for November 18, 2015 through December 1, 2015.

2. Respondents agree to pay temporary partial disability benefits to Claimant in the amount of $192.84 for August 10, 2016 through August 23, 2016.

FINDINGS OF FACT

1. Claimant is employed by employer as a certified nursing assistant (CNA).

2. On November 4, 2015 Claimant sustained an admitted compensability injury while performing her normal work duties when she tripped into a wheelchair and fell, landing on her right side.

3. On November 25, 2015 Claimant was evaluated by David Orgel, M.D. He noted right hip pain and right wrist pain and recommended therapy. Dr. Orgel noted that Claimant was not at maximum medial improvement. Claimant continued to undergo intermittent conservative treatment with Dr. Orgel. *See* Exhibit 2.

4. On February 11, 2016 Claimant was evaluated by David Conyers, M.D. Dr. Conyers noted that Claimant had an MRI study of the right wrist and right forearm that revealed some tendinopathy in the forearm, showed that the treiquetral fracture in the wrist was healed solidly, and showed some degeneration between the proximal pole hamate and the lunate. Claimant reported symptoms in her proximal forearm and elbow that radiated up into the base of the neck and reported breast area and scapular area tenderness as well as tenderness at the base of the neck. On examination, Dr. Conyers found exquisite tenderness over the scalenus anticus muscle at the base of the neck on the right side producing symptoms into the shoulder breath scapular areas and down into Claimant's arm. Dr. Conyers opined that Claimant's forearm and elbow symptoms were related to cervical brachial pathology and that efforts should concentrate on the cervicobrachial area and that treatment of the area would resolve the right arm symptoms. *See* Exhibit 5.

5. On March 4, 2016 Claimant was evaluated by Dr. Orgel. He noted that Dr. Conyers did not believe that Claimant's arm pain was related to the wrist fracture and was recommending an evaluation for cervical brachial region. However, Dr. Orgel opined that the previous evaluation did not really suggest a radicular etiology of Claimant's symptoms. Claimant reported significant and fairly constant moderate pain the right lateral arm. Dr. Orgel noted that since the hand surgeon did not feel the pain was related to the wrist fracture and since Claimant's elbow x-ray showed no abnormalities, he would refer Claimant to Dr. Tobey for evaluation but would not order an MRI of the neck because he was not quite sure what he was treating. *See* Exhibit B.

6. Claimant continued to be evaluated by Dr. Orgel. On March 18, 2016, Dr. Orgel noted that Claimant's right wrist fracture appeared to be solidly healed with no wrist or hand complaints. Dr. Orgel noted that Claimant's right neck and shoulder pain had not improved and had perhaps worsened somewhat. Dr. Orgel opined that Claimant's presentation was starting to narrow and that it suggested a shoulder, rather than neck, etiology of symptoms. Dr. Orgel recommended an MRI of the right shoulder, and referred Claimant to orthopedics. *See* Exhibits 2, 3.

7. On April 6, 2016 Claimant was evaluated by John Tobey, M.D. Claimant reported pain in the right shoulder, forearm, and hip. On examination, Dr. Tobey noted minimal tenderness in the right cervical paraspinals, moderate tenderness in the posterior right shoulder, and significant tenderness of the extensor forearm. Dr. Tobey found that range of motion of the cervical spine was mildly limited in all planes. Dr. Tobey doubted that Claimant's significant tenderness in the extensor forearm and the right shoulder was cervical radicular in nature and opined that Claimant's exam suggested possible labral tear in the right shoulder. Dr. Tobey opined that a cervical spine MRI was not needed. *See* Exhibits 4, E.

8. On April 18, 2016 Claimant was evaluated by Dr. Orgel. Claimant reported right neck and right shoulder pain. Dr. Orgel noted that the MRI showed a labral tear in the right shoulder and that Claimant really had more regional shoulder pain than true radicular symptoms. Dr. Orgel found good range of motion of the neck without pain. Claimant reported painful range of motion in the right shoulder with all movements. Dr. Orgel assessed labral tear of the right shoulder. *See* Exhibit B.

9. On May 23, 2016 Claimant was evaluated by Marc Cahn, D.C. Claimant reported increased right cervicothoracic and shoulder pain as well as increased lower back pain. Dr. Cahn noted that Claimant was referred only for the lumbar spine and right hip. Claimant asked Dr. Cahn to contact Dr. Orgel to see if it was okay for him to treat the cervicothoracic area. *See* Exhibit D.

10. On June 6, 2016 Claimant was evaluated by Dr. Orgel. Claimant reported right neck and right shoulder pain. Dr. Orgel noted that Claimant did have a labral tear in the right shoulder but that Claimant was not interested in surgery despite reported significant pain in the shoulder including pain with activity and some crepitation. Dr.

Orgel noted on examination no tenderness of the trapezius, deltoid, or other upper extremity muscles. He found no tenderness to palpation of the subacromial and subdeltoid regions and that Claimant had no range of motion restrictions, but that she reported pain in all planes. Dr. Orgel noted that Claimant would continue in therapy and that if she was not improving she would either need to proceed with surgery or have her claim closed. *See* Exhibit B.

11. On November 7, 2016 Claimant was evaluated by Dr. Orgel. Claimant reported continued significant pain but that she was not interested in surgery and Dr. Orgel placed her at maximum medical improvement. Dr. Orgel noted Claimant's range of motion impairment and crepitation impairment and opined that she had a 15% upper extremity impairment or a 9% whole person impairment. *See* Exhibits 3, B.

12. On January 5, 2017 Respondents filed a final admission of liability (FAL) admitting for a scheduled impairment rating of 15% of body code 01.

13. Claimant contends that the scheduled impairment rating should be converted to a whole person impairment rating.

14. Claimant testified at hearing that her pain goes up her shoulder to her neck and head. Claimant testified that lifting increases her pain in the back of her shoulder and in her scapula area. Claimant indicating that pushing and pulling also increases her pain and Claimant pointed to the area of muscles down her pectoral on the front of her body and the scapula on the back of her body as areas she experiences pain with certain movements.

15. Claimant's testimony is found credible. Claimant continues to experience pain and loss of function due to her injury that is in her shoulder, trapezius region, neck, scapula, and pectoral chest area. The objective evidence of labral tear combined with the credible testimony of Claimant shows that the pain and limitations extend beyond the arm at the shoulder and that Claimant suffers limitations of the shoulder joint and that suffers pain and limitations beyond the shoulder joint.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Scheduled Injury vs. Whole Person Impairment

Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. The application of the schedule depends upon the "situs of the functional impairment" rather than just the situs of the original work injury. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Pain and discomfort which limit a Claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule. *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Claimant bears the burden of establishing functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits under § 8-42-107(8)(c), C.R.S., by a preponderance of the evidence. *Maestas v. American Furniture Warehouse,* W.C. No. 4-662-369 (June 5, 2007); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005).

In this case, Claimant's testimony, substantiated by the medical records, establish that Claimant is entitled to a whole person medical impairment under § 8-42-107(8)(c), C.R.S. because she has suffered functional impairment to a part of the body

that is not contained on the schedule of impairment. Claimant has met her burden by a preponderance of the evidence that her functional impairment extends beyond the "arm at the shoulder." The credible evidence shows that Claimant's shoulder joint itself is impaired. It does not function as it did before Claimant's work injury. Activities including pushing and pulling cause pain in Claimant's shoulder, shoulder joint, in her upper right back muscles, in the front pectoral/chest area, and in her cervical area such that she is unable or limited in her ability to engage in those motions that she had no trouble with prior to her work injury. Thus, Claimant has established that the situs of her functional impairment is beyond just the location of the arm at the shoulder. The mere fact that the shoulder joint might affect arm mobility does not mean Claimant sustained only a "loss of arm at the shoulder." Accordingly, the ALJ finds that Claimant has established by preponderant evidence that her impairment is not on the schedule of permanent impairments that she is entitled a rating for the whole person.

ORDER

It is therefore ordered that:

1. Claimant suffered functional impairment beyond the shoulder at the arm and off the schedule of injuries listed at § 8-42-107(2), C.R.S. Claimant is entitled to permanent partial disability benefits based upon a whole person impairment rating of 9%.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 18, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Did Respondent prove by a preponderance of the evidence that none of Claimant's ongoing treatment, including medication refills, epidural steroid injections, facet joint injections, rhizotomies, and SI joint injections, are causally related to his admitted March 3, 2000 industrial injury?

2. Did Claimant prove by a preponderance of the evidence that the treatment regimen prescribed by Dr. Finn, including medications, injections, and rhizotomies, is reasonably necessary?

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on March 3, 2000 due to a large explosion while checking a natural gas leak. He was thrown approximately 20-25 feet, and a wall collapsed on top of him.

2. Claimant injured his left shoulder, low back, bilateral elbows, and sustained hearing loss as a result of the accident. He had a rotator cuff repair and bilateral carpal tunnel release.

3. Claimant has had persistent low back pain since the injury. A lumbar MRI on March 29, 2000 was interpreted as showing degenerative changes at L3-4 and L4-5, moderate bilateral neuroforaminal stenosis with facet degeneration, and an L4-5 annular tear.

4. Claimant received relatively aggressive nonsurgical treatment for his low back injury, including facet injections, epidural steroid injections, radiofrequency neurotomies, and SI joint injections.

5. Claimant had a history of chronic intermittent low back pain before the accident, which he primarily treated with periodic chiropractic manipulation. The symptoms were relatively mild. The most closely contemporaneous medical record before the industrial injury is dated March 6, 2000, at which time Claimant described his back problems as "just occasional tightness and stiffness." There is no persuasive evidence that the pre-existing back pain substantially limited Claimant's ability to perform vocational, recreational or other activities.

6. Claimant saw Dr. Kenneth Finn, a physiatrist, for an Independent Medical Examination (IME) at Respondent's Request on December 12, 2000. Claimant described constant right-greater-than-left-sided low back pain radiating to the buttocks. He also reported numbness and tingling in his feet, depending on his level of back pain. Dr. Finn diagnosed mechanical discogenic low back pain, facet dysfunction, and an

annular tear. Dr. Finn apportioned 50% of the low back symptoms to the industrial injury and 50% to the pre-existing condition.

7. In February 2001, the parties agreed to designate Dr. Finn as Claimant's primary ATP.

8. Dr. Finn revised his opinion regarding apportionment based on a "re-review" of Claimant's records. Utilizing a "but for" theory of causation, Dr. Finn opined that "his low back condition is 50% pre-existing and 50% work-related, however the need for treatment is 100% related to his work-related injury."

9. Dr. Finn put Claimant at MMI on March 19, 2002, with an impairment rating that included 11% whole person for the lumbar spine.

10. Respondent filed a Final Admission of Liability (FAL) on May 16, 2002 based on Dr. Finn's impairment determination. The FAL also admitted for "Grover medical."

11. Claimant had a second lumbar MRI on December 20, 2002, which showed moderate facet arthropathy bilaterally at L4-5, an L4-5 annular tear, and possible left L5 nerve root compression. There were "similar, but less prominent degenerative findings" at L3-4 without stenosis or impingement. The radiologist compared the images to the March 2000 MRI and opined that the findings were "unchanged."

12. Claimant was taken off MMI in 2004 for bilateral carpal tunnel surgery. Dr. Finn put him back at MMI on September 29, 2004, with no change to his impairment rating.

13. Respondent filed an FAL on November 16, 2004 admitting for reasonable, necessary, and related "Grover" medical benefits.

14. Treatment since MMI has been primarily directed to Claimant's ongoing low back pain. Claimant does not appear to receive any treatment specifically directed to the shoulder or upper extremity injuries.

15. Claimant had another lumbar MRI on February 7, 2004, which showed similar findings at L4-5, including an annular tear, a mild disc bulge, bilateral facet arthropathy and "slight encroachment on the L5 nerve root bilaterally." The radiologist compared the images to the previous MRI and concluded: "no significant change has occurred comparing this exam to the study dated December 19 [sic], 2002."

16. Claimant had a fourth lumbar MRI on April 24, 2012. Although the radiologist did not have the prior films available for comparison, the described findings were similar to the previous MRIs. The only substantial difference is the MRI did not show the annular tear.

17. A repeat lumbar MRI on May 2, 2015 showed substantially similar findings at L3-4 and L4-5.

18. Claimant's most recent lumbar MRI was performed on August 18, 2016. The radiologist described the findings as "stable" and "unchanged from the prior examination."

19. Claimant has seen Dr. Finn regularly for maintenance care since being put at MMI. He has received periodic lumbar ESIs, facet injections, rhizotomies and SI joint injections. These interventions relieve Claimant's pain and allow him to be more functional. There is no persuasive evidence of any significant negative side effects of these interventions.

20. Dr. Finn also provides ongoing medication management which includes narcotic pain medications. Specifically, Claimant takes Exalgo (a long-lasting narcotic), Dilaudid (for breakthrough pain), Zanaflex (a muscle relaxer), and Movantik (for opioid-induced constipation). The medications relieve Claimant's pain and allow him to be more functional. There is no persuasive evidence that Claimant abuses his medications.

21. Dr. Sander Orent performed an IME for Respondent on April 30, 2007. Dr. Orent reviewed Claimant's preinjury medical records in conjunction with his examination, noting Claimant's long history of intermittent back pain and a positive HLA-B27 test. Dr. Orent believed Claimant had an "undiagnosed medical condition," i.e., HLA-B27 arthropathy and ankylosing spondylitis, that "needs aggressive intervention" outside of the workers' compensation system. If the workup for inflammatory autoimmune disease proved negative, Dr. Orent opined "the current treatment plan seems to be doomed to a cycle of increasing medications, increasing frequency of injections, and increasing symptomatology." Dr. Orent recommended a strengthening and stretching program "with decreased emphasis on [other treatment] modalities."

22. Claimant saw Dr. Brian Beatty for an IME at Respondent's request on May 26, 2016. Dr. Beatty did not question the sincerity of Claimant's low back complaints but opined that his ongoing symptoms are not causally related to the March 3, 2000 injury. Dr. Beatty opined:

> Recent MRIs revealed degenerative disk disease and facet arthrosis with developing spinal stenosis, all of which I do not believe are related to the injury of 2000 but is a chronic ongoing degenerative process related to age along with wear and tear. It is noted there were no major injuries on the initial MRIs for example fractures or herniated discs and there were degenerative changes already noted at L3-L4 and L4-L5 with moderate bilateral neural foraminal stenosis at L4-5, due predominately to facet degeneration and hypertrophy. He had already been treating for intermittent back pain prior to this injury and I believe the natural course of the degenerative changes found on the initial MRIs would have brought him to the point where he is today with a gradual worsening of his condition.

23. Dr. Beatty also opined that, regardless of causation, further treatment with narcotics is not reasonable and necessary. Instead, Dr. Beatty recommended Claimant transition to Suboxone with the eventual goal of weaning off all medications.

24. After receiving Dr. Beatty's report, Respondents denied Claimant's request for additional injections and narcotic medication.

25. Dr. Finn testified in a posthearing deposition on July 11, 2017. Dr. Finn acknowledged Claimant's "history of chronic low back pain," but opined he "had a pretty significant injury when the house blew up next to him, and that aggravated his [ ] pre-existing condition."

26. Dr. Finn further opined "we all have degenerative changes in our spine, as we age, and he did have a prior long history of chronic pain. And then he had this event, that caused that condition to become aggravated, and I don't think it ever went back to the pre-injury levels of pain. And although his MRI continued to show ongoing degenerative changes, we had to take his clinical presentation and his history into consideration, because he has an annular tear, and he has facet arthritis, and he has a spondyloarthropathy, and maybe SI joint pain. But, again, if it [ ] hadn't been for that injury, I probably wouldn't have been treating the guy."

27. Regarding the medications, Dr. Finn stated "I am not excited that he is on chronic opioids for his chronic back pain – I would love for him to be off those medications – but the patient is reporting to me that they allow his pain to be tolerable and manageable and allow him to function. So I can't argue with that." Dr. Finn opined that Suboxone is also an opioid and akin to using methadone to treat heroin addiction. Although "it would not be unreasonable" to switch Claimant to Suboxone, "it's almost robbing Peter to pay Paul." Dr. Finn testified that he regularly reviews PDMP reports regarding Claimant and administers random drug screens. He described Claimant is "very compliant" and has no concerns that Claimant abuses his medications.

28. Dr. Beatty testified in a posthearing deposition on August 1, 2017. He reiterated his opinion that Claimant's need for additional low back treatment, including injection therapy and medications, is not causally related to the March 3, 2000 injury. Dr. Beatty opined Claimant's pre-existing degenerative condition would inevitably have progressed regardless of the industrial accident. He testified "it would continue to worsen over time. He'd continue to get – facets would continue to enlarge [ ] maintain inflammation. The discs would continue to gradually degenerate; again, lose that water content, bulge out. He'd get the spurring and gradual development of spinal stenosis." Dr. Beatty opined there was no evidence in the original MRI that the accident had accelerated the underlying degenerative process.

29. Dr. Beatty also testified Claimant's ongoing use of muscle relaxers and narcotics is not reasonably necessary. Dr. Beatty opined that "in today's current environment, there is nothing in this gentleman, as far as having axial low back pain and mechanical back pain, that requires opioid use for pain control." Dr. Beatty opined that opioids tend to perpetuate and amplify people's perception of pain, and predicted

stopping the medications would "probably . . . reduce his back pain and probably eliminate the need for these recurrent injections." He recommends Claimant transition to Suboxone as a way to wean off narcotics.

30. Dr. Finn's opinions are more persuasive than those of Dr. Beatty and Dr. Orent.

31. The March 3, 2000 industrial accident permanently aggravated Claimant's underlying pre-existing degenerative lumbar spine condition.

32. Respondents failed to prove by a preponderance of the evidence that none of Claimant's ongoing symptoms are causally related to the March 3, 2000 injury.

33. Claimant proved by a preponderance of the evidence that the medications prescribed by Dr. Finn are reasonably necessary to relieve the effects of his injury and prevent deterioration of his condition.

34. Claimant proved by a preponderance of the evidence that periodic injections and rhizotomies are reasonably necessary to relieve the effects of his injury and prevent deterioration of his condition.

CONCLUSIONS OF LAW

A. Respondent failed to prove that none of Claimant's ongoing treatment for low back pain is causally related to his admitted March 2000 injury

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond MMI if the claimant requires further treatment to relieve the effects of the injury or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

Even where the respondents admit liability for post-MMI medical benefits, they remain free to contest the reasonable necessity and causal connection of any specific future treatment. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). Ordinarily, the claimant must prove by a preponderance of the evidence that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). But § 8-43-201(1) was amended in 2009 to place the burden of proof on the party seeking to modify an issue determined by an admission or order. The effect of this statutory provision is to create separate burdens of proof regarding Claimant's entitlement to ongoing treatment.

At hearing, Respondent argued it is not seeking to terminate all post-MMI treatment, but merely disputes the relatedness of treatment directed to Claimant's low back. But Claimant's only current post-MMI treatment is directed to his low back, and Dr. Beatty explicitly opined that "I do not believe that ongoing treatment is reasonable,

necessary and related to the original injury of March 3, 2000." Respondent's proposed FFCLO states that "Claimant's request for medication refills, epidural steroid injections, facet joint injections, radiofrequency neurotomies, and SI joint injections are all hereby denied." That covers all maintenance care Claimant receives, and the practical effect of Respondent's causation argument would terminate all of his ongoing treatment. Consequently, Respondent must prove by a preponderance of the evidence that the treatment by Dr. Finn is not causally related to the 2000 work injury. *See Salisbury v. Prowers County School District RE2*, W.C. No. 4-702-144 (June 5, 2012); *Dunn v. St. Mary Corwin Hospital*, W.C. NO. 4-754-838-01 (October 1, 2013); *Munoz v. JBS Swift & Co. USA, LLC*, W.C. No. 4-780-871-03 (October 7, 2014); *Baker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011).

On the other hand, Respondent also argues that ongoing treatment with narcotics and muscle relaxers is not reasonable and necessary, regardless of causation. Claimant retains the burden to prove that any specific form of treatment is reasonably necessary. *Milco Construction, supra*. Therefore, Claimant must prove by a preponderance of the evidence that narcotic pain medication is reasonably necessary.

As found, Respondent failed to prove by a preponderance of the evidence that none of the treatment by Dr. Finn is causally related to the work injury. Although Claimant suffered some degree of chronic low back pain related to degenerative changes before his accident, the industrial accident permanently aggravated his underlying pre-existing condition. Since the injury, Claimant's low back pain has clearly been more severe and constant than it was before the accident, and his need for treatment escalated dramatically. Dr. Beatty conceded that Claimant's preinjury treatment for back pain was "intermittent," whereas it has been "ongoing and regular" since the accident. Claimant's symptomology has never returned to his preinjury baseline level. Nor is there any persuasive evidence of any significant change in his underlying condition sufficient to sever the admitted causal connection between his symptoms and the 2000 injury. Claimant's symptoms have remained largely the same since he was put at MMI. He has been receiving facet injections, radiofrequency neurotomies, epidural steroid injections and SI joint injections at a relatively steady frequency for many years. Dr. Beatty's opinion that Claimant's degenerative changes would have inevitably progressed regardless of the injury is belied by the MRIs, which have been stable and relatively unchanged since 2000. Objectively, there has been no substantial progression of the underlying structural abnormalities, and the ALJ is not persuaded that Claimant's symptoms inevitably would have worsened to cause him to need extensive treatment irrespective of the accident.

B. The treating regimen prescribed by Dr. Finn is reasonable and necessary

As found, Claimant proved that the treatments prescribed by Dr. Finn, including medications, are reasonably necessary to relieve the effects of his injury.

The ALJ appreciates Dr. Beatty's concerns regarding the potential dangers of long-term opioid use and his experience with some patients whose quality of life improved after stopping narcotics. But the ALJ is persuaded that medications are being

used reasonably in this case. The MTGs recognize opioids as an appropriate form of treatment for long-term chronic pain, and the opioids prescribed by Dr. Finn increase and maintain Claimant's functional abilities. Based on the evidence presented, the ALJ concludes Dr. Finn's prescriptions of medications, including opioids, have been reasonable and necessary to relieve the effects of Claimant's injury and prevent deterioration of his condition.

Similarly, the persuasive evidence demonstrates that the periodic injections and rhizotomies are reasonably necessary because they reduce the severity of Claimant's symptoms for significant periods of time. This, in turn, increases his ability to function and likely reduces the amount and type of medication he would otherwise require.

ORDER

It is therefore ordered that:

1. Respondent's request to terminate Claimant's ongoing maintenance treatment as unrelated to his March 3, 2000 injury is denied and dismissed.

2. Respondent shall pay for all reasonably necessary treatment to relieve the effects of Claimant's injury or prevent deterioration of his condition, including the medications prescribed by Dr. Finn, and periodic epidural steroid injections, facet injections, rhizotomies and SI joint injections.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 18, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-996-237-02

ISSUE

- Whether Claimant established by a preponderance of the evidence that she sustained a cumulative trauma injury to her neck, upper back, and low back.

STIPULATION

If the claim should be found compensable, the parties stipulated to an average weekly wage of $1,285.40.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant worked for the Employer for approximately two years.

2. On September 17, 2015, Employer terminated Claimant's employment. September 14, 2015, was the last day Claimant worked. On October 5, 2015, Claimant filed a Workers' Claim for Compensation.

3. Claimant experienced chronic neck and upper back pain, and difficulties sitting and driving, attributable to multiple motor vehicles accidents (MVAs) prior to the work incident.

   - In 1999 Claimant was involved in a MVA and underwent five years of treatment for her neck and upper back.

   - In 2008, Claimant experienced a flare in symptoms and received medical treatment for her neck and thoracic spine at the Centeno-Schultz Clinic. Claimant treated with Dr. Centeno until October 2009 for her neck and upper back as a result of her chronic neck and upper back condition.

   - In January 2012, Claimant was involved in another MVA in which her vehicle was struck head-on by a sports utility vehicle. Dr. Centeno assessed claimant with a re-aggravation of old facet and thoracic supraspinous and interspinous ligament injury. Claimant received additional treatment for her neck and thoracic spine, including postural education.

   - Claimant continued to treat at the Centeno Schultz Clinic for her neck and upper back symptoms throughout 2013. She received prolotherapy and

IMS injections on the following dates: January 30, 2013, March 26, 2013, April 3, 2013, May 8, 2013, July 9, 2013, and October 9, 2013.

- Just prior to her employment in November 2013 with Employer, Claimant reported an increase in her neck and upper back pain. Dr. Centeno attributed this increased pain to claimant's increased activity. On October 5, 2013, Claimant reported twice monthly pain flares.

4. On April 13, 2014, five months into her job with Employer, Claimant slipped on ice and fell on her back. This was not a work related event. Claimant was taken by ambulance to the emergency room for examination and treatment. Claimant complained of thoracic spine and low back and right hip pain.

- On May 2, 2014, Claimant returned to the Centeno-Schultz Clinic for treatment of neck and upper back pain. Claimant reported the recent fall had significantly exacerbated pain and tightness in her upper back.

5. Beginning in July 2014, Claimant underwent regular treatments for her neck and thoracic spine. Claimant underwent trigger point injections variably in her head, neck and upper back on the following dates: July 29, 2014; August 26, 2014; September 22, 2014; October, 28, 2014; December 1, 2014; January 25, 2015; and April 27, 2015.

- On August 26, 2014; Claimant reported her "usual thoracic pain" that had become more bothersome.

- On April 27, 2015, the physician's assistant also recommended an Egoscue therapist to work with Claimant on her posture issues.

6. The evidence supports a finding that Claimant attributed her pain symptoms to prolonged sitting.

- In December 2012, Claimant reported Dr. Centeno that she was pain-free until late afternoon, and then after sitting for a long time at work, she experienced an increase in pain. Claimant had previously complained that sitting at work increased her symptoms.

- Claimant testified that she has complained of pain as a result of sitting at a desk, sitting for long periods, sitting in general, and sitting while driving since at least 2008.

- Claimant's complaints that driving and sitting aggravated her neck and thoracic spine symptoms, pre-date her employment with the Employer and the alleged non-ergonomic work stations.

- On June 4, 2015, Claimant reported to Dr. Centeno that her pain increased after sitting at her desk for a few hours. Claimant denied any

new injury and attributed her increased pain to postural changes caused by the thoracic proliferent injections she received in April 2015. Claimant was instructed to change how she slept as well as her posture at work, in order to relieve her discomfort. To further address her pain, Claimant was prescribed a 'posture shirt' to address her long-standing scoliosis.

7. Claimant's treating physicians did not opine that her condition was caused or aggravated by her work duties. Neither Dr. Centeno nor physician assistant Shannon Bock opined that Claimant's neck and upper back condition had been caused or aggravated by her work duties.

8. Claimant attributed her increased pain and deteriorated condition to her April 2014 slip and fall, not her work duties.

- On June 16, 2015, Claimant reported to her therapist at Howard Head Sports Medicine that her current symptoms were from a fall on the ice when she fell on her back. Claimant reported after the January 2012 MVA, her symptoms were only 80% resolved and that she reinjured herself in April 2014 when she fell on ice. She did not report that her symptoms were caused either by standing at the front desk area in an awkward position or by sitting for long periods of time at work.

- In June 2015, Claimant reported to Allied Chiropractic that her "current issue" was ongoing neck and upper back pain from her fall on the ice.

9. Dr. Henry Roth, a Level II accredited physician, credibly opined that Claimant did not suffer a work-related injury to her neck and upper back.

- On March 14, 2016, Dr. Roth evaluated Claimant. Claimant reported to Dr. Roth that her onset of neck and upper back pain occurred and gradually worsened beginning in December 2014 when Employer remodeled the front desk, one of Claimant's three workstations.

- Dr. Roth reviewed Claimant's medical records, performed a physical examination, and provided a causation opinion. Dr. Roth determined that there was no mechanism of injury in this claim. Dr. Roth credibly opined that Claimant's medical records showed Claimant had been under continuous intermittent treatment for chronic neck and thoracic spine pain complaints dating back fifteen years. The intensity of Claimant's treatment escalated the year prior to the claim. Dr. Roth confirmed that Claimant denied any new condition.

- Dr. Roth correlated Claimant's three MVAs and the slip and fall in April 2014 with her complaints of worsening symptoms. Claimant's treatment following each of the MVAs, as well as the slip and fall, was the same as her treatment after the 2015 alleged workers' compensation injury. Dr.

Roth noted that Claimant's June 16, 2015 x-rays revealed only degenerative changes, and no instability or acute abnormality.

- Dr. Roth noted that Dr. Centeno's physician's assistant looked at pictures provided by Claimant, and from the pictures assessed that one of Claimant's work stations was ergonomically not correct. Dr. Roth credibly opined that 'ergonomically not correct' is a matter of opinion; there is no ergonomic standard. Thus, one could not possibly tell from pictures alone whether a workstation was ergonomically suited for Claimant.

- Dr. Roth acknowledged that muscular discomfort could result from sustained sitting. But sitting is common to all employment and normal activities of daily living. Further, muscular discomfort does not equate to an injury. Per the current Colorado Treatment Guidelines, sustained sitting is not considered to be in injurious activity.

- Dr. Roth opined that Claimant's theory that she sustained an injury to her neck and thoracic spine by working in an ergonomically incorrect position lacks medical support. Dr. Roth credibly explained that muscular discomfort from prolonged static postures as the result of an individual's unique personal predilection is not a disruption to the spinal anatomy. Evaluated as a cumulative trauma or repetitive motion injury, Dr. Roth concluded that Claimant's postures were not associated with any force.

- Dr. Roth noted that Claimant performed multiple work activities throughout the day, so she had the opportunity to change from sitting to standing and walking. Dr. Roth also noted that Claimant was not continuously typing at the front desk, so that activity would not satisfy the time thresholds of a cumulative trauma injury. Finally, Dr. Roth opined that Claimant's discomfort was reasonably medically expected given her chronic personal medical conditions.

- Claimant acknowledged that although she worked some long shifts, she was neither sitting nor standing for long hours because she was required to walk around and check on operations around the hotel. Claimant acknowledged that while working at the front desk, she was also training front desk agents. Claimant acknowledged that during her shifts she also tended bar, occasionally washed dishes, also helped set up and break down special events at the hotel. Claimant acknowledged that as sales manager and director of sales, she conducted site tours, and the tours could take anywhere from fifteen minutes to an hour long. She also conducted tastings for weddings which lasted up to an hour.

- Dr. Roth credibly opined that "it is not medically probable or even medically possible to associate Claimant's symptoms with otherwise unremarkable, ordinary sitting and standing, even if her posture were not always ideal.

10. Dr. Roth also credibly opined that Claimant did not suffer a work related injury to her low back because there was no temporal relationship between her pain complaints and the alleged mechanism of injury.

- Claimant reported to Dr. Roth that she had an onset of low back pain in mid-October 2015, as the result of cleaning baseboards on September 14, 2015. Claimant reported her symptoms did not begin until four weeks because it was a "delayed condition." Dr. Roth opined that Claimant did not sustain a lumbar spine injury as a result of cleaning baseboards. Dr. Roth credibly opined that the activity of cleaning baseboards provided no mechanism of injury to alter the anatomy of the lumbar spine. Dr. Roth confirmed that Claimant's October 30, 2015 lumbar spine MRI revealed only ordinary lower lumbar degenerative changes.

- Dr. Roth further opined that no impact, compressive event, or cumulative low back activity occurred while Claimant cleaned baseboards. Claimant did not experience low back pain on September 14, 2015 when she cleaned the baseboards, and she did not experience discomfort that night or the next day. Claimant did not report low back pain until mid-October, a month after her employment terminated.

- Claimant acknowledged that she did not have immediate low back pain after cleaning the baseboards. Claimant testified that she did not have low back pain until nearly a month after her termination from employment.

11. Despite Claimant's testimony and her reports to Dr. Roth in March 2016 that she injured her low back cleaning baseboards, October 29, 2015 medical records show that Claimant attributed her delayed onset of low back pain to "sitting at a non-ergonomic desk for long hours each day."

12. Claimant had a prior workers' compensation claim involving her low back which occurred when she was moving furniture for a different employer. Claimant also complained of low back pain after her 2012 MVA. She also experienced low back pain after her fall in 2014.

13. Claimant is a poor historian. Her testimony about the timing of her treatment and what necessitated it was inconsistent with the medical records. For example:

- Claimant reported to Dr. Roth that she reached her baseline status as of January 1, 2016. However, Claimant testified that she did not reach her baseline until October 1, 2016.

- After reporting to Dr. Roth in March 2016 that she had reached her baseline on January 1, 2016, Claimant continued to treat for her neck and upper back pain, including treating with Dr. Centeno for neck and upper

back pain as recently as July 25, 2017, the day before hearing and nearly two years after not working for the Employer.

- Claimant testified that her symptoms began in December 2014, when Employer remodeled the front desk and that the remodeled desk was the primary cause of her increased pain. However, the medical records do not reflect that Claimant's increased symptoms were the result of standing at the front desk in an awkward position. Rather, persuasive medical records document Claimant's reports of increased pain when she sat at one of her two desks.

14. Claimant did not report to Employer that her neck and upper back symptoms were related to her work duties until she was terminated. Claimant testified that in January 2015 she informed Employer that her workstations caused her increased neck pain. Claimant further testified that she had to increase her treatment in June 2015 because all three of her work stations caused her increase in pain and symptoms. However, Claimant later admitted that she did not report a potential workers' compensation claim until Dr. Centeno told her she needed to take an extended period of time off of work. Claimant did not file a Workers' Claim for Compensation until after she was terminated.

15. Claimant's testimony about her standing work station was not persuasive. Claimant testified that the remodeled front desk where she took reservations was approximately forty-two inches high. However, Claimant testified that in order to take a reservation at that desk, she "was hunched over nearly in half. While Claimant testified that she was five feet eleven inches, her medical records state her height as fifty-nine inches, or five foot nine inches. In either event, writing on a forty-two inch high surface would likely not require one to hunch over nearly in half. In contrast, Claimant described her primary desk as "a little bit uncomfortable for me."

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979) The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The "arising out of" test is one of causation which requires that the injury have its origins in an employee's work-related functions. There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009). The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2017). See City of *Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Claimant must prove that an occupational disease is an injury that results directly from the employer or conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of employment. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. V. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

The fact that a claimant experiences symptoms while performing work does not require the inference there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Rather, the symptoms could represent the logical and recurrent consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).

Claimant has suffered from chronic neck and upper back pain for at least fifteen years. In January 2012, Claimant was involved in a head-on collision, which aggravated her underlying neck and thoracic spine condition. Since the 2012 MVA, Claimant has consistently treated for her neck and thoracic spine pain.

While Claimant was treating for her 2012 MVA, she reinjured herself when she slipped and fell on ice in April 2014. The medical records persuasively document Claimant's regular treatment, which included injections, medications, and therapy for her neck and thoracic spine after this slip and fall.

Dr. Roth, the only Level II accredited physician to evaluate Claimant, provided a causation opinion which followed the Colorado Medical Treatment Guidelines. Dr. Roth credibly opined that Claimant sustained no mechanism of injury to her neck and thoracic spine as a result of her work duties. Dr. Roth opined that the musculature discomfort associated with a sitting posture is common to all employment and normal activities of daily living. More importantly, Dr. Roth credibly opined that muscular discomfort is not the same as an "injury" and per the Colorado Medical Treatment Guidelines, it is not considered to be an injurious activity.

Dr. Roth persuasively opined that Claimant would not meet the requirements of an injury under the cumulative trauma guidelines. Dr. Roth persuasively opined that Claimant's postures were not associated with any force, and Claimant had the opportunity to change from sitting to standing. Moreover, Dr. Roth persuasively opined that Claimant was able to perform multiple different work activities throughout the day, which would eliminate the requirement that Claimant had to maintain long periods of repetitive motions or static positions. Claimant did not dispute these facts, and acknowledged that she was not seated at her desk for a prolonged period of time, and when she worked at the front desk, she was not on the phone taking reservations the entire time.

Neither Dr. Centeno nor Ms. Bock opined that Claimant's work duties caused or aggravated her pre-existing conditions, thus causing the need for treatment. Therefore, Dr. Roth's opinion that it was not medically probable that Claimant's neck and thoracic spine complaints could have been caused by sitting and standing. Thus the ALJ finds and concludes that it is medically probable that Claimant's ongoing symptoms were not caused, aggravated, or exacerbated by her work activities.

Dr. Roth also credibly opined that Claimant did not sustain an injury to her low back as a result of cleaning the baseboards on September 14, 2015. Dr. Roth based his opinion on the fact that no impact or compressive event occurred and there were no cumulative activities which could have caused an injury. Dr. Roth reached this conclusion because Claimant had no immediate pain and did not complain of low back pain until a month after the event, a fact that the claimant does not dispute. Dr. Roth

opined that the temporal relationship between the alleged low back injury and the late onset of pain negates that the cleaning activity caused an injury.

Claimant's testimony that the cause of her pain was related to her work duties is not credible because her medical records document her repeated statements to her medical providers that she suffered from chronic pain which had increased as a result of the April 2014 slip and fall.

However, after filing a workers' compensation claim in October 2015, Claimant then attributed her pain and symptoms to sitting long hours at a non-ergonomic desk as noted in the November 2015 medical records. In March 2016, however, Claimant reported to Dr. Roth that her symptoms began when she had to stand in an awkward position at the front desk. At hearing, Claimant testified that all three work stations contributed to her increased pain, but then indicated it was primarily standing at the front desk.

Claimant's testimony that the alleged non-ergonomic work stations caused her symptoms, rather than the aggravation of a chronic condition from the 2014 slip and fall, is not persuasive.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to prove by a preponderance of the evidence that she suffered a compensable injury to her neck, upper back or her lumbar spine.
2. Claimant's claim is denied and dismissed with prejudice.
3. Issues not expressly decided herein are reserved to the parties for future determination.
4. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 18, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

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ISSUES

I. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination ("DIME") physician's opinion that Claimant sustained a combined 25% scheduled impairment to his left upper extremity as a result of his November 12, 2014 industrial injury.

II. Whether Claimant has proven by a preponderance of the evidence that he requires post-maximum medical improvement ("MMI") treatment other than as recommended by the authorized treating physician ("ATP").

III. Whether Claimant established by a preponderance of the evidence that he is entitled to conversion of his scheduled upper extremity impairment rating to a whole person impairment rating.

FINDINGS OF FACT

1. In October 2005 Claimant sustained a non work-related injury to his left shoulder while playing football. Claimant was 12 years of age at the time. Claimant treated with Orthopedic Associates LLC. Medical records from November 2005 document glenohumeral instability of the left shoulder, including slipping and catching. An MRI taken November 21, 2005 was normal.

2. On September 14, 2006, James McElhinney, MD performed an arthroscopy, left shoulder glenohumeral reconstruction, open capulsar shift type. The operative report notes Claimant experienced recurrent dislocations of the left glenohumeral joint. Medical records indicate that by December 13, 2006 Claimant was experiencing minimal discomfort and had good strength.

3. Claimant testified that he underwent extensive rehabilitation and completely recovered from the September 2006 surgery.

4. Claimant returned to Dr. McElhinney on February 21, 2007 after slipping and falling on ice and feeling something in his shoulder. Claimant reported that his shoulder later slipped partially out of the joint while he was washing his hair. Dr. McElhinney gave an impression of a probable re-injury of the left glenohumeral joint.

5. Claimant testified that after 2007 he had normal function of his left shoulder. Claimant stated that, from 2007-2013, he participated in basketball and lacrosse on the high school and collegiate levels, participating in weightlifting, running, jumping, hitting and shooting without any shoulder issues.

6. On November 12, 2014, Claimant suffered an admitted industrial injury to his left shoulder after slipping and falling on ice. Claimant was 21 years old at the time of the industrial injury.

7. Claimant sought treatment at Lutheran Medical Center Emergency Room on November 12, 2014. Claimant reported slipping on ice and landing with his arm outstretched. On physical examination, Ann Margaret Shimkus, PA-C noted left upper extremity tenderness along the acromioclavicular ligament joint and shoulder, with no sulcus sign and no step off. PA-C Shimkus further noted that there were no limitations of movement distal to the shoulder, but pain at the shoulder with range of motion. It was noted that an x-ray obtained on November 12, 2014 revealed findings for a non-displaced coracoid fracture. PA-C Shimkus gave an impression of a fracture of coracoid process of the left scapula. No subsequent medical records indicate Claimant sustained a fracture.

8. Claimant returned to Lutheran Medical Center Orthopedic Hospitalists on November 13, 2014. On physical examination, PA-C Jason McKown noted full and pain-free range of motion of Claimant's left elbow and wrist. PA-C McKown further noted tenderness to palpation at the acromioclavicular joint posterior shoulder along the body of the scapula and mild tenderness anteriorly along the biceps tendon and the coracoids process. Claimant's active range of motion was 30 degrees of forward flexion and 30 degrees of abduction. Passive range of motion was about 90 degrees of forward flexion. PA-C McKown noted a negative drop arm test and good external and internal rotation against resistance. PA-C McKown assessed left shoulder pain.

9. Claimant sought a second opinion at St. Anthony's Hospital Emergency Room on November 17, 2014. Claimant reported pain radiating down his left arm. On examination, Kyle Kirkpatrick, PA-C noted minimal tenderness of the mid-thoracic spine without step-off deformity, and no tenderness of the cervical and lumbar spine. Internal and external rotation of the left shoulder was normal with no gross deformity of the anterior shoulder. PA-C Kirkpatrick further noted "moderate tenderness of the left superior and inferior scapula without step-off deformity, crepitus." A CT scan was obtained and revealed a small Hill-Sachs lesion with no other possible acute fracture or dislocation. OS acromiale was also noted. PA-C Kirkpatrick gave a primary impression of a left Hill-Sachs deformity.

10. Claimant presented to Concentra Medical Centers ("Concentra") on November 21, 2014. Claimant reported falling directly onto his left shoulder. Claimant complained of pain in the left lateral shoulder. On physical examination, Craig Hare, PA-C noted limited range of motion of the left shoulder in all planes with normal appearance and normal diffuse palpation. Shoulder strength was normal bilaterally. PA-C Hare noted that a previous x-ray showed a Hill-Sachs deformity. PA-C Hare assessed a contusion of left shoulder/upper extremity and left shoulder sprain. PA-C Hare referred Claimant for physical therapy and released Claimant to work modified duty.

11. Claimant attended a follow-up evaluation with PA-C Hare on December 2, 2014 Claimant reported having no strength in his shoulder. PA-C documented, "Difficult to

ascertain where patient is having pain. Describes diffuse and pain with ROM to all planes." On examination, PA-C Hare noted normal appearance, normal diffuse palpation, and normal strength bilaterally with limited range of motion in all planes. PA-C Hare referred Claimant to an orthopedic specialist.

12. Claimant presented to orthopedic surgeon Mark Failinger, MD on December 18, 2014. Claimant reported that his initial discomfort was in the shoulder blade, but "he feels it more in shoulder and feels unstable again." Claimant also reported that it was difficult lifting his arm to the side and he thought it "might come out." Claimant further reported that there was no locking or catching. Dr. Failinger noted Claimant had a past surgical history of left shoulder stabilization. On examination, Dr. Failinger noted Claimant lifted to about 40 or 50 degrees actively and 160 degrees passively, "without a problem." Claimant had good external rotation strength with some give-way. The lift-off test was negative. Abduction strength was weak. Dr. Failinger further documented, "Abduction and external rotation, he seems to have anterior translation." Dr. Failinger gave an impression of left shoulder status post stabilization procedure, probable recurrent instability. Dr. Failinger recommended Claimant undergo an MRI.

13. On December 23, 2014, Claimant presented to Scott Richardson, MD at Concentra. Regarding the mechanism of injury, Claimant reported that he fell back with his left hand outstretched and pushed up onto his left shoulder. Claimant reported being worried about instability and occasional popping and radiation of pain into his arm. On examination, Dr. Richardson noted tenderness in the biciptal groove, deltoid, anterior glenohumeral joint, and supraspinatus muscle. Range of motion tests were deferred.

14. A December 30, 2014 MRI revealed no evidence of internal derangement or a Hill-Sachs deformity or Bankart lesion. The MRI did reveal unfused os acromiale without evidence of surrounding bone marrow edema.

15. Dr. Failinger reevaluated Claimant on January 8, 2015. Dr. Failinger noted that the MRI did not show any obvious abnormalities. Claimant reported having less pain and a little better motion, but some pain in the mid ranges. On examination Dr. Failinger noted Claimant lifted to about 90-100 degrees actively and 160 degrees passively "without a problem," with some pain in the mid range. Dr. Failinger further noted multidirectional motion in both shoulders without apprehension.

16. On January 29, 2015, Dr. Failinger noted 160 degrees passive and 90 degrees active forward flexion with good external rotation and give-way abduction strength. Dr. Failinger further noted multidirectional laxity in both shoulders. Dr. Failinger administered an injection in Claimant's left shoulder for diagnostic and therapeutic purposes.

17. On March 24, 2015, Casey McKinney, PA-C at Concentra noted tenderness in the deltoid and anterior glenohumeral joint and full range of motion with pain with abduction.

18. On April 14, 2015, Dr. Richardson noted tenderness in the deltoid, anterior glenohumeral joint and supraspinatus muscle with near full range of motion.

19. On June 11, 2015, Dr. Richardson noted mild diffuse tenderness to palpation mostly in the posterior aspect with full range of motion.

20. On June 25, 2015, Dr. Richardson noted tenderness in the deltoid, anterior glenohumeral joint, scapula and supraspinatus muscle with full range of motion. Dr. Richardson referred Claimant to an orthopedic specialist.

21. On July 2, 2015, Claimant reported to Dr. Failinger that the injection helped initially, but then he suffered a setback. Claimant reported gaining strength, but pain lifting up to the side, and instability. On examination, Dr. Failinger noted 170 degrees of active and passive external rotation strength with some multidirectional laxity in both shoulders.

22. On July 16 and July 30, 2015, Dr. Richardson noted minimal or no tenderness and full range of motion.

23. On August 10, 2015, PA-C McKinney noted tenderness in the anterior glenohumeral joint and full range of motion. PA-C McKinney further noted, “Popping and subjective pain with abduction and forward extension above shoulder level.” PA-C McKinney again referred Claimant to an orthopedic specialist.

24. Claimant presented to orthopedic specialist Craig Davis, MD on September 1, 2015. Regarding the mechanism of injury, Claimant reported that he fell to the side and his left arm was pushed overhead. On examination, Dr. Davis noted full range of motion with pain at about 90 degrees of abduction and forward elevation. Dr. Davis further noted Claimant had good strength and no obvious instability. Apprehension and relocation tests were positive. Sulcus sign was negative. Dr. Davis gave an impression of possible biceps instability along with subacromial bursitis of the left shoulder. Dr. Davis opined Claimant may be a reasonable candidate for surgical treatment, noting, “He does have reproducible clicking and pain with abduction, which was relieved significantly by subacromial injections.”

25. A September 15, 2015 MRI revealed unfused apophysis versus os acromiale with no Hill-Sachs lesion and no rotator cuff tear or tendinopathy,

26. Dr. Davis reevaluated Claimant on September 29, 2015 and noted full range of motion with pain and “reproducible clicking with abduction at around 90 degrees.” Dr. Davis gave an impression of persistent left shoulder pain following a strain. Dr. Davis stated, “I think this patient may have some subtle instability. He has a history of instability surgery in the past and his mechanism of injury is consistent with a capsular stretch. This could result in superior migration of the humeral head with secondary bursitis.” Dr. Davis noted Claimant’s case was unusual due to his young age and not having “frank instability.” Dr. Davis referred Claimant to Dr. Mike Hewitt, another orthopedic specialist.

27. Dr. Hewitt evaluated Claimant on October 5, 2015. Claimant complained of pain within the lateral and posterior aspect of his shoulder, and popping and catching with overhead use. On examination, Dr. Hewitt noted active range of motion of 170 degrees of forward flexion with a painful arc beyond 100 degrees, external rotation of 70 degrees, and internal rotation to T8. The lift-off and cross-arm tests were negative, while the apprehension test was positive. There was no focal tenderness about the clavicle or AC joint and mild-to-moderate tenderness about the impingement areas. Dr. Hewitt further noted that there was no obvious atrophy in the left shoulder. Dr. Hewitt assessed: status post left shoulder hyperabduction injury with persistent pain and a positive apprehension test. Dr. Hewitt remarked that Claimant has persistent symptoms consistent with instability and had failed conservative management. Dr. Hewitt opined that Claimant is an appropriate candidate for shoulder arthroscopy with possible capsular placation versus labral repair.

28. On November 12, 2015, Dr. Richardson noted tenderness in the anterior, lateral superior and posterior shoulder with full range of motion. Dr. Richardson assessed a dislocation of the left shoulder joint and left shoulder instability. Dr. Richardson again referred Claimant to an orthopedic specialist.

29. On December 3, 2015, Claimant reported clicking in his shoulder. Dr. Richardson noted tenderness in the anterior, lateral and posterior shoulder with an active range of motion of 40 degrees of extension and 110 degrees of abduction with pain.

30. On January 19, 2016, Claimant underwent a left shoulder posterior capsular placation and subacromial bursectomy performed by Dr. Hewitt. Dr. Hewitt's postoperative diagnoses included left shoulder 2+ posterior instability, patulous posterior capsule, and moderate subacromial bursitis.

31. Claimant testified that the surgery reduced his pain and increased his stability but did not improve his function.

32. Claimant attended multiple post-operative evaluations at Concentra with Dr. Hewitt and Theodore Villavicencio, MD. Claimant also underwent a second phase of physical therapy. By June 3, 2016, Claimant was reporting that his pain was "mild and more annoying than anything." Dr. Villavicencio noted tenderness to the anterior glenohumeral joint with limited range of motion in all planes. Dr. Villavicencio also noted the following active range of motion measurements: 120 degrees of forward flexion with pain, 30 degrees of extension with pain, 120 degrees of abduction with pain, and painful internal rotation.

33. On July 8, 2016, Dr. Hewitt noted Claimant's active range of motion was 160 degrees of forward flexion, 60 degrees of external rotation, and internal rotation to T10 with mild pain. Instability testing was negative. There was no focal tenderness about the shoulder. Dr. Hewitt remarked that Claimant's range of motion and strength had "significantly improved," and that Claimant had not had any further issues with instability. Dr. Hewitt opined that Claimant was approaching maximum medical

improvement ("MMI"). Dr. Hewitt recommended a six-month gym membership and an orthopedic follow-up one to two times over the course of the year as maintenance care. No permanent restrictions were anticipated.

34. Claimant testified Dr. Hewitt did not use an instrument to measure his range of motion.

35. On July 28, 2016. Claimant reported improved pain and no new symptoms. Dr. Villavicencio noted a limited active range of motion in all planes, with 140 degrees of forward flexion, 30 degrees of extension, 130 degrees of abduction with pain, and painful internal rotation.

36. Dr. Villavicencio placed Claimant at MMI on August 24, 2016. Claimant rated his pain at 1/10 pain. On examination, Dr. Villavicencio noted that there was no tenderness. Active range of motion measurements were as follows: 150 degrees of forward flexion, 60 degrees of extension, 150 degrees of abduction, 50 degrees of adduction, 60 degrees of internal rotation, and 60 degrees of external rotation. Dr. Villavicencio noted all of the range of motion measurements were without pain. Motor strength was normal bilaterally with flexion at 4+/5 on the right side. Dr. Villavicencio opined that Claimant had a work-related fall resulting in dislocation, but had returned to excellent functional status. Dr. Villavicencio assigned a 5% upper extremity (3% whole person) impairment rating based on range of motion deficits. As maintenance care, Dr. Villavicencio recommended a six-month gym membership and as-needed orthopedic follow-up with Dr. Hewitt over the course of the year. Dr. Villavicencio released Claimant to full duty with no permanent restrictions.

37. Claimant testified that Dr. Villavicencio measured his assisted range of motion.

38. Respondents filed a Final Admission of Liability ("FAL") on September 6, 2016, admitting for an MMI date of August 24, 2016 and a 5% upper extremity impairment, per Dr. Villavicencio's August 24, 2016 evaluation. Respondents admitted liability for reasonably necessary and related post-MMI medical treatment as authorized by the authorized treating physician.

39. Claimant objected to the FAL and underwent a DIME with J.E. Dillon, MD on January 24, 2017. Dr. Dillon physically examined Claimant and reviewed medical records. Dr. Dillon's summary of medical records does not reference any medical records prior to November 12, 2014. Regarding Dr. Villavicencio's August 24, 2016 examination, Dr. Dillon remarked, "Of note, [Claimant] reports that Dr. Villavicencio performed essentially active assisted range of motion rather than active range of motion for the assessment."

40. Claimant reported to Dr. Dillon that he slipped on ice and fell onto his outstretched left hand. Claimant complained of pain in his left shoulder with exacerbation with any movements and use of the left upper extremity. Claimant reported that his symptoms had not significantly subsided since shortly after the January 2016 surgery. Dr. Dillon noted, "He does indicate that the shoulder felt 'more

stable' after the surgery, but the continued pain and limited range of motion." Claimant reported an inability to lift more than five pounds using his whole arm and an inability to lift his hand above his shoulder. Claimant also reported suffering a left shoulder dislocation in 2005 and undergoing surgery for a recurrent dislocation. Claimant reported that he recovered completely from those incidents.

41. Regarding Dr. Dillon's physical examination of Claimant, Dr. Dillon noted that Claimant guarded "from movements at the left shoulder." Dr. Dillon noted clicking and some crepitus with movement at the left shoulder. Hawkins, Neer and cross-arm tests were positive. Spurling's test was negative. Dr. Dillon documented normal muscle bulk and strength in the upper extremities and fluid neck movements. Dr. Dillon noted the following active range of motion measurements: 80 degrees of flexion, 20 degrees of extension, 20 degrees of adduction, 60 degrees of abduction, 25 degrees of internal rotation, and 60 degrees of external rotation.

42. Dr. Dillon concurred with Dr. Villavicencio's MMI date of August 24, 2016. Dr. Dillon stated, "Injury to the left shoulder is described, status post shoulder stabilization surgery. This is a ratable condition. No evidence of neck injury and no ratable condition at this level." Dr. Dillon assigned a 20% range of motion impairment rating and a 6% impairment rating under Section 3.1j of the AMA Guides for joint crepitus and clicking, for a combined total 25% upper extremity rating (15% whole person). Regarding post-MMI medical treatment, Dr. Dillon opined that further follow-up with Dr. Hewitt is indicated, the frequency of which was dependent on the nature of Claimant's symptoms. Dr. Dillon remarked, "The need for further treatment and the nature of that treatment would be best judged by Dr. Hewitt. Any treatment for issues related to the occupational injury in question or the surgery performed should be considered covered under this claim"

43. On April 7, 2017, Timothy O'Brien, MD conducted an Independent Medical Examination ("IME") of Claimant at the request of Respondents. Dr. O'Brien issued an IME Report dated April 17, 2017. Dr. O'Brien performed a medical record review and physically examined Claimant. Regarding the mechanism of injury, Claimant reported that he slipped, landed on his left hand, "and then the extremity was forcefully abducted by his fall against the ground when he fell backwards onto the posterior shoulder…" Claimant complained of stiffness, pain, weakness, and loss of endurance and strength. Claimant reported to Dr. O'Brien that he never regained motion in his shoulder.

44. On physical examination, Dr. O'Brien noted no tenderness in the cervical spine, thoracic spine or scapular area, but pain in the anterior subacromial arch on the left. Dr. O'Brien further noted no atrophy in the supraspinatus or infraspinatus fossa, and normal and symmetric muscle bulk and tone. Claimant's arms and forearms measured equal bilaterally. Claimant's grip strength on the right was 38 pounds and 8-10 pounds on the left. Dr. O'Brien documented, "Strength testing of the biceps and tricpes as well as the wrist dorsiflexors and volar flexors was associated with profound clapsed-knife effort on the left. This finding was not noted on the right." Dr. O'Brien noted the following active range of motion measurements on the left: abduction to 85 degrees, forward elevation to 90 degrees, external rotation to 65 degrees in abduction and 50 degrees at

Claimant's side, internal rotation to 45 degrees in abduction and to the posterior-superior iliac spine. Dr. O'Brien further noted that there was no palpable or audible crepitus of either shoulder during active range of motion testing or with provocative testing.

45. Dr. O'Brien noted that provocative tests were difficult to analyze on the left because of splinting and "an inability to abduct the arm to even 80 degrees on the left. [Claimant] also indicated he was somewhat apprehensive about performing some of these tests due to pain." Dr. O'Brien documented that Claimant was able to elevate his left arm to 160 degrees and right arm to 180 degrees in forward elevation with wall-walking.

46. Dr. O'Brien opined that Claimant did not suffer a dislocation, but instead suffered a minor work-related left shoulder sprain or strain. Dr. O'Brien remarked that, if Claimant had suffered a dislocation, it would be "virtually impossible" to have full range of motion, which was noted in the November 12, 2014 emergency room record. Dr. O'Brien stated that acute shoulder dislocations are incredibly painful and associated with profound functional impairment until the dislocation has been reduced. Dr. O'Brien further stated that the CT scan and MRI prove that there was no substantial acute intra-articular injury, as there was no evidence of intra-articular swelling and hydration changes, or intra-articular bleeding.

47. Dr. O'Brien further opined that the industrial injury did not substantially aggravate or accelerate Claimant's pre-existing and longstanding multidirectional instability of the left shoulder. Dr. O'Brien contended that the December 30, 2014 MRI scan demonstrated chronic longstanding changes that were the result of Claimant's age and prior history of dislocation and surgical intervention. Dr. O'Brien further opined that Claimant's minor sprain/strain healed on or before December 30, 2014, and that Claimant's ongoing subjective complaints, medical attention, and exam findings after December 30, 2014 were of "reflection of Claimant's personal issues and are not causally related to the work incident."

48. Dr. O'Brien noted that it was difficult to ascertain Claimant's true level of function due to the presence of nonorganic factors in his examination. Dr. O'Brien concluded that the only way to explain the absent of atrophy but presence of significant side-to-side differences in strength was to implicate lack of effort and nonorganic factors. Dr. O'Brien stated,

> If [Claimant] cannot be relied upon to provide a full effort during strength testing, then his effort during range of motion must also be called into question. In fact, once nonorganic factors are documented, the utilization on any exam outcomes or subjective input as a foundation for clinical thinking or decisions should be abandoned as there is not way (*sic*) to trust those 'claimant-dependent' inputs as valid.

49. Dr. O'Brien opined that Dr. Dillon's findings were inaccurate because Dr. Dillon "relied on a claimant who was misrepresenting his true level of pain and function." Dr.

O'Brien argued that Dr. Dillon's impairment rating based on a side-to-side difference in range of motion is not valid because the absence of atrophy during his exam of Claimant proves that there was no disuse or stiffness. Dr. O'Brien further concluded that crepitus has no correlation to function.

50. Claimant testified that Dr. O'Brien did not measure his range of motion or his biceps.

51. Dr. O'Brien testified at hearing on behalf of Respondents as an expert in orthopedics and orthopedic surgery. Dr. O'Brien is board certified in orthopedic surgery and Level II accredited by the Colorado Division of Workers' Compensation. Dr. O'Brien testified consistent with his IME report. Dr. O'Brien again opined that Claimant suffered a minor shoulder sprain or strain and no acute dislocation, noting Claimant had normal to near-normal range of motion after the work injury. Dr. O'Brien stated that it was not medically probable for the Hill-Sachs lesion to have been caused by Claimant's injury, as there were no acute signs of bleeding.

52. Dr. O'Brien stated that he had since reviewed Claimant's medical records pre-work injury, and that such medical records evidenced bilateral multidirectional instability. Dr. O'Brien contended that the surgery performed by Dr. McElhinney failed to correct posterior instability and pre-disposed Claimant to future shoulder instability.

53. Dr. O'Brien stated that he does not believe Claimant's reports to him and Dr. Dillon regarding his functioning is accurate. Claimant's report that his symptoms had not significantly subsided since shortly after the January 2016 surgery is inconsistent with the medical records. Dr. O'Brien contended that there was no physiologic, medical or objective evidence for Claimant's escalating pain complaints and implicated non-organic factors. Exam findings can only be explained by implicating non-organic factors.

54. Dr. O'Brien testified that he did, in fact, measure Claimant's arm girth. Dr. O'Brien testified that there was no explanation for the discrepancy in grip strength and for the absence of atrophy, which would be expected if Claimant had not be able to use his arm normally. Dr. O'Brien stated that he was unable to complete a full shoulder exam because Claimant indicated the maneuvers were too painful. Dr. O'Brien testified that the range of motion exhibited at his exam was dramatically less than the prior three physicians, and contended that it was not medically probable that strength and range of motion in a healthy young man would deteriorate in five months without further injury. Dr. O'Brien stated that there was a discrepancy between Claimant's active range of motion and passive range of motion during his exam, and opined that there should be symmetric strength and range of motion based on the absence of atrophy.

55. Dr. O'Brien stated that Claimant's July 8, 2016 and August 24, 2016 range of motion measurements were near-normal, with no mention of crepitus. Dr. O'Brien contended that there is no physiological or objective evidence for Claimant's subsequent loss of function.

56. Dr. O'Brien opined that Dr. Dillon was clearly wrong in assigning a 20% impairment rating. Dr. O'Brien stated that DIME physicians are required to review historical medical records and that there is no indication Dr. Dillon reviewed records from Claimant's prior shoulder injuries. Dr. O'Brien further opined that Dr. Dillon discounted the presence of nonorganic factors and historical inconsistency from Claimant. Further, using subjective complaints and exam performance where reliability is in question creates inaccuracy in assigning an impairment rating. The prior records would be important to the causation analysis and impairment rating.

57. Dr. O'Brien further testified that Dr. Dillon was clearly wrong in assigning an impairment rating for joint crepitation under the AMA Guides.

58. Dr. O'Brien again opined that Claimant did not sustain any permanent impairment beyond the left arm at the shoulder as a result of the work incident. Dr. O'Brien stated that it is very common to see a small loss of range of motion after a stabilization procedure and opined that Claimant sustained a 5% scheduled impairment for range of motion deficits.

59. The ALJ credits the medical records and the opinions of Drs. O'Brien, Villavicencio and Hewitt over the conflicting opinion of Dr. Dillon as to Claimant's permanent physical impairment.

60. The ALJ finds Claimant's testimony regarding his physical examinations and his function to not be credible or persuasive.

61. Respondents have overcome the DIME physician's opinion on permanent impairment by clear and convincing evidence.

62. Based on the preponderance of the evidence, Claimant is assigned a 5% scheduled upper extremity permanent impairment rating.

63. Claimant has failed to establish by a preponderance of the evidence that the situs of functional impairment is beyond the arm at the shoulder.

64. Claimant has failed to establish by a preponderance of the evidence that he requires post-MMI treatment other than as recommended by the ATP.

65. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, Section 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must

be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201(1), C.R.S. Generally, the claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

A workers' compensation case is decided on its merits. Section 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986).

The ALJ's resolution of issues will be affirmed if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *City and County of Denver School District 1 v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). Substantial evidence is that quantum of probative evidence, which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Overcoming the DIME Opinion on Permanent Impairment

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; Section 8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

In *Wackenhut Corp.,* the court noted that under the AMA Guides the "evaluation or rating of impairment is an assessment of data collected during a clinical evaluation and the comparison of those data to the criteria contained in the Guides." Consistent with this concept the Industrial Claim Appeals Office has upheld a DIME physician's impairment rating that excluded "valid" range of motion deficits from an impairment rating based on the determination that the range of motion deficits did not correlate with clinical observations and data. *Adams v. Manpower,* W.C. No. 4-389-466 (I.C.A.O. August 2, 2005); *Garcia v. Merry Maids,* W.C. No. 4-493-324 (I.C.A.O. August 12, 2002).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The ALJ concludes Respondents have overcome the DIME physician's opinion on permanent impairment by clear and convincing evidence. Dr. Dillon's clinical findings were not in substantial accordance with the information in the record. Chapter 1.2 of the AMA Guides states, in part, "If the findings of the impairment evaluation are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until communication between the involved physicians or further clinical investigation resolves the disparity." Claimant's active range of motion measurements leading up to and at the time of MMI were significantly greater than Dr. Dillon's measurements approximately five to six months later. At the time Claimant was placed at MMI by Dr. Villavicencio, Claimant rated his pain at 1/10, and his active range of motion measurements were obtained without pain.

Claimant's reports to Dr. Dillon regarding his functional status and lack of improvement post-surgery are inconsistent with the medical records and his reports to other physicians.

Dr. O'Brien credibly testified that there is no physiologic explanation for Claimant's decrease in function from MMI to Dr. Dillon's examination. Furthermore, Dr. O'Brien credibly testified that Dr. Dillon's own findings of normal muscle tone and strength contradict her range of motion measurements. Dr. Dillon did not address the significant discrepancies in range of motion measurements nor did she address the inconsistency in Claimant's subjective reports to her and what was contained in the medical records. Although Dr. Dillon noted Claimant reported suffering a prior dislocation and recurrent dislocation and surgery, there is no indication Dr. Dillon reviewed medical records from prior to the work injury, which Dr. O'Brien credibly testified is imperative to the role of the DIME physician in both the causation and impairment rating analysis. Dr. O'Brien credibly and persuasively testified that both his and Dr. Dillon's findings on clinical examination can only be explained by non-organic factors.

Additionally, Dr. Dillon provided no explanation as to why she assigned an impairment rating for both range of motion limitations and joint crepitation. Section 3.1j of the AMA Guides states,

> Joint crepitation with motion can reflect synovitis or cartilage degeneration…*The evaluator must use judgment and avoid duplication of impairments when other findings, such as synovial hypertrophy, carpal collapse with arthritic changes, or limited motion are present* [emphasis not added]. The latter findings may indicate a greater severity of the same underlying pathological process and take precedence over joint crepitation, which should not be rated in these instances.

While Section 3.1j does indicate that it is within the DIME physician's judgment to assign an impairment rating for joint crepitation, it clearly cautions against assigning duplicate impairment ratings for other findings. Dr. Dillon provided no explanation as to her reasoning for assigning an impairment rating for both limited motion and joint crepitation. Dr. O'Brien credibly opined that Dr. Dillon erred in assigning an impairment rating for joint crepitation in Claimant's circumstances. Based on the totality of the evidence, Respondents have established that it is highly probable that Dr. Dillon's permanent impairment rating is incorrect.

Once the ALJ determines that the DIME's rating has been overcome, the claimant's correct medical impairment then becomes a question of fact and the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *See Garlets v. Memorial Hosp.*, W.C. No. 4-336-566 (ICAO Sept. 5, 2001). "The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols." *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-477 (ICAO Nov. 16, 2006).

As Respondents have overcome Dr. Dillon's impairment rating, the ALJ is charged with calculating Claimant's impairment rating based on the preponderance of the evidence. As previously discussed, Dr. O'Brien also credibly testified that Dr. Dillon erred in assigning an impairment rating for joint crepitation. Claimant's ATP, Dr. Villavicencio, determined Claimant sustained a 5% upper extremity impairment for loss of range of motion. Dr. Villavicencio's opinion is supported by the medical records and Dr. Hewitt's clinical findings. Dr. O'Brien credibly testified that it is very common to see a small loss of range of motion after a stabilization procedure, and agreed with an impairment rating of 5%. Accordingly, Respondents have proven that it is more likely than not that Claimant sustained a 5% upper extremity impairment rating for loss of range of motion.

Medical Benefits

The respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether the claimant proved that specific treatment is reasonable and necessary to maintain his or her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant has failed to prove by a preponderance of the evidence that he requires other medical treatment to maintain his condition at MMI other than as recommended by the ATP. Dr. Dillon opined that any further treatment would be best judged by Dr. Hewitt. Dr. Hewitt and Dr. Villavicencio recommended Claimant receive a six-month gym membership and attend one to two orthopedic follow-up appointments over the course of the year as maintenance care. Claimant has not established that is more likely than not that he requires post-MMI medical treatment other than as recommended by his ATP.

Conversion of Medical Impairment Rating

Section 8-42-107(1)(a), C.R.S., provides that when an injury results in permanent medical impairment and the "injury" is enumerated in the schedule set forth in subsection (2) of the statute, "the employee shall be limited to the medical impairment benefits as specified in subsection (2)." If the claimant sustains an injury not found on the schedule, Section 8-42-107(1)(b), C.R.S. provides the claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Under the "situs of the functional impairment" test there is no requirement that the functional impairment take any particular form. Therefore, pain and discomfort that limit the claimant's ability to use a portion of the body may constitute functional impairment. *Agliaze v. Colorado Cab Co.,* W.C. 4-705-940 (ICAO April 29, 2009); *Johnson-Wood v. City of Colorado Springs,* W.C. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. 4-452-408 (ICAO October 9, 2002).

Section 8-42-107(2)(a), C.R.S. provides for scheduled compensation based on "loss of an arm at the shoulder." The claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to permanent partial disability benefits awarded under Section 8-42-107(8)(c), C.R.S. Whether the claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs, supra.*

"Functional impairment" is distinct from physical (medical) impairment under the AMA Guides and as noted, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or disabled. *Strauch, supra.* Physical impairment relates to an individual's health status as assessed by medical means. On the other hand, disability or functional impairment pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 658 (Colo. App. 1998). Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc., supra.* Symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with a claimant's

ability to use a portion of his body to be considered a functional impairment. *See Mader v. Popejoy Construction Co., Inc.,* W.C. No. 4-198-489 (August 9, 1996). Thus, in order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether Claimant has pain, but whether the injury and the associated pain caused thereby has impacted part of Claimant's body which limits his "capacity to meet personal, social and occupational demands." *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996); *Bernal v. CMHIP*, W.C. No. 4-956- 645 (October 5, 2015).

As found, Claimant has failed to establish by a preponderance of the evidence that he his scheduled upper extremity impairment rating should be converted to a whole person rating. There is insufficient credible and persuasive evidence establishing that Claimant suffered functional impairment beyond the left arm at the shoulder. Claimant's testimony as to his functional limitations was not credible. As previously discussed, there were significant discrepancies in Claimant's reported functioning and clinical findings between the time of MMI and the DIME. Dr. O'Brien credibly testified that Claimant's presentation is due to non-organic factors. Dr. O'Brien credibly testified that atrophy would be expected if Claimant's function was limited as reported. No atrophy was noted by Dr. O'Brien, Dr. Dillon, Dr. Hewitt or Dr. Villavicencio. There is insufficient credible and persuasive evidence Claimant sustained functional impairment beyond the arm at the shoulder. As such, Claimant has failed to prove that it is more likely than not that his scheduled impairment rating should be converted to a whole person impairment rating.

ORDER

It is therefore ordered that:

1. Respondents have overcome the DIME physician's permanent impairment rating by clear and convincing evidence. Based on the preponderance of the evidence, Claimant is assigned a 5% scheduled upper extremity rating.

2. Claimant has failed to establish by a preponderance of the evidence that he requires post-MMI medical treatment other than as authorized by the ATP. Claimant's claim for additional medical benefits not previously admitted is denied and dismissed.

3. Claimant has failed to establish by a preponderance of the evidence that his scheduled upper extremity impairment rating should be converted to a whole person impairment rating.

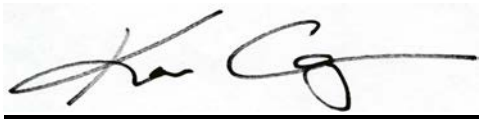
4. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 18, 2017



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Is Claimant entitled to a Permanent Partial Disability rating, based upon his recent Division Independent Medical Examination ("DIME")?

FINDINGS OF FACT

Based upon the evidence presented at Hearing, the ALJ makes the following Findings of Fact:

1) On the date of the hearing Claimant was 31 years of age and was a high school graduate, having graduated from high school in 2004.

2) Claimant testified that he has no medical training or medical background and simply followed the direction of the authorized treating physician's (ATP's) at all times.

3) Claimant worked for Respondent for approximately 3½ years as an "Assembly Technician" working up to 16 hours per day, five days a week. Claimant testified that he very much enjoyed his work and looked forward to a long term career with Respondent employer.

5) The listed date of injury is April 15, 2015, even though Claimant testified his symptoms started earlier.

6) Claimant was terminated by Respondent employer on or about October 6, 2016, as he was no longer capable of performing the work required.

7) Claimant testified as to the strenuous and manual nature of the job he had assembling chiller units and then fabricating/installing aluminum and copper condenser tubes. (Ex. 3) Claimant also operated a press to manufacture the tubes that were then "stuffed" into the chiller cabinets. Such work was done on a production basis and Claimant testified that he was required to use a battery-operated hand held driver to install one and a half inch (1½) self-tapping the bolts utilizing the battery operated driver. Each chiller cabinet required 38 bolts and a total of 16 or more units were manufactured during each shift. In performing such functions, Claimant testified that his hands and wrists were regularly torqued when the bolts were driven into the chiller cabinets for assembly. Claimant also testified that reaching into the chiller cabinets to install the tubes required him to contort his hands, wrists and arms in awkward positions. The actual tubes were anywhere from 8 to 21 feet long and required significant force in terms of pulling and pushing.

8) Claimant began feeling the initial onset of symptoms in late 2014 and was urged to simply use topical creams that were supplied by the employer.

9) Claimant testified that he had no pre-existing conditions including no prior traumatic injuries or no evidence of underlying chronic conditions that affected him before his work related symptoms began. In fact, Claimant began his career with Respondent employer through a temporary service that had screened him for such conditions before he was hired by Respondent employer.

10) After approximately eight (8) months, Claimant was finally referred to ATP, Dr. Terrance Lakin. Dr. Lakin initially diagnoses 1) Hx complex regional pain syndrome of upper limbs bilateral; 2) Hx of carpal tunnel. (Ex. D)

11) ATP Dr. Lakin referred Claimant to Dr. Karl Larsen who subsequently performed surgery on his right wrist on August 4, 2015 and on his left wrist on October 20, 2015.

12) Claimant testified that following the two surgeries his condition began to gradually worsen. He described the pain to Dr. Larson as a nine (9) on a scale of 1 to 10. Claimant testified that as his symptoms began to increase he was unable to use either upper extremity for almost any activities including dressing, personal hygiene, activities of daily living and even the lifting and diapering of his one year old child.

13) Claimant testified that he then developed a severe anxiety/depression due to the chronic pain and that his ATP, Dr. Lakin referred him to Dr. Gary Nueger, psychologist and Dr. Gary Gutterman, psychiatrist.

14) In a letter dated April 28, 2015, Dr. Lakin responded to a fax from Respondent's adjuster stating that:

> "It is my opinion that the guidelines are extremely helpful and educational and I utilize them frequently when appropriate but certainly no manual or algorithm can accommodate for every specific patient or mechanism of injury. When patients present that do not fit the guideline, I use reasonable and appropriate education, training and experience."

He goes on to state:

> "He has a working diagnosis of bilateral carpal tunnel syndrome based on clinical exam findings. His left hand demonstrates carpal tunnel syndrome on nerve conduction studies that were done January 30, 2015. MRI of his left wrist performed on January 5, 2015, indicated mild intercarpal arthrosis, anomalous position of the median nerve and carpal tunnel which can be associated with carpal tunnel syndrome, flexor tendon, hyper spasticity and neurological symptoms." (Ex. 1 p. 2).

Further down, Dr. Lakin states:

> Job duties meet the following on risk factor definitions from the table. My opinion is that he would reach awkward posture and repetition duration equating to six hours of supination –pronation with 10 cycles, 30 seconds or less for posture is used to rate at least 50% of a task cycle. He therefore would have a primary risk factor that is physiologically related to diagnosis risk factor."

Lastly, he states:

> "He appears to be much more symptomatic in both hands then when the study was done in January 2015." (Ex. 1)

Later, however, once Dr. Lakin obtained all records pertinent, he placed Claimant at MMI on 9/16/16, stating:

> Released from WC Care. Issue is Non Occupational problem. Transition to primary care provider and encourage to obtain referral to same or similar specialists. (Ex. 9 p. 51).

15) On referral from Dr. Lakin, Claimant saw Gretchen Brunworth, MD. In turn, Dr. Brunworth referred Claimant to Barbara Goldstein, MD, an Assistant Professor of Medicine at National Jewish for a rheumatologic consult.

16) Claimant saw Dr. Goldstein on August 19, 2016. In her report, Dr. Goldstein summarized Claimant's care and treatment to date. Such included the fact that he was, based on a workup, HLA-B27 positive and he had an abnormal MRI (of his hands). (Ex. H).

17) Claimant's physical exam revealed good pulses and no edema in his extremities, along with shoulders, elbows and hands without any obvious warmth or swelling in them. He also had fairly good range of motion, although tender at the wrists on palpation. (Ex. H).

18) Dr. Goldstein then referenced lab results (which Dr. Hall admitted he did not have) from March and June 2016. (Ex. H).

19) Based on her exam and review of extremely relevant records including lab results, it was her opinion, as a specialist in the field, that Claimant likely suffered from inflammatory arthritis unrelated to his carpal tunnel syndrome. She then recommended follow up testing and care, which Claimant admitted he has so far failed to get. (Ex. H).

20). After his examination with Dr. Goldstein, Claimant saw Dr. Brunworth on August 22, 2016. A few days before, Dr. Brunworth had spoken with Dr. Goldstein about her findings and opinions. It was Dr. Goldstein's opinion, as a specialist in the

field, that Claimant had some type of arthritis and he needed to see a rheumatologist. At the August 22, 2016 visit, Dr. Brunworth told Claimant he'd developed arthritis that was not caused by his work activities and he therefore needed to seek treatment under his private insurance and get a referral to a rheumatologist. She assured him the rheumatologist had excellent medications that should be able to help him. Claimant admitted he failed to seek such care. (Ex. G).

21) On September 15, 2016, Dr. Lakin placed Claimant at MMI, at full duty, with no restrictions and no follow up care for his work related injury i.e. bilateral carpal tunnel syndrome. He was to transition to a specialist for treatment of his (non-work related) arthritis. (Ex. D, pp. 7–11).

22) Dr. Timothy Hall performed a Division Independent Medical Examination (DIME) on February 22, 2017, that outlined all of Mr. Ortiz complaints and his medical history. His impressions include: overuse syndrome, bilateral upper extremity's primarily involving hands with the following specific diagnosis: 1) carpal tunnel syndrome bilaterally; 2) ulnar neuritis; 3) De Quervains tenosynovitis; 4) mild or medium epicondylitis bilaterally and 5) mood and sleep disturbance related to chronic pain and functional deficits (depression/anxiety). Dr. Hall further opined that he did not feel that Claimant met the criteria for chronic regional pain syndrome. Dr. Hall did not dispute Dr. Lakin's placement of Claimant at MMI on September 16, 2016, albeit for different reasons. Dr. Hall simply opined that there was "simply nothing more to offer him [Claimant]". (Ex. 11 pp. 70-71).

23) Dr. Hall testified in person at the hearing and stated his differential diagnosis as a "cumulative trauma disorder". When he was asked: it is your belief that his work activities at Trane doing this assembly type work is why he is in this situation he is in now? His response was "yes". He then went onto outline the methodology he used to apply the rating system based upon his experience as a Physiatrist with over 35 years of experience.

24) Dr. Hall also opined on the issue of an underlying arthritic condition that "people with rheumatoid arthritis usually do not have numbness, tingling, stabbing, shooting, burning hyper trophic pain. They have joint pain and it is a very specific type of pain. He went on to state "I have not seen any convincing evidence that he has a generalized auto immune arthritic process. So I would assign those findings to change locally in the wrist as part of the whole cumulative syndrome".

25) On exam, Dr. Hall noted Claimant's pain complaints were diffuse, meaning they were not specific to his fingers, knuckles or hands, but rather more of an allover complaint. His physical exam also revealed pain complaints that were not in a particular dermatomal distribution, but were instead rather diffuse. (Ex. E). He testified Claimant had an unusual presentation; that the objective EMG test results are not 'all that bad'; that he really does not know exactly what Claimant has (for his injuries) and that this case is a really unusual situation.

26) Dr. Hall's February 22, 2017, DIME report assigns a bilateral 21% upper extremity impairment which he then converts to a 24% whole person impairment rating.

27) Dr. Joseph Sollender consulted for Respondent on this case, beginning in 2016. He then performed an Independent Medical Examination ("IME") on May 18, 2017. He provided a detailed analysis of a Job Demands Analysis which had been performed for Employer. He concluded that the carpal tunnel syndrome risk factors did not apply to Claimant, even based upon working 11 to 13 hour days. He noted that Dr. Hall, in his DIME report, did not have access to this document; nor did Dr. Hall have the closing notes from Dr. Lakin, when he placed Claimant at MMI, and concluded that the case was non-occupational.

28) Dr. Sollender further noted that Dr. Hall did not have the blood work from Dr. Goldstein, and the follow-up with Dr. Brunworth. Dr. Sollender further noted that

> If a person is positive for HLA-B27 and has symptoms such as chronic pain, inflammation, and/or degenerative changes to his bones (as seen on X-ray), then it supports a diagnosis of ankylosing spondylitis, reactive arthritis, or another autoimmune disorder that is associated with the presence of HLA-B27 (Ex. 5 p. 27)

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,*

165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, while the parties agree that Claimant has reached MMI, the rating process used by Dr. Hall has come into question.

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME Opinion of Dr. Hall-Generally

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a claimant's medical condition, the party challenging the DIME must demonstrate that the physicians determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

Has Claimant initially proven that his condition affects the Whole Person?

F. Dr. Hall acknowledged (per Desk Aid #11) that the basis of his rating, cumulative trauma staging, is only to be "used to rate permanent impairment of specific disorders when no other rating is available" in the AMA Guides. Dr. Hall however, testified that the conditions he rated Claimant for (neuritis and tendonitis) are individually ratable under the AMA Guides. (Ex. J, pp. 8 - 9).

G. If the DIME physician offers ambiguous or conflicting opinions concerning MMI *or* impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North & Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005), aff'd, *Stephens v. Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006) (not selected for publication). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's finding of MMI and permanent impairment consists not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); see also, *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002)(noting that DIME physician retracted original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported).

H. *DIME provisions do not apply to the rating of scheduled injuries.* See *Egan v. Industrial Claim Appeals Office,* 971 P.2d 664 (Colo. App.1998) Hence, where the impairment rating attributable to a scheduled injury is in dispute, the Claimant is not required to obtain a DIME to challenge an admission but may set the matter for a hearing at which the extent of permanent impairment may be litigated. *McCormick v. Exempla Healthcare* W. C. No. 4-594-683 (January 27, 2006). In this matter, Claimant's injuries (bilateral carpal tunnel syndrome) are solely on the schedule. Claimant has not shown, by a preponderance of the evidence, *and as a threshold matter*, that his injuries affect the whole person. As such, Dr. Hall's PPD opinion is merely advisory.

Has Claimant proven Causation (and thus an extremity rating), by a Preponderance of the Evidence?

I. Although the opinions of a DIME physician often carry presumptive weight, no presumptive weight is afforded a DIME physician opining about scheduled injuries. Section 8-42-107(8), C.R.S. 2014, requires a party challenging a DIME for non-scheduled injuries to overcome the DIME opinion by clear and convincing evidence. The statute does not attach a commensurate burden of proof for scheduled injuries, which are set out in section 8-42-107(2). See *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000) (recognizing that the requirement to

overcome a DIME opinion by clear and convincing evidence applies “only to non-scheduled impairments”); see also *Egan v. Indus. Claim Appeals Office*, 971 P.2d 664, 665-66 (Colo. App. 1998).

J. Dr. Hall’s PPD opinions do not follow the mandate that cumulative trauma staging is only used to rate permanent impairment of specific disorders when no other rating is available in the AMA Guides.

K. Thus, Dr. Hall’s opinions on PPD are not afforded the enhanced burden of proof to overcome. “Although the Medical Treatment Guidelines are not part of the AMA Guides, they may be relevant to the impairment rating under consideration by the ALJ. A physician's application of those Guidelines when assessing an impairment rating, goes to the weight the ALJ gives to an impairment rating. *Ortiz v. Service Experts, Inc*., W.C. No. 4-657-974 (January 22, 2009) (ALJ credited impairment rating of physician applying impairment rating tips).

L. As noted, Dr. Hall did not have complete information when he conducted the DIME. For reasons entirely unclear, Dr. Hall did not have the Dr. Lakin's notes for almost one year leading up to the DIME, the last being March 10, 2016. Up through that date, Dr. Lakin still thought it was cumulative trauma. Much changed, and significantly, after 3/10/16; most notably the likely diagnosis of rheumatoid arthritis by Dr. Goldstein. Dr. Lakin referenced this in his closing notes when he placed Claimant at MMI, and closed as non-occupational. Dr. Hall did not view these critical records, which existed at the time of his DIME. Moreover, the records make clear that Claimant was informed of this unfortunate news by Drs. Goldstein and Brunworth, with recommendations for treatment options. Instead, Dr. Hall was left the impression by Claimant that while he had seen these physicians, he was not told of this diagnosis by them. Dr. Hall made clear in his report he had not seen any blood work. The blood work existed, along with other critical documents. While Dr. Hall's DIME report was effectively supplemented by his testimony (having viewed the critical documents only earlier on the date of the hearing), the enhanced burden of proof in overcoming his conclusions is no longer applicable.

M. While Claimant presents as sincere in describing his medical history and the symptoms he has experienced (with the conspicuous exception of telling Dr. Hall at the DIME that 'the rheumatologist [Dr. Goldstein] does not feel he has arthritis'), Claimant is not a medical professional. Further, the medical reports-including Dr. Hall's- are replete with references to Claimant's ongoing fragile emotional state. Thus, the ALJ finds that Claimant's self reported medical history is of limited utility in determining causation.

N. The objective data, while not complete, supports a diagnosis of some form of inflammatory arthritis. Claimant's rheumatoid factor went from 'negative' in 03/2016 to '10' in 06/2016. HLK-B27 was positive in 03/2016. His MRI was also 'concerning' for inflammatory arthritis. That data, along with his history, led Dr. Goldstein to conclude that Claimant suffers from "Probable inflammatory arthritis". This was seconded by Dr. Brunworth a few days later, after which Claimant was encouraged to seek treatment for

this unfortunate condition. As of yet, the record is silent if he has been successful in doing so.

O. This new data also led Dr. Lakin to change his initial conclusion from work-related to non-occupational, and discharge Claimant from his care.

P. Several additional points beyond the objective data are addressed by Dr. Sollender, leading him to a similar conclusion. The Job Demands Analysis led him to conclude that Claimant's duties at Trane included no primary risk factors, and no secondary risk factors beyond the force required to perform his job duties for 4 hours out of 11 to 13 hours per day. Despite Claimant being placed on light work duty post-surgery, his overall hand condition worsened. This, despite the apparent success of the surgery, and sufficient passage of time to allow healing. Dr. Sollender also noted on May 5, 2016 that Claimant's physical exam lacked any objective evidence of carpal tunnel syndrome on the left side, and 'barely' any on the right side. Claimant's complaints are also now diffuse in nature, as also noted by Dr. Hall.

Q. In summary, Claimant has not shown, by a preponderance of the evidence, that the symptoms he is now experiencing arose out of his employment with Trane. Rather, the ALJ finds that, more likely than not, Claimant suffers from some form of inflammatory arthritis which has led to his unfortunate constellation of symptoms.

R. Since causation has not been shown, there is no further need to address an extremity impairment rating.

ORDER

It is therefore ordered that:

1. Claimant request for a Permanent Partial Disability rating is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 18, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether Claimant proved by a preponderance of the evidence that his left hip condition is related to his April 23, 2014 work-related injury.

- Was the relatedness issue ripe for determination?

PROCEDURAL POSTURE

Respondents filed an Application for Hearing ("AFH") on or about August 2, 2016. The issues on which an adjudication was requested included medical benefits (reasonably necessary) and relatedness of medical care.

At the outset of the hearing, Claimant objected to the medical benefits issue, asserting that no issue was ripe for determination. In particular, Claimant was not seeking to have the proposed left hip surgery, a fact that was communicated to Respondent on the eve of hearing.

Respondent, by and through its attorney of record, averred it had a right to seek a determination of whether Claimant's left hip condition was related to the admitted industrial injury. Respondent confirmed it was not seeking to withdraw the previously filed General Admission of Liability ("GAL"). As noted *infra*, the ALJ determined the issue of relatedness was ripe for determination.

FINDINGS OF FACT

1. Claimant is employed as a supervisor for Employer. In that capacity, he supervised individuals completing various tasks at the wastewater treatment plant. He also performed some of these tasks.

2. Claimant had a history of chronic low back pain, which was documented in the record. Claimant treated with Byron Jones, M.D. for low back pain. [1] Claimant also underwent an MRI of the lumbar spine on November 10, 2011. The films were read by Steven Brown, M.D. Dr. Brown's impression was very small central and left paracentral HNP at L5-S1, which caused mild mass effect on the ventral thecal sac and perhaps on the descending segment of the left S1 nerve root. The L5-S1 disc showed continued degenerative desiccation. Dr. Brown also noted a minimal concentric annular bulge at L4-L5 without lateralized protrusion. The other lumbar discs appeared normal.

[1] Dr. Jones' records were not admitted at hearing. The October 24, 2016 report of Gary Zuehlsdorff, D.O. was admitted into evidence as Exhibit Q. Dr. Zuehlsdorff noted Claimant longstanding low back pain and received injections, physical therapy ("PT"), as well as dry needling treatments. He also took medications and had a pain contract. There was no reference to treatment of the left hip.

3. Records from Exempla Spine Physical Therapy from January 8 through February 26, 2014 were admitted at hearing. The notes from January 28, 2014 referred to bilateral hip pain and Claimant received PT that day. The February 4, 2014 PT note documented that the Claimant's left hip was higher than the right. On February 11, 2014, Claimant responded well to stretching, which helped relieve right hip pain. The February 27, 2014 note referenced decreased hip extension on the right side, which was treated. On March 3, 2014, Claimant reported he was significantly better. The ALJ noted there was no evidence in the record which showed Claimant received treatment for either hip for an extended period of time before the April 22, 2014 injury.

4. No evidence was admitted at hearing which documented any treatment by Claimant for his right or left hip before 2014.

5. On April 22, 2014, Claimant suffered an admitted industrial injury while riding an ATV at work. Claimant testified he was going down to a concrete ramp when a goose flew directly at him. He swerved to the right and the ATV flipped, which caused him to be thrown inside the roll cage. Claimant testified he was moved around within the interior and had to crawl out of the ATV.

6. Claimant testified he felt pain on the right side, as well as his neck, shoulder, upper back and right knee. He also felt right hip pain immediately after the accident.

7. An Employee's Written Notice of Injury to Employer was completed by Claimant on April 23, 2014. Claimant stated the accident occurred when he swerved to avoid an oncoming goose and tipped the ATV onto its right side. Claimant identified soreness in the right shoulder and upper back, as well as a bruised right hip in response to the question about his injuries.

8. On April 23, 2014, Stan Thurber [safety specialist] completed an Employer's First Report of Injury on behalf of Employer. Claimant was noted to be driving an all-terrain vehicle on the property as part of his routine work as a supervisor. Claimant's right shoulder, hip and upper back were listed as the parts of body affected by the accident.

9. That same day, Claimant was evaluated by Monica Fanning, FNP OccMed Colorado, the ATP for Employer. He was complaining of pain in the upper back, left and right shoulder, soreness in the neck and a bruise on the right hip. On examination, tenderness was found across the iliac crest region, although the ilia were fairly symmetrical. Lying straight leg raise test was negative, however, Patrick’s sign was mildly positive to the right. A contusion at the trochanter insertion site was observed. Range of motion ("ROM") was painful, but no popping, clicking or crepitus was noted. The ALJ noted these were objective signs of injury to Claimant’s right hip.

10. NP Fanning's assessment was: motor vehicle accident; thoracic strain and contusion; lumbar spine; left shoulder strain; right shoulder contusion and abrasion;

and blunt head trauma. NP Fanning wrote a prescription for Ibuprofen and Norco, as well as recommending the application of ice to all affected areas. The report was countersigned by Dr. Zuelhlsdorff.

11. Claimant received conservative treatment of the left shoulder, including an injection. Because his symptoms persisted, he underwent surgery, which was performed by James Johnson, M.D. on July 3, 2014. Dr. Johnson's post-operative diagnoses included: subacromial decompression; lateral clavicular resection; positive Bankart repair; extensive bursectomy and debridement of labrum.

12. Dr. Zuelhlsdorff continued his treatment of Claimant, both before and after the shoulder surgery. Medical records from Dr. Zuelhlsdorff were admitted at hearing. These records documented Claimant's progress after the surgery. Complaints referable to the right hip were noted on September 5, 2014, October 3, 2014, and November 4, 2014.[2] Claimant's pain diagrams also documented these symptoms. In the December 8, 2014 note, Claimant reported massage therapy helped the symptoms in his hip and low back.[3] On January 9, 2015, improvement in the right hip was noted after an injection. Claimant did not report symptoms or receive treatment for his left hip during this period of time. The ALJ concluded Claimant had persistent right hip symptoms following the April 22, 2014 injury.

13. Dr. Zuelhlsdorff noted Claimant fell at work on January 23, 2015, which aggravated his left shoulder and right hip, but not dramatically. Clamant continued treatment for the right hip. On February 20, 2015, PT was started for the right hip. On March 11 and 30, 2015, pain was noted in Claimant's right hip around the trochanter insertion site. On April 13, 2015, Dr. Zuelhlsdorff injected Claimant's right hip.

14. On May 22, 2015, Dr. Zuelhlsdorff reevaluated Claimant. At that time, he reported improvement in the left shoulder, but stated the right shoulder was worse. Claimant was scheduled to see Brian White, M.D. on May 27 for his hip, noting the pain had been more on the lateral side and a little more on the left side trochanteric area. On examination, pain was noted in the right shoulder. Dr. Zuelhlsdorff's assessment related to the right hip included the conclusion that the secondary fall on January 23, 2015 led to a slight exacerbation of right and left shoulders and the right hip, which were minimal given the history and examination.

15. On May 27, 2015, Dr. White conducted an initial evaluation of Claimant. The report was prepared by Shawn Karns, MPA, PA-C, who noted Claimant has had pain over the lateral aspect of the right hip since landing on his right side and right hip on April 22, 2014. He had a contusion injury. Claimant underwent a cortisone injection, which gave him 70% relief. Claimant also noted that the left hip had become more painful over the last three months similar to how the right hip had been in the past. He had since developed groin pain. Claimant's chronic low back pain was noted as mild

[2] Exhibit C, pp. 20, 23, 26.

[3] Exhibit C, pp. 29.

and he was able to distinguish this from hip issues. On examination, Claimant's gait was non-antalgic. He had a negative Trendelenburg sign and gait, with excellent lumbar ROM. X-rays showed underlying reactive CAM morphology over bilateral femoral neck, consistent with some underlying femoroacetabular impingement with alpha angles greater than 60°, Tonnis grade of zero bilaterally. Claimant had a small calcification lateral to the acetabulum on the left side, which Dr. White thought could indicate a chronic labral injury. The MRI showed a degenerative labral tear on the right side, as well as some mild trochanteric bursitis.

16. PA-C Karns' assessment was: Claimant was a 48-year-old male with findings consistent with underlying femoroacetabular impingement, degenerative labral tear on the right side; concern for impingement, labral tear on the left as well as bilateral trochanteric bursitis. Dr. White issued an addendum and opined that the majority of Claimant's pain was coming from the joint. He thought it started as a significant contusion injury to the lateral aspect of the hip, but with the impaction injury, Claimant probably injured the joint. He recommended a diagnostic injection to confirm the pain generator. If confirmed, his recommendation was consideration of hip arthroplasty addressing primarily the joint with a femoroacetabular osteoplasty and labral repair versus reconstruction. The ALJ inferred Dr. White was of the opinion Claimant required surgery on the right hip as a result of the April 22, 2014 workplace injury.

17. On August 31, 2015, Claimant underwent right hip surgery, performed by Dr. White. In a note to Dr. Zuelhlsdorff dated September 1, 2015, Dr. White stated he performed a hip arthroplasty, along with a bursectomy and windowing of the iliotibial (IT) band. Dr. White found an extensively torn acetabular labrum and underlying impingement on both sides of the joint. Dr. White noted Claimant had some complaints of pain on the left side, which were primarily of lateral pain. He recommended a steroid injection in the left trochanteric region.

18. On October 26, 2015, Dr. Zuelhlsdorff issued a report entitled Chart Review Report of Causality for Left Hip. Dr. Zuelhlsdorff noted he reviewed the whole chart and was sending the note at the request of Dr. White. Dr. Zuelhlsdorff recounted the treatment history after the April 22, 2014 injured in which Claimant had left shoulder surgery and received treatment for continuing low back and right hip pain. On May 22, 2015, Dr. Zuelhlsdorff noted left hip pain for the first time in the record. The pain was in the left trochanteric area. Dr. Zuelhlsdorff also noted Dr. White documented Claimant complained of progressively worse left hip pain over the last three months in his May 27, 2015 note.

19. Dr. Zuelhlsdorff opined Claimant's left hip condition was work-related. Even though roughly 13 months elapsed from the injury to the time the left hip was first mentioned, Claimant had a very significant mechanism of injury in his rollover accident. Dr. Zuelhlsdorff stated that more likely than not this was a work-compensable claim for the left hip, as Claimant probably injured it during roll-over, which took a while to

manifest, given the flow of the case, the multiple other diagnoses, with the resulting worsening of the left hip over time.[4] The ALJ found this opinion to be persuasive.

20. On November 18, 2015, Claimant underwent a left hip MR arthrogram and diagnostic injection, which were administered by Jeffrey Weingardt, MD. Dr. Weingardt's impression was: subtle tears involving the superior and anterior left acetabular labrum; dysplastic change noted at the anterolateral left femoral head neck junction with minimal underlying bone marrow edema; probable femoral acetabular impingement involving right hip joint; moderate spondylosis at L5-S1; patchy edema noted within the right femoral head extending into the neck of uncertain etiology; small volume right hip joint effusion.[5]

21. A note dated November 19, 2015 prepared by PA-C Karns was admitted into evidence. It referenced a telephone conference with Claimant after Dr. White reviewed the results of the left hip MRI. The films showed that the joint spaces were well-preserved, but Claimant had a labral tear. Claimant underwent a diagnostic injection and his pain was taken away for a short time. PA-C Karns noted Claimant would be a candidate for hip arthroscopy surgery.

22. Claimant for returned to Dr. White on December 8, 2015, which was roughly 3 months post right hip arthroscopy. Dr. White noted the ROM of the right hip was nice and smooth throughout, without any pinching or significant discomfort. Left hip ROM was good overall, but Claimant got significant discomfort with the anterior impingement maneuver. The single leg bridge on the right side demonstrated weakness compared to the contralateral side, which was to be expected at this point. Dr. White's assessment was that Claimant's right hip was doing well post-operatively. He diagnosed continued left hip pain consistent with a femoroacetabular impingement and labral tear. Dr. White noted Claimant was a candidate for left hip arthroscopy surgery, as well as with potential for labral reconstruction on that side.

23. On December 31, 2015, an Amended GAL was filed on behalf of Respondent, admitting for wage and medical benefits.

24. Claimant returned to Dr. White on March 9, 2016. This was approximately six months post the right hip arthroscopy (with labral reconstruction and greater trochanteric bursectomy). Claimant's left side was characterized as getting progressively worse, despite PT. Claimant had no pain on the right side, including the trochanteric region. On the left side, pain was noted with the anterior impingement maneuver. He had no real trochanteric symptoms. Dr. White reviewed x-rays, which showed very similar CAM morphology of the proximal femur on the left side, with a pre-operative alpha angle exceeding 60°. A review of the MRI confirmed a labral tear, very similar labral size, which was very small as seen on the other side. Dr. White's assessment included confirmation that Claimant had done well with the right hip

[4] Exhibit H, p. 63.

[5] The reference to the right hip appears to be a typographic or transcription error,

arthroscopy. He also diagnosed left-sided impingement, with labral tear, but no bursal symptoms. Dr. White opined it was reasonable to move forward with the left hip arthroscopy, femoroacetabular osteoplasty, with labral reconstruction. The ALJ noted Dr. White was of the opinion that Claimant's left hip condition was getting worse at this point in time.

25. On June 23, 2016, Claimant underwent an independent medical examination requested by Respondent, which was performed by Allison Fall, M.D. At the time of the evaluation, Claimant advised Dr. Fall he had complained of left hip pain prior to the surgery on the right hip. He said when he began putting most of the weight on his left side, it became very painful. Claimant indicated he had chronic low back pain, which increased significantly after the hip surgery. On examination, Claimant had unrestricted ROM of both shoulders, with no signs of impingement or instability. Claimant reported pain along the medial scapular border of the right periscapular area. Claimant's right hip revealed well-healed surgical portals. No tenderness was noted over the sacroiliac joint. Examination of Claimant's left hip revealed some mild pain with and range flexion and rotation. No clicking or crepitus was noted.

26. Dr. Fall's assessment was: (a) S/P right hip arthroscopy on 8/31/15, with femoral osteoplasty, acetabular rim trimming, greater trochanteric bursectomy, and windowing of the IT band-at MMI following aggravation of underlying condition from work-related ATV accident; (b) S/P left shoulder arthroscopic subacromial decompression, distal clavicle resection, and Bankart lesion repair-at MMI following aggravation of underlying condition from work-related ATV accident; (c) same underlying condition on the left hip of femoroacetabular impingement; (d) chronic low back pain on opioid medication with noncompliance on prior UDTs; psychological issues likely affecting presentation and perceived disability.

27. Dr. Fall had no further treatment recommendations. She concluded Claimant's symptom presentation for his hip was related to his underlying somatic symptom disorder and acetabular configuration rather than injuries from the ATV accident. Dr. Fall noted there were no initial complaints regarding the left hip. Dr. Fall characterized her findings with regard to the left hip on examination as minimal and opined these should be treated outside the workers' compensation system.

28. Claimant returned to Dr. Zuelhlsdorff on July 15, 2016 for an evaluation of bilateral shoulders, bilateral hips and upper back. His right hip was 90% better; his left hip was no better, but not overtly worsening. Claimant's history of low back pain and treatment with Dr. Jones was also referenced. Claimant was not taking any medications issued by Dr. Zuelhlsdorff and had discontinued PT. Claimant was working at modified duty. Dr. Zuelhlsdorff scheduled a follow-up appointment in one month.

29. Dr. Zuelhlsdorff evaluated Claimant on October 24, 2016 and noted the focus of the evaluation was on Claimant's hips (as was the July 15, 2016 evaluation). Claimant's left hip was no better and he remained on modified duty. On examination, the appearance of the left hip was normal, including the anterior hip joint and proximal quadriceps. Palpation was normal and full range of motion was noted, with pain on

abduction. Flexion strength was 4/5 and 5/5 on the right side without pain. Dr. Zuelhlsdorff's diagnoses were: MVA; injury of right shoulder, sequela; injury right hip, sequela; injury of left shoulder; injury of left hip, subsequent encounter; surgery follow-up. Claimant's work restrictions were continued.

30. Claimant testified he had not been in any accidents since April 2014, nor had he injured his left hip in any other event.

31. Dr. Zuelhlsdorff testified as an expert at hearing. He is a specialist in Occupational Medicine and is board-certified in Internal Medicine. He is Level II accredited pursuant to the WCRP. Dr. Zuelhlsdorff noted Claimant sustained multiple injuries as a result of the April 22, 2014 accident. He has seen Claimant on average once per month since the time of the accident.

32. Dr. Zuelhlsdorff testified he believed the condition of Claimant's left hip was related to the subject accident. Dr. Zuelhlsdorff confirmed Claimant had complaints of pain in the right hip one day after the accident and there was bruising noted on examination. The symptoms in the left hip did not show up immediately. Given the complexity of injury in the multitude of problems Claimant had, Dr. Zuelhlsdorff did not think it was unusual that he did not report hip pain right away. He said particularly with hips, it can take some time for the symptoms to manifest. The key factor in his opinion was the mechanism of injury. Dr. Zuelhlsdorff noted this was a rollover accident in which Claimant was not restrained, which applied significant forces to the right hip. There would have also been forces applied to the left hip. Dr. Zuelhlsdorff based this conclusion was based upon the principles of physics and noted force vectors would have operated on both sides of Claimant’s body. Dr. Zuelhlsdorff opined these forces were the causes of the pathology in both of Claimant's hips.

33. Dr. Zuelhlsdorff testified symptoms in the left hip manifested subjectively in approximately May 2015. Dr. Zuelhlsdorff also noted that Claimant may not have experienced symptoms immediately, as he was relatively immobile after the accident and not putting a great deal of weight on the hips.

34. Dr. Zuelhlsdorff noted Claimant could have a degenerative condition in the labrum, including a tear, which was not symptomatic until the accident. This was the basis for his conclusion that his condition was more likely than not the result of the injury. The ALJ found Dr. Zuelhlsdorff's testimony persuasive.

35. Dr. Zuelhlsdorff testified Claimant had received PT, home exercises medications and an injection as treatment for the left hip. Surgery on the left hip was an option. Dr. Zuelhlsdorff testified he was aware Claimant had decided, at least at this time, not to proceed with surgery of the left hip. At this time, he recommended home exercises and medications. Dr. Zuelhlsdorff testified Claimant may require surgery for the left hip in the future and opined it was part of the work injury.

36. Dr. Fall testified as an expert in Physical Medicine and Rehabilitation. Dr. Fall has an undergraduate degree in biomedical engineering and testified as an expert

in this field, as well. She is Level II accredited pursuant to the WCRP. She testified consistently with the opinions expressed in her report, although did not focus on Claimant's somatic condition.

37. Dr. Fall testified there was no work-related injury to the left hip. She did not believe the subsequent treatment for the right hip aggravated the left hip. She based her opinion on Claimant's prior medical history, as well the accident itself. Dr. Fall believed Claimant's treatment for the low back prior to the injury had relevance. She testified Claimant's prior low back condition, which was chronic, included hip symptoms and that was significant. She noted the SI joints and hamstrings were structures involved in the low back treatment. The ALJ found Dr. Fall did not identify any treatment of either hip before 2014. Dr. Fall also testified Claimant did not provide a full history to his treating physicians.

38. Dr. Fall testified that there was no temporal relationship between Claimant's reported symptoms in the left hip and the accident. She disagreed with Dr. Zuelhlsdorff on this point. She disagreed that there would have been force vectors operating on Claimant's left hip, although Dr. Fall conceded on cross-examination that a twisting type injury could cause symptoms in the hip. Dr. Fall opined Claimant's soft tissues would have absorbed some the forces operating on his body. Dr. Fall postulated Claimant would have had symptoms right away, had there been an injury to the left hip. She testified the tearing of tissues would cause symptoms. She noted the MRI findings were similar on the left side, as the right. Dr. Fall cited Dr. White, who noted Claimant had a particular angulation of the hip (60°), which pre-disposed him to impingement. Dr. Fall also noted the radiologist described the labral tear as degenerative. Dr. Fall concluded Claimant's hip condition was degenerative, as opposed to an acute injury. She noted some patients with this condition manifested symptoms in their twenties.

39. Dr. Fall testified Claimant injured his right hip in the subject accident, but not his left. Dr. Fall stated that while it was possible, it was not medically probable that Claimant injured his left hip in the accident. The ALJ found Dr. Fall did not provide an explanation as to why Claimant's left hip symptoms manifested after the rollover accident and not before. Dr. Fall did not believe that the surgery on the right hip caused Claimant's left hip to become symptomatic. She cited the medical literature for the proposition that overuse would not have caused the left hip to become symptomatic, but there was no specific article cited and nothing specifically the Workers' Compensation Medical Treatment Guidelines. On cross-examination, Dr. Fall was also asked if Claimant was more active after the right hip surgery, which was documented in the medical records. Dr. Fall did not believe this would be a cause of left hip symptoms.

40. Claimant met his burden of proof and the evidence established the symptoms in his left hip were related to the industrial injury. The ALJ relied upon Claimant's treating physicians, Dr. White and Dr. Zuehllsdorff, who were in the best position to determine whether Claimant's left hip condition was related to the workplace injury.

41. Claimant was not requesting surgery on his left hip as of the date of the hearing.

42. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Ripeness

In *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3 d 1178, 1180 (Colo. App. 2006), the Colorado Court of Appeals considered when an issue was ripe. In that case, Claimant suffered a work place injury and was placed at MMI by his ATP. After a DOWC Independent Medical Examination confirmed MMI, Employer filed a Final Admission of Liability ("FAL"), accepting the date of MMI and admitting for PPD benefits. Claimant filed a timely objection to the FAL and Application for Hearing, but did not endorse the issue of permanent total disability benefits. Claimant subsequently filed two Applications for Hearing, which listed the PTD benefits issue. Respondents asserted the issue of PTD benefits was not ripe because it had not been endorsed on the original AFH.

The Court of Appeals held PTD was ripe for determination at the time the FAL was filed and Respondent admitted for PPD benefits. Writing for the Court, Justice Rovira stated: "Generally, ripeness tests whether an issue is real, immediate, and fit for

adjudication. [citing *Bd. of Dirs. V. Nat'l. Union Fire Ins. Co.* 105 P. 3d 653 (Colo. 2005)]. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur". 143 P.3d at 1180.

The ALJ determined that the issue of whether Claimant's left hip condition was related to the industrial injury was ripe for determination. This issue was ripe at the time Respondent filed its AFH, as the question of surgery for the left hip was controverted. Although Claimant subsequently decided not to have the surgical procedure, the issue of relatedness remained ripe for determination. Under the test articulated by the Court in *Olivas-Soto v. Industrial Claim Appeals Office*, this issue remained controverted and was ready for resolution by the ALJ.

Relatedness of Left Hip

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. ICAO*, 107 P.3d 999, 1001 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury, the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Industrial Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ALJ determined the instant case fit within this factual scenario.

In the case at bench there was no dispute Claimant suffered a compensable injury on April 22, 2014. Respondents provided medical benefits to cure and relieve the effects of the injury, including treatment of the right hip. The ALJ found Claimant's right hip had a contusion immediately following the accident. (Finding of Fact 9). Claimant had persistent right hip symptoms following the April 22, 2014. (Findings of Fact 12-14). Claimant's treating physicians initially provided conservative treatment for the right hip, then surgery was performed. In this regard, Claimant's right hip had underlying conditions which became symptomatic after the workplace injury. *Id.* These included femoroacetabular impingement, labral tear(s), as well as bilateral trochanteric bursitis. (Finding of Fact 16). Claimant's ATPs (Dr. Zuelhlsdorff and Dr. White) concluded Claimant's right hip condition was related to the workplace injury. These physicians concluded Claimant's roll-over accident aggravated these underlying conditions and the ALJ was persuaded by their opinions. (Findings of Fact 16 and 19).

The ALJ also determined Claimant proved that he developed symptoms in his left hip as a result of the industrial injury, albeit not initially. Claimant's left hip had some of the same underlying conditions as the right hip. The medical evidence supported the conclusion the left hip conditions was related to the industrial injury. The ALJ first relied upon Dr. Zuelhlsdorff's analysis on causation when determining the left hip condition was related. (Findings of Fact 18-19). Dr. Zuelhlsdorff's testimony that the forces present in this type of accident could cause an injury to both hips were credible, as was his explanation that an underlying degenerative condition could become symptomatic

after this accidents. (Finding of Fact 32). The inference drawn from Dr. White's evaluations of Claimant were also persuasive to the ALJ. (Finding of Fact 16).

Second, there was evidence in the record that Claimant's left hip condition was aggravated by Claimant's use following the surgery on the right hip. (Finding of Fact 19). Dr. Zuelhlsdorff also noted this in his causation analysis.[6] Claimant's testimony also supported this conclusion. That aggravation of the underlying condition of the left hip resulted from treatment for the industrial injury and led the ALJ to conclude it was related to the industrial injury. (Finding of Fact 40).

Third and finally, there was no evidence in the records that Claimant had a hip diagnosis and treatment plan (including surgery) before the subject accident. He received some very limited physical therapy in 2014. This was related to treatment of low back symptoms. The PT records referred primarily to Claimant's right hip for a period of slightly more than one month. (Finding of Fact 3). However, at the conclusion of these records, Claimant reported a resolution of his symptoms. Most important for the ALJ, there was no medical opinion which tied this treatment to the underlying condition of either hip. No evidence was in the record that showed Claimant received any treatment before 2014. (Finding of Fact 4).

In coming to this conclusion, the ALJ considered Dr. Fall's testimony and Respondent's argument that the delay in reporting symptoms was significant and should lead to the conclusion that this was a degenerative as opposed to an acute condition. The ALJ concluded this was a significant issue and Dr. Fall's testimony raised questions about the etiology of Claimant's left hip symptoms. Dr. Fall raised valid questions concerning the delay in left hip symptoms. However, Dr. Fall did not provide an explanation why it was only after the workplace injury that Claimant's left hip was symptomatic to the degree it required treatment and ultimately surgery was recommended. As noted, *supra*, Claimant's treating physicians provided the rationale that was persuasive to the ALJ. In this respect, Dr. Fall's testimony was less persuasive than Dr. Zuelhlsdorff. On balance, the ALJ found this was a significant accident, which injured multiple parts of Claimant's body. There were significant forces at work on Claimant's body, which injured the left hip. The ALJ determined the workplace accident caused the underlying condition in Claimant's left hip to become symptomatic and require treatment

The ALJ makes no findings as to whether the proposed surgery is reasonable and necessary at this juncture. Those issues were not before the Court, as Claimant has not requested that Respondent provide that medical benefit.

ORDER

IT IS HEREBY ORDERED:

[6] Exhibit H, p. 63.

1. Respondents shall provide medical benefits to Claimant for the injury to his left hip.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 15, 2017

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

STIPULATION

1. Both parties stipulated that the issue of Average Weekly Wage would be held in abeyance, pending a resolution of the contested issues heard at hearing.

ISSUES

I. Whether the Claimant has proven, by a preponderance of the evidence, that she suffered a compensable injury as a result of her fall in the employer-supplied parking lot which occurred on or about February 3, 2016.

II. If the claim is compensable, what medical benefits are reasonable, necessary, and related to this claim.

III. If the claim is compensable, has Claimant suffered from one or more intervening causes, either of which is sufficient to sever the causal relationship between the compensable injury and subsequent symptoms Claimant may have experienced.

IV. Whether Claimant has shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability benefits as a result of a compensable injury.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 21-year-old package handler for the Employer who slipped and fell on ice in the employee parking lot as she left work on February 3, 2016. Claimant began working for the Employer on December 12, 2015. Claimant worked the early morning shift from 3:00 a.m. to 9:00 a.m. and worked from 20 to 25 hours per week, at $11.00 per hour.

2. Claimant alleges that, at approximately 8:46 a.m. on February 3, 2016, she was walking through the parking lot after her shift ended and fell onto her rear, tailbone, and low back. Claimant did not hit her head, her neck, her upper back, her hands, her elbows, or any other body part beyond the low back area. Claimant testified that, after she fell, she laid on the ground "for a minute or so," until an unidentified UPS co-worker came over and assisted her in getting up. Claimant testified that this person witnessed the fall.

3. Claimant testified that she did not remember whether she felt immediate pain after the fall as she was in shock. However, Claimant later told Respondents' expert, Dr. Kathleen D'Angelo, that she felt instant pain in her tailbone pursuant to the fall during her IME examination. Respondents' Hearing Exhibits ("RHE") F at 14. After she fell, Claimant left the parking lot and attended her classes at school. Claimant testified that she first began experiencing pain when she left school and returned home. Claimant testified that she first began experiencing pain in her tailbone. Claimant did not report a work injury to UPS on this day and did not seek medical treatment.

4. Claimant reported a work injury to her supervisor at her next shift, on February 4, 2016. Claimant selected SCL Physicians at Wheat Ridge as her provider and saw Andrew Hildner, PA-C, on February 4, 2016, after completing her shift. Claimant presented with complaints of lumbar and sacral pain. RHE G at 49. Claimant denied any "neurological red flag symptoms."

5. Claimant had a normal gait and no bruising or obvious abnormality upon inspection of the lumbar spine. RHE G at 51. Claimant had no sacroiliac joint tenderness. Claimant was tender upon palpation over the inferior sacrum and had bilateral paraspinal tenderness, which had alternating sides in severity throughout the examination.

6. X-ray studies of the pelvis, sacrum, and coccyx showed no evidence of fracture or dislocation and had good anatomical alignment. There was no obvious fracture in the inferior lumbar vertebrae, which also had normal alignment. PA Hildner noted that there were no concerns for a fracture or neurological involvement, and noted that Claimant had good range of motion without complaint, a nonantalgic gait, and was able to sit comfortably during the examination. RHE G at 52. There was no crepitus noted. Claimant was given 20 pound repetitive lifting restrictions for work.

7. Claimant returned to SCL and saw Dr. Ogrodnick on February 8, 2016. RHE G at 53. Claimant reported that she had back and hip pain and had frequent "cracking" in these areas, which felt unnatural to her. Dr. Ogrodnick noted that Claimant had told PA Hildner that she was in shock and couldn't tell what was hurting her. Claimant stated that "she now knows that driving and handwriting causes increased right arm numbness," which she first noticed the evening after her initial visit. Claimant also reported left arm numbness. Claimant testified at hearing that she did not have symptoms in her left arm.

8. Claimant also reported right leg numbness, which she first noticed on February 6, 2016. RHE G at 53. Claimant further complained of urinary incontinence and had called in sick to work. Dr. Ogrodnick noted that Claimant walked with a limp and needed to hold the exam table when walking

on her toes. RHE G at 55. Claimant reported tenderness in her lumbar spine and both sacroiliac joints. Claimant became tearful with passive right hip flexion due to pain in her right buttock. *Id*. Dr. Ogrodnick diagnosed Claimant with a sacral contusion. Dr. Ogrodnick ordered a STAT MRI to eliminate concern for cauda equina syndrome. RHE G at 53.

9. Claimant had two MRI studies of the lumbar spine performed. The record is unclear why the second one occurred. The first study was performed on February 10, 2016. RHE F at 29. The second study was performed on February 11, 2016. Both studies were reviewed and compared by Dr. Michael Preece. The impression of the lumbar spine was normal. RHE H at 80.

10. A follow-up note with Dr. Ogrodnick on February 12, 2016 notes that "plain films" (X-rays) of the pelvis taken that day did not reveal any acute osseous abnormality. RHE G at 56. Dr. Ogrodnick noted that Claimant “chuckled at how she just started crying ‘for no reason’” after the x-ray that day. Claimant told Dr. Ogrodnick that this date was the first time that she experienced pain radiating into her right fifth toe. It was noted in the records that Claimant was working modified duty in a seated capacity. Claimant was positive for memory loss. RHE G at 57. Claimant again presented with a limp. RHE G at 58. Claimant began to cry when lightly palpated in her anterior right iliac crest.

11. Dr. Ogrodnick noted during a February 16, 2016 follow-up visit that Claimant was having a significant emotional response and was at risk for delayed recovery. RHE G at 59. Dr. Ogrodnick noted that Claimant’s Oswetry disability questionnaire score of 56% indicated severe disability. Claimant presented with a limp on this date and reported her leg would become numb if she did not walk in this manner. Claimant reported that she could not stand up straight due to severe pain in her low back. Claimant reported concern about becoming disabled like her parents. Dr. Ogrodnick referred Claimant to a psychologist.

12. Claimant began physical therapy on February 19, 2016. RHE F at 43. The therapist notes indicate that Claimant would benefit from stabilization and strengthening the sacroiliac region.

13. Claimant reported no improvement during a follow-up visit with Dr. Ogrodnick on February 29, 2016. RHE G at 63. Dr. Ogrodnick noted a substantial risk for delayed recovery. Claimant declined psychological treatment, as she felt there was nothing wrong psychologically. Claimant testified that she declined care because she did not believe that Dr. Ogrodnick’s intentions were to help her, because he believed that her physical pain and physical ailments were psychological. Dr. Ogrodnick noted that Claimant smiled frequently throughout the examination and ambulated without a limp. RHE G at 65.

14. Dr. Ogrodnick saw Claimant again on March 15, 2016 and expressed concern about possible somatoform disorder. RHE G at 66. Dr. Ogrodnick noted that Claimant's Oswetry questionnaire results reflected a score near the crippled category, and it was communicated to Claimant that this was highly inconsistent with her normal MRI study. Dr. Ogrodnick noted in the record that he advised Claimant that it was difficult to substantiate ongoing work restrictions due to the lack of objective findings and her inconsistent examinations.

15. Claimant presented to Dr. Tomm Vanderhorst, also at SCLP clinic, on March 16, 2016. RHE G at 69. Claimant was a walk-in evaluation because she had "too much pain with [her] current work." Claimant testified that she saw Dr. Vanderhorst because Dr. Ogrodnick was not available. Dr. Vanderhorst gave Claimant 35 pound lifting restrictions with 30 minutes maximum of standing and walking. RHE G at 70.

16. Claimant returned to see Dr. Ogrodnick on March 21, 2016. RHE G at 72. Dr. Ogrodnick noted that Claimant did not understand the resistance to taking her off work. Claimant reported that she could not even put weight on her right leg. Claimant walked slowly with a short stride and limp. RHE G at 74. Claimant told Dr. Ogrodnick "It's the worst pain I've ever been in in my life". RHE G at 72. Dr. Ogrodnick opined that Claimant's "constellation of symptoms" required a consultation to rule out multiple sclerosis. Claimant last reported to work at the Employer on March 23, 2016. She testified that she was told not to return to work until she had "hundred percent clearance from the doctor."

17. Claimant was then involved in a motor vehicle accident on March 30, 2016. Claimant was taken to St. Anthony Hospital by ambulance. RHE F at 16. Claimant told Dr. D'Angelo during her IME that she felt neck pain immediately. Claimant testified that she had neck and shoulder injuries from the accident, and that she did not have injuries to her lower back, hips, or tailbone as a result of the injury.

18. The emergency room record from St. Anthony's on the date of the accident states that Claimant was rear-ended by another vehicle traveling at low speed. RHE I at 81. It is noted that Claimant was restrained. Claimant claimed that she was thrown forward and "began to feel pain in her neck and back soon thereafter." The nurse's note indicates reports of posterior neck tenderness and low back pain. Claimant denied any extremity numbness or weakness. A CT scan of both the cervical and lumbar spine were obtained. RHE I at 82. There were no acute findings. Both studies were normal and unremarkable. RHE I at 84-85.

19. Dr. Ogrodnick maintained that Claimant's subjective complaints remained inconsistent with her objective findings during Claimant's next visit, on April 4,

2016. RHE G at 75. Claimant did not disclose that she had been involved in a recent motor vehicle accident. Dr. Ogrodnick noted that, despite the examination, Claimant denied any leg pain, numbness, or weakness. Claimant also walked without a limp during this examination. RHE G at 77. Claimant was subsequently discharged from SCL, and Dr. Vanderhorst later indicated that Claimant was discharged, as no further care was authorized. RHE G at 78.

20. As a result of this car accident, Claimant began treatment with Dr. Bethany Wallace at Injury Treatment Centers Lakewood on April 13, 2015. RHE J at 87. Claimant's complaints included the following: cervical strain; neck pain; thoracic sprain and pain; lumbar strain and low back pain; jaw pain; concussion; vertigo; memory loss; insomnia; left elbow pain and contusion; left forearm pain; occipital neuritis; posttraumatic headaches; and cervicogenic headaches. RHE J at 88.

21. Claimant underwent physical therapy treatment with regular follow-up visits with Dr. Wallace. Treatment included therapy for the low back, in addition to the cervical region, and it was noted on at least one occasion that the modalities utilized caused low back pain. RHE J at 100. At cervical MRI performed on April 28, 2017 was returned normal. RHE J at 92-93. Claimant treated with Dr. Wallace through the end of July 2016. RHE J at 108.

22. Claimant saw Dr. Bennett Machanic for an IME commissioned by Claimant on June 13, 2016. Claimant's Hearing Exhibits ("CHE") 8 at 167. Claimant presented with multiple complaints, including: low back pain; numbness over the right leg and right arm; difficulties with memory, focus, and concentration; and significant emotional depression. Dr. Machanic noted that he had been provided "a scanty amount of medical records." Dr. Machanic noted that Claimant had chiropractic care in 2011 and that it was not clear why this was done, but that the treatment nevertheless ended later that year.

23. Claimant told Dr. Machanic that she struck her lower back when she fell on February 3, 2016. CHE 8 at 168. Claimant told Dr. Machanic that she had two MRI studies, one that showed discogenic damage and another that was normal. CHE 8 at 167. Dr. Machanic noted that Claimant had been involved in a motor vehicle accident on March 30, 2016 with an automobile traveling "at a very high rate of speed driven by an intoxicated driver," and that this accident caused increased low back pain and neck pain. Dr. Machanic noted that he did not have medical records beyond March 21, 2016.

24. Upon examination by Dr. Machanic, Claimant complained of non-related neck pain, low back pain affecting the tailbone to the lower right leg, numbness in the right leg, right arm numbness, and weakness in both her leg and arm. CHE 8 at 169. Claimant claimed she dropped objects due to weakness. Claimant further complained of deficits in memory, focus, concentration, and

depression. Dr. Machanic noted that Claimant broke into tears on multiple occasions during his examination. Dr. Machanic measured breakaway weakness in the right leg. Dr. Machanic noted that it was "very clear that [Claimant] can walk without much difficulty on tiptoes, heels, perform tandem and retrogrades."

25. Dr. Machanic opined that Claimant injured her low back pursuant to a slip-and-fall at work. CHE 8 at 170. Dr. Machanic noted progressive symptoms in the right arm and leg and indicated there was right ulnar neuropathy and right meralgia paresthetica. Dr. Machanic opined that there was significant depression and "perhaps some posttraumatic emotional stress." Dr. Machanic stated that the March 30, 2016 motor vehicle accident "apparently caused neck pain" and that it was "not entirely clear" whether this made the work-related injury worse. Notwithstanding, Dr. Machanic stated that "we can separate out issues fairly nicely" based upon the available materials at the time.

26. Dr. Machanic recommended an EMG and nerve conduction studies of the right arm and leg. Dr. Machanic opined that Claimant was not at MMI and did not calculate an impairment rating. Dr. Machanic opined that Claimant had low back pain, right hip pain, and "signs" that right ulnar neuropathy meralgia paresthetica are work-related conditions.

27. In a report dated June 15, 2016, with Ginger K. Spence, LPC, Claimant presented for psychological treatment. RHE K at 109. It was noted that Claimant presented for initial treatment in November 2014 and treated through July 2015. RHE K at 109-110. Claimant denied any legal problems or problems with work or schooling. It is noted that Claimant had significant problems with anxiety and had struggled with anxiety for the majority of her life. Claimant treated for posttraumatic stress disorder and it was noted that this causes clinically significant stress or impairment in social, occupational, and other important areas of functioning.

28. Claimant presented to Dr. D'Angelo for an IME commissioned by Respondents on August 24, 2016. RHE F at 11. Claimant had complaints including: low back pain; buttock pain; right leg pain and numbness; right arm pain and numbness; problems thinking; stress; and bowel inconsistency. RHE F at 12. Claimant reported that she was worse since the injury. Claimant denied having similar or previous problems. RHE F at 13.

29. Dr. D'Angelo recorded Claimant's history of the alleged incident. Claimant stated that she fell and could not remember whether she was helped up by a person who offered assistance. RHE F at 14. Claimant stated that she then went to her car and drove directly to school. Claimant stated that she immediately felt pain in her low back and tailbone, and subsequently favored her right side due to hip pain.

30. Claimant denied having hip pain prior to the incident. Claimant stated that she did not immediately experience hip pain, which developed later. RHE F at 15. Claimant also stated she subsequently noticed symptoms in her right arm and leg. Claimant stated that Dr. Ogrodnick informed her that she had a "perfect" MRI. RHE F at 17. Claimant stated that she was denied further treatment after March of 2016 and that, as a result, "things have gotten worse." RHE F at 17. Claimant stated that she did feel improvement in her hip during physical therapy, but that she didn't feel improvement in the low back because this was not addressed by the therapist. RHE F at 18.

31. Dr. D'Angelo reviewed multiple medical records, including records from Claimant's preexisting medical history. Dr. D'Angelo reviewed records dating back to 2009, some of which reflected a long history of orthopedic issues and complaints. RHE F at 29. Claimant had bilateral foot pain in 2009. Claimant had complaints throughout 2011 of pain in her neck, including headaches, lumbar spine, thoracic spine, and right sacroiliac joint. RHE F at 24-25. These complaints also included pain down the legs. Claimant had complaints of low back pain in 2014 and complaints of bilateral hip pain at this time as well, with no known trauma. RHE F at 27. Claimant also treated for significant anxiety and depression in 2014.

32. Dr. D'Angelo noted that Claimant had numerous delayed onset of symptoms and complaints following her initial medical evaluation at SCL. RHE F at 35. Dr. D'Angelo noted that the location of the symptoms varied and metastasized over time, which was inconsistent with acute trauma and without medical explanation. Dr. D'Angelo opined that these complaints were not substantiated by objective physical or diagnostic findings. Dr. D'Angelo noted that acute traumatic spine injuries are also acutely symptomatic. *Id*. Dr. D'Angelo indicated that, had Claimant developed a lumbar disc herniation or a neurological injury due to the fall, her symptoms would have been evident immediately. Dr. D'Angelo opined that Claimant's somatic symptoms, such as cognitive difficulties, anxiety, and depression, were impossible to explain from the established mechanism injury.

33. Dr. D'Angelo opined that Claimant sustained a contusion of the coccyx with myofascial pain to the lumbar and sacral regions pursuant to the February 3, 2016 fall. RHE F at 36. Dr. D'Angelo opined that Claimant had Somatic Symptom Disorder causing a litany of complaints and that this should be evaluated under private insurance. Dr. D'Angelo opined that Claimant was at MMI with no permanent impairment.

34. Claimant was then involved in a second motor vehicle accident on October 11, 2016. RHE L at 111. This was not disclosed to Respondents through discovery requests. Claimant is represented by an attorney and is pursuing a claim against the allegedly at-fault driver.

35. Medical records from Denver Health on this date note that Claimant was the restrained passenger in a vehicle that was rear-ended at what Emergency Medical Services ("EMS") described as "incredibly low" speeds. RHE L at 111. The record indicates that the impact was so minimal that there was no paint transfer between vehicles. The speed of the impact was characterized as "walking speed." RHE L at 112. Upon EMS arrival, Claimant was found shrieking and sobbing violently, was unwilling to get out of the vehicle, and was not redirectable. EMS treated Claimant with Versed, which Dr. Machanic testified is a tranquilizer/sedative.

36. Claimant was seen in the emergency room approximately 20 minutes after the accident. RHE L at 112. Claimant complained to the emergency room doctor of neck and back pain. Claimant denied a history of anxiety attacks. It was noted that the examination was limited due to Claimant's "hysteria." A physical examination indicated no noted issues with the pelvis, cervical, thoracic, or lumbar spine, no crepitus, deformities, or evidence of trauma. It is noted in the records from that event that "all of the above serious potential etiologies are felt to be highly unlikely based upon the information available and that Claimant's symptoms improved in the emergency room. Claimant was discharged and not given further medications.

37. Claimant testified at hearing that she was still experiencing symptoms. Claimant claimed there was pain radiating from her lumbar spine to her tailbone, with cracking in the low back and hips. Claimant also testified that she still has symptoms of numbness and tingling in her right arm and leg. Claimant also testified that she had issues with frequency and urgency of urination. Claimant related all of these issues to her slip-and-fall.

38. Claimant denied having any injuries to the low back as a result of her motor vehicle accidents. Claimant also denied having received treatment for her low back. Claimant testified that she had not been having any problems with these body parts prior to the slip-and-fall and that the previous chiropractic care that she received was for "maintenance." Claimant testified that she did not have any past pain in her back or in her hip. Claimant testified that Dr. Ogrodnick's medical records from February 18, 2016, where he indicated that he palpated Claimant's iliac crest area, were incorrect and that he did not palpate this area. Claimant testified that there was no point in this claim during which her symptoms improved.

39. Dr. Machanic testified at hearing on behalf of Claimant. Dr. Machanic testified that, at the time of his examination, Claimant had difficulties or "at least complaints" in her back, her right arm and leg, her right elbow, and also with her neck. Dr. Machanic testified that he felt that the neck was not work-related. Dr. Machanic testified that, based upon the records he reviewed, the "most logical answer" to the symptoms pursuant to the fall was a sacroiliac

hip issue. Dr. Machanic also testified that he “suspect[ed] the right elbow was injured at the time of the fall,” as well as the back.

40. Dr. Machanic testified that Claimant had an aggravation of the right femoral cutaneous nerve. Dr. Machanic testified that there was no evidence that the motor vehicle accident affected these symptoms. Dr. Machanic further testified that he could not make a medical distinction between related psychological or emotional issues and those issues which are not related to the claim. Dr. Machanic testified that Claimant’s emotions did compromise interaction during examination but, “for the most part,” he thought that “probably she was a reliable historian.”

41. Dr. Machanic acknowledged that the medical records do not reflect that Claimant fell on either side of her hips, onto her hand, onto her elbows, or onto any other body part other than her low back region. Dr. Machanic acknowledged that Claimant "may or may not" suffer from a somatization disorder. Dr. Machanic had not reviewed the extent of the medical records and was not aware of the second motor vehicle accident at the time of his testimony. Dr. Machanic acknowledged that there were inconsistencies in the medical records concerning Claimant’s reports of her medical history and what the medical history reflects.

42. Dr. D’Angelo testified on behalf of Respondents. Dr. D’Angelo testified that Claimant had a somatoform disorder and a lifelong pattern of presenting frequently to providers with multiple complaints, including bilateral hip, low back, and leg pain, prior to the slip-and-fall. Dr. D’Angelo testified that the only injury Claimant suffered was a contusion to the coccyx and some myofascial irritation. Dr. D’Angelo testified that Claimant had undergone multiple diagnostic tests and that there was no evidence of objective, physiological, structural damage. Dr. D’Angelo testified that the x-ray studies performed showed no objective abnormalities to the coccyx.

43. Dr. D’Angelo testified that Claimant did not have any injury requiring active treatment and that there was “nothing to be done for this,” as there were no positive findings absent subjective complaints of pain. Dr. D’Angelo testified that the femoral cutaneous nerve was purely sensory and could not cause motor weakness, which Claimant had exhibited, and that her presentation and examination findings were inconsistent with an injury to this nerve. Tr. at 117, ll. 6-16.

44. Dr. D’Angelo testified that Claimant’s symptoms would be expected to resolve without treatment. Dr. D’Angelo testified that Claimant should have been at MMI and discharged after the February 21 and 22, 2016 MRI studies showed no evidence of an acute injury. Dr. D’Angelo testified that additional diagnostic testing was not necessary to rule out additional treatment prior to MMI.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Credibility

D. The ALJ finds that Claimant is not reliable as a medical historian, as her account of her prior medical history in testimony and in the medical records is inconsistent with the medical records prior to her February 3, 2016 fall. The Court finds that Claimant is not sufficiently reliable in her account of the symptoms she reportedly experienced from her two motor vehicle accidents. In each instance, Claimant reported some onset or increase in low back pain as identified in the medical records.

E. The ALJ finds Dr. Machanic to be sincere, but insufficiently persuasive. Dr. Machanic's opinion was not based upon the full medical history of the claim and was derived in large part from Claimant herself. Dr. Machanic's testimony regarding clear objective findings and causality was not consistent with his own report, the medical records, the opinion of the treating providers, or his physical examination. Dr. Machanic's opinion regarding causality is not sufficiently persuasive to meet Claimant's burden of proof.

F. Dr. D'Angelo testified persuasively regarding her opinions on causality, impairment, and reasonable, necessary, and related medical treatment.

Compensability

G. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Simply because a claimant experiences symptoms while in the course and scope of their employment does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (April 10, 2008). Claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009).

H. Claimant's did suffer a work-related injury on February 3, 2016 as the result of a slip-and-fall in the icy parking lot after completing her shift. However, her continuing complaints of injury are based purely on subjective complaints without supporting diagnostic evidence. Claimant testified that she did not know whether she had pain after she fell. Claimant's representation to Dr. D'Angelo that she experienced the immediate onset of pain in her back after the fall was inconsistent with her own testimony at hearing, and her representations to PA Hildner upon her initial medical visit. Claimant did not immediately report a work-related injury or treatment and instead drove directly to school, attended her classes for the day, and testified that she did not experience the onset of symptoms until later in the evening.

I. All diagnostic tests performed in the claim were returned negative for any acute injuries or abnormalities. Upon Claimant's initial examination by the treating provider,

there was no evidence of trauma or obvious abnormality of the lumbar spine upon inspection. Claimant denied any neurological symptoms or sacroiliac joint tenderness. X-ray studies of the pelvis, sacrum, and coccyx have consistently been normal. Two MRI studies of the lumbar spine subsequently performed at the request of the treating provider reflected no evidence of any abnormalities or acute findings. A second x-ray of the pelvic region performed on February 12, 2016, at the request of Dr. Ogrodnick, showed no evidence of abnormalities. Additional diagnostics, including a CT scan performed of the lumbar spine after the March 30, 2016 motor vehicle accident, showed no acute findings. There was no evidence of crepitus in the pelvis or lumbar spine. The only initial finding was tenderness reported by Claimant upon palpation over the inferior sacral area. Dr. D'Angelo opined that Claimant simply suffered a contusion with myofascial irritation pursuant to the slip-and-fall that would not require treatment and resolve with the passage of time.

J. Dr. D'Angelo felt that Claimant had a somatoform disorder, pursuant to which Claimant had chronic complaints derived from psychological stressors. Dr. Machanic acknowledged that possibility as well, but stated that that did not mean Claimant did not suffer real injuries. Claimant had a documented preexisting history suggestive of a "lifelong" pattern of multiple complaints involving her lumbar spine, bilateral hips, and lower extremity pain and numbness. Claimant is found not reliable in regard to her account of her medical complaints of pain and dysfunction prior to the incident. Moreover, Claimant's pain behaviors after both of her motor vehicle accidents support the persistence of subjective complaints of pain in multiple body parts, including those allegedly related to her fall, without supporting objective evidence of any acute injury. Conversely, assuming Claimant's reaction to her motor vehicle accidents was genuine, it renders it problematic to apportion her back complaints between her work injury and her traffic accidents-at least one of which is subject to litigation.

K. Claimant's asserted mechanism of injury is not consistent with her complaints. Claimant had an expanding array of complaints that do not correspond to objective evidence in the record. Dr. Ogrodnick noted on multiple occasions that Claimant's subjective complaints did not correlate with objective findings. Claimant fell onto her tailbone/low back/buttocks region. Claimant did not fall onto her side or her hips and did not hit her head, neck, hands, arms, or elbows during the fall. Claimant subsequently developed complaints into her right arm, left arm, right hip, and right leg, without a supporting mechanism for these alleged injuries. Sacroiliac joint pain was not present upon initial examination- which itself occurred a day after the fall- and did not develop until later.

L. Dr. D'Angelo credibly testified that there was no medical explanation for Claimant's symptoms. Dr. D'Angelo's opinion that, if Claimant had an acute injury corresponding with her subjective complaints, her symptoms would have manifested quickly is persuasive. Dr. Machanic's opinion that Claimant suffered right arm ulnar neuropathy is not supported by a causal mechanism anywhere in the medical records or testimony. Likewise, Dr. Machanic's opinion that Claimant had breakaway leg weakness and neurological issues in her right leg as a result of a femoral cutaneous

nerve injury resulting from the fall is not supported by other medical evidence. The ALJ finds Dr. D'Angelo's opinion that an injury to this nerve should not cause breakaway weakness in the leg to be persuasive. The ALJ parenthetically finds that there was no evidence, from Dr. D'Angelo, Dr. Mechanic, or the admitted medical records, to support a psychological or mental injury related to the slip-and-fall.

Medical Benefits

M. Respondents are liable only for those medical benefits which are reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *City of Durango v. Dunagan*, 939 P.2d (Colo. App. 1997). The record must distinctly reflect the medical necessity of any medical treatment needed to cure and relieve an injured employee from the effects of the industrial injury and any ancillary service, care, or treatment as designed to cure and relieve the effects of such industrial injury. *Public Service Co. of Colorado v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 584 (Colo. App. 1999). The question of whether medical treatment is reasonable and necessary is one of fact for determination by an ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims* Office, 989 P.2d 251 (Colo. App. 1999).

N. Treatment for a work injury must not only be reasonable and necessary but must also be causally related to that injury. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Respondents are permitted to challenge causation and relatedness of the need for any treatment, despite having admitted liability for a claim. *Hanna v. Print Expediters, Inc*. 77 P.3d 863 (Colo. App. 2003); *Snyder v. Industrial Claim Appeals Office of the State of Colo*., 942 P.2d 1337 (Colo. App. 1997). In a dispute over medical benefits that arises after filing an admission of liability, Respondents may assert, based upon subsequent medical reports, that workers' compensation claimant did not establish a threshold requirement of direct causal relationship between the on-the-job injury and need for medical treatment. *Snyder v. Industrial Claim Appeals Office of the State of Colo., supra*. Claimant bears the burden to prove a causal connection exists between a particular treatment and the industrial injury. *Id*.; *see also Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). Causation is a question of fact for resolution by the ALJ. *F.R. Orr Construction v. Rint*, 717 P.2d 965 (Colo. App. 1985).

O. While this fall in the parking lot is a compensable claim, Claimant's reasonable, necessary, and related medical treatment was performed in relation to a sacral/coccyx contusion. As noted previously, Dr. D'Angelo credibly testified that this would have resolved independent of active medical care. Dr. D'Angelo credibly testified that Claimant should have been discharged after multiple diagnostic studies reflected no objective diagnostic evidence of an acute injury in February 2016. The ALJ finds Dr. D'Angelo's opinion that no *further* medical care is reasonable, necessary, or related to the claim to be persuasive. The ALJ finds insufficient evidence to support the relatedness of treatment for Claimant's multiple subjective complaints involving her right

upper extremity, her lower right extremity, her hips, her urinary incontinence and urgency, or her emotional distress. There is no *additional* medical treatment that is reasonable, necessary, or related to this compensable injury.

Intervening Cause/Event

P. While this parking lot fall is a compensable injury, there is substantial evidence in the record to support an intervening cause occurred as a result of the March 30, 2016 motor vehicle accident, as well as the October 11, 2016 motor vehicle accident.

Q. In the event of a compensable injury, an intervening cause may sever the causal relationship between an employee's work injury and the resulting disability. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). An intervening incident that breaks causation between the injury and resulting wage loss means that the employee forfeits both temporary and permanent benefits. *Schlage Lock v. Lahr*, 870 P.2d 615 (Colo. App. 1993). Likewise, an independent medical condition is also not compensated as part of the work-related injury. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002).

R. Claimant sustained two motor vehicle accidents subsequent to her fall on February 3, 2016 and during the course of this claim. The nature of both accidents was similar and involved Claimant being rear-ended by another driver while restrained and seated in a vehicle. While both accidents involved another vehicle traveling at a relatively slow rate of speed and were notably minor, Claimant's subjective complaints pursuant to each accident are nevertheless the same or similar to those prior to the first March 30, 2016 motor vehicle accident, with the exception of the neck. Both accidents involved complaints of the low back and subsequent emotional distress. Of note, Dr. D'Angelo credibly testified that symptoms of neuralgia paresthetica in Claimant's lower extremity would be *more likely* caused by a motor vehicle accident than a slip-and-fall onto the buttocks because of the tightening of the seatbelts across the pelvis.

S. Claimant also treated with Dr. Wallace, who saw Claimant after the first accident, with physical therapy for her lumbar condition. The ALJ finds, by a preponderance of the evidence, that it is more likely than not that Claimant's alleged ongoing conditions of lumbar and lower extremity radicular numbness were caused or aggravated by the motor vehicle accidents than a result of the natural progression of a compensable slip-and-fall on February 3, 2016. Likewise, given the extent and nature of the emotional reaction to the October 11, 2016 motor vehicle accident, it is more likely than not that any ongoing emotional distress is related to this subsequently occurring automobile accident.

Temporary Total Disability Benefits

T. To qualify for temporary total disability (TTD) benefits, a workers' compensation claimant must establish three conditions: 1) the work injury caused the

disability; 2) claimant left work as a result of the injury; and 3) temporary disability is total and lasts for more than three working days (emphasis added). *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997).

U. The preponderance of the evidence does not establish an ongoing work-related disability. Nor does the evidence support a finding that Claimant has suffered any work-related work loss.

ORDER

It is therefore ordered that:

1. Claimant's work-related sacral/coccyl contusion has now resolved. There is no ongoing reasonable , necessary, or related medical treatment needed to further treat this injury.

2. Claimant's claim for further treatment for her right arm, leg, hips, or emotional distress is denied and dismissed.

3. Claimant's claim for further medical treatment following her second automobile accident of October 11, 2016 is denied and dismissed.

4. Claimant's claim for temporary disability benefits is denied and dismissed.

5. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 19, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Did Claimant prove entitlement to TTD benefits commencing March 16, 2017?

2. Did Respondents prove a basis to terminate Claimant's TTD benefits on or after March 27, 2017?

STIPULATIONS

Respondents stipulated Claimant is entitled to TTD benefits from March 16, 2017 through March 27, 2017.

FINDINGS OF FACT

1. Claimant worked as a project manager for Employer. His job entailed a combination of sedentary management duties and more physically demanding construction job site inspections. The inspections frequently required walking on uneven surfaces and climbing ladders. Claimant's average weekly wage was $1,722.30.

2. Claimant sustained an admitted injury on January 17, 2017 when he stepped off a curb and twisted his left knee.

3. Employer did not refer Claimant to a physician, so he selected Dr. Ronald Royce, an orthopedic surgeon. Dr. Royce has been Claimant's primary ATP throughout the claim.

4. Claimant underwent arthroscopic surgery on March 9, 2017. The operative report documents synovitis, meniscal damage, and extensive multi-compartmental cartilage loss.

5. Claimant initially planned to continue working despite surgery. He advised Employer "it is my intention not to miss any time for this, we have way too much going on. I may be moving a little slow for a bit but I'll be in the fight."

6. Claimant worked until being terminated on March 15, 2017, and received full wages through that date.

7. Claimant contacted Dr. Royce's office and requested two weeks off from work. Dr. Royce gave him a note dated March 13, 2017 which stated: "please excuse [from work] for: 2 weeks."

8. Respondents stipulated that Claimant is entitled to TTD benefits from March 16, 2017 until March 27, 2017 for the two-week period he was taken "off work" by Dr. Royce.

9. Claimant saw Dr. Royce on March 20, 2017 for his first postoperative appointment. He told Dr. Royce "my knee is in a lot of pain." Physical examination of the knee documented warmth and swelling with painful, restricted range of motion. Claimant ambulated with an antalgic gait. Dr. Royce advised him to "increase activity as pain allows with warnings of risk of reinjury."

10. Claimant returned to Dr. Royce on March 28, 2017. His pain level had improved, although he still demonstrated warmth, swelling, and limited range of motion of the knee. Dr. Royce noted Claimant was "healing slower than expected." He advised Claimant to begin physical therapy, and stated, "**Plan return to work when safe as demonstrated with physical therapy.**" (Emphasis added). Dr. Royce submitted a referral order for 12 visits of physical therapy, which included a note to the therapist: "**Please advise when patient will be safe to work.**" (Emphasis added).

11. Claimant next saw Dr. Royce on April 25, 2017 and reported his left knee was "improving slowly." He rated his knee pain at 5/10. His main complaint on that date was bilateral hip pain due to an unrelated condition. Regarding the left knee, Dr. Royce noted "will follow-up as recommended and as needed" and instructed Claimant to "return if symptoms worsen or fail to improve." No specific follow-up appointment was scheduled.

12. Claimant saw Dr. Royce again on May 17, 2017 and was "still having pain." Dr. Royce noted Claimant was limping and stated, "patient is not doing well." He opined Claimant's pain was likely related to severe arthritis. He stated, "hopefully this can be treated with injection treatment and restriction of painful activity and would not recommend that he do therapy that aggravates [the] knee." Dr. Royce gave Claimant a cortisone injection and recommended he return in a week.

13. Claimant had another MRI on June 6, 2017 which showed a new tear of the medial meniscus, a full thickness radial tear, and a full thickness cartilage defect.

14. Claimant saw Dr. Royce on June 9, 2017 to review the MRI. Ultimately, Dr. Royce recommended another surgery. Respondents denied the surgery based on a Rule 16 review from Dr. Ciccone. Claimant had surgery on June 29, 2017 through his health insurance. Respondents' liability for surgery was not an issue at the August 9, 2017 hearing, and is not addressed by this Order.

15. The parties had a *Samms* conference with Dr. Royce on June 28, 2017. Dr. Royce indicated he had discharged Claimant on April 25, 2017, instructing him to follow-up as needed. Dr. Royce opined that Claimant's work injury aggravated his significant pre-existing arthritis. He opined that the significant findings on the June 6 MRI were new and likely occurred after April 25, 2017. Dr. Royce confirmed there was no note taking Claimant off work other than the one dated March 13, 2017.

16. Claimant has not returned to work since his termination from Employer. He applied for and received unemployment benefits in the amount of $557.

17. Dr. Royce did not release Claimant to return to regular employment.

18. Dr. Royce has not placed Claimant at MMI.

19. Respondents did not prove a basis to terminate TTD benefits on or after March 27, 2017.

CONCLUSIONS OF LAW

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by limitations which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Respondents stipulated that Claimant is entitled to TTD benefits from March 16, 2017 to March 27, 2017, essentially confessing the threshold requirements for TTD eligibility. The dispositive issue is whether Respondents established a legally sufficient basis to terminate Claimant's TTD benefits.

Once commenced, TTD benefits continue until one of the events enumerated in § 8-42-105(3)(a)-(d). Here, Respondents seek to apply § 8-42-105(3)(c), which mandates termination of TTD when "the attending physician gives the employee a written release to return to regular employment." Section 8-42-105(3)(c) is an affirmative defense, so Respondents have the burden to establish the requisite factual predicates. *Witherspoon v. Metropolitan Club of Denver*, W.C. No. 4-509-612 (December 16, 2004); *Schuldies v. United Sporting Good Wholesale*, W.C. No. 4-413-232 (January 7, 1999).

The ALJ may not disregard the attending physician's opinion that a claimant is released to return to regular employment. *Burns v. Robinson Dairy, Inc*., 911 P.2d 661 (Colo. App. 1995). But the ALJ has the authority to resolve conflicting or ambiguous opinions issued by the attending physician. *Imperial Headware, Inc. v. Industrial Claim Appeals Office*, 15 P.3d 295 (Colo. App. 2000); *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Joe v. Harrison Western Construction Corp.*, W.C. No. 4-747-660 (February 25, 2009). Determining whether a claimant has been released to full duty is a question of fact for the ALJ. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

The ALJ concludes Dr. Royce's opinion regarding whether Claimant was released to regular work on March 27, 2017 is ambiguous and subject to conflicting inferences. Although Dr. Royce never explicitly stated Claimant was released to full duty, but Respondents argue his note taking Claimant "off work for two weeks" implicitly released him to regular employment at the end of that two-week period. That interpretation is not supported by Dr. Royce's contemporaneous records, particularly the March 28 office note and therapy order. In his narrative report, Dr. Royce stated, "Return to work when safe as demonstrated with physical therapy." And the therapy referral order specifically asked the therapist to "please advise when patient will be safe to work." It would be illogical for Dr. Royce to make those statements if he believed Claimant was released to regular work. Claimant was slighly more than two weeks out from surgery, had not even started physical therapy, and was still having significant symptoms and swelling. It makes much more sense from a medical perspective to have Claimant participate in physical therapy before releasing him to his regular duties, which included inspecting construction sites. Furthermore, had Dr. Royce intended to release Claimant to full duty as of March 27, the ALJ would have expected him to make that clear at the *Samms* conference. Based on the totality of evidence presented, the ALJ concludes that Dr. Royce did not release Claimant to regular work.

Although Respondents did not specifically argue MMI as a basis to terminate TTD, the issue was fairly raised by the evidence presented. Therefore, the ALJ has also considered whether Dr. Royce put Claimant at MMI. *See* § 8-42-105(3)(a). Dr. Royce "discharged" Claimant to follow-up as needed on April 25, 2017, which could be interpreted as a determination of MMI. But he did not explicitly state Claimant was at MMI at that time, and when Respondents asked him on May 8, 2017 whether Claimant was at MMI, he replied "No." Dr. Royce opined Claimant's anticipated MMI date is "undetermined" because "left knee arthroscopy is planned." To the extent Dr. Royce's opinion regarding MMI is ambiguous, the ALJ concludes he has not put Claimant at MMI. *See Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996) (when the treating physician issues conflicting opinions concerning MMI, the ALJ must resolve the conflict). Therefore, § 8-42-105(3)(a) does not provide a basis to terminate Claimant's TTD.

Based on the evidence presented, the ALJ concludes that none of the terminating events listed in § 8-42-105(3)(a)-(d) have occurred. Accordingly, Claimant is entitled to ongoing TTD benefits commencing March 16, 2017.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant TTD benefits at the weekly rate of $939.82 commencing March 16, 2017 and continuing until terminated according to law.

2. Insurer may offset the $557 Claimant received in unemployment benefits.

3. Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 19, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether Claimant proved by a preponderance of the evidence that his left hip condition is related to his April 23, 2014 work-related injury.

- Was the relatedness issue ripe for determination?

PROCEDURAL POSTURE

Respondents filed an Application for Hearing ("AFH") on or about August 2, 2016. The issues on which an adjudication was requested included medical benefits (reasonably necessary) and relatedness of medical care.

At the outset of the hearing, Claimant objected to the medical benefits issue, asserting that no issue was ripe for determination. In particular, Claimant was not seeking to have the proposed left hip surgery, a fact that was communicated to Respondent on the eve of hearing.

Respondent, by and through its attorney of record, averred it had a right to seek a determination of whether Claimant's left hip condition was related to the admitted industrial injury. Respondent confirmed it was not seeking to withdraw the previously filed General Admission of Liability ("GAL"). As noted *infra*, the ALJ determined the issue of relatedness was ripe for determination.

FINDINGS OF FACT

1. Claimant is employed as a supervisor for Employer. In that capacity, he supervised individuals completing various tasks at the wastewater treatment plant. He also performed some of these tasks.

2. Claimant had a history of chronic low back pain, which was documented in the record. Claimant treated with Byron Jones, M.D. for low back pain. [1] Claimant also underwent an MRI of the lumbar spine on November 10, 2011. The films were read by Steven Brown, M.D. Dr. Brown's impression was very small central and left paracentral HNP at L5-S1, which caused mild mass effect on the ventral thecal sac and perhaps on the descending segment of the left S1 nerve root. The L5-S1 disc showed continued degenerative desiccation. Dr. Brown also noted a minimal concentric annular bulge at L4-L5 without lateralized protrusion. The other lumbar discs appeared normal.

[1] Dr. Jones' records were not admitted at hearing. The October 24, 2016 report of Gary Zuehlsdorff, D.O. was admitted into evidence as Exhibit Q. Dr. Zuehlsdorff noted Claimant longstanding low back pain and received injections, physical therapy ("PT"), as well as dry needling treatments. He also took medications and had a pain contract. There was no reference to treatment of the left hip.

3. Records from Exempla Spine Physical Therapy from January 8 through February 26, 2014 were admitted at hearing. The notes from January 28, 2014 referred to bilateral hip pain and Claimant received PT that day. The February 4, 2014 PT note documented that the Claimant's left hip was higher than the right. On February 11, 2014, Claimant responded well to stretching, which helped relieve right hip pain. The February 27, 2014 note referenced decreased hip extension on the right side, which was treated. On March 3, 2014, Claimant reported he was significantly better. The ALJ noted there was no evidence in the record which showed Claimant received treatment for either hip for an extended period of time before the April 22, 2014 injury.

4. No evidence was admitted at hearing which documented any treatment by Claimant for his right or left hip before 2014.

5. On April 22, 2014, Claimant suffered an admitted industrial injury while riding an ATV at work. Claimant testified he was going down to a concrete ramp when a goose flew directly at him. He swerved to the right and the ATV flipped, which caused him to be thrown inside the roll cage. Claimant testified he was moved around within the interior and had to crawl out of the ATV.

6. Claimant testified he felt pain on the right side, as well as his neck, shoulder, upper back and right knee. He also felt right hip pain immediately after the accident.

7. An Employee's Written Notice of Injury to Employer was completed by Claimant on April 23, 2014. Claimant stated the accident occurred when he swerved to avoid an oncoming goose and tipped the ATV onto its right side. Claimant identified soreness in the right shoulder and upper back, as well as a bruised right hip in response to the question about his injuries.

8. On April 23, 2014, Stan Thurber [safety specialist] completed an Employer's First Report of Injury on behalf of Employer. Claimant was noted to be driving an all-terrain vehicle on the property as part of his routine work as a supervisor. Claimant's right shoulder, hip and upper back were listed as the parts of body affected by the accident.

9. That same day, Claimant was evaluated by Monica Fanning, FNP OccMed Colorado, the ATP for Employer. He was complaining of pain in the upper back, left and right shoulder, soreness in the neck and a bruise on the right hip. On examination, tenderness was found across the iliac crest region, although the ilia were fairly symmetrical. Lying straight leg raise test was negative, however, Patrick’s sign was mildly positive to the right. A contusion at the trochanter insertion site was observed. Range of motion ("ROM") was painful, but no popping, clicking or crepitus was noted. The ALJ noted these were objective signs of injury to Claimant’s right hip.

10. NP Fanning's assessment was: motor vehicle accident; thoracic strain and contusion; lumbar spine; left shoulder strain; right shoulder contusion and abrasion;

and blunt head trauma. NP Fanning wrote a prescription for Ibuprofen and Norco, as well as recommending the application of ice to all affected areas. The report was countersigned by Dr. Zuelhlsdorff.

11. Claimant received conservative treatment of the left shoulder, including an injection. Because his symptoms persisted, he underwent surgery, which was performed by James Johnson, M.D. on July 3, 2014. Dr. Johnson's post-operative diagnoses included: subacromial decompression; lateral clavicular resection; positive Bankart repair; extensive bursectomy and debridement of labrum.

12. Dr. Zuelhlsdorff continued his treatment of Claimant, both before and after the shoulder surgery. Medical records from Dr. Zuelhlsdorff were admitted at hearing. These records documented Claimant's progress after the surgery. Complaints referable to the right hip were noted on September 5, 2014, October 3, 2014, and November 4, 2014.[2] Claimant's pain diagrams also documented these symptoms. In the December 8, 2014 note, Claimant reported massage therapy helped the symptoms in his hip and low back.[3] On January 9, 2015, improvement in the right hip was noted after an injection. Claimant did not report symptoms or receive treatment for his left hip during this period of time. The ALJ concluded Claimant had persistent right hip symptoms following the April 22, 2014 injury.

13. Dr. Zuelhlsdorff noted Claimant fell at work on January 23, 2015, which aggravated his left shoulder and right hip, but not dramatically. Clamant continued treatment for the right hip. On February 20, 2015, PT was started for the right hip. On March 11 and 30, 2015, pain was noted in Claimant's right hip around the trochanter insertion site. On April 13, 2015, Dr. Zuelhlsdorff injected Claimant's right hip.

14. On May 22, 2015, Dr. Zuelhlsdorff reevaluated Claimant. At that time, he reported improvement in the left shoulder, but stated the right shoulder was worse. Claimant was scheduled to see Brian White, M.D. on May 27 for his hip, noting the pain had been more on the lateral side and a little more on the left side trochanteric area. On examination, pain was noted in the right shoulder. Dr. Zuelhlsdorff's assessment related to the right hip included the conclusion that the secondary fall on January 23, 2015 led to a slight exacerbation of right and left shoulders and the right hip, which were minimal given the history and examination.

15. On May 27, 2015, Dr. White conducted an initial evaluation of Claimant. The report was prepared by Shawn Karns, MPA, PA-C, who noted Claimant has had pain over the lateral aspect of the right hip since landing on his right side and right hip on April 22, 2014. He had a contusion injury. Claimant underwent a cortisone injection, which gave him 70% relief. Claimant also noted that the left hip had become more painful over the last three months similar to how the right hip had been in the past. He had since developed groin pain. Claimant's chronic low back pain was noted as mild

[2] Exhibit C, pp. 20, 23, 26.

[3] Exhibit C, pp. 29.

and he was able to distinguish this from hip issues. On examination, Claimant's gait was non-antalgic. He had a negative Trendelenburg sign and gait, with excellent lumbar ROM. X-rays showed underlying reactive CAM morphology over bilateral femoral neck, consistent with some underlying femoroacetabular impingement with alpha angles greater than 60°, Tonnis grade of zero bilaterally. Claimant had a small calcification lateral to the acetabulum on the left side, which Dr. White thought could indicate a chronic labral injury. The MRI showed a degenerative labral tear on the right side, as well as some mild trochanteric bursitis.

16. PA-C Karns' assessment was: Claimant was a 48-year-old male with findings consistent with underlying femoroacetabular impingement, degenerative labral tear on the right side; concern for impingement, labral tear on the left as well as bilateral trochanteric bursitis. Dr. White issued an addendum and opined that the majority of Claimant's pain was coming from the joint. He thought it started as a significant contusion injury to the lateral aspect of the hip, but with the impaction injury, Claimant probably injured the joint. He recommended a diagnostic injection to confirm the pain generator. If confirmed, his recommendation was consideration of hip arthroplasty addressing primarily the joint with a femoroacetabular osteoplasty and labral repair versus reconstruction. The ALJ inferred Dr. White was of the opinion Claimant required surgery on the right hip as a result of the April 22, 2014 workplace injury.

17. On August 31, 2015, Claimant underwent right hip surgery, performed by Dr. White. In a note to Dr. Zuelhlsdorff dated September 1, 2015, Dr. White stated he performed a hip arthroplasty, along with a bursectomy and windowing of the iliotibial (IT) band. Dr. White found an extensively torn acetabular labrum and underlying impingement on both sides of the joint. Dr. White noted Claimant had some complaints of pain on the left side, which were primarily of lateral pain. He recommended a steroid injection in the left trochanteric region.

18. On October 26, 2015, Dr. Zuelhlsdorff issued a report entitled Chart Review Report of Causality for Left Hip. Dr. Zuelhlsdorff noted he reviewed the whole chart and was sending the note at the request of Dr. White. Dr. Zuelhlsdorff recounted the treatment history after the April 22, 2014 injured in which Claimant had left shoulder surgery and received treatment for continuing low back and right hip pain. On May 22, 2015, Dr. Zuelhlsdorff noted left hip pain for the first time in the record. The pain was in the left trochanteric area. Dr. Zuelhlsdorff also noted Dr. White documented Claimant complained of progressively worse left hip pain over the last three months in his May 27, 2015 note.

19. Dr. Zuelhlsdorff opined Claimant's left hip condition was work-related. Even though roughly 13 months elapsed from the injury to the time the left hip was first mentioned, Claimant had a very significant mechanism of injury in his rollover accident. Dr. Zuelhlsdorff stated that more likely than not this was a work-compensable claim for the left hip, as Claimant probably injured it during roll-over, which took a while to

manifest, given the flow of the case, the multiple other diagnoses, with the resulting worsening of the left hip over time.[4] The ALJ found this opinion to be persuasive.

20. On November 18, 2015, Claimant underwent a left hip MR arthrogram and diagnostic injection, which were administered by Jeffrey Weingardt, MD. Dr. Weingardt's impression was: subtle tears involving the superior and anterior left acetabular labrum; dysplastic change noted at the anterolateral left femoral head neck junction with minimal underlying bone marrow edema; probable femoral acetabular impingement involving right hip joint; moderate spondylosis at L5-S1; patchy edema noted within the right femoral head extending into the neck of uncertain etiology; small volume right hip joint effusion.[5]

21. A note dated November 19, 2015 prepared by PA-C Karns was admitted into evidence. It referenced a telephone conference with Claimant after Dr. White reviewed the results of the left hip MRI. The films showed that the joint spaces were well-preserved, but Claimant had a labral tear. Claimant underwent a diagnostic injection and his pain was taken away for a short time. PA-C Karns noted Claimant would be a candidate for hip arthroscopy surgery.

22. Claimant for returned to Dr. White on December 8, 2015, which was roughly 3 months post right hip arthroscopy. Dr. White noted the ROM of the right hip was nice and smooth throughout, without any pinching or significant discomfort. Left hip ROM was good overall, but Claimant got significant discomfort with the anterior impingement maneuver. The single leg bridge on the right side demonstrated weakness compared to the contralateral side, which was to be expected at this point. Dr. White's assessment was that Claimant's right hip was doing well post-operatively. He diagnosed continued left hip pain consistent with a femoroacetabular impingement and labral tear. Dr. White noted Claimant was a candidate for left hip arthroscopy surgery, as well as with potential for labral reconstruction on that side.

23. On December 31, 2015, an Amended GAL was filed on behalf of Respondent, admitting for wage and medical benefits.

24. Claimant returned to Dr. White on March 9, 2016. This was approximately six months post the right hip arthroscopy (with labral reconstruction and greater trochanteric bursectomy). Claimant's left side was characterized as getting progressively worse, despite PT. Claimant had no pain on the right side, including the trochanteric region. On the left side, pain was noted with the anterior impingement maneuver. He had no real trochanteric symptoms. Dr. White reviewed x-rays, which showed very similar CAM morphology of the proximal femur on the left side, with a pre-operative alpha angle exceeding 60°. A review of the MRI confirmed a labral tear, very similar labral size, which was very small as seen on the other side. Dr. White's assessment included confirmation that Claimant had done well with the right hip

[4] Exhibit H, p. 63.

[5] The reference to the right hip appears to be a typographic or transcription error,

arthroscopy. He also diagnosed left-sided impingement, with labral tear, but no bursal symptoms. Dr. White opined it was reasonable to move forward with the left hip arthroscopy, femoroacetabular osteoplasty, with labral reconstruction. The ALJ noted Dr. White was of the opinion that Claimant's left hip condition was getting worse at this point in time.

25. On June 23, 2016, Claimant underwent an independent medical examination requested by Respondent, which was performed by Allison Fall, M.D. At the time of the evaluation, Claimant advised Dr. Fall he had complained of left hip pain prior to the surgery on the right hip. He said when he began putting most of the weight on his left side, it became very painful. Claimant indicated he had chronic low back pain, which increased significantly after the hip surgery. On examination, Claimant had unrestricted ROM of both shoulders, with no signs of impingement or instability. Claimant reported pain along the medial scapular border of the right periscapular area. Claimant's right hip revealed well-healed surgical portals. No tenderness was noted over the sacroiliac joint. Examination of Claimant's left hip revealed some mild pain with and range flexion and rotation. No clicking or crepitus was noted.

26. Dr. Fall's assessment was: (a) S/P right hip arthroscopy on 8/31/15, with femoral osteoplasty, acetabular rim trimming, greater trochanteric bursectomy, and windowing of the IT band-at MMI following aggravation of underlying condition from work-related ATV accident; (b) S/P left shoulder arthroscopic subacromial decompression, distal clavicle resection, and Bankart lesion repair-at MMI following aggravation of underlying condition from work-related ATV accident; (c) same underlying condition on the left hip of femoroacetabular impingement; (d) chronic low back pain on opioid medication with noncompliance on prior UDTs; psychological issues likely affecting presentation and perceived disability.

27. Dr. Fall had no further treatment recommendations. She concluded Claimant's symptom presentation for his hip was related to his underlying somatic symptom disorder and acetabular configuration rather than injuries from the ATV accident. Dr. Fall noted there were no initial complaints regarding the left hip. Dr. Fall characterized her findings with regard to the left hip on examination as minimal and opined these should be treated outside the workers' compensation system.

28. Claimant returned to Dr. Zuelhlsdorff on July 15, 2016 for an evaluation of bilateral shoulders, bilateral hips and upper back. His right hip was 90% better; his left hip was no better, but not overtly worsening. Claimant's history of low back pain and treatment with Dr. Jones was also referenced. Claimant was not taking any medications issued by Dr. Zuelhlsdorff and had discontinued PT. Claimant was working at modified duty. Dr. Zuelhlsdorff scheduled a follow-up appointment in one month.

29. Dr. Zuelhlsdorff evaluated Claimant on October 24, 2016 and noted the focus of the evaluation was on Claimant's hips (as was the July 15, 2016 evaluation). Claimant's left hip was no better and he remained on modified duty. On examination, the appearance of the left hip was normal, including the anterior hip joint and proximal quadriceps. Palpation was normal and full range of motion was noted, with pain on

abduction. Flexion strength was 4/5 and 5/5 on the right side without pain. Dr. Zuelhlsdorff's diagnoses were: MVA; injury of right shoulder, sequela; injury right hip, sequela; injury of left shoulder; injury of left hip, subsequent encounter; surgery follow-up. Claimant's work restrictions were continued.

30. Claimant testified he had not been in any accidents since April 2014, nor had he injured his left hip in any other event.

31. Dr. Zuelhlsdorff testified as an expert at hearing. He is a specialist in Occupational Medicine and is board-certified in Internal Medicine. He is Level II accredited pursuant to the WCRP. Dr. Zuelhlsdorff noted Claimant sustained multiple injuries as a result of the April 22, 2014 accident. He has seen Claimant on average once per month since the time of the accident.

32. Dr. Zuelhlsdorff testified he believed the condition of Claimant's left hip was related to the subject accident. Dr. Zuelhlsdorff confirmed Claimant had complaints of pain in the right hip one day after the accident and there was bruising noted on examination. The symptoms in the left hip did not show up immediately. Given the complexity of injury in the multitude of problems Claimant had, Dr. Zuelhlsdorff did not think it was unusual that he did not report hip pain right away. He said particularly with hips, it can take some time for the symptoms to manifest. The key factor in his opinion was the mechanism of injury. Dr. Zuelhlsdorff noted this was a rollover accident in which Claimant was not restrained, which applied significant forces to the right hip. There would have also been forces applied to the left hip. Dr. Zuelhlsdorff based this conclusion was based upon the principles of physics and noted force vectors would have operated on both sides of Claimant’s body. Dr. Zuelhlsdorff opined these forces were the causes of the pathology in both of Claimant's hips.

33. Dr. Zuelhlsdorff testified symptoms in the left hip manifested subjectively in approximately May 2015. Dr. Zuelhlsdorff also noted that Claimant may not have experienced symptoms immediately, as he was relatively immobile after the accident and not putting a great deal of weight on the hips.

34. Dr. Zuelhlsdorff noted Claimant could have a degenerative condition in the labrum, including a tear, which was not symptomatic until the accident. This was the basis for his conclusion that his condition was more likely than not the result of the injury. The ALJ found Dr. Zuelhlsdorff's testimony persuasive.

35. Dr. Zuelhlsdorff testified Claimant had received PT, home exercises medications and an injection as treatment for the left hip. Surgery on the left hip was an option. Dr. Zuelhlsdorff testified he was aware Claimant had decided, at least at this time, not to proceed with surgery of the left hip. At this time, he recommended home exercises and medications. Dr. Zuelhlsdorff testified Claimant may require surgery for the left hip in the future and opined it was part of the work injury.

36. Dr. Fall testified as an expert in Physical Medicine and Rehabilitation. Dr. Fall has an undergraduate degree in biomedical engineering and testified as an expert

in this field, as well. She is Level II accredited pursuant to the WCRP. She testified consistently with the opinions expressed in her report, although did not focus on Claimant's somatic condition.

37. Dr. Fall testified there was no work-related injury to the left hip. She did not believe the subsequent treatment for the right hip aggravated the left hip. She based her opinion on Claimant's prior medical history, as well the accident itself. Dr. Fall believed Claimant's treatment for the low back prior to the injury had relevance. She testified Claimant's prior low back condition, which was chronic, included hip symptoms and that was significant. She noted the SI joints and hamstrings were structures involved in the low back treatment. The ALJ found Dr. Fall did not identify any treatment of either hip before 2014. Dr. Fall also testified Claimant did not provide a full history to his treating physicians.

38. Dr. Fall testified that there was no temporal relationship between Claimant's reported symptoms in the left hip and the accident. She disagreed with Dr. Zuelhlsdorff on this point. She disagreed that there would have been force vectors operating on Claimant's left hip, although Dr. Fall conceded on cross-examination that a twisting type injury could cause symptoms in the hip. Dr. Fall opined Claimant's soft tissues would have absorbed some the forces operating on his body. Dr. Fall postulated Claimant would have had symptoms right away, had there been an injury to the left hip. She testified the tearing of tissues would cause symptoms. She noted the MRI findings were similar on the left side, as the right. Dr. Fall cited Dr. White, who noted Claimant had a particular angulation of the hip (60°), which pre-disposed him to impingement. Dr. Fall also noted the radiologist described the labral tear as degenerative. Dr. Fall concluded Claimant's hip condition was degenerative, as opposed to an acute injury. She noted some patients with this condition manifested symptoms in their twenties.

39. Dr. Fall testified Claimant injured his right hip in the subject accident, but not his left. Dr. Fall stated that while it was possible, it was not medically probable that Claimant injured his left hip in the accident. The ALJ found Dr. Fall did not provide an explanation as to why Claimant's left hip symptoms manifested after the rollover accident and not before. Dr. Fall did not believe that the surgery on the right hip caused Claimant's left hip to become symptomatic. She cited the medical literature for the proposition that overuse would not have caused the left hip to become symptomatic, but there was no specific article cited and nothing specifically the Workers' Compensation Medical Treatment Guidelines. On cross-examination, Dr. Fall was also asked if Claimant was more active after the right hip surgery, which was documented in the medical records. Dr. Fall did not believe this would be a cause of left hip symptoms.

40. Claimant met his burden of proof and the evidence established the symptoms in his left hip were related to the industrial injury. The ALJ relied upon Claimant's treating physicians, Dr. White and Dr. Zuehllsdorff, who were in the best position to determine whether Claimant's left hip condition was related to the workplace injury.

41. Claimant was not requesting surgery on his left hip as of the date of the hearing.

42. The evidence and inferences inconsistent with these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Generally, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Ripeness

In *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3 d 1178, 1180 (Colo. App. 2006), the Colorado Court of Appeals considered when an issue was ripe. In that case, Claimant suffered a work place injury and was placed at MMI by his ATP. After a DOWC Independent Medical Examination confirmed MMI, Employer filed a Final Admission of Liability ("FAL"), accepting the date of MMI and admitting for PPD benefits. Claimant filed a timely objection to the FAL and Application for Hearing, but did not endorse the issue of permanent total disability benefits. Claimant subsequently filed two Applications for Hearing, which listed the PTD benefits issue. Respondents asserted the issue of PTD benefits was not ripe because it had not been endorsed on the original AFH.

The Court of Appeals held PTD was ripe for determination at the time the FAL was filed and Respondent admitted for PPD benefits. Writing for the Court, Justice Rovira stated: "Generally, ripeness tests whether an issue is real, immediate, and fit for

adjudication. [citing *Bd. of Dirs. V. Nat'l. Union Fire Ins. Co.* 105 P. 3d 653 (Colo. 2005)]. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur". 143 P.3d at 1180.

The ALJ determined that the issue of whether Claimant's left hip condition was related to the industrial injury was ripe for determination. This issue was ripe at the time Respondent filed its AFH, as the question of surgery for the left hip was controverted. Although Claimant subsequently decided not to have the surgical procedure, the issue of relatedness remained ripe for determination. Under the test articulated by the Court in *Olivas-Soto v. Industrial Claim Appeals Office*, this issue remained controverted and was ready for resolution by the ALJ.

Relatedness of Left Hip

A pre-existing condition "does not disqualify a Claimant from receiving workers' compensation benefits". *Duncan v. ICAO*, 107 P.3d 999, 1001 (Colo. App. 2004). Further, if a pre-existing condition is stable but is aggravated by an occupational injury, the resulting occupational injury is still compensable because the incident caused the dormant condition to become disabling. *Siefried v. Industrial Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986). Thus, if an industrial injury aggravates, accelerates, or combines with a pre-existing condition so as to produce disability and need for treatment, the claim is compensable. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ALJ determined the instant case fit within this factual scenario.

In the case at bench there was no dispute Claimant suffered a compensable injury on April 22, 2014. Respondents provided medical benefits to cure and relieve the effects of the injury, including treatment of the right hip. The ALJ found Claimant's right hip had a contusion immediately following the accident. (Finding of Fact 9). Claimant had persistent right hip symptoms following the April 22, 2014. (Findings of Fact 12-14). Claimant's treating physicians initially provided conservative treatment for the right hip, then surgery was performed. In this regard, Claimant's right hip had underlying conditions which became symptomatic after the workplace injury. *Id.* These included femoroacetabular impingement, labral tear(s), as well as bilateral trochanteric bursitis. (Finding of Fact 16). Claimant's ATPs (Dr. Zuelhlsdorff and Dr. White) concluded Claimant's right hip condition was related to the workplace injury. These physicians concluded Claimant's roll-over accident aggravated these underlying conditions and the ALJ was persuaded by their opinions. (Findings of Fact 16 and 19).

The ALJ also determined Claimant proved that he developed symptoms in his left hip as a result of the industrial injury, albeit not initially. Claimant's left hip had some of the same underlying conditions as the right hip. The medical evidence supported the conclusion the left hip conditions was related to the industrial injury. The ALJ first relied upon Dr. Zuelhlsdorff's analysis on causation when determining the left hip condition was related. (Findings of Fact 18-19). Dr. Zuelhlsdorff's testimony that the forces present in this type of accident could cause an injury to both hips were credible, as was his explanation that an underlying degenerative condition could become symptomatic

after this accidents. (Finding of Fact 32). The inference drawn from Dr. White's evaluations of Claimant were also persuasive to the ALJ. (Finding of Fact 16).

Second, there was evidence in the record that Claimant's left hip condition was aggravated by Claimant's use following the surgery on the right hip. (Finding of Fact 19). Dr. Zuelhlsdorff also noted this in his causation analysis.[6] Claimant's testimony also supported this conclusion. That aggravation of the underlying condition of the left hip resulted from treatment for the industrial injury and led the ALJ to conclude it was related to the industrial injury. (Finding of Fact 40).

Third and finally, there was no evidence in the records that Claimant had a hip diagnosis and treatment plan (including surgery) before the subject accident. He received some very limited physical therapy in 2014. This was related to treatment of low back symptoms. The PT records referred primarily to Claimant's right hip for a period of slightly more than one month. (Finding of Fact 3). However, at the conclusion of these records, Claimant reported a resolution of his symptoms. Most important for the ALJ, there was no medical opinion which tied this treatment to the underlying condition of either hip. No evidence was in the record that showed Claimant received any treatment before 2014. (Finding of Fact 4).

In coming to this conclusion, the ALJ considered Dr. Fall's testimony and Respondent's argument that the delay in reporting symptoms was significant and should lead to the conclusion that this was a degenerative as opposed to an acute condition. The ALJ concluded this was a significant issue and Dr. Fall's testimony raised questions about the etiology of Claimant's left hip symptoms. Dr. Fall raised valid questions concerning the delay in left hip symptoms. However, Dr. Fall did not provide an explanation why it was only after the workplace injury that Claimant's left hip was symptomatic to the degree it required treatment and ultimately surgery was recommended. As noted, *supra*, Claimant's treating physicians provided the rationale that was persuasive to the ALJ. In this respect, Dr. Fall's testimony was less persuasive than Dr. Zuelhlsdorff. On balance, the ALJ found this was a significant accident, which injured multiple parts of Claimant's body. There were significant forces at work on Claimant's body, which injured the left hip. The ALJ determined the workplace accident caused the underlying condition in Claimant's left hip to become symptomatic and require treatment

The ALJ makes no findings as to whether the proposed surgery is reasonable and necessary at this juncture. Those issues were not before the Court, as Claimant has not requested that Respondent provide that medical benefit.

ORDER

IT IS HEREBY ORDERED:

[6] Exhibit H, p. 63.

1. Respondents shall provide medical benefits to Claimant for the injury to his left hip.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 15, 2017

Digital signature

_____

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Lloyd J. Thurston, D.O. that .Claimant has not reached Maximum Medical Improvement (MMI) and suffered a provisional 15% whole person impairment rating as a result of his admitted December 4, 2015 hernia.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his December 4, 2015 hernia or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.,* 759 P.2d 705 (Colo. 1988).

STIPULATION

The parties agreed that Claimant is entitled to receive medical maintenance care as directed by Authorized Treating Physician John T. Sacha, M.D. including medications and referral to a urologist for treatment of erectile dysfunction.

FINDINGS OF FACT

1. Claimant is a 30 year-old male who worked for Employer as a Mover. On December 4, 2015 Claimant suffered an admitted hernia during the course and scope of his employment while lifting furniture.

2. Employer referred Claimant to Concentra Medical Centers for treatment. He underwent two surgeries for bilateral inguinal hernias. However, the surgeries failed to relieve Claimant's symptoms.

3. In June 2016 Claimant was referred to Authorized Treating Physician (ATP) John T. Sacha, M.D. for an examination. Dr. Sacha diagnosed Claimant with ilioinguinal and iliohypogastric neuropathy. He noted that Claimant's nerve damage was caused by an unusual surgical approach during his hernia procedures.

4. Dr. Sacha concluded that Claimant reached Maximum Medical Improvement (MMI) on August 17, 2016. He prescribed medical maintenance treatment. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Sacha remarked that, although Table 51 addresses nerve damage, it does not contain impairments for ilioinguinal or iliohypogastric nerves. Instead, Dr. Sacha reasoned that Table 6 on page 196 of the *AMA Guides* regarding classes of hernia impairment was the appropriate Table. He noted that Claimant was experiencing frequent pain but did not have a protrusion or

defect with abdominal pressure that was readily reduced. Dr. Sacha thus placed Claimant in Class I of Table 6 and assigned a 5% whole person impairment rating as a result of the December 4, 2015 accident.

5. On September 26, 2016 Respondents field a Final Admission of Liability (FAL) consistent with Dr. Sacha's MMI and impairment determinations.

6. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME). Lloyd J. Thurston, D.O. performed the DIME and issued a report on March 11, 2017. Dr. Thurston concluded that Claimant had not reached MMI. He reasoned that further evaluations by a hernia surgeon and urologist would be appropriate. Dr. Thurston explained that "[i]f urologist and surgeon have no additional recommendations, it is my medical opinion [Claimant] is at MMI." He commented that placing Claimant at MMI currently would be "unfortunate as it is my opinion [Claimant] remains in significant, unexplained and unexpected pain."

7. Similar to Dr. Sacha, Dr. Thurston also utilized Table 6 on page 196 of the *AMA Guides* in calculating an impairment rating. However, he placed Claimant in Class II instead of Class I of the Table. Dr. Thurston explained that, "if the urologist and surgeon find nothing else to treat" a 15% whole person impairment rating is appropriate.

8. On March 16, 2017 Respondents filed an Application for Hearing seeking to overcome Dr. Thurston's DIME determination. On March 24, 2016 Claimant filed a Response to the Application.

9. Dr. Sacha reviewed Dr. Thurston's DIME report and explained that a 15% whole person impairment rating was inappropriate. He noted that Claimant had visited numerous physicians but agreed that Claimant was entitled to an additional general surgical evaluation. However, he commented that Claimant did not require an evaluation from a urologist because he lacked any "significant urological dysfunction." In addressing Dr. Thurston's 15% whole person impairment rating Dr. Sacha remarked that Class I of the hernia impairments in the *AMA Guides* requires "frequent protrusion at the site of the defect." However, Claimant lacked frequent protrusion. Instead, Claimant had pain that was "neuropathic in nature and not at the site of the palpable defect." Accordingly, Dr. Sacha concluded that Dr. Thurston's 15% whole person impairment rating was incorrect.

10. Dr. Sacha referred Claimant for a second surgical evaluation with Dr. Beck. Dr. Beck did not have any additional surgical recommendations. Dr. Sacha also noted that a urologist had determined that Claimant did not have any urologic impairment.

11. On July 20, 2017 the parties conducted the pre-hearing evidentiary deposition of Dr. Sacha. He explained that Claimant's pain and discomfort was caused by ilioinguinal and iliohypogastric neuropathy as a result of his surgeries. Dr. Sacha commented that Claimant did not have any urological dysfunction.

12. Dr. Sacha testified that Claimant's ongoing problems are neurological in character. He could have rated the Claimant using Table 51 of the *AMA Guides*, but there are no ilioinguinal and iliohypogastric nerve ratings available. Dr. Sacha commented that the correct mechanism to evaluate Claimant's permanent impairment was thus Table 6 of the *AMA Guides*. Claimant has visited a third general surgeon as suggested by Dr. Thurston and no further surgery has been recommended. Therefore, Dr. Sacha concluded that Claimant reached MMI on August 17, 2016 and only required medical maintenance treatment. He explained that Dr. Thurston used the wrong class of hernia impairmentin in assigning a rating. Although Table 6 is proper for hernia impairments Claimant fits into Class I as opposed to Class II because of his undisputed lack of a palpable defect or protrusion. Nevertheless, Dr. Sacha acknowledged that "this is an interesting area to rate because the Division gives you a lot of latitude when it comes to a non-named nerve that's not on Table 51." He recognized that Claimant falls somewhere between classes I and II of Table 6. Dr. Sacha also remarked that, if Dr. Thurston had provided a better explanation of his impairment rating, it might have been defensible.

13. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Thurston that .Claimant has not reached MMI and suffered a provisional 15% whole person impairment rating as a result of his admitted December 4, 2015 hernia. Initially, Claimant suffered admitted hernia injuries while working for Employer. He subsequently underwent two surgeries for bilateral inguinal hernias. However, the surgeries failed to relieve Claimant's symptoms. ATP Dr. Sacha concluded that Claimant reached MMI on August 17, 2016 with a 5% whole person impairment.

14. On March 11, 2017 DIME Dr. Thurston concluded that Claimant had not reached MMI and assigned a provisional 15% whole person impairment rating. He recommended further evaluation by a hernia surgeon and urologist. Dr. Thurston explained that "[i]f urologist and surgeon have no additional recommendations, it is my medical opinion [Claimant] is at MMI." However, he commented that placing Claimant at MMI would be "unfortunate" because he was suffering significant and unexplained pain.

15. In contrast, Dr. Sacha maintained that Claimant had reached MMI on August 17, 2016. He remarked that Claimant had undergone an evaluation with Dr. Beck and there were no additional surgical recommendations. Dr. Sacha also noted that a urologist had determined that Claimant did not have any urologic impairment. He explained that Dr. Thurston used the wrong class of hernia impairment pursuant to the *AMA Guides* in assigning a rating. Dr. Sacha reasoned that, although Table 6 is proper for hernia impairments, Claimant fits into Class I as opposed to Class II because of his undisputed lack of a palpable defect or protrusion.

16. Dr. Thurston concluded that Claimant warranted additional evaluations because he was experiencing significant and unexplained pain. Although Dr. Sacha noted that the recommended evaluations have been completed, it is it is premature to speculate about whether Dr. Thurston would now determine that Claimant has reached

MMI. Instead, the critical inquiry is whether Respondents have produced unmistakable evidence free from serious or substantial doubt about whether Dr. Thurston erred in determining Claimant has not reached MMI. However, Dr. Sacha did not contend that Dr. Thurston misapplied the *AMA Guides* or otherwise erred in reaching an MMI determination. Furthermore, although there is a dispute about Claimant's appropriate impairment rating based on the *AMA Guides*, Dr. Thurston simply issued a provisional rating because Claimant has not attained MMI. Accordingly, Respondents have failed to demonstrate that it is highly probable that Dr. Thurston's MMI and provisional impairment determinations are incorrect.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the

AMA Guides do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

. 6. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

7. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Thurston that .Claimant has not reached MMI and suffered a provisional 15% whole person impairment rating as a result of his admitted December 4, 2015 hernia. Initially, Claimant suffered admitted hernia injuries while working for Employer. He subsequently underwent two surgeries for bilateral inguinal hernias. However, the surgeries failed to relieve Claimant's symptoms. ATP Dr. Sacha concluded that Claimant reached MMI on August 17, 2016 with a 5% whole person impairment.

8. As found, on March 11, 2017 DIME Dr. Thurston concluded that Claimant had not reached MMI and assigned a provisional 15% whole person impairment rating. He recommended further evaluation by a hernia surgeon and urologist. Dr. Thurston explained that "[i]f urologist and surgeon have no additional recommendations, it is my medical opinion [Claimant] is at MMI." However, he commented that placing Claimant at MMI would be "unfortunate" because he was suffering significant and unexplained pain.

9. As found, in contrast, Dr. Sacha maintained that Claimant had reached MMI on August 17, 2016. He remarked that Claimant had undergone an evaluation with Dr. Beck and there were no additional surgical recommendations. Dr. Sacha also noted that a urologist had determined that Claimant did not have any urologic impairment. He explained that Dr. Thurston used the wrong class of hernia impairment pursuant to the *AMA Guides* in assigning a rating. Dr. Sacha reasoned that, although Table 6 is proper for hernia impairments, Claimant fits into Class I as opposed to Class II because of his undisputed lack of a palpable defect or protrusion.

10. As found, Dr. Thurston concluded that Claimant warranted additional evaluations because he was experiencing significant and unexplained pain. Although Dr. Sacha noted that the recommended evaluations have been completed, it is it is premature to speculate about whether Dr. Thurston would now determine that Claimant has reached MMI. Instead, the critical inquiry is whether Respondents have produced unmistakable evidence free from serious or substantial doubt about whether Dr. Thurston erred in determining Claimant has not reached MMI. However, Dr. Sacha did not contend that Dr. Thurston misapplied the *AMA Guides* or otherwise erred in reaching an MMI determination. Furthermore, although there is a dispute about Claimant's appropriate impairment rating based on the *AMA Guides*, Dr. Thurston simply issued a provisional rating because Claimant has not attained MMI. Accordingly, Respondents have failed to demonstrate that it is highly probable that Dr. Thurston's MMI and provisional impairment determinations are incorrect.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

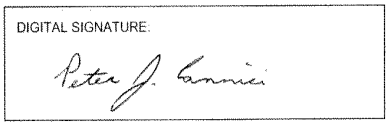
1. Respondents have failed to overcome the DIME opinion of Dr. Thurston that Claimant has not reached MMI and sustained 15% provisional impairment rating.

2. Claimant shall receive medical maintenance care as directed by ATP Dr. Sacha including medications and referral to a urologist for treatment of erectile dysfunction.

3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: September 19, 2017.



_____

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
633 17th Street Suite 1300
Denver, CO 80202

ISSUES

1. Pursuant to the standards established in *City of Littleton v. Industrial Claim Appeals Office*, 370 P.3d 157 (Colo. 2016) and *Industrial Claim Appeals Office v. Town of Castle Rock*, 370 P.3d 151 (Colo. 2016) whether Respondents have established that Claimant did not suffer the compensable occupational disease of melanoma during the course and scope of his employment as a firefighter for Employer under § 8-41-209, C.R.S.

STIPULATIONS

The parties agreed that Claimant has established the following threshold requirements pursuant to § 8-41-209, C.R.S.:

1. Claimant suffered cancer in the form of melanoma that is covered under the statute;

2. Claimant has been a firefighter for more than five years; and

3. There is no evidence that Claimant's melanoma existed at the time he was hired as a firefighter.

The parties further stipulated that, if compensable, Claimant's average weekly wage is $1,721.22.

FINDINGS OF FACT

1. Claimant is a male who has been employed as a firefighter for Employer since 2000.

2. Claimant grew up in Albuquerque, New Mexico and lived there from 1972 until 2000. As a child, Claimant was involved in outdoor activities that included Cub Scouts, Boy Scouts, soccer, and track and field. Claimant also rode his bicycle as a teenager before he had a driver's license.

3. In New Mexico, Claimant worked as an outdoor framer in approximately 1998 or 1999. After moving to Colorado and beginning work as a firefighter for Employer, Claimant continued to work in outdoor framing and deck building as a side job and performed this work in addition to firefighting from 2001 through 2008.

4. In approximately 2005 or 2006 Claimant started his own business, Zuke's Woodworks, and continued to build decks and furniture. Claimant also remodeled

buildings and basements. This business involved working both inside and outside. While performing this type of work, Claimant wore a t-shirt and pants or shorts.

5. From 2000 through 2011 Claimant ran marathons, biked, and hiked outdoors. Claimant also would wear t-shirts and shorts for these activities, depending on the weather.

6. Claimant has had numerous moles and freckles on his body for years, and recalls having them on his body as a child. Claimant's father is of non-Hispanic Caucasian descent. Claimant's mother is of 50% non-Hispanic Caucasian descent and 50% Native American descent.

7. On July 15, 2002 Claimant underwent a physical performed by Raewyn Shell, M.D. Claimant reported that he had some moles that his wife wanted Dr. Shell to look at. Dr. Shell diagnosed Claimant with five atypical or possible dysplastic nevi. Dr. Shell removed these moles or nevi on September 24, 2002 and a pathology report identified the five moles as "atypical" with three being dysplastic.

8. On October 9, 2002 Claimant had another mole removed and the suspected diagnosis by Dr. Shell was dysplastic nevus and it was noted the mole was atypical.

9. In 2008 Claimant developed a mole on his right calf. Claimant advised Dr. Shell on October 23, 2008 that he had a questionable mole on his right leg. This mole was at the same site where Claimant subsequently was diagnosed with melanoma.

10. On July 31, 2009 Claimant was evaluated by Dr. Shell and wanted Dr. Shell to look at the mole on his right calf because it was different than it had been and because Claimant believed the mole looked funny.

11. On September 19, 2011 Claimant had the mole on his right calf removed. On September 26, 2011 Claimant was diagnosed with invasive melanoma on the right calf at the site of the removed mole. Claimant underwent a second excision close to the same area on his right calf on November 22, 2011.

12. On December 11, 2011 Claimant was evaluated by Annyce Mayer, M.D. On February 28, 2012 Dr. Mayer issued a report. Dr. Mayer assessed Claimant with Stage 3B melanoma, superficial spreading type. Dr. Mayer opined that "much remains unknown about what causes cancer, why some people with multiple risk factors for melanoma go on to develop melanoma but many of others with those same risk factors do not."

13. Dr. Mayer opined that it was not possible to identify all the carcinogens that Claimant was exposed to over the course of his firefighting career, but that Claimant had repeated and prolonged skin contact with a number of different chemical carcinogens as well as respiratory exposure. Dr. Mayer also opined that Claimant had intermittent sun exposure and only used sunscreen during training and not during wild land fires or other calls.

14. Dr. Mayer opined that excess risk of malignant melanoma was observed in a number of studies of cancer risk in firefighters including a Howe & Burch study (1.73), the LeMasters meta-analysis (1.32), and the Bates study (1.50).

15. Dr. Mayer opined that Claimant had a number of underlying risk factors for melanoma including multiple nevi, dysplastic nevi, history of sunburn, and sun exposure that were outside of his work as a firefighter. Dr. Mayer opined that there were many people in Colorado with one or all of those same risk factors who did not have melanoma. Dr. Mayer opined that it is not known the degree to which risk factors are simply additive or the degree to which there is an interaction between risk factors, such that the risk of cancer due to an underlying host factor could be greatly increased by an environmental/occupational exposure.

16. Dr. Mayer testified by deposition in this matter consistent with her written report. Dr. Mayer explained the difference between cause and risk as risk being a particular exposure of factor that makes it more likely someone will develop a condition versus causation where it is medically probable that the condition was caused de novo.

17. Dr. Mayer testified that she examined Claimant's skin, and that he had approximately 50-100 moles and many freckles. Dr. Mayer was not confident in her ability to completely distinguish freckles and moles, but noted that Claimant had many present on his body. Dr. Mayer testified that the presence of moles/nevi does not say anything about nevi as a causative factor of melanoma.

18. Dr. Mayer testified that in occupational medicine, risk factors in many cases are simply an indication of an increase in risk rather than specific indication of causation and that having multiple risk factors does not mean a person is going to develop the outcome or particular condition. Referring to the LeMasters study regarding the risk of melanoma in firefighters, Dr. Mayer testified that firefighting was determined as a possible risk for malignant melanoma but again that relative risk does not establish causation.

19. Dr. Mayer testified and agreed that Claimant's mole count and sun exposure were possible risk factors for melanoma but again opined that risk did not establish causation.

20. On February 27, 2012 William Milliken, M.D. issued a report after performing a medical records review. Dr. Milliken noted that the issue in this case was the possibility that firefighting exposure was causally linked to the process of skin cancer (melanoma) development (carcinogenesis) and the possibility that occupational toxicant exposures incurred as a firefighter might have contributed to the melanocyte DNA changes which led to melanoma cell formation in Claimant's right calf.

21. Dr. Milliken opined that melanoma is causally linked to sun exposure, especially in Caucasians living in high sun exposure areas, and especially following a lifetime of sun exposure. Dr. Milliken noted that Claimant grew up in New Mexico and worked in Colorado, both relatively sunny regions, indicating an increased sun exposure

over Claimant's life to date. Dr. Milliken opined that sun exposure was a highly probable cause of Claimant's melanoma.

22. Dr. Milliken noted that well accepted scientific evidence suggested that approximately 90% of melanoma cases in those of European descent living in high ambient sun exposure climates are due to sun exposure and that Claimant was of partial European descent and had significant sun exposure living in sunny regions.

23. Dr. Milliken opined that it was highly probable that Claimant's sun exposure and moles on his body, including multiple dysplastic nevi, were the cause of Claimant's melanoma. Dr. Milliken opined that the probability the melanoma was caused by those factors was 6-10 times normal.

24. Dr. Milliken opined that with the environmental and phenotype based risk for melanoma being 6-10 times normal in Claimant's case, the much smaller risk of melanoma due to firefighting skin exposure at 1.32 times normal, was minor in comparison.

25. Dr. Milliken testified by deposition in this matter consistent with his written report. Dr. Milliken opined that 90 percent of melanoma cancer is associated with a mutation caused by sun exposure leading to the conjecture that 90 percent of melanoma tumors are sun-induced. With regard to the increasing incidence of melanoma in the population at large Dr. Milliken opined that it is theorized that this is due to increased sun exposure.

26. Dr. Milliken also opined that the presence of multiple atypical or dysplastic nevi is a known risk factor for the development of melanoma. Dr. Milliken testified that presence of a dysplastic mole (nevi) is considered a precursor of melanoma but that this does not mean it is going to become melanoma and, in general, most people with atypical moles don't get melanoma. Sun exposure may well accelerate the process of a dysplastic mole progressing to melanoma but it will not happen in the majority of people.

27. Dr. Milliken acknowledged that it would be difficult to prove the cause of melanoma in any person with any number of risk factors for development of this form of cancer and Dr. Milliken agreed that the cause of melanoma remains unknown.

28. Dr. Milliken opined that risk factors such as sun exposure and presence of dysplastic moles/nevi pose a higher risk for development of melanoma by Claimant than his exposures as a firefighter considered in the LeMasters study. Dr. Milliken opined that Claimant's atypical nevus count followed by sun exposure were greater risk factors for Claimant's development of melanoma than Claimant's exposures as a firefighter.

29. Dr. Milliken testified that in some cases, cancer can be the result of firefighting exposure. Dr. Milliken testified that the LeMasters study sought to classify the association of firefighting with melanoma as unlikely, possible, or probable and that the final analysis resulted in a possible classification with a statistically greater chance of developing melanoma in the firefighting population of 1.32. Dr. Milliken opined,

however, that Claimant had other risk factors with statistically far greater than the 1.32 affecting the firefighting population.

30. Dr. Milliken testified that a number of studies have indicated that the higher the number of moles on a person's body, the higher the risk factor for melanoma. Dr. Milliken testified that could be based on the number of total moles on the body or based on the number of atypical moles, but that the higher the number of moles, the higher the risk of melanoma. Dr. Milliken testified that Claimant had 4-5 atypical moles which would place him at 10.49 increased risk (with 5 atypical moles), compared to the 1.32 increased risk due to firefighting.

31. Dr. Milliken testified that Claimant's greatest risk for melanoma by far was due to Claimant's mole count. Dr. Milliken also opined that the next greatest risk for development of melanoma was due to Claimant's history of sun exposure. Dr. Milliken agreed that firefighting had some increased risk for developing melanoma, but that it was less than the risk due to the mole count and the sun exposure.

32. The LeMasters study, which both experts relied upon to some degree, classifies the relative risk for melanoma at a 95% confidence interval for the normal mole count on a person's body. For normal mole count, someone with between 41-60 moles has an increased relative risk for melanoma of 2.24. For normal mole count, someone with between 61-80 moles has an increased relative risk for melanoma of 3.26. For normal mole count, someone with between 81-100 moles has an increased relative risk for melanoma of 4.74. After examining Claimant's skin, Dr. Mayer opined that Claimant had between 50-100 moles. In each of the categories analyzing normal mole count and relative risk of melanoma, the risk is higher than the risk associated with firefighting and melanoma, which is between 1.32 and 1.7 depending on which study is used.

33. The LeMasters study also classifies the relative risk at a 95% confidence interval for atypical nevi/moles. For atypical mole count, someone with 3 atypical moles has an increased relative risk for melanoma of 4.1. For atypical mole count, someone with 4 atypical moles has an increased relative risk for melanoma of 6.55. For atypical mole count, someone with 5 atypical moles has an increased relative risk for melanoma of 10.49. Although there was some disagreement as to what qualified as an atypical nevi for purposes of this chart, both experts agreed that Claimant had multiple atypical nevi. Again, in each category, the risk of melanoma due to Claimant's atypical nevi is much higher than the risk associated with firefighting.

34. Respondents have established by a preponderance of the evidence that Claimant did not suffer the compensable occupational disease of melanoma during the course and scope of his employment as a firefighter for Employer under §8-41-209, C.R.S. Respondents introduced evidence of Claimant's specific exposures and risks for developing melanoma that were statistically more significant than the risk of developing melanoma while firefighting. The expert testimony of Dr. Milliken is found credible and persuasive.

35. Although Dr. Mayer disputed Dr. Milliken's analysis, the record demonstrates that it is more probably true than not that the cause of Claimant's melanoma is not related to his employment as a firefighter for Employer. In fact, Dr Mayer agreed that Claimant had significant risk factors related to both his mole count and sun exposure. Respondents have established that Claimant's particular risk factors as outlined by Dr. Milliken render it more probable that his cancer arose from a source outside the workplace. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability – Occupational Disease

For an injury to be compensable under the Act, it must "arise out of" and "occur within the course and scope" of employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. §8-41-301(1)(c) C.R.S.; *Faulkner v. Industrial Claim Appeals Office,*12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for determination by the ALJ. *Faulkner,* 12 P.3d at 846.

Section 8-41-209, C.R.S. reverses the burden of proof for firefighters who have developed certain types of cancers. The statute provides:

8-41-209 **Coverage for occupational diseases contracted by firefighters – repeal.**

(1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed **five or more years** of employment as a firefighter, caused by cancer of the **brain, skin, digestive system hematological system or genitourinary system** and resulting from his or her employment as a firefighter, shall be considered an occupational disease.

(2) Any condition or impairment of health described in subsection (1) of this section:

(a) Shall **be presumed** to result from a firefighter's employment if, **at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence** of such condition or impairment of health that preexisted his or her employment as a firefighter; and

(b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

. . .

(emphasis added).

In *City of Littleton v. Industrial Claim Appeals Office*, 370 P.3d 157, 165 (Colo. 2016) the Colorado Supreme Court determined that the statutory presumption embodied in §8-41-209(2), C.R.S. "is substantive in that it remains in the case as a substitute for evidence." However, the court emphasized that the statutory presumption "is not conclusive, or irrebuttable." *Id*. at 168. The employer can overcome the presumption by producing a preponderance of the medical evidence that the firefighter's cancer "did not occur on the job." *Id*. at 165. Nevertheless, the employer faces a "formidable" burden, "because the employer is tasked with proving a negative." *Id*. at 172.

The Supreme Court in *City of Littleton* clarified the types of evidence that employers can use to rebut the statutory presumption and prove that a firefighter's cancer is not work-related. The employer may attempt to meet its burden either with evidence establishing the absence of either general or specific causation. *Id.* at 168. Specifically an employer may prove by a preponderance of the medical evidence either: "(1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer, where, for example, the claimant firefighter was not exposed to the cancer-causing agent, or where the medical evidence renders it

more probable that the cause of the claimant's cancer was not job-related." *Id*. at 172. Notably, §8-41-209(2)(a), C.R.S. does not require the employer "to disprove causation from every conceivable substance." *Id.* at 171. In fact, if a firefighter's exposure is "speculative, remote or illogical, then it is not typical of the occupation." *Id.*

In this case, and when remanded by the Colorado Supreme Court, *Industrial Claim Appeals Office v. Town of Castle Rock*, 370 P.3d 151, 157 (Colo. 2016) the Supreme Court further determined that to meet its burden of proof the employer is not required to prove a specific alternate cause of the firefighter's cancer. Rather, the employer need only establish by a preponderance of the medical evidence that the firefighter's employment did not cause cancer because the firefighter's particular risk factors render it more probable that the cancer arose from a source outside the workplace. *Id.*

As found, Respondents have established that it is more probably true than not that Claimant did not suffer the compensable occupational disease of melanoma during the course and scope of his employment as a firefighter for Employer under §8-41-209, C.R.S. Respondents introduced evidence of Claimant's specific exposures and risks for developing melanoma that were statistically more significant than the risk of developing melanoma while firefighting. Initially, the firefighter cancer presumption statute provides that skin cancer is presumed to be caused by an occupational exposure if an individual has been a firefighter in excess of five years. Claimant worked as a firefighter for Employer for over 11 years. Medical examinations prior to and during his tenure as a firefighter did not reveal that he was suffering from melanoma.

As found, Dr. Milliken persuasively concluded that Claimant's cancer was more likely caused by Claimant's mole count and Claimant's sun exposure than due to his work activities as a firefighter for Employer. Claimant's normal mole count is very high, which places him at a much higher relative risk for developing melanoma than due to the risk associated with firefighting. Claimant's atypical mole count also places him at a much higher relative risk for developing melanoma than due to the risk associated with firefighting. Additionally, Claimant is of 75% Caucasian, non Hispanic European descent and has lived in high sun regions his entire life. Claimant has participated in outdoor activities for much of his life. Claimant's risk of developing melanoma due to sun exposure also, as opined by Dr. Milliken, is higher than the risk associated with firefighting. Respondents have established sufficient evidence to rebut the presumption that Claimant's melanoma is causally related to his work activities. Rather, Respondents have established that it is more probable that Claimant's melanoma is related to Claimant's mole count and/or sun exposure. Dr. Milliken is found credible and persuasive. Claimant had a considerably increased relative risk for the development of melanoma based on factors not related to his work activities. It is remote and speculative to attribute Claimant's melanoma to his occupation as a firefighter. Instead, Claimant's particular risk factors as outlined by Dr. Milliken render it more probable that his cancer arose from a source outside the workplace. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 20, 2017

/s/ Michelle E. Jones

_____

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St., 4th Floor
Denver, CO 80203

ISSUES

1. Did Claimant prove a change of condition that would justify reopening her claim for additional medical treatment?

2. If Claimant proved that her claim should be reopened, are Respondents liable for treatment Claimant received from her personal providers after April 7, 2016?

FINDINGS OF FACT

1. Claimant worked for Employer as a certified nursing assistant (CNA). On May 17, 2014, she sustained an admitted low back injury while assisting a patient from her bed to a commode.

2. Dr. Dallenbach was Claimant's primary ATP throughout her claim. Between May 19, 2014 and the MMI date of November 24, 2014, Dr. Dallenbach provided comprehensive workup and treatment, including extensive diagnostic testing and referrals to several specialists. She saw Dr. Bainbridge for pain management/injections, Dr. D.K. Caughfield for an EMG/NCV testing, Dr. David Hopkins for a psychological evaluation and therapy, William Beaver, M.A. for biofeedback therapy, and Dr. Ali Murad for a neurosurgical evaluation. Dr. Dallenbach consistently prescribed and monitored Claimant's medications and referred her for two courses of physical therapy.

3. Despite receiving continuous care under Dr. Dallenbach's direction, Claimant went to the emergency room at Parkview Medical Center on numerous occasions, including five visits between August 16, 2014 and September 10, 2014. The primary purpose of those visits was to obtain pain medication, and at least one ER physician thought Claimant had secondary gain and narcotic dependence issues.

4. Claimant has had two lumbar MRIs which revealed very mild degenerative changes. The first MRI on May 30, 2014 showed a "mild" disc bulge at L4-5, "minimal" anterolisthesis and a broad-based disc bulge at L5 S1 without central stenosis or neural foraminal narrowing, and "no evidence of acute abnormality."

5. Claimant saw Dr. Bainbridge, a physiatrist, in July and August 2014. Dr. Bainbridge reviewed the MRI and raised a concern of a possible L5 S1 disk fragment causing right S1 impingement. However, based on her reported symptoms and the physical examination findings, Dr. Bainbridge opined Claimant's pain was primarily coming from her SI joints. He recommended bilateral SI joint injections for diagnostic and potentially therapeutic purposes.

6. Claimant underwent bilateral SI joint injections on July 18, 2014, with no significant sustained benefit. Dr. Bainbridge suggested bilateral epidural steroid injections to the bilateral S1 nerve roots.

7. On July 30, 2014, Claimant saw Dr. Caughfield for an EMG/NCV study, which demonstrated findings consistent with a mild right S1 radiculopathy.

8. Claimant saw Dr. Dallenbach on August 11, 2014 to discuss her return to part-time modified duty. She was quite upset about being returned to work and told Dr. Dallenbach she felt he cornered her, lied to her, and stabbed her in the back. Claimant sat without shifting in her chair or supporting herself with her arms during the appointment, which lasted for approximately one hour. She demonstrated no difficulty standing, sitting down or moving around the office. Dr. Dallenbach further noted:

> During the interview, [Claimant] was quite tearful, however, on conclusion of the interview she proceeded to the lobby of the clinic where it was immediately evident from an observational perspective that she did not demonstrate any affective pain behaviors, i.e. she was no longer tearful and crying but was noted to be laughing lightheartedly.

9. Dr. Dallenbach initially took Claimant off work that day due to her psychological presentation. But on further reflection, he determined she could return to part-time modified duty performing primarily sedentary duties two hours per day up to 10 hours per week.

10. Claimant had a second MRI on August 19, 2014 which showed "no significant abnormality." There was "very minimal disk bulging" at L5 S1 with no encroachment on the spinal canal or neural foramina. The radiologist opined there was "no change" from the May 30, 2014 MRI. Dr. Dallenbach also asked another radiologist to review the first MRI, who agreed it showed no significant abnormality.

11. At her August 20, 2014 appointment with Dr. Dallenbach, Claimant reported 9/10 pain and stated she was spending essentially the entire day lying on a heating pad and only moving about "every once in a while when I try to sit long enough to have dinner with my family."

12. Dr. Dallenbach discussed Claimant's condition with her physical therapist on September 8, 2014. The therapist told Dr. Dallenbach:

> I really do not think that she is going to buy into this. She complained of pain without provocation and she really did not put forth any effort. It is interesting to note that when she was leaving she seemed to be walking better than when she came in and one of the assistants verbalized that to [Claimant], and right after that, she started walking in a more abnormal fashion. I went to the door and watched her leave, and at first as she was leaving, she had a really abnormal gait, but as she and her mom got closer to the car, she was moving, using her hands and talking with her mom, laughing, and did not seem to have any pain at all. She got into the

car without any apparent difficulty and then must've dropped something because she had to get out and had no problem whatsoever.

13. On September 10, 2014, Claimant told Dr. Dallenbach her pain was so severe she could barely shower by herself. Regarding her willingness to participate in additional physical therapy, Claimant said "I will do anything you tell me to. You can throw a brick me, but I really do not think I'm going to get anything out of it."

14. Claimant was ultimately discharged from physical therapy because she "exhibited no capacity for advancement of therapeutic activity during treatment."

15. Despite the essentially normal MRIs and minimal EMG findings, in deference to Claimant's reports of severe pain and dysfunction Dr. Dallenbach referred her for a neurosurgical evaluation with Dr. Ali Murad.

16. Claimant saw Dr. Murad on October 1, 2014. Her most bothersome symptom was axial lumbosacral pain. She rated her pain level at 7/10. The neurological exam was normal "except mild right thigh flexion weakness 4+/5 – not clear if exerting fully or limited by pain." Dr. Murad reviewed both lumbar MRIs and opined there was no evidence of instability, fracture, disc herniation or nerve impingement. He noted the "very minimal" L5 S1 disk bulge was not causing any significant stenosis. Dr. Murad commented "nonstructural causes" of back pain are "difficult to treat . . . [and] the same goes for low back pain in the absence of any objective findings on imaging or exam." Ultimately, Dr. Murad opined "there is no indication for surgical intervention," and "no contraindication to increasing activity, doing physical therapy, etc."

17. Claimant obtained a second opinion from another neurosurgeon, Dr. Joseph Illig, on October 27, 2014. Dr. Illig observed Claimant's gait was "smooth and fluid." Her reflexes were normal, except for the diminished right Achilles reflex. Sensory testing showed a "patchy" alteration of pinprick sensation in a "nondermatomal" pattern. Dr. Illig opined that "except for subtle sensory abnormalities the neurological examination is benign." He opined there was no basis for surgery.

18. In November 2014, Claimant's supervisor relayed to Dr. Dallenbach some information from one of Claimant's coworkers regarding her presentation at work. The coworker indicated Claimant had not complained of any increased pain while performing modified duties and did not appear to have any difficulty completing her assigned tasks.

19. On November 24, 2014, Claimant told Dr. Dallenbach she had gotten worse since returning to work. Dr. Dallenbach reviewed time records which showed Claimant had worked only eight shifts for a total of 16.06 hours that month. Dr. Dallenbach explained it was important to increase her work hours as part of the rehabilitative process. Claimant became angry with Dr. Dallenbach's decision to liberalize her restrictions. She quickly rose from her chair without difficulty and exited the examination room with a normal gait and no sign of pain. In the lobby, she became belligerent and cursed repeatedly. She insisted the increased hours would put her in the emergency room and demanded "Are you going to pay for it Dr. Dallenbach?" Dr.

Dallenbach informed Claimant he would place her at MMI and refer her for lumbar range of motion measurements. Claimant exclaimed "this is fucking bullshit," and left the clinic.

20. Dr. Dallenbach subsequently issued a "Report of Maximum Medical Improvement and Impairment Rating." Relying on the DOWC's Impairment Rating Tips, he opined Claimant did not qualify for a rating because she had no specific diagnosis or objective pathology. He opined "the mere presence" of incidental mild degenerative changes in the lumbar spine was "not sufficient justification to attribute correlation to a nonspecific spinal complaint." He indicated her final diagnosis was "low back pain, not work-related." He also opined Claimant required no injury-related maintenance care.

21. Claimant had a DIME with Dr. Anjmun Sharma on August 6, 2015. Claimant appeared to sit comfortably in the examination room despite claiming "10/10" pain. Dr. Sharma characterized the physical exam as "a completely benign normal examination." He noted there was minimal objective evidence to substantiate an injury in May 2014. Nevertheless, Dr. Sharma appears to have given Claimant considerable benefit of the doubt and assigned 9% whole person impairment. Regarding maintenance care, Dr. Sharma opined:

> There are no structural lesions on MRIs or other diagnostic tests. She failed injections. The patient also had negative x-rays. She has also had other EMG studies that have been negative for any lower extremity peripheral neuropathy or radicular symptoms. Nothing can be supported from the medical record to sustain the patient's ongoing need for care.

22. Insurer filed a Final Admission of Liability on August 25, 2015 based on Dr. Sharma's DIME report. The FAL denied medical benefits after MMI. Claimant timely objected and requested a hearing on the issue of post-MMI medical benefits.

23. Administrative Law Judge Lamphere conducted a hearing on March 3, 2016. After thoroughly considering all the evidence, ALJ Lamphere issued detailed findings of fact, conclusions of law and order which denied further medical care as not reasonable, necessary, or related to her May 17, 2014 injury.

24. Claimant did not appeal ALJ Lamphere's order, and it became final.

25. After being released by Dr. Dallenbach, Claimant treated with her personal providers through the Southern Colorado Clinic. On September 17, 2015, Claimant saw Amanda Fadenrecht, NP for complaints of "continued back pain." Her daily pain was 8/10 and she requested an increase of Cymbalta[1] and Neurontin. Nurse Fadenrecht stated Claimant's condition had "deteriorated," but there are no objective findings or other significant clinical findings documented in the report that appear substantially worse than those reflected in Dr. Dallenbach's records.

[1] The ALJ notes ALJ Lamphere had specifically found Cymbalta was not reasonable and necessary because there was no persuasive evidence it provided Claimant with any meaningful benefit.

26. Approximately four weeks after the hearing with ALJ Lamphere, Claimant saw Nurse Fadenrecht for a medication refill, and reported "no change in chronic back pain with radiculopathy." Similarly, on August 12, 2016, Claimant reported "no change in pain, not worsening or improving." Later records describe her ongoing symptoms with terms such as "persist[ent]," "chronic," and "unchanged."

27. Claimant began seeing Dr. Brandon Green in November 2016 for "pain management." Dr. Green has administered sacral nerve root rhizotomies, medial branch blocks and epidural steroid injections. The intervenetions have expanded to include the thoracic and upper lumbar areas. Her pain medication was eventually escalated to Dilaudid, although she subsequently stopped Dilaudid after a withdrawal experience.

28. Dr. Green does not appear to have obtained any new MRIs, but simply relied on the 2014 MRIs.

29. Claimant saw Dr. Eric Ridings for an Independent Medical Examination (IME) on June 27, 2017 at Respondents' request. Dr. Ridings interviewed and examined Claimant and performed a comprehensive review of her medical records. Dr. Ridings opined Claimant had an extensive course of medical care but continues to have widespread nonanatomic pain complaints, with no significant objective abnormalities documented. Dr. Ridings opined that at most Claimant had an initial work-related diagnosis of thoracolumbar strain which objectively resolved. Dr. Ridings concluded Claimant has no objective findings of any ongoing diagnosis related to her work injury, remains at MMI, and requires no maintenance care. Dr. Ridings opined there is no credible evidence Claimant's work-related condition has worsened.

30. The opinions of Dr. Dallenbach, Dr. Sharma, and Dr. Ridings, are credible and persuasive.

31. Claimant failed to prove a change of condition that would justify reopening her claim for additional medical benefits.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The reopening authority reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and the decision whether to reopen a claim when the statutory criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof on any issue sought to be reopened. Section 8-43-304(4).

Here, Claimant is seeking to reopen her case based on a change of condition. In the reopening context, a change in condition refers "to a change in the condition of the

original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 741 P.2d 1328, 1330 (Colo. App. 1985). Even if a claimant proves a change in condition, she is not automatically entitled to have his claim reopened. Rather, reopening is only appropriate if additional benefits will be awarded. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000).

As found, Claimant failed to prove a change of her medical condition to justify reopening her claim. Although Claimant told Dr. Ridings her condition is worse, there is no persuasive evidence to support that allegation. Claimant's current condition appears to be essentially the same as it was while she was treating with Dr. Dallenbach and at the DIME. Claimant has reported extreme levels of pain and severe disability since her date of injury. Given the numerous inconsistencies documented in the record and Claimant's demonstrated proclivity toward embellishment of her symptoms, the ALJ is not inclined to give her subjective pain complaints substantial weight. There is no persuasive objective evidence to support her contention she has worsened.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen her claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 21, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the lumbar surgery recommended by Dr. Toby Moore is reasonable, necessary, *and related* to his admitted claim?

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On January 29, 2015, the Claimant was injured while restraining a violent patient while working for the Respondent Employer. A first report of injury was filed, (Exhibit A, p. 2), followed by a General Admission of Liability dated March 1, 2016, which admitted the claim. (Exhibit A, p. 3).

2. As part of his treatment under this claim for the January 29, 2015 injury, the Claimant underwent a Hemilaminotomy and discectomy at L4-5 by Dr. Michael W. Brown, M.D., on December 29, 2015. (Exhibit 6, p. 73).

3. The Claimant was then involved in a motor-vehicle collision while attending a medical appointment related to this workers' compensation claim. "He is status post laminectomy at L4-L5 (sic) Dr. Brown. This has been doing well until April 18 when he was up in Colorado Springs going to his next appointment with Dr. Brown. He was a passenger in his son's Jeep. They were stationary when they're hi(t) from behind by some(one) going approximately 35 miles an hour." "[Claimant] has noticed some increased stiffness since then, but so far no recurrence of the left leg pain…." (Exhibit 6, Pg. 53).

4. Records from physical therapists who were treating the Claimant before the motor-vehicle collision of April 18, 2016, also indicated that Claimant was showing reasonable improvements following his surgery. (Exhibit 4, pp. 61-63).

5. As a result of his worsening back pain, Dr. Daniel Olson, M.D., had referred Claimant for a surgical consultation. (Exhibits, Pg. 43). Claimant was then seen by Dr. Toby Moore for a surgical consultation.

6. Since the motor-vehicle collision of April 18, 2016, the Claimant's states to Dr. Moore that his back pain has worsened. However, Claimant also notes to Dr. Moore that "he never received much relief from that procedure." (Exhibit 1, pp. 2-3).

7. Dr. Moore did an evaluation of the Claimant on February 7, 2017, when he examined Claimant and reviewed his medical history. (Exhibit 1, pp. 1-4). Dr. Moore took lumbar x-rays of the Claimant and examined them as part of his evaluation. "AP and lateral plain radiographs [of] the patient's lumbar spine were obtained and reviewed today." Dr. Moore viewed MRI images and interpreted them himself. "MRI of the L-spine obtained at an outside facility on 1/13/2017 was also reviewed…."

8. In reviewing the MRI image, Dr. Moore noted that the MRI scan showed a "severe central and lateral recess stenosis at L4-5." This finding was also mentioned on the previous radiological report, as 'central canal stenosis' (Exhibit 5, p. 69). The difference in findings is simply that there is no mention that the stenosis at the L4-L5 level on April 21, 2015, was being called "severe."

9. Dr. Moore then recommended the L4-L5 laminectomy. (Exhibit I).

10. In evaluating the opinion of Dr. Moore compared to that of Respondent's IME physician, Dr. Jorge O. Klajnbart, D.O., this ALJ notes that Dr. Klajnbart admitted on cross-examination that he did not personally review the MRI images. He further admitted on cross-examination that if the Claimant was his actual patient, then he would have reviewed the actual images, as opposed to relying on a radiologist's report.

11. Dr. Klajnbart testified that the MRI imaging of January 13, 2017, showed no changes from an earlier MRI taken on April 21, 2015.

12. Dr. Klajnbart stated during the hearing that his opinion on the MRI scans was also voiced by treating physician, Dr. Michael C. Sparr. However, like Dr. Klajnbart, Dr. Sparr also never actually reviewed the MRI images. Instead, he relied upon a radiological report. This is noted in Dr. Sparr's medical records. "I obtained an MRI of the lumbar spine. The report was fully reviewed…." (Exhibit 2 p. 5). "This is reportedly unchanged from the previous MRI…." *Id*.

13. Prior even to his original injury of January 29, 2015, Claimant has had a history of back issues. On October 22, 2014, Claimant had gone to his primary care provider ("PCP"), complaining of lower back pain which had begun two weeks prior, and that was now radiating down his left side. He described the pain as being dull, aching, and constant, with weakness and stiffness. He also reported that heat, muscle relaxants and pain medications had been effective in the past. He received an injection in his lower back on this date. (Exhibit B).

14. On November 21, 2014, Claimant again complained to his PCP of lower back pain "since October of gradual onset" (Exhibit C, p. 10).

15. In the weeks following his surgery of December 29, 2015, Claimant reported resolution of his left leg pain, but continued pain in his left buttock. (Exhibit G, p. 133, Exhibit D, pp. 70-78).

16. Following his April 18, 2016 traffic accident, Claimant saw Dr. Michael Sparr, MD. At that time, Claimant complained of constant, achy back pain, greater on the left side. He denied any leg symptoms. Dr. Sparr recommended lumbar injections, for both therapeutic and diagnostic purposes (Exhibit H, pp. 138-143).

17. On September 14, 2016, Claimant saw Dr. Sparr, and reported no change in symptoms. He was provided a gluteal trigger point injection and was then referred for massage therapy. (Exhibit H, pp. 144-145).

18. On October 4, 2016, Claimant again saw Dr. Sparr, once again noting no significant difference in his pain levels. Massage therapy was continued, along with an additional trigger point injection. (Exhibit H, pp 152-156).

19. On October 11, 2016, Dr. Sparr then performed a left sacroiliac joint injection. This relieved the *central* buttock pain, but not to the left side. (Exhibit H, pp.159-163).

20. On October 26, 2016, Dr. Sparr then ordered a new lumber MRI to rule out any further discogenic cause for Claimant's continued lower back pain. (Exhibit H, p. 170)

21. Once this MRI was performed on January 13, 2017, Dr. Sparr noted that the MRI showed "degenerative findings but *nothing new since his surgery.*"(Exhibit H, p. 177) (emphasis added).

22. On March 16, 2017, Claimant went to his PCP, this time regarding his elevated blood sugar levels relating to his longstanding diabetes (Exhibit J).

23. On June 1, 2017, Claimant reported to his massage therapist that his low back pain is "less intense and less frequent." (Exhibit K).

24. On July 12, 2017, the Claimant saw Dr. Jorge O. Klajnbart, D.O. for an independent medical examination. Dr. Klajnbart is a Level II accredited orthopedic surgeon. He has been trained to make causation determinations with regard to surgical recommendations. He had postdoctoral training in orthopedic surgery through the U.S. Army. Approximately one-third of his medical practice since 1999 has focused upon various treatment modalities for lower back injuries, but he longer performs back surgeries himself.

25. At the IME, Claimant did not mention to Dr. Klajnbart that he continues to have pain below the buttocks. Regardless, Dr. Klajnbart concluded that any

neurogenic claudation referred to by Dr. Moore is more likely than not due to the congenital stenosis and pedicle shortening and not due to any acute traumatic event.

26. Dr. Klajnbart found that the January 13, 2017 MRI confirmed "no significant change in his lumbar spine" following the Claimant's April 20, 2016 motor vehicle accident. (Exhibit L, p.200). Dr. Klajnbart's physical examination of the Claimant showed normal reflexes, excellent strength and good range of motion.

27. Dr. Klajnbart stated in his IME report: "The combination of a normal lumbar spine examination with an unchanged MRI of the lumbar spine upholds a medical opinion that the individual did not sustain any significant injury to his lumbar spine that would require surgical intervention from this motor vehicle collision." (Exhibit L, p.200).

28. On August 1, 2017, ATP Dr. Olson noted his review of Dr. Klajnbart's report, and only offered in response that "*one could argue* that the car accident has made this condition symptomatic." (Exhibit. D, p.119) (emphasis added).

29. In his testimony, Dr. Klajnbart addressed the possibility of the auto accident causing significant nerve swelling in the spinal cord of Claimant:

Q And you testified that an acute incident could make the--the nerve endings swell within the spine. What---is that possible?

A To--to make nerve endings swell you need significant trauma, on the order of being ejected from a vehicle.. So it--can it, is it a possibility, absolutely. Is it medically probable, no sir.

30. Dr. Klajnbart testified that he agreed with Dr. Moore's findings that determined the Claimant's pain generators to be non-industrial in nature.

31. Dr. Klajnbart testified that the Claimant's pain is not discogenic in nature. Instead, it is being generated by his non-industrial degenerative conditions, namely his congenitally shortened pedicles, his congenital stenosis and his neurogenic claudation.

32. Dr. Klajnbart testified that the Claimant's report of a gradual onset of lower back pain in October 2014 prior to his work injuries made it more likely than not that he was suffering from these non-industrial, degenerative conditions before he was injured at work. He also testified, however, that these preexisting conditions did *not* make the Claimant more susceptible to traumatic lower back injuries:

Q So, it's your testimony that somebody with a narrowing of the spinal canal is not any more susceptible to injury to their lumbar spine than--than somebody with a normal spine?

A That's correct.

33. Dr. Klajnbart testified that if either the incident of January 29, 2015 or the motor vehicle accident of April 18, 2016 caused the Claimant's preexisting, non-industrial conditions to temporarily flare symptomatically, surgical correction would not be reasonably necessary to treat those flares. Rather, any resultant swelling or inflammation would be temporary in nature.

34. Dr. Klajnbart testified that the Claimant's diabetes could also be causing him nerve-related pain in the lower back and lower extremities.

35. Dr. Klajnbart testified that range of motion measurements have little, if no impact on the questions of causation, relatedness and necessity of the surgery proposed by Dr. Moore.

36. Dr. Klajnbart testified that while possibly reasonable and necessary, there is no evidence to support that the surgery proposed by Dr. Moore is causally related to the Claimant's industrial injuries.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., (2013). A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2013).

3. The Employer must only provide medical treatment that is reasonable and necessary to cure and relieve the effects of the Claimant's industrial injury. *Colo.Comp.Ins.Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994).

4. The failure of past surgeries to relieve pain and limitations is a sound basis for denying further surgical intervention that is otherwise physiologically indicated. See *Holcombe v. FedEx*, W.C. 4-824-259 (ICAO, March 24, 2017).

5. The Claimant was actively treating, including an injection, for a gradual-onset of lower back pain with left-sided radiculopathy immediately prior to his industrial injury. This preexisting condition presented similarly to the Claimant's reports of lower back and left-sided symptoms after his industrial accident and the subsequent motor vehicle accident.

6. Claimant had actively treated for his lower back and left-sided condition with muscle relaxers and narcotics even prior to the original industrial injury.

7. The Claimant's L4-5 surgery on December 29, 2015 resolved the Claimant's *left leg* symptoms, according to his reports to his treatment providers. This leads the ALJ to believe that the surgery successfully repaired the Claimant's herniated disk.

8. However, Claimant's L4-5 surgery on December 29, 2015 did not relieve his lower back and left buttock pain. Pain complaints in these areas have been consistent from before the industrial accident through to the most recent examination of the Claimant by Dr. Klajnbart on July 12, 2017.

9. Dr. Sparr made numerous attempts to isolate and treat the Claimant's low back and left buttock pain through multiple injections, both diagnostic and therapeutic, as well as targeted massage therapy. When his efforts did not succeed, he ordered a MRI to rule out any further discogenic cause of the Claimant's continued low back and left buttock pain.

10. The lumbar MRI on January 13, 2017 did reveal non-industrial conditions that explain the Claimant's ongoing complaints. The MRI did not reveal any objective findings to suggest that the Claimant's ongoing pain in the lower back and left buttock is related to his industrial injuries.

11. Dr. Moore is not Level II accredited with the Division of Workers' Compensation, and he did not address the *causation* issue at all for the surgery he proposed. Dr. Moore's experience with treating and operating on lower back conditions

is not presented in the record, but the ALJ sees no evidence to question his capabilities as a back surgeon.

12. Dr. Klajnbart, on the other hand, is a Level II accredited orthopedic surgeon with vast experience treating and evaluating lower back conditions. Dr. Klajnbart performed the most recent physical examination of the Claimant, reviewed his medical history and then made a causal analysis with regard to Dr. Moore's proposed surgery.

13. Dr. Klajnbart agreed with Dr. Moore's findings. Those findings all point to non-industrial conditions: namely congenital stenosis, congenitally shortened pedicles and non-traumatic neurogenic claudation. Dr. Klajnbart agrees with Dr. Sparr (and Dr. Moore, for that matter) that there is no acute, discogenic cause of the Claimant's continued low back and left buttock complaints.

14. Dr. Olson noted that the April 18, 2016 motor vehicle accident caused an increase in the Claimant's lower back and left buttock symptoms. A temporary flare in symptoms does not justify surgical intervention. In this case, the Claimant's lower back and left buttock symptoms have remained fairly constant. They have only fluctuated mildly in reported severity since the initial industrial accident, and they began before the initial industrial accident. The Claimant himself told Dr. Moore that the initial surgery did not significantly help this condition for his lower back and left buttock.

15. The ALJ is not persuaded that the two MRI reports differ in any material fashion on the causation issue. Nor was it necessary to personally view the images to render a better conclusion than the radiologists already have. In terming the stenosis "severe", Dr. Moore did not opine on *relatedness*; merely his opinion for the need for surgery.

16. In the final analysis, to accept Claimant's theory of recovery in this case, the ALJ must contrast Dr. Olson's single reference in his report that "*one could argue*" that this car accident rendered his condition symptomatic, versus the opinion stated by Dr. Klajnbart that this is not medically probable. The objective evidence also does not support this theory. Claimant carries the burden of proof on this issue, and it has not been met here.

17. Taken as a whole, the evidence actually shows that it is more likely than not that the need for the surgery proposed by Dr. Moore is *related* to non-industrial factors. These non-industrial factors include neurogenic claudation, congenitally shortened pedicles, congenital stenosis, and possibly the Claimant's ongoing diabetes.

ORDER

It is therefore ordered that:

1. Claimant's request for the surgery being proposed by Dr. Moore is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 25, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant proved, by a preponderance of the evidence, that he sustained a compensable injury to his ears and neck?

II. If compensable, whether Claimant proved, by a preponderance of the evidence, that he was entitled to medical benefits including reimbursement for physical therapy co-pays?

III. If compensable, whether Respondents proved, by a preponderance of the evidence, that Claimant did not timely report the injury?

Although Claimant asserted entitlement to wage loss, the undersigned ALJ determined that temporary total disability (TTD) benefits were not endorsed as an issue for hearing. Consequently, this order does not address Claimant's entitlement to TTD benefits. Because Claimant's entitlement to TTD is not addressed, the ALJ specifically reserves for future determination, the issue of Respondents entitlement to penalties for late reporting, including the time period and the amount of any such asserted penalty.

FINDINGS OF FACT

Based upon the evidence presented, including the post hearing deposition testimony of Dr. Reiner, the ALJ enters the following findings of fact:

1. Employer operates a research and development company which supports a variety of federally funded projects. As part of their work, Employer collects sensitive data to develop and support the research projects they underwrite. Some information gathered as part of the research conducted is proprietary and protected from disclosure to the general public. Claimant's position occasionally brings him in contact with such data stored on computer hard drives. He testified this data ranges from top secret to unclassified.

2. On October 6, 2016, Claimant sought direction concerning the disposal of three metal computer hard drives[1] he felt may have contained the residue of sensitive "For Official Use Only" (FOUO) information.

3. According to Claimant, he took the hard drives to a security officer and asked him to take them for destruction. The security officer declined, prompting Claimant to ask if he should simply throw them in the trash. Getting no direction from security, Claimant decided to take the drives to a metal dumpster located on company grounds.

[1] Estimated to weigh about five pounds. See Respondents' Exhibit C.

4. Intent on rendering the suspected FOUO information on the drives useless, Claimant placed the drives in a plastic bag; top knotted it and proceeded to the aforementioned dumpster. From an "over watch" position, approximately 12 feet above the ground upon which the dumpster sat, Claimant slung the bag containing the metal drives overhead forcefully into the wall of the metal dumpster in an effort to shatter the data containing platters inside.

5. Claimant testified that the impact of the metal hard drives with the metal wall of the dumpster emitted a loud sound that came "blasting" back at him. He likened the sound to a gunshot, testifying that he was knocked backward. Claimant testified that he experienced immediate pain and ringing in his ears so severe that he decided to drive home to take 1600 mg of Ibuprofen.

6. While driving home, Claimant noticed that in addition to the pain and ringing in his ears, he had limited range of motion of his neck. Once home, Claimant took Ibuprofen and proceeded to a pre-scheduled meeting.

7. Five days prior to the October 6, 2016 incident (October 1, 2016), Claimant inadvertently walked face first into a door at his home after getting up at night to use the bathroom. Claimant testified that he sustained an abrasion on the bridge of his nose and likely suffered a mild concussion as a consequence. He sought treatment with his primary care physician, Linda Silvera, who ordered x-rays to verify that his nose was not broken.

8. Claimant testified that after experiencing neck stiffness as well as pain and ringing in his ears for two weeks following the October 6, 2016 incident, he sought treatment with Dr. James Yohanan at Colorado ENT & Allergy. According to Claimant, he self referred to Dr. Yohanan because his health insurance does not require a referral from a primary care provider. By the time Claimant saw Dr. Yohanan, approximately 30 days had elapsed from the initial incident date.

9. The ALJ finds Claimant's testimony concerning the events leading up to the October 6, 2016 event and the symptoms he experienced afterwards credible.

10. Claimant was first evaluated by Dr. Yohanan on November 3, 2016. During this appointment, Claimant's history of present illness (HPI) was documented as follows:

> A 49-year–old male seen in initial consultation of ear pain following a forehead, head and neck injury one month ago. He says it came on shortly after the injury. He accidently walked into the side of a door striking the bridge of his nose. . . . His job requires a lot of concentration and there is some stress. He says these are both triggers for what his main complaint is, bilateral ear pain sometimes transmitting to headache. He says the ear pain is behind the ears and we found taut muscle bands, the mastoid, tenderness infraauricular and C1-C2 tightness bilaterally.

11. Physical examination, including otoscopic evaluation of the ears was normal; however, examination of the neck revealed "bilateral infraauricular tenderness, mild mastoid muscle insertion tenderness and tightness with passive movement." Claimant's C1-C2 rotation was measured at 2-5 degrees with discomfort bilaterally." Normal rotation was documented as 45 degrees. Claimant's hearing was tested and his audiogram was found to be "normal" although one "possible conductive component at 3kHz was found in the right ear."

12. In diagnosing Claimant with otalgia and cervicalgia, Dr. Yohanan opined as follows: "Almost certainly what I am finding on exam as a cause of [Claimant's] stress and tension related posterior ear pain is probably related to some soft tissue musculoskeletal injury to his neck from the injury a month ago. The acute tightening of the musculature in this area is probably triggering ear pain. It certainly can be worse with stress and tension as triggers. I see no primary otologic disorder nor would I expect one with this mechanism of injury." Dr. Yohanan referred Claimant to Cornerstone Physical Therapy for additional evaluation and treatment.

13. There is no mention of the October 6, 2016, dumpster incident Claimant alleges to have caused his symptoms in Dr. Yohanan's November 3, 2016 medical record.

14. Claimant began treatment at Cornerstone Physical Therapy (Cornerstone) for tinnitus (ringing) and pain behind his ears and head under the care of Roni Sorensen on November 7, 2016. Claimant continued his treatment at Cornerstone through March 1, 2017. He paid a total of $1,690.00 in co-pays for his treatment with Ms. Sorensen.

15. On February 16, 2017, Claimant returned to Dr. Yohanan for a follow-up appointment regarding his tinnitus. During this encounter, Dr. Yohanan corrected and clarified the history surrounding the ringing in Claimant's ears and the pain in his neck. In his report from this date of service, Dr. Yohanan notes:

> Patient was seen back in November about a month after an injury. I have a very detailed note, but on closer questioning it turn out there were 2 incidents, somewhat related, but about five days apart that was not clear to me. He admitted he was in "bad shape" when he saw me last, but is feeling remarkably better now. Basically, he had the head and neck injury that is detailed in my previous note on a Sunday. He says he probably had a mild concussion that was affecting his concentration and thinking. He was not noticing hypersensitivity to sounds or light, but again he just did not feel right after that injury. He thinks that might have influenced the behavior he had at work where he threw about 5 pounds of metal into a metal trash contained making a very loud acoustic sound. He likened it to a gunshot. It probably caused a slight percentage more to his right ear than his left. Immediately, he started to notice tinnitus. We referred him for physical

> therapy because of the neck findings which were probably related to the first injury. Interestingly, over time his neck is feeling much better, and he says this has lessened the tinnitus, but it is still present in the background. He is wondering if it ever is going to go away. He also asked about an opinion on his hearing loss. I pulled up his audiogram and actually would not term him as having a true hearing loss. I believe at 2000 Hz he had a single tone on the right side that was borderline of normal levels, but that is the only tone at either side that was a finding. Therefore, I would not call it a hearing loss, although he may have a perception of hearing loss. . .

16. Based upon the content of Dr. Yohanan's February 16, 2017 report, the ALJ finds that he was unaware of the October 6, 2016 incident involving the disposal of computer hard drives into a metal dumpster as well as the alleged impact that the method of disposal had on Claimant's hearing and neck. The ALJ finds it probable that Claimant was laboring under the effects of a mild concussion caused by the October 1, 2016 incident and simply did not provide a history concerning the October 6, 2016 incident and the cause of his tinnitus and neck pain. Consequently, Dr. Yohanan provided an opinion that the pain and ringing in Claimant's ears as well as his neck pain were a direct result of striking his nose on a door on October 1, 2016.

17. During the February 16, 2017 encounter, Dr. Yohanan provided assurances to Claimant that he "really [did] not have hearing loss." Based upon the objective testing referenced in Claimant's medical records along with the opinions of Dr. Yohanan and Dr. Reiner, the ALJ is persuaded that Claimant, more probably than not, does not have hearing loss.

18. At the conclusion of the February 16, 2017 appointment, Dr. Yohanan opined: "I do think the muscle tension of the head and neck injury aggravated by his hypersensitivity to sound from his concussion led to the onset of the tinnitus." He also stated: "Given the situation above and the temporal relationship and possibly of hypersensitivity of his ears and cochlear to sound after a concussion, the work-related noise exposure both temporally and theoretically played a role in his symptoms." The undersigned ALJ interprets the above opinions from Dr. Yohanan to indicate that the conditions of Claimant's employment, i.e. slamming the hard drives into the metal dumpster acted upon an individual weakness and hypersensitivity to result in Claimant developing tinnitus and neck pain after being sensitized to the same by the October 1, 2016 concussion. Consequently, the ALJ finds that the act of destroying the hard drives aggravated a pre-existing, yet latent tinnitus which then became manifest giving rise to the need for treatment.

19. Concerning the reporting of the incident to the Employer, Claimant acknowledged that he did not report the alleged incident to the Employer until after he saw Dr. Yohanan in November of 2016. Claimant testified that he was in "bad shape" and could not report the injury earlier and that the filing procedures to initiate a claim

were buried within Employer's website. The ALJ is not persuaded based upon Claimant's indication that he reported the injury after learning he had hearing loss.

20. Barbara Barrasso, who is a registered nurse with MITRE Health Services, testified that part of her role is intake of workers' compensation claims for the Employer. On November 29, 2016, Claimant provided a written report of the incident to Employer by completing an injury report and a workers' compensation claim.

21. Ms. Barrasso testified that she sent a designated provider list to Claimant at his work email identified as the list contained at Exhibit H along with the contact information of Ms. Sherri Stoner, the CNA Insurance Claims Specialist, who was assigned to handle Claimant's claim. The list contained four local providers who Claimant could see for workers' compensation treatment.

22. Claimant did not present any evidence that he had treated with anyone other than Dr. Yohanan and physical therapist Roni Sorenson for his alleged injury and he acknowledged that he began treating with them prior to the reporting of the incident to any Employer representative.

23. Erin Schultz, the local Colorado Springs Facility Security Officer for Employer, testified concerning the Employer's policies on disposal of unclassified material. She indicated that the only materials that were actually disposed of at the Employer's Colorado Springs location were paper documents, CDs, and DVDs, which could all be shredded. She testified that it was standard policy to accept all unclassified drives (like the hard drives at issue here) including hard drives from employees' home computers for disposal. She testified that such hard drives would be collected in a box stored in the safe in the security office and from time to time would the box would be sent to Employer's home office which would in turn forward it to the National Security Agency (NSA) for ultimate destruction. She testified that all security officers were trained to accept such hard drives in accordance with this policy.

24. Ms Schultz testified that the dumpster outside of the building was not locked or secured, as would be required by Department of Defense policy, because no sensitive materials were ever disposed of in that dumpster. She testified that breaking the hard drives would not be enough to destroy the residual information because broken pieces from the platters could be reconstituted to access the data contained on the drive. Consequently, she testified that shattering the drives would not comply with the Employer's policy for disposal of drives containing sensitive information.

25. As noted above, Dr. Seth Reiner testified by post-hearing evidentiary deposition. Dr. Reiner is board-certified by the American Board of otolaryngology for head and neck surgery. Dr. Reiner testified as an expert in ear, nose and throat (ENT) conditions, including hearing loss and tinnitus caused by acoustic trauma.

26. Dr. Reiner testified when there is an impact and sound, we perceive that

sound by vibration of molecules against other molecules as the sound propagates itself on linear lines. He testified that the greatest hearing damage would be from an up close exposure to an acoustic source which damage would lessen with distance. According to Dr. Reiner, most sound will escape out of the opening of a container along the path of least resistance. After reviewing the pictures of the dumpster in question, Dr. Reiner noted that the dumpster appeared wide open. Consequently, Dr. Reiner opined that any sound created by striking the wall or side of the dumpster would dissipate quickly over its large surface area. He also noted that the plastic bag used to contain the drives in this case may have provided some insulation against the sound, lessening it.

27. Dr. Reiner testified that he anecdotally attempted to re-create Claimant's mechanism of injury taking three hard drives in a plastic bag and sling them into a dumpster from a distance of three feet and measuring the decibel level from the opening of the dumpster with a decibel meter. (Decibels are a measure of sound pressure for the sound we perceive. According to Dr. Reiner, he was only able to produce a range of decibels from 93 – 105. For context, he referred to Purdue University's publication for examples illustrating decibel levels. It noted that motorcycle at 25 feet away would be 90 decibels. A helicopter taking off at 100 feet is equal to 100 decibels. Dr. Reiner explained that 110 decibels with a riveting machine would still take a couple of hours of exposure to cause any trauma. According to Dr. Reiner, acoustic trauma from a single/momentary exposure would take 150 decibels. Therefore, Dr. Reiner concluded that he could "find no evidence of any event that caused significant ear damage, tinnitus or ear pain from [the] event that happened on October 6th." Given the number of variables involved and the methodology utilized to recreate the dumpster incident here, the ALJ is not persuaded that Dr. Reiner's "experiment" is, as he testified, a "very accurate representation" of the incident involving the attempted destruction of the hard drives in this case. To the contrary, the ALJ concludes that the results of Dr. Reiner's "experiment" do not meet the standards for consideration of scientific evidence. Consequently, the ALJ finds Dr. Reiner's opinion that slamming the hard drives into the metal dumpster could not have caused tinnitus and neck pain unreliable and unconvincing.

28. Dr. Reiner also testified that Dr. Yohanan's treatment does not support that Claimant suffered an acoustic trauma in this case. Concerning Claimant's alleged hearing loss, Dr. Reiner explained that Claimant's audiogram with Dr. Yohanan that showed only a slight, right-sided drop at 2000 Hertz, which was within normal limits. Moreover, even assuming that the dumpster incident was as loud as a gunshot, the hearing loss would have been at 4,000 Hertz and not 2,000 Hertz. While the ALJ is persuaded that Claimant does not have a hearing loss based upon the results of objective testing, the ALJ finds that the testing performed does not and cannot measure tinnitus or the presence of neck pain. Even Dr. Reiner testified that tinnitus can be present in the absence of hearing loss. Consequently, the evidence presented persuades the ALJ that Claimant suffered an acoustic trauma causing tinnitus and neck pain after forcibly slamming the hard drives into a metal dumpster. Dr. Reiner's contrary opinion that Claimant's tinnitus is age related and/or caused by the October 1, 2016 concussion is not convincing.

29. Dr. Reiner also testified that the mechanism of injury as described by Claimant would not have caused a musculoskeletal injury. As noted at paragraph 10 above, Claimant's ear pain was noted initially to be behind the ears and it was documented on examination that Claimant had "taut muscle bands, mastoid, tenderness infraauricular and C1-C2 tightness bilaterally." The ALJ finds it probable that Claimant's ear pain and tinnitus resulted in increased muscle tightness/tenderness, i.e. a stiff neck prompting his need for physical therapy involving the cervical spine. While Claimant's exposure to a loud gunshot like sound probably did not cause a primary injury to the neck, the ALJ is persuaded that his ear pain and tinnitus indirectly caused the need for neck treatment.

30. Claimant has failed to establish that he suffered a compensable hearing loss as a consequence of the October 6, 2016 incident. However, the evidence presented persuades the ALJ that Claimant has proven, by a preponderance of the evidence, that he suffered a compensable injury to his neck and ears, in the form of tinnitus as a direct consequence of slamming the hard drives onto the wall of the dumpster in question. Nonetheless, the evidence presented convinces the ALJ that the treatment Claimant obtained through Dr. Yohanan's office and Cornerstone Physical Therapy as a consequence of these compensable injuries is not authorized.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App.*2008).* The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App.2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App.2002). The same principles concerning credibility determinations that apply to lay witnesses apply to

expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App.2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). In this case, the ALJ concludes that the Claimant is a reliable witness. His testimony supported by the record evidence including the medical records submitted for consideration. Specifically, the ALJ concludes that Claimant's testimony regarding the events leading up to his injuries and the symptoms he described thereafter are credible and persuasive. Moreover, the ALJ concludes that the opinions of Dr. Yohanan are credible and more persuasive than the contrary opinions of Dr. Reiner.

C. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo.App.2000).

Compensability

D. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo.App.2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment relationship with Employer and during an activity, specifically attempting to destroy the data containing plates encased in a metal computer hard drive. Nonetheless, the question of whether the alleged conditions, for which Claimant seeks benefits, "arose out of" his employment must be resolved before the injury is deemed compensable.

F. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). There is no presumption that an injury which occurs in the course of employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App.1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation. To the contrary, lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo.App.1986).* As found here, Claimant's testimony regarding the event leading up to and the cause of his symptoms is credible and supported by the content of the medical records.

G. Moreover, Respondents suggestion, through Dr. Reiner that Claimant's symptoms are a direct consequence of the concussion suffered five days prior to the incident involving destruction of the computer hard drives, is not convincing. While the evidence presented establishes that Claimant saw his PCP who obtained x-rays of the nose there is a dearth of medical evidence to support a conclusion that Claimant had ongoing ringing in his ears prior to the October 6, 2016 incident. Moreover, any aggravation of a pre-existing condition (neck pain) or susceptibility to injury (tinnitus) does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo.App.2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo.App.1990). Aggravations of pre-existing, yet latent conditions which become manifest by the work injury are nonetheless compensable. See *Subsequent Injury Fund v. Devore*, 780 P.2d 39 (Colo.App. 1989); *Seifried v. Industrial Commission*, 736 P.2d (Colo.App.1986). As found here, the undersigned ALJ interprets the opinions from Dr. Yohanan to indicate that the conditions of Claimant's employment, i.e. slamming the hard drives into the metal dumpster acted upon an individual hypersensitivity to cause Claimant to develop tinnitus and worsened neck pain after being sensitized to the same by the October 1, 2016 concussion. The totality of the evidence presented, including the medical records and Claimant's testimony persuades the ALJ that the attempt to destroy the data containing pates in the hard drives combined with the latent effects of Claimant's prior concussion to produce pain and ringing in the ears and a painful stiff neck.

H. Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-

existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). Here, the evidence presented supports a conclusion that the pain and ringing in Claimant's neck and ears is a direct consequence of his work-related activities and not the lingering effects of a prior concussion. As found, the contrary opinions of Dr. Reiner are not persuasive. Consequently, the claimed injuries are compensable.

Medical Benefits & Claimant's Entitlement to Reimbursement for Physical Therapy Co-payments

I. As noted, Claimant bears the burden of establishing entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Regardless, Respondents are only liable for authorized treatment. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997). Under §8-43-404(5)(a)(I)(A), C.R.S. 2014 the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973).

J. Under § 8-43-404(5)(a), C.R.S., the employer or insurer is afforded the right in the first instance to select a physician to treat the injury. The statute requires the employer or insurer to "provide a list of at least two physicians, . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list . . .." In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician ... at the time of injury" gives the employee "the right to select a physician or chiropractor." The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals*

Office, 148 P.3d 381 (Colo.App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (Industrial Claim Appeals Office, September 6, 2011). In this case, Claimant treated on his own before reporting the alleged injury. The record evidence is devoid of any indication that Claimant reported his injuries or made a claim prior to seeing Dr. Yohanan. Moreover, Claimant sought physical therapy through Cornerstone based upon the referral of Dr. Yohanan before reporting his claim. He did not he seek authorization to continue therapy with Cornerstone from Insurer after he reported the injury. The evidence presented persuades the ALJ that once he reported his injuries, Ms. Barrasso promptly sent a designated provider list to Claimant from which to select a medical provider to attend to his injuries. There is a lack of credible evidence to establish that the right to select a medical provider in the first instance somehow passed to Claimant. Indeed, Claimant makes no such claim. Instead, Claimant asserts that he is entitled to reimbursement for his treatment simply because it is connected to his compensable injuries. The ALJ is not persuaded. Here, the evidence presented persuades the ALJ that all of the treatment Claimant is seeking reimbursement for is from unauthorized providers who began treating him prior to when he reported the injury without a forthcoming subsequent authorization from the Insurer. Accordingly, the ALJ concludes that Respondent's are not liable for the costs of Claimant's treatment with Dr. Yohanan or the physical therapy obtained through Cornerstone.

ORDER

It is therefore ordered that:

1. Claimant's asserted injuries to the neck and for tinnitus are deemed compensable. Claimant's claim for hearing loss is denied and dismissed.

2. Respondents are liable for all reasonable, necessary and related medical treatment to cure and relieve Claimant from the effects of his compensable neck injury and tinnitus.

3. Claimant's request for reimbursement for medical treatment obtained through Dr. Yohanan and Cornerstone Physical Therapy are denied and dismissed.

4. Respondents request for penalties for late reporting along with any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 25, 2017

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-992-423-01

ISSUES

- Whether Respondents have proven by clear and convincing evidence that DIME Dr. Miguel Castrejon erred by finding Claimant not at MMI, as a result of the August 26, 2015 work-related injury.

- If the DIME opinion has been overcome, whether Claimant has proven by a preponderance of the evidence that he is entitled to PPD benefits.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. On July 10, 2015, Employer hired Claimant to work as a ramp agent. Employer required Claimant to undergo a pre-employment physical. The physical focused on Claimant's hearing to determine whether it was sufficient for Claimant to safely perform his job duties, and a drug screen. Records document that Claimant underwent an audiogram and a urinary drug screen on July 10, 2015. Records from the pre-employment physical reveal a superficial and cursory physical examination was performed.

2. Claimant provided incomplete and misleading information on his Physical Exam questionnaire.

- Claimant did not respond to questions asking whether he had ever been off work for more than one day due to job-related illness or injury, and whether he had ever been hospitalized. Both questions, if answered accurately, required significantly lengthy and detailed responses.

- In answer to the question "Do you have decreased function in the hips, knees, legs, ankles or feet," Claimant answered "No." Had he been truthful here, the doctor would have learned about Claimant's knee problems, permanent work restrictions, the discussion of a total knee replacement, his injections, his prescription for a cane, his prescription shoes and compression stockings, his chronic gout and his need for foot care. Claimant also denied any musculoskeletal problems and stated he had never had surgery.

- Claimant provided an incomplete occupational history.

- Claimant inaccurately reported that he exercised for thirty minutes three times per week.

- Claimant provided an incomplete list of the prescription medications he took, including ones for out of control diabetes and chronic gout. Kaiser medical records of Claimant's August 20, 2015 exam show Claimant was actually on at least fourteen medications at that time.

3. Claimant has had long-standing problems and treatment for both of his knees, a sampling is provided below. This list is by no means comprehensive.

- On December 31, 2007, Claimant sustained a right knee injury while working at Wal-Mart.

- On January 18, 2008, Claimant sustained a second work injury at Wal-Mart involving "an injury to the quadriceps tendon or some kind of internal derangement in the knee." An MRI of his right knee was taken and Claimant received two injections into his knee. Surgery was recommended for a medial meniscal tear. Claimant received narcotic pain medications for at least four months. On May 7, 2009, Claimant received a 22% impairment of the right knee/right lower extremity.

- On September 7, 2009, Claimant sought medical treatment reporting he felt a pop in his knee walking down steps. Claimant complained of left knee pain and swelling. Claimant was noted to have a history of gout and cramping on both calves.

- On March 10, 2010, Claimant sought medical treatment for right knee pain lasting twelve hours. Claimant reported that his symptoms feel like prior gout flares. Six days earlier, Claimant had presented to the UHC emergency department where he was given Vicodin for the same symptoms.

- On April 10, 2010, Claimant sought medical treatment. Records of that visit indicate Claimant's prior history of gout and noted he had a flare now in right knee and left ankle. Claimant reported an inability to ambulate or bear weight. Claimant received Fentanyl en route to the hospital and Claimant was given four Medrol Dosepaks, Dilaudid, Valium, and Zofran, during his stay and upon discharge.

- On June 26, 2010, Claimant presented for an SSDI Exam. Records from that visit document gout flare ups in Claimant's feet, ankles and knees, and that Claimant had had several hospitalizations for gout flares.

- Claimant sustained a third workers' compensation claim against an employer in the auto industry and did not work from July 2010 through at least April 27, 2011. On April 27, 2011 Claimant was experiencing diffuse bilateral tenderness from his knees to his feet with edema and erythema of his lower extremities. Claimant's medical provider attributed Claimant's leg pain to chronic liver disease or possibly from lung disease.

- Records from a May 2, 2011 medical examination note that Claimant had experienced problems with gout for the last three years, including attacks in the dorsal aspect of his feet, his ankles, and his knees.

- On June 29, 2011, Claimant filed a personal injury lawsuit against Wal-Mart alleging he slipped at the store with his right leg out in front of him. Claimant reported that his right leg continued forward, he twisted to his left (twisting the knee medially and the ankle in aversion) then fell onto his buttocks. On physical examination Claimant reported moderate tenderness and mild swelling in the medial joint line right knee, and limited range of motion secondary to pain. Claimant received a financial settlement in his personal injury suit.

- On July 18, 2011, orthopedic surgeon Stephen Lindenbaum evaluated Clamant and recommended a right knee MRI. On July 20, 2011 the right knee MRI took place and a surgery was recommended.

- On October 17, 2011 Claimant underwent an arthroscopic surgery to address right knee pain due to torn medial meniscus along with lateral meniscal tear.

- On October 26, 2011, Claimant returned to Dr. Lindenbaum reporting he slipped and fell *again* at a Wal-Mart store and reinjured his right knee. Claimant filed a personal injury lawsuit against Wal-Mart for this right knee injury.

- On January 25, 2012, Dr. Lindenbaum injected Claimant's right knee with steroid due to ongoing symptoms.

- On May 8, 2012 Claimant was prescribed a cane.

- On May 24, 2012, Claimant continued experiencing right knee pain.

- On July 17, 2012, Claimant was in physical therapy for his right knee. He stated, "my knee pain doesn't allow me to kneel on bed or getting up or down to floor, there's a pain in my knee cap that I feel everything [sic] I move my knee. I don't have the flexibility; feel like I didn't get the right attention for it in my therapy; had 1 injection helped for a few days; then its [sic] back. Continually swells as I use it."

- On September 5, 2012, Claimant sought medical care presenting with knee swelling. Prior treatment included over three months of physical therapy. Following that treatment, Claimant reported his symptoms worsened, and were aggravated by walking. Dr. Lindenbaum recommended weight reduction [Claimant's BMI was over 45], a patella centering brace, and additional physical therapy.

- Between November 7, 2012 and December 14, 2012, Claimant received additional physical therapy for his right knee.

- On January 28, 2013, Claimant sought emergency room treatment for a right knee injury. Claimant slipped on ice at gas station landing on his right knee.

- On January 29, 2013 Claimant obtained an MRI of his right knee. The MRI showed prior meniscus surgery and no acute tear. An area could have indicated chronic inflammation of one of his tendons or an acute injury. Claimant was recommended for physical therapy and if no improvement then to orthopedic referral.

- On January 27, 2014, Claimant sought medical treatment for an injury to his left knee. Claimant reported a twisting injury which occurred at home when he was getting out of a car. He reported moderate joint pain and mild difficulty walking. The medical provider noted mild tenderness and swelling.

- On January 28, 2014, Claimant called a medical provider and reported developing left knee pain getting out of car the day before. Claimant reported developing left knee pain. Claimant reported that he had been wearing a brace, and noticed notice swelling in his left calf, and that he was unable to bend his knee. He reported his entire knee felt warm, and that his leg was shaking due to constant pain and pressure he felt to his knee cap.

- On January 29, 2014, Claimant reported to an emergency room and was diagnosed with left knee arthrocentesis. A fluid analysis was performed and the results were consistent with gout. Claimant received an intra-articular steroid injection.

- On December 8, 2014, Claimant sought medical care presenting with Gout flare ups in both knees. Claimant was taking but not responding to his gout medication. Claimant reported he could not get up.

- On December 14, 2014 Claimant complained of bilateral knee swelling. He was taking narcotics with improvement to his right but not left knee. Imaging showed a popliteal cyst 3cm x 4cm, which was surgically removed.

- On December 16, 2014, Claimant saw orthopedic surgeon Darin Allred MD. “Pt is here for initial evaluation of his left knee. He has had a 1 month history of progressive left knee pain. It started off after a history of gout. He went to the ER and was given a DepoMedrol oral Dosepak which fixed his right knee but not his left. He has had a history of gout and has had previous problems in his knees before. Since that time, he has

had difficulty walking due to this pain. A lot of his pain is associated with flexion of his knee. He has severe obesity and many of the medical problems typically associated with it including diabetes and peripheral neuropathy. X rays show moderate medial compartment arthritis and joint space loss." Dr. Allred recommended they start with a steroid injection. Dr. Allred felt Claimant was much too large and young for an arthroplasty and knee arthroscopy would likely not yield a successful result and would be challenging in somebody Claimant's size.

4. As early as June 26, 2010, Claimant carried diagnoses of hypertension, migraines, vertigo, hyperlipidemia, GERD, chronic cervical neck pain, chronic lower back pain, bipolar disorder, major depression, chronic and severe gout, and multiple kidney stones. Medical records from that date indicate that "most ERs in the local region do not want to treat him because they feel he is seeking narcotic drugs." Claimant reported that he had become an emergency room abuser. Claimant further reported that he had been in and out of prison between 1990 and 2004, and acknowledged he had a "significant legal history that included convictions for sex offenses, assault, and theft." Claimant reported auditory hallucinations "now and then," that "come and go," and acknowledged two inpatient psychiatric admissions.

5. Claimant testified at hearing that on August 26, 2015, he was working for Employer as a ramp agent at DIA. Although Claimant began employment approximately six and a half weeks earlier, he had only been working on the tarmac with planes for about two weeks. Claimant was standing near the hitch were a tow bar was attached to a vehicle used to push back the airplane. This vehicle is called a Pushback or a Tug interchangeably. Claimant was facing the Tug and the aircraft was behind him. The tow bar connecting the Tug to the plane was to his left. Claimant reached across his body with his right hand to unhook the tow bar from the hitch. The tug driver had the vehicle in drive instead of reverse, and the tow bar was pushed out of the hitch. This caused the bar to swing towards Claimant and come in contact with Claimant's legs across his shins below his knees. Claimant testified his hips were essentially ninety degrees to the tow bar. His left hand was on the handle of the tow bar. Claimant testified the tow bar hit him first on the left side of his left leg, on the top of his calf below the knee. He twisted away from the tow bar, but the tow bar then hit him on the right leg. Throughout the event, the tow bar remained attached to the plane.

6. Claimant's report of injury, filed on the date of injury, stated that the tug driver put the tug into drive. According to Claimant, "the tow bar in my hand [met] with pushback and [the tow bar] smacked across both legs below the knees." At hearing, Claimant agreed this was what occurred.

7. Claimant sought emergency room care three times between August 20, 2015 and August 27, 2015, apparently related to his uncontrolled diabetes. The week of Claimant's injury, his BMI was 47.

8. Insurer admitted liability for the injury.

9. On August 27, 2015, Claimant reported to Concentra that he was "Working while removing tow bar from aircraft when tug caused tow bar to strike (L>R) legs below the level of the knee." Claimant told medical providers at Concentra that his past medical history was noncontributory and mentioned nothing about his numerous prior conditions and treatment which impacted his knees. Concentra records indicated no obvious signs of trauma. Claimant reported that the injurious event occurred because of "the incompetence of his supervisor."

10. Concentra medical records from November 23, 2015, discuss Claimant continuing on Oxycodone. Claimant was continued on Oxycodone at his December 17, 2015 Concentra appointment.

11. On September 22, 2015, Dr. Cary Motz performed an orthopedic evaluation of Claimant.

- While taking his medical history Dr. Motz noted, "He denies any prior problems or injury to either knee." Claimant was not truthful with Dr. Motz about his prior knee problems.

- Claimant reported he was hit with a tow bar in the shins. He did not report any significant twisting injury. He stated his pain went up from the shins into his knee and he had significant discomfort in both knees since the injury.

- Regarding causation, Dr. Motz noted,

    - "The patient's mechanism of injury being of a direct blow to the shins without a twisting or squatting injury is unlikely to cause a meniscal tear."

    - "I do not believe that the meniscal tear that was seen on the MRI of the left knee is related to this injury."

    - "It is most likely degenerative tear related to the patient's obesity."

    - "The patient has significant global knee pain that is out of proportion to his MRI of the left knee and out of proportion to his exam."

- Dr. Motz concluded, "I believe it is highly unlikely that surgery is going to improve this patient's course . . . We also discussed the probability that the meniscal tear is not related to the work injury based upon the mechanism of injury." Dr. Motz concluded any need for surgery was not work related, and even if it was work related, surgery was not reasonable or necessary.

12. Claimant testified that following Dr. Motz's evaluation, he requested a second opinion. On September 25, 2015, Dr. Sobanski evaluated Claimant. Claimant

told Dr. Sobanski that he had never had left knee pain prior to his August 26, 2015 work injury. Claimant was not truthful with Dr. Sobanski about his prior knee problems.

13. On October 19, 2015, Dr. Michael Hewitt evaluated Claimant.

- Upon examination, Dr. Hewitt noted Claimant had a significantly antalgic gait and was using crutches. However, he noted no obvious bilateral quadriceps atrophy which would be expected with crutch use.

- Dr. Hewitt noted, "He described being struck directly on the anterior aspect of both proximal tibias without specific twisting mechanism. The patient understands this is an uncommon mechanism for a meniscus tear which usually requires more of a pivoting mechanism."

- Dr. Hewitt concluded, "I would be concerned that knee arthroscopy would not provide significant benefit.

Like Dr. Motz, Dr. Hewitt found that any need for surgery was not work related, but also found that surgery was not reasonable and necessary.

14. Claimant admitted at hearing that he did not tell the truth to his doctors. He did not tell Dr. Hewitt, Dr. Sobanski, Dr. Motz, Dr. Castrejon, or Dr. Shih that he had prior left knee problems, prior right knee arthroscopy, a history of chronic gout affecting his knees, and uncontrolled diabetes which required Claimant to wear special shoes and socks and which required specialized foot care.

15. From August 26, 2015 until December 23, 2015, Claimant received extensive conservative treatment including physical therapy, pool therapy, diagnostics, injections, and medications, including narcotics. Claimant reported none of his treatment relieved his bilateral knee pain.

16. Despite receiving medical treatment through workers' compensation, Claimant sought additional medical treatment outside of the Workers' Compensation system. Examples include:

- On September 15, 2015, Claimant presented to Kaiser to obtain an MRI of his left knee. Kaiser noted, "Orthopedic referral for bilateral knee problem; chronic/recurrent injury. The patient is interested in an MRI and second opinion about the knee."

- On December 2, 2016, Claimant presented to the University of Colorado Health Center with 12-hours of burning right knee pain, which he reported felt similar to his past gout flare-ups. His provider noted "bilateral knees: no effusion, warmth, or arrhythmia."

17. On December 23, 2015, Dr. John Burris evaluated Claimant.

- Dr. Burris noted, "[Claimant] is very somatically focused and he wears neoprene braces on both knees. [Claimant] has not returned to work since the original event. He cannot tell me what makes his pain better or worse…He does not describe any instability with ambulation or locking of the knees."

- Claimant did not use crutches when he saw Dr. Burris despite having used crutches two months earlier when he saw Dr. Hewitt.

- Dr. Burris opined that the only logical diagnosis was contusion to the lower legs.

    - Claimant continued to have diffuse pain complaints four months after a minor contusion injury to his lower legs.

    - He had diagnostic testing which was unrevealing, and two evaluations with specialists who documented pain out of proportion to examination, and that the findings on MRI were not likely related to the reported mechanism of injury.

    - Dr. Burris placed Claimant at MMI with no impairment and no restrictions. Dr. Burris determined no maintenance or follow-up were required.

    - Following Dr. Burris' assessment he noted, "[Claimant] verbalizes understanding of the specialist's evaluations. He does state that 'it does not make any sense to him.' He states that he had no problems before this and he does not know how he could suddenly have arthritis after such an event." This statement was untruthful. Dr. Burris concluded that based on the evaluation Claimant had undergone through the specialists he was referred to, he could not explain Claimant's persistent pain complaints with the reported mechanism of injury.

    - Claimant was not truthful with Dr. Burris about his prior knee problems and treatment.

18. On December 18, 2016, Dr. Edwin Healey performed an IME at Claimant's request. Dr. Healy noted that Claimant "continues to take Percocet5/325 mg every two to four hours for pain. Claimant was somewhat forthcoming with Dr. Healey, mentioning that he sustained a prior work-related injury to his knee in 2007-2008, and that he had a right knee surgery with Dr. Lindenbaum in 2011. Dr. Healey was also provided with these records. However, nothing in Dr. Healey's IME report indicates that he reviewed any of Claimant's extensive Kaiser records, including a surgical evaluation for his left knee 6-months prior to beginning work for Employer and frequent complaints of lower extremity pain. Claimant untruthfully reported to Dr. Healey that following his 2011 right knee surgery with Dr. Lindenbaum, he did not have any complaints of

bilateral knee pain until the date of injury. Dr. Healey relied on Claimant's untruthful history. It appears Dr. Healey was not provided Claimant's records from Dr. Lindenbaum over the year following his surgery, his physical therapy records, or Kaiser or ER records, which prove Claimant's right knee continued to be highly symptomatic. The medical records that Dr. Healey did not review directly and uncontrovertibly oppose Claimant's untruthful assertion that he was free of knee pain following surgery and had no complaints for four years. Dr. Healey was not provided Claimant's entire medical records and clearly misapprehended Claimant's true medical history. The ALJ finds that Dr. Healy's medical opinions are not reliable.

19. On May 12, 2016, Claimant attended a DIME with Dr. Miguel Castrejon. Claimant reported the tow bar jerked towards him to the point where it impacted the left knee anteriorly and the right knee at the medial joint line. As the tow bar forcefully pushed towards him, Claimant reported to Dr. Castrejon that his body was rotated to the right. With regards to his right knee, Claimant reported he underwent an arthroscopy and after surgery, "The claimant had reported almost complete resolution of his right knee pain and was able to resume all of his normal activities without pain. The claimant denied any prior left knee pain until August 26, 2015." Again, Claimant's report was not truthful. Claimant's current complaints were of constant burning pain involving both knees located anteriorly and posteriorly. He noted a sensation of weakness and giving way. Claimant rated his then current pain at 9/10.

20. Claimant reported the mechanism of his injury to Dr. Castrejon as the tow bar striking his knees forcing him to rotate his body. This report was inconsistent with Claimant's earlier reports – that there was no twisting mechanism -- given to Dr. Sobanski, the physical therapist, Kaiser, Dr. Motz, Dr. Hewitt, and Dr. Burris. Dr. Castrejon was unable to reconcile this discrepancy. Despite admitting to prior right knee problems, Claimant stated his right knee surgery allowed him to resume all activities without pain. This was not truthful. Claimant continued to deny a history of left knee problems.

21. Claimant reported to Dr. Castrejon that he had work related left shoulder problems as well. A report from Dr. Stephen Lindenbaum dated August 26, 2015 stated, "At the time he related to me that the original [left shoulder] injury was at work at the airport where he works on the ramp and was injured. At that time, he didn't have a lot of pain or discomfort in the shoulder. He continued to work in this condition. He feels strongly that the original injury was at work." Claimant failed to tell to Dr. Castrejon that on January 26, 2016, Claimant presented to Kaiser and reported he dislocated his shoulder while walking his dog. As to Claimant's left shoulder, Dr. Castrejon noted, "The claimant admits that these symptoms began approximately five months post-injury. He also admits that he developed left shoulder pain after his left arm was forcefully abducted when his dog pulled on the leash. There is no documentation of left shoulder pain being related to the injury in question." Claimant changed his true medical history in an attempt to convert his personal physical problems into work related diagnoses.

22. Dr. Castrejon's medical records review contained MRIs of Claimant's right knee in 2008 and 2011. No other medical records were provided for the period prior to

Claimant's work injury. Following his examination of Claimant and review of the incomplete medical records in his possession, Dr. Castrejon concluded, "There has been no prior left knee condition that has required medical treatment, loss of work time or level of permanent impairment . . . I have not been provided with the complete medical file surrounding these two prior injuries therefore I am unable to conclude what specific [right knee] surgery was performed. Nevertheless, there is no medical documentation that would support a need for ongoing medical care, loss of work time or permanent impairment prior to the event of August 26, 2015. Dr. Castrejon concluded Claimant was not at MMI and recommended repeat MRIs for both knees and an additional orthopedic surgical consultation. Dr. Castrejon noted Claimant did not require bracing or use of assistive devise.

23. Respondents did not contest this first DIME and the case was returned to a General Admission. Claimant underwent repeat MRIs of both knees on August 25, 2016.

24. Claimant sought medical treatment with extreme frequency for an enormous number of issues. Claimant testified at hearing that he currently had at least 40 different health problems or illnesses. Claimant testified these medical conditions make it difficult to accurately recall his medical history. During the six months before Claimant applied for his job with Employer, between January 2015 and July 2015, Claimant had been to emergency rooms or sought medical care on 115 occasions. Emergency departments considered Claimant an "emergency room abuser" and placed on a care plan.

25. Claimant has uncontrolled diabetes. He would not follow his providers' instructions regarding diet or insulin control and often went off of his insulin for days ata time. He required foot care due to his diabetes, but often did not attend to this need. He was required to wear compression stockings and special shoes which he often did not do. Despite his numerous medical conditions which required consistent medical attention, Claimant did not have a primary care physician.

26. Claimant applied for Social Security Disability benefits at least two times, most recently in 2015. In these proceedings, Claimant represented that he was completely unable to perform any type of work.

27. On August 30, 2016, Dr. Joseph Hsin evaluated Claimant. Claimant reported a tow bar weighing 100-pounds struck his bilateral shins. Claimant reported persistent bilateral knee pain, left worse than right. "He is limping and noted occasional swelling. He had multiple injections, which did not help." Following examination Dr. Hsin opined, "The patient has a very difficult exam and significant hypersensitivity. It is difficult to tell whether or not he has non-organic pain out or proportion to exam versus hypersensitivity from a nerve issue. Certainly, his pain pattern is not consistent with his pathology on MRI. The right knee MRI was essentially normal. The left knee MRI does demonstrate anterior horn meniscus tear. I would tend to agree with Dr. Motz that the mechanism of injury is not consistent with his pathology. Nonetheless, I would be reluctant to operate on this patient. I cannot help with his diffuse knee pain that radiates

to his mid-thigh, which does not appear to be coming from his small lateral meniscus tear."

28. On September 21, 2016, Claimant returned to Dr. Burris. Claimant reported diffuse bilateral knee pain at 8/10. He reported no significant changes. Following examination Dr. Burris concluded, "Because we have completed these recommendations with no further treatment recommended as a result, he is once again at MMI. Based on the nature of the original mechanism, the diagnostic testing, the opinions from three orthopedic surgeons and his examination, I do not believe Dr. Castrejon's impairment rating is valid. . . [Claimant] understands that we have now completed the recommendations from the Division IME. The patient is requesting potential nerve testing. I told him that I cannot pursue these tests, as it was not authorized by the Division IME. The patient is released from care at MMI. I find no objective basis for impairment or permanent work restrictions. No maintenance or follow-up are required."

29. On January 3, 2017, Dr. Castrejon performed a follow-up DIME. Dr. Castrejon stated, "I noted that there had been no prior left knee condition that had required medical treatment, loss of work time or level of permanent impairment. In fact, prior to his employment the claimant had undergone a pre-hire physical examination during which time he was cleared for full duty." Dr. Castrejon concluded, "Yet again, how does one explain the bilateral knee findings in an individual who one day, one week, one month, three months prior to the event of August 26, 2015 was working in an unrestricted fashion and not requiring medical care nor experiencing loss of work time. How also does one explain a pre-employment clearance or the ability on the part of the claimant to have held prior employment in physically demanding positions without need for medical care or loss of worktime. Dr. Castrejon opined Claimant was not at MMI. He assigned provisional ratings of an 18% right lower extremity and a 20% left lower extremity. Dr. Castrejon opined Claimant was still in need of a surgical review or required surgery for his knees.

30. At that time, Respondents filed their application for hearing to overcome the DIME and began discovery which ultimately revealed Claimant's prior medical problems and treatment discussed above.

31. Federicco Boccadoro, Employer's Safety Station Manager, testified if the tug had been driven forward instead of backward, the tow bar would have fallen to one side of the hitch. The tow bar would have then fallen down to the ground, not pushed up into Claimant's upper shin or knee. It would have struck a person who is the same height as Claimant at the height of mid-calf or lower. If there were any force to the event, it would have broken the shear pin on the aircraft, which did not occur.

32. On April 25, 2017, Claimant attended an IME with Dr. Franklin Shih. Dr. Shih concurred with the four previous surgeons that Claimant was not a surgical candidate.

33. Dr. Shih noted that at that time, Claimant was on the following medications: Humulin, Metformin, Colchicine, Oxycodone, Proair, Amlodipine, Atorvastatin, Gabapentin, Lisonopril, Pantoprazole, Tamulosin, and Dicyclomine.

34. Dr. Shih testified at hearing to the following:

- Claimant was not a credible historian. "There were aspects of his history that mechanically were implausible. There were aspects of his history that were inconsistent with the past medical records. There were inconsistencies in the medical records of histories and events to different providers. And so there – there was a lack of focus to make me feel comfortable that his history was accurate."

- Dr. Shih did not believe that Dr. Castrejon, the DIME physician, had the full set of records that Dr. Shih had the opportunity to examine.

- Claimant did not have an objective examination to support his complaints. Claimant had diffuse tenderness and said "Ouch" everywhere Dr. Shih pushed. Dr. Shih threw in a couple sham maneuvers. Dr. Shih stated, "By sham maneuver, an example would be I passively, so I took his ankle and I move his ankle down and I move his ankle up, and that caused knee pain. And mechanically, me passively moving the ankle up and down should have done nothing to elicit knee pain. And so at that point, my ability to interpret any of the physical exam subjective complaints gets significantly diminished because something that really shouldn't have caused anything resulted in an 'ow.'" Dr. Shih testified this lack of objective findings was also echoed by other doctors.

- The mechanism of injury did not make sense from a medical or a physics perspective. Dr. Shih explained that physically, the accident could not have happened the way Claimant demonstrated to the court. The tow bar could not have stricken both legs, and was too low to the ground to strike the knees. Furthermore, Claimant gave different histories about the mechanism of injury to different providers.

- Claimant was not a good surgical candidate. Dr. Shih explained the complaints Claimant associated with his knees were not coming from his knee or the articular surface of his knee He explained there was nothing on exam or anything in the history which established Claimant's knee complaints were due to a specific pathology of the knee. With Claimant's pathology, an operation for the meniscus would actually increase his risk of eventually having more problems with the knee. Claimant was already at high risk for degenerative arthritis of the knee associated with chronic gout. With Claimant's weight, any of the things that we would do are more likely to break down. With diabetes, "he's more likely to have failure, infections, all sorts of bad stuff." So there're multiple levels of why surgery is not indicated."

- Dr. Shih opined that Dr. Castrejon's DIME conclusions were wrong. "When you have four surgeons saying to a non-surgeon 'we shouldn't do surgery,' I think that's more than a difference of opinion. Dr. Castrejon doesn't have the depth of background that went into my analysis of this. I mean, [Claimant] reported [to Dr. Castrejon] no significant right knee problems after his first right knee surgery. When, in fact, the medical records show significant problems recovering after the right knee surgery. [Dr. Castrejon] didn't have the information about the gout." Dr. Shih explained that this has to be taken into account by doctors and this was not considered by Dr. Castrejon.

- The DIME doctor did not have Claimant's history of gout in the knees. Even though Claimant reported he had gout, when specifically asked by Dr. Shih if he had gout affecting his knees, Claimant untruthfully said it never affected his knees. Therefore, Dr. Shih had no confidence that other doctors were aware Claimant had chronic gout in his knees. Gout causes wear and tear in the menisci and inflammation of the soft tissues around it. Having that history would be necessary for a doctor to assess whether surgery would help or hurt Claimant and Dr. Castrejon did not have this medical history.

- Claimant has been diagnosed with a pain disorder. Malingering is a type of pain disorder involving conscious symptom magnification deliberately for secondary gain. Dr. Shih stated that malingering could be an explanation for Claimant's behavior. "Why do I feel there's a pain disorder at play? Well if you look at the records, you look at the multiple pain complaints and multiple areas. You look at the multiple different providers describing non-objective findings. Those all play together if there's more than what makes sense purely from a mechanical standpoint."

- Dr. Shih stated no doctor should rely on Claimant's pre-employment physical. Despite "passing" his pre-employment physical, Claimant felt he was disabled three to four months earlier. "In March and April of 2015, what was the claimant's intention regarding working? Based on the social security application, it indicated that he felt he was unable to perform regular work activities and qualified for social security disability."

- There is no further medical treatment to recommend. "It's my opinion that we've done what's medically prudent and to do more risks hurting the patient more than helping him and that would come and go with one of our vows of first do no harm."

35. Dr. Shih assigned no impairment as a result of Claimant's date of injury. "Given the inability to rely on Mr. Krause' subjective report, his non-physiologic presentation and his inaccurate history, an objective area of impairment cannot be indentified."

36. Respondents have met their burden of establishing by clear and convincing evidence that Dr. Castrejon erred by finding Claimant not at MMI.

37. Mr. Boccadoro's testimony, Dr. Shih's testimony, the photographs and the two videos establish that it was physically impossible for the tow bar to strike Claimant's knees or bend around Claimant to strike his right knee as he described. At most, he suffered contusion to his shins.

38. Based on the totality of the evidence, the ALJ finds Claimant did not give an accurate medical history to Dr. Castrejon. Dr. Castrejon's conclusion that Claimant had no prior left knee problems was based on faulty information. Claimant admitted he did not tell any of his doctors about meeting with an orthopedic surgeon six months before he began working for Employer or their discussion about a total knee replacement for his left knee. Dr. Castrejon's conclusion that Claimant had recovered fully from his right knee problems was inaccurate and not supported by the medical records. Dr. Castrejon's reference to the pre-employment physical showing Claimant was without symptoms prior to hire is misplaced because he was unaware Claimant grossly misrepresented his medical history to the doctor performing the pre-employment physical. Dr. Castrejon was unaware Claimant had applied for Social Security Disability Insurance a mere three months before he applied for a job as a full time baggage handler. Claimant did not advise Dr. Castrejon of his prior impairment rating of 22% to his right knee. Without an accurate history, Dr. Castrejon's opinion regarding MMI and PPD are wrong.

39. The ALJ finds it highly probable that Dr. Castrejon's opinion that Claimant suffered a twisting mechanism of injury is wrong. Only after Drs. Hewitt and Motz explained twisting was necessary to cause injuries like his did Claimant change how the injury happened. Dr. Castrejon opined that he took a better history; however, he did not consider that it was more likely that Claimant changed his history. In addition, Dr. Castrejon did not discuss the physics of the event as did Dr. Shih. If Claimant twisted away from the tow bar, he could not have been hit on the right knee/leg if the tow bar was still attached to the fully loaded aircraft.

40. In addition to Dr. Castrejon's mistakes regarding Claimant's medical history or how the mechanism of injury occurred, Dr. Castrejon erred in opining that Claimant was a surgical candidate. Claimant is not a surgical candidate as opined by four surgeons and Dr. Shih. Respondents proved by clear and convincing evidence that Dr. Castrejon is wrong because if no surgery is available, then no care is available for Claimant and he remains at MMI.

41. Dr. Burris and Dr. Shih assigned no impairment for Claimant's injuries and these opinions are more credible than those of Dr. Castrejon. Dr. Castrejon's provisional impairment ratings for Claimant's bilateral knees are not persuasive. The ratings, if any are appropriate, are attributable due to Claimant's preexisting conditions.

42. Claimant also was assigned a 22% extremity impairment of the right knee on May 27, 2009, which would be available for apportionment against any PPD rating here.

43. Because the ALJ finds Claimant is at MMI, offsets should be taken against any TTD owed for Claimant's work: at the Parking Spot from July 14, 2016 to August 14, 2016 at $10.50/hour for 40 hours per week; at La Quinta from October 21, 2016 to February 12, 2017 at $10.50 hour for 40 hours; and at Extended Stay America from February 13, 2017 through February 28, 2017 for 30 hours per week at $12.00/hour.

44. The ALJ specifically finds that Claimant is not credible. Claimant intentionally misled his treatment providers in attempts to receive treatment for injuries and medical conditions which were in no way related to a work related injury. Claimant's intentional misrepresentations

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); CJI, Civil 3:16 (2005). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201(1).

OVERCOMING THE DIME REGARDING MMI

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further

treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

In the case at bar, Claimant is at MMI. Claimant has a long-standing history of bilateral knee complaints. Claimant was dishonest with Dr. Castrejon about his medical history. Dr. Castrejon did not have Claimant's complete medical records. Dr. Castrejon's opinion that the Claimant was not at MMI was based on inaccurate information. Dr. Castrejon was unaware of Claimant's medical history and Claimant's problems telling the truth. Claimant was dishonest about his frequent trips to the emergency room, was dishonest about his previous bilateral knee and lower extremity complaints, and was dishonest about his overall health status to his workers' compensation providers, all of which are relevant in determining whether he is at MMI.

Dr. Castrejon's opinion as to MMI because Claimant simply reported subjective pain is not reasonable because Claimant's complaints of pain cannot be taken at face value based on his physical finding, his credibility issues, his longstanding narcotic drug use, and other persuasive medical evidence. Claimant's severe knee pain complaints cannot be explained by any objective findings. Claimant's physical examination was non-physiologic.

Dr. Franklin Shih's opinion is the most credible. Claimant's bilateral knee complaints have been deemed non-surgical by four surgeons. Claimant's pain is not explained by his MRI findings or any persuasive medical findings. Credible and persuasive evidence supports a finding that surgery is more likely to make Claimant worse, not better. For these reasons, the ALJ adopts the opinion of Dr. Shih that Claimant is at MMI without any permanent impairment.

Respondents have proven by clear and convincing evidence that DIME Dr. Castrejon erred in his DIME report by opining Claimant is not at MMI as a result of the August 26, 2015 work-related injury.

PERMANENT IMPAIRMENT RATING

Because Respondents have overcome the DIME by clear and convincing evidence, Claimant is at MMI. Therefore, the ALJ must determine whether Claimant there is entitled to permanent partial disability benefits. Once the ALJ determines that the DIME's rating has been overcome, Claimant's correct medical impairment then becomes a question of fact and the ALJ is free to calculate Claimant's impairment rating based upon a preponderance of the evidence. See *Garlets v. Memorial Hosp.*, W.C. No. 4-336-533 (ICAO September 5, 2001).

Dr. Castrejon's opinion on impairment for Claimant's knee is not persuasive. The ALJ adopts the opinions of Dr. Burris and Dr. Shih that Claimant does not have any permanent impairment in his knees attributable to this injury.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have proven by clear and convincing evidence that DIME Dr. Miguel Castrejon erred in his Division Independent Medical Exam report as to maximum medical improvement, the need for additional medical treatment, and permanent impairment. Claimant is at MMI, requires no additional medical treatment, and sustained no permanent impairment as a result of the August 26, 2015 work-related injury.

2. If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 26, 2017

/s/ Kimberly Turnbow
Kimberly B. Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he is entitled to a scheduled impairment rating of 16% for his right upper extremity.

- Whether claimant has proven by a preponderance of the evidence that he is entitled to convert his scheduled impairment rating to a whole person award.

- Whether claimant sustained a serious permanent disfigurement to areas of his body normally exposed to public view, resulting in additional compensation, pursuant to Section 8-42-108, C.R.S.

FINDINGS OF FACT

1. Claimant was employed with employer as a driver and armored guard. Claimant suffered an admitted injury to his right shoulder on October 7, 2014. Claimant testified that the injury occurred when he slipped and fell against the inside of his work vehicle, striking his collarbone and right shoulder.

2. After claimant reported the injury to employer he was sent for treatment with authorized treating physician (ATP), Dr. J. Dale Utt. Initially treatment included pain medications, heat, ice, and physical therapy.

3. On November 18, 2014, a magnetic resonance image (MRI) of claimant's right shoulder showed thickening of the inferior capsule, but no rotator cuff tear.

4. Claimant continued to have pain and Dr. Utt referred him to Dr. Mitchell Copeland for consultation. Claimant was first seen by Dr. Copeland on November 21, 2014. At that time, claimant reported sharp and stabbing pain, popping, and reduced range of motion in his right shoulder. Dr. Copeland diagnosed adhesive capsulitis and administered a subacromial injection. Dr. Copeland also recommended additional physical therapy treatment.

5. Thereafter, claimant continued to have pain and decreased range of motion in his right shoulder. On March 17, 2015, claimant was seen by Dr. Utt who noted that claimant might need up to a year from the date of injury to reach maximum medical improvement ("MMI"). Although claimant was seen by Dr. Utt on April 28, 2015 and May 29, 2015, claimant was not yet placed at MMI.

6. On August 18, 2015, claimant returned to Dr. Copeland and reported that he was working without restrictions. Claimant had stopped physical therapy treatment by that time and was following a home exercise program. Dr. Copeland reinstituted physical therapy.

7. On October 30, 2015, Dr. Copeland noted that despite physical therapy treatment, claimant had not had significant improvement. At that time, Dr. Copeland ordered an MRI of claimant's right shoulder. On November 11, 2015, the MRI was taken and showed a small full thickness tear of the supraspinatus tendon, with fluid in the subacromial subdeltoid bursa, a small joint space effusion and subchondral cystic change in the humeral head.

8. On December 24, 2015, Dr. Copeland performed a right shoulder arthroscopic bursectomy, subacromial decompression with acromioplasty and repair of a chronic tear of the supraspinatus.

9. On June 28, 2016, Dr. Utt placed claimant at MMI and assessed a permanent impairment rating of 10% for claimant's right upper extremity. Dr. Utt also assigned a number of work restrictions that included no more than 30 to 40 pounds lifting with his right arm to his waist, no more than 20 to 30 pounds overhead, and no more than 20 pounds for repetitive lifting. Claimant testified at hearing that he continues to have these same work restrictions.

10. Dr. Utt testified that when he placed claimant at MMI, claimant exhibited symptoms of decreased shoulder motion and mid-thoracic spasm.

11. Respondents filed a Final Admission of Liability (FAL) on August 31, 2016 admitting for a permanent impairment rating of 10% for claimant's right upper extremity and the MMI date of July 28, 2016 [*sic*]. Claimant timely contested the FAL on September 13, 2016 and requested a Division-independent medical examination (DIME).

12. On January 26, 2017, Dr. James McLaughlin performed a DIME. Dr. McLaughlin reviewed claimant's medical records, obtained a medical history, and performed a physical examination of claimant in connection with the DIME. Following the DIME, Dr. McLaughlin determined claimant's date of MMI to be June 20, 2016 and assessed a 16% impairment rating for claimant's right upper extremity; (which converts to a whole person impairment rating of 10%). Dr. McLaughlin assessed a higher impairment rating than Dr. Utt because there was evidence of crepitus in claimant's right shoulder during the physical exam. Dr. McLaughlin testified that at the time of the DIME, claimant had irritation over the parascapular area and tenderness on his right collarbone at the right acromioclavicular (AC) joint.

13. On April 14, 2017, respondents filed an amended FAL, admitting for the impairment rating of 16% for claimant's right upper extremity and the MMI date of June 20, 2016.

14. Claimant testified that when he was placed at MMI his symptoms included crepitus with pain in his right shoulder and into his chest and right armpit area. Claimant also testified that he continues to have them same symptoms, which limit his activities. Claimant testified that he has difficulty reaching overhead and his pain symptoms impact his sleep.

15. Claimant left employment with employer in early 2016. Claimant then began working for May Trucking in July 2016 as an "over the road" truck driver. Claimant testified that his new employment allows him to work within his permanent work restrictions. This includes operating a truck with an automatic transmission and a "normal, car sized" steering wheel.

16. The ALJ credits claimant's testimony, the medical records, and the opinion of Dr. McLaughlin and finds that claimant has demonstrated that it is more likely than not that the appropriate impairment rating for claimant's right upper extremity is 16%.

17. The ALJ credits claimant's testimony and the medical records and finds that claimant has demonstrated that it is more likely than not that he suffers from a permanent impairment to his right upper extremity. The ALJ also finds that claimant has demonstrated that it is more likely than not that he has pain and discomfort that limit his ability to use his right upper extremity.

18. As a result of the December 24, 2015 shoulder surgery, claimant has four well-healed arthroscopic scars on his right shoulder.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2014).

3. Section 8-42-107(1) states in pertinent part:

(a) When an injury results in permanent medical impairment and the employee has an injury or injuries enumerated in the schedule set

forth in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (2) of this section.

(b) When an injury results in permanent medical impairment and the employee has an injury or injuries not on the schedule specified in subsection (2) of this section, the employee shall be limited to medical impairment benefits as specified in subsection (8) of this section.

4. The question of whether the claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4-238-483 (ICAO February 11, 1997).

5. It is the claimant's burden of proof by a preponderance of the evidence to establish both that he suffered a permanent impairment and that the permanent impairment is either contained on the schedule set forth at subsection (2) or not on the schedule specified in subsection (2). Further, it is the claimant's burden to prove by a preponderance of the evidence the extent of the permanent impairment.

6. As found, claimant has proven by a preponderance of the evidence that he has a permanent injury to his right upper extremity. As found, an impairment rating of 16% for claimant's right upper extremity is appropriate. As found, claimant's testimony, the opinion of Dr. McLaughlin, and the medical records are credible and persuasive.

7. As found, claimant has demonstrated that he suffers from a functional impairment in the form of pain and discomfort that limits his ability to use his right upper extremity. Therefore, claimant is entitled to a 10% whole person impairment award pursuant to Section 8-42-107(8), C.R.S. As found, claimant's testimony and the medical records are credible and persuasive.

8. Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, he has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

9. As found, claimant has a visible disfigurement to his body consisting of four well-healed arthroscopic scars on his right shoulder as a result of his October 7,

2014 work injury. Therefore, claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

ORDER

It is therefore ordered that:

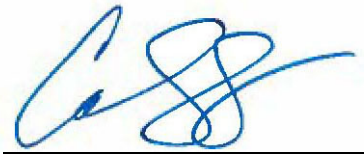
1. Respondents shall pay claimant PPD benefits based on a whole person impairment rating of 10%.

2. Respondents shall pay claimant $400.00 for his disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2017



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Whether Claimant has proven, by a preponderance of credible evidence, that he sustained a compensable injury on November 26, 2016.

II. Whether Claimant has proven, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical benefits, including the hernia surgery recommended by Dr. John Weaver.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant was hired by Employer on July 22, 2015 as a shuttle driver. Claimant's job duties included driving people, and their luggage, to and from Denver International Airport. As part of his job, he also had to lift luggage in and out of the shuttle.

2. On July 22, 2015, Claimant underwent a medical evaluation as part of a Commercial Driver Fitness Determination. See Exhibit 1. As set forth in the evaluation, Claimant was checked for a number of conditions, including a hernia. Claimant was found to not be suffering from a hernia as of July 22, 2015. See Exhibit 1.

3. On or about November 11, 2016, Claimant was advised by Employer that they were restructuring their workforce. Claimant was given the option to contract with Employer as an independent contractor. On November 16, 2016, Claimant declined the offer. Claimant was not, however, terminated at that time.

4. On November 26, 2016, Claimant was working for Employer and transporting passengers to Denver International Airport and they had 2 heavy suitcases. While moving their suitcases, Claimant felt some pain and discomfort in his midsection - abdomen. It felt like he pulled a muscle. Claimant continued working that day.

5. On November 27, 2016, Claimant worked and his abdomen became more painful and symptomatic. Therefore, on November 27, 2016, Claimant reported his injury to his employer/manager, Tim Maeda. Mr. Maeda told Claimant that he did not know the procedure for dealing with a work injury and for Claimant to report the injury the following day by contacting someone else in management.

6. On November 28, 2016, Claimant called Ms. Jacqueline Rice, the driver manager, and reported his injury. She stated that a report had to be made as soon as possible. Ms. Rice, however, was leaving that day at 2:00 p.m. and Claimant could not make it into the office that day before 2:00 p.m.

7. On November 29, 2016, Claimant came to work and gave a written statement to Employer representatives, Renee (last name unknown), Travis Manafee, and Jacqueline Rice regarding his injury. Upon Claimant reporting his injury to Employer, Employer referred Claimant to Concentra.

8. On November 29, 2016 Claimant went to Concentra and was evaluated by Dr. Jonathan Bloch. The medical report indicates Claimant stated he was lifting Saturday and felt an acute sharp tearing pain in his umbilical region, just above his naval. Dr. Bloch diagnosed Claimant as suffering from an umbilical hernia.

9. Dr. Bloch indicated that his objective findings were consistent with Claimant's history and the work related mechanism of injury.

10. This ALJ finds Dr. Bloch's report persuasive that Claimant suffered a hernia at work while lifting.

11. Dr. Bloch referred Claimant to Dr. John Weaver, a surgeon.

12. On November 30, 2016, Claimant was terminated from his employment due to Employer's restructuring.

13. On December 8, 2016, Employer representative, Ms. Janet Garretson, Regional Director of Human Resources, completed an Employer's First Report of Injury. The Employer's First Report of Injury indicates Claimant was injured on November 26, 2016 while moving luggage at the airport. The Report also indicates that Employer was notified of the accident and injury on November 29, 2016.

14. The Employer's First Report of Injury is consistent with the findings above that Claimant reported being injured on November 26, 2016 while moving luggage and that he reported the injury to the employer on November 29, 2016.

15. On December 20, 2016, Dr. Weaver evaluated Claimant. Dr. Weaver's report outlines the following history:

> This is a 51-year-old gentleman who presents to me in consultation from Jonathan Bloch for further evaluation of a supraumbilical ventral hernia. The patient states he was at work on the date of injury, 11/26/2016, when he was lifting bags. The patient stated he noted acute pain in his periumbilical region after this. He noted a bulge above the belly button.

16. Dr. Weaver diagnosed Claimant with a ventral hernia.

17. Dr. Weaver recommended surgical repair of the hernia. He recommended an open ventral hernia repair with mesh.

18. Claimant testified at hearing regarding his injury and the reporting of his injury. Claimant's testimony is found to be credible.

19. Mr. Jason Luckey testified on behalf of Respondents. Mr. Luckey testified that Claimant reported a back injury to him during a meeting on November 28, 2016. Mr. Luckey's testimony is inconsistent with the Employer's First Report of Injury which indicates Claimant reported an injury to his abdomen. Mr. Luckey's testimony is not found to be credible or persuasive as to whether Claimant suffered a hernia on November 26, 2016.

20. Mr. Selecter testified that he and Claimant were terminated on November 30, 2016. Mr. Selecter also testified that Claimant told him that he injured himself at work and this conversation occurred before they were terminated on November 30, 2016. Mr. Selecter could not, however, recall when this conversation took place. This ALJ finds this portion of Mr. Selecter's testimony to be credible and persuasive that Claimant injured himself at work and that he and Claimant were terminated on November 30, 2016.

21. This ALJ finds Claimant suffered a hernia on November 26, 2016 due to lifting luggage while working.

22. This ALJ further finds that upon being notified of the injury on November 29, 2016, Employer referred Claimant to Concentra where Claimant was evaluated by Dr. Bloch. This ALJ also finds that Dr. Bloch referred Claimant to Dr. Weaver. Therefore, this ALJ finds that Dr. Bloch and Weaver are authorized providers.

23. Dr. Weaver has recommended surgery to repair Claimant's hernia. Dr. Weaver has recommended an open ventral hernia repair with mesh placement.

24. This ALJ finds Dr. Weaver's report persuasive that Claimant has a hernia and that the surgery recommended by Dr. Weaver is reasonable, necessary, and related to Claimant lifting luggage at work on November 26, 2016.

25. This ALJ finds that the open ventral hernia repair with mesh placement surgery recommended by Dr. Weaver is reasonable, necessary, and related to Claimant's November 26, 2016 work injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

I. Whether Claimant has proven, by a preponderance of credible evidence, that he sustained a compensable injury on November 26, 2016.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether Claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant underwent a medical examination on July 22, 2015 and it was determined that he did not have a hernia. Claimant's job required him to transport passengers and their luggage to and from Denver International Airport. As part of his job, Claimant was required to lift luggage.

Claimant credibly testified that he injured himself on November 26, 2016 while lifting a passenger's suitcase. Claimant credibly testified that he reported his injury on November 27, 2016 and November 29, 2016 to Employer and was referred to Concentra where he was evaluated by Dr. Bloch. Dr. Bloch evaluated Claimant and diagnosed Claimant as suffering from a hernia. Dr. Bloch also indicated that his objective findings, i.e., hernia, were consistent with the mechanism of injury described by Claimant.

Claimant has established by a preponderance of the evidence that he injured himself at work on November 26, 2016 while lifting a passenger's suitcase. Claimant has established by a preponderance of the evidence that he suffered a hernia on November 26, 2016 due to lifting a suitcase. Therefore, this ALJ concludes that Claimant suffered a compensable injury on November 26, 2016.

II. **Whether Claimant has proven, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical benefits, including the hernia surgery recommended by Dr. John Weaver.**

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Dr. Bloch and Dr. Weaver diagnosed Claimant with a hernia. As found, the hernia was caused by Claimant's work activities. Dr. Weaver has recommended an open ventral hernia repair with mesh placement to fix the work related hernia. As found, the surgery is reasonable, necessary, and related to Claimant's work injury. Therefore, it is concluded that Claimant has established by a preponderance of the evidence that the hernia surgery recommended by Dr. Weaver is reasonable, necessary, and related to Claimant's November 26, 2016 injury.

Authorized Provider

Authorized providers include those medical providers to whom the claimant is directly referred by Employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Kilwein v. Industrial Claim Appeals Office*, 198 P.3d 1274 (Colo. App. 2008); *Town of Ignacio v. Industrial Claim Appeals*

Office, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

In this case, Employer referred Claimant to Concentra where he was evaluated by Dr. Bloch. Dr. Bloch evaluated Claimant and determined Claimant had a hernia. Thereafter, Dr. Bloch referred Claimant to Dr. Weaver, a surgeon, who also diagnosed Claimant as suffering from a hernia and recommended surgery. Moreover, Respondent's did not dispute that Dr. Bloch and Dr. Weaver are authorized providers. Therefore, this ALJ concludes that Dr. Bloch and Dr. Weaver are authorized providers.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury in the form of a hernia on November 26, 2016.

2. Respondents shall provide reasonable, necessary, authorized, and related medical treatment to treat Claimant's hernia.

3. Dr. Bloch and Dr. Weaver are authorized providers.

4. Respondents shall pay for Dr. Weaver to perform the open ventral hernia repair with mesh placement surgery. Respondents shall pay for the surgery pursuant to the Colorado Workers' Compensation Medical Fee Schedule.

5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 29, 2017

_____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she sustained compensable injuries to her neck, right shoulder, right knee, and lower back as a result of a fall occurring at work?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to reasonable, necessary, and related medical benefits as a result of this fall?

STIPULATIONS

I. Claimant's Average Weekly Wage is $624.00

II. In the event the claim is found to be compensable, Claimant is entitled to Temporary Total Disability payments for 10.5 days, all in 2016, as follows: March 28-1/2 day; March 29 through April 1; July 25 through July 29, and August 1.

FINDINGS OF FACT

Based upon the evidence received at hearing, the ALJ makes the following Findings of Fact:

1) Claimant has been employed by Employer from May 19, 2014 up until the date of the hearing. Her job at Employer, in part, included working in a clean room and cleaning various components with an air hose at a work bench. When she did this task she sat on a "bar stool" type chair and put her feet on a foot rest.

2) On March 28, 2016, Claimant was working in clean room 2, cleaning components at her work bench. When she got up from her chair, she grabbed her tool box and pushed the chair under her desk. As she proceeded forward she tripped on an air hose that was hanging on the lip of her work bench and fell first onto her right knee. Claimant testified that she asked to have the air hose moved several times and she was not happy with the workstation set up. The precise sequence of events thereafter will never be known with certainty; by their nature, falls are unexpected, sudden, and end abruptly. Instincts take over. Perceptions are distorted. In any event, Claimant wound up on her back. There was no one else in the Clean Room when the incident occurred

3) Initially Claimant noticed right knee pain. Within a short time thereafter Claimant started to notice low back, neck, and right shoulder pain

4) Right after she got up off the floor, Claimant sat in her chair for a few minutes. She then went in to another clean room to let her boyfriend know what

happened. After she told her boyfriend what happened she returned to the seat at her work station and shortly thereafter notified her supervisor, John Gurule.

5) At Employer's Direction, Claimant presented to Dr. J. Douglas Bradley at Emergicare on March 28, 2016 with complaints of right knee, right shoulder, right posterior neck, and right lower back pain. Dr. Bradley noted a history of tripping on an air hose with her left foot and starting to fall. Claimant told Dr. Bradley as she was falling she attempted to grab a chair and fell onto her right knee and now has neck pain, right shoulder pain, and low back pain due to twisting during the fall. Physical examination revealed pain in the lumbar spine and tenderness in the neck. Dr. Bradley diagnoses were strain of muscle, fascia, and tendons of the neck and back along with a right knee contusion. Dr. Bradley prescribed medications, recommended hot packs be used, and return for follow up in one week. (Ex. 2, pp. 7-11)

6) On March 30, 2016, presented herself to Excel Physical Therapy for an initial evaluation. The P.T. note of that date reflects a history of Claimant getting her foot stuck in a hose hanging from the table and falling. This same note reflects that as she fell, Claimant twisted to try and catch herself but fell onto her back. (Ex. 2. p. 68)

7) Claimant returned to Emergicare on April 4, 2016 where she was seen by Dr. Joseph Zaremba. On this date, Claimant told Dr. Zaremba her back and neck pain was worsening with her back pain being most severe. Claimant advised Dr. Zaremba that she had a prior history of chronic back pain and migraines. Physical examination revealed "neck twist is decreased", tenderness of the right posterior neck, discomfort at midline of lumbar at the right trapezius, and reduced range of motion (ROM) of neck and lumbar spine. Dr. Zaremba recommended Claimant continue PT, home exercises, and medication. Dr. Zaremba gave work restrictions; max lift/carry 5 pounds, no lifting from the ground, max walking/standing 3 hours per day, 45 minutes at a time with 15 minute stretch breaks every hour, max sitting 4 hours per day,45 minutes at a time with 15 minutes stretching in between each hour. (Ex.1.pp.16-19)

8) Claimant was seen in follow up by Dr. Zaremba on April 18, 2016. On this date, Claimant indicated she was still experiencing neck and low back pain but her right shoulder pain had resolved. Dr. Zaremba recommended Claimant continue with the treatment program previously recommended. Dr. Zaremba also recommended Claimant have pool therapy and an MRI. (Ex. 1-pp. 23-27)

9) On April 22, 2016 Claimant had MRIs performed of her cervical, thoracic, lumbar spines, and right shoulder at Peak Medical Imaging. The MRI of the cervical spine revealed advanced disc degeneration at the C4-5 level, C5-6 level and degenerative changes at other levels. The MRI of the thoracic spine was negative for any acute fractures. There was noted a left-sided paracentral disc protrusion at T10-T11with narrowing of the left foramina with possible nerve

impingement in a T10 distribution. There was also a small right-sided disc protrusion at C5-6 and a broad disc protrusion at T6-7. MRI of the lumbar spine demonstrated, in part, a right paracentral disc extrusion which displaces the right L5 nerve roots and causes mild to moderate central spinal stenosis and severe right lateral recess stenosis, and moderate to severe right neural foraminal narrowing. In addition, the MRI revealed a small to medium-sized left paracentral disc protrusion which was displacing the left S1 nerve roots. The MRI report states: "consider correlation for *left* L5 and left S1 radiculopathy." MRI of the right shoulder showed moderate subscapularis tendonitis with possible intrasubstance tear of the tendon, moderate tendonitis, and intra substance degeneration without tear of the supraspinatus. (Ex. 3, pp. 83-93)(emphasis added).

10) On April 26, 2016, Claimant returned to Dr. Zaremba, reporting that her knee was back to normal, but she had reduced range of motion of her neck. Claimant was reporting *right* leg numbness. Dr. Zaremba noted that there was minimal improvement with physical therapy, but felt Claimant had a symptomatic L5 disc and recommended she see Dr. Scheper for a series of epidural steroid injections. Dr. Zaremba also noted that the MRI of the right shoulder shows bursitis and a small intra substance tear which should improve with P.T. and if not, a referral will be made to Dr. Walden for a shoulder injection. (Ex. 1, pp. 32-35)

11) On May 2, 2016, Claimant was evaluated by an orthopedic surgeon, Dr. David Walden. Dr. Walden's notes indicated that on March 28, 2016, Claimant tripped over an air hose and landed initially on her right knee and then fell onto her back and "presumably" her shoulder. Claimant reported to Dr. Walden that her knee hurt the worst at first but the back quickly became painful. In addition, Claimant told Dr. Walden that her shoulder was not the primary problem, but after a visit or two of P.T. the shoulder had become more painful. Claimant described the pain as going up into the neck, over the clavicle region, into the shoulder blade, then down the arm. Physical examination revealed pain upon palpation in the midline spine, trapezius muscles, over the sternoclavicular joint, anterior, posterior and lateral acromial regions, anterior and posterior glenohumeral regions, and the medial border of the scapula. Range of motion was full passively but there was pain with all motions. All other testing was normal. Dr. Walden diagnosed right shoulder possible rotator cuff strain, cervical spine pathology with significant foraminal stenosis possibly affecting the C5 nerve root, and right upper quadrant myofascial pain. Dr. Walden opined that it is *unlikely* Claimant has true shoulder pathology although rotator cuff strain certainly could have occurred with the mechanism of injury described. Dr. Walden administered a Depo-Medrol injection for both diagnostic and therapeutic purposes. Dr. Walden felt Claimant's pain was mainly myofascial and she might benefit from some soft tissue work and perhaps chiropractic intervention. (Ex. 1-pp. 38-39)

12) Claimant was seen again by Dr. Zaremba on May 17, 2016 with continued complaints of right shoulder and low back pain which has essentially been the same since the last visit. On this date, Claimant was complaining of sciatic pain

in both legs. Dr. Zaremba wrote that neither P.T. nor the shoulder injection seemed to help. He again referred Claimant to Dr. Scheper for injections, and to biofeedback for pain management. (Ex.1 pp. 40-43)

13) On June 6, 2016, Claimant was evaluated by Dr. Stephen Scheper. Dr. Scheper noted a history of Claimant at work performing her routine activities when she tripped on an air hose, landing on her right knee which slipped out from under her and she subsequently fell onto the right and posterior side of her back. Physical examination revealed standing flexion painful at about 90 degrees, extension at 30 degrees, facet loading unrestricted bilaterally. Claimant was equally painful in the right lumbar region at end range of all motions, which radiated into the thigh with flexion and facet loading right. Palpation revealed significant tenderness at the L4 and L5 spinous processes, right facets at these levels. Dr. Scheper also found "significant myofascial hypertonicism in the paraspinals in the mid to low lumbar region right greater than left bilaterally and mild myofascial hypertonicity in the right piriformis. Dr. Scheper's impressions were low back and right leg pain secondary to large L4/5 disc extrusion 2 ½ months after the injury which has been unresponsive to P.T. and medications. Dr. Scheper recommended an epidural steroid injection. (Ex. 9, pp.142-145).

14) Claimant returned to Dr. Zaremba on June 7, 2016. On this date Claimant indicated her neck pain was improving and is now a 0/10 in severity. However, Claimant was still having shoulder and back pain. Physical examination revealed decreased flexion at bilateral shoulders to 40 degrees. Range of motion of the lumbar spine was 60 degrees forward flexion with decreased flexion active range of motion of the lumbar spine. Dr. Zaremba prescribed medication and was "concerned" Claimant will need further care for her pain to include injections. (Ex. 1, pp. 50-53)

15) Between March 30, 2016 and June 7, 2016, Claimant had five sessions of P.T. with minimal results. (Ex. 2-pp. 67-78)

16) On June 17, 2017 Claimant underwent psychological testing by Dr. Herman Staudemeyer. Dr. Staudemeyer felt Claimant may be somatizing in her psychological testing but this appeared to be unconscious rather than volitional malingering. Of concern to Dr. Staudemeyer were some compensation, pain, and treatment satisfaction factors, but noted that her Job Dissatisfaction Score was "*average* at the 54th %tile". Dr. Staudemeyer felt that Claimant's defensiveness and poor insight makes her a poor candidate for psychological counseling. Claimant declined any psychological counseling but was willing to pursue biofeedback. Dr. Staudemeyer felt Claimant would benefit from biofeedback therapy to assist with pain management. He referred her to William Beaver for eight 1-hour sessions. (Ex. 4-pp. 94-101)

17) On July 6, 2016 Claimant initiated biofeedback with Mr. Beaver. Under Mr. Beaver, Claimant had eight sessions of biofeedback up through September 7,

2016. Mr. Beaver's office note of September 7, states that Claimant's follow through with self management skills appeared to be satisfactory and he discharged her from care. (Ex. 5, pp.102-124)

18) On July 8, 2016 Claimant was seen by Dr. Erik Ritch at Emergicare with ongoing complaints of low back and right leg pain along with right neck and shoulder pain. Physical exam was similar to that of Dr. Zaremba's examination done on June 7, 2016. Dr. Ritch noted that Claimant's shoulder injury was helped by Dr. Walden's injections but has returned. Dr. Ritch wanted to wait to see how Claimant's biofeedback sessions and epidural injection went before making any surgical referrals. Dr. Ritch opined that Claimant seems likely to have permanent problems with pain and might not make a full recovery. (Ex. 1-pp. 56-59)

19) Claimant was seen again by Dr. Ritch on August 5, 2016 with continued pain in her back, neck, and right shoulder. On this day Claimant reported that she had the epidural steroid injection with no effect. Dr. Ritch referred Claimant to Dr. Primack for an evaluation. Dr. Ritch felt that Claimant's injury may have triggered a chronic pain cycle that is unlikely to be broken, but he would appreciate another doctor's input. (Ex 1, pp. 60-62)

20) On July 14, 2016 and again on September 1, 2016 Claimant underwent epidural steroid injections with Dr. Scheper. In a follow up, on September 8, 2016 after the two injections, Claimant reported 20% improvement but was still experiencing midline lumbosacral pain radiating into the right anterolateral thigh and anterior leg below the thigh. Dr. Scheper felt that there was persistent right L3-L4 radicular pain and sensory disturbance with decreased right L3-L4 radicular pain and sensory disturbance with decreased deep tendon reflexes, hypoesthesia, and mild weakening of the L4-L5 tibialis anterior and EHL. Dr. Scheper specifically noted that lumbar imaging revealed multilevel degenerative disc derangement, most prominent to L4-L5, with a right paracentral/lateral recess extrusion displacing the L5 nerve root causing severe lateral recess stenosis. Dr. Scheper recommended an EMG of the right lower extremity and to consider a surgical evaluation. He indicated that the next possible step would include a diagnostic medial branch block but he indicated that her radicular symptoms appeared more prominent than any facet symptoms. However, Dr. Scheper felt that revisiting facet injections may be a better option if the EMG was negative. (Ex. 9-pp. 153-154).

21) At the request of Respondents, Claimant was evaluated by Dr. Carlos Cebrian on October 16, 2016. As part of his examination, Dr. Cebrian reviewed Claimant's medical records, both before and after the March 18, 2016 injury date. Claimant spoke to Dr. Cebrian of getting out of her chair, grabbing her tool box and pushing the chair in. As she did so, her left foot got caught on an air hose, causing her to fall forward. Claimant further told Dr. Cebrian that she hit her right knee on the ground, rolled her body, and hit the posterior aspect of her right shoulder, and falling on her back. She stated that right after this incident, she had

some discomfort in her right knee. When she got up, she started to feel discomfort in her buttocks. Dr. Cebrian's report further noted that she "told her supervisor, 'John' and was taken to Emergicare." (Ex. B-p.10)

22) At the time of the evaluation, Claimant told Dr. Cebrian that her primary problem is back pain, but she was also having pain on the anterior aspect of her right shoulder which goes down to her hand, with numbness in her hand. Claimant also told Dr. Cebrian that she has no dexterity in her hand and drops objects on a daily basis. Finally, Claimant told Dr. Cebrian she only has neck pain on an occasional basis and her knee pain has completely resolved. Claimant told Dr. Cebrian her worst symptoms are in the morning when she feels very stiff and it takes her quite a while to get going. Upon examination of the cervical spine, Dr. Cebrian found full range of motion with pain side to side. Dr. Cebrian indicated that examination of the left shoulder revealed no swelling bruising, spasms, trigger points, or atrophy. Range of motion, according to Dr. Cebrian, was within normal limits. Examination of lumbar spine revealed, in part, no spasms, trigger points, or atrophy but there was diffuse lumbar spine tenderness, to light touch, over the paraspinal muscles and spine. Dr. Cebrian ultimately opined that in the March 28, 2016 incident, Claimant, at most, would have sustained a right knee contusion; possibly a cervical and lumbar strain, along with a right shoulder strain that should have resolved within a few days with or without medical treatment. Dr. Cebrian wrote in his report that Claimant's subjective symptoms are out of proportion to her objective findings and that most of her problems are related to preexisting conditions and or psychological conditions, none of which are related or exacerbated by the March 28, 2016 incident. Dr. Cebrian said Claimant was at maximum medical improvement as of October 16, 2016 and needs no further medical care. (Ex B, pp. 25-32)

23) Claimant was evaluated by Dr. Jack Rook on November 10, 2016. Claimant told Dr. Rook that on the date of the injury there was machinery taking up room on her work table and she had to move to her left to perform her job. There was also an air hose resting on her left leg that she used in performing her job duties. Claimant further told Dr. Rook that she was in the process of getting out of her chair and as she proceeded forward she tripped on the air hose which was tangled up with her left leg and as she fell forward she struck her knee on the ground, twisted abruptly to her left in an effort to avoid hitting her head, and landed on her right shoulder, right hip, and back. Claimant further told Dr. Rook that initially, she had right knee pain, but within a short time started experiencing severe pain in her low back. Dr. Rook's evaluation included a review of Claimant's medical records post injury. Claimant also told Dr. Rook that a few years prior to the March 28, 2016 incident she had *left* lower sciatica symptoms for which she had a lumbar MRI performed. Claimant told Dr. Rook that this problem resolved, with no ongoing issues until her fall at work. (Ex. 6,pp. 126-131)

24) Dr. Rook noted Claimant's complaints include mild neck pain that comes and goes, but it is much improved. Dr. Rook further noted that Claimant was experiencing severe right shoulder pain radiating down right arm to hand, and over time, she has been experiencing more frequent numbness in the right hand associated with a decrease in dexterity. Claimant also related having episodes of slurred speech when she was having numbness in her right arm. Finally, Claimant complained of severe and constant low back pain which radiates down her *right* lower extremity. Dr. Rook performed a physical examination and noted that Claimant had to switch positions several times from sitting to standing due to complaints of low back pain and ambulated with an antalgic gait, all of which Dr. Rook felt were compatible with in the context of her spinal pathology. Further findings upon physical exam were as follows: Knee jerk 2+ and symmetric bilaterally, right ankle jerk was unattainable and the left ankle jerk 2+, straight leg raising test was positive on the right and negative on the left, and pinprick sensation was diminished in the right lower extremity in L4, L5, and S1 distributions when compared to the left. Examination of the right shoulder revealed moderate to severe tenderness of the anterior shoulder capsule and the right upper trapezius muscle, with a positive impingement test on the right. Palpation of the neck and back musculature revealed increased muscle tone with severe tenderness of the right sided paracervical and trapezius muscles. There was also found severe tenderness with palpation of the lower spinal processes and the right sacroiliac joint, as well as, palpable spasm and facet joint tenderness in the right-sided lower lumbar paraspinal regions. (Ex. 6, pp. 131-133)

25) Dr. Rook's diagnoses were as follows:

1) Chronic right shoulder pain;
   - MRI evidence of rotator cuff tear, rotator cuff tendonitis and bursitis. Surrounding myofascial pain.
   - Rule out component of pain due to cervical radiculopathy.

2) Chronic neck pain;
   - Aggravation of cervical degenerative disc disease.
   - Paraspinal muscles spasm

3) Low back pain with right lower extremity sciatica;
   - MRI evidence of disc extrusion at the L4-5 level and degenerative disc disease at the L5-S1 level.

4) MRI evidence of nerve root entrapment as per lumbar MRI scan.
   - Right sacroiliac joint strain.
   - Probable right lower extremity L5-S1 radiculopathy

5) Right hand numbness of uncertain etiology.
   - Rule out secondary to cervical radiculopathy

- Rule out carpel tunnel syndrome
- Rule out central neurological cause such as transient ischemic attacks.
-

6) Sleep disturbance.

26) Dr. Rook opined that, based upon the patient's history, physical examination and review of the medical records provided to him, that Claimant's current cervical, right shoulder, low back, and right lower extremity symptoms are related to Claimant's fall at work that occurred on March 28, 2016. Dr. Rook felt that Claimant's residual neck pain is a reflection of an aggravation of underlying cervical disk disease in conjunction with the overlying myofascial pain. Dr. Rook recommended further treatment including a follow up visit with Dr. Walden for Claimant's shoulder complaints, electro diagnostic studies of her right arm and both legs, and surgical consults for her neck and low back problems. (Ex. 6, pp.126-135)

27) Claimant testified that on March 28, 2016 in the early afternoon she was at her work station, when she moved to the right to move an air hose out of her lap. At the same time, she reached around to grab her toolbox, pushed her chair in and as she did all this, her leg and foot got tangled up in the air hose and she fell to the ground. When she fell to the ground, Claimant testified that she landed on her knee, turned her body, and hit the ground with her shoulder and lower back. Shortly after the incident occurred, a co-worker came by to assist her. According to Claimant there was no one else in the room at the time she fell. Claimant reported her injury to John Gurule shortly after the incident occurred. Later that same day Claimant was transported to Emergicare by a co-worker at the direction of Mr. Gurule and the H.R. manager Christian Moray.

28) Claimant testified that as a result of the care she has received that her knee pain has resolved and her neck is a lot better, but she continues to have problems with her low back. Since injuring herself, Claimant has continued to work for employer at modified duty.

29) Claimant testified that prior to the incident of March 28, 2016 she had no prior knee or neck problems other than some short lived left sided lower back pain with *left* radicular pain as a result of slipping on some ice in late 2014. Claimant also testified that she saw a chiropractor on January 20-21, 2015 for treatment related to the incident on the ice. Claimant also testified that she had some sort of problem in her low back in the 1990's, but she had no ongoing problems from said injury.

30) Claimant also testified that she had purchased a new automobile in February, 2016 (one month *prior* to this accident). Claimant further testified that she has been able to make her payments without incident.

31) Lorene Proper is a co-worker of Claimant. She testified that she did not actually see Claimant fall, but when she went into the room where Claimant works, Claimant was picking up a few tools that were on the floor. In addition, Ms. Proper testified that when asked Claimant if she was okay, Claimant said her knee hurt. Ms. Proper also testified that at times prior to the March 28, 2016 incident, Claimant would complain of low back, shoulder, and neck pain due to poor ergonomics, such as sitting or craning her neck for extended periods of time. Finally, Ms. Proper testified that she overheard a conversation Claimant had with a fellow co-worker regarding getting an attorney and asking how much she thought she could get.

32) On cross examination, Ms. Proper admitted that she also has back pain, neck pain, and shoulder pain due to poor job ergonomics. In addition, Ms. Proper testified that in the area where the Claimant was supposed to have had the conversation about getting an attorney that there is noise with fans and vents going all the time.

33) Dr. Rook testified as an expert in physical medicine and rehabilitation. Dr. Rook testified that based upon the history given to him by Claimant, his review of the pertinent medical records, and his examination of Claimant that she sustained injuries to her neck, right shoulder, and low back to include a disc extrusion at the L4-5 level with nerve entrapment bilaterally. Dr. Rook recognized that while Claimant had pre-existing degenerative changes in her back, they were essentially asymptomatic and that it was the work injury that created her symptom complex. Dr. Rook based his opinion on a variety of factors including minimal prior complaints, an MRI which revealed, in part, a herniated disc with an extruded fragment which correlates with Claimant's clinical presentation. Dr. Rook went on to testify that most people have degenerative age related changes in their spine but these changes do not necessarily correlate with pain. Dr. Rook felt that a history of when symptoms first occurred after some sort of traumatic event and what symptoms a person has prior to the traumatic event is important in determining etiology. While Dr. Rook recognized that Claimant had a low back issue in December 2014 through late January 2015, he opined that the fact that she went well over a year without any care until she fell at work buttresses his opinion as to causation.

34) Following the December 7, 2016 Hearing, Claimant was evaluated by her primary care physician at Colorado Springs Health Partners on December 8, 2016. (Ex. K, pp. 132-144). Claimant reported that she had experienced two episodes of right hand and arm numbness with speech difficulties that lasted about 30 to 40 minutes. . Claimant was referred for a brain MRI. The MRI scan showed a brain tumor in the left posterior parietal region with moderate surrounding edema. Claimant underwent a craniotomy and resection of the brain tumor on January 19, 2017. (Ex. M, pp. 199-201). The tumor was found to be a meningioma. Dr. Cebrian testified that a meningioma was a slow growing tumor and Claimant's meningioma was likely present at the time of her alleged fall. Dr.

Rook concurred with this particular assessment.

35) Dr. Rook testified that Claimant's brain tumor diagnosed subsequent to the work injury does not play a part in her low *back* problems. Dr. Rook went on to say that if the brain tumor were contributing to her right leg problems, she would have hyperreflexia and not a loss of reflexes. Dr. Rook further explained that Claimant has a loss of reflexes which is indicative of a L5 radiculopathy. Dr. Rook felt that the loss of reflexes in the right leg correlates with the extruded disc fragment as seen on the MRI.

36) Regarding Claimant's shoulder problems, Dr. Rook testified that they are related to an impingement syndrome which should resolve within 6 to 12 weeks with conservative care. If conservative care fails, Dr. Rook felt surgery might be an option.

37) Dr. Cebrian testified as an expert in family practice. Dr. Cebrian testified that since his initial evaluation he has reviewed some additional records along with a transcript from the hearing. Dr. Cebrian testified that in terms of examination findings there were a lot of subjective type complaints with pain behaviors and non-physiologic finding for all of the body parts evaluated. Dr. Cebrian opined that Claimant did not sustain any injury as a result of the March 28, 2016 fall at work. Dr. Cebrian testified that the mechanism of injury coupled with the brain tumor and the physical examination leads him to the conclusion that Claimant did not sustain any injuries as a result of the fall at work. Dr. Cebrian explained that in his opinion, most, if not all of Claimant's symptoms are related to the brain tumor or are non-physiologic, since there was no evidence of an orthopedic injury. Dr. Cebrian opined that the diagnosis of the brain tumor explained many of Claimant's symptoms. He explained that a tumor in the left parietal lobe such as Claimant's would cause symptoms on the right side. He opined that the brain tumor could cause weakness, balance difficulties, tremors, radiculopathy, forgetfulness, and cognitive difficulties. Dr. Cebrian noted that Dr. Rook was the only medical examiner to identify decreased reflexes and pinprick on the right lower extremity. Dr. Cebrian opined that Claimant did not require lumbar surgery. Based on this, Dr. Cebrian said that Claimant never needed medical care or needs future care as it relates to the fall at work.

38) Dr. Cebrian conceded that many of Claimant's treating physicians found diminished reflexes and positive straight leg raising both of which can be indicative of a potential S1 radiculopathy. Dr. Cebrian also conceded that pursuant to the D.O.W.C. treatment guidelines, low back pain frequently does not have a clear diagnosis agreed upon by all examiners. Finally, Dr. Cebrian agreed that while Claimant had a low back injury in January, 2015 there was no medical documentation he was aware of that indicated Claimant had any ongoing low back issues from January, 2015 up until Claimant fell at work on March 28, 2016.

39) The ALJ, based upon the evidence presented, finds Claimant to be sufficiently credible and persuasive.

40) The ALJ finds the opinions of Dr. Rook regarding the etiology of Claimant's knee, neck, right shoulder, and low back problem and treatment ther more persuasive than the contrary opinions of Dr. Cebrian.

41) Based upon the evidence presented the ALJ finds that Claimant had pre-existing degenerative changes in her right shoulder, cervical spine, and lumbar spine. The ALJ further finds no credible evidence to suggest that Claimant was having any symptoms in the low back for at least a year prior to the fall and no credible evidence that Claimant was experiencing shoulder or neck pain prior to the fall. Consequently, the evidence presented persuades the ALJ that Claimant's pre-existing degenerative changes in the low back, neck, and shoulder were more probably than not asymptomatic and non-limiting until the fall at work. In addition, while it is recognized that Claimant has a brain tumor which likely pre-existed the fall at work, there was no credible or persuasive medical evidence presented which reveals that Claimant's present problems with her right shoulder, neck, and low back are related to the tumor. A review of the medical record evidence does not reflect any symptoms or problems in these areas prior to the fall except for the low back issue in January, 2015 in spite of Dr. Cebrian's and Dr. Rook's testimony that the brain tumor was likely present for some time prior to Claimant's fall at work. Consequently, Claimant has proven by a preponderance of the evidence that she suffered compensable injuries to her knee, neck, right shoulder, and low back arising out of and within the course and scope of her work.

42) Crediting the opinions of Dr. Rook and the Claimant's treating provider, the ALJ finds that the medical care and treatment provided by the health care providers at Emergicare and any referrals therefrom are reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), *Sections 8-40-101, C.R.S. 2007, et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. *Section 8-43-201, C.R.S*. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the

evidence, to find that a fact is more probably true than not, *Page V. Clark, 197 Colo. 306, 592 P.2d 792 (1979).* The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the Respondents. *Section 8-43-201, C.R.S.*

B. In accordance with *§8-43-215 C.R.S*., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004)*. This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office, 43, P .3d 637 (Colo. App. 2001).* Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); Bodensieck v. Industrial Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008)*; *Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002)*.

D. Claimant's testimony regarding the fall at work is supported by the medical record evidence. Claimant has been reasonably consistent regarding how she fell. The precise sequence of events of her fall will never be known, absent a high-resolution video of the event. Not surprisingly, Claimant may have provided nuanced versions of her fall, depending upon who was asking the questions, and the context in which they were asked. The ALJ finds, by a preponderance of the evidence, that this fall occurred, *and through no deliberate act of Claimant.* Whether her brain tumor (likely in existence at the time) contributed to her lack of agility is of no consequence here. The ALJ is not persuaded that Claimant's purchase of a new car-one month *prior to* her fall-had any bearing on what occurred. Similarly, the ALJ is not persuaded that Claimant's statements to a co-worker about pursuing a claim through an attorney (which likely did occur, despite ambient noise) diminish her credibility. One might reasonably assume that persons who feel they have been injured in some fashion would explore redress through the courts. Standing alone, her statements do not imply any fraudulent motive. Similarly, Claimant has been

reasonably consistent in describing her various symptoms to her medical providers, and the sequence in which they occurred. Claimant, however, is not a physician, and is not positioned to determine relatedness or causation.

Compensability

E. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office, 321 P.3d 548 (Colo. App. 2011)*, *aff'd Harman-Bergstedt, Inc. v. Loofbourrow, 320 P.3d 327 (Colo. 2014); Section 8-41-301(/)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a Claimant must meet both requirements for the injury to be compensable. *Younger v. City and County of Denver, 810 P.2d 647, 649 (Colo. 1991)*; *In re Question Submitted by U.S. Court of Appeals, 759 P.2d 17, 20 (Colo. 1988)*. The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando, 811 P.2d 379, 381 (Colo. 1991)*. An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).* Claimant's injury occurred within the time and place limits of her employment with employer and performing an activity which is connected to her job duties. Claimant was at her work bench cleaning components when her feet got tangled in a hose as she got up from her chair and then hit the floor hard.

G. The "arising out of' test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian, 32 P.3d 470, 475 (Colo. 2001).* The determination of whether there is a sufficient "nexus" or causal relationship between a Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. In Re Question Submitted by *The United States Court of Appeals, 759 P.2d 17 (Colo. 1988); Moorhead Machinery & Boiler Co. v. Del Valle, 934 P .2d 861 (Colo. App. 1996).* In this case, Claimant noticed symptoms in her neck, right shoulder, low back and knee shortly after she fell. The medical record evidence reveals that Claimant has complained of problems in these body parts on a reasonably consistent basis since the fall-but not prior. In addition, Claimant has seen multiple physicians since the fall and has received treatment on a consistent basis. While Claimant has had some preexisting issues with her back, they became significantly more symptomatic after this fall. There is objective evidence of pre-existing issues with her shoulder. Once again, however,

Claimant did not complain of her shoulder before this incident. And as the record shows, Claimant is not bashful about seeking medical care when something hurts. Her knee is now fine. Her neck was mostly healed as of the hearing. Based upon a totality of the evidence presented the ALJ concludes that Claimant has established the requisite causal connection between the fall at work and her injuries. Consequently, the injuries are compensable.

Medical Benefits

H. Once a Claimant has established the compensable nature of her work injury, she is entitled to a general award of medical benefits and Respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.; Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988); Sims v. Industrial Claim Appeals Office, 797 P. 2d 777 (Colo. App. 1990)*. However, a Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of her need for medical treatment. *Merriman v. Indus. Comm'n, 210 P.2d 448 (Colo. 1949); Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S*. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora, 942 P.2d 1337 (Colo. App. 1997).* The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball, supra*. Claimant's injury occurred within the time and place limits of her employment with employer and performing an activity which is connected to her job duties.

I. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc., W.C. No. 4-117-758 (ICAO April 7, 2003).* The question of whether a particular medical treatment is reasonably necessary to cure and relieve a Claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission, 682 P.2d 513 (Colo. App. 1984).* As found here, Claimant has proven by a preponderance of the evidence that she sustained injuries to her neck, right shoulder, low back, and knee as a result of fall at work. The evidence presented persuades the ALJ that these compensable injuries are the proximate cause of Claimant's need for medical treatment. It is recognized that Dr. Cebrian believes that Claimant does not need any care as a result of the fall. However, multiple doctors, including Dr. Rook, have evaluated Claimant and opined she was injured. In addition these same doctors recommended care for her injuries to include physical therapy, medication, and injections. Diagnostics might be

necessary to establish a link between Claimant's fall and her back symptoms, versus her brain tumor. Taken in its entirety, the ALJ concludes, based on the totality of the evidence, that the care Claimant has received to date under the providers at Emergicare and any referrals therefrom is reasonable, necessary, and related to the March 28, 2016 work injury.

ORDER

It is therefore ordered that:

1. The March 28, 2016 injuries to Claimant's neck, right shoulder, low back and knee are compensable.

2. Respondents shall pay for all medical expenses, pursuant to the worker's compensation fee schedule, to cure and relieve Claimant from the effects of the injuries to her neck, right shoulder, low back, and right knee.

3. Respondents shall pay Temporary Total Disability Payments in accordance with the Stipulation.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 29, 2017

/s/ William G. Edie
William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Is the opinion of the Division Independent Medical Examiner ambiguous on the issue of Maximum Medical Improvement? If so, what is the DIME's determination?

2. Which party must overcome the DIME opinion regarding MMI by clear and convincing evidence?

3. Did the party with the burden to overcome the DIME regarding MMI meet their burden by clear and convincing evidence?

4. If Claimant is not at MMI, is the surgery proposed by Dr. John Pak reasonable, necessary, and related to Claimant's admitted April 18, 2015 injury?

5. The issues of average weekly wage and temporary disability benefits were reserved pending the outcome of this hearing.

FINDINGS OF FACT

1. Claimant works for Employer as a Deputy Sheriff. On April 18, 2015, he sustained an admitted injury to his right knee while attempting to restrain an inmate. Several other responding deputies piled on top of Claimant and the inmate, causing Claimant to twist his knee.

2. Employer referred Claimant to Dr. Frank Polanco for authorized treatment. Claimant was initially diagnosed with a right knee strain and prescribed physical therapy.

3. On May 4, 2015 Dr. Polanco discharged Claimant at MMI with no impairment and no restrictions. There is no dictated report in the record for this date of service, but a handwritten form that appears to have been completed by Dr. Polanco indicated Claimant's knee injury had "resolved." However, a form completed by Claimant in conjunction with that appointment indicated he was still having 3/10 right knee pain, aggravated by standing and sprinting.

4. Claimant testified he told Dr. Polanco at the May 4, 2015 appointment he was still having knee pain. The ALJ finds this testimony credible because it is consistent with the form Claimant completed at that appointment. Nevertheless, he returned to work and performed his duties to the best of his abilities with no formal restrictions.

5. After leaving Dr. Polanco's office on May 4, Claimant called Mr. Rick Bransford in Employer's Risk Management department and requested another physician. Mr. Bransford replied, "okay, give me some time."

6. Claimant did not hear back from Mr. Bransford several months. Eventually, Claimant grew impatient and called Mr. Bransford again. Ultimately, Employer allowed Claimant to change physicians to CCOM.

7. Claimant saw Dr. Kathryn Murray at CCOM on November 10, 2015. He reported 4/10 right knee pain. He told Dr. Murray the knee was still painful when he was released by Dr. Polanco, and had continued to worsen over time, particularly when "walking around or picking up his kids." The pain was also severely aggravated by sprinting to respond to a "code," after which he would limp for the rest of the day. Claimant could not "pinpoint" the exact location of pain "as it seems to radiate through the entire front knee and into the posterior knee." Dr. Murray diagnosed an unspecified "sprain" of the right knee, and ordered an MRI.

8. Claimant had the MRI on November 19, 2015. No chondral defects were identified, nor was there any evidence of meniscal or ligament damage. The only significant findings were a small joint effusion, mild synovitis in the anterior intercondylar notch, and mild to moderate semimembranosus bursitis.

9. After reviewing the MRI, Dr. Murray suggested a cortisone injection, which Claimant declined because "everybody who has ever had this done that he knows it made it worse or did not help." Claimant agreed to try physical therapy. He had stopped taking NSAIDs because "it wasn't helping." His pain was worse if he tried to squat or kneel. He indicated the pain was in the medial aspect of the knee and underneath the kneecap. He felt the pain "has not changed," and expressed frustration there was nothing on the MRI to explain his symptoms.

10. Claimant saw Dr. Murray again on December 29, 2015. He had been off work for several weeks due to the birth of his daughter. During that time his knee felt better, and he had "not really had any pain in 2 weeks." Dr. Murray recommended he continue with PT and liberalized his restrictions.

11. Claimant returned to Dr. Murray on January 7, 2016 with increased pain. He indicated "simply going back to work and having prolonged standing and walking his flared up the left knee pain." He also reported increased pain due to performing lunges in PT the previous day. Dr. Murray referred Claimant to an orthopedic surgeon to evaluate other treatment options.

12. Claimant saw Trisha Finnegan, NP-C at Front Range Orthopedics on January 19, 2016. He reported ongoing deep, constant knee pain that was aggravated by prolonged standing, walking, twisting, bending, and squatting. Physical examination revealed tenderness of the medial patellar facet, the medial femoral condyle, and the medial joint line, mild discomfort with patellar grind test, decreased quadriceps flexibility and a tight lateral retinaculum. Nurse Finnegan opined the physical examination was consistent with patellofemoral syndrome administered an intra-articular steroid injection.

13. Claimant followed up with Dr. John Pak at Front Range Orthopedics on February 19, 2016, and reported his pain had increased after the steroid injection. Dr.

Pak's examination showed tenderness over the lateral and medial patellar facets, mild discomfort with patellar grind test and a tight lateral retinaculum. Dr. Pak thought Claimant had exhausted conservative measures and recommended diagnostic arthroscopy with a probable lateral retinacular release.

14. Dr. William Ciccone II performed a Rule 16 peer review for Respondent on February 26, 2016, and recommended surgery be denied. Dr. Ciccone noted the MRI showed only mild to moderate semimembranosus bursitis, with no evidence of any meniscus tear or degenerative changes. He recommended an ultrasound-guided steroid injection along the semimembranosus insertion with continued physical therapy. He thought diagnostic arthroscopy was not warranted and Claimant would not likely benefit from a lateral release because there was no evidence of patellar chondromalacia or maltracking.

15. Dr. Edward Szuszczewicz in Dr. Pak's office administered an ultrasound-guided steroid injection on March 31, 2016. For unknown reasons, Dr. Szuszczewicz injected the knee joint itself, rather than the semimembranosus insertion as Dr. Ciccone at recommended. Claimant received no significant benefit from the injection.

16. On April 18, 2016, Dr. Pak again recommended diagnostic arthroscopy with probable lateral retinacular release.

17. Dr. Ciccone performed a second Rule 16 record review on May 23, 2016. He noted the intra-articular injection performed by Dr. Szuszczewicz would not be expected to alleviate the semimembranosus bursitis. Dr. Ciccone maintained his opinion that diagnostic arthroscopy is unlikely to alleviate Claimant's symptoms due to lack of significant MRI findings. He also opined that Claimant's anterior patellofemoral pain is not related to the April 18, 2015 injury, which was limited to a minor strain/sprain with semimembranosus bursitis.

18. Claimant saw Dr. Ciccone on August 8, 2016 for a formal IME at Respondent's request. Physical examination showed normal range of motion, no effusion, and no pain on palpation of the lateral retinaculum or lateral facet. He had diffuse pain around the patella with patellofemoral grind testing. Strength was normal and there was no measurable atrophy or girth difference between the right and left knees. Dr. Ciccone noted that two previous injections failed to provide even temporary relief for the duration of the anesthetic, which argues against the presence of intra-articular pathology that would respond to surgical intervention. Dr. Ciccone opined Claimant suffered a twisting injury that stretched the insertion of the semimembranosus muscle causing bursitis. He believed the injury-related condition was adequately treated and resolved. Dr. Ciccone reaffirmed his opinions that surgery would not likely benefit Claimant and his patellofemoral pain is not related to the April 2015 injury. Dr. Ciccone opined Claimant was at MMI with 4% right lower extremity impairment.

19. Dr. Murray placed Claimant at MMI on September 2, 2016 after reviewing Dr. Ciccone's IME report. She opined Claimant could return to work with no restrictions and required no maintenance care.

20. Claimant requested a DIME, which was performed by Dr. Stephen Gray on January 9, 2017. Dr. Gray opined that Claimant's ongoing symptoms were causally related to his injury:

> [I]t is medically probable that [Claimant] did experience aggravation of his pre-existing patellofemoral syndrome while recovering from his 4-18-15 work-related right knee injury. As there are gait abnormalities and changes in muscle mass and knee stress dynamics with limping, wearing braces, and compensating with the other knee/leg during the early phases of the injury/recovery process, it is reasonable to conclude that these factors played a role in the shift of pain from his posterior knee/leg pain to an anterior patellofemoral type pain.

21. Dr. Gray stated Claimant "was medically probably at MMI as of the 2nd September 2016." He also checked the "Yes, the claimant reached MMI" box on the Examiner's Summary Sheet. But Dr. Gray clouded the issue of MMI with the following language in the "maintenance care" section of the report:

> [Claimant] does appear to be a surgical candidate for his persistent right knee patellofemoral syndrome, in the opinion of his surgeon. Denials of authorization for surgery appear to have been based on the acceptance of liability for the patellofemoral syndrome, rather than a disagreement amongst surgeons about indications for surgery with a persistent patellofemoral syndrome. As I am not a surgeon, I would leave the appropriateness of the surgery, given the diagnosis of patellofemoral syndrome, to the surgeons. I would support attribution of aggravation of the pre-existing problem to the 4-18-16 [sic] injury and post-injury early return to work dynamics. If [Claimant] is given authorization for surgery, and if he chooses to go forward with surgery, he would then not be at MMI until adequate therapies had been tried and enough time had passed.

22. Dr. Gray calculated a 6% lower extremity rating. Respondents filed an FAL based on Dr. Gray's report, and Claimant timely requested a hearing to challenge the determination of MMI.

23. Respondent sent Claimant for an IME with Dr. James Lindberg on June 27, 2017. Physical examination documented 4 cm of right quadriceps atrophy, tenderness medial to the patella in the area of the medial prepatellar plica, and anterolateral joint line pain with squatting. The lateral patellar facet was nontender. Dr. Lindberg diagnosed medial patella plica syndrome. He opined there was no evidence of patellar instability or chondromalacia either on MRI or the physical exam. Dr. Lindberg opined:

> As a result of the findings on the MRI and the physical exam, where he was tender over the anteromedial joint line over the medial femoral condyle, which is consistent with plica syndrome, I would recommend a diagnostic arthroscopy and excision of the plica, if that is the only

> pathology found. I would agree with Dr. Ciccone that I see no evidence at this time the lateral release would be indicated, and would specifically deny that unless there were overwhelming objective findings and arthroscopy to justify this.

24. Dr. Pak testified via deposition for Claimant on July 20, 2017. Dr. Pak opined Claimant's symptoms and physical examination findings led him to the diagnosis of anterior knee pain a.k.a. patellofemoral pain. Dr. Pak opined MRIs often poorly visualize chondromalacia under the patella. He explained Claimant has a tight lateral retinaculum, which can exacerbate and perpetuate patellofemoral pain. He explained a diagnostic arthroscopy would allow him to look inside the knee and see if there is any pathology to explain Claimant's symptoms not demonstrated on MRI. He also opined releasing the lateral retinaculum may alleviate some of Claimant's pain by taking pressure off the kneecap. Dr. Pak initially opined, without explanation, that Claimant's patellofemoral symptoms were injury-related. Later in the deposition, after being presented with additional information by Respondent's counsel, Dr. Pak opined the condition was "probably not" work-related.

25. Dr. Ciccone testified via deposition for Respondent on August 7, 2017. Dr. Ciccone indicated he did not perceive tightness of Claimant's lateral retinaculum on his physical examination. He further noted any lateral retinacular tightness would likely produce lateral knee pain whereas Claimant has more medial symptoms. He explained Claimant did not demonstrate any symptoms of ongoing semimembranosus bursitis, confirming his opinion that the original injury had resolved. He reiterated his opinion that Claimant's patellofemoral symptoms are not related to the April 2015 injury.

26. Dr. Gray's report is ambiguous regarding whether he believes Claimant is at MMI.

27. Dr. Gray determined Claimant to be at MMI as of September 2, 2016.

28. Claimant did not overcome the determination of MMI by clear and convincing evidence.

CONCLUSIONS OF LAW

A. What is the DIME's determination regarding MMI?

The DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). This is a higher standard of proof than the typical "preponderance" standard. Clear and convincing evidence is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). Therefore, the party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI finding is incorrect. *Qual-Med*, 961 P.2d at 592; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

If the DIME issues conflicting or ambiguous opinions about whether the claimant's condition is work-related, or the Claimant has reached MMI, the ALJ must determine the Division IME's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2005). Once the ALJ clarifies the ambiguous opinion regarding these issues, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. *Id*.

The ALJ concludes Dr. Gray's opinion regarding MMI is ambiguous and subject to differing interpretations. On the Examiner's Summary Sheet, and in the body of the report, Dr. Gray explicitly stated Claimant reached MMI as of September 2, 2016. But he also stated that if Claimant receives authorization for surgery for patellofemoral syndrome, then he would not be at MMI.

The ALJ concludes Dr. Gray found Claimant to be at MMI on September 2, 2016. Although he opined Claimant would not be at MMI **if** he has surgery, he did not actually opine that Claimant needs surgery. Rather, he deferred that decision to others. "Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). Dr. Gray resolved the causation question in Claimant's favor, but punted to "the surgeons" the issue of whether surgery is reasonably expected to improve Claimant's condition. After considering all the statements in Dr. Gray's reports, the ALJ credits his explicit statement that Claimant "was medically probably in MMI as of the 2nd of September, 2016" as reflecting his "true" finding regarding MMI.

B. Claimant did not overcome the DIME on MMI.

Having found that the DIME declared MMI as of September 2, 2016, it follows Claimant has the burden to overcome that determination by clear and convincing evidence. As found, Claimant has not overcome the determination of MMI by clear and convincing evidence. Claimant's argument regarding MMI hinges on having surgery, but the evidence on that point is highly conflicting. Although the ALJ found Claimant's testimony regarding his progression of symptoms since the injury to be forthright and sincere, the question of whether surgery is reasonable, necessary and causally related to the injury is primarily a medical question. The DIME deferred the decision regarding surgery to "the surgeons," who are all over the map on this issue. Claimant has seen three surgeons with three different opinions regarding whether the diagnostic arthroscopy and lateral release proposed by Dr. Pak is reasonably necessary. Dr. Lindberg opined the lateral release is not indicated but thinks a different surgery is warranted. Dr. Ciccone thinks Claimant will not benefit from surgery. The opinion evidence regarding causation is similarly splintered. Dr. Ciccone strongly opined the patellofemoral syndrome is not injury-related, and Dr. Pak concluded it is "probably not" work-related.

After considering the totality of the evidence presented, the ALJ simply cannot conclude Claimant presented clear and convincing evidence to overcome the DIME regarding MMI.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME regarding MMI is denied and dismissed.

2. Claimant's request for arthroscopic surgery proposed by Dr. Pak is denied and dismissed.

3. All matters not determined herein, or otherwise closed by operation of law, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 29, 2017

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant's 20% scheduled impairment rating should be converted to a 12% whole person impairment rating.

II. Whether Claimant is entitled to temporary partial disability benefits from December 21, 2014 to May 23, 2015 in the amount of $1,217.13.

III. Whether Claimant is entitled to disfigurement benefits due to his left shoulder surgery.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following findings of fact:

1. Claimant worked for Employer packing eggs.

2. Claimant's date of birth is July 1, 1954. On the date of injury, Claimant was 60 years old.

3. Claimant suffered a compensable injury to his left shoulder on November 13, 2014, while packing eggs.

4. On November 24, 2014, Claimant was evaluated by Dr. Matt Slaton. Claimant complained of pain in his left anterior and left lateral shoulder as well as his neck. Claimant was diagnosed with a shoulder sprain and rotator cuff injury. Claimant was also given work restrictions which precluded him from performing his regular job.

5. On January 9, 2015, Claimant was evaluated by Dr. Slatton. Claimant complained of worsening left shoulder pain and neck pain.

6. On January 12, 2015, Claimant underwent an MRI of his left shoulder. The MRI showed full-thickness supraspinatus and anterior infraspinatus tendon tears with retraction and mild volume loss. The MRI also showed acromioclavicular joint arthrosis.

7. On January 19, 2015, Claimant was again evaluated by Dr. Slatton. Claimant continued to complain of shoulder pain and neck pain.

8. On February 3, 2015, Claimant was evaluated by orthopedic surgeon Dr. Thomas Mann, of Cornerstone Orthopedics. Based on Claimant's physical exam, MRI findings, and history, Dr. Mann recommended left shoulder surgery.

9. Shoulder surgery was scheduled for February 11, 2015. Claimant, however, developed pulmonary issues. Therefore, surgery was postponed until August 12, 2015.

10. On August 12, 2015, Dr. Mann performed a left shoulder arthroscopy with arthroscopic rotator cuff repair and subacromial decompression.

11. On May 2, 2016, Claimant was evaluated by Dr. Thurston. Claimant was still working, but he had work restrictions which consisted of no work above his left shoulder with his left arm. Claimant was also being prescribed ibuprofen and oxycodone on an as needed basis for pain.

12. On May 24, 2016, Claimant was evaluated by Dr. Thurston. Claimant's restrictions were increased slightly to a little work above shoulder level. Although Claimant's restrictions were increased, Claimant was still being prescribed oxycodone for pain, as needed, and 600 mg of ibuprofen, as needed.

13. Claimant treated with Concentra from January 19, 2015 to June 21, 2016. Prior to almost every appointment, Claimant filled out a pain diagram. These pain diagrams consistently demonstrate deep aches along the shoulder joint and the upper back shoulder blade as well as the front pectoral regions reflecting pain proximal to the shoulder joint, that is, toward the torso.

14. Claimant testified the industrial injury radiates pain and tenderness toward his neck, upper back and pectoral region. This testimony is credible and consistent with the medical records from multiple different medical providers.

15. On June 21, 2016, Dr. Thurston placed Claimant at maximum medical improvement and provided Claimant a 10% scheduled impairment rating which converts to a 6% whole person impairment rating. At this visit, Claimant was complaining of joint pain and muscle pain.

16. On October 12, 2016, Claimant was evaluated by Dr. Brian Mathwich for a Division IME. According to the medical report, Claimant complained of constant baseline left shoulder pain. Claimant also stated the pain was mild most of the time but increased when he is using his shoulder more frequently in lifting, extending, and work above shoulder height. According to the report, Claimant has to take 800 mg of ibuprofen when the pain becomes too intense.

17. Dr. Mathwich also noted palpation of the left trapezius muscle revealed a large trigger point in the mid trapezius body which was very tender on palpation. Claimant also had very specific point tenderness over the anterior glenohumeral

joint and diffuse pain on palpation throughout the shoulder with maximum tenderness anteriorly.

18. Dr. Mathwich provided Claimant a 20% upper extremity rating which converts to a 12% whole person impairment rating.

19. On March 2, 2017, Claimant underwent and IME which was performed by Dr. Linda Mitchell. Claimant complained of left shoulder pain, with a pain level of 5/10. Claimant stated that he was not able to lift his arm above chest level due to both pain and limited range of motion. Claimant stated that he has been working since being placed at MMI but has been avoiding lifting above chest level since being placed at MMI. Claimant stated that if he works too much, he gets pain bilaterally in the interscapular region. Claimant also stated that he takes ibuprofen – 800 mg – twice a day, which helps. Dr. Mitchell provided Claimant work restrictions. She stated that Claimant should avoid lifting more than 10 pounds frequently or 20 pounds occasionally with his left upper extremity. She also said that he should avoid reaching away from his body or reaching above chest level with the left upper extremity.

20. Claimant credibly testified that he complained of neck pain, but did not get any treatment for his neck pain.

21. Claimant credibly testified about his pain due to his shoulder injury.

22. Claimant has constant pain in his left shoulder. Claimant has functional impairment in his left shoulder.

23. Claimant's left shoulder pain radiates down to his elbow.

24. Claimant's left shoulder pain radiates into his neck and causes functional impairment of his neck.

25. Due to this shoulder injury, Claimant has pain and trigger points in his left trapezius which is proximal to the shoulder joint and on his torso, causing functional impairment of his trapezius.

26. Due to his shoulder injury and associated pain, Claimant cannot perform work above shoulder level with his left shoulder and arm.

27. Due to his shoulder injury, Claimant has pain in the interscapular region, bilaterally, which is on his torso, causing functional impairment in his interscapular region.

28. Claimant's shoulder injury has caused functional impairment beyond the arm and that is not listed in the schedule of disabilities.

29. Claimant's shoulder injury has affected physiological structures beyond the arm at the shoulder.

Temporary Partial Disability Benefits

30. Claimant is requesting temporary partial disability benefits from December 21, 2014 to May 23, 2015.

31. Claimant's work injury impacted his earning capacity from December 21, 2014 to May 23, 2015.

32. Claimant credibly testified that he would have to clock out for his work related therapy and medical appointments. This testimony was confirmed by the Respondent Employer's witness.

33. Claimant missed work due to his work related injury from December 21, 2014 through May 23, 2015 to attend medical appointments for his work related injury.

34. Claimant's admitted average weekly wage (AWW) is $545.97.

35. From December 21, 2014 to May 23, 2015 (a period of 154 days or 11 weeks) Claimant earned $9,615.69. At the admitted AWW he should have earned $12,011.34. His total wage loss was $2,395.62 for a total of temporary partial and temporary total disability of $1,581.11. During this time Respondents paid temporary total disability benefits in the amount of $363.98 from 2/18/15 to 2/24/15. (See Exhibit B and Exhibit 1)

			AWW	ACTUAL	WAGE LOSS	TPD DUE
12/21/14	1/3/15	14	$1,091.94	$1,028.54	$ 63.37	$ 41.82
1/4/15	1/17/15	14	$1,091.94	$846.02	$ 245.92	$ 162.31
1/18/15	1/31/15	14	$1,091.94	$1,038.93	$ 53.01	$ 34.99
2/1/15	2/14/15	14	$1,091.94	$859.22	$ 232.72	$ 153.60
2/15/15	2/28/15	14	$1,091.94	$247.25	$ 844.69	$ 557.50
3/1/15	3/14/15	14	$1,091.94	$834.65	$ 257.29	$ 169.81
3/15/15	3/28/15	14	$1,091.94	$790.35	$ 301.59	$ 199.05
3/29/15	4/11/15	14	$1,091.94	$908.68	$ 183.26	$ 120.95
4/12/15	4/25/15	14	$1,091.94	$1,016.13	$ 75.81	$ 50.03
4/26/15	5/9/15	14	$1,091.94	$999.10	$ 92.84	$ 61.27
5/10/15	5/23/15	14	$1,091.94	$1,046.82	$ 45.12	$ 29.78
			$12,011.34	$9,615.69	$2,395.62	$1,581.11
					TTD Paid	$ 363.98
					TPD Due	

$1,217.13

36. Claimant is entitled to temporary partial disability benefits in the amount of $1,217.13 for the time period of December 21, 2014 to May 23, 2015.

Disfigurement

37. As a result of his work injury, Claimant has a visible disfigurement to his left shoulder consisting of four arthroscopic scars. Claimant has three ½ long by 1/8 wide scars and one small circular scar which is approximately ¼ inch in diameter.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A*., 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

I. Whether Claimant's 20% scheduled impairment rating should be converted to a 12% whole person impairment rating.

The question of whether the claimant sustains a "loss of an arm at the shoulder" within the meaning of §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the claimant's "functional impairment," and the situs of the functional impairment is not necessarily the location of the injury itself. *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

Under the "situs of the functional impairment" test there is no requirement that the functional impairment take any particular form. Therefore, pain and discomfort that limit the claimant's ability to use a portion of the body may constitute functional impairment. *Aligaze v. Colorado Cab Co.,* W.C. 4-705-940 (ICAO April 29, 2009); *Johnson-Wood v. City of Colorado Springs,* W.C. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO April 21, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. 4-452-408 (ICAO October 9, 2002). However, although a physician's impairment rating may be considered in determining the situs of the functional impairment, the AMA Guides' definitions of where the torso ends and the extremity begins are of no consequence in resolving the issue. *Langton v. Rocky Mountain Health Care Corp.,* 937 P.2d 883 (Colo. App. 1996); *Strauch v. PSL Swedish Healthcare System, supra.*

In this case, Claimant has functional impairment of his left shoulder joint. Claimant also has chronic left shoulder pain and discomfort that limits Claimant's ability to use his left shoulder and arm. The functional impairment of his left shoulder joint combined with the chronic shoulder pain prevents Claimant from being able to perform overhead work with his left shoulder and arm.

In addition, due to his shoulder injury, Claimant has pain and trigger points in his left trapezius muscle which is on his torso. Claimant also has pain in his intrascapular region, bilaterally, and his neck. The additional pain in his trapezius, intrascapular region, and neck was caused by his shoulder injury and has caused functional impairment of physiological structures beyond his left arm which are not listed in the schedule of disabilities.

This ALJ concludes that Claimant has established by a preponderance of the evidence functional impairment beyond the arm. Therefore, Claimant has proven, by a preponderance of the evidence, that the 20% extremity rating should be converted to a 12% whole person impairment rating.

II. Whether Claimant is entitled to temporary partial disability benefits from December 21, 2014 to May 23, 2015 in the amount of $1,217.13.

When Claimant establishes that his or her work-related injury contributed in some degree to a temporary wage loss, Claimant is eligible for temporary disability benefits. Such benefits are precluded only when the work-related injury plays no part in the

subsequent wage loss. *Lindner Chev. v. Indus. Claim*, 914 P.2d 496 (Colo. App. 1995). The term "disability" refers to the claimant's inability to perform his regular employment. *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995).

In this case, Claimant missed work due to his work injury. As found, Claimant had to clock out of work to attend therapy and medical appointments between December 21, 2014 and May 23, 2015. This resulted in a decrease in Claimant's earnings from December 21, 2014 to May 23, 2015. As found, from December 21, 2014 to May 23, 2015 (a period of 154 days or 11 weeks) Claimant earned $9,615.69. At the admitted AWW he should have earned $12,011.34. His total wage loss was $2,395.62 for a total of temporary partial and temporary total disability of $1,581.11. During this time Respondents paid temporary total disability in the amount of $363.98 from 2/18/15 to 2/24/15.

Therefore, this ALJ concludes that Claimant is entitled to $1,217.13 in temporary partial disability benefits from December 21, 2014 to May 23, 2015.

III. Whether Claimant is entitled to disfigurement benefits due to his left shoulder surgery.

An award of disfigurement is discretionary with the ALJ so long as he or she considers the relevant factors. See *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961).

Public view means if the scars would be apparent in swimming attire, compensation would be appropriate. *Twilight Jones Lounge v. Showers*, 732 P.2d 1230 (Colo. App. 1986) A disfigurement award should be based on an observable compromise of the natural appearance of a person. See *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961); *Twilight Jones Lounge v. Showers*, 732 P.2d 1230 (Colo. App. 1986).

In this case, Claimant has a visible disfigurement to his left shoulder consisting of four arthroscopic scars. Claimant has three ½ long by 1/8 wide scars and one small circular scar which is approximately ¼ inch in diameter. This ALJ concludes that Claimant shall be entitled to $500.00 for his disfigurement.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for conversion of the award of scheduled impairment benefits to whole person permanent physical impairment benefits is granted. Claimant's 20% scheduled impairment rating shall be converted to a 12% whole

person impairment rating. Respondents are ordered to pay Claimant an award of 12% whole person impairment, taking credit for any PPD benefits previously admitted and paid.

2. Respondents shall pay Claimant temporary partial disability benefits in the amount of $1,217.13 from December 21, 2014 to May 23, 2015.

3. Respondents shall pay Claimant $500 for his disfigurement.

4. Respondents shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 29, 2017

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

The issue presented for consideration at hearing is whether the Claimant overcame the opinion of the Division independent medical examiner (DIME) regarding impairment rating by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant is a 68 year old woman who worked for Employer as an accountant for two years. On January 20, 2015, in the course and scope of Claimant's employment, she lifted a box and injured her entire back on the right side. Claimant promptly reported the injury to her supervisor.

2. Claimant treated with Dr. Nicholas R. Reinholtz, D.C. receiving adjustments, physical modalities, myofascial release and massage therapy to treat her condition. Claimant was placed at maximum medical improvement (MMI) on June 29, 2016.

3. On June 29, 2016, Dr. Shimon Blau, MD, a physiatrist and an authorized treating physician, placed Claimant at MMI and assessed Claimant to have a 20% whole person impairment. Dr. Blau assessed,

> Cervical flexion was measured at 32 degrees equaling 3% impairment, cervical extension was 13 degrees equaling 5% impairment, right lateral flexion was 20 degrees equaling 2% impairment, left lateral flexion was 18 degrees equaling 2% impairment, right rotation was 44 degrees equaling 2% impairment and left rotation was 63 degrees equaling 1% impairment. Added together this equals 15% impairment for range of motion. In addition, she was assigned 6% based on table 53 on page 80 [of the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*]. The 6% for the specific disorder was then combined with the 15% for the range of motion using the combined values chart to yield a total of 20% spine impairment and 20% whole person impairment.

4. On January 26, 2017, Respondents filed a Final Admission of Liability. Respondents admitted liability for a 16% whole person impairment based on the DIME report of Dr. Brian Beatty dated December 15, 2016.

5. In the DIME report, Dr. Beatty noted that "[Claimant] had a cervical MRI that showed moderate to severe multi-level disc desiccations, moderate C6-7 disk

height loss with mild to moderate anterior osteo formation,…" Dr. Beatty performed an impairment rating stating,

> Based on the AMA guides Third Edition Revised [the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*] the patient was found to have a 16% whole person impairment. This was arrived at based on 4% impairment from table 53, page 80, #IIB, combined with the 12% impairment for loss of range of motion.

6. The AMA *Guides* at Table 53, page 80 provides at paragraph IIB that a claimant is entitled to a 4% whole person impairment for the cervical spine where the injury is "[u]noperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasms, associated with none-to-minimal degenerative changes on structural tests.

7. The *AMA Guides* at Table 53, page 80 provides at paragraph IIC that a claimant is entitled to a 6% whole person impairment for the cervical spine where the injury is "[u]noperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasms, associated with moderate to severe degenerative changes on structural tests; includes unoperated herniated nucleus pulposus with or without radiculopathy."

8. Claimant proved by clear and convincing evidence that the DIME report of Dr. Beatty is most probably incorrect because Dr. Beatty utilized the *AMA Guides* incorrectly. Dr. Beatty utilized the *AMA Guides,* Table 53, paragraph IIB, instead of paragraph IIC and the doctor assessed a 16% whole person impairment when Claimant was entitled to an18% whole person impairment.

9. The evidence established that Claimant had moderate to severe degenerative changes on structural tests and therefore was entitled to an impairment rating under Table 53 paragraph IIC of the *AMA Guides.* In the DIME report, it is clear that Dr. Beatty was aware that Claimant had moderate to severe degenerative changes in the cervical spine. Dr. Beatty states at page 5 of the DIME report that, "[Claimant] had a cervical MRI that showed moderate to severe multi-level disc desiccations, moderate C6-7 disk height loss with mild to moderate anterior osteo formation,…" Despite this knowledge, Dr. Beatty assessed Claimant to have a 4% impairment under the provision of paragraph IIB which addresses conditions in which the injured party has none to minimal degenerative changes on structural tests.

10. Accordingly, it is concluded that Claimant is entitled to an 18% whole person impairment rating.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-43-201(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201(1), C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201(1), *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. Claimant proved by clear and convincing evidence that the DIME report of Dr. Beatty is most probably incorrect because Dr. Beatty utilized the *AMA Guides* incorrectly. Dr. Beatty utilized the *AMA Guides,* Table 53, paragraph IIB, instead of paragraph IIC and the doctor assessed a 16% whole person impairment when Claimant was entitled to an18% whole person impairment.

6. The evidence established that Claimant had moderate to severe degenerative changes on structural tests and therefore was entitled to an impairment rating under Table 53 paragraph IIC of the *AMA Guides.* In the DIME report, it is clear that Dr. Beatty was aware that Claimant had moderate to severe degenerative changes in the cervical spine as he noted this fact at page 5 of his report. However, Dr. Beatty erred by failing to assess Claimant's impairment under Table 53 IIC.

7. Therefore, it is concluded that Claimant has an 18% whole person impairment rating.

ORDER

It is therefore ordered that:

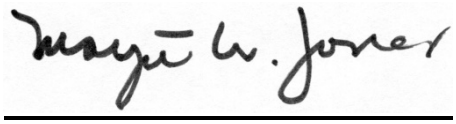
1. Respondents shall be liable for workers' compensation benefits based on an 18% whole person permanent impairment.

2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 29, 2017



Margot W. Jones, Administrative Law Judge
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